

Increased Bar for Establishing Existence of a Heat Hazard to Sustain a General Duty Violation

April 12, 2019 Matthew Deffebach, Mini Kapoor, Andrea Levenson

PRACTICES OSHA, Labor and Employment

In its February 28, 2019 decision in *Sturgill*¹, the Review Commission found that the Secretary's evidence was insufficient to show that a heat hazard existed to sustain a violation of the general duty clause.

In *Sturgill*, MR, a temporary employee with various preexisting medical conditions was tasked with pushing pieces of roofing material off a roof into a dumpster below, on his first day of work. The temperature during his working hours ranged from 72°F to 82°F. The employee collapsed at the worksite, he was diagnosed with heat stroke and later died from complications due to heat stroke.

OSHA cited *Sturgill*, including for a violation of the general duty clause (29 U.S.C. § 654(a)(1)), for exposing employees "to the hazard of excessive heat." An administrative law judge affirmed the citation. The Commission vacated.

The Commission found that there was insufficient evidence of a hazard to sustain a general duty clause violation. Specifically, it found that data from the National Weather Service and expert testimony that lacked a factual basis and reasoning behind the opinion were insufficient to show that a heat hazard existed. The Commission also found that medical privacy laws prevented the employer from asking about the worker's medical history, and thus, *Sturgill* had no basis to believe that the employee may have had medical conditions that could endanger his health if he performed the assigned work. Based in part on this analysis, the citation was vacated.

While *Sturgill* was decided on the narrow facts of the case, it appears to raise the Secretary's bar for showing that a heat hazard existed under the general duty clause, including requiring fair notice to the employer regarding the employee's preexisting health conditions. Also noteworthy is the Commission's disapproval of using the general duty clause for anything other than as a "stopgap measure to protect employees until standards could be adopted." Under *Sturgill*, an employer cited for general duty violation should closely assess whether the Secretary's evidence is sufficient to show the existence of the alleged hazard.

¹ *A.H. Sturgill Roofing Inc. v. Sec'y of Labor*, OSHRC, No. 13-0224, 2019 WL 1099857 (Feb. 28, 2019).