



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

SECRETARY OF LABOR,

Complainant,

v.

R+L CARRIERS SHARED SERVICES, LLC,

Respondent.

OSHRC Docket No. 22-0122

NOTICE

Before: ATTWOOD, Chairman; and LAIHOW, Commissioner.

BY THE COMMISSION:

Before us is Respondent's May 2, 2022, petition seeking interlocutory review of an order issued by Administrative Law Judge Keith E. Bell denying Respondent's motion to dismiss. On December 8, 2021, the Secretary issued Respondent a citation alleging that a violation of 29 C.F.R. § 1910.178(p)(1) occurred "on or about June 7, 2021." Respondent timely contested the citation, and on March 16, 2022, the Secretary filed the complaint. In his complaint, the Secretary amended the citation to allege that the violation occurred "on or about June 8, 2021."

Respondent filed a motion to dismiss objecting to the Secretary's amendment and asserting that the citation was time-barred by section 9(c) of the Occupational Safety and Health Act, 29 U.S.C. § 658(c), which provides that "[n]o citation may be issued under this section after the expiration of six months following the occurrence of any violation." Without explanation, the judge denied Respondent's motion in a two-sentence order.

Under Commission Rule 73(a), the Commission has the discretion to grant interlocutory review where "review involves an important question of law or policy that controls the outcome of the case, and that immediate review of the ruling will materially expedite the final disposition

of the proceedings” 29 C.F.R. § 2200.73(a). The petition is denied if not granted within 30 days. 29 C.F.R. § 2200.73(b). For reasons set out separately below, the two Commission members do not agree on the disposition of Respondent’s petition. Chairman Attwood votes not to grant the petition. Commissioner Laihow votes to grant the petition. Accordingly, the petition is denied pursuant to Rule 73(b).

The separate opinion of each Commission member follows.

/s/ _____

Cynthia L. Attwood
Chairman

/s/ _____

Amanda Wood Laihow
Commissioner

Dated: June 1, 2022

Separate Opinion of Chairman Attwood

ATTWOOD, Chairman.

I vote not to grant the petition for interlocutory review because it neither “involve[s] an important question of law or policy that controls the outcome of the case,” nor would “immediate review of the ruling . . . materially expedite the final disposition of the proceedings . . .” 29 C.F.R. § 2200.73(a)(1).

Respondent argues that Commission Rule 34(a)(3), 29 C.F.R. § 2200.34(a)(3), does not allow the Secretary to amend an untimely citation issued in violation of section 9(c) of the Occupational Safety and Health Act, 29 U.S.C. § 658(c). However, the citation issued to Respondent was not in fact untimely. Section 9(c) requires a citation to be issued no more than “six months following the *occurrence* of any violation.” *Id.* (emphasis added). Here, the Secretary issued the citation on December 8, 2021, alleging violative conduct occurring “*on or about 6/7/21*” (emphasis added). The phrase “on or about” means “approximately; at or around the time specified.” *Black’s Law Dictionary* (11th ed. 2019); *see also Burton’s Legal Thesaurus* 379 (3d ed. 1998); *Evergreen Constr. Co.*, No. 12-2385, 26 BNA OSHC 1615, 1624 n.24 (No. 12-2385, 2017) (separate opinion of Commissioner Attwood). Accordingly, the citation plainly encompasses the violative conduct that the Secretary alleges in the complaint occurred on June 8, 2021.¹ For the citation as amended to be upheld, the Secretary must now meet his *prima facie* burden of proving all the necessary elements of his case as they relate only to the violative conduct that allegedly occurred within the six-month statute of limitations.

¹ My colleague asserts that my reading of “on or about” is contrary to the Secretary’s litigating position. But the Secretary’s litigating position does not govern the timeliness of a citation under section 9(c). 29 U.S.C. § 658(c). Thus, although the Secretary chose to amend the citation to clarify the date of the alleged violation’s occurrence, doing so was not necessary to “cure” any purported defect. On the contrary, the complaint is consistent with a good-faith effort to “amend[] the violation date to conform the allegations to the records currently in the Secretary’s possession and clarify that a violation allegedly occurred on or about June 8, 2021,” as the Secretary has stated.

I likewise disagree with my colleague’s assertion that the citation failed to “describe with particularity the nature of the violation” as required by section 9(a). 29 U.S.C. § 658(a). As discussed above, the citation was, in fact, quite particular—it alleges the violation occurred “*on or about 6/7/21*,” which, if that phrase is to have any meaning, surely includes violative conduct alleged to have occurred the very next day.

For all these reasons, I find that this petition does not raise an “important question of law” and review of the judge’s ruling would not “materially expedite” the case’s final disposition. Accordingly, I vote not to grant this petition.

Separate Opinion of Commissioner Laihow

LAIHOW, Commissioner.

I vote to grant Respondent’s Petition for Interlocutory Review because it meets all the criteria set forth in Commission Rule 73(a)(1). 29 C.F.R. § 2200.73(a)(1). First, the petition “involves an important question of law or policy that controls the outcome of the case.” *Id.* Section 9(c) of the Occupational Safety and Health Act establishes a six-month statute of limitations for the issuance of any citation and expressly provides that “no citation may be issued under this section after the expiration of six months following the occurrence of any violation.” 29 U.S.C. § 658(c). In its petition, Respondent raises the question of whether the Secretary may retroactively cure an untimely citation by simply amending it to allege violative conduct on a date that just so happens to shift the citation into the Act’s six-month limitations period. This question is of critical importance because it implicates the most basic aspect of the Secretary’s enforcement authority under the Act—his power to issue citations to employers. 29 U.S.C. § 658(a). It also raises a purely legal question not previously addressed by the Commission.² Second, “immediate review” of this question will “materially expedite the final disposition of the proceedings” because, as explained below, this untimely citation must be vacated. 29 C.F.R. § 2200.73(a)(1).

There can be no dispute that the citation issued to Respondent is facially invalid because it alleges violative conduct that occurred “on or about 6/7/21,” yet was not issued until December 8, 2021, one day after the expiration of the Act’s six-month limitations period. The Secretary himself recognized this reality by electing to amend the citation in his complaint to allege what is essentially a new violation—one that occurred the following day, “on or about 6/8/2021.” Nonetheless, the judge—in a two-sentence order that provides no explanation or analysis—denied Respondent’s motion to dismiss the citation as untimely. Presumably, the judge concluded the Secretary’s amendment was proper because, as the Secretary erroneously claims in his opposition to Respondent’s petition, the alleged violative conduct on June 8, 2021 relates back to the conduct it alleged occurred in the original citation. *See* Fed. R. Civ. P. 15(c) (relation back of amendments);

² I acknowledge that under Commission and Court of Appeals precedent, the Secretary has considerable latitude to amend a citation prior to the hearing. *See, e.g., P.A.F. Equip. Co.*, 7 BNA OSHC 1209, 1212 (No. 14315, 1979), *aff’d*, 637 F.2d 741 (10th Cir. 1980); *Otis Elevator Co.*, 6 BNA OSHC 2048, 2049 (No. 16057, 1978); *Dye Constr. Co. v. Occupational Safety & Health Review Comm’n*, 698 F.2d 423, 425 (10th Cir. 1983). However, it does not appear that the Commission has ever permitted the Secretary to cure an untimely citation by amendment.

see also Commission Rule 34(a)(3), 29 C.F.R. § 2200.34(a)(3) (allowing Secretary to seek leave to amend the complaint). But any such conclusion is fundamentally flawed. As the Seventh Circuit has explained in the context of an untimely filed complaint, “Rule 15(c) of the Federal Rules of Civil Procedure does not permit an amended complaint to relate back to an earlier, untimely complaint” because the “prior complaint, having been itself filed after the expiration of the [] statute of limitations . . . [is] a nullity.” *Henderson v. Bolanda*, 253 F.3d 928, 933 (7th Cir. 2001). Put simply, the Secretary cannot use procedural rules “as a life-line” to resurrect a citation that was never valid in the first place. *Id.*

I respectfully disagree with my colleague that the citation’s inclusion of the phrase “on or about” is somehow sufficient to cure its inherent defectiveness. First, such an expansive reading of “on or about” to include violative conduct that may have occurred on June 8, 2021, is belied by the Secretary’s own litigating position in this case—indeed, if the Secretary intended “on or about” to include violative conduct on June 8, 2021, he need not have moved to amend the citation in the first place. Second, section 9(a) of the Act requires that the citation “describe with particularity the nature of the violation.” 29 U.S.C. § 658(a). The “nature” of any violation, of course, is fundamentally related to the date on which the Secretary alleges it occurred. Thus, even if the Secretary had intended “on or about” to include conduct occurring on June 8, 2021, the citation would run afoul of section 9(a)’s particularity requirement. In short, the Secretary’s boilerplate inclusion of “on or about” in any citation cannot provide a free pass from the Act’s six-month statute of limitations. One day here, three weeks the next – at what point does this sort of “deadline creep” violate the statute? In my view, taking such a position not only violates the Act but creates uncertainties for employers that Congress never intended. *See AKM, LLC v. Sec’y of Labor*, 675 F.3d 752, 756 (D.C. Cir. 2012) (rejecting notion that “Congress expressly established [section 9(c)’s] statute of limitations only to implicitly encourage the Secretary to ignore it.”).

Finally, in voting to grant the petition, I am particularly mindful that section 9(c) provides certainty and closure to employers regarding their obligations and potential liability under the Act. *See AKM*, 675 F.3d at 758 (explaining that section 9(c) indicates that Congress intended the Secretary to enforce “violations swiftly or else forfeit the chance to do so”). The Secretary’s

disregard of the Act's statute of limitations in this case is fundamentally unfair to Respondent and serves to only weaken the integrity of enforcement actions brought by the Secretary in the future.³

For all these reasons, I vote to grant Respondent's petition.

³ Given that Respondent will now have to mount a defense to what is an otherwise invalid citation, I note—as does my colleague—that no evidence relating to alleged violative conduct that predates June 8, 2021, can be considered by the judge in assessing the merits of the amended citation.