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

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>UHS OF DENVER, INC., d/b/a HIGHLANDS BEHAVIORAL HEALTH SYSTEM,<br><br>Respondent. | OSHRC Docket No. 19-0550 |

ON BRIEFS:

Amy S. Tryon, Senior Attorney; Heather R. Phillips, Counsel for Appellate Litigation; Edmund C. Baird, Associate Solicitor of Labor for Occupational Safety and Health; Seema Nanda, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

Melanie L. Paul, Esq., Dion Y. Kohler, Esq.; Jackson Lewis P.C., Atlanta, GA
For the Respondent

## DECISION AND REMAND

Before: ATTWOOD, Chairman; LAIHOW, Commissioner.

BY THE COMMISSION:

The Occupational Safety and Health Administration cited UHS of Denver, Inc.—the operator of a psychiatric hospital in Littleton, Colorado—for a serious violation of the Occupational Safety and Health Act's general duty clause, 29 U.S.C. § 654(a)(1), based on the company's alleged failure to protect its employees from acts of violence by patients.[1] Former Administrative Law Judge Peggy S. Ball affirmed the citation and assessed the proposed penalty

[1] 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 or serious physical harm to his employees." 29 U.S.C. § 654(a)(1).

of $11,934.[2] In so doing, the judge found that during discovery, UHS failed to produce certain documents and make its chief financial officer (CFO) available for a deposition as requested by the Secretary. As a result of that failure, the judge drew an adverse inference against the company and treated the economic feasibility of the Secretary's proposed abatement measures as established. *See Baroid Div. of NL Indus., Inc. v. OSHRC*, 660 F.2d 439, 447 (10th Cir. 1981) ("[T]he Secretary has . . . [the] burden to show that a feasible [abatement] method exists[,] . . . [which] means economically and technologically capable of being done."). On review, UHS challenges the propriety of this inference.

For the reasons that follow, we find the judge erred in drawing the adverse inference, and we therefore set aside her decision in this regard and remand the case to the Chief Judge for reassignment to another judge to determine whether the record otherwise establishes economic feasibility.

## BACKGROUND

OSHA conducted an inspection of UHS's Littleton facility after receiving an employee complaint about workplace violence. In the citation, as amended, the Secretary alleges that hospital "employees were exposed to physical threats and assaults by patients" and lists ten proposed abatement measures.[3] Prior to the hearing, the parties filed joint stipulations in which UHS conceded three of the four elements required to prove a general duty clause violation.[4] The

[2] Judge Ball retired from the Commission shortly after issuing her decision.

[3] The Secretary's proposed abatement measures are: (1) reconfiguring nurse stations to prevent patients from entering and using items as weapons; (2) providing communication devices to all staff members; (3) continuously monitoring security cameras; (4) developing "one written comprehensive" workplace violence prevention program; (5) designating qualified staff to monitor for potential patient aggression and respond to violent events; (6) communicating workplace violence incidents to all employees; (7) training staff who may come into contact with patients; (8) investigating and debriefing affected staff after each workplace violence incident; (9) "[e]nsur[ing] safe staffing levels across all shifts to ensure adequate staff coverage for behavioral emergencies"; and (10) "[e]valuat[ing] and . . . replac[ing] or redesign[ing] furniture to assure that it cannot be used as a weapon."

[4] "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." *Integra Health Mgmt., Inc.*, 27 BNA OSHC 1838, 1841 (No. 13-1124, 2019). The parties stipulated that UHS's employees

only remaining issue before the judge was whether the Secretary had established the feasibility of the proposed abatement measures, a burden that includes establishing their economic feasibility. *See Waldon Healthcare Ctr.*, 16 BNA OSHC 1052, 1063 (No. 89-2804, 1993) (consolidated) ("One of the criteria for determining whether a proposed measure of abatement is feasible is whether [it] is cost prohibitive," because "an employer is not required to adopt measures that would threaten its economic viability.") (citations omitted).

Following a fourteen-day hearing, the Secretary, in his post-hearing brief, asserted that UHS "provided no evidence that it could not afford to implement [the proposed abatement] measures," *but see id.* at 1064 (burden of proving economic feasibility rests with the Secretary), and that several of the proposed measures are, in any event, economically feasible because they involve minimal costs. In addition, the Secretary claimed for the first time in his post-hearing brief that he "was not able to perform any economic feasibility analyses because [UHS] refused to produce financial information" in discovery. In particular, the Secretary asserted that he had requested, but UHS did not produce, "copies of annual budgets and strategic plans related to the worksite," nor did the company make its CFO available for a requested deposition. The Secretary, therefore, asked that the judge draw "an adverse inference . . . with respect to economic feasibility based on [UHS's] failure to produce or introduce financial information," and reject "any claim by [UHS] that the abatement measures are not economically feasible." The judge summarily granted this request in her decision without analyzing whether the Secretary had otherwise established economic feasibility.[5]

## DISCUSSION

The Commission has stated that "when one party has evidence but does not present it, it is reasonable to draw a negative or adverse inference against that party, *i.e.*, that the evidence would

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were exposed to the hazard of workplace violence, that the hazard was recognized by UHS and its industry, and that injuries from patient violence could result in serious harm.

[5] UHS contends on review that the Secretary never made any economic feasibility arguments before the judge, apart from the requested adverse inference. But, as noted above, the Secretary did in fact assert that some proposed abatement measures are economically feasible because they involve minimal costs. In any event, whether the record establishes a violation is typically not an issue that can be waived. *But cf. Mansfield Indus., Inc.*, No. 17-1214, 2020 WL 8871368, at *3 (OSHRC, Dec. 31, 2020) (affirmative defense of preemption waived where employer "failed to include [it] in its answer and did not raise the argument until its post-hearing brief"); *CMH Co.*, 9 BNA OSHC 1048, 1055 n.12 (No. 78-5954, 1980) (argument regarding exclusion of witness testimony waived where employer failed to object at hearing).

not help that party's case." *Capeway Roofing Sys., Inc.*, 20 BNA OSHC 1331, 1343 (No. 00-1986, 2003) (citations omitted), *aff'd*, 391 F.3d 56 (1st Cir. 2004). The Commission has also stated that "any deficiencies in [an employer's] response [to interrogatories] should be taken as establishing that there was no such evidence, not that the Secretary failed to carry [his] burden." *N. Landing Line Constr. Co.*, 19 BNA OSHC 1465, 1473 (No. 96-0721, 2001). Relying on these two cases, the judge found that the discovery requested by the Secretary here would "presumably" have disclosed UHS's financial condition and allowed the Secretary to perform an economic feasibility analysis, and that "the lack of production on [UHS's] part would show the proposed abatements were not infeasible."

On review, UHS argues that the inference drawn by the judge was erroneous because it amounted to a discovery sanction imposed without the Secretary having ever moved to compel production of the information being sought, without UHS having an opportunity to respond, and without the judge having ordered any such production. In response, the Secretary asserts that it was "appropriate [for the judge] here to infer that if any documents supporting [UHS's] claim of economic infeasibility existed, they would have been produced, and that instead, the withheld discovery material would have demonstrated the economic feasibility of the Secretary's proposed abatement."

We agree with the company that the judge erred in drawing an adverse inference. Commission Rule 52(f) specifically allows a judge to issue the following sanctions, among others, for a party's failure to comply with an order compelling discovery: (1) "[a]n order that designated facts shall be taken to be established for purposes of the case in accordance with the claim of the party obtaining that order"; (2) "[a]n order refusing to permit the disobedient party to support or to oppose designated claims or defenses"; and (3) "[a]n order dismissing the action or proceeding or any part of the action or proceeding or rendering a judgment by default against the disobedient party." 29 C.F.R. 2200.52(f)(2)(i), (ii), (iv). Rule 52 makes clear, however, that any decision to impose a discovery sanction is appropriate only after a "party . . . file[s] a motion conforming to [Commission Rule 40] . . . when another party refuses or obstructs discovery," and after the judge "afford[s] an opportunity [for the non-moving party] to show cause why the order [compelling discovery] should not be entered." 29 C.F.R. § 2200.52(f)(1)-(2).

Here, we find that the Secretary's request—that economic feasibility be taken as established due to UHS's alleged failure to produce the requested information—was in fact a

remedy in line with those specified in Commission Rule 52(f) and thus should have been handled during discovery. Specifically, the Secretary should have filed a separate, written motion seeking to compel production of the discovery he sought and requesting a sanction in the event of UHS's noncompliance. 29 C.F.R. § 2200.52(f)(2); *see also* Commission Rule 40(a), 29 C.F.R. § 2200.40(a) ("A motion shall not be included in another pleading or document, such as a brief or petition for discretionary review, but shall be made in a separate document."). This would have provided UHS with an opportunity to respond and the judge with an opportunity to inquire into the matter after hearing from both parties. *See, e.g., Stone & Webster Constr., Inc.*, 23 BNA OSHC 1939, 1943 (No. 10-0130, 2012) (consolidated) (to impose sanction such as dismissal, judge must find "contumacious conduct by the noncomplying party, prejudice to the opposing party, or a pattern of disregard for Commission proceedings"). The judge would then have been able to consider whether issuing an order compelling UHS to comply was warranted. None of these necessary steps were followed here.

As noted, the Secretary asked in his third set of document requests that UHS "produce copies of annual budgets and strategic plans related to the worksite for October 1, 2017, to the present." UHS responded that this request was "overbroad, unduly burdensome, and not relevant to any issue in controversy and not proportional to the needs of this case," and improperly sought "highly sensitive and proprietary information without demonstrating a sufficient justification or need for such information." The Secretary's only response, at that point, was to move to compel production of certain documents sought in his first and second sets of requests, and to compel production of video recordings related to incidents of patient violence sought in his third set of requests—he made no such motion for the specific documents he now claims were central to conducting an economic feasibility analysis. Likewise, there is nothing in the record showing the Secretary ever filed a motion to have the CFO deposed. *See* Commission Rule 56(a), 29 C.F.R. § 2200.56(a) ("Depositions . . . shall be allowed only by agreement of all the parties or on order of the Commission or the Judge following the filing of a motion of a party stating good and just reasons.").

Notably, it was not until his post-hearing brief that the Secretary first raised any of these issues and requested the adverse inference.[6] As such, the judge never examined whether UHS had any annual budgets or strategic reports, or what any such documents or a deposition of the company's CFO would have revealed about the economic feasibility of the Secretary's proposed abatement. Accordingly, we find that treating economic feasibility as established was not a reasonable inference for the judge to draw from the facts in the record—rather, it was a discovery sanction imposed outside the discovery process and without following the proper procedure under Commission rules.

Moreover, the uncertainty surrounding the contents and significance of the Secretary's sought-after discovery distinguishes this case from the cases upon which the Secretary relies for requesting the inference and upon which the judge relied in granting that request. In *Capeway Roofing*, the Secretary, seeking to show the cited employer had engaged in work on a roof without fall protection, presented testimony from an OSHA compliance officer that the employer's foreman stated during the inspection that such work had been done the previous day. 20 BNA OSHC at 1342. The Commission concluded that the employer's "failure to present testimony from either of the two supervisory employees who were present during the inspection suggests that neither of them would have been able to contradict the [compliance officer's] testimony." *Id.* at 1343. In *North Landing Line*, the Secretary sought to establish the inadequacy of the cited employer's safety program, such that a supervisor's violative conduct—failure to stay 28 inches away from an energized part—was foreseeable and could be imputed to the employer. 19 BNA OSHC at 1473. The Secretary relied on a statement from the employer's president to an OSHA compliance officer that there was no company policy regarding minimum distances to energized parts, and that it was up to the supervisor to determine a safe distance. *Id.* In addition, during discovery, the Secretary had served the employer with interrogatories, seeking evidence of its safety training and enforcement, but received "scant" information in response—a letter generally describing the safety program, which required work areas to be 5 feet away from energized parts. *Id.* Thus, the Commission found that "[b]ecause the only specific distance rule that [the employer] provided in meeting its discovery obligations was the five-foot rule, and [the employer] did not

[6] Given that the Secretary stopped pursuing the requested annual budgets, strategic plans, and CFO deposition through the appropriate mechanisms, it appears reasonable for UHS to have concluded that these discovery issues were closed.

rebut [its president's] statements," the Secretary had established an inadequate safety program. *Id.* at 1474.

Neither of these inferences involved a discovery dispute, and each was limited in scope and eminently reasonable under the circumstances. In *Capeway Roofing*, the facts underlying the adverse inference arose at the hearing, where the employer could have called one or both of its supervisors—one of them was sitting in the courtroom—as a witness to rebut the compliance officer's testimony. *See* 20 BNA OSHC at 1342-43. In *North Landing Line*, the employer had in fact responded to the Secretary's interrogatories but provided little information and nothing to show the company had a work rule meeting the OSHA standard. *See* 19 BNA OSHC at 1474. In each case, therefore, it was reasonable to infer that the employer's failure to present such testimony or evidence when it had the opportunity to do so meant that it could not rebut the Secretary's proof. *Cf. Fluor Daniel*, 19 BNA OSHC 1529, 1531 (No. 96-1729, 2001) (consolidated) ("Although the Commission may draw reasonable inferences from the evidence, we do not think that the evidence in this case supports such an inference."), *aff'd*, 295 F.3d 1232 (11th Cir. 2002).

By contrast, the judge's inference here required speculation—namely, that the information the Secretary sought in discovery, of which the judge knew very little, would have on its own shown the proposed abatement measures to be economically feasible.[7] As noted, the judge: (1) "presum[ed]" that the requested financial information "would disclose [UHS's] financial condition"; (2) found, based on that presumption, that the information would, "in turn, permit [the Secretary] to perform an analysis of whether its proposed abatements would be economically feasible"; and (3) inferred that "the lack of production on [UHS's] part would show the proposed abatements were not infeasible." Each step in the judge's analysis required a leap in logic that, taken together, render her inference unreasonable. *See Pioneer Centres Holding Co. Employee Stock Ownership Plan & Trust v. Alerus Financial, N.A.*, 858 F.3d 1324, 1334 (10th Cir. 2017)

[7] It is unclear whether the Secretary's third request for production of documents, seeking "copies of annual budgets and strategic plans," was in fact asking for financial documentation relevant to an economic feasibility analysis. As UHS notes, "strategic plans" was not defined in the document request and is a vague term that does not necessarily refer to financial documents, let alone those sufficient to conduct an economic feasibility analysis. As for "copies of annual budgets," the company asserts that budgets simply estimate future expenditures and revenues, and that to determine the economic impact of further expenditures, other documentation like balance sheets and income and cash flow statements would be necessary. These uncertainties further demonstrate the speculation underlying the judge's inference.

("[A]n inference is unreasonable if it requires a degree of speculation and conjecture that renders [the factfinder's] findings a guess or mere possibility.") (citation and internal quotation marks omitted); *United States v. Jones*, 998 F.2d 883, 886 (10th Cir. 1993) ("While multiple inferences are not per se impermissible, courts have long been cautious about accepting conclusions that were arrived at "by piling inference upon inference.' ") (quoting *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943)). Indeed, the judge's observation that the information sought by the Secretary would merely "permit" him "to perform" an economic feasibility analysis is a tacit acknowledgment that the information would not necessarily have proven the measures were economically feasible.

In short, we find that the adverse inference drawn by the judge here goes beyond the inferences drawn by the Commission in *Capeway Roofing* and *North Landing Line*. In effect, the judge imposed a discovery sanction on UHS in the absence of a motion to compel production of the requested documents or to conduct the deposition the Secretary purportedly sought, which would have given UHS an opportunity to respond and the judge an opportunity to examine the matter, make necessary findings, and issue an appropriate order. *See* Commission Rule 52(f), 29 C.F.R. § 2200.52(f); Commission Rule 40, 29 C.F.R. § 2200.40. Because none of this occurred, we set aside her decision in this regard.[8]

The Secretary asks on review that we nevertheless affirm the citation, claiming that the record shows the economic feasibility of at least some of his proposed abatement measures. But the judge did not address any of the record evidence relating to economic feasibility in the first instance, and in the briefing notice, the parties were asked to address only the propriety of the inference and "no other issues." *See Bay State Refining Co.*, 15 BNA OSHC 1471, 1476 (No. 88-1731, 1992) ("[T]he Commission . . . has discretion to limit the scope of its review."); *County Concrete Corp.*, 16 BNA OSHC 1952, 1953 n.4 (No. 93-1201, 1994) ("The Commission . . . ordinarily does not decide issues that are not directed for review."). Accordingly, we remand this

[8] On review, UHS filed a motion to reopen and supplement the record with a declaration from its counsel and three emails purportedly showing that the Secretary: (1) never moved to compel, and never took issue with, UHS's responses and objections to his document request at any time before or during trial; and (2) voluntarily withdrew his request to depose the CFO. Given that we find the inference drawn by the judge erroneous, any facts that would have been relevant to a motion to compel—what UHS's motion essentially seeks to introduce—are now irrelevant. UHS's motion is therefore denied as moot.

case to the Chief Judge for reassignment to allow a judge to assess the record as it stands, make any necessary factual findings, and decide whether the Secretary has proven that the proposed abatement measures are economically feasible. *See MasTec N. Am., Inc.*, 20 BNA OSHC 1900, 1904 (No. 99-0252, 2004) (rejecting dissent's assertion "that the Commission should decide without remand whether the general duty clause was violated here," and remanding because "[t]he better course is for the judge, who did not consider the merits of the Secretary's alternative theory under the general duty clause, to decide these questions in the first instance, particularly where the issues were not raised in the Commission's briefing notice") (citation omitted).

SO ORDERED.

/s/
Cynthia L. Attwood
Chairman

/s/
Amanda Wood Laihow
Commissioner

Dated: December 8, 2022