UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, United States Department of Labor Complainant, vs. A.H. Sturgill Roofing, Inc., Respondent.	: : : : : : : : : :	OSHRC Docket No. 13-0224

REPLY BRIEF OF RESPONDENT
A.H. STURGILL ROOFING, INC.

Now comes the Respondent, A.H. Sturgill Roofing, Inc. ("Sturgill"), and replies to the Brief for the Secretary of Labor, as follows:

A. Existence of the alleged hazard.

With regard to the Secretary's burden to prove the prima facie elements of its case, there is no dispute that the Secretary first carries the burden of proving the existence of a hazard. When citing a violation of the General Duty Clause, "the Secretary must establish that the cited condition actually poses a hazard to employees . . . The general duty clause, while intended to protect employees from hazards that have yet to be addressed by standards, is not intended to replace standards as an enforcement mechanism." *Crowley American Transport,* 1999 OSAHRC LEXIS 71, 18 BNA OSHC 1888, (No. 97-1231, 1999), citing *Waldon Healthcare Center,* 16 BNA OSHC 1052, 1060 (No. 89-2804, 1993). As previously argued, the Secretary has failed to prove that a hazard of excessive heat existed on Sturgill's jobsite on August 1, 2012.

It is well-established that in the context of the General Duty Clause, the fact that an accident occurred does not prove that a hazard existed. "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." *Crowley American Transport, Inc*., citing *Kelly Springfield Tire Co.*, 10 BNA OSHC 1970 (No. 78-4555, 1982), *aff'd* 729 F.2d 317 (5th Cir. 1984). In its brief, the Secretary relies heavily upon MR's death to prove the existence of a hazard of excessive heat at Sturgill's jobsite on August 1, 2012. The Secretary states, "The fact that M.R. developed heat stroke and died after working in these heat conditions shows that a serious heat hazard existed." (Sec. Br. 8). The Secretary further argues, "The fact that M.R. developed a fatal heat illness after working in the rooftop heat conditions is strong evidence that these conditions were hazardous." (Sec. Br. 9).

The Secretary cites to *Phoenix Roofing, Inc*., 17 BNA OSHC 1076, 1079 & n.5 (No. 90-2148, 1995) (Sec. Br. 9), to support its contention that MR's illness proves that a hazard existed. However, *Phoenix Roofing* did not involve an alleged violation of the General Duty Clause. Instead, it involved a citation of 1926.500(b)(4), requiring guarding of skylights. *Id*. In that case, the language of the cited standard identified the hazard – and specifically referenced the "danger of falling through [the] skylight opening." *Id*. In contrast, Sturgill was cited with an alleged violation of the General Duty Clause. In *Phoenix*, the fact of the accident confirmed the presence of a hazard that was specifically contemplated by the cited standard. Here, there is no standard recognizing or suggesting that the conditions present on Sturgill's jobsite on August 1, 2012 presented a hazard of excessive heat to its employees.

The Secretary also cites to the case of *Seaworld of Florida, LLC v. Perez*, 748 F.3d 1202, 1205 (D.C. Cir. 2014) to support that an accident can prove the existence of a hazard. (Sec. Br.

9). Although *Seaworld* did involve a citation under the General Duty Clause, the issue in that case was whether Seaworld recognized the hazard. The issue did not involve the Secretary's burden to prove that a hazard existed in the first place.

As extensively argued in Respondent's brief, the conditions present on Sturgill's jobsite the morning of August 1, 2012 did not pose a hazard of excessive heat. (Tr. 9, RX-2). The Secretary, in its brief, considers only the temperatures recorded at 10:53 a.m., less than an hour before MR fell ill at 11:41 a.m. (Sec. Br. 10). The Secretary neglects to mention that work at the jobsite began at 6:30 a.m., when the dry bulb temperatures were only 72ºF. The Secretary also neglects to mention that the dry bulb temperatures did not exceed 80ºF—and thus, did not even register on the heat index—until 9:53 a.m.

The Secretary also continues to perpetuate factual misrepresentations made by the ALJ, and asserts these misrepresentations as evidence that a hazard existed. For example, the Secretary contends—without any evidentiary support—that MR worked in direct sunlight for 5 hours. (Sec. Br. 3, citing ALJ Dec. at 3, 10-11 & Sec. Br. 11). The Secretary also cites to page 5 of CX-13 (the Statement of Foreman Brown) in support of this statement. However, nothing in Foreman Brown's statement indicates that the crew worked in direct sunlight for 5 hours. Rather, Foreman Brown stated that shade was available on the roof due to tall stacks of roofing materials and air conditioning units. (CX-13 p.5-6). The Secretary's evidence regarding working in direct sunlight is limited to the brief period from the time MR fell ill to the time EMS arrived. There is not an iota of evidence to support that MR or anyone else on Sturgill's crew worked in direct sunlight for five hours. To the contrary, the evidence shows that shade was immediately available on the roof, and further shows that shaded rest areas were available indoors and on the ground. (CX-13 p. 5-6, Tr. 10). While the ALJ discounted the availability of shade, noting that it

was not "overhead shade" (ALJ Dec. 11), no regulation or guidance exists to suggest that an employer must provide overhead shade to cover the entire work area to protect employees from heat.

Similarly, the Secretary (like the ALJ) misrepresents the level of exertion required by MR's job duties, classifying his job as "strenuous." (Sec. Br. 11). There is literally no support anywhere in the record for this assertion. Even the Secretary's own expert, Dr. Yee, admitted that MR's job duties did not exceed the light to moderate range. (Tr. 148-150).

In short, no hazard of excessive heat existed on Sturgill's jobsite, and the "facts" upon which the Secretary relies to establish the existence of an alleged hazard, are not supported by evidence in the record. The fact that MR fell ill on Sturgill's jobsite cannot substitute as evidence that a hazard existed.

B. Feasibility of abatement measures.

With regard to the Secretary's burden to prove that feasible means existed to correct the alleged hazard, the Secretary argues that "whether proposed [abatement] measures are standard in the industry is not a criterion for determining feasibility." (Sec. Br. 19). The Secretary fails to acknowledge that where, as here, the employer has already taken steps to address a recognized hazard (i.e. water, rest, shade and acclimatization), the Secretary must specify the additional steps the employer should have taken and must include evidence that persons familiar with the employer's industry would have prescribed such under similar circumstance. *Jewell Painting, Inc*., 1994 OSAHRC LEXIS 112 *28 (No. 92-3636, 1994).

The Secretary goes on to reason that if industry custom dictated the feasibility of an abatement measure, "the Secretary would be forced to accept the level of safety achieved by industry practices, even if such practices were unsafe." (Sec. Br. 19). This argument fails. If the

Secretary is not satisfied with the level of safety achieved by said industry practices, the Secretary may draft and adopt regulations to address these allegedly unsafe practices, and not utilize the General Duty clause to impose requirements in place of specific rulemaking. "Where the Government seeks to encourage a higher standard of safety performance from the industry than customary industry practices exhibit, the proper recourse is to the standard-making machinery provided in the Act, selective enforcement of the general standards being inappropriate to achieve such a purpose." *Southern Ohio Building Sys., Inc. v. OSHRC*, 649 F.2d 456 (6th Cir. 1981) citing *B&B Insulation, Inc. v. OSHRC*, 583 F.2d 1364, 1372 (5th Cir. 1978).

In short, the Secretary wants the Review Commission to ignore the standard practices utilized by Sturgill and others in the roofing industry to protect workers from heat, and to use the General Duty Clause to impose additional requirements upon Sturgill, without any prior notice to Sturgill of what was required of it.

C. Employer awareness of the alleged hazard.

The Secretary is also required to prove the employer's actual or constructive knowledge of the alleged violation, by demonstrating that the employer either knew, or with the exercise of reasonable diligence could have known, of the violative conditions. *Atlantic Battery Co., Inc.* 1994 OSAHRC LEXIS 148, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994). The Secretary argues that the "employer knowledge" element of the Secretary's case does not require proof that Sturgill knew the conditions on August 1, 2012 were actually hazardous. (Sec. Br. 20). Instead, the Secretary cites *Phoenix Roofing* for the proposition that employer knowledge of physical conditions constituting a violation is enough – and that the employer need not recognize that these conditions are actually hazardous. (Sec. Br. 20) Again, the *Phoenix Roofing* case did not involve a violation of the General Duty Clause. In that case, the standard at issue identified the

conditions that OSHA has deemed to constitute a violation. *Phoenix Roofing* has no application in the context of a General Duty Clause citation, where Sturgill had no notice of what conditions might constitute a "violation." No standard identifies the temperatures and working conditions at Sturgill's jobsite as "violative" conditions such that Sturgill should have recognized these conditions as hazardous. Thus, Sturgill's awareness of the conditions on its jobsite on August 1, 2012 does not imply that it also recognized those conditions to be hazardous.

D. ADA and ADEA considerations.

The Review Commission has specifically asked the parties to brief the issue of "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." (OSHRC Not. of Briefing of 4/8/15).

The Secretary briefly addresses this issue in a cursory argument on pages 20-21 of its Brief. The Secretary alleges that "the General Duty Clause violation here does not turn on MR's particular susceptibility to heat because of his age or physical infirmity." (Sec. Br. 20). Instead, the Secretary argues the "factors primarily relevant to MR's increased risk were that he was not acclimated to working in hot weather, and was not trained to recognize the symptoms of heat illness." (Sec. Br. 21). The Secretary mischaracterizes the testimony supplied by its own expert, Dr. Yee, who did not identify "lack of acclimatization" as the sole or primary cause of MR's illness. Rather, Dr. Yee identified several factors, all of which he believes contributed to MR's illness, including but not limited to: (1) MR's age; (2) MR's pre-existing medical conditions (which were extensive) and (3) lack of acclimatization. (Tr. 90, 97, 98-99, 163-164). Dr. Yee did not state or suggest that lack of acclimatization, alone, caused MR's illness. In fact, Dr. Yee

admitted that acclimatization, by itself, probably would not have prevented MR's illness. (Tr. 130-132).

If anything, Dr. Yee's collective testimony indicates that the extent of acclimatization required for MR or any other employees is directly tied to that employee's age and physical conditions—these are not separate considerations. He stated that "extra precautions" such as an increased rest schedule and air-conditioned breaks would be preferred for older employees. (Tr. 163-164). When asked whether employers should inquire of employees' ages and medical conditions to determine whether additional acclimatization is needed, Dr. Yee suggested that this information could be obtained through pre-employment physicals and medical questionnaires. (Tr. 167-168). In short, Sturgill could not have considered all of the factors that Dr. Yee identified as causes of MR's illness, without illegally inquiring as to MR's age and pre-existing medical conditions.

The Secretary argues that the ADA permits employers to ask questions that would tend to elicit information about a person's age or disability where a Federal Law, such as the Occupational Safety and Health Act, requires them. (Sec. Br. 21). While this may be true, nothing in the Act requires an employer to inquire of an employee's age or pre-existing medical condition for purposes of determining the employee's potential susceptibility to heat. Again, the Secretary is alleging a violation of the General Duty Clause. We are not dealing with a specific standard, such as the respiratory protection standard, which expressly permits certain inquiries concerning an employee's medical condition.

As the Secretary acknowledges, employers are not prohibited from asking an employee whether he can perform his job functions. In other words, Sturgill was permitted to ask MR about his abilities – not his disabilities. Sturgill did exactly this, by asking MR (1) whether he

had done roofing work before (Tr. 497); and (2) whether he was okay, after he started doing the job (Tr. 504, 508). To both inquiries, MR responded in the affirmative. To ask anything more would have put Sturgill at risk that MR would file a claim or claims against it under the ADA or the ADEA—even if the questions were only intended to determine MR's need for acclimatization. OSHA cannot reasonably expect any employer to expose itself to such liability in order to avoid a citation under the General Duty Clause.

Thus, the analysis of an alleged General Duty Clause violation for heat exposure should be devoid of any consideration regarding the ages and/or pre-existing conditions of employees who were exposed to the alleged hazard. However, to the extent the Secretary is permitted to rely on factors such as age and disability to establish that the employer should have taken additional steps to protect older or infirm workers, the Review Commission should consider the fact that employers are legally prohibited from making inquiries that would reveal an employee's age or disabilities.

E. Conclusion.

For the above reasons, in addition to the arguments previously set forth in Respondent's Opening Brief on Review, Sturgill respectfully requests that the Review Commission VACATE both items and the proposed penalties.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by regular U.S. mail on the 2nd day of July, 2015 to the following:

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