

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

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**SECRETARY OF LABOR,**

United States Department 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.**

Respondents.

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**OSHRC Docket No.  
99-0958**

**OPENING BRIEF FOR THE SECRETARY OF LABOR**

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## STATEMENT OF THE FACTS

### 1. Respondents and their related corporations<sup>1</sup>

Respondent Vasilios ("Bill") Saites has been involved with over 200 concrete projects during his more than 40 years in the concrete construction business (Tr. 978).<sup>2</sup> He and his son, Nicholas ("Nick"), with their families have owned and operated at least seven concrete construction companies in New Jersey over the years, to wit: Astro Concrete, Inc. (incorporated 1962); WNS, Inc. (incorporated 1981-1982; bankrupt by 1983); Cornicon, Inc. ("Cornicon") (incorporated 1985, no longer "viable" by 1987); Altor (incorporated 1991); Avcon (incorporated 1997)(Ex. C-255, pp. 30-37, 105, 107, Ex. C-1, C-2, C-3); Avcrete, Inc. (Tr. 737, 741-42, 795, 901); and 724 Walnut Corp. (Tr. 741-42, 901). Bill Saites has served as the president and sole executive officer of all of the corporations except Cornicon for which he was the "supervisory" employee (Tr. 733, 735-37, 898-99, 1047; Ex. C-255, pp. 27, 34).

Nick Saites is an attorney in the State of New Jersey representing Altor, Avcon, his father, and his father's other licensed companies (Tr. 738, 885-87). Nick Saites typically reviews "all the contracts" for Altor and Avcon (Tr. 940-41). Other than performing some house closings, he has no other clients (Tr. 886). During the hearing, however, he was unable to recall billing for the legal work he performed for his father, Avcon, and Altor (Tr. 885-87). Nick bought Astro Concrete from Bill in 1983 (Ex. C-255, p. 48).

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<sup>1</sup> The facts pertaining to the individual Respondents and their corporations are relevant to the issue of whether the Commission should pierce the corporate veil and hold the individuals liable as employers under the OSII Act. "Although the tests employed to determine when circumstances justifying 'veil-piercing' exist are variously referred to as the 'alter ego,' 'instrumentality,' or 'identity' doctrines, the formulations are generally similar, and courts rarely distinguish them." *Pearson v. Component Technology Corp.*, 247 F.3d 471, 485 n. 2 (3d Cir. 2001), *cert. denied*, 122 S.Ct. 345 (2001).

<sup>2</sup> References to the Decision and Order of Judge Robert A. Yetman are indicated by "DO" followed by the page number. References to the hearing transcript are indicated by "Tr." followed by the page number. References to exhibits are indicated by "Ex." followed by "C" for Complainant or "R" for Respondent, followed by the number of the exhibit. The Secretary introduced a videotape into evidence which has been designated Ex. C-275. The eight-digit numbers following this exhibit refers to the counter numbers of the video frames. Respondents' Petition for Discretionary Review dated January 21, 2002, is indicated by "Resp PDR."

The Saites companies share office space at 193 Calvin Street, Westwood (Washington Township), New Jersey, first listed at Astro's incorporation in 1962 as the corporate address, and listed as such for Saites companies through the years up to and including the 1997 incorporation of Avcon (Ex. C-1, C-2, C-3). That corporate address is a large room in the basement of a building owned by Bill Saites that was formerly the Saites family home and Nick's former personal residence after his parents moved out (Tr. 791; Ex. C-255, p. 53).

Altor, which contracted to construct the Mariner, is the only corporation paying rent for the use of the office space, which it pays to Cornelia Saites, Nick's wife (Tr. 933-36). During the Mariner Project, there were two office workers compensated by both Avcon and Altor (Tr. 794-95). Nick's wife and sister also worked in the office (apparently uncompensated) (Tr. 796-97).

Altor acts as a general contractor, subcontracting out labor and the rental and use of a crane to Avcon (Tr. 918). Although the president, sole officer, and sole director of Altor, Bill Saites is not a shareholder in Altor and does not know the shareholders' identities (Tr. 735, 899). Nick Saites has an indirect interest in the ownership of Altor and indirectly shares in its profits and losses (Tr. 1115).<sup>3</sup> Bill provides no information about the business affairs of Altor to its shareholders (Tr. 904). No shareholders' organizational meeting was ever held for Altor (Tr. 832). Only Bill has signatory authority over Altor's accounts; office personnel have a stamp with his signature for employee payroll checks (Ex. C-255, p. 57). Bill is not familiar with Altor's by-laws (Tr. 967). Although Altor's by-laws require that any actions performed by consent of the shareholders be recorded in the minute book (Tr. 890), there is no minute book, nor are there any

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<sup>3</sup> The ALJ conducted an *in camera* discussion with Nick Saites and Respondents' counsel about the identity of Altor's shareholders (Tr. 1114-15). After the discussion, Respondents' counsel agreed to the following admissions: first, Nick Saites "indirectly shares in the profit and losses of Altor, Inc."; and second, "Nick Saites has an indirect interest in the ownership of Altor, Inc." (Tr. at 1115).

minutes of any shareholders' meetings for the company (Tr. 834-35, 889).<sup>4</sup> Altor has never paid dividends (Tr. 842). Bill Saites derives no salary or other compensation from his work for Altor (Tr. 924). Other than revenue from contracts, Altor's only assets are "goodwill," a "couple" of trucks, and cash (Tr. 843-45).

Avcon, which acted as the subcontractor to Altor in building the Mariner, was established to limit liability and to qualify as a minority contractor (Tr. 952-53). Bill Saites is the president, sole officer, sole board member and a 49% shareholder; his wife Cornelia is a 51% shareholder (Tr. 736, 820). In addition to the intent to establish a "minority contractor" (Ex. C-255, p. 47), the allocation of Avcon stock was also done for the purpose of limiting personal liability including potential OSHA liability. During the hearing in *Avcon, Inc., Vasilios N. Saites, and Nicholas Saites*, Docket Nos. 98-0755 and 98-1168 (consolidated), 2000 WL 1466090 (J. Rooney, 2000) ("*Avcon I*"),<sup>5</sup> Nick Saites testified to the reason for forming Avcon as follows:

In this business there is a lot of individual liability, this is a perfect example. If OSHA were to obtain a judgment against my father, they would be able to take the shares of Avcon and if Avcon had been owed any money they would be able to levy on those receivables, so it's generally a good idea in this business if you work in this business not to own the shares of the company.

Ex. C-255, pg. 48.<sup>6</sup>

Despite being Avcon's president, Bill Saites is not familiar with Avcon's by-laws (Tr. 967). No organizational shareholders' meeting has ever been held for Avcon (Tr. 832). Although Avcon's by-laws require that any actions performed by consent of the shareholders be recorded in the minute book (Tr. 845), there is no minute book; nor are there any minutes for any

<sup>4</sup> Ex. C-103, Request For Production Nos. 20 & 22; Ex. C-111, Respondents' Response to the Secretary's Request for Production No. 20 & 22.

<sup>5</sup> By order dated September 21, 2000, Judge Ann Z. Cook granted the Secretary's Motion In Limine to admit into evidence in this proceeding trial testimony and exhibits from the first Avcon proceeding.

<sup>6</sup> Nick Saites' meaning is not clear, because his father owned 49% of Avcon's stock. Nick perhaps was stating a hypothetical example or mistakenly referred to Avcon when he meant Altor. Notwithstanding, his testimony makes clear that part of the intent in forming the corporation was the avoidance of OSHA penalty liability.

shareholders' meetings (Tr. 943).<sup>7</sup> There are no annual shareholder's meetings, although Bill talks to his wife "at times over breakfast in the morning . . ." (Tr. 943). Cornelia Saites, the majority shareholder of Avcon, has no authority to sign checks; only Bill Saites has signatory authority (Ex. C-255, p. 57). The only work ever performed by Avcon was done pursuant to subcontracts with Altor (Tr. 917).

## 2. The Saites companies' history of OSHA inspections and violations

The Saites companies have an extensive history of violating OSHA standards including the hard hat and fall protection standards and of failing to pay assessed penalties. Astro first received a citation for failure to comply with the hard hat standard, 29 C.F.R. § 1926.100(a), in May 1973(Ex. C-35). It first received a citation for violating a fall protection standard, 29 C.F.R. 1926 .105(a),<sup>8</sup> in September 1974, when it received a total of 16 citations and was fined \$8005 (Ex. C- 33). It defaulted on that penalty, paying only \$2455 in July 1981, almost seven years after the citation was issued. *Id.* From 1973 through 1989, Astro received four serious, one repeat, and three willful citations for failing to guard open-sided floors.<sup>9</sup> After Nick bought Astro, in 1989 and 1990, Astro received additional fall protection violations, and Nick signed three settlement agreements on its behalf(Ex. C-11, C-36, C-37, C-39). Cornicon and WNS also

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<sup>7</sup> Ex. C-103, Request For Production Nos. 20 & 22; Ex. C-111, Respondents' Response to the Secretary's Request For Production No. 20 & 22.

<sup>8</sup> Section 1926.105(a) provides as follows:

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.

29 C.F.R. § 1926.105(a).

<sup>9</sup> Ex. C-22 -- C-26, Ex. C-32 -- C-34. The standard formerly codified at 29 CFR 1926.500(d)(1) was revised on August 9, 1994, along with all of Subpart M ("Fall Protection"). In pertinent part, the standard at 1926.500(d)(1) previously provided as follows:

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

received serious and willful citations under Sections 1926.500(d)(1) and 1926.105 (a)(Ex. C-41, 43, 44, 46, C-47). All these citations are Commission final orders (Ex. C-54, pp. 354, 356-85, 393-94). On April 7, 1998, Avcon received citations for violations of the hard hat and fall protection standards that were affirmed by ALJ Rooney on September 19, 2000, and are currently on review. *Avcon I*.

**3. The worksite at issue in *Avcon I* – the Hackensack Project**

In 1987, Astro, then owned by Nick, began construction of a high-rise apartment building in Hackensack, New Jersey, called "Excelsior Two" (the "Hackensack Project") (Tr. 853; Ex. C-255, p. 36-37, 44-47). Construction was suspended for 10 years, until 1997, when the building owner received funding to complete the project through the U.S. Department of Housing and Urban Development ("HUD")(Ex. C-255, 46-47). *Avcon I*, 2000 WL 1466090, \*2; *see also* Tr. 741; Ex. C-255, pp. 59-60). *Avcon I*, \*3. The Saites then incorporated Avcon as a "minority contractor", placing 51% of the stock with Bill Saites' wife to qualify Avcon to work on the HUD funded project (Tr. 820; Ex. C-255, p. 47). *Avcon I*, \*3. Altor acting as a general contractor subcontracted with Avcon, the "payroll company," to provide labor (Ex. C-255, p. 45); *see Avcon I*, \*12. Nick Saites was the Assistant Superintendent, and when Bill Saites fell ill, Nick was in control of the work (Tr. 783, 884-85).

**4. The worksite at issue in this case – the Mariner High Rise**

On July 24, 1998, Altor contracted to construct a 16-story apartment building in Edgewater, New Jersey, known as the "Mariner High Rise" (referred to as the "Mariner") for a total contract price of \$4,544,500 (Tr. 78-79; Ex. C-114, pp. 1, 33, 35). On July 27, 1998, Altor subcontracted the labor and provision of cranes and operators to Avcon for \$2,400,000 (Ex. C-

115, pp. 1, 6, 7). The construction process used by Avcon was essentially the same as that used at the Hackensack site (Tr. 766-67).

Ferry Plaza North, LLC, was the owner and developer for the Mariner (Tr. 77). The general contractor was Daibes Brothers, Inc. ("Daibes Bros.")(Tr. 77-78). Fred Daibes, the president of Ferry Plaza North (Tr. 76, 78), selected Altor based on "reputation, ability to start the job [right away], and price" (Tr. 84, 88; Ex. C-114).<sup>10</sup> A factor in Daibes' selection was the Saites' willingness to wait at least 30 days before receiving any payment (Tr. 88). Altor purchased materials on credit during this time (Tr. 785-86).

Bill Saites subcontracted the labor to Avcon (Ex. C-115). At the request of his father, Nick Saites wrote the Altor/Avcon subcontract, which Bill Saites executed on behalf of both companies (Tr. 788, 938; Ex. C-115). Labor was subcontracted to Avcon to shield Altor from liability for "an accident" (Tr. 914-15). In addition, because Bill is not a stockholder in Altor and "the only way [he] can make money is from Avcon", the Altor/Avcon contract provided him the opportunity to receive "dividends" (Tr. 916). Employees on Avcon's payroll performed all the concrete construction work at the Mariner (Ex. C-115). Avcon paid the salaries of the employees and their union benefits with Avcon checks signed by Bill Saites (Tr. 1041).

Nick Saites identified himself to OSHA representatives as the "Assistant Superintendent" at the Mariner Project (Tr. 267-68). He had authority over the Avcon employees and their work including, for example, instructing employees to put on hard hats and construct missing guardrails; instructing employees not to talk to OSHA; and stating that he would not fire employees who refused to wear hard hats (Tr. 267-68, 333, 391).

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<sup>10</sup> Daibes knew that Bill and Nick worked as a team; he considers the names "Bill Saites" and "Altor" to be interchangeable (Tr. 85, 88).

Considering their authority and work, Nick and Bill Saites received disproportionately low salaries. Nick Saites negotiated his salary with his father and was paid \$300 per week on both the Hackensack and Mariner projects (Tr. 777-78).<sup>11</sup> Bill Saites paid himself \$100 per week on both projects (Tr. 922-23, 927; Ex. C-255, p. 125). A journeyman carpenter on the Hackensack Project was paid \$24 per hour, or approximately \$960 per week, and a carpenter foreman on the job was paid \$1,240 per week (Ex. C-255, p. 126).<sup>12</sup>

The carpenter foreman, Frank Georgianna, supervised the majority of the workforce and was responsible for the formwork design and construction (Tr. 979, 1048). Georgianna had worked with Bill and Nick Saites since 1964 (Tr. 979, 1005-06). The ironworker foreman, Bobby Carbone, and the labor foreman, Jim Cavalier, had also worked with the Saites during and prior to the Hackensack Project (Tr. 775). Bill delegated to each foreman the responsibility for the safety of his trade (Tr. 806-07, 970).

Avcon's net profit from the Mariner Project was \$253,535.68. At the hearing in January 2001, Altor still owed Avcon \$139,000. The money had been paid to Altor, but not transferred to Avcon (Tr. 1122-25; Ex. C-166). Avcon's bank balance as of November 30, 2000, was \$9.88 (Tr. 1126; Ex. C-166). According to Bill Saites, all of Avcon's money went to pay for legal fees including legal fees paid to Nick Saites (Tr. 1128-29). Avcon has not performed any work since it completed the Mariner project (Tr. 733-34).

According to Nick Saites, he was "laid off" at the end of the Mariner project in December 1998, because Avcon "had no more work" (Tr. 734, 736). In December 1998, Avcrete was incorporated (Tr. 737). Bill Saites is the president, sole officer and board member for Avcrete

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<sup>11</sup> Ex. C-255, pg. 123. Nick lived rent-free during the Hackensack Project in a house owned by his father, where the Altor and Avcon offices were located (Ex. C-255, pg. 124).

<sup>12</sup> Employees' wages were established by union contract (Tr. 776).

(Tr. 736). Nick Saites explained that one of the reasons for incorporating Avcrete was as follows:

You have to remember when OSHA fines you \$150,000 in a case, you can't take the risk that on the next job you're 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.

After the completion of the Mariner Project, Altor won the contract for construction of the building's parking garage and subcontracted the labor to Avcrete (Tr. 901). Nick Saites began working for Avcrete in January 1999 (Tr. 732-33).

##### **5. The construction method at the Mariner**

Vertical wooden poles or "legs" are erected to support 16-foot long, horizontal wooden beams called "stringers" (Tr. 771, 979). On top of and perpendicular to the stringers are three-by-four-foot ribs (Tr. 1048, 1052). On top of the ribs, four-by-eight-foot sheets of plywood are laid horizontally, and nailed to the ribs to form the "deck" (Tr. 979, 1246-47, 1456-57). Below the deck, interior and exterior columns are formed with plywood (Tr. 878). Reinforcing steel, or rebar, is placed vertically inside the column forms and horizontally on the deck before the concrete is poured (Tr. 1074-75).

The concrete is poured over the finished deck and down into the column forms. Once the poured concrete has obtained sufficient strength, the wooden formwork is removed or stripped from the structure, stacked, and hoisted by crane to the next elevation where the process is repeated (Tr. 213, 878). After stripping the formwork, vertical wooden poles or "reshores" are erected and left in place for 28 days to support the concrete deck while it cures (Tr. 772, 1045). *Compare description in Avcon I*, pp. \*3, \*4.

On the Mariner, the second through 15th floors were "typical", *i.e.*, the dimensions of each floor were identical (Tr. 877). Concrete was poured on a "three-day cycle," two typical floors being poured in a six-day workweek (Tr. 1045).<sup>13</sup> On the first and second day of the

<sup>13</sup> The three-day pour cycle refers to the construction of the typical floors. The atypical floors were poured as much as 14 days apart (Ex. C-116).

cycle, carpenters installed the legs, stringers, ribs, plywood decking and column forms while the ironworkers installed rebar (Tr. 878). On the third day, the entire floor was poured (Tr. 878). The day after the pour, the concrete had sufficient strength to strip the vertical surfaces. Two days after the pour, the concrete had sufficient strength to strip the deck.<sup>14</sup> Stripping continued for three to four days (Tr. 878, 1393-94).

The erection and stripping of the formwork like the legs and the subsequent installation and removal of reshores require employees to work within one foot of the outside edge of the floor (Tr. 772-74). In areas with no balconies, exterior perimeter columns were six inches from the edge of the concrete floor, requiring employees to work very closely to the edge (Tr. 771). The framing and installation of the rebar required employees to work within six feet, sometimes within six inches, of the outside edge of the concrete floor (Tr. 770-72, 774-75).

#### **6. The OSHA inspection**

OSHA began its inspection at the Mariner site on October 23, 1998, as a result of two separate complaints referencing the lack of perimeter fall protection and unguarded floor openings (Tr. 201). OSHA Assistant Area Director Phillip Peist ("AAD Peist") assigned the inspection to Compliance Officer Brian Donnelly ("CO Donnelly"). Accompanying CO Donnelly were AAD Peist, CO Angelo Signorile, CO Charles Triscritti and CO Richard Brown (Tr. 201-02).

When OSHA arrived at the worksite, from the road they saw employees on upper floors working at the perimeter of the building without fall protection (Tr. 209, 212). They also saw employees working on the top deck with only a midrail 24-inches high erected around the perimeter of the deck (Tr. 311, 421). COs Brown and Signorile went to the roof of the nearby Edgewater Municipal Building and videotaped the worksite (Tr. 208; Ex. C-275).

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<sup>14</sup> The concrete used to construct the floor slabs and columns was designed for a 28-day strength of either 6,000 (columns) or 4,000 (floors) pounds per square inch ("psi").

Upon entering the worksite, CO Donnelly started to hold an opening conference with Bill Saites. He identified the complaint items, informed Bill of fall hazards that OSHA had already seen, and informed Bill that OSHA wished to conduct an inspection (Tr. 203-04, 310). Bill refused OSHA permission to enter (Tr. 203). Approximately three hours later, after Daibes gave OSHA permission to enter, AAD Peist and CO Donnelly met with Bill and Nick Saites and discussed the complaint items and the violations seen earlier (Tr. 205-06, 209). CO Donnelly discussed Bill's knowledge of the standards and "his understanding of them, because he's been inspected by [OSHA] before" (Tr. 313). Bill Saites informed OSHA that all of the employees doing the concrete construction work were Avcon employees (Tr. 211-12). Nick Saites then accompanied CO Donnelly and AAD Peist on a walk around inspection (Tr. 209-10).

Throughout the inspection over three months, specifically on October 23, 24, 27, 29, November 3, 4, and 16, 1998, OSHA observed numerous fall protection violations. Employees from the 8th through the 16th floors were seen stripping formwork, installing reshores, picking up and carrying lumber, installing metal bracing and wooden shoring and even performing work while standing on a milk crate at the unprotected edge of the floors with no fall protection, exposing them to falls of at least 80 feet (Tr. 396-520)(Citation 2, Items 2 through 7).<sup>15</sup>

CO Donnelly discussed the violations with Bill and Nick Saites, repeatedly emphasizing the need for fall protection for employees working at the unprotected perimeter of the building or in close proximity to floor openings (Tr. 416-17, 457, 467, 492-94). But, when he discussed the need to extend the guardrail completely around the deck on October 29th, Bill Saites responded that he was "not going to stop . . . pouring concrete . . . to bring the material up onto the deck" (Tr. 467; *see also* 493-94). When asked about employees' failures to wear safety harnesses, Nick Saites stated that he was not going to "baby-sit" them (Tr. 416). During the inspection, Avcon never asserted that compliance with the OSHA fall protection standards was infeasible. Nor did

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<sup>15</sup> The individual citations are described in more detail in Part VI *infra*.

Avcon assert that the employees were engaged in "leading edge work," requiring the implementation of an alternative fall protection plan (Tr. 496-98, 1417-21).<sup>16</sup>

In addition to the lack of perimeter fall protection, CO Donnelly found on October 23, 24, and November 3, 1998, uncovered floor openings, elevator shafts, stairwells and unguarded ladder way openings (Tr. 520-63; Ex. C-195, C-197, C-198, C-199, C-215, C-217, C-233, Ex. C-275)(Citation 2, Item 8). Even though OSHA discussed the failures to guard the floor openings with Bill, Nick and Avcon carpenter foreman Georgiana, OSHA continued to find unprotected floor openings throughout the site during the inspection (Tr. 564). Employees were seen finishing cement, installing rebar, installing reshores, and picking up and moving lumber near unguarded floor openings (Tr. 526-27, 529). Exacerbating the overall lack of fall protection for both perimeter areas and floor openings was the presence of debris causing tripping hazards (Tr. 328-32, 34-344; Ex. C-192, C-200, C-201, C-216, C-275).

In addition to the lack of fall protection, OSHA witnessed 13 separate instances of employees and management working without head protection (Tr. 371-88; Ex. C-196, C-275)(Citation 2, Item 1). Many of the instances involved multiple employee exposure; one involved Avcon supervisor Georgiana (Tr. 372-85; C-196). Avcon employees were exposed to the hazard of head injuries from falling materials and tools during stripping operations and while ascending and descending ladder ways (Tr. 382-83). Employees were also exposed while entering and exiting the site from falling formwork and debris (Tr. 355-61)(Citation 1, Item 5), and while they worked on the deck from the crane loads of concrete, lumber and rebar that came in overhead (Tr. 355, 357, 372-74, 383). Bill Saites refused to wear head protection while he moved about the site (Tr. 393-94, 680-81).

OSHA also found the following violations: (i) there was no effective safety program, no safety meetings, and no requirements for the use of fall protection at the worksite (Tr. 314-

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<sup>16</sup> The alternative fall protection plan, as outlined in 29 C.F.R. § 1926.502(k), is only permitted when the employer demonstrates that conventional fall protection as described in 29 C.F.R. § 1926.501(b)(2) is infeasible during leading edge work. At this worksite, leading edge work was only performed during construction of the plywood deck (Tr. 1793-95). No citations were issued relating to this work (Tr. 1795).

21)(Citation 1, Item 1); (ii) scrap lumber was not cleared from work areas (Tr. 328-44; Ex. C-192, C-200, C-210, C-211, C-216)(Citation 2, Item 2); (iii) portable electric tools were operated from temporary wiring in the absence of a ground-fault circuit interrupter ("GFCI") or an assured equipment grounding conductor program (Tr. 344-49)(Citation 1, Item 4); and (iv) no shoring plans were available for inspection at the work site (Tr. 567-70)(Citation 3, Item 1).

## **ARGUMENT**

### **I. ALTOR AND AVCON WERE A SINGLE EMPLOYER UNDER THE OSH ACT.**

The ALJ correctly held that because Avcon and Altor were "closely related companies having interrelated and integrated operations with a common president, management, supervision and ownership performing services at a common worksite[.]. . . both corporations must be regarded as a single entity . . . constitut[ing] the 'employer' for purposes of OSHA enforcement at the worksite." DO at 4-5.

The Act defines "employer" as a "person . . . who has employees." 29 U.S.C. § 652(5). The term "person" is defined by the Act to mean "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons." 29 U.S.C. § 652(4) (emphasis added). The term "employee" means an "employee of an employer who is employed in a business of his employer. . . ." 29 U.S.C. § 652(6).

Avcon was clearly an "employer" of the employees performing work at the Mariner. Under its contract with Altor, Avcon provided the labor to build the project, paying wages and union benefits with checks issued on its accounts (Tr. 1041; Ex. C-115).

Altor was also an "employer" under the OSH Act. Under well-established Commission precedent, two nominally separate employers are treated as a single entity "when they share a common worksite, have interrelated and integrated operations, and share a common president, management, supervision or ownership." *Trinity Ind., Inc.*, 9 BNA OSHC 1515, 1518 (No. 77-

3909, 1981); *Advance Specialty Co.*, 3 BNA OSHC 2072 (No. 2279, 1976). In this case, the record demonstrates that Altor and Avcon were a single entity under this test.

Altor and Avcon were commonly owned. Bill Saites and his wife owned Avcon and his son, Nick, had an "indirect" interest in Altor (Tr. 820, 1115). There was common management. Bill Saites was the president, sole officer, and sole director of both companies (Tr. 736). Despite his apparent lack of ownership, there were no limitations on his authority over Altor (Tr. 736, 905, 907). Bill acted as the Superintendent and Nick as the Assistant Superintendent on both the Hackensack and Mariner projects (Tr. 783, 884-85, 946, 968). *Avcon I*, 2000 WL 466090, \*2, \*8-9. Altor and Avcon had integrated operations, because Altor had no employees, did not perform any work, and did not operate distinct from Avcon or Avcon's successor, Avcrete (Tr. 913). Avcon acted as the "payroll" company for Altor. The companies shared a common office and office staff. Avcon's only business was its contracts with Altor (Tr. 736-37).

In sum, Altor and Avcon shared a common worksite, president, management, supervision, and ownership, and had interrelated and integrated operations. The ALJ correctly held that Avcon and Altor together were a single employer under the Act. The Commission should affirm this holding.

## **II. THE ALJ ERRED IN HOLDING THAT THE COMMISSION LACKS AUTHORITY TO PIERCE THE CORPORATE VEIL.**

### **A. OVERVIEW.**

Most businesses in the United States are organized as corporations. Operating through a corporation provides the owners of the business with a number of advantages, one of the most important being that the persons who own the corporation's stock obtain "limited liability" in that they are not generally liable for the corporation's debts.

The principle of limited liability, however, is not absolute. Courts have long held that the corporate veil can be pierced, and the responsible individuals held liable, when necessary to effectuate the purpose of a federal statute.<sup>17</sup> As we will show in section III, the Saites have arranged their business affairs to enable them, they hope, to violate the OSH Act with impunity and thereby avoid the command of Congress to provide their employees with safe workplaces. This is therefore a case where the corporate veil should be pierced and the Saites held individually liable for the same violations as Altor and Avcon.

Although the issue of the Saites' liability was presented to the ALJ, he did not resolve it. The ALJ acknowledged that the record could support piercing the corporate veil but nevertheless declined to decide whether the Saites were "employers" within the meaning of the Act. He held that the Commission lacked jurisdiction to pierce the veil of "a lawful and viable corporation," suggesting that an individual who was running the corporation as his alter ego could be pursued in a district court action should the corporations fail to pay the penalties. DO at 6. Accordingly, before addressing why the Commission should pierce the corporate veil and hold the Saites individually liable, we will show why the Commission, and not the federal district courts, is the proper body to determine whether the Saites are responsible for OSH Act violations.

**B. THE COMMISSION IS THE PROPER FORUM TO DETERMINE WHETHER THE SAITES ARE EMPLOYERS FOR PURPOSES OF THIS CASE.**

The OSH Act places the duty to comply on "employers" and authorizes the Secretary to issue a citation to an "employer" when she believes that the employer has violated the Act. 29 U.S.C. §§ 654, 658. Whether the entity to which the Secretary issues a citation is an "employer" within the meaning of the Act is a question for the Commission to decide. *Joel Yandell*, 18 BNA OSHC 1623, 1626 (No. 94-3080, 1999) (employer who had gone out of business when citation

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<sup>17</sup> See *Pearson*, 247 F.3d 471, and cases cited therein.

was issued was nevertheless "employer" under the Act); *MLB Ind., Inc.*, 12 BNA OSHC 1525 (No. 83-231, 1985) (company that loaned employees to another and did not control their working conditions was not an "employer" for purposes of the Act); *University of Pittsburgh*, 7 BNA OSHC 2211 (No. 77-1290, 1980) (state-related university met Act's definition of "employer" because it was not a political subdivision of Pennsylvania).

The determination of whether a cited entity is an "employer" fits squarely within the administrative review scheme established under the OSH Act. *See Martin v. OSHRC*, 499 U.S. 144, 147 (1991) (Commission's role is to carry out adjudicatory functions under the Act). In a case involving a similar body, the Federal Mine Safety and Health Review Commission, the Supreme Court held that the statute's comprehensive administrative review scheme, with initial review in the Commission and review of Commission decision in the courts of appeals, precluded federal district courts from deciding issues that could be resolved by the Commission. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). Three courts of appeals have held that *Thunder Basin* applies with equal force to the OSH Act. *Sturm Ruger & Co. v. Chao*, 300 F.3d 867 (D.C. Cir. 2002) ("interpretation of the parties' rights and duties under the Act and its regulations . . . falls squarely within the Commission's expertise") (internal quotations omitted); *In re Establishment Inspection of Manganas Painting Co.*, 104 F.3d 801, 803 (6th Cir. 1997); *Northeast Erectors Ass'n of the BTEA v. Secretary of Labor*, 62 F.3d 37, 40 (1st Cir. 1995). Accordingly, it is the Commission in a citation contest, not a district court in a collection action, that is the proper body to decide whether a cited individual is an employer under the Act and to pierce the corporate veil if necessary to make that determination.

It is necessary for the Commission to reach the issue to promote the congressional purpose of effective enforcement. Congress provided the Secretary with various enforcement

tools, which would be ineffective if they can only be employed against corporations on the brink of insolvency. These tools include penalties for first-instance violations, court enforcement of Commission final orders and subsequent contempt sanctions against employers violating those orders, and the ability to propose high penalties against employers who fail to abate violations within the prescribed time or who willfully or repeatedly violate the Act.

The civil penalties assessed under the Act for first-instance violations serve the important purpose of providing an incentive for employers to comply with the Act before they are inspected or an accident occurs. *Reich v. OSIIRC (Jacksonville Shipyards, Inc.)*, 102 F.3d 1200, 1203 (11th Cir. 1997), *followed*, *Joel Yandell*, 18 BNA OSHC at 1626. The Eleventh Circuit has recognized that first-instance penalties serve as a necessary deterrent to OSHA violations even where the employer terminated its business before the penalties were assessed.

Because of the large number of workplaces which OSHA must regulate, relying solely on workplace inspections is an impractical means of enforcement. We accept that OSHA must rely on the threat of money penalties to compel compliance by employers. . . .

To let the cessation of business by an employer render a civil penalty proceeding moot might greatly diminish the effectiveness of money penalties as a deterrence. . . . We worry about creating an economic incentive to avoid a penalty by going out of business and, perhaps, then reincorporating under a different name.

As long as a business operates, it should feel itself to be effectively under the applicable laws and regulations – even on the last day. And, the continuing potential of penalties – more so than injunctive relief – makes these feelings real.

102 F.3d at 1203, *quoted in Joel Yandell*, 19 BNA OSHC at 1625.

This reasoning also applies where, as here, a business is run as a series of corporations with the intent to avoid OSHA penalties. An employer who can avoid penalties and other potential sanctions by manipulating the corporate form has little incentive to comply with the Act. The disdain for compliance that the Saites demonstrated during the inspection, as well as its

past history of violations similar to those in this case, suggests they thought they had nothing to fear from OSHA enforcement.

Although the assessment of collectible civil penalties is a key purpose of an enforcement proceeding, the ALJ erred in failing to recognize that it is not the sole purpose. The Act authorizes the Secretary to obtain court of appeals orders enforcing the Commission's final orders, thereby adding the threat of contempt to the Act's normal enforcement tools. 29 U.S.C. § 660(b); *Reich v. Sea Sprite Boat Co.*, 50 F.3d 413 (7th Cir. 1995). The threat of contempt is an important weapon for the Secretary to use in obtaining compliance by those employers who are not deterred by civil penalties alone. *Id.* That will often be the case where, as here, individuals believe they are immune from meaningful sanctions because they use the corporate form as a shield to avoid those sanctions.

Other enforcement tools also depend on the Commission being able to pierce the corporate veil. Failure to abate penalties can only be assessed against employers who are subject to abatement orders. 29 U.S.C. §666(c). A Commission final order can only be used to support a repeat violation if it is issued against the party who commits the later violation. 29 U.S.C. § 666(a). The Act also directs the Secretary and the Commission to take the employer's history into account when assessing penalties. 29 U.S.C. § 666(j). The failure to find that the Saites are employers and to enter an order against them permits them to distort their past by continually forming new corporations. Again, under these circumstances, the Act's purposes are best served by requiring that they bring their "past history with them rather than allowing . . . [them] to restart with a 'clean slate.'" *Joel Yandell*, 18 BNA OSHC at 1629

In sum, the ALJ erred in holding that the Commission lacks authority to determine that Bill and Nicholas Saites were employers under the OSH Act. The Commission has such

authority and, indeed, provides the most appropriate forum for making this determination. The deferral of the issue to the federal district courts would undermine the deterrence of OSHA civil penalties and blunt the other enforcement tools in OSHA's arsenal.

**III. THE SECRETARY'S ACTION IN CITING THE SAITES IS CONSISTENT WITH WELL-ESTABLISHED PRECEDENT IMPOSING INDIVIDUAL LIABILITY FOR VIOLATION OF REMEDIAL LABOR LAWS.**

**A. INTRODUCTION**

The federal courts have long recognized that the corporate form is not inviolate.

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

*First Nat. City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 630 (1983) ("*Bancex*"), quoting *Bangor Punta Operations, Inc. v. Bangor & Aroostook R.R. Co.*, 417 U.S. 703 (1974) ("*Bangor Punta*"). *Bancex* noted, "the Court has consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies." 462 U.S. at 630.

It is also well established that federal law, not state law, provides the criteria for piercing the corporate veil when the issue arises under a federal statute. "[N]o State may endow its corporate creatures with the power to place themselves above the Congress of the United States and defeat . . . federal policy . . ." *Anderson v. Abbott*, 321 U.S. 349, 365 (1944); *Pearson*, 247 F.3d 471, 484-85 & n. 2 (3d Cir. 2001); *Brotherhood of Locomotive Engineers v. Springfield Terminal Ry.*, 210 F.3d 18, 26 (1st Cir. 2000).

The Third Circuit, in which this case arises, has articulated a test for piercing the corporate veil when necessary to effectuate the purpose of a federal statute. In *United States v. Pisani*, the court pierced the corporate veil to impose individual liability on a doctor for

Medicare overpayments he received through a nursing home. The court held that the nursing home was effectively an "alter ego" for the doctor, who disregarded elements of the corporate form at will.<sup>18</sup> 646 F.2d 83, 88 (3d Cir. 1981). In reaching that conclusion, the *Pisani* court specified eight elements that could be relevant in determining whether to impose individual liability: 1) whether the corporation is grossly undercapitalized for its purposes; 2) failure to observe corporate formalities; 3) the nonpayment of dividends; 4) the insolvency of the debtor corporation at the time; 5) siphoning of funds of the corporation by the dominant stockholder; 6) nonfunctioning of other officers or directors; 7) the absence of corporate records; and 8) the fact that the corporation is merely a facade for the operations of the dominant stockholder or stockholders. *Pisani*, 646 F.2d at 88. *Accord DeWitt Truck Brokers v. W. Ray Flemming Fruit Co.*, 540 F.2d 681 (4th Cir. 1976).

In addition, the court commented that "the situation 'must present an element of injustice or fundamental unfairness,'" noting that this requirement could very well be satisfied by the showings made in regard to the eight enumerated factors. *Pisani*, 646 F.2d at 88. In an earlier decision, the court emphasized that piercing the corporate veil is "appropriate . . . when recognition of the corporate entity would defeat public policy . . . ." *Zubik v. Zubik*, 384 F.2d 267, 272 (3d Cir. 1967), *cert. denied*, 390 U.S. 988 (1968). Recently, the Third Circuit reaffirmed the vitality of the *Pisani* analysis, specifically noting the significance of vindicating federal labor law policies in considering whether to set aside the corporate form. *Pearson*, 247

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<sup>18</sup> In *Pisani*, the pierced corporation was owned by a physician who was its president, registered agent, and sole stockholder. The physician attempted to raise the corporate shield against the federal government's effort to obtain reimbursement for Medicare overpayments to his nursing home facility. Applying the factors of the alter ego test to the record before it, the court found that the corporation was undercapitalized; failed to observe corporate formalities such as keeping minutes books; never paid dividends; had no assets whatsoever at the time of the enforcement action; was demonstrated to have paid all of its funds down to the last dollar to the individual who was found to be its alter ego; had no other officers or directors; and was merely a facade for the individual's activities.

F.3d at 484-86 (discussing the veil-piercing doctrine and the Department of Labor's regulation under the Worker Adjustment Retraining Notification Act).

**B. THE *PISANI* FACTORS REQUIRE THAT THE SAITES BE HELD LIABLE FOR THE VIOLATIONS HERE.**

**1. Gross undercapitalization**

As *Pisani* illustrates, this factor looks to whether the corporation has sufficient funds to satisfy its obligations under federal law and whether the individuals who own and operate the corporation can drain the corporation of assets before its liability is established. In *Pisani*, a physician operated a nursing home through a solely-owned corporation. The nursing home received payments from Medicare, and a subsequent audit showed that the government had overpaid it some \$150,000. The physician-owner of the corporation arranged the corporation's affairs to ensure that it had no funds to repay the government. Among other things, he kept the company afloat by making it personal loans rather than investing equity, and he withdrew the money by repaying the loans as the corporation was failing. The physician's use of financial manipulation to keep the corporation with only those assets he could withdraw at any time played a critical role in the court's holding that he was the corporation's alter ego and should be held personally liable for repaying the overpayment.

In this case, Avcon had hundreds of thousands of dollars available to pay labor and material costs to fund the Mariner project before receiving any payments under its contract.<sup>19</sup>

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<sup>19</sup> At the start of the Mariner project, Altor and Avcon did not receive any payments from Daibes for 60 days (Tr. 907-08). Avcon's labor costs would have been well over \$100,000 a week, or more than \$800,000 total; the cost of labor was purported to have been \$2.1 million attributed to the 17-week project (Tr. 830, 929-30 995-96). Nevertheless, Avcon and Altor were able to pay the laborers and the costs for materials during the initial eight weeks. Nick Saites, Altor's indirect owner, testified that he did not know how the job was funded during this period (Tr. 785-86). Avcon essentially bankrolled Daibes Bros. during the first two months of the project, paying at least \$800,000 in cash for the project's labor and material costs. There was no suggestion that the Saites borrowed this amount short term from the bank (Tr. 88). And, the ease with which Nick Saites agreed to the delay in payment and lack of negotiation implies that the Saites had this amount of cash (or could easily obtain it) without having to borrow and pay short-term interest costs (Tr. 88, 907-08).

However, at the time of the hearing in this case in January 2001, Avcon had only \$9.88 in its bank account and no other significant assets.

During the hearing in January 2001, Avcon was still owed \$139,000 (Ex. C-165), representing more than 50% of Avcon's "net profit" from the Mariner project. When questioned, Bill Saites initially testified that Altor had not received full payment from Daibes (Tr. 1123 ("Altor had not received all the money from Daibes")), implying that Daibes' failure to pay Altor was the reason Avcon had not yet been paid. He finally admitted, however, that Daibes had paid Altor (Tr. 1125). After being pressured by the ALJ, he eventually testified that Avcon would be paid in "due course" (Tr. 1122, 1129). Notwithstanding, his testimony shows that he was manipulating the payments, attempting to indefinitely postpone payment of Avcon's portion of the profit to make Avcon look impecunious at the time of the hearing.

Nick candidly stated that placing assets beyond the reach of any liability, and specifically OSHA liability, was a prime reason for forming Avcrete. (Ex. C-255, pp. 50-51, 178-79). The Saites awarded Avcrete their next project, the building of the Mariner garage. The conclusion is thus inescapable that Avcrete was formed and awarded the next contract to avoid putting funds into Avcon that might be available for OSHA penalties (Ex. C-255, pp. 178-79).

The facts that Avcon had hundreds of thousands of dollars when it needed to pay laborers and material suppliers, but not when the hearing considering penalties took place; that Bill Saites indefinitely postponed the payment of Avcon's portion of the profit to attempt to make Avcon look as insolvent as possible; and that rather than refinancing Avcon with the Mariner garage project, the Saites formed Avcrete with the express purpose of avoiding Avcon's potential penalty liability show that the Saites manipulated payments to Avcon to assure that Avcon was undercapitalized for the purpose of meeting any penalty obligations under the Act.

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## **2. Failure to observe corporate formalities**

The "lack of formalities in a closely-held or family corporation has often not . . . [had] as much consequence," compared with other types of corporations. *Zubik v. Zubik*, 384 F.2d at 271 n. 4. Still, the record here demonstrates that corporate formalities were not observed. Avcon held no annual shareholders' meetings except that Bill Saites talks to his wife "at times over breakfast in the morning"; and Avcon has no minute book nor any minutes for shareholder meetings (Tr. 943).

Similarly, in forming Altor, no organizational shareholder's meeting was ever held (Tr. 832); and Altor has neither minute books nor any minutes for shareholder meetings (Tr. 834-835, 889). Its president, sole officer, and sole director, Bill Saites, claims not to know the identity of the shareholders (Tr. 735, 899). If true, the complete lack of communication between the corporation and its shareholders is a further indication that corporate formalities were not observed. But, notwithstanding his lack of communication, there are no limitations on Bill Saites' authority (Tr. 905, 906), and the stockholders do not direct his activities (Tr. 959-60). In addition, Bill Saites essentially subcontracted "with himself" to divert some of the Mariner profits from Altor to Avcon for his and his wife's benefit (Tr. 912).

The lack of formalities shows that Bill Saites dominated the corporations.

## **3. Nonpayment of dividends**

Neither Altor nor Avcon has ever paid a dividend (Tr. 842, 926). In addition, the grossly undervalued salaries paid to Bill and Nick Saites, \$100 a week to Bill and \$300 to Nick (Tr. 777-78, 927), demonstrate that the Saites did not have an arm's length relationship with the companies. The Saites both worked full-time on the project and must have expected compensation for both their labor and their managerial responsibilities. That they were obtaining

this compensation by some means other than salary and dividends shows that there was not an arm's length relationship with the companies.

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

Following the Mariner project, Bill testified that the corporation had \$9.88 in the bank, but eventually admitted that Avcon had an account receivable from Altor of \$139,000 (Tr. 1122, 1125, 1126).<sup>20</sup> And by the Saites' design, the company remained without funds, for they elected to form a new company, Avcrete, rather than recapitalize Avcon with the Mariner parking garage contract (Ex. C-255, pp. 178-79).

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

The record in the two cases shows that the contract profits were divided between Altor and Avcon, but that Avcon's proportionate share of the contract profits was never paid to Avcon. The record also shows that when the corporations needed large amounts of cash, it was available, but when it appeared that the Avcon might become liable for OSHA penalties, there was no cash in Avcon and new projects were placed in a newly formed corporation. Although there is no direct evidence of where the more than \$400,000 in profits from the Mariner job are now, the conclusion is inescapable that funds were siphoned off from the corporations by those who controlled their finances: Bill and Nick Saites.

**6. Nonfunctioning of other officers or directors**

Bill Saites was Avcon's only officer (Tr. 736). Only Bill could sign checks for Avcon (Ex. C-255, p. 57). Bill set his own salary and Nick's salary (Tr. 777, 907, 922-23, 927; Ex. C-255, pp. 124-25). Bill negotiated the Hackensack Project contract with Fred Daibes, who

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<sup>20</sup> With respect to Altor, Bill Saites testified that, aside from revenues from contracts, Altor's assets consisted solely of good will, a couple of trucks and "some cash," amount unspecified (Tr. 843-44).

testified that he considered the names "Bill Saites" and "Altor" to be interchangeable (Tr. 88, 905-07). Bill executed the Altor/Avcon subcontract on behalf of both companies (C-115).

By contrast, the record reflects that other than speaking with her husband over breakfast and contributing her name as Avcon's majority shareholder, Cornelia Saites took no part in the corporation. Bill did not even recall showing his wife the Altor/Avcon contract for the Hackensack Project before it was executed (Ex. C-53, p. 289). *Avcon I*, p. \*12. Mrs. Saites had no authority to sign Avcon checks (Ex. C-255, p. 57).

Similarly, Bill Saites is the only officer of Altor. He stated that there were no limits to his authority as the sole officer and director of the company (Tr. 905). There are no procedures in place for shareholder ratification of Altor contracts (Tr. 905). The stockholders did not direct Bill Saites' activities, and he did not report to them (Tr. 959-60).

**7. Absence of corporate records**

Bill Saites admitted that Avcon has neither minute books nor any minutes for shareholder meetings. Similarly, there is no minute book for Altor, and no records of any actions relating to shareholder meetings or shareholder ratification of actions taken by officers.

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

Bill Saites has been in the construction business for over 40 years, operating through a number of corporations. In recent years, he has used three corporations -- Altor, Avcon, and Avcrete -- to conduct the family business. He incorporated Avcon to manufacture a minority contractor to secure HUD financing for the Hackensack Project and to limit liability by funneling much of the project funds through a corporation that could be kept free of funds except those necessary to pay for the Project's material and labor costs as they arose. By the end of the Mariner apartment-building project, he abandoned Avcon with \$9.88 to avoid paying OSHA

penalties incurred during the Hackensack and Mariner Projects and formed Avcrete to continue the next phase of work at the project.

A businessman may incorporate to limit his personal liability to the amount of assets invested in and profits from his business. However, the use of multiple corporations to ensure that the profits from the enterprise never materialize in the accounts of the ostensibly liable corporation is not a legitimate use of the corporate form. *See Bowater Steamship Co. v. Patterson*, 303 F.2d 369, 372 (2d Cir. 1962), *cert. denied*, 371 U.S. 860 (1962) (strong policy behind the Norris-LaGuardia Act is not to be defeated by the fragmentation of an integrated business into congeries of corporate entities); *Sea-Roy Corp. v. Parts R Parts, Inc.*, 173 F.3d 851 (unpublished), 1999 WL 111281, \*4 (4th Cir. 1999) (excessive fragmentation of a single enterprise into separate corporations is a factor in whether to pierce the corporate veil).

**9. An element of injustice or fundamental unfairness**

As noted above, the Supreme Court has held that public policy is not to be thwarted by interposition of the corporate structure. *Bancex*, 462 U.S. 611; *Bangor Punta*, 417 U.S. 703. When the intent of Congress and the corporate form come into conflict, the legislative goal prevails: "It has often been held that the interposition of a corporation will not be allowed to defeat a legislative policy, whether that was the aim or only the result of the arrangement." *Anderson v. Abbott*, 321 U.S. at 362-63; *see also Pearson*, 247 F.3d at 484, n. 2, 488 (state corporate laws may not be permitted to frustrate federal objectives). The *Pisani* decision likewise emphasized the importance of vindicating the legislative purposes of the Medicare program both in its choice of a uniform federal standard, 646 F.2d at 86-87, and in its application of that standard to the facts before it. *Id.* at 88. *See also Alman v. Danin*, 801 F.2d 1, 3-4 (1st Cir. 1986) ("deferring too readily to the corporate identity may run contrary to the explicit

purposes of the Act"); *Capital Telephone Co. v. FCC*, 498 F.2d 734, 738 (D.C. Cir. 1974)("a corporate entity may be disregarded in the interests of public convenience, fairness, and equity"); *Lowen v. Tower Asset Mgmt., Inc.*, 653 F. Supp. 1542, 1548-53 [quote at 1551] (S.D. N.Y. 1987) ("the remedial thrust of ERISA is not to be frustrated by meticulous emphasis upon the corporate form"), *aff'd on other grounds*, 829 F.2d 1209 (2d Cir. 1987).<sup>21</sup>

It would thwart the purposes of the OSH Act to allow business operators to avoid protecting employees by acting through corporations that are deliberately kept without sufficient funds to pay meaningful penalties and, thus, brought to comply. Businesses who deal with a corporation have means of protecting their interests: lenders can insist that loans be personally guaranteed by the individual owners; persons who contract with the corporation can insist on performance bonds; suppliers can require payment at the time of delivery; but workers have no such options. Because they have no way of learning about their employer's financial condition or whether the contract under which they will be working provides adequate fall protection costs, workers have no realistic way to protect themselves other than looking to OSHA.

As discussed above in Part II, both the courts and the Commission recognize that "OSHA must rely on the threat of money penalties to compel compliance by employers . . . ."

*Jacksonville Shipyards*, 102 F.3d at 1203, *quoted in Revoli Constr. Co.*, 19 BNA OSHC 1682,

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<sup>21</sup> Indeed, courts examining the OSH Act have remarked that its statutory definition of "employer," 29 U.S.C. 652(5), may encompass individuals, so that the corporate form may be set aside in appropriate circumstances, and one district court has so held. Thus, in *United States v. Cusack*, 806 F. Supp. 47 (D. N.J. 1992), the court held that an individual officer or director of a corporation whose role in a corporate entity was "so pervasive and total that the officer or director is in fact the corporation" would be an "employer" within the meaning of the OSH Act's criminal provision, 29 U.S.C. § 666(e). See also *United States v. Shear*, 962 F.2d 488 (5th Cir. 1992) (*dicta* suggesting an individual may be criminally charged as an employer under the OSH Act, although company supervisors in these cases were unsuccessfully indicted under 18 U.S.C. § 2(a) for allegedly aiding and abetting criminal violations of the Act pursuant to § 666(e).); *United States v. Doig*, 950 F.2d 411 (7th Cir. 1991)(*dicta*). Prior to ALJ Rooney's decision in *Avcon I*, another Commission judge had ratified this analysis as applied to the civil context. *Louis Sinisgalli et al.*, 17 BNA OSHC 1849 (No. 94-2981, 1996) (ALJ). See also *Life Science Products Co.*, 6 BNA OSHC 1053 (No. 14910, 1977) (Chairman Cleary considers application of term "employer" to individual; corporate status lapsed), *aff'd sub nom. Moore v. OSHRC*, 591 F.2d 991 (4th Cir. 1979).

1687 (No. 00-0315, 2001). Permitting an employer to go out of business to avoid or, at least, indefinitely postpone paying OSHA penalties, reincorporate under a different name, and continue the business greatly diminishes the effectiveness of the penalties. *Jacksonville*, 102 F.3d at 1203. Here, Nick Saites candidly admitted that Avcrete was formed because Avcon had potential OSHA penalty liabilities. DO at 6. Indeed, Avcrete was formed and Avcon abandoned while staring down the barrel of a potential \$130,000 fine in the Hackensack case (*Avcon I*), and a more than \$400,000 fine in this case.

These circumstances more than meet the ninth element of the *Pisani* analysis; the Saites' companies have been thwarting the Congressional policies underlying the OSH Act almost since the day the statute was enacted.<sup>22</sup> It appears that the only way to compel a Saites company to honor its responsibilities under the OSH Act is to pierce the corporate veil and hold personally liable the individuals who really are this concrete construction enterprise. Perhaps once they are personally responsible, the Saites will begin to meet their most important duty under the OSH Act, to provide a safe and healthful workplace for their employees.

In sum, the evidentiary and legal authority present compelling reasons for holding that Bill and Nick Saites are "employers" under the OSH Act, thereby requiring them to abate the violations and pay assessed civil money penalties.

**IV. THE ALJ CORRECTLY AFFIRMED CITATION 2, ITEM 1 FOR THE FAILURE TO WEAR HEAD PROTECTION AS A WILLFUL VIOLATION.**

**A. THE ALJ CORRECTLY AFFIRMED CITATION 2, ITEM 1.**

The ALJ correctly affirmed Citation 2, Item 1 alleging 13 instances of violating Sec. 1926.100(a) for the failure to wear head protection.<sup>23</sup> This standard requires the use of head

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<sup>22</sup> In May 1973, Astro received a citation for failing to comply with the hard hat standard (Ex. C-35).

<sup>23</sup> Section 1926.100(a) provides as follows:

protection where the nature of the work gives rise to "a **possible** danger of head injury."

*Donovan v. Adams Steel Erection, Inc.*, 766 F.2d 804, 811 (3d Cir. 1985)(emphasis in original).

It does not "require that employees **actually** be exposed to injury." *Id.* (emphasis in original).

*See Franklin R. Lacy (Aqua View Apartments)*, 9 BNA OSHC 1253 (No. 3701, 1981).

The ALJ affirmed the violations on the ground it was "undisputed" that the employees listed in Instances (a) through (m) worked without hard hats in violation of the standard. DO at 10. The record also established that "Avcon knew its employees habitually removed their hard hats"; that "Bill Saites was unsurprised to learn that employees had been observed working with their heads unprotected"; and that "Saites also refused to wear a hard hat." DO at 10. The record overwhelmingly supports the ALJ's findings and holdings.

To prove a violation, the Secretary must show: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard, (c) employee access to the violative conditions, and (d) that the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions. *Kulka Constr. Mgmt. Corp.*, 15 BNA OSHC 1870, 1873 (No. 88-1167, 1992).

The record reflects that on October 23 and 24, and November 3, 1998, as the ALJ correctly found, OSHA observed 13 instances of employees not wearing hard hats, working on the ground, 8th, 11th, 12th, and top levels, exposed to being struck by materials falling from overhead (Tr. 372-96, 1071, Ex. C-196, C-275). In addition, throughout the inspection, specifically on October 23, 24, 27, 29 and November 3, 4, 10 and 16, 1998, Bill Saites himself

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

29 C.F.R. § 1926.100(a).

walked and worked in various work areas without a protective helmet (Tr. 384-85).<sup>24</sup> When CO Donnelly confronted Bill Saites, Bill laughed at him and refused to don a hard hat (Tr. 384).

Respondents argue that the evidence does not support the alleged instances and the employees were not subject to the risk of injury. Resp PDR at 7-9. But, as described above and in the ALJ's decision, the violations are supported by CO Donnelly's testimony corroborated by the videotape. Donnelly saw lumber and other parts of the formwork falling over the side of the building. He also saw employees walking out of the building and looking up to be sure nothing was coming down (Tr. 360-61). Nick Saites admitted during his interview on December 21, 1998, that he believed employees on the deck receiving crane loads should have been wearing hard hats (Tr. 377). The record therefore overwhelmingly supports the ALJ's findings that hard hats were not worn at this worksite; employees were exposed to the hazard of head injuries; and Avcon had actual and constructive knowledge of the violations.<sup>25</sup> Respondents' argument that no evidence supports the violations is completely refuted by the record.

Bill Saites testified that the men do not like to wear the hard hats and find excuses not to wear them (Tr. 996-98). This precise argument was made to and rejected by the Third Circuit nearly 30 years ago. *Atlantic & Gulf Stevedores, Inc. v. OSHRC*, 534 F.2d 541 (3d Cir. 1976) (court rejected employers' argument that compliance was infeasible, because employees were likely to strike if required to wear hard hats).

Bill Saites' testimony also does not make out an affirmative defense of employee misconduct. Under Commission precedent, to prevail on the defense, an employer must show that it has (1) established work rules to prevent the violation, (2) adequately communicated those

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<sup>24</sup> Ex. C-275 segment 02:04:32.00 - 02:04:44.00.

<sup>25</sup> The construction industry recognizes that employees are exposed to being hit by a myriad of falling materials including dropped tools through shaft ways, holes, off the edge of the building, or off of the formwork, requiring the use of hard hats whenever employees are working on and around the building (Tr. 383). Indeed, Avcon's own safety program requires employees to wear hard hats "at all times" (Tr. 377-78, 1039; Ex. C-6).

rules to its employees, (3) taken steps to discover violations, and (4) effectively enforced the rules when violations have been discovered. *CBI Services, Inc.*, 19 BNA OSHC 1591, 1603 (No. 95-0489, 2001), *pet. for review filed*, No. 01-1519 (D.C. Cir., Dec. 21, 2001). Although Avcon had a rule (Tr. 377-78; Ex. C-6), it did not train on its rule; it did not take steps to discover violations; and it did not enforce its rule (Tr. 391). It thus failed to make even a *prima facie* showing of the defense. *CBI*, 19 BNA OSHC at 1603. Bill's participation in the misconduct further strengthens the conclusion that Avcon's safety program was lax and the failure to wear a hard hat at this worksite was not considered misconduct. *See CBI* (supervisory "involvement in . . . [asserted] misconduct is strong evidence that the employer's safety program is lax").

In sum, the ALJ correctly held that Avcon failed to establish the affirmative defense of employee misconduct and correctly affirmed the violations based on the evidence. DO at 11.

**B. THE ALJ CORRECTLY AFFIRMED CITATION 2, ITEM 1 AS A WILLFUL VIOLATION.**

The ALJ held that "Avcon's history of repeated violations of the cited standard demonstrate[d] its heightened awareness of its duty under the Act"; and Bill Saites' refusal to comply with the Act's requirements, or to enforce Avcon employees' compliance constituted a "deliberate disregard" of the standard. DO at 13. The violations were therefore willful. *Id.*

Respondents argue that in the Third Circuit, the Secretary is required to show an "obstinate refusal to comply" on the employer's part. Resp PDR at 5-6, *citing Frank Irey, Jr., Inc. v. OSHRC*, 519 F.2d 1200 (3d Cir. 1975), *aff'd on other grounds en banc*, 519 F.2d 1215, *aff'd on other grounds sub nom. Atlas Roofing v. OSHRC*, 430 U.S. 442 (1977). In this case, Respondents argue, the evidence shows that Avcon had a rule requiring the wearing of hard hats, which it enforced; the times that OSHA observed the lack of hard hats, there was no possibility of head injury; and, in any event, the instances were isolated. Resp PDR at 6-9.

"A violation is willful if committed with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *Williams Enters., Inc.*, 13 BNA OSHC 1249, 1256 (No. 85-355, 1987). A willful violation is differentiated from other types of violations by a "heightened awareness -- of the illegality of the conduct or conditions -- and by a state of mind -- conscious disregard or plain indifference." *Williams*, 13 BNA OSHC at 1256-57.

An employer who knows of a standard's requirements, but who chooses to ignore them acts willfully as a matter of law. *F.X. Messina Constr. Corp. v. OSHRC*, 505 F.2d 701, 702 (1st Cir. 1974); *Caterpillar, Inc. v. Herman*, 154 F.3d 400, 402 (7th Cir. 1998) ("The distinction [between conscious disregard and mere carelessness] is similar to that in tort law between recklessness and negligence, . . . ." Thus, if an employer's "managers or supervisors, whose knowledge . . . is imputed to the company[,] knew about the violation and could have corrected it but failed to do so, then the violation was willful"); *Aviation Constructors, Inc.*, 18 BNA OSHC 1917, 1920 (No. 96-0593, 1999)(*prima facie* case where employer had notice of the standard and was aware of the condition violating the standard, but failed to eliminate employee exposure).

There is little if any difference between the Third Circuit's approach and that of the other courts of appeals. *Universal Auto Radiator Mfg. Co. v. Marshall*, 631 F.2d 20 (3d Cir. 1980). Proof of "bad purpose" or "malicious intent" is not required. *Babcock & Wilcox v. OSHRC*, 622 F.2d 1160, 1167 (3d Cir. 1980).

Here the record overwhelmingly demonstrates that the Saites had a "heightened awareness" of the standard from the following: numerous citations that are Commission final orders and that Saites companies received beginning in 1973 for violating the standard (Ex. C-12, C-22, C-23, C-33, C-35, C-36, C-41, C-43, C-44, C-47, C-49); *Pentecost Contracting Corp.*,

17 BNA OSHC 1953, 1955 (No. 92-3788, 1997); from the affirmed willful citation of the standard from the Hackensack Project inspection, *Avcon I*, 2000 WL 1466090, \* 32 - \*35; from CO Donnelly's discussion with both Bill and Nick Saites about the need for hard hats at the start of the inspection at issue here (Tr. 395); and from Avcon's own rule requiring that hard hats be worn "at all times" (Tr. 395). See Ex. C-6, second page of exhibit, "Minimum Safety Rule" No. 4: "**Hard hats** shall be worn by **everyone** on the job at **all times**" (emphasis in original)).

Proof that the Saites refused to comply is also overwhelming. Contrary to Respondents' argument in its PDR that it enforced its rule, the Saites readily admitted that they did not enforce the rule. Nick Saites stated, "I give them helmets . . . . What else am I supposed to do? I'm not going to fire them. If they don't wear it, they don't wear it" (Tr. 391). Bill Saites refused categorically to wear a helmet.

In sum, the record demonstrates, as the ALJ correctly held, that Bill Saites' refusal to comply or to enforce compliance was a "deliberate disregard" of the standard. The violation was properly classified as willful.

**V. THE ALJ CORRECTLY AFFIRMED A PENALTY OF \$32,000.**

The OSH Act mandates that penalty assessments be based on four factors, to wit: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history of violations. 29 U.S.C. § 666(j); *MJP Constr., Co.*, 19 BNA OSHC 1638, 1649 (No. 98-0502, 2001), *pet. for review filed*, No. 02-1024 (D.C. Cir., Jan. 15, 2002). Gravity is the principal of the four statutory factors. *Amerisig Southeast, Inc.*, 17 BNA OSHC 1659, 1661 (No. 93-1429, 1996). The penalty factors need not be given equal weight. *MJP*, 16 BNA OSHC at 1649. The penalty, however, must be sufficient to ensure future compliance. "The purpose of a penalty is to achieve a safe workplace, and penalty assessments, if they are not to become simply

another cost of doing business, are keyed to the amount an employer appears to require before it will comply." *Quality Stamping Prods. Co.*, 16 BNA OSHC 1927, 1929 (No. 91-414, 1994).

In this case, the factors support the ALJ's penalty assessment. With respect to gravity, if an accident occurred, any head injuries could be very grave. Even a small item falling eight stories could cause a serious head injury or kill an employee (Tr. 389). The record shows that multiple employees were exposed over several days when the inspector was on site and there is no reason to believe that compliance improved when he was not on site. With respect to the element of good faith, as the ALJ correctly found, there "is no mitigating evidence in the record." DO at 13. Respondents had a history of violating this standard, continually refusing to assure compliance with this standard since almost the inception of the Act. Bill Saites demonstrated a cavalier and inexcusable disregard of the standard by his personal defiance of the standard and of his own work rule. With respect to size, the initial gravity-based penalty calculated according to the Field Inspection Reference Manual was reduced 20 percent for Avcon's small size (Tr. 390).

In sum, the record and law fully support the \$32,000 penalty proposed by the Secretary and affirmed by the ALJ. *See MJP*, 19 BNA OSHC at 1649.

**VI. THE ALJ CORRECTLY AFFIRMED CITATION 2 ITEMS 2 THROUGH 7 FOR THE FAILURE TO ASSURE FALL PROTECTION.**

The ALJ correctly affirmed 31 willful violations of Sec. 1926.501(b)(1) requiring fall protection on unprotected sides and edges.<sup>26</sup> DO at 18, 26, 27, 29, 30. The great weight demonstrates that the violations occurred as cited and affirmed by the ALJ.

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<sup>26</sup> Sec. 1926.501(b) provides, in pertinent part, as follows:

(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 guardrail systems, safety net systems, or personal fall arrest systems.

29 C.F.R. § 1926.501(b)(1).

On October 23 and 24, 1998, OSHA observed seven instances of Avcon employees without fall protection and approximately two feet from the outside edge of the building, if not closer, installing reshores, stripping concrete, carrying lumber and performing other work on the 8th floor (Tr. 396-415; Ex. C-275)(Citation 2, Item 2). One of the employees leaned out over the edge of the building while CO Donnelly watched (Tr. 408)(Citation 2, Item 2, Instance f).

On October 23, when OSHA first arrived at the worksite, there was an incomplete guardrail erected around the top deck (10th floor) and Avcon employees<sup>27</sup> were working with no fall protection, exposed to 97 foot falls, pouring concrete, finishing the floor, and bending rebar (Tr. 419-23, 426, 479). According to Nick, the employees had been working on that deck since 7:00 a.m. that morning (Tr. 223). The guardrail consisted of only one midrail 24-inches high (Tr. 420-22, 427 (Ex. C-275 frame 01:52:33:09), 479). The inadequate guardrail was brought to the attention of Bill Saites before he refused entry to the OSHA personnel (Tr. 203). Neither Nick nor Bill Saites could explain to OSHA personnel why there was an inadequate guardrail in place on the top deck (Tr. 420, 431). Over that day and the next, OSHA observed 10 more instances of employees including Nick Saites working on the top deck and 9th levels without fall protection near inadequately constructed guardrails or in areas where the guardrails did not extend (Tr. 420-440; Ex. C-190, C-194, C-227, C-228, C-275)(Citation 2, Item 3).

On October 27, OSHA observed violations on the 10th and 11th floors (Citation 2, Item 4). Avcon ironworkers laying steel rebar at the unprotected edge of the top deck (11th floor) had no guardrail protection and no other means of fall protection (Tr. 454-56, 459-60); Ex. C-225, C-226)(Instance a). The guardrails in place were only in the southwest corner and along the north and west sides, extending approximately halfway around the deck (Tr. 456-57). Bill Saites told

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<sup>27</sup> The employees were identified as Avcon employees by Jerry O'Brien, the masonry foreman, and Nick Saites (Tr. 421).

CO Donnelly that Avcon did not have enough brackets to erect guardrails around the entire deck and he would have to order more (Tr. 224-25, 457, 461). On October 27, two employees with no fall protection were seen clamping formwork and installing shoring at the unprotected edge of the 10th floor (Tr. 457-58, 462-65; Ex. C-225, C-226) (Instance b).

On October 29 and November 3 and 4, OSHA observed seven more instances of violations on the 11th and 12th floors (Tr. 466-491; Ex. C-230, C-232, C-247, C-275)(Citation 2, Item 5). On October 29, the deck (12th floor) was partially protected by a guardrail, but employees working near the edge, carrying and tying rebar were working in areas without guardrail or other fall protection (Tr. 466-68, 485-87; Ex. C-230). CO Donnelly confronted Bill Saites about the lack of guardrails. Bill, however, refused to interrupt pouring concrete to bring lumber up for the guardrails (Tr. 467) (Citation 2, Item 5, Instance a). Other Avcon employees were observed on November 3 and 4, 1998, clamping columns at the unprotected edge of the 12th floor; picking up pieces of lumber at the unprotected edge of the 11th floor; using a sledgehammer to strip concrete at the edge of the 11th floor; stripping formwork and carrying lumber at the unprotected edge of the 11th floor; and picking up pieces of lumber at the unprotected edge of the south side of the 11th floor with no fall protection (Tr. 468-84; Ex. C-232; Ex. C-247)(Item 5, Item Instances b through g).

On November 4, 1998, on the 12th and 13th floors, Avcon employees were observed stripping columns at the unprotected edge of the 12th floor (Instance a) and the curbing from the unprotected edge of the 13th floor with no fall protection (Instance b)(Tr. 500-06; Ex. 246) (Citation 2, Item 6).

On November 16, 1998, on the top deck (16th floor) and the 15th floor, employees were seen working without fall protection. On the top deck, they were installing rebar at the

unprotected edge (Tr. 511-19; Ex. C-275)(Citation 2, Item 7, Instance a). Once again, the top deck was only partially protected by a guardrail so that employees working right at the edge of the deck, well beyond the area that was protected by the guardrail, were exposed to a fall hazard (Tr. 516). Also on November 16, an employee was seen clamping columns at the unprotected edge of the 15th floor with no fall protection (Tr. 513-14, 516-18; Ex. C-251)(Item 7, Instance b). The height of the 15th floor was 143 feet, 8 inches above ground (Tr. 518-19).

Respondents first contend that the cited standard provision does not apply, because Avcon was engaged in "leading edge" work. Resp PDR at 14-15; DO at 16. As the ALJ correctly held, none of the cited work was leading edge work. DO at 17.

Subpart M defines a "leading edge" as follows:

*Leading edge* means the edge of a floor, roof, or formwork for a floor or other walking/working surfaces (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.

29 C.F.R. § 1926.500(b).

The evidence demonstrates, as described above, that employees were stripping formwork, installing reshores, pouring concrete, finishing the concrete, installing rebar, installing column clamps and metal bracing, and carrying lumber. No one was laying the deck. Under the standard, therefore, none were engaged in leading edge work (Tr. 1793-95). DO at 17.

Respondents also contend that the Secretary failed to introduce credible evidence demonstrating the violations. They argue that there was a lack of foundation and demonstrative proof. Resp PDR at 12, 13, 27, 30. The recital of the record above and in the ALJ's decision refutes this contention. Respondents failed to explain why CO Donnelly's observations and the videotape lack credibility. *Id.*

Respondents aver that the employees were not exposed to a hazard, because they were not within six feet of the edge. They contend that the outriggers and formwork extended six feet beyond the edge of the deck, beyond where employees would have been required to work. Resp PDR at 12, 29, 33. DO at 17-18.

Under the Commission's longstanding "reasonably predictable" test for hazard exposure, the Secretary may establish exposure by showing actual exposure or that exposure is reasonably predictable. *Phoenix Roofing Inc.*, 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995); *Gilles & Cotting, Inc.*, 3 BNA OSIIC 2002, 2003 (No. 504, 1976). "Reasonable predictability, in turn, may be shown by evidence that employees while in the course of assigned work duties, personal comfort activities, and normal means of ingress/egress would have access to the zone of danger." *Phoenix Roofing*, 17 BNA OSHC at 1079 n. 6. The CO's eyewitness testimony corroborated by the videotape demonstrates both actual exposure and that exposure was reasonably predictable.

In addition, as the ALJ correctly held, the videotape evidence comports with Avcon's own description of its employees' job duties. DO at 18. The record reflects that erection and stripping of the formwork required employees to work within one foot of the edge of the floor, as did the subsequent installation and removal of reshores (Tr. 770-75). In areas with no balconies, exterior perimeter columns that would have required framing, clamping, and unclamping were six inches from the edge of the concrete floor (Tr. 771). Other framing activities and the installation of rebar also required employees to work within six feet -- and sometimes within six inches -- of the edge of the concrete floor (Tr. 770-75).

This evidence shows that employees' work activities took them within the danger zone. *See Phoenix Roofing*, 17 BNA OSHC at 1079 (record established that access to violative condition was reasonably predictable where employees retrieved materials within 12 feet of an

unguarded skylight opening); *Brennan v. OSHRC (Underhill Constr. Corp.)*, 513 F.2d 1032, 1039 (2d Cir. 1975) (employees exposed at 10 and 15 feet from the edge; Secretary need not show employee was "teetering on the edge of the floor").<sup>28</sup> This evidence also shows that Respondents had actual and constructive knowledge of these violations that were in plain sight of Avcon's owners and foremen.

In sum, the record overwhelmingly supports the ALJ's finding that the violations occurred as alleged.

## **VII. RESPONDENTS FAILED TO PROVE THEIR AFFIRMATIVE DEFENSES OF INEASIBILITY AND GREATER HAZARD.**

### **A. RESPONDENTS FAILED TO PROVE INFEASIBILITY.**

Section 1926.501(b)(1) mandates the use of at least one type of conventional fall protection. 29 C.F.R. § 1926.501(b)(1) ("shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems"). Respondents argue that all forms of fall protection required by the standard were infeasible for the cited work. Nets were infeasible, they argue, because the concrete would not have sufficient time to cure to hold embedments for nets and the building specifications did not permit structural embedments. Resp PDR at 16-17. Fall arrest and fall restraint systems were infeasible, because the formwork would not support the required anchorage, and, again, the concrete was insufficiently strong to support the required anchorage. Resp PDR at 20-22. Finally, they claim guardrails were infeasible, because the guardrails would be continually damaged by the stripping operation. *Id.*

The ALJ rejected Respondents' affirmative defense on the ground that Respondents failed to demonstrate that guardrails were infeasible. DO at 22. The ALJ correctly held that Avcon failed to shoulder its "burden of proof on this issue, present[ing] **no evidence whatsoever** in support of its contention that guardrails were infeasible." DO at 22 (emphasis added).

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<sup>28</sup> The standard requires protection regardless of the distance from the exposed edge for the reason that it is "nearly impossible to develop a policy for most every situation that may or may not require guarding." 59 Fed. Reg. 40,682. "[T]here is no 'safe' distance from an unprotected side or edge that would render fall protection unnecessary." *Id.*

The term "infeasible" means that the construction work is impossible to perform or that each conventional fall protection system is technologically impossible to employ. 29 C.F.R. §1926.500(b); 59 Fed. Reg. 40,672, 40,684-85; *Cleveland Consol., Inc. v. OSHRC*, 649 F.2d 1160, 1167 (5th Cir. 1981); *see also, E & R Erectors, Inc. v. Secretary*, 107 F.3d 157, 163 (3d Cir. 1997).<sup>29</sup>

The burden of proof (persuasion) is on the employer to show both that the method required under the terms of the standard is infeasible and that either an alternative protective measure was used or there was no feasible alternative measure. *Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1225-28 (No. 88-821, 1991). *Accord A.J. McNulty*, 19 BNA OSHC 1121, 1129 (No. 94-1758, 2000), *aff'd*, 283 F.3d 328 (D.C. Cir. 2002). The Commission requires "employers . . . [to] alter their customary work practices to the extent that alterations are reasonably necessary to accommodate the abatement measures specified by OSHA standards." *Seibel*, 15 BNA OSHC at 1228. Moreover, the employer "has a duty to plan a method of construction that enables him to comply with OSHA regulations if possible." *Cleveland Consol.*, 649 F.2d at 1166 n. 11; *followed A.J. McNulty*, 283 F.3d 328.

Here, Respondents did not show that conventional fall protection would have been infeasible. Indeed, as the ALJ correctly noted, Respondents' expert Louis Nacamuli testified that guardrails would have been feasible (Tr. 1474-77, 1484). This admission is itself sufficient to defeat Respondents' affirmative defense. Notwithstanding, Respondents also failed to support their contentions with reliable evidence that the other systems were infeasible.

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<sup>29</sup> The Third Circuit, in which this case arises, refers to the defense as the "impossibility" defense, requiring the employer to prove that: (1) it was impossible to comply with the standard's requirements or compliance would have precluded the performance of the work; and (2) there were no alternative means of employee protection available. *E & R Erectors*, 107 F.3d at 163. Although the Commission's test is arguably less rigorous, the Secretary submits that Respondents have not established their defense under either test. Because the violations arose in the Third Circuit, the Commission is bound by the Third Circuit authority. *Jones & Laughlin Steel Corp. v. Marshall*, 636 F.2d 32, 33 (3d Cir. 1980). *See D.M. Sabia Co.*, 17 BNA OSHC 1413 (No. 93-3274, 1995)(Commission applies Third Circuit precedent), *rev'd on other grounds*, 90 F.3d 854 (3d Cir. 1996).

1. **Respondents failed to show that nets were infeasible.**

Avcon's expert, Leo Nacamuli, testified that nets were infeasible, because the concrete would not cure sufficiently to have the strength to support plates to anchor the nets in time for the work to proceed at a three-day pour schedule (Tr. 1474, 1477-79, 1491, 1494). He, however, had never worked at a site where nets were used for fall protection and had never investigated to determine whether nets were available to accommodate a three-day pour schedule (Tr. 1506, 1523). Nick Saites testified that he telephoned net manufactures that told him safety nets took four to five days to install. He, however, did not inquire whether they had a system that would accommodate a three-day pour schedule (Tr. 1372-81).

The Secretary's expert, on the other hand, clearly established feasibility. Daniel Paine, a fall protection consultant with 40 years of experience, explained that with the floors being poured at the rate of two floors per week, a net system with two nets jumped over each other could provide fall protection for three floors at a time (Tr. 1651-52).<sup>30</sup> Nets can be anchored to C-clamps that are placed over the edge of the concrete floor and secured with heavy duty bolts, making embedments unnecessary (Tr. 1652-53). A net attached to the floor below the stripping floor will protect the pour, framing, and stripping floors (Tr. 1741). By the time the net is placed in service, the concrete floor supporting the C-clamp will have cured for at least a week (Tr. 1651-54, 1741), and the strength of the concrete (approximately 2700 psi) will be more than adequate to support the net (Tr. 1651, 1746, Ex. C-116).

Respondents failed to explain that they considered using C-clamps and two nets to accommodate their three-day pour schedule. They also failed to explain why their schedule could not have been modified to allow the installation of nets. Accordingly, Respondents failed to show that nets were infeasible. *See A.J. McNulty*, 19 BNA OSHC at 1133-34, *aff'd*, 283 F.3d

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<sup>30</sup> Daniel M. Paine is the president of a consulting firm in the business of construction safety and development of fall protection systems (Tr. 1691; Ex. C-291). Paine testified on fall protection in the development of Subpart R (Steel Erection) and Subpart M, and has served as an expert witness (Tr. 1693). He was formerly the president of Safety and Industrial Net Company ("SINCO") for 24 years, a designer and manufacturer of fall protection equipment including fall arrest, fall restraint, guardrail, and safety net equipment (Tr. 1691-93). He has chaired or been a member of the ANSI committees that produced the industry's fall protection standards (Tr. 1693). He has "a lot [of experience with fall protection systems] involving poured-in-place high-rise construction projects" including projects with three-day pour cycles and the use of safety nets, fall restraint, fall arrest and guardrails (Tr. 1695-96)

at 335, 337 (employer failed to explain how free standing or temporary guardrails would have been infeasible or why it could not have drilled holes and attached platform to make the platform more stable for guardrails).

**2. Respondents failed to show that guardrails were infeasible.**

Leo Nacamuli, a physical engineer testifying on behalf of Respondents, admitted that guardrails could have been used on the pour and stripping floors (Tr. 1474-77, 1484, 1495). He even testified to a method for constructing guardrails on the lower floors that involved placing the guardrails in brackets supported by 3-by-4's extending past the edge of the floor (Tr. 1476).

Although his testimony is not perfectly clear, Leo DeBobes, Respondents' other expert witness, agreed that guardrails could be erected on the pour floor or deck. He disagreed, however, that guardrails could be used on the stripping floor (Tr. 1578-79, 1591-92). He did not claim installation of guardrails on the lower floors to be infeasible however. He claimed that it would not be practical to have the same type of guardrail system on those floors and that guardrails would hinder employees pulling down materials extending beyond the edge of the building (Tr. 1578-79, 91-92, 1596). This testimony, however, does not demonstrate that the work was "impossible." *E & R Erectors*, 107 F.3d at 163; 59 Fed. Reg. 40,672, 40,684-85.

Avcon claimed that the guardrails would have been damaged during stripping from the falling formwork. But, as the ALJ correctly noted, it is not customary to allow the formwork to just "fall" and damage guardrails. DO at 22; Tr. 1749-50, 1752-56. Typically, the formwork is lowered to avoid damaging the guardrails (Tr. 1749-50, 1752-56).

The Secretary's experts also testified that prior to stripping the wooden guardrails, wire cabling could have been strung between exterior columns. This type of cabling would not interfere with stripping activities, and would provide employees with continuous fall protection (Tr. 1669-81, 1714). They testified that guardrail systems could have provided protection for employees on the deck, the framing floor, the stripping floor, and on any floor below on which an employee needed to perform work at the perimeter of the building (Tr. 1676-79, 1680-81,

1713-14). Respondents' own expert, Nacamuli, also testified that the guardrails could have been erected outside the columns, permitting the materials to be stripped more easily.

As the ALJ correctly held, Respondents failed to introduce any evidence to support their claim that guardrails were infeasible for the cited work. DO at 22.

**3. Respondents failed to show that fall arrest systems were infeasible.**

Avcon's experts initially testified that because neither the formwork nor the concrete was sufficiently strong to provide anchorage, fall arrest systems were infeasible (Tr. 1471-74, 1581-82). Although both admitted that the formwork could have been modified to support fall anchorage (Tr. 1472, 1593), Nacamuli testified that doing so would "defeat the easy taking down of the formwork" (Tr. 1522).<sup>31</sup> His testimony, however, does not demonstrate impossibility or infeasibility. 59 Fed. Reg. at 40,684-85; *Peterson Bros. Steel Erection Co. v. Reich*, 26 F.3d 573, 579 (5th Cir. 1994).

DeBobes testified that designing formwork to support anchorage points was not done "routinely" (Tr. 1593); but it was "possible" and "typical" to "plan in anchorage points in the construction of a high rise building" (Tr. 1594). The import of his testimony is that a fall arrest system was, in fact, feasible for the Mariner. He did testify that the lanyards would create a tripping hazard (Tr. 1581), but his testimony about planning effectively rebutted this last point, because it is evident that planning the work would abate any tripping hazard (Tr. 1594.1650).

In contrast to this unconvincing testimony, the Secretary's expert, Matthew J. Burkart,<sup>32</sup> a professional engineer, explained that anchorage points for a fall arrest system could have been either embedded into the concrete<sup>33</sup> or the formwork (Tr. 1647-48). The formwork could have

<sup>31</sup> Mr. Nacamuli also stated that he had never designed a system using lifelines and lanyards (Tr. 1486).

<sup>32</sup> Burkart has a degree in civil engineering and for the past 25 years has owned and run a consulting firm (Tr. 1624). His firm is engaged in construction management services, safety consulting services and safety training for the insurance and construction industries (Tr. 1624; Ex. C-290). He has lectured at technical and professional seminars around the world on the subject of construction safety (Tr. 1625-27); has served on American National Standards Institute ("ANSI") committees; and is a member of the American Concrete Institute and other professional organizations (Tr. 1627-30).

<sup>33</sup> Devices such as the Swiss Hammer or Windsor Probe are designed to test the strength of the concrete (Tr. 1736-38). If an employer had any concern whether the concrete had sufficient strength to support an anchor for personal fall arrest systems, these devices could be used to test the strength of the concrete. *Id.* Respondents did not show that they tested the strength of the concrete using these devices (Tr., *passim*).

been designed to accept the loads that a fall arrest system would impose by lateral bracing or "tying" a fairly large area of formwork together so that it is virtually one piece (Tr. 1648-49).

In addition, Respondents could have used a "fall restraint" system consisting of a lanyard attached to a fixed line limiting the distance that an employee can travel. Because this system prevents an employee from falling over the edge, it can be designed for much lower loads on anchorage points (Tr. 1646-47). OSHA has issued an official interpretation permitting the use of this type of system (Tr. 1791-92; Ex. C-274).<sup>34</sup> Respondents testified to generally why they believed that conventional fall protection was infeasible; however, they failed to explain why a fall restraint system would have been infeasible (Tr. 1409-12, 1414, 1415, 1432, 1451-53, 1472-73, 1484, 1522, 1526, 1532-33, 1589-90, 1593-95, 1621-22).

In sum, Respondents failed to introduce any evidence demonstrating that guardrails were infeasible for the cited work and they failed to explain why the other methods mandated by the standard could not have been employed to protect workers performing the cited work.

**B. RESPONDENTS FAILED TO PROVE GREATER HAZARD.**

To establish this affirmative defense, employers must show (1) that the hazards created by complying with the standard are greater than those of noncompliance, (2) other methods of protecting their employees from hazards were unavailable, and (3) a variance is unavailable or that application for a variance is inappropriate. *Walker Towing Corp.*, 14 BNA OSHC 2072, 2078 (No. 87-1359, 1991); *Spancrete Northeast, Inc.*, 15 BNA OSHC 1020, 1022 (No. 86-521, 1991); *Seibel*, 15 BNA OSHC at 1225.

As the ALJ correctly noted, the first two elements of the defense need not be addressed if the employer did not explain its failure to apply for a variance. DO at 23; *Spancrete*, 15 BNA

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<sup>34</sup> A fall restraint system can be anchored to the deck, a stringer, or a plate attached to the deck, because by preventing the occurrence of a fall, the system does not develop significant loads (Tr. 1646). On the deck, the lifelines can be anchored to the deck with a product called Safe-T-Strap attached to the formwork by nailing it through the plywood and into the stringers or ribs below (Tr. 1645-46, 1655; Ex. C-154). Restraint systems can also be used to protect employees who are installing guardrail systems (Tr. 1647). Thus, for example, to protect employees on the stripping floors, clamps can be placed around two columns with a line of cable strung between them to serve as an anchor for a fall restraint system (Tr. 1650). Having the lifeline attached to this cabling allows the employees to strip a large area before having to unclip and re-attach their line to another anchor point (Tr. 1650).

OSHC at 1022. Respondents admittedly did not apply for a variance, and they did not explain their reasoning for their failure (Tr. 1371).

In addition, as the ALJ also correctly noted, Respondents failed to show with credible evidence any hazards associated with guardrails. Although DeBobes testified that having to reach out and around the guardrails presented a "greater risk than being aware that they're not there and having to take other temporary precautions," like having a safety monitor (which Avcon did not provide) (Tr. 1578-79, 1591, 1597-98), his reasoning is questionable. Having to reach past a guardrail to strip material does not create more of a hazard than having to reach out past the edge with no guardrail (Tr. 1649-50, 1674). Moreover, as the ALJ noted, the occasional need to reach over guardrails does not outweigh the advantage of having the protection there during the rest of the stripping operation. DO at 23.<sup>35</sup>

In sum, Respondents failed to meet their burden of showing that complying with the standard would have exposed employees to a greater hazard. Respondents also failed to show that conventional fall protection mandated by the standard was infeasible for the cited work. The Commission should affirm the ALJ's rejection of Respondents' affirmative defenses.

#### **VIII. CITATION 2, ITEMS 2 THROUGH 7 (FALL PROTECTION) WERE WILLFUL.**

The ALJ held that Respondents had a heightened awareness of the fall protection standards and the need for fall protection, but that, nevertheless, they did not make a good faith effort to comply with the standard. The ALJ held that Respondents "consciously disregarded their obligation to comply with the cited regulations." DO at 33. The ALJ's findings and holding are overwhelmingly supported by the record.

The record shows that Respondents had a heightened awareness of the standard and the need for fall protection. Avcon received serious and willful citations for violating Sec.

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<sup>35</sup> DeBobes also testified that the lanyards used with a fall arrest system would create a tripping hazard (Tr. 1581). It is evident, however, from the testimony of Burkart and Paine that the work could have been planned to avoid both of these alleged problems (Tr. 1650, 1717).

1926.501(b)(1) relating to the Hackensack Project. These citations were affirmed by ALJ Rooney and are currently on review before the Commission. The Saites companies also have an extensive history of fall protection violations including serious, repeated, and willful citations for failing to guard open-sided floors in violation of Sec. 1926.500(d)(1), and for failing to provide safety nets or other fall protection at workplaces more than 25 feet above ground in violation of Sec. 1926.105(a).<sup>36</sup> With the exception of the citations issued as a result of the Hackensack inspection and at issue in *Avcon I*, all of these citations are final Commission orders.

Fall protection requirements were also discussed with Bill and Nick Saites during prior OSHA inspections including the Hackensack inspection that concluded just six months before the Mariner inspection commenced (Tr. 243). Bill and Nick Saites admitted to OSHA that they were familiar with current OSHA fall protection requirements at the start of the OSHA inspection at issue here. CO Donnelly again reviewed the fall protection requirements with them during this inspection (Tr. 312-13, 419).

The Secretary's prior inspections establish that Respondents had a heightened awareness of the requirements of the standard. *Pentecost Contracting*, 17 BNA OSHC at 1955. Despite, however, their heightened awareness, OSHA repeatedly found floors with incomplete and no perimeter guarding (Tr. 409, 411-12, 419-23, 454-57, 460, 467, 469, 476-77, 507). The Saites were cautioned that guardrails were inadequate on October 23; nevertheless, on October 29, OSHA again found Avcon employees working outside of an incomplete guardrail (Tr. 466-68, 492-95). When the hazard was pointed out to Bill Saites, he refused to interrupt the pouring of the concrete to permit the crane to bring up the material necessary to complete the guardrails (Tr. 492-94, 497-98). This refusal to comply in and of itself demonstrates, at least, a deliberate

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<sup>36</sup> Ex. C-11, C-23 -- C-26, Ex. C-32, Ex. C-33, Ex. C-34, Ex. C-36, C-39, Ex. C-41, Ex. C-43, Ex. C-44, Ex. C-46, Ex. C-47.

disregard of the standard, if not flaunting. *F.X. Messina*, 505 F.2d at 702; *Frank Irey*, 519 F.2d 1200; *Universal Auto*, 631 F.2d 20.

This recalcitrant attitude was expressed on other occasions. On October 23, 1998, Nick Saites told CO Triscritti that OSHA should be "happy" that the top deck had even one railing in place (Tr. 160). On another occasion, when questioned about why employees were not wearing fall protection on the floors below the deck, Nick Saites told CO Donnelly that the employees were grown men and that he would not baby-sit them to make sure that harnesses were being worn (Tr. 416). On October 24, 1998, when CO Donnelly pointed out some unprotected employees at the edge of the building, Nick responded that he did not know about it and did not care (Tr. 417).

In sum, the record shows that Respondents had a "heightened awareness" of the standard and the need for fall protection, but, nevertheless, failed to comply.

An employer may defend against an initial showing that its state of mind was one of willfulness by showing that it acted in good faith either by establishing that conditions in its workplace conformed to OSHA requirements, *Morrison-Knudsen Co./Yonkers Contracting Co.*, 16 BNA OSHC 1105, 1124 (No. 88-572, 1993); or the employer took steps or made efforts to comply with those requirements. *Caterpillar, Inc.*, 17 BNA OSHC 1731, 1733 (No. 93-373, 1996), *aff'd*, 122 F.3d 437 (7th Cir. 1997)(employer who did not take reasonably objective steps to abate the hazard acted willfully). Here, the evidence shows that Respondents did not take reasonably objective steps to abate the hazard and ignored OSHA when it pointed out hazards

Nick Saites testified that Avcon had a plan providing alternative fall protection. On the deck, the plan provided for the use of guardrails. On the framing floor, it provided for the extension of the formwork to keep employees six feet from the edge, and on the stripping floor,

it provided for the use of outriggers (Tr. 1447-48). The outriggers were made of 16-foot long stringers that projected over the edge of the building and supposedly acted like a horizontal guardrail (Tr. 1400-05). Because they sought to keep employees more than six feet from the edge, Respondents argue they did not willfully violate the standard. Respondents' Post-Hearing Brief, filed June 19, 2001, pp. 34-35.

As an initial matter, Respondents did not comply with the first part of their own plan. This conclusion is demonstrated by OSHA's repeatedly finding the top deck with incomplete guardrails (Tr. 419-20, 454-55, 460-63, 466-67, 507). When asked about the failure to extend the guardrails to locations where employees were working, the Saites' reasons demonstrated their indifference. They testified that there were not enough brackets to complete the guardrails (Tr. 459, 461). They refused to interrupt work to finish constructing the guardrail (Tr. 492-93). The evidence thus shows that, contrary to their claim, they did not take steps to assure that workers were protected with a complete guardrail on the top deck. Indeed, they were indifferent to doing so.

The "outrigger" claim, made for the first time during trial, is not credible. Respondents' never told OSHA during the inspection that they believed these "outriggers" were for fall protection (Tr. 1795). Outriggers are typically used to catch falling debris and formwork (Tr. 1400, 1760), not for fall protection. These outriggers would not prevent an employee from falling and do not constitute adequate fall protection (Tr. 1576, 1610, 1788). Moreover, Respondents failed to assure even minimal compliance with their plan - the construction of the outriggers to block a fall. Nick Saites admitted that some of the outriggers were as much as three and one-half feet apart (Tr. 1261-62; 1607-08), and there was no process for checking the spacing (Tr. 1405-06).

Even assuming *arguendo* that the formwork and outriggers were constructed according to Avcon's plan, the failure to comply with the standard was still willful. The courts and the Commission have repeatedly held that an employer cannot determine for itself the method of compliance when the method is mandated by the standard. The standard "unambiguously forecloses such discretion." *F.X. Messina*, 505 F.2d at 702. An employer who decides to implement a measure that he believes to be as safe as the standard's, but who, nevertheless, disregards the standard's requirements acts willfully. *Williams Enter., Inc.*, 13 BNA OSHC at 1257; *accord Reich v. Trinity, Inc.*, 16 F.3d 1149, 1153 (11th Cir. 1994)(An employer who implemented a hearing protection plan that did not comply with the OSHA standard, but which it believed to be better, acted willfully.); *RSR Corp. v. Brock*, 764 F.2d 355, 363 (5th Cir. 1985); *Fluor Daniel v. OSHRC*, 295 F.3d 1232 (11th Cir. 2002).

Nick Saites also testified that Avcon's plan had work rules requiring that only experienced men work at the edge, that they start framing from the middle and work outward, and that they crouch while working at the edge. He testified that although he was not familiar with the specifics of the standard and did not know if the Avcon plan complied with it, the plan was intended to comply with Sec. 1926.502(b)(2)(i) and 502(k)(Tr. 1434-36).

Section 1926.501(b)(2)(i) requires employers who have demonstrated that conventional fall protection is infeasible for leading edge work to develop and implement a fall protection plan meeting the requirements of Sec. 1926.502(k). Under that provision, the plan must be in writing and document the reasons why conventional fall protection is not feasible at the specific worksite. It must establish controlled access zones ("CAZs") limiting the number of personnel working in areas without fall protection, monitors to watch employees working unprotected at the edge, and training for workers allowed inside the CAZs. 29 C.F.R. § 1926.502(k).

In this case, as discussed above, it is clear that none of the cited work involved leading edge work. Furthermore, the evidence shows Respondents did not institute CAZs or a safety monitoring system. Indeed, they never claimed that they did. The ALJ wrote, "Given Nicholas Saites' failure to assess 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." DO at 33. The record overwhelmingly supports the ALJ's holding. Added to the evidence recounted by the ALJ is the striking fact that contrary to their claims and their own plan, Respondents failed take positive steps to assure that, at the very least, guardrails on the top deck were consistently provided to protect employees working there.

In sum, the ALJ correctly held that Citation 2, Items 2 through 7 were willful violations.

**IX. THE ALJ CORRECTLY ASSESSED PER INSTANCE PENALTIES FOR CITATION 2, ITEMS 2 THROUGH 7. THE ALJ, HOWEVER, SHOULD HAVE ASSESSED THE PENALTIES PROPOSED.**

The Secretary grouped the violations of 29 C.F.R. § 1926.501(b)(1) into six items on the ground that one net would have protected the employees described in each item and she proposed penalties of \$56,000 for a total of \$336,000 (six violations). The ALJ criticized the Secretary's grouping as not reflecting the Secretary's litigation position, because guardrails were so clearly feasible. DO at 36. The ALJ also found that the proposed penalty of \$56,000 for each item (total \$336,000) was too high. He therefore assessed penalties of \$25,000 (total \$150,000). *Id.* The record in this case supports the assessment of the higher, proposed penalties.

As an initial matter, Commission precedent clearly supports the issuance of per instance penalties for these violations. *J.A. Jones Constr. Co.*, 15 BNA OSCH 2201, 2212-13 (No. 87-

2059, 1993); *accord MJP*, 19 BNA OSHC 1649; *A.E. Staley*, 19 BNA OSHC 1199 (Nos. 91-0637, 91-0638, 2000), *aff'd on other grounds*, 295 F.3d 1341 (D.C. Cir. 2002).

With respect to the penalty factors for these violations, any injuries would be very grave. DO at 33, 36. Given the heights at which employees were working and the other circumstances, an accident was "highly" probable and death would certainly result from a fall. *Id.* With respect to history and good faith, as the ALJ found, "Avcon has an extensive record of prior violations and has made no good faith attempts to develop an OSHA compliant fall protection policy." DO at 36. The record overwhelmingly supports these findings. Indeed, the record supports a penalty of \$56,000 or a total of \$336,000 for the six violations.<sup>37</sup> *See MJP*, 19 BNA OSHC at 1649 (\$42,000 each assessed for two violations of § 1926.501(b)(1)); *CBI*, 19 BNA OSHC at 1608 (\$55,000 assessed for allowing employee to ride the crane load).

In sum, the record shows that Respondents consciously disregarded the standard, flagrantly refused to come into compliance after being warned by OSHA, and exposed numerous employees over many days to the risk of falling more than 80 feet to the ground below. The record also supports grouping the violations into six items on the ground that nets would have abated the hazard for the floors and dates described in the citation items. *See supra* p. 40. The great weight of the evidence supports the Secretary's grouping and proposed penalties.

**X. RESPONDENTS WILFULLY VIOLATED CITATION 2, ITEM 8 REQUIRING THAT EMPLOYEES BE PROTECTED FROM FALLING THROUGH HOLES.**

Citation 2, Item 8, alleges violations of Sec. 1926.501(b)(4)(i), requiring that each employee on a walking/working surface be protected from falling through holes more than six feet above lower levels by personal fall arrest systems, covers, or guardrail systems erected

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<sup>37</sup> Due to the heights at which employees were working, up to 152 feet on the 16th floor, and the number of employees exposed, OSHA proposed an initial penalty of \$70,000 (Tr. 519-20). The initial penalty was reduced 20% to \$56,000 to reflect the small size of the employer (Tr. 520). There were approximately 70 employees working at the Mariner (Tr. 324).

around such holes. The ALJ correctly found that the violations occurred as described by the OSHA inspector; that Nicholas Saites and therefore Avcon had actual knowledge of the ladderway cited in Citation 2, Item 8, Instance (a); and that the other conditions described in Citation 2, Item 8, Instances (b) through (d) "were in plain sight of Avcon's supervisory personnel, who should have known of the hazard." DO at 37-39. The ALJ, however, affirmed the violations as serious, not as willful. DO at 36-39, 40-41.<sup>38</sup>

The record overwhelmingly supports the ALJ's findings that the violations occurred as described in the citations. On October 23 and 24, OSHA observed unguarded ladderway openings on **every** floor between the 1st and 10th floors of the building, exposing employees to nine foot falls (Tr. 521-24)(Instance a). Also, on October 23 and November 3, the elevator shaft way and stairway openings on the 10th and 13th floors were not protected with covers or standard guardrails, again exposing employees to nine foot falls (Tr. 522-28) (Instance b). On October 23 and 24, stairway openings on the 4th, 5th, 6th, 7th, 9th, and 13th floors did not have covers or standard guardrails (Tr. 528-30). In sum, Avcon failed to comply with the standard and to protect numerous floor holes in plain view on at least three days at the Mariner worksite.

The violations were willful. The Saites had a "heightened awareness" of the standard from their companies receiving numerous citations for Sec. 1926.500(b)(1), the predecessor of Sec. 1926.501(b)(4)(i) (Tr. 563-64)(DO at 40); Avcon's receipt of citations for violations of the standard during the Hackensack inspection, *Avcon I*; and OSHA's discussion of the floor opening requirements at the start of the inspection at issue here (Tr. 564). DO at 40. *MJP*, 19 BNA

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<sup>38</sup> OSH Act Sec. 17(k) provides that a serious violation is one where "there is a substantial probability that death or serious physical harm could result . . ." 29 U.S.C. § 666(k). *Merchant's Masonry, Inc.*, 17 BNA OSHC 1005, 1008 (No. 92-424, 1994)("The provision in section 17(k) that a violation is serious if there is a substantial probability that death or serious physical harm could result does not mean that the occurrence of an accident must be a substantially probable result of the violative condition but, rather, that a serious injury is the likely result should an accident occur.").

OSHC at 1648 (supervisors "chargeable with knowledge of the requirements of the standard based upon their prior work experience"); *Pentecost*, 17 BNA OSHC at 1955 (heightened awareness of requirements through prior inspections); *Calang Corp.*, 14 BNA OSHC 1789, 1791-92 (No. 85-0319, 1990)(employer who "intentionally ignore[d] OSHA's requirements after the inspector correctly explained them" acted willfully).

An employer who has a "heightened awareness" of a standard is required to take "effective action to remedy known deficiencies in its practices" to prevent the recurrence of conditions violating the standard. *Revoli*, 19 BNA OSHC at 1686; *Pepperidge Farm, Inc.*, 17 BNA OSHC 1993, 2000 (No. 89-0265, 1997)("failure to respond to warnings bespeaks indifference"); see, e.g., *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2189 (No. 90-2775, 2000), *aff'd on other grounds*, 268 F.3d 1123 (D.C. Cir. 2001) (failure to guard punch press was willful based on prior citation and injuries although there was no evidence that prior to the inspection the employer knew the specific machine was unguarded).

For each cited instance, Nicholas Saites testified to reasons that the floor opening was not guarded by covers or guardrails, or employees were not using fall arrest, as required by the standard. DO at 37-38. His testimony, however, provides no more than inadequate excuses for the violations. He did not testify that Respondents had a program to install guardrails around ladderways or to cover floor openings on gaining access to the poured floor. DO at 37-38, 40-41; Tr. 1215-1315, 1357-1455, *passim*. Nor did he testify that Avcon supervisors were instructed to inspect for floor openings and to protect them prior to work commencing in the area. *Id.* Indeed, the evidence convincingly demonstrates that Avcon ignored the standard. On October 23 and 24, OSHA found unguarded ladderway openings on every floor, plus unguarded elevator shaft ways and stairway openings (Tr. 520-30). The record therefore shows that despite

Respondents' inspection history and the inspector's warnings, they did not take "positive steps" to prevent the recurrence of the violative conditions. Respondents were clearly plainly indifferent to the standard and the hazard.

The ALJ relied on *Staley*, but he misapplied that case to these facts. In *Staley*, the employer did not have a citation history for any of the standards cited. *Staley*, 19 BNA OSHC 1199. The ALJ also failed to note that *Staley* affirmed willful violations of the guardrail safety standard about which the employer had been warned it was out of compliance, but which it had not acted to correct. 19 BNA OSHC 1199, *aff'd on other grounds*, 295 F.3d 1341. The ALJ also failed to recognize that in this case the number of unguarded floor openings found over the course of the inspection evinced a pattern of violations from which plain indifference can be inferred. 19 BNA OSHC 1199, *aff'd*, 295 F.3d 1341.

The Commission should therefore affirm Citation 2, Item 8 as willful and assess the penalty proposed by the Secretary of \$44,000.<sup>39</sup>

**XI. THE ALJ CORRECTLY AFFIRMED CITATION 1, ITEM 1.**

The ALJ correctly affirmed Citation 1, Item 1 for violation of Section 1926.20(b)(1) requiring that the employer initiate and maintain programs to comply with OSHA's construction standards. DO at 44-45. Section 1926.20(b)(2) clarifies 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 employer." 29 C.F.R. § 1926.20(b)(2). The Commission has held that under Sec. 1926.20(b)(1) "a reasonably prudent employer . . . with supervisory authority and responsibility for a large construction site . . . would understand that an adequate

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<sup>39</sup> If an employee fell through a floor opening, nine feet to the floor below, the injury might be fatal, but the more likely result was fractures and contusions (Tr. 565-66). A reduction of 20 percent the gravity-based penalty was made in recognition of Avcon's small size. Respondents are not entitled to any further reduction for lack of history and good faith.

program under section 1926.20(b) would include specific measures for detecting and correcting fall hazards . . ." *J.A. Jones Constr.*, 15 BNA OSHC at 2206.

Respondents argued that Avcon had a written safety program and an unwritten fall protection plan that complied with the standard. Their unwritten fall protection plan, they argue, required the use of guardrails on the top floor or pour deck; the extension of formwork past the edge of the concrete on the framing floor; the installation of outriggers on the stripping floor; and in lieu of personal protective equipment ("PPE"), the instruction of employees to frame from the center of the building, not to turn their backs to the fall hazard, and to crouch and keep their center of gravity low (Tr. 1431, 1434, 1435, 1447-48). The Saites testified that the foremen and shop stewards were solely responsible for enforcing safety rules on the work site. DO at 43.

Avcon's **written** safety program contained no requirements for fall protection and made no provision to train employees in fall protection, to inspect for violations of the safety rules, or to enforce the safety program. DO at 42-45, *citing* Tr. 316-21, 1036-39, 1086, 1427; Ex. C-6, R-2.

Avcon's **unwritten** plan was inadequate, because it proposed alternatives to the fall protection mandated by the standard applicable to the worksite, Sec. 1926.501, *i.e.*, guardrail, nets, and personal protective systems ("conventional fall protection"). As discussed above, the standard requires the use of conventional fall protection unless the employer demonstrates that it is infeasible or creates a greater hazard. *A.J. McNulty*, 19 BNA OSHC at 1129, *aff'd* 283 F.3d 328. In this case, as the ALJ correctly held, Avcon failed to demonstrate that conventional fall protection was infeasible or presented a greater hazard. DO at 22. Respondents were therefore required to follow the standard's mandate and use conventional fall protection. They were not entitled to substitute another method of protection. *Williams Enter.*, 13 BNA OSHC at 1257; *Fluor Daniel*, 295 F.3d 1232.

Avcon's unwritten plan was also inadequate, because it failed to describe standard-compliant guardrails. DO at 45. This point is important, because repeatedly during the inspection, OSHA found incomplete, noncompliant guardrails.

Respondents also abandoned any responsibility for employee training, for ensuring compliance with their safety plan, and for inspecting to determine whether employees were complying with their plan the men. See Tr. 320-21, 396 (no need to "baby-sit" men); Tr. 990-91, 1105 (stewards' responsibility to enforce safety).<sup>40</sup> Under Commission precedent, however, an employer cannot abdicate its safety responsibilities. *Baker Tank Co./ Altech*, 17 BNA OSHC 1177, 1180 (No. 90-1786-S, 1995); *Tri-State Steel Constr., Inc.*, 15 BNA OSHC 1903, 1916 n.23 (No. 89-2611, 1992), *aff'd on other grounds*, 26 F.3d 173 (D.C. Cir. 1994), *cert. denied*, 514 U.S. 1015 (1995).

In sum, as the ALJ correctly held, Respondents violated Sec. 1926.20(b)(1) as alleged. The consequence was employees were exposed to the risk of falling at least eight stories to the ground below. The ALJ thus properly affirmed a penalty of \$3,000 for this serious violation.

## **XII. THE ALJ CORRECTLY AFFIRMED CITATION 1, ITEM 2.**

The ALJ correctly affirmed Citation 1, Item 2, alleging that form or scrap lumber with protruding nails was not removed from the work areas on October 23 and 24, 1998, in violation of Sec. 1926.25(a). The standard requires "form or scrap lumber with protruding nails, . . . be kept cleared from work areas. . . ." 29 C.F.R. § 1926.25(a).

Respondents did not contest OSHA observations.<sup>41</sup> They argued, however, that the material was only recently stripped and could not therefore be debris. Resp. PDR at 54. They

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<sup>40</sup> The record, however, shows that, in fact, the Saites exercised management authority over the Avcon employees and the worksite. The Saites admitted that the union had no right to supervise the work and that the management authority at the worksite flowed from Bill Saites through the foremen. Nick Saites also admitted that he was responsible for the determination that conventional fall protection was infeasible and he determined the alternative methods (e.g., crouching at the edge) to be used at the Mariner worksite in lieu of conventional fall protection (Tr. 803-04, 805, 1221-24, 1271).

<sup>41</sup> On October 23, 1998, from outside of the building, CO Donnelly saw employees performing stripping operations, installing reshores and moving lumber on the 8th floor (Tr. 330-331). At the time this work was being performed, there was form and scrap lumber with protruding nails all over the floor, and work areas were not kept clear (Tr. 330, 339). On October 24, 1998, CO Donnelly observed four employees working on the 6th and 7th floors installing reshores and moving lumber in work areas strewn with form and scrap lumber with protruding nails (Tr. 328-39). Because work areas were not kept clear of debris in these instances, employees were exposed to potentially serious injury. The work being performed by employees on these floors required them to move around near unprotected floor openings and open-sided floors, sometimes carrying quantities of lumber (Tr. 336-339). The debris posed a

also argue that immediately removing nails from the formwork or clearing the formwork from areas where stripping was ongoing would have unreasonably disrupted the work. DO at 47. The ALJ correctly rejected both arguments. *Id.* In essence, Respondents raise an infeasibility defense. *Id.* As the ALJ ruled, however, "no evidence supports that contention." *Id.*

The affirmative infeasibility defense requires employers to alter their customary work practices to the extent that alterations are reasonably necessary to accommodate the abatement measures specified by OSHA standards. *Seibel*, 15 BNA OSHC at 1227. The employer has the burden of proof (persuasion) both that the method required under the terms of the standard is infeasible and either an alternative protective measure was used or there was no feasible alternative measure. *Seibel*, 15 BNA OSHC at 1227-28. In this case, Respondents failed to show that employees attempted to clear the lumber or to remove the nails and that this unreasonably interfered with the work. Respondents also failed to show that they used an alternative protective measure or that there were no feasible alternative measures.<sup>42</sup>

In sum, as the ALJ correctly held, Respondents violated Sec. 1926.25(a), as alleged. For the reasons discussed in his opinion, the ALJ also properly affirmed a penalty of \$2,100 for this serious violation. DO at 47-48.

### **XIII. THE ALJ CORRECTLY AFFIRMED CITATION 1, ITEM 4.**

The ALJ correctly affirmed Citation 1, Item 4, alleging a violation of 29 C.F.R. § 1926.404 (b)(1)(i), requiring that all 120-volt single phase receptacle outlets on construction sites

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tripping hazard that could result in employees falling through floor openings; falling from the edge of the building to their death; or falling onto the scrap lumber with protruding nails (Tr. 330, 338, 342, 351).

<sup>42</sup> Nick Saites also testified that no employees should have been working on the 6th and 7th floors on October 24 (Tr. 1092-93). But the employees observed were moving lumber and installing reshores, work clearly performed by Avcon carpenters (Tr. 328-44).

not part of the permanent wiring of the building or structure and in use shall have approved ground fault circuit interrupters ("GFCI").

The record demonstrates the elements of the violation. On October 24, 1998, carpenters were using portable electric saws connected to temporary wiring to cut lumber on the 3rd and 7th floors (Tr. 345-46, 349). There was no GFCI (Tr. 347). No one at Avcon had ever checked to see if there were any GFCIs in the system (Tr. 346). Avcon also did not have an assured equipment grounding conductor program (Tr. 345, 347). Nick Saites testified that it was impossible to tell whether a GFCI was on the site (Tr. 1098), but unlike CO Donnelly, Nick never tested the wiring (Tr. 1442).

Four Avcon employees were using the saws (Tr. 348). Although Nick testified that he was unfamiliar with one of them (Tr. 1098-99), as the ALJ noted, even disregarding that employee, the evidence showed that at least three Avcon employees operated electrical handsaws without the protection of a GFCI, exposing them to the hazard of electrical shock. DO at 48.<sup>43</sup>

In sum, the ALJ correctly affirmed Citation 1, Item 4, for violation of Sec. 1926.404(h)(1)(i). For the reasons discussed in his opinion, the ALJ also properly affirmed a penalty of \$1,500 for this serious violation. DO at 48-49.

#### **XIV. THE ALJ CORRECTLY AFFIRMED CITATION 1, ITEM 5.**

The ALJ correctly affirmed Citation 1, Item 5, alleging that Avcon failed to protect employees from falling objects in violation of Sec. 1926.501(c)(1).<sup>44</sup> DO at 50.

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<sup>43</sup> Nick Saites also testified that another employee, an apprentice carpenter, was not authorized to use the power tools (Tr. 1098-99). Avcon, however, did not prove an affirmative defense of unpreventable employee conduct. It introduced no evidence that it had a rule prohibiting the use of power tools by apprentices, that it communicated its rule, and that it took steps to discover violations (*id.*). It also failed to show that it enforced the safety rules it claimed to have (Tr. 317-21). *CBI Services*, 19 BNA OSHC at 1603.

<sup>44</sup> Sec. 1926.501(c)(1), provides, in pertinent part, as follows:

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

Respondents argued that there was a canopy over the north entrance, and, therefore, they were not in violation. Resp PDR at 55. They also argued that the videotape does not depict any Avcon employees working in the area where stripped material might fall. Resp PDR. at 56. The evidence clearly shows, however, that material fell around all four sides of the building, that employees had access to the building on all four sides, and that no barricades were erected prohibiting employee access (Tr. 359-61). DO at 50.<sup>45</sup> The record therefore overwhelmingly supports the ALJ's findings and holding.

In sum, the ALJ correctly affirmed Citation 1, Item 5. For the reasons discussed in his opinion, the ALJ also properly affirmed a penalty of \$3,000 for this serious violation. DO at 50.

**XV. THE ALJ CORRECTLY REJECTED RESPONDENTS' ARGUMENT THAT THE SECRETARY SELECTIVELY ENFORCED THE ACT AGAINST THEM.**

The ALJ rejected Avcon's claim that it was unfairly cited for the floor holes on the ground that that Avcon failed to ascribe "any motive to OSHA's alleged misconduct." DO at 40. The Saites now argue that they were selectively prosecuted, because they, like Michael Polites, whose companies were cited for similar fall protection violations are Greek. Resp. PDR at 45-48.

A showing of selective prosecution requires proof that the defendant was "singled out for prosecution although others similarly situated who have committed the same acts have not been

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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 there 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.

29 C.F.R. § 1926.501(c)(1).

<sup>45</sup> The evidence showed that on nine different dates between October 23 and November 16, 1998, CO Donnelly observed construction materials, such as lumber, falling off the building on each side (Tr. 355-58). Most of the materials seemed to be falling to the ground as a result of stripping operations being performed above. *Id.* Exposed employees were engaged in different activities at ground level, such as carpenters building column forms, laborers walking throughout the area, and ironworkers installing rebar (Tr. 356-57, 360-61). In addition, employees entered and exited the building from all sides and in many different areas (Tr. 359-60). The employer had made no effort to implement any of the methods of protection outlined in the cited standard (Tr. 358-60). Exhibit C-275 clearly shows debris falling from the building on both October 23 and November 3, 1998 (Tr. 362-63).

prosecuted" and that the government's selection is "motivated by constitutionally impermissible motives such as racial or religious discrimination" or the "exercise of constitutional rights."

*DeKalb Forge Co.*, 13 BNA OSHC 1146 (No. 83-299, 1987); *accord Vergona Crane Co.*, 15 BNA OSHC 1782, 1787-88 (No. 88-1745, 1992).

Here, the record is devoid of evidence that OSHA was motivated by a discriminatory purpose or the inspection and citations were based on an arbitrary classification or an unjustifiable standard. There was no showing that the Secretary was motivated to cite the Saites and their companies because they were of Greek heritage. To the contrary, the record is replete with evidence that Respondents were properly inspected and cited. OSHA conducted this inspection pursuant to its receipt of two complaints (Tr. 201). The ALJ affirmed all the citations except one and affirmed all the allegedly willful violations as willful except one. DO at 52-53. The evidence also shows that OSHA did not cite only Respondents. OSHA issued Daibes Bros. a citation for having unprotected employees sweeping near the edge (Tr. 281).

In sum, the ALJ correctly rejected Respondents' selective enforcement claim.

#### CONCLUSION

For these reasons, the Commission should hold that Bill and Nick Saites are liable as employers and that Altor and Avcon constituted a single employer under the OSH Act. The Commission should also affirm the ALJ's findings, holdings, and penalties. The Commission, however, should assess the penalties proposed by the Secretary for Citation 2, Items 2 through 7, should hold that Citation 2, Item 8 is a willful violation, and should assess the penalty proposed by the Secretary for Citation 2, Item 8.

November 7, 2002  
Washington, D.C.

Respectfully submitted,

  
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