ORAL ARGUMENT NOT YET SCHEDULED

No. 19-1089

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BHC NORTHWEST PSYCHIATRIC HOSPITAL, LLC d/b/a BROOKE GLEN BEHAVIORAL HOSPITAL,

Petitioner,

v.

SECRETARY OF LABOR,

Respondent.

On Petition for Review from the
Occupational Safety and Health Review Commission
(Chief Administrative Law Judge Covette Rooney)

FINAL BRIEF FOR THE SECRETARY OF LABOR

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

(A) Parties and Amici

The petitioner is BHC Northwest Psychiatric Hospital, LLC d/b/a Brooke Glen Behavioral Hospital. The respondent is the Secretary of Labor. PASNAP and Teamsters Local 107 appeared as authorized representatives before the Occupational Safety and Health Review Commission.

(B) Rulings Under Review

The ruling under review is the January 22, 2019 Decision and Order by Chief Administrative Law Judge Covette Rooney of the Occupational Safety and Health Review Commission, Docket No. 17-0063, which became a final order of the Commission on February 21, 2019. The decision is reported as Secretary of Labor v. BHC Northwest Psychiatric Hospital LLC d/b/a Brooke Glen Behavioral Hospital, 27 BNA OSHC 1862 (No. 17-00063, 2019) and available on Westlaw at 2019 WL 989734.

(C) Related Cases

This case has not previously been before this Court or any other court. Counsel for the government are unaware of any related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

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GLOSSARY

ALJ:	Administrative Law Judge
Commission:	Occupational Safety and Health Review Commission
OSHA:	Occupational Safety and Health Administration
OSH Act or Act:	Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678
Secretary:	The United States Secretary of Labor

STATEMENT OF JURISDICTION

This matter arises from an enforcement proceeding brought by the Secretary of Labor 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).

Chief Administrative Law Judge (ALJ) Covette Rooney issued a decision that was docketed with the Commission on February 10, 2019. Brooke Glen Behavioral Hospital (Brooke Glen) timely petitioned the Commission for discretionary review, which the Commission declined to grant. The ALJ's decision therefore became a final order of the Commission on February 21, 2019. Brooke Glen filed its petition for review with the Court on April 17, 2019, within the sixty-day period prescribed by the OSH Act. *See* 29 U.S.C. § 660(a). The Court has jurisdiction over the petition for review under 29 U.S.C. § 660(a).

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the ALJ's finding that the Secretary established the existence of feasible means of abatement where (i) Brooke Glen did not fully implement its programs addressing patient-on-staff violence and there were fifty-one workplace violence injuries reported in 2016, and (ii) the Secretary's expert opined that the Secretary's proposed abatement measures would materially reduce the recognized workplace violence hazard.

2. Whether application of the OSH Act's general duty clause in this case deprived Brooke Glen of fair notice of the Secretary's abatement methods.

RELEVANT STATUTE

The "general duty clause" of the OSH Act provides:

> Each employer – (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

29 U.S.C. § 654(a)(1).

STATEMENT OF THE CASE

I. Procedural History

OSHA Compliance Officer Dena Stone conducted an inspection of Brooke Glen Behavioral Hospital following a complaint alleging patient-on-employee violence. Joint Appendix (JA) 83-84. Upon completion of the investigation, OSHA issued a one-item serious citation to Brooke Glen alleging a violation of section 5(a)(1) of the OSH Act, known as the "general duty clause." JA 7-27, 84.

Brooke Glen timely contested the citation and a hearing was held on February 21-23, and May 2-4, 2018. JA 84. On January 22, 2019, Chief ALJ Rooney issued a decision affirming the citation and assessing a penalty of $12,471. JA 159. The Commission did not grant Brooke Glen's petition for discretionary review of the ALJ's decision, and the ALJ's decision therefore became the final order of the Commission on February 21, 2019. JA 161; *see* 29 U.S.C. § 661(j). On April 17, 2019, Brooke Glen timely filed the instant petition for review.

II. Statutory Background

Congress enacted the OSH Act in 1970 "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. § 651(b). The

OSH Act's purpose is "neither punitive nor compensatory, but rather forward-looking; *i.e*., to prevent the first accident." *Brock v. L.E. Myers Co*., 818 F.2d 1270, 1275 (6th Cir. 1987). To effectuate this purpose, Congress imposed dual obligations on employers to comply both with a general duty clause and OSHA's occupational safety and health standards. *See* 29 U.S.C. § 654(a)(1)-(2).

The Secretary enforces the general duty clause and OSHA's standards by conducting inspections of workplaces and issuing citations that require the employer to abate violations and, where appropriate, pay a civil penalty.[1] *See* 29 U.S.C. §§ 657-659, 666. Violations of the general duty clause and OSHA standards are characterized as "serious," "other-than-serious," "willful," or "repeated." *Id*. § 666(a)-(c). At the time OSHA issued the citation in this case, the OSH Act and implementing regulations authorized civil penalties of up to $12,471 for serious violations. *Id*.; 29 C.F.R. § 1903.15(d)(3) (2016).

If an employer contests a citation, the matter is adjudicated by the Commission, an independent adjudicatory body. *See* 29 U.S.C. §§ 659, 661.

[1] The Secretary's responsibilities under the OSH Act have been delegated to an Assistant Secretary who directs OSHA. 77 Fed. Reg. 3912 (Jan. 25, 2012). The terms Secretary and OSHA are used interchangeably in this brief.

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 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. *See* 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).

III. Statement of Facts

A. Patient-on-Staff Violence at Brooke Glen Hospital.

Brooke Glen is an in-patient psychiatric hospital in Fort Washington, Pennsylvania. JA 168. The hospital has eight units with a total of 146 beds. *Id*. Brooke Glen's patients have a variety of serious psychiatric conditions, such as depression or schizophrenia, and patient aggression poses a hazard to employees. JA 168-70, 174.

In December 2016, Brooke Glen social worker Mollie Cherson was attacked by a patient who had previously made threats and behaved aggressively toward other staff. JA 189-95, 202. Ms. Cherson was scheduled for a meeting with this patient and anticipated the possibility of aggression based on the patient's past behavior. JA 195-97, 202. She

specifically requested the presence of a male mental health technician for the meeting, but fifteen minutes before the meeting was told that no technicians were available. JA 197. While Ms. Cherson was meeting with the patient, he lunged at her and hit her repeatedly in the back of the head, neck, and shoulder. JA 198. An emergency code was called, the patient was taken back to his unit, and Ms. Cherson went to urgent care. JA 198-99.

After the attack, Brooke Glen required Ms. Cherson to continue working with the patient. JA 199. The next time she saw him, he threatened her again, pounding his fists and pacing while he told her "I'm going to beat you like the bitch that you are." JA 200. While Ms. Cherson no longer worked alone with the patient after that incident, she remained the primary social worker on the case and "really struggled for a very long time" after the assault. JA 200-201.

Ms. Cherson was not the only Brooke Glen employee assaulted on the job. In fact, according to Brooke Glen's own records, there were at least fifty-one employee injuries resulting from patient-on-staff violence at Brooke Glen Hospital in 2016 alone. JA 209-10, 667-718. Frederick Ginsberg, a mental health technician, was repeatedly punched, scratched, bit, and spit on by patients during his three years working at Brooke Glen. JA 172, 179. Mr. Ginsberg stopped working at Brooke Glen in February 2017

because he felt it was an unsafe workplace and was not professional. JA 173. Registered nurse Thomas O'Toole was attacked "countless times" during his eleven years at Brooke Glen. JA 349, 351. In April 2016, he was bitten by a patient while responding to a code to restrain the patient. JA 350. Mr. O'Toole has a permanent scar on his arm from this attack. *Id*.

Overnight mental health technician Lamara Palmer was also assaulted by patients at Brooke Glen. JA 258-60. In 2013, Ms. Palmer was thrown against a door and walls while trying to break up a fight in the adolescent unit. JA 260-61. She missed days of work and had to use crutches for several weeks due to her injuries. JA 261-62. Christine Kaun, a registered nurse, was assaulted by a patient who threw a phone at her head. JA 213-14. Another registered nurse was bitten by a patient on her clavicle. JA 603-604.

B. OSHA's Citation to Brooke Glen for Violating the General Duty Clause of the OSH Act by Failing to Adequately Protect Its Employees from Workplace Violence.

OSHA received an anonymous complaint alleging that Brooke Glen employees were being subjected to violence by patients. JA 205-206, 597-600. OSHA Compliance Officer Stone opened an inspection at Brooke Glen in July 2016. JA 203. She visited the hospital several times, interviewed employees, and, based on Brooke Glen's logs and accident reports,

determined that there were fifty-one employee injuries resulting from patient violence in 2016. JA 206, 208-10, 667-718.

OSHA cited Brooke Glen under section 5(a)(1) of the OSH Act alleging that "[o]n or about July 11, 2016, nurses and mental health technicians who provide inpatient care, especially in the close observation and adolescent units, during the course of de-escalating aggressive patients or while trying to prevent patients from injuring themselves, are exposed to serious physical injuries such as from bites, bruises, or strains and sprains." JA 7. OSHA identified several measures Brooke Glen could implement to address the workplace violence hazard, including: (1) performing a comprehensive evaluation of the workplace violence hazards specific to the facility; (2) ensuring appropriate levels of staffing; (3) improving procedures for summoning emergency assistance; (4) improving workplace violence incident tracking; (5) including front-line, non-management staff in safety meetings; and (6) improving training. JA 549-71.

C. The ALJ Finds Brooke Glen Violated the General Duty Clause by Failing to Protect Its Employees from Workplace Violence.

Brooke Glen contested the citation, and the ALJ held a hearing on February 21-23, and on May 3-4, 2018. The parties stipulated to the first two elements of a general duty clause violation: (1) that Brooke Glen's

employees were exposed to hazardous conditions – patient-on-staff aggression – at the time of the alleged violation; and (2) that both Brooke Glen and the industry recognized the hazard of patient-on-staff aggression. JA 168-171. The parties also stipulated that if the violation was affirmed, a penalty of $12,471 was appropriate. JA 67-68. The two issues before the ALJ were whether patient-on-employee violence was likely to cause death or serious physical harm and whether there were feasible abatement methods that would have materially reduced the violence.[2]

ALJ Rooney affirmed the OSHA citation. JA 83. Dr. Jane Lipscomb was qualified as an expert for the Secretary and opined that Brooke Glen's abatement methods were inadequate and that there were additional measures that would have materially reduced the workplace violence hazard. JA 543-71. The ALJ found Dr. Lipscomb's expert testimony credible and largely unrebutted. JA 95. On the other hand, the ALJ found that the testimony of Brooke Glen's expert, Monica Cooke, was not entitled to equal weight. JA 92-95. Ms. Cooke's testimony centered on whether Brooke Glen's existing workplace violence policies were consistent with industry practice, which is not dispositive. JA 95 (noting that the feasibility issue under the general

[2] On appeal, Brooke Glen does not dispute that the hazard was likely to cause death or serious physical harm.

duty clause is whether a precaution is recognized by industry experts as feasible, not whether the precaution's use is customary in the industry). Ms. Cooke did not opine as to whether any of the Secretary's identified abatement measures were technologically feasible or whether they would reduce the workplace violence hazard. JA 524-25, 531-32, 536. Moreover, the judge found that Ms. Cooke's testimony concerning Brooke Glen's existing policies was not supported by the evidence in the record in important respects. JA 92.

In 2016, Brooke Glen had several generic written policies (*i.e.*, workplace violence policy, management of aggression policy, Code 100 policy), incident tracking methods that failed to track many workplace violence incidents, safety committees comprised of management only, and provided training on de-escalation and crisis intervention. JA 96-129. The ALJ found that these abatement measures were inadequate to abate the hazard of patient-on-staff violence. JA 129.

(1) Written Policies. Brooke Glen's written workplace violence policy focused on staff-on-staff violence but did not mention patient-on-staff violence. JA 103, 768-72. The policy itself contained inaccurate information: it directed employees to contact a security department in certain situations, but Brooke Glen did not have any security staff. JA 103, 207,

212, 252. Additionally, the ALJ found that the policy was not well communicated to employees, as Brooke Glen's Director of Risk Management was not aware of how – or if – the policy was made available to employees. JA 104, 401-402, 422-25, 508.

On paper, Brooke Glen's management of patient aggression policy provides guidance on handling aggressive patients, conducting debriefings after an incident, and documenting a crisis intervention. JA 773-80. However, the ALJ found this policy was inadequately communicated and implemented. JA 104. Notably, Brooke Glen's Director of Nursing was completely unaware of the policy, and non-management employees testified that the post-incident briefing described in the policy did not consistently occur. JA 104, 249, 307, 348, 509.

Brooke Glen's "Code 100" policy for addressing psychiatric emergencies was haphazard and ineffective. JA 109-14, 781-83. Employees were unable to summon help in emergencies due to the limited number of telephones or working walkie-talkies available. JA 109, 169, 175-78, 215, 263-64, 298. There were no phones available in several areas where violent incidents frequently occurred. JA 109-10, 298-99. The ALJ found that the record contained several incidents where employees had been unable to call

a Code 100, either because of lack of access to phones or to operable walkie-talkies. JA 110-12.

(2) Incident Tracking. Brooke Glen employees can report some types of accidents and injuries to the company by using an online reporting system called MIDAS or by completing an employee accident report.[3] JA 360-61, 504-505. The ALJ found that the MIDAS system does not gather information about employees' injuries and was not used by all direct care employees. JA 106-108. Mental health technician Mr. Ginsberg never used MIDAS, and Joel Somers, Brooke Glen's mental health technician manager, did not know of any mental health technicians who used it. JA 188, 454.

Additionally, employees were not required to complete employee accident reports, and they generally did not complete the report if the incident involved spitting or verbal assaults. JA 116-17. Brooke Glen does not have any forms or mechanisms for employees to report workplace violence incidents that do not result in an injury, *e.g.*, being spit on or threatened. JA 397, 399. The ALJ therefore found that Brooke Glen's

[3] According to the MIDAS website, MIDAS uses "patient-centric data to manage, measure and monitor everything from quality to patient safety to improve financial and clinical outcomes." *See* https://www.conduent.com/solution/healthcare-provider-solutions/midas-health-analytics-solutions/ (last visited Sept. 18, 2019).

method of tracking violent incidents was inadequate to effectively abate the hazard. JA 115-21.

Even when used, the accident report itself provided few details about the incident and the company did not use the information from the report to make any improvements to employee safety. JA 120. The reports did not ask about actions that could be taken in the future to prevent similar incidents, and Mr. Somers, who collected the reports, "seemed to do little with the information" on the reports. *Id*. Neither Brooke Glen's Director of Risk Management nor the safety committee reviewed the reports. JA 115, 120, 503-504. And multiple employees testified that Brooke Glen did not follow-up on violent incidents. JA 120.

While Mr. Somers conducted a "camera review" and completed a "camera review form" when there was video footage of a violent incident, JA 444-48, this was largely perfunctory. JA 94, 105-106. Mr. Somers did not use the "debriefing form" that was on the back of the camera review form and he filed camera review forms in his office without any further review. JA 94, 105-106, 449-52. The forms were not used to identify trends or examine the effectiveness of Brooke Glen's approach to workplace violence. JA 106.

(3) Safety Committees. Brooke Glen has two management committees, one related to performance improvement and one related to safety, both of which purportedly review workplace violence incidents. JA 211, 364, 494. The ALJ concluded that these committees were not adequate to materially reduce the workplace violence hazard. JA 127. Non-managerial level employees were not permitted to serve on the safety committee, and neither committee reviewed incident reports or camera review forms. JA 123-24. There was no documentation of what was discussed at the meetings or whether any actions were taken to address workplace violence as a result of the meetings. JA 127.

(4) Training. Brooke Glen provides employees verbal de-escalation training and Crisis Prevention Institute (CPI) training, which is nonviolent crisis intervention training. JA 429, 434-35, 773-80, 819-83. Brooke Glen also has a workplace violence PowerPoint. JA 787-818. The ALJ found "significant gaps" in Brooke Glen's training. JA 129, 153. Brooke Glen could not provide basic information on the workplace violence training allegedly conducted through a PowerPoint, such as when the training occurred, who provided the training, or whether it was ever made available to employees prior to the OSHA citation. JA 128-29, 787-818. Further,

training was cut short in 2016 for at least one employee due to short staffing. JA 128, 218-19.

Having found that Brooke Glen's safety program did not adequately address the workplace violence hazard, the ALJ evaluated the feasibility and efficacy of the six abatement methods identified by the Secretary. JA 130-31. Relying on Dr. Lipscomb's unrebutted expert testimony, the ALJ found that these methods were feasible and would materially reduce the hazard. JA 130-153.

(1) Comprehensive Hazard Evaluation. The ALJ found that it would be feasible for Brooke Glen to perform a comprehensive hazard evaluation that included evaluating and modifying its written policies, performing a workplace hazard assessment of the units, and engaging employees in an annual review. JA 131-37. The ALJ rejected Ms. Cooke's opinion that such measures were already in place based on employee witness testimony to the contrary. JA 133-35.

The ALJ found that published research, including the Arnetz et al. study, supported Dr. Lipscomb's opinion that a comprehensive evaluation minimizes the workplace violence hazard. JA 136, 309-311, 313, 342, 607-

651.[4] The Arnetz study showed a 60 percent reduction in staff assaults in healthcare facility units that implemented this type of process-based approach. JA 136, 309-10, 313, 607-17. The ALJ rejected Brooke Glen's argument that it cannot evaluate which interventions would be successful, noting that its own expert, Ms. Cooke, agreed that conducting a comprehensive risk assessment of a facility is a best practice. JA 137, 535.

(2) Appropriate Staffing Levels. The ALJ found that it would be feasible to have sufficient staff for each unit based on the severity of the workplace violence hazard. JA 137-43. While Brooke Glen argued that its staffing was adequate, the ALJ found that Brooke Glen's management denied employee requests for additional support to handle violent patients and that insufficient staffing had led to slower responses when a Code 100 was called. JA 137-40.

[4] The study admitted as CX-45 [JA 607-17] is Judith E. Arnetz, Lydia Hamblin et al., *Preventing Patient to Worker Violence in Hospitals: Outcome of a Randomized Controlled Intervention*, 59 Am. C. of Occupational and Envtl. Med. 18 (2017). The study admitted as CX-46 [JA 618-40] is Jane Lipscomb, et al. *Violence Prevention in the Mental Health Setting, The New York State Experience*, 38 Canadian J. of Nursing Res. 97 (2006). The study admitted as CX-48 [JA 641-51] is Hamblin, et al., *Worksite Walkthrough Intervention: Data-driven Prevention of Workplace Violence on Hospital Units*, 59 Am. C. of Occupational and Envtl. Med. 875 (2017), which describes the interventions discussed in CX-45. JA 319-21.

Based on research and the experience of Brooke Glen's employees, Dr. Lipscomb opined that appropriate staffing would likely prevent injuries and materially reduce the hazard. JA 141-42, 286, 289, 291, 554-57. In focus groups Dr. Lipscomb held with patients at addiction treatment centers in New York, patients told her that having increased staff helps to calm the patients down when they begin to get upset. JA 287. Likewise, patients get upset when there are not enough staff to meet their needs. JA 289. Dr. Lipscomb also explained the importance of having sufficient staff to be able to respond to an emergency code. *Id*.

Unlike Brooke Glen, every behavioral health hospital Dr. Lipscomb has ever been a part of has had security personnel on-site. JA 290. One behavioral hospital she visited in the Baltimore area has a "milieu officer" with no patient care responsibilities whose sole job is to defuse patient aggression. JA 290-91. Dr. Lipscomb opined that such staff would have materially reduced the hazard at Brooke Glen. JA 291. After the OSHA citation, Brooke Glen hired a security mental health technician who does not have ongoing direct patient care responsibilities and who can respond to emergency codes. JA 252-53, 453. Both Dr. Lipscomb and Ms. Cooke agreed that having a security mental health technician was a feasible abatement method. JA 143.

(3) Reliable and Effective Methods of Summoning Help. The ALJ found that it was feasible for Brooke Glen to provide all affected employees with reliable and readily available means of communication (*e.g.*, ensure walkie-talkies are working and available in sufficient quantities and add personal alarms and panic buttons) and train employees on how to use the equipment. JA 144-47. Dr. Lipscomb opined that having a reliable method of summoning assistance when there is a potential for assault would reduce the likelihood of injuries. JA 296-97, 346-47, 558-60. Ms. Cooke likewise agreed that having an effective method of summoning help could prevent injuries from patient aggression. JA 537-38.

Personal alarms could be used to materially reduce workplace violence. JA 299. Likewise, panic buttons, which do not alert the patient to the call for help and allow an employee to discreetly seek assistance, could also be used to materially reduce workplace violence. JA 297, 300-301, 303. Panic buttons are a more rapid method of summoning assistance than a phone, and can prevent an assault or reduce the severity of harm to the employee. JA 302-303.

Dr. Lipscomb's testimony is supported both by research and industry practice. A large survey of nurses in Minnesota and a subsequent case-control study showed that the odds of assault decreased by 70% among

nurses carrying cellular phones or personal alarms. JA 560. All staff in New York State's Office of Mental Health carry a personal alarm. JA 299-300. Personal alarms or panic buttons are also recommended by the Joint Commission.[5] JA 560.

(4) Incident Tracking and Debriefing. The ALJ found that it would be feasible and effective for Brooke Glen to modify and enforce its post-incident documentation and review procedures. JA 147-49. Dr. Lipscomb explained that debriefing should include a review of all recent workplace violence incidents to see if there are any trends, such as where or when violence is occurring. JA 306. Both experts agreed that post-incident debriefing is feasible and important to address the workplace violence hazard. JA 148-49, 304-305, 421, 439.

(5) Involving Direct-Care Staff in Safety Committee. The ALJ also found that involving direct-care workers in a safety committee that reviews workplace violence policies was a feasible way to materially reduce the hazard. JA 150-52, 292-95, 308. Including direct-care staff in the safety committee meetings could materially reduce workplace violence because

[5] The Joint Commission accredits and certifies more than 22,000 health care organizations in the United States. *See* https://www.jointcommission.org/about_us/about_the_joint_commission_main.aspx (last visited Sept. 27, 2019).

these employees are the most knowledgeable about what happens over the course of a shift. JA 288, 292-93. Dr. Lipscomb considered it "critically important" to receive input from these front-line workers, JA 292, and Brooke Glen agreed that front-line employees have the most critical information about how to abate the hazard. JA 151, 506-507. Dr. Lipscomb testified that other hospitals have safety committees with both labor and management involvement. JA 294.

(6) Training. The ALJ also found that the Secretary demonstrated that improving training would materially reduce the hazard. JA 152-53. Dr. Lipscomb testified that training should include an orientation to Brooke Glen's workplace violence prevention policy that includes risk factors for violence, procedures for preventing violence, and the staff's role in the process of risk analysis, hazard control, and evaluation. JA 153, 340, 570-71.

Overall, there was no evidence that Brooke Glen could not adopt any of the Secretary's suggested abatement measures, and the ALJ found that the Secretary established feasible means of abatement that would materially reduce the hazard. JA 154.

Finally, the ALJ rejected Brooke Glen's argument that it lacked fair notice of the abatement necessary to address workplace violence. JA 155.

In fact, Brooke Glen did identify abatement measures that would materially reduce the hazard but simply failed to implement those measures. JA 156.

SUMMARY OF THE ARGUMENT

Substantial evidence in the record supports the ALJ's finding that Brooke Glen failed to protect its employees from workplace violence. In 2016 alone, there were at least fifty-one employee injuries from patient-on-staff assaults at Brooke Glen. These assaults included being slapped, bitten, kicked, and punched.

Brooke Glen half-heartedly and inconsistently implemented the safety programs provided by its corporate office. So while Brooke Glen had a number of safety protocols on paper, employees testified that these measures were inadequately communicated and ineffectively implemented. The evidence in the record shows that Brooke Glen did not have a coordinated and comprehensive approach to workplace violence, did not track and review all incidents of workplace violence, did not ensure that employees could call for help in an emergency, and did not ensure that employees were trained on all policies and procedures.

Evidence in the record supports the ALJ's finding that there are multiple abatement methods that Brooke Glen could have implemented to materially reduce the workplace violence hazard. Dr. Lipscomb, an expert

who is highly experienced in the behavioral health industry, recommended six abatement methods to reduce the hazard. Brooke Glen's expert did not dispute Dr. Lipscomb's opinion that these methods are feasible and will materially reduce the workplace violence hazard. Finally, Brooke Glen's various fair notice arguments are without merit.

ARGUMENT

I. Standard of Review

The court must uphold the Commission's decision unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Fabi Const. Co. v. Sec'y of Labor*, 508 F.3d 1077, 1080 (D.C. Cir. 2007) (quoting 5 U.S.C. § 706(2)(A)) (internal quotation marks omitted). The factual findings of the Commission must be upheld "if supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 660(a). The Court "must uphold the Commission's findings of fact as long as there is enough evidence in the record for a reasonable mind to agree with the Commission." *Fabi Const.*, 508 F.3d at 1081. Likewise, the court "must accept the ALJ's credibility determinations ... unless they are patently unsupportable." *AJP Constr., Inc. v. Sec'y of Labor*, 357 F.3d 70, 73 (D.C. Cir. 2004) (citations omitted). The same standard of review applies

to an unreviewed ALJ decision that applies to Commission decisions. *See P. Gioioso & Sons., Inc. v. OSHRC*, 115 F.3d 100, 108 (1st Cir. 1997).

II. Substantial Evidence Supports the ALJ's Finding That the Secretary Established That Feasible Means to Materially Reduce the Workplace Violence Hazard Existed.

The general duty clause of the OSH Act requires an employer to 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). To establish a violation of the general duty clause, the Secretary must demonstrate that: "(1) an activity or condition in the employer's workplace presented a hazard to an employee, (2) either the employer or the employer's industry recognized the condition or activity as a hazard, (3) the hazard was likely to or did cause death or serious physical harm, and (4) there existed a feasible means to eliminate or materially reduce the hazard." *Fabi Const.*, 508 F.3d at 1081 (citations omitted).

Brooke Glen stipulated that its employees were exposed to the hazard of patient-on-staff aggression and that this hazard was recognized both by Brooke Glen and its industry. JA 87. On appeal, Brooke Glen contests only the abatement element of the Secretary's case. Pet. Br. at 28-39. Substantial evidence in the record supports the judge's findings that the Secretary proved the abatement element by demonstrating that Brooke Glen's existing

safety program was inadequate and that there are additional feasible methods of abatement that would materially reduce the workplace violence hazard.

A. Substantial Evidence Supports the ALJ's Finding That Brooke Glen's Program Addressing the Workplace Violence Hazard Was Inadequate.

Where an employer has taken measures to address the recognized hazard, the Secretary must demonstrate that the employer's measures are inadequate. *See SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202, 1215 (D.C. Cir. 2014) (existing protocols were inadequate to prevent continued incidents of killer whale aggression); *Cerro Metal Prods. Div., Marmon Grp., Inc.*, 12 BNA OSHC 1821, 1822 (No. 78-5159, 1986). While Brooke Glen took some steps to address the recognized workplace violence hazard, employees continued to be attacked and injured at persistently high rates. Ample evidence from the Secretary's expert, Dr. Lipscomb, and the numerous employees who testified at the hearing support the ALJ's finding that Brooke Glen's steps to address workplace violence were inadequate. JA 97-129.

In *SeaWorld*, this Court considered three incidents of killer whale violence towards trainers over the span of four years as evidence of the inadequacy of SeaWorld's existing protocols. *See SeaWorld*, 748 F.3d at 1215. Here, the violence is even more pronounced. The ALJ found that

patient attacks "routinely occurred." JA 156. Brooke Glen's records showed that in 2016 alone, there were at least fifty-one documented employee injuries resulting from workplace violence. JA 89, 96, 209-10, 667-718. Employees have been punched, kicked, slapped, bit, hit with objects, and spit on. JA 89. One nurse described being attacked by patients "countless times" at work. JA 349, 351. As noted in Dr. Lipscomb's report, even Brooke Glen's corporate parent notified Brooke Glen that its employee injury rate far exceeded the parent company's goal of no more than 15 injuries in 2016. JA 563. The prevalence of patient-on-staff violence supports the ALJ's finding that Brooke Glen's attempts to reduce the violence were inadequate. *See SeaWorld*, 748 F.3d at 1215 (SeaWorld's training and protocols did not prevent continued whale-on-trainer violence).

Brooke Glen asserts that its Quality Council Report, JA 928-38, shows that it has successfully reduced overall patient aggression, Pet. Br. at 30, and it claims that this "necessarily" means that patient-on-staff aggression has also been reduced. Pet. Br. at 34, n.11. But the patient aggression rate in the report reflects not just patient-on-staff violence, but also property damage, patient-on-patient aggression, and patient-on-visitor aggression. JA 485. This aggregate rate alone does not demonstrate that patient aggression towards staff has decreased.

Moreover, this report is based on data collected through the MIDAS system, JA 470, which, as the ALJ found, does not gather information about the nature of employees' injuries and was not used by all direct care employees. JA 107-108. And, as Dr. Lipscomb pointed out, this report actually shows an increase in patient aggression rates in 2016 compared to 2015.[6] JA 339, 930. In light of the fifty-one documented employee injuries in 2016, this report simply does not support the argument that Brooke Glen has reduced the workplace violence hazard to the extent feasible.

Brooke Glen argues that – despite the prevalence of workplace violence – its existing protocols were sufficient because the patient aggression rates are lower at Brooke Glen than at most behavioral health facilities managed by Brooke Glen's parent company. Pet. Br. at 33-34. This argument ignores the staggeringly high rates of injury at Brooke Glen and is legally baseless. If there are feasible means to eliminate or materially reduce a recognized hazard, the OSH Act requires the employer to implement them – regardless of what is customary in a particular industry. *See Nat'l Realty & Const. Co. v. OSHRC*, 489 F.2d 1257, 1266, n.37 (D.C.

[6] Brooke Glen mischaracterizes Dr. Lipscomb's testimony regarding this exhibit. Pet. Br. at 32. While she agreed that Brooke Glen's exhibit showed a drop in the patient aggression rate between 2014 and 2016, she highlighted the increase from 2015 to 2016. JA 339.

Cir. 1973) (feasibility depends on "whether a precaution is recognized by safety experts as feasible, not whether the precaution's use has become customary"); *Gen. Dynamics Corp., Quincy Shipbuilding Div. v. OSHRC*, 599 F.2d 453, 464 (1st Cir. 1979) (measuring adequacy of an employer's safety program to that of the industry "would allow an entire industry to avoid liability by maintaining inadequate safety training"). Brooke Glen's acceptance of these levels of violence is antithetical to the general duty clause's mandate to reduce hazards to the extent feasible. *See Nat'l Realty*, 489 F.2d at 1266-67 ("All preventable forms and instances of hazardous conduct must, however, be entirely excluded from the workplace.").

The ALJ credited Dr. Lipscomb's testimony regarding the inadequacy of Brooke Glen's safety protocols. JA 91-129. Brooke Glen appears to argue that Ms. Cooke's testimony should have been given more weight than Dr. Lipscomb's regarding the adequacy of Brooke Glen's safety measures. Pet. Br. at 38. But as the ALJ found, the record did not support the facts underpinning Ms. Cooke's opinion in several respects, and it was therefore entitled to less weight. JA 93-94, 129. For example, while Ms. Cooke opined that Brooke Glen had already implemented the abatement measures recommended by the Secretary, the ALJ found that Brooke Glen failed to implement its own safety protocols as designed. JA 102-29, 132. The

ALJ's finding that Ms. Cooke's testimony was entitled to less weight is to be given "wide latitude." *SeaWorld*, 748 F.3d at 1214; *see also Sec'y of Labor v. Keystone Coal Mining Corp*., 151 F.3d 1096, 1107 (D.C. Cir. 1998) ("[T]his Court must defer to the reasonable determination of the [ALJ] regarding not only the relevance but the reliability of the expert testimony presented at trial.").

The evidence in the record supports the ALJ's finding that there were "significant shortcomings" in the scope and implementation of Brooke Glen's safety measures. JA 115. Brooke Glen's written policies were inadequate to reduce the workplace violence hazard because they contained misinformation or were not consistently implemented. JA 102-15. For example, the company's workplace violence policy did not directly address patient-on-staff violence and contained inaccurate information about who to contact in an emergency. JA 103, 207, 212, 252, 455-57, 768-72.

Likewise, Brooke Glen's management of patient aggression policy, JA 773-80, was inadequately communicated and implemented. JA 104-109. Brooke Glen's Director of Nursing was unaware of the policy. JA 249, 509. While the policy calls for post-incident debriefing, debriefing did not consistently occur; for example, Mr. Ginsberg described multiple violent incidents for which no debriefing occurred. JA 104, 180-81, 187. When

debriefings did occur, they were limited in scope, and employees were not consistently asked what changes could be made to improve safety. JA 105, 220.

Brooke Glen's Code 100 policy, designed to allow employees to call for assistance in emergencies, was wholly unreliable. JA 109-14. There were no phones available to call the code in several areas where violence had occurred, and the limited number of walkie-talkies often were not functioning. JA 109-12, 177-78, 182-86, 215-16. One employee considered the walkie-talkies useless because of their frequent maintenance issues. JA 265. Dr. Lipscomb described Brooke Glen's approach to summoning help in emergencies as "haphazard" and "archaic." JA 297-98.

Brooke Glen's methods of tracking violent incidents were also inadequate because they failed to track all acts of patient-on-staff violence. JA 107-108, 117-18. Employees were not required to complete employee accident reports, and generally did not complete them if the incident involved spitting or verbal assaults. JA 116-17, 357-59, 398. Moreover, the safety committee did not review the reports. JA 115, 504-505.

While Brooke Glen contends that the MIDAS system tracks all incidents of patient aggression in the hospital, Pet. Br. at 17, not all direct care employees used the system. JA 188, 454. Evidence in the record

supports the ALJ's finding that the MIDAS system does not gather information about all injuries and was not used by all direct care employees. JA 107-108.

Evidence also supports the ALJ's finding that Brooke Glen's safety committee did not adequately address the workplace violence hazard. JA 127. The committee did not review any employee accident reports, nor did it review camera review forms. JA 124, 312, 445-46, 504-505, 510. While the committee reviewed aggregate data about patient aggression, those aggregate reports do not include the number of employee injuries caused by patient violence, information on violent incidents not leading to injury, or any analysis of the violence, such as contributing factors or improvements that could be made. JA 124-25, 928-32.

Further, while Dr. Lipscomb considers it "critically important" for a safety committee to receive input from front-line workers, JA 292, Brooke Glen's safety committee was comprised solely of management employees prior to 2017. JA 123, 217. In fact, front-line workers' requests to participate in the safety committee were denied. *Id*. Even Brooke Glen's expert Ms. Cooke agreed that having front-line workers participate in safety committees could be helpful in reducing the hazard and was a good practice. JA 532-33.

Finally, Brooke Glen's training was not adequate to reduce the workplace violence hazard. JA 127-29. Just like other elements of its safety program, Brooke Glen failed to adequately communicate and implement the training it had on paper. JA 129. Even though Brooke Glen had a workplace violence PowerPoint, JA 787-818, employees were not trained on it during new employee training. JA 129, 401-402. And while Brooke Glen's Director of Risk Management indicated the PowerPoint was part of annual training for nurses and mental health technicians, neither she nor anyone else testified that they trained employees on the slides or testified who did. JA 388-89, 425, 514.

Brooke Glen asserts that the ALJ ignored its de-escalation and crisis intervention training. Pet. Br. at 30. In fact, the ALJ acknowledged this training, but found it inadequate. JA 127-29. In reaching this conclusion, the ALJ gave concrete examples of training deficiencies. In one case, an employee's training on patient de-escalation was abbreviated due to issues with short staffing. JA 128, 219. In another case, a mental health technician was bitten by a patient during a restraint because the other technician responding to the code lacked adequate training and made an error. JA 129. Accordingly, evidence supports the ALJ's finding that neither Brooke Glen's training program nor any of its other abatement methods were

sufficient to materially reduce the workplace violence hazard. JA 129; *see Fabi Const.*, 508 F.3d at 1081 (Court must uphold factual findings "as long as there is enough evidence in the record for a reasonable mind to agree with the Commission.").

B. Substantial Evidence Supports the ALJ's Finding That the Secretary's Proposed Abatement Methods Are Feasible and Would Materially Reduce the Workplace Violence Hazard.

Having proven that Brooke Glen's safety program is inadequate, the Secretary must present feasible abatement measures that are capable of eliminating or materially reducing the hazard. *See Nat'l Realty*, 489 F.2d at 1267-68, n.40; *Fabi Const.*, 508 F.3d at 1081; *Beverly Enters., Inc.*, 19 BNA OSHC 1161, 1190 (No. 91-3144, 2000) (consolidated). Abatement is feasible when it is "economically and technologically capable of being done." *SeaWorld*, 748 F.3d at 1215 (citations omitted).

The Secretary must "specify the particular steps a cited employer should have taken to avoid citation, and to demonstrate the feasibility and likely utility of those measures." *Nat'l Realty*, 489 F.2d at 1268. When a hazard cannot be abated with a single measure, OSHA may require an employer to take a "process approach" to abatement "to determine what action or combination of actions will eliminate or materially reduce the hazard." *Pepperidge Farm, Inc.*, 17 BNA OSHC 1993, 2033-34 (No. 89-

0265, 1997). "Feasible means of abatement are established if 'conscientious experts, familiar with the industry' would prescribe those means and methods to eliminate or materially reduce the recognized hazard." *Arcadian Corp.*, 20 BNA OSHC 2001, 2011 (No. 93-0628, 2004) (internal citations omitted); *see also Cerro Metal Prods. Div.*, 12 BNA OSHC at 1822-23 (Secretary "must present evidence that knowledgeable persons familiar with the industry would regard the steps as necessary and valuable for a sound safety program in the particular circumstances existing at the employer's worksite.").

While Brooke Glen claims that there is "no evidence" of any further steps it could take to materially reduce the workplace violence hazard, Pet. Br. at 29, Dr. Lipscomb, a workplace violence expert who is familiar with the behavioral health industry, recommended six abatement methods to materially reduce the hazard. JA 130-54. Brooke Glen's own expert did not dispute the feasibility or efficacy of the identified additional abatement steps. JA 524-25, 531-32, 536. Substantial evidence supports the ALJ's finding that feasible methods exist to materially reduce the workplace violence hazard. JA 130-31.

1. The Secretary's Identified Abatement Specifies the Steps Brooke Glen Should Have Taken to Protect Employees from Workplace Violence.

While Brooke Glen argues that there are no further steps it could have taken to reduce the workplace violence hazard, based on Dr. Lipscomb's testimony the ALJ found that feasible abatement methods include: (1) performing a comprehensive evaluation of workplace violence and developing appropriate policies based on the evaluation; (2) ensuring that units have appropriate levels of staff given the acuity of the workplace violence hazard; (3) improving procedures for summoning assistance in emergencies; (4) improving workplace violence incident tracking and debriefing; (5) having a safety committee obtain input from front-line staff about the workplace violence hazard; and (6) improving training. JA 130-53.

These abatement measures hardly amount to a "try everything" approach, as Brooke Glen claims. Pet. Br. at 35. These six abatement methods were recommended by Dr. Lipscomb and are based on her extensive experience, field research, and the published literature on workplace violence prevention. JA 542. The cornerstone of the identified abatement, the comprehensive hazard evaluation, requires Brooke Glen to assess its workplace, consider the risk data, and update policies and practices

accordingly. JA 308-309. The Commission has long held this type of "process approach" to abatement is permissible. *See Pepperidge Farm*, 17 BNA OSHC at 2033-34 (under process approach, an employer will "determine what action or combination of actions will eliminate or materially reduce the hazard."); *see also Beverly Enters.*, 19 BNA OSHC at 1191.

The Commission recently applied this abatement approach in *Integra Health Management*, a workplace violence case involving the fatal stabbing of a community service coordinator by her client. *Integra Health Management, Inc.*, 27 BNA OSHC 1838 (No. 13-1124, 2019). Based on the testimony of the Secretary's expert, the Commission found that the seven abatement methods identified in OSHA's citation (*e.g.*, creating a written workplace violence prevention program, creating a system for reporting and tracking safety concerns, and providing employees with a reliable way to summon assistance when needed) were feasible and would materially reduce the workplace violence hazard. *Id*. at 1849-51. The abatement process recommended by Dr. Lipscomb is equally appropriate in this case. *See Pepperidge Farm*, 17 BNA OSHC at 2033-34.

2. The Secretary's Identified Abatement Methods Are Undisputedly Feasible and Will Materially Reduce the Workplace Violence Hazard.

The ALJ based her finding that the Secretary's identified abatement methods were feasible and effective on Dr. Lipscomb's expert opinion. JA 95, 135-53. Dr. Lipscomb was qualified as an expert in workplace violence prevention in the healthcare industry, including behavioral health, without objection. JA 91, 284-85. She has testified before state legislatures about workplace violence in the healthcare sector, evaluated the effectiveness of numerous behavioral healthcare facilities' abatement methods, and published approximately twenty-five papers on workplace violence in peer-reviewed journals. JA 270-83, 572-77, 582-89, 618-40, 652-66. Dr. Lipscomb is unquestionably a "conscientious expert" familiar with the behavioral health industry. *See Arcadian*, 20 BNA OSHC at 2011.

Dr. Lipscomb's testimony regarding the feasibility and efficacy of these abatement methods is unrebutted. JA 95, 525. Ms. Cooke did not opine about the feasibility of any of these six abatement methods or whether any of the abatement methods would reduce the workplace violence hazard. JA 92-93, 524-25, 531-32, 536. Nor does Brooke Glen argue that any of these methods are infeasible. Indeed, that Brooke Glen has adopted some of these measures following the OSHA citation, *e.g.*, hiring a security mental

health technician to respond to codes, ensuring walkie-talkies are operable, and including front-line employees on the safety committee, is indicative of their feasibility. *See SeaWorld*, 748 F.3d at 1215 (employer's post-citation implementation of abatement measures supports the finding that these changes were feasible).

Moreover, Dr. Lipscomb's opinion that the recommended abatement methods will materially reduce the hazard is well-supported by her extensive experience and the peer-reviewed literature. JA 136, 618-51. For example, the Arnetz study found that high-risk healthcare facilities that implemented a comprehensive evaluation process reduced staff assaults by 60 percent compared to the control facilities. JA 136-37, 314-29, 613, 616. Another study showed the chances of nurses being assaulted was 70 percent lower if they carried cellular phones or alarms. JA 560.

Contrary to Brooke Glen's assertion, Pet. Br. at 36-37, the Secretary need not quantify the degree to which a hazard will be reduced in order to establish the effectiveness of a proposed abatement method. There is no case law to support Brooke Glen's position. Rather, courts consider whether an expert is of the opinion that abatement would materially reduce the hazard. *See, e.g.*, *Integra*, 27 BNA OSHC at 1850-51 (finding material reduction of the workplace violence hazard based on expert testimony);

Pepperidge Farm, 17 BNA OSHC at 2034 (sufficient evidence of efficacy could be based on successful use of similar approach elsewhere, industry standards, or testimony by experts in the industry); *Morrison-Knudsen Co.*, 16 BNA OSHC 1105 (No. 88-572, 1993) (Secretary not required to offer quantifiable measurement of lead exposure hazard reduction resulting from use of protective clothing).

Here, the ALJ properly relied on Dr. Lipscomb's unrebutted testimony that the six recommended abatement methods would materially reduce the workplace violence hazard.[7] *See Arcadian*, 20 BNA OSHC at 2011 ("Feasible means of abatement are established if 'conscientious experts, familiar with the industry' would prescribe those means and methods to eliminate or materially reduce the recognized hazard."). Substantial evidence therefore supports the ALJ's finding. *See Fabi Const.*,

[7] Relying on *A.H. Sturgill Roofing, Inc*., 27 BNA OSHC 1809 (No. 13-0224, 2019), Brooke Glen incorrectly asserts that the citation should be vacated if it implemented any of the Secretary's identified abatement methods. Pet. Br. at 49-51. In *A.H. Sturgill*, the Commission found that the multiple abatement methods identified by the Secretary were alternatives, the implementation of any of which would result in the employer materially reducing the hazard. 27 BNA OSHC at 1818. The Commission did not hold, as Brooke Glen contends, that whenever multiple abatement methods are identified, they are alternatives. *Id*. ("We find, unlike our dissenting colleague, that the Secretary litigated his proposed measures as alternative means of abatement."). Here, the Secretary recommended – and the ALJ found – that the identified abatement methods together would materially reduce the hazard. JA 135.

508 F.3d at 1081 (Court must uphold factual findings "as long as there is enough evidence in the record for a reasonable mind to agree with the Commission.").

III. Brooke Glen's Remaining Legal Arguments Lack Merit.

Brooke Glen raises several scattershot legal arguments related to whether it had adequate notice of the required abatement and OSHA's authority to address workplace violence hazards under the general duty clause. None of these arguments is persuasive.

A. The General Duty Clause Is Not Unconstitutionally Vague as Applied to Brooke Glen.

Brooke Glen argues that the general duty clause is unconstitutionally vague as applied because Brooke Glen lacked fair notice that it was required to implement the Secretary's proposed abatement measures. Pet. Br. at 39-40. Brooke Glen's fair notice argument was properly rejected by the ALJ. JA 155-57.

A statute satisfies the due process requirement of fair notice if "a reasonably prudent person, familiar with the conditions the [statute is] meant to address and the objectives the [statute is] meant to achieve, would have fair warning of what the [statute] require[s]." *Freeman United Coal Mining Co. v. Fed. Mine Safety & Health Comm'n.*, 108 F.3d 358, 362 (D.C. Cir. 1997) (internal citations omitted). There is no fair notice issue when the

general duty clause is applied only to preventable hazards and "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 (quoting *Donovan v. Royal Logging Co*., 645 F.2d 822, 831 (9th Cir. 1981)).

1. The Workplace Violence Hazard Is Preventable and Brooke Glen Could Have Anticipated the Proposed Safety Measures Were Necessary.

The record establishes that Brooke Glen did not lack fair notice because the workplace violence hazard is preventable. *See SeaWorld*, 748 F.3d at 1216 (SeaWorld did not lack fair notice because killer whale aggression is preventable). Brooke Glen does not dispute that patient-on-staff aggression is preventable – in fact, Brooke Glen contends that it has a number of protocols in place to reduce the aggression. Pet. Br. at 8-24. And, given the continued high rates of workplace violence despite Brooke Glen's safety measures, it could have anticipated that additional abatement methods were necessary. *See SeaWorld*, 748 F.3d at 1216 ("Given evidence of continued incidents of aggressive behavior by killer whales toward trainers notwithstanding SeaWorld's training, operant conditioning practices, and emergency measures, SeaWorld could have anticipated that abatement measures it had applied after other incidents would be required.").

Moreover, Brooke Glen's fair notice argument must fail because a reasonable employer would have known these additional abatement methods were necessary. As discussed above, these abatement methods are recommended by an expert who is familiar with the behavioral health industry. *Supra*, 32-39. Brooke Glen itself had a number of these protocols on paper, but failed to implement them. *Supra*, 24-32. Moreover, several of the recommended abatement measures are considered best practices in the behavioral health industry. For example, Ms. Cooke testified that conducting a hazard evaluation is considered a best practice. JA 137, 535. She likewise opined that including non-management staff on safety committees is a good, helpful practice. JA 532-33. And Dr. Lipscomb testified that every behavioral health hospital she has ever been a part of had security personnel. JA 290.

And, as Dr. Lipscomb noted in her expert report, there are numerous resources to help employers in the healthcare and behavioral health industry develop workplace violence prevention programs. JA 548. There are peer-reviewed studies on how to reduce workplace violence in the healthcare industry, and the Joint Commission recommends health care facilities have an effective communication system to summon help in an emergency. *See, e.g.*, JA 560, 607-40. Evidence in the record establishes that a reasonably

prudent employer in Brooke Glen's industry would have recognized that these additional safety measures were necessary. *SeaWorld*, 748 F.3d at 1216.

Brooke Glen's reliance on the Commission's decision in *Mid South Waffles, Inc., d/b/a Waffle House #1283*, 27 BNA OSHC 1783 (No. 13-1022, 2019), is misplaced. Pet. Br. at 48. In *Mid South Waffles*, a general duty clause case involving a grease fire at a Waffle House, the Secretary's recommended abatement was to inspect, empty, and clean a grease drawer in accordance with the griddle manual and the applicable consensus standard. 27 BNA OSHC at 1790. Because the company's work rule on cleaning the griddle was not in conflict with either the manual or the consensus standard, the Commission found that the Secretary failed to identify specific additional steps beyond those the company had already taken to abate the hazard. *Id*.

Here, by contrast, the Secretary demonstrated in detail that the steps taken by Brooke Glen to prevent workplace violence were inadequate, and further demonstrated, through Dr. Lipscomb's testimony, that the proposed abatement measures would materially reduce the hazard. *Supra*, 24-39. As discussed above, substantial evidence supports the ALJ's finding that Brooke Glen was not already taking the steps recommended by Dr.

Lipscomb. *Supra*, 24-32. Unlike the abatement at issue in *Mid South Waffles*, the six abatement steps at issue here are clearly additional measures beyond those Brooke Glen had in place. Further, *Mid South Waffles* did not involve the type of "process approach" to abatement that is at issue in this case, and nothing in that decision restricts the Secretary's ability to recommend such an approach. *See Pepperidge Farm*, 17 BNA OSHC at 2033-34 (Secretary may identify abatement requiring an employer to "determine what action or combination of actions will eliminate or materially reduce the hazard.").

2. The ALJ's Decision in a Separate Workplace Violence Case Does Not Support Brooke Glen's Fair Notice Claim.

In support of its fair-notice challenge to the citation in this case, Brooke Glen relies heavily on the decision of the same ALJ in another case involving workplace violence at a psychiatric hospital managed by the same parent company that oversees Brooke Glen. Pet. Br. at 2, 41-45. In *HRI Hospital*, the judge vacated the general duty clause citation, finding that the hospital's workplace violence prevention program was adequate to address the hazard of patient-on-staff violence. *See HRI Hospital, Inc., d/b/a Arbour-HRI Hospital*, 27 BNA OSHC 1897 (No. 17-0303, 2019) (ALJ). Brooke Glen claims that the workplace violence program at issue in *HRI Hospital* is very similar to the one implemented by Brooke Glen and that the

conclusion reached by the judge in that case renders the general duty clause unduly vague as applied in the instant case. Pet. Br. at 41-45.

This argument fails for several reasons. First, there is nothing in the record in this case to permit this Court to compare the content and implementation of the two hospitals' workplace violence programs. The two cases were tried on separate factual records, and there is simply no evidentiary basis for Brooke Glen's claim that they involve similar protocols, training, policies, and programs. Pet. Br. at 42. Brooke Glen makes much out of the existence of what it claims are the same safety-related exhibits submitted in each case. Pet. Br. at 43-45. But the exhibits in *HRI Hospital* were not part of the record before the judge in this case and therefore are not part of the record on review. *See* Fed. R. App. P. 16(a); *see also Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008) (ordinarily review is based on the administrative record and parties are not allowed to supplement the record unless they can demonstrate unusual circumstances to justify a departure from this general rule).

Second, even if there were similarities between the two hospitals' workplace violence programs on paper, Judge Rooney's separate opinions reveal significant differences in the way the hospitals were implementing their programs. For example, unlike at Brooke Glen, employees at HRI

Hospital are required to immediately report all accidents and injuries to their supervisor, regardless of severity. *See HRI Hospital*, 27 BNA OSHC at 1908. And unlike at Brooke Glen, threats of violence and incidents of patient aggression that do not result in injury are also reported. *Id*. As noted above, Brooke Glen does not require employees to complete employee accident reports and employees often do not fill them out for verbal threats or aggression that does not result in an injury. JA 116-17, 390-96, 398-99.

Another significant distinction concerns the hospitals' implementation of protocols for addressing psychiatric emergencies. There was extensive evidence in this case that Brooke Glen employees were unable to summon help in an emergency due to lack of access to phones and working walkie-talkies. JA 109 (describing Brooke Glen's approach to summoning help as haphazard and archaic). In *HRI Hospital* by contrast, there was no finding that employees could not access phones when needed. *See HRI Hospital*, 27 BNA OSHC at 1917-18.

A further significant distinction is the hospitals' use of training materials addressing workplace violence. Brooke Glen claims that its training incorporated the same PowerPoint presentation on workplace violence used by HRI, and that Judge Rooney arbitrarily refused to credit the presentation in this case. Pet. Br. at 43. However, assuming *arguendo* that

the presentation reflected in the trial exhibits is the same in both cases, Judge Rooney found that there was no evidence that the presentation was actually incorporated into the training provided by Brooke Glen. JA 128-29 (noting that Brooke Glen's nurse manager did not use the PowerPoint presentation, or even the term "workplace violence," in the training he gave and that no other witness indicated who trained employees on the presentation or when such training occurred); *see also* JA 400-402, 422-25. On the other hand, HRI's nurse educator was trained on HRI's Workplace Violence PowerPoint and uses those slides to conduct training. *See HRI Hospital*, 27 BNA OSHC at 1904.

For all of these reasons, Brooke Glen's as-applied vagueness challenge must be rejected. Far from implicating any fair notice concerns, *HRI Hospital* provides Brooke Glen and other employers in the behavioral health industry clarity on the measures that may be necessary to materially reduce the workplace violence hazard.[8] *HRI Hospital* further demonstrates that "a reasonably prudent employer in the industry would have known that

[8] Even if Brooke Glen lacked notice of the required abatement, the ALJ's decision need not be vacated. In *National Realty*, this Court noted that "a zero penalty, coupled with an abatement order, would obviously be the proper response" where the employer had no notice that its safety regime was defective. 489 F.2d at 1268 n.41. Here, however, Brooke Glen stipulated that the penalty was appropriate if the violation was affirmed. JA 67-69.

the proposed method of abatement was required." *SeaWorld*, 748 F.3d at 1216 (citations omitted).

B. Brooke Glen's Claim That OSHA Can Only Address Workplace Violence by Promulgating and Enforcing a Standard Is Not Properly Before This Court and, in Any Event, Is Baseless.

Brooke Glen next argues that OSHA must promulgate and enforce a standard in order to address workplace violence and cannot proceed by citing an employer under the general duty clause. Pet. Br. at 45-47. However, this argument cannot be considered by this Court now since it was not raised in Brooke Glen's petition for discretionary review to the Commission. In any event, the argument is entirely without merit.

Under section 11(a) of the OSH Act, "[n]o objection that has not been urged before the Commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 660(a). Where the Commission declines to review an ALJ's decision, an issue is preserved for judicial review only if the issue was raised in the aggrieved party's petition for discretionary review, and then only if the issue was raised "face up and squarely, in a manner reasonably calculated to alert the Commission to the crux of the perceived problem." *P. Gioioso & Sons*, 115 F.3d at 107; *see also Frank Lill & Son, Inc. v. Sec'y of Labor*, 362 F.3d 840, 844 (D.C. Cir.

2004) (issues waived where petition for discretionary review to the Commission made no mention of them).

At no stage in litigation before the Commission – not before the ALJ, and not in its petition for discretionary review – did Brooke Glen ever argue that OSHA may not use the general duty clause to ensure workers are protected from workplace violence hazards. *See* JA 70-81. This argument has therefore been waived. *See* 29 U.S.C. § 660(a); *Frank Lill & Son*, 362 F.3d at 844.

Brooke Glen's argument is also wrong. The argument rests primarily on Brooke Glen's perceived distinction between "rulemaking" and "adjudication" and the company's assertion that the law reflects a preference that agencies establish policy through the former. Pet. Br. at 45-46. However, the Secretary's enforcement of the OSH Act does not involve a choice between enforcing a standard on the one hand or the general duty clause on the other. As this Court has made clear, 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. *See 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) (If an employer "knows a

particular safety standard is inadequate to protect his workers against the specific hazard it is intended to address, or that the conditions in his place of employment are such that the safety standard will not adequately deal with the hazards to which his employees are exposed, he has a duty under section 5(a)(1) to take whatever measures may be required by the Act, over and above those mandated by the safety standard, to safeguard his workers.").

Because section 5(a)(1) "clearly and unambiguously imposes on an employer a general duty to provide for the safety of his employees that is distinct and separate" from the duty to comply with standards, the promulgation of a specific standard does not preempt the general duty clause. *Id*. at 1575. Rather, compliance with a standard satisfies the general duty clause to the extent that the employer is not specifically aware that hazards addressed by the standard continue to exist. *Id*. at 1577. It follows, *a fortiori*, 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.

Brooke Glen also asserts that the Commission has issued decisions "challenging" the use of the general duty clause to enforce compliance obligations. Pet. Br. at 47-48. However, in the *Integra* case cited as support, the Commission unanimously upheld a general duty clause citation

for workplace violence involving an employer that provided healthcare outreach services to clients, some of whom had histories of violence. 27 BNA OSHC 1838. In *Integra*, the Commission found that the client-on-staff violence at issue was a "'hazard' that fits plainly within the text of the general duty clause." *Id*. at 1844. Indeed, the Commission appeared to agree with the Secretary that "it would be 'extreme' to conclude that this hazard is outside the limit of the broadly-worded general duty clause given that, according to the Bureau of Labor Statistics, '[w]orkplace homicides remained the number one cause of workplace death for women in 2009.'" *Integra*, 27 BNA OSHC at 1845 n.9.

In short, neither this Circuit's nor the Commission's case law provide any support for Brooke Glen's claim that the Secretary may address the undisputedly recognized hazard of workplace violence only through the promulgation and enforcement of a specific standard.

CONCLUSION

For the foregoing reasons, the Court should deny Brooke Glen's petition for review.

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CERTIFICATE OF COMPLIANCE WITH
FED. R. APP. P. 32(a)(7)(B)

This brief complies with the type-volume limitation of FED.R.APP.P. 32(a)(7)(B) because it contains 10,450 words, excluding the parts of the brief exempted by material referenced in FED.R.APP.P. 32(f).

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Dated: November 4, 2019

CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2019, a copy of this brief was filed electronically via the Court's CM/ECF Electronic Filing System. All registered counsel will be served via operation of the Court's CM/ECF Electronic Filing System.

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