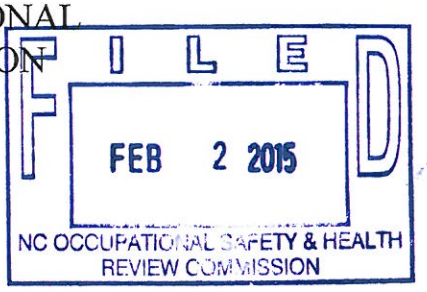
BEFORE THE NORTH CAROLINA OCCUPATIONAL
SAFETY AND HEALTH REVIEW COMMISSION



COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

Complainant,

DOCKET NO. OSHANC-2012-5366
OSHA INSPECTION NO: 316359686
CSHO ID: N8928

vs.

NC DHHS CHERRY HOSPITAL
and its successors

ORDER

Respondent.

THIS CAUSE came on for hearing and was heard before the undersigned Monique M. Peebles, Administrative Law Judge for the North Carolina Occupational Safety and Health Review Commission, on February 18, 2014, at the North Carolina State Bar, 217 E. Edenton Street, Raleigh, North Carolina 27601.

The Complainant was represented at the hearing by Daniel Addison, Special Deputy Attorney General, North Carolina Department of Justice; and the Respondent was represented by Josephine Tetteh, Assistant Attorney General, NC Department of Justice.

As a preliminary matter at the hearing, Respondent and Complainant entered into a settlement agreement for Citation 2, Item (1), Citation 2, Item (2), and Citation 2 Item (3).

Testimony was heard as follows:

For the Complainant: Thomas O'Connell, District Supervisor for North Carolina Department of Labor and Larsene Taylor, Health Care Technician for Respondent Cherry Hospital

For the Respondent: Gwen Bowden, RN, Assessment Admissions Nurse for Cherry Hospital; Dawn Davies, ADN, Assistant Director of Nursing; Nathaniel Carmichael, Jr., MBA, Assistant Director at Cherry Hospital ; Laura White, Master of Arts in Psychology, DHHS Psychiatric Hospitals Team Leader; Steven Peters, PSY.D., licensed clinical psychologist, Director of Psychology at Cherry Hospital; Lucinda Jones, Performance Improvement Coordinator at Cherry Hospital; Jim Mayo, M.D., Clinical Director at Cherry Hospital; Deborah Wall, MSN, Clinical Nurse Supervisor at Cherry Hospital; and Jesse Luckey Welsh, Jr., FACHE, PHARM.D, CEO & Cherry Hospital Director

After reviewing the record file, the evidence presented at the hearing, and reviewing relevant legal authority, the undersigned makes the following Findings of Fact and Conclusions of Law and enters an Order accordingly.

FINDINGS OF FACT

1. Complainant, the North Carolina Department of Labor, by and through its Commissioner, is an agency of the State of North Carolina charged with inspection for, compliance with, and enforcement of the provisions of N.C. Gen. Stat. § 95-126 et. seq., the Occupational Safety and Health Act of North Carolina (the "Act").

2. This case was initiated by Notice of Contest received by the Complainant, Commissioner of Labor of the State of North Carolina, on or about March 22, 2012, contesting a citation issued on August 7, 2012, to Respondent, NC DHHS Cherry Hospital ("Cherry Hospital").

3. Respondent, a state mental hospital, is a North Carolina state-run facility, duly organized and existing under the laws of the State of North Carolina, which does business in the State of North Carolina, subject to the provision of the Act (N.C. Gen Stat § 95-128 and 129) and is an employer within the meaning of N.C. Gen. Stat. § 95-127 (10). Respondent maintains a place of business in Goldsboro, North Carolina, and employs 956 workers overall; and 450 people were employed at the worksite at the time of the inspection.

4. The undersigned has jurisdiction over the case (N.C. Gen. Stat. § 95-135).

5. From February 10, 2012, to August 7, 2012, Compliance Safety and Health Officer Gene Powell ("CSHO Powell") inspected Respondent's worksite at 201 Stevens Mill Road, Goldsboro, North Carolina, ("site") pursuant to a complaint inspection from one of Respondent's employees.

6. CSHO Powell properly entered the site and received consent to the inspection by Mr. Greg Pettigrew, Respondent's manager of safety and health, and Mr. Luckey Welsh, Respondent's CEO ("Mr. Welch").

7. CSHO Powell conducted an opening conference with Mr. Welsh and staff.

8. The site was visited about five times during the inspection and 88 employees were interviewed, including ward nurses and health care technicians.

9. CSHO Powell conducted a closing conference with Mr. Welsh and staff on August 7, 2012, and he recommended that citations be issued.

10. As a result of the recommendations of the compliance officer, on August 7, 2012, the Complainant issued serious citations to Respondent as follows:

Citation 1 Item 1: Serious

Citation 1, Item 1, alleges a serious violation of NCGS 95-129(1): "The employer did not furnish each of his employees conditions of employment and a place of employment free from recognized hazards that were causing of likely to cause death or serious physical harm to employees in that employees were exposed to: potential fatal or serious physical injuries as a result of being assaulted by psychiatric patients and as a result of physically intervening with violent psychiatric patients while working in psychiatric wards of the hospital.

Citation 1 Item 2a: Serious

Citation 1, Item 2a, alleges a serious violation of 29 CFR 1910.132(a): Protective equipment was not provided when necessary whenever hazards capable of causing injury and impairment were encountered.

a) Facility – no personal protective equipment (PPE) was provided to protect employees from hazards of injuries associated with training to use/administer self-defense and patient control procedures known as CPI in response to attacks from violent patients.

Citation 1 Item 2b: Serious

Citation 1, Item 2b, alleges a serious violation of 29 CFR 1910.132(d)(1): The employer did not assess the workplace to determine if hazards were present or are likely to be present, which necessitate the use of personal protective. (PPE)

b) Facility – no personal protective equipment (PPE) was provided to protect employees from hazards of injuries associated with training to use/administer self-defense and patient control procedures known as CPI in response to attacks from violent patients.

c) Facility – no assessment was conducted to determine if hazards necessitating personal protective equipment (PPE) for employees were presented by employee training to use/administer self-defense and patient control procedures known as CPI which are used in response to attacks from violent patients.

11. The following instances illustrating employee injuries were noted in the citations:

a. On or about 3/15/12, at the North Carolina Department of Health and Human Services (NCDHHS) Cherry Hospital facility, a health care technician was injured as a result of a patient attack. He suffered a sprained right leg and Achilles injury. A second technician was also injured during the same incident. He was punched in the jaw and injured his knee, arms, neck, and back. The patient was described as 6'7", 350 pounds.

b. On or about 4/10/12, at the North Carolina Department of Health and Human Services (NCDHHS) Cherry Hospital facility, a health care technician injured her hand, neck and back while placing a patient in a nonviolent crisis intervention (CPI) hold.

c. On or about 5/01/12, at the North Carolina Department of Health and Human Services (NCDHHS) Cherry Hospital facility, a health care technician was injured as a result of a patient attack when she intervened between two fighting patients. She suffered scratches, head and shoulder pain. A second technician was injured in the same incident and suffered contusions and a strained finger.

d. On or about 5/13/12, at the North Carolina Department of Health and Human Services (NCDHHS) Cherry Hospital facility, a health care technician was injured as a result of a patient attack. He was placing the patient in a CPI hold when the patient punched him in the head,

resulting in contusions. A second technician intervened and received scratches, a swollen hand, and injury to her knees and back.

12. The Complainant recommended eight specific methods of abatement as follows:
    a. Conduct a hazard assessment of patient on patient and patient on staff violence to identify risks and abatement strategies that include but are not limited to changes to and/or additions of personal protective equipment (PPE), equipment, facilities, procedures, policies and staffing.
    b. Maintain a system of record keeping and reporting that tracks all violence related episodes/events as well as circumstances surrounding those events that would permit statistical analysis to identify cause and affect relationships. Conduct frequent statistical analysis to assess how such incidents might be prevented when such incidents occur. Include employee safety and health representatives on any investigation teams to identify factors, problems, lessons learned and solutions. Record and report results. Analysis should focus on both violence and violence prevention.
    c. Increase frequency and quality of CPI training. Conduct CPI training as often as needed to make employees comfortable and proficient with the moves. Introduce facility padding and PPE to the training to permit more realistic training and help prevent injury. Make CPI training more realistic by including training in confined areas and training in confined areas and training in interacting with patients in wheelchairs. Review videos of actual incidents of patient violence as learning tools. Require all employees who are present when a patient becomes violent to provide aid when needed, and ensure that this requirement is communicated to and understood by all employees. Provide additional training in techniques for timely de-escalation of inappropriate behavior. Provide frequent feedback and studies of incidents involving client control procedures

(CPI). Determine when CPI works well and those instances where it did not work. Provide a rapid feedback and communication system to allow employees to know which techniques for timely de-escalation of potential altercation worked. Introduce and train additional CPI holds if appropriate. Always utilize a team approach (per CPI methods) for instances where patients must be physically separated due to fighting.

d. Establish an overall hospital policy addressing employee safety with an emphasis on recognizing potential interactions as a hazard to employees. The policy should reflect that such injuries to employees are not necessarily an inevitable part of the job, and the policy should have a focus on, and a goal of, preventing and eliminating injuries from patient workplace violence. In designing and implementing such policies, management and affected employees should be involved and should work together, and ideas from affected employees should be involved and should work together, and ideas from affected employees should be sought and considered to ensure that there is joint ownership of the problems assessment and solutions. Management should involve a steering committee including employees and safety and health personnel with a focus on preventing patient workplace violence and employee injuries from patient workplace violence. There should be sufficient staffing to cover patient duties and to allow employees who participate on the committee to be away from their regular duties to attend meetings. The committee should use statistical analysis to target problems and form solutions.
e. Use case management meetings to address the social, medical, and medication needs of patients with a goal toward minimizing violence.
f. Provide adequate resources, including staffing of sufficient numbers to ensure employees have the ability to protect themselves, to control patients, and restrain patients as needed to prevent patient attacks on employees or other patients. Staffing decisions should

be directed toward minimizing exposures where unaccompanied employees must deal with patients alone or in secluded areas including stairs, elevators, bathrooms and bedrooms. An employee buddy system should be used where appropriate. Establish policies and guidance on the situations in which employees are not allowed to work alone. Develop a communication system that allows all levels of management to review shift staffing and changes to the staffing on a daily basis. Study and improve the scheduling of personnel to minimize the need and use of double shifts and to minimize the resulting fatigue associated with 16 hour shifts. Ensure employees who are expected to use CPI have the physical abilities to do so.

g. To ensure that all staff members who may interact with potentially aggressive patients know that these patients have been designated as such, in addition to coding a patient's chart as "B-alert" at the nurse's station, include "B-Alert" code on the paperwork that staff members use when they conduct checks to observe patients every 15 minutes. The 15 minute check paperwork should also include picture identification of the patients so that staff who have been pulled from other wards/sources and are not familiar with patients on the ward will know who the patients are before interacting with them. Ensure that an employee safety and health component is added to the evaluation of all patients when screened and evaluated for potential violence before being admitted to the hospital. Extend "B-Alert" status to patients with a history of aggression outside the confines of Cherry Hospital.
h. Initiate a program that gives patients and employees joint ownership of violence related solutions such as that suggested in the work of Dr. Marilyn Lanza and used with a reported violence reduction rate of 85% at VA Hospitals.

13. Cherry Hospital is one of three state psychiatric hospitals which provide services to the chronically mentally ill population of eastern North Carolina.

14. The more complex the illness, the greater likelihood that they are declined admission to community hospitals and are admitted at Cherry Hospital.

15. Many patients are drug or alcohol addicted, bipolar or psychotic and are admitted as a result of involuntarily commitment.

16. Of the approximately 950 employees at Cherry Hospital, 65-70% provide direct care (bedside care and any service that touches a patient).

17. Care to patients is delivered 24 hours a day, 365 days a year.

18. Both parties agree that the recognized hazard to Respondents' employees is the potential physical assault by patients at Respondent psychiatric hospital likely to cause serious injuries to Respondents' employees.

19. In 2008 Respondent identified an increase in employee injuries as a result of an increase in the admittance of mentally ill patients.

20. As a result, Respondent initiated a "Performance Improvement Team" with the specific goal to reduce employee injuries through improvement of processes in place and development of new processes. The team was made up of five Health Care Technicians (minimum of three were at every meeting), nurses, and managers. The team analyzed data on all employee injuries from patient aggression. [1] (See Exhibit R-24 for Executive Summary and

[1] Analyzing this data is on-going, (See R-24 for Graph of Staff Injuries Related to Patient Assault from calendar year 2010-2013)

minutes from meetings, and graphs and charts of employee injuries related to patient assaults)

Policies, Procedures & Processes to Address Workplace Violence [2]

1. **New employee orientation** & Training (See Agenda and materials Exhibits R-11a-c)

2. Upon **admission**, an assessment is done of each patient for any history of violence. (See Exhibits R-17a Preadmission Assessment; R-17b 24 Hour/72 Hour Plan; R-17c Psychiatric Evaluation; R-17d Admission Orders for Psychiatrist; R-17e Suicide & Violence Risk Assessment; R-17f Medical History and Physical Assessment; R-17g Comprehensive Nursing Assessment; R-17h Biopsychosocial History Assessment; R-17i Psychological Assessment;
   a. Clothes and electronics are taken and they are searched for any contraband.
   b. Patients needing the highest care are assigned to the Psychiatric Intensive Care Unit **(PICU)** (more unpredictable and aggressive patients where most experienced staff is employed) (Established in 2010)
   c. A detailed treatment plan is worked up for each patient (See Exhibit R-17k) and a determination is made if they should be placed on "**B-ALERT**" status.
      (1) Respondent's B-ALERT policy was established in August 2009 to reduce/prevent physically aggressive behavior towards others by patients deemed to be high risk based on previous aggression within Respondent hospital. (See B-Alert Process Exhibit R-15 f)
      1. B-ALERT status is given to patients who have had a history of aggression or if the

[2] See Exhibit R-9 Extensive Power Point detailing how Respondent deals with workplace violence

patient experiences aggression while at the facility.

2. Anyone can be put on B-ALERT status at any time.

3. Nursing **Kardex**-filled out by nurse and contains all information about patients including what calms patient and picture of patient. (See Exhibit R-17m)
   a. Kept in an open area in nursing station and all nursing staff has access
4. Respondent switched from North Carolina intervention (NCI) and adopted Crisis Prevention Institute's nonviolent crisis intervention program **(CPI)** which utilizes techniques to manage aggressive behavior of patients
   a. 2 day training (day 1 –preventative techniques and day 2 – personal safety training) (See Exhibit R-19 for CPI training material)
   b. CPI techniques strategically posted in hospital as a visual aid for staff
   c. Annual refreshers are required every 6 months, additional training is received for applied physical training, and retraining when needed is also available for staff. (See R-20)
   d. CPI is known as the "gold standard" among hospitals
5. **Community meeting** conducted with patients and staff daily, and **Unit Safety Meetings,** conducted monthly, allow employees to voice safety concerns in unit collectively.
6. **Patient Care Shift report**-occurs at every shift-discuss safety concerns for employees and patients. (See Exhibit R-17t)
7. **Precaution flow sheet** documents patient's behavior and special precautions. Health technician documents every 15 minutes. (See Exhibit R-17o)
8. **RN Shift note** documents patient's orientation and mood, thoughts. The registered nurses assess each patient's behavior including risk of violence/aggression. (See Exhibit R-17p)
9. **Ward Report** (nurses and health care technicians)
10. **Safety sweeps** done so there is nothing patients can pick up to hurt employees.

11. **"Aggressive Protocol Policy"** addresses patient on staff aggression. The policy spells out the expectations of the clinical manager, who is called, what to do, how it's reported and how it's entered into QUANTROS
12. Use of **"QUANTROS,"** a reporting system to track incidents entered into by nurse prior to end of shift. Employee has to report any incidence of violence and all incidents are reviewed immediately by clinical nurse manager. Incidents are also reviewed management and analyzed. (See R-24-26)
13. **Video review** of patient aggression with management and staff.
    a. Reviewed every time intervention was used
14. When Respondent saw an increase in patient aggression again in 2010, the Workplace Safety Committee was formed. **Workplace Safety Committee** is oversight committee that met bi-monthly in 2010 and addressed injuries from patient aggression. After processes were put in place to address patient aggression, Respondent reinitiated quarterly meetings in 2012.
    a. The committee is made up of managerial staff, middle management and front line staff that includes LPNs, RNs and health care technicians.
    b. Staff can talk about any safety issue
    c. Data expert Cindy Jones presents rate of injury via graph and chart broken down into shifts and day of week so personnel can correlate why an injury happened. (See Cherry Hospital Interpretative Data Exhibits R-25a-i)
    d. Front line workers speak out for other staff and inform them what was discussed in meeting.
15. Assaulted Staff Action Program (**ASAP**) – professional peers discuss post incident injury which is staffed by volunteers.
16. **Town Hall meetings** where CEO Welsh addresses questions, concerns.
    a. Index cards are passed out so staff can write down anonymous questions.
17. **Management Rounds** talking to front line staff
18. **Environmental Safety Rounds** – survey done by health care technician on every unit on every shift and documented on nursing assignment sheet.

a. Example-loose chair is a safety issue

19. **"Aggressive Protocol Policy"** addresses patient on staff aggression. The policy spells out the expectations of the clinical manager, who is called, what to do, how it's reported and how it's entered into QUATROS
20. **Staff is equipped with** body alarms, whistles and walkie-talkies
21. **Red phones** – emergency phones in community courtyard
22. **Restrictive Intervention** – used on patients to minimize or eliminate aggressive behaviors (example. Restraint chair)
23. **"Just-Culture"** processes environmental concerns to improve safety and communication(see Exhibit R-14)
24. Adjustments to Patient-Staff ratios when needed
25. **"Escort Policy"**-Buddy System
26. Bolted Beds (2011)

Discussion

N.C.G.S. § 95-129(1), the general duty clause, states:

Each employer shall furnish to each of his employees conditions of employment and a place of employment free from recognized hazards that are causing, or are likely to cause, death or serious injury or serious physical harm to his employees.

In order to establish a violation of the general duty clause, the Commissioner has the burden of proving by a preponderance of the evidence the following: (1) The employer failed to keep its workplace free of a hazard; (2) the hazard was recognized; (3) the hazard was causing or likely to cause death or serious physical harm; (4) ***there were feasible measures that can be taken to reduce materially the likelihood of death or serious physical harm resulting to employees*** (5)employees were exposed; and (6) the hazard created the possibility of an accident. *Metric Constructors,* OSHANC 96-3407 (1999) *citing Brooks v. Rebarco, Inc.*, 91 N.C. App. 459, 372 S.E. 2d 342 (1988).

The hazard in this hospital setting is patient aggression, which is admittedly a recognized hazard in the

state psychiatric hospital setting where the majority of the clients they service have some sort of mental illness. The only way to have employment at this hospital **free** from recognized hazards is to have no physical intervention by employees when dealing with "violent psychiatric patients." To accomplish that, you would need to keep the patients physically or chemically restrained at all times. The court agrees that that is not a feasible means of abatement.

As a result of his inspection, CHSO Powell concluded that the hospital was more concerned with patients' rights than employee safety. Cherry Hospital utilizes a balanced approach by focusing on ways to reduce the aggression of the patients in conjunction with administrative and engineering controls to protect their employees from injuries. The testimony given from Respondent witnesses consistently stated that you cannot separate employee safety and patient safety because, as Laura White testified, "the way to keep the staff safe is to provide a safe and therapeutic environment for patients." Therefore, Respondent has implemented policies and procedures designed to provide a safe and therapeutic environment for the patients to help reduce the likelihood of them becoming aggressive. In turn, employees will have a safer working environment. After hearing testimony over the course of seven days from Respondent's employees about the intricacies of Cherry Hospital, the court agrees that patient and employee safety cannot be separated.

CSHO Powell also was concerned that because many of the attacks on staff happened unexpectedly, CPI offered no protection. CPI, however, was not the sole method used by Respondent to reduce employee injuries from patient aggression. Powell never spoke to Lucinda Jones, the performance improvement coordinator, who was tasked with collecting and analyzing data from employee injuries from patient assaults and employee intervention. She testified at length about the findings and changes made as a direct result of the analysis. (See Exhibit R-9). Looking at all

the engineering and administrative controls in place at Cherry Hospital in its totality, the Court finds that the Respondent had feasible methods in place to abate the hazards in this case.

Personal Protective Equipment

27. Complainant alleges that protective equipment was not provided when necessary whenever hazards capable of causing injury and impairment were encountered.

28. Respondent uses the following Personal Protective Equipment (PPE)
    a. Spit guards, goggles, gloves, masks, gowns, and surgical caps

29. CSHO Powell suggested the following PPE would be appropriate:
    a. Eye protection, sports goggles
    b. Head protection: Boxing/martial arts helmets
    c. Body protection: padding, especially body/chest type for females
    d. Athletic cup for males
    e. Knee pads
    f. Elbow pads
    g. Face protection: guards similar to those worn by basketball players
    h. Mouth guards

30. No other similar hospital setting utilizes the recommended PPE by Complainant.

31. The goal of Respondent is to create a therapeutic environment due to the need of a calm environment for hypersensitive patients they service.

32. Expert testimony from Respondents' psychologist witnesses testified that the PPE suggested by Complainant: (1) would be disruptive and provocative, (2) would not create a safer workplace, (3) would be more dangerous because it would

give the message to the patients that it was not a safe place which would increase their anxiety and stress and cause increased aggression.

33. The goal of Respondent is to create a therapeutic environment, and the PPE suggested by Complainant is contrary to the setting at Cherry Hospital due to the hypersensitive patients need for a calm environment.

34. Respondent follows all the recommendations for CPI for training.

35. A staff member conducting training manages pace of training to keep employees safe during training of CPI techniques.

36. All injuries resulting from training are reviewed.

37. PPE Suggested by CSHO Powell would not eliminate or prevent the injuries employees typically suffer during training, like sprains and strains.

Conclusions of Law

1. The foregoing findings of fact are incorporated by reference as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.

2. Respondent is subject to the provisions and jurisdiction of the Act.

3. Complainant failed to prove by a preponderance of the evidence and substantial evidence that Citation 1, Item 1, was a serious violation of North Carolina General Statute 95-129(1) of the Occupational Safety and Health Act of North Carolina.

4. Complainant failed to prove by a preponderance of the evidence and substantial evidence that Citation 1 , Item 2a, was a serious violation of 29 CFR §1910.132(a).

5. Complainant failed to prove by a preponderance of the evidence and substantial evidence that Citation 1 , Item 2b, was a serious violation of 29 CFR §1910.132(d)(1).

BASED UPON the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, **IT IS ORDERED, ADJUDGED, AND DECREED** that all of the citations and penalties are hereby dismissed.

This the 30 day of January 2015.

Monique M. Peebles
Administrative Law Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this date served a copy of the foregoing ORDER upon:

JOSEPHINE N. TETTEH
ASSISTANT ATTORNEY GENERAL
NC DEPT OF JUSTICE
PO BOX 629
RALEIGH NC 27602-0629

NC DEPARTMENT OF JUSTICE
LABOR SECTION
PO BOX 629
RALEIGH NC 27602-0629

by depositing a copy of the same in the United States Mail, Certified Mail, postage prepaid, at Raleigh, North Carolina, and upon:

NC DEPARTMENT OF LABOR
LEGAL AFFAIRS DIVISION
1101 MAIL SERVICE CENTER
RALEIGH NC 27699-1101

by depositing a copy of the same in the NCDOL Interoffice Mail.

THIS THE 3rd DAY OF February 2015.

OSCAR A. KELLER, JR.
CHAIRMAN

Nancy D. Swaney

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