UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

PETITION FOR REVIEW FROM DECISION AND ORDER
of Administrative Law Judge Carol A. Baumerich
February 23, 2015

OSHRC Docket No. 13-0224

Secretary of Labor, United States Department of Labor, Complainant,
v.
A.H. Sturgill Roofing, Inc., Respondent.

AMICUS CURIAE BRIEF OF NATIONAL ROOFING CONTRACTORS ASSOCIATION

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INTRODUCTION

The National Roofing Contractors Association ("NRCA") respectfully submits this brief as amicus curiae in support of respondent A.H. Sturgill Roofing, Inc. ("Sturgill"). NRCA represents the nation's roofing industry. NRCA urges the Review Commission to vacate the administrative law judge's ("ALJ") decision and order against Sturgill on the issue of Sturgill's alleged failure to implement an adequate heat illness prevention program in violation of section 5(a)(1) of the Occupational Safety and Health Act of 1970 ("OSH Act"), otherwise known as the OSH Act's "general duty clause."[1] The ALJ abused her discretion in finding that Sturgill violated the general duty by failing to implement an adequate individualized heat-illness prevention program on a day where the recorded heat index is below 91°F on the grounds that a "heat-related illness hazard" existed for a single employee due to his medical conditions and age. In *Secretary of Labor v. A.H. Sturgill Roofing, Inc.*, OSHRC Docket No. 13-0224, (February 23, 2015) ("*Sturgill*"), the ALJ found a heat hazard to exist in conditions which had never before been recognized by the Commission or courts as creating an "excessive-heat hazard." If not vacated by the Review Commission, this decision stands to establish an unconstitutional expansion of OSHA's prosecutorial authority under the general duty clause, vastly expands employers' obligations, and presents employers with the dilemma of trying to comply with the Secretary's interpretation of the general duty clause without running afoul the strictures of the Americans with Disabilities Act as Amended ("ADAAA").

STATEMENT OF INTEREST

The National Roofing Contractors Association has a substantial interest in this matter. NRCA is one of the nation's oldest construction industry trade associations in the United States. Founded in 1886, NRCA is a nonprofit association composed of all

[1] 29 U.S.C.A. § 654(a)

segments of the roofing industry, including contractors, manufacturers, distributors, architects, engineers, roof and safety consultants, building owners, and county, city and state government agencies. NRCA's mission is to inform and assist the roofing industry, act as its principal advocate, and help members in serving their customers. NRCA represents the voice of roofing professionals nationwide and is the leading authority in the roofing industry for information, education, technology, advocacy, and business safety practices.

NRCA has more than 3,500 members from all 50 states and 53 countries and is affiliated with 105 local, state, regional and international roofing contractor associations. NRCA contractor members range in size from companies with less than $1 million in annual sales volumes that constitute 50 percent of the current membership, to large, commercial contractors with annual sales volumes of more than $20 million. More than half of NRCA's contractor members perform both residential and commercial roofing work, and more than one-third have been in business for over a quarter of a century. NRCA seeks to elevate the entire roofing industry, and part of that is to help it be a safer profession.

STATEMENT OF ISSUES ON REVIEW

1. Given the conditions, whether the Sturgill jobsite on August 1, 2012 was a hazardous workplace with excessive heat?
2. Can an employer have constructive knowledge of an excessive-heat hazard defined in part by the physiology of one particular employee?
3. Does an employer have the right to require employee disclosure of all personal health conditions which may affect their ability to regulate heat?
4. Does the general duty clause obligate employers to make individualized risk assessments of each employee on every job on every day as to whether that employee, based on his physical condition, may face a hazard to him or her in the work place?

STATEMENT OF THE CASE

NRCA respectfully adopts the statement of the case as stated in Respondent A.H. Sturgill Roofing Inc.'s Petition for Discretionary Review, Opening Brief on Review, and Reply Brief to the brief for the Secretary of Labor, as well as all other statements of fact and evidence referenced therein.

ARGUMENT

I. AN EXCESSIVE HEAT HAZARD DID NOT EXIST AT THE STURGILL JOBSITE ON AUGUST 1, 2012.

a. Prior excessive-heat hazard cases show that the conditions at the Sturgill jobsite had never before been recognized by the Commission or courts as creating an "excessive-heat hazard."

In *Sturgill*, the ALJ found a heat hazard to exist in conditions which have never before been recognized by the Commission or other courts as creating an "excessive-heat hazard." In the September 24, 2014 decision of ALJ Peggy S. Ball in *United States Postal Service*, issued five months before the *Sturgill* decision was published, a postal worker's exposure to heat indices of 105°F and 104°F on two consecutive days was found to pose an "excessive heat" hazard to both acclimated and unacclimated employees alike.[2] In the 2012 case of *Post Buckley Schuh & Jernigan, Inc.*, ALJ Patrick B. Augustine found a "hazard of excessive levels of heat" to exist where employees digging 3-foot deep holes in the desert were exposed to temperatures which reached a high of 99°F with 29% humidity.[3] In the Review Commission's 1983 decision in *Durion Co., Inc.*, affirmed by the Sixth Circuit in 1984, a majority of the Commissioners found a "heat stress hazard" to exist as a

[2] *Secretary of Labor v. United States Postal Service*, OSHRC Docket No. 13-0217 (September 24, 2014).
[3] *Post Buckley Schuh & Jernigan, Inc., Respondent.*, 24 O.S.H. Cas. (BNA) ¶ 1155 (O.S.H.R.C. Mar. 15, 2012).

result of "extreme heat" where the average temperature at the worksite was 95°F and temperatures reached as high as 115°F.[4]

The 1992 case of *Industrial Glass*,[5] the only case on record where the inspection and issuance of an excessive-heat hazard citation were not preceded by a death or serious injury, the Review Commission found that the Secretary failed to prove that an "excessive heat stress" hazard existed where the wet bulb globe temperature readings taken by OSHA inside a glass plant ranged between 83.4°F to 101.2°F and the dry bulb readings ranged from 91°F to 115°F. The experts in *Industrial Glass* all agreed that to determine whether conditions constitute a heat-stress hazard involves "a combination of environmental or ambient heat conditions (the heat in the air, the humidity, and the air velocity) and the internal or metabolic heat produced by the activity being performed ("the workload"), less the cooling effects of evaporation."

A notable 5 of the 12 pages of the *Industrial Glass* decision were dedicated to a discussion of testimony provided by three heat-stress experts who assessed the total heat load experienced by a worker operating molten glass machines at the Industrial Glass plant. Citing favorably to the methods used by Industrial Glass's experts as more representative of the actual conditions experienced by employees, the Review Commission found that the employees were not exposed to an excessive-heat stress hazard likely to cause death or serious harm to employees, as worker's metabolic workload, combined with the environmental heat load, did not create a total heat load great enough to cause heat stress.[6]

By way of comparison, the Secretary in *Sturgill* failed to present any expert testimony or calculations from a heat-stress expert to prove the total heat load created by

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[4] *Duriron Co., Inc., Respondent, & United Steelworkers of Am., Local Union 3320, Authorized Employee Representative*, 11 O.S.H. Cas. (BNA) ¶ 1405 (O.S.H.R.C. Apr. 27, 1983). *affm'd Duriron Co. v. Sec'y of Labor: U.S. Occupational Safety & Health Review Comm'n*, 750 F.2d 28 (6th Cir. 1984).
[5] *Indus. Glass, Respondent, Glass, Molders, Plastic, Pottery & Allied Workers, Local 208, Authorized Employee Representative*, 15 O.S.H. Cas. (BNA) ¶ 1594 (O.S.H.R.C. Apr. 21, 1992).
[6] *Id.*

the jobsite conditions at the PNC rooftop on August 1, 2012. The only expert testimony offered by the Secretary in *Sturgill* was that of a medical doctor, Dr. Yee, who concluded that "[b]ecause in the end [M.R.] had 105-degree temperature, and based upon my review of the medical records, there is nothing that would get him to 105 degrees [except] for exposure to heat in the workplace."[7]

In contrast to the experts in *Industrial Glass* who calculated the worker's actual minute-by-minute activities over an 8-hour period, which they broke down into their various motions to determine the worker's actual Kcal energy expenditures and the metabolic heat generated by the activities, Dr. Yee admitted that he did *not* factor in how many breaks M.R. had or did not have, nor did he mention any consideration of the type or nature of physical tasks M.R. performed. The only factors taken into account by Dr. Yee in concluding that M.R. was exposed to excessive-heat at the worksite were M.R.'s 105°F body temperature, the recorded weather temperature, the relative humidity, and the amount of sunlight observed by EMS upon their arrival.[8]

b. The Secretary's description of the hazard in *Sturgill* in terms of a "heat-related illness" fails to meet the criteria of section 5(a)(1), which requires that a hazard must be defined in a way that apprises the employer of its obligations, and identifies conditions or practices over which the employer can reasonably be expected to exercise control.

To establish a general duty clause violation, the Secretary is required to "define a recognized hazard in a way that gives the employer a broad view of its obligations and identifies practices over which it can reasonably be expected to exercise control.[9]

In *Secretary of Labor, Complainant v. Aldridge Electric, Inc.*, a section 5(a)(1) excessive-heat hazard case issued one year after the *Sturgill* decision was published, Chief Administrative Law Judge Covette Rooney specifically rejected the Secretary's attempt to

[7] Tr. 89 ln. 14-18
[8] Tr. 104 ln. 2-6
[9] *Nelson Tree Servs., Inc. v. Occupational Safety & Health Review Comm'n*, 60 F.3d 1207, 1209 (6th Cir. 1995).

prosecute an employer for violation of the general duty clause for failing to "free" the workplace from an excessive heat-hazard created in part by the physiology of an employee – a condition which an employer has no ability to control.[10]

At issue in *Aldridge* was a thirty-six year old employee who died from heat stroke with a contributing factor of obesity. On June 24, 2013, his first day on the job, the decedent was part of a crew working in a 3-foot wide shoulder-height trench which ran down the middle of a highway. From 10 am to 12 pm, together with a partner, the decedent repeatedly lifted 2 pieces of four-inch diameter PVC pipe (weighing 42 pounds each) at a time from a pile 20 feet away, and carried them over to the trench. In the afternoon, he worked for about 1 hour gluing and hammering the ends of the pipe together. When the decedent began work that morning, the temperature was 73°F with 71% humidity. Approximately five hours later, the decedent collapsed. Temperatures had reached 84°F with 57% humidity, with scattered clouds and 13 mph winds.[11]

OSHA issued a section 5(a)(1) citation to Aldridge Electric alleging that employees were exposed to the hazard of "excessive heat during the performance of the workers' duties." Because the record established that the decedent's death was caused by heat stroke with a contributing factor of *obesity*, the ALJ found that the alleged hazard could be characterized as a "heat balance equation" consisting of four components: (1) environmental heat; (2) metabolic heat; (3) dissipation of heat, and (4) an individual level of excessive heat.

The ALJ found that the Secretary failed to establish that an excessive-heat hazard existed at the Aldridge jobsite due to a lack of evidence proving that the environmental heat (weather) plus metabolic heat (generated by the decedents activities) minus dissipation

[10] *Secretary of Labor, Complainant v. Aldridge Elec., Inc.*, Respondent, 26 O.S.H. Cas. (BNA) ¶ 1449 (O.S.H.R.C.A.L.J. Dec. 2, 2016)
[11] *Id.*

of heat (from sweating and breaks) created a hazard above the "lowest" caution zone (for temperatures 91°F or below) of the OSHA guidance heat-index precaution chart.[12]

As to the fourth component of the alleged heat hazard, the *Aldridge* ALJ considered the fact that the decedent's death was caused by heat stroke with a contributing factor of obesity. Obesity, the record showed, was a physical condition affecting a worker's generation of heat and capacity to dissipate heat. The ALJ found that because the Secretary attempted to establish the existence of a hazard with components over which an employer has no power to control – i.e. – an employee's physiology – that the Secretary's description of the hazard failed to meet the criteria of section 5(a)(1), which requires that a hazard be defined in a way that identifies conditions or practices over which the employer can reasonably be expected to control. This attempt to define an "excessive heat hazard" in part by an individual employee's physiological condition, the *Aldridge* ALJ held, was against Commission precedent.

c. In the *Aldridge Electric* case, which should be followed here, no "excessive-heat hazard" was found to exist at worksite where employees were exposed to essentially identical environmental temperatures over an essentially identical amount of time as on the Sturgill jobsite.

The *Aldridge* decision shows that the ALJ abused her discretion in finding that the Secretary proved that a hazard existed at the Sturgill jobsite on August 1, 2012, where employees were exposed to essentially *identical* environmental temperatures over an

[12] The ALJ first considered whether the evidence warranted increasing the heat index of 85°F above the "caution" zone on OSHA's heat index caution chart, and found that it should not, as the Secretary had failed to provide evidence of the amount or duration of direct sunlight, wind, or shade present at the decedent's *actual* worksite during the time that he was *actually* working.[12] The ALJ next considered whether the Secretary proved that the metabolic heat created by the decedent's physical exertion, minus the decedent's dissipation of heat through sweating and resting, could have resulted in "excessive-heat" for the decedent when combined with the 85°F heat index. Noting that one expert found the level of exertion was "medium," one expert found it was "moderate to heavy," worker testimony ranged from "it was all east to me" to it was "eight hours of aerobicize," and OSHA guidance did not provide an objective means for calculating how much physical exertion it would take to bump up the heat-index caution level chart from one level to the next, the ALJ found insufficient evidence to establish the decedent's level of metabolic heat was "excessive."

essentially *identical* amount of time as employees in *Aldridge*.[13] Just as in *Aldridge*, the heat hazard alleged by the Secretary in *Sturgill* was also defined in part by components over which Sturgill had no power to control – M.R.'s age and health condition. This fact is evident by the ALJ's description of the three factors considered by her in finding that a hazard existed at the Sturgill jobsite:

> Foreman Brown confirmed that it was generally hotter on the roof than on the ground. (CX-13, p. 9). Because it was a white roof, he believed it was about ten degrees hotter. If it had been a dark roof, it would "really be hot." (CX-13, p. 9). Further, the work on the roof was physically demanding and strenuous – tearing off roofing materials, cutting them down, and then tossing them over a parapet wall, into a dump truck on the ground. Additionally, the Secretary's expert, Dr. Theodore Yee, confirmed that the conditions on the roof that day were hazardous. Dr. Yee[18] stated that depending on an individual's age, and other conditions, the heat-related exposure risk ranged from that of heat exhaustion for a younger person up to heat stroke for an older person. (Tr. 155, 157-59; CX-4, p. 3). I find that the working conditions on the PNC roofing project, on August 1, 2012, did present a heat-related illness hazard for the employees.

As demonstrated in pages 13-21 of the Respondent's Opening Brief on Review, the Secretary in *Sturgill* failed to provide sufficient objective evidence proving that M.R. was exposed to an excessively high level of environmental or metabolic heat. Although the conditions in *Sturgill* had never before been recognized by the Commission as creating an "excessive-heat hazard," the ALJ nonetheless found that a hazard existed due to the physical condition of a single employee. Because the *Sturgill* hazard was not defined by "conditions or practices over which the employer can reasonably be expected to exercise control,"[14] the ALJ abused her discretion in finding that it could be used to sustain a general duty clause violation.

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[13] Compare *Aldridge* conditions described, *supra* at footnote 10 to the fact that when M.R. began working the temperature was 72°F with 84% humidity. Approximately four (5) hours later, M.R. became ill and collapsed on the roof at 11:51 a.m. At the time that he collapsed, the temperature was 83°F with 51% humidity and the heat index was 84°F.

[14] *Nelson Tree Servs., Inc. v. Occupational Safety & Health Review Comm'n*, 60 F.3d 1207, 1209 (6th Cir. 1995).

d. An employee's health and age are not "recognized" as hazardous workplace conditions in the roofing industry, nor are they conditions which safety experts familiar with the roofing industry would take into account in prescribing workplace safety programs and policies.

Liability under the general duty clause is limited to dangers actually or constructively "recognized" at the time of the violation. "Establishing that a hazard was recognized requires proof that the employer had actual knowledge that the condition was hazardous or proof that the condition is generally known to be hazardous in the industry...Whether or not a hazard was recognized constitutes a matter of *objective* determination."[15] The standard of "recognition" centers on "the common knowledge of safety experts who are familiar with the circumstances of the industry or activity in question."[16] A "recognized hazard" is a practice or process by which a job is being performed and over which the employer has *control* as opposed to a freakish accident or utterly implausible occurrence of circumstances.[17]

As shown above, the hazard alleged to have existed at the Sturgill jobsite was a "heat-related illness hazard" defined in part by the physical condition and age of the affected worker. However, in analyzing the second prong of the Secretary's case, the ALJ incorrectly applied an oversimplified version of the hazard, finding that Sturgill and the roofing industry recognized "heat as a hazard" rather than the "heat-related illness hazard" actually alleged. By evaluating whether there was "recognition" of the wrong hazard, what the ALJ failed to consider and what the Secretary failed to establish is whether the actual conditions present at the Sturgill jobsite (environmental heat, physical exertion, and M.R.'s individual physical condition) were known to be hazardous, and therefore "recognized."

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[15] (emphasis added, internal citations omitted) *Kelly Springfield Tire Co. v. Donovan*, 729 F.2d 317, 321 (5th Cir. 1984) *citing* Georgia Electric Co. v. Marshall, 595 F.2d at 321.
[16] *National Realty & Const. Co., Inc. v. Occupational Safety and Health Review Commission*, 489 F.2d 1257, 1265, n. 32., O.S.H. Cas. (BNA) 1422 (D.C. Cir. 1973).
[17] *Arcadian Corp.*, 17 BNA OSHA 1345, 1348 (No. 93-3270 1995).

While the ALJ correctly interprets NRCA's toolbox talks and pocket safety guide on heat-illness prevention as showing that the roofing industry recognized heat as a potential hazard, she abused her discretion in intimating that the NRCA safety guidance materials demonstrated industry recognition of the specific hazard alleged in *Sturgill*. NRCA safety publications are written to provide general guidance to increase workplace safety. In developing safety guidelines for the industry, it is impossible to account for physical particularities of individual employees. By finding the second prong of the Secretary's case was established, the ALJ mischaracterized the cited NRCA materials as recognizing that even when the heat index is in the lowest "caution" level on the heat index chart cited in OSHA guidance, that a heat hazard may nonetheless exist because of an employee's poor health or age. It further mischaracterizes NRCA's materials as establishing that the roofing industry recognizes that temperatures in the 70's and 80's pose a heat-hazard to workers. To the contrary, the evidence here shows that NRCA's toolbox talk on Weather-Personal Injury[18] recommends that only when temperatures "hover in the 90's and the 100's," that measures to prevent heat-illness be implemented.

A hazard may also be found to be "recognized" if the Secretary can show that the employer has actual knowledge that a condition is hazardous.[19] Nonetheless, even if a roofing contractor such as Sturgill had known that a 60 year old employee had a congenital heart defect or hyperthyroidism like M.R.,[20] it does not automatically establish knowledge that these conditions created a sufficiently serious heat-related illness hazard likely to cause death or serious injury. Disabilities are not one-size-fits-all with regards to the types and degree of limitations they impose. Not all persons with congenital heart defects are equally sensitive to heat and physical exertion. Nor are all persons over the age of 60 equally

[18] *See* CX-10
[19] St. Joe Minerals Corp. v. Occupational Safety and Health Review Com'n, 647 F.2d 840, 845 n.7, 9 O.S.H. Cas. (BNA) 1646, 1981 O.S.H. Dec. (CCH) P 25376 (8th Cir. 1981).
[20] Tr. 97-99

sensitive to heat and physical exertion. Such generalizations are exactly the types of assumptions that the Americans with Disabilities Act specifically prohibits an employer from using as the basis of any type of employment decision.[21] Absent a showing that an employer has actual knowledge that a certain employee is hypersensitive to heat, "recognition" of a heat-related illness hazard defined in part the individual employee's physiology cannot be established to have existed at the Sturgill jobsite on August 1, 2012.

e. The hazard alleged in *Sturgill* is unconstitutionally vague as it is not defined in terms which would have given Sturgill fair notice of the violative conditions it was supposed to rid the workplace of.

OSHA's authority to prosecute employers under the general duty clause is mitigated by the constitutional constraints built into the Secretary's threshold burden of establishing each element of his *prima facie* case by a preponderance of the evidence. Proof of employer "recognition" and "knowledge" of the violative condition alleged in a general duty citation are not only stand alone elements that the Secretary must establish, but are also repeatedly factored into each element of the Secretary's initial burden of proof so as to ensure employers' constitutional rights to fair notice and freedom from ex-post facto prosecution of laws are protected.[22] Prior courts which have rejected the assertion that the OSH Act's general duty clause is unconstitutionally vague rely on the fact that to prove a violation, the Secretary must establish that a reasonably prudent employer in the industry was on notice "that the proposed method of abatement was required under the job conditions where the citation was issued.[23] Fair notice requires that the challenged statute

[21] *See* 42 U.S.C. § 12112(a) and 29 C.F.R. §1630.4(a)(1)(ii), (iv), (vii). The ADAAA mandates that "[n]o covered entity shall discriminate against a qualified individual with a disability *because of the disability of such individual* in regard to hiring, upgrading, demotion, transfer, job assignments, job classifications, organizational structures, position descriptions, lines of progression, seniority lists, job training, and other terms, conditions and privileges of employment. *Id.*

[22] United States Constitution, Article 9, clause 3.

[23] *Donovan v. Royal Logging Co.*, 645 F.2d 822, 831 (9th Cir. 1981)

or agency action "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."[24]

The Supreme Court has held that in penalty cases, an agency's interpretation of an ambiguous rule should not be given substantial deference by the court if the rule did not place the alleged violator on notice that the conduct at issue constituted a violation of a rule.[25] As a result of the inconsistent way in which an "excessive-heat" hazard has been defined in guidance and general duty citations previously issued by OSHA, as well as by the Secretary and ALJs in prior excessive-heat hazard cases, a roofing contractor such as Sturgill cannot be found to have had fair notice of its obligations to free the workplace from an alleged "excessive-heat hazard" or "heat-related illness hazard" which is defined in part by an individual employee's medical conditions and age.

Moreover, significant confusion arises from the fact that the citation issued to Sturgill, like prior heat-hazard cases, initially identified the hazard as "excessive-heat," while the hazard applied in the ALJ's decision identified the hazard as a "heat-related illness hazard." This distinction is an important one, as the former defines the hazard in terms of objective conditions (weather and activity level), while the latter defines the hazard in terms of the accident (illness or death) and uses the occurrence of the injury to establish that a hazard must have therefore existed. However, it is exactly this type of ex-post facto prosecution that the general duty clause's "notice" provision was designed to protect.[26] Due to the absence of specific standards which place an employer on notice of

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[24] *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972), *see also Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, (1972).

[25] *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 & n.15 (2012) (citing favorably to the Fifth Circuit's fair warning requirement from *Diamond Roofing Co., Inc. v. Occupational Safety & Health Review Comm'n*, 528 F.2d 645, 649 (5th Cir. 1976) (where a monetary penalty may be assessed against a party who violates a statute or regulation, a regulated party must be given fair warning of the conduct that the rule prohibits or requires.).

[26] Section 658 of the OSH Act which provides that an employer charged under the general duty clause must be given notice in the form of a citation which "shall be in writing and shall describe with particularity the nature of the violation ... (and) shall fix a reasonable time for the abatement of the violation." *See e.g., Whirlpool Corp. v. Occupational Safety & Health Review Comm'n*, 645 F.2d 1096, 1098 (D.C. Cir. 1981). *See also Cape Vineyard Division of New Bedford Gas & Edison Light Co. v. OSHRC*, 512 F.2d 1148, 1150 (1st Cir. 1975).

what conditions it is supposed to rid the workplace of, it is paramount to the constitutionality of the general duty clause that the alleged hazard be defined "in a way that gives the employer a broad view of its obligations and identifies practices over which it can reasonably be expected to exercise control,"[27] so that an employer has the opportunity to prevent the accident in the first place. That is why courts have held that the general duty clause only imposes a duty upon employers to eliminate "preventable hazards. Unpreventable hazards…were not intended to be recognized under the clause."[28]

"It is well-established that it is the hazard, not the specific incident that resulted in injury that is the relevant consideration in determining the existence of a recognized hazard."[29] In the watershed general duty clause case of *National Realty and Construction*, the D.C. Circuit Court of Appeals held that:

> "To establish a violation of the general duty clause, **hazardous conduct need not actually have occurred, for a safety program's feasibly curable inadequacies may sometimes be demonstrated before employees have acted dangerously.** At the same time, however, actual occurrence of hazardous conduct is not, by itself, sufficient evidence of a violation, *even when the conduct has led to injury*."[30]

The purpose of the OSH Act is to *prevent* occupational injuries and illnesses before they occur. However, an employer can only prevent hazards which it "recognizes" and has prior notice about, and which are within its ability to prevent. An employee's internal physiology does not qualify as the type of hazard contemplated by the general duty clause. It is evident that in *Sturgill* that OSHA incorrectly used the incident as the basis for alleging a hazard must have therefore existed. Consider this: had an OSHA inspector arrived at the

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[27] *Nelson Tree Servs., Inc. v. Occupational Safety & Health Review Comm'n*, 60 F.3d 1207, 1209 (6th Cir. 1995).
[28] *National Realty, supra*, at 1265–66. *Accord, Whirlpool Corp. v. Occupational Safety and Health Review Commission*, C.A.D.C.1981, 645 F.2d 1096, 207 U.S. App. D.C. 171. (general duty clause does not impose strict liability on employers but instead limits their liability to preventable hazards).
[29] (internal citations omitted) *Crowley Am. Transp., Inc.*, 18 O.S.H. Cas. (BNA) ¶ 1888 (O.S.H.R.C.A.L.J. July 29, 1999) *citing Kelly Springfield Tire Co.*, 10 BNA OSHC 1970 (No. 78-4555, 1982), *aff'd* 729 F.2d 317 (5th Cir. 1984).
[30] (emphasis added) *Nat'l Realty & Const. Co. v. Occupational Safety & Health Review Comm'n*, 489 F.2d 1257, 1267 (D.C. Cir. 1973).

jobsite at 10:53 a.m. on August 1, 2012 to conduct a general inspection, less than an hour before M.R. collapsed, would he or she have issued Sturgill a citation for exposing employees to excessive heat in violation of the general duty clause? No NOAA heat-advisory had been issued for that day. The OSHA inspector, like everyone else, would experience that the wet-bulb globe temperature was 71°F. There were gallons of ice water on the roof and rooftop AC units providing jets of cool air. The inspector may have even seen a few workers taking a break in the shaded outdoor picnic area or in the air-conditioned break room inside. At that time, an OSHA inspector would have seen that M.R. was sweating but otherwise looked fine, and M.R. would have confirmed the same if asked.[31] Under these circumstances, would the OSHA inspector have issued Sturgill a section 5 (a)(1) citation for exposing employees to the hazard of excessive-heat? If the answer is "no," then the citation against Sturgill must be vacated.

[31] Tr. 524-525

II. AN EMPLOYER CANNOT BE FOUND TO HAVE "KNOWLEDGE" OF A HAZARD CAUSED BY AN INDIVIDUAL EMPLOYEE'S UNDERLYING HEALTH CONDITIONS OR AGE.

To sustain a general duty violation, the Secretary must prove that the employer had actual or constructive knowledge that the allegedly hazardous condition existed at its workplace.[32] Constructive knowledge may be found if, through the exercise of reasonable diligence, the employer should have known of a likelihood of the violative condition. [33] "Reasonable diligence involves several factors, including an employer's obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence."[34]

The conditions at the Sturgill jobsite on the morning of August 1, 2012 were not such to put a reasonably prudent employer on notice that an "excessive-heat hazard" existed. First, there is no evidence which established that Sturgill had "actual knowledge" that M.R. was exposed to excessive-heat hazard. In *Aldridge*,[35] the ALJ rejected the Secretary's argument that the decedent's sweating should have signaled Aldridge that he was suffering from heat stroke when sweating is also normal sign that the body is dissipating heat as it should, and that even first responders could reasonably interpret heat illness signs differently. When the decedent stumbled, the Aldridge foreman told him to take a break, and when he said he "couldn't bend anymore," Aldridge began first aid measures. Likewise, other than sweating,[36] M.R. did not exhibit any symptoms of heat-illness which would have put Sturgill on notice that an actual hazard existed, until he began

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[32] 29 U.S.C. § 666(j).
[33] *Getty Oil Co. v. Occupational Safety & Health Review Comm'n.* 530 F.2d 1143, 1145 (5th Cir. 1976) (An employer "cannot be found guilty of a 'serious' violation unless it did not, and could not 'with the exercise of reasonable diligence,' know of the presence of the violation.").
[34] *Pride Oil Wells Service*, 15 BNA OSHC 1809, 1814 (No. 87-692, 1992); *Brand Scaffold Builders, Inc.*, 19 BNA OSHC 1366 (No. 00-1331, 2000).
[35] *Secretary of Labor, Complainant v. Aldridge Elec., Inc., Respondent*, 26 O.S.H. Cas. (BNA) ¶ 1449 (O.S.H.R.C.A.L.J. Dec. 2, 2016).
[36] CX-13, p. 5

walking clumsily, at which time the Sturgill foreman made him take a break and guided him to the shade.[37]

As for "constructive knowledge," in *Aldridge*, the ALJ held that even if the Secretary had proven that an excessive-heat hazard existed, that the employers lack of "constructive knowledge" of a hazard defined by an employee's physical condition would nonetheless defeat the Secretary's case. Specifically, the *Aldridge* ALJ held that the Secretary did not establish that Aldridge knew or should have known that environmental and ambient temperature conditions in the lowest "caution" zone – when no heat advisory had been issued – would nonetheless cause excessive heat to the decedent. Likewise, in *Sturgill*, no NOAA heat-advisory had been issued for August 1, 2012 and the weather was in the lowest "caution" zone of the heat index chart used by OSHA in its heat-illness prevention guidance.[38]

In finding no constructive knowledge in *Aldridge*, the ALJ also cited to the fact that Aldridge had water, allowed for extra breaks, and checked on the decedent after he stumbled (i.e. - monitored him as the "new guy") – to show that there was no reason that Aldridge should have known that the decedent was at higher risk for heat illness that exceeded its heat plan. Similarly, Sturgill also had measures in place to prevent the occurrence of heat-illness, which were communicated to M.R.,[39] including water, shaded rest areas, and both scheduled and discretionary breaks.[40] Sturgill also implemented a de facto acclimatization plan by assigning M.R., as the newest worker on his first day, the least strenuous job on the roof[41] and foreman Brown and other employees checked on him

[37] Tr. 505, 513-14; CX-12, p. 6
[38] CX-5 at pg. 6 and 10
[39] Tr. 498-499
[40] Tr. 9, 208-210, 408, 470, 480, 497-499, 508-509, 511-512
[41] Tr. 497-500, *see also* Tr. 520. (Question to Foreman Brown: And you did not know how long it takes a worker to acclimatize to the heat at that time? Answer by Foreman Brown: Well, I did not know but at the time I said Mr. -- I gave Mr. MR the easiest job on the roof. So basically what you're saying, I already acclimatized -- you know, I gave him -- I put him in a position where it was easy. Put him in a position where he had light work to do. So that's also explaining acclimatization.).

throughout the day.[42] Accordingly, there is no reason that Sturgill should have known that M.R. was at a higher risk for heat illness that exceeded the heat plan measures it had in place, which were appropriate and in compliance with OSHA guidelines on a day when temperatures were below 91°F and the work was light. Moreover, the legal restrictions to obtaining knowledge about an employee's health risks which are imposed on employers by the ADAAA is relevant to the Secretary's burden in proving a general duty violation in a case where the violative conditions which create the "hazard" include the physical condition and age of an employee.

III. AN EMPLOYER CANNOT CONDUCT A MEDICAL INQUIRY PROHIBITED BY THE AMERICANS WITH DISABILITIES ACT AS AMENDED ON THE BASIS THAT IT IS NEEDED FOR AN EMPLOYER TO COMPLY WITH THE OSH ACT'S GENERAL DUTY CLAUSE.

The Americans with Disabilities Act of 1990 as Amended in 2008 ("ADAAA") prohibits employers from using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability.[43] After a conditional offer of employment is given to a prospective employee, an employer is allowed to require that employees undergo medical screening, so long as they require it for all candidates.[44] If following a disability-related question or medical examination an employer rejects a candidate, "the court will closely scrutinize whether the rejection was based on the results of that question or examination. If the question or examination screens out an individual because of a disability, the employer must demonstrate that the reason for the rejection is *job-related and consistent with business necessity.*"[45] Importantly,

[42] Tr. 504 *see also* Tr. 516
[43] 29 C.F.R. §1630.10(a))
[44] 29 C.F.R. §1630.14(b) and EEOC Interpretive Guidance to 29 C.F.R. § 1630.14(b).
[45] ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations *October, 1995* (Also available in PDF format)

however, an employer cannot conduct a medical inquiry on the basis that it is needed for an employer to comply with the OSH Act's general duty clause.[46]

Although the ADAAA does not completely bar employers from inquiring about an employee's health, it creates substantial legal roadblocks to obtaining such knowledge. While the ADAAA's rule on which medical inquiries are permissible is clear – it must be job-related and consistent with business necessity – the rule is complicated to apply.[47] Whether it is permissible for an employer to ask an employee certain questions about his or her medical condition is a fact-specific inquiry and depends on the particular circumstances of the job.[48]

Moreover, a reasonably prudent roofing contractor would not know, without consulting with an attorney, that in certain limited circumstances it is legally permissible to ask an employee about his age or disability. To the extent that the ADAAA may permit medical exams or disability inquiries in certain circumstances, it is nonetheless unfair to hold an employer liable under the general duty clause for not making individualized risk assessments of each employee on every day as to whether that employee, based on his physiological condition, may face a hazard to him in the workplace. An employer who errs on the side of caution by not probing further after asking an employee if he has performed roofing work before, to which he responds "yes," cannot be found to have been

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[46] *See discussion* of *Miller v. Whirlpool Corp.*, 807 F. Supp. 2d 684 (N.D. Ohio 2011), *infra.*

[47] If a disability-related question or medical examination screens out an individual because of a disability, the employer must demonstrate that the reason for the rejection is "job-related and consistent with business necessity." *ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations* (October, 1995). Workplace safety is a well-recognized job-related business necessity; however, the standard of showing required to prove that a person's disability poses a threat to workplace safety is "quite high." *Cripe v. City of San Jose*, 261 F.3d 877, 890 (9th Cir. 2001). Employers may only conduct a medical exam or disability-related inquiry that is "no broader or more intrusive than necessary" and which is a "reasonably effective method" of achieving a business necessity. *Conroy v. N.Y. State Dep't of Corr. Servs.*, 333 F.3d 88, 97–98 (2d Cir. 2003).

[48] In order to comply with the ADAAA, medical examinations of existing and prospective employees must be "limited to an evaluation of the employee's condition only to the extent necessary under the circumstances to establish the employee's fitness for the work at issue." *Tice v. Centre Area Transp. Auth.*, 247 F.3d 506, 515 (3d Cir. 2001). Part of this showing requires the employer to demonstrate that the safety-based qualification standard is necessary and related to "the specific skills and physical requirements of the sought-after position." *Belk v. Southwestern Bell Tel. Co.*, 194 F.3d 946, 951 (8th Cir. 1999).

unsatisfactorily diligent in its efforts to uncover a hazardous condition at its jobsite. Therefore, absent a showing that a supervisory employee had actual knowledge about M.R.'s underlying conditions, there can be no finding that Sturgill had "constructive" knowledge of the hazard created by M.R.'s underlying health conditions and age.

Due to the fact that the broad statutory text of the OSH Acts general duty clause[49] does not specifically require an employer to conduct employee medical screenings or inquire about disabilities, federal courts have held that compliance with the OSH Act's general duty clause cannot be used as justification for conducting medical inquiries which screen out an individual because of a disability.[50] This rule was best articulated in the 2011 case of *Miller v. Whirlpool*, an ADA disability discrimination action brought in federal district court for the Northern District of Ohio.[51]

In *Whirlpool*, a former employee challenged the legality of a medical certification policy implemented by Whirlpool following a serious workplace accident and resulting OSHA citation.[52] The accident involved a powered industrial vehicle that employees drove throughout the Whirlpool facility.[53] As part of Whirlpool's new medical certification policy, employees who drove these vehicles were required to complete a 34-question medical form which asked them to list all prior illnesses, injuries or past accidents.[54] The court rejected Whirlpool's argument that its disability-questionnaire was necessitated by its compliance obligations under the OSH Act's general duty clause.[55] Even though Whirlpool had presented evidence that OSHA had approved of the questionnaire, the court did not allow the employer to proceed with the inquiry, pointing out that OSHA's *approval*

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[49] 29 U.S.C. § 654(a)(1)
[50] *See e.g. Miller v. Whirlpool Corp.*, 807 F. Supp. 2d 684, 688–89 (N.D. Ohio 2011); *Rohr v. Salt River Project Agric. Imp. and Power Dist.*, 555 F.3d 850 (9th Cir.2009); *EEOC v. Murray, Inc.*, 175 F.Supp.2d 1053, 1062 (M.D.Tenn.2001).
[51] *Miller v. Whirlpool Corp.*, 807 F. Supp. 2d 684 (N.D. Ohio 2011).
[52] *Id.* at 685.
[53] *Id.*
[54] *Id.*
[55] *Id.* at 688-89.

of the disability-inquiry was not the same as *requiring* it.[56] **Finding that the text of the general duty clause[57] did not expressly require disability-related inquiries in order to provide a place of employment free from hazards, the court rejected the use of an employer's general duty clause compliance obligations under the OSH Act as a defense to conducting a medical inquiry that violates the ADAAA.[58]**

Accordingly, due to ADAAA limitations on an employer's ability to obtain and use information about their employees' disabilities, coupled with imprecise legal duties placed upon on employers by the OSH Act's vague general duty clause, the Secretary cannot hold an employer liable for failing to discover the existence of a hazard where the definition varies on a person-by-person basis, and therefore, constructive knowledge cannot be established.

[56] *Id.* at 689.
[57] 29 U.S.C. § 654(a)(1)
[58] *Miller v. Whirlpool Corp.*, 807 F. Supp. 2d 684, 688–89 (N.D. Ohio 2011); *Rohr v. Salt River Project Agric. Imp. and Power Dist.*, 555 F.3d 850 (9th Cir.2009).

IV. THE GENERAL DUTY CLAUSE DOES NOT REQUIRE AN EMPLOYER TO CUSTOM-TAILOR HEAT-ILLNESS PREVENTION MEASURES FOR EACH EMPLOYEE BASED ON THEIR AGE AND HEALTH AS SUCH MEASURES ARE NOT A FEASIBLE OR EFFECTIVE MEANS OF REDUCING THE HAZARD OF EXCESSIVE-HEAT.

To prove that an employer failed to render its workplace "free" of a recognized hazard in violation of the general duty clause, the Secretary is required to "specify the particular steps a cited employer should have taken to avoid citation, and to demonstrate the feasibility and likely utility of those measures."[59] This requires the Secretary to identify "conditions or practices over which the employer can reasonably be expected to exercise control in terms of a preventable consequence of the work operation, not the absence of an abatement method."[60] To be feasible, the proposed method must be recognized by "knowledgeable persons familiar with the industry as necessary and valuable steps for a sound safety program in the particular circumstances existing at the worksite."[61] A safety measure is "necessary and valuable" if it will "materially reduce" the likelihood of the accident or incident occurring[62] or eliminate the hazard altogether.[63] If the Secretary alleges that an employer's existing safety measures were inadequate, the Secretary must "specify the additional steps a cited employer should have taken" to avoid a general duty clause citation"[64] and provide "evidence that persons familiar with the employer's industry would have prescribed such [additional] steps under similar circumstances."[65]

According to the ALJ, in order to have adequately addressed the alleged "heat-related illness hazard" which existed at the Sturgill jobsite on August 1, 2012, Sturgill

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[59] (emphasis added) *National Realty, supra*, at 1268. *See also Babcock & Wilcox Co. v. OSHRC*, 622 F.2d 1160, 1164 (3d Cir. 1980); *Empire-Detroit Steel*, 579 F.2d at 384.
[60] (*internal citing references omitted*) *Otis Elevator Co.*, 2007 OSHRC LEXIS 77, *6, 2005 OSHD CCH P32, 920 (No. 03-1344)
[61] *National Realty, supra*, at 1266.
[62] *Id.* at 1267.
[63] *Roberts Sand Co., LLLP v. Sec'y of Labor*, 568 F. App'x 758, 759 (11th Cir. 2014)
[64] (internal citations omitted) *Jewell Painting, Inc. Respondent*, 16 O.S.H. Cas. (BNA) ¶ 2110 (O.S.H.R.C.A.L.J. Sept. 12, 1994) *citing Natl. Realty and Constr. Co. Inc.*, 489 F.2d 1257, 1268 (D.C.Cir.1973). *Accord Pelron Corp.*, 12 BNA OSHC 1833, 1836, 1986-87 CCH OSHD ¶ 27,605 (No. 82-

should have, among other things, implemented a formalized work-rest regimen based on the hourly weather and "other factors such as age and acclimatization"[66] and an acclimatization program which, based on the individual employee's recent work experience, provides a plan for allowing the employee to build-up a physical tolerance to working in the heat.[67]

To implement these additional abatement measures, which the ALJ found were necessary under the circumstances at the Sturgill jobsite, would mean that contractors would have to have all employees undergo a pre-employment medical screening, and then, develop an individual heat-illness prevention program for each employee – before they ever begin working – which based on their height, weight, age, and medical conditions, includes a determination of what their threshold tolerance is for working in varying temperatures at varying levels of physical exertion. Then, after these individual prevention programs are developed, the contractor would then have to implement and enforce each employee's prevention program in the field and monitor each worker to ensure their compliance, which would require keeping track of the activities being performed, how strenuous they are, how long they are being performed, and in what temperatures. Because feasibility includes "utility" and "practicality," the interference with work, inconvenience, manpower and resources needed to implement individualized abatement measures for every employee would clearly rise to the level of infeasibility.

Moreover, due to the multiple variables which come into play and influence how the combination of environmental heat and physical exertion affect an individual with a certain medical condition, no one-size-fits-all rule can be made for predicting how well an

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388, 1986); *Cerro Metal Prod. Div., Marmon Group, Inc.*, 12 BNA OSHC 1821, 1822, 1986-87 CCH OSHD ¶ 27,579 (No. 78-5159, 1986).

[65] *Jewell Painting, Inc. Respondent*, 16 O.S.H. Cas. (BNA) ¶ 2110 (O.S.H.R.C.A.L.J. Sept. 12, 1994) *citing Pelron*, 12 BNA at 1836. *Cerro*, 12 BNA at 1822-23.

[66] *Sturgill* ALJ Dec. p. 17

[67] *Sturgill* ALJ Dec. p. 17

individual with a certain disability will tolerate varying conditions. Factors such as how much sleep they got the night before, how well hydrated they were when they arrive on site, what they ate that morning, what other medical conditions they have going on – possibly known or unknown, all come into play. Consequently, even if an employer had the resources to develop an individual heat-illness prevention program for each employee – the likely utility and effectiveness of such a program can quickly become obsolete.

Physical ability tests, which are permitted by the ADAAA,[68] would not provide an employer with the necessary information needed to materially reduce the risk of heat-illness created by an employee's age or health. The issue in Sturgill is not whether M.R. was able to stand for long periods of time or be able to push materials over the side of a waist-high wall; clearly he could. Rather, the issue is for how long and under what conditions could he do so without it being hazardous to his health.

In the context of the ADAAA, the reasonableness, feasibility, and utility of medical pre-screening of workers (and therefore, whether such an inquiry is illegal or not) depends on the degree of intrusiveness of the requirements. The ADAAA's job-related business necessity exception only permits employers to conduct a medical exam or disability-related inquiry that is "no broader or more intrusive than necessary" and which is a "reasonably effective method" of achieving a business necessity.[69] Such inquiries must be "limited to an evaluation of the employee's condition only to the extent necessary under the circumstances to establish the employee's fitness for the work at issue."[70] Most

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[68] 29 C.F.R 1630.14(a). "Employers are permitted to make pre-employment inquiries into the ability of an applicant to perform job-related functions. This inquiry must be narrowly tailored. The employer may describe or demonstrate the job function" and ask if the employee is able to perform it. *Id.*

[69] *Conroy v. N.Y. State Dep't of Corr. Servs.*, 333 F.3d 88, 97–98 (2d Cir. 2003). *See also See* ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations *October, 1995* (If following a disability-related question or medical examination an employer rejects an applicant or changes an existing employee's terms, conditions or privileges of employment, "the court will closely scrutinize whether the rejection was based on the results of that question or examination. **If the question or examination screens out an individual because of a disability, the employer must demonstrate that the reason for the rejection is "job-related and consistent with business necessity."**")

[70] *Tice v. Centre Area Transp. Auth.*, 247 F.3d 506, 515 (3d Cir. 2001).

importantly, an employer "is not permitted to deny an employment opportunity to an individual with a disability merely because of a slightly increased risk. The risk can only be considered when it poses a significant risk, i.e., high probability, of substantial harm; a speculative or remote risk is insufficient."[71] Thus, in order to protect against unnecessary over exclusion of persons with disabilities, for a screening procedure to be legally permissible under the job-related business necessity exception, a doctor would need to be able to ascertain, with reasonable certainty, the point at which exposure to heat will pose a *substantial* risk of *significant* harm to the individual.

A person with a disability under the ADAAA, is, by definition, an individual with a physiological disorder or impairment which negatively effects one or more of their body systems outside of a "normal" range.[72] The nervous system, endocrine system (hypothalamus, thyroid and metabolism) cardiovascular/circulatory system, and integumentary system (skin and hair), are all systems involved in thermoregulation of body temperature.[73] Obesity, chronic illnesses, and persons taking certain medications (e.g., blood pressure medications, diuretics, or water pills) can increase the risk of heat-illness.[74] Accordingly, a medical examination or questionnaire designed to identify employees with health conditions aggravated by heat or which prevents them from being able to thermoregulate "normally" would implicate an incredibly wide swath of people and conditions. Moreover, in most cases, the point at which an individual's disability will pose a "significant risk" of "substantial harm" to them in the context of heat-stress is difficult to predict with any degree of certainty due to other important variables that come into play after the employee leaves the doctor's office.

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[71] EEOC Interpretive Guidance to 29 C.F.R. § 1630.2(r) *citing* Senate Report at 27; House Report Labor Report at 56–57; House Judiciary Report at 45.
[72] EEOC Interpretive Guidance to C.F.R. §1630.2(h)
[73] https://opencurriculum.org/5385/homeostasis-and-regulation-in-the-human-body/
[74] CX-9 pg. 7

There is also a lack of objective evidence showing that pre-employment medical screening would provide any noticeable impact on reducing the incidence of occupational heat-illness.[75] To the contrary, studies have shown that such screenings have little actual affect in preventing future health related occupational risks.[76] In fact, the most likely outcome of such screening is the unnecessary over-exclusion of individuals with disabilities.[77]

If an employer's screening procedures are overbroad or go too far, they will expose the employer to liability under the ADA. Medical pre-screening which is designed to uncover conditions which might make an individual more vulnerable to heat and physical exertion may easily be viewed as overbroad and not reasonably tailored to a job-related business necessity. Moreover, compliance with the OSH Act's general duty clause is not a defense to a discrimination claim.[78] Due to the large number of physiological systems involved in regulating body heat, such screenings would require individuals to disclose a great amount of detail about protected disabilities, without the employer necessarily being able to prove that the means justify the ends.

The abatement measures suggested by the ALJ and Secretary were not reasonably necessary under the conditions present at the Sturgill jobsite on August 1, 2012, which did not pose a significant risk of death or serious injury to any of the other employees on the roof other than M.R. As it pertains to heat-illness prevention, abatement methods which require individual medical screenings provide relatively low utility in light of the high expense, unreliable results, and high likelihood of unnecessarily screening out of individuals with disabilities – and therefore, are infeasible.

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[75] http://www.who.int/bulletin/volumes/87/7/08-052605/en/
[76] *Id.*
[77] http://www.who.int/bulletin/volumes/87/7/08-052605/cn/
[78] *See e.g. Miller v. Whirlpool Corp.*, at 688–89 (N.D. Ohio 2011) *supra* (compliance with the OSH Act's general duty clause cannot be used as justification for medical inquiries which screen out an individual because of a disability).

V. THE GENERAL DUTY CLAUSE SHOULD NOT BE EXPANDED TO REQUIRE EMPLOYERS TO PERFORM INDVIDUALIZED EMPLOYEE ASSESSMENTS ON EVERY JOB EVERY DAY.

A central issue implicated in the findings which formed the basis of the ALJ's Sturgill decision arises from the similar, yet competing mandates of two federal acts enacted by Congress to protect and enhance the employment rights of American workers. The OSH Act, which was created to enhance workplace health and safety for employees, accomplishes its directive by requiring that employers *implement rules* and *restrictions* designed to reduce the dangers posed by conditions and practices in the workplace. Similarly, the Americans with Disabilities Act as Amended was created to enhance work conditions and opportunities for Americans with disabilities. The ADAAA's directive, however, is achieved by requiring that employers *remove* barriers in the workplace in order to expand opportunities and increase accessibility.

Review of the underlying action presents an opportunity for the Commission to draw a bright line between where an employer's obligation to ensure worker safety pursuant to the OSH Act ends, and an employee's responsibility – and choice – to determine whether they require an individualized workplace accommodation for their disability arises. As demonstrated above, the law requires that this line be drawn at the point where the OSH Act's general duty clause is not interpreted to require an employer to perform a risk-assessment for each employee in order to proactively implement customized work place controls designed to address the physiological idiosyncrasies inherent between people of different ages and health status.

OSHA was never designed, nor could it have been, to eliminate all occupational accidents. Rather, it is designed to require a good faith effort to balance the need of workers to have a safe and healthy work environment against the requirement of industry to function

without undue interference.[79] The general duty clause does not impose strict liability on employers; rather, it only imposes a duty on employers capable of achievement.[80] In *Industrial Union Department v. American Petroleum Institute*, the Supreme Court struck down OSHA's policy which set carcinogen exposure limits to the lowest feasible level, finding that a rule which is designed to safeguard relatively few sensitive workers as not being reasonably necessary or appropriate.[81] The Court held that OSHA's rulemaking authority is limited to rules which are reasonably necessary or appropriate to remedy a "significant" risk of "material" health impairment.[82] Insofar as standards promulgated by OSHA designed to safeguard hypersensitive workers have been struck down as unnecessary, it is unreasonable for an employer's general duty obligations to be more rigorous than those imposed by standards which have gone through the notice and comment rulemaking process.

To find that the OSH Act requires an employer to perform an individual risk assessment for each employee to determine whether their health or age increases the likelihood of a hazard springing into existence would have the perverse effect of providing employers with a legally sanctioned reason to disqualify hundreds of thousands of individuals from job opportunities that they are qualified and able to perform under the pretense that the employer is unable to provide them with a hazard-free workplace as

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[79] *Titanium Metals Corp. of Am. v. Usery*, 579 F.2d 536, 543–44 (9th Cir. 1978) (*internal citations omitted*) *citing* Legislative History of the Occupational Safety and Health Act of 1970, Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92nd Cong., 1st Sess. (Comm. Print 1971) at 435 (Remarks of Senator Williams), Quoted in Anning-Johnson Co. v. OSHRC, 516 F.2d 1081, 1088 (7th Cir. 1975).

[80] *Titanium Metals Corp. of Am. v. Usery*, 579 F.2d 536, 543–44 (9th Cir. 1978). *citing to Brennan v. OSHRC* (Hendrix d/b/a Alsea Lumber Co.), 511 F.2d 1139, 1144 (9th Cir. 1975) (holding that the employer's duty under the general duty clause "must be one which is Achievable.") *Accord*, *National Realty*, *supra*, at 1265-66 ("Congress intended to require elimination only of preventable hazards.").

[81] *Industrial Union Dep't, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980).

[82] *Industrial Union* at 645 ("Expert testimony that a substance is probably a human carcinogen—either because it has caused cancer in animals or because individuals have contracted cancer following extremely high exposures—would justify the conclusion that the substance poses some risk of serious harm no matter how minute the exposure and no matter how many experts testified that they regarded the risk as insignificant. That conclusion would in turn justify pervasive regulation limited only by the constraint of feasibility. **In light of the fact that there are literally thousands of substances used in the workplace that have been identified as carcinogens or suspect carcinogens, the Government's theory would give OSHA power to impose enormous costs that might produce little, if any, discernible benefit.**")

required by the OSH Act's general duty clause. Not only does the ADAAA preclude an employer from obtaining the type of information which would be needed in order to develop an individual hazard-prevention policy for each employee, due to the variable nature of heat-stress, the merits and actual utility of such a policy are low. Moreover, depending on the size, resources, and sophistication of the employer, the actual implementation of individual hazard-prevention programs is completely unfeasible.

Importantly, finding that an employers' obligations under OSH Act does not require that an employer make a proactive effort to free the workplace from conditions which are hazardous on an individual employee level does not mean that such employees will be left unprotected. Rather, it is this level of individualization where the OSH Act's general duty authority ends and the ADAAA's reasonable accommodation mandate comes in, which is specifically designed to ensure that reasonable accommodations are not unduly burdensome to employers, whether that means financially or in terms of disruption to operations.[83] Moreover, the ADAAA allows for employers and employees to engage in an interactive process to develop and determine exactly what type of accommodation is needed based on that employee's specific needs, rather than the employer unilaterally imposing an abatement measure onto an employee on the basis that the general duty clause requires them to do so, or else be fined. The employee will still be entitled to a workplace accommodation if one is needed to allow them to safely perform their job, which accomplishes the OSH Acts directive of ensuring employers provide a workplace free of recognized hazards.

[83] 42 U.S.C. § 12112(b)(5)(A). (One of the main rights that the ADAAA affords a qualified person with a disability is the right to a reasonable accommodation in the workplace,[83] so long as it does not impose an "undue burden" on the employer).

VI. CONCLUSION

The ALJ's interpretation of the definition of "excessive heat-hazard" propounded by the Secretary in the citation issued to Sturgill is inconsistent with the opinions of past courts who have addressed the issue of "excessive-heat hazard" citations issued under the general duty clause. Prior to the hearing in the Sturgill case, no court had never found an excessive-heat hazard to exist where employees had not been exposed to a temperature of at least 95°F. Moreover, no court had ever previously defined an "excessive heat hazard" as being characterized in part by an individual employee's physiological condition. Because the alleged hazard encompasses a component that an employer has no power to control – i.e. – a physical condition that places a worker at a higher risk for heat illness – and because the alleged hazard is defined in a way never previously before found to be an OSH Act violation, the employer here did not have fair notice of the alleged violative condition that would have prompted the employer to act accordingly. The way in which the ADAAA's compliance obligations intersect the OSH Act's general duty clause requirement precludes OSHA from penalizing an employer for failing to implement abatement measures to address a hazard which exists as a result of individual employee's disability. Absent a standard issued by OSHA which has gone through the notice and comment rulemaking process, employers cannot screen employees for disabilities aggravated by heat.[84] Accordingly, the section 5(a)(1) citation issued to Sturgill should therefore be vacated due to the Secretary's failure to establish by a preponderance of the evidence that a general duty violation, as defined by the OSH Act and case law, existed in this case.

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[84] *Miller v. Whirlpool Corp.*, 807 F. Supp. 2d 684, 688–89 (N.D. Ohio 2011); *Rohr v. Salt River Project Agric. Imp. and Power Dist.*, 555 F.3d 850 (9th Cir.2009).

Respectfully submitted, this 14 day of May, 2018.

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CERTIFICATE OF SERVICE

This is to certify that counsel of record in the foregoing matter has been served with the attached document by depositing copies of same in the United States Mail in an envelope with sufficient postage thereon addressed as follows:

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