United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. AKM LLC d/b/a VOLKS CONSTRUCTORS, AND ITS SUCCESSORS, Respondents.	OSHRC Docket No. 06-1990

APPEARANCES:

Robert W. Aldrich, Attorney; Charles F. James, Counsel for Appellate Litigation; Heather Phillips, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor of Labor for Occupational Safety and Health; M. Patricia Smith, Solicitor; U.S. Department of Labor, Washington, DC
For the Complainant

Arthur G. Sapper, Esq.; Robert C. Gombar, Esq.; James A. Lastowka, Esq.; McDermott Will & Emery, LLP, Washington, DC
For the Respondent

DECISION

Before: ROGERS, Chairman; THOMPSON and ATTWOOD, Commissioners.

BY THE COMMISSION:

At issue in this case are five citation items issued by the Occupational Safety and Health Administration ("OSHA") under the Occupational Safety and Health Act of 1970 ("Act" or "OSH Act"), 29 U.S.C. §§ 651-678, alleging that AKM LLC d/b/a Volks Constructors ("Volks") violated certain recordkeeping requirements at its facility located in Prairieville, Louisiana. Having stipulated below to all relevant facts and the appropriateness of the proposed penalties, the parties filed cross-motions for summary judgment primarily addressing whether these recordkeeping violations were time-barred by the six-month limitations period in section 9(c) of the OSH Act, 29 U.S.C. § 658(c).[1] Former Chief Administrative Law Judge Irving Sommer

[1] Section 9(c) of the OSH Act, 29 U.S.C. § 658(c), provides: "[n]o citation may be issued under this section after the expiration of six months following the occurrence of any violation."

found that the violations were not time-barred and affirmed the five citation items at issue.[2] Upon Volks's petition, the case was directed for review, and the Commission subsequently held oral argument on the matter.

DISCUSSION

The citation items at issue pertain to Volks's failure to (1) record injuries/illnesses on a "log" and on "incident report[s]," and (2) review, certify, and post records regarding employee injuries/illnesses initially sustained between January 2002 and April 2006. OSHA inspected Volks's facility on May 10, 2006, and issued the relevant citation on November 8, 2006. A timeliness issue is presented in this case because, based on the stipulated record, it is undisputed that the Secretary issued a citation for these violations more than six months after the recordkeeping duties at issue initially arose. The Secretary argues that the citation was timely because the violations continued during the five-year retention period prescribed by the recordkeeping regulations. Volks argues that these violations were one-time events that were not continuing, and that the citation cannot be considered timely on the basis of the "discovery rule."

For the reasons that follow, we find that the Secretary acted within the section 9(c) period as to the first four citation items and, therefore, affirm those items. We find, however, that the Secretary did not act within the section 9(c) period as to the fifth citation item and, therefore, vacate that item. We also find that the discovery rule has no relevance here based on the facts of this case.

I. TIMELINESS OF CITATION ITEMS 1 THROUGH 4

Section 8(c) of the OSH Act requires that "[e]ach employer . . . *make, keep and preserve* . . . such records . . . as the Secretary . . . may prescribe . . . for developing information regarding the causes and prevention of occupational accidents and illnesses." 29 U.S.C. § 657(c)(1) (emphasis added). This section goes on to direct the Secretary to "prescribe regulations requiring employers to *maintain accurate records* of . . . work-related deaths, injuries and illnesses . . . ." 29 U.S.C. § 657(c)(2) (emphasis added). To implement these statutory mandates, the Secretary has promulgated regulations that effectively require employers to *make* records—specifically, record, review and certify information about employee injuries and

[2] On review are Items 1 through 5 of Serious Citation 2. All other citation items were disposed of in a partial settlement agreement prior to the judge's decision.

illnesses, as well as *keep* and *preserve*, i.e. to *maintain*, such records for five years. *See* 29 C.F.R. §§ 1904.29(b)(2), 1904.29(b)(3), 1904.32(a)(1), 1904.32(b)(3), 1904.33(a).

The Commission has long recognized that these duties must be considered when assessing whether a recordkeeping violation is of a continuing nature for purposes of the six-month limitations period in section 9(c) of the Act. The Commission first addressed this issue eighteen years ago in *Johnson Controls, Inc*., 15 BNA OSHC 2132, 1991-93 CCH OSHD ¶ 29,953 (No. 89-2614, 1993), where the employer erroneously deleted the entry of an employee's elevated blood lead level from its illness and injury log. OSHA issued a citation for that recordkeeping violation more than six months after the entry was deleted. In rejecting the employer's contention that the citation was untimely, the Commission stated:

> "[I]t is of no moment that a violation *first* occurred more than six months before the issuance of a citation, so long as the instances of noncompliance and employee access providing the basis for the contested citation[] occurred within six months of the citation's issuance."
>
> Just as a condition that does not comply with a standard issued under the Act violates the Act until it is abated, an inaccurate entry on an OSHA [log] violates the Act until it is corrected, or until the 5-year retention requirement of [the regulation] expires. Thus, a failure to record an occupational injury or illness as required by the Secretary's recordkeeping regulations . . . does not differ in substance from any other condition that must be abated pursuant to the occupational safety and health standards . . . .

15 BNA OSHC at 2135-36, 1991-93 CCH OSHD at p. 40,965 (quoting *Cent. of Ga. R.R.*, 5 BNA OSHC 1209, 1211, 1977-78 CCH OSHD ¶ 21,688, p. 26,035 (No. 11742, 1977), *aff'd*, 576 F.2d 620 (5th Cir. 1978)); *see Gen. Dynamics Corp.*, 15 BNA OSHC 2122, 2128, 1991-93 CCH OSHD ¶ 29,952, p. 40,957 (No. 87-1195, 1993) ("Part 1904 creates an obligation to keep a log entry for each occupational injury or illness each day for a five-year period.").[3] Since that time, the Commission has consistently applied the approach in *Johnson Controls* to recordkeeping cases involving issues of timeliness. *See, e.g., Kaspar Wire Works, Inc*., 18 BNA OSHC 2178, 2185-86, 2000 CCH OSHD ¶ 32,134, p. 48,411 (No. 90-2775, 2000) (rejecting employer's contention that recordkeeping violations cited more than six months after initial failure to record but within five-year retention period should be vacated as untimely; Commission noted it "has

[3] We emphasize here that the Commission has explicitly held that unlike other federal statutes in which an overt act is needed to show *any* violation, the OSH Act penalizes both overt acts *and* failures to act in the face of an ongoing, affirmative duty to perform prescribed obligations. *Gen. Dynamics*, 15 BNA OSHC at 2129-30, 1991-93 CCH OSHD at pp. 40,959-60.

already considered and rejected this argument in *Johnson Controls*"), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001); *Manganas Painting Co.*, 21 BNA OSHC 2043, 2048, 2004-09 CCH OSHD ¶ 32,945, p. 53,801 (No. 95-0103, 2007) (consolidated) (same), *rev'd in part on other grounds*, 540 F.3d 519 (6th Cir. 2008); *Hercules, Inc.*, 20 BNA OSHC 2097, 2104, 2106 n.2, 2004-09 CCH OSHD ¶ 32,840, pp. 52,796, 52,798 n.2 (No. 95-1483, 2005) (citing *Johnson Controls* with approval in majority and dissenting opinions); *Arcadian Corp.*, 20 BNA OSHC 2001, 2013, 2004-09 CCH OSHD ¶ 32,756, pp. 52,078-79 (No. 93-0628, 2004) (same).

Moreover, circuit courts have found continuing violations in similar circumstances—where there was a failure to act in the face of an ongoing obligation. The D.C. Circuit has repeatedly refused to hold that actions " 'to compel agency action unlawfully withheld or unreasonably delayed' are time-barred" even "if they were initiated years after an agency fails to meet a statutory deadline." *Wilderness Soc'y v. Norton*, 434 F.3d 584, 588-89 (D.C. Cir. 2006) (cases cited therein). In *Wilderness Society*, the court rejected the Secretary of the Interior's contention that a mandamus action to compel issuance of final regulations was time-barred " 'because the [petitioner] does not complain about what the agency has done but rather about what the agency has yet to do.' " *Id.* (citation omitted). Similarly, the Fourth Circuit has found that a company's failure to conduct monthly effluent sampling required by the Clean Water Act constituted a continuing violation, relying in part on the company's failure to comply with a requirement to maintain sampling reports for three years. *Sierra Club v. Simkins Indus., Inc.*, 847 F.2d 1109, 1114-15 (4th Cir. 1988), *cert. denied*, 491 U.S. 904 (1989). Like *Johnson Controls*, *Sierra Club* emphasized the record retention requirements in finding a continuing violation. *Id.*

On review, Volks asks that we overturn the Commission's decision in *Johnson Controls* based on its contention that the case is no longer good law due to intervening precedent from the Supreme Court, as well as various courts of appeals. Specifically, Volks asserts that three lines of cases support its position that the citation items at issue are time-barred because they were not issued within six months of any "discrete, violative act." The cases upon which Volks relies share one thing in common with this case—they first and foremost present an issue of statutory interpretation. But that is where the similarity ends, for the statutes are fundamentally different, as are their respective interpretations. Accordingly, we agree with the Secretary that these cases

do not undermine the Commission's longstanding precedent on the continuing nature of recordkeeping violations.[4]

a. *Ledbetter* Cases

In the first line of cases, courts have held under various statutes that when only the continuing effects of a past violation fall within the limitations period, the action is untimely. In a case representative of this line—*Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act, Pub. L. 111-2, 123 Stat. 5 (2009) (amending 42 U.S.C. § 2000e-5)—the Supreme Court held that an employee's discrimination claim under Title VII of the Civil Rights Act of 1964 was time-barred.[5] The *Ledbetter* Court ruled that the relevant limitations period was triggered by a "discrete, violative act"—the employer's improper "pay-setting" evaluation of the employee—and that the employer's subsequent salary payments resulting from that evaluation were not separate actionable violations. *Ledbetter*, 550 U.S. at 629-31. We reject Volks's argument that under the Court's rationale, the citation items here are time-barred because the recordkeeping failures, like the pay-setting evaluation, only occurred more than six months prior to the citation, and no further "violative act" occurred thereafter.

Neither *Johnson Controls* nor the violations here fall within the ambit of the cases upon which Volks relies. In *Ledbetter*, there was an initial, discrete act that violated a statutory requirement, followed only by that act's effects. But *Johnson Controls*, as well as the case before us, involves not only an initial failure to act in violation of a requirement—the failure to

---

[4] We note that courts addressing the issue have held that deference is owed to the Secretary with respect to the OSH Act as well as OSHA standards and regulations. *E.g.*, *Martin v. OSHRC*, 499 U.S. 144 (1991); *Nat'l. Assoc. of Home Builders v. OSHA*, 602 F.3d 464 (D.C. Cir. 2010); *cf. Interamericas Investments, Ltd. v. Bd. of Governors of the Fed. Reserve Sys.* ("*Interamericas*"), 111 F. 3d 376, 382 (5th Cir. 1997) (holding that courts "should defer to the agency interpretation whether a continuing violation theory is available under a certain statute if the statute of limitations is entrusted to the agency's interpretation").

[5] *See Felter v. Kempthorne*, 473 F.3d 1255, 1260 (D.C. Cir. 2007) (finding no continuing violation where only the effects of decision terminating plaintiffs' status as Indians occurred within limitations period, citing earlier precedent holding that "lingering effect of an unlawful act is not itself . . . unlawful"); *Garcia v. Brockway*, 526 F. 3d 456, 461-64 (9th Cir.) (en banc) (finding no continuing violation where only effects of violation of Fair Housing Act's design/construction requirements for handicapped access continued into limitations period), *cert. denied sub nom. Thompson v. Turk*, 129 S. Ct. 724 (2008).

make a record of the particular employee's injuries/illnesses at issue, but also subsequent violative conduct—the failure to retain that record throughout the five-year retention period.

Volks attempts to find refuge from the effects of the mandated record retention duty in the requirement under § 1904.29(b)(3) that an employer "enter each recordable injury or illness . . . within seven [] calendar days of receiving information that a recordable injury or illness has occurred." 29 C.F.R. § 1904.29(b)(3). Relying on two circuit court cases, Volks argues that, despite the retention requirement, the seven-day period for recording precludes a finding that a recordkeeping violation continues beyond the end of the seven days.

In the first case Volks cites, *Interamericas*, 111 F. 3d 376, the court found violations of the Bank Holding Company Act ("BHCA") to be continuing. It stated that "for reporting statutes such as the BHCA, so long as the reporting *need not occur within a certain time span*, a failure to report certain conditions will generally constitute a continuing violation for so long as the failure to report persists." *Id.* at 382 (emphasis added). Volks points out that under the court's caveat, if the reporting *is* required to "occur within a certain time span," a failure to report cannot be considered a continuing violation. Thus, Volks contends that the recordkeeping duty here must "occur within a certain time span"—the seven-day period—and, therefore, any such violation of that duty cannot be a continuing violation.

We disagree. In identifying the type of requirement that would not result in a continuing violation, it appears the court was referring to provisions that bracket both the beginning and end of a period *during* which a reporting obligation exists. The requirement at issue in Item 5, discussed below, is one such provision in that it requires a summary to be posted for a designated three-month period. 29 C.F.R. § 1904.32(b)(6). In contrast, the requirement at issue here sets a seven-day grace period *before* which the recording must occur—there is no duty to record until that seventh day. Similarly, the BHCA provision cited by the *Interamericas* court as support for its conclusion is one that sets a 180-day period *before* which a bank holding company has to register. 111 F. 3d at 382 (citing 12 U.S.C. § 1844(a)). Just as a failure to register by the 180th day would be a continuing violation under the BHCA, Volks's failures here to record by the seventh day are continuing violations as well.

In the second case Volks cites, the Supreme Court noted that the "standard rule [is] that the limitations period commences when the plaintiff has a 'complete and present cause of action.' " *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S.

192, 201 (1997). Volks argues that under *Bay Area*, the cause of action for each of the recordkeeping violations at issue becomes "complete and present" upon the expiration of the seven-day recording period. But Volks fails to account for its breach of the duty to retain the record of that injury/illness for five years. Accordingly, we find these cases do not support Volks's position.

Under a plain reading of the regulatory language, the seven-day time period establishes that an employer's recordkeeping violation arises upon the expiration of the seventh day. *Manganas Painting Co.*, 21 BNA OSHC 1964, 1990, 2004-09 CCH OSHD ¶ 32,908, pp. 53,405-06 (No. 94-0588, 2007). But there is no basis for concluding that this specified recording period precludes the violation from being of a continuing nature. Nor is it logical to view a requirement that, in effect, delays the onset of a violation for a set period of time as somehow extinguishing a duty plainly established by the Act and expressly implemented by the Secretary's regulations mandating retention of the required records. *See United States v. Cores*, 356 U.S. 405, 408-09 (1958) (holding alien's presence in United States past permit's allotted time "satisfies the definition of the crime" "at the instant of expiration" "but does not exhaust it," and violation continues until alien "physically leaves the United States"); *see also United States v. Advance Mach. Co.*, 547 F. Supp. 1085, 1089 (D. Minn. 1982) (finding 24-hour time limit for reporting product defect to regulatory agency "does not extinguish the continuing statutory duty" to report defects where time limit's only purpose was to "increase the likelihood that a substantial product hazard will come to the attention of the [agency] in a timely fashion so that it could act swiftly to protect the consuming public"); *Cent. of Ga. R.R.*, 5 BNA OSHC at 1211, 1977-78 CCH OSHD at p. 26,035 (stating that for section 9(c) purposes, a violation "occurs" when an applicable standard is not complied with and employees have access to the violative condition, and therefore "it is of no moment that a violation *first* occurred more than six months before the issuance of a citation, so long as . . . noncompliance . . . occurred within six months of the citation's issuance").

Thus, the *Ledbetter* line of cases is inapposite to a situation where, as here, a failure to record is combined with a continuing failure to maintain that record for a specified period. *See E. Smalis Painting Co.*, 22 BNA OSHC 1553, 1580 (No. 94-1979, 2009) (overruling prior holding that improperly focused exclusively on language of cited subsection, noting that "this interpretation elevates form over substance by emphasizing the coincidental placement of

particular wording, and ignores the basic principle of statutory construction that regulations should be read as a consistent whole. 2A Norman J. Singer, *Statutes and Statutory Construction* § 46:05 (6th ed. 2000) ('A statute is passed as a whole . . . and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section . . . [and] it is not proper to confine interpretation to the one section to be construed.')").

b. *Toussie* Cases

The second line of cases upon which Volks relies includes various circuit court decisions that post-date *Johnson Controls,* as well as an earlier Supreme Court criminal case, *Toussie v. United States.*, 397 U.S. 112 (1970). Employing basic principles of statutory construction, *Toussie* holds that in the criminal context, a violation cannot be "continuing" unless the statute in question contains "explicit language" that "compels" such treatment. *Toussie*, 397 U.S. at 115 (holding that offense could not be continuing "unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime . . . is such that Congress must . . . have intended that it be treated as a continuing one"); *cf. Ctr. for Biological Diversity*, 453 F.3d 1331, 1334 (11th Cir. 2006) (interpreting statute in a civil suit to determine whether the continuing violation doctrine applies and mentioning *Toussie* without addressing whether the "explicit language" test applies in the civil context).[6] The Court noted in *Toussie* that the draft registration statute at issue lacked language that "clearly contemplate[d] *a prolonged course of conduct*," and the legislative history of the draft law, which was "slightly ambiguous," supported this reading. 397 U.S. at 116-22 (emphasis added). As a result, the Court reversed the defendant's conviction for failing to register for the draft on his birthday "or within five days thereafter" because the limitations period had not been met. *Id.* at 112.

Despite Volks's contrary contention, none of the cases it cites have held that the "explicit language" test regarding continuing violations applies in the civil context. And in

[6] In *3M Co. v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994), the court held that an action for civil penalties for a failure to file reports required by the Toxic Substances Control Act was not tolled and, therefore, was time-barred by the applicable statute of limitations. Although the court, citing *Toussie v. United States.*, 397 U.S. 112 (1970), and another criminal case, expressed "considerable doubt" that the violations were of a continuing nature, we note that this statement was dictum as the court acknowledged that it was "pass[ing] over" the issue, which was not before it on review. *3M Co.*, 17 F.3d at 1455 n.2 (citing *Toussie*; *United States v. McGoff*, 831 F.2d 1071, 1079 (D.C. Cir. 1987)).

adopting the "explicit language" test in *Toussie*, the Court emphasized that "criminal limitations statutes are 'to be liberally interpreted in favor of repose . . . .' " *Id.* at 115. In contrast, in civil cases prosecuted by the government, such as those arising under the OSH Act, "statutes of limitations . . . are . . . strictly construed in favor of the government *against* repose." *Interamericas*, 111 F. 3d at 382 (emphasis added); *see Diamond v. United States*, 427 F.2d 1246, 1247 (Ct. Cl. 1970) (rejecting *Toussie*'s application in civil action because "the considerations [in *Toussie*] were entwined with the criminal aspects . . . [that] have little relevance to the problems in civil cases"). But in any event, even if we were to apply the "explicit language" test here, we agree with the Secretary that the OSH Act plainly requires a prolonged course of conduct, as it prescribes that employers must "make, *keep* and *preserve*" records of workplace illnesses and injuries. 29 U.S.C. § 657(c)(1) (emphasis added). And OSHA's recordkeeping regulations implementing this statutory mandate establish a retention period of five years, rendering an employer's failure to possess the required records at any time during the retention period a violation of the OSH Act.[7] *See* 29 C.F.R. §§ 1904.29(b)(3), .33(a). Accordingly, we conclude that rather than being at odds with *Toussie*, as Volks contends, *Johnson Controls* is consistent with its logic.

c. Discovery Rule Cases

The third line of cases involves the applicability of the "discovery rule," under which a statute of limitations begins to run when a violation is discovered or reasonably should have been discovered. *See, e.g.*, *TRW Inc. v. Andrews*, 534 U.S. 19 (2001); *3M Co.*, 17 F.3d 1453. One effect of applying this doctrine in an OSHA case is that, in certain circumstances, the Secretary may cite an employer more than six months after a violation has occurred. For example, in

[7] Volks argues that the Secretary cannot rely on her regulations as the basis for considering the violations continuing, citing *United States v. Del Percio*, 870 F.2d 1090 (6th Cir. 1989). In *Del Percio*, the issue was whether a criminal prosecution based on an allegedly false regulatory filing was time-barred. Applying *Toussie*, the court assessed whether the nature of the offense charged indicated a congressional intent that it be considered continuing. The court indicated that such an intent must be found in the criminal statute at issue rather than in the regulations that required the filing. It found the prosecution time-barred "given the sparse language of the statutory provisions under which the defendants [were] charged." *Id.* at 1097. Here, in contrast, we have explicit statutory language, and a civil rather than criminal statute that implicates different interpretive presumptions. Furthermore, the Secretary here is not relying solely on a regulation to establish the continuing nature of the violations. Rather, section 8(c) of the OSH Act is the principal basis for the showing of such intent.

Yelvington Welding Service, 6 BNA OSHC 2013, 2015-16, 1978 CCH OSHD ¶ 23,092, pp. 27,907-08 (No. 15958, 1978), the Commission found that a citation was timely because the employer's failure to comply with a requirement to notify OSHA of a fatal accident deprived OSHA of the notice that would have alerted it to the violative condition within six months of its occurrence.

Volks argues that, pursuant to *TRW* and *3M*, the discovery rule does not enable OSHA to issue a citation for a recordkeeping violation more than six months after the close of the seven-day period provided in 29 C.F.R. § 1904.29(b)(3).[8] But contrary to the contention of our dissenting colleague, the Secretary is not claiming that the discovery rule enabled her to cite Volks more than six months after the violations first occurred. Nor is there any suggestion that the Secretary discovered, or should have discovered, these violations prior to her inspection. Rather, the timeliness of the citation at issue here is predicated solely on the continued existence of the violations throughout the five-year retention period, which means that OSHA did, in fact, issue the citation within six months of the occurrence of the recordkeeping violations. Accordingly, the discovery rule has no relevance to this inquiry.[9]

d. Other Timeliness Arguments

Volks raises several other arguments in support of its contention that the citation at issue was untimely. We find that none of them have merit. We begin with the claim that the recordkeeping violations at issue should not be considered continuing because of the doctrine of staleness and because a contrary finding would be inconsistent with other regulations that

[8] The parties stipulated that "the injuries and illnesses had not been recorded . . . on the Form 300 ('the log') within seven calendar days after the . . . date that Volks received information that a recordable injury illness or injury had occurred."

[9] Volks also argues against applying "the discovery rule of *Johnson Controls*. . . ," an apparent reference to the aspect of the rule that delays commencement of the limitations period in some circumstances. Although the conclusion in *Johnson Controls* was phrased with reference to the discovery rule—"[w]e therefore conclude that an uncorrected error or omission…may be cited six months from the time the Secretary does discover, or reasonably should have discovered, the facts necessary to issue the citation"—the Commission's analysis distinctly focused on the fact that the error or omission constituted a continuing violation. *Johnson Controls*, 15 BNA OSHC at 2135-36, 1991-93 CCH OSHD at p. 40,965. Specifically, the Commission reasoned that because the violation continued into the five-year retention period, the citation was issued no more than six months from the occurrence of the recordkeeping error. *Id.*, 1991-93 CCH OSHD at p. 40,965. In short, the result in *Johnson Controls*, like the result here, does not rest on application of the discovery rule.

address when an employer must review and correct the records. As to staleness, Volks argues that treating the violations as continuing through the five-year retention period allows too much time to elapse after the events that initially gave rise to them occurred, citing to the Supreme Court's concern in *Ledbetter* that the "passage of time may seriously diminish the ability of the parties and the fact-finder to reconstruct what actually happened. . . ." *See Ledbetter*, 550 U.S. at 632.

The parties here have stipulated that Volks did not record injuries/illnesses that are required to be recorded. Thus, any concerns regarding the ability of witnesses to recall facts relating to whether the injuries/illnesses were required to be recorded in the instant case are moot. And there is clearly an endpoint here—the regulation's five-year retention period, which does not raise staleness concerns. *See* 18 U.S.C. § 3282 (setting forth five-year federal criminal statute of limitations); 28 U.S.C. § 2462 (setting forth five-year federal civil statute of limitations); *cf. Ledbetter*, 550 U.S. at 655 (quoting *Goodwin v. Gen. Motors Corp*., 275 F.3d 1005, 1009-10 (10th Cir.), *cert denied*, 537 U.S. 941 (2002), which noted that cause of action could continue indefinitely if considered a continuing violation).

We also find no merit to the claim that considering the violations as continuing is inconsistent with two recordkeeping regulations that address the review and correction of records. Volks argues that §1904.33(b)(1), which requires an employer to update and correct logs based on newly discovered information,[10] and § 1904.32, which requires an annual review of the log to verify that the entries are complete and accurate, would be rendered superfluous and/or redundant if a violation of the duty to record under § 1904.29(b)(3) were to be deemed a continuing violation throughout the five-year retention period.

These provisions require the employer to correct, update and review the records in specific circumstances or at scheduled times. It would be anomalous to construe such provisions as either excusing the violation of a requirement to properly record information or relieving the

[10] This regulation states:

> **Do I have to update the OSHA 300 Log during the five-year storage period?** Yes, during the storage period, you must update your stored OSHA 300 Logs to include newly discovered recordable injuries or illnesses and to show any changes that have occurred in the classification of previously recorded injuries and illnesses. If the description or outcome of a case changes, you must remove or line out the original entry and enter the new information.

29 C.F.R. § 1904.33(b)(1).

employer of the obligation to correct errors before a periodic review. On the contrary, as the Secretary correctly points out, these provisions constitute *additional* duties to ensure the continued accuracy of particular forms. *See* 2A Norman J. Singer, *Statutes and Statutory Construction* § 46:6 (noting "courts do not construe different terms within a statute to have the same meaning"). In these circumstances, we find the continuing obligation to possess properly completed recordkeeping forms is separate from the obligation to correct and/or update those forms at specified times and, therefore, would not be superfluous and/or redundant. *Id.* ("A statute should be construed so that effect is given to all its provisions . . . . No clause, sentence or word shall be construed as superfluous, void or insignificant if a construction can be found which will give force to and preserve all the words of the statute.").

Volks's remaining argument is that amendments made by OSHA in 2002 to the recordkeeping regulations show that an underlying premise of *Johnson Controls*—that the earlier version of those regulations was intended to require employers to update and correct records during the five-year retention period—was erroneous. Specifically, it points out that the prior version of the regulations made no reference to updating or correcting the records, but when the regulations were revised OSHA inserted new language requiring updated information. *See* 29 C.F.R. § 1904.33(b).

The prior version of the regulations, however, implicitly required that the records be accurate—the retention of inaccurate records could hardly be said to effectuate the regulations' purpose. Indeed, section 8(c)(2) of the OSH Act mandates that the Secretary issue regulations "requiring employers to maintain *accurate* records." 29 U.S.C. §§ 657(c)(2) (emphasis added). Therefore, in *Johnson Controls* the Commission correctly concluded that employers were required under the prior regulations to correct omissions and other errors. That this implicit requirement was later made explicit in the revised regulations is indicative only of the Secretary's attempt to improve the regulations' clarity, not to change their substance, as the Secretary herself acknowledged in the preamble. *See* Occupational Injury and Illness Recording and Reporting Requirements, 66 Fed. Reg. 5916, 5918 (Jan. 19, 2001) (final rule) (noting that new regulations were written in "plain language" to comply with the President's June 1, 1998 Executive Memorandum ("Executive Memorandum")).[11]

[11] In the final rule of its revised recordkeeping regulations, OSHA also manifested its view that the prior version had required employers to correct errors and omissions by its reference to 1986

In sum, we conclude that our long-standing case law regarding continuing violations under the OSH Act falls squarely within the parameters of applicable legal precedent. *CBOS West, Inc. v. Hedrick G. Humphries*, 553 U.S. 442, 451-52 (2008) (noting that stare decisis considerations "strongly support . . . adherence" to "well embedded" legal principles, and "impose a considerable burden on those who would seek a different interpretation that would necessarily unsettle many . . . precedents"). Unlike the first two lines of cases Volks relies on, the instant case involves the obligation to make a record and maintain it for a specified time period. This mandate to maintain the record underlines the continuing nature of the violation as recognized by the Commission in *Johnson Controls*, *General Dynamics*, and subsequent Commission precedent. The third line of cases is inapposite because the Secretary met the time limitation set forth in section 9(c) of the Act without resort to the discovery rule. Concomitantly, this case does not present concerns about staleness because the citation items were filed within six months of the existence of the violation. Nor does our conclusion in this regard render superfluous any of the recordkeeping regulations that address updating/correcting records because they supplement the duty imposed by the cited regulations to record, summarize and post correct information. Finally, revisions to predecessor recordkeeping regulations that specifically required correcting/updating records did not establish new duties; rather, they clarified obligations that were implicit in the earlier provisions. In these circumstances, we find that citation items 1 through 4, all of which address recordkeeping violations that continued through the five-year retention period, were timely filed.

II. TIMELINESS OF CITATION ITEM 5

In Item 5, the Secretary alleged that Volks failed to post an annual summary for the full time period required by 29 C.F.R. § 1904.32(b)(6). Under this regulation, the employer must

---

Bureau of Labor Statistics ("BLS") guidelines. Those guidelines clarified a number of issues under the prior version of the regulations, including the duty to correct records during the 5 year retention period. 66 Fed. Reg. at 5919. The guidelines were issued in response to stakeholder requests received by the Department of Labor for an expanded discussion of employer recordkeeping obligations. *See* BLS Recordkeeping Guidelines for Occupational Injuries and Illness, ch. II.A-2 (OMB No. 1220-0029, 1986) (stating in part that the "[l]og must be kept current and retained for 5 years following the end of the calendar year to which they relate. If there is a change in the extent or outcome of a case entered on the log, the first entry should be lined out and a corrected entry made. An entry may be lined out if a case is later found to be nonrecordable. Entries should be made for previously unrecorded cases that are discovered or found to be recordable after the end of the year in which the case occurred").

post the summary from February 1 until April 30 of the applicable year.[12] Volks stipulated that it violated this regulation by posting its summary only until February 28, 2006, but maintains that the citation item was time-barred. In addition to the arguments discussed above, it emphasizes that this regulation sets out a "date certain (April 30th) by which the posting of the annual summary may come to an end." The Secretary counters that having failed to keep the summary posted throughout the three-month period designated in the regulation, the violation continued throughout the remainder of the year. She bases this argument on her view that the regulation implicitly requires an employer that misses the designated three-month period to "post for some [subsequent] three[-]month period" of the applicable year (2006). She claims that the citation was timely because it was issued within six months of the end of that year.

The Secretary's argument is simply untenable. The regulation imposed a duty to post the summary for only a specified time period, and the Secretary failed to issue a citation within six months of the last day of that specified period. Section 1904.32(b)(6) unambiguously requires the summary to be posted from February 1 to April 30. Like the § 1904.29(b)(3) requirement in Items 1 through 4 that sets an onset date (seven days after receiving certain information) for a duty (making a record), this provision sets an onset date of February 1 by which the posting of the summary must begin. And like the § 1904.33(a) requirement that establishes an additional duty to retain the records for five years, § 1904.32(b)(6) establishes a duty to continue to post the summary for three months. Having failed to continue to post the summary after March 1, Volks was in violation of that duty through April 30. Just as the plain language of § 1904.33(a) ends the duty to retain records after five years, the plain language of § 1904.32(b)(6) ends the duty to post after April 30.

The Secretary's contention that requiring the summary to be posted during any three month period of the year would better serve the purposes of the regulation is the type of consideration that normally cannot be reached in the face of unambiguous regulatory language. *E.g.*, *Beverly Healthcare-Hillview*, 21 BNA OSHC 1684, 1685, 2004-09 CCH OSHD ¶ 32,845, p. 52,835-3 (No. 04-1091, 2006) (consolidated) (noting "[i]f the meaning of the language is 'sufficiently clear,' the inquiry ends there") (citation omitted), *aff'd in relevant part*, 541 F.3d

[12] That provision requires, in part, that an employer "post the summary no later than February 1 of the year following the year covered by the records and keep the posting in place until April 30." 29 C.F.R. § 1904.32(b)(6).

193 (3d Cir. 2008). Because the Secretary issued this Item more than six months after the close of the designated posting period, we find that it was untimely and vacate Item 5.

III. MERITS OF CITATION ITEMS 1 THROUGH 4

a. Items 1 and 2

Under these citation items, the Secretary alleges that Volks failed to complete OSHA 301 Incident Reports ("Report") for the 67 injuries that occurred between August 2002 and April 2006, in violation of 29 C.F.R. § 1904.29(b)(2), and failed to enter 102 recordable injuries that occurred between January 2002 and April 2006 on its OSHA 300 Logs ("Log"), in violation of 29 C.F.R. § 1904.29(b)(3).[13] For the following reasons, we affirm both items.

1. Item 1—Whether a Report is required absent a Log entry

Volks asserts that the judge erred in affirming Item 1 because § 1904.29(b)(2) requires an employer to prepare a Report only "for each recordable injury or illness *entered on the OSHA 300 Log*." (Emphasis added.) Since Volks made no entries in the Log for these injuries/illnesses, it maintains that its failure to make a Report cannot constitute a violation of § 1904.29(b)(2).[14] The Secretary, however, interprets the regulation as requiring a Report when an injury or illness is recordable, irrespective of whether an entry was made on the Log.

We agree with the Secretary's interpretation, as we find that it is consistent with the overall structure, language, purpose and history of the regulation. *See Unarco Commercial Prods.*, 16 BNA OSHC 1499, 1502-03, 1993-95 CCH OSHD ¶ 30,294, pp. 41,732-33 (No. 89-

---

[13] The cited sections provide:

> **§ 1904.29 Forms**
> . . .
> (b) *Implementation.*
> . . .
> (2) *What do I need to do to complete the OSHA 301 Incident Report?* You must complete an OSHA 301 Incident Report form, or an equivalent form, for each recordable injury or illness entered on the OSHA 300 Log.
> (3) *How quickly must each injury or illness be recorded?* You must enter each recordable injury or illness on the OSHA 300 Log and 301 Incident Report within seven (7) calendar days of receiving information that a recordable injury or illness has occurred.

[14] The relevant stipulation states that "[t]he injuries and illnesses [relating to Citation 2, Items 1 and 2] had not been recorded on either form [300 or 301] by the date the OSHA inspection was initiated . . . ."

1555, 1993) (looking to the text, structure, and history of regulation to determine its meaning, and noting that Secretary is accorded deference where her interpretation of ambiguous regulatory language is reasonable). In terms of structure, the relevant portion of the applicable regulations, § 1904 Subpart C, is divided into two types of requirements—criteria for determining what injuries/illnesses must be recorded, i.e. "recordable" information (§§ 1904.4 to 1904.11), and the rules regarding the particular forms onto which recordable information must be entered, the OSHA 300 Log and 301 Incident Report (§ 1904.29).[15] This bifurcation is echoed in the introductory "Note to Subpart C" at the beginning of the subpart, which states: "This Subpart describes the work-related injuries and illnesses that an employer must enter into the OSHA records *and* explains the OSHA forms that employers must use to record work-related fatalities, injuries and illnesses." (Emphasis added.) But Volks argues that the forms provision (which prescribes what forms must be used for listing particular recordable information) imposes an additional requirement (whether information has been entered on the Log) for initially determining whether an injury/illness must be entered on the Report. This is plainly at odds with the overall structure of the regulation.[16] *See U.S. Nat'l Bank of Or. v. Ind. Ins. Agents*, 508 U.S. 439, 455-56 (1993) (considering Federal Reserve Act's structure in resolving statutory interpretation issue); *cf. Smith v. Brown*, 35 F.3d 1516, 1523 (Fed. Cir. 1994) (concluding that location of Veterans Affairs provision in "the structure of the regulation casts considerable light [on its meaning]"), *superseded by statute*, Revision of Veteran's Benefits Decisions for Clear and Unmistakable Error, Pub. L. 105-111, 111 Stat. 2271 (1997) (amending 38 U.S.C. § 7111).

Volks's reading of the cited provision also ignores a fundamental canon of statutory construction: "language cannot be construed in a vacuum" but must be "read in [] context and with a view to [its] place in the overall statutory scheme." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). Subpart C is written in an instruction format that reflects the Secretary's effort to convey its requirements in a user-friendly, step-by-step manner. *See* 66 Fed. Reg. at

[15] The remainder of the subpart is "reserved" and, therefore, contains no regulatory text. *See* 29 C.F.R. §§ 1904.13-.28.

[16] That the recordability criteria serve as the sole trigger for having to complete a Report is also reflected in §1904.29(a), which states: "Basic requirement. You must use OSHA 300, 300-A, and 301 [Report] forms, or equivalent forms, *for recordable injuries and illnesses*." 29 C.F.R. § 1904.29(a) (emphasis added). Similarly, § 1904.29(b)(3) provides that the employer "must enter each recordable injury or illness on the OSHA 300 Log *and* 301 Incident Report within seven (7) calendar days . . . ." 29 C.F.R. § 1904.29(b)(3) (emphasis added).

5918 (noting that the current recordkeeping regulations were written in question and answer format to comply with the Executive Memorandum to "make[] the rule easier for employers and employees to use and improve[] the quality of the records. . . ."). The phrase "entered on the OSHA 300 Log" that appears in § 1904.29(b)(2) must therefore be construed in the context of its role in a series of step-by-step instructions. Having explained to the employer in § 1904.29(b)(1) that recordable injuries/illnesses must be entered in the Log, §1904.29(b)(2) describes the next step—fill out a Report. Since the employer would have had to determine recordability in order to comply with the previous step regarding the Log, there is no need to repeat the instruction to determine recordability for purposes of the Report. As such, the instruction to create a Report for each injury/illness "entered on the OSHA 300 Log" represents a practical, plain language approach to telling the employer that this additional record must be made for each recordable injury/illness.

Moreover, Volks's contention that these provisions require a Log entry before a Report must be made undermines the very purpose of the Report—to generate a detailed record about each recordable injury/illness. *See* 66 Fed. Reg. at 6025 (describing details required in the Report). Under Volks's interpretation, an employer would look only to whether an injury or illness has been entered in the Log and not consider whether the injury and illness information is recordable in the first place. *See* 29 C.F.R. § 1904.29(a), (b)(3) (reflecting OSHA's intent that Report be made whenever recordability criteria met). Treating recordation on the Log as a criterion for making a Report not only acts to effectively restrict an employer's Report obligation, but essentially rewards any failure to comply with the Log requirement. *See Sierra Club*, 847 F.2d at 1114-15 (holding that mill operator with continuing obligation to retain records and file completed reports "cannot successfully defend against its failure to file complete [reports] or retain records by noting that the underlying data was never collected in the first instance" as allowing such a defense would "effectively provide . . . [an] opportunity to escape liability").

Finally, the provision's regulatory and enforcement history is consistent with the Secretary's interpretation. Like the current regulation, the predecessor recordkeeping provision used recordability as the trigger for requiring a more detailed record in the Report, stating that, in addition to what was then known as the OSHA 200 log, employers must prepare a "supplementary" (more detailed) record "for each occupational injury or illness." 29 C.F.R.

§ 1904.4 (1986) (former regulation requiring completion of the "OSHA 101" form). In explaining that requirement, the BLS guidelines in effect at that time used the same step-by-step wording as the current regulation: "[f]or every injury or illness *entered on the log*, it is necessary to record additional information on the supplementary record." BLS Recordkeeping Guidelines for Occupational Injuries and Illnesses, ch. II.C (OMB No. 1220-0029, 1986) (emphasis added). Indeed, as discussed above, the Secretary's modification of the regulation's wording simply reflects an effort to comply with a policy to use plain language rather than any intent to substantively change the requirements.[17] As to enforcement under the predecessor provision, the Secretary's practice was to issue separate citations for an employer's failure to maintain the OSHA 200 log and its failure to prepare the supplementary OSHA 101 for the same recordable events. *See Hercules, Inc.*, 20 BNA OSHC at 2098, 2004-09 CCH OSHD at p. 52,791 (issuing separate citations for failure to record 189 injuries on OSHA 200 and failure to maintain OSHA 101 for "each of the injuries"); *Hern Iron Works, Inc.*, 16 BNA OSHC 1206, 1207, 1993-95 CCH OSHD ¶ 30,046, pp. 41,249-50 (No. 89-433, 1993) (issuing separate citations for Hern's failure to properly record ten injuries on OSHA 200, and "failure to record nine of the ten . . . injuries on Form OSHA No. 101, the supplementary record of workplace injuries and illnesses").

Taking into account all of these considerations, we conclude that § 1904.29(b)(2) requires an employer to complete an OSHA 301 Report for a recordable injury/illness irrespective of whether it was recorded on the OSHA 300 Log.

2. Items 1 and 2—Duplicativeness

Volks argues that the violations at issue under these items are duplicative because a single wrong recordkeeping decision underlies both. However, the test for duplicativeness is not whether one error triggers the employer's non-compliance with both cited obligations. Rather, "[v]iolations are duplicative 'where the standards cited require the same abatement measures, or where abatement of one citation item will necessarily result in abatement of the other item as well.' " *Gen. Motors Corp.*, 22 BNA OSHC 1019, 1024, 2004-09 CCH OSHD ¶ 32,928, pp. 53,606-07 (No. 91-2834E, 2007) (consolidated) (citation omitted); *see J.A. Jones Constr. Co.*, 15

[17] Volks notes that the proposed rule reflected the former regulation's wording, but was changed in the final rule to include "entered on the OSHA 300 Log." Occupational Injury and Illness Recording and Reporting Requirements, 61 Fed. Reg. 4030-01, 4067 (Feb. 2, 1996) (notice of proposed rulemaking). The Executive Memorandum, however, was issued subsequent to the proposed rule and before the final rule.

BNA OSHC 2201, 2207, 1991-93 CCH OSHD ¶ 29,964, p. 41,027 (No. 87-2059, 1993) (rejecting employer's contention that violations were duplicative where abatement was not the same, as "the two [cited] standards . . . [we]re directed at fundamentally different conduct").

The two provisions at issue here, § 1904.29(b)(2) and § 1904.29(b)(3), require the completion of two separate forms—the Log and the Report— each of which sets forth different information. A completed Log lists all reportable injuries and illnesses that occurred at the workplace in a given year. The Log consists of a pre-printed form in ledger format with one line for each reportable event on which an employer must insert the: (a) employee name and job title; (b) nature and date of injury or illness, location of event and affected body part; and (c) number of lost work days or job restriction. In contrast, a completed Report consists of a separate form for each recordable event, with responses to a pre-printed set of 18 questions asking the following information: (a) employee personal information – name, address, gender, birth and hiring dates; (b) treatment information – health care professional name and location, whether treated in emergency room and/or admitted to a hospital; (c) circumstances of the event – date and time of injury or illness and time work shift began, nature of employee's activity when incident occurred and how injury occurred; and (d) detailed description of illness or injury.

The more comprehensive Report does not include the employee's job title or lost and restricted work day information that is required on the Log, and the Log does not include any of the medical treatment information included on the Report. That these forms are "fundamentally different" is also illustrated by the fact that an establishment in which 26 recordable events, for example, occurred in a given year would generally have a single two-page Log, and 26 separate Reports. Although there is some overlap in the information recorded, it is clear that an employer's completion of a Log would not satisfy its obligation to complete a Report, nor would the reverse be true. *Cf. Burkes Mech. Inc.*, 21 BNA OSHC 2136, 2142, 2004-09 CCH OSHD ¶ 32,922, p. 53,564 (No. 04-0475, 2007) (assessing grouped penalty where compliance with broader provision would have satisfied separately cited narrower provision). Therefore, we find that under applicable precedent, these two citation items are not duplicative. Accordingly, we affirm Citation 2, Items 1 and 2.

b. Items 3 and 4

Under these items, the Secretary alleges that Volks failed to: (1) review its 2002 to 2005 Logs to verify that entries were complete and accurate, and to correct any deficiencies, in

violation of 29 C.F.R. § 1904.32(a)(1), and (2) have a company executive examine the Logs and certify that the annual summaries (Form 300-A) were correct and complete, in violation of 29 C.F.R § 1904.32(b)(3).[18] Volks argues that "it is not clear" this regulation applies to omitted recordable events because the requirement set forth under § 1904.32(a)(1) states that the employer must "verify that *the entries are* complete and accurate . . . ." (Emphasis added.)

The interpretation suggested by Volks might be appropriate if the provision required verification that *each* entry *is* complete. But we need not reach that issue because the use of the plural in the rule's phrase "entries are complete" signals a duty to check both for missing and incomplete entries. In addition, there is a second element to the provision—the employer must correct "any deficiencies," language that clearly encompasses a missing entry. Finally, a broader meaning reflects the provision's obvious purpose of ensuring the accuracy of the records; "the final rule . . . require[s] employers to review the OSHA records as extensively as necessary to ensure their accuracy." 66 Fed. Reg. at 6047. In fact, OSHA specifically indicated its intent to require correction of missing entries when it stated that an employer could use several suggested sources of information, such as workers' compensation injury reports, "to make sure that *all* the recordable injuries and illnesses have been included." *Id*. In short, it would be anomalous for the regulation to address entries that had been made, but not entries that are missing altogether. Accordingly, we affirm Citation 2, Items 3 and 4.

---

[18] The cited provisions provide:

> **§ 1904.32 Annual summary.**
> (a) *Basic requirement.* At the end of each calendar year, you must:
> (1) Review the OSHA 300 Log to verify that the entries are complete and accurate, and correct any deficiencies identified;
> (2) Create an annual summary [Form 300-A] of injuries and illnesses recorded on the OSHA 300 Log;
> (3) Certify the summary; and
> (4) Post the annual summary.
> (b) *Implementation*. (1) *How extensively do I have to review the OSHA 300 Log entries at the end of the year?* You must review the entries as extensively as necessary to make sure that they are complete and correct.
> . . .
> (3) *How do I certify the annual summary?* A company executive must certify that he or she has examined the OSHA 300 Log and that he or she reasonably believes, based on his or her knowledge of the process by which the information was recorded, that the annual summary is correct and complete.

IV. CHARACTERIZATION AND PENALTY

The Secretary proposed a total penalty of $13,300 for the four other-than-serious items alleged under Items 1 through 4.[19] The judge affirmed the alleged characterization and assessed the proposed penalty amounts. Volks does not challenge the characterization of these violations as other-than-serious and agreed in the stipulations not to contest the appropriateness of the penalties. In these circumstances, we affirm the violations as other-than-serious, and upon consideration of the penalty factors set forth under § 17(j) of the OSH Act, find the proposed penalty amounts to be appropriate. *See* 29 U.S.C. § 666(j) (penalty factors include employer's business size, prior violative history, good faith and the gravity of the violation); *see also Burford's Tree, Inc.*, 22 BNA OSHC 1948, 1952 (No. 07-1899, 2010), *aff'd*, 2011 WL 462157 (11th Cir. Feb. 9, 2011) (affirming judge's serious characterization and penalty where parties did not dispute the issue on review).

CONCLUSIONS OF LAW

We reaffirm the Commission's decision in *Johnson Controls* and conclude that the Secretary timely cited Volks for the conditions alleged under Citation 2, Items 1 through 4. We also conclude that the judge erred in finding that the Secretary timely cited Volks for the condition alleged under Citation 2, Item 5. In addition, we find that an employer's obligation to complete an OSHA 301 Report under § 1904.29(b)(2) does not depend on entry of the recordable injury/illness on the OSHA 300 Log, and that the violations at issue under Items 1 and 2 are not duplicative. Finally, we conclude that the requirements of § 1904.32 apply even when a Log entry is missing.

[19] The Secretary proposed penalty amounts for each of these items as follows: Item 1 - $6,300; Item 2 – $5,000; Item 3 - $1,000; and Item 4 - $1,000.

ORDER

We affirm Citation 2, Items 1 through 4 as other than-serious, and assess a total penalty of $13,300. We vacate Citation 2, Item 5.

SO ORDERED.

_/s/_____
Thomasina V. Rogers
Chairman

_/s/_____
Cynthia L. Attwood
Commissioner

Dated: 3/11/11

COMMISSIONER, Thompson, dissenting in part:

I join the majority with respect to its decision to vacate Citation 2, Item 5, but I respectfully disagree with the majority's conclusion that the four other citation items at issue are not also barred by the six-month statute of limitations set forth in section 9(c) of the Occupational Safety and Health Act ("OSH Act" or "Act"), 29 U.S.C. § 658(c).

When Congress passed the OSH Act in 1970, it prohibited the Occupational Safety and Health Administration ("OSHA") from issuing citations more than six months after the occurrence of a violation. 29 U.S.C. § 658(c). In the case before us, OSHA cited Respondent for numerous recordkeeping violations nearly five years after the violations occurred. This conduct eviscerates the very concept of statutes of limitations and violates all notions of fundamental fairness and due process. For these reasons, I cannot agree with my colleagues that these four citation items should be affirmed.

Legislatures have been prescribing deadlines by which legal action must be taken, lest the right to do so be permanently extinguished, for nearly four hundred years. The first statute of limitations was enacted in Great Britain in 1623.[1] In 1944, the United States Supreme Court described the fundamental importance of statutes of limitations:

> Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Order of R.R. Telegraphers v. Ry. Express Agency, 321 U.S. 348, 348-49 (1944).[2] The Court's language has been quoted repeatedly in subsequent cases dealing with statutes of limitations, because it precisely describes the Congressional intent manifested in the limitations periods of various statutes, including the OSH Act's six-month limitations.

---

[1] Statute of 16 Jas. I, ch. 16. *See Hart v. Deshong*, 8 A.2d 85, 86 (Del. Super. Ct. 1939).

[2] Statutes of limitations promote three distinct purposes: (1) The diligent prosecution of viable claims in a timely manner; (2) the adjudication of claims in a just and effective manner; and (3) repose for the defendant, who is entitled to treat expiration of the deadline as extinguishment of the claim. *See Interpreting Federal Statutes of Limitations*, 37 Creighton L. Rev. 493, 571-72 (2004).

Because the current case comes to us on a stipulated record, there are no factual issues to resolve. Distilled to its legal essence, this case presents the Commission with a clear record upon which to apply the OSH Act's six-month limitations period to stipulated recordkeeping omissions. These omissions are from Respondent's log of injuries and illnesses, all of which relate to triggering events and recordation that did not occur during the limitations period. The Secretary has sought to tie this straightforward issue into a Gordian knot by arguing that the violations are continuing and/or the discovery rule is necessarily enmeshed in any analysis of this case. Accepting this circuitous argument would allow her to extend the Act's statutory deadline for issuance of a citation to nearly ten times its congressionally-mandated length, in this case from six months to nearly five years or more. The Alexandrian solution for this Gordian knot arises from the plain and unambiguous language of section 9(c): "No citation may be issued under this section after the expiration of six months following the occurrence of any violation."

There is no hint of ambiguity in any of the words or phrases of section 9(c). The phrase "[n]o citation may be issued" is categorical and self-defining, as is the phrase "following the occurrence of any violation." The critical term "occurrence" is plainly distinguishable from the potentially ambiguous term "accrual" found in some other statutes of limitation.[3] Use of the term "accrual" in those other statutes may suggest the need for the coalescence of several events before the limitations period is triggered. But in the OSH Act, Congress specified that the six-month limitations period runs from the "occurrence" of a violation, not its "accrual." In construing the language of a statute, words are to be given their common, ordinary, everyday meaning. *Watson v. United States*, 552 U.S. 74, 79 (2007) (noting that "[w]ith no statutory definition or definitive clue," meaning of word in statute "turn[s] on the language as we normally speak it"). Webster's New Collegiate Dictionary (1979) defines "occurrence" as "something that takes place" or "the action or process of happening." Similarly, Black's Law Dictionary defines "occurrence" as "[a] coming or happening." The Random House Dictionary of the English Language (1971) (unabridged edition) defines "occurrence" as "1. the action or fact of occurring. 2. something that happens; event; incident: *We were delayed by several unexpected occurrences*." By any common definition, there has been no "occurrence," i.e., no discrete

[3] *See, e.g.*, 28 U.S.C. § 2401(b). The Federal Tort Claims Act statute of limitation begins to run when "such claim accrues."

action, event or incident, no coming about, and no process of happening, within the requisite six months.

The Secretary asserted during oral argument that "a recordkeeping citation is timely under section 9(c) if it is issued within six months of any day during the retention period that the Secretary discovers a violation." Under the Secretary's theory, the Act's six-month limitations period could be extended for the five-year retention period applicable to logs of injuries and illnesses, plus a one-week grace period following the occurrence of the triggering event, plus six months for the statute of limitations to run. By extension of such a theory, for example, an employer's determination that a measurement reflects no unique occupational exposure under OSHA's rule governing access to medical and exposure records, 29 C.F.R. § 1910.1020 (e.g., a medical decision not to retain a chest x-ray reflecting no potential work-related exposure) could be challenged in a citation issued even after expiration of the thirty-year period for retention of employee exposure records.[4] Without question this is not what Congress had in mind when it prohibited the Secretary from issuing citations "after the expiration of six months following the occurrence of any violation.[5]

In the case before us, the stipulated record indicates that each date on which a recordable injury or illness should have been entered on a required log was more than six months (four years and ten months in one case) before the date that OSHA issued the citations in this case. The cited items are, therefore, stale as well as untimely when read against the unambiguous prohibition of section 9(c). The Secretary relies on the Commission decisions of *Johnson Controls* and *General Dynamics* as support for the proposition that the Commission has applied a discovery rule to extend the six-month deadline in recordkeeping cases.[6] The facts in both of those cases, however, render them inapposite to this case. In *Johnson Controls*, the violation was for the deletion of a previously recorded injury, as distinguished from this case, which involved recordable injuries about which no action was taken. Therefore, the "occurrence" in *Johnson Controls* was the deletion, whereas in our case, there was no occurrence; that is, there

[4] *See* OSHA's series of Standard Interpretations on § 1910.1020, maintenance of and access to employee medical records (www.osha.gov).

[5] 29 U.S.C. § 658(c).

[6] *Johnson Controls, Inc.*, 15 BNA OSHC 2132, 1993 CCH OSHD ¶ 29,953 (No. 89-2614, 1993); *Gen. Dynamics Corp.*, 15 BNA OSHC 2122, 1993 CCH OSHD ¶ 29,952 (No. 87-1195, 1993).

was no log entry or amendment or deletion within the limitations period. In *Johnson Controls*, the deletion was an affirmative act which continued to occur until corrected by the employer or cited by OSHA. The "occurrence"—a deleted entry—was cited within the limitations period. To the extent that the Commission in *Johnson Controls* ventured beyond the facts of that case to generalize about situations not before it—involving "omissions" from the log that were not entered during the limitations period—the generalization is dictum, bearing no precedential weight. In this case, the dictum of *Johnson Controls* is unpersuasive.

Contrary to the Secretary's argument, there is no functional equivalency between an omitted recordation and an unguarded machine. All elements of a violative log omission are complete on the eighth day after the duty to record attaches, and no further "occurrence" of the elements necessary to complete the violation become manifest after that date. A missing guard is a physical condition manifesting an "occurrence" of a hazardous condition on every day there is known employee exposure until the hazard is abated.

Furthermore, the Supreme Court has held that a continuing violation/discovery rule is not to be inferred from the otherwise unambiguous language of a statute of limitations, if there was no discrete act or occurrence within the limitations period. In *Ledbetter v. Goodyear Tire &Rubber Co.*,[7] the Court addressed the issue of whether a charge of sex discrimination, based on an allegedly discriminatory performance appraisal which pre-dated the charge-filing period, became timely with every subsequent paycheck which continued the discriminatory effect of the past occurrence. The Court then reviewed a long line of its cases in the context of discriminatory employment practices, and concluded that the continuing effect of an earlier discrete act which occurred outside of the limitations period does not restart the clock. *Id.* at 623-24. The Court then cited Justice Stevens' concurring opinion in *United Airlines, Inc. v. Evans*, 431 U.S. 553, 558 (1977):

> United was entitled to treat [Evans' termination] as lawful after respondent failed to file a charge of discrimination within the 90 days then allowed by § 706(d). A discriminatory act which is not made the basis for a timely change . . . is merely an unfortunate event in history which has no present legal consequences.

Ledbetter, 550 U.S. at 625-26 (internal quotation marks omitted). The same rationale applied to a college professor who alleged he was denied tenure because of his race, but did not file a

[7] 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act, Pub. L. 111-2, 123 Stat. 5 (2009) (amending 42 U.S.C. § 2000e-5).

charge with the EEOC until the conclusion of a subsequent one-year, non-renewable contract. The Court held that the clock for the applicable 180-day limitations period began to run from "the time the tenure decision was made and communicated to [the professor]" and not from the date of his discharge, more than a year later. *Delaware State Coll. v. Ricks*, 449 U.S. 250, 256-59 (1980). Once again, the Court reiterated the need for an occurrence, that is, for a discrete affirmative act to occur within the limitations period.

Similarly, in *Lorance v. AT&T Technologies, Inc.*,[8] the Court was faced with deciding the timeliness of an EEOC charge filed when the discriminatory effects of a seniority system were first felt several years after the decision giving rise to the discrimination was made. Once again, and consistent with its rationale in *Evans* and *Ricks*, the Court held that the charging period began to run from the date the decision to change the way seniority was calculated was made, and not from when the effects of the practice were felt. *Id.* at 909-13.

Finally, the Court referenced in *Ledbetter* its holding in *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), which involved claims of discrimination based on hostile work environment. There, the Court once again held that a discrete act or occurrence triggered the charge-filing period, and that the mere passage of time, without subsequent acts of discrimination, is of no legal consequence. In *Morgan*, the Court reiterated its prudential instruction first articulated in *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980), that, "in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law."

As the foregoing analysis demonstrates, the Supreme Court has applied the requirement of a discrete act within the limitations period to a myriad of employment practices—a discriminatory performance appraisal (*Ledbetter*), a facially-neutral seniority system which had a discriminatory effect (*Evans*), a denial of tenure decision (*Ricks*), and a hostile work environment (*Morgan*)—all in the context of the broad category of laws regulating employment practices, the same category of laws into which the OSH Act fits. Moreover, all these cases arose under a statute having a relatively short period of 180 days for filing a complaint, a timeframe virtually identical to the OSH Act's six-month limitations period for issuing a citation. As the Court in *Mohasco* observed, Congress was purpose-driven in selecting a short filing

[8] 490 U.S. 900 (1989), *superseded by statute*, 1991 Civil Rights Act, Pub. L. 102-166, 105 Stat. 1071 (1991) (amending 42 U.S.C. § 2000e-5).

period: "By choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination." 447 U.S. at 825.

The same rationale works equally in favor of the prompt investigation of employment practices that produce workplace injuries and illnesses. In *Ledbetter*, the petitioner's claim of discrimination was based on disparate treatment, which required proof of discriminatory intent. The petitioner alleged that her 1997 performance appraisal was based on deficiency reports falsified by her then supervisor, in retaliation for her rejection of his sexual advances in the early 1980's and again in the mid-1990's. By the time her case came to trial, the supervisor was dead. The Court made the prudential observation that "[a] timely change might have permitted his evidence to be weighed contemporaneously." *Ledbetter*, 550 U.S. at 632 n. 4. Similarly, in this case, the Volks employee who was responsible for keeping the 2002 log died over a year before the inspection began. Just as in *Ledbetter*, where proof of intent was required to support a claim of disparate treatment, proof of employer knowledge is required to support an OSHA violation. Here, the stale citation presents Respondent with a considerable hurdle—determining what indicia were considered by the deceased record-keeper in deciding whether or not certain events met the criteria for requiring recordation. In light of the intervening death of the person responsible for making such determinations, Respondent's ability to defend against the stale citation is further compromised by the application of evidentiary rules that discourage the introduction of hearsay evidence.

In an effort to escape the unequivocal Congressional command in section 9(c), the Secretary references section 8(c) of the OSH Act, which directs her to "prescribe regulations requiring employers to *maintain accurate* records of . . . work-related deaths, injuries and illnesses." 29 U.S.C. § 657(c) (emphasis added). However, her attempt to define one provision of the statute by arguing that it draws its meaning from a separate provision, serving an unrelated purpose, rings hollow for two reasons. First, section 8(c)(2) is a direction from Congress to the Secretary of Labor to promulgate recordkeeping regulations; it makes no mention of deadlines for issuing citations. Second, while section 8(c)(2) is the statutory predicate for issuance of recordkeeping regulations that require retention of injury and illness logs for five years,[9] the citations in this case were for a failure to make certain log entries, not for a failure to maintain

[9] 29 C.F.R. § 1904.33.

the logs. Therefore, none of the language in the statute authorizing the Secretary to adopt recordkeeping rules could be read as a proviso reflecting the intent of Congress to extend the 9(c) limitations period for recordkeeping violations, or to allow OSHA to do so. That Congress is fully capable of describing certain employer conduct as a continuing violation when it so desires is evident in section 17(d), the penalty section assessing $7,000 per day for failure to abate violations for citations which have become final orders. In that section, Congress provided a penalty for such violations "for each day during which such failure or *violation continues*." 29 U.S.C. § 666(d) (emphasis added).

In *3M Co. v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994), the D.C. Circuit addressed the issue of whether a discovery rule could be engrafted onto the five-year limitations period contained in 28 U.S.C. § 2462, the general statute of limitations governing federal civil enforcement actions in statutes where one is not specified. The issue arose in the context of a recordkeeping violation under the Toxic Substances Control Act ("TSCA"), 15 U.S.C. §§ 2601-2629. 3M, the importer of a new chemical, was required to provide the Environmental Protection Agency ("EPA") with ninety days' notice prior to its importation. It inadvertently failed to give EPA the requisite notice for two new chemicals it imported between August 1980 and July 1986. Upon discovering its oversight, 3M informed EPA of its recordkeeping violations.

EPA instituted a civil enforcement action to collect a penalty for non-reporting violations. Although its action was initiated more than five years from when the importation notice violations occurred, EPA argued that its action was timely because it was instituted within five years of having discovered the violations. Significantly, in holding that the discovery rule could not be applied to extend the limitations period in 28 U.S.C. § 2462, the court distinguished the types of cases to which a discovery rule did apply from administrative enforcement proceedings to collect civil penalties. Specifically, in occupational disease cases characterized by latent manifestation of symptoms many years after the exposure, no claim accrues until the harm materializes. The court contrasted this "discovery of harm" rule to what it characterized as a "discovery of violations" rule, which EPA was attempting to read into the TSCA's five-year limitations period. The court ruled the "discovery of harm" rule to be inapposite to the "discovery of violations" rule. Its rationale in so deciding is dispositive of our case:

> In an action for a civil penalty, the government's burden is to prove the violation; injuries or damages resulting from the violation are not part of the cause of action; the suit may be maintained regardless of damage. Immediately upon the violation, EPA may institute the proceeding to have the penalty imposed.

3M Co., 17 F.3d at 1461. So, too, in the case before us, OSHA must prove that a recordable injury occurred, that the employer had knowledge of the injury, either actual or constructive, and that it nevertheless failed to record it. All these elements must be present simultaneously, at which time the violation occurs; nothing needs to ripen with the passage of time beyond six months; rather than ripening the violation becomes stale. Nor should the Secretary be heard to complain about needing more than six months to ferret out violations and issue citations. She currently administers or enforces numerous whistleblower protection statutes which require her to act in 180 days or less.[10] In addition, the D.C. Circuit has dismissed any enforcement difficulties resulting from a fixed deadline as justification for a discovery rule:

> We therefore cannot agree with EPA that our interpretation of § 2462 ought to be influenced by EPA's particular difficulties in enforcing TSCA. And we cannot understand why Congress would have wanted the running of § 2462's limitations period to depend on such considerations. An agency may experience problems in detecting statutory violations because its enforcement effort is not sufficiently funded; or because the agency has not devoted an adequate number of trained personnel to the task; or because the agency's enforcement program is ill-designed or inefficient; or because the nature of the statute makes it difficult to uncover violations; or because of some combination of these factors and others. The subject matter seems more appropriate for a Congressional oversight hearing.

Id. at 1461 (footnote omitted).

The fact that there has been no discrete act or occurrence during the limitations period should dispose of this case in its entirety on timeliness grounds. In any event, the citations themselves are facially defective and must be vacated.

At issue in this case are Items 1 through 4 of Citation 2, issued by OSHA on November 8, 2006. Item 1 alleges a violation of § 1904.29(b)(2) for failing to record 67 work-related injuries on OSHA 301 Incident Reports for calendar years 2002-2006, for each recordable injury entered on the OSHA 300 log. Item 2 alleges a violation of § 1904.29(b)(3) for failing to record 102 work-related injuries on the OSHA 300 log, for calendar years 2002-2006.

---

[10] *See, e.g.*, Toxic Substances Control Act, 15 U.S.C. § 2622; Safe Drinking Water Act, 42 U.S.C. § 300j-9(i); Energy Reorganization Act, 42 U.S.C. § 5851; Clean Air Act, 42 U.S.C. § 7622; Surface Transportation and Assistance Act, 49 U.S.C. § 31105.

Both of these citations are based on regulations that require the entries to be made "within seven (7) calendar days of receiving information that a recordable injury or illness has occurred," 29 C.F.R. § 1904.29(b)(2) and (b)(3). The "occurrence" that triggers the duty to record is the receipt of information; the time period within which the entries must be made is by the seventh day. Therefore, the limitations period begins to run on the eighth day, and the ability to cite for failure to record expires six months thereafter, in the absence of an "occurrence" within that period. The receipt of information that a recordable event occurred was stipulated to be the injury date and not thereafter. There is no language in either regulation that suggests the duty to record continues during the five-year retention period or beyond.

Unlike an unguarded machine, which continues to violate the Act for the entire period during which an employer has knowledge and an employee has exposure, a failure to record has its end-point on the eighth day after an employer receives notification of a recordable injury. OSHA's authorization to cite within the six-month period must give way to the employer's right to be free from the burden of defending against stale claims.

Item 3 alleges AKM did not "review the OSHA 300 log to verify that the entries are complete and accurate, and correct any deficiencies identified," for the years 2002 through 2005, in violation of 29 C.F.R. § 1904.32(a)(1). This regulation did not impose a continuing duty, automatically violated by the mere passage of time. The duty to review the OSHA 300 log occurred "at the end of [the] calendar year." *Id.* The regulation did not impose a duty to review the logs year after year; because there was no discrete act which occurred during the limitations period, there was no violation that can be said to be continuing. The violations ripened into citable events on the first day following the calendar year for which they were not reviewed, and for the six-month period thereafter. Beyond that, they became stale, and of no legal consequence.

Item 4 alleges that the wrong person certified the OSHA 300 log, in violation of 29 C.F.R. § 1904.32(b)(3), which requires that: "At the end of each calendar year, [a] company executive must certify that he or she has examined the OSHA 300 Log and that he or she reasonably believes . . . that the annual summary is correct and complete." Instead of a company executive being the certifier, the logs were certified by the Human Resources/Safety Manager. Like the recordkeeping regulations that have gone before it, this one also had a fixed point in time, namely, "at the end of the calendar year." There was no suggestion that the duty to review

continued from year-to-year or indefinitely, if not reviewed when required. Consequently, there was no hint of a continuing violation, and the failure to review became citable up to six months from the end of the year, and not thereafter.

In sum, "[a] discovery rule . . . substitutes a vague and uncertain period for a definite one." *J.D. Hamilton v. 1st Source Bank*, 928 F.2d 86, 88 (4th Cir. 1990). By making such a substitution in this case, I fear the Review Commission thrusts itself into matters reserved exclusively to the realm of the legislative branch. Because of this reticence, courts have frowned upon reading a discovery rule into all but those cases which "cry out" for one, such as occupational disease cases characterized by latent manifestation of symptoms, and medical malpractice cases, where the plaintiff has no reason for knowing, and no means for finding out, of the malpractice until the doctor's negligence produces injury. There is no fraudulent concealment alleged in this case; contrary to the Secretary's assertions, there is no statutory ambiguity arguably justifying deference; the case does not "cry out" for a discovery rule; the D.C. Circuit has precluded use of a discovery rule in administrative enforcement actions; and Congress has clearly spoken on the issue of statutes of limitations in multiple employment law contexts. In this case, it is clear from the language of the statute itself that it was not Congress's intent to have the administrative or judicial process entertain such stale claims.

For these above-stated reasons, I respectfully dissent.

__/s/_____
Horace A. Thompson III
Commissioner

Dated: 3/11/11

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC DOCKET NO. 06-1990
	:	
AKM LLC d/b/a VOLKS CONSTRUCTORS,	:	
	:	
Respondent.	:	

DECISION AND ORDER

This matter is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). The parties in this matter, the Secretary of Labor ("the Secretary") and AKM LLC d/b/a Volks Constructors ("Volks" or "Respondent"), have filed cross-motions for summary judgment based on stipulated facts. For the reasons that follow, the Secretary's motion is granted and Respondent's motion is denied.

Background

The Occupational Safety and Health Administration ("OSHA") inspected Respondent's facility in Prairieville, Louisiana, from May 10, 2006 to November 8, 2006. As a result of the inspection, on November 10, 2006, OSHA issued to Volks a 16-item serious citation and a 17-item "other" citation. Respondent contested all items of the citations and the proposed penalties.

On January 8, 2007, before the Secretary filed her complaint, Respondent filed a motion to dismiss Items 1 through 5 of Other Citation 2, which allege violations of OSHA's record-keeping requirements. Specifically, Items 1 and 2 allege, respectively, 67 and 102 instances of failure to record injuries and illnesses as required, from November 2002 to January 2006. Item 3 alleges that Volks did not review the OSHA 300 log to verify the entries were complete and accurate for the years 2002 to 2005. Item 4 alleges that a company executive of Volks did not certify that he or she

had examined the OSHA 300 log and that the annual summary was correct and complete for the years 2002 to 2005. Item 5 alleges that Volks did not post the annual summary for the year 2006 for the period required. The basis of Respondent's motion to dismiss was that, in view of section 9(c) of the Act and certain Supreme Court and Circuit Court decisions, Items 1 through 5 were untimely. The Secretary filed a response to the motion to dismiss. On February 15, 2007, the undersigned issued an order denying the motion to dismiss.

On January 29, 2007, the Secretary filed her complaint in this matter. On February 26, 2007, Respondent filed a petition for interlocutory review of my order of February 15, 2007. On March 1, 2007, Respondent filed a motion for a stay, or, alternatively, an extension of time to file its answer, based on its petition for interlocutory review. The Secretary filed her opposition to the petition for interlocutory review, and she also filed her opposition to the motion for a stay or an extension of time. On March 29, 2007, Respondent's petition for interlocutory review was denied. On that same day, Respondent filed another motion for an extension of time to file its answer, which the Secretary did not oppose; the motion stated the parties were engaged in settlement discussions and had made substantial progress in reaching a settlement. On April 2, 2007, the undersigned issued an order granting the motion for an extension of time until April 13, 2007, for Volks to file its answer.

On April 18, 2007, the parties filed a partial settlement agreement resolving all of the citation items except for Items 1 through 5 of Other Citation 2. The parties also filed "Stipulations of the Parties" that addressed the five items not resolved in the settlement agreement. On May 15, 2007, the parties filed their cross-motions for summary judgment based on the stipulated record, and the Secretary's motion included supplemental stipulations of the parties. On May 29, 2007, Volks filed its response to the Secretary's motion, and on May 30, 2007, the Secretary filed her response to Volks' motion. On June 6, 2007, Volks filed a reply to the Secretary's response.

The Parties' Stipulations

The "Stipulations of the Parties," filed April 18, 2007, state as follows:

> 1. Volks will no longer, for the purpose of these stipulations, contest the allegations of Citation 2, Items 1 through 5, that violations occurred and that the proposed penalties are appropriate, except that: (a) Volks preserves its defense that the items are untimely under Section 9(c) of the Act; (b) Volks does not admit that violations occurred on or about the date of the inspection; and (c) as to Item 1, Volks

preserves its defense that the allegations fail to state a claim upon which relief may be granted with respect to whether an OSHA Form 301 was required.

2. With respect to Items 1 and 2, the injuries or illnesses had not been recorded on the Form 301 ("the incident report") or Form 300 ("the log") within seven calendar days after the injury or illness dates, which for purposes of this stipulation is the date that Volks received information that a recordable injury or illness occurred. The injuries and illnesses had not been recorded on either form by the date the OSHA inspection was initiated, May 10, 2006.

3. With respect to Item 3, Volks did not by the end of calendar year 2002, 2003, 2004, and 2005 review the OSHA 300 Log for the respective year to ensure that all entries were complete and accurate. The logs had not been reviewed as of the date the OSHA inspection was initiated, May 10, 2006.

4. With respect to Item 4, the annual summaries for the year 2002, the year 2003, the year 2004, and the year 2005 were certified by a person other than a company executive during those calendar years. The certifications by a company executive had not occurred as of the date the OSHA inspection was initiated, May 10, 2006.

5. With respect to Item 5, the annual summary for 2005 was posted only from February 1, 2006 to February 28, 2006.

The parties' supplemental stipulations filed on May 15, 2007, which were included with the Secretary's motion for summary judgment, are as follows:

1. The Occupational Safety and Health Review Commission has jurisdiction over this proceeding under Section 10(c) of the Occupational Safety and Health Act, 29 U.S.C. Section 659(c).

2. Respondent is an employer engaged in a business affecting commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. Section 652(5).

3. After an inspection at Respondent's workplace by an authorized representative of Complainant, Respondent was issued Citation 2, Items 1 through 5, alleging other-than-serious violations of the Act.

4. On December 4, 2006, Complainant received from Respondent a timely notice of intent to contest Citation 2, Items 1 through 5, pursuant to the provisions of Section 10(c) of the Act.

5. Volks Constructors no longer contests the appropriateness of the periods for abatement proposed in Citation 2, Items 1 through 5.

The foregoing stipulations are hereby adopted as my findings of fact and conclusions of law in this matter.

The Cited Standards

Item 1 of Citation 2 alleges 67 instances of failure to record injuries and illnesses as required, in violation of 29 C.F.R. 1904.29(b)(2), which requires the employer to "complete an OSHA 301 Incident Report form, or an equivalent form, for each recordable injury or illness entered on the OSHA 300 Log."

Item 2 of Citation 2 alleges 102 instances of failure to record injuries and illnesses as required, in violation of 29 C.F.R. 1904.29(b)(3), which requires the employer to "enter each recordable injury or illness on the OSHA 300 Log and 301 Incident Report within seven (7) calendar days of receiving information that a recordable injury or illness has occurred."

Item 3 of Citation 2 alleges a violation of 29 C.F.R. 1904.32(a)(1) for the years 2002 through 2005; the standard requires the employer, at the end of each calender year, to "[r]eview the OSHA 300 Log to verify that the entries are complete and accurate, and correct any deficiencies identified."

Item 4 of Citation 2 alleges a violation of 29 C.F.R. 1904.32(b)(3), as a company executive did not certify the OSHA logs for the years 2002 through 2005; the standard states that:

> A company executive must certify that he or she has examined the OSHA 300 Log and that he or she reasonable believes, based on his or her knowledge of the process by which the information was recorded, that the annual summary is correct and complete.

Item 5 of Citation 2 alleges a violation of 29 C.F.R. 1904.32(b)(6), in that the annual summary was not posted for the required period; the standard requires the employer to "post the [annual] summary no later than February 1 of the year following the year covered by the records and keep the posting in place until April 30."

Discussion

As indicated above, the parties have filed cross-motions for summary judgment, pursuant to Commission Rules of Procedure 40 and 61, 29 C.F.R. §§ 2200.40 and 61, respectively, and Federal Rule of Civil Procedure 56 ("Rule 56"). Rule 61 states, in pertinent part, that:

> A case may be fully stipulated by the parties and submitted to the ... Judge for a decision at any time....The submission of a case under this rule does not alter the burden of proof, the requirements otherwise applicable with respect to adducing proof, or the effect of failure of proof. Motions for summary judgment are covered by Fed.R.Civ.P. 56.

Rule 56(c) states that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." As the Secretary points out, the trier of fact, in making this determination, must draw inferences from the record in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). However, the trier of fact may draw "only those inferences that are legitimate and reasonable....A scintilla of evidence is not enough." *Harbor Ins. Co. v. Schabel Found. Co., Inc.*, 946 F.2d 930, 935 (D.C. Cir. 1991).

It is clear from the parties' stipulations and the language of the standards, set out *supra*, that there is no dispute that the alleged violations occurred. However, Respondent contends the citations were untimely, based on section 9(c) of the Act and on Supreme Court and Circuit Court decisions.

Section 9(c) of the Act provides that "[n]o citation may be issued under this section after the expiration of six months following the occurrence of any violation." As the Secretary notes, however, the Commission has long held that section 9(c) allows the Secretary to "cite an uncorrected violation six months from the date the Secretary discovers, or reasonably should have discovered, the facts necessary to issue the citation." *Arcadian Corp.*, 20 BNA OSHC 2001, 2013 (No. 93-0628, 2004), citing *Kaspar Electroplating Corp.*, 16 BNA OSHC 1517, 1519 (No. 90-2866, 1993); *Johnson Controls, Inc.*, 15 BNA OSHC 2132, 2136 (No. 89-1614, 1993); *General Dynamics Corp., Elec. Boat Div.*, 15 BNA OSHC 2122, 2127 (No. 87-1195, 1993). There is no contention here that the Secretary should have discovered the alleged violations any earlier than she did.[1]

As the Secretary also notes, in *Johnson Controls*, the employer was cited for failing to log a recordable injury or illnesses on the OSHA log as required. The Commission rejected the employer's argument that the six-month limitations period began to run at the original "occurrence" of the alleged record-keeping violation and that it did not "continue" until it was discovered by the Secretary. In so doing, the Commission stated as follows:

> Just as a condition that does not comply with a standard issued under the Act violates the Act until it is abated, an inaccurate entry on an OSHA [log] violates the Act until

[1]Although Respondent raised this issue in its motion, it conceded later that its argument in this regard should be rejected. *See* R. Motion, p. 4, and R. Reply, p. 1.

> it is corrected, or until the 5-year retention requirement ... expires. Thus, a failure to record an occupational injury or illness as required by the Secretary's recordkeeping regulations set forth in 29 C.F.R. Part 1904 ... does not differ in substance from any other condition that must be abated pursuant to the occupational safety and health standards in 29 C.F.R. Part 1910....We therefore conclude that an uncorrected error or omission in any employer's OSHA-required injury records may be cited six months from the time the Secretary does discover, or reasonably should have discovered, the facts necessary to issue a citation.

Johnson Controls, 15 BNA OSHC 2132, 2135-36 (footnote omitted).

Despite the foregoing, Volks contends Items 1 through 5 are time barred, and, in support of its position, cites to numerous cases. The primary cases it addresses are a U.S. Supreme Court case, *TRW Inc. v. Andrews*, 534 U.S. 19 (2001) ("*TRW*"), and a D.C. Circuit case, *3M v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994) ("*3M*").[2] After considering the parties' arguments with respect to these two cases, and after reviewing the cases myself, I agree with the Secretary that they do not provide a basis for overturning well-settled Commission precedent. As the Secretary notes, these cases were issued before the Commission's decision in *Arcadian Corp.*, set out *supra*, and I would assume that, had these cases been considered relevant, the Commission would have addressed them then; in addition, as the Secretary also notes, Volks' arguments as to section 9(c) are essentially old arguments the Commission has considered and rejected before. Even more significant, as the Secretary points out, neither *TRW* nor *3M* involved section 9(c) of the Act.[3] Rather, *TRW* involved the statute of limitations that applies to the Fair Credit Reporting Act, which provides for a limited situation in which a discovery rule applies, while *3M* involved the general five-year statute of limitations set out at 28 U.S.C. § 2462, which applies to the entire federal government in all civil penalty cases unless Congress specifically provides otherwise. Because these cases do not address section 9(c) of the Act, and based on the Commission precedent noted above, I disagree with Respondent's position that the citation items are time barred. Furthermore, as a Commission judge, the undersigned is constrained to follow Commission precedent and must do so in this matter.

---

[2]As Respondent notes, this matter could be appealed to the D.C. Circuit.

[3]In fact, as the Secretary notes, none of the numerous cases Respondent cites addresses section 9(c) or any statute of limitations similar to section 9(c).

Respondent makes many other arguments in this matter. For example, Volks contends, as it did in its motion to dismiss, that *Johnson Controls* does not apply to Item 1 because the "linchpin for the holding of *Johnson Controls* – a duty to update recordkeeping forms during the five-year retention period (15 BNA OSHC at 2135-36) – is missing from Item 1." I rejected this argument in my order of February 15, 2007, and I reject it again here. As the Secretary states, and as the excerpt from *Johnson Controls* set out *supra* makes clear, the *Johnson Controls* decision is broadly worded and is not limited to OSHA records that specifically require updating. Volks also contends the 2001 revisions to OSHA's record-keeping regulations supercede *Johnson Controls* and similar cases, asserting that the current regulations require updates only as new information is discovered. However, I agree with the Secretary's statement that "[n]othing in the current regulations changes an employer's obligation to correct errors or omissions in its OSHA-required injury and illness records." As the Secretary points out, Respondent was not cited for failing to update its records with newly-discovered information; rather, Respondent was cited for record-keeping errors and omissions that had not been corrected and still existed when the OSHA inspection took place. Respondent's contention with respect to the 2001 revisions to the record-keeping regulations is also rejected.[4]

Based on the foregoing, I find that *Johnson Controls* applies in this matter. I further find that, in light of *Johnson Controls* and the other Commission precedent noted *supra*, Items 1 through 5 of Other Citation 2 were not time barred. The Secretary's motion for summary judgment is GRANTED, and Respondent's motion for summary judgment is DENIED.

[4]Any other arguments not specifically addressed herein have also been considered and rejected.

ORDER

1. The parties' Partial Settlement Agreement, which resolves Items 1 through 16 of Serious Citation 1 and Items 6 through 17 of Other Citation 2, is attached hereto and is incorporated by reference, as is my order approving the Agreement.

2. Items 1 through 5 of Other Citation 2, as set out in the body of this decision, are AFFIRMED as other-than-serious violations, based upon the foregoing findings of fact and conclusions of law. A total penalty of $14,300.00 has been proposed for these items. That penalty is appropriate and is accordingly assessed.

/s/

Irving Sommer
Chief Judge

Dated: June 25, 2007
Washington, D.C.