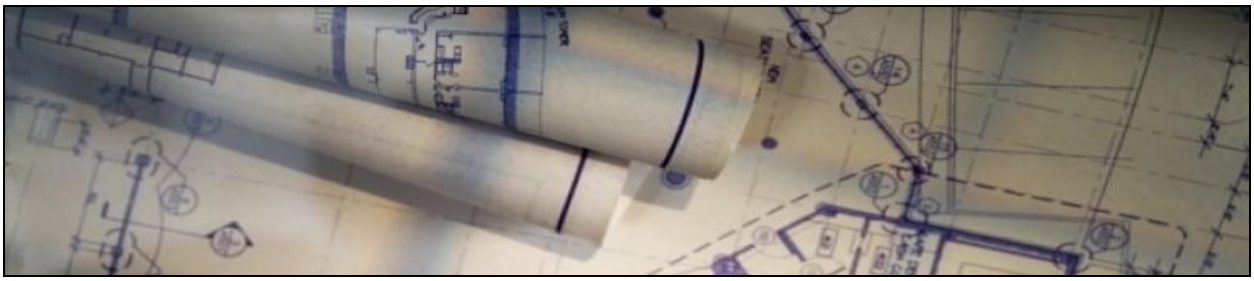
N.C. Construction Law, Policy & News

Matthew C. Bouchard, Esq.
919.719.8565
mcb@lewis-roberts.com
www.nc-construction-law.com



D.C. Circuit Court of Appeals Strictly Enforces Six-Month Statute of Limitations for OSHA Record-Keeping Violations.

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In a decision likely to be celebrated by employers in the construction industry, the U.S. Court of Appeals for the District of Columbia issued a decision on April 6, 2012 that strictly applies the six-month statute of limitations for citing an employer for record-keeping violations under the federal Occupational Safety & Health Act (the "OSH Act"). In so holding, the D.C. Circuit Court of Appeals rejected the U.S. Department of Labor's argument that an employer's failure to record employee injuries and illnesses represented "continuing violations" of the OSH Act that, until corrected, prohibited the six-month statute of limitations from expiring.

The Facts of the Case

The decision in AKM LLC d/b/a Volks Constructors v. Secretary of Labor arises from inspections made by the Occupational Safety & Health Administration ("OSHA") of AKM LLC, a Louisiana contractor doing business as Volks Constructors. OSHA discovered that Volks had not been diligent in completing its workplace injury and illness logs between 2002 and April 2006. On November 8, 2006 – slightly more than six months after the last of the alleged record-keeping violations – OSHA issued its citations and assessed a $13,300 fine against Volks.

Volks moved to dismiss the citations as untimely. The OSHA administrative law judge upheld the citations, and Volks appealed to the Occupational Safety and Health Review Commission ("OSHRC"). By a 2-1 vote, the OSHRC upheld the citations as well. Volks then petitioned for review by the D.C. Circuit Court of Appeals, the federal appellate court having jurisdiction over challenges to OSHRC decisions.

The D.C. Circuit Court's Analysis

In reviewing the case, the D.C. Circuit Court of Appeals focused on the language of the statute of limitations applicable to record-keeping violations at 29 U.S.C. § 648(c): "No citation may be issued . . . after expiration of the six months following the occurrence of any violation[.]" Specifically, the Court

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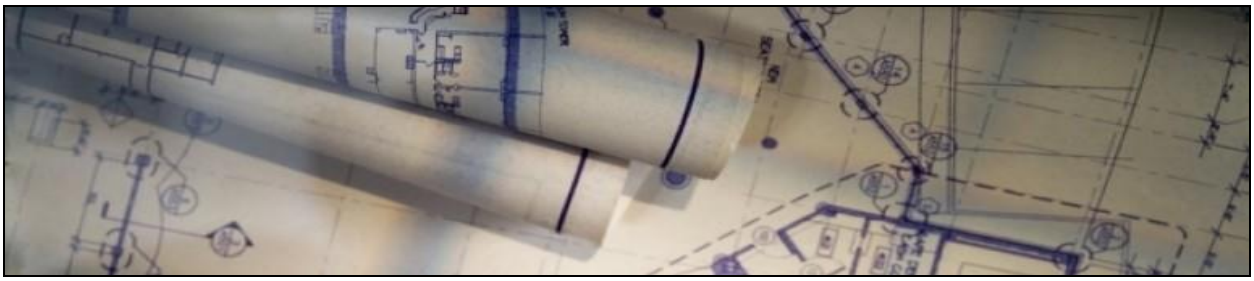

focused on the term "occurrence," which it defined as "a discrete antecedent event -- something that happened or came to pass in the past." Applying this definition to the citations issued to Volks, the Court held as follows:

> In this case, every single violation for which Volks was cited -- failures to make and review records -- and every workplace injury which gave rise to those unmet recording obligations were "incidents" or "events" which "occurred" more than six months before the issuance of the citations. As the dissenting Commissioner stated in this case, "[b]y any common definition, there [was] no 'occurrence,' i.e., no discrete action, event or incident, no coming about, and no process of happening, within the requisite six months."

In so holding, the D.C. Circuit Court of Appeals reversed what had been a common practice by OSHRC to treat record-keeping shortcomings as "continuing violations" that effectively tolled the six-month statute of limitations until the end of the five-year document retention period required by 29 C.F.R. § 1904.33(a). The Court rejected this argument decisively and colorfully:

> The Secretary does not offer any other definition of "occurrence" but instead heroically attempts, as the dissenting Commissioner put it, to "tie this straightforward issue into a Gordian knot."
>
> . . .
>
> Despite the cloud of dust the Secretary [of the U.S. Department of Labor] kicks up in an effort to lead us to her interpretation, the text and structure of the Act reveal a quite different congressional intent that requires none of the strained inferences she urges upon us.
>
> . . .
>
> Indeed, the Secretary's interpretation has absurd consequences in the context of the discrete record-making failure in this case. Under her interpretation, the statute of limitations Congress included in the Act could be expanded *ad infinitum* if, for example,

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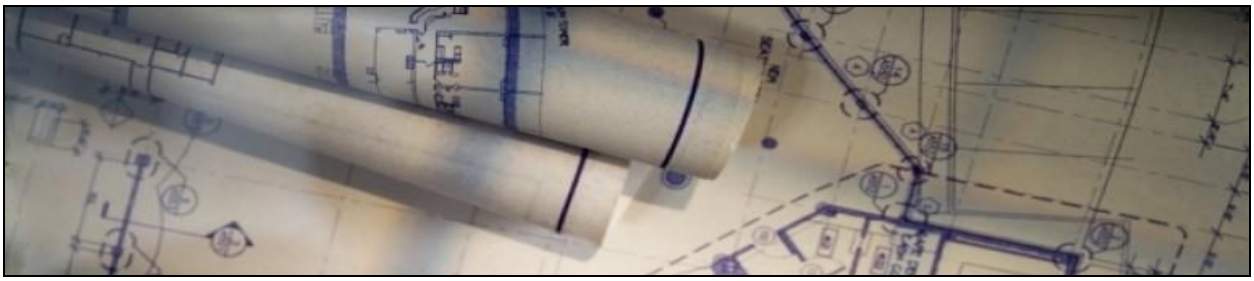

> the Secretary promulgated a regulation requiring that a record be kept for every violation for as long as the Secretary would like to be able to bring an action based on that violation. There is truly no end to such madness. If the record retention regulation in this case instead required, say, a thirty-year retention period, the Secretary's theory would allow her to cite Volks for the original failure to record an injury thirty years after it happened. . . . We cannot believe Congress intended or contemplated such a result.

The Takeaway

The decision could be appealed to the U.S. Supreme Court. For now, however, the takeaway for construction industry employers is twofold:

(1) the burden to properly keep records under the OSH Act remains, and so employers should continue following internal procedures for ensuring that the Act's requirements are met (a detailed FAQ about the OSH Act's record-keeping requirements can be found here); and

(2) the burden is on OSHA to issue citations for record-keeping violations in a timely manner, and employers should consider challenging citations issued more than six months after the alleged violation(s) in question.