

No. 17-0737

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

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

Respondent.

BRIEF FOR THE SECRETARY OF LABOR

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May 4, 2020

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ISSUES FOR REVIEW

1. Whether the Secretary established one or more feasible methods of abating the hazard of patient-on-staff workplace violence at Pembroke Hospital, where the evidence shows that providing panic alarms to employees, providing enough music players to calm patients, and placing sufficient staff members on each shift to respond appropriately to medical orders and agitated patients are feasible and would reduce the hazard to Pembroke employees.
2. Whether UHS-Pembroke and UHS-DE should be deemed a “single employer” for purposes of OSH Act liability, where extensive evidence shows that the two entities worked hand-in-hand to address safety matters at Pembroke Hospital.
3. Whether the violation in this case is properly characterized as a repeat violation, where UHS-Pembroke previously violated the general duty clause for exposing employees at a different psychiatric hospital to the hazard of patient-on-staff assaults.

PROCEEDINGS BELOW

This case arose from an inspection by the Occupational Safety and Health Administration (OSHA) of the Pembroke Hospital worksite in Pembroke, Massachusetts. Decision and Order, Feb. 19, 2020 (Dec.), at 1. After the inspection, OSHA issued Respondents UHS of Westwood Pembroke, Inc. (UHS-

Pembroke) and UHS of Delaware, Inc. (UHS-DE) a citation alleging one repeat violation of the general duty clause of the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. § 654(a)(1). *Id.* at 1-2.

Respondents timely contested the citation and a hearing was held before administrative law judge (ALJ) Keith E. Bell on six days in July 2018. Dec. 2. On February 19, 2020, the ALJ issued a decision and order affirming the citation against UHS-Pembroke but dismissing it against UHS-DE. *Id.* at 75. The ALJ also reclassified the violation from repeat to serious. *Id.* Both UHS-Pembroke and the Secretary filed petitions for discretionary review. On March 19, 2020, the Commission directed review of the ALJ’s decision, and by notice dated March 25, 2020, the Commission requested that the parties brief three issues: (1) whether the ALJ erred in finding that Respondents were not a “single entity”; (2) whether the ALJ erred in finding that the Secretary established a feasible and effective means of abatement; and (3) whether the ALJ erred in reclassifying the violation from “repeat” to “serious.”

STATEMENT OF FACTS

A. Pembroke Hospital’s Operations

Background. Pembroke Hospital is a 120-bed, locked inpatient psychiatric hospital in Pembroke, Massachusetts. Dec. 5. Four patient care units focus on adults, one is for adolescents, and a sixth is for older adults. Tr. 373,

1397-98. Nurses and Mental Health Associates (“MHAs”) work directly with patients in the units. Tr. 669, 821-824.

The parties stipulated that employees at Pembroke Hospital were exposed to the hazard of workplace violence, specifically violence and/or assault by patients against staff. Ex. J-1. The types of violence to which nurses and MHAs were subjected include being punched, kicked, and bitten. Exs. C-3; C-68; C-69.

Patient De-Escalation Plans and Music. A “de-escalation plan,” also known as an “individual crisis plan” or “crisis intervention plan,” is created upon a patient’s admission to Pembroke Hospital to document triggers that generally stress the patient as well as measures that generally calm the patient. Tr. 512-13; 962; 1063-64; 1136; 1254-55; 1398; Tr. 1423; 1439; Ex. R-18.

Music had a soothing and calming effect on many aggressive patients at Pembroke Hospital, and was identified as a calming measure in most patients’ de-escalation plans. Tr. 73-74; 666-67; 830-31. Often, after listening to music, an aggressive patient would start to calm down and then manage a conversation with staff about the situation. Tr. 831. However, music was not consistently available to patients who requested it. Tr. 74; 667. On a unit with sixteen patients, it was common to have no more than three music-playing devices available. Tr. 74. Many conflicts occurred involving access to music. Tr. 74-75. One employee was injured while intervening in an altercation between two patients involving access to a single music player. Tr. 809-10.

Employees' Unreliable Methods for Summoning Assistance. Pembroke Hospital did not provide panic buttons for staff to use to summon assistance during an emergency. Tr. 231. In the event of a crisis involving violence or potential violence, staff could announce a "Code Green" calling for assistance from available staff throughout the hospital. Tr. 57. Code Greens could be called over two-way radios, also known as "walkie-talkies," or over a staff phone that connected to an overhead public address system. But there were just one to two staff phones with this capability on each unit. Tr. 59-60.

Regardless of the number of staff working in a given unit, at the time of the inspection, no more than four walkie-talkies were available on each unit. Tr. 60-61; 456-57. Not every staff member could have a radio to carry. Tr. 60-61. The two-way radios "weren't the most reliable." Tr. 60. Problems with the radios included static, faulty batteries, and radio airwaves shared with maintenance workers. *Id.*

Staffing Issues. Low staffing levels at Pembroke Hospital interfered with employees' ability to perform many of their job functions safely. For example, understaffing prevented Pembroke Hospital employees from properly fulfilling 1:1 staffing orders. Tr. 233. In a "1:1," one staff member is assigned to stay with a single patient, pursuant to a medical order, often as a result of violent or self-injurious behavior. Tr. 77-78. Maintaining adequate staffing to fulfill 1:1 orders helps ensure employee safety because the assigned staff member can help keep an

agitated patient engaged, prevent rumination and frustration, and reduce aggression. Tr. 1125. When a patient becomes violent while under 1:1 observation, the observer is able to respond early and alert other additional staff of the need to intervene. Tr. 1125.

Other areas of the hospital become understaffed when an employee is pulled for a 1:1 unless additional staff are provided to compensate. When a 1:1 staffing assignment was initiated mid-shift at Pembroke Hospital, an additional staff member was not always available, so existing staff on the unit would absorb the added responsibility of the 1:1 assignment. Tr. 382-83. After an investigation, the Massachusetts Department of Mental Health (DMH) informed Pembroke that this approach was inadequate.¹ Ex. R-13. Pembroke submitted a plan of correction calling for specially designated staff to handle 1:1s, but failed to adhere to the plan. Tr. 332, 396, 703-04, 736; Exs. C-26, C-38, C-47.

An example of Pembroke Hospital's inadequate approach to staffing 1:1s occurred on November 12, 2016, when an MHA ("KS") was injured by an assaultive patient ("Patient A") in the adolescent unit. Ex. C-3; Tr. 794, 803, 857.

¹ DMH inspected Pembroke Hospital on March 27-28, April 7, and April 11, 2016, and described its findings in a subsequent report, including:

- While there were RNs on each unit, the staffing did not allow for emergency coverage among the units.
- While there was a float staff available to all the units, this was not sufficient (i.e., one unit had 22 patients with 1 RN and 1 MHW as the float was moved to another unit). Ex. C-47.

There were three staff members and fourteen or fifteen patients on the unit that day. Tr. 794, 797, 1270. Another patient had already been placed on a 1:1, occupying one staff member; the second staff member was performing observation checks on patients, leaving KS as the only available staff member. Tr. 799-801. Patient A became agitated, began throwing objects, and attacked KS, pulling chunks of hair from KS's scalp while KS tried to restrain her. Tr. 796, 1266. Following this assault, Patient A was placed on a 1:1 assignment, but the 1:1 was discontinued because Patient A was upset about having a male staff member covering the 1:1. Tr. 801. A supervisor told KS there were not enough staff to cover a second 1:1 assignment in the middle of the shift. Tr. 814-15.

Staffing records demonstrate that on several days during the OSHA inspection period, Pembroke Hospital was understaffed in relation to its own staffing "grid."² Tr. 942. The record refers to these type of staffing issues as "acuity" staffing issues.³ Employee injuries from workplace violence were documented on each of those dates and shifts on which understaffing occurred. Tr. 942; Ex. C-5.

² The "grid" is a document setting default staffing levels for nurses and MHAs at Pembroke Hospital on each unit at varying levels of the patient census. Tr. 371-72; 1316-17; Ex. C-20.

³ In the context of a behavioral health hospital, the "acuity" of a unit refers to the level of activity and risk. Tr. 1001-02. Factors influencing the level of acuity include how many patients, staff, and visitors are present on a unit, and the condition of the patients on the unit. Tr. 1002-03.

Newly admitted patients can be the least stable patients on the unit. Tr. 1056-57. New patient admissions arriving mid-shift were often unanticipated at the start of the shift, and no staffing buffer was consistently provided to cover such contingencies. Tr. 242-43; 381-82. More often than not, staffing at the start of the shift did not take into account even anticipated admissions. Tr. 878-79. As many as seven admissions could arrive on a unit during a single shift. Tr. 862-63. At times, staffing would be reduced mid-shift following discharge of several patients even when the same number of new admissions were pending for arrival during the same shift, leading to lack of compliance with the grid upon arrival of the new patients. Tr. 107-08, 838-39.

Pembroke Hospital scheduled various activity groups for patients, run by MHAs, nurses, or therapists. Tr. 819-20. Groups led by staff are important for patients therapeutically and also as engagement in distraction activity. Tr. 968-70. Groups were regularly canceled because there were not enough staff to lead them; this was the case, for example, when staff were busy with a new admission or had to respond to a Code Green. Tr. 137, 221, 677-78, 818-20.

B. The OSHA Inspection and Citation

OSHA received a complaint in October 2016 about worker safety at Pembroke Hospital following a severe employee injury resulting from patient aggression. Dec. 7; Ex. C-8. OSHA opened an investigation, reviewed employee injury and illness records, interviewed employees, and ultimately issued a citation

to UHS-Pembroke for failing to adequately protect employees from patient-on-staff workplace violence at Pembroke Hospital. The Secretary subsequently amended the complaint to include UHS-DE as a respondent and to change the classification of the citation from serious to repeated.

As feasible means of abating the cited hazard of patient-on-staff workplace violence, OSHA identified, among other things:

- Provide personal panic alarms for all employees who may work in close proximity to patients
- Ensure that staffing is sufficient to allow the issuance and implementation of medical orders that specify staffing arrangements
- Maintain staffing that is adequate to safely address changes in patient acuity and new patient admissions
- Maintain adequate staffing to support therapeutic activity groups and recreation periods
- Maintain equipment that is sufficient for the implementation of each patient's individual crisis prevention plan

Secretary's Unopposed Motion to mend Abatement (Dec. 8, 2017) at 2-3
(*granted*, Dec. 13, 2017).⁴

⁴ The Secretary also identified additional methods of abatement related to the patient admissions process; the ALJ found that these methods would not materially reduce the hazard, and they are not at issue before the Commission. Dec. 66, 68.

C. Relationship Among UHS-DE, UHS-Pembroke, and Pembroke Hospital.

UHS-Pembroke owns and operates Pembroke Hospital. Dec. 3. At the time of the inspection, Pembroke Hospital was one of three facilities, also including Lowell Treatment Center, owned by UHS-Pembroke. *Id.* UHS-Pembroke is a wholly-owned subsidiary of an entity called UHSD, which is a wholly-owned subsidiary of Universal Health Services, Inc. (UHS). *Id.*; Ex. J-1, stip. 13. UHS-DE is also a wholly-owned subsidiary of UHS. Ex. J-1, stip. 12. In other words, UHS owns UHS-DE and owns UHS-Pembroke, which operates Pembroke Hospital. Dec. 3.

A management agreement between UHS-DE and Pembroke Hospital outlines the parties' responsibilities and the services each will provide at Pembroke Hospital. Ex. C-27. Among other things, it provides that UHS-DE will develop a number of systems and procedures for Pembroke Hospital, provide human resources management, and provide "key personnel" – including the CEO and the Chief Financial Officer (CFO). Ex. C-27 at 3-4.

Pembroke Hospital's CEOs during OSHA's inspection were UHS-DE employees Thomas Hickey and Raymond Robinson, who worked full-time onsite at Pembroke Hospital. Dec. 3, 74; Tr. 370, 693, 764, 1343. The CEOs were responsible for hiring, firing, and disciplining staff; maintaining the budget; reviewing program quality; and ensuring the hospital met health standards. Tr.

695, 741-42, 764-67, 771-72, 779-81. They were also responsible for all of the clinical and operational aspects of running the hospital. Tr. 695.

UHS-DE developed and provided Pembroke Hospital with the vast majority of the hospital's policies. Tr. 535-36. The policies provided by UHS-DE included the hospital's workplace violence policy, its risk management training program, its code of conduct, and its code of ethics. Tr. 504, 519-20, 558-560; Ex. C-30.

UHS-DE also tracked and actively intervened to address patient-on-staff workplace violence matters at Pembroke Hospital. UHS-DE Loss Control Manager Gina Gilmore visited the hospital monthly, attended its Aggression Reduction Team meetings, and trained its leadership on managing patient aggression. Tr. 549-52, 559-560. She tracked Pembroke Hospital's monthly number of staff injuries and set goals for annual injuries. *See, e.g.*, Exs. C-55, C-57, C-58, C-59. UHS-DE employees Mr. Hickey and Mr. Robinson participated in committees and meetings relating to patient aggression and workplace violence and reviewed all patient aggression incidents. Tr. 693-94, 714, 727, 743. Additionally, Pembroke Hospital was required to report incidents of patient aggression resulting in staff injury to UHS-DE. Tr. 508, 514. UHS-DE provided Pembroke Hospital with analyses of patient aggression and related injuries, as well as comparisons of Pembroke Hospital's rates and various UHS-DE-identified benchmarks. Tr. 514-15, 553-554, 558-59; Exs. C-60, C-61.

UHS-DE was also involved in Pembroke Hospital's finances. Mr. Hickey and Mr. Robinson developed Pembroke Hospital's budget with UHS-DE employee and Pembroke Hospital CFO Diane Airosus. Dec. 3, 74; Tr. 695, 766-67, 1345-46; Ex. J-1, stip. 10. Pembroke Hospital's budgets and strategic plans were approved by UHS-DE management. Tr. 626-27, 1345-46. UHS-DE handled other financial matters for Pembroke Hospital as well, including its workers' compensation budget and claims. Dec. 3.

D. UHS-Pembroke's Prior Patient-on-Staff Workplace Violence Citation

OSHA cited UHS-Pembroke in 2015 for a violation of the general duty clause for employee exposure to workplace violence at Lowell Treatment Center. Ex. C-14. The citation alleged that employees were exposed to acts of violence from patients, including verbal threats of assault, physical assaults, choking, punches, kicks, bites, scratches, and hair pulling. Ex. C-14, p. 6. OSHA identified numerous feasible means of abatement, including creating a comprehensive written workplace violence program, providing employees with panic buttons, and providing security to respond to aggressive behavior. *Id.*

The parties settled the case, and UHS-Pembroke agreed to take a number of steps to "protect[] all of its staff from the hazard of workplace violence including but not limited to physical/verbal assaults by patients." Ex. C-15, p.3. UHS-Pembroke agreed to implement a workplace violence prevention program, implement an admissions process that included review of patients' history of

violence, provide training, provide staff with reliable communication devices to rapidly summon assistance, and ensure sufficient properly trained staff to respond immediately to workplace violence incidents. Ex. C-15. The workplace violence citation became a final order of the Commission on May 27, 2016. Ex. C-17.

E. The ALJ's Decision

Feasible Abatement. The ALJ affirmed OSHA's citation against UHS-Pembroke, finding that UHS-Pembroke violated the general duty clause by exposing employees to the hazard of workplace violence in the form of patient-on-staff aggression. Dec. 1-2. On the issue of feasible abatement, the ALJ applied the three-part test described in the Commission's recent decision in *Integra Health Mgmt., Inc.*, 27 BNA OSHC 1838 (No. 13-1124, 2019):

[T]he threshold question is whether the abatement actions the employer took are inadequate. If the Secretary shows that the employer's abatement is inadequate, then he must propose abatement measures which can be put into effect, i.e., show that the measures are "feasible." If the measures are feasible, then the Secretary must show the measures will materially reduce the incidence of the hazard, i.e., the Secretary must show the identified measures will be effective.

Dec. 21-22 (citing *Integra*, 27 BNA OSHC at 1849-50 & n.14).

Applying this test, the ALJ first found that Pembroke's existing workplace violence prevention program was inadequate. Dec. 22-23, 44. He noted that in many instances, Pembroke was not even following its own guidelines for staffing arrangements, compliance with patient de-escalation plans, and compliance with

medical orders such as those ordering 1:1 staffing with agitated patients. Dec. 22-24. The ALJ also found that Pembroke employees lacked reliable means to summon assistance when dealing with aggressive patients. Dec. 42.

Next, the ALJ noted that Pembroke did not allege any of the Secretary's proposed abatement methods were technologically or economically infeasible. Dec. 47. He nonetheless found that the proposed staffing increases were feasible because other comparable psychiatric hospitals maintained higher staff-to-patient ratios than Pembroke and because in several instances Pembroke's own internal policies called for higher staffing ratios.⁵ Dec. 54. He also found that provision of panic alarms to employees is feasible because other similar facilities provide personal panic alarms and studies show that they have been successfully used in healthcare settings. Dec. 69-70.

Turning to the efficacy of the proposed abatement measures, the ALJ found a link between adequate staffing and reductions in patient-on-staff violence. Dec. 53, 57, 58, 63, 64. He also found that panic alarms have been shown to reduce workplace violence in healthcare settings and that Pembroke's own patient

⁵ In making this and other findings, the ALJ credited the testimony of the Secretary's expert, Dr. Robert Welch. Dec. 51-53. Dr. Welch, a board-certified psychiatrist and neurologist who has served as chief of psychiatry at a number of hospitals, conducted an extensive review of Pembroke documents and relevant peer reviewed literature. He also surveyed how other similar facilities abated the hazard. *Id.* at 52. The ALJ found that Dr. Welch's opinions addressed the contentions at hand and were backed by specifically identified peer reviewed literature. *Id.* at 53.

de-escalation plans indicate that enabling agitated patients to listen to music is an important method for avoiding aggression and violence. Dec. 69, 72. He therefore concluded that the Secretary had proven feasible and effective means of abating the hazard of patient-on-staff workplace violence at Pembroke Hospital.

Single Employer. The ALJ dismissed the Secretary's citation as against UHS-DE, finding that UHS-DE and UHS-Pembroke did not operate as a single entity. Dec. 74. The ALJ found that UHS-DE and UHS-Pembroke did not share a "common worksite" because UHS-DE and Pembroke Hospital had different business addresses and there was no evidence of workplace violence anywhere other than Pembroke Hospital. Dec. 73. He also found that UHS-DE and UHS-Pembroke did not have sufficiently interrelated and integrated operations because (1) UHS-DE is a management and consulting business, while UHS-Pembroke provides direct patient care; and (2) there was no evidence that UHS-Pembroke lacked the resources to address workplace safety issues. Dec. 73. And, while acknowledging that UHS-DE employees worked at Pembroke Hospital and that Pembroke Hospital's CEO was a UHS-DE employee, the ALJ found that UHS-Pembroke and UHS-DE did not share common management because UHS-DE had its own management structure including a separate CEO. Dec. 74.

Repeat Classification. The ALJ reclassified the violation from "repeat" to "serious," finding that the Secretary did not provide sufficient information about the circumstances surrounding the prior citation to show that UHS-Pembroke's

two general duty clause violations were substantially similar. Dec. 74-75.

Because some of the abatement measures proposed in the two cases were “notably different,” the ALJ found the record showed “significant differences related to the hazard.” Dec. 75.

SUMMARY OF THE ARGUMENT

The Secretary established feasible methods of abating the hazard of patient-on-staff workplace violence at Pembroke Hospital. Pembroke’s existing workplace violence prevention plan was inadequate to abate the hazard because Pembroke did not follow its own guidelines for staffing arrangements, compliance with patient de-escalation plans, and compliance with medical orders such as those ordering 1:1 staffing with agitated patients, resulting in continuing employee injuries. Pembroke employees also lacked reliable means to summon assistance when dealing with aggressive patients. The abatement methods proposed by the Secretary, which consist of increasing staffing to levels adequate to achieve stated treatment goals and providing panic alarms and music-playing equipment, are feasible because other similarly situated psychiatric hospitals successfully maintain higher staff-to-patient ratios and use such equipment. And the abatement methods would materially reduce the hazard at Pembroke Hospital by reducing opportunities for patient aggression and increasing employees’ ability to respond appropriately when patient aggression does occur.

The ALJ erred in dismissing UHS-DE from the citation because UHS-DE and UHS-Pembroke should be deemed a single entity under the Commission's single-employer test. Among other key facts discussed below, UHS-DE employees served as onsite CEOs at Pembroke Hospital and directed many important decisions affecting the hospital – from safety and health policies and practices, to staffing, to the hospital's budget, and even patient care and admissions. Tr. 626-27, 693-95, 714, 727, 1345-46.

Finally, the ALJ erred in reclassifying the affirmed violation from repeated to serious where UHS-Pembroke previously violated the general duty clause by failing to protect employees at a behavioral health hospital from patient-on-staff assaults.

ARGUMENT

I. The Secretary Established Feasible Means of Abating the Hazard of Patient-on-Staff Workplace Violence at Pembroke Hospital.

To prove a violation of the general duty clause, the Secretary must establish that: (1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was causing or likely to cause death or serious physical harm; and (4) a feasible and effective means existed to materially reduce the hazard. *Arcadian Corp.*, 20 BNA OSHC 2001, 2007 (No. 93-0628, 2004). Only the fourth element is at issue in this case.

To establish the feasibility and efficacy of a proposed abatement measure, the Secretary must “demonstrate both that the measure[] [is] capable of being put into effect and that [it] would be effective in materially reducing the incidence of the hazard.” *Science Applications Int’l Corp.* (No. 14-1668, Apr. 16, 2020) (“*SAIC*”), slip op. at 10 (citing *Arcadian Corp.*, 20 BNA OSHC at 2011). The Secretary need only show that the abatement method would materially reduce the hazard, not that it would eliminate the hazard. *Id.* at 11; *see also Carlyle Compressor Co. v. OSHRC*, 683 F.2d 673, 677 (2d Cir. 1982) (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. *SAIC* at 11 (citing *U.S. Postal Serv.*, 21 BNA OSHC 1767, 1773-74 (No. 04-0316, 2006)).

Here, the ALJ correctly found that Pembroke Hospital’s existing workplace violence prevention program was inadequate to abate the hazard of patient-on-staff violence. He also correctly found that multiple different methods of abatement proposed by the Secretary were capable of being put into effect and would materially reduce the hazard.

A. Pembroke Hospital’s Existing Workplace Violence Prevention Program was Inadequate to Abate the Hazard of Patient-on-Staff Violence.

The ALJ correctly found that Pembroke’s existing workplace violence prevention program was inadequate. Dec. 44. He noted that in many instances,

Pembroke was not even following its own guidelines for staffing arrangements, compliance with patient de-escalation plans including conducting group activities and providing music to patients, and compliance with medical orders such as those ordering 1:1 staffing with agitated patients. Dec. 22-24. The ALJ also found that Pembroke employees lacked sufficient means to summon assistance when dealing with aggressive patients, such as panic buttons or reliable walkie-talkies. Dec. 42.

The 1:1 staffing assignments are an illustrative example of Pembroke's inadequate approach. Pembroke did not have enough staff to fulfill the 1:1 assignments while also maintaining the appropriate minimum staff-to-patient ratio for the remaining patients on the unit. Dec. 58; *see supra* pp. 4-6. This approach increased the likelihood of patient-on-staff violence because each remaining employee was responsible for more patients, making de-escalation more difficult, as in the example of Patient A's assault on KS. Dec. 58; *see supra* p. 6.

B. The Proposed Staffing Increases are Economically Feasible Because Other, Similarly Situated Psychiatric Hospitals Already Maintain Higher Levels of Staff.

Although it did not raise the issue of economic feasibility before the ALJ, Pembroke now argues that the proposed staffing increases are not economically

feasible.⁶ Dec. 47; Resp. PDR 5-6. “[A] precaution does not become infeasible merely because it is expensive. But if adoption of the precaution would clearly threaten the economic viability of the employer, the Secretary should propose the precaution by way of promulgated regulations, subject to advance industry comment. . . .” *Nat’l Realty & Const. Co. v. OSHRC*, 489 F.2d 1257, 1267 n.37 (D.C. Cir. 1973). The Commission has held that economic infeasibility is established if the proposed abatement methods are “so expensive that safety experts would substantially concur in thinking the methods infeasible.” *Integra*, 27 BNA OSHC at 1841 n.3.

The staffing increases proposed in this case are economically feasible because other psychiatric hospitals already maintain those higher levels of staff. Dec. 54, 56. Just as technological feasibility can be shown by the fact that an employer is already implementing the proposed abatement action, *see SeaWorld of Florida, LLC v. Perez*, 748 F.3d 1202, 1215 (D.C. Cir. 2014), so economic feasibility can be shown by the fact that other employers in the industry are implementing the proposed abatement while remaining economically viable entities. Here, as the ALJ found, staff-to-patient ratios were consistently lower at Pembroke Hospital than at other stand-alone psychiatric hospitals. Tr. 1046-47.

⁶ Pembroke does not dispute that all of the proposed abatement measures are technically feasible, nor does it contend that providing panic alarms and music players would be economically infeasible.

Pembroke Hospital operated shifts with 15 to 20 percent fewer nurses than other similar psychiatric facilities in the same state. Dec. 56 n.7; Tr. 1047.

Moreover, Pembroke does not contend that increasing staffing levels to achieve the specific goals identified by the Secretary would threaten its economic viability. See *Nat'l Realty*, 489 F.2d at 1267 n.37. Pembroke did not introduce any information regarding its finances or provide any evidence that it could not afford the proposed abatement measures. Dec. 54 n.70. In addition, Dr. Welch testified that adding staff is an achievable goal; therefore, “safety experts” do not “concur” that doing so would be infeasible. Dec. 59; *Integra*, 27 BNA OSHC at 1841 n.3. Accordingly, the Secretary has established that the abatement measures are economically feasible.

C. The Proposed Abatement Methods Would Materially Reduce the Hazard Posed by Patient-on-Staff Workplace Violence.

Staffing-Related Abatement Methods. The ALJ found that the Secretary’s proposal to increase staffing to levels sufficient to achieve certain workplace tasks would materially reduce the hazard of patient-on-staff violence at Pembroke Hospital. Dec. 53, 57, 58, 63, 64. Pembroke takes issue with this finding, arguing that “having more staff is not going to prevent a psychiatric patient from becoming aggressive” and that the Secretary’s proposed abatement measures are too vague. Resp. PDR 9, 18. These arguments should be rejected.

Pembroke's claim that more staff would not prevent patients from becoming aggressive misses the point. A central purpose of ensuring adequate staff for certain specific functions – such as 1:1 orders – is to ensure that staff are adequately protected when incidents of patient aggression do occur. And contrary to Pembroke's argument, incidents of mental-illness-based violence are foreseeable and even if they cannot be entirely prevented, injuries to staff members can be reduced. *See SeaWorld*, 748 F.3d at 1215. The relevant question is not whether the workplace hazard can be eliminated altogether but whether it can be reduced. *Carlyle Compressor Co.*, 683 F.2d at 677. Also, as the ALJ noted, Pembroke's own expert admitted there are "certainly" ways to reduce patient-on-staff violence. Dec. 45; Tr. 1508.

Second, the Commission should reject Pembroke's argument that the proposed staffing-related abatement measures are too vague because they are not expressed in terms of an exact number of employees Pembroke should hire. Resp. PDR 9. The Secretary did not propose, and the ALJ did not find, that Pembroke should simply "hire more people." Rather, the abatement methods identify specific tasks and functions for which Pembroke had insufficient staff and tie each of those tasks and functions to the hazard faced by employees:

- Pembroke did not have enough staff to fill recommendations for 1:1 staffing when 1:1 is called for. Dec. 29-30. With an aggressive and potentially violent patient, a staff member assigned to a 1:1 can help keep

the patient engaged, prevent rumination and frustration, and reduce aggression. Tr. 1125. When a patient becomes violent while assigned to 1:1 observation, the observer is able to respond early and alert other additional staff of the need to intervene. Tr. 1125.

- Pembroke was understaffed for acuity needs, often failing to abide by their own staffing grid. Dec. 32-33. Employee injuries from workplace violence were documented on each of those dates and shifts on which understaffing occurred. Tr. 942; Ex. C-5.
- Pembroke was understaffed for admissions needs. Dec. 36-37. Staff were diverted from their regular tasks to handle admissions, leaving the regular tasks understaffed. *Id.* Newly admitted patients can be the least stable patients on the unit. Tr. 1056-57.
- Pembroke lacked sufficient staff to implement its own program that called for verbal de-escalation of agitated patients and regular group activities for the patients. Dec. 38-40. “Engaging patients in therapeutic group activities and recreation reduces patient agitation and incidents of workplace violence, making it an effective method to materially reduce the hazard.” Tr. 967-68, Ex. C-101, Dec. 64.

Therefore, each abatement method that involves a staffing increase is tied to a specific function or task that Pembroke employees need to perform. If Pembroke

acquires sufficient staff to accomplish these specific functions and tasks, it will reduce the hazard of patient-on-staff violence.

Equipment Acquisition Abatement Methods. Two of the abatement methods that the ALJ found involve Pembroke Hospital acquiring certain equipment: panic alarms and/or appropriate walkie-talkies for employees to call for help and equipment for playing music as called for by patients' de-escalation plans. Dec. 69, 71-72. The ALJ correctly found that these acquisitions would reduce the hazard. Dec. 69, 72. Studies have found that access to panic alarms correlates with significantly lower rates of assault against staff in a healthcare setting. Tr. 972-74, 995; Exs. C-95, C-96. And Pembroke acknowledges that providing music to agitated patients is a key step in calming them down before violence occurs. Dec. 72. Therefore, acquiring equipment that employees can use to summon help and that patients can use to listen to calming music are feasible means of abating the hazard in this case.

II. UHS-DE and UHS-Pembroke Should be Treated as a Single Entity.

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.*, 23 BNA OSHC 1458, 1463 (No. 09-0958, 2011), *aff'd*, 498 F. App'x 145 (3d Cir. 2012). The "single employer inquiry turns on whether the entities in question 'handled safety matters as one company.'" *Solis v.*

Loretto-Oswego Residential Health Care Facility, 692 F.3d 65, 76 (2d Cir. 2012) (quoting *C.T. Taylor Co.*, 20 BNA OSHC 1083, 1087 (No. 94-3241, 2003)). The three factors are to be considered holistically: the question is “not whether one or another prong has been met, in some legal sense, but rather whether the facts relevant to all three prongs dictate the legal conclusion that the entities operated as a single employer.” *Loretto-Oswego*, 692 F.3d at 77. Extensive evidence in the record shows that UHS-Pembroke and UHS-DE handled policy and other safety matters at Pembroke Hospital as one company and should be treated as a single employer.

A. Pembroke Hospital is a Common Worksite for both UHS-Pembroke and UHS-DE Employees.

Two entities share a common worksite when “employees of both have access to the same hazardous conditions.” *Advance Specialty Co., Inc.*, 3 BNA OSHC 2072, 2076 (No. 2279, 1976). The common worksite element involves looking “to the location at which the employees worked and were exposed to the workplace hazard.” *A.C. Castle Constr. Co. v. Acosta*, 882 F.3d 34, 42 (1st Cir. 2018) (finding a construction contractor and subcontractor shared a common worksite at the home roofing site where the violation occurred). A finding of a common worksite does not require a common business address. *See id.* at 42 (“[T]o rule that [a common business address] is necessary would rewrite the test as stating ‘common business address’ rather than ‘common worksite.’”).

Here, the common worksite was Pembroke Hospital. Both UHS-DE and UHS-Pembroke employees worked at Pembroke Hospital on a daily basis. Tr. 693-94, 740. During the time frame of OSHA’s inspection in 2016, UHS-DE employees Thomas Hickey, Dania O’Connor, and Raymond Robinson were Pembroke Hospital’s CEOs and worked on site at Pembroke Hospital as they handled the hospital’s day-to-day operations. Tr. 370, 693, 740-41, 1343, 1345.

This case is factually distinct from *Loretto-Oswego*, where the Commission found that a nursing home and its corporate parent did not share a common workplace. 23 BNA OSHC 1356, 1361 (Nos. 02-1164 & 02-1174, 2011), *aff’d*, 692 F.3d 65 (2d Cir. 2012). Unlike *Loretto-Oswego*, where the corporate management had “no physical presence” at the worksite, were rarely onsite, and were not involved in the nursing home’s day-to-day operations, 23 BNA OSHC at 1361, UHS-DE employees Mr. Hickey and Mr. Robinson worked exclusively at Pembroke Hospital. Other UHS-DE employees were regularly at Pembroke Hospital as well, such as UHS-DE’s Loss Control Manager, Gina Gilmore. Tr. 549-51, 554. Therefore, UHS-DE and UHS-Pembroke shared the common worksite of Pembroke Hospital.⁷

⁷ The Commission has held that mutual access to hazardous conditions is not a necessary precondition to a finding of a common worksite, and that the common worksite factor may be established based on the sharing of office space alone, regardless of whether the space presents mutual hazards. *See, e.g., Vergona Crane Co., Inc.*, 15 BNA OSHC 1782, 1783 (No. 88-1745, 1992) (common worksite where two companies operated out of the same office); *see also A.C.*

B. UHS-DE and UHS-Pembroke Have Interrelated and Integrated Operations.

The second factor is whether the two entities “are interrelated and integrated with respect to operations and safety and health matters.” *Southern Scrap Materials Co., Inc.*, 23 BNA OSHC 1596, 1627 (No. 94-3393, 2011); *see also Loretto-Oswego*, 692 F.3d at 76 (it may be appropriate to consider whether there is “centralized control of employee *safety*” in assessing the integration of operations between two entities) (emphasis in original). In answering this question, the Commission has considered the extent to which a management company could and did influence and control its affiliate company. *See id.*

The evidence shows that UHS-DE and UHS-Pembroke addressed employee safety and health at Pembroke Hospital together. Not only did UHS-DE exert considerable control and influence over employee health and safety policies and practices at Pembroke Hospital, UHS-DE was heavily involved in UHS-Pembroke’s budget, finances, and day-to-day operations, such as administration of the hospital and patient care.

Castle, 882 F.3d at 42 (“A.C. Castle points to no precedent holding that workers from each entity must be at the site at the time the violation occurred, or directly exposed to the risk.”). Accordingly, Pembroke Hospital is properly considered a common worksite even if the UHS-DE employees working there were not directly exposed to the workplace violence hazard.

1. *UHS-DE's control and influence of safety and health at Pembroke Hospital.*

Employee safety and health matters were highly integrated between UHS-DE and UHS-Pembroke. UHS-DE provided Pembroke Hospital with numerous policies related to safety and health, which is strong evidence that the entities handled safety matters as a single entity. *See Loretto-Oswego*, 692 F.3d at 77 (“[I]t is no small detail that, prior to the OSHA inspection in question, [the parent company] hired a corporate safety officer and had begun work on a corporate safety policy applicable to its affiliates.”). UHS-DE provided Pembroke Hospital’s workplace violence policy and risk management training program, which was used to train new employees. Tr. 519-20, 558-60; Ex. C-30.

UHS-DE directed safety and health matters through its onsite CEOs. Unlike the nursing home in *Loretto-Oswego*, which maintained its own safety committee comprising only its employees, 23 BNA OSHC at 1360, UHS-DE employees participated in Pembroke Hospital’s committees and meetings relating to patient aggression and workplace violence. Tr. 693-94, 714, 727, 743. Pembroke Hospital was required to report incidents of patient aggression resulting in staff injury directly to UHS-DE. Tr. 508, 514. In turn, UHS-DE provided detailed comparisons between a UHS-DE-identified benchmark and Pembroke Hospital’s rates of restraints, aggression, injury, staff hours spent on one-on-one patient assignments, and a number of other metrics. Tr. 514-515. UHS-DE also

provided analyses of patient aggression and related injuries and performed analyses to identify the areas and times of the day where most patient aggression occurred at Pembroke Hospital. Tr. 553-54, 558-59; Exs. C-55 at 2, C-60, C-61.

UHS-DE intervened directly in safety matters at Pembroke Hospital. *See C.T. Taylor Co.*, 20 BNA OSHC at 1087 (finding integrated operations where steel erection contractor directly intervened by inquiring about the use of a safety line for subcontractor's employees and requiring its installation). UHS-DE Loss Control Manager Gina Gilmore played a key role in addressing employee safety and health issues at Pembroke Hospitals. Ex. C-55, p. 1. She visited the hospital monthly, attended its Aggression Reduction Team meetings, and trained its leadership on managing patient aggression. Tr. 549-52, 559-560. She tracked Pembroke Hospital's monthly number of staff injuries and set goals for annual injuries. *See, e.g.*, Exs. C-55, C-57, C-58, C-59. UHS-DE even provided incentives if Pembroke Hospital could meet these goals. Ex. C-57, p. 1.

Ms. Gilmore's monthly visits identified numerous employee safety issues. She advised Pembroke Hospital on concerns such as employees not knowing how to defend themselves if attacked and whether Pembroke Hospital was regularly providing therapeutic groups that could reduce patient aggression. Dec. 39 n.55, 40, n.57; Tr. 549; Exs. C-55, C-57, C-59. She also was involved in trying to fix specific causes of patient aggression. For example, in identifying 12-1 p.m. as when the most aggression occurred in a particular area, Ms. Gilmore wrote that

she planned to “drill down to ascertain aggression [levels] around ‘meal time’ or travel back/forth.” Ex. C-58, p. 2. This degree of involvement is in stark contrast to that of the parent company in *Loretto-Oswego*, where “there was little evidence that [the parent company’s] personnel addressed employee safety matters in their interactions with [the nursing home].” *Loretto-Oswego*, 692 F.3d at 73.

2. *UHS-DE’s control and influence of Pembroke Hospital’s budget and finances.*

In determining the integration of two entities, the Commission considers their financial relationship. *See C.T. Taylor*, 20 BNA OSHC at 1085 (single entity where steel erector performed the financial, payroll, and workers’ compensation recordkeeping for subcontractor); *see also Loretto-Oswego*, 692 F.3d at 77-78 (finding it “significant” that the parent company, among other things, authorized the affiliate’s budgets). The evidence shows that UHS-DE had authority over nearly all aspects of Pembroke Hospital’s budget and finances.

Pembroke’s CEO and CFO – who were UHS-DE employees – developed the budget for Pembroke Hospital. Tr. 695, 766-67, 1345; Ex. C-27. Higher-level UHS-DE executives approved Pembroke Hospital’s annual budget and reviewed the Hospital’s compliance with budget projections, particularly in relation to staffing costs. Tr. 605, 613, 622, 626-27, 705-706, 1345-46.

The agreement between UHS-DE and Pembroke describes extensive UHS-DE involvement in Pembroke Hospital’s finances. Tr. 708; Ex. C-27.

Under the agreement, UHS-DE developed and implemented “all systems and procedures required for the efficient operation” of Pembroke Hospital, including its billing system, collection system, payroll system, insurance claim system, and patient safety improvement system. Ex. C-27.

3. *UHS-DE’s involvement in supervising staff and providing patient care at Pembroke Hospital.*

The Commission has considered an entity’s overall involvement in another’s administrative matters in evaluating integration of operations. *See Loretto-Oswego*, 23 BNA OSHC at 1359 (finding that on a day-to-day basis, administrative personnel at the nursing home operated independently of the parent company), *aff’d* 692 F.3d at 77 (day-to-day control is part of larger inquiry of whether entities handled safety as one company). In addition to safety and finances, UHS-DE exercised control over several other aspects of the hospital.

UHS-DE was heavily involved in Pembroke Hospital’s personnel matters through both its onsite CEOs and higher-level UHS-DE management. UHS-DE’s onsite CEOs were responsible for hiring, disciplining, and firing staff. Tr. 695, 741-42. Further, a number of Pembroke Hospital employees, including the Director of Nursing and the Risk Manager, reported to UHS-DE management. Dec. 3; Tr. 369-70, 457, 497-98, 502. That UHS-DE directly supervised Pembroke Hospital employees is additional evidence of the interrelated and integrated nature of the operations. *See Fabi Const. Co., Inc. v. Sec’y of Labor*,

508 F.3d 1077, 1090 (D.C. Cir. 2007) (interrelated operations where management company's employees supervised contractor's employees at the worksite); *C.T. Taylor Co.*, 20 BNA OSHC at 1087 (companies were a single entity where contractor's general manager "controlled and directed" the work of subcontractor's employees on the cited worksite).

UHS-DE was involved in numerous decisions related to patient care. UHS-DE's onsite CEOs controlled all clinical and operational aspects of running the hospital, including regulatory compliance, licensing, quality of clinical care, and clinical programming. Tr. 695, 741-42. UHS-DE was responsible for the Strategic Plan submitted to the Massachusetts Department of Mental Health outlining improvements that would be taken at Pembroke Hospital on several matters directly related to patient care, such as reducing patient seclusions and restraints, promoting "person-centered treatment," and ensuring a "respectful, safe, clean and therapeutic environment for patients." Ex. C-26, p. 2.

C. UHS-DE and UHS-Pembroke Shared Common Owners and Pembroke Hospital Employees.

UHS-Pembroke is a wholly-owned subsidiary of UHSD, which is a wholly-owned subsidiary of UHS. Ex. J-1 stip. 13. UHS-DE is also a wholly-owned subsidiary of UHS. Ex. J-1, stip. 12. Despite distinctions between the corporate structures of the two entities, UHS owned both UHS-DE and UHS-Pembroke. *Id.* This fact alone establishes common ownership of the two entities.

See Penntech Papers, Inc. v. NLRB, 706 F.2d 18, 26 (1st Cir. 1983) (finding common ownership between parent company and two subsidiaries where parent company owned 100% of the stock in a subsidiary, which in turn held 100% of the stock of a second subsidiary).

Moreover, common management or supervision exists here because there is a “single line of management” running from each entity. *A.C. Castle Constr.*, 882 F.3d at 43 (finding common management or supervision where subcontractor was in effect the general contractor’s supervisory employee). Here, there was a direct line of management and supervision between UHS-Pembroke employees at Pembroke Hospital and UHS-DE. Employees at Pembroke Hospital were supervised by UHS-DE’s onsite CEOs, who in turn were supervised by senior UHS-DE employees. Tr. 695-96, 741-42, 1343.

In sum, there is extensive evidence that UHS-DE and UHS-Pembroke worked hand-in-hand to address safety matters at Pembroke Hospital. UHS-DE provided UHS-Pembroke with Pembroke Hospital’s safety and health policies; participated in its safety committees; reviewed, tracked, and analyzed its employee injury data; developed plans and strategies to reduce employee injuries; handled its workers’ compensation; and directly controlled day-to-day safety and health matters like staffing through its onsite CEOs. The degree of UHS-DE’s influence and control over safety and health at Pembroke Hospital indicates that the two entities should be considered a single employer.

III. The ALJ Erred in Reclassifying the Violation from Repeated to Serious.

A violation is properly classified as repeated if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for “a substantially similar violation.” *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979). A “principal factor” in assessing repeat liability “is whether the two violations resulted in substantially similar hazards.” *Lake Erie Constr. Co.*, 21 BNA OSHC 1285, 1289 (No. 02-0520, 2005). The circumstances surrounding the violation are also relevant to the analysis. *See, e.g., Active Oil Serv., Inc.*, 21 BNA OSHC 1184, 1189 (No. 00-0553, 2005) (general duty clause violations substantially similar because both involved employees entering a fuel tank to clean it, which exposed them to similar asphyxiation hazards); *Stone Container Corp.*, 14 BNA OSHC 1757, 1762 (No. 88-310, 1990) (violations substantially similar because they both involved employees’ use of the same type of cranes and resulted in similar fall hazards).

OSHA classified the citation in this case as repeated based on UHS-Pembroke’s prior general duty clause violation for exposing employees at Lowell Treatment Center to patient-on-staff assaults, including punches, kicks, bites, scratches, and hair pulls. Dec. 3, 7; Exs. C-14, C-15. The prior citation noted that assaults resulted in injuries such as concussion, sprains, strains, and contusions. Ex. C-14. The citation in this case involved patient-on-staff assaults resulting in

injuries such as concussion, fracture, strains, contusions, and burns. Nonetheless, the ALJ found that UHS-Pembroke's two citations involved "significant differences related to the hazard" and reclassified the violation as serious. Dec. 75. The only basis for the ALJ's finding was that some of the Secretary's proposed abatement measures were "notably different." Dec. 75. This was error.

The Commission has consistently held that abatement methods need not be similar for the violation to be substantially similar. See *Active Oil Serv., Inc.*, 21 BNA OSHC at 1189 ("the similarity of abatement is not the criterion ... the test is whether the two violations resulted in substantially similar hazards."); *Lake Erie Constr. Co.*, 21 BNA OSHC at 1289 (rejecting argument that violation was not substantially similar because prior citation required use of a scissor lift rather than personal fall protection and finding substantially similar violation because both citations involved the same fall hazard).

The ALJ's decision to reclassify the violation as serious due to different abatement measures is particularly inappropriate given that abatement measures identified in a general duty clause citation are simply recommended – but not required – ways for an employer to abate the hazard. Because an employer does not violate the general duty clause by failing to implement OSHA's identified feasible means of abatement, OSHA's recommended abatement measures do not directly shed light on whether the violations themselves are "substantially similar." See *Potlatch*, 7 BNA OSHC at 1063.

Ample evidence in the record shows that UHS-Pembroke's two violations were substantially similar. Most importantly, the hazard – patient-on-staff workplace violence – was exactly the same. *See Lake Erie Constr.*, 21 BNA OSHC at 1289 (principal factor in determining repeat liability is the similarity of the hazard). Moreover, the conditions and circumstances surrounding the violence were substantially similar. Both violations involve healthcare workers in a psychiatric hospital being assaulted by patients. The specific types of assaults were the same: in both cases, employees were kicked, punched, bitten, and had their hair pulled. Dec. 7, 19-20. And in both cases these assaults resulted in injuries like concussions, strains, and contusions. Ex. C-14; Dec. 20-21.

Further, while the abatement need not be similar, *see Active Oil Serv., Inc.*, 21 BNA OSHC at 1189, a number of OSHA's recommended abatement methods in both cases were similar. For example, in both cases, OSHA identified panic buttons and security staff as feasible means to materially reduce the hazard. *See* Ex. C-14. To the extent that the similarity of the abatement can show the similarity of the circumstances surrounding the violation, these abatement methods reveal that additional emergency assistance and notification systems were needed to address the patient-on-staff assaults at both of these inpatient behavioral health hospitals. Accordingly, the ALJ erred in finding the two violations were not substantially similar.

CONCLUSION

For the reasons stated above, the Commission should affirm the citation against both UHS-Pembroke and UHS-DE and classify the violation as repeated.

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Dated: May 4, 2020

CERTIFICATE OF SERVICE

I certify that on May 4, 2020, I served a copy of the foregoing Brief for the Secretary of Labor via the Commission's e-filing system on the attorney for

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