OSHRC's Recent Ruling Provides Important Guidance for Employers on Heat Exposure and the General Duty Clause

by Michael B. Pascoe

On Feb. 28 the Occupational Safety and Health Review Commission (OSHRC) reversed a citation issued to A.H. Sturgill Roofing, Inc. for the heat-related death of an employee, finding that all of the elements of proof of the violation had not been met by the Secretary of Labor. Sturgill's citation was for a general duty clause violation for exposing its employee "to the hazard of excessive heat from working on a commercial roof in the direct sun."[i] In response to this ruling, the way employers defend against heat-related OSHA citations for violations of the general duty clause may change.

Background Facts

Sturgill had a temporary employee on site, MR, who was 60-years-old and had several medical conditions including hepatitis C and congestive heart failure. It was MR's first day on the job and the temperature that day began at 72 degrees with 84 percent relative humidity. It is undisputed that Foreman Leonard Brown encouraged all employees to use immediate access to ice, water, rest and shade without fear of reprisal. MR was assigned the lightest duty possible – pushing debris off the roof into a dumpster below. Approximately five hours into the workday, other workers expressed some concerns regarding MR to the foreman. Shortly after that, MR collapsed. The temperature at the time was 82 degrees with 51 percent relative humidity. MR was taken to the hospital, where he was diagnosed with heat stroke and died three weeks later. The official cause of death was "complications from heat stroke".

The General Duty Clause

A general duty clause violation requires proof of four elements: (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.[ii] In reversing the citation, the OSHRC found that the Secretary failed to meet his burden on element (1) existence of a hazard and (4) a feasible means of abatement.

(1) Existence of a Hazard

Previously, the Administrative Law Judge relied on the National Weather Service (NWS) Heat Index in upholding the citation. The NWS Heat Index sets forth four levels of warning for outside work: caution, extreme caution, danger, and extreme danger. In its opinion reversing this decision, the Commission noted that the NWS Heat Index chart's warnings only applied when there was either "prolonged exposure" to heat or "strenuous activity" in hot conditions. The Commission observed that the record was devoid of any evidence that there was "prolonged exposure" at times when the temperature and relative humidity were high enough that the NWS Heat Index advisory chart advised caution. Also absent was any evidence that MR was engaging in strenuous activity, as he was pushing waste material off the roof into a dumpster below. The Commission characterized this as light to moderate work. Because there was neither prolonged exposure nor strenuous activity the Commission found that the Secretary had failed to carry its burden to establish the existence of a hazard.

(4) Feasible Means of Abatement

In establishing a feasible means of abatement, 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."[iii] There were five abatement measures proposed by the Secretary in the citation: "(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 held that these were all proposed alternative means of abatement and not a single means of abatement, thus the implementation of any one would be sufficient. The Commission found that Sturgill met at least three of the methods of abatement and thus the Secretary did not prove the fourth element of a general duty clause violation.

The Scope of the General Duty Clause

Chairman MacDougall wrote a separate concurrence, stating that the Department of Labor, in this case, sought to apply the General Duty Clause in ways never intended by Congress. Chairman MacDougall noted that the general duty clause requires a concrete condition that poses a risk of harm and that excessive heat does not meet that concrete requirement. She noted that heat was something inherent in any outdoor activity and only presented the *possibility* of harm and not the concrete hazard required for a General Duty Clause citation. She also raised a concern with the vagueness of the term "excessive heat" and the inherently moving target imposed by this phrase. Speaking recently at the American Bar Association's OSHA Committee's Mid-Winter Meeting, Chairman MacDougall referenced this concurrence and specifically highlighted her concerns as expressed in her written opinion.

Finally, in addressing the idiosyncratic issues applicable to MR, Chairman MacDougall cited the amicus brief from the National Association of Home Builders, and quoted that the "provision is referred to as the "general" duty clause, not the "individual" duty clause: 'Analyzing personal risk factors such as underlying health conditions or ages eliminates the sweeping concept of a 'recognized hazard' for all employees and instead turns the General Duty clause into an individual duty clause whereby the recognition of the hazard is now employee-specific.'"

The Dissent

Commissioner Atwood dissented and, reasoning backward from the occurrence of heat stroke, found the existence of a hazard. She also found the abatement methods to be proposed, not in the alternative, but as elements of a single method of abatement. When speaking on this issue at the recent ABA OSHA Committee's meeting, Commissioner Atwood reaffirmed her statement in the dissent that she would have required all of the methods as a single form of abatement of the hazard.

Important Takeaway

One footnote stands out as a concise summary of the takeaway from this decision. On page 8 in footnote 9 of the decision, the Commission stated that "[w]hile practical considerations may have lead OSHA over the years, to rely on the general duty clause in lieu of setting standards, the provisions 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." This is further emphasized by Chairman MacDougall's concurrence, which criticizes the vagueness of standard used in this particular citation.

Given the expiration of Commissioner Atwood's term next month and the current administration's anti-regulatory inclination, OSHA may find it increasingly difficult to uphold heat-related citations for violations of the general duty clause and employers may see a number of valid defenses based on the OSHRC's decision in Sturgill.

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[i] *Sec'y of Labor v. A.H. Sturgill Roofing, Inc.*, OSHRC Docket No. 13-0224.
[ii] *Arcadian Corp.*, 20 BNA OSHC 2001, 2007 (No. 93-0628, 2004).
[iii] *Arcadian*, 20 BNA OSHC at 2011 (citing Beverly Enters. Inc., 19 BNA OSHC at 1190).

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