THE
NATIONAL LAW REVIEW

Volks, Part III: OSHA Withdraws the Dead Volks Rule from the CFR. What Now?

Article By
Arthur G. Sapper
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
Our Insights

- Labor & Employment
- All Federal

Tuesday, May 9, 2017

On May 3, 2017, the final curtain was rung down on the *Volks* saga: OSHA revoked its so-called "*Volks* Rule," which would have amended the recordkeeping regulations in 29 C.F.R. Part 1904 to, it hoped, avoid the holding of the District of Columbia Circuit in *AKM LLC dba Volks Constructors v. Sec'y of Labor,* 675 F.3d 752 (D.C. Cir. 2012). That decision held that the Occupational Safety and Health Administration (OSHA) has six months, not five and a half years, after a recordkeeping violation to issue a citation. The removal was published at 82 Fed. Reg. 20548 (May 3, 2017).

OSHA had no choice but to do so, as Congress had passed and the president had signed a resolution under the Congressional Review Act disapproving of the amendments. That meant, according to that statute, that the amendments would "have no force or effect" and that they "may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued."

For more on the background of this controversy, see my previous blog posts here and

here.

Loose Ends?

Relitigation? Technically, the removal of the *Volks* Rule does not prevent OSHA from trying before other courts to relitigate the issue under the regulations as they stood when the D.C. Circuit's *Volks* decision was issued. This is, however, highly unlikely. First, it is highly unlikely that another court of appeals would disagree with *Volks*' view of the statute of limitations, especially since the Fifth Circuit in *Delek Ref., Ltd. v. OSHRC*, 845 F.3d 170 (5th Cir. 2016), announced that it agreed with it. Second, it is highly unlikely that other federal judges would disagree with the view of Judge Garland of the D.C. Circuit that, even if the statute would permit a continuing violation theory, the wording of the regulations does not.

"Continuing" Physical Violations? There is language in both the *Volks* and *Delek* decisions saying that OSHA could prosecute "continuing violations" such as unguarded machines and untrained employees. These passages ought not to concern employers, for those violations are by their nature embodied in currently violative physical conditions. That means that they are violations now and thus would be citable even if they were not called "continuing" violations.

Discovery Rule? There is language in both *Volks* and *Delek* suggesting that OSHA might effectively extend the limitations period by using the so-called "discovery rule." (That rule holds that statutes of limitations do not begin to run until a plaintiff knew or with reasonable diligence should have known of the claim.) The Supreme Court of the United States in *Gabelli v. Securities and Exchange Commission*, 568 U.S. 133 (2013), however, held that such a theory may not be used in federal civil penalty prosecutions.

What About State Plans? The California Occupational Safety and Health Appeals Board has held that it will follow *Volks* because, "We are persuaded that the *Volks* court's analysis is sound." *Key Energy Services, Inc.*, Cal/OSHA App., No. 15-R4D7-0255 and 0256 (October 7, 2016).

At least one OSHA-approved state plan, however, has taken the position that the *Volks* decision does not apply to it. Michigan's state plan has pointed to the wording of its limitations period, which is different than that of the federal Occupational Safety and Health Act (OSH Act). The Michigan statute requires the issuance of a citation "within 90 days after *the completion of the physical inspection*" (emphasis added)—not the "occurrence" of a violation. Washington State's OSHA statute of limitations is similar: "No citation may be issued . . . after the expiration of six months following a compliance inspection . . . revealing any such violation"—again, not an "occurrence." An employer might ask whether the federal OSHA regulation at § 1904.37(b)(1) would prevent such deviations. It states that, "State-Plan States must have the same requirements as Federal OSHA for determining which injuries and illnesses are recordable and how they are recorded." The state plans would probably argue that this addresses recording criteria, not enforceability under a statute of limitations.

Reporting Violations? As to *reporting* violations, i.e., failures to report injuries (as opposed to just recording them), California's Appeals Board has declined to follow

Volks. *Bellingham Marine Industries, Inc.*, Cal/OSHA App. 12-3144 (Oct. 16, 2014). It cited the federal OSH Act decision in *Yelvington Welding Service*, 6 BNA OSHC 2013, 1978 CCH OSHD ¶ 23,092 (OSHRC 1978), which held that the limitations period does not begin to run until a report is made or OSHA becomes aware of the accident.

The *Volks* case began in 2006 when OSHA opened an inspection of Volks. It is unfortunate that it took 11 years for the issue that it raised to be resolved.