



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

SECRETARY OF LABOR,

Complainant,

v.

INTEGRA HEALTH MANAGEMENT, INC.,

Respondent.

OSHRC Docket No. 13-1124

APPEARANCES:

Lee Grabel, Attorney; Louise McGauley Betts, Senior Attorney; Charles F. James, Counsel for Appellate Litigation; Ann Rosenthal, Associate Solicitor of Labor for Occupational Safety and Health; M. Patricia Smith, Solicitor of Labor; U.S. Department of Labor, Washington, DC  
For the Complainant

Kevin C. McCormick; Whiteford, Taylor & Preston, L.L.P., Baltimore, MD  
For the Respondent

Lynn K. Rhinehart, Harold C. Becker, Yona Rozen, Angelia Wade Stubbs, Office of the General Counsel; Margaret Seminario, Rebecca Reindel, Safety and Health Department  
For Amicus Curiae AFL-CIO, Washington, DC

Pamela Allen, Carol Igoe, Legal Department  
For Amicus Curiae California Nurses Association/National Nurses United,  
Oakland, CA

Jacqueline M. Holmes, Jones Day, Washington, DC; Steven P. Lehotsky, Warren Postman, U.S. Chamber Litigation Center, Washington, DC  
For Amicus Curiae Chamber of Commerce of the United States

Randy S. Rabinowitz, Occupational Safety and Health Law Project, Washington, DC  
For Amici Curiae National Association of Social Workers, National Council for Occupational Safety and Health, and Service Employees International Union

Sky Westerlund, Executive Director  
For Amicus Curiae Kansas Chapter, National Association of Social Workers,  
Topeka, KS

Antonia Domingo, Assistant General Counsel, United Steelworkers, Pittsburgh, PA  
For Amicus Curiae United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union

## DECISION

Before: MACDOUGALL, Chairman; ATTWOOD and SULLIVAN, Commissioners.

BY THE COMMISSION:

Section 5(a)(1) of the Occupational Safety and Health Act of 1970, known as the general duty clause, states that “[e]ach employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.” 29 U.S.C. § 654(a)(1). At issue here is whether Integra Health Management, Inc., violated this provision 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. In the circumstances of this case, we conclude that a violation has been established and affirm the citation.

## BACKGROUND

Integra employs “service coordinators” to help its clients—referred to by the company as “members”—obtain and maintain medical care. Health insurers send the members to Integra after reviewing claims histories to identify individuals who are not receiving appropriate care for, in many cases, chronic medical conditions like mental illness. Typically, the health insurers have been unable to maintain contact with these individuals, who tend to avoid visiting their regular physicians and taking their prescribed medications, resulting in costly emergency room visits and hospital stays.

Integra assigns a service coordinator to each member. The service coordinator is responsible for locating the member, introducing the company and its services, and obtaining consent from the member to receive assistance from Integra. If the member consents, the service coordinator will typically contact the member several times a month, both by telephone and face-to-face, and assist in ensuring that the member receives medical treatment. For example, the service coordinator will help set up doctor appointments for the member and ensure that the member goes to the appointments and takes any prescribed medications. Service coordinators are not clinically trained. According to Integra’s president and CEO, the company does not “provide a clinical service. We provide a service that a community health worker would provide.” In other words, Integra is “really just trying to get the [member] connected with things just like a family member might, a neighbor, a friend, if that person existed.”

Integra trains its service coordinators in several ways. One is an internet-based course (referred to as the “Neumann training”) with a session on “In-Home and Community Safety.” This training includes PowerPoint presentations on “Screening the Dangerous Member” and “Safety in the Community.” The “Screening the Dangerous Member” slides advise service coordinators to obtain “critical history about previous unsafe behaviors” and “collateral information from family members, friends, [and] clergy,” and the record indicates that the service coordinators could obtain such information from the members themselves. At the time of the alleged violation, however, Integra did not require that this information be obtained, nor did the company conduct member background checks.<sup>1</sup> The “Safety in the Community” slides identify certain potential, high-risk behaviors, such as a “history of violence or self[-]harm” and “[c]riminal behavior,” and instruct service coordinators to “[b]e [s]mart – use common sense” and “[l]isten to your gut.” Service coordinators are tested at the end of the training, and they then “shadow” more senior staff in the field before taking on cases alone.

In addition to the Neumann training, Integra: (1) holds in-person training sessions, which include safety discussions and role-playing scenarios; (2) conducts weekly conference calls with service coordinators, including safety discussions; (3) uses a voluntary “buddy system,” advising service coordinators who “feel uncomfortable” to call another service coordinator “and go out together;” and (4) maintains a written workplace violence prevention policy, stating that “[v]iolence . . . against an employee . . . will not be tolerated,” advising employees to report any threatening communications to supervisors, and warning that “[v]iolations of this policy . . . may result in disciplinary action.”

Integra was founded in 2007 and is based in Owings Mills, Maryland. The company began operating in Florida in 2012 after contracting with Amerigroup to provide services to several of its insureds. An online posting for Integra’s Florida-based service coordinator position, dated July 17, 2012, stated that the “ideal candidate(s) would be able to provide support services to a specific group of individuals with serious mental/somatic illness through community-based teams,” and

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<sup>1</sup> By the time of the hearing, Integra had implemented new protocols, including performing background checks on all members, “red-flagging” those members with criminal backgrounds, taking certain members with violent criminal histories off the company’s rolls, establishing a liaison with local law enforcement, instituting a written workplace violence prevention program with mandatory reporting of incidents, and conducting de-escalation training for service coordinators.

must have a bachelor's degree. The posting also stated that "interest in social work, psychology or a related field and possessing 2 years [of] experience in the field is a plus." In August and September 2012, Integra hired several new service coordinators for its Florida team, including Employee-A, a 25-year-old recent college graduate with no prior experience in social work or working with the mentally ill. After providing the requisite training, Integra assigned Employee-A the case file for Member-L, who suffered from cardiovascular disease and schizophrenia. Unknown to Employee-A, Integra, and Amerigroup, Member-L had a prior criminal record—he served a total of approximately 15 years in prison for grand theft of a motor vehicle in 1981, battery in 1982, aggravated battery with a deadly weapon in 1990, and aggravated assault with a weapon in 1995.

After several attempts to contact Member-L by phone, Employee-A visited him at his home three times in October and November 2012. On October 12, Employee-A made her first visit, introducing herself and making an appointment with Member-L to conduct an initial assessment three days later at his home. Employee-A stated in her Progress Note Report (Report)—a record that Integra requires all service coordinators to complete and submit any time they have contacted a member—that Member-L "said a few things that made [her] uncomfortable, so [she] asked [him] to be respectful or she would not be able to work with him," and that, because of this, she was "not comfortable being inside [Member-L's home] alone with [him] and will either sit outside to complete [the] assessment or ask another [service coordinator] to accompany her."

On October 15, Employee-A visited Member-L's home for their scheduled appointment, but he refused to sign the required consent form without his case manager from his healthcare provider being present. Employee-A phoned the case manager and told Member-L that she would arrange a meeting among the three of them. Employee-A stated in her Report of this visit that Member-L "showed [her] a print of The Last Supper, [erroneously] crediting it to Michelangelo," and identified Jesus as "my father," "someone else in the picture" as himself, and "a few others in the picture" as "people in the community, such as the waitress who works down the street." On November 14, Employee-A returned to Member-L's home and stated in her Report that he initially "pretended to be his own twin brother," but then "admitted to being himself," "agreed to sign the consent without his [case manager] present," "discussed how he sometimes has a hard time with police stopping him because they say he looks suspicious," and "told [Employee-A] to get a

cowboy hat and go to a rodeo.” This Report along with the two previous October Reports were reviewed by Employee-A’s supervisors.

After an unsuccessful attempt to meet with Member-L on November 26, 2012, Employee-A returned to Member-L’s home on December 10 to complete her assessment, which had to be done, per Integra’s requirements, by December 14, thirty days from the date that Member-L signed the consent form. During this visit, Member-L attacked Employee-A with a knife, stabbing her nine times while chasing her across his front yard. Member-L then went inside his home, leaving Employee-A wounded on the lawn. A passerby saw Employee-A lying on the ground and drove her to the hospital, where she died later that day.

Following an inspection, the Occupational Safety and Health Administration issued Integra a citation alleging a violation of the general duty clause for exposing employees “to the hazard of being physically assaulted by members with a history of violent behavior.” After a hearing, Administrative Law Judge Dennis L. Phillips affirmed this citation.<sup>2</sup>

## DISCUSSION

To prove a violation of the general duty clause, the Secretary must establish that: (1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was causing or likely to cause death or serious physical harm; and (4) a feasible and effective means existed to materially reduce the hazard.<sup>3</sup> *Arcadian Corp.*,

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<sup>2</sup> The judge also affirmed an other-than-serious citation alleging that Integra violated 29 C.F.R. § 1904.39(a) for failing to notify OSHA of its employee’s death. Integra does not seek review of this violation, conceding that the company did not notify OSHA of the fatality.

<sup>3</sup> Commissioners Attwood and Sullivan take issue with their colleague’s assertion in her concurrence that these long-standing elements of a general duty clause violation—as articulated in well-established precedent from the Commission and Courts of Appeals—are somehow “flaw[ed]” because, in her view, they fail to “address the ability of an employer to ‘free’ a workplace of a recognized hazard.” This is simply not the case. The text of the general duty clause does not limit applicability only to hazards that can be completely eliminated; it simply states that the employer shall provide a workplace that is “free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees”—the provision is silent as to the extent of an employer’s obligation if it is not possible to eliminate the hazard. 29 U.S.C. § 654(a)(1).

Under long-standing precedent, the Commission and courts have resolved this question by recognizing that employers should not be liable for failing to eliminate a hazard if that is not feasible—it is sufficient for employers in such circumstances to reduce the hazard *to the extent* feasible. See, e.g., *Carlyle Compressor Co. v. OSHRC*, 683 F.2d 673, 677 (2d Cir. 1982)

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(Secretary’s proposed abatement “need not completely solve the problem as long as it reduces the danger”); *Jones & Laughlin Steel Corp.*, 10 BNA OSHC 1778, 1782 (No. 76-2636, 1982) (“An employer’s duty under section 5(a)(1) is to free its workplace—to the extent feasible—of recognized hazards that are likely to cause death or serious injury.”) (emphasis added). This approach has been justified—quite reasonably—by interpreting “free” as an aspirational goal for employers—they are charged only with taking “reasonable steps to protect [their] employees.” *Beaird-Poulan*, 7 BNA OSHC 1225, 1228-29 (No. 12600, 1979) (noting general duty clause’s use of “free”). See 29 U.S.C. § 651(b) (“The Congress declares it to be its purpose and policy . . . to assure *so far as possible* every working man and woman in the Nation safe and healthful working conditions . . . .”) (emphasis added).

Reading section 5(a)(1) as limiting the jurisdictional reach of the general duty clause to only those hazards that can be completely eliminated is unreasonable—indeed, such a reading would permit an employer to do nothing in the face of a known hazard that cannot be eliminated from its workplace but could be materially reduced by 95 percent. As Judge J. Skelly Wright, in the D.C. Circuit’s landmark *National Realty* decision, pronounced in interpreting the “free from” language in the general duty clause, the record must “indicate that demonstrably feasible measures would have *materially reduced* the likelihood” that hazardous conduct would have occurred. *Nat’l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1267 (D.C. Cir. 1973) (emphasis added).

Commissioners Attwood and Sullivan therefore reject the Chairman’s interpretation of *National Realty*. In that case the court distinguished preventable hazards from unpreventable hazards: “[a]ll preventable forms and instances of hazardous conduct must . . . be entirely excluded from the workplace,” as opposed to “unpreventable instances,” which, to avoid making employers strictly liable, are not covered. *Id.* at 1266-67. The court’s statement that the Secretary must demonstrate that feasible measures would materially reduce the hazard, rather than stating that such measures would eliminate the hazard, shows that the court’s point in distinguishing the preventable from the unpreventable was to emphasize that the alleged hazard must be one over which the employer has control:

Though resistant to precise definition, the criterion of preventability draws content from the informed judgment of safety experts. *Hazardous conduct is not preventable if it is so idiosyncratic and implausible in motive or means that conscientious experts, familiar with the industry, would not take it into account in prescribing a safety program.* Nor is misconduct preventable if its elimination would require methods of hiring, training, monitoring, or sanctioning workers which are either so untested or so expensive that safety experts would substantially concur in thinking the methods infeasible. *All preventable forms and instances of hazardous conduct must, however, be entirely excluded from the workplace.* To establish a violation of the general duty clause, hazardous conduct need not actually have occurred, for a safety program’s feasibly curable inadequacies may sometimes be demonstrated before employees have acted dangerously. At the same time, however, actual occurrence of hazardous conduct is not, by itself, sufficient evidence of a violation, even when the conduct has led to injury. The record must additionally indicate that demonstrably feasible measures would have materially reduced the likelihood that such misconduct would have occurred.

20 BNA OSHC 2001, 2007 (No. 93-0628, 2004). On review, Integra contends that the Secretary has failed to prove a violation because he has not established that either Integra or its industry recognized the cited hazard and that his proposed abatement measures would have materially reduced that hazard. As a threshold matter, Integra also argues that the hazard alleged here is beyond the scope of the Act itself—as the company puts it, “the hazards encompassed by the general duty clause [do not] include the risk of criminal assaults upon employees by third parties.” Essentially, the company contends that certain hazards, even if recognized by an employer, cannot be the basis of a general duty clause violation.<sup>4</sup> We begin with this jurisdictional issue.

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*Id.* (emphasis added). Numerous Commission and Court of Appeals decisions have interpreted *National Realty* in precisely this way. See, e.g., *SeaWorld of Fla. v. Perez*, 748 F.3d 1202, 1207 (D.C. Cir. 2014) (“Notwithstanding the ‘unqualified and absolute’ textual imperative that the workplace be ‘free’ of the recognized hazard, . . . the court [in *National Realty*] further observed that ‘Congress quite clearly did not intend the general duty clause to impose strict liability: The duty was to be an achievable one,’ . . . . So understood, the court held that ‘[a]ll preventable forms and instances of hazardous conduct must . . . be entirely excluded from the workplace.’”).

In short, the court’s statement that an employer must “free from” its workplace all preventable instances of hazards cannot mean that the court was excluding from the general duty clause’s coverage hazards that can be materially reduced. Indeed, no Commission or Court of Appeals decision has adopted the Chairman’s novel theory, which would largely eliminate the applicability of the general duty clause.

As he notes in his concurring opinion, Commissioner Sullivan ascribes to a “reasonable foreseeability” test because any practice or condition which is unforeseeable cannot be prevented. An employer cannot render a workplace, therefore, “free” of a recognized hazard if the hazard is unforeseeable.

<sup>4</sup> Commissioner Attwood notes that the Chairman, in her concurring opinion, asserts that the general duty clause should be viewed as a “‘placeholder,’ to be used only until section 6(b) rulemaking could be initiated to address hazards.” The Fourth Circuit provided an apt response to such a theory forty years ago in *Bristol Steel & Iron Works, Inc. v. OSHRC*, 601 F.2d 717 (4th Cir. 1979). The court in *Bristol Steel* stated that the Act contemplates the promulgation of specific safety standards *and* the use of general safety standards and the general duty clause, “which are designed to fill those interstices necessarily remaining after the promulgation of specific safety standards.” *Id.* at 721. The court added that “[i]t would be utterly unreasonable to expect the Secretary to promulgate specific safety standards which would protect employees from every conceivable hazardous condition.” *Id.* n.11. And, although the Chairman dismisses the difficulties associated with modern section 6(b) rulemaking, a review of recent OSHA rulemaking efforts is instructive. Between 1981 and 2010, it took an average of 7 years to promulgate an OSHA standard. U.S. Gov’t Accountability Off., GAO-12-330, *Workplace Safety and Health: Multiple Challenges Lengthen OSHA’s Standard Setting* 7-8 (2012). And the difficulties associated with rulemaking have only increased over the ensuing years. Thus, for example, from the pre-rule phase

## I. Jurisdiction

Before the judge, Integra argued that “the violent conduct of a third party is an inherently unpredictable act of a different nature than the hazards typically regulated under the general duty clause.” The judge viewed this argument as a challenge to OSHA’s jurisdiction—“that the violent conduct at issue is fundamentally unpredictable and therefore cannot be regulated by the OSH Act”—and rejected it, stating that “the . . . violent incident . . . was reasonably foreseeable,” and “the hazard in this case [was] obvious.” According to Integra, the judge’s conclusion is erroneous because nothing “supports the Secretary’s contention that the general duty clause imposes upon an employer a duty to anticipate and prevent criminal attacks on employees by third parties.” The Secretary responds that the general duty clause does not exclude such a hazard from its coverage—he contends that, apart from having to be recognized and causing serious harm, “there is no further limitation on the scope of hazards that employers must address under section 5(a)(1).” For the reasons that follow, the allegation of workplace violence as presented in this case is a cognizable “hazard” under the Act.

“[T]he starting point for interpreting a statute is the language of the statute itself.” *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). We “must assume that Congress intended the ordinary meaning of the words it used, and absent a clearly expressed legislative intent to the contrary, that language is generally dispositive.” *Gonzalez v. McNary*, 980 F.2d 1418, 1420 (11th Cir. 1993); *see also Blount Int’l, Ltd.*, 15 BNA OSHC 1897, 1902 (No. 89-1394, 1992) (if provision’s wording is unambiguous, plain language governs); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (“The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.”); *Am. Fed’n of Gov’t Emps., Local 2782 v. Fed. Labor Relations Auth.*, 803 F.2d 737, 740 (D.C. Cir. 1986) (“[S]tatutes . . . are to be read as a whole with each part or section . . . construed in connection with every other part or section.”) (citation omitted). As noted, the general duty clause provides that “[e]ach employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death

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to final rule publication, two recently promulgated standards took eighteen years and twenty-one years, respectively, to complete. *See* Occupational Exposure to Respirable Crystalline Silica, 81 Fed. Reg. 16,286, 16,295 (Mar. 25, 2016) (final rule); Confined Spaces in Construction, 80 Fed. Reg. 25,366 (May 4, 2015) (final rule).

or serious physical harm to his employees.” 29 U.S.C. § 654(a)(1). Thus, the jurisdictional issue presented here is whether the workplace violence alleged by the Secretary is a “hazard.”

The term “hazard” is not defined in the Act, but its commonly understood meaning is “[s]omething causing danger,” “peril, risk, or difficulty.” RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 652 (1971); *see United States v. Sherburne*, 249 F.3d 1121, 1126 (9th Cir. 2001) (“turn[ing] to the dictionary for guidance” in absence of statutory definition); *Crawford v. Metro. Gov’t of Nashville & Davidson Cty.*, 555 U.S. 271, 276 (2009) (undefined term “carries its ordinary meaning”). The context in which the term is used makes clear that in the Act, “hazard” means a danger/peril/risk *arising out of the employee’s work*—in a broad sense. Specifically, the general duty clause references both “employment” and “place of employment,” so the hazards addressed by this provision include not only those arising out of the physical setting of the work, but those arising out of the “employment.” *See* RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE at 468 (defining “employment” as “an occupation by which a person earns a living” or “work”); *Allen v. U.S.A.A. Cas. Ins. Co.*, 790 F.3d 1274, 1284 (11th Cir. 2015) (rejecting “narrow interpretation” of undefined statutory term in light of term’s “ordinary meaning”). The broad nature of this concept is echoed in the Act’s findings and purpose section, which states that the statute is meant not only “to assure . . . safe and healthful *working conditions*” but also to address “personal injuries . . . arising out of *work situations*.” 29 U.S.C. § 651(a)-(b) (emphasis added).

Here, there is a direct nexus between the work being performed by Integra’s employees and the alleged risk of workplace violence. Integra requires its service coordinators to meet face-to-face with members, many of whom have been diagnosed with mental illness and have criminal backgrounds as well as a history of violence and volatility.<sup>5</sup> Integra team supervisor Laurie Rochelle described certain members as just “getting out of jail,” “drug seeking,” “people with severe mental health issues,” and having “a history of violence.” In addition, the primary “place of employment” where the service coordinator’s work is performed is the member’s home, where

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<sup>5</sup> Integra contends that it is “a disturbing line of reasoning” to conclude that service coordinators are at a heightened risk of violence because many of the individuals they serve are mentally ill, and that no scientific evidence was presented at the hearing showing that individuals with mental illness pose such a heightened risk. Our decision today makes no such conclusion about mental illness in general. Moreover, Integra’s concerns are belied by its own training materials, which specifically identify “[p]aranoia,” “[p]sychosis,” “[a]nti-social personality,” and “manic behavior” as “[r]isk [f]actors” and “[h]igh-[r]isk [b]ehaviors” tending toward violence from its members.

the service coordinator often makes unannounced visits. Service coordinators also use their own cars to drive members to medical appointments and occasionally must locate members in homeless shelters.<sup>6</sup> Integra’s own training on “In-Home and Community Safety” assumes that providing these services to its members in these locations presents potential safety issues for service coordinators. Indeed, the training instructs service coordinators to “[k]now as much ahead of time what [you are] getting involved in,” “[v]isit during normal business hours if at all possible,” and “[d]on’t take chances, take precautions.” In short, the hazard identified by the Secretary is rooted in the very reason for Integra’s services—this means the hazard arises from the employment itself. Under these circumstances, the workplace violence risk at issue here is a “hazard” that fits plainly within the text of the general duty clause.<sup>7</sup>

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<sup>6</sup> In its amicus brief, the Chamber of Commerce suggests that these face-to-face meetings do not occur at a “place of employment,” as contemplated by the Act. 29 U.S.C. § 654(a). We disagree. As noted above, “employment” means “an occupation by which a person earns a living” or “work,” RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE at 468, so the plain meaning of “place of employment” is simply the location where that work occurs. Just as the “place of employment” of a construction worker is not limited to one permanent location but occurs wherever the work takes place, meeting with members at their homes and/or in their community is the foundation of Integra’s business model and a required aspect of the service coordinator’s employment. Integra’s lack of control over these locations may bear on what abatement measures are feasible, but it is undisputed that those locations are where the work at issue is performed. *Cf. Capform, Inc.*, 13 BNA OSHC 2219, 2222 (No. 84-556, 1989) (explaining the multi-employer worksite defense as predicated on an employer’s lack of “control [over] the violative condition such that it could [not] have abated the condition in the manner required by the standard,” but “not alter[ing] the general rule that each employer is responsible for the safety of its own employees”), *aff’d*, 901 F.2d 1112 (5th Cir. 1990).

<sup>7</sup> Integra notes that the D.C. Circuit found in *Oil, Chem. & Atomic Workers Int’l Union v. Am. Cyanamid Co.*, 741 F.2d 444 (D.C. Cir. 1984), that “[t]he words of the [Act]—in particular, the terms ‘working conditions’ and ‘hazards’—are not so plain that they foreclose all interpretation.” *Id.* at 448. *American Cyanamid*, however, did not find the term “hazard” ambiguous on its face. Instead, the court simply found an ambiguity *as applied to the unusual facts of the case* before it, and then concluded that a “policy which required women employees to be sterilized in order to be eligible to work in the areas of [the employer’s] plant where they would be exposed to certain toxic substances” was not a hazard cognizable under the Act. *Id.* at 446-47 (emphasis added). Here, by contrast, being physically assaulted by members is a risk in the ordinarily understood sense; it is not a direct and certain result of an employer’s policy, but rather arises directly out of the very duties a service coordinator is required to perform. As a result, in these factual circumstances, the term “hazard” is not ambiguous. *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, 689 (2001) (“[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.”).

Notwithstanding the general duty clause’s plain language, Integra makes essentially three arguments as to why the provision cannot be invoked here. First, citing to the Commission’s decision in *Pelron Corp.*, 12 BNA OSHC 1833 (No. 82-388, 1986), the company claims that “the decision of a human, imbued with free will, to engage in a violent attack on another person is inherently resistant to prediction,” so using the general duty clause to regulate such a hazard “is directly contrary to the principle that the clause . . . encompass[es] only those risks which an employer can reasonably be expected to prevent.”<sup>8</sup> This concern, however, is addressed by the Act itself through the proof required to establish a general duty clause violation—the existence of a hazard, hazard recognition, feasibility of abatement, and material reduction of the hazard. It is also addressed, as discussed above, by the Act’s use of “hazard” in the context of “employment” and “place of employment”—in other words, the provision encompasses only hazards that arise out of (that is, have a sufficient nexus with) the work at issue. There is no basis for Integra’s implication that, beyond these express criteria, there are other, implicit jurisdictional limitations that exclude certain types of workplace hazards, particularly in light of the broad language of the

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<sup>8</sup> Similarly, the Chamber of Commerce, in its amicus brief, cites *Pelron* for the proposition that “the normal activities of a business do not represent the *types* of ‘hazards’ that the general duty clause was intended to regulate”—specifically, the Chamber contends that the general duty clause has no application here because “[h]uman interaction . . . is an essential component of” Integra’s business. (Emphasis added.) *Pelron*, however, neither holds nor suggests that certain types of workplace hazards are beyond the Act’s coverage. Rather, the Commission in *Pelron* held that, in defining the hazard in a general duty clause case, the Secretary must specify “conditions or practices over which [an employer] can exercise control, which is the basis for [the employer’s] duty under section 5(a)(1).” 12 BNA OSHC at 1835; see *SeaWorld of Fla. v. Perez*, 748 F.3d 1202, 1212 (D.C. Cir. 2014) (“Nothing . . . in *Pelron* immunizes a workplace’s dangerous ‘normal activities’ from oversight; the Commission simply applied well-established law that only ‘preventable’ hazards can be considered as recognized.”); *Beverly Enters., Inc.*, 19 BNA OSHC 1161, 1187 n.58 (No. 91-3344, 2000) (consolidated) (“*Pelron* does not stand for the proposition that customary work activities cannot be a recognized hazard . . . [but rather] addresses . . . the preliminary question of how the hazard is to be defined . . .”). Here, the alleged hazard goes beyond the omnipresent, background risk of violence; the Secretary specifically alleges the presence of an enhanced risk of violence arising from the nature of Integra’s work with a particular, high-risk group, and has specified conditions and practices (such as the circumstances under which service coordinators meet with members) over which Integra has control. Therefore, *Pelron* does not support the contention that workplace violence hazards are per se excluded from the general duty clause’s coverage, nor does it compel a ruling that the particular workplace violence hazard alleged in the instant case is excluded.

general duty clause.<sup>9</sup> See *Allen*, 790 F.3d at 1284 (applying “broad” ordinary meaning of pertinent term); *GTE Sylvania*, 447 U.S. at 108 (declining to limit meaning of ordinarily broad phrase in Consumer Product Safety Act); *Gonzalez*, 980 F.2d at 1421 (“Absent a clearly expressed legislative intent to the contrary, the plain and unambiguous language of the statute must prevail.”); see also *Brown & Williamson Tobacco*, 529 U.S. at 132 (statutory words and phrases are to be read in context).

Second, Integra contends that invoking the general duty clause here raises public policy concerns. Specifically, the company contends that it would be inappropriate to deny its services to “uniquely vulnerable persons” with a history of violence, “notwithstanding the fact that such individuals are not presently under any restriction by the police or civil authorities.” Additionally, Integra claims that “given the racial disparities in criminal prosecutions in this country, any policy that an employer may enact to screen out individuals from receiving services based on their criminal histories would raise troubling concerns of discrimination.” These arguments, however, presuppose that the sole means of abating the alleged hazard is for Integra to refuse to serve certain individuals, a measure the Secretary has not proposed—in fact, he makes clear that his proposed abatement measures “are primarily designed to make such . . . interactions safer.” Moreover, even if such screening were the only means of abatement sought by the Secretary and doing so would violate anti-discrimination laws, the citation would necessarily fail under the feasibility of abatement element of the Secretary’s burden of proof, so there is no need to account for this “public policy” concern by narrowing the jurisdictional reach of the general duty clause.

Finally, Integra asserts that “there is no rational way to define th[e] obligation [to screen its members] in such a way that it would not also apply to a range of employers whose workers perform work in the homes of their customers.” This claim lacks merit given the facts of this case. The danger or risk of workplace violence arises from the nature of both the “employment” and “place of employment” of Integra’s service coordinators. This renders the service coordinator position distinct from that of a generic service employee (such as a cable television or appliance technician); the latter interacts with the general population, while service coordinators assist a

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<sup>9</sup> Indeed, counsel for the Secretary asserted at oral argument that it would be “extreme” to conclude that this hazard is outside the limit of the broadly-worded general duty clause given that, according to the Bureau of Labor Statistics, “[w]orkplace homicides remained the number one cause of workplace death for women in 2009.” OSHA Directive No. CPL 02-01-052, at 4 (Sept. 8, 2011).

specific group of people with particular mental health conditions and criminal and/or violent backgrounds that create an enhanced potential for aggression and hostility.<sup>10</sup> Accordingly, Integra’s jurisdictional argument is rejected.

## II. Hazard Recognition

Hazard recognition “may be shown by proof that ‘a hazard . . . is recognized as such by the employer’ or by ‘general understanding in the [employer’s] industry.’ ” *Otis Elevator Co.*, 21 BNA OSHC 2204, 2207 (No. 03-1344, 2007) (quoting *Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1873 (No. 92-2596, 1996)); see *Kelly Springfield Tire Co. v. Donovan*, 729 F.2d 317, 321 (5th Cir. 1984) (“Establishing that a hazard was recognized requires proof that the employer had actual knowledge that the condition was hazardous or proof that the condition is generally known to be hazardous in the industry.”). The judge concluded that recognition was established here, based in part on “Integra’s own training, handbook, and existing policies.” The record supports concluding that the hazard of a service coordinator being physically assaulted during a face-to-face meeting by a member with a history of violent behavior was clearly recognized by Integra.

Work rules addressing a hazard have been found to establish recognition of that hazard. See *Otis Elevator*, 21 BNA OSHC at 2207 (recognition established by work rules and safety protocols); *Gen. Elec. Co.*, 10 BNA OSHC 2034, 2035 (No. 79-0504, 1982) (recognition established by safety “precautions [employer] has taken”); *Wheeling-Pittsburgh Steel Corp.*, 10 BNA OSHC 1242, 1246 (No. 76-4807, 1981) (consolidated) (“That [the employer] took some [safety] measures . . . to protect against this hazard, demonstrates that the hazard was recognized within the meaning of Section 5(a)(1).”); *Ted Wilkerson, Inc.*, 9 BNA OSHC 2012, 2016 (No. 13390, 1981) (“That Respondent . . . required the use of personal protective equipment . . . indicates that [Respondent] recognized the existence of a hazard . . .”). While the

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<sup>10</sup> Integra maintains that a decision finding the cited workplace violence hazard covered under the general duty clause will necessarily mean that all employers that provide in-home services—including services in the homes of the general population, such as cable TV installation—must screen their customers. Our decision today carries no such implication because, as explained, the requisite nexus between the risk of violence and the work involved must be present, as it is here. Nonetheless, Integra’s speculation in this regard highlights the benefits of addressing the hazard of workplace violence through notice-and-comment rulemaking. In a rulemaking proceeding, all interested persons would have the opportunity to be heard, and the Secretary would give clear notice of what is required of the regulated community. Indeed, the California Division of Occupational Safety and Health has promulgated a Workplace Violence Prevention in Health Care standard that went into effect in April 2017. Cal. Code Regs. tit. 8, § 3342.

Commission has been “reluctant to rely solely on an employer’s safety precautions to find hazard recognition absent other ‘independent evidence,’ ” *Mid South Waffles, Inc.*, No. 13-1022, slip op. at 8 (OSHRC Feb. 15, 2019) (citing *Pepperidge Farm, Inc.*, 17 BNA OSHC 1993, 2007 (No. 89-0265, 1997)), the record here establishes both that Integra had work rules addressing the hazard of workplace violence and that the company, through its supervisory personnel, otherwise recognized this hazard.

As to work rules, the company’s training materials cover two topics addressing dangerous behavior from members—“Screening the Dangerous Member” and “Safety in the Community,” the latter of which included instruction on “[o]btaining critical history about previous unsafe behaviors,” “[o]bserving for . . . threats,” and identifying “[h]igh-[r]isk [b]ehaviors.” Dr. Melissa Arnott, Integra’s Vice President of Community Programs and co-developer of this training, “felt it was necessary to instruct [s]ervice [c]oordinators on how to identify and assess dangerous members, because [the service coordinators] would work directly with persons who were mentally ill,” and she conceded that she “recognize[d] . . . certain members might be dangerous” and might have had criminal histories.<sup>11</sup> *See Coleco Indus., Inc.*, 14 BNA OSHC 1961, 1966 (No. 84-546, 1991) (hazard recognition established through actual knowledge of supervisor). Additionally, the OSHA compliance officer who conducted the inspection here testified that two other Integra supervisory employees told him that they were aware that members had criminal and violent

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<sup>11</sup> Integra contends that the judge erred in considering evidence outside the record in evaluating Dr. Arnott’s credibility, and that his error warrants a remand for a new hearing. While summarizing Dr. Arnott’s testimony, the judge questioned the quality of the school from which she obtained her doctoral degree, relying on information that appears to be the product of his own research. For instance, the judge pointed out that the school filed a bankruptcy petition in 1991 and had been described in some court filings as “a non-traditional university.” This led the judge to give Dr. Arnott’s degree less weight “than that [which would be] accorded a similar degree awarded following completion of a full-time, resident study program taken over the course of several years at a traditional university with a suitable accredited program.” The judge’s analysis and his reliance on information outside the record here is inappropriate. Nevertheless, it constitutes harmless error because Dr. Arnott’s testimony focused primarily on the various forms of training Integra provides its service coordinators, and the company does not challenge the judge’s finding that this training, along with the company’s other abatement measures, was inadequate. Indeed, as noted below, Integra’s only abatement argument concerns the efficacy of the Secretary’s proposed abatement measures. In short, while Integra describes Dr. Arnott as its “chief witness . . . concerning the nature of the Service Coordinator position and [the sufficiency of] Integra’s training programs,” her opinion regarding these issues is of little significance to the issues in dispute here.

histories. See *Caterpillar, Inc. v. OSHRC*, 122 F.3d 437, 440 (7th Cir. 1997) (imputing supervisor’s recognition of hazard to employer). Finally, the record shows that threatening incidents were previously reported to Integra supervisors by several service coordinators, both in person and in the Reports they submitted. See *Pepperidge Farm*, 17 BNA OSHC at 2007, 2030-31 (using employer’s knowledge of prior accidents and injuries as basis for recognition). Taken together, this evidence shows that before the alleged violation, Integra was aware that training its service coordinators to deal with violence from members was necessary, and therefore recognition of the hazard has been established. *Id.* at 2007 (voluntary safety efforts may be considered in conjunction with other, “independent evidence” to establish recognition element).

On review, Integra relies on *Megawest Financial, Inc.*, No. 93-2879, 1995 WL 383233 (OSHRC May 8, 1995) (ALJ)—an unreviewed judge’s decision that is not binding Commission precedent—as support for its contention that recognition has not been proven. See *Leone Constr. Co.*, 3 BNA OSHC 1979, 1981 (No. 4090, 1976) (“[A] Judge’s opinion . . . lacking full Commission review does not constitute precedent binding upon us.”). In that case, former Administrative Law Judge Nancy Spies found that what would suffice for recognition in “the typical [general duty clause] case” is insufficient with regard to a workplace violence hazard. *Megawest*, 1995 WL 383233, at \*8. According to Judge Spies, “[i]t is not enough that an employee may fear that he or she is subject to violent attacks, even if that fear is communicated to the employer, . . . [n]or is it sufficient that there has been a previous injury from a violent incident.” *Id.* at \*9. There is simply no need for “a high[er] standard of proof . . . to show that the employer itself recognized the hazard of workplace violence” than for employer recognition of other hazards alleged under the general duty clause. *Id.* Putting aside that Judge Spies cited no precedent in support of imposing this higher burden, her three-part rationale for reaching this conclusion is unconvincing.

First, Judge Spies noted that the typical workplace hazard involves “inanimate objects . . . over which [an employer] can exercise . . . control,” not “people, capable of volitional acts.” *Id.* Control over employees, however, has long been required in the context of compliance with the Act—for example, employers must ensure that employees use ladders correctly, 29 C.F.R. § 1926.1053(b); maintain proper clearance distances from electrical lines, 29 C.F.R. § 1926.955(e)(15); use eye protection when welding, 29 C.F.R. § 1910.252(b)(2)(C); take certain actions when working in a confined space, 29 C.F.R. § 1910.146(h); and verify isolation and

deenergization of equipment that is subject to lockout/tagout requirements, 29 C.F.R. 1910.147(d)(6). *See also Morrison-Knudsen Co.*, 16 BNA OSHC 1105, 1120-21 (No. 88-0572, 1993) (noting Commission precedent holding that “the general duty clause is applicable to require a particular form of personal protective equipment . . . where . . . there is no [applicable] standard”); *PSP Monotech Indus.*, 22 BNA OSHC 1303, 1307 (No. 06-1201, 2008) (affirming § 5(a)(1) violation based on employer’s failure to keep employees clear of suspended loads). Even compliance with OSHA requirements that are not specifically directed at the actions of employees typically depends on employees properly executing assigned tasks that are necessary for compliance. *See, e.g.*, 29 C.F.R. §§ 1926.652(b)(1)(i) (“Excavations shall be sloped at an angle not steeper than one and one-half horizontal to one vertical . . .”), 1926.502(b)(1)-(b)(15) (criteria for “[g]uardrail systems” used as fall protection), 1926.451(f)(3) (“Scaffolds . . . shall be inspected for visible defects by a competent person . . .”). Indeed, the expectation that employees will complete such tasks is the underlying basis for the unpreventable employee misconduct defense. *See L.E. Myers Co.*, 16 BNA OSHC 1037, 1042 (No. 90-945, 1993) (concept underlying UEM defense is that employee “failures . . . to comply with the applicable standards [have] occurred despite a vigorous program of safety education and enforcement”).

In Commissioner Attwood’s view, the judge’s second rationale—that an “employer has even less control over . . . third parties not in its employ”—ignores a number of OSHA standards that address the “third-party” hazards posed by vehicular traffic. *Megawest*, 1995 WL 383233, at \*9. *See* 29 C.F.R. §§ 1926.200(g) (requiring traffic signs), 1926.201(a) (criteria for flaggers), 1926.202 (requiring traffic barricades), 1926.651(d) (excavation requirement regarding “[e]xposure to vehicular traffic”), 1910.269(e)(7) (regarding electrical work in enclosed spaces, and requiring “an attendant with first-aid training . . . to provide assistance if a hazard exists because of traffic patterns in the area of the opening used for entry”). *Cf. Summit Contractors, Inc.*, 23 BNA OSHC 1196, 1206 (No. 05-0839, 2010) (affirming § 1926.404(b)(1)(ii) violation against controlling employer for defective electrical box supplied by third party), *aff’d*, 442 F. App’x 570 (D.C. Cir. 2011). Several of these requirements predate the Act and remain largely unchanged today. *See* Safety and Health Regulations for Construction, 36 Fed. Reg. 7,340, 7,356-57 (Apr. 17, 1971) (promulgating predecessor traffic safety standards under Construction Safety Act, 29 C.F.R. §§ 1518.200, 1518.201, 1518.202). Thus, Commissioner Attwood finds no basis

for viewing this “third-party” consideration as justification for a higher standard of proof for employer recognition.<sup>12</sup>

Finally, the judge noted that “violence exists in society [at large],” which has “empower[ed] the police,” and not employers, “to control [violent] conduct.” *Megawest*, 1995 WL 383233, at \*9. The ubiquity of violence in society, however, is not an indicator of the *difficulty* of recognizing a workplace hazard. For example, medical emergencies and fire hazards are quite common, and emergency medical personnel and fire departments have traditionally been relied upon to address such hazards, but these are not grounds to conclude that they are less easily recognized as workplace hazards. *Cf.* 29 C.F.R. §§ 1910.151 (medical and first aid standard), 1910.155 through 165 (fire protection), 1926.24 (fire protection and prevention in construction).<sup>13</sup> As discussed, a more relevant factor in assessing whether a workplace violence hazard is recognized by an employer is the extent to which there is a nexus between the nature of that hazard and the work being performed, which is clearly the case here.

Two circuit court cases have addressed the *Megawest* decision, but neither dictates reaching a different conclusion on the issue of hazard recognition. In *SeaWorld of Fla. v. Perez*, 748 F.3d 1202 (D.C. Cir. 2014), the court affirmed a general duty clause violation based on the hazard of “drowning or injury when working with killer whales during performances” and rejected the employer’s contention that, pursuant to *Pelron*, the hazard posed by the whales was not covered by the Act because it was so “idiosyncratic and implausible that it cannot be considered preventable.” *Id.* at 1205, 1210. Without elaboration, the court noted that the facts in *SeaWorld* were distinguishable from those in *Megawest*: “SeaWorld controls its employees’ access to and contact with its killer whales, unlike the employer in *Megawest* . . . , who could not prevent the potentially criminal, violent actions of third parties residing in the apartment buildings it managed.” *Id.* at 1210. In making this distinction, the court relied on what it assumed was *Megawest*’s inability to *abate* (“could not *prevent*”) the workplace violence hazard, not its inability to *recognize* it; indeed, Judge Spies never addressed in her *Megawest* decision whether any proposed abatement measure would have been feasible or effective, given that she vacated the

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<sup>12</sup> Commissioner Sullivan would find that there is no need for a higher standard of proof for employer recognition in cases like *Megawest* so long as the Secretary is able to prove that the hazard in question is reasonably foreseeable by the employer. He is not relying, therefore, on OSHA standards addressing third-party behavior in arriving at this determination.

<sup>13</sup> These particular OSHA standards have been in place since the 1970s.

citation for lack of hazard recognition. *See Megawest*, 1995 WL 383233, at \*11 (“[W]hether the Secretary’s suggested means of abatement would eliminate or materially reduce the hazard need not be addressed.”). Accordingly, the *SeaWorld* court’s reference to *Megawest* is not an endorsement of that decision’s unsupported analysis regarding hazard recognition.

The other circuit case addressing the *Megawest* decision, *Ramsey Winch, Inc. v. Henry*, 555 F.3d 1199 (10th Cir. 2009), is cited by the Chamber of Commerce in its amicus brief. In that case, several businesses seeking to enjoin enforcement of an Oklahoma law requiring employers to allow employees to store firearms in locked vehicles on company property argued that the state law was preempted by the Act’s general duty clause. *Id.* at 1202. The court disagreed, concluding that the presence of the stored firearms is “too speculative” a danger to be a “recognized hazard” under the general duty clause—accordingly, an employer’s general duty clause obligation would not conflict with its ability to comply with the state law. 555 F.3d at 1207; *see also id.* at 1206 (describing hazard in *Megawest* as “random physical violence”) (emphasis added). The Chamber, in arguing that the workplace violence hazard cited here is not “recognized,” attempts to analogize it to this “speculative” firearm hazard. The court in *Ramsey Winch*, however, expressly distinguished the firearm hazard from a circumstance “in which a psychiatric hospital . . . fail[ed] to protect its workers from patients’ violent behavior,” stating that “[a] primary function of a psychiatric hospital’s work is to manage unstable and often violent behavior . . . arising out of work situations.” 555 F.3d at 1207 n.8 (emphasis added) (citation omitted). In other words, the court acknowledged that such violence at a psychiatric hospital could be a recognized hazard, given the nexus between it and the employment at issue. That is precisely the case here. Accordingly, Integra’s reliance on *Megawest* is misplaced. The Secretary, therefore, has proven employer recognition.

### **III. Feasibility of Abatement**

The final issue is whether the Secretary has established “that the [proposed abatement] measures are capable of being put into effect and that they would be effective in materially reducing the incidence of the hazard.”<sup>14</sup> *Beverly Enters., Inc.*, 19 BNA OSHC 1161, 1190 (No.

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<sup>14</sup> The Secretary must also show, “as a threshold matter, that the methods undertaken by the employer to address the alleged hazard were inadequate.” *U.S. Postal Serv.*, 21 BNA OSHC 1767, 1773-74 (No. 04-0316, 2006). The judge concluded that the Secretary carried this burden and Integra does not challenge the judge’s ruling.

91-3344, 2000) (consolidated). The Secretary asserts in the citation that “[a]mong other methods, feasible means to abate this hazard include” the following:

- Creat[ing] a stand-alone written Workplace Violence Prevention Program for all the service programs[,] . . . includ[ing] . . . a policy that workplace violence will not be tolerated and every incident will be investigated[,] . . . [t]raining and education of all staff[,] . . . [i]ncident reporting and investigation[,] . . . [and] [a] system for reporting safety concerns internally.
- Determin[ing] the behavioral history of new/transferred member[s]; . . . identify[ing] members with assaultive behavior problems . . . and . . . communicat[ing] such pertinent information to all potentially exposed employees; . . . and hav[ing] a system for holding members accountable for violent behavior through consequences or interventions.
- Put[ting] procedures in place that would communicate any incident of workplace violence to all staff who could potentially be exposed to the member(s) involved in the violent incident in a timely manner . . . .
- Training all employees on effective methods for responding during a workplace violence incident[,] . . . [including] recognizing aggressive behavior exhibited by members or others, and . . . techniques for timely de-escalating the behavior.
- Implement[ing] and maintain[ing] a buddy system as appropriate based on a complete hazard assessment which includes procedures for all staff to request and obtain double coverage when necessary, including but not limited to situations where an employee communicates that he or she feels unsafe being alone with a particular member.
- Provid[ing] all staff with a reliable way to summon assistance when needed, . . . including when an employee is with a member . . . .
- Establish[ing] a liaison with law enforcement representatives.

The judge noted that Integra did not claim that the Secretary’s proposed abatement methods were infeasible—indeed, he found that the company had since implemented some of these methods, such as regularly performing background checks on members before assigning them to service coordinators; initiating “red flags” on those members with criminal histories, so that employees are notified; and instituting a written workplace violence prevention program with mandatory reporting requirements.

The only abatement argument Integra made to the judge, and the only one the company now makes on review, is that the Secretary failed to establish that the proposed abatement measures would materially reduce the incidence of the workplace violence hazard. The judge rejected this contention largely based on the testimony of Janet Nelson, the Secretary’s expert in clinical social work, personal safety awareness, and personal safety skills and safety programs for health and

human service workers. On review, Integra contends that Nelson was “noncommittal” on the issue of abatement efficacy and that her testimony was therefore insufficient to establish that the methods would materially reduce the incidence of the hazard. Specifically, Integra focuses on three aspects of Nelson’s testimony in which, the company contends, she was equivocal on this element of the Secretary’s burden.

Integra first points to an exchange between Nelson and the Secretary’s counsel concerning safety training:

- Q. In your opinion, even though Service Coordinators are not clinicians, would more – more adequate, more . . . appropriate safety training have made them less exposed to the workplace violence, risk of workplace violence?
- A. I don’t know if they would be less exposed. They may be better able to assess . . . red flags . . . .

Nelson was not equivocating here. She was simply distinguishing between the extent of exposure (that is, the number of potentially violent members with whom the service coordinator may work)—a factor that would be unaffected by training—and training service coordinators as to how to respond when encountering such members. In any event, Nelson later explained how and why training in de-escalation and self-defense techniques would be effective—it would allow service coordinators “to move [their] bod[ies] in a certain way so that [they] can escape without actually ever even touching the person,” and would be “useful to [them] in the type of work that they were doing.”

Integra next claims that Nelson conceded in the following exchange that violent incidents could still occur even if a buddy system were made into a mandatory, formalized program:

- Q. Are you saying that . . . Integra should have required its Service Coordinators to always be partnered?
- A. No, no. [] I think given the population they’re dealing with and because they have a paucity of information, that double teaming on an initial . . . helps. Does that mean violence won’t happen? It still could. It still could.

Again, this testimony is not equivocal, particularly in light of Nelson’s testimony immediately following that “the likelihood [of violence] is less because you have two people,” and that using a buddy system for “at least the first few visits where you’re familiarizing yourself with the client and establishing the relationship” would help “the worker feel safe,” and “through that, the client feels safe.”

The final exchange upon which Integra relies shows, according to the company, that Nelson “could offer only a guess” regarding the effectiveness of member background checks:

Q. In your opinion, does a risk – violence risk assessment . . . does that decrease the incidence of workplace violence?

A. I don’t know statistics on that, but yes, the more information you have on what you’re walking into, the better off you are.

Q. (Nodding affirmatively.)

A. So I guess I would say yes.

In the context of the rest of her testimony, however, Nelson’s use of the word “guess” does not weaken her expert opinion on this issue. As a whole, her expert testimony is sufficient to establish the feasibility and efficacy of the Secretary’s proposed abatement measures. *Beverly Enters., Inc.*, 19 BNA OSHC at 1190.<sup>15</sup> Therefore, the Secretary has established the feasibility of abatement element of his case.

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<sup>15</sup> Integra contends that the general duty clause is unconstitutionally vague as applied here because the Secretary has failed to show that a reasonably prudent employer would have known that it was required to implement the proposed methods of abatement. Specifically, the company cites *Donovan v. Royal Logging*, 645 F.2d 822 (9th Cir. 1981), which states that “problems of fair notice [posed by general duty clause citations] . . . dissipate when we read the clause as applying when a reasonably prudent employer in the industry would have known that the proposed method of abatement was required.” *Id.* at 831. *Royal Logging*, however, is not relevant precedent in this case, which could be appealed to the Fourth Circuit (Integra is headquartered in Maryland), the Eleventh Circuit (the events giving rise to the citation were in Florida), or the D.C. Circuit. See 29 U.S.C. § 660(a) (“Any person adversely affected or aggrieved by an order of the Commission . . . may obtain . . . review . . . in any United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office, or in the Court of Appeals for the District of Columbia Circuit . . .”); *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000) (Commission generally applies law of circuit where it is probable case will be appealed).

In any event, Commission precedent states that “[t]he question is whether a precaution is recognized by safety experts as feasible, and not whether the precaution’s use has become customary.” *Beverly Enters.*, 19 BNA OSHC at 1191. Also, Integra’s constitutional vagueness challenge fails because the proposed abatement measures here were available to, and readily knowable by, the industry—indeed, as the CO testified, they were derived from OSHA’s workplace violence directive, which was issued in September 2011, more than a year prior to the inspection. OSHA Directive No. CPL 02-01-052 (Sept. 8, 2011); see *Pegasus Tower*, 21 BNA OSHC 1190, 1191 (No. 01-0547, 2005) (affirming judge’s finding that feasibility-of-abatement element was satisfied by means “set forth in OSHA Instruction Compliance Directive 2-1.29” regarding fall hazards).

For all of these reasons, we conclude that a violation of the general duty clause has been proven and therefore affirm the citation.<sup>16</sup>

SO ORDERED.

/s/ \_\_\_\_\_  
Cynthia L. Attwood  
Commissioner

Dated: March 4, 2019

/s/ \_\_\_\_\_  
James J. Sullivan, Jr.  
Commissioner

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<sup>16</sup> Integra contends that the violation should not be characterized as serious because the company did not know, and could not reasonably be expected to know, that it was in violation of the Act. To avoid a serious characterization, the record must show that “the employer did not, and could not with the exercise of reasonable diligence, know of *the presence of the violation.*” 29 U.S.C. § 666(k) (emphasis added). Here, the Secretary has established Integra’s actual knowledge of the violative condition, based on testimony showing supervisor awareness that service coordinators were interacting with potentially dangerous members. *See Trumid Constr. Co.*, 14 BNA OSHC 1784, 1788-89 (No. 86-1139, 1990) (equating knowledge element of Secretary’s prima facie case with knowledge necessary to establish serious violation under 29 U.S.C. § 666(k)). As such, and in light of the fact that Integra challenges no other aspect of characterization, nor does the company contest the amount of the penalty, we affirm this violation as serious and assess the Secretary’s \$7,000 proposed penalty.

SULLIVAN, Commissioner, concurring:

I am in agreement with Commissioner Attwood for the reasons stated in our opinion. I write separately to expand on several aspects of that opinion. I believe that Congress did not contemplate that the Secretary would apply the general duty clause to workplace violence hazards. Nevertheless, I agree that the general duty clause does cover the hazard alleged in this specific case, but I arrive at this conclusion because, in addition to the conclusions I reach with Commissioner Attwood regarding hazard recognition and feasible abatement, I find that the Secretary established that the hazard cited here was reasonably foreseeable to a “reasonable employer” presented with the specific facts and circumstances in this case.

The general duty clause was “designed to fill those interstices necessarily remaining after the promulgation,” through notice-and-comment rulemaking, “of specific safety standards.” *Bristol Steel & Iron Works, Inc. v. OSHRC*, 601 F.2d 717, 721 (4th Cir. 1979). Although specific obligations under the general duty clause are not subject to notice-and-comment, they are as subject to the constitutional requirement of fair notice as any other law. *See, e.g., Otis Elevator Co.*, 21 BNA OSHC 2204, 2206 (No. 03-1344, 2007) (“[T]he Secretary must define the cited hazard [in a general duty clause case] in a manner that gives the employer fair notice of its obligations . . .”). Because of section 5(a)(1)’s broad language, meeting the fair notice requirement in a general duty clause case is, however, inherently problematic—employers cannot be left only to guess at their legal obligations. When it comes to hazards that are also of a broad nature, such as workplace violence, this notice problem is further compounded, so employers need some way of evaluating whether they could be held in violation of the general duty clause in the event of a violent incident at the workplace. Unsurprisingly, in such situations OSHA often proffers guidance to the regulated community, as it has done here, to establish the requisite notice. *See, e.g., Reflections Tower Serv., Inc.*, No. 00-1201, 2001 WL 777056, at \*4 (OSHRC July 2, 2001) (ALJ) (“In [attempting to] prov[e] the alleged violation, the Secretary is relying on OSHA Instruction CPL 2-1.29 . . .”). This practice is troubling because such guidance, which is an obvious attempt to provide the specificity lacking in the general duty clause itself, effectively becomes a mandatory compliance requirement that was neither contemplated by Congress nor

subjected to notice-and-comment rulemaking.<sup>1</sup> Accordingly, especially when dealing with a broad hazard such as workplace violence, a check on the application of the general duty clause is necessary.

In a case involving workplace violence, proof of reasonable foreseeability is the only way, in my view, that the Secretary can prove that a hazard “exists” or is “cognizable” under the general duty clause. “Congress quite clearly did not intend the general duty clause to impose strict liability: The duty was to be an achievable one.” *Nat’l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1265-66 (D.C. Cir. 1973). As such, the intent was “to limit the general duty imposed by section 5(a)(1) to preventable hazards.” *Pelron Corp.*, 12 BNA OSHC 1833, 1835 (No. 82-0388, 1986). Preventability, in my view, must include some element of foreseeability—indeed, any hazard that is unforeseeable cannot meaningfully be prevented, nor can it be truly “recognized.” 29 U.S.C. § 654(a)(1). In other words, an employer cannot be held responsible for a hazard over which it has no control, and the occurrence of which it cannot predict. *See Pratt & Whitney Aircraft v. Sec’y of Labor*, 649 F.2d 96, 101 n.2 (2d Cir. 1981) (violation must, at a minimum, be reasonably foreseeable to be deemed a serious violation). Put another way, “[i]f an employer, in the exercise of reasonable diligence cannot foresee that a hazardous incident will occur, the employer cannot be found in violation of the Act.” *U.S. Steel Corp.*, 10 BNA OSHC 1752, 1760 (No. 77-1796, 1982) (Cottine, Comm’r, concurring) (citing *Gen. Elec. Corp.*, 9 BNA OSHC 1722, 1733 (No. 13732, 1981)).

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<sup>1</sup> The Department of Justice has recently emphasized that “[g]uidance documents cannot create binding requirements that do not already exist by statute or regulation.” Justice Manual, Title 1-20.000 (Dec. 2018) (adopting Memorandum from Assoc. Att’y Gen. to Heads of Civil Litigating Components and U.S. Attorneys, “Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases” (Jan. 25, 2018)). The Justice Manual instructs Justice Department attorneys to “not treat a party’s noncompliance with a guidance document as itself a violation of applicable statutes or regulations,” but instead to “establish a violation by reference to [the] statutes and regulations” themselves. *Id.* Although this Manual is inapplicable to agencies outside the Justice Department, OSHA guidance documents do typically contain disclaimers asserting that the guidance does not create any legal obligations. *See, e.g.*, “Guidelines for Preventing Workplace Violence for Health Care and Social Service Workers,” OSHA Publication 3148-01R (2004) (“This informational booklet . . . does not alter or determine compliance responsibilities in OSHA standards or the Occupational Safety and Health Act of 1970.”). These disclaimers, however, are rendered meaningless when the agency uses its guidance in enforcement actions to compensate for the lack of specificity in the general duty clause.

This is especially relevant in the workplace violence context—one cannot just rely on broad assumptions concerning the potentially violent behavior of a whole population. Moreover, such violence is in many cases inherently unpredictable, as it is the result of an individual’s affirmative, volitional, and deliberate choice. We should not, therefore, adopt a broad reading of the Act that would make an employer liable for every violent act committed against the employer’s employees. OSHA itself has acknowledged as much, instructing its personnel to gather specific documentation when “conducting a programmed inspection where a *reasonably foreseeable* workplace violence hazard has been identified.” OSHA Directive, Enforcement Procedures and Scheduling for Occupational Exposure to Workplace Violence, CPL 02-01-058, at 4 (Jan. 10. 2017). Indeed, OSHA instructs its personnel that, in analyzing whether a workplace violence hazard exists in a given case, the question is, “Were the employer’s own employees exposed to a *foreseeable*, hazardous workplace condition or practice?” *Id.* at 8 (emphasis added). Accordingly, in my view, a workplace violence “hazard” exists, and may be citable under the general duty clause, only when the hazard was reasonably foreseeable based on facts that would lead a “reasonable employer” to conclude that a violent incident could occur in its workplace.

I join with Commissioner Attwood in recognizing that foreseeability (though described differently in that opinion) is an important consideration with regard to both the existence of the hazard and the “hazard recognition” elements in a case alleging a workplace violence hazard under the general duty clause. Specifically, our opinion applies the “nexus” concept in finding both the “existence” of a hazard in this case and, in part, in finding “hazard recognition.” For example, in discussing the required proof of the “existence” of a hazard that is “cognizable” under the general duty clause in this case, the opinion states that “there is a direct nexus between the work being performed and the alleged risk of workplace violence.”<sup>2</sup> The opinion also states that “the requisite nexus between the risk of violence and the work involved must be present.” At the same time, when discussing the second step of “hazard recognition” the opinion states that the *more relevant* factor in assessing whether a workplace violence hazard is recognized by an employer is the extent to which there is a nexus between the nature of that hazard and the work being performed, which is clearly the case here.

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<sup>2</sup> Our opinion states: “In short, the hazard identified by the Secretary is rooted in the very reasons for Integra’s services—this means the hazard arises from the employment itself.”

I believe this is no coincidence, as the examination of “cognizable hazard” and “hazard recognition” necessarily implicates the question of whether it was reasonably foreseeable to a “reasonable employer” presented with the same set of facts. For example, the “nexus” discussed in our opinion may be readily apparent in the case of a psychiatric hospital, but what are the factors to consider when examining the nexus question when it is not so obvious? If such a nexus is not so apparent, how will an employer know whether the “nexus” applies where its employees work?

For instance, if a “security company” employee in the lobby of a downtown office building is murdered by a mentally disturbed law firm client, is there a sufficient nexus between the homicide and the specific work duties of that employee—i.e., checking identifications of those wishing to enter the building? Is the fact that the employer calls its employees “security guards” sufficient to prove the “nexus”? What other factors does an employer need to examine in advance to determine whether it may be subject to a citation under section 5(a)(1) in these hypothetical circumstances? Does it matter that the employer’s “security” personnel are neither expected nor trained to confront a “dangerous” visitor, but only are expected to call law enforcement? What if no other security employee of this company has ever been confronted by any act of violence in this workplace, or at any of its other sites of employment? What if these security guards do receive some limited training by their employer in “handling” angry or upset visitors? Consequently, the “nexus” question must necessarily include an examination of reasonable foreseeability, which involves facts such as a prior history of any exposure to violence. Without the express incorporation of such a reasonable foreseeability inquiry, the “nexus” test alone will not provide an employer with fair notice that a workplace violence hazard exists or is “cognizable” at a specific workplace.

In *Bomac Drilling*, 9 BNA OSHC 1681 (No. 76-0450, 1981) (consolidated), *overruled by U.S. Steel Corp.*, 10 BNA OSHC 1752 (No. 77-1796, 1982), the Commission held that “to establish a section 5(a)(1) violation, the Secretary must show that . . . the occurrence of an incident [of the hazard] was *reasonably foreseeable*.” *Id.* at 1691 (emphasis added). The Commission overruled *Bomac* because it concluded that the “reasonable foreseeability” element is the “same as [whether] the employer had failed to free its workplace from a recognized hazard,” and because it found that the reasonable foreseeability concept “simply added an unnecessary complication to the analysis of section 5(a)(1) cases.” *See U.S. Steel*, 10 BNA OSHC at 1756-57; *see also Bomac*, 9 BNA OSHC at 1700-01 (Cleary, Comm’r, concurring) (“[R]easonable foreseeability . . .

unnecessarily complicates the analysis of section 5(a)(1) violations while serving no useful purpose in that analysis.”). In my view, the Commission got it wrong in *U.S. Steel*. I agree with Commissioner Cottine’s concurrence in *U.S. Steel* in which he cites *National Realty* and emphasizes that “requiring . . . an incident to be reasonably foreseeable is necessary to assure that the employer is not held to a standard of strict liability under section 5(a)(1).” *U.S. Steel*, 10 BNA OSHC at 1760. Indeed, the Commission in *Bomac*, in a decision written by Commissioner Cottine, held that the Secretary had to prove four elements: (1) the Respondent failed to render the workplace free from a hazard that is recognized; (2) the occurrence of an incident was reasonably foreseeable; (3) the likely consequence in the event of an accident was death or serious physical harm to its employees; and, (4) there were feasible means available to abate the hazard. *Bomac*, 9 BNA OSHC at 1691.

Since it is clear that reasonable foreseeability is a necessary element in both (1) cognizable hazard and (2) hazard recognition, I view the test set forth by Commissioner Cottine in the majority opinion in *Bomac* as the more accurate reading of what the Act requires the Secretary to prove in a general duty clause case. In short, I do not believe a workplace violence “hazard” can exist, nor can it be truly “recognized,” if the violence at issue cannot be reasonably foreseen. Therefore, I would require the Secretary to show that an incident of violence (for example, an assault, battery, or homicide) was reasonably foreseeable. As the Commission ruled in *Bomac*, this *does not* mean that the occurrence of an incident of violence need be likely, only that it is foreseeable. While I concur in the result here, and therefore find a recognized workplace violence hazard, it is only because the record establishes the reasonable foreseeability of Integra’s service coordinators being physically assaulted by members with a history of violent behavior.<sup>3</sup>

In sum, I believe that requiring the Secretary to demonstrate that it was “reasonably foreseeable” to a “reasonable employer” that the employer’s employees would be subject to an alleged workplace violence hazard is the only way to provide fair notice to an employer that a “hazard” of workplace violence “exists” and is “cognizable” for purposes of the general duty clause. Facts that would be considered in finding such a “cognizable” hazard in such a case would

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<sup>3</sup> This test does not use the word “reasonable” in the context of a standard of care an employer owes to its employees, but rather it distinguishes a preventable danger from an unpreventable one. An employer cannot be held responsible for not taking feasible precautions to prevent a hazard over which it has no control or means to anticipate its occurrence.

be the objective facts that were available to a “reasonable employer,” which would inform the employer of the risks of violence to which its employees may be exposed, i.e., whether it was “reasonably foreseeable” for the employer to anticipate such exposure.

Therefore, to establish a violation of the general duty clause in a workplace violence case, I believe the Secretary must show that at the time of the incident:

- there was a recognized hazard because the Secretary has shown (a) there was “a tangible and appreciable risk,” *Beverly Enters., Inc.*, 19 BNA OSHC 1161, 1172 (No. 91-3144, 2000) (consolidated), of the act of violence coming to fruition—that is, employees were faced with something more than the risk of violence to which the public at large is subject—and (b) the occurrence of a violent incident was reasonably foreseeable in the circumstances presented by the case;<sup>4</sup>
- the violence was likely to cause death or serious physical harm; and
- there were feasible means of abating the hazard by preventing employees from being exposed to the violence.

I join with Commissioner Attwood in our analysis of the latter two elements, and I therefore agree that those elements have been established. As to the first element, I find that Integra clearly recognized the hazard cited here. Its supervisors were well aware that service coordinators were being sent, in many cases unannounced, to meet face-to-face with members with a history of violent behavior. Additionally, in Employee-A’s case, Integra’s supervisors ignored several warning signs in the reports she submitted concerning her visits to Member-L’s home and allowed her to continue those visits by herself. I find that in the circumstances presented here, an incident involving an act of violence was reasonably foreseeable and that was likely to cause death or serious physical harm. Furthermore, I find that Integra had knowledge that the hazard of violence posed by its members existed at its service coordinators place of employment, such that they were

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<sup>4</sup> In my view, the “jurisdictional” argument presented by Integra concerning “hazard” under the general duty clause is a red herring. The question of whether any allegation of a workplace hazard in a particular case “exists,” or is “cognizable” under the general duty clause is, in my opinion and as discussed above, answered by whether it is foreseeable by a “reasonable” employer that employees are presented with a risk of violence at work that is “preventable.” In other words, the nexus between the risk of violence and the work involved is part of the foreseeability question. If such a hazard is not “preventable” and thus not foreseeable, the violence hazard is not “related” to the workplace, but is simply the same risk of violence to the general public in the same area.

exposed to it, and that there were feasible means of abatement to materially reduce or eliminate the hazard. Accordingly, I concur in affirming the citation item at issue.

Dated: March 4, 2019

/s/  
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James J. Sullivan, Jr.  
Commissioner

MACDOUGALL, Chairman, concurring:

Today, for the first time, the Commission is faced with deciding whether an alleged workplace violence hazard—specifically, one posed by a schizophrenic client of an employer in the social services industry—is a recognized hazard that the employer must “free” from its workplace.<sup>1</sup> One aspect of this question is not difficult: there is no doubt that Integra’s service coordinators were vulnerable employees and the tragedy in this case was foreseeable. Indeed, the hazard of workplace violence could be said to not only be known by Integra’s industry but by anyone paying attention to the news media today. The other aspect of this question is more challenging: it is the broader issue of whether in 1970, when Congress enacted the Occupational Safety and Health Act, it intended for workplace violence to be covered as a hazard under section 5(a)(1).

In assessing Congress’ intent and addressing the scope of the general duty clause as it applies in this case, I am mindful of two essential touchstones—an employer’s constitutional right to fair notice and the fact that an employer’s liability under the general duty clause is limited to conditions and practices that it can control. When a hazard alleged under section 5(a)(1) is defined in a way that is overly broad, it deprives the employer of the requisite notice and often invokes a risk that is inherent (and thus unpreventable) in the workplace. *Pelron Corp.*, 12 BNA OSHC 1833, 1835 (No. 82-0388, 1986) (“To permit the normal activities in . . . an industry to be defined as a ‘recognized hazard’ within the meaning of section 5(a)(1) is to eliminate an element of the Secretary’s burden of proof and, in fact, almost to prove the Secretary’s case by definition, since under such a formula the employer can *never free* the workplace of inherent risks incident to the business.”) (underline emphasis added). *See also Mid South Waffles, Inc.*, No. 13-1022, slip op. at 22-23 (OSHRC Feb. 15, 2019) (“*Waffle House*”) (MacDougall, Chairman, concurring) (Secretary’s overly broad hazard definition—risk of burns from failing to properly maintain grease drawer to prevent grease fire—fails to provide adequate notice of protective measures employer could implement); *Mo. Basin Well Serv., Inc.*, 26 BNA OSHC 2314, 2316 n.5 (No. 13-1817, 2018) (MacDougall, Chairman, concurring) (alleged hazard—unsafe distance between pump and discharges of oil and gas from tank—was too broadly defined to give employer fair notice).

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<sup>1</sup> The Secretary alleges a violation of the general duty clause for exposing employees “to the hazard of being physically assaulted by [clients] with a history of violent behavior.”

I wrote separately in *A.H. Sturgill*, and do so again here, to highlight these fundamental limitations on enforcement and to express my concern about the Secretary’s invocation of the general duty clause in circumstances Congress likely never contemplated. Recent cases like *A.H. Sturgill*—where the Secretary alleged that an excessive heat hazard existed at an Ohio roofing worksite in August—demonstrate that the Secretary has failed to give these considerations sufficient regard. *A.H. Sturgill Roofing, Inc.*, No. 13-0224, slip op. at 2 (OSHRC Feb. 28, 2019). These cases include allegations of a fire hazard the Secretary claims was posed by a restaurant grill’s grease drawer that employees were required to clean three times per day and three times as often as the grill manufacturer recommends, as well as an explosion hazard the Secretary claims was posed by a pump placed less than 100 feet from a water tank used in a fracking operation. See *Waffle House*, slip op. at 22 (MacDougall, Chairman, concurring); *Mo. Basin Well Serv.*, 26 BNA OSHC at 2316 n.5 (MacDougall, Chairman, concurring). As I stated in *A.H. Sturgill*:

To implicate the general duty clause, a work situation must present a “hazard.” The term “hazard” refers to a concrete condition that poses a risk of harm. Longstanding Commission and court of appeals precedent requires that to constitute a cognizable hazard under the general duty clause, a worksite condition must pose more than the mere possibility of harm. See *Pelron Corp.*, 12 BNA OSHC at 1835 (“Defining the hazard as the ‘possibility’ that a condition will occur defines not a hazard but a potential hazard.”); *Pratt & Whitney Aircraft v. Donovan*, 715 F.2d 57, 64 (2d Cir. 1983) (“[T]he Secretary must show more than the mere possibility of injury; he must show that the potential hazard presents a significant risk of harm.”) In addition, to comport with due process, the Secretary must define the hazard that he charges an employer with allowing to exist at its worksite in a manner that “apprise[s] [the employer] of its obligations and identif[ies] conditions or practices over which the employer can reasonably be expected to exercise control.” *Davey Tree Expert Co.*, 11 BNA OSHC 1898, 1899 (No. 77-2350, 1984).

*A.H. Sturgill*, slip op. at 23 (MacDougall, Chairman, concurring).

The Secretary’s proclivity to overreach in his application of the general duty clause not only runs afoul of the prohibitions against holding employers liable for ill-defined hazards that cannot be controlled, it also stands in stark contrast to the unmistakable Congressional preference in the overall structure of the Act for specific standards. See *Reich v. Arcadian Corp.*, 110 F.3d 1192, 1196 (5th Cir. 1997) (“Courts have held that enforcement through the application of standards is preferred because standards provide employers notice of what is required under the OSH Act.”) Section 6(a) of the Act directed the Secretary to promulgate “any national consensus standard, and any established Federal standard” as an OSHA standard for a two-year period after the effective date of the Act; while section 6(b) set forth a rigorous process for the promulgation

of hazard-specific standards through the Administrative Procedure Act’s notice-and-comment rulemaking process. 29 U.S.C. § 655(a)-(b). As such, instead of viewing the general duty clause as a catch-all provision that Congress intended to be used indefinitely, it is more reasonable to view the clause as a “placeholder,” to be used only until section 6(b) rulemaking could be initiated to address hazards. *See* S. Rep. No. 91-1282 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5185-86 (stating the Act’s general duty clause would not be “a general substitute for reliance on standards”). In other words, Congress intended the general duty clause to facilitate the Secretary’s duty to “insure protection of employees who are working under special circumstances for which no standard has yet been adopted.”<sup>2</sup> *Id.* at 5186. *See also* Donald L. Morgan and Mark N. Duvall, *OSHA’s General Duty Clause: An Analysis of Its Use and Abuse*, 5 BERKELEY J. EMP. & LAB. L. 283 (1983); *Teal v. E.I. DuPont de Nemours and Co.*, 728 F.2d 799, 804 (6th Cir. 1984) (purpose of general duty clause was to cover unanticipated hazards not covered by a specific regulation).

Another limitation on the reach of the general duty clause that bears noting—one which has been almost entirely ignored—is that Congress intended section 5(a)(1) to be restricted to recognized hazards that can be made, in the words of the statutory clause itself, “free” from the workplace. 29 U.S.C. §654(a)(1). As I discuss in detail below, were we writing on a clean slate, I would have found this to be a controlling issue in this case.

It is against this backdrop, with these concerns in mind, that I consider the question of Congress’ intent regarding the Act’s coverage of the hazard alleged here. I have no doubt that as

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<sup>2</sup> The Secretary’s expanded use of the general duty clause in recent years under the guise that he does not have sufficient resources to engage in difficult rulemaking disrupts the split enforcement model Congress enacted whereby the Secretary of Labor was delegated authority for rulemaking and the Commission responsibility for adjudication. *See Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 6-7 (1985) (“It is the Secretary . . . who sets the substantive standards for the work place, [while] . . . [t]he Commission’s function is to act as a neutral arbiter and determine whether the Secretary’s citations should be enforced . . .”). In cases such as the one before us, the Commission essentially engages in adjudicative lawmaking—without notice and comment. Thus, while I am sympathetic to the Secretary’s and Commissioner Attwood’s concerns that rulemaking has become too difficult, even on important issues such as workplace violence, this does not allow the Commission to circumvent Congress’ intent. Nor can it be said that workplace violence, which has been a serious concern of OSHA, *see* Prevention of Workplace Violence in Healthcare and Social Assistance, 81 Fed. Reg. 88,147, 88,150 (Dec. 7, 2016) (OSHA request for information noting that since September 2011, OSHA has taken “important step[s] toward . . . address[ing] workplace violence in healthcare and other high-risk settings”), falls into uncharted seas where the Secretary cannot be expected to think to promulgate a standard on “every conceivable hazardous condition.”

an historical matter, the 91st Congress never contemplated covering the hazard alleged here under the Act; violence as a workplace safety issue simply did not have the national attention then that it does now. I am constrained, however, by the silence of the Act’s legislative history. While there is nothing in the statute or its legislative history to show that workplace violence was contemplated as a hazard in 1970 by Senator Harrison Williams, Congressman William Steiger, or the collective mind of the 91st Congress, thereby allowing it to be swept into the scope of section 5(a)(1), neither does the legislative history evidence an intent to exclude it.

Given that the plain meaning of the term “hazard” as used in the statute is, as my colleagues discuss, 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. *United States v. Mitchell*, 39 F.3d 465, 468-69 (4th Cir. 1994) (“The plain language of the statute will control unless the history demonstrates that Congress clearly intended a contrary meaning.”) (citing *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993)). As to the other elements of the Secretary’s burden of proving a general duty clause violation, as discussed below, I join with my colleagues in finding that they have been established in this case.

## DISCUSSION

### **I. The Threshold Issue: Employer’s Duty to Provide a Workplace “Free” from Recognized Hazards**

When interpreting a statute, “the beginning point must be the language of the [provision], and when a statute speaks with clarity to an issue[,] judicial inquiry into the statute’s meaning, in all but the most extraordinary circumstances, is finished.” *Arcadian Corp.*, 17 BNA OSHC 1345, 1347 (No. 93-3270, 1995) (quoting *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992)), *aff’d*, 110 F.3d 1192 (5th Cir. 1997). See *Sharon & Walter Constr., Inc.*, 23 BNA OSHC 1286, 1293 (No. 00-1402, 2010) (“[T]he first step in our analysis is to determine whether the [statutory] language at issue has a plain meaning with regard to the particular dispute before us, or whether it is ambiguous.”) (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). The “plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.” *Shell Oil*, 519 U.S. at 341. The remedial purpose of the Act—“[t]o assure so far as possible every working man and woman in the Nation safe and healthful working conditions,” 29 U.S.C. § 651(b)—“does not give license to disregard the plain meaning of” one of its provisions. *Arcadian*, 17 BNA OSHC at 1348 (citing *Kiewit Western Co.*, 16 BNA OSHC 1689, 1694 (No.

91-2578, 1994); *Symons v. Chrysler Corp. Loan Guarantee Bd.*, 670 F.2d 238, 241 (D.C. Cir. 1981)). “We should prefer the plain meaning since that approach respects the words of Congress.” *Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004).

The general duty clause states that “[e]ach employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.” 29 U.S.C. § 654(a)(1). From this language, the courts and the Commission have derived the four traditional elements of a general duty clause violation—(1) a workplace condition or activity that presents a hazard; (2) recognition of that hazard by the employer or its industry; (3) a likelihood that the hazard will cause serious physical harm; and (4) a feasible method of materially reducing the hazard. *See, e.g., Nat’l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1265 (D.C. Cir. 1973); *Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1872 (No. 92-2596, 1996). There is a flaw in this existing framework, however, because nowhere does it address the ability of an employer to “free” a workplace of a recognized hazard—an express requirement of section 5(a)(1). While my colleagues have apparently not been troubled by this restriction on the hazards that may be addressed by a general duty clause citation, I remain so.

“Free” is defined as “clear, exempt, relieved,” “not obstructed or impeded,” “open,” and “not subject to a particular ruling, authority, or obligation.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 904-05 (1971); *see United States v. Sherburne*, 249 F.3d 1121, 1126 (9th Cir. 2001) (“turn[ing] to the dictionary for guidance” in absence of statutory definition); *Crawford v. Metro. Gov’t of Nashville & Davidson Cty.*, 555 U.S. 271, 276 (2009) (undefined term “carries its ordinary meaning”). These definitions suggest that a hazard must not only be recognized, but also be of the type over which an employer can exercise control such that it can be removed from the workplace entirely.

Indeed, in looking at the broader context of the Act, a significant distinction between the language of sections 5(a)(1) and 5(a)(2) supports this reading. An employer’s duty under section 5(a)(2) is unconditional: employers “shall comply with occupational safety and health standards promulgated under this Act.” 29 U.S.C. § 654(a)(2). This is because the “standards promulgated under this Act” are the result of notice-and-comment rulemaking, are typically directed at

particular hazards, and ordinarily proscribe specific means of abatement.<sup>3</sup> See *Pratt & Whitney Aircraft v. Sec’y of Labor*, 649 F.2d 96, 104 (2d Cir. 1981) (“[B]efore [the Secretary] can promulgate any permanent health or safety standard, [he] is required to make a threshold finding that a place of employment is unsafe in the sense that significant risks are present and can be eliminated or lessened by a change in practice.”) (quoting *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 642 (1980)). By contrast, an employer’s duty under section 5(a)(1) is conditional and by no means absolute: the broad obligation to protect the safety and health of employees applies only to those hazards from which an employer can “free” its workplace. See *Nat’l Realty*, 489 F.2d at 1266 (“Congress’ language is consonant with its intent only where the ‘recognized’ hazard in question can be totally eliminated from a workplace.”). This more limited obligation makes sense when one considers that the duty under section 5(a)(1) “was [meant] to be an achievable one.” *SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202, 1207 (D.C. Cir. 2014) (quoting *Nat’l Realty*, 489 F.2d at 1265-66).<sup>4</sup>

Additionally, Commission case law has recognized the significance of the general duty clause’s inclusion of the word “free.” In *Pelron*, the hazard at issue was an explosion caused by a build-up of ethylene oxide at the company’s workplace, but because the accumulation of ethylene oxide was a possibility that could never be entirely prevented—in other words, the workplace could never be “free” of it—the Commission rejected the judge’s finding that it was the type of hazard to which Congress intended the general duty clause to apply. In other words, “[t]o respect Congress’ intent, hazards must be defined in a way that apprises the employer of its obligations, and identifies conditions or practices over which the employer can reasonably be expected to

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<sup>3</sup> As a result, Commissioner Attwood’s reliance on OSHA standards addressing third-party behavior seems misplaced. All of those standards (e.g., 29 C.F.R. §§ 1926.200(g), 1926.651(d), and 1910.269(e)(7)) were promulgated under section 5(a)(2) pursuant to notice-and-comment rulemaking. As such, they would have no bearing on whether OSHA may address a third-party hazard under the general duty clause.

<sup>4</sup> To be clear, I find the dissent in *SeaWorld* to be more instructive than the majority’s decision in that case regarding the meaning of the general duty clause for purposes of the issue before us. See *SeaWorld*, 748 F.3d at 1218-19 (Kavanaugh, J., dissenting) (“The courts and the Department of Labor have recognized that the broad terms of the General Duty Clause must be applied reasonably lest the Clause morph into a blunt instrument by which absolute workers’-compensation-like liability is imposed on employers for all workplace injuries.”). Nevertheless, the *SeaWorld* majority’s decision itself was based on the reasonable ability of the employer to *control* the cited conditions—it was able to eliminate direct interactions with a killer whale on its property. *Id.* at 1212.

exercise control.” *Pelron Corp.*, 12 BNA OSHC at 1835. Court precedent has made similar points. *See Pratt & Whitney*, 649 F.2d at 104 (“Section 5(a)(1) . . . obligates employers to rid their workplaces not of possible or reasonably foreseeable hazards, but [only] of recognized hazards.”); *Nat’l Realty*, 489 F.2d at 1266 (noting that some “hazard[s] . . . cannot . . . be totally eliminated,” because a “demented, suicidal, or willfully reckless employee may on occasion circumvent the best conceived and most vigorously enforced safety regime”). These same considerations hold true for workplace violence, which is a condition that results from the acts of third parties, engaged in unpredictable human behavior, and outside of the employer’s control; no matter how sound an employer’s safety program might be for the particular circumstances at its workplace, it is possible the employer cannot free the workplace of the hazard.

Moreover, even if “free” could be considered an ambiguous term such that resort to the Act’s legislative history would be necessary, that history, although extensive, offers nothing to refute the foregoing. As might be expected, much of the discussion over the general duty clause involves how to define the limitations on an employer’s obligation. Many legislators voiced concern that the enforcement agency would unfairly hold employers to a vague standard or cite them for hazards of which they were unaware. *See, e.g.*, 116 Cong. Rec. 38,713 (1970) (comments of Rep. Robison), *reprinted in* Senate Committee on Labor & Public Welfare, Legislative History of the Occupational Safety & Health Act of 1970, at 1087-88 (June 1971) (“Legislative History”) (employers should furnish safe jobs and places of employment, but vague duty provision of Act imposes impossible burden); 116 Cong. Rec. 38,368 (1970) (comments of Rep. Anderson), *reprinted in* Legislative History at 982 (broad, general, and vague duty provision defies practical interpretation and responsible enforcement); H.R. Rep. No. 91-1291, at 51 (1970), *reprinted in* Legislative History at 881 (unfair to require employers to comply with vague mandate in highly complex industrial circumstances). Legislators eventually deemed the change in language from “readily apparent” to “recognized” hazards in the final draft sufficient to address these concerns. *See* S. Rep. No. 91-1282, at 57 (1970) (Javits Amendments), *reprinted in* Legislative History at 197 (general duty clause changed from applying to “readily apparent” to “recognized” hazards); 116 Cong. Rec. 42,206 (1970) (comments of Rep. Steiger), *reprinted in* Legislative History at 1217 (conference bill general duty clause provision made realistic by application to only “recognized hazards” likely to cause serious injury or death); 116 Cong. Rec. at 38,367 (1970) (comments of Rep. Smith), *reprinted in* Legislative History at 980 (limited duty more reasonably

enforceable and more fair); 116 Cong. Rec. 37,326 (1970) (comments of Sen. Williams), *reprinted in* Legislative History at 416 (vagueness and broadness of duty clause corrected by restricting liability to “recognized hazards”). Because much of the debate in Congress centered on whether to include a general duty requirement in the statute at all, *see* H.R. Rep. No. 91-1291, at 21-22, 50-51, 54 (1970); S. Rep. No. 91-1282, at 9-10, 58 (1970), many particular questions relating to the meaning of the requirement were never considered.<sup>5</sup> Thus, the legislative history provides no basis to disregard the plain meaning of “free” in section 5(a)(1).<sup>6</sup>

In sum, I am compelled by longstanding precedent outlining the elements of a general duty clause violation, as well as the lack of briefing on this issue and its impact on our precedent, to affirm the citation item at issue here. Nevertheless, unlike my colleagues, I find that a valid question remains regarding whether Congress intended the Secretary to address workplace violence hazards pursuant to the general duty clause.<sup>7</sup> There is no question that the better course

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<sup>5</sup> To complicate matters, coverage of the general duty clause was narrowed somewhat as the provision passed through several versions during its consideration; the original bills with the “broader” general duty requirements provided no penalties for violation. Hence, a number of the explanations that do appear in the legislative record with regard to the precise scope of the clause, in addition to reflecting the usual degree of inconsistency among themselves, refer to earlier versions of the provision, which were quite different in concept from the final version.

<sup>6</sup> Furthermore, an interpretation that is inconsistent with the plain meaning of a statute is not entitled to deference. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). *See also INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987) (if the plain meaning of the statutory language is clear, the legislative history is reviewed only to determine whether there is “clearly expressed legislative intention” contrary to that language “which would require us to question the strong presumption that Congress expresses its intent through the language it chooses”).

<sup>7</sup> In a footnote, my colleagues take issue with this observation. In doing so, they disregard the plain meaning of the statutory term “free” by suggesting that it should not be read literally but instead as “aspirational” in nature and interpret it to require that the Secretary show only that feasible measures would have *materially reduced* the likelihood that hazardous conduct would have occurred. This allows them to jump all the way to the end of the general duty clause analysis rather than grapple with its first step—that the hazard must be defined a way that comports with the Act’s plain language. While my colleagues claim that no court of appeals has adopted my theory and in support of their arguments they cite and quote Judge J. Skelly Wright’s opinion for the D.C. Circuit in *National Realty*, a fuller reading of that case undercuts their view here and indeed supports my interpretation of the general duty clause:

A workplace cannot be just “reasonably free” of a hazard, or merely as free as the average workplace in the industry. On the other hand, Congress quite clearly did

would be for the Secretary to promulgate, pursuant to notice-and-comment rulemaking, a specific standard addressing such hazards under section 5(a)(2).

## II. Beyond the Threshold Issue: The Elements of the Alleged General Duty Clause Violation

As noted, despite the concerns I raise here, I join my colleagues in their conclusion that the Secretary has established a violation of the general duty clause. I do so with the understanding that the citation is affirmed in accordance with Commission precedent regarding the elements of a

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not intend the general duty clause to impose strict liability: The duty was to be an achievable one. Congress' language is consonant with its intent only where the "recognized" hazard in question *can be totally eliminated from a workplace*. A hazard consisting of conduct by employees, such as equipment riding, cannot, however, be totally eliminated. A demented, suicidal, or willfully reckless employee may on occasion circumvent the best conceived and most vigorously enforced safety regime. This seeming dilemma is, however, soluble within the literal structure of the general duty clause. Congress intended to require elimination only of preventable hazards. It follows, we think, that Congress did not intend unpreventable hazards to be considered "recognized" under the clause. Though a generic form of hazardous conduct, such as equipment riding, may be "recognized," unpreventable instances of it are not, and thus the possibility of their occurrence at a workplace is not inconsistent with the workplace being "free" of recognized hazards.

489 F.2d at 1265 (emphasis added) (footnotes omitted). Thus, the D.C. Circuit declined to impose a general duty clause test requiring an employer to "reasonably free" a workplace of a hazard.

I also note that violations of the general duty clause have been found in a variety of cases where the hazards were ones that the employer could control. *See, e.g., Noble Drilling Servs., Inc.*, No. 00-0462, 2002 WL 538935, at \*5-7 (OSHRC Apr. 3, 2002) (ALJ) (fall hazard from crane-hoisted personnel baskets could be controlled by installation of inside grab rails); *Wiley Organics, Inc.*, 17 BNA OSHC 1586, 1593 & n.7 (No. 91-3275, 1996) (hazard of "valves and vents of the reactor . . . not [being] configured so as to discharge to a safe location away from employee work areas" could be eliminated by "diverting the vent to a catch tank, header pipe, or similar safe location"); *Waste Mgmt. of Palm Beach*, 17 BNA OSHC 1308, 1309, 1311 (No. 93-0138, 1995) (hazard of collapse of trash loader boom, exacerbated by employer's unauthorized reinforcement of boom, could be eliminated by replacing boom entirely); *Anoplate Corp.*, 12 BNA OSHC 1678, 1686-87 (No. 80-4109, 1986) (hazard of common storage of cyanide and acid containers could be eliminated by separate storage); *Safeway, Inc.*, 382 F.3d 1189, 1195 (10th Cir. 2004) (employer "could have eliminated the hazard of using a forty-pound tank with the grill by simply using a twenty-pound tank"); *St. Joe Minerals Corp.*, 647 F.2d 840, 844 (8th Cir. 1981) (employer did not "render its workplace 'free' of hazard" when it bypassed broken interlock system on freight elevator by having employee operate elevator manually; employer could have eliminated hazard by "fully repair[ing] or replac[ing] malfunctioning equipment"). Thus, my colleagues' fear for the virtual elimination of this statutory provision is unfounded.

general duty clause violation. I am also mindful that the parties in this case were not asked to brief the issue of whether this, admittedly long-standing, precedent should be revisited. In joining my colleagues, I note that our ruling today is a narrow one limited to the facts before us in that there was much Integra could have done to implement a sound safety program in the particular circumstances that exist at its workplace.

**A. Nexus Between the Work Being Performed and the Alleged Risk at a “Place of Employment”**

I join my colleagues in their conclusion that the interactions between the service coordinators and clients occur at a “place of employment.” 29 U.S.C. § 654(a)(1) (“Each employer . . . shall furnish to each of his employees employment and a *place of employment* which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”) (emphasis added). Although the terms “employment” and “place of employment” are not defined in the Act, I agree that for purposes of the general duty clause, these terms have been construed liberally, and the broad definition of “workplace” can include customers’ homes, hospitals, restaurants, and public spaces extending beyond the walls of an employer’s physical office or plant. *See Usery v. Marquette Cement Mfg.*, 568 F.2d 902, 904-05 (2d Cir. 1977) (employer violated Act although employee injured in alley between employer’s buildings); *Clarkson Constr. Co. v. OSHRC*, 531 F.2d 451, 458 (10th Cir. 1976) (employer liable for unsafe conditions on public highway); *Anning-Johnson Co. v. OSHRC*, 516 F.2d 1081, 1085 (7th Cir. 1975) (Act places primary responsibility on employers because they have control); *see also* S. Rep. No. 91-1282, at 9 (1970), *reprinted in* Legislative History at 149-50 (employers have primary control of work environment and should insure that it is safe and healthful); H.R. Rep. No. 91-1291, at 21 (1970), *reprinted in* Legislative History at 851 (employers bound by common duty to bring no adverse effects to employees because they have primary control over work environment). In *Clarkson*, the court noted that the broad construction of “employment” and “place of employment” is consistent with the broad remedial purposes of the Act. 531 F.2d at 458 (drawing narrow boundaries on worksite would defeat purpose of Act).

I also agree with my colleagues that a sufficient nexus between the risk of violence and the work involved is required and that a direct nexus exists here—Integra requires its service coordinators to meet face-to-face with members, many of whom have been diagnosed with mental illness and have criminal backgrounds as well as a history of violence and volatility. I find this nexus distinguishable from generic service providers because Integra’s service coordinators’ place

of work has an enhanced potential for aggression and hostility. Consequently, I do not view our decision today as creating an employer's open-ended obligation under the Act to address potential workplace violence. In future cases, in my view of our holding today, it will remain the Secretary's burden to establish a sufficient, direct nexus between the work being performed and the alleged risk of workplace violence.

### **B. Hazard Recognition**

In addition, I would find the hazard of being physically assaulted by members with a history of violent behavior to be a "recognized hazard" in the circumstances present here—both on the basis that Integra had actual knowledge of this hazard, for the reasons discussed by my colleagues, and because the hazardous condition is generally recognized in the social services industry.<sup>8</sup> *See Duriron Co.*, 11 BNA OSHC 1405, 1407 n.2 (No. 77-2847, 1983) (using standard proposed by National Institute for Occupational Safety and Health as evidence of industry recognition of hazard); *Beverly Enters., Inc.*, 19 BNA OSHC 1161, 1188 (No. 91-3144, 2000) (consolidated) (rejecting employer's "criticisms of the NIOSH Lifting Equation as evidence of industry recognition," even where equation was advisory, because of general acceptance in scientific community of methodology upon which it was based). *See also* OSHA Directive, Enforcement Procedures for Investigating or Inspecting Workplace Violence Incidents, CPL 02-01-052 (Sept. 8, 2011); OSHA's Guidelines for Preventing Workplace Violence for Health Care and Social Service Workers, OSHA 3148-01R (2004). Indeed, there are numerous publications and studies within the social services and healthcare industry addressing workplace violence such as the National Association of Social Workers' Guidelines for Social Worker Safety in the Workplace and several NIOSH publications.<sup>9</sup>

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<sup>8</sup> I reach this conclusion without the need to reference either *Megawest Financial, Inc.*, No. 93-2879, 1995 WL 383233 (OSHRC May 8, 1995) (ALJ), a nonprecedential, unreviewed administrative law judge decision, or the D.C. Circuit's decision in *SeaWorld*, which as previously noted addressed the employer's ability to recognize the hazard of a killer whale, a hazard the court determined was one over which the employer could "reasonably be expected to exercise control." *SeaWorld*, 748 F.3d at 1212.

<sup>9</sup> Further, the record shows that Integra relied upon these guidelines in designing training for its service coordinators.

### C. Feasibility of Abatement

I find no need to repeat my colleagues' discussion on the feasibility of the Secretary's proposed abatement measures. I agree with their determination that the Secretary has met his burden to establish the feasibility of abatement element in this case.

### CONCLUSION

In line with the adage that “bad facts make bad law,” *Tharpe v. Sellers*, 138 S.Ct. 545, 547 (2018) (Thomas, J., dissenting), we establish precedent today that the workplace violence hazard alleged here is a hazard covered by the general duty clause. *See also Sucic v. McDonald*, 640 F. App'x. 901 (Fed. Cir. 2016) (Wallach, J., dissenting) (“[H]ard cases[ ] make bad law. So do bad facts.”).) (citations omitted). I recognize that it is easier to fit a decision within the safe haven of stare decisis than to boldly overrule precedent, even where the precedent may have failed to account for a key term in a statute. My hope is that this precedent will be revisited in a future decision and, even better, that OSHA will continue in its effort to promulgate a standard that addresses workplace violence. My concurring opinion today should not be construed as a failure to acknowledge that workplace violence is a serious employee safety concern, particularly in healthcare and social service settings where employees are at the greatest risk of violent events. However, while the desire to address workplace violence is admirable, the result cannot be reached at the expense of the law that binds us.

Dated: March 4, 2019

/s/  
\_\_\_\_\_  
Heather L. MacDougall  
Commissioner



**Please note that personal identifiers have been removed.**

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

SECRETARY OF LABOR,

Complainant,

v.

INTEGRA HEALTH MANAGMENT, INC.,

Respondent.

OSHRC Docket No. 13-1124

Appearances: Lydia J. Chastain, Esquire; Rolesia B. Dancy, Esquire  
U.S. Department of Labor, Office of the Solicitor, Atlanta, Georgia  
For the Secretary

Kevin C. McCormick, Esquire  
Whiteford, Taylor & Preston, L.L.P., Baltimore, Maryland  
For the Respondent

Before: Dennis L. Phillips  
Administrative Law Judge

### **DECISION AND ORDER**

This proceeding is before the Occupational Safety and Health Review Commission (Commission) pursuant to sections 2-33 of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (OSH Act). Following a fatality-related safety and health inspection, the Occupational Safety and Health Administration (OSHA) issued two citations to Integra Health Management, Inc. (Integra or Respondent), alleging a violation of section 5(a)(1) (the general

duty clause)<sup>1</sup> of the OSH Act and a violation of OSHA’s reporting standard. Integra filed a timely notice of contest, bringing this matter before the Commission. A hearing was held in Tampa, Florida from May 6 to May 9, 2014. Both parties filed post-hearing briefs and post-hearing reply briefs. For the reasons set forth below, the Court affirms both citations.

### **JURISDICTION**

Integra admits that, as of the date of the alleged violations, it was an employer engaged in business affecting commerce within the meaning of section 3(5) of the OSH Act. (Answer at ¶¶ II, III). Based upon the record, the Court finds that at all relevant times Integra was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5) of the OSH Act. The Court concludes that the Commission has jurisdiction over the parties and subject matter in this case. (Answer at ¶ I, where Integra admits jurisdiction).

### **STIPULATED FACTS**

The parties stipulate to the following facts:

Integra, based in Owings Mills, Maryland, performs mental and physical health assessments and coordinates case management via contracts with various insurance companies. These assessments are performed by employees known as “community service coordinators.” Integra performs these services in four states: Tennessee, Pennsylvania, Maryland, and Florida. There are no company offices in Florida; service coordinators work from their homes or in the field. The Integra service coordinator program focuses on helping clients receive appropriate medical care. Service coordinators are assigned a caseload of clients and are responsible for calling them and for face to face meetings during which the clients are assessed and encouraged or persuaded to register for services. Insurance companies apparently

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<sup>1</sup> Specifically, Citation 1, Item 1, alleged (in part):

OSH ACT of 1970 Section (5)(a)(1): The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees, in that employees were exposed to the hazard of being physically assaulted by members with a history of violent behavior:

a) On or about December 10, 2012, an employee providing health care management services was fatally stabbed by a member with a violent criminal history. Employees acting as service coordinators regularly interacted on their own directly with members with a history of violent behavior.

refer these clients to companies such as Integra due to chronic difficulties in contacting them. Many of the clients suffer from mental illness.

On December 13, 2012, an inspection was initiated when the OSHA Tampa Area Office received an anonymous phone call reporting a workplace violence fatality. Three days earlier, on December 10, 2012, [redacted], an Integra service coordinator, was fatally stabbed by a mentally ill client. The victim was meeting the assailant at his house for a required face to face visit to conduct an initial assessment.

(Jt. Pre-Hr'g Statement, at p. 8).

## **BACKGROUND**

### **Incident**

Integra provides mental and physical health assessments and coordinates healthcare/case management services. It is hired by insurance companies to help their insureds avoid hospital admissions and emergency room visits. Integra has about 62 employees. On December 10, 2012, one of its employees, [redacted], went to work. She was a newly-hired Integra Service Coordinator (SC) working out of the Tampa, Florida branch. She was 25 years old, and had about three months on the job. She had no prior experience in the community health or social worker industries. [redacted] had a virtual office consisting of her home in Lakeland, Florida, a computer, a phone, and her car. In the morning on December 10, [redacted] took and received phone calls. She then drove out into "the field," to Apartment 1, 37020 Coleman Avenue, Dade City, Florida, to make an unscheduled visit to [redacted], age 53. (Tr. 88, 198, 248, 1064-65; Exs. C-5, at p. 8, C-6, at p. 3, C-8, C-27, at p. 2, R-P, at p. 1, R-T, at p. 3, R-GG, R-LL; Jt. Pre-Hr'g Statement, at p. 8).

Mr. [redacted], a diagnosed schizophrenic, was on [redacted]' list of clients, called "members," for which she was responsible.<sup>2</sup> [redacted] had a history of violent behavior. He had been convicted of violent crimes and incarcerated for many years.<sup>3</sup> This history of violent behavior was not reported by anyone to [redacted] when [redacted] was assigned to her. [redacted] attempted to contact [redacted] by telephone on September 9, September 16, and September 23, 2012. These three attempts were unsuccessful because [redacted] could not locate a valid telephone number for [redacted]. (Tr. 136-41, 270-75, 356-57).

The first time [redacted] visited [redacted], on October 12, 2012, she went to his house unannounced, introduced herself and Integra, and arranged a return visit for October 15, 2012 to conduct an initial assessment. [redacted] reported in her progress note report for that day that during their conversation, [redacted] "said a few things that made SC [[redacted]] uncomfortable,

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<sup>2</sup> [redacted] was assigned as a member to [redacted] within about a month of her being hired. The Integra progress note report approved by her supervisor on September 8, 2012 identifies [redacted] as [redacted]'s SC and states:

AMG [Amerigroup, the medical insurance carrier] reports the following past issues for this member [[redacted]]:

Cohort: Cardiovascular  
MH [Mental Health]: Schizophrenia  
SA [substance abuse]: Blank  
(Tr. 140-41; Ex. C-7, at p. 1).

<sup>3</sup> [redacted]'s prison record shows that he was convicted of: 1) Grand Theft Motor Vehicle and sentenced to prison for two years on August 12, 1981, of which he served two months and 16 days, 2) Battery and sentenced to prison for five years on September 21, 1982, of which he served three years, two months, and 15 days, 3) Aggravated battery with a deadly weapon and sentenced to prison for five years on April 30, 1991, of which he served nearly four years, 4) Aggravated battery with a deadly weapon and sentenced to prison for 10 years on April 27, 1998 for an offense that occurred on August 13, 1990, and 5) Aggravated assault with a weapon and no intent to kill and sentenced to prison for 10 years on April 27, 1998 for an offense that occurred on September 9, 1995. He served more than seven and one-half years in prison for these two latter convictions. He was also adjudged guilty in a Florida state court on March 15, 2006 for battery for an offense he committed on September 19, 1997. On March 15, 2006, [redacted] was sentenced to time served for this conviction. (Tr. 136-38, 223; Exs. C-25, R-MM).

SC asked member to be respectful or she would not be able to work with him.” She also documented in her progress note report that “[b]ecause of this situation, SC is not comfortable being inside alone with member and will either sit outside to complete assessment or ask another SC to accompany her.”<sup>4</sup> (Tr. 136-43, 273-75, 356-59; Exs. C-7, C-25, R-KK at pp. 73, 77, R-MM).

A few days later, on October 15, 2012, [redacted] arrived at [redacted]’s house for their appointment at about 2:45 p.m. When she presented him with the Integra “Consent to Receive Services” form to sign that would give Integra his consent to provide him with services, [redacted] refused and told [redacted] that he would not sign anything without his case manager present.<sup>5</sup> He then pointed to a picture of *The Last Supper*, crediting it to Michelangelo,<sup>6</sup> and stated that Jesus was his father and that he and other people in his community, including a

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<sup>4</sup> On October 18, 2012, Laurie Rochelle, [redacted]’ supervisor, approved [redacted]’ October 12, 2012 progress note report. She testified that she could not say for sure when she approved this progress note report because Integra’s “database was also very shady.” She said that she put in assessments that were later found gone. Compliance Safety & Health Officer (CO) Jason Prymmer testified that Integra’s management took no further action. It did not perform a background check or criminal background check on [redacted] and it relied upon [redacted]’ discretion to arrange for any “buddy” to accompany her on her next visit. CO Prymmer testified that there was no Integra work rule for the buddy system, it was discretionary and not a mandate, and SCs “fended for themselves.” When interviewed, Dr. Melissa Arnott, then Integra’s Vice President of Behavioral Health, told CO Prymmer that [redacted] did not need any additional management input after first visiting with [redacted]. CO Prymmer testified as follows:

Q And what did she [Dr. Arnott] tell you?

A Melissa Arnott stated that additional input was not needed because they felt [redacted] did such a great job that she wouldn’t need management direction, that she would get somebody. They felt that she would get somebody and they don’t need to input, give any – enforce anything. They don’t need to direct anything. They basically put it all on [redacted].

(Tr. 143-44, 147-48, 275-76, 296-98, 340; Ex. R-QQ, at p. 15).

<sup>5</sup> [redacted] noted that [redacted]’s case manager was Mellissa Jones, from BayCare. At [redacted]’s request, [redacted] contacted Ms. Jones by telephone during her visit with [redacted]. [redacted] also told [redacted] that he had an upcoming court date relating to trespassing charges against him. The trespass charge was filed against [redacted] on September 12, 2012. Ms. Rochelle testified that a lot of members insured by Amerigroup had case managers. (Tr. 314; Exs. C-7, at p. 6, R-T, at p. 3).

<sup>6</sup> CO Prymmer testified that he concluded that [redacted] entered [redacted]’s apartment on October 15, 2012 because she described the picture in her progress note report. The Court takes judicial notice that *The Last Supper* was painted by Leonardo da Vinci. (Tr. 149-50).

waitress, were also in the picture. [redacted] noted in her progress note report that she planned to meet again with [redacted] the following week to schedule an appointment with him, Ms. Jones, and herself. On October 15, 2012, Ms. Rochelle approved [redacted]' October 15, 2012 progress note report.<sup>7</sup> (Tr. 149-50, 280, 297, 360-62; Exs. C-7, at p. 6, R-EE, at p. 2, R-KK at p. 78).

On November 2, 2012, Dr. Arnott sent [redacted] an email identifying [redacted] as a member missing a consent form. Later that day, [redacted] sent Dr. Arnott an email response saying: “[redacted] refused to sign a consent unless his case manager was present. I am working

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<sup>7</sup> CO Prymmer also testified about an email exchange that occurred in March, 2013 between him and Integra's Chief Operating Officer (COO), Diane (Dee) Brown. On March 13, 2013, CO Prymmer asked Ms. Brown if Integra's management had reviewed [redacted]' October 12 and October 15, 2012 progress note reports, and if it made certain that someone else accompanied [redacted] on her next visit with [redacted]. Ms. Brown told CO Prymmer that she, Dr. Arnott and others had reviewed [redacted]' progress note reports. She also told him that “we do not make certain people are doing their jobs.” She also told CO Prymmer that there was no management intervention at all with regard to [redacted]' October 12 and October 15, 2012 progress note reports. The Court notes the following email exchange that occurred on March 14, 2013:

From: CO Prymmer [extraneous material omitted]  
Sent: Thursday, March 14, 2013, 12:57 PM  
To: Dee Brown  
Subject: RE: Other State Workplace Violence Recognition

Hi Dee,

The notes were well documented/reported and reviewed (10/12/12, 10/15/12); was there management intervention at all in these two circumstances for the service coordinator?

[Extraneous material omitted]

From: Dee Brown [extraneous material omitted]  
Sent: Thursday, March 14, 2013, 1:15 PM  
To: Prymmer, Jason P. – OSHA  
Subject: RE: Other State Workplace Violence Recognition

[N]o. Management needs to intervene only if a plan described in the notes is not adequate or a statement is made that [sh]ould be accompanied by a plan and no plan is noted.

[Extraneous material omitted]

(Tr. 144-47; Ex. C-19, at pp. 2-3).

on that situation, but he has not been entirely cooperative in setting an appointment and does not have a phone.” Shortly thereafter, Dr. Arnott responded: “Can you contact the CM [Case Manager] and introduce yourself and our services and possibly schedule to go see the member with the CM. Sounds like the member trusts the CM.” Minutes later that same day, [redacted] responded by email and informed Dr. Arnott that she had “been in contact with his CM and she was willing to meet, but the member would not agree on a date. There is a note on it. I will probably just schedule a time with her and show up unannounced at his house.” (Ex. R-EE).

On November 14, 2012, [redacted] returned unannounced to [redacted]’s house at about 2:05 p.m., without his case manager, Ms. Jones, present. During this meeting, [redacted] initially told [redacted] that he was not [redacted], and that he was actually his twin brother. He then admitted to being himself. [redacted] agreed to sign the consent form without his case manager present.<sup>8</sup> [redacted] brought a chair outside so [redacted] could sit and the two spoke for about twenty minutes. He also told [redacted] to “get a cowboy hat and go to a rodeo.” They set up a meeting for November 26, 2012 for [redacted] to return to conduct the initial assessment.<sup>9</sup> No one from Integra’s management approved [redacted]’ November 14, 2012 progress note report.<sup>10</sup> (Tr. 150-52, 189, 363-65; Exs. C-7 at p. 7, C-8, at p. 9, R-KK, at p. 79).

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<sup>8</sup> Ms. Rochelle testified that Integra needed to have its consent form signed by the member in order to get paid by Amerigroup. She also said that “we were pressured to get those papers signed and get those members signed up no matter what.” (Tr. 154, 279-82; Ex. C-8, at p. 9).

<sup>9</sup> [redacted] needed to complete [redacted]’s initial assessment, consisting of eight pages, within thirty days of his conveying consent to receive services; *i.e.* by December 14, 2012. CO Prymmer testified that Integra’s assessment required SCs to gather information from the member concerning a member’s: 1) medications, 2) addictions history, 3) legal/criminal history, 4) medical history, 5) domain Issues including bathing, bladder and bowel continence, and toileting, and 6) personal routine/condition. SCs were also required to conduct a Memory Orientation and make behavioral observations. (Tr. 155, 366).

<sup>10</sup> Ms. Rochelle left Integra on November 6, 2012. The role of acting team lead was filled by Ms. Whitney Ferguson and Dr. Arnott. CO Prymmer testified that SCs told him that after Ms. Rochelle left progress note reports were not getting approved by management and they were not getting feedback from management about questions and concerns they had about members. (Tr. 152, 187, 217, 281).

On November 26, [redacted] arrived at [redacted]’s house to conduct the initial assessment, but [redacted] was not at home. She left a note on his door. No one from Integra’s management approved [redacted]’ November 26, 2012 progress note report. (Tr. 152, 189; Exs. C-7 at pp. 7-8, R-KK, at pp. 79-80).

On her final December 10, 2012 visit, [redacted] had still to assess [redacted] and his needs.<sup>11</sup> The assessment was never completed by [redacted].<sup>12</sup> Instead, during her unscheduled visit to his home, [redacted] attacked [redacted] at 12:45 p.m., and stabbed her about 9 times, reportedly with a butcher knife. She attempted to run away, but [redacted] chased her while stabbing her repeatedly. He then went inside his house, leaving her mortally wounded on his front lawn. A passerby saw [redacted] lying on the ground, and drove her to Pasco Regional Hospital, where she died of her wounds at 1:30 p.m. [redacted] was arrested, incarcerated and charged with murder in the first degree, a capital felony, but on about May 3, 2013 was found mentally/physically unable to stand trial before the Florida state criminal court. (Tr. 152-55, 365-66; Exs. C-5 at p. 1, C-6, at p. 3, C-8, R-P, R-T).

#### *OSHA Investigation*

On Monday, December 10, 2012 at about 7:05 p.m., OSHA received an anonymous telephone call reporting a fatality in Dade City, Florida. The OSHA Duty Officer followed up the tip and prepared an OSHA Fatality/Catastrophe Report (OSHA Fatality Report) on about December 12, 2012 that described the circumstances surrounding [redacted]’ death.<sup>13</sup> CO

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<sup>11</sup> CO Prymmer testified that Integra did not require anyone to accompany [redacted] on this visit. (Tr. 240).

<sup>12</sup> [redacted]’s assessment only included his name, address, date of birth, age, social security number, and some information regarding his living arrangements. It was otherwise blank. (Tr. 154; Ex. C-8).

<sup>13</sup> The OSHA Fatality Report identified the incident as “work place violence” and stated [redacted] “was assigned to deliver insurance papers and ensure patient was taking medications. When she arrived as the patient’s home he attacked her and subsequently caused her death by multiple stab wounds.” (Ex. C-3).

Prymmer investigated the claim by interviewing Integra officials and employees,<sup>14</sup> and requesting records.<sup>15</sup> CO Prymmer followed OSHA's workplace violence directive as guidance and consulted with the OSHA regional office in Atlanta, Georgia as to what questions he should ask Integra employees to get pertinent information. CO Prymmer interviewed several Integra representatives, management and non-management, including many SCs, face-to-face, over the telephone, and via e-mail. He learned about Integra's business model, the role of the SCs, and Integra's approach to safety in the workplace. He also investigated [redacted]' role specifically, and the circumstances surrounding her death. (Tr. 81-155; Exs. C-3, C-4, C-33; Jt. Pre-Hr'g Statement, at p. 8).

As a result of the OSHA investigation, the Secretary issued Integra two citations alleging violations of the OSH Act. The Secretary alleged that Integra committed a serious violation of the general duty clause because Integra employees "were exposed to the hazard of being physically assaulted by members with a history of violent behavior."<sup>16</sup> The Secretary asserted that, as illustrated by the stabbing on December 10, 2012, Integra did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees because Integra "service coordinators regularly interacted on their own directly with members with a history of violent behavior." For

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<sup>14</sup> In the Jt. Pre-Hr'g Statement, Respondent objected to Ex. C-6, OSHA's Violation Worksheet, as hearsay. At the hearing, Respondent limited its objection to only parts of Ex. C-6. Initially, Respondent objected to pp. 3-6, and 11 through 21, Ex. C-6, that contained transcriptions of interviews conducted by CO Prymmer. It then confirmed that it had no objections to Ex. C-6, pp. 1-3 and 5 – 10, and these pages were admitted at trial. (Tr. 17-18). The Court notes that Respondent offered and the Court admitted as Ex. R-QQ, OSHA's Violation Worksheet, including pp. 3-6, at the start of the trial, without objection. (Tr. 39). The Secretary later withdrew his p. 4 (already in evidence at Ex. R-QQ, at p. 4) and pp. 11-21, Ex. C-6, at the trial. (Tr. 748).

<sup>15</sup> CO Prymmer has been a CO and industrial hygienist at OSHA since 2009. Before that, he was employed as an industrial hygienist at EE&G Environmental Services where he worked nearly full-time on health and safety matters for about 3 years. He has a Bachelor of Science degree in environmental health. (Tr. 77-79).

<sup>16</sup> Section 5(a)(1) of the OSH Act, the "general duty clause," requires that each employer "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a)(1).

this serious citation item, the Secretary proposed a \$7,000 penalty. (Tr. 346; Exs. C-1, C-6, at pp. 7-8).

The Secretary also cited Integra for an other-than-serious violation of 29 C.F.R. § 1904.39(a) because Integra failed to timely report [redacted]' death to OSHA.<sup>17</sup> (Ex. C-1, at p. 9). The Secretary proposed a \$3,500 penalty for this citation item. (Ex. C-1, at p. 9). Integra claimed in its Answer that it did not violate the general duty clause because its "existing procedures meet or exceed the general industry standards concerning the events that lead to the events referenced in the citations."<sup>18</sup> (Answer, at ¶ IX).

### *Integra*

Hiring requirements for Integra SCs included a bachelor's degree, and at least one year of experience in the field of Behavioral Health was desired.<sup>19</sup> Integra also looked for "individuals

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<sup>17</sup> Section 1904.39(a) requires employers to report any work-related death of an employee within eight hours of the death to OSHA. 29 C.F.R. § 1904.39(a).

<sup>18</sup> With regard to the workplace violence citation item, Integra also raised the unpreventable employee misconduct (UEM) affirmative defense in its Answer, arguing that the attack was the result of "unauthorized actions by a certain employee and the criminal misconduct of another individual." (Answer, at ¶ IX). As a basis for its UEM defense, Integra claimed:

[redacted] was properly trained in how to avoid dangerous/unsafe working conditions, by either meeting with clients outside of the residence, having a second Service Coordinator present for a client visit, leaving if circumstances warranted it or not attending the meeting, if the Service Coordinator felt unsafe. [redacted] was aware of these specific safety procedures, had followed them in the past, but on the day of the incident, for whatever reasons did not follow them, and attempted to meet with the client, by herself, without a partner. Her death was caused by the criminal act of a third party, who has been found mentally incompetent to stand trial.

(Jt. Pre-Hr'g Statement, at p. 10).

<sup>19</sup> Integra's "Job Snapshot" for the SC position posted on the internet on July 17, 2012 stated that the Job Type was Health Care, with a 4 year degree needed, along with at least two years of experience. The job posting further stated (in part) that [t]he ideal candidate would be able to provide support services to a specific group of individuals with serious mental/somatic illness through community-based teams. ...

### REQUIREMENTS

who have particular characteristics and traits that ... are indicative of their ability to relate to people, to engage in conversation, to ... help them be accepted as a coach in essence.” (Tr. 98, 104-05, 590, 758; Exs. C-9, C-10).

At the time of her death, [redacted] had just recently graduated from the University of South Florida with a degree in psychology. She was enrolled in a program to get a teaching certificate to be a teacher. She had no previous experience working with the mentally ill and had no previous experience or certifications in social work. She had never had a job where she visited people at their homes. Despite this lack of experience, [redacted] was hired, according to her team lead at the time, because of “that heart that she wanted to help others.” CO Prymmer testified that during the course of his investigation he learned that [redacted] was very motivated,

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Individuals must possess a Bachelor’s Degree. An interest in social work, psychology or a related field and possessing 2 years experience in the field is a plus. The applicants should demonstrate the following skills [including, in part]:

- Knowledge of community resources
- Able to conduct hospitalization risk assessments ...
- Ability to form strong positive relationships with the member, family and hospital/facility staff ...
- Ability to formulate a written service plan

Integra’s internal Job Description for SC, dated January, 2012, stated:

Job Function: The Community-Based Service Coordinator will provide community-based service coordination services to a specific group of individuals with serious mental illness/somatic illness, while under the supervision of the Team Lead. Responsibilities include maintaining a caseload, as directed by the Team Leader, provide on-going evaluation of the client’s needs, facilitation and coordination of service plans. The community-based Service Coordinator will meet with clients in their home setting or treatment facility.

Education Required: Bachelors Degree in Social Work, Psychology, or a related field. Those with a combination of experience and education will be considered.

Experience: 1 year experience in the field of Behavioral Health is desired.

Job Duties [including, in part]:

- Knowledge of community resources.
- Conduct hospitalization risk assessments
- Telephonic and in-person triage ...
- Ability to form strong positive relationships with the patient, family and hospital/facility staff....
- Ability to formulate a written treatment plan.

(Tr. 99, 104-05; Exs. C-9, C-10).

wanted to do a good job, and wrote good progress note reports. (Tr. 105, 136, 199, 248-49; Ex. R-KK, at pp. 82, 84).

[redacted]' job as an Integra SC was to coordinate community resources for Integra "members." These members were people that had been identified by the member's insurance company as those who incurred high costs associated with emergency room care and in-patient hospitalization. These members had a history of non-compliance with their medical orders – *i.e.*, they were failing to fill their prescriptions, or they were failing to schedule or show up to their doctor's appointments. Insurance companies, and in this case, Amerigroup, contracted with Integra to address these "gaps in care." For example, a gap in care would be when a diagnosed diabetic did not get retinal eye examinations. "That would be something a health plan would know about because they have seen claims come in with a diagnosis of diabetes and they're not seeing claims come in for these lab tests." Integra and Amerigroup entered into a contract, with the possibility of annual renewal, to address these "gaps in care" and achieve a cost-savings goal for the insurance company. (Tr. 87, 270, 755-56, 772, 786, 1017-18).

Integra's approach to fulfilling its end of the contract was to personally find these non-compliant members, determine what obstacles prevented them from following doctor's orders, and connect them with community resources that would empower them to get back on track, medically. Obstacles that the member might be facing may be traced back to a lack of basic needs being met. Many of these members were not getting food, clothing or shelter, preventing them from even thinking about medical care. Integra SCs, described as "feet on the street," would personally contact these members and help them with their basic needs, "as a family member might," so that they could eventually address their medical needs. Along with a salary, SCs got a \$350 monthly gas allowance for using their own personal cars to meet, visit, and

handle members. SCs were expected to personally drive, in their privately owned vehicle, members to doctor's appointments. (Tr. 315, 418, 438, 453, 757, 779, 896, 926-27).

Integra asserted that Amerigroup "typically" sent Integra background information about potential members before Integra assigned a member to a SC that included the following: 1) member's name, address and telephone number, 2) name of primary care physician, 3) primary, secondary and tertiary diagnosis, 4) prescriptions and their costs, 5) substance abuse and mental health conditions, 6) name of health plan case manager, 7) number/cost of inpatient behavioral health admissions, 8) number/costs of Emergency Room admissions, and 9) total medical costs per member per month. Integra supposedly transmitted this information to the SC team lead in Tampa, who assigned each SC approximately 35-38 members for which they were responsible.<sup>20</sup> The team lead assigned members to SCs based on geographic location, for "geographic and scheduling efficiencies;" and not by member risk. When assigned a new member, the record shows that SCs sometimes might have only a member's residence address and a telephone number if one was available. (Tr. 87-88, 127-28, 254-55, 315, 915-16; Ex. C-28, at pp. 12-14, Resp't Answers to Sec'y First Set of Interrogatories).

For each member, Integra required the SC make two telephone contacts and two face-to-face contacts, per month. SCs were also required to personally visit with any member admitted to a hospital within seven days. The SC first had to obtain a consent form signed by the member, because Integra would be working with the member regarding his or her health. Integra then required SCs to complete a written health "Needs Assessment" of the member during a follow-on face-to-face meeting within 30 days of obtaining the consent form. The Needs Assessment included topics such as the member's health, daily activities including bathroom habits, legal and

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<sup>20</sup> Based on the testimony discussed herein, the Court finds that SCs at Integra's Tampa office did not routinely receive all of this background information on each member.

criminal history, substance abuse, and medications. To complete the Needs Assessment, the SC asked the member questions and transcribed the member's answers "in real-time during the face-to-face." Using the Needs Assessment as a baseline, the SC developed a service plan to meet the health, social, and community care management needs of the member with the goal to preempt members from unnecessary hospitalizations. All interactions with members were documented in progress report notes that were recorded and uploaded into Integra's electronic database, called ServiceConnect, for the team lead to review and ultimately approve.<sup>21</sup> Integra's services were measured based on whether it was saving Amerigroup money by reducing unnecessary hospitalizations. (Tr. 87-96, 250, 255, 351-52, 1017-18; Exs. C-8, C-34).

### WITNESS TESTIMONY

**Jason Prymmer, OSHA CO.** CO Prymmer testified that Integra conducted a program in Florida where SCs coordinated health care related services for mentally and/or physically disabled members. Most members were severely mentally ill, with maladies including bipolar disorder and schizophrenia. Most members also had criminal backgrounds.<sup>22</sup> Many were

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<sup>21</sup> SC team leads were supposed to review and approve progress report notes on a daily basis. This was not always done. For clarification purposes, Respondent withdrew Ex. R-AA, Florida Supervision Summary, Nov. 1 2012 – Dec 12, 2013, and it is not in evidence. The Court notes that Complainant made hearsay and relevance objections to its admissibility in the Jt. Pre-Hr'g Statement, at p. 4. (Tr. 96, 1071).

<sup>22</sup> CO Prymmer testified that Dr. Arnott and Ms. Brown told him that most of Integra's members have criminal backgrounds. (Tr. 89, 177). Specifically, on December 14, 2012, Dr. Arnott told CO Prymmer in a signed statement that:

The service coordinators case list is mostly mental patients. We knew [redacted] was not comfortable with the assailant [[redacted]]. We didn't have high risk groups [identified]. We are going to do that now. I read the note [about [redacted]]'s reluctance to meet with the client in his home]. "That is how we know [redacted] was not comfortable. We do not have a written policy or procedure for the buddy system. We are evaluating our safety practices. We know a large percent, it is common knowledge have criminal history. We are dealing with the toughest people that no one wants to deal with. We don't have a workplace violence prevention program. We haven't formalized a buddy system until now [after the fatality]. ...' (Ex. R-QQ, at pp. 14-15).

Ms. Rochelle also knew that the majority of Integra's members had mental illness and criminal backgrounds. (Tr. 133).

substance abusers. CO Prymmer testified that Dr. Arnott told him during a face-to-face interview that when [redacted] was killed Integra did not: 1) have a workplace violence prevention program, 2) perform criminal background checks on members, and 3) identify “high risk groups” before assigning SCs their individual caseload.<sup>23</sup> Integra did not require SCs to perform their own background checks on members. He testified that Integra was paid “based on the two phone calls and two face-to-face visits and the ... seven-day period hospital readmission.” Integra’s SCs helped members schedule medical and social services appointments, drive members or arrange for travel to their appointments, and assisted them in completing paperwork. SCs were required to “track down” and visit with the many members who did not have telephones. Members generally lived in publicly provided housing located in “high crime neighborhoods.” SCs often met with members alone in areas off the beaten path, in areas where the general public could not see them; *e.g.* trailer parks, government housing projects, and high crime areas.<sup>24</sup> Integra had no office in Florida. SCs worked out of their homes and privately owned vehicles, and drove out to members’ residences. (Tr. 87-93, 109-10, 127-28, 134-35, 177, 786; Exs. C-8, R-QQ, at pp. 14-15).

CO Prymmer testified that Dr. Arnott developed the Neumann University training (Neumann training), an about 40 hour online training course for SCs.<sup>25</sup> CO Prymmer testified

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<sup>23</sup> OSHA’s Safety Narrative, Accident Investigation Summary & Findings, stated Integra “did not have a cohesive and comprehensive written workplace violence prevention program to address hazards that included engineering and administrative controls, personal protective equipment and training programs.” (Ex. C-5, at p. 1). On March 8, 2013, Jessica Cooney, Coordinator of Programs and Implementation of Training, told CO Prymmer that “[t]here were no check-in procedures for service coordinators. A challenging or difficult client was not defined. All notes are to be reviewed. There was no workplace violence program previous to the incident. There wasn’t any categorizing of clients of difficulty level and a way of assigning a client bases [sic] on the experience of a service coordinator.” (Ex. R-QQ, at p. 15).

<sup>24</sup> CO Prymmer testified that an OSHA directive identified high crime areas and areas not visible to the public as risk factors for workplace violence. (Tr. 134-35).

<sup>25</sup> The Summer 2012 Syllabus for the Neumann training, also referred to as the Community Intervention Specialist Certificate Program or Integra Health Management Program, stated that the course was designed to enable SCs to effectively understand “the field of Behavioral Health – future needs” and the “importance of integrating integrated Behavioral Health and Physical health.” (Tr. 106; C-15).

that Session 8, In-Home & Community Safety, dealt with workplace violence or safety, including: 1) Screening Dangerous Members, 2) Identifying Risky Situations, 3) Safety in the Community, 4) Recognizing High Risk Behaviors, and 5) Minimizing Risk on the Job. CO Prymmer testified that two slide presentations in Session 8, concerning Screening Dangerous Members and Safety in the Community, consisted of general bullet points with no assigned additional readings or classroom training. He testified that the bullet points, including the “Partner with someone” bullet point, were not mandates and following them was up to the self-discretion of each SC.<sup>26</sup> The terms “Dangerous Member,” “dangerous situation,” or “potential danger” used in the Screening the Dangerous Member presentation were not defined. He further said that the Screening the Dangerous Member slide presentation showed that “[t]he employer recognized somewhat of a hazard recognition of a dangerous member. The – the employer has – has a recognition.” (Tr. 105-13, 347; Exs. C-6, at p. 7, C-15 through C-17).

CO Prymmer testified that the Safety in the Community slide presentation included bullet points that stated that high risk behaviors included: 1) A history of violence or self-harm, 2) Paranoia/Suspiciousness, 3) Psychosis/Confusion, 4) Substance Abuse, 5) Hopelessness, 6) Verbal Threats, 7) Lack of Future Plans, and 8) Criminal Behavior. Another slide identified more risk factors including: 1) Antisocial Personality, 2) Head Injury, 3) Family History of Violence, 4) Noncompliance, 5) History of Impulsive Behavior, 6) Loud/Manic Behavior, and 7) Possessor of Weapons. CO Prymmer testified that SCs first learned of the existence of any of these high risk behaviors when conducting their face-to-face health assessment of the member in the field. He further stated that the Safety in the Community slide presentation showed that Integra recognized members with these risk factors as a hazard. He testified that Integra

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<sup>26</sup> CO Prymmer testified that Ms. Rochelle and other SCs told him that Integra pressured SCs not to seek to partner with other SCs when visiting members. (Tr. 111-13; Ex. C-17).

recognized that its members could be violent and exhibit criminal behavior. CO Prymmer testified that when he interviewed SCs “[t]hey had nothing good to say about it [Neumann training] in terms of how to do their job and how to be safe on their job.” (Tr. 114-17; Ex. C-17).

CO Prymmer stated that there was a general statement regarding “Workplace Violence” in Integra’s employee handbook that said “Violence by an employee or anyone else against an employee, supervisor or member of management will not be tolerated.” He testified that the general statement did not identify the specific types of workplace violence that SCs were most likely to be exposed to. He stated that Integra “didn’t have a written comprehensive workplace violence preventive program.” CO Prymmer also testified that many of the SCs received on-the-job training in the form of shadowing other SCs. Shadowing was not required and he reported an instance where an Integra SC, Ellen Rentz, just went out and did face-to-face visits without first shadowing anyone or completing the Neumann training. He testified that [redacted] shadowed SC Andy Macaluso a couple times. (Tr. 117-26,134-35, 341-42; Exs. C-5, at pp. 1-2, C-18, at p. 96).

CO Prymmer testified that he recommended Integra receive Citation one, Item one, a violation of the general duty clause, because Integra “failed to materially reduce or eliminate the hazard of workplace violence.” He stated that he relied upon OSHA Instruction Directive Number: CPL02-01-052, effective date: September 8, 2011, Subject: Enforcement Procedures for Investigating or Inspecting Workplace Violence Incidents (OSHA Directive 052).<sup>27</sup> He said that he also followed other publications and guidelines OSHA has for social service work and

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<sup>27</sup> OSHA Directive 052 identifies “Types of Workplace Violence” and includes classifications of workplace violence that describe the relationship between the perpetrator and the target of workplace violence, including Type 2 – Customer/Client/Patients: Violence directed at employees by customers, clients, patients, students, inmates or any others to whom the employer provides a service. (Ex. C-33, at p. 10).

health care. He testified that OSHA does not have a standard for workplace violence. He stated that Integra was required to create a workplace violence prevention program because health care and social services have a higher incidence of workplace violence than other industries. He classified Integra as being in the social services and health care industries. He testified about the known risk factors for OSHA compliance officers to consider as criteria for initiating workplace violence related inspections. These include: 1) working with unstable or volatile persons in certain healthcare, and social service settings, 2) working alone, 3) having a mobile workplace and 4) working in high-crime areas. He testified that he considered these risk factors when determining whether to cite Integra. He testified that the hazard present in this case was workplace violence with SC and management face-to-face exposure to violent members who have violent histories with a criminal background. He testified that [redacted] was exposed to workplace violence when she was required to be around [redacted], a member with a violent criminal background unknown to the employee, where no criminal background check was first performed by the employer.<sup>28</sup> (Tr. 155-61, 239; Exs. C-5, at p. 8, C-33).

CO Prymmer further testified that the social service and health care industries recognize the hazard of violence from exposure to persons with a violent behavior. He identified OSHA Publication 3148-01R 2004, Guidelines for Preventing Workplace Violence for Health Care & Social Service Workers (OSHA Guidelines), as a guide to help employers establish effective workplace violence prevention programs. CO Prymmer relied upon the OSHA Guidelines when determining that the social service industry recognized a heightened risk of workplace violence.<sup>29</sup> He testified that Integra recognized the hazard of workplace violence from exposure

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<sup>28</sup> Following [redacted]' death, CO Prymmer testified that Integra started to perform criminal background checks and stopped providing services to eight members because it deemed them to be too dangerous. (Tr. 160).

<sup>29</sup> The OSHA Guidelines state:

to persons with violent behaviors based upon what he saw in the Neumann training and employee handbook. He testified that Integra's response to the threat of workplace violence prior to [redacted]' death was insufficient because Integra did not: 1) have a written comprehensive workplace violence program, 2) perform criminal background checks on members and stop providing services to members found to be dangerous, and 3) have procedures requiring SCs to use a buddy system.<sup>30</sup> He also testified that he relied upon OSHA Directive 052, Appendix B – Potential Abatement Methods, when he developed his list of recommended feasible abatements in the citation.<sup>31</sup> (Tr. 161-66, 238-39, 362; Exs. C-5, at pp. 1-2, C-6, at pp. 8-9, C-32, C-33).

CO Prymmer testified that he also recommended that Integra be cited for failing to report [redacted]' death to OSHA within eight hours. He stated that Ms. Brown told him that Integra did not do it. She told CO Prymmer that she did not think Integra was responsible for calling

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The Bureau of Labor Statistics (BLS) reports that there were 69 homicides in the health services from 1996 to 2000.... BLS data shows that in 2000, 48 percent of all non-fatal injuries from occupational assaults and violent acts occurred in health care and social services. ... Injury rates also reveal that health care and social service workers are at high risk of violent assault at work. BLS rates measure the number of events per 10,000 full-time workers – in this case, assaults resulting in injury. In 2000, health service workers overall had an incidence rate of 9.3 for injuries resulting from assaults and violent acts. The rate for social workers was 15, .... This compares to an overall private sector injury rate of 2.

(Ex. C-32, at p. 5).

<sup>30</sup> OSHA's Safety Narrative, Accident Investigation Summary & Findings, stated: Integra "didn't have a set standard for double teaming; the buddy system wasn't formalized. There were no high risk groups." On December 13, 2012, Ms. Brown told CO Prymmer that "We practice if you feel at risk you double team, don't have a set standard for it. I think Stefanie was following policies. We were not looking at criminal history. Most of these people have a background, not a general practice to do background checks on patients...." On March 8, 2013, Dr. Arnott told CO Prymmer that "[i]n Pennsylvania we tried to go in pairs all of the time, but it took too long." (Exs. C-5, at p. 2, R-QQ, at pp. 14-15).

<sup>31</sup> CO Prymmer testified that since [redacted]' death, Integra has developed a written workplace violence prevention program, updated safety assessments, performed background checks, stopped providing services to potentially violent members, created a color code system to identify members who are more dangerous than others, and provided more workplace violence training to their employees. OSHA's Safety Narrative, Accident Investigation Summary & Findings, states: "Since the workplace violence incident, Integra Health Management has put in place the following, such as, but not limited to: critical incident debriefing, workplace analysis, background checks, member lists, member alerts, mandatory two service coordinator visits, safety checklists, M3MobileHelp transponder devices, staff tracking, and enhanced internal/external training." These are all additional measures OSHA or CO Prymmer identified as feasible abatements. He said that all of these measures were feasible for Integra to have implemented before [redacted]' death. (Tr. 166-67; Ex. C-5, at p. 2).

OSHA to report the fatality.<sup>32</sup> He stated that Integra never kept OSHA injury and illness logs or documented any incidence of workplace violence. CO Prymmer testified that it was his understanding that an anonymous family member first reported [redacted]' death to OSHA. (Tr. 88, 163, 167-68, 176-77; Exs. C-1, at p. 9, C-3, C-4, C-28, at p. 4; Jt. Pre-Hr'g Statement, at p. 8).

**Michael Yuhas** is the President and CEO of Integra. He founded Integra in 2007. He does not manage Integra's "day-to-day operations." Mr. Yuhas has a Master's degree in community clinical psychology, and has done additional graduate work towards a Doctorate in public and mental health, and epidemiology. He has a background in psychology, mental health, behavioral health and public health training. He has been in the health care business for more than 25 years, having worked at Blue Cross BlueShield in Maryland, the National Institute of Mental Health, the University of Maryland School of Medicine, and a company in Tampa called Health Integrated. In these positions, he has worked in research, administration, and executive level management. (Tr. 753-54, 785).

Integra began operating in Florida in May, 2012. Mr. Yuhas testified that Integra worked "with people who fall through the cracks." Integra's members in Florida are covered by Medicaid. According to Mr. Yuhas, Integra was paid based on the numbers of members it worked with each month. These members most commonly have multiple chronic illnesses that do not get treated properly. They do not access preventive care. They do not take their medications or visit their primary care doctor. They regularly visit emergency rooms and are often hospitalized. Their health care providers are often unable to contact them. Mr. Yuhas testified that the health care insurers realize "that the only way you're going to engage some of

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<sup>32</sup> Integra's Response to Interrogatory No. 4 states (in part) that Integra "was unaware of its obligation to report this matter to OSHA within eight hours. The OSHA log was completed on 12/13/2012." (Ex. C-28, at p. 9).

these members is to really do it on a personal level and – talk face to face and get them engaged.” The health care insurer identifies members for Integra and informs Integra of the members’ fundamental problems. At that time, Integra has no information concerning a member’s criminal background.<sup>33</sup> Integra locates the member and helps the member connect to health care services and reminds them to take their prescribed medications. Mr. Yuhas testified that “it’s much more common that these individuals are likely to have depression and anxiety disorders and other mental health problems accompanying them.” He said that the range of mental health diagnosis for members is from the mild end, a minor depression, to the more severe end of mental illnesses, which is a cognitive disorder like a schizophrenia bipolar. He said members “have behavioral health which can include mental health and/or substance abuse conditions.” He said that there are members with criminal backgrounds that range from credit card fraud to violent crimes. SCs help facilitate the care plan that members and their health care providers have set up. About 35 members are assigned to each SC. He said that Integra’s guidelines call for SCs to make telephone calls to, and visit with, members several times a month. (Tr. 755-57, 760-65, 770-74, 778-79, 781, 786).

Mr. Yuhas testified that in Florida during the fall of 2012 Integra’s SC training included training conducted online, face-to-face in the field, and by telephone each week. He said that Integra asked its employees to “avoid any situation that shows any indication of danger, potential danger.” He said that Integra recommended its SCs bring along another SC to member visits where there was any indication of being unsafe going alone. (Tr. 767).

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<sup>33</sup> Mr. Yuhas testified that many of Integra’s SCs took it upon themselves to conduct a public information check on members in the fall of 2012; “but it was not something that was a hundred percent done by everybody.” (Tr. 774). The Court finds that there is insufficient evidence in the record to support this assertion.

He testified that Integra's work is within the community health work industry.<sup>34</sup> The industry, according to Mr. Yuhas, was not social work because Integra's industry was not clinical. Mr. Yuhas described Integra's industry as "community health work," and explained that "80 percent of the factors that impact people's health are not related to health care at all. They ... are related to basic 101 issues, uh, barriers to care that are ... educational, ... psychosocial, behavioral, environmental, and not clinical." While doctors, nurses, and social workers, *i.e.*, clinicians, focus on the other 20 percent of the factors that impact people's health, Integra's industry, according to Mr. Yuhas, focuses on the non-clinical solutions that would connect members to their clinicians. He said that it was not standard practice for the community health industry to conduct criminal background checks before sending employees out to visit members. Mr. Yuhas testified that there are no national or Florida regulations for the community health industry. (Tr. 762, 768, 774-77, 883, 1018).

**Dr. Melissa Arnott** is the vice-president of community programs at Integra.<sup>35</sup> (Tr. 340). She has a Doctorate in counseling education from the University of Sarasota awarded in 2004,<sup>36</sup>

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<sup>34</sup> Mr. Yuhas testified that Integra changed its SC designation to Community Coordinator in about January, 2014. He said that there are about 50,000 community health workers in the nation, including 2,500 in Florida. (Tr. 758, 762, 769, 783).

<sup>35</sup> Dr. Arnott has served in a variety of positions serving the mental health community since 1990 to the present. From 1997 through 2008, she also privately practiced as a therapist providing individual, group and family counseling. She has also been an instructor at Rowan and Neumann Universities. (Tr. 863-65; Ex. R-TT).

<sup>36</sup> Dr. Arnott testified that the University of Sarasota was bought by Argosy University. On November 8, 1991, the University of Sarasota, Inc. filed a voluntary bankruptcy petition No. 8:91-bk-14551-TEB under Chapter 11 in the United States Bankruptcy Court, M.D. FL. A plan was confirmed on April 8, 2002. Dr. Arnott's resume shows that she worked in Pennsylvania from the time she was awarded her Master's degree in 1995 through 2004, the year she was awarded her Doctorate degree in Florida, suggesting most of the work for her Doctorate degree was done off campus. In at least one instance, the University of Sarasota has been seen as a "non-traditional" university and had its doctorate programs called into question. *See* No. 78-2294, *Dr. John Gullo v. Fla. Bd. of Exam'r. of Psychology*, 1979 WL 63236 (Fla. Div. Admin. Hrgs, June 28, 1979) (noting that University of Sarasota does not have an accredited degree program that would qualify the plaintiff to sit for the board examination for certification). The Court is crediting Dr. Arnott's Doctorate degree in counseling education with weight less than that accorded a

a master's of science degree in counseling education in higher education and counseling from West Chester University awarded in 1995, and an undergraduate degree in liberal studies with a concentration in psychology from Neumann University awarded in 1993. She is a licensed professional counselor in Pennsylvania and New Jersey; a licensed clinical addictions counselor in New Jersey; a certified Addictions Counselor Diplomat in Pennsylvania, and an international certified Advanced Alcohol and Other Drug Abuse Counselor. (Tr. 858, 861-62; Ex. R-TT).

Dr. Arnott joined Integra in August, 2010 as the team lead for Philadelphia, Pennsylvania where she oversaw eight SCs in a new program. She helped train the SCs at her Philadelphia office and was with them every day. She testified that she also “spent time with them [Philadelphia SCs] in the field, much time training.” During the 18 months of that program, the SCs in Philadelphia did the same thing as the SCs in Florida later did starting in May, 2012. After Integra's contract expired in Philadelphia about February, 2012, Dr. Arnott helped develop Integra's new program in Memphis and train its new team there comprising a team lead, lead SC, and 6 SCs. In about May, 2012, she also created a similar SC program for Integra at Pittsburgh and Harrisburg, Pennsylvania. She testified that even though the job was “not clinical”, she had a clinician overseeing each of the teams. (Tr. 866-75, 897).

She developed the Neumann training for the new SCs along with Dr. Krajewski.<sup>37</sup> The Neumann training was available by late August, 2012. Integra hired the majority of its SCs in Florida in August/September, 2012. Dr. Arnott directly supervised Ms. Rochelle, Integra's team

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similar degree awarded following completion of a full-time, resident study program taken over the course of several years at a traditional university with a suitable accredited program. (Tr. 858; Ex. R-TT).

<sup>37</sup> Dr. Arnott testified that Neumann University wanted the training to “go through them, so we were going to start through adult education. And then they were going to make it a minor in the university because, you know, as we know with the Affordable Care Act, this is where the industry is heading with this community care or community health worker.” She said Neumann University “called it a Community Intervention Specialist” Certificate Program. (Tr. 884; Ex. R-J).

lead in Florida, from about April 30 through November 6, 2012. SCs in Florida and one or two from Tennessee and Pennsylvania took the Neumann training in 2012.<sup>38</sup> Integra scheduled up to 49 hours for Florida SCs to take the Neumann Training from August 27 through September 7, 2012. The Neumann training consisted of 15 sessions, where the SC had to: 1) post at least two paragraphs of reaction reflection responses for each session (represented 50 percent of the grade), 2) prepare a one-page paper (representing 25 percent of the grade), and 3) complete a final examination (representing 25 percent of the grade). Integra paid \$1,500 to Neumann University each time a SC took the training. (Tr. 105-06, 340-50, 876-81, 888-90, 894-95, 998,1015-16; Exs. C-15, C-16, at pp. 1-4, C-17, at pp. 4-5, R-J, R-Y).

Dr. Arnott said she felt it necessary to instruct SCs on how to identify and assess dangerous members because they worked directly with persons who were mentally ill. She said that the SCs used the Brief Psychiatric Rating Scale (BPRS) looking for psychotic symptoms changing over time. She further said that the Team Lead would also look at the BPRS and evaluate whether a member was making progress, a criteria for discharge. Dr. Arnott testified that “the team lead is the one that discharges [members]” and “when it came time to discharging, then that would be the team lead’s decision.” She considered standards for both social workers and community health workers when developing the Neumann training. She testified that she used the National Association of Social Workers’ (NASW) social worker standard for safety and material from “SAMHSA.”<sup>39</sup> She noted that best practices for the community health worker

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<sup>38</sup> [redacted] completed the Integra Health Management Program in October, 2012. She made Neumann training reaction reflections on September 27, 2012 to both Crisis Services and Safety Discussions. On that date she authored a reflection that stated re: Safety Tips, (in part): “I also think having some background information on a client can help determine whether he or she could be dangerous. But in the end, one can never really be sure, so it is always best to put safety first.” The court finds [redacted] was working on completing the Neumann training in late September, 2012. (Tr. 948-54, 992-93; Exs. R-VVV, R-QQQQ, at p.8, R-RRRR, at p. 11).

<sup>39</sup> Although not defined in the record, the Court notes that SAMHSA is the federal government agency Substance Abuse and Mental Health Service Administration within the U.S. Department of Health and Human Services. Ms.

“didn’t have any safety in there.” She also said that she looked at agencies where she had worked and said that there was “very little safety training out there. And I never had safety training in places I worked.” (Tr. 344-50, 876-81, 1002-03, 1102).

She initially said that the initial assessment form “was a health and behavioral health and basic needs type assessment” that did not require SCs to have any clinical skills to complete.<sup>40</sup> Later on, she testified that when completing the assessment form, SCs recorded behavioral observations, including whether a member was confused or depressed. She agreed that the assessment form called for SCs to summarize their assessment of the member and state whether member’s answers to their questions were consistent with their clinical observations. She also said that the assessment form called for SCs to write a psychosocial note and watch GAF and BPRS scores for each member over time.<sup>41</sup> (Tr. 873-74, 897, 1006-07; Ex. C-34).

She testified that both Neumann training and training given monthly by Dr. Krajewski included an overview of psychotropic medications. She said by knowing the medications, SCs know more about their members and possible medicinal side effects. She testified that the

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Janet Nelson, the Secretary’s expert, testified that NASW’s social worker guidelines are generally applicable to all human service workers. (Tr. 1102).

<sup>40</sup> At one point in her testimony, Dr. Arnott said Integra “didn’t want assessments done like a clipboard going through and checking off boxes. It was a discussion. It’s engaging the person.” Later she said that the assessment “is really like a checklist. I don’t know why we call it an assessment.” In rebuttal, Ms. Nelson testified that SCs perform as clinicians, in part. She said the initial assessment form called for SCs to conduct a brief mental status examination of the member, make clinical observations of the member, write biopsychosocial notes, and use clinical tools such as Global Assessment of Functioning (GAF) and BPRS scores. She said that SCs without a Bachelor’s degree in social work or any field experience lacked the experience or knowledge necessary to apply these tools. She further testified that the use of inexperienced and unqualified workers to apply these clinical tools affected the worker’s exposure or ability to respond to workplace violence. Ms. Nelson testified that the ability to do a clinical assessment informs the person doing the assessment of the risk of violence. She said that is well understood in the field. She said the problem with Integra’s program is its use of workers without much experience to perform an assessment that includes a violence risk assessment. She said Integra’s client population of members with severe and persistent mental illness provides a challenge to inexperienced workers to assess a member’s propensity for violence. (Tr. 106, 897, 905, 1099-1104; Ex. C-34).

<sup>41</sup> Dr. Arnott described GAF as a clinical score in the DSM. DSM commonly refers to the Diagnostic and Statistical Manual of Mental Disorders which is the standard classification of mental disorders used by mental health professionals in the United States. She said Integra gave the SCs a member’s GAF score. (Tr. 1008-09).

Neumann training included a session entitled “Layperson’s Guide to Mental Health” where SCs are given information about mood, thought, and personality disorders so that they know what to expect when seeing members with any of these disorders. She testified that Session 13 dealt with substance abuse and that Integra wanted its SCs to be able to identify when a member was impaired. She testified that “20 to 25 percent of [Integra’s] members have severe mental illness.”<sup>42</sup> (Tr. 905-09; Exs. C-J, at p. 4, R-J, at pp. 4-5).

The Neumann training also included a PowerPoint slide in Session 8 that suggested SCs “[o]btain critical history about previous unsafe behaviors” of members.<sup>43</sup> Dr. Arnott admitted that Integra did not require SCs try to obtain such information before visiting with a member. She testified that Amerigroup did not provide criminal background information about a member to Integra.<sup>44</sup> She also said that when visiting a member for the first time SCs should assume “anybody had the potential of violence.” Dr. Arnott testified that SCs would learn of a member’s history of violence, or a family’s history of violence, when doing the initial assessment or from any research they might do online.<sup>45</sup> She also admitted that, at the time of [redacted]’ death, Integra did not require taking another SC along on a face-to-face visit when a SC suspected that

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<sup>42</sup> She also testified that many of Integra’s mentally ill members in Florida also had medical issues. (Tr. 342).

<sup>43</sup> Dr. Arnott initially testified that the Neumann training did not include any discussion about Integra’s buddy system. (Tr. 898). Later on, when discussing page 4 of the Screening the Dangerous Member module of the Neumann’s training Session 8 she discussed a SC’s consideration of taking another SC when visiting a dangerous member. She stated Integra would probably discharge a member thought to be dangerous. She further said that if the member was thought to be something less than dangerous, Integra would want SCs to take another SC along on a visit, or meet with the member in a public place. (Tr. 943-44; Ex. C-16, at p. 4).

<sup>44</sup> Dr. Arnott testified that many of the Florida SCs checked the criminal database themselves. Dr. Arnott testified that she talked about SCs checking “mugshot” during training, but also stated “[i]t’s not accurate” and “you can’t rely on mugshot.” She also said that Integra tried to contract with Pinkerton to perform criminal background checks, but Pinkerton told Integra that it would not do it because it was a violation. The Court finds SCs did not regularly check a reputable criminal database in the fall of 2012. (Tr. 109-10, 916-17).

<sup>45</sup> Dr. Arnott also said that SCs could ascertain a member’s past criminal behavior by getting a member’s consent to contact a member’s family, friends, or clergy. She also testified that Integra discharged members when learning during the assessment that the member had a gun. (Tr. 936-40).

there was a potential danger. It was suggested that the SC ask another colleague to join the SC as a “buddy” if the SC felt unsafe. It was up to the SC to arrange for a “buddy” to accompany them on a face-to-face visit to a member. Dr. Arnott said if they were unable to do so, they were to go to their supervisor, who would assign someone or go along themselves. Integra did not have a written procedure for requesting a “buddy.” Dr. Arnott testified Integra had an unwritten procedure where SCs told their “safety partner” and “program manager” where they were at all times.<sup>46</sup> She also testified that Integra saw no reason to conduct “takedown training” for SCs. She said that Integra’s guidance to SCs confronting criminal behavior is to “just leave.” ( Tr. 344-54, 915-16, 923-24, 931-35, 938-41, 1012; Exs. C-15, C-16, at pp. 1-4, C-17, at pp. 4-5, R-J).

Dr. Arnott testified that she and Ms. Cooney conducted face-to-face training in September and November, 2012 in Florida. She also said that Integra provided three additional safety trainings pursuant to Integra’s yearly training schedule that were conducted by telephone or webinar.<sup>47</sup> She testified that SCs were expected to identify the high-risk behaviors listed in the Neumann training’s Safety in the Community segment identified above while doing their

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<sup>46</sup> Dr. Arnott’s testimony on this procedure does not make reference to a time frame when any such policy was in effect. The Court notes that on August 28, 2012 Dr. Arnott posted material with the “Topic: Safety Tips”, “Subject: Safety Tips” that included at Step 1 a reference to designating a team colleague as a monitor or informing the Director. The posting also said:

[t]he monitor needs to know your visitation schedule for field visits. Provide the monitor all visitation addresses and directions to each destination. You can call the monitor to check in when you arrive at the home. The Monitor should set a timer for the time allotted for the visit. Check in with the monitor again when you get in your car and leave the visit. The monitor should contact you if you do not call within the agreed-upon timeframe.

(Ex. R-RRRR, at p. 7).

The Court finds insufficient evidence to support a finding that any such monitoring procedure was actually in effect or followed by SCs in Florida prior to December 10, 2012.

<sup>47</sup> Integra’s training schedule called for training in a variety of topics including Psychotic Disorders, Personality types, and High Risk Behaviors. (Ex. R-A). There are no records of attendance for any of these telephone or webinar yearly training sessions in evidence and the Court is unable to determine if any Florida SCs actually participated in any of these sessions in 2012.

face-to-face initial assessment of the member. Integra relied upon members self-reporting their own criminal behavior, feelings of hopelessness and history of violence.<sup>48</sup> She said that Integra's initial assessment would be used anywhere in the health care industry. It was similar to those used at doctor's offices. (Tr. 344-50, 959-60, 974-79; Exs. C-15, C-16, at pp. 1-4, C-17, at pp. 4-5, R-A, R-G, R-Y).

Dr. Arnott testified that she reviewed [redacted]' October 12, 2012 progress note report shortly after it was created. She thought that [redacted] knew what she was supposed to do; be outside or not go alone if she felt anything.<sup>49</sup> Dr. Arnott testified that she did not know whether [redacted] had a history of violent behavior. She said she knew he had an injectable, antipsychotic medication. She did not have confirmation from [redacted]'s psychiatrist whether he was being properly monitored and medicated for his schizophrenia before [redacted]' death. Dr. Arnott testified that Amerigroup did not report any history of violence by [redacted] to [redacted]. Dr. Arnott did not know whether [redacted] took another SC with her when she visited [redacted] on October 15, 2012. She testified that she did not consider [redacted]'s October 15, 2012 discussion about his *The Last Supper* picture to be delusional or alarming. She said that for a member to be considered dangerous there needed to be more than one symptom. Dr. Arnott did not follow up with Mmes. Rochelle or [redacted] to determine how [redacted] intended to subsequently meet with and provide services to [redacted]. (Tr. 140-41, 270-72, 356-63; Ex. C-7, at pp. 1,5).

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<sup>48</sup> Dr. Arnott also testified that SCs may obtain some information of high-risk behaviors from the member's family or Amerigroup. (Tr. 350-51).

<sup>49</sup> Dr. Arnott testified that during her training Integra told SCs:

not to go in the home when they're alone, ..., and there's no one else in the home. But then also we also tell them to look at who's in the home, because people in the home could be dangerous as well as the member. So everything could be a dangerous situation. (Tr. 929-30).

After Ms. Rochelle left Integra, Dr. Arnott began to act as the team lead in Florida. She testified that she promptly reviewed [redacted]' November 14, 2012 progress note report of her visit to [redacted] which indicated he reportedly initially pretended to be his twin brother, and later signed the Integra's consent form as himself. Dr. Arnott did not follow-up with [redacted] to ascertain whether she had not met with [redacted] inside his home alone. She testified that after three face-to-face visits with [redacted] at his home, [redacted] remained unaware of his history of violent behavior. (Tr. 356, 363-66; Ex. C-7, at p. 7).

Dr. Arnott testified that Integra's services were evaluated based on whether it was saving Amerigroup money by reducing unnecessary hospitalizations. She described Integra's industry as a "niche in the market that other people are not doing in this community health worker type role, ...." (Tr. 883, 1017-18).

**Dr. Thomas Krajewski**, referred to throughout the hearing as "Dr. K," is the Medical Director at Integra, and has served in that position since 2007.<sup>50</sup> As the Medical Director, Dr. Krajewski "provide[s] consultation, education services and help[s] with program development." He helped Dr. Arnott develop the Neumann training by providing input based on his experience in the field. Dr. Krajewski testified that, in developing the Neumann training, he surveyed other programs in which community health workers go out and do home visits. He found some programs had virtually no training and other programs had a maximum of two weeks of training. He said Integra wanted SCs to: 1) be well informed when they go out in the community, 2) be

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<sup>50</sup> Dr. Krajewski had previously served in the administration of Springfield Hospital, "the largest state mental health facility in Maryland." In 1984, he was appointed Maryland's Assistant Secretary for Health, and Chief Physician. In 1986, Dr. Krajewski was appointed Assistant Secretary for Developmental Disabilities, Mental Health and Addictions. In the late 1980's, he was appointed Director of the Medical Surgical Psychiatric Unit and Director of Geropsychiatry for Spring Grove Hospital. In the 1990's, Dr. Krajewski served as the Senior Medical Advisor to Magellan Health Services. He continued seeing patients with his private practice. Dr. Krajewski graduated from Loyola University in Maryland, and then went to the University of Maryland Medical School, where he was the chief resident. (Tr. 1023-25).

prepared to develop what they can see are a member's needs, and 3) connect members to those missing services. He testified that Integra developed the Neumann training, weekly rounds, on-site face-to-face training, and a hot-line for SCs to contact management to satisfy its training needs. He stated that Integra's training was "superior" to what he saw in the community health worker community because Integra provided weekly rounds, on-site training, and on-call availability. (Tr. 1023-26).

Dr. Krajewski testified that the SCs were "not supposed to make any clinical judgments ... or provide any clinical therapy or treatment." He said the SC's role is to connect members to clinical services they are missing. He stated SCs are not required to be licensed in Florida. He stated what Integra's SCs "do is very unique." He testified that Integra's safety policy of "universal precautions", where an employee "[a]ssumes everybody you deal with could have the potential for harm" was in its employee handbook. He discounted the need for self-defense training and said "if there's a danger, you get out." (Tr. 1029-31, 1034).

**Diane Brown** is the Chief Operating Officer at Integra. Ms. Brown testified that the primary performance problem with Ms. Rochelle concerned her reliance on her own clinical training and her need to complete the Neumann training. (Tr. 1037, 1061-62).

She also testified about [redacted]' telephone records on December 10, 2012. She testified that the records show that at 10:00 a.m., Scott Schneider called [redacted] and was on the line for two minutes.<sup>51</sup> At 10:05 a.m., she spoke with Mr. Schneider by telephone for 12 minutes. At 11:05 a.m. and from 11:19 a.m. to 11:22 a.m., she was in telephone contact with another member that was assigned to her, not [redacted]. (Tr. 1064-65; Ex. R-GG).

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<sup>51</sup> The telephone record for this call includes a reference to "CALL WAIT". (Ex. R-GG, at p. 1). It is unclear to the Court who initiated the telephone calls between [redacted] and Mr. Schneider because the telephone records at Ex. R-GG, at p. 1, show [redacted] initiating the calls and the records at Ex. R-GG, at p. 2, show Mr. Schneider initiating the calls. (Ex. R-GG, at pp. 1-2).

Ms. Brown further testified that Dr. Arnott resided in New Jersey and did not have an office at Integra's Maryland corporate facility. (Tr. 1066).

At the time of [redacted]' death, Ms. Brown was unaware of OSHA's policy concerning injury logs. She admitted that Integra did not report [redacted]' death to OSHA. (Tr. 1068; Ex. C-5, at p. 1).

### **Jessica Amy Cooney – Coordinator of Program Implementation and Training**

Ms. Cooney was hired by Integra in 2010 as a SC in Philadelphia, Pennsylvania.<sup>52</sup> Ms. Cooney has been Integra's coordinator of program implementation and training since about the fall of 2012.<sup>53</sup> Her business address is in Owings Mills, Maryland. Ms. Cooney's duties include shadowing, database training with data entry, and participating in classroom training. In about September/October, 2012, she participated in two of the three face-to-face training sessions conducted by Integra at a Florida hotel.<sup>54</sup> She testified that the training consisted of a PowerPoint presentation that covered from the point when a SC first received a caseload to being in the community. She also testified it included some role playing and a discussion about safety. She said each training session lasted two days. In addition to the face-to-face training, Ms. Cooney provided "shadowing" or "mentoring" type training. This field training consisted of showing SCs what it is like to do their job. She went with SCs to visit members. She watched them perform a visit with members, providing tips along the way. Ms. Cooney mentored

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<sup>52</sup> Before that she worked in sales for Verizon Wireless. She also did volunteer work for a domestic abuse project in her neighborhood. She also volunteered at Impact Systems, where she took members from their home to doctors' appointments and grocery stores. After a year-and-a-half as a SC, she took a six-eight month break from Integra and worked as a consultant for Ameritox. She has earned some college credits in general studies at the community college level. She does not have a bachelor's or associates degree. (Tr. 796, 806).

<sup>53</sup> Ms. Cooney still also performs the duties of a SC from time to time. (Tr. 799).

<sup>54</sup> Ms. Cooney testified that she did not recall the dates she conducted any training in Florida. (Tr. 803).

Messrs. Schneider and Macaluso, as well as Annie Hinman and Marisa Donahue. (Tr. 788-93, 797, 800).

Ms. Cooney testified that Integra implements the buddy system whenever someone is uncomfortable. She said if nobody was around to buddy up, “then you just don’t go. You save it for a time when somebody can come with you.” Ms. Cooney testified that no SC communicated to her any concerns related to the buddy system or safety training that Integra provided. She never trained [redacted]. (Tr. 793-95, 801).

### **Laurie Rochelle – Service Coordinator Team Lead**

Laurie Rochelle worked at Integra from April 30, 2012 through November 6, 2012.<sup>55</sup> She was the Tampa office team lead. She supervised Ms. Ferguson, the lead SC, and all of the other SCs, including Mmes. [redacted], Rentz, Hinman, Donahue, “Yvonne,” “Claire,” and “Danielle”, and Messrs. Macaluso and Schneider. Ms. Rochelle reported to Dr. Arnott at Integra. Ms. Rochelle interviewed all of the prospective SCs in the Tampa office, except for Ms. Ferguson. She testified that she understood that the SC’s job was to coordinate services for members.<sup>56</sup> She described their job as trying to get members to connect with their doctors and avoid getting re-admitted into hospitals. She testified that every week SCs “were supposed to either make a face-to-face contact or a call, but they had to make at least two face-to-face

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<sup>55</sup> Before working at Integra, Ms. Rochelle worked as a clinical supervisor for a few months at Gulf Coast Jewish Community Services and before that at Ceridian where she provided assistance to military personnel who needed counseling. She has a Bachelor’s degree in psychology and a Master’s degree in counseling. She has a Florida license in Mental Health Counseling. She also had a private practice providing weekly couple’s counseling to five long-term patients of hers. She is employed as a Care Manager at Wellcare. (Tr. 243-44, 288, 316, 320-21).

<sup>56</sup> Ms. Rochelle testified that it made no sense to describe the SC’s job as nonclinical because they were required to make assessments of a member’s medical, mental health, counseling, and treatment of substance abuse needs. (Tr. 265).

contacts per month.” Ms. Rochelle testified that Integra did not get paid by Amerigroup for its provision of services to a member if two face-to-face contacts were not made each month. She also said that Dr. Arnott told her that SCs who did not make two face-to-face contacts each month with members would not be paid. Ms. Rochelle testified that she was getting pressure from Integra management to insure that SCs made two face-to-face contacts each month. (Tr. 245-50, 255, 259-60, 281, 287-88, 312-13).

According to Ms. Rochelle, the SC applicants were first screened at Integra by someone other than her, and then the applicants were passed on to her with Ms. Arnott’s instructions on which questions to ask them. She then passed on the information she received from the interviews to Dr. Arnott, who had the final say in the hiring process. Ms. Rochelle testified that Dr. Arnott encouraged her to hire those “just getting out of school” with a Bachelor’s degree. She explained that this was so because “the salary was very low” and the company wanted to “train them the Integra way, you know, train them a certain way.” According to Ms. Rochelle, Integra did not value experience as much as she did in its hiring process. She felt that SCs needed to have some experience in a mental health facility. She did not know when conducting interviews that the SCs were going to be working with members “that were getting out of jail.” Ms. Rochelle preferred to hire SCs who had at least six months of experience entering a person’s home.<sup>57</sup> She felt that SCs “needed to have some street smarts.” Ms. Rochelle interviewed [redacted]. [redacted] did not have this experience. Ms. Rochelle testified that she initially did not want to hire [redacted] because “she was very young” and seemed “somewhat fragile in a way.” But Ms. Rochelle hired her anyway because [redacted] had “that heart that she wanted to help others,” and Ms. Rochelle hired “as [she] was instructed.” (Tr. 247-49, 312).

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<sup>57</sup> Ms. Rochelle testified that she completed three years of in-home counseling during her own internship. (Tr. 249).

As the office team leader, Ms. Rochelle assigned the SC workload according to geography, reviewed and approved SC progress note reports, held weekly office meetings via teleconference, and carried her own full caseload of 32-40 members.<sup>58</sup> Ms. Rochelle testified that SCs had to first locate members who were staying in hospitals, mental health facilities, homes, group homes, and homeless shelters. Integra required SCs to go to a member's home unannounced and knock on the door where a member did not have a phone. One member lived in a tent. Other members met them at restaurants because they did not want SCs coming to their homes. Ms. Rochelle described the type of members that SCs visited as being "drug seeking," those just "getting out of jail," "people with severe mental health issues," including some who were schizophrenic or had personality disorders,<sup>59</sup> and members with a history of violence. She testified that SCs were not given any information regarding a member's criminal background or history of violence. She explained that SCs had to find a member "or you don't get paid because Amerigroup would only give us 325 [members]. It was a pilot program. So, you know, the more members that we found – and they were known to be the hard to find members." (Tr. 251-54, 258-59, 267, 272, 287-88).

Ms. Rochelle testified that she conducted weekly telephone conferences with the SCs on Wednesdays from 11:00 a.m. to noon. She said that they discussed members and other topics she did not recall. She also testified that Drs. Krajewski and Arnott conducted weekly "rounds" by telephone with the SCs in Florida. She testified that [redacted] raised [redacted]'s situation regarding "some very strange" statements he made concerning *The Last Supper* on October 15,

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<sup>58</sup> Ms. Rochelle testified that the SC case load once reached 50 members. She stated that each SC was supposed to be assigned "no more than 35" members. (Tr. 253-54).

<sup>59</sup> Ms. Rochelle testified that SCs were required to visit members who were admitted to a hospital or mental health facility within 24 hours of learning of their admission. She stated that often these visits occurred after the member was discharged. (Tr. 253-54).

2012 at a weekly rounds conference call in which Dr. Krajewski participated. She did not recall anyone offering any advice to [redacted] as to how to proceed with [redacted].<sup>60</sup> She saw the situation as a “small red flag” involving a mentally ill person who did not say “I’m going to kill you.” She said “[w]e all knew that the person [[redacted]] – these people are mentally ill.” She said that the situation “would have been a little bit different” had the progress note report said [redacted] was “paranoid schizophrenic” and not just “schizophrenic.” (Tr. 292-94).

She testified that she also fielded concerns from her SCs. She affirmed that SCs expressed concerns about safety. She testified that she had “a lot of safety concerns.”<sup>61</sup> Ms. Rochelle testified that Mr. Schneider weighed jumping a fence and being chased by dogs against the “pressure[] to find [a] member.” She testified that Mr. Macaluso called her regarding safety. She testified that a member Ms. Hinman was driving to doctors’ appointments was later found to have burned down his mobile home, gone to prison, and had “thoughts of killing her.” She testified that she could not tell Dr. Arnott these stories because if she did, “pretty much you’re fired.” SCs did not have personal protective equipment, such as panic buttons or alarms. There were no procedures in place at Integra to allow her to know which members SCs were visiting or where they were at any time during the week. She testified that Integra did not provide safety training to its employees. (Tr. 133, 256-61, 266-69).

Ms. Rochelle testified that she was “not comfortable” with [redacted]’ stated intention, set forth in her September 9, 2012 progress note report, to make an unplanned visit to [redacted] at his home address, but Ms. Rochelle stated “but that was the only way that you could get to the member, uh, is to go to their house.” Ms. Rochelle testified that there was nothing for Integra to

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<sup>60</sup> Ms. Rochelle testified that, right after this, she was told by Dr. Arnott “not to talk to any of the Service Coordinators.” (Tr. 275).

<sup>61</sup> Ms. Rochelle testified that the SCs did not receive notice of a member’s diagnoses. She was concerned that SCs were unknowingly entering homes of members who were paranoid schizophrenic. (Tr. 256-57).

do for safety with regard to the progress note report [redacted] prepared for her October 12, 2012 face-to-face visit to [redacted] where she said [redacted] said things that made her uncomfortable. She said “everybody was uncomfortable with a lot of these members, the new members that were coming in. The new 325 [members] that we got, I mean there was a lot of shady people. Uh, I was feeling very uncomfortable the more and more that I met.” Ms. Rochelle testified that [redacted] was not supposed to visit [redacted] alone on October 15, 2012. She said that [redacted] should have asked Ms. Ferguson [to accompany her] since she was the closest geographically to her; even though she knew Ms. Ferguson might not do so. Ms. Rochelle testified that it was not her job to insure that SCs had other SCs accompany them on face-to-face visits to members. She said that Integra did not ensure that a “buddy” accompanied [redacted] on any of her face-to-face visits with [redacted].<sup>62</sup> She said “[t]he most important thing with Integra was to go meet that member and have them sign the paperwork.” (Tr. 273-74, 277-78, 284, 294; Ex. C-7, at p. 2).

Ms. Rochelle also testified that, following her October 15, 2012 face-to-face meeting with [redacted], [redacted] said in their “rounds meeting” that [redacted] said “some very strange things” to her about a depiction of *The Last Supper* he had on his wall. Integra did not conduct any sort of safety assessment(s) of the situation [redacted] reported in her October 12 and 15, 2012 progress note reports concerning [redacted] after Ms. Rochelle approved them. She also said that Integra did not have a policy that called for incident reports to be prepared. She also testified that the buddy system was not effective because SCs were spread thin over four counties

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<sup>62</sup> Ms. Rochelle testified that “a big part” of the Lead SC’s [Ms. Ferguson] job was to ensure that [redacted] had a buddy with her when she visited face-to-face with [redacted]. She also said that [redacted] was never disciplined for not taking someone with her. Ms. Rochelle was never told to discipline any SC for not taking a buddy along. She stated that a lot of the SCs told her in October/November, 2012: “We don’t know what to do.” Ms. Rochelle told them she was leaving Integra, and they were “just as lost as I was.” (Tr. 284-86).

and were not available, and time for it “just was not allowed.”<sup>63</sup> The buddy system was not mandatory. Ms. Rochelle testified that she did not recall asking any SC to go with [redacted] on her next face-to-face visit to [redacted] after she approved [redacted]’ October 15, 2012 progress note report. (Tr. 265-66, 275-81, 298-99; Ex. C-7, at p. 6).

Ms. Rochelle testified that Dr. Arnott developed the Neumann training about a month or two after Integra hired the SCs. Ms. Rochelle took the Neumann training on November 4 and November 5, 2012, five and a half months after she started at Integra, because the human resources office demanded her to.<sup>64</sup> Integra gave her two days to complete the 40 hour training course. She mentioned that there was not time before then to take the Neumann training and that there were technical issues with the computer system.<sup>65</sup> She testified that she and many of the SCs found the Neumann training to be “a joke.” She found the Neumann training to be “very basic” with five percent of it being “a little bit informational.” She testified that she was perturbed that Dr. Arnott told her that the SCs needed only to complete the Neumann training, and nothing else. (Tr. 119, 261-64, 319-20, 329-30).

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<sup>63</sup> CO Prymmer testified that Ms. Rochelle told him that prior to [redacted]’ death there was not time for SCs to consider taking along another SC because there was pressure on SCs to complete their calls and conduct their face-to-face interview with members. CO Prymmer further testified that after [redacted]’ death, the new SC team lead, Ms. Tonya Flores, told SCs “if you don’t get out and do your two face-to-face visits, there are going to be fewer of you.” (Tr. 111-13, 203-04).

<sup>64</sup> CO Prymmer testified that Ms. Rochelle told him that the Neumann training was insufficient and did not prepare SCs to perform their job. He also testified that she told this to Dr. Arnott. In her letter to COO Brown of December 3, 2012, Ms. Rochelle stated: “After finally given the time to complete the Neumann training which was embarrassingly a cut and paste of the SAMSA (sic) website and not what SCs really need to do their job ‘(the Integra way)’ - ....” She also stated that there was a “lack of proper or any appropriate training.” (Tr. 117-19; Ex. C-14). On November 6, 2012, Ms. Rochelle authored a reaction to the Safety Tips topic, Subject: Safety and dangerous neighborhoods that stated (in part):

Safety is vitally important with being a community intervention specialist. I know that when we did not have many employees when starting out program I took a couple of risks in a couple crack neighborhoods. I would not recommend any one else to do the same. I wanted to find that member but I did notice it was crack infested and everyone to get a buddy to go into some of these neighborhoods – if something bad happens well then you can’t [sic] help anyone!! (Ex. R-RRRR, at p. 2).

<sup>65</sup> CO Prymmer testified that Ms. Rochelle told him that she tried to increase the safety and health training for SCs. She was unsuccessful because Dr. Arnott did not want that to happen since it took too much time, and she did not have time for it. (Tr. 133).

On November 7, 2012, Ms. Rochelle submitted her resignation letter and gave Integra 30 days' notice of her proposed December 6, 2012 termination of employment. She testified that she resigned because there was: 1) not enough training, 2) a lack of teamwork, 3) a lack of direction from Dr. Arnott and 4) a lot of conflict between her and Ms. Ferguson. She also said Amerigroup did not work with Integra and she did not want to put her mental health counselor license in jeopardy. By letter, dated November 26, 2012, Ms. Brown told Ms. Rochelle that she ended her employment duties with Integra on November 7, 2012. She told her that her final pay would occur on November 30, 2012, which paid her through the pay period ending November 24, 2012. She also told Ms. Rochelle that Integra was recouping company property and \$300 for debit card charges that it questioned from her final pay. Integra seeks to discredit this witness due to the alleged workplace performance problems and unauthorized charges on Integra's card. Ms. Rochelle has denied making the alleged unauthorized charges on the company debit card. (Tr. 259, 281, 330, 332-37; Exs. C-13, C-14, R-RRR, R-TTT, R-UUU; Resp't Reply Br., at 3 n1).<sup>66</sup>

The Court finds that Ms. Rochelle's testimony is consistent with the overwhelming bulk of the evidence surrounding Integra's practices and procedures toward members, the SCs, and their work environment. The Court also observed the demeanor of this witness and found her to be credible, straightforward and trustworthy. The Court credits Ms. Rochelle's testimony discussed herein.

**Ellen Elaine Rentz – Service Coordinator**

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<sup>66</sup> The record shows that on October 21, 2012, Integra issued a Written Warning & Corrective Action Plan, Re: Leadership and Management Performance Deficiencies, to Ms. Rochelle that included a plan for improvement that included (among other things) her completing training by November 15, 2012 and assuring she and all of her team members attended weekly telephone rounds on Wednesdays at noon. (Ex. R-RRR).

Ellen Rentz worked at Integra from September, 2012 until February, 2013. Her job duties included two face-to-face meetings with a member per month, typically at the member's home, where she would obtain consent from the member to assist them in what they needed. Her duties also included making two telephone calls to a member each month. The types of assistance included "getting food stamps, transportation, food, [and] housing." She carried about a 25-35 member caseload. Her work day and work environment depended on how successful she was in chasing down the face-to-face interaction: sometimes she worked more than eight hours per day, driving into unfavorable areas, sometimes at night, and across neighboring counties, in order to procure the "face-to-face." For each member, Integra provided Ms. Rentz a telephone number and an address, and usually no other information. (Tr. 369, 373-74, 406-07).

Ms. Rentz took the Neumann training using a computer, which lasted "probably six hours," but she did not complete the training before she went into the field.<sup>67</sup> She never shadowed anyone while working at Integra.<sup>68</sup> She testified that she did not receive any classroom training at Integra regarding safety in the workplace. After Ms. Rochelle left, she participated in the weekly telephone meetings on Wednesdays with Drs. Arnott and Krajewski. She testified that these telephone meetings were mandatory, although attendance was not taken. She testified that people would ask questions or tell Dr. Krajewski about situations they did not know how to handle. An example she gave was a member that "may have been hospitalized or they were in, you know, a hospital where they were having mental breakdowns and stuff." She said that Dr. Krajewski would "probably say, well, when this person is discharged, you need to make sure that you're there to help that person." She testified that she was not sure a SC could

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<sup>67</sup> Neumann University certified that she completed the Integra Health Management Program in December, 2012. (R-BBB).

<sup>68</sup> CO Prymmer testified that new SCs were expected to be in the field visiting members "pretty rapidly." He also testified that Ms. Rentz told him there was a lot of pressure to "saddle up and go [into the field]." (Tr. 97, 124, 134).

discuss safety issues during these calls because the discussions were about helping the members, “[n]ot so much about anything else.” (Tr. 122-24, 135, 369-72, 379-80, 394).

According to Ms. Rentz, Integra instituted a “sign-in” and “sign-out” procedure after [redacted]’ death. Before her death, Integra had no sign-in/sign-out procedure for SCs. Integra also did not give SCs a member’s history of violence or criminal background when a member was initially assigned. After [redacted]’ death, Integra started “red-flagging” members in “the system” by providing any criminal background information associated with the members. Ms. Rentz testified that one of her members, who she had visited alone inside her home prior to [redacted]’ death, was “red-flagged” after [redacted]’ death by Integra because of mental health and criminal backgrounds, involving a gun. She testified that after learning this information, she was “in shock” and “would not go back out there to see this lady.” She said “[b]ut going into her home, I would never do that again.” Ms. Rentz testified that she was not concerned about safety before [redacted]’ death because she “assumed we were safe. We were working for a company. I felt I was safe to go out there. They had already possibly done all the legwork necessary to make sure they were not sending me into harm’s way somehow.” She said Integra never discussed with her any risk associated with her job. (Tr. 375-77, 380-81, 389, 395-96, 410).

After [redacted]’ death, Integra pulled the SCs out of the field for four or five weeks. Instead of visiting members, SCs made telephone calls. Then, Ms. Flores, her new supervisor, “started telling us we needed to get over it and get back out there and help these people.” Ms. Rentz testified that Integra did not have a policy regarding partnering or buddying with another employee. She said before [redacted]’ death, “[w]e didn’t have one. We were not told to partner up and go with anyone.” After [redacted]’ death, Ms. Flores told the SCs that:

the only reason you would need two people to go to an individual’s home is that another Service Coordinator has never seen that person before, so then two people should go. But if a

Service Coordinator has already been there, you can go alone. And that was the point where I realized that I'm not staying here. I am going to leave this job. It's not worth my life.

(Tr. 382-84; Ex. C-11).

Integra terminated Ms. Rentz's employment on February 7, 2013.<sup>69</sup> She testified that she was not upset over being terminated because she was not going to stay at Integra anyway. Ms. Rentz then testified that she wrote a letter "to Ms. Flores or some management person" explaining her concerns about safety at Integra, but she does not know when she sent it or even if she sent it at all.<sup>70</sup> She testified that she left Integra "with a sad heart because I was worried that someone else may get hurt." She said that the SCs needed more things in place for safety. She testified that she did not know that she was working with people "who had criminal backgrounds, who may have killed someone before or may have assault and battery." (Tr. 385-89, 407-09; Exs. C-11, R-AAA).

#### **Yaharya Denise Stevens – Service Coordinator**

Yaharya Stevens was a SC for Integra from December 3, 2012 through mid-February, 2013.<sup>71</sup> She visited members in their homes twice a month, called them twice a month, and transported them to medical appointments and public housing offices in her own car. She took

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<sup>69</sup> Respondent seeks to discredit this witness due to the circumstances that led to her firing that occurred starting in January, 2013. (Exs. R-VV through R-AAA; Resp't Reply Br., at p. 3 n1). The Court finds that this witness's testimony is consistent with the other evidence in the record regarding Integra's practices and procedures. The Court also observed this witness's demeanor and found her to be a credible, straightforward, and trustworthy witness. The Court credits Ms. Rentz's testimony.

<sup>70</sup> Among other things, the letter states:

I am saddened by the way that your management staff is handling the safety concerns of the employees. ... Some of the other service coordinators simply left without having another employment in place this action was due to being in fear for their lives. I have been in management for over 21 years and have never worked for a company that does not have or follow any safety rules when it comes to making the dollar/meeting numbers for the company. ... (Friday – 1/15/13) ... It is obvious that no one cares about the employees' safety here at Integra it seems to be all about the dollar.

(Ex. C-11).

<sup>71</sup> Before then, she worked in administration at the Polk County Health Department for about a year. She was also in the military for four years, where she worked in Human Resource. She has a degree in health care administration. She had no background in social work. (Tr. 416-17).

the online interactive Neumann training when she first started on December 3rd. She shadowed Ms. Ferguson for two to three days. She participated in the rounds held on Wednesdays at 12 o'clock with Drs. Arnott and Krajewski by telephone. At the time, she thought that Ms. Ferguson was her supervisor. She verbally shared her concerns with Ms. Ferguson about driving certain members who were not taking their medication. She felt uncomfortable and unsafe transporting the members because she was "concerned if I'm driving and they get upset and they want to attack me." She thought this because she learned that most of the members she was responsible for had severe mental illnesses that either chose not to take medication or did not have access to their medication. Ms. Stevens described two incidents in which she and Ms. Ferguson were in cars with mentally ill patients who were not taking their medications. "They were not on medication and they just were not themselves. The members were, uh, fidgety and uncomfortable." In one instance, a member told her that he was uncomfortable driving with her because of her ethnicity. She testified that Dr. Krajewski made it clear that we had to drive them around in her own car to appointments. She testified that SCs were required to drive members to psychiatric appointments. She was never told by management to get members bus passes; other SCs suggested how to get bus passes or transportation through the county. (Tr. 416-21, 424-30).

She still had safety concerns regarding transportation when she left Integra in February, 2013. She left due to an incident that occurred after [redacted]' death when she was told she had to physically find a member. She went to the member's primary care doctor's office to speak to the doctor. She waited in the waiting room for an hour-and-a-half, and got up to leave her contact information with the receptionist for the doctor to contact her. As she was waiting to speak to the receptionist, a "patient" of hers came up to her and pushed her out of the way as she was speaking to the receptionist. She did not report that incident at that time to Integra. She

decided to resign because two other coworkers had similar incidents happen to them and even though they reported it, they were told that it was part of their job and that they had to “deal with it.” (Tr. 132-33, 422, 429).

**Kimberly Michelle Daniel – Service Coordinator**

Kimberly Daniel worked for Integra from August, 2012 through February, 2013. Before that, she worked as a crisis counselor, where she did field work. She was a former co-worker of Ms. Rochelle at Ceridian with Military Once Source. When she started, Ms. Rochelle was her supervisor, then Dr. Arnott, and finally Ms. Flores. She did not shadow anyone at Integra. She learned her job through trial and error. She took the Neumann training and received the certificate within a month of starting the job. The Neumann training was delayed that month due to computer glitches. She testified that it was “very simplified” and not “anything that really helped” her do her job. When assigned members, she knew her member’s medical diagnosis and sometimes their mental health diagnosis. She said that she did not receive any safety training at Integra before [redacted]’ death. She found out later that members had violent histories, including robbery, armed robbery, and sexual assault backgrounds, that were not initially disclosed to the SCs. Her first duty was “doing whatever they could to locate them [members]. Go in wherever, no matter what the conditions looked like, no matter what the situation was to try and locate them.” Ms. Daniel testified this included sometimes going to “abandoned looking buildings” and apartment buildings that should be condemned that had “roaches and ants crawling about, things falling down from the ceilings.” Sometimes she would go inside members’ homes or go to homeless shelters. She said that Dr. Arnott told the SCs to locate members “at any cost necessary.” (Tr. 433-37, 441-43).

Once she located the member, she determined whether “they were compliant,” *i.e.*, whether “they were taking their medications” or whether “they are in services.” If not, she would offer to help them become compliant by driving them to the doctor’s office and back home, and otherwise connecting them with resources. She would be in her car driving with members for up to 45 minutes to the doctor’s office, and then another 45 minutes driving back home. She was required to meet with the members twice a month. Before December, 2012, any request she had for a buddy was denied because the other SCs were working on their own caseload, “everybody was too busy” and nobody was available. She said that using the buddy system “wasn’t an option” available to SCs. She recalled some type of training with Dr. Arnott and Ms. Cooney in Florida in October that she attended, but felt it was “incomplete,” so she did not “sign off on everything.” She sent an email to “all service coordinators and management” requesting additional training “that they had been promising us” in December, 2012 after [redacted]’ death. Ms. Daniel was laid off in February, 2013 due to a reduction in force, and she “was not too upset about that.” (Tr. 439-46).

**Scott Matthew Schneider<sup>72</sup> – Service Coordinator**

Scott Schneider was an Integra SC from the end of August, 2012 until about February 19, 2013. His duties included developing a “care plan” and providing members the resources that “would hopefully mitigate them from either being admitted into a crisis stabilization unit or a hospital, as well as provide them with any third party resources that may not have been covered under their current health insurance benefits.” Examples of services he provided included locating “durable medical equipment” for a morbidly obese woman, and convincing health professionals that a replacement insulin pump was required due to the member breaking the

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<sup>72</sup> The original court transcript, since corrected by Court identified *errata*, spelled his last name as “Snyder”. (Ex. R-P, at p. 9).

pump by accident and not abusing the medication. Mr. Schneider testified that he spent 15-20% of his time driving members to appointments at mental health facilities and personal errands in his own car.<sup>73</sup> He testified that he never transported anybody that had any type of erratic behavior. He carried a 25-30 member caseload at first, and the caseload grew to 50-60 members. SCs had to act as “detectives and hunt them [members] down by any means” because Integra provided SCs with so little information about assigned members. (Tr. 450-54, 459-60, 465).

Mr. Schneider took the Neumann training when he started at Integra in August, 2012. He received his certificate in October, 2012. He stated that he did not receive any safety training at Integra prior to [redacted]’ death. He did not shadow any SC when he started working at Integra. In October, 2012, as part of a one day group training, he accompanied Ms. Cooney into a very dangerous area of town. He testified that Integra did not have a workplace violence policy. He also participated in the weekly rounds on Wednesdays with Drs. Arnott and Krajewski. He testified that when he or another SC discussed safety concerns during the weekly rounds, Dr. Krajewski had the “ultimate say” on how to handle the situation, and typically “nobody was really getting any resolve. So we all tried to keep quiet as best as we could because it was just a colossal waste of our time.” He also participated in the weekly meetings with Ms. Rochelle, but testified that no safety concerns were brought up until after [redacted]’ death. They instead typically discussed “better ways that we could serve the clients,” explaining that “we were all kind of new. There was a pilot project. We all had to kind of feed off each other to kind of find out what resources were available in the community to better service the clients that we were serving.” He testified that whenever he asked questions of management, he “never

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<sup>73</sup> Mr. Schneider testified that: “We had to do errands too. We were like, you know, little do boys and do girls.” These errands included driving members to the bank, pharmacy, Department of Motor Vehicles (DMV), food store and medical appointments. (Tr. 465; Ex. C-29, at p. 6).

really got answers.” He testified that he had to find “solutions out for myself because there was no support from management.” He did not recall getting answers from management to his concerns about safety that included feeling unsafe going to a member’s house. (Tr. 454-56, 460, 481-88; Ex. R-PPP).

He did not raise any safety concerns with Integra before [redacted]’ death because, “I think I was really naive, and I believed that the company had my best interest at heart, they properly screened these people, and I never really thought about it, you know.” Ms. Rochelle had no problem with SCs going out in pairs. He testified that he buddied up several times with Mmes. Rentz and [redacted].<sup>74</sup> In January, 2013, Ms. Flores “relayed to us that it [the buddy system] was a misappropriation of time and that we needed to do that individually. It got to the point that if I had somebody that I felt [] uncomfortable around, I would go out with the SC and I just would not document it.” He testified that “[m]anagement disapproved of us going out in – in a team.” (Tr. 457, 485-87).

He recalled an incident, prior to [redacted]’ death, where a schizophrenic member made a verbal threat against him. According to Mr. Schneider, the member made it “abundantly clear,” in a public place, that “he would have knocked me in the middle of next week.” This incident occurred during the initial assessment. He said a lot of the questions were very personal, including those about medical or psychiatric conditions, medications, or institutionalizations. Mr. Schneider confirmed that on September 13, 2012 a member also disclosed during the initial assessment that he had “a history of anger management issues which has led to many physical altercations.” Despite this disclosure, Mr. Schneider continued to meet with this member several

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<sup>74</sup> Mr. Schneider testified that he helped train [redacted] and teamed up with her about five or six times. He said that “[t]here was no support or training, so I had to tell her [[redacted]] what needed to be done.” He also testified that he and [redacted] and Rentz had lunch at Panera Bread to therapeutically vent because of “the stress that we were under, the large amount of pressure to produce an unrealistic goal in an unrealistic time frame.” (Tr. 487, 494).

times afterward because “you had to continue meeting with them until they got rolled off or, uh – you know, even if they said they didn’t want to participate, you still had to badger them, uh, until they – until management decided yeah, we’re going to roll them off.”<sup>75</sup> In order to get a member “rolled off,” Mr. Schneider testified that a safety concern or “tendencies that are violent in nature” were not enough. “It had to go before management and the doctor. The doctor was the one that made the decision to my understanding.” He said that Integra did not “roll off” too many members because doing so caused Integra to lose money. (Tr. 458-59, 466-67, 492; Ex. C-29, at p. 6).

Mr. Schneider testified about other experiences that he had while working at Integra. He recalled a member that was frequently “Baker Acted” by his family, “almost every other month.”<sup>76</sup> (Tr. 462-63; Ex. C-29, at p. 6).

He recalled that he visited a member [on November 20, 2012] whose house was plastered with “no trespassing” and “beware of dog” signs. He noted that in his progress note report because “this person obviously doesn’t want unsolicited people coming up to their doors, and they need to be aware of that.” Mr. Schneider testified that he was scared that a dog, that he viewed as unfriendly, could break away from its rope and bite him. He reported his concern about the dog during one of the “rounds” and was “probably” told to find some other way to contact the member. He said that the member’s broken down trailer home was “in the middle of

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<sup>75</sup> “Rolling them off” meant Integra stopped providing services to the member. (Tr. 833-34).

<sup>76</sup> Mr. Schneider explained that he used the term “Baker Acted” to mean that a judge has determined that “you’re a threat to yourself or somebody else and you need to be institutionalized.” He stated that the institutionalization “generally lasts anywhere from 48-72 hours.” With regard to this member, Mr. Schneider testified that, as of September 13, 2012, he was institutionalized for an “extended period[] of time” into “Peace River Center,” which he described was “a sanitarium in a nice way.” Neither party mentioned the “Baker Act” in their briefs. Based on a cursory search, it is presumed that the witness is referring to the Florida Mental Health Act, codified at Fla. Stat. § 394.451 *et seq.* (Tr. 463-64; Ex. C-29, at p. 6).

nowhere” and “[t]here was no way to get in contact with them.” (Tr. 468, 495-96; Ex. C-29, at p. 15).

He noted that “15 to 20 percent of [his] caseload” included members who had bipolar disorders and multiple personalities.” One of those members, he recalled, made him “extremely uncomfortable” because “she just was very promiscuous and very forthcoming towards me.” He described one instance where “like a light switch flicks, looks like a light went off and then all of a sudden it was like Dr. Jekyll, Mr. Hyde. She was this completely different person. She had this knife in her hand like a kitchen knife, and she was just kind of like twirling it around. And I was like I need to get the heck out of here.” He met with her two or three more times after that, but always outside of her home. (Tr. 469-71; Ex. C-29, at p. 18).

He also recalled a member that “scared the bejesus out of me, and I refused to go to that house.” He told his supervisor at the time that he was not going to that member’s house. He had originally met with that member at a psychiatric unit in a hospital. He likened his interaction with her to sitting in a “courtroom with Charles Manson on trial.” He had recorded on December 10, 2012 that her mother told him that: 1) “[t]he whole family has been terrified of her and has sought shelter elsewhere....”, and 2) the member had physically assaulted her boyfriend and had “a serious addiction to meth and becomes violent and thinks she’s God.” Despite sharing his safety concerns with his supervisor, he was still required to go to the member’s house. He refused to do so, except on one occasion, when accompanied by Ms. Rentz, they visited her house together, but she did not answer the door. (Tr. 471-72, 492-93; Ex. C-29, at p. 24).

Mr. Schneider testified that he left Integra because he was assigned a member that required a face-to-face encounter who had a very lengthy criminal record. He informed management that he “did not feel comfortable going and meeting with this person.” After being

told to “just meet in a public place,” he left Integra because his “life was more important than that.” (Tr. 457-58).

### **Andrew Macaluso – Service Coordinator**

Mr. Macaluso was an Integra SC from August, 2012 to December, 2013. His duties include assisting members in finding community resources, and helping to “make sure they were taking their medications as prescribed.” He would “locate transportation for them if they needed it,” and he would “confer [] with clinical staff if [he] had questions about [] some of their conditions.” It was one of his duties to transport members to their doctor’s appointments or to alternative places to live when their current placement was not stable. (Tr. 500, 508-09).

On October 15, 2012, Mr. Macaluso had a discussion with his supervisor, Ms. Rochelle, about Mr. D, one of the members assigned to him. He wrote in his October 15, 2012 progress note report that he spoke with Ms. Rochelle that day regarding Mr. D’s “positive homicidal ideations with plans, probable means (access to a firearm), and intent.” He also noted “the member’s suicidal ideations regarding the member shooting himself in the mouth with the same gun.” He further noted that he did “not want to transport the member due to the extreme possible safety risks to himself and others. These ideations and access to a weapon could prove dangerous to the SC or other individuals in the vicinity of the transport.” He also noted that he told Ms. Rochelle that Mr. D has been placed in the state mental hospital for four years for suicidal and homicidal ideations. He further recorded that he informed Ms. Rochelle that Mr. D “had multiple felony charges including assault with attempt to maim.” (Tr. 504-05, 510; Ex. C-30, at p. 21).

The next day, he sent her an e-mail to discuss the “possible duty to warn the target of Mr. D’s homicidal ideations.” He also requested “take down training and hands-on crisis de-

escalation training.”<sup>77</sup> He testified that he sent the email because “I had some concerns about some of the members that I was working with. That I felt it would be beneficial to have that type of training. Other places I’ve worked we’ve had similar types of training [ ] to deal with people who have [ ] different types of mental health issues where there might be a problem with them being aggressive.” He wrote on October 16, 2012: “I’m concerned that as I have had to transport and visit more than one member who has a history of violence towards others resulting in severe bodily injury.” (Tr. 504-10; Exs. C-30, at p. 21, C-31 at pp. 1, 9).

He followed up with another e-mail to Ms. Rochelle on October 19, 2012:

I am uncomfortable being alone with Mr. D as he has expressed homicidal ideations and access to a firearm. [ ] Mr. D has a history of multiple felony assaults including a felony assault with attempt to maim. He currently has domestic violence charges pending against his girlfriend. I am also uncomfortable with placing a member who has shown himself to be aggressive with staff on the inpatient unit in my car. All Mr. D. would need to do is jerk the steering wheel to kill or gravely injure both of us. ... What is the safety plan given the homicide plan that he has told me and his history of assault behavior?”<sup>78</sup>

He testified that Mr. D’s homicidal ideations were directed at a former roommate: “he had wanted to shoot this fellow that he [ ] had stayed with before [ ] in the head with a firearm.” (Tr. 508, 511; Exs. C-30, at p. 30, C-31 at pp. 2-3).

On November 1, 2012, Mr. Macaluso noted in his progress note reports that Mr. D had assaulted the driver of a car earlier in the week and expressed suicidal ideations to law

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<sup>77</sup> Mr. Macaluso explained that “take down training” was “a type of training where you could [ ] in a nonviolent fashion make someone who is, say, hostile [ ] unable to engage in those activities without injuring them.” He further explained that “usually it’s a combination of de-escalation, which would be verbal, and [ ] physical, which would be, you know, the last resort.” “Physical,” he explained, would include some way of physically having contact with a patient to take him down to the ground. It’s intended to prevent members “from harming themselves or harming someone else.” Mr. Macaluso testified that he received “take down training” at Eckerd Reentry, Department of Juvenile Justice, where he worked as a reentry counselor. He also said that he received “team training” that had been developed by the Florida Mental Health Institute while working briefly at Northside Mental Health. He described “team training” as a nonviolent way to guide a person having a violent episode either to the floor or a chair; or to free yourself where someone has grabbed your hair or shirt. (Tr. 520-24).

<sup>78</sup> Mr. Macaluso testified that he “was saying that I felt like I would be unsafe in that situation.” (Tr. 597).

enforcement that resulted in his admission to the Mental Health Care's Crisis Center. He also noted that Mr. D was "ROLLED OFF (REMOVED) FROM THE INTEGRA PROGRAM TODAY AFTER THE EVENTS DISCUSSED IN THIS NOTE." (Ex. C-30, at p. 30).

On November 15, he sent an e-mail to Dr. Arnott and Ms. Ferguson regarding the previous emails he had sent to Ms. Rochelle, who had left Integra by that time. In this email to Dr. Arnott and Ms. Ferguson, Mr. Macaluso recounted an incident that occurred on November 2, 2012. He wrote that "Mr. D is the member who threatened to 'kick my ass' when Whitney and I attempted to transport him a few weeks ago. This threat made me afraid for my safety as I thought I was going to be assaulted and would have to defend myself." (Tr. 129-30, 511-15; Exs. C-30 at pp. 28-33, C-31, at p. 2).

Neumann University certified that Mr. Macaluso completed the Integra Health Management Program in October, 2012.<sup>79</sup> Mr. Macaluso resigned from Integra in December, 2013, when he was offered a position at a community agency closer to his house.<sup>80</sup> Mr. Macaluso is currently a case manager where he visits pregnant mothers in the field. His current employer conducts background checks and he believes also has a workplace safety program. (Tr. 500, 519; Ex. R-KKK)

**Annie Marie Hinman – Service/Community Coordinator**

At the time of the trial, Annie Hinman was an Integra Community Coordinator. She started working at Integra in September, 2012, and testified that she works out of her home in

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<sup>79</sup> He also testified that Integra provided some de-escalation training to him on May 1, 2013. (Tr. 525).

<sup>80</sup> Respondent seeks to discredit this witness through documented workplace performance issues that arose in 2013. (Tr. 1053; Exs. R-FFF, GGG, HHH, III, JJJ; Resp't Reply Br., at p. 3 n1). No witness testified to these exhibits. Mr. Macaluso was not given an opportunity to address them at the trial. The Court finds that his testimony is consistent with the other evidence in the record regarding Integra's practices and procedures. The Court also observed the demeanor of this witness and found him to be credible, straightforward, and trustworthy. The Court credits Mr. Macaluso's testimony.

Port Richey, Florida. She is also currently working on a master's degree in mental health counseling. Her duties as a Community Coordinator include calling members and checking in with them to see if that have gone to their provider appointments, transporting members to provider appointments, attending telephone staff meetings, and putting in notes at the end of the day. (Tr. 807-09, 826).

Ms. Hinman testified that after getting her case load from her supervisor, she now checks "to see if there are any red flag members where I would need to bring someone with me to visit them." She testified that she now checks public records at the Pasco County or Pinellas County Sheriff's departments. She enters member's names to see any information that comes up. If she finds any criminal background, she reports it to her supervisor "so that they could review it and determine if we would keep that member or if they would be discharged." She testified that, for example, if a member's history showed a "dog bite case from 12 years ago," she "would put a red flag in. Make sure you go there with a partner." She did not recall when she started checking public records. Ms. Hinman testified that in September, 2012, Integra did not require her to do the criminal background checks. (Tr. 809-12, 825).

Ms. Hinman completed the Neumann training online, which she characterized as "average," before she began to work in the field visiting members. She then shadowed Ms. Rochelle for two days.<sup>81</sup> She attended two or three training sessions with Dr. Arnott and Ms. Cooney that lasted "an hour or two maybe." There was no role playing involved in the training. She testified that Ms. Rochelle also gave training. She participated in the weekly telephone rounds on Wednesdays, which she testified lasted 45 minutes to an hour. She did not recall any

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<sup>81</sup> CO Prymmer testified that Ms. Hinman told him that she completed the Neumann training in eight hours and thought it was a joke. Here also testified that none of the SCs told him that they thought that the Neumann safety training was sufficient. (Tr. 119-20).

safety issues discussed during the Wednesday rounds. She also attended mandatory telephone conference meetings with Ms. Rochelle and the Florida SCs once or twice a month, during which, “similar to the rounds call,” they would discuss issues on how to better serve their clients. She testified that she utilized Integra’s buddy system in the fall of 2012. She buddied up with Ms. Ferguson and Mr. Macaluso. She never had “any occasion when [she] felt the need to have a buddy and [she] couldn’t get one.” (Tr. 814-24).

Ms. Hinman testified that Ms. Rochelle was her first supervisor, followed by Dr. Arnott. There was a period of time in 2012 that she felt that her supervision was “inadequate,” and that there was a lag of time of two days in getting her progress note reports approved by a supervisor in the database. (Tr. 829-30).

Ms. Hinman recalled a member who had been jailed for burning down his mobile home.<sup>82</sup> In 2012, the member told his health care provider at a medical office, in front of her, that he had homicidal thoughts toward her. “And the [medical] provider asked him if he had suicidal or homicidal thoughts, and he said yes. And the therapist asked him to explain. And he said, the thoughts are telling me to harm her, which was me. He pointed to me.” She had seen him many times, having worked with him “for a long period of time,” and had never known of these homicidal thoughts toward her and “never felt like I needed to ask him if he was suicidal or homicidal or if he had thoughts of harming me.” She said she “wasn’t told to ask those questions, ....” She said that Integra required her to continue to provide services to the member. After that incident, Ms. Hinman buddied up with Mr. Macaluso and Ms. Cooney, on one occasion, to meet with him. This member was eventually “discharged” or “rolled off” her caseload after she had worked with him “for a long period of time.” (Tr. 830-34).

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<sup>82</sup> Ms. Hinman testified she learned that the member had burned down his home by conducting her own search of police public records. She did not state when she conducted her public records search of this member. (Tr. 831).

### **Whitney Ferguson – Service/Community Coordinator**

At the time of the trial, Whitney Ferguson was an Integra Community Coordinator. She began working at Integra in the Philadelphia office as an intern and became a SC in the Philadelphia office in October, 2010. In August, 2011, she transferred to the Memphis office. In May, 2012, she transferred to the Tampa office where she was the lead SC. Her supervisor in May, 2012 was Ms. Rochelle. At that time, Integra had 50 members assigned and she and Ms. Rochelle split them evenly. She worked in the Tampa office during the fall of 2012, with the exception of a six week maternity leave from September through mid-October. She reported to Dr. Arnott after Ms. Rochelle left. (Tr. 836-38, 843, 854-56).

When Ms. Ferguson started at Integra, she received training by Dr. Arnott and field training by other SCs. Her training, which included safety training, continued in Memphis and Tampa. In Tampa, there were three training sessions that occurred in September, October, and about November/December of 2012. According to Ms. Ferguson, “safety was one of the things that was incorporated in all of the trainings.” This was because she believed “it’s such an important part of what we do.” The September training was “a few days” and was at a Marriott Hotel. She did not attend all of the training because she was getting ready to go on maternity leave.<sup>83</sup> Ms. Cooney conducted the training, which Ms. Ferguson said included safety-related “role-playing.” Mr. Yuhas gave the introduction and attended, in part. The October and November/December training sessions were also “two or three days,” at a hotel, and included safety issues. She did not know if there was any role playing in the October training. Dr. Arnott and Ms. Cooney conducted the October training. Only Dr. Arnott conducted the November/December training. (Tr. 838-43, 958).

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<sup>83</sup> Because of her partial attendance at the September, 2012 training, the Court affords little or no weight to her testimony regarding the substance and scope of the training.

According to Ms. Ferguson, the Integra Tampa office hired seven SCs from September through December, 2012. The number of Integra members grew from the original 50 to 200. About 30 members were assigned to each SC. During this time, Ms. Ferguson testified that she oriented Mmes. Hinman and Stevens, as well as Mr. Macaluso. Shadowing entailed bringing the new SC along for the day so that they could see what she did and she could explain why she did things a certain way. (Tr. 843-46).

She testified that during the fall of 2012 she would buddy up with someone if she was going to an area or visiting a member that made her uncomfortable. If she could not get a buddy, she said she would reschedule the appointment, or sometimes buddy up with Ms. Rochelle. She recalled Ms. Rochelle accompanying her on one visit to a member's home in 2012. She did not recall ever requesting anyone accompany her on a visit to a member's home in 2012.<sup>84</sup> (Tr. 847-48, 857).

She testified that all the new SCs took the Neumann training, although she herself did not because she started at Integra before the Neumann training was created and she had already received face-to-face training. Ms. Ferguson also testified that she participated in the Wednesday rounds with Drs. Krajewski and Arnott, as well as Ms. Rochelle. She testified that safety issues were discussed during the Wednesday rounds, although she could not recall any specific safety related discussion. (Tr. 848-51).

Ms. Ferguson recalled one instance in which she buddied up with Mr. Macaluso to visit one of his members. Ms. Ferguson could smell marijuana when the member opened the door to his apartment. According to Ms. Ferguson, she called Dr. Arnott from outside the member's

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<sup>84</sup> The Court finds Ms. Ferguson's testimony regarding her use of the buddy system in 2012 to be contradictory and affords it little or no weight.

door, told her about the marijuana, and Dr. Arnott told her that they should leave.<sup>85</sup> As they went to leave, the member “got in Andy’s face and – you know, I don’t remember verbatim what he said, but he made some statements that made us, you know, continue on leaving like Melissa had instructed us to do, and we left.” That member was later “discharged from the program.” (Tr. 852-53, 925-26).

### *Expert Testimony*

**Janet Ann Nelson** was qualified at trial as an expert witness by knowledge, skill, experience, training and/or education in three areas: (1) clinical social work, (2) personal safety awareness, and (3) personal safety skills and safety programs for health and human service workers.<sup>86</sup> See Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589

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<sup>85</sup> Dr. Arnott testified that she was not sure if Integra made an incident report for this event. (Tr. 1010-11).

<sup>86</sup> Ms. Nelson has been working in the social work field since 1977, when she graduated with a Bachelor of Arts degree from the University of Florida. Ms. Nelson began her career at the Florida Department of Health and Rehabilitative Services, where she did some in-home visits to clients. She then worked as an informational referral specialist at the Alachua County Crisis Center “phone banks” for almost a year. After that, Ms. Nelson pursued and mastered martial arts. She has a fourth degree black belt and has taught martial arts since 1978. She earned her Master’s degree in Social Work (MSW) in 1994 at Florida State University. Ms. Nelson explained that she saw a need for self-defense training because the social service field “is a women’s based profession for the most part,” and the work itself can be threatening due to home visits, certain clients, and certain neighborhoods. After earning her MSW degree, Ms. Nelson worked at the Pace Center for Girls, a Departmental of Juvenile justice program in the state of Florida. Ms. Nelson also provided Pace Center staff training that included conflict resolution, adolescent mental health issues and behaviors, adolescent suicide, de-escalation, crisis intervention, behavior management, working with adolescents, and self-defense. Ms. Nelson became a licensed clinical social worker (LCSW) in Florida in February, 2005. To become licensed, Ms. Nelson had to have 1,500 “face-to-face contact hours,” which she explained was field experience. She testified that “‘clinical’ means that you’re focused on basically three pieces, which is assessment, diagnosis and treatment. And so it’s a special track.” She chose the clinical track during her master’s studies. As a LCSW, Ms. Nelson had a private practice. Her clients included mainly juveniles, but also adults, from her clinical supervisor’s private practice. In her private practice, she treated mentally ill persons. She performed mental health assessments on all her clients. Along with her private practice, Ms. Nelson remained at the Pace Center as a LCSW and also started working part-time at Tallahassee Community College (TCC), providing mental health services for the college and the TCC police department. She worked 10-12 hours each week at TCC for seven years. She testified that she worked with TCC in response to the Virginia Tech massacre because “the whole orientation towards safety on campus changed, and mental health was of course seen as a piece of that.” She confirmed that the purpose of the project was to “to help identify, uh, students with mental illness who may become violent.” She completed her Tension and Trauma Releasing

(1993) (finding that judge serves as a “gatekeeper” to “ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable”); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999) (extending the court's gatekeeper function to all expert testimony).<sup>87</sup> She testified that she had been retained and paid \$15,000 by the Department of Labor for her expert opinion in this case at \$200 per hour. She had never been an expert witness before this case. She has testified in court for clients who she treated. (Tr. 562-64, 584; Ex. C-27, at p. 2).

Integra argues Ms. Nelson’s testimony should be afforded little weight due to her lack of experience as an expert witness, her lack of publications, and the fact that she “has not

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Exercises (TRE) Level 1 Certification in August, 2012 and TRE Level II Certification in February, 2013. She is certified in TRE at the individual and group levels, which is “a program that [is] physically based [as opposed to pharmaceutically based] to treat PTSD.” She has been a member of the NASW since 1994. In 2002, she received her certification from NASW’s Academy of Certified Social Workers. Certification required two years of full-time work post Master’s degree, peer review and recommendations, and successful passing of a national test. Ms. Nelson has taught self-defense for social workers classes for NASW chapters in Illinois, Iowa, West Virginia, Kansas, Missouri, Pennsylvania, Minnesota, and Florida; and other organizations elsewhere. She developed a course called National Safety based upon her analysis of murders of social or human service workers that occurred around the nation. She testified that she looked into the murder of Teri Zenner, a social worker, that occurred in Overland Park, Kansas in August, 2004. In 2004, she published a book entitled “Everyday Self Defense for Social Workers,” which is also dually titled, “Everyday Self Defense for Human Service Workers.” In 2010, she made a presentation to the Council on Social Work Education entitled “Effective Strategies for Teaching Personal Safety Skills to Social Work Students.” Her self-defense courses are designed to meet the qualifications for social work licensing, including in Kansas where each social work licensee has to complete six hours of training in personal self-protection. (Tr. 529-61, 567, 570-72, 575; Ex. C-26).

<sup>87</sup> Fed. R. Evid. 702 provides that:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

undertaken any doctoral studies or served as a faculty member at any institution of higher learning.” Integra does not deny and does not criticize Ms. Nelson’s field experience or her experience providing safety training to those who work in the field. The Court finds that Ms. Nelson’s experience in the field, and years of providing safety and safety awareness training to those in similar workplaces, is persuasive when weighing the issues presented in this case. *ACME Energy Servs. dba Big Dog Drilling*, 23 BNA OSHC 2121, 2125 (No. 08-0088, 2012) (comparing experts and finding one “in a better position” based on “professional training and extensive experience”), *aff’d*, 542 F. App’x 356 (5th Cir. 2013) (unpublished). She proved to be a credible, informative witness whose opinions assisted the Court. (Resp’t Br. at 13 n.4; Tr. 82-83).

Ms. Nelson testified that Integra’s service workers were exposed to the hazard of workplace violence and that prior to December 10, 2012, Integra did not adequately protect its SCs from workplace violence. She testified that Integra’s worker safety program was inadequate because: 1) its management did not support the need for adequate safety training of SCs,<sup>88</sup> 2) the isolated nature of the SCs’ job increased their risk to workplace violence, 3) SCs were placed at increased risk to workplace violence by being expected to apply clinical knowledge of social work they did not have and use clinical assessment tools that they were not qualified to administer or interpret, 4) the personal safety training materials provided to SCs were vague,

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<sup>88</sup> Ms. Nelson testified that Integra exhibited a sense of dismissal and disregard when workers raised safety issues or the need for safety training. She recalled a statement attributed to Dr. Arnott that workers were responsible for their own lives and Integra did not need to provide any self-defense training. On March 8, 2013, Dr. Arnott told CO Prymmer that “[t]he employees wanted self defense training. We don’t do that in this industry. I would take a self defense class myself. The employees should take a self defense class by themselves. They should do that. They don’t take self responsibility for their lives.” In rebuttal, Ms. Nelson testified that she disagreed with Dr. Arnott’s testimony that self-defense, personal protection or personal safety awareness training was not appropriate for Integra SCs. (Tr. 674-75, 1094-95; C-27, at pp. 4-5, Ex. R-QQ, at p. 15).

lacking practical content and incomplete,<sup>89</sup> and 5) its safety practices and protocols were incomplete and inadequate.<sup>90</sup> (Tr. 585-87, 602-16, 678-79; Ex. C-27).

Ms. Nelson testified that Integra required its SCs to have a bachelor's degree. They were not required to be licensed in social work. She testified SCs were doing social work based activities and required to apply the BPRS as a clinical tool when completing their initial assessments of members.<sup>91</sup> Ms. Nelson testified that the initial assessment called for SCs to apply clinical analysis and/or skills that they did not have, to accurately and safely complete the Personal Routine/Condition section of the assessment.<sup>92</sup> She likened it to a brief mental status examination that a clinician would normally complete, or the conduct of a biopsychosocial assessment normally completed by someone with a Bachelor's degree in social work. She said SCs were tasked to make a psychosocial impression of members using BPRS and GAF scores. She described the initial assessment as "a very extensive assessment" that included histories of violence and substance abuse. She said that these were two of the top five predictors of violence. The assessment also included questions concerning the member's current living arrangement and conditions to ascertain whether the member is a loner, another predictor of violence. She

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<sup>89</sup> Ms. Nelson testified that the portion of Integra's Employee Handbook that addressed workplace violence was a "very general statement" that "was not specific to social workers or Service coordinators in the field per se." It did not adequately prepare SCs to prevent and deal with workplace violence. She further testified that section 8 of the Neumann training was "vague and lacked depth and there was no how to's. There was no experiential process." She said that she "didn't see any de-escalation techniques" in Integra's training. She also said that a SC's shadowing of a more senior SC was on-the-job training "of the most minimal kind", was "not enough" and did not always occur. (Tr. 608-09, 613, 745; Ex. C-27, at p. 9).

<sup>90</sup> Ms. Nelson testified that SCs were at risk to violence because Integra did not conduct criminal background checks on its members before SCs visited member's homes. She considered it a poor practice for Integra not to conduct a criminal background check considering it was serving members who were seriously mentally ill that may also have criminal backgrounds. She said that it was particularly dangerous to do an unscheduled visit to a member's home because of the element of surprise. She further testified that she knew of health and human services agencies that did perform criminal background checks before sending workers out. (Tr. 616-19, 675, 718-22; Ex C-27, at p. 11).

<sup>91</sup> Ms. Nelson testified that the BPRS is a clinical tool used by psychiatrists, generally in an inpatient setting, to assess patients with psychosis. (Tr. 590).

<sup>92</sup> Ms. Nelson testified that Integra's SCs were performing work in Florida that should have been done by clinicians or licensed social workers with bachelor's or master's degrees in social work. (Tr. 690-93; Ex. C-27, at p. 7).

testified that not having this information before meeting with members at their homes placed SCs at a very high risk to violence situations. She stated that the assessment asks the SCs for their clinical impressions and a psychosocial summary of the member. (Tr. 590-93, 621-34, 689-90, 695; Exs. C-8, C-27, at pp. 7-9).

Ms. Nelson further opined that Integra's SCs were not able to safely assess or determine some of the high risk behaviors identified in the Neumann training; such as paranoia, suspiciousness, antisocial personalities, impulsiveness, and hopelessness reflecting a higher risk for suicide. She said that SCs who are not good at assessing members because of a lack of clinical skills "are less able to recognize the propensity of someone to engage in violence or become violent." She testified that [redacted] was expected to apply clinical tools that she was not qualified to apply and was exposed to a heightened risk of workplace violence due to her inexperience. She stated that SCs performed the jobs of clinical social workers, in part. She said that these considerations "[m]ost definitively" contributed to the risk of workplace violence. She also opined that the lack of safety training at Integra contributed to the risk of workplace violence that occurred on December 10, 2012. Additionally, Ms. Nelson suggested that Integra's SCs were isolated, both in their working environment and by the online Neumann training, and that this isolation could have had "a negative psychological impact on a worker, particularly as it pertains to a worker's belie[f] that he must be self-reliant[.]" (Tr. 593-99, 601-02, 614, 1103-04; Exs. C-17, at pp. 4-5, C-27, at pp. 5-9).

Ms. Nelson testified that Integra's "buddy system" was insufficient before [redacted]' death. It was discretionary, not commonly practiced, not standardized, and more of a backup when a SC was going on vacation. (Tr. 624-26, 742).

Ms. Nelson testified that [redacted] “was most likely having a delusional episode” when he explained the print of *The Last Supper* to [redacted] on October 15, 2012. She referred to the September 8, 2012 progress note report which reported that [redacted] had a past mental health issue involving “schizophrenia.” She said that delusion is the number one symptom in schizophrenia. She said that it would also be useful to know if [redacted] was a catatonic or paranoid schizophrenic because a member with the latter might “react much more violently” to a home visit. Ms. Nelson stated that schizophrenics and people with any kind of paranoid, delusional or antisocial personality disorders are considered to be at higher risk for violent behavior. (Tr. 600-01, 619; Ex. C-7, at p. 1).

Ms. Nelson testified that Integra was part of the social services/healthcare industry. She also testified that the social service worker industry recognized the risk of workplace violence when working under conditions similar to Integra’s SCs. Ms. Nelson believes that workers in this industry may not report an incident for fear of reprimand, being seen as not doing their job, saving face with peers, self-blame, or ‘it comes with the job.’ Ms. Nelson also stated that another common mentality within the human service field also puts workers at risk: the “belief that if you are a good person out there helping people, *i.e.*, ‘doing good,’ that nothing bad will happen to you.” Characterizing this mentality as “false and naïve,” Ms. Nelson claims that “this core belief that a good heart and a helping hand will be a safety shield [is what] truly puts workers at risk. It has the effect of enabling the worker to operate ‘in denial’ that this type of work could really become dangerous.” (Tr. 555-57, 575, 605, 679, 1103-04; Exs. C-27, C-32, C-33).

Ms. Nelson testified to a laundry list of activities that were feasible and could have been taken by Integra to provide a safe workplace for its SCs before December 10, 2012.<sup>93</sup> For example, she testified that it would have been reasonable for Integra to always buddy up, or double team, SCs when visiting members with a higher risk for violent behavior when obtaining their consents and completing initial assessments, even where two or three visits are needed. She also stated “challenging” members with a propensity to violence should have been assigned to more experienced SCs. Ms. Nelson testified that Integra did not use any sort of tracking system for its SCs.<sup>94</sup> She said that it was fairly common practice for social workers to have some sort of tracking device. Integra also did not use a risk assessment tool to assess any risk of violence. She stated that Integra could feasibly implement, at low cost, an assessment process to identify and decrease any risk of violence. Ms. Nelson also testified that Integra could devise a method to alert SCs to members with assaultive behavior problems. She also stated that Integra lacked a workers’ incident reporting program, which she described as a “really vital” activity.<sup>95</sup> Ms. Nelson also testified that she found Mr. Macaluso’s October 16, 2012 request for takedown and hands-on crisis de-escalation training to be reasonable.<sup>96</sup> (Tr. 636-41, 650-51, 661-63; Exs. C-1, at p. 6, C-5, at p. 1, C-27).

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<sup>93</sup> Ms. Nelson testified that her listing included a few activities that did not apply to Integra; *e.g.* “minimize crowding and noise.” (Tr. 733-35; Ex. C-27, at p. 13).

<sup>94</sup> Dr. Arnott testified that SCs could not use their laptops to find other SCs. (Tr. 899).

<sup>95</sup> OSHA’s Safety Narrative, Accident Investigation Summary & Findings, stated that Integra “did not document, track or have a system for identifying workplace violence occurrences while employees reported several incidents within a year that included being chased by clients, verbal confrontations/lashing out, transporting erratic clients in SC-owned vehicles, pursuing clients in poor neighborhoods and being pushed in line by an agitated person at a clinic.” (Ex. C-5, at p. 1).

<sup>96</sup> In rebuttal, Ms. Nelson testified that recent NASW guidelines include the use of verbal de-escalation and non-harming techniques, exit strategies, and a safety plan in their safety training section. She also testified that SCs having these tools would be more prepared to face workplace violence. She also said that the NASW guidelines are a reference tool that can be used for community health workers. (Tr. 1095-96, 1101-02).

Ms. Nelson also testified that Citation 1, Item 1, included a list of methods that were feasible means of abating the hazard of workplace violence alleged therein. (Tr. 636-79; Exs. C-1, at pp. 7-9, C-27, at p. 12, C-31, at p. 1).

## **DISCUSSION**

### **I. Serious Citation I, Item 1 – Alleged General Duty Clause Violation**

#### **a. Merits**

The Secretary alleges that Integra violated the general duty clause of the OSH Act because its “employees were exposed to the hazard of being physically assaulted by members with a history of violent behavior.” (Sec’y Br., at p. 3). To prove a violation of the general duty clause, the Secretary has the burden to establish that “a condition or activity in the workplace presented a hazard, that the employer or its industry recognized this hazard, that the hazard was likely to cause death or serious physical harm, and that a feasible and effective means existed to eliminate or materially reduce the hazard.” *ACME Energy Servs.*, 23 BNA OSHC at 2123; *see also Robert Sands Co., LLP, v. Sec’y. of Labor*, 568 F. App’x. 758, 759 (11th Cir. 2014) (unpublished); *SeaWorld of Florida, LLC v. Perez*, 748 F.3d 1202, 1207 (D.C. Cir. 2014). The Court affirms this Citation Item.

#### *1. Nature and Existence of the Hazard*

“A safety hazard at the worksite is a condition that creates or contributes to an increased risk that an event causing death or serious bodily harm to employees will occur.” *Baroid Div. of NL Indus., Inc. v. OSAHRC and Marshall*, 10 BNA OSHC 1001, 1003 (No. 79-1775, 1981). “A ‘hazard’ is defined in terms of conditions or practices deemed unsafe over which an employer can reasonably be expected to exercise control.” *Valley Interior Sys., Inc.*, No. 06-1395, 2007 WL 2127305, at \* 4 (O.S.H.R.C.A.L.J. June 11, 2007) (citing *Morrison-Knudson Co./Yonkers*

*Contracting Co., A Joint Venture*, 16 BNA OSHC 1105, 1121 (No. 88-572, 1993), *aff'd* 288 F. Appx. 238 (6<sup>th</sup> Cir. 2008) (unpublished). The hazard “is not defined in terms of the absence of appropriate abatement measures.” *Wheeling-Pittsburgh Steel Corp.*, 10 BNA OSHC 1242, 1245 (No. 76-4807, 1981) (consolidated), *aff'd*, 688 F.2d 828 (3<sup>rd</sup> Cir. 1982) (unpublished). A hazard has also been defined “to mean ‘a condition or practice in the workplace’ which introduces an element of danger into the work environment.” *Foseco, Inc.*, No. 81-944, 1982 WL 22452, at \*13 (O.S.H.R.C.A.L.J. July 28, 1982) (citing *Empire-Detroit Steel Div., Detroit Steel Crop. v. OSHRC*, 579 F.2d 387 (6<sup>th</sup> Cir. 1978)). A hazard must be defined in a way that apprises the employer of its obligations, and identifies conditions or practices over which the employer can reasonably be expected to exercise control.” *Arcadian Corp.*, 20 BNA OSHC 2001, 2007 (No. 93-0628, 2004). The Commission may define the hazard itself when the Secretary’s definition is too broad or generic. *Davey Tree Expert Co.*, 11 BNA OSHC 1898, 1899 (No. 77-2350, 1984).

Here, the Secretary defined the hazard as “being physically assaulted by members with a history of violent behavior.” As an example, the Secretary stated that “an employee [[redacted]] providing healthcare management services was fatally stabbed by a member with a violent criminal history. Employees acting as SCs regularly interacted on their own directly with members with a history of violent behavior.” (Ex. C-1, at pp. 7-9; Sec’y Br., at p. 23).

Integra argues that the Secretary essentially defines the hazard as “the potential criminal acts of the citizens being served by Integra.” (Resp’t Br., at p. 9). Integra further claims that the Secretary includes in his definition of the hazard not only Integra members but also, “presumably, by extension, other residents of these same communities with whom Integra staff may have occasion to interact or even pass on the street in the course of performing their jobs.” (Resp’t Reply Br., at p. 4). Integra’s presumption is ill-founded. Citation 1, Item 1, deals with

physical assaults by, and direct interactions with, Integra members that have a history of violent behavior; not public passersby.

The arguments here illustrate a disagreement over the definition of the hazard. It is essential that the hazard be defined to the extent that Integra is apprised of: (1) its obligations, and (2) the conditions or practices it can reasonably be expected to exercise control. *Arcadian*, 20 BNA OSHC at 2007; *see also Pelron Corp.*, 12 BNA OSHC 1833, 1835 (No. 82-388, 1986) (noting hazard must be defined in terms of preventable practices or conditions).

Under the general duty clause, Integra is obligated to provide a “place of employment” free of hazards, to the extent required under the OSH Act. 29 U.S.C. § 654(a)(1). The workplace in this case may be viewed as essentially virtual, but that fact does not relieve Integra of its obligation. Anywhere an Integra SC performs work-related tasks is a workplace. *Anthony Crane Rental v. Reich*, 70 F.3d 1298, 1303 (D.C. Cir. 1995); *Reich v. Simpson, Gumpertz & Heger Inc.*, 3 F.3d 1, 5 (1st Cir. 1993); *Clarkson Constr. Co. v. OSHRC*, 531 F.2d 451, 458 (10th Cir. 1976); *REA Express v. Brennan and OSAHRC*, 495 F.2d 822, 825 (2d Cir. 1974); *Access Equip. Sys. Inc.*, 18 BNA OSHC 1718, 1720-22 (No. 95-1449, 1999). The record shows that Integra SCs work at member’s homes, in their own personal vehicles, or in public places such as hospitals, restaurants, and doctor’s offices. All of these places are considered an Integra workplace.

Inside of this workplace, Integra SCs regularly must interact with members who have been identified as non-compliant with their doctor’s orders, the essence of Integra’s contractual commitment with its funding sources; *i.e.*, insurance companies. The record shows that many members had severe mental health issues and/or histories of violent behavior. One member, [redacted], had a mental illness diagnosis of schizophrenia and had a publicly documented

history of violent behavior. He physically assaulted and killed an Integra employee at an Integra workplace, his home. The record also shows that Integra SCs had experienced and reported to management many other episodes of violent behavior by members directed toward them.

The parties discuss at length *Megawest Financial Inc.*, No. 93-2879, 1995 WL 383233 (O.S.H.R.C.A.L.J. June 19, 1995).<sup>97</sup> *Megawest* is a Commission case dealing with workplace violence by another human.<sup>98</sup> In *Megawest*, OSHA cited an owner of an apartment building for exposing its staff employees to the violent acts of its tenants. *Id.*, at \*1. The judge found that the potential hazard arose from a critical element of the apartment staff's job, *i.e.* personal interaction with the apartment residents. The judge found that the Secretary established the existence of the hazard of violence leading to serious physical harm under section 5(a)(1) of the OSH Act where: 1) the responsibilities of the office staff led to adversarial relationships with tenants, 2) the staff was not trained to defuse anger, 3) the residents often directed intimidating threats or conduct towards the staff that was not sanctioned, and 4) no positive measures were in effect to discourage attacks.<sup>99</sup> The judge concluded that the conditions as they existed at the apartments constituted a hazard to the office employees. *Id.*, at \*\*7-8.

Two circuit courts provide guidance because they have discussed *Megawest*. In *Ramsey Winch Inc. v. Henry*, 555 F.3d 1199 (10th Cir. 2009), the 10<sup>th</sup> Circuit reversed a district court's determination that the general duty clause of the OSH Act preempted Oklahoma laws holding employers criminally liable for prohibiting their employees from storing firearms in their

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<sup>97</sup> *Megawest* is an unreviewed administrative law judge decision. It is not binding precedent within the Commission. *See Leone Constr. Co.*, 3 BNA OSHC 1979, 1981 (No. 4090, 1976) (finding that unreviewed administrative law judge decision does not constitute binding precedent for the Commission).

<sup>98</sup> This is in contrast to *SeaWorld of Florida, LLC*, 24 BNA OSHC 1303 (No. 10-1705, 2012), *aff'd*, 748 F.3d 1202, 1210 (D.C Cir. 2014), a case where physical violence was inflicted on a Seaworld employee by a killer whale.

<sup>99</sup> The judge in *Megawest* ultimately vacated the alleged violation concluding that the hazard was not recognized by *Megawest* or by its industry within the meaning of section 5(a)(1) of the OSH Act. *Megawest*, 1995 WL 383233, at \*11.

personal vehicles on company property. *Id.* at 1202. “[I]n finding preemption, the district court held that gun-related workplace violence was a ‘recognized hazard’ under the general duty clause.” *Id.* at 1205. Disagreeing with the district court, the 10<sup>th</sup> Circuit characterized the violent activity at issue in *Megawest* as “random,” connecting it to a “general fear” held by a *Megawest* employee. *Ramsey Winch*, 555 F.3d at 1206. Further distinguishing *Megawest*’s “random” violent activity, the 10<sup>th</sup> Circuit noted that the general duty clause might be implicated from other types of workplace violence situations, such as “injuries ‘arising out of work situations’” in a psychiatric hospital. *Ramsey Winch*, 555 F.3d at 1207 n.8. The 10<sup>th</sup> Circuit cited to OSHA’s Standard Interpretation Letter, Dec. 10, 1992, regarding workplace violence which states that “[w]hether or not an employer can be cited for a violation of section 5(a)(1) is entirely dependent upon the specific facts, which will be unique in each situation.”<sup>100</sup> *Id.* at 1207 n.8. Similarly, in *SeaWorld*, 748 F.3d at 1210, the D.C. Circuit distinguished the hazard in *Megawest* from the hazard of interacting with killer whales. The D.C. Circuit characterized the *Megawest* violence as unpreventable because the employer had no control over third parties residing in the apartment building it managed, whereas *SeaWorld* did have control over “its employees’ access to and contact with its killer whales.” *SeaWorld*, 748 F.3d at 1210.

Here, the violent behavior is not random. The risk of an Integra SC being physically assaulted by a member is recognized by Integra as an inherent part of the SC’s role in performing his or her job responsibilities in the field. According to Ms. Nelson, it was particularly dangerous for a health and human service worker to do an unscheduled visit to a home. She also testified that the limited information that SCs had before meeting the member for the first time

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<sup>100</sup> OSHA’s Standard Interpretations Letter, December 10, 1992, is available at <http://www.osha.gov/SLTC>.

put them at a very high risk of a violent situation. She testified that the population that Integra served warranted criminal background checks before entering their homes:

Given the population that [Integra] serve[s], it would be highly recommended that they do criminal background checks.... And if you know that you are serving seriously mentally ill people that may have criminal backgrounds, it would be advisable to check on that background before you enter their home.

Ms. Nelson also testified that interviewing paranoid schizophrenics is challenging and dangerous. (Tr. 619, 624, 722).

The Court finds that Integra's practices of requiring SCs to physically meet face-to-face with members likely to have a history of violent behavior increased the likelihood of SCs being physically assaulted by a member with such a history and constituted a hazard.<sup>101</sup> Integra SCs were required to repeatedly interact with members, often in their private homes, with histories of violent behavior that were unknown to the SCs. These interactions called for SCs to make face-to-face inquiries and assessments regarding intimate details of members' lives. Integra's SCs were not adequately trained or experienced to defuse a member's anger with, or negative reaction to, the face-to-face assessment process. Such personal inquiries may be conducive to hostile reactions by a severely mentally ill member with a history of violent behavior directed toward the SC. Members often directed intimidating threats or conduct towards SCs and before December 10, 2012 there is little, or no, evidence that members responsible for such behavior

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<sup>101</sup> See *Waldon Healthcare Ctr.*, 16 BNA OSHC 1052, 1060 (No. 89-3097, 1993) ("Rather, the existence of a hazard is established if the hazardous incident can occur under other than a freakish or utterly implausible concurrence of circumstances."); *Tuscan/Lehigh Dairies, Inc.*, 22 OSHC 1871, 1885 (No. 08-0637, 2009) ("Freakish and unforeseeable deaths do not necessarily trigger statutory liability under the general duty clause of the [OSH] Act."). Here, the Court finds that [redacted]' death was not the result of an utterly implausible concurrence of circumstances.

were sanctioned by Integra.<sup>102</sup> There were also inadequate positive measures in effect to discourage physical assaults of SCs by members.

Despite Integra's assertions, Integra members are not classified in such broad categories as "citizens" or "third parties." (Resp't Br., at p. 9). The members have been pre-screened by Amerigroup and placed into a "non-compliant," distinct category from which Integra is paid to make "compliant." Their very behavior is the essence of Integra's business, and so the Court finds that their behavior in this case is work-related. Additionally, Integra has control over its SCs, and how they go about their job interacting with the members. While Integra cannot reasonably be expected to control the violent actions of these members, Integra does have control of its employees and the precautions that they must take to decrease the likelihood of violence in their workplace by members with a history of violent behavior.

The Court finds based on the evidence in the record that Integra's practices and procedures in place on and before December 10, 2012 increased the likelihood of an Integra SC being physically assaulted by members with a history of violent behavior during a face-to-face meeting. These practices and procedures included: 1) unannounced visits to a member's home, 2) assigning members to a SC's caseload based on "geographical and scheduling efficiencies" rather than on client risk; *e.g.*, assigning a person with a known mental illness, and non-compliant with his medical orders, and who has a history of violent behavior [*i.e.* [redacted]] to

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<sup>102</sup> While one of Mr. Macaluso's members was "rolled off" on November 1, 2012, Mr. Macaluso noted in his progress note report that Mr. D's violent behavior "resulted in his admission to the Mental Health Care's Crisis Center." Mr. Macaluso's experience is consistent with Mr. Schneider's testimony in that in order to get a member "rolled off," a safety concern or "tendencies that are violent in nature" were not enough. "It had to go before management and the doctor. The doctor was the one that made the decision to my understanding." (Tr. 467; Ex. C-30, at p. 30).

an inexperienced new hire [[redacted]], 3) requiring face-to-face visits before safety training was completed, 4) implementing a non-mandatory buddy system for inexperienced new hires, 5) relying on SCs to perform their own background checks, if at all, and 6) assigning heavy caseloads such that the buddy system was viewed by Integra employees as unavailable and a hindrance.<sup>103</sup>

The Court construes the hazard presented to an Integra SC as being physically assaulted during a face-to-face meeting by a member with a history of violent behavior.<sup>104</sup> *See Davey Tree Expert Co.*, 11 BNA OSHC at 1899 (redefining the hazard from “electrocution caused by a limb touching a high-voltage line” to “electrocution from a tree limb contacting a power line because of the actions of employees in removing the limb.”); *Pelron Corp.*, 12 BNA OSHC 1833, 1835 (No. 82-388, 1986) (Judge erred by not defining the hazard in terms of preventable practices or conditions).<sup>105</sup> The existence of the hazard has been established.

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<sup>103</sup> The Secretary did not specify in the complaint these specific Integra practices that increased the risk of violence here. Administrative pleadings, however, are to be very liberally construed. *Baroid Div. of NL Indus., Inc. v. OSAHRC and Marshall*, 10 BNA OSHC at 1007. The issue of whether Integra’s practices, procedures or conditions in place as of December 10, 2012 increased the likelihood of an Integra SC being physically assaulted by members with a history of violent behavior was fully litigated at trial. *Nat’l Realty & Constr. Co., Inc. v. Occupational Safety and Health Review Comm’n*, 489 F.2d 1257, 1264 (D.C. Cir. 1973) (“So long as fair notice is afforded, an issue litigated at an administrative hearing may be decided by the hearing agency even though the formal pleadings did not squarely raise the issue.”). Both CO Prymmer and Ms. Nelson testified to this issue at length on direct examination.

<sup>104</sup> Administrative pleadings are to be very liberally construed. *Baroid Div. of NL Indus., Inc. v. OSAHRC and Marshall*, 10 BNA OSHC at 1007.

<sup>105</sup> The Secretary included in the complaint the following practices and procedures that Integra could implement to abate this hazard: 1) having a stand-alone written Workplace Violence Prevention Program that included the elements set forth in Citation 1, Item 1 at ¶1, 2), a) determining the behavioral history of new/transferred members to identify members with assaultive behavior problems and to communicate such pertinent information to all SCs before they visit with new members in their homes, b) training all employees to understand a system flagging potentially violent members, and c) having a system for holding members accountable for violent behavior, 3) having procedures in place to timely communicate incidents of workplace violence to all employees, 4) ensuring training: a) is sufficient to make all employees aware of its workplace violence policy, and b) includes effective methods for responding during a workplace violence incident, recognizing aggressive behavior exhibited by members or others and techniques for timely de-escalating such behavior, identifying risk factors that cause or

## 2. Recognition of the Hazard

“A hazard is ‘recognized’ within the meaning of the general duty clause if the hazard is known either by the employer or its industry.” *Waldon Health Care Ctr.*, 16 BNA OSHC at 1061; *Brennan v. OSHRC*, 494 F.2d 460, 464 (8<sup>th</sup> Cir. 1974) (noting actual knowledge of a hazard by an employer makes the hazard recognized for purposes of the general duty clause). “Whether a work condition poses a recognized hazard is a question of fact.” *SeaWorld*, 748 F.3d at 1208. Actual knowledge of a hazard by an employer may be gained by means of prior episodes, employee complaints, and warnings communicated to the employer by an employee. *St. Joe Minerals Corp. v. OSHRC*, 647 F.2d 840, 845 (8<sup>th</sup> Cir. 1981) (employer had both actual and constructive knowledge of the hazard when previously warned by at least one employee).

The record establishes that Integra recognized the hazard of being physically assaulted by members with a history of violent behavior during a face-to-face interaction. Integra used precautions, inadequate as they were, against violence and also was aware of specific incidents of violence before [redacted]’ death.<sup>106</sup> *Waldon Health Care Ctr.*, 16 BNA OSHC at 1061 (“precautions taken by an employer can be used to establish recognition in conjunction with

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contribute to assaultive behaviors, mandatory procedures to report all incidents of workplace violence, and conducting the training before employees are exposed to members. The Secretary also included: 5) implementing and maintaining an effective buddy system based upon a complete hazard assessment, which includes procedures for all staff to request and obtain double coverage when necessary, including situations where an employee communicates he or she feels unsafe being alone with a particular member, 6) providing all staff a reliable way to rapidly summon assistance when needed, and 7) establishing a liaison with law enforcement representatives. (Ex. C-1, at pp. 6-8). As discussed in the feasibility of abatement section herein, Integra had the ability to control and implement at least some of the above practices, procedures or conditions in an effective manner. It chose not to do so before December 10, 2012.

<sup>106</sup> In addition to recognition of the hazard, the Secretary must prove that Integra knew or, with the exercise of reasonable diligence, could have known of the hazardous condition. *See Burford’s Tree, Inc.*, 22 BNA OSHC 1948, 1950 (No. 07-1899, 2010). Here, the evidence shows that Integra’s management, including Ms. Rochelle and Drs. Krajewski and Arnott, recognized that the SC’s mandatory face-to-face interaction with members with a history of violent behavior was a hazard of the Integra workplace. A supervisor’s actual knowledge of a hazard is imputed to the employer, even if the supervisor subsequently departs the employ of the employer. *See Caterpillar, Inc. v. OSHRC*, 122 F.3d 437, 440 (7<sup>th</sup> Cir. 1997). Dr. Arnott knew that Integra’s SCs were “dealing with the toughest people that no one wants to deal with.” She and Dr. Krajewski recognized that Integra’s SCs were performing an “unique” role and filling a “niche in the market that other people are not doing” in the community health worker industry. (Tr. 883, 1017-18, 1029-34; Ex. R-QQ, at pp. 14-15).

other evidence.”). Integra’s own training, handbook, and existing policies establish that it recognized that its SCs were exposed to the hazard of workplace violence by members with a history of violent behavior. (Tr. 110, 114-17; Ex. C-17).

As Dr. Krajewski testified, Integra teaches its SCs to use “universal precautions” and to “[a]ssume everybody you deal with could have the potential for harm.” The Neumann Training has topics devoted to the “Dangerous Member” that an Integra SC must screen by identifying “high-risk behaviors” including (as relevant to this case): a history of violence, paranoia/suspiciousness, psychosis/confusion, substance abuse, verbal threats, criminal behavior, antisocial personality, noncompliance, and possessor of weapons. (Tr. 1030, Exs. C-16, C-17, at pp. 4-5).

The record establishes that [redacted] exhibited some of the high risk behaviors described above before he killed [redacted]. The evidence also establishes that Integra recognized that [redacted] presented a specific threat to [redacted]. Integra performed no background check on [redacted] to determine if he possessed violent tendencies, and took no action when the victim’s progress note reports described her discomfort and his alarming, delusional behavior. [redacted] noted that [redacted] made her so “uncomfortable” that she did not want to be alone in his house with him. Although Integra managers admit to reading this note, Integra took no steps to assess the risk posed by [redacted] and made no follow-up to ensure that [redacted] took measures to protect her safety. Integra also did not discipline [redacted] for failing to bring a partner on her subsequent visits to [redacted] and/or for failing to remain outside his home. Integra made no inquiries into whether [redacted]’ interactions with [redacted] had improved or changed since her initial visit. Thereafter, [redacted] performed three additional face-to-face visits with [redacted]. During these visits, [redacted]’ notes indicate that [redacted] exhibited behaviors that indicated

delusional or paranoid behavior. Delusions and paranoia are identified in Integra's training as "high risk" behaviors. [redacted]' progress note reports show Integra recognized that she was exposed to the hazard of workplace violence when visiting [redacted] alone at his home. (Tr. 139-43, 148, 278, 285-86, 356-65, Exs. C-7, C-19).

The evidence also establishes that, prior to the fatal attack on [redacted], Integra managers were aware of several instances of violence or aggression by members against other SCs. The evidence shows that several SCs were exposed to members exhibiting these "high risk behaviors." Furthermore, the record establishes that the SCs brought up their concerns in progress note reports, which were reviewed and approved by Integra management. The record also shows that SCs brought up their concerns regarding these high-risk behaviors during weekly telephone calls with Drs. Krajewski and Arnott, as well as with Ms. Rochelle. In particular, SCs Macaluso, Schneider, and Hinman had all reported to their supervisors particular instances in which members acted aggressively, threateningly, or so strangely as to raise safety concerns. This prior history of workplace violence put Integra on notice that its SCs were exposed to the hazard of workplace violence during the face-to-face interaction with members with a history of violent behavior. (Tr. 52-59, 268, 458, 470-72, 507, 831; Exs. C-29, at pp. 6, 18, 24, C-31, at p. 3).

Integra claims that it did not know, nor could it have known, that it was in violation of the OSH Act because "no precedent exists under which the general duty clause has ever been construed as supporting enforcement of a citation stemming from a criminal attack on an employee."<sup>107</sup> (Resp't Reply Br., at p. 11). Integra also claims that the general duty clause as

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<sup>107</sup> Respondent placed these arguments in the characterization section of its briefs. They are addressed here in the knowledge component of this citation item. As noted *infra*, there is no knowledge component regarding the characterization of an affirmed citation item.

applied in this case was unconstitutional because “a reasonable prudent employer” would not have known of the abatement as proposed, asserting that its approach to safety was “robust” and “above and beyond” the standard in the industry. (Resp’t Br., at pp. 15-17, Resp’t Reply Br., at p. 10). The Court is unpersuaded.

“The goal of the [OSH] Act is to prevent the first accident, not to serve as a source of consolation for the first victim or his survivors.” *Arcadian*, 20 BNA OSHC at 2008 (citation omitted).

Facial challenges to the general duty clause have been rejected. Courts have accommodated possible fair notice problems in this context “by interpreting ‘recognized hazard’ only to include preventable hazards” or applying the clause only “when a reasonably prudent employer in the industry would have known that the proposed method of abatement was required.

*SeaWorld*, 748 F.3d at 1216 (citations omitted); *accord Ensign-Bickford Co. v. OSHRC*, 717 F.2d 1419, 1421 (D.C. Cir. 1983); *Donovan v. Royal Logging Co.*, 645 F.2d 822, 831 (9<sup>th</sup> Cir. 1981). “Hazardous conduct is not preventable if it is so idiosyncratic and implausible in motive or means that conscientious experts, familiar with the industry, would not take it into account in prescribing a safety program.” *Nat’l Realty*, 489 F.2d at 1266.

The evidence shows that Integra did not lack fair notice because the hazard associated with the likelihood of an Integra SC being physically assaulted in the Integra workplace by members with a history of violent behavior was preventable, and not “idiosyncratic and implausible.” Given the multiple incidents of aggressive behavior by members directed toward SCs, Integra knew, or could have at least anticipated, that readily available abatement measures were required to decrease the risk of workplace violence directed toward SCs before December 10, 2012.

The record shows that management at all levels of Integra knew about the “high-risk” behaviors exhibited by members in the fall of 2012. Despite this fact, and despite what Integra has termed a “robust” and “above and beyond” safety program, Integra did not implement its own abatement measures even after being told of safety concerns by the SCs. *SeaWorld*, 748 F.3d at 1216 (finding recognition because “[g]iven evidence of continued incidents of aggressive behavior by killer whales toward trainers notwithstanding SeaWorld’s [practices], SeaWorld could have anticipated that abatement measures it had applied after other incidents would be required.”). Progress note reports detailing the events of each visit were reviewed and approved by Integra managers. E-mails with concerns were sent to management. Drs. Krajewski and Arnott held weekly rounds in which everyone was involved, including team leads and all SCs. In these weekly rounds, SCs brought up situations about which they sought advice. Both testified their advice was to leave a situation in which the SC felt uncomfortable.<sup>108</sup>

The problem with this advice is that “feeling uncomfortable” was a prerequisite to safety in the Integra workplace. And the record shows that the level at which an Integra SC became “uncomfortable” was subjective and dependent on experience, situation, and even naiveté. By requiring its employees to “feel uncomfortable” as a prerequisite to feeling safe, Integra shifted its responsibility for employee safety and health onto its employees. This Integra may not do, especially when there are practices, procedures or conditions that are within its control that would decrease the likelihood of violence by members with a history of violent behavior.

*Armstrong Cork Co.*, 8 BNA OSHC 1070, 1074 (No. 76-2777, 1980), *aff’d* 636 F.2d 1207 (3d

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<sup>108</sup> See *contra* Question No. 11 of the CIS Final examination that asked, “When confronted with a dangerous member the first thing you should do is to?” The correct answer was “b. Assure your own safety” and not “d. Leave your belongings and run.” The correct response to Question 17 that asked “If a mentally ill person appears to be dangerous:” was “b. You should obtain a consult with a clinician.” The correct response to Question 24 that asked “If you are having difficulty providing services to a challenging member you should:” was “b. Be creative, try something different even if you fail[.]” (Ex. R-SSSS, at pp. 12, 18, 25). None of the correct responses to these questions was to leave the situation.

Cir. 1980) (unpublished) (“The duty to comply with section 5(a)(1) rests with the employer. An employer cannot shift this responsibility to its employees by relying on them to, in effect, determine whether the conditions under which they are working are unsafe.”).

With regard to [redacted] in particular, Integra did not implement its own abatement measures despite [redacted]’ progress note reports that showed that she was uncomfortable with [redacted] and then that she was also showing up to [redacted]’s house unannounced. Integra did not assign a mandatory buddy for [redacted] for these visits with [redacted]. Integra did not require [redacted] to finish her safety training before attempting to contact [redacted] for the first time even though his diagnosis of schizophrenia, which according to Mmes. Nelson and Rochelle was cause to consider safety, was on the report provided by Amerigroup. After Ms. Rochelle left, Integra did not even review some of [redacted]’s progress note reports.<sup>109</sup>

The hazard in this case was recognized by Integra.<sup>110</sup>

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<sup>109</sup> Respondent argues that the violent conduct at issue is fundamentally unpredictable and therefore cannot be regulated by the OSH Act. (Resp’t Reply Br., at p. 5). The Court disagrees. Here, the occurrence of a violent incident during [redacted]’ interaction with [redacted] on December 10, 2012 at his home was reasonably foreseeable. Sending alone a young, inexperienced, ill-informed and poorly-trained female SC, back into the home of a severely mentally ill middle-aged, male member who had displayed alarming behavior toward the SC in prior, recent visits, and who had a lengthy criminal history of violent behavior, on an unscheduled visit on a mission to ask the member many intimate questions laid the foundation for, and foreshadowed [redacted]’ exposure to, a preventable episode of workplace violence. Not only was the hazard in this case obvious, but, as discussed below in the feasibility section, Integra’s approach to safety in its workplace was plainly inadequate. *See Kelly Springfield Tire Co. v. Donovan*, 729 F.2d 317, 321 (5<sup>th</sup> Cir. 1984) (“[W]here a hazard is ‘obvious and glaring,’ the Commission may determine that the hazard was recognized without reference to industry practice or safety expert testimony.”); *see also ComTran Grp., Inc. v. U.S. Dep’t of Labor*, 722 F.3d 1304, 1316 (11<sup>th</sup> Cir. 2013) (holding that foreseeability of a supervisor’s misconduct may be found using evidence of the employer’s lax safety standards); *W.G. Yates & Sons Constr. Co., Inc. v. OSHRC*, 459 F.3d 604,60809 (5<sup>th</sup> Cir. 2006) (finding foreseeability of a supervisor’s misconduct not shown when the employer’s safety policy, training, and discipline are sufficient to make the supervisor’s conduct in violation of the policy unforeseeable.”).

<sup>110</sup> Respondent argues the Secretary failed to establish industry recognition of the hazard of violence in the workplace. (Resp’t Reply Br., at pp. 3, 7, 10). Since the Court finds that Integra recognized the hazard described herein, it is unnecessary for it to find that the hazard was alternatively recognized by the community health worker or social services and health care industries. *See Tuscan/Lehigh Dairies, Inc.*, 22 BNA OSHC at 1881 (finding no need for Court to evaluate every element of the Secretary’s case where doing so is unnecessary). Proof that the employer had actual knowledge of a hazard, even absent a showing that the hazard is recognized in a relevant industry, is sufficient to establish a “recognized hazard” under section 5(a)(1). *See Usery v. Marquette Cement*

### 3. Likelihood of Harm

“[T]he criteria for determining whether a hazard is “causing or likely to cause death or serious physical harm” is not the likelihood of an accident or injury, but whether, if an accident occurs, the results are likely to cause death or serious harm.” *Waldon*, 16 BNA OSHC at 1060. Here, the record shows that the result of [redacted]’s attack was [redacted]’ death. The Secretary has established that the hazard of physical assault by an Integra member with a history of violent behavior during a face-to-face interaction is likely to cause death or serious harm.

### 4. Feasibility of Abatement

“To show that a proposed safety measure will materially reduce a hazard, the Secretary must submit evidence proving, as a threshold matter, that the methods undertaken by the

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*Mfg. Co.*, 568 F.2d 902, 910 (2d Cir. 1977). Ms. Nelson’s opinion, however, that the SC’s face-to-face interaction with an Integra member with a history of violent behavior was recognized, could also establish recognition of the hazard. (Tr. at 679); *ACME Energy Servs.*, 23 BNA OSHC at 2124 (“Industry recognition may be shown through the knowledge or understanding of safety experts familiar with the workplace conditions or the hazard in question.”). Respondent seeks to distinguish the community health worker industry from the Secretary’s expert witness’s background. Respondent incorrectly claims that Ms. Nelson’s expert qualification was limited to clinical social work. The record establishes that Ms. Nelson was qualified in the areas of clinical social work, personal safety awareness, and personal safety skills and safety programs for health and human service workers. (Tr. 584). Ms. Nelson has a background in field work, which supported her qualification as an expert in this case in health and human service worker safety. The record establishes that Ms. Nelson is a safety expert familiar with the general workplace conditions experienced by Integra SCs. With regard to industry recognition, Ms. Nelson’s qualifications show that she is an expert in personal safety, which, in this Court’s view, is a basic principle “not confined to any one industry” and that she was familiar with interacting with people in the field. *Waste Mgmt. of Palm Beach, Div. of Waste Mgmt., Inc. of Fla.*, 17 BNA OSHC 1308, 1310-11 (No. 93-128, 1995) (finding industry recognition based on a safety expert’s knowledge of a “basic” and “general principle” combined with knowledge of the company’s specific practice) *citing Kelly Springfield Tire Co.*, 10 BNA OSHC 1970, 1973 (No. 78-4555, 1982), *aff’d*, 729 F.2d 317 (5th Cir. 1984). The Court, however, relies on Integra’s own recognition of the hazard for affirming this violation. The Court also finds that Integra’s claim that SCs are “community health workers”, as defined by the Bureau of Labor Statistics (BLS), and not social workers is not dispositive. The Court agrees with the Secretary that both social workers and community health workers are considered types of “community and social service occupations” by the BLS. (Sec’y Reply Br., at pp. 1-2).

employer to address the alleged hazard were inadequate.” *U.S. Postal Serv.*, 21 BNA OSHC 1767, 1773-74 (No. 04-0316, 2006). As a threshold matter, the Court finds that Integra’s approach to safety for workplace violence during face-to-face interactions with members on December 10, 2012 was inadequate. The Secretary argues that Integra shifted the ultimate responsibility of safety onto its employees by instructing them to leave if they felt in danger or to bring a buddy if they felt they needed one.<sup>111</sup> The Secretary also claims that these “universal precautions” fail because they were dependent on a SC’s “accurate assessment and identification of potential danger,” which could not be accurate due to a SC’s lack of skills and overly demanding caseload. (Sec’y Br., at p. 37). The Court agrees with all of these points and finds Integra’s approach to safety inadequate as discussed below.

*a. Integra’s Inadequate Approach to Safety*

This is a tale of two differing views of safety. To Integra’s senior management located in Maryland and New Jersey, it was the best of times. To Integra SCs operating in the field in Florida during the fall of 2012, it was the worst of times. Integra expected its SCs to “avoid any situation that shows an indication of danger, potential danger. If you sense that you are in such a situation, remove yourself immediately, notify your supervisor.” As President Yuhas testified, “it all starts and ends with if you’re in a situation that appears in any way to be posing danger, just don’t do it. It kind of boils down to that.” According to Dr. Krajewski, Integra’s safety training was “more than adequate” and “above and beyond” compared to “what was out there in

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<sup>111</sup> Integra’s reliance on its SCs to recognize potential danger and thereby prevent violent behavior by the members runs counter to the requirements of the OSH Act. *See SeaWorld*, 24 BNA OSHC at 1324 (stating that employer’s reliance on employees to recognize precursors and prevent unpredictable behavior is inconsistent with the requirements of the OSH Act).

the field.” He testified that the goal of the training was to ensure that the SC was “well informed when they go out in the community, be prepared to [] develop what they can see is the needs for the patient, you know, what’s the patient missing, and connect them to those services.” (Tr. 767-68, 1026-27, 1034).

Integra’s safety policies and training consisted of: 1) a portion of the Neumann Training, 2) face-to-face field-based training, 3) weekly rounds, 4) a buddy system, 5) immediate advice via a telephone hotline manned 24 hours per day, and 6) self-empowered “universal precautions” – where employees were allowed to leave a situation if they felt unsafe. Ms. Nelson testified that Integra’s approach to safety was inadequate. The Court agrees with Ms. Nelson. (Tr. 585, 767, 1027; Ex. C-27).

**1. The Neumann Training:** The Neumann Training was an online slideshow course focused on orienting new SCs with their job duties.<sup>112</sup> In the summer of 2012, the training consisted of 15 sessions. One session addressed safety, Session 8: “In-Home & Community Safety.” According to Dr. Arnott, completing all 15 sessions took about 30-35 hours, on average. Dr. Arnott affirmed that a SC spent a little more than about 2 hours on Session 8. At the end of each session, including the safety session, a SC had the opportunity and was required as part of the class participation grade to contribute to an online discussion. (Tr. 889-90, 910-12, 937-38, 951-54, 994-96; Exs. C-15 through C-17, R-E, R-J, R-V, R-QQQQ, R-RRRR).

Ms. Nelson’s opinion of the safety portion of the Neumann training was that it was inadequate because it “lacked depth, good explanation of items, and a chance for application through case studies. Also, personal safety materials provided to SCs were vague, lacking practical content and incomplete.” Ms. Nelson believed that the Neumann training did not instill

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<sup>112</sup> The record establishes that [redacted] attempted to contact [redacted] before she finished the safety portion of the Neumann training.

the requisite “ability to assess the person, their situation and the setting” in a novice Integra SC. The Neumann training also “failed [to] engage the trainee in an experiential process to improve their self-awareness of the ‘flight or fight’ response, increase their ability to maintain calmness under pressure, recognize and use non-verbal communication, utilize tone of voice, safe language skills, and practice possible case scenarios,” all of which are “fundamental in safety training.” Ms. Nelson noted that “[m]uch of the at-risk behaviors and crisis management information presented was directed towards client care and not towards the worker.” (Ex. C-27, at pp. 9-10).

Ms. Nelson believed that the assessment form SCs were tasked to fill out required a certain skill set to be filled out safely. “Less skill in dealing with potentially dangerous clients and situations makes violence inherent in this work.” Workers need “proper training in interviewing, assertiveness, de-escalation, verbal/non-verbal communication, mental illness, assessment and crisis intervention” to reduce safety risks. Although some safety points were covered, Integra failed to “tell workers how to practice them.” Moreover, Ms. Nelson believed that the Neumann training increased the danger risk to its novice employees by “providing a list [of high risk behaviors] without [providing] the knowledge to truly know[] how to identify high risk behaviors[.]” The Court agrees with Ms. Nelson and finds that the Neumann training provided inadequate safety training to the Florida SCs for the reasons that she conveyed. (Ex. C-27, at pp. 5-10).

**2. Face-to-face training:** Dr. Arnott and/or Ms. Cooney conducted face-to-face training of the Florida SCs in September, October and November, 2012. From September 4 through September 7, 2012, Ms. Cooney shadowed some of the new SCs as they worked with members

in the community over the course of 17.5 hours.<sup>113</sup> During the shadowing, the SC observed Ms. Cooney perform various scenarios like finding a member or visiting a member in the hospital or at home. On September 4, 2012, Dr. Arnott, Mr. Yuhas and Ms. Cooney conducted a “Team Meeting” with the SCs at Amerigroup for three hours. As part of this team meeting, Dr. Arnott taught a 45 minute “overview” session concerning the “Day of a Service Coordinator”, that included discussion of values, expectations, safety, and tips. Dr. Arnott testified that she passed out handouts entitled “Social Worker Safety Tips” from Syracuse University and “Home Safety Tips”. She said that these two handouts were also part of the Neumann training.<sup>114</sup> The record shows classroom type training also occurred in November, 2012 during which safety was discussed. (Tr. 704-05, 961, 998-1001, 1027; Exs. R-F, R-G, R-H, R-EEEE, at pp. 12-13).

According to Ms. Nelson, “[g]roup training in safety is important because the subject is intimidating to many people.” Ms. Nelson believed that “the most effective training occurs when workers share their experiences and feelings with their peers. Beyond building camaraderie, they gain practical safety ideas and learn about real-life encounters to help expand their knowledge base.” Ms. Nelson characterized the ‘shadowing’ done at the onset of the job as brief and insufficient given the isolating nature of the SC’s virtual workplace. She testified that the

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<sup>113</sup> There is no record showing [redacted] attended any part of the Florida Orientation Training Integra conducted from August 27 through September 7, 2012. Ms. Cooney testified that she never met [redacted]. (Tr. 800; Exs. C-27, at p. 5, R-Y).

<sup>114</sup> The Court notes that the assigned readings in the Neumann training before December 10, 2012 did not include articles entitled “Social Worker Safety Tips” or “Staying Safe on Home Visits.” Session 8 of the Neumann training included an assignment to read material entitled “Home Safety.” In rebuttal, CO Prymmer testified that on May 14, 2013, Ms. Brown told him that Integra did not start using the article entitled “Social Worker Safety Tips” as part of the Neumann training until after [redacted]’ death. CO Prymmer also testified that Integra had not provided to him the material entitled “Staying Safe on Home Visit” during his investigation even though he had asked Integra to provide him with the complete version of the Neumann training materials. The Court finds that the article entitled “Social Worker Safety Tips” was not the material referred to in the Session 8 of the 2012 Neumann training as “Home Safety.” The Court further finds that, on August 28, 2012, Dr. Arnott posted material with the “Topic: Safety Tips” that included all of the material; *i.e.* 10 steps, included within the article entitled “Staying Safe on Home Visits.” (Tr. 1086-91, Exs. C-15, C-35, at pp. 2-3, R-EEEE, at pp. 12-13).

face-to-face training Integra provided was consistent with worker isolation. Ms. Nelson believed that Integra management did not prioritize safety. Ms. Nelson pointed out that, despite workers' concerns communicated to management, Integra lacked a standardized workplace violence prevention program, ignored worker's requests for better safety training, and lacked an established safety committee to consider employee concerns and assure that safety protocols were being followed.<sup>115</sup> (Tr. 644-46, 697-98; Ex. C-27).

The Court finds Integra's face-to-face safety training to be inadequate. It was short in time and safety content, and was not mandatory before going out into the field (even for inexperienced new hires). In one instance, it was included as one of the many topics addressed in a 45 minute overview. Ms. Cooney served as Coordinator of Program Implementation and Training. She provided face-to-face training to the SCs in the fall of 2012. Ms. Cooney was not qualified to train or mentor SCs. She lacked any academic credential and did not meet Integra's basic requirement that SCs have a bachelor's degree. Her answers to questions concerning her academic achievements were evasive. She did not know how many credits she had earned while taking community college courses. The record also does not establish to what extent, if at all, [redacted] was trained by Ms. Cooney in the field. Ms. Cooney never met [redacted]. Some SCs began visiting

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<sup>115</sup> Integra claims that Ms. Nelson's testimony regarding Integra's approach to safety was "called into question" because she was neither aware of "the nature of the face-to-face meetings" nor the topics during the weekly rounds when she composed her report. Ms. Nelson, however, was at the hearing and heard all of the testimony regarding Integra's approach to safety. After reading the depositions of Dr. Arnott and Ms. Brown and listening to the testimony regarding the Neumann training, face-to-face field training, weekly rounds, buddy system, hotline, and universal precautions, Ms. Nelson did not change her opinion that Integra's approach to safety for its workers was inadequate. (Tr. 589, 687-89, 744-46; Resp't Br., at p. 14 n5).

members without having first received any shadow training and some SCs never shadowed anyone.<sup>116</sup> (Tr. 122-23, 702-03, 800; Ex. C-27).

**3. Weekly Telephone Training:** The “weekly rounds” were telephone conference calls among the SCs, team leads, and Drs. Arnott and Krajewski. These phone calls typically occurred on Wednesdays and lasted up to about one hour. Accounts differed on whether roll was taken. There are no written attendance sheets in the record. Dr. Krajewski testified that during these calls, “cases are presented. We go through scenarios. We talk about, uh, patients who are making people, you know, feel uneasy, uh. Patients who are – you know, we said, well, what kind of services do they need? We talked about safety issues.” Ms. Rochelle also held some staff meetings on Wednesdays at 11:00 a.m. that lasted up to about one hour. They discussed issues similar to the telephone calls with Dr. Krajewski. These telephone calls primarily focused on how SCs were to provide care to members, and not SC safety. Mr. Schneider testified that they did not discuss safety issues during the weekly rounds until after [redacted]’ death. None of the three witnesses who led these calls testified to the specific content of the safety message given to the SCs during these weekly rounds. Rather, the message given to the SCs was to leave a situation if the SC felt unsafe. The Court finds that this message is conclusory and empty of specific content regarding prevention and detection of potential violence by a member at the Integra workplace. (Tr. 96, 98, 196 -97, 289-91, 483-84, 767, 818-21, 914, 1027, 1030).

**4. Buddy System:** Integra had a loosely-defined buddy system. Ms. Nelson recalled Dr. Arnott and Ms. Brown mentioning the buddy system as Integra’s primary safety policy. Integra’s buddy system was developed for both safety and back up reasons, *i.e.*, “if you’re going on vacation, or you’re out, there’s a backup person who can step in.” Buddies were not assigned.

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<sup>116</sup> CO Prymmer testified that new SCs were not required to shadow anyone. (Tr. 122-23),

Integra did not have a written procedure for requesting a buddy. Dr. Arnott testified that Integra's buddy system policy was that "if a Service Coordinator felt unsafe, he should ask a colleague to go with him."<sup>117</sup> Before [redacted]' death, Integra did not require SCs to take a buddy to a member's house if the SC thought there was a danger. SCs allegedly complained to Dr. Arnott that "they didn't want to do it [buddy up] because their days were so long." Dr. Arnott could not recall whether Integra had ever disciplined a SC for visiting a member without a buddy before [redacted]' death. (Tr. 127, 348, 353-55, 698-700, 898, 942-43).

According to Ms. Nelson, Integra's buddy system was poorly implemented. It was not standardized "with specific procedures on how to double team," allowing workers to be "unprepared to deal with a violent situation." It was also discretionary, when it should have been mandatory, and it was ineffective because "Integra did not have workers discuss, role-play, identify code words, non-verbal signals and practices scenarios in order to be an effective team."<sup>118</sup> (Tr. 741-42, Ex. C-27, at p. 11).

The Court agrees with Ms. Nelson and finds that Integra's buddy system was ineffective and in the case of [redacted] of no real safety value. Before [redacted]' death, SCs relied on themselves to arrange for another SC to accompany them. Dr. Arnott testified that a mandatory buddy system was started, but then stopped, previously in the Philadelphia Integra office because the work load was inconsistent with it. As a solution, Integra made the buddy system discretionary, which, the Court finds, conveyed the message that the workload was more important than a buddy. (Tr. 114, 354-56).

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<sup>117</sup> Based upon her cavalier demeanor at trial, the Court gave little weight to Ms. Cooney's testimony concerning Integra's buddy system.

<sup>118</sup> CO Prymmer testified that before [redacted]' death, SCs relied on themselves to arrange for another SC to accompany them. (Tr. 114).

**5. Hotline:** Integra set up a telephone hotline to be used when “somebody’s in a bind and they need to have information right away.” The hotline was set up so that the first call was to the team lead, the second call to Dr. Arnott, and the third call to Dr. Krajewski. With regard to the hotline, Ms. Nelson testified: “I was aware of two different things. That [Drs. Arnott and Krajewski] said they were available and that the workers said they had trouble getting a hold of them.” Ms. Nelson’s testimony is consistent with the SC testimony in this case regarding trying to get in touch with management. Even if the SC got in touch with management, the standing advice was to get out of the situation if they felt uncomfortable. If the hotline was to be used when the SC was “in a bind,” and needed something “right away,” the SC was already face-to-face with a member. Integra’s hotline was of limited practical use when the “bind” was workplace violence by a member at Integra. (Tr. 725, 1027).

**6. Universal Precautions:** Integra says it directed its employees to use “universal precautions,” and treat all members as if they had violent tendencies. Integra says SCs were allowed to “get out” of or leave any situation they were currently in if they felt in danger. Dr. Krajewski explained that “universal precautions” means to “[a]ssume everybody you deal with could have the potential for harm. And you need to have that healthy sense of awareness [] so that when you go out there, you want to be aware.” Ms. Nelson testified that she did not view testimony by Dr. Arnott and Ms. Brown alluding to SCs exiting when feeling unsafe or to meeting members in a public place as part of Integra’s workplace safety program because they were not mandated strict policies. At best, Integra’s message to its SCs was mixed. Managers say they said leave any dangerous situation. The Neumann training test questions sought answers that were correct and different. Practicing “universal precautions” was plainly

inadequate when, as here, the SC was inexperienced, naïve, untrained, and already face-to-face with the member with a history of a violent behavior. (Tr. 700, 924, 1030-31; Exs. C-16, C-27).

For these reasons, the Court finds that Integra's approach to safety was inadequate. One more point is by far more persuasive in illustrating Integra's inadequate approach to safety. The SC's goal was to complete the assessment of the member. The assessment contained information necessary to gauge potential violence from the member, including previous history of violence, living habits, substance abuse, and whether they are compliant with their medication. Before assessing these "predictors of violence," the SC was forced to meet face-to-face with a member multiple times. The record shows that in many instances Integra directed its SCs to cold-call members, and if unsuccessful, go to their homes unannounced, to make an initial contact. After obtaining a member's written consent to accept Integra's services, SCs had up to thirty days to complete their assessment of the member and determine his needs. Before making their assessment, SCs generally did not know how non-compliant the member had been with his doctor's orders, whether he had any substance abuse addictions, and whether he had any criminal behavior or history. And during this time before the assessment, SCs were charged by Integra to chase down members and obtain this information, all while not knowing how dangerous they actually are. (Ex. C-34, at p. 3; Sec'y Br., at p. 37).

The case of [redacted] showcases Integra's inadequacy. [redacted] was hired sometime during the period from August through September 8, 2012. By September 8, 2012, Integra had assigned [redacted] to [redacted] as a member in her caseload. [redacted] attempted to contact [redacted] three times in September: September 9, September 16, and September 23. The discussion notes associated with the Neumann training indicate that [redacted] did not complete the safety portion of the Neumann training before September 27, 2012. [redacted] met with

[redacted] for the first time in October 2012, the same month that she was awarded her certificate for completing the Neumann training. In the paper she prepared as part of the Neumann training, she stated: “Lastly knowing how to act in a crisis situation is not a skill that is easily learned, and I know that it will be difficult when I encounter it for the first time.” Despite Integra’s approach to safety, Integra’s own practices and policies exposed [redacted] to a hazard she should not have been required to confront while working for Integra. (Tr. 136, 141-42, 992-93, 1015-16; Exs. C-7, R-JJ, at p. 1, R-VVV, R-RRRR, at p. 11).

*b. The Secretary Has Established Feasible Means of Abatement*

After establishing that the employer’s existing means of abating the hazard are inadequate, “[t]he Secretary must [then] specify the proposed abatement measures and demonstrate both that the measures are capable of being put into effect and that they would be effective in materially reducing the incidence of the hazard. The Secretary must also show that her proposed abatement measures are economically feasible.” *Beverly*, 19 BNA OSHC 1161, 1190 (No. 91-3144, 2000) (consolidated) (citations omitted). “‘Feasible’ means economically and technologically capable of being done.” *Id.* “[F]easible means of abatement are established if ‘conscientious experts, familiar with the industry’ would prescribe those means and methods to eliminate or materially reduce the recognized hazard.” *Arcadian*, 20 BNA OSHC at 2011 *citing Pepperidge Farm, Inc.*, 17 BNA OSHC 1993, 2032 (No. 89-0265, 1997) *citing Nat’l Realty & Const. Co., Inc.*, 489 F.2d at 1257. “[T]he Secretary need only show that the abatement method would materially reduce the hazard, not that it would eliminate the hazard.” *Morrison-Knudsen*, 16 BNA OSHC at 1122.

As previously discussed herein, the Secretary identified many feasible means of abatement in Citation 1, Item 1, and during trial that Integra could use to reduce the likelihood of

the workplace violence described herein.<sup>119</sup> Ms. Nelson testified that performing background checks, implementing certain administrative and engineering controls, including assigning member/caseloads considering member risk,<sup>120</sup> and providing employee training in de-escalation and non-harming self-defense techniques, would be low-cost to Integra and would materially reduce the risk of the workplace violence described herein. She also testified that the abatement recommended by OSHA was feasible and would materially reduce instances of workplace violence. This portion of Ms. Nelson's testimony was unchallenged by Integra, which provided neither lay nor expert opinion testimony claiming that these abatement measures were infeasible or would not reduce the hazard of workplace violence described herein.<sup>121</sup> (Tr. 617, 644-66, 672-75, 1094-95; Exs. C-1, at pp. 6-8, C-27, at p. 12; Sec'y Br., at pp. 34-35).

Integra does not claim that the methods proposed by the Secretary are infeasible technologically or economically. Indeed, the record shows that Integra has already implemented some of the Secretary's proposed means of abatement. For instance, Integra now has a written workplace violence prevention program with mandatory reporting requirements. They had no such plan prior to [redacted]' death. Integra now regularly performs background checks on all members before assigning them to a SC. If a member has a criminal history, Integra initiates a "red flag" on that member's chart, notifying anyone reading about that member about the criminal history. Typically, Integra now "rolls off" that member, so an Integra employee would

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<sup>119</sup> See *Nat'l Realty*, 489 F.2d at 1268 ("Only by requiring the Secretary, at the hearing, to formulate and defend his own theory of what a cited defendant should have done can the Commission and the courts assure evenhanded enforcement of the general duty clause."); *Baroid Div. of NL Indus., Inc.*, 660 F.2d at 449 ("While an inadequate citation may be cured through actual notice at the hearing, the employer must at least at the hearing stage receive adequate notice of what particular steps it should have taken to avoid citation.").

<sup>120</sup> Examples of such controls include establishing a safety committee; assigning the committee to write field safety procedures; developing safety plans and practice them; race, gender, language and culture; having home visit itineraries and call-in requirements to monitor location of employees; establishing a system to communicate to employees all incidents of threats or violence; and developing code words to indicate when there is a problem.

<sup>121</sup> Integra presented no expert testimony in its defense.

never come into contact with that person while on the job. This evidence supports a finding that the Secretary's first three proposed means of abatement are feasible technologically and economically for Integra. *SeaWorld*, 748 F.3d at 1215 (finding that evidence of post-citation methods of abatement taken by SeaWorld support finding that the proposed means were feasible and did not fundamentally alter SeaWorld's business.). (Tr. 126, 166-67, 377, 389, 410, 810; Ex. R-R).

Integra claims that the Secretary failed to show that any of these abatement measures would be effective in abating the hazard. Integra bases its claim on the fact that Ms. Nelson could not quantify how effective the abatement measures could be and could not promise that the hazard would be completely eliminated. It is not necessary that the hazard be eliminated, only that it be materially reduced. *Morrison-Knudsen*, 16 BNA OSHC at 1122. OSHA itself notes in its "Guidelines for Preventing Workplace Violence for Health Care & Social Service Workers," that "[a]lthough not every incident can be prevented, many can, and the severity of injuries sustained by employees can be reduced." (Ex. C-32, at p. 7; Resp't Br., at pp. 13-14; Resp't Reply Br., at pp. 7-9).

Ms. Nelson testified specifically to these methods of abatement and that they do decrease the risk of physical assault in the Integra workplace. *See Williams Enters., Inc.*, 7 BNA OSHC 1247, 1250 (No. 4533, 1979) ("The Secretary must establish hazard recognition by reference to the level of awareness or knowledge in the industry or by the employer himself, but the required abatement is determined by reference to feasibility rather than industry custom or knowledge."); *Wheeling-Pittsburgh Steel Corp.*, 10 BNA OSHC at 1245 ("[S]ection 5(a)(1) may require that feasible protective measures be taken even though such measures are not considered customary in a particular industry."). The Court finds that Ms. Nelson's opinion as an expert in personal

safety, and visiting people in the field, is persuasive evidence that the Secretary provided for this issue.

The Court is persuaded by Ms. Nelson's opinion that "[t]he key variables in workplace safety training are identifying 'who, what and where.' The ability to assess the person, their situation and the setting is paramount." (Ex. C-27, at p. 9). The Court finds that preparation is essential to reduce the risk of physical assault in the Integra workplace by a member with a violent history. A written workplace violence prevention program decreases the risk of assault by helping prepare the SC for the possibility of a violent situation. Ms. Nelson testified that: 1) a written document is an established resource for trainees, preventing experienced workers from taking all of their knowledge with them if they leave the company; 2) the safety program also provides "scenarios" to make trainees aware of possible safety situations like a member with a weapon, dogs, trespassing signs, and other people in the member's house; and 3) the safety program will then list ways to identify, prevent, and escape from those scenarios. (Tr. 646-49). The Court agrees with Ms. Nelson that a background check gives more information to the SCs so that they know who they are meeting with and can prepare themselves appropriately. (Ex. C-27, at p. 11). It is undisputed that a history of violent behavior, which could be uncovered in a background check, is one of the top predictors of future violence. Flagging a potentially violent member with a history of violence decreases the risk of assault because it allows the SCs to know who may have a propensity for violence so that they may prepare themselves or alternatively assign the member to a SC based on client risk, rather than geographic or scheduling concerns. (Tr. 618-19). The Court finds that "rolling off" a member with a history of violent behavior decreases the risk of assault because the SC would not be required by Integra to meet with that member. The Court also agrees with Ms. Nelson that mandatory reporting

requirements decrease the risk of assault because: 1) by making it mandatory, it decreases the chance that Integra SCs will not report it for fear of looking like they are not doing their job, and 2) it allows all the SCs to know what is going on so that they can all help and prepare for the possibility of a violent situation with a particular member. (Tr. 661-62).

The record shows that Integra's approach to containing this hazard was plainly inadequate. The measures Integra has adopted since [redacted]' death are consistent with Ms. Nelson's expert testimony,<sup>122</sup> as well as OSHA's recommendations as noted in its Guidelines. The Secretary has met his burden in establishing feasible means of abatement for this general duty citation.

This citation item is affirmed.<sup>123</sup>

#### **b. Characterization**

The Secretary characterizes this citation item as serious. A violation is "serious" if there was a substantial probability that death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k). The record shows that [redacted], a novice employee who Integra hired and trained inadequately, died as a result of an attack by member [redacted]. The violation is properly characterized as serious.<sup>124</sup>

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<sup>122</sup> See *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1536 (No. 86-360, 1992) (finding proposed means of abatement were materially reduced based on expert testimony).

<sup>123</sup> Despite raising it in its Answer, Respondent has not claimed the UEM defense in its post hearing briefs. *L&L Painting Co.*, 23 BNA OSHC 1986, 1989 n. 5 (No. 05-0055, 2012) (finding item not addressed in post-hearing briefs deemed abandoned); *Midwest Masonry Inc.*, 19 BNA OSHC 1540, 1543 n. 5 (No. 00-0322, 2001) (noting arguments not raised in post-hearing briefs generally deemed abandoned); *Jersey Steel Erectors*, 16 BNA OSHC 1162, 1168 (No. 90-1307, 1993), *aff'd*, 19 F.3d 643 (3d Cir. 1994) (unpublished) (holding that to establish UEM defense, employer must show that it had a "thorough safety program, which was adequately communicated and enforced, and that the violative conduct of the employee was idiosyncratic and unforeseeable.").

<sup>124</sup> Respondent argues that the violation can not be characterized as serious because it had no knowledge that its actions were in violation of the general duty clause. As the Secretary notes, there is no "knowledge" component to a violation's characterization. Respondent's argument goes to the recognition/ knowledge prong of the merits of the general duty violation, not to its characterization. As discussed above in that section, the Court finds that Respondent's arguments in this regard are without merit. (Sec'y Br., at p. 9, Resp't Br. at 16-18; Resp't Reply Br., at pp. 10-11).

## II. Serious Citation II, Item I – Alleged Reporting Violation

### a. Merits

The Secretary claims that Integra violated the reporting standard at 29 C.F.R. § 1904.39(a) because it did not report [redacted]’ death within eight hours of its occurrence to OSHA. To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition, and (4) the employer knew or could have known of the condition with the exercise of reasonable diligence. *Astra Pharma Prods.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff’d in relevant part*, 681 F.2d 69 (1<sup>st</sup> Cir. 1982) (Sec’y Br., at p. 38).

It is undisputed that [redacted] was an employee of Integra, that she died as a result of a work-related incident, and that Integra did not report her death to OSHA within eight hours of its occurrence. 29 C.F.R. § 1904.39(a); *see also* 29 C.F.R. § 1904.5(a) (an injury is work-related if an event or exposure in the work environment either caused or contributed to the resulting condition). It is undisputed that Integra failed to report [redacted]’ death to OSHA because of the mistaken assumption that its responsibility extended only to “Work[er’s] Compensation.” Although initially contested, Integra states in its post-hearing brief that it no longer contests this citation item.<sup>125</sup> *See Charles A. Gaetano Constr. Corp.*, 6 BNA OSHC 1463, 1465 (No. 14886, 1978) (noting ignorance of the requirements of the law generally does not excuse noncompliance). (Tr. 86; Resp’t Br., at p. 18).

This citation item is affirmed.

### b. Characterization

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<sup>125</sup> In its Post-Hearing Brief, Respondent admits “it did not also report the fatality to OSHA.” (Resp’t Br., at p. 7, n 3).

The Secretary characterizes this citation item as other-than-serious. A violation is “other-than-serious” if the evidence in the record does not support a finding that failure to comply with the cited standard would likely result in death or serious physical harm. 29 U.S.C. § 666(k); *Miniature Nut & Screw Corp.*, 17 BNA OSHC 1557, 1559 (No. 93-2535, 1996). The Secretary has not claimed that Integra’s failure to report [redacted]’ death would likely result in another Integra employee death or serious physical harm. The record also does not support such a finding. The Court finds that the violation is properly characterized as other-than-serious.

### **III. Penalties**

“Section 17(j) of the [OSH] 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, gravity of the violation, good faith, and prior history of violations.” *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1624 (No. 88-1962, 1994). When determining gravity, typically the most important factor, 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. *Id.* When evaluating good faith:

the Commission focuses on a number of factors relating to the employer's actions, ‘including the employer's safety and health program and its commitment to assuring safe and healthful working conditions[,]’ in determining whether an employer's overall efforts to comply with the OSH Act and minimize any harm from the violations merit a penalty reduction.

*Monroe Drywall Constr., Inc.*, 24 BNA OSHC 1209, 1211 (No. 12-0379, 2013) (citations omitted). The Commission is the “final arbiter” of penalties. *Hern Iron Works*, 16 BNA OSHC at 1622 (citation omitted).

For Citation 1, Item 1, the workplace violence violation, the Secretary proposed the maximum statutory penalty for a serious violation, \$7,000. *See* 29 U.S.C. § 666(b). The Court finds that the gravity of the violation is high. Due to its inadequate approach to safety in the SC

workplace, Integra exposed essentially all of its SCs to an increased likelihood of workplace violence by a member with a history of violence. Some of these exposures lasted for hours while alone with a violent person in a private home or vehicle. The record establishes that Integra could have taken precautions preventing injury by hiring, training, performing, and assigning work appropriately, but chose not to in the interest of saving money and time. The record also establishes that an encounter at the home of a dangerous member resulted in a fatality. Integra has no prior history with OSHA. OSHA never inspected Integra before [redacted]' death. The record shows that Integra had about 62 employees at the time of [redacted]' death. OSHA had initially calculated a 30% reduction in penalty due to size, but revised it to 0% "to achieve the appropriate deterrent effect." OSHA did not recommend a good faith reduction because it is only given "if there's an adequate safety and health program." The Court agrees with the Secretary's proposed penalty recommendations. Integra also does not address the proposed penalty amount for this citation item in its post-hearing briefs.<sup>126</sup> The Court finds that the proposed penalty is appropriate for this affirmed citation item. (Tr. 168-69; Exs. C-2, C-6, at p. 2; Sec'y Br., at p. 39).

For Citation 2, Item 1, the reporting violation, both parties agree that the proposed \$3,500 penalty is appropriate. The statutory maximum civil penalty for an other-than-serious violation of the OSH Act is \$7,000. 29 U.S.C. § 666(c). The Court finds that the gravity for this other-than-serious violation is low as there was little, if any, risk of injury as a result of this violation. The Court also agrees with the Secretary's proposal for a reduction for size, but no reduction for

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<sup>126</sup> In this respect, Respondent only addresses the characterization of the general duty violation. (Resp't Br., at pp. 16-18; Resp't Reply Br., at p. 11). As found above, the Secretary has established that the violation is properly classified as serious. Furthermore, any argument not included in Respondent's brief is deemed abandoned. *L&L Painting Co.*, 23 BNA OSHC at 1989 n. 5 (noting item not addressed in post-hearing briefs deemed abandoned); *Midwest Masonry Inc.*, 19 BNA OSHC at 1543 n. 5 (finding arguments not raised in post-hearing briefs generally deemed abandoned).

good faith or history. The Court finds that the proposed \$3,500 penalty is appropriate for this affirmed citation item.<sup>127</sup> (Tr. 169-70; Sec’y Br., at p. 40; Resp’t Br., at p. 22).

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been made above. *See* Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are denied.

### ORDER

Based on these findings of fact and conclusions of law, it is ordered that:

- 1) Item 1 of Citation 1, alleging a serious violation of section 5(a)(1) of the OSH Act, is AFFIRMED and a penalty of \$7,000 is ASSESSED.
- 2) Item 1 of Citation 2, alleging an other-than-serious violation of 29 C.F.R. § 1904.39(a), is AFFIRMED and a penalty of \$3,500 is ASSESSED.

/s/  
The Honorable Dennis L. Phillips  
U.S. OSHRC Judge

Date: June 22, 2015  
Washington, D.C.

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<sup>127</sup> In its brief, Integra proposes that “the \$3,500 penalty identified by the Secretary is appropriate.” (Resp’t Br., at p. 22).