

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

AVCON, INC., VASILIOS N. SAITES,
and NICHOLAS SAITES,

Respondents.

OSHRC DOCKET NOS.:

98-0755

98-1168

Consolidated Matters

RESPONDENTS' BRIEF

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This Brief is submitted in support of Respondents' Petition to reverse the Decision and Order of the Honorable Covette Rooney, dated August 15, 2000. The standard of review which applies is whether Judge Covette Rooney abused her discretion in finding that the Secretary's position was substantially justified and whether Judge Rooney abused her discretion by affirming the alleged violations under the circumstances of this case. The standard of proof in Commission proceedings is "preponderance of the evidence." See Trumid Constr. Co., 14 BNA (OSHC 1784 (1990)), citing Astra Pharmaceutical Prods., 9 BNA (OSH 2126, 2131 (1981)). Accordingly, to determine whether the Secretary proved her case by a preponderance of the evidence, the Review Commission must reexamine the underlying merits of the case.

Respondents respectfully submit that the Decision and Order should be reversed on the following grounds:

1. **JUDGE ROONEY ERRED IN AFFIRMING THE ALLEGED VIOLATIONS IN DOCKET NOS. 98-0755 AND 98-1168 WITH RESPECT TO THE TWO INDIVIDUAL RESPONDENTS, VASILIOS N. SAITES AND NICHOLAS SAITES**
 - a. **Judge Rooney erred in denying Respondents' March 23, 1999 Motion to Dismiss Claims Against Vasilios N. Saites and Nicholas Saites because the Occupational Safety and Health Review Commission lacked jurisdiction and statutory authority to adjudicate claims against Vasilios N. Saites and Nicholas Saites.**

Judge Rooney committed reversible error by allowing the Secretary of Labor to amend her Complaint to include the individual Respondents, Vasilios N. Saites and Nicholas Saites, more than six months after the alleged occurrence of the violations set forth in the Amended Complaint. Such amendment is barred under section 9(c) of the Occupational Safety and Health Act of 1970 ("the OSHA Act"), 29 U.S.C. § 658(c) and is further impermissible under Fed. R. Civ. P. 15(c)(3).

29 U.S.C. § 658 (c) governs the time for issuance of citations by the Secretary of Labor for violations of the OSHA Act and states, "**No citation may be issued under this section after the expiration of six months following the occurrence of any violation.**" (emphasis added). Noncompliance with six-month limitations period contained in 29 USCS § 658(c) may be raised as defense in contest proceeding. See Secretary of Labor v Kaspar Electroplating Corp. 16 BNA (OSHC 1517, (1994)) The Third Circuit has given credence to the rule in Bloomfield Mechanical Contracting, Inc. v. Occupational Safety and Health Commission, 519 F.2d 1257 (1975), when it ruled that the Occupational Safety and Review Commission did not have jurisdiction over a party that was not named in the original Complaint which sought to affirm certain citations and therefore could not join it as a party defendant because the Secretary did not issue a new citation, file and serve an amended citation or file an Amended Complaint within the statutory six (6) month limitation period.

Bloomfield Mechanical Contracting, Inc., has essentially the same procedural history as the instant one. There, the Secretary issued citations against Bloomfield Mechanical Contracting, Inc., which was one member of a joint venture named, "Bloomfield-Bloomin Joint Venture" for violations that allegedly occurred on November 21, 1972. The Secretary then filed a formal Complaint with the Commission against Bloomfield alleging the violations and requesting affirmance of the citations and proposed penalties. Within six (6) months of the occurrence of the alleged violations, as required under 29 U.S.C. 658 (c), the Secretary's moved to amend its Complaint against the joint venture which motion was granted. The Secretary, however, did not file its Amended Complaint until June 6, 1973, which was sixteen (16) days after the six (6) month time period expired. In holding that the Occupational Safety and Health Review Commission did not have jurisdiction over the joint venture, the Court stated:

It is the citation that serves as the statutory vehicle for notice of the violation, 29 U.S.C. §658(a), and it is the notice of the proposed penalty which serves as the process which triggers the penalty enforcement mechanism. 29 U.S.C. § 659(a) and (b). Provision for the issuance of a Complaint is not even expressly mentioned in the statute. See 29 U.S.C. § 659(c). The Complaint procedure is a creature of administrative regulation, 29 C.F.R. §2200.33, and the regulations recognize the necessity for amending the citation. 29 C.F.R. §2200.33(3). In this case, **the Secretary failed to amend the Complaint until after the statute of limitations had run and failed to amend the citation at any time. Thus we conclude that no service of process contemplated by the act was made upon the joint venture within the period permitted by 29 U.S.C. §658(c).** [Emphasis Added]

In the case at bar, the Secretary **never** issued a citation to either Vasilios N. Saites or Nicholas Saites; **did not** amend the citations against Avcon to name the individual respondents; **did not**, in violation of 29 U.S.C. §659(a), address a notice of the proposed penalties to the individual defendants; **did not** name the individual Respondents in her Complaint to affirm the citations. The Secretary **did not even seek to amend** the Complaint to join Vasilios N. Saites and Nicholas Saites as individual defendants until well after the six (6) month limitation within which to issue *citations* had expired. Citations were issued to Avcon, Inc. on April 7, 1998 for alleged violations that last occurred on January 7, 1998. Subsequently, citations were again issued to Avcon on June 23, 1998 for alleged violations that last occurred on May 12, 1998. The Secretary did not move to amend the citations to name the individual defendants until November 20, 1998, which was more than six (6) months after the last violations were allegedly committed by Avcon. The Secretary never issued citations to Vasilios and Nicholas Saites at the time of any alleged violations, nor did she amend any of the citations to name them personally. The first "notice " they received of such intention was the filing of the motion to assert personal claims against them, which was dated November 20, 1999, more than six (6) months after the last citations were allegedly committed by Avcon. Therefore, the Court does not have jurisdiction

pursuant to 29 U.S.C. 658(c) and the Amended Complaints against Vasilios and Nicholas Saites must be dismissed with prejudice. The jurisdictional requirement of 29 U.S.C. 658(c) cannot be waived.

As stated in Bloomfield Mechanical Contracting, Inc., supra, it is the issuance of the citation and notice of the proposed penalties that acts as service of process and confers the Review Commission with jurisdiction over a defendant. In the present case, the first "notice" that the individual Respondents received of the Secretary's intention was the filing of her Motion to assert personal claims against them which was dated November 20, 1999. The hallmark of this statute is to afford the parties who are alleged to have committed violations a fair opportunity to prepare their defense. Thus, the Saites were not accorded due process under the law and any ruling against them must be vacated.

The individual Respondents never waived the jurisdictional defect of the Secretary's failure to serve citations upon them individually. In Bloomfield Mechanical Contracting, Inc., supra, the Court ruled that the Joint Venture did not waive the jurisdictional defect by answering the Amended Complaint. Id. The Court ruled that since the Secretary could have taken appropriate steps to timely serve the Joint Venture within the six (6) month limitation period, but neglected to do so, there was no basis for any assertion that one member of the Joint Venture misled the Secretary so as the cause of tolling of the running of the statute of limitations. Id. Thus, there was no basis for estopping the Joint Venture from pleading the statutory bar.

Furthermore, the Commission Rules allow affirmative defenses to be plead up to the time of the Pre-Hearing Conference. It is only after the time of the Pre-Hearing Conference that waiver of an affirmative defense can be asserted. 29 U.S.C. § 2200.207.

Based on the foregoing, on March 23, 1999, respondents moved to dismiss the Complaint against them for lack of jurisdiction. In support of their motion, Respondents relied on the deposition testimony of several OSHA workers, which clearly established that OSHA was aware of the requirement in 29 U.S.C. § 658, which mandates that all citations must be issued or amended within six (6) months of the alleged occurrence of the violations. The record reflects that OSHA did not issue citations or notices to the individual Respondents, did not amend the citations to include them, or even amend the Complaint in this matter within the six month time frame, despite ample opportunity (and knowledge) to do so based on facts adduced during discovery. The Saites never acquiesced to their joinder in this case. Pursuant to 29 U.S.C. § 658 and Bloomfield Mechanical Contracting, Inc., supra., the claims against the individual Respondents were time barred and should have been dismissed with prejudice.

Notwithstanding the controlling law, Judge Rooney denied Respondents' motion to dismiss. Not only was the Court's decision in direct contravention of 29 U.S.C. § 658(c) and the precepts of Bloomfield Mechanical Contracting Inc., supra, but it was without any explanation of the basis of its opinion.

Additionally, Fed. R. Civ. P. 15 (c) is not applicable and could not be used as a mechanism to bootstrap the Saites as parties to cure the Secretary's error. The Rule provides in pertinent part:

The amendment changes the party or the naming of a party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the Summons and Complaint, the party to be brought in by amendment (A) had received such notice of the institution of the action, that the party will not be prejudiced in maintaining a defense on the merits and (B) knew of or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.[Emphasis added]

The purpose of the Rule is to ameliorate the effect of a statute of limitations where the Complainant (or plaintiff) has sued the wrong party. See Bloomfield Mechanical Contracting, Inc., supra at 1262. The Secretary seeks The Rule cannot be used to cure a jurisdictional defect, contrary to statute, which is essentially what OSHA did in this case. Avcon, not Vasilios and Nicholas Saites was named in the original Complaint. There was no "mistake" concerning the identity of the proper party. The Secretary does not aver that she sued the *wrong* party, rather she attempts to add parties that she was well aware of at the time of the filing of the original Complaint, but failed to name.

F.R.C.P. 15(c) is not applicable because in the present case, the Secretary did not initially file a Complaint against the wrong party; she was not seeking to change the party designation; and she was not seeking to simply change the name of the party. Rather, the Secretary moved to amend the Complaint to add the individual Respondents as *new* parties, based on *new* theories, while still retaining Avcon, the originally named Respondent as a party.

Moreover, the Secretary did not show that the failure to name Vasilios and Nicholas Saites in the original Complaint was the result of some "mistake " concerning the identity of the proper party as is required by Rule 15 (c)(3). This is inexcusable. There is no indication that the Secretary was ever mistaken as to the identity of Avcon, Inc., Vasilios N. Saites or Nicholas Saites.

Indeed, the Secretary misled the Court in her papers seeking to amend the Complaint. Conspicuously, the Secretary did not bring all the facts, most notably, all relevant dates to the attention of the Court when filing her motion to amend the Complaint. As a result, the motions were improperly granted and the Saites were wrongfully and maliciously named as parties.

For all of the foregoing reasons, Judge Rooney erred in failing to sustain the individual Respondents contentions that the Secretary of Labor's amendment of her Complaint to allege violations on the part of the individual Respondents was (i) barred under Section 9(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 685(c) and (ii) was not permissible under F.R.C.P. 15(c)(3).

Accordingly, based on the law and the facts at bar, the Review Commission must reverse the decision of the Honorable Covette Rooney, which denied the Respondents March 23, 1999 motion to dismiss claims against them, and the Commission must vacate the judgment entered against the individual respondents.

- b. **Judge Rooney erred in finding that Vasilios and Nicholas Saites were "employer[s]" of the affected employees under the statutory definition set forth at section 3(5) of the OSH Act, 29 U.S.C. § 652(5).**

The Court abused its discretion and committed reversible error by improperly expanding the definition of "employer" under the OSHA Act, 29 U.S.C. § 652(5) and finding that Vasilios N. Saites and Nicholas Saites were individually liable with regard to each and every violation affirmed in this case. The Secretary failed to proffer evidence to support any conclusion that Vasilios Saites and Nicholas Saites were "employers" within the meaning of the OSHA Act at 29 U.S.C. §652(5). For purposes of the Act, 29 U.S.C. § 652(5) defines an "employer as a "person engaged in a business affecting commerce who has employees but does not include the United States . . ." The Court erroneously concluded that personal liability could be obtained against Bill and Nick by relying on inapplicable and distinguishable authorities.

In its Decision, the Court noted that the existence of a corporate entity does not shield its officers and directors from personal liability where they exercise full control over the working conditions of the corporation's employees and have the authority to abate violations of the Act.

However, the facts of the within matter clearly indicate that the individual Respondents did not exercise full control over the working conditions of Avcon's employees, nor did they have the sole authority to abate violations of the Act. Therefore, they could not, by any stretch of the definition, be considered "*employers.*"

Avcon, Inc. is a closely held concrete construction company owned 51% by Cornelia Saites ("Cornelia") and 49% by individual Respondent, Vasilios Saites ("Bill"). (Tr29:2-4) Bill is the president as well as a director of the corporation. Individual Respondent Nicholas Saites ("Nick"), is not, and never was, a director, officer or stockholder of Avcon. (Tr04:8-19) He does not operate Avcon as a sole proprietorship, or as a partnership with his father, Bill. (Tr204:20-25) Nick is and always was a mere employee of Avcon, who performed layout engineering work. (Tr203:1-5) The company was incorporated in 1997 by Nick who is an attorney admitted to practice law in the State of New Jersey. (Tr28:5) It was formed as a minority business enterprise with Cornelia as the majority owner since Nick was aware that the funding for the project that was to be performed by Avcon, the Excelsior II project in Hackensack, New Jersey ("the Project") would be HUD funded and therefore it would require a minority business enterprises. (Tr47:11-13; 20-21) The company was established to perform concrete work at the project and therefore entered into collective bargaining agreements with unions that would be performing the work. Specifically, Avcon entered into contracts with the Carpenters Union, the Ironworkers Union, the Laborers Union, the Operating Engineers Union and the Masons Union. (Tr61:23-25)

Both Bill and Nick had extensive experience in the concrete construction industry. Corporations with which they have been associated have constructed over 200 high rise poured in place reinforced concrete structures. It is notable that none of these 200 projects involved any

serious injuries or deaths. Both Nick and Bill testified that safety was an important factor in the day-to-day activities of Avcon, Inc. at the project.

Both Nick and Bill testified that Avcon was not formed to perpetuate fraud on creditors, or any such injustice. (Tr222:28-223:9) They both testified that none of their personal expenses were paid through the corporation. (Tr201:1-6) All corporate forms and filings were made for the corporation by Bill or the company's attorney. (Tr210:7-11) The Secretary produced no witnesses in connection with any alleged commingling of funds or misuse of the corporate form.

Nick testified that he had no ability to write checks for Avcon; this was solely Bill's responsibility. Avcon had a signature stamp for Bill wherein any check under \$1,500.00 could be signature stamped. Both Bill and Nick testified that they did not purchase all the materials for the corporation; in fact, the foremen were authorized to purchase materials directly. (Tr149:22-25) In addition, the office staff purchased all of the office supplies.

The Court even acknowledged that "Only an employer can be found responsible for violations that affect the safety and health of its 'employees,' ie. those with whom a party has an employment relationship." (p. 9 of Decision, citing Van Buren-Madawaska Corp., 13 BNA OSHC 2157, 2158 (No. 87-124, 1989) Both Nick and Bill testified that there was no direction to Avcon employees to violate OSHA regulations or safety procedures. All Avcon employees were union employees and were paid by Avcon checks, and all those employees that testified knew that Avcon, not Bill or Nick, was their employer. Thus, Bill and Nick cannot possibly be considered "employers" under 29 U.S.C. § 652(5) and therefore cannot be held personally liable.

1) **Piercing the Corporate Veil/ Alter Ego Theories**

As a predicate to assessing 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. Coier v. Henner, 90 F. Supp. 872 (D.N.J., 1995). In order to prove fraud, the proponent must show by clear and convincing evidence, facts necessary to support the cause of action. (See, for example, Baldassarre v. Butler, 254 N.J.Super. 502, 521 (App. Div. 1992)).

Here, there was absolutely no proof that Bill or Nick used the corporate Respondent, Avcon, for personal motives, personal gain, or any fraudulent or wrongful act. Judge Rooney so concluded (Dec. at p. 22). It has been said that personal liability may only be imposed upon a controlling stockholder of a close corporation where the stockholder disregards the corporate form and utilizes the corporation as a vehicle for committing equitable or legal fraud. See, Marascio v. Campanella, 298 N.J.Super., 491 (App. Div. 1997). In addition, the fact that a closely held corporation is owned by one or two shareholders or family members is not, in and of itself, sufficient to undermine the corporate identity and the general rule of limited liability. Coppa v. Taxation Division Director, 8 N.J. Tax, 236 (N.J. Tax 1986).

The Secretary produced no witnesses, other than Bill and Nick, to testify about the Respondent's corporate structure. The Secretary elicited no testimony as to Bill or Nick's "misuse" of the corporation to commit fraud on creditors; or any other such malfeasance, because such evidence does not exist. Indeed, both Bill and Nick testified to the contrary. Avcon's payroll records with regard to union employees were placed into evidence. (Exhibit R-21). Testimony was elicited that all employees were paid by Avcon check and there was no payment by cash or in kind. Bill did testify that at Christmas time, Avcon provided its union workers with a small Christmas gift, but that would hardly qualify as a fraudulent act; rather an act of kindness.

Individual Respondents cannot be held personally liable unless clear and convincing evidence can be demonstrated to pierce Avcon's corporate veil. Indeed the evidence presented points to the contrary. No "fraud" was proven by the Complainant by clear and convincing evidence, or any evidence whatsoever. Judge Rooney exhibited deliberate indifference to the

respondents. The conclusions reached by the Court on the issue of personal liability were fallacious and mere conjecture, and, therefore, must be reversed..

2) **A New OSHA Standard For Finding Individual Liability In Connection With Civil Penalties Under The Act.**

In its Decision, the Court relied upon an undefined, unpublished theory 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 Bill and Nick personally liable. The assessment of direct individual liability against Nick, an employee, is even more unsupportable. 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 which employs union workers at a job site, who are alleged to violate the Act, but where there are no deaths. 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.

Respondents' research uncovered only three cases which in any way suggest the ability of OSHA to assert a claim against an individual, however, these cases are factually and legally distinguishable from the case at bar. Nonetheless, Judge Rooney abused her discretion by not applying precedential case law. In contradistinction, the majority of cases which are similar to this case do not find individual employer liability vested in corporate representatives for OSHA civil penalties.

3) **Distinguishable Cases Where Individuals Are Held To Be "Employers" Responsible For OSHA Violations.**

In U.S. v. Cusack, 806 F.Supp. 47 (D.N.J., 1992), the United States sought to impose individual liability in a **criminal** action against the defendant, the corporation's principal, for OSHA

violations which resulted in an **employee's death**. In response to the defendant's pre-trial dismissal motion, the Court observed that if the government could prove certain facts as alleged in the indictment, the defendant/corporate principal would be deemed an "employer", **criminally** liable for OSHA violations. The statute, at issue, Section 666(e) of OSHA provides:

Any employer who willfully violates any standard, rule, or order promulgated pursuant to Section 655 of this Title, or of any regulations prescribed pursuant to this Chapter, and that violation **caused death to any employee**, shall, upon conviction, be punished by a fine of not more than \$10,000 or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by a fine of not more than \$20,000 or by imprisonment for not more than a year, or both.

In addition, the defendant had been charged as an aider and abettor under 18 U.S.C. 2 which provides:

- (a) whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
- (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

* * *

The criminal indictment charged defendant, Cusack, and an unindicted co-defendant, Quality Steel, Inc. (hereafter "Quality"), with violations of Sections 655 of the Act which, inter alia, caused the death of an employee, Hugo Castro.

In its opposition brief, the government described civil proceedings which it had brought against Quality Steel and noted that it had alleged two willful violations of OSHA structural steel assembly regulations, and five serious violations related to the absence of information and training to avoid unsafe conditions assessing a total original penalty against Quality Steel for \$20,000 for its willful violations and \$3,560.00 for the remaining serious violations. Quality Steel entered into a

settlement agreement under which the civil penalty for the willful violations was reduced to \$16,000 and the penalty for serious violations was reduced to \$600.00. The criminal defendant, Cusack, signed the settlement agreement on behalf of the civil Respondent, Quality Steel. **Interestingly, the government did not seek individual penalties from defendant, Cusack, in the civil proceedings.** Quality Steel made three installment payments on the settlement agreement and defaulted, owing the government a balance of \$11,066.68.

The government then made a proffer in its brief as to facts it was going to show regarding Cusack's exercise of complete control over Quality Steel, as follows:

Although the defendant's business was incorporated, he ran it as a sole proprietorship. The defendant made every decision for the company, controlled its operations and had unlimited access to its funds. He alone hired and fired its employees and decided how much to pay them. He signed Quality Steel's employee's paychecks; he established his own pay and changed it at will. He made all the bids for jobs; he ordered all necessary materials; and he directed where, when and how work would proceed. When he needed cash, he would write himself checks from the corporate checking account. He ran the company out of his private home and he had unrestricted discretion to operate the company as he saw fit. Finally, when the defendant abandoned the company in December of 1990, it ceased operations.

The Court then analyzed two opinions which it deemed "pertinent" to the issues there presented, United States v. Doig, 950 F.2d 411 (7th Cir. 1991) and United States v. Shear, 962 F.2d 488 (5th Cir. 1992) (see discussion regarding these cases infra.) The Cusack court allowed the government to proceed with the indictment and left the employee issue up to the jury who would need to find beyond a reasonable doubt that, "defendant's role was such that he was an employer." **However, the criminal statute, Section 666(e) of the Act is wholly different from that at issue in this case.** Indeed, the Cusack court, commenting upon dicta from the Doig and Shear opinions reasoned that,

Their dicta lead to the conclusion that an officer's or director's role in a corporate entity (particularly a small one) may be so pervasive in toto where the officer or director is in fact the corporation and is therefore an employer under 666(e). To conclude that such a person cannot be held liable under **OSHA's criminal provisions** would strip 666(e) of much of its force when applied to a Corporation were, as in the present case, the owner and principal officer is also the person actively supervising the work in which OSHA regulations were violated.

In the case at bar, the Secretary made no persuasive showing that either Bill or Nick were in such pervasive control of the corporation that they did everything. Indeed, there was much testimony that the shop stewards hired and fired employees, that the foreman ordered materials, that the office workers ordered office supplies, and, most importantly, that Bill spent one month in the hospital during the project. There was also testimony that Bill stayed in the trailer, that the foremen ran the job since it was repetitive, and that Bill did not supervise the work. Rather, the individual foremen supervised their own crews.

There was also testimony that Nick did layout work, and there was ample testimony that he did not order all the materials, make all the decisions, sign any checks, etc. In addition, all of the foremen that testified, as well as the shop stewards, indicated that they each had the power to direct employees to abate alleged violations and, in fact, did so. A particular example, captured on the OSHA videotape, was an incident on the tenth floor, where carpenters were working at the edge of the building, and, after the OSHA inspector, Mr. Signorile, requested that these employees tie off, the foreman obliged. In that particular instance, the videotape depicts the before, and after, sequences. There was absolutely no intervention of either Bill or Nick with regard to the abatement process.

Therefore, the Complainant failed to show such pervasive control which might imbue personal liability upon either Nick or Bill under Section 666(e) of the Act, assuming, arguendo, that the violations here at issue rose to the level of a criminal nature causing death to an employee. Nonetheless, Judge Rooney found, inappropriately, that "control" existed and she ignored the credible testimony of the foreman, carpenters, shop steward and Respondents, which was

uncontested. Clearly, the Cusack case is inapposite, deals with a completely different section of the Act, involves criminal penalties for employee death, and, most importantly, in the OSHA civil action against the corporation, Quality, OSHA did not attempt to obtain civil penalties against Cusack, since such penalties are clearly outside the scope of the Act.

An entirely different situation was considered by the Fourth Circuit Court of Appeals in Moore v. Occupational Safety & Health Review Commission, 591 F.2d 991 (4th Cir. 1979). There, the court held that pursuant to Virginia state corporate law, directors of a corporation who continue the corporate business following **dissolution of the corporation** incurred personal liability as employers under the OSHA Act for violations during the period between dissolution and reinstatement of the corporation. The court also found that subsequent reinstatement of the corporate charter did not relieve the directors of such liability prior to reinstatement. The court explained that the corporation, which had manufactured a dangerous pesticide contrary to OSHA regulations, was **dissolved** by operation of Virginia corporate law for failure to file the annual report and to pay certain franchise taxes and penalties. The court was not impressed that the dissolution of the corporation by operation of law was the result of a clerical oversight without the knowledge of either of the individual defendants. The court further reasoned that the subsequent reinstatement would not relieve the directors of the personal liability they had already incurred by continuing the normal operations of the corporations during its dissolution.

Clearly, the facts in Moore are not present here. Inherent in the Fourth Circuit opinion in Moore is that had the corporate charter not been revoked, no personal liability would have imbedded against the directors. Since the Moore directors chose to operate the corporation without the protection of the corporate entity, they exposed themselves to individual liability as employers under the OSHA Act. Here, Avcon was at all times in good standing and was a valid corporation and Judge Rooney did not dispute this in her decision.

The case of Secretary of Labor v. Sinisgalli, et als., BNA 17 (OSHC 1849 (1996)), is aberrational in terms of its facts, and clearly distinguishable in connection with the case at bar. The

Complainant contorted the facts of this matter to fit into Sinisgalli's unusual factual matrix, which cannot be fathomed.

Sinisgalli involved an accident which occurred at the Mumford Trailer Park in Rochester, New York. Two workers were inside an excavation when a large piece of earth broke free from one of the excavation walls, injuring one of the workers. In defense of the individual liability claim, Sinisgalli contended that the workers were not employed by him, or any of his corporations, but were employed by Metro Wrecking of Rochester, Inc. (hereinafter "Metro") [Metro was also a Respondent]. Sinisgalli also admitted that another corporation he owned, Son-Dar Enterprises, Inc. ("Son-Dar") owned the trailer park. As owner of the trailer park, Sinisgalli testified that he hired subcontractors, including Metro, to perform work associated with installation of a new septic tank. The excavation in which the septic tank would be installed, Sinisgalli alleged, involved a bartering deal with Metro who had performed the work in exchange for prior consultation work for Metro, for which Sinisgalli never received compensation.

On the date of the accident, Sinisgalli requested the presence of two individuals at the site to remove five electric pumps which were at the bottom of the excavation which were used to pump water from the bottom. These individuals were paid in cash. Sinisgalli testified that he instructed these individuals to return to the site the following day, since they had not completed their work, as he would not pay them until all pumps were removed. Sinisgalli assured the workers that there would be no safety problem the following day, since the water at the bottom would freeze due to the cool overnight temperatures. Unfortunately, one employee was injured inside the excavation removing the last pump since a large chunk of an excavation wall fell onto his leg. The other worker suffered only minor injuries.

The Court spent considerable time analyzing the relationship between Sinisgalli and Metro and concluded that, "Sinisgalli's testimony reveals that he never actually approached this project as a representative of Metro; to the contrary, he operated with his own interests as owner of the trailer park in mind. For instance, when Metro was digging the excavation, Sinisgalli testified that he

visited the site as much as possible to make sure that the excavation was being done the way he, not Metro, wanted it (citations omitted)." The court further observed,

Similarly, Sinisgalli testified that even though he had 'hired' Metro to do so, he participated in placing the electric pumps in the excavation because 'it [is] *my* property and *I* wanted to make sure [it] was done right'.

The court also noted that the existence of cash payments and the lack of employment records between the injured workers, Sinisgalli and his corporations, militated in favor of an employment relationship with Sinisgalli, individually. Finally, according to the court, the individual workers,

...never seem to know exactly which company they allegedly were working for when Sinisgalli hired them for a project, but their testimony reflects that they understood it was Sinisgalli who had hired them and it was Sinisgalli who would pay them in cash. (citations omitted).

As can be plainly seen from the foregoing recitation, the facts in Sinisgalli presented a unique opportunity for the Commission Judge to find individual liability in a civil OSHA case since Sinisgalli did not observe the corporate form in retaining the employees who were injured in the trench. Sinisgalli directed the work in the trench, and told the workers to return on the day of the accident in order to get their cash payments. There were no employment records and the workers had no idea which corporation, if any, had retained them to do this trench work.

The facts in the case at bar are entirely different. All of the union workers who testified at the hearing indicated that they were paid with Avcon checks. They were aware that Avcon was their employer. There were no cash payments, and there were adequate and extensive payroll records to substantiate Avcon's employer role. (See Exhibit R-21). The testimony of both Bill and Nick substantiated that there was no attempt to abuse the corporate form and as a consequence, no factual basis on which Judge Rooney could find individual liability against them. The project was

not owned by Nick or Bill, and there is no evidence that either Nick or Bill directed any worker to perform in an unsafe manner.

The Sinisgalli case clearly stands as an aberration, and an exception to the general rule of limited individual liability for corporate actions. Unfortunately, Judge Rooney was blindsided by the Complainant's tactics and expanded the Sinisgalli opinion to facts which are wholly different. It is not surprising that Sinisgalli is the only case where OSHA has maintained a veil-piercing argument against an individual for civil penalties before the instant case. In Cusack, supra, the individual was not even impleaded as a respondent in the civil case. Thus, Sinisgalli must be interpreted narrowly, and should not be expanded to an illogical extreme.

4) **Cases Which Do Not Find An Individual Liable As An Employer, Factually Applicable To This Case.**

In Skidmore v. Travelers Insurance Company, 356 F.Supp. 670 (E.D.La., 1973), an action was brought against executive officers of an employer seeking to recover civil damages for the employer's failure to comply with OSHA. There, the plaintiff argued that there was an implicit private civil remedy against the executive officers of the corporate employer. Particularly relevant for the analysis here is the court's observation as follows,

But we may pretermite the issue of the employer's liability, for this suit seeks to assert the individual liability of executive officers. The Act in terms applies only to "employers". Nothing in it purports to impose any duty on employees of an employer, executive or otherwise." Id. at 672.

The Skidmore court went on to conclude,

neither statutory provision nor legislative history has been cited to support the chimerical proposition that Congress intended either to create a duty on other employees of the same employer (even though they are executive) or to give injured workers a private civil remedy against such other employees, albeit executives. Id.

It is too clear for comment that holding Nick and Bill liable in this case was a chimerical proposition.

Similarly, in U.S. v. Doig, 950 F.2d 411 (7th Cir. 1991), the Seventh Circuit Court of Appeals was called upon by the government to review a District Court order dismissing individual defendant, Doig, from a criminal OSHA violation action brought under 29 U.S.C. § 666(e). The corporate defendant, S.A. Healy Company ("Healy"), was building a tunnel as part of Milwaukee Metropolitan Sewerage District's Water Pollution Abatement Program. Individual defendant, Doig, was the manager of the project. Unfortunately, an explosion in the tunnel killed three of Healy's employees. While Healy was charged with willful violations of various safety regulations under the Act, Doig was charged with aiding and abetting Healy in those violations. The Seventh Circuit provided an exhaustive analysis of the cases theretofore decided regarding employee's criminal liability under § 666(e). The Doig court concluded that,

We hold that an employee who is not a corporate officer, and thus not an employer, cannot be sanctioned under § 666(e).

Our research has uncovered no opinions issued after Doig which in any way question its holdings. Therefore, as a matter of law, Nick, being solely an employee of Avcon, should have been dismissed from any claims of individual liability. **Not to do so was reversible error** and warrants a remedy from this Commission.

Similarly, in U.S. v. Shear, 962 F.2d 488 (5th Cir. 1992), the Fifth Circuit reversed a conviction against a construction company superintendent for criminal violations of the OSHA Act. The facts of the Shear case bear some elucidation as relates to the claims against Bill in this case. In Shear, the corporate employer, ABC Utilities Services, Inc. (hereinafter "ABC"), was awarded a contract to install a water line for the City of Azle, Texas. ABC was a small family owned construction company, with Frank Wolf, the President, owning 60% of the stock, and his mother, owning the remaining 40%.

ABC employed between 80 and 100 individuals comprising between 3 and 4 work crews. Wolf, as President, was the final authority in the company. Shear was the Superintendent and as such was the individual on site with the decision-making power to bind ABC. Shear directly supervised a number of foreman, however, he was neither an officer, director nor stockholder of ABC.

During the installation of a pipe to be connected to existing water lines, **under Shear's direct supervision**, a worker was trapped inside the trench and killed when the trench walls collapsed. The collapse of the walls was proximately caused by a violation of OSHA regulations. Interestingly, OSHA brought a two count indictment against ABC and Shear for violating OSHA § 666(e), but did not bring a claim against either Frank Wolf, the President and final authority in the company, or Wolf's mother, a 40% shareholder. On appeal of his conviction, Shear argued that because he was an employee, he could not be held guilty of § 666(e) violations. As such, the Shear court reversed and dismissed the case.

5) **Judge Rooney's Decision Ignores The Facts Advanced At Trial And Constitutes Illegal Rulemaking.**

The facts presented by Respondents as to the issue of liability, which were un rebutted by the Secretary, established that no direct cause of action against Bill and Nick Saites could be found. Nevertheless, Judge Rooney drew a completely illogical conclusion by finding Bill and Nick Saites to be "employers" as defined in the OSHA Act. Instead of relying upon the proofs and applying a preponderance of the evidence standard, Judge Rooney adopted the Complainant's concocted arguments regarding individual liability (which were largely not litigated, discovered or included in the Pre-Trial Order). At trial, the Complainant was not able to elicit sufficient facts which would allow the Court to pierce the corporate veil of Avcon in order to imbue personal liability upon Bill as a corporate officer, director or shareholder. Similarly, the Secretary proved absolutely no facts on which to support her direct claim of individual liability as against Nick, a mere employee. Thus,

there is simply no support for Judge Rooney's conclusion that the OSHA Act should be extended to apply to Bill and Nick.

The compelling argument is that Judge Rooney, in an ex officio matter, amended the OSHA Act in order to create a direct cause of action against Bill and Nick, without following the mandates of the Administrative Procedures Act at 5 U.S.C. §500 et seq. and traditional rule-making policy, which requires notice, the opportunity to be heard, hearings and eventual decision. Although Respondents suggested that the issue lies properly before Congress, Judge Rooney exceeded her authority and thus abused her discretion by essentially changing the Act by judicial means, ignoring well-established case law on the issue of personal liability, overlooking the corporate laws of the State of New Jersey, which govern Avcon's creation and subsistence and finding liability against the individuals. Clearly, Respondents are entitled to due process of the law, pursuant to the Fourteenth Amendment. Their rights as United States citizens have been violated. Regrettably, Judge Rooney adopted the Complainant's "vendetta" against the individual Respondents and found them liable as "employers" under the OSHA Act. Instead of applying the law, Judge Rooney circumvented it thereby extending the OSHA Act and, making Bill and Nick "guarantors" of the payment of fines by Avcon, a conclusion and decision beyond cavil.

The evidence in the record supports the fact that Avcon was a legitimately formed corporation of the State of New Jersey. Judge Rooney completely ignored Nick's credible testimony regarding risk management as it relates to the construction business, generally, and the use of legitimate corporate enterprises to limit individual liability, specifically. There is nothing sinister or wrong about the use of a corporate form to limit liability, so long as the corporate form is properly recognized, and all corporate niceties are observed. At trial, the Complainant produced not one scintilla of evidence to establish that the Avcon corporate form was not properly observed, pursuant to New Jersey law. Nor could she. This is because both Bill and Nick testified as to Avcon's proper corporate filings regarding taxes, payroll and other items.

It is general hornbook law that incorporating a business entity limits individual liability and is not improper. At the Hackensack project, all of the foremen and shop stewards were "individuals

who are responsible for the working conditions of employees". The Congressional purpose of the OSHA Act was not to punish individuals by labeling them as "employers" when they are directors, officers or simply employees of a legitimately formed business. Judge Rooney abused her discretion by placing undue reliance upon the case of Griffin and Brand of McAllen, Inc., 6 BNA OSHC 1702, 1702 (No. 14801, 1978) by jumping to the conclusion that the term "employer" is a term of "art contained in remedial legislation". Judge Rooney ostensibly took the position that the Court can disregard a legitimately formed and operated corporation of the State of New Jersey in an arbitrary and capricious fashion. This reasoning is fundamentally flawed. A Review Commission Judge has no authority to circumvent the Code of Federal Regulations and create new law in a haphazard fashion. This is what the Court has done here. Most disturbingly, the Complainant's relentless attack on Bill and Nick Saites personally was adopted by Judge Rooney. For example, it is utter nonsense that the language of the OSHA Act and its legislative history condone imposition of personal liability on individuals such as Bill and Nick. In this case, Judge Rooney completely disregarded the record evidence and gave full weight to the Complainant's argument that Bill and Nick were "responsible" for the working conditions of Avcon employees at the Hackensack work site. (Query as to how Nicholas Saites, a mere employee, was responsible for himself under this tortured analysis?)

The uncontroverted evidence in the record clearly demonstrated that the employees knew who their employer was and the fact that the employees had the power to abate violations.

As to the first issue, knowledge of employer, the following chart summarizes the testimony of all Avcon employees who testified, confirming that Avcon was their employer, and that they were all hired at a union hall:

WITNESS	DATE OF TESTIMONY	PAGE(S)	LINE(S)	SUMMARY OF TESTIMONY
Frank Georgiana	9/16/99	2936	2 & 3	Frank has had the occasion to work for Avcon.

WITNESS	DATE OF TESTIMONY	PAGE(S)	LINE(S)	SUMMARY OF TESTIMONY
Frank Georgiana	9/16/99	2938	23-25	At some point he was hired by a company known as Avcon.
Robert Carbone	10/18/99	3263	14 & 15	Reinforced concrete was the majority of his work which is what he was doing with Avcon.
Robert Carbone	10/18/99	3265	7 & 8	Robert said earlier that he worked for Avcon.
Robert Carbone	10/18/99	3283	23 & 24	He does not really remember if Angelo asked him who his employer was.
Robert Carbone	10/19/99	3386	13-16	He got hired for the Hackensack project through the union hall.
Robert Carbone	10/19/99	3390	22-24	The way the union works is that one gets called from the union hall to the job that the company called into the union hall for.
Nicholas Amisegeo	10/19/99	3521 & 3522	23-25 & 1-3	The job in Hackensack was Nick's first employment with that firm (Avcon) as he had never worked for them before.
Nicholas Amisegeo	10/19/99	3524 & 3525	24 & 25 & 1-4	He became employed for the Hackensack project by being sent out of the union hall (the Local 483).
Nicholas Amisegeo	11/1/99	3551	4 & 5	As far as he knows, he works for Avcon.
Lorraine Cianfrone	11/2/99	3669	9 & 10	She works out of the Carpenter's Local #15 in Bergen County.
Lorraine Cianfrone	11/2/99	3670	10 & 11	She was employed by Avcon on the Excelsior II project in Hackensack.
Frank Catalioto	11/2/99	3791	12-14	Prior to the Excelsior job, Frank never worked for Avcon.

WITNESS	DATE OF TESTIMONY	PAGE(S)	LINE(S)	SUMMARY OF TESTIMONY
Frank Catalioto	11/2/99	3791	23 & 24	He was hired for the Excelsior project by being sent out of the hall.

Equally clear, the following testimony was elicited to confirm that Avcon employees had the authority to abate alleged OSHA violations:

WITNESS	DATE OF TESTIMONY	PAGE(S)	LINE(S)	SUMMARY OF TESTIMONY
Frank Georgiana	10/18/99	3229	2-6	There were times when Angelo asked him to direct workers to change something and Frank had the power to make changes like that.
Robert Carbone	10/18/99	3284 & 3285	25 & 1-3	Robert had the authority to direct workers to stop doing something if told by an OSHA representative that he was doing something wrong or unsafe.
Robert Carbone	10/19/99	3322	9-15	He would have the authority to direct workers to tie off to the inter column rebar at the behest of an OSHA inspector without speaking to Bill or Nick.
Frank Catalioto	11/2/99	3819	6-14	When he walked with Angelo and he pointed out something that he thought was a violation of OSHA, he had the authority to fix same without going to Bill.
Frank Catalioto				He did not need to go to anyone else to get authority to change something at the behest of an

WITNESS	DATE OF TESTIMONY	PAGE(S)	LINE(S)	SUMMARY OF TESTIMONY
	11/2/99	3819	20-23	OSHA inspector.
Frank Catalioto	11/2/99	3820	5-12	He never had to speak to Nick before directing a change at the behest of an OSHA inspector.

The above-referenced examples illustrate how far Judge Rooney has gone to distort the record to support a conclusion that individual liability be imposed against the individual respondents. Nowhere in her opinion does Judge Rooney state that Frank Georgiana, Robert Carbone, Nicholas Amisegeo, Lorraine Cianfrone or Frank Catalioto are not credible.

There was no evidence to suggest that the individual Respondents ran Avcon as a "sole proprietorship". Nonetheless, this is obviously the conclusion that Judge Rooney drew, based upon her review of the record. The record is clear that all of the foremen, shop stewards and even Lorraine Cianfrone, a carpenter, had the power to abate. (See above charts). In addition, union regulations forbade a union employee to be directed by a non-union employee. Therefore, in reality, neither Bill nor Nick (who are non-union members) had the direct power to abate.

Contrary to Judge Rooney's decision that Bill and Nick "maintained control over the work site", and that Bill "obtained the subcontracts and negotiated the prices with Nick's assistance", this does not conclusively establish that the individual respondents maintained "control" over the work site. (Parenthetically, Judge Rooney obviously gave little credence to the unrefuted evidence that Bill was hospitalized for several weeks with pneumonia during the project and therefore, he could not have been at the work site just about everyday [sic], as she concluded in her Opinion.) Does the Court think that Bill was supervising the work site from his hospital bed?

OSHA has the statutory power to fine the employer of the employee affected. The Act has not been amended by virtue of the Administrative Procedures Act to allow OSHA the power to fine the employer and the employee. This is not currently the law because it was not the legislative

intent to make an officer or employee of a corporation liable to OSHA for a violation of its employees, but rather, just the corporate employer. Therefore, Judge Rooney has exceeded her judicial powers by finding Bill and Nick liable under the OSHA Act, resulting in improper rule-making and an abuse of judicial discretion. A Review Commission Judge cannot usurp her powers and create new legislation by rendering an opinion which extends beyond legally adopted regulations and statutes. This is what Judge Rooney has done and the result is improper rule-making. The United States has three distinct branches of government (Executive, Legislative and Judiciary) in order to maintain a balance of power. Judge Rooney's ill-founded decision as to Bill and Nick clearly violates the constitutional mandate of separation of powers and has denied the individual respondents due process of law. It is well-settled that the rule-making procedures for OSHA standards are specified in §6 of the Act (U.S.C. §655), the Administrative Procedure Act, 5 U.S.C. §553, as well as OSHA Regulations on rule-making procedures. 29 C.F.R. §1911. The importance of OSHA adherence to these decisions has been repeatedly emphasized in court decisions. For example, the District of Columbia Circuit made clear that the court's role was to, "ensure that the regulations resulted from a process of reasoned decision-making". AFL-CIO v. Marshall, 617 F.2d 636, 649-650 (D.C. Cir. 1979).

The AFL-CIO Court indicated that the rule-making process must include, "notice to interested parties of issues presented in the proposed rule" and "opportunities for these parties to offer contrary evidence and arguments". Ibid. In addition, the Court asserted that its responsibility included making certain that the Agency has followed statutory procedures, including those procedures prescribed by its own regulations, and that the Agency has "explicated the basis for its decision". 29 U.S.C. §655(b)(2). In this regard, the Administrative Procedure Act, 5 U.S.C. §553 requires the Agency to publish, "either the terms or substance of the proposed rule or description of the subjects and issues involved". Here, Judge Rooney has expanded the parameters of the OSHA Act. If the Secretary wishes to extend the OSHA Act to impose civil penalties against corporate officers and employees in the absence of death or serious injuries, then her recourse is to persuade Congress to amend and/or supplement the OSHA Act. Clearly, Complainant chose to "test" its

novel theory on Bill and Nick Saites and most unfortunately, Judge Rooney found in complainant's favor (even though no death or serious injury occurred at the Hackensack work site). The business community would not fathom such a rule, just like the recent ergonomic rule-making, which OSHA abruptly withdrew. There, OSHA proposed to hold employers liable for employees' injuries occurring at home while telecommuting.

Judge Rooney could not find that Avcon was run as a sole proprietorship. Judge Rooney furthermore abused her discretion by applying "federal common law" as to the issue of "federal common law alter ego questions". Her misreliance upon Kaplan v. First Options of Chicago, Inc., 19 F. 3d 1503, 1521 (3rd Cir. 1994) illustrates her incorrect interpretation of the law. Kaplan stated that the alter ego concept can be applied "when the Court must prevent fraud, illegality or injustice or when the recognition of the corporate entity would defeat public policy or shield someone from liability for a crime". Ibid. Judge Rooney did not articulate any fraud, illegality or injustice or shielding someone from a crime in order to rely upon the Kaplan rationale. Furthermore, there were no proofs whatsoever presented at trial that either Bill or Nick used Avcon to further their own personal interests. The Court went to great lengths to find personal liability against Bill and Nick, even going so far as to rely upon cases involving ERISA, unfair labor practice, energy matters and an enforcement action under the Department of Energy Organization Act to support her conclusions. Judge Rooney never recited the corporate law of the State of New Jersey. Under the Commission Judge's analysis, no corporation could ever have a valid purpose, especially a closely-held one, such as Avcon. Judge Rooney's critical comments that Avcon did not exist "but for the will of these two individuals" and that Avcon was merely a "payroll company" are ill-founded. However, Bill and Nick are astute businessmen. Nick is also an attorney-at-law of the State of New Jersey. They have been in the concrete construction business for many years. Nick testified that Avcon was created, inter alia, to limit personal and corporate liability and to create a minority-owned company for purposes of obtaining HUD financing. (Tr47:11-13; 20-21) These objectives are not illegal or fraudulent. To claim that such objectives create individual liability is to undermine

the very essence of limited individual liability for corporate action. The Commission must address these errors by vacating the judgments entered against Vasilios and Nick Saites, individually.

2. **WITH REGARD TO DOCKET NO. 98-0755, JUDGE ROONEY ERRED IN AFFIRMING ITEM 9 OF CITATION 1 AND ITEMS 2a-2c OF CITATION 2 (FAILURE TO PROVIDE PROTECTION AGAINST FALLS FROM THE UNPROTECTED SIDES AND EDGES OF WALKING/WORKING SURFACES)**

- a. **Judge Rooney erred in rejecting the Respondents' contention that the cited conditions were governed by 29 C.F.R. § 1926.501(b)(2) and § 1926.502(k) rather than the cited standard, 29 C.F.R. § 1926.501(b)(1), because each of the affected employees was constructing a "leading edge" or working in an area "where leading edges were under construction" within the meaning of §1926.501(b)(2)(i) & (ii).**

Judge Rooney improperly affirmed Citation 1, Item 9 and Citation 2, Items 2A-C alleging violations of the Fall Protection Standard without basis or proof. The Respondents met their burden of proof at trial by establishing infeasibility.

In the case of Seibal Modern Manufacturing & Welding Corp., 15 BNA OSHC 1218, 1227 (1991), the Review Commission set forth the standards by which an employer must prove infeasibility:

An abatement measure must be usable, during employees' work activities for its intended purpose of protecting employees. If there is no way to use a measure for its intended purpose without unreasonably disrupting the work activities, the mere fact that the measure's installation is physically possible does not, in our view, mean that we should compel the employer to install the measure.

Ibid.

The Commission has also held that placement of guardrails on the top deck of a concrete construction work site is not always feasible. The Commission stated: "Guardrails would interfere with the vertical shoring along the perimeter of the floor" and "Any perimeter guarding would force... employees to work outside the perimeter guards". Ibid. Furthermore, the Commission

agreed with the employer's well-reasoned argument that guardrails placed on a floor after the concrete hardened would naturally have been destroyed as the formwork was stripped and, thereby fell on the guardrails, thus making installation of the guardrails infeasible. Ibid. Thus, the guardrails could have been installed but truly had no practical purpose.

In the instant matter, which involved poured-in-place concrete construction, much of the cited activity constituted leading edge work. Respondents properly argued that the cited regulation did not apply. The Complainant improperly cited Respondents under Section 1926.501(b)(1) and relied upon 29 C.F.R. 1926.501(b)(1) for all of the fall protection allegations in this case. Consequently, the Secretary has not issued any violations under 29 C.F.R. 1926.502(b)(2) dealing with the concept of "leading edges". Complainant made no motion to amend these citations at any time. Nonetheless, Judge Rooney abused her discretion by confirming that "... Review of the instant matter indicates that no citations were issued for a lack of protection on leading edges. Rather, the citations were properly issued for failure to provide adequate fall protection on unprotected sides and edges." See Decision and Order of Judge Rooney dated August 15, 2000. Nonetheless, Judge Rooney abused her discretion by finding violations of the fall protection standard by respondents, which encompassed, in reality, non-issued citations for lack of protection on leading edges.

Judge Rooney's failure to apply the "leading edge exception" to the fall protection standards is contrary to well-settled commission precedent, not supported by a preponderance of the evidence and thus, raises an important question of law and public policy. The leading edge concept was added to 29 C.F.R. 1926 in or about August, 1994. Pursuant to 29 C.F.R. 1926.500(b), the leading edge is defined as follows:

Leading edge means the edge of a floor, roof, or formwork for a floor or other walking/ working surface (such as the deck), which changes location as additional floor, roof, decking or formwork sections are placed, formed or constructed. The leading edge is considered to be

an 'unprotected side and edge' during periods when it is not actively and continuously under construction.

Respondents correctly argued and proved at trial that performing the installation of formwork or plywood decking falls within this category. In addition, the construction of formwork sections necessarily involves the removal or stripping of the sections. Clearly, the leading edge concept applies to the creation of formwork on balconies, as well as the removal of formwork on balconies. The leading edge concept was confirmed by respondents' expert, Leo DeBobes, who testified that, "Leading edge work is completed... after all of the forms and all of the temporary components have been removed." (Tr. 3971). As a consequence of the foregoing, the cited references, by their very terms, related to leading edge work and should have been dismissed summarily by Judge Rooney:

Citation 1, Item 9 Type of Violation: Serious

- a) Second Floor, South/West Corner, Column #24: **Two employees were working stripping the wood frame off column 24 near the open edge of the floor**, on or about 10/9/97.
- b) Main Lobby, West Area, Column 37: **One employee setting up forms for the columns** was standing on steel flanges of the frame and was not protected from falling, on or about 10/9/97.
- c) Second Floor, North/West Corner, Column #49: **Two employees working near the edge of the floor**, were not protected from falling while stripping the column, on or about 10/14/97.

* * *

- g) Third Floor, East Area: **Two employees working on installing stringers for a balcony**, on or about 10/21/97.

* * *

- j) Seventh Floor, Column #27, South/West Corner: **Three employees framing the eight floor from seventh floor**, were not protected from falling, on or about 11/17/97.

- k) Seventh Floor, West Side Balcony: **Three employees framing the balcony** were not protected from falling, on or about 11/18/97.
- l) Eleventh Floor, South/West corner: **Two employees framing and one employee marking the floor** were not protected from falling on or about 12/8/97.
- m) Eleventh Floor, Northwest corner: **An employee framing the floor** was not protected from falling, on or about 12/11/97.
- n) North Side, 11th Floor Balcony: **One employee setting up a deck balcony** with his back towards Prospect Ave., was not provided with a fall protection, on or about 12/11/98.
- o) Eleventh Floor, South/East Area, South/West Area, South Area: **Employees building columns, framing the deck and marking out the deck were not protected from falling**, on or about 12/15/97.
- p) Tenth Floor, South/East Area: **One employee stripping the balcony** was not protected from falling, on or about 12/15/97.
- q) Ninth Floor, South/East corner: **One employee stripping the balcony** was not protected from falling, on or about 12/15/97.

Citation 2, Item 2a Type of Violation: Willful

- a) Eighth Floor: **Employees framing the floor** were not protected from falling, on or about 11/24/97.
- b) Seventh Floor, **Employees framing the eight floor from the seventh floor** were not protected from falling below, on or about 11/24/97.
- c) Seventh Floor, South/West corner: **Employees stripping the floor** were not protected from falling, on or about 11/24/97.
- d) Sixth Floor Balcony, West Side Area: **One employee bending steel rebars** was not protected from falling, on or about 11/24/97.
- e) Seventh Floor, West Side Area: **Two employees stripping and or removing excess concrete** were not protected from falling, on or about 11/24/97.

Citation 2, Item 2c Type of Violation: Willful

- g) 10th floor, East Side: **Three employees were stripping wood forms** and were not protected from falling, on or about 1/7/98.

- h) 13th floor, South Side Area: **Three employees working near the edge of the floor** were picking up stripped lumber and steel brackets and were not protected from falling, on or about 1/7/98.

Most of the fall protection allegations are erroneous, due to OSHA inspectors' lack of knowledge of the leading edge concept. In fact, there was testimony at the trial from Avcon employees that Angelo Signorile did not consider any of the work at the project to be leading edge work. Such conclusion is clearly contrary to the intent of the revisions to 29 C.F.R. Section 1926 and Judge Rooney abused her discretion and committed reversible error by not dismissing these citations.

Even if conventional fall protection was feasible, Judge Rooney's Decision is contrary to well-settled Commission precedent and not supported by a preponderance of the evidence. To establish a violation of the fall protection standard, the Secretary must show that the employees at issue were "exposed to a falling hazard". American Tank & Vessel, Inc., 15 BNA OSHA 1288 (1991)(ALJ). Here, the Secretary failed to meet this burden because her "proof" supporting these citations consisted only of the unreliable, equivocal and speculative testimony of OSHA compliance officer, Angelo Signorile, whose assertions were often directly at odds with the images on the videotape of his inspection, filmed by others. For this reason, Judge Rooney's affirmance of these citations is contrary to Commission precedent and not supported by a preponderance of the evidence and therefore warrants review by the Commission.

In A. Wachsberger Roofing & Sheet Metal Workers, Inc., 12 BNA OSHC 1517, 1518 (1985) the Commission rejected the compliance officer's testimony that an employee was within 10 feet of the roof's edge where the compliance officer "failed to take photographs of the worksite and did not make notes of his observations." In vacating the fall protection citation, the Commission held that, "The totality of the compliance officer's testimony demonstrated a total lack of

definiteness and certainty." Similarly, in American Tank & Vessel, Inc., 1991 OSAHRC LEXIS 98 at *5, the administrative law judge vacated a fall protection citation on the ground that:

[The compliance officer's] observations were made from a distance of 600 feet, and this circumstance casts considerable doubt on the reliability of his estimate concerning the proximity of the painter to the edge of the roof.

Finally, in Dynamic Painting, 17 BNA OSHC 1086 (1995)(ALJ), Chief Judge Sommer vacated a fall protection citation where:

[T]he compliance officer's testimony was unconvincing and presented a pattern of inconsistencies and equivocation as to the time photographs were taken and the area where the employee was working so as to cause doubt about the veracity of the compliance officer's statements as to where the violation occurred, what the employee was doing at the time, and whether or not he was tied on.

Id. at 1087.

The facts presented in each of these cases are strikingly similar to the facts of record here. As in American Tank & Vessel, the distant spots from which Mr. Signorile made his observations ranging from 100 to 400 feet from adjacent buildings are sufficient, standing alone, to cast "considerable doubt" on the "reliability" of his estimates concerning the proximity of the employees at issue to the floor's edge.

The finding in Dynamic Painting Corp. that the compliance officer's testimony presented a "pattern of inconsistencies and equivocation" which cast doubt on the "veracity" of his testimony bears an uncanny resemblance to the evidence here, where Mr. Signorile constantly contradicted himself on the number of employees allegedly exposed, the floors they were working on, and what they were doing, and equivocated on such threshold issues as what distance to an edge constitutes exposure to a fall hazard.

Indeed, the precise conclusion urged here -- that Mr. Signorile's vague and unreliable testimony is insufficient to prove the Secretary's case -- was actually reached by the Commission in Scafar Contracting, Inc., 18 BNA OSHC 1540, 1998 OSAHRC LEXIS 74 (1998). There, Judge Schoenfeld, in vacating a willful excavation citation, which was issued after an inspection, relied explicitly on the OSHA inspector's deficient testimony concerning the measurements he made of the excavation -- in which he admitted, inter alia, making a "mistake" in recording the date soil samples were taken and in neglecting to make complete notes and concluded as follows:

In sum, the cited standard requires that reliable measurements be made, preserved and made part of the Secretary's obligation to prove the existence of a violative condition by a preponderance of reliable evidence of record requires more than assumptions and inferences where the violation alleged is that of a standard with specific distances as an integral part of its requirements. The Secretary has not fulfilled that burden on this record.

Id. at 28-29.

Here, Judge Rooney's decision was based almost entirely on Mr. Signorile's flawed testimony. Indeed, after acknowledging that respondents "... elicited testimony... providing a different interpretation of what the photo or videotapes depicted", Judge Rooney nevertheless gave "... very little weight" to this testimony (See Dec. at p. 29). But a compliance officer's failure to identify the floor where an alleged violation occurred, the number of employees affected and how close an employee was to the edge of a floor are hardly "harmless" errors in a case involving alleged violations of the fall protection standard. Rather, they are critical mistakes which mandate dismissal of the citations. This decision is directly at odds with the record evidence here and the Commission's rulings in Wachsberger, American Tank & Vessel, Dynamic Painting, and Scafar. For these reasons, Respondents respectfully urge the Commission to reverse Judge Rooney's decision and vacate the order entered against all of the Respondents.

- b. **Judge Rooney erred in denying both (i) the Respondents' pre-trial requests for discovery of the anticipated "rebuttal" testimony of the**

Secretary's expert witnesses (Burkart and Paine) and (ii) the Respondents' request, during trial, for an opportunity to rebut that expert testimony through the testimony of their own expert "surrebuttal" witness.

Judge Rooney's failure to allow Respondents to present engineering testimony to support the infeasibility defense was a procedural defect, constituted reversible error, was against the great weight of authority and well-settled Commission precedent, and therefore, warrants reversal of the Court's Decision. The trial below was conducted as outlined in pretrial submissions and governed by the Court's Amended Notice of Hearing, Scheduling Order and Special Notices dated April 7, 1999. Clearly stated therein, the parties were, no later than May 17, 1999, to provide a joint pre-hearing statement containing, "... a list of all expert witnesses including, as to each such expert witness, a statement of the subject matter and a summary of the substance of the testimony," as well as, "a list of all exhibits to be offered into evidence with notations of all objections thereto". Respondents duly complied by identifying their expert witness, Mr. Leo DeBobes together with all exhibits that they intended to proffer at the trial. However, during the cross-examination of individual Respondent, Nicholas Saites, OSHA's counsel indicated for the first time that OSHA would produce expert testimony at trial. Noting the surprise (and prejudice) on the record, Respondents' counsel requested disclosure.

Faced with the prospect of disclosing this surprise expert witness, OSHA manufactured a novel argument and claimed that the expert witness was going to "rebut factual testimony," and therefore, somehow disclosure of the identity of the expert witness was not mandated. The fallacy of this reasoning deserves no comment, and unsurprisingly, on September 22, 1999, the Court compelled disclosure of Complainant's expert rebuttal witness and provided Respondents with the right to depose such expert, even though 18 days of trial had already been completed! Respondents believed that any prejudice which may have inured to them by the Secretary's surprise in calling an

expert witness on rebuttal, whose identity or opinions had not been disclosed, was never mitigated. However, on the very next day, the Court issued an unsolicited "clarification" of its September 22, 1999 Order stating as follows:

My Order of September 22, 1999 requires Complainant's immediate disclosure of his rebuttal expert witness. I neglected to include within that Order that such disclosure is mandatory only in the event that this rebuttal expert witness is being called to contradict or rebut evidence on the same subject matter introduced by Respondent's expert. Rule 26(a)(2) mandates such disclosure. As the record presently exists, it is not clear if the Complainant's rebuttal expert witness is being called to rebut the testimony offered by Respondents' expert.

If this expert is being called solely to rebut testimony offered by Respondent's fact witnesses with regard to its affirmative defenses, I will permit such rebuttal testimony on these narrow issues, and disclosure is not mandatory at this time. However, prior to the Complainant's rebuttal case, Complainant is to provide Respondent with the identity and curriculum vitae of said rebuttal expert witness. If any new issue is raised during the course of this witness' testimony, I will permit the Respondent to address these issues by surrebuttal. SO ORDERED.

How can an expert witness rebut factual testimony? The Court, without explanation, completely blind-sided Respondents' ability to prepare and defend against a rebuttal case, which allowed the Secretary an uneven advantage not permitted by the Federal Rules of Civil Procedure. As the record reflects, the Secretary produced two rebuttal expert witnesses who were allowed to testify on issues well beyond the scope of Respondents' defenses, and as such, Respondents were severely prejudiced. To make matters worse, the Secretary was allowed to introduce numerous exhibits which were neither disclosed in the pretrial submissions, or any amendments thereto, and were literally handed to Respondent's counsel just prior to introduction during trial.

Finally, Respondent's efforts at providing surrebuttal were met with disdain from the Court and were summarily denied without due process or any equitable considerations. Notwithstanding that the identity of the proposed surrebuttal witness was disclosed to the Secretary in sufficient time

between hearing dates to obtain his deposition, the Secretary, by letter, chose not to depose such witness.

A close reading of Judge Rooney's Opinion at Pages 55 through 61, shows clearly that her rejection of the infeasibility defense was based entirely on the rebuttal expert witnesses, which OSHA failed to disclose and were foisted upon Respondents after the government had rested. Although Judge Rooney had the "opportunity" to allow Respondents to present a surrebuttal engineering witness to surrebut the government's rebuttal case, she refused to do so. Justice was not served. Thus reversal of the Decision by this Commission is warranted and a remand is required to allow Respondents the ability to reassert the barred rebuttal testimony.

c. **Judge Rooney erred in concluding that the Respondents had failed to establish their affirmative defense of infeasibility.**

Judge Rooney's conclusion that Respondents did not establish their affirmative defense of infeasibility constitutes reversible error. The Decision was against the great weight of the evidence and contradicts well-settled Commission precedent, and, therefore reversal of the erroneous Decision is the only remedy. While Respondents believe that they sufficiently carried their burden at trial of demonstrating that the guardrail system employed on this project was the appropriate fall protection method, together with the alternative section 502(k) provisions for leading edge-work, in the alternative, Respondents successfully proved, through overwhelming evidence, that the use of nets, or fall arrest/restraint systems were not feasible on this project. In reviewing this aspect of the case, the Court accepted the Secretary's wild theories not grounded in site-specific facts.

For purposes of this argument, anything is possible, yet what is possible is not always what is reasonable under the circumstance. Here, infeasibility must be measured with regard to the project as a whole, as it actually existed, and not hypothetically, ideally or what "could have" happened. This is especially so in light of the fact that there were no injuries and, on no occasion did OSHA representative issue a notice of imminent danger or in any way attempt to stop work on the project based, inter alia, upon a perceived lack of adequate fall protection.

(a) **Fall Protection Nets.**

The infeasibility of fall protection nets rests, in large part, on three factors, (1) more workers are exposed to a greater hazard; (2) concrete curing time precludes embedment of anchorages capable of maintaining the pour cycle; and (3) the plans and specifications on which Avcon bid did not contain structural embedments for fall protection nets.

First, the main difficulty with fall protection nets, especially on a project the size of Excelsior II, is the amount of nets required and the amount of men needed to install, dismantle, and reinstall the nets as the project builds skyward. DeBobes, respondents' safety expert, testified that it takes an average of 12 men to install fall protection nets. (Tr3986) He explained that people who are installing the nets are going to be exposed to a greater hazard for a greater period of time, versus the few carpenters who are on the deck performing leading edge work prior to guardrail installation. (Tr3983) DeBobes has seen fall protection nets installed and moved and is familiar with manpower and equipment necessary to move the nets. (Tr3981) DeBobes, however, is not a salesman for nets and had no pecuniary interest when he comes to a project in selling the owner or contractor on nets. This was in complete contradistinction to the surprise rebuttal expert, Daniel Paine (hereinafter "Paine"), who admitted that he makes commissions on the safety nets he sells.

Since the OSHA requirement for safety net systems calls for nets to be installed no more than 30 feet from the working surface, the nets must be moved so as to follow the work. Assuming a typical floor of 10 feet, the net can only be effective to protect against all hazards for a maximum of three floors. Such requirement creates the exposure of the installation and reinstallation crews to fall hazards at the edge of the building where the nets will be installed, removed and reinstalled.

Moreover, the constant deliveries of forming wood to the top deck from the lower floors by the cranes make the use of nets impractical as they would interfere with that task. (Tr3984) The

nets cannot remain stationary at certain locations on the building since once the deck work is more than 30 feet away, the nets will not be serving their fall protection purpose. (Tr3985) The fact that the building contained many balconies on each floor creates additional installation hurdles, requiring more nets and, therefore, more risk exposure.

In addition, OSHA requires that safety nets be drop-tested after initial installation and before being used as a fall protection system "whenever relocated". 29 CFR 1926.502(c)(4)(i). As a consequence of the foregoing requirement, members of the installation crew will need to drop-test each installation at each floor by throwing a 400 pound bag of sand over the edge of the building into the net to see if it will hold. The drop-testing procedure itself will expose more people to a greater hazard. OSHA also requires that safety nets be inspected at least once a week for wear, damage and other deterioration, and if any defective components are found, they shall be removed from service. 29 CFR 1926.502(c)(5). Thus, the inspecting crews will necessarily be exposed to a fall hazard on a weekly basis.

OSHA's attempts to explain away these difficulties with nets on a project of this size were unavailing, as the guardrail system employed at the project did not suffer from the foregoing greater exposure risk. Rather, the same two individuals constructed the guardrails on the deck and once installed, those working on the deck were protected. Safety nets were not the chosen fall protection method on this project and it made little sense for Avcon to install nets to protect a few carpenters performing leading edge work while exposing dozens of installers, de-installers, re-installers, drop testers and inspectors to catastrophic falls.

In addition, the installation time for the nets would be almost two days, for each installation, while the guardrail installers would be on the deck for a very short period of time. Clearly, the

installation of nets to protect the limited amount of leading edge work on the project which preceded the guardrail installation would not be feasible due to greater risk exposure.

Second, the feasibility issue with regard to nets in connection with the Excelsior project relates to the anchorage for the nets, which must be installed in curing or "green" concrete. The contractor using the safety net system must install the baseplate anchorages for the nets in the curing concrete, and wait a sufficient amount of time for the concrete to harden before the baseplate can be used to anchor the supporting arm of the net. Since the aim of installing nets is to protect workers who have already fallen off the building, the installing contractor must be sure that the concrete has reached sufficient strength to secure the baseplate anchorage.

OSHA's own engineering expert, Burkhart, testified that the curing time required on this project would have been between 7-10 days. OSHA's safety net salesman, Paine, testified that he does not agree or disagree with Burkhart's opinion. Thus, the Court can certainly rely on OSHA's professional engineer's judgment in this regard. Indeed, the salesman, Paine, testified that he does not even know what effect the strength of concrete has in terms of its ability to support an embedment which anchors a net protection system. Obviously, Paine is only interested in selling nets; safety is not an issue.

Thus, OSHA's expert engineer confirmed that a safe estimate for curing time would be about 10 days. If the installation of the net system at the perimeter of the building takes two days (even including drop testing), the net installation would take a minimum of 12 days. Since Avcon employed a four-day pour cycle, the nets could never keep up with the work. The nets would always be four floors behind the work and would therefore be beyond the 30 foot OSHA mandated distance. Paine's response of "jumping" nets would require twice the personnel and would therefore expose dozens of installers, drop testers and inspectors to deadly falls in an effort to protect a few

(b) **Fall Arrest/Fall Restraint Systems.**

The infeasibility of fall arrest or fall restraint systems in connection with the subject project can be summarized as follows:

- (1) Formwork is not designed to anchor these devices;
- (2) Anchorage strength and curing time of concrete columns on stripping floors is insufficient; and
- (3) Exposure of more workers to a greater hazard.

Personal fall arrest systems and personal fall restraint systems (also known as positioning device systems) are discussed in 29 CFR § 1926.502(d) and (e) respectively. These alternative fall protection methods will be discussed together since they suffer parallel infeasibility.

The required anchorage for fall arrest and fall restraints systems cannot be met by attaching the systems to formwork. In connection with leading edge work on the deck, both personal fall arrest systems and positioning device systems are infeasible protection alternatives because the required anchorages used for attachments cannot support the minimum weight resistance required. In the case of personal fall arrest systems, 29 CFR 1926.502(d)(15) calls for the anchorage to support a load of at least 5,000 pounds per employee attached, while in the case of positioning device systems, 29 CFR 1926.502(e)(2), such devices must secure to an anchorage capable of supporting at least twice the potential impact load of an employee's fall or 3,000 pounds whichever is greater. In either case, neither the plywood deck, nor the formwork will sustain any such lateral load since this formwork was not intended for, designed or installed with anchorage capability. Formwork, by OSHA's own definition, is temporary in nature and not intended to be used as an anchor point. Thus, nailing a lanyard to a stringer or rib will not provide sufficient anchorage for

such use. In addition, attaching a lanyard to formwork would violate 29 CFR 1926.501(d)(11) which provides "Lifelines shall be protected against being cut or abraded."

It is also clear that OSHA regulations require attaching a lanyard for these systems above a worker's head and the only thing above the head of an employee working on a deck is sky! According to DeBobes, 29 CFR 1926.104(b) would prohibit attaching lanyards above a worker to formwork not intended for or designed for the purpose since, in pertinent part, the provision provides:

Life line shall be secured above the point of operation to an anchorage or structural member capable of supporting a minimum dead weight of 5,400 pounds.

Faced with the overwhelming evidence against her, the Secretary attempted to suggest that the Canadian product known as "Safe-T-Strap" would provide a sufficient anchor point. However, a close review of the installation guidelines revealed that the product was designed primarily for residential construction in Canada, where the fall protection standards are entirely different. According to OSHA's net salesman, Paine, fall protection is required on all Canadian residential construction. Merely nailing a Safe-T-Strap into the formwork would not provide sufficient anchorage which satisfies OSHA requirements cited above. Thus, OSHA failed to prove feasibility of using fall arrest or restraint systems for deck work which precedes the installation of guardrails.

Additionally, embedment of anchorages for fall arrest or restraint systems will not have sufficient strength. These alternative fall restraint systems suffer the same deficiency in connection with the strength of curing concrete as with the fall protection nets. This is because, if anchorages, such as Safe-T-Straps, are inserted in the curing concrete columns, the column must attain certain compressive strength before the anchorage will yield the OSHA mandated minima for use as a proper anchorage for these systems. Moreover, the installation literature contained in the Safe-T-

Strap brochure, more particularly Figures 1 through 4, depict installations wholly different from that of the project.

For example, Figure no. 1 depicts a "typical reinforced concrete wall installation," which on this project did not exist. Figure no. 2 again deals with a reinforced concrete wall. Figure no. 3 deals with reinforced concrete floor slab, however, the leading edge work for which fall protection is allegedly sought involves creation of the plywood deck well prior to the pour. Such installation is thus inappropriate. Finally, Figure 4 depicts a typical installation of a restraint between walls, which is not relevant.

Therefore, none of the typical installations contained in the Safe-T-Strap literature which might relate to high rise construction is "typical" on this job. Moreover, under the "notes" sections of these typical installations, the following is relevant:

Formwork engineer **must** be consulted for special anchorage requirements if Safe-T-Strap is intended to be used prior to pour in concrete wall.

Concrete wall **must** have attained a compressive strength of at least 15 NPa (2250 psi) before Safe-T-Strap is used.

Thus, the user of Safe-T-Strap is advised that the formwork engineer must be consulted and that concrete which is curing must have attained a particular compressive strength. Assuming arguendo, that an installation for the Safe-T-Strap could be devised for the concrete columns closest to the edge, the curing time would preclude using such anchorages based upon the pour cycle. Here again, OSHA has failed to demonstrate feasibility.

The third substantive defect in connection with the feasibility of these systems is the exposure of more workers to a greater hazard. If we assume that appropriate anchorages could be either nailed to the plywood deck or embedded in column concrete, there would be additional lanyards on the deck or attached to columns which would create tripping hazards to the workers

attached to them as well as others on the deck. With regard to the deck, videos clearly show numerous Avcon employees, as well as other trades, performing repetitive tasks such as marking out penetrations, nailing the plywood deck, installing guardrails and reinforcing steel, etc. Thus, to the extent that those workers near the edge were attaching their lanyards to points inside of the edge, a tripping hazard would obtain.

Based on all of the above, Respondents clearly established that the fall arrest and restraint systems are not feasible for framing or deck work which precedes the installation of guardrails. Thus, Avcon's use of its alternative fall protection plan was adequate and appropriate under the circumstances. This is especially so given that both Bill and Nick are "qualified persons" under the OSHA Act, and have been involved with corporations that have used these methods on over 200 high-rise projects. There was clearly a guardrail system in place, and the alternative fall protection plan was limited to those activities preceding the installation of guardrails. Reversal of Judge Rooney's erroneous decision and vacatur the judgments entered against the individual Respondents is therefore mandated.

d. **Judge Rooney erred in classifying the violations alleged in items 2a, 2b and 2c of citation 2 as Willful.**

Judge Rooney's affirmance of these citations as willful is not supported by a preponderance of the evidence, amounts to an abuse of discretion, and, is contrary to well-settled commission precedent and thus raises an important question of law and public policy, which the Commission must resolve. It is well-settled that the Commission will refuse to find a willful violation merely because an employer disagrees with the view expressed by OSHA. Keco Industries, Inc. 13 BNA OSHC 1161 (1987). As explained in Northeastern Contracting Company, 2 BNA OSHC 1539 (1975), a difference of opinion between the employer and OSHA as to whether a violation existed in a given factual situation "should not be construed as constituting a willful violation of the Act

merely because labor holds a contrary opinion on the facts and advises the employer of that opinion". Furthermore, an alleged violation will be summarily dismissed when brought solely "as a retributive measure" because the employer did not adopt the views of OSHA. Kerr Glass Manufacturing Corporation, 11 BNA OSHC 2239 (1984)(ALJ). The record before Judge Rooney clearly established that Respondents' employces, performing leading edge work, found traditional fall protection methods infeasible. In addition, 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 that indicia of willfulness which the law requires.

The seminal case applicable to **this** matter is Frank Irej, Jr. Inc. v. OSHRC, 519 F.2d 1200 (3rd Cir. 1975) where the Court held that a finding of willfulness requires a showing of an "obstinate refusal to comply" on the employer's part. In Irej, an action was brought by an employer challenging the assessment of a civil penalty for a willful trench shoring OSHA penalty. The side of a trench collapsed in which an employee of Irej was killed. The Court's analysis of the appropriate legal standard to determine willful violations is extremely well reasoned and deserves close attention. The Court first observed its power in connection with interpreting administrative regulations as follows:

"When a delegation of legislative authority to an administrative agency is broad in scope, the Courts have a greater role to play to prevent or correct disparate treatment of those subjected to regulations. Furthermore, it is the duty of the Courts to interpret the statute under which the agency functions and to determine whether the agency is acting within the congressional purpose. (citations omitted, emphasis added) 519 F.2d at 1206.

The Court then analyzed the standard employed by the hearing officer before the OSHA Commission and observed:

The hearing officer concluded that a willful violation may exist under the Act when the employer commits an intentional and knowing violation and is conscious that his action is proscribed or, if the employer is not consciously violating the Act, when he is aware that a hazardous condition exists and makes no reasonable effort to eliminate the condition.

However, the Court in Irey disagreed with the hearing officer there, and analyzed the reasons why a different, heightened standard should apply to a willful violation. That analysis follows:

It is obvious from the size of the penalty which can be imposed for a "willful" infraction - ten times that of a "serious" one - that Congress intended to deal with a more flagrant type of conduct than that of a "serious". Willfulness connotes defiance or such reckless disregard of consequences as to be equivalent to a knowing, conscious, and deliberate flaunting of the Act. Willful means more than merely voluntary action or omission - it involves an element of obstinate refusal to comply. Id at 1207. (Emphasis added)

The Irey Court then concluded that the government had failed to carry its burden of proof and remanded the matter for further consideration as the Commission had based its judgment on an erroneous legal standard. The Irey Court concluded,

"We believe that a restrictive definition is appropriate here since otherwise there would be no distinction between a "serious" offense and a "willful" one. The lack of demarcation would permit the agency to assess a higher penalty than that which is authorized for conduct defined as a "serious" violation. A broad interpretation of "willful" would disrupt the gradation of penalties and violations so carefully provided in the Act. (Id).

Irey's heightened standard for willful violations has been consistently upheld in other Third Circuit opinions. See, for example, Universal Auto Radiator Manufacturing Co. v. Secretary of Labor, 631 F.2d 20 (3rd Cir. 1980), Babcock & Wilcox Co. v. OSHRC, 622 F.2d 1160 (3rd Cir.

1980), Fagan v. City of Vineland, 22 F.3d 1296 (3rd Cir. 1994) and Wehr v. Burroughs, 619 F.2d 276 (3rd Cir. 1980).

In her opinion, Judge Rooney found a "... conscious disregard of the terms of the (fall protection) standard, and, "... disregard for the advice of compliance officers" (Dec. at p. 48). However, nowhere in her analysis of willfulness of these citations is there a finding, consistent with the aforesaid authorities, that respondents deliberately flaunted the Act. Accordingly, Respondents request that the Commission reverse this Decision.

3. **DOCKET NO. 98-0755**

a. **Judge Rooney erred in concluding that the Secretary met her burden of proving the inadequacy of the Respondents' hazard communication program, as alleged in items 1a and 1b of citation 1.**

In affirming citation 1 items 1(a) and (b), Judge Rooney contradicted well-settled Commission precedent. Additionally, the Decision was not supported by a preponderance of the evidence and therefore, raises an important question of law and public policy, which the Commission must resolve.

Judge Rooney affirmed the alleged failure to maintain written information regarding hazard communication programs, hazardous chemicals and safety, notwithstanding direct evidence of the existence of such information at the site. Respondents testified that all written materials regarding these chemicals were kept in a folder and in a loose-leaf file constituting the hazardous communication program (Tr. 2322). There were also a complete set of Material Safety Data Sheets on site (Id.). The communication program involved telling the employees how to handle materials if there was an accident and what to do about it (Id.). Therefore, there was credible evidence adduced by Respondents regarding the existence of the written program, as well as the implementation of same, however, Judge Rooney ignored this evidence. Respondents now, respectfully request that this Commission rectify the flawed Decision.

b. **Judge Rooney erred in concluding that the Secretary met her burden of proving the inadequacy of the Respondents' accident prevention program, as alleged in item 2 of citation 1.**

Judge Rooney's Decision in this regard is contrary to well-settled Commission precedent, not supported by a preponderance of the evidence and, therefore, raises an important question of law and public policy which the Commission should resolve. In this Citation, OSHA claims that Respondents had an inadequate safety and health program at the work site. However, there was ample testimony that a safety and health program was created for the project using a sample that had been given to Respondents former OSIIA Assistant Area Director (and now and OSHA Director), by Mr. Peist on another project (Tr. 2325). Respondents gave this written program to OSHA during the subject inspection, which program had been modified from the sample he had received (Exhibit C-6).

There was further un rebutted testimony that the program was discussed with all the foremen and each foreman received a copy of the program (Tr. 2327). Furthermore, it was the foreman's and/or the shop steward's responsibility to discuss the program with the workers, and respondents testified that the shop stewards were seen discussing aspects of the safety program with the workers since the shop stewards had safety responsibility (Id.). Not only would the shop stewards deal with the workers on a one-to-one basis, but also, shop stewards went around taking attendance every day on the job for union reports and would, therefore, talk to employees every day, typically twice; once in the morning and once after lunch (Id.).

There was further un rebutted testimony that Mr. Signorile did not go through the written safety program with Respondents pointing out any perceived problems (Tr. 2328). Indeed, no one at OSHA ever indicated to Respondents that the written safety program was inadequate (Id.). According to Respondents, whenever Mr. Signorile perceived a violation, whether, in fact, it

existed, he assumed that there was "no safety program" (Tr. 2322). Judge Rooney's citation to Northwood Stone & Asphalt, Inc., 16 BNA OSHC 2097 2099 (1994), is of no moment. The safety program was in place and enforced, which included, "Those measures for detecting and correcting hazards which a reasonably prudent employer similarly situated would adopt". Indeed, the form which was copied was that given to respondents by OSHA. Accordingly, the Commission should reverse Judge Rooney's Decision in this regard.

c. **Judge Rooney erred in affirming the alleged scaffolding violations set forth in items 8a & 8b of citation 1.**

Judge Rooney's opinion was not supported by a preponderance of the evidence and thus, raises an important question of law and public policy which the Commission must resolve. The two instances under this Citation, affirmed by Judge Rooney in the Opinion below, lack sufficient credible evidence as there was direct testimony offered by respondents contradicting Mr. Signorile's unsubstantiated allegations.

Instance (a) involved work in an elevator shaft on the second floor of the building. Mr. Signorile claimed that he observed a worker "in the elevator shaft standing on a platform that was not fully planked". Although the OSHA 1-B Form indicated that the "scaffold platform (was) approximately 6'5" high", Mr. Signorile testified and Judge Rooney noted that the "plank was 6'3/4" above the floor (Dec. at p. 80). However, Judge Rooney completely ignored the testimony of Respondents who were present at the time of the alleged occurrence (Tr. 2416). Respondents' testimony was that Mr. Signorile observed a working platform, not a scaffold, and it was not 6' off the ground. Respondents further explained that the member was actually part of the elevator formwork and was nailed to the formwork with uprights (Tr. 2417). Therefore, based upon Respondents' testimony, the subject provision does not apply to the cited occurrence and, hence, Judge Rooney's Opinion is not supported by a preponderance of the evidence.

Instance (b) deals with the same horizontal form member as Instance (a). Since Judge Rooney identified this member as the "same scaffold which was the subject of Item 8A", her Opinion in connection therewith suffers from the same defects (Dec. at p. 81). Respondents' testified that, since there were no workers at the time in the area who were attempting to gain access to the horizontal member, there was no need for a ladder (Tr. 2422). In addition, Respondents indicated that, contrary to Mr. Signorile's testimony, there was no steel in the wall in question and, in fact, the only metal in the wall were snap-ties, which could not be walked on, as they were only 1/8" in diameter (Tr. 2423). Accordingly, the Secretary lacked sufficient credible evidence to support this violation and the Review Commission should reverse Judge Rooney's Decision based on these deficiencies and vacate the citations.

d. Judge Rooney erred in affirming Citation 2, Item 1, alleging serious violations of the head protection standard.

Judge Rooney correctly noted that respondents had a company policy which required hardhats be worn at all times while on the job site, that management constantly enforced this rule through all reprimands and that one employee was fired for violating the rule (Dec. at 66). Moreover, she explained and accepted Respondents' testimony regarding the method by which materials were landed on the plywood deck and explained the warning system employed by the signalman when the concrete bucket arrives. (Id.) Judge Rooney concluded that, "Based on the video and photographic evidence, and the testimony of respondents' witnesses, I find that respondents made a good faith effort to comply with the standard..." (Dec. at 67). Nevertheless, Judge Rooney affirmed a serious penalty, even though OSHA failed to prove, by a preponderance of the evidence, the existence at a particular date and time, of an overhead risk by respondents' employees not wearing hardhats. The evidence proffered for the six alleged incidents, however, fails to prove such facts. The failure of the proofs is demonstrated seriatim:

1) **Instance (a)**

Instance (a) allegedly occurred on October 21, 1997 and the Secretary relies on Exhibit C-72. However, Judge Rooney finds that there are sufficient facts to support violation, but, unbelievably, concludes that, "The fact that the photo does not depict all eight (8) employees and the bucket is of no consequence." (Dec. p. 62 FTN38)

2) **Instance (b)**

Instance (b) was allegedly supported by Mr. Signorile's testimony that he saw the crane pass a load across the entire top deck of the building, that is from the east side to the west side. Respondents presented un rebutted testimony that crane loads did **not** swing over the west side, rather just the east side. (Tr. 2271) In addition, Mr. Signorile claimed that exposed employees were working on a balcony, however, respondents' un rebutted testimony was that no loads were landed on the balcony and hence no loads passed over the balcony. (Tr. 2270)

In addition, Mr. Signorile claimed to have made the observation from the general contractor's trailer, which was at least 70' away. Clearly, Judge Rooney's affirmance here is not supported by the preponderance of the evidence.

3) **Instance (c)**

Instance (c) was supported by a videotape and depicted the landing of a load of reinforcing steel. However, a close review of the videotape shows that at no time are any individuals in danger of an overhead risk.

4) **Instance (d)**

Instance (d) was, again, the subject of videotape evidence, such video being filmed from a building at least 200' from the subject project. As such, it was impossible for the viewer to depict the actual overhead risk. Moreover, individuals in the videotape were wearing hardhats and, further, there were individuals in the video who were not respondents' employees (Tr. 2299-2302). Here, again, the evidence did not support Judge Rooney's affirmance.

5) **Instance (e)**

Instance (e) involved a stripping operation which, by its definition, cannot involve an overhead risk. This is because the employee uses a stripping bar, which is approximately 4' long, to strip the materials. Thus, the materials were not overhead.

6) **Instance (f)**

Instance (f) is also an alleged overhead risk during a stripping operation. The use of the stripping bar, ipso facto, would mean that the wood being removed would be, at least, 4' from the worker's body and to the side.

Therefore, no credible evidence existed to support these instances. Accordingly, the Commission should grant reverse Judge Rooney's affirmance of these violations. The fact that Judge Rooney believed that the standard guards against "possible" impact is of no moment since, in none of the videotape or photographic evidence, is any impact possible or otherwise shown.

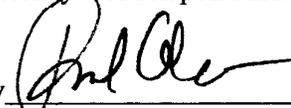
CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that the Review Commission reverse the Decision and Order of the Honorable Covette Rooney, dated August 15, 2000 and dismiss all citations with prejudice.

Respectfully submitted,

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SECRETARY OF LABOR.

Complainant,

-vs-

VASILIOS SAITES and NICHOLAS SAITES
dba ALTO, INC., and/or AVCON, INC.,

Respondents.

OSHRC
DOCKET NOS - 98-0755 and
98-1168

Civil Action

CERTIFICATION OF SERVICE

Service of the within Respondents' Brief in Support of Respondents' Petition to Reverse the Decision and Order of Hon. Covette Rooney, dated August 15, 2000, has this date been made by forwarding a copy thereof via Federal Express to the following:

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