

**UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

ELAINE CHAO, SECRETARY
OF LABOR, U.S. DEPARTMENT
OF LABOR,
Complainant,

OSHRC Docket Nos.:
98-0755 and 98-1168

-vs-

AVCON, INC., VASILIOS N.
SAITES and NICHOLAS SAITES,
Respondents-Petitioners.

RESPONDENTS-PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

| | Page |
|---|------|
| PRELIMINARY STATEMENT..... | 1 |
| COUNTER-STATEMENT OF FACTS..... | 2 |
| LEGAL ARGUMENT..... | 13 |
| I. Judge Rooney erred in denying Respondents' March 23, 1999 Motion to Dismiss Claims Against Vasilios N. Saites and Nicholas Saites because the Occupational Safety and Health Review Commission lacked jurisdiction and statutory authority to adjudicate claims against Vasilios N. Saites and Nicholas Saites..... | 13 |
| II. Judge Rooney erred in finding Individual Respondents, Vasilios Saites and Nicholas Saites Individually Liable..... | 16 |
| III. Judge Rooney committed reversible error in holding that the Respondents violated the Fall Protection Standard at 29 CFR § 1926.501(b)(1) as alleged..... | 21 |
| IV. Judge Rooney erred in rejecting the Respondents' contention that the cited conditions were governed by 29 C.F.R. § 1926.501(b)(2) and § 1926.502(k) rather than the cited standard, 29 C.F.R. § 1926.501(b)(1), because each of the affected employees was constructing a "leading edge" or working in an area "where leading edges were under construction" within the meaning of §1926.501(b)(2)(i) &(ii)..... | 22 |
| V. Judge Rooney erred in concluding that the Respondents had failed to establish their affirmative defense of infeasibility..... | 24 |
| VI. Judge Rooney erred in denying <i>both</i> (i) the Respondents' pre-trial requests for discovery of the anticipated "rebuttal" testimony of the Secretary's expert witnesses (Burkart and Paine) and (ii) the Respondents' request, during trial, for an opportunity to rebut that expert testimony through the testimony of their own expert "surrebuttal" witness..... | 29 |
| VII. Judge Rooney erred in classifying the violations alleged in items 2a, 2b and 2c of citation 2 as Willful..... | 29 |
| VIII. Judge Rooney erred in concluding that the Secretary met her burden of proving the inadequacy of the Respondents' hazard communication program, as alleged in items 1a and 1b of citation 1..... | 31 |

Page

IX. Judge Rooney erred in finding a violation of 29 C.F.R. 1926.20(b)(1)..... 32

IX. Judge Rooney erred in affirming the alleged scaffolding violations
set forth in items 8a & 8b of citation 1..... 33

CONCLUSION..... 35

TABLE OF AUTHORITIES

| | Page |
|---|----------|
| <u>CITATIONS</u> | |
| <u>Bloomfield Mechanical Contracting, Inc. v. Occupational Safety and Health Commission</u> , 519 F.2d 1257 (1975)..... | 14,15,16 |
| <u>DeWitt Truck Brokers v. W. Rey Flemming Fruit Company</u> , 540 F.2d 681 (4th Cir. 1976)..... | 17 |
| <u>Griffen & Brand McAllen</u> , 6 BNA OSCH 1702 (No. 14801, 1978)..... | 19 |
| <u>Frank Irey, Jr. Inc. v. OSHRC</u> , 519 F.2d 1200 (3rd Cir. 1975)..... | 30 |
| <u>Keco Industries, Inc.</u> 13 BNA OSHC 1161 (1987)..... | 31 |
| <u>Secretary of Labor v. Major Construction Corp., and Michael J. Polites</u> , (Docket No. 99-0943)..... | 19 |
| <u>Secretary of Labor v Kaspar Electroplating Corp.</u> , 16 BNA (OSHC 1517 (1994)). | 14 |
| <u>Seibal Modern Manufacturing & Welding Corp.</u> , 15 BNA OSHC 1218, 1227 (1991).. | 21 |
| <u>United States v. Pisani</u> , 646 F.2d 83 (3 rd Cir. 1981)..... | 17 |
| <u>Williams Enterps., Inc.</u> , 13 BNA OSHC 1249, 1256 (No. 85-355, 1987)..... | 30 |
| <u>FEDERAL STATUTES</u> | |
| <u>Fed. R. Civ. P. 15(c)(3)</u> | 14 |
| 29 <u>U.S.C.</u> §652(5)..... | 16 |
| 29 <u>U.S.C.</u> § 658(c)..... | 14,15,16 |
| 29 <u>U.S.C.</u> §659(a)..... | 14 |
| 29 <u>C.F.R</u> 1926.501(b)(1)..... | 22,23 |
| 29 <u>C.F.R</u> 1926.501(d)(11)..... | 28 |
| 29 <u>C.F.R</u> 1926.502(b)(2)..... | 22,23 |

| | |
|--|----|
| 29 <u>C.F.R</u> 1926.502(c)(4)(i)..... | 24 |
| 29 <u>C.F.R</u> 1926.502(d)(15)..... | 27 |
| 29 <u>C.F.R</u> 1926.502(e)(2)..... | 22 |
| 29 <u>U.S.C.</u> §2200.207..... | 15 |

STATE STATUTES

| | |
|--------------------------------|----|
| <u>N.J.S.A.</u> § 14A:2-8..... | 18 |
| <u>N.J.S.A.</u> § 14A:5-2..... | 18 |

I. PRELIMINARY STATEMENT

The Responding Brief of the Secretary of Labor's (hereinafter "Secretary") is rife with factual inaccuracies, misstatements of the record, and applies improper legal standards to the case at bar. It can be said that her vendetta against respondents continues.

Most glaring is the Secretary's audacious inclusion of testimony of Respondents Vasilios Saites ("Bill") and Nicholas Saites ("Nick") from **another distinct and completely separate trial**. Simultaneous with the filing of her Brief, the Secretary filed a "Motion to Take Notice of Judicial Admissions in Related Proceeding." Without waiting for a decision on said Motion, The Secretary brazenly assumed that the Review Commission would grant her Motion, and included testimony of Respondents in a totally unrelated proceeding in her Brief.¹ Accordingly, the Secretary's Motion is untimely and it is prejudicial to Respondents in that the Secretary filed her Motion together with her Responding Brief

Additionally, the Secretary has concocted arguments and issues regarding individual liability which were not litigated at trial. Realizing her error, she attempts to infuse, by legal argument, facts which were not elicited on the record below. The Secretary was not able to elicit sufficient facts which would allow this Court to pierce the corporate veil of Avcon in order to imbue personal liability upon Bill as a corporate officer, director and shareholder, since none exist. Similarly, the Secretary has elicited no facts on which to support her claim of individual liability as against Nick, a mere employee, since none exist. Realizing her lack of proofs, she seeks an extension of the OSHA Act to guarantee payment of fines from Bill and Nick, individually.

¹ Contrary to the Secretary's assertions, these cases are not related at all. There are two completely different construction projects involved in the two litigation matters. These are not "related" proceedings nor are they "companion" proceedings in the same Court, as argued by the Secretary. Therefore, the citations referenced by the Secretary of Labor are not controlling. Evidently, the Secretary is trying to bolster the instant matter with any alleged judicial admissions made in the second matter, involving Respondents due to neglect, or oversight or insufficient proofs adduced by the Secretary from the first trial.

In essence, the Secretary is asking this Court to amend the OSHA Act to create a direct cause of action against Bill and Nick without following the mandates of the Administrative Procedures Act 5 U.S.C. § 500 *et seq.* and traditional rule making policy, which requires notice, opportunity to be heard, hearings, and an eventual decision. Although respondents have suggested that the issue lies properly before Congress, the Secretary continues her attempt to change the Act by judicial means. This Court should see this attempt for what it is and deny it.

The Secretary has also failed to show willful violations of the Act as such are defined under the Third Circuit opinions governing this matter, which require a heightened standard of proof of a deliberate flaunting of the Act. No such proof exists here where even by her own videotape evidence, employees are shown tying off to interior column reinforcing steel at the behest of the OSHA inspectors. Furthermore, there is adequate evidence of a pre-planned perimeter guardrail system and an alternative leading edge fall protection plan employed where the constraints of the project precluded guardrail installation.

In sum, OSHA's vendetta against Respondents must cease and Respondents should be awarded all attorney's fees incurred as a result of the Secretary's continual wrongful conduct. Any other result would be a serious miscarriage of justice.

COUNTER-STATEMENT OF FACTS

The relevant facts are set forth in Respondents' Brief excerpted therefrom and reiterated below are relevant facts which counter those asserted by the Secretary.

A. Lack of Jurisdiction and Statutory Authority

Most notably, the Secretary's Brief is silent on the issue of whether Judge Rooney erred in denying Respondents' March 23, 1999 Motion to Dismiss Claims Against Vasilios N. Saites and Nicholas Saites. Given the Review Commission's directive that the issue be briefed, as well as Respondents' extensive analysis of the issue in their Brief, it is patent that the Secretary's omission of this issue was strategic, in an attempt to divert the Review Commission's attention from the Secretary's blatant error.

The Secretary never issued a citation to either Vasilios N. Saites or Nicholas Saites; did not amend the citations against Avcon to name the individual Respondents; did not address a notice of the proposed penalties to the individual defendants; and did not name the individual Respondents in her Complaint to affirm the citations. The Secretary did not even seek to amend the Complaint to join Vasilios N. Saites and Nicholas Saites as individual defendants until well after the six (6) month limitation within which to issue *citations* had expired. Citations were issued to Avcon, Inc. on April 7, 1998 for alleged violations that last occurred on January 7, 1998. Subsequently, citations were again issued to Avcon on June 23, 1998 for alleged violations that last occurred on May 12, 1998. The Secretary did not move to amend the Complaint to name the individual defendants until November 20, 1998, which was more than six (6) months after the last violations were allegedly committed by Avcon. The Secretary never issued citations to Vasilios and Nicholas Saites at the time of any alleged violations, nor did she amend any of the citations to name them personally. The first "notice " they received of such intention was the filing of the motion to assert personal claims against them, which was dated November 20, 1999, more than six (6) months after the last violations were allegedly committed by Avcon. Therefore, the Court does not have jurisdiction pursuant to 29 U.S.C. 658(c) and the Amended Complaints against Vasilios and Nicholas Saites must be dismissed with prejudice.

B. Individual Liability

In its continuing and intentional vendetta against Bill, Nick and Avcon, OSHA has repeatedly, and with malice, distorted the record, miscited critical testimony and has taken other testimony completely out of context. A review of such inconsistencies exposes the Secretary's disingenuousness.

On pages 4 and 5 of her Brief, after the anticipated recitation of the inapposite "extensive histories" of WNS, Astro Concrete and Cornicon, the Secretary makes the bold statement that, "... Over the years, while paying a total of \$30,940.00, Saites companies have failed to pay a total of approximately \$42,000.00 in initially assessed fines." Indeed, these companies made payments on the settled fines, until such time as they each went out of business. It is obvious that corporations

were not incorporated for the purpose OSHA fines. If this was their intention, no fines would have ever been paid. At no time did OSHA make a claim in WNS' Chapter 11 proceeding that the obligation owed to OSHA should not be discharged, or that the bankruptcy was not proper under the circumstances.

Similarly, when Cornicon became insolvent, OSHA took no action against Nick or Bill for individual liability, nor did OSHA in any way attempt to claim it was defrauded. Equally clear is that OSHA took no action against Astro Concrete, Bill or Nick in connection with Astro's cessation of business due solely to economic reasons as a result of the troubled Buckingham Towers project. In fact, OSHA filed no claims whatsoever against WNS, Cornicon or Astro regarding the unpaid balance of fines. The Secretary's failure to do so, belies her credibility now as she cries foul, anticipating (prior to receipt of an enforceable judgment) the demise of Avcon and Avcon's hypothetical inability to pay OSHA its undeserved penalties.

The Secretary's attack on Nick and Bill personally reaches new levels of hypocrisy at page 3 of her Brief, where, without factual support whatsoever, she claims, that, Avcon was created to "limit liability for OSHA penalties." It is hornbook law that incorporating a business entity **limits individual liability**. The limitation of individual liability is the touchstone of the corporate form.

One reason Altor subcontracted to Avcon was for Altor to remove the risks associated with labor from itself. Altor was content to make its profit from the material provided while Avcon had the headaches and uncertainties associated with labor. Contractors often subcontract the labor for this reason. In addition, Bill was a shareholder of Avcon, but not a shareholder of Altor. He could receive a dividend from Avcon, but not from Altor. The subcontracting was not done to defraud OSHA or any other creditor. Contrary to OSHA's assertion, the purpose of Avcon was not to limit liability for OSHA penalties or for any responsibilities under the Act. Judge Rooney specifically found no fraud associated with this arrangement. The allocation of Avcon's stock, 51% to Cornelia and 49% to Bill was done to qualify the company as a minority contractor. The Secretary admits that this is true. Therefore, the quoted testimony of Nick regarding individual liability is superfluous, since Bill admits, and OSHA has not contested, that Bill owns 49% of Avcon stock.

The Secretary further states that Cornelia Saites had “ no connection with the business other than ‘overseeing’ the company office and occasionally running errands to the worksite.” What the Secretary fails to add is the following testimony of Nick regarding the additional reasons why Mrs. Saites became the majority stockholder of Avcon:

Q. Now, we have two concerns, are there any more concerns?

A. I'd say my mother probably had more longevity than my father in life. Even though she's a little bit older, my father doesn't have the best health, that was another concern. [Tr48].

In fact, the Secretary has failed to highlight Nick's testimony regarding the reasons why he believes that in the construction business, it is good practice not to perform too many jobs using one corporate entity; "it's called risk management." (Tr50).

In the context of the reasons why Nick started Cornicon as opposed to reinstating the corporate charter of Astro, Nick explained that, "... it's probably easier in dealing with the State of New Jersey to start the new company than it is to have the corporate charter reinstated. That's one reason." (Tr50). Nick then explained his opinion of “risk management” as follows:

One of the things you do in the construction business if you do too many jobs under one corporation then you may be owed a significant amount of money in that corporation. Then what happens is if there's some type of liability that that corporation has, if for instance somebody was injured on the street and they sue that corporation for 10 million dollars and maybe you have a million dollars in liability insurance, that corporation would then be responsible for all the excess over the million dollars, so what that would do then is that would -- it would make all your accounts receivable subject to that injury.

Also in the construction business there's always what they term as back charges and that is when the contractor you work for claims that either they did work on your behalf, or the project cost them extra money as a result of the work that you did, or the fact that you didn't do the work in a timely fashion.

So, what happens is let's say I do the work on one project, I don't get paid on that project. I sue the contractor that owes the money for that project. That contractor -- I'm referring to the general contractor, the general contractor will then counter-claim with back charges in the amount of X dollars and maybe a million dollars in production costs lost or the job came in late and they're claiming it cost them so much money in -- for not being able to open the building on time.

Now, what happens is as far as I'm concerned, those claims are not valid, but you never know what a Court is going to do, so now what happens is you run the risk now if they would happen to get a judgment against you, whether it's right or wrong, then any job that you do in the future under that corporation would then be -- those monies would then be subject to some judgment that may have been had.

So, for that reason, it's a lot of times better business to do jobs under different corporate names and there's nothing illegal about that, people do it all the time. (Tr50-51).

Thus, the Secretary has completely ignored Nick's credible testimony regarding risk management as it relates to the construction business, generally, and the use of legitimate corporate enterprises to limit individual liability, specifically. Contrary to the Secretary's assertions, no corporation, including Avcrete, was ever formed for any fraudulent purpose or to avoid its responsibilities under the Act. There is nothing sinister or wrong about the use of a corporate form to limit liability, so long as the corporate form is properly recognized, and all corporate niceties are observed. The Secretary has not one scintilla of evidence to establish that the Avcon corporate form was not properly observed. Nor could she.

This is because both Nick and Bill testified as to Avcon's proper corporate filings regarding taxes, payroll, and other items. Once again, we challenge the Secretary to assert facts which would compel this Court to pierce Avcon's veil under traditional corporate law concepts.

Yet another example of the Secretary's impropriety here is the attack on the amount of salary that Bill and Nick drew from Avcon during the project. In a vain effort to support an undisclosed "under capitalization" theory, the Secretary concocts a nexus between the amount of monies Nick and Bill drew as salary to the resulting inability of OSHA to prospectively collect fines from Avcon.

However, a close reading of the appropriate testimony reveals that both Nick and Bill received ample salary given their financial situation. For example, Nick testified as follows:

- Q. So, it is true that your salaries were kept to a minimum at least at that stage for the sake of maintaining a certain cash flow in the company?
- A. That, in combination with the fact that **I didn't need that much money, yes.** (Tr124-125).

With regard to Bill's salary, Nick testified as follows:

- Q. Do you know what your father got paid during the job?
- A. Yes.
- Q. How much was that?
- A. \$100 a week, **he doesn't need money.**

* * *

- Q. And again, was that for purposes of cash flow at the time?
- A. That was probably one purpose.
- Q. What would the other purpose be, if you know?
- A. **He doesn't need that much money.** (Tr125).

In addition, Bill testified that even though he owned the building where Nick lives, he did not charge Nick rent. (Tr286). Bill stated that his wife is in charge of the office. (Tr291). Finally, Bill confirmed that the \$100 weekly salary sufficed for his needs, as follows:

- Q. Is that the normal amount of wages you'd get on a job like that?
- A. **I don't need much money.** (Tr274)

* * *

Q. In terms of the \$100 a week, is that a typical amount of money that you would have been paid on the jobs you've worked on?

A. Well, it might not be typical, **but I don't need much money. I don't smoke, I don't drink, I don't fool around with other women.** (Tr275)

Even though the pretrial order in this matter was intended to govern the issues in the case, the Secretary has improperly added an issue by way of her brief; the alleged "under capitalization" of Avcon. Not only is this theory factually inapposite, there was not one question lodged by Staton of any Avcon witness as to the amount of money with which Avcon was capitalized. The fact that Nick and Bill didn't need a lot of money, only helped the cash flow of Avcon. That is not under capitalization, just good business.

In addition, one only need review the Avcon payroll records to determine that the payroll accumulated to approximately \$50,000 per week during the tenure of the project. There is no claim by OSHA that Avcon ever failed to pay Union wages and fringe benefits. Therefore, the Secretary's attack is way off the mark. The fact that Avcon contracted to perform the concrete labor on the project would necessitate that it also handled the payroll for the concrete work. Avcon had the collective bargaining agreements with the unions whose laborers manned the job. The Secretary suggests that there is something wrong with this and that Bill and Nick's salary are evidence of "under capitalization". The very testimony cited by the Secretary in ostensible support of these arguments completely undercuts it. It is very common in labor intensive businesses to segregate operations in one corporation and property ownership in another corporation.

The Secretary suggests that there was something wrong with Bill, as a 49% shareholder, receiving profits from Avcon's work on the project. What could possibly be wrong with this concept? In a closely held corporation, after all bills are paid, is not a shareholder entitled to his pro rata distribution of profit? Isn't this the American way?

Furthermore, the notion of under capitalization is peculiarly at OSHA's doorstep. This is because OSHA's insistence on alleging personal liability and improperly assessing willful and serious violations has caused Avcon to incur legal fees at least three times the penalties assessed in the citations. Thus, Bill's testimony on this issue is telling:

Q. AVCON?

A. AVCON. So whatever is left, I'm going to get. So if I take the money now, or I take the money later.

Q. When will you know if there is any money left?

A. Well, after getting through all the lawyers and all that, I don't know how much is going to be left.

Q. Well, let me ask you this. I think at the time of the Deposition you said that there was still some money that was due to AVCON or ALTOR. Is that correct?

A. Some money is due to ALTOR, probably, but you know how those things work. You never know -- Owing and collecting is a different thing.

Q. So does that mean there is no money due to AVCON, they received all their money?

A. From, I'm not sure. I have to check the figures, but AVCON might not have money from -- I don't know. But, AVCON might have money coming from other projects.

Q. But do you know if there is some money due to ALTOR from that project?

A. And there might be some money due to AVCON. I'm not sure. I have to check the figures. I don't know.

Q. So there could be some due to AVCON and ALTOR?

A. Could. (Tr276-277).

The Secretary further distorts the record as to the hiring and firing authority of Nick and Bill. What could happen and what actually happened are two completely different things. Obviously as President of the Company, Bill could hire and fire employees, but according to Nick,

He really didn't. I mean if we needed employees, the foreman generally would tell the shop stewards that they needed employees and the shop stewards would then call the respective union hall and tell the type of employee that they needed for this type of work and the union hall would generally send that employee. (Tr121).

Bill confirmed in his testimony the following:

Q. Did you, personally, contact the Union Hall to hire employees?

A. No.

Q. Who did that?

A. Usually the general foreman in charge of each trade and, in turn, they would call their Union Hall or they would let the Shop Steward know and the Shop Steward calls the Union Hall, and then they send them in. (Tr272).

Here again, the Secretary fails to cite the testimony of the foremen, Georgiana and Carbone, for example, who all indicated that they had the authority to hire and fire employees and abate OSHA violations.

C. Violations

The Secretary seriously misquotes testimony regarding the use of fall protection on the project. For example, at page 7, citing the Transcript at pages 2595-98, the Secretary claims that Respondents' witnesses testified they had never "used personal fall arrest systems or safety belts and lanyards during framing or on the top deck". This summary is simply untrue.

Part of the planning on the project revolved around anticipated fall protection. Bill and Frank discussed the plan of the building and the fact that the building contained exterior beams and columns at its perimeter. Since a guardrail system was the preferred choice of fall protection, the guardrails would necessarily have to be installed between exterior columns. However, the exterior beam form would provide a step down or, in essence, an extension of the edge of the building. It was therefore determined that the guardrail system would be used to provide fall protection for the top, or "framing" deck. Clearly, Avcon considered the fall protection issue and decided on an appropriate plan. The use of guardrails had been the consistent method of fall protection throughout the tenure of Bill and Frank's long history in the business.

Avcon also produced a safety program, Exh. C-6, which program was distributed to all foremen. (Tr118:20) The purpose of the program was to alert all of the foremen, and the workers, to safety concerns. The shop stewards for each union also discussed safety with the employees on a daily basis. Nick prepared the safety program based upon a form he had received several years earlier from Philip Peist, an OSHA Assistant Area Director, at the time of the inspection. (Tr116:5).

For example, and not by way of limitation, the following testimony of Nick is pertinent:

Q. But why would you assume that they would have some training by virtue of their experience with OSHA if you have had similar experience with OSHA and were unaware of the standard?

* * *

A. Because we had discussions concerning fall protection. We discussed the fact that guardrails would be used and that when you couldn't use the guardrails, **that safety belts or safety harnesses would be used when feasible.** And the Carpenters installed the guardrails and **there were times that they did use the safety harnesses.**

Q. When did you have these discussions?

- A. All during the job.
- Q. When did they start?
- A. In the very beginning because we always use guardrails.
- Q. Now, you said, according to these discussions, **it was decided that safety harnesses or belts would be used when feasible**, is that correct?
- A. **That's correct, when there was an adequate tie-off point.** (Tr2589-2590).

There was ample testimony in this record to support Avcon's belief that the formwork on this project, and on any other similar one, was not intended for or designed to anchor or support any type of fall protection or restraint system. Rather, Avcon employed the use of guardrails as has been done in this industry for over 40 years. The guardrails act as a barrier and warning for those few carpenters working on the framing deck. Indeed, the formwork was not designed nor intended to act as an anchor for any such restraining or retraction mechanisms.

Moreover, Avcon's foremen insured that only experienced workers would work at or near the edge of the building, would kneel or crouch, would face the edge at all times, and would work safely. The ironworker foreman testified that as part of his reinforcing steel layout operations, he would chalk mark the deck approximately three feet from the edge. Since the plywood decking would be removed, hoisted upward and reused, that 3' line would continue up to each decking floor. The line clearly acted as a visual demarcation of the edge along with the guardrails. (See, Exhibit R-111.)

In addition, the Secretary avers that neither Bill nor Nick consulted with any engineers or "knowledgeable professionals" (sic), however, she seriously misstates their qualifications. Both Bill and Nick have Bachelor of Science degrees in civil engineering and are knowledgeable concrete construction professionals. In addition, Georgiana has extensive experience, and there

was ample testimony regarding the fall protection planning between Bill and Georgiana on the project. Contrary to the Secretary's assertions, Bill did contact net manufacturers prior to the start of the project, and determined from the information provided, that nets were infeasible for this type of construction.

Based on all of the foregoing, it is clear that the Secretary has intentionally misquoted testimony in a continuing vendetta against Bill, Nick and Avcon. For these reasons, as well as others, Judge Covette Rooney's Decision must be reversed, OSHA's claims should be dismissed, and the matter remanded for determination as to the quantum of attorney's fees recoverable by Respondents as against OSHA in this matter.

LEGAL ARGUMENT

I. **Judge Rooney erred in denying Respondents' March 23, 1999 Motion to Dismiss Claims Against Vasilios N. Saites and Nicholas Saites because the Occupational Safety and Health Review Commission lacked jurisdiction and statutory authority to adjudicate claims against Vasilios N. Saites and Nicholas Saites.**

Although the Secretary made a strategic decision to omit this issue from her Brief, it must be addressed as it is the crux of the Secretary's claims for individual liability against Bill and Nick. The Secretary knows that the Review Commission must dismiss the claims for individual liability against Bill and Nick as untimely, and, therefore, she chose not to address the issue, in a futile attempt to deflect this Commission's attention from the Secretary's unalterable error. However, it cannot be ignored that Judge Rooney committed reversible error by allowing the Secretary of Labor to amend her Complaint to include the individual Respondents, Vasilios N. Saites and Nicholas Saites, more than six months after the alleged occurrence of the violations set forth in the Amended Complaint. Such amendment is barred under section 9(c) of the

Occupational Safety and Health Act of 1970 ("the OSHA Act"), 29 U.S.C. § 658(c) and is further impermissible under Fed. R. Civ. P. 15(c)(3).

29 U.S.C. § 658 (c) states, "**No citation may be issued under this section after the expiration of six months following the occurrence of any violation.**" (emphasis added). Noncompliance with six-month limitations period contained in 29 USCS 658(c) may be raised as defense in a contested proceeding. See Secretary of Labor v Kaspar Electroplating Corp., 16 BNA (OSHC 1517 (1994))

In a factually analogous case, the Third Circuit ruled that the Occupational Safety and Health Review Commission did not have jurisdiction over a party that was not named in the original Complaint which sought to affirm certain citations and therefore, could not join it as a party defendant because the Secretary did not issue a new citation, file and serve an amended citation or file an Amended Complaint within the statutory six (6) month limitation period, in Bloomfield Mechanical Contracting, Inc. v. Occupational Safety and Health Commission, 519 F.2d 1257 (1975)²

In the instant matter, the Secretary **never** issued a citation to either Bill or Nick; **did not** amend the citations against Avcon to name the individual Respondents; **did not**, in violation of 29 U.S.C. §659(a), address a notice of the proposed penalties to the individual defendants; and **did not** name the individual Respondents in her Complaint to affirm the citations. The Secretary **did not even seek to amend** the Complaint to join Bill or Nick as individual defendants until well after the six (6) month limitation within which to issue *citations* had expired. Citations were issued to Avcon, Inc. on April 7, 1998 for alleged violations that last occurred on January 7, 1998. Subsequently, citations were again issued to Avcon on June

² An extensive analysis of the facts and holding in Bloomfield Mechanical Contracting Inc., is set forth in Respondents-Petitioners' Brief in Support of Petition at pages 2-6, and is not regurgitated herein.

23, 1998 for alleged violations that last occurred on May 12, 1998. The Secretary did not move to amend the citations to name the individual defendants until November 20, 1998, which was more than six (6) months after the last violations were allegedly committed by Avcon. The Secretary never issued citations to Bill or Nick at the time of any alleged violations, nor did she amend any of the citations to name them personally. The first "notice " they received of such intention was the filing of the motion to assert personal claims against them, which was dated November 20, 1999, more than six (6) months after the last citations were allegedly committed by Avcon. The hallmark of 29 U.S.C. 658(c) is to afford the parties who are alleged to have committed violations a fair opportunity to prepare their defense. Thus, the Saites were not accorded due process under the law and any ruling against them must be vacated. Accordingly, the Court does not have either subject matter or personal jurisdiction pursuant to 29 USCS 658(c) and the Amended Complaints against Bill and Nick must be dismissed with prejudice.

The jurisdictional requirement of 29 U.S.C. 658(c) cannot be waived. The Commission Rules allow affirmative defenses to be plead up until the time of the Pre-Hearing Conference. It is only after the time of the Pre-Hearing Conference that waiver of an affirmative defense can be asserted. 29 U.S.C. § 2200.207.

The record reflects that OSHA did not issue citations or notices to the individual Respondents, did not amend the citations to include them, or even amend the Complaint in this matter within the six month time frame, despite ample opportunity (and knowledge) to do so based on facts adduced during discovery. The Saites never acquiesced to their joinder in this case. Pursuant to 29 U.S.C. § 658 and Bloomfield Mechanical Contracting, Inc., supra., the claims against the individual Respondents were time barred and should have been dismissed with

prejudice. Based on the foregoing, on March 23, 1999, Respondents moved to dismiss the Complaint against them for lack of jurisdiction.

Notwithstanding the controlling law, Judge Rooney denied Respondents' motion to dismiss. Not only was the Court's decision in direct contravention of 29 U.S.C. § 658(c) and the precepts of Bloomfield Mechanical Contracting Inc., supra, but it lacked any explanation for its rationale.

For all of the foregoing reasons, Judge Rooney erred in failing to sustain the individual Respondents' contentions that the Secretary of Labor's amendment of her Complaint to allege violations on the part of the individual Respondents was barred under Section 9(c) of the Occupational Safety and Health Act of 1970 and 29 U.S.C. § 685(c).

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

II. Judge Rooney erred in finding Individual Respondents, Vasilios Saites and Nicholas Saites Individually Liable.

The Court abused its discretion and committed reversible error by improperly expanding the definition of "employer" under the OSHA Act, 29 U.S.C. § 652(5) and finding that Bill and Nick were individually liable with regard to each and every violation affirmed in this case. The Secretary failed to proffer evidence to support any conclusion that Vasilios Saites and Nicholas Saites were "employers" within the meaning of the OSHA Act at 29 U.S.C. §652(5). The Secretary relies on testimony **taken out of context** from a completely separate trial! As such, said testimony should be disregarded.

In her Brief, the Secretary misstates Respondents argument that the individual Respondents cannot be held liable under the Act since individual Respondents did not exercise full control over the working conditions of Avcon's employees, nor did they have the sole authority to abate violations of the Act. The Secretary erroneously cites Respondents as averring that "under no circumstances may the corporate veil be pierced in the context of civil violations of the OSH Act." (SB: 10). In this case however, there is no evidence whatsoever that either Bill or Nick exercised such control over the corporate entity so as to imbue personal liability. Judge Rooney erroneously concluded that personal liability could be obtained against Bill and Nick by relying on inapplicable and distinguishable authorities.

The Secretary's reliance on United States v. Pisani, 646 F.2d 83 (3rd Cir. 1981) is misplaced. Pisani sets forth factual tests which cannot be met based upon the facts of this case. There, a physician was held individually liable to Medicare for overpayments made by the Department of Health, Education and Welfare to his solely owned corporation, Eaton Park Associates, Inc. The Third Circuit Court of Appeals applied traditional veil piercing concepts, and relied in part on the test announced by the Fourth Circuit in DeWitt Truck Brokers v. W. Rey Flemming Fruit Company, 540 F.2d 681 (4th Cir. 1976) as follows:

... failure to observe corporate formalities, non-payment of dividends, the insolvency of a debtor corporation at the time, siphoning of funds of the corporation by the dominant stockholder, non-functioning of other officers or directors, absence of corporate records, ... 646 F.2d at 88.

Most importantly, in Pisani, the physician was found to have committed fraud. No such finding was determined here. In fact, Judge Rooney found the opposite, stating, "...their actions do not appear to be fraudulent,..." (D19) In a gross misstatement, OSHA claims Nick testified that a prime concern in the creation of Avcon and Avcrete was to place assets beyond the reach of any

liability, specifically OSHA liability. This is simply **not true** and Judge Rooney's determination that there was no fraud indicates this.

There was no testimony in the instant proceeding concerning capitalization, yet OSHA claims Avcon to be undercapitalized. It appears OSHA believes a corporation to be undercapitalized if it fails to meet its financial responsibilities at any time, including OSHA fines, attorney fees, OSHA consultant fees, expert fees or any other fee required to defend against OSHA citations, as well as any other anticipated or unanticipated bill, no matter what the circumstance is. This is simply not true. Avcon had ample funds to make payroll and pay its bills. OSHA failed to inquire about capitalization and so attempted to adapt information to support their argument.

Clearly, there was no testimony in this case that corporate formalities were not observed, rather, just the opposite holds true. Annual shareholders meetings were held and minutes waived, in accordance with New Jersey Business Corporations law. N.J.S.A. § 14A:5-2.

In addition, Bill indicated that if there were monies left after the payment of all corporate related expenses, he would be entitled to his pro rata share as a stockholder return or dividend.

Nick testified that there was a, "Unanimous Consent of Directors in Lieu of Organizational Meeting" in accordance with New Jersey Business Corporations Law. See N.J.S.A. § 14A:2-8.

Bill testified that there were numerous stockholders' meetings annually. New Jersey Corporate law only requires one annual stockholder meeting. Dividends had not been paid, but Avcon was a corporation less than one year old at the time of the Hackensack OSHA inspections. It is unreasonable to expect dividends to be paid for such a young corporation. Furthermore, there is no evidence that Avcon is insolvent. Moreover, there is no evidence of "siphoning of funds of the corporation" by Bill, rather, there is evidence that he took a small salary.

Additionally, there were no non-functioning officers or directors. Since Bill was the sole officer and director of Avcon, there could not be any other non-functioning ones. Corporate records do exist and the substantial Avcon payroll records are in evidence.

Avcon is not a façade for the operation of the dominant stockholder. The dominant stockholder is Bill's wife, and her limited corporate involvement support this proposition. As for Bill, the testimony indicates Avcon to be a properly formed and maintained viable corporation. The Secretary believes that the mere fact that an individual is a stockholder in more than one corporation, one of which may have ceased doing business for whatever reason, imputes personal liability for every corporate debt other than the first corporation in which he became a shareholder. This is ludicrous. Thus, none of the Pisani factors exist to warrant the piercing of the veil as against Bill. The liability of Nick, however, cannot obtain through veil piercing under these tests or any others.

Most recently, Administrative Law Judge G. Marvin Bober addressed the propriety of citing a 4% shareholder of a construction corporation individually in his capacity as president in Secretary of Labor v. Major Construction Corp., and Michael J. Polites, (Docket No. 99-0943). In finding that the Secretary failed to submit sufficient evidence during the trial to prove that Polites was an "employer" as that term is defined by Commission precedent, the Commission relied on the "realities test" set forth in Griffen & Brand McAllen, 6 BNA OSCH 1702 (No. 14801, 1978) to determine whether an employment relationship existed. The test requires an inquiry into "(1) who the workers consider to be their employer; (2) who pays the workers wages; (3) who has the responsibility to control the workers; (4) whether the alleged employer has the power to control the workers; (5) whether the workers' ability to increase their income depends on efficiency rather than initiative, judgment and foresight and (6) how the workers wages are established." Id., at 1703.

In Major Construction, supra, the Commission held that while Polites had some control over the job site, for example, he held himself out as having authority to hire and fire employees and to “deny access to the job site to various compliance officers,” such control did not make him an employer, under the Act. Id., at 29. There was no testimony that any of the workers considered Polites to be their “employer”. The Corporation paid all of the expenses of the company and there was no evidence that Polites had any input into how much the workers were paid or what factors would influence the amount of their salaries. Accordingly, the Commission held there was insufficient evidence to identify Polites as an employer under the criterion set forth in Griffin & Brand McAllen, supra. and, therefore, he could not be held personally liable for violations of the Corporation under the Act.

In the case before the Review Commission, (1) the workers considered Avcon to be their employer; (2) Avcon paid the workers’ wages; (3) Avcon foremen had the responsibility to control their workers; (4) according to union regulations, only the workers, foremen and shop stewards had the power to control them; and (5) the workers had no ability to increase their income because their wages were established by the union. Clearly, there was absolutely no proof that Bill or Nick used the corporate Respondent, Avcon, for personal motives, personal gain, or any fraudulent or wrongful act. Judge Rooney so concluded (Dec. at p. 22). Nevertheless, Judge Rooney drew a completely illogical conclusion by finding Bill and Nick Saites to be “employers” as defined in the OSHA Act.

The Secretary claims the corporate veil may be pierced when the recognition of the corporate entity would defeat public policy. The policy the public wants to ensure is a safe workplace for all employees. OSHA claims that without personal liability they are powerless to enforce their regulations. This is simply not true. OSHA has the power to post a “Notice of

Eminent Danger” and shut down the worksite. Simply because an employer disagrees with OSHA’s interpretation of a regulation or feasibility of its application does not warrant individual liability. OSHA must abide by the same set of laws Congress set forth governing their conduct as an employer must, governing his.

Accordingly, Judge Rooney committed reversible error in holding Bill and Nick individually liable and this Commission must reverse her decision.

III. Judge Rooney committed reversible error in holding that the Respondents violated the Fall Protection Standard at 29 CFR § 1926.501(b)(1) as alleged.

Judge Rooney improperly affirmed Citation 1, Item 9 and Citation 2, Items 2A-C alleging violations of the Fall Protection Standard without basis or proof. The Respondents met their burden of proof at trial by establishing infeasibility.³

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

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

Ibid.

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

³ An itemized analysis of each instance is set forth in Respondents’ Brief in Support of Petition at pages 30-33, and is not reproduced herein.

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

In the instant matter, Respondents properly argued that the cited regulation did not apply since much of the work at the Excelsior II project was "leading edge" work. The Complainant improperly cited Respondents under Section 1926.501(b)(1) and relied upon 29 C.F.R. 1926.501(b)(1) for all of the fall protection allegations in this case.

Judge Rooney's failure to apply the "leading edge exception" to the fall protection standards is contrary to well-settled commission precedent, not supported by a preponderance of the evidence and thus, raises an important question of law and public policy and therefore, her Decision must be reversed.

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

The Secretary contends that Judge Rooney was correct in rejecting Respondents' argument that the work done at the Excelsior II project was "leading edge" work and, therefore governed by 29 C.F.R. 1926.502(b)(2). The Secretary, however, points to no evidence, to rebut Respondents' argument that the Court erred in not finding that the work done on this project was "leading edge" work. Rather, the Secretary's Brief merely quotes Judge Rooney's Decision with regard to leading edge work. As was discussed in great detail in Respondents' Brief in Support of Petition, the facts in this case clearly support Respondents' argument that the violations for fall

protection issued to Respondents on the Excelsior II project should have been issued pursuant to 29 C.F.R. 1926.502(b)(2), not 29 C.F.R. 1926.501(b)(1). The Secretary did not issue any violations under 29 C.F.R. 1926.502(b)(2) dealing with the concept of "leading edges".

Pursuant to 29 C.F.R. 1926.500(b), the leading edge is defined as follows:

Leading edge means the edge of a floor, roof, or formwork for a floor or other walking/ working surface (such as the deck), which changes location as additional floor, roof, decking or formwork sections are placed, formed or constructed. The leading edge is considered to be an 'unprotected side and edge' during periods when it is not actively and continuously under construction.

The installation of formwork or plywood decking falls within this category and Respondents amply proved this at trial. In addition, the construction of formwork sections necessarily involves the removal or stripping of the sections. Clearly, the leading edge concept applies to the creation of formwork on balconies, as well as the removal of formwork on balconies. The leading edge concept was confirmed by respondents' expert, Leo DeBobes, who testified that, "Leading edge work is completed... after all of the forms and all of the temporary components have been removed." (Tr. 3971). Here, Judge Rooney's decision was based almost entirely on Mr. Signorile's flawed testimony. Indeed, after acknowledging that Respondents "... elicited testimony... providing a different interpretation of what the photo or videotapes depicted", Judge Rooney nevertheless gave "... very little weight" to this testimony (See Dec. at p. 29). However, a compliance officer's failure to identify the floor where an alleged violation occurred, the number of employees affected and how close an employee was to the edge of a floor are hardly "harmless" errors in a case involving alleged violations of the fall protection standard. Rather, they are critical mistakes which mandate dismissal of the citations. As discussed in Respondents' Brief in Support of Petition, Judge Rooney's decision is directly at odds with the record evidence here and the Commission's rulings in Wachsberger, American Tank & Vessel, Dynamic Painting, and Scafar.⁴

⁴ The facts presented in each of these cases are strikingly similar to the facts of record here and in each case, the citations for fall protection were vacated where said citations were based on the flawed observation and testimony of an OSHA compliance officer. For a full analysis of these cases, see Respondents' Brief in Support of Petition at page 33.

Accordingly, Judge Rooney's failure to apply the "leading edge exception" to the fall protection standards is contrary to well-settled commission precedent, not supported by a preponderance of the evidence and thus, must be reversed.

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

1. **Nets**

Contrary to the assertions of the Secretary, Avcon demonstrated that its guardrail system was pre-planned by "qualified persons" as defined under the OSHA Act. The leading edge infeasibility has been shown, and Avcon's leading edge alternative fall protection plan is adequate and was planned to accommodate those limited situations where the perimeter guardrails could not provide protection due to the constraints of the project. The Court should have looked at the project as it was constructed, and not in a vacuum, as it did. Now, this Review Commission is called upon to apply common sense to what occurred as opposed to the ideal or hypothetical job site. To do anything else would be patently prejudicial to respondents.

A greater number of employees would be exposed to a great danger installing, relocating and removing nets than the limited number of employees exposed to the building edge for a brief period of time. In addition, OSHA requires that safety nets be drop-tested after initial installation and before being used as a fall protection system "whenever relocated". 29 CFR 1926.502(c)(4)(i). As a consequence of the foregoing requirement, members of the installation crew will need to drop-test each installation at each floor by throwing a 400 pound bag of sand over the edge of the building into the net to see if it will hold. The drop-testing procedure itself will expose more people to a greater hazard. OSHA also requires that safety nets be inspected at least once a week for wear,

Guardrails were installed on the deck and once installed, those working on the deck were protected. Safety nets were not the chosen fall protection method on this project and it made little sense for Avcon to install nets to protect a few carpenters performing leading edge work while exposing dozens of installers, de-installers, re-installers, drop testers and inspectors to catastrophic falls.

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

The Secretary states that Respondents "estimates" for the curing time of the cement are unsupported, however, the fact that OSHA's own engineering expert, Burkhardt, confirmed the length of time required for concrete to cure has been ignored by the Secretary. Mr. Burkhardt, testified that the curing time required on this project would have been between 7-10 days. Additionally, OSHA's safety net salesman, Paine, testified that he does not agree or disagree with Burkhardt's opinion. Mr. Paine refused to respond to the questions regarding the relationship between the concrete curing time and the net embedment anchorage strength. His failure to have an opinion on that issue belies the veracity of his entire opinion, which respondents contend is no opinion at all. Additionally, it cannot be overlooked that no one testified about the use of fall protection nets on any poured in place concrete high rise building in the northern New Jersey

area, because they had never been used prior to this matter, nor afterwards, in compliance with OSHA net regulations..

Thus, the Court can certainly rely on OSHA's professional engineer's judgment in this regard. The Secretary at page 34 of her Brief relies on the testimony of Daniel Paine to support her position that safety nets were feasible. However, Mr. Paine, testified that he does not even know what effect the strength of concrete has in terms of its ability to support an embedment which anchors a net protection system. Obviously, Paine is only interested in selling nets; safety is not an issue.

Thus, OSHA's expert engineer confirmed that a safe estimate for curing time would be about 10 days. If the installation of the net system at the perimeter of the building takes two days (even including drop testing), the net installation would take a minimum of 12 days. Since Avcon employed a four-day pour cycle, the nets could never keep up with the work. The nets would always be a minimum of four floors behind the work and would therefore be beyond the 30 foot OSHA mandated distance. Paine's response of "jumping" nets would require twice the personnel and would therefore expose dozens of installers, drop testers and inspectors to deadly falls in an effort to protect a few carpenters performing the small amount of leading edge work on the project. Of course, Paine would double the amount of his sale, and his commission! Note, that a net may not be jumped to concrete until the concrete is sufficiently cured.

Obviously, the strength of the net support would be critical to its installation and based upon Avcon's construction process, the hypothetical net installation would not be a feasible method to protect the few carpenters prior to the installation of guardrails.

Again, the nets proposed by OSHA on this building, were hypothetical. The installation of anchor plate embedments would require structural drawings since these baseplates would effect the

structural integrity of the building. The plates would have to be removed, and some form of grinding and patching would necessarily need to occur to create a smooth concrete finish. The developer of the project never asked the structural engineer to design anchorage points for fall protection net baseplates into the building. According to DeBobes, there is nothing in the OSHA standard that would require a concrete contractor to modify the building design to accommodate fall protection net anchorage baseplates. (Tr3980).

Thus, Nick and Bill testified that the drawings received from Tenwood showed no such anchorages. As a consequence, Avcon could not unilaterally install these devices. OSHA never cited the general contractor, never issued a notice of imminent danger nor in any way attempted to shut down the project. Avcon could not feasibly install the nets without appropriate embedments. Therefore, Avcon wisely chose to use guardrails for fall protection together with alternative fall protection methods for leading edge work, which preceded guardrail installation, since these methods were more feasible and unquestionably much safer than OSHA's "hypothetical" nets. Yet, Judge Rooney disregarded the overwhelming evidence presented by Respondents, and erroneously concluded that Respondents failed to establish their affirmative defense of infeasibility.

2. Fall Arrest/Fall Restraint Systems

Similarly, fall arrest/fall restraint systems were equally infeasible on the Excelsior II project. The required anchorage for fall arrest and fall restraints systems could not be met by attaching the systems to formwork. Formwork is not intended for nor designed to be used as anchor points. Personal fall arrest systems and positioning device systems are infeasible protection alternatives with regard to Avcon's work because the required anchorages used for attachments cannot support the minimum weight resistance required. 29 CFR 1926.502(d)(15) calls for the anchorage to support a load of at least 5,000 pounds per employee attached for personal fall arrest systems, and

29 CFR 1926.502(e)(2), requires that such devices must secure to an anchorage capable of supporting at least twice the potential impact load of an employee's fall or 3,000 pounds, whichever is greater with regard to the positioning device systems. In either case, neither the plywood deck, nor the formwork will sustain any such lateral load since this formwork was not intended for, designed or installed with anchorage capability. Formwork, by OSHA's own definition, is temporary in nature and not intended to be used as an anchor point. Thus, nailing a lanyard to a stringer or rib will not provide sufficient anchorage for such use. In addition, attaching a lanyard to formwork would violate 29 CFR 1926.501(d)(11) which provides "Lifelines shall be protected against being cut or abraded."

OSHA contends that the Canadian manufactured "Safe-T-Strap" would provide a sufficient anchor point. However, merely nailing a Safe-T-Strap into the formwork would not provide sufficient anchorage which satisfies OSHA requirements cited above. Thus, OSHA failed to prove feasibility of using fall arrest or restraint systems for work which precedes the installation of guardrails. In addition, reinforcing steel will not support anchorages in accord with OSHA's standard.

Based on all of the above, OSHA has failed to demonstrate feasibility of any other method of fall protection on this particular project. On the other hand, Respondents met their burden and established that the fall arrest and restraint systems are not feasible for framing or deck work which precedes the installation of guardrails. Thus, Avcon's use of its alternative fall protection plan was adequate and appropriate under the circumstances. This is especially so given that both Bill and Nick are "qualified persons" under the OSHA Act, and have been involved with corporations that have used these methods on over 200 high-rise projects. There was clearly a guardrail system in place, and the alternative fall protection plan was limited to those activities preceding the

installation of guardrails. Reversal of Judge Rooney's erroneous decision and vacatur of the judgments entered against the individual Respondents is therefore mandated.

VI. Judge Rooney erred in denying both (i) the Respondents' pre-trial requests for discovery of the anticipated "rebuttal" testimony of the Secretary's expert witnesses (Burkart and Paine) and (ii) the Respondents' request, during trial, for an opportunity to rebut that expert testimony through the testimony of their own expert "surrebuttal" witness.

Contrary to the Secretary's assertions, the evidence clearly shows that Respondents were "blindsided" by the introduction of the Secretary's "surprise" *expert* witness. Judge Rooney, in blatant disregard for well established procedure, allowed OSHA to call an expert witness to rebut factual testimony! Obviously her ruling caught Respondents off guard and hindered their ability to prepare and defend against a rebuttal case, which allowed the Secretary an uneven advantage not permitted by the Federal Rules of Civil Procedure. The Secretary produced two rebuttal expert witnesses who were, contrary to the Secretary's contention, allowed to testify on issues well beyond the scope of Respondents' defenses, and as such, Respondents were severely prejudiced. Further, the Court denied Respondent's efforts to provide surrebuttal.

Judge Rooney based her rejection of the infeasibility defense was based entirely on the rebuttal expert witnesses. Although, as the Secretary avers in her Brief, Judge Rooney had "wide latitude in curing any prejudice the Respondents might have suffered in regard to the late disclosure of the expert witness", she refused to do so. Justice was not served. Thus reversal of the Decision by this Commission is warranted and a remand is required to allow Respondents the ability to reassert the barred rebuttal testimony.

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

Contrary to the Secretary's assertions, Judge Rooney's holding and penalty assessment with regard to Citation 2 items 2a through 2c is unsupported by the facts established at the trial of this matter. In her Brief, the Secretary quotes Williams Enterps., Inc., 13 BNA OSHC 1249, 1256 (No. 85-355, 1987), "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." Respondents rely on the precedent of the Third Circuit, under whose jurisdiction, the instant matter lies. The Third Circuit requires a showing of a "deliberate flaunting of the Act" or an "obstinate refusal to comply" on the employer's part in order to find willfulness. Frank Irey, Jr. Inc. v. OSHRC, 519 F.2d 1200 (3rd Cir. 1975). Clearly, the Third Circuit in Irey, sets forth a heightened standard for a finding of willfulness, which the Secretary fails to properly cite. Any alleged violations in the instant case were simply not intentional, nor were they committed with knowing or voluntary disregard for the requirements of the Act, and, therefore the violations should not have been classified as willful. Avcon had a bona fide, good faith disagreement with OSHA concerning the interpretation of the fall protection regulation and feasibility of same for which OSHA chooses to persecute the Saites and any corporation with which they are associated.

The Secretary cites prior history of corporations the Saites were associated with, not Avcon, to support her contention of "knowing" the regulation. The fall protection regulation, to which OSHA references prior history, is different than the one which OSHA cites in the instant proceeding. OSHA's contention of prior knowledge is therefore flawed.

The Secretary concedes that 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. In the instant matter, nowhere in the analysis of willfulness of these citations is there a finding, consistent with the aforesaid authorities, that

Respondents deliberately flaunted the Act. Conversely, the record before Judge Rooney clearly established that Respondents' installed the only feasible fall protection, a guardrail system, and Respondents' workers were told to tie off where feasible. The fact that OSHA and Respondents disagree as to the feasibility of alternative fall protection methods does not create rise to the level of what is required by law to evidence willfulness. A difference of opinion between the employer and OSHA as to whether a violation existed in a given factual situation "should not be construed as constituting a willful violation of the Act merely because labor holds a contrary opinion on the facts and advises the employer of that opinion". Keco Industries, Inc. 13 BNA OSHC 1161 (1987). The Commission will refuse to find a willful violation merely because an employer disagrees with the view expressed by OSHA. Id. A finding of willfulness requires a showing of a "deliberate flaunting of the Act" or an "obstinate refusal to comply" on the employer's part. See Frank Irey, Jr. Inc. v. OSHRC, 519 F.2d 1200 (3rd Cir. 1975). That is simply not present in this case.

Accordingly, Judge Rooney's erroneous Decision in this regard must be vacated.

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

There was presented at the trial of this matter, direct evidence of the existence of written information regarding hazard communication programs, hazardous chemicals and safety information at the site. Respondents testified that all written materials regarding these chemicals were kept in a folder and in a loose-leaf file constituting the hazardous communication program (Tr. 2322). There were also a complete set of Material Safety Data Sheets on site (Id.). The communication program involved telling the employees how to handle materials if there was an accident and what to do about it (Id.). Therefore, there was credible evidence adduced by Respondents regarding the existence of the written program, as well as the implementation of same,

however, Judge Rooney ignored this evidence. Respondents now, respectfully request that this Commission rectify her flawed Decision.

IX. Judge Rooney erred in finding a violation of 29 C.F.R. 1926.20(b)(1)

OSHA avers that Respondents had an inadequate safety and health program at the work site. However, there was ample testimony that a safety and health program was created for and implemented at the project using a sample that had been given to Respondents from former OSHA Assistant Area Director (and now and OSHA Area Director), Philip Peist on another project (Tr. 2325). Respondents provided this written program to OSHA during the subject inspection, which program had been modified from the sample they had received (Exhibit C-6).

There was further un rebutted testimony that the program was discussed with all the foremen and each foreman received a copy of the program (Tr. 2327). The foremen and/or the shop stewards were responsible for discussing the program with the workers. Respondents testified that the shop stewards were in fact seen discussing aspects of the safety program with the workers. (Id.). In addition, shop stewards went around taking attendance every day on the job for union reports and would, therefore, talk to employees daily, typically twice; once in the morning and once after lunch about safety. (Id.)

There was further un rebutted testimony that Mr. Signorile did not go through the written safety program with Respondents pointing out any perceived problems (Tr. 2328). Indeed, no one at OSHA ever indicated to Respondents that the written safety program was inadequate (Id.). According to Respondents, whenever Mr. Signorile perceived a violation, whether, in fact, it existed, he assumed that there was "no safety program" (Tr. 2322). OSHA's convoluted interpretation of this regulation is that should an employer be cited for a violation, it is unrefutable proof that their safety program is not created or implemented. Judge Rooney's citation to

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

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

The two instances under this Citation, affirmed by Judge Rooney in the Opinion below, lack sufficient credible evidence as there was direct testimony offered by Respondents contradicting Mr. Signorile's unsubstantiated allegations.

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

Instance (b) deals with the same horizontal form member as Instance (a). Since Judge Rooney identified this member as the "same scaffold which was the subject of Item 8A", her Opinion in connection therewith suffers from the same defects (Dec. at p. 81). Respondents

testified that, since there were no workers at the time in the area who were attempting to gain access to the horizontal member, there was no need for a ladder (Tr. 2422). In addition, Respondents indicated that, contrary to Mr. Signorile's testimony, there was no steel in the wall in question and, in fact, the only metal in the wall were snap-ties, which could not be walked on, as they were only 1/8" in diameter (Tr. 2423). Accordingly, the Secretary lacked sufficient credible evidence to support this violation and the Review Commission should reverse Judge Rooney's Decision based on these deficiencies and vacate the citations.

CONCLUSION

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

Respectfully submitted,

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Dated: July 12, 2001