UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

ELAINE L. CHAO, Secretary of Labor, United States Department of Labor, Complainant, v. AKM LLC dba VOLKS CONSTRUCTORS, Respondent.	No. 06-1990

BRIEF OF THE SECRETARY OF LABOR

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January 17, 2008

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2. Whether section 9(c) barred the Secretary from citing Volks in 2006 for its failures to review the OSHA Form 300 log for accuracy and to have a company executive certify the logs with respect to calendar years 2002 through 2005. (Citation 2, items 3 & 4)

3. Whether section 9(c) barred the Secretary from citing Volks in November 2006 for its failure to post an annual summary of recordable injuries and illnesses from February 1, 2006 through April 30, 2006. (Citation 2, item 5)

STATEMENT OF THE CASE

A. *OSHA's recordkeeping regulations are a vital aspect of the statutory scheme to protect American workers.*

This case raises questions about the enforcement of OSHA's part 1904 recordkeeping regulations. Thus, it is useful to briefly review the purpose and mechanics of those regulations before addressing the merits.

The OSH Act's fundamental goal is to ensure to the extent possible that American workers have safe working conditions. 29 U.S.C. § 651(b). One of the tools that Congress created to achieve that goal is a system of recordkeeping that allows the government to "develop[] information regarding the causes and prevention of occupational accidents and illnesses." 29 U.S.C. § 657(c)(1). Thus, section 8 of the OSH Act directs the Secretary to "prescribe regulations requiring employers to maintain accurate records of, and to make periodic reports on, work-related deaths, injuries and illnesses other than minor injuries[.]" 29 U.S.C. § 657(c)(2). "The legislative history of section 8 clearly indicates Congress's recognition that a comprehensive system of recording and reporting occupational injuries and illnesses is essential to achieving the purposes of the Act and ensuring employer compliance with its requirements." *Thermal Reduction Corp.*, 12 BNA OSHC 1264, 1266 (No. 81-2135, 1985).

The Secretary complied with section 8's mandate by promulgating the regulations set forth at 29 C.F.R. Part 1904. As relevant here, the regulations require employers to record certain injuries and illnesses on OSHA Form 301 incident reports and an OSHA 300 log, "within seven (7) calendar days of receiving information that a recordable injury or illness has occurred." 29 C.F.R. § 1904.29(b)(1) - (3). In addition, employers are required, at the end of each calendar year, to check the OSHA Form 300 log for accuracy and to correct any mistakes; to prepare an annual summary, to have a company executive certify the accuracy of the

summary; and to post the summary for the employees' benefit from February 1 through April 30 of the following calendar year. *See* 29 C.F.R. § 1904.32. In addition, employers are required to retain copies of the OSHA Form 300 log and Form 301 reports, as well as the annual summary, for a period of five years. *See* 29 C.F.R. § 1904.33.

As the Commission has noted, the part 1904 regulations "are a cornerstone of the Act and play a crucial role in providing the information necessary to make workplaces safer and healthier." *General Motors Corp.*, 8 BNA OSHC 2036, 2041 (No. 75-5033, 1980).

B. *The Secretary cites Volks upon discovering wholesale violations of part 1904 recordkeeping regulations.*

OSHA inspected Volks's facility in Prairieville, Louisiana from May 10, 2006 to November 8, 2006. ALJ Dec. 1. On November 10, 2006, the Secretary cited Volks for, among other things, numerous violations of the recordkeeping regulations set forth at 29 C.F.R. part 1904. ALJ Dec. 1-2.[1] Volks contested the citations and the matter was referred to an ALJ. *Ibid.*

The citation items at issue here are as follows:

- Citation 2, item 1, which charged that Volks failed to record 67 work-related injuries or illnesses on OSHA Form 301 incident reports ("incident report") or equivalent forms, in violation of 29 C.F.R. § 1904.29(b)(2). The injuries and illnesses cited in item 1 occurred between August 2002 and April 2006;

- Citation 2, item 2, which charged that Volks failed to record 102 work-related injuries or illnesses on its OSHA Form 300 log, in violation

[1] Only the recordkeeping violations are at issue here.

29 C.F.R. § 1904.29(b)(3). The injuries and illnesses cited in item 2 occurred between November 2002 and April 2006;

• Citation 2, item 3, which charged that Volks failed to review the OSHA Form 300 log during the years 2002, 2003, 2004 and 2005 to verify that the entries were complete and accurate and to correct any deficiencies, and thereby violated 29 C.F.R. § 1904.32(a)(1);

• Citation 2, item 4, which charged that Volks violated 29 C.F.R. § 1904.32(b)(3) by failing to have a company executive certify that he examined the OSHA Form 300 log and that the OSHA Form 300A Annual Summary was correct and complete for the years 2002, 2003, 2004 and 2005; and

• Citation 2, item 5, which charged that Volks violated 29 C.F.R. § 1904.32(b)(6) by failing to post the annual summary for the required posting time from February 1, 2006 to April 30, 2006.

ALJ Dec. 4.

During the course of the proceedings, Volks stipulated that the violations occurred as alleged, but asserted that Citation 2 was brought outside the six-moth limitations period set forth in section 9(c) of the OSH Act, 29 U.S.C. § 658(c). Specifically, the parties stipulated as follows:

"1. Volks will no longer, for the purposes 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."

ALJ Dec. 2-3.

C. *The ALJ rejects Volks's section 9(c) challenge to Citation 2 on the basis of controlling Commission precedent.*

In light of the foregoing stipulations, the ALJ granted summary judgment to the Secretary. ALJ Dec. 5-7. In so ruling, the ALJ determined that the Commission's decision in *Johnson Controls, Inc.*, 15 BNA OSHC 2132 (No. 89-1614, 1993), foreclosed Volks's statute of limitations defense. *Ibid.*

Volks then filed a petition for discretionary review with the Commission, and the Commission directed the case for review on July 27, 2007.

ARGUMENT

A. *Volks's violations of the recordkeeping regulations set forth at 29 C.F.R. §§ 1904.29(b)(2) and (b)(3) occurred within six months of the citation date. (Citation 2, items 1 and 2).*

In Citation 2, item 1, the Secretary alleged that Volks violated 29 C.F.R. § 1904.29(b)(2) by failing to prepare an injury and illness incident

report (OSHA Form 301) for 67 individual recordable injuries and illnesses that occurred between 2002 and 2006. Similarly, Citation 2, item 2 alleged that Volks violated 29 C.F.R. § 1904.29(b)(3) by failing to record on the OSHA Form 300 log 102 injuries and illnesses that occurred during the same approximate time frame. Volks contends that citation items 1 and 2 fall outside the six-month statute of limitations set forth in section 9(c) of the OSH Act, 29 U.S.C. § 658(c). Commission precedent squarely forecloses Volks's argument, and Volks has not offered persuasive reasons for the Commission to depart from that precedent. Therefore, the ALJ's decision should be affirmed.

1. *The citation items at issue were timely under controlling Commission precedent.*

Section 9(c) of the OSH Act provides that "[n]o citation may be issued under this section after the expiration of six months following the occurrence of any violation." 29 U.S.C. § 658(c). Neither that section nor any other part of the OSH Act, however, defines what constitutes an "occurrence" of a "violation." In the context of recordkeeping regulations, however, the Commission has held that "an inaccurate entry on an OSHA form 200 violates the Act until it is corrected, or until the 5-year retention requirement of section 1904.6 expires." *Johnson Controls, Inc.*, 15 BNA OSHC 2132, 2135 (No. 89-2614, 1993).[2] Accordingly, "an

[2] The part 1904 regulations have been amended since *Johnson Controls* was decided. *See* 66 Fed. Reg. 5916 (Jan. 19, 2001). OSHA Form 300 replaced the OSHA Form 200, and the duty to retain records for five years is now codified at 29 C.F.R. § 1904.33(a).

uncorrected error or omission in an 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." *Ibid.*; *see also General Dynamics Corp., Elec. Boat Div.*, 15 BNA OSHC 2122, 2128 (No. 87-1195, 1993) ("the obligation to correct any error or omission in an employer's OSHA-required injury records runs until the error or omission is either corrected by the employer, or discovered or reasonably should have been discovered by the Secretary").

Under *Johnson Controls* and *General Dynamics*, Volks's failure to record injuries and illnesses on the OSHA Form 300 and 301 forms during the 2002 to 2006 time frame violated the OSH Act until they were corrected or until the five-year retention period (*see* 29 C.F.R. § 1904.33) expired. The stipulated facts show that neither of those conditions took place prior to the date the citation was issued (November 8, 2006). Therefore, items 1 and 2 were issued within section 9(c)'s limitation period.

2. *Johnson Controls and General Dynamics remain good law.*

Volks acknowledges the holdings of *Johnson Controls* and *General Dynamics* but nonetheless argues that those decisions have been abrogated by the 2001 amendments to the part 1904 regulations and by subsequent caselaw. None of its arguments has merit.

a. *The 2001 amendments to the part 1904 regulations did not abrogate Johnson Controls and General Dynamics.*

Volks argues (Br 19-23) that the part 1904 regulations, as amended in 2001, do not impose an ongoing duty to record injuries and illnesses on Forms 300 and 301 beyond the seven-day reporting window set forth in 29 C.F.R. § 1904.29(b)(3). Thus, according to Volks, a failure to record is complete as of the eighth day following the employer's receipt of information that a recordable injury or illness has occurred, and section 9(c)'s limitations period begins to run from that day.

Volks's argument is based upon a misreading of the part 1904 regulations. Although a failure to record does constitute a violation on the eighth day following the employer's receipt of information that an injury or illness has occurred, the violation continues to "occur" within the meaning of section 9(c) until either the employer records the information as required in the part 1904 regulations or the five-year period for retaining OSHA Forms 300 and 301 has elapsed. In other words, the same analysis that the Commission applied to the pre-2001 recordkeeping regulations in *Johnson Controls* and *General Dynamics* applies with equal force today.

1. *The OSH Act and the part 1904 regulations supply ample evidence that the duty to record is an ongoing one.*

A review of the part 1904 regulations, construed in light of the OSH Act itself, reveals that the continuing duty rule laid down in

Johnson Controls and *General Dynamics* was not extinguished when the Secretary amended the regulations in 2001.

To begin with, section 8(c)(2) of the OSH Act directs the Secretary to "prescribe regulations requiring employers to *maintain accurate* records of" work-related injuries and illnesses. 29 U.S.C. § 657(c)(2) (emphasis added). Obviously, the regulations would not meet that statutory mandate if the duty to record were confined to a seven-day window. Thus, the Commission's and the Secretary's interpretation of the part 1904 regulations -- under which employers have a continuing duty to maintain accurate records until the five-year retention period has elapsed -- comports with section 8(c)(2)'s directive better than Volks's interpretation, under which employers have a duty to comply within the seven-day initial reporting period but not thereafter. Br. 19. *See Alfred S. Austin Constr.*, 4 BNA OSHC 1166, 1168 (No. 4809, 1976) ("It is especially important that the regulations promulgated by the Secretary of Labor under the Act be construed to effectuate the congressional objectives." (internal quotation marks and citation omitted)).

The structure of the part 1904 regulations as a whole likewise confirms that the recordkeeping duty is a continuing one. Although section 1904.29(b)(3) states that injuries and illnesses must be entered on Forms 300 and 301 within seven days, the previous subsections of 1904.29(b) (1904.29(b)(1), (2)) make clear that the duty to record is a categorical one. So does 29 C.F.R. § 1904.4, which mandates that

employers *must* record injuries and illnesses if certain criteria are met. Further evidence is supplied by 29 C.F.R. § 1904.32(a)(1), which requires employers to review the OSHA 300 log at the end of each calendar year to "verify that the entries are complete and accurate, and correct any deficiencies identified." That regulation, read in conjunction with the requirement that records be kept for a period of 5 years, *see* 29 C.F.R. § 1904.33, makes clear that the duty to record injuries and illnesses does not end at the expiration of the initial 7-day reporting period.

In arguing to the contrary, Volks relies on several provisions of the part 1904 regulations that were added by the 2001 amendments. Its reliance on those provisions is badly misplaced.

In the first place, nothing in the language of the part 1904 regulations, as amended, or the preamble to the 2001 amendments indicates that the Secretary intended to depart from the rule, set forth in *Johnson Controls* and *General Dynamics*, that the duty to record injuries and illnesses is an ongoing one during the five-year retention period. Absent a specific indication that the Secretary intended a change in her interpretation, the Commission should not presume that one was intended. *See Troy Corp. v. Browner*, 120 F.3d 277, 286-87 (D.C. Cir. 1997).

The specific provisions that Volks relies upon, moreover, do not support its position. For example, it points to 29 C.F.R. § 1904.32(a)(1), the provision that requires employers to review the OSHA 300 log "at the

end of each calendar year." According to Volks, that provision is redundant if employers already have an ongoing duty to correct deficiencies throughout the 5-year retention period. Br. 21.

Volks's argument fails because 29 C.F.R. § 1904.32 also requires employers to prepare and post for their employees' benefit an annual summary based upon the OSHA Form 300 log. *See* 29 C.F.R. § 1904.32(a)(2), (4). Thus, the requirement that the OSHA Form 300 log be reviewed and corrected at the end of each calendar year helps to ensure that the information supplied to employees is as accurate as possible. *See* 66 Fed. Reg. 5916, 6043 (Jan. 19, 2001). Consequently, the requirement to check the accuracy of the log at the end of each calendar year serves a more specific purpose than the general rule that accurate records be maintained throughout the five-year retention period. Under these circumstances, 29 C.F.R. § 1904.32(a)(1) is not redundant. *See United States v. Stewart*, 104 F.3d 1377, 1387 (D.C. Cir. 1997).[3]

Volks also points to 29 C.F.R. § 1904.33(b), which requires employers to "update" OSHA Form 300 logs during the retention period to include "newly discovered recordable injuries and illnesses" and to make changes to "previously recorded injuries and illnesses." Because

[3] Volks's argument would fail even if the provisions *were* redundant. It is hardly unusual for statutes and regulations to emphasize points that have been previously stated or implied. *See Shock v. District of Columbia Financial Responsibility and Mgmt. Assistance Auth.*, 132 F.3d 775, 782 (D.C. Cir. 1998) ("Sometimes congress . . . drafts provisions that appear duplicative of others simply, in Macbeth's words, "to make assurance double sure.")

the regulation only refers to update the logs with "new information," Volks concludes, the regulation does not require updates of information that the employer already knew about and should have recorded, but did not. Br. 22.

Volks's argument must fail. It is based upon the maxim *expressio unius exclusio alterius* -- "expressing one item of an associated group or series excludes another left unmentioned." *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 80 (2002) (internal quotation marks and citation omitted). That maxim, however, is a "feeble helper" in the interpretation of administrative regulations. *Cheney R.R. Co. v. ICC*, 902 F.2d 66, 69 (D.C. Cir. 1990); *see also Whetsel v. Network Property Servs., LLC*, 246 F.3d 897, 902 (7th Cir. 2001) (*expressio* canon "has reduced force in the context of interpreting agency administered regulations"). And it is an especially feeble helper here: the Secretary did not spell out the obligation to "update" logs with information that the employer was already required to record because she was entitled to presume that employers would follow the law in the first place. In addition, employers already knew from *Johnson Controls* and *General Dynamics* that the duty to record was an ongoing one throughout the five-year retention period. Requiring employers to update the logs with "new information," cannot reasonably be held to show the Secretary's intent to eliminate the duty to record illnesses and injuries that should have been recorded earlier.

2. *The Secretary's interpretation of section 9(c) and the part 1904 regulations is entitled to deference.*

The Commission should also adhere to *Johnson Controls* and *General Dynamics* because the views expressed in those decisions regarding the meaning of section 9(c) and the part 1904 regulations are shared by the Secretary. The Secretary's reading of section 9(c) is entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and the Secretary's reading of the part 1904 regulations is entitled to deference under *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). *See Martin v. OSHRC (CF&I)*, 499 U.S. 144, 157 (1991).

Volks cites *Arcadian Corp.*, 17 BNA OSHC 1345 (No. 93-3270, 1995), for the view that the Secretary is not entitled to deference regarding her interpretation of the OSH Act. Br. 30. Whatever the force of that decision, it should not be followed here. As Volks points out, this case is likely to be appealed to the D.C. Circuit (Br. 5), and that court has held that the Secretary's interpretations of the OSH Act are entitled to deference. *See A.E. Staley Mfg. Co. v. Secretary of Labor*, 295 F.3d 1341, 1345 (D.C. Cir. 2002); *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. OSHA*, 938 F.2d 1310, 1319 n.9 (D.C. Cir. 1991); *cf. Secretary of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 261 (D.C. Cir. 2005) (holding that Secretary's interpretations of Federal Mine Safety and Health Act in litigation before

the Federal Mine Safety and Health Review Commission are entitled to *Chevron* deference).[4]

Citing *United States v. Mead Corp.*, 533 U.S. 218 (2001), Volks also contends that the Secretary's interpretation of her part 1904 regulations is not entitled to deference because that interpretation has not been formally promulgated through rulemaking or adjudication. Br. 29-30. *Mead*, however, addressed the circumstances under which an agency's interpretation of a *statute* should be accorded *Chevron*-type deference, and did not address the circumstances under which an agency's interpretation of its own *regulation* should be accorded deference. *See Glover v. Standard Fed. Bank*, 283 F.3d 953, 962 (8th Cir. 2002); *American Express Co. v. United States*, 262 F.3d 1376, 1382-83 (Fed. Cir. 2001). In any event, nothing in *Mead* diminished the Court's holding in *CF&I* that "the Secretary's litigating position before the Commission is as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a workplace health and safety standard." 499 U.S. at 157. Thus, the Secretary's interpretation of the part 1904 regulations as

[4] In *Leach Corp. v. NLRB*, 54 F.3d 802, 806 (D.C. Cir. 1995), the court noted that the NLRB's interpretation of the statute of limitations set forth in the National Labor Relations Act was entitled to *Chevron* deference. The NLRB, unlike the Commission, is a policymaking body whose decisions are entitled to deference. In the OSH Act context, the Secretary, not the Commission, serves the role of policymaking agency, and her views are entitled to *Chevron* deference. *See Anthony Crane Rental, Inc. v. Reich*, 70 F.3d 1298, 1302 (D.C. Cir. 1995). *See also Interamericas Investments, Ltd. v. Federal Reserve Sys.*, 111 F.3d 376, 382 (5th Cir. 1997) (a court "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").

set forth in this litigation (and as previously approved in *Johnson Controls* and *General Dynamics*) is entitled to deference. *Cf. Twentymile Coal Co.*, 411 F.3d at 261.

Volks also claims that deference principles do not apply because the part 1904 regulations are not ambiguous. Br. 29. Nothing in the regulations, however, clearly supports Volks's position that the duty to record exists only during the seven-day window set forth in 29 C.F.R. § 1904.29(b)(3). If anything, the regulations are most easily read to support the Secretary's position. And in *Johnson Controls*, the Commission held that the duty to record exists throughout the five-year retention period, even though the regulations at that time required employers to record injuries and illness "no later than six working days after the employer received information about the case." 66 Fed. Reg. at 6023. Thus, the regulations cannot be read to unambiguously support Volks's interpretation.

b. *Subsequent caselaw has not abrogated Johnson Controls and General Dynamics.*

Contrary to Volks's argument (Br. 16, 19-22), the caselaw does not require the Commission to revisit *Johnson Controls* and *General Dynamics*.

Volks first relies upon a line of cases, most recently illustrated by *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S.Ct. 2162 (2007), for the proposition that "a discrete, violative act must occur within a limitations

period and [ ] passive inaction is not a continuing violation." Br. 2. The Commission, however, already addressed cases like *Ledbetter* in *General Dynamics*, where it stated:

> [General Dynamics] further relies on cases under numerous other Federal statutes that require the plaintiff to show an overt act violating the statute within the limitations period. However, the statutes at issue in those cases, unlike the [OSH] Act, require proof of an "overt act" to show any violation. . . . By contrast . . . the [OSH] Act penalizes the occurrence of noncomplying conditions which are accessible to employees and of which the employer knew or reasonably could have known. That is the only "act" that the Secretary must show to prove a violation.

15 BNA OSHC at 2129-2130. Nothing in *Ledbetter* affects the analysis set forth in *General Dynamics*, and the Commission thus has no reason to depart from that decision.

Toussie v. United States, 397 U.S. 112 (1970), does not help Volks either. To begin with, it is far from clear that *Toussie* has any application to civil cases, as Volks contends (Br. 16). *See Diamond v. United States*, 427 F.2d 1246, 1247 (Ct. Cl. 1970) ("[t]he Supreme Court's opinion [in *Toussie*] makes clear that the considerations moving the Court to decide that the offense was not a continuing one were entwined with the criminal aspects of the matter, and holding was limited to criminal statutes of limitations"). In addition, the *Toussie* Court made clear that whether a violation was continuing in nature is ultimately a matter of statutory interpretation. *See Toussie*, 397 U.S. at 115. In the present case, a proper interpretation of the part 1904 regulations, given due

deference to the Secretary's interpretation, CF&I, 499 U.S. at 157, confirms that the recordkeeping duty at issue is a continuing one throughout the five-year retention period.

Finally, Volks's reliance on *Interamericas Investments, Ltd. v. Federal Reserve Sys.*, 111 F.3d 376, 382 (5th Cir. 1997), is equally misplaced. As Volks points out (Br. 21 n.25), the court there stated that, "[f]or reporting statutes such as the [Bank Holding Company Act], *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." (Emphasis added). But that statement does not support Volks's position, because the court also acknowledged that it "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." *Interamericas Investments,* 111 F.3d at 382. As stated above, the Secretary interprets section 9(c) of the OSH Act and the part 1904 regulations as authorizing the citation of unrecorded injuries and illnesses throughout the five-year retention period, and that interpretation is entitled to deference.[5]

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[5] Quoting *Phillips v. United* States, 843 F.2d 438, 443 (11th Cir. 1988), Volks states that "*Johnson Controls* also violates the principle that '[s]tatutes of limitations, both criminal and civil, are to be liberally interpreted in favor of repose.'" Br. 16. In so arguing, Volks overlooks the statement in *Interamericas Investments* that "statutes of limitations in the civil context are to be strictly construed in favor of the Government against repose." 111 F.3d at 382.

c. *The Commission addressed Volks's staleness concerns in General Dynamics.*

Volks also contends that "continuing violations may not be found if they are necessarily based on stale facts." Br. 16. Although staleness concerns are highly relevant in determining section 9(c)'s scope and application, the Commission has already addressed those concerns in this exact context:

> A statute of limitations such as section 9(c) serves important purposes: to insure repose by giving stability to human affairs and to spare a person the burden of preparing a defense after the evidence has been lost, memories have faded, or witnesses have departed or died. However, those concerns do not arise where, as here, the alleged violations existed within six months before the citations were issued. The Secretary must prove that all elements of the alleged violation "occurred" during that period, regardless whether they also "occurred" earlier. In particular, the Secretary must show that the employer knew, or with the exercise of reasonable diligence could have known, of the errors and omissions during the limitations period.

General Dynamics, 15 BNA OSHC at 2130 n.16 (internal quotation marks and citation omitted). Given that staleness concerns must be weighed against the remedial purposes of the OSH Act, *see generally Connecticut Light & Power Co. v. Secretary of Labor*, 85 F.3d 89, 96 (2nd Cir. 1996), the Commission's resolution of this issue in *General Dynamics* was entirely reasonable, and Volks has not supplied adequate reasons for the Commission to change course now.

3. *Stare decisis counsels in favor of reaffirming Johnson Controls and General Dynamics.*

As the foregoing discussion shows, Volks's challenge to the continuing violation rule established in *Johnson Controls* and *General Dynamics* is not in fact based upon developments that have occurred subsequent to those decisions. Rather, it is a challenge to the correctness of those decisions. The Commission, however, follows the principle of *stare decisis*, *see John R. Jurgensen Co.*, 12 BNA OSHC 1889, 1894 (No. 83-1224, 1986), and that principle weighs heavily against the overruling of prior decisions where the only argument for doing so is that they were wrongly decided. As the Seventh Circuit has remarked, "if the fact that a court considers one of its previous decisions to be incorrect is a sufficient ground for overruling it, then stare decisis is out the window, because no doctrine of deference to precedent is needed to induce a court to follow the precedents that it agrees with; a court has no incentive to overrule them even if it is completely free to do so." *Tate v. Showboat Marina Casino Partnership*, 431 F.3d 580, 582-83 (7th Cir. 2005).

The decisions in *Johnson Controls* and *General Dynamics* are consistent with the policies underlying the OSH Act and the part 1904 recordkeeping regulations, and are also consistent with the Secretary's reasonable interpretations of those provisions. Because Volks has put forth no convincing arguments that outweigh *stare decisis*, the

Commission should reaffirm the holdings in *Johnson Controls* and *General Dynamics*.

4. *The discovery rule is not implicated in this case.*

Volks devotes a substantial portion of its brief to the argument that the discovery rule, as adopted in *Johnson Controls* and *General Dynamics*, is no longer viable in light of Supreme Court and D.C. Circuit precedent. Br. 5-14. This case does not present an occasion for the Commission to consider that issue, because the timeliness of items 1 and 2 does not rest upon the discovery rule.

In the OSHA context, the discovery rule limits the Secretary's ability to cite an employer for recordkeeping violations within the five-year retention period. That is, if the Secretary discovers or reasonably should have discovered failures to record, then section 9(c)'s six-month limitations period begins to run from the date of the actual or constructive discovery, even if the discovery occurs well before the employer's five-year retention period has expired. *See Johnson Controls*, 15 BNA OSHC at 2136; *General Dynamics*, 15 BNA OSHC at 2127-28 & n.8.

In this case, Volks stipulated that it had not recorded the injuries and illnesses set forth in items 1 and 2 by the time the Secretary initiated the inspection in May 2006. ALJ Dec. 3. There is no suggestion, moreover, that the Secretary knew about or should have discovered the violations at issue sooner than she did. ALJ Dec. 5.

Therefore, the violations "occurred" for section 9(c)'s purposes no earlier than May 2006, and the Secretary issued the citation within six months of that "occurrence," in November 2006. ALJ Dec. 1. Therefore, the discovery rule simply does not come into play. *See General Dynamics*, 15 BNA OSHC at 2127-28 & n.8.

Even if it were at issue in this case, nothing in the cases cited by Volks requires the Commission to abandon the discovery rule outlined in *Johnson Controls* and *General Dynamics*. Volks makes the broad assertion that the District of Columbia Circuit "does not recognize discovery rules in civil administrative proceedings." Br. 5. This misstates the holding in *3M v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994).

In *3M*, the District of Columbia Circuit held that the general federal five-year statute of limitations, 28 U.S.C. § 2462 ("section 2462"), applied to an administrative proceeding in which the Environmental Protection Agency ("EPA") sought to impose civil penalties. 17 F.3d at 1454. The court also analyzed when that particular statute of limitations begins to run, *ibid.*, specifically recognized that:

> [t]he provision before us, § 2462, is a general statute of limitations, applicable not just to EPA in TSCA cases, but to the entire federal government in all civil penalty cases, unless Congress specifically provides otherwise. We therefore cannot agree with EPA that our interpretation of § 2462 ought to be influenced by EPA's particular difficulties in enforcing TSCA.

Id. at 1462.

Volks' reads this excerpt to stand for the proposition that *3M* holds that "enforcement difficulties are, as a matter of law, never sufficient to justify a discovery rule in civil penalty cases." This reading misstates the court's holding. It is clear that the D.C. Circuit did not want to interpret section 2462 in a manner that was unique to EPA only, since its decision would affect a wide range of cases brought under a variety of statutes by a variety of Federal agencies. In fact, the variety of cases cited by Volks to support its claim that *3M* has been "widely followed" underscores the many types of cases that are affected by an interpretation section 2462.

In contrast, OSHA has its own statute of limitations in section 9(c) of the Act. The Commission and courts can and do consider OSHA's unique enforcement issues when interpreting and analyzing the Act's statute of limitations because their decisions do not impact non-OSHA cases. Volks ignores this very obvious distinction between section 9(c) and section 2462. Notably, none of the cases Volks cites as support for its statement that the *3M* case has been "widely followed" involve section 9(c).

Nor does *TRW Inc. v. Andrews*, 534 U.S. 19 (2001), provide support for Volks' position. In *TRW*, the Supreme Court held only that "Congress implicitly excluded a general discovery rule by explicitly including a more limited one." *TRW v. Andrews*, 534 U.S. at 28. As we have explained, Congress did no such thing in section 9(c) of the Act, and OSHA did no

such thing in the recordkeeping regulation. To the contrary, the rules set out in *Johnson Controls* and *General Dynamics* remain in effect.

Thus, the Supreme Court did not hold that a discovery rule is only appropriate in cases that "cry out" for it, as Volks implies. Significantly, the court stopped short of determining whether there is a presumption that federal statutes of limitations incorporate a general discovery rule. *Id.* at 27.

Finally, even if Volks's reading of *TRW* were correct, OSHA's recordkeeping regulation does "cry out" for a general discovery rule. As noted above, OSHA recordkeeping cases are inherently undiscoverable--typically requiring an on-site OSHA inspection and thorough review of workers' compensation records and medical records, in addition to an employer's OSHA-required recordkeeping records. If OSHA were precluded from citing uncorrected recordkeeping errors when such errors are discovered, OSHA would be unable to enforce its injury and illness recordkeeping regulations, which are essential to the Agency's purpose of protecting employee safety and health.

5. *Items 1 and 2 are not duplicative.*

In its briefing notice, the Commission also asked the parties to address whether items 1 and 2 are duplicative. In its brief, Volks states that they are duplicative, but offers no argumentation in support. Br. 25. That assertion is clearly wrong.

Citation items are duplicative when they address the same violative conduct and when they "require the same abatement measures." *MJP Constr. Co.*, 19 BNA 1638 (No. 98-0502, 2001). Here, the information required to complete the OSHA Form 300 log is different from the information needed to complete an OSHA Form 301 report, and the forms serve different purposes. Thus, while the OSHA Form 300 log requires employers to classify work-related injuries and illnesses and to note the extent and severity of each case, the OSHA Form 301 report requires employers to fill out more detailed information about each recordable injury or illnesses, including what the employee was doing when injured or ill; how the incident occurred; the specific details of the injury or illness; and the object or substance that harmed the employee. *See* 66 Fed. Reg. at 6025, 6031. The completion of an OSHA Form 300 log, moreover does not abate an employer's failure to complete an OSHA Form 301 report.

In this particular case, moreover, item 1 alleged that Volks failed to complete an OSHA Form 301 report for 67 individual recordable injuries and illnesses, whereas item 2 alleged that Volks failed to record 102 injuries and illnesses on the OSHA Form 300 log. Thus, the items do not cover the exact same failures to record.

6. *The duty to complete an OSHA Form 301 report arises whether or not the employer has complied with his duty to complete an OSHA Form 300 log.*

Finally, Volks argues that item 1, which charges numerous failures to record injuries and illnesses on OSHA Form 301 incident reports, should be vacated because Volks never recorded those same injuries and illnesses on the OSHA 300 Log. According to Volks, the cited regulation, 29 C.F.R. § 1904.29(b)(2), requires employers to complete an OSHA Form 301 for each recordable injury and illness "entered on the OSHA 300 Log," and since Volks never entered the items at issue on the Form 300 log, the duty never arose to prepare Form 301 reports. Br. 24-25.

That argument is frivolous. The regulations make clear that the duty to prepare a Form 301 report is independent of the duty to prepare a Form 300 log. *See* 29 C.F.R. § 1904.29(b)(3) ("You must enter each recordable injury or illness on the OSHA 300 Log *and* 301 Incident Report with seven (7) calendar days of receiving information that a recordable injury or illness has occurred (emphasis added)). In addition, Volks's interpretation is perverse: an employer who complies with his obligation to report an injury or illness on the OSHA 300 Log has a duty to report that same injury or illness on OSHA Form 301, but an employer who ignores the duty to complete the OSHA 300 Log is thereby exonerated from any duty to complete Form 301. It is difficult to see how that interpretation advances the policies underlying the recordkeeping regulations, and it should be rejected by the Commission.

B. *Volks's violations of the recordkeeping regulations set forth at 29 C.F.R. §§ 1904.32(a)(1) and 1904.32(b)(3) occurred within six months of the citation date. (Citation 2, items 3 and 4).*

In Citation 2, item 3, the Secretary alleged that Volks violated 29 C.F.R. § 1904.32(a)(1), which requires employers to review the OSHA Form 300 log for completeness and accuracy and to correct any deficiencies, "at the end of each calendar year." According to the citation, Volks did not review the logs for accuracy with respect to the 2002 through 2005 calendar years. ALJ Dec. 4. Citation 2, item 4 charged that Volks did not have a company executive certify the annual summaries for the 2002 through 2005 calendar years for accuracy and thus violated 29 C.F.R. § 1904.32(b)(3). *Ibid.* Like items 1 and 2, these items were charged within the six-month limitations period under a continuing violation theory.

Volks argues that these violations were complete, and the limitations period began to run, as of the end of each calendar year at issue. Br. 26-28. The logic of *Johnson Controls* and *General Dynamics*, however, applies with equal force to these violations. The requirements of 29 C.F.R. § 1904.32(a)(1) and (b)(3) are designed to insure the accuracy of the records that the employer must retain for a five-year period, *see* 66 Fed. Reg. at 6042-6048; *see also id.* at 6047 (annual summary "is also used as a data source by OSHA and BLS"), and in that sense are no different from the requirements of the regulations at issue in *Johnson Controls* and *General Dynamics*. *See, e.g., Johnson Controls,*

15 BNA OSHC at 2133-2134. Thus, the continuing violation rule set forth in those Commission decisions should be applied to these violations.

The record shows that Volks did not perform its duties with respect to 29 C.F.R. § 1904.32(a)(1) and (b)(3) for the 2002 through 2005 OSHA Form 300 logs and annual summaries by the time that the Secretary inspected its worksite in 2006. ALJ Dec. 3. Therefore, items 3 and 4 were not time-barred under section 9(c) of the OSH Act. The ALJ's decision should therefore be affirmed.

C. *Volks's failure to post the annual summary for the full three-month period in 2006 as required under 29 C.F.R. § 1904.32(b)(6) was a continuing violation throughout 2006; therefore, the citation in this case, filed in November 2006, was timely. (Citation 2, item 5).*

Employers are required to complete an annual summary at the end of each calendar year and to post that summary no later than February 1 of the following year and to keep it posted until April 30 of that year. 29 C.F.R. § 1904.32(b)(6). Here, Volks complied in part by posting the 2005 annual summary from February 1 through February 28, 2006. ALJ Dec. 3. The Secretary cited Volks in November 2006 for failing to post for the entire three-month period, and Volks contends that the citation was untimely under section 9(c). In Volks's view, the violation was complete as of May 1, and the limitations period began to run from that date. Br.

Concededly, the precise holding of *Johnson Controls* and *General Dynamics* cannot be applied to this violation. The information contained in an annual summary would be of little use to an employee if it were

posted four or five years later, so placing an ongoing duty upon employers to post for any three-month period during the course of the five-year retention period would make little sense. It does make sense, however, to place a continuing duty upon employers to post the previous year's annual summary for any three-month period *during the following calendar year*. Applying that continuing violation theory, Volks had the duty to post the 2005 annual summary from February 1 through April 30, 2006; but, having failed in that duty, was nonetheless required to post for *some* three-month period in 2006. Because the citation was issued in November 2006, before Volks had posted the 2005 summary for three months in 2006, the citation was timely under section 9(c).

This limited continuing violation theory is perfectly consistent with the reasoning in *Johnson Controls* and *General Dynamics*. The Commission in those cases acknowledged a continuing duty to record throughout the five-year retention period because the recordable information is useful, and serves the OSH Act's purposes, for the entire retention period. Similarly, the three-month posting requirement is designed to "raise employee awareness of the recordkeeping process . . . by providing greater access to the previous year's summary without having to request it from management." 66 Fed. Reg. at 6046.[6] Raising employee awareness in that fashion, OSHA believes, will "improve employee participation in the recordkeeping system." *Id.* at 6047. That

[6] The rule prior to the 2001 amendments only required posting for a one-month period.

goal can be achieved if the records are posted during any three-month period during the following year, even if the employer fails to post during the prescribed time period.[7]

The Commission should thus hold, in light of the reasoning in *Johnson Controls* and *General Dynamics*, that employers have a continuing duty under 29 C.F.R. § 1904.32(b)(6) to post a year's annual summary for a three-month period during the following calendar year. In this case, Volks did not post for three months prior to the date of the citation. Therefore, citation 2, item 5 was timely under section 9(c) of the OSH Act.

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[7] OSHA decided that the three-month posting period should begin on February 1 because the thirty days in January would be sufficient for employers to prepare the documents to be posted. 66 Fed. Reg. at 6046. Although OSHA stated that "[d]elaying the posting any further would mean that employers would not have access to the Summary for a longer period, thus diminishing the timeliness of the posted information," *ibid.*, the preamble makes clear that making the posted information available for a three-month period is more important than having it posted by February 1. *See* 66 Fed. Reg. at 6046-47.

CONCLUSION

For the foregoing reasons, the citation and penalty should be affirmed.

Respectfully submitted.

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January 17, 2008

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of January, 2008, the following counsel of record for Respondent Volks Constructors was served with one copy of the Brief of Complainant Secretary of Labor by facsimile and two copies by overnight mail:

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