UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor,	)	
Complainant,	)	
v.	)	
	)	**OSHRC Docket No. 13-0224**
A.H. Sturgill Roofing, Inc.,	)	
Respondent.	)	

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES IN SUPPORT OF RESPONDENT, A.H. STURGILL ROOFING, INC.

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I. The National Association of Home Builders of the United States

The National Association of Home Builders of the United States ("NAHB") submits its brief on review, as *amicus curiae*, in support of the position of Respondent, A.H. Sturgill Roofing, Inc. Good cause exists for NAHB to participate as *amicus curiae* in this matter.

A. NAHB is the Leading Industry Trade Association of the Residential Home Building Industry.

Founded in 1942, NAHB represents more than 140,000 members involved in home building, remodeling, multifamily construction, property management, specialty trade contractor, design, housing finance, building products manufacturing, and all other aspects of the residential and light commercial construction industries. *See* https://www.nahb.org/en/about-nahb.aspx (last visited May 13, 2018) for a full description of NAHB, its mission, and its membership. NAHB is affiliated with more than 700 state and local home builders associations located in all 50 states and Puerto Rico. NAHB's members touch on all aspects of the residential construction industry.

About one-third of NAHB's members are home builders and/or remodelers. The others are associates working in closely-related specialties such as sales and marketing, housing finance, and manufacturing building materials. Currently, the residential construction sector employs over 2 million people and NAHB's builder members will construct approximately 80 percent of the new housing units projected in the next 12 months.

The more than 14,000 members that belong to NAHB's Remodelers Council comprise about one-fifth of all firms that specify remodeling as a primary or secondary business activity. The NAHB Multifamily Council is comprised of more than 1,000 builders, developers, owners, and property managers of all sizes and types of multifamily housing, comprising condominiums and rental apartments. NAHB is a non-profit national trade association incorporated in the State of Nevada with headquarters located in Washington, D.C.

B. NAHB Members are Directly and Significantly Impacted by the Decision on Review.

NAHB members are significantly impacted by this case. Residential home building work is performed outside in a wide variety of work environments, including those where the temperature and heat index ranges involved in this case are present. For several months throughout the year, home builders – particularly in the southern and western parts of the United States – work outside and in hot conditions.

Throughout the course of the day, home builders can experience a range of temperatures and in a variety of conditions. At times during the home construction process, there may be shade conditions in the general work environment, but none provided by the house structure itself. As the home building process moves from setting the foundation to framing, shade may be created by the house itself. Even after the house is built, employees may still be required to work on the roof of the house or outside in hot conditions. Home building involves work outside in heat.

The decision on review before the Occupational Safety and Health Review Commission ("Commission") presents key issues regarding how the Occupational Safety and Health Administration ("OSHA") applies Section 5(a)(1) of the Occupational Safety and Health Act of 1970 ("OSHA Act" or "Act"), commonly referred to as the General Duty Clause, in the context of purported heat hazards. Given the extent to which NAHB members perform work outside, the decision of the Commission will have a significant impact on NAHB's members.

C. NAHB has Developed Guidance Material on Heat Stress.

One of the key issues involved in the decision on review relates to industry-developed guidance material. The Administrative Law Judge in this case relied on guidance material produced by the National Roofing Contractors Association ("NRCA") to find that the roofing industry recognized "heat as a hazard for employees engaged in roofing work." *Secretary of Labor*

v. A.H. Sturgill Roofing ("*Sturgill Roofing*"), Slip. Op., p. 12. The Judge referenced an NRCA pocket guide discussing heat hazards, along with two tool box talks entitled "Heat Stress" and "Weather-Personal Injury." *Id.* Based on this material, the Judge found that the entire roofing industry recognized heat as a hazard. *Id.*

Like NRCA, NAHB develops important safety and health guidance material for its members. This guidance material can take the form of video training, webinars, and written documentation. Trade associations play an important role in protecting the safety and health of employees by developing key information in a user-friendly format for employer and employee use.

NAHB also has developed training material on the hazards of working in hot conditions. *See* https://www.nahb.org/en/research/safety/video-toolbox-talks/heat-stress.aspx (last visited May 13, 2018). NAHB has put forth a one-page fact sheet entitled "Heat Stress Safety." It lists certain common heat stress hazards and ways to avoid heat stress. It is not meant to be a full and comprehensive guide to working in the heat, but is designed to provide useful information to employers and employees in a user-friendly manner. It is provided in English and Spanish.

NAHB has also produced a short video on working in the heat. As with the one-page fact sheet, the video is designed to provide key information on protecting employees from heat hazards in a user-friendly format.

How the Commission views the guidance material put forth by organizations such as NAHB or NRCA regarding industry recognition will impact NAHB's activities significantly in this area, and thus impact the safety and health of employee members. NAHB has a strong interest in assisting the Commission in understanding the impact that the decision on review may have with respect to its own development of safety and health guidance material.

D. NAHB's Experience and History with the Issues Involved in this Matter will Assist the Commission's Consideration of the Case.

NAHB's submission of a brief in this matter will assist the Commission in assessing the impact of the General Duty Clause regarding working in heat in an environment significantly impacted by outside working conditions. Neither party can speak to the range of exposures, work environments, and conditions that exist on a typical residential home building site. Respondent can speak to its experience performing roofing work, but that does not address the variety of conditions that otherwise exist on a daily basis on home building sites throughout the country.

NAHB will provide the Commission a practical view of the impact of the decision on home builders across the United States, something that the parties cannot address. If left standing, this decision will have significant, negative consequences for home builders, potentially subjecting them to large penalties and citations whenever their employees work in any hot conditions, regardless of whatever actions they may have taken to protect employees from getting ill on the job site.

II. Summary of Argument

The decision on review has expanded the application of the General Duty Clause with respect to working in hot conditions in such a manner as to potentially subject any employer with employees working outside in hot weather to a citation. In several ways, the decision essentially eliminates the need for the Secretary to *prove* key elements of a General Duty Clause citation.

First, the Judge's calculation of heat and the conclusion of the existence of a heat hazard are not supported. Through a series of assumptions and back-of-the-envelope math, the Judge essentially "created" a heat hazard at the worksite at issue. Even though there was no heat advisory issued on the day of the accident, the Respondent employer was expected to make the same – or similar – calculations of the heat that the Judge made and implement a panoply of measures based

upon those calculations. Under the Judge's decision, any time that the temperature is approximately 80 degrees and work is performed – even if just momentarily – in direct sunlight, a hazard is established under the General Duty Clause. This eliminates the need for the Secretary to prove a hazard at all and is inconsistent with another recent decision by Chief Judge Covette Rooney, whereby she examined multiple criteria to determine the presence of a heat hazard.

Second, the Judge's finding of industry recognition of the hazard in the case based solely on three NRCA guidance documents reads the "recognition" criteria out of the General Duty Clause altogether. While it is true that industry guidance material can be used as the basis for establishing industry recognition, the Judge expands that principle to the extreme. In effect, the Judge states that because NRCA provided informational material indicating heat can be a hazard, the industry has recognized that heat is a hazard in virtually all conditions in virtually all roofing environments. But that type of analysis should not be conclusive under the General Duty Clause. Recognition in the area of heat illness requires consideration of the specific circumstances at issue in the case. Under the lens of the NRCA materials, the environment at issue in this case does not qualify as a recognized hazard.

Third, the decision appears to eliminate the requirement that feasible means of abatement must be *proven* to eliminate or materially reduce a hazard. In contrast to previous significant cases examining the General Duty Clause where abatement takes the form of a process approach, the Judge simply made findings that there were other steps that the Respondent could have taken to protect employees from heat and those steps could have been implemented. The Judge made no affirmative finding that those steps would "eliminate" or "materially reduce" the hazard. There is always more that an employer can do to address hazards of working in hot conditions. That, in itself, cannot be the test of whether feasible means of abatement exist in the context of heat stress. The Secretary must show, and the Judge must find, that each proposed abatement would eliminate

or materially reduce the hazard. The Judge made no such finding here.

The combination of the above has eviscerated any meaning to the General Duty Clause. It would cause home builders to be subject to a citation by OSHA whenever home building work is performed in the heat at all. Congress did not intend for the General Duty Clause to have such a broad, vague, and ambiguous application.

III. Decision on Review

In *Sturgill Roofing*, a roofing contractor was cited by OSHA for (1) a violation of the General Duty Clause for allegedly failing to protect its employees from heat-related hazards, and (2) a violation of 29 C.F.R. § 1926.21(b)(2) for allegedly failing to adequately train employees on heat-related hazards. Slip. Op., p. 1.

The citations stemmed from a workplace fatality that occurred during a roofing job in Miamisburg, Ohio. *Id.* at 2, 6. An employee was working on the jobsite and became ill, allegedly due to heat. *Id.* at 13-16. The project involved work on a flat, white roof, with shaded areas on the roof provided by stacks of material and large air conditioning units. *Id.* at 2-3. The air conditioning units also provided a jet of cold air. *Id.* at 3. On the ground surrounding the building were shaded areas with benches. *Id.* Employees could also avail themselves of an air conditioned resting area inside the building. *Id.*

On the day of the incident, temperatures in the morning ranged from 72-83 degrees. *Id.* Temperatures were predicted to reach approximately 89 degrees. *Id.* at 2. Much of the work was performed in the morning, starting around 6 a.m., before the sun reached its peak. *Id.* at 3-4. At 10:53 a.m., the temperature was 83°F with 55% relative humidity, resulting in a Heat Index value of 85°F. *Id.* at 10.

In addition to the shaded and break areas made available to employees, the employer in the case provided water and ice for employees. *Id.* at 7. There were three set breaks, but employees

could take a break at any time "without retribution." *Id.* Sturgill had also provided training to its permanent employees regarding heat-related hazards and how to prevent heat-related illness. *Id.* at 6.

The employee that became fatally ill was a 60-year old temporary employee who had performed roofing work in the past, but had most recently been assigned to an indoor, air conditioned job. *Id.* at 16. Sturgill had monitored the employee throughout the day and had specifically encouraged him to drink fluids and take breaks when needed. *Id.* at 5. The record does not show that any other employees experienced heat-related illness on the day in question.

In her decision, the Judge concluded that Sturgill's employees "were exposed to heat-related illness hazards" during their work on the roof in question. *Id.* at 10. In making this conclusion, the Judge added 15 degrees to the National Weather Service ("NWS") Heat Index, which was in the "caution" category based upon the temperature and relative humidity that existed at the time that the employee collapsed at the worksite. *Id.* She did so based upon a finding at the time that the employee was working in direct sunlight. *Id.*

The Judge then concluded that both Sturgill and the roofing industry recognized "heat" as a hazard for employees engaged in roofing work. *Id.* at 12. With respect to industry recognition, the Judge described three NRCA guidance products that existed and that Sturgill had used as part of its training program. *Id.* The Judge never explained how the NRCA material directly addressed the specific heat conditions at issue on the roofing job on the day of the accident.

After concluding that the heat hazard was likely to cause death or serious physical harm, the Judge concluded that feasible and effective means existed to eliminate or materially reduce the hazard. *Id.* at 16. The bases for the Judge's conclusion was her finding that Sturgill's existing heat-illness program was "inadequate," and that there were other forms of abatement that Sturgill could have undertaken to help address heat on the worksite. *Id.* at 16-21. The Judge never made

any specific findings that each particular abatement would "eliminate" or "materially reduce" the hazard and the Secretary did not present expert testimony regarding the same. *See id.*

Respondent petitioned for review of the decision and the Commission requested briefing on any of the issues raised in the Petition, and in particular on the following two issues:

- Whether an employer's knowledge or lack of knowledge of its employees' underlying health conditions or ages, and any legal restrictions upon the employer in obtaining such information, are relevant to the Secretary's burden to establish a violation of the general duty clause in this case.
- Whether the judge miscalculated the heat index on the day in question and, if so, whether the Secretary established the existence of a hazard even if the heat index remained in the lowest "caution" quadrant.

See Commission Briefing Notice.

IV. Argument

A. The Commission Must Hold the Secretary to a Strict Burden of Proof Under the General Duty Clause.

This case presents an important issue for the Commission relating to the Secretary's reliance on the General Duty Clause to issue citations to employers in the area of heat illness in the absence of a standard and without holding the Secretary to an exacting burden of proof. By doing so, this case demonstrates the worst fears of those in Congress in promulgating the OSH Act that the General Duty Clause would become a "gotcha" tool used by the Secretary to issue citations against employers without providing sufficient notice of the expected standard of conduct and how to avoid the hazards.

In the legislative history of the OSH Act, the General Duty Clause was one of the most "controversial provisions." Randy S. Rabinowitz, *Occupational Safety and Health Law*, p. 35 (2d

Ed. 2000). While there was general agreement within Congress that OSHA could not be expected to issue specific standards related to each and every hazard at all worksites across the country and that a general provision requiring safe employment was needed to be included in the Act, agreement on the exact parameters of the General Duty Clause was complicated. *Id.*

The concept of the General Duty Clause was urged by the National Safety Council, which stated in testimony:

> If national policy finally declares that all employees are entitled to safe and healthful working conditions, then all employers would be obligated to provide a safe and healthful workplace rather than only complying with a set of promulgated standards. The absence of such a general obligation provision would mean the absence of authority to cope with a hazardous condition which is obvious and admitted by all concerned for which no standard has been promulgated.

S. Rep. No. 91-1282, at 10 (1970), *reprinted in* LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, at 150 (1971). As set forth in this testimony, the concept of the General Duty Clause is well supported. However, it is the emphasis on "obvious" that caused grave concern with stakeholders. In particular, there were criticisms raised of various forms of the General Duty Clause that it could impose "too vague and sweeping a duty on employers" and could ultimately prove "unenforceable." Senate Debate, Nov. 16, 1970, *reprinted in* LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, at 416 (1971); H. Res. 1218, H.R. Debate, Sept. 22, 1970, *reprinted in* LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, at 982 (1971).

The concerns raised were real and significant and led Congress to add further constraints on the General Duty Clause to limit its application to "recognized," "serious," "hazards." 29 U.S.C. § 654(a)(1). Congress intended the provision to be narrowly construed so as to ensure that

employers were not faced with civil penalties for hazards which were not "obvious" and compliance expectations clear and achievable. *See Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1260-61 (D.C. Cir. 1973) ("Congress quite clearly did not intend the general duty clause to impose strict liability: The duty was to be an achievable one."); *Industrial Glass*, 1992 OSAHRC LEXIS 34, *36, 15 OSHC (BNA) 1594 (No. 88-348, 1992) ("We note that Congress intended that an employer's duty to free its workplace of hazards under section 5(a)(1) to be an achievable one.")

Congress was concerned that OSHA would use the General Duty Clause as an unfair tool in its enforcement toolbox, citing employers for not taking actions to address vague, ambiguous hazards. It is that intent that underscores the Commission's past practice of holding the Secretary strictly accountable to proving each element of the General Duty Clause: (1) that a hazard exists; (2) that the hazard was recognized by the employer or the employer's industry; (3) that exposure to the hazard would result in serious harm; and (4) that feasible means of abatement exist that would eliminate or materially reduce the hazard. 29 U.S.C. § 654(a)(1); *Arcadian Corp.*, 2004 OSAHRC LEXIS 85, *19, 20 BNA OSHC 2001 (No. 93-0628, 2004).

This is particularly important in areas such as heat stress, where the hazard is ill-defined and the abatement methods involve a process or programmatic approach. Failing to hold the Secretary to those exacting standards opens up Congress's worst fears about the application of the General Duty Clause.

B. The Judge's Determination of the Heat "Hazard" was Flawed.

The Commission has asked whether the Judge miscalculated the Heat Index on the day in question. For the reasons discussed below, the short answer to this question is "yes." The Judge miscalculated the Heat Index on the day in question and inappropriately inflated the Heat Index, undermining the remaining analysis in the Judge's decision.

1. The Judge Miscalculated the Heat Index in Two Respects.

In the absence of a specific standard regulating heat exposure and heat related illnesses, OSHA advises employers to rely on the NWS Heat Index to assist in determining whether employees are exposed to a hazard from heat while working outdoors. *See* Brief for the Secretary of Labor, p. 10. The Heat Index "is a measure of how hot it really feels when relative humidity is factored in with the actual air temperature." National Weather Service Heat Index, https://www.weather.gov/media/unr/heatindex.pdf, (last visited May 8, 2018). The NWS Heat Index has an annotation that states, "exposure to full sunshine *can* increase heat index values by up to 15°F." *Id.* (emphasis added).

In *Sturgill*, the Judge miscalculated the Heat Index in two respects. First, the Judge incorrectly found that "adding 15°F for working in direct sunlight (i.e. 98°F) increased the heat index category from 'caution' to 'danger.'" Slip. Op., p. 10. Simply put, the Judge added the 15°F to the air temperature rather than the Heat Index value resulting in an overinflated Heat Index on the day in question. According to the Judge, the air temperature on the day at 10:53 a.m. was 83°F. *Id*. Using this air temperature, the Judge then added the 15°F to adjust for working in direct sunlight – resulting in 98°F. *Id.* Using the Heat Index chart with an air temperature of 98°F and a relative humidity of 55%, the Heat Index category was incorrectly classified as "danger." *Id.*

The Heat Index values (the value calculated using the air temperature and the relative humidity) are referred to in terms of Fahrenheit. It appears the Judge assumed the 15°F was meant to be added to the air temperature, rather than the Heat Index itself. The NWS Heat Index chart specifically states, "exposure to full sunshine can increase *heat index values* by up to 15°F." National Weather Service Heat Index, https://www.weather.gov/media/unr/heatindex.pdf, (last visited May 8, 2018). The addition of up to 15°F should be added to the values contained in the chart, not to the air temperature.

The Secretary admits as much in his brief on review by noting "direct sunshine can increase heat index values up to 15 degrees, from a heat index value of 85 to 100." Brief for the Secretary of Labor, pp 10-11. While this part of the calculation is true, the Secretary then incorrectly claims that the resulting category is elevated from "caution" to "danger." *Id*. Rather, based on the NWS chart, a Heat Index value of 100°F is in the "extreme caution" category not the "danger" category.[1]

This error, by both the Secretary and the Judge is pervasive. Several times the Judge supports the decision by referencing the "danger" category that the employees were working in. *See, e.g.,* Slip. Op., p. 11 ("It is also not reasonable to only implement a heat-related safety plan at the "danger" level on the NWS chart."); pp. 11-12 ("Calculation of the heat index that morning for employees working in direct sunlight, increased the heat index category to danger."). As explained above, these are simply incorrect and unsupported findings, which undermine the Judge's conclusion that a hazard existed.

The second respect in which the Judge miscalculated the Heat Index was by adding the full value of the 15 degrees. The Index notes that "exposure to full sunshine *can* increase heat index values *by up to* 15°F." National Weather Service Heat Index, https://www.weather.gov/media/unr/heatindex.pdf, (last visited May 8, 2018) (emphasis added). The Judge assumed, without any supporting evidence, that the day in question resulted in adding the full 15 degrees to the Heat Index values. As Respondent explains in its brief on review, "The ALJ abused her discretion by applying the maximum temperature increase without any authority supporting her unilateral decision to do so." Respondent A.H. Sturgill Roofing, Inc.'s Opening

[1] In his brief, the Secretary asserts yet another application of the Heat Index chart, by adding an additional ten degrees to the air temperature, based upon testimony from Respondent's foreman that the temperature on the roof was "about" ten degrees hotter. Brief for the Secretary of Labor Secretary, p. 11. This third interpretation of the Heat Index chart just further "muddies the water" as to the actual application of the Heat Index chart and provides further evidence of the ambiguity and lack of notice to employers on the Agency's expectations for compliance in this area.

Brief on Review, p. 19.

No expert opined on why a full increase of 15 degrees was warranted or whether the value may have only increased by 5 degrees or 8 degrees or even 12 degrees. The Judge arbitrarily increased the value by a full 15 degrees despite the NWS chart's clear notation that "full sunshine can" but does not automatically, increase the value and that the increase is "by up to 15°F." The phrase "up to" is instructive. As applied by the Judge, the notation would simply read "full sunshine does increase Heat Index values by 15°F."

In contrast to this case, in *Aldridge Electric*, a case decided by Chief Judge Covette Rooney, Judge Rooney dismissed claims by the Secretary to adjust the heat index because "the Secretary has not proven how and by how much the index value should be adjusted." *Aldridge Electric*, 2016 OSAHRC LEXIS 62, *83, 26 OSHC (BNA) 1449 (No. 13-2119, 2016). In *Aldridge Electric*, various experts testified about how the heat index should be adjusted (*see id.* at *72-84), yet here, no expert opined on the adjustment of the heat index. The Judge simply added 15 degrees without any supporting evidence. In contrast to the decision here, the Judge's analysis in *Aldridge Electric* takes the Secretary to task in establishing the existence of a hazard as contemplated by Congress when addressing the existence of a hazard.

Since the Judge incorrectly calculated the Heat Index value by arbitrarily adding the *full* 15 degrees directly to the air temperature, the finding of a hazard is unsupported. These errors significantly impact the Judge's remaining analysis and undermine the determination that an "excessive heat" hazard existed.

2. Sturgill and the Regulated Community Lack Notice of When A Heat Hazard Exists.

With respect to the General Duty Clause, "[t]he Secretary must define the cited hazard in a manner that gives the employer fair notice of its obligations under the Act by specifying conditions or practices over which the employer can reasonably be expected to exercise control." *Otis Elevator Co.*, 2007 OSAHRC LEXIS 77, *6, 21 OSHC (BNA) 2204 (No. 03-1344, 2007) (internal citation omitted). The Judge's decision analyzed facts and criteria for determining whether a heat hazard existed that the regulated community, Sturgill, NAHB and others have never been put on notice as needing to analyze in their work environments. Since OSHA has not developed specific standards regulating this hazard, OSHA has provided guidance on its website and through its annual heat-illness campaign. To say that the guidance in this area is vague and muddled is an understatement.

In its guidance, OSHA urges employers to rely on the Heat Index, but without the adjustments applied by the Judge. For example, OSHA's Heat Illness Mobile Application ("Mobile App") for employers uses the NWS Heat Index and never accounts for other conditions such as shade, wind, or physical exertion. *See* OSHA Heat Safety Tool, https://www.osha.gov/SLTC/heatillness/heat_index/heat_app.html, (last visited May 8, 2018). Nor does the Mobile App take into account the NWS reference that working in "full sunshine" can add up to 15 degrees to the Heat Index values. *Id*. The Mobile App requires that the individual enter a location and then the App calculates the threat level and Heat Index gauge, all based solely on the location and no other factors, such as wind, shade, direct sunlight, clouds, etc. So in short, according to the Judge, even an employer who relies on OSHA's own Mobile App as a heat safety tool would be misguided to do so and could possibly be subject to citation by OSHA.

If the Mobile App recommended by OSHA is inappropriate to rely on in determining

whether a hazard exists, what else is the regulated community supposed to rely on? What are the factors each employer *must*, not should, consider in assessing exposure to heat-illness? Even within OSHA this seems to be a moving target.

A Regional Emphasis Program for Heat Illness was established in 2015 for Region VI covering Arkansas, Louisiana, Texas, Oklahoma, and parts of New Mexico under federal jurisdiction. *OSHA Regional Emphasis Program for Heat Illness*, CPL 2 02-00-027, October 1, 2015, https://www.osha.gov/dep/leps/RegionVI/reg6_fy2016_heat_CPL2_02-00-027.pdf (last visited May 8, 2018). This emphasis program focuses on heat advisories issued by various NWS offices within Region VI. While OSHA might say this is not guidance to the regulated community but to its internal staff, the point remains that what triggers excessive heat and when OSHA expects employers to implement precautions seems to vary even within OSHA.

The ambiguity is more troubling when considering the recommendations of other OSHA State Plan states. As with Federal OSHA, outdoor heat hazards are generally not regulated by specific standards in the majority of State Plan states. Some states take a similar approach as Federal OSHA and issue alerts, guidance, and engage in active heat-illness campaigns. But some State Plan states have adopted specific standards regulating outdoor heat hazards, such as the California Department of Industrial Relations, Division of Occupational Safety and Health ("Cal/OSHA") and Washington State Department of Labor & Industries, Division of Occupational Safety and Health ("DOSH").

The approaches taken by those states that have adopted specific requirements regulating outdoor heat hazards, while not perfect, illustrate the need for clarity in approach so that employers can adequately assess, determine, and protect employees against potential heat-related hazards. Without such clarity, employers are left to question whether they can rely on the Heat Index, or according to the Judge's decision here, rely on the Heat Index but then assess a multitude of other

factors, such as wind, clouds, physical exertion, and possibly the health of the employee in determining the existence of a hazard.

Recognizing the need for simplicity in assessing when outdoor heat may become a hazard, the Cal-OSHA standard relies solely on outdoor temperature to trigger various requirements under the standard. Cal. Code Regs., tit.8, §3395. The standard defines temperature as "the dry bulb temperature in degrees Fahrenheit obtainable by using a thermometer to measure the outdoor temperature in an area where there is no shade. While the temperature measurement must be taken in an area with full sunlight, the bulb or sensor of the thermometer should be shielded while taking the measurement, e.g., with the hand or some other object, from direct contact by sunlight." *Id*. at §3395(b). Cal-OSHA recommends that "[t]he supervisor should use a thermometer to keep track of the temperature at the work site on hot days. A simple thermometer available at hardware stores can be used to measure the outdoor ('dry bulb') temperature, as long as it is taken in an area where there is no shade." Heat Illness Prevention Enforcement Q&A, updated May 14, 2015, https://www.dir.ca.gov/dosh/heatillnessQA.html (last visited May 8, 2018).

Further, DOSH's heat-illness standard in Washington State also relies on air temperature and establishes "temperature action levels." WAC 296-62-09510. If A.H. Sturgill Roofing, Inc. was an employer in Washington State and was conducting the same work at 83°F the morning of the accident, no violation would have existed under the DOSH standard.

Specifically, DOSH has three "outdoor temperature action levels" based on the type of clothing worn by employees (not based on the color of clothing as the Judge analyzed here). *Id*. For non-breathing clothes such as vapor barrier clothing or personal protective equipment such as chemical resistant suits the temperature action level is 52°F, for double-layer woven clothes including coveralls, jackets and sweatshirts the temperature action level is 77°F, and for all other clothing the temperature action level is 89°F. *Id*.

So while the Judge found a hazard would exist based on a plethora of vague and ambiguous factors in this case, none of which the regulated community has been provided notice of from OSHA, that same hazard under the exact same conditions in another state would not exist. And contrary to the Judge's assertion that "it is not reasonable for a roofing employer to rely solely on the generic NWS heat index to determine if a heat hazard exists at its worksite," the National Institute for Occupational Safety and Health's ("NIOSH") own recommendations for employers is to rely solely on the NWS heat index because "the simplicity of the heat index makes it a good option for many outdoor work environments." OSHA-NIOSH Heat Tool App, https://www.cdc.gov/niosh/topics/heatstress/heatapp.html (last visited on May 2, 2018).

When this decision is viewed in context of other ALJ and Commission decisions addressing "excessive heat" under the General Duty Clause, the guidance to the regulated community is further muddled. In one case, the air temperatures coupled with the symptoms of a heat stroke were enough to find a hazard existed. *See Post Buckley Schuh & Jernigan, Inc*., 2012 OSAHRC LEXIS 20, *16-19, 24 OSHC (BNA) 1155 (No. 10-2587, 2012). In *Aldridge Electric*, Chief Judge Rooney analyzed whether a hazard of "extreme heat" was present based on a combination of factors, including (1) ambient heat, (2) the decedent's metabolic heat, and (3) the decedent's ability to dissipate heat, brought on by the weather and the working conditions. 2016 OSAHRC LEXIS at *77-99. In yet another case, a heat hazard existed where the air temperature was 104°F and 105°F and the NWS had issued warnings about the dangerously hot temperatures. *United States Postal Service*, 2014 OSAHRC LEXIS 63, 25 OSHC (BNA) 1116 (No. 13-0217, 2014). And in one Commission decision, the presence of a heat stress hazard was found when there was 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." *Industrial Glass*, 1992 OSAHRC LEXIS 34,

*11, 15 OSHC (BNA) 1594 (No. 88-0348, 1992).

If anything, these cases illustrate the inconsistent approach OSHA has taken with respect to identifying when a hazard exists. There is nothing in OSHA guidance or Commission decisions which provide the regulated community with sufficient notice of when an actual hazard exists or how the hazard should be determined. If those that enforce such requirements cannot agree on how to assess the hazard, how can employers be expected to know under what conditions the hazard actually exists and when various precautions "must," rather than "should," be taken?

For employers whose work is not static, such as a residential home builder, the Judge's decision would require such employers to be re-evaluating the weather every time any employee moved location on the job. What about for a home builder who spends half his day in shade and half his day in direct sunlight; at what point is there a heat hazard? What about a home builder who spends a portion of his day on the roof and then a portion inside a partially-built home? Also, how does an employer determine what "direct sunlight" encompasses? Is it measured on the number of direct sun rays, how long the sun rays are on employees without any cloud coverage, what about periodic cloud coverage? Here, the Judge seemed to ignore evidence that there was some "occasional scattered clouds" and held that employees were working in "direct sunlight." Slip. Op., p. 3. Is direct sunlight measured on the strength of the UV Index and UV Reports for each geographical area, which typically take into account the angle of the sun and the cloud coverage? Should employers now encompass looking at both the NWS Heat Index, since that was designed for "shady, light wind conditions" and now use the UV Index to determine if there is "direct sunlight" and how strong?

The Judge's finding of a hazard despite a lack of explicit information or guidance from OSHA on when a heat hazard is triggered and what obligations an employer *must* take presents the very real concerns of the "gotcha" General Duty Clause that worried many in Congress in

developing the OSH Act.[2]

C. The NRCA Guidance Material on its Own is Insufficient to Demonstrate Industry Recognition.

In her decision, the Judge examined the extent to which Sturgill or Sturgill's industry recognized "heat as a hazard for employees engaged in roofing work." *Id.* at 12. In finding that the industry recognized heat as a hazard, the Judge relied primarily upon a pocket safety guide that "includes a section on heat-related illnesses and precautions to avoid heat exhaustion or heat stroke." *Id.* The Judge quotes from a section of the pocket guide:

> Roofing can be hot work. Hot weather makes it even more difficult to stay cool. Too much heat can lead to heat exhaustion or, worse heat stroke. Both conditions can be dangerous, so it is important to understand the precautions you need to take to avoid heat-related illnesses.

Id. The remainder of the pocket guide related to "heat-related illnesses" is just over 200 words

[2] The Commission has also asked "whether an employer's knowledge or lack of knowledge of its employees' underlying health conditions or ages, and any legal restrictions upon the employer in obtaining such information, are relevant to the Secretary's burden to establish a violation of the general duty clause in this case." *See* Commission Briefing Notice. In NAHB's view, an assessment of an employee's underlying health condition or age undercuts the "recognition of a hazard." The personal risk factors of each employee, in this case and in others, should have no bearing on whether there is a violation of the General 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. Furthermore, NAHB notes that other states that have implemented specific outdoor heat standards or heat illness prevention standards do not require employers to assess personal conditions. *See* California, Cal. Code Regs., tit. 8, § 3395(h)(1)(A) (addressing personal risk factors for heat illness only in the context of training employees so that they are aware of the potential personal factors that may impact their risk and making clear in rulemaking that the standard does not require employers to get personal information from employees, and employers are neither expected nor encouraged to do this); Washington, WAC 296-62-09560(1)(b) (equally addressing personal factors as part of training to provide general awareness of these factors to employees and specifically stating that such information is for the employee's personal use).

discussing symptoms of heat exhaustion and heat stroke, as well as treatment for both. *See* Respondent's Exhibit 9. The pocket guide includes statements such as "Call 911-get medical attention immediately," "Drinking alcohol the night before can cause dehydration the next day," "Make sure you get enough sleep at night and eat properly," and "Do not work in shorts, and always wear a shirt." *Id.*

While the Judge does not rely on them specifically for industry recognition, she also discusses two NRCA Tool Box talks. Slip. Op., p. 12. One talk – "Heat Stress" includes a chart for identifying and treating heat rash, heat cramps, heat exhaustion, and heat stroke. Secretary's Exhibit 14. It then includes all of seven bullet points on how heat illness is preventable, most of which overlap with the points made in the safety pocket guide. *Id.* The other Tool Box talk – "Weather – Personal Injury" discusses the hazards of working outside in "extremely" high or low temperatures, along with severe weather such as thunderstorms. Secretary's Exhibit 10. Again, many of the same points as were included in the safety pocket guide are discussed in this one-page document. *Id.*

The NRCA guidance material, like NAHB's guidance documents, are designed to provide education to employers in a user-friendly format. Quick, understandable guidance material is critical to spreading the message of safety. These types of documents are very important in protecting the safety and health of construction employees who have to work outside in a wide range of work environments.

On their own, however, and without additional evidence in the record, the NRCA documents should not have been considered as conclusive of industry recognition. An industry trade association that puts out a few documents noting that heat can be hazardous to one's health, is not evidence that the industry recognized the conditions at issue in Sturgill as presenting a hazard.

In the case of Sturgill, the temperature at the time of the incident was below 90 degrees with around 55% relative humidity, placing it in the "caution" category for the NWS Heat Index, as set forth above. There is no evidence in any of the NRCA documents that these conditions would be recognized as hazardous by the roofing industry. The pocket safety guide does not at all discuss what heat levels constitute a "hazard" to employees. Nor does the tool box talk addressing "Heat Stress."

The only NRCA document that even comes close to touching on when heat becomes hazardous to employees is the "Weather – Personal Injury" tool box talk that references "extreme" heat and mentions temperatures in the 90s and 100s, significantly above the temperature conditions at issue in Sturgill. *See* Secretary's Exhibit 10.

NAHB does not dispute that industry recognition of a hazard under the General Duty Clause can be shown through information put forth by industry trade associations. However, in this instance, the Judge's decision has taken that principal too far. The Judge, in effect, has stated that the industry recognizes essentially any remotely elevated temperature as a recognized "heat" hazard for employees performing roofing work. This is not what the NRCA material does, however. The NRCA material simply provides information to member companies and to their employees on ways to protect themselves from working in certain hot environments. This information – without more – is insufficient to demonstrate that the entire roofing industry recognizes a "heat" hazard when working under the conditions at issue in Sturgill.

The importance of this in the context of the General Duty Clause and the Secretary's burden of proof cannot be overstated. One of the four prongs of the Secretary's burden is to demonstrate that the employer *or the employer's industry* recognizes the hazard. The cursory way in which the Judge has analyzed industry recognition in this instance has essentially written this prong out of the test. If left to stand, the Secretary can just point to the NRCA documents as industry

recognition of any "heat" hazard that the Secretary deems to be excessive.

The Judge's decision is in stark contrast to other Commission decisions that have been presented with, and analyzed, extensive expert and other evidence of industry recognition in satisfying this prong of the Secretary's burden. *See, e.g., Beverly Enterprises, Inc.*, 2000 OSAHRC LEXIS 121, *106-111, 19 OSHC (BNA) 1161 (Nos. 91-3144, 92-238, 92-819, 92-1257, 93-724, 2000) (analyzing extensive expert testimony and other studies and equations to determine industry recognition); *Arcadian Corp.*, 2004 OSAHRC LEXIS at *29-34 (same).

NAHB is very concerned about the impact of such a decision on its own members and guidance material. As set forth above, NAHB has also put forth some user-friendly guidance material to assist member companies and their employees regarding working in the heat. Like the NRCA material, these are not meant to be comprehensive treatises on heat hazards and at what level the outside work environment constitutes a heat hazard for purposes of the General Duty Clause.

NAHB notes that NIOSH's "Criteria for a Recommended Standard, Occupational Exposure to Heat and Hot Environments" is a 160-page document comprehensively analyzing heat exposures, when heat can become dangerous, and steps to take based on heat level to protect employees. *See* https://www.cdc.gov/niosh/docs/2016-106/pdfs/2016-106.pdf (last visited on May 13, 2018). This 160-page document serves a useful purpose and likely establishes the level at which NIOSH – not the industry – recognizes a hazard in the context of heat. The NIOSH document would be useless in the hands of a small contractor, however. Trade association publications like the ones put forth by NRCA and NAHB serve a different purpose altogether.

What is troubling about the Judge's decision is the complete reliance on the materials to show industry recognition in this instance. The Secretary presented virtually no evidence – expert or otherwise – that the industry recognized the conditions at the Sturgill worksite as hazardous. It

was enough in the Judge's view to simply reference the NRCA material and then summarily state that industry recognized the hazard.

NAHB is not arguing that guidance material cannot be used as evidence of industry recognition and there *may* even be situations where the material – on its own – may be sufficient to make that finding. But in this case with the very general information included in the NRCA guidance, relying simply on that for showing industry recognition was not appropriate.

It also may have a chilling effect on the willingness of trade associations to produce guidance material to their members on issues such as heat illness prevention. Trade associations serve many important roles, including educating members on safety and health hazards. Trade associations also strive to make these user-friendly and understandable to their workforce. In these situations, trade associations are not suggesting that the entire industry recognizes a hazard at a certain level. Certainly in the case of heat stress, the NRCA materials cannot be read to suggest that the entire roofing industry recognizes a heat hazard when performing roofing work at 83 degrees with 55% humidity and a Heat Index in the caution zone.

Trade associations may decide to simply avoid publishing guidance material on heat illness – or other potentially hazardous situations – as the *Sturgill* decision has used those materials to "check the industry recognition" box without any other evidence. The Commission should reject this.

D. The Judge Failed to Find that the Abatement Methods would Eliminate or Materially Reduce the Hazard.

In the decision, the Judge purports to examine the extent to which the Secretary's proposed abatement methods were feasible and would materially reduce the hazard. Upon close review, however, the Judge never found that any abatement method would materially reduce the hazard.

The Judge correctly described the legal test for the Secretary to prove the fourth prong of

a General Duty Clause violation. The Judge states:

> The Secretary must show that the proposed abatement method is feasible and will materially reduce the hazard. *Arcadian Corp.*, 20 BNA OSHC 2001, 2011 (No. 93-0628, 2004). "[T]he Secretary need only show that the abatement method would materially reduce the hazard, not that it would eliminate the hazard. The Secretary is therefore not required to show that the abatement method's absence was the *sole* likely cause of the serious physical harm." *Id. citing (Morrison-Knudsen Co./Yonkers Contracting Co.*, 16 BNA OSHC 1105, 1122 (No. 88-572, 1993) (emphasis in original)).

Slip. Op., p. 15. The Judge then further adds – in a summary fashion – that she finds that "Sturgill could have feasibly abated and materially reduced the heat-related hazard at this worksite." *Id.* In the pages that follow, however, the Judge never in fact finds that the particular abatement methods put forth by the Secretary would eliminate or materially reduce the hazard.

In analyzing the fourth prong of the Secretary's burden, the Judge essentially reviewed certain measures that she believed Sturgill could have implemented at the worksite. For example, she states:

- "Sturgill could have required its employees to wear suitable clothing when working on a roof in the heat."
- "Sturgill could have implemented a formalized work-rest regimen that accounted for the weather conditions and removed from the roof any employee who did not follow the regimen."
- "Sturgill could have implemented a specific, formalized hydration policy."
- "Sturgill could have developed a practice of monitoring employees for signs and symptoms of heat-related illness."

Id. In her opinion, the Judge never finds that each abatement method would have eliminated or materially reduced the heat hazard. They are framed as things that could have been done with no stated finding of their impact. She then summarily states that "I find that the Secretary has shown that feasible means existed to reduce the hazard of heat-related illness for Sturgill's employees working on the PNC roofing project." *Id.*

On its face, this is insufficient to sustain the Secretary's burden. The standard under the "feasible abatement" prong is not that something else *could* have been done by an employer. It is that there are feasible abatement measures available that could have been implemented and would eliminate or materially reduce the hazard. The availability of measures that "could" have been taken does not constitute a violation of the General Duty Clause. The Judge's failure to make this type of finding stands in stark contrast to, and is contrary to Commission precedent on the Secretary's burden of proof under the General Duty Clause, other analogous situations where there are several potential steps an employer can take to address a hazard from a litany of options.

In *Secretary of Labor v. Pepperidge Farm, Inc.*, 1997 OSAHRC LEXIS 40, 17 OSHC (BNA) 1993 (No. 89-265, 1997), the Commission grappled with a similar situation in the context of a General Duty Clause citation for ergonomics. In that case, the Secretary proposed, and the employer did not disagree with, the concept of a process approach to abatement. 1997 OSAHRC LEXIS at *167. The employer, as with Sturgill here, had taken certain measures to address ergonomics. However, there were other steps that the employer could have taken that the Secretary suggested were appropriate. *Id.* at *171.

The Commission found that a process approach was consistent with the General Duty Clause and allowable. *Id.* at *165-167. However, to meet his burden under the General Duty Clause, the Secretary could not simply list a number of potential measures that could have been implemented. The Secretary needed to demonstrate – through expert testimony or other means –

that a particular method of abatement was effective in another setting based on empirical evidence or equivalent expert testimony. *Id.* at *168. As the Commission stated: "What is called for, and what the Secretary appears to invite, is evidentiary presentation that a given action is both within the range of what is feasible at the worksite and is reasonably likely to produce a material reduction in hazard." *Id.* at *189n.127. *See also Beverly Enterprises*, 2000 OSAHRC LEXIS at *120 ("The Secretary must specify the proposed abatement measures and demonstrate both that the measures are capable of being put into effect and that they would be effective materially reducing the incidence of the hazard.").

The Judge in Sturgill ignores this precedent and does not make any findings with respect to whether a particular abatement measure would materially reduce the hazard.[3] With respect to abatement, addressing heat at the worksite involves a process approach similar to what an employer would do to address ergonomic hazards. A number of measures could be taken, but not all of them are appropriate and not all would materially reduce the hazard. The Secretary presented no expert testimony or other significant evidence providing the empirical evidence of success that the Commission in *Pepperidge* found was needed in that case.

The Judge's failure to make these findings weakens in a significant way the burden on the

[3] The Secretary in his brief appears to recognize the failure of the Judge to make this finding. The Secretary's brief is riddled with references to how certain evidence showed the hazard would be "materially reduced." *See* Brief for the Secretary of Labor, pp. 16-18 ("acclimatization materially reduces the heat hazard by increasing an employee's ability to cool off in the heat"; wearing close-fitting clothing "keeps the worker cooler, i.e., materially reduces the heat hazard"; formalized work-rest regimen "materially reduces the heat hazard by giving the body an opportunity to get rid of excess heat."). The Judge never made these findings, however, and the evidence does not in fact demonstrate this. The Secretary even states that the NRCA "recommended all of the Secretary's proposed abatement measures, and explained how these measures would materially abate the hazard." *Id.* at 8. In fact, as described above, the NRCA material, while useful to provide general information to roofing contractors to keep safe in heat, did not make any finding that a particular abatement measure would "materially reduce" the hazard under the General Duty Clause.

Secretary to prove feasible means of abatement. Coupled with the other aspects of analysis, the decision eviscerates OSHA's burden in this area. In a heat illness case, there will always be some step that an employer could have taken that it did not, short of not performing the work at all. It should not be enough for a Judge to simply describe the steps that an employer *could* take to meet this prong of the General Duty Clause.

V. Conclusion

For the reasons set forth above, NAHB respectfully urges the Commission to vacate the decision on review. The decision represents a dangerous expansion of the General Duty Clause, which if left to stand, places residential home builders in ongoing, significant legal jeopardy.

Dated: May 14, 2018

Respectfully submitted,

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ATTORNEYS FOR
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CERTIFICATE OF SERVICE

I HEREBY CERTIFIY that copies of the foregoing Brief of *Amicus Curiae* National Association of Home Builders of the United States has been served on the below-named individuals this 14th day of May, 2018, in the manner indicated below:

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