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The Heat is Off… Review Commission Reverses Decision in Heat Stress Case

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On February 28, 2019, the Occupational Safety and Health Review Commission (OSHRC) issued a much anticipated decision in the case of Secretary of Labor v. A.H. Sturgill Roofing, Inc. The case involved two citations, one brought by OSHA under Section 5(a)(1), the general duty clause, that alleged Sturgill exposed its employees to "excessive heat" and another alleging the company failed to provided adequate heat-related training under 29 CFR 1926.21(b)(2). After hearing oral arguments and taking outside comments from interested parties, the Commission, in a 2-1 decision, reversed the administrative law judge's order affirming the citations. The Commission held OSHA had failed to establish the existence of a hazard or feasible means of abatement. Most interesting was the Commission's criticism of OSHA's use of the general duty clause instead setting standards. In a footnote the Commission wrote, "[w]hile practical considerations may have lead OSHA, over the years, to rely on the general duty clause in lieu of setting standards, the provision seems to have increasingly become more of a "gotcha" and "catch all" for the agency to utilize, which as a practical matter often leaves employers confused as to what is required of them."

The backdrop for the *Sturgill* case was the death of a temporary employee after he suffered a heat stroke on his first day on the job. The employee was a 60-year-old man with "various preexisting medical conditions[.]" The work being done consisted of removing a building's existing roof so a new roof could be installed. At the hottest part of the day, the heat index was 85°F, which was in the "caution" category of the National Weather Service's heat advisory chart.

In order to prove a violation of the general duty clause, OSHA must show: 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 eliminate or materially reduce the hazard. *Arcadian Corp.*, 20 BNA OSHC 2001, 2007 (No. 93-0628, 2004). In *Sturgill*, the employer argued that the judge erred in finding the presence of a hazard because there was no "excessive heat" at the worksite. The Commission agreed.

To prove a hazard under the general duty clause, the Secretary has to show employees were exposed to a significant risk of harm. The Commission held that the Secretary did not meet this burden and that the judged erred in relying on the NWS Heat Index chart to establish a hazard. The NWS Heat Index chart sets out four warning levels—caution, extreme caution, danger, and extreme

danger— these levels indicate the “likelihood of heat disorders with prolonged exposure or strenuous activity.” The Commission held the Secretary did not prove that the employees suffered prolonged exposure or that their work could be considered strenuous activity. Further, the Commission held that the NWS Heat Index chart’s label of “caution” “simply does not connote a significant risk of harm.”

The Commission went on to address the Secretary’s arguments that the employee’s death itself was evidence of a hazard. It found this argument to be “unfounded” holding that Sturgill had no knowledge of the employee’s preexisting medical conditions that made him more susceptible to becoming ill. Additionally, Sturgill was constrained by law in its ability to ask the employee about his medical conditions.

Next, the Commission found the Secretary failed to establish feasible abatement measures. In its citation, OSHA listed five suggested abatement measures:

(1) implementing an “acclimatization plan”;

(2) requiring employees to wear loose fitting, reflective clothing;

(3) imposing a “formalized work-rest regimen”;

(4) imposing a “formalized hydration policy” that requires employees to drink water at regular intervals; and

(5) monitoring employees for signs of a heat illness.

The Commission found that these five abatement measures were presented as alternative means of abatement, meaning that the Secretary would need to show that Sturgill did not implement any of these measures. Sturgill argued that it had utilized an acclimatization program by given new employees less strenuous tasks and allowing them to take additional breaks. Citing another recent general duty clause decision, the Commission held that the Secretary failed to “‘show the *specific additional measures*’ required to abate the hazard.” Mid-South Waffles, Inc., No. 13-1022, slip op. at 12 (OSHRC Feb. 15, 2019).

While *Sturgill* may give employers reason to let out a sigh of relief, there are still questions left open. What if the heat index had been in the extreme danger range? What if Sturgill did not have an informal acclimatization program? What if the employee hadn’t had any preexisting medical conditions? Because these cases can be very fact specific, it would be wise for employers to consider the need for a heat-related illness safety program, especially as the days get hotter and longer during the summer months.

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