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Safety commission drills down on OSHA's general duty clause

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An independent agency may be ready to curtail the U.S. Occupational Safety and Health Administration's perceived overuse of the Occupational Safety and Health Act's general duty clause to cite employers for failing to provide safe workplaces to their employees, according to some legal experts.

OSHA's use of the general duty clause to issue citations against employers for heat-related hazards prompted an uncommon invitation from the Occupational Safety and Health Review Commission to file briefs — due May 14 — in a case related to OSHA's reliance on the clause to cite an employer for a heat stress-related fatality. Then the review commission scheduled rare oral arguments in two cases involving the use of the clause for June 7 — the heat stress case and one against a health care facility for a fatal workplace violence incident.

The OSH Act's general duty clause requires employers to “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.” To use the clause, OSHA must prove the existence of a hazard, that the hazard is recognized and causing or likely to cause death or serious physical harm, and that a feasible abatement method exists.

“The regulated community has largely seen OSHA's use of the general duty clause as an example of agency overreaching, basically using it to enforce what is essentially just guidance and circumventing the public rule-making process in ways that can significantly affect the regulated community,” said Ilana Morady, San Francisco-based counsel in the workplace safety and environmental group at Seyfarth Shaw L.L.P. “It's nice to see the review commission taking up this issue ... because I think arguably that wasn't the intent of Congress when the general duty clause was drafted, that it would be used in the way it's been used in recent years.”

In *Secretary of Labor v. A.H. Sturgill Roofing Inc.*, the review commission will consider arguments in a case in which an administrative law judge affirmed a serious citation issued against the company for not adequately implementing a heat illness prevention program in violation of the clause and a citation for not providing adequate training to its employees for heat-related hazards. OSHA inspected the workplace in August 2012 following the death of a temporary employee, according to commission documents.

Robert Dunlevey, Dayton, Ohio-based senior counsel at Taft Stettinius & Hollister L.L.P. and the lawyer for Sturgill, said his first impression of the case was that OSHA, in trying to emphasize heat stress matters, was attempting to use the clause in a “de facto fashion to formulate a standard and then attempt to hold the employer to it.”



“It appears obvious to me that it’s an overreach,” Mr. Dunlevey said. “And that’s not an unusual situation when you have a (general) duty clause violation, because OSHA is basically hoping to create de facto regulations with stringent requirements for employers.”

OSHA uses the general duty clause to cite an employer for a hazard for which there is no OSHA standard, according to an emailed statement from OSHA.

“If you have identified heat stress as a risk, promulgate a standard,” said Jim Stanley, president of safety consulting firm FDRsafety L.L.C. in Franklin, Tennessee, and a former deputy assistant secretary of labor for OSHA. “Don’t just haphazardly go out and make the rules up. If that’s what they’re doing, they’re going to lose before the commission.”

The heat stress case is different from other general duty clause cases, in that the guide that OSHA relied on to demonstrate that heat stress was a recognized hazard was not an industry consensus standard, which courts and the review commission have allowed the agency to rely on to demonstrate hazard recognition, said William Wahoff, a Columbus, Ohio-based member of Steptoe & Johnson P.L.L.C. In addition, OSHA was asking the employer to evaluate the health of a person who wasn’t even an employee of the company, which could trigger issues for the employer under the Americans with Disabilities Act, he said.

Prior to announcing the June hearing, the review commission issued its invitation for outside entities to file briefs in the *Sturgill* case, specifically in relation to whether an employer’s knowledge or lack of knowledge of its employees’ underlying health conditions or ages and legal restrictions on employers’ ability to obtain such information are relevant to the Department of Labor’s burden of proof to establish a general duty clause violation.

Raymond Perez, of counsel in the Atlanta office of Jackson Lewis P.C., said it is “very odd” for the review commission to invite the submission of outside briefs.

“That’s what leads us to think they’re going to be issuing a pretty broad decision that’s going to be more than just the facts of that particular case — that they’re looking ... to come up with a broader decision on the general duty clause and how it relates to heat stress in particular.”

But Gary Visscher, of counsel with the Law Firm of Adele L. Abrams P.C. based in Beltsville, Maryland, and a former member of the review commission, said he is not expecting a broad finding about OSHA’s use of the clause to cite employers to emerge from the case, although he noted that it was an “unusual case” in the sense that it directly pertains to a host employer’s obligation to protect temporary employees.

In *Secretary of Labor v. Integra Health Management Inc.*, the review commission will also examine OSHA’s use of the clause in citing the health care facility after a mentally ill client fatally stabbed an Integra service coordinator in December 2012.

“I think that workplace violence is similar, but it’s not as extreme as this heat stress case,” Mr. Wahoff said. “This heat stress case is extreme because they are reacting to the unknown — and really the unknowable — physical infirmities of this gentleman who passed away.”

