UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

OSHRC Docket No. 13-1124

Secretary of Labor,
Complainant,
v.

Integra Health Management, Inc.,
Respondent.

FIRST AMENDED BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF COMPLAINANT, SECRETARY OF LABOR

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The American Federation of Labor and Congress of Industrial Organizations, (AFL-CIO) submits this amicus curiae brief in support of the Secretary of Labor, pursuant to the Occupational Safety and Health Review Commission's September 18, 2015 Briefing Notice and Invitation to File Amici Curiae Briefs in Integra Health Management, Inc.

I. STATEMENT OF INTEREST OF AMICUS CURIAE

The AFL-CIO and its 56 national and international union affiliates collectively represent 12.2 million working people. The AFL-CIO has a strong interest in ensuring that federal and state safety and health laws are strongly and effectively enforced. Specifically, a number of our affiliates represent workers in industries that have been the focus of particular attention for high levels of injury and death as a result of workplace violence. Many of these affiliates represent workers in the healthcare and social services industry who frequently work in settings where there is an increased potential for workplace violence due to the populations and circumstances with which they work. The AFL-CIO is extremely concerned that the narrow reading of the general duty clause urged by Integra and the Chamber of Commerce in their briefs, would substantially undermine the Secretary's ability to hold employers responsible for their statutory duty to protect employees from safety hazards, would reduce on-going enforcement efforts and thereby deprive millions of workers protection from hazards that properly should be covered by the Occupational Safety and Health Act. A number of our affiliates represent workers in the home healthcare, healthcare, and social services industries and have a strong interest in reducing the risk of workplace violence which has been demonstrated to be a higher risk in these settings. For these members and for all workers, the AFL-CIO is interested in strong and effective enforcement of safety and health protections.

II. SUMMARY OF THE ARGUMENT

In the case before the Commission, the Secretary properly applied the general duty clause to workplace violence in this specific setting, home healthcare and social services. The Occupational Safety and Health Act (OSH Act)[1] is intended to be broadly interpreted and the legislative history supports utilization of the general duty clause to address the recognized hazard of workplace violence in this and related industries. Integra and the Chamber of Commerce are attempting to obfuscate the real issues by broadening their arguments to address all potential third party violence in any and all settings, but consideration in this case should be based upon the particular facts of this instance and the way in which this work was organized. In the case at hand, both the type of work and the population being served, raise concerns and are predictive of increased threat of workplace violence, by the patients/clients. This increased threat has been widely recognized by OSHA, state agencies and by the healthcare and social services industry.

Contrary to the assertions by Integra and the Chamber, this was not a unique citation, as OSHA had previously issued guidelines and a directive regarding the increased hazard of workplace violence in several settings (healthcare, social services and late night retail) and has issued numerous citations in similar situations, based upon violation of the general duty clause, both in institutional settings and in home and community based settings. The only unique element in this case is the fact that Integra challenged the citation and litigated the matter, where other respondents more often have settled or accepted the citations, without prolonged legal challenge.

Integra's service coordinators were dealing with a high risk population and the manner in which their work was organized, including meeting members alone in their homes and working

[1] The Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.*

alone, also put the employees at an increased risk. OSHA's directive to field personnel cites two high risk work settings: social services and healthcare and late-night retail settings. In addition to substantial activity by OSHA in this area, the increased threat of workplace violence in the healthcare and social services field has been recognized by many states and professional groups in the healthcare/social services industry.

In this case, the Secretary proved all the necessary elements for a violation of the general duty clause: (1) existence of the hazard in the healthcare/social services industry, (2) recognition of the hazard by the industry and/or by this employer; (3) the likelihood the hazard could cause death or serious physical harm, and (4) the existence of feasible control and abatement measures that can address and materially reduce or eliminate the hazard. Case law does not preclude, but instead supports, the citation issued by the Secretary in this case and the Commission should affirm the ALJ's decision.

III. ARGUMENT

A. The Secretary properly applied the general duty clause to workplace violence in this setting.

The Occupational Safety and Health Review Commission (herein "the Commission") requested *amici curiae* briefs in this case and directed that such briefs should address the following questions, as well as the issues raised in the petition for discretionary review that had been filed:

1. Does the general duty clause apply to the condition as alleged by the Secretary—the workplace violence hazard of "[Respondent's employees] being physically assaulted by [Respondent's clients (known as "members")] alleged to have "a history of violent behavior"?

2. If so, did the Secretary establish that Respondent or its industry recognized the hazard and that a feasible and effective means of abatement existed to materially reduce the hazard,
3. In addition, the parties may address the effect, if any, of OSHA's Guidance for Preventing Workplace Violence for Healthcare and Social Service Workers.

This brief will primarily focus on Question 1 and 2, but in passing will also address Question 3. In this brief, the AFL-CIO asserts that the Commission should affirm the Administrative Law Judge (ALJ)'s decision in this case because the Secretary properly applied the general duty clause to the particular harm addressed in this case. The specific industry in which this injury occurred and the Respondent's manner of organizing the work, are critical to consideration of the issues. In their briefs, Integra and the Chamber both attempt to confuse the issues by addressing issues substantially beyond the facts presented in the case pending before the Commission. Critical to the ALJ's decision is the fact that Integra's business model required caseworkers to travel to the homes of clients, meet with them alone, face to face, deal with clients (members) who had already been designated as problematic (i.e. not following their medical regimes and difficult to contact) and included a large number of individuals who suffered from serious mental illnesses. This business model put the Integra caseworkers (termed Service Coordinators at the time) in work arrangements that are common to the visiting healthcare or social services settings. These are work settings/arrangements which are long recognized to pose a higher risk of workplace violence. However, although these settings have long been recognized to pose a higher risk of workplace violence, there are also well developed, recognized feasible means of abatement to eliminate or substantially reduce the hazard.

The general duty clause allows the Secretary to address appropriate hazards for which there are no established standards, but which nonetheless, create unsafe and dangerous working conditions. The general duty clause[2] requires an employer to shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

To establish a violation under the general duty clause, a four part test is applied. [3] In this case, the Secretary has established that all four requirements necessary for a general duty clause citation were met. (See discussion *infra,* at Section F).

B. Breadth of OSH Act coverage and legislative history supports the application of the general duty clause to this case

The development of the OSH Act and the legislative history supports a very broad definition of workplace hazard, such as that to include hazards like workplace violence. The Act's legislative history establishes broad coverage of hazards and does not support Integra's argument that "The general duty clause is not applicable to potential injuries resulting from criminal assaults by third parties"[4] and the Chamber of Commerce's argument that "The inherent risk of criminal acts by customers or clients is not a recognized hazard within the meaning of the general duty clause".[5]

Here, the general duty citation issued by OSHA was not for the hazard of criminal assaults by third parties. The citation issued by OSHA was for failure of the employer to "furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees, in that employees were

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[2] Section 5(a)(1) of the OSH Act; 29 U.S.C. § 654(a)(1).
[3] Wiley Organics Inc. v. OSHRC, 124 F.3d 2011 (6th Cir. 1997)
[4] Integra Brief, p.12
[5] Chamber Brief, p.19

exposed to the hazard of being physically assaulted by members with a history of violent behavior." The ALJ characterized the hazard as the risk of "being physically assaulted during a face-to face meeting by a member with a history of violent behavior."

There is nothing in the language of the OSH Act or its legislative history to suggest or support an argument that the Congress intended to limit the coverage of the Act only to certain kind of hazards. Indeed, the legislative history and the actual language included in the Act show just the opposite - that Congress was concerned about a broad range of safety and health hazards across a broad range of industries and workplaces. In addition to the massive toll of injuries and deaths suffered by workers as a result of safety hazards, Congress recognized that there were a wide array of occupational health and other threats that needed to be addressed through national legislation. Moreover, there was a keen recognition that hazards were constantly changing and emerging as technology, processes and workplaces changed: "In addition, technological advances and new processes in American industry have brought new hazards to the workplace. Carcinogenic chemicals, lasers, ultrasonic energy, beryllium metal, epoxy resins, among others all present incipient threats to the health of workers. .... It is estimated that every 20 minutes a new and potentially toxic chemical is introduced into industry. New processes and new sources of energy present occupational health problems of unprecedented complexity." S. Rep. No. 91-1282 at 142 (1970).

Moreover, the Act imposed an affirmative obligation on the Secretary of Health and Human Services to conduct research, experiments and demonstration projects on a wide range of occupational safety and health issues and hazards. There was a specific directive to conduct "special research ...necessary to explore new problems." H. Rep. No. 91-1291 at 874 (1970); H. Rep. No. 91-1282 at 160 (1970).[6]

In 2002, following the September 11, 2001 attacks, the Act was amended to direct HHS to enhance and expand its research activities to address the health and safety of workers at risk for bioterrorists attacks in the workplace, an explicit recognition that the type of safety and health hazards that posed a risk to workers were changing and expanding and needed to be addressed.[7]

It is clear that the Congress intended that the OSH Act protect workers against a vast, wide range of hazards, including new hazards that hadn't been identified or recognized at the time the Act was passed. In a message to Congress on August 6, 1969 urging passage of a comprehensive occupational safety and health bill, President Nixon stated: "The side effects of progress present special dangers in the workplaces of our country. For the working man and woman, the by-products of change constitute an especially serious threat....Today we are asking our workers to perform far different tasks from those they performed five or fifteen or even fifty years ago. It is only right that the protection we give them is also up to date." S.Rep. No. 91-1282 at 145 (1970).

Since the OSH Act was passed, workplace violence is one of the dangers faced by workers that has emerged and been identified as a serious workplace hazard, as we discuss *infra*. It is precisely the type of hazard that Congress intended the Act to cover in order to provide workers protection that is "up to date" and addresses the serious hazards in today's workplace.

In short, the general duty clause of the OSH Act provides that "[e]ach employer [] shall furnish to each of his employees employment and a place of employment which are free from

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[6] 29 U.S.C. § 669.

[7] 29 U.S.C. § 669(a).

recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. §654 (a)(1). The clause was included in the Act to protect workers against hazards for which no standard was in place. The Committee on Labor and Welfare, in evaluating the bill that would become the OSH Act, recognized that "precise standards to cover every conceivable situation will not always exist." S. Rep. No. 91-1282 at 149 (1970) (Comm. Rep) and included the general duty clause "to insure the protection of employees who are working under special circumstances for which no standard has yet been adopted." S. Rep. 91-1282 at 150. The Senate committee concluded that the "legislation would be seriously deficient if any employee were killed or seriously injured on the job simply because there was no specific standard applicable to a recognized hazard..." which could result in the injury. S. Rep. No. 91-1282 at 149 (1970).There is nothing in the legislative history of the statute to support the argument that the scope and type of hazards covered by general duty clause was to be narrow, and indeed subsequent interpretations have found that provision applies broadly. The general duty clause is a catch-all provision that applies to hazardous conditions, in the absence of a standard.

The general duty clause applies to the feasible prevention of hazards no matter the circumstances under which those conditions arise.[8] Congress's recognition that the government would not be able to anticipate every workplace health and safety issue that might arise provides proof that the clause applies in instances of workplace violence. Ramsey Winch, Inc. v. Henry, 555 F.3d 1199, 1205 (10th Cir. 2009). Moreover, to contend Congress intended to limit the

[8] Secretary of Labor v. Wal-Mart Stores, Inc. 2011 WL 12678760, *29 (No. 09-1013, 2011) (*citing* Reich v Arcadian Corp. 110 F.3d 1192, 1196 (5th Cir. 1997). The provision requires an employer to rid the workplace of "feasibly avoidable recognized hazard[s]. Baroid Div. of NL Industry, Inc. v OSHRC, 660 F.2d. 439, 446 (10th Cir. 1981), *citing* Beatty Equipment Leasing v. Sec'y of Labor, 577 F.2d 534 (9th Cir. 1978); Champlin Petroleum Co. v. OSHRC, 593 F.2d 637, 640 (5th Cir. 1979) ("feasibly preventable" hazards).

clause to only traditional forms of injury in the workplace, and not workplace violence, thwarts the purpose of the Act. American Smelting and Refining Company v. OSHRC, 501 F.2d 504, 511 (8th Cir. 1974) (stating, "we further think that the purpose and intent of the Act is to protect the health of workers and that a narrow construction of the general duty clause would endanger this purpose in many cases.").

C. Integra's and the Chamber of Commerce's arguments are broader than what is properly at issue--the Commission should refrain from reaching beyond the facts presented

The Respondent and the Chamber are trying to expand the focus to a broader consideration of workplace violence by third parties more generally. The facts of this case[9], are much narrower and more limited than the general threat of violence by third parties, which is discussed by both Integra and the Chamber in their briefs. The specific facts in terms of the way in which the Service Coordinators were hired, the way they were required to conduct their work and the specific population they worked with must all be considered in assessing the propriety of the application of the general duty clause. This more narrow focus is clearly reflected in the description in the citation as to the hazard: "The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees, in that employees were exposed to the hazard of being physically assaulted by members with a history of violent behavior". (ALJ Decision at p. 2). This description was further refined by the ALJ when he defined the hazard as "being

[9] As the ALJ noted, OSHA's Standard Interpretation Letter, December 10, 1992, regarding workplace violence states that "[w]hether or not an employer can be cited for a violation of Section 5(a)(1) is entirely dependent upon the specific facts, which will be unique in each situation" (available at http://www.osha.gov/SLTC).

physically assaulted during a face to face meeting by a member with a history of violent behavior". (ALJ Decision at p. 69).

1. **Service Coordinators were required to deal with a high-risk population and the way in which the work was organized—meeting members at their homes and working alone also put workers at increased risk of violence.**

The parties stipulated certain facts which support the premise that the Service Coordinators were subject to employment and places of employment which exposed them to a substantially higher risk of incidents of workplace violence from the patients/clients/"members". Specifically the parties stipulated: "Integra.....performs mental and physical health assessments and coordinates case management.....These assessments are performed by employees known as "community service coordinators"...in Florida, service coordinators work from their homes or in the field. The Integra service coordinator program focuses on helping clients receive appropriate medical care. Service coordinators are assigned a caseload of clients and are responsible for calling them and for face to face meetings during which the clients are assessed and encouraged or persuaded to register for services. Insurance companies apparently refer these clients to companies such as Integra due to chronic difficulties contacting them. Many of the clients suffer from mental illness......" (ALJ Decision, pp 2-3).

In addition to these stipulated facts, the record reflects other facts which demonstrate that the population that made up the caseloads of the service coordinators was comprised of individuals already designated as hard to reach, non-compliant in terms of medical treatment and medications and many suffered from mental illness, and/or had a history of violent criminal behavior and/or drug use.

In addition, the way in which the service coordinators were hired, their lack of training and expertise in dealing with this population and the manner in which the work was organized by Integra all provided additional factors which created the circumstances for the hazard of being subjected to increased exposure to workplace violence by clients. Integra hired young, inexperienced individuals and did not require any previous experience in social work or community service work. There was no requirement of a buddy system, no regular means of contact and tracking the location and safety of the service coordinators who were expected to meet face to face with "members" and to transport these members in the service coordinators' personal vehicles.

2. OSHA Directive cites two high risk work settings: social services/healthcare and late-night retail settings

As discussed, *infra,* in Section D (1), OSHA in its Directive issued in 2011 to guide its field personnel when they conducted investigations of workplace violence, specifically cites as high risk work settings social services/healthcare and late-night retail. This is based upon the fact that there is a demonstrably higher incident of workplace violence in these settings.[10]

D. In contrast with Integra/Chamber contentions—OSHA has been active in the area of workplace violence in high risk workplaces, particularly the health and social services settings for many years

Integra and the Chamber both urge that this application of the general duty clause to workplace violence is a unique departure from precedent but in fact, this is an area in which OSHA has been actively involved for many years, both in terms of issuing guidance to

[10] DIRECTIVE NUMBER: CPL 02-01-052 EFFECTIVE DATE: September 8, 2011 SUBJECT: Enforcement Procedures for Investigating or Inspecting Workplace Violence Incidents, https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-01-052.pdf

employers, directives to its investigators and actually issuing numerous citations in similar situations in this and related industries.

1. History of OSHA Guidance, Directive

As early as 1996 NIOSH (National Institute of Occupational Safety and Health) issued a Current Intelligence Bulletin (CIB) on violence in the workplace.[11] NIOSH issues CIBs to disseminate new scientific information about occupational hazards. In this publication, NIOSH noted that workers in health care, community services, and retail settings are at increased risk of nonfatal assaults.

Due to the growing body of evidence of violence as a workplace hazard in healthcare, in 1996 OSHA issued its first guidance on workplace violence prevention for healthcare and social service workers. The guidelines were designed to provide employers common sense solutions to reduce the risk of injury and death from workplace violence by modifying the workplace and instituting appropriate administrative controls. These guidelines were based on OSHA's 1989 safety and health program management guidelines for all employers, which could be applied to workplace violence prevention programs. OSHA defines the "workplace" at risk to be "any location either permanent or temporary where an employee performs any work-related duty" and has specifically included clients' homes in this definition. These OSHA guidelines were developed with stakeholder input, both from labor and management.[12]

According to the press release announcing the 1996 guidelines, OSHA's "focused its first guidelines on the healthcare and social services industries because their nearly 8 million workers

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[11] http://www.cdc.gov/niosh/docs/96-100.

[12] McPhaul and Lipscomb, Volume 9 – 2004, No 3: Sept'04. *Online Journal of Issues in Nursing (OJIN)*. See section on "A Joint Labor-Management Violence Prevention Intervention and Evaluation" http://www.nursingworld.org/MainMenuCategories/ANAMarketplace/ANAPeriodicals/OJIN/TableofContents/Volume92004/No3Sept04/ViolenceinHealthCare.aspx

experience a dramatically higher risk of assault than other workers in private industry and nearly two-thirds of all non-fatal assaults."[13] They were an effort by OSHA to address a new serious hazard in America's workplaces as then Assistant Secretary of Labor for OSHA Joseph A. Dear explained when the guidelines were released:

"When OSHA was created 25 years ago, no one imagined that violent individuals would pose the greatest safety and health threat to working women or the second highest risk to men on the job. But OSHA is changing with the times to provide employers the tools they need to protect workers and to prepare them for the realities of the workplace."[14]

In 2004, OSHA updated the 1996 guidelines on preventing workplace violence for health care and social service workers. These updated guidelines addressed violence inflicted by patients or clients against staff, highlight risk factors such as solo work, often in remote locations, and includes a broad spectrum of health care and other workers including home health care workers and social workers. A variety of control measures for employers applying specifically to home health are described in the guidance, including: determining the behavioral history of new and transferred clients for any past and assaultive behaviors, having workers use the "buddy system" and avoid threatening situations; and develop policies and procedures about how home visits are conducted, the presence of others in the home, and the refusal to provide services in clearly hazardous situations. This was the guideline in effect at the time of the death of the Integra Service Coordinator in 2012 that was the basis for the citation in this case.[15]

[13] U.S. Department of Labor news release, "Secretary of Labor Reich announces violence prevention guidelines for healthcare and social services workers, " March 14, 1996, https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=366

[14] *Id.*

[15] In 2015 OSHA updated its guidelines for preventing workplace violence for healthcare and social service workers. In doing so it expanded the 2004 guidelines with specific tools to conduct detailed hazard assessment. Guidelines for Preventing Workplace Violence for Healthcare and Social Service Workers, OSHA 3148-04R 2015; https://www.osha.gov/Publications/osha3148.pdf

In 2011, OSHA issued and publically released a compliance directive,[16] establishing uniform procedures for OSHA field staff when responding to any complaints of workplace violence or for conducting programmed inspections at worksites that are in industries with a high incidence of workplace violence, specifically including the healthcare, social services settings and late-night retail establishments. This directive states that "employers may be found in violation of the general duty clause if they fail to reduce or eliminate serious recognized hazards."[17]

It is evident that in this particular industry and setting (home healthcare and social services) there is a clear recognition of the high incidence of workplace violence that differentiated this type of work, from a broader, more general concern about violence by third parties and makes it obvious that workplace violence by patients/clients is a recognized hazard in this industry. The next section reflects that OSHA, for many years, not only has recognized but has acted in this area and has done so using the general duty clause.

2. History of citations issued for workplace violence under the general duty clause

In addition to issuing the guidelines and directive discussed above, OSHA through its field offices has actively pursued citations for workplace violence in the healthcare and social services industry by utilizing the general duty clause, for decades. A search of OSHA's enforcement database shows that the first reported citations for workplace violence in health care and social services were issued by federal OSHA in 1993[18]. In September 1993, OSHA cited the Charter

[16] DIRECTIVE NUMBER: CPL 02-01-052 EFFECTIVE DATE: September 8, 2011 SUBJECT: Enforcement Procedures for Investigating or Inspecting Workplace Violence Incidents, https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-01-052.pdf

[17] *Id, at p. 15..*

[18] The search was conducted on December 15, 2015 by accessing https://www.osha.gov/imis/generalsearch.html and using the search queries "violence" and "assaults" for the

Barclay Hospital, a psychiatric facility in Chicago, Illinois, and in November 1993, the agency cited the Resource Exchange, a nursing and personal care facility in Colorado Springs, Colorado for failing to protect employees from assaults by violent patients during the transport of these individuals. Since 1993, OSHA has issued at least 40 citations for workplace violence utilizing the general duty clause, with the vast majority of cases resolved through informal or formal settlements with the agency.[19]

E. In addition to substantial OSHA activity in this area, the considerable threat of workplace violence in health and social services fields has been recognized by States and within the Healthcare/Social Services Industry.

In addition to the substantial activity by federal OSHA recognizing the high incidence of workplace violence in healthcare and social service settings, a number of states and professional groups in the field have recognized and addressed the significant threat of workplace violence in these settings. Twenty one states have enacted or adopted some kind of law to address workplace violence against nurses. [20] These laws vary in their approach, some requiring comprehensive programs, with others establishing increased penalties for assaults on nurses/healthcare personnel. For example the following states require employers to run workplace violence programs: California, Connecticut, Illinois, Maryland, New Jersey, and

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following time periods: Dec.14, 2005-Dec. 14, 2015; Dec. 14, 1985-Dec.14, 1995; Dec.14, 1975-Dec.14, 1985; and Jan. 1, 1972-Dec.14, 1975.

[19] *Id.;* The AFL-CIO is submitting an Appendix in support of this brief, to provide documents collected by affiliates and included in the appendix is a section containing several examples of other citations. See Tab 1.

[20] See generally the following compilations; 50 State Survey Criminal Laws Protecting Health Professionals Updated January2014,
https://www.ena.org/government/State/Documents/StateLawsWorkplaceViolenceSheet.pdf

Oregon.[21] In Illinois, Washington, New Jersey and Connecticut the law is specific to health care workers.[22] In New York, the law is limited to public employers only.[23]

There are laws establishing or increasing penalties for assault of "nurses" in Alabama, Alaska, Arizona, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Louisiana, Michigan, Mississippi, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Rhode Island, Tennessee, Texas, Vermont, Virginia, West Virginia and Wyoming (Penalties apply only to mental health personnel in Kansas, public health personnel in Mississippi, emergency room personnel which includes nurses in Louisiana).[24]

The problem of workplace violence is not new. In 1997 BLS issued a report documenting the growth of home care and the high number of lost time injuries in home care where "assaults and violent acts" were recorded.[25] In 2005 BLS conducted a survey specifically on workplace violence. [26]The survey results separated health care and social services from other industries and documented that incidents of workplace violence committed by a customer or client was higher in the healthcare and social services than in other industries.[27] Workplace violence is a major cause of death on the job. In the same year that the Integra service worker was killed, 2012, 765 workers were killed due to violence; 475 of these deaths were workplace homicides.[28] That

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[21] **California** – Cal. Lab. Code § 6401.8 (requiring workplace violence prevention plans in hospitals);**Connecticut** – CT Public Act No. 11-175 (healthcare including mental);**Illinois** – 405 Ill. Comp. Stat. 90/1, et seq. (healthcare including mental);**Maryland** – Md. Health-General Code Ann. § 19-1410.2 (nursing homes);**New Jersey** – NJ Rev. Stat. § 26:2H-5.17 (2013) (healthcare facilities);**New York** - N.Y. Lab. Law § 27-b;**Oregon** – Or. Rev. Stat. §§ 654.001 – 654.295 (2013); **Washington** – Rev. Code Wash. § 49.19.005 et seq. (healthcare and state hospitals).
[22] *Id.* Illinois, Washington, New Jersey and Connecticut.
[23] *Id.*New York.
[24] See compilation cited at footnote 17, supra.
[25] Injuries to Caregivers Working in Patient's Homes, U.S. Department of Labor, BLS, Summary 97-4, February 1997 http://www.bls.gov/opub/ils/pdf/opbils11.pdf
[26] Survey of Workplace Violence Prevention 2005, http://www.bls.gov/iif/osh_wpvs.htm.
[27] *Id.*
[28] U.S. Department of Labor, Bureau of Labor Statistics, Census of Fatal Occupational Injuries. Fatal occupational injuries by selected characteristics, 2003-2014. http://www.bls.gov/iif/oshwc/cfoi/all_worker.pdf

same year, over 24,000 workplace violence incidents led to injuries involving days away from work. Healthcare and social assistance continued to be the leading industry for workplace violence injuries, responsible for 72% of these incidents. Nursing, psychiatric home health aides were the leading occupations requiring days away from work due to a workplace violence event, and a patient was the responsible party in more than half the events. As of 2013, personal care aides were the third-highest occupation for lost-time injuries due to workplace violence.[29]

In addition to state legislative activity, a number of agencies and employers in the industry have recognized the concern in this setting and have issued workplace violence prevention policies that include provisions for home health and community settings.[30] In 2000, the New York State Office of Mental Health (OMH) issued a memorandum to the directors of its facilities who employed case management staff and community based staff. The memo instructed staff to ensure that facility policies were consistent with five abatement measures directed by the New York Department of Labor's Public Employee Safety and Health (PESH) Bureau in its order to comply after the death of an intensive case manager (ICM) in Buffalo. Under an approved state plan, PESH enforces OSHA standards and several state standards for New York public employees. The memo notes that the Buffalo Federation of Neighborhood Centers also revised their safety, clinical and in-field contact and wellness monitoring policies in response to PESH's investigation.[31]

In 2002, the Public Children Services Association of Ohio (PCSAO) issued a standard for effective practice on staff safety (9.0) to ensure that staff safety incidents around violence are documented, aggregated and analyzed, and reports disseminated for evaluation. Standards

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[29] Guidelines for Preventing Workplace Violence for Healthcare and Social Service Workers, OSHA 3148-04R 2015; https://www.osha.gov/Publications/osha3148.pdf.

[30] Representative examples of such policies are included in the AFL-CIO's Appendix at Tab 2-9.

[31] See Appendix Tab 2-Tab 9 for copies of the documents discussed in this section.

addressed the identification and evaluation of risk factors such as high risk/unknown clients and high risk/dangerous locations, and emergency response protocols that involve coordination with law enforcement and emergency communication mechanisms.

In 2006, the Visiting Nurses Association of New York issued Safety Guidelines for Working in the Community. These guidelines instructed nurses to make visits with an escorts when in "escort-designated" areas, and with a guard in "guard-designated" buildings; and outlined specific measures for home safety, which included procedures for sending out an escort or canceling the visit when the worker feels uncomfortable, and reporting if leaving home because worker felt endangered.

In 2007, the NYS OMH developed Policies & Procedures for Mohawk Valley Psychiatric Center. These policies included procedures for conducting home visits, which required history of individuals to be recorded and a joint staff visit to homes; and for clinic and outreach staff to conduct a screening and assessment of individuals at every visit involving the supervisor. Joint visits could be mandated under this policy.

More recently (in 2010), the New York State Commissioner of Mental Health issued a memorandum outlining the steps that NYC Office of Mental Health was taking in accordance with the new state law on workplace violence prevention. These included the creation of a workplace violence prevention unit, a standard curriculum for training and a health and safety steering committee. OMH provides specific forms for conducting risk evaluations and reporting workplace violence incidents in accordance with these policies.

The Los Angeles County Department of Mental Health (DMH) included workplace violence in its Injury and Illness Prevention Program, a written program that Cal/OSHA, California's state OSHA program, requires of employers. This program requires a job safety analysis for hazard identification and evaluation and a security incident report form to be utilized for reporting threats and injuries. The program dedicates a section to field safety, focusing on staff allocation, training, mobile communication and personal alarms. This comprehensive program was issued in 2014, but the DMH has several policies that incorporate the program. For example, DMH policy no. 308.01 on Security/Safety Management/Violence Prevention (effective Feb 24, 2013) was developed under the authority of Cal/OSHA Guidelines and LAC-DMH Illness and Injury Prevention Program Manual. A previous version of this policy was first issued February 1, 1999.

LA County DMH's program specifically states:

"If an employee who has been assigned to respond alone believes that he/she will be entering an unsafe condition, he/she shall notify his/her direct supervisor and request that a team member accompany him/her. If a team member is not available, the supervisor or manager shall accompany the employee, or the call shall be reassigned to an already paired team for response. In circumstances where law enforcement will respond and provide assistance, this may be considered as an acceptable alternative option. When precautions are required for particular calls, the reasons for the precautions shall be noted in the response notes and field notes for future reference, historical data and review." (Section B: Field Safety Protocols and Guidelines, subsection (2)(a)(2)(a)(i)).

We note that in the Integra case, the young worker who was murdered reported feeling unsafe during several prior visits to the same client's home.

Private employers and professional organizations in the industry have acted as well. In 1997, Colorado Home Care, Inc. issued a workplace violence prevention program, and specifically outlined measures to protect home health workers. These measures included an initial assessment of client's behavioral history that must be shared with the employee; using the "buddy system"; an evaluation of firearms in the home; annual training on recognition and prevention of potential incidents, incident reporting, exit strategy when threatened, and other issues; and appropriate follow up to reports of threat or unsafe conditions

In its Safety and Security Management Plan (2010), MCGHealth, Inc. recognizes that "Violence in the workplace is a growing program in healthcare. It is necessary to develop a program to address workplace violence." Their program requires proactive risk assessment to evaluate potential of adverse impacts on security of staff. The risk assessment is used "to evaluate current programs, and help identify new programs and activities" to better protect staff. The employer requires this plan to be written, and provide an annual evaluation of the program and management and staff training.[32]

In 2011, the Society for Human Resources Management (SHRM) and ASIS International (an organization of security professionals) released a **Workplace Violence Prevention and Intervention Standard.** [33] Included in the ASIS/SHRM Standard was the following:

Ideally, workplace violence prevention, intervention, and response should be viewed as an integral part of an organization's comprehensive occupational injury and illness prevention program. Like other hazards in the workplace, the risk for violence can be minimized through workplace design, employee training, and workplace policies and procedures or practices". "An organization that chooses to adopt workplace violence prevention and intervention efforts...shall consider, among other requirements and recommendations: Applicable requirements and guidelines promulgated by Fed OSHA related to workplace violence and prevention. In

[32] https://paws.gru.edu/pub/cop/Documents/safety-security-managment/SafetyandSecurityManagementPlan.pdf
[33] http://www.shrm.org/HRStandards/Documents/WVPI%20STD.pdf

particular, it should examine (i) its duties under the "general duty" clause of the federal OSHAct and (ii) specific guidelines pertinent to health care and social service workers…."

Similarly, the National Association of Social Workers (NASW) published Guidelines for Social Worker Safety in the Workplace in 2013 which stress the hazards of entering in a home. [34] That hazard noted by NASW in its guidelines, is one that was experienced by Integra's Service Coordinators.

F. In this case, the Secretary proved the necessary elements:

1. Existence of this hazard in healthcare/social services.

There is strong evidence that in a number of healthcare and social service settings, there is a clear hazard of increased risk of workplace violence by client/patient assaults. This is particularly true in the situations where the workers are working alone, going into patient/client homes and dealing with populations which have a higher incidence of mental illness, history of violent criminal behavior or drug use.[35]

2. In this specific industry, workplace violence from clients/members is a recognized threat of serious injury/death. Both the industry and this employer have recognized the threat.

Integra itself and the industry in general, recognized the increased threat of serious injury or death in this type of setting and dealing with these kinds of clients. The recognition by the industry is discussed *supra* at pp. 12-21. There is substantial evidence discussed by the ALJ concerning Integra's recognition. (See ALJ Decision, pp. 70-76). In addition to the information discussed by the ALJ, there is evidence that key individuals who testified at the hearing and are

[34] https://www.socialworkers.org/practice/naswstandards/safetystandards2013.pdf
[35] Guidelines for Preventing Workplace Violence for Healthcare and Social Service Workers, OSHA 3148-04R 2015; https://www.osha.gov/Publications/osha3148.pdf

responsible for the company's business have extensive mental health credentials and clearly should be aware of the hazard based upon industry recognition. [36]

3. The hazard is causing or likely to cause death or serious physical harm.

Tellingly, the Commission did not even ask that this element be addressed in the briefs. There can be no question, given the death of [redacted] at the hands of one of the "members" assigned to her as part of her caseload, the specified hazard caused or is likely to cause death or serious physical harm.

4. There are feasible control and abatement measures that can address and materially reduce the hazard.

There are definitely feasible controls and abatement measures that can address and materially reduce the hazard in this case. The methods listed by the Secretary in the citation would go a long way in reducing the hazard. In contrast with the suggestion in briefs filed by Integra and the Chamber, the Secretary is not required to prove on a numerical basis the extent to which the hazard would be reduced nor is the Secretary required to eliminate the hazard altogether. Rather there are recognized and agreed means of reducing the threat of client violence which are detailed in the OSHA guidelines, in OSHA's directive and which are recognized in the industry. As the ALJ outlined in the decision, there were a number of things that could easily have been done that would have substantially decreased the hazard, which is all that is required.

In the AFL-CIO's Appendix filed in support of this brief, there are a number of workplace violence prevention policies developed for this industry and setting, and a number of

[36] Michael Yuhas, ALJ Decision p.20; Dr. Melissa Arnott, ALJ Decision pp.22-23; Dr. Krajewski, ALJ Decision p. 29.

the provisions mirror the suggested means of abatement in the citation in this case. In addition, the most recent guidance issue by OSHA in 2015 discusses the difference between "engineering controls" where there are physical changes that either remove the hazard from the workplace or put a barrier between the hazard and worker (pointing out that home healthcare and social services which occur in private residences may not be susceptible of engineering controls) and "administrative and work practice controls" which may be more appropriate to certain types of work.[37] Many of the administrative and work control practices have been successful means of abatement in this setting. Such means of abatement may not eliminate all possible incidents but will certainly reduce the likelihood of workplace violence by patients/clients with a history of violent behavior.

G. Cases by Integra and the Chamber do Not Support Reversal

Both the Respondent's brief and the Chamber's brief rely heavily on the **Megawest**[38] case, an ALJ decision (not reviewed by the Commission) which should not be given any weight. In the first place, an ALJ decision which has not been reviewed by the Commission or a circuit court is not controlling as to the Commission.[39] Moreover, the facts in that case are substantially different and are not instructive to this case. Without intending any disrespect to service coordinators or other healthcare and social service and home care workers by comparing to them to SeaWorld trainers or their clients/patients to killer whales, ***SeaWorld of Fla., LLC v. Perez,***[40] is a much more instructive case. In ***SeaWorld,*** a trainer working with a killer whale died when she drowned after being pushed and dragged under the water by a killer whale who had previously had incidents of aggressive behavior towards trainers. Some but not all of the killer

[37] Guidelines for Workplace Violence for Healthcare and Social Service Workers at pp. 13-22.
[38] *Megawest Financial Inc.*, 17 BNA OSHC 1337, 1995
[39] See *Leone Constr. Co.*, 3 BNA OSHC 1979,1981 (No. 4090, 1976)
[40] 748 F.3d 1202 (D.C.Cir. 2014), 2014 U.S. App. LEXIS 6660.

whales were known to have presented dangers by virtue of reported incidents of aggressive behavior. So while it was not absolutely predictable as to which killer whales would push or drag a trainer, it was predictable that some of them would and the employer did not take sufficient steps to eliminate or reduce that hazard.

Similarly in the case of the "members" who comprise Integra's service coordinators' caseloads, not every patient would in fact present a danger of violent attack, but it was certainly predictable that a portion of those who made up the caseload possessed elements that are predictive indicators of such violent attacks. This is in contrast with the general public or even the sub-group of apartment dwellers addressed in the **Megawest** case.

The OSHA Directive differentiates the circumstances in which field personnel should investigate for a potential general duty clause violation for workplace violence and where they should not, based upon a similar contrast as to situations where there are predictable risks and others where there is a more random aspect to violence.[41] In **SeaWorld,** the D.C. Circuit denied review of the Commission's decision upholding the citation under the general duty clause. This recent circuit case provides substantial support for the ALJ's decision in the instant case.

IV. CONCLUSION

Based upon the foregoing, it is clear that the general duty clause was an appropriate vehicle to address the workplace hazard reflected in this case and all four elements of necessary for establishing a violation of that clause were met. OSHA has the authority to and must be allowed to address the serious risk of workplace violence for homecare workers from violent behavior by their patients/clients demonstrated by the Secretary in this case. Therefore the AFL-

[41] https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-01-052.pdf, at pp 7-12.

CIO strongly urges the Commission to affirm the ALJ decision in this important case and uphold the citations issued by OSHA.

Date: December 22, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this 22nd day of December 2015, a true and correct copy of the foregoing Brief was filed by first class mail with the following:

John X. Cerveny, Executive Secretary
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Washington, DC 20036-3457

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December 22, 2015

John X. Cerveny, Executive Secretary
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Dear Mr. Cerveny,

Please find enclosed the First Amended Amicus Brief of the American Federation of Labor and Congress of Industrial Organizations in support of the Secretary of Labor. The only change is to add the names of two additional contributors who were inadvertently omitted from the cover page when the original brief was filed. Please substitute this version for the one that was filed last week.

Sincerely,

Yona Rozen
Associate General Counsel

cc: Heather Phillips
Charles James
Kevin McCormick