BEFORE THE UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| Secretary of Labor,<br>Complainant,<br>v.<br>A.H. Sturgill Roofing, Inc.,<br>Respondent. | OSHRC Docket 13-0224 |

# Brief on Review of *Amici Curiae*, The Utility Line Clearance Coalition, The Tree Care Industry Association, The United States Postal Service, and The Chamber of Commerce of the United States of America

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## I.The *Amici Curiae* and Their Interest

**The Utility Line Clearance Coalition** ("ULCC") represents the interests of ten companies engaged in line-clearance tree trimming for electric utility, municipal, and commercial customers.[1] ULCC member companies employ over 37,000 workers to perform about ninety percent of all such work in the United States.

The ULCC has participated widely in occupational safety and health matters. For example, it has participated in numerous OSHA rulemakings (*e.g.,* "Electric Power Generation, Transmission, and Distribution; Electrical Protective Equipment; Final Rule," 79 Fed. Reg. 20315, 20342 (2014) (noting comments)), and it has submitted *amicus curiae* briefs, such as in *Davey Tree Expert Co.*, 25 BNA OSHC 1933 (No. 11-2556, 2016). The ULCC has, like the Tree Care Industry Association, worked directly with OSHA-approved state plans, such as those in

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[1] The ULCC is composed of Asplundh Tree Expert, LCC; The Davey Tree Expert Company; Lewis Tree Service, Inc.; Lucas Tree Experts, Inc.; McCoy Tree Surgery, Inc.; Nelson Tree Service, Inc.; Penn Line Service, Inc.; Townsend Tree Service, Inc.; Trees, Inc.; and Wright Tree Service, Inc.

California, Maryland and Virginia, to help craft arborist-specific safe work practice standards.

**The Tree Care Industry Association** ("TCIA") is a trade association comprised of about 2,500 employers nationally. Its members provide tree care services for homeowners as well as commercial, municipal and utility clients, and together employ over 100,000 arborists and other workers.

The TCIA is active in regulatory matters affecting workplace safety. For example, it actively participates on the ANSI committee that crafts ANSI Z133, *Safety Requirements in Arboricultural Operations*. It submitted an *amicus curiae* brief in *Davey Tree Expert Co.*, 25 BNA OSHC 1933 (No. 11-2556, 2016); has urged OSHA to adopt a standard for tree care operations; and has submitted comments in OSHA rulemakings, such as OSHA Docket No. OSHA-2012–0007, Standards Improvement Project-Phase IV, 81 Fed. Reg. 68504 (invited, Oct. 4, 2016), as well as the rulemaking noted above. And, like the ULCC, the TCIA has worked directly with state plans to help them craft arborist-specific safe work practice standards.

**The United States Postal Service ("Postal Service")** is a self-supporting, independent federal agency. It is the only delivery service that reaches every residential and business address in the United States and its territories. In 2017, the Postal Service served 157.3 million delivery points and delivered 149.5 billion

pieces of mail. With more than half a million employees, the Postal Service is one of the nation's largest employers. The Postal Service is committed to ensuring the safety of its employees, including the prevention of heat-related illnesses.

**The Chamber of Commerce of the United States of America** ("Chamber") is the world's largest business federation. It represents 300,000 direct members and the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber represents its members in matters before Congress, the Executive Branch and the courts, and thus regularly files *amicus curiae* briefs regarding issues of concern to the nation's business community.

*Amici* and their members value their employees and their safety. However, as part of the regulated community subject to OSHA enforcement, they have significant concerns about OSHA's application of the General Duty Clause, 29 U.S.C. § 654(a)(1) ("GDC"), to heat exposure. As this case and other GDC heat-illness cases show, the Secretary has taken a broad, undisciplined approach to the GDC, one that leaves employers without any practical guidance for how much heat is too much, or what can and should be done to protect employees and avoid citation. Such citations also fail to faithfully and consistently apply the limitations that Congress placed on the GDC. For example, such citations commonly reflect

the supposition that, just because *some* level of heat was recognized as hazardous, a hazard was "recognized" at whatever level harm might or did occur. This ignores a key issue—whether the condition that allegedly occurred on the date of the alleged violation was recognized to be hazardous. *Amici* therefore argue that the Commission should ensure that application of the various GDC elements is internally consistent and adheres to congressional intent.

## II. Argument

A GDC violation requires (1) a "hazard" that is (2) "recognized" by the employer or its industry as (3) likely to cause death or serious physical harm, and (4) that can be prevented by measures that are feasible and useful (*i.e.*, would materially reduce the hazard). *See, e.g., Pegasus Tower*, 21 BNA OSHC 1190, 1191 (No. 01-0547, 2005).

### A. The Secretary Proposes An Inappropriate Definition of the "Hazard."

A key term in the GDC is "hazard." The "hazard" in a GDC case must not only be defined in a way that comports with congressional intent, and to reflect conditions or practices over which the employer can reasonably be expected to exercise control (see note 2 below), but in a way that maintains logical consistency with other GDC elements. As we shall show, the Secretary's brief consistently fails to do that.

The Secretary's argument gets off on the wrong foot by arguing that a "hazard" is a "condition that creates or contributes to an *increased* risk that an event causing death or serious bodily harm to employees will occur." Sec.Br. 9 (emphasis added), quoting *Baroid Div. of NL Indus., Inc. v. OSHRC*, 660 F.2d 439, 444 (10th Cir. 1981); *see also* Sec.Br. at 10 ("hazard" because of "increased" risk of heat illness).

By this logic anything that merely "increases" a risk is a "hazard." But any motion, any activity, even walking on a level surface, increases risk. That cannot be the standard. Congress wrote the GDC to govern a narrow class of cases, not to outlaw risk. As we more fully explain in Part II.B beginning on page 15 below, for a finding of "hazard" to comport with the teachings of the U.S. Supreme Court, the resultant risk must be at least "significant." To comport with the word "likely" in the GDC, the hazard must be "likely" to cause death or serious physical harm.

**1. What Was the "Hazard" Here?**

The citation describes the hazard of "excessive" heat. That term as a regulatory criterion is useless. It tells employers nothing, for it fails to state how much heat is

excessive and for whom.[2] It also fails to pose the relevant question—whether the conditions upon which the Secretary collectively relies constitutes a "hazard."

The Secretary argues that a hazard existed largely because employee M.R. developed heat stroke and died. "[T]hat M.R. developed a fatal heat illness after working in the rooftop heat conditions is strong evidence that these conditions were hazardous." Sec.Br. 9. But employee M.R. died also, the Secretary's expert witness testified, because "the work site exposed him to high heat, environmental exposures, and that combined with his elderly age, lack of acclimatization, preexisting conditions, all combined together to cause a heat stroke." Tr. 98-99. Those preexisting conditions included congestive heart failure, kidney deficiency requiring dialysis, hepatitis C infection, and anemia. Tr. 122, 158. Thus, the alleged hazard here is not merely "heat" but includes the factors that combined to cause his death. Those include M.R.'s pre-existing conditions as well as his exposure to heat under the following conditions:

1. The ground-level temperature at 10:53 a.m. was 83 degrees.

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[2] *See Pelron Corp.*, 12 BNA OSHC 1833 (No. 82-388, 1986) (hazards must be "defined in a way that . . . identifies conditions or practices over which the employer can reasonably be expected to exercise control."); *cf. Kropp Forge Co. v. Secr'y of Labor*, 657 F.2d 119, 122-23 (7th Cir. 1981) (requirement for "effective" hearing conservation program "does not give reasonable notice").

2. The temperature on the roof was ten degrees hotter than that at ground level.

3. The relative humidity was 55 percent.

4. The employees were working in direct sunlight.

5. The employees were performing the following work:

    a. For employees other than M.R.: Tearing off the existing roof (a rubber roofing membrane over a layer of Styrofoam insulation); cutting the rubber pieces (weighing up to ten pounds each) and the Styrofoam pieces (weighing one or two pounds) and cutting them into smaller pieces; loading them into a cart and moving the cart to the roof edge; and installing a new roof.

    b. For employee M.R.: Throwing discarded roofing materials (weighing up to ten pounds each) over a 39-inch high parapet wall for five hours with only one 15-minute break for water, while wearing a black sweater and black pants, while being 60 years old, without recent acclimation to working in the above conditions, and with the above-noted physical conditions.

To maintain internal consistency, therefore, the Commission must apply this same understanding of the "hazard" to other GDC elements—for example, when it inquires into whether the roofing industry or Sturgill "recognized" (a) conditions 1-5.a as together posing a "hazard" as to employees other than M.R.; and (b) conditions 1-5.b as together posing a "hazard" as to employee M.R.; and into whether *those* "hazards" were "causing or likely to cause death or serious physical harm."

### 2. Was A Hazard Proven Here?

Regardless of whether the unique circumstances of M.R.'s health might allow the conclusion that he was exposed to a hazard in this unusual case, the broad holding and rationale used by the Judge and the Secretary to find a hazard clearly goes too far.

#### a. The Documents Submitted By the Secretary Do Not Prove A "Hazard."

The Secretary argues not only that the activities of Sturgill's employees on the roof posed an "increased" risk (Sec.Br. 10, top) but that the Commission should treat as "further evidence" of a "hazard" that the National Weather Service's "heat index at the job site exceeded OSHA's threshold for implementation of a heat illness prevention plan . . . ." *Id.*, first full paragraph.

The Secretary's first argument—that the other employees' outdoor activities (roof removal and installation) posed an "increased" risk—is, as shown in part II.A above, insufficient as a matter of law to constitute a hazard under the GDC. The Secretary's second argument—the National Weather Service's "heat index at the job site exceeded OSHA's threshold for implementation of a heat illness prevention plan—relies on two documents, complainant's exhibit four, "Heat: A Major Killer," published by the National Weather Service (NWS) on its web site, and complainant's exhibit five, a series of information sheets published on

OSHA's web site that includes a section entitled, "Using the Heat Index to Protect Workers."

*Amici* submit that ordinarily such documents would not properly be considered to prove a hazard in a GDC heat stress case because they are not admissible for this purpose under the Federal Rules of Evidence, which apply to Commission proceedings (29 C.F.R. § 2200.71), and which equally bind the Secretary and employers.[3] Such documents are hearsay as defined by FED.R.EVID. 801(c)—that is, out-of-court statements relied upon for the truth of the matter asserted (and, as documents, inherently not subject to cross-examination)—and therefore excluded by FED.R.EVID. 802. They would not qualify under any hearsay exception, such as FED.R.EVID. 803(18), unless perhaps they were relied upon by an expert witness and established as reliable, and even then they would "not [be] received as an exhibit." Under the rules, the evidence would be supplied, if at all, by the expert—not the document and, implicitly, not its non-testifying author.

To avoid public misunderstanding as to the role those documents play in this case and might play in future heat stress cases, the Commission should make clear that it is examining them here solely because they were admitted into evidence

[3] APA § 559 states in part that, "requirements or privileges relating to evidence or procedure apply equally to agencies and persons."

without objection, that it is not passing on their admissibility, and that a serious question might be raised as to their admissibility.

On the merits, the Commission should hold, for the following reasons, that the probative value and reliability of the two documents to prove a "hazard" is insufficiently established on the record:

- The documents do not state facts but conclusions. They do not state *why* certain heat index values belong in a "caution" category and why others belong in a "danger" category. They do not state what science or knowledge they are based on, or provide a way to judge their reliability. Instead of providing facts about the hazardousness of certain heat conditions, they set out what appear to be prescribed as binding norms. Reliance on such conclusory documents would permit OSHA and other agencies to, through mere publication, arrogate to themselves the Commission's adjudicatory role.

- A crucial portion of at least one of the documents—the heat index bands in the NWS document, "Using the Heat Index to Protect Workers"—was "modified" by OSHA "for use at worksites."[4] The modifications and their appropriateness are unstated and thus impossible to judge.

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[4] The NWS document states, "The NOAA [National Oceanic and Atmospheric Administration, a sister agency of the NWS] [heat index] bands have been

- The documents do not indicate what level of risk they considered

significant enough to present a hazard, nor do they indicate whether their "advisory" "guidance"[5] incorporates a safety margin and, if so, how wide it is. This is crucial in a GDC case, lest conditions be treated as hazardous even when they are not. *Industrial Glass*, 15 OSHC 1594, 1603 (No. 88-0348, 1992) (heat stress case, discussing safety margins).[6]

- They do not indicate whether the NOAA heat index (which, the Secretary

maintains, uses a dry-bulb temperature reading) validly indicates a heat hazard in

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modified." Although the statement is in the passive and thus does not indicate who modified the bands, NIOSH's criteria document states that, "The risk level–related measures in Table C-1 have been modified *by OSHA* for use on worksites." NIOSH, CRITERIA FOR A RECOMMENDED STANDARD: OCCUPATIONAL EXPOSURE TO HEAT AND HOT ENVIRONMENTS (REVISED CRITERIA 2016), APPENDIX C, "NOAA'S NATIONAL WEATHER SERVICE HEAT INDEX," p. 158 (DHHS (NIOSH) Pub. 2016-106) (emphasis added).

[5] Ex. C-5, in the portion entitled, "Using the Heat Index: A Guide for Employers," states: "This guidance is advisory in nature . . . . It is not a standard or regulation . . . ." The portion entitled, "Using the Heat Index to Protect Workers," states that it sets out a "guide."

[6] The Commission there stated: "While it would be very appropriate for the Secretary to include a safety margin in an OSHA standard, the presence of a safety margin in the documents she relied on to prove a hazard here gives us reservations as to whether evidence that the limits in the NIOSH document were exceeded would, in fact, prove that there was a hazard."

the ordinary work environment or whether a wet-bulb measure, which, unlike a dry-bulb measure, takes wind into account, should have been used instead.[7]

- The NOAA heat index has been criticized by the American Conference of Governmental Hygienists (ACGIH) as "not appropriate to occupational exposures." Citing a scientific study, the ACGIH states that the heat index is not "predictive of heat stress exposure" unless "the relationship between the Heat Index and a conventional method of exposure assessment has been established for a particular environment . . . ."[8]

Even to the extent that these documents were relied upon the Secretary's expert witness, Dr. Theodore Yee, he did not testify *how* he used these documents to reach a conclusion. [9] For example, he did not attribute M.R.'s death to

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[7] The Commission officially notice under APA § 556(e) that this is a subject of debate, which the Secretary could not dispute. See NIOSH, CRITERIA at p. 109, § 9.1.1 ("Dry bulb temperature is easily measured, but its use when the temperature is above the comfort zone is not justified, except for work situations where the worker is wearing completely vapor- and air-impermeable encapsulating protective clothing."). OSHA's TECHNICAL MANUAL, Section III, Ch. 4, appears to favor the wet-bulb technique, calling the NWS heat index a "screening tool" and the wet bulb technique "more accurate"). The American Conference of Governmental Industrial Hygienists (ACGIH), HEAT STRESS AND STRAIN: TLV® PHYSICAL AGENTS DOCUMENTATION (7th ed. 2017), uses the WBGT as the unit for its TLV at p. 3, Table 2.

[8] ACGIH, HEAT STRESS AND STRAIN at 18.

[9] Tr. 81: "There is another reference from the NOAA website, entitled Heat a

conditions having been rated in a particular way by the heat index; the first mention of the heat index in his testimony came on cross-examination (Tr. 101-106, 125). Instead, he testified that, to determine the cause of death, he "reasoned backwards" from M.R.'s 105°F body temperature, then eliminated all causal factors except ambient heat.[10]

As to employees other than M.R., the Secretary claims that Dr. Yee testified that, while a person's age and other conditions may affect his tolerance for heat, the conditions at the Sturgill worksite "increased the risk" of a "range of heat

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major killer and another reference from the Centers for Disease Control and Prevention entitled Heat stress." Q Are these references reliable sources in the occupational medicine community. A Yes." Tr. 82: "Q Dr. Yee, based on your education, training, and experience, in review of the medical records in this matter and review of the scientific references that you discussed earlier and to a reasonable degree of scientific certainty, did you reach a conclusion and cause of M.R.'s heat stroke in this matter? A Yes. Q And what is your opinion in this matter? A My opinion is that M.R. died from heat stroke."

[10] Tr. 139-140 (cross-examination): "Q Isn't it true that you worked backwards from the medical evidence, and, in fact, started out with the assumption that there was 105-degree temperature and something had to cause that and it was more likely than not that it was heat stress that caused that, that's how you went through the deducti[ve] reason[ing] processes . . . . A Yeah, but I look at everything. You start with a differential and you look at all the causes that could have caused heat stress and then you start eliminating or adding potential causes. I eliminated everything else. It was environmental conditions."

This backwards logic is common in the record. *E.g.*, Tr. 99: "Q … Isn't it true that M.R. was not exposed to excessive heat on August 1? A He was exposed to enough heat to cause the heat stroke he sustained."

illnesses, from heat exhaustion in younger workers to heat stroke in in older workers," citing Tr. 155, 157-59. More precisely, Dr. Yee testified that (1) younger workers recover from heat illnesses at a higher percentage than older ones (not that the cited conditions exposed younger workers to heat illness *in the first place*); and (2) it would be "possible" for workers over age 60 without preexisting conditions to get heat stroke. He specifically testified that he "can't honestly say whether it's more likely than not but it's certainly possible."

The problem with those assertions are their relevance. First, as discussed above, merely "increasing" a risk cannot suffice to show a "hazard." Second, that serious physical harm is "possible" does not satisfy the GDC's requirement that the hazard be "likely" to cause such harm. See Part II.B below. Third, *amici* are unable to find record evidence that employees other than M.R. came to the task without acclimatization. Fourth, nothing in Dr. Yee's testimony relies on or appears to be based on the documents touted by the Secretary. In sum, the documents have insufficient indicia that they are reliable and probative enough to infer that a certain heat index is necessarily a "hazard" to all employees within the meaning of the GDC.

## B. The Record Does Not Show That The Alleged Hazards Were "Likely" to Cause Death or Serious Physical Harm.

The Judge found here a hazard "likely" to cause death or serious physical harm. JD 13. She stated, however, that under the case law, the issue is not whether the *hazard* was likely to cause a heat-related injury or illness. "Instead," she stated, the issue is "whether there is *a* likelihood that death or serious physical harm *could* result *if* an *accident* occurs" (emphasis added), citing *Duriron Co., Inc.*, 11 BNA OSHC 1405, 1407 (No. 77-2847, 1983).

The Secretary argues likewise, claiming that he "does not have to show that an injury is likely to occur but instead that death or serious physical harm could result *if* an accident occurred." Sec.Br. at 15, citing *Duriron*, 11 OSHC at 1407 (emphasis added)). He therefore states that it is enough that "heat exposure *can* cause serious harm . . . ." (Emphasis added). Thus, instead of a *hazard* posing the requisite probability of harm, an intervening event—an "accident"—would pose it, even if the accident itself is not substantially probable to occur.[11] The argument,

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[11] *E.g., Cal. Stevedore & Ballast Co. v. OSHRC*, 517 F.2d 986, 987-88 (9th Cir. 1975) ("accident resulting in death or serious injury [need only be] possible, . . . even if not probable"), *aff'g* 1 BNA OSHC 1305 (No. 14, 1973); MARK A. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW § 14:3, p. 498 (2018) (decisions "consistently" hold that "it is not necessary . . . that there is a substantial probability that an accident will occur" but that "an accident is possible").

like OSHA's Field Operations Manual ("FOM"), effectively equates the GDC's probability element with the test for whether a violation is "serious" under section 17(k). *See* OSHA, FIELD OPERATIONS MANUAL, CPL-02-00-160, Ch. 4, § III.B.7.a, p. 4-14 (Aug. 2, 2016) ("This element . . . is virtually identical to the substantial probability element of a serious violation under Section 17(k)")[12]; *Compass Environ., Inc.*, 23 BNA OSHC 1132, 1136 (No. 06-1036, 2010) (section 17(k) discussion), *aff'd*, 663 F.3d 1164, 1168 (11th Cir. 2011).

This conflation of "likely" in the GDC with "substantial probability" in section 17(k) is inconsistent with the GDC's text and legislative history, and contrary to Supreme Court precedent, for it means that the GDC would apply to a mere possibility of harm.

We start with the GDC's words. They state that a "hazard" must be "causing or likely to cause" death or serious physical harm. The word "likely" means "having a high probability of occurring or being true : very probable,"[13] or at least

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[12] The Commission should take official notice of the FOM under 5 U.S.C. § 554(d) because it is cited here to evince a legislative, not an adjudicative, fact. *See generally* Advisory Committee Note on FED.R.EVID. 201(a) ("Legislative facts . . . are those which have relevance to legal reasoning and the lawmaking process . . . in the formulation of a legal principle or ruling by a judge or court . . . .").

[13] MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 721 (11th ed. 2014); MERRIAM-WEBSTER.COM DICTIONARY (current).

"probable."[14] "The definitions of the adverb 'likely' [as "probable"] are consistent, clear and strong[.]" *United States v. Rivera*, 131 F.3d 222, 231 (1st Cir. 1997) (*en banc*). *See also Alaska Oil & Gas Ass'n v. Pritzker*, 840 F.3d 671 (9th Cir. 2016) ("probable."), *cert. denied,*138 S.Ct. 924 (2018). And "likely" does not mean "possible." *Wieland-Werke AG v. United States*, 31 C.I.T. 1884, 1890 (2007), *aff'd*, 290 F. App'x 348 (Fed. Cir. 2008) ("not ambiguous"; quoting dictionaries, citing cases).

Yet, under the Secretary's approach, the GDC can apply—indeed, will almost always apply—to a mere possibility of death or serious physical harm, for if one of two factors is a mere possibility, their product can be no greater. Even if that were a correct interpretation of section 17(k), it cannot be a correct view of "likely" in the GDC. Unlike section 17(k), the GDC does not use the word "could." It does not speak of an intervening event such as an "accident"; it requires the "hazard"

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[14] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1310 (1986) (adv., "in all probability : probably"; adj., "of such a nature or so circumstanced as to make something probable," "having a better chance of . . . occurring than not"); AMERICAN HERITAGE DICTIONARY 757 (1981) (adv., "probably"); RANDOM HOUSE DICTIONARY 1114 (2d ed. 1987) (adv., "probably"; adj., "probably or apparently destined"); OXFORD ENGLISH DICTIONARY (2018) ("probably," adv., "probable," adj.); BLACK'S LAW DICTIONARY (10th ed. 2014) ("probable . . . Showing a strong tendency; reasonably expected <likely to snow>.")

to *directly* cause the requisite probability. It requires more than a "substantial" probability; it requires that harm be "likely." The Secretary's approach is therefore inconsistent with the GDC's plain language.

The Secretary's approach is inconsistent with the GDC's text in another respect: It is inconsistent with the element of probability (that is, risk) that is inherent in the very meaning of the key word "hazard."[15]

The Secretary's reading is also inconsistent with the GDC's legislative history, in which GDC versions that lacked the word "likely" were twice rejected, first in the House and then in conference committee. In the House, the Daniels bill proposed a very broad general duty—to provide "safe and healthful" employment.[16] This language was included in the committee bill reported to the

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[15] MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 572 (11th ed. 2014) ("a source of danger"; "chance, risk"); MERRIAM-WEBSTER.COM DICTIONARY (current) ("a source of danger"; "the effect of unpredictable and unanalyzable forces in determining events : chance, risk"); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1041 (1986) ("an adverse chance : danger, peril"); AMERICAN HERITAGE DICTIONARY 605 (1981) ("A danger; peril; risk"); RANDOM HOUSE DICTIONARY 879 (2d ed. 1987) ("an unavoidable danger or risk, even though often foreseeable," "something causing unavoidable danger, peril, risk, or difficulty"); OXFORD ENGLISH DICTIONARY (2018) ("A chance happening; an unpredictable outcome"; "A risk of loss or harm posed by something; a possibility of danger or an adverse outcome"); BLACK'S LAW DICTIONARY (10th ed. 2014) ("[d]anger or peril").

[16] H.R. 16785, 91ST CONG. 6-7 (1970) (as introduced) ("Each employer—(1) shall furnish to each of his employees employment and a place of employment which is

House floor[17] but was opposed as unduly vague.[18] The House thus adopted[19] the Steiger-Sikes substitute,[20] which, to make the GDC language "limited and … more specific,"[21] used the term "likely."[22] Although the Senate had passed a bill lacking the word "likely,"[23] "[t]he House provision was adopted" by the conference

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safe and healthful[.]"), in SEN. SUBCOMM. ON LABOR, LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, 92D CONG. 721, 726-727 (1971) ("Leg. Hist.").

[17] H.R. 16785, 91ST CONG. 47 (1970) (as reported), Leg. Hist. at 939.

[18] *E.g.,* Leg. Hist. at 980 (floor remarks of Rep. Smith) (committee bill GDC "too broad and vague and could subject employers to unfair harassment"; substitute's language imposes "a more restrictive duty, . . . much more reasonably enforceable and subject to fair interpretation by enforcement bodies and employers alike."); *id*. at 982 (floor remarks of Mr. Anderson) ("this language is so broad, general, and vague as to defy practical interpretation[,] let alone responsible enforcement"; advocates provision with "likely" as "specific").

[19] Leg. Hist. at 1117.

[20] H.R. 19200, 91st CONG. (1970), Leg. Hist. 763.

[21] Leg. Hist. at 992 (floor remarks of Mr. Steiger). The OSH Act is often known as "the Williams-Steiger Act." *E.g.*, 29 C.F.R. Part 1975, "Coverage of Employers Under the Williams-Steiger Occupational Safety and Health Act of 1970."

[22] Leg. Hist. at 1094 ("causing or are likely to cause death or serious physical harm").

[23] S. 2193, 91ST CONG. 6-7 (Nov. 17, 1970) (as passed), Leg. Hist. 534-35 ("free from recognized hazards so as to provide safe and- healthful working conditions"), Leg. Hist. at 534-35.

committee.[24] A word adopted after two legislative efforts should not be construed into meaninglessness.

The Secretary's argument also makes no sense as a construction of a regulatory provision, and especially makes no sense under the Act. The GDC calls upon the Commission to, in cases not governed by OSHA standards, fashion an *ad hoc* rule to govern an employer's behavior. As such, it must reflect the strictures that the Act puts on the imposition of regulatory burdens upon employers. The Supreme Court has clarified that the Act "was not designed to require employers to provide absolutely risk-free workplaces," a significant risk of harm must be shown before a standard can be adopted. *Indus. Union Dep't, AFL-CIO v. American Pet. Inst.*, 448 U.S. 607 (1980) (Benzene Case) (plurality opinion). Construing the GDC to guard against a mere possibility of harm is thus inconsistent with the Act. *Kastalon Inc.*, 12 BNA OSHC 1928, 1931-32 (No. 79-3561, 1986) (relying on Benzene Case).

Section 17(k)'s definition of "serious" is also an unsuitable model for construing the word "likely" in the GDC. Unlike the GDC, section 17(k) does not distinguish between violations and non-violations—that is, between conditions

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[24] H. CONF. REP. 1765, 91st CONG. 4, 33 (Dec. 16, 1970), Leg. Hist. 1154, 1157, 1186.

that require abatement and those that do not. Instead, it distinguishes only between violations that require a mandatory penalty ("serious" violations) and those that do not ("other than serious" violations). The duty to comply imposed by OSH Act § 5(a) draws no distinction between "serious" and "other than serious" violations.

Moreover, the case law defining "substantial probability" under section 17(k) was aimed at an even narrower purpose—to end litigation over a trivial penalty issue. In the Act's early days, parties were litigating and judges were deciding whether violations were "serious." But the issue was nearly inconsequential because the two kinds of violations cannot differ in gravity[25] and, thus, except for a penny, not in penalty amount.[26] This wasteful pursuit did not end until the

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[25] This is so because the "gravity" element of section 17(j) (unlike section 17(k)) encompasses both the probability of an accident and the probability of injury in the event of an accident. *Tacoma Boatbuilding Co.,* 1 BNA OSHC 1309, 1311 n. 6 (No. 6, 1973). (Thus, "it is quite possible for a serious violation to be of low gravity and a nonserious violation to be of high gravity." MARK A. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW § 14.3, p. 499 (2018); *see also* OSHA, FIELD OPERATIONS MANUAL, CPL-02-00-160 (Aug. 2, 2016), at, *e.g.,* p. 6-4, Ch. 6, § III.A.4.a (referring to "low gravity" and "high gravity" serious violations).) The penalty would be, but for a penny, the same because all other section 17(j) penalty elements would be the same.

[26] *Emory H. Mixon*, 1 BNA OSHC 1500, 1501 (No. 403, 1973) (dissenting opinion) (not "a dime's worth"); *Portland Stevedoring Co.*, 1 BNA OSHC 1250 (No. 5, 1973) (dissenting opinion) ("academic exercise").

announcement of the probability test in *Natkin & Co.*, 1 BNA OSHC 1204, 1205 (No. 401, 1973). But none of that history or reasoning applies under the GDC, which unlike section 17(k), has *regulatory* consequences, often industry-shaking ones. *E.g.*, *Seaworld of Florida, LLC v. Perez*, 748 F.3d 1202 (D.C. Cir. 2014).

The Secretary in his brief does not rely on the phrase "is causing" in the GDC to argue that the GDC's probability element was met because heat stroke "is causing" the required harm. The FOM at Ch. 4, § III.B.7.b, page 4-14, suggests that the Secretary might take the position that the likelihood element was satisfied here because, "An actual death or serious injury resulted from the recognized hazard, whether immediately prior to the inspection or at other times and places[.]" This would effectively construe the phrase "is causing" to mean "caused once." But that would be inconsistent with the GDC's wording, which uses a present participle phrase in its present progressive tense (*is* caus*ing*), not a past tense (caused), to connote a currently ongoing series of injuries or deaths. The Secretary's view would also result in the GDC being applied in the absence of a significant risk, for it is not logically possible to judge the significance of a risk from a single event.[27] For the GDC to make logical sense, and to comport with the

[27] *E.g.*, Jari M. Nisula, *Modern Approach For Integrating Safety Events In A Risk Management Process* (2015) ("conceptual flaw"; "likelihood of recurrence" "is not a

Benzene Case, 448 U.S. 607, the phrase must connote a probability commensurate with the "likely" element—to apply to hazards evinced by a series of recent events close enough in time that one can judge the significance of the risk and determine that it is commensurate with the alternative "likely" element.

In sum, the Commission should hew to the GDC's text, and require that the allegedly hazardous conditions pose a high probability, or be probable, of causing serious injury or death. Inasmuch as the Judge did not so find, and the parties may not have been on notice that such evidence would be required, a remand should be offered on that issue; if the offer is not accepted, the citation item should be vacated.

### C. The Secretary Failed to Prove a Hazard That is "Recognized" by the Employer or Its Industry.

#### 1. The Judge Erroneously Held and the Secretary Erroneously Argues That It Is Enough To Recognize Mere "Heat" As A Hazard.

The Judge found that the Secretary proved the recognition element of a GDC violation because both Sturgill and the roofing industry recognized "heat" as "a

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feature of a single event. It is a feature of an event family"), in PODOFILLINI ET AL. (EDS), SAFETY AND RELIABILITY OF COMPLEX ENGINEERED SYSTEMS 3551-3559 (London, 2015); GERD GIGERENZER, CALCULATED RISKS: HOW TO KNOW WHEN NUMBERS DECEIVE YOU 33 (2002) (single-probability event not falsifiable; "can never be proven wrong").

hazard for employees engaged in roofing work." JD 12 (emphasis added). The Secretary takes the same approach. Sec.Br. 13 (hazard of "heat" recognized).

This approach is wrong. The issue cannot be whether "heat" in the abstract was recognized as a hazard because it was not mere "heat" that the Secretary alleged here or the record shows was the "hazard." That hazard was conditions 1-5.a (as to employees other than M.R.) and conditions 1-5.b (as to M.R.). Moreover, everything contains "heat."[28] To maintain logical consistency, what must be shown to have been *"recognized"* as a hazard is not "heat" in the abstract but *those* conditions. The Secretary's approach to the recognition issue exemplifies the internally inconsistent and undisciplined approach to the GDC that *amici* mentioned above.

**2. The Record Contains Insufficient Evidence of Recognition.**

*Amici* suggest that, correctly viewed, there is insufficient evidence that Sturgill or its industry recognized conditions 1-5.a or 1-5.b on the PNC roofing project, on or about August 1, 2012, as hazards.

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[28] *E.g.,* LYNNAE D. STEINBERG, WHAT IS HEAT ENERGY? 11 (2018) ("All objects have heat energy . . . ."); JOHN DIXON, MODERN DIESEL TECHNOLOGY: HEATING, VENTILATION, AIR CONDITIONING & REFRIGERATION 28 (2014) ("everything contains some heat (except at absolute 0")).

As to the roofing industry, the Secretary points to publications of the National Roofing Contractors Association—toolbox talk outlines and a pocket safety guide. The toolbox talk outlines speak of temperatures "in the 90's and the 100's," and of "extremely high" temperatures. The pocket safety guide speaks only of "hot weather" and "[t]oo much heat." None of the documents identify the conditions *here* as a hazard.

As to Sturgill, the Secretary argues only that Sturgill was aware that roofing work in hot weather posed an "increased" risk. Sec.Br. 14-15. But that is just as fallacious as the assertion that a condition is a "hazard" if it causes merely an "increase" in risk. See page 5 above. An employer can recognize that conditions might cause a risk to increase without recognizing that the conditions would increase them to the point that a *hazard* exists (let alone a hazard causing or likely to cause death or serious physical harm). What the Act requires to be recognized is not an "increase" in risk but a "hazard." The Secretary's approach ignores whether one recognized that the "increase" was high enough to constitute a "hazard."

**a. An Employer's Taking of Measures Against Heat Is Insufficient Evidence of Recognition.**

The Secretary correctly observes that Sturgill took precautions—the provision of coolers of water and the scheduling of rest breaks—that were tailored to the

particular conditions at the job site on the date of the alleged violation. From that, he argues that Sturgill was aware that the *cited* work posed a hazard of heat illness. That may be a correct argument in some cases, but it is not correct here. An employer's provision of certain measures—say, tight-fitting chemical goggles or fall harnesses—might well be taken as evidence that the employer recognized that the conditions under which the employees were expected to use them constituted a hazard. Such inferences are logical, however, only when those measures have only one purpose—protection against hazards.

But that is not necessarily true—and is only rarely true—of heat-related measures. An employer might provide cold water, shade, air conditioning, break times, etc., to enhance the comfort and efficiency of its work force without also having recognized that the particular temperature and work conditions they face together present a "hazard." The employer might well provide these measures because thirsty, hot and tired employees work less efficiently than those who are not. As OSHA's own publication (Ex. C-5) states, "Water. Rest. Shade. The work can't get done without them." Or a conscientious employer might provide those measures because it fears that a heat hazard is present. Or, as is usually the case in the real world, the employer can *contingently* provide those things for both reasons—comfort and efficiency up to a point, and prevention of heat illness if the

temperature and associated conditions should go beyond that point and present a hazard.

The evidence *here*, however, does not show that Sturgill provided these measures because it recognized, as to any employee, that that point *had* been reached. Therefore, Sturgill's taking of those measures is alone insufficient on this record to establish that it "recognized" that the site conditions presented a "hazard."

**D. The Record Fails to Show that The Employer Should Have Known With Reasonable Diligence of the Alleged Hazard to M.R. or Other Employees.**

The Judge found, and the Secretary agrees, that Sturgill knew of the "hazardous condition" largely because it knew that M.R. had not been acclimatized to "heat."

Once again, the Secretary uses one approach to the "hazard" element when analyzing one GDC element but a different approach when analyzing another element. As to employee M.R., the Secretary argues that a "hazard" existed because he died. But employee M.R. died, we are told, because he was exposed to certain heat conditions, *and* he was 60 years old *and* he had certain health conditions (including lack of acclimatization). *Those* were the physical conditions that *together* caused the death on which the Secretary relies to prove a "hazard" as to M.R. If logical consistency is to be maintained, the Secretary must show the

employer's knowledge, before the alleged violation, of *those* physical conditions—not just one of them. *Southwestern Acoustics & Specialty, Inc.*, 5 BNA OSHC 1091 (No. 12174, 1977) (knowledge pertains to the "physical conditions which constitute a violation"). On that point, however, the Secretary is silent.

**1. The Inquiries Implicitly Required By the Secretary's Position Would Have Potentially Placed Sturgill in Violation of the ADA and ADEA.**

The Secretary's position that Sturgill should have known of M.R.'s pre-existing conditions would have required Sturgill to make inquiries that are prohibited under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.* (ADA) as amended by the Americans with Disabilities Act Amendments Act of 2008, P.L. 110-325, or the Age Discrimination in Employment Act, 29 U.S.C. § 633a (ADEA).

"[A]n employer's discretion to order employees to undergo [medical] examinations is hardly unbounded." *Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804, 811 (6th Cir. 1999). The ADA states that employers "shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity." 42 U.S.C. § 12112(d)(4)(A). But the EEOC states that for medical examinations or inquiries to be "job-related and consistent

with business necessity," an employer must have a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions is impaired by a medical condition; or (2) an employee may pose a direct threat due to a medical condition.[29] "An employer bears the burden of establishing that an examination is consistent with business necessity, and that burden is 'quite high.'" *Wright*, 798 F.3d at 523 (quoting *Conroy v. N.Y. State Dep't of Corr. Servs.*, 333 F.3d 88, 97 (2d Cir. 2003)). Moreover, the belief must be reasonably based on objective evidence and not mere speculation. "Courts . . . require that an employer provide 'significant evidence that could cause a reasonable person to inquire as to whether an employee is still capable of performing his job.'" *Wright*, 798 F.3d at 523 (quoting *Sullivan*, 197 F.3d at 811).

Here, no evidence suggests that Sturgill had an objective basis to conclude that M.R. was not capable of performing his job. M.R.'s age alone was far from sufficient to constitute the "significant evidence" that courts have consistently required employers to provide to justify medical examination or inquiries of

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[29] EEOC, *Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the ADA*, No. 915.002 (July 27, 2000); *see also Wright v. Ill. Dept. of Child. & Fam. Servs.*, 798 F.3d 513, 523 (7th Cir. 2015) (citing *Coffman v. Indianapolis Fire Dep't*, 578 F.3d 559, 565 (7th Cir. 2009)).

current employees. *Wright*, 798 F.3d at 523. Requiring employees to submit to medical examinations or inquiries based on their age alone would have violated the ADEA, as there is no evidence that age is a bona fide occupational qualification for the position that M.R. held.[30] Employers "cannot comply with the ADEA prohibition that no employer may discriminate against any individual because of age . . . while at the same time requiring employees [based on age alone] to pass an annual medical examination [or submit to similar medical inquiries] as a condition of continued employment."[31]

The Secretary argues that Sturgill could, however, have avoided liability under the ADA because OSHA permitted Sturgill to make medical inquiries of M.R. to determine whether he required heat acclimatization. But that is not so clear that it demonstrates that Sturgill was not reasonably diligent in thinking otherwise. The Secretary's argument applies only where the challenged action—here, the medical examination or inquiry—"is *required* or *necessitated* by another Federal law or

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[30] *See EEOC v. Massachusetts*, 987 F.2d 64, 68-74 (1st Cir. 1993) (invalidating as ADEA violation a Massachusetts statute requiring state employees 70 years old or older to pass medical examination as condition of continued employment) ; *see also Epter v. N.Y. City Transit Auth.*, 127 F. Supp. 2d 384, 392 (E.D.N.Y. 2001) ("where an employer believes a medical examination is required for a particular position, the test cannot be age-based unless there is a powerful case supporting such disparate treatment.").

[31] *EEOC v. Massachusetts*, 987 F.2d at 74.

regulation." 29 C.F.R. § 1630.15(e) (emphasis added); *see also EEOC v. Murray, Inc.*, 175 F. Supp. 2d 1053, 1066 (M.D. Tenn. 2001) ("The admittedly few courts that have considered this provision have accepted it as a complete defense to an ADA claim, *as long as* the defendant could show that *the action was, in fact, required by another Federal law*.") (emphasis added). There are no Federal laws or regulations, OSHA or otherwise, that *expressly* required or necessitated the medical examination or inquiry of M.R. Moreover, the federal "standards" referenced in the ADA regulations and interpretive guidance contemplate well-established standards that are easily understood and applied:

> Such standards may include Federal safety regulations that regulate bus and truck driver qualifications, as well as laws establishing medical requirements for pilots or other air transportation personnel. These standards also *include health standards promulgated pursuant to the Occupational Safety and Health Act of 1970*, the Federal Coal Mine Health and Safety Act of 1969, or other similar statutes that require that employees exposed to certain toxic and hazardous substances be medically monitored at specific intervals.

29 C.F.R. § 1630, App. § 1630.14(c) (emphasis added).

The GDC does not even approach the level of specificity contemplated by this EEOC guidance. In addition, employers are not free to just inquire of an employee as to his or her medical condition; the inquiry would have to be so constructed that the result would be "a specific limitation that would preclude *all* individuals with the condition from" the work. *EEOC v. Murray*, 175 F. Supp.2d at 1066-67

(emphasis added). Aside from the inability of medical science to be that prescient with respect to heat stress, no such "specific limitation" can be extracted from the GDC, which provides no specificity at all. *See Rohr v. Salt River Proj. Agric. Imp. & Power Dist.*, 555 F.3d 850, 863 (9th Cir. 2009) (employer sought to comply with § 1910.134(a)(2) ("protect [employee] health") and § 1910.134(c)(1)(ii) ("medical evaluation") by itself prescribing screening criteria; held, OSHA standards so "broad" that employer's criteria *not* compelled by law). While OSHA may approve and support the medical inquiries it proposes, "approving certain medical questions is not the same as requiring them." *Miller v. Whirlpool Corp.*, 807 F. Supp. 2d 684, 689 (N.D. Ohio 2011) (rejecting employer's reliance on GDC compliance as ADA defense); *see also Murray, Inc.*, 175 F. Supp.2d at 1066-67 (rejecting employer's contention that GDC constituted ADA defense and required categorical exclusion of employees with certain medical conditions from driving forklifts).[32]

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[32] Part of the practical problem employers face when running this regulatory gauntlet is that no guidance document tells employers in advance what conditions are hazardous or measures would be protective for older or infirm workers, and yet avoids ADA/ADEA liability. The NWS document states, unhelpfully, that "the severity of heat disorders tends to increase with age." The OSHA documents do not even say that, and seem to veer away from any mention of age or infirmity. The ACGIH document at 13 discusses age but states that it "must be interpreted carefully," without much else. And the NIOSH document at 20 seems to endorse

Accordingly, the only way in which roofing employers can conduct the medical inquiries or examinations suggested by the Secretary is if they can show that they are job-related and consistent with business necessity under the ADA framework discussed above.[33] Inasmuch as the record is devoid of the objective evidence necessary for Sturgill to have made such a determination, the Secretary's approach would have placed Sturgill squarely in the cross-hairs of a claim under the ADA. At the very least, Sturgill cannot be held to have lacked reasonable diligence, and be penalized, in attempting to navigate through the murky

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age discrimination: It suggests using an age-related maximum heart rate adjustment to determine work duties.

[33] See the EEOC's interpretive guidance, which provides as follows:

> [The ADA's provision on medical examinations and inquiries] permits periodic physicals to determine fitness for duty or other medical monitoring if such physicals or monitoring are required by medical standards or requirements established by Federal, State, or local law that are consistent with the ADA and this part (or in the case of a Federal standard, with section 504 of the Rehabilitation Act) *in that they are job-related and consistent with business necessity.*

29 C.F.R. § 1630, App. § 1630.14(c) (emphasis added). Thus, medical examinations or inquiries of current employees must always remain "job-related and consistent with business necessity," *id.*, and "standards or requirements established by federal, state, or local law" are just one way of showing consistency with business necessity.

intersection of three amorphous statutes—the GDC, the ADA and the ADEA—completely lacking in interpretive guideposts regarding heat stress.

### E. The Record Does Not Clearly Enough Show The Likely Utility and Feasibility of The Acclimatization Demanded by the Secretary.

The Judge found and the Secretary argues that a "formal" acclimatization program would have been a feasible and useful abatement measure. Sturgill argues, however, that it *did* implement an acclimatization program—"formal" or not—and that it was adequate under the circumstances.

It is hard to see why the argument is wrong. Although Sturgill's acclimatization program was informal, it appeared to include in substance all the elements one would expect, including giving M.R. lighter tasks on his first day of work—the key element of such a program. Moreover, the Commission should view the testimony against Sturgill's program with skepticism. Dr. Yee testified that the acclimatization steps that Sturgill argues it followed here were "inadequate" because M.R. died.[34] That does not follow. That the program did not prevent a death does not mean that the employer did not do what the Act

[34] Tr. 138: "Q If A.H. Sturgill did the six things that you told me here today, would you consider that to be an adequate acclimatization program? A . . . In the end he ended up dying of heat stroke. That doesn't happen every day on every work site and certainly with not every worker in the country or the state, so whatever was done was not adequate. . . ."

required. A safety measure need not be perfect to comply with the Act, for it must protect against significant risks, not all risks, and, under the GDC, it must protect against hazards "likely" to cause death or serious physical harm, not all hazards. Implicitly requiring employers to implement perfect measures is neither feasible nor required by the Act.

## III. CONCLUSION

The Judge's decision should be reversed and the citation item vacated or, if the "likelihood" issue is thought controlling, a remand on that issue should be offered.

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**Certificate of Service**

I certify that all parties have consented to filing and service of papers through the E-File system, and on May 14, 2018, the foregoing was so served on:

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