MR Article --------- Update of Heat Stress and OSHA

It appears that the mandate for employers in the construction industry to provide heat illness protection to their employees is, if anything, more confusing after the decision of the Occupational Safety and Health Review Commission (OSHRC) in the *Sturgill Roofing* case than it had been before. Some individuals claim that the *Sturgill* decision will effectively prevent OSHA from enforcing heat illness prevention under the General Duty Clause, while others claim that OSHA is ready to propose or issue a new standard on heat illness prevention. Both are merely rumors, and I think I can safely say that neither is accurate. But I hope the following comments will put both “rumors” to rest, and clear up any misunderstanding about what the *Sturgill* decision did (and, importantly, did NOT) say.

First, a brief reminder about the General Duty Clause. This language is found at Section 5(a)(1) of the Occupational Safety and Health Act of 1970. The General Duty Clause requires all employers to “provide a place of employment for its employees free of recognized hazards that are causing or likely to cause death or serious physical harm. This is unlike standards that are promulgated under the authority of Section 5(a)(2) of the act that require employers to take certain specific actions with regards to its activities. The General Duty Clause addresses recognized hazards that are not regulated by any of the specific standards found in 5(a)(2).

On March 15, 2012 Judge Augustine, an OSHRC Judge out of the Denver office, issued a decision in case titled *Secretary of Labor v. Post Buckley Schuh & Jernigan, Inc.,* finding that the hazard of heat illness is covered by the General Duty Clause. Without going into the facts of that case, Judge Augustine concluded that heat illness was a recognized hazard that was causing or likely to cause death or serious physical harm. He also found that the NIOSH criteria document lists five feasible steps an employer can take, and that Post Buckley Schuh & Jernigan could have taken, to prevent the fatality that occurred in that case. From that point forward, OSHA has been enforcing heat illness prevention against employers in the construction industry under the General Duty Clause.

Following Judge Augustine’s decision, OSHA issued a memo dated July 19, 2012 in which it stated that it had issued a directive to expedite heat related illness inspections and to issue citations. Its stated goal was to obtain swift abatement and reduce heat related illnesses and deaths. The memo referenced the National Oceanic and Atmospheric Administration (NOAA) Heat Index Chart. OSHA has also developed an app for smart phones, which can be used as a guide by employers to identify situation in which remedial action is necessary by employers to prevent heat illnesses.

The NIOSH Criteria Document referenced by Judge Augustine listed six steps an employer can take to prevent heat illnesses and fatalities. The six steps include:

1.Develop procedures to acclimatize new employees and employees who have been away from the workforce to a high heat index environment.

2.Develop work-rest regimens on each job site with a high heat index.

3.Provide cool water and encourage employees to drink five to seven ounces of fluid every fifteen to twenty minutes.

4.Provide a cool rest area in close proximity to the worksite.

5.Provide training to employees regarding the health effects associated with heat stress, the symptoms of heat induced illnesses and methods of prevention,

The sixth part of the NIOSH criteria document was to require the employer to determine the health of its employees and use that information to determine whether they could work in a high heat index environment. Judge Augustine correctly pointed out that there are other federal laws such as the ADA which prevent an employer from obtaining that information. Therefore, this item on the list could not be enforced.

OSHA continued enforcing heat illness prevention under the General Duty Clause following Judge Augustine’s decision. Then, in 2012, OSHA cited Sturgill Roofing under the General Duty Clause for not having a heat illness prevention program following the death of a temporary employee working for Sturgill. The matter was heard by an Occupational Safety and Health Review Commission Administrative Law Judge (ALJ) who affirmed the OSHA citation. Among other things, the judge concluded that Sturgill should have ensured that all employees consumed certain amounts of water on an appropriate schedule. The Review Commission (OSHRC) agreed to review the decision. Finally, on February 28, 2019 the Review Commission published its decision. The three commissioners voted 2-1 to overturn the ALJ’s decision affirming the citation.

The decision of the OSHRC has provoked quite a bit of comment. One attorney who was interviewed felt that the Review Commission decision essentially precludes OSHA from using the General Duty Clause to enforce heat illness protection. Other attorneys who practice in this area have taken a more studied approach. One commentator felt that the decision of the Review commission was fact-specific. She feels (and I agree) that OSHA has not been precluded from using the General Duty clause to protect employees from heat illness. Both of the judges in the majority who voted to vacate the citation noted that they did not feel that OSHA had met its burden to prove the existence of a hazard and a feasible means of abatement. Both of these are criteria that must be proven to affirm a General Duty clause violation. The ALJ’s decision was a reflection of the mentality that the employer must have failed to provide a safe workplace because an injury/fatality occurred. The Review Commission has long rejected that argument, and did so again here.

As I discuss below, I feel that the OSHRC is using the *Sturgill* decision to put OSHA on notice of the Review Commission’s concerns with OSHA’s overuse (and perhaps improper use) of the General Duty clause as an enforcement tool in many different situations, including but not limited to heat illness prevention.

My take is that the Review Commission used this case to send a message to OSHA, that OSHA is overusing the General Duty Clause instead of promulgating specific OSHA standards. I have been advising and defending employers for forty-plus years in OSHA matters. I have dealt with quite a few General Duty Clause cases and reviewed many more. When the Occupational Safety and Health Act (the Act) was adopted into law, I believe Congress expected the General Duty Clause to be used by OSHA to protect employees until a specific standard could be promulgated. My belief has been buttressed by the language used by the Review Commission in footnote 9 in the *Sturgill* decision in which it stated:

“We note that when reviewing the history of cases in which the Commission has addressed the general duty clause ,… the Commission has from time to time changed its view as to the scope of the provision and what the Secretary must prove for each of its elements . .. .The general expectation was that once a hazard was identified through the general duty clause, OSHA would then engage in rulemaking to ensure the hazard was addressed by a standard. While practical considerations may have lead OSHA, over the years, to rely on the general duty clause in lieu of setting standards, the provision seems to have increasingly become more of a ‘gotcha’ and ‘catch all’ for the agency to utilize, which as a practical matter often leaves employers confused as to what is required of them.”

I have always taken the position that OSHA standards are intended to put industry on notice of what is expected of it to protect employees. I believe that one of the reasons it takes OSHA so long to promulgate a new standard is the painstaking process which is required to get a proposed standard into a final rule. This process is intended to provide all stakeholders an opportunity to be involved in the process to ensure that not only are all safety and health concerns addressed, but that they are addressed in such a way as to require feasible remedial measures to protect employees.

I feel that the *Sturgill* decision is broader than the heat illness question alone. From its decision, the Review Commission appears to be chastising OSHA to some extent for overusing the General Duty clause in place of specific rulemaking in general. As you are probably aware, OSHA has used the General Duty Clause to cite employers on workplace violence issues. It has issued a directive to employers on distracted driving that it (OSHA) will cite employers under the General Duty Clause if the employer does not prohibit texting while driving. It is a virtual certainty that if an employee is seriously injured as a result of either scenario (workplace violence or distracted driving), OSHA will issue a citation to the employer under the General Duty Clause. But the circumstances of every case will differ, and employers will still be in the dark as to what specific steps they need to take to prevent such injuries. This lack of specificity (guidance) by OSHA, which could be overcome by standard setting, appears to be a driver in the *Sturgill* decision.

So, where does that leave employers in the area of heat illness protection? First OSHA has not published an Advanced Notice of Proposed Rule Making (ANPRM) indicating an intention to promulgate a rule on heat illness protection. I can tell you that if and when OSHA does issue an ANPRM on heat illness protecting we will advise you of it and we will advocate for you, as your trade association, as the rulemaking proceeds.

Second, OSHA can and will continue to cite employers under the General Duty Clause for failing to protect employees from heat related illnesses. *Sturgill* has not changed this. What should you be doing as an employer to provide heat illness protection for your employees? Whether you are concerned with protecting your employees, avoiding a citation, or both, heat illness has been identified as a recognized hazard to employees, especially in construction. I suggest that you establish a heat illness prevention program. Further I suggest you strive to have your program follow the five components of the NIOSH criteria for heat illness protection. You should (1) establish a procedure to acclimatize your employees; (2) set a work/rest regimen (this will vary depending on the heat index and the type of work being performed); (3) establish a program for regular hydration of all employees (depending again on the heat index and the type of work being performed); (4) establish a cooling off area in close proximity to the job site; and (5) effectively train your employees in the types of heat illnesses, the symptoms of each, how they can recognize the symptoms in themselves and others and the first aid steps to take when those symptoms are observed. Your program should be in writing and it should be the responsibility of supervisors and management to ensure compliance at each site.

In spite of the *Sturgill* decision I feel OSHA will still be able to inquire as to the steps you are taking to protect your employees from heat illness during an inspection as long as they have a reasonable concern for the health of your employees. The one thing the *Sturgill* case did for employers is to require OSHA to specifically identify the heat illness hazard on any jobsite, to demonstrate that the employer’s heat illness prevention program is not effective to prevent heat illness, and to prove that alternative and more effective steps are feasible for the employer. One additional step you might consider to enable you to demonstrate that you have an effective heat illness prevention program will be to have your program reviewed by your company doctor and to work with him/her to fine tune your program to make it an effective tool to protect your employees.

The preceding is just the tip of the iceberg, but it gives you a start. We at your trade association will continue to monitor OSHA rulemaking and we will take steps on your behalf, if necessary, to respond to any efforts by OSHA to set standards in heat illness prevention, workplace violence and distracted driving, the three areas currently being enforced by OSHA using the General Duty clause.