

UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,	)	
	)	
Complainant,	)	
	)	
v.	)	OSHRC Docket No. 13-0224
	)	
A.H. STURGILL ROOFING, INC.,	)	
	)	
Respondent,	)	
	)	

**BRIEF OF CALIFORNIA RURAL LEGAL ASSISTANCE, INC. AND CALIFORNIA  
RURAL LEGAL ASSISTANCE FOUNDATION IN SUPPORT OF THE SECRETARY  
OF LABOR**

**INTRODUCTION AND STATEMENT OF INTEREST**

Amici Curiae, California Rural Legal Assistance, Inc., and California Rural Legal Assistance Foundation are non-profit legal services providers who have represented low wage workers in California since 1966 and 1986, respectively. Amici represent individuals working in agriculture, construction, landscaping and other occupations where workers are regularly exposed to high heat conditions and the attendant health risks. Many of our clients are seasonal workers who travel for work in various areas around California and migrate to other states, including states that do not have a federally approved State Plan for regulation of occupational safety and health. It is common for low-wage construction workers and agricultural workers to change employers frequently during their seasonal work and, increasingly, these industries are relying on temporary labor supplied by off-site agencies that do not provide training appropriate

to all of the worksites where an employee might be assigned. California enforces worker health and safety protections under its federal OSHA-approved State Plan. Since 2005 those protections have included an outdoor heat standard. Title 8 Cal. Code of Regulations § 3395. Amici’s interest in the outcome of this case arises from its representation of California workers who, while employed outside of the state, may be subjected to less protective heat standards and at a greater risk for heat-related illness or death.

Amici support the position of the Secretary in this matter and join in the argument submitted by the North America’s Building Trades Unions (NABTU) in their amicus curiae brief.

In this brief, Amici will provide information about the historical impact of enforcing California’s heat standard since 2005. Amici will address the importance of the various factors considered by the Secretary when issuing the citations, particularly the lack of training and enhanced observation of new employees. The analysis will address Commission’s question regarding “Whether an employer’s knowledge or lack of knowledge of its employees’ underlying health conditions or ages ... are relevant to the Secretary’s burden to establish a violation of the general duty clause.”

## **BACKGROUND**

Heat illness has been an identified occupational hazard for decades. State and national agencies, industry safety consultants and academic institutions have examined incidents of illness and death in thousands of studies.<sup>1</sup> NIOSH’s 2016 comprehensive update of its

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<sup>1</sup> A search using the term “heat illness” on the CDC/NIOSH website yielded 2,216 results including studies, reports, blogs, advisories and other publications, see: <https://search.cdc.gov/search/?subset=NIOSH&query=heat+illness&utf8=%E2%9C%93&affiliate=cdc-main&sitelimit=www.cdc.gov%2Fniosh+%7C+blogs.cdc.gov%2Fniosh-science-blog%2F>.

“Occupational Exposure to Heat and Hot Environments”<sup>2</sup> report relies upon hundreds of studies, and reports analyzing the developments in understanding the impact of heat in an occupational setting. While specific recommendations vary, there are generally accepted hazard indicators and preventative measures that form the core of industry, agency and medical recommendations about how to address the risk of illness and death from occupational heat stress. These include heat index monitoring, acclimatization, the availability of shade, hydration and training.<sup>3</sup>

Since California adopted heat illness regulations in 2005, Cal/OSHA has documented dramatic reductions in the number of heat fatalities per year. In 2015, there was one confirmed heat-related fatality compared to 10 in 2005, when the initial emergency standard was enacted. In other words, California has seen a 90% decrease in heat-related fatalities in the workplace since 2005, while the nation as a whole has experienced a 38% decrease in reported heat fatalities during this same time, from 34 to 18.<sup>4</sup>

These achievements are attributable largely to heat illness prevention regulatory requirements (Title 8 California Code Regs. § 3395) that include general provisions including training of workers and supervisors in prevention, recognition and response to heat illness (*id.* § 3395(h)), providing ready access to shade ( § 3395(d)), and increasing access to drinking water (*id.* § 3395(c)). These general requirements are consistent with industry and medical recommendations about how to identify and address heat stress risk. However, California’s

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<sup>2</sup> This report can be found at <https://www.cdc.gov/niosh/docs/2016-106/pdfs/2016-106.pdf> .

<sup>3</sup> *Id.* Executive Summary at v-viii; see also, “CDC Heat Stress Recommendations” found at <https://www.cdc.gov/niosh/topics/heatstress/recommendations.html> ; National Association of Homebuilders, Heat Stress Toolbox, found at <https://www.nahb.org/en/research/safety/video-toolbox-talks/heat-stress.aspx> .

<sup>4</sup> Occupational Safety and Health Program, *State OSHA Annual Report (SOAR)* 9 (2016), available at [https://www.dir.ca.gov/dosh/reports/State-OSHA-Annual-Report-\(SOAR\)-FY-2016.pdf](https://www.dir.ca.gov/dosh/reports/State-OSHA-Annual-Report-(SOAR)-FY-2016.pdf) .

experience demonstrates that enforcement of these generally accepted standards can reduce the incidence of heat related occupational deaths, as the dramatic reduction in heat related deaths occurred during a timeframe when California's heat illness prevention standard was adopted and there was a significant increase in rate of compliance. As a result of effective enforcement measures, Cal/OSHA found a significant increase in the overall compliance rate with the Heat Illness Prevention standard, from 63.3% in 2015 to 73.7% in 2016.<sup>5</sup>

Just as major gains have been possible in California through the state's effective enforcement of heat illness prevention standards, so too are positive results achievable in health and safety protections at the national level through enforcement of the general duties clause. Such enforcement is appropriate given the reasonable expectation that employers like A.H. Sturgill will know of and follow generally accepted practices regarding heat illness prevention as well as their own training protocols. In this case, the Secretary's citations fell well within the criteria for enforcement of the general duties clause. Because the ALJ's decision is supported by the evidence in the record, it should be affirmed.

## **ARGUMENT**

### **1. THE SECRETARY MET ITS BURDEN OF PROVING THE EXISTENCE OF A RECOGNIZED HEAT ILLNESS HAZARD AND FAILURE TO IMPLEMENT REASONABLE ABATEMENT MEASURES.**

A.H. Sturgill's argues that the Secretary has not met its burden of showing the existence of a hazard by urging the Commission to disregard all of the evidence relied upon by the ALJ including Sturgill's own training protocol, the Secretary's guidelines, industry resources, Sturgill's own foreman's acknowledgment of the risk and the ultimate illness and death of an employee due to heat illness related complications. (Reply at pages 5-6) However, if an

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<sup>5</sup> *Id.* at 8.

employer is allowed to ignore all such factors, there would never be a circumstance when the general duties clause may be used as the basis for a heat related citation.

The Secretary's evidence, and the ALJ findings established that information was known or available to the employer that was not properly taken into consideration when evaluating the health hazard confronting employees at its job site. The NWS heat index (CX-3, CX-4 at 2) provides a bright line for assessing the likelihood of heat related illness. The National Roofing Contractors Association (NCRA) toolbox and toolbox talks on heat hazards and a pocket safety guide (CX-10; CX-14; RX- 9) demonstrate that assessment of heat risks is industry practice, as are recommended prevention measures such as acclimatization, clothing considerations and water consumption. These, in addition to the science-based guidelines provided by OSHA (X-5) are all part of the general information that must be used when assessing the dangers at a workplace and designing abatement. Sturgill argues, in essence, that it need not consider these sources when it assesses danger, or designs abatement measures unless they are included in express regulations. (Reply Brief at p. 5). This head in the sand argument is completely contrary to the purpose of the general duties clause which both assumes that it is neither possible nor prudent to attempt to identify through regulation all potential work hazards or the appropriate steps to be taken. 29 U.S.C. § 654(a)(1). "The general duty clause should still be available for use by the Secretary, when an employer is violating a standard of health concerning a well-known industrial ill that is recognized as a hazard by the industry through its own nationally accepted criteria..." *Am. Smelting & Ref. Co. v. OSHRC*, 501 F.2d 504, 514 (8<sup>th</sup> Cir. 1974).

Sturgill suggests that once it develops and implements its own hazard abatement approach consistent with industry practice, it may not be cited in the absence of a specific standard. (Reply at 4-5). This argument is inconsistent with the very notion of the general duties

clause. But that argument need not be addressed as the measures taken by A.H. Sturgill were inadequate by industry standards. (See Secretary's Opening Brief at pp. 4, 14-15, 17.)

The law cannot countenance a general standard that allows an employer to ignore the breadth of resources available on heat illness, particularly in light of the documented deaths that have occurred as a result of this largely preventable hazard. Sturgill attempts to argue that an employer can ignore industry recommendations, guidelines from two federal agencies and its own training materials, but avoid liability when the predictable injury – or in this case, death – occurs. Yet that contention runs directly counter to the fundamental purposes of the general duties clause.

**2. THERE IS NO NEED TO ADDRESS STURGILL'S KNOWLEDGE OF THE AGE OR HEALTH ISSUES OF ITS EMPLOYEES WHEN REVIEWING THE CITATION IN THIS CASE.**

Amici join the Secretary, Amicus Curiae, NABTU and Respondent, all of whom share the position that knowledge of the age and health of M.R. is not relevant to any of the issues in this case. As pointed out by the Secretary and NABTU, focusing on this inquiry here, or when addressing enforcement of the general duties clause generally, will not promote the interests of employees or employers who are genuinely interested in maintaining a safe work place for its diverse workforce. Rather, it promotes the notion that health and safety precautions could be worker specific, both increasing complexity and the likelihood that certain worker characteristics such as age, sex, health, and physical attributes will be preferred. That is contrary to both worker protection laws and anti-discrimination protections and therefore should not be a part of the Commission's analysis.

**3. STURGILL’S VIOLATION THE TRAINING REQUIREMENTS OF 29 C.F.R. § L 926.2L(B)(2) AS TO M.R. AND OTHER NEW EMPLOYEES IS ALSO EVIDENCE OF THE VIOLATION OF THE GENERAL DUTIES CLAUSE.**

According to comparative data reported by California, for 2015 Agriculture had the highest overall fatality rate of 22.8% followed by construction at 10.1%. In California, for that year, the fatality rate for agriculture was 17.1% and construction was 6.8%, again the two highest industries in the state. Agriculture had the highest number of heat related deaths between 2005 and 2016, followed by construction and landscaping.<sup>6</sup> These are highly seasonal industries, in California and throughout the country. The increased use of staffing agencies, as was the case here, means that “new” or “temporary” employees are showing up at these worksites on a more frequent basis.<sup>7</sup> Sturgill did not dispute the fact that M.R. and other temporary employees were not provided even the minimal training given to permanent employees. (ALJ Dec. 6-7.)

Studies conducted by the California Division of Occupational Safety and Health of illnesses and injury incidence in California demonstrated that employees who are new on the job are far more likely to fall victim to heat illness. An analysis of reported heat illness incidents in 2005 revealed that [r]oughly 80% of involved employees had been on the job for fewer than 4 days.”<sup>8</sup> A similar review of 2006 incidents found that “[t]he heat-related incident occurred on the first day of work or first day of heat wave for 15% of victims, 1-4 days (30%), 5-7 days

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<sup>6</sup> Occupational Safety and Health Program, *supra* at 6, 10.

<sup>7</sup> OSHA, *Protecting Temporary Workers* May 7, 2018, found at [https://www.osha.gov/temp\\_worker](https://www.osha.gov/temp_worker); OSHA *Policy Background on the Temporary Worker Initiative*, July 15, 2014, found at [https://www.osha.gov/temp\\_workers/Policy\\_Background\\_on\\_the\\_Temporary\\_Worker\\_Initiative.html](https://www.osha.gov/temp_workers/Policy_Background_on_the_Temporary_Worker_Initiative.html) .

<sup>8</sup> Cal/OSHA *Investigations of Heat Related Illnesses*, February 17, 2006, p.2, found at <https://www.dir.ca.gov/oshsb/heatillnessinvestigations.pdf> .

(27%), 8-14 days (9%) and greater than 2 weeks (18%).”<sup>9</sup> Sturgill had clearly included some level of training as part of its abatement practices for permanent employees and had provided them with the industry produced pocket safety guide including information on heat illness and toolbox talks on heat hazards. (ALJ Dec. at 6-7). These briefings would have familiarized M.R. with abatement measures such as acclimatization, recommended dress, recommended hydration the use of shade (see (CX-10; CX-14; RX- 9). But he and other temporary employees were denied the benefit of even these minimal measures,<sup>10</sup> given their lack of training. This demonstrates that the hazard was known, abatement measures recognized by the industry – including training – were available, but were not followed by A.H. Sturgill all of which contributed to the unnecessary death of M.R.

### CONCLUSION

This case demonstrates the need for enforcement of the general duties clause when well-established industry and agency recommendations are known to the employer, but ignored. It is particularly important in high hazard industries like construction and agriculture that workers be afforded the feasible protection measures available to employers, especially when industry standards embrace these protections. The case also demonstrates that training requirements, either regulatory or based on company practice, must be adhered to for all employees.

Neglecting the training of new or temporary workers increases risk to all employees. The

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<sup>9</sup> Cal/OHSA investigations of Heat-Related Illness 2006, 4, *available at* <https://www.dir.ca.gov/dosh/heatillnessinvestigations-2006.pdf>.

<sup>10</sup> Of note, these materials also emphasize the need to move a victim to a shady area and take measures to cool the victim down. (See CX 14). Yet, M.R. was found laying in the sun by the EMT responders who themselves shaded him while performing emergency treatment. (ALJ Dec. 6). This suggests a failure to follow the very abatement measures A.H. Sturgill relies on; which was likely attributable to a lack of training, and certainly contributed to the hazard of the condition.



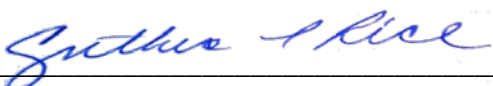
Secretary's actions in this case were consistent with his authority under the general duties clause and 29 C.F.R. § 1926.21(b)(2). As the ALJ's decision is based on findings supported by the record, it should be affirmed.

Respectfully submitted,

Dated: May 14, 2018

CALIFORNIA RURAL LEGAL ASSISTANCE, INC.

CALIFORNIA RURAL LEGAL ASSISTANCE  
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**CERTIFICATE OF SERVICE**

I am employed in Alameda County, California. I am over the age of eighteen years and not a party to the within titled action. My business address is 1430 Franklin Street, Suite 103, Oakland, California 94612. On May 14, 2018, I served the foregoing document entitled:

**BRIEF OF CALIFORNIA RURAL LEGAL ASSISTANCE, INC. AND CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION IN SUPPORT OF THE SECRETARY OF LABOR**

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true. Executed on the 14<sup>th</sup> day of May, 2018 in Oakland, California.

  
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SYLVIA VALENTINE