



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

SECRETARY OF LABOR,

Complainant,

v.

UHS OF DELAWARE, INC., and
PREMIER BEHAVIORAL HEALTH
SOLUTIONS OF FLORIDA, INC., d/b/a
SUNCOAST BEHAVIORAL HEALTH
CENTER,

Respondents.

OSHRC Docket No. 18-0731

ON BRIEFS:

Anne R. Godoy, Attorney; Heather R. Phillips, Counsel for Appellate Litigation; Edmund C. Baird, Associate Solicitor of Labor for Occupational Safety and Health; Seema Nanda, Solicitor; U.S. Department of Labor, Washington, D.C.

For the Complainant

Eric J. Neiman, Esq.; Lewis, Brisbois, Bisgaard & Smith LLP, Portland, OR

For the Respondent, UHS of Delaware, Inc.

Dion Y. Kohler, Esq.; Jackson Lewis P.C., Atlanta, GA

For the Respondent, Premier Behavioral Health Solutions of Florida, Inc., d/b/a Suncoast Behavioral Health Center

DECISION

Before: ATTWOOD, Chairman and LAIHOW, Commissioner.

BY THE COMMISSION:

After receiving an employee complaint about workplace violence, the Occupational Safety and Health Administration conducted an inspection of Suncoast Behavioral Health Center, a 60-bed inpatient psychiatric hospital in Bradenton, Florida. OSHA subsequently issued a one-item repeat citation to Premier Behavioral Health Solutions of Florida, Inc., doing business as Suncoast

Behavioral Health Center (Suncoast), and the hospital’s management company, UHS of Delaware, Inc. (UHS-DE), alleging a violation of the Occupational Safety and Health Act’s general duty clause, 29 U.S.C. § 654(a)(1), for exposing employees at the hospital to “acts of workplace violence,” and proposing a penalty of \$71,137.¹

Administrative Law Judge Dennis L. Phillips affirmed the alleged violation, recharacterized it from repeat to serious, and assessed a penalty of \$12,934. The judge concluded that the two Respondents were independently liable for the violation and, alternatively, that they operated as a single employer under the Act. Both Respondents petitioned for review of the judge’s decision.² For the following reasons, we find that Respondents operated as a single employer and affirm the citation as serious.

BACKGROUND

Universal Health Services, Inc. (UHS, Inc.) is the owner and parent company of both Suncoast and UHS-DE.³ Pursuant to written management agreements drafted by UHS-DE’s legal department, UHS-DE is the management company for all of UHS, Inc.’s subsidiary behavioral health centers, including Suncoast. As the management company, UHS-DE provides oversight as well as a wide array of services to these centers. Much of this oversight is provided through each center’s “C-Suite” leadership—the chief executive officer (CEO), chief financial officer (CFO),

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).

² Of the issues raised in the petitions, the Commission requested briefing on the liability of Respondents, either independently or as a single employer, and the economic feasibility of the third and fourth abatement measures listed in the amended citation. *See* Commission Rule 92(a), 29 C.F.R. § 2200.92(a) (“The issues to be decided on review are within the discretion of the Commission.”); *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.”); *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.”). Neither party sought review of the judge’s recharacterization of the violation as serious or his penalty assessment.

³ The parties stipulated that “UHS-DE is a wholly owned subsidiary” of UHS, Inc., a corporation that has no employees of its own and operates as a “holding company” through its subsidiaries. The parties also stipulated that “Suncoast is a wholly owned subsidiary of Premier Behavioral Solutions, Inc., which is a wholly owned subsidiary of Psychiatric Solutions, Inc., which is a wholly owned subsidiary of UHS, Inc.” UHS-DE’s Chief Compliance Officer testified in a deposition that UHS, Inc. is the “ultimate parent company” of Suncoast, in that “[i]t indirectly owns all of the shares of Suncoast through other entities.”

and chief operating officer (COO)—which consists of UHS-DE employees who UHS-DE assigns to each center. It is undisputed that at the time of OSHA’s inspection, Suncoast’s CEO, CFO, and COO-in-training were employees of UHS-DE who worked onsite at the hospital.

Suncoast is divided into three patient care units—a youth unit, an adult unit for acute patients, and an adult unit for those with sensitivity disorders. When patients first arrive at the hospital, they are initially processed by intake specialists. During their stay, patients receive direct care from mental health technicians (MHTs), registered nurses (RNs), therapists, and psychiatrists. The duties of the MHTs, who are primarily responsible for ensuring the patients’ safety on the units, include checking on patients during rounds conducted every 5 to 15 minutes and continuously monitoring certain high-risk patients. RNs directly supervise the MHTs and are also responsible for providing nursing care that includes patient assessments and the administration of prescribed medications. Therapists conduct psychosocial assessments of the patients and provide group therapy, while psychiatrists conduct psychiatric evaluations, prescribe medications, issue restraint and seclusion orders, and lead teams that determine how to treat the patients.

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 eliminate or materially reduce the hazard.” *UHS of Westwood Pembroke, Inc.*, No. 17-0737, 2022 WL 774272, at *2 (OSHRC Mar. 3, 2022), *petition for review filed*, Docket No. 22-1845 (3d Cir. May 2, 2022). The Secretary must also establish that “the employer knew or, with the exercise of reasonable diligence, could have known of the hazardous condition.” *Id.*

The citation here alleges that in November 2017, employees working at Suncoast “were exposed to acts of workplace violence” that included “physical assaults in the form of punches, kicks, bites, scratches, pulling, and the use of objects as weapons by patients throughout the facility.” As described by the judge in his decision, patients at Suncoast have assaulted RNs, MHTs, intake specialists, and therapists on numerous occasions, resulting in serious injuries to employees. Neither Respondent disputes these findings or that they establish the existence of a workplace hazard. Respondents also do not dispute that the Secretary has proven both the hazard recognition and knowledge elements of his burden of proof, nor do they dispute the judge’s

conclusion that measures taken at the hospital were not effective in materially reducing the recognized workplace violence hazard.⁴ *U.S. Postal Serv.*, 21 BNA OSHC 1767, 1773-74 (No. 04-0316, 2006) (“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 employer to address the alleged hazard were inadequate. Where the Secretary fails to show any such inadequacy, a violation of the general duty clause has not been established.”).

In his amended citation, the Secretary proposes eight abatement measures, each of which the judge concluded would be feasible and effective. Based on our review of the record, including how the parties litigated the abatement element of the Secretary’s burden, we find that these measures were alleged “as a process-based approach to abate the cited [workplace violence] hazard.” *Westwood*, 2022 WL 774272, at *8 (recognizing that abatement measures alleged as parts of a process “aligns with the nature of workplace violence, which . . . arises in different contexts and conditions at [the cited psychiatric hospital], necessitating different abatement measures”).

On review, Respondents challenge only the economic feasibility of the third and fourth abatement measures proposed by the Secretary, both of which would require that additional hospital staff be hired for security purposes. Respondents do not dispute the judge’s findings concerning the other six proposed measures, which include implementation of a comprehensive workplace violence prevention program, reconfiguration of the nurses’ workstations, revising intake procedures, creating a law enforcement liaison position, certain types of staff training, and investigation and debriefing following each incident of workplace violence. Given that there is no dispute regarding the feasibility and efficacy of these six proposed measures, we find that the

⁴ We note that these undisputed findings relate solely to Suncoast’s liability. The judge’s finding that UHS-DE was also independently liable for this violation is in dispute, as is the single-employer status of Suncoast and UHS-DE. Given our conclusion, as discussed below, that Suncoast and UHS-DE operated as a single employer, we need not address whether the judge correctly held UHS-DE independently liable. *C.T. Taylor Co.*, 20 BNA OSHC 1083, 1087-88 (No. 94-3241, 2003) (affirming judge’s decision that C.T. Taylor and Esprit are single business entity, and concluding that this single business entity, rather than just Esprit, was responsible for general duty clause violation).

abatement element of the Secretary's burden has been established.⁵ *Id.* (finding that when abatement measures are alleged as part of a process, "the Secretary need only prove that at least one of the measures he proposed was not implemented and that the same measure is both effective and feasible in addressing the alleged hazard").

Accordingly, based on the judge's undisputed findings, we conclude that the Secretary has established a general duty clause violation. Therefore, the only remaining issue on review is whether, as the judge concluded, Respondents are liable for the violation as a single employer under the Act. Having considered the voluminous record evidence on this issue, we conclude that Suncoast and UHS-DE operated as a single employer.

The Secretary bears the burden of establishing a single-employer relationship. *FreightCar Am., Inc.*, No. 18-0970, 2021 WL 2311871, at *5 (OSHRC Mar. 3, 2021); *Loretto-Oswego Residential Health Care Facility*, 23 BNA OSHC 1356, 1358 n.4 (No. 02-1164, 2011) (consolidated), *aff'd*, 692 F.3d 65 (2d Cir. 2012). The factors relevant to determining if such a relationship exists include whether the cited entities "share a common worksite, are interrelated and integrated with respect to operations and safety and health matters, and share a common president, management, supervision, or ownership." *FreightCar*, 2021 WL 2311871, at *5; *S. Scrap Materials Co.*, 23 BNA OSHC 1596, 1627 (No. 94-3393, 2011).

Common worksite

We agree with the judge that Suncoast and UHS-DE share a common worksite. Although Suncoast employs most of the personnel at the hospital, several UHS-DE employees work at the hospital in supervisory positions alongside Suncoast employees. The parties stipulated that at the time of the inspection, Suncoast's CEO, CFO, and COO-in-training, all of whom worked in offices in the administrative section of the hospital, were employed by UHS-DE.⁶ In addition to these

⁵ Chairman Attwood, therefore, finds it unnecessary to address whether the Secretary has established that the third and fourth abatement measures are economically feasible. For the reasons explained in her concurring opinion, while Commissioner Laihow agrees that a general duty clause violation has been proven here, she also believes the Commission should reach the economic feasibility arguments raised by Respondents and conclude that the Secretary has not established the economic feasibility of these two measures.

⁶ According to the management agreement between Suncoast and UHS-DE, Suncoast's Chief Nursing Officer is also an employee of UHS-DE. More specifically, a provision in the agreement concerning "Key Personnel" states that along with the CEO, CFO, and COO, UHS-DE "shall

UHS-DE employees who are continuously present at the hospital, UHS-DE sends its regional clinical services director and regional risk manager to Suncoast to conduct annual audits, each of which lasts two or three days.

On review, Respondents argue that the common worksite factor requires employees of both companies to be exposed to the same workplace hazards. This argument, however, was rejected by the Commission in *Westwood*: “[M]utual employee access to a hazard is not a precondition to establishing the common worksite factor.” 2022 WL 774272, at *3. Moreover, unlike *Westwood*, at least one UHS-DE employee—the CEO—was exposed to the hazard of workplace violence, as her testimony shows that she interacts with patients and the record shows that she is occasionally present in the patient units during the hospital’s “senior leadership rounds.”

We therefore find that the record establishes Suncoast and UHS-DE share a common worksite.⁷ *See id.* (finding entity that owned cited hospital and UHS-DE, its management company, shared common worksite based on evidence that two UHS-DE management employees worked alongside hospital’s employees “on a consistent basis”).

Interrelation and Integration

We also conclude, as the judge found, that an abundance of evidence shows Suncoast and UHS-DE are “interrelated and integrated with respect to operations and safety and health matters.” *FreightCar*, 2021 WL 2311871, at *5. This evidence includes (1) the role of Suncoast’s CEO at the hospital as an employee of UHS-DE, (2) UHS-DE’s additional managerial responsibilities at

provide” Suncoast with its “Chief Nursing Officer.” Under the terms of the agreement, UHS-DE is required to “negotiate and contract with all Key Personnel for services to be provided at [Suncoast]. Salaries and benefits of Key Personnel shall be included in the Management Fee.” The record shows that Suncoast’s Chief Nursing Officer at the time of the inspection also held the position of Director of Nursing and worked alongside Suncoast employees at the hospital.

⁷ As further support for this factor, the judge concluded that the two companies’ corporate offices share the same corporate address in King of Prussia, Pennsylvania. Although corporate filings show that Suncoast shared a corporate office with UHS-DE at this address (and that Suncoast’s corporate officers were technically based there), the record makes clear that Suncoast’s *principal* address is actually in Bradenton, Florida, the location of the hospital. In fact, there is no evidence in the record that *employees* of Suncoast (as opposed to its *corporate officers*) ever visited, or had reason to visit, the office in King of Prussia. Accordingly, we disagree with the judge that this shared corporate office establishes the two entities also shared a common worksite. *See FreightCar*, 2021 WL 2311871, at *5 (“Although the Secretary established that the corporate headquarters for the two companies is at the same address in Chicago, Illinois, the record does not show that the companies ‘share’ the worksite at issue—the Cherokee facility.”).

the hospital as outlined in its management agreement with Suncoast and corroborated by testimony from various UHS-DE employees, and (3) Suncoast's use of UHS-DE's policies, forms, and templates.

Suncoast's CEO

Suncoast's CEO is an employee of UHS-DE who manages Suncoast's day-to-day operations and is supervised by a UHS-DE vice-president. The CEO is responsible for hiring and directly supervising at least eight of the hospital's director positions, which include the medical director and the directors of nursing, clinical services, business development, plant operations, marketing, risk management, and human resources. The CEO also manages the hospital's regulatory compliance and, along with the CFO (another UHS-DE employee), oversees Suncoast's finances. *Westwood*, 2022 WL 774272, at **4-5 (examining role of Pembroke CEO, as employee of UHS-DE, to determine extent of interrelation and integration between Pembroke and UHS-DE).

Contrary to Respondents' claim that the CEO is not involved with the management of patient care or the administration of clinical treatment at Suncoast, the record shows that she *does* have a role in these areas and, as relevant to this case, that role also concerns safety and health issues, such as workplace violence. *Loretto-Oswego*, 23 BNA OSHC at 1359-61 (considering involvement in both "general administrative matters" and "safety and health matters" to assess companies' interrelation and integration of operations). Specifically, Suncoast's medical director and physicians all report to the CEO, who ensures that the physicians follow the applicable regulations and submit proper documentation, and that the hospital has "coverage for the physicians." The CEO also receives and considers requests from nursing supervisors seeking additional staff during shifts if there are patients whose behavior makes them "more challenging to work with."

In addition, the CEO participates in senior leadership rounds of the hospital's units, during which she reviews staffing assignment sheets and reports from MHTs, and assesses unit security and the cleanliness of the units and nursing stations. *See Westwood*, 2022 WL 774272, at *4 (rejecting UHS-DE's argument that clinical and administrative functions are kept separate based, in part, on Pembroke CEO's testimony that he was responsible for making sure clinical process "happened the way it should"). Specific to workplace violence, the CEO has the authority to approve or change Suncoast's workplace violence policy and meets with Suncoast's directors to discuss compliance with the hospital's workplace violence plan. She is also made aware of any

workplace violence incidents at the hospital through reports, meetings, and discussions with patients and staff.

On top of these multiple responsibilities, the CEO sits on numerous committees at Suncoast that develop and implement hospital policy on various matters ranging from the addition of physicians (Medical Executive Committee) to insurance issues (Utilization Management) and healthcare compliance (Performance Improvement Committee). Some of the committees on which the CEO sits specifically address patient and employee safety. For example, one purpose of the Patient Safety Council is to examine safety-related issues, including “instances of patient aggression resulting in injury.” Similarly, the Environment of Care Committee is tasked with examining “everything environmental through the hospital from a safety standpoint,” such as whether barriers should be installed at the intake desk. Moreover, the Governing Board, which includes the CEO and her immediate supervisor (a UHS-DE regional vice-president), has overarching authority at Suncoast, in that it approves or recommends changes to any actions—including those relating to workplace violence—approved by Suncoast’s other committees.

Finally, the CEO leads or participates in various types of staff meetings at Suncoast that address matters ranging from policy changes and staff morale to workplace incidents and patient treatment. As with the committee meetings, some of these staff meetings specifically address patient and employee safety. Every weekday morning, for example, the CEO participates in a “flash meeting,” during which the CEO, CFO, and certain Suncoast directors discuss patients and incidents from the previous day.

Given this extensive evidence of the CEO’s involvement in every facet of the hospital’s operations, we reject Respondents’ claim that she is tasked with merely “ ‘submitting proper and appropriate . . . documentation,’ attending meetings, and otherwise complying with certain regulatory requirements.”⁸

⁸ Relying on *Loretto-Oswego*, Respondents argue that the interrelation/integration factor has not been established here because “UHS-DE is not responsible for the safety of Suncoast employees as it is Suncoast employees who make all patient care decisions and are primarily responsible for safety at the site without any oversight or supervision from UHS-DE.” But this argument ignores the compelling evidence discussed above regarding the CEO’s extensive role in every facet of Suncoast’s operations, including workplace safety. Indeed, unlike Suncoast’s CEO, the nursing home administrator in *Loretto-Oswego*, who had a role akin to the CEO here, was *not* an employee of the management company. 23 BNA OSHC at 1359-61. Just as the Commission concluded in

UHS-DE's additional managerial responsibilities at Suncoast

Respondents assert that UHS-DE's role at Suncoast is limited to administrative functions. The record shows, however, that Suncoast's CEO is involved in every facet of the hospital's operations and that UHS-DE's additional managerial responsibilities at the hospital—regardless of whether they are labelled administrative—directly impact patient care, regulatory compliance, employee training, and employee safety and health.

First, both the management agreement and testimony from UHS-DE employees show that UHS-DE recruits, hires, and employs Suncoast's entire C-suite leadership—at the time of OSHA's inspection, this included Suncoast's CEO, CFO, and COO-in-training. UHS-DE also handles payroll for Suncoast's C-suite leadership as well as any independent contractors who work at the hospital. And UHS-DE provides and manages employee benefits—including retirement and medical insurance—for Suncoast and even gives employees the opportunity to purchase "UHS stock" at a discount.

Second, UHS-DE provides a variety of technology services to Suncoast, some of which relate to patient care and employee safety and health. UHS-DE, for example, facilitates access by Suncoast and other centers to "MIDAS," a system that includes incident reports following episodes of patient aggression. Suncoast also uses a risk management website managed by UHS-DE that contains "benchmarks" for patient aggression, restraints, and seclusion. UHS-DE sets these benchmarks for all UHS, Inc. centers, including Suncoast, and each center's risk manager is expected to meet them. And, at UHS-DE's instruction, Suncoast switched from a paper-based system for reporting employee injuries for workers' compensation claims to an electronic system managed by a third-party vendor. UHS-DE also requires the hospital to use other technology services that, although not related to safety and health, are integral to Suncoast's administrative operations. For example, UHS-DE facilitates the use of the same virtual private network by all UHS, Inc. subsidiaries, including Suncoast, and assigns email addresses with the same domain—"@uhsinc.com"—to the subsidiaries' employees.

Westwood under nearly identical circumstances, "the facts here are distinguishable from those in *Loretto-Oswego*, where the management company had 'no physical presence' at the inspected nursing home, was rarely onsite, and was not involved in its day-to-day operations." *Westwood*, 2022 WL 774272, at *3 (discussing *Loretto-Oswego*, 23 BNA OSHC at 1361).

Third, UHS-DE provides a variety of financial services to Suncoast. A regional finance director from UHS-DE's financial department provides Suncoast's CFO with day-to-day support. Suncoast's CEO and CFO, both of whom work for UHS-DE, prepare Suncoast's annual budget, and then submit it to a UHS-DE vice-president for approval. *See Westwood, 2022 WL 774272*, at **4-5 (rejecting judge's finding that "Pembroke primarily develops and sets its own budgets" based on evidence that Pembroke's CEO and CFO, both UHS-DE employees, develop the hospital's budget, "which is then reviewed and approved by higher-level UHS-DE employees"). UHS-DE's control over Suncoast's budget undoubtedly has a profound impact on all of the hospital's operations, from its ability to provide adequate staffing for patient care to funding safety and health measures. UHS-DE also pays taxes and assessments on behalf of Suncoast from accounts that UHS-DE opened for Suncoast, and UHS-DE controls a "Reserve Account" for Suncoast, which can be used to pay for capital improvements at the hospital subject to UHS-DE's approval.

Fourth, UHS-DE's compliance department provides support to Suncoast that includes training on health care-related regulatory and privacy issues. This department also oversees audits of UHS, Inc.'s centers, including Suncoast, that focus on health care regulatory compliance, and include reviewing submissions from the centers' compliance committees and providing analysis and guidance following the audits. The department manages a compliance hotline that can be used by any Suncoast employee to anonymously report violations of rules and regulations. Suncoast initially investigates any complaints made to the hotline, but the resulting report is sent to UHS-DE. And typically, the CEO—a UHS-DE employee—is the individual at Suncoast who determines how to conduct such investigations.

Fifth, UHS-DE provides training to Suncoast employees. UHS-DE contracts with Handle with Care—a behavioral management system used by some UHS, Inc. centers—to provide training to hospital workers. UHS-DE also provides materials about and training for verbal de-escalation. Such training directly bears on workplace violence caused by patients, the very hazard cited here. UHS-DE manages a learning management platform that Suncoast uses for annual employee training and requires that Suncoast employees be trained on a "code of conduct" included in its compliance manual. This code includes "the standards" that all employees are required to follow, such as raising concerns about patient care or legal compliance without fear of reprisal.

Finally, various UHS-DE departments not already mentioned above have a range of responsibilities at Suncoast—from clinical services and risk management to legal services and construction—and some of those responsibilities directly concern patient care or employee safety and health at Suncoast. UHS-DE’s clinical services department conducts an annual regulatory audit at Suncoast that includes auditing medical charts and observing patient treatment. UHS-DE’s risk management department assigns a regional risk manager to each UHS, Inc. center—including Suncoast—to provide day-to-day support to the center’s onsite risk manager. The UHS-DE regional risk manager also conducts annual site visits to review Suncoast’s risk management program to ensure that it complies with UHS-DE requirements. UHS-DE’s insurance and loss control departments are also involved when workplace incidents occur at the hospital. For example, if an incident results in injury to a Suncoast patient, the hospital reports possible claims to the insurance department and UHS-DE determines what needs to be done to prepare for possible litigation or regulatory surveys. If an incident results in injury to a Suncoast employee, the hospital reports that injury to the loss control department.

UHS-DE departments provide the hospital with other services as well. UHS-DE’s legal department, for example, reviews real estate contracts, locates and retains outside counsel for Suncoast in the event of a lawsuit, and reviews all of Suncoast’s contracts for products and services. When a UHS, Inc. center such as Suncoast is entertaining a significant construction project, it is UHS-DE’s design and construction department that assists “in scoping the project,” hiring vendors, and reviewing bids. And UHS-DE’s supply chain department is involved in the purchasing of inventory and supplies at Suncoast—UHS-DE negotiates contracts through the supply chain rather than on an individual facility basis, and Suncoast in turn uses vendors that are registered in UHS-DE’s approved supply chain.

Based on this evidence, we find that as with the CEO’s role at Suncoast, Respondents grossly mischaracterize UHS-DE’s managerial responsibilities at the hospital. Rather than being limited to “resource sharing,” as Respondents argue, the record shows that UHS-DE’s control and influence extends to all facets of Suncoast’s operations, including those that specifically concern the safety and health of both patients and employees.

Suncoast’s use of UHS-DE’s policies and templates

The parties stipulated that Suncoast uses various final and template forms provided by UHS-DE for policy purposes. For instance, UHS-DE provided the template for Suncoast’s

“Employee Handbook,” which includes sections on “Safety and Security” and “Workplace Violence.” Suncoast’s only revision to this template was to insert the hospital’s name.

On review, Respondents rely on the Commission’s decision in *FreightCar* to argue that the judge, when evaluating these various forms, “failed to give any consideration to the ‘necessary context’ of how” Suncoast and UHS-DE actually operate. 2021 WL 2311871, at *5. But in contrast to the circumstances of *FreightCar*, the UHS-DE forms undeniably reflect the two companies’ interrelation and integration. *Cf. id.* at *6 (finding that “the evidence does not address the extent, if any, to which FreightCar America, Inc. is involved in operational and safety and health matters at the Cherokee facility”). Moreover, unlike the forms at issue in *FreightCar*, the record here explains the creation and use of the forms that UHS-DE provided. *Cf. id.* at *5 (finding that visual representation of “FreightCar America” throughout facility “lacks the necessary context,” as it could simply be use of “common brand name” rather than evidence of interrelation or integration). The record shows, for example, that Suncoast typically does not make substantive edits to UHS-DE’s template forms and that some of these UHS-DE forms, such as PowerPoint training on trauma-informed care and patient observation rounds, are provided to the hospital in final form, not subject to change. And to the extent these forms include policies and procedures that Suncoast employees are required to follow, Suncoast’s CEO—a UHS-DE employee—is ultimately responsible for establishing these policies and procedures, and Suncoast’s Governing Board, which consists of Suncoast and UHS-DE managerial employees, is tasked with approving or recommending certain policy changes.

Considering the totality of this evidence, particularly the CEO’s role at Suncoast as a UHS-DE employee, we find the Secretary has established that Suncoast and UHS-DE are highly interrelated and integrated “with respect to operations and safety and health matters.” *Id.*; see *Westwood*, 2022 WL 774272, at **4-5 (concluding that UHS-DE and Pembroke were “interrelated and integrated regarding operations, including safety and health matters,” where record established “UHS-DE’s direct involvement in supervising Pembroke staff and in providing patient care,” as well as UHS-DE’s “control of and influence over the hospital’s budget and finances, [and] clinical and operational aspects of running the hospital, such as regulatory compliance, licensing, quality of clinical care, and clinical programming”).

Common Ownership, Officers, and Management

Finally, we agree with the judge's finding that Suncoast and UHS-DE share common officers, management, and ownership. It is undisputed that UHS, Inc. is the common owner and "ultimate corporate parent" of Suncoast and UHS-DE. Further, the record shows that the two companies had a common officer—Suncoast's corporate president was also the president of UHS-DE's behavioral health division. Indeed, as Suncoast's president, this corporate officer signed the management agreement that defines the relationship between the two companies.

As to shared management, Suncoast and UHS-DE are "linked" through the hospital's CEO and CFO, both UHS-DE employees supervised by higher-level UHS-DE managers. *See Westwood*, 2022 WL 774272, at *6 (finding that "the cited entities are linked through Pembroke's CEO and CFO who are UHS-DE employees supervised by higher-level UHS-DE managers"); *cf. S. Scrap Materials Co.*, 23 BNA OSHC at 1627 (common management factor not met where entities were owned by same parent company and shared company president but record lacked evidence "supervision or management at the two subsidiary companies' scrap yards was shared"); *Loretto-Oswego*, 23 BNA OSHC at 1359 ("At the time of the violations, LMC and the three affiliates shared the same president, chief executive officer, and chief financial officer. This outward appearance of a common identity gives way, however, . . . because the record shows that on a day-to-day basis, administrative personnel at Loretto-Oswego operated independently of LMC."). Suncoast's CEO reports to a UHS-DE regional vice president in the company's behavioral health division. This vice-president's responsibilities include day-to-day healthcare operations of Suncoast and other assigned centers. In addition, as previously discussed, Suncoast's CFO receives day-to-day support from a UHS-DE regional finance director, and Suncoast's CEO and CFO prepare the hospital's annual budget and share it with UHS-DE management, which has approval authority.

Shared management is also shown by the participation of both Suncoast and UHS-DE management on the hospital's Governing Board, and by UHS-DE's involvement in the day-to-day management of the hospital, including its core function of patient care and related safety matters.⁹

⁹ Respondents note that "UHS-DE has its own management structure with a separate CEO, CFO, and management group and Suncoast's CEO and CFO have no corporate managerial duties for UHS-DE." But "this merely shows that [the hospital's] management did not control UHS-DE, not the converse." *Westwood*, 2022 WL 774272, at *6 n.8.

See *Westwood*, 2022 WL 774272, at *6 (“Evidence of shared management is also found in Pembroke’s Board of Advisors—as noted, the Board is comprised of both Pembroke and UHS-DE employees . . . and approves policy changes at the hospital.”). As we have already found, UHS-DE is integrally involved, particularly through Suncoast’s CEO, in every facet of the hospital’s operations. See *id.* (relying on evidence showing “UHS-DE is integrally involved in the day-to-day management of Pembroke” to find common management).

Based on our analysis of the pertinent factors, we conclude that a single-employer relationship existed between Suncoast and UHS-DE at the time of the violation.¹⁰ Accordingly, we affirm the citation as serious and assess a penalty of \$12,934.¹¹

SO ORDERED.

/s/ _____
Cynthia L. Attwood
Chairman

/s/ _____
Amanda Wood Laihow
Commissioner

Dated: February 28, 2023

¹⁰ In its review brief, Suncoast requests that the Commission consolidate this case with *UHS of Westwood Pembroke, Inc.*, OSHRC Docket No. 17-0737, and that the briefing notice be amended to add “the effectiveness of the proposed abatements.” Putting aside the fact that including a motion in another document, such as a review brief, is prohibited by the Commission’s procedural rules, we deny Suncoast’s request. 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.”). The Commission has already issued its decision in *Westwood*, 2022 WL 774272, so the request for consolidation is moot. In addition, further briefing is not necessary to our determination that the Secretary has proven the abatement element here.

¹¹ As previously noted, neither party has challenged the judge’s characterization of the violation or penalty assessment. See *Gate Precast Co.*, No. 15-1347, 2020 WL 2141954, at *6 n.12 (OSHRC Apr. 28, 2020) (affirming judge’s characterization of violation and penalty assessment when not disputed).

LAIHOW, Commissioner, concurring:

I agree with Chairman Attwood that the Secretary has proven the alleged general duty clause violation, as well as its serious characterization. I also agree with my colleague that, given our other findings, we are not compelled to address the economic feasibility of the third and fourth abatement measures proposed in the amended citation in order to affirm the violation. Nonetheless, for the reasons explained below, I find that the circumstances of this case warrant review of the economic feasibility of those measures.

For any alleged violation of the general duty clause, the Secretary carries the burden of establishing that “feasible means existed to eliminate or materially reduce the hazard.” *Erickson Air-Crane, Inc.*, No. 07-0645, 2012 WL 762001, at *2 (OSHRC Mar. 2, 2012). To prove feasibility, the Secretary must show that a proposed abatement measure is both “economically and technologically capable of being done.” *Beverly Enters., Inc.*, 19 BNA OSHC 1161, 1191 (No. 91-3144, 2000) (consolidated); *UHS of Denver, d/b/a Highlands Behavioral Health Sys.*, No. 19-0550, 2022 WL 17730964, at *1 (OSHRC Dec. 8, 2022) (“The only remaining issue before the judge was whether the Secretary had established the feasibility of the proposed abatement measures, a burden that includes their economic feasibility.”). As discussed in our decision today, the Secretary listed eight abatement measures in the amended citation, each of which the judge concluded is both feasible and effective. Respondents do not challenge the judge’s findings with respect to six of these proposed measures. In one of the Petitions for Discretionary Review, however, Respondents requested review of the economic feasibility of the third and fourth abatement measures proposed by the Secretary. These measures would require Suncoast to hire additional security personnel to monitor for patient aggression at intake and on the units during all shifts, and to respond as needed to such incidents. In its briefing notice, the Commission specifically requested the parties to brief “[w]hether the judge erred in concluding that the third and fourth ‘means of abatement’ listed in the amended citation are economically feasible.”

Although I agree with my colleague that the economic feasibility of the third and fourth abatement measures is not a dispositive issue here, the Commission retains broad discretion to reach important issues that warrant review. Commission Rule 92(a), 29 C.F.R. § 2200.92(a) (“Unless the Commission orders otherwise, a direction for review establishes jurisdiction in the Commission to review the entire case. The issues to be decided on review are within the discretion of the Commission.”). I would exercise that discretion here and address the feasibility of these

proposed abatement measures. As with abatement measures proposed in other general duty clause citations, these proposed measures are akin to the requirements of a promulgated standard, but are not subject to the same rigorous notice and comment rulemaking process. 29 U.S.C. § 655(b) (stating how Secretary may promulgate, modify, or revoke an “occupational safety or health standard”); *see Am. Iron & Steel Inst. v. OSHA*, 939 F.2d 975, 980 (D.C. Cir. 1991) (“To prove economic feasibility [of a promulgated standard], OSHA must construct a reasonable estimate of compliance costs”) (citation omitted). Indeed, employers are often forced to rely on the Commission’s review of a general duty clause citation’s proposed abatement measures to determine their compliance obligations. *See Integra Health Management, Inc.*, No. 13-1124, 2019 WL 1142920, at *15 (OSHRC Mar. 4, 2019) (Sullivan, J., concurring) (noting that “a check on the application of the general duty clause is necessary,” particularly when “a broad hazard such as workplace violence” is at issue, because fair notice is “inherently problematic” under the broad language of the clause and the Secretary, therefore, often relies on OSHA guidance to the regulated community—not subject to notice-and-comment rulemaking—to establish general duty clause requirements). Accordingly, in my view, it is important for the Commission to ensure that proposed abatement measures, such as the ones in this case, are properly vetted—i.e., that the Commission assesses their feasibility and effectiveness. *See, e.g., UHS of Denver*, 2022 WL 17730964, at *6 (remanding for 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”); *RoadSafe Traffic Sys., Inc.*, No. 18-0758, 2021 WL 5994023, at **8-9 (OSHRC Dec. 10, 2021) (after reviewing evidence, finding that proposed abatement method was both feasible and effective); *Waldon Health Care Ctr.*, 16 BNA OSHC 1052, 1064 (No. 89-2804, 1993) (consolidated) (after reviewing evidence, finding that “the Secretary failed to fulfill his burden of establishing that [the proposed abatement measure] was economically feasible”).

Here, I would find the Secretary has failed to prove that the third and fourth abatement measures are economically feasible. The record shows that these two measures would require Suncoast to hire staff to fill six 8-hour shifts for every 24-hour period and the abatement measures dictate that these staff members “not be given other assignments such as patient rounds, which would prevent the person from immediately responding to an alarm or other notification of a violent incident.” As Respondents point out, the Secretary’s expert, Dr. Jane Lipscomb, admitted

that she did not consider “the economic costs” of adding these staffing positions and there is no other evidence in the record providing that information.

The Secretary puts forth several arguments purporting to show that he established the abatement measures’ economic feasibility, but these post hoc rationalizations fall completely short. For example, the Secretary parrots the judge’s finding that Respondents’ “partial implementation” of the proposed staffing measures—a “float” and an intake mental health technician were added to certain shifts—show they are feasible. The record, however, reflects that these added positions not only remained vacant for long periods of time, but required employees in those positions to perform job tasks not related to security and provided limited coverage (8 hours as opposed to 24 hours a day). Equally unpersuasive is the Secretary’s argument that feasibility is established because other “similarly situated psychiatric hospitals” make effective use of security guards. The evidence relating to these other facilities provides little to no meaningful points of comparison to Suncoast: the facilities are either of differing size or their size is unknown; some serve different functions (several, for example, are large hospital complexes); the guards’ duties at these facilities are either different from the ones proposed in the citation or unknown; and most notably, it is not clear how the staffing positions at these facilities impacted the overall finances of the businesses that owned them. *See Waldon Health Care Ctr.*, 16 BNA OSHC at 1063-64 (finding “Secretary failed to fulfill his burden of establishing [prophylactic vaccination as a proposed abatement measure] was economically feasible,” because “on this record, it is not possible to determine whether the nursing homes could have absorbed or passed on the significant costs of prophylactic vaccination without endangering their economic position”).

The Secretary’s other arguments fair no better. The Secretary claims that industry experts have recommended the third and fourth abatement measures and asserts that this proves their economic feasibility. But there is simply no proof in this case to support such a claim. As noted, Dr. Lipscomb was directly asked if she considered the economic costs of implementing her recommendations for these staffing measures, and she answered, “No, I did not.” The Secretary also claims that Respondents’ own policies emphasize the need for security, thus undermining their assertion that the addition of the staff specified in the abatement measures is not economically feasible. This too misses the mark. Respondents’ internal policy documents are about security in general, not the additional security staffing proposed in the two abatement measures. And as is clear under Commission precedent, it is not Respondents’ burden to establish the proposed

measures are economically *infeasible*—rather, it is the Secretary’s burden to prove that they are *feasible*. *UHS of Denver*, 2022 WL 17730964, at *1; *Beverly Enters., Inc.*, 19 BNA OSHC at 1191; *Waldon Health Care Ctr.*, 16 BNA OSHC at 1064.

The Secretary’s final argument is that “publicly available financial information” on UHS Inc.’s website shows it is a “multi-billion-dollar company” that would remain economically viable even with the hiring of additional staff members. However, as Respondents note, this webpage is not part of the record. Additionally, even if it were, such information is hardly relevant given that it appears to reflect the combined revenue of *all* UHS, Inc. entities, rather than the specific two companies at issue here—UHS-DE and Suncoast. Although “[t]he Commission has held that matters of economic feasibility are properly considered on a company-wide basis,” the Secretary points to no evidence here that would support treating all the entities associated with UHS, Inc. as a single company. *W. Point Pepperell, Inc.*, 9 BNA OSHC 1784, 1796 (No. 77-4297, 1981).

One last point bears noting. This case is just another in a series of recent matters where the Commission has been faced with the issue of economic feasibility for an alleged general duty clause violation. In *UHS of Denver*, for example, the Commission remanded for the judge to determine whether the Secretary had in fact established economic feasibility—notably, the Secretary faulted the employer for having “provided no evidence that it could not afford to implement [the proposed abatement] measures” even though our precedent makes clear that this burden rests with the Secretary. 2022 WL 17730964 at **2-3. And in a recent decision in another case, *United States Postal Service*, the Commission found that the Secretary provided no cost estimates for any of his proposed abatement measures, let alone proof that their implementation would not threaten the Postal Service’s economic viability. Docket No. 16-1713, slip op. at 20-24 (OSHRC Feb. 17, 2023) (consolidated). The case currently before us is yet another reminder for the Secretary that economic feasibility is a critical part of his *prima facie* case.

For all these reasons, I would address the economic feasibility of the third and fourth abatement measures and conclude that the Secretary failed to establish that these measures were, in fact, feasible.

Dated: February 28, 2023

/s/

Amanda Wood Laihow
Commissioner