No. 13-0224

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

A.H. STURGILL ROOFING, INC.,

Respondent.

BRIEF FOR THE SECRETARY OF LABOR

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STATEMENT OF THE ISSUES

(1) Whether an employer's knowledge or lack of knowledge of its employees' underlying health conditions or ages, and legal restrictions upon the employer in obtaining such information, are relevant to the Secretary's burden to establish a violation of the general duty clause in this case.

(2) Whether the judge miscalculated the heat index on the day in question and, if so, whether the Secretary established the existence of a hazard even if the heat index remained in the lowest "caution" quadrant.

(3) Whether there was a feasible and effective means of eliminating or materially reducing the hazard.

(4) Whether the employer failed to provide adequate training to its employees on how to recognize and avoid heat illness.

STATEMENT OF THE CASE

After an A. H. Sturgill, Inc. temporary employee died from complications of heat stroke after collapsing on the roof of a Sturgill work site, the Secretary of Labor inspected the site, and issued a two-item serious citation to the company on January 16, 2013. Administrative Law Judge's Decision and Order at 1, 6. The citation alleged that Sturgill violated the general duty clause by exposing employees to the hazard of excessive heat while working on the roof in direct sunlight. ALJ Dec. 1; Citation 1, Item 1, attached to Secretary's Complaint. The citation also alleged a serious violation of 29 C.F.R. § 1926.21(b)(2) for failure to provide adequate training to employees on recognition and avoidance of heat hazards. ALJ Dec. 1; Citation 1, Item 2. The citation proposed a total penalty of $8,820 for these violations. ALJ Dec. 1.

Sturgill timely contested the citation, and the ALJ held a three-day hearing in Dayton, Ohio on March 25-27, 2014. ALJ Dec. 2. In her February 23, 2015 decision, the ALJ affirmed both violations as serious and assessed a total penalty of $8,820. ALJ Dec. 29. Sturgill filed a petition for discretionary review ("PDR") of the ALJ's decision. The Commission directed the case for review, and, on April 8, 2015, issued a briefing notice requesting that the parties brief all the issues presented in the PDR, particularly issues 1 and 2 above. *Supra* p. 1; Commission Briefing Notice 1.

STATEMENT OF FACTS

1. *Sturgill and the Roofing Project*

Sturgill is a commercial roofing firm in Dayton, Ohio with thirty-six employees. ALJ Dec. 1. On July 13, 2012, Sturgill began a roofing project at a PNC bank building in Miamisburg, Ohio. ALJ Dec. 2. The project required tearing off the existing roof and installing a new one. ALJ Dec. 2. The roof consisted of a rubber roofing membrane over a layer of styrofoam insulation. ALJ Dec. 2.

On August 1, 2012, Sturgill employees were tearing off and removing the existing roofing materials. ALJ Dec. 2. To perform this task, employees removed the roofing materials, and cut the styrofoam and rubber into smaller pieces so that one person could dispose of the material. ALJ Dec. 2. The styrofoam pieces weighed one or two pounds; the rubber pieces weighed up to ten pounds each. ALJ Dec. 2. The materials were loaded into a cart and moved to the edge of the roof, where they were lifted over a thirty-nine-inch parapet wall and thrown into a dump truck below. ALJ Dec. 2.

2. *Weather Conditions at the Job Site*

The weather at the PNC roofing project was hot, from July 13 through August 1, 2012. ALJ Dec. 2. Sturgill foreman Leonard Brown recalled that, on the morning of August 1, 2012, the temperature was in the 80s Fahrenheit with a predicted high that day of 89 degrees. ALJ Dec. 2; Complainant's Exhibit (CX) 13 at 4, 8-9. Foreman Brown also noted that it was about ten degrees hotter on the roof than it was on the ground. ALJ Dec. 11; CX-13 at 9. The morning hourly high temperatures on August 1, 2012 ranged from 72 to 83 degrees, and the relative humidity varied from 51% to 87%. ALJ Dec. 3, 10; CX-1. The National Weather Service (NWS) heat index, which factors in relative humidity and air temperature, and is used to calculate the "likelihood of heat disorder with prolonged exposure or strenuous activity," was 85 degrees at 10:53 a.m.[1] ALJ Dec. 10; CX-1; CX-3. The skies were generally clear that morning, with occasional scattered clouds. ALJ Dec. 10; CX-1. Although there were several shaded areas on the roof behind stacks of roofing materials and large air-conditioning units, the Sturgill crew was working in direct sunlight. ALJ Dec. 3, 10-11; CX-1.

3. *The Accident*

On August 1, 2012, nine permanent Sturgill employees, and three temporary employees, provided by temporary employment agency Labor-Works-Dayton, LLC, worked on the PNC roofing project. ALJ Dec. 3. One of the temporary employees was M.R., a sixty-year-old, who had prior construction and roofing work experience, but had worked the previous three years on

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[1] The heat index is devised for shady, light wind conditions. CX-4 at 2. Exposure to full sunshine can increase heat index values up to 15 degrees. CX-4 at 2. The Occupational Safety and Health Administration (OSHA) advises employers to implement a heat illness prevention plan when the heat index is at or above 80 degrees. CX-5 at 8-9. The NWS places a heat index value of 85 degrees in the "caution" category, but a 15 degree increase for working in sunlight would elevate that value to the "danger" category. ALJ Dec. 10; CX-4 at 2.

the night shift in an air-conditioned printing facility.[2] ALJ Dec. 3. August 1, 2012 was M.R.'s first day on the PNC roofing job site. ALJ Dec. 4.

That morning, M.R. told Foreman Brown that he had done roofing work before, but the foreman did not ask M.R. when he had last performed this work. ALJ Dec. 4. Foreman Brown took M.R. to the roof and showed him the safety warning lines and the water coolers, and told him that it was going to be hot that day. ALJ Dec. 4; Hearing Transcript (Tr.) 498; CX-13 at 4. Foreman Brown also showed M.R. the break area, and told M.R. to let him know if he (M.R.) got hot and needed an extra break. ALJ Dec. 4. Foreman Brown did not train M.R. on heat hazards or on recognizing the signs and symptoms of heat illness.[3] ALJ Dec. 4. Although Foreman Brown noticed that M.R. was wearing black pants and a black sweater, the foreman did not say anything to M.R. about his clothing, even though the foreman acknowledged that he knew that one is supposed to wear light clothing when working on a roof on a hot day. Tr. 506; CX-13 at 7; ALJ Dec. 4-5.

Because of M.R.'s age, Foreman Brown assigned M.R. the least strenuous work on the roof: throwing discarded roofing materials, weighing from one to ten pounds each, from a cart near the edge of the roof over a thirty-nine-inch parapet wall and into a dump truck below. ALJ Dec. 2, 5; CX-13 at 2-3, 12. There was a shaded area, created by a stack of roofing materials, about ten-to-fifteen feet from M.R.'s work area. ALJ Dec. 5. Sometime between 8 and 9 a.m., the Sturgill crew took its scheduled fifteen-minute morning break. ALJ 5. M.R. was given a

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[2] M.R. is designated by his initials for privacy reasons. ALJ Dec. 3 n.5.

[3] None of Sturgill's three temporary employees on the PNC roofing project received any training on heat hazards. ALJ Dec. 6-7. Sturgill's nine permanent employees received a pocket safety guide including information on heat illness and two toolbox talks on heat hazards, not necessarily presented during the summer, as part of a 52-week program. ALJ Dec. 6-7.

forty-four ounce cup of ice water, but Foreman Brown was unsure if M.R. drank all of it, and believed that M.R. did not drink any more water that morning. ALJ Dec. 5.

Sometime after the break, Foreman Brown noticed that M.R. was sweating, but M.R. said that he was fine and declined to drink anything. ALJ Dec. 5. Later that morning, other employees asked Foreman Brown to check on M.R. when he would not speak to them. ALJ Dec. 5. Foreman Brown checked on M.R. and found him fine, but fifteen minutes later, M.R. was walking clumsily. ALJ Dec. 5. Foreman Brown went over to him and ordered him to stop working and sit down after M.R. initially declined to do so. ALJ Dec. 5-6. At about 11:41 a.m., M.R. became ill and collapsed. ALJ Dec. 6. At the time of his collapse, M.R. had been working for about five hours in direct sunlight. ALJ Dec. 16-17. When M.R. started shaking, Foreman Brown called 911. ALJ Dec. 6. When the emergency medical services personnel arrived, they found M.R. still in direct sunlight, and they shaded him by holding a sheet over his body. ALJ Dec. 6. M.R. was admitted to a hospital with a core body temperature of 105.4 degrees and diagnosed with heat stroke. ALJ Dec. 6. Twenty-one days later, M.R. died in the hospital. ALJ Dec. 6. The coroner's report concluded that M.R. died of complications from heat stroke. ALJ Dec. 6; CX-8.

THE ALJ'S DECISION

The ALJ affirmed both cited violations as serious. The ALJ found that the Secretary established the four elements of the general duty clause violation, and showed that Sturgill had knowledge of the hazardous condition. First, the ALJ determined that the Secretary established that a hazard of heat illness existed because employees performed strenuous work, on a roof in the direct sunlight, with temperatures over 80 degrees, and a heat index in the "caution" to "danger" categories for the likelihood of heat disorders. ALJ Dec. 10-12.

Second, the ALJ found that both Sturgill and the roofing industry recognized the heat illness hazard as shown by the National Roofing Contractors Association's publication of toolbox talks, and a pocket safety guide, on heat hazards, and Sturgill's use of those publications in its training program for permanent employees. ALJ Dec. 12, 21. The ALJ also determined that Foreman Brown recognized early the morning of August 1, 2012 that it would be hot working on the roof. ALJ Dec. 4, 13. The ALJ further found that Sturgill knew that temporary employees would be working there without training on heat hazards or the signs and symptoms of heat illness because the company knew that it had not given those employees that training. ALJ Dec. 13, 21.

Third, the ALJ also found that the heat illness hazard at the Sturgill job site on the day in question was likely to cause death or serious physical harm if an accident occurred. The ALJ accepted the Secretary's expert's opinion that occupational exposure to heat contributed to M.R.'s development of heat stroke that morning, and that the heat conditions could also result in heat cramps or heat exhaustion in a younger worker. ALJ Dec. 13-15.

Fourth, the ALJ found that Sturgill could have materially reduced the heat hazard at its work site by implementing a heat safety program containing the following elements: (1) an effective heat acclimatization program; (2) a requirement that employees wear suitable clothing when working on a roof in the heat; (3) a formalized work-rest regimen based on weather conditions; (4) a specific, formalized hydration policy; and (5) a monitoring program to detect the signs and symptoms of heat illness. ALJ Dec. 16-19. The ALJ found that Sturgill's heat safety program was inadequate because it did not contain these elements. ALJ Dec. 19-22.

Furthermore, the ALJ found that Sturgill had actual knowledge of the heat hazard on August 1, 2012 because the company knew that the weather would be hot that day, and that a

new temporary employee, who had not been acclimatized to the heat, was starting strenuous roofing work in direct sunlight. ALJ Dec. 22. The ALJ also determined that Sturgill knew, through its superintendent, Thomas Gould, and Foreman Brown, that temporary employee M.R. had not received the same training as permanent employees. ALJ Dec. 23. The ALJ further found that Sturgill could have learned from the temporary agency and from M.R. directly what his previous jobs and working conditions were, and whether he needed to be acclimatized to the heat. ALJ Dec. 23. But Sturgill did not make these inquiries and allowed an unacclimatized employee to be exposed to direct sunlight on a hot day while performing strenuous roofing work for five hours. ALJ Dec. 16-17, 23.

The ALJ also affirmed the serious violation of the training provision, 29 C.F.R. § 1926.21(b)(2), on the ground that Sturgill did not provide adequate training to its permanent and temporary employees on how to recognize and avoid heat hazards. ALJ Dec. 25-28. The ALJ determined that it was undisputed that temporary employees did not get the safety training, including heat hazard training, that its permanent employees got, and that Sturgill knew about this disparity. ALJ Dec. 25. The ALJ also determined that temporary employees were exposed to the same heat hazards as permanent employees, but without proper training. ALJ Dec. 25-26. The ALJ also noted that Foreman Brown's generalized instructions to M.R. on heat hazards were insufficient because they did not include information on the need for frequent breaks, the importance of drinking water even before thirsty, and how to recognize the signs and symptoms of heat illness. ALJ Dec. 26-28. The ALJ further found that Sturgill's heat hazard training for permanent employees was deficient because it did not give specific instructions on the need to acclimatize new employees or specific guidance on how to implement an acclimatization program. ALJ Dec. 27-28.

SUMMARY OF THE ARGUMENT

The ALJ properly affirmed the general duty clause violation because all the elements of the violation were satisfied. A heat hazard existed at Sturgill's job site because the heat conditions increased the risk that employees would develop heat illness. The fact that M.R. developed heat stroke and died after working in these heat conditions shows that a serious heat hazard existed. Both Sturgill and the roofing industry recognized the heat hazard. Foreman Brown was aware of the heat conditions on the cited date, and even took some, albeit inadequate, heat precautions. The National Roofing Contractors Association (NCRA), the undisputed industry leader, published toolbox talks on heat hazards and a pocket safety guide that discusses heat illnesses, their signs and symptoms, and heat illness precautions. Sturgill could have feasibly abated the heat hazard because the Centers for Disease Control and Prevention and the NCRA recommended all of the Secretary's proposed abatement measures, and explained how these measures would materially abate the hazard. Further, Sturgill knew about the heat hazard because Foreman Brown knew that the cited day would be hot, and both Superintendent Gould and he knew that temporary employee M.R. would be exposed to a heat hazard without the heat training that Sturgill gave its permanent employees.

The ALJ properly affirmed the violation of the training provision because Sturgill did not provide adequate training to its permanent and temporary employees on how to recognize and avoid heat hazards. Foreman Brown's generalized instructions to M.R. on heat hazards were insufficient because they did not include information on the need for frequent breaks, the importance of drinking water even before thirsty, and how to recognize the signs and symptoms of heat illness. Sturgill's heat hazard training for permanent employees was also deficient

because it did not give specific instructions on the need to acclimatize new employees or specific guidance on how to implement an acclimatization program.

ARGUMENT

I. *Sturgill Violated the General Duty Clause Because the Company's Work Site Was Not Free of Recognized Heat Hazards on August 1, 2012.*

A. *A Hazard of Heat Illness Existed at Sturgill's Work Site.*

A hazard, for purposes of the general duty clause, is a work site condition that creates or contributes to an increased risk that an event causing death or serious bodily harm to employees will occur. *Baroid Div. of NL Indus., Inc. v. Occupational Safety & Health Review Comm'n* (OSHRC), 660 F.2d 439, 444 (10th Cir. 1981). Here, the Secretary's expert, Dr. Yee, determined that M.R. developed heat stroke and died because of his exposure to the heat conditions on the roof. Tr. 82. M.R. was admitted to the hospital with a core body temperature of 105.4 degrees and diagnosed with heat stroke after working in the heat at the Sturgill job site for five hours. CX-13 at 5; CX-16 at 4, 6. Every one of the multiple doctors who treated M.R. in the hospital agreed with this diagnosis. CX-16 *passim*. The coroner's report concluded that M.R. died of complications from heat stroke. CX-8; Tr. 308. The fact that M.R. developed a fatal heat illness after working in the rooftop heat conditions is strong evidence that these conditions were hazardous. *Phoenix Roofing Inc.*, 17 BNA OSHC 1076, 1079 & n.5 (No. 90-2148, 1995) (fact that employee fell through cited skylight opening to his death established that hazard existed), *aff'd without published opinion*, 79 F.3d 1146 (5th Cir. 1996); *see also Seaworld of Florida, LLC v. Perez*, 748 F.3d 1202, 1205 (D.C. Cir. 2014) (death of killer whale trainer demonstrated that close contact with whales was a hazard likely to cause death or serious injury); *infra* p. 16 (citing authorities stating that fatal accidents are evidence of the seriousness of a hazard).

Dr. Yee's expert testimony provides further support for the existence of a hazard, apart from his conclusion that M.R. died of heat stroke. Dr. Yee testified that, while a person's age and other conditions may affect his tolerance for heat, the conditions at the Sturgill worksite increased the risk of a range of heat illnesses, from heat exhaustion in younger workers to heat stroke in in older workers. ALJ Dec. at 1; Tr. 155, 157-59; CX-4 at 3.

Moreover, the fact that the heat index at the job site exceeded OSHA's threshold for implementation of a heat illness prevention plan constitutes further evidence that a heat hazard existed. The National Weather Service (NWS) heat index "is a measure of how hot it really feels when relative humidity is factored with the actual air temperature." CX-4 at 2 (NWS, "Heat: A Major Killer"). OSHA uses the heat index to evaluate heat hazards. (Tr. 32). OSHA advises employers to implement a heat illness prevention plan "when the heat index is at or above 80° Fahrenheit." CX-5 at 9 (OSHA, "Using the Heat Index to Protect Workers"). On the morning of August 1, 2012, the NWS heat index at Dayton-Wright Brothers Airport, two miles from the Sturgill work site, was 85 degrees at 10:53 a.m. (based on a temperature of 83 degrees and relative humidity of 55%), five degrees above OSHA's threshold for implementation of a heat illness prevention plan. Tr. 104; CX-1; CX-3.

Several factors increased the work site's heat index value of 85 degrees. First, although there were scattered clouds that morning, the Sturgill crew, especially M.R., was working in direct sunlight. CX-1 (skies were generally clear at Dayton-Wright Brothers Airport on August 1, 2012, with only scattered clouds); Tr. 102-04 (Emergency Medical Services personnel found the collapsed M.R. in direct sunlight), 505 (Foreman Brown carried M.R. into the shade from a sunnier area). Since the heat index is devised for shady, light wind conditions, exposure to full

sunshine can increase heat index values up to 15 degrees, from a heat index value of 85 to 100, or from the "caution" category to the "danger" category. CX-4 at 2.

Second, as Foreman Brown acknowledged, it was about ten degrees hotter on the roof than it was on the ground. CX-13 at 9. That increase alone, quite apart from any addition for exposure to direct sunlight, would raise the heat index value from 85 to 103.5 degrees (based on a temperature of 93 degrees and relative humidity of 55%), and from the "caution" category to the "danger" category. CX-4 at 2.

Third, although M.R. was assigned the least strenuous work on the roof, the work was still strenuous, consisting of throwing discarded roofing materials, weighing from one to ten pounds each, from a cart near the edge of the roof over a thirty-nine-inch parapet wall and into a dump truck below. CX-13 at 2-3, 12. Even if M.R. mainly handled the lighter styrofoam pieces and not the heavier rubber pieces, and even if, as Foreman Brown claimed, M.R. could have pushed, rather than thrown most of the pieces off the roof, Tr. 502, the fact remains that M.R. worked for about five hours in direct sunlight, with only one fifteen-minute water break. CX-13 at 5. Moreover, M.R. was wearing a black sweater and black pants in the heat. Tr. 506. OSHA's heat index guidance advises that:

> Strenuous work and the use of heavy or specialized protective clothing also have an additive effect [on heat index values]. As a result, the risk at a specific heat index could be higher than listed in the . . . [NWS heat index table] if . . . the work involves strenuous tasks or the use of heavy or specialized protective clothing. Extra measures, including implementing precautions at the next risk level, are necessary under these circumstances.

CX-5 at 8 (OSHA, "Using the Heat Index to Protect Workers").

On review, Sturgill denies that a heat hazard existed at its job site. Sturgill cites an OSHA enforcement memorandum to the field, RX-4 ("Extreme Heat Outdoor Inspections") (the Galassi Memo), attached to Sturgill's initial brief, issued two weeks before the cited date, allegedly identifying two necessary criteria for citing an employer for a general duty clause violation for an excessive heat hazard: (1) employee exposure to a NWS heat index value at or above the danger zone; or (2) permitting employees to work outside when a National Oceanic and Atmospheric Administration (NOAA) heat advisory is in effect. Sturgill Init. Brf. at 14-16. Sturgill asserts that neither criterion was met at its work site. *Id.* at 14. Sturgill also claims that the ALJ improperly inflated the work site's heat index value by 15 degrees, unjustifiably adding the maximum increase for work in direct sunlight and thereby erroneously elevating the value from the "caution" to the "danger" category. *Id.* at 18-20. Sturgill further asserts that the ALJ's determination of the heat index value at the work site was also too high because the ALJ erroneously used the less accurate and higher dry-bulb temperatures instead of the more accurate and lower wet-bulb temperatures, which would have produced a lower heat index value.[4] *Id.* at 17-18.

Sturgill's arguments are wholly unpersuasive. Contrary to Sturgill's assertion, the Galassi Memo does not "address the burden of proof which the Compliance Officer must meet in order to issue a General Duty Clause citation." Sturgill Init. Brf. At 14. The Galassi Memo provides guidance to compliance officers on the elements of a general duty clause violation and the types of evidence that may be relevant in determining whether to issue a citation. It is not a compliance guide for employers, and does not establish any enforceable rights for Sturgill. *United States v. Myers*, 123 F.3d 350, 355-56 (6th Cir. 1997) (Justice Department's internal

[4] Wet-bulb temperatures reflect ambient temperature, relative humidity and wind. Tr. 125. The heat index measures only ambient temperature and relative humidity. Tr. 125.

operating procedures do not create any enforceable rights). Moreover, the memo does not state or imply that compliance officers must document either that the heat index was at or above the danger level, or that a NOAA heat advisory was in effect. Rather, the memo explicitly states that these are examples of "some types of evidence that could establish . . . the [general duty clause] factors; they are not the only types that would satisfy OSHA's burden." RX-4 at 1.[5]

Furthermore, Sturgill's claim that the ALJ understated the value of the heat index by erroneously using dry-bulb temperatures, instead of wet-bulb temperatures, is groundless. Heat index values are calculated by using dry-bulb, not wet-bulb, temperatures. Tr. 125. Therefore, the value of the wet-bulb temperature does not affect the calculation of a heat index value.

B. *Both Sturgill and the Roofing Industry Recognized the Heat Hazard.*

A hazard can be recognized by either the individual employer or its industry. *Wiley Organics Inc.*, 17 BNA OSHC 1586, 1591 (No. 91-3275, 1996). Here, both Sturgill and the roofing industry recognized the hazard of heat in roofing work. Sturgill recognized that the conditions under which the roofing work was performed on August 1, 2012 posed a hazard of heat illness. Sturgill was well aware that roofing work in hot weather posed an increased risk of heat exhaustion and heat stroke. Sturgill's training materials for its permanent employees

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[5] Even if the Secretary had to show that the heat index was in the danger category, several factors show that threshold was met. First, as discussed above, *see supra* p. 11, Foreman Brown acknowledged that it was ten degrees hotter on the roof than it was on the ground. That increase alone, quite apart from any addition for exposure to direct sunlight, would raise the heat index value from 85 to 103.5 degrees, and from the caution category to the danger category. *Supra* p. 11. Moreover, the fact that M.R. was wearing heavy clothing, and performing strenuous work raised the heat index value even further. *Supra* p. 11; CX-5 at 8 (instructing that precautions at the next highest risk level are necessary in these circumstances). In addition, the Compliance Officer presented unrebutted testimony that direct sunlight increased the heat index by at least 7 ½ degrees because the skies were clear for four consecutive hours and heat accumulated in M.R.'s body. Tr. 105. The sum of all these additive factors would put the heat index in the danger category or extreme danger category.

note these risks, and the need to take precautions. ALJ Dec. at 12. Foreman Brown was aware that job site conditions on the cited date were such that heat safety measures were necessary. He knew early that morning that it would be hot that day, and that it would be about ten degrees hotter on the roof than on the ground. Tr. 498-99, 508, 512-13; CX-13 at 4; CX-13 at 9. He was also aware of other conditions that increased the risk of heat illness: e.g., that the work was performed in direct sunlight; that the work was strenuous; and that temporary workers would be working without training on heat hazards, including how to recognize the symptoms of heat illness. ALJ Dec. 12-13; Tr. 470-71 (Gould); Tr. 518-19 (Brown); CX-13 at 11-12 (Brown). Foreman Brown's knowledge of the heat hazard is imputable to Sturgill. *N & N Contractors Inc.*, 18 BNA OSHC 2121, 2123 (No. 96-0606, 2000), *aff'd*, 255 F.3d 122 (4th Cir. 2001) ("The actual or constructive knowledge of a foreman or supervisor can be imputed to the employer"). The fact that Sturgill took some, albeit inadequate, heat precautions in these circumstances, such as providing coolers of water and scheduling rest breaks, Tr. 498; CX-13 at 4-5, further demonstrates that it was aware that the job site conditions on the cited date were hazardous.

Sturgill's industry also recognized the hazard. The National Roofing Contractors Association (NCRA), the undisputed leader in the industry, Tr. 467-68, publishes toolbox talks on heat hazards and a pocket safety guide that includes a section on heat illnesses, their signs and symptoms, and precautions to avoid heat exhaustion and heat stroke. CX-10; CX-14; RX-9 at 5-6; Tr. 469-70. Sturgill used these publications in its training program for permanent employees. Tr. 466-70.

Sturgill argues that the ALJ improperly dismissed evidence that shade was available on the roof. Sturgill Init. Brf. at 20. The ALJ acknowledged that stacks of roofing materials and air

conditioning units on the roof created areas of shade. ALJ Dec. at 11. The amount of shade provided by these object, however, varied according to the sun's location in the sky. The ALJ found that as the sun approached noon, there would be little to no shade available on the roof where the employees were working. ALJ Dec. at 11. Moreover, the ALJ found that M.R. worked in direct sunlight, and was not moved to a shady area until he became ill. ALJ Dec. at 6, n.11 (rejecting Foreman Brown's contrary recollection). Nothing in Sturgill's brief establishes a basis for questioning the ALJ's findings.

Sturgill also challenges the ALJ's finding that the work was "physically demanding and strenuous," arguing that no witness testimony supports that finding. Sturgill Init. Brf. at 21-22. M.R.'s job was to lift pieces of discarded roofing from a cart and throw them over a 39-inch parapet wall into a dump truck below. The pieces weighed from 1 to 2 pounds up to 10 pounds each. The ALJ reasonably found that work, performed by a 60-year-old man, was physically demanding and strenuous. In any event, the work required physical exertion, which, together with the temperature and other listed factors, increased the risk of heat illness.

C. *The Heat Hazard Was Likely to Cause Death or Serious Physical Harm If an Accident Occurred.*

To show that a hazard was likely to cause death or serious harm, the Secretary does not have to show that an injury is likely to occur but instead that death or serious physical harm could result if an accident occurred. *The Duriron Co.*, 11 BNA OSHC 1405, 1407 (No. 77-2847, 1983). It is undisputed that heat exposure can cause serious harm ranging from heat exhaustion to heat stroke, conditions which can require medical attention. ALJ Dec. 13; CX-10; CX-14; RX-9.

Moreover, M.R.'s exposure to the heat hazard contributed to his development of heat stroke, and ultimately to his death. M.R. was admitted to the hospital with a core body

temperature of 105.4 degrees and diagnosed with heat stroke after working in the heat at the Sturgill job site for five hours. CX-13 at 5; CX-16 at 4, 6. Every one of the multiple doctors who treated M.R. in the hospital agreed with this diagnosis. CX-16 *passim*. Twenty-one days later, M.R. died in the hospital. Tr. 9. The coroner's report concluded that M.R. died of complications from heat stroke. CX-8; Tr. 308.

In addition, the Secretary's expert witness, Dr. Theodore Yee, reviewed the medical records of the treating physicians, and testified that occupational heat exposure – working in the heat conditions on the roof - contributed to M.R.'s development of heat stroke. Tr. 82. The fact that M.R. died of heat stroke shows that if the heat hazard did cause heat illness, death or serious physical harm was likely to result. *Nat'l Realty & Constr. Co. v.* OSHRC 489 F.2d 1257, 1265 n.33 (D.C. Cir. 1973) (employee's death while riding equipment indicated the potential for injury of that activity); *Georgia Elec. Co. v. Marshall*, 595 F.2d 309,322 (5th Cir. 1979) (death that occurred from reversed control lever convincing evidence of the seriousness of the hazard); *Usery v. Marquette Cement Mfg. Co.*, 568 F.2d 902, 910 (7th Cir. 1977) (fact that dumping activity caused death at least prima facie evidence that the hazard was serious); *Western Massachusetts Elec. Co.*, 9 BNA OSHC 1940, 1947 (No. 76-1174, 1981 (fatal explosion accident further evidence that explosion hazard was serious).

D. *Sturgill Could Have Feasibly Abated the Heat Hazard.*

To show that the proposed abatement measures are feasible, the Secretary must show that the measures are capable of being put into effect and that they would materially reduce the hazard. *Arcadian Corp.*, 20 BNA OSHC 2001, 2011 (No. 93-0628, 2004). As demonstrated below, the record shows that the proposed abatement measures are feasible.

First, the Secretary's proposed implementation of an acclimatization plan, ALJ Dec. 16, is feasible because, as the Secretary's expert explained, acclimatization materially reduces the heat hazard by increasing an employee's ability to cool off in the heat: "Without acclimatization[,] you can sweat about a gallon of water an hour. With acclimatization[,] you can sweat two to three gallons of water per hour. What that means is you can dissipate heat from your body much faster. That's one of the reasons why acclimatization is so important." Tr. 159. Both the Centers for Disease Control and Prevention (CDC) and the National Roofing Contractors Association (NRCA) recommend acclimatization. The CDC advises that "[g]radual exposure to heat gives the body time to become accustomed to higher environmental temperatures. Heat disorders in general are more likely to occur among workers who have not been given time to adjust to working in the heat . . . ." CX-9 (CDC, "Working in Hot Environments") at 5. Furthermore, an NRCA toolbox talk, which Sturgill presented to its permanent employees but not to M.R., urges employees to "[work] up to it. It can take about two weeks to get used to working in a hot environment." CX-14 (NRCA, "Heat Stress").

Second, the Secretary's proposed requirement that employees wear loose-fitting reflective clothing in the heat, ALJ Dec. 16, is feasible because such clothing tends to reflect heat while dark clothing, such as that worn by M.R., tends to absorb and retain heat. Both the CDC and the NRCA recommend such clothing because it keeps the worker cooler, i.e., materially reduces the heat hazard. CX-9 at 6; CX-10 at 1.

Third, the Secretary's proposed implementation of a formalized work-rest regimen based on weather conditions, increasing the ratio of rest periods to work periods when appropriate, ALJ Dec. 16-17, is feasible because such work-rest cycles materially reduce the heat hazard by giving the body an opportunity to get rid of excess heat, slowing down the production of internal body

heat, slowing down the heart rate, and increasing the blood flow to the skin. CX-5 at 18 (OSHA, "About Work/Rest Schedules"). Such a regimen is also supported by the CDC and the NRCA. CX-9 at 6 (recommending shorter but frequent work-rest cycles in hot work environments); CX-10 at 1 (recommending more frequent breaks in hot weather)

Fourth, the Secretary's proposed implementation of a specific, formalized hydration policy requiring employees to drink water at regular intervals when working in the heat, ALJ Dec. 18, is feasible. The CDC explained that a formal hydration policy would ensure that employees drink when they need to drink and not wait until they are thirsty: "Because so many heat disorders involve excessive dehydration of the body, it is essential that water intake during the workday be about equal to the amount of sweat produced. Most workers exposed to hot conditions drink less fluids than needed because of an insufficient thirst drive." The CDC recommends that "[a] worker . . . should not depend on thirst to signal when and how much to drink. Instead, the worker should drink 5 to 7 ounces of fluids every 15 to 20 minutes to replenish the necessary fluids in the body." CX-9 at 6. The NRCA advises employees to follow a similar policy: "[d]rink plenty of *water* during the day – don't wait until you feel thirsty." CX-14.

Finally, the Secretary's proposed practice of monitoring employees for signs and symptoms of heat illness is feasible. This practice of monitoring employees for heat illness would materially reduce the heat hazard because, as the CDC explained, "[e]arly recognition and treatment of heat stroke are the only means of preventing permanent brain damage or death." CX-9 at 3. The CDC notes that many industries have attempted to reduce the hazards of heat stress by training workers in the recognition and prevention of heat stress. CX-9 at 5.

The NRCA instructs employees to cool down co-workers immediately and call an ambulance if the employees note signs of heat stroke – dry, red skin and strange behavior. CX-10 at 1.

Sturgill argues that the record does not establish that the Secretary's proposed abatement measures were feasible, because the Secretary failed to prove that these measures were standard practice in the roofing industry. Sturgill Init. Brf. at 28. But whether proposed measures are standard in the industry is not a criterion for determining feasibility. If it were, the Secretary would be forced to accept the level of safety achieved by industry practices, even if such practices were unsafe. *Beverly Hills Enters.*, 19 BNA OSHC 1161, 1191 (Nos. 91-3144, 92-238, 92-819, 92-1257, 93-724, 2000) ("The question is whether a precaution is recognized by safety experts as feasible, and not whether the precaution's use has become customary"). Sturgill further notes that heat guidelines such as those issued by the CDC, are not legally binding. Sturgill, Init. Brf. at 28. But whether the guidelines are legally binding is not the issue - the guidelines reflect the opinions of experts on the causes and prevention of heat illness and demonstrate the likely utility of the particular abatement measures the Secretary proposed. Sturgill does not seriously dispute the efficacy of the proposed measures, nor does it dispute their economic and technological feasibility. Accordingly, Sturgill's argument should be rejected.

E. *Sturgill Knew, or Reasonably Could Have Known, of the Hazardous Condition.*

As shown above, Sturgill had actual knowledge of the hazardous conditions existing on August 1, 2012. Foreman Brown realized early that morning that it would be hot that day, and even hotter on the roof. *See supra* p. 14. He was also obviously aware of the working conditions, including the presence of direct sunlight, and the nature of M.R.'s work activities. Sturgill also knew, through Superintendent Gould, and Foreman Brown, that temporary

employee M.R. had not received the same training on heat hazards as the permanent employees. *See supra* p. 7. Thus, Sturgill knew, or reasonably could have known, that M.R. would be exposed to a heat hazard without the heat training that Sturgill gave to its permanent employees.

Sturgill further knew, or reasonably could have known, that M.R. was not acclimatized to the heat. Sturgill could have learned from the temporary agency and from M.R. directly what his previous jobs and working conditions were, and whether he needed to be acclimatized to the heat. But Sturgill did not make these inquiries and allowed an unacclimatized, 60-year-old employee to be exposed to direct sunlight on a hot day while performing strenuous roofing work for five hours.

On review, Sturgill argues that it was not aware that a heat hazard existed. Sturgill Init. Brf. at 29-30. But the employer knowledge element of the Secretary's case does not require proof that Sturgill knew that the conditions on August 1, 2012 were actually hazardous. It is sufficient that Sturgill was aware of the conditions that created the hazard. *Phoenix Roofing*, 17 BNA OSHC at 1079-80 (employer knowledge is awareness of the physical conditions that constitute a violation, not recognition that those conditions were actually hazardous). There is no dispute that Sturgill was aware of the conditions existing on the cited date.

Sturgill also asserts that it was not aware of M.R.'s age and physical infirmities and could not have questioned M.R. on these subjects without violating the Americans with Disability Act (ADA). Sturgill further asserts that it could not have prohibited M.R. from working based on his age and pre-existing medical conditions without violating both the ADA and the Age Discrimination in Employment Act (ADEA). Sturgill Init. Brf. at 25-26. These claims are largely irrelevant because the general duty clause violation here does not turn on M.R's particular susceptibility to heat because of his age or physical infirmity. As discussed

supra pp. 3, 5, 10-11, the hazard of heat illness created by the working conditions on August 1, 2012 affected all employees working on the roof, not just M.R. While the conditions were more likely to cause a fatal heat stroke in an older worker such as M.R., younger workers also faced an increased risk of illnesses ranging from heat cramps to heat exhaustion. ALJ Dec. at 15 (citing Dr. Yee's expert opinion). The proposed abatement measures would materially reduce the risk faced by all workers, not just M.R.

In addition, the factors primarily relevant to M.R.'s increased risk were that he was not acclimated to working in hot weather, and was not trained to recognize the symptoms of heat illness. Sturgill could have known of these factors without running afoul of the ADA.

The ADA prohibits only inquiries about whether an employee has a disability, or about the nature and severity of the disability, unless the inquiry is shown to be job-related and consistent with business necessity. 29 U.S.C. § 12112(d)(4). The ADA does not prohibit asking an employee whether he or she can perform job functions. EEOC, "Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the ADA" at 4, attached to Sturgill Init. Brf. Sturgill has not shown that asking M.R. what his previous jobs and working conditions were would be likely to elicit information about a disability. The ADA does not prohibit questions that are unlikely to elicit such information. EEOC Guidance at 4. Furthermore, even if such questions would be likely to do so, the ADA permits them when the Occupational Safety and Health Act requires them. EEOC Guidance at 15; 29 C.F.R. § 1630.15 ("It may be a defense to a charge of discrimination under this part that a challenged action is required or necessitated by another Federal law or regulation . . . ").

The questions that the ALJ found that Sturgill should have asked M.R. were designed to determine whether he needed heat acclimatization, not to deny him a position or advancement,

or to discharge him. As such, these questions are not barred by the ADA, which was enacted to prevent discrimination against people with disabilities, not to prevent workers from getting the protective training they need to do their jobs safely.[6]

II. *Sturgill Failed to Provide Adequate Training to its Employees on How to Recognize and and Avoid Heat Hazards.*

To prove a violation of the training provision, 29 C.F.R. § 1926.21(b)(2), the Secretary must show that the cited employer failed to instruct employees on how to recognize and avoid the unsafe conditions which they may encounter on the job. *O'Brien Concrete Pumping Inc.*, 18 BNA OSHC 2059, 2061 (No. 98-0471, 2000). An employer's instructions must be specific enough to advise employees of the hazards associated with their work and the ways to avoid them, and modeled on the applicable OSHA requirements. *Id.*

Sturgill violated the training provision because the company did not provide adequate training to its permanent and temporary employees on how to recognize and avoid heat hazards. The record shows that temporary employees did not get the safety training, including heat hazard training, that its permanent employees got, and that Sturgill knew about this disparity. Tr. 470-71 (Gould); Tr. 518-19 (Brown); CX-13 at 11-12 (Brown). Thus, temporary employees were exposed to the same heat hazards as permanent employees but without proper training. .

Foreman Brown's generalized instructions to M.R. on heat hazards, *see supra* p. 4, were insufficient because they did not include information on the need for frequent breaks, the importance of drinking water even before thirsty, and how to recognize the signs and symptoms of heat illness. Instead, Foreman Brown merely showed M.R. the safety warning lines, the water

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[6] The same analysis applies to the ADEA, which prohibits job discrimination on the basis of age, not protective training for older workers. No question that the ALJ suggested that Sturgill should have asked M.R. about his previous jobs and working conditions would have violated the ADEA's prohibitions on age discrimination, 29 U.S.C. § 623(a).

coolers and the break area, and told M.R. to let him know if he (M.R.) got hot and needed an extra break. Tr. 497-98, 508-09, 511-12; Cx-13 at 4. Furthermore, although M.R. displayed some of the classic symptoms of heat stroke – excessive sweating, confusion, disorientation and altered behavior (refusing to speak to co-workers, walking clumsily, Tr. 504, 516; CX-13 at 7, 12), CX-5 at 16; CX-9 at 3; CX-14, Foreman Brown did not recognize these symptoms and did not request medical attention until after M.R. collapsed and started shaking. Tr. 9, 504-05, 508, 516; CX-13 at 5, 7, 12.

Sturgill's heat hazard training for permanent employees was also deficient because it did not give specific instructions on the need to acclimate new employees or specific guidance on how to implement an acclimation program. Cx-13 at 11. Indeed, on M.R.'s first day, Foreman Brown did not even know how long it took a new worker to acclimate to the heat. Tr. 520.

CONCLUSION

For the above reasons, the ALJ's decision should be affirmed.

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June 17, 2015

CERTIFICATE OF SERVICE

I hereby certify that, on this 17th day of June 2015, I served a copy of the preceding *Brief for the Secretary of Labor* by fax on:

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PLEASE HAND DELIVER THE FOLLOWING DOCUMENTS TO:

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VIA FACSIMILE

June 17, 2015

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Re: *A. H. Sturgill, Inc.*, No. 13-0224

Dear Mr. Cerveny:

I fax herewith the *Brief for the Secretary of Labor* in this case. I have also faxed a copy of the brief to opposing counsel as indicated in the certificate of service attached to the end of the document.

Sincerely,

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