**UNITED STATES OF AMERICA**
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

| | | |
|---|---|---|
| Secretary of Labor,<br><br>Complainant,<br><br>v.<br><br>UHS of Delaware, Inc., and Premier Behavioral Health Solutions of Florida, Inc., dba Suncoast Behavioral Health Center,<br><br>Respondents. | ) | OSHRC Docket No. 18-0731 |

**ORDER GRANTING COMPLAINANT'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND SUPPORTING MEMORANDUM**
**TO THE EXTENT INDICATED HEREIN**

## I. FACTS[1]

On April 24, 2018, OSHA closed its inspection and issued a one-item Repeat citation to Respondents for exposing employees to acts of workplace violence, in violation of Section 5 (a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 654 (a)(1) (Act),[2] and proposing a penalty of $71,137. These incidents of workplace violence include, but are not limited to, physical assaults by patients against employees in the form of punches, kicks, bites, scratches, hair pulling, and battery with objects used as weapons by patients throughout Respondents' facility.

[1] The following facts are drawn from the pleadings, Complainant's Motion to Compel Production of Documents and Supporting Memorandum (Motion to Compel), Respondents' Response to Complainant's Motion to Compel (Response to Motion to Compel), Complainant's Reply to Respondents' Response to Complainant's Motion to Compel (Reply), and Respondents' Surreply to Complainant's Reply to Respondent's (sic) Response to Complainant's Motion to Compel (Surreply) and are found solely for the purpose of ruling upon the Motion to Compel.

[2] Section 5(a)(1) of the OSH Act, also known as the general duty clause, provides that each employer "shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are

Respondents filed a notice of contest. Pleadings have been filed.

On August 9, 2018, Complainant served his First Request for Production of Documents upon Respondents. Specifically, the Secretary asked Respondents to produce the following documents:

> **REQUEST NO. 5**: **All risk assessment documentation, including but not limited to High Risk Notification Alerts,** completed for each patient involved with each incident of workplace violence, as documented in Employee Accident Reports and/or OSHA logs, from February 3, 2016, to the present at the worksite. Any such documents may be redacted for the patient's personally identifiable information (hereinafter "PII") but the redactions must be labelled as such.
>
> **REQUEST NO. 6**: **All one-to-one designations completed for each patient involved with each incident of workplace violence**, as documented in Employee Accident Reports and/or OSHA logs, from February 3, 2016, to the present at the worksite. Any such documents may be redacted for the patient's PII but the redactions must be labelled as such.
>
> **REQUEST NO. 7**: **All root cause analyses completed for each incident of workplace violence**, including but not limited to those documented in Employee Accident Reports and/or OSHA logs, from February 3, 2016, to the present at the worksite.
>
> **REQUEST NO. 8**: **All debriefings completed for each incident of workplace violence**, including but not limited to those documented in Employee Accident Reports and/or OSHA logs, from February 3, 2016, to the present at the worksite.
>
> **REQUEST NO. 11**: **All intake forms for each patient involved with each incident of workplace violence**, as documented in Employee Accident Reports and/or OSHA logs, from February 3, 2016, to the present at the worksite. Any such documents may be redacted for the patient's PII but the redactions must be labelled as such.
>
> **REQUEST NO. 12**: **All injury summaries for each employee injured during each incident of workplace violence**, as documented in Employee Accident Reports and/or OSHA logs, from February 3, 2016, to the present at the worksite.

In his Motion to Compel, the Secretary asserts that he seeks materials from only a

---

causing or likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a)(1).

relatively small, discrete amount of patient medical files, where instances of workplace violence occurred from February 3, 2016 to the present.[3]

On October 11, 2018, Respondents served their Response to Complainant's First Requests for Production of Documents. Respondents declined to produce the above-requested documents that are responsive to Document Request Nos. 5 through 8 and 11, stating in response to each of these requests:

> Respondent objects to the production of patient medical information pursuant to the Patient Safety and Quality Improvement Act of 2005 (PSQIA), Confidentiality and Privilege Protections, 42 USC § 299b-22(b)(1)(2); 42 CFR §3.206. In addition, OSHA does not have jurisdiction to assess the quality of patient care as this is outside the agency's statutory function.

Respondents stated the above objection also with regard to Document Request No. 12, but added: "Respondent has provided the Employee Accident Reports and OSHA 300 logs."

On November 9, 2018, Complainant filed his Motion to Compel. Complainant seeks an order compelling Respondents to produce "documents responsive to Requests for Production Numbers 5, 6, 7, 8, 11 and 12, redacted as appropriate to protect the identities of patients."

On November 27, 2018, Respondents filed their Response to Motion to Compel. Respondents argue with regard to Document Request Nos. 5 through 8 and 11:

1) the information sought is beyond the scope of permissible discovery;

2) the information sought is not maintained by Respondent UHS-DE;[4]

[3] Complainant did not define the phrase "to the present" in his document discovery request.

[4] The Court need not resolve this argument for the purposes of ruling on the Motion to Compel. Respondents' argument that Respondent UHS-DE does not maintain the information sought is unsupported by affidavit or deposition testimony, or documents. The Court also notes that Respondents claim that at least some of the information sought was submitted by Suncoast to a component patient safety organization (PSO) of UHS of

3) Complainant seeks patient medical records that are not proportional to this case;

4) "the attitude of Secretary's counsel and aggressive seeking of patient medical records reflects a sense of vindictiveness to this litigation;"[5]

5) the time frame sought for the production of information through "to the present" is too long because the Secretary should not be able to seek materials that came into existence after April 24, 2018, when the citation was issued;

6) requests for patient medical information are beyond the scope of the OSH Act.

7) the documents requested in Document Request Nos. 5 (risk assessment documentation, including High Risk Notification Alerts), 6 (one-to-one designations), 7 (root cause analyses), 8 (debriefings) and 11 (patient intake forms), are protected from disclosure to the Secretary by the patient-physician privilege;[6]

8) patient medical information is not relevant to this case; and

9) patient safety work product is protected by the Patient Safety Quality Improvement Act of 2005 (PSQIA).[7]

Respondents argue with regard to Document Request No. 12 that only the time frame sought for the production of information through "to the present" is too long because the Secretary should not be able to seek materials that came into existence after April 24, 2018,

---

Delaware, Inc., where it is allegedly protected from disclosure by the PSQIA.

[5] The Court also need not resolve this argument for the purposes of ruling on the Motion to Compel. The Court is ruling upon a discovery dispute; not resolving a motion for summary judgement involving one of Respondents' defenses. *See* Answer, at p. 3 (Fourth Affirmative Defense of vindictive prosecution).

[6] In their Response to Motion to Compel, Respondents also assert that materials responsive to Document Request Nos. 5, 6, and 11 are also protected from disclosure by the Health Insurance Portability and Accountability Act of 1996 (HIPAA); although Respondents did not specify any particular HIPAA provision.

[7] In their Response to Motion to Compel Respondents appear to narrow their assertion of any protection from disclosure afforded by the PSQIA to Document Request Nos. 7 (root cause analysis) and 8 (debriefings).

when the citation was issued.[8]

On December 4, 2018, Complainant filed his Reply. Complainant argues that his requests are relevant, proportional to the case and not beyond the scope of the Act. He asserts that he requests these documents because he wishes to analyze what notice, if any, Respondents provided to employees that the patients who ended up committing acts of workplace violence were a hazard. The Secretary argues that Respondents themselves identified the requested documents as part of their "policies and procedures" to address the hazard of workplace violence. He asserts that these documents relate to whether: a) a patient is a risk to employees and b) Respondents are properly documenting any potential risk during their patient intake process.

Complainant also argues that he is entitled to information showing whether acts of workplace violence were ongoing beyond the date OSHA closed its inspection, *i.e.* April 24, 2018, to any extent Respondents: a) deny there is a condition or activity that presents a hazard to its employees, b) deny recognition of the hazard of workplace violence, and/or c) put any abatement in place. Complainant further asserts that Respondents have not met their burden of proving that the documents sought are protected from disclosure by the PSQIA. Lastly, Complainant states that "[c]oncerns with respect to patient confidentiality may be addressed through an appropriate protective order."

On December 13, 2018, Respondents filed their surreply. Respondents "readopt all of the stated positions from the Response filing." Specifically, Respondents again argue that patient

[8] Respondents state "that the requested documents were provided for the time period from February 2016 until the close of the OSHA inspection [i.e. April 24, 2018]." There is no indication that Respondents produced "**injury**

medical records re not proportional to the needs of the case. They say that the crux of the Secretary's case whether a patient is a risk to employees and whether Respondents are properly documenting the risk during the intake process "is something that can be stipulated to and there is no need for patient medical information."[9] Respondents reiterated their argument that the Secretary's requests seeking documents "to the present" is "frivolous."[10]

Discovery closes March 29, 2019. An eight-day trial commences on April 23, 2019 at Bradenton, Florida.

## II. DISCUSSION

When solving discovery disputes, it is appropriate for the Court to consider the need of the moving party for the information sought, any undue burden to the party from whom the discovery is sought, and any undue delay in the proceedings that may occur. *KLI, Inc.,* 6 BNA OSHC 1097, 1098 (No. 13490, 1977). The Court finds that Complainant has sufficiently demonstrated a need to have Respondents produce all of the materials that are responsive to Document Request Nos. 5 through 8 and 11 through 12, subject to the limitations set forth herein from February 3, 2016 to August 9, 2018 (the date of the Secretary's Document Requests for Production). The Court further finds that in doing so there would not be: 1) an undue burden on Respondents, and 2) any undue delay in these proceedings.

Respondents have offered a litany of reasons explaining why they should not have to produce any material that is responsive to the document requests at issue in this Motion to Compel. Most, except as to argument nos. 5 (Time frame of production), 6 (Patient-physician

---

**summaries** for each employee injured during each incident of workplace violence, …." (emphasis added).

[9] No such agreed to stipulation has been presented to the Court.

privilege) and 9 (PSQIA) as indicated above, have no merit for the purposes of this motion as indicated below.

**Employers Must Review Patient Medical Records to Identify and Produce Non-Privileged Information Responsive to the Secretary's Discovery Requests in Cases Involving Allegations of Workplace Violence**

This Court has already ruled in this case that "[t]he Secretary may utilize the evidence she obtains of other instances of workplace violence to show, for example, Respondent's knowledge of the cited hazard" and that knowledge of a hazard may be gained by an employer through prior accidents, prior injuries, employee complaints, and warnings communicated to the employer by an employee. *See* Order Granting Complainant's Motion to Compel and/or to Show Why Respondents Cannot Produce Video Surveillance Evidence to the Extent Indicated Herein, dated December 4, 2018.

This Court has also already laid out guidance in *N. Suffolk Mental Health Assoc.*, No. 11-2132, https://www.oshrc.gov/assets/1/6/11-2132.pdf, (April 18, 2012), as to the producibility of patient medical records in discovery in a case involving allegations of workplace violence. There this Court found that the patient medical records of a patient that was involved in a workplace violence incident were required to be reviewed by the employer to identify information or documents that were responsive to the Secretary's discovery requests. *Id.* at 10. The Court further agreed with the Secretary that certain actions by the patient, as opposed to his diagnosis or treatment, are not privileged; e.g. facts about any emotional distress leading to

[10] Respondents acknowledge that they are producing nine additional Employee Accident Reports they have found that pertain to the period through April 24, 2018 to the Secretary by December 14, 2018.

treatment are not protected by privilege.[11] *See Booker v. City of Boston*, 1999 WL 734644, at *1. "[C]linical impressions based on observations" or about how a patient interacts with others, as well as communications made in the course of investigations of suspected rules violations or criminal conduct or in disciplinary reports generally do not qualify for the privilege. *See U.S. v. Whitney*, CR. 05-40005-FDS, 2006 WL 2927531, at * 3 (D. Mass. Aug. 11, 2006). This Court ordered N. Suffolk Mental Health Assoc. to review its company files, files of its employees who observed the patient involved in the workplace violence incident at issue, and patient medical records and produce information and documents, without the redaction of the patient's name,[12] that pertain to the patient's actions that are not protected by any privilege.[13] These same principles apply to the case now before the Court.

**Risk Assessment Documentation, including High Risk Notification Alerts, One-to-One Designations, Root Cause Analysis, Debriefings, and Intake forms are Relevant, Not Beyond the Scope of Permissible Discovery or the Act, and Not Out of Proportion to this Case**

1. The requested documents are relevant and not beyond the scope of permissible discovery or the Act.

Respondents' objections to the production of the materials that are responsive to the document requests because they are irrelevant, beyond the scope of permissible discovery or the

[11] For example, the psychotherapist-patient privilege applies only to "communications" between the patient and his or her therapist, and the records of such communications. *See Booker v. City of Boston*, Nos. 97-CV-12534-MEL, 97-CV-12675-MEL, 1999 WL 734644, at *1 (D. Mass. Sept. 10, 1999).

[12] *See In re Zuniga*, 714 F.2d 632, 640 (6th Cir. 1983) ("the identity of a patient or the fact and time of his treatment does not fall within the scope of the psychotherapist - patient privilege."), *Richardson v. Sexual Assault/Spouse Abuse Res. Ctr., Inc.*, 764 F. Supp. 2d 736, 743 (the disclosure of an individual's receipt of services is not tantamount to a disclosure of confidential information). Here, Complainant has made clear that Respondents may redact personal identifying information (PII) from responsive documents.

[13] Respondent was also ordered by the Court to exclude any reference to confidential communications between the patient and the patient's doctor that were made in the course of diagnosis or treatment.

Act, and not proportional[14] to the needs of case are without merit. The Court has reviewed blank samples of a High Risk Notification Alert, Patient Observation/Rounds form, and Intake form, as examples of the types of documents sought by Complainant and finds that Risk Assessment documentation, including High Risk Notification Alerts, one-to-one designations, root cause analysis, debriefings, and intake forms are relevant to the matters at issue in this case and not beyond the scope of permissible discovery or the Act in cases involving workplace violence at hospitals involving hospital employees.

"Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense... Information within this scope of discovery need not be admissible in evidence to be discoverable." Fed. R. Civ. P. 26(b)(1). The Commission's parallel rule, found at 29 C.F.R. § 2200.52(b), similarly provides:

> The information or response sought through discovery may concern any matter that is not privileged and that is relevant to the subject matter involved in the pending case. It is not ground for objection that the information or response sought will be inadmissible at the hearing, if the information or response appears reasonably calculated to lead to discover of admissible evidence, regardless of which party has the burden of proof.

The Supreme Court has construed the language, "relevant to the subject matter in the pending action," as being sufficiently broad "to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 350 (1978) (citing *Hickman v. Taylor*, 329 U.S. 495, 501 (1947)).

2. The requested documents are not out of proportion to this case.

[14] An opposing party is not permitted "to refuse discovery simply by making a boilerplate objection that it is not proportional." Fed. R. Civ. P. 26(b)(1) advisory committee's note to 2015 amendment.

Discovery must be proportional to the needs of the case, considering the importance of the issues at stake, the amount in controversy, the parties' resources, the importance to discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Fed. R. Civ. P. 26 (B)(1); *Oxbow Carbon & Minerals LLC v. Union Pac. R.R.*, 322 F.R.D. 1, 6 (no one factor outweighs others, and proportionality determination must be made on case-by-case basis); 6 James WM Moore et al, Moore's Federal Practice, ¶ 26.42[2] (3d ed. 2018). After considering these factors, the Court finds that the requested documents are also not out of proportion to the needs of this case as only a relatively small universe of specifically identified patient medical files, estimated to be about fifty,[15] need to be reviewed by Respondents for responsive documents.

**The Temporal Scope of Discovery Extends Through to the Date of the Document Discovery Requests**

Complainant seeks all responsive documents through "to the present", a phrase that he does not define. Some medical records that post-date the issuance of an OSHA citation may be found relevant. Because of the highly factual nature of many of OSHA cases, varying OSHA citations, and the differing judge's views of relevancy, Occupational Safety and Health Review Commission courts may reach different results about the temporal scope of discovery; just as courts in other contexts have.[16] Often courts pick a reasonable amount of time or find that the

[15] Complainant's Motion to Compel asserts "that there were 38 instances of workplace violence between 2015 and 2017." (Motion to Compel at 7). His Reply asserts that there were "26 instances of workplace violence that occurred between February 2016 and November 2017, …." (Reply at 3).

[16] *See Travares v. Lawrence & Mem'l Hosp*., No. 3:11-CV-770, 2012 WL 4321961, at *11 (D. Conn. Sept. 20, 2012) (denying motion to narrow the time frame for discovery); *LeFave v. Symbios, Inc*., No. CIV.A. 99-Z-1217, 2000 WL 1644154, at *2 (D. Colo. Apr. 14, 2000) (finding defendants were entitled to discovery of plaintiff's medical records for any condition for a period of five years prior to the events giving rise to the complaint and continuing through to the present time); *Hicks v. Arthur*, 159 F.R.D. 468, 471 (E.D. Pa. 1995) (four months prior to

time frame sought by a party to be unreasonable. *See EEOC v. APS, Inc., et al*., Civil Action No. 10-3095, 2012 WL 1656738, at *23 (D. N. J. May 10, 2012) (a judge's determination of the precise temporal discovery boundaries is within the court's discretion and depends upon context of each particular action.). "Courts have construed this rule liberally, creating a broad vista for discovery." *Id*. Courts have been cautioned not to impose unnecessary limitations on discovery. *Id.*

Complainant seeks responsive documents through "to the present." Respondents wish to curtail production of responsive documents beyond April 24, 2018, the date OSHA closed its inspection and issued its citation. Complainant argues that he is entitled to information showing whether acts of workplace violence were ongoing beyond April 24, 2018 to any extent Respondents: a) deny there is a condition or activity that presents a hazard to its employees, b) deny recognition of the hazard of workplace violence, and/or c) put any abatement in place. The Secretary has demonstrated that documents responsive to his document requests that came into being beyond April 24, 2018 may be relevant to this case.

Based upon the Court's analysis of the record before it, the Court finds that the time frame sought for the production of materials that are responsive to Document Requests Nos. 5 through 8, 11 and 12 from February 3, 2016 through "to the present" is, however, somewhat ambiguous and a bit too long if extending beyond August 9, 2018. The Secretary shall not be able to seek documents that are otherwise responsive to his document requests, including video surveillances, that came into existence beyond August 9, 2018; the date of his document

---

and two years after tenure of plaintiffs was a reasonable time frame in which to conduct discovery); *but see Anderson v. Abercrombie & Fitch Stores, Inc.*, No. 06cv991-WQH, 2007 WL 1994059, at *4 (S.D. Cal. July 2, 2007)

requests.[17]

**Respondents Shall Produce a Privilege Log that Will Enable Complainant to Adequately Assess, Along with Sworn Affidavits and/or Deposition Testimony to Support, their Claims of Privilege**

In 2005, Congress enacted the PSQIA, Pub. L. No. 109–41, 119 Stat. 424 (codified at 42 U.S.C. § 299b–21 *et seq.*). The PSQIA created a system of voluntary, confidential, and nonpunitive sharing of health care errors to facilitate and promote strategies to improve patient safety and the quality of health care. PSQIA, 73 Fed. Reg. 70,732 (Nov. 21, 2008). To facilitate the sharing of medical errors, Congress provided for the creation of patient safety organizations (PSO), private or public entities certified by the United States Department of Health and Human Services (HHS), to receive information about medical errors, analyze the errors, and recommend strategies to health care providers to prevent such errors in the future. 42 U.S.C. §§ 299b–21(4), 299b–24 (2012); S. Rep. No. 108–196, at 5 (2003); H.R. Rep. No. 109–197, at 9 (2005); *Jones v. Teruel et al.*, 2018 IL. App (1st) 170891, ¶ 31 (June 28, 2018).

Congress did not intend the PSQIA to provide absolute protection for all documents related to patient safety. *See* H.R. Rep. No. 109–197, at 9 (2005) (explaining that the disclosure protections only apply to "certain categories of documents and communications"). The PSQIA contains a "Clarification" to the definition of patient safety work product and lists two exceptions. 42 U.S.C. § 299b–21(7)(B) (2012); *Jones v. Teruel et al.*, 2018 IL. App (1st) 170891, at ¶ 39.

---

(concluding that requested records documenting plaintiff's medical treatment while employed by defendant were not relevant to the emotional distress plaintiff may have experienced after his termination.).

[17] This Order extends the date from April 24, 2018 now through August 9, 2018 that Respondents must produce surveillance videos that are responsive to Document Request No. 9 (sic). *See* this Order Granting Motion to Compel at p. 20, herein.

Under the first exception, "[i]nformation described in [the general definition of patient safety work product] does not include a patient's medical record, billing and discharge information, or any other original patient or provider record." 42 U.S.C. § 299b-21(7)(B)(i). There may also "be documents or communications that are part of traditional health care operations or record keeping" such as "medical records, billing records, guidance on procedures, physician notes, hospital policies, logs of operations, records of drug deliveries, and primary information at the time of events" that are not patient safety work product. H.R. Rep. No. 109–197, at 14 (2005). While "these original documents and ordinary information about health care operations may be relevant to a patient safety evaluation system," they "are not themselves patient safety work product." *Id.*; *see also* Patient Safety Act Guidance (PSAG), 81 Fed. Reg. 32,655, 32,658 (May 24, 2016) (stating that "original provider records" that are not patient safety work product include "[o]riginal records (*e.g.*, reports or documents) that are required of a provider to meet any Federal, state, or local public health or health oversight requirement regardless of whether such records are maintained inside or outside of the provider's [patient safety evaluation system]"). *Jones v. Teruel et al*., 2018 IL. App (1st) 170891, at ¶ 40.

Under the second exception, "[i]nformation described in [the general definition of patient safety work product] does not include information that is collected, maintained, or developed separately, or exists separately, from a patient safety evaluation system. Such separate information or a copy thereof reported to a patient safety organization shall not by reason of its reporting be considered patient safety work product." 42 U.S.C. § 299b–21(7)(B)(ii) (2012). Information created for "purposes other than reporting" to a PSO is also not considered patient safety work product. PSAG, 81 Fed. Reg. 32,655, 32,656 (May 24, 2016); *Jones v. Teruel et al*.,

2018 IL. App (1st) 170891, at ¶ 41.

Although there could be instances where documents fit both exceptions, the crux of the exceptions are that, where health care providers create records for more than one purpose, the records themselves do not qualify as patient safety work product because the intent of the PSQIA "is to protect the additional information created through voluntary patient safety activities, not to protect records created through providers' mandatory information collection activities." PSAG, 81 Fed. Reg. 32,655, 32,655 (May 24, 2016). Where other laws require the reporting of health care information, the burden is on providers to assemble separate and original information for purposes of meeting those reporting requirements and then create additional information as part of their voluntary participation under the PSQIA. *See* PSQIA, 73 Fed. Reg. 70,732, 70,743; *see also Univ. of Ky. v. Bunnell*, 532 S.W.3d 658, 668 (Ky. Ct. App. 2017) ("When a provider participates in this voluntary program, the data it generates for that program must be superfluous to the documentation necessary for patient care or regulatory compliance."). Health care providers should not commingle information necessary to satisfy mandatory record keeping or reporting obligations with information used in their voluntary participation under the PSQIA. *See* PSAG, 81 Fed. Reg. 32,655, 32,659 (May 24, 2016) (recommending that a provider maintain at least two separate systems, one where it maintains records necessary to satisfy external obligations and the other, its patient safety evaluation system, where it maintains patient safety work product); *Jones v. Teruel et al*., 2018 IL. App (1st) 170891, at ¶ 42.

Respondents assert that Document Requests Nos. 7 (root cause analysis) and 8 (debriefings) relate to requests for information contained within the privileged information complied (sic) [i.e. patient safety work product] by Respondent Suncoast pursuant to the

[PSQIA]." Citing to 42 U.S.C. § 299b-22(a), they state:

> The statute provides, in relevant part: Notwithstanding any other provision of Federal, State, or local law, . . . patient safety work product shall be privileged and shall not be (1) subject to a Federal, State, or local civil, criminal, or administrative subpoena or order, including in a Federal, State, or local civil or administrative disciplinary proceeding against a provider; [or] (2) Subject to discovery in connection with a Federal, State, or local civil, criminal, or administrative proceeding, including in a Federal, State, or local civil or administrative disciplinary proceeding against a provider.

Respondents further state:

> The PSQIA defines "patient safety work product," in relevant part, as any data, reports, records, memoranda, analyses (such as root cause analyses), or written or oral statements which are assembled or developed by a provider for reporting to a patient safety organization [PSO] and are reported to a [PSO]; . . .and which could result in improved patient safety, healthcare quality, or healthcare outcomes; or (ii) which identify or constitute the deliberations or analysis of, or identify the fact of reporting pursuant to, a patient safety evaluation system." *Id.*

Respondents assert that Respondent UHS of DE has a PSO component and is "listed as a PSO under the Agency for Healthcare Research and Quality [AHRQ], and (sic) agency within the Department of Health and Human Services."[18] Respondents state that Suncoast utilizes the UHS-DE PSO for reporting of root cause analyses and debriefings pursuant to a system called MIDAS. They allege that incident reporting, including, but not limited to root cause analyses and debriefings, are contained within MIDAS.[19] They further allege that Respondent Suncoast reports incidents into the MIDAS system for the purpose of reporting to the PSO managed by UHS of DE.

The Secretary argues that Respondents have failed to meet their burden of proving that

[18] The Court notes that AHRQ has an entry at the cited website for PsychSafe (Component PSO of UHS of Delaware, Inc. Behavioral Health Division).

[19] Respondents state that the purpose of MIDAS is to protect self-critical analyses from being used in a variety of proceedings, such as this one.

they are entitled to any protection afforded by PSQIA.[20] He asserts that Respondents have waived any such protection by failing to provide a privilege log.[21] Fed. R. Civ. P. 26(b)(5)(A).[22] By failing to produce a privilege log, the Secretary asserts that Respondents have failed to: 1) identify the name of the alleged PSO to which they allegedly submitted the alleged documents, 2) prove that the documents requested were actually submitted to the PSO and 3) show that the documents were created for the sole purpose of submission to the PSO.[23]

Complainant further argues that PSQIA emphasizes that documents not created for the sole purpose of submission to a PSO are not covered by the patient safety work product privilege. 42 U.S.C. § 299b-21(7)(B); *see also Dunn v. Dunn*, 163 F. Supp. 3d 1196, 1210 (M.D. Ala. 2016) (the "statute itself 'stress[es]' that information that is not developed for the

[20] *See Jones v. Teruel et al*., 2018 IL. App (1st) 170891, at ¶ 26 ("A party may meet this burden by submitting the allegedly privileged materials for an *in camera* review or by submitting affidavits setting forth facts sufficient to establish the applicability of the privilege to the particular documents being withheld); *Maple Wood Partners, L.P. v. Indian Harbor Ins. Co*., 295 F.R.D. 550, 620 (S.D. Fla. 2013) ("The burden rests on the party advocating for the protection. Fed. R. Civ. P. 26(b)(5)(A)"); *Bridgewater v. Carnival Corp*., 286 F.R.D. 636 (S.D. Fla. 2011) (party claiming protection must provide underlying facts demonstrating existence of the privilege).

[21] *See Maple Wood Partners, L.P v. Indian Harbor Ins. Co.,* 295 F.R.D. at 620 ("Courts have rejected blanket claims of work-product immunity and have found that the protection was waived when a party failed to provide sufficient detail as to the subject of memoranda or their authors."). The Secretary further argues that Respondents "failed to raise patient-physician privilege and/or the Health Insurance Portability and Accountability Act of 1996 in the Response [to the discovery requests] and thus waived those alleged privileges."

[22] Fed. R. Civ. P. 26(b)(5)(A) states in relevant part:

> (5) Claiming Privilege …
>
> > (A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged, …the party must:
> > (i) expressly make the claim; and
> > (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed – and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

[23] Complainant argues that a privilege log would require Respondents to identify each root cause analysis and debriefing requested by date of creation, the name of the individual creating it, and some proof that the they submitted the documents to the PSO. *See Quimbey by Faure v. Cmty. Health Sys. Prof'l Servs. Corp.,* 222 F. Supp. 3d 1038, 1043-44 (D.N.M. 2016) (documents allowed to be protected under PSQIA after an *in-camera* review and submission of privilege log identifying document as "CHS PSO, LLC Confidential patient safety work product document.").

purpose of reporting to a patient safety organization does not become privileged merely because it is in fact reported to one"); *Johnson v. Cook Cty*., No. 15 C 741, 2015 WL 5144365, at *6 (N.D. Ill. Aug. 31, 2015) ("The text of the PSQIA manifests the drafters' intent by emphasizing that only information specifically made or gathered for or by a patient safety organization ("PSO") or a patient safety evaluation system is patient safety work product. 42 U.S.C. § 299b-21(7)(A).").[24]

Complainant asserts that the risk assessment documentation, one to one designations, intake documentation, and injury summaries for employees, were not created for the purpose of submission to a PSO.[25] Thus, the Secretary argues they are not protected by the patient safety work product privilege. In addition, Complainant argues that Respondents have failed to show that root cause analyses and debriefings for employee injuries caused by patients would be submitted to a PSO. Complainant asserts Respondents acknowledged in their November 2017 letter to OSHA that they created and reviewed the debriefings and root cause analyses as part of their workplace violence program, without mention that these documents were created for, or submitted to, a PSO.

Privileges are created to protect interests outside the truth-seeking process and need to be strictly construed as exceptions to the general duty to disclose. *Jones v. Teruel et al*., 2018 IL. App (1st) 170891, at ¶ 26. The Court agrees with the Secretary that without an informative

[24] *See also Charles v. So. Baptist Hosp. of Fl., Inc*., 178 So. 3d 102, 110 (2015), *cert. denied*, 138 S. Ct. 129 (Oct. 2, 2017) (A document is protected from disclosure by the patient safety work product privilege if it is placed into a patient safety evaluation (PSE) system for reporting to a PSO and does not exist outside of the PSE system.).
[25] The Secretary also argues that the risk assessment documentation, one to one designations, and intake documentation, do not fall under the definition of "patient medical information" as set for in the definition section of PSQIA. *See* 42 U.S.C. 299b-21 (7)(B)(i). Consequently, he says these three types of documents are not protected from discovery. 42 U.S.C. 299b-21 (7)(B)(iii )("nothing in this part shall be construed to limit the discovery of or admissibility of information described in this subparagraph in a criminal, civil, or administrative proceeding").

Privilege Log he is unable to adequately assess any claim of privilege by Respondents, including privileges pertaining to PSQIA (including patient safety work product privilege), HIPAA, patient-physician, psychotherapist-patient, and work product. Respondents should have provided such a privilege log with all necessary information to the Secretary months ago when responsive documents were first withheld.

## III. CONCLUSION

For the reasons stated above, the Court finds that Complainant's Motion to Compel has merit to the extent indicated herein.

## IV. ORDER

WHEREFORE IT IS ORDERED that Complainant's Motion to Compel is GRANTED to the extent indicated herein;

IT IS FURTHER ORDERED that Respondents shall produce all responsive documents[26] to Document Request Nos. 5 through 8 and 11 through 12 (excluding any privileged material) on or before December 24, 2018;[27]

IT IS FURTHER ORDERED that Respondents shall produce all injury summaries not protected by any privilege (with redactions as necessary and appropriate) that are responsive to Document Request No. 12 on or before December 24, 2018;

IT IS FURTHER ORDERED that where PII is redacted from a patient medical record, Respondents shall use numbers to indicate patient identities to allow Complainant to pair documentation with the relevant acts of workplace violence;

[26] At their option, Respondents may, instead of delivering all responsive documents to Complainant's counsel, make all responsive documents available to the Secretary for his inspection and copying, by the same date.
[27] Respondent may redact PII from any responsive documents.

IT IS FURTHER ORDERED that Respondents shall submit by December 24, 2018 to the Secretary a PRIVILEGE LOG identifying each and every withheld document, including documents with redactions, and stating the author(s), all addressee(s) and recipients, date created, brief description of subject matter, number of pages withheld (including bates numbers of pages withheld), nature of document, *e.g.* letter or email, basis of privilege asserted, *e.g.* psychotherapist-patient, and the identity of all persons to whom the original or any copies of the document were provided;

IT IS FURTHER ORDERED that the parties shall meet and confer, and submit for the Court's consideration by January 7, 2019, a proposed protective order to address any patient confidentiality concerns that may be mutually resolved by a protective order;

IT IS FURTHER ORDERED that the parties shall meet and confer by January 9, 2019 and attempt to resolve any disagreements Complainant may have as to the appropriateness of Respondents asserting privilege(s) with regard to any risk assessment documentation (including High Risk Notification Alerts), one-to-one designations, root cause analyses, debriefings, patient intake forms, and injury summaries that are otherwise responsive to Document Requests 5-9 and 11 through 12, and Complainant shall advise the Court by January 16, 2019 of the extent to which Complainant continues to take the position that Respondents assertion of privilege protections with regard to any of these documents is inappropriate; including the basis for any such position;

IT IS FURTHER ORDERED that to any extent Complainant continues to take the position that Respondents privilege assertions are inappropriate, the parties shall appear at an evidentiary hearing in Tampa, Florida (at a precise courtroom location to be determined at a later

date) commencing 9:00 a.m., E.S.T., on Thursday, January 24, 2019, where witness testimony supporting or opposing the assertion of any such privileges and an *in-camera* review of any unresolved documents shall occur; and

IT IS FURTHER ORDERED that Respondents shall by December 24, 2018 produce in a supplemental response to Document Request No. 9 (sic) all video surveillances relating to workplace violence incidents that occurred on or after April 24, 2018 through on or before August 9, 2018; and identify any such video footage that was destroyed on or after October 25, 2017 and fully explain the circumstances of any such destruction, including identifying who ordered or approved of the destruction and stating why, when and how the video footage was destroyed.

SO ORDERED.

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

Dated: December 14, 2018
Washington, D.C.