United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

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

APPEARANCES:

Paul Spanos, Esquire
U.S. Department of Labor, Cleveland, Ohio
For the Secretary

Robert T. Dunlevey, Jr., Esquire
Dunlevey, Mahan & Furry, Dayton, Ohio
For the Respondent

BEFORE: Carol A. Baumerich
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (the Commission) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) (the Act). A.H. Sturgill Roofing, Inc. (Sturgill or Respondent) is a commercial roofing firm in Dayton, Ohio with 36 employees. The Occupational Safety and Health Administration (OSHA) opened an inspection in August 2012 after receiving a referral regarding the death of an employee. OSHA issued a two-item serious citation and notification of penalty (citation) to Sturgill on January 16, 2013, with a total proposed penalty of $8,820.00. The citation alleged that Sturgill had not adequately implemented a heat illness prevention program in violation of the general duty clause and that it had not provided adequate training to its employees for heat-related hazards in violation of 29 C.F.R. § 1926.21(b)(2).

Sturgill filed a timely notice of contest, bringing this matter before the Commission. A three-day hearing was held in Dayton, Ohio from March 25-27, 2014. Both parties filed post-hearing briefs.[1] For the reasons set forth below, I affirm both citation items as serious and assess a total penalty of $8,820.00.

Jurisdiction

Based upon the record, I find that at all relevant times Sturgill was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5) of the Act. I also find that the Commission has jurisdiction over the parties and subject matter in this case. (Tr. 10).

Background and Factual Findings

Sturgill has been in the roofing business for almost 20 years. (Tr. 469). On July 13, 2012, Sturgill began a roofing project at a PNC bank building in Miamisburg, Ohio. (Tr. 5, 446; CX-11). The flat, white, roof consisted of a rubber roofing membrane over a layer of Styrofoam insulation. (Tr. 446-48, 490). The project required the tear-off of the existing roof and installation of a new roof. (Tr. 446). Sturgill's job superintendent, on the PNC roofing project, was Thomas Gould. (Tr. 431; CX-12, p. 1). Sturgill's jobsite foreman was Leonard Brown. (Tr. 487; CX-13, p. 1).

On August 1, 2012, employees were tearing off and removing the existing roofing materials. (Tr. 446). To tear-off the roof, employees removed the roofing materials and cut the Styrofoam and rubber into smaller size pieces, so that one person could handle the material for disposal. (Tr. 488-89; CX-13, pp. 2-3). The Styrofoam pieces were light-weight, weighing one or two pounds. The rubber pieces weighed up to ten pounds each. (Tr. 447; CX-13, p. 3; RX-16, 16A, 17, and 17A). The materials were loaded onto a cart and moved to a staging area at the roof edge, where the materials were lifted over a 39 inch parapet wall and thrown into a dump truck below. (Tr. 490, 500, 502; CX-13, p. 3).

During the PNC roofing project the outside weather conditions were hot, from July 13, 2012, up to and including August 1, 2012. (CX-1, CX-2; CX-3). On August 1, 2012, foreman Brown recalled that the temperature that morning was in the 80s with a predicted high that day of 89°F. (CX-13, pp. 4, 8-9). Brown knew it would be hot working on the roof that day. (Tr. 497-

[1] In its Answer to the Secretary's Complaint, Sturgill raised several affirmative defenses which it did not pursue at the hearing or in its post-hearing brief. I deem these affirmative defenses to be abandoned. *See Georgia-Pacific Corp.*, 15 BNA OSHC 1127, 1130 (No. 89-2713, 1991).

98; CX-13, p. 4). That morning the hourly high temperatures ranged from 72ºF to 83ºF. There were generally clear sky conditions, with occasional scattered clouds. (CX-1). Much of the roofing work performed by the employees that morning, as the noon hour approached, was in direct sunlight. (CX-7; RX-18. *See* Tr. 102-04).

At several places on the roof, the roofing materials to be installed were double-stacked, forming an 8-foot high stack of 4x8 foot wide roofing material. (Tr. 451-52, 492-94; RX-18). Depending on the position of the sun during the day, there were shaded areas on the roof behind the stacks of roofing materials and behind the large air-conditioning units on the roof. (Tr. 10; CX-7; CX-13, pp. 5-6). The air-conditioning units provided a jet of cooled air. [2] (Tr. 10, 454-55, 492; CX-7; CX-13, p. 9). On the PNC roofing jobsite, employee break areas included tree shaded areas on the ground with picnic tables and benches. (Tr. 9-10, 495). Air-conditioning was available to the employees in the PNC break room below the roof, if necessary. (Tr. 9-10).

On August 1, 2012, Sturgill assigned nine permanent employees,[3] including foreman Brown, to work on the PNC roofing project.[4] (CX-11, Tr. 504, 519). That day Labor Works-Dayton, LLC, (Labor Works), a temporary employment agency, supplied three temporary employees to Sturgill to work on the PNC roofing project. (Tr. 9; CX-11; CX-13, p. 3). M.R. [5] was one of the temporary employees. [6] (Tr. 9). M.R. was 60 years old on August 1, 2012. (Tr. 9-10). M.R. had been employed by Labor Works for ten years. (Tr. 287). Over the years, M.R. had been placed at several temporary assignments for Labor Works. Immediately before his assignment to Sturgill's PNC roofing project, M.R.'s Labor Works assignment, for three years, had been working the night shift in an air-conditioned printing facility. (Tr. 291). M.R. had prior experience performing construction and roofing work. (Tr. 9-10, 297-98). The record does not disclose when M.R. previously performed construction work. Labor Works relied on the client company Sturgill to supervise and direct the temporary employees and to provide the required individual training for the assigned positon. (Tr. 286, 292).

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[2] The parties read stipulated facts into the record. (Tr. 9-10).

[3] Employees hired directly by Sturgill are referred to as permanent employees. Employees acquired through Labor Works are referred to as temporary employees. Foreman Brown recalls monitoring ten employees, in total, on the PNC roof jobsite, on the morning of August 1, 2012. (Tr. 501, 504, 519).

[4] The record includes a list of employees who worked on the PNC roofing project and the dates each employee worked from July 13, 2012 through August 1, 2012. This list reveals that, during this period, fifteen permanent employees, including foreman Brown, were assigned by Sturgill to work on the PNC roofing project. (CX-11).

[5] For privacy purposes, M.R. is the designation for the deceased employee. (Tr. 8-9).

[6] Labor Works was not cited by OSHA regarding M.R.'s work assignment to Sturgill on August 1, 2012. (Tr. 9-10).

The first day M.R. was assigned by Labor Works to work at Sturgill was on August 1, 2012. Early that morning, before M.R. reported to the Sturgill PNC roofing jobsite, in accordance with their regular practice, Labor Works administered a breath-alcohol test to M.R. (Tr. 289, 293-94).[7] M.R.'s test results detected no alcohol.[8] (Tr. 289, 294). That day, M.R. started work at the PNC roofing jobsite at approximately 6:30 a.m. (Tr. 9-10). Sturgill's permanent employees started roofing work at 6:00 a.m. that day. (Tr. 497). Foreman Brown was responsible to provide the necessary training to the temporary employees. (Tr. 470; CX-13, pp. 4, 12).

Because it was M.R.'s first day on the worksite, foreman Brown asked M.R. if he had done roofing work before. M.R. told Brown that he had. (Tr. 497-99; CX-13, pp. 4, 7, 9). Brown asked no follow-up questions regarding when M.R. previously performed roofing work – recently or in the distant past. (CX-13, p. 9). Foreman Brown took M.R. to the roof and showed M.R. the safety warning lines. (Tr. 497; CX-13, pp. 4, 9). Brown told M.R. that it was going to be hot that day and showed him the water coolers on the roof. (Tr. 497-98, 508-09, 511-13; CX-13, p. 4). Brown showed M.R. the break area on the roof and told him that if he got hot and needed an extra break to tell him. (Tr. 497-98, 508-09, 511-12). Brown recalled telling M.R.:

> if he get hot, you know, he got to tell me and if he wanted a break, if he can't do it, let me know. I won't be mad.

(CX-13, p. 4; Tr. 509-10). Foreman Brown provided no training to temporary employee M.R. on heat-related hazards or on recognizing the signs and symptoms of heat-related illness.

Foreman Brown noticed that M.R. was wearing all black clothing; however, he didn't say anything to M.R. about his clothing because M.R. had stated to Brown that he had done roofing work before. (Tr. 506; CX-13, pp. 6-7). When interviewed by the OSHA Compliance Officer

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[7] Melissa Ann Hanson for ten years worked as the branch manager for Labor Works of Dayton. Every day before going to a job assignment, Labor Works employees are breath-alcohol tested. (Tr. 290, 293-94). Hanson testified that she saw M.R. every day he worked. (Tr. 286-87, 289). Hanson knew M.R. as a reliable, dependable employee, who did not miss work. (Tr. 287). Hanson credibly testified that based on her ten years of interaction with M.R. she never had a concern that M.R. had a drug or alcohol problem. (Tr. 287-88, 290). I observed Hanson testify in a reliable, candid, and unequivocal manner. Hanson's testimony is credited.

[8] Jason Buckley, a Labor Works temporary employee referred to the Sturgill PNC roofing jobsite on August 1, 2012, testified. Mr. Buckley's demeanor during his brief testimony revealed a poor recollection. His testimony is given no weight. (Tr. 391-92). Tracie Buckley, Jason's wife, also testified. (Tr. 412). Tracie Buckley was an unreliable witness, with a poor recollection, prone to speculation and exaggeration. (Tr. 394-429). Further, Ms. Buckley's testimony is contradicted by Ms. Hanson's credible testimony that M.R. was a reliable employee while working on Labor Works assignments and by the absence of any objective evidence that M.R. was under the influence of alcohol on August 1, 2012. *See* footnotes 7 and 21 and related text. I find Tracie Buckley's testimony untrustworthy and accord it no weight.

(CO) during the investigation, foreman Brown told the CO that "you are supposed to wear light clothes" when you work on a roof on a hot day. (CX-13, p. 7. *See also* CX-10; RX-9).

Because M.R. "was a much older guy," foreman Brown assigned M.R. to the least strenuous work on the roof. "The only thing he had to do was stand there and throw the trash." (Tr. 499-500; CX-13, pp. 3-4, 12-13). Brown also gave this assignment to M.R. because M.R. did not have any tools with him and Sturgill would not loan him tools. (CX-13, p. 4). There was a shaded area (from a stack of roofing materials) about 10-15 feet away from M.R.'s work area. (Tr. 500-01). Foreman Brown stated that he didn't want M.R. to pull the cart of discarded materials to the roof edge because it was heavy and sometimes it took two people to move the cart. (CX-13, p. 4). Other employees put the discarded roofing materials in the cart and then took the cart to M.R. for disposal. (CX-13, p. 3). M.R. was assigned to take the materials, remove them from the cart, lift them over the 39-inch parapet wall, and toss them into the dump truck below. (CX-13, pp. 3-4). That morning sometime between 8:00 a.m. and 9:00 a.m.,[9] the crew took its first usual, scheduled 15-minute break. (Tr. 449; CX-13, p. 5) A co-worker took a 44-ounce cup of ice water to M.R. during the break. Brown was unsure if M.R. drank all the water. (CX-13, p. 5; Tr. 503, 519). Foreman Brown did not believe M.R. drank any other water that morning. (CX-13, p. 5).

Sometime after the morning break, temporary employee M.R. began to show signs of heat-related illness. Foreman Brown noticed M.R. was sweating, but M.R. said he was fine and didn't need anything to drink. (CX-13, p. 5). Later that morning, employees asked foreman Brown to check on "the old guy" when M.R. wouldn't speak to them. (Tr. 516; CX-13, p. 7). The employees "figured something was wrong" with M.R. (CX-13, p. 7). Brown stated that he checked on M.R., who seemed fine.[10] (Tr. 516-17, 523-26). M.R. told foreman Brown that he was "alright." (CX-13, p. 7). However, about fifteen minutes later, foreman Brown observed M.R. walking in a clumsy fashion and went over to him. (Tr. 504-05; CX-13, pp. 7, 12). M.R. did not want to sit down and wanted to continue working, but foreman Brown insisted and

[9] The break time is based on superintendent Gould's testimony that when he was onsite that morning, he observed the employees on their morning break at 8:45 a.m. (Tr. 449-50, 452). Foreman Brown's interview statement indicated that the morning break was taken about 8:00 a.m. (CX-13, p. 5).

[10] While foreman Brown stated that he knew the symptoms of heat illness and that M.R. was not displaying any of those symptoms (Tr. 504), record evidence reveals otherwise.

guided him to a "shaded area" on the roof.[11] (Tr. 505, 513-14; CX-13, p. 6). At approximately 11:41 a.m. M.R. became ill and collapsed on the roof. (Tr. 9-10). M.R. began shaking, so foreman Brown called 911. (Tr. 508; CX-13, p. 7). One of the workers began CPR on M.R. As instructed by the EMS, foreman Brown wet down M.R.'s clothing. (CX-13, pp. 7-8; Tr. 515). When the EMS personnel arrived M.R. was found in direct sunlight. (Tr. 102-04). The EMS personnel provided shade for M.R. by holding a sheet over him. (Tr. 369). M.R. was admitted to Sycamore Hospital and remained in the hospital for 21 days until he died on August 22, 2012. (Tr. 9-10). M.R. was admitted with a core body temperature of 105.4°F and diagnosed with heat stroke. (CX-16). The coroner concluded that M.R. died from complications of heat stroke. (Tr. 308; CX-8).

Sturgill's heat-related illness prevention program

The National Roofing Contractors Association (NRCA) is a leader in the roofing industry. (Tr. 467-68). The NRCA publishes toolbox talks on heat hazards and a pocket safety guide that includes a section on heat-related illnesses. The toolbox talks and the pocket safety guide include information regarding methods to avoid heat-related illness, the signs and symptoms of heat-related illness, and a discussion of what an employee should do if a coworker shows signs of heat illness. (Tr. 469-70; CX-10; CX-14; RX-9, pp. 5-6).

Superintendent Gould provided orientation and training to the company's permanent employees. (Tr. 436). Sturgill provided NRCA's pocket safety guide to each permanent employee. (Tr. 466). Superintendent Gould presented two 40-minute videos to each permanent employee at orientation.[12] (Tr. 456-57). Gould then reviewed the content of the videos and

[11] Brown seemed to believe it was a shaded area. I find that at 11:41 a.m., with the sun directly overhead, there would be little available shade from the objects on the roof. That little, if any, shade was available on the roof is corroborated by the actions of the EMS personnel who responded to the 911 call. (Tr. 369).

[12] There is no credible evidence that the videos included safety information about heat hazards. Foreman Brown, during his September 14, 2012 interview with the CO, stated that there was some information about heat included in the orientation video, along with other safety subjects. (CX-13, p. 11). However, the OSHA Accident Investigation Summary states that the CO reviewed several Sturgill training videos and did not see heat stress covered in the videos. The CO surmised the employees may have confused what was covered in the videos with the information in the toolbox talks. (RX-3, pp. 2-3).

The OSHA Accident Investigation Summary was received in evidence. (RX-3). The facts sets forth in the summary, based on reported hearsay statements, are accorded limited weight. Greater weight is given to the direct and cross-examination testimony of the hearing witnesses. Superintendent Gould and foreman Brown testified at the hearing. Both Gould and Brown were reliable, credible witnesses.

Great weight is accorded to the OSHA CO's September 2012 recorded interviews of superintendent Gould (CX-12) and foreman Brown (CX-13), prepared with Respondent counsel present, close in time to the events at issue. (Tr. 527). Where Gould and Brown's testimony at the hearing differs from their OSHA recorded interviews, I give their recorded statements greater weight, as they were given close in time to the events, when recollections were fresh.

pocket safety guide and addressed heat-related illness hazards.[13] (Tr. 457). Further, every two or three years, Sturgill's permanent employees received the OSHA 10-hour training which included a segment on heat stress.[14] (Tr. 433; RX-13).

Sturgill's foreman presented an NRCA toolbox safety talk each week to the employees. Two of the weekly toolbox talks concerned heat-related hazards entitled "Weather – Personal Injury" and "Heat Stress." (CX-10; CX-14). Superintendent Gould stated that the toolbox talks were presented as part of a 52-week program and whatever topic was next was presented – the heat-related toolbox talks were not necessarily presented during the summer. (CX-12, p. 2; CX-13, pp. 11-12).

The job foreman was responsible for training the temporary employees regarding safety issues on a site specific basis.[15] (Tr. 470). The temporary employees working on the PNC roofing jobsite did not receive the information in the toolbox talks regarding heat-related hazards. (Tr. 518-19; CX-13, pp. 11-12).

At the worksite, Sturgill provided large, five to seven gallon, coolers of water on the roof every morning. (Tr. 444, 495). Employees could purchase ice and water for the crew, if needed, and be reimbursed. (Tr. 456). Additionally, superintendent Gould or the foreman would occasionally buy Gatorade for the crew. (Tr. 456). At the PNC roofing jobsite, Sturgill had the use of the PNC break room and its ice machine. (Tr. 452, 495). Superintendent Gould testified that in addition to the three scheduled breaks per day, each employee could take an informal break at any time without retribution. (Tr. 443, 496-97). Sturgill had a break location with shade available for its employees. (Tr. 446).

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[13] Gould testified that Sturgill also had a company safety manual which was a part of its heat-related illness prevention program. This safety manual was not entered into the record. (Tr. 436-39, 465-66).

[14] Gould testified that the 10-hour course included safety training on heat issues. (Tr. 433). The agenda for the 10-hour course does not specifically list heat illness; however, it does have a 30-minute section entitled "Health Hazards in Construction." (RX-13).

[15] There is a conflict in the record as to the date that the Labor Works temporary employees, other than M.R., started work at the PNC project. Respondent provided a list of all the employees that worked on the PNC project and the dates each person worked. The report shows only the date of August 1, 2012, for all three temporary employees. (CX-11, p. 4). However, in his interview with the CO, foreman Brown stated that the other temporary employees had worked at the PNC project from the beginning of the project in July. (CX-13, p. 10). Brown also stated that, because it was his first day, M.R. did not have any tools; however, the other temporary employees had tools because they had been there all week, which would have been July 30 and 31. (CX-13, p. 4). Upon questioning at the hearing, the CO admitted that while the employee listing provided by Respondent indicated that the temporary workers were only at the PNC roofing jobsite on August 1, she was told in her investigative interviews that two of the temporary employees on the list had worked at the work site before August 1, 2012. (Tr. 275-76). I find, viewing the record as a whole, that August 1, 2012 was not the first work day on the PNC roofing jobsite for the two other temporary workers.

Whether Sturgill Was The Employer For Its Temporary Employees

The Act requires each employer to provide a workplace "free from recognized hazards" and to comply with "occupational safety and health standards." *See* § 5(a) of the Act. An employment relationship must be established because only an "employer" may be cited for a violation. *See* § 9(a) of the Act; *Don Davis*, 19 BNA OSHC 1477, 1479 (No. 96-1378, 2001). I find Sturgill was the employer, with respect to the OSH Act, for the temporary employees hired through Labor Works at its PNC roofing jobsite.

To determine whether the Secretary has established the existence of an employer-employee relationship, the Commission relies upon the "Darden factors." *Sharon & Walter Constr., Inc*., 23 BNA OSHC 1286, 1289 (No. 00-1402, 2010). In *Darden*, the Court set out several factors to consider when evaluating the existence of an employment relationship. *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 323-24 (1992) (*Darden*). The Commission has noted that the critical factor in the analysis is the "the hiring party's right to control the manner and means by which the product [was] accomplished." *Sharon & Walter,* 23 BNA OSHC at 1289; *quoting Darden* 503 U.S. at 323.

The facts here compare favorably to those in *Froedtert Mem. Lutheran Hosp., Inc.,* 20 BNA OSHC 1500, (No. 97-1839, 2004). In that case, while the hospital obtained employees from a staff leasing company, the hospital supplied the tools, materials, and supervised the work. *Id.* at 1506-07. The Commission found that the hospital was an employer because it "exercised extensive control" over the employees acquired through the leasing company. *Id.* at 1507. There is no dispute that Sturgill controlled the means, methods, location, and timing of the work of its temporary workers. Here, Sturgill was responsible for assigning job tasks, training, and supervising the temporary employees. Therefore, for the purpose of the OSH Act, Sturgill was the employer responsible for the safety of all its employees on the PNC roofing jobsite, including its temporary employees.

DISCUSSION

Citation 1, Item 1

This citation item alleges a serious violation of § 5(a)(1), also referred to as the "general duty clause." Section 5(a)(1) requires an employer to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a)(1).

The citation alleged a violation as follows:

> The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to workers, in that workers were exposed to excessive heat:
>
> On or about August 1, 2012, full time and temporary employees of A.H. Sturgill Roofing, Inc. were exposed to the hazard of excessive heat from working on a commercial roof in the direct sun during the performance of their duties which included removal of roofing material, tossing the material off the roof into a dump truck, and installation of new roofing material. The employer had not developed and implemented an adequate heat-related illness prevention program.
>
> Such exposures may lead to the development of serious heat-related illnesses such as heat exhaustion and heat stroke. A temporary employee working on the roof in the direct sun throwing roofing material off the roof into a dump truck developed heat stroke as a result of working on the project, his first day with the company. The employee began work between 6:00 a.m. and 6:30 a.m. on August 1, 2012. At approximately 11:41 a.m. the employee collapsed and emergency medical assistance was summoned. On August 22, 2012, the employee died due to complications from heat stroke. NOAA Heat Index values for the morning of August 1, 2012 at the time of the employee's collapse were approximately 85 degrees Fahrenheit. NOAA Heat Index values are devised for shady, light wind conditions, and it has been noted that exposure to full sunshine can increase heat index values by up to 15 degrees Fahrenheit. The employer failed to develop and implement a heat-related illness prevention program which adequately addressed appropriate clothing for working conditions, a formalized work/rest schedule, worksite monitoring, guidelines for removing employees from hazardous conditions, and acclimatization for new or returning employees.

Feasible and acceptable methods to abate this hazard were stated, as discussed below. *See* Complaint, Exh. A.

The Secretary's Burden of Proof

To prove a violation of the general duty clause, the Secretary must establish that: (1) a condition or activity in the workplace presented a hazard, (2) the employer or its industry recognized the hazard, (3) the hazard was likely to cause death or serious physical harm, and (4) a feasible and effective means existed to eliminate or materially reduce the hazard. *See, e.g., Arcadian Corp.*, 20 BNA OSHC 2001, 2007 (No. 93-0628, 2004) (citation omitted). The Secretary must also establish that the employer knew, or with the exercise of reasonable diligence could have known, of the hazardous condition. *Burford's Tree, Inc.*, 22 BNA OSHC 1948, 1949 (No. 07-1899, 2010) (citations omitted).

Whether a Condition or Activity in the Workplace Presented a Hazard

I find that Sturgill's employees were exposed to heat-related illness hazards during the PNC roofing project, and in particular, on August 1, 2012. The Secretary has established that while Sturgill was at the PNC roofing jobsite, in July 2012 and on August 1, 2012, the daily high temperature exceeded 80°F for every day, except one. (*See* CX-1; CX-2).

"The Heat Index is a measure of how hot it really feels when relative humidity is factored with the actual air temperature." (CX-4, p. 2). A NOAA/National Weather Service (NWS) heat advisory publication includes a heat index chart to calculate the "likelihood of heat disorders with prolonged exposure or strenuous activity." *Id.* The NWS publication states that the heat index values are devised for "shady, light wind conditions, exposure to full sunshine can increase the heat index values up to 15°F." *Id.* The Secretary utilizes the NWS heat index value as a starting point to determine whether a heat-related hazard exists. (Tr. 32). OSHA's guidance to employers is to implement a heat-related illness prevention plan "when the heat index is at or above 80°F." (CX-5, p. 9).

Dayton Wright Patterson (DWP) Airport is two miles from the Sturgill worksite. (Tr.104). National Climatic Data Center[16] records from DWP Airport for the morning work hours on August 1, 2012 show that hourly high temperatures ranged from 72°F to 83°F and relative humidity ranged from 51% to 87%. (CX-1). The sky conditions that morning were generally clear with occasional scattered clouds. *Id.*

On August 1, 2012, temporary employee M.R. collapsed at the jobsite at 11:41 a.m. That morning, at 10:53 a.m., the temperature was 83°F, with 55% relative humidity, for a heat index of 85°F. (CX-1, CX-3). This heat index was in the "caution" category on the NWS heat index chart "for the likelihood of heat disorders with prolonged exposure or strenuous activity." (CX-4, p. 2). Further, adding 15°F for working in direct sunlight (i.e. 98ºF) increased the heat index category from "caution" to "danger."[17] (CX-4, p. 2. *See* Tr. 102-04).

The NWS chart calculates the heat index for light wind and shady conditions. (CX-4, p. 2). Those were not the working conditions on the PNC bank roof where the Sturgill employees were working on August 1, 2012. There were only occasional scattered clouds that morning. (CX-1). The "shade" available was from 8-foot stacks of new roofing material and the air-

[16] The National Climatic Data Center is part of the National Oceanic & Atmospheric Administration (NOAA) within the Department of Commerce. (CX-1).

[17] The NWS chart has four categories on its heat index chart: Caution, Extreme Caution, Danger, Extreme Danger. CX-4, p. 2. .

conditioning units on the roof. (Tr. 9-10). This was not overhead shade, such as shade provided by an awning or overhead cover. The amount and location of the shade from the stacked material and air-conditioning units was relative to the sun's position in the sky. As the noon hour approached, there would be little to no shade available on the roof where the employees were working. Foreman Brown stated that he moved M.R. to the shade when he realized M.R. was ill. This indicates that M.R. was working in direct sunlight, not in a shaded area.

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.

Respondent asserts there was no hazard of "excessive heat" that day.[19] (R. Br. 25). Respondent argues that because there was no heat advisory issued by NOAA that day and because the heat index was only in the caution zone, and not the danger zone, that a heat hazard did not exist. (R. Br. 25).

An employer is responsible to assess the environment that its employees are working in and establish a safety program accordingly. *See Associated Underwater Services*, 24 BNA OSHC 1248 (No. 07-1851, 2012); *W.G. Fairfield Co.,* 19 BNA OSHC 1233, 1237 (No. 99-0344, 2000) (*Fairfield*), *aff'd by* 285 F.3d 499 (6th Cir. 2002). 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. It is also not reasonable to only implement a heat-related safety plan at the "danger" level on the NWS chart. Moreover, as noted above, calculation of the heat index that morning,

[18] Dr. Theodore Yee was the medical officer for OSHA in 2012. (Tr. 75). At the hearing, Dr. Yee testified as a qualified expert in Occupational Medicine and Injury. (Tr. 81-82). Dr. Yee had been trained and certified to read and review drug screens. (Tr. 125).

[19] Respondent contends that under the general duty clause a "recognized hazard is not defined in terms of the absence of appropriate abatement measures." *Wheeling-Pittsburgh Steel Corp.,* 10 BNA OSHC 1242, 1245 (Nos. 76-4807; 76-4808, 1981). (R. Br. 25). In this case, a heat-related illness hazard was present on the PNC roofing jobsite on August 1, 2012. The cited hazard is not defined in terms of the "absence of appropriate abatement measures." Sturgill's argument is rejected.

for employees working in direct sunlight, increased the heat index category to danger. An employer must assess the conditions of its worksite to determine if its heat-related safety program must be implemented. The working conditions on the roof magnified the effects of the heat. First, the roof was hotter than the ground. Second, the work was in direct sunlight. Finally, the work was physically demanding and strenuous. These conditions, in their entirety, establish the existence of a heat-related illness hazard.

Whether Sturgill Or Its Industry Recognized the Hazard

I find that that both Sturgill and the roofing industry recognize heat as a hazard for employees engaged in roofing work. As noted above, the National Roofing Contractors Association (NRCA) publishes toolbox talks on heat hazards and a pocket safety guide that includes a section on heat-related illnesses and precautions to avoid heat exhaustion or heat stroke. (CX-10; CX-14; RX-9, pp. 5-6). The NRCA pocket guide states:

> 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. (RX-9, p. 5)

Further, Sturgill recognized heat as a hazard. Sturgill distributed the NRCA pocket guide to all of its permanent employees. Sturgill utilized two NRCA toolbox talks entitled "Heat Stress" and "Weather-Personal Injury" as part of its training program. (CX-10, CX-14). Both note the serious nature of heat illness from roofing work. In particular, "[w]hen your body is exposed to heat, your system can become stressed to the point where it cannot effectively deal with it." (CX-14). The "Heat Stress" toolbox talk addressed the importance of employee acclimatization to prevent heat illnesses stating: "Work up to it. It can take about two weeks to get used to working in a hot environment." (CX-14).

Sturgill argues that it did not recognize that a heat hazard existed on August 1, 2012, because it had no prior problems with heat-related illness at this worksite. (R. Br. 25-26). This argument is without merit. The lack of a prior illness or injury on the worksite is not determinative regarding the finding of hazard recognition by an employer or industry. *See Titanium Metals Corp. of America v. Usery*, 579 F.2d 536, 542 (9th Cir. 1978). An employer's past record is not dispositive, "in light of the Act's declared policy to prevent the occurrence of accidents and injury." *Id.* (citation omitted).

On August 1, 2012, an unacclimatized, temporary employee, M.R., began work on the PNC roofing jobsite. The risks of working outside in hot, direct sunlight, conditions are greater

for an employee unacclimatized to working in heat, than for an employee who over time has had the opportunity to "work up to it." (CX-14). Foreman Brown acknowledged, early that morning, that it would be hot working on the roof. Sturgill knew temporary employees would be working on the PNC roofing jobsite without training regarding heat hazards or recognizing the signs and symptoms of heat-related illness. The evidence shows that Sturgill did recognize that heat was a hazard for its roofing employees working on the PNC roofing jobsite.

Whether The Hazard Was Likely To Cause Death Or Serious Physical Harm

I find that the heat-related illness hazard was serious and likely to cause death or serious physical harm.[20] Determination of whether a hazard can cause serious harm is not based on the likelihood that an injury will occur, instead it is whether there is a likelihood that death or serious physical harm could result if an accident occurs. *The Duriron Co., Inc.*, 11 BNA OSHC 1405, 1407 (No. 77-2847, 1983); *see also Compass Environmental, Inc.*, 23 BNA OSHC 1132, 1136 (No. 06-1036, 2010) (*Compass*), *aff'd*, 663 F.3d 1164, 1168 (11th Cir. 2011). Sturgill's own training documents highlight that heat exhaustion and heat stroke are serious conditions which require medical attention. (CX-10, CX-14, RX-9). There is no dispute that exposure to excess heat can cause serious harm ranging from heat exhaustion to heat stroke.

Further, M.R. was hospitalized for a heat-related illness – heat stroke. M.R. was admitted to the hospital on August 1, 2012 with a core body temperature of 105.4ºF. He was diagnosed with heat stroke. He remained in the hospital, at times in the Intensive Care Unit (ICU), until his death on August 22, 2012. (CX-16, pp. 1-2). Multiple physicians treated M.R. throughout that time and each continued to confirm the primary diagnosis of work-induced heat stroke. The Montgomery County Deputy Coroner Dr. Bryan Casto reviewed the medical records of the treating physicians and found the cause of death was complications of work-induced heat stroke. (Tr. 308; CX-8). The Secretary's expert Dr. Yee also reviewed the medical records and agreed that heat stroke was the cause for M.R.'s admission. The Secretary's expert Dr. Yee opined that the conditions on the roof that morning – "occupational heat exposure" – contributed to M.R.'s development of heat stroke. (Tr. 82). Dr. Yee stated that the conditions that morning were more likely to result in heat cramps or heat exhaustion in a younger worker and that heat stroke was more likely to result with a 60-year-old employee, especially when it was an employee's first day working in hot conditions without acclimatization. (Tr. 98-99, 155, 157-59).

[20] Sturgill asserts that an incident on a worksite is not proof of a hazard. (R.Br. 26). I agree. The hazard was not M.R.'s particular medical condition that day. It was the jobsite heat-related illness hazard to which Sturgill's employees were exposed.

Sturgill asserts that M.R. did not suffer the effects of work-related heat stroke and instead M.R.'s hyperthermia was caused by pre-existing medical conditions. (Tr. 335; R. Br. 22-23). Sturgill's expert Dr. David Randolph posited several opinions as to the possible cause of M.R.'s death. Dr. Randolph's July 23, 2013 opinion was that M.R.'s cause of death was "cocaine-induced hyperthermia." (Tr. 366). Dr. Randolph admitted that at the time of his first report in July he did not know that medical testing revealed that there was no cocaine in M.R.'s system. (Tr. 362). Later, in a November 12, 2013 addendum to his initial report, Dr. Randolph revised his opinion as to M.R.'s cause of death to "chronic alcohol abuse." (Tr. 366-67). Finally, at the hearing, Respondent's expert Dr. Randolph again changed his opinion as to the cause of M.R.'s death to "an acute cardiac event." (Tr. 337). Even though he disagreed with the diagnosis of M.R.'s treating physicians, Dr. Randolph admitted that he assumed the medical records he reviewed were accurate. (Tr. 352).

The Secretary's expert Dr. Yee testified that the medical records show that M.R. did not test positive for alcohol or drugs of abuse. (Tr. 85-87). The medical records show that neither alcohol nor cocaine was present in either the blood or urine specimens collected from M.R. upon his admission to the hospital on August 1, 2012. (Tr. 85-87; CX-16, pp. 35, 37). Further, Labor Works' breath-alcohol testing of M.R., on the morning of August 1, 2012, did not detect alcohol.[21] (Tr. 289, 294).

I give the greatest weight to the contemporaneous diagnosis of M.R.'s treating physicians, who actually observed, examined, and treated M.R. (CX-16; RX-14). I find that the physicians, who personally treated M.R., upon his admission and during his hospitalization, were in the best position to make a diagnosis and, therefore, I give great weight to their primary diagnosis of heat stroke. The coroner, Dr. Casto, is a neutral party in this action, so his opinion is also highly credited. Dr. Yee, the Secretary's expert provided an opinion consistent with that of Dr. Casto and M.R.'s treating physicians. Dr. Yee's opinion also is given great weight.

I find the varied opinions offered by Respondent's expert Dr. Randolph unreliable and unpersuasive. I give the opinion of Dr. Randolph regarding M.R.'s diagnosis no weight.

[21] There is no credible record evidence that M.R. was under the influence of alcohol or drugs of abuse during the morning of August 1, 2012, while working on the PNC roofing jobsite. A hearsay statement in the medical records is given no weight, as it is specifically contradicted by the contemporaneous medical testing. (CX-16, pp. 3, 35, 37). I find the records from Montgomery County, Ohio, Court of Common Pleas proceedings, in 2003 and 2004, regarding M.R., to be very remote in time and unhelpful to resolution of the issues presented in this case regarding the working conditions on the PNC roofing jobsite, on August 1, 2012. The remote court records are given no weight. (RX-10, RX-11).

Likewise, no weight is accorded to Dr. Randolph's opinion that it would not have made a difference for M.R. had Respondent implemented an acclimatization program for M.R. on his first work day on the PNC roofing jobsite. Each opinion offered by Respondent's expert appeared predetermined to support a conclusion that work-related heat exposure could not have caused M.R.'s admission to the hospital and subsequent death. His opinion that hyperthermia was cocaine-induced was not supported by laboratory results. The opinions of Respondent's expert were in stark contrast to all other medical opinions regarding M.R.'s diagnosis. Respondent's expert never observed M.R. Dr. Randolph's opinions changed too often to be accorded any weight. Finally, his assertion that all the treating physicians simply copied the prior physician's diagnosis without question is not believable. Many physicians from multiple disciplines treated M.R. during his three-week hospitalization. (CX-16; RX-14). There was ample opportunity during M.R.'s lengthy hospital stay for another diagnosis to be made by a treating physician. Respondent's argument that something other than occupational heat-related illness led to M.R.'s hospitalization is rejected.

In summary, I find that the heat-related illness hazard present on August 1, 2012, on the PNC roofing jobsite, was serious and likely to cause death or serious physical harm. I give great weight to Dr. Yee's stated opinion that the working conditions on the Sturgill PNC roofing jobsite, on the morning of August 1, 2012, were more likely to result in heat cramps or heat exhaustion in a younger worker and were more likely to result in heat stroke in a 60-year-old employee, especially when it was an employee's first day working in hot conditions without acclimatization. (Tr. 98-99, 155, 157-59). Dr. Yee's opinion is consistent with the guidance set forth in the NWS publication "Heat: A Major Killer," regarding the hazards of exposure to excessive heat. (Tr. 91; CX-4, p. 3).

Whether Feasible and Effective Means Existed to Eliminate or Materially Reduce the Hazard

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). I find that Sturgill could have feasibly abated and materially reduced the heat-related hazard at this worksite.

The Citation sets forth five means of abatement:

1. Develop guidelines for employees to wear loosely worn reflective clothing to deflect radiant heat and/or by providing cooling vests or wetted garments in high temperature and low humidity conditions. Remove employees from hazardous conditions when/if guidelines are not being followed.
2. Develop a formalized work/rest regimen based on environmental working conditions. Remove employees from hazardous conditions when/if rest breaks are not being taken.
3. Develop a work practice for monitoring employees for signs and symptoms of heat-related illness.
4. Develop guidelines for removal of employees from hazardous conditions when recognized through worksite monitoring.
5. Develop a formalized acclimatization work practice which includes the element of reduced time to hazardous conditions in addition to a reduction in work-load. Develop an acclimatization program and provide training of heat related illness.

See Complaint, Exh. A.

Secretary has shown that feasible means existed to abate the hazard of heat-related illness. First, Sturgill did not have an acclimatization plan. Acclimatization is the body's way of gradually adjusting to work in hot conditions. (CX-5, p. 24). "On the first day of work in a hot environment, the body temperature, pulse rate, and general discomfort will be higher." *Id.* OSHA recommends a minimum of a five-day build-up period to allow the body to adjust to work in the heat for both new employees and for employees that have been absent from the worksite for two or more weeks. *Id.* Most of the body's acclimatization occurs in the first week, but full acclimatization takes two or three weeks. *Id.* The CDC/NIOSH advises that gradual exposure to heat gives an employee's body time to adjust to higher environmental temperatures. "Heat disorders in general are more likely to occur among workers who have not been given time to work in the heat . . . ." *See* Centers for Disease Control and Prevention DHHS (NIOSH) publication no. 86-112 (April, 1985)(CX-9, p. 5). Further, Sturgill's own training document, an NRCA toolbox talk, states that an employee should: "Work up to it. It can take about two weeks to get used to working in a hot environment." (CX-14).

On August 1, 2012, temporary employee M.R.'s work schedule was the same as the work schedule of the other workers on the roof. Just prior to the Sturgill PNC roofing job, M.R. worked at night in an air-conditioned printing facility for three years. (Tr. 291). Sturgill's only modification was to have M.R. do the "lightest" job on the roof. (Tr. 499). However, just because it was the "lightest" job available on the roof, does not mean it was not strenuous. In direct sunlight, at the roof edge, M.R. had to toss roofing materials, some weighing up to ten pounds, over the 39-inch parapet wall into the dump truck below. M.R. worked for about five

hours on the morning of August 1, 2012. Foreman Brown stated that he gave the lightest task on the roof to M.R. because he didn't have any tools and because M.R. was an older guy. (CX-13, p. 4). It was not a plan designed to help an employee acclimatize to working in the heat all day. Further, as discussed below, foreman Brown's statement to M.R. that if he needed a break, or couldn't do it, to let Brown know, was not equivalent to an effective acclimatization program.

Sturgill did not implement an acclimatization program for the employees based on the extent to which they had recently worked outdoors in a hot environment. Foreman Brown admits that, even with a white roof, it is about ten degrees hotter on the roof than on the ground. Brown knew August 1, 2012 was going to be a hot day. Nonetheless, there was no acclimatization plan in place for temporary employee M.R.'s adjustment, over time, to work in a hot environment. There was no schedule for a new employee, unaccustomed to working in the heat, to build up a tolerance or acclimatize. There is no evidence that Sturgill had a plan that allowed temporary employee M.R., or any other new employee, to acclimatize to the heat that day and on other days during the PNC roofing project.

Second, Sturgill could have required its employees to wear suitable clothing when working on a roof in the heat. If an employee did not comply, he could have been removed from the worksite. The proper clothing would depend on the working conditions. Foreman Brown noticed that temporary employee M.R. was wearing all black clothing on August 1, 2012, and knew that it was not suitable for working on the roof. (Tr. 506; CX-13, pp. 6-7). However, M.R. was not told to wear light-colored clothing. This requirement could have easily been communicated to the temporary employees through Labor Works. M.R. was not instructed to change into suitable clothing before he began work on the roof. Instead, M.R. was allowed to work on the roof in his unsuitable, all-black clothing.

Next, 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. (CX-9, p. 5). A work-rest schedule is based on the weather conditions of the day and on a one-hour cycle. (CX-5, p. 18). For example a 15/45 schedule is 15 minutes of rest and 45 minutes of work per hour. In extreme heat and humidity a schedule of 45 minutes of rest and 15 minutes of work may be needed. Further, other factors such as age and acclimatization are considered to determine an adequate work-rest schedule. *Id.*

Instead, Sturgill maintained its routine schedule of two 15-minute breaks and a 30-minute lunch break each day. (Tr. 9, 444, 496; CX-13, p. 5). Employees were allowed to take more

breaks after notifying the foreman. (CX-13, pp. 4, 6). This is not an adequate schedule that considers the weather conditions of the day. This put the responsibility on the employee to understand the symptoms of heat illness and take breaks when necessary. An unacclimatized employee cannot be relied upon to recognize his own symptoms and remove himself from the roof. Sturgill's own toolbox talk noted that "altered behavior" and "increasing disorientation" are both symptoms of heat illness; therefore, an employee experiencing these conditions cannot be relied upon to take the necessary breaks. (CX-14). Further, an employee who has not been instructed in the recognition and avoidance of heat-related illness hazards will not be knowledgeable regarding when to take additional, necessary breaks. On August 1, 2012, M.R., an unacclimatized employee, had only one 15-minute break in five hours of work. (Tr. 513).

Foreman Brown's statement to M.R. that "if he wanted a break, if he [couldn't] do it," to let Brown know, and Brown "[would not] be mad" is not equivalent to an appropriate work-rest regimen designed to acclimatize an employee to work in a hot environment. (CX-13, p. 4; Tr. 509-10). Brown's comment likely would be heard by a temporary employee as a caution that if the employee was unable to sustain work in these conditions, he would not retain this temporary work assignment, and the employer would not be angry.[22]

In addition, Sturgill could have implemented a specific, formalized hydration policy. Water was provided, but Sturgill relied on a worker's thirst for adequate hydration rather than being proactive and monitoring its employees' intake.[23] (Tr. 519). Superintendent Gould stated that water was always available and ready for whenever employees wanted to take a drink, "but you can't force a guy, you can't hold his head and pour water down his throat." (CX-12, p. 3). According to the CDC/NIOSH, it is common for "workers exposed to hot conditions [to] drink less fluids than needed because of an insufficient thirst drive. A worker, therefore, should not depend on thirst to signal when and how much to drink." (CX-9, p. 6). A worker needs to drink 5-7 ounces of water every 15-20 minutes to replenish necessary body fluids. A worker may lose as much as two to three gallons of sweat on a hot work day and needs to hydrate accordingly. (CX-9, p. 6).

Instead, Sturgill's policy relied on a worker to know when and how much to drink even though thirst is not an adequate signal for proper hydration. The inadequacy of this policy

[22] Foreman Brown concedes that, in the past, when employees told him they "can't handle it," Brown "wouldn't be mad, [he would] sign their ticket . . . let them go." (Tr. 509-10).
[23] It appears that most employees drank directly from the cooler, so the employer would not be able to measure how much water was consumed. (CX-13, p. 5).

became apparent on August 1, 2012. A fellow worker brought M.R. a 44-ounce cup of ice water at the morning break; however, it is unknown if he drank it. Foreman Brown admitted that M.R. said he wasn't thirsty later that morning, even though he was sweating noticeably. (CX-13, p. 5). Sturgill could have communicated and enforced a simple policy regarding water breaks and necessary water consumption. If an employee was not following the hydration schedule, Sturgill could have removed the employee from the roof until he was adequately hydrated.

Sturgill could have developed a practice of monitoring employees for signs and symptoms of heat-related illness. The initial signs that M.R. displayed of heat related illness, that morning, odd behavior, sweating, and not drinking water, went unnoticed and unrecognized by foreman Brown. (Tr. 524; CX-13, pp. 5, 7). A work practice of monitoring employees for signs and symptoms of heat-related illness would have disclosed the M.R. was experiencing the initial warning signs and symptoms of illness. 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.

Sturgill's heat-related illness prevention program was not adequate

Sturgill asserts that its heat hazard program exceeded that of most roofing companies and that the Secretary's proposed abatement is not valid because he did not provide an expert from the roofing industry to set forth feasible means to abate heat-related hazards. (R. Br. 25, 38). Respondent also asserts that M.R.'s heat illness came on quickly and there were no signs or symptoms that could have been recognized earlier that morning. (R. Br. 37; Tr. 504, 524). Further, Sturgill asserts that none of the Secretary's proposed abatements would have improved M.R.'s condition. (R. Br. 37). Finally, Sturgill asserts that it included all of the abatement measures listed in an internal July 19, 2012 OSHA memorandum ("Galassi memo") regarding heat hazards and, therefore, Sturgill had an adequate heat-related safety program. (RX-4).

Review of the Sturgill's heat-related safety program discloses that Sturgill's program was not adequate. A comparison to other roofing companies is inapt. The Act requires an employer to provide a safe workplace for its employees; it is not relevant whether other employers are compliant with OSHA's regulations. Further, a roofing expert is not needed to set forth abatement measures for working in the heat. To prove his case, the Secretary is only required to show that the proposed abatement is feasible and could materially reduce the hazard. *See Arcadian,* 20 BNA OSHC at 2011. The record evidence discloses that M.R. did have symptoms of heat illness earlier that morning. Whether or not the abatement proposed by the Secretary

would have changed M.R.'s particular outcome is not the relevant inquiry. Rather, the relevant inquiry is whether the working conditions on the PNC roofing project, on or about August 1, 2012, presented a heat-related illness hazard to Respondent's employees, including employees who were not acclimatized to working in hot weather, in direct sunlight, performing strenuous work.

Sturgill asserts that the Galassi memo shows that its safety program for heat-related hazards was adequate, as Sturgill provided all of the stated abatement methods. (R. Br. 24). The Galassi memo, entitled "Extreme Heat-Related Outdoor Inspections," is from OSHA's Director of Enforcement Programs, Thomas Galassi, to OSHA's Regional Administrators. (RX-4). This memorandum is an enforcement instruction with examples of "evidence that could establish each of the factors [for a general duty clause violation]; they are not the only types [of evidence] that would satisfy OSHA's burden." *Id.* The abatement methods listed in the memorandum are: provide immediate access to water, rest, and shade, and allow workers to use it; implement an acclimatization program for new employees and those returning from an extended time away from work; implement a work/rest schedule; or provide a climate-controlled area to cool down. (RX-4, p. 2). The Galassi memo is designed for OSHA's enforcement employees investigating heat-related violations. It is not a compliance guide designed for employers. This memorandum does not provide any important or procedural rights to the Respondent. *See United States v. Myers,* 123 F.3d 350, 355-56 (6th Cir.1997) (holding that a violation by the DOJ of its internal operating procedures, on its own, does not create an enforceable right). Importantly, the record reveals that Sturgill had not effectively implemented the abatement methods listed in the Galassi memo. Sturgill's assertion that the Galassi memo shows its heat-related safety program is adequate is rejected.

I find that Sturgill's heat-related illness safety program is inadequate in a number of ways. First, there was no attempt to strategically present a heat-related toolbox talk during hot weather. The foreman presented a toolbox talk each week to the employees. Superintendent Gould stated it was a 52-week program and whatever topic was next was presented – the heat-related toolbox talks were not necessarily presented during the summer. (CX-12, p. 2; CX-13, pp. 11-12). On the day of the incident, there were three temporary employees at the worksite. (CX-11, p. 4). During the PNC roofing project, the temporary employees did not receive the information in these heat-related toolbox talks. (CX-13, p. 11-12). In particular, the toolbox talks were not presented to M.R. (Tr. 472, 518-19).

Next, the NRCA pocket safety guide was only distributed to Sturgill's permanent employees; it was not provided to the temporary employees. (Tr. 466, 473). The safety videos were only presented to permanent employees. (CX-13, pp. 10-11). There is no credible evidence that the videos included safety information about heat hazards.[24] The OSHA 10-hour training was not available to the temporary employees or permanent employees hired after the training dates in March 2012. (Tr. 433; RX-13). At the PNC roofing jobsite, five permanent employees had start dates after the OSHA10-hour training had been presented. (CX-11).

Sturgill did have a climate-controlled area available in the PNC break room. Sturgill told employees to drink water, rest, or find shade whenever they needed to. However, there is no indication in the record that new or temporary employees knew when they should use the shaded rest areas. Further, there is no evidence in the record that a new temporary employee would be comfortable asking for and taking additional breaks. Fearing loss of additional days of employment at this job assignment, a temporary employee likely would be reluctant to take multiple unscheduled breaks on his first day on the job, absent a specific instruction that additional breaks were anticipated and required for new employees unaccustomed to working in a hot environment.

Sturgill inconsistently trained its permanent employees and purposely provided limited training to its temporary employees. Sturgill did not train M.R. on heat-related hazards or on the recognition of the signs and symptoms of heat-related illnesses. Instead, Sturgill relied on the employees to know when to drink water, take a break, and recognize the signs and symptoms of heat-illness. An employer cannot shift its responsibility for safety to its employees. The Commission addressed this attempt to shift responsibility to an employee in *Pride Oil Well Svc.,* 15 BNA OSHC 1809, 1815 (No. 87-692, 1992). An employer "cannot fail to properly train and supervise its employees and then hide behind its lack of knowledge of their dangerous working practices." *Id.* (citations omitted.)

Finally, I find that Sturgill did not implement an acclimatization program. Giving temporary employee M.R. the "lightest" job on the roof is not a program designed to gradually condition an employee to work in the heat. Foreman Brown gave M.R. this job because he was an older guy and did not have any tools. Sturgill did not provide the jobsite foreman with an acclimatization plan for new employees unaccustomed to working in a hot environment. The 15-

[24] *See* footnote 12 above.

minute breaks and lunch break were not a heat-related work-rest schedule adapted to the work and weather conditions of the day. These were Sturgill's routine work breaks.

I find that Sturgill's heat-related illness prevention program was not sufficient.[25] As discussed above, it did not include acclimatization for new employees. It did not have a plan to proactively monitor its employee's hydration or determine if a break was needed when the early symptoms of a heat-related illness occurred. Finally, there was no plan to implement a modified work-rest schedule each day based on the weather. The Secretary has proven that feasible abatement methods existed to materially reduce the heat-related illness hazard for Sturgill's employees and that Sturgill's safety plan was inadequate.

Sturgill Had Knowledge of the Hazardous Condition

The Secretary must prove the employer either knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Dun-Par Engineered Form Co.,* 12 BNA OSHC 1962, 1965 (No. 82-928, 1986). I find that Sturgill had actual knowledge of the heat hazard on August 1, 2012. In particular, I find that Sturgill knew that a new temporary employee, who had not been acclimatized to the heat, was starting work that day. The PNC roofing project had been ongoing since mid-July and every day, except one, the high temperature was over 80°F with eight days over 90°F. (CX-1, CX-2). Therefore, Sturgill knew that it was likely to be a hot day requiring it to implement its heat safety program. Sturgill was aware that its roofing work occurs outside and that its employees were exposed to direct sunlight. Further, Sturgill knew that roofing work was strenuous.

"The actual or constructive knowledge of a foreman or supervisor can be imputed to the employer." *N&N Contractors, Inc.*, 18 BNA OSHC 2121, 2123 (No. 96-0606, 2000) (citation omitted)(*N&N*), *petition for review denied,* 255 F.3d 122 (4th Cir. 2001). Knowledge is directed to the physical conditions that constitute a violation. The Secretary need not show that an employer understood or acknowledged that the physical conditions were hazardous. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079-1080 (No. 90-2148, 1995), *aff'd without published opinion*, 79 F.3d 1146 (5th Cir. 1996).

[25] One of Sturgill's arguments is that a deficiency in a safety program is not proof of a hazard. (R. Br. 28). This argument is not relevant to the hazard at issue here. The hazard here is strenuous work, on a roof in the direct sun, with temperatures over 80 degrees, and a heat index in the "caution" to "danger" categories for the likelihood of heat disorders with prolonged exposure or strenuous activity. I note that Sturgill's discussion of *Tampa Shipyards, Inc*., to support this argument appears to rely to an unpublished portion of the ALJ's decision that was not reviewed by the Commission. *Tampa Shipyards, Inc*., 15 BNA OSHC 1533 (Nos. 86-360, 86-469, 1992).

The knowledge of both superintendent Gould and foreman Brown is imputed to Sturgill. Superintendent Gould was responsible for obtaining temporary employees from Labor Works for the PNC project. (CX-13, p. 10). Gould testified that he relied on foreman Brown to train the temporary employees because he knew they would not receive the same orientation training as the permanent employees. (Tr. 480). Gould also knew that the toolbox talks were in random rotation and not likely to occur on the day a new employee starts. Therefore, Gould knew that August 1, 2012, was temporary employee M.R.'s first day working for Sturgill and that the only training M.R. would receive was from the foreman. Foreman Brown also knew that M.R. had not received the same training as a permanent employee.

Foreman Brown knew that it was going to be hot working on the roof that day. Brown knew the predicted high was 89°F and Brown knew that it was about ten degrees hotter on the roof, than on the ground. Foreman Brown knew that the only "shade" available on the roof came from stacked roofing materials and air-conditioning units, shade dependent upon the angle of the sun. Further, superintendent Gould testified that, as roofers, they "plan ahead . . . we know what the weather is going to be." (CX-12, p. 4; Tr. 443). Sturgill was aware of the weather conditions in order to plan its roofing work. Sturgill also had to plan ahead to request additional temporary employees from Labor Works.

Therefore, Sturgill knew it was going to be hot that day and that a new employee was starting. Superintendent Gould and foreman Brown were able to inquire and obtain information, from the temporary agency and from the employee directly, regarding a new employee's prior jobs and working conditions. This important information could be used to determine whether the new employee was ready for heat exposure or needed to be acclimatized. Both Gould and Brown knew that there was no particular plan to acclimatize the new temporary employee on August 1, 2012. The Secretary has shown that Sturgill knew of the hazardous conditions on August 1, 2012 and that an unacclimatized employee would be exposed. This serious citation item is affirmed.

Respondent argues that the instant case is distinguishable from the decision in *Post Buckley Schuh & Jernigan, Inc.,* 24 BNA OSHC 1155 (No. 10-2587, 2012) (ALJ) (*Post*). (R. Br. 35-37). In *Post* an administrative law judge affirmed a violation of the general duty clause for a heat-related fatality at an archaeological worksite. I note that the Secretary did not cite to this case. I find the parallels between the instant case and *Post* outweigh the differences. Respondent seems to argue that only a desert-like jobsite is subject to heat hazards and that the

evidence does not support the existence of a heat hazard in the instant case. This argument is rejected. As discussed above, a heat-related hazard was present on the Sturgill PNC roofing project on August 1, 2012. Respondent's assertion that M.R.'s heat illness came on suddenly, when compared to the employee in *Post,* also is rejected. (R. Br. 37). As discussed above, the record reveals that temporary employee M.R. displayed signs and symptoms of heat illness, during the morning of August 1, 2012, prior to his collapse on the roof. The findings in the *Post* case are not contrary to the findings here.

Citation 1, Item 2

The Secretary's Burden of Proof

To establish a violation of an OSHA standard, the Secretary must prove that: (1) the cited standard applies; (2) the terms of the standard were violated; (3) one or more employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Astra Pharm. Prod.*, *Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part,* 681 F.2d 69 (1st Cir. 1982).

> Citation 1, Item 2 alleges a serious violation of 29 C.F.R. § 1926.21(b)(2) as follows:
>
> The employer did not instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his/her work environment to control or eliminate any hazards or other exposure to illness or injury:
>
> (a) . . . On or about August 1, 2012, [Sturgill] did not ensure that its full time permanent employees, including managers, and temporary employees all received reasonable and necessary instruction specific to the recognition and avoidance of risk factors related to the development of heat-related illnesses such as, but not limited to heat stroke, heat exhaustion, heat cramps, and heat rash.
>
> (i) Temporary employees had not been provided with detailed information related to the hazards, danger signs and symptoms, and methods of prevention associated with heat-related illnesses.
> (ii) Permanent employees, including foreman, had not received effective heat-related illness training as demonstrated by:
>
> (A). An employee wearing dark clothing on a white, reflective work surface in direct sun conditions was not encouraged to change clothing or prevented from working under those conditions.
> (B). A formalized work/rest regimen has not been developed or applied based on working conditions.
> (C). An employee that was demonstrating signs of heat exhaustion (i.e. refusing to drink water, profuse sweating) was not immediately removed

from the work environment and provided shade, water and medical attention.
(D). An acclimatization program has not been formalized and lacked the element of reduced time in elevated heat conditions.

For the reasons that follow, I find that Sturgill did not provide adequate training to its permanent and temporary employees to recognize and avoid heat-related hazards.[26] To prove a violation of § 1926.21(b)(2), the Secretary must show that the cited employer failed to instruct employees on "how to recognize and avoid the unsafe conditions which they may encounter on the job." *O'Brien Concrete Pumping, Inc.*, 18 BNA OSHC 2059, 2061 (No. 98-0471, 2000) (*O'Brien*) (citations omitted). "An employer's instructions must be 'specific enough to advise employees of the hazards associated with their work and the ways to avoid them,' and modeled on the applicable OSHA requirements." *Id.* (citations omitted). The Secretary must show "that the cited employer failed to provide the instructions that a reasonably prudent employer would have given in the same circumstances." *Compass*, 23 BNA OSHC at 1134 (citations omitted). If the employer rebuts the alleged training violation, with proof that it provided the training in question, the burden shifts to the Secretary to show that the training provided was deficient. *N&N,* 18 BNA OSHC at 2127.

There is no dispute that the standard applies.[27] Superintendent Gould and foreman Brown knew that temporary employees did not receive the same training as Sturgill's permanent employees. Temporary employees did not receive OSHA10-hour training, new employee orientation training, and did not receive the NRCA pocket safety guide. Gould also knew that the toolbox talks about heat-related hazards were not timed to coincide with hot weather. Foreman Brown did not present the heat hazard toolbox talks to employees, including temporary employees, during the PNC roofing project. Superintendent Gould and foreman Brown knew that a new temporary employee was starting work at the PNC roofing jobsite on August 1, 2012, and would not have the same training as a permanent employee. Foreman Brown and superintendent Gould admitted that temporary employee M.R. had no training other than foreman Brown's limited work instructions at the start of the day on August 1, 2012. The knowledge of the superintendent and foreman is imputed to Sturgill. Through its superintendent and foreman, Sturgill had knowledge that the temporary employees were working on the roof, in

[26] The Respondent also presented an argument regarding 29 C.F.R. § 1926.21(b)(1). (R. Br. 34). Because the Respondent was not cited for a violation of 1926.21(b)(1), this argument is not addressed.
[27] Sturgill argues that there is no requirement that its training instructions be in written form. (R. Br. 32-33). I agree. The allegation here is that, in general, Sturgill did not adequately train.

hot weather conditions, without adequate training on how to recognize and avoid heat-related hazards.

Sturgill asserts that it only trained its temporary workers for the particular tasks they were assigned and did not train them for safety issues not encountered during the day. (Tr. 539). However, the facts of this case show that Sturgill did not train its temporary employees for hazards they would encounter. Clearly, the temporary employees had equal exposure to any heat-related hazard as did the permanent employees. Further, a temporary employee would be more likely to suffer a heat-related illness due to the lack of acclimatization.

Respondent asserts that it is being cited for not enforcing its work rule rather than for inadequate training.[28] I disagree. The facts in the instant case reveal that Sturgill's heat-related illness training program was inadequate, especially regarding Sturgill's temporary employees.

The Commission has held that failure to enforce compliance with a safety rule does not establish proof of a training violation. *See N&N*, 18 BNA OSHC at 2128 (citation omitted). The instant case is easily distinguished from *N&N*. In *N&N*, the Commission found that the employer had provided adequate fall protection training through its written work rule requiring the use of fall protection equipment, training at the corporate office, training at the worksite, monthly safety meetings, special training from the worksite's general contractor just four months before the inspection, training of the foremen by the safety coordinator two days before the inspection, and toolbox talks by those foreman to the employees at the site. *Id*. The Commission found that the training was adequate to provide employees with the knowledge to recognize and avoid fall hazards.

In contrast, in the instant case, Sturgill employed temporary employees at the PNC roofing worksite with almost no training regarding the recognition and avoidance of heat-related hazards. The minimal instruction foreman Brown provided to temporary employee M.R. on August 1, 2012, regarding working in a hot environment, disclosed that the foreman's jobsite work instructions were deficient. The minimal instruction was simply to show M.R. the water coolers on the roof and tell him to ask for a break if he was hot. Foreman Brown's generalized instructions were not "specific enough" and did not include a discussion of heat-related illness hazards or information regarding how to recognize the signs and symptoms of heat-related

[28] The Respondent relies on *Northern Excavating Co., Inc.,* 24 BNA OSHC 1272 (No. 11-0638, 2012)(ALJ) to show that the instructions M.R. received were adequate. Because *Northern Excavating* is a decision without precedential value, I will instead address the Commission's decision in *N&N Contractors, Inc.*, 18 BNA OSHC 2121 (No. 96-0606, 2000), *petition for review denied,* 255 F.3d 122 (4th Cir. 2001), which *Northern Excavating* relies upon.

illness. Foreman Brown's limited jobsite instructions did not include information regarding the importance of acclimatization for new employees unaccustomed to working in the heat, the need for frequent breaks, the importance of water consumption even if the employee is not thirsty, and the need to dress appropriately when working in a hot environment. (CX-13, p. 11). Temporary employee M.R. could have been informed that a lack of thirst and excessive sweating are symptoms of heat illness. He could have been trained to recognize these symptoms, take frequent breaks, and hydrate.

Sturgill did have heat-related hazard training for its permanent employees that covered many useful topics. That said, I find Sturgill's heat-hazard training for its permanent employees working on the PNC roofing project, including its foreman, was also deficient as it lacked important specific information regarding the need to acclimatize new employees. Foreman Brown had not received guidance regarding implementation of an acclimatization program for new employees unaccustomed to working in a hot environment, including monitoring the employee's condition, water consumption, appropriate clothing, and work / rest schedule. Foreman Brown had not received guidance on development of a work / rest schedule based on the weather conditions. Foreman Brown had not received instruction to require that a new unacclimatized employee take more frequent break periods, during his initial period on the job, as the employee "worked up to it." (CX-13, p. 11). Further, Sturgill's heat hazard training for permanent employees was deficient because its instruction delegated to the employees the responsibility to recognize when to take additional breaks and the amount of water to consume based on thirst.

"An employer's obligation to instruct and train is dependent upon the specific conditions, whether those conditions create a hazard, and whether the employer or its industry has recognized the hazard." *Fairfield,* 19 BNA OSHC at 1235. In *Fairfield,* even though the employer recognized and addressed the hazard and had identified a possible means of abatement, the Commission found that the employer did not provide adequate training. It allowed employees the discretion as to how and when to cross a busy highway when, instead, it should have given the employees "specific guidance for making such decisions." *Id.* at 1236. (citations omitted).

Similarly, here Foreman Brown's generalized jobsite instructions given to temporary employee M.R. were not "specific enough" and did not include a discussion of heat-related illness hazards or information regarding how to recognize the signs and symptoms of heat-

related illness. Absent this information, Foreman Brown's vague instruction to M.R., to let the foreman know if he was hot, was woefully insufficient. Likewise, Sturgill did not give its permanent employees, including its foreman, necessary information and specific guidance regarding the need to acclimatize new employees unaccustomed to working in a hot environment and specific guidance regarding implementation of an acclimatization program. *See also Danis Shook Joint Venture XXV*, 19 BNA OSHC 1497, 1500-01 (No. 98-1192, 2001), *aff'd*, 319 F.3d 805 (6th Cir. 2003) (Commission found the employer's training program was inadequate because it did not give specific instructions on how to recognize and avoid the particular hazard at issue.); *O'Brien*, 18 BNA OSHC at 2061 (Commission found that although the employer did provide training and a general warning, the training was inadequate because it did not include safety instructions for the particular work activity.). I find that Sturgill did not provide adequate training to its permanent employees, including its foreman, and to its temporary employees to recognize and avoid heat illness.

I conclude that the Secretary has met his burden of proving the alleged violation of the cited standard. The Secretary classified Citation 1, Item 2 as serious. A violation is properly classified as serious if "there is substantial probability that death or serious physical harm could result" if an accident occurs. *See Compass*, 23 BNA OSHC at 1136. A lack of training regarding effective methods to avoid heat-related illness when working in a hot environment may result in employees developing a serious heat-related illness. A lack of training regarding the recognition of the signs and symptoms of heat-related illness may result in an employee not receiving timely appropriate treatment, thereby allowing the condition to progress from heat stress, to heat exhaustion, to heat stroke. This case demonstrates the serious consequences of overexposure to heat.

This item is therefore affirmed as a serious violation.

Penalty

Section 17(j) of the Act requires the Commission to give due consideration to four criteria in assessing penalties: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history of violations. Gravity is generally the primary factor in the penalty assessment. *See J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993).

The statutory maximum penalty for a serious violation is $7,000.00. *See* § 17(b) of the Act. The Secretary classified Citation 1, Item 1, and Citation 1, Item 2 as serious and proposed a

penalty of $4,410.00 for each. As discussed above, these items are properly characterized as serious.

OSHA assessed the proposed penalties to reflect both the high severity and high probability of heat illness for both violative conditions; in particular, the high probability of harm for an unacclimatized employee. (Tr. 71). The statutory maximum of $7,000.00 was reduced after consideration of the size of the company and Sturgill's lack of a prior OSHA citation history. There was no reduction for good faith. (Tr. 71).

I conclude the proposed penalties are appropriate. A penalty of $4,410.00 is assessed for each item for a total penalty of $8,820.00.

Findings of Fact and Conclusions of Law

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been made above. *See* Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are denied.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1, alleging a Serious violation of § 5 (a)(1) is AFFIRMED, and a penalty of $4,410.00 is ASSESSED.

2. Citation 1, Item 2, alleging a Serious violation of 29 C.F.R. § 1926.21(b)(2), is AFFIRMED, and a penalty of $4,410.00 is ASSESSED.

/s/
Carol A. Baumerich
Judge, OSHRC

Date: February 23, 2015

Washington, D.C.