United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. CATERPILLAR LOGISTICS SERVICES, INC, Respondent, ---------- UAW LOCAL 974, Authorized Employee Representative.	OSHRC Docket No.: 09-0901

Appearances:

Kevin Koplin, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois
For Complainant

Brent Clark, Esq., Elizabeth Ash, Esq., Seyfarth Shaw LLP., Chicago, Illinois
For Respondent

Stephen Yokich, Esq., Cornfield and Feldman, Chicago, Illinois
For Authorized Employee Representative

DECISION AND ORDER

Procedural History

On May 24, 2011, this Court issued a Decision and Order ("Decision") in the above-captioned matter, which affirmed an alleged violation of 29 C.F.R. § 1904.4(a), which requires employers to maintain a log of work-related deaths, injuries, and illnesses. *See Caterpillar Logistics Servs., Inc.*, 23 BNA OSHC 1806 (No. 09-0901, May 24, 2011). The citation was

issued by Complainant pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act"). The Occupational Safety and Health Review Commission ("Review Commission") declined to review the Decision, which became a final order on June 30, 2011. Subsequent to the Review Commission's action, Respondent appealed to the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit"). On March 20, 2012, the Seventh Circuit reversed this Decision and remanded the case for "proceedings consistent with this opinion." *Caterpillar Logistics Servs., Inc. v. Solis*, 674 F.3d 705, 710 (7th Cir. 2012).

Although the Seventh Circuit found that this Court's Decision was consistent with Review Commission precedent set forth in *Home Depot #6512*, 22 BNA OSHC 1863 (No. 07-0359, 2009), and was supported by substantial evidence, it noted that "[s]ubstantial evidence is not enough to sustain an administrative decision, however." *Id.* at 709. The Seventh Circuit identified this Court's purported failure to provide an "account of competing evidence and inferences" showing why it "credited one witness rather than another" with respect to the issue of whether the working conditions in the packing department "contributed to" MK's epicondylitis as the basis for its remand. *Id.* In particular, the Seventh Circuit found that the "big consideration missing from the ALJ's analysis is Caterpillar Logistics' 300-person-years of experience with its packing department," which showed an incidence rate of epicondylitis much lower than that of the general population.[1] *Id.* The Seventh Circuit placed particular emphasis on this consideration because it found ambiguity in the term "contributed to" in the definition of

1. In that regard, the Seventh Circuit noted that this Court, because it disregarded the experience at Caterpillar, did not make a finding regarding the statistical significance of Caterpillar's sample size versus the incidence of epicondylitis in the general population (approximately 1-3%).

29 C.F.R. § 1904.5(a) and noted that this Court "did not choose" between possible interpretations that would have an impact on whether Caterpillar's experience had any salience. *Id.* at 709–10.

In addition, after this Court issued its Decision and after the Seventh Circuit's remand of this Court's Decision, the D.C. Circuit Court of Appeals ("D.C. Circuit") issued its decision in *AKM LLC d/b/a Volks Constructors*, 675 F.3d 752 (D.C. Cir. 2012). The D.C. Circuit reversed the Review Commission and held that the six month statute of limitations found at 29 U.S.C. § 658(c) applies to an employer's obligation to record work-related injuries and illnesses pursuant to 29 C.F.R. § 1904.29(b)(3). *Volks*, 675 F.3d at 753. The D.C. Circuit in the *Volks* case rejected the interpretation proffered by the Secretary, and accepted by the Review Commission, that the failure to record is a continuing violation that prevents the running of the statute of limitations until the expiration of the five-year document retention period found at 29 C.F.R. § 1904.33(a). Instead, the D.C. Circuit held "that the statutory language in Section 657(c) which deals with record-keeping is not authorization for OSHA to cite the employer for a record-making violation more than six months after the recording failure." *Id.*at 758 (citations omitted).

With the foregoing in mind, this Court certified the following questions on remand:

> Certified Question 1: (a) Whether the Citation in this case is barred by the six-month statute of limitations (29 U.S.C. § 658(c)) as raised in Respondent's Affirmative Defenses; and (b) whether Respondent is entitled to relief under Fed. R. Civ. P. 60(b) to argue its Affirmative Defense due to a change in law pending a Final Decision in this case?
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> Certified Question 2: Parties are to address: (1) Caterpillar Logistics' 300-person-years of experience and the role it plays in the Respondent's obligation to record a work-related illness; (b) legal arguments on what the term "contributed to" the injury means in relation to § 1904.5(a); and (c) whether Caterpillar Logistics' 300-person-years of experience is relevant under F.R.E. 401–403 as to Respondent's obligation to record work-related injuries.

Certification of Questions and Briefing Order at 2. The Court shall address each of these questions in turn. Based upon what follows, the Court finds that Respondent waived its statute of limitations defense and reaffirms its original Decision, wherein the Court found that Respondent violated 29 C.F.R. § 1904.4(a).

Discussion

Because the Seventh Circuit limited its analysis to the discrete issue of the role that Caterpillar Logistics' 300-person-years of experience plays with respect to whether MK's epicondylitis was a recordable injury, the Court will not engage in the unnecessary exercise of rehashing the entire record. Rather, the Court shall incorporate by reference the factual findings from its Decision. *See Caterpillar Logistics Servs., Inc.*, 23 BNA OSHC 1806 (No. 09-0901, 2011) (ALJ Augustine).

Statute of Limitations

On June 5, 2009, Complainant issued to Respondent a citation pursuant to 29 C.F.R. § 1904.4(a), alleging that Respondent failed to record a work-related injury (MK's epicondylitis) on July 23, 2008. In its Complaint, Complainant amended the Citation and Notification of Penalty and changed the operative date to August 5, 2008. The Court accepted the Complaint and Amended Citation at trial and held that August 5, 2008 was the controlling date.[2]

2. According to Respondent's calculations, that would mean that the Citation was issued 296 days after the statute of limitations began to run (using August 13, 2008 as the starting date in light of Respondent having seven days to record the injury).

Respondent raised the statute of limitations defense in its Answer to the Complaint. A trial was held on September 21–23 and November 1–3, 2010.[3]

On the second day of trial, September 22, 2010, Respondent attempted to address the statute of limitations issue. (Tr. 380–385). At that point in the trial, the Court did not allow testimony with respect to the statute of limitations issue because Respondent had failed to advise the Court of its intent to proceed on that affirmative defense during the pretrial conference. (Tr. 382). At the time, the Court viewed the statute of limitations defense as jurisdictional in nature.[4] Nevertheless, the Court, mindful of the anticipated delay in the proceedings, invited the parties to brief the statute of limitations issue with references to the depositions that had taken place prior to trial. (*Id.*). To the extent that the issue was not discussed during the pre-trial depositions, the Court granted the parties the authority to reconvene a "very narrow deposition" of CSHO Karl Armstrong. (Tr. 383). On October 7, 2010, Respondent submitted a letter to the Court indicating that it had "decided to withdraw its statute of limitations affirmative defense." *See* Brent I. Clark, Letter to the Court re: *Secretary of Labor v. Caterpillar Logistics Services, Inc.*, October 7, 2010. There was no further discussion of the statute of limitations: (i) during the November 2010 portion of the trial; (ii) in the post-trial brief of the Respondent[5]; or (iii) on appeal. Thus, on May 24, 2011, the Court affirmed a violation of the standard.

Prior to the beginning of this case, the respondent in the *Volks* case had appealed the decision upholding its own recordkeeping violations to the Review Commission. All briefs in

3. A portion of the trial had to be continued due to the death of the undersigned's brother-in-law.
4. After further review of the case law, the Court recognizes that Section 9(c), 29 U.S.C. § 658(c), is an affirmative defense that must be pled rather than an absolute jurisdictional bar to the issuance of a citation after six months. *See Duane Smelser Roofing Co.*, 4 BNA OSHC 1948, 1950 (No. 4773, 1976).
5. Issues not briefed in a party's post trial brief are deemed abandoned. *See Georgia-Pacific Corp.*, 15 BNA OSCH 1127, 1130, 1991 CCH OSDH ¶29,395 (No. 89-2713, 1991). The actions of the Respondent are consistent with a knowing and deliberate waiver of its affirmative defense.

the *Volks* case were submitted to Review Commission by February 12, 2008. On October 22, 2010, the Review Commission announced, via press release, that it would be holding oral arguments in the *Volks* case on November 2, 2010.[6] On March 11, 2011, the Review Commission upheld the ALJ's determination that the failure to record an injury or illness is a continuing violation that can be cited up to six months *from the time OSHA discovers the violation*. *AKM LLC (Volks)*, 23 BNA OSHC 1414, 1422 (No. 06-1990, 2011). As noted above, the D.C. Circuit reversed the Commission on April 6, 2012.

Fed. R. Civ. P. 60(b) Relief

Subpart (b) of the Court's first certified question asked whether Respondent is entitled to relief under Fed. R. Civ. P.60 (b). The parties are in agreement that Rule 60(b) relief is not available in this case because the Seventh Circuit reversed and remanded the Court's decision and, thus, there is no final decision from which relief can be granted. Accordingly, the Court finds that Respondent is not entitled to Rule 60(b) relief to argue its statute of limitations affirmative defense.

Fed.R.Civ.P. 54(b) Relief

That does not end the debate, however, because Respondent has also argued that, pursuant to Fed. R. Civ. P. 54(b), it is entitled to relief from the Court's interlocutory decision not to allow testimony with respect to the statute of limitations issue. *See Johnson-Parks v. D.C. Chartered Health Plan*, 806 F. Supp. 2d 267, 268 (D.D.C. 2011) ("[R]elief upon reconsideration of an interlocutory decision pursuant to Rule 54(b) is available 'as justice requires.'") (citations omitted). In particular, Respondent argues that application of Rule 54(b) relief is appropriate for

6. Links to the press release and briefs, including an amicus brief from the National Federation of Independent Business Legal Foundation, can be found at www.oshrc.gov.

two reasons: "(1) the significant intervening change in law established in *Volks*; and (2) the Court's error in denying Respondent the opportunity to support its statute of limitations Affirmative Defense and requiring Respondent to brief and file a motion to dismiss in the middle of the hearing . . . ." Resp't Brief in Response to the Court's Certified Questions at 18.

With respect to Respondent's second argument, the Court does not find that justice requires relief from its order directing briefing of the statute of limitations issue. The Court provided Respondent a clear opportunity to address the statute of limitations issue during the break between trial dates by submitting a well-reasoned and researched legal brief and/or reconvening the deposition of the CSHO to take testimony to include in its brief. Furthermore, the Court did not preclude the possibility that Respondent could provide testimony with respect to the statute of limitations at the November portion of the trial; rather, the Court, not having been apprised of the issue during the pre-trial conference, stated that it would not accept testimony with respect to the statute of limitations "at this particular point in time."[7] (Tr. 383). Instead of presenting the Court with potentially persuasive arguments and taking the opportunity to develop evidence and testimony, Respondent sent a letter to the Court indicating that it was withdrawing its statute of limitations defense. *See* Clark, Letter to the Court.

For the same reasons, the Court does not find that the intervening change in law established by *Volks* provides a sufficient basis for overturning its order directing briefing. The Court's Order, with respect to testimony on the issue of the statute of limitations, was temporal

7. The Respondent, in its brief, could have requested the Court grant it leave to present witness testimony to support its affirmative defense; however, instead of electing to pursue this avenue, it withdrew its affirmative defense.

in nature and could have been remedied by proper briefing by Respondent. Respondent did not avail itself of this opportunity and chose to formally withdraw its defense.

Law of the Case Doctrine and the Supervening-Decision Doctrine

In addition to the foregoing, there are two doctrines that are applicable to this dispute that require discussion; namely, the law of the case doctrine and the supervening-decision doctrine. Complainant argues that Respondent formally waived its statute of limitations defense and, therefore, should not be able to avail itself of the defense now that the case has been remanded. Respondent contends that it did not waive its defense because, in light of the supervening decision in *Volks*, its waiver was not an "intentional release of a known right." *United States v. Hampton*, 585 F.3d 1033, 1044 (7th Cir. 2009).

"When the [court] addresses a case on remand, the 'law of the case' generally requires it to confine its discussion to the issues remanded." *United States v. Morris*, 259 F.3d 894, 898 (7th Cir. 2001). This doctrine only applies to issues that have been resolved, which, in some instances, leaves the judge free to address issues that the appellate court left undecided. *Id.* (citing *Moore v. Anderson*, 222 F.3d 280, 283 (7th Cir. 2000)). This power, however, "must be construed in harmony with our familiar exhortation that parties cannot use the accident of remand as an opportunity to reopen waived issues." *Id.* (citing *United States v. Jackson*, 186 F.3d 836, 838 (7th Cir. 1999)); *see also United States v. Parker*, 101 F.3d 527, 528 (7th Cir. 1996). "If the opinion identifies a discrete, particular error that can be corrected on remand without the need for a redetermination of other issues, the [court] is limited to correcting *that* error." *Parker*, 101 F.3d at 528 (emphasis added). Thus, the Seventh Circuit has held that "on remand, and in the absence of special circumstances, a [court] may address only (1) the issues

remanded, (2) issues arising for the first time on remand, or (3) issues that were timely raised before the district and/or appellate courts but which remain undecided." *Morris*, 259 F.3d at 898.

The Seventh Circuit did not remand the issue of the statute of limitations because it was never before the court in the first place. Respondent argues that because the decision was vacated in its entirety, that it should be allowed to start anew. As noted above, however, Respondent cannot use the "accident of remand" to address an argument that it withdrew during the course of the trial. Further, the scope of remand was clearly limited to "proceedings consistent with this opinion," which only addressed the discrete issue of Caterpillar's 300-person-years of experience. Second, the statute of limitations is not arising for the first time on remand; it arose during the original trial and was abandoned by the Respondent. Third, although the issue was timely raised during the course of the trial, and remained undecided, the statute of limitations defense was formally withdrawn during the period between hearing dates. *See Morris*, 259 F.3d at 899 (holding that appellant's argument fell into third category because he preserved the argument even though the court of appeals did not address it in the first round of appeals). The issue remained undecided because there was no issue before the Seventh Circuit to decide.[8]

As regards the issue of waiver, Respondent first contends that it did not, indeed could not, waive the statute of limitations defense because *Volks* had not been decided and, therefore, its right to make such a claim did not exist at the time of the purported waiver. *See Hampton*, 585 F.3d at 1044. This is the essence of the supervening-decision doctrine, which "reflects the

8. Furthermore, as will be shown below, the Court does not find that a special circumstance exists such that Respondent's waiver of its statute of limitations defense should be excused.

principle that it would be unfair, and even contrary to the efficient administration of justice, to expect a defendant to object at trial where existing law *appears so clear as to foreclose any possibility of success*." *United States v. Washington*, 12 F.3d 1128, 1139 (D.C. Cir. 1994) (emphasis added). This approach is followed by several of the circuit courts, including the Seventh and D.C. Circuits. *See, e.g.*, *Holland v. Big River Minerals Corp.*, 181 F.3d 597 (4th Cir. 1999); *Forshey v. Principi*, 284 F.3d 1335 (Fed. Cir. 2002); *but see United States v. Ardley*, 273 F.3d 991, 992 (11th Cir. 2001) (holding that the failure to raise an issue in an opening brief—the procedural bar doctrine—is not trumped even by an intervening Supreme Court decision).

This is not a case where Respondent failed to raise an issue because the law was so settled as to render "futile" any argument regarding the statute of limitations. If that were the case, Respondent would not have raised it in the first instance. Rather, Respondent, faced with the prospect of addressing the issue via brief (for which it had ample time to prepare between hearings), opted to withdraw its pursuit of that claim. *See Ackerman v. United States*, 340 U.S. 193, 198 (1950) ("There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from."). Indeed at the time of Respondent's withdrawal, no circuit court had addressed the statute of limitations issue with respect to the Part 1904 recordkeeping requirements.

Further, had Respondent done its research, it would have found that the *Volks* case was pending before the Review Commission. *See Norgaard v. DePuy Orthopaedics, Inc.*, 121 F.3d 1074, 1075 (7th Cir. 1997) ("Ignorance of the Supreme Court's docket, although "neglect," is not "excusable"—it is nothing but negligence, which does not justify untimely action."). Although

we are not dealing with Supreme Court precedent, it is nevertheless incumbent upon Respondent, and its counsel, to be aware of potential developments in the law affecting their case. The issue of the statute of limitations as applied to the Part 1904 recordkeeping requirements was clearly up for debate, as evidenced by the *Volks* appeal to both the Review Commission and to the D. C. Circuit. The information regarding the appeal to the Review Commission was available to Respondent both prior to the commencement of this case, as well as during the interim period between trial dates. The Court finds that the existing law on this issue was not so clear as to foreclose the possibility of success on appeal. Accordingly, the Court finds that Respondent waived the issue of the statute of limitations.[9]

Respondent's Injury History

Prior to the Seventh Circuit's decision, the Court had found that Respondent violated 29 C.F.R. § 1904.4(a) because MK's epicondylitis was work-related. Because the Court has already incorporated by reference its previous findings, this section is limited to the sole question of the role that Respondent's 300-person-years of experience plays in making the determination that MK's epicondylitis was work-related.

The cited standard requires an employer to keep records of fatalities, injuries, and illnesses that are work-related. 29 C.F.R. § 1904.4(a). An employer must consider an injury or illness to be work-related if "an event or exposure in the work environment either caused *or contributed to* the resulting condition or significantly aggravated a pre-existing injury or illness."

9. Because the Court finds that Respondent waived the statute of limitations defense, it need not address the issue of whether it is required to apply as precedent the Review Commission's *Volks* decision, 23 BNA OSHC 1414, or the D.C. Circuit's *Volks* decision, 675 F.3d 752. Accordingly, Respondent's *Motion Requesting Briefing on the Issue of the Court's Obligation to Follow the Circuit Court of the District of Columbia's Decision in AKM LLC, Doing Business as Volks Constructors v. Sec. of Labor, 675 F.3d 752 (D.C. Cir. 2012)* is DENIED.

29 C.F.R. § 1904.5(a) (emphasis added). The Seventh Circuit expressed concern about the proper interpretation of the phrase "contributed to" and the role that Respondent's injury history plays in making that determination. With that framework in mind, the Court shall address each of the certified sub-questions in turn.

Relevancy of Respondent's 300-Person-Years of Experience

With respect to the issue whether Respondent's 300-person-years of experience is relevant, the Court agrees with Complainant that the issue is relevant according to the Federal Rules of Evidence, because such information could potentially inform or confirm the analysis of work-relatedness. *See* Fed. R. Evid. 401 ("Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence . . . ."). In fact, both Drs. Harrison and Covert testified as such. (Tr. 541–45, 1354–56). That being said, and as will be shown below, the Court does not believe that Respondent's injury history is determinative of whether MK's epicondylitis was work-related.

Test for Work-Relatedness

The Review Commission's test for work-relatedness was expressed in the case of *Home Depot*. The Review Commission reiterated the position of the Secretary when it promulgated the rule:

> [T]he work itself must be a tangible, discernible causal factor to render an injury or illness work-related. . . . [P]ure speculation that some event in the workplace may have caused or contributed to an injury or illness would not be enough to trigger the application of the cited regulation."

Home Depot, 22 BNA OSHC 1863. In the *Home Depot* case, an employee died after he was found underneath a truck with no visible signs of trauma. *Id.* The Review Commission found

that although it could speculate as to the cause of the injury, the evidence was insufficient to establish that a fall in the parking lot or any other event at the workplace caused or contributed to the employee's death. *Id.* Accordingly, the Review Commission held that the Secretary failed to show by a preponderance of the evidence that there was an identifiable event that led to the death of the employee in the Home Depot parking lot. *Id.*

The Review Commission's decision in *Home Depot* clearly shows that the absence of a non-occupational cause alone is not enough to establish work-relatedness. Accordingly, Complainant cannot engage in speculation as to what may have caused an injury. This much is confirmed by the preamble to Part 1904, which, in the context of musculoskeletal disorders (MSDs), "directs the employer to evaluate the employee's work activities to determine whether it is likely that one or more events or exposures in the work environment caused or contributed to the disorder." Occupational Injury and Illness Recording and Reporting Requirements, 66 Fed. Reg. 5916, 6018 (Jan. 19, 2001). This evaluation includes consideration of "the employee report, the ergonomic risk factors present in the employee's job, and other available information." *Id.*

Respondent argues that the foregoing means that, in order to prove work-relatedness in the context of MSDs, Complainant is required to provide "concrete evidence" illustrating that the hazards are "clearly linked" to the injury. Compl't Brief at 30–31. The specific evidence Respondent suggests would fit this bill is its particular injury history and data, which would fall under the description of "other available information." *See id.*

Before addressing Respondent's injury history, however, the Court must address Respondent's interpretation of the phrase "contributed to." Respondent's interpretation is

misguided in at least two respects. First, the Secretary explicitly rejected the suggestion that MSD cases should have separate criteria for determining whether an injury is recordable. 66 Fed. Reg. at 6018. In particular, it noted that "[e]mploying consistent recording criteria thus helps to achieve one of OSHA's major goals in this rulemaking, simplification." *Id.* Second, Respondent's formulation is a close approximation of a test that was explicitly rejected by the Secretary in the preamble; namely, the "predominant" or "significant" cause test. *Id.* at 5929. The preamble states that the language of the statute (29 U.S.C. § 657) indicates that "Congress did not intend to give 'work-related' a narrow or technical meaning, but rather sought to cover a *variety of causal relationships* that might exist in workplaces." *Id.* (emphasis added). The test formulated by Respondent overstates the requirement of causation and almost completely disregards the concept of contribution, which implies that, although a work activity may not be the direct cause of an injury, it is a factor among the "variety of causal relationships" that was more likely than not to cause the injury.[10] Respondent's interpretation is at odds with the statutory and regulatory scheme, which seeks to simplify the recordkeeping requirements and ensure that "the records must reflect not only those injuries and illnesses for which the precise causal mechanism is apparent at the time of recordation, but also those for which the mechanism is imperfectly understood." *Id.* at 5930.

The preamble explains this understanding of work-relatedness by way of a question-and-answer example from the BLS Guidelines. In response to a hypothetical about whether there

10. The Court would like to point out that "more likely than not" does not imply that a particular factor was more likely than any other factor to cause the injury. Rather, the phrase implies that but for the presence of the factor(s), the injury would be less likely to occur.

must be an identifiable event or exposure in the workplace to render a case recordable, the preamble states:

> Usually, there will be an identifiable event or exposure to which the employer or employee can attribute the injury or illness. However, this is not necessary for recordkeeping purposes. If it seems likely that an event or exposure in the work environment either caused or contributed to the case, the case is recordable, even though the exact time or location of the particular event or exposure cannot be identified.

Id. 6018. Only if a particular injury is known to result from some nonwork-related activity outside the work environment that merely surfaces at work is the case nonrecordable. *Id.* In other words, the preamble to the standard anticipates that, with respect to MSDs, employers will be operating from a position of imperfect knowledge regarding the potential causes of the MSD. To the extent that there are no discernible, nonwork explanations for an injury, and there are identifiable work-related risk factors that are associated with the onset of such an injury, then the foregoing analysis leads to the conclusion than such an injury should be recordable. Identifying risk factors goes beyond mere speculation about possible causes, because, as the term implies, risk factors have an identifiable and discernible connection to the injury suffered.

This is not a case where Complainant is merely saying that because there was an injury that manifested itself at work, then work is *ipso facto* the cause of the injury. Contrary to *Home Depot*, Complainant identified very specific and medically accepted risk factors that potentially contributed to MK's epicondylitis. While the Court is cognizant of the fact that merely showing there was no plausible non-work explanation for the injuries is not sufficient to establish that the injury is work-related, the lack of any concrete non-work explanation, coupled with specific, identifiable work-related risk factors is a strong indication of work-relatedness. Even if the correlation between the risk factors present at Consol Pak and MK's subsequent epicondylitis is

"imperfectly understood" or unquantifiable, it cannot be said that Complainant is merely clutching at straws to show that MK's work activities had "any possibility of playing a causal role." *See Id.* at 5929; *see also Home Depot*, 22 BNA OSHC 1863. Therefore, the Court rejects Respondent's arguments that in order to prove work-relatedness in the context of MSDs, Complainant is required to provide "concrete evidence" illustrating that the hazards are "clearly linked" to the injury. Compl't Brief at 30–31. Such an interpretation is contrary to the intent and purpose of the Act. Complainant's interpretation of the Act is reasonable and supported by the preamble to the standard. Deference to the Complainant's interpretation is warranted under *Auer v. Robins*, 519 U.S. 452 (1997).

Evaluation of Respondent's 300-Person-Years of Experience

Notwithstanding the foregoing, the Court understands that Respondent, as well as the Seventh Circuit, is more concerned with the purported countervailing evidence of Respondent's 300-person-years of experience without a case of epicondylitis (other than MK's). Given Respondent's interpretation of the regulatory language, it is understandable that it, as well as the Seventh Circuit, would find the historical injury data to be persuasive, if not determinative of the present dispute. *See Caterpillar Logistics Servs.*, 674 F.3d at 709 (stating that it viewed the phrase "contributed to" in 29 C.F.R. § 1904.5(a) as an increase in the probability of injury, above background levels, by a statistically significant amount). As was shown above, this interpretation is inconsistent with the statutory and regulatory scheme for recording injuries because it operates under assumptions that will not always be present in every case; in particular, (1) that background levels of a particular injury/illness are a known quantity; or (2) that the

particular employer will have a sufficient amount of operating history to establish whether its experience of a particular injury is consistent with, or in excess of, incidence rates in the general population. Now, that is not to say that the injury history of a particular employer, when measured against incidence rates in the general population, is not relevant. Rather, the Court is concerned that the use of such a benchmark would frustrate one of the primary purposes of the standard, which is to "promote research into the causes and prevention of occupational injuries and illnesses."[11] 66 Fed. Reg. at 5929.

In this case, although there is evidence that Respondent's experience of epicondylitis is below the levels experienced in the general population,[12] there is also evidence that there are risk factors present in Respondent's Consol Pak plant that have been recognized by the medical profession as being linked to epicondylitis. The competing inferences to be gained from these two pieces of information provide the foundation of the present controversy. The Court has already established why it has credited Dr. Harrison's testimony over that of Dr. Covert. *See Caterpillar Logistics Servs.*, 23 BNA OSHC 1806 (finding that Dr. Covert's opinion was

11. From a practical perspective, requiring every employer to engage in an analysis of historical data as compared to incidence rates in the general population introduces another set of problems. First, using such a metric may cause employers to refrain from reporting a particular injury because the rate of injury at its particular workplace is less than the incidence rate for the general population. This is clearly at odds with the purpose of the statute, which seeks to increase awareness of occupational injuries such that future injuries can be prevented. Second, as pointed out by Complainant, such an analysis would run counter to one of the primary goals of the rulemaking, which was simplification. Injecting such a requirement would place the onus on the employer to scan its entire inventory of medical records, worker's compensation claims, and other information to determine its particular incidence rate. Furthermore, Respondent would also be required to maintain OSHA-300 logs far beyond the five-year requirement imposed by the Act.

12. With respect to the 300-person-years of experience referenced by the Seventh Circuit, the Court would point out that no such testimony was presented during trial. Rather, there was testimony from Mr. Edwards, who stated that in the seven or eight years before he testified, more than 100 employees worked at Consol Pak for a total of 200,000 to 400,000 working hours. This does not come close to the number cited by the Seventh Circuit, which Complainant represents was derived from a statement by Respondent's counsel at oral argument, and indicates that the record does not contain a complete history of Respondent's incidence rate of epicondylitis. Counsel argument's at any level of judicial proceeding is not testimony and thus is given no weight except where those arguments are supported by underlying evidence.

inconsistent with the opinions of Dr. Harrison, Dr. Just, Mr. Edwards, and the AMA Guide to Evaluation of Disease and Injury Causation). As noted above, Dr. Harrison stated that a finding that epicondylitis occurred at Consol Pak at a rate greater than that of the general population would *confirm* his finding that MK's epicondylitis was work-related; however, he also stated that the historical data is not a consideration as to whether a particular incidence of epicondylitis is work-related, nor was it a part of medical best practices to do so. (Tr. 541–45).

Dr. Covert testified as to his methodology and did not indicate that statistical evaluation of risk would determine that a particular injury was work-related. (Tr. 1307, 1309–17, 1322–26, 1330–36, 1342–45). Rather, Dr. Covert testified with respect to two other cases that he had worked on—UPS and Mallinckrodt—that involved a high incidence rate of epicondylitis. Dr. Covert stated that the high rate of epicondylitis indicated the presence of "some sort of mechanical risk factor." (Tr. 1355). It was only after he determined that there was an unusual incidence of epicondylitis that he was able to determine what those risk factors were. (Tr. 1315, 1347–48, 1354–55). In other words, in the case of Mallinckrodt and UPS, the presence of a cluster of epicondylitis cases was only an indication of an unidentified mechanical risk factor. It was not until he did an analysis of the work environment itself that he was able to determine whether such a risk factor existed or whether there was a different explanation. (*Id.*). This methodology is consistent with Dr. Harrison's, which looked at the particular activities and environment that MK worked in to determine if any risk factors related to epicondylitis were present. Put simply, the use of historical injury data serves the diagnostic purpose of determining whether a particular worksite may have an ergonomics problem; however, it is not until the particular worksite is examined that a conclusion can be reached as to whether that

problem is work-related. In that regard, Respondent's injury history may be relevant, though slightly, to the Court's determination that MK's epicondylitis was work-related; however, it is by no means a determinative factor, especially when measured against the considered opinion of Dr. Harrison, who was able to clearly and convincingly describe to this Court how the risk factors present at the Consol Pak plant contributed to MK's epicondylitis.

In addition to the foregoing, the Court would like to address one last issue regarding the concept of contribution. Respondent makes much of the fact that there are numerous other employees at Consol Pak, none of whom suffered from epicondylitis. The problem, however, is that none of these people are MK. Similar to the concept of the "eggshell plaintiff" in civil litigation, you take your workers as they are. Perhaps there were numerous contributing factors to MK's epicondylitis—Dr. Covert mentioned that gender, smoking, and obesity are a few of those factors—however, the presence of multiple factors does not establish that MK's epicondylitis was not work-related. In fact, for an injury or illness to be recordable, the work activity itself need only be a contributing cause, not the only or "predominant" cause. *See* 66 Fed. Reg. at 5929. Neither Dr. Just nor Dr. Covert could provide a competing, nonwork explanation to a reasonable degree of medical certainty. Respondent's witnesses merely speculated as to potential alternative causes. (Tr. 1440–41). Dr. Harrison, on the other hand, identified specific and discernible risk factors at Consol Pak that likely contributed to MK's epicondylitis. (Tr. 460–61, 468). Accordingly, the only reasonable conclusion was that MK's epicondylitis was work-related and, therefore, recordable pursuant to 29 C.F.R. § 1904.4(a).

The preamble indicates that a determination of work-relatedness includes consideration of "the employee report, the ergonomic risk factors present in the employee's job, and other

available information." 66 Fed. Reg. at 6018. Although Respondent relied on "other information" in the form of its injury history, the Court finds that injury history is but one factor to consider when assessing whether an injury is work-related. The weight of the evidence, including MK's report and the ergonomic risk factors identified by Dr. Harrison, illustrates that MK's activities at Caterpillar's Consol Pak, at the very least, contributed to her epicondylitis.

ORDER

Based upon the foregoing, it is ORDERED that Citation 1, Item 1 is AFFIRMED and a penalty of $900.00 is ASSESSED.

SO ORDERED.

/s/Patrick B. Augustine
PATRICK B. AUGUSTINE
Judge, OSHRC

Dated: October 9, 2012
Denver, Colorado