

OSHA Fails to Prove Feasible, Effective Abatement for Excessive Heat Hazard, Commission Rules

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The Occupational Safety and Health Administration (OSHA) successfully established the existence of an excessive heat hazard for which the agency cited the employer, the Occupational Safety and Health Review Commission (OSHRC) has ruled, resolving a question open since 2019.

The quasi-judicial body overseeing enforcement actions by OSHA made its ruling on a series of citations issued to the United States Postal Service (USPS) under the general duty clause of the Occupational Safety and Health Act (29 U.S.C. § 654(a)(1)) for heat hazards. The general duty clause provides: “Each employer ... shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”

OSHRC agreed that OSHA had established the cited conditions posed a hazard. Even so, in four of the five cases, OSHRC vacated the citations because OSHA failed to establish a feasible and effective means of abatement. *Secretary of Labor v. USPS*, OSHRC Nos. 16-1713, 16-1872, 17-0023, & 17-0279 (Feb. 17, 2023). In the fifth case, OSHRC found USPS failed to provide effective training to supervisors on heat-related illnesses. *Secretary of Labor v. USPS*, OSHRC No. 16-1813 (Feb. 17, 2023).

Background

The citations related to seven letter carriers working in five cities in the summer of 2016 (San Antonio and Houston, Texas; Des Moines, Iowa; Benton, Arkansas; and Martinsburg, West Virginia). Each letter carrier became ill while delivering mail and sought medical treatment. OSHA alleged that six of these letter carriers were ill because of excessive heat.

Administrative Law Judge (ALJ) Sharon D. Calhoun was assigned to each of the cases which were tried separately, and she vacated all five citations. The ALJ found OSHA failed to prove that the workplace conditions posed a hazard and that feasible and effective means were available to abate the hazard.

OSHRC consolidated the cases in San Antonio, Houston, Benton, and Martinsburg and issued a separate decision for the Des Moines case.

OSHA Established Excessive Heat Hazard, Maintains Standard Needed

OSHA’s ability to establish the existence of an excessive heat hazard has been an open question since OSHRC’s 2019 decision in *A.H. Sturgill Roofing Co. v. Secretary of Labor*, OSHRC No. 13-0224 (Feb. 28). In *Sturgill*, OSHA relied on a National Weather Service (NWS) heat index chart that provides the likelihood of heat disorders with prolonged exposure or strenuous activity based on temperature and relative humidity. Because the record did not establish NWS’s definitions of “prolonged exposure” or “strenuous

activity,” OSHRC found OSHA had not established a heat hazard.

In *USPS*, the ALJ found OSHA had not established the existence of an excessive heat hazard because USPS’s experts also referenced the NWS heat index chart.

OSHRC disagreed with the ALJ’s findings. First, OSHA’s experts did not rely exclusively on the NWS chart, OSHRC noted. Rather, one expert testified he examined the environmental and metabolic heat conditions present in each incident and believed they were hazardous based on multiple studies on heat-related illnesses and scientific papers. One of USPS’s experts also agreed that excessive heat posed a hazard in the cases (although he believed USPS took sufficient steps to prevent serious heat illness).

The ALJ also erred, OSHRC continued, in “faulting” OSHA’s expert for “failing to quantify the percentage of employees that will experience a heat-related illness under any particular conditions.” OSHRC reiterated that OSHA “is not required to determine the mathematical probability of a workplace condition causing harm to show that it poses a hazard.”

As OSHA argued that a heat standard could provide clarity, Commissioner Amanda Wood Laihow challenged that “excessive heat” is a “vague” term, and “leaves employers guessing.” She emphasized that the findings in *USPS* do not establish any sort of criteria for determining whether “excessive heat” is present, but stated that OSHA’s forthcoming heat standard presumably would establish such criteria. In 2021, OSHA published an Advance Notice of Proposed Rulemaking to initiate a “[Heat Injury and Illness in Outdoor and Indoor Work Settings](#)” standard with specific criteria.

OSHA Failed to Establish Feasible, Effective Abatement Measures

OSHA argued USPS violated the general duty clause by failing to implement a “comprehensive program.” OSHA proposed a series of potential abatement measures that USPS could have taken, including: (1) work/rest cycles; (2) emergency response plans and employee monitoring; (3) analyzing USPS’s data on employee heat-related illnesses; (4) reducing employee time outdoors; (5) use of air-conditioned vehicles; (6) training on heat-related illnesses; and (7) acclimatization.

In all locations at issue, USPS already provided training on the recognition and prevention of heat-related illnesses, including directing employees to inform a supervisor of symptoms of heat-related illnesses and training supervisors to call 911 if systems are severe. In some locations, USPS stated that it sometimes sent supervisors on routes to monitor employees. USPS was in the process of a multi-year plan to provide air-conditioned vehicles, but also argued that carriers already had access to air-conditioned or shaded locations to rest (such as air-conditioned businesses).

OSHA argued the training was deficient. USPS’s training program addressed heat safety in a variety of media, including stand-up talks, computer-based courses, posters, videos, bulletins, messages on computer screen savers, and laminated cards with the signs and symptoms of heat-related illness, among other things.

In all locations, except Des Moines, OSHRC found that OSHA had failed to show the training was inadequate.

With respect to the remaining abatement methods, OSHRC vacated four of the five citations because OSHA failed to prove “feasible and effective means were available to

abate the hazards.” According to the OSHRC:

- OSHA failed to identify the specific costs associated with work/rest cycles, reduced time outdoors, and acclimatization. These measures were not technically feasible in part because, “[t]o reduce carrier workloads and time spent outdoors during hot days ... the Postal Service would have to either slow or alter delivery schedules or make extra employees available to assist.”
- Although OSHA argued USPS should have established a buddy system to have workers monitor one another for symptoms of heat illness and instructed carriers to contact the USPS’s occupational health service program if they experience heat-related illness symptoms, it failed to show that either system would be feasible or materially effective. OSHA never explained what the buddy system would specifically require of carriers, including whether they would have to contact each other at specified intervals, and if so, what the feasible but also effective intervals would be. Nor did OSHA show that being able to quickly speak to a nurse or physician in that occupational health services program would have been a feasible measure or more effective than USPS’s existing directive for supervisors to call 911 in severe cases.
- OSHA vaguely asserted that the information USPS acquired from analyzing data could be used to create an effective heat stress program. But OSHA’s failure to provide any details or examples precluded a finding that analyzing data could materially reduce the excessive heat hazard.
- OSHA failed to show it would have been feasible for USPS to have made air-conditioned vehicles available to all carriers before the summer of 2016. USPS was already in a multi-year process to provide air-conditioned vehicles and OSHA did not present any evidence on whether it would have been feasible for USPS to have much such vehicles available to all carriers by 2016.

Inadequate Training Warranted Remand in One Case

In the Des Moines case, the record reflected three incidents in which mail carriers reported symptoms of possible heat-related illness to supervisors. One supervisor provided water to a mail carrier and then left. No other action was taken with respect to the three incidents. One supervisor had not received any training on heat-related illness. In addition, safety talks were scheduled at a time when one classification of mail carriers was not present.

OSHRC concluded that USPS could have feasibly and materially reduced the hazard at that location by ensuring all employees were trained on heat safety. Therefore, OSHRC remanded the Des Moines case for further review.

Takeaway: Training, Written Heat Illness Prevention Plan

The takeaway is that employers can place themselves in a position to defend a general duty clause citation by providing sufficient training and developing and implementing a written Heat Illness Prevention Plan.

OSHA’s [guidance](#) suggests employers train supervisors to ensure they can:

- Identify and control heat hazards;
- Recognize early symptoms of heat stress;

- Administer first aid for heat-related illnesses; and
- Activate emergency medical services quickly when needed.

The guidance also advises employers to have a Heat Illness Prevention Plan that aims to:

- Ensure new workers or those returning from a break in employment or vacation are acclimatized, gradually building up to a full workday in the heat;
- Monitor ambient temperature and levels of work exertion at the worksite, categorizing physical exertion levels as low, moderate, and heavy;
- Provide access to cool water for hydration and ensure workers are drinking enough fluids;
- Ensure that workers have sufficient water and rest breaks;
- Provide access to shade for rest periods and air conditioning or other cooling systems if feasible;
- Consider using a buddy system to have workers monitor one another for symptoms of heat illness; and
- Train workers to identify the signs and various stages of heat illness, how to report signs and symptoms, when first aid is required, and when and how to contact emergency personnel.

To learn more, or if you need compliance assistance related to heat injury and illness prevention, defense of an OSHA inspection or citations, please contact a member of the [Workplace Safety and Health Practice Group](#) or the attorney with whom you regularly work.

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