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'

OPENING BRIEF ON REVIEW

Arthur G. Sapper
Robert C. Gombar
James A. Lastowka
McDERMOTT WILL & EMERY LLP
600 13th Street, N.W.
Washington, D.C. 20005

Attorneys for Respondent

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

MISCELLANEOUS

TABLE OF AUTHORITIES
(continued)

Page

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' OPENING BRIEF ON REVIEW

I. Summary of Volks' Principal Argument

An allegedly recordable injury or illness happened and eight days later, when the case was not recorded on the log, a violation occurred. Thereafter, nothing happened, in most cases for years. As a result, all charges here rest on alleged events that preceded the Act's limitations period, usually by years.

Section 9(c) does not permit citations to rest – under either a discovery or a continuing violation theory – on facts that are stale by years. "[A] finding of violation which is inescapably grounded on events predating the limitations period is directly at odds with the purposes of" a limitations period. *Machinists Local v. Labor Board*, 362 U.S. 411, 422 (1960). "Statutes of limitations ... 'represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.'" *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S.Ct. 2162, 2170 (2007).

The discovery rule of *Johnson Controls, Inc.*, 15 BNA OSHC 2132, 2135-36 (No. 89-2614, 1993), may not be applied in the face of the decisions disapproving

such a rule by, first, the D.C. Circuit in *3M v. Browner*, 17 F.3d 1453, 1460-63 (D.C. Cir. 1994), and then by the U.S. Supreme Court in *TRW Inc. v. Andrews*, 534 U.S. 19, 27 (2001). Nor may a continuing violation theory may be applied in the face of decisions – including *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S.Ct. 2162, 2170 (2007) – holding that a discrete, violative act must occur within a limitations period and that passive inaction is not a continuing violation. Moreover, the cited regulation does not impose an unlimited, continuing duty to correct a log.

II. General Statement of the Case

A. Background

Citation 2, Items 1 through 5 (detailed in Part III below), allege that AKM LLC dba Volks Constructors ("Volks") violated several recordkeeping regulations in 29 C.F.R. Part 1904, set out in Addendum B. In lieu of an evidentiary hearing, the parties submitted this case under Commission Rule 61 on a stipulated record (Addendum A), for a ruling on, *inter alia*, whether the items were untimely under Section 9(c) of the Act, 29 U.S.C. § 658(c).

B. The Judge's Decision

Chief Judge Sommer denied Volks' motion for judgment and granted the Secretary's motion. As to the discovery-rule issue, the Chief Judge held that *3M* and *TRW* were distinguishable because they did not involve Section 9(c). As to the continuing-violation theory, the Chief Judge concluded that he was bound by *Johnson Controls*. Additional details about the decision are provided below.

III. Further Statement of the Case and Argument

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

Volks begins with Item 2 because it most clearly illustrates the issues in the case and because the analysis of Item 2 applies to all other items discussed here.

1. Allegations and Stipulated Record

Item 2 alleges a violation of § 1904.29(b)(3) for not entering 102 recordable cases on the OSHA Form 300 Logs for calendar years 2002 through 2006. Section 1904.29(b)(3) (Addendum B-1) states: "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."

The parties stipulated: "With respect to Item ... 2, the injuries or illnesses had not been recorded on the ... 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 [the] form by the date the OSHA inspection was initiated, May 10, 2006." The parties also stipulated that "Volks does not admit that violations occurred on or about the date of the inspection[.]"

The earliest date that the regulation required any cited injury to be entered on the OSHA Form 300 Log is January 11, 2002, alleged in instance 74. Because that was stipulated to be the date that Volks received information that a recordable case had occurred, the regulation required that case be entered on the log seven days later, by January 18, 2002. Hence, the alleged violation occurred the next day, January 19, 2002 – i.e., the first day after the expiration of the seven-day period. The citation was issued almost five years later, on November 8,

2006. The most recent alleged violation date is April 26, 2006 (Instance 5; the case allegedly occurred on April 18, 2006). The citation was issued more than six months after that date.

2. Argument

Section 9(c) of the OSH Act, 29 U.S.C. § 658(c), states: "No citation may be issued ... after the expiration of six months following the occurrence of any violation." As noted above, the first alleged violation occurred on January 19, 2002, the first day after the expiration of the seven-day recording period. Section 9(c) then began to run, for "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). Inasmuch as the citation was issued more than six months (in most cases, years) after that date and every other such date, the items are facially untimely.

In response, the Secretary argued to the Chief Judge that "Section 9(c) incorporates a discovery rule."[1] She never pointed, however, to any statutory language or legislative history from which a discovery rule could be derived. She instead cited the Commission's decision in *Johnson Controls, Inc.*, 15 BNA OSHC 2132, 2135-36 (No. 89-2614, 1993), which held that an uncorrected error or omission in the former OSHA 200 Log "may be cited six months from the time the Secretary *does discover, or reasonably should have discovered,* the facts necessary to issue a citation." (Emphasis added.) *See also General Dynamics Corp.*, 15 BNA

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

OSHC 2122, 2177-78 (No. 87-1195, 1993). We now show that controlling judicial precedent bars the application of a discovery rule under Section 9(c).

a. The Discovery Rule of *Johnson Controls* May Not Be Applied Here Because This Case is Appealable To A Circuit That Does Not Recognize Discovery Rules in Civil Administrative Cases.

The Commission applies the precedent of a court to which a case is appealable.[2] "Where it is highly probable that a case will be appealed to a particular circuit, the Commission generally has applied the law of that circuit in deciding the case, even though it may clearly differ from the Commission's law."[3] Volks states that it is highly probable that an adverse decision would be appealed to the District of Columbia Circuit.

The law of the D.C. Circuit on the discovery rule in administrative prosecutions is stated in *3M v. Browner*, 17 F.3d 1453, 1460-63 (D.C. Cir. 1994). We show below (Part III.A.2.a(i), beginning on page 6) that *3M* bars a discovery rule unsupported by the text of a statute. We then show (Part III.A.2.a(ii), beginning on page 9), that inasmuch as nothing in Section 9(c)'s language supports a discovery rule, *3M* requires that the citation items be vacated.

The Chief Judge suggested that the Commission would not re-examine *Johnson Controls* in light of *3M* and *TRW* because they "were issued before the Commission's decision in *Arcadian Corp.*, [20 BNA OSHC 2001, 2013 (No. 93-628, 2004)], and I would assume that, had these cases been considered relevant, the Commission would have addressed them; ... Volks' arguments ... are essentially

---

[2] *Farrens Tree Surgeons Inc.*, 15 BNA OSHC 1793, 1794 (No. 90-998, 1992).

[3] *D.M. Sabia Co.*, 17 BNA OSHC 1413, 1414 (No. 93-3274, 1995), *vacated and remanded on other grounds*, 17 BNA OSHC 1680 (3rd Cir. 1996).

old arguments the Commission has considered and rejected before." JD at 6. This was error. First, cases are not precedent on points that they did not discuss.[4] *Arcadian* did not discuss *3M* or *TRW*, for the parties' briefs did not mention them.[5] Second, *D.M. Sabia* did not distinguish between court decisions that pre- and post-date a conflicting Commission precedent.

(i) A Discovery Rule Must Rest on Statutory Language.

In *3M*, the D.C. Circuit held that, unless a discovery rule rests on statutory language, it may not be applied in administrative prosecutions. The *3M* case involved an administrative prosecution by the EPA under the Toxic Substances Control Act (TSCA). That prosecution was alleged to be untimely under 28 U.S.C. § 2462, which requires that federal civil penalty prosecutions be "commenced within five years from the date when the claim first accrued."[6] The EPA argued that the prosecution was timely because it was commenced within five years of the date the EPA discovered or should have discovered the alleged violations. The EPA invoked a discovery-of-injury rule, which originated in tort

---

[4] *E.g., Summit Contractors, Inc.*, 21 BNA OSHC 2020, 2007 CCH OSHD ¶ 32,888 (No. 03-1622, 2007) (departing from 31-year-old precedent in light of previously undiscussed regulation), *pet. for review filed*, No. 07-2191 (8th Cir., May 15, 2007).

[5] The briefs in *Arcadian* are part of the Commission's records and hence may be officially noticed under 5 U.S.C. § 556(e).

[6] 28 U.S.C. § 2462 states:

> § 2462. Time for commencing proceedings
> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

suits in which surgical instruments left in patients were not discovered until after the limitations period had run.[7]

The D.C. Circuit rejected use of a discovery rule in civil administrative prosecutions. It noted that the rationale for a discovery rule did not apply to non-tort cases, such as administrative enforcement actions. It also observed that an agency's failure to detect violations "does not avoid the problems of faded memories, lost witnesses and discarded documents" that statutes of limitations are enacted to avoid. The D.C. Circuit required that any discovery rule be based on statutory language, noting that it was "[m]ost important" that "nothing in the language of § 2462 even arguably makes the running of the limitations period turn on the degree of difficulty an agency experiences in detecting violations." Noting that the Supreme Court had disapproved of a discovery rule in a similar context,[8] the *3M* court concluded that such a rule is "incompatible" with the purposes of a limitations period and cannot be justified by an agency's enforcement difficulties. The court stated: "We seriously doubt that conducting ... hearings to determine whether an agency's enforcement branch adequately lived up to its responsibilities would be a workable or sensible method of administering *any* statute of limitations." 17 F.3d at 1460-63 (emphasis added). (An excerpt from *3M* is set out beginning on Addendum page C-1 below.)

---

[7] *E.g., Byers v. Bacon*, 95 A. 711, 250 Pa. 564, 567 (1915) (surgical tube); E. H. Schopler, Annotation, *When Statute of Limitations Commences to Run Against Malpractice Action Against Physician, Surgeon, Dentist, or Similar Practitioner*, 80 A.L.R.2D 368, 388 (1961).

[8] *Unexcelled Chemical Corp. v. United States*, 345 U.S. 59, 65 (1953): "A cause of action is created when there is a breach of duty owed the plaintiff [Secretary of Labor]. It is that breach of duty, not its discovery, that normally is controlling."

3M has been widely followed by other circuits and other federal and state courts, and has been applied under other federal statutes[9] as well as under a state statute.[10] For example, the Eleventh Circuit, in applying 28 U.S.C. § 2462 to a claim under the Energy and Policy Conservation Act, stated: "This discovery rule, which might be applicable to statutes of limitations in state tort actions, has no place in a proceeding to enforce a civil penalty under a federal statute. The statute of limitations begins with the violation itself – it is upon violation, and not upon discovery of harm, that the claim is complete and the clock is ticking."[11] The Ninth Circuit recently refused, without citation to *3M*, to apply a discovery rule because it "would contradict the text of the [Fair Housing Act], as [its] statute of limitations for private civil actions begins to run when the discriminatory act occurs — not when it's encountered or discovered." *Garcia v. Brockway*, 503 F.3d 1092, 1100 (9th Cir. 2007) (per Kozinski, J.).

---

[9] *Trawinski v. United Techs.*, 313 F.3d 1295, 1298 (11th Cir. 2002) (applying 28 U.S.C. § 2462 under Energy and Policy Conservation Act); *Arch Mineral Corp. v. Babbitt*, 104 F.3d 660, 669-70 (4th Cir. 1997) ("We adopt the reasoning of ...*3M*"; applying 28 U.S.C. § 2462 under Surface Mining Control and Reclamation Act); *FEC v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996) (expressly agreeing with *3M*; applying 28 U.S.C. § 2462 under Federal Election Campaign Act), *cert. denied*, 522 U.S. 1015 (1997); *United States ex rel. Tillson v. Lockheed Martin Energy Sys.*, 2004 U.S. Dist. LEXIS 22246 (D. Ky. 2004) (*3M* "persuasive"; one circuit and five district court opinions rejected; applying 28 U.S.C. § 2462 under Resource Conservation and Recovery Act (RCRA)); *United States v. Taigen & Sons*, 303 F. Supp.2d 1129, 1144 (D. Idaho 2003) (*3M* "persuasive"; applying *3M* to 28 U.S.C. § 2462 under Fair Housing Act).

[10] *State v. Chrysler Outboard Corp.*, 219 Wis. 2d 130, 146-155, 580 N.W.2d 203, 209-213 (1998) (prominently citing *3M* to reject discovery rule under Wis. Stat. § 893.87 (1995-96); lengthy, detailed discussion);

[11] *Trawinski*, 313 F.3d at 1298.

Chief Judge Sommer held that *3M* does not control here because it did "not address section 9(c)" and because 28 U.S.C. § 2462 is not "similar to section 9(c)." JD at 6 & n. 3. The Chief Judge never explained how the language of the two statutes differ. Instead, he stated that *3M* is distinguishable because 28 U.S.C. § 2462 "applies to the entire federal government." JD at 6. He apparently was referring to the D.C. Circuit's remark that § 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 .... We therefore cannot agree with EPA that our interpretation of § 2462 ought to be influenced by EPA's particular difficulties in enforcing TSCA." The Chief Judge overlooked that *3M*'s holding rested on a much broader ground – the absence of any statutory language upon which a discovery rule could rest: "*Most important*, nothing in the language of § 2462 even arguably makes the running of the limitations period turn on the degree of difficulty an agency experiences in detecting violations." 17 F.3d at 1461 (emphasis added). The Supreme Court recently emphasized the principal importance of a limitation period's wording. *Ledbetter*, 127 S.Ct. at 2177 ("We apply the statute as written ...."). The Ninth Circuit did the same in *Garcia.* In sum, a discovery rule must rest on Section 9(c)'s language.

(ii) A Discovery Rule Cannot Rest On Section 9(c).

Despite Volks' repeated challenges to do so, the Secretary never pointed to any language in Section 9(c) on which a discovery rule can rest. This is understandable, for the language of Section 9(c) is "*absolute*." *Brennan v. Chicago Bridge & Iron Co.*, 514 F.2d 1082, 1084, 3 BNA OSHC 1056, 1057 (7th Cir. 1975) (emphasis by the court). The Secretary also failed to point to anything in the

Act's legislative history suggesting that Section 9(c) could support a discovery rule. Indeed, Congress unequivocally stated that its language "prohibited issuance" of a citation after the limitations period expired, which it stated would occur "after the occurrence of any violation"[12] – not its discovery.

b. *Johnson Controls* is Inconsistent With The Supreme Court's Distillation in *TRW* of Its Case Law on When A Discovery Rule May Be Used.

Volks argued to the Chief Judge that *TRW Inc. v. Andrews*, 534 U.S. 19, 27 (2001), a Supreme Court decision issued after *3M* and involving the Fair Credit Reporting Act (FCRA), requires vacation of the citation items. The Chief Judge disagreed, holding that *TRW* did not control because it did not involve Section 9(c) of the Act, and because FCRA "provides for a limited situation in which a discovery rule applies." JD at 6. Neither is a valid distinction.

In *TRW*, the Supreme Court made essentially two holdings: *First*, it surveyed its case law and stated that it has recognized a discovery rule only in "an area of the law that cries out for application of a discovery rule," such as "latent disease and medical malpractice," or when "the statute is silent on the issue of when the statute of limitations begins to run." One Justice added that the discovery rule when applied outside the medical malpractice field is "bad wine of recent vintage." 534 U.S. at 37 (Scalia, J., concurring). *Second*, the Court held that the presence of an express but limited discovery rule in the FCRA's text indicated that it should not be construed to permit a broader discovery rule.

---

[12] H. Conf. Rep. No. 91-1765, at 38 (1970), *reprinted in* S. COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., 1ST SESS., LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, at 1154, 1191 (Comm. Print 1971) ("Leg. Hist.")

It is the first holding of *TRW* that is controlling here, not the second. As the Solicitor General has recognized, the Court's first holding represents the Court's distillation of its case law on the discovery rule generally – a distillation in which the Court "rejected the view that 'a generally applied discovery rule' is implicit in federal statutes of limitations."[13] Accordingly, *TRW*'s first holding applies to the OSH Act, and the Chief Judge erred in not following it.

Realizing that *TRW*'s first holding does apply here, the Secretary tried to come within its "cries out" branch. But as *3M* held, the Secretary cannot do so, for the discovery rule does not apply to administrative prosecutions; it applies to tort cases, and only some tort cases. That alone requires rejection of the Secretary's "crying out" argument.

Second, the Secretary is nowhere close to being the kind of plaintiff the discovery rule contemplates. Such a plaintiff lacks any means of protection except a damage suit; she faces physical and financial devastation from malpractice so subtle that she could not detect it in her own body within the limitations period; and she was injured by a professional in a position of trust.[14]

---

[13] Brief by Federal Respondents in Opposition to Petition for Certiorari at 6, *Perna v. United States*, No. 02-727 (U.S. Jan. 2003) (cert. denied 2003) ("[T]his Court never has endorsed application of the discovery rule in FTCA cases outside the medical malpractice context. To the contrary, the Court recently rejected the view that 'a generally applied discovery rule' is implicit in federal statutes of limitations," *citing TRW*), *available at* http://www.usdoj.gov/osg/briefs/2002/0responses/2002-0787.resp.pdf. This position would be binding on the Secretary. OSH Act § 14, 29 U.S.C. § 663.

[14] *United States v. Kubrick*, 444 U.S. 111, 121 n.7 (1979), quoting the reasons for the discovery rule in RESTATEMENT (SECOND) OF TORTS 899, Comment e, pp. 444-45 (1979): "One is the fact that in most instances the statutory period within which the action must be initiated is short ... but since many of the consequences of medical malpractice often do not become apparent for a period longer than that of the statute, the injured plaintiff is left without a remedy. The second reason is that the nature of the tort itself and the

None of that applies here. Volks is not a professional in a position of trust with OSHA. No devastating loss or damages cry out for redress; as a rule, a lack of recording devastates no one, causes no tragedies, is an "other than serious" violation[15] (as it was alleged here), and is of low gravity.[16]

Unlike the helpless medical malpractice victim, OSHA is also not without remedy. OSHA can, for six months after each calendar year, issue a citation under § 1904.32(b)(3) for a failure to examine the log from the previous calendar year. It can refer any knowingly false certification of a log for criminal prosecution under Section 17(g) of the Act; such a prosecution would be especially appropriate for the extremely rare case in which a failure to record actually affected employees, such as where it obscured a pattern of illness and delayed treatment. OSHA can also amend its regulations to incorporate a system that it has been considering[17] – to require some or all employers to electronically

---

character of the injury will frequently prevent knowledge of what is wrong, so that the plaintiff is forced to rely on what he is told by the physician or surgeon." *See also Shinabarger v. Jatoi*, 385 F. Supp. 707, 710-711 (D.S.D. 1974) (position of trust).

[15] *Manganas Painting Co.* 21 BNA OSHC 1964, 1989 (No. 94-588, 2007); OSHA INSTRUCTION CPL 02-00-135, RECORDKEEPING POLICIES AND PROCEDURES MANUAL § II.B.1 (2004) (non-serious even if violations "materially impair the understandability" of hazards and injuries), *available at* http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=3205.

[16] *E.g., Caterpillar Inc.*, 15 BNA OSHC 2153, 2178 (No. 87-922, 1993) (Commission "constrained" to characterize gravity as low).

[17] "OSHA [is] ... pursuing ways to allow employers to submit occupational injury and illness data electronically. In 1998, the OSHA [Survey of Occupational Injuries and Illnesses] allowed employers for the first time to submit their data electronically, and this practice will continue in future OSHA surveys." 66 Fed. Reg. 5916, 6070 col. 2 (2001); "Employers Would Submit Injury, Illness Logs For OSHA Review, Verification, DOL Report Says," 24 BNA OSH Rep. 477 (1994); "Special Report: Improved Targeting," 23 BNA OSH Rep. 968 (1994) ("OSHA's existing data-gathering program,

report their injuries, hours worked and SIC Code (all required on Form 300A). A computer could analyze such returns to find patterns of under-recording. (Before the Chief Judge, the Secretary did not deny any of this.) As the D.C. Circuit observed in *3M*, 17 F.3d at 1461 n. 15, that a limitations period could be equitably tolled on the ground of fraudulent concealment by a false report further militates against any discovery rule.

A recordkeeping violation also bears no resemblance to an act of malpractice so subtle that the latent injury it causes may not become manifest or actionable until the limitations period expires. A recordkeeping violation arises immediately, is citable immediately and, depending on congressional decisions to appropriate enforcement monies, is detectable immediately. Its discoverability depends not on inherent latency but on political choices to devote monies to OSHA enforcement rather than another purpose. As the *3M* court observed, passing on such arguments would be wholly inappropriate. It would require the Commission to hold hearings on resource-allocation decisions by Congress, the President, and the Secretary on the number of inspectors to be hired, and on the manner and efficiency in which they are allocated and used. "[C]onducting ... hearings to determine whether an agency's enforcement branch adequately lived up to its responsibilities would [not] be a workable or sensible method of administering any statute of limitations ...." The situation

---

which may eventually require employers in certain industries, states, or regions to submit their injury and illness logs directly to OSHA.").

does not even come close to "crying out" for a departure from the plain language of Section 9(c).

In sum, as the D.C. Circuit stated in *3M*, a discovery rule is "unworkable; outside the language of the statute; ... unsupported by the discovery of injury rule adopted in non-enforcement, remedial cases; and incompatible with the functions served by a statute of limitations in penalty cases."

c. A Failure to Record An Injury or Illness On An OSHA Form 300 Log Is Not A Continuing Violation.

The Secretary also argued, and the Chief Judge agreed, that the violations were continuing under *Johnson Controls*. That cannot be so. The facts are simple: An allegedly recordable injury or illness happened on a certain date. According to the stipulation, that day is also the date on which Volks "receiv[ed] information that a recordable injury or illness has occurred." Section 1904.29(b)(3) then required that the case be entered on the Log "within seven (7) calendar days ...." The alleged violation occurred on the eighth day, when the case was not recorded on the Log. According to the "standard rule" (*Bay Area Laundry*, 522 U.S. at 201), Section 9(c) then began to run. Thereafter, nothing happened, in most cases for years.

These facts cannot establish a continuing violation. First, there is no continuing violation here under Supreme Court case law, for there is no discrete, violative *act* that occurred within the limitations period; the predicate events occurred long before. Part III.A.2.c(i), p. 15 below. Without a violative act that occurred within the limitations period, the facts are stale, and basing a citation on them defeats the purpose of a statute of limitations. Part III.A.2.c(ii), p. 16 below.

Second, for a continuing violation theory to apply, the cited condition must have not merely existed during the limitations period but must have been a *violation* within that period. As shown in Part III.A.2.c(iii), p. 19, the regulations do not impose an unlimited, continuous obligation on employers to correct logs.

(i) A Continuing Violation Theory Does Not Permit Charges to Rest on Events That Preceded The Limitations Period.

There is a straightforward reason why a "continuing violation" theory cannot be applied to this case: The predicate events occurred only once and before, not during, the limitations period. "[A] finding of violation which is inescapably grounded on events predating the limitations period is directly at odds with the purposes of" a limitations period. *Machinists Local v. Labor Board*, 362 U.S. 411, 422 (1960). There must be an "act[] committed by the defendants within the statute of limitations[.]" *Felter v. Kempthorne*, 473 F.3d 1255, 1260 (D.C. Cir. 2007 (Indian claim statute).[18] Hence, failures to rectify a fiduciary duty (*Felter*, 473 F.3d at 1260), to submit accurate reports,[19] or to revoke an unlawful

---

[18] *See also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380-81 (1982) (Fair Housing Act; continuing violation requires overt act in limitations period); *Mayers v. Laborers' Health & Safety Fund*, 478 F.3d 364, 368 (D.C. Cir. 2007) (discrimination statute; continuing violation requires that "at least one illegal act t[ake] place within the filing period"); *Center for Biological Diversity v. Hamilton*, 453 F.3d 1331, 1335 (11th Cir. 2006) (continuing violation requires that "additional violations of the law occur within the statutory period"). These decisions draw upon holdings reiterated in *Ledbetter*, 127 S.Ct. at 2169-2172. *E.g., National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110-115, 117 (2002) (Title VII of Civil Rights Act; requiring "discrete acts" within limitations period for ordinary claims; for hostile environment claims, "act contributing to the claim [must] occur[] within the filing period"); *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 908 (1989) (no continuing violation if claim "is wholly dependent on discriminatory conduct occurring well outside the period of limitations").

[19] *United States v. Del Percio*, 870 F.2d 1090 (6th Cir. 1989).

regulation,[20] are not continuing violations. As the Sixth Circuit put it, "[p]assive inaction ... does not support a continuing violation theory." *Tolbert v. Ohio Dep't of Transp.*, 172 F.3d. 934, 940 (6th Cir. 1999).

Johnson Controls is also inconsistent with the Supreme Court's seminal decision on whether passive inaction can constitute a continuing violation – *Toussie v. United States*, 397 U.S. 112 (1970), which concerned a failure to register for the draft. That case, which has been applied to civil cases (*e.g., Center for Biological Diversity*, 453 F.3d at 1335), made clear that, because the continuing offense theory "extends the statute beyond its stated term," the Court would be reluctant to apply it without a violative act that occurred during the limitations period, and that a mere continuing duty (while necessary) is not sufficient. 397 U.S. at 861 (no continuing violation if "single, instantaneous act to be performed at a given time"), at 863 ("prolonged course of conduct" required; "continuing duty" not enough without violative act).

Johnson Controls also violates the principle 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), citing, *inter alia, United States v. Marion*, 404 U.S. 307, 322 n. 14 (1971).

(ii) Continuing Violations May Not Be Found If They Are Necessarily Based on Stale Facts.

"Statutes of limitations ... are intended to keep stale claims out of the courts. ... Where the challenged violation is a continuing one, the staleness

---

[20] *Preminger v. Sec'y of Veterans Affairs*, 498 F.3d 1265, 1272 (Fed. Cir. 2007) (if unlawful 1973 adoption of regulation were continuing APA violation, "there effectively would be no statute of limitations because the injury would always be ongoing").

concern disappears." *Havens Realty*, 455 U.S. at 380. Section 9(c)'s purpose is likewise to "protect[] the employer" from stale charges. *Todd Shipyards Corp. v. Secretary of Labor*, 566 F.2d 1327, 1330, 6 BNA OSHC 1227, 1229 (9th Cir. 1977). Staleness is not a concern if the principle of *Toussie* and other cases is applied – that is, that a violative act must occur during the limitations period.

Here, the staleness concern is a real one, and Volks has received no protection from it. The Volks employees and former employees who are still alive (a Volks employee who kept the 2002 log died over a year before the inspection began[21]) would have had to search their recollections of events that occurred almost five years ago and then draw fine distinctions to determine recordability, such as whether a particular injury restricted an employee's normal duties on a particular day, or amounted to medical treatment beyond first aid.[22] *Compare Ledbetter*, 127 S.Ct. at 2172 & n.4 ("passage of time may seriously diminish the ability of the parties and the fact-finder to reconstruct what actually happened"; noting death of key witness).

---

[21] The Secretary authorized Volks to state that the Secretary does not object to this representation. See Addendum D.

[22] The recordkeeping regulations require a formidable number of fine distinctions. Thus, use of medical glue to close a wound is recordable, but not to cover a wound. § 1904.7(b)(5)(ii)(D), *as interpreted in* Letter from K. Goddard (OSHA) to R. Bjork (CNH America LLC) (Aug. 26, 2004), *available at* http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=24949. Removing an eye cinder is recordable, unless only irrigation or a cotton swab is used. *Id.* at (J). An employee told by a physician to work more slowly or who works less efficiently is not restricted, but is restricted if told to omit a task regularly performed at least once per week. § 1904.7(b)(4) & (vi); OSHA RECORDKEEPING HANDBOOK (OSHA 3245-01R, 2005) at Question 7-4, *available at* http://www.osha.gov/recordkeeping/handbook/index.html. X-rays are not recordable if taken solely for diagnosis, but are recordable otherwise. § 1904.7(b)(5)(i)(B). Many more examples could be given.

By contrast, in a conventional unguarded saw case, the evidence is necessarily *not* stale. Even if the saw's guard had been removed in 2002 and never replaced, and the condition persists into the limitations period, the absence of a guard today and employee exposure today are events within the limitations period – and thus provable with fresh evidence; the Secretary need not reach back to 2002 when the guard was first removed. Such a citation would not be "grounded on events predating the limitations period" under *Machinists Local,* and would thus be permitted. *See also Knight v. Columbus,* 19 F.3d 579, 583 (11th Cir. 1994) (permitting claims that "do not require reference to any action ... outside the limitations period"). But that is not this case.

The Secretary may claim that a continuing violation exists because the alleged violations deprived the Department of Labor, researchers, Volks or its employees of statistical information. This consideration was mentioned in *Johnson Controls,* 15 BNA OSHC at 2134, 2135. However, after *Johnson Controls* was issued, the Supreme Court held that the continuation of a violation's adverse effects does not make the violation continuing.[23] Accordingly, any continuing effects argument must be rejected.

---

[23] *Nat'l R.R. Passenger,* 536 U.S. at 111-13. This holding was reiterated in *Ledbetter,* 127 S.Ct. at 2167-68. *See also Felter v. Kempthorne,* 473 F.3d 1255, 1260 (D.C. Cir. 2007) ("[a] lingering effect of an unlawful act is not itself an unlawful act.") (*quoting Dasgupta v. Univ. of Wis. Bd. of Regents,* 121 F.3d 1138, 1140 (7th Cir.1997)); *Center for Biological Diversity v. Hamilton,* 453 F.3d 1331, 1335 (11th Cir. 2006) ("present consequence of a one time violation ... does not extend the limitations period").

(iii) Part 1904 Does Not Impose An Unlimited Continuing Duty To Record After The Seven-Day Recording Period.

There can be no continuing violation without a *violation* during the limitations period, and there can be no violation unless a duty to act applied then. *Ledbetter*, 127 S.Ct. at 2168; *see also Garcia*, 503 F.3d at 1097-98 & nn.4-5 (applying principle; "design and construct" FHA violation not continuing, occurs only during "design-and-construction phase"). The question therefore arises: What provision of the recordkeeping regulations affirmatively imposed an unlimited, continuing duty to record after the seven-day recording period expired?

The only possible candidate is § 1904.29(b)(3), the regulation allegedly violated. It states: "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." No language there suggests that the duty to log a case continues uninterrupted after the seven-day recording period, and neither the Secretary nor the Chief Judge ever pointed to any. Instead, the Chief Judge pointed to what he called "the broadly worded" holding in *Johnson Controls*, and specifically this passage:

> 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, or until the 5-year retention requirement of section 1904.6 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 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.

With respect, this passage *assumed* that an unrecorded but recordable injury violates the Act until it is "abated"; the Commission identified no words in the former[24] regulations that imposed such an unlimited, continuing obligation. As shown below, there is no such duty in the current regulations. Although the previous paragraph in *Johnson Controls* spoke of a housekeeping standard, the implied analogy is not apt, for that standard imposes a duty (*e.g.*, hosing down) so long as a certain physical condition (*e.g.*, dirt on a floor) persists. Such cases do not present staleness problems because, by hypothesis, the duty-triggering facts (the dirty floor and exposure) persist into the limitations period, thereby daily generating fresh evidence of a violation.

By contrast, 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, not every day. (Here, it was stipulated, the receipt of information occurred on the injury date, not thereafter.) Inasmuch as the duty-triggering fact did not recur, a violation of the duty to enter a recordable case on the log within seven days did not continue to occur. And as it receded into the past, the evidence for that duty-triggering fact became increasingly stale.

As noted above, neither the Secretary nor the Chief Judge pointed to language in § 1904.29(b)(3), or even in Part 1904, suggesting that the duty to log a case continues uninterrupted after the seven-day recording period. Moreover,

---

[24] In 2002, a new Part 1904 went into effect. It reflected "a comprehensive revision of the OSHA injury and illness recordkeeping system." 66 Fed. Reg. 5916 (2001).

Part 1904 refutes the notion. First, there is the specific recording period in the cited regulation. A violation of a duty to record or report within a specified time cannot be a continuing violation. *Interamericas Investments, Ltd. v. Federal Reserve Sys.*, 111 F.3d 376, 382 (5th Cir. 1997),[25] *citing Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 502 n.15 (1967) (violation "which, if it occurs at all, must occur within some specific and limited time span" not continuing).

Second, several regulations would be redundant – and their limitations nullified – if § 1904.29(b)(3) imposed an unlimited duty to ensure a log's completeness. Thus, §§ 1904.32(a)(1) and (b)(1) impose a duty to review log entries and ensure that they are "complete and correct" – but that duty applies "at the end of the year,"[26] not thereafter. Similarly, § 1904.32(b)(3) requires a company executive to certify "that the annual summary is correct and complete," but that duty applies "[a]t the end of each calendar year" (§ 1904.32(a)), not thereafter.

Third, an ever-ongoing obligation would make superfluous the new-information provision in Paragraph (b)(1) of § 1904.33 (Addendum B-2), entitled "Retention and updating." It is possible that *Johnson Controls* relied on the five-year retention provision in former § 1904.6 (2001) as the source of an implied

---

[25] The Fifth Circuit stated: "For 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.)

[26] Section 1904.32(b)(1) states that the employer must "at the end of the year ... review the entries as extensively as necessary to make sure that they are complete and correct." *See also* § 1904.32(a)(1).

continuing duty to keep the log up to date; the Secretary there prominently relied on that provision as the source of a supposed continuing duty to "correct inaccuracies". Such reliance is not possible under Part 1904's new retention provision (§ 1904.33), for it imposes separate and more limited duties – to "save" the log (§ 1904.33(a)); and to "update" it (§ 1904.33(b)(1)). The updating duty applies only to "previously recorded" and "newly discovered" injuries. The regulation's preamble shows that this narrow wording was was deliberate:

> The comments on the proposed rule's updating requirements for individual entries on the OSHA Form 300 reflected a considerable amount of confusion .... Because the proposed rule did not state how frequently the form was to be updated, some employers interpreted the proposed rule as permitting quarterly updates (proposed by OSHA for year-end summaries only) during the retention period .... Some participants argued for even less frequent updating .... Several employers recognized that the Log is an ongoing document and that information must be updated on a regular basis, preferably at the same frequency as required for initial recording .... The final rule requires Log updates to be made on a continuing basis, ***i.e., as new information is discovered.*** For example, if a new case is discovered during the retention period, it must be recorded within 7 calendar days of discovery, the same interval required for the recording of any new case.

66 Fed. Reg. 5916, 6049 col. 3 (2001) (emphasis added); *see also id.* at 6048 col. 3. The record does not show, and the Secretary has never claimed, that new information was discovered here. Construing § 1904.29(b)(3) 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.

Given the staleness problem here, the rule that limitations period must be interpreted in favor of repose, the lack of a duty-triggering event within the

limitations period, and the lack of words in the regulation imposing an unlimited duty to update the log, the alleged violations were not continuing.

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

1. Allegations and Stipulated Record

Item 1 alleges 67 violations of § 1904.29(b)(2) (Addendum B-1), which states: "You must complete an OSHA 301 Incident Report form ... for each recordable injury or illness entered on the OSHA 300 Log." The Form 301 must be completed "within seven (7) calendar days of receiving information that a recordable injury or illness has occurred." Section 1904.29(b)(3).

The parties stipulated: "the injuries or illnesses had not been recorded on the Form 301 ('the incident report') ... 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 [the] form by the date the OSHA inspection was initiated, May 10, 2006." The parties also stipulated that "Volks does not admit that violations occurred on or about the date of the inspection[.]"

When the citation was issued on or about November 8, 2006, all of the alleged instances of violation were older than six months, and most were years old. For example, Instance 64 was then over four years old. It alleges that a recordable injury occurred "on or about August 21, 2002, but "was not recorded on the OSHA Form 301 ...." Citation 2 was issued on November 8, 2006.

2. Argument

All the arguments made above with respect to Item 2 also apply to Item 1, and Volks incorporates them by reference. As with the OSHA Form 300 log, the

cited regulation, § 1904.29(b)(3) requires the Form 301 to be completed within a seven-day period, which was long over when the citation was issued here. If the case is not entered by the end of the seventh day, the violation is complete and citable on the eighth day. As with Item 2, there is no basis for applying a discovery rule. As with Item 2, there is no basis for finding a continuing violation, for no discrete, violative act occurred during the limitations period. Moreover, nothing in the regulations suggests an unlimited, continuing duty. On the contrary, the regulation expressly states that the review, and hence any violation, must occur at a "fixed point in time"[27] – *i.e.*, "within seven (7) calendar days of receiving information that a recordable injury or illness has occurred." After the injury, nothing happened, often for years. Passive inaction is not a continuing violation. *Tolbert*, 172 F.3d at 940.

But Item 1 must be vacated for additional reasons. First, as noted above, it appears that *Johnson Controls* rested on the duty under the former recordkeeping regulations to update the log during the retention period. Yet, the new regulations expressly state that there is no obligation to update the Form 301 during the retention period. Section 1904.33(b)(3) (Addendum B-2) states: "you are not required to update the OSHA 301 Incident Reports." Hence, there cannot be a continuing violation, and *Johnson Controls* is inapplicable.

Second, the cited regulation, § 1904.29(b)(2), is inapplicable by its terms. It states: "You must complete an OSHA 301 Incident Report form ... for each recordable injury or illness *entered on the OSHA 300 Log*." (Emphasis added.)

---

[27] *Center for Biological Diversity*, 453 F.3d at 1335.

Thus, if a case was not entered on the log, there is no duty to prepare a corresponding Form 301. Yet, Item 2 alleges and the parties stipulated that cited cases were *not* on the log. Before the Chief Judge, the Secretary nowhere denied the logic of this argument. Instead, she attempted to re-write the regulation to insert the words "required to be" – as if to make the regulation read "You must complete an OSHA 301 Incident Report form ... for each recordable injury or illness *[required to be]* entered on the OSHA 300 Log." But this is not how the regulation reads. Indeed, the phrase "entered on the OSHA 300 Log" was added to the proposed version,[28] and the preamble to the final regulations indicates that the phrase was used advisedly. See 66 Fed. Reg. at 6025 (Form 301 required "for each injury and illness *recorded on the Form 300*") (emphasis added).

Third, as the Commission suggested in its briefing order, the Secretary's position would also make for duplicative citation. Item 1 must be vacated.

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

1. Allegations and Stipulated Record

Item 3 alleges: "During the years 2002 to 2005, Volks ... did not review the 300 Log to ensure that all entries were complete and accurate." Section 1904.32(a)(1) (Addenum B-1) states: "At the end of each calendar year, you must ...[r]eview the OSHA 300 Log to verify that the entries are complete and accurate, and correct any deficiencies identified."

---

[28] Proposed § 1904.5(a) (Addendum B) stated in part: "In addition to the ... OSHA Form 300 ..., each employer, shall complete an ... OSHA Form 301 ... for each recordable injury or illness experienced ... within 7 calendar days of receiving information that a recordable injury or illness has occurred." 61 Fed. Reg. 4030, 4060 (1996).

The parties stipulated: "... 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." The parties also stipulated that "Volks does not admit that violations occurred on or about the date of the inspection[.]" The referenced years (2002 to 2005) ended between four years and 11 months before the issuance of the citation.

2. Argument

All the arguments made above with respect to Item 2 also apply to Item 3, and Volks incorporates them by reference. The cited regulation required the log to be reviewed "[a]t the end of [the] calendar year...." If it was not then reviewed, the violation was then complete and citable. Those dates were long past when the citation here was issued. As with Item 2, there is no basis for applying a discovery rule. As with Item 2, there is no basis for finding a continuing violation, for no discrete, violative event occurred during the limitations period. Instead, nothing happened, in most cases for years. There is here only passive inaction – which does not support a continuing violation.

Moreover, nothing in the regulations suggests that there is continuing duty on which to base a continuing violation. On the contrary, the regulation expressly states that the review, and hence any violation, must occur at a "fixed point in time"[29] – "the end of [the] calendar year." The Secretary has not pointed to any provision to suggest that, months or years after the end of the calendar

---

[29] *Center for Biological Diversity*, 453 F.3d at 1335.

year, there is a continuing duty to go back and review old logs to determine whether a previous review occurred or was adequate. Thus, Item 3 is untimely.

D. Citation 2, Item 4: Wrong Certifier of Log (§ 1904.32(b)(3))

1. Allegations and Stipulated Record

Item 4 alleges that between 2002 and 2005 the wrong person certified the annual summary: "the Human Resources/Safety Manager ...certif[ied] that the OSHA 300 Log had been examined and that the annual summary was correct and complete." Section 1904.32(b)(3) (Addendum B-1) states: "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."

The parties stipulated that "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." The parties also stipulated: "Volks does not admit that violations occurred on or about the date of the inspection". The referenced years (2002 to 2005) ended between four years and 11 months before the citation's issuance.

2. Argument

All the arguments made above with respect to Item 2 also apply to this item, and Volks incorporates them by reference. The cited regulation required the log to be certified "[a]t the end of [the] calendar year...", after which the violation was complete and citable. Those dates were long past when the citation was issued. As with Item 2, there is no basis for applying a discovery rule. As

with Item 2, there is no basis for a continuing violation, for no discrete, violative act occurred during the limitations period; there is only passive inaction. Moreover, the regulations nowhere suggest a continuing duty on which to base a continuing violation. On the contrary, the cited regulation sets a "fixed point in time"[30] ("the end of each calendar year") by which the certification was required.

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

1. Allegations and Stipulated Record

Item 5 alleges: "During the year 2006 the OSHA Form 300A [annual summary] was only posted from February 1, 2006 until February 28, 2006." The cited regulation, § 1904.32(b)(6) (Addendum B-1) states: "You must 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."

The parties stipulated: "the annual summary for 2005 was posted only from February 1, 2006 to February 28, 2006." They also stipulated: "Volks does not admit that violations occurred on or about the date of the inspection". Six months after March 1st (the first date that the summary was not posted) would have been September 1, 2006. The citation here was issued on November 8, 2006.

2. Argument

All the arguments made above with respect to Item 2 also apply to this item, and Volks incorporates them by reference. The cited regulation required the posting of the summary "until April 30, 2006," after which the violation was

[30] *Center for Biological Diversity*, 453 F.3d at 1335.

complete and citable. That date was long past when the citation was issued. As with Item 2, a discovery rule may not be applied.

As with Item 2, there is also no basis for a continuing violation, for no discrete, violative act occurred during the limitations period; there is only passive inaction. Moreover, the regulations nowhere suggest any continuing duty on which to base a continuing violation, for the cited regulation states a date certain (April 30th) by which the posting of the annual summary may come to an end. Nothing in the regulations suggests that there is a duty to post the annual summary thereafter if one had not previously posted it for the full period (*i.e.*, from February 1st until April 30th). On the contrary, the phrase "no later than" in the regulation indicates just the opposite. As the Eleventh Circuit has stated: "The language 'not later than' creates not an ongoing duty but a fixed point in time at which the violation for the failure of the [party] to act arises." *Center for Biological Diversity*, 453 F.3d at 1335. Item 5 must be vacated.

F. Scope of Review

1. The Secretary's View of A Regulation Is Entitled to Only As Much Weight As It Deserves, and Not *Chevron*-Level Deference.

The Commission owes the Secretary's views no deference or weight unless a regulation is ambiguous. *Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144, 156-57 (1991); *Reich v. General Motors Corp.*, 89 F.3d 313 (6th Cir. 1996). The regulations here are not ambiguous.

The Secretary may argue that, if a regulation is ambiguous, then under *CF&I Steel* her view is entitled to prevail if it is merely reasonable. Such an argument would be incorrect. An agency interpretation not fashioned in

rulemaking or formal adjudication, but in litigation, is not entitled to *Chevron*[31]-level deference – *i.e.*, entitled to prevail if it is merely reasonable. *United States v. Mead Corp.*, 533 U.S. 218 (2001). Under *Mead*, such a view is entitled to only as much as weight as the Commission believes, in its *de novo* examination of the interpretive issue, that the view intrinsically deserves. *Mead* characterized *CF&I Steel* specifically as requiring only *Skidmore*[32] weight: It stated that only "some weight" need be given to OSHA's "informal interpretations" and not the "the same deference as norms that derive from the exercise of ... delegated lawmaking powers." 533 U.S. at 234-35, citing *CF&I Steel,* 499 U.S. at 157. Hence, *Chevron*-level deference is inappropriate here.

2. The Secretary's View of the Act Is Entitled to Neither Deference Nor Weight.

As to construction of the Act, the Commission owes the Secretary neither *Chevron* deference nor *Skidmore* weight. *Arcadian Corp.*, 17 BNA OSHC 1345, 1352 (OSHRC 1995), *aff'd*, 110 F.3d 1192 (5th Cir. 1997). *Amici* urge the Commission to not only adhere to this precedent, but to explain clearly and firmly to the courts why it does not defer on statutory questions. If the Commission does not defend its intended role under the Act, the courts will continue to pay no attention to employers or *amici* who do, and the courts will continue to fail to closely analyze whether *CF&I Steel* applies to questions of statutory construction. They will thereby implicitly force the Commission to defer to the Secretary on questions of statutory construction, and ultimately destroy the Commission's intended role

---

[31] *Chevron, U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837 (1984).

[32] *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

under the Act. For these reasons, the Commission should expressly reject any deference argument and explain its reasoning in detail.

At bottom, the Secretary's argument rests on *CF&I Steel*. But as the Commission has recognized, that decision says nothing about statutory construction. The Court's holding was confined to the Secretary's interpretation of her standards. And the essential premises underlying the reasoning of *CF&I Steel* — that the Secretary's power to construe standards is derivative of her power to adopt them, and that the Secretary is in a superior position to construe standards she authored — are inapplicable to interpretations of the Act. *Kerns Bros. Tree Service*, 18 BNA OSHC 2064, 2067-68 n. 7 (No. 96-1719, 2000) (*CF&I Steel* applies to standards, not "contested interpretations of the statute itself.").

Moreover, there is strong reason why *CF&I Steel* should not be extended further than its precise holding. That reason is *indisputable* congressional intent, not discussed in *CF&I Steel,* but documented on p. 33 below and never plausibly denied by the Secretary, that Congress intended that the Commission be "an autonomous, independent commission which, ***without regard to the Secretary***, can find for or against him on the basis of individual complaints."

In 1970, when Congress was considering passage of the Act, a central dispute was who would decide enforcement cases. One proposal, advocated by labor unions and Democrats, was to commit adjudication to the Labor Department; the expectation was that it would establish a departmental appeals board, *i.e.*, a board established by a cabinet agency to adjudicate cases brought by its enforcement bureau. For example, the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 *et seq.* (1976), gave all administrative functions to the

Department of the Interior. That department established an enforcement arm, the Mining Enforcement Safety Administration (MESA), and an adjudication arm, the Interior Board of Mine Operation Appeals (IBMA). The IBMA reviewed questions of law *de novo,* without deference to MESA,[33] and courts deferred to the views of the IBMA, for *it* – not the enforcement office – spoke for the cabinet department.[34] Such departmental appeals boards were then the rule within the federal government.

But in 1970, dissatisfaction and suspicion of the independence and objectivity of such boards ran so deep as to endanger the Act's passage.[35] The President threatened to veto any bill that placed all administrative powers in one agency. BOKAT & THOMPSON, OCCUPATIONAL SAFETY AND HEALTH LAW at 42 (1st ed. 1988). To save the Act, Senator Javits proposed an "important"[36] compromise – the establishment of an independent adjudicator. In urging it, he assured the Senate that it would establish "an autonomous, independent commission which,

---

[33] *See, e.g., Eastern Associated Coal Corp.*, 7 IBMA 133, 1976-77 CCH OSHD ¶ 21,373 (1976) *(en banc)* ; 1 COAL LAW & REGULATION, ¶ 1.04[9][b][iii], p. 1-49 (T. Biddle ed. 1990) ("Of course, the Board could independently decide questions of law."). MESA was later transferred to the Labor Department and became MSHA after the Federal Mine Safety and Health Act of 1977 was passed; the IBMA's functions were transferred to the newly-created Federal Mine Safety and Health Review Commission.

[34] *Zeigler Coal Co. v. Kleppe,* 536 F.2d 398, 409 (D.C. Cir. 1976) (IBMA's view "must be given some significant weight").

[35] S. REP. NO. 1282, 91st Cong., 2d Sess. 55 (1970), *reprinted in* Leg. Hist. at 194 (debate "so bitter as to jeopardize seriously the prospects for enactment...."). *See also* the pointed remarks by Senators Dominick and Smith appended to S. REP. at 61-64, Leg. Hist. at 200-03.

[36] MARK A. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW § 3, p. 7 (4th ed. 1998) (Act passed only after Senate "passed a series of compromise amendments, including an important amendment by Senator Jacob Javits ....").

without regard to the Secretary, can find for or against him on the basis of individual complaints."[37] Senator Javits's remark is apparently the only piece of legislative history that directly addresses deference. It was on the strength of that assurance that Senator Holland immediately declared his support, stating that "that kind of independent enforcement is required ...."[38] It was on the heels of that assurance that the Senate voted in favor of the Javits compromise.

The Secretary's position on deference is irreconcilable with Senator Javits's statement. The Commission cannot both decide cases "without regard to" the Secretary's position *and,* at the same time, give the Secretary's position weight, let alone controlling regard. Moreover, ignoring Senator Javits's specific remarks on deference would, ironically, make the Commission even more subservient than the pre-Act departmental appeals boards that Congress in 1970 specifically rejected as insufficiently independent.

Respect for Congress requires that its undisputed intent be given as much effect as possible. Although Senator Javits's statement was noted in one *amicus* brief in *CF&I Steel,*[39] the employer's brief failed to quote or cite it,[40] and the Supreme Court did not discuss it or note it. Thus, *CF&I Steel* should not be

---

[37] Leg. Hist. at 463 (emphasis added).

[38] *Id. See also id.* at 193-94, 200-03, 380-94, 479; and Judson MacLaury, *The Job Safety Law of 1970: Its Passage Was Perilous,* MONTHLY LAB. REV. 22-23 (March 1981), *available at* http://www.dol.gov/oasam/programs/history/osha.htm.

[39] Brief of Am. Iron and Steel Institute at 4, available on Lexis at 1989 U.S. Briefs 1541.

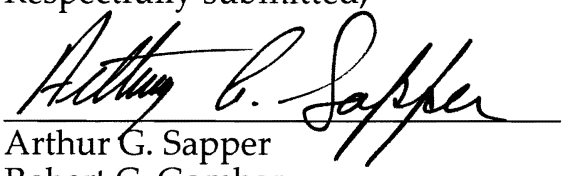
[40] The Commission may take official notice that CF&I Steel was then in bankruptcy (*United States v. Reoganized CF&I Fabricators Of Utah, Inc.,* 518 U.S. 213 (1996)), and was represented by a small practitioner (http://pview.findlaw.com/view/2222453_1?noconfirm=0) that a Westlaw or Lexis search would show had not previously litigated cases before the Commission.

extended beyond the narrow rule it established – that the Secretary receives deference or weight with respect to interpretation of her own standards and regulations.

IV. Conclusion

Items 1 through 5 of Citation 2 should be vacated.

Respectfully submitted,

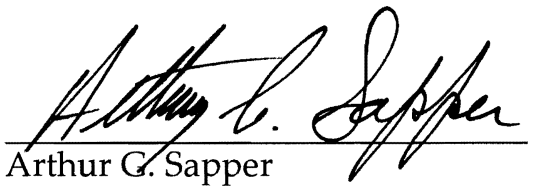


Arthur G. Sapper
Robert C. Gombar
James A. Lastowka
McDERMOTT WILL & EMERY LLP
600 13th Street, N.W.
Washington, D.C. 20005
(202) 756-8246, (202) 756-8087 (fax)
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on November 27 2007, the foregoing was served upon the following by first class mail on:

Orlando Pannochia, Esq., Counsel for Regional Trial Litigation,
Charles F. James and Michael Doyle, Esq., Counsels for Appellate Litigation
Room S-4004
Office of the Solicitor
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20036-3419



Arthur G. Sapper

Addendum A: Stipulation of the Parties

With respect to Citation 2, Items 1 through 5, the only citation items still at issue in this case, Complainant, Secretary of Labor, United States Department of Labor, and Respondent, AKM LLC dba Volks Constructors ("Volks"), submit the case for decision under Commission Rule 61. The parties respectfully request permission to file briefs and/or motions for judgment after filing these stipulations. For the purpose of this case, the parties stipulate 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.

Addendum B: Excerpts from Part 1904 and Related Materials

The cited portion of § 1904.29 states in context:

> § 1904.29 Forms
>
> * * *
>
> (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.
>
> (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.

The cited portion of § 1904.32 states in context:

> § 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 of injuries and illnesses recorded on the OSHA 300 Log;
>
> (3) Certify the summary; and
>
> (4) Post the annual summary.
>
> * * *
>
> (b) ...(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.

* * *

(6) When do I have to post the annual summary? You must 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.

Section 1904.33 states:

§ 1904.33 Retention and updating.

* * *

(b)(1) *Implementation.* 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.

(2) Do I have to update the annual summary? No, you are not required to update the annual summary, but you may do so if you wish.

(3) Do I have to update the OSHA 301 Incident Reports? No, you are not required to update the OSHA 301 Incident Reports, but you may do so if you wish.

The text of the proposed version of § 1904.5 (from 61 Fed. Reg. 4030, 4060 (1996)):

§ 1904.5 -- OSHA Injury and Illness Incident Record (OSHA Form 301 or Equivalent).

(a) In addition to the OSHA Injury and Illness Log and Summary (OSHA Form 300) provided for under Section § 1904.4(a) of this Part, each employer, shall complete an OSHA Injury and Illness Incident Record [OSHA Form 301 (formerly

OSHA Form 101)] for each recordable injury or illness experienced by employees of that establishment, within 7 calendar days of receiving information that a recordable injury or illness has occurred. Each OSHA Form 301 must contain the unique case or file number relating it to the corresponding case entry on the OSHA Form 300.

(b) An employer may maintain the OSHA Form(s) 301 on an equivalent form(s), by means of data processing equipment, or both, when all of the following conditions are met:

(1) The equivalent form or computer printout is as readable and understandable as the OSHA Form 301 to a person familiar with the OSHA Form 301.

(2) The equivalent form or computer printout must contain, all of the information found on the OSHA Form 301, or must be supplemented by an OSHA Form 301 containing the missing information. The detailed information concerning the injury or illness (questions 16, 17 and 18) must be asked in the same order and using identical language from the Form 301. All other questions may be asked in any manner and in any order.

Addendum C: Excerpts from *3M v. Browner*, 17 F.3d 1453, 1460-63 (1994)

The remaining issue concerns the meaning of § 2462's phrase "unless commenced within five years from the date when the claim first accrued." ... EPA contends, and the ALJ held, that its claim for penalties "first accrued" when it discovered 3M's violations, not beforehand when the company committed those violations.

A claim normally accrues when the factual and legal prerequisites for filing suit are in place. [Citations omitted.] While this appears to be a straightforward formulation, there may be complications: "The statutory period may begin either when the defendant commits his wrong or when substantial harm matures. This choice, unnecessary where the two events are simultaneous, becomes complex where considerable time intervenes; here the courts have generally looked to the substantive elements of the cause of action on which the suit is based." Note, *Developments in the Law – Statutes of Limitations*, 63 HARV. L. REV. at 1200. If the period always ran from the date of the wrong, actions by workers previously exposed to dangerous chemicals, for example, might be time-barred when brought years later after the workers' injuries manifested themselves. For cases involving such latent injuries or injuries difficult to detect, courts have developed the "discovery rule." We adopted the rule in *Connors v. Hallmark & Son Coal Co.*, ... 935 F.2d 336, 342 (D.C. Cir. 1991), following the lead of the other courts of appeals. [Footnote omitted.] The "discovery rule" rests on the idea that plaintiffs cannot have a tenable claim for the recovery of damages unless and until they have been harmed. Damage claims in cases involving hidden injuries or illnesses therefore are viewed as not accruing until the harm becomes apparent. The rule approved in *Connors*, in which we "borrowed" a local statute of limitations for a federal claim, is of this type--a "discovery of injury" rule. [Citation omitted.] Although use of the rule has not been restricted to personal injury actions, the rule has only been applied to remedial, civil claims. [Footnote reference omitted.]

The rule EPA sponsors is of an entirely different sort. It is a "discovery of violation" rule having nothing whatever to do with the problem of latent injuries. The rationale underlying the discovery of injury rule--that a claim cannot realistically be said to accrue until the claimant has suffered harm--is completely inapposite. The statute of limitations on which EPA would engraft its rule is aimed exclusively at restricting the time within which actions may be brought to recover fines, penalties and forfeitures. Fines, penalties and forfeitures, whether civil or criminal, may be considered a form of punishment. [Citation

omitted.] 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. The penalty provision of TSCA ... says just that: "Any person who violates a provision of section 2614 of this title shall be liable to the United States for a civil penalty in an amount not to exceed $ 25,000 for each such violation." Because liability for the penalty attaches at the moment of the violation, one would expect this to be the time when the claim for the penalty "first accrued."[14]

[14] The Supreme Court rejected a "discovery of violation" rule in *Unexcelled Chemical Corp. v. United States*, 345 U.S. 59 ... (1953), which held that an enforcement claim accrued at the moment of violation. The suit was for liquidated damages against a government contractor for unlawfully employing child labor. The Court held: " "the cause of action accrued' ... when the minors were employed. That was the violation ... giving rise to the liability for liquidated damages... A cause of action is created when there is a breach of duty owed the plaintiff. It is that breach of duty, not its discovery, that normally is controlling." 345 U.S. at 65.

The Court rejected a discovery of the wrong rule in *United States v. Kubrick*, 444 U.S. 111 ... (1979), a civil action under the Federal Tort Claims Act. In an argument roughly analogous to the one EPA makes here, Kubrick contended that his claim accrued only upon his discovery of the "wrong," that is, only when he discovered that the acts inflicting his injury constituted medical malpractice. After discussing why the prevailing case law and the statute's legislative history were against Kubrick's position, 444 U.S. at 120, the Court rejected his proposed rule as unworkable and contrary to the purposes of statutes of limitations. *Id.* at 123-24.

EPA's contrary arguments tend to disregard the limited role of the court in this case. We are interpreting a statute, not creating some federal common law. The 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.[15] 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. In this case, EPA suggests a remand for an evidentiary hearing on such matters and proposes a test: whether, "in the exercise of due diligence," EPA should have discovered 3M's

violations earlier than it did. [Citation omitted.] The subject matter seems more appropriate for a congressional oversight hearing. We seriously doubt that conducting administrative or judicial hearings to determine whether an agency's enforcement branch adequately lived up to its responsibilities would be a workable or sensible method of administering any statute of limitations. Nor do we understand how any of this relates to the reasons why we have a statute of limitations in penalty cases. An agency's failure to detect violations, for whatever reasons, does not avoid the problems of faded memories, lost witnesses and discarded documents in penalty actions brought decades after alleged violations are finally discovered. Most important, nothing in the language of § 2462 even arguably makes the running of the limitations period turn on the degree of difficulty an agency experiences in detecting violations.

When we return to the statutory language and ask what Congress meant when it required actions to be brought within five years from the date when a claim for a penalty "accrued," the answer readily presents itself. The meaning of this portion of § 2462 has been settled for more than a century. [Discussion of history of statute and case law omitted.]

In light of the legal meaning of the word "accrued" in 1839, the retention of the word in the 1874 version of § 2462, and its appearance in the current statute, we hold that an action, suit or proceeding to assess or impose a civil penalty must be commenced within five years of the date of the violation giving rise to the penalty. We reject the discovery of violation rule EPA advocates as unworkable; outside the language of the statute; inconsistent with judicial interpretations of § 2462; unsupported by the discovery of injury rule adopted in non-enforcement, remedial cases; and incompatible with the functions served by a statute of limitations in penalty cases.

[15] EPA tells us that violations like 3M's are inherently undiscoverable and that this case involves self-reporting rules. After the incidents involved in this case, EPA instituted a new certification procedure. Under 19 C.F.R. § 12.12(a), importers are now required to certify that the shipment complies with TSCA or that TSCA does not apply. The certification is sent to EPA after inspection by a customs agent. Thereafter, EPA can compare the certification with its Premanufacture Notice and inventory records. Given this certification requirement, it may be that in future cases EPA could invoke the fraudulent concealment doctrine to toll the statute of limitations. *Holmberg v. Armbrecht*, 327 U.S. 392, 90 L. Ed. 743, 66 S.Ct. 582 (1946). At any rate, EPA's new procedure suggests that violations of the sort 3M committed are not "inherently undiscoverable." *See ALM Corp. v. EPA*, 974 F.2d 380, 382 (9th Cir. 1992).

Addendum D: Electronic Communication from the Secretary Regarding Representation