



OSHA 30/30®

A thirty minute update
on OSHA law every thirty days

with
Manesh Rath

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OSHA Fails to Enforce Heat Stress Citation Under General Duty Clause Requirements

March 22, 2023

Manesh Rath



Manesh Rath is a partner in Keller and Heckman's litigation and OSHA practice groups. He has been the lead amicus counsel on several cases before the U.S. Supreme Court including *Staub v. Proctor Hospital* and *Vance v. Ball State University*.

Manesh Rath represents clients in a wide range of matters related to occupational safety and health law, litigation, wage and hour and class action litigation, and association law. He has extensive experience representing clients' interests in Occupational Safety and Health Administration (OSHA) rulemakings. Employers, including some of the largest in the U.S., seek his representation in citations and investigations before federal OSHA and State Plans across the country.

Manesh has served as the lead amicus counsel on several cases before the U.S. Supreme Court, including *Staub v. Proctor Hospital* and *Vance v. Ball State University*. On several occasions, Manesh has testified before Congress on questions of occupational safety and health law.

Manesh is frequently quoted in or interviewed by publications such as The Wall Street Journal, Bloomberg, Smart Money magazine, Entrepreneur Magazine, on PBS's "Nightly Business Report," WAVY-TV, and C-SPAN. He has served as a panelist and as a moderator for the American Bar Association's annual OSHA conference and as faculty for legal ethics coursework for the D.C. Bar's continuing legal education program.



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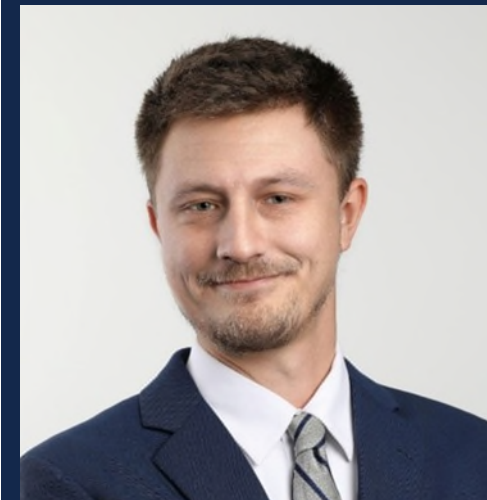
Taylor Johnson



Taylor Johnson is an environmental lawyer specializing in the area of environmental regulation of products, including chemical control, pesticides, energy efficiency regulation, and importantly, domestic and international transportation of hazardous materials. Mr. Johnson also advises clients on community-right-to-know laws, Proposition 65, occupational safety and health matters, and supports a wide variety of commercial tort and other litigation issues.

Mr. Johnson has special expertise in the area of hazardous materials transport, including enforcement defense and compliance counseling. Mr. Johnson helps companies secure competent authority approvals, special permits, and letters of interpretation from regulatory authorities around the world. He has also prepared successful petitions to PHMSA on behalf of shippers seeking regulatory relief.

Prior to joining Keller and Heckman, Mr. Johnson promoted the development of energy and environmental legislation and policy at the state level.



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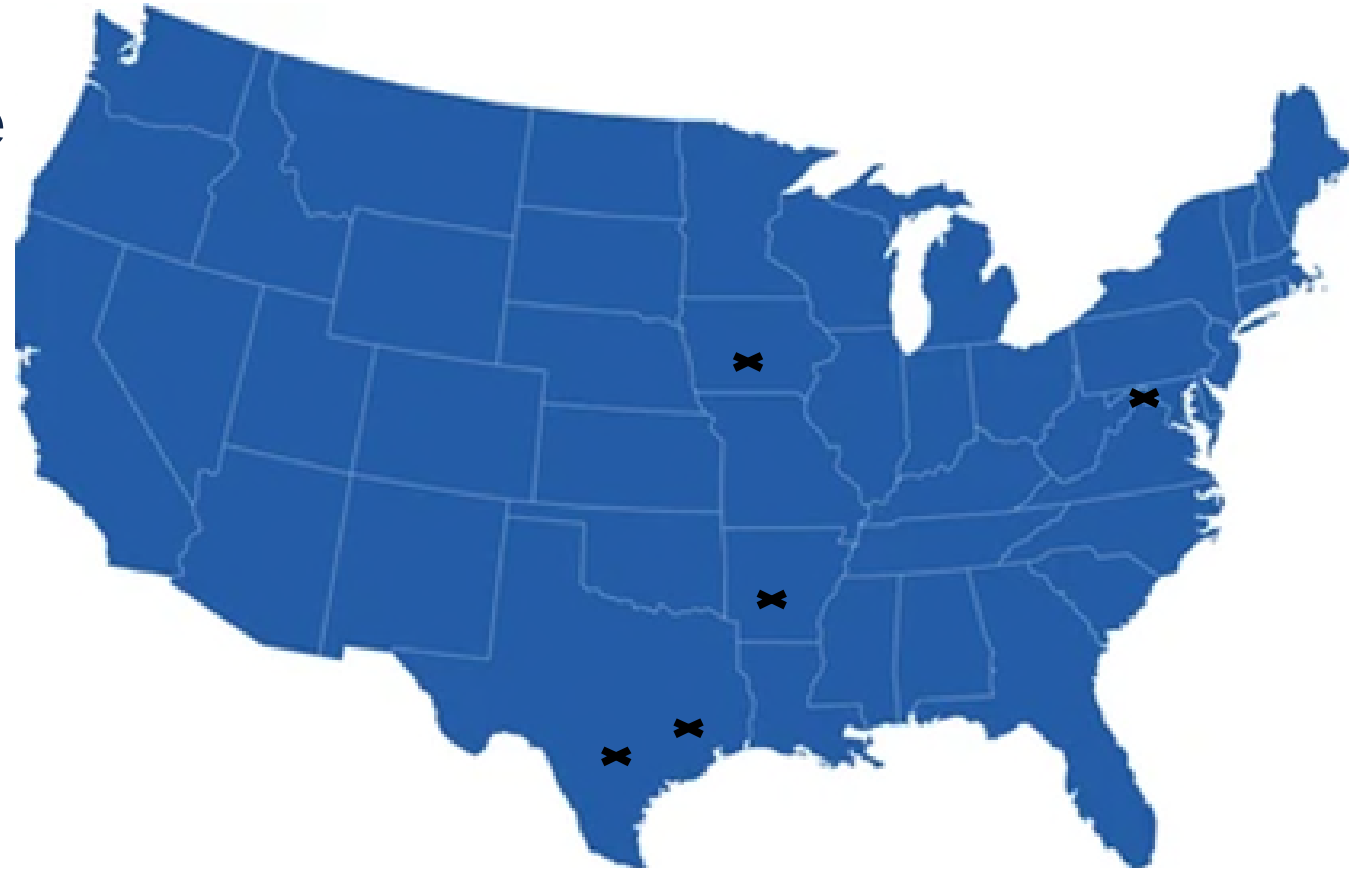
Topics to be Discussed

- ◆ Factual Background
- ◆ General Duty Clause
- ◆ ALJ Decision
- ◆ Review Commission Decision
- ◆ Update on Federal Heat Stress Standard
- ◆ What Employers Should Do

Secretary of Labor v. United States Postal Svc.



- ◆ In the summer of 2016, several mail carriers, in different cities, experienced symptoms of heat illness such as headaches, nausea, vomiting, muscle cramps, memory loss during their routes.
- ◆ These cities include:
 - ◆ San Antonio, TX
 - ◆ Benton, AR
 - ◆ Houston, TX
 - ◆ Martinsburg, WV
 - ◆ Des Moines, IA*
- ◆ Each mail carrier informed their supervisors of their condition and received medical treatment

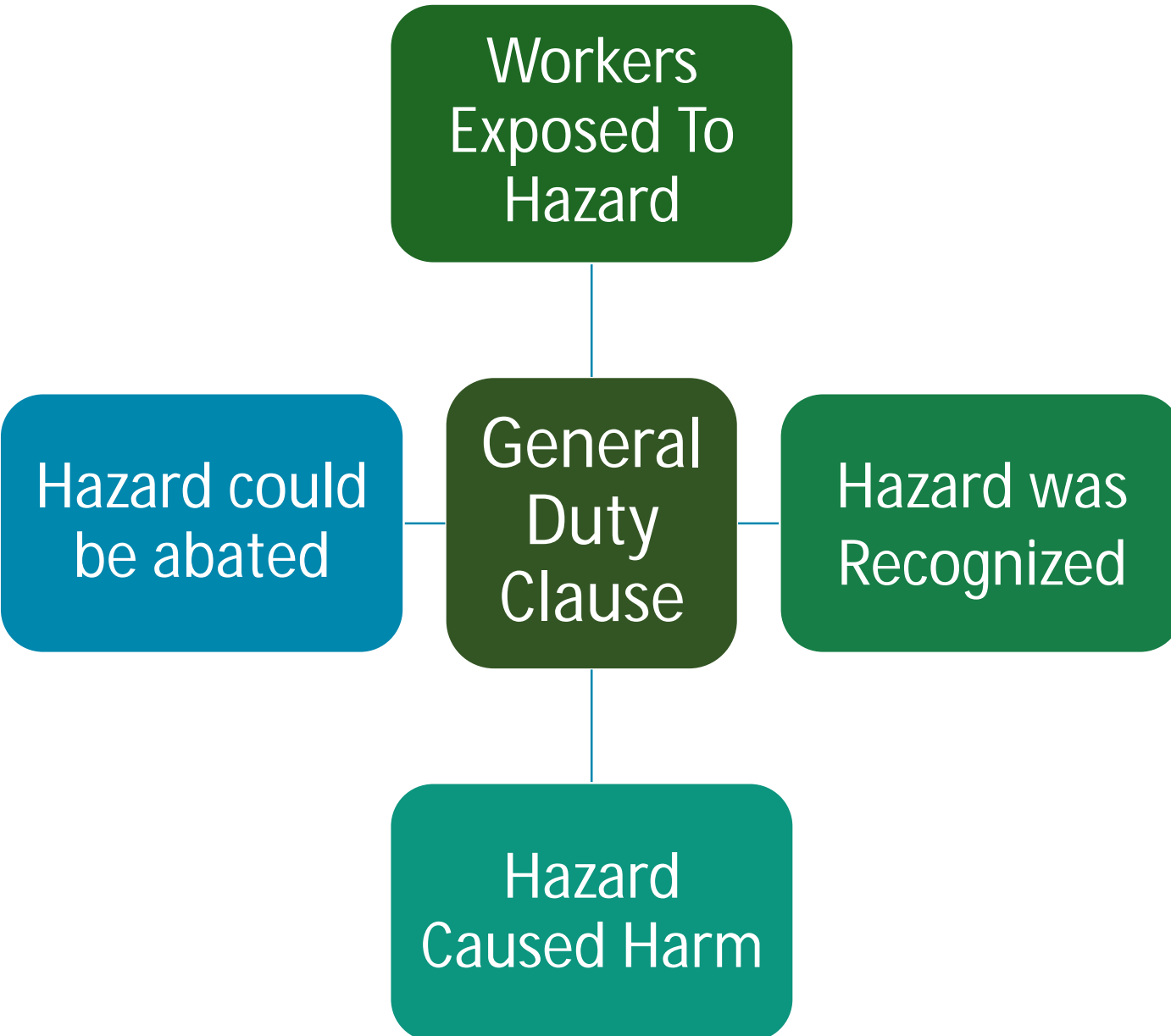


Secretary of Labor v. United States Postal Svc.



- ◆ The post offices reported the incidents to OSHA, and OSHA conducted investigations
- ◆ OSHA issued citations under the General Duty Clause
- ◆ OSHA: USPS allegedly exposed workers “to the hazard of excessive heat while walking and hand-delivering mail in an outdoor environment.”
- ◆ The penalties for the alleged violations:
 - ◆ San Antonio, TX: \$124,709
 - ◆ Benton, AR: \$124,709
 - ◆ Houston, TX: \$124,709
 - ◆ Martinsburg, WV: \$69,713
 - ◆ Des Moines, IA: \$68,591
 - ◆ **Total: \$512,431**
- ◆ OSHA also proposed specific abatements to be implemented enterprise-wide
- ◆ After settlement negotiations failed, USPS contested the citations

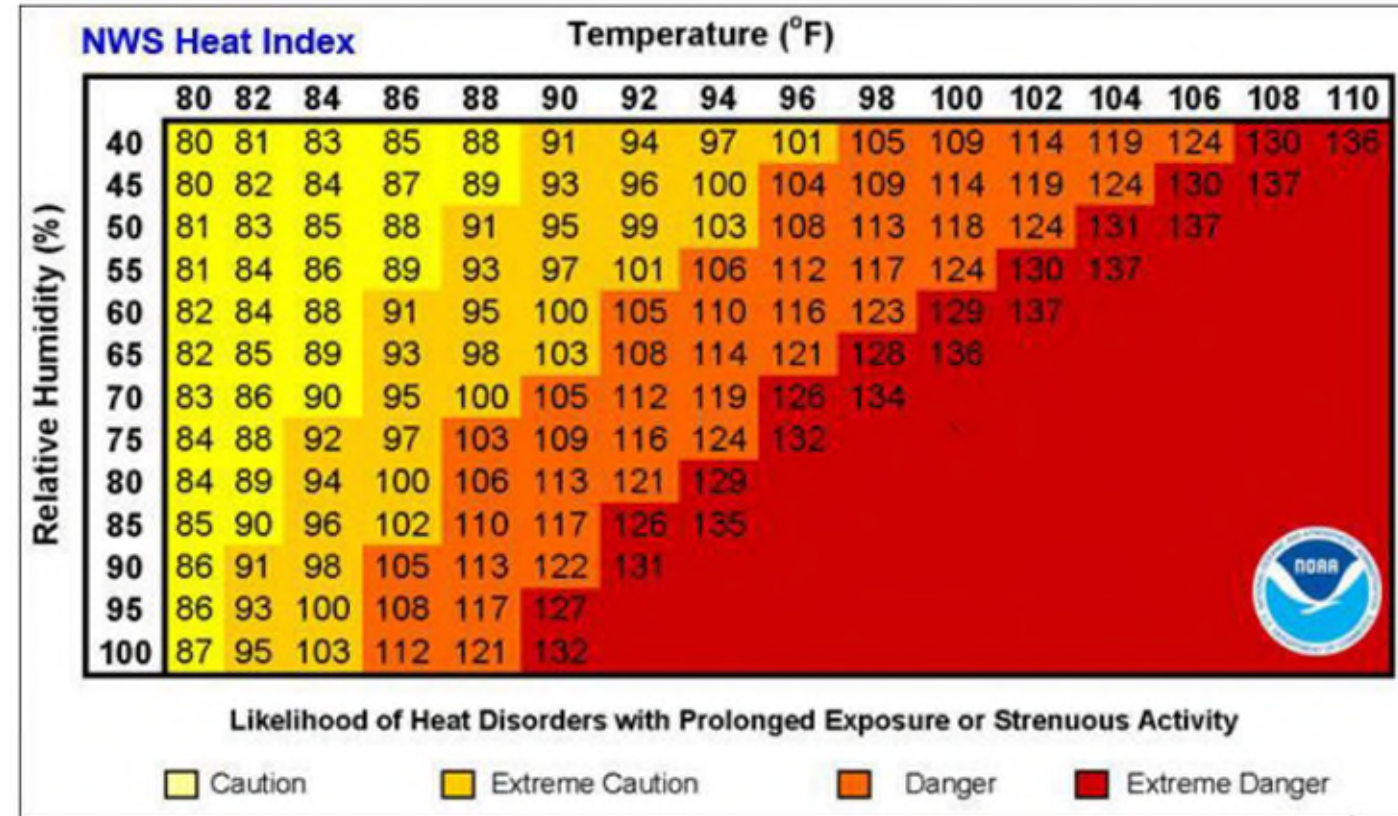
Citations



- ◆ The Secretary issued five citations to the USPS
- ◆ Used the General Duty Clause
- ◆ OSHA plans rulemaking process, a federal heat stress standard does not exist yet
- ◆ Must prove all four elements of its prima facie case

ALJ Decision

- ◆ Held separate and “national” hearings
- ◆ Issued 5 separate decisions
- ◆ ALJ vacated all five citations on basis that:
 - ◇ OSHA presented insufficient evidence as to how to define the amount of heat exposure that qualifies as a “recognized hazard”
 - OSHA’s expert’s opinions were based on an NWS chart that did not have a scientific basis
 - ◇ OSHA failed to show an economically feasible means existed to materially reduce the hazard



Review Commission Decision



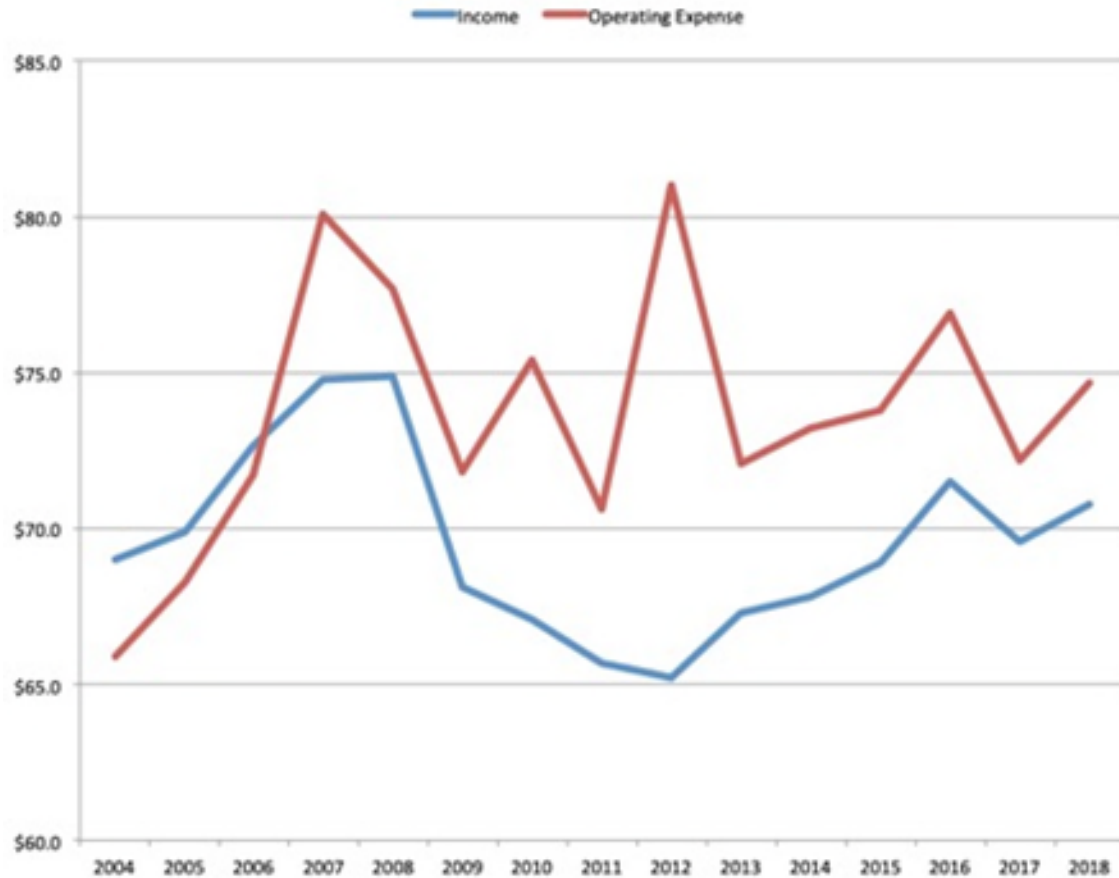
- ◆ Consolidated four of the five cases (San Antonio, Benton, Houston, and Martinsburg)
- ◆ Vacated all four citations
- ◆ Commission opined the Secretary proved the existence of a hazard
- ◆ Commission: OSHA failed to establish a feasible and effective means of abatement

OSHRC Decision - Hazard

- ◆ Secretary must prove “significant risk” or “meaningful possibility” that workplace conditions would harm employees
- ◆ To prove excessive heat secretary must show that environmental and metabolic heat conditions subjected the carriers to significant risk of experiencing a heat-related illness or injury
- ◆ ALJ erred in concluding that evidence was insufficient that conditions were hazardous
 - ◆ OSHA experts consulted NWS chart, but did not exclusively rely on it
 - ◆ Secretary relied on expert witness testimony to prove hazardous conditions
- ◆ Concluded that the expert witnesses support a finding that the environmental and metabolic heat conditions present during the incidents were hazardous.



OSHRC- Feasible and Effective Means of Abatement



Source: The R Street Institute from USPS annual report data.

- ◆ Secretary did not establish economic feasibility
 - Did not provide cost estimates
 - Rejects Secretary's reliance on USPS's cost estimates because estimates were not reflective of proposed abatement measures (5 minutes v. 15 minutes)
 - USPS puts on evidence that it is facing a looming financial crisis, which this measure would exacerbate, and rejects Secretary's arguments that because USPS is quasi-governmental agency, Congress will not allow it to fail
- ◆ Secretary did not refute USPS's evidence showing these measures would create substantial problems for its logistical network and difficult to implement due to CBAs

OSHRC- Feasible and Effective Means of Abatement

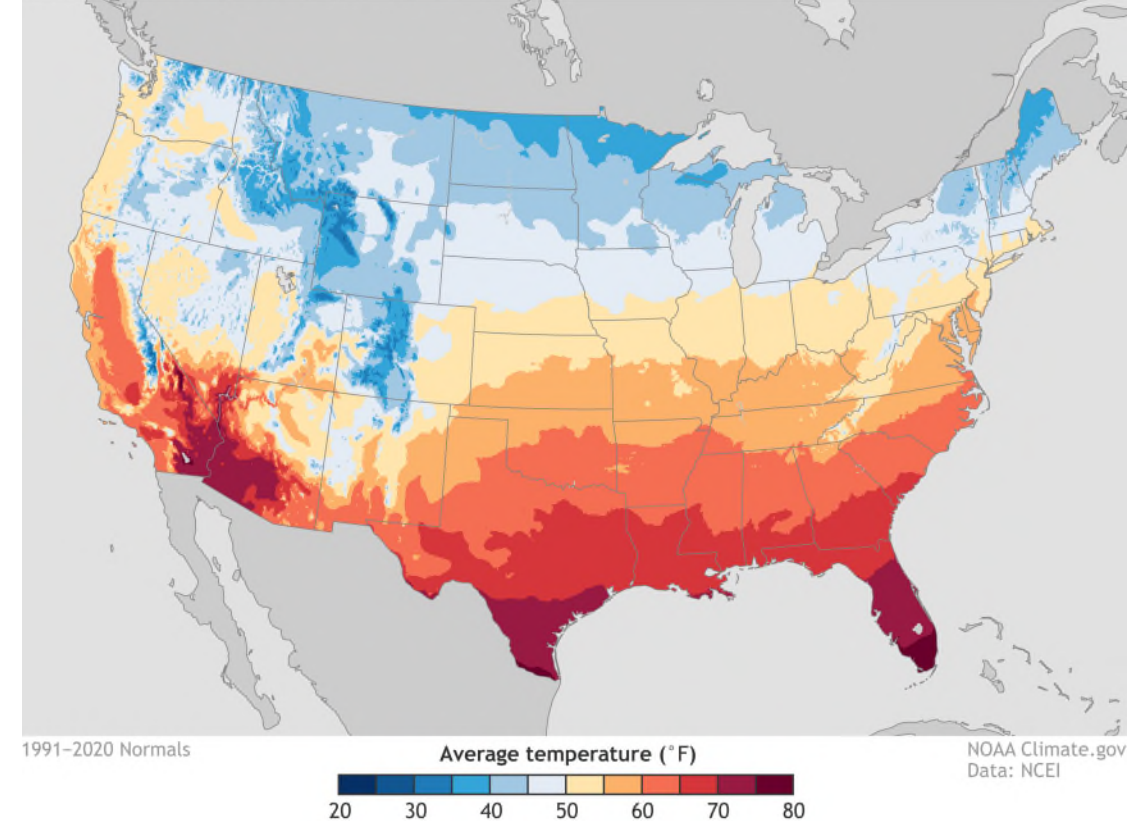
- ◆ Emergency Response Plans and Monitoring—Secretary did not show how these measures would materially reduce the hazard beyond what the USPS had in place
- ◆ Vehicles—did not show it was economically feasible to replace mail trucks with air-conditioned vehicles before the summer of 2016
- ◆ Training—factual issues in different cases:
 - ◇ Rejects Secretary's general claim that additional training was needed for lack of specificity
 - ◇ In one case, OSHRC found that key manager had not been trained, and thus established feasible means of abatement in that case



Commissioner Laihow Footnote



U.S. annual average temperature (1991–2020)



- ◆ Commissioner Laihow in a footnote stated that “excessive heat” is vague
- ◆ Notes that the lack of clarity makes it difficult for employers to know what heat conditions the Secretary will treat as “*excessive heat*”
- ◆ Affirms that Commission decision does not establish criteria for determining when “excessive heat” is present
- ◆ Thus, in general duty clause cases, Commission would apply a particularized inquiry
- ◆ Commission noted that rulemaking would address criteria for determining when “excessive heat” may be present

National Emphasis Program

A National Emphasis Program for outdoor and indoor heat-related hazards has been in effect since April 8, 2022, and will continue until at least April 2025.

Targets over 70 high risk industries, including construction

Sets up "neutral and objective" selection criteria for conducting inspection

Use of Complaints, SST, high hazard industries, and Fat/Cat Inspections

OSHA will inspect alleged heat-related incidents regardless of industry's risk level

CSHOs will inquire about protocols for heat priority days

OSHA will conduct preplanned inspections of high-risk industries


Heat priority days are when the heat index is expected to be 80° or higher

When National Weather Service has announced a heat warning or advisory for the local area

Update on Federal Heat Stress Standard



No decisions made by Agency on content or timing for a proposed rule



Upcoming Small Business Regulatory Enforcement Fairness Act review in 2023



Seven State AGs petitioned OSHA for an Emergency Heat Danger Rule in February of 2023

What Employers Should Do



Conduct a hazard assessment for both indoor and outdoor heat stress

Acclimatization program for employees new to working in warm environments

Appoint a safety monitor to observe employees for heat illness on high heat days

National Emphasis Program implies increased inspections on days when the heat index is above 80°

Consider changing shift start times to cooler parts of the day

If cited under the GDC, examine the feasibility and effectiveness of each proposed abatement



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with
Manesh Rath

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