



Association of the Wall and Ceiling Industry
513 W Broad St, Suite 210
Falls Church, VA 22046



Signatory Wall and Ceiling Contractors Alliance
3222 N Street NW, Suite 300
Washington, D.C. 20007

January 26, 2022

U.S. Department of Labor
Occupational Health and Safety Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Submitted via the Federal eRulemaking Portal at <http://www.regulations.gov>

RE: Docket No. OSHA-2021-0009, Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings, Advance Notice of Proposed Rulemaking

To Whom It May Concern:

The Association of the Wall and Ceiling Industry and the Signatory Wall and Ceiling Contractors Alliance jointly submit these comments in response to the Advance Notice of Proposed Rulemaking for Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings.

The Association of the Wall and Ceiling Industry (AWCI) represents 2,400 companies and organizations in the acoustics systems, ceiling systems, drywall systems, exterior insulation and finish systems, fireproofing, insulation, prefabrication/panelization and stucco industries. AWCI's members are contractors, suppliers and manufacturers and those in allied trades. AWCI's mission is to provide services and undertake activities that enhance the members' ability to operate a successful business.

The Signatory Wall and Ceiling Contractors Alliance (SWACCA) advocates for the interests of union-signatory wall and ceiling construction contractors. SWACCA represents approximately 400 wall and ceiling construction employers who perform commercial framing, drywall, and interior systems work nationwide. SWACCA contractors employ thousands of carpenters, drywall finishers, plasterers, and other skilled building trades professionals throughout the United States.

INTRODUCTION

The wall and ceiling industry includes thousands of employees who work outdoors and indoors across the country and in every climate. Construction has evolved to become a safety-first industry due to its many occupational risks, which include heat injury and illness. Many if not most of our member contractors have adopted heat injury and

illness prevention programs and have years of experience in successfully managing these programs. Our organizations have consulted industry safety experts to develop this response to the Department's Advance Notice of Proposed Rulemaking (ANPRM) regarding Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings.

COMMENTS

If OSHA pursues a standard for heat injury and illness prevention, a distinct standard should be established for the construction industry through a negotiated rulemaking process.

Construction is an industry with unique safety risks that requires unique regulation. The Department recognizes this in 29 CFR 1926, which identifies specific work-related risks associated with the construction industry.

Heat injury and illness is unique in construction as compared to other industries because of its varied and variable work environments. Construction work occurs on jobsites that are indoors and outdoors, in open and confined spaces, and in hot and cold environments. The wall and ceiling industry includes indoor and outdoor work, work on or over hot substrates, and work in highly varied and variable environmental conditions. Each of these conditions can occur on the same jobsite and may be encountered by the same employee. Significantly, there is rarely just one employer on a construction jobsite. More often, multiple employers perform different tasks on the same site, sometimes side-by-side, simultaneously.

The heat injury and illness risks in construction are most frequently a result of outdoor environmental conditions as opposed to other heat sources, whether those risks exist in an indoor or outdoor work setting. As a result, unlike many other industries, it can be impossible – not just difficult – to control the temperature of a construction work environment, and that temperature can vary greatly at any given time or location on the site.

Consistency in the construction work environment's temperature can be equally impossible to control. Workers on the same project may encounter highly variable temperatures. Consider, for example, an employee working on the exterior side of a wall assembly as compared to an employee working on the interior side of a wall assembly. Consider the humidity created by a wet material being installed by an employee in one room of a building as compared to an employee installing a dry material in an adjacent room. While other industries no doubt have variable work environments for the same employees in the same location, construction is uniquely variable due not only to the variable environments but also due to the variable scopes of work involved among multiple employers on the same site.

The risk of heat injury and illness in the construction industry is unique from the risks in industries such as agriculture, food service, manufacturing, transportation-warehousing,

and others that face more *consistent* risks that may require *consistent* controls in an environment under a single employer's control.

The basic elements of existing construction industry heat injury and illness prevention programs probably are not particularly unique to the construction industry. Our programs include requirements for employee training, employee acclimatization, access to water, and access to relatively cooler break/rest areas. However, while these same controls can and should be used in other industries, the varied and variable work environments of construction and the presence of multiple employers on most jobsites add complexity to the implementation of these controls that does not exist in other industries. A comprehensive standard developed for all industries is unlikely to be able to successfully take those complexities into account.

The Administrative Procedure Act (APA) establishes a framework for the conduct of negotiated rulemaking to encourage agencies to use the process when it enhances the informal rulemaking process.¹ An agency may establish a negotiated rulemaking committee to negotiate and develop a proposed rule, if the head of the agency determines that the use of the negotiated rulemaking procedure is in the public interest.²

The construction industry has a history of successfully using the negotiated rulemaking process to develop a consensus recommendation, specifically in the case of the development of protections for workers engaged in steel erection through the Steel Erection Negotiated Rulemaking Advisory Committee (SENRAAC). In congressional testimony before the House Judiciary Subcommittee on Commercial and Administrative Law, Assistant Secretary of Labor Joseph A. Dear noted, "SENRAAC's perseverance led to a major success."³

The APA specifies seven factors that the head of the agency shall consider in determining whether the use of the negotiated rulemaking procedure is in the public interest:

- (1) there is a need for a rule;
- (2) there are a limited number of identifiable interests that will be significantly affected by the rule;
- (3) there is a reasonable likelihood that a committee can be convened with a balanced representation of persons who—

¹ 5 U.S.C. § 561

² 5 U.S.C. § 563(a)

³ *Statement of Joseph A. Dear Before the House Judiciary Subcommittee on Commercial and Administrative Law, 104th Congress (1996)*, available at <https://www.osha.gov/news/testimonies/06271996> (accessed Jan. 25, 2022).

(A) can adequately represent the interests identified under paragraph (2);
and

(B) are willing to negotiate in good faith to reach a consensus on the
proposed rule;

(4) there is a reasonable likelihood that a committee will reach a consensus on
the proposed rule within a fixed period of time;

(5) the negotiated rulemaking procedure will not unreasonably delay the notice of
proposed rulemaking and the issuance of the final rule;

(6) the agency has adequate resources and is willing to commit such resources,
including technical assistance, to the committee; and

(7) the agency, to the maximum extent possible consistent with the legal
obligations of the agency, will use the consensus of the committee with respect
to the proposed rule as the basis for the rule proposed by the agency for notice
and comment.⁴

Should OSHA pursue a heat injury and heat illness prevention standard, analysis of
these factors supports a determination that use of the negotiated rulemaking procedure
for a construction-specific heat injury and illness standard is in the public interest.

The need for a construction-specific rule, as opposed to a general standard, is
supported by the highly varied and variable work environments of the construction
industry, the fact that employees encounter these varied and variable conditions on a
regular basis (sometimes on the same day), that multiple employers commonly perform
work together on a construction jobsite, and the fact that construction industry
occupations have an above-average risk of heat related deaths according to the NPRM.

The APA defines an “interest” to mean “with respect to an issue or matter, multiple
parties which have a similar point of view or which are likely to be affected in a similar
manner.”⁵ The construction industry is represented by trade associations, labor
organizations, and coalitions that frequently work together on issues of interest and
could be expected to collaborate in supporting balanced appointments to a construction
industry heat injury and illness negotiated rulemaking advisory committee that would
adequately represent the interests of all construction industry groups, and who are
willing to negotiate in good faith to reach consensus on the proposed rule as has been
accomplished previously within the industry.

As to the period of time it might take to reach consensus, the SENRAC example is
useful to draw from. That committee met 11 times over 17 months and “hammer[ed] out

⁴ 5 U.S.C. § 563(a)

⁵ 5 U.S.C. § 562(5)

long-standing differences that, until negotiated rulemaking, could not be resolved.”⁶ A SENRAC member subsequently stated, “This is a major success that permitted those who must abide by a government regulation to help write it. Because it was done this way, it will expedite swift voluntary compliance by the industry.”⁷

The ANPRM requests responses to 115 specific questions. OSHA is unlikely to receive responses to each of these questions in the related comments. A construction industry heat injury and illness negotiated rulemaking advisory committee would be a far more productive way of gathering feedback.

If OSHA will pursue a heat injury and illness standard, our organizations recommend that the Department establish a negotiated rulemaking advisory committee with construction industry experts to develop a heat injury and illness prevention standard specific to the construction industry.

If the Department is unwilling to consider a construction-specific heat injury-illness standard, we believe that only a very general standard could be successfully applied across industries.

The need for a construction-specific heat injury and illness prevention standard, as opposed to an industry-wide standard, is supported by the highly varied and variable work environments of the construction industry, the fact that employees encounter these varied and variable conditions on a regular basis (sometimes on the same day), that multiple employers commonly perform work together on a construction jobsite, and the fact that construction industry occupations have an above-average risk of heat related deaths according to the NPRM. If OSHA instead pursues a rule that covers all industries, the rule must be more basic and general in nature to allow construction industry employers to address the complexities on their jobsites. We offer the following comments based on that possibility:

A heat injury and illness prevention standard should focus on employee training and awareness.

In response to question 38 (“What efforts are employers currently taking to prevent occupational heat-related illness in their workplace?”), our industry’s experts emphasized that employee training and awareness is the cornerstone of a successful heat injury and illness prevention program. The Department noted in the ANPRM that individual risk factors contribute to the risk of heat-related illness as some individuals are more susceptible to the detrimental effects of heat. Specifically, the ANPRM points out that preexisting health conditions, use of certain medications, fitness level, alcohol consumption, prior heat-related illness, and lack of access to air conditioning in housing can reduce the body’s ability to regulate heat and can increase individual risk of heat-

⁶ *Statement of Joseph A. Dear Before the House Judiciary Subcommittee on Commercial and Administrative Law, 104th Congress (1996)*, available at <https://www.osha.gov/news/testimonies/06271996> (accessed Jan. 25, 2022).

⁷ *Id.*

related illness. An employer may, but in many cases probably will not be aware of these non-work-related factors. Therefore, employee training and awareness must be a cornerstone of any standard to prevent heat-related illness at work.

Our organizations agree with the Department that an effective heat injury and illness prevention program would include elements on: Assessing heat hazards that may occur at the workplace, acclimatizing new and returning workers, evaluating how and when heat will be measured, and determining what controls will be put into place and what training will be provided to workers and supervisors. Best practices include regular training of employees that will be exposed to conditions that substantially increase the likelihood of heat-related illness, specifically regarding the symptoms of possible heat illness and the appropriate responses.

The heat index is an appropriate way of measuring environmental conditions. The Wet Bulb Globe Temperature is not practical for use in the construction industry.

In response to question 40 (“What metrics are currently being used to monitor and assess hazardous heat exposure in the workplace?”), our wall and ceiling industry safety experts agreed that the heat index or the “apparent temperature” is an appropriate tool to evaluate heat levels at a construction work site. The heat index is easily calculated using information available from sources such as the Heat Safety Tool Smartphone App developed by OSHA and NIOSH (for outdoor environments), or from basic, inexpensive, and passive equipment that can be located on a jobsite when an indoor heat index is necessary. In contrast, the Wet Bulb Globe Temperature (WBGT) requires specialized, relatively expensive equipment and/or a trained operator who must actively take repeated readings throughout the day. Therefore, it is impractical to expect the WBGT to be obtained on most construction jobsites. The heat index can and should be adopted as the standard for determining the potential risk of heat injury on a construction jobsite.

A heat injury and illness standard should be modeled on the National Institute for Occupational Safety and Health (NIOSH) Criteria for a Recommended Standard, Occupational Exposure to Heat and Hot Environments

In response to question 27 (“Are OSHA’s existing efforts and authorities adequate or effective in protecting workers from hazardous heat in indoor and outdoor work settings?”), the wall and ceiling industry recognizes the value and effectiveness of the Heat Safety Tool smartphone app co-developed by OSHA and NIOSH. The app is in use in the wall and ceiling industry now and provides valuable information that is used by our industry safety professionals in implementing their heat illness and injury prevention programs.

The app is based on NIOSH’s Criteria for a Recommended Standard, Occupational Exposure to Heat and Hot Environments and includes information about the current

heat index, the predicted heat index, symptoms of heat-related illness, and first aid among other items. While this guidance is not specific to construction and contains recommendations that are impractical or irrelevant to our industry, in response to question 36 (“Are there other industry standards that contain elements that should be considered for a Federal standard?”) the wall and ceiling industry supports the consideration of the elements of this guidance that were incorporated in the Heat Safety Tool smartphone app should OSHA propose a standard for heat injury and illness prevention.

CONCLUSION

The construction industry presents unique challenges to the implementation of an effective standard for the prevention of heat injury and illness. Our organizations strongly believe that additional feedback and information will be necessary for the Department to develop an appropriate standard for our industry. For this reason, we urge the Department to establish a negotiated rulemaking advisory committee with construction industry experts to develop a heat injury and illness prevention standard specific to the construction industry. If OSHA instead proposes a heat injury and illness standard that applies to all industries, such a standard should be basic and general in nature to permit construction industry employers to take into account the complexities of their operations.

Thank you for your consideration of these comments.

Sincerely,



Michael F. Stark
CEO
AWCI



Robert Klugh
President
SWACCA