UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. **AKM LLC dba VOLKS CONSTRUCTORS,** Respondent.	**OSHRC Docket No. 06-1990**

VOLKS CONSTRUCTORS'

REPLY BRIEF ON REVIEW

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I. Argument In Reply to the Secretary's Brief

A. Citation 2, Item 2: Form 300 Log (§ 1904.29(b)(3))

1. Neither § 1904.29(b)(3) Nor Any Regulation in Part 1904 Imposes A Continuing Duty to Record A Case on A Log.

The Secretary states (Br. 6) that neither section 9(c) nor any other part of the OSH Act defines an "occurrence" of a "violation." Inasmuch as she places "occurrence" within quotation marks, one would expect her to then cite a dictionary definition of "occurrence." But she does not. The likely reason for her reticence is that, in 2002, after *Johnson Controls* was decided, the Supreme Court held in *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110-115, 109 n. 5 (2002), that "occurred" in a statute of limitations bears its ordinary, common meaning of having "happened."[1] Inasmuch as the ordinary, common meaning of

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[1] "A discrete retaliatory or discriminatory act 'occurred' on the day that it 'happened.'" *Id.* at 109-110 & n. 5. The Court explained (*id.* at n. 5):

> "In the absence of an indication to the contrary, words in a statute are assumed to bear their 'ordinary, contemporary, common meaning.'" .... WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1561 (1993) defines "occur" as "to present itself: come to pass: take place: HAPPEN." See also BLACK'S LAW

"occurrence" is "something that takes place," or the "action or process of happening or taking place,"[2] *Morgan* teaches that section 9(c) requires a violative act to have *happened* – or, for a failure to act, a duty-triggering fact to have *happened* – within the limitations period. Yet, the Secretary never points to any violative or duty-triggering fact that *happened* during the limitations period – even though Volks prominently argued its necessity (Opening Br. 18, 20).

Similarly, the Secretary never relies on the words of the allegedly-violated regulation (§ 1904.29(b)(3)) to define the term "violation," even though she placed that word too within quotation marks. Although she asserts that a

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DICTIONARY 1080 (6th ed. 1990) (defining "[o]ccur" as "[t]o happen; ... to take place; to arise").

[2] WEBSTER'S THIRD INTERNATIONAL DICTIONARY 1561 (1986) states in part:

> 1: something that takes place; *esp* : something that happens unexpectedly and without design : HAPPENING (a happy~) (a disastrous ~) (an unusual ~)
> 2a: the action or process of happening or taking place (the ~ of a genuine dispute – R.M. Dawson) (b: the action or process of being met with or coming into view : APPEARANCE (the ~ of mammal remains falls sharply throughout the summer – *Ecology*) (a fish of regular ~ along the southern coast of California) : the fact of being met with or of taking place
> 3 : the presence of a natural form or material at a particular place; *also* : the mineral, rock, or deposit thus occurring (evidence of oil ~) (the ~ of shallow coal beds in this region) ...
>
> **syn** ... OCCURRENCE is a general term for taking place or happening and lacks much connotational range; it may suggest a happening without plan, intent or volition (occurrences which we not only do not, but cannot perceive – Bertrand Russell) ....

RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 1340 (2d ed. 2001) defines "occurrence" as "1. the action, fact, or instance of occurring. 2. something that happens, event, incident."; and principally defines "occurring" as "to happen; take place; come to pass[.]" Both BLACK'S LAW DICTIONARY editions that pre- and post-dated the Act's passage define "occurrence" as "[a] coming or happening; any incident or event, especially one that happens without being designed or expected." *Id.* at 1231 (4th ed. 1951); at 974 (5th ed. 1979).

violation continues to occur until the case is recorded or the five-year log-retention period elapses (Br. 8), she never claims, or points to any language in the regulation to show, that its words impose a duty for either of those periods, and hence that a "violation" occurs then. What she does rely upon falls far short.

OSH Act § 8(c)(2). The Secretary relies on section 8(c)(2)'s command to the Secretary to "prescribe regulations" requiring employers to "maintain accurate records." Instead of pointing to the regulations that she "prescribed" to show how they impose a continuing duty by their terms, the Secretary asks the Commission to suppose that she must have prescribed whatever she now thinks is needed – even if it cannot be found in the regulation's actual words. If the Secretary thinks that her regulations as written do not meet her statutory mandate or do not impose the continuing duty that she believes should be there, she should re-write them.[3]

Provisions in Part 1904 Other Than the Cited Provision. The Secretary points to various Part 1904 provisions other than § 1904.29(b)(3). There are, however, fundamental problems with relying on them. If any such provision does "make clear" that the duty to record is a "categorical" one, then they preempt § 1904.29(b)(3) under either § 1910.5(c) or under the general rule of construction that the specific prevails over the general, and the Secretary should have cited Volks for having violated them, or for having violated the most specific of them. Inasmuch as the Secretary never moved to amend to allege a

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[3] *Fabi Constr. Co. v. Sec'y of Labor*, 508 F.3d 1077, 1088 (D.C. Cir. 2007) (citing *Bethlehem Steel Corp. v. OSHRC*, 573 F.2d 157, 161 (3d Cir. 1978); and *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 650 (5th Cir. 1976)).

violation of any these provisions, Item 2 must be vacated. In any event, none of the uncited provisions impose any such duty. Moreover, inasmuch as no reasonable employer would ever read them to carry the meaning now ascribed to them by the Secretary, her position would deprive Volks of the fair notice required by the Due Process Clause of the Fifth Amendment to the Constitution.

Paragraphs (b)(1) and (b)(2) of § 1904.29. The Secretary claims that the two paragraphs that precede § 1904.29(b)(3) "make clear" that the duty to record is a "categorical" one. The argument makes little sense. Paragraphs (b)(1) and (b)(2) of § 1904.29 state:

> (b)(1) *Implementation.* What do I need to do to complete the OSHA 300 Log? You must enter information about your business at the top of the OSHA 300 Log, enter a one or two line description for each recordable injury or illness, and summarize this information on the OSHA 300-A at the end of the year.
>
> (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.

As the introductory questions indicate, these provisions deal only with the manner of completing the Form 300 log (paragraph (b)(1)), and what triggers the duty to complete a Form 301 (paragraph (b)(2)). Neither states *when* a case must be entered. Neither indicates that, despite the specific seven-day recording period in paragraph (b)(3), the recording period for cases actually continues for five years. The Secretary also ignores her own preamble statement, placed under the heading, "Deadline for Entering a Case," that it is "Paragraph 1904.29*(b)(3)* [that] establishes the requirement for how quickly each recordable injury or

illness must be recorded into the records." 66 Fed. Reg. 5916, 6023 col. 1 (2001) (emphasis added).

§ 1904.4. The Secretary then relies on § 1904.4, entitled "Recording criteria." As its title indicates, this provision and its ten paragraphs state only recording *criteria* (*i.e., what* cases must be recorded). They nowhere indicate *when* the recording duty applies or even hint that the recording duty continues after the expiration of the specific recording period in § 1904.29(b)(3).

§ 1904.32(a)(1). The Secretary then relies on § 1904.32(a)(1), which tells employers that "[a]t the end of each calendar year," they must "[r]eview the OSHA 300 Log to verify that the entries are complete and accurate, and correct any deficiencies identified." First, the duty to "review" entries and correct "identified" deficiencies expressly applies at the "end of each calendar year," not for five years, so it is impossible to see in it a duty to record for five years. Second, the regulation requires a review of only the last calendar year, not years before that.[4] Third, it is not clear that this provision applies to cases that are entirely missing from a log; by its terms, it requires that the "entries" be verified to be complete and accurate, not that the "log" be so verified. (If it does include the latter, then its express limitation to the end of the calendar year would be nullified by the Secretary's reading. See p. 7 below.)

§ 1904.33. The Secretary relies on § 1904.33, "Retention and updating." The Secretary does not point to or quote any particular one of the provision's

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[4] See, in addition to the words of § 1904.32(a)(1), the preamble at 66 Fed. Reg. at 6083 col. 2 ("The final rule also requires the employer to review the records *at year end* for accuracy ....") (emphasis added).

four paragraphs. And indeed nothing in it imposes a duty to "record" cases after the seven-day recording period expires; the provision does not even use the verb "record." Paragraph (a) requires employers to "save" the log for five years.[5] "Save" does not mean "record" (and the Secretary does not argue that it means "record"), so it cannot impose a continuing duty to record. Paragraph (b) requires employers to "update" the logs "to include "newly discovered" cases and to show any "*changes* that have *occurred* in the classification of *previously recorded*" cases – not to record previously *un*recorded cases. The Secretary also never disputes that the preamble to this provision shows that its narrow wording was deliberate. Opening Br. 22.

The Secretary is unable to point to any language that imposes a duty to record after the expiration of the specific seven-day recording period in § 1904.29(b)(3).[6] That should be the end of the matter.

2. The Secretary Is Unable to Refute Volks's Showing That Construing § 1904.29(b)(3) to Impose A Continuing Duty to Record A Case on A Log Would Nullify Other Provisions in Part 1904.

Beginning at 10, the Secretary tries to refute an additional argument by Volks – that construing § 1904.29(b)(3) to impose an unlimited, continuing duty

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[5] Paragraph (a) of 1904.33 states: "You must save the OSHA 300 Log, the privacy case list (if one exists), the annual summary, and the OSHA 301 Incident Report forms for five (5) years following the end of the calendar year that these records cover."

[6] These provisions do not indicate a continuing duty with enough clarity to overcome the rule that "[s]tatutes of limitations, both criminal and civil, are to be liberally interpreted in favor of repose." *Phillips v. United States*, 843 F.2d 438, 443 (11th Cir. 1988) . The Secretary relies in a footnote on the view of *Interamericas Investments, Ltd. v. Federal Reserve Sys.*, 111 F.3d 376, 382 (5th Cir. 1997) , that "statutes of limitations in the civil context are to be strictly construed in favor of the Government against repose." With all respect to that circuit, the more specifically applicable rule to statutes of limitations governing agency imposition of civil penalties is that stated in *Phillips*.

to record a case on a log would make several other provisions in Part 1904 redundant, and would nullify their limitations. The effort is not a success.

§ 1904.32(a)(1). That provision requires employers "[a]t the end of each calendar year" to "[r]eview the OSHA 300 Log to verify that the entries are complete and accurate, and correct any deficiencies identified[.]" Volks argued that an unlimited, continuing duty to ensure that the log is correct would nullify the express limitation of § 1904.32(a)(1) to the end of the calendar year. The Secretary responds that § 1904.32(a)(2) and (4) require preparation and posting of an annual summary for the information of employees. "[T]he requirement to check the accuracy of the log at the end of each calendar year serves a more specific purpose than" the alleged continuing requirement that the log be accurate throughout the five-year retention period; that purpose being, apparently, to ensure that accurate information is posted for employees. Br. at 11. The Secretary's response just ignores the obvious: A continuous duty to be mindful of and record all omitted cases for every day of five years would swallow up the rule as written, erasing its contours and nullifying the rulemaking in which those contours were hammered out.[7]

§ 1904.33(b)(1). That provision requires employers to "update" the logs during the five-year retention period "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." Volks argued that

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[7] The Secretary argues, in a footnote, that redundant provisions might "emphasize points that have been previously stated or implied." She fails to show where in her regulations any duty to continuously review and update the log *is* stated or implied.

construing this provision "to impose an ever-ongoing obligation to update the log would make § 1904.33(b)(1) superfluous and nullify its limitation to 'newly discovered' cases and information." Opening Brief at 22.

The Secretary does not deny this. Instead, she first builds up a straw man and knocks it down. She claims that Volks had invoked the maxim "*expressio unius est exclusio alterius.*" But that is wrong; Volks did not rely on that maxim. Volks argued instead that the Secretary's interpretation of § 1904.29(b)(3) would make § 1904.33(b)(1) redundant and nullify its limitations, as the quotation above from Volks's brief makes clear. Courts have long distinguished between *expressio unius* and a claim that a broad construction would render other language redundant. *E.g., Orlando Food Corp. v. United States*, 423 F.3d 1318, 1324 (Fed. Cir. 2005) ("The government's argument rests on two principles of statutory construction: (1) statutes should be construed to avoid holding language to be redundant, and (2) *expressio unius est exclusio alterius.*"). Moreover, *expressio unius* is indeed "a useful aid" in the administrative setting "where the context shows that the 'draftsmen's mention of one thing, ... does really necessarily, or at least reasonably, imply the preclusion of alternatives' ...." *Indep. Ins. Agents v. Hawke*, 211 F.3d 638, 644 (D.C. Cir. 2000) (quoting *Shook v. District of Columbia Fin. Responsibility & Mgmt. Assistance Auth.*, 132 F.3d 775, 782 (D.C. Cir. 1998)); *see also Christensen v. Harris County*, 529 U.S. 576, 583 (2000) (using the maxim in the administrative context). This case fits that circumstance precisely.

The Secretary then claims that she did not "spell out" a continuing, unlimited obligation to record unrecorded cases "because she was entitled to presume that employers would follow the law in the first place." What "law"

does the Secretary mean? She points to no place in the current regulations where that obligation can be found; instead, she admits that the regulations do not "spell out" the duty. The Secretary then retreats to *Johnson Controls* and *General Dynamics*,[8] implying that they held "that the duty to record was an ongoing one throughout the five-year period" and arguing that the Secretary did not intend to "eliminate th[at] duty." This assumes that *Johnson Controls* rested on a construction of former Part 1904. But a careful analysis shows that it did not. The Secretary had *argued* that the former retention regulation was the locus of such a duty (15 OSHC at 2135 & n.2), but the Commission refrained from so holding. Moreover, the Commission stated in *General Dynamics*, 15 OSHC at 2127 n.8 that it was *refraining* from holding that the former regulations imposed a "continuing obligation." As Volks has observed without dispute, "the Commission identified no words in the former regulations that imposed such an unlimited, continuing obligation." Opening Br. 20. Nor did *Johnson Controls* base its holding on the language of section 9(c).

Instead, *Johnson Controls* rested on a general observation that violations continue to be violations until abated.[9] The Secretary does not dispute Volks's point (Opening Br. 20) that whether an unlogged case continues to be a "violation" of the duty to record after the expiration of the recording period was only "assumed." The Secretary does not dispute our showing that a

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[8] Unless otherwise indicated, references to *Johnson Controls* include *General Dynamics*.

[9] 15 OSHC at 2135-36: "Just as a condition that does not comply with a standard ... violates the Act until it is abated, an inaccurate entry on an OSHA form 200 violates the Act until it is corrected .... [A] failure to record ... does not differ in substance from any other condition that must be abated ...."

housekeeping violation continues to be a violation until abated only because the duty-triggering fact continues into the limitations period. She does not dispute our showing that, with respect to a failure to log a case, the duty-triggering fact ("receiving information" of a recordable case) does *not* continue into the limitations period. It is crucial that the Secretary fails to defend the central assumption of *Johnson Controls.*

Much of the Secretary's brief is instead built on the assertion that she could not have intended to write her regulations so as to depart from *Johnson Controls.* The Commission might wonder why the Secretary did not explicitly codify *Johnson Controls* when she overhauled Part 1904. Why did she instead continue to depend on the Commission to "spell it out"?

The reason is that the Secretary knew that she lacks the statutory authority to codify *Johnson Controls.* Her only authority under section 8(c)(2) is to state the regulatory duty of an employer to record injuries. She may decide (based on substantive statutory factors and the rulemaking record) what facts trigger the duty, what the duty is, and by when it must be fulfilled. But section 8(c)(2) does not authorize her to state a violation period. She cannot write a regulation stating how long a violation continues, or artificially extending a violation so that it remains citable under section 9(c). She could not have written a regulation stating, "The duty imposed here continues until the case is recorded" or "record a case within seven days, and thereafter if not previously recorded." She could only do what she did: Write a regulation with a duty-triggering fact – such as to "include newly discovered recordable injuries" (§ 1904.33(b)(1)).

The situation is analogous to the unit-of-violation problem that the Commission faced in *Reich v. Arcadian Corp.*, 110 F.3d 1192 (5th Cir. 1997); *Hartford Roofing, Inc.*, 17 BNA OSHC 1361 (No. 92-3855, 1995); and other cases. In *Arcadian,* the Secretary argued that she may directly set a unit of violation (and thus a penalty multiplier) by rulemaking. The Fifth Circuit bluntly disagreed, holding that setting a unit of violation was outside the Secretary's authority to adopt "standards" and that any unit of violation must reflect the substantive duty imposed by a standard.[10] The same is true here. The "occurrence" of a "violation" must reflect the substantive duty spelled out by the cited regulation.

3. Subsequent Judicial Decisions Have Undermined *Johnson Controls*; Stare Decisis Is No Obstacle Here.

The Secretary asserts that subsequent judicial decisions have not eroded *Johnson Controls.* For example, the Secretary claims that subsequent decisions do not affect *General Dynamics's* statement that a "violation" need not be an overt act but merely a "noncomplying" condition. The argument is an invitation to error.

First, the Supreme Court's 2002 *Morgan* decision is inconsistent with that view, for it held that, where a statute of limitations uses the term "occur," there

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[10] The Fifth Circuit stated (110 F.3d at 1198-99):

> [Section 3(8)] permits the Secretary to promulgate standards governing "conditions" and "practices" of employment and within the workplace. ... As such, the Secretary cannot set a unit of prosecution because, in most cases, a unit of prosecution has nothing to do with employment or workplace practices or conditions. An employee could be a unit of violation ... only if the regulated condition or practice is unique to the employee (*i.e.*, failure to train or remove a worker).

See also Chao v. OSHRC (Eric K. Ho), 401 F.3d 355, 368 (5th Cir. 2005) (multiple citation "is restricted 'to those standards which are capable of such interpretation.'").

must be a "happening" within the limitations period, not merely a passive continuation of a once-citable condition.

Second, *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2170 (2007), is inconsistent with that view. *Ledbetter* demands that all elements of a violation must themselves occur during the limitations period; the continuation of a once-violative practice into the limitations period is insufficient. For Title VII claims, this meant that discriminatory intent had to persist along with all other Title VII elements into the limitations period.[11] *Ledbetter* no longer permits one to assume that a once-citable condition violates the Act until it is abated; one must inquire into whether and precisely what *language* of the cited regulation was violated *during the limitations period.*

Johnson Controls did not make the inquiry required by *Ledbetter*. The Secretary nowhere disagrees with Volks (Opening Br. 20) that *Johnson Controls* merely "*assumed*" that an unrecorded case violates the Act until it is abated and that it "identified no words in the former regulations that imposed such an unlimited, continuing obligation." She never disagrees with Volks (Opening Br. 19) that "the duty-triggering fact in § 1904.29(b)(3) – 'receiving information that a recordable injury or illness has occurred' – occurs at one specific point in time,

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[11] *Ledbetter* stated: "these arguments fail because they would require us in effect to jettison the defining element of the legal claim on which her Title VII recovery was based. ... Ledbetter asserted disparate treatment, the central element of which is discriminatory intent. ... However, Ledbetter does not assert that the relevant Goodyear decisionmakers acted with actual discriminatory intent either when they issued her checks during the [limitations period] or when they denied her a raise in 1998. ... Ledbetter's argument [would] effectively eliminate the defining element of her disparate-treatment claim ...."

not every day" and that "it was stipulated [that] the receipt of information occurred on the injury date, not thereafter." This alone should end the matter.

As to *Toussie v. United States*, 397 U.S. 112 (1970) , the Secretary does not dispute Volks' reading of *Toussie*, or that *Johnson Controls* is inconsistent with *Toussie*. Instead, she states only that it is "far from clear" that *Toussie* applies to civil cases; she does not unqualifiedly argue that it does not apply. She neither mentions nor disputes the recent holding of *Center for Biological Diversity v. Hamilton*, 453 F.3d 1331, 1335 (11th Cir. 2006), that *Toussie does* apply to civil cases. Her citation to *Diamond v. United States*, 427 F.2d 1246, 1247 (Ct. Cl. 1970), is unavailing because that case held only *Toussie* is inapplicable to a pay dispute over monies owed; it did not deal with a civil penalty prosecution for a violation of a regulation or statute.

As to *Interamericas Investments, Ltd. v. Federal Reserve Sys.*, 111 F.3d 376, 382 (5th Cir. 1997) , which states that a violation of a duty to record or report within a specified time cannot be a continuing violation, the Secretary argues that this was based not on the court's own view but on its deference to an agency's view. That is just wrong; *this* part of *Interamericas* was not based on deference but on only the holding of *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 502 n.15 (1967) , that a violation "which, if it occurs at all, must occur within some specific and limited time span" is not a continuing violation. In any event, the Secretary nowhere disputes the authoritativeness of *Hanover Shoe.*

As to stare decisis, it is unnecessary for the Commission to conclude that *Johnson Controls* was wrongly decided in 1993. It concerned different regulations with different wording, and emerged from a different legal environment. It was

issued before *Morgan* made clear what an "occurrence" is and before *Ledbetter* made clear that, before one can find a continuing violation, one must find that all elements of a violation have "happened" during the limitations period. It was issued before appellate courts made clear that passive violations cannot be continuing violations.[12] It was issued before the Supreme Court and several appellate courts issued decisions disapproving or barring a discovery rule in civil penalty prosecutions, a rule that figured strongly in *Johnson Controls*. Whether *Johnson Controls* was correct when issued, it cannot be considered authoritative now and must be re-examined in light of these developments, particularly because a reviewing court would do so.

4. The Commission Did Not Address Volks's Staleness Concerns in *General Dynamics*.

The Secretary claims that the following footnoted statement in *General Dynamics*, 15 OSHC at 2130 n.16, has "already addressed" staleness concerns: "those concerns do not arise where, as here, the alleged violations existed within six months before the citations were issued."

This statement cannot survive *Morgan* or *Ledbetter*, which require during the limitations period an "occurrence" – *i.e.*, happening – of each element of a "violation." They do not permit the absence of an event to be considered an "occurrence" of a "violation." The statement also cannot survive the many court

[12] *E.g.*, *Felter v. Kempthorne*, 473 F.3d 1255, 1260 (D.C. Cir. 2007); *Tolbert v. Ohio Dep't of Transp.*, 172 F.3d 934, 940 (6th Cir. 1999) .

of appeals opinions holding that inaction is not a continuing violation.[13] And neither these cases nor logic permit one to say, and no reviewing court will agree, that nearly five-year-old facts are not stale. A court will follow the holding of *Machinists Local v. Labor Board*, 362 U.S. 411, 422 (1960), that finding a violation "inescapably grounded on events predating the limitations period is directly at odds with the purposes of" a limitations period.

5. The Secretary May Not Rely On A Discovery Rule.

The Secretary's position on the discovery rule is unclear. At first, she seemed to abandon her principal argument before Chief Judge Sommer (upon which he prominently relied) – that "Section 9(c) incorporates a discovery rule."[14] See J.D. at 5, citing *Arcadian Corp.*, 20 BNA OSHC 2001, 2013 (No. 93-0628, 2004), among other cases. She at first implies that, as to Items 1 and 2, she is relying solely on the continuing-violation theory. Later, she tacks the other way and defends a discovery rule. With respect to Items 3 through 5, however, she relies on only a continuing-violation theory.

As to whether *3M v. Browner*, 17 F.3d 1453, 1460-63 (D.C. Cir. 1994), applies and whether a discovery rule can be read into Section 9(c), the Secretary's brief says nothing that Volks has not already addressed in its opening brief.

As to *TRW Inc. v. Andrews*, 534 U.S. 19, 27 (2001), it is surprising that the Secretary fails to admit what the Solicitor General has admitted – that *TRW*

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[13] Ironically, one of these is *Connecticut Light & Power Co. v. Sec'y of Labor*, 85 F.3d 89 (2d Cir. 1995), which the Secretary cites. It too requires a violative "*action* taken pursuant to [an unlawful] policy during the [limitations] period ...." *Id.* at 96 (emphasis added).

[14] Secretary's Response to Motion to Dismiss at 1 (filed Jan. 23, 2007).

"rejected the view that 'a generally applied discovery rule' is implicit in federal statutes of limitations."[15] Although the Secretary tries to invoke the "cries out" branch of *TRW*'s first holding, she does not deny that the doctrine applies only to a sub-class of tort cases. She does not deny that OSHA is nowhere close to being the kind of devastated plaintiff the discovery rule contemplates. She does not deny that no devastating loss or damages cry out for redress, nor does she deny that a lack of recording devastates no one, causes no tragedies, is an "other than serious" violation, and is of low gravity. She does not deny that, unlike a tort plaintiff, OSHA has alternative remedies. Nor does she deny that Section 9(c) could be equitably tolled on the ground of fraudulent concealment by a false report.

What she does offer is thin gruel indeed – that recordkeeping violations are "inherently undiscoverable." She does not deny that the discoverability of such violations depends entirely on appropriations from Congress, the efficiency with which the Secretary uses them, and the priorities she chooses. She does not deny the holding of *3M* that to pass judgment on such matters would be inappropriate for a judicial or quasi-judicial body. And she *again* does not deny that she could require some or all employers to electronically report their injuries, hours worked and SIC Code (all required on Form 300A), and analyze the returns to find patterns of under-recording. That alone defeats her inherent-indiscoverability argument.

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[15] Fed. Resps. Br. Opp. Cert. at 6, *Perna v. United States*, No. 02-727 (U.S. Jan. 2003) (*cert. denied* 2003), *available at* www.usdoj.gov/osg/briefs/2002/0responses/2002-0787.resp.pdf.

The Commission should hold: (a) that the discovery rule is inconsistent with and may not be applied under Section 9(c); and (b) that a violation is not "continuing" unless, within the limitations period, a violative act happened or, in the case of a failure to act, a duty-triggering fact happened.

6. The Secretary's View is Not Entitled To Deference.

The Secretary argues that her views of both Section 9(c) and the Part 1904 regulations are entitled to *Chevron*-level deference. She fails, however, to show ambiguity, the threshold qualification for deference. As to Section 9(c), she never points to any word in it that is ambiguous; indeed, she studiously ignores its wording. As to the regulations, she points to nothing in them that is ambiguous. Instead, she relies on *Johnson Controls*, which never construed these regulations and did not rest its holding on the wording of the previous regulations. The Secretary's deference argument can be rejected on this threshold ground.

The Secretary maintains that, although the Commission held that it owes the Secretary no deference on statutory construction, the D.C. Circuit has "held" the opposite. That is untrue, for all such expressions have been *dictum*,[16] which does not bind a subsequent panel.[17] This is particularly true here, for in neither

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[16] In *A.E. Staley Mfg. Co. v. Secretary of Labor*, 295 F.3d 1341, 1345 (D.C. Cir. 2002), the Commission and the Secretary agreed; see *id.* at 1351. *Anthony Crane Rental, Inc. v. Reich*, 70 F.3d 1298, 1302 (D.C. Cir. 1995), which *Staley* cited, involved a standard, as did *S.G. Loewendick & Sons v. Reich*, 70 F.3d 1291 (D.C. Cir. 1995). *Auto Workers v. OSHA*, 938 F.2d 1310, 1319 n.9 (D.C. Cir. 1991), a section 6(f) decision, noted in *dictum* that precisely because *CF&I Steel* was limited to "regulations," it only "may" have impaired deference to the Commission as to the "statute."

[17] *Gersman v. Group Health Ass'n*, 975 F.2d 886, 897 (D.C. Cir. 1992) , ("Binding circuit law comes only from the holdings of a prior panel, not from its dicta.").

cited case was the point actually litigated, and in neither was Senator Javits's statement considered. *See Brecht v. Abrahamson*, 507 U.S. 619, 630-31 (1993).

As to the regulations, the crux of the Secretary's argument is that "nothing in *Mead* diminished ... *CF&I*'s [holding] 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.'" The statement is wrong. The whole point of *Mead* was to overrule the notion that mere litigating positions deserved anything more than *Skidmore* weight. *Mead* even cited *CF&I Steel* as an example of a case in which *Skidmore* weight rather than *Chevron* deference was to be afforded. *Mead*, 533 U.S. at 235.

B. Citation 2, Item 1: Form 301 Incident Report (§ 1904.29(b)(2))

Volks argued that § 1904.29(b)(2) is inapplicable because it requires an OSHA 301 Incident Report form only for injuries "entered on the OSHA 300 Log." The Secretary never denies that this reading is compelled by the provision's plain language and its regulatory history. She points to § 1904.29(b)(3) but it is inapposite, for it answers only the question, "How quickly must each injury or illness be recorded?," not *whether* it must be completed. Paragraph (b)(2) is the most specific provision on that issue.

Applying the regulation as written results in the most rational and fair outcome. An employer who erroneously concludes that a case is not recordable and hence does not record it on either the Form 300 log or the Form 301 is penalized once – for the one underlying wrong recordkeeping decision. This rational and fair result also avoids, as the Commission correctly suggested, duplicative penalties. Item 1 must be vacated.

C. Citation 2, Item 3: Review of Log at End of Calendar Year (§ 1904.32(a)(1)); Item 4: Wrong Certifier of Log (§ 1904.32(b)(3))

The Secretary makes no argument that warrants a response.

D. Citation 2, Item 5: Too-Brief Posting of Summary (§ 1904.32(b)(6))

To make this item timely, the Secretary asks the Commission to re-write her regulation: Instead of employers being required to post the annual summary for the period from February 1st until April 30th, she asks that employers be required to post it "for any three-month period" during the calendar year if it had not been previously posted until April 30th. This is not permissible.

First, the Secretary does not claim or show that the regulation is ambiguous; hence, any "interpretation" is unwarranted. Second, an employer is not guilty of violating a regulation that does not exist. The argument illustrates how far the theory of continuing violation underlying the Secretary's case strays from the words of her regulations.

II. Conclusion

Items 1 through 5 of Citation 2 should be vacated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2008, the foregoing was served upon the following by first class mail on:

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WDC99 1504712-2.076211.0011