THIS CASE IS NOT A FINAL ORDER OF THE REVIEW COMMISSION AS IT IS PENDING COMMISSION REVIEW

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. UHS OF FULLER, INC., UHS OF DELAWARE, INC., Respondent.	OSHRC DOCKET NO. 20-0032

Appearances:

Seema Nanda, Solicitor of Labor
Maia S. Fisher, Regional Solicitor
Nathan C. Henderson, Counsel for OSHA, Region I
Robin Ackerman, Senior Trial Attorney
Rachel A. Culley, Trial Attorney
U.S. Department of Labor, Office of the Solicitor, Boston, Massachusetts
For the Complainant

Melanie L. Paul, Esquire
Dion Y. Kohler, Esquire
Jackson Lewis, P.C., Atlanta, Georgia
For Respondent UHS of Fuller, Inc.

Eric J. Neiman, Esquire
Kip J. Adams, Esquire
Lewis Brisbois Bisgaard & Smith LLP, Boston, MA
and
Jonathan L. Snare, Esquire
Alana F. Genderson, Esquire
Morgan Lewis & Bockius, LLP, Washington, DC
and
Michael R. Callahan, Esquire
Katten Muchin Rosenman, LLP, Chicago, IL
For the Respondent UHS of Delaware, Inc.

Before: Carol A. Baumerich
Administrative Law Judge

DECISION AND ORDER

After receiving a complaint about workplace violence at a psychiatric hospital, the Occupational Safety and Health Administration ("OSHA") directed Compliance Safety and Health Officer Kadis ("CO Kadis") to commence an inspection of a facility that provides psychiatric care services (the "Worksite"). The Worksite includes an in-patient psychiatric hospital and facilities for outpatient programs where individuals receive psychiatric care while living elsewhere.[1] OSHA's investigation continued for several months. On December 11, 2019, a Citation and Notification of Penalty ("Citation") was issued to UHS-Fuller, and an affiliate, UHS-DE (collectively with UHS-Fuller, "Respondents"), alleging that they failed to ensure the adequate protection of employees in violation of Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (the "OSH Act").[2]

[1] Ex. S-449, Stips. 1, 2, 6, 9, 25; Tr. 1365-66, 1405-6, 1605-6, 2514. In its brief, UHS-Fuller states that it does business as "Fuller Hospital," and claims the parties reached a stipulation about this. (UHS-Fuller Br. 1, 11.) The language UHS-Fuller cites is not in Exhibit S-449, the document setting out the parties' stipulations, or in stipulations set out in the briefs from UHS-DE and the Secretary. (Ex. S-449; UHS-Fuller Br. 11; Sec'y Br. 1-5; UHS-DE Br. 7-13.) The stipulations refer to "Fuller Hospital," but that is not a defined term in Ex. S-449. *Id.* The undersigned relied on the stipulations as set forth in Exhibit S-449, as opposed to those in UHS-Fuller's Brief. (Ex. S-449; Sec'y Br. 1-5; UHS-Fuller Br. 11-17.) This decision uses the term set out in Stipulation 1, "UHS-Fuller," to refer to the corporate entity "UHS-Fuller, Inc." and the term Worksite for the place where the inspection occurred, 200 May St., South Attleboro, MA. (Ex. S-449, Stip. 1.) Stipulation 1 states: "Respondent UHS of Fuller, Inc. ("UHS-Fuller") is an employer engaged in a business affecting commerce within the meaning of Section 3(5) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 652(5)." *Id.* Similarly, the undersigned will refer to UHS of Delaware, Inc. as "UHS-DE," consistent with Stipulation 2. (Ex. S-449, Stip. 2.) Stipulation 2 is: "Respondent UHS of Delaware, Inc. ("UHS-DE") is an employer engaged in a business affecting commerce within the meaning of Section 3(5) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 652(5)." *Id.* Stipulation 6 is: "Fuller Hospital is located at 200 May St., South Attleboro, MA." (Ex. S-449, Stip. 6.) Stipulation 9 is "Fuller Hospital is an in-patient psychiatric hospital." (Ex. S-449, Stip. 9.) Stipulation 25 is: "Psychiatric patients come to Fuller Hospital for treatment/management of their psychiatric disorders." (Ex. S-449, Stip. 25.)

[2] "The Citation and Notification of Penalty underlying this proceeding was issued on December 11, 2019." (Ex. S-449, Stip. 4.)

Respondents timely contested the Citation bringing the matter before the Occupational Safety and Health Review Commission ("Commission").[3] A hearing commenced on July 26, 2021 and concluded on August 10, 2021. All parties filed opening, reply, and supplemental briefs after the hearing.[4]

The Citation asserts that employees were exposed to physical attacks from aggressive patients in violation of section 5(a)(1) of the OSH Act, the provision commonly known as the general duty clause.[5] 29 U.S.C. § 654(a)(1). Among other circumstances, the Citation alleges employees were attacked and injured during behavioral health emergencies, while breaking up fights among patients, and while assisting co-workers with patients.[6]

[3] "UHS-Fuller and UHS-DE timely filed their Notices of Contest on December 20, 2019." (Ex. S-449, Stip. 7.) In addition to the Citation contest, pre-hearing motions related to discover are pending. The undersigned reviewed the arguments made in the parties' post-hearing briefs, the pending motions, and the oppositions and replies related to the pending motions, including those made in these filings: (1) Respondents' July 16, 2021 Response in Opposition to Complainant's Motion in Limine, (2) UHS-DE and UHS-Fuller's July 20, 2021 Response to Order Show Cause ("Jt. Show Cause Resp."), (3) UHS-Fuller's July 21, 2021 Opposition to the Secretary's Motion for Sanctions ("UHS-Fuller Opp'n"), (4) UHS-DE's July 21, 2021 Opposition to the Secretary's Motion for Sanctions and Response to the Order to Show Cause ("UHS-DE Opp'n"), (5) UHS-DE's July 23, 2021 Opposition to Motion for Further Sanctions ("UHS-DE Further Opp'n"), and (6) Secretary's July 21, 2021 Reply Regarding Respondents' Response to Order to Show Cause ("Show Cause Reply"). (Exs. S-449, S-450, S-451, S-451A thru S-451AC, S-452, S-452A thru S-452E, S-456.)

[4] After the parties submitted post-hearing briefs, the Commission issued *UHS of Westwood Pembroke, Inc., UHS of De.*, No. 17-0737, 2022 WL 774272 (OSHRC, Mar. 3, 2022) *appeal docketed*, No. 22-1845 (3d Cir. May 2, 2022). The parties were ordered to submit statements of position regarding the impact, if any, of that decision on this matter. All parties complied with the order and submitted supplemental briefs. On May 2, 2022, UHS-DE and UHS of Westwood Pembroke, Inc. ("UHS-Pembroke") appealed *UHS Pembroke* to the Third Circuit. Despite this appeal, the Commission's decision is a Final Order and is followed as precedent. *See e.g., Gulf & W. Food Prods. Co.*, 4 BNA OSHC 1436, 1439 (No. 6804, 1976) (consolidated) ("The orderly administration of [the OSH Act] requires that Commission's administrative law judges follow precedents established by the Commission"); *McDevitt St. Bovis, Inc.*, 19 BNA OSHC 1108, 1110 (No. 97-1918, 2000) (applying Commission precedent when pertinent circuit "neither decided nor directly addressed" issue).

[5] This provision requires each employer to "furnish to each of his employees employment and places of employment which are free from 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).

[6] When issued, the Citation characterized the violation as Repeat. (Tr. 8, 599.) During the hearing, the Secretary's counsel withdrew the Repeat characterization. (Tr. 628.) The characterization was amended to Serious. (Tr. 628-29.) Initially, the Citation also alleged an other-than-serious violation of 29 C.F.R. § 1904.29(b)(1). The Secretary withdrew that allegation, and it is no longer before the Commission. (Sec'y May 20, 2020 Notice of Partial Withdrawal.)

UHS-DE and UHS-Fuller stipulated that physically violent or assaultive patients created a hazard for those at the Worksite.[7] There were over 500 incidents of aggression from June 1, 2019, through the end of 2019.[8] "Staff injuries from patient violence and/or assaults by patients against staff can result in serious injuries, and have so resulted."[9] Employees were punched in the head (and elsewhere), kicked, slapped, bitten, had their hair ripped out, and were scratched by patients with bloodborne diseases.[10] Many incidents resulted in serious injuries that required follow-up medical care, days away from work, and job changes.[11] To provide one example, on July 18, 2019, several workers suffered injuries when they had to address multiple violent and aggressive patients. (Exs. S-24, S-178, S-436 thru S-441.) The workers were unable to address the violence

[7] "The hazard of workplace violence, defined in this case as physically violent or assaultive behavior of patients toward staff, was recognized by UHS-Fuller at the time of the alleged violation on June 12, 2019." (Ex. S-449, Stip. 21.) Likewise, "the hazard of workplace violence, defined in this case as physically violent or assaultive behavior of patients toward staff, was recognized by UHS-DE at the time of OSHA Inspection 1408076." (Ex. S-449, Stip. 22.)

[8] Exs. S-26, S-27, S-55, S-60, S-68, RF-32 at 5, RF-33 at 7. There were 271 incidents of aggression from June 1 to September 30, 2019, according to a Loss Prevention Summary prepared by Gina Bricault, a UHS-DE Loss Control Manager. (Tr. 1244-47, 2769, Ex. S-61.) During the next three months of 2019, there were 245 physical confrontations and patients had to be restrained 344 times, according to the minutes from the Board of Advisor's February 4, 2020 meeting. (Ex. S-26.) A different summary of aggression at the Worksite, also prepared by Ms. Bricault, indicates there were 627 incidents of aggression from June 1, 2019 through the end of the year. (Ex. S-68.) The parties stipulated: "UHS-DE Loss Control Manager Gina Bricault (formerly Gina Gilmore) conducts periodic meetings at Fuller Hospital and other UHS-DE managed behavioral health facilities to discuss employee injuries, including those resulting from workplace violence." (Ex. S-449, Stip. 49.)

[9] Ex. S-449, Stip. 24. The parties further stipulated that: "this was also true during the time of OSHA Inspection 1408076." *Id.*

[10] Tr. 234-35, 1175, 1208-9; Exs. S-1, S-1B, S-11, S-24, S-27, S-52, S-53, S-54, S-55, S-57 at 2; S-60 at 2, S-61 at 2-3; S-228, S-229, S-244, S-246, S-248, S-249, S-250, S-317, S-334, S-337, S-338, S-384, S-385, S-397. Most pages in Exhibit S-11 bear a label indicating that the document is Patient Safety Work Product ("PSWP"). (Ex. S-11.) However, no party objected to the document prior to the hearing as being privileged under the Patient Safety Quality Improvement Act 43 U.S.C. § 299b-21 *et seq*. or on any other grounds. (Tr. 1178-84; Protective Order I.) At the hearing, UHS-DE declined the offer to perform *voir dire* on the document and withdrew its objection on the grounds that the information qualified as PSWP. (Tr. 1183.) UHS-Fuller only objected to the extent that some names had not been redacted. *Id.* The Secretary agreed that those names should be redacted, and the document was admitted as redacted. (Tr. 1183-84; Ex. S-11.) Thus, as revised, Exhibit S-11 was admitted without objection.

[11] Ex. S-449, Stips. 19, 20, 24; Exs. S-11, S-24, S-178, S-436 thru S-441. "Fuller Hospital employees at Fuller Hospital are exposed to the hazard of workplace violence, defined in this case as physically violent or assaultive behavior of patients toward staff. This was also true during the time of OSHA Inspection 1408076." (Ex. S-499, Stip. 19.) Likewise, "UHS-DE employees at Fuller Hospital are exposed to the hazard of workplace violence, defined in this case as physically violent or assaultive behavior of patients toward staff. This was also true during the time of OSHA Inspection 1408076." (Ex. S-449, Stip. 20.)

themselves and had to contact the local police department for assistance.[12] The injuries employees suffered from this incident included concussions, bites, a strained shoulder, and a bruised scalp. (Exs. S-24, S-397 at 8-9.) While the number of patient attacks on staff varied month to month, such events consistently occurred. (Exs. S-1, S-1B, S-2, S-27 at 2, 7, RF-32 at 4, RF-33.)

The key issues in dispute are: (a) whether UHS-DE and UHS-Fuller should be considered a single employer for purposes of the cited violation at the Worksite; (b) whether additional sanctions are warranted for the destruction of electronically stored information ("ESI") before the hearing; and (c) whether the Secretary established a violation of the general duty clause.

For the reasons discussed below, the Citation is AFFIRMED as to UHS-Fuller and UHS-DE as a serious violation of the OSH Act, and a $13,494 penalty is assessed. Additional relief is granted in response to the Secretary's July 2, 2021 Motion in Limine Concerning Respondents' Extensive Destruction of Highly Relevant Video Footage ("Motion in Limine") and the Secretary's Sanctions Motions regarding UHS-Delaware's failure to timely comply with prehearing discovery obligations is granted in part and denied in part.[13]

I. Jurisdiction

Respondents filed timely Notices of Contest, bringing this matter before the Commission. (Stip. 7.) UHS-Fuller and UHS-DE are both employers affecting interstate commerce within the meaning of 29 U.S.C. § 659(c).[14] Both are employers under the OSH Act. (Stips. 1-2, 5, 34-36.)

---

[12] "There are times when police are called to Fuller Hospital to assist with assaultive patients. This was also true during the time of OSHA Inspection 140876." (Ex. S-449, Stip. 27.) For instance, "Police were called to respond to an incident on the adolescent unit at Fuller Hospital on July 18, 2019." (Ex. S-449, Stip. 28. *See also* Ex. S-24, Tr. 1066.)

[13] Section II.B. resolves the Motion in Limine. The Appendix Decision addresses the Secretary's July 12, 2021 Motion for Sanctions ("Sanctions Motion I") and the Secretary's July 20, 2021 Motion for Further Sanctions ("Sanctions Motion II," and collectively with Sanctions Motion I, "Sanctions Motions").

[14] Ex. S-449, Stips. 1-2, 5, 34-36. "5. UHS-Fuller is a Massachusetts corporation. … 34. UHS-DE is a Delaware corporation. 35. UHS-DE has its corporate office in King of Prussia, Pennsylvania. 36. The business address for UHS-DE is 367 S Gulph Rd., King of Prussia, PA, 19406." (Ex. S-449, Stips. 5, 34-36.) UHS-DE misquotes Stipulation 5 in its brief. (UHS-DE Br. 8.) This decision relies on the stipulations set out in Exhibit S-449.

Based upon the record, including the parties' explicit acknowledgment that they are employers and subject to the Commission's jurisdiction, the undersigned finds that the Commission has jurisdiction over the parties and the subject matter of this case.[15]

II. Preliminary Matters

This section: (a) addresses why UHS-DE and UHS-Fuller should be considered a single employer for purposes of the Citation; (b) grants, in part, the Secretary's Motion in Limine by finding that additional sanctions against Respondents are warranted for the destruction of ESI; and (c) rejects Respondents' vindictive prosecution claim.

A. Single Employer

Universal Health Services, Inc. ("UHS") is a publicly traded company with no direct employees. (Tr. 1483-84, 1648-49.) Instead, it operates through its wholly owned management company, UHS-DE, and other subsidiaries.[16] UHS-DE provides services for UHS-Fuller and other subsidiaries UHS wholly owns. *Id.* Susan Bullick, the Director of Loss Control for UHS-DE, explained that UHS-DE "is the managing part of the hospitals that are owned by UHS." (Tr. 1000, 1598, 1649.)

[15] Ex. S-449, Stips. 1-3. "The Occupational Safety and Health Review Commission has jurisdiction in this proceeding pursuant to § 10(c) of the Occupational Safety and Health Act … ." (Ex. S-449, Stip. 3.) Despite stipulating to their roles as employers within the meaning of the OSH Act and to the Commission's jurisdiction over this matter, Respondents still challenge OSHA's authority over them. (Stips. 1-3.) Those arguments lack merit and are discussed below in Section II.C. (Role of the Massachusetts Department of Mental Health and Other Regulators Does Not Deprive OSHA of Jurisdiction).

[16] Ex. S-449, Stips. 34, 37-39; Tr. 1483-84, 1537, 1648-49. "UHS-DE describes itself as a management company, which provides administrative, management, information, and other services to behavioral health entities, including Fuller Hospital." (Ex. S-449, Stip. 37.) "Fuller Hospital and UHS-DE each have their own articles of incorporation and bylaws." (Ex. S-449, Stip. 38.) "UHS-DE is a separate corporate entity from Fuller Hospital." (Ex. S-449, Stip. 39.)

One such hospital is the Worksite.[17] It is an in-patient psychiatric hospital with a maximum capacity of 102 patients.[18] There are six in-patient psychiatric units, including an adolescent unit, a developmental disabilities unit, and adult care units. (Stip. 10; Exs. S-397 at 2-3; S-24 at 5.) There is also a lobby, courtyard, and cafeteria. (Ex. S-397 at 3.) Access to the patient care units is controlled, but patients can generally move freely around the common areas of the units to which they are assigned. (Tr. 212.)

Patients with behavioral and mental illnesses receive therapeutic care at the Worksite. (Stip. 25; Tr. 212, 536.) Most patients are there on an involuntary basis.[19] Under the involuntary commitment process, typically, patients are either (1) at imminent risk of harming themselves or others, or (2) cannot care for themselves in the community because of psychiatric illness. (Tr. 2293-94.)

The Worksite is led by Chief Executive Officer ("CEO") Rachel Legend, a UHS-DE employee.[20] Ms. Legend is joined by three other UHS-DE employees who also have offices at the Worksite: Jim Rollins, the Chief Financial Officer ("CFO"), Robin Weagley, the Chief Operations Officer in training ("COO"), and Gina Bricault, a UHS-DE Loss Control Manager. (Stip. 49; Tr. 399, 490, 1123, 1299, 2511, 2701.) UHS-Fuller employs the other workers at the Worksite. This includes the current Director of Risk and Quality, Jill MacCormack, the person in that role at the

[17] Tr. 1537. Herein, the property located at 200 May St., South Attleboro, MA 02703, is referred to as the Worksite, and the company which employs most of the workers at that location is referred to as UHS-Fuller. (Stips. 1, 5-6.)

[18] Stips. 8-10; Tr. 536, 2371, 2429; Exs. S-24, S-452B. "8. Fuller Hospital is a healthcare provider licensed by the state of Massachusetts. … 10. Fuller Hospital has 6 units with a total of 102 patient beds." (Ex. S-449, Stips. 8, 10.) In addition to the in-patient facility, there is also a partial hospitalization program ("PHP") for individuals that do not need to stay overnight. (Tr. 2514.)

[19] Tr. 2291-94. The Medical Director, Dr. Scott Haltzman, clarified that patients frequently "come in wanting to be admitted" but transportation companies will not pay for them to be transported and "often hospitals won't accept them" unless they come through the involuntary commitment process. (Tr. 2293.)

[20] "Fuller Hospital's Chief Executive Officer (CEO) and UHS-DE Group Director, Rachel Legend, is employed by UHS-DE." (Ex. S-449, Stip. 40.)

start of OSHA's investigation, Jessica Gosselin, the Medical Director, Dr. Haltzman, Mental Health Specialists ("MHSs"), nurses, doctors, and other healthcare professionals, such as pharmacist, pharmacy techs, and social workers, among others. (Tr. 2524-25.)

Although UHS-DE and UHS-Fuller are separately incorporated, the Secretary maintains that both entities are responsible for the violation. (Sec'y Br. 48, 59; Sec'y Reply Br. to UHS-DE Br. 11-12; Sec'y Suppl. Br. 3; Tr. 486, 489, 491.) Both entities employed workers exposed to the cited hazard at the Worksite.[21] Still, UHS-DE disavowed any responsibility for the violation, even if UHS-Fuller was appropriately cited.[22]

The OSH Act defines an "employer" as "a person engaged in a business affecting commerce who has employees" and further defines a "person" as "one or more individuals, partnerships, associations, corporations … or any organized group of persons." 29 U.S.C. § 652. In certain circumstances, the purposes of the OSH Act, including effective enforcement, "are well served" by holding two separate legal entities equally responsible for one violation.[23]

[21] Ex. S-449, Stips. 5, 19, 20, 34, 38, 39, 41. "The employees of UHS-DE located at the worksite in King of Prussia, PA, are not exposed to the same workplace hazards as the employees of UHS-DE and UHS-Fuller who work at Fuller Hospital in South Attleboro, MA." (Ex. S-449, Stip. 41.) The Secretary did not pursue a veil piercing theory of liability. Nor does the Secretary assert that UHS-Fuller and UHS-DE could have been separately cited for the hazard. *See C.T. Taylor,* 20 BNA OSHC 1083, 1086 n.7 (No. 94-3241, 2003). (Sec'y Br. 48-61.)

[22] UHS-Fuller "agrees with" UHS-DE's arguments on single employer set out in UHS-DE's post-hearing brief," which was filed on the same day UHS-Fuller filed its brief. (UHS-Fuller Br. 104.) It does not raise any specific arguments related to the issue of single employer. *Id.*

[23] *See C.T. Taylor,* 20 BNA OSHC at 1086-88. UHS-DE correctly notes that in *C.T. Taylor* the employers sought to be treated as one entity. (UHS-DE Suppl Br. 5 n.1.) There is no rationale for finding that the assessment should vary depending on the party seeking to establish that two entities should be jointly responsible for a violation of the OSH Act. The Commission applies the same test either way.

UHS-DE contends that the appropriate analysis is whether two entities are so interrelated and integrated that piercing the corporate veil is warranted.[24] In the veil-piercing context, the analysis encompasses all aspects of operations, and two entities can be considered one for all purposes. Here, what the Secretary seeks is much more narrow. So is the analysis. The Secretary does not deny that some corporate formalities were observed and accepts that UHS-DE and UHS-Fuller are legally distinct. (Stips. 5, 34, 38.) He does not contend that UHS-DE is liable for anything UHS-Fuller does. He does not maintain that UHS-DE is responsible for any future violation of the OSH Act. Nor do his claims extend to other facilities with whom UHS-DE has a relationship. The Secretary's claims relate to this Worksite's handling of health and safety matters during the relevant inspection period and whether two legally distinct entities should be held jointly responsible for one violation of the OSH Act.

In matters like this, to determine whether separate corporations operate as a single employer within the meaning of the OSH Act, the Commission examines three factors. *A.C. Castle*, 882 F.3d at 41-42 (discussing the Commission's three-prong single employer test); *UHS Pembroke*, 2022 WL 774272, at *2. First, do the entities share a common worksite? *Id.* Second, are the entities interrelated and integrated with respect to safety and health matters? *Id.* Third, do

[24] UHS-DE Suppl Br. 6. UHS-DE cites *Marzano v. Computer Sci. Corp. Inc*, 91 F.3d 497 (3d Cir. 1996), a case arising under New Jersey state laws. Applying New Jersey corporate law, the Third Circuit concluded that only the entity that employed the plaintiff was appropriately named to the action, which raised employment discrimination claims under two New Jersey state laws. 91 F.3d at 502, 511, 513-14. In contrast, when the Third Circuit considered whether two legally distinct entities constituted a single employer in connection with an alleged violation of the federal OSH Act, it applied a different test and upheld the Commission's finding. *Altor, Inc. v. Sec'y of Labor*, 498 F. App'x 145, 148 (3d Cir. 2012) (looking at the same three factor test the Commission applied along with the fourth factor of "centralized control of labor relations" before concluding the two entities were a single employer). Like the Third Circuit, the Commission, and the First Circuit do not apply the common law veil piercing test to assess whether separate corporate entities constitute a single employer under the OSH Act. *UHS Pembroke,* 2022 WL 774272, at *2; *A.C. Castle v. Acosta*, 882 F.3d 34, 41-42 (1st Cir. 2018). *Accord Loretto-Oswego Residential Health Care Facility*, 23 BNA OSHC 1356, 1358 n.4 (No. 02-1164, 2011), *aff'd*, 692 F.3d 65 (2d Cir. 2012). UHS-DE is headquartered in Pennsylvania and the Worksite is in Massachusetts, giving the First, Third and D.C. Circuits potential jurisdiction over an appeal of this matter. (Stips. 5, 6, 35, 36.) *See* 29 U.S.C. § 660(a). Generally, Commission judges apply the law of the circuit where it is probable a case will be appealed. *See, e.g., Kerns Bros. Tree Serv*., 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000).

the entities share a common president, management, supervision, or ownership? *Id.* The Secretary bears the burden of establishing a single-employer relationship. *Id. See also Loretto*, 23 BNA OSHC at 1358 n.4.

The parties disagree on whether all three factors must weigh in favor of finding a single-employer relationship. *See Solis v. Loretto-Oswego Residential Health Care Facility*, 692 F.3d 65, 76 (2d Cir. 2012) ("It is not clear … whether all three of the Commission's factors must be met in order to find that several entities did handle safety matters as one company"). Resolving this is unnecessary as the Secretary showed all three factors weigh in favor of concluding that a single employer relationship existed within the meaning of the OSH Act and both entities should be held jointly responsible for the single violation.

1. **Common worksite**

UHS-DE's "corporate offices" were not at the Worksite, and it was not common for UHS-Fuller employees to work at UHS-DE's corporate offices in King of Prussia, Pennsylvania.[25] However, a common business address or headquarters is not necessary to find there was a common worksite.[26]

[25] Stips. 5-6, 35-36; Exs. RD-1, RD-2, RD-3. UHS-DE Senior Vice President Gary Gilberti indicated that some training occurred at the King of Prussia, Pennsylvania offices. (Tr. 1421; Exs. S-80, S-81.) Not everyone who participated in such training was employed by UHS-DE. (Tr. 1415.)

[26] *A.C. Castle*, 882 F.3d at 42; *UHS Pembroke*, 2022 WL 774272, at *3 (finding that although UHS-DE operates out of Pennsylvania and the hospital facilities were in Massachusetts, this did not mean there was no common worksite). Like in *UHS Pembroke*, the First Circuit is a relevant Circuit for this matter. 29 U.S.C. § 660(a); 2022 WL 774272, at *1, 3. *A.C. Castle* found that for there to be a common worksite, workers from each entity do not have to "be at the site at the time violation occurred or directly exposed to the risk." 882 F.3d at 42. UHS-DE tries to distinguish *A.C. Castle*, arguing that despite this language, when read as a whole, the decision held that workers from both entities must be exposed to the hazard at some point. (UHS-DE Suppl. Br. 4-5.) This potential distinction does not affect the analysis of the common worksite factor in this matter. Employees from both entities were routinely present at the Worksite, including when incidents of the workplace violence hazard occurred. UHS-DE employees discussed responding to violent situations at the Worksite and UHS-DE stipulated its employees were exposed to the cited hazard. (Stip. 20.)

The lack of a shared headquarters is not persuasive because of the presence and deep involvement of UHS-DE employees in critical aspects of operations, particularly those related to employee health and safety at the Worksite. *See A.C. Castle*, 882 F.3d at 42 (noting that while a shared headquarters or business address "generally satisfies the common worksite factor," it is not "necessary," and requiring such would rewrite the test); *UHS Pembroke,* 2022 WL 774272, at *3. In *Loretto*, the management company had "no physical presence" at the inspected nursing home, was rarely onsite, and was not involved in the facility's day-to-day operations. 23 BNA OSHC at 1361.

In contrast, multiple UHS-DE employees worked at the inspected location, and Respondents acknowledge that both entities' employees were exposed to workplace violence at the Worksite. (Stips. 19, 20.) Indeed, the CEO is a UHS-DE employee whose office is at the Worksite.[27] She is routinely present at the Worksite, supervising UHS-Fuller employees and overseeing its day-to-day operations.[28] Three other UHS-DE employees were based at the Worksite and held key leadership roles. Ms. Bricault, a UHS-DE Loss Control Manager, handles various Worksite safety matters, including workplace violence. (Tr. 1123-26, 1299.) The CFO, who oversaw financial matters, and the COO, were also UHS-DE employees working at the

[27] Tr. 2510. Ms. Legend was often evasive in her testimony. For example, she could not provide basic information about her direct supervisor. (Tr. 2704-5.) Even though they regularly spoke by phone, sometimes as frequently as twice a week, she claimed not to know his title, where his office was, or what time zone he was in. (Tr. 2704-6.) She also denied that she reported to UHS-DE Senior Vice President, Mr. Gilberti. (Tr. 2705.) However, Mr. Gilberti testified that he supervised her, explaining that she regularly reported "key metrics" and other information to him, including details about safety at the Worksite. (Tr. 1394, 1396-97.) Mr. Gilberti's testimony is credited.

[28] Tr. 2345, 2510, 2705. Ms. Legend is in the patient care units at the Worksite "several times a week" and "sometimes every single day." (Tr. 2728.) Ms. Legend has responsibilities for another UHS-DE affiliate, UHS-Pembroke. (Tr. 2706, 2708.) She remains in touch with employees at the Worksite even when she is at UHS-Pembroke. *Id.* Like in *Advance Specialty Co., Inc.*, 3 BNA OSHC 2072 (No. 2279, 1976), there were no "physical barriers" restricting where the UHS-DE employees worked while at the Worksite. 3 BNA OSHC at 2074. *See also Vergona Crane*, 15 BNA OSHC 1782, 1783 (No. 88-1745, 1992) (shared office space). In *Advance Specialty*, two Commissioners concurred in the result, but one would not have reached the single employer issue and one would have vacated the citation. 3 BNA OSHC at 2076.

Worksite. (Tr. 399, 493, 1416, 1422, 2701, Ex. S-81.) In addition, for long stretches of time between 2018 and 2020, a UHS-DE employee supervised the Director of Nursing ("DON").[29]

These UHS-DE employees consistently work alongside UHS-Fuller employees at the inspected location and are integral to the Worksite's day-to-day operations. (Tr. 399, 401-2, 425, 614-15, 1299, 2510, 2701, 2703, 3109.) Their involvement includes hiring, firing, and managing hospital staff. *Id.* They have direct and oversight responsibilities for worker safety, including the hazard of workplace violence.[30]

This overlap of supervision and management at the Worksite distinguishes this matter from *S. Scrap Materials Co*., 23 BNA OSHC 1596 (No. 94-3393, 2011). Here UHS-DE's handpicked supervisors oversaw the work of the UHS-Fuller employees at the Worksite daily. So, this matter is analogous to the situations in *C.T. Taylor* and *UHS Pembroke.* 20 BNA OSHC at 1087; 2022 WL 774272, at *3-6 (finding the presence of one UHS-DE employee and involvement of additional UHS-DE employees sufficient to show a common worksite). For these reasons, the common worksite factor supports finding a single-employer relationship.

[29] Tr. 1488-89, 1599, 1637, 2710; Ex. S-120. The DON at a facility like the Worksite must have a master's degree to meet the Centers for Medicare and Medicaid Service's ("CMS's") criteria for participation in its reimbursement program. (Tr. 1489, 1615, 2710; Ex. S-449, Stip. 14.) Frequently, in the relevant timeframe, the person in the role of DON or Assistant Director of Nursing ("ADON") did not meet this requirement and so a UHS-DE employee with the appropriate credentials had to supervise them. (Tr. 1405, 1488-89, 1616-17, 1710, 2579, 2710; Ex. S-120.) Stipulation 14 is: "Fuller Hospital is certified as a Medicare and Medicaid hospital by the federal Centers for Medicare and Medicaid Services ("CMS")." (Ex. S-449, Stip. 14.) Maintaining CMS certification was very important to the Worksite's financial health. (Tr. 2189.)

[30] In *UHS-Pembroke,* the Commission distinguished UHS-DE and UHS-Pembroke's relationship from the facts of *Loretto* and found a common worksite. 2022 WL 774272, at *3, 5-6. *See also C.T. Taylor*, 20 BNA OSHC at 1085 (finding single-employer relationship where one entity's employee directed and supervised the work performed by the other entity's employees). UHS-DE cites *Absolute Roofing & Constr., Inc.,* 24 BNA OSHC 1885 (No. 11-2919, 2013) (ALJ). (UHS-DE Br. 28, 30, 39, 44, 46, 49.) *Absolute Roofing* applied the same three-part test discussed herein and found that two entities should be treated as a single employer. 24 BNA OSHC at 1892. The Commission did not review *Absolute Roofing,* but the ALJ's decision was upheld when the employer appealed it to the Sixth Circuit. *Absolute Roofing & Constr. Inc. v. Sec'y of Labor*, 580 F. App'x 357 (6th Cir. 2014) (unpublished).

2. Interrelation and Integration

The second element looks at the interrelation and integration of the two entities. UHS-DE acknowledges extensive involvement with UHS-Fuller's management but contends this should not be determinative because it played a limited role in patient care and provided services pursuant to a Management Services Agreement ("MSA"). (UHS-DE Br. 1, 2, 4, 34, UHS-DE Suppl. Br. 10-11, 18-19; Stip. 37.) The Secretary counters that UHS-DE and UHS-Fuller were well integrated with overlapping responsibilities in key areas and the existence of an MSA does not preclude finding that the two entities should be treated as a single employer in connection with an OSH Act violation.

a. Overlapping Areas of Responsibility

Respondents were well integrated in connection with employee health, safety, and other operational matters. UHS-DE was directly involved in overseeing Worksite staff. CEO Legend managed clinical care, staff engagement, and regulatory compliance.[31] With the CFO and COO, she was involved in daily operational flash meetings and other leadership meetings. (Tr. 395, 398-99.) At these meetings, she and the others reviewed patient aggression, workplace violence, and staffing. *Id.* She was involved in physician hiring and firing (if needed) and heard complaints about understaffing at the Worksite. (Tr. 2369, 2709-10.) She was aware that staff claimed they were forced to work through breaks but denied that it was necessary for MHSs to work through breaks. (Tr. 2734, 2750, 2753.)

[31] Tr. 2345, 2706-9. Ms. Legend described her job duties as "the physical health of the facility, the clinical care of patients, staff engagement, budgetary concerns, regulatory compliance, and everything in between." (Tr. 2345.) In this context, her description of her own job duties is more persuasive than the testimony of CO Kadis pointed to by UHS-DE. (UHS-DE Suppl. Br. 11.)

Ms. Legend and other UHS-DE employees led key committees for the Worksite, including its Board of Governors and Patient Safety Council.[32] These committees reviewed issues related to the hazard, such as patient aggression, physical confrontations, and employee injuries. (Tr. 406-7, 1403, 2345-47.) Ms. Legend or the CFO also led periodic town hall meetings during which safety was a topic.[33] The Worksite's workplace violence prevention plan ("WVPP") indicates the CEO, or her designee, is to "coordinate all safety and security management activities."[34]

At least one UHS-DE employee attended the daily flash meetings, which included discussions about all employee injuries. (Tr. 397-401, 947-50, 1297.) In addition, another UHS-DE employee, Ms. Bricault, spoke to certain injured employees and received clinical consultation reports for all employees who reported injuries and sought care.[35] She reviewed videos of reported workplace violence incidents to confirm how they occurred.[36]

---

[32] Tr. 406, 1405, 1410-11, 1427, 1724, 2328-29, 2579-80; Exs. S-27, S-79, S-213, RF-33. The Board of Governors was also called the Board of Advisors. (Tr. 1404-5.) Exhibit RF-33 has a label suggesting it is Patient Safety Work Product (PSWP). However, UHS-Fuller did not claim this document as PSWP at the hearing and the contents do not appear to constitute PSWP. (Tr. 2578.) Respondents claimed and marked a wide swatch of documents as PSWP, even when the document did not meet the criteria for PSWP protection. (June 25, 2020 Protective Order; June 14, 2021 Disc. Order Regarding Sec'y Cross-Mot. to Compel ("Discovery Order I"), July 15, 2021 Suppl. Order Regarding Disc. ("Discovery Order II"); Decision App. Section II.)

[33] Tr. 324, 2761-62. After the November 2019 town hall, Ms. Legend created what she called "minutes" of the meeting. (Tr. 2365-66; Ex. RF-30.) The short list of phrases does not directly mention safety but does list "staffing patterns" and "1:1 staffing requirements." (Ex. RF-30.)

[34] Ex. S-166 at 2. Camera reviews of incidents of aggression were conducted at the direction of the CEO (a UHS-DE employee), the Director of Risk Management (a UHS-Fuller employee), or the DON (a UHS-Fuller employee that was often directly overseen by a UHS-DE employee). (Exs. S-34, S-166, S-459.) The WVPP was accepted into the record under two different labels, S-166 and RF-42. (Tr. 1128, 2631; Ex. ALJ-1.)

[35] Tr. 1164-65, 1186, 1191; Exs. S-252, S-254, S-255, S-260, S-261, S-268, S-384. Some injuries were directly reported to Ms. Legend. (Exs. S-244, S-280.) Injured workers were informed that Ms. Bricault would contact them and were directed to speak with her when she did so. (Tr. 1169-72, 1189-91; Exs. S-13, S-229, S-230, S-242, S-245, S-250, S-258, S-260, S-268, S-317, S-337, S-338, S-383, S-384, S-385; Stip. 49.)

[36] Tr. 2935; Ex. S-252. Ms. Bricault worked with staff to develop a post-incident camera review procedure. (Tr. 1180, 2933-35; Exs. S-11, S-39.) She discussed the results of camera reviews in the loss control summaries she shared with the CEO and UHS-Fuller employees. (Exs. S-51 thru S-57, S-59 thru S-62.) The CEO also reviewed videos of employee injuries. (Tr. 2935; Exs. S-229, S-242.) Although video "can be accessed by a facility's risk manager," the CEO also had access to the Worksite's video surveillance. (UHS-DE Suppl. Br. 14; Exs. S-34, S-449.) Moreover, video showing "physical altercations" was to be copied and sent to UHS-DE. (Exs. S-34, S-35.) Thus, contrary to UHS-DE's claims, how video surveillance footage was handled supports finding a single employer relationship.

Ms. Bricault was based at the Worksite and her primary role was safety. (Tr. 1123, 2934-36.) She performed periodic safety walk-through surveys, completed Worksite assessments, and tracked injury data.[37] She compared the injury data she tracked to UHS-DE benchmarks. (Tr. 1266-68.) She prepared summaries and held regular meetings with UHS-Fuller leadership to discuss safety, patient aggression and injury data.[38] She made sure that OSHA logs were signed and posted.[39] She assisted with the development of the Worksite's WVPP. (Tr. 1129-30; Ex. S-99.) UHS-DE expected Ms. Bricault to follow its standardized expectations for Loss Control Managers.[40] It had a standard template for all loss control visit reports, which included a section on "Managing Patient Aggression Program Assessment."[41] The template also provided general information on the general duty clause, OSHA's expectations surrounding workplace violence and ergonomics, and other safety topics. (Ex. S-121 at 5.)

[37] Tr. 1125-26, 1244-45; Exs. S-57 thru S-63. Separate from those surveys, UHS-DE created and distributed a Culture of Safety survey to UHS-Fuller and its other affiliates. (Tr. 1501-2.) PsychSafe, another division of UHS-DE, analyzed the results of these surveys and would distribute information related to the findings. (Tr. 1502-3, 1505, 1562-63; Ex. S-449, Stips. 50-51.) The parties stipulated: "50. PsychSafe is a component of UHS-DE. 51. PsychSafe offers resources to UHS-DE associated behavioral health facilities such as Fuller Hospital, regarding workplace violence issues." (Ex. S-449, Stips. 50-51.) Karen Johnson is the Director of PsychSafe, the Senior Vice President of the Behavioral Health Division of UHS-DE, and UHS-DE's Chief Clinical Officer. (Tr. 1482, 1563.) Exhibits S-122 and S-227 were related to the PsychSafe program. They were admitted as sealed exhibits. They are not discussed herein, nor were they relied upon in reaching this decision.

[38] Tr. 1125, 1245-46, 1263-67, 1321, Exs. S-52 thru S-62, S-68. UHS-DE also provided benchmarks on safety and quality. (Tr. 1267, 2648-50.) UHS-Fuller's performance in meeting these benchmarks was discussed in periodic reports to UHS-DE. (Tr. 379-81, 1266-67, 2648-50, 3040-41.)

[39] Under the Worksite's guidelines for OSHA recordkeeping, employees were directed to contact UHS-DE Loss Control Managers "immediately" when OSHA arrived at a facility. (Tr. 1280-83, 1672; Ex. S-97.) UHS-DE contracted with Sedgwick to maintain OSHA logs for the Worksite and other facilities. (Ex. S-449, Stips. 46-47; Tr. 1280; Ex. S-97.) The parties stipulated: "46. UHS-DE contracts with Sedgwick on behalf of Fuller Hospital and other behavioral health facilities it manages. 47. Sedgwick compiles OSHA logs for Fuller Hospital and other behavioral health facilities. 48. Sedgwick communicates with injured employees following injuries as part of processing potential workers' compensation claims." (Ex. S-449, Stips. 46-47.)

[40] Tr. 1278-79, 1671; Ex. S-96. UHS-Fuller considered the loss control visits to be a component of its WVPP. (UHS-Fuller Br. 3, 74.)

[41] Tr. 1701-2; Exs. S-96, S-121. This section included several questions related to the hazard, such as questions about staffing, video surveillance, employee injuries, panic buttons and debriefings. (Tr. 1701-13; Ex. S-121.)

Many of the "resources" UHS-DE provided were directly related to the cited hazard.[42] They include OSHA's expectations surrounding workplace violence and a checklist to confirm the scope of a facility's WVPP.[43] The checklist asked about safe staffing, camera review of incidents, staff involvement in injury prevention initiatives, and post-incident debriefing.[44]

UHS-DE trainers and others could visit the Worksite to conduct training and perform assessments.[45] The Preventing Workplace Violence training materials UHS-Fuller used came from UHS-DE.[46] UHS-DE also developed verbal de-escalation training for Worksite employees. (Tr. 1582-83.) For Handle With Care ("HWC") training, UHS-DE contracted with a third party

[42] While witnesses used terms such as "resources" or "guidelines," employees were not consistently free to disregard the requirements set forth in the documents. (Tr. 1668.) For example, UHS-DE put together the document titled "Employee Injury Analysis." (Tr. 1668-69; Ex. S-94.) It sets forth the process for investigating and analyzing incidents that injure employees. Despite the nomenclature, employees were expected to follow the requirements set out in the document. *Id.* Similarly, UHS-DE had an employee accident reporting procedure that applied to the Worksite. (Tr. 1270-71; Ex. S-83.)

[43] Tr. 1674-75, 1701-13; Exs. S-93, S-121, S-134. Ms. Bricault repeatedly gave written reminders to the CEO and certain UHS-Fuller employees to update the Worksite's WVPP annually. (Exs. S-53, S-60.) UHS-Fuller employees were to schedule a meeting with the UHS-DE Loss Control Department as part of the WVPP's review and update. *Id.* This evidence is credited over Ms. Bricault's claim that she did not have to review or approve the WVPP. (Tr. 1297.) In addition, the final WVPP had to be signed by the CEO, a UHS-DE employee. (Ex. S-54.) UHS-DE's claim that the WVPP did not have to be reviewed or approved by its employees is rejected. (UHS-DE Suppl. Br. 11-12.)

[44] Tr. 1701-13; Ex. S-121. The post-incident debriefing form that was to be used after incidents during which an employee was injured includes a reference to "UHS policies" on protective holds of patients. (Tr. 1179-80, Ex. S-11.) The form indicates that if the reviewer determines that the policy is not followed, the "necessity" for the deviation "must be established, otherwise re-education on risk reduction and policies related to protective holds must be documented." *Id.* Other "resources" provided by UHS-DE included fillable OSHA forms, an OSHA "Safe Patient Handling Checklist," and information on lockout/tagout. (Exs. S-93, S-94, S-97.)

[45] Tr. 1493, 1570-83. For instance, a UHS-DE Milieu Manager periodically visited the Worksite to provide training and assess the care environment. (Tr. 1493.) This assessment included looking at the frequency of patient observation, the adequacy of programming, and the quality of the staff's verbal de-escalation skills. (Tr. 1494-97, 1499.) The assessment could include attending a treatment team meeting and reviewing video of restraints. (Tr. 1499.) After the visit, the UHS-DE Milieu Manager prepared a report identifying issues observed and developed an action plan with those at the Worksite. (Tr. 1500-1501.) The UHS-DE Milieu Manager followed up periodically to assess the progress on completing the action plan. *Id.*

[46] Tr. 2918, 2921, 2933; Ex. S-155. Each slide for the training has the "UHS" logo on it. (Ex. S-155.) The parties submitted a Joint Exhibit List, which was received into evidence and marked as Exhibit ALJ 1. (Tr. 268-69.) However, each document was individually received into evidence and designated as Secretary (S), Respondent UHS-Fuller (RF), or Respondent UHS-Delaware (RD), and given a separate exhibit number. Consistent with the parties' briefs, the joint exhibit numbers will not be used herein. The undersigned notes that several documents listed on the Joint Exhibit List were not offered into evidence and are not part of the record. Those documents are listed in Exhibit ALJ 1 as: Jt. Ex. 9, Jt. Ex. 10, Jt. Ex. 13, Jt. Ex. 14, and Jt. Ex. 15. (Ex. ALJ 1.)

on behalf of UHS-Fuller. (Tr. 1584.) UHS-DE trainers also can assist with the annual renewal process for HWC training. (Tr. 1581-82.) Ms. Bricault also provided training on aggression to supervisors at the Worksite using materials developed by a department of UHS-DE. (Tr. 1137-39, 1148-49, 1153, 1668; Exs. S-39, S-94, S-156, S-158, S-162.)

UHS-DE had responsibility for the Worksite's financial matters. The CFO, a UHS-DE employee, handled the "financial activity" of UHS-Fuller, including accounts payable, payroll, and the billing department.[47] UHS-DE paid UHS-Fuller's taxes and purchased insurance for it. (Tr. 506-8, 510-11.) UHS-Fuller had to obtain UHS-DE approval for capital expenditures above certain threshold amounts. (Tr. 387.) Sometimes UHS-DE would buy the requested items directly. *Id.* As the expenditure increased, UHS-Fuller had to obtain additional approvals from UHS-DE employees before incurring the expense. (Tr. 387-90.)

UHS-DE employees also drafted UHS-Fuller's yearly budget and strategic plan.[48] During the budgeting process, UHS-DE would generate a target number of employees per patient that UHS-Fuller aimed to stay at or below. (Tr. 375-76.) Meeting the budget targets increased the salaries of the CEO and CFO. Ms. Legend could earn a bonus of up to the total amount of her baseline salary by exceeding the established budgetary targets, including through budgetary efficiencies. (Tr. 426-28.)

---

[47] Tr. 357. UHS-DE argues UHS-Fuller "manages its own payroll." (UHS-DE Suppl. Br. 10.) However, the transcript shows this to be an overstatement of the CFO's testimony. The CFO, a UHS-DE employee, was asked "Did you outsource your payroll, or was it done in-house? He replied, "We did it in-house." (Tr. 485.) The CFO confirmed he oversaw payroll. (Tr. 357.) Likewise, when asked "And in managing your payroll, did you do withholding and unemployment taxes and pay workers' compensation on that entire employee workforce at Fuller Hospital," he said "Correct. Yes, we did." (Tr. 485.) The CFO never denies the role he played in overseeing the payroll, including tax payments. UHS-DE's suggestion that UHS-Fuller handled this without the involvement of its employee (the CFO) is disingenuous. (UHS-DE Suppl. Br. 10.)

[48] Stip. 52; Tr. 376-78. "The Fuller Hospital yearly budget and strategic plan are initially drafted by the CEO and CFO of Fuller Hospital." (Ex. S-449, Stip. 52.) The CFO was "ultimately responsible" for developing the budget, in conjunction with the CEO and department managers. (Tr. 376-77.) After the CFO completed the draft budget, it would be reviewed by the CEO and other UHS-DE employees before being finalized. *Id.* Both the CEO and CFO work for UHS-DE. (Stip. 40; Tr. 357.)

UHS-DE, with the assistance of a third-party contractor it retained, Sedgwick, managed workers' compensation, the compilation of OSHA logs, accident reporting, clinical consultations for injured employees, a workers' compensation budget, and a system of chargeback or absorption of claims related to worker injuries.[49] An appropriate number of workers' compensation claims for each facility was determined after discussions among UHS-DE employees, the facility's CEO (or her designee), and the UHS-DE Loss Control Manager. (Tr. 1661-62.) There were financial incentives for meeting this target. (Tr. 1663.) UHS-DE also handled the payment of workers' compensation claims that met particular criteria. (Tr. 1657-61, 1731.)

UHS-DE was responsible for the Worksite's information technology ("IT").[50] The email addresses of UHS-DE and UHS-Fuller employees all end in "UHSinc.com" and are part of the same server. (Stip. 42, Tr. 1330; Exs. S-258, S-260, S-261.) UHS-DE controlled the servers and networked drives at the Worksite. (Stips. 42-43; Tr. 383-85, 433-34.) UHS-Fuller staff saved documents to these drives, and UHS-DE could access the drives and emails of any employee. *Id.*

UHS-DE had a compliance committee and a compliance department that oversaw the observance of various regulatory requirements and adherence to loss control policies at its affiliates. (Tr. 1540, 1560-62, 3047, Exs. S-34, S-35, S-79, S-459.) It maintained a compliance hotline to receive anonymous complaints. (Tr. 1547-48, 2754-55.) These complaints would lead to investigations at facilities it managed. *Id.* UHS-DE had a Code of Conduct and required UHS-Fuller employees to adhere to it. (Tr. 1431, 1435-36.) The Code of Conduct requires UHS-Fuller

[49] Tr. 507-8, 1189, 1270-71, 1280-82, 1291-94, 1301, 1656-61, 1663-64, 1731, 2348, 3419; Exs. S-134, S-229, S-244, S-245, Stips. 46-48.

[50] Tr. 381, Ex. S-449, Stip. 42-43. Besides responsibility for financial matters, the CFO also oversaw other departments at the Worksite, including, "IT, medical records, utilization review, dietary, maintenance, and housekeeping." (Tr. 357.) "UHS-DE staff can access and preserve the email of UHS-Fuller employees." (Ex. S-449, Stip. 43.) "Email between employees at Fuller Hospital is part of the same UHS-DE email system server." (Ex. S-449, Stip. 42.)

employees to follow "all state, federal, and local environmental and workplace safety laws, regulations and rules, including those promulgated by the Environmental Protection Agency and [OSHA]." (Ex. S-82 at 14.)

UHS-DE claims no role in medical or clinical care at the Worksite.[51] This claim is incorrect. Clinical care was not UHS-Fuller's exclusive domain. Ms. Johnson, UHS-DE's Chief Clinical Officer, described the services UHS-DE provided, as including "services that support clinical excellence and support a safe and quality environment for patients." (Tr. 1598.) UHS-DE assigned each facility a UHS-DE Director of Clinical Services, whose responsibilities included visiting the Worksite.[52] A UHS-DE employee also supervised UHS-Fuller's Director of Nursing (DON) and Assistant Director of Nursing (ADON) for long periods in the two years preceding the Citation.[53] This supervision included visits to the Worksite, discussions of patient care, staffing, root cause analyses, and addressing other patient care issues. (Tr. 1579, 1616, 1637, 1653-54; Ex. S-120.) The UHS-DE employee's responsibility was to make sure the DON or ADON was comfortable and confident in her work and to ensure the Worksite met the Centers for Medicare and Medicaid Services ("CMS") requirements. (Tr. 1615-17; Stips. 14, 15.)

Besides the oversight of the DON, the Medical Director also reported to UHS-DE's employee, CEO Legend. (Tr. 505, 2322, 2328.) She hired and could fire the Medical Director or

[51] UHS-DE Br. 13; UHS-DE Suppl. Br. 9-11. UHS-Fuller has a state license for the provision of healthcare services. (Stip. 8; Tr. 494-95.) CO Kadis did not know whether UHS-DE had a license to provide healthcare services. (Tr. 1000.)

[52] Tr. 1574, 1576. Lisa Graney, a UHS-DE Director of Clinical Services, was responsible for providing "oversight and guidance" on regulatory compliance. (Tr. 1574-78.) Her responsibilities included visiting the Worksite. (Tr. 1576.)

[53] Tr. 1488-49, 1616, 1637, 2710; Ex. S-120. UHS-DE Regional Risk Manager Linda Starr also made regular site visits to the Worksite which would result in the development of a Patient Safety – Facility Action Plan ("Action Plan"). (Tr. 1506-1512, 1572-74; Exs. S-74.) The Worksite had to follow these Action Plans. (Tr. 1573.) Ms. Starr visited the Worksite in August 2019. (Tr. 549, 1510-12, 1573-74; Exs. S-74.) A document related to that visit was admitted into evidence as Exhibit S-75 and placed under seal. (Tr. 1511, 1515; Ex. S-75.) It was not considered in reaching this decision and is not discussed herein. The parties agree that the Action Plan (Ex. S-74) is not Patient Safety Work Product (PSWP) and that exhibit is not sealed. (Tr. 1510-11, 1563; Ex. S-74.)

other physicians after consultation with other UHS-DE employees. (Tr. 1461-62, 2330, 2709-10.) Ms. Legend indicated her responsibilities included "clinical care." (Tr. 2345.) She discussed staffing levels for patient units, including whether constant (1:1) supervision should be removed.[54] She visited the patient care units daily and interacted with patients. (Tr. 2367-68, 2728.) The CFO came to the units once or twice a week to check plant operations or respond to codes. (Tr. 391, 393.) UHS-DE Senior Vice President Gilberti worked on the recruitment, hiring, and potential termination of physicians. (Tr. 1461-62.) He signed contracts for new physicians and chaired the committee that voted on whether to accept or renew contracts for the medical staff.[55]

While there is no evidence of UHS-DE employees directly writing medical orders, they reviewed medication orders and treatment plans in consult with UHS-Fuller employees. (Tr. 2328-29, 2478.) For example, Ms. Legend described the response of "leadership" to a workplace violence incident.[56] The response included looking at medication orders to "ensure they're there" and to "see if they need to be updated." (Tr. 2478.) In discussing the Restraint Reduction Initiative, Ms. Legend explained, "we created PRN order sets, which are as-needed order sets for every patient at admission." (Tr. 2360.) These PRN order sets were required. *Id.* If there were no medical orders to address patient aggression, she would work to "rectify the situation."[57]

In addition, before a patient can be mechanically restrained, staff must contact the DON or the Administrator on Call ("AOC"). (Tr. 2360, 2577; Ex. RF-33 at 4.) The AOC role rotated

[54] The CEO did not order the removal of 1:1 supervision but would direct unit managers to discuss with physicians reducing the level of supervision. (Tr. 404-5.) Dr. Haltzman and the CEO would discuss changing the doctors assigned to particular patients on occasion. (Tr. 2327-28.)

[55] Tr. 1446, 1461-62; Ex. S-26. The CFO also reviewed contracts to pay physicians. (Tr. 390-91.)

[56] Tr. 2477-78. Multiple witnesses used the term "leadership" or "leadership team" to describe the senior leaders at the Worksite. Those in "leadership" attended a daily Flash meeting. (Tr. 395, 397, 401.) The Worksite's "leadership" included the CEO, CFO, and COO Weagley, who were employed by UHS-DE, and three UHS-Fuller employees. *Id.*

[57] Tr. 2362. The Worksite had a procedure known as "Code 22." This was a call for "all hands-on deck" to come and assist with a patient. (Tr. 85.) The Worksite's leadership would respond to such requests for assistance and participate in the response if available and their assistance was necessary. (Tr. 391, 2551-52; Ex. RF-33 at 4.)

among various senior leaders, such as the CEO, CFO, and COO, who were all UHS-DE employees. (Tr. 424-25, 2360.) Similarly, the leadership team, which included UHS-DE employees, regularly responded to calls for assistance in the patient care units to help and provide guidance.[58]

Moreover, even if UHS-DE had no role in clinical care that would not preclude finding a single employer relationship for purposes of the OSH Act. The two entities acted in an interrelated and integrated manner on employee health and safety. Shared control over safety concerns is a persuasive factor when determining whether it is appropriate to impose liability for violations of the OSH Act on more than one employer at a worksite. *C.T. Taylor*, 20 BNA OSHC at 1087; *Loretto*, 692 F.3d at 76; *UHS Pembroke*, 2022 WL 774272, at *3.

b. Management Services Agreement (MSA) – Not Determinative

UHS-DE argues it only provides management services to UHS-Fuller pursuant to the MSA. (Ex. S-21; UHS-DE Br. 15-16, 34-40.) Although relevant, the MSA is not determinative on the issue of single employer. *See Loomis Cabinet Co. v. Sec'y of Labor*, 20 F.3d 938, 942 (9th Cir. 1994) (discounting the contract and emphasizing "the substance over the form of the relationship" when assessing whether there was an employer/employee relationship); *Manua's, Inc. d/b/a Manua's Discount Store*, No. 17-1208, 2018 WL 4861362, at *13 (OSHRC Sept. 28, 2018) (finding the OSH Act, not the contract, determines responsibility), *aff'd*, 948 F.3d 401 (D.C. Cir. 2020). What matters is how the relationship works in practice. *Id.* When the focus is on that question, it is evident that Respondents' description of their relationship understates the degree of interrelation and integration on employee health and safety matters. *See UHS Pembroke*, 2022

[58] Tr. 391, 395, 401, 2596-97, 2776, 2815. UHS-DE also points out that patient records are kept at the Worksite. (UHS-DE Suppl. Br. 10.) This is not persuasive as a UHS-DE employee oversaw the Worksite's medical records department. (Tr. 357.)

WL 774272, at *5 (finding a single employer relationship despite the existence of a management agreement between two entities).

The MSA demonstrates a lack of arm's length negotiation between UHS-Fuller and UHS-DE: both signatories are UHS-DE employees.[59] *See Altor, Inc. v. Sec'y of Labor*, 498 F. App'x 145, 148 (3d Cir. 2012) (unpublished) (finding that the single employer test leads to an examination of whether the entities exhibited "a lack of arm's length dealing"). The CFO was unfamiliar with the MSA and could not recall ever seeing it. (Tr. 477, 480, 482.) The existence of the MSA in this context is not persuasive. *See UHS Pembroke*, 2022 WL 774272, at *5 (discussing the management agreement between UHS-DE and a behavioral health hospital).

Ms. Legend and other UHS-DE employees involved with the Worksite had ultimate command over critical aspects of UHS-Fuller, and all were employed by and acted on behalf of UHS-DE. By serving in senior leadership roles, UHS-DE charged them with running crucial elements of the Worksite's operations, including employee health and safety. *See A.C. Castle*, 882 F.3d at 39-41 (finding a single employer relationship when the owner of a general contractor exercised an unusual amount of control over the subcontractor's actions and the subcontractor was an employee of the general contractor).

The lack of evidence of UHS-DE providing management services to any unaffiliated entity further bolsters the Secretary's argument that operations between the two entities were well-integrated when it came to employee safety and health. *See Altor Inc.*, 23 BNA OSHC 1458, 1464 (No. 99-0958, 2011) (the fact that two entities always did business together favored finding a single employer relationship), *aff'd*, 498 F. App'x 145 (3d Cir. 2012) (unpublished). Here, multiple

[59] Stip. 40; Tr. 1392-93; Ex. S-21. Ms. Legend executed the MSA on behalf of UHS-Fuller d/b/a Arbour-Fuller Hospital. (Ex. S-21 at 1, 11.) She had the authority to sign on UHS-Fuller's behalf. (Tr. 2517.) The other signatory, Steve Filton, was the CFO for UHS-DE. (Tr. 1551, 2518; Ex. S-21.)

UHS-DE witnesses described working with other UHS-affiliated entities. (Tr. 354-55, 614-15, 1122-23, 1394, 1398, 1437, 1499, 1521, 1537, 1548, 1571, 2701, 2707.) None worked with unaffiliated entities. *Id.* Likewise, there is no evidence of UHS-DE providing its "suite of services" to entities unaffiliated with its corporate parent, UHS. (Tr. 428, 1536.)

UHS-DE maintains that it would continue to exist even if UHS-Fuller ceased operations.[60] The ability of entities to operate independently on other projects does not determine whether two employers should be considered a consolidated entity for purposes of an OSH Act violation at a particular worksite. *C.T. Taylor*, 20 BNA OSHC at 1087 n.7. Instead, the Commission focuses on the relationship at the worksite with the cited hazard. *Id. See also Altor*, 23 BNA OSHC at 1464. When the focus is on how UHS-DE and UHS-Fuller interacted at this Worksite, there is substantial evidence of their interrelation and integration, particularly for safety matters.

3. **Common Management, Supervision, or Ownership**

Both UHS-DE and UHS-Fuller are subsidiaries of the same corporate parent, UHS. (Tr. 1483-84; Corp. Discl. Statement.) *See Wal-Mart Stores, Inc. v. Sec'y of Labor*, 406 F.3d 731, 737 (D.C. Cir. 2005) (relying on the fact that two stores had the same "controlling corporation" to support a repeat characterization). When reporting to the Securities and Exchange Commission, UHS consolidates all profits from the Worksite with those from all the other UHS-DE managed facilities. (Tr. 428.)

The senior leadership for the Worksite, *i.e.*, the CEO, CFO, and COO, are all employees of UHS-DE.[61] UHS-DE makes the disingenuous claim that these employees do not perform

[60] UHS-DE Br. 41. There is no evidence the same would be true for UHS-Fuller if UHS-DE ceased operations.

[61] Stip. 40; Tr. 401, 493, 614-15. UHS-DE acknowledges that the "CEO, CFO and COO are UHS-DE employees" and asserts that it has "never disputed or otherwise called into question" this fact. (UHS-DE Br. 47.) In addition, a UHS-DE employee periodically directly supervised the DON for the Worksite. (Tr. 401, 1488-49, 1616, 2710; Ex. S-120.)

corporate management functions for UHS-DE and do not supervise other UHS-DE employees. (UHS-DE Br. 3.) In contrast to that claim, Ms. Legend described the management, supervision, and oversight functions she provides for two UHS-DE affiliated hospitals. (Stip. 40; Tr. 2706-9, 2344-49.) She supervised UHS-Fuller's CFO and other UHS-DE employees at the Worksite. (Tr. 357-58, 614, 1436, 2709.) Ms. Legend was overseen by UHS-DE Senior Vice President Gilberti.[62] The CFO reported financial information monthly to Ms. Legend and another UHS-DE employee.[63] These reports described all variances from the budget goals, including those goals related to staffing. (Tr. 379-80.) His monthly reports also included risks related to aggression. (Tr. 380.) The involvement of multiple UHS-DE employees in the finances undercuts UHS-DE claims about the extent to which UHS-Fuller manages its financial affairs. (UHS-DE Br. 37-38, 39, n.4.)

The CEO, CFO, and COO all engage in tasks to benefit their employer, UHS-DE, and UHS-Fuller. Besides those employees based at the Worksite, other UHS-DE employees routinely visited the location, including employees from UHS-DE's nursing, risk management, milieu management, clinical services, clinical training, and loss control divisions. (Tr. 1244-45, 1278-79, 1444, 1493, 1570, 1572-74, 1579, 3430-3; Exs. S-51 thru S-63, S-74.)

UHS-DE suggests that there had to be parity where the employee served as a leader for both UHS-Fuller and UHS-DE. That is not the test. Common management can mean that one entity's employee oversees the other entity's financial, executive, or operational aspects. *UHS*

[62] Tr. 1394, 1396, 2704. Ms. Legend provided monthly operating reports to Mr. Gilberti, which included adherence to the Worksite's budget, safety reports, and information concerning patient aggression. (Tr. 1396-97.) Mr. Gilberti oversaw Ms. Legend and the CEOs of several other UHS affiliated facilities. (Tr. 1394, 1452, 1458.) He also led UHS-Fuller's Board of Advisors, which included UHS-DE and UHS-Fuller employees. (Tr. 395-96, 1398, 1405; Ex. S-26.) As part of its work, the Board of Advisors votes on whether to approve the hiring of new physicians, reviews committee meeting minutes and approves them. (Tr. 1404-5, 1407-9, 1462; Ex. S-26.) Ms. Legend was also supervised by Joe Sheehy, another UHS-DE Vice President. (Tr. 2704-6.)

[63] Tr. 379, 2708-9. UHS-DE asserts that the CFO lacked "accounting expertise" and indicated that another UHS-DE employee provided "guidance" and filled "any informational gaps." (UHS-DE Br. 37, n.3.) UHS-DE acknowledges the role of multiple employees in managing UHS-Fuller's finances.

Pembroke, 2022 WL 774272, at *5-6. The focus is on the relationship between the entities at the relevant worksite for the citation. *Id.*; *C.T. Taylor*, 20 BNA OSHC at 1087 n.7.

UHS-DE points to a case addressing the common-law agency doctrine about whether an employment relationship existed between a worker and an entity, *FreightCar Am., Inc*., No. 18-0970, 2021 WL 2311871 (OSHRC Mar. 3, 2021). (UHS-DE Br. 4, 28, 34, 45-46.) Unlike the situation in *FreightCar*, Respondents here stipulated that: (1) both entities recognized the cited hazard, and (2) employees of both entities were exposed to the cited hazard. (Stips. 19-24.) UHS-DE's extensive onsite involvement with safety, including the hazard at issue (workplace violence), also distinguishes this matter from *FreightCar*.[64]

The cited entities are linked through the CEO, CFO, and other UHS-DE employees. Key oversight committees were either led by or had UHS-DE employees as members. Both share the same ultimate corporate parent. In short, UHS-DE was integrally involved in the Worksite's day-to-day management, including with safety and core business functions. *See UHS Pembroke*, 2022 WL 774272, at *6 (concluding that similar facts showed that the common management,

[64] *See UHS Pembroke*, 2022 WL 774272, at *5 (distinguishing the relationship between UHS-DE and a behavioral health facility from the one in *FreightCar*); Stips. 44-46, 49-51. "44. UHS-DE ranks its behavioral health facilities, such as Fuller Hospital, based on data regarding patient aggression and injury to staff. 45. UHS-DE holds workplace violence/employee safety committee meetings." (Ex. S-449, Stips. 44-45.) In its Supplemental Brief, UHS-DE cites a decision issued by the National Labor Relations Board ("N.L.R.B.") under a different regulatory framework and unrelated to the OSH Act. (UHS-DE Suppl. Br. 15-16.) The Commission is a fully independent agency. 29 U.S.C. § 661. It is not part of OSHA or the Department of Labor. 29 U.S.C. §§ 658-66; *Martin v. OSHRC* (*CF&I Steel Corp.*), 499 U.S. 144, 147, 151 (1991) ("Under the OSH Act, however, Congress separated enforcement and rulemaking powers from adjudicative powers, assigning these respective functions to two *different* administrative authorities"). Nor is the Commission affiliated with the N.L.R.B. *Id.* N.L.R.B. decisions are neither binding, nor particularly helpful to this analysis because they concern a different statute, the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-169. When determining single-employer status, the NLRB considers four factors, common ownership, common management, interrelation of operations, and common control of labor relations. The single employer determination is dependent on all the circumstances and is "characterized by the absence of an arm's-length relationship found between unintegrated entities." *The Dow Chem. Co.*, No. 7-CA-39233, 1998 WL 560744, at *2-3 (N.L.R.B., Aug. 24, 1998) (in the context of an alleged violation of the NLRA, "centralized control of labor relations," critical to a finding of single-employer status, was "wholly lacking"). Here, UHS-DE exercised actual control of over many essential aspects of employee health and safety at this Worksite. The absence of an arm's-length relationship is the MSA negotiation between UHS-Fuller and UHS-DE is just one example of UHS-DE's actual control.

supervision, or ownership prong of the single entity test weighed in favor of finding a single employer relationship).

4. Single-Employer Established

UHS-DE directs core aspects of employee health and safety and exhibits extensive control over these issues at the shared Worksite. It requires compliance with its Code of Conduct. UHS-DE's handpicked CEO is onsite and has responsibilities for staff, regulatory compliance, budget matters, and, in her words, "everything in between." (Tr. 2345.) Another UHS-DE employee handled aspects critical to the cited hazard, including facilitating the development of the WVPP, camera review policies, and analyzing employee injuries. A third oversees financial matters for the Worksite. All three factors support concluding a single-employer relationship existed between UHS-DE and UHS-Fuller at the Worksite at the time of the Citation.

B. Motion in Limine re Destruction of Evidence

Before continuing, the Secretary's pre-hearing Motion in Limine requesting sanctions against Respondents for the destruction of evidence must be resolved. It is undisputed that video related to 22 different incidents of workplace violence were destroyed.[65] This included destruction during OSHA's investigation, after the Secretary served a valid subpoena on September 27, 2019 (the "Subpoena"), during the pendency of the Secretary's Petition for Enforcement of Administrative Subpoena Duces Tecum ("Enforcement Action"), and after Respondents filed their

[65] UHS-Fuller Br. 17; UHS-DE Br. 6, 59. Responsive video of incidents, occurring on the following dates were not preserved: June 12, 2019, June 13, 2019, June 16, 2019, June 17, 2019, June 18, 2019, June 26, 2019, July 3, 2019, July 10, 2019, July 18, 2019, July 26, 2019, August 6, 2019, August 12, 2019, August 30, 2019, September 19, 2019, September 22, 2019, October 3, 2019, December 24, 2019, February 22, 2020, March 5, 2020, March 19, 2020, March 21, 2020, and April 4, 2020, were not preserved. These incidents all occurred after OSHA's investigation began and after Respondents received the Secretary's June 12, 2019 evidence preservation letter ("Preservation Letter"). (Exs. S-20, S-451, S-451N, S-451O, S-455.) Cameras are located throughout the facility, but "[t]here are no cameras in bathrooms or patient bedrooms." (Ex. S-449, Stip. 17.)

respective Notices of Contest.[66] The Secretary filed a Motion in Limine and sought various sanctions to redress this wrong.[67]

1. August Order Granting Motion In Limine in Part

The undersigned reviewed the parties' filings and issued a partial ruling on the Motion in Limine on July 26, 2021, the first day of the hearing. (Tr. 26-32.) This ruling was discussed more fully in an Order issued on August 4, 2021 ("August Order"). The August Order incorporates the findings of two related federal court filings: the Magistrate's Report and Recommendations Regarding the Enforcement Action ("Magistrate's Report"), and the U.S. District Court for the District of Massachusetts' ("District Court's") August 11, 2020 Order ("District Court Order"), adopting the Magistrate's Report.[68]

---

[66] Because the video surveillance system automatically saves video for thirty days, video of incidents on August 30, 2019, September 19, 2019, and September 22, 2019, was available to Respondents when the Subpoena was served. (Aug. Order 3; Exs. S-450, S-451O, S-451W.) As Respondents acknowledge, video of at least seven incidents occurring after the Subpoena's service were not preserved. (Ex. S-451O, noting events on Oct. 3, 2019, Dec. 24, 2019, Feb. 22, 2020, Mar. 5, 2020, Mar. 19, 2020, Mar. 21, 2020, and Apr. 4, 2020; Tr. 3062-3072; Exs. S-32, S-461; Aug. Order 5.) The Citation was addressed to UHS-DE's employee, Ms. Legend, UHS-Fuller, and UHS-DE. (Ex. S-148.) It was issued on December 11, 2019 and signed for on December 17, 2019. *Id.* The Secretary's Motion in Limine was admitted as Exhibit S-451, with each attachment having a separate lettered designation. The Secretary's Petition and Memorandum submitted to the District Court as part of the Enforcement Action is Exhibit S-451M.

[67] Ex. S-451 at 24-35; Sanctions Mot. I at 1, 9, 21. The Secretary's Motion in Limine included three Orders Judge Phillips issued in *Sec'y of Labor v. UHS of DE, Inc. & Premier Behavioral Health Solutions of Fla*., *d/b/a Suncoast Behavioral Health Ctr.*, Docket No. 18-0731 ("*UHS-DE & Suncoast*"): (1) December 4, 2018 Order Granting Complainant's Motion to Compel and/or to Show Cause Why Respondents' Cannot Produce Video Surveillance Evidence ("Suncoast Compel Order"); (2) March 29, 2019 Motion for Sanctions for Respondents' Destruction of Relevant Video Surveillance Evidence, and (3) April 19, 2021 Order Awarding the Secretary $9,600 in Attorneys' Fees for His Sanctions Motion Pursuant to Rule 37(e) for Respondents' Destruction of Electronically Stored Information ("UHS-DE/Suncoast Sanctions Order"). (Exs. S-451U, S-451Y, S-451AB.) In affirming the citation, Judge Phillips found that identified worksite surveillance video was relevant, discoverable, and should have been preserved. Respondents' failure to preserve the video prejudicial to the Secretary. As a result of the destruction, Judge Phillips granted curative measures under Federal Rule of Civil Procedure 37(e)(1) ("Rule 37(e)(1)"). Further, after finding sufficient circumstantial evidence of Respondents' intent to deprive the Secretary of the best evidence of the hazard and how Respondents' abatement program addressed it, Judge Phillips imposed additional sanctions under Federal Rule Civil Procedure 37(e)(2) ("Rule 37(e)(2)"). In a separate order, Judge Phillips awarded attorneys' fees to the Secretary for the time spent pursuing sanctions related to the spoliation of videos of incidents of workplace violence at the inspected worksite after OSHA commenced an investigation and during litigation. (Ex. S-451AB at 5.) Judge Phillips' decision to affirm the citation in *UHS-DE & Suncoast* is currently before the Commission. *UHS-DE & Suncoast*, Docket No. 18-0731, directed for review, May 19, 2021, per Commission Rule 92 (29 C.F.R. § 2200.92).

[68] The Magistrate's Report was admitted as Exhibit S-451E, and the District Court Order was admitted as Ex. S-451F.

The District Court Order found:

1. Respondents were on notice as of June 12, 2019 that they were required to preserve, at least, any videos concerning workplace violence at the Worksite then in existence, as well as any subsequently created videos.
2. The Secretary appropriately subpoenaed videos concerning workplace violence on September 27, 2019.
3. On January 6, 2020, Respondents were expressly ordered to preserve "any existing video surveillance, footage" responsive to the Subpoena.[69]

Failing to disclose responsive videos and opposing the Enforcement Action was not "substantially justified."[70] The District Court awarded the Secretary the fees associated with bringing the Enforcement Action and defending against Respondents' Motion to Quash.

The August Order found "no reason to depart" from the District Court's findings. (Aug. Order 13.) It adopted those findings and made additional factual findings, including:

1. Respondents' video retention policy required the preservation of videos of physical altercations.
2. At any time, Respondents and their counsel could have implemented sufficient measures to ensure that all required videos were being preserved.
3. Respondents failed to preserve many of the videos created at [the Worksite] after they received the Preservation Letter, including almost all of the videos created during the inspection period; and
4. Respondents and their counsel could have complied with their preservation obligations by, *e.g.*, conducting a reasonable search for responsive videos before the District Court ordered them to do so and could have taken measures to ensure all videos identified as a result were preserved.

Id. at 6. Respondents failed to take reasonable steps to ensure the discovery and preservation of relevant, admissible ESI (electronically stored information). (Tr. 27; Aug. Order 8-15.) The destroyed ESI could not be restored or replaced through additional discovery.[71] Respondents'

[69] Exs. S-451E at 3, 4-5, 16-17; S-451F. The District Court concluded that UHS-DE and UHS-Fuller were on notice of the litigation upon receipt of the June 12, 2019 Preservation Letter. (Exs. S-451A, S-451E at 3, 4, 16, S-451F.)

[70] *Walsh v. UHS of Fuller, Inc.*, No. 19-91541-FDS, 2021 WL 4926124 (D. Mass. Oct. 21, 2021). This decision was admitted as Ex. S-451A. *See also* Exs. S-451, S-451Q (October 19, 2020 email to Respondents' counsel regarding the destruction), and S-451E.

[71] Tr. 27-28; Aug. Order 15-16. Respondents have offered no evidence of any attempts to recover any of the ESI they represent is unavailable.

failure to preserve almost all the videos from the inspection period greatly prejudiced the Secretary's ability to try this case. (Tr. 27-28; Aug. Order 17-18.)

Respondents agreed to several stipulations, which mitigated some of the prejudice resulting from the spoliation. (Tr. 28-29; Aug. Order 18.) As the stipulations were insufficient to cure the prejudice, these curative measures were ordered:

> 1. The destroyed ESI would support a finding that the hazard of workplace violence was causing or was likely to cause death or serious physical harm.
> 2. The destroyed ESI would support a finding of knowledge of the presence of the hazard of workplace violence at [the Worksite] on the part of both UHS-DE and [UHS-Fuller].
> 3. The destroyed ESI would support a finding, [and] the Secretary's claim, that Respondents' abatement was inadequate.
> 4. The destroyed ESI would support a finding, [and] the Secretary's claims, that the proposed abatement is feasible and would materially reduce the hazard of workplace violence at [the Worksite].
> 5. Respondents are precluded from arguing that the content of the destroyed ESI would have been favorable to any of its defenses.[72]

Respondents knew OSHA was investigating the hazard of workplace violence and that there was video of the hazard.[73] They knew the videos were within the Subpoena's scope. They knew the District Court was concerned about evidence preservation, and they represented to the

[72] Tr. 29-30, 2691-2695, 2824; Aug. Order 18-19. Apart from this relief, the undersigned also addressed the period for relevant evidence in response to Respondents' July 2, 2021 Motion in Limine. (UHS-Fuller Br. 19.) Respondents sought, among other things, the exclusion of all evidence outside of the six months between when OSHA held the opening conference and when the Citation issued. (Resp't Mot. in Lim. 1.) Respondents subsequently modified their proposal, suggesting a relevancy period of January 1, 2019 through May 11, 2020. (Tr. 270.) The undersigned ruled that the relevancy window for the receipt of evidence would be from one year before the inspection began, through a year after the Citation's issuance, *i.e.*, from June 12, 2018 through December 11, 2020, "considering Respondents' failure to preserve most of the video evidence during the inspection period." (Aug. 4 Order 24; Tr. 270.) Parties remained free to offer evidence outside of this period but were cautioned that there would need to be persuasive argument that the evidence connected back to the "core period of the OSHA inspection." (Tr. 271-73.) The undersigned's ruling was to provide guidance to help "focus" the hearing of a complex matter that the parties wanted to try in a reasonable amount of time, as opposed to altering the Secretary's obligation to meet his burden. (Tr. 269-72.)

[73] Aug. Order 20. *See Barnes v. Harling*, 368 F.Supp.3d 573, 607 (W.D.N.Y. 2019) (collecting cases on the importance of preserving video of physical altercations).

District Court that evidence was not being destroyed.[74] The District Court ordered them to preserve ESI.[75] Even after that, more ESI was lost. (Ex. S-451O.) Although the undersigned held a "final ruling" on sanctions in abeyance, it was not because additional evidence was needed to find an intent to deprive. (Tr. 31.)

2. Renewed Request for Further Relief Under Rule 37(e)(2)

The Secretary renewed his request for further relief under Federal Rule of Civil Procedure 37(e)(2) ("Rule 37"), including the imposition of two adverse inferences related to abatement.[76] The first would find that "the destroyed video footage would have shown that Respondents were not implementing what the Secretary has proposed as abatement." (Sec'y Br. 38.) The second inference sought is a finding that "the destroyed video would have shown both the efficacy and the feasibility of what the Secretary has proposed as abatement." *Id.*

UHS-Fuller argues that the loss of the videos was neither intentional nor in bad faith. (UHS-Fuller Br. 17.) It acknowledges "regrettable mistakes and errors" but claims that the August Order should be reversed in part and no further sanctions imposed. *Id.* at 17, 20. UHS-DE argues that no further sanctions are warranted as it did not intentionally deprive the Secretary of relevant evidence. (UHS-DE Br. 6; UHS-DE Reply 9, 11-14.)

---

[74] UHS-DE and UHS-Fuller were represented by counsel at the District Court hearing, and both made representations denying any evidence destruction. (Ex. S-451J at 10-11, 20-21.)

[75] Federal Rule of Civil Procedure Rule 37(b) ("Rule 37(b)") separately permits the imposition of sanctions for failing to abide by a court order. *See e.g., Sines v. Kessler*, No. 3:17-cv-00072, 2022 WL 972600 (W.D. Va. Mar. 30, 2022) (discussing sanctions under Rules 37(b) and 37(e)); *Paisley Park Enters., Inc. v. Boxill*, 330 F.R.D. 226, 237 (D. Minn. 2019) (imposing sanctions under Rule 37(b) against defendants who "violated the Court's pretrial scheduling orders, all of which directed them to preserve [ESI]," and noting that plaintiffs' request for an adverse-inference instruction "may well be justified" after discovery closed).

[76] Sec'y Br. 37-43. Rule 37(e) does not specify which party bears the burden of establishing the applicability of the provision. *See* Rule 37(e), advisory committee's note to 2015 amendment ("The rule does not place a burden of proving or disproving prejudice on one party or the other. Determining the content of lost information may be a difficult task in some cases and placing the burden of proving prejudice on the party that did not lose the information may be unfair.") The undersigned placed the burden on the Secretary, in keeping with the Commission's general framework of imposing the burden of proof on the Secretary and on the moving party when evaluating motions.

The evidence produced during the hearing only bolstered the reasoning and conclusions of the August Order and the District Court's decisions. Those decisions remain sound and applicable. In addition, the burden of proof necessary to impose both curative sanctions and the harsher sanctions available under Rule 37(e)(2) was met.

a. Relief Under Rule 37(e)(1)

Relief under Rule 37(e)(1) is available for unintentional losses whenever ESI should have been preserved in anticipation of litigation, and the party failed to take reasonable steps to preserve it.[77] Multiple videos of workplace violence incidents were lost during OSHA's investigation and this litigation. (Aug. Order 6.) Respondents failed to take reasonable steps to preserve this evidence, which could not be replaced through restoration or other discovery. *Id.* at 13-14. The deletion of videos was neither accidental nor the result of circumstances beyond the Respondents' control. *Id.* at 14-15. Its loss prejudiced the Secretary. *Id.* at 17-18.

UHS-Fuller fails to rebut the findings in the August Order or the District Court's decision. It attempts to blame one of its directors, Ms. MacCormack, for failing to preserve multiple videos. (UHS-Fuller Br. 18.) This argument omits several key details.

[77] *Integrated Commc'ns & Tech., Inc. v. Hewlett-Packard Fin. Servs., Co*., No. 16-0386-LTS, 2020 WL 4698535 (D. Mass. Aug. 13, 2020) (applying First Circuit precedent and imposing sanctions under Rule 37(e)(1) when a party did not backup emails or take other steps to preserve the information). Respondents refer to a criminal case where evidence was allegedly spoliated. (UHS-Fuller Reply Br. 17; UHS-DE Br. 61, citing *U.S. v. Laurent*, 607 F.3d 895 (1st Cir. 2010).) The Secretary does not allege his right to due process was violated. Instead, he argues that in this civil matter, Rule 37(e) applies; a contention not refuted. Respondents also cite a decision by Judge Saylor, the same judge who found that their arguments regarding the Subpoena had no merit. *Id.* In that matter, there were claims related to the destruction of both ESI and physical evidence. *Hefter Impact Techs. LLC v. Sport Maska, Inc.*, Civ. Action No. 15-13290-FDS, 2017 WL 3317413, at *7-9 (D. Mass., August 3, 2017). Respondents quote the part of the decision related to courts inherent power to sanction the destruction of physical evidence, rather than Judge Saylor's application of Rule 37(e) to assess lost ESI. (UHS-Fuller Reply Br. 17; UHS-DE Reply Br. 10-11 (quoting same language as UHS-Fuller).) The Secretary is seeking sanctions under Rule 37(e), not the court's inherent power. Factually, *Hefter* represents a stark contrast to the present matter. In *Hefter*, there was no evidence "any relevant emails" were destroyed and the relevant content from a laptop was preserved before it was wiped. 2017 WL 3317413, at *7. Although the loss did not result in much prejudice, the destruction complicated the discovery process and the spoliating party had to pay fees and costs associated with bringing the motion. *Id*. at *9. Here, relevant ESI was destroyed on multiple occasions, and it cannot be restored or replaced.

First, a long-time risk manager, Ms. Gosselin, was in place when Respondents received the Preservation Letter. At that point, she had worked for UHS-Fuller for nearly eighteen years and had been the risk manager for several of those years. (Tr. 2543, 2547; Exs. S-451S, S-451T, S-452C.) She was well educated, having received both a bachelor of science and a master's degree in health administration. (Tr. 2543.) She acknowledged that saving videos of incidents was part of her job and described how she saved them to a networked computer file. (Tr. 2553.) Despite her long-time presence in the position and experience with saving video, Respondents failed to produce video of any workplace violence incidents that occurred while Ms. Gosselin was the risk manager.[78]

Second, after Ms. Gosselin's departure, another existing employee, Ms. MacCormack, became the Director of Risk and Quality. (Tr. 2966.) Ms. MacCormack worked at the facility for three years as a director in two different departments. *Id.* Her prior position was also a "senior leadership role." (Tr. 2968, 2970.) Like Ms. Gosselin, she had a master's degree. (Tr. 2968.) Involvement in how the facility addressed patient aggression was not new to her. She had been

[78] Video of sixteen incidents that occurred between when Respondents received the Preservation Letter and when Ms. Gosselin left her role were apparently "overwritten" and had never been saved. (Exs. S-451, S-451N, S-451O.) Ms. Gosselin left in August 2019 and Ms. MacCormack started in the role in the beginning of September 2019. (Tr. 2970, 3044.)

On the eighth and ninth hearing days, Respondents produced to the Secretary, for the first time, documents responsive to the Secretary's document requests. The Secretary requested these documents on January 31, 2020, a year and a half prior. (Tr. 2379, 2381-87, 2402-16, 2418-2419, 2699, 2812, 2831-42; Exs. S-455, S-456 at 2; RD-11.) The extremely late production of these documents is prejudicial to the Secretary and impacts to appropriate weight to be accorded to these documents and the related testimony. (Tr. 2413, 2415, 2831-41.) Ms. Legend's June 26, 2019 Fuller Weekly Supervision Template ("supervision note") warrants little consideration and is accorded very minor weight. (Ex. RD-11.) Likewise, Ms. Legend's uncorroborated testimony regarding this supervision note is not credited. (Tr. 2349-51, 2838-41.) There is no evidence this handwritten note is anything more than Ms. Legend's note to herself. There is no evidence this note was shown to Ms. Gosselin, Mr. Kelly, or anyone else at the Worksite. Relatedly, Ms. Legend's three-word email ("print for file"), sent to Ms. Gosselin on June 21, 2019 is unpersuasive. (Ex. S-455.) Although she recalled the OSHA inspection, Ms. Gosselin did not recall a conversation with Ms. Legend or any other senior leader regarding saving video as a result of it. (Tr. 2252-54; S-451S at 9.) Ms. Gosselin's testimony on this issue is accorded greater weight then the late produced documents or Ms. Legend's testimony.

involved with the issue when she worked as the Director of Clinical Services.[79] In short, although new to this particular position, she was an educated and experienced employee who had long been involved in risk management and held leadership roles related to the Worksite's response to patient aggression and violence.

Third, Respondents failed to act when they knew video had not been preserved.[80] Rather than intervening when it was apparent that relevant, responsive evidence was not available, Respondents chose to do very little. For example, on December 4, 2019, when Ms. MacCormack was unable to play the videos of workplace violence incidents during a pre-arranged meeting, OSHA Assistant Area Director Marie Lisa Abundo ("AAD Abundo") asked her to contact IT to see if someone could assist with the issue. (Tr. 3036.) Ms. MacCormack refused to do so.[81] After that meeting, additional videos continued not to be preserved as required. Ms. MacCormack was not even sure how many videos she failed to preserve. (Tr. 2981.)

Fourth, while UHS-Fuller makes claims of technical snafus, it failed to call any IT employees to support its claims or produce other evidence of an unavoidable technical error. (UHS-Fuller Br. 17-18.) Ms. MacCormack claimed she saved videos of staff injuries to a folder

[79] Tr. 2969-70. Ms. McCormack was also a member of the Worksite's Board of Advisors and the Medical Executive Committee. (Tr. 2338; Exs. S-26, S-27.)

[80] Neither Respondent confirms when it first learned videos of workplace violence incidents were not being preserved in response to the Preservation Letter or Subpoena. UHS-Fuller was aware of the loss December 4, 2019, if not before. UHS-DE was a party to the Secretary's Enforcement Action, which was filed on December 10, 2019. So, at the latest, UHS-DE became aware of the claims of evidence destruction when that matter commenced. The exact date Respondents learned that the videos had been destroyed is not critical. On multiple occasions, video was not preserved, including after Respondents had actual knowledge of the issues with preservation during OSHA's investigation and after they commenced this litigation. (Aug. Order 7.)

[81] Ms. MacCormack could not recall why she refused the request to get assistance from IT. (Tr. 3036.) UHS-Fuller's counsel was present at this meeting. (Tr. 3035-36 Exs. S-452D, S-452E.) Frequently during her testimony, Ms. MacCormack's demeanor was hesitant and evasive. She was uncertain and had difficulty recalling information about important events. Her demeanor negatively impacts the reliability of her testimony. Her testimony has been accorded limited weight.

on her desktop created by Don Kelly, the Worksite's IT Director.[82] Mr. Kelly was still employed at the Worksite at the time of the hearing but was not called as a witness.[83] All the lost ESI was not the result of unavoidable technical errors.[84]

Fifth, Respondents' policies required preserving videos of physical altercations.[85] Under the Camera Policies, videos of incidents of workplace violence were to be saved and transferred to UHS-DE. (Aug. Order 13; Exs. S-35, S-459, S-451X, S-452C, S-452D; Tr. 428-29.) Two UHS-Fuller risk managers confirmed that they can save video and had done so.[86] No one checked to see if Ms. Gosselin or Ms. MacCormack were complying with the Camera Policies or the

[82] Tr. 431, 2976-77, 3025, 3042-43, 3432. Mr. Kelly gave the permissions necessary to save files to desktop folder which was connected to a networked drive. (Tr. 3042, 3044.) Saving files to this folder was not a new practice or done only for purposes of saving videos related to OSHA's investigation. (Tr. 3025.)

[83] Tr. 1742, 3432. Ms. MacCormack's testimony that a "hack of the system" in September 2020 resulted in lost ESI is rejected. (Tr. 3032.) By then, Respondents should have already turned over the videos. There is no support for finding an external cause to explain the loss of any ESI during the pendency of OSHA's investigation, the Enforcement Action, or the Commission proceedings. UHS-Fuller alleges amorphous "technical challenges," but does not assert that a hack or external cyber-attack led to the ESI's loss. (UHS-Fuller Br. 17.) Ms. MacCormack also qualified her response about a hack resulting in lost ESI, indicating that she would have to check her notes to know what happened. (Tr. 3032.) After being given multiple opportunities to explain the extensive destruction of ESI, Ms. MacCormack's uncorroborated testimony implying a possible external cause for the loss of certain videos is rejected.

[84] At the hearing, it became apparent that UHS-Fuller failed to turn over notes Ms. MacCormack took in a spreadsheet about the ESI. (Tr. 3048-52.) Notably, the information under the heading "video saved" was not produced and was now unavailable to the Secretary. (Tr. 3054-56.) The repeated instances of "late-breaking evidence" must be considered when the evidence is weighed and when credibility determinations are made. (Tr. 3056.) Ms. MacCormack also claimed she took notes on paper about the videos she saved. (Tr. 3043.) She indicated that these notes "may still exist" but didn't know where they would be. *Id. Brown Jordan Int'l, Inc. v. Carmicle,* No. 0:14-CV-60629-ROSENBERG/BRANNON*,* 2016 WL 815827, at *37 (S.D. Fla. Mar. 2, 2016) (consolidated) (presuming lost metadata was unfavorable to defendant under Rule 37(e)(2))*, aff'd,* 846 F.3d 1167 (11th Cir. 2017); *DR Distribs., LLC v. 21 Century Smoking, Inc.*, 513 F.Supp.3d 839, 960 (D. Ill. 2021) ("Untimely disclosures and discovery responses and supplements to them are generally not substantially justified or harmless.").

[85] Aug. Order 6, 13-14. Two applicable policies are: Compliance 9.1 Facility Surveillance Video Camera Recording ("Compliance 9.1"), and Fuller Hospital Policy and Procedure Video Surveillance & Recording ("UHS-Fuller Video Policy"). (Tr. 1540, 1640; Exs. S-34, S-35, S-451AC, S-451W, S-459.) The stated scope of Compliance 9.1 is "All subsidiaries of Universal Health Services, Inc., including facilities and UHS of Delaware Inc. and their personnel." (Exs. S-34, S-35, S-451AC.) Exhibits S-35 and S-451AC are substantively the same as Compliance 9.1. Similarly, Exhibit S-459 includes all the same requirements (in the same words) as Compliance 9.1, but also includes some additional provisions. (Ex. S-459 at 2-3; Ex. S-35.) Exhibits S-35 (Compliance 9.1) and S-459 (UHS-Fuller Video Policy) are collectively referred to as the Camera Policies herein.

[86] Aug. Order 15. The DON also had direct access to videos and could save them. (Tr. 2553-54, 2974-76, 3022-23; Ex. S-451W at 4.) Certain UHS-DE employees also could direct risk managers to save videos of incidents at the Worksite. (Aug. Order 15; Ex. S451X.)

obligations triggered by the Preservation Letter and Subpoena. Instead, Respondents were content to essentially leave it up to Ms. MacCormack on when and how to save the video.[87]

Although Ms. MacCormack expressed that she reviewed and coded the videos differently by the time of the hearing, she still viewed the Camera Policies the same. (Tr. 2985, 3078.) When asked whether she should have preserved more videos, she said her understanding of the Camera Policies was the same as when she began her position in September 2019. (Tr. 3078.) She continued to believe the Camera Policies did not require the retention of video footage related to a pending OSHA investigation or litigation with the agency.[88] No one dissuaded her of this interpretation: not after the videos were subpoenaed, not after videos were unavailable when AAD Abundo arrived to review them, not after Ms. MacCormack told OSHA during its investigation she had "no idea" why videos were not preserved in response to the Preservation Letter, not after the Secretary filed the Enforcement Action, not after Respondents contested the Citation, not after counsel represented to the District Court that ESI was being preserved, not after the District Court enforced the Subpoena, and not after the District Court found that contesting the Subpoena was

[87] Exs. S-15, S-452D. In contrast, Respondents knew how to act to preserve video when helpful to a potential defense. (Exs. S-451W, S-451X at 9-10, 13.) When an employee account about an incident on July 25, 2020 differed from what was seen on camera, there was prompt instruction to save the video. (Ex. S-15.) Likewise, the CEO reviewed instances where employees worked through breaks to assess whether, in her view, the failure to take a break was warranted or was an attempt to seek additional wages. (Tr. 2732, 2734.) Rule 37(e) advisory committee note to 2015 amendment notes that beyond the obligation to "preserve in the anticipation or conduct of litigation," courts may also consider whether there was an independent requirement that the information be preserved under "a party's own information-retention protocols." *See also Ala. Aircraft Indus., Inc. v. Boeing Co.*, No. 20-11141, 2022 WL 433457, at *16 (11th Cir. Feb. 14, 2022) (party's failure to follow its plan supported finding an intent to deprive); *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739, 746-48 (8th Cir. 2004) (upholding finding of intent to deprive when railroad acted promptly to preserve recordings helpful to it but claimed a recording related to another incident was destroyed pursuant to a routine retention policy).

[88] Tr. 3036, 3038, 3072-74. Mia Meloni, the Chief Compliance Officer who reviewed and approved Compliance 9.1, disagreed with Ms. MacCormack's interpretation of the policy. (Tr. 1543, 1547; Exs. S-35, S-451X at 4-5, 7, S-451AC.) No one corroborated Ms. MacCormack's view of the Camera Policies. Nor does the 2020 training on the retention policies align with her view. (Ex. S-451W.) Exhibit S-451W was initially withheld from production during discovery. UHS-DE failed to comply with the deadline for producing it and Exhibit S-451V, a related audio file of the presentation set out in Discovery Order I. (Disc. Order II at 13; Sanctions Mot. I at 10.) Respondent UHS-DE released Exhibit S-451W from its privilege log on July 1, 2021, shortly before the hearing and after multiple discovery deadlines had elapsed. *Id.*

not substantially justified.[89] Confronted with a similar situation in the future, Ms. MacCormack testified she "might ask for further clarification" about the Camera Policies. (Tr. 3078.) However, her interpretation of what needed to be preserved had not changed.[90] While UHS-Fuller now theorizes reasons for her errors, Ms. MacCormack sees no error in how she interpreted the Camera Policies.

Unsurprisingly given the lack of intervention after Ms. MacCormack was unable to play the requested footage during OSHA's investigation, additional video continued to be destroyed during the pendency of the Enforcement Action and this litigation. (Aug. Order 7; Exs. S-451N, S-451O.) Video of events on at least five different dates after Respondents filed their Notices of Contest were not preserved. *Id.* Litigation was not only anticipated but had already begun when this destruction occurred.[91]

[89] Tr. 2966, 2970-71, 2981, 3044, 3078-79; Aug. Order 7; Exs. S-452D at 6, S-452E, S-451X. OSHA conducted an administrative interview of Ms. MacCormack on December 4, 2019. (Exs. S-451, S-452E.) UHS-Fuller's counsel was present at the meeting and that counsel asked Ms. MacCormack "do you know anything about why there wasn't preserved any response to the evidence preservation letter." (Exs. S-451, S-451P, S-452E.) Ms. MacCormack said she had "no idea." *Id.* Similarly, she had "no idea" who would know why video was not preserved in response to the Preservation Letter. *Id.*

[90] Tr. 3078. *Fast v. Godaddy.com LLC, et al.*, 340 F.R.D. 326, 344 (D. Ariz. 2022) (failing to backup ESI amounted to not reasonably preserving ESI).

[91] Rule 37(e) advisory committee note to 2015 amendment ("prospect of litigation may call for reasonable steps to preserve information by intervening" in the otherwise routine operation of an electronic information system); *DR Distribs.*, 513 F.Supp.3d at 932-33 (collecting cases and stating that courts regularly warn parties to suspend their automatic deletion policies once litigation is reasonably anticipated); *MOSAID Techs. Inc. v. Samsung Elecs. Co*., 348 F. Supp. 2d 332, 339 (D.N.J. 2004) ("When the duty to preserve is triggered, it cannot be a defense to a spoliation claim that the party inadvertently failed to place a 'litigation hold' or 'off switch' on its document retention policy to stop the destruction of that evidence"). The Enforcement Action was filed on December 10, 2019, a few days after the video could not be shown to OSHA during a pre-arranged meeting. The Citation issued on December 11, 2019 and Respondents filed their respective Notices of Contest on December 20, 2019. (Ex. S-148.) Video of incidents on five dates between December 24, 2019 and April 4, 2020 was still destroyed. (Aug. Order 7, 12; Ex. S-451O.) In addition, video of patient aggression on February 21, 2020 and August 2, 2020 may not have been preserved. (Ex. S-451O.) The District Court ordered Respondents to "[p]rovide the Secretary with a log listing each video that was created and stating whether it still exists or was deleted or rendered unavailable." (Ex. 451E, S-451F.) February 21, 2020 and August 2, 2020 are listed on the log of incidents Respondents prepared, but the required information about whether the video was saved was not provided. (Ex. S-451O.)

On this record, awarding reasonable attorney's fees and expenses associated with seeking sanctions for Respondents' spoliation of relevant ESI is appropriate.[92]

b. Further Sanctions Under Rule 37(e)(2)

The same evidence that supports the conclusions of the August Order also supports finding that there was an "intent to destroy" within the meaning of Rule 37(e)(2). The rule does not require a party to establish prejudice or bad faith for sanctions to be imposed.[93] Circumstantial evidence of intent to deprive is sufficient.[94]

While plausible that the occasional file could be lost inadvertently, the pattern of loss here takes place over many months, involves multiple senior managers, and a sophisticated entity with access to resources, including counsel and IT support. When it was abundantly clear that videos related to OSHA's investigation were not available, the pattern of destruction continued. (Aug. Order 7.) Nothing altered Respondents' behavior. The Secretary plainly and promptly informed

---

[92] Exs. S-451, S-451A through S-451Z, S-451AA (sealed), S-451AB. *See 4DD Holdings, LLC v. U.S.*, 143 Fed. Cl. 118 (2019) (awarding fees and costs when copyright owner suffered prejudice from the destruction of ESI); *GN Netcom, Inc. v. Platronics, Inc*., 930 F.3d 76, 84 (3d Cir. 2019) (upholding adverse inference instruction and the award of costs for lost ESI); *Postle v. SilkRoad Tech., Inc.*, No. 18-cv-224-JL, 2019 WL 692944 (D.N.H. Feb. 19, 2019) (awarding costs and other sanctions for deleting ESI); *Borum et al. v. Brentwood Village, LLC*, 332 F.R.D. 38, 42 (D.D.C. 2019) (awarding costs for the destruction of ESI without finding an intent to deprive); *Charlestown Cap. Advisors, LLC v. Acero Junction, Inc.*, 337 F.R.D. 47, 60, 68 (S.D.N.Y. 2020) (courts have "discretion to award attorneys' fees and costs" in addition to the express remedies of Rule 37(e)), *Experience Hedrix, LLC v. Pitsicallis*, No. 17 Civ. 1927 (PAE), 2018 WL 6191039, at *11 (S.D.N.Y. Nov. 28, 2018) (granting an adverse inference instruction and costs associated with litigating motions for sanctions when a party failed to ensure preservation on computing devices and deleted text messages).

[93] Rule 37(e) advisory committee's note to 2015 amendment; ("Subdivision (e)(2) does not require that the court find prejudice to the party deprived of the information"); *Fed. Trade Comm'n v. F&G Int'l Grp. Holdings, LLC*, 339 F.R.D. 325, 332 n.3 (S.D. Ga. 2021). As intent and prejudice can be interrelated concepts, the August Order's discussion of prejudice is relevant to the assessment of the intent to deprive. (Aug. Order 17-18.)

[94] *Paisley Park*, 330 F.R.D. at 236. *See also* S. Gensler & L. Mulligan, *Federal Rules of Civil Procedure, Rules and Commentary* Rule 37 (2022) (collecting cases and commenting that "while direct evidence certainly can show a party's intent to deprive, it is not needed. Rather, a court can find intent to deprive based on circumstantial evidence"); Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2284.2 (2015) provision regarding failure to preserve electronically stored information, April 2022 update; *Ala. Aircraft Indus., Inc. v. Boeing Co.*, 319 F.R.D. 730, 746 (N.D. Ala. 2017) (relying on circumstantial evidence to impose sanctions under Rule 37(e)(2)), *aff'd*, No. 20-11141, 2022 WL 433457, at *1, 5-6, 14-15 (11th Cir. Feb. 14, 2022) (affirming the sanctions for spoliation of ESI); *Moody v. CSX Transp., Inc*., 271 F. Supp. 3d 410, 431 (W.D.N.Y. 2017) (noting "the Court may infer an intent to deprive from the defendants' actions" and imposing sanctions under Rule 37(e)).

Respondents of the need to preserve video evidence at the start of the investigation. As the District Court found, the "Preservation Letter placed Respondents on notice that they were required to preserve at least any videos concerning workplace violence at Fuller then in existence, as well as any subsequently created videos." *Id.* at 2. This responsibility was reiterated on September 27, 2019, when OSHA served the Subpoena.[95]

Two different senior experienced employees failed to save video properly on multiple occasions between the service of the Preservation Letter and the Subpoena, and that pattern continued even after this litigation commenced. Notably, UHS-Fuller had at least one, and possibly as many as six, responsive videos in its possession when the deadline to comply with the Subpoena elapsed. (Aug. Order 3.) *See Kindergartners Count, Inc. v. Demoulin, et al.*, 209 F.R.D. 466, 468-69 (D. Kan. 2002) (appropriate sanction was to deem defendant's alleged defamatory conduct established when failure to timely produce records led to spoliation). This represented and sophisticated entity joined a Motion to Quash the Subpoena without confirming it was preserving the videos as required. *See Fast*, 340 F.R.D. at 344 (deleting posts rather than archiving them when the party knew how to do so showed evidence of an intent to deprive warranting sanctions under Rule 37(e)(2)).

Court orders are not needed to trigger compliance with preservation obligations. *See e.g., West v. Goodyear Tire & Rubber Co*., 167 F.3d 776, 779 (2d Cir. 1999); *Chambers v. NASCO, Inc.,* 501 U.S. 32, 43-45 (1991) (discussing the need to sanction behavior that "abuses the judicial process"). Similarly, a Motion to Quash may result in a subpoena being found invalid but filing

[95]Aug. Order 7; Ex. S-451E at 3, 4, 16. *See Fed. Trade*, 339 F.R.D. at 332 (finding an intent to deprive when party deleted ESI after being notified a federal agency was investigating it); *O'Berry v. Turner,* No. &:15-CV-00064, 2016 WL 1700403, at *2-4 (M.D. Ga. Apr. 27, 2016) (consolidated).

such a motion does not permit a party to destroy evidence while the motion is pending.[96] Especially when making representations in District Court that evidence was being preserved and not being destroyed, there should have been some effort to ensure that was the case. (Aug. Order 4.)

Respondents fail to refute the evidence of intent. They provide no evidence of a litigation hold or a suspension of their routine destruction policies. Neither Ms. MacCormack nor Ms. Gosselin indicated they ever checked to see if the files were saved before the December 4, 2019 meeting.[97] Nor is there evidence of anyone checking on Ms. MacCormack to ensure the ESI was preserved while Respondents contested the Subpoena or during the Enforcement Action's pendency. The District Judge's express Order that Respondents preserve "any existing video surveillance footage" responsive to the Subpoena did not prompt additional safeguards.[98] Nor were responsive videos backed up.[99]

---

[96] Counsel for both Respondents appeared well-versed in this requirement. Both volunteered to the District Court that evidence was not being destroyed. (Ex. S-451, at 15; S-451J at 10-11, 20-21.) *See Ala. Aircraft*, 319 F.R.D. at 741.

[97] Although Ms. MacCormack claimed to check after the video was unavailable on December 4, 2019, video continued not to be saved properly on multiple occasions after that date. (Ex. S-451O.)

[98] The District Court's Order to preserve any existing surveillance footage was issued less than two weeks after an incident of workplace on December 24, 2019. (Aug. Order 4-5.) There is no claim that video was ever over-written in less than two weeks. Yet, like so much other video evidence, the relevant footage from that day was not preserved. Apparently, no one confirmed whether Ms. MacCormack saved it properly before the January 6, 2020 hearing or in a timely fashion after the District Court issued its order that day. *See John v. Cty. of Lake*, No. 18-CV-06935-WHA (SK), 2020 WL 3630391, at *7 (N.D. Cal. July 3, 2020) (finding intent to deprive when court warning failed to stop any policy of destruction); *So. New Eng. Tel. Co. v. Global NAPs, Inc.,* 251 F.R.D. 82, 92 (D. Conn. 2008) (running a program to overwrite data after the court told the party not to destroy any records showed bad faith).

[99] The Camera Policies had limitations on maintaining copies of surveillance footage. (Exs. S-34, S-35, S-459, S-451W.) However, they contemplated that information would be protected from being overwritten by being downloaded and transferred to UHS-DE. *Id.* In *O'Berry*, a loss control manager obtained ESI related to an accident. 2016 WL 1700403 at *2. A preservation letter was passed onto the manager, but neither internal personnel nor outside counsel took any additional steps. *Id*. In finding an intent to deprive, the court noted that no one contacted the loss control manager for some time after the litigation began, and people with access to the information did not appear to understand the importance of preserving it. *Id*. at *4. No one "ensured preservation occurred, even after the preservation letter." *Id*. Leaving it to one individual to possess the only copy was "irresponsible" and supported finding an intent to deprive the other side of use of the information. *Id*.

At any time, Respondents could have implemented sufficient measures to ensure that all required videos were preserved.[100] Respondents could have complied with their preservation obligations by, among other actions, promptly conducting a reasonable search for responsive ESI and implementing safeguards to prevent the ESI from being overwritten.[101] They took no such actions. When errors with saving video became known, Respondents let a pattern of destruction continue unabated. (Aug. Order 6.)

Nothing worked to get Respondents to comply with the basic rule of litigation that parties cannot destroy relevant, discoverable information when litigation is "reasonably anticipated" or has commenced. Respondents are responsible for the absence of evidence they would be expected to possess.[102]

---

[100] Like the instant matter, in *Culhane v. Wal-Mart Supercenter*, 364 F. Supp. 3d 768 (E.D. Mich. 2019), a company policy required the preservation of all videos of certain types of incidents. 364 F.Supp.3d at 773-744. Rather than comply with the policy, a manager decided which footage to save. *Id.* at 771-72. The plaintiff sought sanctions for the manager's selective preservation. The combination of the preservation letter and the departure from the retention policy gave the court "reason to be skeptical" of the manager's testimony that he could not remember why he did not save the exterior footage. *Id*. The defendants "knew or should have known" to save the video footage and, by not acting, the video was overwritten. *Id*. These actions established an intent to deprive and the imposition of an adverse instruction. *Id.* at 774-75. Also of note is *Browder v. City of Albuquerque*, 209 F. Supp.3d 1236 (D. N.M. 2016), where the court found that the defendant should have been on notice of litigation as soon as it learned of an employee's involvement in a fatal accident. 209 F.Supp.3d at 1244. The fact that the employer's procedures for saving video were new did not preclude sanctions. *Id.* at 1244-45. Courts can pardon "human error or negligence," but doing so is not appropriate when a party has an "inadequate information management and evidence retention policy." *Id.* at 1245. *See also Blazer v. Gall et al.*, No. 1:16-CV-01046-KES, 2019 WL 3494785 (D. S.D. Jan. 21, 2021) (finding loss of evidence that should have been preserved per policy and other improper withholding during discovery supported finding an intent to deprive); Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2284.2 (2015) (failure to preserve electronically stored information (discussing Rule 37(e)).

[101] Aug. Order 6. Respondents' own policies require this. (Exs. S-34, S-35, S-459, S-451W.)

[102] *See e.g., Browder*, 209 F. Supp.3d at 1246 (imposing sanctions when a party failed to have an effective system to preserve ESI); *Ala. Aircraft*, 319 F.R.D. at 746-47 (imposing sanctions when a party hid what it possessed after litigation was anticipated); *Zubulake v. UBS Warburg LLC,* 220 F.R.D. 212, 217 (S.D.N.Y. 2003) ("anyone who anticipates being a party or is a party to a lawsuit must not destroy unique, relevant evidence that might be useful to an adversary"); Rule 37(e) advisory committee note to 2015 amendment ("Many court decisions hold that potential litigants have a duty to preserve relevant information when litigation is reasonably foreseeable. Rule 37(e) is based on this common-law duty").

When there is an intent to deprive another party of the information's use, adverse inferences may be appropriate.[103] UHS-Fuller argues that additional sanctions are not warranted because the Secretary did not "use" the videos that were turned over. (UHS-Fuller Br. 20.) This argument is flawed in several respects. First, at a basic level, it is untrue. The Secretary's expert, Robert Welch, M.D., reviewed all available video footage. (Ex. S-397; Sec'y Br. 32.) He described these videos in detail and relied on them to reach his conclusions. *Id.* His report is rife with discussion and analysis of the meager amount of video footage Respondents, or the police, preserved. *Id.* UHS-Fuller's claim that the Secretary did not use the ESI turned over is rejected as contrary to undisputed evidence. (Tr. 1108-9; Exs. S-32, S-397.)

Second, the Secretary used video clips cobbled together from another source, the local police department.[104] The police officer who attempted to preserve evidence of what happened on July 18, 2019 could only record brief snippets on his cell phone, not the entire video available to

[103] Rule 37(e)(2) advisory committee's notes to the 2015 amendment ("Adverse-inference instructions were developed on the premise that a party's intentional loss or destruction of evidence to prevent its use in litigation gives rise to a reasonable inference that the evidence was unfavorable to the party responsible for loss or destruction of the evidence"); *Moody*, 271 F.Supp.3d at 431-32 (imposing an adverse inference instruction when railroad acted with an intent to deprive plaintiff of data from an event recorder).

[104] Sec'y Br. 25-30. Ten videos were offered into evidence, all under seal: S-436, S-437, S-438, S-439, S-440, S-441, S-442, S-443A, S-443B, S-446. Certain of these exhibits were segmented into different mp4 files in the electronic exhibit record for this matter. Each separate file did not receive a separate exhibit designation. In particular, Exhibit S-442 is divided into four files and Exhibit S-446 is divided into five. References herein to Exhibits S-442 or S-446 refer to all of the mp4 files in the electronic record labeled as part of each exhibit. At the hearing, the Secretary separated out one exhibit into S-443A and S-443B. (Tr. 89, 91.) Exhibit S-443A is not further subdivided. However, Exhibit S-443B is divided into five separate files in the electronic exhibit record. (Tr. 120.) As with S-442 and S-446, references to Exhibit S-443B refer to all of the mp4 files in the electronic exhibit record labeled Exhibit S-443B.

Respondents.[105] The salvaged evidence was relevant and compelling. There is no reason to believe that the additional camera angles and complete footage would not have been helpful to the Secretary. As Dr. Welch explained, "video footage provides the most accurate and detailed evidence of incidents of violence and staff response to those events." (Ex. S-397 at 56.)

Third, the July 18, 2019 incident occurred while OSHA's investigation was ongoing and the February 22, 2020 incident occurred while this litigation was pending.[106] OSHA should have been able to timely view the footage, particularly when its preservation was demanded in the Preservation Letter and sought via a valid Subpoena.[107] AAD Abundo explained that video of incidents was "enormously useful" in investigating what happened and how to mitigate future incidents. (Tr. 1021.) The Secretary had to rely on witnesses' testimony, many of whom Respondents employ, and incomplete records. The Secretary's use of video evidence underscores what was lost. *See Paisley Park*, 330 F.R.D. at 236.

---

[105] Tr. 673-74. For July 18, 2019, only about three minutes of footage, separated into several brief segments, was preserved. (Ex. S-397 at 6.) Police Officer Mark Brunelli of the Attleboro Police Department, who acted to preserve video of this incident, explained that he would have liked to have much more video than he was able to preserve. (Tr. 673-74.) Among other things, it would provide confirmation of the participants actions. *Id.* The Secretary's expert, Dr. Welch, testified that videos of incidents are "critical and essential information." (Tr. 1953.) Respondents had the opportunity to review the July 18, 2019 video and prepare a root cause analysis. (Ex. S-38; Tr. 583-84, 2470-75.) While the Secretary was able to review that analysis, it is apparent it is not fully accurate. As Dr. Welch explained, when the limited video preserved by Officer Brunelli is compared to the written analysis, discrepancies are apparent. (Tr. 1953-54; Exs. S-38, S-397 at 5-6.) *See Paisley Park*, 330 F.R.D. at 236 (finding prejudice when the deleted ESI left a party with "scattershot texts and emails," rather than "a complete record" from the defendants themselves). The preservation of some video does not immunize Respondents. *See CAT 3 LLC v. Black Lineage, Inc.*, 164 F.Supp.3d 488, 497-98, 502 (S.D.N.Y. 2016) (sanctions still appropriate even though the recovery of some information thwarted the "gang that couldn't spoliate straight"); *Stevenson*, 354 F.3d at 746-48 (destroying ESI while preserving other information about event supported finding intent to deprive).

[106] By February 2020, Respondents were contesting the Subpoena before the District Court and had filed their Notices of Contest for this matter. As noted, Respondents were ordered to log each video of workplace violence that was created and specify whether it was preserved or destroyed. (Ex. S-451E at 17.) Respondents' log indicates that video related to incidents of patient aggression on February 22, 2020, were "not captured on camera." (Exs. S-451N at 5, S-451O at 5, S-461 at 9.) On the contrary, video related was available and obtained by the Attleboro Police. (Tr. 91, 1108-9, 3058-81, Ex. S-32, S-442, S-443A, S-443B, S-446.) This discrepancy calls into question the accuracy and overall credibility of Respondents' log. (Exs. S-451E, S-451N, S-451O.)

[107] Respondents initially refused to comply with the Subpoena. They did attempt to permit viewing of the footage months after the Subpoena, on December 4, 2019. By then the footage of multiple events was no longer available. (Tr. 2981; Exs. S-452D, S-452E.)

Fourth, multiple witnesses explained the utility of video from workplace violence incidents. UHS-Fuller's HR specialist, Christopher Kirk, explained that camera footage for "all injuries that happen at Fuller" is reviewed.[108] This allows them to see "exactly what happened" and assess what could be done to prevent such situations. (Tr. 3418.) "Camera review of episodes" was part of the Worksite's WVPP. (Ex. S-166.) Respondents' expert, Marc Cohen, M.D., agreed that camera review can be an important part of incident investigations. (Tr. 3374.) Like Mr. Kirk, Dr. Cohen said that video surveillance allows you to capture behavior that preceded the incident and to see how staff intervened. *Id.* Viewing the incidents can help educate staff to see if the response can be improved.[109]

Fifth, the point of precluding spoliation of evidence is that one side does not unilaterally get to decide what to preserve. When one side (a) has possession, custody, or control of material videos, (b) has the opportunity to review the video, (c) is capable of preserving video, and (d) only preserves some of the videos, it deprives the other side of viewing all relevant evidence. *Nation-Wide Corp., Inc.*, 692 F.2d 214, 218 (1st Cir. 1982) (Breyer, J., drawing inferences from the destruction of documents under common law precedents). With selective preservation, it may be reasonable to infer that the destroyed videos were unfavorable. *Id.*

---

[108] Tr. 3406, 3418. Respondents stipulated that a risk manager "reviews incidents of patient aggression toward staff that result in staff injuries, which may include reviewing camera footage, if available." (Aug. Order 15; Tr. 28; Ex. S-449, Stip. 18; Ex. RF-33 at 6.) Reviewing camera footage was also part of Respondents' patient safety assessment processes. (Tr. 1511; Ex. S-74.)

[109] *See Regan v. Time, Inc.*, 468 U.S. 641, 678 (1984) (Brennan, J., concurring in part and dissenting in part) ("the adage that 'one picture is worth a thousand words' reflects the common-sense understanding that illustrations are an extremely important form of expression for which there is no genuine substitute"); *Stevenson*, 354 F.3d at 748 ("the only contemporaneous recording of conversations at the time of the accident will always be highly relevant to potential litigation over the accident"); *Rivera v. Sam's Club Humacao et al.*, 386 F.Supp.3d 188, 199, 208-9 (D.P.R. 2018) (collecting cases imposing sanctions for the destruction of surveillance footage). The employee handbook indicates that one of the goals of camera surveillance program is "to provide a reference for any staff injuries … ." (Ex. RF-5 at 2 "Security Cameras.") It goes on to note that camera footage provides "an opportunity to analyze situations for teaching opportunities and case study." *Id.*

Respondents failed to preserve video of multiple incidents appropriately and now argue that lost ESI would not be helpful. But the discovery process allows the opposing side to see such evidence and determine its worth. One side cannot destroy relevant evidence and then claim it wouldn't have benefitted its opponent. While possible that the ESI might not have been helpful to the Secretary, it is extremely difficult to support such speculation when Respondents failed to preserve what would be the best evidence of this conclusion.[110]

Respondents' actions warrant the imposition of additional adverse inferences. Appropriate spoliation sanctions "should be molded to serve the prophylactic, punitive and remedial rationales underlying the spoliation doctrine." *Sharp v. Hylas Yachts, LLC*, 872 F.3d 31, 42 (1st Cir. 2018). Besides the relief already awarded, the Secretary is entitled to these adverse inferences:

1. The destroyed ESI would have been unfavorable to Respondents, and helpful to the Secretary, on the issue of the inadequacy of the existing abatement in place at the Worksite when the Citation was issued.
2. The destroyed ESI would have been unfavorable to Respondents, and helpful to the Secretary, on the issue of the feasibility and effectiveness of the Secretary's proposed abatement.

These inferences go directly to what was lost by the destruction. As Rule 37(e)(2)(A), provides, when there is an intent to deprive, judges may "presume that the lost information was unfavorable to the party" whose conduct deprived "another party of the information's use in the litigation."[111]

[110] The Eleventh Circuit explained that a party "could not substantiate its speculation" that the lost ESI was relatively unimportant because it had deleted the information that would support its conclusion. 2022 WL 433457, at *16. Respondents here are in a similar bind of their own making. *Paisley Park*, 330 F.R.D. at 235-36 ("Even when the information lost is cumulative to some extent, the loss of the information still has an impact because [a party] cannot present the overwhelming quantity of evidence they otherwise would have to support their case.").

[111] The ordered relief differs from the Secretary's proposal. (Sec'y Br. 38.) The Secretary appeared to ask for an adverse inference establishing that he carried his burden on both the inadequacy of the existing abatement and the proposed abatement's feasibility and efficacy. *Id.* Under the totality of circumstances, such an inference is unnecessary to sufficiently redress Respondents' actions. *See* Rule 37(e) advisory committee's note to 2015 amendment (indicating that the remedy granted should "fit the wrong" even when there is an intent to deprive).

c. Sanctions apply to UHS-DE

UHS-DE argues that further sanctions are not warranted because, in its view, (1) the video footage of incidents of workplace violence at the facility "are not probative of any of the elements of the single employer test;" and (2) UHS-DE did not intentionally deprive the Secretary of access to the video footage he requested.[112] It acknowledges that the loss of the videos was "unfortunate," but contends the adverse inferences sought are unwarranted. (UHS-DE Reply Br. 9.) UHS-DE does not address the Secretary's entitlement to expenses.

UHS-DE's arguments are wrong in both respects. On the single employer issue, as addressed, UHS-DE and UHS-Fuller are jointly responsible for the Citation. Employees of both entities could be present in-patient areas and exposed to the hazard. (Tr. 2368, 2586-87, 2815-16; Stips. 19, 20.) CEO Legend, a UHS-DE employee, visited patient units every day but claimed UHS-DE employees were never involved in restraints or de-escalation related to patient aggression against employees.[113] Video evidence of workplace violence incidents would be probative of this claim and could establish the involvement of UHS-DE employees in such incidents and the abatement of the hazard. *See e.g., Sec. Alarm Fin. Enters., L.P. v. Alarm Prot. Tech., LLC*, No. 3:13-cv-00102-SLG, 2016 WL 7115911, at *7 (D. Ala. Dec. 6, 2016) (call notes and depositions

[112] UHS-DE Br. 6, 61-62; UHS-DE Reply 11-14. UHS-DE did not argue that the sanctions imposed in the August Order were inappropriate or should be modified. (UHS-DE Br. 6.) However, UHS-DE claimed it "did not have access to the video surveillance footage and could not therefore save them on its own." *Id.* at 63. This claim is false. Its own policy required its employees to have both access to and the ability to save footage. (Aug. Order 14; Exs. S-15, S-34, S-35.) In this matter, the District Court found that the information sought in the Subpoena was relevant and the claims to the contrary were meritless. (Aug. Order 8-13; Exs. S-451A, S-451E, S-451F.) Having been provided with both a Preservation Letter and Subpoena, UHS-DE knew the information was sought in connection with litigation. Further, even after the Citation issued and UHS-DE filed its Notice of Contest, more ESI was destroyed.

[113] Tr. 2368, 2522. Besides Ms. Legend, other UHS-DE employees could be in patient units or involved in the response to workplace violence. If a patient was restrained after hours, the Administrator on Call (AOC) had to be contacted so the person serving in the role could assess whether everyone was "safe." (Tr. 2360, 2576-77; Ex. RF-33 at 5.) The AOC was also available to respond to other types of behavioral health emergencies. (Tr. 2815-16.) Senior leadership at the facility rotated being in the AOC role, with multiple UHS-DE employees in the rotation, including CEO Legend, CFO Rollins, and COO Weagley. (Tr. 424-25, 469, 2360.)

could not replace missing recordings because those alternatives "are likely to be far inferior evidence than the recordings of the calls themselves"); *Regan*, 468 U.S. at 678; *Stevenson*, 354 F.3d at 748.

UHS-DE's own reliance on video also undercuts its argument that the destruction of such evidence would not be probative. The Senior Vice President of the Behavioral Health Division of UHS-DE explained that camera reviews were a part of safety assessments.[114] Ms. Legend attended camera reviews of incidents of patient aggression and explained that there were "a lot of different occasions that might drive" her to review video of an incident. (Tr. 2436, 2352-53.) UHS-DE Loss Control Manager Bricault also reviewed video of incidents to ask questions about the techniques used during incidents.[115]

Turning to intent, it is appropriate to infer an intent to deprive from UHS-DE actions (and in some respects, inactions).[116] UHS-DE has been involved in this matter from its early days. The District Court expressly concluded that UHS-DE was on notice of the litigation upon receipt of the Preservation Letter. (Exs. S-451A, S-451E, S-451F.) Its employee, Ms. Legend, and its

[114] Tr. 1482, 1511-12. While more of her work was focused on patient safety, Ms. Johnson acknowledged that the lines between patient and staff safety "get blurry." (Tr. 1565.)

[115] Tr. 1132, 2935. *See Integrated*, 2020 WL 4698535, at *5 (rejecting party's claim that the lost ESI was of marginal value or relevance and imposing sanctions under Rule 37(e)); *Ala. Aircraft*, 2022 WL 433457, at *16 (rejecting claim that lost ESI was unimportant and likely was produced elsewhere in discovery as unsubstantiated).

[116] A showing of intent is not required to impose curative measures under Rule 37(e)(1). *See e.g., Kologik Capital, LLC v. In Force Tech., LLC*, No. 18-11168-GAO, 2020 WL 1169403, at *2 (D. Mass. Mar. 11, 2020) (distinguishing pre-2015 precedent and explaining that intent is only required for the certain sanctions listed in subpart (e)(2)); *Integra*, 2020 WL 4698535, at *5 (issuing various sanctions under Rule 37(e)(1) for lost ESI without determining whether the actions were motivated by bad faith or by an intent to deprive); *Nunnally v. District of Columbia*, 243 F.Supp.3d 55, 73-75 (D.D.C. 2017) (sanction of adverse inference was warranted when party acted negligently by failing to preserve potentially relevant emails). UHS-DE relies, in part, on cases predating the inclusion of Rule 37(e) into the applicable rules. (UHS-DE Br. 62, 65 citing *U.S. v. Sepulveda,* 15 F.3d 1161 (1st Cir. 1993); *Booker v. Mass. Dep't of Public Health*, 612 F.3d 34 (1st Cir. 2010); *Gomez v. Stop & Shop Supermarket Co*., 670 F.3d 395, 399 (1st Cir. 2012); UHS-DE Reply Br. 11-13.) It also quotes *Hefter* as support. (UHS-DE Br. 64; UHS-DE Reply Br. 10-11.) In so doing, it leaves out where *Hefter* clarifies that negligent destruction can be "sufficient" to merit sanctions. 2017 WL 3317413, at *8.

outside counsel received the Preservation Letter at the start of the investigation.[117] The Camera Policies specifically directed that the facility CEO, *i.e.*, Ms. Legend, had to have the "[a]bility to copy/burn camera surveillance recorded images."[118] Consistent with the policies, Ms. Legend had access to download and save videos herself.[119] She also could, and periodically had, instructed UHS-Fuller employees to save video of incidents of patient aggression against staff. (Aug. Order 14; Exs. S-15, S-34, S-35, S-459.) In addition, Sedgwick, a third-party contractor retained to assist Respondents with workers' compensation claims and injury reporting, could request video of incidents which led to employee injuries. (Tr. 1663-66.)

UHS-DE Loss Control Manager Bricault visited the Worksite the day the investigation commenced. (Exs. S-55 at 1, S-57 at 2.) She was aware of the investigation and that information related to it was sent to the "legal department."[120] Like Ms. Legend, Ms. Bricault, could direct Ms. MacCormack to save video, and had done so, including during the pendency of OSHA's investigation.[121] Mr. Rollins, the former CFO for UHS-Fuller, confirmed that UHS-DE

---

[117] Tr. 586-87, 1010, 1354-55, 1354-56, 2349-51, 2971-72, 3105-6; Exs. S-20, S-57, S-455; Aug. Order 21.

[118] Exs. S-34, S-459. *See Culhane,* 364 F.Supp.3d at 773-75 (inferring an intent to destroy when company failed to adhere to its policy of preserving all relevant video of certain incidents); Rule 37(e) advisory committee note to 2015 amendment (noting the relevance of a "a party's own information-retention protocols" in assessing the appropriateness of sanctions). UHS-DE acknowledges that routinely videos of workplace violence incidents that occurred in the relevant time were neither saved nor transmitted to UHS-DE as the Camera Policy requires. (UHS-DE Br. 65.)

[119] Tr. 3022; Exs. S-34, S-35, S-459. Ms. Legend said she did not "know how" to save video but did not deny she had access and authority to download and save video, as required by Respondents' policies. (Tr. 2351; Exs. S-34, S-35, S-451W, S-459.) Nor did Ms. Legend contend that UHS-Fuller was not complying with Camera Policies' requirement that she have access to both view and save video from the facility camera surveillance system. *Id.*

[120] Ex. S-57 at 2. *See Fed. Trade*, 339 F.R.D. at 332 (intent to deprive shown when deletion of ESI occurred after the notice of agency investigation); *Roadrunner Transp. Svcs., Inc. v. Tarwater*, 642 F. App'x 759, 760 (9th Cir. 2016) (unpublished) (upholding imposition of default judgment as a sanction for deleting data after preservation obligations accrued); *Brown Jordan*, 2016 WL 815827, at *37 (finding an intent to deprive where a represented defendant had no credible explanation for the failure to preserve data), *aff'd*, 846 F.3d 1167 (11th Cir. 2017).

[121] Tr. 1165, 2769-70, 2772; Exs. S-15, S-451X. Ms. Bricault also sent an email during the inspection period directing various UHS-Fuller employees to complete a form which required camera reviews of incidents. (Ex. S-13 at 1, 12-13.) The UHS-DE Senior Risk Manager, Ms. Star, assessed the Worksite in August 2019. (Tr. 549, 1510-12, 1572-74; Ex. S-74.) The 2019 Patient Safety Facility Action Plan (Ex. S-74), regarding the UHS assessment refers to the use of camera reviews to implement the steps called for by the plan. *Id.*

periodically requested video footage for incidents in which patients or employees were hurt. (Tr. 428-29.) UHS-DE employees, Chief Compliance Officer Meloni and Ms. Bricault also had the authority to instruct someone to preserve video footage. (Aug. Order 22; Tr. 1167, 1169, 1543, 1547; Exs. S-15, S-35, S-451X.)

Besides being able to exercise control to ensure video was saved, UHS-DE also knew when incidents related to the hazard and responsive to the Preservation Letter occurred.[122] UHS-DE, through Ms. Legend and other direct employees, was timely informed of incidents of workplace violence. (Tr. 1125, 1236, 1297, 1396-97, 1628-29, 2482.) This included prompt knowledge of workplace violence that occurred during the inspection period or the pendency of this litigation for which there was video evidence. (Tr. 2482; Ex. S-15.) For example, on July 29, 2020, Ms. Legend was informed of an employee being hit in the face. (Ex. S-15.) A few days later, another UHS-DE employee, Ms. Bricault directed Ms. Legend to "[s]ave the video" of the incident.[123] UHS-DE did not act similarly for video responsive to the Preservation Letter or the Subpoena.[124]

UHS-DE knew litigation was reasonably anticipated and, with respect to some videos, had already begun. (Aug. Order 8-13.) It knew OSHA repeatedly requested recordings of incidents

[122] Under the Camera Policies, all video was to be retained for thirty days and the video surveillance system had the capacity to meet this requirement. (Exs. S-34, S-35, S-451W, S-459; Aug. Order 8.) At the hearing, Ms. MacCormack asserted that data from the surveillance system was available for "two weeks to no more than 30 days-ish, 30, 35 days-ish." (Tr. 2992.) If no one acted, the date upon which the data would be deleted was not exact. *Id.* No evidence corroborated her testimony that video was not consistently available for thirty days as the Camera Policies required. (Exs. S-34, S-35, S-459.)

[123] Tr. 1167; Ex. S-15. Ms. Bricault wanted the video saved because information in the video "did not line up with" an employee's statement. (Tr. 277.) Ms. Legend then forwarded the message chain to Ms. MacCormack to act upon this video preservation request if she hadn't already done so. (Ex. S-15.)

[124] In *Stevenson*, Union Pacific had a one-year retention period for keeping recordings related to collisions. 345 F.3d at 745. A year after a collision, Union Pacific destroyed an audio recording but preserved other evidence. *Id.* at 748. The company did not have direct knowledge of litigation when the destruction occurred but did have a "general knowledge" that litigation was frequent when there were deaths or serious injuries. *Id.* Selectively preserving some information combined with Union Pacific's demonstrated ability to preserve ESI, supported finding an intent to destroy evidence. *Id.*

of workplace violence.[125] It preserved written records of incidents but not the contemporaneous recordings. "Common sense suggests that when a party preserves helpful or neutral information while deleting harmful information, that tends to indicate intentionality."[126]

UHS-DE also attempts to rely on the fact that it took no action to secure the evidence as a basis for avoiding sanctions. However, failing to take possession of the videos does not absolve UHS-DE of responsibility, as it asserts. "Spoliation is the destruction or significant alteration of evidence, or the *failure to preserve* property for another's use as evidence in pending or reasonably foreseeable litigation." *West*, 167 F.3d at 779 (emphasis added); *Silvestri v. Gen. Motors Corp*., 271 F.3d 583, 591 (4th Cir. 2001) (obligation to provide access to the evidence or notice of the possible destruction); *Jones v. U.S*., No. 1:13-cv-00227-RAH, 2022 WL 473032, at *5 (Fed. Cir. Feb. 16, 2022) ("Physical possession is not a prerequisite to the imposition of a duty to preserve"). "A party's discovery obligations include taking affirmative steps to ensure that all potentially relevant evidence is retained." *Moody*, 271 F. Supp. 3d at 428. *See also DR Distribs*., 513 F.Supp.3d at 931; *Stevens & Sons, Inc. v. JELD-WEN, Inc*., 327 F.R.D. 96, 103, 108-9 (E.D. Va. 2018) (failure to suspend routine ESI deletion was unreasonable). The concept of "control" over evidence has been construed broadly. Evidence is under a party's control when that party has the

[125] It received the Preservation Letter and Subpoena. It was also party to the Enforcement Action.

[126] *Bristrain v. Levi,* 448 F.Supp.3d 454, 475-76 (E.D. Pa. 2020). *See also related decision, Bristrian v. Levi*, No. 08-3010, 2022 WL 888878, at *3 (E.D. Pa. Mar. 25, 2022) and *Culhane*, 364 F.Supp.3d at 774.

right or authority to obtain the document upon demand.[127] "A party is in control of documents possessed by a third party if that third party is … obligated to make them available."[128]

Multiple UHS-DE employees could either preserve the relevant evidence themselves or direct someone else to do so. (Aug. Order 22; Tr. 3022; Exs. S-34, S-35, S-459.) Except when the video of an incident would have been helpful to Respondents, there is no evidence anyone inquired into why videos of workplace violence were not being transmitted to UHS-DE as one would expect if the Camera Policies were being followed. (Aug. Order 22; Ex. S-15.) Nor is there evidence Ms. Legend, or anyone else, confirmed the preservation obligations were being adhered to when Ms. MacCormack took over the risk manager role. The same is true after the service of the Subpoena, after the loss of video become known to Respondents during the OSHA investigation, after the filing of the Enforcement Action, after UHS-DE filed its Notice of Contest with the Commission, and after the District Court ordered UHS-DE to honor its preservation obligations.

UHS-DE contends its failure to gather responsive materials after the Subpoena was served or to act when it learned evidence was not being preserved should be excused. (UHS-DE Post Hr'g Br. 65; UHS-DE Reply Br. 11-14.) Particularly after litigation commenced, UHS-DE's

---

[127] Fed. R. Civ. P. 34(a)(1) (a party can be required to produce things it can obtain directly or indirectly); *Merchia v. U.S. Internal Revenue Serv*., 336 F.R.D. 396, 398-400 (D. Mass. 2020) (party had to produce documents, including ESI even though not in his personal possession).

[128] *Moog, Inc. v. ClearMotion, Inc.*, No. 19-CV-12066-AK, 2022 WL 16636250, at *3 (D. Mass. June 8, 2022); *Linhares v. Woods Hole, Martha's Vineyard & Nantucket Steamship Auth*., No. 1:20-cv-12035-IT, 2022 WL 17736800, at *5-6 (D. Mass. Dec. 16, 2022) (company had to produce records it had the "practical ability" to obtain). None of the cases UHS-DE cites on the issue of control involved affiliated companies: *In re Salvador,* 277 F.Supp.3d 154, 156, 160 n.7 (D. Mass. 2017) (business records not in party's control after business sold to a third party); *Hofer v. Gap*, 516 F. Supp. 2d 161, 170-71 (D. Mass. 2007) (accident victim did not commit spoliation when she failed to immediately retain a sandal after a fall and the owner of the location where the fall occurred lost it); *Townsend v. Am. Insulated Panel Co.*, 174 F.R.D. 1, 5 (D. Mass. 1997) (food store manager lacked sufficient control over freezer owned by her employer who was not a party); *Ortiz v. City of Worcester*, No. 4:15-cv-40037-TSH, 2017 WL 2294285, at *3-4 (D. Mass. May 25, 2017) (no spoliation when driver employed by an independent company failed to keep independent records).

failure to act to preserve evidence after being ordered to do so by the District Court is not excusable. Even wrongly cited employers still must comply with the Commission's discovery process. UHS-DE knew OSHA was investigating the hazard of workplace violence at the location of one of its affiliates.[129] It had both a representative and counsel at the opening conference. (Tr. 1355-56.) It knew its affiliate had video evidence of the hazard. (Aug. Order 23.) It received a Preservation Letter and a Subpoena for videos related to workplace violence. (Aug. Order 23; Exs. S-20, S-23, S-455; Tr. 1355-56.) And the District Court ordered it to preserve ESI.[130]

As with UHS-Fuller, UHS-DE's pattern of behavior shows an intent to deprive the Secretary of evidence. Sanctions under Rule 37(e) are appropriate. After indisputably becoming aware of the destruction of video evidence, it continued not to act to prevent further destruction of relevant, discoverable evidence. This did not change after UHS-DE was cited and filed its Notice of Contest. (Aug. Order 4-5.) UHS-DE's failure to act to preserve evidence it had access to, control over, and could have secured shows its intent to deprive the Secretary of relevant, admissible ESI. *Id.* The adverse inferences are jointly applicable to UHS-DE, and it is jointly responsible with UHS-Fuller for payment of the Secretary's costs and expenses in bringing the Motion in Limine.[131]

---

[129] Aug. Order 23. Ms. Legend was aware of OSHA's investigation from the start, including its interest in evidence related to workplace violence incidents. (Aug. Order 21; Ex. S-455.) The District Court found Respondents were on notice of the potential for litigation as of June 12, 2019, the date of the Preservation Letter. (Aug. Order 2.) "Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents." *Zubulake,* 220 F.R.D. at 218.

[130] Aug. Order 22-23. At the January 6, 2020 hearing, counsel for UHS-DE stated: "I just wanted to make sure the Court understands that nobody—we haven't been destroying the evidence, the evidence is being preserved." (Ex. S-451 at 15.) The Court responded: "[T]here is now a Court Order ordering that that state of affairs be preserved." *Id.*

[131] The relief and sanctions imposed for the destruction of videos of multiple incidents did not impinge upon UHS-DE's ability to establish its claim that it should not be held jointly responsible for the OSH Act violation.

3. Summary of Spoliation Sanctions

For these reasons, the Secretary is entitled to these adverse inferences, applicable to both UHS-DE and UHS-Fuller:

1. The destroyed ESI would support a finding that the hazard of workplace violence was causing or was likely to cause death or serious physical harm.
2. The destroyed ESI would support a finding of knowledge of the presence of the hazard of workplace violence at the Worksite on the part of both UHS-DE and UHS-Fuller.
3. The destroyed ESI would support a finding that the Respondents' abatement was inadequate.
4. The destroyed ESI would support a finding that the proposed abatement is feasible and would materially reduce the hazard of workplace violence at the Worksite.
5. Respondents were precluded from arguing that the content of the destroyed ESI would have been favorable to any of its defenses.
6. The destroyed ESI would have been unfavorable to Respondents, and helpful to the Secretary, on the issue of the inadequacy of the existing abatement in place at the Worksite when the Citation was issued.
7. The destroyed ESI would have been unfavorable to Respondents, and helpful to the Secretary, on the issue of the feasibility and effectiveness of the Secretary's proposed abatement.

The Secretary is also entitled to attorneys' fees associated with bringing the spoliation issue before the Commission. This includes his attorneys' fees related to the Motion in Limine, the Show Cause Reply, and the relevant sections of his post-hearing briefing.

If the Secretary wishes to pursue the reimbursement of those expenses related to bringing spoliation before the Commission, he shall file with the undersigned an accounting of those costs and expenses and present the same to Respondents UHS-Fuller and UHS-DE within four calendar days of the service of this decision to the parties on January 20, 2023. 29 C.F.R. § 2200.90(a), (b). He may include any relevant authority supporting the awarding of costs. Respondents UHS-Fuller and UHS-DE, if they so choose, may, within four calendar days of receiving the Secretary's accounting, file with the undersigned any objections to the accounting or the authority relied on for calculating such expenses.

All other orders, adverse inferences and other requested relief south in the Motion in Limine is denied.

C. Unsupported Vindictive Prosecution Claim

Respondents claim the Citation was the result of "vindictive prosecution." (UHS-Fuller Br. 107-113; UHS-DE Br. 53-55.) These claims are baseless and without support. They are dismissed with prejudice.

Respondents fail to make even a minimal showing of vindictive prosecution. Neither Respondent claims the exercise of a protected right triggered OSHA's inspection, a basic requirement of a vindictive prosecution claim.[132] *See Nat'l Eng'g & Contracting Co.,* 18 BNA OSHC 1075, 1077-79 (No. 94-2787, 1997) (finding that although the employer "appears to receive a good deal of attention from OSHA," the failure to identify "any protected right it exercised that caused the Secretary to initiate [the] inspection or prosecution" or to characterize the violation as willful defeated its claim of vindictive prosecution)*, aff'd,* 181 F.3d 715 (6th Cir. 1999); *S. Scrap*, 23 BNA OSHC at 1602-3 (rejecting a vindictive prosecution claim when there was no evidence that government action was taken in response to the exercise of a protected right). Nor is there any evidence to support Respondents' claim. *See Vergona*, 15 BNA OSHC at 1788 (noting the Secretary's "broad prosecutorial discretion" and finding that selectivity in enforcement is not enough to sustain claim of impermissible prosecution).

[132] There is no presumption of prosecutorial vindictiveness, it must be proven. *U.S. v. Goodwin*, 457 U.S. 368, 384 (1982); *U.S. v. Jenkins*, 537 F.3d 1, 3-5 (1st Cir. 2008) (requiring the exercise of a protected right and rejecting claim of prosecutorial vindictiveness in a criminal matter); *U.S. v. Gibson*, No. 15-CV-10323-IT, 2016 WL 11189802, at *4-6 (D. Mass. Aug. 11, 2016) (in a criminal matter, noting the requirement rejecting claim there should be a presumption of vindictiveness and dismissing vindictive prosecution claim). *Cf. U.S. v. Meyer*, 810 F.2d 1242, 1245 (D.C. Cir. 1987) (finding district court did not abuse its discretion in finding that protestors were exercising First Amendment rights when arrested and charged criminally).

A complaint regarding, among other things, concerns about workplace violence triggered OSHA's inspection. (Tr. 534-35, 1354-55, 1364; Exs. S-20, S-57, S-148, RF-89.) After receiving the complaint, OSHA conducted an on-site inspection on June 12, 2019. *Id.* On that date, CO Kadis performed an opening conference with the Worksite's leadership and presented an evidence preservation letter. (Tr. 586, 1354-56; Exs. S-20, S-22, S-455.) She walked through all the units and chose random employees to interview. (Ex. S-22.) Approximately three months later, AAD Abundo became involved in the investigation.[133] AAD Abundo and CO Kadis requested documents, interviewed employees, performed on-site inspections, and issued subpoenas.[134]

OSHA spent months gathering evidence, reviewing documents, and talking to workers before the Citation was issued. (Tr. 544-50, 583-84, 614-15, 999-1000, 1354-64; Exs. S-22, S-24, S-38.) While reviewing the Worksite's OSHA logs, AAD Abundo noted head injuries and other serious injuries.[135] Respondents' data showed that in the first six months of 2019, there were 41 staff injuries requiring medical attention. (Tr. 1267; Exs. S-1, S-1B, S-2, S-68.) This placed the Worksite well above Respondents' own "benchmark" for employee injuries and placed it in the category of the top 50 UHS affiliates for injuries. (Tr. 1133, 1264-69, 1321, 1333; Exs. S-68 at 8, 10, S-397.)

Through interviews and reviews of documents, AAD Abundo learned that Respondents did not consistently investigate or thoroughly analyze employee injuries. (Tr. 578-84; Ex. S-24.) She also learned from employee interviews that sufficient staff was not consistently available to

[133] Tr. 533, 535-36. AAD became the lead investigator by September 24, 2019. (Ex. S-22.) She informed Respondents' respective counsel of the change by phone. *Id.*

[134] Tr. 544-50; Exs. S-22, S-24. CO Kadis interviewed twenty current or former employees. (Ex. S-24.) ADD Abundo interviewed ten current or former employees. *Id.*

[135] Tr. 542; Exs. S-1, S-1B, S-2, S-24. In 2019, staff suffered head injuries, including bruises and concussions. (Ex. S-24 at 5.)

respond to emergencies. (Tr. 562, 565; Ex. S-24.) This inadequacy led to the need for police to respond to incidents at the Worksite. (Tr. 565; Ex. S-24.) AAD Abundo also learned of the difficulties staff had when attempting to call for assistance with violent patients. (Tr. 562, 565, 567-69, 584-86, 597-98.) At the investigation's close, the Citation was issued to UHS-Fuller and UHS-DE. (Exs. S-24, S-148, RF-89.)

There was ample evidence to support the Citation's issuance.[136] Further, the additional steps OSHA took to emphasize Respondents' obligation and responsibility to preserve evidence are not signs of vindictive prosecution. (UHS-DE Br. 53 n.7; UHS-Fuller Br. 107-8.) The actions were motivated by concerns about the potential loss of evidence. (Ex. S-22.) Sadly, those concerns proved to be well-founded.[137]

III. Factual Background and Select Findings of Fact

This section provides background on the hazard of workplace violence at the Worksite, including the incidents on July 18, 2019, August 22, 2019, and February 22, 2020, and the frequent need for police. Next, it summarizes the policies and procedures Respondents' claim were sufficient to address the hazard. Finally, it discusses how the existence of other regulators did not

[136] Citing a footnote in a D.C. Circuit Court decision, UHS-Fuller argues the Secretary "waived" his right to make any argument about its vindictive prosecution claim. (UHS-Fuller Reply Br. 15-16.) UHS-Fuller did not discuss waiver in its opening brief. The precedent it cites concerns limitations on raising arguments for the first time in a federal Court of Appeals and is unpersuasive. *Grant v. U.S. Air Force,* 197 F.3d 539, 542 (D.C. Cir. 1999); *Benkelman Tel. Co. v. FCC*, 220 F.3d 601, 607 n.10 (D.C. Cir. 2000) (citing *Grant*). The Secretary vigorously supported the Citation's appropriateness during the hearing and in the post hearing briefs. His Reply Brief's scope was appropriate, particularly considering there was simultaneous, non-sequential briefing. In any event, in reaching these conclusions the undersigned relied on the hearing record and appropriate caselaw.

[137] The parties should be well aware of the facts surrounding the Subpoena, but Respondents' briefs suggest further reiteration is necessary. On January 6, 2020, the District Court held a hearing regarding the Secretary's Subpoena for video evidence. At that hearing counsel for each Respondent inaccurately represented to the District Court that such evidence was being preserved. The District Court later found that the opposition to the Subpoena was not "substantially justified" and ordered UHS-Fuller and UHS-DE to pay the Secretary's attorney fees associated with enforcing the Subpoena. (Ex. S-451A.) The District Court appropriately held both UHS-Fuller and UHS-DE accountable for their conduct. *Id.*

preclude OSHA from investigating the hazard at the Worksite or citing the identified violation of the OSH Act.

A. Workplace Violence Incidents at the Worksite

Incidents of workplace violence consistently occurred both before and during the pendency of OSHA's investigation. (Exs. S-1, S-1B, S-2, S-26, S-27, S-51, S-451N.) In 2018, there were approximately forty-eight injuries from patient aggression or assault. (Exs. S-2, S-166 at 1.) In just the first six months of 2019, there were over 600 incidents of aggression, with approximately 46 resulting in injuries that required medical attention.[138] During the inspection period, employees were injured in direct attacks by patients, when breaking up fights between patients, during safety checks, and while working with patients. (Exs. S-1, S-1B, S-11, S-24.)

OSHA compared the Worksite's Days Away, Restricted or Transferred ("DART") to the national DART rate for Psychiatric/Substance Abuse Hospitals reported by the Bureau of Labor Statistics ("BLS"). (Tr. 879, 904; Exs. S-2, S-22, S-24.) For 2017, the Worksite's DART rate was nearly four times higher than the national rate for similar businesses.[139] For the first eight months of 2019, the Worksite's DART rate was 19.4, substantially increasing from prior years and well

[138] Tr. 1240, 1267; Exs. S-1, S-1B, S-2, S-24, S-26, S-27, S-51, S-54, S-55 at 2. In July 2019, the first full month after the OSHA inspection started, there were 18 instances of patients attacking staff. (Ex. S-27 at 2.) The following month there were thirty-one such incidents. *Id.* at 7. For all of 2019, there were approximately 75 injuries requiring medical attention. (Tr. 1240, 1267, Exs. S-54, S-68 at 8.) The OSHA Form 300 indicates that in 2019 injuries led to 126 days when employees could not work and 52 days where employees had to be transferred to different positions or had to have their duties restricted due to an injury they sustained at work. (Ex. S-1.)

[139] Exs. S-24 at 6-7. When OSHA calculated the DART rates, the BLS statistics were not yet available for 2018 or 2019, so a comparison to nationwide rates for those years was not possible. (Tr. 1388-89, 1390; Ex. S-24 at 7.) Still, the nationwide rate never went higher than 4.5 from 2014 to 2017, and the Worksite substantially exceeded this every year in that timeframe. (Ex. S-24 at 6-7.) The Worksite's DART rate was 12.2 in 2018 and 19.4 for the first nine months of 2019. (Tr. 1386; Exs. S-24 at 7, RF-63.)

above where the national rate historically was.[140] Injuries from workplace violence incidents appeared to drive the increase. (Ex. S-22.)

UHS-Fuller also calculated an injury rate for the Worksite using a different metric. It looked only at the hours worked by the direct care staff and determined the injuries to staff from patients. (Tr. 380-81, 1265-69, 1333-36; Exs. S-24, S-51, S-54, S-57, S-68.) Like the facility-wide calculations, the rate for just the direct care workers increased significantly over time, from 4.5 in 2013 to 22.05 in 2019. *Id.*

UHS-Fuller acknowledges that a "riot" occurred on July 18, 2019, and that assaults occurred on August 22, 2019, February 22, 2020, and other dates. (Stips. 28-29; UHS-Fuller Br. 52-55.) However, it claims the Secretary "cherry-picked the worst incidents to occur" at the Worksite. (UHS-Fuller Br. 52.) The Secretary does not dispute that the events of July 18, 2019 and February 22, 2020, were particularly egregious. However, the pattern of workplace violence incidents and inadequate abatement measures preceded the start of OSHA's investigation and continued after the Citation's issuance. (Exs. S-1, S-1B, S-51, S-54, S-56, S-57, S-61, S-68, RF-32 at 4.) Violence was not an idiosyncratic occurrence at this Worksite. *Id.*

[140] Tr. 1389-90; Exs. S-24, RF-63. With the information Respondents provided, OSHA calculated the DART rate during the investigation, so it did not cover all of 2019. (Tr. 1386; Exs. S-24, RF-63.) UHS-Fuller attempts to undercut the sharp rise in injuries in 2019 by arguing that the CO sent an email in September of 2019 indicating that the DART rate from 2016-2018 appeared to trend downward for that limited timeframe. (Tr. 1398-99; Ex. RF-63; UHS-Fuller Br. 39.) However, the brief improvement in 2018 did not continue, and the downward trend evaporated. (Ex. S-24 at 7.) By August 2019, the trend was worse than ever. *Id.* UHS-Fuller's argument that they had fewer injuries in 2018 than in 2019 does not undercut the overwhelming evidence of frequent, serious injuries during the inspection period. *Id.* Further, even in the years UHS-Fuller points to, the DART rate was still multiple times higher than the historic DART rate for other similar businesses. *Id.* at 6-7.

1. Series of Violent Events starting on July 18, 2019

Multiple staff members were injured on July 18, 2019, while responding to patient behavior at the Worksite.[141] Starting around 11:00 pm on July 18, 2019, two patients began peeling paint from the walls and forming it into balls. (Exs. S-38, S-178, S-436, S-437, S-438.) One patient starts to throw the balls toward nearby staff. *Id.* Then, the patient escalates his behavior from peeling off more paint to getting up and pulling down a ceiling tile. (Ex. S-439.) Two other patients attempt to do the same. *Id.* Additional patients joined in the commotion. (Ex. S-438, S-439.) By now, employees are attempting to contain four patients who are aggressive and assaulting staff. (Exs. S-438, S-439, S-440, S-441; Tr. 695-97.)

During the response, a patient repeatedly hits an employee (L.T.) in the head and then grabs her hair near the scalp. (Exs. S-178, S-438, S-439, S-440; Tr. 695-97.) L.T's head and body twist as she strains to free herself. *Id.* She is forced to the floor as the patient maintains her grasp on L.T. *Id.* Other employees come to assist L.T. but when they do not act to remove the patient's hand grasping the top of L.T.'s head. *Id.* For several minutes, staff cannot stop the assault. (Ex. S-440; Tr. 1821.) L.T. is on the ground with her hair grasped by the roots and her head twisted for five minutes. (Tr. 697, 1812; Ex. S-440; S-397 at 15.)

[141] Exs. S-1 at 28-30, S-22, S-24, S-38, S-55, S-178, S-397 at 4-8, 14-18. Respondents failed to retain surveillance camera footage from this incident and are precluded from arguing that the destroyed evidence would have been favorable to its defenses or supportive of its claims about abatement. Officer Brunelli requested a copy of the footage the Worksite's camera system recorded from Mr. Kirk on the night of the incident but was told it could not be provided. (Tr. 670, Ex. S-178.) He then requested the footage two additional times. (Tr. 670.) As an alternative, Officer Brunelli was permitted to view the footage as Ms. Gosselin played it on her computer screen. (Stip. 28; Tr. 670-71, 685; Ex. S-178.) He used his cell phone to record a portion of what he could see on the screen. (Tr. 671-72, 685, 687, 692, 698-99, 703-4.) Due to the cell phone's capacity limits, the officer could only record short segments. (Tr. 670-74.) In all, he was only able to record about three minutes of video. (Tr. 673-74.) The original video recorded by the Worksite's system did not include audio. The audio heard in the segments that Officer Brunelli recorded on his cellphone are the sounds at Ms. Gosselin's workstation at the time he viewed the video as opposed to being part of the original recording. (Exs. S-436, S-437, S-438, S-439, S-440, S-441.)

Officer Brunelli described the situation as "alarming." (Tr. 697; Exs. S-440, S-441.) L.T. could not "help herself" and was "at the mercy" of the patient assaulting her. *Id.* The patient "could take control of [L.T.'s] arm and throat." *Id.* "It was a dangerous situation" for L.T. *Id.*

Around the same time as L.T.'s assault, another employee was physically restraining a different patient nearby. (Exs. S-440, S-441; Tr. 699-701.) As that restraint continued, another patient became aggressive. (Ex. S-440, S-441; Tr. 701-02.) Staff attempted to address that aggression but were still busy with the restraint and could not halt the aggression. (Exs. S-397 at 5, S-440, 441.) So, the patient walked away unattended. *Id.*

As the violence progressed, multiple calls were made to the police to come and assist employees at the Worksite with addressing the violence. (Stip. 28; Tr. 565, 652-53, 745, 792-93, 1079; Ex. S-178.) Four officers were dispatched. (Tr. 663, 745, 792; Ex. S-178.) The police were told that juveniles were rioting and needed to be restrained because they were being assaultive towards staff and other patients. (Tr. 792.)

Officers Brunelli and Sherratt arrived first, with two additional officers arriving 8-10 minutes later. (Tr. 663, 652-54, 745, 792-93; Ex. S-178.) Upon arrival, the officers had to wait for someone to let them into the locked unit. (Tr. 652-54, 745, 792-93.) Once inside, they saw multiple acts of aggression occurring and described the unit as being in "disarray." (Tr. 654, 745, 792-93; Exs. S-178, S-440, S-441.)

Officer Sherratt saw one patient on the floor with employees attempting to hold him. (Tr. 745; S-178.) The patient was struggling with the employees and had the fingers of one employee in his mouth. (Tr. 721-22, 745; Ex. S-178.) The officer asked if the employees needed assistance,

and they asked him to handcuff the patient. (Tr. 745; Ex. S-178.) As Officer Sherratt finished handcuffing the patient, he and Officer Brunelli heard more commotion.[142]

Officer Brunelli moved toward another part of the unit to assist more employees struggling with other patients. He saw an employee restraining a patient to prevent the patient from attacking anyone. (Tr. 657; Ex. S-178.) That person did not need his assistance, but other employees did. *Id.* They were trying to manage another patient. (Tr. 657-58, 704; Ex. S-178, S-440.) The patient repeatedly tried to hit one employee's face as the second employee struggled to assist. *Id.* Officer Brunelli ordered the patient to separate from the employee he was trying to hit and lie on his stomach. (Tr. 657, 705, 707; Ex. S-178.) After multiple requests, the patient got to his stomach but continued moving and swinging. (Tr. 657, 705, 722-24; Ex. S-178.) Officer Brunelli handcuffed the patient to protect the patient and others. *Id.* Shortly after handcuffing him, Officer Brunelli transitioned the patient to a seated position on the floor and then to a chair. (Tr. 657, 706-7; Ex. S-178.) The officer removed the handcuffs when the patient calmed down and agreed to stay calm. (Tr. 657-58, 746; Ex. S-178.)

"Multiple physical alterations" were all "happening at the same time." (Tr. 697; Exs. S-397 at 4-6, S-436 thru S-441.) Officer Brunelli candidly explained that, in the moment, he was not aware of all that was going on, particularly what was happening behind him as he tried to address the situation in front of him.[143] After the officers handcuffed two patients, additional police were still needed. At one point on July 18, 2019, more than half of Attleboro's police

[142] Tr. 657, 704, 745; Ex. S-178. Officer Sherratt stayed with the first handcuffed patient. He removed the handcuffs when the patient calmed down and agreed to stay calm. (Tr. 746; Ex. S-178.)

[143] Tr. 707-8. Officer Brunelli, like the other responding officers, was armed. (Tr. 664, 727-28.) He found it difficult to properly cover his firearm. (Tr. 665.) There were "multiple people involved in physical altercations" and he could not "observe everyone at the same time." (Tr. 665, 669.) He was concerned that as he was busy assisting with the restraint of one patient, another patient could attempt to access his firearm. (Tr. 665, 667, 669-70.) Dr. Cohen agreed that firearms are dangerous when present in psychiatric care units. (Tr. 3304.) He appeared to believe that officers had to lock their guns before entering the units at the Worksite, but the record does not support that conclusion.

officers on duty were at the Worksite in response to calls about assaultive patients. (Tr. 1066.) When Sergeant Fleming arrived, multiple other patients were walking around the unit, "hollering" and "screaming." (Tr. 793.) He looked for ways to try to "quell" the situation. (Tr. 792-93.) Police remained in the unit for about thirty-five minutes before the violence was sufficiently contained and the officers could depart. (Tr. 663, 792-93.) Throughout the incident, the staff was "out numbered and overwhelmed." (Tr. 1821.) Some staff injuries from the incident were significant enough to require medical attention and time off work. They included a concussion, bites, a strained shoulder, and a bruised scalp.[144]

2. MHS Assaulted on August 22, 2019

MHS SM discussed another example of workplace violence. On August 22, 2019, a patient assaulted her. (Tr. 75-76.) The patient slapped her in the face and kicked her in the groin. (Tr. 75; Ex. S-383.) After the kick, the patient ran down a hallway. (Tr. 75.) The same MHS had to go after the patient.[145] At the end of the hall, she saw the patient standing on a table as she tried to rip down the exit sign hanging from the ceiling. (Tr. 76.)

SM, with the assistance of the MHS who was supposed to be exclusively performing safety observation checks, tried to help the patient down from the table. *Id.* The patient then grabbed the lanyard of the second MHS and began using the attached flashlight to whip SM. (Tr. 77.) SM needed to scream for additional assistance because of her location and because the only other MHS on the unit at that time was already with her. (Tr. 76-77.) She did not have a walkie-talkie, and

[144] Exs. S-1 at 30-32, S-1B at 5-6, S-2, S-22, S-24, S-55, S-397 at 8-9, 14. Ms. Bricault's loss control summary for July 2019, appears to suggest that five medical claims resulted from the incident, while the house officer's report refers to six injuries resulting from the incident. (Exs. S-55, S-397 at 8-9.)

[145] Tr. 75-76, 86-87. A single MHS was responsible for doing safety checks on eighteen patients and could not stop that continuous work. (Tr. 76; Ex. S-397 n. 10.) The second MHS was on break. (Tr. 76.) The nurse was giving out medications and could not just step away from that work. *Id.* It was also apparent that the nurse could not hear what was occurring in the hallway very well, as she did not initially hear or respond to SM's screams for help. (Tr. 77.)

there was no phone or any other way to get assistance. (Tr. 77, 83, 86.) She "just screamed and hoped that the nurse heard." (Tr. 77, 86.) No one initially responded. (Tr. 77.) Eventually, the unit nurse heard and came over to assist. *Id.* When that was not enough, the nurse left the area so she could call for more assistance using the phone down the hall. *Id.* It was not until the completion of that call did workers from other units start to arrive and help.[146]

3. **Violence of February 22, 2020**

Another series of violent events occurred in the adolescent unit on February 22, 2020.[147] Three patients, all minors and identified herein as Mr. A, Mr. B, and Ms. C, jointly assaulted staff.[148] The events began with Mr. A kicking a mailbox off the wall. (Tr. 94-96; Exs. S-32, S-446.) He then proceeded to pull down a wall-mounted telephone along with the drywall behind the phone. *Id.* The staff on the unit were unable to manage him. (Tr. 1114; Exs. S-397 at 18-19, S-446.)

Staff from other units then arrived to assist. (Tr. 98, 106; Exs. S-32, S-397 at 18, S-446.) Mr. A proceeded to violently assault one of the responding employees by punching him in the head. *Id.* Eventually, staff were able to wrestle Mr. A to the ground. *Id.*

Two other patients, Mr. B and Ms. C, witnessed Mr. A's restraint. *Id.* Apparently upset by the restraint, Mr. B and Ms. C began assaulting staff. (Tr. 108-9; Exs. S-32, S-397 at 18, S-

---

[146] Tr. 77-78. Following the assault, SM was directed to contact Sedgwick to report the incident and her injuries. (Stip. 48; Tr. 82-83.) The written report prepared by Sedgwick mischaracterizes how the injury occurred, suggesting that a "fellow worker" caused it. (Tr. 76-78; Ex. S-383.) SM was not shown the report prior to the hearing. (Tr. 82-83.) Her testimony is credited over Sedgwick's report. UHS-Fuller also provides an unsupported characterization of the incident, stating that the nurse and others "promptly arrived to assist …." (UHS-Fuller Br. 53.) The MHS did not characterize the response as prompt. (Tr. 77-78.) Rather, she, and then another co-worker had to scream for help until the nurse "finally kind of heard" them. *Id.* Then it took still longer before the situation ended. *Id.* SM's demeanor was forthright and direct. Her testimony is credited.

[147] Stipulation 29 is: "Police were called to respond to an incident at Fuller Hospital on February 22, 2020." (Ex. S-449, Stip. 29.) *See also* Tr. 98-151, 1095, 1103, 1106, 1112, 1114, 1116; Exs. S-32, S-397 at 18, S-443A, S-443B, S-446.

[148] Tr. 139; Ex. S-32. Mr. A was seventeen years old, and Ms. C was fourteen. (Ex. S-32.)

446.) Their behavior continued until staff restrained them as well. *Id.* Staff held all three patients on the floor for 36 minutes before allowing them up. (Tr. 104, 109-10, 118-19, Exs. S-397 at 18; S-446.) Other patients remained in the room during the assaults and subsequent restraints. (Tr. 113; Exs. S-397 at 18-19; S-446.)

Once the restraints ended, staff did not closely monitor Mr. A, Mr. B, or Ms. C.[149] Tragically, about ninety minutes after the release, an MHS discovered Mr. A sexually assaulting Ms. C.[150] The MHS tried to pull the assailant off the patient, who was sedated and asleep at the time.[151] When she was unable to stop the assault herself, she ran into the hall to yell for help. (Tr. 136-37; Exs. S-32, S-178, S-442.) As the MHS tried to obtain help, Mr. A walked away from Ms. C's room with full access to other patients and staff. (Tr. 137-38, 140, 145-46, 148; Exs. S-397 at 18-19; S-442.) MHSs arrived to assist but Mr. A was not placed under direct supervision for several minutes. (Tr. 137-40, 145-52; Exs. S-398 at 18-19, S-442, S-443B.) Ms. C also appears to be unsupervised for a time after being sexually assaulted. (Tr. 149, 151; Exs. S-442, S-443B.) Ms. C was later transported to Sturdy Hospital for further care.[152]

The police investigation included speaking to Ms. C and Mr. A, reviewing the available video, and collecting evidence from the Worksite. (Ex. S-32.) According to Officer Brillion, the staff were unable to control Mr. A's behavior "and it got further out of control" as the evening

[149] Tr. 115, 117-18, 121-23, 128-32, 138, 145-46, 148-49, Exs. S-397 at 18-19, S-442, S-443A, S-443B.

[150] Tr. 89, 133-34, 144, 1114, 1116; Exs. S-32, S-397 at 18-19, S-442.

[151] The MHS had previously tucked the patient in with her teddy bear about an hour before the attack and knew of her sedated status. (Tr. 119-20, 134-36, 1040, 1114, 1116; Ex. S-32.)

[152] Tr. 1103; Ex. S-32. After Mr. A was placed under direct supervision, the MHS who intervened in the assault attempted to hand off her observation duties to an employee who responded to her calls for help. (Tr. 156.) She then went into a back office, crawled up in a ball and cried. (Tr. 156; Ex. S-397 at 29, 83.) John Divine, an administrator serving as a "house officer" at the time, found her when she was still visibly upset. (Tr. 156-57; Ex. S-397 at 29, 83.) He told her to complete her shift and denied her request to be assigned to a different unit. *Id.*

progressed.[153] Mr. A overpowered the MHS and she was in danger when she attempted to stop the assault. (Tr. 1114.)

4. Attleboro Police Department Responses to the Worksite

Besides the July 18, 2019 and February 22, 2020 incidents, there are other "times when police are called to [the Worksite] to assist with assaultive patients." (Stip. 27.) Police respond to the Worksite for assistance with aggression, elopements, and other issues about once every two weeks.[154] The Worksite is one of the "top 5" locations in terms of requests for assistance from the local police. (Tr. 645.)

Many of the police responses to the Worksite related to patient attacks on staff.[155] Several calls related to situations when staff contacted the police because they were unable to manage patients. (Tr. 767-68; Exs. S-178, S-190, S-191, S-206.) Sometimes the police were called to

[153] Tr. 1114. Dr. Welch reached a similar conclusion. (Ex. S-397 at 18-19.)

[154] Stips. 27-29; Tr. 645, 801-2; Exs. S-32, S-32, S-168 thru S-207. OSHA's violation worksheet indicates that from January 1, 2019 through October 28, 2019, there were approximately 24 calls to the Attleboro Police Department for assistance with aggression at the Worksite. (Exs. S-24, S-169, S-172, S-173, S-174, S-175, S-177, S-179.) On multiple times after that date, police assistance was requested to address aggression and elopements. (Tr. 801-2; Exs. S-32, S-182 thru S-191, S-193 thru S-207.)

[155] Exs. S-172, S-173, S-174, S-176, S-178, S-179, S-182, S-183, S-186, S-190, S-191, S-192, S-193, S-195, S-196, S-198, S-201. The police reports relate to incidents involving attacks on staff which occurred on January 10, 2019, February 28, 2019, April 16, 2019, April 25, 2019, July 18, 2019, August 4, 2019, January 26, 2020, March 4, 2020, April 16, 2020, August 8, 2020, August 16, 2020, August 21, 2020, August 22, 2020, September 5, 2020, September 14, 2020, and October 15, 2020. (Exs. S-169, S-172, S-173, S-174, S-179, S-181, S-183, S-186, S-192, S-193, S-195, S-196, S-198, S-201.) Sometimes the officers arrived after the violence had ceased and other times the officers' assistance was needed to stop the violent behavior. *Id.* Some police reports indicate multiple occasions on which staff was assaulted. (Exs. S-174, S-178, S-182, S-191, S-195.)

assist because patients had left the facility (referred to as elopements).[156] Other times the incidents involved patient attacks on other patients.[157]

B. Respondents' Policies and Procedures

Respondents emphasize the steps taken to address workplace violence. They developed a WVPP (Workplace Violence Prevention Plan), which sets forth several policies and procedures concerning the cited hazard.[158] The WVPP includes one policy focused on workplace violence with additional policies incorporated by reference. The WVPP claims the Worksite "adopted a 'Zero Tolerance' approach to workplace violence." (Ex. S-166 at 1; UHS-DE Br. 21.) However, workplace violence was both anticipated and tolerated. The WVPP notes that forty-eight injuries from patient aggression or assault occurred in 2018 and set a goal of forty-three injuries (or less) for 2019.[159]

---

[156] Exs. S-171, S-180, S-185, S-189, S-194, S-197, S-202, S-203, S-205, S-207.

[157] Exs. S-32, S-167, S-168, S-170, 175, 177, 181, 184, 187, 188, 190, 204. Three reports involve situations where the parent of a patient reported an assault or battery at the Worksite. (Exs. S-167, S-181, S-200.) One report referred to a patient being transported to Sturdy Hospital from the Worksite following a "melee" which turned into an "all out brawl" among a group of juvenile patients. (Ex. S-200.) The parent understood that the incident involved people "seeking treatment" but wanted to document the way the incident was handled. *Id.* Another parent reported an assault at the Worksite, stating there was a lack of supervision of patients. (Ex. S-181.) The parent was not sure why UHS-Fuller had not contacted the police after the incident. *Id.* Hearsay objections were raised to Exhibits S-32, S-152, and S-167 thru S-209. (Tr. 779-83, 1101-02.) The parties resolved the hearsay concerns amicably. The Secretary agreed to various redactions, withdrew Exhibit S-209, and Exhibits S-32, S-152, and S-167 thru S-208 were received. (Tr. 1473-78, 2688.)

[158] UHS-Fuller claims "the D.C. Circuit has found that a comprehensive WVPP would not materially reduce the hazard." (UHS-Fuller Suppl. Br. 5.) As support, it cites page 43 of an ALJ decision. *Id.* That page only discusses the penalty and stipulations for the general duty clause violation. *BHC*, 2019 WL 989734, at *43. Nor is there support for the claim elsewhere in the decision or in the D.C. Circuit's subsequent affirmance of it. Rather, the ALJ found, and the D.C. Circuit agreed, that the behavioral health facility's incomplete and inconsistently implemented safety protocols were inadequate abatement for the hazard of workplace violence. *Id.* at *8-25; 951 F.3d at 564-65. The ALJ did note, when assessing a fair notice claim, that the employer had workplace violence polices and collected information on the hazard. 2019 WL 989734, at *42. Neither the ALJ decision, nor the D.C. Circuit's decision holds that if the employer had no policies related to workplace violence, implementing policies would not materially reduce the hazard. The ALJ was not addressing a situation where an employer had no policies or protocols related to workplace violence. Instead, the ALJ assessed whether an employer with policies it failed to adhere to sufficiently abated the hazard. *Id.* at *8-40.

[159] Ex. S-166 at 1. In this context, Respondents used the term "injury" to mean a condition for which medical treatment was sought and for which there was a workers' compensation claim associated with the injury. (Tr. 1240, 1257, 1267.) The Worksite ended up with 75 such injuries in 2019. (Exs. S-53 at 1, S-54 at 1.)

Broadly, the Respondents' approach to addressing the hazard focuses on: (1) training, (2) debriefings and incident investigations, (3) staffing, and (4) managing the milieu. (Exs. S-55, S-166; UHS-Fuller Br. 28-37, 42-52, 68-78.)

1. Training and Shadowing

Respondents train all new direct care employees for about a week.[160] Certain employees are provided additional annual or "as needed" training.[161] One day of the training is all computer-based through a program called "Healthstream." (Tr. 191, 1204.) The other four days are in a classroom-type setting with opportunities to role-play.[162] The training includes: (a) techniques to de-escalate situations verbally; (b) how to restrain patients, and (c) a week of working directly with a more experienced employee in the patient care units.[163]

a. Verbal De-escalation Techniques

New employee training for direct care employees includes about one-day focused on verbal de-escalation. (Tr. 284, 2856.) UHS-DE developed the verbal de-escalation training used, but UHS-Fuller employees teach it. (Tr. 1582-83, 2856.) The training covers terminology, listening to and re-directing patients, and avoiding power struggles. (Tr. 190, 281-82.) It includes role-play activities and a written test. (Tr. 2861-62, 2877-78.)

A subset of employees working in a unit with higher-need patients are required to supplement the one-day training with an additional program so that they can be part of the Behavioral Emergency Response team ("Dr. BERT") team. (Tr. 207-8; Ex. RF-14.) Employees

[160] Tr. 184; Exs. RF-6, RF-7, RF-13. The training included how to handle violent patients and other matters. *Id.*

[161] Tr. 193, 291-92, 1581-82. There is also a weekly newsletter that could include "an educational tidbit." (Tr. 2592-93; Exs. S-53, S-58.)

[162] Tr. 2861-62. After the Citation's issuance, the hands-on portions of training were modified. During the COVID pandemic, rather than employees directly practicing the techniques with one another, mannequins without arms or legs were used during HWC recertification training. (Tr. 194.)

[163] Tr. 458-59. Non-direct care employees received less comprehensive training. (Tr. 2938-41.)

must have worked at the facility and be recommended by a manager before they can elect to receive Dr. BERT training. (Tr. 194-5, 2884.) Dr. BERT trained staff are akin to "first responders" for situations that may require restraining a patient. (Tr. 216.) The Dr. BERT techniques require at least two employees and are designed to be applied in the early stages of escalating behavior.[164]

b. Restraint Techniques

Verbal de-escalation is not always effective, and sometimes staff must physically intervene with violent patients. (Tr. 3275.) The facility uses the HWC (Handle With Care) training program developed by a third party to teach employees how to restrain patients. (Tr. 1584, 2855; Ex. RF-13.) HWC training must be completed before employees can work on a care unit. (Tr. 196.) The portion of the HWC training focused on going "hands-on" with a patient was several hours.[165] The primary restraint technique taught requires the assistance of multiple people. (Tr. 198, 916, 1820, 2866; Ex. RF-13.)

Clinical staff (doctors, nurses, MHS, and social workers) receive the full HWC restraint training.[166] Non-clinical staff, such as housekeeping and cafeteria workers, are trained only on the

[164] Tr. 205-6; 2884-85. The Worksite's Dr. BERT policy specifies that "a minimum" of four staff members, a leader, a de-escalator and two additional staff members to assess whether any other patients were "triggered by the event." (Tr. 2258; Ex. RF-14 at 4.) UHS-Fuller offered into evidence one supervisor's report for May 30, 2019, which was before OSHA' investigation commenced. (Ex. RF-49.) The document discusses a Dr. BERT call during which verbal de-escalation was unsuccessful. *Id.* Although referred to as a supervisor or house officer's report, a managerial employee did not necessarily complete the reports throughout the time of OSHA's investigation. (Tr. 149-50, 1833, 2122.)

[165] Tr. 191, 2865. UHS-Fuller argued that the restraint technique orientation was an "all-day, 8-hour class." (UHS-Fuller Br. 32.) However, during cross-examination, a participant in the HWC training disputed counsel's description of it as "all day" and disagreed with counsel's characterization that the training went from "8 a m. to 4:30 p m." (Tr. 191.) In the employee's experience, HWC training was "a maximum of four hours." *Id.* Similarly, the trainer indicated that the technical portion of HWC was taught on the same day as a presentation on developmental disabilities. (Tr. 2865.) The employee's testimony that the training was less than one day is credited.

[166] Tr. 2927. Nursing students who spend time on the units are taught the verbal de-escalation portions of HWC, but not the restraint techniques. (Tr. 2941.)

HWC techniques related to upper body restraints.[167] There is no written test on the restraint techniques. However, the trainer reviews a checklist with each participant to see if they have any questions.[168] If an employee has questions, the trainers demonstrate the technique again. (Tr. 2906.) Completing a less comprehensive version of HWC training is required annually after the initial training.[169]

c. Shadowing

At the end of the training week, new direct care employees are "shadowed" by another employee for four shifts.[170] Mr. Martin and/or a nurse educator evaluate new employees after 30 days and again after 60 days of employment. (Tr. 2879-80.) During these evaluations, Mr. Martin discusses the opportunities for more training if the employee would like it. (Tr. 2880.)

2. Debriefings and Incident Investigations

Training has not eliminated the hazard and workplace violence still routinely occurs. (Ex. S-166 at 1; Tr. 2153-54.) Workplace violence incidents are supposed to be examined to see why they happened and to prevent re-occurrence. (UHS-Fuller Br. 36.) This process is referred to as "debriefing" and is part of the Worksite's efforts to "address and mitigate the hazard of workplace violence." *Id.* at 3-4, 37. UHS-DE's Chief Clinical Officer explained that debriefing is "the only way to understand what's happened." (Tr. 1585-86.) Debriefing is necessary "to understand from the patient perspective and the staff perspective what happened." *Id.* The debriefing process

---

[167] Tr. 2927. Although non-clinicians had long been required to respond to behavioral health emergencies and had other patient interactions in the care units, they only started to be trained in aspects of HWC sometime in 2019. (Tr. 392-93.)

[168] Tr. 2903-4, 2906, 2909; Exs. RF-11, RF-12. Wayne Martin has worked at the Worksite for forty years. (Tr. 2851.) He is a certified HWC trainer and is involved in new employee orientation and training. (Tr. 2853, 2855-56.) He is re-certified as a HWC trainer about once a year. (Tr. 1581-82.)

[169] Tr. 193-94, 2891-94, 2927. Employees must also sign an Acknowledge of No Prone Policy and a Statement of Restraint Philosophy. (Tr. 2899-2901; Exs. RF-8, RF-9, RF-10, RF-11.) Staff cannot return to work if they fail to complete the re-training.

[170] Tr. 195, 459, 2879. An extension of the shadowing period occurred "every now and then." (Tr. 459.)

permits the creation of action plans that can prevent or mitigate recurrence of aggressive behavior or violence. *Id.*

The Massachusetts DMH also requires the employees involved in a patient restraint to complete a debriefing form afterwards.[171] There is no evidence that DMH requires the completion of any paperwork if an employee is injured or experiences workplace violence in a situation not involving a restraint. But, according to Mr. Martin, under the Worksite's policies, there is supposed to be a debriefing with staff after "every code." (Tr. 2881, 2874-75.)

Employees acknowledged that debriefings occurred but denied that they happened after every code and raised issues with the ones that did occur. (Tr. 157-58, 160, 255, 445, 580-81, 1018, 1822-23.) Often, managers would not seek feedback from staff who had to intervene in violent incidents. (Tr. 157-60, 445, 580-81, 1018; Ex. S-11.)

Separate from the debriefing process, Respondents collected information related to the injuries sustained by employees from workplace violence as part of its management of workers' compensation claims. After being injured, employees are directed to contact Sedgwick, a third-party workers' compensation claim manager. (Stip. 48; Tr. 241, 1188-90, 1280-81, 2348, 3419.) During such calls, someone from Sedgwick assesses the injury and directs the employee for further care if appropriate.[172] Sedgwick then prepares reports based on employee calls and forwards them

[171] Ex. S-449, Stip. 11; Tr. 951, 1958, 2952; Ex. S-11. "Fuller Hospital is regulated by Massachusetts state agencies, including the Department of Public Health, Department of Mental Health (DMH), and the Attorney General's office, among others." (Ex. S-449, Stip. 11.)

[172] Tr. 240-41, 1190-91. Employees do not have to go to the medical care provider Sedgwick directs them to. (Tr. 1190-91, 1314, 3419.) UHS-Fuller reviewed information from Sedgwick and knew if an employee elected not to follow Sedgwick's advice. (Tr. 1186, 1188-91.) For example, following an injury, an employee went to urgent care rather than engaging only in "self care" as Sedgwick advised. (Ex. S-250.) The Human Resources Director emailed Sedgwick to indicate that "time and time again" the employee would go to urgent care after an injury and that this would result in the employee being "signed out of work for a period of days." (Tr. 1199-1200, 1330; Ex. S-250.) The email continues, "I know we cannot direct care, but this employee has a history of this pattern." *Id.*

to the UHS-DE Loss Control Manager.[173] She, in turn, forwards the reports to HR personnel and the HWC educators at the Worksite. (Tr. 1191.) The educators look to see if there was "any gap" in the employee's response to the "patient's aggression or physical confrontation." (Tr. 1192.)

Besides the information Sedgwick compiles, Respondents also maintain a risk management database to track certain incidents.[174] The database lets employees log information about "events that occur." (Tr. 1249.) Incidents in the database can be labeled as patient aggression towards staff, patient attacked staff, patient out of control, patient attacked by another patient, property damage, and other categories. (Tr. 1250, 1252-54, 1258.) Information from the database is presented at Patient Safety Council and Quality Management Committee meetings. (Tr. 2555-56, 2558; Exs. S-61, RF-32, RF-33.)

3. **Staffing**

UHS-Fuller cites staffing as part of its approach to addressing incidents of workplace violence. (UHS-Fuller Br. 3, 42.) A state regulator sets forth a minimum number of nursing hours per day for each patient.[175] UHS-Fuller meets this minimum by using a "staffing grid." (Tr. 1424-25, 3407-8.) The grid indicates how many nurses are needed and how many MHSs are needed for various numbers of patients. (Tr. 3407-8; Exs. S-3 thru S-10, S-153.) The number of patients is determined once per day, and this count is referred to as the patient census. (Tr. 368.) In

[173] Tr. 1191. Despite citing its employee injury reporting as part of its "system" for safety, UHS-Fuller argues that the Sedgwick incident reports "should not be given any weight." (UHS-Fuller Br. 37-38, n.6.) The undersigned finds that sufficient information was provided about Sedgwick and the reports such that they were appropriately admitted to the record.

[174] Stips. 47-48. This database was referred to by two different names, Healthcare Peer Review or MIDAS. (Tr. 1124-25.)

[175] Stips. 30-31; Tr. 3407-8; Ex. RF-1. "The Massachusetts Department of Mental Health (DMH) sets standards for staffing ratios for nurses in behavioral health facilities in the state of Massachusetts." (Ex. S-449, Stip. 30.) "The DMH require that psychiatric hospitals have 6.0 nursing care hours per patient day (NCHPPD) for adult units and 7.0 NCHPPD for adolescent units." (Ex. S-449, Stip. 31.) It is unclear if there are any DMH regulations related to other types of staff.

scheduling workers, the staffing coordinator indicates that he assumes the census will be at the maximum.[176] The ratio of staff to patients is sometimes referred to as employees per occupied bed ("EPOB"). (Tr. 359; Exs. S-454, RF-95, RF-96.)

On the first shift, there are two nurses and three MHSs for eighteen patients. (Tr. 225-26.) For the first four hours of the second shift, there are two nurses and three MHSs. (Tr. 225, 253.) For the later part of the second shift, there are two nurses and two MHSs. (Tr. 72-73, 76, 225.) Then, for the overnight shift, there is one nurse and two MHSs. (Tr. 76, 226, 253.) In addition to the nurses and MHSs, other administrative employees can assist if they are on-site and available.[177]

a. Calling for Additional Assistance

The number of people working at the Worksite varied, with the fewest employees on nights and weekends. (Tr. 225-26, 252-53, 335.) RN, a former MHS and milieu manager, described the third shift as a "skeleton crew" with the "bare minimum." (Tr. 253.) If an employee needs additional assistance to manage patient aggression or violence, they can seek help from co-workers by calling a "code."[178] Staff can yell out, "Code 22." (Tr. 207-8, 438, 918.) Then another employee who can both hear the request and gain access to a phone needs to complete the process

[176] Tr. 3409. The Worksite's policy does not require this approach. (Ex. RF-1.) Instead, it indicates the staffing coordinator "will staff all units daily to DMH staffing regulations noting census by unit." *Id.* It permits deviations from the staffing grid "for acuity or hospital needs," provided the DMH's required minimum number of nursing hours per patient is met. *Id.*

[177] Tr. 3413-14. After hours and on weekends, the administrator on call (AOC) can give the approval needed for increases in staffing. (Tr. 423-24.) However, the AOC is off-site and cannot respond to codes. *Id.*

[178] Tr. 77-78. Calling a code is supposed to be a last resort after verbal de-escalation fails. (Tr. 304.) New employees are trained on "code leadership" and Mr. Martin described how the process is supposed to work. (Tr. 2868-74; Ex. RF-7.) UHS-Fuller indicates that mock, or practice, Code 22s are done monthly. (UHS-Fuller Br. 51.) Witnesses disagreed as to whether the practice began before or after the Citation's issuance. (Tr. 2921-22, 2354, 3021.)

before assistance arrives.[179] If the person needing help is near a phone, they can pick it up and dial a number to start the process themselves. *Id.* Dialing the number allows an employee to use an overhead speaker system to ask employees, including those in other units and administrative roles, to respond to a particular unit if they are available.[180] Alternatively, rather than using the overhead paging system, someone near the phone could individually call other units to see if they can send anyone to assist. (Tr. 208-9, 2776.) The staff coming from other units have other responsibilities. (Tr. 324, 1843, 2258.) There was no "excess staff in the building." (Tr. 1843.) A request for assistance in one unit depletes the other units of workers. (Tr. 1837.)

For situations where the threat of injury appears less imminent, employees can request assistance from the Dr. BERT team. (Ex. RF-14.) To do this, staff had to locate a phone, dial a number, and say "Dr. BERT" along with their location. *Id.* at 4. Like those responding to Code 22s, those responding to requests for the Dr. BERT team had other responsibilities. There was no staff dedicated to responding to calls for assistance. (Tr. 72-73, 178-79, 324, 565, 929, 2258; Ex. S-397 at 32.)

Each unit also has one pair of walkie-talkies. (Tr. 83-85, 220-22, 2938.) However, there are not enough walkie-talkies for each person, and staff do not carry them within the patient care units.[181] Instead, employees take one of the devices and leave the other in the unit when they

[179] Tr. 207-8, 254. Each unit has two phones, but one is in a room with limited access. (Tr. 97.) The former milieu manager indicated panic buttons were never used when he worked there. (Tr. 348.) The CFO indicated that the few wall-based buttons at the Worksite were not "viable." (Tr. 438.) No one discussed how any fixed panic buttons worked, such as what would occur when pressed, who they alerted (if anyone), or described a time when one was used. The record lacks support for finding that panic buttons were a successful part of Respondents' existing abatement.

[180] Tr. 85, 254, 2890-91. At times, there is an operator who answers the phone and then can call out the code over the intercom. (Tr. 160-61, 2890-91.)

[181] Tr. 2420, 2938. There were times when staff had to escort patients without a walkie talkie. (Tr. 254-55.) Dr. Welch also recalled learning of an instance where one unit lacked any devices for a week because a patient had taken one of the devices. (Tr. 1950-51.) However, the CEO indicated that the facilities department has extra devices if one is misplaced or not functioning properly. (Tr. 2420.)

escort patients outside of the unit. *Id.* Each walkie-talkie connects to only one other device. (Tr. 84, 222.) When used, multiple people do not hear the request for assistance even if they are also carrying a device. *Id.* The devices do not have an emergency call feature or a way to ask for assistance silently. (Tr. 1938-39, 1950-51.) Nor do the walkie-talkies indicate where the person needing assistance is located. (Tr. 1943, 2777.) Staff must explain their location to the person responding to their call. *Id.*

b. Police Involvement

According to the CEO, the facility has a "practice" not to call the police. (Tr. 2504-5.) This was not an official policy.[182] Despite the CEO's claims, the police routinely responded to behavioral health emergencies at the Worksite. (Tr. 565, 652-53, 2054, 2505, 2783; Exs. S-32, S-167 thru S-207, S-397.) They responded to incidents involving patient-on-staff violence and patient-on-patient violence. *Id.* Officer Sellers testified that there is no security staff at the Worksite. In his opinion, the lack of security staff required police to deal with things that would otherwise be handled, at least in part, by security. (Tr. 1066-67.)

c. Requests for Additional Staffing

At the start of OSHA's investigation, in addition to the nurse in each unit, there was also an on-site nursing supervisor. (Tr. 412-14, 2962.) The nursing supervisor would assess acuity and call in more staff if needed. *Id.* Around October 2019, the nursing supervisor position was eliminated. (Tr. 412, 414, 417, 2962-64, 1883, 2499.) Instead, employees must first talk to their charge nurse or unit manager if they believe additional staffing beyond the DMH requirements is needed. (Tr. 3410-11.) If that person agrees, the staffing coordinator or house officer is contacted. *Id.* That individual is required to check with the CEO or the administrator on call (AOC) before

[182] Tr. 2784. The CEO did not "think anyone has said to [employees], you should not call the police." (Tr. 2785.)

responding to the request. (Tr. 3410-11; Ex. RF-1.) If the request is approved, the house officer or staffing coordinator attempts to find someone to work in the unit. (Tr. 3410-11.) Mr. Kirk, a former staffing coordinator, could not recall management denying a request for extra staff. (Tr. 3410.) Still, it was rare for a unit to have more staff than the minimum required by DMH.[183]

Unlike the nursing supervisor, the house officer did not have the skills or background to provide clinical judgment around patient care.[184] When the Citation issued, there was no longer a nursing supervisor who could make a clinical determination regarding acuity and independently authorize additional staff. (Tr. 413-15, 424.) Although there was always an on-site physician, an administrator (the AOC or CEO) had to authorize any increases to staff levels for acuity.[185]

4. **Managing the Milieu**

Respondents consider managing the milieu, or environment of care, to be "a critical mitigation measure." (UHS-Fuller Br. 45; Ex. S-166.) They seek to create environments where individuals who need care can receive it safely and effectively. (Tr. 1620.) Care units have a "sensory room," which is a quiet space for patients to relax. (Tr. 127.) Staff are taught various de-escalation techniques to manage the milieu and communicate with the patients. (Tr. 282, 301-4, 2305, 3189; UHS-Fuller Br. 46.) Tasks to manage the milieu included: (a) a process to ensure

[183] Tr. 1843, 3410-11; Ex. S-397. Dr. Haltzman described a different process he would follow if an employee was concerned about an aggressive patient. He indicated that the first step would be to gather more information about the concern before any action is taken. (Tr. 2296.) He would also direct the staff member to consult with the unit manager and nurse. *Id.* After that, Dr. Haltzman would consult the patient's psychiatrist or nurse. *Id.* He did not discuss any immediate action that would be taken. *Id.* He did not refer to any policy, procedures, or training materials that suggest other employees were told to or could take a similar approach to what he described. *Id.*

[184] Tr. 415, 418, 3416. When the nursing supervisor position was eliminated, an MHS or clerical worker took over aspects of the position, such as finding people to cover shifts. The person in the position began being identified as a "house officer," rather than a "nursing supervisor." (Tr. 149-50, 412, 414, 417, 2122, 2962, 2964.) Dr. Welch explained that in hospitals, typically, the term "house officer" refers to resident physicians in training, not MHSs or clerical workers. (Tr. 1883, 2122.) Respondents' use of the term house officer for the position was a "non-standard use" of the term. *Id.*

[185] Tr. 423-24, 2500, 2816, 3410. Various non-clinical administrators, such as the CFO, CEO, and COO, rotated the responsibility to approve requests for additional staff on the second and third shifts. (Tr. 423-25, 468.)

patients are routinely observed, (b) sharing information between shifts, and (c) loss control assessments that include follow-up actions to address issues identified.[186]

a. Observation

Patient observations was part of the Worksite's WVPP. (Ex. S-166.) Typically, most patients are observed every fifteen minutes.[187] One MHS focuses on completing the observations. (Tr. 124-25, 3416.) They have a checklist and observe each patient within the appropriate period. (Tr. 124-25.) Staff are to look for anything hazardous and record the patient's behavior at the observation time.[188] Senior managers conduct in person rounds or review video to confirm that the observations occur. (Tr. 2555, 2578, 2586-87; Exs. RF-32 at 2, RF-33 at 3.)

A doctor can also increase a patient's observation level so that an MHS checks a patient every five minutes or observed constantly. (Tr. 87, 202-3, 3409.) Constant observation requires always remaining at arm's length from the patient. (Tr. 75, 87.) This is sometimes called being on 1:1 observation. *Id.* Typically, 1:1 observation is not used for aggressive patients at this Worksite. (Tr. 2311.)

---

[186] Milieu management also includes group activities for patients run by MHSs. (Tr. 67.) These groups were supposed to teach things like coping skills and provide creative outlets. (Tr. 67-68, 70-71, 1620.) MHSs typically had a high school diploma, and no degree was required to run the groups. (Tr. 68.) An MHS explained that the group activities were ineffective in managing the milieu. (Tr. 67-68, 70-71.)

[187] Tr. 124, 202, 1428-29; Ex. S-166. When a patient arrives at the facility, they are observed every five minutes. (Tr. 201-3.) Once a doctor evaluates the patient, this level of observation typically changes to every fifteen minutes, but doctors can order more frequent checks. *Id.* When a patient arrives at the Worksite through the involuntary commitment process, a doctor must assess a patient within two hours of arrival. (Tr. 2291.)

[188] Tr. 67-71, 124-25, 200, 292, 2490-92; Ex. S-397. One safety checklist completed by Ms. Bricault on November 27, 2019 is in evidence. (Ex. S-63.) UHS-Fuller also provided documents from two pre-Citation meetings during which assessments of the environment of care was discussed. (Tr. 2557-58; Exs. RF-32, RF-33.) According to those documents, reports on the environment of care were presented quarterly, but minutes from a meeting that occurred during or related to the six-month inspection period were not provided. (Ex. RF-32 at 3.) The minutes from the Patient Safety Council (dated May 30, 2019) refers to "monthly" environment of care rounds conducted by "maintenance" in addition to the "hourly environmental checks" conducted by MHSs. (Ex. RF-33 at 1.) The minutes from the Patient Safety Council meeting, and those from the May 2019 Quality Management meeting, refer to various attached documents. (Exs. RF-32 at 3, 5; RF-33 at 3.) Those attachments were not offered into evidence. *Id.* The Action Plan, developed after a UHS-DE senior risk manager visited the Worksite in August 2019, made several recommendations regarding how observation rounds were to be conducted. (Tr. 1573-74; Exs. S-74.)

b. Reports

Direct care employees work eight-hour shifts. (Tr. 2879.) During the first shift, there is no written shift report to leadership, but such reports are prepared on the later shifts when management and senior leadership are not present. (Tr. 2956-57; Ex. RF-49.) The shift reports include information about incidents and administrative or environmental issues to address. (Tr. 2957-58.) They also identify patients under more frequent observation and specify the supervisors for the shift. (Tr. 2957-58, 2964.)

c. Loss Control Visits

Ms. Bricault conducts formal loss control assessments about once a month. (Tr. 1246.) The assessments look at the success of aggression control measures, staff injuries trends, look for recommendations related to safety, and track efforts to comply with past recommendations. (Tr. 1237-49; Exs. S-52, S-53, S-55, S-57, S-60, S-61, S-62.) After the assessment, she holds a meeting with senior leadership to discuss the assessment findings and provides a written report. (Tr. 1236-37, 1244.)

C. Role of the Massachusetts Department of Mental Health ("DMH") and Other Regulators Does Not Deprive OSHA of Jurisdiction

Before turning to the merits of the Citation, Respondents' challenge to OSHA's scope of authority will be considered. UHS-Fuller titled a section of its brief, "Congress did not intend for OSHA to regulate in-patient psychiatric hospitals such as [the Worksite]." (UHS-Fuller Br. 65.) UHS-DE frames things somewhat differently, arguing that OSHA's presence in the healthcare field is "misguided and unnecessary." (UHS-DE Br. 26-28, 55.)

Despite the rhetoric, neither Respondent provides support for finding that OSHA lacks jurisdiction over, or responsibility for, workplace safety at in-patient psychiatric hospitals or other places of employment. (UHS-Fuller Br. 65; UHS-DE Br. 55-59.) Each Respondent stipulated that

(1) the Commission "has jurisdiction" over this matter, and (2) each was an employer as defined in the OSH Act.[189] At best, Respondents appear to be arguing against permitting OSHA to cite medical facilities for hazards that cannot be eliminated.

Curiously, UHS-Fuller points to *Integra Health Mgmt., Inc.*, No. 13-1124, 2019 WL 1142920 (OSHRC Mar. 4, 2019) as support for its contention. (UHS-Fuller Br. 65-66.) *Integra* addresses whether the employer violated the general duty clause by failing to "adequately address a workplace violence hazard-specifically, the risk of Integra's employees being physically assaulted by a client with a history of violent behavior during a face to face meeting." 2019 WL 1142920, at *1. The Commissioners unanimously upheld the applicability of the general duty clause to workplace violence experienced by employees working with individuals with mental illness or criminal backgrounds and found that the Secretary established a violation. *Id.* at *1, 6 n.5. None concluded that OSHA lacked jurisdiction over the hazard of workplace violence when assisting those with mental illness.[190] *Id.*

Equally unpersuasive is UHS-DE's citation to *Am. Dental Ass'n v. Sec'y of Labor*, 984 F.2d 823 (7th Cir. 1993).[191] *American Dental* was not related to a citation for violation of the OSH Act. Instead, it was a petition from an industry group seeking review of a rule OSHA promulgated about occupational exposure to bloodborne pathogens. 984 F.2d at 824. The Seventh Circuit

[189] Stips. 1-3. See also Section I (Jurisdiction) above.

[190] UHS-Fuller tries to obfuscate that former Commissioner MacDougall *joined* the majority in finding that the employer violated the general duty clause by failing to take sufficient action to address the workplace violence hazard. 2019 WL 1142920, at *22. Her concurrence explicitly states, "given that the main meaning of the term 'hazard' as used in the statute is, broad enough on its face to include the hazard presented by the specific facts of this case, Congress' use of that term in such a circumstance is determinative here." *Id*. She agreed with the other Commissioners that the Secretary met the burden of proving a violation of the general duty for the hazard of workplace violence. *Id.* at *22, 26.

[191] UHS-DE Br. 59. The Seventh Circuit is not a Circuit to which this matter can be appealed. 29 U.S.C. § 660(a). UHS-DE cites to no other case, statute, standard or regulation in support of its contentions in this section of its brief. (UHS-DE Br. 55-59.)

noted that the standard would impose an "extensive array of restrictions on the practice of medicine, nursing and dentistry." *Id.* at 825. However, the circuit court was not free to conclude that the regulation of safety of the medical and dental workplace should be placed beyond OSHA's purview. *Id.* at 827. And, when it looked at OSHA's authority, it found that the rule was reasonable as applied to hospitals, nursing homes, and other employer-controlled workplaces. *Id.* at 830-31. Thus, *American Dental* supports finding OSHA has jurisdiction over facilities like the Worksite. *Id.*

There is no debate that Respondents knew the hazard was present at the Worksite and that they could take steps to reduce it.[192] Section 5(a)(1) of the OSH Act does not provide an exemption for businesses that provide medical care, and the application of the general duty clause to such employers has been repeatedly upheld.[193] *See e.g., BHC Nw. Psychiatric Hosp*., 951 F.3d 558 (D.C. Cir. 2020) (upholding a violation for workplace violence hazards at an in-patient psychiatric facility); *UHS Pembroke,* 2022 WL 774272, at *1, 9 (same); *Beverly Enters., Inc*., 19 BNA OSHC 1161, 1162 (No. 91-3144, 2000)(consolidated) (finding that the Secretary met the first three elements of establishing a violation of the general duty clause for hazards related to lifting and

[192] Stips. 19-24. In addition to recognizing the hazard of workplace violence themselves, Respondents also stipulated that: "The hazard of workplace violence, defined in this case as physically violent or assaultive behavior of patients toward staff, is recognized in the behavioral health/psychiatric care industry. This was also true during the time of OSHA Inspection 1408076." (Ex. S-449, Stip. 23.) Further, adverse inferences related to the presence of the hazard, the harm it was causing, and Respondents' knowledge of it at the Worksite were imposed. See Section II.B.3 (Summary of Spoliation Sanctions).

[193] The Commission has also addressed violations of particular standards at medical facilities. *See e.g., Metwest, Inc.,* 22 BNA OSHC 1066 (No. 04-0594, 2007) (upholding a violation against a patient service center), *aff'd*, 560 F.3d 506 (D.C. Cir. 2009) (upholding citations under bloodborne pathogen standard); *Froedtert Mem'l Lutheran Hosp., Inc*., 20 BNA OSHC 1500 (No. 97-1839, 2004) (affirming violations relating to how the hospital handles bloodborne pathogens and communicates hazards); *Charles W. Mason, DDS & Assocs., PLLC*, 25 BNA OSHC 1792 (No. 10-2313, 2015) (upholding violations related to the handling of sharps used in medical procedures and hazard communication); *Loretto*, 23 BNA OSHC at 1358 n.2 (affirming violations related to, among other things, providing timely vaccination shots, making medical evaluations following certain incidents, and training on bloodborne pathogens at a nursing home). *See also Columbia Presbyterian Hosp.*, 17 BNA OSHC 1640 (No. 93-298, 1996) (ALJ) (finding hospital to be an employer and subject to the OSH Act); *Am. Dental Ctrs.*, No. 89-1369, 1990 WL 118162 (OSHRCALJ, June 4, 1990) (consolidated) (upholding violations issued to dental treatment facilities).

transferring patients, and remanding for further findings on the issue of feasibility of abatement); *Integra*, 2019 WL 1142920, at *1 (upholding violation of the general duty clause for the hazard of workplace violence); *Waldon Healthcare Ctr.*, 16 BNA OSHC 1052, 1059-62 (No. 89-3097, 1993) (finding that the general duty clause applied to the hazard of virus transmission at nursing homes).[194]

Respondents also argue that the oversight of other regulators and an industry credential reduce the Secretary's authority at the Worksite. (UHS-DE 53-59; UHS-Fuller 66-67.) Like other types of employers, Respondents must comply with laws other than the OSH Act. The Worksite is certified as a Medicare and Medicaid hospital by the CMS. (Stip. 14.) To maintain this certification, the Worksite must comply with federal regulations concerning "quality standards in hospitals."[195] The Worksite "is also subject to other federal laws and regulations and to the oversight of various federal agencies in addition to Complainant."[196]

In addition to federal regulation, UHS-Fuller must comply with the DMH's regulations and other state requirements.[197] Like the Medicaid regulations, the state regulations focus on patient

---

[194] *See also HRI Hosp., Inc. d/b/a Arbour-HRI Hosp.*, No. 17-0303, 2019 WL 989735, at *1-7 (OSHRCALJ, Jan. 22, 2019) (Chief Judge Rooney finding the general duty clause applicable to a provider of psychiatric services); *UHS of Centennial Peaks LLC*, No. 19-1579, 2022 WL 4075583, at *23 n.27 (OSHRCALJ, Jul. 26, 2022) (same), *appeal docketed,* No. 22-9572 (10th Cir. Oct. 26, 2022).

[195] "As a CMS-certified hospital, Fuller Hospital is subject the Medicare Conditions of Participation and Conditions for Coverage, which are federal regulations intended to ensure quality standards in hospitals." (Ex. S-449, Stip. 15.)

[196] "As a CMS-certified hospital, Fuller Hospital also is subject to other federal laws and regulations and to the oversight of various federal agencies in addition to Complainant." (Ex. S-449, Stip. 16.) UHS-DE Exhibits 7 and 10 contain many of the same provisions of Title 42, Part 482 of the Code of Federal Regulations. (Tr. 3249; Exs. RD-7, RD-10.) Part 482 is directed toward "Public Health," and the sub-sections UHS-DE points to relate to obligations hospitals must meet to participate in the federal Medicare program. 42 C.F.R. § 482.1 ("Basis and Scope"), 42 C.F.R. § 482.11 (to participate, hospitals must comply with applicable laws "related to the health and safety of *patients*") (emphasis added). None of the provisions in UHS-DE's exhibits refer to OSHA or the OSH Act. (Exs. RD-7, RD-10.) Respondents point to no regulation, in Title 42 or otherwise, that conflicts with its obligation under the OSH Act to provide employees employment and places of employment "free from recognized hazards that are causing or are likely to cause death or serious physical harm." 29 U.S.C. § 654(a)(1). (Tr. 2201-12, 2214-18.)

[197] Stip. 11; Tr. 2215-16, 2203, 2218-19, 2226. UHS-DE submitted two exhibits containing sections of Massachusetts state regulations. (Tr. 3249, Exs. RD-8, RD-9.) There is no content in RD-9 that is not also in RD-8. *Id.*

safety. (Ex. RD-8.) Respondents point to no other regulation or obligation that conflicts with their responsibilities under the OSH Act, including the obligation set out in section 5(a)(1). Further, the regulations cited by Respondents explicitly contemplate a role for OSHA. *Id.* Facilities are to notify DMH "immediately" of any complaint communicated to the facility by OSHA, as well as any "findings, citations, agreements or other notifications from OSHA."[198] *Id.*

DMH audited the Worksite a few months before OSHA's investigation began.[199] Its audit found that the facility failed to comply with DMH's required staff-to-patient ratio. (Stips. 31-33; Ex. S-147 at 4-5, 13-14; Tr. 2539.) As a result, UHS-Fuller submitted a corrective action plan to DMH indicating what it would do to ensure compliance with the ratio in the future. (Stip. 33; Tr. 2225, 2536-37; Ex. S-147.) DMH accepted the plan. (Stip. 33; Tr. 2540.) DMH's focus on the impact of staffing levels on patient care did not deprive OSHA of its authority to examine the effect of staffing levels on worker safety.

Besides complying with patient safety regulations, maintaining appropriate credentials is important to the Respondents' business.[200] The Worksite "is accredited by The Joint Commission ("TJC") per its standards." (Stip. 12.) Periodic surveys by TJC of the Worksite are required to maintain the credentials necessary for the business to receive reimbursement through federal

---

[198] These regulations relate to "Licensing" for mental health facilities" in Massachusetts. (Ex. RD-8.) *See* 104 CMR 27.03(23)(h)(7) (setting out the "required notifications" to the DMH). Other healthcare providers in Massachusetts, including those that provided psychiatric services, have previously been cited for violating the general duty clause of the OSH Act. *See UHS Pembroke*, 2022 WL 774272, at *13 (upholding a similar citation to the one at issue here and characterizing that violation as repeat based on an earlier citation issued to another Massachusetts facility); *HRI Hosp.*, 2019 WL 989735, at *1-7 (Chief Judge Rooney finding the general duty clause applicable to a Massachusetts based provider of psychiatric services).

[199] Stip. 30-32; Tr. 2532; Ex. S-147. On February 26, 2019, DMH conducted an audit at Fuller Hospital, which found that Fuller had not correctly calculated the NCHPPD and was not in compliance with its required staffing ratio when a patient was on a 1:1 level of staff observation on two of the units during the audit period." (Ex. S-449, Stip. 32.) "The DMH require that psychiatric hospitals have 6.0 nursing care hours per patient day (NCHPPD) for adult units and 7.0 NCHPPD for adolescent units." (Ex. S-449, Stip. 31.) "

[200] Stips. 12, 14-16; Tr. 476-77, 2195, 2200. "Fuller Hospital is accredited by The Joint Commission (TJC) per its standards." (Ex. S-449, Stip. 12.)

programs for the care provided. (Tr. 2218.) These surveys look at compliance with TJC's criteria. (Stip. 12.) The criteria include "organization quality, safety-of-care issues, and the safety of the environment in which care is provided."[201]

Dr. Welch elaborated on the limitations of TJC's surveys, particularly concerning employee health and safety. (Tr. 2192-93, 2196-2200, 2204-6, 2211, 2230.) Surveyors have broad authority to make requests, but "they certainly don't review everything." (Tr. 2193.) They do not review videos and do not review all documents. (Tr. 2192-93, 2196-97.) He described the process as "managed" and "very guided," with "major parts" omitted or lost. (Tr. 2197, 2199.)

Other workplace violence cases have involved situations where the entity must comply with other regulations and for which an industry credential is important. In each instance, other regulators and/or the need to maintain a credential did not undermine the Secretary's authority to cite the employer for the hazard of workplace violence. *See UHS Pembroke,* 2022 WL 774272, at *4 (noting the CEO's responsibility to meet TJC and DMH standards); *HRI*, 2019 WL 989735 (discussing DMH requirements); *UHS Centennial*, 2022 WL 4075583, at *23 n.27 (rejecting argument that TJC or state statute precluded proposed abatement measures). *See also Integra*, 2019 WL 1142920, at *7 (rejecting the argument that public policy concerns related to serving people with histories of violent behavior precluded citation for a general duty clause violation); *Waldon*, 16 BNA OSHC at 1058 (finding abatement feasible even though the nursing home was in a "highly regulated business").

Importantly, Respondents identify no other regulator or credentialing authority charged with protecting workers as opposed to those focused primarily on the health and safety of the

[201] Stips. 12, 13; Tr. 2195-96. TJC standards deal with organization quality, safety-of-care issues, and the safety of the environment in which care is provided. (Ex. S-449, Stip. 13.)

consumers of the services provided at the Worksite. *See Shamokin Filler Co., Inc. v. Fed. Mine Safety & Health Review Comm'n*, 772 F.3d 330, 332-33 (3d Cir. 2014) (OSHA is the default agency for worker safety and health). There is no evidence that the DMH, CMS, TJC, or any other regulatory authority besides OSHA, concluded that the Respondents' handling of workplace violence was appropriate or that there were no actions Respondents could take to materially reduce employee exposure to the hazard.[202] Respondents cite no portion of the OSH Act, the implementing regulations, or precedent to support their contentions that an exemption for their industry is directly or implicitly in the OSH Act.[203]

IV. Analysis

This section discusses the two experts who testified and explains why Dr. Welch's opinions are credited more heavily. After that, the legal standard for finding a violation of the general duty clause is set forth. The parties essentially agree on the first three elements of the Secretary's burden, so those topics are addressed only briefly. Then the disputed issues related to Respondents' existing abatement and the Secretary's proposed abatement are discussed in detail. Finally, the rejection of Respondents' affirmative defense is discussed.

A. Expert Witnesses

Both sides offered the testimony of expert witnesses: Dr. Welch, who testified on the Secretary's behalf, and Dr. Cohen, who testified for Respondents. Although each person satisfied

[202] Tr. 2199, 2203-6, 2214; Ex. S-147; Stips. 11-15. DMH's surveyors also act on behalf of CMS during their surveys. (Tr. 476.) Neither DMH nor TJC assessed the Worksite during the pendency of OSHA's investigation. The DMH conducts a survey every two years and TJC does one every three years. (Tr. 472, 1613, 2533.)

[203] In *SeaWorld of Fla. LLC v. Perez*, 748 F.3d 1202 (D.C. Cir. 2014), the D.C. Circuit held that an amusement park violated the general duty clause by exposing trainers to recognized hazards when working in close contact with animals during performances. 748 F.3d 1205. The majority rejected the dissent's arguments about policy decisions. *Id.* at 1211. Instead, it focused on the fact that "Congress has vested the Secretary of Labor and the Commission general authority to protect employees from unhealthy and unsafe work places." *Id.* Although the *SeaWorld* dissent takes issue with OSHA overseeing employee safety in the entertainment and sports industries, it in no way states or implies that OSHA lacks jurisdiction over workplace violence in general, or over psychiatric care providers. *Id.* at 1216-22.

the threshold requirements to be qualified to offer expert testimony, their respective opinions are not entitled to equal weight. *See i4i Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 852 (Fed. Cir. 2010) ("When the methodology is sound, and the evidence relied upon sufficiently related to the case at hand, disputes about the degree of relevancy or accuracy (above this minimum threshold) may go to the testimony's weight, but not its admissibility"), *aff'd*, 564 U.S. 91 (2011).

1. **Dr. Welch**

Dr. Welch was certified as an expert in workplace violence at a behavioral health facility, an expert in psychiatry, and an expert in patient and clinical care at behavioral health hospitals. (Tr. 1766, 1768-70, 1789.) He practiced medicine as an attending psychiatrist at multiple hospitals. (Exs. S-145, S-146.) His experience included working as the chief of psychiatry at Tewksbury State Hospital ("Tewksbury"), which the DMH operates. (Tr. 1755-56.) At Tewksbury, he oversaw 180 patients and twelve physician psychiatrists. *Id.* He chaired the risk committee for higher-risk patients, including those with an increased risk for violence. (Tr. 1757.) And he provided services and training to staff regarding decreasing violence at facilities DMH operates. (Tr. 1757-58.) Besides his work at Tewksbury, he served as chief of psychiatry at another Massachusetts hospital, Melrose-Wakefield Hospital ("Melrose"), and as the Medical Director of Inpatient Psychiatry for Cambridge Health Alliance. (Tr. 1758-61; Ex. S-146 at 2.) For three years, he served on the Workplace Violence Committee for the parent company of Melrose. (Ex. S-146 at 4.) Judges have accepted Dr. Welch as an expert witness in many matters, including a case before the Commission.[204]

[204] Exs. S-145, S-397. Dr. Welch provided expert testimony on the Secretary's behalf in *UHS Pembroke*, 2022 WL 7747272, at *10.

As part of his assessment, Dr. Welch spoke directly with four former employees and visited the Worksite.[205] He extensively reviewed the information OSHA gathered in its investigation and medical literature. (Tr. 1789-91; Ex. S-397.) He reviewed the OSHA inspection report, the Citation, OSHA 300 illness and injury logs for the Worksite, and photos taken during the inspection. *Id.* He reviewed notes from the employee and employer interviews and the depositions of managers and administrators for the Worksite. *Id.* He reviewed reports of employee injuries compiled by Sedgwick and patient medical records. *Id.* He reviewed training materials, policies, and procedures, including the forms that were supposed to be used to document post-incident debriefings. *Id.* He assessed documents related to staffing patterns, incident reports, and the daily reports of the nursing supervisor or house officer. *Id.* He examined the use of security and panic buttons in other behavioral health facilities. (Tr. 1918, 1934, 1936-37, 2048-49; Ex. S-397 at 33, 38-40.) He reviewed the DMH's inspection reports, meeting minutes, and loss control reports. *Id.* He reviewed records from the Attleboro Police Department. *Id.* He reviewed all the available video evidence. *Id.* His report includes a detailed analysis of the video of the assaults that occurred on July 18, 2019, and February 22, 2020. (Ex. S-397.)

Dr. Welch assessed and offered an opinion on: (1) the existence of a risk of injury due to workplace violence at the Worksite, (2) the recognition of the risk; (3) abatement measures that would materially reduce the risk of injury due to workplace violence; and (4) the feasibility of such abatement measures. (Tr. 1789.) At the hearing he was received as an expert on: (1) workplace violence in behavioral health facilities, (2) psychiatry, and (3) patient care or clinical care at a behavioral health facility. (Tr. 1770, 1788-89.)

[205] Tr. 1789-91, Ex. S-397 at 2. Dr. Welch listened to the hearing testimony and attended some depositions. (Exs. S-397, S-451X.)

2. **Dr. Cohen**

Dr. Cohen is a physician specializing in forensic and general psychiatry. (Tr. 3121; Exs. RF-66, RF-67.) He is a staff psychiatrist with Olive-View UCLA Medical Center. *Id.* Dr. Cohen has testified as an expert in many matters related to the psychiatric care of patients. *Id.* In two Commission proceedings related to an OSHA citation against a behavioral health facility, judges accepted him as an expert in the field of psychiatry.[206] He is qualified and accepted as an expert in psychiatry and patient care.

Dr. Cohen's report and testimony focused on the engineering and control-based abatements Secretary proposed, as opposed to psychiatry or patient care.[207] He was not asked to and did not reach an opinion on whether there were feasible methods to materially reduce the hazard of workplace violence at the Worksite. (Tr. 3136-37, 3274-75.) He did not visit the facility. (Tr.

[206] Tr. 3147; Ex. RF-67. At the hearing, Dr. Cohen indicated that an administrative law judge qualified him to testify as an expert witness in "an OSHA proceeding" on the abatements at issue in this matter. (Tr. 3147.) He indicated that matter was "Highlands Behavioral Health." *Id.* However, in *UHS of Denver, Inc. d/b/a Highlands Behavioral Health System*, No. 19-0550, 2022 WL 17730964, at * 8 (OSHRC, Dec. 8, 2022) (ALJ decision) he was qualified as an expert forensics psychiatrist, not an expert in the abatement of workplace violence. (Tr. 3147, 3231.) He was also qualified as an expert "in the field of psychiatry" in *UHS Centennial*, 2022 WL 4075582, at *29. (Ex. RF-67 at 2; Tr. 3147, 3231-32.) Neither decision refers to him as an expert in the abatement of workplace violence at a medical facility. Instead, both decisions focus on his expertise in psychiatry and clinical care. *UHS Highlands*, OSHRC Docket No. 19-0550 at 33, *UHS Centennial,* 2022 WL 4075582, at *28-30, 39, 51, 53. He acknowledged that he has never been hired to provide advice on workplace violence issues at a behavioral health hospital. (Tr. 3136-37.)

[207] Dr. Cohen's report indicates that the purpose of his review was to answer one question: "Are the OSHA proposed abatement measures likely to materially reduce the risk of violence and injury to healthcare workers caring for psychiatric patients at [the Worksite]?" (Ex. RF-67 at 1.)

3261, 3263.) He did not review any video of incidents of workplace violence. (Tr. 3139, 3263-65.) His review of documents was more limited than Dr. Welch's.[208]

Dr. Cohen's discussion of the proposed abatement was also less well-supported. Dr. Cohen's experience with the clinical management of psychiatric conditions and forensic psychiatry makes him qualified to opine on psychiatry and patient care or clinical care at a behavioral health facility, and he is accepted as an expert in those two areas.[209] However, he does not have substantial experience working in an inpatient psychiatric unit. (Tr. 3136.) He spends 60-70 percent of his time on paid litigation or trial-related work rather than on the practice of psychiatry.[210] He has never provided advice on systemic workplace violence problems at a behavioral health hospital.[211] His assessment of the abatement of the hazard was limited in time and scope. He seemed to have some difficulty recalling information about this Worksite and what

[208] Tr. 1789-91, 3139-40, 3258, 3260-61; Exs. RF-67, S-397. Dr. Welch reviewed 2,000 pages of just house officer reports, which was a small portion of his review. (Tr. 1789; Ex. S-397.) Dr. Cohen believed he also reviewed the house officer reports. (Tr. 3139-40.) If his recollection was accurate, that category of documents alone would account for a significant amount of the documents he reviewed, as he said he reviewed around 4,000 pages. (Tr. 3142, 3147, 3258.) He was unaware that Respondents produced at least 80,000 pages of documents for this matter. (Tr. 3258.) His analysis includes only a few references to specific documents, making it difficult to determine the scope of his review. (Ex. RF-67.) He did not know which patient files he reviewed or how many. (Tr. 3258-59.) Although he argued that state hospitals that treat people who committed crimes were substantially different than the Worksite, he did not know what proportion of the Worksite's patients had a criminal record for violent crimes. (Tr. 3285-86.) He did not look into how many patients with criminal records were treated at the Worksite. (Tr. 2800, 2802-4, 3286.)

[209] The undersigned initially reserved judgment on the scope of Dr. Cohen's expertise. (Tr. 3146-47.) He was offered as an expert in three areas: (1) psychiatry, (2) patient care or clinical care of patients at a behavioral health facility, and (3) whether the proposed abatements would materially reduce the hazard of workplace violence or violent acts by patients against staff. (Tr. 3135.) He is not being accepted as an expert on whether the proposed abatements would materially reduce the hazard.

[210] Tr. 3227-28, 3253; Exs. RF-66, RF-67. Dr. Cohen acknowledged that some of the documents listed in his report were a "holdover or misplaced" from his work related to *UHS Highlands*, OSHRC Docket No. 19-0550. (Tr. 3252-57.) Untangling what was related to the present matter and what was unrelated was complicated. Despite his claims to the contrary, Dr. Cohen frequently did not use the Bates numbers included on the documents when he referred to them. (Tr. 3252, 3255, 3257-60; Ex. RF-67.) Further, the headings he used "may not correspond to the document heading" used by the Secretary or UHS-Fuller. *Id.* Co-mingling documents from a different case and neither using the Bates number or the document heading used by the parties, undermined his report's utility in assessing the issues.

[211] Tr. 3136-37; Ex. RF-66. Dr. Cohen's CV does not list any published, peer-reviewed articles he authored or co-authored related to workplace violence or any subject. (Tr. 3231; Ex. RF-66.)

he relied upon in reaching his conclusions. He was not asked and did not offer an opinion on Respondents' existing abatement. (Ex. RF-67 at 1.)

Dr. Cohen claimed he rigorously assessed credible scientific literature to evaluate the proposed feasible abatement measures.[212] Scrutiny reveals that Dr. Cohen rejected the testimony of employee witnesses in favor of anecdotes from other facilities. He did not interview direct care employees or listen to their testimony about what they experienced and observed at the Worksite.[213] Instead, he cites a compilation of eight interviews with workers at a facility in Canada and argues that these anecdotes are more persuasive than the record evidence. (Tr. 3287-88; Ex. RF-101.) He generally condemned cross-sectional studies but then relied on them when they suited his position. (Tr. 3161-65, 3280.) He laid out his chosen methodology for assessing the proposed abatement but did not seem to apply it consistently. *Id.* Without support, he appeared to claim that security personnel are universally incompetent. (Tr. 3290, 3299-03, 3306-7, 3309-11, 3314.) The regular use of members of the Attleboro Police to address workplace violence at the Worksite undermines his testimony. (Tr. 3304.) Dr. Cohen is not accepted as an expert on the issue of whether the proposed abatements would materially reduce the hazard of workplace violence.

3. **Dr. Welch's Testimony Is Entitled to More Weight**

Dr. Cohen is sufficiently qualified such that his testimony satisfies the admissibility threshold to testify as an expert in psychiatry and clinical care. However, Dr. Welch's experience

[212] Dr. Cohen indicated he reviewed a large volume of material, including thousands of pages of documents, and that he researched and then reviewed about 100 scientific or related articles from that research. (Tr. 3155-56, 3260-61, 3270-71, 3273-74; Ex. RF-67 at 4-11.) He indicated that this review and the preparation of his report took about 100 hours. (Tr. 3155.) When discussing articles, he often had difficulty remembering details about them. (Tr. 3201-2, 3280-81, 3317, 3293, 3296, 3300.)

[213] Tr. 3139, 3154, 3261; Ex. RF-67 at 4. Dr. Cohen indicated he reviewed 8-10 depositions. (Tr. 3140, 3151.) According to his report, he reviewed the deposition of AAD Abundo and six depositions of Respondents' management level employees, for a total of seven. (Tr. 3149-51; Ex. RF-67 at 4.)

and analysis better suited the facts of this case. His review was far more extensive than that of Dr. Cohen's.[214] His review included assessing the workplace violence prevention measures in place at the Worksite during OSHA's investigation and the feasibility of the Secretary's proposed abatement. (Ex. S-397.) Unlike Dr. Cohen, Dr. Welch opined directly on each aspect of the Secretary's burden, including whether the abatement measures proposed would materially reduce the hazard and whether the proposals were feasible. (Tr. 1789, 3274-75; Exs. S-397, RF-67.) *See BHC*, 951 F.3d at 564 (discussing the relative weight the ALJ gave to two experts assessing workplace violence at psychiatric facilities and upholding the ALJ's decision not to afford both opinions equal weight).

B. Legal Standard

The general duty clause requires every employer to provide employees with a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm." 29 U.S.C. § 654(a)(1). As interpreted by the Commission, to establish a violation of this clause, the Secretary must show: (1) there was an activity or condition in the employer's workplace that constituted a hazard to employees; (2) either the cited employer or its industry recognized that the condition or activity was hazardous; (3) the hazard was causing or was likely to cause death or serious physical harm; and (4) there were feasible means to eliminate the hazard or materially reduce it. *Waldon*, 16 BNA OSHC at 1058. The evidence must also show that the employer knew or, with the exercise of reasonable diligence, could have known of the hazardous condition. *Otis Elevator Co.*, 21 BNA OSHC 2204, 2207 (No. 03-1344, 2007).

[214] Tr. 1789-91; Ex. S-397 at 2-4. Dr. Welch was forthcoming when the scientific literature on a particular point was less comprehensive. He acknowledged when he was relying more on experience or employee accounts of Worksite conditions. This candor and his overall demeanor enhanced his testimony's credibility.

Despite agreeing with the Secretary on the appropriate test to determine whether there has been a violation of the general duty clause and stipulating the first three elements of that test, UHS-Fuller argues that Congress did not intend for OSHA to regulate in-patient psychiatric hospitals.[215] In their Joint Pre-Hearing Statement, the parties agreed that the four-prong test, as articulated in cases like *Waldon* is the criteria for finding a violation of the general duty clause. Yet, UHS-Fuller now seeks to interject an additional element and demands that the Secretary prove the general duty clause applies to hazards that cannot be eliminated. (UHS-Fuller Br. 65-66; UHS-Fuller Reply Br. 2-3.)

The general duty clause has repeatedly been found applicable to workplace violence hazards. *BHC*, 951 F.3d at 563-67 (upholding a citation for a general duty clause violation for a workplace violence hazard at a psychiatric hospital); *Integra*, 2019 WL 1142920, at *4 (finding "allegation of workplace violence … is a cognizable 'hazard' under the Act"); *UHS Pembroke*, 2022 WL 7747272, at *1 (upholding a citation for a general duty clause violation for workplace violence hazard at a psychiatric hospital in Massachusetts). Non-precedential decisions also concluded that the general duty clause applied to workplace violence hazards.[216] *See UHS Centennial*, 2022 WL 4075583, at *23 n.27 (finding the hazard of workplace violence at a behavioral health facility to be within the scope of the general duty clause and affirming the citation); *HRI*, 2019 WL 989735, at *2-8 (applying the *Waldon* test to assess a citation issued for workplace violence at a behavioral health facility); *Megawest Fin., Inc.,* No. 93-2879, 1995 WL 383233, at *6 (OSHRCALJ May 8, 1995) (finding that the Secretary was "not precluded from

[215] UHS-Fuller Br. 65-68; UHS-Fuller Reply Br. 2-3. The undersigned reiterates that Respondents failed to preserve video surveillance. Their actions made it more difficult for the Secretary to carry his burden. The stipulations reached by the parties addressed some of the prejudice resulting from Respondents' discovery failings. Had the parties not reached such stipulations, the Secretary would have been entitled to additional adverse inferences.

[216] *UHS-DE & Suncoast*, which is currently pending before the Commission, also found the same.

asserting that workplace violence constitutes a general duty clause violation). The inability to eliminate a hazard does not preclude the Secretary from asserting a general duty clause violation. *See, e.g., Sci. Applications Int'l Corp.*, No. 14-1668, 2020 WL 1941193, at *4 (OSHRC Apr. 16, 2020) (general duty clause applicable to drowning hazard that employer could not eliminate); *Arcadian Corp.*, 20 BNA OSHC 2001, 2011 (No. 93-0628, 2004) (Secretary does not have to show that abatement would eliminate the hazard).

Having found the *Waldon* test appropriate, each element of that test is addressed below. However, the core disputed issue is abatement: Was Respondents' existing abatement adequate? If not, did the Secretary propose feasible and effective abatement?

C. Employee Exposure to a Hazard

The first element in Waldon's four-part framework is whether "a condition or activity in the workplace presented a hazard." 16 BNA OSHC at 1058. The parties stipulated that the hazard of workplace violence was present at the Worksite, Respondents' employees were exposed to this hazard and suffered serious injuries from it.[217] Even without the stipulations or inference, the record contains ample evidence of the hazard of workplace violence and employee exposure to it.[218]

D. Recognition and Knowledge of the Hazard

The *Waldon* test's second element examines whether the employer or its industry recognized the condition as a hazard. 16 BNA OSHC at 1058. "Healthcare is one of the most dangerous professions primarily due to employee injuries from WPV." (Ex. S-134 at 8.)

[217] Stips. 19-20, 25. The Secretary is entitled to the curative finding that the destroyed ESI would support a finding that the hazard of workplace violence was causing or was likely to cause serious physical harm at the Worksite. See Section II.B.3 above. (Tr. 29-30; Aug. Order 18-19.)

[218] Tr. 234-35, 1175, 1208-9; Exs. S-1, S-1B, S-24, S-54, S-57 at 2; S-60 at 2, S-61 at 2-3; S-228, S-229, S-244, S-246, S-248, S-249, S-250, S-317, S-334, S-337, S-338, S-384, S-385, S-397.

Respondents recognized the hazard of workplace violence in the context of patient-on-staff violence, as did the behavioral health industry.[219] Dr. Welch concurred, explaining that the hazard is "well-recognized." (Ex. S-397 at 1.)

Besides hazard recognition, the Secretary must also show the employer's knowledge of the hazardous condition. *SeaWorld*, 748 F.3d at 1208-9; *Puffer's Hardware, Inc. v. Sec'y of Labor,* 742 F.2d 12, 18 (1st Cir. 1984) (hazard recognition established when employer warned employees its elevator was hazardous). Establishing knowledge does not require showing that the employer was actually aware it was violating the OSH Act. *SeaWorld*, 748 F.3d at 1208-9 (actual knowledge or knowledge in the relevant industry is sufficient); *Peacock Eng'g Inc.*, 26 BNA OSHC 1588, 1592 (No. 11-2780, 2017) (knowledge prong met when the employer knew or should have known of the conditions constituting a violation).

The Citation followed OSHA's second inspection of the Worksite. Its previous inspection, in 2016, resulted in OSHA issuing UHS-Fuller a Hazard Alert Letter indicating the hazard of workplace violence was present at the Worksite. (Ex. S-22 at 2.) Respondents also had actual knowledge of its presence through frequent employee injury reports.[220] Injuries from workplace

[219] Stips. 21-23; Tr. 43; Exs. S-134, S-22, S-24, S-213. Despite a header with an abbreviation for patient safety work product (PSWP), meeting minutes from Corporate Employee Safety Council were not PSWP and could not be withheld on such grounds. (Disc. Order II at 14-19.) They were offered as Exhibits S-213, S-217, S-223. *Id.* at 14-19. Limited redactions in Exhibit S-213 were permitted for attorney-client privilege. (Disc. Order II at 19.) Similarly, the UHS-DE Employee Safety Council Charter is not protected as PSWP. (Tr. 1426-27, 1517-18, Ex. S-133). See Decision App. Section II.

[220] Exs. S-1, S-1B, S-22, S-54, S-241, S-242, S-280, S-334, S-337, S-338, S-833, S-384, S-385. Employees were directed to contact a third-party vendor (Sedgwick) that handled worker injury reports for the Respondents. (Tr. 508, 2348; Stips. 46, 48.) Sedgwick compiled brief summaries of these calls. (Tr. 1185-86; Stip. 48.) As part of the process, Sedgwick also reaches out to UHS-Fuller's Human Resources ("HR") department to gather information. (Tr. 1186.) Ms. Bricault was copied on such communications between Sedgwick and UHS-Fuller's HR department. (Tr. 1186; Stip. 49.) Sedgwick's summaries often indicate that the workplace violence involved or was reported to at least one supervisor. (Exs. S-244, S-246, S-248, S-249, S-251, S-334, S-337, S-338, S-383, S-384, S-385.) A UHS-DE employee also received reports about injuries UHS-Fuller employees reported to Sedgwick. (Tr. 1191; Exs. S-242, S-244, S-280, S-384.) Many of the reports indicate that the employee may receive a phone call from a UHS-DE employee and direct the worker to speak with the UHS-DE employee. (Exs. S-317, S-334, S-337, S-338; Stip. 49.)

violence and employee concerns about the sufficiency of the response to such reports were discussed at management meetings and at the Corporate Employee Safety Council ("CESC") meeting.[221] Notes from the CESC meeting reflect a continued rise in injuries related to workplace violence at UHS-DE affiliated behavioral health facilities and state that "staff expressed concerns that the work is not safe and the complaints are not being addressed."[222] UHS-DE identified the Worksite as having one of highest employee injury rate among all its affiliates. (Tr. 1133, 1266-65, 1264-69, 1279, 1321, 1333; Ex. S-397 n.2.) Although not appropriately preserved, the facility's surveillance system captured incidents of workplace violence at the Worksite. These videos were available for review by supervisors and, in some instances, were reviewed by senior management.[223]

The Secretary showed both recognition and knowledge of the cited hazard.

E. Serious Physical Harm

A hazard is likely to cause death or serious physical harm if the likely consequence of employee exposure to the hazard would be serious physical harm. *Morrison-Knudsen Co./Yonkers Contracting Co.,* 16 BNA OSHC 1105, 1122 (No. 88-572, 1993). Respondents stipulated that patient violence and assaults have resulted in serious injuries. (Stip. 24.) The record is replete with evidence of serious and potentially life-altering injuries related to the cited hazard in the

[221] Tr. 1690-91, 2347; Ex. S-213 at 3-4. The meeting was held on August 26, 2019. (Ex. S-213.) Nine people attended, including UHS-DE's Chief Clinical Officer and UHS-DE's Director of Loss Control. *Id.* The Committee also met well after the Citation's issuance on September 17, 2020 and again on March 16, 2021. (Tr. 1691, 1695; Exs. S-217, S-223.)

[222] Ex. S-213 at 4. The meeting minutes also recognized an increase in the number of "security related" incidents. (Ex. S-213 at 4.)

[223] Tr. 428-29, 583-84, 2470-75; Exs. S-38, S-397. Because Respondents destroyed evidence, the Secretary was entitled to an adverse inference that the destroyed ESI would support a finding that Respondents knew the hazard of workplace violence was present at the Worksite. (Tr. 29-30; Aug. Order 18-19.) See also Section II.B.3 above.

relevant period.[224] Most physical confrontations at the Worksite involved patient attacks on staff. (Exs. S-1B, S-11, RF-32, RF-33.) Dr. Welch opined that the hazard as it existed at the Worksite was likely to cause serious injury or death. (Ex. S-397 at 1.) Many injuries from the inspection period were serious enough to keep employees from returning to work for long periods and included concussions; head, jaw, and neck injuries; back, leg, and knee strain; bites, and scratches from patients with bloodborne diseases.[225] The Secretary established the hazard caused and was capable of causing serious physical harm and possibly death.

F. Existing Abatement

Having shown that a recognized hazard capable of causing serious physical harm to employees was present at the Worksite, the next consideration is what action the employer took to address the hazard. The requirement to provide a workplace free of recognized hazards is limited to preventable hazards. *Nat'l Realty & Constr. Co., Inc. v. OSHRC*, 489 F.2d 1257, 1265-66 (D.C. Cir. 1973). When an employer has already undertaken methods to address a hazard, the Secretary must show that those methods were inadequate. *U.S. Postal Serv., Nat'l Ass'n of Letter Carriers*, 21 BNA OSHC 1767, 1773 (No. 04-0316, 2006); *UHS Pembroke*, 2022 WL 774272 at *8; *Integra*, 2019 WL 1142920, at *12 n. 14 (indicating that the threshold question is whether the employer's abatement was inadequate); *Roadsafe Traffic Sys. Inc*., No. 18-0785, 2021 WL 5994023, at *6 (OSHRC Dec. 21, 2021) (*citing Ala. Power Co*., 13 BNA OSHC 1240, 1243-44 (No. 84-357, 1987) and finding existing safety program inadequate).

[224] Stip. 24. To help mitigate the impact from the ESI destruction, the Secretary was entitled to an inference that the destroyed ESI would support a finding that the hazard of workplace violence was causing or was likely to cause serious physical harm. (Tr. 29-30; Aug. Order 18-19.) See also Section II.B.3 (Summary of Spoliation Sanctions) above.

[225] Tr. 234-35, 238, 1174-75, 1208-10, 1220-21, 1263; Exs. S-1, S-1B, S-11, S-22, S-60 at 2, S-61 at 2-3, S-62 at 1, S-68, S-152, S-241, S-242, S-244, S-246, S-248, S-249, S-250, S-251, S-252, S-253, S-260, S-264, S-267, S-334, S-337, S-338, S-384, S-385, S-397 n.1. At the time of the hearing, one employee was out of work, after sustaining multiple head injuries at the Worksite and was receiving workers' compensation. (Tr. 236-38, 1208-10, 1215-17, 1219; Exs. S-11, S-317.)

Respondents point to various actions they say constituted adequate abatement.[226] The Secretary counters that the existing abatement was inadequate as conceived and implemented. (Sec'y Br. 65.) *See CF&T Available Concrete Pumping, Inc.,* 15 BNA OSHC 2195, 2198 n.9 (No. 90-239, 1993) (noting that the "mere existence of a safety program on paper does not establish that the program was effectively implemented on the worksite"); *Pepperidge Farm Inc.*, 17 BNA OSHC 1993, 2007-8 (No. 89-265, 1997) (employer failed to implement abatement it identified).

Through expert testimony and otherwise, the Secretary showed that Worksite's abatement efforts were ineffective.[227] He identified significant gaps between how Respondents said they mitigated the hazard and what occurred. Frequently, documents or employees' experiences did not support Respondents' claims. *See BHC*, 951 F.3d at 565 (discussing the disconnect between stated policies and actual practices); *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2182, n.12 (No. 90-2775, 2000) (finding that while witness claimed her practices remained unchanged, the data belied the claim), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001).

---

[226] UHS-Fuller sets forth the alleged components of its abatement with limited references to the record. (UHS-Fuller Br. 3, 65, 69-78.) Section V.B. of its brief purports to address the legal arguments related to its abatement efforts at the time of the Citation. (UHS-Fuller Br. 65-78.) In that section, UHS-Fuller cites these documents: (1) a WVPP (Ex. S-166); (2) meeting minutes for one Quality Management Committee Meeting held before the inspection commenced (Ex. RF-31); (3) a report from the Patient Safety Council, also dated before the inspection began (Ex. RF-33); and (4) its Restraint Reduction Plan (Ex. RF-34). *Id*. at 68-78. The only testimony referred to is from Ms. Gosselin, who left UHS-Fuller three months before the Citation's issuance, and Dr. Cohen's, its expert. (UHS-Fuller Br. 68-78.) Dr. Cohen reviewed a fraction of the documents produced during discovery, never visited the facility, and never spoke with direct care employees who worked there. (Tr. 2543, 3142, 3147, 3258, 3261.) Nor did he assess the effectiveness of the Worksite's existing abatement. (Ex. RF-67.) Respondents threw up a hodgepodge of documents, policies, and claims without explaining how they effectively mitigated the hazard. Respondents failed to communicate what implemented practices, in their opinion, effectively abated the hazard. Instead, they rely on the Secretary to piece together how the hazard was, or was not, addressed and then show its ineffectiveness.

[227] As summarized in Section II.B.1 above, the Secretary was entitled to adverse inferences related to the existing abatement. (Tr. 29-30; Aug. Order.) The destroyed ESI would support a finding that the Respondents' abatement was inadequate. Had it been available, it would have been unfavorable to Respondents, and helpful to the Secretary, on the issue of the inadequacy of the existing abatement in place at the Worksite when the Citation was issued. Respondents were also precluded from arguing that the content of the destroyed ESI would have been favorable to its defenses. *Id.* The Secretary was able to meet his burden on all elements of the *Waldon* test without these inferences. However, this showing was more difficult because of Respondents' destruction of evidence.

Respondents did not consistently prepare employees for the hazard of workplace violence. Then, after incidents occurred, Respondents did not consistently perform adequate investigations. Not properly investigating incidents prevented Respondents from addressing issues adequate reviews would have identified. Frequently, there was not enough staff for the number and severity of the patients to implement the protocols Respondents identified as necessary to mitigate the hazard appropriately.

This section discusses: (1) the persistent occurrence of injuries from the cited hazard, (2) deficiencies in employee training, (2) ineffectiveness of the post-incident debriefing process as implemented, (3) how staff levels made it difficult to implement the abatement the WVPP requires, (4) deficiencies in milieu management, and (5) how adequate abatement requires more than appropriate medical treatment.

1. Persistent Occurrence of Injury

Injury rates from the cited hazard are one aspect of assessing the effectiveness of an existing abatement approach. *SeaWorld*, 748 F.3d at 1215 (existing safety procedures held inadequate where evidence showed employer's training and protocols did not prevent continued injuries). Respondents argue that the OSH Act does not provide "certainty" about eliminating the risk of injuries. (UHS-Fuller Br. 68-69.) This case is in a far different category from those where degrees of certainty are at issue. Staff were routinely assaulted and suffered injuries from aggression and the response to it.[228] Some multiple times.[229] Respondents like to blame one patient for a rise in violence in April 2019 (before the citation) and then blame another rise in July

[228] Tr. 75-76, 99-101, 234-36, 238-39, 241, 322-23, 2093; Exs. RF-32 at 4, S-1, S-1B, S-11, S-54, S-57, S-61, S-68, S-228, S-229, S-241, S-248, S-249, S-251, S-252, S-253, S-255, S-256, S-257, S-259, S-260, S-261, S-264, S-266, S-334, S-337, S-338, S-383, S-385.

[229] Ex. S-11. For example, an MHS was slapped in the face and kicked in the groin on August 22, 2019, and also kicked and thrown off a patient she was trying to restrain on February 22, 2020. (Tr. 75-76, 99-101; Ex. S-383.)

2019 on a different patient.[230] These were not aberrant one-off occasions. While the individual patients changed, having aggressive and sometimes violent individuals at the Worksite was routine.[231]

The level of violence at the Worksite was an outlier among for-profit behavioral health facilities.[232] UHS-DE considered the Worksite "high risk" among its affiliates in 2019. (Tr. 1279, 2093.) There were hundreds of incidents of aggression in 2019, requiring 69 employees to seek medical attention for their injuries.[233] The number of injuries and workplace violence incidents may not be dispositive, but they support the Secretary's claim that the abatement implemented at the Worksite was inadequate.[234]

---

[230] UHS-Fuller cites the significant limitations of some patients in the developmental delay unit. (UHS-Fuller Br. 5, 41.) This too is misdirection. Neither the July 18, 2019, nor February 22, 2020 incidents occurred in that unit. (Ex. S-397 at 4-19.) The developmental delay unit may have had more incidents, but it was not the only unit to have many incidents of aggression. (Tr. 1257-58; Ex. S-68.)

[231] Tr. 1240, 1246, 1250, 1252, 1255-1257, 1333-36; Exs. S-54, S-57, S-61, S-62, S-68. In other words, the names and faces changed but the hazard remained. (Tr. 1279; Exs. S-1, S-1B, S-11, S-54, S-55, S-61, S-152, S-397.)

[232] Tr. 1279, 2093. Ex. S-397 at 34. Rates of violence against staff in behavioral health facilities run by non-profits is generally lower than those in for-profit facilities of a similar type. (Tr. 2092-93, 2098, 2246-47; Exs. S-397 at 34, RF-90.)

[233] Tr. 1246, 1250, 1252, 1255-1256, 1262-64; Exs. S-52. S-53, S-54, S-55, S-57, S-60, S-61, S-62, S-68. From January 2019 through September 2019, 79 injured employees were directed to consult Sedgwick after an incident. (Tr. 1256; Exs. S-54, S-61, S-62, S-68.) Ms. Bricault acknowledged that employees would not contact Sedgwick unless they had been injured. (Tr. 1256.) For all of 2019, of those who contacted Sedgwick, 69 required further medical care. (Tr. 1256-57, 1263, 1267; Ex. S-68 at 8.) Ms. Bricault does not consider something an injury if Sedgwick advises self-care. (Tr. 1256-57, 1333-36.) To be injury, the employee must have need medical attention beyond calling the Sedgwick triage hotline. (Tr. 1240, 1256-57, 1264, 1333-36.) Using that definition of injury, Ms. Bricault calculated the injury rate for the Worksite. *Id.* The Worksite's injury rate was consistently double the "goal" rate. (Tr. 1265-66, 1333-36; Exs. S-54, S-57, S-61, S-68.) In absolute numbers, the Worksite had a "goal" of no more than 43 staff injuries but ended up with 75 in 2019. (Exs. S-54, S-68; Tr. 1333-36.)

[234] Ex. S-397 at 58. The only case UHS-Fuller cites when discussing the role injuries in assessing the adequacy of abatement is an Eighth Circuit decision from the early days of the OSH Act. (UHS-Fuller Br. 68 discussing *Brennan v. Vy Lactos Labs., Inc*., 494 F.2d 460 (8th Cir. 1974).) In that matter, the Eighth Circuit concluded that the Commission's decision did not find the employer had knowledge of hazard and remanded the matter. 494 F.3d at 464. After remand to the Commission, the employer withdrew its notice of contest. *Vy Lactos Labs., Inc.*, 1 BNA OSHC 1774 (No. 31, 1974). Here, the Secretary showed both actual knowledge and recognition of the hazard.

2. **Training**

An MHS who began working at the facility near the start of OSHA's investigation explained that the training she received did not prepare her for the situations she faced at the Worksite. (Tr. 65, 100-1, 217.) For example, it did not address techniques to intervene in sexual assault, although confronting such situations was required.[235] Further, the training included only brief discussions of various physical maneuvers to mitigate being injured from patient violence. (Tr. 218, 321.) In practice, some of the maneuvers were not "very successful." (Tr. 99-101, 218, 282; Ex. S-55.) For instance, she was repeatedly thrown off by a patient and kicked in the face as she and other staff members tried to restrain him with the techniques taught. (Tr. 99-101; Ex. S-443A.) Aggressive patients injured multiple employees during the same incident. (Tr. 101-3; Ex. S-443A.)

Management employees differed in their view of whether the training consistently prepared employees for the hazard of workplace violence. The CFO conceded that "one of the things we need to do better is orientation and training." (Tr. 408-10.) In 2019, he witnessed about one restraint a month and saw employees assaulted. (Tr. 393, 395.) He was involved in routine meetings about staff injuries and patient aggression. (Tr. 395-97.) He described gaps in the training, noting that some new hires have little or no prior experience with patient care, let alone the complex psychiatric patients treated at the Worksite. (Tr. 230, 332, 408-10.) In contrast, the CEO claimed that the verbal de-escalation techniques taught prevented many incidents and described the training as "robust." (Tr. 2354-55.)

Dr. Welch reviewed the training materials related to the cited hazard. He opined that the high rates of behavioral incidents and employee injuries related to violence showed that the

[235] Tr. 87-88. Addressing "sexual allegations/boundary violations" was a responsibility of MHSs. (Exs. RF-32 at 4, RF-33 at 10.)

training was inadequate to keep employees safe from patient aggression.[236] Trained staff were sometimes unable to manage aggressive patients. (Ex. S-397 at 58.) Further, the low number of staff in the units, their physical capabilities, and the high staff turnover undermined the training's effectiveness at abating or mitigating the hazard. (Tr. 1886-92; Exs. S-123, S-397 at 34, 46-47.)

UHS-DE claims UHS-Fuller utilized the "resources" it provides to address the cited hazard. (UHS-DE Br. 23, 50.) Those included a Loss Control Department whose purpose is to "promote a safe work environment," and the Staff Safety Initiative, a program to provide extra assistance to address workplace violence.[237] The Secretary points out that the Worksite was not selected to be in the touted Staff Safety Initiative. (Sec'y Br. 17-18; UHS-Fuller Br. 37, n.7.) UHS-DE focused the extra resources provided through the Staff Safety Initiative on the facilities with the highest injury rates. (Tr. 1526, 1534-35, 1691.) The Worksite's injury rate placed it in this category, but UHS-DE did not select it for the program.[238] Respondents failed to show how the program mitigated the hazard at facilities, like the Worksite, which did not receive the "extra resources" to address workplace violence. (Tr. 1520-26, 1691-92.)

Site visits by UHS-DE's Loss Control Department noted issues with the training as implemented at the Worksite and the impact of inexperienced staff. (Exs. S-52, S-53, S-54, S-55, S-59, S-61.) Employees either did not know the appropriate restraint techniques to minimize injuries to themselves or were unable to use the techniques in the conditions at the Worksite. *Id.* Similarly, how to call for additional assistance to address violence and what to do when responding

[236] Ex. S-397 at 58. Officer Brunelli also cited better training as something that could have prevented or reduced the violence he observed at the Worksite. (Tr. 677.)

[237] UHS-DE Br. 24, 50-51; Tr. 1520-26, 1652-53, 1691-92. The Staff Safety Initiative assesses the participant facilities and then makes specific recommendations for areas related to employee safety and workplace violence. (Tr. 1652-53; UHS-DE Br. 24, 51.)

[238] Tr. 1267, 1321, 1535, 1655. UHS-DE decided how many facilities participated in the program. (Tr. 1535.)

to such a request were addressed during training. (UHS-Fuller Br. 34, 50-52, 69, 77.) Still, in practice, both new and "seasoned" employees did not always know what to do.[239] Viewing the training in connection with WVPP's overall implementation, it did not effectively mitigate the hazard and was insufficient to prevent many injuries.[240]

3. Post-Incident De-briefing & Camera Reviews

Respondents acknowledged the importance of reviewing workplace violence incidents to reduce the number and severity of subsequent occurrences.[241] They cite debriefing as a component of their WVPP and claim to perform post-incident debriefing with camera reviews after incidents of workplace violence. (Tr. 447, 1133-34, 2605-6, 2734-35; Exs. S-55 at 2, S-121.)

UHS-Fuller claimed there was "a debriefing with staff after every code" and that it maintained records of these debriefings. (UHS-Fuller Suppl. Br. 6.) At best, this statement goes well beyond the record. Ms. Britto, a supervisor, was not asked whether debriefings always occurred. She only said she was involved in debriefings and described a time, before OSHA's investigation, when she completed written debriefing forms. (Tr. 2951-52.) For incidents that occurred when she was not working, she did not claim she spoke to those involved or completed the debriefing form called for by Respondents' policies. (Tr. 2951.) Instead, she said she would "reference any codes in regards to staff injury, any staff questions and at times review video." *Id.*

---

[239] Tr. 470, 505; Exs. S-11, S-52, S-57, S-397 at 58. Although there were debriefing forms produced for only a fraction of the incidents of aggression at the Worksite, they do not suggest that injuries or improper techniques were confined to a few people. (Tr. 1179-80; Ex. S-11.)

[240] Ex. S-68. In discussing training, UHS-Fuller cites a case involving a violation of standard that required a specific type training. (UHS-Fuller Br. 99 discussing *N&N Contractors, Inc.*, 18 BNA OSHC 2121 (No. 96-0606, 2000) *aff'd*, 255 F.3d 122 (4th Cir. 2001).) In *N&N*, the Commission found that the employer had a poorly implemented safety program and upheld a violation of the fall standard. 18 BNA OSHC at 2125. It also vacated the alleged violation of the training standard finding the Secretary failed to meet his burden of proof to establish employees did not receive the training specified in the standard. *Id.* at 2128.

[241] Tr. 1133, 1302-3, 1585-86, 1704, 2352-53, 2787; Exs. S-121, S-166, S-459, RF-7; UHS-DE Br. 3; UHS-Fuller Br. 3, 36-37.

She did not claim she would discuss the incident or create or maintain a record of such incidents. *Id.* Nor did she make any claims about what other unit managers did after codes. (Tr. 2951-52.)

The issue is not whether debriefings ever occurred at the Worksite. The issue is whether debriefings consistently occurred and their scope. Management claims about debriefing every incident were contradicted by the testimony from front-line workers and other evidence.[242] The debriefing documentation does not cover every incident during which an employee was injured, let alone every incident of workplace violence.[243]

SM frequently witnessed or was otherwise involved in responding to violent incidents at the Worksite. (Tr. 157.) Violent events occurred "more often than not" on her shifts.[244] She participated in between 30 to 50 restraints of patients in the two years she was at the Worksite. (Tr. 65, 157, 159-60.) She was never shown video of incidents in which she had intervened and could only recall one post-incident debriefing during her entire employment. (Tr. 157-58, 160; Ex. S-11.) No one debriefed her after she was assaulted on August 22, 2019, or after she intervened to stop a sexual assault on February 22, 2020. *Id.*

SM's experience was not unique. Debriefing forms for about forty incidents that occurred during OSHA's six-month investigation were produced. (Ex. S-11 at 72-161.) The summaries from loss control visits indicate more employee injuries than those documented in the debriefing

[242] The CFO drew a distinction between the need for debriefings after restraints as opposed to after employee injuries. (Tr. 445.) He recalled debriefings after patient restraints but not if the violence or staff injury was unrelated to a restraint. *Id.*

[243] Tr. 1179; Ex. S-11. Likewise, while Respondents maintained some debriefing forms, there certainly is not documentation for many incidents. They cannot maintain what was never created. Thus, both aspects of UHS-Fuller's claim that it does a debriefing after every code and maintains records of these debriefs is rejected. (UHS-Fuller Suppl. Br. 6.)

[244] Tr. 157, 160. Her testimony is consistent with Mr. Martin's. He is not a direct care employee and only works day shift. (Tr. 2852, 2875.) Still, he responds to 15-20 codes a month. (Tr. 2874-75.)

forms.[245] For example, in June 2019, there were 49 restraints of aggressive patients but only about ten incomplete debriefing forms for the month.[246]

The debriefing forms were often incomplete and did not include interviewing the injured employee.[247] Ms. Bricault identified issues at the Worksite with the interviews of injured staff. She highlighted the need for managers to conduct such interviews so they could understand the reason for patient aggression.[248] No debriefing forms were produced for the July 18, 2019 riot or for when the MHS interrupted the sexual assault. (Tr. 157-58; Exs. S-11, S-178, S-397 at 14; Sec'y Br. 26.)

Dr. Cohen acknowledged that debriefing employees about incidents is important and recognized it as one component of a WVPP. (Tr. 3373.) He agreed that camera reviews could be an important part of post-incident investigations, noting that they allow people to capture behavior

[245] Exs. S-1B, S-11, S-51, S-52, S-53, S-54, S-61, S-62, S-68. In the first six months of 2019, there were 788 incidents of aggression, with a majority of those incidents requiring employees to physically intervene and restrain the patient. (Tr. 1337-38; Exs. S-54, S-55, S-56.)

[246] Ex. S-56, S-11. The debriefing forms indicate ten different employees were injured on ten dates. (Ex. S-11 at 66-91.)

[247] Tr. 2172; Ex. S-11. The form has two main sections. The first is titled, "POST Incident STAFF DEBRIEFING," and is one page long. (Tr. 1179-80, Ex. S-11 at 32.) It asks who was interviewed about the incident. *Id.* Frequently, this portion is blank or does not include the injured employee. *Id.* The second section is titled "Camera Review of Systems/Incident," and is two pages long. (Ex. S-11 at 33.) This section asks whether "injured staff" reviewed the footage. (Ex. S-11.) This question is frequently left blank or indicates the injured staff did not review the footage. (Tr. 2953-54, Ex. S-11.) There are multiple blanks in the forms for these dates which occurred during OSHA's investigation: June 12, 2019, June 16, 2019, June 26, 2019, July 12, 2019, August 6, 2019, August 9, 2019, August 16, 2019, September 17, 2019, September 19, 2019, September 29, 2019, October 3, 2019, October 14, 2019, and November 20, 2019. (Ex. S-11.)

[248] Tr. 1238-39; Exs. S-52, S-60. Ms. Britto was a unit manager during OSHA's investigation and later become the Director of Staff Engagement. (Tr. 2944, 2959.) Her debriefings happened only verbally and generally did not include a review of related video footage. (Tr. 2951-52.) She did complete a written debriefing after an incident that injured several employees in April 2019. (Tr. 2952-54; Ex. S-11 at 32-43.) According to Ms. Britto, she interviewed three injured workers and then completed the forms herself. *Id.* The forms are identical except for the name of the injured employees. (Tr. 1963-68, 2953; Exs. S-11 at 32-42, S-397.) In the section to identify who was interviewed as part of the debriefing, Ms. Britto did not list any names, titles or interview dates in the spaces for such information on the forms. It appears that Ms. Britto also conducted a camera review on May 15, 2019 for an incident that occurred the prior day. (Ex. S-11 at 51-53.) Like the forms she discussed at the hearing, the form for the May incident does not indicate that she interviewed the injured employee. *Id.* at 51-52.

before the violence and see how the staff intervened before injuries occurred. *Id.* Such reviews can help determine improvements in staff interventions.[249]

Dr. Welch shared Respondents' understanding of the importance of debriefings that include camera reviews. (Ex. S-397 at 30, 41, 54, 56.) He considered such reviews "a well-accepted tool for identifying opportunities for improvement, and for educating staff." *Id.* at 30, 54. Although the policy of debriefing staff after every incident of patient aggression was "standard," Respondents' implementation of the policy was "inconsistent and ineffective." *Id.* at 53-57. The written debriefings failed to capture even "devastating and remarkable" events. (Ex. S-397 at 14, 16, 53, 56.) The process often did not include staff involved in violent incidents or a review of the video.[250] By not obtaining the input of the involved staff members, Respondents "simply cannot learn" from errors and improve. (Ex. S-397 at 14, 54, 56.) Not accurately investigating and debriefing episodes of severe violence "prevents critical clinical information from being shared" and "materially increases the risk of workplace injury due to violence" at the Worksite. (Exs. S-11, S-397 at 56.)

[249] Dr. Cohen believed that debriefings occurred, and that Respondents tried to learn from incidents. (Tr. 3375.) This conclusion is rejected. First, Dr. Cohen was not asked to assess the abatement in place at the Worksite. (Ex. RF-67 at 1.) Second, he was uncertain about whether he reviewed any debriefing forms, and they are not listed in the "sources of information" section of his report. (Tr. 3140; Ex. RF-67 at 2-4.) Third, it is difficult to accept the conclusion that the process was adequate and/or effective at abating the hazard when the related documentation is often missing or incomplete. *See Chevron Oil Co.*, 11 BNA OSHC 1329, 1333 (No. 10977, 1983) (abatement not adequate when inspections were "haphazard and unsystematic," which precluded the collected data from being used accurately).

[250] Tr. 157-60, 445, 580-81, 1018, 1959-61, 1964-69, Exs. S-11, S-68, S-397 at 14, 53-56. Respondents reviewed video to confirm whether statements about employee injuries were accurate or if, in management's view, employees needed to work without taking their breaks was necessary. (Tr. 2732, 2735, 2769.)

Information from incident reviews is only beneficial if it is "used" to improve staff safety. (Exs. S-51 at 2; S-53 at 1.) Because Respondents failed to ensure their debriefing policies were followed, this abatement method did not effectively reduce the hazard to the extent feasible.[251]

4. **Staffing**

Respondents cite staffing provisions in their WVPP as another aspect of the Worksite's existing abatement.[252] They fail to elaborate on what those policies and procedures are or, more importantly, as implemented, how effective they are at abating the hazard. Despite this lack of precision, Respondents recognition of the importance of adequate staffing to reduce incidents of workplace violence and mitigate the hazard when it occurs is apparent.[253]

Dr. Haltzman and Ms. Legend heard complaints from workers about the impact of staffing levels on employee safety. (Tr. 396-97, 2334-35, 2761.) Ms. Bricault also heard concerns about staffing and would mention these in the loss control meetings she led with supervisors for the Worksite. (Tr. 1192-93, 1307-8.) Other employees raised concerns to management about staffing levels being insufficient for safety and requested higher levels of staffing. (Tr. 160, 242, 324-25, 396-97, 2761.)

There was no on-site security team to intervene when staff is assaulted. (Tr. 72, 178-79, 565, 929, 2258; Ex. S-397.) Instead, Respondents task the direct care providers with ensuring

[251] *See UHS Centennial*, 2022 WL 4075583, at *17, 55-57 (finding employer's approach to debriefings at a behavioral health facility ineffective in abating the hazard of workplace violence when the debriefings did not consistently occur and were limited in scope); *UHS of Westwood Pembroke, Inc., UHS of De., Inc.*, No. 17-0737, 2022 WL 774272, at *27 (OSHRCALJ Feb. 19, 2020) (finding debriefings at a behavioral health facility ineffective at abating the hazard of workplace violence when policy did not cover all workplace violence incidents and the ones that were conducted were often incomplete), *aff'd*, 2022 WL 774272 (not specifically discussing debriefing but upholding ALJ's conclusion that existing abatement, which included debriefings, was inadequate). Here, having destroyed the related ESI, Respondents cannot now claim they reviewed and implemented lessons from such footage. See Section II.B.3 above.

[252] UHS-Fuller makes various claims about its staffing without citation to the record. (UHS-Fuller Br. 3, 72-74.)

[253] For instance, loss control visits assessed whether the Worksite was "appropriately staffed to ensure safe patient-to-staff ratio(s)." (Tr. 1703-4; Ex. S-121.)

patient care and safety as well as their own. *Id.* During its investigation, OSHA learned from employee interviews that there was not always enough staff to respond to workplace violence incidents. (Tr. 562, 565, 929; Ex. S-24 at 8-10.) The frequent police calls indicate that often there were neither enough people in absolute numbers nor enough people with the right skills to manage assaults or riots.[254] Having police in care units was "dangerous" and "unsafe," as "they come onto the unit with guns." (Tr. 2782-83, 2786.) "There are lots of different things that can happen when police enter the unit."[255] While the CEO appeared to prefer that staff not contact the police, she did not explain who could have promptly provided the assistance needed during situations like the July 18, 2019 riot. (Tr. 2782, 2784-87.)

Dr. Welch and Officer Brunelli raised concerns about needing police intervention to manage behavioral health emergencies. (Tr. 664-65, 667, 669-70, 727-28; Ex. S-397.) Dr. Welch considered it "highly traumatic" for patients to be handcuffed and for other patients to witness such an intervention. (Ex. S-397 at 13.) Nonetheless, for events like July 18th, given the staffing levels in place that evening, the staff did not have "any alternative to restore basic safety for the patients and staff on that unit other than to call the police." *Id.* Officer Brunelli agreed that if there had been enough staff members in the unit to handle the situation, the police would not have been needed, and this could have prevented or reduced the violence. (Tr. 677-78.)

[254] Stip. 27; Tr. 245-47, 249, 562, 565, 929, 932, 1065-66, 1790; Exs. S-178 ("officers … dispatched … for patients fighting with staff"; S-191 (caller stated that there were "approximately 14 patients rioting and not enough staff"); S-206 (caller stated that "3 young males are acting out of control" and requested assistance because "they are short staffed").

[255] Tr. 2782-83, 2786. Dr. Cohen agreed that firearms represent a danger to inpatient psychiatric units. (Tr. 3304; Ex. RF-82.)

Dr. Welch reviewed documents related to nursing staff patterns, daily reports of the nursing supervisor, incident reports, 1:1 staffing levels, DMH inspection reports, and other documents.[256] Based on his review, he concluded there was "substantial evidence of the inadequacy of staffing" at the Worksite. (Tr. 1880.) At times, staff were "clearly overwhelmed and outnumbered. They're wrestling, brawling with the patients." (Tr. 1811, 1820-21.) As implemented, the staffing policies resulted in frequent understaffing, which exacerbated, rather than mitigated, the hazard. (Tr. 1810-11, 1887-99, 2121-23; Exs. S-123, S-397 at 37.)

Staffing levels also made it difficult to implement the WVPP's mitigation measures. For instance, most units had only three people assigned to work there on the third shift.[257] Yet, the restraint techniques taught can require seven or more individuals.[258] Two people are needed for the upper body, two for the legs, and sometimes one person for the head and one for the wrists. (Tr. 100, 223, 1920, 2873-74.) Additional people not involved in the physical restraint itself are also necessary. (Tr. 1811-12, 1820-21; 2873-74; Ex. RF-7.) One person should continue to do verbal de-escalation. *Id.* One person should lead the code, and one more person should direct other patients away from the incident so that the unit does not become more violent.[259] It was not

[256] Ex. S-397; Tr. 1790-91. He visited the Worksite and spoke with four people who worked there during the inspection period. He had experience with other behavioral health hospitals in Massachusetts and reviewed scientific literature. (Tr. 1918, 1934, 2048-49; Ex. S-397.) Dr. Cohen did not know if care units were in the same building and had not visited the Worksite. (Tr. 3261-62.)

[257] Tr. 226. Other shifts had two more individuals. (Tr. 225.) While patients were supposed to be sleeping for most of the third shift, this was unpredictable. (Tr. 209, 1804, 1813-14, 2442; Exs. S-436 thru S-441.) At night, there were "very few people in the building" to respond to violence. (Tr. 411.)

[258] Tr. 223, 2873-74; Ex. RF-7 at 1. The Code Leadership training described the roles of the people responding to a code a bit different than witnesses. (Ex. RF-7.) However, consistent with the testimony, the training called for needing seven to eight people for restraints. *Id.*

[259] Separating the other patients from the violent situation is important because: (1) exposure to violence "can instigate further violence," (2) other patients can be injured by the person being restrained, and (3) exposing patients to violence can be "traumatic." (Tr. 108-9, 177-78, 329, 1821; Ex. S-397.) The policy for the Dr. BERT team also recognized the importance of limiting patient exposure to incidents of aggression. (Ex. RF-14.) It calls for "two additional BERT members" to "be available on the unit to assess for any other patients which may have been triggered by the event." *Id.*

atypical for restraints to require multiple people for up to an hour. (Tr. 104-5, 222-23, 249, 331.) Nor was it unusual for multiple patients in one unit to require restraint simultaneously.[260]

During the investigation, there were times when "there weren't enough people" present to manage violent and aggressive patients appropriately.[261] Respondents consistently aimed to staff the units at the minimum level DMH requires for nursing care.[262] The adolescent unit was extremely volatile in the days before and after July 18, 2019. (Ex. S-397 at 9-10, 13.) Despite the rise in acuity, staffing did not change significantly during this period.[263] Similarly, on the evening of February 22, 2020, the video and police reports suggest that the Worksite lacked capable staff

[260] Tr. 331, 3071-72. Respondents prohibited staff from engaging "in solo efforts toward client containment." (Ex. S-11.)

[261] Tr. 98, 1812, 1821; Exs. S-436 thru S-442, S-443A, S-397. On February 22, 2020, SM and others tried to restrain a patient after multiple acts of aggression. (Tr. 96-100; Ex. S-443A.) SM was laying on top of a patients' legs, but he managed to repeatedly throw her off and kick her in the face. (Tr. 99-100; Ex. S-443A.) Although two people are supposed to be on the legs during a restraint, there was not enough staff available to do that during this incident. (Tr. 99-100; Ex. S-443A.) Later in the same shift, SM had to intervene to stop a sexual assault. She was visibly upset and did not feel she had the appropriate state of mind to return to the unit. (Tr. 156-57.) The house officer told her to return to the unit. *Id.* There was no one to fill-in for her as she recovered. *Id.*

[262] Stips. 8, 11, 20-22; Tr. 1861, 1864, Ex. S-397 at 36-37. In February 2019, the DMH cited UHS-Fuller for failing to meet the state minimum staffing levels for patient care. (Stip. 32; Tr. 2538-59; Exs. S-147 at 13, S-24.) As part of its assessment, the DMH reviewed staffing for a selected two-week period. (Ex. S-147 at 13.) One unit was "well under" the DMH minimum nursing care hours per patient day ("NCHPPD"). *Id.* Another unit was below the minimum NCHPPD for four days in the two-week period reviewed. *Id.* After the DMH inspection, Respondents told the DMH that they adjusted their "staffing tool" to meet DMH standards. *Id.* UHS-Fuller argues that the staffing requirements were "unknown" to it in early 2019. (UHS-Fuller Reply Br. 10.) It does not contend, and there is no support for contending, that the requirement was not capable of being known before DMH's inspection. *Id.* During the inspection period, one unit may have failed to meet the DMH's staffing requirements on two occasions. (Tr. 2721-22, 2792, 2794, 3328; Exs. S-457, RF-2, RF-96.)

[263] Tr. 2830; Exs. RF-96, RF-99, S-397 at 9-10, 13, S-457. During discovery, Respondents failed to provide complete records on staffing levels. (Tr. 373, 630-31.) In particular, the summary of EPOB data for July 2019 was only produced to the Secretary during the hearing. (Tr. 2440, 2265-66, 2719, 2721-24, 2727, 2797; Exs. S-454, S-457, RF-95.) Dr. Welch explained that the withheld information would have been helpful to his review. (Tr. 2254-56.) UHS-Fuller disingenuously argues that the Secretary did not point out the entire column was missing until during the hearing. (UHS-Fuller Br. 21.) Its characterization ignores the fact that UHS-Fuller failed to note information was redacted and did not include the redaction on any privilege log, as required. Unsurprisingly, the Secretary did not identify information which was improperly withheld and of which it he lacked knowledge. The fault for the late production rests with UHS-Fuller.

in sufficient numbers to supervise the patients who became assaultive towards staff early in the evening.[264]

AAD Abundo explained that the pattern of insufficient staffing contributed to the hazard of workplace violence, particularly when there was not enough staff to assist in emergencies. (Tr. 568-69.) Dr. Welch reached the same conclusion. (Tr. 1810-13, 1841-42, 2121-23; Ex. S-397.) Chronic low staffing compounded the other flaws in Respondents' implementation of their WVPP and other abatement measures. (Tr. 1880-85, 1892-93.)

5. **Managing the Milieu**

The Worksite's WVPP called for several actions to manage the milieu, or environment of care, including: (1) "controlled facility access;" (2) "processes to alert staff of patient aggression"; (3) "continual monitoring of patient behavior and communication of warning signs of past and potential assaults of staff"; (4) "environment of care rounding and loss control site visits …. ." (UHS-Fuller Br. 3; Exs. S-62, S-74, S-166.)

As with the other aspects of abatement, milieu management cannot be assessed in a vacuum. Staffing limitations impacted the ability of employees to manage the milieu effectively. (Tr. 2257-58; Ex. S-397 at 41.) "Staff create a stabilizing presence" by, among other things, "engaging" with patients, "supporting positive activities, and responding to patient needs … in a timely and empathetic manner." *Id.* Unmet patient needs are a risk factor for patient violence. *Id.*

[264] Ex. S-397 at 18. UHS-Fuller trumpets the fact that 12 to 13 people responded during multiple acts of aggression on February 22, 2020. (UHS-Fuller Br. 45; Tr. 105-6; Ex. S-443A.) What it fails to account for is that after the initial round of restraints, the staffing level in the unit substantially decreased, leaving one of the aggressors inadequately supervised. (Tr. 1831-39, 1841-43; Ex. S-397 at 18-23.) There was not enough staff in the unit to contain the initial situation and to provide the appropriate level of supervision throughout the evening. *Id.*

Respondents recognized the connection between violence and a lack of engagement in meeting patient needs.[265] How Respondents handled milieu management in practice prevented it from effectively mitigating the hazard. MHSs described the difficulty of providing quality care with too few staff. (Tr. 178-79, 324-28, 330-32.) It made it difficult to appropriately engage patients and timely assist them, as called for by the WVPP.[266]

The incidents of July 18, 2019 and August 22, 2019 highlight some gaps in milieu management at the Worksite. Patient observation rounds and reporting information about patient status were not enough to prevent violence when there was not enough staff to address the observations.[267] Similarly, the code response protocol called for at least one person to be charged with keeping patients away from the violence. (Exs. RF-7, RF-14.) Witnessing recent violence is a predictor of future violent adolescent behavior. (Tr. 3279.) Likewise, while the Worksite had "controlled access," the assistance of armed police was sometimes necessary. (Stip. 27; Ex. S-397

[265] When assessing employee injuries, managers were to examine the patient's activity prior to the violence. (Ex. S-11 at 2, 4.) The debriefing form directs the employee to note "any requests the patient made" and to assess "**[w]hat was the unmet need**." (Ex. S-11 (emphasis in original).) The training for the Dr. BERT program also emphasized responding to patient needs as part of the appropriate response to patient aggression. (Ex. RF-14.) It was difficult for staff to respond to patient needs or requests. (Tr. 327-28, 324-25, 1810; Ex. S-397 at 44-46.) Typically, two or three MHSs were in each unit, per the staffing grid. (Tr. 224-26, 1842-43, 1861, 1863.) Only infrequently was there more staff than required by the grid. (Tr. 1843, 2138.) One MHS must be observing the patients (performing the required checks) 24 hours a day. (Tr. 1842; Ex. S-397 44 n. 34.) If an MHS is on a break, depending on the shift, it can leave only one MHS available to respond to patient needs or requests. (Tr. 225-26; Ex. S-397 at 44- 46.)

[266] Tr. 178-79, 324-28, 331-32; Exs. S-52, S-53, S-74, S-166, S-397.

[267] Tr. 76; Exs. S-74, S-397. An MHS explained how her colleague needed to briefly stop the rounds to come to her assistance because there were no other MHSs in the unit at the time of the assault. (Tr. 76.) Further, simply doing observation rounds was not enough. By reviewing video of incidents in the fall of 2019, Ms. Bricault determined that many incidents occurred during observation rounds and noted that staff might not be responding to patients while engaged in the required checks. (Ex. S-53.) Ms. Bricault frequently advised that staff engage more with patients. (Exs. S-53, S-57, S-60, S-61.) But staff explained that they either lacked the skills or the time to do so. Nor was there evidence to support Respondents' claims that camera footage of all incidents of violence that resulted in an employee injury were reviewed. (Ex. S-58.)

at 13.) The police officers' actions, even when necessary for safety and done at the staff's direction, still resulted in traumatic experiences for patients.[268]

Loss control visits occurred regularly and identified shortcomings in milieu management. (Tr. 1235-37, 1244, 1246; Exs. S-50, S-55, S-53, S-58, S-60, S-61, S-68.) But if Respondents do not address the findings from such assessments or do not allocate sufficient resources to change what is occurring at the Worksite, the assessments lose their effectiveness. Persistent insufficient staffing undermined the potential effectiveness of the milieu management called for by the WVPP.

6. **Medical Treatment**

Respondents also tout their approach to medical treatment as part of their abatement. Its expert emphasized the treatment of mental illness as the effective method of modifying patient aggression. (Tr. 3169.) A doctor or nurse practitioner sees each patient at least once a day. (Tr. 2297.) In addition, the assigned doctor, social worker, unit manager, and nurse periodically review each patient's medical treatment. (Tr. 2284, 2287.) These meetings include discussions of patients exhibiting aggressive behavior and the appropriate level of precautions for patients.[269]

Dr. Welch agreed that effective treatment helps to mitigate the hazard. (Ex. S-397.) Other actions either support the treatment or undermine its effectiveness. *Id.* For instance, persistent insufficient staffing undermined the potential effectiveness of this abatement method. Two MHSs

[268] Tr. 1827-29, 1921, 3277-79; Ex. S-397 at 13. Dr. Cohen agreed it would be distressing and stressful for patients to be handcuffed and distressing for patients to witness violence. (Tr. 3277-78.) Still, he disputed such an experience met the technical definition for trauma. *Id.* Dr. Welch's opinion that it was traumatic for both the child being handcuffed and those watching it was supported by a published study. (Tr. 1827-29; Ex. S-409.)

[269] Ex. S-55; Tr. 2285-87. Information about safety trends, including staff injuries, patient seclusions, and the number of restraints, is also presented to the Medical Executive Committee. (Tr. 2281-82; Ex. S-27.) UHS-Fuller emphasized its focus on reducing the number of restraints because they can injure patients and staff. (UHS-Fuller Br. 50.)

described the difficulty of providing quality care without enough staff.[270] There was not always enough staff to limit patients' exposure to the violence that occurred.[271] Witnessing violence can make patients more likely to become violent and undermines otherwise effective clinical treatment. (Tr. 177-78, 329-31, 1279, 1826-30; Exs. S-68, S-397, S-409.) Even when medical care is the best available, the hazard of workplace violence will not be reduced to the extent feasible without other actions. (Ex. S-397.)

7. Respondents' pre-citation abatement measures were inadequate as implemented

UHS-Fuller argues it "had a comprehensive WVPP," but describes a program not borne out by the evidence.[272] Much of the training and orientation did not align with the Worksite's actual conditions. *See SeaWorld*, 748 F.3d at 1206, 1215 (finding existing safety procedures inadequate); *BHC*, 951 F.3d at 565 (incomplete and inconsistently implemented safety protocols were inadequate to address the hazard of patient-on-staff violence). Time-consuming verbal de-escalation techniques require sufficient personnel to handle other tasks while the attempt to

[270] Tr. 178-80, 331-32. In July 2019, Ms. Bricault noted that "treatment team communication is paramount" and recommended the process for this be developed. (Ex. S-55.) The following month, Ms. Bricault made a similar recommendation, advising that there should be a "process where the staff know how to report issues" with "follow-up from the treatment team" to provide solutions. (Ex. S-52 at 2.) This recommendation remained outstanding the following month. (Ex. S-62.)

[271] This is seen in limited the videos preserved from July 18, 2019. Videos from other workplace violence events could have shed light on whether staff were able to keep patients away from aggression as called for by Respondents' policies. The Secretary was deprived of the best evidence of whether this occurred. See Section II.B.2 above.

[272] UHS-Fuller Suppl. Br. 5-6. For instance, its claims about debriefing every incident and maintaining records of the debriefings are not credible. (Ex. S-11.) While Respondent the WVPP called for widespread and consistent debriefing, there was a profound mismatch between the number of injuries and debriefing forms completed. *See Roadsafe*, 2021 WL 5994023, at *6 (finding safety measures inadequate when they conflicted with industry standards and the employer's job safety analysis). *Cf. Jones & Laughlin Steel Corp.*, 10 BNA OSHC 1778, 1782-83 (No. 76-2636, 1982) (finding abatement adequate when employees understood the rules and hazards, there were adequate reminders, there was adequate discipline when rules were not followed, and a need for further monitoring was not apparent).

verbally de-escalate a patient continues. Likewise, the restraint techniques required more employees than were readily available in each unit.[273]

Injuries persistently occurred, several times a month. (Exs. S-11, S-55, S-56, S-63, S-68.) SM's assault on August 22, 2019 highlights deficiencies in Respondents' existing abatement. The level of staff met Respondents' policies. Yet, when SM was attacked, the only two other people in the unit could not assist her promptly. One was conducting observation rounds which required checking on all 18 patients, and the other was handing out medication.[274] Both tasks required focused attention. The MHS responsible for checking on the patients was in a difficult position, faced with the choice of aiding her colleague during an assault or continuing the critical work of checking on the other patients. Likewise, it is unsurprising that a nurse passing out medication might not realize a co-worker was yelling for help down a hallway. SM had no way to directly alert someone not involved in patient care when she needed assistance. The techniques taught to her in training were insufficient to stop the attack or end it promptly once it began. There were not enough other people in the unit to hear her yelling and respond to it right away. The lack of a prompt response interfered with the desire to maintain a therapeutic milieu. And there was little attempt to learn from the situation.

The Secretary established that, as implemented, the existing abatement was inadequate.

---

[273] Claims that the level of staffing consistently increased to account for acuity are not supported. (Exs. S-166, S-397.) Similarly, although medical treatment is critical, that cannot be the sole approach to abatement. There must be enough staff to identify the early stages of patient aggression and time to communicate with the treatment team so they can make adjustments. (Exs. S-11, S-52, S-55, S-62, S-397.) Further, exposure to a violent milieu undermines the effectiveness of other treatments. (Tr. 1826-30; Exs. S-397, S-409.)

[274] A third person, an MHS, was on a break. (Tr. 76.) The CEO emphasized that employees should be taking all their breaks and criticized employees who worked through their breaks. (Tr. 2729-31, 2733-34, 2750, 2752-53, 2758-59; Ex. S-18.) UHS-Fuller says employees can "communicate their need for assistance using the walkie talkies available on the unit and carried by staff when off unit." (UHS-Fuller Suppl. Br. 6.) But there was only one pair of devices for each unit. If an employee took part of the pair off the unit, those on the unit could only use the remaining device to call the employee supervising patients outside of the unit. Neither SM nor the other MHS in the unit had access to a walkie talkie during the attack.

G. Proposed Abatement

Having established the existing abatement's inadequacy, we turn to whether the proposed abatement is capable of being put into effect and would materially reduce the hazard.[275] The proposed feasible abatement includes four main actions: (1) provide personal panic alarms; (2) maintain adequate staffing, including security staff focused on preventing and responding to violent events; (3) conduct prompt, comprehensive investigations of all incidents of workplace violence; and (4) provide adequate training.[276]

UHS-Fuller, citing *A.H. Sturgill Roofing, Co.*, 27 BNA OSHC 1809 (No. 13-0224, 2019), claims that the Secretary proposed various alternative abatement methods. (UHS-Fuller Br. 79, 90, 92; UHS-Fuller Suppl. Br. 1-7.) It insists that the Secretary argued that the hazard could only be materially reduced through a combination of actions. (UHS-Fuller Suppl. Br. 2-5.) This position is not supported by the testimony quoted in its Supplemental Brief or other evidence.[277]

---

[275] *Integra*, 2019 WL 1142920, at *12. The undersigned reiterates that had the destroyed ESI been available, it would have supported a finding that the proposed abatement is feasible and would materially reduce the hazard of workplace violence at the Worksite. The destroyed ESI would have been unfavorable to Respondents, and helpful to the Secretary, on the issue of the feasibility and effectiveness of the Secretary's proposed abatement. See Section II.B.3 above.

[276] Relying on *Mid-South Waffles*, No. 13-1022, 2019 WL 990226 (OSHRC Feb. 15, 2019), UHS-Fuller argues that the Secretary failed to provide adequate notice of the proposed abatement. (UHS-Fuller Br. 63-65, 92.) *Mid-South* did not turn on notice of the proposed abatement measure. Rather, what was at issue there was whether the Secretary established a feasible and effective means of abatement. 2019 WL 990226, at *6. The Secretary had proposed an end goal of a regularly cleaned grease trap, but not the additional steps the employer needed to take to reach the goal. *Id.* The Commission did not hold that the Secretary must establish that the employer knew before the citation's issuance how to abate the hazard. The Secretary's obligation when it comes to abatement, as was reiterated in *UHS Pembroke*, is to establish that "feasible and effective means existed to eliminate or materially reduce the hazard." 2022 WL 774272, at *2.

[277] UHS-Fuller Suppl. Br. 2-5 citing Ex. S-397 and Tr. 1878, 1917-18, 1936, 1956-57, 1977. The Citation and the Secretary's briefs do not provide support either for these assertions. (Ex. S-148; Sec'y Br. 32-33, 69, Sec'y Supp. Br. 15-16, 19.) For instance, the Secretary did not cite to *Sturgill* in its briefs, which supports the view that he was not proposing the measures as alternatives.

Like in other cases concerning workplace violence, the Secretary proposed multiple actions to reduce the hazard.[278] He offered expert testimony that each proposed action, individually, would materially reduce the hazard. (Tr. 1878, 1917-18, 1936, 1956-57, 1977; Ex. S-397.) There is no contradiction in arguing that each measure would individually result in a material reduction while also viewing each as part of a comprehensive process to reduce the hazard to the greatest extent feasible. To prove a violation, the Secretary only needs to establish one feasible and effective method of inducing a material reduction in the hazard. *UHS Pembroke*, 2022 WL 774272, at *9-12. Nothing precludes the Secretary from offering additional evidence. *Id.* (finding communication devices and equipment for de-escalation each were feasible and effective methods of abating workplace violence hazard).

Further, even if Respondents thought the Secretary was proposing various alternatives, Respondents have not implemented any of the proposed abatement in the manner the Citation describes. For one, employees did not have personal panic alarms when working close to patients and in areas out of sight of other staff. Second, contrary to the Secretary's proposal, there was no trained security staff without patient care responsibilities on any shift, let alone all three shifts. Nor was staffing maintained at levels adequate to address changes in patient acuity and the patient census.[279] Third, Respondents had not implemented a system of prompt, comprehensive

[278] Tr. 1983-84; Ex. S-399. *See UHS Pembroke*, 2022 WL 774272, at *7-8 ("The Sectary's approach in this regard aligns with the nature of workplace violence, which as alleged here arises in different contexts and conditions at [UHS-Pembroke], necessitating different abatement measures"); *Integra,* 2019 WL 1142920, at *12-13 (considering numerous proposed abatement measures as means of materially reducing workplace violence hazard alleged under general duty clause); *BHC Nw. Psychiatric Hosp., LLC, v. Sec'y of Labor*, 951 F.3d 558, 564 (D.C. Cir. 2020) (Secretary proposed "menu" of abatement options to materially reduce workplace violence hazard alleged under general duty clause); *UHS Centennial*, 2022 WL 4075583, at *27 (abatement measures were "a process by which Respondent could achieve a material reduction in the hazard of workplace violence"); *Pepperidge Farm*, 17 BNA OSHC at 2033-34 (specifying that the Secretary may require an employer "to engage in an abatement process").

[279] Dr. Welch explained that when there is an increase in the patient census, sometimes Respondents will add a staff member for only half a shift in a particular unit. (Ex. S-397 at 36-38.) This technically satisfies the DMH required minimum level of staffing for patient safety, but, in his view, leaves the unit understaffed for a half a shift. *Id.*

investigations of all incidents of workplace violence. The Secretary also calls for debriefings to include the retention of video footage of all incidents of workplace violence. Respondents failed to retain footage even when subpoenaed. Fourth, although Respondents trained employees, the training did not adequately prepare new employees to respond to the hazard in the context it occurred at the Worksite. The techniques called for more people than were available in the units, and the method for calling for additional assistance was flawed. Thus, the resources available did not match what the training identified as needed to implement the techniques properly.

Sturgill presented a different situation. There, the Commission concluded that any one of five actions would be sufficient abatement for the cited hazard. 2019 WL 1099857, at *8-10. In contrast, no single action can abate the hazard at issue here.[280] Rather than alternatives, the Secretary proposed a series of abatement measures, each individually capable of materially reducing the hazard and collectively a process.[281] *Id. See also Nat'l Realty v. OSHRC*, 489 F.2d at 1266-67 ("All preventable forms and instances of hazardous conduct must, however, be entirely excluded from the workplace").

To satisfy the abatement requirement, "the Secretary need only prove that at least one of the measures he proposed was not implemented and that the same measure is both effective and feasible in addressing the alleged hazard." *UHS Pembroke*, 2022 WL 774272, at *9. *See also BHC*, 951 F.3d at 564 (Secretary proposed a "menu" of abatement options to materially reduce the

[280] Respondents' claim that their existing abatement is made up of many actions and programs. (UHS-Fuller Br. 3.) They refer to the "steps" that need to be taken to appropriately abate the hazard of workplace violence to the extent feasible. *Id.* at 1, 68-70, 115. Similarly, Dr. Cohen opined on the Secretary's proposed "abatement measures," referring to them in the plural rather than individual alternatives. (Ex. RF-67 at 1.) *See UHS Pembroke*, 2022 WL 774272, at *12-22, 26-27 (finding that a single action could not abate the hazard of workplace violence at a behavioral health facility); *Pepperidge Farm,* 17 BNA OSHC at 2033 (Secretary did not have to establish that a single action could abate the hazard).

[281] The Secretary acknowledges the interrelatedness of the proposed abatement measures. (Sec'y Suppl. Br. 16.) Still, he maintains that each method is distinct. *Id.* For instance, some of the actions are preventative while others are mitigative. *Id.*

hazard of workplace violence); *Beverly Enters., Inc.*, 19 BNA OSHC 1161, 1190 (No. 91-3144, 2000) (consolidated); *Pepperidge Farm,* 17 BNA OSHC at 2033-34; *UHS Centennial*, 2022 WL 4075583, at *26-27 (discussing *Sturgill*). Reliable expert testimony is sufficient to establish that an abatement method would materially reduce the hazard. *See Integra*, 2019 WL 1142920, at *13-14 (finding that reliable expert testimony is sufficient to establish that an abatement method would materially reduce a hazard, even if the expert cannot quantify the reduction). As the D.C. Circuit explained:

> the Secretary need not quantify the extent to which that program and its component parts "would have materially reduced the likelihood" of patient-on-staff violence. *Nat'l Realty*, 489 F.2d at 1267. Instead, the Secretary satisfied the General Duty Clause's test by establishing that a comprehensive workplace safety program would more effectively and consistently apply measures designed to reduce patient-on-staff violence than [the employer's] present system did.

BHC, 951 F.3d at 565. Alternatively, successful use of a similar approach elsewhere can establish effectiveness. *See Pepperidge Farm*, 17 BNA OSHC at 2034.

The Secretary established that each of his proposed methods of abatement was effective and feasible. Respondents failed to rebut his evidence.

1. **Personal Panic Alarms**

One step of the Secretary's proposed feasible abatement methods is to provide personal panic alarms and training on such equipment:

> Provide personal panic alarms for all employees who may work in close proximity to patients and who work in areas out of sight of other staff. Provide training on this equipment and ensure that the equipment is maintained in working order at all times.

In short, this aspect of the proposed abatement calls for providing employees with the means to quickly summon assistance and ensure they know how to use the device.

Respondents recognized the need for communication devices as part of an effective abatement program.[282] They sidestep the limited availability and utility of the devices provided. At the time of OSHA's inspection, employees were supposed to carry a walkie-talkie device when escorting patients off the unit. (Tr. 83-84; Ex. S-63.) The walkie-talkie connected to one other device, which remained on the unit. *Id.* There was only one pair of devices per unit. *Id.* Those working on the unit had to shout or manage to get to the phone at the nurses' station to request assistance with violent or aggressive patients. (Tr. 85-86.)

As part of his review of this abatement method, Dr. Welch assessed scientific literature, professional guidelines, OSHA guidelines, practices at other hospitals, clinical experience, the hearing testimony, and conversations he had with other employees. (Tr. 1936-49; Exs. S-397 at 34-35; S-418, S-420 at 4, 11.) He discussed one study that found that panic alarms had a significant effect on staff safety. (Tr. 1940-42.) Overall, the scientific literature on personal panic alarms was "not very developed," but he pointed to other sources that strongly support using panic alarms.[283] For one, unlike screaming for help or using phones that are only available in limited

[282] UHS-Fuller claimed its WVPP includes "communication devices for staff to call a behavioral health code and summon assistance." (UHS-Fuller Br. 3.) UHS-DE also recognized that personal panic alarms can be a component of workplace violence prevention programs. (Tr. 1687; Ex. S-134.) Ms. Bullick gave a presentation in January 2019 that set out "loss control strategies and initiatives" related to the hazard of workplace violence. (Tr. 1676; Ex. 134 at 7.) The presentation noted the provision of "personal panic alarms" as a strategy or initiative to reduce the hazard. (Tr. 1676, 1686; Ex. 134 at 7.) She attempted to downplay the description, claiming personal panic alarms were noted because they might be something a facility used to address the hazard. (Tr. 1687.) She did not claim such devices were ineffective or infeasible. The presentation and her testimony acknowledge that such devices can be used to mitigate the hazard and that UHS-DE wanted to know whether facilities had personal panic alarms. Ms. Bullick frequently paused and answered hesitantly when questioned about Ex. S-134 and another loss control document, Ex. S-121. (Tr. 1677-89, 1691, 1702-15.) She recognized the documents, acknowledged they were loss control documents, and she led that department. (Tr. 1676, 1702, 1705, 1707, 1715.) She put together Ex. S-134 and "her team" created Ex. S-121. (Tr. 1676, 1710.) Despite this, when asked about the workplace violence prevention strategies outlined in the documents, she could not answer questions or provide further details on multiple aspects of the documents. (Tr. 1683-84, 1688, 1704-5, 1707, 1710-14.)

[283] Tr. 1936, 1949, 1952; Exs. S-397 at 34, RF-76. Medical literature "generally found a positive association" between the use of personal security alarms and reduced assaults on health care staff. *Id.* Dr. Cohen noted that one study found that cell phones were beneficial in terms of protecting from violence. (Tr. 3198.) At the Worksite, employees were precluded from having cell phones on the unit. (Tr. 77, 86, 2591.)

fixed locations, personal panic alarms allow for discreet requests for assistance during emergencies. (Tr. 1937-44.) Silent alarms enable employees to ask for help without the escalation that screaming for assistance creates. (Tr. 1936-37.)

Direct care providers corroborated his view that the proposal would materially reduce the risk of injury from workplace violence. (Tr. 1935-36; Ex. S-397 at 25, 35.) An MHS explained how the existing approach to obtaining assistance prolonged her exposure to the hazard. A patient repeatedly whipped her in the back with a flashlight. There was no phone she could reach, so she "just screamed and hoped" someone would hear her. (Tr. 77.) Another MHS who was supposed to perform only safety checks had to stop her critical work and assist until the unit nurse eventually heard them.[284] The nurse came over, but more help was needed. *Id.* It took more time before someone else could complete calling the code over the intercom. *Id.* And then, the responding individuals had to arrive from other units before they could assist her. *Id.* The MHS continued to struggle with the patient the entire time. *Id.* Without phone access, she was "alone" at the time of the incident. (Tr. 77, 176-77.) While other people were at the Worksite, if she could not get to a phone or make herself heard during the attack, their presence did not matter. *Id.* A few months later, the same MHS had to leave a patient being sexually assaulted when she could not stop the attack by herself. The MHS had to leave the patient's room to yell for help in the hallway before she could return to the patient to try again to stop the assault from continuing. (Tr. 137; Exs. S-32, S-442.)

Another benefit of the proposed abatement over the existing approach is that the devices mitigate the "ripple effect" that occurs when patients hear calls for assistance. (Tr. 176-77, 327,

[284] When assigned to safety checks, the employee is not supposed to restrain patients. (Tr. 77; Ex. RF-7 at 1.) The safety checks require the continuous attention of the person performing them. *Id.*

331.) When patients hear such codes called over the intercom, some act out, forcing the staff to address additional issues besides the one that triggered the initial call for assistance. *Id.* Activating a personal alarm was still advantageous even if an employee could access a phone because it is less obvious and, therefore, less likely to escalate a potentially violent situation. (Tr. 1936-37.) Such alarms allow employees to obtain assistance without making the situation worse. *Id.* They can mitigate the risk of assault and the seriousness of incidents. (Tr. 1940-42.) The employees' real-world experience and knowledge are particularly informative. They know the nature of the hazard at this Worksite and explained why personal panic alarms would materially reduce it.[285]

Respondents also argue that personal panic alarms would not prevent workplace violence incidents. Their argument ignores the mitigative effect of prompt responses to requests for assistance. The MHS explained how she could not call for assistance during her assault and had to leave a patient assaulted to obtain more assistance during another incident. In neither instance could she request aid at the start of the incident. When employees can summon help quickly and effectively, this reduces the likelihood of an employee needing to engage a violent patient alone.[286] In addition, when patients know there is an alarm system and security, there is a deterrent to violent behavior.[287]

---

[285] Tr. 1950-52. The information from direct care workers about this abatement method is credited "very heavily." (Tr. 1951.) Their testimony, like the available videos, displayed what was "actually happening" as to opposed to what management said occurred, when employees attempted to obtain additional assistance with violent or aggressive patients. (Tr. 1952-1955.) The Secretary is entitled to a finding that the destroyed ESI would support his claim that this abatement method was feasible and would materially reduce the hazard of workplace violence. See Section II.B.3 (Summary of Spoilation Sanctions) above.

[286] Ex. S-397. Being alone negatively impacts an employee's ability to perform a hold safely and Respondents' policies generally precluded a single person restraint. (Ex. S-11.) Given the staffing issues identified, it is not unusual for an employee to be alone, rendering the need for each employee to have accessible communication devices.

[287] Tr. 1942-43, 3315. To show the existence of feasible abatement, the Secretary does not have to establish that his proposal would have stopped a particular injury or incident. *Arcadian*, 20 BNA OSHC at 2011-12. Instead, the inquiry is whether the proposed intervention would eliminate or materially reduce the recognized hazard. *Id.* Applying this test, the evidence of the efficacy of the Secretary's proposal is strong. (Tr. 1951-52; Ex. S-397.)

Dr. Cohen essentially argued for a wait-and-see approach. Perhaps, at some point, more scientific studies would conclusively establish panic alarms' benefit in the Worksite's conditions.[288] However, Respondents had already tested the effectiveness of not having such devices. The MHS cited the ineptness of her yells for help and made clear how a personal panic alarm could have resulted in a prompter response to her assault. (Tr. 77.) Likewise, having effective radios for staff to communicate with each other would have prevented or reduced some of the violence on July 18, 2019. (Tr. 677.) Personal panic alarms can mitigate risks associated with workplace violence.[289] Dr. Welch's testimony and the other evidence in the record outweigh Dr. Cohen's ambivalence.

This abatement method is also known to the relevant industry. OSHA reviewed workplace violence prevention systems in place in about a dozen healthcare facilities in its Preventing Workplace Violence: A Road Map for Healthcare Facilities ("OSHA WVP Roadmap"). (Ex. S-423.) The OSHA WVP Roadmap provides concrete examples of how healthcare facilities successfully utilized workplace violence prevention policies and procedures. *Id.* It identifies panic buttons as an engineering control and discusses how one healthcare facility added mobile devices beyond the fixed panic buttons to facilitate obtaining assistance with actual or potentially violent patients. *Id.* at 16, 23.

Other Commission cases found that providing employees with individual communication devices would materially reduce the hazard of workplace violence in healthcare facilities. In *UHS*

[288] Tr. 3200, 3355, 3358. In his view, the scientific literature did not support "definitive conclusions" about the use of personal panic alarms. (Tr. 3358; Ex. S-427.) Dr. Cohen indicated that the size and physical characteristics of a facility is one of the most important factors in the assessment of what kind of alarm system is appropriate. (Tr. 3193-94, 3262.) He never visited the Worksite and did not seem to have a clear understanding of the Worksite's layout. (Tr. 1950-51, 3261-63.) Dr. Cohen was not accepted as expert in whether this proposed abatement would materially reduce the hazard. The employee testimony about panic alarms is weighted more heavily than Dr. Cohen's.

[289] Tr. 1940-43; Exs. S-397, S-420. Dr. Cohen acknowledged that some studies found having a personal panic alarm was associated with lower rates of violence. (Tr. 3200.)

Pembroke, the Commission found that the behavioral health facility's reliance on walkie-talkies and an intercom system was "inadequate."[290] Notably, that facility had more walkie-talkies per patient care unit than the Worksite but still lacked enough for every employee to always carry one. 2022 WL 774272, at *9. Even when combined with the intercom system, the walkie-talkies were not sufficiently effective at abating the hazard. *Id.* The system required an employee to leave a potentially violent situation to access the phone or audibly call out for assistance. *Id.* Other devices "allow employees to immediately seek help without audibly calling for help over a walkie-talkie or with a loud voice," actions which "can agitate a distressed patient and escalate the situation." *Id.* at *10. Such devices reduce "the likelihood of staff becoming victims of patient violence."[291] *Id.* The Commission went on to conclude:

> it is apparent from the record that in the face of patient aggression and the potential for imminent violence, verbally asking or yelling for help in the presence of the distressed individual is not equivalent to silently and discreetly summoning help via a personal panic alarm. For all these reasons, we find that the Secretary has established that … providing personal panic alarms is both feasible and effective.

Id.

The Secretary also calls for training on the equipment and ensuring that the devices are maintained in working order at all times. Respondents and others in the relevant industry agree that employees need an effective way to obtain assistance for addressing violent or aggressive patients. (Exs. S-397, S-418, S-423.) To be effective, the staff must know how to summon

---

[290] 2022 WL 774272, at *9. UHS-DE was a party to *UHS Pembroke.* The Commission found it and UHS-Pembroke should be considered to be a single employer, jointly responsible for the Citation. *Id.* at *2. While there were questions about utility, neither UHS-DE nor UHS-Pembroke disputed the technical or economic feasibility of providing personal panic alarms to those working at the behavioral health facility. *Id.* at *10 n. 12. UHS-Fuller was not a party to *UHS Pembroke.*

[291] In *UHS Centennial*, employees had to either verbally call for assistance or access a telephone from fixed locations. 2022 WL 4075583, at *41-42. Post-inspection evidence demonstrated that it was possible to equip each employee with a radio and that doing so reduced response times. *Id.* Using individual devices rather than the overhead paging system allowed calls for assistance to occur without disturbing other patients and "unnecessarily affecting acuity of the milieu." *Id.* at 42, citing *Sea World*, 748 F.3d at 1215 and *FMC Corp.*, 12 BNA OSHC 2008 (No. 83-488, 1986) (consolidated).

assistance, and the devices must be effective. (Ex. S-397 at 35.) The walkie-talkies did not always work. (Tr. 566, 1950.) During the inspection period, contrary to the Worksite's policies, staff lacked walkie-talkies when escorting patients outside the unit.[292]

Other similar facilities have systems like the one called for by the proposed abatement. (Tr. 1951; Exs. S-397 at 34-35, S-150 at 5; S-423.) There is no evidence that financial or technical barriers precluded using devices at the Worksite. (Tr. 1022, 1951; Exs. S-150 at 6; S-397 at 34-35, S-423.) The proposed abatement method is feasible and would materially reduce the hazard.

Having shown that the existing abatement was inadequate and that the provision of personal panic alarms would be feasible and effective in materially reducing the hazard, the Secretary established a violation of the general duty clause. While further proof is not required, the undersigned will address each proposed abatement.[293]

2. **Staffing**

Two of the Secretary's proposals relate to staffing. First, the Secretary proposes that a feasible means of abatement includes having "trained security staff without patient care responsibilities." Such staff should be available "on all three shifts" and be able "to assist in preventing and responding to violent events." Second, the Secretary proposes adjustments so that there is adequate staffing "to safely address changes in patient acuity and the patient census," as well as enough staff to perform tasks safely.

---

[292] Exs. S-63, S-397 at 35. It is unclear if working devices were unavailable or if the staff was unaware or forgot to take a device.

[293] *See UHS Centennial*, 2022 WL 4075583, at *27 (acknowledging that the Secretary need only prove one of the measures proposed was feasible and would be effective at mitigating the hazard but addressing each of the Secretary's proposals). In *UHS Pembroke*, the Commission held that: "the Secretary need only prove that at least one of the measures he proposed was not implemented and that the same measure is both effective and feasible in addressing the hazard." 2022 WL 774272, at *8-9, n.11. It went on to evaluate two of the Secretary's proposed abatement actions, providing equipment for summoning assistance and equipment for de-escalation. *Id.* at *9-12. Those measures had not been implemented but would have been effective and feasible in reducing the hazard of workplace violence. *Id.* It then concluded UHS-Pembroke, acting as a single employer with UHS-DE, violated the general duty clause and characterized the violation as repeat. *Id.* at *12-13.

a. Trained Staff Dedicated to Security

The Worksite site had no staff dedicated to security. (Tr. 72, 565, 645, 804, 929, 1033, 1067, 2054.) Instead, MHSs served as security in addition to their patient care duties. (Tr. 72, 565.) When an employee cannot address aggression or violence alone, they can request assistance from their co-workers.[294] On the second and third shifts, most of those responding to such requests are direct care employees assigned to take care of patients in the various units.[295] When responding, they leave their assigned patients, and likely the unit, to help with the aggression. (Tr. 1918-19.) The Secretary proposes as a feasible and acceptable means of abatement: "Provide trained security staff without patient care responsibilities on all three shifts available to assist in preventing and responding to violent events."

The Secretary identified multiple foundations to support a finding that providing trained security staff without patient care responsibilities would materially reduce the hazard. Dr. Welch did a "very extensive literature review of the published medical and scientific literature on many topics relevant to workplace violence." (Tr. 1791.) His review included looking at specific factors relevant to workplace violence, such as the use of security. *Id.* He personally had been involved in many physical restraints.[296] Based on his review and experience, he concluded that having security personnel who did not have other patient care responsibilities would materially reduce the risk of injury from the hazard of workplace violence. (Tr. 1917-18.)

His conclusion is supported by, among other things, considering the events of July 18, 2019. The employees were unable to restrain the patients properly. (Tr. 1810-12.) There was no

[294] Employees also called police for assistance. (Stips. 27-29.)

[295] During the day shift, non-direct care workers can respond to Code 22s.

[296] Tr. 1811. Among other things, Dr. Welch was qualified as an expert in patient care and workplace violence at behavioral health hospitals. (Tr. 1770, 1789.)

on-site security or crisis intervention team to assist when more than one patient needed restraint. (Tr. 565, 1812.) Respondents' training and policies indicate that an individual not involved in the restraint should act as the call leader to coordinate the response. Often, there were not enough people to do this or other aspects of proper restraint technique necessary to ensure the process is safe for employees.[297]

Dr. Cohen acknowledged that, sometimes, when there is a motivated offender, a ready target, and no security, "then you have violence." (Tr. 3220.) However, he argued this premise did not hold for the type of violence seen at the Worksite. *Id.* This opinion is rejected. Respondents destroyed the best evidence of the nature of the violence experienced. Further, Dr. Cohen did not attempt to use the available evidence to assess the nature of the hazard as experienced by the employees at the Worksite. He did not visit the units, talk with direct care employees, or view the preserved videos.

Dr. Cohen also agreed that studies have concluded that "security measures may be helpful" in addressing workplace violence. (Tr. 3174-75, 3184, 3283; Ex. RF-67.) Still, he argued that there was inadequate scientific proof that the proposed abatement would materially reduce the hazard.[298] *Id.* For support, he pointed to part of a study by Due et al. (the "Due Study"), which focused on the use of manual restraints in Australia.[299] The Due Study involved the collection of

[297] Tr. 1812; Exs. S-397; RF-7. A former employee told AAD Abundo that during the July 18th riot, they had to call a code multiple times before there was a response. (Tr. 912.)

[298] Dr. Cohen agreed security was appropriate in state facilities treating patients who had been sent to a facility after a legal process. (Tr. 3283-84.) He was not aware of what proportion of patients at the Worksite have a record of incarceration for violent crimes. (Tr. 3285.) The record indicates that some patients had past criminal records, some committed crimes while at the Worksite, and some were later transferred from the Worksite to other types of institutions. (Tr. 645, 929-30, 1031-32.) As noted, Dr. Cohen was accepted as an expert in psychiatry and patient care, but not on the issue of whether the proposed abatements would materially reduce the hazard of workplace violence.

[299] Tr. 3301-2; Ex. RF-74. Respondents recognized a connection between manual restraints and employee injuries. (Tr. 3019.) They adopted several measures to reduce the use of manual restraints. (Exs. RF-15, RF-33, RF-34; UHS-Fuller Br. 50.)

anecdotes and was qualitative, not quantitative in nature. (Tr. 3300; Ex. RF-74.) It showed a correlation, but not a causation, between levels of violence and "shows of force."[300] The Due Study did not examine the relationship between security personnel and injuries to staff. (Tr. 3302.) It does not support eliminating or reducing security at behavioral health facilities like the Worksite. (Tr. 3300-1; Ex. RF-74.)

Actual experiences at the Worksite identify the weakness of stretching the Due Study too far. "Shows of force," like those reviewed in the Due Study, were a part of the Worksite's planned response to aggression. (Tr. 2305.) They were effective in Dr. Haltzman's experience as the facility's Medical Director. *Id.* Having enough staff around the patient can help the patient realize they will not win and calm down without further intervention. *Id.* Dr. Welch and the police officers who testified agreed, explaining how the presence of a security staff alone has a deterrent effect.[301]

Dr. Cohen also suggested a negative correlation between security and a therapeutic environment. However, he overstates the conclusions of the articles he relies on for support. For example, like the Due Study, the articles by Bowers *et al*. indicate a correlation without finding that security causes violence.[302] Unsurprisingly, when there are violent behaviors, it is expected that staff, including security if available, would respond. (Tr. 1927-28.) Further, the studies did not compare facilities where local police are regularly brought into patient care units like at the Worksite.

---

[300] Tr. 3183-84, 3301, 3303; Ex. RF-74. The study authors collected anecdotes from facilities in Australia. (Tr. 3183, 3300; Ex. RF-74.)

[301] Tr. 679, 731, 810, 1942-43. Dr. Cohen also appeared to indicate that uniformed security would have a deterrent effect. (Tr. 3315.)

[302] Tr. 1921, 1925-26, 1928; Exs. RF-71, RF-72, S-405. According to the authors, the information learned was not sufficient to allow for firm conclusions about causality. (Tr. 1928; Ex. S-405.) Another study relied on by Dr. Cohen focused on when calls to security are made during a patient's stay at a care facility. (Tr. 3292-93; Ex. RF-79.) The authors take no position on whether security protects staff or patients against violence. (Tr. 3293-94; Ex. RF-79 at 6.)

To give another example, Dr. Cohen emphasized the "breadth of the analysis" in the article by Shannon, *et al*., but that article bases its conclusions on mentions of security in nineteen reports out of hundreds.[303] Of those nineteen reports, some indicated that "security resulted in a more therapeutic ward," but at least one reached a different conclusion. (Tr. 3297; Ex. RF-83 at 5.) As the authors discuss, the difference of opinion regarding the use of security may be attributable to significant uncontrolled variables, including differences in employment relationships, role function, and training of the security employees. (Tr. 1924, 3297-98; Ex. RF-83.) The authors take no position on whether using security personnel protects staff against violence. (Tr. 3299; Ex. RF-83.)

Dr. Cohen elevates anecdotes from other workplaces over employees' experience at this Worksite.[304] His assertion that security would negatively impact the therapeutic environment does not appear to be grounded in persuasive scientific or practical evidence.[305] As with personal panic alarms, Dr. Cohen argues that the abatement method cannot be considered effective until someone conducts a formal scientific study that leads to definitive results proving the benefit in the Worksite's exact conditions.[306]

---

[303] Tr. 1923-224, 3179, 3295; Ex. RF-83. The authors reviewed 349 reports relating to a four-year period from facilities providing psychiatric care in Ireland to find references to security. (Tr. 1922-23; Ex. RF-83 at 3.) Nineteen of those 349 reports contained such references. *Id.* The study was admitted as both Ex. S-431 and RF-83.

[304] He pointed to a news article about how security guards not trained in mental health can exacerbate situations. (Tr. 3186-87; Ex. RF-82.) He acknowledged that the article was "anecdotal" but felt it was consistent with his "limited experience." (Tr. 3186-87, 3303; Ex. RF-82.) Surprisingly, he did not extend the concerns the article raises about police in healthcare to Respondents' use of the police to address aggression at the Worksite. The other articles Dr. Cohen cites do not render any conclusions about security personnel specifically. (Tr. 3287-88, 3293-94, 3307.)

[305] Nothing in the Secretary's proposal precludes security from receiving the same training currently given to direct care workers, including the more advanced Dr. BERT training offered to some workers. (Tr. 1928-30.) Indeed, the Secretary's proposal acknowledges the security staff would have to be "trained."

[306] Tr. 3306-7, 3314. Dr. Cohen acknowledged that his view that security wouldn't reduce the hazard was based primarily on his literature review, not his work experience or review of this Worksite. (Tr. 3175.)

Such an exact level of proof is not required. Dr. Welch acknowledged that no double-blind placebo-controlled studies showing the efficacy of on-site security at behavioral health facilities had been conducted. (Tr. 1915-17, 1921, 1933-34, 2050.) Double-blind placebo-controlled studies are appropriate for medication assessments, but the design is not appropriate for every hazard. (Tr. 1989, 3161, 3347.) Such studies are particularly ill-suited to assessing the use of security or other types of staffing. (Tr. 1989, 3160, 3347.) Thus, the absence of such evidence did not undermine his conclusions about this abatement method's feasibility or effectiveness in abating the hazard as it existed at the Worksite. (Tr. 1914-17, 1933-34, 1989-90; Ex. S-397.) There is strong other support for its effectiveness. *Id.*

Respondents try to drag the analysis of the feasibility and effectiveness of the abatement into weeds through Dr. Cohen's compilation of various papers.[307] When these papers are reviewed, it is apparent that they do not speak directly to the issues before the Commission. Further, as even Dr. Cohen concedes, such studies are not the only way to assess whether an abatement method will materially reduce the hazard of workplace violence at this Worksite.[308] Besides studies, community standards, regulatory guidance, and experience support using security to materially reduce the hazard. (Tr. 1933-34; Ex. S-397.)

Multiple witnesses discussed how security could reduce the hazard. SM cited security as a measure that would abate the hazard and permit MHSs to focus more on patient care.[309] Police officers who had responded to various incidents at the Worksite discussed how security can

[307] Dr. Cohen was not accepted as an expert on the issue of whether the proposed abatements would materially reduce the hazard of workplace violence.

[308] Tr. 1989, 3347. Dr. Cohen acknowledged that a material reduction could be shown "through some sort of scientific method or other demonstration." (Tr. 3274.) He did not express an opinion on whether there are any abatement methods that could materially reduce the hazard. (Tr. 3274-75; Ex. RF-67.)

[309] Tr. 72, 177-79. CO Kadis interviewed current and former employees. (Tr. 1357-58, 1360, 1385.) She recalled that some cited having security as something that would be helpful at addressing the hazard. (Tr. 1361, 1370.)

mitigate and prevent the hazard and related injuries. For example, it could reduce the safety risk from patient elopements through prevention, responding quicker when elopements occurred, and by providing helpful information if police response became necessary.[310] Unlike some people they confront in the community, the police do not have opportunities to build rapport with the patients and do not know them before they are dispatched to the Worksite.[311] In contrast, on-site security personnel can build the type of rapport that later helps if intervention to prevent aggression or limit violence is necessary. (Tr. 680; Ex. S-423.) Officer Sellers explained how on-site security would alleviate the police from responding to some incidents and mitigate the impact of any such responses that were still necessary. (Tr. 1066-67, 1082, 1088.) Dr. Welch agreed. Security

[310] Tr. 805-11, 819, 1066-67. Police responded to the Worksite to address many elopements. (Exs. S-185, S-189, S-197, S-202, S-203, S-205, S-207.) When not engaged in emergency response, security could perform other safety related tasks such as making sure "the doors are locked and secure," which would help with elopements. (Tr. 810.) Security could also monitor for increased acuity. Officer Brunelli indicated that if security had been available to watch video surveillance in real time on July 18, 2019, staff could have intervened sooner before the incident "became a big gang type assault on staff." (Tr. 677.)

[311] Tr. 677, 679-80. Police responding to behavioral health emergencies at the Worksite can be dangerous. CEO Legend believed it was "unsafe" for police to be in patient care units. (Tr. 2781-86.) She cited the officers lack of clinical care experience or an understanding of "what's happening." (Tr. 2786.) Despite this recognition of the limitations of calling in police to address workplace violence at this Worksite, staff frequently needed their assistance with the hazard. (Stip. 27; Tr. 801, 2782-84; Exs. S-178, S-191, S-206, S-208.) In Dr. Welch's view, the Worksite "clearly depends upon the Attleboro [police] department to provide security, safety and patient management services." (Tr. 2054.) Officers Brunelli and Sellers explained that having security reduces the need for police at a location. (Tr. 680-82, 1066-67.) Further, if a situation necessitates a police response, having on site security can help make the police response more effective. (Tr. 681-82.) In comparison to frequent police visits at the Worksite, Dr. Welch could recall only one instance when police were called to the behavioral health unit where he had worked. (Tr. 2045-46.) That facility is in the same state as the Worksite and has a dedicated trained security team. *Id.*

personnel can assist with addressing aggression before it reaches the level where police are dispatched to the Worksite.[312]

Respondents do not assert that they could not afford to hire employees to focus on security. UHS-DE provided a target "goal" for the amount spent on staffing for the Worksite. (Tr. 375-76; Stip. 52.) The CFO tracked the number of employees for each patient to see if they were in line with the budgeted amounts for staffing. (Tr. 379-80, 497-98.) The CFO and CEO could receive salary bonuses if budget targets were met or exceeded. (Tr. 426-28.) The CEO's salary could double through budgetary efficiencies. (Tr. 427-28.) Not meeting the targets did not mean the facility was not profitable, but it did impact bonuses.

Multiple witnesses provided evidence about other healthcare facilities that use dedicated security to address and mitigate violence. Officers Brunelli, Sellers, and Fleming explained how the security team at a general hospital near the Worksite helped address workplace violence. (Tr. 680-81, 714, 731, 804-5, 1033, 1067.) Noting its widespread use, Dr. Welch described it as "eminently feasible." (Tr. 1934; Ex. S-397.) A former employee and Dr. Cohen also discussed

[312] Tr. 1920-21, 1929, 2045-46; Ex. S-397. An industry group, the International Association for Healthcare Security and Safety Foundation also supports having security to mitigate the risk of workplace in healthcare settings. (Tr. 1930-31; Ex. S-418.) Similarly, the OSHA WVP Roadmap identifies security as a method to reduce workplace violence. (Tr. 2083-85; Ex. S-423.) The OSHA WPV Roadmap discusses examples of security use at healthcare facilities. (Ex. S-423.) It includes citations to scientific literature and other resources. *Id.* In his report and testimony, Dr. Welch also indicated that OSHA guidelines support the use of security at behavioral health hospitals. (Tr. 1930-33; Ex. S-397.) His report references the 2016 Guidelines for Preventing Workplace Violence for Healthcare and Social Service Workers ("2016 OSHA Healthcare WPV Guidelines"). (Ex. S-397.) Neither party offered the 2016 OSHA Healthcare WPV Guidelines or any other OSHA guidelines as an exhibit. The 2016 OSHA Healthcare WPV Guidelines are publicly available on OSHA's website at https://www.osha.gov/sites/default/files/publications/osha3148.pdf (last visited 1/12/2023). UHS-Fuller appears to suggest that Exhibits S-423 included both the OSHA WPV Roadmap and the 2016 OSHA Healthcare WPV Guidelines. (UHS-Fuller Br. 2, 4, 28, 58, 81; UHS Fuller Reply Br. 2.) It does not.

the presence of security at other facilities providing behavioral health care.[313] The Secretary showed that this proposal was feasible and would be effective at materially reducing the hazard.[314]

b. Sufficient Staff for Patient Acuity, Census & Safety

The proposal for having dedicated security relates to the proposal requiring adequate staffing to address the number of patients and their acuity. As addressed in the assessment of Respondents' existing abatement, the level of direct care staff was repeatedly inadequate for the acuity of the units. Intervention required more people than were available on the individual units and sometimes more than were at the Worksite. To address this, the Secretary argues that a feasible and acceptable means of abatement is to:

> Maintain staffing that is adequate to safely address changes in patient acuity and the patient census. Staffing levels must allow for safety of staff during admission of new patients, behavioral health emergencies, 1:1 patient assignments, staff breaks, and the accompaniment of patients off-unit (cafeteria, fresh air breaks, gym). Staffing levels must also allow for and ensure safety during therapeutic activity groups and recreational periods.

(Ex. S-148.) Dr. Welch opined that maintaining direct care staffing at a level adequate to address changes in patient acuity and patient admissions would significantly reduce the hazard of workplace violence. (Tr. 1878, 1888; Exs. S-123, S-397 at 36.) He cited the July 18th riot, the

---

[313] Dr. Cohen confirmed there is security at Olive-View-UCLA Medical Center where he works. (Tr. 3286.) That facility has an emergency room as well as in-patient services for psychiatric patients. (Tr. 3125.) An MHS explained that "security would be a large, large help to a facility, any kind of psychiatric facility." (Tr. 72, 177-79.) The facility where she now works has two security officers staffed in the psychiatric unit, which has a nine-patient capacity. (Tr. 180.) The OSHA WPV Roadmap discusses the use of security at a behavioral health facility. (Ex. S-423 at 21-22.) The security officers at that facility are called Milieu Safety Officers and have no patient care duties other than safety. *Id.* They are trained in security and mental health. *Id.* They monitor acuity changes to aid prompt responses. *Id.*

[314] *Integra*, 2019 WL 1142920, at *14 (expert testimony sufficient to establish feasibility and efficacy of proposed abatement measures); *Pepperidge Farm Inc*., 17 BNA OSHC at 2032-34. *BHC* found that a similar abatement proposal was feasible and effective abatement for the hazard of workplace violence at a behavioral health hospital. 2019 WL 989734, at *29-33. The proposed abatement in that matter called for the employer to "determine the appropriate number of staff needed in each unit based on the acuity of the workplace violence hazard to ensure a safe workplace for employees" and to "ensure staffing levels are met daily and on each shift." 2019 WL 989734, at *31. The ALJ found that appropriate staffing could prevent injuries and materially reduce the hazard. *Id.* at 33. *See also Brennan v. OSHRC* (*Hanovia Lamp Div. of Canred Precision Indus.*), 502 F.2d 946, 952 (3d Cir. 1974) (remanding decision vacating a citation alleging a violation of the general duty clause to address whether employer exposed employee to serious hazard by permitting him to work alone).

February 22nd sexual assault, multiple restraints, and an elopement as examples of when the Worksite lacked adequate staffing and employees faced elevated risk from the hazard.[315] Scientific literature supports the connection between adequate staffing, in terms of numbers and capabilities, and lower rates of violence and staff injuries.[316]

Increased staffing when acuity rises means more people are available to help address actual or potential violence. (Tr. 327-28, 324-25, 1893-94.) SM, who was involved in many situations at the Worksite where the cited hazard was present or likely, succinctly described the connection between staffing and the hazard: "The more people you have, the more resources that you have available to help you. It's really as simple as that. Is it going to be easier to take down somebody with three people or easier to take down somebody with eight people? There's a big difference there." (Tr. 179.)

Respondents hide from the fact that they recognized the critical connection between increasing direct care staff during times of acuity and improving employee safety. (Tr. 1901; Ex. RF-1.) Dr. Cohen indicated that patient observation, as in keeping an eye on the patients, is "probably the primary method of prevention" for the hazard. (Tr. 3189.) Yet, Respondents constantly aimed to minimize staffing levels.[317] Any deviation required administrative approval

[315] For example, on July 18, 2019, the staff did not have the ability to properly do the number of restraints necessary. (Tr. 1811-12.) Beyond the people needed for the restraint itself, it is also critical to have a call leader and someone else directing other patients away from the aggression. (Tr. 1811-12, 1821, 1827, 1829.) Respondents' training materials called for seven or more people for a restraint. (Ex. RF-7.) Similarly, on February 22, 2020, there was not enough staff to increase the level of observation for all the patients who needed it. (Tr. 1841-43.)

[316] Tr. 1811-12, 1833, 1837, 1839, 1841-43, 1878-80, 1892-1900; Exs. S-397, S-406, S-424, S-426. Dr. Welch also discussed a study which found that a higher staff to patient ratio led to fewer restraints. (Tr. 1898-99.) Respondents agreed that fewer restraints correlated with fewer staff injuries. (Tr. 2283; Exs. RF-33, RF-34.)

[317] The DMH set a minimum ratio of nursing care hours for each patient. (Stip. 30-31.) There is no evidence the ratio relates to the level of staff needed to keep employees safe.

and explanations in writing.[318] An administrator, who sometimes is off-site, makes the final decision on whether personnel can be added beyond the state minimum, even though doctors and medical professionals are always on-site. *Id.*

Respondents' approach to staffing eliminated room for variability and was inadequate to address the hazard at this Worksite.[319] Even when the necessary approvals and justifications were in place, the system required calling people in from home, which required time and prevented prompt responses to changes in acuity or census. (Ex. S-397 at 38.) Dr. Welch acknowledged that he was not suggesting that "more staffing is always better." (Tr. 1901-2.) The staff's training, qualifications, and skill impact the number needed. (Tr. 1893, 1895, 1901.) For this reason, he supports the abatement calling for "adequate" staffing, meaning sufficient in terms of both number and qualifications.[320]

In arguing against this proposed abatement method, Dr. Cohen relies on some of the same anecdotal and limited studies addressed above.[321] He also cites two associational studies that examined levels of staff and violence. (Tr. 1904, 1911; Exs. F-67 at 11, S-432, S-433.) None of

[318] Tr. 379-80; Ex. RF-1. If acuity rises, direct care staff can start the process of increasing the number of staff in the unit by first speaking to their supervisor. If the supervisor agrees, he or she must seek further approvals. If those are obtained, the staffing coordinator or another person attempts to find someone to add to the unit staff. Alternatively, if a unit was staffed for the maximum census but did not have that many patients, staff could get sent home. (Tr. 2138.)

[319] Tr. 2138; Ex. S-397. During the inspection period, UHS-Fuller developed and began to implement corrective action plan to address deficiencies with its approach to staffing identified during an inspection by a state health regulator, the DMH. (Stip. 30-33; Tr. 2369.) The destruction of ESI limited the ability to assess the extent to which Respondents implemented all of the corrective actions it said it had implemented in the corrective action plan submitted to DMH.

[320] Tr. 1893, 1895, 1901. In *BHC*, the employer argued that the Secretary should have identified a specific staff to patient ratio. 2019 WL 989734, at *32. The ALJ rejected the argument. *Id.* Such an approach was inappropriate because the facility, like the Worksite, had fluctuations in patient acuity. *Id.*

[321] Tr. 1909-10, 3287-88; Exs. F-67, F-71, F-72, F-74, F-101. Dr. Cohen clarified that Ex. F-101 is a collection of a few anecdotes from one Canadian facility, not a study. (Tr. 3287.) Dr. Cohen did not interview anyone at the Worksite and argued that doing so would not be reliable. (Tr. 3288.) He did not adequately explain why his approach of relying on the people interviewed by a third party at an unrelated facility and then attempting to extrapolate the findings to this Worksite would not raise an even greater reliability concern. (Tr. 3288-90.)

the studies were conclusive.[322] Further, looking at association without causation is not particularly helpful. (Tr. 1905-8.) Following Respondents' interpretation of the studies, one could reach the erroneous conclusion that having no staff will lead to no injuries and the safest units. (Tr. 1908.) Common sense and experience expose that fallacy.[323]

Like the discussion around security, associational studies do not counter the other evidence about the efficacy of this proposed abatement. None of the articles Dr. Cohen discussed undermine Dr. Welch's opinion or the other record evidence supporting this abatement.[324] As with security, community standards, guidelines, and experience support adequately staffing the units for the number of patients and their acuity. (Tr. 1916; Ex. S-397.) The Secretary sufficiently established this abatement method's effectiveness at materially reducing the hazard.

As for feasibility, the Secretary can establish that a means of abatement is feasible by showing that "conscientious experts familiar with the industry would prescribe those means and methods to eliminate or materially reduce the hazard." *Arcadian*, 20 BNA OSHC at 2011.

[322] For instance, the qualifications of the staff altered the picture. When registered nurses provided more of the care, assault rates decreased. (Tr. 1911-12; Ex. S-432.) In other words, the correlation between increased staff and violence did not hold for all situations examined. (Tr. 1912.)

[323] Tr. 1908, 1910-12. The authors of the study relied on by Dr. Cohen accept that higher acuity can lead to higher staffing rather than more staffing causing acuity to rise. (Tr. 1913-14; Ex. S-432.) The events of July 18, 2019 illuminate this principle. On that day, the staffing ratio was typical for an evening at the Worksite. As things began to escalate in the adolescent unit, staff from other units arrived increasing the patient to staff ratio in that unit. (Tr. 1906.) People arriving to assist did not cause the violence. *Id.* So, although the higher ratio correlates with more violence, it cannot be said that the increased staff caused more violence. *Id.*

[324] The destroyed ESI could have shed light on the accuracy of Respondents' claims that the staffing was adequate for the acuity of the units. See Section II.B.3 (Summary of Spoilation Sanctions) above.

Ensuring adequate staffing for the hazard of patient on staff violence has been upheld as a feasible means of abatement.[325]

The Worksite's policies already called for a minimum staffing level and permitted deviations for acuity. (Ex. RF-1.) All units were to "maintain sufficient staff in order to provide a safe environment."[326] *Id.* Dr. Welch opined that increasing staffing levels was "quite feasible." (Tr. 1916-17; Ex. S-397.) He reviewed the direct care staff-to-patient ratios at other similar facilities nearby.[327] He determined they have higher direct care staff-to-patient ratios than the Worksite.[328]

Respondents failed to adequately rebut the Secretary's evidence that these proposed actions for staffing were feasible and would be effective at abating the hazard.

---

[325] *See BHC,* 2019 WL 989734, at *33 ("The Secretary provided sufficient evidence to show that a feasible method of abatement would be for BGH to determine the appropriate number of staff each unit requires based on acuity of the workplace violence hazard"), *aff'd*, 951 F.3d 558. *Cf. Brennan*, 502 F.2d at 952 (remanding decision vacating a citation alleging a violation of the general duty clause to address whether employer exposed employee to serious hazard by permitting him to work alone). To prevail in establishing a violation of the general duty clause, the employer's existing abatement must have been inadequate and there must be actions the employer could have taken to materially abate the hazard. The proposed abatement does not have to be the only way to abate the hazard. Employers are free to develop solutions different than what the Secretary proposes as long as the alternative methods achieve at least as great a reduction in the hazard. *Chevron*, 11 BNA OSHC at 1134, n. 16; *Brown & Root, Inc., Power Plant Div.*, 8 BNA OSHC 2140, 2144 (No. 76-1296, 1980) ("the employer may use any method that renders its worksite free of the hazard and is not limited to those methods suggested by the Secretary"); *Pepperidge Farm*, 17 BNA OSHC at 2032 (Commission Chair Weisberg concurring and noting that employers are free to develop solutions different than what the Secretary proposes to render their workplace "free" of recognized hazards).

[326] As addressed, Respondents failed to adhere to this policy. They did not establish that they could not follow their staffing policies.

[327] Tr. 1857-60, 1866-69, 1871-75; Exs. S-6, S-7, S-397 at 38-40. Separate from his review of direct care staff to patient ratios, Dr. Welch also reviewed the use of security at healthcare facilities. That review included information from a hospital in New York. (Tr. 2048-49; Ex. S-397 at 33.) Respondents note that as part of his review, Dr. Welch considered information on a website maintained by the Massachusetts Hospital Association. (Ex. S-397 at 2.) The website is publicly available and shows staffing ratios in different Massachusetts hospitals. (Tr. 2126; Ex. RF-92.)

[328] Tr. 1857-60, 1873, 1875-76; Ex. S-397 at 38-40. The Worksite had both fewer overall direct care providers and fewer nurses per patient. *Id.* A former MHS explained that the psychiatric emergency unit where she now works has about 50 percent more staff for each patient than she experienced at the Worksite. (Tr. 180-81, 224.) Staffing had changed by the time of the hearing in this matter. (Tr. 2082-83; Ex. S-54.)

3. **Investigate All Incidents of Workplace Violence**

The Secretary proposes that it would be feasible and effective for Respondents to: (a) "implement a system of prompt, comprehensive investigations of all incidents of workplace violence resulting in injury to staff or near miss, to include consistent performance of root cause analyses and review of surveillance footage"; (b) "maintain video footage of all incidents of workplace violence, including one full hour before and after each assault, for a period of two years following each incident"; and (c) "ensure that managers and staff are trained on injury and near miss reporting and investigative procedures."[329] UHS-Fuller argues that this would not prevent workplace violence and is not sufficiently supported by scientific evidence. (UHS-Fuller Br. 97-98.) However, post-incident debriefing has been upheld as a feasible and effective means of abatement for the hazard of workplace violence.[330]

Debriefing is a standard accepted practice in behavioral health hospitals.[331] The importance of "systematic, consistent, and effective debriefing after patient assaults and behavioral health emergencies" is broadly recognized. (Ex. S-397 at 54.) Comprehensive debriefing of

[329] When read as a whole and considering how the matter was litigated, it is apparent that the Secretary is calling for all incidents of workplace violence resulting in either actual injury to staff or where staff injury nearly occurred, *i.e.*, a near miss, to be investigated. In other words, the proposal's second sentence, like the first, should be read as being limited to workplace violence incidents that resulted in staff injury or when such injury was nearly adverted. Separately, for the subset of workplace violence incidents that include actual assault on an employee, the video reviewed and maintained should include the hour before the assault and the hour after the assault occurred. (Sec'y Br. 85-88.)

[330] In *BHC*, like the present matter, the employer had a system to conduct debriefings after workplace violence incidents at a behavioral health hospital. 2019 WL 989734, at *12. In practice, those debriefings did not consistently occur and were not always comprehensive. *Id.* at *12-13, 36. The ALJ found "it would be feasible and effective for [the employer] to modify and enforce its workplace violence prevention program to ensure that staff are debriefed after incidents and that the information learned is utilized." *Id.* at 37. *UHS Centennial* also addressed staff debriefings and comprehensive investigations after incidents of workplace violence and near misses at a psychiatric care facility. 2022 WL 4075583, at *55-57. In that matter, the ALJ concluded that the Secretary established that such abatement was both capable of being implemented and would materially reduce the hazard of workplace violence. *Id.*

[331] Tr. 1958-59; Ex. S-397. Ms. Johnson noted that debriefing was not unique to behavioral health hospitals, "every industry does it." (Tr. 1585.) She explained that it allows for an understanding of "what happened" and facilitates the creation of action plans. (Tr. 1586.)

workplace violence incidents, including a camera review of both ones that result in violence and those where violence nearly occurred, permits facilities to learn from adverse events. *Id.*

Respondents agree that debriefings and incident investigations are an important way to mitigate the hazard.[332] When assessing the Worksite's program for managing patient aggression, UHS-DE emphasized the importance of debriefings and camera reviews as methodologies to reduce workplace violence. (Ex. S-121 at 4.) It assessed its affiliates, including UHS-Fuller, to ensure they conducted debriefings with the involved staff after "an aggression/violent episode" and reviewed surveillance footage of such incidents. (Tr. 1701-12; Exs. S-55, S-121.) After seeing higher injury rates, Respondents claimed to implement a more expansive approach to camera reviews of incidents at the Worksite in 2019. (Tr. 1133.) Ms. Bricault said this was implemented to determine "if there was something they could do to prevent injuries … and to afford better protection for their staff and prevent workplace violence." *Id.*

Respondents object to assessing "near miss" incidents, claiming doing so would be a "waste of resources." (UHS-Fuller Br. 95-96.) UHS-Fuller attempts to characterize the Secretary's proposal as requiring debriefings when patients merely say, "unkind things." *Id.* at 95. The characterization is disingenuous. The Secretary's proposal is limited to near misses, *i.e.*, situations that nearly resulted in injury from violence. It does not include cases where injury was conceivable but unlikely. Dr. Welch described a near miss as a situation where a patient was violent and destroyed property but did not injure staff. (Tr. 1975.) Reviewing such situations ensures that the proper steps are in place to avoid injuries and build on successful interventions. (Tr. 1974-75.)

[332] Tr. 1133-34, 1404, 1499-1500, 1585-86, 1971, 2172, 2572; Exs. S-11, S-55 at 2, RF-7; UHS-Fuller Br. 95.

Further, the Secretary's proposal aligns with what Respondents' policies already required.[333] The WVPP's called for documented debriefings of "all patient episodes and incidents, inclusive of episodes that result in aggression or assault."[334] Although the phrase "near-miss" is not used, the WVPP required debriefings incidents of violence even when they did not result in assault or injury.[335] Aggression alone is sufficient to trigger the debriefing process. (Ex. S-166 at 3-4.) The process is supposed to include: (1) debriefings with staff, (2) an examination of the sources of the aggression, (3) antecedent behaviors, and (4) the staff's attempted interventions. *Id.* at 3. The data from such debriefings is to be analyzed so it can be used "for the corrective action process." *Id.* Separate from the WVPP's requirements, Respondents also mandated the review of video of workplace violence incidents and the retention of videos from assaults or "physical altercations."[336]

Dr. Cohen conceded the value of post-incident investigations, including reviewing camera footage. (Tr. 3214-3215, 3371-76.) Scientific studies were not needed to conclude that measuring information facilitates tracking a problem. (Tr. 3371-72.) He argued not so much that this

[333] CMS, TJC and some state programs require debriefings after patient restraints. (Tr. 1499-1500.)

[334] Tr. 1585-86, 2396, Ex. S-166 at 3. Similarly, the Code Leadership training explained that codes should be called for "agitated patients," and that debriefings should follow codes. (Ex. RF-7.)

[335] Ex. S-166 at 3-4. Likewise, the policy related to the Dr. BERT team, calls for debriefings any time the team responds to a call. (Ex. RF-14 at 5.) Neither injury nor assault is necessary to trigger the debriefing. *Id.* UHS-Fuller also indicated that the Patient Safety Council and the Quality Management met regularly to discuss, among other things, "near misses." (UHS-Fuller Suppl. Br. 6.) Former Risk Manager Gosselin testified that another phrase for "near miss" is "good catch." (Tr. 2581-82.) Successful de-escalation was a big "good catch" that department managers would acknowledge and report. *Id.*

[336] Tr. 1133, 1303; Exs. S-34, S-35, S-55 at 2, S-459. The Camera Policies indicated that video footage from the Worksite's camera system should be maintained in various circumstances, including (1) "for any allegations of rape, assault or other physical altercations involving patients or residents," (2) "if such footage is related to a Probable Claim Report (PCR) mater and/or for liability claims, as warranted;" and (3) for incidents resulting in "an investigation by any administrative, civil, or criminal authority." (Exs. S-34, S-35, S-459.) The policies call for the video to be transmitted to the King of Prussia address within 30 days of an incident. *Id.* The policies do not specify for how long video of such incidents must be maintained after they are sent to UHS-DE. *Id.* The Secretary proposes a two-year period. His proposal does not preclude longer retention.

abatement proposal would be ineffective but that it was unnecessary because of Respondents' existing practices.

Dr. Cohen's belief about how Respondents investigated incidents of workplace violence at the Worksite is not adequately supported. *See BHC,* 951 F.3d at 565 (discussing the ALJs finding that the employer failed to implement the "policies it had on paper to prevent [workplace] violence."). There is no evidence of debriefings for many incidents of workplace violence that caused injuries.[337] And the reviews that did occur were often cursory and incomplete.[338]

Dr. Welch concluded that this abatement method would materially reduce the hazard of workplace violence at the Worksite. (Tr. 1956-57; Ex. S-397.) Appropriate assessments of violence and risk should look for antecedents and predictive factors. Just looking at the assault itself may lead someone inaccurately to conclude it was unprovoked or came about without warning.[339] Examining what occurred before the assault allows staff to learn triggers for violent behavior and assess how to improve interventions. (Tr. 1969-71.) Ms. Legend also acknowledged that "looking at the precursor episodes" frequently provided information about managing

[337] Tr. 1959-60, 1964-65, 1967-68, 2170. The disconnect between Respondents' policies and their implementation exhibits some of the limitations of Dr. Cohen's approach to assessing the proposed abatement. Dr. Cohen believed UHS-Fuller was "paying attention" and conducting root cause analysis of physical injuries. (Tr. 3214-15.) But he points to no documents or employee testimony to support that belief. In fact, the documents and testimony show "root cause analysis" of events was not done consistently and frequently there was little follow up. Dr. Cohen's unsupported beliefs illustrate the necessity of weighing the expert testimony differently. Dr. Welch visited the Worksite, spoke with employees, reviewed the available video of incidents, and conducted a more extensive review of the documents. His review of how Respondents investigated workplace violence in practice is more helpful than Dr. Cohen's speculation about how Respondents assessed such incidents. (Ex. S-397 at 53-56.)

[338] Tr. 1959, 1964-67, 2170, 2172; Exs. S-11, S-397 at 14, 28, 30, 54-56. Had video of incidents which occurred during the investigation been available, it could have been used to assess accuracy and utility of the debriefings that did occur. Respondents destroyed the best evidence of the accuracy and effectiveness of their assessment procedures. See Section II.B.3 (Summary of Spoilation Sanctions) above.

[339] Tr. 1969-71. Dr. Cohen explained that while a video clip of "a brief moment" may show overwhelmed staff being unable to stop violence, it is not sufficient to tell you about the cause of the violence. (Tr. 3266-67.) He did not suggest how long the video clip would have to be for it to be helpful.

situations before a patient became so violent that a restraint was necessary.[340] Respondents' written directions for reviewing video from incidents of violence reflect this understanding in that they call for examining the thirty minutes before an incident and assessing what could have been done to avert it. (Ex. S-11.) Respondents also acknowledged the importance of looking at the intervention and what occurred thereafter.[341]

Dr. Welch discussed how reviewing and retaining video footage of what occurred before and after assaults is an important part of risk assessment.[342] It allows for the identification of precursors and predictive factors for violence. (Tr. 1969-71.) Reviewing such incidents can show how staff could have "intervened differently" and ensured the violence was not repeated. (Tr. 1960-61, 1971.) Video debriefing is "one of the most effective" aspects of mitigating workplace violence. (Tr. 1971.) It provides "the most accurate and detailed evidence of incidents of violence and staff responses to these events." (Tr. 1819-20, 1971; Ex. S-397 at 56.) It avoids issues where employees do not remember exactly what occurred and can be used to show employees techniques that worked (or did not). (Tr. 1971-72.)

The two-year retention period also facilitates "meaningful review" of workplace violence incidents.[343] Retaining such videos facilitates review "by the appropriate personnel, including those that have the ability to make changes to the existing program." *Id.* Video provides detailed

---

[340] Tr. 2359-60. Ms. Gosselin agreed, explaining that assessments of incidents often focused on what was going on before things rose to the level where a patient needed to be restrained. (Tr. 2572.) Discussing what occurred before a physical confrontation or restrain is "always the best way to really understand what was happening" in the units. *Id.*

[341] Tr. 2572. A review of the events of July 18, 2019 and February 22, 2020 highlights why looking at what occurred after a restraint is also important. (Tr. 149, 151; Exs. S-442, S-443B, S-397.) After initial incidents, patients were not appropriately observed, leading to further violence. *Id.*

[342] Tr. 1819-20, 1968-69. Dr. Welch viewed the available video footage and was in a better position than Dr. Cohen to assess the utility of reviewing what occurred before and after the incident as part of the debriefing process and the retention of the video. "[V]ideo review really helps us illuminate what's actually taking place." (Tr. 1819-20.)

[343] Ex. S-397 at 57. The retention requirement proposed by the Secretary relates to incidents of workplace violence that led to an assault: "Maintain video footage of all incidents of workplace violence, including one full hour before and after each assault, for a period of two years following each incident."

information on how to limit violence from particular patients. (Tr. 1972-93.) It is common for patients to be re-admitted to the same behavioral health facility. (Tr. 1972.) Experience with a patient allows workers to understand a patient's particular precursors to violence. (Tr. 1973-74.) This enables employees to know the signs of violence and potentially de-escalate the patient with the methods that were previously successful. *Id.*

The Secretary's proposal also calls for training on investigative and reporting procedures. As addressed, Respondents' policies required comprehensive and documented debriefings for all incidents of workplace violence and that video of assaults or physical altercations be copied to preserve it from being overwritten by the camera system. At the hearing, the risk manager still did not appear to understand the Camera Policies, their importance, or the implications of not adhering to them.[344] Training will help address the disconnect between the policies and the practices. (Ex. S-397 at 53-57.)

There appeared to be either a lack of comprehension or perhaps desire to implement the debriefing program Respondents had "on paper." *BHC*, 2019 WL 989734, at *42; *SeaWorld*, 748 F.3d at 1216 (finding that employer could have anticipated that abatement measures it applied after other incidents would be required); *Babcock & Wilcox Co. v. Sec'y of Labor*, 622 F.2d 1160 (3d Cir. 1980) (upholding a violation of the general duty clause when the company knew of the hazard and had a policy to mitigate it but did not effectively implement the policy). The Secretary showed that the deficiencies in the existing process could be addressed by training and taking steps to ensure debriefings included the consistent performance of root cause analyses, review of

[344] Tr. 3072-74, 3078. After a July 2019 site visit, Ms. Bricault recommended that the Worksite develop "a process where the staff know how to report issues." (Ex. S-55 at 2; Stip. 49.) After similar visits in September and November 2019, she recommended assessing the camera review process to revise for "effectiveness." (Exs. S-60 at 2; S-61 at 3, S-62 at 2.) By April 2020, after the Citation's issuance, Respondents had developed a revised process under which any Sedgwick report would trigger a review of the video and an interview with staff. (Ex. S-51 at 1, 3.)

surveillance footage, and retaining footage. Consistent, thorough post-incident investigations with a review of available video would materially reduce the hazard of workplace violence.[345]

Respondents already had a policy to review all workplace violence incidents, including those that did not result in staff injury. (Tr. 1976-77.) Such reviews were supposed to include staff interviews and watching available camera footage. (Tr. 1133, 1303, 1238-39; Exs. S-11, S-55.) The policies also called for videos of assault or physical altercations to be maintained.[346] The record shows this was not done, but there is no support for finding the proposal is technically or economically infeasible. (Tr. 1976-77.) The Secretary established that conducting prompt, comprehensive investigations of all incidents of workplace violence resulting in injury to staff or a near miss is a feasible method of abatement. *See SeaWorld*, 748 F.3d at 1215 (extending actions taken with one animal to all similar work was feasible); *Con Agra, Inc*., 11 BNA OSHC 1141, 1144-45 (No. 79-1146, 1983) (finding extension of existing abatement feasible).

4. **Adequate Training**

Besides the training discussed in connection with the other proposals, the Secretary also proposes specific training for new employees: "Ensure that new employees have training to respond to violent patients prior to exposure."[347]

Dr. Welch concluded that employees at the Worksite were not appropriately trained. (Ex. S-397 at 31, 58.) Rather than recognize deficiencies in the training, Respondents adopted a "blame

[345] Tr. 1957, 1960, 1971; Ex. S-397 at 53-57. *See BHC*, 951 F.3d at 565 ("the Secretary satisfied the General Duty Clause's test by establishing that a comprehensive workplace safety program would more effectively and consistently apply measures designed to reduce patient-on-staff violence than Brooke Glen's present system did").

[346] The polices did not specify exactly what should be captured or how long the videos should be maintained by UHS-DE. (Exs. S-34, S-35, S-459.) There is no evidence that clarifying how much of the incident to capture and specifying the minimum amount of time such videos should be kept is not feasible for technical or economic reasons.

[347] UHS-Fuller contended that its efforts to address and mitigate the hazard included: "providing staff with extensive de-escalation and physical hold training." (UHS Fuller Br. 3.) This argument lacks merit and is addressed above. It doesn't dispute that training can be an effective abatement measure.

the victim" approach for injuries that occurred when employees attempted to implement the techniques in the units.[348] Dr. Welch reviewed the segments of video the police preserved of the July 18, 2019 incident. He believed the video showed that the employees were neither the right type of employee (such as security) nor adequately trained.[349] Instead of recognizing the limitations of the existing training program, Respondents blamed the employees for injuries related to cited hazard.[350]

Employee testimony also supports finding that improved training would materially reduce the hazard and the severity of injuries experienced by employees. CFO Rollins believed that more training would mitigate workplace violence at the Worksite. (Tr. 408-10.) An MHS explained the inadequacy of the existing program. For example, she had no training in intervening when a sexual assault was in process. When confronted with that situation, she was unable to stop the assault from continuing. (Tr. 87-88, 155-56.) Sometimes the techniques taught were ineffective outside of the classroom. Other times there was insufficient staff to implement them as taught.

Dr. Cohen was more equivocal on the effectiveness of training as part of a program to abate the hazard. He admitted it might help but had not found evidence that it would reliability or significantly reduce the risk. (Tr. 3384.) Dr. Cohen's review was less extensive and less reflective of conditions at the Worksite, so Dr. Welch and other evidence about the effectiveness of training is credited over his testimony.

---

[348] Ex. S-397 at 59. For instance, although the techniques taught require multiple people for many situations, the number of staff involved in restraints was often less than the number called for by the technique. (Ex. S-11.) Staff would then be criticized for weak or ineffective holds. *Id.*

[349] Ex. S-397 at 18. The destroyed ESI could have shed additional light on how effective the training provided was at addressing the actual conditions employees confronted at the Worksite. See Section II.B.3 (Summary of Spoilation Sanctions) above.

[350] Ex. S-397 at 18. As implemented, the gaps in the training's effectiveness were particularly apparent when patients were much larger than staff members or when the patients were highly agitated. (Ex. S-147 at 58.) In such situations, staff would still be injured even when employees followed the techniques taught correctly. *Id.*

There is no evidence that Respondents could not implement the proposal for technical or economic reasons.[351] The Secretary established that adequate training was a feasible abatement step that would materially reduce the hazard.

5. Respondents' Unsupported Claims of Adverse Consequences and Economic Infeasibility

Through expert testimony and other evidence, the Secretary showed that all of his proposals were feasible and would materially reduce the hazard. *See Integra*, 2019 WL 1142920, at *13-14. The Worksite's WVPP and other policies already call for most of the proposed measures. *See BHC*, 951 F.3d at 566. Similarly, most actions were already implemented at other behavioral health facilities and could be used effectively at the Worksite. (Tr. 1934, 1951; Exs. S-397, S-423.) Such evidence shows the efficacy and feasibility of the Secretary's proposed approach. *See Pepperidge Farm*, 17 BNA OSHC at 2034 (viewing "successful use of a similar approach elsewhere" and expert testimony as elements of an effective abatement method); *Wheeling-Pittsburgh Steel Corp.*, 10 BNA OSHC 1242, 1246 n.5 (No. 76-4807, 1981) (finding abatement method feasible when it had previously been used at the cited facility); *Integra*, 2019 WL 114920, at *13-14 (finding expert testimony indicating the hazard of workplace violence would be materially reduced was sufficient); *UHS Centennial*, 2022 WL 4075583, at *56-57 (finding similar abatement technologically and economically feasible). In addition, once the Secretary establishes that there is a feasible and effective method that materially reduces the hazard, the burden shifts to the employer to produce evidence showing or tending to show that

[351] *BHC*, 2019 WL 989734, at *39 (upholding training as an abatement methodology for the hazard of workplace violence); *BHC*, 951 F.3d at 564-65. As part of its Staff Safety Initiative, UHS-DE already provided selected affiliates with additional training related to the hazard of workplace violence. (Tr. 1522-24, 1534-35.) There is no evidence that the Worksite could not be included in this program. *Id.*

using the Secretary's methods will cause consequences so adverse as to render their use infeasible.[352]

UHS-Fuller suggests, without substantiation, that the Secretary's proposals "may adversely affect the care and treatment" of patients.[353] In so doing, it attempts to cast all it does under the umbrella of patient care and to imply that the Secretary can advise no action for the protection of employees because, in theory, the measure could impact patient care. *Id.*

UHS-Fuller sets up a false choice between patient and staff safety. The Secretary does not prescribe actions to alter Respondents' clinical care procedures. Respondents put the clinical care of patients in issue by claiming it as part of their abatement and arguing, without support, that the Secretary's abatement proposals might not be therapeutic. In response, the Secretary produced evidence that Respondents' existing approach was not therapeutic and that implementing the proposed abatement actions would benefit both patients and staff. (Tr. 2257-58; Ex. S-397.)

The undersigned need not resolve whether the abatement in place at the time of the Citation was appropriately therapeutic for patients to determine it was inadequate for employee health and safety. Conceivably, although effective at addressing a hazard, a proposed abatement method

---

[352] *ACME Energy Servs., dba Big Dog Drilling*, 23 BNA OSHC 2121, 2128 (No. 08-0088, 2012) (abatement prong met even though worker may still be exposed to the cited hazard as long as the proposed abatement reduces the "incidence of the hazard"), *aff'd*, 542 F. App'x 356 (5th Cir. 2013) (unpublished). UHS-Fuller tries to conflate the affirmative greater hazard defense with the Secretary's burden of proving a feasible and effective abatement. (UHS-Fuller Br. 1, 86, 88-89.) Here, through expert testimony and otherwise, the Secretary rebutted what amounted to speculation about theoretical risks. *See Roadsafe*, 2021 WL 5994023, at *5-6 (distinguishing *Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1873 (No. 92-2596, 1996) and finding that the Secretary rebutted employer's assertion that abatement was infeasible). *See also CSA Equip. Co., LLC*, 24 BNA OSHC 1476 (No. 12-1287, 2014) (remanding for further fact finding to determine whether the proposed abatement "will cause consequences so adverse as to render its use infeasible"). Respondents were precluded from arguing that the content of the destroyed ESI would have been favorable to any of its defenses. See Section II.B.3 (Summary of Spoilation Sanctions) above.

[353] UHS-Fuller Br. 1. Dr. Cohen argued that if staff believe they are safe as a result of abatement measures, but they are incorrect it can cause false confidence and lead to an "unintended consequence." (Tr. 3281-82.) The article he cites as support for this contention found that perceptions of violence were not well correlated with rates of violence. (Ex. RF-55.) The article does not support finding that implementing the proposed abatement or otherwise reducing the hazard to the extent feasible would have adverse consequences. *Id.*

could be so contrary to the services a business provides that the method ceases to be feasible. Here, the undersigned does not confront such a situation. *See Chevron Oil Co.*, 11 BNA OSHC 1329, 1334 (No. 10799, 1983) (finding that the benefits afforded by the abatement method greatly outweighed the potential harm that could be caused).

The Secretary established that the proposed abatement measures were safe and effective for patient and staff safety through expert testimony and other means. Dr. Welch and others explained how protecting employees facilitates patient care. "Security staff can and are safely and effectively utilized to support patient and staff safety in psychiatric treatment settings, both to mitigate patient violence and to decrease staff injuries resulting from patient violence."[354]

As for economic feasibility, by showing that the proposed methods were implemented elsewhere and through other evidence, the Secretary met his burden and established that the proposed methods were feasible. (Ex. S-397.) Respondents did not introduce evidence about their financials. UHS-DE acknowledged that Worksite had more injuries than over 150 other behavioral health facilities it operated.[355] Respondents knew other facilities implemented additional abatement measures beyond what was done at the Worksite.[356] They do not rebut the Secretary's proof of economic feasibility, despite having ready access to a large pool of comparable

[354] Ex. S-397 at 34. Dr. Welch was accepted as a psychiatry and patient care expert at a behavioral health hospital.

[355] Tr. 1133, 1263-64, 1321, 1537, 1691; Ex. S-68. UHS-DE operated "more than 200" behavioral health facilities. (Tr. 1537.) The Worksite's injury rate, as calculated by UHS-DE, placed it at least in the top 50 in the terms of the number of injuries per hour of care provided. (Tr. 1263-64, 1321, 1333-36; Exs. S-68 at 8, S-397 n.2.)

[356] For example, Respondents were aware that other facilities provided personal communication devices for each direct care worker. (Tr. 1687; Ex. S-134 at 7.) Likewise, Respondents' policy required the Worksite to maintain "safe" staffing levels and the minimum staffing level set by DMH could be deviated from for "acuity." (Ex. RF-1.)

facilities.[357] There is no evidence that implementing the proposed abatement would threaten the viability or existence of UHS-Fuller, UHS-DE, or the two collectively.[358] Nor did Respondents present sufficient evidence of an inability to pay for the abatement.[359]

The Secretary met his burden of establishing feasibility. Respondents failed to establish adverse consequences or economics rendered the proposals infeasible.

---

[357] Tr. 1537. *Capeway Roofing Sys. Inc*., 20 BNA OSHC 1331, 1342-43 (No. 00-1986, 2003) (when one party has the capacity to produce evidence but fails to do so, there's a presumption that the evidence would not have been favorable to that party), *aff'd*, 291 F.3d 56 (1st Cir. 2004). UHS-Fuller's discussion of economic feasibility cites no exhibits and refers to a single page of the transcript. (UHS-Fuller Br. 100-3.) The cited page does not support its contention that it was precluded from introducing reimbursement information from Medicaid and Medicare. *Id.* at 103 n.14. Further, the case it cites for support of its arguments, *Smith Steel Casting Co. v. Brock*, 800 F.2d 1329 (5th Cir. 1986), is inapposite. *Smith Steel* case concerned the Secretary's rulemaking obligations, not an employer's obligations under section 5(a)(1) of the OSH Act. 800 F.2d at 1338-39. There is no evidence to find that implementing the proposed abatement will threaten Respondents' long-term profitability or competitiveness.

[358] UHS-DE does not raise any economic feasibility concerns in its post-hearing briefs. UHS-Fuller alludes to economics but does not make the absurd contention that that this abatement would materially impact their parent company, UHS. *Cf. Beverly,* 19 BNA OSHC at 1192 ("generally" an abatement is not economically feasible if it "would clearly threaten" the employer's economic viability); *Harry C. Crooker & Sons, Inc. v. OSHRC*, 537 F.3d 79, 82-84 (1st Cir. 2013) (finding compliance with OSHA standards was feasible). AAD Abundo was asked whether she did any economic analysis of the proposed abatement but was not asked whether anyone else did. (Tr. 920.) Mr. Rollins, who was CFO during OSHA's investigation, was not asked about the financial health of UHS-Fuller or the cost of the proposed abatement. (Tr. 357-58.) In fact, when the Secretary asked the CFO what the Worksite's largest source of profit was, UHS-Fuller's counsel objected. (Tr. 418-19.) Mr. Rollins left UHS-DE in 2020 and his successor was not called to testify. (Tr. 354, 2510.) Respondents offered no evidence of deficits (or profits).

[359] In *Beverly*, the employer presented evidence on the abatement's cost and the judge failed to resolve the dispute between the Secretary's expert and the employer's expert. 19 BNA OSHC at 1198. Here, Dr. Cohen's testimony was limited to his opinion on whether OSHA's proposed abatement measures are likely to materially reduce the risk of violence and injury to healthcare workers at the Worksite. (Ex. RF-67 at 1.) Neither he nor anyone else testified the cost of implementing the proposed abatement measures would threaten either UHS-DE or UHS-Fuller's viability. *Beverly,* 19 BNA OSHC at 1192. *Smith Steel* and *Walker Towing Corp*., 14 BNA OSHC 2072 (No. 87-1359, 1991) do not compel a different result as UHS-Fuller suggests. (UHS-Fuller Br. 102-3.) Neither concerned abatement for violations of the general duty clause. In *Smith Steel*, the Fifth Circuit was addressing OSHA's rulemaking process and specific standards not in issue here. 800 F.2d at 1338-39. *Walker* concerned the infeasibility defense for a violation of a standard that specified it was not always applicable. 14 BNA OSHC at 2074-77. UHS-Fuller leaves out most of the criteria for that defense in its brief. To show infeasibility it is not enough to argue that costs cannot be passed on to the customer. 14 BNA OSHC at 2077, n. 9. The costs must be "prohibitively expensive." *Id.* (rejecting infeasibility defense). Respondents have not made such a showing, so it is not relevant whether costs could or could not be passed on.

H. Affirmative Defense of Fair Notice is Rejected

UHS-Fuller argued that the general duty clause is impermissibly vague, and it lacked fair notice of how to abate the hazard.[360] UHS-Fuller and UHS-DE knew workplace violence was a hazard.[361] They knew employees were exposed to, and suffered injuries from, this hazard at the Worksite. (Stips. 18-24, 27-29, 49-51.) Respondents also knew of OSHA's concerns about workplace violence generally and specifically at the Worksite.[362] Nor is there any dispute that

[360] UHS-Fuller Br. 104-107. UHS-Fuller's arguments about OSHA's authority and the general duty clause are addressed elsewhere. See Sections I (Jurisdiction), III.C. (Role of the Massachusetts Department of Mental Health and Other Regulators Does Not Deprive OSHA of Jurisdiction), and IV.B. (Legal Standard). In addition, the Secretary's obligations on the element of abatement are addressed in Sections IV.B. (Legal Standard), IV.F. (Existing Abatement), and IV.G. (Proposed Abatement). UHS-Fuller also alleges the Secretary did not challenge its claims the proposed abatement was unconstitutionally vague. (UHS-Fuller Reply Br. 15-16.) The Secretary defended his proposed abatement at length during the hearing and in the post-hearing briefs. UHS-Fuller's claims are rejected.

[361] Stips. 19-23. Respondents were precluded from arguing that the content of the destroyed ESI would have been favorable to any of its defenses. See Section II.B.3 (Summary of Spoilation Sanctions) above. In 2016, Ms. Bricault worked with another behavioral health facility, Pembroke Hospital, as a loss control manager, when it was cited for a repeat general duty clause violation because of the hazard of workplace violence. *UHS-Pembroke*, 2022 WL 774272, at *1, 5, 16, n.24, 49 (discussing monthly visits by the UHS-DE loss control manager, the corporate structure of UHS and the testimony of Ms. Gilmore (now Ms. Bricault) and Mr. Gilberti). The citation addressed in *UHS-Pembroke* was the second time OSHA had investigated Pembroke Hospital. *Id.* at *18 (ALJ Bell discussing OSHA's prior investigation). At the end of the 2015 investigation, OSHA informed the employer that employees were exposed to workplace violence hazards. *Id.* OSHA decided against issuing a citation at that time and instead outlined several methods of feasible abatement the employer could adopt. *Id.* Around the same time, an affiliate of Pembroke Hospital, the Lowell Treatment Center ("LTC"), was also cited for workplace violence hazards. *Id.* at *1, 13-14. (Tr. 601, 614.) That citation became a final order of the Commission on May 16, 2016, several months before the citation for workplace hazards was issued to UHS-Pembroke and UHS-DE, and years before the Citation at issue here. *Id.* LTC's citation was for exposing workers at a psychiatric care facility in Massachusetts "to acts of workplace violence, including, but not limited to: verbal threats of assault, physical assaults … ." *Id.* LTC's citation also sets forth the means of abating the hazard. *Id.* (Tr. 614-16; Exs. S-149, S-150.) Although the citation issued to UHS-DE and UHS-Pembroke was still being litigated when OSHA inspected the Worksite, the citation issued to LTC was final and not subject to appeal. (Tr. 614-16, 955; Ex. S-150.) UHS-Fuller was not a party to *UHS Pembroke* and was not cited in connection with the investigation of LTC.

[362] Three years before the inspection leading to this litigation, OSHA inspected the Worksite and issued UHS-Fuller a Hazard Alert Letter ("HAL"). (Tr. 551; Ex. S-22 at 2.) Hazard Alert Letters "assist employers in meeting their responsibilities regarding hazards in the industry." *Marion Landmark, Inc*., No. 79-936, 1980 WL 10108, at *4 (OSHRCALJ, Mar. 3, 1980). *Cf. Pepperidge Farm*, 17 BNA OSHC at 2003-4, 2007-8 (memos from insurer put the employer on notice of lifting hazards and provided abatement methods). The HAL discussed workplace violence and provided recommendations to reduce the risk to employees from the hazard. (Tr. 551; Ex. S-22 at 2.)

experts familiar with the industry would consider the hazard when prescribing a safety program.[363] *See Nat'l Realty*, 489 F.2d at 1266.

Knowledge of the hazard provides adequate notice to satisfy the requirement of due process. *See e.g., Cape & Vineyard Div. of New Bedford Gas & Edison Light v. OSHRC*, 512 F.2d 1148 (1st Cir. 1975) (finding that actual knowledge of the hazard provides fair notice); *Bethlehem Steel Corp. v. OSHRC*, 607 F.2d 871, 875 (3d Cir. 1979) (finding that fair notice is addressed by the requirement that the hazard is recognized); *Babcock*, 622 F.2d at 1164 (concluding that either the employer or its industry must be aware of the hazard).

In *BHC*, the employer made similar arguments to those that Respondents now raise.[364] 951 F.3d at 566. The D.C. Circuit's reasoning is applicable and compelling. The Secretary identified specific measures needed to meet the general duty clause's requirements and protect staff from patient violence at a behavioral health facility. In *BHC*, as is the case here, the proposed "measures accord with well-known industry best practices and peer-reviewed research." *Id*. Further, "the need for full and consistent implementation of such measures is or should be evident to reasonably prudent managers of any major psychiatric inpatient hospital." *Id*. *See also A.C. Castle*, 882 F.3d at 38, 43-44 (rejecting fair notice claims and limiting the doctrine's scope).

Akin to *SeaWorld* and *BHC*, the application of the general duty clause in this matter "turns in significant part on the employer's failure to extend throughout its workplace the very safety measures it had already applied, albeit inconsistently." *Id*. Just as Chief Judge Rooney in *BHC*

---

[363] Stip. 23, 50-51. *National Realty* predates *Waldon* and the development of the four-part test for establishing violations of the general duty clause. *See Integra*, 2019 WL 1142920, at *4, n.3 (discussing how precedent has interpreted the OSH Act's requirement that employers provide a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees").

[364] UHS-DE also managed the facility cited in *BHC.* 951 F.3d at 561. The underlying citation in *BHC* was issued in January 2017. *BHC,* 2019 WL 989734, at *3, n. 4. Chief Judge Rooney's decision affirmed the citation on January 22, 2019 and the decision became a final order of the Commission on February 22, 2019. *Id.* at *1, 43.

was troubled by the disconnect between the employer's written policies and its actual practices, the undersigned also finds that Respondents, contrary to their claims, did not implement the abatement called for by their policies and procedures. Like in *BHC*, Respondents here "can hardly object" that they were "blindsided by the utility of measures" they "already embraced, at least on paper." *Id*.

UHS-Fuller claims that knowledge of the hazard and actual, frequent employee exposure to it is insufficient to show notice. (UHS-Fuller Br. 104-06.) It argues that the Secretary also had to show UHS-Fuller knew it could materially reduce the hazard by adopting the measures the Secretary proposes. *Id.* at 106. Such knowledge is not required for a Citation to pass constitutional muster. The recognition necessary to satisfy due process "relates to knowledge of the hazard, not recognition of the means of abatement."[365] Requiring knowledge of the Secretary's proposed abatement is not appropriate. Employers are not bound to adopt the proposed abatement. They can defend against an alleged general duty clause by arguing they were using a different abatement

[365] *UHS Pembroke,* 2022 WL 774272, at *18-21, 41-42 (collecting cases and rejecting employer's due process claims related to the Citation and proposed abatement). The Commission did not address Judge Bell's findings related to fair notice and constitutionality. 2022 WL 774272, at *13, n. 18 (noting, but declining to address employer's arguments that it was not on notice of what additional measures were required to prevent subsequent violations). They did uphold his affirmance of the Citation. *Id.* at *1. UHS-Fuller cites to *Connally v. Gen. Constr. Co*., 269 U.S. 385 (1926), a case that predates the OSH Act and interprets a criminal Oklahoma state law related to minimum wages. (UHS-Fuller Br. 104.) The due process requirements for criminal violations do not apply here. *See e.g., Brennan v. Santa Fe Transp. Co.*, 505 F.2d 869, 872 (10th Cir. 1974) (finding *Connally* inapplicable and rejecting claim that standard issued by OSHA was impermissibly vague).

method other than the abatement method the Secretary suggests.[366] The proposed abatement measures were available to and readily knowable by Respondents. Indeed, much of the Secretary's proposed abatement calls for the actual implementation of the policies and procedures Respondents identified as methods to protect employees and minimize serious injuries from workplace violence.[367] Respondents knew of the practices and procedures within their control that would decrease the likelihood of patient on staff violence and minimize the severity of such incidents. Yet, they failed to implement these actions fully and appropriately. *See SeaWorld*, 748 F.3d at 1216 (finding that employer could have anticipated that abatement measures it applied after incidents would be required); *Babcock*, 622 F.2d at 1165 (affirming finding of liability when the company failed to take feasible precautions to reduce the risk of injury). In short, the proposed abatement measures were specific, in accord with industry practice, and consistent with Respondents' unfollowed policies.

Respondents' existing measures for addressing patient-on-staff violence were insufficient, and they failed to implement feasible measures capable of materially reducing the hazard. *See CF&T,* 15 BNA OSHC at 2198, n.9 ((noting that the "mere existence of a safety program on paper

[366] *See, e.g., Waldon*, 16 BNA OSHC at 1062-63 (discussing abatement in the context of upholding general duty clause citation issued to a nursing home operator and specifying that an employer may defend against a general duty clause citation by demonstrating that it was using an abatement method as effective as the one the Secretary suggested); *Cyrus Mines Corp*., 11 BNA OSHC 1063, 1067 (No. 76-616, 1983) (explaining that the employer "is not required to adopt the abatement method suggested by the Secretary, even one found feasible by the Commission; it may satisfy its duty to comply with the standard by using any feasible method that is appropriate to abate the violation"); *Brown*, 8 BNA OSHC at 2144 ("the employer may defend against a section 5(a)(1) citation by asserting that it was using a method of abatement other than the one suggested by the Secretary."). The requirement to show a feasible and effective means of abatement is not set forth in the OSH Act. 29 U.S.C. § 654(a)(1). The concept was developed through caselaw as means to ensure the OSH Act was not interpreted in a way that imposed strict liability. *See* 29 U.S.C. § 651(b) (requiring employers "to assure so far as possible ... safe and healthful working conditions"); Mark A. Rothstein, *Occupational Safety and Health Law* §§ 6:1, 6:5, 6:9 (2022 ed.) (indicating the hazard must be defined in a way as to give fair notice).

[367] *See St. Joe's Minerals Corp. v. OSHRC*, 647 F.2d 840, 844 (8th Cir. 1981) (employer violated the general duty clause because its abatement was not sufficiently protective). The relevant industry also recognized the hazard. (Stip. 23; Exs. S-397 at 1, S-423 (OSHA WPV Roadmap).) Fair notice challenges to a general duty clause citation fail when the abatement measures are available to and readily knowable by the industry. *Integra*, 2019 WL 1142920, at * 14, n.15.

does not establish that the program was effectively implemented on the worksite"); *Pepperidge Farm*, 17 BNA OSHC at 2007-8 (employer failed to implement abatement it identified). Neither the need for implemented policies nor the contents of appropriate abatement were unknown to Respondents.[368] *See Integra,* 2019 WL 1142920 at * 14, n.15 (rejecting constitutional vagueness challenge because the proposed abatement measures were "available to, and readily knowable by the industry.")

V. Penalty

"Section 17(j) of the Act, 29 U.S.C. § 666(j), requires that when assessing penalties, the Commission must give due consideration to four criteria: the size of the employer's business, the gravity of the violation, the employer's good faith, and any prior history of violations." *Hern Iron Works, Inc*., 16 BNA OSHC 1619, 1624 (No. 88-1962, 1994). When determining gravity, the Commission considers the number of exposed employees, the duration of their exposure, whether precautions could have been taken against injury, and the likelihood of injury. *Capform, Inc*., 19 BNA OSHC 1374, 1378 (No. 99-0322, 2001), *aff'd*, 34 F. App'x 85 (5th Cir. 2000) (unpublished). Gravity is typically the most important factor for determining the penalty. *Id.*

During the hearing, the Secretary amended the citation classification from repeat to serious. (Tr. 628-29). In his brief, the Secretary argues that based on the record, the penalty should be the maximum amount for a serious violation issued in 2019, $13,260. (Sec'y Br. 93-94). *See* 84 Fed.

[368] The cases UHS-Fuller cites do not undermine this reasoning. *Asamera Oil (U.S.)*, 9 BNA OSHC 1426 (No. 1426, 1980) (consolidated), is a non-binding ALJ opinion addressing a specific standard, not the general duty clause. 9 BNA OSHC at 1427 (affirming the ALJ's decision but awarding it only "the precedential value of an unreviewed judge's decision"). The Ninth Circuit decision*, Donovan v. Royal Logging Co.*, 645 F.2d 822 (9th Cir. 1981), is also not binding. *See Integra*, 2019 WL 1142920 at *1-14, n.15 (declining to follow *Royal Logging's* statements about abatement in the context of a workplace violence hazard). Reliance on *Davey Tree Expert Co*., 11 BNA OSHC 1898 (No. 77-2350, 1984) is also misplaced. Here, unlike *Davey Tree*, Respondents explicitly chose not to contest how the hazard was defined or their recognition of it. (Stips. 19-23.) For similar reasons, the rationale of *Missouri Basin Well Service,* 26 BNA OSHC 2314 (No. 13-1817, 2018) does not come to UHS-Fuller's aid. The language UHS-Fuller quotes concerns about how the hazard is defined. 26 BNA OSHC at 2316. It has not been extended beyond the context of hazard definition. In this matter, there is no dispute about how the hazard is defined or Respondents' recognition of it when it is so defined. (Stips. 19-23.)

Reg. 213, 219 (Jan. 23, 2019). Citing the frequency and severity of injuries experienced at this Worksite from the hazard, the Secretary argues that the violation's gravity warrants the maximum penalty. (Sec'y Br. 93-94.) In his view, the other penalty factors (size, good faith, and history) do not support reducing the penalty from the maximum for a serious violation. *Id*.

After considering the record and penalty factors, the undersigned finds that a penalty of $13,260 is appropriate. The hazard caused serious injury and was capable of causing death. Many employees were exposed to the hazard, with several suffering serious injuries. Respondents employ too many individuals to warrant a reduction for size. (Tr. 485.) Nor are there grounds for a reduction based on history.

As for good faith, while Respondents took some steps to mitigate the hazard, they failed to implement feasible abatement measures they identified. More importantly, the destruction of evidence during and after the close of OSHA's investigation runs strongly against reducing the penalty for good faith. Had the maximum penalty not been appropriate based on gravity alone, an increase for lack of good faith would have been appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that:

1. The Secretary's July 2, 2021 Motion in Limine Concerning Respondents' Extensive Destruction of Highly Relevant Video Footage is GRANTED in part and DENIED in part.

2. Citation 1, Item 1 for a violation of section 5(a)(1) of the OSH Act is AFFIRMED as SERIOUS, and a penalty of $13,260 is ASSESSED.

3. Citation 1, Item 2 was withdrawn.

It is further ORDERED, as stated in the Decision Appendix that:

4. The Secretary's July 12, 2021 Motion for Sanctions is GRANTED in part and DENIED in part.

5. The Secretary's July 20, 2021 Motion for Further Sanctions is GRANTED in part and DENIED in part.

SO ORDERED.

/s/ *Carol A. Baumerich*
Carol A. Baumerich
Judge, OSHRC

Dated: January 31, 2023
Washington, D.C.

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. UHS OF FULLER, INC., UHS OF DELAWARE, INC., Respondent.	OSHRC DOCKET NO. 20-0032

DECISION APPENDIX
FURTHER ORDER REGARDING FAILURE OF UHS-DE TO TIMELY COMPLY WITH DISCOVERY

Respondents UHS of Fuller, Inc. ("UHS-Fuller") and UHS of Delaware, Inc. ("UHS-DE") are sanctioned for the destruction of video evidence as summarized in Decision Section II.B.3 (Summary of Spoilation Sanctions) above. Sadly, the destruction of evidence was not the only unfortunate conduct to mar these proceedings. UHS-DE also engaged in inappropriate dilatory tactics that hampered both the discovery process and the hearing. In two Motions, the Secretary sought additional sanctions solely against UHS-DE for failing to comply with discovery obligations and Orders.[1] UHS-DE's actions do not necessitate the imposition of additional adverse inferences. Still, the Secretary's Sanctions Motions are granted, in part, including payment of the

[1] The motions are the Secretary's July 12, 2021 Motion for Sanctions, including proposed order and exhibits ("Sanctions Motion I") and Secretary's July 20, 2021 Motion for Further Sanctions Following In Camera Review by Court ("Sanctions Motion II" and collectively with Sanctions Motion I, the "Sanctions Motions"). As the Secretary's Sanctions Motions were filed just before the hearing began, ruling on the Motions was held in abeyance. (Tr. 23-26.) This Decision Appendix states the undersigned's Order granting, in part, the Secretary's Sanctions Motions, including the payment of certain attorneys' fees associated therewith and an expedited transcription expense.

Secretary's reasonable expenses, including attorneys' fees, associated with the preparation and filing of certain documents, and an expedited transcription expense, because UHS-DE's failure to abide by the undersigned's Orders was not substantially justified.[2]

I. Discovery Order I

A brief recap of the past orders and motions is necessary.[3] About a month and a half before the hearing commenced, the undersigned issued the June 14, 2021 Discovery Order Regarding the Secretary's Cross-Motion to Compel ("Discovery Order I") in response to cross-motions from the parties.[4] It granted, in part, the Secretary's May 13, 2021 Opposition to Respondents' Motion for a Protective Order and Cross-Motion to Compel ("Motion to Compel") and addressed

[2] 29 C.F.R. § 2200.52(f); Federal Rule of Civil Procedure 37(a)(5) ("Rule 37(a)(5)") (permitting the payment of expenses when a party fails to meet its discovery obligations without judicial intervention), (b)(2)(C) (permitting the payment of expenses associated with filings related to non-compliance with court orders); Sec'y Br. 46 n.20. UHS-DE was given an opportunity to clarify whether the discovery failings were the result of ineffective counsel. It neither made such assertions nor offered proof of such a claim. As such, its reliance on precedents related to Federal Rule of Civil Procedure 11 is unpersuasive. (UHS-DE Br. 70-71, citing *McCarty v. Verizon New England, Inc*., 731 F.Supp.2d 123, 134 (D. Mass. 2010) and 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1336.2 (3d ed. 2004)).

[3] Respondent UHS-DE was represented at the hearing and in post-hearing briefing by Eric J. Neiman and Kip J. Adams, with the firm Lewis Brisbois Bisgaard & Smith, LLP. Notices of Appearance dated June 25, 2021 and July 7, 2021. (Tr. 2832.) Respondent UHS-DE also was represented by Michael R. Callahan, with the firm Katten Muchin Roseman LLP. Notice of Appearance dated June 2, 2021. During the OSHA inspection and prehearing discovery Respondent UHS-DE was represented by Jonathan L. Snare and Alana F. Genderson, with the firm Morgan, Lewis & Bockius, LLP. (Ex. S-22; Notice of Contest dated December 20, 2019.)

On July 23, 2021, the last business day before the hearing in this matter began on July 26, 2021, Mr. Snare and Ms. Genderson filed a Motion to Withdraw as Counsel for Respondent UHS-DE. UHS-Fuller did not oppose the Motion. The Secretary objected to the Motion because of UHS-DE's discovery problems and delay, the pending Sanctions Motions regarding the UHS-DE discovery, and declarations by opposing counsel stated in the July 21, 2021 UHS-DE Opposition to Secretary's Motion for Sanctions and Response to the Order to Show Cause ("UHS-DE Opp'n"). (UHS-DE Opp'n, Snare Decl.; Tr. 19-21.) At the hearing, the Motion to Withdraw was denied, in part. The Motion to Withdraw as Counsel was denied regarding UHS-DE's delayed discovery, the Secretary's pending Sanctions Motions regarding UHS-DE's discovery, and the Secretary's requested sanctions regarding UHS-DE's failure to preserve surveillance video. (Tr. 21.)

[4] The parties were informed of the findings in and requirements of Discovery Order I during the June 3, 2021 teleconference. (Sec'y Mot. 7; UHS-DE Opp'n 4-5, 20-24, Snare Decl. ¶ 4-8; July 23, 2021 UHS-DE Opp'n to Sec'y Mot. for Further Sanctions Following In Camera Review ("UHS-DE Further Opp'n") 6.) Discovery Order I was issued and served electronically on the parties on June 14, 2021.

Respondents' May 7, 2021 Second Motion for Protective Order ("2d Protective Motion").[5] At the time, UHS-DE had yet to certify it had searched for responsive documents to the Secretary's January 31, 2020, and March 6, 2020 Requests for Production.[6] These discovery requests were relevant and proportional to the case needs. (Disc. Order I at 19-20.) UHS-DE also failed to produce a log with sufficient information regarding the documents withheld on purported privilege grounds. *Id.* at 24, 30. As a remedy, Discovery Order I directed UHS-DE to produce all improperly withheld documents by June 21, 2021. *Id.* at 31. Any document UHS-DE continued to withhold on privilege grounds needed to be logged appropriately, and the log had to be turned over by the same deadline, June 21, 2021. *Id.* at 31-32.

II. Discovery Order II

UHS-DE failed to comply with Discovery Order I. It produced hundreds of pages of responsive materials on three occasions *after* the deadline.[7] These late productions account for over half of all documents produced by UHS-DE.[8] Some of the documents related to the issues

[5] Although referred to herein as 2d Protective Motion, Respondents styled their May 7, 2021 motion as a "Motion for Protective Order." However, a Protective Order was already in place at that time, having been granted nearly a year earlier on June 25, 2020. Like the 2d Protective Motion, Respondents' original May 11, 2020 Motion for a Protective Order ("1st Protective Motion"), also claimed to seek protection for documents that were either privileged or otherwise fell within the purview of the Patient Safety and Quality Improvement Act of 2005 ("PSQIA"). (1st Protective Mot. 1-2.) The Secretary had also moved for a Protective Order on June 5, 2020. The undersigned issued a Protective Order on June 25, 2020. The Protective Order permitted parties to designate documents as "Confidential." Documents properly designated confidential would be maintained in confidence. Further, any disclosed information that met "the definition of Patient Safety Work Product ("PSWP") under the [PSQIA]," was a "limited release of such information pursuant to Section 3.206(b)(3) of the PSQIA." (1st Protective Order 1.)

[6] Disc. Order I at 29, 31. The Notice of Rescheduled Hearing, Second Partially Revised Scheduling Order and Special Notice ("2d Scheduling Order") ordered that UHS-DE certify it completed a reasonable search for documents responsive to the Secretary's First and Second Sets of Requests for Documents by March 5, 2021. (2d Scheduling Order 2.) At that point in time, the Secretary's discovery requests had been pending for over a year. (UHS-DE Opp'n 7; Snare Decl. ¶¶ 11, 12.)

[7] UHS-DE produced responsive documents on June 24, 2021, June 29, 2021, and July 7, 2021.

[8] As of July 12, 2021, UHS-DE had produced 755 documents, of which 395 were produced after the ordered deadline, which was itself a significant extension from the designated date when the production should have been completed. (Sanctions Mot. I at 10; 2d Scheduling Order 2.)

that Discovery Order I addressed. Nevertheless, UHS-DE does not claim that all the late produced documents were connected to claims Discovery Order I resolved. In addition, it continued to withhold documents improperly and failed to provide a sufficient privilege log. (Disc. Order II at 13, 15, 18-19.) These failings prompted the Secretary to request in camera review of a sample of the withheld documents on June 30, 2021.[9] After review, the undersigned issued Discovery Order II, which found that UHS-DE improperly withheld nearly all the disputed documents, which documents should have produced in response to the Secretary's long pending valid discovery requests.[10]

III. Sanctions Motions & Renewed Request for Relief

On July 12, 2021, the Secretary filed Sanctions Motion I for UHS-DE's failure to comply with Discovery Order I, arguing UHS-DE's actions hindered his ability to prepare for the hearing. (Sanctions Mot. I at 11-21.) Sanctions Motion I sought costs and other orders. *Id.* at 21-22. On July 15, 2021, the undersigned ordered Respondents to address why the relief sought in Sanctions

[9] In Camera Request 2-3. On July 1, 2021, the undersigned directed Respondents to produce to the undersigned, the disputed documents identified in the In Camera Request, in unredacted form for *in camera* review. (July 7, 2021 Order 2.) Respondents complied.

[10] Disc. Order II. Had UHS-DE timely searched for documents responsive to the Secretary's discovery requests, reviewed the responsive documents identified, prepared and provided a compliant privilege log, the *in camera* review likely would not have been necessary. Most of the documents subject to the *in camera* review were offered into evidence. (Disc. Order II at 2-3, 19; Exs. S-122, S-213, S-217, S-223, S-227.) Despite a header with an abbreviation for patient safety work product (PSWP), meeting minutes from Corporate Employee Safety Council were not PSWP and could not be withheld on such grounds. *Id.* at 14-19. They were offered as Exhibits S-213, S-217, S-223. *Id.* at 14-19. Exhibits S-122 and S-227 were admitted as sealed exhibits and are not discussed herein.

The Secretary requested *in camera* review of UHS-DE training materials on video preservation. (Sec'y In Camera Request 2.) Only after the Secretary's *in camera* request, did UHS-DE "review the training documents further," and remove two training documents from its patient safety work product privilege log and belatedly provide them to the Secretary, on July 1, 2021. These training documents are in evidence as Exhibit S-451W (Preservation of Video Surveillance; Video Surveillance Compliance Policy). (Disc. Order II at 10-11, 13.)

Motion I should not be granted. (Show Cause Order 3.) UHS-DE and UHS-Fuller jointly filed a response to the Show Cause Order.[11]

On July 20, 2021, the Secretary filed Sanctions Motion II, which expanded on the relief sought in Sanctions Motion I. By that point, on July 15, 2021, Discovery Order II had issued and UHS-DE's failure to comply with multiple aspects of Discovery Order I was evident.

In his post-hearing brief, the Secretary renewed his request for sanctions for UHS-DE's conduct but narrowed the adverse inferences sought.[12] He focused on obtaining this adverse inference: "UHS-DE's discovery conduct constitutes credible evidence that UHS-DE operated Fuller Hospital as a single employer with UHS-Fuller." (Sec'y Br. 46.) As discussed in Decision Section II.A, the undersigned found that the Secretary satisfied the requirements for finding a single employer relationship without this inference. Most of the other relief sought in the Sanctions Motions is no longer in issue. The primary request remaining is the Secretary's request for the attorneys' fees associated with the Sanctions Motions and the increased costs for transcribing the late-produced audio file regarding evidence preservation training.[13]

IV. Analysis

UHS-DE acknowledges "documents were untimely produced to the Secretary" and that its discovery conduct "necessitated the Court's intervention." (UHS-DE Br. 68-69.) Largely, it does

[11] *See* July 20, 2021 Jt. Resp. to Order to Show Cause Regarding Disputed Facts In Complainant's Motion In Lim. ("Jt. Show Cause Resp."). UHS-Fuller and UHS-DE also filed separate oppositions to Sanctions Motion I. The UHS-DE Opp'n included attachments and the Declaration of Counsel Snare with exhibits. The UHS-DE Opp'n was accepted on July 22, 2021. UHS-Fuller's July 21, 2021 Opposition to the Secretary's Motion for Sanctions ("UHS-Fuller Opp'n") was filed and accepted on July 21, 2021.

[12] The Secretary has been clear that he is only seeking sanctions against UHS-DE for its failure to comply with Discovery Order I. (Tr. 24-26; Sec'y Br. 45-48, n.19.)

[13] Sanctions Mot. I at 22, Sec'y Br. 43-48. Certain of the factual findings requested in the Sanctions Motions have been established. (Disc. Order II at 4-18; Sanctions Mot. I at 21-22; Sanctions Mot. II at 3-5.)

not dispute the timeline or factual contentions set forth in the Sanctions Motions or Discovery Orders I and II. Nonetheless, it claims that the Secretary's prejudice was minimal, and the delays did not hinder the Secretary's ability to present his case. (UHS-DE Opp'n 1; UHS-DE Reply Br. 17.) UHS-DE also argues that it did not act "in bad faith" when withholding certain documents on privilege grounds. (UHS-DE Further Opp'n 14; UHS-DE Reply Br. 17.)

UHS-DE had months to prepare to produce all the required documents. (Sec'y Br. 44.) It failed to timely conduct a search for responsive documents. It waited until after Discovery Order I's deadline to produce more than half of the total documents it produced in this litigation. *Id.* at 44, 47. The late production occurred close to the hearing, after the completion of depositions and the preparation of expert reports. *Id.* at 44. Accepting that reasonable privilege claims led to withholding some documents before Discovery Order I's issuance, UHS-DE continued to withhold responsive, non-privileged documents after the deadline set in that order elapsed.[14] This approach to discovery necessitated another motion by the Secretary to get UHS-DE to come close to complying. *Id.* In the Secretary's view, UHS-DE's actions during discovery were a purposeful attempt to avoid acknowledging the full extent to which it had access to documents concerning UHS-Fuller. *Id.* at 46-47. He argues that failing to impose sanctions incentivizes UHS-DE to "thwart its discovery obligations in all future OSHRC proceedings." *Id.* at 47.

UHS-DE repeatedly claims that it delayed production because it was awaiting a ruling on the validity of privilege claims. (UHS-DE Br. 70; UHS-DE Reply Br. 15-16.) This argument ignores critical facts. First, it does not address UHS-DE's failure to timely provide a compliant privilege log when it elected to withhold hundreds of documents. It was ordered to do so by March

[14] UHS-DE does not claim all the late produced documents were not timely produced because there was a justifiable privilege or relevancy claim. (Disc. Order I at 8, 19-20; Disc. Order II at 10-11, 13; UHS-DE Opp'n 6, 21; Snare Decl. ¶ 10.)

5, 2021. It still had not provided a compliant log three months later. (2d Scheduling Order 2; Disc. Order I at 1-2.) Second, it does not explain why UHS-DE continued withholding documents without any rightful privilege claim. (Disc. Order I at 8, 18-20.) Third, it does not account for UHS-DE's failure to meet the extended production deadlines ordered in the Second Scheduling Order and Discovery Order I. (2d Scheduling Order 2; Disc. Order I at 30-33.)

A. Privilege Log Failures

Under Commission Rule 52, the "initial" claim of privilege must "specify the privilege claimed and the general nature of the material for which the privilege is claimed." 29 C.F.R. § 2200.52(d). In response to an order from the judge or in response to a motion to compel, the claimant of the privilege must: "identify the information that would be disclosed, set forth the privilege that is claimed, and allege the facts showing that the information is privileged." *Id.* UHS-DE failed to comply with this rule.[15] As Discovery Orders I and II explain, UHS-DE's privilege log was "minimal" and "incomplete." (Disc. Order I at 1-2; Disc. Order II at 5-7, 12, 15.)

UHS-DE points to the limited time for production after Discovery Order I's issuance. (UHS-DE Opp'n 21, 24.) This argument fails to acknowledge the role the lack of an appropriate privilege log played in the compressed production time. The Second Scheduling Order directed UHS-DE to complete its privilege log by March 5, 2021. Yet, it waited until two months after that deadline to file a motion asserting what it inaccurately describes as "novel" privilege claims.[16]

[15] The Federal Rules of Civil Procedure elaborate on these requirements. Under Federal Rule of Procedure 26(b)(5)(A), to claim that information should be protected from discovery, a party must: "(i) expressly make the claim; and (ii) describe the nature of the documents, communications … and do so in a manner that … will enable other parties to assess the claim."

[16] UHS-DE Reply Br. 15. Since the early stages of this litigation, there has been a Protective Order in place which addressed issues related to the release of information that meets the definition of patient safety work product under the PSQIA, 43 U.S.C. § 299b-21 *et seq*. (Protective Order 1.)

The filing of the Second Protective Order Motion met the filing deadline for such motions but bringing the motion did not extend the time to provide a compliant privilege log. That obligation remained long overdue when UHS-DE brought its privilege claims. (2d Scheduling Order 2.) At that time, UHS-DE had only provided a document with broad categories of documents withheld rather than listing each document separately and providing the required information to assess its privilege claims. (Disc. Order I at 10, 24, 30.) This failure hindered the prompt resolution of the privilege claims forcing the undersigned to specifically order UHS-DE a second time to prepare and provide an appropriate privilege log.[17] Although the log was months overdue, UHS-DE was granted even more time to provide the complaint privilege log. Once again, it failed to meet the ordered deadline.[18]

Hampered by UHS-DE's continued failure to produce a compliant privilege log, the Secretary sought a review of a sample of the documents he believed UHS-DE was improperly withholding. (Disc. Order II at 5-6, 12-13.) As noted above, while the In Camera Request was pending, UHS-DE acknowledged that some of the documents were improperly withheld and belatedly produced them. *Id.* at 11, 13.

B. Improperly Withheld Documents

Conceivably some of the initial withholdings resulted from a legitimate confusion about the scope of various privileges. But UHS-DE also improperly withheld other responsive

[17] Discovery Order I required UHS-DE to provide an "updated, complete privilege log" with the title of the withheld document and "a description sufficient to explain why the alleged privilege applies." (Disc. Order I at 30, 32.) UHS-DE admits that when it finally reviewed the withheld documents and prepared a complete privilege log, "UHS-DE identified 364 documents – including many policies and procedures related to PsychSafe – that it determined were not in fact protected by PSWP." (UHS-DE Opp'n 6, 21; Snare Decl. ¶ 10.) UHS-DE admits these documents were not produced to the Secretary until June 29, 2021, after the production deadline. *Id.*

[18] Disc. Order II at 6-7, 12-13, 15, 17; UHS-DE Opp'n 11-8, 22. UHS-DE admits it completed the privilege log, as ordered in Disc. Order I, by July 7, 2021, and submitted this log to the Secretary. (UHS-DE Opp'n 11; Snare Decl.¶ 20; Sanctions Mot. I at 9.)

documents, claiming they were irrelevant. (Disc. Order I at 26-27.) These documents related to sexual allegations, boundary violations, elopement, and the corporate relationship between UHS-DE and UHS-Fuller. *Id.* at 29. Discovery Order I rejected the contention that the documents were irrelevant and directed UHS-DE to produce these withheld documents by June 21, 2021. *Id.* at 31. UHS-DE failed to comply, producing documents on multiple occasions after the deadline. (Sanctions Mot. I at 10.)

C. Extended Production Deadlines

UHS-DE's claims of time pressure are not persuasive. The Secretary served his First Set of Requests for Production of Documents on UHS-DE on January 31, 2020. A little over a month later, he served his Second Set of Requests for Production of Documents, First Set of Requests for Admission, and First Set of Interrogatories. UHS-DE received its first extension for production in March 2020. The parties then discussed a protective order, which the undersigned issued on June 25, 2020, over a year before the hearing commenced. The parties agreed to complete production by September 30, 2020. UHS-DE failed to meet that deadline, and the parties agreed to a series of extensions. UHS-DE promised to complete its search for responsive documents, produce responsive non-privileged material, and provide a privilege log by February 12, 2021.[19]

Again, UHS-DE did not meet the deadline. Instead, it produced documents in drips and drabs over the next three months after the extended deadline.[20] UHS-DE made various claims of

[19] This deadline was specified in the parties' February 1, 2021 Joint Planning Recommendations, which was filed with the Commission approximately six months before the anticipated hearing date. The undersigned notes that this deadline was an over four-month extension from what the parties initially agreed to.

[20] UHS-DE made partial productions on February 21, 2021, and in March, April, and May of 2021. The 2d Scheduling Order required the completion of the search for documents, the production of responsive non-privileged documents and the provision of a log of withheld privileged documents by March 5, 2021.

privilege but continued to neglect its obligation to identify the withheld documents and the basis for withholding, as required by Federal Rule of Civil Procedure 26.

After the extended deadline for fact discovery closed, the parties participated in a status conference on June 3, 2021. At that point, UHS-DE still had not certified that it had completed a reasonable search for documents, had not produced all responsive documents, and had not produced a log that sufficiently explained the responsive materials being withheld and the rationale for the withholding. The undersigned explicitly ordered UHS-DE to produce responsive materials and log any responsive materials protected by valid privilege claims.[21] Without an appropriate privilege log, there was no support for finding UHS-DE was withholding the documents appropriately. (Disc. Order I at 24.) Still, rather than rejecting all the privilege claims, the undersigned permitted UHS-DE an additional opportunity to rectify its failings. *Id.* at 30-33. Unfortunately, it failed to take full advantage of the opportunity, necessitating the In Camera Motion and Sanctions Motions.

D. Commission Rule 52 and Fed. R. Civ. P. 37

In its Post-Hearing Brief, UHS-DE argues that the request for sanctions "finds no support in the law."[22] On the contrary, under Commission Rule 52, if "a party fails to comply with an order compelling discovery," the Judge may, in appropriate circumstances, issue "any sanction stated in Federal Rule of Civil Procedure 37." 29 C.F.R. § 2200.52(f). Rule 37, in turn, provides that when a party fails to comply with discovery obligations or obey a court order, judges may require the payment of expenses or provide other relief. Rule 37(a)(5), (b)(2). Perhaps

[21] Disc. Order I at 29-33. UHS-DE produced more documents on the day after the status conference and again on June 11, 2021.

[22] UHS-DE Br. 70. Despite this assertion, UHS-DE previously acknowledged the availability of sanctions for failure to comply with a discovery order. (UHS-DE Further Opp'n 2.)

unsurprisingly given its assertions, UHS-DE appears not to address Rule 37 in its filings. (UHS-DE Opp'n 11-23; UHS-DE Further Opp'n 2; UHS-DE Br. 70-74; UHS-DE Reply Br. 14-16.) The remedies set out in Rule 37 have been available to Commission Judge's since the agency's earliest days. *See e.g.*, *Capital Dredge & Dock Co*., 1 BNA OSHC 1066, 1068 (No. 803, 1972) (stating that Rule 37 "provide[s] sanctions for a failure to obey an *order* to permit or provide discovery") (emphasis in original).

Appropriate sanctions are important to ensure compliance with pre-hearing procedures and the fair, efficient adjudication of cases. *Duquesne Light Co.*, 8 BNA OSHC 1218, 1221 (No. 78-5034, 1980). The Commission reserves the most severe sanction of dismissal for those situations where the conduct of the noncomplying party constitutes contumacy *or* there is prejudice to the opposing party.[23] When lesser sanctions for failure to comply with discovery obligations are at

[23] *S. Scrap Materials Co.*, 23 BNA OSHC 1596, 1601 (No. 94-3393, 2011) ("The judge, however, may not sanction a party by dismissing the citation unless the record shows contumacious conduct by the noncomplying party or prejudice to the opposing party"); *St. Lawrence Food Corp*., 21 BNA OSHC 1467, 1472 (No. 04-1734, 2006) (consolidated) (finding dismissal sanction inappropriate when party complied with Commission rules by seeking interlocutory review of discovery order). UHS-DE incorrectly summarizes the holding of *Southern Scrap*. (UHS-DE Br. 72.) In that case, the Commission found that the Secretary's response to discovery requests "did not rise to the level of contumacy" and upheld the ALJ's finding that the employer did not suffer legal prejudice in its defense. 23 BNA OSHC at 1601. The employer had weeks to review the late-produced documents and did not claim there was insufficient time to review them. *Id.* (indicating that the employer had "fifty-one" days to review one set of responsive material and "forty-seven days" to review other late-produced documents).

issue, the Commission follows Rule 37's test of whether the conduct was "substantially justified."[24]

UHS-DE contends that its failure to timely produce documents was because of a misunderstanding of the scope of privileges and that the Secretary failed to establish "prejudice" from the delay. (UHS-DE Br. 71-74.) These arguments miss the mark in two critical respects. First, what is at issue here is not UHS-DE's decision to withhold documents before Discovery Order I's issuance but its failure to comply with Discovery Order I.[25] Second, for less harsh sanctions, like the award of expenses, a finding of prejudice is not required.[26]

As Discovery Order I made plain, UHS-DE improperly withheld many documents from production and needed to turn them over promptly. (Disc. Order I at 20, 24, 28-30.) Yet, UHS-DE continued to withhold them. Its explanation for not timely complying with Discovery Order I is the volume of materials involved. (UHS-DE Br. 71; UHS-DE Reply 16.) However, UHS-DE

---

[24] *Tri-State Steel Constr. Co., Inc*., 17 BNA OSHC 1769, 1775-76 (No. 93-0512, 1996) (consolidated) (applying Rule 37 and finding monetary sanctions inappropriate when discovery conduct was substantially justified); *Pittsburgh Forgings Co.*, 10 BNA OSHC 1512, 1513 (No. 78-1361, 1982) (noting Rule 37 and upholding the ALJ's sanctions). *See also Roy's Constr. Inc.*, 24 BNA OSHC 1373, 1382 n.26 (No. 11-0892, 2012) (ALJ) (awarding attorney's fees associated with filing the motion to compel and the motion for sanctions when a party failed to comply with discovery obligations). In its briefs, UHS-DE cites two decisions which do not reference Commission Rule 52 or Rule 37, *Samsonite Corp*., 10 BNA OSHC 1583 (No. 79-5649, 1982), and *Genesee Brewing Co.*, 11 BNA OSHC 1516 (No. 78-5178, 1983). (UHS-DE Br. 72; UHS-DE Reply Br. 16-17.) Both cases involve the most severe sanction of vacating citation items and do not address lesser sanctions. In *Samsonite*, the Commissioners could not agree on a rationale. 10 BNA OSHC at 1588. Two agreed on remanding the matter but disagreed on the rationale. *Id*. The third Commissioner dissented and would not have remanded the matter. *Id*. In *Genesee*, the employer claimed that delaying the proceedings to permit further discovery would cause prejudice, not that the Secretary's actions during discovery resulted in prejudice. 11 BNA OSHC at 1518 ("Genesee Brewing does not claim that it has already suffered any prejudice from the Secretary's conduct in seeking the discovery"). Nor was there any failure to comply with a court order. *Id.*

[25] UHS-DE also failed to comply with the Second Scheduling Order.

[26] Rule 37 (a)(5), (b)(2)(C). *Choice Elec. Corp.,* 14 BNA OSHC 1899 (No. 88-1393, 1990) is readily distinguishable. (UHS-DE Opp'n 11, 20; UHS-DE Further Opp'n 2.) *Choice Electric* concerned a default sanction against a *pro se* party, who appeared to lack sufficient knowledge of Commission procedure. 14 BNA OSHC at 1900. The matter was remanded for further factual finding on whether the employer had sufficient reason for failing to file an answer. *Id.* at 1901. In contrast, UHS-DE is a sophisticated entity with prior involvement in Commission proceedings. It has been represented by experienced counsel from the inception of OSHA's investigation. The relief granted herein in no way deprived UHS-DE of an appropriate opportunity to be heard. The sanctions are monetary in nature and imposed after the hearing concluded and the record closed.

had many months to compile and log the responsive documents throughout the year before it filed the motion Discovery Order I addresses.[27] UHS-DE is a large, sophisticated entity that challenged the Secretary's discovery requests. Both internal and outside counsel have represented it throughout the process. The decision to wait for another order before starting to complete a compliant privilege log and compile responsive, non-privileged material was solely within its power.[28]

The Secretary established how UHS-DE's pattern of behavior during discovery, particularly its failure to comply with the Second Scheduling Order and Discovery Order I, hindered his ability to present his case. UHS-DE produced responsive materials to Discovery Order I eighteen days before the hearing commenced, with additional materials provided ten days before the hearing began.[29] The Secretary's document requests were pending for over a year before UHS-DE served its first deficient privilege log. (Disc. Order I at 24; Disc. Order II at 5-7.) Even after Discover Order I and the Secretary's Request for In Camera Review, UHS-DE still failed to give the required information for the responsive materials it was withholding. (Disc.

[27] Had UHS-DE evaluated and logged the documents before discovery closed, as required, it would not take long to comply with Discovery Order I. UHS-DE's approach to discovery may have made compliance with even the repeatedly extended deadline more difficult. But UHS-DE choose that approach. It made sweeping privilege and relevancy claims on broad categories of documents rather than following Commission Rule 52. 29 C.F.R. § 2200.52(d).

[28] The completion of the privilege log was ordered over two months before Discovery Order I's issuance. (2d Scheduling Order 2.) UHS-DE also withheld documents it later acknowledged were not privileged. (Disc. Order I at 8, 19-20; Disc. Order II at 10-11, 13; UHS-DE Opp'n 6, 21; Snare Decl. ¶ 10.)

[29] The availability of the withheld information in other formats distinguishes *Southern Scrap*. 23 BNA OSHC at 1601. Moreover, in *Southern Scrap*, the party against whom sanctions were sought complied with the judge's order compelling the production of documents. *Id*. UHS-DE also cites to *Trinity Industries, Inc*., 17 BNA OSHC 1003 (No. 88-1545, 1994) (consolidated) for support, but appears to be quoting not the final decision but an earlier decision in the same matter. (UHS-DE Opp'n 19.) The earlier decision was reversed and remanded back to the Commission. *Reich v. Trinity Indus., Inc*., 16 F.3d 1149 (11th Cir. 1994). After remand, the Commission's subsequent decision only addressed the appropriate penalty for the affirmed violations. 17 BNA OSHC at 1003-4. The undersigned notes that entering the citation "17 BNA OSHC 1003" in the Westlaw database may have pulled up both the decision after remand and the earlier decision (15 BNA OSHC 1579). In any event, besides not being precedential, the text UHS-DE quotes is inapposite as it concerned a situation where the non-complying party's position was "substantially justified." *Trinity Indus. Inc.*, 15 BNA OSHC 1579, 1582-83 (No. 88-1545, 1992). It was appropriate to deny sanctions when the conduct was justifiable. *Id.*

Order II at 12-13, 15-16; Sanctions Mot. I at 8-9.) The late production precluded the Secretary's counsel from being able to use the documents during depositions and having his expert review them before the extended deadline to issue his report.[30] (Sanctions Mot. I at 10-21, Sanctions Mot. II at 2-4.) And the Secretary expended further resources to get UHS-DE to comply with its discovery obligations.[31]

UHS-DE's conduct was "problematic for everyone" and hindered the Secretary's ability to prepare for the case. (Tr. 25.) However, unlike the videos, UHS-DE did not destroy the evidence, and it complied with the orders before the hearing commenced. Thus, imposing the harshest of sanctions is unnecessary. *See Jersey Steel Erectors,* 16 BNA OSHC 1162, 1166 (No. 90-1307, 1993) (the "extreme sanction" of exclusion of evidence critical to a party's case may be appropriate, but only where a party has willfully deceived the Commission or flagrantly disregarded a Commission order), *aff'd without published opinion*, 19 F.3d 643 (3d Cir. 1994).

[30] Depositions for fact witnesses had to be completed by May 28, 2021, and expert reports had to be produced by June 18, 2021. (2d Scheduling Order 2.) The deadline to exchange expert reports was extended to June 25, 2021, with depositions to be completed by July 7, 2021. (June 4, 2021 Order.) As UHS-DE still had not complied with its discovery obligations by June 25, 2021, the deadline to exchange expert reports had to be extended again to July 2, 2021. (June 24, 2021 Order.) Thereafter, due to the document production delays and privilege log delays the parties agreed to exchange expert reports on July 9, 2021. (Sanctions Mot. I at 9.) Even by then, UHS-DE still had not fulfilled its obligations.

[31] UHS-DE also argues that the Secretary's failure to ask for a continuance precludes a finding of prejudice. (UHS-DE Br. 72-73.) However, a continuance would not cure the additional resources the Secretary had to expend to get UHS-DE to comply with its discovery obligations, particularly after Discovery Order I's issuance. *See DR Distribs., LLC v. 21 Century Smoking, Inc.*, 513 F.Supp.3d 839, 960 (D.Ill. 2021) (the ability of a court to reopen discovery after its closure does not make a party's discovery failings substantially justified or harmless). The Memorandum and Order from the matter of *BRT Mgmt. LLC. v. Malden Storage LLC*, No. 17-10005-FDS, 2020 WL 93952 (D. Mass. Jan. 8, 2020) ("Malden Memo") compels no different result. (UHS-DE Br. 72-73 citing the Malden Memo.) The Malden Memo is neither relevant nor binding. In that matter, discovery was re-opened well over a year before trial. *BRT Mgmt. LLC v. Malden Storage LLC*, No. 17-100005-FDS, 2021 WL 4133298, at *1 (D. Mass. Sept. 10, 2021).

Still, the Secretary is entitled to his attorneys' fees associated with the Sanctions Motions and certain expenses necessitated by the very late production. Notably, UHS-DE does not address the Secretary's entitlement to expenses in any of its filings related to the Sanctions Motions.[32] Fees and expenses are not being awarded because UHS-DE asserted privilege claims. The award is necessary and appropriate because UHS-DE failed to timely comply with the discovery requirements after being ordered to do so. (2d Scheduling Order 2; Disc. Order I at 30-33.) UHS-DE's failings include neglecting to properly log withheld documents and not timely turning over responsive documents after its privilege and relevancy contentions were rejected. It is undisputed that UHS-DE turned over many responsive, non-privileged documents after Discovery Order I's deadline. (UHS-DE Br. 68; UHS-DE Opp'n 6, 21; Snare Decl. ¶ 10; Disc. Order II at 11, 13.) Indeed, UHS-DE produced hundreds of documents (compromising over 1,200 pages) and an audio file *after* the deadline without adequate justification for the late production. (Sanctions Mot. I at 10.)

UHS-DE's failure to comply with Discovery Order I was not "substantially justified," nor are there any "other circumstances" which would make the award of the expenses associated with bringing the Sanctions Motions "unjust."[33] In addition, because of the untimely production of the audio file, the Secretary is entitled to the increased costs associated with transcribing the file on an

[32] This includes in the Joint Show Cause Response, the UHS-DE Opposition, the UHS-DE Further Opposition, the UHS-DE Brief, and the UHS-DE Reply Brief.

[33] 29 C.F.R. § 2200.52(f); Rule 37(a)(5), (b)(2)(C). The determination that UHS-DE and UHS-Fuller should be held jointly responsible for the Citation and for the destruction of ESI does not extend to these sanctions related to discovery behavior engaged in by UHS-DE alone.

expedited basis.[34] Ordering the payment of expenses associated with the Secretary's Sanctions Motions, a section of the Secretary's Request for In Camera Review, and sections of the Secretary's post-hearing briefing, as stated below, and the increased transcription costs is sufficient to redress UHS-DE's failure to comply with an order compelling discovery. 29 C.F.R. § 2200.52(f)(2).

ORDER

Summary of UHS-DE Document Discovery Sanctions

The Secretary is entitled to the increased costs associated with transcribing the untimely produced audio file on an expedited basis. (Exs. S-435(A), S-451V.)

The Secretary is entitled to reasonable expenses, including attorneys' fees, associated with the preparation and filing of Sanctions Motion I, including the proposed order and attached exhibits, and Sanctions Motion II.

The Secretary is entitled to reasonable expenses, including attorneys' fees, associated with the preparation and filing of the section entitled "Additional Concerns," in the Secretary's Request for In Camera Review.[35]

[34] UHS-DE produced an audio file after Discovery Order I's deadline. (Sanctions Mot. I at 10; Disc. Order II at 13.) The 2d Scheduling Order required the transcription of any electronic or audio file which a party planned to introduce as evidence during the hearing. (2d Scheduling Order 7.) The audio file concerned training on UHS-DE requirements related to the preservation and transfer of ESI. (Exs. S-435(A), S-451V.) *See* September 30, 2022 Order Regarding Hearing Exhibits.

[35] Specifically, pages 2 and 3 of the Secretary's Request for In Camera Review. This sanction of a partial grant of fees does not broadly include attorneys' fees associated with the Secretary's preparation and filing of the entire Request for In Camera Review. The partial grant of fees is limited to the section of the Request for In Camera Review entitled "Additional Concerns," describing UHS-DE's failure to comply with Discovery Order I. Discovery Order I stated the Court would consider *in camera* review of a sample of the withheld documents on UHS-DE's completed privilege log, if the parties were unable amicably to resolve their discovery dispute. (Discovery Order I at 33-34). Accordingly, the partial grant of attorneys' fees sanction does not include fees associated with all parts of the Request for In Camera Review.

The Secretary is entitled to reasonable expenses, including attorneys' fees, associated with the preparation and filing of the sections in the Secretary's post-hearing brief and the Secretary's reply brief to UHS-DE's post hearing brief, regarding the Secretary's requested sanctions for UHS's discovery failures, which expenses and attorneys' fees are separate from and in addition to the spoilation sanctions granted in the Decision Section II.B.3 (Summary of Spoilation Sanctions).

If the Secretary still wishes to pursue the reimbursement of the increased costs associated with transcribing the untimely produced audio file on an expedited basis and reasonable expenses, including attorneys' fees, for the preparation and filing of the motions, request, and post-hearing briefing, as stated above, the Secretary shall file with the undersigned an accounting of those costs and expenses and present the same to UHS-DE within four calendar days of the service of this decision to the parties, on January 20, 2023. 29 C.F.R. § 2200.90(a)(b). He may include any relevant authority supporting the awarding of costs and expenses. UHS-DE, if it chooses, may, within four calendar days of receiving the Secretary's accounting, file with the undersigned any objections to the accounting or the authority relied on for calculating such costs and expenses.

All other orders and adverse inferences sought in the Sanctions Motions are denied.

SO ORDERED.

/s/ Carol A. Baumerich
Carol A. Baumerich
Judge, OSHRC

Dated: January 31, 2023
Washington, D.C.