UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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

RESPONDENT A.H. STURGILL ROOFING, INC.'S OPENING BRIEF ON REVIEW

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INTRODUCTION

This case arises from an investigation into the death of a temporary employee ("MR") who had been working on Respondent, A.H. Sturgill Roofing, Inc.'s ("Sturgill") job site in Dayton, Ohio on August 1, 2012. On August 1, 2012, MR suddenly became ill and was transported to the hospital, where he stayed for 21 days until he died on August 22, 2012. OSHA's inspection was opened on August 23, 2012.

Following the inspection, the Secretary of Labor issued a two-item citation. Citation 1, Item 1 alleged that employees "were exposed to the hazard of excessive heat" while working on August 1, 2012, and that Sturgill did not develop and implement an adequate heat-related illness prevention program, in violation of Section 5(a)(1) of the Act ("the General Duty Clause"). Citation 1, Item 2 alleged that Sturgill did not adequately train its employees in the recognition and avoidance of risk factors related to heat illnesses, in violation of 1926.21(b)(2).

Since the inception of its widely-publicized "Heat Illness Prevention Campaign" in 2011, OSHA has cited employers under the General Duty Clause for employee exposure to heat while working outdoors. No standard promulgated by OSHA addresses this issue. There are no specific methods an employer is required to follow to prevent heat-related illnesses in workers on the job, nor are there any requirements as to the elements that must be included within an employer's heat-illness prevention program. (Tr. 225-226). OSHA has not made any effort to promulgate a standard addressing heat stress. (Tr. 226). The instant case is an example of OSHA's improper attempt to formulate a heat illness standard through *ad hoc* adjudication of the General Duty Clause, in place of administrative rulemaking. See *Southern Ohio Building Sys., Inc. v. OSHRC*, 649 F.2d 456 (6th Cir. 1981), *citing B&B Insulation, Inc. v. OSHRC*, 583 F.2d

1364, 1372 (5th Cir. 1978).[1] Importantly, in this case, the Compliance Officer did not initially recommend that a citation be issued for an alleged violation of the General Duty Clause. (Tr. 61-62). Rather, this directive came from the OSHA national office (Tr. 61-62)—supporting that OSHA seized the opportunity to make an example out of Sturgill, in furtherance of its ongoing campaign to curtail heat-related illnesses.

In this case, there is no evidence that Sturgill's employees were exposed to a hazard of excessive heat on August 1, 2012. The temperatures that day did not exceed the lowest quadrant of the Heat Index. Nevertheless, the Secretary argued, and the ALJ apparently agreed, that because an employee fell ill on Sturgill's jobsite, and later died, a hazard must have existed. In fact, the Secretary's expert, Dr. Yee, stated, "In the end, [MR] 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 in the state, so whatever was done was not adequate." (Tr. 138). When asked directly whether MR was exposed to the condition of "excessive heat," Dr. Yee responded, "He was exposed to enough heat to cause the heat stroke he sustained." (Tr. 99). Similarly, the Compliance Officer testified, " . . . there must have been a hazard. MR collapsed and he died." (Tr. 230).

To support her foregone conclusion that a heat hazard must have existed on the jobsite, the ALJ improperly inflated the Heat Index on August 1, 2012 by 15ºF to place the Heat Index in the "danger zone." The ALJ then held Sturgill to very specific and rigorous requirements (such as institution of formal work-rest cycles, a formal hydration policy requiring the monitored

[1] "Where the Government seeks to encourage a higher standard of safety performance from the industry than customary industry practices exhibit, the proper recourse is to the standard-making machinery provided in the Act, selective enforcement of general standards being inappropriate to achieve such a purpose. The use of standard-making procedures assures that not only would employers be appraised of the conduct required of them and responsibility for upgrading the safety of the industry would be borne equally by all its members, but the resulting standard would benefit from input of the industry's experts, both employer and employee, cost and technology obstacles faced by the industry could be weighed, and more interested parties can participate in the process."

intake of 5-7 oz. of water every 15 minutes, and a formal acclimatization schedule) to protect employees from heat illness, despite the total lack of evidence that Sturgill's employees were actually exposed to excessive heat on August 1, 2012. (ALJ Dec. 16-18). The practices and procedures recommended by the ALJ are merely guesses at what Sturgill could have done to prevent MR's death, without regard to whether the practices and procedures she recommended are utilized by other reasonably prudent employers in the roofing industry when the conditions are comparable to the conditions on Sturgill's jobsite on August 1, 2012.

Sturgill's failure to prevent the sudden illness, and eventual death of a temporary employee whom it later discovered was in exceptionally poor health, does not prove that a hazard existed, nor does it suggest that Sturgill failed to adequately protect its employees from heat illnesses. The focus upon what Sturgill could have done to prevent MR from suffering an alleged heat-related illness is misguided. Instead, the inquiry must focus upon whether the actual conditions at Sturgill's jobsite presented a hazard of excessive heat, and whether the measures Sturgill took to protect its employees on the whole were the measures a reasonably prudent employer would have taken, considering the temperatures and conditions on the jobsite that day.

The Secretary failed to prove exposure to a hazard of excessive heat, and failed to prove that reasonably prudent employers in the industry would have taken precautions different than those taken by Sturgill on August 1, 2012. The Secretary did not prove that Sturgill failed to provide the training and precautions that reasonably prudent employers in the roofing industry would have provided under the circumstances. Therefore, both citation items should be vacated.

STATEMENT OF THE CASE

A.H. Sturgill Roofing, Inc. ("Sturgill") is a well-established roofing contractor in the Dayton area possessing a stellar business reputation (Tr. 469). On August 1, 2012, MR, a 60

year-old male temporary employee employed by Labor Works, was assigned to Sturgill's PNC roofing project ("Project").[2] (Tr. 9).

MR's background and training.

MR had prior experience performing construction and commercial roofing work and advised Sturgill's foreman, Leonard Brown ("Foreman Brown") of this during his orientation on August 1. (Tr. 297, 298). MR was told by Foreman Brown at the start of the work day that if he felt he could not do the job to let Brown know. (Tr. 297-298). At the time of MR's assignment to Sturgill, Sturgill did not know that MR suffered from several serious medical conditions which included long term congestive heart failure, Hepatitis C, acute hemo-dialysis, acute necrosis of the liver and anemia. (Tr. 123) Further, he was suspected of abusing alcohol and cocaine, also unbeknownst to Sturgill. (RX-10 & 11. Tr. 396, 402 & 413).

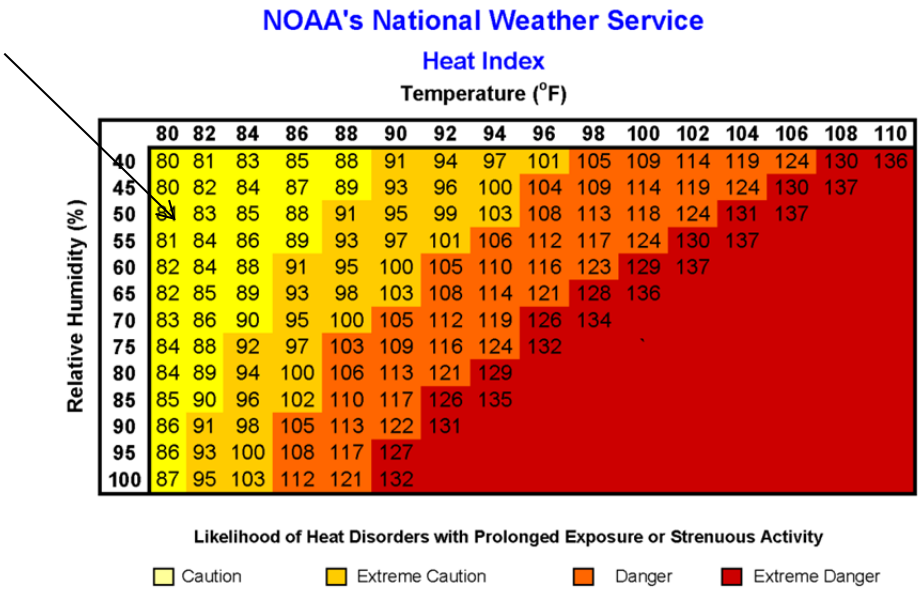
On August 1, 2012, MR commenced work at approximately 6:30 a.m. at the PNC project. (Tr. 9). At the outset of the shift, Foreman Brown provided specific safety instruction to MR which included a description of the work to be performed that day, fall prevention, prevention of heat related illness and other such matters, including break areas and availability of liquid refreshments and told MR to come to him if he needed relief. (Tr. 208-210, 408, 470, 480, 497-499, 508-509, 511-512). Specifically, Foreman Brown encouraged MR and other employees to drink plenty of water and to take breaks in the shade. (Tr. 9). He showed him five and ten gallon ice/water containers on the roof and break areas on the ground which included picnic tables shaded by trees which surrounded the building. (Tr. 497-498). All of the employees had been advised through multiple pre-shift discussions with Foreman Brown of the need to drink plenty of water and to take

2 Labor Works was not cited by OSHA regarding MR's work assignment to Sturgill.

frequent breaks when needed. (Tr. 9). Sturgill's foreman and the employees recognized the need to be aware of the signs and symptoms of heat illnesses and how to avoid such (Tr. 208).

The conditions and scope of work at the PNC job site.

The weather conditions were optimum for performing roofing "tear-off" on the morning of August 1, 2012. The morning was cool, and employees were wearing long-sleeve t-shirts and jackets. (Tr. 489). Between 6:53 a.m. and 11:53 a.m. on August 1, 2012 at the Wright Brothers Weather Station (approximately two miles from the PNC project), the wet bulb globe temperature ranged from 69°F and 84% relative humidity at 5:53 a.m., to 70°F and 51% humidity at 11:53 a.m. (Tr. 230, CX-1). The highest measured wet bulb temperature during the morning work hours of August 1, 2012 was 71ºF, from the hours of 8:53 a.m. to 10:53 a.m. (CX-1). The dry bulb temperatures ranged from 70ºF and 87% relative humidity at 5:53 a.m., to 83ºF and 51% relative humidity at 11:53 a.m. (CX-1). The sky conditions ranged from clear, to few clouds, to broken clouds, and the wind speeds ranged from 0 to 8 mph. (Tr. 201). According to the NOAA Heat Index, these conditions placed the Heat Index in the lowest level of caution, presenting the least likelihood of a heat disorders with prolonged exposure or strenuous activity. (Tr. 101 -103, CX-4).



The conditions were not in the Extreme Caution, Danger, or Extreme Danger Zones. (Tr. 229). There was no NOAA heat advisory in effect at the Wright Brothers Station on August 1, 2012. (Tr. 230).

The white roof was reflective, a breeze existed, and there were trees alongside the building. (Tr. 453, 492). There was an abundance of shade on the roof, created by 4 ft. x 8 ft. bundles of roofing materials 8-10 ft. high, and by chillers/air conditioning units, as depicted in RX-18. (Tr. 190, 191, 211, 451, 454, 494). The air conditioning chillers on the roof provided a flow of cool air to the workers. (Tr. 454, 455). Shade was available to MR within 10-15 feet of where he was working, and MR availed himself of the shade. (Tr. 452, 501). At times when MR had no materials being brought to him to be pushed off the side of the roof, he would stand in the shade created by the tall stacks of new insulation on the roof. (Tr. 501). The Compliance Officer admitted that there were scattered clouds at 10:53 a.m., broken clouds at 11:53 a.m., and scattered clouds again at 12:53 p.m. (Tr. 179).

The Project consisted of tearing off a single ply sheet rubber membrane and styrofoam insulation under that membrane so that a new roof could be applied thereafter. (Tr. 488). There was no equipment being used by the workers on August 1, 2012 which emitted heat. (Tr. 455). The work at the project was some of the easiest type of work which a roofer can perform. (Tr. 489). MR was tasked with standing near the side of the roof and intermittently pushing and throwing bundles of roofing materials off of the roof as his fellow employees brought the materials to him on a cart. (Tr. 201, 499-503). The materials were no heavier than 10 lbs. (RX-16A & RX-17A). Fellow employees would bring the materials in a wheelbarrow to MR so that he could merely push (as opposed to lift) most materials off of the roof into the dumpster. (Tr. 210, 502). MR's job was the least strenuous job at the project. (Tr. 499, 500). It was considered a "cake" job. (Tr. 455). MR

worked at his own pace. The assignment to this job was intentionally made by Foreman Brown to acclimatize MR, because it was MR's first day on the project. (Tr. 210, 499-503).

Sturgill provided immediate access to water, rest and shade and all employees were encouraged to utilize that relief. (Tr. 211, 261, 453, 495). Sturgill provided formal morning and afternoon breaks of 15 minutes each and a lunch break of 30 minutes. (Tr. 9). There is no dispute that Sturgill encouraged all employees to take as many additional breaks as needed, without fear of discipline. (Tr. 9). The parties even stipulated to this fact at the start of the hearing. (Tr. 9-10). Break areas included shaded tree areas on the ground with picnic tables and benches. (Tr. 10). Superintendent Gould observed the employees taking their morning break in the shade on August 1, 2012. (Tr. 452, 495). Air conditioning was also available to employees inside the PNC building on which the employees were working. (Tr. 10).

There was more than an adequate supply of ice water and ice available to Sturgill's employees at all times during the course of work on August 1, 2012. (Tr. 452, 495). Sturgill encouraged employees routinely to drink water from ten and five gallon Igloo coolers placed on the roof. (Tr. 208, 444). Sturgill also provided Gatorade at times. (Tr. 456). Foreman Brown encouraged all employees to drink water early and often. (Tr. 208, 216, 503; RX-4, p.2).

The incident on August 1, 2012

At approximately 11:41 a.m. on August 1, 2012, MR became disoriented and the employees recognized this. (Tr. 504, 507-508). Even though MR wanted to continue to work, Foreman Brown stopped him from doing so. (Tr. 505-506). Foreman Brown and the fellow employees took immediate action by placing him in the shade, administering First Aid and calling 911. (Tr. 509). Contrary to the Secretary's assertions, the employees and Foreman Brown did act as soon as possible to aid MR after he first displayed signs of illness. (Tr. 504, 507, 508).

Previous to the incident, Foreman Brown periodically checked on MR to ensure that he was performing his job safely and properly and to see if he was “all right.” (Tr. 504, 508). MR had displayed no signs or symptoms of heat illness. (Tr. 504, 524). MR’s illness came on quickly. (Tr. 504, 524). Foreman Brown testified as follows:

Q. Were there any signs or symptoms of heat related illness during the course of the morning up until the time he was …

A. No.

Q. Acting woozy?

A. No. (Tr. 507)

Q. All right, how promptly, how quickly, did you react to this situation?

A. I reacted immediately, as soon as it got brought to my attention (Tr. 508).

At the time of the incident, Foreman Brown was wearing a long-sleeved flannel shirt, and described the weather conditions at the time MR became ill as "kind of cool," "partly cloudy" with a "little breeze" (Tr. 506-507).

MR’s condition at the time of his death

Unfortunately, after being removed from the jobsite and taken to Sycamore Hospital, MR died 21 days later, on August 22, 2012, of numerous medical conditions. MR’s medical conditions at the time of his death included those identified on Secretary's Exhibit 16, pg. 1-2. Even Dr. Yee admitted that numerous medical conditions can cause malignant hyperthermia (Tr. 94, 319, 335, 344, 347, 348). Sturgill’s expert, Dr. Randolph, opined that hyperthermia may be caused by drug use, alcohol use, heart attacks, infections of general types, cancer, strokes, seizure disorders (Tr. 335), liver function abnormalities (Tr. 347), thyroid problems, (Tr. 348) and/or congestive heart failure (Tr. 336). MR suffered from a number of such problems. Thus, while several healthcare

providers perpetuated the assumption that MR suffered from a heat related illness, a review of all of the medical records and the circumstances support the position that he died of multiple system failures (Tr. 336, 383, 384, CX-16, p.1-2).

Sturgill's Heat-Related Illness Prevention Plan

Prior to MR's incident, there was no prior alleged incident of heat related illness on the project. (Tr. 456, 508). At the time of the incident, Sturgill had a comprehensive safety program which included provisions related to the recognition, prevention and treatment of heat related illnesses. (Tr. 457, 467, 469, 470) (RX-9). This program included, but was not limited to, safety training videos viewed by the employees (Tr. 435); OSHA 10 hour formal instruction classes which addressed heat related illnesses (Tr. 433); the dissemination of information including the National Roofing Contractors Association ("NRCA") Pocket Guide to Safety, containing a section (18E) concerning heat-related illnesses, symptoms, treatment and prevention, which was distributed to the employees and reviewed with them (Tr. 438; Respondent's Exhibit 9); NRCA tailgate toolbox talks entitled Weather – Personal Injury and Heat Stress (Tr. 56, 214, 232, 432 & 435, Secretary's Exhibits 10, 14); daily presentations at the start of the shift by the foreman or superintendent; and the Sturgill Employee Handbook including safety provisions (Respondent's Exhibit 12).

In addition, onsite presentations were made personally by the owner of the company related to heat stress and prevention (Tr. 441). Employees were warned through multiple pre-shift discussions by site foremen of the need to drink plenty of water and to take frequent breaks when needed. (Tr. 216; Respondent's Exhibit 3). In extreme heat, Sturgill would schedule night work with portable lighting when working conditions became overly strenuous (Tr. 443, 216). Sturgill would also schedule abbreviated work days, limiting the amount of work expected to be completed, when the conditions warranted (Tr. 443, 445).

Sturgill also utilized an acclimatization program for employees, including MR. (Tr. 445, 217). Foreman Brown specifically assigned MR to the lightest, easiest job of pushing trash off the roof. (Tr. 499). MR worked at his own pace and had approximate five minute breaks between loads, due to the pace of the other workers bringing trash to him. (Tr. 501). MR's position on the roof was located in proximity to the shade so that he could work in and out of the shade. (Tr. 208-223; 499-501). Foreman Brown advised MR of the formal break schedule, and of the opportunity to take as many additional informal breaks as he desired, without repercussion. (Tr. 499-500). Foreman Brown observed MR drink a 44 oz cup filled with ice water, while taking a break. (Tr. 503). Previous to the incident, Foreman Brown periodically checked on MR to ensure that he was performing his job safely and properly and to see if he was "all right." (Tr. 504, 508). MR had displayed no signs or symptoms of heat illness. (Tr. 504, 524).

The ALJ's decision

The ALJ affirmed both citation items against Sturgill as "Serious," along with the proposed penalty of $8,820. With regard to Citation 1, Item 1, she found that a "heat-related illness hazard" existed on Sturgill's jobsite on August 1, 2012. (ALJ Dec. 10, 12, 13). She concluded that a hazard existed based upon (1) the temperature on the date of the incident; (2) the Heat Index; (3) the availability of shade vs. direct sunlight; and (4) the physical demands of the work. (ALJ Dec. 12, 22). Specifically, she concluded that the temperature on August 1, 2012 was 83ºF with 55% relative humidity; that the Heat Index was 85ºF, but should be elevated to 98ºF and placed in the "danger zone" to account for direct sunlight; that the employees, including MR, worked in direct sunlight all morning, and that the work MR performed was physically demanding and strenuous. (ALJ. Dec. 10-12). Next, she found that Sturgill and the

roofing industry generally recognize heat as a hazard, and that heat is a hazard that is likely to cause death or serious physical harm. (ALJ Dec. 12-13).

The ALJ then considered whether feasible and effective means existed to eliminate or materially reduce the alleged hazard. (ALJ Dec. 15). In so doing, she proposed a number of measures she believes Sturgill should have adopted to prevent MR's illness, including a formal acclimatization plan, a "formalized work-rest regimen," and a "specific, formalized hydration policy" requiring monitored intake of "5-7 oz. of water every 15-20 minutes." (ALJ Dec. 16-18). The ALJ specifically rejected the contention that OSHA must prove other reasonably prudent employers in the industry follow the practices set forth as "feasible" abatement measures. (ALJ Dec. 19).

The ALJ found that Sturgill had knowledge of a heat hazard on August 1, 2012, based upon the fact that a new temporary employee was starting work that day. (ALJ Dec. 22) Again, she mischaracterized the work as "strenuous" work in "direct sunlight." (ALJ Dec. 22). She pointed to temperatures in July 2012 as evidence that Sturgill should have expected August 1 to be hot as well. (ALJ Dec. 22). The ALJ did not address whether the actual temperatures and relative humidity on August 1, 2012 should have alerted Sturgill to a heat hazard that day.

The ALJ concluded with a discussion of Citation 1, Item 2. (ALJ Dec. 25). She agreed that OSHA is required to "show that the cited employer failed to provide the instructions that a reasonably prudent employer would have given in the same circumstances." (ALJ Dec. 25). However, she went on to cite alleged deficiencies in Sturgill's heat-illness prevention program without any evidence that other reasonably prudent employers would have provided different or additional instruction.

The ALJ found that Sturgill's training of MR, as a temporary employee, was deficient because the instruction provided to MR was 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." (ALJ Dec. 26-27). She found that Foreman Brown should have instructed MR on the importance of acclimatization, the need for frequent breaks, the importance of consuming water – even when not thirsty—and the need to dress appropriately. (ALJ Dec. 27). She expected Foreman Brown to instruct MR that a lack of thirst and sweating are symptoms of heat illness. (ALJ Dec. 27). In addition, the ALJ found that permanent employees should be trained in the need to acclimatize new employees, and given specific guidance regarding implementation of an acclimatization program." (ALJ Dec. 27-28). Again, the ALJ concluded that Sturgill's program was required to include all of these practices, without any evidence that other reasonably prudent employers in the roofing industry adhere to the same. The ALJ affirmed both citations as "Serious" and affirmed the $8,820 penalty.

STANDARD OF REVIEW

The Commission's Direction for Review "establishes jurisdiction in the Commission to review the entire case." OSHRC R. 2200.92(a). On review of the initial decision by the ALJ, the Commission "has all the power which it would have in making the initial decision except as it may limit the issues on notice or by rule." *Stevens Equipment Co*., 1973 OSAHRC LEXIS 331, *7; 1 OSHC (BNA) 1227 (April 27, 1973). The Commission may decide any issues presented by the record as a whole, which record includes the ALJ decision. *Id*. at *8. Therefore, the Commission "may correct any errors of law not excluded by rule or by its direction for review." *Id*. at *9. The Commission may also make factual findings *de novo*. *Superior Rigging & Erecting*

Co., 2000 OSAHRC LEXIS 14, *16, 19 OSHC (BNA) 2089 (April 5, 2000), citing *Franklin R. Lacy*, 1981 OSAHRC LEXIS 457, *2, 9 OSHC (BNA) 1253 (January 30, 1981).

ARGUMENT

I. Citation 1, Item 1: Section 5(a)(1) of the Occupational Safety and Health Act of 1970 ("the General Duty Clause").

A. The Secretary did not satisfy its burden to prove a violation the General Duty Clause, as the Secretary failed to prove that employees were exposed to a recognized hazard of "excessive heat" at Sturgill's jobsite on August 1, 2012.

Citation 1, Item 1 alleged that employees "were exposed to the hazard of excessive heat" (emphasis added) while working on August 1, 2012, and that Sturgill did not develop and implement an adequate heat-related illness prevention program, in violation of Section 5(a)(1) of the Act ("the General Duty Clause").

To establish a violation of the General Duty Clause, the Secretary must first prove that a condition or activity in the workplace presented a hazard. *Crowley American Transport*, 1999 OSAHRC LEXIS 71, *13, 18 BNA OSHC 1888, (No. 97-1231, 1999). A hazard is a "physical agent that would injure employees." *Wheeling v. Pittsburgh Steel*, 1981 OSAHRC LEXIS 31, *13, 10 BNA OSHC 1242 (No. 76-4807; 76-4808, 1981). Congress "conceived of occupational hazards in terms of processes and materials which cause injury or disease by operating directly upon employees as they engage in work or work-related activities." *Amoco Chemicals Corporation*, 1986 OSAHRC LEXIS 108, *28, 12 OSHC (BNA) 1849 (No. 78-250, 1986), citing *American Cyanamid Co*., 9 BNA OSHC 1596 (No. 76-5792, 1981), aff'd, 741 F.2d 444 (D.C. Cir. 1984). As part of its burden, "the Secretary must define the cited hazard in a manner that gives the employer fair notice of its obligations under the Act by specifying conditions or practices over which the employer can reasonably be expected to exercise control." *Otis Elevator Co*., 2007 OSAHRC LEXIS 77, *6, 2005 OSHD CCH P32,920 (No. 03-1344), citing

Arcadian Corp., 20 BNA OSHC 2001, 2007, 2005 CCH OSHD P32,756, p.32,756 (No. 79-3286). A hazard "must be defined in terms of a preventable consequence of the work operation, not the absence of an abatement method." *Id*. At *7, citing *Morrison-Knudsen Co./Yonkers Contracting C*o., 16 BNA OSHC 1105, 1121-22, 1993-95 CCH OSHD P 30,048, p.41,279 (no. 88-572, 1993).

In the instant case, the hazard alleged in the citation is "excessive heat." Yet, the Secretary has offered no convincing evidence that MR and his fellow employees were exposed to excessive heat on the jobsite on the morning of August 1, 2012. To the contrary, no hazard of excessive heat existed on the morning of August 1, 2012, as alleged.

1. **A July 19, 2012 Memorandum from Thomas Galassi, Director/Directorate of Enforcement Programs, to all Regional Administrators, identifies the circumstances when a hazard of excessive heat exists. Per the guidelines set forth in the Memorandum, no hazard of excessive heat existed at Sturgill's job site on August 1, 2012.**

On July 19, 2012, two weeks prior to MR's incident at Sturgill's job site, Thomas Galassi, Director/Directorate of Enforcement Programs, issued a Memorandum to all Regional Administrators, entitled "Extreme Heat-Related Outdoor Inspections" ("the Galassi Memo"). (RX-4) (Tr. 258). It instructed the Region on how to deal with potential heat-related illness cases and addressed the burden of proof which the Compliance Officer has to meet in order to issue a General Duty Clause citation. It set the guidelines for CSHO enforcement of the General Duty Clause in high Heat Index situations. **The Galassi Memo identified two primary ways to prove that a hazard of excessive heat exists: (1) by establishing that the employee was exposed to either a Heat Index at or above the Danger Zone; or (2) by establishing that the workers were exposed to conditions where a NOAA Heat Advisory had been issued. Neither condition existed in this case. (Tr. 263, RX-4, p.1-2).**

The Galassi Memo provided, among other things:

> "The National Oceanic and Atmospheric Association (NOAA) issues a heat advisory when the heat index (HI) is forecast to be at or above the Danger zone for a particular area …. A violation of the general duty clause may exist in these conditions when workers have been working outdoors and their employer is aware of heat-related dangers but has not taken protective action to provide workers with, at a minimum, water, rest and shade. To establish the evidence necessary to cite a general duty clause violation, the following types of information should be documented. NOTE: These examples represent some types of evidence that could establish each of the factors; they are not the only types that would satisfy OSHA's burden):
>
> **1. The employer failed to keep the workplace free of a hazard to which its employees were exposed:**
>
> **a. Workers were exposed to a HI at or above the Danger zone (see HI chart); or**
>
> **b. Workers were working outside for most of the day or during the heat of the day when there was a NOAA heat advisory.**
>
> 2. The hazard was recognized:
>
> a. NOAA issued heat advisory because of a HI at or above the Danger zone (see HI chart) and employer was or should have been aware of the advisory;
>
> b. Employees made complaints regarding heat;
>
> c. Employees showed signs or symptoms of heat exposure;
>
> d. Employer indicated that it was aware of the heat hazard (e.g., by providing water but not rest and shade); or
>
> e. The employer's industry has issued guidance or information about heat hazards.
>
> 3. The hazard was causing or was likely to cause death or serious physical harm:
>
> a. Heat exhaustion;
>
> b. Heat Stroke; or
>
> c. Fatality.
>
> 4. There was a feasible and useful method to correct the hazard:
>
> a. Providing workers with immediate access to water, rest, and shade, and allowing them to use that relief;
>
> b. Implementing an acclimatization program for new employees and for those returning from extended time away (e.g. vacation);
>
> c. Implementing a work/rest schedule; or
>
> d. Provide a climate-controlled area to cool down.
>
> If all four factors for a general duty clause violation are not present, a Hazard Alert Letter (HAL) shall be issued to the employer as soon as possible." (Emphasis Added).

The Compliance Officer, who was the sole investigator of the incident, never even consulted the Galassi Memorandum during the investigation (Tr. 169, 259). Further, the ALJ rejected the Galassi Memo, stating that "it does not provide any important or procedural rights to the Respondent." (ALJ Dec. 20).[3] She found that the Galassi Memo is "designed for OSHA's enforcement employees" and "is not a compliance guide designed for employers." (ALJ Dec. 20).

Given that the Galassi Memo was issued by OSHA just two weeks before MR's incident at Sturgill, and that it directly addressed the issue cited, the Galassi Memo was the most relevant guidance available at the time. The Galassi Memo identified criteria that would have to be met to make excessive heat a recognized hazard. Yet, neither the Secretary nor the ALJ thought it important that, pursuant to the terms of OSHA's own enforcement guidance, no hazard existed on Sturgill's jobsite. The ALJ cannot be permitted to substitute her opinion in place of specific directions from OSHA. This is especially true when dealing with a General Duty Clause citation as opposed to an alleged violation of a specific standard.

2. In finding that a "heat-related illness hazard" existed on the jobsite on August 1, 2012, the ALJ relied upon material findings of fact that are not supported by a preponderance of the evidence.

In concluding that employees were exposed to the hazard of "excessive heat," the ALJ relied upon findings of fact concerning the following: the temperature on the date of the incident; the Heat Index; the availability of shade vs. direct sunlight; and the physical demands of the work. Specifically, the ALJ stated, "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." (ALJ Dec.

[3] The ALJ rejected the Galassi Memo on the basis that it lacks binding legal authority, but then proceeded to rely heavily upon other non-binding authority, published by the CDC/NIOSH, as evidence of what Sturgill should or could have done to protect MR from heat-related illness.

12). Later, the ALJ commented, "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." (ALJ Dec. 22). None of the ALJ's findings with regard to these matters are supported by a preponderance of evidence in the record.

a. Contrary to the ALJ's Decision, the Heat Index on August 1, 2012 did not exceed the lowest "caution" zone.

The ALJ relied upon the NOAA National Weather Service Heat Index chart ("the Heat Index") in concluding that a hazard existed on the jobsite the morning of August 1, 2012. (ALJ Dec. 10). The temperatures on this chart are divided into four quadrants, based upon the severity of the hazard posed by heat, as follows: "caution; extreme caution; danger and extreme danger." Temperatures in the "caution" zone pose the lowest risk of heat-related illness. (RX-1). Temperatures below 80ºF do not even register on the Heat Index. (RX-1). Pursuant to the Secretary's own exhibit (CX-5, p.9) an employer is not advised to implement its heat illness prevention program unless the Heat Index is at least 80ºF.

The ALJ stated "National Climatic Data Center records from DWP Airport[4] for the morning work hours on August 1, 2012, the date of the incident, show that hourly high temperatures ranged from 72ºF to 83ºF and relative humidity ranged from 51% to 87%." (ALJ Dec. 10). The ALJ also concluded that at 10:53 a.m. (approximately one hour before the incident) the temperature was 83ºF with 55% relative humidity, for a Heat Index of 85ºF. (ALJ Dec. 10). In so finding, she relied upon the dry bulb temperatures recorded at the Airport. (ALJ Dec. 10).

[4] The "DWP Airport" or "Dayton Wright Patterson Airport" referenced by the ALJ does not exist. The climatological data referred to by the ALJ was actually recorded by the Dayton Wright Brothers Airport, which is closest to the jobsite, approximately 2 miles away, as the crow flies. (Tr. 103). The ALJ appears to have confused/conflated the Dayton Wright Brothers Airport with the Wright Patterson Airforce Base, also in Dayton.

However, as Dr. Yee admitted, the wet bulb globe temperature ("wet bulb temperature") is used by many, and is the most accurate way of determining climatic heat (Tr. 125:7-21). The wet bulb temperature is dependent upon ambient temperature, relative humidity and wind. (Tr. 125:10-16). The same climatological data provided by the Airport reveals that the wet bulb temperature ranged from 69°F and 84% relative humidity at 5:53 a.m., to 70°F and 51% humidity at 11:53 a.m. (CX-1). The highest measured wet bulb temperature during the morning work hours of August 1, 2012 was 71ºF, from the hours of 8:53 a.m. to 10:53 a.m. (CX-1). However, even using the less accurate dry bulb temperature, the temperatures did not exceed the lowest "caution" category of the Heat Index.

b. The ALJ improperly inflated the temperature by 15ºF, and placed the Heat Index in the "danger" zone.

The Heat Index contains a notation that it is devised for shady, light wind conditions, and notes that "exposure to full sunshine can increase Heat Index values by up to 15ºF." (CX4, p.2). The notation at the bottom of the Heat Index is simply that—a notation—and is unsupported by empirical studies or references to scientific data. Based upon this language, the ALJ unilaterally added the maximum 15ºF increase to the dry bulb temperature (83ºF) based on her incorrect determination that the crew worked in "direct sunlight" all morning. (ALJ Dec. 10). She concluded that the temperature on the work site was really 98ºF, placing the Heat Index in the "danger" zone. The ALJ stated, "Further, adding 15ºF for working in direct sunlight (i.e. 98ºF) increased the Heat Index category from "caution" to "danger." (ALJ Dec. 10).

The notation on the Heat Index does not require or support an automatic 15ºF inflation of the temperature in the event of direct sunlight. No evidence was offered by the Secretary to support the assumption that 15ºF should be added to the recorded temperature. The Secretary did not call any witness who possessed sufficient knowledge of the Heat Index to testify when,

and by how much, one may inflate the temperature to account for the effects of direct sunlight. Thus, the ALJ's erroneous conclusion that the crew was working in direct sunlight all morning, by itself, does not warrant an automatic 15ºF increase.

Further, none of the Secretary's witnesses supported an automatic 15ºF increase in temperature. Dr. Yee testified, ". . . you can add on various factors such as if the person were in direct sunlight you can add on 15 degrees." (Tr. 102-104). However, Dr. Yee admitted that he was not sure he correctly remembered the portion of the Heat Index chart that discusses when an increase in temperature can be applied (Tr. 102:5-10). Later, Dr. Yee clarified that he believed the affected employee was exposed to direct sunlight, and based on that, "we know to some degree it increased the Heat Index somewhere up to 15-degrees . . ." (Emphasis added). (Tr. 103). Dr. Yee then admitted that even if the Heat Index increases when there is direct sunlight, he could not quantify the extent to which the Heat Index would be elevated. (Tr. 105).

Similarly, the Compliance Officer testified that the Heat Index could be higher under certain conditions, but based upon her investigation of this matter, she had no knowledge that the conditions were anything other than what the climatological data showed. (Tr. 224). Thus, neither the Compliance Officer nor Dr. Yee supported an automatic 15ºF temperature increase.

The ALJ abused her discretion by applying the maximum temperature increase without any authority supporting her unilateral decision to do so. This is a critical error on the part of the ALJ. Had the ALJ not added 15ºF to the recorded temperature dry bulb temperature on August 1, 2012, the Heat Index remained in the lowest "caution" quadrant. Artificially elevating the temperature by 15ºF placed the Heat Index in the "danger" quadrant, thereby supporting the ALJ's predetermined conclusion that a hazard existed.

c. The crew did not work in direct sunlight, such that an elevation of the Heat Index was appropriate.

The ALJ concluded that " . . . the work was in direct sunlight." (ALJ Dec. 12). As noted above, she added 15ºF to the highest recorded dry bulb temperature for "working in direct sunlight." (ALJ Dec. 10). In concluding that the work was in direct sunlight, she stated, "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." (ALJ Dec. 6, fn. 11). She later stated, "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." (ALJ Dec. 11). The ALJ also adopted Dr. Yee's conclusion that "the working conditions on the roof that day were hazardous," but Dr. Yee incorrectly believed that MR had worked for four hours in direct sunlight prior to his collapse. (ALJ Dec. 11, Tr. 104).

Further, the ALJ improperly dismissed evidence that shade was available on the roof. The ALJ stated that the shade "was not overhead shade, such as shade provided by an awning or overhead cover." (ALJ Dec. 11). The ALJ suggests that somehow, overhead shade is better than other shade, and that workers are deemed to be working in "direct sunlight" unless the jobsite is shielded from the sun by an overhead awning or cover. There is no basis for this conclusion.

To the contrary, pictures of the job site show that objects on the roof did cast shadows. (RX-18). The Compliance Officer admitted that there were scattered clouds at 10:53 a.m., broken clouds at 11:53 a.m., and scattered clouds again at 12:53 p.m. (Tr. 179). Further, Foreman Brown described the weather conditions at the time MR became ill as "kind of cool," "partly cloudy" with a "little breeze" (Tr. 507). Foreman Brown was asked:

Q. … did you observe MR performing work?

A. Yes. I mean at the time he didn't have no material, he could just stand there at the back of the insulation which shaded him. (Tr. 501)

Q. … So you observed him standing in the shade?

A. Yes ….

Q. … how were the weather conditions at the time you sat him down in the shade?

A. I mean it was about 10:00 in the morning so it was still kind of cool. It was like partly cloudy. It was cool because we had a little breeze at times. (Tr. 507)

Thus, there was shade available on the roof and MR availed himself of such. The evidence in the record does NOT support that the crew worked in direct sunlight all—or even most of—the morning of August 1, 2012. Further, nothing in the NIOSH criteria or in any OSHA publication requires that employees be able to do all their work in the shade. The available guidance suggests only that shaded or cooling off areas be made available in close proximity to the work area. The Galassi Memo instructs compliance officers to determine if shade or a climate controlled area is "available for breaks and rest periods" if workers need to recover. (R-x4, pg.5). Sturgill provided shade on the roof, a shaded picnic area on the ground, and an air-conditioned break room inside the building on which it was working. (ALJ Dec. 3).

d. The ALJ's conclusion that the work was "physically demanding and strenuous" is not supported by a preponderance of evidence in the record.

The job at Sturgill's worksite on August 1, 2012 consisted of tearing off single ply sheet rubber membrane and Styrofoam insulation under that membrane so that a new roof could be applied thereafter. (Tr. 488). The ALJ concluded " . . . the work on the roof was physically demanding and strenuous—tearing off roofing materials, cutting them down and then tossing them over the parapet wall, into a dump truck on the ground." (ALJ Dec. 11). The ALJ did not

cite to any testimony or documentary evidence in the record that allowed her to conclude that the activities she described are "physically demanding and strenuous." Nor does any such evidence exist. No witness testified that the work in general was physically demanding or strenuous. Further, MR did not perform all of the tasks described by the ALJ.

Sturgill Foreman Leonard Brown stated that the job was not "strenuous" work. (Tr. 489 and 502).[5] MR did not perform any tearing off or cutting of roofing materials. He was simply responsible for pushing trash, consisting of cut Styrofoam and rubber membrane pieces, off of a cart on the roof into a dump truck parked on the ground. (Tr. 499-502). This was the "easiest task on the job." (Tr. 499). It was considered a "cake" job. (Tr. 455). Even Dr. Yee admitted that these duties were in the "light to moderate" range. (Tr. 148-150). No witness from OSHA observed the work being done. No witness described the work as "physically demanding" or "strenuous." The witness testimony on this point is all the ALJ may consider – she cannot adopt, as evidence, her own beliefs about the physical demands of roofing work. Contrary to the ALJ's opinions, the work was not strenuous, and the physical demands of the work performed on Sturgill's jobsite do not support the existence of a hazard on August 1, 2012.

3. An employee's age and specific physical infirmities[6] cannot serve as proof that a hazard existed, or that an employer's heat-related illness prevention program is inadequate.

The Secretary argued, and the ALJ apparently agreed, that employers must consider the ages and physical infirmities of individual employees when assessing whether a heat-related

[5] This is just one example of the ALJ picking and choosing testimony to rely on from a witness whom the ALJ specifically found to be credible. She adopted only the witness's testimony that supported the decision she wanted to reach, while ignoring testimony he gave that did not support her pre-conceived conclusions.

[6] Sturgill does not admit or agree that MR suffered from a heat-related illness. MR apparently suffered from hyperthermia, but it was not environmental heat-related hyperthermia. Numerous medical conditions can cause malignant hyperthermia (Tr. 319, 335, 344, 347, 348). While several healthcare providers perpetuated the assumption that MR suffered from a heat related illness, a review of all of the medical records and the circumstances support the position that he died of multiple system failures (Tr. 336, 383, 384).

hazard exists, and when determining whether the employer took adequate measures to protect its employees.

First, the Compliance Officer testified regarding several documents which recommend consideration of a person's age and physical condition, in order to assess his or her risk of developing a heat-related illness. Specifically, the Compliance Officer discussed information provided on the National Weather Service website, stating, "Heat disorders share one common feature: the individual has been in the heat too long or exercised too much for his or her age and physical condition. Studies indicate that, other things being equal, the severity of heat disorders tends to increase with age. Conditions that cause heat cramps in a 17-year-old may result in heat exhaustion in someone 40 years old, and in heat stroke in a person over 60." (Tr. 42; C-4 p.2-3). The ALJ specifically cited this document in finding that a heat-related illness hazard existed on Sturgill's job site. (ALJ Dec. 11).

Next, Dr. Yee testified "I don't believe there is a universal tolerance for heat. Every individual is different. It's based upon age, gender, different preexisting medical conditions, and medications that you are on how acclimatized you are to the new environment as well as among many other factors." (Tr. 90). Dr. Yee opined that MR died because conditions at the work site "combined with his elderly age, lack of acclimatization, [and] preexisting conditions" to cause a heat stroke. (Tr. 98-99). When asked whether someone age 61 would be at high risk for heat stress, Dr. Yee responded that extra precautions would need to be taken with that person, as they would be at a greater risk than a 20, 30 or 40 year old. (Tr. 163-164). When asked directly whether MR was exposed to the condition of "excessive heat," Dr. Yee responded, "He was exposed to enough heat to cause the heat stroke he sustained." (Tr. 99).

In other words, when it comes to protecting employees from heat illness, Dr. Yee would have employers treat older employees differently from younger employees, males differently from females, and employees with certain medical conditions differently than those without. Clearly, Dr. Yee relied upon MR's age and pre-existing infirmities to establish that a hazard existed with respect to MR specifically, without regard to the actual temperature or the work conditions.

The ALJ then asked Dr. Yee to comment on whether a person, age 60 or 61, without MR's pre-existing medical conditions, would have suffered a heat related illness given the conditions on the jobsite that day. (Tr. 158-160). Dr. Yee testified that such a person would suffer a heat related illness, possibly a heat stroke. (Tr. 159-160). Dr. Yee did not give any opinion as to whether a heat hazard existed at Sturgill's jobsite with respect to employees younger than age 60 or 61. Yet, the ALJ relied upon Dr. Yee's testimony to establish that a hazard existed on the jobsite on August 1, 2012. (ALJ Dec. 11). She stated, "Dr. Yee 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." (ALJ Dec. 11). In short, the ALJ agreed that MR's age and "other conditions" (i.e. his pre-existing medical conditions) should be considered in determining whether a hazard existed on the job site on August 1, 2012.

The position advocated by the Secretary, and adopted by the ALJ, would require employers to inquire about and take the ages and physical infirmities of individual employees into account when assessing whether a heat hazard exists. The employer would then be further required to custom-tailor its heat illness prevention program to address the specific needs of each employee, based upon his or her age and underlying medical conditions, regardless of the

temperature and weather conditions.[7] Such inquiry should not be part of the analysis in determining whether a hazard exists.

To inquire and use medical history and age information would require Sturgill to have violated the Age Discrimination in Employment Act ("ADEA"), the Americans with Disabilities Act, as amended by the Americans with Disabilities Amendments Act of 2008 ("ADA"), and other laws that prohibit employers from making such inquiries and relying on such information to alter the terms and conditions of an employee's employment. For example, the ADEA specifically prohibits employers from not only discriminating against an employee with respect to the terms, conditions or privileges of employment because of age but also from limiting, segregating or classifying an employee in any way which would deprive or tend to deprive him of employment opportunities because of his age. *See* 29 U.S.C. § 623(a). Similarly, the ADA prohibits even asking an employee the information the Secretary and ALJ assert Sturgill should have considered on August 1, 2012.

Once MR arrived at Sturgill to begin work, Sturgill was only permitted under the ADA to make a disability related inquiry if Sturgill had a "reasonable belief," based on "objective evidence," that MR's ability to perform the job was impaired or that he was a direct threat due to a medical condition. *See EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act, July 27, 2000.* Such objective evidence must come from a reliable source or from observing the employee performing his job. *Id.* Sturgill was not informed that MR had any medical conditions and observation of MR performing his job showed that he was performing his job without difficulty. Therefore, under the ADA, Sturgill was not permitted to even ask MR if he had any medical

[7] As referenced in Argument Section I A herein, Sturgill maintains that the alleged hazard is the alleged excessive heat – a physical agent that could injure an employee – not the employee's age or medical condition. In fact, the Citation does not even mention MR's age or pre-existing medical conditions unknown to Sturgill.

conditions. As such, if Sturgill had prohibited MR from working based on a perceived risk due to his age and pre-existing medical conditions, Sturgill would have violated the ADEA and ADA.

Further, even assuming that MR's age and/or underlying medical conditions caused him to be particularly sensitive to heat, the Secretary cannot base a General Duty Clause citation—alleging deficiencies in Sturgill's heat-related illness prevention program—upon the particular sensitivities of a single employee. OSHA did not introduce any evidence that it is feasible to custom tailor a heat-illness prevention strategy for each employee who may be particularly sensitive to heat. The NIOSH guidance that is available on heat stress does not recommend screening employees to identify health conditions that may be aggravated by exposure to heat stress. *See Post Buckley Schuh & Jernigan, Inc*., 2012 OSAHRC LEXIS 20, *49. The Secretary did not introduce any evidence to show that reasonably prudent employers in the roofing industry make efforts to identify the ages and health conditions of their workers, and take extra precautions to address each individual's specific needs. In fact, Dr. Yee admitted that he does not know whether the average roofing company would take extra precautions with a 61-year-old individual performing roofing work, as he does not know what is reasonable for a company or not. (Tr. 164).

Therefore, to the extent that the Secretary argues that a General Duty Clause violation can be established based upon an employer's alleged failure to protect an employee who is particularly susceptible to heat illness (due to his age and/or physical infirmity), it is relevant to consider that employers are legally prohibited from obtaining such information about their employees, and are further restricted from treating those employees differently than other employees based upon any perceived or known disability. Because consideration of an

employee's age and underlying medical conditions are prohibited and for the other reasons stated, these issues should be excluded from the analysis in determining whether a hazard exists, and whether the General Duty Clause has been violated.[8] Again, the hazard must be defined in terms of conditions or practices in the workplace over which the employer can reasonably be expected to exercise control. *Otis Elevator Co.*, 2007 OSAHRC LEXIS 77, *6. As such, an employee's pre-existing medical issues—over which employers have no control—cannot be used to establish the existence of a hazard in the work environment. **Whether MR suffered a heat related illness condition on August 1, 2012 or died 21 days later due to complications of an alleged heat related episode, these matters do not determine whether Sturgill has violated the General Duty Clause.** Instead, the issue is whether in fact MR was exposed to an actual hazard at the time of the incident on the morning of August 1, 2012. He was not.

B. The Secretary failed to meet its burden to prove that feasible and effective means existed to eliminate or materially reduce the alleged hazard of excessive heat, even if it could have proven the existence of an excessive heat hazard.

To establish a violation of the General Duty Clause, the Secretary has the burden to prove that feasible and effective means existed to eliminate or materially reduce the cited hazard. (ALJ Dec. 9). When an employer has already taken steps to address a recognized hazard—as Sturgill had—the Secretary must specify the additional steps the employer should have taken to avoid citation, and demonstrate the feasibility and likely utility of these measures. *Jewell Painting, Inc., 1994 OSAHRC LEXIS 112 *28* (No. 92-3636, 1994). Proof of additional measures must be specific and must include evidence that persons familiar with the employer's industry would have prescribed such under similar circumstances. *Id.*

[8] The ALJ also improperly relied upon MR's age and pre-existing physical infirmities with regard to the third prong of the Secretary's burden of proof, to show that exposure to the alleged hazard is likely to cause serious physical harm or death. (ALJ Dec. 13). The ALJ relied upon Dr. Yee's testimony that heat stroke was more likely to result with a 60-year old employee. (ALJ Dec.13) T

In her Decision, the ALJ did not cite to any evidence supporting that the abatement measures she recommended would have been prescribed by persons familiar with the roofing industry. In fact, the ALJ dismissed this requirement and stated, "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." (ALJ Dec. 19). (Emphasis added). The ALJ failed to acknowledge that in the context of a General Duty Clause citation, where there are no applicable regulations, the law requires one to look to the standard practices of others familiar with the industry to determine reasonable abatement measures. The practices of other employers in the industry are probative of the feasibility of the abatement measures proposed.

Instead, the ALJ relied upon educational materials on OSHA's website (CX-5), a publication from the CDC/NIOSH (CX-9), and the recommendations set forth in the Citation itself. (ALJ Dec. 16). Recommendations by NIOSH are not legally binding authority in an OSHA case. *GAF Corp. v. OSHRC*, 561 F.2d 913, 917 (D.C. Cir., 1977), citing *Indus. Union Dept. v. Hodgson*, 499 F.2d 467 (D.C. Cir 1974), (Tr. 225). Further, although informal interpretations and agency enforcement guidelines are entitled to some weight on judicial review, they do not carry the force of law. *Davey Tree Expert Co*., 2013 OSAHRC LEXIS 56, *121 (No. 11-2556, 2013), (Tr.225).

Based upon this non-binding authority, the ALJ found that Sturgill should have had a formal "acclimatization plan" with a schedule for new employees to build up a tolerance to working in heat. (ALJ Dec. 16-17). Second, the ALJ found Sturgill should have required employees to wear "suitable clothing" which would "depend on the working conditions." (ALJ Dec. 17). The ALJ also found that Sturgill should have "implemented a formalized work-rest

regimen," based on a one-hour cycle, that "accounted for weather conditions." (ALJ Dec. 17). Last, the ALJ recommended a "specific, formalized hydration policy" requiring proactive monitoring of employee intake.[9] (ALJ Dec. 18). She concluded that it was not enough to provide coolers of water on the jobsite, as doing so does not allow employers to "measure how much water is consumed." (ALJ Dec. 18, fn. 23). She recommended that workers drink 5-7 oz. of water every 15-20 minutes, regardless of the temperature. (ALJ Dec. 18).

None of these recommendations are supported by any citation to evidence showing that those familiar with the roofing industry recommend such procedures when the temperatures are in the lowest caution category of the Heat Index.[10] Again, no such evidence was offered by the Secretary.

C. The Secretary failed to meet its burden to prove that Sturgill knew, or with the exercise of reasonable diligence, could have known, of the allegedly hazardous condition.

In addition to industry recognition of heat as a hazard, the Secretary must prove that Sturgill knew, or with the exercise of reasonable diligence, should have known, that a heat hazard existed on the jobsite on August 1, 2012. (ALJ Dec. 22, citing *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965 (No. 82-928, 1986)). The ALJ found that in order to sustain a

[9] This is an example of ad hoc rulemaking through adjudication of the General Duty Clause, without any evidence that other reasonably prudent employers in the roofing industry follow this practice. Requiring all employees on a jobsite to drink 5-7 oz. of water every 15-20 minutes, and to monitor their consumption of this water, would essentially require the employer to hire "water enforcement" personnel, whose sole job is to walk around the jobsite with jugs of water and force employees to drink it as they stood there.

[10] The abatement measures proposed are not even recommended by OSHA, given the conditions present on Sturgill's jobsite on August 1, 2012. See CX-5, pg. 2-10, recommending "basic heat safety and planning" when the Heat Index is below 91ºF. OSHA has also developed a Smartphone App, known as the "OSHA Heat Tool" which allows the user to input the temperature and relative humidity. Based on this information, the App will classify the heat risk as "lower caution," "moderate" or "high". Precautions to be taken are described for each category. Even if one inputs the highest recorded dry bulb temperature measured on the morning of August 1, 2012 (83ºF), along with the relative humidity of 55% (CX-1), the heat risk is in the "lower caution" zone. The precautions recommended for these conditions do not include a formal acclimatization plan, a formal work-rest schedule, or a formal hydration policy.

General Duty Clause violation, "The Secretary must also establish that the employer knew, or with the exercise of reasonable diligence could have known, of the hazardous condition."

The ALJ found that Sturgill had knowledge of a heat hazard on August 1, 2012 because a new temporary employee started work that day, and because temperatures in the preceding two weeks had, for the most part, exceeded 80ºF. (ALJ Dec. 22). She further reasoned that Sturgill knew the work was outside, that employees would be in direct sunlight, and that the work was strenuous.

The ALJ's analysis concerning Sturgill's supposed "knowledge" of the hazard is devoid of any consideration of the actual temperature and conditions on the jobsite that day. Sturgill had no reason to believe that a hazard from heat existed on the morning of August 1, 2012, given that the temperature did not exceed 83ºF and 51% relative humidity. According to the Galassi Memo, Sturgill was not even required to implement its heat illness prevention program under such circumstances. Further, as previously discussed, the evidence does not support that the work on August 1, 2012 was performed in direct sunlight, or that the work performed that day was strenuous. Thus, the evidence does not support that Sturgill was or should have been aware of a heat hazard on August 1, 2012.

II. Citation 1, Item 2: 1926.21(b)(2)

A. Sturgill did not violate 1926.21(b)(2), as Sturgill instructed each employee in the recognition and avoidance of heat related illnesses.

29 CFR 1926.21(b)(2) states, "The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury." An employer's instructions are adequate under 1926.21(b)(2) if they are specific enough to advise employees of the

hazards associated with their work and the ways to avoid them. *Model Continental Construction Co., Inc.*, 2001 OSAHRC LEXIS 96, 19 BNA OSHC 1760 (No. 00-1629, 2001).

Citation 1, Item 2 alleges that Sturgill "did not instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his/her environment to control or eliminate any hazards or other exposure to illness or injury." (Emphasis added). As the Compliance Officer candidly admitted, there are no such "regulations" on heat stress. (Tr. 229). Further, 29 CFR 1926.21(b)(2) provides no guidance to an employer whatsoever on how to instruct employees in the recognition of "unsafe conditions."

Citation 1, Item 2 alleges that permanent employees had not received "effective heat related illness training." However, the 1926.21(b)(2) obligation imposed upon the employer does not specifically address "effectiveness" or "heat related illnesses" whatsoever. In any event, Sturgill did instruct each employee in the recognition and avoidance of possible unsafe heat conditions.

At the time of the incident, Sturgill had a comprehensive safety program which included provisions related to the recognition, prevention and treatment of heat related illnesses. (Tr. 457, 467, 469, 470) (Respondent's Exhibit 9). This program included, but was not limited to, safety training videos viewed by the employees (Tr. 435); OSHA 10 hour formal instruction classes which addressed heat related illnesses (Tr. 433); the distribution and review of the National Roofing Contractors Association ("NRCA") Pocket Guide to Safety, with Section18E pertaining to heat-related illnesses, symptoms, treatment and prevention (Tr. 438; Respondent's Exhibit 9); NRCA tailgate toolbox talks entitled Weather – Personal Injury and Heat Stress (Tr. 56, 214, 232, 432 & 435, Secretary's Exhibits 10, 14); daily presentations at the start of the shift by the foreman or superintendent; and the Sturgill Employee Handbook including safety provisions (Respondent's

Exhibit 12). In addition, onsite presentations were made personally by the owner of the company related to heat stress and prevention. (Tr. 441). Employees were warned through multiple pre-shift discussions by site foremen of the need to drink plenty of water and to take frequent breaks when needed. (Tr. 216; Respondent's Exhibit 3).

Contrary to Citation 1, Item 2(a)(i) temporary employees had been provided detailed information with respect to the hazards and signs, symptoms and methods of prevention associated with heat related illness. The temporary employees other than MR had received all of the comprehensive training because they were long term (Tr. 208, Respondent's Exhibit 3, p. 2). "In addition to site specific awareness, nearly all permanent employees, and a few temp agency workers having worked for an extended period of time with this employer, reported being provided more specific heat stress awareness training including the signs and symptoms associated with heat related illness as well as common sense prevention measures." (Respondent's Exhibit 3, p. 2). MR received the information necessary for him to avoid any hazards including possible exposure to excessive heat even though it was not anticipated that he would confront such heat on that day and did not, in fact, confront such on August 1, 2012. Foreman Brown, in a scheduled pre-job orientation meeting (Tr. 480), alerted MR to possible heat issues and told MR what to do to avoid heat issues including using water, rest and shade. MR was instructed to come to Foreman Brown if he needed any relief.

Citation 1, Item 2(a)(ii) sets forth an itemized list of the alleged shortcomings of Sturgill's heat illness prevention program. As to Citation 1, Item 2(a)(ii)(a), MR was not working in direct sun conditions because there was shade on the roof and he was entitled to take as many informal breaks as he desired. (See Respondent's Exhibit 18 which confirms there was an abundance of shade). Moreover, the mere fact that an employee is wearing something other than

light colored clothing does not demonstrate that MR had not received heat related training or that his foreman had not received such.[11] As to Citation 1, Item 2(a)(ii)(b), Sturgill did utilize a formalized work/rest schedule, consisting of 15-minute breaks in the morning and afternoon, a 30-minute lunch break, and unlimited additional rest breaks as needed, without fear of reprisal. (Tr. 9). Contrary to Citation 1, Item 2(a)(ii)(c), MR's fellow employees did immediately recognize that MR had taken ill. They and foreman Brown immediately removed him from the work environment and provided shade and water and called for medical attention. Citation 1, Item 2(a)(ii)(d) contends that the acclimatization program was not "formalized," but no such requirement for a "formalized" program exists. Moreover, an acclimatization program for MR was in fact utilized. He was accorded reduced time on the roof through a flexible work schedule, even though there were not elevated heat conditions that day.

The Secretary discounts the instruction provided to MR on the grounds that it was not in written form. Section 1926.21(b)(2) does not limit the employer in the method by which it may impart the necessary training and does not require safety rules to be written as long as the rules are clearly and effectively communicated to employees. *Capform, Inc*., 2001 OSAHRC LEXIS 15, 19 BNA OSHC 1374 (No. 99-0322 2001), citing *Concrete Constr. Co.,* 1992 OSAHRC LEXIS 63, 15 BNA OSHC 1614 (No. 89-2019, 1992) and *GEM Industrial, Inc.,* 17 BNA OSHC 1861, 1863 n.5, 1996 CCH OSHD ¶31,197, P. 43,688 n.5 (No. 93-1122, 1996) *aff'd*, 149 F.3d 1183 (6th Cir. 1998).

Therefore, Sturgill trained both its temporary and permanent employees in the recognition of heat hazards.

[11] A possible conflict exists in the evidence as to MR's apparel worn at various times during the morning of August 1, 2012. While a sweater was referenced, OSHA's investigative report states that MR wore "several sleeveless dark gray or black t-shirts." Again, the ALJ adopted the version of facts that best fit her pre-determined conclusion.

B. The Secretary failed to meet its burden of proof to establish a training violation of 1926.21(b)(2).

As to Citation 1, Item 2 – 29 CFR 1926.21(b)(2), the Secretary has the burden of proving that Sturgill failed to provide the instructions that a reasonably prudent employer would have given in the same circumstances. *Compass Environmental, Inc*., 663 F.3d 1164, 1168 (10th Cir. 2011), citing *N&N Contractors, Inc*. 18 BNA OSHRC 2121, 2125 (No. 96-0606, 2000) (Stating that the four-part burden of proof analysis set forth in *Secretary v. Atlantic Battery*, 16 BNA OSHRC 2131, 2138 *(*No. 90-1747, 1994) is ill-fitted for alleged training violations, and finding that a more specific test—based upon the conduct expected of a reasonably prudent employer—is appropriate).[12] An employer's obligation to train is "dependent on the conditions at the worksite, whether those conditions create a hazard, and whether the employer or its industry has recognized the hazard. " *Id*. at 1168, citing *W.G. Fairfield Co*., 19 BNA OSHRC 1233, 1236 (No. 99-0344, 2000).

There was no heat-related hazard present on this jobsite. No reasonably prudent employer would have instructed MR to wear different clothing, or would have imposed additional rest breaks on August 1, 2012, because excessive heat was not forecasted and did not occur. No evidence was introduced by the Secretary to show that reasonably prudent employers would have acted differently than Sturgill, given the conditions at the job site, including the temperate climate and the abundance of shade. The Secretary did not introduce any expert or lay witness to testify as to the heat stress training that reasonably prudent employers in the roofing industry provide to their employees. Instead, the Secretary relied solely upon non-binding guidance published by NIOSH and OSHA, which is not industry specific and does not reflect the practices followed by reasonably prudent

[12] While the parties stipulated in this matter to the basic standard burden of proof analysis contained in *Atlantic Battery*, the discussion within *Compass Environmental* gives further meaning to that standard.

roofing companies. There is no statement or explanation within the ALJ Decision as to what a reasonably prudent employer would have done under the circumstances.

Thus, the Secretary failed to satisfy its burden to prove a violation of the training requirements in 1926.21(b)(2).

CONCLUSION

In this case, there is no evidence that Sturgill's employees were exposed to a hazard of excessive heat on Sturgill's jobsite on August 1, 2012. Even using the less accurate "dry bulb" temperatures recorded that morning, the temperatures did not exceed the lowest quadrant of the Heat Index. The fact that an extraordinarily unhealthy temporary employee became ill while working on Sturgill's jobsite does not prove that a heat hazard existed, nor does it mean that Sturgill failed to adequately train and protect its employees against the hazard of excessive heat.

Sturgill utilized a heat illness prevention program which included the three required elements—water, rest and shade—set forth in the Galassi memo published two weeks prior to MR's incident. Employees on Sturgill's jobsite had ready access to water, shaded and air conditioned break areas, shade immediately available in the work area, and three formal breaks, in addition to unlimited informal breaks. No legal requirements exist that require more than this. No evidence was introduced to show that other reasonably prudent employers in the industry take precautions above and beyond those taken by Sturgill, particularly considering the conditions present on August 1, 2012.

For the above reasons, Sturgill respectfully asks that both citation items be VACATED.

Respectfully submitted,

/s/ Robert T. Dunlevey, Jr.
Robert T. Dunlevey, Jr. (0011154)
DUNLEVEY, MAHAN & FURRY
110 N. Main Street, Ste. 1000
Dayton, OH 45402
Ph: (937) 223-6003
Fax: (937) 223-8550
Email: rtd@dmfdayton.com
Attorney for Respondent,
A.H. Sturgill Roofing, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by regular U.S. mail on the 15th day of May, 2015 to the following:

Charles F. James, Counsel for Appellate Litigation
Heather R. Phillips, Counsel for Appellate Litigation
Office of the Solicitor
U.S. Department of Labor
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

/s/ Robert T. Dunlevey, Jr.
Robert T. Dunlevey, Jr.

The U.S. Equal Employment Opportunity Commission

[redacted]	**NOTICE**	**Number**
EEOC		915.002
		Date
[redacted]		7/27/00

1. SUBJECT: EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)

2. PURPOSE: This enforcement guidance explains when it is permissible foremployers to make disability-related inquiries or require medical examinations of employees.

3. EFFECTIVE DATE: Upon receipt.

4. EXPIRATION DATE: As an exception to EEOC Order 205.001, Appendix B,Attachment 4, § a(5), this Notice will remain in effect until rescinded or superseded.

5. ORIGINATOR: ADA Division, Office of Legal Counsel.

6. INSTRUCTIONS: File after Section 902 of Volume II of the Compliance Manual.

7/27/00 /s/
Date Ida L. Castro
Chairwoman

DISTRIBUTION: CM Holders

ENFORCEMENT GUIDANCE: DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES UNDER THE AMERICANS WITH DISABILITIES ACT (ADA)

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The Americans with Disabilities Act (ADA) Amendments Act of 2008 was signed into law on September 25, 2008 and becomes effective January 1, 2009. Because this law makes several significant changes, including changes to the definition of the term "disability," the EEOC will be evaluating the impact of these changes on this document and other publications. See the list of specific changes to the ADA made by the ADA Amendments Act.

INTRODUCTION

Title I of the Americans with Disabilities Act of 1990 (the "ADA")(1) limits an employer's ability to make disability-related inquiries or require medical examinations at three stages: pre-offer, post-offer, and during employment. In its guidance on preemployment disability-related inquiries and medical examinations, the Commission addressed the ADA's restrictions on disability-related inquiries and medical examinations at the pre- and post-offer stages.(2) This enforcement guidance focuses on the ADA's limitations on disability-related inquiries and medical examinations during employment.(3)

Disability-related inquiries and medical examinations of employees must be "job-related and consistent with business necessity." This guidance gives examples of the kinds of questions that are and are not "disability-related" and examples of tests and procedures that generally are and are not "medical." The guidance also defines what the term "job-related and consistent with business necessity" means and addresses situations in which an employer would meet the general standard for asking an employee a disability-related question or requiring a medical examination. Other acceptable inquiries and examinations of employees, such as inquiries and examinations required by federal law and those that are part of voluntary wellness and health screening programs, as well as invitations to voluntarily self-identify as persons with disabilities for affirmative action purposes, also are addressed.(4)

GENERAL PRINCIPLES

A. Background

Historically, many employers asked applicants and employees to provide information concerning their physical and/or mental condition. This information often was used to exclude and otherwise discriminate against individuals with disabilities -- particularly nonvisible disabilities, such as diabetes, epilepsy, heart disease, cancer, and mental illness -- despite their ability to perform the job. The ADA's provisions concerning disability-related inquiries and medical examinations reflect Congress's intent to protect the rights of applicants and employees to be assessed on merit alone, while protecting the rights of employers to ensure that individuals in the workplace can efficiently perform the essential functions of their jobs.(5)

Under the ADA, an employer's ability to make disability-related inquiries or require medical examinations is analyzed in three stages: pre-offer, post-offer, and employment. At the first stage **(prior to an offer of employment)**, the ADA prohibits all disability-related inquiries and medical examinations, *even if* they are related to the job.(6) At the second stage **(after an applicant is given a conditional job offer, but before s/he starts work)**, an employer may make disability-related inquiries and conduct medical examinations, regardless of whether they are related to the job, as long as it does so for all entering employees in the same job category.(7) At the third stage **(after employment begins)**, an employer may make disability-related inquiries and require medical examinations *only* if they are job-related and consistent with business necessity.(8)

The ADA requires employers to treat any medical information obtained from a disability-related inquiry or

medical examination (including medical information from voluntary health or wellness programs [(9)]), as well as any medical information voluntarily disclosed by an employee, as a confidential medical record. Employers may share such information only in limited circumstances with supervisors, managers, first aid and safety personnel, and government officials investigating compliance with the ADA.[(10)]

B. Disability-Related Inquiries and Medical Examinations of Employees

The ADA states, in relevant part:

> A covered entity[(11)] 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 and severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.[(12)]

This statutory language makes clear that the ADA's restrictions on inquiries and examinations apply to all employees, not just those with disabilities. Unlike other provisions of the ADA which are limited to qualified individuals with disabilities,[(13)] the use of the term "employee" in this provision reflects Congress's intent to cover a broader class of individuals and to prevent employers from asking questions and conducting medical examinations that serve no legitimate purpose.[(14)] Requiring an individual to show that s/he is a person with a disability in order to challenge a disability-related inquiry or medical examination would defeat this purpose.[(15)] *Any* employee, therefore, has a right to challenge a disability-related inquiry or medical examination that is not job-related and consistent with business necessity.

Only disability-related inquiries and medical examinations are subject to the ADA's restrictions. Thus, the first issue that must be addressed is whether the employer's question is a "disability-related inquiry" or whether the test or procedure it is requiring is a "medical examination." The next issue is whether the person being questioned or asked to submit to a medical examination is an "employee." If the person is an employee (rather than an applicant or a person who has received a conditional job offer), the final issue is whether the inquiry or examination is "job-related and consistent with business necessity" or is otherwise permitted by the ADA.[(16)]

1. What is a **"disability-related inquiry"**?

In its guidance on Preemployment Questions and Medical Examinations, the Commission explained in detail what is and is not a disability-related inquiry.[(17)] A "disability-related inquiry" is a **question (or series of questions) that is likely to elicit information about a disability.**[(18)] The same standards for determining whether a question is disability-related in the pre- and post-offer stages apply to the employment stage.[(19)]

Disability-related inquiries may include the following:

- asking an employee whether s/he has (or ever had) a disability or how s/he became disabled or inquiring about the nature or severity of an employee's disability;[(20)]
- asking an employee to provide medical documentation regarding his/her disability;
- asking an employee's co-worker, family member, doctor, or another person about an employee's disability;
- asking about an employee's genetic information;[(21)]
- asking about an employee's prior workers' compensation history;[(22)]
- asking an employee whether s/he currently is taking any prescription drugs or medications, whether s/he has taken any such drugs or medications in the past, or monitoring an employee's taking of such drugs or medications;[(23)] and,
- asking an employee a **broad** question about his/her impairments that is likely to elicit information about a disability (e.g., What impairments do you have?).[(24)]

Questions that are not likely to elicit information about a disability are *not* disability-related inquiries

and, therefore, are not prohibited under the ADA.

Questions that are permitted include the following:

- asking generally about an employee's **well being** (e.g., How are you?), asking an employee who looks tired or ill if s/he is feeling okay, asking an employee who is sneezing or coughing whether s/he has a cold or allergies, or asking how an employee is doing following the death of a loved one or the end of a marriage/relationship;
- asking an employee about nondisability-related impairments (e.g., How did you break your leg?)(25)
- asking an employee whether s/he can perform job functions;
- asking an employee whether s/he has been drinking;(26)
- asking an employee about his/her **current illegal use of drugs**;(27)
- asking a pregnant employee how she is feeling or when her baby is due;(28) and,
- asking an employee to provide the name and telephone number of a person to contact in case of a medical emergency.

2. What is a **"medical examination"**?

A "medical examination" is a **procedure or test that seeks information about an individual's physical or mental impairments or health**.(29) The guidance on Preemployment Questions and Medical Examinations lists the following factors that should be considered to determine whether a test (or procedure) is a medical examination: (1) whether the test is administered by a health care professional; (2) whether the test is interpreted by a health care professional; (3) whether the test is designed to reveal an impairment or physical or mental health; (4) whether the test is invasive; (5) whether the test measures an employee's performance of a task or measures his/her physiological responses to performing the task ; (6) whether the test normally is given in a medical setting; and, (7) whether medical equipment is used.(30)

In many cases, a combination of factors will be relevant in determining whether a test or procedure is a medical examination. In other cases, one factor may be enough to determine that a test or procedure is medical.

Medical examinations include, but are not limited to, the following:

- vision tests conducted and analyzed by an ophthalmologist or optometrist;
- blood, urine, and breath analyses to check for alcohol use;(31)
- blood, urine, saliva, and hair analyses to detect disease or genetic markers (e.g., for conditions such as sickle cell trait, breast cancer, Huntington's disease);
- blood pressure screening and cholesterol testing;
- nerve conduction tests (i.e., tests that screen for possible nerve damage and susceptibility to injury, such as carpal tunnel syndrome);
- range-of-motion tests that measure muscle strength and motor function;
- pulmonary function tests (i.e., tests that measure the capacity of the lungs to hold air and to move air in and out);
- psychological tests that are designed to identify a mental disorder or impairment; and,
- diagnostic procedures such as x-rays, computerized axial tomography (CAT) scans, and magnetic resonance imaging (MRI).

There are a **number of procedures and tests employers may require that generally are not considered medical examinations**, including:

- tests to determine the **current illegal use of drugs**;(32)

- **physical agility tests**, which measure an employee's ability to perform actual or simulated job tasks, and **physical fitness tests**, which measure an employee's performance of physical tasks, such as running or lifting, as long as these tests do not include examinations that could be considered medical (e.g., measuring heart rate or blood pressure);
- tests that evaluate an employee's ability to read labels or distinguish objects as part of a demonstration of the ability to perform actual job functions;
- **psychological tests** that measure personality traits such as honesty, preferences, and habits; and,
- polygraph examinations.(33)

3. Who is an **"employee"**?

The ADA defines the term "employee" as "an individual employed by an employer."(34) As a general rule, an individual is an employee if an entity controls the means and manner of his/her work performance.(35)

Where more than one entity controls the means and manner of how an individual's work is done, the individual is an employee of each entity.

> Example: XYZ, a temporary employment agency, hires a computer programmer and assigns him to Business Systems, Inc. (BSI), one of its clients. XYZ determines when the programmer's assignment begins and pays him a salary based on the number of hours worked as reported by BSI. XYZ also withholds social security and taxes and provides workers' compensation coverage. BSI sets the hours of work, the duration of the job, and oversees the programmer's work. XYZ can terminate the programmer if his performance is unacceptable to BSI.
>
> The programmer is an employee of both XYZ and BSI. Thus, XYZ and BSI may ask the programmer disability-related questions and require a medical examination only if they are job-related and consistent with business necessity.

4. How should an employer treat an employee who **applies for a new (i.e., different) job with the same employer**?

An employer should treat an employee who *applies* for a new job as an **applicant** for the new job.(36) The employer, therefore, is prohibited from asking disability-related questions or requiring a medical examination before making the individual a conditional offer of the new position.(37) Further, where a current supervisor has medical information regarding an employee who is applying for a new job, s/he may not disclose that information to the person interviewing the employee for the new job or to the supervisor of that job.

After the employer extends an offer for the new position, it may ask the individual disability-related questions or require a medical examination as long as it does so for all entering employees in the same job category. If an employer withdraws the offer based on medical information (i.e., screens him/her out because of a disability), it must show that the reason for doing so was job-related and consistent with business necessity.

An individual is *not* an applicant where s/he is **noncompetitively** entitled to another position with the same employer (e.g., because of seniority or satisfactory performance in his/her current position). An individual who is temporarily assigned to another position and then returns to his/her regular job also is not an applicant. These individuals are employees and, therefore, the employer only may make a disability-related inquiry or require a medical examination that is job-related and consistent with business necessity.

> Example A: Ruth, an inventory clerk for a retail store, applies for a position as a sales associate at the same store. Ruth is an applicant for the new job. Accordingly, her employer may not ask any disability-related questions or require a medical examination before extending her a conditional offer of the sales associate position. Following a conditional offer of employment, the employer may ask disability-related questions and conduct medical examinations, regardless of whether they are related to the job, as long as it does so for all entering employees in the same job category.(38)
>
> Example B: A grade 4 clerk typist has worked in the same position for one year and received a

rating of outstanding on her annual performance appraisal. When she was hired, she was told that she automatically would be considered for promotion to the next grade after 12 months of satisfactory performance. Because the clerk typist is noncompetitively entitled to a promotion, she is an employee and not an applicant. The employer, therefore, only may make a disability-related inquiry or require a medical examination that is job-related and consistent with business necessity.

Example C: A newspaper reporter, who regularly works out of his employer's New York headquarters, is temporarily assigned to its bureau in South Africa to cover the political elections. Because the reporter is on a temporary assignment doing the same job, he is an employee; the employer, therefore, may make disability-related inquiries or require medical examinations only if they are job-related and consistent with business necessity.

JOB-RELATED AND CONSISTENT WITH BUSINESS NECESSITY

Once an employee is on the job, his/her actual performance is the best measure of ability to do the job. When a need arises to question the ability of an employee to do the essential functions of his/her job or to question whether the employee can do the job without posing a direct threat due to a medical condition, it may be job-related and consistent with business necessity for an employer to make disability-related inquiries or require a medical examination.

A. In General

5. When may a disability-related inquiry or medical examination of an employee be "**job-related and consistent with business necessity**"?

Generally, a disability-related inquiry or medical examination of an employee may be "job-related and consistent with business necessity" when an employer "has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat(39) due to a medical condition."(40) Disability-related inquiries and medical examinations that follow up on a request for reasonable accommodation when the disability or need for accommodation is not known or obvious also may be job-related and consistent with business necessity. In addition, periodic medical examinations and other monitoring under specific circumstances may be job-related and consistent with business necessity.(41)

Sometimes this standard may be met when an employer knows about a particular employee's medical condition, has observed performance problems, and reasonably can attribute the problems to the medical condition. An employer also may be given **reliable information** by a credible third party that an employee has a medical condition,(42) or the employer may observe symptoms indicating that an employee may have a medical condition that will impair his/her ability to perform essential job functions or will pose a direct threat. In these situations, it may be job-related and consistent with business necessity for an employer to make disability-related inquiries or require a medical examination.

Example A: For the past two months, Sally, a tax auditor for a federal government agency, has done a third fewer audits than the average employee in her unit. She also has made numerous mistakes in assessing whether taxpayers provided appropriate documentation for claimed deductions. When questioned about her poor performance, Sally tells her supervisor that the medication she takes for her lupus makes her lethargic and unable to concentrate.

Based on Sally's explanation for her performance problems, the agency has a reasonable belief that her ability to perform the essential functions of her job will be impaired because of a medical condition.(43) Sally's supervisor, therefore, may make disability-related inquiries (e.g.,ask her whether she is taking a new medication and how long the medication's side effects are expected to last), or the supervisor may ask Sally to provide documentation from her health care provider explaining the effects of the medication on Sally's ability to perform her job.

Example B: A crane operator works at construction sites hoisting concrete panels weighing several tons. A rigger on the ground helps him load the panels, and several other workers help

him position them. During a break, the crane operator appears to become light-headed, has to sit down abruptly, and seems to have some difficulty catching his breath. In response to a question from his supervisor about whether he is feeling all right, the crane operator says that this has happened to him a few times during the past several months, but he does not know why.

The employer has a reasonable belief, based on objective evidence, that the employee will pose a direct threat and, therefore, may require the crane operator to have a medical examination to ascertain whether the symptoms he is experiencing make him unfit to perform his job. To ensure that it receives sufficient information to make this determination, the employer may want to provide the doctor who does the examination with a description of the employee's duties, including any physical qualification standards, and require that the employee provide documentation of his ability to work following the examination.(44)

Example C: Six months ago, a supervisor heard a secretary tell her co-worker that she discovered a lump in her breast and is afraid that she may have breast cancer. Since that conversation, the secretary still comes to work every day and performs her duties in her normal efficient manner.

In this case, the employer does not have a reasonable belief, based on objective evidence, either that the secretary's ability to perform her essential job functions will be impaired by a medical condition or that she will pose a direct threat due to a medical condition. The employer, therefore, may not make any disability-related inquiries or require the employee to submit to a medical examination.

An employer's reasonable belief that an employee's ability to perform essential job functions will be impaired by a medical condition or that s/he will pose a direct threat due to a medical condition must be based on *objective evidence* obtained, or reasonably available to the employer, prior to making a disability-related inquiry or requiring a medical examination. Such a belief requires an assessment of the employee and his/her position and cannot be based on general assumptions.

Example D: An employee who works in the produce department of a large grocery store tells her supervisor that she is HIV-positive. The employer is concerned that the employee poses a direct threat to the health and safety of others because she frequently works with sharp knives and might cut herself while preparing produce for display. The store requires any employee working with sharp knives to wear gloves and frequently observes employees to determine whether they are complying with this policy. Available scientific evidence shows that the possibility of transmitting HIV from a produce clerk to other employees or the public, assuming the store's policy is observed, is virtually nonexistent. Moreover, the Department of Health and Human Services (HHS), which has the responsibility under the ADA for preparing a list of infectious and communicable diseases that may be transmitted through food handling,(45) does not include HIV on the list.(46)

In this case, the employer does *not* have a reasonable belief, based on objective evidence, that this employee's ability to perform the essential functions of her position will be impaired or that she will pose a direct threat due to her medical condition. The employer, therefore, may not make any disability-related inquiries or require the employee to submit to a medical examination.(47)

6. May an employer make disability-related inquiries or require a medical examination of an employee **based, in whole or in part, on information learned from another person**?

Yes, if the information learned is **reliable** and would give rise to a reasonable belief that the employee's ability to perform essential job functions will be impaired by a medical condition or that s/he will pose a direct threat due to a medical condition, an employer may make disability-related inquiries or require a medical examination.

Factors that an employer might consider in assessing whether information learned from another person is sufficient to justify asking disability-related questions or requiring a medical examination of an employee

include: (1) the relationship of the person providing the information to the employee about whom it is being provided; (2) the seriousness of the medical condition at issue; (3) the possible motivation of the person providing the information; (4) how the person learned the information (e.g., directly from the employee whose medical condition is in question or from someone else); and (5) other evidence that the employer has that bears on the reliability of the information provided.

Example A: Bob and Joe are close friends who work as copy editors for an advertising firm. Bob tells Joe that he is worried because he has just learned that he had a positive reaction to a tuberculin skin test and believes that he has tuberculosis. Joe encourages Bob to tell their supervisor, but Bob refuses. Joe is reluctant to breach Bob's trust but is concerned that he and the other editors may be at risk since they all work closely together in the same room. After a couple of sleepless nights, Joe tells his supervisor about Bob. The supervisor questions Joe about how he learned of Bob's alleged condition and finds Joe's explanation credible.

Because tuberculosis is a potentially life-threatening medical condition and can be passed from person to person by coughing or sneezing, the supervisor has a reasonable belief, based on objective evidence, that Bob will pose a direct threat if he in fact has active tuberculosis. Under these circumstances, the employer may make disability-related inquiries or require a medical examination to the extent necessary to determine whether Bob has tuberculosis and is contagious.(48)

Example B: Kim works for a small computer consulting firm. When her mother died suddenly, she asked her employer for three weeks off, in addition to the five days that the company customarily provides in the event of the death of a parent or spouse, to deal with family matters. During her extended absence, a rumor circulated among some employees that Kim had been given additional time off to be treated for depression. Shortly after Kim's return to work, Dave, who works on the same team with Kim, approached his manager to say that he had heard that some workers were concerned about their safety. According to Dave, people in the office claimed that Kim was talking to herself and threatening to harm them. Dave said that he had not observed the strange behavior himself but was not surprised to hear about it given Kim's alleged recent treatment for depression. Dave's manager sees Kim every day and never has observed this kind of behavior. In addition, none of the co-workers to whom the manager spoke confirmed Dave's statements.

In this case, the employer does not have a reasonable belief, based on objective evidence, that Kim's ability to perform essential functions will be impaired or that s/he will pose a direct threat because of a medical condition. The employer, therefore, would not be justified in asking Kim disability-related questions or requiring her to submit to a medical examination because the information provided by Dave is not reliable.

Example C: Several customers have complained that Richard, a customer service representative for a mail order company, has made numerous errors on their orders. They consistently have complained that Richard seems to have a problem hearing because he always asks them to repeat the item number(s), color(s), size(s), credit card number(s), etc., and frequently asks them to speak louder. They also have complained that he incorrectly reads back their addresses even when they have enunciated clearly and spelled street names.

In this case, the employer has a reasonable belief, based on objective evidence, that Richard's ability to correctly process mail orders will be impaired by a medical condition (i.e., a problem with his hearing). The employer, therefore, may make disability-related inquiries of Richard or require him to submit to a medical examination to determine whether he can perform the essential functions of his job.

7. May an employer ask an employee for **documentation** when s/he requests a **reasonable accommodation?**

Yes. The employer is entitled to know that an employee has a covered disability that requires a reasonable accommodation.(49) Thus, when the **disability or the need for the accommodation is not known or obvious,** it is job-related and consistent with business necessity for an employer to ask an employee for

reasonable documentation about his/her disability and its functional limitations that require reasonable accommodation.(50)

8. May an employer ask **all employees what prescription medications** they are taking?

Generally, no. Asking all employees about their use of prescription medications is not job-related and consistent with business necessity.(51) In limited circumstances, however, certain employers may be able to demonstrate that it *is* job-related and consistent with business necessity to require employees in positions affecting public safety to report when they are taking medication that may affect their ability to perform essential functions. **Under these limited circumstances, an employer must be able to demonstrate that an employee's inability or impaired ability to perform essential functions will result in a direct threat.** For example, a police department could require armed officers to report when they are taking medications that may affect their ability to use a firearm or to perform other essential functions of their job. Similarly, an airline could require its pilots to report when they are taking any medications that may impair their ability to fly. A fire department, however, could not require fire department employees who perform only administrative duties to report their use of medications because it is unlikely that it could show that these employees would pose a direct threat as a result of their inability or impaired ability to perform their essential job functions.

9. **What action may an employer take if an employee fails to respond to a disability-related inquiry or fails to submit to a medical examination** that is job-related and consistent with business necessity?

The action the employer may take depends on its reason for making the disability-related inquiry or requiring a medical examination.

> Example A: A supervisor notices that the quality of work from an ordinarily outstanding employee has deteriorated over the past several months. Specifically, the employee requires more time to complete routine reports, which frequently are submitted late and contain numerous errors. The supervisor also has observed during this period of time that the employee appears to be squinting to see her computer monitor, is holding printed material close to her face to read it, and takes frequent breaks during which she sometimes is seen rubbing her eyes. Concerned about the employee's declining performance, which appears to be due to a medical condition, the supervisor tells her to go see the company doctor, but she does not.
>
> Any discipline that the employer decides to impose should focus on the employee's **performance problems**. Thus, the employer may discipline the employee for past and future performance problems in accordance with a uniformly applied policy.
>
> Example B: An accountant with no known disability asks for an ergonomic chair because she says she is having back pain. The employer asks the employee to provide documentation from her treating physician that: (1) describes the nature, severity, and duration of her impairment, the activity or activities that the impairment limits, and the extent to which the impairment limits her ability to perform the activity or activities; and (2) substantiates why an ergonomic chair is needed.
>
> Here, the employee's possible disability and **need for reasonable accommodation** are not obvious. Therefore, if the employee fails to provide the requested documentation or if the documentation does not demonstrate the existence of a disability, the employer can refuse to provide the chair.(52)

B. Scope and Manner of Disability-Related Inquiries and Medical Examinations

10. **What documentation** may an employer require from an employee who requests a **reasonable accommodation**?

An employer may require an employee to provide documentation that is **sufficient** to substantiate that s/he has an ADA disability and needs the reasonable accommodation requested, but cannot ask for unrelated documentation. This means that, in most circumstances, an employer cannot ask for an employee's

complete medical records because they are likely to contain information unrelated to the disability at issue and the need for accommodation.(53)

Documentation is sufficient if it: (1) describes the nature, severity, and duration of the employee's impairment, the activity or activities that the impairment limits, and the extent to which the impairment limits the employee's ability to perform the activity or activities; and, (2) substantiates why the requested reasonable accommodation is needed.

> Example: An employee, who has exhausted all of his available leave, telephones his supervisor on Monday morning to inform him that he had a severe pain episode on Saturday due to his sickle cell anemia, is in the hospital, and needs time off. Prior to this call, the supervisor was unaware of the employee's medical condition.
>
> The employer can ask the employee to send in documentation from his treating physician that substantiates that the employee has a disability, confirms that his hospitalization is related to his disability, and provides information on how long he may be absent from work.(54)

11. May an employer **require an employee to go to a health care professional of the employer's (rather than the employee's) choice** when the employee requests a **reasonable accommodation?**

The ADA does not prevent an employer from requiring an employee to go to an appropriate health care professional of the employer's choice if the employee provides **insufficient documentation** from his/her treating physician (or other health care professional) to substantiate that s/he has an ADA disability and needs a reasonable accommodation.(55) However, if an employee provides insufficient documentation in response to the employer's initial request, the employer should explain why the documentation is insufficient and allow the employee an opportunity to provide the missing information in a timely manner.(56) The employer also should consider consulting with the employee's doctor (with the employee's consent) before requiring the employee to go to a health care professional of its choice.(57)

Documentation is insufficient if it does not specify the existence of an ADA disability and explain the need for reasonable accommodation.(58) Documentation also might be insufficient where, for example: (1) the health care professional does not have the expertise to give an opinion about the employee's medical condition and the limitations imposed by it; (2) the information does not specify the functional limitations due to the disability; or, (3) other factors indicate that the information provided is not credible or is fraudulent. If an employee provides insufficient documentation, an employer does not have to provide reasonable accommodation until sufficient documentation is provided.

Any medical examination conducted by the employer's health care professional must be job-related and consistent with business necessity. This means that the examination must be limited to determining the existence of an ADA disability and the functional limitations that require reasonable accommodation. If an employer requires an employee to go to a health care professional of the employer's choice, the employer must pay all costs associated with the visit(s).(59)

The Commission has previously stated that when an employee provides sufficient evidence of the existence of a disability and the need for reasonable accommodation, continued efforts by the employer to require that the individual provide more documentation and/or submit to a medical examination could be considered retaliation.(60) However, an employer that requests additional information or requires a medical examination based on a good faith belief that the documentation the employee submitted is insufficient would *not* be liable for retaliation.

12. May an employer require that an **employee, who it reasonably believes will pose a direct threat, be examined by an appropriate health care professional of the employer's choice?**

Yes. The determination that an employee poses a direct threat must be based on an individualized assessment of the employee's present ability to safely perform the essential functions of the job. This assessment must be based on a reasonable medical judgment that relies on the most current medical knowledge and/or best objective evidence.(61) To meet this burden, an employer may want to have the employee examined by a health care professional of its choice who has expertise in the employee's specific condition and can provide medical information that allows the employer to determine the effects of the

condition on the employee's ability to perform his/her job. Any medical examination, however, must be limited to determining whether the employee can perform his/her job without posing a direct threat, with or without reasonable accommodation. An employer also must pay all costs associated with the employee's visit(s) to its health care professional.(62)

An employer should be cautious about relying solely on the opinion of its own health care professional that an employee poses a direct threat where that opinion is contradicted by documentation from the employee's own treating physician, who is knowledgeable about the employee's medical condition and job functions, and/or other objective evidence. In evaluating conflicting medical information, the employer may find it helpful to consider: (1) the area of expertise of each medical professional who has provided information; (2) the kind of information each person providing documentation has about the job's essential functions and the work environment in which they are performed; (3) whether a particular opinion is based on speculation or on current, objectively verifiable information about the risks associated with a particular condition; and, (4) whether the medical opinion is contradicted by information known to or observed by the employer (e.g., information about the employee's actual experience in the job in question or in previous similar jobs).

13. **How much** medical information can an employer obtain about an employee when it reasonably believes that an employee's **ability to perform the essential functions** of his/her job will be impaired by a medical condition or that s/he **will pose a direct threat** due to a medical condition?

An employer is entitled only to the information necessary to determine whether the employee can do the essential functions of the job or work without posing a direct threat. This means that, in most situations, an employer cannot request an employee's complete medical records because they are likely to contain information unrelated to whether the employee can perform his/her essential functions or work without posing a direct threat.

14. May an employer require an employee to provide **medical certification that s/he can safely perform a physical agility or physical fitness test**?

Yes. Employers that require physical agility or physical fitness tests may ask an employee to have a physician certify whether s/he can safely perform the test. (63) In this situation, however, the employer is entitled to obtain only **a note simply stating that the employee can safely perform the test or, alternatively, an explanation of the reason(s) why the employee cannot perform the test.** An employer may not obtain the employee's complete medical records or information about any conditions that do not affect the employee's ability to perform the physical agility or physical fitness test safely.

C. Disability-Related Inquiries and Medical Examinations Relating to Leave(64)

15. May an employer request an employee to provide a **doctor's note or other explanation** to substantiate his/her use of sick leave?

Yes. An employer is entitled to know why an employee is requesting sick leave. An employer, therefore, may ask an employee to justify his/her use of sick leave by providing a doctor's note or other explanation, as long as it has a policy or practice of requiring all employees, with and without disabilities, to do so.

16. May an employer require **periodic updates** when an employee is on extended leave because of a medical condition?

Yes. If the employee's request for leave did not specify an exact or fairly specific return date (e.g., October 4 or around the second week of November) or if the employee needs continued leave beyond what was originally granted, the employer may require the employee to provide periodic updates on his/her condition and possible date of return.(65) However, where the employer has granted a fixed period of extended leave and the employee has not requested additional leave, the employer *cannot* require the employee to provide periodic updates. Employers, of course, may call employees on extended leave to check on their progress or to express concern for their health.

17. May an employer make disability-related inquiries or require a medical examination**when an employee who has been on leave for a medical condition seeks to return to work**?

Yes. If an employer has a reasonable belief that an employee's **present** ability to perform essential job

functions will be impaired by a medical condition or that s/he will pose a direct threat due to a medical condition, the employer may make disability-related inquiries or require the employee to submit to a medical examination. Any inquiries or examination, however, must be limited in scope to what is needed to make an assessment of the employee's ability to work. Usually, inquiries or examinations related to the specific medical condition for which the employee took leave will be all that is warranted. The employer may not use the employee's leave as a justification for making far-ranging disability-related inquiries or requiring an unrelated medical examination.

Example A: A data entry clerk broke her leg while skiing and was out of work for four weeks, after which time she returned to work on crutches. In this case, the employer does not have a reasonable belief, based on objective evidence, either that the clerk's ability to perform her essential job functions will be impaired by a medical condition or that she will pose a direct threat due to a medical condition. The employer, therefore, may not make any disability-related inquiries or require a medical examination but generally may ask the clerk how she is doing and express concern about her injury.

Example B: As the result of problems he was having with his medication, an employee with a known psychiatric disability threatened several of his co-workers and was disciplined. Shortly thereafter, he was hospitalized for six weeks for treatment related to the condition. Two days after his release, the employee returns to work with a note from his doctor indicating only that he is "cleared to return to work." Because the employer has a reasonable belief, based on objective evidence, that the employee will pose a direct threat due to a medical condition, it may ask the employee for additional documentation regarding his medication(s) or treatment or request that he submit to a medical examination.

D. Periodic Testing and Monitoring

In most instances, an employer's need to make disability-related inquiries or require medical examinations will be triggered by evidence of **current** performance problems or observable evidence suggesting that a particular employee will pose a direct threat. The following questions, however, address situations in which disability-related inquiries and medical examinations of employees may be permissible absent such evidence.

18. May **employers** require **periodic medical examinations** of employees in **positions affecting public safety (e.g., police officers and firefighters)**?

Yes. In limited circumstances, periodic medical examinations of employees in positions affecting public safety that are narrowly tailored to address specific job-related concerns are permissible.(66)

Example A: A fire department requires employees for whom firefighting is an essential job function to have a comprehensive visual examination every two years and to have an annual electrocardiogram because it is concerned that certain visual disorders and heart problems will affect their ability to do their job without posing a direct threat. These periodic medical examinations are permitted by the ADA.

Example B: A police department may not periodically test all of its officers to determine whether they are HIV-positive because a diagnosis of that condition alone is not likely to result in an inability or impaired ability to perform essential functions that would result in a direct threat.

Example C: A private security company may require its armed security officers who are expected to pursue and detain fleeing criminal suspects to have periodic blood pressure screenings and stress tests because it is concerned about the risk of harm to the public that could result if an officer has a sudden stroke.

If an employer decides to terminate or take other adverse action against an employee with a disability based on the results of a medical examination, it must demonstrate that the employee is unable to perform his/her essential job functions or, in fact, poses a direct threat that cannot be eliminated or reduced by reasonable accommodation.(67) Therefore, when an employer discovers that an employee has a condition for which it lawfully may test as part of a periodic medical examination, it may make additional inquiries or require additional medical examinations that are **necessary to determine whether the employee currently is**

unable to perform his/her essential job functions or poses a direct threat due to the condition.

19. May an employer subject an employee, who has been off from work in an alcohol rehabilitation program, to **periodic alcohol testing** when s/he returns to work?

Yes, but only if the employer has a reasonable belief, based on objective evidence, that the employee will pose a direct threat in the absence of periodic testing. Such a reasonable belief requires an individualized assessment of the employee and his/her position and cannot be based on general assumptions. Employers also may conduct periodic alcohol testing pursuant to "last chance" agreements.(68)

In determining whether to subject an employee to periodic alcohol testing (in the absence of a "last chance" agreement), the employer should consider the safety risks associated with the position the employee holds, the consequences of the employee's inability or impaired ability to perform his/her job functions, and how recently the event(s) occurred that cause the employer to believe that the employee will pose a direct threat (e.g., how long the individual has been an employee, when s/he completed rehabilitation, whether s/he previously has relapsed). Further, the duration and frequency of the testing must be designed to address particular safety concerns and should not be used to harass, intimidate, or retaliate against the employee because of his/her disability. Where the employee repeatedly has tested negative for alcohol, continued testing may not be job-related and consistent with business necessity because the employer no longer may have a *reasonable* belief that the employee will pose a direct threat.

> Example A: Three months after being hired, a city bus driver informed his supervisor of his alcoholism and requested leave to enroll in a rehabilitation program. The driver explained that he had not had a drink in more than 10 years until he recently started having a couple of beers before bed to deal with the recent separation from his wife. After four months of rehabilitation and counseling, the driver was cleared to return to work. Given the safety risks associated with the bus driver's position, his short period of employment, and recent completion of rehabilitation, the city can show that it would be job-related and consistent with business necessity to subject the driver to frequent periodic alcohol tests following his return to work.
>
> Example B: An attorney has been off from work in a residential alcohol treatment program for six weeks and has been cleared to return to work. Her supervisor wants to perform periodic alcohol tests to determine whether the attorney has resumed drinking. Assuming that there is no evidence that the attorney will pose a direct threat, the employer cannot show that periodic alcohol testing would be job-related and consistent with business necessity.(69)

OTHER ACCEPTABLE DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES

20. May an **Employee Assistance Program (EAP)(70) counselor** ask an employee seeking help for personal problems about any physical or mental condition(s) s/he may have?

Yes. An EAP counselor may ask employees about their medical condition(s) if s/he: (1) does not act for or on behalf of the employer; (2) is obligated to shield any information the employee reveals from decision makers; and, (3) has no power to affect employment decisions. Many employers contract with EAP counselors so that employees can voluntarily and confidentially seek professional counseling for personal or work-related problems without having to be concerned that their employment status will be affected because they sought help.(71)

21. May an employer make disability-related inquiries and require medical examinations that are required or necessitated by another **federal law or regulation**?

Yes. An employer may make disability-related inquiries and require employees to submit to medical examinations that are mandated or necessitated by another federal law or regulation.(72) For example, under federal safety regulations, interstate bus and truck drivers must undergo medical examinations at least once every two years. Similarly, airline pilots and flight attendants must continually meet certain medical requirements.(73) Other federal laws that require medical examinations or medical inquiries of employees without violating the ADA include:

- the Occupational Safety and Health Act;(74)
- the Federal Mine Health and Safety Act;(75) and
- other federal statutes that require employees exposed to toxic or hazardous substances to be medically monitored at specific intervals.(76)

22. May an employer make disability-related inquiries or conduct medical examinations that are part of its **voluntary wellness program**?

Yes. The ADA allows employers to conduct voluntary medical examinations and activities, including voluntary medical histories, which are part of an employee health program without having to show that they are job-related and consistent with business necessity, as long as any medical records acquired as part of the wellness program are kept confidential and separate from personnel records.(77) These programs often include blood pressure screening, cholesterol testing, glaucoma testing, and cancer detection screening. Employees may be asked disability-related questions and may be given medical examinations pursuant to such voluntary wellness programs.(78)

A **wellness program is "voluntary"** as long as an employer neither requires participation nor penalizes employees who do not participate.

23. May an employer ask employees to **voluntarily self-identify as persons with disabilities for affirmative action purposes?**

Yes. An employer may ask employees to voluntarily self-identify as individuals with disabilities when the employer is:

- undertaking affirmative action because of a federal, state, or local law (including a veterans' preference law) that requires affirmative action for individuals with disabilities (i.e., the law requires some action to be taken on behalf of such individuals); or,
- *voluntarily* using the information to benefit individuals with disabilities.(79)

If an employer invites employees to voluntarily self-identify in connection with the above-mentioned situations, the employer must indicate clearly and conspicuously on any written questionnaire used for this purpose, or state clearly (if no written questionnaire is used), that: (1) the specific information requested is intended for use solely in connection with its affirmative action obligations or its voluntary affirmative action efforts; and, (2) the specific information is being requested on a voluntary basis, that it will be kept confidential in accordance with the ADA, that refusal to provide it will not subject the employee to any adverse treatment, and that it will be used only in accordance with the ADA.(80)

In order to invite self-identification for purposes of an affirmative action program that is voluntarily undertaken or undertaken pursuant to a law that encourages (rather than requires) affirmative action, an employer must be taking some action that actually benefits individuals with disabilities. The invitation to self-identify also must be *necessary* in order to provide the benefit.

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1. 42 U.S.C. §§ 12101-12117, 12201-12213 (1994)(codified as amended).

2. Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations Under the Americans with Disabilities Act of 1990, 8 FEP Manual (BNA) 405:7191 (1995) [hereinafter Preemployment Questions and Medical Examinations]. This and other ADA guidances are available through the Internet at http://www.eeoc.gov.

3. Pursuant to the Rehabilitation Act Amendment of 1992, the ADA's employment standards apply to all nonaffirmative action employment discrimination claims of individuals with disabilities who are federal employees or applicants for federal employment. Pub. L. No. 102-569 §503(b), 106 Stat. 4344, 4424 (1992) (codified as amended at 29 U.S.C. §791(g)(1994)). Accordingly, the analysis in the guidance applies to federal sector complaints of nonaffirmative action employment discrimination arising under section 501 of the Rehabilitation Act of 1973. It also applies to complaints of nonaffirmative action employment discrimination arising under section 503 and to employment discrimination under section 504 of the Rehabilitation Act. Id. at §§793 (d), 794(d)(1994).

4. The purpose of this guidance is to explain when it is permissible for an employer to make a disability-related inquiry or require a medical examination of an employee. It does not focus on what actions an employer may take based on what it learns in response to such an inquiry or after it receives the result of a medical examination.

5. In the ADA legislative history, Congress stated that an employee's "actual performance on the job is, of course, the best measure of ability to do the job." S. Rep. No. 101-116, at 39 (1989); H.R. Rep. No. 101-485, pt. 2, at 75 (1990).

6. However, where an applicant has an obvious disability, and the employer has a reasonable belief that

s/he will need a reasonable accommodation to perform specific job functions, the employer may ask whether the applicant needs a reasonable accommodation and, if so, what type of accommodation. These same two questions may be asked when an individual voluntarily discloses a nonvisible disability or voluntarily tells the employer that s/he will need a reasonable accommodation to perform a job. 42 U.S.C. §12112(c)(B)(1994); 29 C.F.R. §1630.13(a)(1998); see also Preemployment Questions and Medical Examinations, supra note 2, at 6-8, 8 FEP at 405:7193-94; EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities at 13-15, 8 FEP Manual (BNA) 405:7461, 7467-68 (1997)[hereinafter The ADA and Psychiatric Disabilities]; Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act at 20-21, 8 FEP Manual (BNA) 405:7601, 7611(1999)[hereinafter Reasonable Accommodation Under the ADA]. Under certain circumstances, an employer also may ask applicants to self-identify as individuals with disabilities for purposes of its affirmative action program. See Preemployment Questions and Medical Examinations, supra note 2, at 12-13, 8 FEP at 405:7196-97.

7. 42 U.S.C. §12112(d)(3)(1994); 29 C.F.R. §1630.14(b)(1998). However, if an individual is screened out because of a disability, the employer must show that the exclusionary criterion is job-related and consistent with business necessity. 42 U.S.C. §12112(b)(6)(1994); 29 C.F.R. §§1630.10, 1630.14(b)(3)(1998).

8. 42 U.S.C. §12112(d)(4)(A)(1994); 29 C.F.R. §1630.14(c)(1998).

9. See infra note 77.

10. 42 U.S.C. §§12112(d)(3)(B), (4)(C)(1994); 29 C.F.R. §1630.14(b)(1)(1998). The Commission also has interpreted the ADA to allow employers to disclose medical information to state workers' compensation offices, state second injury funds, workers' compensation insurance carriers, and to health care professionals when seeking advice in making reasonable accommodation determinations. 29 C.F.R. pt. 1630, app. §1630.14(b)(1998). Employers also may use medical information for insurance purposes. Id. See also Preemployment Questions and Medical Examinations, supra note 2, at 21-23, 8 FEP at 405:7201; EEOC Enforcement Guidance: Workers' Compensation and the ADA at 7, 8 FEP Manual (BNA) 405:7391, 7394 (1996)[hereinafter Workers' Compensation and the ADA].

11. "Covered entity" means an employer, employment agency, labor organization, or joint labor management committee. 29 C.F.R. §1630.2(b)(1998). For simplicity, this guidance refers to all covered entities as "employers." The definition of "employer" includes persons who are "agents" of the employer, such as managers, supervisors, or others who act for the employer (e.g., agencies used to conduct background checks on applicants and employees). 42 U.S.C. §12111(5)(1994).

12. 42 U.S.C. §12112(d)(4)(A)(1994); 29 C.F.R. §1630.14(c)(1998). See infra Question 5 and accompanying text for a discussion of what the "job-related and consistent with business necessity" standard means.

13. See e.g., 42 U.S.C. §12112(a)(1994)(no entity shall discriminate against a qualified individual with a disability because of the disability of such individual).

14. Congress was particularly concerned about questions that allowed employers to learn which employees have disabilities that are not apparent from observation. It concluded that the only way to protect employees with nonvisible disabilities is to prohibit employers from making disability-related inquiries and requiring medical examinations that are not job-related and consistent with business necessity. See S. Rep. No. 101-116 at 39-40 (1989); H.R. Rep. No. 101-485, pt. 2, at 75 (1990) ("An inquiry or medical examination that is not job-related serves no legitimate employer purpose, but simply serves to stigmatize the person with a disability." A person with cancer "may object merely to being identified, independent of the consequences [since] being identified as [a person with a disability] often carries both blatant and subtle stigma").

15. See Roe v. Cheyenne Mountain Resort, 124 F.3d 1221, 1229, 7 AD Cas. (BNA) 779, 783 (10th Cir. 1997)("it makes little sense to require an employee to demonstrate that he has a disability to prevent his employer from inquiring as to whether or not he has a disability"). Although Roe involved only the issue of disability-related inquiries of employees, the same rationale applies to medical examinations of employees and to disability-related inquiries and medical examinations of applicants. The ADA's restrictions on disability-related inquiries and medical examinations apply to individuals both with and without disabilities at

all three stages: pre-offer, post-offer, and during employment. See also Griffin v. Steeltek ,Inc., 160 F.3d 591, 595, 8 AD Cas.1249, 1252 (10th Cir. 1998), *cert. denied,* 119 S.Ct. 1455, 9 AD Cas. 416 (1999)(a job applicant without a disability can sue under the ADA regarding medical history questions); Gonzales v. Sandoval County, 2 F.Supp. 2d 1442, 1445, 8 AD Cas.1337, 1340 (D. N.M. 1998)(plaintiff need not establish disability to state a claim for a prohibited inquiry under the ADA); Fredenburg v. Contra Costa County Department of Health Services, 172 F.3d 1176, 9 AD Cas. 385 (9th Cir. 1999)(requiring plaintiffs to prove that they are persons with disabilities to challenge a medical examination would render §12112(d)(4)(A) of the ADA "nugatory"; thus, plaintiffs need not prove that they are qualified individuals with a disability to bring claims challenging the scope of medical examinations under the ADA).

Some courts, however, have held that to bring a claim alleging a violation of the ADA's prohibition against disability-related inquiries and medical examinations, an individual must demonstrate that s/he is a qualified individual with a disability. See e.g., Armstrong v. Turner Industries, Inc., 141 F.3d 554, 558, 8 AD Cas. (BNA) 118, 124 (5th Cir. 1998), *aff'g* 950 F. Supp. 162, 7 AD Cas. 875 (M.D. La. 1996) (plaintiff must be a qualified individual with a disability to challenge an illegal preemployment inquiry); Hunter v. Habegger Corp., 139 F.3d 901(7th Cir. 1998)("it seems clear that in order to assert that one has been discriminated against because of an improper inquiry, that person must also have been otherwise qualified"). For the reasons stated above, it is the Commission's position that the plain language of the statute explicitly protects individuals with and *without* disabilities from improper disability-related inquiries and medical examinations.

16. For example, employers may make disability-related inquiries and require medical examinations that are required or necessitated by another federal law or regulation. See infra Question 21 and accompanying text. Employers also may make disability-related inquiries and conduct medical examinations that are part of their voluntary wellness programs. See infra Question 22 and accompanying text.

17. Preemployment Questions and Medical Examinations, supra note 2, at 4-13, 8 FEP at 405:7191, 7192-97.

18. Id. at 4, 8 FEP at 405:7192.

19. Id. at 4-13, 8 FEP at 405:7192-97.

20. The prohibition against making disability-related inquiries applies to inquiries made directly to an employee, as well as to indirect or surreptitious inquiries such as a search through an employee's belongings to confirm an employer's suspicions about an employee's medical condition. See Doe v. Kohn Nast & Graf, P.C., 866 F. Supp. 190, 3 AD Cas. (BNA) 1322 (E.D. Pa. 1994) (employer conducted an unlawful medical inquiry when it searched the office of an employee it knew was sick and discovered a letter indicating the employee had AIDS).

21. As used in this guidance, the term "genetic information" has the same definition as "protected genetic information" in Executive Order 13145. In general, genetic information is information about an individual's genetic tests, information about the genetic tests of an individual's family members, or information about the occurrence of a disease, medical condition, or disorder in family members of the individual. See Exec. Order No. 13,145, To Prohibit Discrimination in Federal Employment Based on Genetic Information, 65 Fed. Reg. 6877 (Feb. 8, 2000).

22. See Griffin v. Steeltek, Inc., 160 F.3d 591, 594, 8 AD Cas. (BNA) 1249, 1252 (10th Cir. 1998), *cert. denied,* 119 S.Ct. 1455, 9 AD. Cas. 416 (1999) (on its application for employment, employer unlawfully asked: "Have you received workers' compensation or disability payments? If yes, describe.").

23. See Roe v. Cheyenne Mountain Conference Resort, Inc., 124 F.3d 1221, 7 AD Cas. (BNA) 779 (10th Cir. 1997)(employer had a policy of requiring all employees to report every drug, including legal prescription drugs); Krocka v. Bransfield, 969 F. Supp. 1073 (N.D. Ill. 1997)(police department implemented a policy of monitoring employees taking psychotropic medication).

24. Preemployment Questions and Medical Examinations, supra note 2, at 9, 8 FEP at 405:7195.

25. Preemployment Questions and Medical Examinations, supra note 2, at 9, 8 FEP at 405:7195.

26. Employers also may maintain and enforce rules prohibiting employees from being under the influence of

alcohol in the workplace and may conduct alcohol testing for this purpose if they have a reasonable belief that an employee may be under the influence of alcohol at work.

27. An individual who currently uses drugs illegally is not protected under the ADA; therefore, questions about current illegal drug use are not disability-related inquiries. 42 U.S.C. §12114(a)(1994); 29 C.F.R. §1630.3(a)(1998). However, questions about *past* addiction to illegal drugs or questions about whether an employee ever has participated in a rehabilitation program *are* disability-related because past drug addiction generally is a disability. Individuals who were addicted to drugs, but are not currently using drugs illegally, are protected under the ADA. 29 C.F.R. §1630.3(b)(1),(2)(1998).

28. Pregnancy is not a disability for purposes of the ADA. 29 C.F.R. pt. 1630, app. §1630.2(h)(1998). However, discrimination on that basis may violate the Pregnancy Discrimination Act amendments to Title VII. 42 U.S.C. §2000e(k)(1994).

29. Preemployment Questions and Medical Examinations supra note 2, at 14, 8 FEP at 405:7197.

30. Id.

31. See supra note 26.

32. See supra note 27.

33. Under the ADA, polygraph examinations, which purportedly measure whether a person believes s/he is telling the truth in response to a particular inquiry, are not medical examinations. However, an employer cannot ask disability-related questions as part of the examination. See Preemployment Questions and Medical Examinations, supra note 2, at 17, 8 FEP at 405:7199.

34. 42 U.S.C. §12111(4)(1994); 29 C.F.R. §1630.2(f)(1998). This term has the same meaning as it does under Title VII of the Civil Rights Act of 1964. 42 U.S.C. §2000e(f)(1994).

35. In its guidance on contingent workers, the Commission lists additional factors that indicate when a worker is an employee and explains that other aspects of the relationship between the parties may affect the determination of whether an employee-employer relationship exists. See EEOC Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms at 4-7, 8 FEP Manual (BNA) 405:7551, 7554-55 (1997).

36. An employee in this situation is an applicant with respect to rules concerning disability-related inquiries and medical examinations but *not* for employee benefits (e.g., retirement, health and life insurance, leave accrual) or other purposes.

37. Where the employer already has medical information concerning an individual at the pre-offer stage for the new position (e.g., information obtained in connection with the individual's request for reasonable accommodation in his/her current position) and this information causes the employer to have a reasonable belief that the individual will need a reasonable accommodation to perform the functions of the *new* job, the employer may ask what type of reasonable accommodation would be needed to perform the functions of the new job, before extending an offer for that job. An employer, however, may not use its knowledge of an applicant's disability to discriminate against him/her. The employer also may not use the fact that the individual will need a reasonable accommodation in the new position to deny him/her the new job unless it can show that providing the accommodation would cause an undue hardship.

38. 42 U.S.C. §12112(d)(3)(1994); 29 C.F.R. §1630.14(b)(1998).

39. "Direct threat" means a significant risk of substantial harm that cannot be eliminated or reduced by reasonable accommodation. 29 C.F.R. §1630.2(r)(1998). Direct threat determinations must be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job, considering a reasonable medical judgment relying on the most current medical knowledge and/or best available objective evidence. Id. To determine whether an employee poses a direct threat, the following factors should be considered: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that potential harm will occur; and, (4) the imminence of the potential harm. Id.

40. The Commission explained this standard in its enforcement guidance on The ADA and Psychiatric

Disabilities, supra note 6, at 15, 8 FEP at 405:7468-69.

41. See infra Questions 18 and 19 and accompanying text.

42. See infra Question 6 and accompanying text.

43. See Yin v. State of California, 95 F.3d 864, 868, 5 AD Cas. (BNA) 1487, 1489 (9th Cir. 1996)(where employee missed an inordinate number of days and her performance declined, employer's request that she submit to a medical examination was job-related and consistent with business necessity).

44. See also infra Question 12.

45. 42 U.S.C. §12113 (d)(1994).

46. The most current list was published by HHS, Centers for Disease Control and Prevention (CDC), in 1998. 63 Fed.Reg. 49359 (Sept. 15, 1998).

47. But see EEOC v. Prevo's Family Market, Inc., 135 F.3d 1089, 1097, 8 AD Cas. (BNA) 401, 408 (6th Cir. 1998) (employer did not violate the ADA when it required a produce clerk, who claimed to be HIV-positive, to submit to a medical examination to determine whether he posed a direct threat). The Commission believes that Prevo's was wrongly decided because the employer did not base its belief that the employee posed a direct threat on reasonably available objective evidence and, therefore, its request that the employee submit to a medical examination was not job-related and consistent with business necessity. A number of sources, such as the Centers for Disease Control (www.cdc.gov), a physician or health care provider knowledgeable about HIV and other infectious diseases, a state or local health department, a public or university library, or a state or county medical association can provide information about the likelihood of an employee transmitting HIV or other infectious diseases to co-workers or the public.

48. This guidance does not affect the obligation of a physician, under any state law, to report cases of active tuberculosis to appropriate public health authorities.

49. See Reasonable Accommodation Under the ADA, supra note 6, at 14-15, 8 FEP at 405:7608 for examples of other situations where employers may ask for documentation; see also id. at 16-17, 8 FEP at 405: 7609 for examples of situations in which an employer **cannot** ask for documentation in response to a request for reasonable accommodation.

50. 29 C.F.R. pt. 1630 app. §1630.9 (1998); see also Preemployment Questions and Medical Examinations, supra note 2, at 6, 8 FEP at 405: 7193; ADA and Psychiatric Disabilities, supra note 6, at 22-23, 8 FEP at 405:7472-73; Reasonable Accommodation Under the ADA, supra note 6, at 12-13, 8 FEP at 405: 7607. See also Templeton v. Neodata Services, Inc., 162 F.3d 617, 618, 8 AD Cas. (BNA) 1615, 1616 (10th Cir. 1998)(employer's request for updated medical information was reasonable in light of treating physician's letter indicating doubt as to employee's ability to return to work as scheduled, and employer needed the requested information to determine appropriate reasonable accommodation for employee in event she was able to return to work).

51. See Roe v. Cheyenne Mountain Conference Resort, 124 F.3d 1221, 1229, 7 AD Cas. (BNA) 779, 784 (10th Cir. 1997) (employer, who implemented a drug and alcohol policy that included many permissible inquiries but also asked employees to inform the employer of every drug they were taking, including legal prescription drugs, violated the ADA by failing to demonstrate that this inquiry was job-related and consistent with business necessity).

52. See Reasonable Accommodation Under the ADA, supra note 6, at 15, 8 FEP at 405:7608.

53. See id. at 13, 8 FEP at 405:7607. (An "employer may require only the documentation that is needed to establish that a person has an ADA disability, and that the disability necessitates a reasonable accommodation." If an employee has more than one disability, an employer can request information pertaining only to the disability for which the employee is requesting an accommodation.)

54. See Reasonable Accommodation Under the ADA, supra note 6, at 14-15, 16-17, 8 FEP at 405:7607-09. If the employee subsequently should request another reasonable accommodation related to his sickle cell

anemia, the employer may ask for reasonable documentation relating to the new request (if the need is not obvious). The employer, however, cannot ask again for documentation that the employee has an ADA disability where the medical information the employee provided in support of his first reasonable accommodation request established the existence of a long-term impairment that substantially limits a major life activity. Id. at 16-17, 8 FEP at 405: 7609.

55. See Reasonable Accommodation Under the ADA, supra note 6, at 15-16, 8 FEP at 405:7698; The ADA and Psychiatric Disabilities, supra note 6, at 23, 8 FEP at 405:7473.

56. See Reasonable Accommodation Under the ADA, supra note 6, at 15, 8 FEP at 405:7608.

57. Since a doctor cannot disclose information about a patient without his/her permission, an employer must obtain a release from the employee that will permit the doctor to answer questions. The release should be clear as to what information will be requested. See Reasonable Accommodation Under the ADA, supra note 6, at 13-14, 8 FEP at 405:7607.

58. Id. at 15, 8 FEP at 405:7608-09.

59. Id. at 16, 8 FEP at 405:7609; The ADA and Psychiatric Disabilities, supra note 6, at 23, 8 FEP at 405:7473.

60. See Reasonable Accommodation Under the ADA, supra note 6, at 15 (n.30), 8 FEP at 405:7609.

61. 29 C.F.R. §1630.2(r)(1998).

62. See Reasonable Accommodation Under the ADA, supra note 6, at 16, 8 FEP at 405:7609; The ADA and Psychiatric Disabilities, supra note 6, at 23, 8 FEP at 405:7473.

63. See Preemployment Questions and Medical Examinations, supra note 2, at 16, 8 FEP at 405:7198.

64. The questions and answers in this section address situations in which an employee has used sick, annual, or some other kind of leave because of a medical condition, but has **not** taken leave under the **Family and Medical Leave Act (FMLA)**. 29 U.S.C. §2601(1994). Where an employee has been on leave under the FMLA, the employer must comply with the requirements of that statute. For example, the FMLA generally does not authorize an employer to make its own determination of whether an employee is fit to return to work but, rather, states that the employer must rely on the evaluation done by the employee's own health care provider. Id. at §2613(b).

65. See Reasonable Accommodation Under the ADA, supra note 6, at 57, 8 FEP at 405:7632.

66. See The ADA and Psychiatric Disabilities, supra note 6, at 16 (n.41), 8 FEP at 405:7469.

67. See supra note 39.

68. Some employers, including some federal government agencies, commonly use "last chance agreements" in disciplinary actions involving employee use of alcohol. Such agreements typically provide that, as a condition of continued employment, employees must enter into a rehabilitation program and submit to periodic alcohol testing.

69. The employer, however, may require the attorney to submit to an alcohol test if it has objective evidence that she is violating a workplace policy prohibiting all employees from being under the influence of alcohol on the job. See supra note 26.

70. Generally, EAPs are confidential programs designed to assist employees in coping with personal issues (e.g., substance abuse, grief) that may interfere with their job performance.

71. See Vardiman v. Ford Motor Co., 981 F. Supp. 1279, 1283, 7 AD Cas. (BNA) 1068, 1072 (E.D. Mo. 1997)(EAP representative had no power to affect employment decisions and, in fact, was obligated to shield the decision makers from an employee's personal or substance abuse problems).

72. 29 C.F.R. 1630.15(e)(1998)("it may be a defense to a charge of discrimination . . . that a challenged action is required or necessitated by another Federal law or regulation . . . .").

73. See e.g., 14 C.F.R. pt. 67(1999)(Federal Aviation Administration (FAA) and Department of Transportation (DOT) medical certifications); 14 C.F.R. pt. 121, app. I (1999)(FAA and DOT drug testing program); 49 C.F.R. pt. 40 and app. (1999)(procedures for transportation workplace drug testing programs); 49 C.F.R. 240.207(1996)(Federal Railroad Administration and DOT procedures for making determination on hearing and visual acuity); 49 C.F.R. pt. 391(1999)(Federal Highway Administration and DOT medical certification requirements); 49 C.F.R. pt. 653(1999)(Federal Transit Administration (FTA) procedures for prevention of prohibited drug use in transit operations); 49 C.F.R. pt. 654(1999)(FTA procedures for prevention of alcohol abuse in transit operations).

74. 29 U.S.C. §§651-678 (1994).

75. 30 U.S.C. §§801-962 (1994).

76. See e.g., The Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9601(1994).

77. See H.R. Rep. No. 101-485, pt. 2, at 75 (1990) ("As long as the programs are voluntary and the medical records are maintained in a confidential manner and not used for the purpose of limiting health insurance eligibility or preventing occupational advancement, these activities would fall within the purview of accepted activities.").

78. If a program simply promotes a healthier life style but does not ask any disability-related questions or require medical examinations (e.g., a smoking cessation program that is available to anyone who smokes and only asks participants to disclose how much they smoke), it is not subject to the ADA's requirements concerning disability-related inquiries and medical examinations.

79. See Preemployment Questions and Medical Examinations, supra note 2, at 12, 8 FEP at 405:7196-97.

80. Id.

This page was last modified on March 24, 2005.

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EXHIBIT
tabbies 4

U.S. Department of Labor

Occupational Safety and Health Administration
Washington, D.C. 20210

Reply to the attention of:

JUL 19 2012

MEMORANDUM FOR: REGIONAL ADMINISTRATORS

THROUGH: RICHARD E. FAIRFAX
Deputy Assistant Secretary

FROM: FOR THOMAS GALASSI, Director
Directorate of Enforcement programs

SUBJECT: Extreme Heat-Related Outdoor Inspections

This memo directs the field to expedite heat-related inspections and to issue citations, where appropriate, as soon as possible. This will result in swift abatement and reduce heat-related injuries and deaths.

CSHOs shall ensure that heat hazard citations are well documented. Using the general questions in the attached questionnaire, some of which were in the August 19, 2011, Heat-Related Illness memo, reissued on May 2, 2012, CSHOs can collect the necessary information to adequately document worker exposure to heat.

The National Oceanic and Atmospheric Association (NOAA) issues a heat advisory when the heat index (HI) is forecast to be at or above the Danger zone for a particular area (see below for the HI chart). Please note that the heat index DOES NOT account for impermeable clothing; workers in impermeable clothing will be at risk at lower temperatures.

A violation of the general duty clause may exist in these conditions when workers have been working outdoors and their employer is aware of heat-related dangers but has not taken protective action to provide workers with, at a minimum, water, rest, and shade. To establish the evidence necessary to cite a general duty clause violation, the following types of information should be documented. NOTE: These examples represent some types of evidence that could establish each of the factors; they are not the only types that would satisfy OSHA's burden):

1. **The employer failed to keep the workplace free of a hazard to which its employees were exposed:**
   a. Workers were exposed to a HI at or above the Danger zone (see HI chart); or
   b. Workers were working outside for most of the day or during the heat of the day when there was a NOAA heat advisory.

2. **The hazard was recognized:**
   a. NOAA issued heat advisory because of a HI at or above the Danger zone (see HI chart) and employer was or should have been aware of the advisory;
   b. Employees made complaints regarding heat;
   c. Employees showed signs or symptoms of heat exposure;
   d. Employer indicated that it was aware of the heat hazard (e.g., by providing water but not rest and shade); or
   e. The employer's industry has issued guidance or information about heat hazards.

3. **The hazard was causing or was likely to cause death or serious physical harm:**
   a. Heat exhaustion;
   b. Heat Stroke; or
   c. Fatality.

4. **There was a feasible and useful method to correct the hazard:**
   a. Providing workers with immediate access to water, rest, and shade, and allowing them to use that relief;
   b. Implementing an acclimatization program for new employees and for those returning from extended time away (e.g., vacation);
   c. Implementing a work/rest schedule; or
   d. Providing a climate-controlled area to cool down.

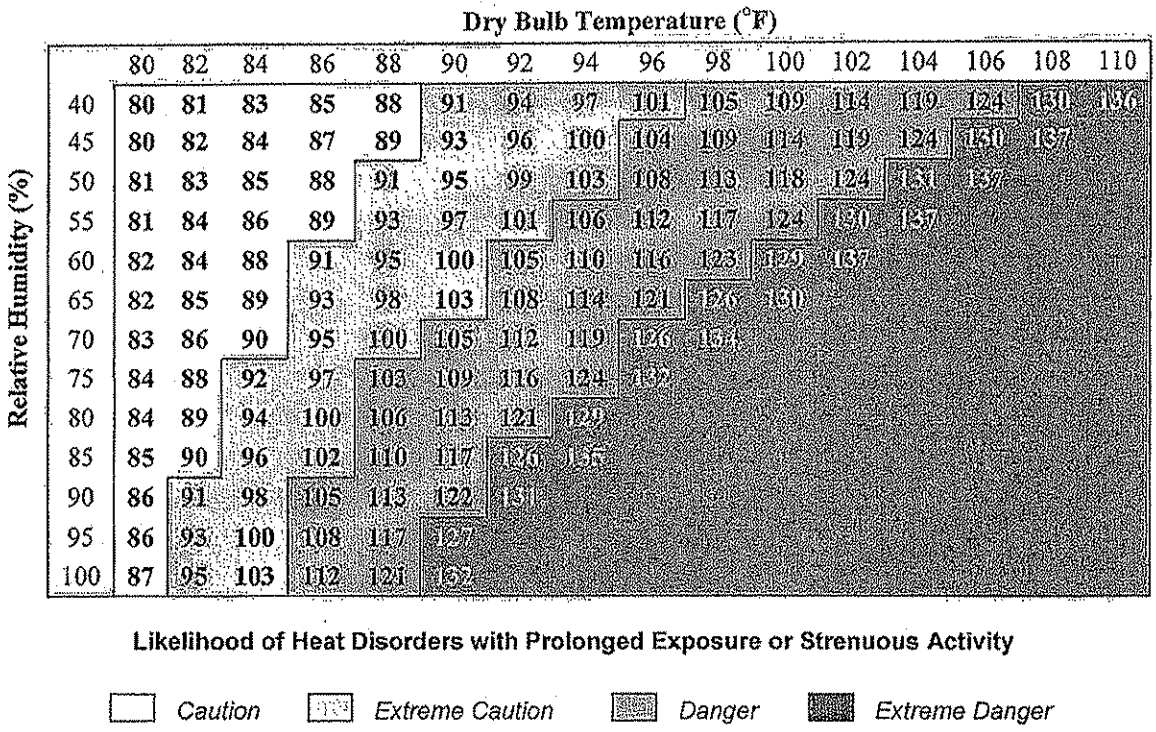
If all four factors for a general duty clause violation are not present, a Hazard Alert Letter (HAL) shall be issued to the employer as soon as possible. The HAL shall recommend specific steps the employer can take to protect workers from the heat hazard. A sample HAL is attached.

Where a heat-related illness or fatality is involved, the Directorate of Technical Support and Emergency Management (DTSEM), Office of Occupational Medicine (OOM), should be consulted. DSTM/OOM can provide valuable assistance in reviewing medical records.

As stated above, any heat-related citations must be issued as soon as possible. Other violations of OSHA standards (e.g., fall protection, personal protective equipment) noted on the inspection may be issued at a later date.

If you have any questions, please contact Audrey Profitt or Mary Reynolds of my staff. They may be reached at profitt.audrey@dol.gov or 202-693-2155; or reynolds.mary@dol.gov or 202-693-2187, respectively.

Heat Index[1] (bold numbers in table)



Likelihood of Heat Disorders with Prolonged Exposure or Strenuous Activity

Caution *Extreme Caution* *Danger* *Extreme Danger*

IMPORTANT: Since heat index values were devised for shady, light wind conditions, exposure to full sunshine can increase heat index values by up to 15°F. Also, strong winds, particularly with very hot, dry air, can be extremely hazardous.

Please see the heat webpage on how to use the heat index available at http://www.osha.gov/SLTC/heatillness/heat_index/index.html.

[1] Adapted from the National Weather Service (NWS) of the National Oceanic Atmospheric Administration (NOAA), at.http://www.nws.noaa.gov/om/heat/index.shtml#heatindex

HEAT-RELATED INSPECTION QUESTIONNAIRE

GENERAL

1. Are there any recorded heat-related incidents on the OSHA 300 log?
    - If yes, please list.
2. Is the work being done in the direct sun or a facility that is not air conditioned (e.g., warehouse)?
3. What are the potential sources of heat?
4. Is the heat stress potential regularly evaluated/monitored? Describe how (e.g., buddy system)
5. How long have employees worked at this task or work assignment?
6. Are employees required to wear protective clothing or equipment? If so, please describe.
    - Are there additional requirements for employees working in PPE (e.g., impervious clothing)?
7. What actions were implemented to prevent heat-related illnesses?
8. Is there a heat stress prevention program in place?
    - Has the employer taken steps to reschedule strenuous tasks for cooler parts of the day or days with reduced temperatures?
    - Has the employer bought equipment with air conditioned cabs?
9. Is there an acclimatization program?
    - Are the employees acclimatized to the work environment?

WATER

10. Is drinking water available?
    - If yes, describe drinking water source and proximity to workers.
11. Are workers required to drink water or any other beverages when working under hot conditions?
    - If yes, is there a specific amount to ensure employees are drinking enough water?
    - Is it enforced?
12. Are water coolers refilled throughout the day?

REST

13. Is there a Work/Rest Cycle in Place?
    - If applicable, describe the work/rest cycle (e.g., how many breaks do you take, when/where do you take breaks, how long is a typical break, etc.)
    - Is there a knowledgeable person on site who is authorized to modify work tasks and work/rest schedules as necessary?

SHADE

14. Is shade or a climate controlled area available for breaks, rest periods and if workers need to recover?
    If yes, please describe.

HEALTH EFFECTS/EMERGENCIES

15. Have employees experienced any health effects (e.g., dizziness, nausea, not sweating) related to working in excessive heat? If yes, describe.
16. What is done if employees suffer heat-related health effects?
17. Does everyone know who to notify if there is an emergency?
18. Does everyone know who will provide first aid?

TRAINING

19. Have employees received training on the effects of heat and heat-related illnesses?
    If yes, what information was provided?
    Are OSHA or other materials on heat-related illness posted in the workplace?
20. Do workers know the:
    - Common signs and symptoms of heat illness?
    - Proper precautions to prevent heat illness? (are the precautions updates as necessary)
    - Importance of acclimatization?
    - Importance of drinking water frequently (even when they are not thirsty)?
    - Steps to take if someone is having symptoms?

SAMPLE HAZARD ALERT LETTER

Note: This letter must be adapted to the specific circumstances noted in each inspection. The letter below is an example of the type of letter that may be appropriate in some circumstances. If the employer has implemented, or is in the process of implementing efforts to address hazardous conditions, those efforts should be recognized and encouraged, if appropriate. The CSHO should tailor the recommended controls outlined below to the specific needs of the employer.

Italicized comments are for OSHA compliance use only and should not be included in the letter.

Dear Employer:

An inspection of your workplace and evaluation of your OSHA recordkeeping logs at *(location)* on *(date)* disclosed the following workplace condition(s) which have been associated with the development of symptoms in workers and are consistent with worker heat-related illnesses.

[Include a general description of working conditions for each task/job, type of PPE worn, if any, length of time on each task and other specific heat related information].

The results of our investigation *(fill in specific information).* In the interest of workplace safety and health, I recommend that you voluntarily take the necessary steps to materially reduce or eliminate your workers' exposure to the conditions listed above.

General Controls.

General controls include training, personal protective equipment (PPE), administrative controls and hygiene practices, health screening and heat alert programs.

1. **Training**: workers must be informed of the following (*when appropriate for the specific situation*):

    a. Hazards of heat stress.
    b. Responsibility to avoid heat stress.
    c. Recognition of danger signs and symptoms.
    d. First-aid procedures.
    e. Employer's program to address heat-related illnesses.
    f. The effects of certain medication, drugs and alcohol in hot work environments.

2. **Personal Protective Clothing and Equipment** (CSHOs *should recommend the appropriate PPE).*

    a. Loosely worn reflective clothing to deflect radiant heat, such as vests, aprons or jackets.
    b. Cooling vests, wetted clothing and water cooled/dampened garments are effective

under high temperature and low humidity conditions.

c. In environments where respirator usage is necessary consult with industrial hygienists to determine the appropriate clothing to prevent heat stress, but still protect the workers.

3. **Administrative Controls**: (*CSHOs should consult the Tech Manual for additional information*)

   a. Schedule hot jobs for cooler parts of the work day, and schedule routine maintenance and repair work for the cooler seasons of the year.
   b. Permit employees to take intermittent rest breaks with water breaks, use relief workers and reduce physical demands of the job.
   c. Have air-conditioned or shaded areas available for these break/rest periods.

4. **Health Screening and Acclimatization:**

   a. Workers should be allowed to get used to hot working environments by using a staggered approach over several days. The same should be done for workers returning from an absence of two weeks or more. For example, begin work with 50% of the normal workload and time spent in the hot environment, and then gradually increase the time over a 5-day period.
   b. Workers should be made aware of the following:

      1. Medications such as the following can increase risk of heat stress:

         - Diuretics – water pills
         - Antihypertensives – blood pressure medication
         - Anticholinergics – for treatment of chronic obstructive pulmonary disease (COPD)
         - Antihistamines – allergy medications
         - A doctor or pharmacist should be contacted for more information.

      2. Dangers of using drugs and alcohol in hot work environments.

You may voluntarily provide this Area Office with progress reports on your efforts to address these conditions. OSHA may return to your worksite to further examine the conditions noted above.

HEAT-RELATED INFORMATION LINKS

1. Safety and Health Topics: Heat stress:
http://www.osha.gov/SLTC/heatstress/index.html.

2. OSHA Technical Manual, Section III: Health Hazards, Chapter 4, Heat Stress:
https://www.osha.gov/dts/osta/otm/otm_iii/otm_iii_4.html.

3. NIOSH Workplace Safety and Health Topics:
http://www.cdc.gov/niosh/topics/heatstress/.

4. The National Oceanic and Atmospheric Administration (NOAA), National Weather Service:
http://www.nws.noaa.gov/om/heat/index.shtml#heatindex.

5. Current weather conditions, including the previous three day weather conditions at www.noaa.gov, information from prior dates can also be requested.

6. NIOSH Publication 86-112: Working in Hot Environments:
http://www.cdc.gov/NIOSH/docs/86-112/.

7. California OSHA Heat Illness Prevention:
http://www.dir.ca.gov/dosh/heatillnessinfo.html.