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COUNTER-STATEMENT OF FACTS

A. Statement of the Facts

Respondent Avcon, Inc. ("Avcon"), is owned by Vasilios N. Saites ("Bill Saites") and his wife Cornelia (Tr. 46, 288). At the time of the inspection in 1998, Avcon was building the floors of an 18 story, poured-in-place, reinforced concrete building known as the Excelsior Two Project. Nicholas Saites ("Nick Saites") is Bill Saites' son. He is an attorney and mechanical engineer.

This case concerns one serious citation with 16 violations and one willful citation with four violations issued to Avcon as the result of an inspection of the Excelsior Two worksite beginning April 1998 (OSHRC Docket No. 98-0755). The case also concerns a second serious citation with four violations issued to Avcon after a second inspection of the worksite on June 23, 1998 (OSHRC Docket No. 98-1168). The Secretary was granted leave to amend her complaints in the two dockets to allege that Bill and Nick Saites were individually liable as "employers" under the OSH Act § 3(5), 29 U.S.C. § 652(5).

1. Facts Pertaining to Individual Liability of Bill and Nick Saites:

(a) The Saites Family and its Corporations

Respondent Vasilios Saites ("Bill") and his son, respondent Nicholas Saites ("Nick"), have owned and/or operated several concrete construction companies in New Jersey (Tr. 26-27, 29-34).¹ In chronological order, these corporations are: Astro Construction (incorporated 1962), WNS (incorporated 1981-1982; bankrupt by 1983), Cornicon (incorporated 1985, no longer "viable" by 1987); Altor (incorporated 1991), and Avcon (incorporated 1997) (Tr. 31, 35-36, 107, Exs. C-1 - C-3). Nick bought Astro from Bill in 1983 (Tr. 48). A sixth company, Avcrete, was founded in 1999, after the

¹ "Tr." references are to the transcript of proceedings; "Ex." references are to trial exhibits; "J.D." references the Judge's Decision.

citations were issued in this case, once again with Bill as its president and sole officer (Tr. 177-179).

In fact, Bill Saites has served as the president and sole executive officer of all of these corporations except Cornicon, for which he was the “supervisory” employee. Saites companies have worked on some 200 projects over their nearly forty years of operation (Resp. Brf. at 8). All Saites companies for which addresses were given in this record² have the same office space, at 193 Calvin Street, Westwood, New Jersey, which was first listed at Astro’s incorporation in 1962 as the corporate address, and has been listed as such for Saites companies through the years up to and including the 1997 incorporation of Avcon (Exs. C-1 - C-3). That corporate address actually represents a single large room in the basement of Nick Saites’ personal residence (Tr. 53). Nick and his wife live rent-free at this address, courtesy of Bill Saites and his wife Cornelia, the owners (Tr. 286).

Altor and Avcon are operated out of the large room in the Nick’s basement (Tr. 53). One full-time office worker worked for both companies and is paid by both companies (Tr. 55). Altor paid her salary and back-charged Avcon for any hours of work she performed for Avcon. *Id.* Other than one part-time worker, the remaining office workers were family members who worked for Altor and whose salaries were paid by Altor (Tr. 53-57, 291-293). Only Bill Saites could sign checks for Altor or Avcon, although a stamp with his signature could be used for checks under about \$1500, an arrangement intended to spare him from individually signing weekly paychecks for employees at Excelsior II (Tr. 57-58, 287).

At the hearing, the Saites stated that they establish corporate entities for reasons extrinsic to the

² The Secretary promulgated thirty five requests for documents concerning the Saites’ corporations, but received only one directly from the respondents; however, the Secretary was able to obtain independently corporate status reports for Avcon, Altor, and Astro (Tr. 102-103).

actual performance of concrete construction operations. Avcon was formed to be “a payroll company,” so that Altor could be the materials company (Tr. 287-288); to qualify the Saites’ operation, at least technically, for HUD funding as a “minority-owned business” by vesting 51% ownership in Cornelia Saites, Bill’s wife and Nick’s mother (who had no connection with the business other than “overseeing” the company office and occasionally running errands to the worksite) (Tr. 47, 288, 291-293); and to limit liability for OSHA penalties (Tr. 48, 50). Avcrete was incorporated in 1999 to perform concrete construction work because 1) there was “no money” in Avcon, and 2) to limit liability (Tr. 177-179). With regard to the latter concern, the Saites acknowledged that they were specifically mindful of the sizeable penalty OSHA had proposed upon issuing citations to Avcon in this case.

Saites companies were first documented to have violated OSH Act requirements within months of the Act’s effective date. All of the Saites companies have been cited for OSHA violations. They have been cited many times for violations of the standards at issue here, including one willful violation each for failure to require hard hats, 29 C.F.R. § 1926.100(a), failure to guard an open-side floor, 29 C.F.R. § 1926.500(d)(1), and failure to provide fall protection, 29 C.F.R. § 1926.105(a). Over the years, and excluding the instant citations, Saites corporations have received a total of 29 citations for violations of these standards (§ 1926.100 - 12 citations, § 1926.500(d)(1) -- 12 citations; § 1926.105(a) - 5 citations) (Exs. C-7 - C-51, C-99, C-100). These 29 citations comprise three willfuls, one repeat, as well as at least 19 serious, and three other than serious citations (*id.*) (Exs. C-99, C-100). Over the years, excluding the instant citations, Saites companies have received a total of 169 citations.³ (Exs. C-7 - C- 51; C-99).

³ Thus, Astro was first cited for violating a regulation at issue in the instant case in May 1973, when it received a citation for failure to comply with the hardhat standard, 29 C.F.R. § 1926.100(a), and
(continued...)

Saites companies first defaulted on OSHA penalties in 1974, following Astro's third inspection (Ex. C-99). The company failed to make any payment on the fines assessed until 1981, and then paid only 30% of the amount assessed. *Id.* The most recent time a Saites company failed to pay an assessed penalty was the most recent time a Saites company was cited (Ex. C-9, C-11, C-99). Over the years, while paying a total of \$30,940, Saites companies have failed to pay a total of approximately \$42,000 in

³(...continued)

was fined \$65. (Ex. C-99). It first received a citation for violation of the fall protection standard, 29 C.F.R. § 1926.105(a), in September 1974 (Ex. C-99, C-100), at which time it received a total of 16 citations and was fined a total penalty of \$8005. It was also at this time that a Saites company first defaulted on an OSHA penalty, as only \$2455 of that \$8005 fine was ever paid – in July 1981, almost seven years later. *Id.* In 1980, a Saites company received its only citations for repeated violation of the Act as result of inspections in February and May of that year. A total of thirteen citations resulted from the February inspection (two willful, three repeated, four serious, and four other than serious), with a total penalty of \$3545, which Astro paid. A total of twelve citations issued as a result of the May inspection (one willful, two repeated, six serious, and three other than serious) with a total penalty of \$8370, of which only \$1200 was ever paid (Ex. C-99). Astro was most recently inspected in 1990 and 1991, receiving serious citations as a result of each inspection; it was fined a total of \$1750 for these violations, of which it never paid a dime (Ex. C-99). Over the years, Astro amassed a tally of unpaid fines amounting to \$39,890.26. (Ex. C-99, p. 3)

In its short life, WNS Corporation (named for Bill's initials, with the W substituting for a Greek 'V') was inspected five times within a six month period of 1982, receiving citations following each inspection, including for violation of the hardhat standard and the open sided floor standard. Assessed total penalties of \$2900, it defaulted on \$300 of that amount (Ex. C-99, C-100). WNS went into bankruptcy in 1982 or 1983 (Tr. 29).

Nick's company, Cornicon, for which Bill was a "supervisory" official (Tr. 34), was inspected six times between January 1986 and August 1987, receiving serious citations following each inspection and, in one inspection, willful citations for violation of the hard hat standard, the open sided floor standard, and the fall protection standard at issue here. It accrued total fines of \$10,770, of which it paid \$9200. The \$1520 fine for the three serious citations issued at the final inspection went unpaid (Ex. C-99). Cornicon "ceased to be viable" some time in 1987 (Tr. 33-34).

At the time the instant citations were issued, Altor was the only Saites corporation not to have been either inspected or cited by OSHA. However, Altor has subsequently been cited; those citations are pending in *Avcon II*. Aside from Bill Saites as its president and Nick Saites as its attorney, it has only clerical employees at the Calvin Street basement office, and is intended by the Saites to be the materials company to Avcon's payroll company.

initially assessed penalties (Ex. C-99).⁴

(b) The Excelsior II Project

In 1987, Astro Concrete, with Bill Saites as supervisor and Nick Saites as owner, commenced work performing the concrete construction work for an 18-story apartment building in Hackensack, New Jersey, called Excelsior II (Tr. 46-47, 254-255). The general contractor was Tenwood Construction; Bill Saites had worked with Tenwood, and its president James Canino, many times over a twenty year period (Tr. 255-56, 259-261). After completion of the foundation work, funding was lost and the project was discontinued (Tr. 46-47, 255).

In 1997, fresh funding for the project was obtained through the U.S. Department of Housing and Urban Development ("HUD") by the building owner; Tenwood was again the general contractor (Tr. 46, 47). At that time, Canino contacted Bill regarding the reinforced concrete work at the Excelsior Two Project (Tr. 43, 255). As a result, Tenwood signed a contract with Altor, and Avcon was formed to subcontract, as a minority contractor, the "labor" part of the concrete construction process from Altor. (Tr.40-46, Exs. C-4, C-5) Altor's contract for overall performance of the work was worth \$ 6,959,000 (Ex. C-4 p. 13); Avcon's subcontract for performing the labor of this work was worth \$4,495,000 (Ex. C-5, p. 7). Bill stated that profits from such a project would normally be an amount equivalent to 5%-10% of the overall contract value, but that this project was likely to produce somewhat less profit than that (Tr. 295, 297).

Nick was present at the worksite "4.9 days out of 5" even when his father was not ill (Tr. 110). Nick designated himself as the 'assistant superintendent' for Avcon onsite. *Id.* He believed he had

⁴ This figure includes amounts later settled or waived by the Secretary.

authority to hire (Tr.121-122). It was less certain that Nick could fire employees – it was possible that only Bill could fire employees, because employees had to be paid for their time when fired, and only Bill could sign those checks (Tr. 122-123). Both Bill and Nick believed that Bill could countermand any decision Nick made to fire an employee. *Id.*

2. Facts Pertaining to the Violations: Docket No. 98-0755.

The actual construction methods and specs of the project are as follows. Each of the 18 floors of the Excelsior Two Project was 306 feet, 6 inches long and 80 feet wide with balconies on all four sides (Tr. 2095, 2100). The 3rd through 17th floors were identical except that the 3rd floor had no balconies (Tr. 2083, 2095). The height of a "typical" floor was 8 feet 1 inch (Tr. 2094, 2104). The first two floors as well as the 18th floor had higher ceilings (Tr. 2082-83).

The construction method used was the same method that Bill Saites had used during his 40 years in the concrete business and the method that Nick Saites had been taught (Tr. 205). Vertical 4" x 4" wooden poles or "legs" were erected to support layers of perpendicular, horizontal wooden beams called "low stringers," "high stringers," and "ribs" (Tr. 2083-84, 2087-91, 2104; Ex. R-108). There was one leg per 16 square feet (Tr. 2095, 2098).

Avcon formed the next floor to be poured, called the "deck," by laying 4' x 8' sheets of 5/8" plywood horizontally on the ribs (Tr. 2084). Below the deck, to support the floor, 145 columns were formed with plywood (Tr. 2100, 2103, 2109; Ex. R-109). Two-thirds of the columns were located at the perimeter of the building (Tr. 2103, 2118). Reinforcing steel ("rebar") was placed vertically inside the column forms and horizontally on the deck before concrete was poured (Tr. 2105). The concrete was poured on the deck and into the column forms below at the same time. *Id.*

Avcon formed a floor on a "four day cycle" (Tr. 2081). On the first and second days, Avcon carpenters installed the legs, stringers, column forms, and deck and the Avcon ironworkers installed the rebar (Tr. 2081-82). On the third day, 60% of the concrete was poured. On the fourth day, the remaining 40% of the concrete was poured. *Id.*

After the concrete had cured, Avcon employees stripped the wooden formwork from the concrete surfaces, the vertical columns and the deck and removed the legs, stringers and ribs below the deck (Tr. 2118-19). They stacked the stripped lumber in bays along one side of the building to be hoisted by crane up to the next level to be installed again (Tr. 2118-19, 2127). After stripping was complete, vertical legs, called "reshores," were erected below the new floor (Tr. 2119). Reshores are left in place for 28 days to support the concrete while it cures, as it normally takes concrete that amount of time to achieve 90% of its strength (Tr. 2119). Some reshores are located along the outside perimeters of the floor (Tr. 2121; Ex. C-65).

Avcon hired employees from the union hall (Tr. 65). Frank Georgianna, Avcon's general and carpenter foreman, who had worked for Bill Saites since 1964, supervised the majority of the Avcon workforce (Tr. 268-69, 2941). Bobby Carbone, the ironworker foreman, had also worked many times with Bill and Nick Saites. (Tr. 270).

Avcon employees were required by their duties to work at the outside edges of the floors (Tr. 138-44). Despite the heights at which they worked, Bill and Nick Saites, their foremen, and their employees never used personal fall arrest systems, safety belts and lanyards, during framing or while they were on the deck (Tr. 2595-98). They also never used safety nets (Tr. 302, 316). Employees also worked without guardrail protection, as guardrails were typically removed to frame the columns and not immediately

replaced (Tr. 25, 2651).

Before beginning work on the project, although familiar with the OSHA fall protection requirements from previous citations, Bill and Nick Saites failed to consult any engineers or knowledgeable professionals (Tr. 301, 2605-06, 4253-56). They also never reviewed any literature about available fall protection systems (Tr. 301, 166-68).

In addition to the problems with fall protection on the jobsite, the CHSO discovered numerous other safety issues as well. Although employees on the jobsite worked with and around tanks of oxygen, acetylene, propane, and gasoline, the respondent had no hazard communication program for this particular jobsite and, in addition, provided no training on the handling of these materials. (Tr. 918, 1326-27, 1329-30, 2322). The respondent also violated the scaffolding standard by failing to fully plank a platform used by Avcon employees in an elevator shaft. (Tr. 971-972). An additional scaffolding violation occurred due to the failure of the respondent to provide a ladder to access the scaffold in question. (Tr. 974-75). These safety problems, combined with numerous others on the jobsite, demonstrated that the respondent had an extremely inadequate safety program which provided its employees with no specific guidance regarding hazards on this particular jobsite.⁵

B. Administrative Proceedings and Decision Below

In her decision, Judge Rooney affirmed the citations against the corporation. She additionally affirmed the citations against each of the Saites as individuals, based on a three part analysis. First, the

⁵ In its brief, respondent presents an argument concerning violations of the head protection standard in Citation 2, Item 1 of Docket No. 98-0755. This issue is not on review pursuant to the Commission's Briefing Notice of November 29, 2000 and, as a result, will not be addressed by the Secretary. *See, e.g., Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1535 n. 4 (No. 86-360, 1992) (consolidated).

judge held that Bill and Nick Saites were “employers” within the definition of the OSH Act. In doing so, the judge looked principally to an OSH-Act specific control analysis, holding that the Saites acknowledged that they had control of worksite operations and had the authority to abate safety and health violations, citing, *inter alia*, *Griffin & Brand of McAllen, Inc.*, 6 BNA OSHC 1702 (No. 14801, 1978) (J.D. at 7-16). In addition, pointing to evidence of “dominance” at the worksite because he served essentially the same function as his father, the judge held that Nick Saites specifically, though not an owner of Avcon, fell within the Act’s definition of an “employer” since he used Avcon as his “alter ego or business conduit” within the meaning of the established federal common law test, citing, *inter alia*, *Labadie Coal. Co. v. Black*, 672 F.2d 92 (D.C. Cir., 1982) and *United States v. Pisani*, 646 F.2d 83 (3d Cir. 1982) (J.D. 17-20). Finally, the judge noted that courts have stated that the corporate form may be disregarded “whenever justice or public policy demands,” citing, *inter alia*, *First Nat. City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 713 (1983).

The dockets were consolidated and heard by the ALJ on various dates between May 24, 1999, and December 8, 1999. During the hearing, Citation 1, Item 6 was vacated (Docket No. 98-0755). The Secretary also moved to amend the proposed penalties in Docket No. 98-0755 to reflect an adjustment for the number of Avcon employees (Tr. 440-42). The total amended proposed penalty in Docket No. 98-0755 was \$121,800, of which \$102,000 was for the willful violations.

Judge Covette Rooney issued her decision on August 15, 2000. Respondents filed a petition for discretionary review with the Commission that was granted. On November 29, 2000, the Commission issued its Briefing Notice.

ARGUMENT

I. The Saites Were Properly Held To Be Individually Liable

A. Applicable Law

Respondents Bill Saites and Nick Saites contend that they cannot be held liable for civil violations under the OSH Act as individuals. They assert that the OSH Act's definition of 'employer,' 29 U.S.C. 652(5), will not reach individuals where a corporate form has been interposed (Resp. Brf. at 8-20). Essentially, they are arguing that under no circumstances may the corporate veil be pierced in the context of civil violations of the OSH Act. They are incorrect. As we show, the Secretary's action in citing the Saites is fully consistent with federal common law concerning the appropriateness of disregarding the corporate form. In addition, the Secretary's action is consistent with precedent imposing individual liability for violation of remedial labor law.

Federal courts have long recognized that the corporate form is not inviolate. In *First Nat. City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 713 (1983) ("*Bancex*"), the court stated:

Although a corporation and its shareholders are deemed separate entities for most purposes, the corporate form may be disregarded in the interests of justice where it is used to defeat an overriding public policy. [citations omitted] In such cases, courts of equity, piercing all fictions and disguises, will deal with the substance of the action and not blindly adhere to the corporate form.

(holding federal common law permitted equitable piercing of corporate veil of Cuba's financial entity to find that real party in interest was the Cuban government, which was liable for counterclaims resulting from its confiscation of U.S. bank's assets) quoting *Bangor Punta Operations, Inc. v. Bangor & Aroostook Railroad Co.*, 417 U.S. 703 (1974) ("*Bangor Punta*"). *Bancex* noted that "[i]n particular, the Court

has consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies. 462 U.S. at 713. *See also Anderson v. Abbott*, 321 U.S. 349, 362-363 (1944).

This case arises within the geographic jurisdiction of the Third Circuit, whose precedent is therefore binding on these Commission proceedings. *Kerns Brothers Tree Service*, 18 BNA OSHC 2064 (No. 96-1719, 2000). The leading case articulating that court's analysis of the appropriateness of piercing a corporate veil is *United States v. Pisani*, 646 F.2d 83 (3rd Cir. 1981). In *Pisani*, the court pierced the corporate veil to impose individual liability on a doctor for Medicare overpayments he received through a nursing home. The court held that the nursing home was effectively an 'alter ego' for the doctor, who disregarded elements of the corporate form at will. 646 F. 2d at 88. In reaching that conclusion, the *Pisani* court specified a number of elements it would examine in considering an argument of individual liability.⁶

The *Pisani* analysis involves examination of eight specific elements relating to the individual's relationship to the asserted corporate structure, though the court was at pains to state that The articulated factors were: 1) whether the corporation is grossly undercapitalized for its purposes; 2) failure to observe corporate formalities; 3) the non-payment of dividends; 4) the insolvency of the debtor corporation at the

⁶ In *Pisani*, the pierced corporation was owned by a physician who was its president, registered agent, and sole stockholder. The physician attempted to raise the corporate shield against the federal government's effort to obtain reimbursement for Medicare overpayments to his nursing home facility. Applying the factors of the alter ego test to the record before it, the court found that corporation was undercapitalized; failed to observe corporate formalities such as keeping minutes books; never paid dividends; had no assets whatsoever at the time of the enforcement action; was demonstrated to have paid all of its funds, down to the last dollar, to the individual who was found to be its alter ego; had no other officers or directors; and was merely a facade for the individual's activities.

time; 5) siphoning off funds of the corporation by the dominant stockholder; 6) non-functioning of other officers or directors; 7) the absence of corporate records; 8) the fact that the corporation is merely a facade for the operations of the dominant stockholder or stockholders. *Pisani*, 646 F.2d at 88. *Accord*, *DeWitt Truck Brokers v. W. Ray Flemming Fruit Co.*, 540 F.2d 681 (4th Cir. 1976).

In addition, the court commented that “the situation ‘must present an element of injustice or fundamental unfairness,’” noting that this requirement could very well be satisfied by showings made in regard to the eight enumerated factors. *Pisani*, 646 F.2d at 88 [citations omitted]. Earlier, that court had emphasized that piercing the corporate veil is “appropriate . . . when recognition of the corporate entity would defeat public policy . . .” *Zubik v. Zubik*, 384 F.2d 267, 272 (3d Cir. 1967), *cert. denied*, 390 U.S. 988 (1968). Very recently, the Third Circuit reaffirmed the vitality of the *Pisani* analysis, specifically noting the significance of vindicating federal labor law policies in considering whether to set aside the corporate form. *Pearson v. Component Technology Corp.*, 2001 WL 369784, 17 BNA IER CAS 769 (3rd Cir., April 13, 2001).

Federal labor law in particular specifically takes account of public policy underlying statutes in considering whether to set aside a corporate form.. Thus, in the labor law context, the courts apply a test to determine the identity of the true employer, known as the “integrated enterprise” test. *Radio & Television Broad Techs. Local 1264 v. Broadcast Serv. Of Mobile*, 380 U. S. 255, 256 (1965) (*per curiam*); *Hukill v. Auto Care Inc.*, 192 F.3d 437, 444 (4th Cir. 1999); *Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773, 777 (5th Cir. 1997);.

B. Applying the Pisani analysis to the instant facts

As the judge held, analyzing this record in light of applicable law leads unerringly to the conclusion

that the Avcon served as nothing more than an alter ego for the Saites.

1. Gross undercapitalization

The record strongly suggests that Avcon had no capital other than the monies it received pursuant to its contract with Altor. Nick acknowledged that “in the beginning [of] the job, there wasn’t that much cash flow” (Tr. 124). The contract between Avcon and Altor called for Avcon to receive \$4,495,000 for providing the labor for the concrete work Altor was contracted to perform (for \$6,959,000) on the Excelsior II project (Exs. C-4, C-5). Avcon was to receive its payments in monthly installments some days after Altor received its payments from Tenwood. *Id.* Nick’s testimony suggests strongly that Avcon had little or no capital at the time of its formation, and relied upon its monthly drawdown from Altor to meet its payroll expenses, which were significant.

This inference is bolstered by the salaries which Bill and Nick drew for their work for Avcon throughout the project. Thus, as the project superintendent, Bill set his salary at \$100 per week; as the assistant superintendent, and as Avcon’s legal counsel, Nick took \$300 per week (Tr. 123, 306). By contrast, a carpenter foreman on that job made \$1240 per week; a journeyman carpenter made \$960 per week; Avcon met a payroll of some sixty to seventy employees on the Excelsior II site. Nick acknowledged that one reason he and Bill took such small salaries was to maintain cash flow, which was scant (Tr. 124). Likewise, using Avcon to provide the labor via a subcontract with Altor (Tr. 105-106), but reserving approximately \$2.5 million in the contract price to Altor, similarly shielded the Saites’ “corporate” income from OSH Act liability, since Altor had no “employees” at the Excelsior site, only its

corporate president, Bill. Altor's only employees were three clerical employees at the company office.⁷

Nor did Avcon's capital picture improve as the Excelsior II neared or reached completion. Thus, Bill stated that the ordinary profit margin on such a contract would be from 5%-10%, and suggested that margin would be a little bit less on this contract (Tr.295, 297). Taking the low end of that figure, 5% of Avcon's contract value would be approximately \$224,800; the full 10% would be nearly half a million. Yet by the time of the hearing, Avcon apparently had very little money. Both Bill and Nick seemed strangely unable to recall whether Avcon had any profit or payments coming to it from the Excelsior II project (Tr. 133, 297). They offered no information as to how the Excelsior profits were spent or distributed to Avcon's owners. The record does state, however, that whatever money may have been received was no longer present in Avcon's accounts, although there were, by then, outstanding OSHA citations with potential penalties over \$100,000 (Tr. 179).

The conclusion is virtually inescapable that Avcon was very thinly capitalized for its purposes at all times. Moreover, the under-capitalization is utterly deliberate, even calculated. Thus, the weight of the financial evidence is further augmented by what might be characterized as the Saites' corporate philosophy: Nick candidly stated that placing assets beyond the reach of any liability, and specifically OSHA liability, was a prime concern in the creation of both Avcon and Avcrete (Tr. 50-51, 178-179). Indeed, the

⁷ Avcon continued to be undercapitalized. In the *Avcon II* proceeding, it was established that Avcon had a total of \$9.88 in its bank account at the time of the hearing in the fall of 2000. At that time, the company had an account receivable from Altor in the amount of \$139,000, which represented the balance of Avcon's \$253,535.68 "net profit" from another project, called Edgewater. When asked where the first payment from Edgewater had gone, Bill claimed that all of Avcon's money went to pay legal fees, including fees paid to Nick. At that time, the corporation still had potential liabilities of over \$90,000 in this case, and over \$150,000 in *Avcon II*, as well as continuing expenses in the form of legal services relating to both cases.

OSHA penalties were in the forefront of the Saites' thinking in 1999 as they moved on to yet another corporation: Nick stated that part of the reason for the formation of Avcrete in 1999 was that Avcon had no money and might have a substantial liability in OSHA penalties (Tr. 178-179).

2. Failure to observe corporate formalities

The Third Circuit has noted in the past that “lack of formalities in a closely-held or family corporation has often not . . . [had] as much consequence” compared with other types of corporations.” *Zubik v. Zubik*, 384 F.2d at 271 n. 4. Still, the record here suggests some carelessness with the corporate form. Thus, when Bill signed the subcontract between Altor and Avcon – signing for both companies, since he was the president of both – the contract was not put to the shareholders of either company for ratification. Nick said the Altor shareholders were aware of the contract, but invoked attorney-client privilege when asked how they knew; Bill did not remember if his wife, the majority owner of Avcon, had seen the contract before it was signed. Nick looked at the contract between Altor and Tenwood (the general contractor on the Excelsior II project), and the contract between Altor and Avcon, and made modifications and/or deletions to both (Tr. 97-99; Ex C-3, C-4). Nick testified that he did this work at Bill's request, but couldn't say whether Bill asked him to do this in his capacity as president of Altor or of Avcon (Tr. 45).⁸ It is impossible to have an honest, arms-length bargaining session fairly intended to protect shareholders where the same individual is the President of both bargaining parties. Likewise, the amounts of Bill's and Nick's incomes for their services on the project reflect their distance from the

⁸ In *Avcon II*, Bill testified that numerous formalities have been omitted with respect to Avcon: no organizational shareholder's meeting was ever held, there are no annual shareholders meetings except that Bill talks to his wife “at times over breakfast in the morning;” Avcon has never declared a dividend; and Avcon has no minute book nor any minutes for shareholder meetings.

ordinary pressures and counterpressures of arm's-length employer-employee salary negotiations.

3. *Non-payment of dividends*

There is no evidence either way in this record.⁹

4. *The insolvency of the debtor corporation at the time*

It is not clear from the cases what "time" in the life of the corporation is the relevant time.

However, the record here so strongly indicates that Avcon was undercapitalized both at the outset and at the end of the Excelsior II project.¹⁰ Certainly by the time of the hearing – the time at which Avcon's potential liability for OSHA fines would be determined – the company had "no money," according to Nick (Tr. 179). And by the Saites' design, the company remained insolvent, for they elected to form a new company, Avcrete, rather than recapitalize Avcon with the profits from Excelsior II project (Tr. 177-179).

5. *Siphoning of funds of the corporation by the dominant stockholder*

The record contains no evidence of siphoning by Bill or Nick with respect to Avcon. To the contrary, both Bill and Nick offered direct, vehement denials of any usage whatsoever of corporate monies for personal expenses. (Tr. 210, 306). Likewise, Nick described in detail the methods by which he handled and documented the use of monies from either Avcon or Altor for small purchases of worksite materials (Tr. 45 ff.). Yet the fact remains that Avcon apparently has no money.

While they did not engage in intermingling Avcon's funds with their personal funds, there is nevertheless a strong indication in the record that the Saites, particularly Bill, regard their companies'

⁹ In *Avcon II*, Bill expressly stated that Avcon has never declared a dividend.

¹⁰ In *Avcon II*, Bill stated that the corporation had \$9.88 in the bank, and an account receivable from Altor of \$139,000.00. He also stated that, aside from revenues from contracts, Altor's assets consisted solely of good will, a couple of trucks and "some cash," amount unspecified.

income as their own personal property. Everyone connected with Avcon, which is to say all members of the Saites family, seem to have taken for granted that Bill would dispose of Avcon's profits as he saw fit. Thus, while it is not 'siphoning,' *per se*, Bill stated he gets 'whatever is left' of Avcon's funds after a project is complete, making no reference to any outstanding debts or recurring corporate expenses. Likewise, Nick stated that he "hoped" for additional income from Avcon for his work on the Excelsior II project, even though he 1) described the \$300/week salary he drew as representing his full compensation and 2) was neither a shareholder nor a corporate officer of Avcon. This "hope," founded on a conversation with his father, is another indication that the Saites regarded Avcon's corporate monies as being essentially Bill's personal property.

6. *Non-functioning of other officers or directors*

Here the record shows that Bill essentially was the corporation, with Nick as his deputy. Bill is Avcon's only officer. Only Bill could sign checks for either Avcon or Altor (Tr. 61). Bill set his own salary of \$100/week for his work as Avcon's project superintendent, and Nick's salary of \$300/week for his work as assistant superintendent (Tr. 123-124, 280).

By contrast, Avcon's majority shareholder, Mrs. Cornelia Saites, took almost no part in the corporation. Bill stated that she oversaw the office, but acknowledged that she took no pay for this task from either Avcon or Altor (Tr. 292, 295). She was not authorized to sign checks and went to the Excelsior worksite only incidentally, on errands (Tr. 293-294). Bill didn't recall if he showed the Altor-Avcon contract to his wife before he signed it (Tr. 289). She didn't ratify it. Nick stated that, based on a conversation with Avcon's shareholders, he hoped to receive extra money from the Excelsior Project at its completion, then acknowledged that he had not actually spoken with his mother "directly" about this

hope (Tr. 134-136). In short, seeking additional compensation from Avcon, the company's assistant superintendent and attorney asked Bill.¹¹ Likewise, even while Nick was running the worksite during his father's absence illness, both Bill and Nick believed that Bill could reverse a firing decision Nick made. (Tr. 248).

In short, the record shows plainly that, essentially, Avcon was Bill.

7. *Absence of corporate records*

The record here does not establish the existence or condition of Avcon's corporate records. Avcon resisted the Secretary's discovery requests, supplying only one of some 35 requested documents.¹²

8. *Corporation is merely a facade for operations of the dominant stockholder or stockholders*

We have seen that Avcon was essentially Bill Saites, as four other corporations had been before it. Avcon was not a mere shell. It signed contracts, filed tax returns, met a payroll, was a registered corporation, had an office, etc. If an Altor employee spent time doing Avcon work, Avcon was billed for it; if material was purchased for Avcon's use with Altor funds, Avcon was billed for it. Nevertheless, when the activities of the Saites in establishing and abandoning corporations over a period of decades are looked at as a unified whole, it seems clear that Bill and Nick are using the corporations to conduct the family

¹¹ Nick, who held no ownership position in Avcon, stated at one point that the \$300/week salary he drew during Excelsior II was payment for "legal services" to Avcon (Tr. 134). If so, he was serving as the second in command 'Assistant Superintendent' and running the worksite during the month that his father was ill with pneumonia for no compensation whatsoever.

¹² In *Avcon II*, Bill admitted there is no minute book for Altor, and no records of any actions relating to shareholder meetings or shareholder ratification of actions taken by officers. Similarly, Avcon has no minute book nor any minutes for shareholder meetings.

business. By this token, each corporate entity, including Avcon, has been simply a tool -- Bill's tool, most of all, but increasingly Nick's as well.

9. *An element of injustice or fundamental unfairness*

As we have noted, the Third Circuit has held that piercing the corporate veil is "appropriate . . . when recognition of the corporate entity would defeat public policy. . . ." *Zubik*, 384 F.2d at 272. The Third Circuit reiterated this concern in a recent application of the *Pisani* analysis. *Pearson v. Component Technology Corp.*, 2001 WL 369784 at *9. As we noted, above, there is a venerable yet vital line of Supreme Court precedent holding that public policy is not to be thwarted by interposition of the corporate structure; it is the corporate form which must yield precedence when the two come into conflict. *Bancex, supra*; *Bangor Punta, supra*. The Supreme Court has held that the legislative goal prevails even where no such conflict, noting, in *Anderson v. Abbott*, 321 at 362-363 that "[i]t has often been held that the interposition of a corporation will not be allowed to defeat a legislative policy, whether that was the aim or only the result of the arrangement." Thus, in piercing the veil in *Pisani* to allow Medicare overpayment recovery directly from the individual physician, the Third Circuit emphasized the importance of vindicating the legislative purposes of the Medicare program both in its choice of a uniform federal standard, 646 U.S. at 86-87, and in its application of that standard to the facts before it. *Id.* at 88. See *Alman v. Danin*, 801 F.2d 1, 3-4 3-4 (1st Cir. 1986) "deferring too readily to the corporate identity may run contrary to the explicit purposes of the Act"); *Capital Telephone Co. v. FCC*, 498 F.2d 734, 738 (D.C. Cir. 1974) ("a corporate entity may be disregarded in the interests of public convenience, fairness, and equity"); *Kavanaugh v. Ford Motor Co.*, 353 F.2d 710, 716-717 ("[n]otwithstanding that the corporate format may be legally unassailable in other situations, its vulnerability is exposed when the purposes of the Dealers'

Day in Court Act and its legislative history are considered”); *Lowen v. Tower Asset Mgmt. Inc.*, 653 F. Supp. 1542, 1548-1553 [quote at 1551] (S. D. N.Y. 1987) (“the remedial thrust of ERISA is not to be frustrated by meticulous emphasis upon the corporate form”).¹³

Indeed, the field of federal labor law has its own specific body of caselaw examining the question of setting aside the corporate form. As the *Pearson* court notes, those cases opine that “because public policy varies from contract to tort to property, for example, veil-piercing standards should vary as well.” *Pearson*, 2002 WL 369784 at *9, citing Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 Cornell L. Rev. 1026 (1991). Thus, in focusing on the question of whether affiliated corporations actually were a “single employer” such that their distinct corporate identities should be disregarded, the NLRB crafted a four point test which looks to four labor-related characteristics of affiliated corporations: 1) interrelation of operations; 2) common management; 3) centralized control of labor relations and,

¹³ Indeed, courts examining the OSH Act have remarked that its statutory definition of “employer,” 29 U.S.C. 652(5), may encompass individuals, so that the corporate form may be set aside in appropriate circumstances, and one district court has so held. Thus, in *U.S. v. Cusack*, 806 F.Supp. 47, 49, 51 (D.N.J. 1992), the court held that an individual may be an “employer” within the meaning of 29 U.S.C. § 652(5). See also *U.S. v. Shear*, 962 F.2d 488 (5th Cir. 1992) (*dicta* suggesting an individual may be criminally charged as an employer under the OSH Act, although company supervisors in these cases were unsuccessfully indicted under 18 U.S.C. § 2(a) for allegedly aiding and abetting criminal violations of the Act pursuant to § 666(e).); *U.S. v. Doig*, 950 F.2d 411 (7th Cir. 1991) (same). Prior to Judge Rooney’s decision in this case, another Commission judge had ratified this analysis as applied to the civil context. *Louis Sinisgalli et al.*, 17 BNA OSHC 1849 (1996)(ALJ). See also *Life Science Products Company et al.*, 6 BNA OSHC 1053 (1977) (Chairman Cleary considers application of term “employer” to individual) *aff’d*, *Moore v. OSHRC*, 591 F.2d 991 (4th Cir. 1979). However, the Supreme Court has held that a statutory term such as “employee” must be read in light of its established meaning within the common law. *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 323-324 (1992) (“ERISA’s nominal definition of ‘employee’ as ‘any individual employed by an employer,’ warrants application of the common-law of agency because “we do not find[] any provision either giving specific guidance on the term’s meaning or suggesting that construing it to incorporate traditional agency law principles would thwart the congressional design or lead to absurd results”).

4) common ownership or financial control. This test has been applied to identify an employee's true employer in the context of numerous federal labor laws, including ERISA, Title VII and the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Federal Labor Standards Act, and the Family Leave Medical Act.¹⁴ See *Annotation*, "Individual Liability of Supervisors, Managers, or Officers for Discriminatory Actions--Cases Postdating the Civil Rights Act of 1991," 131 A.L.R. Fed. 221 (1996), *collecting cases*.

It is a familiar statement that the OSH Act was intended to prevent the first injury that might result from unsafe conditions. *Mineral Indus. & Heavy Constr. Group v. OSHRC*, 639 F.2d 1289, 1294 (Former 5th Cir. 1981) (the purpose of the Act is "to prevent the first accident"); *Lee Way Motor Freight v. Secretary of Labor*, 511 F.2d 864, 870 (10th Cir. 1975); *Ryder Truck Lines v. Brennan*, 497 F.2d 230, 233 (5th Cir. 1974). Congress anticipated that most employers would comply voluntarily, but included a hierarchical penalty structure in the Act to coerce or compel compliance from recalcitrant employers by giving them economic incentives.¹⁵ *George Hyman Constr. Co. v. OSHRC*, 582 F.2d 834

¹⁴ *Frank v. U.S. West, Inc.*, 3 F.3d 1357 (10th Cir. 1993)(Title VII & ADEA); *EEOC v. Chemtech Intl. Corp.*, 890 F.Supp 623 (S.D. Texas 1995)(ADA); *Takacs v. Hahn Auto. Corp.*, 1999 WL 33117265 (S.D. Ohio 1999)(FLSA). However, one circuit has rejected the application of the integrated enterprise test in the context of antidiscrimination law, though its holding applies directly only to the ADA. *Papa v. Katy Industries, Inc.*, 166 F.3d 937, 940-943 (7th Cir. 1999). In addition, *Pearson* may be regarded as leaving the question open, for though the court discusses the integrated enterprise test, it reaches its holding based on the application of that circuit's test in *Pisani*.

¹⁵ The Act depends greatly on voluntary employer compliance, and was designed to facilitate it by ensuring that a safety-conscious employer would not suffer in the marketplace because of his expenditures. "National uniform standards [and] . . . enforcement will . . . reduce or eliminate the disadvantage that a conscientious employer might experience where inter-industry or intra-industry competition is present." Legislative History at p. 854. However, the statute also created an enforcement mechanism, by which the Secretary was empowered to enter and inspect workplaces and issue citations (continued...)

(4th Cir. 1978). Indeed, in pursuing one particularly recalcitrant employer, one court reached past a series of corporate forms and held the individual employer liable for contempt fines initially arising from OSH Act proceedings, *See Reich v. Sea Sprite Boat Company*, 50 F.3d 413 (7th Cir. 1995), while another, its patience exhausted, has imposed a \$10,000 per day fine on a company with a long and richly documented history of illegally resisting OSHA inspections. *See Matter of Trinity Industries, Inc.*, 876 F.2d 1485 (11th Cir. 1989).

Here, the corporate history of the Saites' companies illustrates a long and frequently successful avoidance of OSH Act responsibilities. The Saites freely admit that they have never used nets at their worksites; their companies are still receiving hard hat citations even though one was first cited for such a violation in 1973, scant months after the OSH Act came into being. They have avoided both complying with occupational safety and health standards and owning up to the financial responsibilities of the penalties incurred once they have been detected in violations – and they have persisted in this avoidance for nearly thirty years. Altor, Avcon, and the nascent Avcrete are merely the most recent avatars of a violative course of conduct that has blanketed itself with the technicalities of corporate law while grossly resisting the substance of safety and health law. It does not overstate the situation to say that the Saites essentially use their corporations to thumb their noses at the OSH Act.¹⁶

¹⁵(...continued)
for noncomplying conditions. 29 U.S.C. §§ 657, 658. Penalties may also be levied for these violations. *E.g.*, 29 U.S.C. § 666.

¹⁶ The OSH Act is not the only federal statute for which the Saites have slight regard. The principal reason for the formation of Avcon was to vest 51% ownership in Mrs. Cornelia Saites in order to qualify the company as a 'minority-owned enterprise' to obtain federal housing funding from HUD. While this may have complied with the letter of the federal housing law, it is very far from honoring its spirit.

While Avcon and Altor may be shown to have observed some of the niceties of the corporate form, the Saites themselves admit that, at a minimum, the underlying purposes for the creation of Avcon including the limitation of OSHA liability. Indeed, knowing that they were staring down the barrel of a potential \$130,000 fine in this case, and a potential \$150,000 fine in *Avcon II*, the Saites have moved on to Avcrete, leaving, as Nick stated, \$9.88 in Avcon's bank account. Nick candidly acknowledged that the pending fine in this case was a motivation for establishing the new company.

These circumstances more than meet the ninth element of the *Pisani* analysis; Saites companies have been thwarting the Congressional policies underlying the OSH Act almost since the day the statute was enacted. It appears that the only way to coerce or compel any Saites company to honor its responsibilities under the OSH Act is to pierce the corporate veil and hold the individuals who really are this concrete construction enterprise, and have been all along since 1962, personally liable. Perhaps once they are personally responsible, no matter what their corporate name, the Saites will begin to meet their most important duty under the OSH Act, and one they have resisted steadfastly for all three decades of the Act's life – the Congressionally mandated duty of providing a safe and healthful workplace for their employees.

II. The Judge correctly held that the Respondents violated the Fall Protection Standard at 29 C.F.R. § 1926.501(b)(1) as alleged.

Introduction

Serious Citation 1, Item 9 alleges that the Respondents violated Section 1926.501(b)(1) ¹⁷ by

¹⁷ Section 501 provides, in pertinent part, as follows:

(b)(1) *Unprotected sides and edges*. Each employee on a walking/working
(continued...)

failing to use guardrail, safety net, or personal fall arrest systems to protect employees erecting and stripping formwork and performing other duties near the outer building perimeter. The violations pertain to employees working on the main lobby to the 11th floor from October 9 through December 15, 1998. Willful Citation 2, Items 2a, 2b, and 2c describe violations occurring on the 6th to the 13th floors from November 24, 1998, through January 7, 1998.

The Judge correctly rejected Respondents' arguments and affirmed all alleged instances except Citation 1, Item 9, Instance (e), which is not on review. Respondents here renew their arguments that Section 1926.501(b)(2), governing "leading edge" work, applies to the cited conditions. (Resp. Brf. at 29-32). Respondents also renew their argument that CSHO Signorile's testimony was unreliable. (Resp. Brf. at 32-34). Respondents argue that the Judge erred in her denial of their requests concerning the Secretary's rebuttal evidence and in rejecting their infeasibility defense. (Resp. Brf. at 23-37).

The judge correctly rejected Respondents' arguments. The record evidence establishing the specific violations is as follows:¹⁸

A. CITATION 1, ITEM 9:

Instance (a) - On October 9, 1997, CSHO Signorile saw two employees stripping the wood frame off column 24 on the second floor, working one foot from the edge (Tr. 978).

¹⁷(...continued)

surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

29 C.F.R. § 1926.501(b)(1).

¹⁸ In all instances employees were exposed to falls from heights from 12 to 120 feet. All the workers observed were Avcon employees, and no fall protection was used in any instance.

Instance (b) - On October 9, 1997, CSHO Signorile observed an Avcon employee standing on steel flanges and exposed to a 10 foot fall (Tr. 985-86, 988, Ex. C-61).

Instance (c) - On October 14, 1997, the CSHO saw two employees stripping column 49 exposed to a 12 foot fall (Tr. 1000-1003; Ex. C-62).

Instance (d) - On October 14, 1997, the CSHO saw Avcon employees stripping on the second floor within one foot from the outside edge (Tr. 1004-09).

Instance (f) - On October 21, 1997, the CSHO saw a foreman and one other employee at the edge of the east side of the second floor exposed to a 20 to 24 foot fall (Tr. 1009-1013).

Instance (g) - On October 21, 1997, the CSHO photographed two unprotected employees working on the east side of the third floor, one 5 to 6 feet and another 1 foot from the edge (Tr. 1013-1018). Foreman Georgiana was observing their work (Tr. 1016).

Instance (h) - On October 29, 1997, the CSHO saw employees stripping framework, working within one foot from the edge of the west side of the third floor (Tr. 1018-22).

Instance (i) - On October 29, 1997, the CSHO saw two or three unprotected Avcon employees stripping formwork one foot from the edge on the fourth floor, west side (Tr. 1022-28; Ex. C-65).

Instance (j) - On November 17, 1997, the CSHO saw three employees erecting formwork on the 7th floor (Tr. 1028; Tape 1 - 01:06.22.02-01:07.22.22). The employees were working at the edge, but they were not using fall protection (Tr. 1029).

Instance (k) - On November 18, 1997, the CSHO saw three employees working from the edge of a balcony and not using any fall protection (Tr. 1030-35, Ex. C-67).

Instance (l) - On December 8, 1997, CSHOs observed and videotaped three employees at the perimeter of the southwest corner of the 11th floor (Tr. 1035, 1082-85). The employees were not using fall protection (Tr. 1035-37).

Instance (m) - On December 11, 1997, CSHOs and AD Peist saw an employee, in this case Foreman Georgiana's son, framing at the edge of the eleventh floor, northwest corner and not using fall protection (Tr. 1037-39).

Instance (n) - On December 11, 1997, CSHO Signorile and AD Peist saw an Avcon employee framing on the eleventh floor without fall protection (Tr. 1039). When informed of this violation, Nick Saitey yelled at the employee to get a safety belt (Tr. 1040-41).

Instance (o) - An OSHA videotape on December 15, 1997, depicts employees on the 11th floor, the deck, working on columns and walking along the edge of the deck using no form of fall protection (Tr. 1043-46).

Instance (p) - On December 15, 1997, CSHO Signorile observed an employee stripping on the tenth floor balcony, southeast area without fall protection (Tr. 1046-47).

Instance (q) - An OSHA videotape taken December 15, 1997, shows an employee bending rebar on the ninth floor balcony, southeast corner without fall protection (Tr. 1047-48).

B. CITATION 2, ITEM 2a:

Instance (a) - On November 24, 1997, through his binoculars, the CSHO Signorile saw approximately 11 employees with Dominic Paniscotti, the Avcon Carpenter Foreman, framing on the eighth floor and not wearing fall protection (Tr. 881-84, 1104-05).

Instance (b) - On November 24, 1997, through his binoculars, CSHO Signorile saw five unprotected

employees framing on the seventh floor working within one to two feet from the edge (Tr. 888). Avcon foremen were in the vicinity of the exposed workers (Tr. 895-96).

Instance (c) - On November 24, 1997, the CSHO saw two employees, one a foreman, stripping on the seventh floor at the edge of the southwest corner (Tr. 889-90).

Instance (d) - A videotape, shot the same day also depicts an employee bending rebar on the west side at the sixth floor balcony one to two feet from the edge (Tr. 891-82; Ex. C-101).

Instance (e) - The November 24th videotape depicts two unprotected employees working on the outer edge of the west side of the seventh floor (Tr. 892-93; Ex. C-101, C-103, C-110). This activity was taking place in the presence of Bill Saites and Foreman Georgiana (Tr. 894).

C. CITATION 2, ITEM 2b:

Instance (a) - On December 8, 1997, CSHO Signorile and his supervisor Mr. Peist saw an employee picking up metal brackets one or two feet from the edge of the 9th floor (Tr. 896).

At the time that the CSHO observed the exposure, he and his supervisor were interviewing Bill Saites, who could see the exposed employee (Tr. 897-899). When the CSHO and Mr. Peist discussed the condition with Mr. Saites; however, Bill Saites stated he did not believe fall protection was necessary, because the employee was not near the edge (Tr. 899).

D. CITATION 2, ITEM 2c:

Instance (a) - The January 7, 1998 videotape shows three employees stripping forms on the east side of the 10th floor (Tr. 900). There is only a single slack perimeter cable and no intermediate railing or cable along the edge of the floor where the employees were working (Tr. 901-902). Without fall protection, the employees crawled under the cable to strip a piece of wood from the outer edge. *Id.* Foreman Georgiana

admitted that he was directing and assisted the work. *Id.* He also identified himself and the other employees from the videotape (Tr. 901-02). They were exposed to a 100 foot fall to the ground below (Tr. 902-03).

Instance (b) - On January 7, 1998, through his binoculars, CSHO Signorile saw three employees picking up stripped lumber and steel brackets on the south side of the 13th floor (Tr. 904-914; Ex. C-73). One of the employees was Bob Gallagher, Avcon's labor foreman (Tr. 905-07). When Mr. Signorile and his supervisor later interviewed Mr. Gallagher, he admitted that he and his work crew were not using fall protection, but should have been (Tr. 907). They were exposed to a 130 foot fall (Tr. 905).

As the above recitation of the facts makes clear, for each instance alleged, the record establishes that Avcon employees were working within one to six feet from the outside edge of the floor, they were exposed to falls from 10 to 130 feet, and they were not protected by guardrails, safety nets, or personal fall arrest systems. The Respondents do not dispute that a fall from these heights would likely result in serious injuries or death. With respect to Willful Citation 2, Items 2a, 2b, and 2c, the Secretary's witnesses also testified that management officials were present in the area and, therefore, had actual knowledge of the violative conditions (Tr. 882, 890, 894-95, 901, 915). The knowledge of supervisory employees is imputable to the employer. *Pentecost Contracting Corp.*, 17 BNA OSHC 1953, 1955 (No. 92-3788, 1997); *see also Western Waterproofing Co. v. Marshall*, 576 F.2d 139, 143 (8th Cir. 1978), *cert. denied*, 439 U.S. 965 (1979). In addition to the supervisor direct knowledge, the Respondents knew or could have known of the violative conditions through their routine supervision of the work activities, their long standing knowledge of the construction procedure and its obvious, inherent fall hazards, and Avcon's policy not to use fall protection when framing, stripping, stacking material for hoisting, and working on the

deck. *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814 (No. 87-692, 1992). The evidence therefore supports Judge Rooney's finding of violations of Section 1926.501(b)(1) as alleged in each instance above.¹⁹

III. The Judge correctly rejected the Respondents' contention that 29 C.F.R. § 1926.501(b)(2) governing "leading edge" work applied in finding that Avcon was in violation of the standard.

The Respondents argued that the cited activities were "leading edge" work, covered by 29 C.F.R. § 1926.501(b)(2), not 29 C.F.R. § 1926.501(b)(1), as alleged in the citations. J.D., at 25. Holding that "no citations were issued for lack of protection on leading edges," the Judge correctly rejected this argument. (J.D. at 27). Because the Respondents' definition of leading edge work plainly includes work

¹⁹ The Respondents also argue that the Judge erred in affirming the violations, because she relied on CSHO Signorile's allegedly unreliable testimony. (Resp. Brf. at 32-34). As this issue is outside the scope of the Briefing Notice, the Commission should decline to address it. *See* footnote 5, *supra*.

The Respondents fail to cite any portion of the record to establish their argument. Resp. Brf. at 32-34. Nor do they discuss how the testimony was unreliable except to generally assert that the CSHO made his observations from 100 to 400 feet away and failed to "identify the floor" where the alleged violation occurred, "the number of employees affected," and "how close an employee was to edge of a floor." (Resp. Brf. at 32-34).

The Judge correctly considered and rejected the Respondents' argument. She specifically found CSHO Signorile's testimony to be credible, because his testimony was corroborated by other OSHA officials' statements, photographs, CSHO Brown's videotape, interviews, and by Respondents and their supervisory personnel who viewed the videotapes. *Id.* at 29-30.

The Respondents rely on *A. Wachsberger Roofing & Sheet Metal Works, Inc.*, 12 BNA OSHC 1517, 1518 (No. 84-810, 1985), and two other unreviewed administrative law judge decisions. In *Wachsberger*, however, the judge credited the employer's supervisor's sworn testimony over the OSHA compliance officer's uncertain and uncorroborated testimony. *Wachsberger* is patently inapplicable to this case, because here the Respondents do not offer sworn testimony contradicting CSHO Signorile's corroborated observations.

Because Judge Rooney's findings are well-reasoned and supported, the Commission should uphold her ruling that CSHO Signorile's testimony was credible. *Agra Erectors, Inc.*, 19 BNA OSHC 1063, 1066 (No. 98-0866, 2000); *E.L. Jones and Son Inc.*, 14 BNA OSHC 2129, 2132 (No. 87-8, 1991).

not covered by the standard and the proof adduced at hearing plainly shows that none of the work involved leading edge work as defined by the standard, the Judge's ruling is correct.

As the Judge wrote, "The term 'leading edge' is defined in the fall protection standard as 'the edge of a floor, roof, or form work for a floor or other walking/working surface (**such as the deck**) **which changes location as additional floor, roof, decking, or form work sections are placed, formed, or constructed.**" (J.D. at 26), *quoting* 29 C.F.R. § 1926.500(b) (emphasis added).

As the Judge found, the "leading edge" in this case was the laying of the plywood panels on the ribs to form the base of the deck. (J.D. at 27). She writes as follows:

In the instant matter, the leading edge work involved the progressing of the plywood deck for each level - laying the deck and erecting the structure upon which the plywood deck rested. The leading edge changed each time an additional section of plywood deck was set into place. Once the plywood was placed, any further activity in the area became work at an unprotected side and edge, and remained such until an additional plywood section was added to the deck. My review . . . indicates that no citations were issued for a lack of protection on leading edges.

(J.D. at 27).

Her conclusion is clearly correct. All of the employees described in the citations were performing work like framing, stripping, stacking framing material to be hoisted to the top deck, and chipping concrete off the edge while standing or kneeling on the completed, poured concrete floor. Other employees were working on the completed deck marking it and picking up metal brackets. None of the cited employees were observed standing on top of the ribs laying the plywood to form the deck, which is arguably the only work that would constitute "leading edge" work at this worksite. *See, supra*, at 25-28; (J.D. at 22), (Resp. Brf. at 30-32).

In sum, because none of the unprotected employees were laying the plywood deck, the work was not "leading edge" work as defined by the standard. The Judge did not therefore err in ruling that the citations were governed by § 1926.501(b)(1), not § 1926.501(b)(2) as Respondents contend.

IV. The Judge did not err in rejecting the Respondents' infeasibility defense.

A. Overview. In *Seibel Modern Manufacturing & Welding Corp.*, 15 BNA OSHC 1218, 1225-28 (No. 88-821, 1991), the Commission discussed the affirmative defense of infeasibility at length. The cases show, wrote the Commission, "that employers must alter their customary work practices to the extent that alterations are reasonably necessary to accommodate the abatement measures specified by OSHA standards." *Id.* at 1227. The employer has the burden of proof (persuasion) both that the method required under the terms of the standard is infeasible and either an alternative protective measure was used or there was no feasible alternative measure. *Seibel*, 15 BNA OSHC at 1227-28.²⁰

The Respondents argue that nets were infeasible, because the curing time of the concrete precluded placing anchorages in the concrete to be available when needed (J.D. at 49). Fall arrest or fall restraint systems were similarly infeasible, argue the Respondents, because the form work was not designed for and the concrete was insufficiently cured to anchor the devices (J.D. at 49).

²⁰ The Third Circuit, in which this case arises, refers to the defense as the "impossibility" defense, requiring the employer to prove that: (1) it was impossible to comply with the standard's requirements or compliance would have precluded the performance of the work; and (2) there were no alternative means of employee protection available. *E & R Erectors, Inc. v. Secretary*, 107 F.3d 157, 163-64 (3rd Cir. 1997). Although the Commission's test is less rigorous, the Secretary submits that the Respondents have not established the defense under either the Commission's or the Third Circuit's test. Because the violations arose in the Third Circuit, the Commission is bound by the Third Circuit authority. *Jones & Laughlin Steel Corp. v. Marshall*, 636 F.2d 32, 33 (3d Cir. 1980). See *D.M. Sabia Co.*, 17 BNA OSHC 1413 (No. 93-3274, 1995) (Commission applies Third Circuit precedent), *rev'd on other grounds*, 90 F.3d 854 (3rd Cir. 1996).

The Judge correctly rejected these arguments, because the Respondents failed to preplan for fall protection. The Respondents “ignored their obligation to provide fall protection, and made no attempt to comply with the fall protection standards.” (J.D. at 50). As the Judge correctly noted, the Commission requires employers to exercise some creativity to achieve compliance. *Gregory & Cook Inc.*, 17 BNA OSHC 1189, 1191 (No. 92-1891, 1995); *Pitt-Des Moines, Inc.*, 16 BNA OSHC 1429, 1433 (No. 90-1349, 1993) (“The Commission has long recognized that standards will, in some instances, require some creativity on the part of employers to achieve compliance.”). The record in this case demonstrates, however, that “Respondents simply ignored their obligation to provide fall protection. . . .” (J.D. at 50). The record overwhelmingly supports this ruling.

B. Nets. The Respondents argue that nets were infeasible, because (1) they exposed workers to a greater hazard;²¹ (2) concrete curing time precluded embedding “anchorage capable of maintaining

²¹ The Commission’s Briefing Notice does not request briefs on a “greater hazard” defense. The Respondents argue nevertheless that nets and fall arrest and restraint systems would pose a “greater hazard.” (Resp. Brf. at 38-39, 42, 44-45). As this issue is outside the scope of the Briefing Notice, the Commission should decline to address it. *See* footnote 5, *supra*.

In any event, the Judge correctly ruled, that:

[T]he record does not show that Respondents applied for a variance or that applying for a variance was inappropriate. Additionally, Respondents’ claim that the hazards of complying with the standard would have been greater than those on noncompliance assumes that lanyards would have been strewn haphazardly across the floor, causing tripping hazards, and affixed to structures which would be incapable of supporting the worker if he fell. Such conditions could only exist, however, where, as here, the use of fall protection was never incorporated into job- planning in the first place. I also note that, even in the absence of personal fall arrest systems or safety harnesses, Respondents still had a duty under the standard to provide either guardrail systems or safety net systems, which it failed to do. The Secretary’s experts established that numerous fall protection devices, and combinations thereof, could have been safely installed at the worksite to

(continued...)

the pour cycle;" and (3) the plans and specifications on which Avcon bid did not contain "structural embedments for fall protection nets." (Resp. Brf. at 38).

The Respondents argue that based upon the testimony of Matthew J. Burkart,²² the Secretary's expert, the curing time for the concrete was seven to ten days. (Resp. Brf. at 40). Assuming it would take 10 days for the concrete to cure sufficiently to hold the anchorage and two more days to install the net, it would take 12 days to install the net on the floor. Therefore, the Respondents argue, the nets would "always be four floors behind the work." *Id.*

As an initial matter, even assuming the Respondents's unsupported time estimates are true, the failure to maintain the "four day pour" cycle, as the Respondents describe it, although it may have economic consequences to the Respondents, was not shown to be an "unreasonable accommodation" under the *Seibel* standard or to make the work "impossible" under *E & R Erectors (Tr., passim)*. See, *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962, 1966-67 (No. 82-928, 1986) (employer did not show that the "costs [for building the guardrails] were unreasonable in light of the protection afforded"). The Respondents' argument is irrelevant. As Avcon's attorney stated during the hearing, "There is nothing in our case about cost" (Tr. 4752). The Respondents fail to make their *prima facie* case for their defense.

²¹(...continued)

protect workers from fatal falls, and that the use of such equipment would not have exposed workers to hazards.

(J.D. at 60-61). As the discussion below demonstrates, her rulings are more than amply supported by the record.

²² Although the Secretary called two expert witnesses in rebuttal, this should not be construed as any acknowledgment by the Secretary that the Respondents adduced sufficient evidence of infeasibility to shift the burden of persuasion to the Secretary.

Furthermore, Mr. Burkart,²³ the sole witness upon whom the Respondents rely,²⁴ testified that the curing time of the concrete may be accelerated by modifying the composition of the concrete, *i.e.* the ratio of cement, sand, gravel and water, and by placing additives in the concrete mix (Tr. 4474-76, 4478-79; Ex. C-112). Contractors can also use larger base plates or anchorages to distribute support for the intended load over a larger area, requiring a lower compressive strength and thus a shorter curing time to support the anchorages (Tr. 4482-84). He testified that the plates could be used in three to four days (Tr. 4489).

Daniel Paine, who has had 40 years experience in the construction industry, specifically described how a contractor can erect safety nets to accommodate a four-day pour schedule. The base plates supporting the poles and cables to which the nets are attached can be either poured or bolted to the concrete, or attached to the columns, or attached with a “clip-on method” (Tr. 4714-16). Base plates can

²³ Mr. Burkart has a degree in civil engineering and previously worked as a union carpenter with reinforced concrete formwork (Tr. 4444, 4447). Mr. Burkart's consulting firm is engaged in, among other things, construction management services which include “manag[ing] the entire construction site, from working with the owner in the design phase through the management construction and final completion” (Tr. 4446-47). Mr. Burkart's firm also provides safety training to contractors, and Mr. Burkart has lectured at technical and professional seminars around the world on the subject of construction safety (Tr. 4446, 4452). Mr. Burkart has served on ANSI (American National Standards Institute) committees and is a member of the American Concrete Institute and other professional organizations (Tr. 4450-51). Mr. Burkart has taught a fall protection seminar and has advised contractors on fall protection systems (Tr. 4448-49, 4456).

²⁴ The Respondents rely on their purported expert Leo DeBobes for the proposition that there is nothing in the OSHA standard requiring a concrete contractor to modify the building to accommodate anchorage points. (Resp. Brf. at 41). The standard, however, is based on a rulemaking finding that “equipment is generally available to provide safe anchorage points for personal fall arrest systems. It is in this area that preplanning of the construction project is most critical.” 59 Fed. Reg. 40,684. Moreover, an employer's affirmative duty to investigate and implement available methods of compliance flows from the Act itself. *Brock v. Dun-Par Engineering Form Co.*, 843 F.2d 1135 (8th Cir. 1988).

be placed into the fresh concrete every three floors and the concrete will have 12 days to cure before the nets are moved up (Tr. 4720, 4722-24, 4727-28, 4734). Using this procedure on actual worksites, Mr. Paine has found that the concrete achieves a compressive strength of at least 3,000 psi, which is more than adequate to support base plates, and the safety nets pass the "drop ball test" within a four-day pouring cycle (Tr. 4725-26, 4729-34). The installed nets protect employees working on the floor on which the net is installed and on the three higher floors, because the floors are eight feet one inch apart (total 24 feet, three inches) (Tr. 4719-23).

The Respondents denigrate Mr. Paine's testimony on the ground of bias. They argue that he is in the business of selling nets. (Resp. Brf. at 41). The Respondents do not, however, cite any evidence refuting Mr. Paine's testimony, nor do they point to any inconsistencies in the record. *Id.* The Judge heard Mr. Paine testify and found his and Mr. Burkart's testimony "very credible." (J.D. at 55). "[A] judge's findings are entitled to deference . . ." if there is "no basis to set aside the judge's findings . . ." and "the preponderance of the evidence clearly supports the judge's determination. . . ." *Wiley Organics, Inc. d/b/a Organic Technologies*, 17 BNA OSHC 1586, 1594 (No. 91-3275, 1996). Here the Respondents have not shown any basis to set aside Mr. Paine's testimony. His testimony dovetails with Mr. Burkart. The preponderance of the evidence clearly supports the Judge's determination that Messrs. Paine's and Burkart's testimony was credible and nets were feasible.

The Respondents argue that the building plans and specifications did not provide for anchorages, the anchorages would "require structural drawings because they would effect [*sic*] the structural integrity of the building," and the anchorages would require removal and grinding and patching to smooth the concrete finish. (Resp. Brf. at 41). Again, the Respondents do not provide any citations to the record to

support their assertions. Moreover, as appears from the testimony discussed above, there were alternative means of attachment like bolts and clip-on devices.

Furthermore, and very importantly, as the Judge correctly held, the employer must preplan the work to provide fall protection. “Employers have a duty to anticipate the need to work at heights and to plan their work activities accordingly. Careful planning and preparation (*e.g.*, project design that incorporates fall protection and employee training) lay the necessary ground-work for an accident-free workplace.” 59 Fed. Reg. 40,680. The Preamble comports with Commission precedent. *See A.J. McNulty & Co., Inc.*, 2000 W.L. 1490235, *16, *24 (No. 94-1758, 2000) (an employer with a heightened awareness of need for guardrails, who held planning sessions, but who did not specifically consider and reject temporary barriers, in willful violation). In this case, as the Judge found, there is no reliable evidence that the Respondents did **any** planning to incorporate fall protection other than to inquire about the costs of nets, which were apparently rejected on that basis. The Judge found as follows:

There was not even a clear understanding between Respondents and the general contractor as to who would provide guardrails on the site (Tr. 84, 1005). Prior to the start of this job, Respondents did not conduct any research to find out if fall protection standards had changed since their last construction job, in 1991 (Tr. 2550). Respondents acknowledge that there was some discussion about the costs of nets. However, no other inquiries were made (Tr. 2568-70, 4274-79). Respondents made no efforts to seek any other equipment for fall protection.

(J.D. at 50).

The Respondents do not explain why the building plans, particularly after their previous citations, could not be changed to incorporate anchorage. The Respondents’ argument that the building plans did not incorporate anchorage, even if true, is legally insufficient to demonstrate infeasibility under the applicable standard and Commission case law. *A.J. McNulty, Gregory & Cook, Pitt-Des Moines.*

C. Fall Arrest and Fall Restraint Systems. The Respondents argue that fall arrest and restraint systems²⁵ were infeasible, because there was no place to anchor them. The formwork, argue the Respondents, was not strong enough and the concrete was insufficiently cured to support the anchorage required to support either system when it was needed. (Resp. Brf. at 42). The Respondents, again, cite no record support.

The Respondents' witnesses generally testified, on the basis of their construction experience, that wooden formwork, *i.e.* column forms, legs, stringers, and ribs, would not provide an adequate anchorage point for a personal fall arrest system.²⁶ (J.D. at 50). The Judge correctly found that this testimony was entitled to little or no weight, because the "opinions were offered without any supporting scientific or professional data or tests (Tr. 3121-23, 3308, 3405, 3520, 3523, 3565, 3700, 3748-50, 3858-59). Also, these witnesses were unfamiliar with OSHA's fall protection standards (Tr. 3115-17, 3121, 3240, 3370-7, 3405, 3407-09, 3497, 3502-03, 3572-73, 3590-92, 3597, 3636-37, 3693, 3747-48, 3833-34,

²⁵ In addition to the three forms of conventional fall protection referenced in Section 1926.502 (guardrail, safety net, and personal fall arrest systems), OSHA has issued an official interpretation which also permits the use of a fall restraint system (Ex. C-114).

²⁶ Section 1926.502(d)(15) requires, in pertinent part, as follows:

Anchorage used for attachment of personal fall arrest equipment shall be independent of any anchorage being used to support or suspend platforms and capable of supporting at least 5,000 pounds (22.2 kN) per employee attached, or shall be designed, installed and used as follows:

- (i) as part of a complete personal fall arrest system which maintains a safety factor of at least two; and
- (ii) under the supervision of a qualified person.

29 C.F.R. § 1926.502(d)(15).

3837, 3853- 55).” (J.D. at 50-51).²⁷

Moreover, the Respondents fail to explain why they did not anticipate the need for additional anchorage points and incorporate them into the floors being constructed or to make the formwork stronger. 59 Fed. Reg. 40,684 (“equipment is generally available to provide safe anchorage points for personal fall arrest systems. It is in this area that preplanning of the construction project is most critical”); 59 Fed. Reg. 40,680 (“many employers are minimizing exposure to fall hazards by having anchorage points for personal fall arrest systems fabricated or designed into structural members”); *A.C. Dellovade, Inc.*, 13 BNA OSHC 1017, 1020 (No. 83-1189, 1987) (an employer who could have easily foreseen the need for and provided anchorage for fall protection willfully violated the Act). The Respondents also do not explain why they could not have provided an alternative fall arrest system with a safety factor of two under the supervision of a qualified person, as permitted by 29 C.F.R. § 1926 .502(d)(15). (Resp. Brf. at 42-45). The Respondents thus fail to make out their *prima facie* case for their affirmative defense.

Notwithstanding the Respondents’ failures, the Judge found, “the Secretary's expert rebuttal witnesses refuted each of the contentions of Respondents' witnesses.” (J.D. at 51). This ruling is clearly correct.

Mr. Burkart testified that contractors are required to design formwork to withstand all anticipated

²⁷ To the extent the testimony was offered as evidence of industry custom and practice, it is not relevant, because the language of the standard is clear. *See Superior Rigging & Erecting*, 18 BNA OSHC 2089, 2091 (Docket No. 96-0126, 2000) and cases cited therein (industry custom and practice are not relevant where the language of a standard, as defined by its legislative history, is clear and unambiguous).

vertical and lateral loads (Tr. 4486-88).²⁸ The desired support for lateral loads can be achieved through diagonal bracing within the shoring system (*i.e.*, along the wood vertical shores or legs) (Tr. 4488-89, 4507-08). By increasing the size or number of diagonal braces, the lateral load-bearing capability of the formwork would increase by distributing the load throughout the structure (Tr. 4489). The fall restraint system could be anchored to various structures, *i.e.*, the plywood deck itself, a stringer, a plate, etc.; "it does not develop significant loads because you're not allowing the person to fall" (Tr. 4496-97).

Mr. Paine testified that there are pre-engineered fall protection systems as well as systems which require the contractor and/or its professional engineer to design the equipment to be used (Tr. 4696-99; Ex. C-120). "Pre-engineered systems" are systems which have been tested by the manufacturer to meet specified criteria and only require the contractor's installation in accordance with the manufacturer's instructions (Tr. 4696-97). Pre-engineered systems exist for fall arrest and fall restraint including a tie-off system called "Safety Strap" where a strap can be nailed through the plywood deck into a stringer with a three-inch double-headed nail or imbedded into concrete as it is poured (Tr. 4697-98, 4701-04).

The Respondents argue that the "Safety Strap" system was inappropriate for the Excelsior II Project, because it was designed for residential construction²⁹ and nailing the strap to the stringer would

²⁸ Section 1926.703(a)(1) pertinently provides as follows:

Formwork shall be designed, fabricated, erected, supported, braced and maintained so that it will be capable of supporting without failure all vertical and lateral loads that may reasonably be anticipated to be applied to the formwork. . . .

²⁹ C.F.R. § 1926.703(a)(1).

²⁹ The Respondents cannot be arguing that the framework for residential construction would have greater structural strength than the framework supporting a sufficient amount of concrete to form a
(continued...)

not comport with the OSHA requirements for a fall arrest system. But, as Mr. Burkhardt testified, the framework at the Project could have been strengthened with diagonal bracing. Moreover, a fall restraint system would not require the same structural strength as a fall arrest system, because the worker is only being restrained, not caught after falling (Tr. 4489, 4496-97).

The Respondents argue that the installations depicted for the strap are wholly different from the Excelsior II Project. (Resp. Brf. at 44). The Respondents also argue that in certain circumstances a formwork engineer must be consulted, but again the Respondents were obligated to preplan their work. The fact that they did not retain a formwork engineer does not establish infeasibility. To the contrary, the failure to retain a formwork engineer where they were pouring concrete to form a 24,000 square foot floor every four days tends to show the Respondents' extreme indifference to safety. *A.C. Dellovade*, 13 BNA OSHC at 1020 (failure to exercise forethought to provide a static line for employees to tie off to was a willful violation).

The Respondents also argue that the concrete wall in which the strap is embedded must attain a compressive strength of 2250 psi before use. (Resp. Brf. at 44). But as discussed above, the Respondents do not explain why they could not have attached the strap to strengthened formwork.

D. Guardrails. The Respondents do not address why guardrails either alone or in conjunction with other methods could not have been used to protect employees while they were performing the cited activities. (Resp. Brf. at 45). The Respondents therefore fail again to make out even a *prima facie* case of infeasibility. Notwithstanding, the Secretary's experts again testified to specifically how this employer

²⁹(...continued)
24,000 square feet floor with balconies protruding on all four sides (Tr. 2095, 2100).

could have provided guardrails to protect their employees.

Mr. Burkart testified that a guardrail system could have been installed on the plywood deck at the Project by extending the stringers beyond the spandrel beam and attaching metal brackets to support uprights to which the guardrails would be affixed (Tr. 4449-4502). Mr. Burkart has observed the installation of such guardrail systems in conjunction with the building of the plywood deck (Tr. 4449-4500). The employees engaged in the installation of the guardrail system could be protected by a "fall restraint system" consisting of a fixed line attached to a lanyard which would limit the distance that an employee could travel and prevent the employee from falling from the edge of the structure while erecting guardrails (Tr. 4501-4503). Mr. Paine testified that in general, contractors use a combination of fall protection systems rather than a single system (Tr. 4759-60). Like Mr. Burkart, Mr. Paine testified that all of the fall protection options outlined in § 1926.501 were feasible. In his opinion, it would also have been feasible to have retrofitted fall protection devices on the structure as it existed at the start of the inspection even in the absence of "pre-planning" (Tr. 4790-96).

In sum, the Respondents have the burden of establishing the affirmative defense of infeasibility. The Respondents have not shown that it was infeasible to provide anchorages for fall arrest and fall restraint systems and nets. Nor have they shown that guardrails were infeasible or that the systems could not have been used together to protect employees. The record shows that "Respondents made no effort to achieve compliance with the fall protection standards" and that they "simply ignored their obligation to provide fall protection when planning work at the Excelsior II site." (J.D. at 50). Under well-established Commission and Third Circuit precedent, the Respondents failed to prove the affirmative defense of infeasibility. *A. J. McNulty, A. C. Dellovade, E. & R. Erectors*. The Judge did not therefore err in rejecting Respondents'

infeasibility defense. J.D., p. 49.

- V. As a result of Judge Rooney's ruling that the identity of the Secretary's expert rebuttal witnesses be immediately disclosed to the Respondents as soon as the Court was aware of their existence, followed by the opportunity for the Respondents to depose the Secretary's expert rebuttal witnesses prior to their testimony, any prejudice suffered by the Respondents was cured and the judge correctly admitted the testimony of Matthew Burkart and Daniel Paine into evidence and also correctly denied Respondents' request for surrebuttal.**

Judge Rooney's decision to permit the testimony of Mr. Burkart and Mr. Paine after ordering the Secretary to divulge their identity and allowing time for the Respondents to take depositions of the witnesses is supported by substantial evidence. Although the Respondents argue that they were "completely blindsided" by the introduction of the Secretary's expert rebuttal witnesses and were "severely prejudiced" by this action, Avcon, outside of several conclusory assertions, fails to introduce any evidence or point to any Commission or court authority actually supporting its claims. (Resp. Brf. at 35-36). In fact, a brief synopsis of the proceedings related to the introduction of Mr. Burkart's and Mr. Paine's testimony demonstrates that the Respondents had ample opportunity to conduct discovery and prepare cross examination prior to the resumption of the trial.

As noted by the Respondents in their brief, the Secretary's intention to use expert witnesses to rebut factual testimony presented in regard to Avcon's infeasibility defense became known during Nick Saites' testimony. On September 22 and 23, 1999, Judge Rooney issued an order, followed by a clarification, directing the Secretary to disclose any experts to the Respondents which she planned to call in rebuttal to Respondents' infeasibility defense. The Secretary timely divulged its experts and the Respondents subsequently deposed Mr. Paine and Mr. Burkart on November 9 and 10, 1999. On

December 6, 1999 Mr. Burkart testified before Judge Rooney, followed by Mr. Paine on December 8, 1999.

Pursuant to the Commission Rules of Procedure, Judge Rooney had wide latitude in curing any prejudice the Respondents might have suffered in regard to the late disclosure of the expert witnesses. Commission Rule 52(e) outlines a Commission judge's options compelling discovery, specifically stating that the judge may make such orders with regard to a failure to disclose discoverable evidence as are "just." 29 C.F.R. § 2200.52(e). In this case, Respondents not only were given the opportunity to depose these witnesses, but, in addition, had nearly a month to prepare for their testimony. The Commission, in determining whether a party was prejudiced in the context of a late amendment, determined that prejudice arises only when one party achieves an unfair advantage or where the opposing party is deprived of a fair opportunity to present evidence. See *Bland Construction Company*, 15 BNA OSHC 1031, 1042-43 (No. 87-992, 1991), citing *Secretary of Labor v. Arco Chemical Co.*, 921 F.2d 484, 488 (3rd Cir. 1990). A late amendment, which was at issue in *Bland*, is analogous to the present situation. The remedies allotted erased any unfair advantage the Secretary may have had and allowed for ample preparation time on the part of the Respondents to conduct an effective cross examination.

The Respondents, in addition to its objections to the testimony of Mr. Burkart and Mr. Paine, also argue that the judge improperly denied their request for a surrebuttal witness. Following their review of Mr. Burkart's testimony, the Respondents requested an opportunity to present a surrebuttal witness which was opposed by the Secretary in a letter to Judge Rooney dated November 16, 1999. Judge Rooney addressed her standard for determining whether surrebuttal would be permitted in a Hearing Schedule issued on October 21, 1999, in which she stated that surrebuttal would be allowed only if the Secretary's

rebuttal witnesses raised a new issue broadening the scope of its case. Following the testimony of Mr. Burkart, Judge Rooney determined that no new issue had been raised and denied the Respondents' request to present a surrebuttal witness (Tr. 4648-4657). Such a ruling was well within Judge Rooney's discretion, and Respondents present no evidence in their brief how the judge's decision to deny a surrebuttal witness in any way affected their case, nor do they point to any authority demonstrating an abuse of discretion on the part of the judge. As a result, the Respondents' request for a remand on this issue should be denied.

VI. Respondents willfully violated 29 C.F.R. § 1926.501(b)(1), as alleged in Citation 2, Items 2a - 2c.

The Judge held that the Section 1926.501(b)(1) violations alleged in Citation 2, Items 2a through 2c were willful and affirmed a \$70,000 penalty. J.D., at 42-48. Judge Rooney's holding and penalty assessment are overwhelmingly supported by the record.

"A violation is willful if committed with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *Williams Enterps., Inc.*, 13 BNA OSHC 1249, 1256 (No. 85-355, 1987). Proof of "bad purpose" is not required. *Id.* A willful violation is differentiated from other types of violations by a "heightened awareness -- of the illegality of the conduct or conditions -- and by a state of mind -- conscious disregard or plain indifference." *Williams*, 13 BNA OSHC at 1256-57; *General Motors Corp., Electromotive Div.*, 14 BNA OSHC 2064, 2068 (No. 82-630, 1991) (consolidated).

If an employer has made a good faith effort to comply with the standard or eliminate a hazard, even though the employer's efforts were not entirely effective or complete, then the violation is not willful.

Williams, 13 BNA OSHC at 1256-57. The test of good faith for these purposes, however, is an objective one, *to wit*: whether the employer's efforts were objectively reasonable even if not totally effective in eliminating the violative conditions. *A.E. Staley Mfg Co.*, 19 BNA OSHC 1199, 1202 (No. 91-0637, 91-0638, 2000), *on appeal* (7th Cir.); *Williams*, 13 BNA OSHC at 1256-57.

The Respondents had a "heightened awareness" of the standard's requirements from previous inspections. *Pentecost Contracting Corp.*, 17 BNA OSHC 1953, 1955 (No. 92-3788, 1997) (heightened awareness of requirements through prior inspections). Prior to the inspections at issue here, OSHA had issued numerous citations for violations of the fall protection standards to construction companies owned and managed by Bill and Nick Saites. These citations became Commission final orders (Tr. 358, 362, 367).³⁰

³⁰ From May 1974 to June 1980, OSHA issued to Astro Concrete, a company owned by Bill Saites, who was also Astro's president, three serious, one repeated, and **three willful** citations for failing to guard open-sided floors as required by 29 C.F.R. § 1926.500(d)(1). Section 1926.500(d)(1) was revised on August 9, 1994, with the rest of Subpart M ("Fall Protection") (Ex. C-116). In pertinent part, the standard previously provided as follows:

Every open-sided floor or platform 6 feet or more above adjacent floor or ground level shall be guarded by a standard railing, or the equivalent, . . . on all open sides,

29 C.F.R. § 1926.501(d)(1)(1994).

Astro Concrete was sold to Nick Saites in 1983. After its sale, between December 1989 and December 1990, Astro was issued one serious citation for a violation of Section 1926.500(d)(1) and two serious citations for violations of Section 1926.105(a) (Exs. C-11, C-14). Nick Saites signed three of the settlement agreements (Exs. C-36, C-37, C-39).

Between January and April 1986, Cornicon, a company owned by Nick Saites, was issued one serious and one **willful** citation for Section 1926.500(d)(1) violations. The April 29, 1986 citation, containing two willful fall protection violations under Sections 1926.105(a) and 1926.500(d)(1), was issued by the Respondents' current safety consultant Joseph Rufolo when he was an OSHA Area Director (Tr. 371-76; Ex. C-43). Between April 1986 and February 1987, Cornicon was also issued one serious and one willful citation for violations of Section 1926.105(a) (Exs. C-41, C-43, C-44). Between June and

(continued...)

Nick and Bill Saites were also aware of the standard's requirements from their discussions with OSHA personnel.³¹ Indeed, Bill and Nick Saites admitted to OSHA at the start of the first inspection at issue here that they were familiar with current OSHA fall protection requirements (Tr. 885).³²

The record is also clear that for each willful cited instance, Avcon supervisors were present where the employees were working and had actual knowledge of the violative conditions (Tr. 882, 890, 894-95, 901, 915). The knowledge of supervisory employees is imputable to the employer. *Pentecost*, 17 BNA OSHC at 1955; *Western Waterproofing*, 576 F.2d at 143. However, despite the Respondents' extensive history of OSHA violations, their knowledge of OSHA requirements, and their knowledge of the violative conditions, Respondents took no "positive steps" to comply. Their failures were therefore willful. *Aviation Constructors Inc.*, 18 BNA OSHC 1917, 1922 (No. 96-0593, 1999); *V.I.P. Structures Inc.*, 16 BNA OSHC 1873, 1875-76 (No. 91-1167, 1994) (a supervisor's permitting employees to work without safety nets, although he tried unsuccessfully to raise the nets was willful); *Sal Masonry Contrac., Inc.*, 15 BNA OSHC 1609, 1613 (No. 87-2007, 1992) (foreman's conscious decision to continue work upon scaffold without guardrails established willfulness).

³⁰(...continued)

August 1982, OSHA issued to WNS, another company owned by Bill Saites, two serious citations for violations of Section 1926.500(d)(1) (Exs. C-46, C-47).

³¹ On January 10, 1986, as a result of a serious citation issued to Cornicon, AD Peist discussed the OSH standards and what OSHA was looking for with regard to fall protection with Nick Saites. Then again, in December 1990, during the inspection of Astro Concrete, OSHA discussed fall protection with Bill and Nick Saites (Tr. 716-19). Bill Saites was sufficiently aware of OSHA requirements during the inspections at issue here to alert everyone, "put on your belts, OSHA's here" and "put up the rails, OSHA's here" (Tr. 1499, 1503).

³² A copy of the revised (1994) Subpart M ("Fall Protection") was given to Nick Saites when the OSHA inspection commenced in October, 1997 (Tr. 4610).

The Respondents do not have even a colorable argument that they made “reasonable good faith efforts to comply,” *Pentecost*, 17 BNA OSHC at 1955, because they utterly failed to plan for fall protection at the worksite other than to inquire about the costs of nets. (J.D. at 46). “Where an employer has actual knowledge of the requirements of a standard and is aware that the conditions at the site do not meet those requirements, failure to take positive steps to comply . . . constitutes at least a careless disregard of the mandate of the Act.” *Aviation*, 18 BNA OSHC at 1922 (emphasis in original); *Woolston Constr. Co.*, 15 BNA OSHC 1114, 1119 (No. 88-1877, 1991), *aff’d without published opinion*, No. 91-1413, 15 BNA OSHC 1634 (D.C. Cir. May 22, 1992) (employer who cut steps into trench and excavated with backhoe straddling the excavation, but nevertheless sent employees back into unsloped, unshored trench did not take “reasonable measures” to comply with the standard); *Acme Fence & Iron co.*, 7 BNA OSHC 2228, 2231 and n. 5 (No. 78-982, 1980) (no “good faith” belief in impossibility of compliance where reasonable diligence not exercised to find alternatives). The Respondents attempt to argue that their belief that the work in question was “leading edge work” by rendering any form of fall protection unnecessary and even infeasible. But, a reasonably objective reading of the OSHA standard clearly demonstrates that the cited work activities were not “leading edge” and the standard required that employees be protected by nets, guardrails, or personal protective equipment (Tr. 461).

Finally, the Respondents argue that the proper standard for a willful violation is “deliberate flaunting,” relying on *Frank Irely, Jr., Inc. v. OSHRC*, 519 F.2d 1200 (3rd Cir. 1975). The Respondents’ argument is undercut by their complete failure to recognize the Third Circuit’s later holding that there is “little, if any, difference between . . . [the Third Circuit’s] approach and that taken by . . . other courts.” *Universal Auto Radiator Manufacturing Co. v. Marshall*, 631 F.2d 20, 23 (3rd Cir. 1980), *quoting*

Babcock & Wilcox v. OSHRC and Secretary of Labor, 622 F.2d 1160, 1167-68 (3rd Cir. 1980).³³

The record also overwhelmingly supports the propriety of the \$70,000 penalty for Citation 2, Items 2a, 2b, and 2c based on the gravity of the violations, the willful nature of the conduct, and the Respondents' and their related companies' extensive, aggravated history of fall protection violations (Tr. 894-96, 899, 914-16). *Amerisig Southeast, Inc.*, 17 BNA OSHRC 1659, 1661 (No. 93-1429, 1996).

VII. Judge Rooney correctly determined that the Respondents violated 29 C.F.R. § 1910.1200(e) and (h) in Citation 1(a) and (b) in Docket 98-0755 because the hazard communication program provided to OSHA during the inspection failed to contain any of the chemicals used at the job site, and, in addition, no training on the chemicals in question was provided to Avcon employees.

In her decision, Judge Rooney correctly found that the Respondents had violated 29 C.F.R. § 1910.2000(e)(1)³⁴ due their failure to include in their hazard communication program information related to oxygen, acetylene, propane, and gasoline, all of which were undisputedly present at the jobsite and used by Avcon employees (Tr. 918, 1326-27, 1329-30, 2322). In addition, the hazard communication program ultimately produced by Nick Saites nearly two weeks following the original request by CSHO Signorile,

³³ Other circuits have agreed with the Third Circuit's holding in *Universal Auto*. The DC Circuit stated in *Cedar Construction Co. v. OSHRC*, that "[w]hile there may be a difference in emphasis in the Third Circuit's approach, we do not see that it rises to the level of a 'conflict' among the Circuits; indeed the two approaches are very likely to yield the same results in particular cases. 587 F.2d 1303, 1305 (D.C. Cir. 1978).

³⁴ 29 C.F.R. § 1910.1200(e)(1) states, in relevant part:

(e)(1) Employers shall develop, implement, and maintain at each workplace, a written hazard communication program which describes how the criteria specified in paragraphs (f), (g), and (h) of this section for labels and other forms of warning, material safety data sheets, and employee information and training will be met, and which also includes the following:

- (i) a list of the hazardous chemicals known to be present . . .
- (ii) the methods the employer will use to inform employees of the hazards of non-routine tasks. . . .

was for an entirely different company, Astro.

The Respondents attempt to argue that they did, in fact, have the Material Safety Data Sheets (MSDS) in a loose leaf binder along with the hazard communication program. However, the testimony of Nick Saites cited by the Respondents in their brief contains no assertion that the program was implemented. The standard specifically requires an employer to implement a hazard communication program, it is not enough that the program exists on paper. The Respondents, as Judge Rooney correctly noted, provided no evidence that implementation of the program had occurred. The only explanation Nick Saites could muster was that the program “told employees how to handle materials, and if there was an accident, what to do” (Tr. 2322-2323). The terms of the standard, as noted above, require far more.

Item 1(b) of Citation 1 is in reference to the training required by 29 C.F.R. § 1910.1200(h)(1)³⁵ which the Respondents claim occurred with respect to its so-called hazard communication program. Judge Rooney again correctly credited the testimony of CSHO Signorile who, upon interviewing employees in the area where oxygen and acetylene cylinders were stored, determined that no training had occurred. In their brief, the Respondents present no contrary argument, thereby conceding the issue (Resp. Brf. at 48). In fact, Nick Saites himself admitted at trial that no on-site training had occurred (Tr. 921, 1329-30, 1344, 1347-48). Judge Rooney’s finding should be affirmed.

³⁵ 29 C.F.R. § 1910.1200(h)(1) states:

Employers shall provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new physical or health hazard the employees have not previously been trained about is introduced into their work area. Information and training may be designed to cover categories of hazards (*e.g.* flammability, carcinogenicity) or specific chemicals. Chemical-specific information must always be available through labels and material safety data sheets.

VIII. Because the Respondents, through the failure of both their senior management and various jobsite foremen and superintendents, failed to monitor all aspects of health and safety at the jobsite, Judge Rooney was correct in finding a violation of 29 C.F.R. § 1926.20(b)(1)

Although the Respondents state in their brief that shop stewards were constantly talking to employees about safety, Judge Rooney correctly concluded from her analysis of the record that, in reality, no accident prevention program existed at this jobsite in violation of 29 C.F.R. § 1926.20(b)(1).³⁶ Safety problems, as noted by the judge, occurred regularly at this worksite. Employees consistently failed to wear hardhats. Fall protection was routinely discarded. Housekeeping was minimal. An employer may reasonably be expected to conform its safety program to known duties and a safety program must include those measures for detecting and correcting hazards which a reasonably prudent employer similarly situated would adopt. *Northwood Stone & Asphalt, Inc.*, 16 BNA OSHC 2097, 2099 (No. 91-3409, 1994). In interpreting a general standard such as 29 C.F.R. § 1926.20(b)(1), the Commission has specifically considered whether a “reasonable person” examining the generalized standard in light of a particular set of circumstances, can determine what is required, or if the employer was aware of the existence of a hazard and the means to abate it. *R&R Builders, Inc.*, 15 BNA OSHC 1383, 1387 (No. 88-282, 1991).

There are numerous examples throughout the record of Avcon management reminding employees of the need to use hard hats and fall protection, thereby demonstrating Bill and Nick Saites’ full awareness of the hazards at this particular jobsite. Further evidence of their knowledge that a safety program was required is shown by the so-called “written program” produced by Nick Saites, which had been given to

³⁶ 29 C.F.R. § 1926.20(b)(1) provides:

It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part.

him as a guidance document several years prior by OSHA, but was in no way tailored or adapted to a company engaged in shoring, form work, or concrete pouring (Tr. 451-52). In fact, the written plan which was actually produced was for Astro, an entirely different company (Tr. 487). Such an inadequate and superficial treatment of the serious hazards presented at a jobsite such as Excelsior II by Avcon is certainly not enough to satisfy the requirements of 29 C.F.R. § 1926.20(b)(1). *See W.G. Fairfield Company*, 19 BNA OSHC 1233, 1237 (No. 99-0344, 2000) (where limited instructions concerning obvious hazards posed by work on an open, active six-lane interstate expressway failed to include the obvious hazard of an employee crossing the roadway).

IX. Because the Respondents did not meet terms of 29 C.F.R § 1926.451(b)(1) in that they did not provide for its employees a fully planked and decked scaffold platform, Judge Rooney correctly affirmed a violation of the standard.

The Respondents violated 29 C.F.R. § 1926.451(b)(1) by failing to have a fully planked scaffold platform. CHSO Signorile testified that he observed employees working on a platform approximately 6.3 to 6.5 feet high which contained an approximately 20 inch space from the front of the plank to the wall which was being formed (Tr. 971-972). CHSO Signorile confirmed that the employee in question was an Avcon employee through an onsite interview. *Id.*

The Respondents argue in their brief before the Commission that the cited standard is not applicable to the violation in question. Nick Saites testified that the platform was actually elevator formwork (Tr. 2417). However, on cross examination at trial, Nick conceded that the definition of scaffold, as well as the definition of platform as it appears in the standard, applies to this particular platform (Tr. 2735). This concession undercuts the Respondents' entire argument that the standard is inapplicable, as the scope and application provision of the standard at 29 C.F.R. § 1926.450 indicates that the standard applies to "all

scaffolds in this subpart”. Scaffold is further defined as “any temporary elevated platform (supported or suspended) and its supporting structure (including points of anchorage), used for supporting employees or materials or both”. 29 C.F.R. 1926.450(b). The Respondents’ arguments concerning the disputed height of the platform are, as a result, superfluous as the standard includes “any temporary elevated platform.” Because the Respondents, through the testimony of Nick Saites, concedes applicability and, furthermore, present no evidence that the scaffold in question was actually planked, Judge Rooney’s decision should be affirmed.

- X. Because the scaffold platform was more than 2 feet above the point of access and a ladder or its equivalent was not provided for employee access to the scaffold platform, Judge Rooney’s finding of a violation of 29 C.F.R. § 1926.451(e)(1) in Citation 1, Item 8(b) should be sustained.**

CSHO Signorile testified that he observed an employee using one-half inch wide steel flanges attached to a wall as steps to gain access to the same platform described, *supra* (Tr. 974). CHSO Signorile testified that there was no other means of access, and it is undisputed that the platform was more than 2 feet off the ground, the triggering height for compliance with the standard (Tr. 971-72, Tr. 2417). 29 C.F.R. § 1926.451(e)(1).

The Respondents’ defense is not that the steel flanges were a permissible means of access under the standard but that no employee had need for, or used, this means of access. This assertion is in direct contradiction to the observations of CHSO Signorile. But, as argued *supra*, Judge Rooney made a favorable credibility determination of CHSO Signorile over Nick Saites and, as a result, her finding should be affirmed.

CONCLUSION

For the reasons set forth above, the Secretary respectfully requests that the Commission affirm Judge Rooney's decision and the total penalties assessed.

Respectfully submitted,

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