ORAL ARGUMENT NOT YET SCHEDULED.

No. 11-1106

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AKM LLC d/b/a VOLKS CONSTRUCTORS,

PETITIONER,

v.

SECRETARY OF LABOR, DEPARTMENT OF LABOR AND OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION,

RESPONDENTS.

ON PETITION FOR REVIEW OF A FINAL ORDER OF
THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

BRIEF FOR THE SECRETARY OF LABOR

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SEPTEMBER 28, 2011

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. *Parties*

The parties before the Occupational Safety and Health Review Commission were the Secretary of Labor (Complainant) and AKM LLC d/b/a Volks Constructors (Respondent).

The parties in this case are AKM LLC d/b/a Volks Constructors (Petitioner) and the Secretary of Labor and the Occupational Safety and Health Review Commission (Respondents). The Commission, an independent tribunal, is a party in name only and, like a district court, has no stake in the outcome of this case.

The *amicus curiae* is the National Federation of Independent Business Legal Foundation.

B. *Rulings*

The ruling under review is a Commission final order, issued March 11, 2011, in *AKM LLC d/b/a Volks Constructors*, 23 BNA OSHC 1414 (No. 06-1990, 2011). (Joint Appendix (JA) 31.)

C. *Related Cases*

This case has not previously been before this Court or any other court. I am not aware of any related cases pending before this Court or any other court.

/s/ *Robert W. Aldrich*
Attorney for the Secretary of Labor

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TABLE OF AUTHORITIES

CASES:

**Authorities upon which we chiefly rely are marked with asterisks.*

STATUTES:

REGULATIONS:

MISCELLANEOUS:

Federal Register,

GLOSSARY

ALJ	Administrative Law Judge
Annual Summary	OSHA Form 300A – Summary of Work-Related Injuries and Illnesses
BLS	Bureau of Labor Statistics
Commission	Occupational Safety and Health Review Commission
Incident Report	OSHA Form 301 – Injury and Illness Incident Report
JA	Joint Appendix
OSHA	Occupational Safety and Health Administration
OSH Act	Occupational Safety and Health Act
OSHA log (or "the log")	OSHA Form 300 – Log of Work-Related Injuries and Illnesses
Part 1904	OSHA's injury and illness recordkeeping regulation at 29 C.F.R. § 1904
Secretary	Secretary of Labor
Volks	AKM LLC d/b/a Volks Constructors

JURISDICTIONAL STATEMENT

Petitioner AKM LLC d/b/a Volks Constructors (Volks) petitions for review of a final order of the Occupational Safety and Health Review Commission (Commission). The final order arose out of an Occupational Safety and Health Administration (OSHA) inspection and citation of Volks' facility in Prairieville, Louisiana.[1] Volks contested the citation, and the matter was assigned to a Commission administrative law judge (ALJ). The ALJ affirmed the citation (which contained five instances of violation), and Volks appealed the decision to the three-member Commission. The Commission issued its decision on March 11, 2011, affirming four of the five items in the citation. (Joint Appendix (JA) 31-62.) The Commission's decision became a final order by operation of law thirty days after its issuance. 29 U.S.C. § 659(c). On April 12, 2011, Volks filed the instant petition for review of the Commission's final order.

The Commission had jurisdiction under section 10(c) of the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. § 659(c). The Court has jurisdiction over Volks' petition for review because it was timely filed within sixty days of the date of the Commission's final order. *Id.* § 660(a).

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[1] The Secretary of Labor (Secretary) has delegated her responsibilities under the OSH Act to the Assistant Secretary for Occupational Safety and Health, who heads OSHA. The terms "Secretary" and "OSHA" are used interchangeably in this brief.

STATEMENT OF THE ISSUES

Whether the six-month statute of limitations set forth in section 9(c) of the OSH Act barred OSHA from citing Volks for its failure to (1) record work-related injuries and illnesses on the OSHA 300 log and OSHA 301 incident report forms and (2) review its OSHA 300 log for accuracy and have a company executive certify its annual summary for calendar years 2002 though 2005, where these failures constituted continuing violations throughout the five-year record retention period mandated by the regulations, and where, as of the date of OSHA's inspection, the retention period had not elapsed and Volks had not corrected the failures.

STATUTES AND REGULATIONS

Except for the following (which are set forth in the addendum to this brief), all applicable statutes and regulations are set forth in the addendum to Volks' brief:

29 C.F.R. § 1904.0

29 C.F.R. §1904.4

29 C.F.R. §1904.4(a)

STATEMENT OF THE CASE

On November 8, 2006, OSHA issued a citation to Volks stemming from OSHA's inspection of Volks' facility in Prairieville, Louisiana. (JA 9-24.) The inspection took place from May 10, 2006, through November 8, 2006. (JA 63.)

Relevant to the instant petition for review, the citation alleged five other-than-serious violations of OSHA injury and illness recordkeeping regulations at 29 C.F.R. §§ 1904.29(b)(2),(3), .32(a)(1), .32(b)(3), and .32(b)(6), and proposed a civil penalty of $14,300.[2] (JA 9-24.) Volks contested the citation to the Commission, claiming that the five citation items were time-barred by the six-month statute of limitations found in section 9(c) of the OSH Act, 29 § U.S.C. 658(c).

The parties submitted the matter for decision by a Commission ALJ without a hearing under Commission Rule 61, 29 C.F.R. § 2200.61. (JA 25.) The ALJ affirmed all five citation items on June 25, 2007. (JA 63.) Volks appealed that decision to the three-member Commission, which issued its decision on March 11, 2007, affirming four of the five citation items and assessing a penalty of $13,300. (JA 31 - 62.) On April 12, 2011, Volks filed the instant petition for review with this Court seeking review of the Commission's decision affirming the violations of 29 C.F.R. §§ 1904.29(b)(2), (b)(3), .32(a)(1), and .32(b)(3).

[2] Following the inspection, OSHA issued Volks a sixteen-item serious citation and a seventeen-item other-than-serious citation. (JA 63.) On April 18, 2007, the parties entered into a settlement agreement resolving all but five of the other-than-serious recordkeeping citation items. (JA 64.)

STATEMENT OF FACTS

A. *Statutory and Regulatory Framework*

1. *The OSH Act*

The goal of the OSH Act is "to assure so far as possible" safe working conditions for "every working man and woman in the Nation." 29 U.S.C. § 651(b). To achieve this goal, the OSH Act separates rule-making and enforcement powers from adjudicative powers, and assigns these respective functions to two different, independent administrative actors: the Secretary and the Commission. *Martin v. OSHRC ("CF&I ")*, 499 U.S. 144, 147, 151 (1991). OSHA (through authority delegated by the Secretary) is charged with promulgating and enforcing workplace health and safety standards and regulations, while the Commission is responsible for carrying out adjudicatory functions under the OSH Act. *Id.* at 147. OSHA enforces standards and regulations by inspecting workplaces and, where it discovers violations, issuing citations. 29 U.S.C. §§ 657-58. The Commission is an independent agency that is a "neutral arbiter" for adjudicating disputes between employers and the Secretary that arise from citations. *Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 7 (1985) (per curiam); *see also CF&I*, 499 U.S. at 147-48, 154-55.

Citations describe the nature of the violation, require abatement of the violation, and, where appropriate, propose a civil penalty. 29 U.S.C. §§ 658,

659(a). Under section 9(c) of the OSH Act, "[n]o citation may be issued under this section after the expiration of six months following the occurrence of any violation." *Id.* § 658(c). An employer may contest a citation by filing a written notice of contest with the Secretary within fifteen working days of receiving the citation. *Id.* § 659(a). If an employer contests the citation, a Commission ALJ provides an opportunity for a hearing and then issues a decision on the contested citation. *Id.* §§ 659(c), 661(j). The Commission may review and modify the ALJ's decision. *Id.* §§ 659(c), 661(j). Either the Secretary or any aggrieved party may seek judicial review of a Commission final order "in any United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office, or in the Court of Appeals for the District of Columbia Circuit[.]" *Id.* § 660(a)-(b).

2. *OSHA's Injury and Illness Recordkeeping System*

Section 8 of the OSH Act authorizes the Secretary to issue regulations to carry out her statutory functions, including regulations requiring employers to record and report work-related deaths and non-minor injuries and illnesses. 29 U.S.C. § 657(c). Under section (8)(c)(1), "[e]ach employer shall make, keep and preserve, and make available to the Secretary . . . such records regarding his activities relating to this Act as the Secretary . . . may prescribe as necessary or appropriate for the enforcement of this Act or for developing information regarding

the causes and prevention of occupational accidents and illnesses." *Id.* § 657(c)(1). Section 8(c)(2) of the OSH Act further provides that the Secretary "shall prescribe regulations requiring employers to maintain accurate records of, and to make periodic reports on, work-related deaths, injuries and illnesses other than minor injuries[.]" *Id.* § 657(c)(2).

Importantly, "[t]he legislative history of section 8 clearly indicates Congress's recognition that a comprehensive system of recording and reporting occupational injuries and illnesses is essential to achieving the purposes of the OSH Act and ensuring employer compliance with its requirements." *Thermal Reduction Corp.*, 12 BNA OSHC 1264, 1266 (No. 81-2135, 1985). Indeed, the Senate committed expressly stated that "[f]ull and accurate information is a fundamental precondition for meaningful administration of an occupational safety and health program." *Id.* (citing S. Rep. No. 1282, 91st Cong. 2nd Sess. 2 (1970), reprinted in Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, *Legislative History of the Occupational Safety and Health Act of 1970* (Comm. Print 1971) at 156).

The Secretary complied with section 8's mandate by promulgating the regulations set forth at 29 C.F.R. Part 1904, *Recording and Reporting Occupational Injuries and Illnesses*. First issued in 1971, these regulations require employers to record information about the injuries and illnesses that take place in

their workplaces. An employer must record work-related injuries and illnesses that meet one or more of certain recording criteria set forth in the regulations, including injuries and illnesses resulting in death, loss of consciousness, days away from work, restricted work activity or job transfer, medical treatment beyond first aid, or diagnosis of a significant injury or illness by a physician or other licensed health care professional. *See generally* 29 C.F.R. Part 1904.

OSHA's recordkeeping regulations reference three recordkeeping forms, the OSHA 300, 300-A, and 301 forms. 29 C.F.R. § 1904.29(a). Employers must record each recordable employee injury or illness on an OSHA 300 form, which is a "Log of Work-Related Injuries and Illnesses." *Id.*§ 1904.29(a)-(b)(1). Employers must also prepare a supplementary "OSHA 301 Incident Report or equivalent form" that provides additional details about each injury or illness recorded in the OSHA 300 log. *Id.* § 1904.29(b)(2). And, at the end of each calendar year, employers are required to prepare a summary report of all injuries or illnesses on the OSHA 300-A form, which is the "Summary of Work-Related Injuries and Illnesses." *Id.*§ 1904.29(a)-(b)(1).

OSHA's recordkeeping regulations impose mandatory duties on employers such as Volks. In pertinent part, "[e]ach employer . . . *must* record *each* fatality, injury and illness that [meets recording criteria and]: (1) is work related; and (2) is a new case." *Id.* § 1904.4(a) (emphasis added). Employers are required to record

such fatalities, injuries, or illnesses on OSHA 301 incident report forms and on an OSHA 300 log "within seven (7) calendar days of receiving information that a recordable injury or illness has occurred." *Id.* § 1904.29(b)(3). Additionally, at the end of each calendar year, employers are required to check the OSHA 300 log for accuracy and correct any mistakes, prepare an annual summary (on an OSHA 300-A summary form or equivalent) of injuries and illnesses recorded on the OSHA 300 log, and have a company executive certify the accuracy of the annual summary. *Id.* § 1904.32. Employers are required to retain copies of the OSHA 300 log, OSHA 301 incident report forms, and the annual summary, for a period of five years. *Id.* § 1904.33.

Accurate injury and illness records serve several important purposes. One purpose is to provide information to employers whose employees are being injured or made ill in the workplace. They also assist employers in the identification of hazards, and encourage the voluntary correction of hazardous workplace conditions. Similarly, employees who are accurately informed about injuries and illnesses are more alert to hazards they face in the work environment, more likely to report them, and more inclined to use prescribed safety equipment and to follow safe work practices.[3] *See* 66 Fed. Reg. 5917 ("When employees are aware of

[3] Under 29 C.F.R. § 1904.35, employees, former employees, and employee representatives may access OSHA injury and illness records.

workplace hazards and participate in the identification and control of those hazards, the overall level of safety and health in the workplace improves.").

Accurate records also enhance OSHA's enforcement efforts. Before beginning an inspection of a worksite, OSHA reviews the employer's injury and illness data and then focuses its inspection on the hazards revealed by the records. Employers' records also yield statistical data on the incidence of workplace injuries and illnesses, thereby affording a more complete measure of the nature and magnitude of the occupational safety and health problem across the country. In short, the injury and illness recordkeeping regulations contained in 29 C.F.R. Part 1904 "are a cornerstone of the Act and play a crucial role in providing the information necessary to make workplaces safer and healthier." *General Motors Corp.*, 8 BNA OSHC 2036, 2041 (No. 76-5033, 1980).

B. *OSHA's Inspection of Volks' Facility and Issuance of the Citation*

OSHA inspected Volks' facility in Prairieville, Louisiana from May 10, 2006, to November 8, 2006. (JA 63.) Following the inspection, on November 8, 2006, the Secretary cited Volks for, among other things, *see supra* p. 3 n.2, the four OSHA recordkeeping violations at issue in this appeal:

(1) A violation of 29 C.F.R. § 1904.29(b)(2) for sixty-seven instances where Volks failed to complete "[t]he OSHA Form 301 (or equivalent) for each recordable injury and illness entered on the OSHA Form 300" (JA 9-14);

(2) A violation of 29 C.F.R. § 1904.29(b)(3) for 102 instances where Volks failed to enter "[e]ach recordable injury or illness . . . on the OSHA 300 Log and/or an incident report (OSHA Form 301 or equivalent) within seven (7) calendar days of receiving information that a recordable injury or illness has occurred" (JA 15-22);

(3) A violation of 29 C.F.R. § 1904.32(a)(1) for Volk's failure during the years 2002 to 2005, "[a]t the end of each calendar year . . . [to] review the OSHA 300 Log to verify that the entries were complete and accurate, and correct any deficiencies identified" (JA 23); and

(4) A violation of 29 C.F.R. § 1904.32(b)(3) for Volks' failure to have "[a] company executive . . . certify that he or she examined the OSHA 300 Log and that the annual summary is correct and complete" when Volks allowed, during the years 2002 to 2005, "the Human Resources/Safety Manager to certify that the OSHA 300 Log had been examined and that the annual summary was correct and complete." (JA 24.)

C. *Volks Contests the Citation on Timeliness Grounds But Stipulates to the ALJ that it Committed the Cited Recordkeeping Violations.*

Volks contested the citation and the matter was referred to a Commission ALJ. (JA 63.) Volks then filed a motion to dismiss with the ALJ claiming that the recordkeeping violations were barred by the statute of limitations contained in section 9(c) of the OSH Act. (JA 64). Thereafter Volks and the Secretary submitted the matter for a decision by the ALJ without a hearing under Commission Rule 61, 29 C.F.R. § 2200.61. (JA 25.) In support of their submissions, and as required by Commission Rule 61, the parties filed a joint stipulation of facts. (JA 25-27.) In the joint stipulation Volks admitted to the

factual basis for the four recordkeeping violations at issue in this appeal. (JA 25-27.) In pertinent part, Volks stipulated that:

> (1) "[T]he [four recordkeeping] violations occurred and that the proposed penalties are appropriate" (JA 25);
>
> (2) With respect to the violations of 29 C.F.R. § 1904.29(b)(2) and (b)(3), that the injuries or illnesses had not been recorded on the OSHA 301 incident report forms or the OSHA 300 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" (JA 26);
>
> (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" (JA 26);
>
> (4) "[T]he 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." (JA 26.)

Relevant to the instant appeal, Volks preserved its defense that the recordkeeping violations were "untimely under section 9(c) of the Act," and did "not admit that the violations occurred on or about the date of the inspection[.]" (JA 25.)

After considering the parties' submissions, the ALJ granted summary judgment to the Secretary and affirmed the cited recordkeeping violations. (JA 70.)

D. *The Commission's Decision Affirming the Four Recordkeeping Violations at Issue in this Appeal.*

Volks' appealed the ALJ's decision to the Commission, which, on March 11, 2011, issued its decision affirming the four recordkeeping violations at issue before the Court.[4] (JA 31-62.) The Commission firmly rejected Volks' argument that the recordkeeping violations were time-barred, noting that it "has long recognized that [the recordkeeping duties imposed by the regulations] must be considered when assessing whether a recordkeeping violation is of a continuing nature for purposes of the six-month limitations period in section 9(c) of the Act." (JA 33.)

Citing *Johnson Controls, Inc.*, 15 BNA OSHC 2132, 1991-93 (No. 89-2614, 1993), the Commission re-affirmed its longstanding precedent on the continuing nature of recordkeeping violations:

> [I]t 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.

[4] Two Commission members (constituting a quorum, 29 U.S.C. § 661(f)) joined in the decision. (JA 52.) Commissioner Thompson filed a dissenting opinion. (JA 53-63.)

> Just as a condition that does not comply with a standard issued under the Act violates the Act until it is abated, an inaccurate entry on an OSHA [log] violates the Act until it is corrected, or until the 5-year retention requirement of [the regulation] expires. Thus, a failure to record an occupational injury or illness as required by the Secretary's recordkeeping regulations . . . does not differ in substance from any other condition that must be abated pursuant to the occupational safety and health standards . . . .

(JA 33-35.) In so holding, the Commission rejected Volks' contention that *Johnson Controls* was no longer good law due to intervening precedent from the Supreme Court, as well as various courts of appeals. (JA 34-42.)

The Commission noted that in the first line of cases relied on by Volks, courts had determined that when only the continuing effects of a past violation fell within the limitations period, an action is untimely. (JA 35.) Thus, in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007), an employee's Title VII discrimination claim was time-barred because the employer's improper "pay-setting" evaluation of the employee triggered the relevant limitations period, and the subsequent salary payments resulting from that evaluation were not separate actionable violations. *Id.* at 629-31. Unlike the discrete act in *Ledbetter*, however, which led only to continuing effects, the Commission found that Volks' recordkeeping violations involved not only an initial failure to act (*e.g.*, the failure to record a specific injury or illness), but also subsequent violative conduct: the

failure to retain the record of the injury or illness throughout the mandated five-year retention period. (JA 35-36.)

The Commission also rejected Volks' argument that 29 C.F.R. § 1904.29(b)(3), which requires an employer to record an illness or injury within seven calendar days, precludes a finding that a recordkeeping violation continues beyond the seventh day. (JA 36.) Instead, the plain language of § 1904.29(b)(3) simply set a seven-day grace period by which the illness or injury must be recorded, and Volks' argument failed to account for its breach of the duty to retain the records for five years. (JA 37.)

Volks also premised its claim that the citation was time-barred on the Supreme Court's decision in a criminal matter, *Toussie v. United States*, 397 U.S. 112 (1970). *Toussie* involved the defendant's failure to register for the draft within a five-day limitations period; the Supreme Court held that in the criminal context, an offense could not be continuing "unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime . . . is such that Congress must . . . have intended that it be treated as a continuing one." *Id.* at 115. The Commission determined that *Toussie* did not apply because, unlike in criminal cases, "in civil cases prosecuted by the government, such as those arising under the OSH Act, statutes of limitations . . . [should be] strictly construed in favor of the government[.]" (JA 39, citing *Interamericas Investments, Ltd. v. Bd.*

of Governors of the Fed. Reserve Sys., 111 F.3d 376, 382 (5th Cir. 1997).) Moreover, the Commission found that even assuming the "explicit language" test in *Toussie* applied outside the criminal context (and the Commission noted that none of the cases cited by Volks so held), section 8(c) of the OSH Act prescribes that employers must "make, keep and preserve" records of workplace injuries and illnesses, and therefore provides the requisite explicit language. (JA 39.)

Volks' third line of argument involved the applicability of the "discovery rule," under which a statute of limitations begins to run when a violation is discovered or reasonably should have been discovered. (JA 39.) The Commission rejected this argument, finding that the Secretary was not attempting to revive a time-barred claim by relying on the date she discovered the violations. (JA 39-40.) Instead, the timeliness of the citation was "predicated solely on the continued existence of the violations throughout the five-year record retention period, which means that OSHA did, in fact issue the citation within six months of the occurrence of the recordkeeping violations. Accordingly, the discovery rule has no relevance to this inquiry." (JA 39-40.)

The Commission found Volks' remaining arguments meritless. (JA 40-43.) The case did not present staleness issues because Volks had stipulated that it did not properly document recordable injuries and illnesses, rendering any concerns about witnesses' memories moot. (JA 41.) And, the Commission concluded that

its determination that the four recordkeeping violations were continuing violations did not render other OSHA recordkeeping regulations addressing the updating and correcting of records superfluous. (JA 41-42.) Instead, the updating and correcting requirements supplemented the duty imposed by the cited regulations to record, summarize and post correct information. (JA 41-42.) Nor did the 2002 amendments to the recordkeeping regulations adding specific language requiring the correcting and updating of records establish new duties; they merely clarified obligations that were implicit in prior provisions. (JA 42-43.)

SUMMARY OF THE ARGUMENT

The Commission correctly found that Volks' citation for the four recordkeeping violations was not time-barred by the six-month limitations period in section 9(c) of the OSH Act. Volks' violations of 29 C.F.R. §§ 1904.29(b)(2) and (b)(3) constituted continuing violations beginning with Volks' initial failure to record employees' work-related injuries and illnesses on the OSHA 300 log and the OSHA 301 incident report form within seven days of learning of each injury or illness. The violations then continued throughout the five-year record retention period prescribed by the regulations, which period had not elapsed as of the date of OSHA's inspection. Likewise, Volks' violations of 29 C.F.R. §§ 1904.32(a)(1) and (b)(3), based on Volks' failure in 2002, 2003, 2004, and 2005 to review the OSHA 300 log at the end of each calendar year and to have a company executive

certify that its annual summary was correct and complete, constituted continuing violations for the entirety of the five-year record retention period. The November 8, 2006 citation was therefore issued well within section 9(c)'s six-month limitations period.

Volks' arguments to the contrary are meritless. Section 8(c) of the OSH Act expressly requires that "[e]ach employer . . . make, keep and preserve . . . such records . . . as the Secretary . . . may prescribe . . . for developing information about the causes and prevention of occupational accidents and illnesses." Section 8(c) further tasks the Secretary with "prescribe[ing] regulations requiring employers to maintain accurate records of . . . work-related deaths, injuries and illnesses . . . ." This is precisely what the Secretary has done. Under the recordkeeping regulations that Volks violated, an employer must "make, keep and preserve" and "maintain accurate records" of employee injuries and illnesses. Volks stipulated that it failed to do so. And, under 29 C.F.R. § 1904.33, an employer must keep the prescribed records for five years "following the end of the calendar year that the records cover." The Secretary's interpretation of the OSH Act and her regulations is therefore reasonable and entitled to deference, and the Court should find that Volks' noncompliance with the recordkeeping regulations constituted a continuing violation throughout the five-year record retention period.

ARGUMENT

A. *Standard of Review*

The Commission's legal conclusions may only be set aside if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Fabi Constr. Co. v. Sec'y of Labor*, 508 F.3d 1077, 1081, 1084 (D.C. Cir. 2007). The factual findings of the Commission, "if supported by substantial evidence on the record considered as a whole," shall be conclusive. 29 U.S.C. § 660(a); *Fabi Constr. Co.*, 508 F.3d at 1084.

On matters of statutory interpretation, the Court must first determine whether Congress has expressed its intent on the interpretive question. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). If "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* If Congress' intent is not express, the Court defers to the reasonable interpretation of the agency responsible for administering the statutory provision at issue. *See id.* at 843-44; *CF&I Steel Co.*, 499 U.S. at 150-57.

The Court therefore gives substantial deference to the Secretary's construction of the OSH Act and her regulations, "upholding such interpretations so long as they are consistent with the statutory language and otherwise reasonable." *A.E. Staley Mfg. Co. v. Sec'y of Labor*, 295 F.3d 1341, 1345 (D.C.

Cir. 2002); *see also CF&I Steel Co.*, 499 U.S. at 150-51 (Secretary's interpretation of her standards entitled to deference); *Nat'l Ass'n of Home Builders v. OSHA*, 602 F.3d 464, 468 (D.C. Cir. 2010) (Court defers to both the Secretary's interpretation of her regulations and of the OSH Act); *Am. Train Dispatchers Ass'n v. ICC*, 54 F.3d 842, 848 (D.C. Cir. 1995) (applying *CF&I Steel Co.* as the standard of review of an agency's interpretation of its order). And, "the Secretary's litigating position before the Commission is as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a workplace health and safety standard." *CF&I*, 499 U.S. at 157. Consequently, the Secretary's interpretation of the OSH Act and the recordkeeping regulations contained in 29 C.F.R. Part 1904 as set forth in this litigation (and as approved of and adopted by the Commission in its decision) is entitled to deference. *Cf. Secretary v. Twentymile Coal Co.*, 411 F.3d 256, 261 (D.C. Cir. 2005) (according deference to Secretary's litigation position in Mine Safety and Health Act litigation).

The Court should also defer to an agency's determination of whether a continuing violation theory is available under a statute it administers if the statute of limitations is likewise entrusted to the agency's interpretation. *Interamericas*, 111 F.3d at 382; *see also Capital Telephone v. FCC*, 777 F.2d 868, 871 (2d Cir. 1995) (deferring to FCC's interpretation of statute of limitations).

B. *The Court Should Affirm the Commission's Decision*

The Commission correctly found that Volks violated the four cited recordkeeping regulations. Volks stipulated that it had not complied with the regulations, and the Commission properly found that Volks' failure to record, review, and certify in the face of ongoing obligations constituted continuing violations throughout the prescribed five-year record retention period. The November 8, 2006 citation, which was issued before the five-year record retention period had elapsed, was therefore timely.

Volks' challenge to the Commission's decision primarily consists of four lines of attack. Volks first claims that its recordkeeping violations are not continuing violations because the underlying recordable injuries or illnesses (and related recording obligations) occurred outside of the six-months limitations period found in section 9(c) of the OSH Act, and "nothing happened during the limitations period." Volks. Br. 33. Volks alternatively argues that a continuing violation theory is inconsistent with the OSH Act and the Secretary's recordkeeping regulations, and the Secretary's interpretation is therefore unreasonable and not entitled to deference. Volks Br. 36-45. Volks then asserts that even if a continuing violation theory is consistent with the statute and regulations, under relevant case law the Secretary is prohibited from citing Volks for a continuing violation. Volks Br. 38, 46. Finally, according to Volks, the

Secretary's citation of continuing recordkeeping violations "subverts Congress's purpose in enacting a statute of limitations." Volks. Br. 53. As explained below, Volks is wrong on all counts.

1. *The Commission Correctly Found that the Citation Was Timely Because Volks' Continued Failure to Comply with Its Ongoing Recordkeeping Obligations Constituted Continuing Violations.*

The Commission correctly found that the November 8, 2006 citation was timely issued. Volks stipulated that it had failed to record recordable injuries and illnesses on its OSHA 300 log and on OSHA 301 incident report forms. (JA 25-26.). Volks likewise admitted that it did not review its OSHA 300 log at the end of the calendar year in 2002, 2003, 2004, and 2005, nor did it have a company executive certify its annual summary in those years. (JA 25-26.). These violations remained uncorrected as of the date of OSHA's inspection on May 10, 2006. (JA 25-26.) Because the five-year record retention period mandated by 29 C.F.R. § 1904.33(a) had not yet elapsed and consequently "the instances of noncompliance and employee access providing the basis for the contested citation[] occurred within six months of the citation's issuance," *Johnson Controls*, 15 BNA OSHC at 2135, the November 8, 2006 citation for Volks' continuing recordkeeping violations was not time-barred by section 9(c) of the OSH Act, 29 U.S.C. § 657(c).

Relying on the six-month limitations period contained in section 9(c), Volks claims that "the citation items were untimely issued." Volks Br. 30. Under section

9(c) of the OSH Act, "[n]o citation may be issued under this section after the expiration of six months following the occurrence of any violation." 29 U.S.C. § 658(c). According to Volks, the use of the word "occurrence" in section 9(c) means that a citation must be based on "a happening, an event or an incident," and "nothing happened" after the initial recordable injury or illness and initial failure to comply with recordkeeping requirements. Volks. Br. 33. Therefore, Volks argues, there was no "subsequent violative conduct" and no continuing recordkeeping violation. Volks Br. 33. Volks is wrong on both counts.

As an initial matter, Volks' narrow reading of the word "occurrence" is off base. "[U]nlike other federal statutes in which an overt act is needed to show any violation, the OSH Act penalizes both overt acts and failures to act in the face of an ongoing, affirmative duty to perform prescribed obligations." (JA 33); *Secretary v. Gen. Dynamics*, 15 BNA OSHC 2122, 2129-30 (No. 87-1195, 1993) ("[T]he 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.").

Moreover, courts have frequently found a continuing violation where there was a failure to act in the face of a continuing duty. For example, in *Wilderness Society v. Norton*, 434 F.3d 584, 588-89 (D.C. Cir. 2006), this Court held that a failure to act in the face of an ongoing obligation constituted a continuing

violation. In so holding, the Court rejected the Secretary of the Interior's contention that a mandamus action to compel issuance of final regulations was time-barred "because the [petitioner] does not complain about what the agency has done but rather about what the agency has yet to do." *Id.*

Likewise, in *Sierra Club v. Simpkins Indus. Inc.*, 847 F.2d 1109, 1114-15 (4th Cir. 1988), a case involving an employer's failure to create and maintain water sampling records under the Clean Water Act, the Fourth Circuit relied on a three-year records retention requirement to find a continuing violation. The Fourth Circuit rejected the employer's argument that because it failed to collect the underlying sampling data in the first place, it should not be liable for creating and retaining the associated records. *Id.* The Fourth Circuit further found that where the employer has a continuing obligation to retain records, allowing such a defense would effectively provide an employer with the opportunity to escape liability by failing at the outset to conduct sampling.[5] *Id.* at *115*.

Also, in *United States v. George*, 579 F.3d 962 (9th Cir. 2009), the defendant was convicted of the federal crime of sexual abuse of a minor and later failed to register as a sex offender in violation of the Sex Offender Registration Act. The defendant argued that the violation "occurred" when he failed to register as a sex

[5] The Commission likewise correctly found Volks' contention -- that it was not required to create OSHA 301 incident report forms for the injuries and illnesses that it omitted from its OSHA 300 log, Volks Br. 35 n.31 – to be specious. (JA 47-48.); *Sierra Club*, 847 F.2d at 114-15.

offender within three days after moving to a new state, that his failure to register was a one-time crime rather than a continuing offense, and that the violation (if there was one) was "complete" when he failed to register within the required three day time period. *Id.* The Ninth Circuit held that the defendant's arguments failed because he was under a continuing obligation to register, and that if a convicted sex offender does not register by the end of the third day after changing his residence, he is in violation of the statute, and the violation continues until he does register. *Id.* at 968.

Similarly, a willful failure to pay child support was deemed a continuing offense for statute of limitations purposes. *United States v. Edelkind*, 525 F.3d 388, 393 (5th Cir. 2008). And, the five-year limitations period for the crime of being found in the United States after deportation, a continuing offense, did not begin to run until the illegal conduct was terminated. *United States v. Are*, 498 F.3d 460, 464 (7th Cir. 2007).

Volks relies heavily on *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), and its treatment of the term "occurred" in Section 2000e-(5)(e)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.[6] According to Volks, the dictionary definition of "occurred" and the *Morgan* decision preclude a continuing

[6] Section 2000e-5(e)(1) requires that a plaintiff under Title VII must file a charge of employment discrimination with the Equal Employment Opportunity Commission (EEOC) within the specified time "after the alleged unlawful employment practice occurred."

violation under the OSH Act unless there is some additional "happening" or "event." Volks Br. 33-36. Volks also relies on *Ledbetter*, 550 U.S. at 618, where the Supreme Court held that claims are time-barred when only the continuing effects of a past violation fall within the limitations period. In *Ledbetter*, the Supreme Court concluded that the statute of limitations in Title VII was triggered by a "discrete violative act" – the employer's improper pay-setting evaluation – and that subsequent salary payments resulting from that evaluation were not separate discrete violations. 550 U.S. at 629-31.

The Title VII cases Volks relies on are distinguishable from cases arising under the OSH Act. As an initial matter, there is a fundamental difference between violations under Title VII and violations under the OSH Act. For example, in a Title VII case, such as *Morgan* or *Ledbetter*, plaintiffs must file a lawsuit within a specific period of time after a "discrete act." In other words, the discriminatory employment practice is something that takes place at a specific point in time (i.e., it "occurred" at a specific time). Additionally, as the Commission noted in its decision, the initial, discrete act (the violation) in Title VII cases is followed only by that act's effects. (JA 35.) In contrast, under the OSH Act, the initial violative act (e.g., failure to record an injury or illness within seven calendar days) is followed by further violative conduct – the failure to retain the required record throughout the prescribed five-year retention period.

The OSH Act is also distinguishable from Title VII because the Secretary does not act to right a wrong done to her personally. Unlike a Title VII plaintiff, the Secretary will not personally feel the effects of a recordkeeping violation, and therefore, absent an inspection (or possibly an employee's complaint) cannot know for certain when the violative conduct initially takes place. Title VII is also distinguishable from the OSH Act in that the former contains a prohibition *against* a specific action (an unlawful employment practice), and the employer commits a violation by taking such action. In contrast, under the OSH Act, there is a continuing requirement to *take* an action (e.g., make, keep and preserve records, 29 U.S.C. § 657(c)), and in the face of that requirement, the violation continues so long as the employer fails to act.

Volks also contends that a recordkeeping violation "rests entirely on a long-ago occurrence (such as the receipt of information of recordable injuries, or a signature by the wrong person)." Volks Br. 69. A recordkeeping violation, according to Volks, is therefore unlike an ordinary violation of an OSHA standard, such as the operation of unguarded machinery or work on slippery floors, which is "manifested by an occurrence that persists into the limitations period, thus daily generating fresh evidence of an 'occurrence of a violation.'" Volks Br. 49. Volks' argument misses the mark. Under the OSH Act, if a guard comes off a machine in violation of an OSHA requirement, that violation does not end if the guard is still

missing after six months. Instead, the violation continues for as long as the guard is off the machine. *See Johnson Controls*,, 15 BNA OSHC at 2135-36. Likewise, and contrary to Volks' assertion, the duty to record injuries and illnesses created by section 8(c) and the Part 1904 recordkeeping regulations also continues. In other words, the failure to comply with a recordkeeping regulation, like any other OSHA standard, violates the OSH Act until it is corrected or the five-year records retention period expires.

Turning to the timeliness of the citation items, in item one of the November 8, 2006 citation, the Secretary alleged that Volks violated 29 C.F.R. § 1904.29(b)(2) by failing to prepare an OSHA 301 incident report form for sixty-seven recordable injuries and illnesses that occurred between August 2002 and April 2006. Similarly, item two alleged that Volks violated 29 C.F.R. § 1904.29(b)(3) by failing to record on the OSHA 300 log 102 injuries and illnesses that occurred during the same approximate time frame. Volks' failure to record injuries and illnesses on the OSHA 300 and 301 forms during the 2002 to 2006 time period in the face of ongoing recording obligations continuously violated the cited regulations until the forms were completed or until the five-year record retention period mandated by 29 C.F.R. § 1904.33 expired. The five-year retention period had not yet elapsed as of May 10, 2006, the date OSHA initiated the inspection, and as stipulated by Volks, "[t]he injuries and illnesses had not been

recorded on either form by the date the OSHA inspection was initiated." (JA 26.) OSHA's citation for these two items was therefore timely.

Likewise, citation items three and four, for Volks' violations of 29 C.F.R. §§ 1904.32(a)(1) and (b)(3), were not time-barred. Like the other recordkeeping requirements contained in 29 C.F.R. Part 1904, §§ 1904.32(a)(1) and (b)(3) are designed to ensure the accuracy of the records that the employer must retain for a five-year period, *see* 66 Fed. Reg. at 6042-6048; *see also id.* at 6047 (annual summary "is also used as a data source by OSHA and BLS"). Section 1904.32(a)(1) requires employers to review the OSHA 300 log for completeness and accuracy and to correct any deficiencies "at the end of each calendar year." Like the seven-day grace period for entering each recordable case on the log, the "end of each calendar year" marks the beginning, not the end, of the obligation to review the log for accuracy.

Volks admittedly did not review the OSHA 300 logs for accuracy in 2002, 2003, 2004, and 2005. (JA 23.) And, in violation of § 1904.32(b)(3), Volks did not have a company executive certify the annual summaries for the same years. (JA 23.) Volks failed to update and ensure the accuracy of these records by the time OSHA began the inspection on May 10, 2006 (JA 23), and the inspection was begun within the five-year record retention period. 29 C.F.R. § 1904.33. The

November 8, 2006 citation for these items was therefore not time-barred under section 9(c) of the OSH Act.

2. *The Secretary's Interpretation of the OSH Act and Her Recordkeeping Regulations Is Reasonable and Entitled to Deference.*

Since enacting her recordkeeping regulations in 29 C.F.R. Part 1904 in 1971, the Secretary has consistently set forth her position that violations of the recordkeeping regulations constitute continuing violations until corrected or until the five-year record retention period ends. *See, e.g.*, *Johnson Controls,* 15 BNA OSHC at 2135-36 (acknowledging and adopting Secretary's continuing recordkeeping violation theory); *Gen. Dynamics Corp.,* 15 BNA OSHC at 2128 ("Part 1904 creates an obligation to keep a log entry for each occupational injury or illness each day for a five-year period."); *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178 (No. 90-2775, 2000) (rejecting employer's contention that recordkeeping violations cited more than six months after initial failure to record but within five-year retention period should be vacated as untimely). *See also* BLS Recordkeeping Guidelines for Occupational Injuries and Illness, ch. II.A-2 (OMB No. 1220-0029, 1986) (stating in part that the "[l]og must be kept current and retained for 5 years following the end of the calendar year to which they relate. . . . Entries should be made for previously unrecorded cases that are discovered or found to be recordable after the end of the year in which the case occurred."). The Court should defer to the Secretary's interpretation of her recordkeeping

regulations and of the OSH Act because it is reasonable and consistent with the statutory language. *CF&I*, 499 U.S. at 150-51, 157

Section 8(c)(1) of the OSH Act states that: "[e]ach employer shall make, keep and preserve, and make available to the Secretary [of Labor] . . . such records regarding his activities relating to this Act as the Secretary . . . may prescribe by regulation as necessary or appropriate for the enforcement of this Act or for developing information regarding the causes and prevention of occupational accidents and illnesses." 29 U.S.C. § 657(c)(1). Section 8(c)(2) further directs the Secretary to "prescribe regulations requiring employers to maintain accurate records of, and to make periodic reports on, work-related deaths, injuries and illnesses other than minor injuries[.]" *Id.* § 657(c)(2).

The Secretary complied with section 8's mandate by promulgating the recordkeeping regulations set forth at 29 C.F.R. Part 1904.[7] These regulations implement the statutory obligation to "make, keep and preserve" records by requiring employers to "record *each* fatality, injury and illness that [meets the recording criteria]. 29 C.F.R. § 1904.4(a) (emphasis added). Further, an employer

[7] Volks' contention, Volks Br. 36-37, that section 8(c) "cannot be the source of a violation, let alone a 'continuing' violation," is false and appears to reflect Volks fundamental misunderstanding of the operation of the OSH Act. In section 8(c), Congress directed the Secretary to issue recordkeeping regulations. 29 U.S.C. § 657(c) ("The Secretary *shall* issue regulations . . . .") (emphasis added). And, section 9(a) of the OSH Act, further authorizes the Secretary to issue a citation for a violation of "*any* regulations prescribed pursuant to this Act." 29 U.S.C. § 658(a) (emphasis added).

"must enter each recordable injury or illness on the OSHA 300 Log and 301 Incident Report within seven (7) calendar days after receiving information that a recordable injury or illness has occurred." *Id.* § 1904.29(b)(3).

The recordkeeping regulations in Part 1904 also implement the statutory mandate in section 8(c)(2) that employers "maintain accurate records" of occupational injury and illness. Among other things, at the end of each calendar year employers are required to: (1) check the OSHA 300 log for accuracy and to correct any mistakes; (2) prepare an annual summary; and (3) have a company executive certify the accuracy of the summary. 29 C.F.R. § 1904.32. In addition, employers are required to retain copies of the OSHA 300 log and 301 incident reports, as well as the annual summary, for a period of five years. 29 C.F.R. § 1904.33(a). The OSHA 300 log must be updated during the five-year retention period "to include newly discovered recordable injuries or illnesses and to show any changes that have occurred in the classification of previously recorded injuries and illnesses." *Id.* § 1904.33(b).

Taken together, section 8 of the OSH Act and the recordkeeping regulations at 29 C.F.R. Part 1904 impose an obligation on employers to record a case beginning on the seventh day after receiving information that a recordable injury or illness has occurred, and that obligation continues until either the case is recorded or the five-year record retention period expires. Likewise, the regulations impose a

continuing obligation to possess properly completed and accurate recordkeeping forms, including the OSHA 300 logs, the OSHA 301 incident report forms, and the annual summaries. This is the only reading consistent with the purpose and wording of the regulations and with Congress' direction in section 8(c) of the OSH Act requiring employers to maintain accurate injury and illness records.

Notwithstanding the express language highlighted above, Volks claims that a continuing violation theory is inconsistent with both the OSH Act and the Secretary's recordkeeping regulations at 29 C.F.R. Part 1904. Volks Br. 36-47. According to Volks, an employer's obligation to record a case ends after the seventh day of receiving information about a recordable injury or illness, and section 9(c)'s six-month limitations period begins to run from that day. Volks Br. 38. Volks is wrong. OSHA's recordkeeping regulations would not meet the statutory mandate in section 8(c) of the OSH Act of ensuring that employers "make, keep and preserve" and "maintain accurate records" if the duty to record were confined to a seven-day window. Indeed, that would virtually guarantee *inaccurate* records. Nor is there anything in the Part 1904 recordkeeping regulations that supports Volks' contention that the duty to record ends after the seventh day. Instead, a plain reading of the language in 29 C.F.R. § 1904.29(b)(3) makes clear that the seven-day window is a grace period that allows employers to

gather evidence and make determinations as to whether specific injuries and illnesses meet certain recording criteria.[8]

Under 29 C.F.R. § 1904.29(b)(3), the employer has no duty to record an injury or illness during the first six days after learning of the case. The employer's duty begins on the seventh day after receiving information that a recordable injury or illness has occurred. *Id.* However, the obligation does not end on the seventh day.[9] Instead, the violation (the failure to record), and the employer's obligation to record, continues to "occur" on every subsequent day the case is not recorded. This is because other provisions in the recordkeeping regulations make clear that the recording obligation is a categorical one that is not delimited by the seven-day grace period found in § 1904.29(b)(3). *Id.* § 1904.0 ("The purpose of this rule (Part 1904) is to require employers to record and report [work-related injuries and illnesses]"); § 1904.29(b)(1) ("[y]ou must . . . enter a one or two line description [on the OSHA 300 log] for each recordable injury or illness"); § 1904.29(b)(2) ("You must complete an OSHA 301 Incident Report form . . . for each recordable

[8] In the vast majority of cases, an employer will know immediately, or within a short time, that a recordable injury or illness has occurred. In a few cases, however, it may be several days before the employer is informed that an employee's injury or illness meets one or more of the recording criteria. *See* 66 Fed. Reg. 6023.

[9] Under Volks' theory, the employer would have an obligation to record only on the seventh day. Not before, and not after, even if the employer is well aware the case is recordable.

injury or illness entered on the OSHA 300 Log."); § 1904.4 ("each employer . . . must record each fatality, injury and illness . . .").

Further evidence that employers' recording obligations are not limited to the seven-day grace period is supplied by 29 C.F.R. § 1904.32(a)(1), which requires employers to review the OSHA 300 log at the end of each calendar year to "verify that the entries are complete and accurate, and correct any deficiencies identified." That regulation, read in conjunction with the requirement that records be kept for a period of five years, *id.* § 1904.33, makes clear that the duty to record injuries and illnesses does not end at the expiration of the initial seven-day reporting period. Thus, Volks was in violation every day after the seventh day that it failed to record the injuries and illnesses in this case, and that daily re-occurrence of the violation continuously triggered the six-month limitations period in section 9(c), 29 U.S.C. § 658(c).

As the Commission noted in its decision, there is simply no basis for concluding that the specified seven-day recording period precludes the violation from continuing. (JA 37.) It "is [not] logical to view a requirement that, in effect, delays the onset of a violation for seven days as somehow extinguishing the duty plainly established by the Act and expressly implemented by the regulations mandating retention of the records." (JA 37); *see United States v. Cores*, 356 U.S. 405, 409 (1958) ("It seems incongruous to say that while the alien 'willfully

remains' on the 29th day when his permit expires, he no longer does so on the 30th, though still physically present in the country."); *United States v. Advance Mach. Co.*, 547 F. Supp. 1085, 1089 (D. Minn. 1982) (finding twenty-four hour time limit for reporting product defect to regulatory agency "does not extinguish the continuing statutory duty" to report defects where time limits only purpose was to "increase the likelihood that a substantial product hazard will come to the attention of the agency in a timely fashion so that it could act swiftly to protect the consuming public).

Volks also selectively quotes from Part 1904's recordkeeping regulations in support of its claim that OSHA recordkeeping violations cannot be continuing violations. According to Volks, 29 C.F.R. § 1904.33, entitled *Retention and Updating*, only requires that records be "saved," and that save does not mean "record," "correct," or "continuously re-examine" for the five-year retention period. Volks Br. 43. And, Volks asserts that 29 C.F.R. § 1904.29(b)(3) only requires that cases be recorded within seven days of "receiving information about a recordable injury or illness" and not "at any time during the retention period." Br. 46-47. Volks badly misconstrues these provisions.

As the Commission correctly noted in its decision (JA 37-38), the OSHA recordkeeping regulations must be read as a whole and not as isolated requirements. And, 29 C.F.R. § 1904.4(a), entitled *Recording Criteria*, expressly

states, without any time limitation, that employers "*must* record *each* fatality, injury or illness that [meets the recording criteria]." (emphasis added). Additionally, far from Part 1904 requiring an employer to just "save" the OSHA 300 log for five years, the record-retention requirements of § 1904.33 must be interpreted in conjunction with the requirements of § 1904.32, which requires employers, at the end of each calendar year, to check the OSHA 300 log for accuracy and correct any mistakes, prepare an annual summary, and have a company executive certify the accuracy of the summary. Part 1904 also requires the employer to update the entries on the OSHA 300 log to include newly discovered cases and to show changes to cases that have previously been recorded. 29 C.F.R. § 1904.33(b). Thus, "the final rule . . . require[s] employers to review the OSHA records as extensively as necessary to ensure their accuracy." 66 Fed. Reg. at 6047.

This does not mean, as Volks contends, that employers are required to constantly re-examine injuries and illnesses during the five-year retention period. Volks Br. 39-40. Instead, the examination and assessment of illnesses and injuries should usually take place only once, either within the seven-day grace period found in § 1904.29(b)(3), or at any point thereafter as soon as the employer realizes that it

has failed to meet its ongoing recording obligations.[10] Likewise, Volks' obligation to annually review its OSHA 300 log and certify its annual summary need occur only once, either at the prescribed time, or thereafter in compliance with its continuing obligation under the regulations to ensure the accuracy of its records.

For the same reasons, Volks' claim that a continuing-violation theory is inconsistent with the minimal burden estimates that OSHA submitted for the recordkeeping regulations under the Paperwork Reduction Act, 44 U.S.C. § 3501, is without merit. Volks Br. 43-44. OSHA's burden estimates (fourteen minutes to prepare OSHA 300 log entries, and thirty minutes for year-end review by a company executive) remain accurate. The paperwork burden arises when an employer takes the requisite action, whether within the time frame prescribed by the regulations, or at some later time when the employer determines that because it failed to act at the appropriate time, further action is necessary to comply with its continuing duty to maintain accurate records.

Volks also claims that section 9(c) of the OSH Act does not encompass continuing violations because, according to Volks, a different provision of the

[10] The employer has seven days after receiving information about an injury or illness to decide whether the case is recordable, but it must record by the end of the seventh day even if it has not finally determined that all the recording criteria have been met. 66 Fed. Reg. 6023 (cases must be recorded within seven days but may be lined out if employer later decides case is not recordable).

statute, section 17(d), expressly provides for a continuing violation. Volks Br. 31-32. Volks' perceived conflict between the two provisions is illusory.

Under section 17(d), "any employer who fails to correct a violation for which a citation has been issued under section 9(a) within the period permitted for its correction [which period shall not begin to run until the date of the final order of the Commission] . . . may be assessed a civil penalty of not more than $7,000 for each day during which such failure or violation continues." 29 U.S.C. § 666. As such, section 17(d) addresses an employer's failure to comply with a final order and failure to abate a proven violation, while section 9(c) governs the period before the issuance of a citation. Importantly, however, both provisions relate to the *same* citation, just at different points on the time continuum. Therefore it simply cannot be the case that a violation can be continuing under section 17(d), but the same violation cannot be continuing under section 9(c).

In sum, the Secretary's interpretation of the Part 1904 recordkeeping regulations and of the OSH Act – that employers have a continuing duty to maintain accurate records until the five-year retention period has elapsed -- comports with section 8(c)'s mandate. Volks' interpretation, under which employers only have a duty to comply on the seventh day following a recordable injury or illness but not thereafter, does not. *See Alfred S. Austin Constr.*, 4 BNA OSHC 1166, 1168 (No. 4809, 1976) ("It is especially important that the regulations

promulgated by the Secretary of Labor under the Act be construed to effectuate the congressional objectives.") (internal quotation marks and citation omitted). The Court should therefore defer to the Secretary's reasonable interpretation of the OSH Act and her recordkeeping regulations. *Nat'l Ass'n of Home Builders*, 602 F.3d at 468.

3. *Relevant Case Law Further Supports the Commission's Conclusion that Volks' Recordkeeping Violations Were Continuing.*

The Commission's finding that Volks' recordkeeping violations constituted continuing violations is also fully consistent with relevant case law. Indeed, this Court has previously found that a statue of limitations will not operate to bar claims where the action (or inaction) that constitutes the basis for a claim was "carried forward by more recent actions [or inactions]." *International Union, United Auto., Aerospace and Agric. Implement Workers of Am. v. NLRB*, 363 F.2d 702, 706-07 (D.C. Cir. 1966). *See also Shaw v. Rice*, 409 F.3d 448 (D.C. Cir. 2005) (reaffirming principle that continuing violation of law resets the statute of limitations in employment discrimination context); *Atlas Air, Inc., v. Air Lone Pilots Ass'n*, 232 F.3d 218, 226-27 (D.C. Cir. 2000) (holding that statute of limitations cannot bar claims alleging continuing violations of National Labor Relations Act); *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 34 (D.C. Cir. 1990) (statute of limitations start running after last violation of the Fair Housing Act).

Volks argues that under existing Supreme Court and other courts of appeals case law, the Commission erred by finding continuing violations premised solely on the language of the Part 1904 recordkeeping regulations. Volks Br. 45-47. Volks cites *Toussie v. United States*, 397 U.S. 112 (1970), for the principle that the Secretary's recordkeeping regulations alone cannot justify a continuing violation. Br. 45-46. *Toussie* is inapposite here.

As an initial matter, it is far from clear that *Toussie,* a criminal matter, has any application to civil cases, as Volks contends.[11] *See Diamond v. United States*, 427 F.2d 1246, 1247 (Ct. Cl. 1970) ("[t]he Supreme Court's opinion [in *Toussie*] makes clear that the considerations moving the Court to decide that the offense was not a continuing one were entwined with the criminal aspects of the matter, and the holding was limited to criminal statutes of limitations").[12] Moreover, civil statutes of limitations are to be strictly construed in favor of the government against repose. *Interamericas*, 111 F.3d at 382. And, as the Commission correctly found, "even if

[11] In *Toussie* the Supreme Court held that the draft statute at issue lacked language that "clearly contemplate[d] a prolonged course of conduct," and the legislative history of the draft law, which was "slightly ambiguous," supported this reading. 397 U.S. 116-22. Also, the Supreme Court emphasized that criminal limitations statutes are to be liberally interpreted in favor of repose . . ." *Id*. at 115.

[12] In *3M Co. v. Browner*, 17 F.3d 1453, 1455 n.2, (D.C. Cir. 1994), the Court, citing *Toussie*, expressed "considerable doubt" that the failure to file reports required by the Toxic Substances Control Act constituted violations of a continuing nature. This statement, however, was dicta as the Court acknowledged that it was "pass[ing] over" the issue, which was not before it on review. *Id.*

we were to apply the 'explicit language' test [of Toussie] here, we agree with the Secretary that the OSH Act plainly requires a prolonged course of conduct, as it prescribes that employers must 'make, keep and preserve' records of workplace illnesses and injuries." (JA 39.); 29 U.S.C. § 657(c). Volks also cites *United States v. Del Percio*, 870 F.2d 1090 (6th Cir. 1989), another criminal case, in support of the principle that congressional intent for a continuing violation must be found in the statute rather than the regulations. For the same reasons *Toussie* is distinguishable, *Del Percio* is not on point.

Thus, the Secretary is not only relying solely on her regulations to establish the continuing nature of recordkeeping violations, but also on the explicit language of the OSH Act. And, the OSH Act expressly contemplates a prolonged course of employer conduct as section 8(c) prescribes that employers "maintain accurate records" and that they must "make, keep and preserve" records of workplace injuries and illnesses. 29 U.S.C. § 657(c).

4. *Volks' Contention that a Continuing Violation Theory Undermines the Purpose of the OSH Act's Statute of Limitations Is Meritless.*

Citing staleness concerns and the allegedly improper "plac[ing of] the statue of limitations for recordkeeping violations entirely in OSHA's hands," Volks asserts that the Secretary's citation of continuing recordkeeping violations "subverts Congress's purposes in enacting a statute of limitations." Volks Br. 53. Volks' arguments in this regard are meritless.

Although Volks claims that staleness concerns are an issue in this case, Volks provides no support for this assertion. Volks Br. 47-49. Nor could it: Volks has stipulated that it did not record the recordable injuries and illnesses that are the subject of the citation and did not perform the other required recordkeeping activities. (JA 25-26.). Thus, and as the Commission correctly found, "any concerns regarding the ability of witnesses to recall facts relating to whether the injuries/illnesses were required to be recorded in the instant case are moot." (JA 41.) Even if this were not the case, Volks' recordkeeping violations existed within six months before the citations were issued. 29 C.F.R. § 1904.33(a) (prescribing five-year record retention period); 29 U.S.C. § 657(c) (mandating that the Secretary promulgate regulations requiring employers to maintain accurate records). And, in *Haven's Realty Corp. v. Coleman,* 455 U.S. 363 (1982), a unanimous Supreme Court held that ongoing violations must be treated differently than discrete, isolated unlawful acts. *Id.* at 380 ("Where the challenged violation is a continuing one, the staleness concern disappears.").

Moreover, and contrary to Volks' assertion, assessing whether an OSHA recordkeeping violation has occurred is not always complicated by events that have taken place in the faded past. For example, by reviewing medical and other records during its inspection, OSHA was able to determine (without resort to witnesses' memories) that Volks failed to record numerous recordable injuries and

illnesses over a period of several years.[13] And, as noted above, Volks itself had sufficient reliable information to stipulate that the recordkeeping violations occurred as alleged in the citation. (JA 25.)

Citing *Ledbetter*, 550 U.S. at 618, and *Goodwin v. Gen. Motors Corp*., 275 F.3d 1005, 1009-10 (10th Cir.), the Commission noted that there is an endpoint in the Part 1904 recordkeeping regulations (i.e., the five-year retention period), and that this time period does not raise staleness concerns. (JA 41.) Given that staleness concerns must be weighed against the remedial purposes of the OSH Act, *see generally Connecticut Light & Power Co. v. Secretary of Labor*, 85 F.3d 89, 96 (2nd Cir. 1996), the Commission's resolution of this issue in this case is entirely reasonable, and not an abuse of discretion. In contrast, Volks' contention that section 9(c) of the OSH Act must be construed to require a citation within six months of the initial failure to act (e.g., failure to record a recordable injury or illness) without regard to the continuing violation of duly promulgated regulations, is inconsistent with the wording, purpose and intent of the OSH Act.

Volks' claim that the Commission's decision improperly "place[s] the statute of limitations for recordkeeping violations entirely in OSHA's hands," Volks Br. 53, is likewise unavailing. According to Volks, other OSHA standards

[13] OSHA's Recordkeeping Policy and Procedure Manual, CPL 02-00-135, directs Compliance Officers to review medical records to determine whether an employer has failed to enter recordable injuries and illnesses on the OSHA forms.

and regulations, some of which impose longer record-retention periods than the five-year period found in 29 C.F.R. § 1904.33, would require employers to defend against citations that were up to thirty years old. Volks Br. 53-55. For example, Volks points to 29 C.F.R. § 1910.1020, entitled *Access to Employee Exposure and Medical Records*, which requires employers to retain medical records for at least the duration of employment plus thirty years. *Id.* § 1910.1020(d)(1)(i). According to Volks, allowing continuing violations in the face of such lengthy retention periods would impermissibly extend the statute of limitations for decades. Volks Br. 53-55. Volks is wrong.

As an initial matter, the OSHA standards and regulations that Volks points to are not at issue in this case. The Court should therefore decline to address Volks' claims that they contain impermissibly long retention periods. Moreover, the standards and regulations relied upon by Volks are not contained within 29 C.F.R. Part 1904, OSHA's recordkeeping regulations. They are therefore not subject to the requirements contained in Part 1904 to maintain and update the accuracy of records. 29 C.F.R. §§ 1904.32(a), 1904.33; *see also* 29 U.S.C. § 657(c). Nor are employers required to create records. Instead, the lengthy retention periods Volks notes simply require an employer to retain records (generally medical records that were created by a health provider) for the prescribed period of time. *E.g.*, 29 C.F.R. § 1910.1020. Thus, unlike in the Part

1904 recordkeeping regulations, there is no duty to update the records during that thirty-year period. Under such circumstances, a thirty-year retention period is not unreasonable, especially given that many medical conditions resulting from occupational exposures may not manifest for decades. In any event, and as the Commission correctly found, the five-year retention period at issue in the recordkeeping regulations is certainly reasonable. (JA 41.)

CONCLUSION

For the foregoing reasons, the court should dismiss the petition for review and affirm the Commission's decision.

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September 28, 2011

COMBINED CERTIFICATION OF COUNSEL

Undersigned counsel for the Secretary of Labor hereby certifies that:

1. The Secretary's brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 10,154 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). In addition, the brief complies with the typeface requirement of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in Times New Roman 14-point font.

2. The Secretary's brief complies with the electronic filing requirements of the Court's General Order on Electronic Filing dated May 15, 2009, because the text of the electronic copy is identical to the text of the paper copies, all required privacy redactions have been made, and a virus detection program (McAfee Enterprise Virus Scan, Version 8.0, updated July 1, 2011), has been run on the file containing the electronic brief and no virus was detected.

3. On September 28, 2011, a copy of the Secretary's brief was electronically filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, which will serve the same upon all counsel of record.

4. Within the allowed time period, before close of business on that day, I will serve the Clerk's Office eight paper copies of the Secretary's brief via either hand-delivery or overnight delivery with a commercial carrier service. That same day, I certify that two copies of the Secretary's brief will be served by depositing them in the first class mail addressed to:

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September 28, 2011

ADDENDUM

Part 1904--Recording and Reporting Occupational Injuries and Illnesses

Subpart A – Purpose

§ 1904.0 Purpose

The purpose of this rule (Part 1904) is to require employers to record and report work-related fatalities, injuries and illnesses.

NOTE TO § 1904.0: Recording or reporting a work-related injury, illness, or fatality does not mean that the employer or employee was at fault, that an OSHA rule has been violated, or that the employee is eligible for workers' compensation or other benefits.

Subpart C—Recordkeeping Forms and Recording Criteria

NOTE TO SUBPART C: This subpart describes the work-related injuries and illnesses that an employer must enter into the OSHA records and explains the OSHA forms that employers must use to record work-related fatalities, injuries, and illnesses.

§ 1904.4 Recording criteria

(a) Basic requirement. Each employer required by this part to keep records of fatalities, injuries, and illnesses must record each fatality, injury and illness that:

(1) Is work-related; and

(2) Is a new case; and

(3) Meets one or more of the general recording criteria of §1904.7 or the application to specific cases of §1904.8 through §1904.12.