Full Written Statement of Testimony
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May An Agency Extend A Statute of Limitations by Regulation?: OSHA's Attempt to Overrule *AKM LLC dba Volks Constructors v. Sec'y of Labor*, 675 F.3d 752 (D.C. Cir. 2012)

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Mr. Chairman, I am Arthur G. Sapper, a partner in the OSHA Practice Group of McDermott, Will & Emery. I practice administrative law generally, but tend to specialize in appellate litigation and cases arising under the Occupational Safety and Health Act. I am also the former Deputy General Counsel of the Occupational Safety and Health Review Commission, and was for nine years an adjunct professor at Georgetown University Law Center, where I taught a graduate course in occupational safety and health law. I thank the committee for permitting me to place this written statement into the record.

Background

Since the earliest day of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (OSH Act), the Occupational Safety and Health Administration (OSHA) has required employers to keep logs of certain work-related injuries and illnesses. In 2001, OSHA substantially overhauled those regulations (they are in 29 C.F.R. Part 1904), but their basic contours remained much the same.

The statute of limitations in the OSH Act, 29 U.S.C. § 658(c), states that "[n]o citation may be issued … after the expiration of six months following the *occurrence* of any violation." (Emphasis added.) Although the OSH Act's limitation period is six months, OSHA took the position that it could cite an employer for failing to record a case on its log, even if the failure

occurred years before. It reasoned that, because employers were required to retain their logs for five years, they could be cited throughout that five-year retention period.

The *Volks* Case

In late 2006, OSHA issued a citation to a small- to medium-size company called Volks Constructors, which I had the privilege of representing. Despite the six-month statute of limitations in the OSH Act, OSHA alleged recordkeeping violations going back as much as almost five years. Not only were the cases long stale, but during those five years one of Volks's recordkeepers died, making it difficult for the company to defend itself.

We appealed to the Review Commission, arguing that the OSH Act's statute of limitations requires an "occurrence" of a violation within the limitations period and that there had been no such "occurrence." The Commission, in a 2-1 decision that used frail logic, held that the recordkeeping violations continued through the five-year retention period.

The D.C. Circuit unanimously reversed. *AKM LLC dba Volks Constructors v. Sec'y of Labor*, 675 F.3d 752 (D.C. Cir. 2012). The court, speaking through Judges Henderson and Brown, held the statute is "clear and the agency's interpretation unreasonable." It reasoned that, because the OSH Act's statute of limitations used the phrase "*occurrence* of a violation" and nothing had *occurred* within the six-months limitation period, the citations were untimely. "[T]he word 'occurrence' clearly refers to a discrete antecedent event—something that 'happened' or 'came to pass' 'in the past.'" The court noted that, under OSHA's position, "the real statute of limitations for recordmaking violations [would be] the length of the agency's record retention period plus the limitations period Congress proposed—here, five years beyond the six months" in the statute. This would "diminish[] [the limitation period] to a mere six-month addition to whatever retention/limitations period [OSHA] desires. We do not believe

Congress expressly established a statute of limitations only to implicitly encourage [OSHA] to ignore it."

The majority opinion also addressed the prospect that OSHA might try to change the result by amending its regulations. It found that that would have "absurd consequences": "Under [OSHA's] interpretation, the statute of limitations Congress included in the Act could be expanded *ad infinitum* if, for example, [OSHA] promulgated a regulation requiring that a record be kept of every violation for as long as [OSHA] 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." "Nothing in the statute suggests Congress sought to endow this bureaucracy with the power to hold a discrete record-making violation over employers for years …." 675 F.3d at 758-59.

A concurring opinion by Judge Merrick Garland, however, seems to have given OSHA the impression that OSHA might, by merely changing the wording of its regulations, alter the result in *Volks*, regardless of the staleness that would ensue. Judge Garland found that the regulations as then worded "do not impose continuing obligations that may be continually violated." As the regulations are written, "the requirement to update a stored log does not obligate an employer **to constantly reexamine injuries and illnesses."** 675 F.3d at 760 (Garland, J., concurring in the judgment) (bolding added.) (I will return to this bolded language later in my testimony.)

At this point, OSHA could have sought panel rehearing; *en banc* rehearing by the full court; *certiorari* from the Supreme Court; or a statutory amendment from Congress.

OSHA's Response: Change The Regulations

OSHA chose none of those alternatives. Instead, in an astounding display of bureaucratic arrogance, it proposed to alter the result in *Volks* by merely changing its regulations. See "Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness," 80 Fed. Reg. 45116 (July 29, 2015). It proposed to change, for example, 29 C.F.R. § 1904.29(b)(3) to state that the employer is under a "continuing obligation" to record and that, "This obligation continues throughout the entire [five-year] record retention period …." This, it believes, will avoid the *Volks* decision.

The Problems with OSHA's Proposal

1. OSHA's proposal will defeat the purpose of the statute of limitation; for example, it will result in the same stale prosecutions that the limitations period was intended to avoid. "[T]he basic policies of all limitations provisions [are] repose, elimination of stale claims, and certainty about a plaintiff 's opportunity for recovery and a defendant's potential liabilities." *Rotella v. Wood*, 528 U. S. 549, 555 (2000). OSHA's proposal would defeat all three of these purposes.

Take staleness. Under OSHA's proposal, citations could rest on facts that would be stale by years, for no new event would have occurred within the limitations period. We know this because OSHA has told us so. An OSHA attorney responded as follows to questions by a member of the Advisory Committee on Construction Safety and Health (ACCSH), which was required to review a draft of the proposed amendment:

> MR. CANNON: … [T]his continuing duty would apply even if an employer had not received any new information that a recordable injury or illness had occurred, right?
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> MS. GOODMAN: That's correct.
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> MR. CANNON: And so the continuing duty would be triggered by the same information that would have triggered the original duty to record, correct?

> MS. GOODMAN: Right. Ultimately, the employer has a duty to assess each case and determine whether it's recordable, and if they don't do that on day one, then the obligation continues.
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> MR. CANNON: And so, say, for instance --I'm going to use a hypothetical situation here. Say an employer mistakenly fails to record an injury or illness within the seven-day period, as required. They don't get any new information that would suggest that this was a recordable injury or illness, and nothing else ever happens with that particular case. So, based on what you're saying, is that they could be cited … during that five-year retention period … for … missing that initial seven-day period.
>
> MS. GOODMAN: That's correct.

Amended Transcript, Advisory Comm. on Constr. Safety and Health, at pp. 110-111 (Dec. 4, 2014) (www.osha.gov/doc/accsh/transcripts/accsh_20141203_amended.pdf). So, according to OSHA's lawyers, an employer could be cited even if there were no new facts—no new recordability information had been received, and nothing else had happened within the limitations period. There would be only same facts known and the same mistake made, years before, during the original seven-day recording period.

The proposal's preamble argues that staleness would not occur because an employer need only examine his medical records to see if a case is recordable. That is demonstrably untrue, for many facts crucial to recordability are not recorded there. For example, one of the most common kinds of recordable injuries involves "restrictions"—a physician or employer instruction that an employee not perform a certain activity that he regularly performs at least weekly (for example, climbing a ladder). § 1904.7(b)(4)(ii). So to determine whether an employee had been "restricted," the employer must know whether the task was regularly performed at least weekly. That detail is never stated in medical records and it is often impossible to reconstruct nearly five years later. For example, rare is the welder who can recall nearly five years later how often he climbed a ladder on a particular job. So there is nothing to OSHA's non-staleness argument.

2. OSHA's proposal will still violate the statute of limitations, and thus result in pointless and confused litigation. The proposed amendments will be pointless because they

will, after much confused and pointless litigation, fail. The courts are very highly likely to follow the *Volks* court's holding that the language of the statute is "clear," that there must be an "occurrence" within the limitations period, and that, inasmuch as nothing would have "occurred" within the limitations period, the statute of limitations will have run.

Moreover, the courts are unlikely to tolerate OSHA's arrogant attempt at regulatory hocus-pocus—*i.e.,* to evade a statute of limitations by merely changing the wording of a regulation. Not only will the courts likely quote the "madness" language of the *Volks* court quoted above but they may well point to the Supreme Court decision in *Toussie v. United States,* 397 U.S. 112, 121-22 (1970), which held that, because "questions of limitations are fundamentally matters of legislative not administrative decision," "the statute itself, apart from the regulation, [must] justif[y]" any continuing violation holding.

Until a court issues such a decision, however, the Nation's employers will be pointlessly incurring lawyers' fees to defend themselves against stale and unlawful charges. They will pay the price of OSHA's bureaucratic arrogance.

3. If the proposal is not a sham—an empty form of words—it will impose huge and unjustifiable costs on the Nation's economy. One of the greatest problems with the proposal, and the one that should be of concern to this Committee, is that, OSHA's proposal would, if read literally, impose huge and unjustifiable costs on the Nation's economy.

As Judge Garland's concurring opinion in *Volks* stated, for a regulation to impose a continuing duty to record, it must "obligate an employer to *constantly reexamine* [unrecorded] injuries and illnesses" to determine whether they should have been recorded. (Emphasis added.) But that cost would be massive. Speaking conservatively (for example, assuming a daily duty to re-examine), such a daily reconsideration duty would cost the economy almost two billion

dollars for a ***single*** unrecorded case.[1] The costs pertaining to all unrecorded cases throughout the Nation would be astronomical.

OSHA has so far refused to own up to that burden. The preamble to the proposal included as costs only the cost of recording a case *once* its recordability is spotted.[2] It completely ignored the duty of daily reconsideration. So OSHA wants to have its cake and eat it too: It wants the regulations to *say* that they impose a continuing duty to record but it refuses to acknowledge the massive cost of that duty. OSHA ignores the simple truth that Judge Garland saw: A regulation that imposes a continuing duty to record necessarily imposes a continuing duty to "***constantly*** reexamine" past injuries.

If OSHA owned up to this, it would have to acknowledge that its proposal would impose a massive burden on American employers—and for little gain, what OSHA itself estimates to be but a one percent increase in compliance. OSHA would have to acknowledge that its proposal violates section 8(d) of the OSH Act, which requires that, "Any information obtained by the Secretary… shall be obtained with a minimum burden upon employers, especially those operating small businesses. Unnecessary duplication of efforts in obtaining information shall be reduced to the maximum extent feasible."

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[1] Assuming that daily reconsideration would take one minute per unrecorded injury (a conservative assumption), then repeating that effort every day for five years would require every establishment in the Nation to devote up to 30.3 man-hours to the task [((365 x 4) + (365-7) = 1818 days) x 1/60 man-hrs/case/day = 30.3 man-hours/case]. Factoring in what OSHA estimated in 2001 as the 1,365,985 establishments covered by Part 1904, and the $46.72/man-hr. labor-time cost used in the current proposal, then the cost to the economy of daily reconsideration over the five-year retention period of a ***single*** unrecorded injury per establishment would be up to 41,389,346 man-hours (1,365,985 establishments x 30.3 man-hours/case x 1 case/establishment) x $46.72/man-hr. = $1,933,710,222, *i.e.*, almost two billion dollars.

[2] OSHA's "Preliminary Economic Analysis" (80 Fed. Reg. at 45128-45129) states that, "The proposed revisions impose no new cost burden" for "OSHA estimated the costs to employers of these requirements when the existing regulations were promulgated in 2001, see 66 FR 6081–6120, January 19, 2001." 80 Fed. Reg. at 45128 cols. 2-3. The cited preamble pages from 2001 estimate only the one-time cost of recording an injury, not the cost of daily reconsideration.

One dodge that OSHA might present to this Committee is the assertion that, if an employer once considers recordability, the employer need not consider it again. OSHA's attorneys attempted to give this impression to the Advisory Committee on Construction Safety and Health. See ACCSH Tr. 116-117.[3] The suggestion was dishonest double-talk, for the wording of the proposed amendments draws no such distinction. The proposed amendments unqualifiedly state that one must "record" and that this obligation continues to the end of the retention period, unless one records—*not* unless one records or has *once considered* whether the case is recordable. See, *e.g.*, proposed § 1904.29(b)(3). To smoke OSHA out, the Committee might consider asking whether OSHA would agree to actually write into the proposal the distinction it suggested to the ACCSH committee. For example, proposed § 1904.29(b)(3) might have this language: "This obligation continues throughout the entire record retention period described in § 1904.33 *until the case is correctly recorded or until the employer has once considered whether the case is recordable, whichever occurs first*." (New language italicized.)

OSHA will never agree to such language, for it would prevent OSHA from evading the limitations period. An employer could defeat a citation by showing that he had previously considered recordability once, not continually, *even if his conclusion was wrong*.

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[3] Tr. 116-117 states:

> MR. PRATT [ACCSH committee member]: Okay. … Let's say that there is a recordable case by the employer and he reaches the wrong conclusion about the recordability of that particular case, and he did not record by the eighth day…. You're saying that the employer would have to consider re-recordability again, let's say, on the ninth day.
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> MS. GOODMAN: That is not what we're saying.
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> * * *
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> MR. PRATT: Well, then what are you saying?
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> MS. GOODMAN: … [I]f you do not do the assessment, if you do not evaluate the recordability of the case on day one, you have an ongoing duty to evaluate the recordability of that case and make a determination. We are not saying that determination needs to remade on every day during the retention period.

In sum, OSHA's proposal is either a sham—an attempt, through an insincere form of words, to effectively extend a statute of limitations without owning up to the consequences of its words—or an unjustifiable imposition of massive burdens on the economy for little gain.

For further information on this topic, I respectfully refer the Committee to rulemaking comments I filed with OSHA on October 27, 2015, on behalf of the National Federation of Independent Business; the Dewberry Companies; the United States Beet Sugar Association; the North American Meat Institute; and AKM LLC dba Volks Constructors, which I have attached as an exhibit.

The Reasons for OSHA's Behavior

The Committee might ask, why does OSHA behave as if it were an imperial bureaucracy? There are two basic reasons:

The first reason is that the federal courts have effectively encouraged such behavior. They have held in cases such as *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), and *Auer v. Robbins*, 519 U.S. 452 (1997), that, if a statute or regulation is ambiguous, the courts must follow the agency's view so long as it is merely "reasonable," *even if the court concludes that the agency's view is wrong*. Agencies now happily see ambiguities everywhere, and almost never conclude that their positions are unreasonable. They are thereby emboldened to force the citizenry to shoulder the massive cost of proving their view unreasonable. Given the difficulty of proving an agency unreasonable (even when it *is* unreasonable), that is always a good gamble for the agency. As a result, an atmosphere of arrogance and lawlessness thrives among federal agencies. For more on this subject, I refer the Committee to—

- Materials supporting the "Separation of Powers Restoration Act of 2016," H.R. 4768 and S. 2724;

- A. Sapper and M. Baker, "Why Federal Agencies Run Amok," Forbes Online (April 14, 2014); and
- Prepared Statement and Testimony of Arthur G. Sapper before the Senate Subcommittee on Employment and Workplace Safety (May 10, 2005).

The second reason why OSHA behaves with such arrogance is that the Office of Management and Budget (through its Office of Information and Regulatory Affairs (OIRA)) appears to uncritically accept its statements that proposed regulations would not have a "significant" effect on the economy. As a result, OIRA did not review this proposal and, apparently, will not review the final rule before it comes out. This is inexcusable.

The reasoning on costs in OSHA's economic impact statement is so transparently illogical that even a casual analysis of it should have caused OIRA to question OSHA's representation that the proposal would not "[h]ave an annual effect on the economy of $100 million or more," one of the key criteria in Executive Order 12866, 58 Fed. Reg. 51735 (Sept. 30, 1993).

Moreover, the proposal met another key trigger in the Executive Order for OIRA review—that the proposal "[r]aise[s] novel legal … issues arising out of legal mandates." Not only would OSHA's proposal effectively overrule a court decision on the meaning of a *statute* that the court has already called "clear," but it would do so by merely amending a *regulation*. That obviously raises a "novel legal issue."

As a result of these failures by OSHA and OIRA, a final rule that would pointlessly drag employers into court and impose massive burdens on the economy is now looming on the horizon. The Committee might inquire into how OIRA review procedures should be changed to avoid this specter.

Thank you, and I am happy to answer any questions that you have.

Exhibit: Comments by A. G. Sapper, in Docket No. OSHA-2015-0006, "Clarification of Employer's Continuing Obligation To Make and Maintain an Accurate Record of Each Recordable Injury and Illness" (filed Oct. 27, 2015), available at https://www.regulations.gov/contentStreamer?documentId=OSHA-2015-0006-0014&attachmentNumber=1&disposition=attachment&contentType=pdf