No. 22-1845

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UHS OF WESTWOOD PEMBROKE, INC., and UHS OF DELAWARE, INC.,

Petitioners,

v.

SECRETARY OF LABOR,

Respondent.

On Petition for Review of a Final Order of the
Occupational Safety and Health Review Commission

BRIEF FOR THE SECRETARY OF LABOR

SEEMA NANDA
Solicitor of Labor

EDMUND C. BAIRD
Associate Solicitor for
Occupational Safety and Health

HEATHER R. PHILLIPS
Counsel for Appellate Litigation

ANNE R. GODOY
Senior Attorney
U.S. Department of Labor
200 Constitution Ave., NW, Room S-4004
Washington, D.C. 20210
Godoy.anne@dol.gov
(202) 693-5452

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STATEMENT OF JURISDICTION

This matter arises from an enforcement proceeding brought by the Secretary of Labor (Secretary) before the Occupational Safety and Health Review Commission (Commission) under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (OSH Act). The Commission had jurisdiction over this proceeding under 29 U.S.C. § 659(c).

On February 7, 2020, administrative law judge (ALJ) Keith E. Bell issued a decision finding that UHS of Westwood Pembroke (UHS-Pembroke) violated the OSH Act but dismissing the citation against UHS of Delaware, Inc. (UHS-DE). JA28-104.[1] The parties timely petitioned the Commission for discretionary review, and the Commission issued a decision affirming the violation against both UHS-Pembroke and UHS-DE on March 3, 2022. JA5-24. UHS-DE and UHS-Pembroke filed a single petition for review with this Court on May 2, 2022, within the sixty-day period prescribed by the OSH Act. *See* 29 U.S.C. § 660(a).

The underlying OSH Act violation occurred at Pembroke Hospital in Pembroke, Massachusetts, which is where UHS-Pembroke is located. Because

[1] Record references are to the Joint Appendix (JA); the Commission's Decision (Comm'n Dec.); the ALJ's Decision (ALJ Dec.); the hearing transcript (Tr.); Stipulations (Stip.); Government's Exhibit (GX-); Respondents' Exhibit (RX-); and UHS-Pembroke and UHS-DE's brief (Pet. Br.).

UHS-DE is headquartered in Pennsylvania, this Court has jurisdiction over the petition for review under 29 U.S.C. § 660(a) and 28 U.S.C. § 1367.

STATEMENT OF THE ISSUES

1) Whether the Commission correctly applied the single employer test to the facts in finding that UHS-DE and UHS-Pembroke are a single employer for purposes of OSH Act liability where extensive evidence shows that the two entities worked hand-in-hand to address employee safety at Pembroke Hospital.
2) Whether substantial evidence supports the Commission's determination that the Secretary's proposed abatement measures would cumulatively reduce the patient-on-staff workplace violence hazard at Pembroke Hospital.
3) Whether substantial evidence supports the Commission's finding that the cited general duty clause violation is substantially similar to UHS-Pembroke's previous general duty clause violation and therefore properly characterized as a repeat violation.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not previously been before this Court. There are currently three cases in various stages of litigation before the Commission involving Petitioner UHS-DE where the Secretary alleged the company violated the general duty clause of the OSH Act by exposing employees to the hazard of patient-on-staff violence at psychiatric hospitals. These cases also all involve the issue of whether UHS-DE and the Universal Health Services subsidiary operating the psychiatric facility are a single employer for the purpose of OSH Act liability. The three cases are:

- *Sec'y of Labor v. UHS of Delaware, Inc. and Premier Behavioral Health Solutions of Florida, Inc. d/b/a Suncoast Behavioral Health Center*, Commission No. 18-0731, slip op. (Apr. 21, 2021), available at https://www.oshrc.gov/assets/1/6/ALJ_Decision_-_UHS_of_Delaware_18-0731.pdf

- *Sec'y of Labor v. UHS of Delaware and UHS of Fuller*, Commission No. 20-0032. This case has been litigated and fully briefed before ALJ Carol A. Baumerich.

- *Sec'y of Labor v. UHS of Delaware and Cedar Springs*, Commission No. 20-0887. This case has been litigated and fully briefed before ALJ Christopher D. Helms.

STATEMENT OF THE CASE

I. Procedural History

This case arose from an inspection in October 2016 by the Occupational Safety and Health Administration (OSHA) of Pembroke Hospital, an inpatient psychiatric facility in Pembroke, Massachusetts following an employee complaint alleging patient-on-employee violence. JA5-6 (Comm'n Dec.). Following the inspection, OSHA issued a citation to UHS-Pembroke (which owns Pembroke Hospital) in April 2017 alleging one serious violation of the general duty clause of the OSH Act, 29 U.S.C. § 654(a)(1). JA28-29 (ALJ Dec.).

UHS-Pembroke timely contested the citation, and the Secretary amended the citation and the complaint filed with the ALJ to add UHS-DE (the management company at Pembroke Hospital) and change the classification of the violation from "serious" to "repeat." JA29 (ALJ Dec.). The Secretary also filed an unopposed motion to amend the abatement proposed in the citation and complaint, which was granted. *Id*. A hearing was held on July 17-20, 2018, and July 24-25, 2018. *Id*. On February 19, 2020, ALJ Bell issued a decision affirming a serious citation against UHS-Pembroke only and assessing a $12,675 penalty. JA104.

The parties appealed to the Commission, which issued a decision on March 3, 2022, affirming the citation against both UHS-DE and UHS-Pembroke, classifying it as repeat, and assessing a $25,350 penalty. JA24. On May 2, 2022, UHS-DE and UHS-Pembroke (Petitioners) timely filed the instant petition.

II. Statutory Background

Congress enacted the OSH Act in 1970 "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. § 651(b). The OSH Act's purpose is "neither punitive nor compensatory, but rather forward-looking; *i.e*., to prevent the first accident." *Brock v. L.E. Myers Co*., 818 F.2d 1270, 1275 (6th Cir. 1987). To effectuate this purpose, Congress imposed dual obligations on employers to comply both with the OSH Act's general duty clause and with occupational safety and health standards promulgated by OSHA. *See* 29 U.S.C. § 654(a)(1)-(2).

The general duty clause of the OSH Act 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 causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a)(1). The Secretary enforces the general duty clause and OSHA standards by conducting inspections of workplaces and issuing citations that require the employer to abate violations and, where appropriate, pay a civil penalty.[2] *See* 29 U.S.C. §§ 657-659, 666.

[2] The Secretary's responsibilities under the OSH Act have been delegated to an Assistant Secretary who directs OSHA. *See Pub. Citizen Health Research Grp. v. U.S. Dep't of Labor*, 557 F.3d 165, 175 (3d Cir. 2009); 77 Fed. Reg. 3912 (Jan. 25, 2012). The terms Secretary and OSHA are used interchangeably in this brief.

Violations of the general duty clause and OSHA standards are characterized as "serious," "other-than-serious," "willful," or "repeated." *Id*. § 666(a)-(c). At the time OSHA issued the citation in this matter, the OSH Act and implementing regulations authorized civil penalties up to $12,675 for a serious violation and up to $126,749 for a repeated violation. *Id*.; 29 C.F.R. § 1903.15(d)(2) (2017).

If an employer contests an OSHA citation, the matter is adjudicated by the Commission, an independent adjudicatory body. *See* 29 U.S.C. §§ 659, 661; *see also Martin v. OSHRC*, 499 U.S. 144, 152 (1991) (Commission is a "neutral arbiter" for adjudicating disputes between employers and OSHA). Initially, an ALJ appointed by the Commission adjudicates the dispute. *See* 29 U.S.C. §§ 659(c), 661(j). A party adversely affected by the ALJ's decision may petition for discretionary review of the decision by the three-member Commission. *See* 29 U.S.C. § 661(j); 29 C.F.R. § 2200.91(a). A party adversely affected or aggrieved by the Commission's final order may seek review in the appropriate court of appeals. *See* 29 U.S.C. § 660(a), (b).

III. Statement of Facts

A. OSHA's Previous Investigations into Patient-on-Staff Workplace Violence at Lowell Treatment Center and Pembroke Hospital.

Following an investigation into employee exposure to workplace violence at Lowell Treatment Center, in May 2015, OSHA issued a general duty clause citation to UHS-Pembroke, which owns Lowell Treatment Center. JA22 (Comm'n

Dec.), JA334-47 (GX-14). Lowell Treatment Center is an inpatient psychiatric facility in Lowell, Massachusetts. JA22 (Comm'n Dec.). The citation alleged that employees were exposed to acts of violence from patients, including verbal threats of assault, physical assaults, choking, punches, kicks, bites, scratches, and hair pulling. JA22 (Comm'n Dec.), JA339-47 (GX-14), JA349-56 (GX-15). OSHA identified numerous feasible means of abatement, including providing employees with panic buttons, providing employees with a communication device, and providing security to respond to aggressive behavior. JA339-42 (GX-14, pp. 6-9).

OSHA and UHS-Pembroke entered into a settlement agreement, and the workplace violence citation became a final order of the Commission on May 27, 2016. JA348-60 (GX-15, GX-17). As part of the agreement, UHS-Pembroke agreed to take several abatement actions to address the patient-on-staff workplace violence hazard, including providing staff with reliable communication devices to rapidly summon assistance and ensuring sufficient and properly trained staff to respond immediately in the event of a workplace violence incident. JA349-56 (GX-15).

In June 2015, OSHA inspected Pembroke Hospital, the facility at issue in this case, after receiving an employee complaint alleging workplace violence. JA538 (RX-37). Pembroke Hospital is a 120-bed inpatient psychiatric hospital in Pembroke, Massachusetts that is also owned by UHS-Pembroke. JA6 (Comm'n

Dec.). Following the June 2015 inspection, OSHA issued a Hazard Alert Letter to UHS-Pembroke, stating that mental health associates at Pembroke Hospital were exposed to workplace violence but that "it is not considered appropriate *at this time* to invoke Section 5(a)(1), the general duty clause of the [OSH] Act." JA538 (RX-37 at 2) (emphasis added). OSHA recommended that UHS-Pembroke voluntarily take several steps to reduce employees' exposure to the workplace violence hazard, including increasing staffing levels to account for patients with histories of violence, using silent panic buttons, and implementing a written workplace violence program. JA538-39 (RX-37). The Hazard Alert Letter noted that the identified abatement measures were not the only ones available and feasible, and offered free, on-site consultation services that could identify other measures. JA540 (RX-37).

B. OSHA's 2017 Citation for Patient-on-Staff Workplace Violence at Pembroke Hospital.

OSHA received another employee complaint related to patient-on-staff workplace violence at Pembroke Hospital in October 2016 and opened another investigation. JA34 (ALJ Dec.). OSHA's investigation revealed that employees at Pembroke Hospital were exposed to the hazard of workplace violence, including assault by patients. JA512 (Stip. 7). The types of violence that nurses and mental health associates were exposed to included being punched, kicked, and bitten. JA317-23 (GX-3); JA449-53 (GX-68); JA454-59 (GX-69). A mental health

associate described being hit or kicked approximately fifty times during his four-year employment at Pembroke Hospital. JA115, 117-18 (Tr. 47, 56-57). One nurse witnessed the assault of another nurse who "had her ear almost ripped off" by a patient. JA130 (Tr. 218). Another mental health associate tore the triangular fibrocartilage complex in her wrist after intervening in a fight between patients. JA241-42 (Tr. 809-811). Nine days later, the same employee had a chunk of her hair pulled out by a patient while she tried to help restrain the patient. JA238 (Tr. 796).

Following the 2016 investigation, OSHA issued a citation to UHS-Pembroke for failing to adequately protect employees from patient-on-staff workplace violence at Pembroke Hospital. JA560-62 (Complaint). OSHA identified several measures to abate the workplace violence hazard, including providing panic alarms, ensuring sufficient staffing levels, and maintaining equipment that is sufficient for each patient's individual crisis prevention plan. *Id.*; JA570-71 (Unopposed Motion to Amend Abatement). The Secretary subsequently amended the complaint to include Pembroke Hospital's management company, UHS-DE, as a respondent and reclassified the citation from serious to repeat. JA564-67.

C. The Relationship Between UHS-DE, UHS-Pembroke, and Pembroke Hospital.

UHS-Pembroke owns and operates Pembroke Hospital and employs most of the staff at the hospital, including the Medical Director, clinicians, doctors, and

nurses. JA30 (ALJ Dec.); JA228 (Tr. 742). At the time of OSHA's 2016 inspection, UHS-Pembroke owned three facilities, including Lowell Treatment Center. JA30 (ALJ Dec.). UHS-Pembroke is a wholly-owned subsidiary of an entity called UHSD, LLC, which is a wholly-owned subsidiary of Universal Health Services, Inc. JA30 (ALJ Dec.); JA512 (Stip. 13).

UHS-DE is also a wholly-owned subsidiary of Universal Health Services, Inc. JA512 (Stip. 12). The management agreement between UHS-DE and UHS-Pembroke outlines the respective responsibilities and the services the parties provide at Pembroke Hospital. JA390-401 (GX-27). Under the agreement, UHS-Pembroke pays UHS-DE a management fee and covers various other costs in return for UHS-DE's services. JA396 (GX-27). Among other things, the agreement provides that UHS-DE will develop systems and procedures for Pembroke Hospital, provide human resources management, and provide "key personnel" – including the Chief Executive Officer (CEO) and the Chief Financial Officer (CFO). JA393-94 (GX-27).

Pembroke Hospital's CEO, who is responsible for all of the clinical and operational aspects of running Pembroke Hospital, is a UHS-DE employee who work at the hospital full-time. JA8 (Comm'n Dec.); JA215-16 (Tr. 693, 695); JA298 (Tr. 1343). The CEO is responsible for hiring, firing, and disciplining staff; maintaining the budget; reviewing program quality; and ensuring the hospital

meets health standards. JA216 (Tr. 695); JA227-28 (Tr. 741-42); JA232-35 (Tr. 764-67, 771-72, 779-81).

UHS-DE developed and provided Pembroke Hospital with the vast majority of the hospital's policies, including its workplace violence policy, risk management training program, code of conduct, and its code of ethics. JA176 (Tr. 504); JA180 (Tr. 519-20); JA184 (Tr. 535-36); JA190 (Tr. 558-60); JA402-12 (GX-30). UHS-DE also tracked and intervened in patient-on-staff workplace violence at Pembroke Hospital. JA12 (Comm'n Dec.); JA188-89 (Tr. 553-54); JA425-440 (GX-55, GX-57, GX-58, GX-59). Additionally, Pembroke Hospital's CEO participated in committees and meetings relating to patient aggression and workplace violence and reviewed all patient aggression incidents. JA215-16 (Tr. 693-94); JA221 (Tr. 714-15); JA224 (Tr. 727), JA228 (Tr. 743).

Pembroke Hospital reports to UHS-DE incidents of patient aggression resulting in staff injury. JA177 (Tr. 508); JA179 (Tr. 514). In turn, UHS-DE provides Pembroke Hospital with analyses of patient aggression and related injuries, as well as comparisons of Pembroke Hospital's incident rates and various UHS-DE-identified benchmarks. JA179 (Tr. 514-16), JA188-90 (Tr. 553-54, 558-59); JA441-48 (GX-60, GX-61).

UHS-DE is also involved in Pembroke Hospital's finances. Pembroke Hospital's CEO developed Pembroke Hospital's budget with the hospital's CFO,

both of whom are employed by UHS-DE. JA6, 10-11 (Comm'n Dec.); JA216 (Tr. 695); JA233 (Tr. 766-67), JA298-99 (Tr. 1345-46); JA512 (Stip. 10). Pembroke Hospital's budgets and strategic plans are approved by UHS-DE management. JA207 (Tr. 626-27); JA298-99 (Tr. 1345-46). UHS-DE handled other financial matters for Pembroke Hospital as well, including its workers' compensation budget and claims. JA6 (Comm'n Dec.).

D. The ALJ Finds UHS-Pembroke Violated the General Duty Clause by Failing to Protect Its Employees from Patient-on-Staff Violence.

The ALJ affirmed a serious general duty clause violation against UHS-Pembroke only. JA104. The parties stipulated to the first two elements of a general duty clause violation: (1) "[e]mployees at the worksite were exposed to the hazard of workplace violence, specifically defined in this case as violence and/or assault by patients against staff"; and (2) UHS-DE and UHS-Pembroke as well as the behavioral health industry recognize the hazard of patient-on-staff violence. JA42-44 (ALJ Dec.); JA512 (Stips. 7-9). The ALJ found that the Secretary established the third and fourth elements: (3) the violence was likely to cause death or serious physical harm; and (4) there were feasible abatement methods that would have materially reduced the hazard. JA44-99.

On the issue of feasible abatement methods, the ALJ found as an initial matter that UHS-Pembroke's existing workplace violence prevention program was

inadequate. JA51-71. He noted that, in many instances, UHS-Pembroke was not even following its own guidelines for staffing arrangements, compliance with patient de-escalation plans, and compliance with medical orders such as those ordering one-on-one staffing with agitated patients. JA49-51. The ALJ credited the Secretary's expert, Dr. Robert Welch, who opined that staffing at Pembroke Hospital was both inadequate and significantly below other hospitals he surveyed or worked in. JA55 (ALJ Dec.); JA263 (Tr. 939).

The ALJ also found that UHS-Pembroke employees lacked reliable means to summon assistance when dealing with aggressive patients. JA69. There were not enough two-way radios for each staff member, and they were not reliable. JA69 (ALJ Dec.); JA118 (Tr. 60); JA243 (Tr. 815). Additionally, the ALJ found that UHS-Pembroke failed to properly implement patient de-escalation plans. JA70. While many patients identified listening to music as their preferred calming technique in their de-escalation plan, there were not enough music-playing devices, which led to conflicts among patients. JA70 (ALJ Dec.); JA120 (Tr. 74-75); JA241-42 (Tr. 809-11).

Because the Secretary demonstrated Pembroke's measures were inadequate, JA51-71, the ALJ considered the efficacy and feasible of the Secretary's proposed abatement measures. JA71-99. The ALJ found that the Secretary proposed multiple abatement methods and that all of them should be taken to materially

reduce the hazard. JA73. Based on Dr. Welch's testimony, ALJ found adequate staffing, panic alarms, and having sufficient equipment to implement patient crisis prevention plans, including music players, were feasible and would reduce the workplace violence hazard. JA81-81, 84-87, 90-92, 96-99. The ALJ therefore found that the Secretary established feasible and effective abatement measures and affirmed the violation. JA71-99.

While the ALJ affirmed the citation against UHS-Pembroke, he dismissed it against UHS-DE, finding that UHS-DE and UHS-Pembroke did not operate as a single employer under the Commission's single-employer test. JA100-101. The ALJ found that none of the three factors of the single employer test articulated in *Solis v. Loretto-Oswego Residential Health Care Facility*, Nos. 02-1164 & 02-1174, 2011 WL 95330 (OSHRC Jan. 7, 2011), *aff'd*, 692 F.3d 65, 76 (2d Cir. 2012) were met. JA99-101. The ALJ determined that UHS-DE and UHS-Pembroke did not share a common worksite because they did not have the same business address and there was no allegation that employees were exposed to workplace violence at UHS-DE's corporate location in Pennsylvania. JA100. The ALJ also determined that UHS-DE and UHS-Pembroke did not have sufficiently interrelated and integrated operations and did not have common management personnel who were sufficiently involved in both entities. JA100-101.

The ALJ reclassified the violation from "repeat" to "serious." JA102. The ALJ found that "while the hazards appear to share some commonality," there was insufficient information about the circumstances surrounding the prior citation to show the two general duty clause violations were substantially similar. *Id*. Because some of the abatement measures proposed in the two cases were "notably different," the ALJ found the record showed "significant differences related to the hazard." *Id*.

E. The Commission Finds UHS-DE and UHS-Pembroke Are a Single Employer and Characterizes the Violation as Repeat.

Both the Secretary and UHS-Pembroke appealed the ALJ's decision to the Commission, and the Commission ordered briefing on three issues: (1) whether UHS-DE and UHS-Pembroke were a "single entity"; (2) whether the Secretary established a feasible and effective means of abatement; and (3) the characterization of the violation. JA684. Following briefing, the Commission found that UHS-DE and UHS-Pembroke were a single employer at Pembroke Hospital, affirmed the citation as repeat, and assessed a $25,350 penalty. JA7-24.

Single Employer: Applying the factors articulated in its long-standing single-employer test, the Commission found that UHS-DE and UHS-Pembroke were a single employer because they: (1) shared a common worksite; (2) were interrelated and integrated with respect to safety and health; and (3) shared common ownership. JA7-14. The Commission determined that the ALJ erred in finding

that there was no common worksite, explaining that under applicable precedent, mutual access to a hazard is not a precondition to establishing the common worksite. JA9. The Commission found that the two companies shared a common worksite because both have employees working at Pembroke Hospital, emphasizing that Pembroke's CEO is a UHS-DE employee who works full-time onsite at Pembroke Hospital and that a UHS-DE Loss Control Manager is regularly present at Pembroke Hospital to address safety matters. JA8-9. The Commission also found that UHS-DE's onsite employees were integrally involved in Pembroke Hospital's day-to-day operations, including hiring, firing, and managing hospital staff, overseeing patient treatment and care, and addressing the workplace violence hazard. JA9.

The Commission next determined that UHS-DE and UHS-Pembroke were interrelated and integrated. JA10. UHS-DE was directly involved in supervising Pembroke Hospital staff and in providing patient care, it controlled and influenced the hospital's budget and finances, and it was involved in the clinical and operational aspects of running a hospital, such as regulatory compliance, licensing, quality of clinical care, and clinical programming. *Id*.

The Commission found UHS-DE was also involved in setting policies at Pembroke Hospital and had authority over the hospital's budget and finances. JA11. UHS-DE established hospital policies through Pembroke's Board of

Advisors, which included both Pembroke managers and UHS-DE corporate employees. JA11. And while the ALJ found that UHS-Pembroke set its own budget, the Commission found that UHS-DE, though its employees who served as Pembroke Hospital's CEO and CFO, developed the hospital's budget. JA11.

The Commission pointed to several key factors in finding that UHS-DE and UHS-Pembroke were integrated with respect to safety and health matters. JA12. First, the Pembroke Hospital CEO was a UHS-DE employee who participated in committees and meetings related to patient aggression and workplace violence at the hospital. *Id*. Additionally, UHS-Pembroke reported workplace violence incidents directly to UHS-DE, and UHS-DE provided detailed comparisons between a UHS-DE-created benchmark and a number of metrics related to patient aggression, such as the rate of restraints and injury. JA12.

UHS-DE also made recommendations about how to address workplace violence at Pembroke Hospital. *Id*. UHS-DE's Loss Control Manager, Gina Gilmore, visited Pembroke Hospital every month and attended "aggression reduction" meetings where she presented analyses of patient aggression and directly interacted with hospital employees regarding worker safety. *Id*. UHS-DE even gave a reward to Pembroke Hospital in the form of a credit to its workers' compensation budget if Pembroke reduced its employee injuries to below UHS-DE's target. *Id*. UHS-DE performed root cause analyses of patient-on-staff

violence at Pembroke Hospital that resulted in employee injury. *Id*. The Commission distinguished UHS-DE's direct, daily, hands-on involvement in employee safety and health from *Loretto-Oswego*, where the corporate management company was only infrequently and indirectly involved in employee safety and health. *Id*.

The Commission concluded that the third factor also weighed in favor of treating the companies as a single employer. JA13-14. The Commission found a direct line of management between UHS-Pembroke and UHS-DE that ran through the hospital's CEO, who supervised UHS-Pembroke employees and was supervised by UHS-DE employees. JA13. Additionally, UHS-DE and UHS-Pembroke shared a common owner – Universal Health Services. JA13. The Commission therefore found that all three factors supported finding a single-employer relationship between UHS-DE and UHS-Pembroke at the time of the violation. *Id*.

Feasible and Effective Means of Abatement: The Commission next considered the methods proposed by the Secretary to abate the workplace violence hazard. JA14. The Commission rejected UHS-Pembroke's argument that the abatement methods were proposed as alternatives and agreed with the ALJ that the Secretary proposed, and the parties tried, the measures listed as a process-based approach to abate the hazard. JA15-16. The Commission noted that before the

ALJ, UHS-Pembroke understood the multi-pronged nature of the abatement by accusing the Secretary of trying to impose "various abatement methods." JA16.

The Commission found two of the Secretary's proposed abatement methods were feasible and effective and declined to reach the feasibility and efficacy of the staffing-related abatement measures. JA17 n.11. The Commission found that the Secretary established that providing personal panic alarms for staff to summon assistance and providing adequate equipment to support de-escalation efforts for patients in crisis were feasible and effective abatement methods. JA17.

The Commission relied on Dr. Welch's expert testimony in determining that access to personal panic alarms correlates with significantly lower rates of employee assault by patients. JA18. They are more effective because they permit employees to call for help inconspicuously and silently, thereby preventing further escalation with a distressed patient. *Id*.

The Commission also found that maintaining sufficient equipment to implement each patient's individual crisis prevention plan was feasible and effective. JA19. While roughly nine out of ten patients identified listening to music as a "helping" strategy in their crisis prevention plan, there were at most four music-playing devices available on each unit. *Id*. Patient conflicts over access to the limited number of music-playing devices occurred regularly. *Id*. The Commission relied on Dr. Welch's testimony that patients' inability to receive the

equipment that helps them calm down and de-escalate creates a higher-risk situation. JA20. This testimony was corroborated by several former Pembroke Hospital healthcare staff who testified that music helps de-escalate a patient in crisis. JA21.

Repeat Characterization: The Commission found that the violation was properly characterized as a repeat violation because UHS-Pembroke's 2015 general duty clause violation at Lowell Treatment Center was substantially similar. JA22. The Commission relied on well-established case law that the hazard, not the abatement methods, must be substantially similar. *Id*. The Commission found that the two violations "involve employees exposed to an almost identical hazard – the hazard of physical assault by patients at a psychiatric care facility." JA23. The Commission therefore affirmed the citation as repeat and assessed a $25,350 penalty. JA24.

SUMMARY OF THE ARGUMENT

The Commission correctly interpreted single employer case law, and substantial evidence in the record supports the Commission's finding that UHS-DE and UHS-Pembroke acted as a single employer for the purpose of OSH Act liability. Through its onsite CEO, UHS-DE maintained a daily, physical presence at Pembroke Hospital and was involved in nearly every aspect of Pembroke Hospital's operations. UHS-DE dictated and implemented Pembroke Hospital's

safety and health policies, hired and supervised Pembroke Hospital's management, and managed the facility on a day-to-day basis. UHS-DE exerted wide-ranging control over employee safety and health at Pembroke Hospital by participating in all safety and health committees, monitoring and intervening in safety and health matters, and maintaining the ultimate authority to authorize virtually any measure that would address workplace violence at Pembroke Hospital. In addition, UHS-DE supervised UHS-Pembroke employees, and UHS-DE and UHS-Pembroke share the same ultimate corporate parent.

Substantial evidence also supports the Commission's determination that the Secretary's proposed abatement measures were feasible, effective, and that the Secretary proposed them as multi-pronged, cumulative measures rather than alternatives to each other. Moreover, Petitioners clearly understood the measures to be cumulative given their complaints before the ALJ that the Secretary was improperly trying to "impose various abatement methods."

Additionally, the record evidence supports the Commission's finding that the general duty clause violation was properly characterized as a repeat violation. The violation here is substantially similar to UHS-Pembroke's prior violation at Lowell Treatment Center given the similarity of the patient-on-staff workplace violence hazard, the workplace setting, the types of assaults suffered, and the resulting injuries. The Court should therefore deny the petition for review.

ARGUMENT

I. Standard of Review

The Commission's factual findings must be upheld "if supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 660(a); *Bianchi Trison Corp. v. Chao*, 409 F.3d 196, 204 (3d Cir. 2005). The Court "must uphold the Commission's findings of fact as long as there is enough evidence in the record for a reasonable mind to agree with the Commission." *Fabi Const. Co. v. Sec'y of Labor*, 508 F.3d 1077, 1081 (D.C. Cir. 2007). Whether multiple entities are a single employer under the OSH Act is a question of fact, and the Commission's conclusions must therefore be upheld if supported by substantial evidence. *See Altor, Inc. v. Sec'y of Labor*, 498 F. App'x 145, 148 (3d Cir. 2012); *see also NLRB v. Al Bryant, Inc*., 711 F.2d 543, 551 (3d Cir. 2005) ("The single employer question is primarily factual, and the Board's conclusion must be upheld if supported by substantial evidence."). Legal conclusions may only be set aside if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Bianchi Trison Corp.*, 409 F.3d at 204.

II. The Commission Correctly Applied the Single Employer Test to the Facts and Its Finding that UHS-DE and UHS-Pembroke Are a Single Employer Is Supported by Substantial Evidence.

The OSH Act imposes obligations and liabilities on "employers" and defines "employer" in part as "a person engaged in a business affecting commerce who has employees." 29 U.S.C. § 652(5). A person includes "one or more … corporations

… or any organized group of persons." *Id*. § 652(4). The Commission treats two separate companies "as a single employer when three elements are present: (1) a common worksite; (2) interrelated and integrated operations; and (3) a common president, management, supervision, or ownership." *Altor, Inc*., No. 99-0958, 2011 WL 1682629, at *5 (OSHRC Apr. 26, 2011), *aff'd*, 498 F. App'x 145 (3d Cir. 2012); *see also Advance Specialty*, No. 2279, 1976 WL 22254, at * 2 (OSHRC Mar. 5, 1976) ("when ... two companies share a common worksite such that employees of both have access to the same hazardous conditions, have interrelated and integrated operations, and share a common president, management, supervision or ownership, the purposes of the Act are best effectuated by the two being treated as one.").

These factors are to be considered holistically: the question is "not whether one or another prong has been met, in some legal sense, but rather whether the facts relevant to all three prongs dictate the legal conclusion that the entities operated as a single employer." *Loretto-Oswego*, 692 F.3d at 77. Single employer status is "marked by an absence of an 'arm's length relationship found among unintegrated companies.'" *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 25 (1st Cir. 1983) (internal citations omitted).

The Commission correctly applied the single employer test, and substantial evidence in the record shows that UHS-DE and UHS-Pembroke "handled safety

matters" at Pembroke Hospital "as one company." *Loretto-Oswego*, 692 F.3d at 76. Petitioners' claim that the Commission abused its discretion by misapplying the single employer test is without merit. While not overtly stated, their true objection to the Commission's decision lies not with the application of the single employer test, but rather to the Commission's factual findings. This objection also fails because the evidence in the record amply supports the Commission's factual finding.

A. The Commission Correctly Held that UHS-DE and UHS-Pembroke Shared a Common Worksite Where UHS-DE and UHS-Pembroke Maintained a Daily, Physical Presence at Pembroke Hospital.

With respect to the first factor of the single employer test, there are multiple ways the Secretary can establish that two companies share a common worksite. One way is to show that the companies share a business office. *See A.C. Castle Constr. Co. v. Acosta*, 882 F.3d 34, 42 (1st Cir. 2018) ("A shared headquarters or business address generally satisfies the common worksite factor."); *Fabi Const.*, 508 F.3d at 1090 (common worksite where companies shared a common main office and office workers and employees of one company supervised employees of the other at the worksite); *Absolute Roofing & Constr., Inc*., No. 11-2919, 2013 WL 5505275, at *4 (OSHRC Aug. 20, 2013) (ALJ) (two companies treated as a single employer where they shared office space, employees, letterhead, and held themselves out to the public as the same entity), *aff'd,* 580 F. App'x 357, 364 (6th

Cir. 2014); *Vergona Crane Co., Inc.*, No. 88-1745, 1992 WL 184539 (OSHRC July 22, 1992) (common worksite where two companies operated out of the same office).

Another way is to show that employees of both entities have a "physical presence" at the inspected worksite. *Loretto-Oswego*, 2011 WL 95330 *4 (finding no common worksite when corporate parent had "no physical presence" at nursing home); *A.C. Castle*, 882 F.3d at 42 (general contractor and roofing subcontractor shared a common worksite where general contractor's employee was present at the home roofing inspection site); *C.T. Taylor Co.*, No. 94-3241, 2003 WL 1961272, at *2, 4 (OSHRC Apr. 26, 2003) (steel erection contractor and a subcontractor shared a common worksite where contractor's general manager was present at the cited construction worksite and supervised subcontractor's laborers). The Commission has also found two companies to have a common worksite when "employees of both [companies] have access to the same hazardous conditions." *Advance Specialty Co., Inc*., 1976 WL 22254, at *4.

The Commission properly found that UHS-Pembroke and UHS-DE have a common worksite at Pembroke Hospital because employees of both entities work there on a consistent basis. JA8-10. Pembroke Hospital's CEO, a UHS-DE employee, worked onsite at Pembroke Hospital every day supervising the hospital's employees and overseeing day-to-day operations. JA8 (Comm'n Dec.);

JA215 (Tr. 693); JA227 (Tr. 740-41); JA298 (Tr. 1345). UHS-DE's Loss Control Manager was also regularly present at Pembroke Hospital. JA8 (Comm'n Dec.); JA188-89 (Tr. 552, 554). These UHS-DE employees were "integrally involved in the hospital's day-to-day operations, including hiring, firing, managing hospital staff, as well as overseeing patient treatment and care and addressing the cited workplace violence hazard." JA9 (Comm'n Dec.).

Petitioners argue that UHS-DE's physical presence at Pembroke Hospital is irrelevant and that there is no common worksite because employees of both employers must be exposed to the same hazardous condition.[3] Pet. Br. 17. This argument fails given that a shared business address – which is not the location where employees are exposed to a hazard – "generally satisfies the common worksite factor." *A.C. Castle Constr.*, 882 F.3d at 42; *see also Fabi Const*., 508 F.3d at 1090 (concrete contractor and its management company had a common worksite where they shared a common main office and office workers and employees of one company supervised employees of the other at the worksite);

[3] Petitioners also seem to argue that the definition of "establishment" in OSHA's standards for Federal Employee Occupational Safety and Health Programs, 29 C.F.R. § 1960.2(h), supports their theory that employee exposure is a necessary component of the "common worksite" element. Pet. Br. 18. Not only is this standard irrelevant to the single-employer test, nothing in the cited definition supports Petitioners' reading. Further, if any definition in this standard is instructive, it would be the definition of "workplace," which is "a physical location where […] work or operations are performed." 29 C.F.R. § 1960.2(f).

Vergona Crane, 1992 WL 184539, *1 (companies had a common worksite because they operated out of the same office).

Moreover, there are multiple court and Commission decisions finding a common worksite absent any evidence that employees of both employers were exposed to the hazard. In *A.C. Castle*, for example, the First Circuit affirmed the ALJ's finding that a general construction contractor and its roofing subcontractor were a single employer. *See* 882 F.3d at 42. *A.C. Castle* involved numerous scaffolding and fall protection citations related to improper scaffolding that broke, seriously injuring two workers. *Id.* While the general contractor had been to the worksite to secure and arrange the work, and one of his employees was physically present at the worksite before the scaffolding broke, there was no indication that the general contractor's employees had access to or were in any way exposed to the hazardous scaffolds. *Id*. In fact, the First Circuit noted that in cases involving general contractors and subcontractors, the common worksite factor "will almost always be satisfied." *Id*. This further underscores that both employers' employees need not be exposed to the hazard to establish a common worksite.

Similarly, in *C.T. Taylor*, the Commission found that a steel erection contractor and its subcontractor shared a common worksite even though there was no indication that any of the contractors' employees were exposed to the fall hazard at the construction site. *See* 2003 WL 1961272, at *4. Likewise, in *Altor*,

the Commission found that the two companies shared a common construction worksite where the contractor provided daily supervision and the subcontractor provided labor, but there was no evidence that the contractor was exposed to the cited hazard. *See* 2011 WL 1682629, at *5, *aff'd*, 498 F. App'x 145 (3d Cir. 2012).

Accordingly, Commission precedent does not require employees from both companies to be exposed or have access to the hazard to establish a common worksite.[4] Pet. Br. 18. As such, petitioners' argument that the Commission

[4] Petitioners fault the Commission for departing from a requirement that employees be *exposed* to the same hazard, though a principal case it cites refers to *access* to the hazard. Pet. Br. 18 (quoting *Advance Specialty*, 1976 WL 22254, at * 2). As a general matter, these are not distinct concepts under Commission case law. To establish a violation of an OSHA standard or the general duty clause, the Secretary must demonstrate employee exposure to the violative condition, but that only requires demonstrating *access* to the hazard was reasonably predictable, "either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Fabricated Metal Prods., Inc*., No. 93-1853, 1997 WL 694096, at *3 (OSHRC Nov. 7, 1997). But employee exposure to the violative condition is not at issue in this case because UHS-DE and UHS-Pembroke stipulated, without any caveats, that "[e]mployees at the worksite were exposed to the hazard of workplace violence." JA512 (Stip. 7). The ALJ was therefore incorrect in finding that UHS-DE employees were not exposed to the cited hazard. JA100.

Nor is it true, as Petitioners argue, that *Advance Specialty* holds that employees of both employers must be exposed to the hazard. Although the employees of both companies in *Advance Specialty* happened to be exposed to the hazardous conditions in that case, the Commission did not say that fact was essential. 1976 WL 22254, at * 2, 4. Indeed, *Advance Specialty* relies on an earlier Commission case, *Home Supply Co.*, No. 69, 1974 WL 4021 (OSHRC Mar.

"announced a brand new rule for what qualifies as a 'common worksite,'" Pet. Br. 19, is wrong. In explaining that "mutual employee access to a hazard is not a precondition to establishing the common worksite factor," JA5, the Commission relied on *A.C. Castle*, which addressed precisely this point. In *A.C. Castle*, the First Circuit specifically rejected the proposition that "workers from each entity must be at the site at the time the violation occurred, or *directly exposed to the risk*." 882 F.3d at 42 (emphasis added). Notably, Petitioners omit the italicized language from their discussion of the case. Pet. Br. at 20.

Like the general contractor in *A.C. Castle*, UHS-DE had a physical presence at Pembroke Hospital. As the Commission found, UHS-DE maintained a daily presence at Pembroke Hospital through the hospital's CEO, a UHS-DE employee who works onsite full-time, supervises the hospital's employees, and oversees the hospital's day-to-day operations. JA8. This is in stark contrast to *Loretto-Oswego*, where the nursing home's corporate parent had "no physical presence" at the worksite, was rarely onsite, and was not involved in the nursing home's day-to-day operations. *Loretto-Oswego*, 2011 WL 95330 *4, *aff'd,* 692 F.3d 65.

The purpose of the single employer test is not, as Petitioners claim, "to identify situations where two sets of employees are exposed to common risks, and

28, 1974), which discusses employees' mutual presence on a worksite rather than their mutual exposure to the hazards. *Id.* at *4.

thus can fairly be regulated as one." Pet. Br. at 21. Petitioners cite no case law to support this proposition because it is incorrect. The purpose of the single employer doctrine is to better effectuate the OSH Act by preventing technicalities from thwarting the purpose of the Act. *See C.T. Taylor*, 2003 WL 1961272, at *4 (citing *Schenley Distillers Corp. v. United States*, 326 U.S. 432 (1946) (reason for disregarding mere technical distinctions between related corporations is to effectuate clear legislative purpose)). Under Petitioners' theory, even a company that controlled every aspect of another company's safety and health program could evade liability so long as it protected *its own* employees from the hazard. Such theory would grossly undermine – rather than better effectuate – the purpose of the OSH Act.

B. Substantial Evidence Supports the Commission's Finding that UHS-DE and UHS-Pembroke Have Integrated and Interrelated Operations.

The second factor the Commission considers as part of its single employer analysis is whether the two entities have integrated and interrelated operations. *See C.T. Taylor*, 2003 WL 1961272, at *3. Of particular importance is the extent of integration "with respect to operations and safety and health matters." *Southern Scrap Materials Co., Inc*., No. 94-3393, 2011 WL 4634275, at *34 (OSHRC Sept. 28, 2011); *see also Loretto-Oswego*, 692 F.3d at 76 ("single employer inquiry turns on whether the entities in question 'handled safety matters as one company.'"). In

answering this question, the Commission has considered the extent to which a management company influenced and controlled its affiliate company and whether there was "concerted action on employee safety." *Loretto-Oswego*, 692 F.3d at 77-78. Substantial evidence supports the Commission's finding that UHS-DE and UHS-Pembroke's operations at Pembroke Hospital are interrelated and integrated with respect to employee safety, as well as to administrative, clinical, and operational matters. JA10-12.

1. UHS-DE's Involvement in Employee Safety.

The Commission found that UHS-DE "directs safety and health matters through its onsite CEO, who participates in Pembroke's committees and meetings related to patient aggression and workplace violence." JA12. Substantial record evidence supports this finding.

UHS-DE developed and provided Pembroke Hospital with the vast majority of the hospital's policies, including its workplace violence policy, risk management training program, and code of conduct. JA176 (Tr. 504); JA180 (Tr. 519-20); JA184 (Tr. 535-36); JA190 (Tr. 558-60); JA402-12 (GX-30). Any deviations from UHS-DE policies could only be made by the CEO – a UHS-DE employee – and the Pembroke Hospital Board of Advisors and the Medical Executive Committees, which are comprised of both UHS-Pembroke and UHS-DE employees. JA165 (Tr. 461); JA208 (Tr. 631-32); JA217 (Tr. 699-700). UHS-DE

participates in safety meetings at Pembroke Hospital on patient aggression and workplace violence and reviewed all incidents of patient aggression at the hospital. JA215-16 (Tr. 693-94); JA221 (Tr. 714-15); JA224 (Tr. 727), JA228 (Tr. 743).

UHS-DE also collected and analyzed patient-on-staff aggression, set benchmarks for Pembroke Hospital, and even provided a financial incentive in the form of a prevention credit to UHS-Pembroke's workers' compensation budget if Pembroke employee injuries met the target set by UHS-DE. JA12 (Comm'n Dec.); JA189-90 (Tr. 556-58). The Commission therefore correctly determined that, unlike the management company in *Loretto-Oswego*, which was only infrequently and indirectly involved in employee safety and health, UHS-DE and UHS-Pembroke clearly handled safety matters at Pembroke Hospital as one company. JA12.

Petitioners argue that the Commission misapplied the law because the second element of the single employer test can only be established if one company "exercises near total control over another with respect to safety, or where the two companies' safety operations are fully integrated." Pet. Br. 22. According to Petitioners, the Commission lowered the bar to establish interrelated and integrated operations without any rationale given that UHS-DE's role was limited to "advice and supervision." Pet. Br. 24. Petitioners are wrong both legally and factually.

First, neither the Commission nor the courts of appeals have ever held that total control or complete integration are required. Instead, courts have considered whether one entity directs, influences, or intervenes in safety and health matters. In *A.C. Castle*, for example, the First Circuit found two entities handled employee safety as one company where one company directly intervened in another company's safety matters. 882 F.3d at 43. In that case, the general contractor provided safety policies to the subcontractor and instructed it to follow them. *Id*. Likewise, here, too, UHS-DE provided numerous safety policies to UHS-Pembroke, which it could not deviate from without UHS-DE's approval. JA165 (Tr. 461); JA176 (Tr. 504); JA180 (Tr. 519-20); JA184 (Tr. 535-36); JA190 (Tr. 558-60); JA208 (Tr. 631-32); JA217 (Tr. 699-700); JA402-12 (GX-30). Petitioners' claim that "Pembroke staff ultimately decides" which UHS-DE-provided safety programs to adopt, Pet. Br. 7, is therefore contrary to the record evidence.

Similarly, in *C.T. Taylor*, the Commission found a steel erection contractor and its subcontractor had integrated operations where the steel erection contractor directly intervened in safety matters by inquiring about the use of a safety line for a subcontractor's employees and requiring its installation. *See C.T. Taylor*, 2003 WL 1961272, at *4. Here, too, UHS-DE consistently and repeatedly intervened in Pembroke Hospital's safety matters. UHS-DE Corporate Loss Control's stated

goal is to assist facilities like Pembroke Hospital "with reduction of all staff injuries and with a focus on those incidents caused by patient aggression." JA426 (GX-55); JA430 (GX-57); JA434 (GX-58); JA438 (GX-59). To that end, UHS-DE's Loss Control Manager Gina Gilmore visited Pembroke Hospital monthly, conducted rounds, and attended "aggression reduction" meetings where she presented analyses of patient aggression data. JA12 (Comm'n Dec.); JA430-44 (GX-55, GX-57, GX-58, GX-59). Ms. Gilmore also identified numerous employee safety issues, specified corrective action to address aggression, performed root cause analyses after employee injuries due to patient aggression, and developed goals and plans to reduce patient aggression. *Id.*

In contrast, in *Loretto-Oswego*, there was no integration of safety where the management company "rarely intervened or dictated policy" and there was little evidence that the management company addressed employee safety in its interactions with the nursing home subsidiary. 692 F.3d at 72-73. Here, and as described above, ample evidence in the record supports the Commission's finding that UHS-DE directed and intervened in safety and health matters at Pembroke Hospital. JA12.

Petitioners' reliance on the Commission's decision in *Southern Scrap Materials* is unavailing. Pet. Br. 23-24. In that case, the Commission assessed whether Southern, the cited scrap yard subsidiary, was a single employer with

Houma, a previously-cited *sister* scrap yard subsidiary. *Southern Scrap Materials*, 2011 WL 4634275, at *34. The question in that case was not, as Petitioners suggest, whether the parent company Southern Holdings and subsidiary Southern were a single employer, Pet. Br. 23, but rather whether two subsidiaries of Southern Holdings, Southern and Houma, were a single employer. 2011 WL 4634275, at *34. Thus, while there was evidence that the corporate parent company Southern Holdings exercised considerable authority over safety at Southern, including by drafting its safety program, the Commission was unable to determine whether the two subsidiaries Southern and Houma comprised a single employer because the extent of Southern Holdings' involvement in safety matters at Houma was unknown. *Id*. at *35. Here, on the other hand, there is extensive evidence of UHS-DE's concerted efforts related to safety matters at Pembroke Hospital. *See Loretto-Oswego*, 692 F.3d at 78 (evaluating whether there is "concerted action on employee safety").

2. UHS-DE's Involvement in Administrative, Clinical, and Operational Matters.

In addition to evaluating a company's involvement in another's safety and health matters, the Commission also considers a company's involvement in another's administrative and operational matters in determining whether they are integrated. *See Loretto-Oswego*, 2011 WL 95330, at *3 (finding that on a day-to-day basis, administrative personnel at the nursing home operated independently of

the parent company). The Commission found here that UHS-DE's onsite employees were integrally involved in Pembroke Hospital's day-to-day operations, including hiring, firing, and managing hospital staff. JA8-9. While day-to-day control over an entity's administrative matters is not required to establish single employer liability, UHS-DE's day-to-day involvement in UHS-Pembroke Hospital's operations is especially strong evidence of the companies' integration. *See Loretto-Oswego*, 692 F.3d at 77 (day-to-day involvement is part of larger inquiry of whether entities handled safety as one company).

The Commission has also considered whether companies are entangled with respect to finances, employee supervision, and the division of responsibilities. *See C.T. Taylor*, 2003 WL 1961272, at *2 (single employer where one company provided labor at the worksite while the other supervised and provided the financial, payroll, and workers' compensation recordkeeping services); *Loretto-Oswego*, 692 F.3d at 77-78 (finding it "significant" that the parent company, among other things, authorized the affiliate's budgets). Here, the Commission found that UHS-DE was directly involved in controlling and influencing the hospital's budget and finances. JA10-11. Under UHS-DE's management agreement with UHS-Pembroke, UHS-DE developed and implemented "all systems and procedures required for the efficient operation" of Pembroke Hospital, including its billing system, collection system, payroll system, insurance claim

system, management information system, and patient safety improvement system. JA392 (GX-27). Petitioners do not challenge the Commission's finding, and it is well-supported by the record.

The Commission also found that UHS-DE was directly involved in supervising UHS-Pembroke staff. JA10. UHS-DE manages daily operations at Pembroke Hospital though the onsite CEO, a UHS-DE employee, and through its supervision of UHS-Pembroke's Director of Nursing and Risk Manager. *Id*. Although Petitioners downplay the importance of UHS-DE's supervisory role, Pet. Br. 24, a supervisory relationship is additional evidence of interrelation and integration. *See Fabi Const.*, 508 F.3d at 1090 (interrelated operations between concrete contractor and its management company where management company's employees supervised contractor's employees at the worksite); s*ee also C.T. Taylor*, 2003 WL 1961272, at *4 (companies were a single employer where contractor's general manager "controlled and directed" the work activities of subcontractor's employees on the cited worksite).

Petitioners also suggests that the two companies are not integrated because UHS-DE and UHS-Pembroke perform different functions, with UHS-Pembroke performing clinical functions and handling safety and UHS-DE performing management functions and handling administrative services. Pet. Br. 6-7, 24. This is factually and legally incorrect.

Petitioners rely on the ALJ's finding that UHS-Pembroke provides direct patient care while UHS-DE is a management and consulting business, Pet. Br. 24, but the Commission explicitly disagreed with those findings. JA10-12. The Commission found that UHS-DE is involved in patient care because it supervised Pembroke Hospital's Director of Nursing, Risk Manager, and Medical Director. JA11. And, as noted earlier, UHS-DE also directed safety and health through its onsite CEO and participation in safety committees and meetings. *Id*. The Commission was not bound by the ALJ's findings, and it is the Commission's findings – not the ALJ's – that must be upheld if supported by substantial evidence. *See* 29 U.S.C. § 660(a); *Bianchi Trison Corp.*, 409 F.3d at 204; *Little Beaver Creek Ranches, Inc*., No. 77-2096, 1982 WL 22633, *5 (OSHRC June 30, 1982) ("The ultimate responsibility for decision is placed in the Commissioners to discharge the function of administering the Act.").

In any event, rather than reflecting a lack of integration, the Commission has determined that such division of responsibilities "actually demonstrates that [the companies] were structured to function as one business with interconnected operations." *Altor*, 2011 WL 1682629, at *5 (finding two companies' division of responsibilities between administrative operations and field work showed that the two companies depended on each other), *aff'd* 498 F. App'x at 148. The fact that UHS-Pembroke depended on UHS-DE so completely to handle its administrative,

financial, and operational matters further highlights the interrelated nature of the two entities. *Id.*

Although Petitioners profess to object to the Commission's application of the relevant case law to the facts, their true objection seems to be to the Commission's factual findings. But as explained above, the Commission thoroughly examined the evidence and found UHS-DE's involvement extended far beyond simple advice, supervision, and "back-office services." *Supra,* 30-37. In the words of UHS-DE employee Dr. Thomas Hickey, Pembroke Hospital's on-site CEO, he was responsible for "the whole caboodle of what's involved in running a freestanding psychiatric facility and outpatient programs as well." JA227 (Tr. 741). Substantial evidence therefore supports the Commission's finding that UHS-DE and UHS-Pembroke have integrated and interrelated operations given UHS-DE's extensive involvement in employee safety, administrative, financial, and operational matters at Pembroke Hospital. *See* 29 U.S.C. § 660(a).

C. Substantial Evidence Supports the Commission's Finding that UHS-DE and UHS-Pembroke Have Common Ownership and Management.

The third factor in the single-entity test is whether there is a "common president, management, supervision, or ownership." *Advance Specialty*, 1976 WL 22254, at * 2. Substantial evidence supports the Commission's finding that UHS-DE and UHS-Pembroke have common ownership and management. JA13. UHS-

DE and UHS-Pembroke share the same ultimate corporate parent, Universal Health Services. *Id*.; JA512 (Stip. 12). Contrary to Petitioners' claim, Pet. Br. 25-26, this fact alone establishes a common ownership of the two entities. *See Penntech Papers*, 706 F.2d at 26 (finding common ownership between parent company and two subsidiaries where parent company owned 100% of the stock in a subsidiary, which in turn held 100% of the stock of a second subsidiary).

Although unacknowledged by Petitioners in their brief, the Commission also found there was common management between UHS-DE and UHS-Pembroke given that Pembroke Hospital's CEO and CFO are UHS-DE employees and are supervised by higher-level UHS-DE managers. JA13. This "single line of management," running from entity to entity establishes common management or supervision. *A.C. Castle*, 882 F.3d at 43 (finding common management or supervision between general contractor and subcontractor where subcontractor was in effect the general contractor's supervisory employee). The Commission further found evidence of shared management in that Pembroke Hospital's Board of Advisors, which approves policy changes at the hospital, consists of both UHS-Pembroke and UHS-DE employees. JA13. The Commission's finding that UHS-DE and UHS-Pembroke have common ownership and management is therefore amply supported by the record.

* * * * *

In sum, the Commission's determination that all three factors of the single employer test weigh in favor of a single-employer relationship between UHS-DE and UHS-Pembroke is consistent with the applicable case law and supported by substantial evidence in the record. Petitioners' hyperbolic claims that the Commission changed the single employer test and that "virtually any management or advisory relationship between two companies would suffice," Pet. Br. 14, does not hold water. As described above, all three factors of the single employer test reveal the lack of arm's length relationship between UHS-DE and UHS-Pembroke at Pembroke Hospital. *See Penntech Papers*, 706 F.2d at 25 (single employer status "marked by an absence of an 'arm's length relationship found among unintegrated companies.'"). The Commission's findings are supported by substantial evidence and must be upheld. *See Al Bryant*, 711 F.2d at 551 ("The single employer question is primarily factual, and the Board's conclusion must be upheld if supported by substantial evidence."). Given the Commission's unrebutted findings related to UHS-DE's extensive involvement in safety matters at Pembroke Hospital, JA8-14, there can be little doubt that the "purposes of the Act, including effective enforcement, are well served" by treating UHS-DE and UHS-Pembroke as a single employer. *C.T. Taylor*, 2003 WL 1961272, at *4.

III. Substantial Evidence Supports the Commission's Finding That the Secretary's Proposed Abatement Measures Would Cumulatively Reduce the Patient-on-Staff Workplace Violence Hazard.

To establish a violation of the general duty clause, the Secretary must prove that: (1) a condition or activity in the workplace posed a hazard to employees; (2) the employer or its industry recognized the hazard; (3) the hazard was likely to cause death or serious physical harm; and (4) there was a feasible means of eliminating or materially reducing the hazard. *See BHC Nw. Psychiatric Hosp., LLC v. Sec'y of Labor*, 951 F.3d 558, 563 (D.C. Cir. 2020); *Babcock & Wilcox Co. v. OSHRC*, 622 F.2d 1160, 1164 (3d Cir. 1980). The first three elements are not at issue in this case. JA7 (Comm'n Dec.).

The general duty clause requires employers to "take all feasible steps" to protect workers from recognized hazards. *Gen. Dynamics Corp., Quincy Shipbuilding Div. v. OSHRC*, 599 F.2d 453, 464 (1st Cir. 1979). Therefore, to establish the fourth element, the Secretary is required to "specify the particular steps a cited employer should have taken to avoid citation, and to demonstrate the feasibility and likely utility of those measures." *Nat'l Realty & Const. Co. v. OSHRC*, 489 F.2d 1257, 1268 (D.C. Cir. 1973); *see also Pelron*, No. 82-388, 1986 WL 53616, *4 (OSHRC June 2, 1986) (Secretary must demonstrate that there are "specific additional measures" that would have materially reduced the risk of harm). When a hazard cannot be abated with a single measure, OSHA may require

an employer to take a "process approach" to abatement "to determine what action or combination of actions will eliminate or materially reduce the hazard." *Pepperidge Farm, Inc.*, No. 89-265, 1997 WL 212599, *45 (OSHRC Apr. 26, 1997).

Here, the Secretary identified multiple abatement measures to materially reduce patient-on-staff violence at Pembroke Hospital. JA570-71 (Unopposed Motion to Amend Abatement). Relying on Dr. Welch's expert testimony, the ALJ found that five of the proposed abatement measures were feasible and would materially reduce the hazard. JA81-81, 84-87, 90-92, 96-99. The Commission determined it was not necessary to address the feasibility and efficacy of all of those measures. JA17 n.11. Instead, the Commission found the Secretary established that there were two abatement methods that were feasible and effective: providing personal panic alarms for staff to summon assistance and providing adequate equipment to support de-escalation efforts for patients in crisis. JA17-21.

Petitioners do not challenge the Commission's finding that these two methods are feasible and would materially reduce the hazard.[5] Instead, relying on

[5] While Petitioners seem to question the efficacy of additional music players, Pet. Br. 1, the actual proposed abatement measure is to maintain sufficient equipment, including music playing devices, to implement each patient's individual crisis prevention plan. JA570-71. And it is Pembroke Hospital – not OSHA – that identified music players as a calming device; the fact that Pembroke Hospital did not have enough music players to implement these crisis prevention plans not only

the Commission's decision in *A.H. Sturgill Roofing, Inc*., No. 13-0224, 2019 WL 1099857 (Feb. 28, 2019), they argue that the Secretary's identified abatement methods are alternatives to each other; as such, if it implemented *any* of these measures, the citation should be vacated. Pet. Br. 27-32. Petitioners are wrong.

In *A.H. Sturgill*, a general duty clause case involving employee exposure to excessive heat hazards, the Commission determined that the Secretary was unable to establish the fourth element of a *prima facie* violation because, the Commission found, the multiple identified abatement methods in that case were proposed by the Secretary as alternatives to each other and the employer implemented one of those measures. 2019 WL 1099857, *9 ("We find, unlike our dissenting colleague, that the Secretary litigated his proposed measures as alternative means of abatement.").

In other words, because one of the proposed abatement measures materially reduced the hazard to the extent feasible, the others provided no further protection and the employer did not need to implement them. *Id*. (abatement measures are alternatives where "any one of them would constitute abatement of the alleged violation"); *see also SeaWorld of Florida, LLC v. Perez*, 748 F.3d 1202, 1215 (D.C. Cir. 2014) (Secretary proposed, and the court found, that employer could abate hazard by using barriers *or* distance between employees and killer whales).

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prevented patients from calming down, but also created conflict among patients. JA19-21 (Comm'n Dec.).

On the other hand, if multiple abatement measures would cumulatively reduce the hazard to the (greatest) extent feasible, the employer has an obligation to implement every method (or an equally effective alternative) until no preventable recognized hazard remains. *See Nat'l Realty*, 489 at 1266 (Congress intended to require elimination of preventable hazards).

This case is different than *A.H. Sturgill* for multiple reasons. First, as both the ALJ and the Commission found, the abatement methods were proposed as a multi-prong process rather than as alternatives. JA16 (Comm'n Dec.). This finding is supported by substantial evidence. As the Commission pointed out, the Secretary's post-hearing trial brief explained that while "each of [the Secretary's] proposed abatement measures would have independently provided a material reduction in the hazard[,]" "[m]aximal reduction of the hazard may require implementation of multiple abatement measures." JA16; JA638 n.7 (Sec'y Post-Trial Brief). This is consistent with Dr. Welch's expert opinion that multiple measures are needed to reduce the workplace violence hazard: "it is certainly not one single thing" required to reduce the hazard. JA280 (Tr. 1137); *see also* JA638 n.7 (Sec'y Post-Trial Brief) ("This is not to say, however, that maximal reduction of the hazard can be achieved with just one of the proposed abatement measures.").

Second, Petitioners also understood that the proposed abatement measures were a multi-step process. JA16 (Comm'n Dec.). Petitioners did not argue before

the ALJ that the identified abatement measures were alternatives; rather, they argued that the Secretary was trying to impose *too many* abatement measures through the general duty clause instead of than through rulemaking. UHS's Post-Trial Brief, p. 23. As the Commission found, by accusing the Secretary of trying to "impose various abatement methods," JA16, Petitioners quite clearly understood the multi-pronged, cumulative nature of the proposed abatement measures. *See also* UHS's Post-Hearing Brief, pp. 2-3 (asserting that because the hazard cannot be eliminated, employers are forced to try "all suggested abatement methods").

Third, contrary to Petitioners' assertion, Pet. Br. 30, implementing any one of the Secretary's proposed measures would not reduce the workplace violence hazard to the extent feasible. Relying on Dr. Welch's expert testimony, the ALJ found that to properly address the hazard, "workplace violence programs must include adequate staffing *and* the use of engineering controls such as maintaining systems to quickly summon assistance." JA71 (ALJ Dec.) (emphasis added).

Petitioners question why panic alarms cannot abate almost all assaults,[6] Pet. Br. 30, but simply providing panic alarms would not prevent or eliminate all patient-on-staff violence. To be sure, panic alarms are only effective if there are adequate staff to respond to the alarms, and the ALJ found that staffing levels at

[6] This is reversal from Petitioners' position before the ALJ, where it argued that panic alarms would not materially reduce patient-on-staff aggression. *See* UHS Post-Hearing Brief, p. 36.

Pembroke Hospital were inadequate to respond to violence. JA60. Further, while providing equipment like panic alarms enables staff to call for help discreetly to *respond* to an agitated patient, JA96 (ALJ Dec.), providing equipment like music players relates to de-escalating patients to *prevent* the patient agitation that can lead to violence. JA98-99. And while providing music to patients would help de-escalation in many situations, it certainly does not reduce the workplace violence hazard to the extent feasible. *See Nat'l Realty*, 489 F.2d at 1266 (Congress intended to require elimination of preventable hazards).

As the Commission found, a cumulative, process-based approach to abatement aligns with the nature of the workplace violence hazard, which arises in different circumstances necessitating different abatement measures. JA16. OSHA's Guidelines for Preventing Workplace Violence for Health Care and Social Service Workers recognizes that a process-based approach is needed to address the workplace violence hazard, recommending that employers implement abatement measures that are specific to the setting (*e.g.*, hospital, residential treatment) and the worksite.[7] As such, OSHA's general duty clause citations for workplace violence hazards consistently identify multiple, site-specific measures necessary to materially reduce the hazard. *See BHC Nw. Psychiatric Hosp.*, 951

[7] *See* Guidelines for Preventing Workplace Violence for Health Care and Social Service Workers, pp. 1, 13 (OSHA Pub. No. 3148, 2015), *available at* https://www.osha.gov/sites/default/files/publications/osha3148.pdf.

F.3d at 565 (given multiple shortcomings in employer's process of preventing and addressing workplace violence, Secretary proposed multiple abatement measures to comprehensively address workplace violence hazard); *UHS of Centennial Peaks LLC, d/b/a Centennial Peaks Hosp.*, No. 19-1579, 2022 WL 4075583, at *26 (OSHRC July 26, 2022) (ALJ) (Secretary's abatement measures in workplace violence general duty clause case were proposed as a process).

Finally, this case is different than *A.H. Sturgill* because, unlike the employer in that case, UHS-DE and UHS-Pembroke have not implemented any of the abatement measures that the ALJ found were feasible and effective. JA49-71 (ALJ Dec.). Petitioners fail to point to any evidence in the record to support their claim that they implemented some of the Secretary's proposed abatement measures. Pet. Br. 32. Instead, they simply reference a conclusory footnote in their Commission brief stating – without citing any evidence in the record – that they put forth evidence of sufficient staffing. JA749 n.20. This is particularly unpersuasive given the ALJ's thorough findings that staffing levels at Pembroke Hospital were inadequate to address the workplace violence hazard. JA52-68. Accordingly, assuming *arguendo* that the Secretary proposed the abatement methods as alternatives, the ALJ's finding that none of those measures were implemented at Pembroke Hospital is unrebutted and supported by the record evidence.

IV. Substantial Evidence Supports the Commission's Finding That This Was a Repeat Violation.

The OSH Act provides for enhanced penalties, up to $126,749 per violation at the time of this citation, for employers that repeatedly violate the Act. *See* 29 U.S.C. § 666(a); 29 C.F.R. § 1903.15(d)(2) (2017). A violation is properly classified as repeated "if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation." *Reich v. D.M. Sabia Co.*, 90 F.3d 854, 860 (3d Cir. 1996) (quoting *Potlach Corp.*, No. 16183, 1979 WL 61360, *3 (OSHRC Jan. 22, 1979)). The "principal factor" in assessing repeat liability "is whether the two violations resulted in substantially similar *hazards*." *Lake Erie Constr. Co.*, No. 02-0520, 2005 WL 2902315, *4 (OSHRC Sept. 23, 2005) (emphasis added).

Substantial evidence supports the Commission's determination that the violation in this case was properly characterized as repeated. JA22-24. The repeat characterization is based on a 2015 general duty clause citation to UHS-Pembroke for patient-on-staff workplace violence at Lowell Treatment Center, an inpatient psychiatric facility in Massachusetts. JA22. That citation was resolved by settlement agreement and became a final order in 2016. *Id*. The Commission found the violation in this case was substantially similar to the violation at Lowell Treatment Center. JA22-24. In fact, the Commission found that both violations

involved employee exposure to "an almost identical hazard – the hazard of physical assault by patients at a psychiatric care facility." JA23.

Further, the circumstances surrounding the violations are also similar. *See Active Oil Serv., Inc*., No. 00-0553, 2005 WL 3934873 *6 (OSHRC July 15, 2005) (general duty clause violations substantially similar because both involved employees entering a fuel tank to clean it, which exposed them to similar asphyxiation hazards); *cf*. *GEM Industrial Inc*., No. 93-1122, 1996 WL 710982 (OSHRC Dec. 6, 1996) (classifying the violation as serious rather than repeated because there was insufficient evidence about the circumstances surrounding the hazard). Not only is the patient-on-staff workplace violence hazard the same, the nature of the workplace, the individual acts of violence, and the resulting injuries are also similar. Both violations occurred at inpatient psychiatric facilities. JA22 (Comm'n Dec.). Both violations involved patients choking, punching, kicking, biting, scratching, and pulling employees' hair. *Id*.; JA117-18 (Tr. 56-57); JA238 (Tr. 796); JA240 (Tr. 805); JA286 (Tr. 1264-66); JA317-23 (GX-3); JA449-59 (GX-68, GX-69). And both violations involve the same or similar employee injuries, such as concussions, sprains, strains, contusions, and other injuries. JA22; JA240 (Tr. 805); JA242 (Tr. 810-11); JA317-23 (GX-3): JA333-47 (GX-14).

On appeal, Petitioners argue the Commission's repeat characterization was arbitrary and should be vacated.[8] Pet. Br. 32-44. However, the Commission's conclusion that the violations were substantially similar is a factual finding that must be upheld if it is supported by substantial evidence. *See* 29 U.S.C. § 660(a); *Mod. Cont'l Const. Co. v. OSHRC*, 305 F.3d 43, 53 (1st Cir. 2002) (applying substantial evidence standard to review finding that the hazards were substantially similar).

Petitioners' main argument is that the hazard of "violence and/or assault by patients against staff," JA512, has been described so generally that "virtually *any* two General-Duty-Clause violations would qualify [as repeat]." Pet. Br. 33. This argument is wholly without merit. A general duty clause violation can involve any serious, recognized hazard, including hazards as disparate as combustible dust explosions, the storage of incompatible chemicals together, and excessive heat. None of these would be considered "substantially similar" to each other.

This is also an especially puzzling argument because UHS-DE and UHS-Pembroke stipulated that employees at Pembroke Hospital were exposed "to the hazard of workplace violence, *specifically defined* in this case as violence and/or

[8] Assuming *arguendo* this Court finds the Commission's findings are not supported by substantial evidence, the proper relief would be to recharacterize the violation as serious rather than vacate it because Petitioners never challenged the ALJ's finding that the hazard was likely to cause death or serious physical harm. *See GEM Industrial Inc*., 1996 WL 710982, *6.

assault by patients against staff." JA512 (Stip. 7) (emphasis added). Likewise, the Lowell Treatment Center settlement agreement defined the hazard as "workplace violence including but not limited to physical/verbal assault by patients." JA351. Given that Petitioners agreed to those hazard definitions (and considered them specific), they cannot argue now that the hazard was defined too generally to provide sufficient notice. *See Caterpillar, Inc. v. Herman*, 154 F.3d 400, 403 (7th Cir. 1998) (hazards must be sufficiently defined to put the employer "on notice of the need to take steps to prevent the second violation").

Indeed, Petitioners do not actually argue that they lacked notice. Petitioners concede that the hazard of patient-on-staff violence is similar, the acts of violence are similar, and the injuries are similar. Pet. Br. 36. Petitioners' post-trial brief acknowledged that other citations OSHA issued to different UHS-managed hospitals were for "the same hazard in similar settings." UHS Post-Trial Br. at 3; *see also id*. at 22 (other citations relate to "the same hazard of workplace violence"). On appeal, Petitioners assert without explanation that these similarities should be disregarded as "superficialities." Pet. Br. 36. But given the similarity of the hazard, the similarity of the workplace, the similarity of the specific assaults, and the similarity of the resulting injuries, Petitioners should have been "particularly alert for the condition that brought about the second violation." *Caterpillar, Inc.*, 154 F.3d at 403.

The Commission also correctly rejected Petitioners' contention that the abatement methods must be substantially similar in order for the violation to be substantially similar. JA23. The Commission has consistently held that that abatement methods need not be similar for the violation to be substantially similar. *See Active Oil Serv.*, 2005 WL 3934873 *6 ("the similarity of abatement is not the criterion … the test is whether the two violations resulted in substantially similar hazards."); *Lake Erie Constr. Co*., 2005 WL 2902315, *4 (rejecting argument that violation was not substantially similar because prior citation required use of a scissor lift rather than personal fall protection and finding substantially similar violation because both citations involved the same fall hazard).

While Petitioners assert that the Commission erred in finding the differences in the proposed abatements are irrelevant, Pet. Br. 40-43, the Commission in fact noted that at least one of the proposed measures in Lowell Treatment Center is essentially the same as one proposed here. JA23 n.19. The Lowell Treatment Center settlement agreement required UHS-Pembroke to provide sufficient communication devices, such as panic alarms, to all direct care workers to ensure they had a reliable way to rapidly summon assistance. JA353 (GX-15). Here too, the Secretary proposed providing panic alarms to all employees who work in close proximity to patients so that they could summon assistance. JA17 (Comm'n Dec.). In addition, the Lowell Treatment Center citation identified providing security staff

on all shifts to respond to aggressive behavior as one of the feasible abatement measures. JA342 (GX-14). Here, too, the Secretary proposed providing security staff and/or crisis intervention specialists on all shifts to prevent and respond to violence. JA14 (Comm'n Dec.). As such, while the abatement methods need not be similar, the similarity of these important measures indicates that additional emergency assistance and notification systems were needed to address the patient-on-staff assaults at both of these inpatient behavioral health hospitals.

Petitioners' other miscellaneous attacks on the repeat characterization also lack merit. Their contention that a repeat citation and the corresponding $25,350 penalty has the potential to "penalize the inpatient psychiatric care industry out of existence," Pet. Br. 37, is absurd. There is no question that Universal Health Services, a multi-billion dollar company,[9] will still exist after paying its OSHA penalty. Petitioners also seems to suggest that focusing on the similarity of the hazard for the purposes of characterizing the violation somehow eliminates the Secretary's burden to establish a *prima facie* violation. Pet. Br. 37. This is not the case – the characterization of the violation as repeated is separate from the Secretary's burden to establish a violation exists. *See* 29 U.S.C. § 666(a)-(c).

Further, Petitioners' musings about the reach of the general duty clause, Pet. Br. 37-39, have no bearing on the repeat characterization at issue. Contrary to their

[9] *See* https://ir.uhs.com/

belief, there is nothing strange about citing an employer for a repeat violation of the general duty clause. Pet. Br. 38. The "substantially similar" test applies to repeat violations of standards as well as repeat violations of the general duty clause. *See Active Oil Serv., Inc*., 2005 WL 3934873 *6 (finding two general duty clause violations substantially similar because both involved employees entering a fuel tank and being exposed to similar asphyxiation hazards). Finally, given that UHS-DE and UHS-Pembroke stipulated to the "specifically defined" hazard of "violence and/or assault by patients against staff," JA512, their argument that this definition of the hazard gives the Secretary "unprecedented power over American industry," Pet. Br. 38 (quoting *W.Va. v. EPA*, 142 S.Ct. 2587, 2612 (2022)), is completely specious.[10]

OSHA penalties are meant to "inflict pocketbook deterrence," *Atlas Roofing Co. v. OSHRC*, 518 F.2d 990, 1001 (5th Cir. 1975), *aff'd* 430 U.S. 442 (1997), and the deterrent purpose would be undermined if Petitioners avoided the enhanced penalties prescribed by the OSH Act. *See Zemon Concrete Corp. v. OSHRC*, 683

[10] There is also nothing "unprecedented" about OSHA's regulation of the workplace violence hazard in this industry. OSHA first published guidance on preventing workplace violence in healthcare and social services in 1996, which it updated in 2004 and 2015. *See* Guidelines for Preventing Workplace Violence for Health Care and Social Service Workers. Moreover, the Commission explicitly rejected the argument that the OSH Act does not cover workplace violence in the healthcare and social services industry. *See Integra Health Management, Inc.*, No. 13-1124, 2019 WL 1142920, *7 (OSHRC Mar. 4, 2019).

F.2d 176, 181 (7th Cir. 1982) (penalties cannot be so low as to frustrate OSH Act's purposes). As evidenced by the prior citation at Lowell Treatment Center, UHS-Pembroke has repeatedly exposed employees to workplace violence at its psychiatric facilities, and the repeat characterization is legally and factually appropriate.[11] *See Potlatch Corp*., 1979 WL 61360, at *5 ("it is not unrealistic to require that an employer observe the [OSH Act] (as with any other statute) in all locations where it transacts business."). The Commission's determination that this violation is substantially similar to the Lowell Treatment Center violation is well supported by the record evidence and should be upheld.

[11] In addition to the Lowell Treatment Center violation, another UHS-DE subsidiary violated the general duty clause by failing to protect its employees from patient-on-staff violence at an inpatient psychiatric facility. *See BHC Nw. Psychiatric Hosp., LLC*, 951 F.3d at 561-62 (comparing the patient aggression rate of one UHS-DE managed psychiatric facility to all UHS facilities). More recently, three other ALJs have found that UHS subsidiaries violated the general duty clause by failing to protect employees from patient-on-staff violence at inpatient psychiatric facilities. *See UHS of Centennial Peaks LLC d/b/a Centennial Peaks Hospital*, No. 19-1579, 2022 WL 4075583 (OSHRC July 26, 2022) (ALJ); *UHS of Denver, Inc. d/b/a Highlands Behavioral Health*, No. 19-0550, slip op. (Mar. 1, 2022), *available at* https://www.oshrc.gov/assets/1/6/UHS_Highlands_Docket_No._19-0550_Decision_and_Order_Ball_Final_REDACTED.pdf; *UHS of Delaware, Inc. and Premier Behavioral Health Solutions of Florida, Inc. d/b/a Suncoast Behavioral Health Center*, No. 18-0731, slip op. (Apr. 20, 2021), *available at* https://www.oshrc.gov/assets/1/6/ALJ_Decision_-_UHS_of_Delaware_18-0731.pdf. While the violations in those cases do not form the basis of OSHA's repeat characterization, they do undermine any suggestion that UHS lacked notice about the hazard.

CONCLUSION

For the foregoing reasons, the Court should deny UHS-DE and UHS-Pembroke's petition for review.

SEEMA NANDA
Solicitor of Labor

EDMUND C. BAIRD
Associate Solicitor of Labor for
Occupational Safety and Health

HEATHER R. PHILLIPS
Counsel for Appellate Litigation

/s/ *Anne R. Godoy*
ANNE R. GODOY
Senior Attorney
U.S. Department of Labor
200 Constitution Ave., N.W.
Washington, D.C. 20210
(202) 693-5452

Dated: October 14, 2022

CERTIFICATE OF SERVICE

I hereby certify that, on October 14, 2022, I filed a copy of the foregoing brief via the Court's CM/ECF Electronic Filing System, providing service on all registered counsel for Petitioners. Hardcopies of the Secretary's Brief in the number required are being mailed to the Court and Petitioners' counsel. Petitioners' counsel is also a Filing User and will be served electronically by the Notice of Docket Activity generated by the Court's CM/ECF system.

/s/ *Anne R. Godoy*
ANNE R. GODOY
Senior Attorney
U.S. Department of Labor
200 Constitution Ave., N.W.
Washington, D.C. 20210
(202) 693-5452
IL Bar No. 6300740

Dated: October 14, 2022

CERTIFICATE OF BAR ADMISSION

In compliance with 3d Cir. L.A.R. 28.3(d) and 46.1(e), I hereby certify that at least one of the attorneys whose names appear in this brief is a member of the bar of this court, or has filed an application for admission pursuant to this rule.

/s/ *Anne R. Godoy*
ANNE R. GODOY
Senior Attorney
U.S. Department of Labor
200 Constitution Ave., N.W.
Washington, D.C. 20210
(202) 693-5452

CERTIFICATE OF COMPLIANCE

I hereby certify that the Secretary's brief contains 12,228 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as measured by Microsoft Office, and complies with the type-volume limitations in Fed. R. App. P. 32(a)(7)(B). The font used was Times New Roman 14-point proportional space type.

I also certify that the ECF document was scanned for viruses with Microsoft Defender and found to be free of viruses and that the paper copies of this brief are identical to the version submitted electronically.

/s/ *Anne R. Godoy*
ANNE R. GODOY
Senior Attorney
U.S. Department of Labor
200 Constitution Ave., N.W.
Washington, D.C. 20210
(202) 693-5452

Dated: October 14, 2022