SECRETARY OF LABOR, Complainant, v. GENERAL DYNAMICS CORP., ELECTRIC BOAT DIV., QUONSET POINT FACILITY, Respondent.	:	OSHRC DOCKET NO. 87-1195

DECISION

BEFORE: FOULKE, Chairman; WISEMAN and MONTOYA, Commissioners.

BY THE COMMISSION:

At issue in this case is whether the Commission Administrative Law Judge erred in vacating the citations issued by the Secretary of Labor (''the Secretary") to the Quonset Point Facility of General Dynamics Corporation (''Quonset Point"), on the ground that the citations are time-barred under section 9(c) of the Occupational Safety and Health Act of 1970 (''the Act"), 29 U.S.C. § 659(c).[1] Also at issue is whether the citations should be vacated for certain other procedural reasons. Specifically, Quonset Point argues that the citations should be vacated because: (1) they were not issued ``with reasonable promptness"; (2) they were not served properly; and (3) the petitions for discretionary review of the judge's decision, and the Commission's direction for review, were untimely. For the reasons that follow, we find that the judge erred in finding the citations time-barred, and we reject Quonset Point's other asserted grounds for vacating the citations. Thus, we reverse the judge's decision and remand this case for a ruling on the merits of each alleged violation.

[1]That section provides that ''[n]o citation may be issued under this section after the expiration of six months following the occurrence of any violation.''

I. BACKGROUND

The citations allege that Quonset Point failed to comply with regulations issued by the Secretary under the Act, requiring employers to make and maintain certain specified records of occupational injuries and illnesses. The citations arose out of an inspection by the Secretary's Occupational Safety and Health Administration (''OSHA") of Quonset Point's injury and illness records. That inspection was conducted pursuant to an employee complaint.

Specifically, the first citation alleges 121 instances of inaccurate or missing entries on a mandatory log and summary of occupational injuries and illnesses (OSHA Form 200 or equivalent), in violation of 29 C.F.R. § 1904.2(a).[2] The injuries and illnesses involved occurred during 1985 and 1986. The Secretary alleges that the violations were willful and, accordingly, proposes civil penalties totaling $605,000 for them. The same citation alleges fifty three willful violations of 29 C.F.R. § 1904.4[3] for failure to prepare a supplementary report (on OSHA Form 101 or equivalent) regarding certain injuries and illnesses during 1985 and 1986. The Secretary proposes a single, $10,000 penalty for these alleged violations. The second citation alleges a non-serious violation of section 1904.2(a) because of certain omissions on the OSHA Form 200's for 1985, 1986, and January 1987. No penalty is proposed for these alleged violations.

---

[2]That regulation states in pertinent part:

> Each employer shall . . . (1) maintain in each establishment a log and summary of all recordable occupational injuries and illnesses for that establishment; and (2) enter each recordable injury and illness on the log and summary as early as practicable but no later than 6 working days after receiving information that a recordable injury or illness has occurred. For this purpose form OSHA No. 200 or an equivalent which is as readable and comprehensible to a person not familiar with it shall be used. The log and summary shall be completed in the detail provided in the form and instructions on form OSHA No. 200.

[3]That regulation provides in pertinent part:

> In addition to the log of occupational injuries and illnesses provided for under § 1904.2, each employer shall have available for inspection at each establishment within 6 working days after receiving information that a recordable case has occurred, a supplementary record for each occupational injury or illness for that establishment. The record shall be completed in the detail prescribed in the instructions accompanying Occupational Safety and Health Administration Form OSHA No. 101. Workmen's compensation, insurance, or other reports are acceptable alternative records if they contain the information required by Form OSHA No. 101.

The judge's basis for vacating the citations under section 9(c) of the Act was his finding that all of the alleged violations occurred more than six months before the Secretary issued the citations, on July 29, 1987. He further held that the Secretary reasonably should have discovered the alleged violations before January 29, 1987, when the inspection which led to the citations began. Specifically, he found that OSHA had ample opportunity to discover them previously, including in 1983 when an OSHA compliance officer inspected Quonset Point's records and suspected that certain types of injuries were being underrecorded.

Our reasons for reversing the judge's decision on the timeliness of the citations under section 9(c) are discussed in Part II.D., below. Before turning to that issue, we will address the other procedural issues.

II. ANALYSIS

A. Whether Commission review of the judge's decision is barred on the ground that the petitions for discretionary review and the direction for review were untimely filed

Quonset Point argues that the Commission may not review the judge's decision because the petitions for discretionary review and the direction for review were all filed more than 30 days after the judge transmitted his decision to the parties. Quonset Point relies on section 12(j) of the Act, 29 U.S.C. § 661(j), which provides in pertinent part:

> The report of the administrative law judge shall become the final order of the Commission within thirty days after such report by the administrative law judge, unless within such period any Commission member has directed that such report shall be reviewed by the Commission.

Commission Rule 90(b)(2), which implements section 12(j), provides:

> On the twenty-first day after the transmittal of his decision to the parties, the Judge shall file his report with the Executive Secretary for docketing. The report shall consist of the record, including the Judge's decision, any petitions for discretionary review and statements in opposition to such petitions. Promptly upon receipt of the Judge's report, the Executive Secretary shall docket the report and notify all parties of the docketing date. The date of docketing of the Judge's report is the date that the Judge's report is made for purposes of section 12(j) of the Act, 29 U.S.C. § 661(j).

All of the actions of which Quonset Point complains comply with Commission Rule 90(b)(2), so far as the record shows. The judge transmitted his decision to the parties on April 27, 1990. He filed

that decision with the Commission on May 18, 1990. The Executive Secretary docketed the judge's report on May 30, 1990. The petitions for discretionary review were filed on or about June 19, 1990, and the direction for review was filed on June 28, 1990. Quonset Point has provided no basis for a finding that the judge's decision was not docketed ''promptly" after the judge filed his decision with the Commission.

Nevertheless, Quonset Point argues that the terms of Rule 90(b)(2) are inconsistent with the terms of section 12(j) of the Act. Thus, argues Quonset Point, the Commission must evaluate whether the clear meaning of the Act has been violated. Based on our evaluation of this issue, we find that applicable case law rejects Quonset Point's argument and supports the validity of the Commission rule. *E.g., H.S. Holtze Constr. Co.*, 7 BNA OSHC 1753, 1755, 1979 CCH OSHD ¶ 23,925, pp. 29,005-06 (No. 16059, 1979), *aff'd*, 627 F.2d 149, 153 (8th Cir. 1980) (Commission reasonably applied predecessor of Rule 90(b)(2) to consider as timely a direction for review that was filed 42 days after judge transmitted decision to parties, and 21 days after judge's decision was filed with Commission). In *Holtze*, the court noted that the rule ``provides the parties an opportunity to study the [judge's] decision" for 21 days before it is officially filed with the Commission, and allows the decision to be recalled by the judge during that period.

> The objective of this regulation is to provide a date certain[4] following the release of the decision from which the statutory period can run. Under these circumstances we believe that the application of this regulation is reasonable, and we cannot say that the regulation is invalid . . . .

Id. Further, we note that the Commission's docketing procedure implements the intent of Congress in section 12(j) that the Commissioners have 30 days to review the judge's report. For these reasons, we hold that Commission Rule 90(b)(2) is valid, and that the petitions for discretionary review, and the direction for review, were timely in this case.

B. Whether the citations should be vacated on the ground that they were not issued with reasonable promptness?

Section 9(a) of the Act states, ``[i]f, upon inspection or investigation, the Secretary or his authorized representative believes that an employer has violated a requirement . . . of any regulations

---

[4]The term ''date certain'' means a definite, predictable date.

prescribed pursuant to this Act, he shall *with reasonable promptness* issue a citation to the employer.'' (Emphasis added). Quonset Point argues that OSHA failed to issue the citations with ''reasonable promptness,'' because the compliance officer (''CO'') who conducted the inspection, Ralph Gumpert, was actually aware of apparent recordkeeping violations by early February 1987, shortly after the inspection began. As mentioned above, the citations were issued on July 29, 1987.

This issue was not directed for review. However, Quonset Point claims that the judge implicitly found a lack of reasonable promptness, because he stated, ''[h]ere each incident can be identified and many were within the six-month period had complainant acted with 'reasonable promptness,' 29 U.S.C. § 658(a)." Thus, we will address the issue.

Our review of the record reveals that Quonset Point has not alleged that it was prejudiced in presenting its case due to the Secretary's delay in issuing the citation. Nor does Quonset Point cite or discuss Commission or court precedent on the issue. Under long-established Commission precedent, the employer must establish such prejudice, to warrant vacating the citation for lack of ``reasonable promptness." *E.g., Vanco Constr., Inc.*, 11 BNA OSHC 1058, 1061, 1983-84 CCH OSHD ¶ 26,372, p. 33,454 (No. 79-4945, 1982), *aff'd on other grounds*, 723 F.2d 410 (5th Cir. 1984). Numerous courts of appeals have addressed this issue and are of the same view. *E.g., Havens Steel Co. v. OSHRC*, 738 F.2d 397, 399 (10th Cir. 1984), and cases cited therein.

We find no unreasonable delay in issuing the citations, especially considering the magnitude of the items and issues involved. Although the CO may have had the necessary information to cite all the alleged violations early in the inspection, that inspection took about fifteen days during February. The CO then followed up in May by executing a medical access order, under which he reviewed Quonset Point's underlying medical records regarding the injuries and illnesses involved. The CO did not receive the OSHA 200 summary page for 1986 from Quonset Point until early July 1987. Under these circumstances, it was not unreasonable of OSHA to issue the citations at one time, in late July 1987. Thus, we reject Quonset Point's argument that the citations were not issued with reasonable promptness.

C. Whether the citations should be vacated for lack of proper service upon Quonset Point

It is undisputed that the citations and notification of proposed penalties were hand-delivered to a Quonset Point employee, rather than being sent by certified mail. Quonset Point argues that the citations must be vacated, because 29 U.S.C. § 659(a) requires that if the Secretary issues a citation, he shall ``notify the employer by certified mail of the penalty, if any, proposed to be assessed'' for the violation.

However, as the Commission has stated, ``if an employer receives actual notice of a citation, it is immaterial to the exercise of the Commission's jurisdiction that the manner in which the citation was sent was not technically perfect.'' *P & Z Co.*, 7 BNA OSHC 1589, 1591, 1979 CCH OSHD ¶ 23,777, p. 28,830 (No. 14822, 1979). As the Supreme Court stated recently:

> We would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake. When, as here, there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act.

Brock v. Pierce County, 476 U.S. 253, 260 (1986) (footnote omitted).[5] *See also Fleisher Engg. and Constr. Co. v. United States*, 311 U.S. 15, 16 & n.1 (1940) (purpose of provision in remedial statute (Miller Act) that written notice of suit ``shall be served by mailing the same by registered mail'' was to assure receipt of the notice, not to make registered mail mandatory). The Act, like the Miller Act, is remedial social legislation, and is to be broadly construed to effectuate the Congressional purpose. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 13 (1980).

Personal service is recognized as a superior form of service of process in federal civil proceedings generally. *E.g.*, Fed. R. Civ. P. 4(d). The Secretary's regulation interpreting the Act's provision for service by certified mail expressly authorizes personal service as an alternative. 29 C.F.R. § 1903.15(a). A citation and notification of proposed penalties are not the same as court process, *e.g., P & Z*, 7 BNA OSHC at 1591, 1979 CCH OSHD at p. 28,829. However, we believe

---

[5]The Court noted, however, that where the deadline at issue is a statute of limitations, the action will be dismissed if not filed within the stated time period. *Id.* at 261 (citing *Mohasco Corp. v. Silver*, 447 U.S. 807, 815-17 (1980)). The statute of limitations in *Mohasco* governed private causes of action based on an unfair employment practice under 42 U.S.C. § 2000e-5(e).

that the Secretary has reasonably construed the Act to permit personal service of citations and penalty notices in lieu of certified mail.[6]

Quonset Point relies on certain pre-World War II tax cases that held, under a provision stating that a notice of tax deficiency ''shall" be served by registered mail, that alternative forms of service were unacceptable. *E.g., Heinemann Chem. Co. v. Heiner*, 92 F.2d 344, 346 (3d Cir. 1937). There also were decisions suggesting that alternative forms of service were permissible under that provision, however. *E.g., Olsen v. Helvering*, 88 F.2d 650 (2d Cir. 1937) (''we are unwilling to construe even a tax statute in the archaic spirit necessary to defeat this levy; the notice is only to advise the person who is to pay the deficiency that the Commissioner means to assess him; anything that does this unequivocally is good enough'') (citing cases).

In any event, the Commission analyzed the case law under the amended version of that provision in *P & Z*, and agreed with the more recent cases which hold that use of registered mail is not required if the person notified actually receives the document without prejudicial delay. 7 BNA OSHC at 1591, 1979 CCH OSHD at pp. 28,829-30, citing *Delman v. Commissioner*, 384 F.2d 929, 933-34 (3d Cir. 1967), *cert. denied*, 390 U.S. 952 (1968). We hereby reaffirm the discussion and conclusions on this specific issue in *P & Z*.[7]

Finally, Quonset Point notes a case in which the Commission held that service of a citation on a corporation was inadequate where it was made on the president's wife at home. *Donald K. Nelson Constr., Inc.*, 3 BNA OSHC 1914, 1915, 1975-76 CCH OSHD ¶ 20,299, p. 24,204 (No. 4309, 1976) (citing Fed. R. Civ. P. 4(d)(3)). However, Quonset Point has not alleged or shown that the citations and penalty notice to it were not served upon a proper official under appropriate

---

[6]As Quonset Point notes, Congress rejected an amendment that would have ''combined proposed penalties with the issuance of the citation." H.R. Conf. Rep. No. 1765, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Admin. News 5177, 5234. However, that action does not indicate that Congress intended citations to be a nullity if personally served on the employer.

[7]Quonset Point cites a principle of statutory construction that where a statute provides that an action is to be taken in a particular way, it implicitly negates other ways of taking the action. *E.g., Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929). However, such principles of statutory construction are employed only when a contrary legislative intent is not known. As mentioned above, where the legislative intent is to create a remedial statute, such as the Act, its provisions are to be construed to effectuate the congressional purpose. *E.g., Whirlpool*, 445 U.S. at 13; *Johnson v. Southern Pacific Co.*, 196 U.S. 1, 15-18 (1904) (maxims of statutory interpretation are not to be applied so as to defeat intention of legislature in enacting remedial employee safety statute). *See generally* 2A *Sutherland Statutory Construction*, §§ 47.23-.25 (5th ed. 1992).

circumstances. For the reasons given above, we find that the citations and notification of proposed penalties were properly served upon Quonset Point.

D. Whether the judge erred in vacating the citations on the ground that they were not issued timely under section 9(c) of the Act

The Secretary argues that the citations were timely because he issued them within six months of when he first discovered or reasonably should have first discovered the violations.[8] Quonset Point asserts that it was cited only for discrete, identifiable errors and omissions in recordkeeping entries, not a ''continuous chain of tortious activity,"and that each alleged error and omission last occurred more than six months before the citations.[9] Quonset Point also argues that the Secretary had reasonable opportunities to discover the alleged violations before his 1987 inspection began, and thus the citations are untimely. In any event, Quonset Point asserts that the Secretary must show that an overt, violative act occurred within six months before the citations were issued in order to avoid the bar of section 9(c) of the Act, and he failed to do so here.[10]

The Commission has generally upheld the Secretary's authority to issue a citation for an unsafe condition that an OSHA compliance officer first discovers during an inspection made more

---

[8]The Secretary further argues that section 1904.2(a) creates a continuing obligation to report each occupational injury and illness on the OSHA 200 log and thus the alleged violations are properly termed ''continuing violations"which he may cite throughout the five-year retention period of section 1904.6, regardless of discovery. While it is not necessary to reach this argument to find in favor of the Secretary, we would note that this argument fails to address Congress' intent that section 9(c) operate as a statute of limitations with a definite six-month cutoff on issuance of citations.

[9]Quonset Point argues that the Secretary interprets § 1904.2(a) in a manner inconsistent with his interpretation of § 1904.8 in *Yelvington Welding Serv.*, 6 BNA OSHC 2013, 2014, 1978 CCH OSHD ¶ 23,092, p. 27,906 (No, 15958, 1978). However, the Secretary forwarded a copy of his brief in that case to us. His interpretation in *Yelvington* is consistent with his interpretation here. *Cf. e.g., American Cyanamid Co.*, 15 BNA OSHC 1497, 1504, 1992 CCH OSHD ¶ 29,598, p. 40,067 (No. 86-681, February 7, 1992) (agency may change its policies pursuant to existing requirements only if the change in policy is adequately explained), *appeal filed*, No. 92-3321 (6th Cir., April 7, 1992).

[10]Quonset Point further argues that section 9(c) is not actually a statute of limitations, but a jurisdictional bar to issuance of a citation more than six months after a violation occurs. However, it cites no authority for this proposition. Commission precedent is to the contrary. *E.g., CMH Co.*, 9 BNA OSHC 1048, 1051-52, 1980 CCH OSHD ¶ 24,967, p. 30,824 (No. 78-5954, 1980) (rejecting employer's argument that section 9(c) presents absolute jurisdictional bar to amendment of citation after six-month period expires, and holding that section 9(c) is statute of limitations). As the Secretary notes, in the Congressional conference report that accompanied the final version of the Act, the managers on the part of the House referred to section 9(c) as a ``statute of limitations." H.R. Conf. 1765, 91st Cong. 2d Sess. 1, 38, *reprinted in* 1970 U.S. Code Cong. and Admin. News 5228, 5234. Quonset Point has not cited any indication of a contrary interpretation of section 9(c) in the legislative history. Hence, we affirm the Commission's precedent that section 9(c) is a statute of limitations.

than six months after the unsafe condition's creation. For example, in a case of poor housekeeping, covered by a standard under 29 C.F.R. Part 1910, the Commission rejected the employer's argument that a violation ''occurs" at the time--and only at the time--that the unsafe conditions first come into existence. *Central of Georgia R.R.*, 5 BNA OSHC 1209, 1211, 1977-78 CCH OSHD ¶ 21,688, at p. 26,035 (No. 11742, 1977). The employer had argued that, inasmuch as the ``conditions forming the basis of the citation . . . were admittedly in existence for *more* than six months prior to the issuance of the citation, the citation is unenforceable." The Commission replied:

> For section 9(c) purposes, a violation of section 5(a)(2) of the Act ``occurs" whenever an applicable occupational safety and health standard is not complied with and an employee has access to the resulting zone of danger. Therefore, it is of no moment that a violation *first* occurred more than six months before the issuance of a citation, so long as the instances of noncompliance and employee access providing the basis for the contested citation[] occurred within six months of the citation's issuance.

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 and promulgated pursuant to section 8 of the Act, 29 U.S.C. § 657, does not differ in substance from any other failure to comply with a safety or health standard in 29 C.F.R. Part 1910 and promulgated pursuant to the Act. Therefore, an inaccurate entry on an OSHA form 200 violates the Act until it is corrected, just as a condition that does not comply with a standard issued under the Act violates the Act until it is abated. We conclude that the obligation to correct any error or omission in an employer's OSHA-required injury records runs until the error or omission is either corrected by the employer, or discovered or reasonably should have been discovered by the Secretary.[11]

---

[11]The Commission has already considered these issues in a recordkeeping context. The most recent case concerned a reporting requirement set forth in an entirely different body of standards, 29 C.F.R. Subpart O, governing machine guarding and requiring that employers report to OSHA any injuries caused by mechanical power presses. *Kaspar Wire Works, Inc.*, 13 BNA OSHC 1261, 1262, 1986-87 CCH OSHD ¶ 27,882, pp. 36,554-55 (No. 85-1060, 1982). The two earlier cases concerned reporting issues arising out of the recordkeeping regulations involved in the case now before us, *i.e.*, those pertaining to ``Reporting and Recording Occupational Injuries and Illnesses" in general. *Sun Ship, Inc.*, 12 BNA OSHC 1185, 1984-85 CCH OSHD ¶ 27,175 (No. 80-3192, 1985); *Yelvington Welding Serv.*, 6 BNA OSHC 2013, 2014, 1978 CCH OSHD ¶ 23,092, p. 27,906 (No. 15958, 1978). *Yelvington*, like *Kaspar*, involved a failure to present a report of a fatality as required by 29 C.F.R. § 1904.8. *Sun Ship* involved failures to disclose employee names and to produce the OSHA form 200 logs and summaries requested by a union pursuant to 29 C.F.R. § 1904.7. The evidence in *Sun Ship* revealed that the Secretary had not issued his citation within the six-month period after discovering the failures to disclose, which was why the Commission held the citation untimely in that case.

In the case now before us, the inspection took place beginning on January 29, 1987, but it was not until February 3, 1987 that the CO first compared Quonset Point's 1985 OSHA 200 log to the company's workers' compensation file and was able to detect mistakes or omissions on the log. All of the violations found by the CO first occurred during the time period beginning in January, 1985 and extending through December, 1986. The evidence shows that prior to the inspection in this case, OSHA last inspected Quonset Point's plant in 1983 and 1984, before any of the alleged violations in this case occurred. Thus, we agree with the Secretary that, prior to February 3, 1987, when he first actually discovered the violations, he had no prior opportunity to reasonably discover the violations after they first arose. Part 1904 creates an obligation to keep a log entry for each occupational injury or illness each day for a five-year period. On the day of inspection, Quonset Point had not corrected the incomplete entries beginning January, 1985 through December, 1986, all of which were well within the five-year retention period of section 1904.6. Accordingly, the CO duly discovered Quonset Point's noncompliance with an existing recordkeeping regulation, and OSHA duly issued the citations within six months of that discovery.[12] The citations were, therefore, timely under section 9(c) of the Act because the Secretary issued them within six months of when he knew or reasonably should have known of the violations.[13]

Furthermore, Quonset Point has not established that the Secretary reasonably should have been expected to inspect and discover a violation regarding Quonset Point's 1985 and 1986 OSHA 200 logs before his inspection began on January 29, 1987. It notes that it filed regular reports on OSHA Form No. 200-S to the Bureau of Labor Statistics (''BLS"), including a report for 1985. The information on that form is identical to the information on the summary page of Quonset Point's

---

[12]We assume that the Secretary would not use his resources to inspect the same records repeatedly for different violations. Multiple citations of essentially the same conditions, even in different plants, have resulted in vacation of those citations on grounds of harassment. *E.g., Continental Can Co., U.S.A. v. Marshall*, 603 F.2d 590, 596 (7th Cir. 1979) (''[w]e agree with the district court that requiring [the employer] to relitigate the issue 'over and over in an untold number of hearings involving single plant (or small, consolidated group) citations is harassment of a capricious kind.'") *Cf., e.g., R. R. Donnelley & Sons Co. v. FTC*, 931 F.2d 430, 433 (7th Cir. 1991) (where defendant faces only one administrative case, *Continental Can* harassment principle does not apply). A second citation regarding the same records also could be questioned on grounds of res judicata or collateral estoppel. *Id.*, 603 F.2d at 593-96.

[13]We emphasize that this Commission strongly favors and supports effective safety programs. The purpose underlying the requirement that an employer must have accurate records is the quick and efficient identification and correction of potential hazards. However, employers must also have sufficient notice and clear guidelines as to what is expected of them which we believe this ruling provides.

OSHA 200 for the same year. However, that summary does not contain sufficient facts to show, by itself, that a violation had occurred. Thus, further investigation would have been needed. Furthermore, Quonset Point does not proffer any evidence that OSHA had reasonably available resources that it failed to use to further investigate sufficiently to cite the alleged violations before January 29, 1987. For these reasons alone, Quonset Point's argument based on 1985 and 1986 OSHA 200-S's is insufficient. Thus, we need not address other arguments by the Secretary on this issue.

The record indicates that OSHA inspected Quonset Point 15 days after receiving the 1987 complaint from the union about Quonset Point's recordkeeping. No unreasonable delay was shown in responding to that complaint. As the judge noted, there is evidence that certain unions had lodged general complaints with OSHA, prior to January, 1987, regarding alleged widespread underreporting of injuries and illnesses in certain industries, ''maybe even shipbuilding." Those complaints had been received for ''several years before '86 . . . ." However, no union complaints specific to Quonset Point or even General Dynamics were alleged. Based on this record, those general union complaints do not show that the Secretary was required in the exercise of reasonable diligence to inspect Quonset Point's 1985 and 1986 OSHA 200 records during those years.

As the judge noted, OSHA inspector Ralph Gumpert, who conducted the 1987 inspection, testified that another inspector suspected in 1983 that Quonset Point's OSHA 200 logs for 1981 and 1982 may have underreported eye injuries. However, again there was no evidence that OSHA failed to use reasonably available resources in 1985 or 1986 to inspect Quonset Point's eye injury records, or others. Thus, there is no basis for concluding that OSHA ''reasonably should have discovered a violation'' in Quonset Point's 1985 or 1986 records before its 1987 inspection began.

The judge relied on certain other judge's decisions which vacated citations on the ground that the Secretary had failed to exercise reasonable diligence to investigate and cite the violations earlier than he did. *John Morrell & Co.*, 90 OSAHRC 21/A3 (No. 87-635, 1988) (''*Morrell I*'');*Kaspar Wire Works Inc.*, 88 OSAHRC 12/A3 (No. 85-1060, 1988) (ALJ). However, unlike here, in those cases OSHA had all the necessary facts in its possession to cite the alleged occurrences for more than six months before it issued citations. Here, OSHA did not have all the necessary facts to cite any of the alleged violations until after its 1987 inspection began.

At the Commission's request, the parties have briefed a number of decisions that discuss the six-month statute of limitations for unfair labor practices (''ULP's"). The language of that limitations provision, found in section 10(b) of the National Labor Relations Act (''NLRA"), 29 U.S.C. § 160(b),[14] is directly analogous to section 9(c) of the Act. As Quonset Point notes, ULP charges must be based on a specific action or event. *See, e.g., Local Lodge No. 1424, IAM v. NLRB (Bryan Mfg. Co.)*, 362 U.S. 411, 416-17 (1960) (majority opinion); *Id* at 431 (Frankfurter, J., dissenting) (ULP charge is properly barred where it is based on ``mere inert continuity of consequences through antecedent action"). However, if a new, independent ULP occurs, it may be citable for six months even though previous ULP's that are part of the same pattern were not charged. *See, e.g., NLRB v. Preston H. Haskell Co.*, 616 F.2d 136, 140-41 & n. 13 (5th Cir. 1980) (courts are divided on whether ULP charge is timely when filed within six months of repeated refusal to bargain over particular subject, but more than six months after first such refusal); *NLRB v. Field & Sons, Inc.*, 462 F.2d 748, 750-51 (1st Cir. 1972) (``[w]e distinguish a failure to bargain, or breach of a general duty imposed by the [NLRA], as to which[,] each refusal . . . may be a new unfair labor practice, [from] a failure to perform a particular act, such as to . . . execute a particular agreement").

The ULP decisions are not inconsistent with our interpretation of the regulations cited here. Under the Act, a violation of a safety or health requirement may be cited ``so long as the instances of noncompliance and employee access providing the basis for the contested citation, occurred within six months of the citation's issuance." *Central of Georgia*. That is the case here.

Quonset Point further relies on cases under numerous other Federal statutes that require the plaintiff to show an overt act violating the statute within the limitations period. However, the statutes at issue in those cases, unlike the Act, require proof of an ``overt act" to show *any* violation. *E.g., Zenith Radio Corp. v. Haseltine Research Inc.*, 401 U.S. 321, 338 (1971) (where plaintiff charges conspiracy to violate antitrust laws, cause of action accrues only at time of injurious act committed pursuant to conspiracy, and plaintiff must sue within limitations period after that act to

---

[14]That provision states in pertinent part:

> [N]o complaint shall be issued based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such a charge is made . . .

recover from it); *Fitzgerald v. Seamans*, 553 F.2d 220 (D.C. Cir. 1977) (''the mere failure to right a wrong [cannot toll] the statute of limitations, for that is the purpose of any lawsuit and the exception would obliterate the rule"); *Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1981) (company'srefusal to reinstate plaintiff upon request was not new and separate act of discrimination under 42 U.S.C. § 2000e and did not render previous, allegedly discriminatory dismissal actionable). By contrast, as discussed above, the Act penalizes the occurrence of noncomplying conditions which are accessible to employees and of which the employer knew or reasonably could have known. That is the only ``act" that the Secretary must show to prove a violation.

Quonset Point argues that the citations issued to it should be vacated because they do not allege violations that actually occurred during the six month period prior to the issuance of the citations. Rather, Quonset Point argues, the citations allege separate and discrete instances of inaccurate or missing entries, all of which last occurred in 1985 and 1986.

The language of the citations was not a model of clarity. However, we find that the citations, as clarified by the Complainant, show that the Secretary was charging Quonset Point with violations that were unabated within six months before the citations were issued. For example, the Complaint stated that the basis for the alleged willful violations of section 1904.2(a) was that ``*[b]eginning* at the expiration of the sixth workday after being aware of [specified occupational injuries and/or illnesses], *Respondent failed to maintain accurate records* . . ." (Emphasis added.) Further, the Complaint stated that the basis for the alleged willful violations of section 1904.4 was that ``*[b]eginning* at the expiration of the sixth workday after receiving information that a recordable case had occurred[,] Respondent violated 29 C.F.R. 1904.4." (Emphasis added.) The italicized words show that the Secretary was alleging violations that existed at the time of the inspection.

As to the alleged nonserious violations, the Complaint stated that ``[o]n or about January 29, 1987, at the aforesaid workplace, the Respondent violated [section] 1904.2(a)." That allegation, along with the other statements in the Complaint, quoted above, show that all the violations were being alleged as a failure to have accurate records on the date of the Secretary's discovery of the facts.[15]

---

[15]On review, the Secretary argues that the citations are timely for the additional reason that the violations ''were the (continued...)

The judge found that all the violations last ''occurred" more than six months before the citations were issued. However, he did not discuss the language of the citations of the Complaint. His ruling essentially was based on his interpretation of the cited regulations in light of the case law, with which we disagree for the reasons discussed above. His ruling was not based on the Secretary's specific allegations in this case. We find that the Complaint shows that the Secretary was alleging violations that occurred within six months before the citations were issued.[16]

Quonset Point notes a few statements by the Secretary's counsel during the course of the litigation to the effect that the alleged violations were for failure to ''record," or accurately ''record," the injuries and illnesses involved. However, it does not claim that it was so misled by the Secretary's counsel that it lacked fair notice that it was charged with violations that occurred within six months before the citations were issued. Nor does the record before us provide support for such a claim. The statements quoted above from the Complaint put Quonset Point on fair notice that the violations were alleged to exist within six months before the citations were issued. The judge understood such statements to be the Secretary's position, and he has reiterated that position on review.

For the reasons discussed above, we find that the alleged violations occurred and were discovered by the Secretary within six months before the citations were issued. Furthermore, we find that the Secretary had no previous opportunity to know about the alleged violations and

---

[15](...continued)
result of an unlawful policy of failing to treat restricted work activity as a lost work day." However, he has not drawn our attention to any citation item that alleges such an unlawful overall policy. Rather, he has cited numerous specific entries as separate violations with separate penalties. Thus, we are aware of no basis for the Secretary to rely on such an alleged overall policy here.

[16]A statute of limitations such as section 9(c) serves important purposes: ''to insure repose by giving stability to human affairs and to spare a person the burden of preparing a defense after the evidence has been lost, memories have faded, or witnesses have departed or died." *Yelvington*, 6 BNA OSHC at 2016, 1978 CCH OSHD at p. 27,907. However, those concerns do not arise where, as here , the alleged violations existed within six months before the citations were issued. The Secretary must prove that all elements of the alleged violation ''occurred" during that period, regardless whether they also ''occurred" earlier. In particular, the Secretary must show that the employer knew, or with the exercise of reasonable diligence could have known, of the errors and omissions during the limitations period.

therefore could not have reasonably discovered them prior to his actual discovery in this case.[17] From this finding, we conclude that the citations were timely issued.[18]

E. Other issues

Quonset Point argues that the Commission should exclude from evidence ''all of the records obtained pursuant to the MAO [Medical Access Order]," as a sanction for alleged violations by OSHA of its own regulations governing handling of employee medical records, 29 C.F.R. § 1913.10. Quonset Point also argues that the judge erred in admitting into evidence reports required to be kept by employers of employee injuries and illnesses under 33 U.S.C. § 930(a), (b).

We decline to consider those evidentiary issues, and other issues relating to the merits of the citations, at this time. The Commission has discretion either to remand the case to a judge for a ruling on those issues, or to decide them itself. *E.g., Accu-Namics, Inc. v. OSHRC*, 515 F.2d 828, 834 (5th Cir. 1975), *cert. denied*, 425 U.S. 903 (1976). Ordinarily, a Commission judge resolves factual issues first, and the Commission then exercises its review function. *E.g., Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1228 n.15, 1991 CCH OSHD ¶ 29,442, p. 39,685 n.15 (No. 88-821, 1991). We believe that is the best course here. The hearing covered 22 days. The transcript is 3,876 pages. The evidentiary and other issues relating to the merits of the citations are voluminous. The issues that we have resolved on review are only a small portion of the issues that the parties presented to the judge.

III. ORDER

For the reasons stated above, we reverse the judge's decision. We remand this case to the Chief Administrative Law Judge for reassignment, because the judge who rendered the decision has

---

[17]Quonset Point argues that ''the Secretary presented no proof that any of the alleged recordkeeping violations had *any* impact whatsoever on the safety and health of the Company's employees, either before *or* after the discovery of those alleged violations by the Secretary." (Emphasis in original). However, the Secretary need not prove harm to any particular employee resulting from a violative record, to establish a violation. Although Quonset Point notes that the cited regulations are not safety or health standards, they clearly are safety- and health-related. *E.g., General Motors Corp., Inland Div.*, 8 BNA OSHC 2036, 2040-41, 1980 CCH OSHD ¶ 24,743, p. 30,470 (No. 76-5033, 1980) (the Act's recordkeeping requirements ``play a crucial role in providing the information necessary to make workplaces safer and healthier").

[18]The parties also addressed the question of which party has the burden of persuasion that section 9(c) has been complied with or not. It is unnecessary to decide that complex question here, because even if the Secretary bears the ultimate burden of persuasion, he has established that the alleged violations were timely cited.

retired and is unavailable. The judge to whom the case is reassigned shall conduct further proceedings consistent with this decision, including findings of fact and conclusions of law on the merits of the citations.

/s/
Edwin G. Foulke, Jr.
Chairman

/s/
Donald G. Wiseman
Commissioner

Dated: February 3, 1993

MONTOYA, Commissioner, concurring:

Though I agree with the result reached by the majority, I am not convinced that the Commission could properly vacate a recordkeeping citation pursuant to section 9(c) of the OSH Act merely because it believes that the Secretary ''reasonably should have discovered" the violation during a prior inspection. It has long been established that OSHA is not precluded from issuing a citation simply because it failed to do so following a prior inspection. ''OSHA's failure to issue a citation following an inspection does not grant an employer immunity from enforcement of applicable occupational safety and health standards." *Columbian Art Works, Inc.*, 10 BNA OSHC 1132, 1133, 1981 CCH OSHD ¶ 27,456, p. 32,102 (No. 78-29, 1981). ``Certainly, an employer is required to comply with a standard regardless of whether it has previously been informed that a violation exists." *Simplex Time Recorder Co.*, 12 BNA OSHC 1591, 1596, 1984-85 CCH OSHD ¶ 27,456, p. 35,572 (No. 82-12, 1985). *See also Donovan v. Daniel Marr & Son*, 763 F.2d 477, 484 (1st Cir. 1985); *Cedar Construction Co. v. OSHRC*, 587 F.2d 1303, 1306 (D.C. Cir. 1978); *Seibel Modern Manufacturing & Welding Corp.*, 15 BNA OSHC 1218, 1223-24, 1991-92 CCH OSHD ¶ 29,442 p. 39,681 (88-821, 1991); *and Lukens Steel Co.*, 10 BNA OSHC 1115, 1126, 1981 CCH OSHD ¶ 25,742, p. 32,122 (No. 76-1053, 1981).

While it is true that none of the above cited cases involved allegations of recordkeeping violations, it is also true that the OSH Act provides only one scheme for enforcement. I share the majority's concern that OSHA not engage in excessive enforcement of its recordkeeping regulations. However, I question the majority's basis for establishing a stricter standard of review for the timeliness of OSHA's citation of recordkeeping violations than the Commission applies to other types of violations.

/s/
Velma Montoya
Commissioner