

OSHA heat safety



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Many of you have followed the bouncing ball on the subject of heat safety through my earlier columns. On Feb. 28, 2019, the Occupational Safety and Health Review Commission (OSHRC) issued a decision in which it vacated a citation previously issued by the Occupational Safety and Health Administration (OSHA) to a roofing business. The citation was issued based on OSHA's belief that the company had violated the "general duty clause" of the law that created OSHA.

The OSHRC decision has prompted the Biden administration to propose the establishment of a rule specific to "heat injury and illness prevention in outdoor and indoor work settings." This will take a long time and will not help us through the next few years if it in fact does become a rule. Do not, however, give up on doing all that we can within our sphere of influence.

Why did the OSHRC vacate the citation?

A closer look at the OSHRC decision provides as follows:

...The Secretary alleges that Sturgill violated § 1926.21(b)(2) because it failed to adequately instruct its employees on the recognition and avoidance of "risk factors related to the development of heat related illnesses." The judge agreed and affirmed the violation. On review, Sturgill argues not only that it instructed each of its employees in the recognition and avoidance of unsafe heat conditions but that the Secretary failed to provide evidence that a "reasonably prudent employer" would have given different instructions under the same circumstances. For the following reasons, we vacate this item.

If an employer "rebut[s] the allegation of a training violation 'by showing that it has provided the type of training at issue, the burden shifts to the Secretary to show some deficiency in the training provided.'" N & N Contractors, Inc., 18 BNA OSHC 2121, 2126 27 (No. 96 0606, 2000) (quoting Am. Sterilizer Co., 18 BNA OSHC 1082, 1086 (No. 91 2494, 1997)), *aff'd*, 255 F.3d 122 (4th Cir. 2001). To prove that an employer's instructions are insufficient to satisfy § 1926.21(b)(2), the Secretary must "establish that the cited employer failed to provide the instructions that a reasonably prudent employer would have given in the same circumstances." *Compass Envtl., Inc.*, 23 BNA OSHC 1132, 1134 (No. 06 1036,

2010), *aff'd*, 663 F.3d 1164, 1168 (10th Cir. 2011) (internal citation omitted). Further, "[an employer's] obligation to train is dependent upon the specific conditions [at the worksite], whether those conditions create a hazard, and whether the employer or its industry has recognized the hazard." *Id.* (quoting *W.G. Fairfield Co.*, 19 BNA OSHC 1233, 1236 (No. 99 0344, 2000), *aff'd*, 285 F.3d 499 (6th Cir. 2002)).

The above explanation of the reasons for vacating the citation should be used by our grievance handlers as a beginning point to guide them on what needs to be investigated and argued.

From the above, we should focus on the following:

- USPS is required to provide training when the circumstances are appropriate. Keeping an eye on the weather and National Weather Service alerts will let you know when a heat wave is coming.
- If NALC is investigating a training failure, our burden is to show that the training was not conducted or that the employer "falsely claimed" that specific employees were trained when we can prove that they were not.

Over the last decade, we have experienced the heat-related deaths of three NALC members: John Watzlawick of Independence, MO; Peggy Frank of Woodland Hills, CA; and Dalvir Bassi of San Jose, CA. We have watched OSHA investigate these deaths and many heat-related injuries, watched USPS challenge those citations and then watched those challenges evaporate before the OSHRC.

In this process, USPS has developed and improved its heat-safety training, but the key question is whether or not the training was given to each and every employee before each employee was put in harm's way. The USPS heat-safety training material is available in the Hero Training course (see my June 2020 column).

Management's instructions, as shared with NALC in 2019 and 2020, were that every single city letter carrier in the country, as well as every person who supervises our craft, would be required to undergo the training.

As safety activists, you should focus on whether or not the weather trend is alerting us to require the training. Management committed that it would require the training annually by April 1 of each year. If you are reading this column and your office has not conducted the training, then we need to step up, bring it to management's attention and, if necessary, reach out to your branch officers or the national business agent to address at the area or district level.

Keep an eye on each other.