# Seasonal Safety: Is Fear of Heat Stress Valid Grounds for Refusing Work?

At best, working in heat and humidity is highly uncomfortable; at worst, it's highly dangerous, especially if the work is strenuous and/or the worker must wear certain equipment while doing it. Drawing the line between danger and discomfort is critical not only as a matter of health and safety but also OHS laws. If a worker believes that work poses a danger of heat stress, he can invoke his work refusal rights; but if the worker is just in discomfort, a work refusal isn't justified.

So, what should you do when one of your own workers refuses to work because she's afraid of heat stress' The laws say that the refusing worker's fears must be 'reasonable' but don't explain what reasonable means. To find guidance you can apply to real-life refusal situations, you must look to actual cases where courts and arbitrators decided if refusing to work in the heat was justified under OHS laws. But, like most OHS coordinators, you probably don't have the time to gather up and analyze all the cases'nor the budget to hire a lawyer to do it for you. So, we've taken the liberty of doing it for you.

**The 10 Key Factors that Make or Break Heat Stress Work Refusals**

The *Insider* found 9 cases where a court had to decide if there was a real danger of heat stress to workers. Five of the cases were federal, 2 were from Ontario and one was from Nova Scotia. Final Score:

- Refusal unjustified: 4;
- Refusal valid: 4.

Click here for a Scorecard summarizing each case. Although each case involved a different situation, the courts followed the same basic approach in resolving the refusal. Specifically, they focused on 10 factors:

**Factor 1: How Worker Engaged in Refusal**

OHS laws require refusing workers to notify their supervisor or another appropriate person that they're engaging in a work refusal. Failure to follow the required notification procedures dooms the refusal regardless of whether the underlying basis of the refusal is valid.

**Example:** Refusal to work in overheated kitchen car fails because worker doesn't initiate it until after the trip when the train was already gone and there was no way the safety officer could investigate the conditions inside [***Gray (Re),*** [1999] C.L.R.B.D. No. 21, June 28, 1999].

**Factor 2: How Employer Responded to Refusal**

Procedural requirements cut both ways. Thus, when employers are notified that a worker is engaging in a refusal, they must investigate to determine whether danger exists and, if so, how to address it. Thus, failure to properly investigate can cost you the case even if the refusal turns out to be unreasonable (just as workers with reasonable refusals can lose by failing to properly follow notification procedures).

**Example:** In siding with a train chef for refusing to work in an unventilated kitchen car, the arbitrator cites not just that the car was overheated but the railway safety officer's mishandling of the investigation, specifically finding of no danger without actually checking the thermal conditions in the kitchen [*LeBlanc & VIA Rail Canada Inc.,* CLRB Decision No. 714, Board File: 950-93, Nov. 18, 1988].

**Factor 3: Actual Thermal Conditions**

Heat stress becomes a danger when high temperatures and humidity levels coupled with physical activity causes the body to absorb heat faster than the body can get rid of it. In essence, the body overheats. Unfortunately, there's no consensus standard on 'when is hot too hot.' Moreover, courts don't seem to care all that much about thermal conditions in refusal cases. Of the 8 cases we analyzed, only 3 bothered to cite the temperature of the workplace; and none mentioned humidity, air movement or sources of radiant heat.

**Exception:** Nova Scotia arbitrator cites detailed cited Wet Bulb Globe Temperature (WGBT) readings over a roughly 90-minute period WBGT readings in concluding that work inside a mill is dangerous and worthy of extra pay for 'abnormal' conditions [*International Brotherhood of Electrical Workers, Local 625 v. Black and MacDonald Ltd*, [2003] N.S.L.A.A. No. 1].

**Factor 4: Workers' Clothing**

Heat stress becomes more of a danger when workers are required to wear heavy clothing and/or protective equipment.

**Example:** Ontario arbitrator rules that hotel doormen forced to wear four-layered polyester 'Beefeater' uniforms in summer are at risk of heat stress and have a right to refuse [*Re Westin Hotel, Restaurant and Cafeteria Employees' Union, Local 75*, 11 L.A.C. (3d) 1, Aug. 16, 1983].

**Factor 5: Engineering Controls in Place**

OHS regulations and guidelines require employers to implement engineering controls such as ventilation to keep thermal conditions at safe levels. The presence or absence of such controls may play a key role in determining whether a heat stress work refusal is justified.

**Example:** Federal arbitrator in *LeBlanc* ruling above cites lack of air-conditioning and poor ventilation system in upholding railroad cook's refusal to work in dining car during the summer.

**Factor 6: Physiological Measures**

Heat stress can be measured by physiological parameters such as core body temperature and heart rate. Courts may rely on these measures to determine if a refusing worker was at risk of heat stress.

**Example:** The Ontario arbitrator that ruled in favor of the hotel doormen in the *Westin Hotel* case mentioned above cites the testimony of an industrial hygienist that the polyester Beefeater uniforms created a significant risk of heat stress by restricting heat transfer through radiation, convection and evaporative cooling.

**Factor 7: Administrative Controls in Place**

Employers can take a number of administrative measures to cut the risk of heat stress, e.g., allowing for frequent breaks, schedule intense work early or late in the day or acclimatize workers to working in the heat. Two courts cited administrative controls as factors in their decisions:

**Example:** Railway workers refuse work claiming that the black, unvented ponchos they were forced to wear put them at risk of heat stress. Federal arbitrator rejects claiming citing the fact that workers are allowed to take frequent breaks to deal with the heat [*Betts and Canadian National Railway*, [2005] C.L.C.A.O.D. No. 50, Dec. No. 05-51].

**Factor 8: Whether Worker's Fear Was Genuine**

In addition to procedures and actual conditions, courts examine what's on the mind of the refusing worker. The first rule: The worker's fear of danger must be genuine. The concern is that the refusal may be a pretext to stage a labour action or simply get out of an unpleasant but not dangerous job.

**Example 1:** A sleep-deprived chef refuses to work in an overheated kitchen car because she fears that the fatigue and heat will cause her to get into an accident. It seems like a strong case. The kitchen is above 100′ F, the hood ventilation fans aren't working and she has less than 6 hours to recover from an 18-hour shift in the kitchen. But the chef still loses because her union used the grievance to complain not only about the working conditions in the kitchen on the day of the refusal but the lack of mandatory rest periods for all on-board workers. The federal Labour Board found that the union was misusing the chef's refusal rights as a 'vehicle for resolving labour issues' and throws out the complaint [***Gray (Re),*** [1999] C.L.R.B.D. No. 21, June 28, 1999].

**Example 2:** Three Ontario steel workers refuse to work on a ladlemen's platform because it's too hot. The plant installs fans and offers alternative work but the refusing workers are uncooperative. The arbitrator finds the refusal

invalid. While ‘conditions were very unpleasant,’ the workers didn’t have ‘reasonable grounds to believe’ that they were in any unusual danger [*Eastern Steelcasting (Re)*, 28 L.A.C. (2d) 310, (1981)].

**Factor 9: Whether Worker’s Fear Was Reasonable**

Sincerity isn’t enough. The fear prompting a worker’s refusal must also be ‘reasonable.’ But the threshold for reasonable is pretty low’the worker’s fear need only be well-founded, not necessarily right.

**Example:** Arbitrator upholds trucker’s refusal to drive cement truck with a broken air-conditioner on a hot July day. The trucker’s fears for his personal safety were genuine and reasonable even though the safety officer’s evidence proved that they were ultimately mistaken ***Court v John Grant Haulage Ltd***, 2010 CIRB 498 (CanLII), March 10, 2010.

**Factor 10: Whether Heat Stress Is Inherent to Job**

The right to refuse unsafe work doesn’t apply to hazards that are an essential part of the job. Thus, while exposure to extreme temperatures might work for a construction worker but not for a firefighter.

**Takeaway: The 9 Things To Do**

So where does all of this leave you’ While it’s impossible to extract ironclad principles from these rulings, there are 9 practical lessons you can take away from them:

1. Courts judge the legitimacy of heat stress refusals not simply by thermal conditions but by how the refusal is brought, how it’s investigated, which side is more believable and how the parties behave before, during and after the dispute;
2. Unsafe work refusals can’t be brought *willy-nilly* but only in accordance with notification and refusal procedures set out in the OHS laws;
3. Once you learn that a worker is refusing to work because it’s too hot, you need to keep your cool, avoid snap judgments and on-the-spot discipline;
4. Properly brought work refusals must be immediately investigated starting with the thermal and other conditions of the workplace;
5. Investigation results, including thermal measurements need to be properly documented;
6. A refusal to work in the heat is unjustified if it’s:
    - A pretext for insubordination;
    - A pretext to get out of an unpleasant job;
    - A collective bargaining ploy; or
    - Sincere but totally unreasonable and not based in reality;
7. A refusal may still be reasonable even if the worker’s fear is wrong;
8. While PPE should be comfortable, workers don’t get a discomfort veto’DON’T trade thermal comfort for safety;
9. Frequent breaks and other work controls should be used to alleviate thermally oppressive work conditions.