

Nos. 24-9519 & 24-9521

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

**UHS OF DELAWARE INC. and CEDAR SPRINGS HOSPITAL, INC., doing
business as CEDAR SPRINGS HOSPITAL**

Petitioner-Appellants,

v.

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION and
SECRETARY OF LABOR,**

Respondent-Appellees.

On Petition for Review of the
Occupational Safety and Health Review Commission Final Order
Administrative Law Judge Christopher D. Helms | OSHRC No. 20-0887

BRIEF FOR THE SECRETARY OF LABOR

Oral Argument Requested

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STATEMENT OF RELATED CASES

This case has not previously been before this Court. There are currently two other cases in litigation involving Petitioner UHS of Delaware (UHS-DE) where the Secretary alleged the company violated the general duty clause of the Occupational Safety and Health Act (OSH Act) by exposing employees to the hazard of patient-on-staff

violence at psychiatric hospitals. These cases also both involve the issue of whether UHS-DE and the Universal Health Services subsidiary operating the psychiatric facility in question are a single employer for purposes of OSH Act liability. The cases are:

- *Sec’y of Labor v. UHS of Fuller, Inc., UHS of Delaware, Inc.*, Commission No. 20-0032. This case was decided by ALJ Carol A. Baumerich on January 31, 2023, and the Commission directed review of the ALJ’s decision on March 2, 2023.
- *Sec’y of Labor v. UHS of Delaware Premier Health Solutions d/b/a Suncoast Behavioral Health Center*, 2023 WL 2388069 (No. 18-0731, 2023) (on appeal to the 11th Circuit, No. 23-11327). This case has been fully briefed before the 11th Circuit and oral argument is scheduled for the week of March 24, 2025.

A third case involving UHS-DE and raising the same single employer issue was decided by the Third Circuit in 2023. *UHS of Westwood Pembroke, Inc. v. Occupational Safety & Health Rev. Comm’n*, 2023 WL 3243988 (3d Cir. May 4, 2023).

GLOSSARY OF ACRONYMS AND ABBREVIATIONS

ALJ	Administrative Law Judge
APA	Administrative Procedure Act
CMS	Centers for Medicare & Medicaid Services
Commission	The Occupational Safety and Health Review Commission
FLSA	Fair Labor Standards Act
FRCP	Federal Rules of Civil Procedure
NLRB	National Labor Relations Board
OSH Act	Occupational Safety and Health Act of 1970
OSHA	Occupational Safety and Health Administration
UHS	Universal Health Services, Inc.
WVPP	Workplace Violence Prevention Plan

JURISDICTIONAL STATEMENT

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 December 22, 2023, administrative law judge (ALJ) Christopher D. Helms issued a decision, and UHS of Delaware (UHS-DE) and Cedar Springs Hospital, Inc. (Cedar Springs) timely petitioned the Commission for discretionary review. ALJ Dec. 156–57; CR Vol. 19, p. 1–99.¹ The Commission declined review and the ALJ’s decision became a final order of the Commission on February 5, 2024. CR Vol. 19, p. 100–01. UHS-DE and Cedar Springs separately filed petitions for

¹ Record references are to the ALJ’s Decision (ALJ Dec.); the hearing transcript (Tr.); Stipulations (Stip.); Secretary’s exhibits (Ex. C-); Cedar Spring’s exhibits (Ex. CSH-R-); Cedar Springs’ brief (CSH Br.); UHS-DE’s brief (UHS-DE Br.); and to the Certified Record (CR Vol., page number). For reference, the Stipulations are in CR Vol. 16, p. 68–74, the Secretary’s exhibits are in CR Vol. 10, and Cedar Springs’ exhibits are in CR Vol. 11.

review² with this Court on April 4, 2024, within the sixty-day period prescribed by the OSH Act. 29 U.S.C. §660(a). The underlying OSH Act violation occurred at Cedar Springs Hospital in Colorado Springs, Colorado, so this Court has jurisdiction over the petition for review under 29 U.S.C. § 660(a).

STATEMENT OF THE ISSUES

1. Whether the ALJ correctly applied the single employer test to the facts in finding that UHS-DE and Cedar Springs 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 Cedar Springs.
2. Whether substantial evidence supports the ALJ's determination that the Secretary's proposed abatement measures were feasible to implement and would materially reduce the hazard of patient-on-staff workplace violence at Cedar Springs Hospital where expert witnesses testified to this effect, the company had already

² These cases were subsequently consolidated. Clerk's Order, May 14, 2024.

implemented some of these measures, the measures were considered best practices in the industry, and the measures had been implemented at other similar facilities.

3. Whether Cedar Springs' other legal arguments regarding preemption, the ALJ's imposition of sanctions, the Administrative Procedure Act, and the Secretary's failure to provide fair notice, lack merit because they are waived, include little to no applicable legal support for its positions, and/or are directly contrary to precedent.

STATEMENT OF THE CASE

I. Procedural History

This case arose from an inspection of Cedar Springs Hospital, an inpatient psychiatric facility in Colorado Springs, Colorado, by Occupational Safety and Health Administration (OSHA) Compliance Officer Aimee Stark, which began on November 18, 2019, following employee allegations of workplace violence received by OSHA's Whistleblower Protection Program. Tr. 64, 71. Following the inspection, OSHA issued a citation to UHS-DE and Cedar Springs alleging one serious violation of the general duty clause of the OSH Act, 29 U.S.C.

§ 654(a)(1), and one other-than-serious violation of 29 C.F.R.

§ 1904.40(a). Ex. C-1.

UHS-DE and Cedar Springs timely contested the citation. ALJ Dec. 2. A hearing was held on February 7-17, 2022. *Id.* On December 22, 2023, ALJ Helms issued a decision affirming the citations against UHS-DE and Cedar Springs and assessing a total penalty of \$15,422. *Id.* at 156–57.

UHS-DE and Cedar Springs appealed to the Commission, which declined review, and the ALJ’s order became final on February 5, 2024. CR Vol. 19, p. 100–01. On April 4, 2024, UHS-DE and Cedar Springs 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 achieve the Act’s purposes, 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). To avoid duplication of effort across agencies, Congress also included a limited exception to the requirements of the OSH Act in section 4(b)(1), which states, in relevant part, that the Act does not apply to working conditions “with respect to which other Federal agencies... exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.” 29 U.S.C. § 653(b)(1).

The general duty clause of the OSH Act requires that each employer provide a work environment “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). OSHA enforces both its standards and the general duty clause by issuing citations requiring the employer

to abate violations and, where appropriate, pay a civil penalty.³ 29 U.S.C. §§ 658-659, 666.

If an employer contests a citation, the matter is adjudicated by the Commission, an independent adjudicatory body. *Id.* §§ 659, 661. Initially, an ALJ appointed by the Commission adjudicates the dispute. *Id.* §§ 659(c), 661(j). A party adversely affected by the ALJ's decision may petition for discretionary review of the decision by the full three-member Commission. *Id.* § 661(j); 29 C.F.R. § 2200.91(a). If review is not granted, the ALJ's decision becomes the final order of the Commission thirty days after its issuance. 29 U.S.C. § 661(j). A party adversely affected or aggrieved by the Commission's final order may seek review in the appropriate court of appeals. *Id.* § 660(a), (b).

Congress tasked another agency, the Centers for Medicare and Medicaid Services (CMS), with managing the Medicare and Medicaid programs, which provide health insurance for elderly, disabled, and

³ The Secretary has delegated his responsibilities under the OSH Act to an Assistant Secretary who directs OSHA. Secretary's Order 08-2020, 85 Fed. Reg. 58,393 (2020). The terms "Secretary" and "OSHA" are used interchangeably in this brief.

low-income Americans. *See, Biden v. Missouri*, 595 U.S. 87, 89–90 (2022). Among its duties is ensuring patient safety in facilities, including behavioral health facilities, that participate in these programs. *Id.* at 90. In order to fulfill this duty, Congress authorized CMS to promulgate “conditions of participation,” which facilities voluntarily accept as a condition of participation in the program in the program. *Id.*, *see, e.g.*, 42 C.F.R. part 482.

III. Statement of Facts

A. Patient-on-Staff Violence at Cedar Springs.

Cedar Springs is an inpatient behavioral health hospital in Colorado Springs, Colorado. The hospital has eight units with a total of 110 beds. *Stip.* ¶ 4. Most patients are admitted involuntarily while suffering from serious conditions, and some are brought in by the police. *ALJ Dec.* 5.

Worker injuries due to patient-on-staff aggression were a common occurrence both before and during OSHA’s investigation. *Exs.* C-3 (p. 11–16), C-19; *Tr.* 122–23, 388–399. These violent incidents included employees being bitten, hit, jumped on, and choked, and in one case an employee had his head repeatedly smashed against concrete. *Tr.* 415,

957–58, 1425–29, 1507; Exs. C-12, C-64, C-66. Several of these instances occurred in and around the nursing stations. Tr. 925, 957–58, 993, 1643–45; Exs. C-92 (p. 22–23), C-94 (p. 22). In one instance, after a fire alarm was pulled the aggression was so significant that workers termed it a “patient riot” and the police needed to be called. Tr. 992–95. In another case, a patient managed to bring a 10-inch butcher knife into a unit for over 24 hours before an employee asked him to hand it over and he did. Tr. 1496–98. One patient was so aggressive he had fourteen restraints in the space of four days. Ex. C-64. Employee injuries included eye injuries, wrist injuries, back injuries, neck injuries, and puncture wounds, and workers were regularly referred to the emergency room after incidents. Ex. C-12.

In pre-trial stipulations, Cedar Springs and UHS-DE agreed that they recognized the hazard of workplace violence, their employees were exposed to the hazard at the worksite, and the hazard could result in serious injuries to employees. Stip. ¶¶ 7–11.

B. Relationship Between UHS-DE and Cedar Springs.

Cedar Springs is a wholly-owned subsidiary of Psychiatric Solutions Hospital, Inc., which is wholly owned by Universal Health

Services, Inc. (UHS). Stip. ¶ 18. UHS-DE is a management company that is wholly-owned by UHS. Stip. ¶ 17. UHS is a holding company without any employees. ALJ Dec. 4.

UHS-DE managed Cedar Springs through a management services agreement. Ex. C-84. Under that management services agreement, UHS-DE developed and implemented all systems and procedures required for the efficient operation of Cedar Springs and exercised widespread authority, including administering Cedar Springs' employee benefits, patient safety improvement system, billing system, payroll system, and insurance claim system. Stip. ¶ 31; Ex. C-84. It filed Cedar Springs' taxes, provided approved vendors, and ordered and purchased some inventory and supplies. Ex. C-84; Stip. ¶ 36; Tr. 1964. UHS-DE had final approval of Cedar Springs' budgets and had to approve any capital expenditure over \$5,000. Stip. ¶¶ 32, 34. UHS-DE selected the bank in which Cedar Springs' revenue was deposited and directly removed its monthly management fee from Cedar Springs' account. Stip. ¶¶ 29, 35. UHS-DE also contracted with Sedgwick Claims Management Services, Inc. (Sedgwick), which in turn compiled the OSHA 300 logs for Cedar Springs. Stip. ¶¶ 39–40. UHS-DE provided

other services, as well, including assistance with compliance with all federal rules and regulations, legal and contracting assistance, and databases such as the MIDAS database, which is an electronic system used to report incidents to UHS-DE. Ex. C-84; Stip. ¶ 38.

UHS-DE employees followed up after workplace violence incidents occurred at Cedar Springs and were involved in compiling trend data for the facility regarding patient-on-staff aggression. Tr. 910–913, 1865–68; Exs. C-29, C-44, C-48, C-49. They also trained the trainer who provided training to Cedar Springs employees on de-escalation techniques. Tr. 123–24. Furthermore, UHS-DE provided Cedar Springs with numerous policies, procedures, forms, and training materials related to employee safety and health, including the UHS-DE code of conduct (which all Cedar Springs employees were expected to follow), a workplace violence prevention plan (WVPP) template, trainings for all staff on workplace violence and risk management in behavioral health, and an incident reporting form. Tr. 1817, 1871–1873, 1933; Ex. C-82. For the WVPP, UHS-DE not only provided the template, but also reviewed and approved it and required Cedar Springs to implement it.

Ex. C-27, C-28. UHS-DE also required elements of Cedar Springs' restraint and seclusion policy. Tr. 906.

UHS-DE employees regularly worked at or conducted site visits at the Cedar Springs worksite. Tr. 1984; Stip. ¶ 42. Cedar Springs' Chief Executive Officer (CEO) and its Chief Financial Officer (CFO) were UHS-DE employees. Ex. C-84; Stip. ¶ 21, 26. At the time of the OSHA investigation David Franklin was the CEO of Cedar Springs and Brandon Askew was the CFO. Stip. ¶¶ 21, 26. They both maintained offices at Cedar Springs. Ex. C-5 (p. 2, 4). Both of them also had hiring and firing authority and served on Cedar Springs' Board of Governors, the body responsible for approving changes in hospital policy, and the Performance Improvement Company, where employee injuries were discussed. Tr. 1920, 1982–83; Ex. C-74; Stip. ¶¶ 21, 26, 27.

The CEO was the direct supervisor of certain Cedar Springs employees, including the Director of Risk Management, the Director of Nursing, the Medical Director, the Clinical Services Director, the Director of Admissions and Referrals, the Human Resources director, and the Director of Plant Operations. Stip. ¶ 25. Two of those employees, the Director of Risk Management and the Director of

Nursing, had monthly requirements to engage with other UHS-DE employees by sending reports and attending UHS-DE meetings, respectively. Tr. 904, 1830, 1857–59. The CFO also directly supervised Cedar Springs employees, managed the budget and finances for the hospital, and walked around patient care units multiple times per week at the instruction of the CEO. Tr. 1980–84, 1990–92.

C. The OSHA Inspection and Citation.

After receiving a complaint alleging workplace violence hazards through OSHA's Whistleblower Protection Program, OSHA initiated an investigation on November 18, 2019, at the Cedar Springs facility. Tr. 71; Ex. C-2b. Two days after the commencement of the investigation, the Secretary sent Cedar Springs' CEO a subpoena requiring that Cedar Springs maintain video surveillance footage dealing with workplace violence incidents, and the next day sent an evidence preservation letter making clear the facility's obligation to maintain records. Tr. 81–83; CR Vol. 13, p. 24–30. On May 15, 2020, OSHA cited UHS-DE and Cedar Springs for exposing employees to workplace violence in violation of the general duty clause. Ex. C-1.

In the citation, OSHA identified seven means of abating the hazard of patient-on-staff workplace violence. Ex. C-1. These were:

1. Re-configure the nurses' stations to prevent patient access and secure items so they cannot be used as weapons.
2. Provide staff members with reliable communication devices and provide a means to silently communicate the need for assistance without alerting the patient population.
3. Implement the WVPP, including a building-specific hazard analysis, employee involvement, post-incident debriefs, an effective reporting process, providing copies of the WVPP to staff, and reviewing and updating the WVPP.
4. Maintain adequate staffing to safely address changes in patient acuity and patient census.
5. Develop and implement a policy in the Admissions and Referrals unit to improve isolation and inspection of patient belongings for contraband.
6. Designate specific staff with specialized training in security and/or hire trained security specialists to monitor patients for aggression and assist in responding to workplace violence incidents.

7. Conduct an investigation and debriefing after each act of workplace violence, including near misses, and maintain accurate records of patient assaults on staff.

Ex. C-1.⁴ UHS-DE and Cedar Springs contested the citation and the case was assigned to ALJ Christopher D. Helms.

D. The Discovery Process and the ALJ's Decision.

During the subsequent process of discovery, the Secretary learned that many of the videos that she had instructed Cedar Springs to maintain had been destroyed, and the Secretary only received a total of 65 video clips, many of which were of the same incidents from different angles, and 47 of the videos fell within a single week. CR Vol. 13, p. 5–6. The Secretary filed a motion for sanctions for destruction of video evidence, which the ALJ denied without prejudice. CR Vol. 13, p. 1–89; Vol. 17, p. 54–60.

Following a nine-day trial, ALJ Helms issued a 157-page decision affirming OSHA's citations against both Cedar Springs and UHS-DE.

⁴ Cedar Springs does not challenge abatements 3 or 5 on appeal.

ALJ Dec. 157. As an initial matter, the ALJ reviewed the Secretary's motion for sanctions, which had been renewed in the Secretary's post-trial brief. ALJ Dec. 31. In so doing, the ALJ found that UHS-DE and Cedar Springs had failed to take reasonable steps to preserve the videos since the Director of Risk Management was already supposed to review videos for violent incidents as a matter of hospital policy and had failed to preserve many videos that she reviewed with no explanation as to why. ALJ Dec. 34–40. The ALJ also found that the videos could not be restored or replaced and their loss prejudiced the Secretary because they would have been helpful for meeting the Secretary's burden, particularly the inadequacy of the facility's existing mitigation measures and the feasibility and efficacy of the proposed abatements. ALJ Dec. 40–45. In determining what sanctions were appropriate to impose, the ALJ also determined that there was sufficient evidence to infer intent to deprive. ALJ Dec. 46–47. However, the ALJ determined the harshest sanctions were inappropriate and only imposed adverse inferences that the destroyed videos would have been unfavorable to UHS-DE and Cedar Springs and favorable to the Secretary on the issues of knowledge, abatement, and gravity. ALJ Dec. 48.

The ALJ then went on to confirm that OSHA has authority to address workplace violence through the general duty clause, employers can be required to comply with multiple agencies' regulations, Cedar Springs and UHS-DE had not been deprived of fair notice or due process, and OSHA was not impermissibly enforcing its guidance documents, before analyzing whether the Secretary had proven a violation of the general duty clause. ALJ Dec. 48–56.

In reviewing the general duty clause citation, the ALJ noted that Cedar Springs and UHS-DE had stipulated that employees were exposed to the hazard, they had knowledge and recognition of the workplace violence hazard, and the hazard could cause serious physical harm to employees, leaving only the abatement prong to be resolved. ALJ Dec. 63–64. When evaluating abatement, the ALJ first determined that the existing mitigation measures in place at Cedar Springs were inadequate because, among other things, there were frequent injuries at the worksite, management failed to make changes after incidents, the worksite suffered from chronic understaffing at times, workers were often left alone with multiple patients, post-incident debriefings were inconsistently performed, and the WVPP was insufficiently

implemented. ALJ Dec. 65–95. The ALJ noted that “The actions taken were ‘paper exercises’ rather than committed efforts to take feasible measures to reduce the incidence of the hazard.” ALJ Dec. 95.

Before evaluating feasibility and efficacy, the ALJ noted that the Secretary had proposed a process-based approach and that, based on Commission precedent, the Secretary therefore only needed to show that one of the proposed measures was not already implemented and was feasible and effective. ALJ Dec. 97–98. The ALJ then found that all of the Secretary’s proposed abatements were feasible and effective because they were used at other facilities, they were supported by testimony of experts who had extensive experience with workplace violence and the industry, and Cedar Springs had implemented several of them post-citation. ALJ Dec. 109–142. In so doing, the ALJ relied in part on OSHA’s Guidelines for Preventing Workplace Violence for Healthcare and Social Service Workers and OSHA’s Road Map (guidance documents issued by OSHA to disseminate best practices for mitigating workplace violence) as well as a Sentinel Event Alert by The Joint Commission (a document issued by a major accrediting organization covering recommended practices for mitigating workplace

violence). *See, e.g.*, ALJ Dec. 102, 118, 133, 136, 138, 142; Exs. C-95, C-96, C-100. Additionally, for economic feasibility, the ALJ considered the former CFO's testimony that Cedar Springs could have hired many more employees and remained profitable. ALJ Dec. 139–40.

Finally, the ALJ turned to the question of whether UHS-DE and Cedar Springs were a single employer, and he determined that they were. ALJ Dec. 152. He found that they shared a common worksite because UHS-DE had employees onsite, including in key supervisory positions, and employees of both companies were exposed to the hazard at the worksite. ALJ Dec. 143–45. He found extensive evidence that the two companies were interrelated and integrated because, among other things, UHS-DE employees (the CEO and CFO) had significant responsibilities for making decisions at the facility and UHS-DE was involved in handling workplace violence incidents at Cedar Springs. ALJ Dec. 145–51. UHS-DE also had involvement in many aspects of day-to-day operations at Cedar Springs through their Management Services Agreement. ALJ Dec. 146–48. Lastly, the ALJ determined that there was common ownership and management because the two entities

had a line of management linked through the CEO and CFO and they share the same ultimate corporate parent. ALJ Dec. 151–52.

The ALJ therefore affirmed the citations and assessed a total penalty of \$15,422.⁵ Both UHS-DE and Cedar Springs sought discretionary Commission review of the ALJ’s decision. CR Vol. 19, p. 1–99. The Commission declined review, and the ALJ’s order became final on February 5, 2024. CR Vol. 19, p. 100. This appeal followed.

SUMMARY OF THE ARGUMENT

The ALJ correctly applied single employer case law and substantial evidence in the record supports the finding that UHS-DE and Cedar Springs acted as a single employer for the purposes of OSH Act liability. Through Cedar Springs’ CEO and CFO, who were UHS-DE employees, the two companies maintained a common worksite and were deeply interrelated and integrated in the daily operations of Cedar Springs, including the handling of occupational safety and health

⁵ The ALJ also affirmed the citation for failure to timely produce records under 29 C.F.R. §1904.40(a), but Cedar Springs and UHS-DE do not contest that citation on appeal.

issues. The CEO and CFO sat on Cedar Springs committees and the Board of Governors, which set policies and procedures for the hospital, and supervised, hired, and fired Cedar Springs employees. UHS-DE also maintained control over Cedar Springs' budget, provided extensive trainings and materials to Cedar Springs (including on issues related to patient-on-staff violence), and was involved in tracking and managing workplace violence at the facility. In addition, UHS-DE and Cedar Springs share the same ultimate corporate parent.

The ALJ also correctly determined that the Secretary met her burden to show that there were feasible and effective means of abating the workplace violence hazard. Cedar Springs' existing mitigation measures were insufficient because workers were regularly being injured due to patient-on-staff violence and Cedar Springs management failed to implement its own policies or responsive changes after incidents. The Secretary's proposed abatements were tailored to the failures in Cedar Springs' existing measures and were supported by expert testimony as both technologically and economically feasible, as demonstrated by Cedar Springs' partial or full implementation of several of the abatements post-citation.

Cedar Springs raises several other arguments that are all without merit. It argues⁶ that OSHA is preempted from regulating the hazard of patient-on-staff violence by the Centers for Medicare & Medicaid Services (CMS) regulations, but it failed to raise this affirmative defense at any time in the proceedings before the ALJ and has thus waived it. Even if it had not waived it, its argument fails due to CMS's lack of statutory authority and exercise of any authority that could preempt OSHA. Cedar Springs also argues the ALJ improperly imposed sanctions for destruction of video evidence, but it offers little to no legal support for its argument and it is clear that it failed to take adequate steps to preserve the evidence, this prejudiced the Secretary, and it acted with an intent to deprive. Furthermore, Cedar Springs' argument that OSHA has violated the Administrative Procedure Act (APA) lacks meaningful support in case law and its argument that OSHA failed to provide fair notice is contradicted by precedent.

⁶ Cedar Springs and UHS-DE adopt each other's arguments, but this brief refers to arguments based on which brief they were raised in. UHS-DE Br. 8, CSH Br. 2.

ARGUMENT

I. Standard of Review

The OSH Act specifies the standard of review for a court of appeals reviewing the Commission's findings of fact: "The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive." 29 U.S.C. § 660(a); *Safeway, Inc. v. Occupational Safety and Health Rev. Comm'n*, 382 F.3d 1189, 1192–93 (10th Cir. 2004). This standard is met where, "after conducting a plenary review of the record, 'a reasonable mind' would consider the evidence adequate to support the conclusion reached." *Universal Const. Co., Inc. v. Occupational Safety and Health Rev. Comm'n*, 182 F.3d 726, 732 (10th Cir. 1999) (citation omitted). The Commission's legal determinations are only to be overturned if they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. 5 U.S.C. § 706(2); *Safeway*, 382 F.3d at 1192–93.

These standards of review still apply where, as here, the ALJ's decision became a final order of the Commission after the Commission declined review. *Id.* (noting that, based on 29 U.S.C. §§ 660(a) and

661(j), to hold otherwise “would be contrary to the plain language of the statute”). To the extent that UHS-DE suggests that Commission ALJ legal determinations are reviewed de novo, it does not cite any case law that supports that argument,⁷ and the 10th Circuit has held otherwise.⁸

⁷ UHS-DE states that the Tenth Circuit has recognized that ALJ legal determinations must be reviewed de novo, but the “id.” citation following that quote is incorrect. UHS-DE Br. 26. To the extent that UHS-DE intended to refer to *BNSF R. Co. v. U.S. Dep’t of Lab.*, 816 F.3d 628, 638 (10th Cir. 2016), that case concerns the standard of review for decisions by the Administrative Review Board, rather than Commission ALJs.

⁸ Cedar Springs argues that the Supreme Court’s decision in *Loper Bright Enters., et. al., v. Raimondo*, 144 S.Ct. 2244 (2024), dictates that legal determinations in final orders of the Commission must be reviewed de novo, but this argument misapplies the Court’s holding. CSH Br. 9. In *Loper Bright*, the Supreme Court overturned *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), and held that courts do not have to defer to agency interpretations of ambiguous statutes that the agency administers. *Loper Bright*, 144 S.Ct. at 2273. Cedar Springs does not argue there is an ambiguous statute being interpreted here and where, as here, the *Chevron* analysis would not have been involved in a court’s determination, *Loper Bright* is not relevant to the standard of review.

II. The ALJ Correctly Applied the Single Employer Test to the Facts and His Finding that UHS-DE and Cedar Springs Are a Single Employer Is Supported by Substantial Evidence.

The OSH Act imposes obligations 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.*, 2011 WL 1682629, at *5 (No. 99-0958, 2011), *aff’d*, 498 F. App’x 145 (3d Cir. 2012); *see also*, *Advance Specialty Co., Inc.*, 1976 WL 22254, at *4 (No. 2279, 1976) (“[W]hen ... 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 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.” *Solis v. Loretto-Oswego Residential Health Care Facility*, 692 F.3d 65, 77 (2nd Cir. 2012). 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).⁹ 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 they are supported by substantial evidence.¹⁰ *Altor, Inc. v. Sec’y of Lab.*, 498 F. App’x 145, 148 (3d Cir. 2012); *see also, NLRB v. Al Bryant, Inc.*, 711 F.2d 543, 551 (3d Cir. 1983) (“The single

⁹ The Commission’s three-factor single employer test is based on a similar test long used by the National Labor Relations Board (NLRB) to determine when to treat two corporate entities as one for purposes of the National Labor Relations Act. *See Advance Specialty Co., Inc.*, 1976 WL 22254 at *3; *Loretto-Oswego*, 692 F.3d at 74. This brief accordingly cites certain relevant NLRB cases.

¹⁰ UHS-DE attempts to couch this issue as a question of law by arguing the ALJ “sub silentio abrogated the Commission’s applicable precedents by radically expanding the single-employer test,” but the substance of its argument is an objection to the ALJ’s factual findings. UHS-DE Br. 31.

employer question is primarily factual, and the Board’s conclusion must be upheld if supported by substantial evidence.”).

Here, the ALJ correctly applied the single employer test, and substantial evidence in the record shows that UHS-DE and Cedar Springs “handled safety matters” at the hospital “as one company.”

Loretto-Oswego, 692 F.3d at 76.

A. The ALJ Correctly Determined that UHS-DE and Cedar Springs Shared a Common Worksite Where UHS-DE Maintained a Regular, Physical Presence at Cedar Springs and Had Employees Exposed to the Hazard.

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) (stating that while “[a] shared headquarters or business address generally satisfies the common worksite factor,” it is not “necessary”); *Vergona Crane Co., Inc.*, 1992 WL 184539, at *1–2 (No. 88-1745, 1992) (finding a common worksite where two companies operated out of the same office and used the same staff).

Another way is to show that employees of both entities have a “physical presence” at the inspected worksite. *Loretto-Oswego Residential Health Care Facility*, 2011 WL 95330, at *4 (Nos. 02-1164 & 02-1174, 2011) (finding no common worksite when corporate parent had “no physical presence” at nursing home); *A.C. Castle*, 882 F.3d at 42 (“Given the Act’s focus on worker safety... it is not unreasonable to look to the location at which the employees worked and were exposed to workplace hazards, i.e., the ‘worksite,’ not just the ‘business address.’”). The Commission has also found 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 and the Third Circuit Court of Appeals have found that UHS-DE and its facilities shared a common worksite in very similar cases. *Pembroke/UHS-DE*, 2023 WL 3243988 at *1 (affirming the Commission’s finding of a common worksite where multiple UHS-DE employees regularly worked onsite and were involved in day-to-day operations); *UHS of Westwood Pembroke, Inc., UHS of Del., Inc.*, 2022 WL 774272, at *3 (No. 17-0737, 2022) (finding that UHS-DE and Pembroke had a common worksite where multiple UHS-DE employees

were regularly present onsite at Pembroke and integrally involved in the day-to-day operations); *UHS of Del., Inc. and Premier Behav. Health Sols. of Fla., Inc., dba Suncoast Behav. Health Ctr.*, 2023 WL 2388069, at *4 (No. 18-0731, 2023) (finding that Suncoast and UHS-DE shared a common worksite where several UHS-DE employees worked in supervisory positions, multiple other UHS-DE employees regularly visited the worksite, and a UHS-DE employee was exposed to workplace violence when she interacted with patients during visits to patient units).

The facts in this case are very similar, and the ALJ properly found that Cedar Springs and UHS-DE have a common worksite at Cedar Springs Hospital because employees of both entities worked there on a regular basis and were exposed to the hazard of workplace violence. Specifically, UHS-DE employed the CEO and CFO of Cedar Springs Hospital. Stip. ¶¶ 21, 26; Ex. C-84. Both maintained offices at Cedar Springs. Ex. C-5 (p. 2, 4). The CEO directly supervised a number of Cedar Springs employees on a daily basis. Stip. ¶ 25; Tr. 1919–20. The CFO was often at the worksite, walked around patient care units multiple times a week at the direction of the CEO, and directly

supervised multiple Cedar Springs employees. Tr. 1981–84. Several other UHS-DE employees regularly visited Cedar Springs: six different UHS-DE employees visited during 2019 and the Divisional Director of Clinical Services visited nine separate times. Stip. ¶ 42. UHS-DE therefore maintained a regular physical presence on-site at Cedar Springs and was involved in day-to-day operations.

Additionally, the parties in this case stipulated that employees from both UHS-DE and Cedar Springs were exposed to workplace violence at Cedar Springs. Stip. ¶ 42. UHS-DE now wishes to argue that this exposure is purely speculative because no evidence was elicited regarding incidents of UHS-DE employees exposed to the hazard, but the Secretary had no need to introduce such evidence since UHS-DE had already stipulated to the exposure. UHS-DE Br. 38–39. Additionally, the CFO testified to visiting patient units and interacting with patients multiple times per week, which was sufficient to support a finding of exposure to the hazard in a previous case involving UHS-DE. *UHS-DE/Suncoast*, 2023 WL 2388069 at *4; Tr. 1984. These facts all demonstrate that substantial evidence supports the ALJ’s conclusion that UHS-DE maintained a physical presence at Cedar Springs and its

employees were exposed to the hazard such that the two companies shared a common worksite.

UHS-DE's arguments against a common worksite, UHS-DE Br. 33–38, all fail. As noted above, there is more than one way to show a common worksite, and while a shared headquarters or business address generally demonstrates a common worksite, it is not required to meet that element of the single employer test. *A.C. Castle Constr. Co.*, 882 F.3d at 42. Similarly, UHS-DE does not cite any case law demonstrating that two companies having the same managers is a required element for finding a common worksite – the test is whether there was a “common worksite,” not “common ‘C-Suite’ leadership.” UHS-DE Br. 35–36.

Additionally, while UHS-DE seeks to distinguish this case from *Pembroke/UHS-DE*, the only purportedly “materially different facts” it cites are that the UHS-DE Loss Control Manager worked onsite and was integrally involved in the hospital's operations in Pembroke, and the scope of the CEO's duties were different. UHS-DE Br. 36–38. However, in this case the CFO worked onsite at the hospital and was integrally involved in the day-to-day operations, as was the CEO. Tr.

1919–20, 1981–84. Additionally, the CEO and CFO here had hiring and firing authority and the CFO maintained the hospital budget, indicating that the duties UHS-DE cites as relevant to the common worksite determination are all present in this case as well. UHS-DE Br. 36–38; Tr. 1920, 1982, 1989–90. Just as in the Commission’s decision in *Pembroke/UHS-DE*, “[t]here can be no dispute here that UHS-DE employees work alongside” the facility’s employees “on a consistent basis” at the facility. *Pembroke/UHS-DE*, 2022 WL 774272 at *3. The other cases that UHS-DE cites as support for its argument that there is not a common worksite here have less in common with the facts in this case. *See, e.g., Loretto-Oswego*, 2011 WL 95330 at *4 (relying on the fact that the two companies did not have a “physical presence” at the same worksite in finding there was not a common worksite); *FreightCar America, Inc.*, 2021 WL 2311871, at *5 (No. 18-0970, 2021) (finding that sharing a corporate headquarters was insufficient to show a common worksite where there was no evidence the companies shared the worksite at issue).

Accordingly, substantial evidence supports the ALJ’s finding that the common worksite factor was met in this case.

B. The ALJ Correctly Determined that UHS-DE and Cedar Springs Have Integrated and Interrelated Operations for Both Employee Safety and General Administrative Matters.

The second factor the Commission considers as part of its single employer analysis is whether the two entities have integrated and interrelated operations. *C.T. Taylor Co.*, 2003 WL 1961272, at *3 (No. 94-3241, 2003). Of particular importance is the extent of integration “with respect to operations and safety and health matters.” *S. Scrap Materials Co., Inc.*, 2011 WL 4634275, at *34 (No. 94-3393, 2011); *see also, Loretto-Oswego*, 692 F.3d at 76 (“The Commission’s 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. It also considers involvement in “general administrative matters.” *UHS-DE/Suncoast*, 2023 WL 2388069, at *5 (citing *Loretto-Oswego*, 2011 WL 95330, at *3).

The ALJ correctly concluded, based on the extensive evidence in the record, that UHS-DE and Cedar Springs were interrelated and

integrated with respect to employee safety and health matters and general operations.

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

UHS-DE was consistently involved in Cedar Springs' tracking and monitoring of worker injuries, including those due to workplace violence. For instance, UHS-DE provided support in maintaining the MIDAS database, which Cedar Springs used to record some incidents of patient-to-staff aggression, and UHS-DE had access to that data. Stip. ¶ 38; Tr. 1856. UHS-DE also hired a contractor, Sedgwick, to handle employee injury reporting and compile OSHA 300 logs. Stip. ¶ 68; Tr. 116–17. Following injuries, a UHS-DE employee often followed up to ask additional questions regarding a reported incident and what measures Cedar Springs had taken. Tr. 910–913; Exs. C-44, C-48. A UHS-DE employee also sometimes compiled trend data regarding injuries to staff members, and in once case presented that data to Cedar Springs management. Tr. 1865–68; Exs. C-29, C-49. Cedar Springs' Director of Risk Management sent the UHS-DE risk manager monthly reports, including information on violent incidents at the facility and other metrics. Tr. 1830, 1857–59. UHS-DE was also concerned about

the consequences of incidents: at the start of the OSHA investigation in this case, Cedar Springs reported the investigation to UHS-DE because it was aware that UHS-DE wanted “to know about all OSHA investigations.” Ex. C-36.

UHS-DE was also integral in setting policies and creating training related to workplace violence. Specifically, the CEO and CFO, both UHS-DE employees, participated in a variety of Cedar Springs’ committees, including the Board of Governors and the Performance Improvement Committee, that handled policies and issues related to workplace violence, and the CEO acknowledged he “had a responsibility to take care of patients and staff to ensure safety” as part of his duties. Tr. 1920–21 1983–84; Ex. C-74. Additionally, UHS-DE provided a Preventing Workplace Violence and Corporate Compliance training that Cedar Springs employees were required to take. Tr. 1113–14. The trainer who provided the de-escalation training to Cedar Springs employees was trained by UHS-DE and described the change from one type of de-escalation training to another as “a corporate requirement,” indicating that the decision was not made by Cedar Springs. Tr. 123–24, 2884–85. Contrary to UHS-DE’s assertion that it merely provided a

template for Cedar Springs' WVPP, it required Cedar Springs to have a WVPP in place, provided a template, and reviewed and approved the final WVPP. UHS-DE Br. 46; Exs. C-27, C-28. UHS-DE also required certain elements of Cedar Springs' restraint and seclusion policy. Tr. 906. These were not all policies and materials that "Cedar Springs was free to disregard," as UHS-DE alleges. UHS-DE Br. 47.

Additionally, a number of UHS-DE employees came to Cedar Springs to assess safety matters, including the Senior Loss Control Manager and the Regional Risk Manager. Stip. ¶ 42. Their reviews included recommending Cedar Springs take a number of actions, some of which were included in OSHA's proposed abatements in this case. Ex. C-77, C-78, C-79. Thus, UHS-DE was involved in every aspect of managing workplace violence, from setting policies and creating training to tracking injuries and recommending changes to practices at the hospital.

2. UHS-DE's Involvement in Administrative, Clinical, and Operational 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). As part of this factor of the single employer test, the Commission has 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 (concluding that two companies were a 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, conducted trainings and inspections at facilities, and assisted during an OSHA inspection). A supervisory relationship is additional evidence of interrelation and integration. *See Fabi Constr. Co., Inc. v. Sec'y of Lab.*, 508 F.3d 1077, 1090 (D.C. Cir. 2007) (finding interrelated operations between concrete contractor and its management company where management company's employees supervised contractor's employees at the worksite); *see 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).

Here, UHS-DE was integral to all aspects of Cedar Springs' operation. As noted above, the CEO and CFO were UHS-DE employees and sat on the Board of Governors, which was responsible for "planning, management and operational activities," including approving changes to Cedar Springs policies. Tr. 1920–26, 1983; Ex. C-85. The CFO prepared the budget and handled Cedar Springs' finances, and other UHS-DE employees assisted with preparing the annual capital and operating budgets. Tr. 1980, 1990–92. UHS-DE had final approval over Cedar Spring's budgets and had to approve any capital expenditures over \$5,000. Stip. ¶¶ 32, 34. UHS-DE selected the bank in which Cedar Springs' revenue was deposited and directly removed its monthly management fee from Cedar Springs' account. Stip. ¶¶ 29, 35.

UHS-DE also administered the systems for payroll and benefits, the billing system, the collection system, the disbursement system, and the insurance claim system. Stip. ¶¶ 30, 31. It filed Cedar Springs' taxes, provided approved vendors, and ordered and purchased some inventory and supplies. Ex. C-84; Stip. ¶ 36; Tr. 1964. It provided

numerous templates, trainings, policies, and forms to Cedar Springs, some of which were mandatory for Cedar Springs to use. Tr. 1871–73; Exs. C-27, C-47, C-82, and C-83. It provided legal services, including reviewing contracts, providing assistance with complying with “all laws, rules, regulations, interpretive guidelines” and other requirements. Ex. C-84.

With regard to personnel, UHS-DE hired the CEO and CFO for Cedar Springs, who in turn had and exercised hiring and firing authority over Cedar Springs employees. Stip. ¶¶ 21, 26; Tr. 1920, 1982. A number of Cedar Springs employees directly reported to either the CEO or CFO, and the CEO oversaw the department directors on a daily basis. Stip. ¶ 25; Tr. 1919, 1981. All Cedar Springs employees were expected to comply with UHS-DE’s Code of Conduct. Tr. 1932–33.

While UHS-DE argues that the ALJ failed to properly consider the factual differences between this case and the prior *Pembroke/UHS-DE* case with respect to this factor, the cases it cites are less comparable to the facts at Cedar Springs. With respect to *Pembroke/UHS-DE*, UHS-DE again cites the differences regarding the presence of a UHS-DE Loss Control manager onsite and the scope of the CEO’s duties, but as

discussed above these facts are not material differences from the relationship at Cedar Springs. The only other difference that UHS-DE cites for this factor is that in *Pembroke*, UHS-DE drafted the hospital's strategic plan. This fact is insignificant in the face of the overwhelming similarities between the two cases, including that every fact the Commission relied on in finding interrelation and integration of health and safety matters is also present here. *Pembroke/UHS-DE*, 2022 WL 774272 at *5 (noting that the UHS-DE-employed CEO participated in committees related to workplace violence, the facility reported workplace violence incidents to UHS-DE, UHS-DE provided metrics and data related to workplace violence at the facility, and UHS-DE made recommendations for changes to address workplace violence in finding the two companies were integrated with respect to safety and health matters). *Pembroke/UHS-DE* also shows that, contrary to UHS-DE's assertions, the two companies at issue do not need to be engaged in identical operations to operate as a single employer. UHS-DE Br. 45.

By contrast, the cases that UHS-DE cites as demonstrating that there was not interrelation and integration with Cedar Springs are less applicable and do not support its position. For example, in *Loretto*-

Oswego, the Commission relied on the facts that the management company delegated almost all authority for day-to-day personnel matters to the facility, did not engage in any safety and health matters other than the control of infectious diseases at the facility and OSHA inspections, and did not sit on any committees regarding safety at the facility to find no interrelation and integration between the companies. 2011 WL 95330 at *3–4. Similarly, in *Southern Scrap*, the Commission found that the record was lacking information on who exercised control over operational decisions affecting safety and health and handled recordkeeping responsibilities and it was “essentially silent” on integration and interrelation for matters other than safety and health in finding no integration or interrelation between the companies. 2011 WL 4634275 at *35.

Thus, as explained above, the ALJ thoroughly examined the evidence and correctly found UHS-DE’s involvement extended far beyond its professed “managerial and administrative support” and that the two companies are not “independent operations for unrelated purposes.” UHS-DE Br. 17, 41. Substantial evidence therefore supports the ALJ’s finding that UHS-DE and Cedar Springs have integrated and

interrelated operations given UHS-DE's extensive involvement in employee safety and administrative, financial, and operational matters at Cedar Springs.

C. Substantial Evidence Supports the ALJ's Finding that UHS-DE and Cedar Springs Have Common Ownership and Management.

The third factor in the single employer test is whether there is a “common president, management, supervision, or ownership.” *Advance Specialty*, 1976 WL 22254, at *4. The Commission and the Third Circuit in prior cases involving UHS-DE and its subsidiary facilities have all found that this prong was met based on some or all of the following factors: the two entities shared the same ultimate corporate parent; the facility and UHS-DE were “linked” through the hospital’s CEO and CFO; and the two companies were integrated and interrelated for management purposes, including through shared participation in the hospital’s Board of Governors. *Pembroke/UHS-DE*, 2023 WL 3243988, at *2; *Pembroke/UHS-DE*, 2022 WL 774272, at *6; *UHS-DE/Suncoast*, 2023 WL 2388069, at *9–10; *see also A.C. Castle*, 882 F.3d at 43 (finding common management or supervision between general contractor and subcontractor where there was “a single line of

management” running through the two companies). Contrary to UHS-DE’s argument, these cases demonstrate that it is not necessary for the managers of one company to also be managers at the other company in order to establish common management. UHS-DE Br. 52.

The same facts relevant in the prior UHS-DE cases are also found here: UHS is the ultimate corporate parent of both UHS-DE and Cedar Springs; the two companies were linked through the CEO and CFO of Cedar Springs, who were employees of UHS-DE; and the CEO and CFO participated in the day-to-day management of Cedar Springs, including by sitting on the Board of Governors. Stip. ¶¶17–18, 21, 26; Tr. 1920, 1983. The ALJ’s finding that UHS-DE and Cedar Springs have common ownership and management is therefore amply supported by the record.

This Court should reject UHS-DE’s implausible claim that common management is not established on the ground that no evidence was introduced into the record that the CEO (who was employed by UHS-DE) was supervised by UHS-DE employees. Essentially, UHS-DE would have the Court believe that once it employed David Franklin as CEO at Cedar Springs, it never again provided supervision for him or monitored his performance despite continuing to pay him. Yet, while

the CEO did not directly testify at trial as to who his direct supervisor was, he did testify that he was eligible for a bonus based on the financial performance and clinical measures at Cedar Springs, which he earned in 2020, indicating that his work performance was reviewed and supervised by UHS-DE. Tr. 1921. Additionally, it is clear under the Management Services Agreement that UHS-DE selected the CEO, negotiated his contract, and provided him with a specific job description, all of which indicate that he must be supervised to ensure the terms of the contracts were being met. Ex. C-84. Even if that were not the case, the “single line of management” also runs through the CFO: he had to present the Cedar Springs budgets he prepared to UHS-DE’s senior leadership, the UHS-DE regional vice president of finance reviewed it, and the regional vice president of operations approved it. Tr. 1990–92; *see also, UHS-DE/Suncoast*, 2023 WL 2388069, at *9 (identifying UHS-DE’s approval authority of budgets prepared by the CEO and CFO as relevant to determination of common management).

UHS-DE fails to identify any other purported factual differences from the *UHS-DE/Pembroke* case, and points to other cases that rely on facts that are not consistent with the relationship between UHS-DE

and Cedar Springs. *See Loretto-Oswego*, 2011 WL 95330, at *3 (finding that “administrative personnel at [the facility] operated independently” where the management company’s hiring and firing responsibilities were delegated to an employee of the facility, the management company’s employee did not have any employees of the facility that directly reported to him, and the management company was rarely consulted on personnel issues); *FreightCar*, 2021 WL 2311871, at *6–7 (finding that there was insufficient evidence that the one employee that was identified as part of common management was actually employed by the management company).

Thus, it is clear that UHS-DE and Cedar Springs did have common management, supervision, and ownership, as demonstrated by the common corporate parent and the “single line of management” between the two companies.

* * * * *

In sum, the ALJ’s determination that all three factors of the single employer test weigh in favor of a single-employer relationship between UHS-DE and Cedar Springs is consistent with the applicable case law and supported by substantial evidence in the record. UHS-DE’s

hyperbolic claim that the ALJ “*sub silentio* abrogated the Commission’s applicable precedents by radically expanding the single-employer test” does not hold water.¹¹ UHS-DE Br. 31, 53. As described above, all three factors of the single employer test reveal the lack of arm’s length relationship between UHS-DE and Cedar Springs at Cedar Springs Hospital and the ALJ’s determination should be upheld.

III. Substantial Evidence Supports the ALJ’s Finding That Feasible Means Existed to Materially Reduce the Workplace Violence Hazard.

To prove a violation of the general duty clause, the Secretary must establish: “(1) that the employer failed to render its workplace free of an obvious and recognized hazard, (2) the hazard was causing or likely to cause death or serious physical harm, and (3) there was a feasible method by which the employer could have abated the hazard.” *F&H*

¹¹ UHS-DE also argues that the ALJ did not engage in a holistic inquiry within the necessary context, and argues that the “necessary context” involves considering the “substantial benefits” from resource-sharing across companies and evaluating whether OSHA is the best entity to regulate workplace violence, rather than CMS, but provides no explanation of why those would be relevant to the single employer test determination. UHS-DE Br. 53–56.

Coatings, LLC v. Acosta, 900 F.3d 1214, 1224 (10th Cir. 2018) (citation omitted). Only the third element is at issue in this case. Stip. ¶¶ 7–11 (stipulating that Cedar Springs and UHS-DE employees are exposed to the hazard of workplace violence, both companies and the industry recognize the hazard, and the hazard could cause serious injuries to staff).

To establish the feasibility and efficacy of a proposed abatement measure, the Secretary must show the “availability of feasible measures that would have significantly reduced the likelihood of accident.” *F&H Coatings*, 900 F.3d at 1228 (citing *Marshall v. Cities Serv. Oil Co.*, 577 F.2d 126, 133 (10th Cir. 1978) (Holloway, J. dissenting)). The Secretary need only show that the abatement method would materially reduce the hazard, not that it would eliminate the hazard. *Id.*; see also, *Carlyle Compressor Co. v. Occupational Safety and Health Rev. Comm’n*, 683 F.2d 673, 677 (2d Cir. 1982) (stating that the Secretary’s proposed abatement “need not completely solve the problem as long as it reduces the danger”). Where an employer has undertaken measures to address the hazard, the Secretary must also show that such measures were inadequate. *BHC Nw. Psychiatric Hosp., LLC v. Sec’y of Lab.*, 951 F.3d

558, 564 (D.C. Cir. 2020); *SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202, 1215 (D.C. Cir. 2014).

Here, the ALJ correctly found that Cedar Springs' existing workplace violence prevention program was inadequate to abate the hazard of patient-on-staff violence. He also correctly applied precedent in determining that the Secretary only had to prove one abatement was feasible and effective, but regardless found that all the methods of abatement proposed by the Secretary were capable of being put into effect and would materially reduce the hazard.

A. Substantial Evidence Supports the ALJ's Finding that Cedar Springs' Workplace Violence Prevention Measures Were Inadequate.

The ALJ correctly found that Cedar Springs' existing workplace violence prevention measures were inadequate and that "[t]he actions taken were 'paper exercises' rather than committed efforts to take feasible measures to reduce the incidence of the hazard." ALJ Dec. 95. This is so because, while Cedar Springs took some steps to address the recognized workplace violence hazard, it failed to fully implement its policies, and its employees continued to be attacked and injured at persistently high rates.

These facts are similar to those in other cases where existing mitigation measures were found to be inadequate. *See, BHC Nw.*, 951 F.3d at 565 (concluding that inconsistently implemented workplace violence safety protocols were inadequate to materially reduce the hazard); *SeaWorld*, 748 F.3d at 1215 (relying on evidence of continued employee injuries and deaths in determining that existing safety measures were inadequate). Ample evidence from the Secretary's experts and the numerous employees who testified at the hearing support the ALJ's finding that Cedar Springs' steps to address workplace violence were inadequate. ALJ Dec. 65–96 (highlighting the Secretary's experts' opinions that Cedar Springs' measures were inadequate, the persistent occurrence of injuries due to workplace violence, chronic understaffing, failures to make responsive changes after incidents, and the mismatch between the WVPP on paper and actual practices at the facility, among other issues).

In claiming that the ALJ applied the wrong standard for evaluating whether the facility's actions were inadequate, Cedar Springs misstates the relevant legal burden. While it asserts that the ALJ erred because employers are only required to take all feasible steps

to eliminate or materially reduce a hazard in general duty clause cases where it is possible to fully eliminate a hazard, it cites no authority to support this argument, and such an argument is contrary to the purpose of the general duty clause. *See General Dynamics Corp. v. Occupational Safety and Health Rev. Comm’n*, 599 F.2d 453, 464 (1st Cir. 1979) (“The purpose of the Act is to require all employers to take all feasible steps to avoid industrial accidents”).

To the extent that it proposes an alternative standard when it argues that “[t]he Acting Secretary cannot prove her case by establishing that taking other mitigation steps would further reduce the hazard if the steps taken by Cedar Springs already materially reduces the hazard,” this argument similarly lacks any support. CSH Br. 45–46. The only case law it cites to support this assertion is *Brennan v. Occupational Safety and Health Rev. Comm’n*, 494 F.2d 460, 462 (8th Cir. 1974), but that case involved an employer that had taken no safety measures to address the hazard of accumulated hydrogen sulfide gas, and the portion of the case that Cedar Springs refers to was discussing whether a hazard was recognized or not, which is not at issue here. *Brennan* certainly does not hold, as Cedar Springs claims, that once an

employer has materially reduced the hazard to some degree it has no further obligations under the General Duty Clause even if a risk of serious physical harm remains.

In fact, other courts have evaluated the question of whether existing policies were inadequate to protect employees from workplace violence in the same manner as the ALJ here: they considered whether there were flaws in the existing policies or the employer's implementation of those policies. *See, e.g., BHC Nw.*, 951 F.3d at 565 (stating that the employer's principal shortcoming was the failure to implement policies it had on paper); *Pembroke/UHS-DE*, 2022 WL 774272 at *9 (concluding that existing communication systems were inadequate where the hospital supplied walkie-talkies but they were not reliably functional, not every employee carried them during shifts, and use of phones and yelling for help were not practical or helpful). The ALJ properly applied this case law, and Cedar Springs' arguments to the contrary are without merit.

B. The ALJ Correctly Applied Commission Precedent When Determining that the Secretary Only Had to Prove One Abatement Measure Was Feasible and Effective.

In laying out the legal test for the feasibility element of the Secretary's burden, the ALJ properly followed the Commission's decisions in *Pembroke/UHS-DE* and *UHS-DE/Suncoast*, where the Commission held that, when the Secretary proposes a process-based approach to abatement, "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." *Pembroke/UHS-DE*, 2022 WL 774272 at *8, *aff'd*, 2023 WL 3243988 (3d Cir. 2023); *UHS-DE/Suncoast*, 2023 WL 2388069 at *3; ALJ Dec. 97–98. In *Pembroke/UHS-DE*, the Commission distinguished the proposed workplace violence abatement measures from abatements that are proposed as alternatives (any of which would adequately abate the hazard on its own), where the Secretary has to show that none of the alternative abatement options had been implemented. *Pembroke/UHS-DE*, 2022 WL 774272 at *7 (distinguishing from *A.H. Sturgill Roofing, Inc.*, 2019 WL 1099857 (No. 13-0224, 2019)). The Commission found that it had previously approved a "process-based approach" and that in

such cases the abatement measures were meant to work together to mitigate the hazard and thus, if any one of the abatement measures was feasible, effective, and not implemented by the employer then the Secretary had met her burden. *Id.* at *7–8; *see, Pepperidge Farm, Inc.*, 1997 WL 212599, at *45 (No. 89-265, 1997) (upholding a process-based abatement approach).

This is a commonsense approach – if the Secretary asserts that an employer may use any one of a number of alternative options for abating a hazard, each of which would adequately abate the hazard on its own, the Secretary must prove that the employer did not implement any of the abatement options. Here, however, the Secretary argues that a suite of abatement measures are collectively needed to address multiple underlying causes of a hazard. Thus, in this case, she need only prove that the employer failed to implement any one of those feasible and effective measures to meet her burden.

Contrary to Cedar Springs’ assertion, this is not a “vast departure from prior Commission precedent,” and there is no case law establishing that the Secretary must prove every single abatement method identified in the citation. CSH Br. 12–13. The Secretary’s obligation, rather, is to

establish at least one method that is both feasible and would eliminate or materially reduce the hazard in question. *See, U.S. Postal Serv.*, 2023 WL 2263314, at *2-3 (No. 16-1813, 2023) (finding Secretary established feasible means of abatement by proving one abatement was feasible and effective, even though citation included other means of abatement that were not proven). Cedar Springs' enthusiastic endorsement of Commissioner Laihow's concurring opinion in *UHS-DE/Suncoast* does not change this; indeed, the concurrence itself agrees that the Commission was not required to evaluate the viability of all of the proposed abatement measures and only advocates that the Commission consider the evidence presented for each abatement in order to clarify which abatements are upheld as a final order of the Commission rather than stopping its analysis once it finds a single abatement is feasible and effective. CSH Br. 13–17; *UHS-DE/Suncoast*,

2023 WL 2388069, *10 (concurring opinion).¹² In any event, the ALJ here did consider all of the proposed abatement measures.

C. Substantial Evidence Supports the ALJ’s Finding that the Proposed Abatement Measures Were Feasible and Would Materially Reduce the Workplace Violence Hazard.

Since the ALJ correctly determined that the Secretary only needs to show that one abatement is feasible and effective in order to uphold this general duty clause citation, and Cedar Springs does not seek review of every abatement which the ALJ found feasible and effective. Specifically, the ALJ found that the proposed abatements regarding implementation of Cedar Springs’ WVPP and the development of a policy in the admissions and referrals unit to improve isolation and inspection of patient belongings for contraband would be feasible and

¹² Additionally, Cedar Springs points to a decision where an ALJ relied on Commissioner Laihow’s concurrence in deciding to evaluate the economic feasibility of each proposed abatement measure (which the ALJ in this case did, as well), but ultimately upheld a violation of the general duty clause where seven out of nine of the forms of abatement were economically feasible. *UHS of Denver, Inc. d/b/a Highlands Behav. Health Sys.*, 2023 WL 5527549, *2, 18 (No. 19-0550, 2023) (ALJ). The ALJ did not say, as Cedar Springs suggests, that *Pembroke/UHS-DE* was a “vast departure from prior Commission precedent.” CSH Br. 12.

effective, and the company does not dispute these findings on appeal. ALJ Dec. 119–128. Thus, the Secretary has already met her burden for showing a general duty clause violation and the Court need not analyze this issue further. Regardless, the ALJ correctly found that each of the proposed abatements were feasible and effective, and substantial evidence supports those conclusions.

An abatement is feasible when it is “economically and technologically capable of being done.” *Baroid Div. of NL Indus., Inc. v. Occupational Safety and Health Rev. Comm’n*, 660 F.2d 439, 448 (10th Cir. 1981). In determining feasibility, “[t]he question is whether a precaution is recognized by safety experts as feasible, not whether the precaution’s use has become customary.” *Nat’l Realty & Constr. Co., Inc. v. Occupational Safety and Health Rev. Comm’n*, 489 F.2d 1257, 1266, n. 37 (D.C. Cir. 1973). An abatement measure is not economically feasible if it would “clearly threaten the economic viability of the employer.” *Id.* However, “a precaution does not become infeasible merely because it is expensive.” *Id.*

An abatement method is effective when it would “materially reduce the hazard” or, in other words, “significantly reduce[] the

likelihood of the accident.” *F&H Coatings, LLC*, 900 F.3d at 1228. The Secretary does not have to show that the hazard would be eliminated to demonstrate an abatement method would be effective. *Id.*

There is significant overlap in the evidence that demonstrates feasibility and efficacy. For instance, the implementation of the abatement at other, similar workplaces or post-inspection changes at the cited facility can establish both feasibility and efficacy. *See, e.g., Puffer’s Hardware, Inc. v. Donovan*, 742 F.2d 12, 19 (1st Cir. 1984) (citing the fact that other owners of similar equipment had installed the abatement as evidence of feasible means existing to abate the hazard); *UHS-DE/Pembroke*, 2022 WL 774272, at *10–11 (citing the effective use of personal panic alarms at other behavioral health hospitals and the facility’s implementation of one of the abatement methods post-citation in finding the abatements feasible and effective); *Integra Health Mgmt., Inc.*, 2019 WL 1142920, at *71 (No. 13-1124, 2019) (citing company’s post-inspection implementation of multiple of the Secretary’s recommended workplace violence abatement measures as evidence that they were feasible).

Similarly, quantification is not required for demonstrating feasibility or efficacy. With regard to economic feasibility, while expert testimony on an employer's finances and the abatement's cost is one method of meeting this prong, the Secretary can meet her burden without the proposal's exact cost. *See, e.g., UHS-DE/Pembroke*, 2022 WL 774272, at *11 (discussing an expert's testimony that an abatement could be accomplished "at minimal expense" and the facility's post-citation implementation of the abatement as evidence of economic feasibility); *Sci. Applications Int'l Corp. d/b/a SAIC*, 2020 WL 1941193, at *8-10 (No. 14-1668, 2020) (finding a measure technologically and economically feasible when the employer had already implemented it post-citation).¹³ For efficacy, reliable expert testimony is sufficient to establish that an abatement method would materially reduce a hazard, even when the reduction cannot be quantified. *See, Integra*, 2019 WL

¹³ Cedar Springs' claims that the Secretary should have shown the cost of implementing the abatement measures other than staffing in order to demonstrate economic feasibility, and that using the former CFO's testimony to establish economic feasibility was improper, are inconsistent with this case law, and the company cites no contrary case law to support its position. CSH Br. 20–21.

1142920 at *13-14 (finding that an expert who testified based on experience and could not quantify the reduction in workplace violence that would be achieved if the abatements were implemented was still sufficient to establish the efficacy of abatement measures).

Substantial evidence supported the ALJ's determination that all of the Secretary's proposed abatement measures, including the abatement measures challenged by Cedar Springs,¹⁴ are technologically and economically feasible and would materially reduce the hazard of workplace violence. ALJ Dec. 142. Cedar Springs' arguments to the contrary are without merit.

Nursing stations. With regard to the proposed abatement recommending that Cedar Springs reconfigure its nursing stations to prevent patients from entering, the ALJ correctly noted that the Secretary's experts both opined that this abatement was feasible, Cedar

¹⁴ In its brief, Cedar Springs contests the ALJ's abatement determinations related to staffing, personnel with security training, silent communication methods, and reconfiguring the nurses' stations. CSH Br. 18–21. Cedar Springs does not contest the efficacy determination related to adequate staffing. CSH Br. 22–26.

Springs had made some post-citation changes to its nursing stations, and other behavioral health facilities had more enclosed nursing stations in his determination that the abatement was feasible. ALJ Dec. 111–115; Exs. C-92 (p. 22–24), C-94 (p. 22–24); Tr. 413, 879–882, 2703–04. When considering efficacy, the ALJ pointed to the fact that injuries due to patients jumping over nursing station barriers or weaponizing items in the nursing stations were fairly common, and the testimony of both the Secretary’s experts and workers indicated that reconfiguring the nursing stations could have prevented injuries and the post-citation changes had been helpful. Exs. C-92 (p. 22–24), C-94 (p. 22–24); Tr. 879–82, 986, 992–93, 1024–26. 2703–04. Accordingly, substantial evidence supports the ALJ’s determination that this abatement method is feasible and would materially reduce the hazard.

Cedar Springs argues that preventing a patient from accessing the nursing station only moves the location of the aggressive behavior rather than reducing workplace violence, but it does not cite any evidence to support this claim. Furthermore, it fails to address the evidence that, based on prior incidents at the facility, removing access to implements in the nursing station that can be weaponized, and

preventing patients from jumping down on top of workers, would reduce the harms of the violence. CSH Br. 23; *see, e.g.*, Tr. 992–93; 1025. It also argues that there is a trend in the behavioral health field to have more open and collaborative spaces without nurses’ stations, but this alleged trend does not demonstrate that enclosing the nursing stations would not be effective at materially reducing workplace violence incidents and hazardous outcomes. CSH Br. 24. Thus, these arguments do not undermine the ALJ’s finding that enclosing the nursing stations would be feasible and materially reduce the hazard.

Silent communication devices. For the proposed abatement regarding silent communication devices, the ALJ noted the evidence that patients would sometimes escalate if they heard audible calls for assistance, and silent communication devices would reduce that tendency. ALJ Dec. 116; Tr. 141–42, 1518, 1651. In determining feasibility and efficacy of this abatement, the ALJ properly relied on Dr. Lipscomb’s statement that the ability to ask for help silently was commonplace in the industry, the fact that UHS-DE had recommended that Cedar Springs consider installing more panic buttons in addition to the ones it already had installed in its assessment and referral rooms,

and workers' testimony that it would improve reliability of summoning assistance. Ex. C-78; Tr. 103, 402, 1507–08, 1650–51. Substantial evidence therefore supports the ALJ's determination that this proposed means of abatement would be feasible and materially reduce the hazard.

Cedar Springs argues that because Dr. Lipscomb and Dr. Forman testified that walkie-talkies are effective, they undermined the evidence regarding the necessity for personal panic alarms, but that argument distorts both the proposed abatement and the testimony at trial.¹⁵ The Secretary's abatement merely recommends providing "a means to silently communicate [the] need for assistance without alerting the patient population," rather than personal panic alarms specifically, and Dr. Lipscomb specified in her report that walkie-talkies do not address the need for a silent communication option to avoid escalating patients in some circumstances. Exs. C-1 (p. 6–7); C-94 (p. 26). Thus, Cedar

¹⁵ Cedar Springs also says it "had a means available to call a silent code using radios by making a request 'to join the party,'" but it provides no citation to the record for that assertion. CSH Br. 26.

Springs' arguments do nothing to undermine the ALJ's finding of effectiveness for this abatement method.

Security staff. With regard to the abatement proposing “specific staff with specialized training in security and/or hir[ing] trained security specialists,” the ALJ reasonably concluded the abatement would be effective because the availability of dedicated staff without other responsibilities to prevent them from responding would ensure an adequate number of appropriately trained staff was available to respond to all incidents. ALJ Dec. 138; Tr. 179. The ALJ's finding of feasibility and efficacy for this abatement measure was also supported by expert testimony, as well as evidence that this practice was used at other worksites and is a best practice in reducing workplace violence, as evidenced by its inclusion in the OSHA guidance documents and the Joint Commission's Sentinel Event Alert. ALJ Dec. 135–38; Exs. C-92 (p.17), C-94 (p. 37–40), C-95 (p. 20, 27), C-96 (p. 21–22), C-100 (3, 5–6); Tr. 2714–15. Cedar Springs has already partially implemented this measure because it added a milieu manager and eliminated unit care responsibilities for other workers, further indicating feasibility. Ex. C-

94 (p. 40). Accordingly, substantial evidence supports the ALJ's finding that this element was feasible and would materially reduce the hazard.

Cedar Springs' argument that the abatement suggests "replacing existing staff with security staff who perform the same function" is a mischaracterization of the proposed abatement. In fact, the ALJ's decision clearly explains that ensuring there are sufficient personnel to respond to each incident reduces the risk of injury and particularly more serious injuries, rather than, as Cedar Springs suggests, "simply shift[ing] the hazard from one group of employees to another." CSH Br. 23.

Adequate staffing. Similarly, the ALJ reasonably determined that having "staffing that is adequate to safely address changes in patient acuity and patient census" is a feasible abatement because Cedar Springs has implemented post-citation staffing changes, including adding milieu specialists and a float mental health specialist to the night shift, and both of the Secretary's experts indicated that it was feasible. Tr. 846–57, 1321, 1668–69. In terms of efficacy, the ALJ relied on OSHA's and The Joint Commission's guidance, as well as the testimony of the Secretary's experts who, while recognizing that staffing

is not a cure-all for workplace violence, both persuasively identified specific aspects of Cedar Springs' staffing that demonstrated additional staffing was necessary to mitigate the hazard. Exs. C-92 (p. 13–17), C-94 (p. 27–33), C-95 (p. 4, 10), C-96 (p.19), C-100 (p. 3, 5). The staffing failures they noted included the practice of regularly leaving workers alone with aggressive patients and failing to regularly adjust staffing levels in response to patient acuity. Exs. C-92 (p. 13–17), C-94 (p. 27–33). Workers' experience at the worksite bears out this assessment, and they provided significant evidence of pervasive understaffing, including instances where police needed to be summoned because there were insufficient staff to control workplace violence incidents. Tr. 771–73, 992–95, 1506–07. Management at Cedar Springs confirmed that worker safety had benefitted from the addition of several new full-time staff positions. Tr. 856–57, 1963.

Additionally, in support of the economic feasibility of both of the staffing-related abatements, Cedar Springs' former CFO discussed the financial implications and opined that Cedar Springs could have afforded higher staff levels. In fact, he indicated that Cedar Springs could have added more than 52 full-time employees and would still have

been profitable. Tr. 2051. Even after Cedar Springs hired several new staff members post-citation, it remained profitable. Tr. 2078; Ex. C-90. Thus, there was abundant evidence in the record that supported the ALJ's conclusion that each of these abatement measures were feasible and effective.

The Commission and ALJs in other cases have found many of these measures feasible and effective in very similar cases. *See, e.g., Pembroke/UHS-DE*, 2022 WL 774272 at *10 (finding that providing personal panic alarms is feasible and effective); *UHS-DE/Suncoast*, 2023 WL 2388069 at *73 (finding that reconfiguring nursing stations was feasible and effective); *UHS of Centennial Peaks LLC d/b/a Centennial Peaks Hosp.*, 2022 WL 4075583, at *42, 44, 51 (No. 19-1579, 2022) (concluding that use of personal panic alarms, reconfiguring nurses' stations, and adding staff were feasible and effective).

Cedar Springs's arguments to the contrary are not persuasive. Its primary argument is that the Secretary's experts were not competent. CSH Br. 18–19, 21–24. As an initial matter, as discussed above, the ALJ relied on more than just the experts' testimony in determining that each of the abatements were feasible and effective. More importantly,

though, Dr. Lipscomb and Dr. Forman were exceedingly qualified to opine on feasibility and efficacy of these abatements, and Cedar Springs' arguments to the contrary are utterly meritless.

Determining the admissibility of expert testimony¹⁶ involves a two-pronged analysis: (1) “whether the expert is qualified ‘by knowledge, skill, experience, training, or education’ to render an opinion” and (2) “whether the expert’s opinion is reliable by assessing the underlying reasoning and methodology.” *F&H Coatings*, 900 F.3d at 1222. Where an expert testifies partly based on experience, as here, determining whether the expert’s testimony is “reliable” turns on “the nature of the issue, the expert’s particular expertise, and the subject of

¹⁶ The admissibility of expert testimony in Commission cases is governed by Federal Rule Evidence 702, which states that a trier of fact may qualify a witness as an expert by knowledge, skill, experience, training, or education and permit the witness to provide expert testimony and opinions where: (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. *S. Pan Servs. Co.*, 2005 WL 2697266, at *2 (No. 99-0933, 2005); 29 C.F.R. § 2200.71 (stating that the Federal Rules of Evidence are applicable to Commission hearings).

[the] testimony.” *Id.* at 1222 (citing *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 148–50 (1999)). The ALJ’s determination is reviewed for an abuse of discretion. *F&H Coatings*, 900 F.3d at 1223.

The record overwhelming demonstrates that the Secretary’s experts are eminently qualified. As the ALJ highlighted, Dr. Lipscomb has more than 30 years of experience in workplace violence prevention in healthcare, including working at the National Institute for Occupational Safety and Health, fifteen years of field research, designing training programs, and over twenty peer-reviewed publications in the area. ALJ Dec. 58–59; Exs. C-93, C-94 (p. 2–3). Dr. Forman has over fourteen years working as a doctor in psychiatric settings and has extensive experience treating aggressive or violent patients while they are in psychiatric care. ALJ Dec. 57–58; Ex. C-91, C-92 (p. 10). The ALJ therefore properly qualified them as experts on the feasibility and efficacy of the Secretary’s proposed abatement

measures.¹⁷ Tr. Both of these experts have been qualified in other workplace violence cases before the Commission as well. *See, e.g., UHS-DE/Suncoast*, 2023 WL 2388069 at *46 (qualifying Dr. Lipscomb and Dr. Forman as experts); *BHC Nw. Psychiatric Hosp. d/b/a Brooke Glen Behav. Hosp.*, 2019 WL 989734, at *5–8 (No. 17-0063, 2019) (ALJ) (qualifying Dr. Lipscomb as an expert); *see also, BHC Nw.*, 951 F.3d at 561, 564 (concluding that the ALJ permissibly credited Dr. Lipscomb over the facility’s expert).

In preparing for their reports and testimony, both experts conducted an extensive review of the conditions at Cedar Springs based on evidence collected during the investigation. Ex. C-92 (p. 10); Tr. 1175, 1598–99. They based their opinions on the feasibility and efficacy of the Secretary’s proposed measures on their review of the evidence

¹⁷ The ALJ certified Dr. Forman as qualified to opine on the evaluation and management of psychiatric patients, the inadequacy of Cedar Springs’ existing measures, and the measures that OSHA proposed. Tr. 1183. The ALJ admitted Dr. Lipscomb as an expert in workplace violence in healthcare and behavioral health settings including on issues regarding adequacy of workplace violence prevention programs and other methods for preventing workplace violence to workers. Tr. 1602–03.

specific to Cedar Springs, a literature review, their education and training, and years of personal experience in the behavioral health field. *Id.* Thus, their methodology for coming to their conclusions was appropriate and reliable based on “the nature of the issue, the expert’s particular expertise, and the subject of [the] testimony.” *F&H Coatings*, 900 F.3d at 1222.

Cedar Springs argues that Dr. Forman’s and Dr. Lipscomb’s opinions were based on small unrepresentative samples and improper comparator evidence rather than “fundamental and accepted methodology,” but this argument distorts the standard for admitting expert testimony. CSH Br. 19, 21–22. In its view, the only appropriate methodology is one that involves quantified analysis of a large number of facilities, and it cites a long list of cases that involve courts finding quantified analyses insufficient. The existence of cases where experts relied on quantified analyses does not, however, undermine the relevance and admissibility of expert testimony based on experience. Its primary citation in support of its theory that the experts relied on improper comparator facilities is the concurrence in *UHS-DE/Suncoast*, but that reliance is misplaced. In addition to being merely a

concurrence, that discussion was limited to the shortcomings of analogizing staffing needs between different facilities. *UHS-DE/Suncoast*, 2023 WL 2388069 at *12. The concurrence does not change the fact that the Commission has found the type of evidence presented by Dr. Forman and Dr. Lipscomb to be sufficiently reliable in other cases on the types of abatement measures at issue here. *See, e.g., Pembroke/UHS-DE*, 2022 WL 774272 at *10 (describing the expert background of Dr. Welch, which is similar to Dr. Forman’s, and relying on it in assessing feasibility). Its attack on the credibility of one of the foremost experts in workplace violence is thus fully without merit and the ALJ correctly relied on expert testimony of Dr. Forman and Dr. Lipscomb in reaching his conclusions.

Cedar Springs’ other arguments also fail. The evidence in the record of economic feasibility is more than adequate to support the ALJ’s finding that the proposed abatement measures are economically feasible, and the Secretary properly relied on post-citation measures to establish the economic feasibility of those measures, contrary to Cedar Springs’ arguments. Cedar Springs cites no case law to support its claim that, because it has only partially implemented some of the

proposed abatement measures, the ALJ improperly considered post-citation measures as evidence of economic feasibility. CSH Br. 20. In fact, *Sea World* indicates that partial post-citation implementation of a recommended abatement measure is evidence that it is feasible to extend that abatement measure to the full facility. 748 F.3d at 1215. It also does not explain how its staffing policy changes are insufficient to meet the Secretary's proposed abatement regarding adequate staffing.

Cedar Springs' argument that the ALJ improperly shifted the burden of proving economic feasibility to Cedar Springs also fails because it mischaracterizes the ALJ's decision. In fact, the ALJ merely noted that the Secretary had demonstrated the abatements were economically feasible, and Cedar Springs provided no competing evidence to weigh against that finding. CSH Br. 19–20; ALJ Dec. 105–08.

IV. Cedar Springs' Remaining Legal Arguments Lack Merit.

A. Cedar Springs' Claim that OSHA Is Preempted from Using the General Duty Clause to Address the Hazard of Workplace Violence Is Not Properly Before this Court and, in Any Event, Is Baseless.

1. Cedar Springs Failed to Raise the Affirmative Defense of Preemption at Any Point Before the ALJ and Therefore Waived the Argument.

Cedar Springs waived the affirmative defense of preemption under section 4(b)(1) of the OSH Act by failing to raise it prior to the trial in this case, or, in fact, before the ALJ at all. The issue is, therefore, improperly before this Court.

Section 4(b)(1) states, in relevant part, that “[n]othing in this Act shall apply to working conditions of employees with respect to which other Federal agencies... exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.” 29 U.S.C. § 653(b)(1). The Commission has consistently held that an argument that OSHA is preempted by another agency under section 4(b)(1) is an affirmative defense. *MEI Holdings, Inc.*, 1997 WL 672049, *3-4, (No. 96-740, 1997) (compiling a number of cases where the Commission concluded that preemption is an affirmative defense). This

means that the Commission considers such an argument waived unless it was raised prior to the hearing. *Id.*; 29 C.F.R. § 2200.34(b)(3) and (4).

The Commission's position is supported by the fact that section 4(b)(1) preemption falls neatly within the definition of an affirmative defense. An affirmative defense is "[a] defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true." *Affirmative Defense*, BLACK'S LAW DICTIONARY (12th ed. 2024); *U.S. v. Portillo-Madrid*, 292 Fed. App'x 746, 747 n. 1 (10th Cir. 2008) (citing this definition). Preemption is just such an assertion because even if everything the Secretary alleges about a hazard is true, an employer will prevail in the proceeding if the Secretary is preempted from enforcing its requirements.

While the Tenth Circuit has not directly addressed the question of whether section 4(b)(1) preemption is an affirmative defense, analogous case law supports this conclusion. The Supreme Court and the Tenth Circuit have stated that federal preemption of a state law claim is an affirmative defense that can be waived. *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 634 (2011) (concluding that a defendant has the burden to

prove preemption because it is an affirmative defense in a case concerning federal preemption of state drug labeling laws); *Cook v. Rockwell Int’l Corp.*, 790 F.3d 1088, 1092 (10th Cir. 2015) (stating that “potential preemption defenses, like most other affirmative defenses, are forfeited if not made” in a case about whether a federal law regarding nuclear incidents preempted state tort law claims). Federal preemption of state law is comparable to section 4(b)(1) preemption because it is also a question of whether another entity has the authority to regulate a topic in such a way that an underlying complaint is invalid.

Similarly, statutory exemptions are also affirmative defenses. *Meacham v. Knolls Atomic Power Lab’y*, 554 U.S. 84, 91 (2008) (describing it as a familiar principle that an exception carved out of the body of a statute is an affirmative defense that must be proved by the party who raises it). For example, exemptions from the Fair Labor Standards Act (FLSA), which govern whether wage and hour requirements can apply to certain types of employers and employees, are affirmative defenses, including the Motor Carrier Act exemption, which exempts employees whose hours are regulated by the Secretary

of Transportation. *See, e.g., Triple “AAA” Co. v. Wirtz*, 378 F.2d 884, 887 (10th Cir. 1967) (“An argument that an employee is exempted from coverage of the [FLSA] is in the nature of an affirmative defense, and it is the employer’s burden to establish the exemption clearly.”); *White v. U.S. Corrs., L.L.C.*, 996 F.3d 302, 310 (5th Cir. 2021) (noting that when an employer raised the Motor Carrier Act exemption, they had the burden to prove the employee falls within the exemption); 29 U.S.C. § 213(b)(1).

The language of section 4(b)(1) of the OSH Act is also written as an exemption, in the same manner as the exemptions from the FLSA: both state the provisions of the act “shall not apply with respect to...” and then specify the circumstances of the exemption. 29 U.S.C. §§ 213, 653(b)(1). Additionally, the Commission has previously correctly described section 4(b)(1) as “exemptory.” *Lombard Brothers, Inc.*, 1977 WL 7718, at *1 (No. 13164, 1977) (“It is well settled that the nature of section 4(b)(1) is not jurisdictional but exemptory and that the affirmative defense permitted by the section cannot be raised beyond the hearing stage of the proceedings.”). The principle of treating

statutory exemptions as affirmative defenses therefore applies to section 4(b)(1).

Although the Third and Fourth Circuits have held that section 4(b)(1) preemption is jurisdictional and thus not waivable, neither court explained that holding or addressed the Commission's long line of case law. *Columbia Gas of Pa., Inc. v. Marshall*, 636 F.2d 913, 918 (3d Cir. 1980) ("Section 4(b)(1) preempts OSHA of subject matter jurisdiction once concurrent regulation is determined to cover the same working conditions"); *U.S. Air, Inc. v. Occupational Safety and Health Rev. Comm'n*, 689 F.2d 1191, 1195 (4th Cir. 1982) (describing Section 4(b)(1) as "a jurisdictional limitation upon OSHA's authority to issue a citation"). To the extent that the Third Circuit concluded that OSHA is deprived of subject matter jurisdiction when it is preempted under section 4(b)(1), that incorrectly applies the logic of the waiver exemption for jurisdictional questions to section 4(b)(1) because subject matter jurisdiction is something the court has, rather than something OSHA has. *See Kennedy v. Lubar*, 273 F.3d 1293, 1301 (10th Cir. 2001) (describing the justification for the limited waiver exception for jurisdictional questions as based on the nature of the federal court of

appeals as a court of limited jurisdiction and stating that no action or lack of action from the parties can give a court jurisdiction where it does not have authority); *see also, Powderhorn Coal Company v. Director, Office of Workers' Compensation Programs*, 2023 WL 7486464, *2 (10th Cir. 2023) (“Because we have a duty to assure this court has jurisdiction, a party cannot waive a jurisdictional argument.”). These out-of-circuit cases are not binding on the Tenth Circuit and given their lack of analysis are also of limited persuasive value. This Court should instead affirm the Commission’s well-founded case law concluding that section 4(b)(1) preemption is an exemption and an affirmative defense.

Cedar Springs falsely claims in its brief that the “Commission [e]rrred in [c]oncluding that OSHA had [j]urisdiction” to propose the contested abatement measures because CMS preempts OSHA from regulating workplace violence under section 4(b)(1) of the OSH Act, but in fact it did not raise this argument at any point before the ALJ. CSH Br. 37–38. None of the affirmative defenses listed in its answer to the complaint concerned preemption, and it did not amend its complaint or file any other motions in which it raised this argument. CR Vol. 12, p. 31. During trial it argued on several occasions that regulating patient

care is outside the scope of OSHA’s authority, which the Secretary did not dispute because she was arguing that Cedar Springs needed to take actions regarding *worker safety*, unrelated to patient care. *See, e.g.*, Tr. 643–48. At no point did Cedar Springs even use the word preemption or cite section 4(b)(1) in its post-trial brief, let alone cite legal authority to support the proposition that OSHA is preempted from regulating workplace violence in healthcare facilities. Its passing reference to the expertise of other regulating bodies, and its assertion that employee recruitment and retention is “not within OSHA’s jurisdiction,” cannot reasonably be construed as raising a preemption argument under section 4(b)(1). CR Vol. 18, p. 183, 193.¹⁸ Thus, Cedar Springs first raised this issue in its petition for discretionary review, which the Commission did not direct for review, and the Secretary has not

¹⁸ The ALJ did address Cedar Springs’ arguments about the extent of OSHA authority and its overlap with other agencies, but specifically noted “Respondents cite no portion of the OSH Act, the implementing regulations, or precedent to support their contentions that an exemption for their industry is directly or implicitly in the OSH Act. Likewise, complying with other applicable regulations and requirements neither conflicts nor precludes complying with the OSH Act.” ALJ Dec. 51–53.

previously briefed this issue in this case. CR Vol. 19, p. 45–50. Cedar Springs’ preemption argument is therefore waived.

2. OSHA Is Not Preempted by CMS from Regulating Workplace Violence.

Even if Cedar Springs had not waived this argument, however, OSHA is not preempted from regulating workplace violence because CMS does not have the statutory authority to regulate to protect workers and has not exercised the kind of authority that can preempt OSHA. Section 4(b) of the OSH Act provides, in relevant part, that “[n]othing in this Act shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.” 29 U.S.C. § 653(b)(1).

Under this provision, the OSH Act does not apply if: (1) another federal agency has statutory authority to regulate the cited working conditions, and (2) the other agency has actually exercised that authority by issuing regulations having the force and effect of law. *See Chao v. Mallard Bay Drilling, Inc.*, 534 U.S. 235, 241–45 (2002); *JTM Indus., Inc.*, 2001 WL 1631750, at *2 (No. 98-0030, 2001). When

Congress passed the OSH Act, certain federal agencies had authority to regulate occupational safety and health of employees in particular fields, and section 4(b)(1) therefore helps avoid duplication of effort. Cedar Springs bears the burden of proving section 4(b)(1)'s applicability. *Rockwell Int'l Corp.*, 1996 WL 559889, at *3 (No. 93-233, 1996).¹⁹

Statutory Authority. CMS does not preempt OSHA under the first prong of the preemption test because Congress did not give it the statutory authority to regulate worker safety. The first step of the section 4(b)(1) preemption test looks at whether another federal agency has statutory authority to prescribe or enforce occupational health and safety regulations that protect workers. Long-standing Commission precedent establishes that the statutory authority supporting the agency's action must have the purpose "to assure safe and healthful working conditions for the benefit of employees." *Gearhart-Owen Indus., Inc.*, 1975 WL 22187, at *2 (No. 4263, 1975). In other words,

¹⁹ Even if the Secretary bore the burden, OSHA is clearly not preempted here.

workers need to be part of the class of people Congress intended to protect, and the protection to employees may not be merely “incidental”. *See Fineberg Packing Co., Inc.*, 1974 WL 4011, at *1–2 (No. 61, 1974) (finding that, while there was incidental benefit to employee health, the Wholesome Meat Act was only intended to protect consumers, so OSHA was not preempted from regulating workplace safety); *Nw. Airlines, Inc.*, 1980 WL 121045, at *5–7 (No. 13649, 1980) (noting that when an authorizing statute is concerned with protecting both members of the general public and employees, regulations issued pursuant to that authority can preempt OSHA).

Here, Cedar Springs has pointed to 42 C.F.R. §§ 482.13, 482.15, and 42 C.F.R. § 482.62 as the regulations it argues preempt OSHA,²⁰

²⁰ Cedar Springs also argues that it is required to comply with safety standards issued by the Joint Commission (CSH Br. 41), one of many private accrediting organizations that may be used to demonstrate compliance with CMS conditions of participation, but those standards cannot preempt OSHA: the Joint Commission is a private organization rather than a federal agency, CMS is not bound by its determinations, and it has imposed rules beyond what CMS requires. 42 C.F.R. § 488.13; *see also*, CMS State Operations Manual (SOM) Chapter 1 at 1018C; Chapter 2 at 2005B, 2022C; Chapter 3 at 3005E. Thus, these

but an examination of the statutory authority under which CMS has issued these purportedly preemptive regulations shows that the purpose of the enabling legislation is providing benefits to persons served by facilities receiving Medicare and Medicaid funds (collectively referred to hereinafter as “patients”). *See, Biden v. Missouri*, 595 U.S. at 90 (describing the protection of patients’ safety and health as “perhaps the most basic” function of CMS, “given the Department’s core mission”). Numerous statutory provisions speak to this authority and purpose, and each makes clear that this authority to regulate health and safety matters is specific to those matters impacting the patients served. For example, the statute authorizes CMS to promulgate, as a condition of a facility’s participation in the programs, such “requirements as [the agency] finds necessary in the interest of the health and safety of individuals who are furnished services in the

additional safety standards are not required by CMS, are not enforced by CMS, and do not carry the force and effect of law required to preempt OSHA. To hold otherwise would have the extraordinary effect of permitting a private organization to dilute the OSH Act’s safety and health requirements. *Accord Ensign-Bickford*, 717 F.2d at 1421.

institution.” 42 U.S.C. § 1395x(e)(9) (hospitals); *see also, e.g.*, §§ 1395x(cc)(2)(J) (authorizing regulations for “health and safety of individuals who are furnished services” by outpatient rehabilitation facilities), 1395x(f)(4) (authorizing regulations for staffing psychiatric hospitals as “necessary for the institution to carry out an active program of treatment for individuals who are furnished services in the institution”). Nothing in the statutory language indicates that Congress had any intention of also charging CMS with authority to regulate for the purpose of protecting the health and safety of the employees of those facilities.

Furthermore, Commission case law affords “considerable weight” to the position of the potentially preempting agency, and CMS has made clear that it does not preempt OSHA’s regulation of workplace violence. *See, e.g., MEI Holdings, Inc.*, 2000 WL 123924, at *2 (considering Department of Defense position that it did not preempt OSHA); *Yellow Freight Sys., Inc.*, 1996 WL 434490, at *2 (No. 93-3292, 1996) (reviewing Department of Transportation statement on preemption). Specifically, in a prior case before a Commission ALJ,

CMS intervened and filed a letter²¹ stating that its “regulations necessarily must serve the statutory purpose of protecting the health and safety of patients. CMS has no free-floating power to protect healthcare employees *qua* employees” and therefore any benefit to employee health and safety is incidental to its actions to protect patients. Additionally, the CMS workplace violence guidance to which Cedar Springs points reiterates that the purpose of the CMS regulations that Cedar Springs cites is to ensure “each patient receives care in an environment that a reasonable person would consider to be safe.” CMS Memorandum re Workplace Violence-Hospitals (November 28, 2022) at 1, available at <https://www.cms.gov/files/document/qso-23-04-hospitals.pdf>.

Cedar Springs has not identified any evidence of Congressional intent to provide CMS with the authority to focus on the protection of “employees” and CMS itself disagrees with the argument that it has authority to regulate for the purpose of protecting employees.

²¹ The letter is attached to this brief as Attachment 1.

Consequently, patients are the “class of persons” to which protection under the statute is directed. Any safety or health benefit to employees is incidental, which is insufficient to preempt OSHA. *Fineberg Packing*, 1974 WL 4011 at *1–2.

Exercise of Authority. Under the second step of the two-prong preemption analysis, even assuming CMS had the required statutory authority, Cedar Springs has also failed to show that CMS has exercised that authority in a manner that preempts OSHA because participation in the Medicare and Medicaid programs is voluntary, and because CMS has not actually prescribed occupational health and safety regulations related to the specific working conditions at issue. Both the D.C. Circuit and the Commission have expressed skepticism as to claims of section 4(b)(1) preemption where the relevant safety and health obligations are imposed as a result of a voluntary choice by the regulated party to subject itself to an agency’s authority. *See, e.g., Ensign-Bickford Co. v. Occupational Safety and Health Rev. Comm’n*, 717 F.2d 1419, 1421 (D.C. Cir. 1983) (finding a contractual obligation does not constitute an exercise of statutory authority within the meaning of section 4(b)(1)); *Rockwell Int’l Corp.*, 1996 WL 559889, at *3

and n.3 (finding that NASA did not preempt OSHA where its safety obligations were imposed by contract).

For instance, in *Ensign-Bickford*, the D.C. Circuit held that an agency had not “exercised” its authority sufficient to justify section 4(b)(1) preemption where the agency imposed occupational safety or health-related requirements only through an employer’s voluntary choice to bind itself in agreement with the agency, because such a voluntary scheme does not implement “the regulatory apparatus necessary to replace those safeguards required by the Act.” 717 F.2d at 1421. In concluding that the Department of Defense had not preempted OSHA, the court found significant that “the sole remedy available to the Department of Defense, after [the employer] disregarded the safety standards set forth in the manual, was to terminate the contract. This stands in sharp contrast to the civil and criminal penalties provided for in the [OSH] Act.” *Id.* at 1421 n.3.

The D.C. Circuit’s decision and reasoning are instructive in the present case. Provider participation in the Medicare and Medicaid programs is wholly voluntary. *Livingston Care Ctr., Inc. v. United States*, 934 F.2d 719, 720 (6th Cir. 1991); *see also, Baker Cnty. Med.*

Servs., Inc. v. U.S. Atty. Gen., 763 F.3d 1274, 1279–80 (11th Cir. 2014) (surveying cases that conclude participation in Medicare and Medicaid is voluntary). Cedar Springs here has voluntarily entered into an agreement with CMS to comply with federally imposed conditions to receive Medicare and Medicaid funds. *See, e.g.*, 42 C.F.R. § 489.3. And the sole enforcement remedy available to CMS in the event Cedar Springs disregards the required conditions of participation is to terminate Cedar Springs’ participation in the program. *See* 42 C.F.R. §§ 488.28(a), 489.53(a); *see also, A Q&A with CMS: Getting up to speed on inspection reports*, Association of Health Care Journalists, available at <https://www.hospitalinspections.org/qanda> (explaining if a hospital “is not in substantial compliance, the only enforcement remedy, if the facility fails to make timely correction, is termination of its participation in Medicare and Medicaid. There is no authority to issue civil monetary penalties . . .”). Because of the distinctly different nature of CMS’s regulatory scheme here, which requires voluntary participation and provides for no punitive enforcement mechanisms to compel compliance, CMS does not exercise the kind of authority that can preempt OSHA.

Additionally, the CMS regulations that Cedar Springs points to do not actually constitute an exercise of authority over the workplace violence hazard at issue in this case such that they preempt OSHA. Another agency’s “minimal exercise of some authority” does not result in complete OSHA preemption. *Mallard Bay Drilling*, 122 S. Ct. at 742. OSHA’s authority is preempted under section 4(b)(1) only “if the working conditions at issue are the particular ones ‘with respect to which’ another federal agency has regulated, and if such regulations ‘affect[t] occupational safety or health.’” *Id.* (quoting 29 U.S.C. § 653(b)(1)) (emphasis added).

None of the provisions Cedar Springs points to rise to this level. First, it points to the requirement for hospital facilities to develop and maintain a comprehensive emergency preparedness program under 42 C.F.R. § 482.15. CSH Br. 38–40. But the purpose of these requirements has nothing to do with patient-on-staff violence. Rather, the requirements are, in relevant part, designed to ensure Medicare and Medicaid providers and suppliers “plan adequately for both natural and man-made disasters,” “enhance patient safety during emergencies for persons served by Medicare- and Medicaid-participating facilities, and

establish a more coordinated and defined response to natural and man-made disasters” in order to maintain “access to healthcare services during emergencies.” Medicare and Medicaid Programs; Emergency Preparedness Requirements for Medicare and Medicaid Participating Providers and Suppliers, 81 Fed. Reg. 63,860, 63,860–61 (Sept. 16, 2016). Second, Respondent points to § 482.13(c)(2), which is found within the “Patient’s rights” condition of participation and provides that “[t]he patient has the right to receive care in a safe setting.” This requirement is unambiguously and exclusively about *patient* safety and nothing in the requirement’s language purports to regulate occupational health or safety. Cedar Springs points to the language in the CMS State Operations Manual interpreting this provision, which says hospitals “*should* provide... training to staff regarding the identification of patients at risk of harm to self or others,” but this is neither worded in a mandatory manner nor does it directly address training for avoiding harms to staff members. SOM Appendix A, A-0144 (emphasis added).

CMS’s recent policy statement recognizing that “CMS health and safety requirements do not preclude healthcare workers from taking appropriate action to protect themselves from workplace violence” in no

way constitutes an affirmative requirement for healthcare employers to protect workers from patient violence. CSH Br. 38–39; CMS Memorandum re Workplace Violence-Hospitals (Nov. 28, 2022) at 1. And, the fact that some of its conditions of participation, including the two cited above, will incidentally protect workers, does not transform these conditions of participation into occupational safety and health regulations. Rather, the memorandum and its citation of these two very general conditions of participation merely reflect the commonsense understanding that measures to protect patient safety are likely to have an incidental protective effect on all other persons in the facility, which is not sufficient to preempt OSHA’s authority. *Fineberg Packing*, 1974 WL 4011 at *1–2; *see also*, *Mallard Bay Drilling*, 122 S. Ct. at 743 (holding the Coast Guard’s “general marine safety regulations” did not preempt OSHA because they did not address the specific occupational safety and health concerns at issue).

Cedar Springs next claims that § 482.13(e), which addresses the use of restraints and seclusion on patients, is relevant because CMS’s rule balances patient and staff safety needs, but this argument fails because the rule indicates this requirement is unambiguously about

how to best protect patient safety and rights. CSH Br. 41. The few scattered references to staff safety are included for the purpose of defining the outer limits of the patient's right to be free from restraint or seclusion. *See* §§ 482.13(e), (e)(2), and (e)(12). The regulation does not establish any affirmative protections for workers.

This focus on the rights of the patient is again evident in the preamble and operative interpretive guidance. Medicare and Medicaid Programs; Hospital Conditions of Participation: Patients' Rights, 71 Fed. Reg. 71378 (Dec. 8, 2006); SOM Appendix A at A-0154–A-0188. Respondent cites no authority to the contrary. Moreover, nothing addressed in § 482.13(e) is implicated in OSHA's citation and proposed abatement measures.

Respondent's final argument is that CMS staffing requirements in psychiatric hospitals address patient-on-staff workplace violence in these facilities, but this argument fails because CMS requires sufficient staff solely to conduct activities related to patient care, not for staff safety purposes. CHS Br. 40–41. Section 482.62 provides generally that hospitals "must have adequate numbers of qualified professional and supportive staff to evaluate patients, formulate written, individualized

comprehensive treatment plans, provide active treatment measures, and engage in discharge planning.” This condition of participation is once again about meeting the needs of patients and is not directed at occupational safety and health concerns at all.

Cedar Springs’ arguments are also wholly inconsistent with the Congressional purpose of the OSH Act, and adopting Cedar Springs’ position would create a patchwork of nonuniform employee protections for healthcare workers on a facility-by-facility basis and upend the decades-long practice of complementary OSHA and CMS regulation. *See, e.g., Usery v. Lacy*, 628 F.2d 1226, 1229 (9th Cir. 1980) (stating the Congressional purpose in enacting the OSH Act was “to reach as broadly as constitutionally permissible in regulating employee safety, since nonuniform coverage would give unsafe employers a competitive advantage”); 42 U.S.C. § 1395cc(a)(1)(V) (specifically requiring CMS to apply and enforce OSHA’s Bloodborne Pathogen Standard for all hospitals “not otherwise subject to the Occupational Safety and Health Act” or a state plan under the OSH Act). Many workers would be left with no meaningful regulatory protection against patient-on-staff

workplace violence if this Court concludes that CMS preempts OSHA from regulating the hazard.

In short, CMS regulates participating healthcare facilities pursuant to enabling legislation directed at patient care, and CMS has no statutory authority “to prescribe or enforce” occupational health and safety regulations related to the “working conditions” at issue, nor has CMS actually exercised any such authority to regulate the specific working conditions at issue here in a manner affecting occupational safety and health. For these reasons, OSHA’s authority to regulate workplace violence at Cedar Springs is not preempted under section 4(b)(1).²²

²² Cedar Springs subsequently argues that if OSHA is not preempted, the agency should still defer to other entities, such as CMS, the Joint Commission, and Colorado state agencies, but provides no legal citations to support the existence of such a legal concept. Next, it bafflingly argues that because those agencies **do not require** the proposed abatements, OSHA should not require them either. CSH Br. 41–44. This argument only supports the Secretary’s point that CMS has not exercised its authority to regulate workplace violence hazards.

B. The ALJ Appropriately Sanctioned Cedar Springs and UHS-DE for Destruction of Video Evidence.

The ALJ appropriately imposed adverse inferences against Cedar Springs and UHS-DE because they were obligated to preserve videos of workplace violence incidents and failed to take reasonable steps to do so, thereby prejudicing the Secretary, and they did so with an intent to deprive. For spoliation to occur under the Federal Rules of Civil Procedure (FRCP) Rule 37(e), which the Commission has incorporated into its rules governing discovery, the record must establish the following: (1) the spoliating party must have been under a duty to preserve the electronically stored information when the loss occurred; (2) the information was lost because the party failed to take reasonable steps to preserve it; and (3) the information cannot be restored or replaced through additional discovery. FRCP 37(e) Advisory Committee Notes to 2015 Amendment; 29 C.F.R. § 2200.52(a)(1)(v), (f)(2).

To impose sanctions under FRCP 37(e)(1), the ALJ must find that UHS's spoliation of video evidence prejudiced the Secretary and may only impose curative measures proportional to the harm. *See* FRCP 37(e) Advisory Committee Notes, 2015 Amendment, Subdivision (e)(1).

In comparison, subsection (e)(2) of the same rule reserves the harshest sanctions for when the spoliating party acted with an intent to deprive the aggrieved party of the ability to use the information in litigation and does not require a separate finding of prejudice. *See* FRCP 37(e) Advisory Committee Notes, 2015 Amendment, Subdivision (e)(2). A factfinder's imposition of sanctions is reviewed for an abuse of discretion and the factfinder's factual findings are accepted unless they are clearly erroneous. *Burlington N. and Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1032 (10th Cir. 2007).

It is undisputed that Cedar Springs was under a duty to preserve the videos. CR Vol. 13, p. 23–30. It is also clear that Cedar Springs failed to take reasonable steps to preserve the videos. As the ALJ highlighted, the Risk Management Director was already supposed to be reviewing videos of workplace violence incidents each day and the evidence demonstrates that she reviewed videos for more incidents than those for which Cedar Springs and UHS-DE produced videos. ALJ Dec. 34–40; Tr. 1837–38, 1904–09. The Risk Management Director also could not explain almost any aspect of what she had done to retain videos. Tr. 1899–1914.

Cedar Springs' claims that it was difficult to preserve the videos, and the Secretary failed to clearly define exactly which videos to preserve, are entirely without merit. CSH Br. 47–48. As it notes in its own brief, the videos that should have been preserved “could be hundreds of hours of video or more” and yet it only produced 65 video clips, many of which were of the same incidents from different angles, and 47 of those videos fell within a single week. CSH Br. 47; CR Vol. 13, p. 5–6. It is impossible to credit Cedar Springs' argument that it took reasonable steps when it is so clear that it simply stopped trying to preserve the video evidence.

Additionally, the Secretary's explanation of what videos needed to be preserved was not vague – in the subpoena the Secretary requested “security camera video footage... of any incidents of aggression towards staff, including threats, near-misses, or assaults, whether or not they resulted in injury.” CR Vol. 13, p. 27. Cedar Springs does not explain how the Secretary should have been expected to specify exactly which incidents needed to have video preserved given that the Secretary was not aware of what incidents had occurred.

In fact, the Secretary sent this subpoena so quickly because she was aware of UHS-DE and its facilities' history of destroying evidence in other cases. *See, UHS-DE/Suncoast*, 2023 WL 2388069, at *32-35 (discussing UHS-DE and Suncoast's failure to take reasonable steps to preserve video evidence); *Centennial Peaks*, 2022 WL 4075583, at *3 n.4 (discussing the imposition of sanctions on Centennial Peaks for failure to preserve video evidence); *UHS of Fuller, Inc., UHS of Del.*, at 26–30 (No. 20-0032, 2023) (ALJ), available at [https://www.oshrc.gov/assets/1/6/20-0032_Decision_and_Order_DATED_\(for_web\).pdf](https://www.oshrc.gov/assets/1/6/20-0032_Decision_and_Order_DATED_(for_web).pdf) (discussing UHS-DE and UHS of Fuller's destruction of video evidence and imposing sanctions). Cedar Springs and UHS-DE were well aware of the requirement to maintain video evidence and what kind of videos to keep, yet they did almost nothing to preserve the videos.

It is also undisputed that the videos could not be restored or replaced, and the ALJ correctly found that no other discovery could have replaced that information because there were often very few details documented in other forms of evidence and witnesses' memories may have faded over time regarding specific incidents. ALJ Dec. 40–41. Cedar Springs' argument that the other information it provided

included more detail about overall staffing levels than videos misses the point – the videos would have shown other relevant aspects of staffing such as whether staff were regularly able to leave their units to respond to workplace violence incidents and whether adequate numbers of staff members were available during recorded incidents. CSH Br. 50–51.

The lack of this video evidence also prejudiced the Secretary, thus justifying sanctions under FRCP 37(e)(1). As the ALJ correctly noted, the Secretary was prejudiced by this loss of video because the video evidence would have related to the efficacy of Cedar Springs' existing abatement measures and whether the proposed abatements are feasible and effective (particularly with regard to staffing), as well as credibility assessments for some of the witnesses. ALJ Dec. 41–45. Cedar Springs' claim that it was equally prejudiced by the loss of the video is nonsensical. It cites *Capeway Roofing Sys., Inc.*, 2003 WL 22020485, at *12 (No. 00-1968, 2003), for the proposition that a negative inference should be drawn from the fact that the Secretary did not show every video produced at trial, but that case addresses a situation where only one party was in a position to produce a witness with rebuttal evidence. Here, Cedar Springs was clearly in possession of all the videos it

provided the Secretary and could have introduced them at trial, and *Capeway Roofing* in fact supports a negative inference against Cedar Springs because it had the ability to preserve and produce video evidence for its own case “peculiarly within its power...and fail[ed] to do so.” *Id.*

Additionally, Cedar Springs’ claim that the Secretary’s failure to use all of the limited video evidence produced indicates all of the unproduced videos would not have helped her case is preposterous. The fact that UHS-DE and Cedar Springs did not produce very many useful video clips to the Secretary does not have any bearing on whether the other, destroyed videos would have been helpful to the Secretary’s case. *See* CR Vol. 13, p. 5. Because the ALJ correctly determined that Cedar Springs’ destruction of video evidence prejudiced the Secretary, he properly imposed sanctions under FRCP 37(e)(1). *See* FRCP 37(e) Advisory Committee Notes, 2015 Amendment, Subdivision (e)(1).

Finally, even if the ALJ incorrectly found prejudice against the Secretary, it is clear that Cedar Springs and UHS-DE acted with the intent to deprive, which is an independent basis for sanctions under FRCP 37(e)(2). *See* FRCP 37(e) Advisory Committee Notes, 2015

Amendment, Subdivision (e)(2). As discussed, Cedar Springs and UHS-DE were already regularly reviewing video, were aware of the OSHA investigation and the need to preserve the video evidence, and offer “no sound explanation” for why they failed to preserve it, which is sufficient to infer an intent to deprive. ALJ Dec. 47; *see, e.g., Fed. Trade Comm’n v. Nolan*, 2021 WL 3857413, *12–13 (D. Ariz. 2021) (finding an intent to deprive where a company was aware it was under investigation by a federal agency and destroyed relevant communications anyway); *BankDirect Cap. Fin., LLC v. Cap. Premium Fin., Inc.*, 2018 WL 1616725, *11 (N.D. Ill. 2018) (rejecting excuses for continuing to destroy emails long after the company was aware it was the subject of a lawsuit). In its brief, Cedar Springs states that it did not act with an intent to deprive but offered no argument to support this contention.

The ALJ was well within his discretion to impose sanctions in the form of adverse inferences that the destroyed videos would have been unfavorable to Cedar Springs and UHS-DE and favorable to the Secretary with regard to knowledge, abatement, and gravity. ALJ Dec. 48. As the ALJ explained, he concluded that the harshest sanctions were not warranted since the Secretary was still able to prove her case

and the Respondents had agreed to several stipulations, so the adverse inferences were the appropriate remedy to “fit the wrong.” ALJ Dec. 45–46, 48; FRCP 37(e) Advisory Committee Notes, 2015 Amendment, Subdivision (e)(2).

Cedar Springs’s argument that these sanctions do not logically flow from the failure to produce the videos on the ground that the videos would not have shed light on the abatement measures fails to acknowledge the ALJ’s clear and persuasive conclusions about all the ways in which the videos could have aided the Secretary’s case, as noted above. CSH Br. 50–51; ALJ Dec. 41–45. Cedar Springs further argues that these sanctions were tantamount to a default judgment,²³ but this is obviously untrue as the ALJ explicitly did not grant the Secretary’s request to impose a definitive adverse inference establishing that the abatement prong was met, and the ALJ exhaustively analyzed

²³ Cedar Springs also argues it was not given the opportunity to rebut these inferences, but it does not explain in what way it was not given this opportunity. CSH Br. 50. The ALJ weighed all of the evidence Cedar Springs presented, including evidence that weighed against findings that the Secretary had met her burden of proving the abatement prong.

voluminous record evidence to further support his feasibility findings.

ALJ Dec. 48. In fact, the ALJ referenced the adverse inferences very few times in evaluating the evidence and only relied on them to resolve discrepancies in the evidence presented. *See*, ALJ Dec. 64, 75, 111, 132.

Thus, the ALJ was well within his discretion to impose these adverse inferences against Cedar Springs and UHS-DE in light of their flagrant destruction of video evidence, and Cedar Springs' arguments to the contrary are without merit.

C. OSHA's Wording of the Citation Did Not Deprive Cedar Springs and UHS-DE of Fair Notice.

The ALJ correctly determined that Cedar Springs was not deprived of fair notice because Cedar Springs was aware it needed to protect workers from workplace violence and knew how to do so. ALJ Dec. 55. Courts have dealt with constitutional challenges to the general duty clause by interpreting the clause's language of "recognized hazard" to include "preventable hazards... or applying the clause only 'when a reasonably prudent employer in the industry would have known that the proposed method of abatement was required.'" *SeaWorld*, 748 F.3d at 1216 (citations omitted); *see also*, *Nat'l Realty & Constr. Co., Inc.*,

489 F.2d at 1266 (“Hazardous conduct is not preventable if... conscientious experts, familiar with the industry, would not take it into account in prescribing a safety program.”). The D.C. Circuit, the Commission, and Commission ALJs have all found that employers had fair notice of the general duty clause as applied to workplace violence hazards. *BHC Nw.*, 951 F.3d at 566; *Integra*, 2019 WL 1142920, at *14, n. 15; *Pembroke/UHS-DE*, 2022 WL 774272, at *18–21; *UHS-DE/Suncoast*, 2023 WL 2388069, at *108–110.

Here, it is clear that Cedar Springs was aware of the hazard and that it was possible to reduce the incidence of workplace violence, as evidenced by the policies it had put in place at its worksite. Stip. ¶¶ 7–10. Given the continued high rates of workplace violence despite Cedar Springs’ mitigation efforts, it should have anticipated that additional abatement methods were necessary. *See Sea World*, 748 F.3d at 1216 (“Given evidence of continued incidents of aggressive behavior by killer whales toward trainers notwithstanding SeaWorld’s...measures, SeaWorld could have anticipated that abatement measures it had applied after other incidents would be required.”). It is also clear that a reasonably prudent employer would have known that the abatements

were required since, as discussed above, experts testified that the recommended abatements are industry best practices and the abatements were included in OSHA’s guidance documents.²⁴

Additionally, for the abatements regarding adequate staffing and debriefing following near misses, Cedar Springs had already incorporated these in its policies on paper but failed to implement them. Exs. CSH-R-47, C-83 (p. 26). Cedar Springs “can hardly object that it was blindsided by the utility of measures it had already embraced, at least on paper.” *BHC Nw.*, 951 F.3d at 566.

To the extent that Cedar Springs asserts the Secretary is required to prescribe exactly what constitutes “adequate staffing,” or provide more specificity on what “staff with specialized training in security,” “trained security specialists,” or “near miss” mean in order to provide

²⁴ Cedar Springs argues that OSHA’s guidance documents cannot be used to create fair notice, but it does not cite any case law to support that assertion, and in fact the Commission has found the opposite. *Integra*, 2019 WL 1142920, at *14, n. 15 (concluding that the employer had fair notice partly based on the fact that the proposed abatement measures “were available, and readily knowable by, the industry” where they were derived from OSHA’s workplace violence directive).

fair notice, this assertion fails because the Secretary is entitled to propose a performance-oriented approach, and the Secretary identified “specific measures...needed to protect staff from patient violence.” *BHC Nw.*, 951 F.3d at 566 (finding that abatement measures were sufficiently specific and there was fair notice of similar requirements, including process-based elements like an overarching WVPP); *see also*, *Pepperidge Farm*, 1997 WL 212599, at *51 (Wiesberg, Chairman, concurring) (“Section 5(a)(1) establishes only a performance standard that must be met...not...the particular measures the employer must take to attain this objective” and “the citation...gave Pepperidge broad flexibility in selecting or designing the...solutions it deemed to be the optimal means for abating the...hazard.”). In proposing that Cedar Springs ensure adequate staffing to “safely address changes in patient acuity and patient census” and that it “designate staff with specialized training in security and/or hire trained security specialists,” the Secretary recognized the flexibility Cedar Springs retains to effectively manage its own staff.

The case law Cedar Springs cites to support its contention that the abatements listed were insufficiently specific are distinguishable

because they all involve situations where the Secretary's proposed abatements did not specify additional steps on top of what the employer was already doing that would abate the hazard. *Nat'l Realty & Const. Co.*, 489 F.2d at 1267–68 (finding that the record was “barren of evidence describing, and demonstrating the feasibility and likely utility of, the particular measures” which the company needed to take to improve its safety policy); *Mid South Waffles, Inc.*, 2019 WL 990226, at *6 (No. 13-1022, 2019) (concluding that the Secretary had failed to specify additional steps beyond the company's existing work rule that needed to be implemented where its practice comported with the relevant operations manual and consensus standard); *A.H. Sturgill Roofing, Inc.*, 2019 WL 1099857, at *10 (noting that the Secretary did not identify how much the employee's time on a roof needed to be limited in order to acclimate to heat where the company had a process for acclimating new employees). Here, it is clear that Cedar Springs did not have any personnel that qualified as meeting the security staff recommendation and, as discussed above, it failed to implement its own policies regarding sufficiently debriefing staff after near misses. To the extent that it did do some amount of staffing for acuity, the citation

specified a number of situations where additional staffing was necessary for safety, including “during admission of new patients, behavioral health emergencies, one-one-one patient assignments, staff breaks, and the accompaniment of patients off unit.” Ex. C-1. Thus, all the abatements Cedar Springs contests were sufficiently specific and identified steps it could take above and beyond its existing mitigation measures.

Finally, Cedar Springs erroneously contends that the Secretary’s framing of the proposed abatement measures in this case is unconstitutionally vague because the language does not mirror the abatement language used in other citations issued to different facilities, including those within UHS’s network, despite the fact that the language used in these citations are quite similar. Additionally, nothing requires OSHA to use identical wording in its citations. Moreover, the referenced citations relate to distinct facilities; thus, any proposed abatement may vary depending on the factual circumstances at each facility. Even assuming the facilities have the same workplace violence prevention policies on paper, the policies and abatement should be

tailored to the specific conditions at each facility. Thus, Cedar Springs' arguments that it lacked fair notice fail.

**D. Cedar Springs' Claim that OSHA is Violating the
Administrative Procedure Act by Relying on the General
Duty Clause is Baseless.**

The ALJ properly dismissed Cedar Springs' argument that OSHA has violated the Administrative Procedure Act (APA) through its use of the general duty clause and guidance documents to address workplace violence. CSH Br. 27; ALJ Dec. 55–56. As noted above, the Commission and the D.C. Circuit have correctly held that OSHA can address workplace violence through the general duty clause. *BHC Nw.*, 951 F.3d at 566; *Integra*, 2019 WL 1142920, at *4.

The duty imposed on the employer by section 5(a)(1) of the Act to take all feasible steps to free its workplace from recognized hazards is independent of that imposed under section 5(a)(2) to comply with OSHA standards. 29 U.S.C. § 654(a)(1) and (2); *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Gen. Dynamics Land Sys. Div.*, 815 F.2d 1570, 1577 (D.C. Cir. 1987). It follows, therefore, that the absence of a specific standard cannot relieve the employer of its

independent duty under the general duty clause to address “recognized” hazards, such as the workplace violence hazard in this case.²⁵

To the extent that Cedar Springs is arguing that OSHA is impermissibly enforcing its guidance documents as legislative rules that must be issued through notice and comment rulemaking under the APA, 5 U.S.C. § 553, that argument also fails because the guidance documents do not impose new obligations or legally binding requirements. Under the APA, agencies must engage in notice and comment rulemaking for “legislative rules,” which have a legally binding effect, but the statute exempts non-binding “interpretive rules” and “general statements of policy.” 5 U.S.C. § 553(b); *Nat’l Mining Ass’n v. McCarthy*, 758 F.3d 243, 251–52 (D.C. Cir. 2014) (“Legislative rules

²⁵ For the same reason, OSHA’s decision to pursue rulemaking efforts regarding workplace violence does not have any bearing on whether employers have a duty to protect employees from workplace violence under the general duty clause, contrary to Cedar Springs’ assertion. CSH Br. 29. Cedar Springs also suggests that OSHA has “a long history of ignoring its responsibility” to address workplace violence through rulemaking but cites two proposed laws that were never enacted and therefore have never required OSHA to issue a rule on workplace violence. CSH Br. 27, n. 14.

generally require notice and comment, but interpretive rules and general statements of policy do not.”).

Cedar Springs argues that OSHA’s Guidelines and Roadmap “have become a de facto workplace violence regulation and a substitution for rulemaking in violation of the APA,” but that characterization is incorrect because those documents are not legally binding and do not create new obligations. CSH Br. 27. If those guidelines *were* legally binding, OSHA would not be required to prove all of the steps of the abatement prong in every workplace violence case.

Additionally, the abatement measures listed in a general duty clause citation, including those based on OSHA’s guidance documents, are illustrative rather than exhaustive, and a cited employer is not required to implement the Secretary’s proposed measures. *Cyprus Mines Corp.*, 1982 WL 22717, at *4 (No. 76-616, 1982); *Brown & Root, Inc. Power Plant Div.*, 1980 WL 10668, at * 5 (No. 76-1296, 1980). To the extent Cedar Springs finds measures to address the workplace violence hazard at its facility other than those recommended in the guidelines or the proposed abatements, it may use any abatement method it wishes so long as it effectively addresses the hazard. Thus,

the function of the guidelines is merely to provide employers with information regarding some of their options to comply with the general duty clause and does not mandate any particular action or impose any binding obligations. Therefore, OSHA is not in violation of the APA by issuing guidance on ways to mitigate workplace violence hazards and regulating such hazards through the General Duty Clause.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for review and affirm the final order of the Commission.

STATEMENT REGARDING ORAL ARGUMENT

The Secretary requests oral argument in this matter in order to address the nature of prior Commission case law and answer any questions the court may have regarding the preemption question, as that issue has not previously been briefed in this case and there is no underlying decision for the court to review.

January 2, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limitation prescribed in Fed. R. App. P. 27(d)(2)(A) and the court's order of May 14, 2024, permitting the Secretary to file a brief that does not exceed the type-volume limitations for two separate principal briefs, because, excluding parts of the document exempted by Fed. R. App. P. 32(f), this document contains 21,085 words.
2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word version 2409 in 14-point font size Century type style.

Dated: January 2, 2025

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I certify that on January 2, 2025, a copy of the foregoing brief was served through the Court's CM/ECF Electronic Filing System, providing service on all registered counsel for Petitioners.

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ATTACHMENT 1

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

JULIE A. SU, Acting Secretary of Labor,	)	OSHRC DOCKET NO. 23-0902
United States Department of Labor,	)	
	)	
Complainant	)	REGION IV
	)	
v.	)	
	)	INSPECTION NO. 1635621
	)	
UHS OF DELAWARE, INC. / WEKIVA	)	
SPRINGS CENTER LLC, dba Wekiva	)	
Springs Hospital,	)	
	)	
Respondent	)	

LETTER FROM INTERVENOR
UNITED STATES DEPARTMENT OF HEALTH AND
HUMAN SERVICES

Respondent argues that the Occupational Safety and Health Administration (“OSHA”) lacks authority to pursue this action. It contends that the authority of the Centers for Medicare & Medicaid Services (“CMS”) to regulate conditions in behavioral health facilities preempts the general power OSHA otherwise has to protect worker health and safety. We disagree. We submit this filing on behalf of the Secretary of Health and Human Services (HHS)—the parent agency of CMS—to explain why CMS’s authority does not preempt this action. CMS has the power to regulate for the purpose of protecting the health and safety of patients receiving care in Medicare- and Medicaid-participating facilities. Although CMS’s regulations in many cases also protect the health and safety of workers in those facilities, they do so only as an incident to achieving the purpose of protecting patients. Because “any protection of the health of employees in the workplace, as distinguished from [patients], is incidental,” *Secretary v. Fineberg Packing*

Co., Inc., 7 OSAHRC 405 (O.S.H.R.C. 1974), at *1, the OSH Act’s preemption provision, 29 U.S.C. § 653(b)(1), does not apply in this case.

CMS administers the Medicare and Medicaid programs. Among other responsibilities, it issues regulations that govern conditions at Medicare- and Medicaid-certified facilities. These regulations include requirements meant to protect the health and safety of patients; to participate in Medicare and Medicaid, facilities must meet those requirements. As the Supreme Court recently explained, “healthcare facilities that wish to participate in Medicare and Medicaid have always been obligated to satisfy a host of conditions that address the safe and effective provision of healthcare.” *Biden v. Missouri*, 595 U.S. 87, 94 (2022).

For example, the Medicare statute authorizes payments for “hospital services,” 42 U.S.C. § 1395d(a), and defines a “hospital” as an institution that, among other things, meets such “requirements as the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services in the institution,” *id.* § 1395x(e)(9); *see also, e.g., id.* § 1395i-3(d)(4)(B) (providing that a “skilled nursing facility must meet” such “requirements relating to the health, safety, and well-being of residents or relating to the physical facilities thereof as the Secretary may find necessary”). The Medicaid statute also imposes requirements to protect the health and safety of patients served by Medicaid-participating institutions, *see, e.g., id.* § 1396r(d)(4)(B), or incorporates by reference analogous Medicare standards for psychiatric hospitals, *see id.* § 1396d(h); rural health clinics, *id.* § 1396d(l)(1), and hospices, *id.* § 1396d(o). Almost all facilities participating in Medicare and/or Medicaid are subject to provisions that give the Secretary of HHS explicit authority to protect “the health and safety of patients” (*see, e.g., 42 U.S.C. § 1395x(e)(9)*).

To implement the Secretary of HHS’s statutory mandate to protect and ensure the “health and safety” of patients receiving services from each discrete type of provider or supplier, the Secretary of HHS, through CMS, has statutory authority to make “rules and regulations... as may be necessary to efficient administration of the functions with which he is charged under” the Medicare and Medicaid programs. 42 U.S.C. § 1302(a); *see* 42 U.S.C. § 1395hh(a)(1).

Longstanding regulations establish detailed “Conditions of Participation” for Medicare and Medicaid facilities. These regulations address (among other things), the qualifications of health care staff, the physical condition of the facilities, and any other requirements that the Secretary deems necessary to protect patient health and safety. *See generally Missouri*, 595 U.S. at 94.

All of these regulations necessarily must serve the statutory purpose of protecting the health and safety of patients. CMS has no free-floating power to protect health care employees *qua* employees. But that does not mean that the agency lacks the ability to incidentally promote employee health and safety when it regulates to protect patients. The Supreme Court recognized the point when it upheld CMS’s COVID-19 vaccine mandates for facility staff. It endorsed the HHS’s Secretary’s determination that “reduc[ing] the likelihood that healthcare workers will contract the virus and transmit it to their patients” made “a vaccine mandate ... ‘necessary to promote and protect patient health and safety’ in the face of the ongoing pandemic.” *Missouri*, 595 U.S. at 93.

In many cases, both patients and workers will face common risks from conditions at their Medicare or Medicaid facilities. In those cases, patient protection will necessarily protect everyone at the facility—including workers—from the risks. For example, Medicare and Medicaid facilities must satisfy fire safety regulations. *E.g.*, 42 C.F.R. § 482.41(b). Because a fire hazard that puts facility patients at risk will also necessarily put workers at risk, CMS’s

regulation pursuant to its patient-protection authority will ultimately address the hazard to both groups. The CMS workplace violence guidance to which Respondent points (Mot. at 15 & n.12) addresses the same sort of risk—in facilities where patients experience the threat of violence, hospital workers are likely to face the same threat. Thus, “ensur[ing] effective delivery of healthcare” to patients requires “that patient and staff have an environment that prioritizes their safety.” CMS Memorandum re Workplace Violence-Hospitals (November 28, 2022) at 1, available at <https://www.cms.gov/files/document/qso-23-04-hospitals.pdf>; *see also id.* at 2 (“this standard is intended to provide protection for the patient’s emotional health and safety as well as his/her physical safety”).

Although CMS’s regulations may in some cases protect workers, those protections are merely an incident to the agency’s authority to safeguard patient health and safety. In this regard, CMS’s authority is very different than that exercised by OSHA. Unlike CMS, OSHA has the responsibility for setting and enforcing standards to ensure safe and healthy conditions for workers *qua* workers. The OSH Act requires OSHA “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). As CMS noted in its COVID-19 vaccine regulation, CMS has always regarded its jurisdiction with OSHA in health care facilities as “complementary,” such that CMS’s regulations do not displace the requirements imposed under the OSH Act. “Medicare and Medicaid Programs; Omnibus COVID–19 Health Care Staff Vaccination,” 81 Fed. Reg. 61,555, 61,562 (Nov. 5, 2021).

Under this Commission’s longstanding precedent, OSHA’s jurisdiction is not preempted simply because another agency regulates in ways that “hav[e] a benign but fortuitous effect on job safety or health.” *Fineberg Packing Co.*, at *2. Where another agency’s regulation has such

a “benign” effect on worker health or safety, but “any protection of the health of employees in the workplace” is “incidental” to the regulation’s purpose of protecting other individuals or groups, OSHA will retain jurisdiction. *Id.* That is the case here. Like the Department of Agriculture’s plant sanitation regulations, which the Commission considered in *Fineberg Packing*, CMS’s regulations may “incidentally affect the safety and health of respondent’s employees.” *Id.* at *1. But, also like those USDA regulations, that effect on worker health is incident to the goal of protecting a distinct group of individuals—consumers in *Fineberg Packing*, patients here. As in *Fineberg Packing*, there is no basis for displacing OSHA jurisdiction.

For the foregoing reasons, CMS’s authority to protect patients, while incidentally permitting the agency to reach working conditions in covered facilities, is not “statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health” within the meaning of 29 U.S.C. § 653(b)(1). Nor have CMS’s actions to carry out its statutory authority constituted the “exercise[.]” of the kind of authority that triggers preemption under that statute. *Id.* And as Respondent noted, “CMS’s determination of its own authority should not be second-guessed so long as ‘the statute reasonably supports the agency’s interpretation.’ *Yellow Freight Sys., Inc.*, OSHRC No. 93-3292, 1996 WL 434490, at *2 (July 31, 1996).” (Mot. 17).

* * *

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CERTIFICATE OF SERVICE

I certify I filed this letter via Commission's Electronic Filing System (E-File System) on December 20, 2023. A copy of the document was also simultaneously served on this date, by electronic mail, pursuant to 29 C.F.R. § 2200.7, on the following:

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