

UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR,

Complainant,

OSHRC Docket  
No.: 98-0755 and  
98-1168

v.

AVCON, INC.; VASILIOS SAITES and NICHOLAS  
SAITES,

Respondents.

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SECRETARY OF LABOR,

Complainant,

v.

OSHRC Docket  
No.: 00-0958

ALTOR, INC., and/or AVCON, INC., and/or VASILIOS  
SAITES, individually, and  
d/b/a ALTOR, INC. and/or AVCON, INC.,  
and NICHOLAS SAITES, individually, and  
d/b/a ALTOR, INC. and/or AVCON, INC.,

Respondents.

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SECRETARY OF LABOR,

Complainant,

v.

OSHRC Docket  
No.: 00-1402

SHARON and WALTER CONSTRUCTION, INC.,

Respondent.

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**Respondents' Avcon, Inc., Vasilios Saites, Nicholas Saites and Altor Inc.'s  
Supplemental Brief**

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## TABLE OF AUTHORITIES

	<b>Page</b>
<b><u>Statutes</u></b>	
1 U.S.C. §5.....	6
29 U.S.C.A. § 652(5) .....	1
29 U.S.C.A. 659(c) .....	3
<b><u>Cases</u></b>	
<u>Atlantic &amp; Gulf Stevedores, Inc. v. OSHRC</u> , 534 F2d 541 (3 <sup>rd</sup> Cir. 1976).....	3
<u>Dale M. Madden Const. Inc. v. Hodgson</u> , 502 F2d 278 (9 <sup>th</sup> Cir. 1974).....	9
<u>DeWitt Truck Brokers v. W. Rey Flemming Fruit Company</u> , 540 F.2d 681 (4 <sup>th</sup> Cir. 1976).....	2, 14
<u>Dole v. HMS Direct Mail Service, Inc.</u> , 752 F.Supp. 753 (W.D.N.Y 1990).....	6
<u>Frohlick Crane Service, Inc. v. OSHRC</u> 521 F.2d 628 (10 <sup>th</sup> Cir. 1975).....	1
<u>Kent Nowlin Const. Co. v. OSHRC</u> , 648 F2d 1278 (10 <sup>th</sup> Cir. 1981).....	7, 13
<u>Mobay Corporation v. Allied Signal Inc.</u> , 761 F.Supp. 345 (D.N.J., 1991).....	1
<u>Northeastern Contracting Company</u> , 2 BNA OSHC 1539 (1975).....	9
<u>Potlatch Corp.</u> , 7 BNA OSHC 1061 (No. 16183, 1979).....	7
<u>Sebastopol Meat Co. v. Secretary of Agriculture</u> , 440 F.2d 983 (9 <sup>th</sup> Cir. 1971).....	9
* <u>Skidmore v. Travelers Ins. Co.</u> , 356 F.Supp. 670 (E.D. La. 1973) <i>aff'd</i> , 483 F.2d 67 (5 <sup>th</sup> Cir. 1973).....	2
<u>Stripe-A-Zone v. OSHRC</u> , 643 F.2d 230 (5 <sup>th</sup> Cir. 1981).....	3, 4
* <u>United States v. Best Foods</u> , 524 U.S. 51 (1998).....	8, 10
<b><u>Miscellaneous</u></b>	
Karnezis, Kristine Cordier <u>Who is "Employer" for Purposes of Occupational Safety and Health Act</u> , 153 A.L.R. Fed 303 (1999).....	1

*Piercing the Corporate Veil: The Alter Ego Doctrine Under Federal Common Law,*  
95 Harv. L. Rev. 853 (1982).....1, 9, 11

1. **The Occupational Safety and Health Review Commission does not have the authority, statutory or otherwise, to pierce the corporate veil of a corporation to hold individuals personally liable for violations of the Occupational Safety and Health Act.**

Section 3(5) of the Occupational Safety and Health Act ("the Act") defines an employer as "a person engaged in a business affecting commerce who has employees, but does not include the United States (not including the United States Postal Service) or any State or political subdivision of a State". (29 U.S.C.A. § 652(5)). Any employer employing one or more employees would be "an employer, engaged in a business affecting commerce, who has employees and, therefore, is covered by the Act." (See Karnezis, Kristine Cordier Who is "Employer" for Purposes of Occupational Safety and Health Act, 153 A.L.R. Fed 303 (1999)) In determining whether an individual or an entity is an "employer" under the Act, the Commission must consider whether a party has control of the workplace. (Frohlick Crane Service, Inc. v. OSHRC 521 F.2d 628 (10<sup>th</sup> Cir. 1975). The Act may not be applied to enlarge, diminish, or affect in any other manner any common law or statutory rights or duties of employers and employees.

The general rule is that a corporate entity should be recognized and upheld except in the most unusual circumstances. (See *Piercing the Corporate Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 Harv. L. Rev. 853 (1982)). In order to assess personal liability of corporate representatives, the Complainant must show that the corporate form was ignored or abused in order to pierce the corporate veil. In other words, the Court must be satisfied that some fraud or injustice has been proven before it can pierce the corporate veil. Mobay Corporation v. Allied Signal Inc., 761 F.Supp. 345 (D.N.J., 1991). A corporate veil will be pierced only when the corporation has been used to perpetrate fraud or in order to prevent an injustice.

DeWitt Truck Brokers v. W. Rey Flemming Fruit Company, 540 F.2d 681 (4th Cir. 1976) is instructive as to when it is permissible to pierce the corporate veil to impose individual liability on officers and or employees of a corporation and directs that only in instances where there exists gross under-capitalization, failure to observe corporate formalities, non-payment of dividends, the insolvency of a debtor corporation at the time, siphoning of funds of the corporation by the dominant stockholder, non-functioning of other officers or directors, absence of corporate records, should the corporate veil be pierced.

Accordingly, where there is a valid corporate employer and there are no facts upon which traditional veil piercing can be based, the Commission does not have authority to pierce the corporate veil to hold individuals personally liable for violations of the Act.

In the within matters, OSHRC Docket Nos.: 98-0755 and 98-1168, there was absolutely no proof that individual respondents, Vasilios or Nicholas Saites used the corporate respondents, Avcon or Altor, for personal motives, personal gain, or any fraudulent or wrongful act, and, in fact, the Administrative Law Judge recognized same. (See Rooney Decision. at p. 22). Furthermore, Judge Yetmen in Docket No. 00-0958, determined that the corporate entities, Avcon, Inc. and Altor, Inc. were the "employers".

Respondents rely on the litany of cases set forth in their Briefs to the Commission, in which Courts have held that individuals were not "employers" for purposes of the provisions of the Occupational Safety and Health Act. Specifically, Respondents rely on Skidmore v. Travelers Ins. Co., 356 F.Supp. 670 (E.D. La. 1973) *aff'd*, 483 F.2d 67 (5<sup>th</sup> Cir. 1973), wherein the Court reasoned that the Act applies only to employers and that nothing in it purports to impose any duty on employees of an employer, in holding that the duties imposed upon an employer under that Act does not imbue liabilities of

those duties upon officers or other employees of the employer. Congress did not intend to confer on the Secretary or the Commission the power to sanction employees, rather, the enforcement scheme is directed only against employers. Atlantic & Gulf Stevedores, Inc. v. OSHRC, 534 F2d 541 (3<sup>rd</sup> Cir. 1976).

Finally, Section 10(c) of the Act authorizes the Commission to "issue an order based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, *or directing other appropriate relief*." 29 U.S.C.A. 659(c) (emphasis added). The Fifth Circuit in Stripe-A-Zone v. OSHRC, 643 F.2d 230 (5<sup>th</sup> Cir. 1981), concluded that the phrase "directing other appropriate relief" can refer only to those OSHRC decisions which order remedial measures after a determination on the merits of the allegations that the Act has been violated. Id., at 233.

The phrase "other appropriate relief" authorizes the Commission to issue orders directing other appropriate relief against an employer; not to relief against employees who disregard safety standards or Commission order. Atlantic & Gulf Stevedores, Inc. v. OSHRC, 534 F2d 541 (3<sup>rd</sup> Cir. 1976). In so holding, the Court stated

Nor do we believe that the language in § 10(c) authorizing the Commission to issue orders "directing other appropriate relief" can be stretched to the point that it includes relief against employees. Rather, the generality of that language must be deemed limited by its context relief in connection with the Secretary's citation. The Secretary appears not to have authority to issue a citation against an employee, and the Commission's powers cannot be any broader. "Other appropriate relief" refers to other appropriate relief against an employer.

Id., at 554.

Accordingly, §10(c) of the Act does not expand this Commission's authority to allow it to pierce the corporate veil of a decidedly valid corporation in order to impose individual liability.

2. **The Act does not empower the Commission to extend a remedial order entered against a cited employer to a successor or alter ego of that employer, unless a final determination on the merits has been made that an individual is a successor or alter ego of the corporation.**

It has been established that §10(c) of the Act can refer only to those OSHRC decisions which order remedial measures after a determination on the merits of the allegations that the Act has been violated. Stripe-A-Zone, supra. Therefore, in order for the Commission to extend a remedial order entered against a cited employer to a successor or alter ego under §10(c) of the Act, a determination on the merits must be made that the employer is guilty of the alleged violation and that an entity or individual is a successor or alter ego of the employer.

With respect to individual respondents, Vasilios Saites and Nicholas Saites in the instant matter, as is set forth in great detail in Respondents' respective Briefs, absolutely no evidence exists in the record to make a determination that either Vasilios or Nicholas Saites are the alter egos of corporate respondents, Avcon, Inc. or Altor Inc. Avcon, Inc. is a closely held concrete construction company owned by Cornelia Saites and Vasilios Saites, who is the president as well as a director of the corporation. Nicholas Saites, is a mere employee of Avcon. The record is rife with evidence that the workers considered Avcon their employer; that Avcon paid the workers' wages and fringe benefits pursuant to collective bargaining agreements; that Avcon foremen had the responsibility to control their workers; that according to union regulations, only the foremen and shop stewards had the

power to control the workers; and that the workers had no ability to increase their income because their wages were established by the union through the collective bargaining agreement.

Furthermore, with respect to Docket No. 00-0958, respondent, Avcon, Inc. was the subcontractor of Altor, Inc. Altor, Inc. is a New Jersey Corporation, of which individual respondent, Vasilios Saites is the President and sole director. However, he is not a shareholder of Altor. Individual respondent, Nicholas Saites is not, nor was he ever, an employee, shareholder or officer of Altor, Inc. There is ample testimony in the record that neither Avcon nor Altor were incorporated in order to avoid their responsibilities under the OSHA Act. Rather, they are legitimate corporate entities.

Moreover, the corporate respondents, Altor, Inc. and Avcon, Inc. were separate employers. The two corporations did not share a common worksite, their operations were not interrelated or integrated, nor did they share common supervision or ownership in order to make one the "alter ego" of the other. .

The record before this Commission is devoid of any basis upon which to make a determination that individual respondents, Vasilios Saites and Nicholas Saites are the alter egos of corporate respondents, Avcon, Inc. and/or Altor, Inc. or that Avcon or Altor exist as the alter egos of each other.

Accordingly, the Commission cannot extend a remedial order entered against the corporate respondents to the individual respondents or from one corporate respondent to the other under a "alter ego" theory of liability.

3.

**The definition of a "person" in §3(4) of the Act may include the successor of a cited employer pursuant to 1 U.S.C. §5**

1 U.S.C. §5 explains that the word "company" or "association", when used in reference to a corporation, shall be deemed to embrace the words "successors and assigns of such company or association", in like manner as if these last-named words, or words of similar import, were expressed." The definition of a "person" under § 3(4) of the Act is "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives or any organized group of persons." As aforementioned, the Act defines an employer as a "person engaged in a business affecting commerce who has employees..."

A successor of a corporation takes that entity pursuant to any remedial measures already in place. Successor corporation liability can be imposed under OSHA where the alleged violator sold or transferred its entire operation to another entity, which, in essence, merely continued business using same premises, machinery, employees and supervisory personnel. Dole v. HMS Direct Mail Service, Inc., 752 F.Supp. 753 (W.D.N.Y 1990) Under the foregoing analysis, if a valid transfer of the entire operation of a corporate entity is made, the successor will be liable for any OSHA violations of the previous entity.

There are no allegations in the within matter of successor liability against these respondents.

4. **Section 17(a) of the Act cannot be interpreted as authorizing successor or alter ego liability for a repeat violation.**

The purpose of §17(a) of the Act is to punish an employer who willfully or repeatedly violates regulations by assessing a civil penalty for each violation. Kent Nowlin Const. Co. v. OSHRC, 648 F2d 1278 (10<sup>th</sup> Cir. 1981). Congress intended to permit enhanced penalties when employers permit violations of the same standard to occur several times. Id. There is absolutely nothing in the language of the Act, nor has it previously been interpreted to authorize successor or alter ego liability. Rather, Courts and the Commission have focused on the remedial nature of the Act.

Applying the standard promulgated in Potlatch Corp., 7 BNA OSHC 1061 (No. 16183, 1979), in order to constitute a violation under Section 17(a) of the Act, a violation must be repeated and at the time of the alleged repeated violation, there must be a final order by the Commission against the same employer for a substantially similar violation. Potlatch at 1063. As aforementioned, a successor of a corporation takes that entity pursuant to any remedial measures already in place. Accordingly, if a successor willfully or repeatedly violates the requirements of the Act, even though prior violations were committed by the predecessor corporation, a civil penalty may be imposed against the successor for a willful or repeated violation.

In order to impose a civil penalty against the “alter ego” of a corporation, it must first be established that the individual or entity charged was, in fact, acting as the alter ego of the corporation alleged to have violated the Act. Once again, in order to make such a finding and hold the individual respondents liable for the corporate respondents' alleged conduct, the corporate form would need to have been misused to accomplish

certain wrongful purposes, most notably fraud. United States v. Best Foods, 524 U.S. 51 (1998)

Here, the Administrative Law Judge, in Docket No. 00-0958 correctly found that the "Secretary has provided no authority and none has been found to support the conclusion that the Review Commission has the authority to pierce the veil of a lawful viable corporation or, in the event that such action is taken, that the federal district court is bound by such a finding either by *res judicata*, judicial notice, comity or otherwise in a subsequent action to recover debt...", and dismissed the Secretary's Complaint against individual respondents, Vasilios and Nicholas Saites. (See Yetman Decision at pages 6-7)

In addition to OSHA's failure to establish that the individual respondents were acting as the alter egos of the corporate respondents in the instant matters, the individuals were never previously cited for the same alleged violations in order to rise to the level of a willful violation. Indeed, in Docket Nos. 98-0755 and 98-1168, OSHA failed to cite the individuals for any violations within six (6) months from the date of the inspection as is required under the Act.

Furthermore, the Secretary failed to set forth any evidence whatsoever that the alleged violations of the corporate respondents were willful. Neither of the corporate respondents, Avcon, Inc. nor Altor, Inc. refused to abate and remediate the cited safety deficiencies. The record before Judge Rooney in Docket Nos. 98-0755 and 98-1168 clearly established that Respondents' employees, performing leading edge work, found traditional fall protection methods infeasible. Indeed, a guardrail system was installed on the top deck and respondents' workers were told to tie off where feasible. The fact that OSHA and Respondents disagree as to the feasibility of alternative fall protection methods does not

create any indicia of willfulness that the law requires. (See Northeastern Contracting Company, 2 BNA OSHC 1539 (1975)).

In Docket No. 00-0958, Judge Yetman erred in not dismissing the Secretary's allegations of willful hard-hat and fall protection violations, since same were not supported by sufficient credible evidence. The record is clear that Avcon did, indeed, have a hard-hat policy in place and it was enforced by the foremen and shop stewards on the jobs. In fact, there was testimony at trial that in the past, employees were fired for not complying with Avcon's hard hat policy. Furthermore, OSHA's own employees testified at trial that Avcon employed guardrail systems at the sites. Even a video of the projects depicts the guardrail and stanchions in place.

Accordingly, the within respondents cannot be liable for willful or repeat violations as is contemplated by §17(a) of the Act.

5. **Absolutely no policy of OSHA would be served by piercing the corporate veil or by extending the Commission's remedial orders to successors and alter egos, rather, the due process rights of the individual respondents for protection from personal liability would be frustrated.**

The controlling purpose of the Act is to reduce safety hazards and improve working conditions. Dale M. Madden Const, Inc. v. Hodgson, 502 F.2d 278 (9<sup>th</sup> Cir. 1974). In order to meet that end, it is the duty of the Secretary to take remedial measures to insure workplace safety, **not** to collect fines. In fact, courts have been reluctant to pierce a veil when monetary damages are sought. (See Piercing the Corporate Veil: The Alter Ego Doctrine Under Federal Common Law, 95 Harv. L. Rev. 853, 868 (1982)).

In an attempt to resolve state law limitations on veil piercing and the scope of remedial orders under federal regulatory statutes, the Ninth Circuit in Sebastopol Meat Co. v. Secretary of Agriculture, 440 F.2d 983 (9<sup>th</sup> Cir. 1971) explained that

...when interpreting a statute the aim of which is to regulate interstate commerce and to control and outroot some evil practices in it, the courts are not concerned with the refinements of common-law definitions, when they endeavor to ascertain the power of any agency to which the Congress has entrusted the regulation of the business activity or the enforcement of standards it has established.

That case differs in its facts, but is authority for the power of the federal government to insure that federal regulations will not be thwarted by continued unlawful conduct.

A better analysis in conjunction with the instant matters is United States v. Best Foods, 524 U.S. 51 (1998), wherein the United States brought an action under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") against parent corporations of chemical manufacturers for costs of cleaning up industrial waste generated by a chemical plant. The Supreme Court held, *inter alia*, that a parent corporation may be held liable under CERCLA for its subsidiaries' actions based on CERCLA's operator provision. The most notable distinction between that case and the instant matters is that CERCLA, unlike the OSH Act, has a provision for individual liability built into it. The Court in Best Foods, *supra*, recognized that CERCLA

gives no indication that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute, and the failure of the statute to speak to a matter as fundamental as the liability implications of corporate ownership demands application of the rule that in order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law.

Best Foods, at 63. The Court further noted that the "failure of a [federal] statute to speak to a matter as fundamental as the liability implications of corporate ownership demands application of the rule that '[i]n order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law.' *Id.* at 63 (quoting United States v. Texas, 507 U.S. 529 (1993)).

Unlike CERCLA, the OSH Act does not specifically provide for corporate veil piercing to impose personal liability upon individuals. Congress' intent with regard to personal liability for corporate officers of a corporation is not directly addressed in the legislative history of the Act, however, vast case law evidences that Congress *did not* intend to provide for personal liability of corporate officers. (See case law set forth in Respondents' Brief in Docket No. 00-0958 at pages 21-25) In those instances that Congress did intend to imbue personal liability for corporate officers, Congress specifically enacted laws providing for such liability. (Id.)

In light of the foregoing, in addition to the established, stringent standards for piercing the corporate veil under New Jersey law as is set forth at length in respondents' respective briefs, federal common law must also be examined. The test for veil piercing under federal common law is similar to New Jersey law, that is, that it must be determined whether the corporation was created for a legitimate business purpose or primarily for evasion of a federal policy or statute. (*Piercing the Corporate Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 Harv. L. Rev. 853 (1982)). "The true objective of the test is to see whether a violation of federal law has resulted from an abuse of the corporate form, not to use the violation as an excuse to justify piercing the corporate veil." (Id., at 870).

In order for this Commission to pierce the corporate veil to impose individual liability in the instant matters, it would have to rely on some as yet heretofore undefined legal standard which has not exactly been articulated, announced or decided, and which does not reach the level of fraud proven by clear and convincing evidence to pierce a corporate veil and find a stockholder or employee personally liable.. Respondents assert that no such lessened individual liability standard exists under the OSHA Act to hold an individual

personally liable as an "employer" for civil penalties where there is a valid corporation. To do so would contravene the purposes of the Act, remediation of safety violations, and would impose upon an individual such heightened liability as to chill competition and economic vigilance in the construction industry.

Accordingly, it is not the purpose of the Act to act as a profit center for fine collection. Clearly, the corporations at issue in these cases were not established to create OSHA violations; in contradistinction, they had safety programs and have legitimate arguments with OSHA with respect to certain fall protection/leading edge issues. Most important is that neither Avcon nor Altor refused to abate and remediate the cited safety deficiencies. Since OSHA's legislative policy is to promote workplace safety, remedial action is the called for response, and where, as here, the corporations acceded, there is no basis to pierce the veil.

6. **As a predicate to imposing liability on individuals pursuant to either a successor or alter ego theory under the Act, the Secretary must first establish by clear and convincing evidence that individuals are, in fact, successors or alter egos of the cited corporate entity.**

As is set forth above, a successor takes a corporate entity pursuant to all remedial measures already in place, whereas, under an alter ego theory, the alter ego may be liable under certain circumstances in which it is shown that two corporations or an individual and a corporation existed as a single entity. Before liability can be imposed under either theory however, a determination on the merits must be made that an individual is a successor or alter ego of the employer.

With respect to the instant respondents there is no allegation of successor liability. However, the Secretary does, albeit futilely, attempt to establish alter ego liability,

alleging that Altor and Avcon were a single employer. The Secretary's assertions are in error. The two corporations did not share a common worksite, their operations were not interrelated or integrated, they did not share common supervision or ownership, nor was Avcon a subsidiary of Altor in order to make one the "alter ego" of the other.

The Administrative Law Judge Yetman recognized the foregoing in his opinion wherein he states that, "Complainant does not allege that Altor, Inc. is a responsible party under the multi-employer worksite theory; that is, no exposed employee was employed by Altor, nor did any representatives of that firm control the worksite in relation to work performed by Avcon employees." (See Yetman Decision, at 3).

Accordingly, any remedial action by the Secretary must be directed only to Avcon, as there is no basis for finding liability against Altor or the individual respondents.

7. **Section 17(1) of the Act in no way affects the Commission's need to consider piercing the corporate veil, successor liability, or alter ego liability.**

Section 17(1) of the Act was enacted to impose penalties against any employer who willfully or repeatedly violates regulations and to permit enhanced penalties when employers permit violations of the same standard to occur several times. Kent Nowlin, supra. It is in no way necessary to pierce the corporate veil or impose successor or alter ego liability in order to meet this end. To consider such theories of liability is merely the Secretary's way of attempting to insure fine collection, not workplace safety.

By way of repetition, in order to impose a civil penalty, *vis a vis*, piercing the corporate veil to attach liability to an individual, a successor or the "alter ego" of a corporation, it must first be established that veil piercing is warranted or that the individual or entity charged was, in fact, the successor or the alter ego of the corporation alleged to have violated the Act.

In his Decision and Order in Docket No.: 00-0958, the Administrative Law Judge Yetman determined that he lacked the authority to decide whether the corporate veil should be pierced and rightly declined to engage in a "premature and extrajurisdictional act." (See Yetman Decision at page 6). In reaching his conclusion, Judge Yetman correctly found that the "Secretary has provided no authority and none has been found to support the conclusion that the Review Commission has the authority to pierce the veil of a lawful viable corporation or, in the event that such action is taken, that the federal district court is bound by such a finding either by *res judicata*, judicial notice, comity or otherwise in a subsequent action to recover debt...", and dismissed the Secretary's Complaint against Vasilios and Nicholas Saites, individually. (See Yetman Decision at pages 6-7)

Furthermore, there is no basis upon which to conclude that either Altor or Avcon was acting as the alter ego of the other.

8. **The Commission may only pierce the corporate veil to impose individual liability in unique circumstances which are not present in the instant matters.**

Traditional concepts of veil piercing require a showing of gross undercapitalization, failure to observe corporate formalities, non-payment of dividends, the insolvency of a debtor corporation at the time, siphoning of funds of the corporation by the dominant stockholder, non-functioning of other officers or directors and the absence of corporate records. DeWitt Truck Brokers v. W. Rey Flemming Fruit Company, 540 F.2d 681 (4th Cir. 1976) None of the requisite factors are present in the instant matters, thus the Commission does not have authority to pierce the corporate veil. Here, the corporate entities were not undercapitalized, there is absolutely no evidence of fraud or that any corporate formalities were ignored. Indeed, corporate records were kept, the corporations filed tax returns and paid wages and benefits.

Based on all of this evidence as presented at trial, Judge Yetman correctly determined that it is not the responsibility of the Review Commission to determine personal liability. Rather, as he opined "it is the responsibility of determining, based upon the evidence, the identity of the employer of exposed employees..." (See Yetman Decision at page 5) In the instant matters, Avcon was the "employer" and, therefore, there is no need to look to the individual respondents, as mere employees, to guaranty payment of alleged OSHA violations.

Accordingly, the record in the within matters does not present any evidence that would warrant a piercing of the corporate veil to impose liability upon individual respondents, nor does the record establish alter ego liability.

**Conclusion**

For all the foregoing reasons, as well as those set forth in Respondents' Briefs to the Commission, Respondents respectfully request that the the Review Commission reverse the Decision and Order of the Honorable Covette Rooney, dated August 15, 2000 and dismiss all citations with prejudice with respect to Docket Nos. 98-0755 and 98-1168 and that the Review Commission affirm in part and reverse in part Judge Yetman's Decision and Order accordingly with respect to Docket No. 00-0958.

Respectfully submitted,

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Dated: February , 2004

**CERTIFICATE OF SERVICE**

I certify that on February 27, 2004, I served a copy of Respondents' Avcon, Inc.,  
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