

SECRETARY OF LABOR,

Complainant,

v.

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

Respondent.

OSHRC DOCKET NO. 99-0958

APPEARANCES:

For the Complainant:

William G. Staton, Esq., Noelle B. Fisher, Esq., Office of the Solicitor, U.S. Department of Labor,
New York, New York

For the Respondent:

Paul A. Sandars, III, Esq., Lum, Danzis, Drasci, Positan & Kleinberg, LLC, Roseland, New Jersey

Before: Administrative Law Judge: Robert A. Yetman

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondents, Altor, Inc., and/or Avcon, Inc., and/or Vasilios SAITES, individually, and d/b/a/ Altor, Inc., and/or Avcon, Inc., and Nicholas Saites, individually and d/b/a Altor, Inc., and/or Avcon, Inc. (Avcon), at all times relevant to this action maintained a place of business at the Mariners High Rise building, Edgewater, New Jersey, where they were engaged in poured-in-place concrete construction. Respondent, Avcon, Inc., admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act. Respondents Vasilios Saites, Nicholas Saites and Altor, Inc. deny that they are employers within the meaning of the Act (answer to complaint; affirmative defenses Nos. 19, 20, 21 and 22) and vigorously assert that neither individual nor Altor have any responsibility for the violations alleged by Complainant.

On October 23 through April 19, 1999 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Avcon's Edgewater, New Jersey work site. As a result of that inspection, Avcon was issued one willful, one serious, and one other than serious citation alleging multiple violations of the Act together with proposed penalties. By filing a timely notice of contest

Avcon brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On January 17-30, 2001, a hearing was held in New York, New York. During the hearing, the Secretary's counsel indicated that citation 1, item 3 had been withdrawn (Tr. 344-45). The parties have submitted briefs on those items remaining at issue, and this matter is ready for disposition.

BACKGROUND

On October 23, 1998, the Occupational Safety and Health Administration (hereinafter "OSHA") commenced an inspection of the worksite known as the Mariner High Rise located at Edgewater, New Jersey. The worksite was a sixteen story poured in place reinforced concrete residential apartment building owned by Ferry Plaza North LLC. The general contractor for the construction site was Daibes Brothers, Inc. which subcontracted the poured in place concrete work to Altor, Inc. Altor, in turn, subcontracted that work to Avcon, Inc., according to Respondent Nick Saites, for "risk management" reasons. Pursuant to that subcontract, Altor supplied all the necessary materials and supplies and Avcon performed the work with union supplied workers. As far as can be determined on this record, the only employee of Altor, Inc. present at the site was Vasilios Saites, the president of that company. All of the exposed employees relevant to this matter were employed by Avcon, Inc.

As a result of the October 23, 1998 inspection, a citation was issued to Vasilios (Bill) Saites and Nicholas Saites, individually and doing business as Altor, Inc. and/or Avcon, Inc. A timely notice of contest was filed and by an amended complaint, Altor, Inc. and Avcon Inc. were added as individual Respondents. Respondents' answer denies generally the allegations contained in the complaint and, in particular, denies liability on the part of Altor, Inc. and personal liability of Vasilios and Nicholas Saites. Complainant asserts, however, that the facts of this case justify piercing the corporate veil of Altor, Inc and Avcon, Inc. and assessing personal liability in this matter against Vasilios and Nicholas Saites as the "alter ego" of those corporations.

Based upon the testimony at the hearing as well as the stipulations and other submissions of the parties, the following facts have been established regarding the personal liability issue and the liability of Altor, Inc. Vasilios Saites is a civil engineer with approximately thirty years experience in the construction industry. His son, Nicholas, is also a civil engineer and an attorney qualified to practice law within the State of New Jersey. Nicholas represents his father in his various business activities including the drafting and review of construction contracts and the review and drafting of documents necessary for the incorporation of construction businesses within the State of New Jersey. Although

Nicholas is an attorney at law, it appears that his only clients are his father and his various businesses. Moreover, the majority of his work activity is as an engineer at the various construction projects performed by corporations owned by him or his father. Over the years Vasilios has been owner and president of Astro Concrete, Inc., Cornicon, Inc., WNS Construction and more recently Altor, Inc., Avcon, Inc. and Avcrete, Inc. However, ownership of one or more of these corporations has been transferred to Nicholas. All of the corporations were formed and operated in accordance with the laws of the State of New Jersey. Avcrete was incorporated subsequent to the inspections which resulted in this action and is owned by Vasilios Saites.

The corporate office of all of the aforesaid corporations was and is located at the personal residence of Vasilios Saites and his wife. From the record, it is clear that these corporations are closely held by the Saites and are created to limit liability at the various job sites and to meet other legal requirements. For example, Avcon, Inc. was created with Vasilios's wife as the majority stockholder in order to qualify that firm as a minority owned business for Housing and Urban Development financed projects. Although Respondents freely admit that the various corporations were created to limit potential liability, there is nothing in this record which supports the conclusion that the formation and operation of the various corporations violated any laws of the State of New Jersey. There is evidence, however, that some of the corporations became inactive after completion of various jobs and others filed for bankruptcy. On the other hand, it appears that Altor, Inc. and Avcon, Inc. were legitimate and active corporations at the time of the inspection and the hearing in this matter. There is no dispute between the parties, and the record supports the conclusion that Avcon, Inc. was the employer of the employees exposed to hazards at the worksite. At the request of Avcon, various unions supplied all of the labor for the job and wages were paid to these employees by Avcon, Inc. As far as can be determined on this record, Complainant does not allege that Altor, Inc. is a responsible party under the multi-employer worksite theory; that is, no exposed employee was employed by Altor nor did any representatives of that firm control the worksite in relation to work performed by Avcon employees. It is undisputed that Vasilios Saites is the president and sole member of the board of directors of both firms; however, there is no evidence that Nicholas Saites held any corporate position within either firm other than as an employee (assistant superintendent) of Avcon, Inc. Based upon the evidence in this case as well as the demeanor of Vasilios and Nicholas at the hearing, it is clear that there was and is a close working relationship between the father and son and Vasilios relies heavily upon the advice of his son. Both were present at the worksite on a regular basis and provided oversight for the work activities of Avcon employees.

On these facts Complainant seeks, for the first time in almost thirty years of OSHA enforcement¹, to pierce the corporate veil of a legitimate, viable corporation² to assess personal liability against an officer/owner of that corporation (Vasilios Saites) and his son (Nicholas Saites) who has no official connection with either Altor, Inc. or Avcon, Inc. other than as an employee of Avcon, Inc. Complainant's counsel explained the reason for this citation as follows:

[the courts] also talked about whether or not observing the corporate shield would frustrate public policy, and that's really more pertinent here. To the extent that OSHA issues citations to individuals who periodically change the name of the company under which they're doing business, it makes it impossible for the Secretary then to follow up on these inspections and get abatement violations, to collect penalties when, in fact, we have a judgment against a corporate entity that no longer exists or has been abandoned because the principals have now moved on to form a new corporation under which they're doing business now. So that there's no effective way for us to accomplish the objectives of the statute under those kinds of circumstances. (Tr. 29).

The theory underlying the action taken by the Secretary in this case raises fundamental questions concerning the jurisdiction of the Review Commission to grant the relief sought. Initially, the Secretary must establish, by credible evidence, the identity of the "employer" of exposed employees. Section 3(5) of the Act defines "employer" as "a person engaged in business effecting commerce who has employees . . ." Section 3(4) of the Act defines "person" as "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives or any organized group of persons." The Review Commission is charged with the responsibility of determining the identity of the employer and, based upon the evidence submitted by the Secretary in this case, it is concluded that Avcon, Inc. was the employer of employees exposed to hazards alleged to exist at the worksite by the Secretary. *Usery v. Lacy*, 628 F2d 1226 (9th Cir. 1980); *Clarence M. Jones*, 11 BNA OSHC 1529, 1983 CCH OSHD ¶26,516 No. 82-516 (1983). Moreover, the evidence establishes that Altor, Inc. and Avcon, Inc. are closely related companies having interrelated and integrated operations with a common president, management, supervision and ownership performing services at a common worksite. Under these circumstances, both corporations must be regarded as a single entity and, therefore, constitute the "employer" for purposes of OSHA enforcement at the worksite. *Advanced Specialty Co.*, 3 BNA

¹In a recent case involving similar facts against the same Respondents, *Avcon Inc., Vasilios Saites and Nicholas Saites*, Docket Nos. 98-0755 and 98-1168, Judge Rooney found personal liability against the individual Respondents. That decision is currently on review before the Review Commission.

²Compare: *United States v. Pisani* 646 F2d 83 (3rd Cir. 1981); *Life Science Products*, 6 BNA OSHC 1053, 1977 CCH OSHC ¶22,313 No. 14910 (1977).

OSHC 2072, 1975-76 CCH OSHD ¶20,490 No. 2279, (1976). *See also; Trinity Industries, Inc.*, 9 BNA OSHC 1515, 1981 CCH OSHD ¶25,297 No.77-3909, (1981).

The more difficult issue is whether a corporate official and an individual having no formal relationship to the lawful viable corporate entities other than as an assistant superintendent may be found to be “employers” within the meaning of the Act. The position of the Secretary is reflected in the following colloquy:

JUDGE YETMAN: Mr. Staton, I understand the overall concept. We both have dealt with this for many years. I want to deal with just the Occupational Safety and Health Act and if it's the Secretary of Labor's position today that personal liability may attach to corporate officials.

I'm trying to determine from you what officials may be held liable. What tests would I have to apply to determine which officials to hold responsible and those which are not responsible? . . .

MR. STATON: Your Honor, in answer to your questions, it is the Secretary's position that under the definition of employer in the Occupational Safety and Health Act, which references persons/individuals as constituting employers, that that term would cover an individual who is, in fact, the alter ego of a company which receives a citation.

And we believe, under the circumstances present in this case, that Bill Saites and Nicholas Saites are, in fact, the alter egos of the companies for which they assert they were working at the time that the citation was issued (Tr. 19, 20).

Thus, rather than seeking a finding that Congress intended within the four corners of the statute³ for corporate officials to be personally liable for corporate civil violations of the OSHA Act, the Secretary seeks to have the Review Commission “pierce the veil” of a viable, lawful corporation under the circumstances of this case and find personal liability for compliance with the Act and, more importantly, personal responsibility for the payment of assessed penalties.

As previously stated, the Review Commission is charged with the responsibility of determining, based upon the evidence, the identity of the employer of exposed employees. That finding has been made above and as seen *infra*, violations have been found and penalties assessed for those violations against the employers, Avcon, Inc. and Altor, Inc. Under the civil enforcement scheme of the Act, the only means available to encourage compliance with the Act, other than an imminent danger petition in the federal district court, is by way of a civil penalty. Accordingly, upon a final order of the Review Commission and/or the exhaustion of all appeal rights where findings of violations and assessment of

³*Compare*: The Fair Labor Standards Act which defines an employer as including “any person acting directly or indirectly in the interest of an employer in relation to an employee . . .”. 29 U.S. C. §203(d) (emphasis added).

penalties remain, those penalties become a debt owed to the Treasury of the United States and, pursuant to sections 17(L) of the Act, a civil action may be brought by the Secretary in the appropriate federal district court to recover the unpaid debt.

It is clear that the Secretary is concerned that the individuals controlling the corporations involved in this matter may engage in activities to avoid the payment of penalties that may be assessed by filing bankruptcy proceedings or merely leaving the corporations as inactive shells without assets. This position has some justification based upon the statement of Nicholas Saites that:

“You have to remember when OSHA fines you \$150,000 in a case, you can’t take the risk that on the next job your going to make some money and then OSHA is going to come and they’re going to take all your money.” (Ex. C-255, pp. 178-79).

Based upon the past practices of Respondents, the Secretary has reason to believe that the corporate entities may default in paying assessed penalties. Congress, however, did not grant authority to the Review Commission to enforce its final orders. Upon assessment of a penalty via a final order, Complainant may not seek collection of the penalty by petitioning the Review Commission. Rather, as previously stated, the penalty becomes a debt owed to the government collectable by filing a civil action in the district court which has the authority to determine whether a debt is owed, in what amount and by whom. In this case, the identity of the debtor (Altor, Inc. and Avcon, Inc.) has been established as well as the amount of the penalty. Nothing more needs to be done by this Commission because the Secretary’s fears have not come to fruition at this time. As this case runs its course and, presumably, findings of violations and assessment of penalties are affirmed, Respondent may or may not come into compliance and pay the penalty. The Secretary seeks extraordinary relief from the Review Commission at this time in anticipation of an event or events which may not occur. Moreover, the Secretary has provided no authority and none has been found to support the conclusion that the Review Commission has the authority to pierce the veil of a lawful viable corporation or, in the event that such action is taken, that the federal district court is bound by such a finding either by *res judicata*, judicial notice, comity or otherwise in a subsequent action to recover the debt.

In this case, the Secretary is asking the Review Commission to engage in a premature and an extra jurisdictional act. While it is true that the past actions of Vasilios and Nicholas Saites and their corporations⁴ may provide sufficient grounds for a district court to pierce the corporate veil to collect a

⁴The history of previous citations for corporations controlled by Vasilios and Nicholas Saites is as follows: WMS Corp. - 2 citations, Cornican, Inc. - 3 citations, Astro Concrete - 11 citations, and Avcon, Inc. - 1 prior citation on review to the Review Commission.

debt owed to the government, that decision does not fall within the jurisdiction of the Review Commission when the Respondent employer is a lawful and viable corporation, as in this case, at the time of decision. The Review Commission cannot speculate as to future events. Accordingly, Vasilios Saites and Nicholas Saites are DISMISSED as individual Respondents and as individuals doing business as Altor, Inc and Avcon, Inc.

Alleged Violation of §1926.100(a)

Willful citation 2, item 1 alleges:

29 CFR 1926.100(a): Employees were not protected by protective helmets while working in areas where there was a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns:

- a) 10th floor: The employees pouring the concrete on the deck were not wearing protective helmets, on or about 10/23/98.
- b) Yard area north side: The employee working in the yard area erecting the concrete formwork for the columns was not wearing a protective helmet, on or about 10/23/98.
- c) 9th floor north side: The employee installing the shoring was not wearing a protective helmet, on or about 10/23/98.
- d) 9th floor east side: The employee clamping the concrete column was not wearing a protective helmet, on or about 10/23/98.
- e) 10th floor: The employees landing the concrete form work on the deck were not wearing protective helmets, on or about 10/23/98.
- f) 8th floor north side: The employee stacking the plywood was not wearing a protective helmet, on or about 10/24/98.
- g) 10th floor: The carpenter foreman who was supervising the employees was not wearing a protective helmet, on or about 10/24/98.
- h) 13th floor: The employees pouring the concrete on the deck were not wearing protective helmets, on or about 11/3/98.
- i) 12th floor south side: The employee clamping the concrete column was not wearing a protective helmet, on or about 11/3/98.
- j) 12th floor south side: The employee measuring the deck was not wearing a protective helmet, on or about 11/3/98.

- k) 11th floor south side: The employee carrying lumber was not wearing a protective helmet, on or about 11/3/98.
- l) 12th floor south side: The employees standing at the edge of the building below the employees pouring concrete were not wearing protective helmets, on or about 11/3/98.
- m) Throughout the jobsite: The company president, who was supervising construction activities throughout the project was not wearing a protective helmet while there were overhead hazards during the cast-in-place construction of the building, on or about the following dates 10/23/98, 10/24/98, 10/27/98, 10/29/98, 11/3/98, 11/4/98, 11/10/98 and 11/16/98.

Facts

Instance a). CO Donnelly testified that on October 23, 1998 he observed 10 to 15 Avcon employees standing on the 10th floor deck of the Mariner building while concrete was being poured (Tr. 372, 375). The suspended bucket of concrete moved over the heads of the workers in the immediate area, several of whom were not wearing hard hats (Tr. 372-73, 376, 386; Exh. C-196, C-275, 01:39:08-01:39:34, 04:25:33-04:23:10). CO Donnelly believed that the workers could be struck by material falling off of the bucket, or hit with the bucket itself (Tr. 373-74).

Instance b). On the same day Donnelly saw an employee identified as an Avcon concrete worker on the ground adjacent to the building working without a hard hat (Tr. 379, 386; Exh. 275; 04:06:41-04:06:55). *Instances c) and d).* He observed two additional Avcon employees without hard hats working on the 9th floor, installing shoring, and clamping a concrete column, one of whom was videotaped (Tr. 379, 386; Exh. C-275, 04:04:65-04:05:35). *Instance e).* Donnelly further observed employees landing formwork on the 10th floor without hard hats (Tr. 379-80, 386; Exh. C-275, 01:56:15-01:56:59).

Instances f) and g). On October 24, 1998, Donnelly observed an Avcon employee on the 8th floor stacking plywood, and Frank Georgiana, the carpenter foreman, on the 10th floor. Neither employee wore a hard hat (Tr. 381).

Instance h). On November 3, 1998, Donnelly again saw Avcon employees pouring concrete, now on the 13th floor, without wearing hard hats (Tr. 381, 387; Exh. C-275, 02:35:45-02:36:42).

Instances i), j) and l). Donnelly also noted employees on the 12th floor clamping concrete columns, measuring the deck, and having coffee, who were not wearing hard hats (Tr. 381-84, 387; Exh. C-275, 02:22:54-02:28:35, 03:01:19-03:01:52). *Instance k).* On the 11th floor, the stripping floor, an Avcon employee did not wear a hard hat as he carried lumber (Tr. 382l, 387; Exh. C-275, 02:39:15-02:40:54).

Instance m). Finally, Donnelly stated that Bill Saites refused to wear a hard hat at any time during the OSHA inspections, which took place on October 23, 24, 27, and 29, and on November 3, 4, 10 and 16, 1998 (Tr. 384-85; Exh. 275; 02:04:32-02:04:44). Donnelly testified that the cited employees were exposed to a hazard in that construction materials can fall through floor holes and/or shafts. He believed that the danger from falling materials is inherent in any construction job (Tr. 383, 385).

Bill Saites testified that hard hats were generally unnecessary on the Edgewater site. Although the ironworkers and the carpenters kept the crane in constant use, a signalman was in place on the top floor to warn employees to move out of the way of overhead loads (Tr. 999). Nonetheless, Avcon supplied hard hats to employees on the site (Tr. 991). Bill Saites admitted that the OSHA COs might well have seen eleven instances of noncompliance with the hard hat rule over the course of their inspection. According to Saites, the men don't like to wear the hard hats, and find excuses not to (Tr. 996-98). Nicholas Saites was also aware that employees continually removed their hard hats (Tr. 1040).

Discussion

The cited standard requires:

Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns shall be protected by protective helmets.

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991-93 CCH OSHD ¶29,239, p. 39,157 (No. 87-1359, 1991), *citing Astra Pharmaceutical Products, Inc.*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶25,578, pp. 31,899-31,900 (No. 78-6247, 1981).

Avcon argues that the Secretary failed to prove the applicability of the cited standard, in that she did not show that there was a possible danger of head injury from impact or from falling or flying objects on the job site. The Commission has held that this standard by its express language applies whenever employees are exposed to a *possible* danger of head injury. *Skepton Contracting, Inc.*, 1997 CCH OSHD ¶31,405 (No. 97-0208, 1997). Thus, the standard requires proof of an access to zone of

danger rather than actual exposure test. *Adams Steel Erection, Inc.*, 766 F.2d 804, 12 BNA OSHC 1393, 1398 (3d. Cir., 1985).

As CO Donnelly testified, the danger from falling materials is inherent in any construction job. Here, the videotape demonstrates a number of specific overhead hazards. Both concrete and construction materials were hoisted overhead; stripping operations brought overhead materials down onto the work floors and to the ground around the building below. There is no doubt that the employees on the Mariner high rise work site were exposed to a possible danger of head injury. It is undisputed that the employees listed in *instances a) through m)* worked without hard hats in violation of the standard. The record further establishes that Avcon knew its employees habitually removed their hard hats and Bill Saites was not surprised to learn that employees had been observed working with their heads unprotected. Saites also refused to wear a hard hat. Although the cited violations of §1926.100(a) have been established, Nicholas Saites characterized the violations as instances of employee misconduct (Tr. 1105).

Employee Misconduct

Facts

Avcon's safety program requires that: "Hard hats shall be worn by everyone on the job at all times." (Tr. 377-78; Exh. C-6, R-2). At the hearing, Nicholas Saites noted that Avcon's program requires the use of hard hats at all times and maintained that its foremen enforced the rule with verbal reprimands (Tr. 1039-40, 1105). Nicholas Saites stated that he wore a hard hat himself and if he saw an employee without a hard hat, he would tell the employee to put one on (Tr. 1106-07); however, beyond supplying hard hats, Avcon could do nothing to ensure that the workers always wore their hard hats. Both he and Bill Saites maintained that it was not Avcon's responsibility to establish or enforce safety rules (Tr. 391, 797, 968, 991).

Both Saites testified that Avcon had no authority to discipline employees, and union stewards and foremen were solely responsible for enforcing safety rules and regulations (Tr. 797, 802-07, 968, 991, 1038, 1439). Bill Saites testified that, although he was the superintendent on the Edgewater job, the carpenter's shop steward and carpenter's foreman were in charge of safety (Tr. 968, 991). Nicholas Saites admitted that all authority flowed from his father to the foremen on the job; nonetheless, he maintained that the foremen and shop stewards, who are representatives of the workers' unions, are solely responsible for the workers' safety (Tr. 797, 802-07, 1439).

Bill Saites testified that he had no authority to hire or fire employees, and that he would have to go through the union foreman, Frank Georgiana, to discipline an employee (Tr. 994). However,

Nicholas Saites testified that his father could hire and fire employees. Both Saites testified that Bill Saites had fired workers in the past for violating safety rules, in particular for violating the hard hat rule (Tr. 860-61, 992, 1105, 1442). Finally, Bill Saites testified that Frank Georgiana had been working for him since 1963 or 1964 and would not argue with him if he wanted an employee off the site (Tr. 995, 1005). If Bill Saites was unhappy with Georgiana or any other foreman on site, he had the authority to fire the foreman (Tr. 1026).

Discussion

In order to establish an unpreventable employee misconduct defense, the employer must establish that it had: established work rules designed to prevent the violation; adequately communicated those work rules to its employees (including supervisors); taken reasonable steps to discover violations of those work rules; and effectively enforced those work rules when they were violated. *New York State Electric & Gas Corporation*, 17 BNA OSHC 1129, 1995 CCH OSHD ¶30,745 (91-2897, 1995). Moreover, it is well settled that the Act places ultimate responsibility for compliance with its requirements on the employer. The employer cannot delegate those duties or abdicate its responsibilities to another party. *See, e.g., Baker Tank Company/Altech*, 17 BNA OSHC 1177, 1180, 1995 CCH OSHD 30,734, p. 42,684 (No. 90-1786-S, 1995); *Tri-State Steel Constr., Inc.*, 15 BNA OSHC 1903, 1916 n.23, 1991-93 CCH OSHD P 29,852, p. 40,740 n.23 (No. 89-2611, 1992), *aff'd on other grounds*, 26 F.3d 173 (D.C. Cir. 1994), *cert. denied*, No. 94-921 (Mar. 20, 1995).

Avcon admits it was the employer of the employees at the Mariners high rise site. (Respondent's post-hearing brief, p. 15). The record establishes that Avcon did have the authority to hire, fire, and discipline employees, either directly, or through union representatives, though it rarely exercised its authority. Avcon had a work rule which required the use of hard hats at all times, which, if adequately communicated to employees and enforced, would have prevented the cited violation. However, the record establishes that Avcon abandoned all responsibility for either communication or implementation of the rule, claiming to have no responsibility for employee safety or authority to enforce safety rules. Avcon introduced no evidence tending to show that it conducted any training or made any effort to discover or to correct violations of its safety rules.

Avcon failed to establish the affirmative defense of employee misconduct.

Willful

Facts

CO Donnelly testified that he discussed OSHA hard hat requirements with Bill and Nicholas Saites at the beginning of the Edgewater inspection (Tr. 395). However, the Saites were already aware that hard hats were to be worn at all times on the construction site. Other companies owned by the Saites were cited at least twelve times for violations of the hard hat rule between 1974 and 1989 (Exh. C-12, C-14, C-22, C-23, C-33, C-35, C-36, C-41, C-43, C-44, C-47, C-49). Each of the citations became a final order of the Commission (Exh. C-54). In addition, Avcon itself was cited for 6 instances alleging violations of §1926.100(a) at its work site in Hackensack, New Jersey only months before the Edgewater inspection.

As set forth above, Avcon knew its employees routinely disregarded its stated hard hat policy and worked without head protection. According to CO Donnelly, when he and other COs came onto the site, hard hats would “suddenly” be hoisted up to the deck where employees were working without head protection (Tr. 393). Nicholas Saites told CO Donnelly that he wasn’t going to fire employees who wouldn’t wear head protection (Tr. 391). Avcon’s owner, Bill Saites, refused to wear a hard hat even when directly confronted by OSHA’s CO (Tr. 384, 391, 393).

Discussion

The Commission has defined a “willful” violation as one “committed with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety.” *Valdak Corp.*, 17 BNA OSHC 1135, 1136, 1993-95 CCH OSHD ¶30,759, p. 42,740 (No. 93-239, 1995), *aff’d*, 73 F.3d 1466 (8th Cir. 1996). The Secretary must differentiate a willful violation by showing that the employer had a heightened awareness of the illegality of the violative conduct or conditions, and demonstrating that the employer either consciously disregarded OSHA regulations or was plainly indifferent to the safety of its employees. *Propellex Corporation (Propellex)*, 18 BNA OSHD 1677, 1999 CCH OSHD ¶31,792 (No. 96-0265, 1999). In *Propellex*, the Commission provided examples of an employer’s heightened awareness, citing cases where an employer with actual notice of the cited violative conditions has previously been cited for violations of the standards in question, or has otherwise been made aware of the requirements of the standards. *Id.*

Here, there can be no question that Avcon was aware not only of its duty to ensure the use of hard hats under OSHA’s head protection standard, but of its employees’ habitual violation of the standard. Despite its familiarity with OSHA requirements and its employee’s misconduct, Avcon failed to take any measures to ensure that its employees used head protection. Though OSHA warned Avcon about hard hat violations on the Edgewater site on October 23 and 24, 1998, employees were observed without hard hats on November 3, 1998. Bill Saites, Avcon’s superintendent, refused to take

any action to train or to discipline employees, and refused to wear a hard hat himself. Avcon's history of repeated violations of the cited standard demonstrates its heightened awareness of its duty under the Act. Bill Saites refusal to comply with the Act's requirements, or to enforce Avcon's employees' compliance constitutes a deliberate disregard for those requirements. Accordingly this violation is properly classified as willful.

Penalty

CO Donnelly believed the gravity of the cited violation was high. Numerous instances of non-compliance were observed. An employee struck by either a concrete bucket or by falling construction materials could suffer lacerations, contusions, concussions or death (Tr. 389). Donnelly testified that the gravity based penalty was originally set at \$40,000.00 (Tr. 390). A 20% adjustment was made based on Avcon's size (Tr. 390). A penalty of \$32,000.00 was proposed for this item.

There is no mitigating evidence in the record. The proposed penalty of \$32,000.00 is deemed appropriate, and is assessed for the violation.

Alleged Violations of §1926.501(b)(1)

Willful citation 2, item 2 alleges:

29 CFR 1926.501(b)(1): Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which was 6 feet (1.8 m) or more above a lower level was not protected from falling by the use of guardrail system, safety net system, or a personal fall arrest system:

- a) 8th floor east side: The employees stripping the concrete formwork and installing reshores at the unprotected edge of the floor were exposed to a fall hazard, on or about 10/23/98.
- b) 8th floor south side: The employees installing reshores at the unprotected edge of the building were exposed to a fall hazard, on or about 10/23/98.
- c) 8th floor south side: The employee cleaning off a piece of plywood with his back to the unprotected edge of the building was exposed to a fall hazard, on or about 10/23/98
- d) 8th floor north side: The employee stripping the concrete formwork at the unprotected edge of the building was exposed to a fall hazard, on or about 10/23/98.
- e) 8th floor south side: The employees walking along the unprotected edge of the building were exposed to a fall hazard, on or about 10/23/98.
- f) 8th floor north side: Employees picking up the lumber at the unprotected edge of the building were exposed to a fall hazard, on or about 10/24/98.
- g) 8th floor south side: Employee carrying plywood at the unprotected edge of the building was exposed to a fall hazard, on or about 10/24/98.0

The Violation

Facts

In constructing the 16 floor Mariners building in Edgewater, New Jersey, Avcon utilized a poured-in-place concrete technique (Tr. 213, 877). Concrete forms consisting of vertical wooden posts supporting horizontal ribs, or cross-braces and beams, were constructed for each floor. The framework was covered with plywood decking, and concrete poured into the forms (Tr. 213, 979). As the concrete sets, or hardens, the formwork for the next floor was constructed (Tr. 213). Nicholas Saites testified that each floor was constructed in a three day pour cycle. During the first and second days forms were framed and reinforcing steel installed (Tr. 878; *See also*, testimony of Bill Saites, Tr. 980). On the third day the entire floor was poured (Tr. 878). The day after the pour, vertical framing for columns and/or side beams was stripped (Tr. 878, 1398-99) and “reshores,” vertical wood members supporting the concrete floor were installed while the rest of the form work remained in place (Tr. 772, 1396). Two days after the pour, the vertical members supporting the plywood decking, “legs” and “stringers,” and most of the horizontal ribs were taken down (Tr. 1397), and plywood on the bottom of the deck stripped away (Tr. 878, 1397). According to Nicholas Saites, the stripped lumber lays on the floor below the concrete deck until it can be collected and sorted (Tr. 1088; Exh. C-200, C-201). The nails are removed from the lumber, which is then stacked at the edge of the building and lifted to the next floor for re-use (Tr. 1088, 1090).

Nicholas Saites testified that Avcon employees were required to work within six feet of the edge of the poured concrete on the Edgewater job (Tr. 770). Except where balconies extended out past the building’s edge, poured columns were located only six inches from the edge of the concrete (Tr. 771), and employees would work within a couple of feet of the poured edge (Tr. 775). Employees erecting legs and installing reshores would work approximately twelve inches from the concrete’s edge (Tr. 771-73). When removing reshores workers may use a stripping tool which allows them to stand three or four feet back from the edge (Tr. 774).

Although employees routinely worked near the edge of the poured concrete floor at the Edgewater site when erecting and stripping formwork and reshores, no personal fall protection was required for those employees (Tr. 878-79). Nicholas Saites specifically stated that strippers did not use personal fall protection nor were safety nets provided (Tr. 879). According to Saites, fall protection on the stripping floor was provided by 16 foot long 3 x 4 lumber outriggers, which were installed when the stripping of vertical members approached the exterior of the building (Tr. 1398-1400). The lumber

was placed flat on the concrete floor, and a 16 foot 3 x 4" placed across the back of the outrigger to hold it in place. The beam across the back of the outriggers was wedged into place with a minimum of two vertical shores (Tr. 1402). The outriggers extended approximately six feet beyond the edge of the poured concrete and was intended to catch formwork that would otherwise fall to the ground during the stripping operation (Tr. 879-80, 1100, 1396, 1400, 1408, 1448, 1450-51, 1457-59; Exh. C-190). Nicholas Saites testified that he and the carpenter's foreman, Frank Georgiana, intended for the outriggers to be placed less than two feet apart (Tr. 1404-05). However, Saites and Avcon's safety expert, DeBobes, admitted that the outriggers appeared to be more than two feet apart (Tr. 1262, 1608; Exh. C-228).

On the framing floor above, plywood decking covered the horizontal ribs approximately three to four feet past the pour area. The uncovered ribs extended two to three feet past the plywood (Tr. 987, 1448, 1450, 1457-59). According to Saites, "leading men," who are not afraid, and who know how to work at the edge, are assigned to work at the edge of the concrete (Tr. 1001-02, 1022). Saites testified that employees begin framing from the center of the building, work their way to the edge and are exposed to the fall hazard. Employees working at the edge are instructed to crouch or keep their center of gravity low (Tr. 1435).

CO Donnelly testified that on October 23 and 24, 1998, he observed Avcon employees stripping concrete formwork and installing reshores on the eighth floor of the Mariners building (Tr. 396-397, 404, 413; Exh. C-275). There was no fall protection on the perimeter of the east side of the eighth floor where employees were working without personal fall protection (Tr. 404). Donnelly testified that on October 23, 1998 he noted: *Instance a*) An Avcon employee working approximately two feet from the unguarded edge who was exposed to falls of 80 to 90 feet to the yard below. The employee was videotaped removing shoring with his back to the building's edge. Removing the shoring involved strenuous physical activity; the employee was videotaped losing his balance and falling over plywood and other lumber on the stripping floor (Tr. 396-97, 402, 409-10; Exh. C-201, C-202, C-275, 01:02:32-01:03:07, 01:07:25-01:10:22); *Instance b*) Two employees installing reshores on the south side of the building worked approximately two feet from the unprotected edge of the building without personal fall protection (Tr. 400, 405, Exh. 275, 01:14:19-01:16:54). Nicholas Saites and Thomas DiPasquale, the shop steward, identified the exposed workers as Avcon employees (Tr. 401); *Instance c*) An employee identified as an Avcon laborer was moving lumber away from the unprotected edge of the building without the benefit of fall protection. The employee is seen in shadows behind the line of columns (Tr. 401, 405-06; Exh. 275; 01:50:32-01:51:16); *Instance d*) An Avcon employee was

stripping concrete formwork within approximately two feet of the unprotected north edge. Complainant's videotape shows the employee leaning out over the edge of the concrete floor throwing a piece of lumber onto outriggers that were more than two feet apart (Tr. 403, 406; Exh. 275; 04:05:35-04:06:00); *Instance e*) A worker identified as an Avcon employee was walking within approximately two feet of the unprotected south edge of the building. This employee also appears in shadows moving behind the line of columns (Tr. 403; Exh. 275, 01:24:23-01:24:46). On October 24, 1998 CO Donnelly observed employees exposed to a fall hazard of 79 feet, 6 inches, including: *Instance f*) up to six Avcon employees picking up lumber within inches of the unprotected north edge of the building. One of the employees leaned over the outside of the building (Tr. 403, 407); *Instance g*) An Avcon employee was carrying plywood within three feet of the unprotected south edge of the building (Tr. 404, 408).

Discussion

The cited standard provides:

(b)(1) *Unprotected sides and edges*. Each employee on a walking/working 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 guardrails systems, safety net systems, or personal fall arrest systems.

As noted above, in order to prove a violation of section 5(a)(2) of the Act, the Secretary must show that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *Walker Towing Corp., supra*.

As a threshold matter, Avcon argues that the cited standard is not applicable because Avcon is engaged in leading edge work. Avcon argues that the standard applicable to its work is

§1926.501(b)(2)(i) *Leading edges*. That standard provides:

Each employee who is constructing a leading edge 6 feet (1.8 m) or more above lower levels shall be protected from falling by the use of guardrails systems, safety net systems, or personal fall arrest systems: Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of §1926.502.⁵

⁵ Pursuant to subparagraph (k), an alternative fall protection plan must fulfill a number of requirements including:

- (1) The fall protection plan shall be prepared by a qualified person and developed specifically for the site where the leading edge work . . . is being performed and the plan must be maintained up to date.
- (2) Any changes to the fall protection plan shall be approved by a qualified person.
- (3) A copy of the fall protection plan with all approved changes shall be maintained at the job

(continued...)

NOTE: There is a presumption that it is feasible and will not create a greater hazard to implement at least one of the above-listed fall protection systems. Accordingly, the employer has the burden of establishing that it is appropriate to implement a fall protection plan which complies with §1926.502(k) for a particular workplace situation in lieu of implementing any of those systems.

Section 1926.500(b) states:

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. A leading edge is considered to be an “unprotected side and edge” during periods when it is not actively and continuously under construction.

The evidence establishes that on October 23, 1998, the eighth floor of the Mariners building was the “stripping floor.” The ninth floor was the framing floor and was complete. Concrete was being poured on the tenth floor deck. Neither the eighth nor the ninth floor was “actively” or “continuously” under construction. There were, therefore, no leading edges on either floor. The edge of concrete floor on the eighth floor of the Mariners building was properly designated as an “unprotected side and edge,” and the cited standard is applicable.

It is undisputed that Avcon management knew that there was neither a guardrail system, safety net system, or personal fall arrest system in use at the Mariners high rise; however, Avcon disputes CO Donnelly’s estimates of the distances Avcon employees worked from the unguarded edges. At the hearing, Nicholas Saites estimated that all the cited employees were more than six feet away from the edge of the concrete based on his viewing of the videotape (Tr. 1244-54). However, the record

⁵(...continued)

site.

(4) The implementation of the fall protection plan shall be under the supervision of a competent person.

(5) The fall protection plan shall document the reasons why the use of the conventional fall protection systems (guardrail systems personal fall arrest systems or safety nets systems) are infeasible or why their use would create a greater hazard.

(6) The fall protection plan shall include a written discussion of other measure that will be taken to reduce or eliminate the fall hazard for workers who cannot be provided with protection from the conventional fall protection systems. . . .

(7) The fall protection plan shall identify each location where conventional fall protection methods cannot be used. These locations shall then be classified as controlled access zones and the employer must comply with the criteria in paragraph (g) of this section.

(8) Where no other alternative measure has been implemented, the employer shall implement a safety monitoring system in conformance with §1926.502(h).

(9) The fall protection plan must include a statement which provides the name or other method of identification for each employee who is designated to work in the controlled access zones. No other employees may enter the controlled access zones. . . .

supports the conclusion that CO Donnelly's estimates are more credible than those of Nicholas Saites. The evidence establishes that Avcon management knew its employees would, in the course of their duties, work near the edge of the concrete on the stripping floor, *i.e.*, within a foot to a "couple" of feet of the edge. Even when using a stripping tool, strippers can only stand back three to four feet from the edge. The videotaped evidence comports with Avcon's description of its employees job duties in the main and establishes that the Avcon employees on the stripping floor cited did work within six feet of the unguarded edge of the building.

Avcon argues, however, that workers within six feet of the edge were not working in the "zone of danger" posed by the unprotected side or edge. In order to establish employee exposure the Secretary must show either that Respondent's employees were actually exposed to the violative condition or that it is "reasonably predictable by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Fabricated Metal Prods.*, 18 BNA OSHC 1072, 1074, 1998 CCH OSHD ¶31,463, pp. 44,506-07 (No. 93-1853, 1997). The zone of danger is "that area surrounding the violative condition that presents the danger to employees the standard is intended to prevent." *RGM Constr. Co.*, 17 BNA OSHC 1229, 1234, 1993-95 CCH OSHD ¶30,754, p. 42,729 (No. 91-2107, 1995). Avcon's own safety expert, Leo DeBobes, testified that workers within six feet of an unguarded edge are generally considered to be at risk of falling (Tr. 1569-71). Moreover, in this case the cited employees were engaged in physical labor, swinging a stripping tool, pulling down large sheets of plywood from the bottom of the deck above and moving lengths of lumber. The employees working the stripping floor were constantly exposed to the tripping hazard posed by the loose lumber on the floor while their attention was directed upward towards the decking being stripped. Complainant's videotape shows an employee tripping and falling [though not, in this case, over the unguarded edge] while performing his job. The record establishes that it was reasonably predictable that Avcon employees would inadvertently, or while performing the jobs described in citation 2, item 2, instances (a) through (g), be exposed to the fall hazard addressed by §1926.501(b)(1).

The Secretary has established the cited violations.

Affirmative Defenses

Despite the inapplicability of §1926.501(b)(2)(i), Respondent raises the affirmative defenses of infeasibility and greater hazard. Nicholas Saites testified that he, his father and Frank Georgiana were aware of the three means of fall protection required under the cited standard (Tr. 1372) and required foremen and shop stewards to determine when it was feasible to use safety harnesses and lanyard and

require their use when appropriate (Tr. 1431). Early on, however, Saites and the foremen decided among themselves that tying off to the formwork was not appropriate, and would create a greater hazard for employees (Tr. 1433). Workers were told, therefore, not to tie off (Tr. 1434). Saites stated that he conferred with net manufacturers and determined that safety nets were infeasible based on the amount of time it took to install and remove them (Tr. 1372-76, 1380). Avcon admits that guardrails were feasible on the pour deck and were used there (Tr. 420-21, 881, 988, 1447; Exh. 275); however, there is nothing in the record indicating that Avcon considered the use of guard rails on the framing or stripping floors or found them to be infeasible.

Infeasibility

To establish the affirmative defense of infeasibility, an employer must show that 1) the means of compliance prescribed by the applicable standard would have been infeasible in that (a) its implementation would have been technologically or economically infeasible or (b) necessary work operations would have been technologically or economically infeasible after its implementation and 2) either an alternative method of protection was used or there was no feasible alternative means of protection. *V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1994 CCH OSHD ¶30,485 (No. 91-1167, 1994).

Nets. Louis Nacamuli, a licenced professional engineer and owner of Nacamuli Associates, testified that his firm was retained by Daibes Construction to provide the structural engineering for the Mariners building (Tr. 1467, 1469-70; Exh. R-6). According to Nacamuli, concrete must cure to three quarter strength or for approximately 14 days before any employer could ensure that the concrete could adequately support the base plates needed to anchor safety nets (Tr. 1491-92). On the Mariners construction site, where a new floor was poured approximately every three days, it was impossible to keep a net anchored 30 feet or less below the advancing fall hazard (Tr. 1491). Two or three day old concrete has reached only 10-15 percent of its desired strength, and cannot be guaranteed to support the anchorage for a net requiring 18,000 foot pounds to support it (Tr. 1474, 1479, 1488). However, Matthew Burkart, a professional engineer with Aegis Corp, a construction consulting firm (Tr. 1624, 1634; Exh. C-290) and Daniel Paine, president of Innovative Safety, a safety and health consulting firm, (Tr. 1690-91; Exh. C-291) both testified that after seven days nets could be attached to the partially cured concrete floor with a C-clamp (Tr. 1649, 1651-52, 1667-69, 1696, 1740-41, 1751). The nets are jumped, in order to keep up with the advancing work, which adds two floors every week (Tr. 1651-53, 1667-1669, 1740-41).

Personal fall protection. Bill Saites maintained that the use of personal fall protection was infeasible on the stripping and framing floors, because anchorages were not available (Tr. 987). According to Bill Saites, the vertical formwork is designed to support the vertical load imposed by the weight of the concrete, but not lateral loads (Tr. 982). Saites admitted that formwork *could* be designed to withstand lateral loads so as to provide adequate anchorages for a fall protection system (Tr. 1010). Louis Nacamuli testified, however, that a substantial modification would be required to provide fall protection anchorages (Tr. 1472). Removing the reinforced formwork would take an “inordinate amount of time” (Tr. 1473). Moreover, according to Saites, Avcon was prohibited from embedding any anchorages into the concrete for a fall arrest system (Tr. 984, 1012). He admitted however, that industry literature describes the means of embedding anchorages in concrete work for fall protection systems (Tr. 1012-15). Saites testified that embedding anchorages was not practical, where a floor was poured every two to three days because the concrete would not set up before the work moved on (Tr. 1012; *See*, concurring testimony of L. Nacamuli, Tr. 1479, 1518-19).

Both Burkart and Paine testified that it *was* feasible to install anchorages for a safety *restraint* system, which prevents falls by keeping employees from approaching the unguarded edge too closely (Tr. 1645-47, 1716). Unlike a fall arrest system, the restraint system does not require significant anchorages (Tr. 1646-48). According to Paine, nylon straps with looped ends may be placed around rebar in the pour deck and dropped to the floor below (Tr. 1716-17, 1726). After the concrete is poured, the nylon straps provide overhead attachment points for a personal restraint system (Tr. 1723, 1726). The straps are cut off with a knife once construction is completed (Tr. 1717-18). However, Mr. Nacamuli stated that he had never seen harnesses and lanyards in use on either the framing or stripping floors in poured-in-place erection (Tr. 1480). Nacamuli testified that personal fall protection systems were impractical because employees must navigate “literally a forest of shores” (Tr. 1482). In addition, the lanyard might limit an employee’s ability to get out of the way if formwork started to come down from the deck above (Tr. 1486). Matthew Burkart agreed that a personal arrest system, though feasible to install, would be difficult to work with because of the volume of material coming down from the overhead deck (Tr. 1676).

Guardrails. Louis Nacamuli testified that he would recommend guardrails for fall protection on the floor being poured as well as the stripping and framing floors (Tr. 1484). Nacamuli stated that guardrails are practical for poured-in-place concrete construction such as the Mariners building, and that guardrails are normally used by concrete contractors (Tr. 1475, 1496). According to Nacamuli, guardrails may be attached to the concrete floor by way of clamps, but are generally placed in brackets

which are shored to the concrete slab outside the columns. One flange on the base of the bracket is wedged beneath an outrigger, while a vertical shore wedged between the concrete floor and the floor above holds the other flange in place (Tr. 1476).

Burkart agreed that guardrails could have been installed on the pour deck as well as on the floors below. He stated that guardrails could be attached to the structure using either temporary stanchions, or, once the columns were stripped, by wrapping or clamping cables to the concrete columns (Tr. 1643-44, 1678). Burkart stated that it was common for contractors to leave the original guardrails in place on the poured deck while erecting the formwork for the next floor (Tr. 1644, 1646, 1677). The guardrails provide protection for the framers, who install new guardrails on stanchions slightly outside of the perimeter columns before the old ones are pulled down from below with the rest of the form work (Tr. 1644-45, 1670). Daniel Paine also testified that guardrails are the preferred fall protection method for poured-in-place concrete construction (Tr. 1712-14, 1747). Normally, Paine stated, the guardrails erected on the pour deck are left in place until the perimeter columns are ready to be stripped and the guardrails replaced with wire cable, ensuring 100% fall protection (Tr. 1714).

Leo DeBobes, a safety and health expert presently acting as a special assistant to the vice president of the State University of New York (Tr. 1545-46; R-5) testified that guardrails were practical on the top or pour floor (Tr. 1578). DeBobes did not claim that installation of guardrails on the lower floors was infeasible, stating only that it wouldn't be practical to have the same type of guardrail system on those floors (Tr. 1581, 1592). However, DeBobes maintained that guardrails would hinder employees in the performance of stripping operations which include pulling down materials that extend beyond the edge of the building (Tr. 1591, 1596). However, Burkart did not believe that guardrails would significantly hinder the stripping operation, stating that there is very little material outside the building perimeter (Tr. 1649, 1680). Burkart testified that smaller areas might have to be stripped to prevent material falling onto the guardrails and outside the building, but stated that stripping operations would not be significantly slowed (Tr. 1680-81). Finally, Burkart stated that temporary stanchions are generally replaced with metal cables strung between the stripped columns before the plywood deck is pulled down to eliminate the danger of damaging the guardrail (Tr. 1670-72). Paine agreed that the stripping operation need not interfere with the guardrails (Tr. 1748). He testified that by adding a few extra nails to the formwork the contractor can guide sections of formwork inside the stripping floor by hand, thus preventing them from falling either outside the building or onto existing guardrails (Tr. 1749-50, 1752-54). Paine did not believe that bringing the stripped material

down by hand would prohibitively expand the stripping operation, stating that it was the preferred method in the industry (Tr. 1750, 1755-56).

Discussion

The record is replete with evidence that guardrails, the primary means of abatement specified in §1926.501(b)(1), were feasible on the eighth floor of Avcon's Edgewater work site, *i.e.*, the stripping floor. Both Complainant's and Respondent's expert witnesses testified that guardrails were the standard and were generally used to provide fall protection during poured-in-place concrete construction. Louis Nacamuli, Matthew Burkart and Daniel Paine all described in detail the means by which guardrails could be installed and maintained during the cycle of framing, pouring and stripping. Avcon, which bears the burden of proof on this issue, presented no evidence whatsoever in support of its contention that guardrails were infeasible. Though Avcon maintains that guardrails would continually be damaged by the stripping operation on the eighth floor, its counsel provides not a single cite to the record in support. DeBobes, the only expert witness testifying to the infeasibility of guardrails, never claimed that guardrails could not be maintained on the stripping floor stating only that the guardrails would "hinder" employees stripping the formwork. DeBobes' bald assertion cannot establish, in the face of the overwhelming expert testimony to the contrary, that guardrails were infeasible on the stripping floor. Thus, Avcon failed to sustain its affirmative defense. Because the record establishes the feasibility of guardrails on the Edgewater site, there is no need to address the feasibility of either safety nets or personal fall protection.

Greater Hazard

Facts

The only testimony supporting Avcon's contention that guardrails constituted a greater hazard was offered by Leo DeBobes (Tr. 1578). DeBobes testified that workers reaching through guardrails to pull down formwork outside of perimeter columns could overreach and fall over the railing (Tr. 1578-79). Matthew Burkart, however, pointed out that it was more dangerous to reach out with no guardrail, than to reach out over a guardrail providing some protection (Tr. 1674).

Discussion

In order to establish the affirmative defense of a greater hazard, the employer must show that 1) the hazards of compliance are greater than the hazards of non-compliance; 2) alternative means of protection are unavailable; and 3) an application for a variance would be inappropriate. *See Walker Towing Corp.*, 14 BNA OSHC 2072, 2078, 1991-93 CCH OSHD ¶29,239, p. 39,161 (No. 87-1359, 1991). While the hazards associated with both safety nets and personal fall arrest systems were

exhaustively briefed in Avcon's post hearing submission, no hazards associated with guardrails are mentioned. It is clear that an employee's occasional need to reach over established guard rails cannot outweigh the advantage of providing 100% fall protection for employees during the remainder of the stripping operation. In any event, Bill Saites admitted, without explanation, that no one from Avcon applied for a variance based on the perceived hazard (Tr. 1371). The Commission has held that where an employer does not explain its failure to apply for variance for regularly performed operations, the first two elements of the defense need not be addressed. *Spancrete Northeast, Inc.*, 15 BNA OSHC 1020, 1991 CCH OSHD ¶29,313 (No. 86-521, 1991).

Based upon the record, Avcon failed to establish the affirmative defense of greater hazard.

Conclusion

Where, as here, the cited standard's required means of protection were not infeasible and did not create a greater hazard, it is unnecessary to address whether Respondent's use of outriggers as catch platforms, either alone or in conjunction with any other measures, constituted an alternative means of fall protection. The Commission has held that where a required means of protection is feasible and safe, employers cannot substitute an alternative means. *A.J. McNulty & Co., Inc.*, 19 BNA OSHC 1121, 2000 CCH OSHD ¶32,209 (No. 94-1758, 2000), *citing*, *R & R Builders, Inc.*, 15 BNA OSHC 1383, 1390-91, 1991-93 CCH OSHD ¶29,531, pp. 39,863-64 (No. 88-282, 1991).

Willful citation 2, item 3 alleges:

29 CFR 1926.501(b)(1): Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which was 6 feet (1.8 m) or more above a lower level was not protected from falling by the use of guardrail system, safety net system, or a personal fall arrest system:

- a) 10th floor east side: The employees working at the edge of the building pouring concrete were exposed to a fall hazard. The employer failed to install an adequate guardrail system, only one wooden railing at a height of 24 inches was installed around the deck, on or about 10/23/98.
- b) 10th floor west side: The employees working on the deck bending rebar with a pipe with their backs to the edge of the building were exposed to a fall hazard, in that the employer installed only one wooden railing at a height of 24 inches around the deck nor was there any other fall protection system in use, on or about 10/23/98.
- c) 10th floor west side: The employees working at the edge of the floor, placing the wooden concrete form work over the protruding rebar and erecting the 11th floor deck, were not protected from a fall hazard in that the employer installed only one wooden railing at a height of 24 inches around the deck nor was there any other fall protection system in place, on or about 10/23/98 and 10/24/98.

d) 10th floor south side: Employees removing the concrete form work (curbing) at the edge of the building were not protected from a fall hazard in that the employer installed only one wooden railing at a height of 24 inches around the deck nor was there any other fall protection system in place, on or about 10/23/98.

e) 10th floor west side: The employee standing with his back to the edge of the building while he was operating the transient was not protected from a fall hazard in that the employer installed only one wooden railing at a height of 24 inches around the deck nor was there any other fall protection system in place, on or about 10/23/98.

f) 9th floor southeast corner: Employees working at the unprotected edge of the building installing a clamp on the column were exposed to a fall hazard, on or about 10/23/98.

g) 9th floor east side: The employee standing on a milk crate at the unprotected edge of the building working on the column was exposed to a fall hazard, on or about 10/23/98.

h) 9th floor northwest corner: Employees working on the concrete formwork installing metal bracing at the unprotected edge of the building were exposed to a fall hazard, on or about 10/23/98.

i) 9th floor northeast corner: The employee installing the wooden shoring at the unprotected edge of the building was exposed to a fall hazard, on or about 10/23/98.

j) 9th floor east side: The employee standing on a milk crate working on the concrete formwork at the unprotected edge of the building was exposed to a fall hazard, on or about 10/23/98.

k) 9th floor north side center: The employee installing the reshoring at the unprotected edge of the building was not protected from a fall hazard, on or about 10/27/98.

Facts

Both Nicholas and Bill Saites testified that guardrails were required on the edge of the top floor where employees were engaged in pouring concrete (Tr. 881, 988, 1431, 1447). Bill Saites testified that Avcon rents brackets and attaches them to 4 x 4 “stringers,” which are part of the formwork (Tr. 988-89). Rails consisting of 2 x 4s are dropped into the brackets (Tr. 988-89). On October 23, 1998, CO Donnelly observed that a single wooden railing at a height of 24 inches had been installed around the deck of the tenth, or top floor (Tr. 420-22). The brackets supporting the 24 inch high midrail were designed to hold a top rail, however, the top rail had been omitted (Tr. 427; Exh. C-275, 01:52:29-01:52:33). Approximately 10 to 15 workers pouring concrete and finishing the top floor were identified as Avcon employees by Nicholas Saites and Avcon’s cement finisher foreman, Jerry O’Brien (Tr. 420-22).

Employees exposed to the fall hazard included: *Instance a*) employees pouring concrete at the perimeter of the tenth, or top floor of the building (Tr. 423, 430-31; Exh. C-194); *Instance b*) employees working at the column line, within a couple of feet of the edge of the deck, bending rebar with a pipe with their backs to the edge of the building (Tr. 423, 428; Exh. C-275, 01:52:29-01:54:08); *Instance c*) employees working within a couple of feet of the edge of the west side of the top floor, placing the wooden concrete form work over the protruding rebar and erecting the 11th floor deck (Tr. 424, 428; Exh. C-275, 01:58:29-0:59:50); *Instance d*) employees removing the concrete form work (curbing) at the south edge of the building (Tr. 424, 428; Exh. C-275, 01:55:21-01:55:48); *Instance e*) Nicholas Saites standing within a couple of feet of the west side of the building with his back to the edge of the building while he was operating the transient (Tr. 424, 428; Exh. C-275, 01:52:29-01:54:08).

On October 23, 1998, Nicholas Saites and employee DiPasquale identified workers on the ninth floor as Avcon employees to CO Donnelly (Tr. 425). Donnelly testified that he observed: *Instance f*) employees working at the unprotected edge of the south east corner of the building installing a clamp on the column (Tr. 424-25, 433-34; Exh. 190); *Instance g*) employee standing on a milk crate at the unprotected east edge of the building working on the column (Tr. 425, 442-43); *Instance h*) employees working on the concrete formwork installing metal bracing at the unprotected northwest edge of the building (Tr. 425, 429; Exh. C-275, 01:26:03-01:26:40); *Instance i*) employees installing the wooden shoring at the unprotected north west edge of the building (Tr. 425, 438-40). *Instance j*) An employee standing on a milk crate working on the concrete formwork at the unprotected edge of the building (Tr. 426, 429; Exh. C-275, 01:44:11-01-45:15). On October 27 Donnelly observed *Instance k*) employee installing the reshoring at the unprotected edge of the ninth floor (Tr. 426, 435-38; Exh. C-227, C-228).

Discussion

Avcon does not specifically address any of the items alleged at citation 2, item 3 in its brief. At the hearing Nicholas Saites argued that cited employees on the pour deck never worked past the edge of the concrete stops. According to Saites, the formwork, to which the guardrails were attached, extended six feet past the edge of the stops. Employees working in the pour area, therefore, were never within six feet of the edge of the formwork. Saites also maintained that the employees working on the ninth floor were further than six feet from the unguarded edge (Tr 1254-63).

It is clear from the record that employees on the deck worked right at the edge of the pour area and well within six feet of the inadequate guardrails. As noted above, formwork extensions are not provided for in the standard, and may not be substituted for standard guardrails. *A.J. McNulty & Co.*,

Inc., supra. Employees on the ninth floor also appear to be well within the six foot zone of danger posed by the building's edge.

Bill Saites argued that the guardrails merely provide a visual reminder for employees, warning them that they are near the edge (Tr. 989). He did not believe the guardrails would actually prevent an employee from falling because the guardrail "doesn't hold that much" (Tr. 1007; *See also* testimony of Nicholas Saites, Tr. 1073-77). According to Saites a man could fall below the 22 inch high midrail, through the 22 inch gap between the midrail and the 44 inch high top rail (Tr. 990). Nicholas Saites believed the guardrails were redundant because the formwork on the top floor also extended out further than the pour area (Tr. 881; Exh. C-190).

As noted above, the record establishes that it was feasible to install guardrails on the pour deck, the framing floor and the stripping floor. None of the experts testifying, *i.e.* Nacamuli, DeBobes, Burkart, and Paine, doubted that OSHA compliant guardrails capable of resisting 200 pounds of lateral pressure could successfully be attached to concrete formwork (Tr. 1475, 1588-90, 1643-45, 1713). Based on the testimony at hearing, Avcon appears to question the necessity of the cited standard, suggesting that guardrails are both unnecessary and futile. It is well settled however, that the employer may not use the adjudicatory process to challenge the wisdom of a required safety measure. *See, Austin Engg. Co.*, 12 BNA OSHC 1187, 1188, 1984-85 CCH OSHD ¶27,189, p. 35,099 (No. 81-168, 1985). If the employer disagrees with the need for regulation, it may either challenge a proposed standard through the rule making process, or it may apply for a variance excusing it from compliance with an existing rule. *Carabetta Enterprises, Inc.*, 15 BNA OSHC 1429, 1991-93 CCH OSHD ¶29,543 (No. 89-2007, 1992). Avcon did neither, choosing instead to substitute its own opinion as to the efficacy of guardrails. The Secretary has established that a number of employees were exposed to fall hazards on the ninth floor and the pour deck of the Mariners building, described in *Instances a* through *k*. Since Avcon raises no cognizable defenses to this item⁶, it is affirmed.

Willful citation 2, item 4 alleges:

29 CFR 1926.501(b)(1): Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which was 6 feet (1.8 m) or more above a lower level was not protected from falling by the use of guardrail system, safety net system, or a personal fall arrest system:

⁶ At the hearing, Nicholas Saites testified that the absence of a top rail on the pour floor on October 23 was the result of employee misconduct (Tr. 1077). That affirmative defense was not briefed, and is deemed abandoned.

a) 11th floor, south side: The employer did not provide fall protection for the employees installing the rebar on the deck at the unprotected edge of the building, the employees were exposed to a fall hazard, on or about 10/27/98.

b) 10th floor, south side: The employees clamping the concrete form work and installing the wooden shoring at the unprotected edge of the building were exposed to a fall hazard, on or about 10/27/98.

Facts

CO Donnelly testified that on October 27, 1998, he observed *Instance a*), Avcon employees laying rebar on the 11th floor pour deck (Tr. 454, 459-61; Exh. C-225; C-226). Although adequate guardrails had been erected around approximately half of the deck, there was no perimeter guarding in the area where the cited employees were working (Tr. 457-61). Nicholas Saites admitted that ironworkers on the pour deck would probably go within a foot or two of the concrete stop (Tr. 1264). According to CO Donnelly, Bill Saites told him that he didn't have enough brackets to install guardrails around the entire deck (Tr. 457-61). Donnelly also noted *Instance b*), two Avcon employees moving along the edge of the 10th floor, clamping columns. Donnelly photographed the area, but was unable to photograph the men working (Tr. 457-59, 462, 464).

Discussion

Avcon does not separately discuss the two instances addressed at item 4. However, because formwork may not be utilized as an alternative protective measure, as discussed above, and because Avcon failed to make out its affirmative defenses of infeasibility and greater hazard, item 4 is affirmed.

Willful citation 2, item 5 alleges:

29 CFR 1926.501(b)(1): Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which was 6 feet (1.8 m) or more above a lower level was not protected from falling by the use of guardrail system, safety net system, or a personal fall arrest system:

a) 12th floor north side: The employees carrying and tying the rebar at the unprotected edge of the deck were not protected from a fall hazard, on or about 10/29/98.

b) 12th floor south side: The employees working at the unprotected edge of the building, clamping the columns were exposed to a fall hazard, on or about 11/3/98.

c) 11th floor south side: Employee picking up pieces of lumber at the unprotected edge of the building was exposed to a fall hazard, on or about 11/3/98.

- d) 11th floor south side: The employee swinging the sledge hammer to strip the concrete form work with his back to the unprotected edge of the building was not protected from a fall hazard, on or about 11/3/98.
- e) 11th floor north side: The employee standing on top of the stripped lumber installing reshores at the unprotected edge of the building was exposed to a fall hazard, on or about 11/3/98.
- f) 11th floor south side: The employees stripping the formwork and carrying lumber at the unprotected edge of the building was not protected from a fall hazard, on or about 11/3/98.
- g) 11th floor south side: The employee working at the unprotected edge of the building picking up pieces of lumber was exposed to a fall hazard, on or about 11/4/98 .

Facts

On October 29, 2001, CO Donnelly observed *Instance a*); Avcon employees were working on the north side of the 12th floor carrying and tying rebar (Tr. 466). As on October 27, 2001, the deck was only partially guarded, and the employees were working beyond the end of the guard rails (Tr. 467-68, 485-86). Donnelly testified that Bill Saites told him that he was not going to stop work to bring up more brackets and lumber for guardrails (Tr. 467).

On November 3, 1998, Donnelly observed: *Instance b*) two Avcon employees working a few feet from the edge of an unguarded balcony at the south edge of the 12th floor, clamping columns (Tr. 468-70, 477, 479-80, 482-84; Exh. C-275, 02:19:03-02:19:50; Exh. C-232); *Instance c*) an employee picking up pieces of lumber at the unprotected south edge of the 11th floor (Tr. 470, 481; Exh. C-275, 03:11:30-03:13:05); *Instance d*) an employee swinging a sledge hammer to strip the concrete form work with his back to the unprotected south edge of the 11th floor (Tr. 471-72, 481; Exh. C-275, 02:33:52-02:34:22); *Instance e*) an Avcon employee standing on top of stripped lumber installing reshores at the unprotected north edge of the 11th floor (Tr. 472-73); *Instance f*) two employees stripping the formwork and carrying lumber at the unprotected south edge of the 11th floor (Tr. 473-74, 488-89; Exh C-275, 02:39:15). On November 4, CO Donnelly noted *Instance g*); an employee picking up pieces of lumber at the unprotected south edge of the 11th floor (Tr. 474-75, 488; Exh. 247).

Discussion

Avcon does not discuss the specific instances addressed at item 5; however, at the hearing Nicholas Saites testified that the employees cited at *Instances b*), *c*) and *g*) were working at the back of a balcony that extends out six feet six inches further than the building's edge (Tr. 1267-73). The videotape does not support Saites' testimony in that the men shown in *Instance b*) were clamping both

the inside and the outside of the columns. The outside edge of the column is less than six feet from the intersection of the extended balcony and the building's edge. Although the video for instances (c) and (d) indicates that the employees remained between the two columns; the observations of the compliance officer remain un rebutted. Thus, the record establishes by a preponderance of the evidence that the employees cited at *Instances a), b), d) e) and f)* were exposed to the cited fall hazard. Avcon fails to establish its affirmative defenses of infeasibility and greater hazard. Accordingly, item 5 is affirmed.

Willful citation 2, item 6 alleges:

29 CFR 1926.501(b)(1): Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which was 6 feet (1.8 m) or more above a lower level was not protected from falling by the use of guardrail system, safety net system, or a personal fall arrest system:

- a) 12th floor south side: The employees working at the unprotected edge of the building stripping the columns were exposed to a fall hazard, on or about 11/4/98.
- b) 13th floor south and north sides: Standard guardrails or other means of fall protection were not provided to protect the employees stripping the curbing at the unprotected edge of the building from a fall hazard, on or about 11/4/98 .

Facts

CO Donnelly testified that on November 4, 1998, he observed *Instance a)*, *i.e.*, four Avcon employees stripping curbing at the edge of the unguarded south side of the 12th floor (Tr. 500-02). On the same day, Donnelly observed *Instance b)*, an additional three employees stripping curbing on the 13th floor (Tr. 502-04; Exh. C-246).

Discussion

Avcon does not raise any defenses specific to the instances addressed at citation 2, item 6. As noted above, Avcon failed to make out its general affirmative defenses of infeasibility and greater hazard. Item 6 is affirmed.

Willful citation 2, item 7 alleges:

29 CFR 1926.501(b)(1): Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which was 6 feet (1.8 m) or more above a lower level was not protected from falling by the use of guardrail system, safety net system, or a personal fall arrest system:

- a) 16th floor north and south sides: The employees installing the rebar at the unprotected edge of the deck were exposed to a fall hazard, on or about 11/16/98.
- b) 15th floor south side: the employee working at the unprotected edge of the floor clamping the concrete column was exposed to a fall hazard, on or about 11/16/98.

Facts

On November 16, 1998 CO Donnelly observed *Instance a*) Avcon employees installing rebar at the edge of the 16th floor pour deck (Tr. 512). As on an earlier occasion, the employees were working past the end of an incomplete guardrail system (Tr. 515-16; Exh. C-275; 03:12:50-03:13:05). Donnelly also observed *Instance b*) an Avcon employee clamping columns at the south edge of the 15th floor (Tr. 513-14, 517; Exh. C-251).

Discussion

Avcon does not discuss the specific instances addressed at citation 2, item 7, and the observations of the compliance officer are un rebutted in the record. Accordingly, this item is affirmed.

Willful

As noted above, a willful violation is one “committed with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety.” *Valdak Corp., supra*. A willful violation is differentiated by the employer’s heightened awareness of the illegality of the violative conduct or conditions. A violation will be found willful where the Secretary demonstrates that the employer either consciously disregarded OSHA regulations or was plainly indifferent to the safety of its employees. *Propellex, supra*.

In this case, there can be no question that Avcon was aware of its duty to provide fall protection under OSHA’s fall protection standards. CO Donnelly testified that both Bill and Nicholas Saites have “an extensive history” of safety and health inspections, and both were familiar with OSHA requirements (Tr. 415). According to Donnelly, only six months before the Edgewater inspection, OSHA concluded an inspection of another Saites’ jobsites where fall protection was an issue (Tr. 243, 416, [identified by the Secretary as a 1997-98 inspection in Hackensack, New Jersey, which resulted in citations issued to Avcon for 17 serious and 8 willful violations of §1926.501(b)(1), *see* Secretary’s post-hearing memorandum, pp. 2, 55; referencing *Secretary v. Avcon, Inc., Vasilios Saites and Nicholas Saites*, OSHRC Docket Nos. 98-0755 and 98-1168, currently pending before the Commission]). Donnelly testified that he reviewed the OSHA fall protection standards in depth with both Nicholas and Bill Saites at the time of the earlier inspection.

In addition, despite OSHA’s presence on the Edgewater site between October 23 and November 16, 1998, the same kind of fall protection violations continued to be observed. CO Donnelly testified that Avcon had been cautioned about inadequate guardrails erected on the pour deck on October 23, yet workers were again found working outside of incomplete guardrails on October 29, 1998 (Tr. 494-95; *see*, citation 2, items 2 and 5). On October 29, Bill Saites refused to interrupt work to move lumber and brackets necessary to complete guard rails on the pour deck (Tr. 492-495, 498). CO Donnelly

testified that Avcon did not refuse to put up guardrails once he pointed out the need for them; however, it is clear from the record that no guardrails were erected on a floor until after it was stripped (Tr. 499; Exh. C-228, C-246, C-247).

Finally, the Secretary introduced evidence of a number of fall protection citations issued to companies owned and operated by Bill and/or Nicholas Saites, dating from 1974 to 1990 (Exh. C-11, C-14, C-23, C-24, C-25, C-26, C-32, C-33, C-34, C-36, C-37, C-39, C-41, C-43, C-44, C-46). Those citations contained seven serious, one repeat and four willful citations alleging violation of §1926.500(d)(1) which requires that “[e]very 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 . . .,” as well as four serious and one willful violation of §1926.105(a), which states that:

Safety nets shall be provided when workplaces are more than 25 feet above the ground or water surface, or other surface where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical.

All the citations introduced by the Secretary have become final orders of the Commission (Exh. C-54, pp. 358, 362, 367).

As the Secretary points out, the record is replete with evidence that Avcon abandoned its responsibility to enforce OSHA fall protection requirements on its site, refusing to fulfill its obligation to control the manner and means by which its work was accomplished where employee safety, and particularly fall protection, was concerned (Secretary’s post hearing memorandum pp. 57-59). During the hearing, Nicholas Saites testified that Avcon’s fall prevention program did address fall protection, providing for the use of personal fall protection (Tr. 1086, 1429-30). Avcon maintained that it provided safety harnesses for employees working at heights. Foremen on site were to determine when it was appropriate to tie off and to ensure that employees did, in fact, tie off when appropriate (Tr. 1431).⁷ However, the Saites’ did not believe that Avcon management had any responsibility to ensure that fall protection was actually used. According to CO Donnelly, Nicholas Saites told him that his employees were grown men and that he was not going to “babysit” them (Tr. 416). Nicholas Saites told Donnelly that he wasn’t going to fire his men for not wearing safety harnesses (Tr. 419). As noted above, the Saites’ consistently testified at trial that Avcon had no authority to discipline employees and that union stewards and foremen were solely responsible for enforcing safety rules and regulations (Tr. 797, 802-07, 968, 991, 1439).

⁷ Both Donnelly and a second CO, Phil Peist, testified that there were not enough harnesses on the site for the workers. Only after OSHA began its inspection did harnesses begin appearing on the site (Tr. 214, 417).

Under Respondent's final theory of its case, however, Avcon never intended their men to wear personal fall protection or to provide either of the other two fall protection measures provided for in §1926.501 (b)(2)(i). Instead, Avcon now maintains it developed an alternative fall protection plan including: 1) outriggers that extended six feet beyond the edge of the poured concrete floor on the stripping floor; 2) the retention of formwork three feet beyond the poured concrete floor on the framing floor; and 3) guardrails on the pour deck. Avcon asserts that it held a good faith belief that it could rely on such an alternative fall protection plan pursuant to the standard at §1926.501(b)(2)(i) *Leading edges* (Tr. 1428; Respondent's post-hearing brief, pp. 34-35).

The Commission has held that a finding of willfulness is not justified if an employer has made a good faith effort to comply with a standard, believing that the violative conditions conformed to the requirements of the cited standard, even though the employer's efforts are not entirely effective or complete. The test of good faith for these purposes is an objective one. The employer's belief concerning a factual matter or concerning the interpretation of a standard must have been reasonable under the circumstances. *Calang Corp.*, 14 BNA OSHC 1789, 1987-90 CCH OSHD ¶29,080 (No. 85-319, 1990). Moreover, an employer is not necessarily spared from a finding of willfulness by taking any measure, regardless how minimal, to enhance employee safety. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201, 1991-93 CCH OSHD ¶29,964 (No. 87-2059, 1993). Based on the evidence in the record, there is no support for the conclusion find that Avcon had a good faith belief that §1926.501(b)(2)(i) was applicable to its work place or that it's unwritten fall protection plan complied with the standard.

Nicholas Saites testified that he and his father disagreed with OSHA about the need for fall protection on the Hackensack site but changed Avcon's fall protection policies following the Hackensack citations (Tr. 1370-71). The change in "policy" Nicholas Saites referred to was (a) the decision to extend the ribs and stringers out beyond the edge of the concrete pour area so that employees on the framing floor would be working further from the edge, (b) the requirement that only experienced men work at the edge, and (c) the decision to begin framing from the interior of the building (Tr. 1371, 1435). Saites then testified, conversely, that the Edgewater plan was the same plan that Avcon employed on the Hackensack job (Tr. 1436). Nicholas Saites testified that, although he wasn't aware of the specific requirements for developing an alternative fall protection plan set forth in §1926.502(b)(2)(i) and 502(k), Avcon's unwritten procedure was intended to satisfy the requirements of those standards (Tr. 1435-36). At the time of the hearing Nicholas Saites did not know whether the plan as he described it fulfilled the requirements of 502(k) (Tr. 1437).

In fact, Avcon's plan did not come close to fulfilling the requirements set forth at §1926.502(k), set forth fully above. Leo DeBobes, Avcon's expert witness testified that to comply with subparagraph (k), a fall protection plan must be in writing (Tr. 1611, 1615). Moreover, a compliant plan would include demarcation of the controlled access zones, training for workers allowed inside those zones, and the use of a safety monitor (Tr. 1576, 1598, 1606, 1611). DeBobes believed that the outriggers, though admittedly providing no fall protection themselves, (Tr. 1610), provided an "awareness barrier," which would alert workers that they were approaching the edge of the poured concrete floor (Tr. 1573). DeBobes admitted that he was never at the Edgewater job site, and had no first hand knowledge about any other elements of Avcon's alleged fall protection plan (Tr. 1613). The evidence in the record, which includes both Nicholas Saites own description of the plan, and the photographic evidence of the alleged plan's implementation, establishes that there was no written plan, or designated safety monitor. Avcon did not attempt to show that employees were trained to work with safety monitors within controlled access zones.

Given Nicholas Saites' failure to assess the feasibility of guardrails, his unfamiliarity with the requirements of §1926.502(k), and the disparity between Avcon's alleged fall protection plan and a 502(k) compliant plan, it is clear that Avcon failed to make a good faith effort to comply with OSHA regulations. Moreover, Respondents had a heightened awareness of the illegality of their actions and consciously disregarded their obligation to comply with the cited regulations. Accordingly, citation 2 items 2 through 7 are affirmed as willful violations.

Penalty

Six combined penalties of \$56,000.00 were proposed for Avcon's failure to provide required fall protection on the eighth through sixteenth floor of the Mariners high rise. The gravity of the violations was high. Many employees were shown to have been exposed to fall hazard in excess of 79 feet from October 23 through November 16, 1998 (Tr. 396-414, 426, 453, 465, 491, 510-11, 519). A fall from 79 feet or above would certainly result in an employee's death (Tr. 414, 452, 465). CO Donnelly believed that the probability of an accident occurring was high because of the amount of debris on the floor (Tr. 414). However, no accidents were actually reported on this or any of the Saites' previous jobs (Tr. 1000). CO Donnelly testified that the cited fall protection violations were separated into six separate groups because for each group cited a single remedial measure, *e.g.*, the installation of a safety net on all four sides of the structure would have abated all the violations observed (Tr. 399). Each \$56,000.00 penalty reflects a 20% reduction based on Avcon's size (Tr. 415, 454, 466).

Avcon objects to the Secretary alleging the separate fall hazards. Avcon argues that OSHA's objection is to Avcon's fall protection as a whole and maintains that all the alleged fall protection violations should have been grouped into a single citation with a single proposed penalty (Respondent's post-hearing brief, pp. 40-41). Avcon further claims that the Secretary did not prove that the violations were "egregious," in that Avcon did not meet the criteria⁸ set forth by the Secretary's CPL 2.80.H.2.b.1. for **Handling of Cases To Be Proposed for Violation-By-Violation Penalties** (Exh. R-16). Avcon asserts that it was improper, therefore, for the Secretary to cite it on an "instance by instance" basis (Respondent's post-hearing brief, p. 38-40).

First, it is well settled that it is within the Secretary's discretion to issue separate citations for multiple violations of a standard so long as the plain language of the standard can be read to permit multiple units of prosecution. Further, it is within the Commission's discretion to assess separate penalties for multiple violations of a standard when the final penalty assessed is "appropriate," given the gravity of the violations and the size, history and good faith of the employer. *E.g.*; *Andrew Catapano Enterprises, Inc.*, 17 BNA OSHC 1776, 1778, 1996 CCH OSHD ¶31,180(90-0050 *et al.*, 1996); *Caterpillar, Inc.*, 15 BNA OSHC 2153, 2172, 1993 CCH OSHD ¶29,962 (No. 87-0922, 1993). Moreover, the Commission has specifically found that separate penalties may be assessed for individual violations of the fall protection standards. *J.A. Jones Construction Co. (J.A. Jones)*, 15 BNA OSHC 2201, CCH OSHD ¶29,964 (No. 87-2059, 1993)[dealing with multiple citations for violations §1926.500 **Guardrails, handrails, and covers**]. Under Commission precedent, it is irrelevant whether the multiple violations of a standard result from a single management decision or if they potentially could be abated by a single action. *See, Hartford Roofing Co.*, 17 BNA OSHC 1361, 1366-1367; 1995 CCH OSHD ¶30,857 (No. 92-3855, 1995).

However, it is clear that Avcon was *not* cited on an instance by instance basis under the Secretary's "egregious" penalty policy. Under that policy, each employee exposure to a cited hazard is cited as a separate violation, and a separate penalty proposed. *See*, CPL 2.80.H.3.d.3.b. Citation 2, items 2 through 7 involve 31 factually distinguishable violations; many of violations exposed multiple

⁸ CPL 2.80 H.2.b requires that at least one of seven criteria be met, including:

- (2) The violations resulted in worker fatalities, a worksite catastrophe, or a large number of injuries or illnesses.
- (3) The violations resulted in persistently high rates of worker injuries or illnesses.
- (4) The employer has an extensive history of prior violations of the Act.
- (5) The employer has intentionally disregarded its safety and health responsibilities.
- (6) The employer's conduct taken as a whole amounts to clear bad faith in the performance of his/her duties under the Act.
- (7) The employer has committed a large number of violations so as to undermine significantly the effectiveness of any safety and health program that might be in place.

employees to fall hazards. As is clear from the face of the citation and from CO Donnelly's testimony at trial, the 31 separate violations were grouped and six combined penalties were proposed. Grouping separate violations for purposes of proposing combined penalties is well within the Secretary's discretion. *See; A. E. Staley Mfg. Co.*, 19 BNA OSHC 1199, 2000 CCH OSHD ¶32,220 (Nos. 91-0637, 91-0638, 2000).

The Commission, however, is the ultimate arbiter in determining an appropriate penalty; has wide discretion in assessing penalties and has the authority to group distinct but overlapping violations for the purpose of assessing an appropriate penalty. *E. L. Davis Contracting Co.*, 16 BNA OSHC 2046, 1994 CCH OSHD ¶30,580 (No. 92-35, 1994); *H. H. Hall Construction Co.*, 10 BNA OSHC 1042, 1046, 1981 CCH OSHD ¶25,712 (No. 76-4765, 1981). As noted above, due consideration must be given to the size of the employer, the gravity of the violation and the employer's good faith and history of previous violations. *J.A. Jones, supra*. The gravity of the offense is the principle factor to be considered. In determining the gravity consideration must be given to: (1) the number of employees exposed to the risk of injury; (2) the duration of exposure; (3) the precautions taken against injury, if any; and (4) the degree of probability of occurrence of injury. *Kus-Tum Builders, Inc.* 10 BNA OSHC 1049, 1981 CCH OSHD ¶25,738 (No. 76-2644, 1981).

An undetermined number of Avcon's employees were exposed to fall hazards on the 8th through the 16th floors of the Mariners high rise between October 23 through November 16, 1998. Each of the fall hazards were in excess of 79 feet; a fall would likely result in death. Though there was no evidence of prior accidents involving fall hazards, Avcon's employees were repeatedly exposed to the unguarded edge during physically demanding stripping operations. Loose lumber created a tripping hazard on the site which increased the probability that an accident would occur. The outriggers on the stripping floor, euphemistically described as "vertical guardrail[s] on a horizontal plane," may have acted as an awareness barrier, but would not have arrested a fall. Some of the employees exposed to the fall hazards on the pour deck were partially protected by a 24 inch high midrail. It is clear, however, that a 24 inch midrail would not prevent a fall. While portions of the formwork appear to remain in place on the framing deck, *see*, Exh. 190, which depicts the violation alleged at citation 2, item 3, *instance f*, in other portions of the video, *i.e.*, depicting the alleged violations at citation 2, item 3, *instances h* and *j* all formwork has been removed. Employees working from the edge of the concrete floor remain in the zone of danger even where three feet of formwork extend out from the concrete's edge.

The gravity of the cited violation is deemed high. Avcon has an extensive record of prior violations and has made no good faith attempts to develop an OSHA compliant fall protection policy. As noted above, the cited violations were willful in nature. However, the Secretary's rationale for combining the 31 violations into six hypothetical groups, each of which the Secretary maintains could have been abated with a single net on all four sides of the building is unsupportable. The Secretary convincingly argued that the most viable method of fall protection consisted of an evolving system of guardrails wherein temporary rails in brackets would be moved from the formwork to the edge of the concrete floor, and eventually replaced with wire cable. The Secretary's proposed penalties, however do not reflect her litigation position. Moreover, in proposing six separate violations of §1926.501(b)(1), the Secretary proposes combined penalties of \$336,000.00 for the cited fall hazards. Based upon the factors set forth at section 17 (j) of the Act, the proposed penalty is excessive. Taking into account the relevant factors, it is concluded that a combined penalty of \$150,000.00 (\$25,000 for each citation) for the violations cited at willful citation 2, items 2 through 7 is appropriate, and is assessed.⁹

Alleged Violations of §1926.501(b)(4)(i)

Willful citation 2, item 8 alleges:

29 CFR 1926.501(b)(4)(i): Each employee on walking/working surfaces was not protected from falling through holes (including skylights) more than 6 feet above lower levels by personal fall arrest systems, covers, or guardrail systems erected around such holes:

- a) 1st floor through the 10th floor: The ladderway openings were not provided with standard guardrails at the unused portion of the opening to protect the employees from fall hazards, on or about 10/23/98 and 10/24/98.
- b) Floors 11 and 13: The elevator shaft and stairway openings were not provided with standard guardrails or covers to protect the employees from fall hazards, on or about 10/23/98 and 11/3/98.
- c) Floors 4, 5, 6, 7 and 9: The stairway openings were not provided with standard guardrails or covers to protect the employees from fall hazards, on or about 10/23/98 and 10/24/98.
- d) 5th floor: The stairway opening was not provided with standard guardrails or a cover to protect the employee from a fall hazard, on or about 10/24/98 .

⁹Pursuant to the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 1 of 508, §3101 (1990), a minimum mandatory penalty of \$5,000.00 must be assessed for each willful violation.

Facts

On October 23 and 24, 1998 CO Donnelly observed *Instance a*), the ladderway openings on the 1st through the 10th floor were not provided with standard guardrails on the three unused sides of the openings (Tr. 520, 535-539; Exh. C-275, 02:00:05 through 02:14:49). Donnelly testified that the ladderways, which measured approximately 30" x 30", were used by Avcon employees for access to and egress from the building (Tr. 521). Donnelly stated that an employee could step or back into the openings and fall 9 feet, 2 inches to the floor below (Tr. 522, 537).

Nicholas Saites testified that ladderways are constructed in elevator shafts (Tr. 1275). The shafts are planked over and a hole, approximately 3 x 3 feet, is left in one end of the center shaft (Tr. 1275). An inclined ladder in the hole provides employee access (Tr. 1276). Saites testified that he believes the ladderways are as safe as possible. The planking over the elevator shaft is raised creating a platform which employees must step over when approaching the ladderway openings (Tr. 1278; Exh. R-50). The openings are so small that employees have trouble fitting through them (Tr. 1277). Moreover, Saites claimed an employee would not fall 9 feet 2 inches to the floor below. If an employee stepped into the open hole, his fall would be broken by the ladder (Tr. 1279). Finally, Nicholas Saites testified that guardrails were placed around the cited ladderways when CO Donnelly asked for them (Tr. 1279).

Donnelly stated that on October 23, 1998 the elevator shaft and stairway openings on the 10th floor¹⁰ had not been guarded (Tr. 545-550; Exh. C-194 through C-198) and on November 3, 1998, the elevator shaft and stairway openings on 13th floors had not been provided with standard guardrails or covers (Tr. 522, 551; Exh. C-233). Both instances were cited at *Instance b*). Donnelly testified that he observed Avcon employees tying steel and pouring and finishing concrete within inches of the unguarded floor holes (Tr. 525-28). The elevator shafts were 26 feet long and 6 feet, 9 inches wide (Tr. 523). The stairway openings measured 5' x 8'2" (Tr. 524).

Nicholas Saites testified that the cross-members pictured in the elevator shaft opening provided fall protection for workers on the 10th floor deck as well as maintaining size of the elevator opening (Tr. 1280-81; Exh. C-194-C-196). Moreover, Nicholas Saites testified the employees do not actually need to stand next to the opening while operating the concrete finishing machine (Tr. 1282). He stated

¹⁰ Donnelly testified that the citation erroneously referred to the 11th floor. Complainant averred that a motion to amend the complaint to conform to CO Donnelly's testimony had been made (Tr. 524). In addition, it is clear from the record that there was no 13th floor on October 23, 1998, and that concrete pouring on the 10th floor had been completed by November 3, 1998. To the extent that CO Donnelly's testimony suggests otherwise, it is discounted (Tr. 525-28).

that employee couldn't fall through the stairway openings because the reinforcing steel running through the stairwell opening provided fall protection (Tr. 1285-86; Exh. C-197, C-233). Saites further testified that elevator shaft and stairway openings would have been covered once employees began to frame the floor (Tr. 1284, 1290).

On October 23 and 24, 1998 Donnelly noted *Instance c*), stairway openings on floors four, five, six, seven and nine were not provided with standard guardrails or covers (Tr. 528-29, 540, 542, 552; Exh. C-199, C-275; 02:12:51, 02:18:39). Donnelly testified that employees were near the openings working on the reshores and moving lumber around (Tr. 529, 540, 542, 553-54).

Mr. Saites knew the openings on the lower floors did not always stay covered, pointing to Complainant's Exhibit C-199, where the reinforcing steel extended only about four feet into the unguarded opening. Plywood resting on the rebar covers little of the floor hole (Tr. 1291; Exh. C-199). However, Saites maintained that his men were not working on the on the fourth, fifth sixth or seventh floors on October 23-24, 1998 (Tr. 1290). He testified that Daibes and the plumbing, electrical and sheetrock subcontractors were working on the third floor on that date (Tr. 1302-04). Saites identified workers cleaning up the fifth or sixth floor on the unedited videotape as Daibes workers and workers erecting perimeter cables on the sixth floor as employees of the sheetrock subcontractor (Tr. 1304-06).

On October 24, 1998 Donnelly saw an Avcon employee, Norman Vanderhagen, rolling up a hose for an oxygen acetylene torch inches from the fifth floor stairway opening (Tr. 530, 544; Exh. 217). That incident was cited at *Instance d*) because the stairwell was not provided with standard guardrails or a cover (Tr. 542, 554-57; Exh. C-215, C-216, C-275, 02:09:07). Mr. Saites admitted that the acetylene cart Donnelly photographed on the fifth floor belonged to Avcon (Tr. 1293). CO Donnelly testified that he spoke to Nicholas Saites about the unguarded openings (Tr. 530) and Saites assured him the openings would be covered (Tr. 531). Frank Georgiana told Donnelly that he put covers on the openings, but someone kept taking them off (Tr. 531).

Discussion

The cited standard provides:

Each employee on walking/working surfaces shall be protected from falling through holes (including skylights) more than 6 feet (1.8 m) above lower levels, by personal fall arrest systems, covers, or guardrail systems erected around such holes.

The evidence establishes that Avcon employees used floor holes approximately 3 feet x 3 feet as ladderways to access their work floors. The openings, or holes, through which the ladders extended were sufficient to allow the passage of employees. The holes were not covered and no guardrail was

erected to prevent employee falls into the opening. Employees using the ladderways were not protected by personal fall arrest systems. Avcon was aware of the cited condition but chose not to guard the ladderways. Respondent asserts that employees were not in danger of falling to the floor below because of the small size of the openings and the ladder prevented falls to the floor below. Moreover, employees could not approach the openings without stepping onto a raised platform.

It is undisputed that the installation of guardrails around the unused three sides was feasible and guardrails were installed at CO Donnelly's request. As noted above, where a required means of protection is feasible and safe, employers cannot substitute an alternative means. *A.J. McNulty & Co., Inc., supra*. The violation alleged in *Instance a)* has been proven.

The evidence further establishes that elevator shafts and stairway openings on the 10th and 13th floors were not provided with standard guardrails or covers and that Avcon employees worked in the vicinity of those fall hazards. The unguarded openings were on the pour deck in plain sight of Avcon's supervisory personnel, who should have known of the hazard. Covers and/or guardrails, the required means of protection, were feasible. Accordingly, the violation alleged in *Instance b)* has been established.

Avcon knew that the covers for stairway openings on the lower floors were routinely removed by other sub-contractors during the course of the job. Nicholas Saites' contention that no Avcon employees worked on the lower floors cannot be credited. First, Saites admitted that Avcon was working on the 9th floor, which is included in *instance c)*. Though some employees on floors four through seven were videotaped cleaning or installing perimeter cables, others were observed working with Avcon's reshores and lumber. During his testimony regarding *instance c)*, CO Donnelly specifically identified an Avcon employee he observed on the fifth floor rolling up hoses on Avcon's welding cart. *Instances c) and d)* have been established.

Selective Prosecution

Avcon maintains that it was unfairly cited for the floor hole violations cited at Willful citation 2, item 8. According to Nicholas Saites, all the subcontractors on this job used the ladderways and worked on the floors where unguarded stairway openings were located (Tr. 1289-90, 1295). Saites testified that none of the other subcontractors were cited (Tr. 1290, 1295, 1305, 1306, 1314), although he also testified that he believed the sheetrock subcontractor was cited for fall protection violations (Tr. 1311). In its brief, Avcon argues that OSHA's selective enforcement of the Act deprived it of its right to due process under the law.

It is well settled that the conscious exercise of some selectivity in enforcement is not in itself a violation of due process. Relief is available only if the decision to prosecute is shown to have been deliberately based on an unjustifiable standard such as race or religion or other arbitrary classification. *Cuyahoga Valley Ry. V. United Transportation Union*, 474 U.S. 3, 106 S.Ct. 286 (1985), or was unreasonably initiated with the intent to punish the employer for his exercise of a constitutionally protected right. *Futernick v. Sumpter Township*, 78 F.3d 1051 (6th Cir.), *cert denied*, 117 S. Ct. 296 (1996). Avcon does not ascribe any motive to OSHA's alleged misconduct. In order to state a claim for selective enforcement the employer must allege that the challenged governmental action was based on an illegal basis, such as race or religion, as noted above, or for exercising a protected right. Because Avcon has alleged no such improper motivation for OSHA's prosecution, no claim of selective enforcement can stand.

Willful

As stated previously, a willful violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety. A willful violation is differentiated from a non-willful violation by an employer's heightened awareness of the illegality of the conduct or conditions and by a state of mind, *i.e.*, conscious disregard or plain indifference for the safety and health of employees. *Propellex, supra*.

Complainant maintains that Avcon was familiar with OSHA requirements for covering floor holes. Companies owned by Bill and Nick Saites received numerous citations for violations of §1926.500(b)(1), an earlier version of 1926.501(b)(4)(i), which became final orders of the Commission (Exh. C-9, C-22, C-23, C-33, C-34, C-43, C-47). CO Donnelly testified that Avcon received citations for the same or similar standards following the OSHA inspection of its Hackensack work site in March, 1998. According to Donnelly, OSHA's area director, Phil Peist, and the CO conducting the inspection discussed the requirements of the standards with Avcon at that time (Tr. 563-64). Donnelly stated that he told Nick and Bill Saites about the requirements for guarding floor openings on October 23, when he initiated the Edgewater inspection (Tr. 564). During the course of the construction, guardrails were installed and floor holes were covered.

Unlike the violations cited in Willful citation 2, items 2 through 7, Complainant has not shown that Avcon made a deliberate decision not to comply with OSHA regulations regarding floor holes. There is no evidence in the record suggesting that Avcon considered and rejected compliance with OSHA guarding requirements before designing its ladderways. The summaries of prior violations introduced by Complainant's at Exhibits C-9, C-22, C-23, C-33, C-34, C-43, and C-47 do not detail the

basis of the citations and it cannot determine whether any of the prior violations specifically involved guarding ladderways, where the floor hole was used for access and could not be covered or completely guarded. There is simply not enough in the record to determine whether Avcon had the required heightened awareness of its duties regarding *Instance a*).

With regard to *Instances b), c), and d)*, there is no evidence that Avcon's failure to promptly cover stairwells and/or elevator shafts, and ensure that they remained covered resulted from a deliberate company policy decision. The majority of the cited violations were abated when called to Avcon's attention. The Secretary's willful classification rests on CO Donnelly's belief that Avcon complied reluctantly (TR 533, 564-65) and on his discovery of a subsequent violation on the 13th floor pour deck where the newly created elevator shaft and stairway openings had not yet been guarded. Avcon was not shown to have had actual knowledge of the November 3, 1998 violation.

The violations cited involve different types of floor holes in various locations throughout the Edgewater site. Different methods of abatement were employed in abating the floor hole hazards. There is no evidence that the individual floor hole violations cited here were part of a deliberate course of conduct. The Commission has been reluctant to infer willfulness from the existence of a number of dissimilar violations unless those disparate violations are part of a pattern, practice, or course of conduct. *A.E. Staley Mfg. Co.*, 19 BNA OSHC 1199, 2000 CCH OSHD ¶32,229 (Nos. 91-0637, 91-0638, 2000). In *Staley*, the Commission found that general evidence of poor compliance with OSHA regulations does not, in itself, sufficiently demonstrate the employer's intent to circumvent the Act so as to support a blanket finding of willfulness.

The evidence is insufficient to support a willful classification for these items.

Penalty

A combined penalty of \$44,000.00 was proposed for these violations. The proposed penalty is based on the CO's gravity based penalty, with a multiplier of 10 for willful violations. CO Donnelly testified that the proposed penalty reflects a 20% reduction for Avcon's size (Tr. 566).

The violations, though not found willful, are "serious" violations of the Act, in that employees falling into or through an unguarded floor hole would in all likelihood sustain serious injury such as bone fractures (Tr. 566). Though insufficient to support a finding of willfulness, Avcon's history with OSHA, its familiarity with OSHA regulations, and the number of violations discovered during OSHA's inspection of the Edgewater site are all relevant to a determination of good faith and the appropriate penalty for these violations. *Staley, supra*. Taking into account the relevant factors, it is concluded that

the CO's proposed gravity based penalty, minus the willful multiplier, is appropriate. A penalty of \$4,400.00 is assessed.

Alleged Violation of §1926.20(b)(1)

Serious citation 1, item 1 alleges:

29 CFR 1926.20(b)(1): The employer did not initiate and maintain such accident prevention programs to provide compliance with the general safety and health provisions of the standard:

a) Throughout the job site: An adequate safety and health program was not initiated and maintained by the employer as evidenced by the lack of the use of fall arrest and head protection by employees, including management, unguarded floor holes, improperly stored materials and poor housekeeping, on or about 10/23/98.

Facts

Nicholas Saites testified that Avcon had a written safety program, which he developed based upon a sample program supplied by OSHA CO Phil Peist in 1990 (Tr. 1036-39, 1086, 1427; Exh. C-6, R-2). Saites testified that the written plan was given to each foreman and shop steward and was posted in the construction trailer (Tr. 1427).

Avcon's safety program states, *inter alia*:

The Project Superintendent/Assistant Superintendent will coordinate the following activities where necessary:

* * *

(5) Seeing that all necessary personal protective equipment and job safety materials are available.

(6) Instructing the foreman that safe practices are to be followed and safe conditions maintained throughout the job.

* * *

The Foreman will:

(1) See that all workmen follow safe practices.

(2) Making sure that unsafe conditions are corrected in their work area.

(3) Making sure that protective equipment is on hand and used. . .

* * *

MINIMUM SAFETY RULES FOR EMPLOYEES

All employees have a safety responsibility to themselves and to the fellow workers around them. These safety rules apply to all employees on the jobs. Special additional rules may be established by the Project Superintendent or foreman.

* * *

36. Any questions regarding safety or safety equipment should be directed to supervision.

CO Brian Donnelly testified that the safety program was inadequate in that it did not contain any requirements for fall protection (Tr. 316). Donnelly stated that the safety program was also

deficient in that it made no provision for training employees or for informing them of the hazards present on their work site (Tr. 318-20). Finally, Donnelly testified that the program did not provide for job site inspections to discover violations of the safety rules and that there was no enforcement of the safety program (Tr. 318-21).

Fall Protection. Nicholas Saites testified that the written safety plan covered fall protection requirements for employees in the section dealing with personal protective equipment (Tr. 1086, 1429-30). Saites maintained that Respondent provided safety harnesses for employees working at heights and foremen on site were to determine when it was appropriate to tie off. Foremen were also responsible for ensuring that employees did, in fact, tie off when appropriate (Tr. 1431). Moreover, Saites testified that Avcon had a “totally separate” unwritten fall protection plan which was communicated to the foremen and shop stewards (Tr. 1429, 1431-32, 1446). As discussed above, Nicholas Saites testified that Avcon believed it could comply with OSHA fall protection requirements by developing alternative methods of protecting its workers from fall hazards (Tr. 1436). According to Saites, the unwritten plan required the use of guardrails on the top floor, the extension of formwork past the edge of the concrete on the framing floor and the installation of outriggers on the stripping floor (Tr. 1431, 1434, 1447-48). In lieu of using personal protective equipment, employees were to begin framing from the center of the building and work their way to the edge. Employees were not to turn their backs to the fall hazard. Only experienced workers were allowed to work at the edge. Employees working at the edge were to crouch or keep their center of gravity low (Tr. 1435).

Both Nicholas and Bill Saites maintained, however, that it was not Avcon’s responsibility to establish or enforce a safety program (Tr. 797, 968, 991). Bill Saites testified that, although he was the superintendent on the Edgewater job, the carpenter’s shop steward and carpenter’s foreman were in charge of safety (Tr. 968, 991). Nicholas Saites admitted that all authority flowed from his father to the foremen on the job; nonetheless, he maintained that the foremen and shop stewards, who are representatives of the workers’ unions, are solely responsible for the workers’ safety (Tr. 797, 802-07, 1439). According to Nicholas Saites the foremen and shop stewards are solely responsible for enforcing safety rules on the site (Tr. 807, 1038, 1439).

Avcon provided safety harnesses on the Edgewater site, but delegated all responsibility for determining when personal fall protection was required and ensuring its use to Frank Georgiana, the foreman from the carpenter’s union (Tr. 968-70, 991, 1017, 1022, 1025). Bill Saites testified that he had no authority to hire or fire employees and he would have to go through the union foreman, Georgiana, to discipline an employee (Tr. 994). However, Nicholas Saites testified that his father

could hire and fire employees and had fired workers in the past for violating safety rules (Tr. 860-61, 992, 1105, 1442). Moreover, Frank Georgiana had been working for Bill Saites since 1963 or 1964, and would not argue with him if he wanted an employee off the site (Tr. 995, 1005). If Bill Saites was unhappy with a foreman on site, he had the authority to fire the foreman (Tr. 1026).

Discussion

The cited standard provides:

General safety and health provisions.

* * *

(b) *Accident prevention responsibilities.* (1) It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part.

As noted above, to establish a violation the Secretary must show that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *Walker Towing Corp., supra*. Specifically, the Commission has held that under §1926.20(b)(1), the Commission has held that an employer may reasonably be expected to develop safety programs conforming to any known duties under the Act. To comply with the standard the employer's safety program must include those measures for detecting and correcting hazards which a reasonably prudent employer similarly situated would adopt. *W.G. Fairfield Co.*, 19 BNA OSHC 1233, 2000 CCH OSHD ¶32,216 (No. 99-0344, 2000).

Avcon was the employer of the employees involved in the poured-in-place operation at the Mariners high rise (Respondent's post-hearing brief, p. 15), and was obligated to comply with the provision of §1926.20(b)(1). The Act places ultimate responsibility for compliance with its requirements on the employer; the employer cannot delegate those duties or abdicate its responsibilities to another party. *See, e.g., Baker Tank Company/Altech, supra*. The standard is, therefore, applicable. To comply with §1926.20(b)(1) a safety program must address known hazards and set forth such corrective measures as are adopted by the employer. The abatement measures must conform to OSHA requirements and be at least as effective as those of a similarly situated employer. In this case, Avcon was aware that its employees would be exposed to fall hazards when constructing and stripping forms and while pouring concrete, yet its safety program fails to set forth an OSHA compliant fall protection plan or prescribe any specific means of addressing fall hazards.

Avcon's written safety program merely cautions supervisory personnel to follow safe job practices and to maintain safe condition throughout the job site. The unwritten program, as explained by Nicholas Saites, calls for the installation of guardrails on the pour deck but provides for no other fall protection. Neither the temporary retention of formwork on the framing floor nor the installation of outriggers on the stripping floor complies with OSHA fall protection requirements set forth under Subpart M which specifies guardrails, nets or personal fall protection. Neither of the measures utilized by Avcon provide adequate alternative fall protection. Avcon's admonitions to be careful while working, *i.e.*, "don't turn your back to the edge," "keep your center of gravity low," likewise fail to conform to OSHA requirements or to provide effective fall protection.

As discussed fully above, the evidence establishes that compliance with OSHA fall protection standards was feasible and safe. There is ample evidence in the record establishing that the erection of guardrails is standard in Avcon's business, *i.e.* poured-in-place concrete construction. Under the circumstances of this case a reasonably prudent employer engaged in the industry would have developed a safety program that included instructions describing the proper installation of guardrails during poured-in-place concrete construction

Employee training/discipline. Section 1926.20(b)(2) goes on to clarify §1926.20(b)(1), stating that "[s]uch programs shall provide for frequent and regular inspections of the job sites, materials and equipment to be made by competent persons designated by the employers." Section 1926.21(b)(2) further requires employers to "instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment. . ." The Secretary argues that Avcon failed to initiate and maintain a program of regular job site inspections necessary to comply with subparagraph .20(b)(2) or to institute employee training programs necessary to comply with subparagraph .21(b)(2). According to Complainant, Avcon abandoned any responsibility for employee training or for ensuring compliance with applicable safety requirements on the job site.

Nothing in Avcon's written safety plan provides for employee training. The written plan does not provide for inspections of the job site by competent persons. Avcon maintains that the union foremen and shop stewards were responsible for conducting employee training. Based upon the foregoing, this item is affirmed as a serious violation.

Penalty

CO Donnelly testified that the gravity of the cited violation was high. He stated that Avcon had about 70 employees, and that a 40% reduction for size is reflected in the proposed penalty of \$3,000.00

(Tr. 324-26). No additional reductions were afforded for either good faith or for history, as the Saites' have received serious citations from OSHA (Tr. 325). Accordingly, a penalty in the amount of \$3,000.00 is assessed for the violation.

Alleged Violation of §1926.25(a)

Serious citation 1, item 2 alleges:

29 CFR 1926.25(a): During the course of construction, form or scrap lumber with protruding nails was not kept clear:

a) Floors 6, 7 and 8: Scrap lumber with protruding nails was not removed from the work areas, on or about 10/23/98 and 10/24/98.

Facts

On October 23, 1998, CO Donnelly observed and videotaped Avcon employees stripping the decking and cleaning up lumber from the eighth floor (Tr. 330, 342). Donnelly testified that the floor was covered with form lumber (Tr. 330, 338; Exh. C-192, C-200, C-201, C-275). Nicholas Saites testified that Complainant's exhibit C-200 accurately depicts how a floor typically looks after the decking has been stripped from the ceiling and before the lumber is collected, nails removed and the lumber sorted and stacked at the edge of the building (Tr. 1088, 1095-96; Exh. C-275). Respondent maintains that because the stripped decking is reused, it is not "debris." Moreover, he stated that it is impossible to strip the formwork and remove the nails at the same time (Tr. 1078). According to Saites, clean up of the used forms takes place a couple of hours after the deck is stripped (Tr. 1089). Saites further testified that no work takes place on the stripping floor between stripping and clean up (Tr. 1090).

Donnelly testified that on October 24, 1998, he found debris, including lumber with protruding nails, strewn about the sixth and seventh floors of the Edgewater site (Tr. 326, 328). Donnelly testified that on each of the sixth and seventh floors approximately four men were moving lumber around and pounding wedges into some reshores (Tr. 328-30, 333-37). Donnelly videotaped scrap lumber on both floors while accompanied by Nicholas Saites (Tr. 330-33, 343-44; Exh. C-216, C-275). He testified that Saites told him that Avcon employees were doing the reshoring, shoring, stripping, steel and concrete (Tr. 332-33). Donnelly stated that employees left the work area when he began to videotape and he was unable to tape any workers on the sixth or seventh floors (Tr. 336).

According to Nicholas Saites, no Avcon employees should have been working on the sixth or seventh floor on October 24 (Tr. 1092-93). and it was the responsibility of the general contractor, Daibes, to conduct any clean-up required after Avcon had completed work on a floor (Tr. 1093).

Discussion

The cited standard provides:

During the course of construction, alteration, or repairs, form and scrap lumber with protruding nails, and all other debris, shall be kept cleared from work areas, passageways, and stairs, in and around buildings or other structures.

The cited standard specifically refers to form lumber with protruding nails and requires that such lumber be kept cleared from work areas. It is undisputed that employees perform stripping on an entire floor before nails are removed from the lumber stacked. The hazard posed by Avcon's stripping procedure is clear from the videotaped evidence, cited at willful citation 2, item 2(a), where an employee performing stripping operations in an area crowded with fallen plywood is shown tripping and falling onto the lumber. Avcon was aware of the cited hazard but maintains that immediately removing nails from the formwork or clearing the formwork from the areas where stripping is ongoing would unreasonably disrupt operations. However, No evidence supports that contention. Avcon's argument raises the affirmative defense of infeasibility and it bears the burden of establishing that protective measures required under Section 1926.25(a) are infeasible as well as showing there were no alternative feasible means of protecting its workers from the tripping and puncture hazards created by leaving the form work lying in work areas. *See; Seibel Modern Mfg & Welding Corp.*, 15 BNA OSHC 1218, 1991-93 CCH OSHD ¶29,442 (No. 88-821, 1991). Avcon has not sustained its burden of proof. With regard to the eighth floor stripping operation, the violation is affirmed.

It has been previously established that Avcon workers continued to perform work on floors below the three top floors where Avcon was actually engaged in framing, pouring and stripping operations. CO Donnelly observed men on the sixth and seventh floor working with reshores, a work activity assigned to Avcon employees. CO Donnelly's testimony, as well as the videotape, establishes that lumber debris remained on those floors. Accordingly, the violation has been established with regard to floors six and seven as a serious violation.

Penalty

Employees could fall and suffer puncture wounds in the cited areas. The proposed penalty included a 40% reduction based on Avcon's size. Because of Avcon's history of OSHA violations and

the number of violations on the site, no credit for history or good fail is appropriate. The Secretary's proposed penalty of \$2,100.00 is assessed.

Alleged Violation of §1926.404(b)(1)(i)

Serious citation 1, item 4 alleges:

29 CFR 1926.404(b)(1)(i): Employer did not use either ground fault circuit interrupters as specified in paragraph (b)(1)(ii) of this section, or an assured equipment grounding conductor program as specified in paragraph (b)(1)(iii) of this section to protect employees on construction sites:

- a) 3rd and 7th floors: The employees operating the portable electric Skilsaws were not protected from an electrical hazard by either a ground fault circuit interrupter or the assured grounding conductor program while using temporary receptacles, on or about 10/24/98.

Facts

On the third and seventh floors, CO Donnelly found Avcon employees, Matt York, Gus Protus, Loraine Cinafrone and Tom DiPasquale, using portable electric saws that were plugged into temporary wiring (Tr. 345, 348, 353-54; Exh. 275). Donnelly tested the electrical circuits and found that there was no ground fault interrupter in use (Tr. 346-47). Donnelly stated that the saws were not color coded to indicate that presence of an assured grounding conductor program (Tr. 347). Nicholas Saites testified that it was impossible to tell whether there was a ground fault interrupter on the site because it could be located anywhere in the building (Tr. 1098). Donnelly testified, however, that Saites never investigated whether a ground fault circuit interrupter had been installed on the site (Tr. 346). At the hearing, Saites admitted that he had never tested any of the electrical wiring at the site (Tr. 1442). However, Saites testified that he did not know Gus Protus and could find no reference to an employee by that name in Avcon's records (Tr. 1098-99). He further testified that Matt York was an apprentice carpenter and was not authorized to use the power tools (Tr. 1099).

Discussion

Section 1926.404(b)(1)(i) requires:

The employer shall use either ground fault circuit interrupters as specified in paragraph (b)(1)(ii) of this section, or an assured equipment grounding conductor program as specified in paragraph (b)(1)(iii) of this section to protect employees on construction sites.

The evidence establishes that at least three of Respondent's employees operated electrical hand saws which were not protected with a ground fault circuit interrupter and exposed to electrical shock in violation of the cited standard. With the exercise of reasonable diligence Avcon could have

ascertained whether a ground fault system had been installed on the electrical wiring at the site. Avcon admits it failed to test the site's wiring.

A violation of the cited standard has been established as a serious violation.

Penalty

CO Donnelly testified that an employee could be electrocuted should an accident occur. The proposed penalty included a 40% reduction based on Avcon's size. Because of Avcon's history of OSHA violations, and its failure to inspect the site for electrical hazards, no credit for history or good faith is appropriate. The Secretary's proposed penalty of \$1,500.00 is assessed.

Alleged Violation of §1926.501(c)(1)

Serious citation 1, item 5 alleges:

29 CFR 1926.501(c)(1): When an employee was exposed to falling objects, the employer did not have each employee wear a hard hat and implement one of the following measures; (1) Erect toeboards, screens, or guardrail systems to prevent objects from falling from higher levels; or, (2) Erect a canopy structure and keep potential fall objects far enough from the edge of the higher level so that those objects would not go over the edge if they were accidentally displaced; or, (3) Barricade the area to which objects could fall, prohibit employees from entering the barricaded area, and keep objects that may fall far enough away from the edge of a higher level so that those objects would not go over the edge if they were accidentally displaced:

a) Throughout building: Materials such as lumber and steel pins used for the concrete formwork were observed falling off the building thus exposing employees working and walking below to the hazard of being struck by falling materials, on or about 10/23/98 - 11/16/98.

Facts

CO Donnelly testified that between October 23 and November 16, 1998, he observed numerous instances of lumber and other material falling off the building (Tr. 357-58, 360). Donnelly stated that employees working in the yard adjacent to the building below the stripping operation including ironworkers, carpenters and laborers, were all exposed to the falling debris (Tr. 354-58). Donnelly stated that the area adjacent to the building was neither partially nor completely barricaded off and workers were observed entering and exiting the building from different locations. No discrete entry/exit area had been demarcated and no canopy had been erected to protect employees entering or leaving the building (Tr. 357-60).

Nicholas Saites testified that there was a canopy installed on the north side of the Edgewater site (Tr. 1094, 1358; Exh. R-48). Saites also stated that Avcon assigned an employee to go down to ground level and monitor the area where stripping was taking place. The assigned employee was to

watch for employees in the area and warn them away from areas where there was a danger of falling debris (Tr. 1102).

Discussion

Section 1926.501(c) provides:

Protection from falling objects. When an employee is exposed to falling objects, the employer shall have each employee wear a hard hat and shall implement one of the following measures:

- (1) Erect toeboards, screens, or guardrail systems to prevent objects from falling from higher levels; or
- (2) Erect a canopy structure and keep potential fall objects far enough from the edge of the higher level so that those objects would not go over the edge if they were accidentally displaced; or
- (3) Barricade the area to which objects could fall, prohibit employees from entering the barricaded area, and keep objects that may fall far enough away from the edge of a higher level so that those objects would not go over the edge if they were accidentally displaced.

CO Donnelly's testimony establishes that Avcon complied with neither subparagraph (c)(1), (c)(2), or (c)(3) and no attempt was made to keep objects from falling over the ledge. It is clear from the testimony and from the videotape of the work site that Avcon expected stripping materials to go over the edge of the building. Some attempt was made to catch larger pieces of formwork on the stripping floor outriggers, however, Avcon knew that debris fell to the ground during stripping operations. Although Avcon maintains that a canopy was erected on the north side of the building, stripping operations took place over the entire length of all four sides of the building. No barricades were erected to prohibit employee access to the areas not protected by the canopy. CO Donnelly's testimony establishes that employees entered and exited the building from all areas.

The cited violation is established as a serious violation.

Penalty

CO Donnelly testified that an employee could be killed by debris falling from the eighth floor or above (Tr. 361). The proposed penalty included a 40% reduction based on Avcon's size. Because of Avcon's history of OSHA violations no credit for history or good faith is appropriate. The Secretary's proposed penalty of \$3,000.00 is assessed.

Alleged Violation of §1926.502(d)

Serious citation 1, item 6 alleges:

29 CFR 1926.502(d): Personal fall arrest systems and their use did not comply with provisions set forth effective January 1, 1998, in that a body belt was used as part of a fall arrest system:

a) North side of building, mezzanine level: The employee working on top of the bricklayers' multi-point suspended scaffold was wearing a body belt as part of a personal fall arrest system rather than the safety harness required, on or about 11/16/98.

b) West side of building, 16th floor: The employee working on top of the bricklayers' multi-point suspended scaffold was wearing a body belt as part of a personal fall arrest system rather than the safety harness required, on or about 1/24/99.

Facts

CO Donnelly testified that, on two different dates, he observed Philip Armstrong wearing a body belt while working on a bricklayer's scaffold (Tr. 364-67, 370-71; Exh. C-275). Donnelly stated that Bill Saites acknowledged that Armstrong was an Avcon employee (Tr. 367, 369). At the hearing, Bill Saites denied telling Donnelly that Armstrong worked for him (Tr. 1000). Saites testified that Armstrong had worked for him as a laborer on previous jobs, however, on the Mariners high rise, Armstrong worked for the general contractor, Daibes (Tr. 1000-01). Nicholas Saites testified that Philip Armstrong was not employed by Avcon on November 16, 1998 or January 24, 1999 (Tr. 1102-03, 1442). According to Saites, Armstrong was employed by the general contractor, Daibes, as a bricklayer (Tr. 1103).

Discussion

Avcon argues that the named employee did not work for Avcon during the relevant periods. Avcon was engaged to install concrete form work and to pour concrete for the Mariners building (*See*, Avcon's Subcontract Agreement, Exh. C-114, Exhibit B, p. 30). Philip Armstrong was occupied as a bricklayer both times Donnelly saw him. Because there is evidence that Avcon performed only poured-in-place concrete work on the Edgewater site, the record supports the conclusion that Armstrong was not an Avcon employee. Accordingly, this item is vacated.

Alleged Violation of §1926.703(a)(2)

Other than serious citation 3, item 1 alleges:

29 CFR 1926.703(a)(2): Drawings or plans, including all revisions, for the jack layout, formwork (including shoring equipment), working decks, and scaffolds were not available at the jobsite:

a) Jobsite: The shoring layout drawings were not available, on or about 10/24/98.

Facts

CO Donnelly testified that Nicholas Saites told him that there was no shoring layout plan for the concrete form work on the Edgewater site (Tr. 568, 570-72). This evidence was not rebutted by Respondent. Accordingly, the violation is affirmed as an other than serious violation. No penalty was proposed by the Secretary. Accordingly, no penalty is assessed.

FINDINGS OF FACT

All findings of fact relevant and necessary to a determination of the contested items have been made above Fed R. Civ P. 52(a). All proposed findings of fact inconsistent with this decision are denied.

CONCLUSION OF LAW

1. Respondent, Avcon Inc., is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act.
2. Respondent, Altor Inc., is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act.
3. Respondents' Avcon Inc. and Altor Inc. are closely related companies having interrelated and integrated operations and are a single entity for purposes of this matter and jointly constitute an employer within the meaning of the Act.
4. Nicholas Saites and Vasilios Saites are not employers within the meaning of the Act in relation to this matter and are dismissed as individual Respondents.

ORDER

1. Serious citation 1, item 1, alleging violation of §1926.20(b)(1) is AFFIRMED, and penalty of \$3,000.00 is ASSESSED.
2. Serious citation 1, item 2, alleging violation of §1926.25(a) is AFFIRMED and a penalty of \$2,100.00 is ASSESSED.
3. Serious citation 1, item 3 is WITHDRAWN.
4. Serious citation 1, item 4, alleging violation of §1926.404(b)(1)(i) is AFFIRMED and a penalty of \$1,500.00 is ASSESSED.
5. Serious citation 1, item 5, alleging violation of §1926.501(c)(1) is AFFIRMED and a penalty of \$3,000.00 is ASSESSED.
6. Serious citation 1, item 6, alleging violation of §1926.502(d) is VACATED.

7. Willful citation 2, item 1, alleging violations of §1926.100(a) is AFFIRMED and a penalty of \$32,000.00 is ASSESSED.
8. Willful citation 2, items 2 through 7, alleging violations of §1926.501(b)(1) are AFFIRMED and a combined penalty of \$150,000.00 is ASSESSED.
9. Willful citation 2, item 8, alleging violations of §1926.501(b)(4)(i) is AFFIRMED as a serious violation and a penalty of \$4,400.00 is ASSESSED.
10. Other than Serious citation 3, item 1, alleging violation of §1926.703(a)(2) is AFFIRMED without penalty.

A total penalty in the amount of \$196,000.00 is assessed for the aforesaid violations.

/s/
Robert A. Yetman
Judge, OSHRC

Dated: