UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR. Complainant, v. INTEGRA HEALTH MANAGEMENT, INC., Respondent.	)	OSHRC Docket No. 13-1124

BRIEF OF AMICUS CURIAE CALIFORNIA NURSES ASSOCIATION/ NATIONAL NURSES UNITED (CNA/NNU) IN SUPPORT OF COMPLAINANT SECRETARY OF LABOR

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CORPORATE DISCLOSURE STATEMENT

Pursuant to § 2200.35 of the Occupational Health and Safety Review Commission's Rules of Procuedure, the California Nurses Association/National Nurses United (CNA/NNU) provides the following corporate disclosure statement:

> CNA/NNOC has no parent corporation, no subsidiary corporation or affiliate corporations.

DATED: December 17, 2015

Respectfully submitted,

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National Nurses United ("NNU") submits this amicus brief in support of the Secretary of Labor, Pursuant to the Commission's September 18, 2015, Briefing Notice and its November 4, 2015, Order extending the Opposition briefing deadline. NNU addresses the principal arguments of Integra, and its amicus, that workplace violence falls outside the reach of the Occupational Health and Safety Act, and that workplace violence is not a recognized or abatable hazard.

I. STATEMENT OF INTEREST OF AMICUS CURIAE

NNU represents more than 165,000 registered nurses throughout the country. Our nurses work in areas deeply affected by workplace violence, including emergency rooms, psychiatric facilities, jail infirmaries, and home care. Unfortunately, far too many nurses have been seriously injured because of inadequate workplace violence prevention programs. Some have even lost their lives. It is now well established that the frequency and severity of such tragic workplace violence can be greatly reduced by adoption of simple strategies like those recommended in the citation at issue in this case. But many employers are slow to adopt these measures, despite the well known risks. Accordingly, we are committed advocates for effective workplace violence prevention practices. Nurses must be able to serve their patients without fearing for their lives. In short, we have a deep and abiding interest in OSHA's ability to regulate workplace violence.

II. SUMMARY OF ARGUMENT

Congress passed the Occupational Health and Safety Act to combat the disturbingly high numbers of worker injuries and death caused by preventable workplace accidents. The congressional intent that drove passage was desire to

eliminate recognized workplace hazards that could result in such losses Foreseeable and abatable workplace violence leads to an alarming numbers of injuries and deaths in the healthcare and social services industries. Workplace violence is foreseeable in these industries because this dire problem is well publicized through state regulation, OSHA and state guidance, industry publications, and widely disseminated studies. And conscientious experts, familiar with the industry, would prescribe the prevention methods specified in the citation at issue in this case—which establishes that this hazard is abatable. Accordingly, workplace violence is exactly the type of hazard that Congress intended the Act to reach. OSHA, therefore, may properly issue citations to protect workers from the recognized and abatable hazard of inadequate workplace violence prevention practices.

III. ARGUMENT

A. Inadequate Workplace Violence Prevention Can Amount to a Hazard under the Act.

Integra asserts that Congress did not intend the General Duty Clause to extend to workplace violence. Pet. Br. 12-15. Integra makes this argument without accounting for whether workplace violence can foreseeably lead to injury and death or whether that risk can be abated by effective prevention practices. *Id.* This blanket assertion is foreclosed by the text of the Act, which ends the inquiry. But even if further inquiry were warranted, legislative history and agency interpretation also bar Integra's argument.

1. The Plain Text of the Statute Reaches All Recognized Hazards that Could Lead to Workplace Injury or Death.

The text of the Act is unambiguous. It opens with a "Congressional statement of findings and declaration of purpose and policy." 29 U.S.C. § 651 (title

of section). This section explicitly states that the impetus for the Act was Congress's finding "that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments." 29 U.S.C. § 651(b). For these reasons, the Act's purpose is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources . . . ." 29 U.S.C. § 651(b).

The Act then prescribes specific methods to realize this lofty goal. One key method is by charging the Secretary of Labor with "establish[ing] Federal standards." 29 USCS § 655(a). Another is by requiring that each employer "furnish to each of [its] 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 [its] employees." 29 U.S.C. § 654(a). This section is known as the General Duty Clause. *See United States v. Pitt-Des Moines, Inc.*, 168 F.3d 976, 982 (7th Cir. 1999) ("The duty imposed by § 654(a)(1) is considered [a] 'general' [duty] because it asks employers to protect employees from all kinds of serious hazards, *regardless of the source*." (emphasis added)). The text does not contain any limitations on the types of hazards it is intended to reach. The text does not exclude hazards that Congress had not yet contemplated or that involve conduct of third parties. In fact, the Act does not differentiate types of hazards at all.

"Congress says in a statute what it means and means in a statute what it says there." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). Accordingly, when "the statute's language is plain, the sole function of the

courts -- at least where the disposition required by the text is not absurd -- is to enforce it according to its terms." *Id.* (internal quotation marks omitted). Applying these bedrock principles of statutory interpretation requires little analysis here. The text means what it says. Its purpose is to assure "healthful working conditions." It does so in part by requiring employers to "furnish to each of [its] 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 [its] employees." Nothing in the text in anyway limits the types of hazards Congress intended to reach. There are no exclusions. Accordingly, the text of the Act forecloses the argument that foreseeable and abatable workplace violence falls outside the scope of the Act. *See Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 568 (2005) ("the authoritative statement is the statutory text").

This faithful plain-text reading of the Act's mandate is especially appropriate here because "safety legislation is to be liberally construed to effectuate the congressional purpose." *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 13 (1980). And applying the General Duty Clause to the emerging problem of workplace violence furthers the remedial purposes of the Act. *Universal Constr. Co. v. OSHRC*, 182 F.3d 726, 729 (10th Cir. 1999) (observing that the Act is a "remedial legislation designed to protect employees from workplace dangers, and therefore must be liberally construed"); *Godwin v. OSHRC*, 540 F.2d 1013, 1015 (9th Cir. 1976) ("We hold also that Congress intended the coverage of the Act to be as broad as the scope of the commerce clause.").

In sum, there is no support in the text for Integra's argument that Congress intended to exclude foreseeable and abatable workplace violence from the reach of the General Duty Clause. On the contrary, the plain text of the Act extends that duty to all "recognized hazards that are causing or are likely to cause death or serious physical harm." Accordingly, the text of the Act forecloses Integra's argument that Congress did not intend to reach this type of hazard.

2. Legislative History Shows Congress Intended to Reach All Recognized Hazards that Could Lead to Workplace Injury or Death.

Despite the plain text of the Act, and without engaging with it, Integra argues that the legislative history establishes that Congress intended to exclude workplace violence from the reach of the General Duty Clause. Legislative history, however, is not relevant here because the text of the Act is clear. "[T]he authoritative statement is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil*, 545 U.S. at 568.

But even if the text of the Act were not dispositive, which it is, the legislative history supports the plain-text's broad reach rather than Integra's asserted narrower scope. "In enacting that statute, Congress noted the 'grim current scene . . . . in the field of occupational health,' and sought, by passage of the statute, 'to reduce the number and severity of work-related injuries and illnesses which, despite current efforts of employers and government, [were] resulting in ever-increasing human misery and economic loss.'" *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 579 (3d Cir. 1980) (quoting Occupational Safety and Health Act of 1970, S.Rep. No. 1282, 91st Cong., 2d Sess. (1970), reprinted in (1970) U.S.Code Cong. & Admin.News, pp. 5177, 5178, 5177). Tellingly, one of the sentors advocating for

passage emphasized the need for remedial legislation by explaining that the number of "workers killed by work-related accidents each year represented an annual death toll exceeding that of the Vietnam war." *Anning-Johnson Co. v. United States OSHRC*, 516 F.2d 1081, 1087-1088 (7th Cir. 1975) (citing Subcomm. on Labor of Senate Comm. on Labor and Public Welfare, Legislative History of the Occupational Safety and Health Act of 1970, S, 92d Cong., 1st Sess. 411 (Comm. Print 1971) (remarks of Senator Williams)). Ultimately, "[c]onfronting a legislative record which showed that each year 14,500 workers died and two million were disabled because of their jobs, resulting in $1.5 billion in lost wages and an $8 billion loss to the GNP, . . . Congress passed a wide-ranging bill, characterized by one commentator as 'the most revolutionary piece of labor legislation since the National Labor Relations Act.'" *Brennan v. Gilles & Cotting, Inc.*, 504 F.2d 1255, 1259-1260 (4th Cir. 1974) (citing Subcommittee on Labor, 92d Cong., 1st Sess., Legislative History of the Occupational Safety and Health Act of 1970, 831, 844 (Comm. Print 1971)) (additional citation omitted).

This legislative history further confirms that the purpose of the Act was to reduce the workplace death and injury. Nothing in this history suggests that Congress meant to exclude some foreseeable and abatable hazards merely because, as Integra and its amicus suggest, the hazard was not then currently recognized as a major problem or because Congress did not consider the specific hazard or others like it. *See also Ryder Truck Lines, Inc. v. Brennan*, 497 F.2d 230, 233 (5th Cir. 1974) ("The Act's goal is to eliminate dangerous conditions in the workplace."); *CH2M Hill, Inc. v. Herman*, 192 F.3d 711, 720 (7th Cir. 1999) ("A per se exception

excluding professionals, regardless of their duties, from liability under the Act and its regulations would diminish the aims of Congress in enacting this legislation."). Accordingly, even if legislative history were relevant, it too forecloses Integra's congressional intent argument.

Ignoring this strong legislative history in support of its broad misreading, Integra asserts that the "legislative history of the Act contains no suggestions whatsoever that the 'recognized hazards' encompassed in the General Duty Clause would potentially include criminal behavior by individuals not under the employer's control." Pet. Br. at 13. But the fact that Congress did not discuss a particular hazard is hardly meaningful evidence that Congress meant to exclude that hazard from the reach of the General Duty Clause. On the contrary, as the New Mexico Court of Appeal explained:

> Congress contemplated that the purposes of the federal OSHA would be achieved in part by 'stimulat[ing] employers and employees to *institute new . . . programs providing for safe and healthful working conditions*.' 29 U.S.C. § 651(b)(1) (emphasis added). 'Congress specifically included recordkeeping provisions . . . to aid in enforcing [OSHA] and in preventing future accidents and illnesses.' Mark A. Rothstein, Occupational Safety and Health Law 234 (4th ed. 1998). Congress authorized 'research, experiments, and demonstrations relating to occupational safety and health, including studies of psychological factors involved, and relating to innovative methods, techniques, and approaches for dealing with occupational safety and health problems.' 29 U.S.C. § 669(a)(1) (2000). Responsibility for collecting statistics on occupational injuries and illnesses was delegated to the Bureau of Labor Statistics. [citation omitted] Congress created the National Institute for Occupational Safety and Health and directed it to conduct studies and research to develop criteria for new or improved safety and health standards. 29 U.S.C. § 671 (d)(1) (2000). Workplace violence against employees seems to us to be precisely the type of emerging workplace hazard that the

> record-keeping and research provisions of OSHA were designed to discover and monitor.

N.M. Petroleum Marketers Ass'n v. N.M. Envtl. Improvement Bd., 141 N.M. 678, 681-682 (N.M. Ct. App. 2007).

Integra's "acts of third parties" argument is also belied by Congress's later decision to specifically direct the Secretary to "enhance and expand research as deemed appropriate on the health and safety of workers who are at risk for bioterrorist threats or attacks in the workplace." 29 U.S.C. § 669(a) (enacted 2002). Of course Congress is not suggesting that the Act makes employers responsible for preventing terrorism or controlling terrorists. Rather Congress recognized that employers can adopt policies and procedures that materially reduce the hazard of workplace injury or death resulting from bioterrorist threats. This is really just a matter of common sense. Congress passed the Act to protect workers from preventable injury and death. Employers can minimize the risk of harm from terrorism through effective policy and procedure. And were an employer to fail to take adequate preventative measures in the face of the recognized hazard of bioterrorist threats, that failure would violate the General Duty Clause. The same is true of workplace violence. Congress's decision to direct research on "health and safety of workers who are at risk for bioterrorist threats" highlights that Congress did not intend to exempt the risk of harm stemming from third party conduct from the reach of the Act.

Alternatively, Integra suggests its argument is supported by Congress's decision to shift the final language of the General Duty Clause from requiring employers to furnish a place of employment "which is safe and healthful" to one that

is "free from recognized hazards." This minor shift in language doesn't bear the weight Integra seeks to place upon it. The new qualifier that was introduced was "recognized." That makes sense. Congress would not want to penalize an employer for a truly unforeseeable hazard. Limiting the reach of the General Duty Clause to "recognized" hazards eliminates that risk. And, in fact, this is exactly what was discussed in Congress when this change was made. Opponents of the "safe and healthful" language thought it was "so broad, general and vague as to defy practical enforcement." 116 Cong. Rec. 10616 (remarks of Congressman Anderson). As a result, "safe and healthful" was replaced by "hazards which are readily apparent." H.R. 19200, 91st Cong., 2d Sess., § 12 (1970). Concern then arose that the new language was too limiting, as it might exclude hazards that were recognized but not readily apparent to the naked eye. So the ultimate compromise was "recognized hazards," which was understood to encompass all hazards "that can be readily detected on the basis of the basic human senses." 116 Cong. Rec. 42204 (remarks of Congressman Steiger).

Nothing in this compromise suggests that Congress intended to exclude foreseeable and abatable workplace violence. On the contrary, "[t]he underlying rationale in effectuating [the] purposes [of the Act,] by placing primary responsibility on employers is that employers have primary control of the work environment and should therefore insure that it is safe and healthful." *Anning-Johnson*, 516 F.2d at 1087-1088 (citing S. Rep. No. 91-1282, 91st Cong., 2d Sess. 9 (1970); H.R. Rep. No. 91-1291, 91st Cong., 2d Sess. 21 (1970)). That rationale adheres strongly here because employers control the policies and procedures that can

minimize the likelihood of employee injury or death from the recognized risk of workplace violence.

3. OSHA's Guidance Further Illustrates that Lack of Adequate Workplace Violence Prevention Procedures Can Amount to a Hazard Under the Act.

OSHA is the expert on interpreting the Act. OSHA has long recognized, and cautioned, that failure to adopt adequate workplace violence prevention practices, in the face of a recognized risk, can violate the General Duty Clause: "Whether or not an employer can be cited for a violation of [the General Duty Clause] is entirely dependent on the specific facts . . . . The recognizability and foreseeability of the hazard, and the feasibility of the means of abatement, are some of the critical factors to be considered." OSHA Standard Interpretations Letter, Dec. 10, 1992.[1] "Employers who do not take reasonable steps to prevent or abate a recognized violence hazard in the workplace can be cited" for violating the General Duty Clause. OSHA Workplace Violence Fact Sheet (2002).[2]

Although not due Chevron-level deference, an agency's guidelines nonetheless are due respectful deference where they fall within an agency's particular expertise. *See Skidmore v. Swift & Co.*, 323 U.S. at 140 (noting that the "rulings, interpretations and opinions" of an agency "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance"); *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 381 (1969) ("the construction of a statute by those charged with its execution should be followed

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[1] *Available at* www.osha.gov/SLTC/workplaceviolence/standards.html (last visited Dec. 9. 2015).

[2] *Available at* http://www.osha.gov/OshDoc/data_General_Facts/factsheet-workplace-violence.pdf (last visited Dec. 9. 2015).

unless there are compelling indications that it is wrong"). Longstanding guidance developed independent of litigation is accorded particular deference. *See Alaska Dept. of Envtl. Conservation v. EPA*, 540 U.S. 461, 487-88 (2004) ("We normally accord particular deference to an agency interpretation of longstanding duration.") (quotation marks omitted).

Here OSHA developed guidance recognizing that failure to adopt adequate workplace violence prevention practices in the face of recognized and abatable risk of workplace violence can violate the General Duty Clause. That guidance is longstanding. It was developed independent of any litigation. Accordingly, that guidance is due respectful deference. This is especially true because the guidance is reasonable and consistent with the purpose of the Act. *Elec. Smith, Inc. v. Sec'y of Labor*, 666 F.2d 1267, 1270 (9th Cir. 1982) ("The Commission's interpretations of OSHA must be treated with deference, and may not be overturned if reasonable and consistent with the purposes of the Act."). OSHA's guidance thus further forecloses Integra's congressional intent argument.

4. *Megawest* Does Not Support Integra's Position Because It Found that Workplace Violence Did Amount to a Hazard and Its Reasoning on Recognition Is Unpersuasive.

Megawest involved a General Duty citation based on workplace violence against office staff at an apartment complex known as the "Villa." Both Integra and its amicus rely heavily on *Megawest* for the proposition that workplace violence is simply not the type of hazard the General Duty Clause, or the Act itself, was meant to reach. Pet. Br. 14, 22-26; Chamber of Commerce Br. 6-10. That reliance is misplaced. First, *Megawest* is an unreviewed, administrative law judge decision from 1995. It therefore sets no precedent. *See In re Cerro Copper Prods. Co.*, 752

F.2d 280, 284 (7th Cir. 1985) (per curiam) ("An unreviewed ALJ decision does not bind OSHRC or the courts as precedent.") (citing cases).

Second, *Megawest* did not so hold. On the contrary, it rejected the argument that workplace violence was not a hazard within the meaning of the Act. The decision starts its analysis by identifying the four elements of a General Duty violation: "(1) a condition or activity in the employer's workplace presented a hazard to employees; (2) the cited employer or the employer's industry recognized the hazard; (3) the hazard was likely to cause death or serious physical harm; and (4) feasible means existed to eliminate or materially reduce the hazard." *Megawest Fin., Inc.*, 17 O.S.H. Cas. (BNA) ¶ 1598, 1995 OSAHRC LEXIS 80, at *18 (O.S.H.R.C.A.L.J. Dec. 22, 1995).

The *Megawest* decision then goes on to find that the first element was established. The workplace violence at issue, which "stem[med] from the critical element of the staff's job," presented a hazard to employees within the meaning of the Act. *Id.* at *19, 23-24. The decision rejected the argument that workplace violence did not amount to a hazard because "there was no significant risk residents would physically attack staff." *Id.* at *22-23. "There is no requirement," the decision explained, "that there be a significant risk of the hazard coming to fruition, only that, if the hazardous event occurs, it would create a significant risk to employees. * * * [T]he existence of a hazard is established if the hazardous incident can occur under other than a freakish or utterly implausible concurrence of circumstances. *Id.* at *23 (citing and quoting *Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1265 n. 33 (D.C. Cir. 1973)). Accordingly, because there was a risk

that workplace violence would lead to serious harm if it occurred, and because its reoccurrence would be neither freakish nor implausible, it amounted to a hazard for purposes of the General Duty Clause. *Id.*

In short, *Megawest* simply did not find that workplace violence cannot amount to a hazard. Instead, the decision found that workplace violence was not recognized as a hazard by either the industry or the employer. This aspect of the *Megawest* decision, however, is not particularly relevant to the instant matter because it was fact bound. Additionally, as an unreviewed administrative law judge opinion, its "utility depends solely on the persuasive power, if any, of [its] reasoning." *United States v. Sturm, Ruger & Co.,* 84 F.3d 1, 5 (1st Cir. 1996). And that utility is limited.

In finding that the hazard was not recognized in the instant case, *Megawest* reasoned that the industry, apartment management, was not one that had been identified by OSHA as being at high risk, and it did not share many of the risk factors that correlate to those industries. *Id.* at *31-32. Accordingly, the decision concluded, there was no industry recognition. *Id.* at *32

The decision further reasoned that the employer did not have actual recognition of the hazard even though there had been prior incidents of violence and the circumstances make it likely that there would be future incidents. *Id.* at * 28. The *Megawest* decision reaches this conclusion in part based on the analysis that a hazard is not recognized unless the specific incident is anticipated. *Id.* ("an employer may legitimately fail to recognize that the potential for a *specific* violence incident exists) (emphasis added). This assertion is unsupported by precedent, the purpose of

the Act, or common sense.

If the General Duty Clause only reached specifically anticipated incidents, it would be almost meaningless. For example, imagine this standard applied to the hazard of blood borne pathogens. A hospital employer knows that treating patients creates the risk of exposure to blood borne pathogens through needle sticks. The employer knows that this exposure has resulted in serious injury to its employees in the past. The employer knows this is likely to happen again in the future. But under the "specific incident" standard, the employer would have no duty to protect employees from this serious, foreseeable, and abatable hazard because it's impossible to anticipate the exact next specific incident in which an employee might be stuck by a needle containing a blood born pathogen. This "specific incident" standard would render the General Duty Clause virtually application-less, thus undermining its purpose. Accordingly, this aspect of the *Megawest* decision is unpersuasive and ought not be applied to future analysis of General Duty claims.

The *Megawest* decision also rested its conclusion that the employer did not recognize the risk on the premise that a "high standard of proof must be met to show that the employer itself recognized the hazard of workplace violence. It is not enough . . . that there has been a previous injury from a violent incident." *Id.* at *29. This reasoning is likewise unsupported by any citation to case law. And because of the facts of the case, this aspect of the *Megawest* decision is wholly unpersuasive. As the decision recognized, the Villas were in a high crime area. *Id.* at *31. The office staff were responsible for issuing and enforcing notices of eviction, car towing, non-compliance with rent, and refusal to return security deposit. *Id.* at *19-

20. They were also "expected to confront irate residents." *Id.* at *22. As a result, the office staff were often subjected to threats, belligerent conduct, and even physical attack. *Id.* at *7.

There were several very serious attacks in the two years before the citation issued. For example, an angry tenant maced two staff so severely that they were hospitalized and out of work for a week. *Id.* at *8. In another illustrative incident, on the day the OSHA compliance officer visited, and in his presence, an irate tenant slapped and scratched a staff person in the face. *Id.* at *12. There were also numerous threats in the months leading up to the citation. For example, one tenant threatened that "innocent people in the office were going to get hurt" if he didn't get what he wanted. *Id.* at *10. Such threats were so typical that Megawest's president "considered responding to tenant threats to be a normal part of the staff's job." *Id.* at *20.

Yet even in the face of all this evidence of risk of violence, "there were no positive measures in effect to discourage attacks." *Id.* at *23. Megawest did not enforce lease provisions that provided sanctions for threats or violence. *Id.* at *21. Staff were not trained to diffuse anger or handle potential incidents until police arrived. *Id.* at *22. Megawest even failed to take basic preventative measures, such as two-way radios or panic buttons. *Id.* And there was no security during the day, the time during which the staff worked and the incidents occurred. *Id.* at *12.

On these facts, the ALJ's finding that Megawest did not recognize the risk of future workplace violence is simply unpersuasive. A recognized hazard is "something that would be recognized by all people." 116 Cong. Rec. 17967

(remarks of Senator Saxbe). Any person with a modicum of common sense would recognize the risk on these facts. And anyone would recognize that basic security measures would reduce this risk. Accordingly, these facts show that Megawest had actual or constructive knowledge of the risk. *See, e.g., St. Joe Minerals Corp. v. OSHRC*, 647 F.2d 840, 845 (8th Cir. 1981) (holding employer had actual and constructive knowledge of risk because employer had been warned by at least one engineering firm that its method of operating its elevator "increased the risk of accident"); *Edgewood Constr. Co.*, 15 OSAHRC 17 (1975) (holding that evidence the employer had actual notice of gas leaks in sewage manholes on four previous occasions established the employer should have known of the existence of the obvious and recognized hazard).

In sum, *Megawest* does not support Integra's contention that workplace violence cannot amount to a hazard under the Act because *Megawest* found that the workplace violence at issue did amount to a hazard under the Act. And *Megawest's* reasoning on recognition does not support Integra's position because the facts of the case establish that the employer had actual and constructive knowledge. That aspect of the decision is therefore unpersuasive, and thus, as an unreviewed ALJ decision, provides no guidance on the question.

B. The Risk of Serious Injury or Death from Workplace Violence is a Recognized Hazard in the Healthcare and Social Service Industries.

Integra argues that it did not recognize the risk of serious injury or death resulting from workplace violence, and that the risk was not recognized in its industry. Pet. Br. 15-20, 22-26. This amicus leaves the argument about Integra's recognition to the Secretary, and merely notes that Integra's knowledge of its client

base and the deceased's particular concerns, along with its passing efforts to prevent injury from workplace violence are at least sufficient to establish constructive knowledge. *See, e.g., Otis Elevator Co. v. OSHRC*, 581 F.2d 1056, 1058 (2d Cir. 1978) (rejecting employer's argument that it did not recognize hazard as "paradoxical" in the face of its own rules concerning the same risk); *Kelly Springfield Tire Co. v. Donovan*, 729 F.2d 317, 321-322 (5th Cir. 1984) (explaining that "where a hazard is obvious and glaring, the Commission may determine that the hazard was recognized without reference to industry practice or safety expert testimony").

With respect to industry recognition, unfortunately, it is far too well established that workers within the healthcare, psychiatric care, and social service industries face risk of serious injury or death resulting from workplace violence.[3] As *Megawest* persuasively explained, "[p]ublicized studies, enactment of legislation, industry publications, or similarly disseminated information known to an applicable industry are all relevant to industry recognition." 1995 OSAHRC LEXIS 80, at *29; *accord* MARK A. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW, § 6:5 (2011 ed.) (collecting cases and explaining sources that give rise to inference of industry recognition). "[C]ommon knowledge of safety experts who are familiar with the circumstances of the industry" also establishes industry recognition. *Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1265 (D.C. Cir. 1973).

The public record is replete with such information. For example, in 1996,

[3] The risk appears to also be an established hazard within many aspects of the service industry, such as late night convenience stores. But in the interest of brevity and focus, this brief limits itself to the industries with which this Union is more familiar.

OSHA published Guidelines for Preventing Workplace Violence for Healthcare and Social Service Workers.[4] This Guidance, last updated in 2013, is thoroughly substantiated by forty-eight published studies and articles. *See* Guidance at pp. 40-45. And the studies are explicit. For example, the Guidance explains that "[b]etween 2011 and 2013, workplace assaults ranged from 23,540 and 25,630 annually, with 70 to 74% occurring in healthcare and social service settings." Guidance at p. 2. This Guidance is widely disseminated. A Google search for the Guidance's exact title, restricted by quotation marks, returns over 2,500 results.[5]

This OSHA Guidance does not stand alone. Many states have adopted regulations recognizing the risk to workers in these industries. California, for example, recently enacted legislation requiring workplace violence prevention plans in hospitals because of recognition that violence in healthcare settings is a serious occupational hazard for healthcare workers in California and throughout the nation. Cal. Lab. Code § 6401.8; Ex. 1, Padilla Decl. at ¶ 8. That legislation was authored by then Senator, now Secretary of State, Alex Padilla. Ex. 1 at ¶ 1-3. Secretary Padilla justified the need for this legislation based on widely available studies documenting the problem. *Id.* at ¶ ¶ 5-6. This included:

- findings from the U.S. Bureau of Labor Statistics, which show that from 2003 to 2007, a worker in healthcare and social assistance was nearly 5 times more likely to be the victim of a nonfatal assault or violent act by another person than the average worker in all other industries combined. (Available at: http://www.bls.gov/iif/osh_wpvs.htm); and
- a 2007 report commissioned by the National Institute of

[4] *Available at* https://www.osha.gov/Publications/osha3148.pdf (last visited Dec. 9. 2015).

[5] Search last run Dec. 14, 2015.

> Occupational and Environmental Health, titled 'Evaluation of Safety and Security Programs to Reduce Violence in Healthcare Settings.' *** The report explained that healthcare workers, especially nurses, have long been recognized as experiencing a high risk of work-related assault, with an average of almost 70,000 violent victimizations reported per year.

Id. at ¶ ¶ 5-6. Based on these readily available studies, and strong anecdotal evidence from nurses and other healthcare workers, Secretary Padilla concluded that workplace violence in the healthcare industry is a recognized hazard which needed to be addressed through legislation and regulation. Id. at ¶ ¶ 7-9. That legislation is now law. Cal. Lab. Code § 6401.8.

And California is in good company. Washington, Connecticut, Illinois, Maryland, New Jersey all recognize and regulate workplace violence in healthcare, social services, or both. *See* Rev. Code Wash. §§ 49.19.005 et seq., 72.23.400 et seq. (healthcare and state hospitals); CT Public Act No. 11-175; 405 Ill. Comp. Stat. 90/1, et seq. (healthcare including mental health); Md. Health-General Code Ann. § 19-1410.2 (nursing homes); NJ Rev Stat § 26:2H-5.17 (2013) (healthcare facilities).[6] *See also* MN HF 1087 & SF 1071 (pending legislation); 12 NYCRR § 800.6 (regulating workplace violence in public employment).

Several additional states seek to educate employers about the hazard of workplace violence through published guidance. North Carolina, for example, published guidelines explaining that healthcare, long term care, and social service workers all face an increased risk of work-related assaults. *See* N.C. Dept. of Lab., *Workplace Violence Prevention Guidelines and Program for Healthcare, Long Term*

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[6] This list is illustrative, and does not purport to be exhaustive.

Care and Social Services Workers.[7] *See also* Oregon Occupational Safety and Health Div., Dept. of Consumer and Business Serv., Program Directive A-123 (explaining how workplace violence amounts to a recognized hazard);[8] MA Executive Order #511 (similar).[9]

Industry publications and programs also showcase that workplace violence is a recognized hazard by heralding risk reduction programs. *E.g.*, Florida Hospital Association, *Workplace Violence in the Healthcare Environment* (advising on how to reduce risk of workplace violence in hospitals);[10] Rutter Compliance Blog, *New OSHA Guidelines Underscore Workplace Violence Risks Faced by Healthcare and Social Service Workers* (explaining the risk of citation for unabated workplace violence and offering courses on workplace violence prevention);[11] Robert L. Weisman, DO, *Violence Prevention & Safety Training for Case Management Services*, COMMUNITY MENTAL HEALTH J., Aug. 2002, 339-48 (providing "practical, prevention-based safety training for case managers" and citing 27 supporting references).[12]

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[7] *Available at* http://www.nclabor.com/osha/etta/indguide/ig51.pdf (last visited Dec. 9. 2015).

[8] *Available at* http://www.orosha.org/pdf/pds/pd-283.pdf (last visited Dec. 9. 2015).

[9] *Available at* http://www.mass.gov/lwd/labor-standards/massachusetts-workplace-safety-and-health-program/12-workplaceviolence-standards.pdf (last visited Dec. 9. 2015).

[10] *Available at* http://www.floridahealth.gov/programs-and-services/emergency-preparedness-and-response/_documents/workplace-violence-in-hosp-env.pdf (last visited Dec. 9. 2015).

[11] *Available at* http://www.wecomply.com/blog/post/2638376-New-OSHA-Guidelines-Underscore-Workplace-Violence-Risks-Faced-by-Healthcare-and-Social-Service-Workers (last visited Dec. 9. 2015).

[12] *Available at* https://www.urmc.rochester.edu/medialibraries/urmcmedia/psychiatry/

These are but several illustrative examples of the vast number of publicized studies, state actions, industry publications, expert opinions, and other publicly disseminated information which demonstrate pervasive awareness of the risks of workplace violence in these industries. And as even this brief canvas of the public record shows, the insurmountable evidence that healthcare and social service workers, including case managers, face serious injury or death from workplace violence is now ubiquitous. Accordingly, industry recognition is established.

C. It Is Well Established that the Risk of Serious Injury or Death from Workplace Violence Can Be Materially Reduced.

Integra further asserts that the Secretary failed to establish a violation of the General Duty Clause because the Secretary failed to prove that the risk reduction methods identified in the citation would abate the hazard of Integra staff "being assaulted during a face-to-face meeting by a member with a history of violent behavior." Pet. Br. 26-28. Integra primarily argues Janet Nelson, the Secretary's expert, did not state definitively that any one of the abatement measures suggested by the Secretary would prevent all violence and that she did not have statistical evidence to support her conclusions. This argument fails because it misunderstands the relevant legal standards and mistakes the nature of Ms. Nelson's testimony.

As Judge Phillips explained, "feasible means of abatement are established if conscientious experts, familiar with the industry would prescribe those means and methods to eliminate *or materially reduce the recognized hazard.*" *Integra Health Managment, Inc.*, 13-1124, 2015 WL 4474372, at *44(CMPAU June 22, 2015) (emphasis added) (quoting *Arcadian*, 20 O.S.H. Cas. (BNA) ¶ 2011 (O.S.H.R.C.

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documents/violencepreventiontraining.pdf (last visited Dec. 9. 2015).

Sept. 30, 2004); *see also Roberts Sand Co., LLLP v. Sec'y of Labor*, 568 Fed. Appx. 758, 760 (11th Cir. 2014) (holding abatement established because experts would take the proposed abatement measures). There is no requirement that abatement eliminate all risk. On the contrary, the standard is materially reduce. *ACME Energy Servs. v. OSHRC*, 542 Fed. Appx. 356, 365 (10th Cir. 2013) ("To establish this fourth element, the Secretary must show that demonstrably feasible measures would materially reduce the likelihood that such injury as that which resulted from the cited hazard would have occurred.") (internal quotation marks omitted). Likewise, there is no requirement that an expert base her opinion on statistics. On the contrary, the Secretary can establish abatement even where the prescribed methods are not widely adopted. "The question is whether a precaution is recognized by safety experts as feasible, not whether the precaution's use has become customary." *Nat'l Realty*, 489 F.2d at 1267 n37.

The Secretary presented substantial evidence that the methods in the citation would abate the hazard through Ms. Nelson's testimony. Judge Phillips properly admitted Ms. Nelson as an expert. *Integra*, 2015 WL 4474372, at *28. The test for establishing expert testimony is whether the witness "has specialized knowledge that the lay person cannot be expected to possess and reasonably applies that knowledge to the relevant facts." *Chao v. Gunite Corp.*, 442 F3d 550, 559 (7th Cir. 2006) (internal quotation marks omitted). Judge Phillips found that "Ms. Nelson's experience in the field, and years of providing safety and safety awareness training to those in similar workplaces, is persuasive when weighing the issues presented in this case." *Integra*, 13-1124, 2015 WL 4474372, at *28 (citing *ACME Energy Servs. dba*

Big Dog Drilling, 23 BNA OSHC 2121, 2125 (No. 08-0088, 2012) (comparing experts and finding one "in a better position" based on "professional training and extensive experience"), *aff'd*, 542 F. App'x 356 (5th Cir. 2013) (unpublished)). He further found that she "proved to be a credible, informative witness whose opinions assisted the Court." *Id.* (citing Resp't Br. at 13 n.4; Tr. 82-83). Therefore, Ms. Nelson was a proper expert for testimony on the Secretary's proposed abatement methods. And Ms. Nelson testified that the abatement strategies recommended by OSHA were "feasible and would materially reduce instances of workplace violence." *Id.* at *44. Accordingly, the Secretary has met his burden of establishing that the proposed abatement measures would materially reduce the hazard.

Moreover, Ms. Nelson's testimony is consistent with other published expert opinions. *E.g.*, Susan Rees, MS, RN, *A Program to Minimize Violence and Keep Employees Safe*, JOURNAL OF EMERGENCY NURSING, September 2010, at 460–465 ("Program components include a stages of escalation grid, visual cues, a huddle, a plan for access control, security presence, and staff training."); Robert L. Weisman, DO, *Violence Prevention & Safety Training for Case Management Services*, COMMUNITY MENT HEALTH J., Aug. 2002, at 339-48 ("efforts to train case managers should be offered as early as possible, and should consider addressing risk factors for patient violence, providing environmental assessments, and teaching the essentials of communication along with crisis de-escalation and exit strategies").[13]

These expert opinions are further buoyed by studies on the efficacy of several

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[13] *Available at* https://www.urmc.rochester.edu/medialibraries/urmcmedia/psychiatry/documents/violencepreventiontraining.pdf (last visited Dec. 9. 2015).

of the Secretary's recommended abatement measures. For example, at least two major studies documented significant reduction in emergency department assault rates after California enacted a policy calling for comprehensive security plan, including training, risk assessment, environmental modification, and work practice changes like those recommended in the *Integra* citation. *See* Casteel, Carri et al. 2009, *Hospital Employee Assault Rates Before and After Enactment of the California Hospital Safety and Security Act*, AEP 19(2): 125-133 Feb 2009 (assault rates in California emergency departments decreased 48%); Peek-Asa, Corinne et al. 2002, *Violent Events and Security Programs in California Emergency Departments Before and After the 1993 Hospital Security Act*, JOURNAL OF EMERGENCY NURSING, Oct. 2002, at 420-426 (violence decreased 1990 to 2000, with corresponding increases in security measures).

Another study found that assault rates in a psychiatric unit fell significantly after implementation of a violence prevention program that included increased qualified staffing, improved lighting, security alarms, and a training course on handling violent incidents. Magnavita, N. (2011), *Violence Prevention in a Small-scale Psychiatric Unit: Program Planning and Evaluation*, INTERNATIONAL JOURNAL OF OCCUPATIONAL ENVIRONMENTAL HEALTH, at 336-344. Yet another found that injury levels to staff in a mental health facility decreased significantly after adoption of violence prevention program which included staff training, risk assessment, and incident monitoring/reporting. Meehan, Tom et al., *Reducing Aggressive Behavior and Staff Injuries: A Multi-strategy Approach*, AUST. HEALTH REV., 2006, at 203-210 (injury levels to staff decreased significantly after violence

prevention program which included staff training, risk assessment, and incident monitoring/reporting).

In sum, Ms. Nelson's expert testimony shows that the practical prevention measures recommended in Integra's citation would materially reduce the hazard of "being assaulted during a face-to-face meeting by a member with a history of violent behavior." And her expert testimony is consistent with other experts in the field, as well as supported by studies showing abatement after adoption of similar risk-reduction strategies. Because experts would adopt the proposed measures, abatement is established.

IV. CONCLUSION

Ultimately, this case is about a young woman who was murdered on the job because her employer did not charge itself with the responsibility of adopting an effective workplace violence prevention program despite the obvious risk. That failure is inexcusable in light of the foreseeability of the risk: Integra serves a high-risk population, often in high crime areas. It requires face-to-face initial assessments by lone, scarcely trained community service coordinators. The murdered young woman repeatedly reported concerns that showcased this client's deteriorating mental health and disassociation from reality. The risk to this young woman's life could have been materially reduced by simple prevention measures: thorough training, risk assessment, mandatory buddy system for high-risk clients, and other appropriate measures. By placing this young woman squarely in the face of this foreseeable hazard without proper risk management in place, Integra failed its obligation to provide "a place of employment . . . free from recognized hazards that

are causing or are likely to cause death or serious physical harm." In so doing, Integra violated the General Duty Clause of the Occupational Safety and Health Act, as well as its moral obligation to the community. Accordingly, NNU respectfully requests the Review Commission affirm the citation.

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Respectfully submitted,

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