

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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

Complainant,

:
:
: OSHRC DOCKET NO.:
: 99-0958

-vs-

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

Respondents.

RESPONDENTS' OPENING BRIEF TO THE REVIEW COMMISSION

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STATEMENT OF FACTS

Altor, Inc. is a New Jersey Corporation in good standing, of which Bill Saites ("Bill") is the President and sole director. (Tr. 897) Bill is not a shareholder of Altor. Avcon, Inc. is also a New Jersey Corporation in good standing, of which Bill is the President, director and minority shareholder. Nick Saites ("Nick") is not, nor was he ever, a director, officer or stockholder of Avcon. (Tr. 733) He was an employee of Avcon. (Tr. 205:1-5) Nick is not, nor was he ever, an employee, shareholder or officer of Altor, Inc. As an attorney admitted to practice law in the State of New Jersey, Nick was the initial director of Altor, Inc. in 1991, for the ministerial purpose of organizing the corporation and issuing stock. Immediately thereafter, he resigned. Nick does not confer with Bill regarding business or internal operations of these corporations. (Tr. 740) Contrary to the Secretary's unsubstantiated assertion, neither Altor nor Avcon were incorporated in order to avoid their responsibilities under the OSHA Act. (Tr. 851)

In 1998, Altor, Inc. contracted to perform concrete work at a sixteen-story highrise project in Edgewater known as the Mariner ("Edgewater Project" or "Mariner"). Thereafter, Altor, Inc. entered into a subcontract with Avcon Inc, to perform the labor required.

Both Bill and Nick have extensive experience in the concrete construction industry. Corporations with which they have been associated constructed over 200 high rise, poured in place, reinforced concrete structures. It is notable that none of these 200 projects involved any serious injuries or deaths. (Tr. 1078) In addition, only a small percentage of the projects were the subject of any OSHA citations. Both Nick and Bill testified that safety was an important factor in the day-to-day activities at the project. (Tr. 1039)

Nick and Bill also testified that neither Altor nor Avcon were formed to perpetuate fraud on creditors, or any such injustice. (Tr. 851,894) They both testified that none of their personal

expenses were paid through the corporation. (Tr. 861) The Secretary produced no witnesses in connection with any alleged commingling of funds or misuse of the corporate form.

Neither Bill nor Nick directed any Avcon employees to violate OSHA regulations or safety procedures. All employees were union members and were paid by Avcon checks, and OSHA was aware that the employees on site were Avcon's employees. (Tr. 861)

Bill and Nick's prior experience involved previous corporations. While OSHA has asserted an extensive history of violations with these prior entities, the Secretary was unable to link any of the specific violations at issue in this case with those of the prior companies. All of the prior citations involved different issues than the ones cited in the instant case. (Tr. 858). In addition, OSHA is improperly imputing the history of three former companies through Nick and Bill to Avcon, without any legal or statutory support.

The project, which is the subject matter of this case, was a high rise, poured in place, reinforced concrete structure located in Edgewater, New Jersey. The project was designed for rental residential use and was developed by the project owners. Avcon's work included labor to be performed by unions with which Avcon had the appropriate collective bargaining agreements.

There was nothing sinister or suspect about the arm's length subcontract between Altor, on the one hand, and Avcon, on the other. Although Bill signed both contracts in his capacity as President of both companies, there were good business reasons for the subcontract arrangement. Since Avcon was the signatory to collective bargaining agreements, it would be in a position to hire the union workers and since Altor had credit with all the material suppliers, it was in the best position to purchase materials for the project. Such subcontract arrangement was not in any way designed to defraud creditors, to conceal or to commingle assets. Both corporations observed all corporate filings, forms and procedures. (See Exhibits C155-162)

Pre-planning on the project involved the need for and implementation of fall protection. The formwork was constructed to extend six feet beyond the edge of the concrete building. (Tr. 891). In addition, a guardrail system was used to provide fall protection. The formwork was extended past the pour stop in such a manner as to provide fall protection for those employees working on the framing floor and deck. A guardrail system was used to provide an additional means of fall protection for the top deck. On the stripping/stacking floor, a catch platform was constructed to serve the dual purpose of providing fall protection and retaining stripped material. Clearly, Avcon considered the fall protection issue and decided on an appropriate plan. The use of guardrails, formwork extensions and catch platforms had been the consistent method of fall protection employed in the past by companies associated with Bill and Nick.

Steel reinforced concrete construction consists of pouring concrete into wooden formwork, which is then removed or "stripped" from that level, dismantled and lifted to another level, whereupon the process is repeated. (Tr1078) More specifically, after the lower-level slab has been poured and stripped, the forms for the upper level columns are constructed by nailing together plywood which is held in place by "shoes", as well as clamps. Wooden joists called "stringers" that are supported by vertical posts or "legs" are placed adjacent to the columns at specified intervals. On top of the stringers and running in an opposite direction are "ribs" that are also placed at a specified interval.

Plywood decking is then placed on top of the stringers and ribs, and then, reinforcing steel ("rebar") is laid on top of the decking. Rebar is also set vertically into column formwork. A pour stop is constructed to retain the concrete which is located at the edge of the concrete building and six feet from the edge of the formwork. After that process, concrete is poured onto the deck and into the column formwork. Vertical formwork is stripped the following day. Horizontal formwork

is stripped the second day after the concrete is poured. The nails are removed from the formwork, laborers gather the formwork and stack it at the edge of the floor. These materials are then hoisted up by crane for use on the next level. The process is then repeated until the structure is completed. (Tr1078)

At the project, Avcon was on a "three-day pour" cycle. (Tr878:1-3) This meant that every three days the concrete work for an entire floor would be completed. As discussed above, steel reinforced concrete construction is a continuous cycle which consumes a tremendous amount of wood for formwork purposes. The formwork is used and reused until it is so small to be of any value. Once the floor has been poured and stripped, reshores are placed to keep the concrete from deflecting during the cure period. (Tr1243) It is generally accepted practice that reshores are removed within 28 days of each pour, allowing the concrete to fully cure during such period.

There is ample testimony in this record to support Avcon's reasonable belief that the formwork on this project, as well as any comparable project, was not designed to anchor or support any type of fall protection or restraint system. Rather, Avcon employed the use of guardrails, formwork extensions and catch platforms, as has been done in this industry for over 40 years. The guardrails act as a barrier and warning for those employees working on the deck. The formwork extends past the pour stop providing a six foot zone of safety for employees working within the confines of the "building"; six feet being the minimum distance from the building edge for which OSHA inspectors do not require fall protection. The catch platform is used where guardrails would be continually damaged, such as on the stripping/stacking floor, and where formwork extensions were required to be removed or "stripped." Indeed, the formwork was not designed nor intended to act as an anchor for any fall arrest or restraining systems.

At no time during the construction of this project, did Avcon lack a fall protection method or system. Rather, through the combined experiences of Bill, Nick, various foremen, shop stewards and workers, the system that was employed was adequate and feasible for the type of work; did not expose more workers to a greater hazard; and complied in all respects with OSHA requirements. Unfortunately, it was OSHA who simply did not understand that the use of the fall protection methods that it preferred was not consistent with the nature of the operation, the movement of materials and the fact that the temporary nature of the formwork on a poured in place reinforced concrete building is not designed nor intended to resist any lateral loads, or that the concrete would take too long to cure to act as an embedment for other fall protection systems.

On October 23, 1998, Brian Donnelly, Charles Triscritti, Richard Brown and Phil Peist arrived at the work site on behalf of OSHA. On that day, ten stories of the building had been erected. Upon arrival, compliance officer, Charles Triscritti videotaped the north and west side of the project from across the street and compliance officer, Richard Brown videotaped the south and west side of the project from the roof of the Edgewater municipal building which is approximately 300 yards south and west of the Mariner Highrise.

OSHA inspected the site having little interaction with Avcon management and employees, consistent with their disregard for worker safety, but rather a focus on issuing citations and assessing fines. Testimony and videos depict countless fall protection violations of other contractors' employees, for which OSHA conveniently turned a blind eye. During the trial, OSHA inspectors that videoed the site admitted that citations to the other contractors should have been issued. The bias OSHA displayed against respondents is outrageous.

OSHA went about its fact-finding activities in such a way as to exhibit a complete lack of concern for workers' safety, while merely documenting alleged violations. For example, and not by

way of limitation, OSHA employees went to the roof of an adjacent building from which they videotaped the project. Using telephoto lenses, they zoomed in on Avcon's employees (and often times non-Avcon employees) and videotaped alleged OSHA violations. In every instance of videotaping, they did not confront Avcon foremen or shop stewards with the alleged violations, did not issue any notices of imminent danger, or in any way place the worker being videoed on notice that the inspectors believed that such worker was in a dangerous, life threatening situation.

Yet, many of the violations that were videotaped were categorized as those which might result in death. Several videos depicted an OSHA inspector leaning into and measuring a stairway opening that he believed constituted a fall protection violation which could result in death. The OSHA inspector testified at trial that he was exempt from the regulation because he was performing his job. Query why an OSHA inspector who films someone on a videotape who he believes is in danger of dying would not immediately warn the worker to avoid that potentially deadly situation? The answer is clear; OSHA wants to collect money, and cares little about workers who are allegedly in danger or at the time of the alleged violation did not believe it could result in death, contrary to the inspector's trial testimony. In fact, Mr. Staton, trial counsel for OSHA, admitted that the motivation for bringing this action in the first instance is to collect the penalty against the individuals, **not** to promote workplace safety. (Tr1192).

Respondents respectfully assert that such conduct should not be condoned and that all of the citations should be dismissed. This is especially so in light of the strong admonition issued to the Secretary in Secretary of Labor v. L.R. Wilson & Sons, Inc., 17 BNA OSHC 2059 (1997). There, the Review Commission had occasion to comment on the use of videotape by OSHA in its fact finding activities.

More specifically, the OSHA inspector in L.R. Wilson used a video camera with a 16 power zoom lens and videotaped two individuals working on structural steel beams approximately 80 feet

above the ground allegedly without fall protection. The Review Commission indicated that they were "troubled by the compliance officer's conduct", which, "does cause us great concern". The Review Commission further analyzed the situation as follows:

We do not consider a desirable practice to leave employees exposed to potentially fatal hazards for the sake of further documenting a violation. Having identified the violation specified in the complaint and recorded it, the compliance officer nonetheless allowed the employees to continue being exposed to a fall of 80 feet for an additional 45 minutes while he videotaped their activities. The compliance officer's first duty was to the safety of the employees, but he allowed them to remain exposed to a serious fall hazard for close to an hour before he went to the work site and halted the practice. It is fortunate that neither of the ironworkers fell while the compliance officer videotaped. **In our view, this type of delay is contrary to the very purposes of the Act, making the workplace safer, and we urge the Secretary to take steps to prevent it in the future.** (Footnotes omitted, emphasis added)

The Review Commission concluded, quite strongly, as follows:

We do not endorse the course of action followed by the compliance officer or the Secretary's apparent failure to give guidance to compliance officers. **We urge the Secretary to address this issue.** (Emphasis added)

The Review Commission's admonitions in L.R. Wilson & Sons, Inc. fell on deaf ears because the very conduct which caused great concern there was employed throughout the course of this inspection. This court can redress these wrongs by dismissing the violations. Perhaps then OSHA will hear the message.

The examples of OSHA's wrongful conduct in connection with the subject inspection are legion. The most glaring example of such wrongful conduct is OSHA's issuance of citations to Bill and Nick individually when such liability is not even remotely supported by the facts, let alone any cognizable precedent which would yield such a result. All of OSHA's witnesses at trial testified under oath that they had no proof to support their contention of individual liability. The OSHA lead inspector, Brian Donnelly, did not even recommend the issuance of citations to Bill or Nick.

(Tr574:14-19) Phil Peist, OSHA's Area Director, believed individual liability was required to achieve the necessary deterrent effect to insure compliance with OSHA's interpretation of a regulation and its feasibility and overruled Donnelly. This is the case even though Peist testified that he was aware of no facts on which he could conclude that Avcon and Altor were not legitimate corporations. (Tr.305:15-25)

OSHA's brief in this case chronicles the "OSHA history" of previous independent companies and citations. However, what is important for the Review Commission to realize is that OSHA took no action in any case involving any of these corporations against Nick or Bill personally. In those other cases, there was never a citation issued against Nick or Bill, individually, nor did OSHA seek to imbue personal liability against Nick or Bill for any alleged violation of the other companies. Nor did OSHA file suit or other administrative proceedings seeking to collect any alleged unpaid fines as against any of the other companies. Nor did OSHA institute any litigation as against Nick or Bill individually for allegedly unpaid OSHA fines due from these other companies. OSHA has attempted to imbue personal liability against Bill and Nick with regard to the "Hackensack" case, however that matter is presently being appealed before the Review Commission.

Furthermore, the aforementioned other companies paid OSHA fines pursuant to Settlement Agreements. OSHA well knows that a couple of these entities ceased paying fines due to insolvency or bankruptcy, as opposed to any nonbusiness related reason.

Query then why OSHA has changed its tack and has gone after these individuals in this case? Here again, the answer is clear. OSHA has shifted its focus from a safety organization to a fine collection center and as such, OSHA well knows that should it be unable to collect any fines from Avcon, it would behoove itself to have Bill and Nick "guarantee" any corporate debt. This approach should not be fathomed here.

OSHA also seeks retribution for unpaid fines of prior corporations whose partial non-payment was strictly business related. OSHA sought personal liability in this matter to guaranty the payment of fines in the event of Avcon's potential insolvency or bankruptcy; most likely due to the

attorneys fees and expert costs to defend the OSHA citations. By removing corporate insolvency or bankruptcy as an option to avoid payment, and understanding the cost of litigation, OSHA could force a settlement for whatever the Secretary perceived reasonable or, in the alternative, compel a lengthy and excessive legal battle where the Secretary has no exposure to legal fees.

Either way, the Secretary would secure her "pound of flesh" and send the message that OSHA's will is a force to be reckoned with, whether or not OSHA is in the right. In essence, the Secretary through her actions in this case warns others in the industry that they might receive a similar fate. The respondents in this case have shown the Court that this type of financial extortion should not be tolerated.

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

ARGUMENT

I. STANDARD OF REVIEW

The standard of review which applies is whether Judge Yetman abused his discretion in finding that the Commission had no jurisdiction to pierce the corporate veil, that Altor and Avcon were a single employer and whether Judge Yetman abused his discretion by affirming the alleged violations under the circumstances of this case. The standard of proof in Commission proceedings is "preponderance of the evidence." See Trumid Constr. Co., 14 BNA (OSHC 1784 (1990)), citing Astra Pharmaceutical Prods., 9 BNA (OSH 2126, 2131 (1981)). Accordingly, to determine whether the Secretary proved her case by a preponderance of the evidence, the Review Commission must reexamine the underlying merits of the case.

Respondents respectfully submit that the Decision and Order must be affirmed in part and reversed in part in accordance with the following.

II. THE ALJ ERRED IN HOLDING THAT ALTOR AND AVCON WERE A SINGLE EMPLOYER UNDER OSHA.

Respondents respectfully submit that a closer review of the case law cited by the Secretary and relied upon by the Commission in its Opinion, supports a finding that Altor and Avcon are separate employers.

In Advance Specialty Co., Inc., 3 BNA OSHC 2072 (No. 2279, 1976), one employee of Platers & Coaters, Inc. and one employee of Advance Specialty, Inc. were killed when they were overcome by lethal hydrogen cyanide gas. Id. at 2. The two organizations shared the same building as well as a common worksite, with no physical barriers separating the two operations. Id. at 6. Mr. Joseph Kavorkian was the President and owner of both companies and actively supervised their activities. Id. The workers of both companies were free to travel into any area of the common worksite. The Commission also noted that it is not, "uncommon for employees of Advance Specialty to be 'former employees' of Platers & Coaters, and vice versa." Id. The Commission further noted that in occupying the common worksite, the employees of both companies were, "equally exposed or had access to the hazards presented by inadequate instructions to employees.... Indeed, the chemical fumes that required many an employee to go home early because of illness did not distinguish between the employees of the two companies." Id. at 6-7. Upon arriving at the plant in response to the reported accident, the OSHA compliance officer and industrial hygienist found "what would appear to be a single operation." Id. at 7. The respondents were adamant in claiming their separate identities, so the industrial hygienist issued two citations, one to each company, wherein he charged each company with the same violation. The Commission found that when two companies, "share a common work site such that the employees of both have access to the same

hazardous conditions, have interrelated and integrated operations, and share a common president, management, supervision or ownership, the purposes of the Act are best effectuated by the two being treated as one.” (Emphasis added) Id. at 14. In affirming the hearing judge’s ruling, the Commission stated that if the two companies had been treated as one, they would have held the resulting entity in violation of the citation. Id.

A. Altor and Avcon Did Not Share A Common Worksite.

Altor and Avcon did share office space and a clerical person, however, the "worksite" for purposes of the OSHA citation, is not the office space that is shared by both companies. Instead, the "worksite" that was cited in this matter is the Mariner Highrise jobsite. Although Altor was the general contractor for the poured-in-place concrete work at the Mariner Project, Altor did not employ or supervise any personnel at the project site. The "worksite" for Altor’s employees was the office located at 193 Calvin Street, Westwood, New Jersey, whereas the worksite for Avcon’s employees (for the underlying citations) was the jobsite at the Mariner Project. Avcon's employees did not frequent Altor’s office and none of such employees reported to the office. The only common employee of both Avcon and Altor is one office worker that is compensated by both companies. Altor employees did not work at the Mariner Project site. If any "common worksite" exists, it is not the site of the Mariner Highrise, rather it is the location shared by an individual compensated by both Companies – 193 Calvin Street. Unlike in Advance Specialty Co., the Altor employees were not affected by the alleged hazardous conditions at the site of the Mariner project. Judge Yetman’s opinion itself states that, “Complainant does not allege that Altor, Inc. is a responsible party under the multi-employer worksite theory; that is, no exposed employee was employed by Altor, nor did any representatives of that firm control the worksite in relation to work performed by Avcon employees.” Decision & Order, at 3. Conversely, Avcon employees would

not have been affected by any hazardous conditions at 193 Calvin Street (if such conditions existed), with the exception of one shared employee.

B. Altor And Avcon's Operations Are Not Interrelated And Integrated.

Avcon was not a subsidiary of Altor. Although the two companies did share one employee and office space, Altor and Avcon kept different financial books and records and otherwise maintained separate corporate identities. Altor received/obtained contracts for the poured-in-place concrete projects. Avcon was subcontracted by Altor for purposes of performing the actual poured-in-place concrete work. The Secretary's statements that Altor, "had no employees," and, "did not perform any work," are inaccurate. Altor employed at least three people to perform primarily paper- and office-work. In contrast, Avcon's operations were primarily fieldwork. The fact that both companies are in the same industry and share one employee – who never visited the Mariner Project, does not, in and of itself, render two companies interrelated and integrated.

C. Altor And Avcon Do Not Share A Common Supervision Or Ownership.

The third and last factor considered in determining whether two corporations should be treated as a single employer is whether they share a common president, management, supervision or ownership. The Secretary erroneously represented to the Commission that Altor and Avcon were commonly owned. While Bill and Cornelia Saites (his wife) are shareholders of Avcon, Inc., neither Bill nor Cornelia owns any interest in Altor. The Secretary never established the identity of Altor's owners. The Secretary's assertion that Bill's son, Nick, had an "indirect" interest in Altor is irrelevant in that it does not establish the common ownership required for the single employer finding. While Bill Saites is the President and Director of both Avcon and Altor, the ownership of both companies is different. Moreover, their supervision is wholly different in that the union foremen supervised the site at the Mariner Project, not Bill Saites. Avcon employees report to the

union foremen on the job and any safety concerns or hazards would have been reported to the shop stewards, who are the go-betweens for the union workers. This is so regardless of Bill Saites' status as President and Director of both companies. There was no "supervision" of the Altor employees who do office work.

For the reasons set forth above, namely, (1) the different worksites of both Altor and Avcon, (2) the difference with regard to the nature of operations of both Avcon and Altor, and (3) the difference in supervision and ownership between Altor and Avcon, the purpose of the Act is not best effectuated by the two companies being treated as a single employer. Moreover, the factors discussed above are conjunctive, thus, all three elements must weigh in favor of treating Avcon and Altor as one employer. The facts here vary greatly from those in Advance Specialty and do not support Judge Yetman's Opinion. Holding otherwise would greatly expand the Commission's holding set forth by Advanced Specialty Company, supra, beyond its logical reach.

III. JUDGE YETMAN DID NOT ERR IN HOLDING THAT THE COMMISSION LACKS AUTHORITY TO PIERCE THE CORPORATE VEIL, RATHER HIS DECISION IS AMPLY SUPPORTED BY CASE LAW AND CONGRESSIONAL INTENT UNDERLYING THE OSHA ACT.

In his Decision and Order, Judge Yetman correctly found that the "Secretary has provided no authority and none has been found to support the conclusion that the Review Commission has the authority to pierce the veil of a lawful viable corporation or, in the event that such action is taken, that the federal district court is bound by such a finding either by *res judicata*, judicial notice, comity or otherwise in a subsequent action to recover debt...", and dismissed the Secretary's Complaint against Bill and Nicholas Saites, individually. (See Decision at pages 6-7) Judge Yetman **did not**, contrary to the Secretary's assertion, "acknowledge that the record could support piercing the corporate veil." (See Sec. Brief at page 14) Rather, the ALJ found that he lacked the

authority to determine whether the corporate veil should be pierced. Judge Yetman simply and accurately declined to engage in a "premature and extrajurisdictional act." (See Decision at page 6).

A. Congressional Intent and Case Law

The term "employer" as defined by the Occupational Safety and Health Act, means a person engaged in a business affecting commerce who has employees. For purposes of the definition, a corporation is an employer and therefore can be liable for violations of the Act. Congress' intent with regard to personal liability for corporate officers of a corporation is not directly addressed in the legislative history of the Act, however, vast case law evidences that Congress *did not* intend to provide for personal liability of corporate officers. In those instances that Congress did intend to imbue personal liability for corporate officers, Congress specifically enacted laws providing for such liability; for example, corporate officers being individually liable for trust fund taxes, deducted from employees pay checks to the Internal Revenue Service.

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

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

In the case before this Court, (1) the workers considered Avcon their employer; (2) Avcon paid the workers’ wages; (3) Avcon foremen had the responsibility to control their workers; (4) according to union regulations, only the foremen and shop stewards had the power to control the workers; (5) the workers had no ability to increase their income because (6) their wages were established by the union through the collective bargaining agreement. There is no basis upon which Judge Yetman could conclude that Bill Saites was an employee under the Griffin v. Brand McAllen analysis. Furthermore, Nick Saites, a mere employee of the corporate Respondent Avcon, could not, under any test, qualify as an employer.

In Skidmore v. Travelers Insurance Company, 356 F.Supp. 670 (E.D.La., 1973) *aff’d*, 483 F.2d 67 (5th Cir. 1973), an action was brought against executive officers of an employer seeking to recover civil damages for the employer’s failure to comply with OSHA. There, the injured plaintiff argued that there was an implicit private civil remedy against the executive officers of the corporate employer. Particularly relevant for the analysis here is the court’s observation as follows,

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

The Skidmore court went on to conclude,

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

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

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

There have been no opinions issued after Doig that in any way question its holdings. Therefore, as a matter of law, Judge Yetman correctly dismissed any claims of individual liability against Nick, solely an employee of Avcon, (even though Doig addresses criminal OSHA liability, not civil)

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

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

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

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

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

* * *

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

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

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

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

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

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

Their dicta lead to the conclusion that an officer's or director's role in a corporate entity (particularly a small one) may be so pervasive in

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

The most compelling fact in Cusack, for purposes of the instant analysis, is that civil proceedings were brought against Quality Steel, the company that Cusack worked for, and a penalty of \$20,000 was assessed for violations stemming from the same inspection from which the criminal penalties imbued. Quality Steel entered into a settlement agreement which Mr. Cusack himself signed on behalf of the company. After three initial payments, Quality Steel defaulted, yet the government never even pursued Mr. Cusack individually either for civil penalties under the OSHA Act as an employer or individually by piercing the corporate veil of Quality Steel, for the unpaid monetary penalties.

Cusack speaks volumes as to the fact that Congress did not *intend* to hold corporate officers personally liable for civil OSHA violations. It is a case where the government was successful in having a motion for summary judgment denied within a criminal case where they didn't even bring civil proceedings against the individual as an employer or through a veil piercing argument. To enforce the penal nature of the statute for a criminal cause of action, the government must seek prosecution against the principal of the corporation, since the corporation itself cannot be "imprisoned". However, when there is no criminal cause of action, as is the case in the instant matter, the enforcement of the statute for violations of the Act may be carried out solely through the assessment of fines to the corporation and/or the cessation of work by posting a "Notice of Imminent Danger." This is precisely what Judge Yetman explained in his Decision and Order. (See Decision and Order at page 6).

B. The Review Commission Lacks Jurisdiction To Pierce the Corporate Veil of the Corporate Respondents.

The Review Commission does not have authority to pierce the veil of a viable, lawful corporation. The Secretary's Opening Brief fails to cite any reliable authority that would support a finding to the contrary. The Secretary puts great emphasis on the Supreme Court's decision in Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994), wherein it 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." However, it is not the responsibility of the Review Commission to determine personal liability. Rather, as Judge Yetman opined "it is the responsibility of determining, based upon the evidence, the identity of the employer of exposed employees..." (See Decision at page 5) In this case, after hearing all of the evidence, Judge Yetman determined the "employer" to be Avcon (and Altor under the single employer theory). Even if the record supported a finding of personal liability, which Respondent submits it does not, the Commission lacks jurisdiction now to pierce the corporate veil to assess personal liability against Bill. With respect to Nick, there is no basis upon which any Court could imbue liability as he lacks any corporate nexus (shareholder, director, officer) that might arguably be used as a starting point for such analysis..

The Secretary's reliance on Sturm Ruger & Co. v. Chao, 300 F.3d 867 (D.C. Cir. 2002), is also misplaced. That case merely gives the Commission the responsibility of interpreting the parties' duties under the Act, not piercing the corporate veil once a viable corporation is determined to be the employer for purposes of the Act.

In order for this Commission to reverse the holding of Judge Yetman in this regard, to find Bill or Nick individually liable, it must rely on some as yet heretofore undefined legal standard

which has not exactly been articulated, announced or decided, which does not reach the level of fraud proven by clear and convincing evidence to pierce a corporate veil and find a stockholder or employee personally liable, but suffices to find an individual to be an "employer" under the OSHA Act. Respondents assert that no such lessened individual liability standard exists under the OSHA Act to hold an individual personally liable as an "employer" for civil penalties where there is a valid corporation which employs union workers at a job site, who are alleged to violate the Act, but where there are no deaths. To do so would contravene the purposes of the Act, remediation of safety violations, and would impose upon an individual such heightened liability as to chill competition and economic vigilance in the construction industry.

C. Individual liability under other statutory schemes

In federal question cases, courts are wary of allowing the corporate form to "stymie legislative policies." United Electrical Workers v. 163 Pleasant St. Corp., 960 F.2d 1080, 1091 (1st Cir. 1992). As a result, in cases involving the Federal Labor Standards Act courts have consistently held that a corporate officer with operational control who is directly responsible for a failure to pay statutorily required wages is an "employer" along with the corporation, jointly and severally liable for the shortfall. See Donovan v. Agnew, 712 F.2d 1509 (1st Cir. 1983)

However, in Donovan, supra, the First Circuit cautioned that that it should not lightly be inferred that Congress intended to disregard the shield from personal liability which is one of the major purposes of doing business in a corporate form. Id., at 1509. In Rockney v. Blohorn, 877 F.2d 637 (8th Cir. 1989) the Court held that there is no indication in the legislative history that Congress intended to expose a corporate officer, to liability for the corporation's violation of ERISA. The exclusion of "corporate officers" from the extensive enumerations of those included in the definition of persons points in the opposite direction. Id., at 641, citing Solomon v. Klein,

770 F.2d 352 (3rd Cir. 1985). "Limited liability is the hallmark of corporate law. Surely if Congress had decided to alter such a universal and time-honored concept, it would have signaled that resolve somehow in legislative history." International Brotherhood of Painters and Allied Trades Union v. Kracher, 856 F.2d 1546 (D.C. Cir. 1988). Thus, in deciding which veil-piercing test is appropriate, federal courts should "look closely at the purpose of the federal statute to determine whether the statute places importance on the corporate form, an inquiry that usually gives less respect to the corporate form than does the strict common law alter ego doctrine." Herr v. Grain, 841 F.Supp.1500, 1521 (D. Kan. 1994).

With regard to disputes involving workers' claims to ERISA benefits, Federal Courts have held that the federal common law standard of corporate separateness should apply. "United Electrical Workers v. 163 Pleasant St. Corp., 960 F.2d at 1092 (quoting Town of Brookline v. Gorsuch, 667 F.2d 215, 221 (1st Cir. 1981), wherein the court reasoned legislative intent dictated "a modicum of corporate disregard in ERISA cases" because "Congress enacted ERISA to protect the interests of employee benefit plan participants and their beneficiaries." *Id.* At 224) "The congressional intent of ERISA is to hold employers responsible for pension benefits, so that when the corporate form poses a bar to liability, 'concerns for corporate separateness are secondary to what we view as the mandate of ERISA.'" Pension Benefit Guar. Corp. v. Quimet Corp., 711 F.2d 1085, 1093 (1st Cir. 1982), cert. denied, 446 U.S. 961 (1983). The First Circuit Court of Appeals then set forth the following standard: "(1) whether the parent and the subsidiary ignored the independence of their separate operations, (2) whether some fraudulent intent existed on the principals' part, and (3) whether a substantial injustice would be visited on the proponents of veil piercing should the court validate the corporate shield." United Elec. Workers, *supra*, at 1093.

In Rockney, supra, the Eighth Circuit relied on the Third Circuit's holding in Soloman v. Klein, 770 F.2d 352 (3rd Cir. 1985) in affirming the District Court's award of summary judgment to defendants in an action by four retired executives of a corporation to collect benefits due them under the company's unfunded "Top Hat" pension and deferred compensation agreements. Plaintiffs alleged defendants were liable as control persons under the language of the agreements and under the definition of "employer" contained in the Employee Retirement Income Security Act of 1974. In Solomon, the Third Circuit held that an individual, who was the president, chief executive officer and holder of fifty percent of the stock of the defendant corporation, was not personally liable for delinquent contributions of the corporation to a retirement fund which the corporation had formed pursuant to a collective bargaining agreement. Chief Judge Aldisert stated the issue to be: "whether under concepts of statutory construction of ERISA we should conclude that Congress intended that corporate officers or large stockholders could be held liable for a corporation's violation of ERISA." Absent a reason to pierce the corporate veil, the Solomon court found that Congress, in enacting ERISA, did not intend to compromise the fundamental principle of corporate law that owners, officers and directors of a corporation have limited liability. *Id.* The Solomon court stated:

we find nothing in the legislative history [of Title I] to indicate that Congress intended to impose a personal liability on a shareholder or a high-ranking officer of a corporation for ERISA contributions owed by the corporation.

Id., at 354. The Third Circuit further stated: "There is no indication that Congress intended to expose corporate officers to liability for their employers' violation of ERISA; in fact, the exclusion of corporate officers from the extensive enumeration of persons points in the

opposite direction." Solomon at 354. The Court held that corporate officers cannot be held personally liable under ERISA where there is no basis for piercing the corporate veil.

The Soloman analysis is applicable to the matter sub judice, since the purpose of the ERISA statute is the protection of employee benefits. The mandate of the OSH Act is the interest of workplace safety. The congressional intent of the Act is to hold employers responsible for violations of workplace safety regulations, just like ERISA holds employers responsible for violations of pension and profit sharing regulations.

In the instant matter, Avcon was the "employer." While the Secretary contends that the mandate of the statute is to deter hazardous conditions, this is still not a basis to impose personal liability upon Bill or Nick. Interestingly, the Secretary never considered deeming any of the foremen or shop stewards to be employers for the purposes of obtaining the "necessary deterrent effect." (Tr270) Indeed, the Secretary has admitted that her motivation for bringing this action in the first instance is to collect the penalty against the individuals, **not** to promote workplace safety. (Tr1192) It would be flagrant error to compromise the corporate shield of the company and hold Bill and Nick personally liable.

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

Neither Bill or Nick Saites can be held personally liable for any alleged OSHA violations and the Decision and Order with regard to the Commission's lack of jurisdiction to

impose personal liability against them when there is a legal corporate employer against which penalties may be assessed, must be affirmed.

IV. THE SECRETARY OF LABOR CANNOT PIERCE THE CORPORATE VEIL OF THE CORPORATE RESPONDENTS TO ASSERT PERSONAL LIABILITY AS AGAINST BILL OR NICK.

The Secretary's effort to assert individual liability as against Bill (and especially Nick), clearly shows OSHA's intent to be guaranteed payment, as is the wish of all other corporate creditors, who have legitimate claims. However, unforeseen business expenses as well as a host of other reasons may deem a corporation unviable and unable to pay its debts. For some reason, OSHA believes that such unforeseen circumstances are no excuse and the Secretary should be in the superior position to collect her debt. It is well known that 90% of all corporations are closely held family owned companies. To subject officers and their kin to individual liability for OSHA violations would create a chilling economic effect and bestow upon OSHA unlimited and unfettered power. The Secretary's tactics should be seen for what they are and summarily disregarded.

The Secretary's reach for precedent to support the alter ego or veil piercing arguments leads to the inescapable conclusion that the Secretary is asking the Court to amend the Act, without the required rule-making process. (See, supra). Simply stated, the cases on which the Secretary relies to articulate grounds for individual liability are the federal equivalent of long established state court cases on alter ego and veil piercing. Each of the cases relied upon by the Secretary puts forth factual tests which cannot be met based upon the facts of this case.

As a predicate to assessing personal liability of corporate representatives, the complainant must show that the corporate form was ignored, or abused, in order to pierce the corporate veil; stated otherwise, the Court must be satisfied that some fraud or injustice has been proven before it can pierce the corporate veil. Mobay Corporation v. Allied-Signal, Inc., 761 F.Supp. 345 (D.N.J.,

1991). A corporate veil will be pierced only when the corporation has been used to perpetrate fraud or in order to prevent an injustice. Coier v. Hemmer, 901 F.Supp. 872 (D.N.J., 1995). With regard to what law this Court should apply in determining whether the corporate veil should be pierced, see Major Construction, supra, holding that New Jersey law affords protection from personal liability to an individual through incorporation of the business. Under New Jersey law, in order to prove fraud, the proponent must show by clear and convincing evidence facts necessary to support the cause of action. (See, for example, Baldasarre v. Butler, 254 N.J.Super. 502, 521 (App. Div. 1992))

Generally, New Jersey courts, like the federal courts, will not **pierce the corporate veil** of a legitimate corporation, absent fraud or injustice. Lyon v. Barrett, 89 N.J. 294, 300 (1982) **Personal liability** may be imposed upon a controlling stockholder of a close corporation only where the controlling stockholder disregards the corporate form and utilizes the corporation as a vehicle for committing equitable or legal fraud. Walensky v. Jonathan Royce Intern., 264 N.J. Super. 276 (App. Div. 1993), certif. denied, 134 N.J. 480 (1993).

While Judge Bober in Major Construction, supra, properly held that Mr. Polites was not an “employer” as defined in the Act, making inquiry into whether OSHA could pierce the corporate veil moot, he nevertheless opined that:

Even if such inquiry were appropriate, the evidence in this case does not disclose sufficient facts which would warrant a piercing of the corporate veil. It is well settled that a Court will generally not pierce the corporate veil to hold an individual shareholder liable for the acts of a corporation, absent fraud or injustice. In this case, the evidence is insufficient in this regard. There is no evidence that Polites received any proceeds beyond his salary. Indeed, the evidence indicates rather that any proceeds were funneled back into the business concern. It does appear that no dividends to the shareholders were paid, however, the corporation was newly formed and had undertaken only one job as of the date of the OSHA investigation. . . . There was no siphoning off of funds, and the Complainant presented no evidence that the corporation is insolvent.

Id., at 30.

Here, there is absolutely no proof that Bill or Nick used the corporate respondents, Altor or Avcon, for personal motives, personal gain, or any fraudulent or wrongful act. Indeed, in the "Hackensack" case, Judge Rooney found that no fraud existed with respect to Avcon, Altor, Bill or Nick. Avcon was a relatively new corporation, approximately one and a half years old and was undertaking only its second job at the time of the OSHA inspection. Both Bill and Nick drew nominal salaries and no dividends were paid, thereby lowering expenses and increasing profits. No evidence was adduced remotely suggesting that Bill or Nick received any benefits from the corporation in lieu of salary.

OSHA's Opening Brief states:

The Saites both worked full time on the project and must have expected compensation for both their labor and 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... Although there is no direct evidence of where 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.

(Secretary's Brief at page 22-23).

Nick Saites had no control over either company's finances. He did not sign checks, nor did he control any other company policies. Altor performed other projects since the Mariner and both Altor and Avcon have spent in excess of \$1,000,000 in legal fees defending two OSHA cases, thereby depleting any profits the companies earned on projects. Nick Saites, a New Jersey licensed attorney, has expended countless hours on these cases, but has only received compensation of approximately \$5,000. OSHA's quoted statements are accusatory at best and defamatory to say the least. This is yet another example of the depths the Secretary will stoop to twist the truth.

OSHA has attempted to use the legal opinions of Nick Saites, an attorney-at-law, to infer a motive of fraud in the Saites' forming a new corporation. This is furthest from the truth. Altor and Avcon were not formed for the purpose of avoiding paying OSHA fines. (Tr857-858)

Testimony elicited in the "Hackensack" case was admitted as evidence, but was used out of context when applied to this matter. The Secretary misleads this Court to believe another corporation, "Avcrete", was formed because Avcon had potential OSHA liabilities and "placing assets beyond the reach of any liability and specifically, OSHA liability was a prime reason for forming Avcrete." (Secretary's Brief at page 21, 27) Nick, as an attorney, expressed his opinion as to one reason he believed a new corporation should be formed to perform a new contract. Bill, the sole Avcrete shareholder testified that he formed Avcrete because he wanted to be the sole shareholder, and he was only a minority shareholder of Avcon (and owned no stock in Altor).

Further, facts indicate that Avcrete was not formed to place assets beyond the reach of any Avcon liability nor because Avcon had OSHA liabilities. Avcrete is a separate and distinct corporation from Avcon. The assets of one have no relation to those of the other. No assets have been transferred to or from either corporation. Avcrete contracted to construct the Mariner parking garage. There was no requirement that Avcon be issued the contract, nor that a corporation perpetuate itself to pay potential debts.

A person is entitled to incorporate as many times as he or she wishes and it is very common to do so, in order to limit liability of a particular project to the assets of that project. At the time of Avcrete's formation, there was no way of knowing whether citations would issue to Avcon and, if so, for what amount. Avcrete constructed the Mariner parking garage and completed same prior to OSHA issuing citations for the Mariner highrise.

It has been said that personal liability may only be imposed upon a controlling stockholder of a close corporation where the stockholder disregards the corporate form and utilizes the corporation as a vehicle for committing equitable or legal fraud. See, for example, Marascio v. Campanella, 298 N.J. Super. 491 (App. Div. 1997). Neither Bill nor Nick are controlling stockholders of either Altor or Avcon. Nick is not a stockholder of either and Bill owns a minority interest in Avcon and no shares in Altor. In addition, the fact that a closely held corporation is owned by one or two shareholders or family members, is not, in and of itself, sufficient to undermine the corporate identity and the general rule of limited liability. Coppa v. Taxation Division Director, 8 N.J. Tax. 236 (N.J. Tax. 1986).

The Secretary produced no witnesses, other than Nick and Bill, to testify about the respondents' corporate structure. The Secretary elicited no testimony as to Nick or Bill's "misuse" of the corporate forms; the use of the corporations to pay personal expenses; the commingling of funds; the use of the corporations to commit fraud on creditors; transfer of assets between the companies; or any other such malfeasance, because such evidence does not exist. Indeed, both Nick and Bill testified to the contrary. Testimony was elicited that all employees were paid by Avcon check, and there was no payment by cash or in kind. (Tr1041-42).

A. **None of the Pisani factors exist in this case to warrant the piercing of the veil as against Bill or Nick Saites.**

The Secretary relies heavily on the Third Circuit case of United States v. Pisani, 646 F.2d 83 (3rd Cir. 1981), in support of her attempt to have this Commission pierce the corporate veil. At the outset it must be noted that Pisani is a case involving Medicare fraud, which in and of itself makes the case inapplicable to the facts in this case. In Pisani, a physician was held individually liable to Medicare for overpayments made by the Department of Health, Education and Welfare to his solely owned corporation, Eaton Park Associates, Inc. There, the Third Circuit Court of Appeals applied traditional veil piercing concepts, and relied in part on the test announced by the Fourth Circuit in

DeWitt Truck Brokers v. W. Rey Flemming Fruit Company, 540 F.2d 681 (4th Cir. 1976) as

follows:

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

Most notable in Pisani is that, unlike this case, the government was already a creditor, having proven that the individual defendant had defrauded the Government by over billing Medicare and personally reaping the rewards of such fraud. Such abuse of the corporate form was the Pisani court's predicate to its veil piercing analysis. The Pisani Court had the authority to pierce the corporate veil because fraud was shown. Here, no fraud exists. The corporate Respondents have defended the citations, and this Commission, therefore, lacks authority to undertake a veil piercing analysis. Nevertheless, each of the Secretary's preposterous arguments to liken this case to Pisani and to establish requisite factors as set forth in Pisani to pierce the corporate veil, are addressed separately below, although it is Respondents' position that such analysis is inapposite and uncontrolling.

1. Gross Undercapitalization

In a creative attempt to establish that Avcon and Altor were undercapitalized, the Secretary misinterprets the record testimony to insinuate that Bill or Nick Saites were "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." (See Secretary's Brief at page 21) This argument is yet another example of the Secretary's unsupported vendetta against Bill and Nick Saites.

The Secretary relies on Bill's testimony that at the time of the hearing, Avcon was still owed money from Altor. Bill testified, in no uncertain terms, that Avcon would be paid by Altor and that

it takes time to transfer the monies due to Avcon for labor. (Tr1124-1126) The Secretary mischaracterizes Bill Saites' testimony when she avers that Bill "indefinitely postponed payment of Avcon's portion of the payment." It is a more than a leap of faith to argue that the Saites' manipulated payments to assure that Avcon was undercapitalized so as to avoid payment of any penalties under the Act. In addition, since OSHA cited both Altor and Avcon, this allegation is without merit. The record is rife with testimony that Avcon, as a result of previous citations, incurred substantial legal fees as well as experts and consultant expenses defending such citations in lengthy proceedings. Additionally, at the hearings, Bill Saites testified, under oath, that Avcon would be paid by Altor within three months. Should Avcon escrow the money to abide the outcome of the case? OSHA hasn't suggested such an approach. Nor could it. This is because OSHA lacks an enforceable judgment with which to pursue Respondents' assets.

OSHA recognizes that Altor and 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." (Secretary's Brief at page 20, Footnote 19). Capitalization is not the capital required to begin a corporation foreseeing any possible financial requirement, but, rather, only those reasonably foreseeable. Should the Review Commission accept OSHA's interpretation of "under capitalization" any corporation that was unable to pay its debts due to poor cash flow, bad business decisions, uncollectable receivables, bankruptcy or a host of other reasons, would render its officers liable for the corporate debt.

Furthermore, the Secretary makes a big deal out of the fact that the Saites were associated with other companies that were issued OSHA citations. In so asserting, the Secretary relies on testimony taken out of context from a completely separate trial! As such, said testimony should be disregarded. Nevertheless, Nick testified that the majority of citations issued to those other

companies were paid by them. (Tr853-854) OSHA filed no claims whatsoever against any of these other companies for the small unpaid balance of fines. The Secretary's failure to do so, belies her credibility now as she cries foul, anticipating (prior to receipt of an enforceable judgment) the demise of Avcon and Avcon's hypothetical inability to pay OSHA its undeserved penalties.

Altor and Avcon were not formed for the purpose of avoiding paying OSHA fines. (Tr857-858) Nick testified that no one could possibly know when OSHA was going to inspect any of the companies' jobsites, and therefore it would be impossible to create a company in an attempt to avoid any penalties. (Tr857) There is nothing sinister or wrong about the use of a corporate form to limit liability, so long as the corporate form is properly recognized, and all corporate formalities are observed.

2. Failure to observe corporate formalities

Equally incongruous is the Secretary's assertion that corporate formalities were not observed. The Secretary has not one scintilla of evidence to establish that the Avcon or Altor corporate forms were not properly observed. Nor could she. There was no testimony in this case that corporate formalities were not observed, rather, just the opposite. Bill testified that both he and his wife are shareholders of Avcon and that they have weekly or monthly meetings. (Tr943) New Jersey Corporate law only requires one annual stockholder meeting. The fact that Bill Saites did not keep minutes of his meetings with his wife and fellow shareholder is of no consequence as minutes of such meetings can be waived under New Jersey Business Corporations Law. See N.J.S.A. § 14A:5-2.

The Secretary tries to hang her hat on the fact that no organizational meeting was held in connection with the formation of Altor, Inc. However, Nick Saites clearly testified that there was unanimous consent of the directors in lieu of an organizational meeting and therefore under New

Jersey corporate law an organizational meeting was not required. See N.J.S.A. § 14A:2-8. (Tr. 832, 890)

Both Nick and Bill testified as to Avcon's proper corporate filings regarding taxes, payroll, and other items. Indeed, corporate tax returns and bank statements of each corporate respondent were admitted into evidence as OSHA exhibits. (See Exhibits C155-162). Once again, we challenge the Secretary to assert facts which would compel this Court to pierce Avcon's veil under traditional corporate law concepts, assuming, arguendo, that there is a legal basis to do so (i.e., fraud against OSHA which rises to the level of Medicare fraud as in Pisani). The evidence in the record is not indicative of any failure to observe corporate formalities.

3. **Nonpayment of dividends**

In her Opening Brief, the Secretary speculates, without any substantiation in the record, that the amount of salary that Bill and Nick drew, is some indication that they were "obtaining compensation by some means other than salary and dividends." (See Secretary's Brief at page 22-23). In a vain effort to support her theory, the Secretary concocts a nexus between the amount of monies Nick and Bill drew as salary to the resulting inability of OSHA to prospectively collect fines from Altor or Avcon. How does she know anything about Bill and Nick's lifestyles and personal expense levels?

Avcon had collective bargaining agreements with the unions whose laborers manned the job. The Secretary suggests that there is something wrong with this and that Bill and Nick's salary are evidence of "under capitalization". That salaries not governed by collective bargaining agreements were kept to minimum, suggests that the corporation was keeping expenses low with a view towards making greater income, not less.

Bill testified in no uncertain terms that Avcon would be paid by Altor and that it takes time to transfer the monies due to Avcon for labor. (Tr1124-1126). The Saites' had no obligation to "recapitalize Avcon with the Marnier parking garage contract." The fact that a legally sound business decision was made to form another company with which Altor would contract to build the garage is irrelevant to this matter and does not indicate any insolvency of the corporation.

Furthermore, if there were monies left after the payment of all corporate related expenses, Bill would be entitled to his pro rata share as a stockholder return or dividend. Clearly, there is no statutory requirement that a New Jersey closely held corporation pay a dividend.

4. Insolvency of the debtor corporation

This argument fails on its face. The alleged insolvency of Altor and Avcon is irrelevant because neither Altor nor Avcon has been adjudged a debtor to OSHA. In Pisani the defendant was already determined to be a debtor of the government, having stolen money from the Medicare system. Here, no such determination has been made in the Government's favor. A final, unappealable monetary entitlement in OSHA's favor is lacking.

Nonetheless, there is no evidence that Altor or Avcon are currently insolvent or will be insolvent if OSHA ever obtains an enforceable judgment. The Secretary offers the testimony of Bill Saites indicating that at the time of the hearing in this matter, Avcon had \$9.88 in its bank account and \$139,000 in an account receivable. This testimony is of no consequence. The fact is that Avcon maintained a bank account. The balance of that account at a particular period in time is completely insignificant and in no way evidences that Avcon was undercapitalized. The Secretary's argument that since Avcon paid its laborers, but only had \$9.88 in its bank account at the time of the hearing, Avcon was in some way attempting to manipulate monies to avoid paying penalties for

alleged OSHA violations, yet to be reduced to judgment is absurd. Nick Saites testified that neither Avcon nor Altor were incorporated to avoid any responsibilities under the OSHA Act. (Tr851)

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

The Secretary's ludicrous conclusion that the Saites' siphoned funds from the corporations lacks any support in the record. Incredibly, the Secretary admits that "there is no direct evidence of where the more than \$400,000 in profits from the Mariner job are now." (See Secretary's Brief at page 23). There is ample testimony that Avcon and Altor paid greater sums to defend OSHA citations. Such legitimate business expenses cannot, under any analysis, constitute siphoning of funds to the shareholders. The Secretary makes a mockery of this Review Commission by asking it to find that the Saites' engaged in such wrongful conduct without citing any evidence whatsoever. Such a request is a testament to the invalidity of the Secretary's case.

6. Nonfunctioning of other officers or directors

The Secretary herself acknowledges that Bill Saites was Altor and Avcon's only officer. How then does the Secretary propose that other officers were "non-functioning"? Since Bill was the sole officer and director of Altor and Avcon, there could not be any other non-functioning ones. Indeed, Bill testified that there were no limits to his authority as the sole officer and director of the companies. (Tr905) New Jersey Corporate law allows such authority and specifically prescribes certain instances that would require shareholder notification, i.e. the sale of all company assets. See N.J.S.A. §14A:10-1 et. seq.

7. The lack of corporate records

Corporate records do exist and the extensive Avcon payroll records were received into evidence. (R-1) The following corporate books and records were also introduced into evidence by the Secretary herself:

<u>Exhibit</u>	<u>Description</u>
C-155	Avcon 1997 Tax Return
C-156	Avcon 1998 Tax Return
C-157	Avcon 1999 Tax Return
C-158	Altor 1998 Tax Return
C-159	Altor 1997 Tax Return
C-160	Altor 1996 Tax Return
C-161	Avcon Corporate Records
C-162	Altor Minutes and Bylaws
C-165	Altor Profit and Loss Statement
C-166	Avcon Profit and Loss Statement

To now aver that no corporate records exist is flagrant deceitfulness. Aware of her misrepresentation, the Secretary harps on the fact that no minutes were kept of the shareholder meetings that Bill testified took place. As discussed supra, minutes of such meetings can be waived under New Jersey Business Corporations Law. N.J.S.A. § 14A:5-2.

8. **The corporations are a facade for operations of the dominant stockholder or stockholders**

Avcon is not a façade for the operation of the dominant stockholder. The dominant stockholder is Bill's wife, and her limited corporate involvement supports this proposition. As for Bill, the testimony indicates Avcon to be a viable, properly formed and maintained corporation. The Secretary believes that the mere fact that an individual is a stockholder in more than one corporation, one of which may have ceased doing business for whatever reason, imputes personal liability for every corporate debt other than the first corporation in which he became a shareholder. This is ludicrous and unsupportable

There is no testimony in the record indicating the identity of Altor shareholders. Therefore, it is impossible for OSHA to claim that Altor is a façade for operations of the dominant stockholder or stockholders. Furthermore, Nick is not a shareholder of either company. He is simply an employee, to which no individual liability can be attached under any analysis, since OSHA liability never attaches to the employees.

Finally, the Secretary cites several cases to support the proposition that 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. (Secretary's Brief at page 25). These cases are distinguishable from the facts presented here. In those cases, the corporations had "fragmentation of a single enterprise into separate corporations." This analysis would apply to subsidiaries receiving assets from related corporations in order to shield assets, not completely separate and distinct corporations without transfer of assets inter se.

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

As stated above, the Secretary is seeking a guarantee of payment for alleged citations from Bill and Nick Saites. However, so long as the corporate form is adhered to and there is no proof of commingling or fraud, personal liability will not lie. This is the rule of law, applied to every corporation. The fact that Bill and Nick have been associated with other corporations in the past that have gone out of business for legitimate reasons does not taint Altor or Aveon. It is very common for developers or owners of real estate to separately incorporate each project so as to limit the project's liability to whatever assets or revenue are generated from that particular project. In fact, that is precisely what was done here. A business decision was made to form new companies in order to protect the shareholders of companies that already had liabilities. (Tr893-893) Furthermore, there was no misrepresentation of fact in the formation of the new companies.(Tr894)

It has been held under New Jersey law that a parent corporation's control over its subsidiary was insufficient to establish the parent corporation's liability for the subsidiary's tort obligations on either an "alter ego" or "piercing corporate veil" theory. Craig v. Lake Asbestos of Quebec, Ltd., 843 F.2d 145 (3rd Cir. 1987). There, the court observed that although the parent corporation indicated that it would "control" the subsidiary in the course of a takeover, the parent corporation's

actual control of the subsidiary's day-to-day operation was limited, and the two entities maintained separate books, records and bank accounts. Id. at 151. Certainly, if a parent corporation is not liable for the obligations of its controlled subsidiary, ipso facto, an unrelated corporation cannot be liable for the debts of another.

The Craig court relied heavily on the New Jersey Supreme Court opinion in Department of Environmental Protection v. Ventron, 94 N.J. 473 (1983). There, the New Jersey Supreme Court observed, "we begin with the fundamental propositions that a corporation is a separate entity from its shareholders, and that a primary reason for incorporation is the insulation of shareholders from the liabilities of the corporate enterprise." (Citations omitted, 94 N.J. at 500). The Court continued, "even in the case of a parent corporation and its wholly-owned subsidiary, limited liability normally will not be abrogated." (Id.)

In Ventron, the New Jersey Department of Environmental Protection was seeking to assess penalties and cleanup costs based upon mercury pollution of a state waterway. The primary defendants were Velsicol Chemical Corporation, its former subsidiary, Woodridge Chemical Corporation, and Ventron Corporation, into which Woodridge was merged. After the Court discussed the traditional method of veil piercing where fraud or injustice are shown and announced that the purpose of piercing the corporate veil is to "prevent an independent corporation from being used to defeat the ends of justice, to perpetrate fraud to accomplish a crime or to otherwise evade the law", the Court concluded that it was unable to find that Velsicol had incorporated Woodridge for an unlawful purpose.

The Secretary has no right in this case, or any other, to seek individual fines from Bill or Nick, where there is absolutely no proof, as required, of corporate form abuses. Here, the business of Altor and Avcon was poured in place high rise concrete construction. Avcon was not formed to avoid hypothetical OSHA penalties which might be assessed sometime later. How

would Avcon know that OSHA was going to inspect the site when Avcon was incorporated in 1996? Absent evidence of corporate form abuses, undercapitalization, commingling of assets, fraud on creditors, and every other articulated test contained in over 100 years of case law, the Secretary's attempt to amend the OSHA Act must fail. It would be a gross injustice, should the Secretary be allowed to use this case for improper rule-making or statutory modifications.

The Secretary sets forth the accepted rule of law as to limited individual liability as follows: "A businessman may incorporate to limit his personal liability to the amount of assets invested in and profits from his business." (Secretary's Brief at page 25) Such rule of law does not evaporate if, as here, the corporation properly spends its profits to defend OSHA citations that it believes are erroneous. Having spent the profits from the business legitimately, there can be no argument that the corporate principals are individually liable for corporate debts. If such were the law, the corporate form would be a nullity and business as we know it would grind to a halt.

**V. JUDGE YETMAN WRONGFULLY AFFIRMED
CITATION 2, ITEM 1 AS A "WILLFUL VIOLATIONS"**

Judge Yetman abused his discretion in finding that Avcon failed to abide by 29 C.F.R. 1926.100(a) and in finding that said violations were willful.

Judge Yetman further erred in failing to consider the fact that Avcon employed a "hard hat policy" on this project. The testimony at trial clearly enunciated Avcon's policy that workers on the Mariner Project were to wear hard hats at all times. (Tr. 1039). Indeed, Avcon went so far as to employ a signalman/crane operator process which is geared toward the safety of all employees where loads of rebar, formwork and concrete bucket deliveries are received on a continuous basis. Judge Yetman failed to weigh the safety policies that Avcon devised for this project. Avcon's head protection rule was even stronger than OSHA's "overhead risk" rule.

Therefore, there was no “deliberate disregard” of the OSHA standard or “obstinate refusal to comply” on the employer’s part as set forth in the case of Frank Irely, 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). The Secretary failed to meet her burden of proof as to the hard hat issue and the affirmance of citation 2, item 1 as a “willful violation” must be vacated by the Review Commission.

The OSHA standard that addresses head protection is flawed in that it suffers from a serious subjectivity criteria. The OSHA standard discusses, “possible danger of head injury from impact, or from falling or flying objects” but does not define what an “overhead risk” is. The standard is also void for vagueness because it does not define whether the “possible” danger of head injury is a possibility in terms of remoteness or reasonableness. There is absolutely no objective method to measure the “zone of danger” of overhead risks vis-à-vis head protection issues other than mere visual observation and arbitrary speculation.

The record does not support the finding that the Avcon employees refused to wear hard hats. The irony here is that had the Avcon employees merely complied with the OSHA standard, they would have been in breach of Avcon’s more stringent standard!

Based upon the facts presented by the Secretary, Judge Yetman erred in finding that Avcon violated the head protection standard. There were no facts produced at trial which supported a finding that at a particular date and time an Avcon employee, not wearing a hard hat, was faced with a possible danger of head injury. In the absence of that possibility, it matters not that the particular employee is in violation of Avcon’s more stringent rule. Judge Yetman improperly failed to weigh the evidence that Avcon enforced its hard hat policy.

Hard hats were required during the construction of the Edgewater Project at all times. Bill Saites testified that every employee on the job was provided with a hard hat and, if an employee lost or removed a hard hat, another one would be provided. (Tr. 991:17). Additionally, the foremen and shop stewards enforced Avcon's hard hat policy. (Tr. 991:22). In fact, there is testimony at trial that in the past, employees were fired for not complying with Avcon's hard hat policy. This evidence, mistakenly overlooked by Judge Yetman, flies in the face of the decision that Avcon's employees had a "deliberate disregard" of the hard hat standard. A large amount of the work performed on this project involved workers kneeling, crouching or bending over. In these situations, hard hats will obviously fall off. These are temporary lapses of head gear, not "willful" disregard of the OSHA standard and therefore, do not translate into willful violations.

The Mariner project was very substantial. There were thousands of deliveries of materials and concrete to the building and tens of thousands of man hours expended on this project. (Tr. 996). There were eleven (11) alleged violations spread out over a six month period. This is de minimus at best and certainly does not rise to the willful level, as Judge Yetman wrongfully determined.

The alleged instances of willful hard hat violations were not supported by sufficient credible evidence and therefore, Judge Yetman erred in not dismissing such allegations. Certainly, the Secretary failed to prove an "obstinate refusal to comply" or "defiance or such reckless disregard of consequences as to be equivalent to a knowing, conscious and deliberate flaunting of the act." See Ircy, supra at 1200, 1207. The fact that the evidence showed that Avcon workers were supplied hard hats and are issued replacements if they lose their original hard hats combined with the fact that workers are verbally reprimanded if they are not briefly

wearing a hard hat can only lead to the conclusion that there was no willful violation of the hard hat standard. Furthermore, no employee was injured on this project as a result of not wearing a hard hat.

In her opening brief, the Secretary wrongfully imputes knowledge to Avcon, because of previous citations, beginning in 1973, relating to companies with which the Saites were affiliated, for allegedly violating the same standard. This was an unjust assessment against Avcon and was one of the factors ostensibly utilized to find a "willful" violation as to this issue. Furthermore, Bill Saites alleged refusal to wear a hard hat because he had no overhead risk does not rise to the level of "willful" conduct imputable against Avcon. There was also no evidence to support the finding that Bill Saites refused to enforce compliance and therefore, insinuates a "deliberate disregard" of the standard. Furthermore, the fines imputed were excessive in light of the de minimus nature of the remote observations compared with the size of the project and the total number of man hours expended.

For all of these reasons, Judge Yetman's decision affirming citation 2, item 2 as a willful violation must be vacated in its entirety. Assuming, arguendo, that such penalty is affirmed, it is respectfully suggested that the penalty be reduced to the minimum \$5000, given the de minimus nature of the incidents cited, the lack of injury and the fact of Avcon's very stringent hard hat policy.

VI. JUDGE YETMAN COMMITTED REVERSIBLE ERROR IN AFFIRMING CITATION 2, ITEMS 2 THROUGH 7 FOR FAILURE TO ASSURE FALL PROTECTION.

The Complainant improperly cited Respondents under § 1926.501(b)(1), and relied upon such section for all of the fall protection allegations in this matter. Respondents properly argued that the cited regulation did not apply since much of the work at the Mariner Highrise project

was “leading edge” work. The facts in this matter clearly support Respondents’ argument that the violations for fall protection issued to Respondents on the Mariner Highrise project should have been issued, if at all, pursuant to 29 C.F.R. 1926.501(b)(2) not § 1926.501(b)(1). The Secretary did not issue any violations under § 1926.501(b)(2) dealing with the concept of “leading edges.” “Leading edge” means,

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

§ 1926.500(b) (emphasis added). Respondents’ safety expert, Leo DeBobes, testified that the leading edge work is not completed until the formwork is stripped. (Tr. 1600:7). Thus, “construction” of formwork sections necessarily involves the removal or stripping of the sections, so that until fully stripped, the edge is “leading”. The edge of the formwork at the Mariner Highrise project extended some six feet beyond the concrete. (Tr. 880:24). No employees were required, nor was it necessary to work past the pour stops, also referred to as the edge of the concrete building. Therefore, the six-foot formwork extension and catch platforms provided a buffer zone or a zone of safety during leading edge work.

A. Respondents Established Infeasibility Of Conventional Fall Protection Systems.

Assuming, *arguendo*, that the Commission does not dismiss the majority of the fall protection allegations for OSHA’s failure to properly cite them as leading edge violations, the Commission, in the interest of justice, should permit Respondents to rely on the protections of § 1926.501(b)(2). Section 1926.501(b)(2) provides,

2. Leading Edges. (i) Each employee who is constructing a leading edge 6 feet (1.8 m) or more above lower levels shall be protected

from falling by guardrail systems, safety net systems, or personal fall arrest systems. **Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph 14 of § 1926.502.**

The Respondents met their burden of proof at trial by establishing infeasibility and it is respectfully submitted that Judge Yetman improperly affirmed Citation 2, Items 2 through 7, alleging violations of the fall protection standard without basis or proof.

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

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

Id. In Seibel, the Respondent, had testified that he was unaware of any cases of weld flash even though one fitter worked for twenty-five (25) years and another employee worked for eight (8) years. The Seibel Commission stated that,

[t]he mere absence of any injury does not necessarily lead to the conclusion that there is no hazard; however, it is at least of some weight on the question of whether a hazardous condition exists. And the fewer number of injuries and the greater the length of time without injury are both of some consequence in answering that question.

Id. Of particular importance is that in Seibel, the Commission found that the “uncontradicted testimony that the Respondent’s method of welding had been carried on for some 25 years without any accident or injury to any employee. That record certainly supports the Respondent’s contention

that its method of welding is nonhazardous.” *Id.* Unlike in Gilles & Cotting, Inc.¹, 3 BNA OSHC 2002, 2003 (No. 504, 1976), where two workers fell to their death, no worker has ever had any accident or suffered an injury resulting from a fall with any company associated with Bill Saites (or Nick Saites) involving poured-in-place construction. (Tr. 1000:6-12).

In the present case, Avcon incorporated a series of fall protection measures including the combined use of guardrails, form extensions and catch platforms, as has been done in this industry for over 40 years. The formwork extensions past the pour stops provided a six-foot zone of safety for employees working within the confines of the “building”; six feet being the minimum distance from the edge for which OSHA inspectors do not require fall protection. The catch platform is used where guardrails would be continually damaged, such as on the stripping/stacking floor, and where form extensions were required to be removed or “stripped.” The formwork was neither designed nor intended to act as an anchor for any fall arrest or restraining systems.

Respondents respectfully submit that Judge Yetman’s failure to apply the “leading edge exception” to the fall protection standards is contrary to well-settled commission precedent, not supported by a preponderance of the evidence, and therefore must be reversed.

1. Fall Protection Nets.

Avcon demonstrated that its guardrail system was pre-planned by “qualified persons” as defined under the OSHA Act. The leading edge infeasibility has been shown, and Avcon’s leading edge alternative fall protection plan is adequate and was planned to accommodate those limited situations where the perimeter guardrails could not provide protection due to the constraints of the project. This Review Commission is called upon to apply common sense to what occurred as

¹ The Secretary relies on *Gilles & Cotting, Inc.* in support of its contention that exposure to harm was “reasonably predictable.”

opposed to the ideal or hypothetical job site. To do anything else would be patently prejudicial to respondents and would do nothing to further the spirit of the Act.

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

OSHA's own engineering expert, Burkhart, indicated that the 7-day concrete sample, with a unit load of 2,830 psi, has significant strength to act as embedment. (Tr. 1639:17-20). Additionally, OSHA's safety net salesman, Paine, testified that he is not qualified to allow construction loads to be embedded into concrete. (Tr. 1701:9 - 1702:22). The uncontested testimony by Respondents' and OSHA's expert is that concrete would reach an appreciable strength for net embedments at 7 days. If net installation and drop-testing at the perimeter of the building requires two days, the net installation would take a minimum of 9 days from the pour date. Bearing in mind that Avcon employed a three-day pour cycle, the nets could never keep up with the work. Thus, the result would be either, 1) the nets would always be a minimum of four floors behind the work and would therefore be beyond the 30 foot OSHA mandated distance, or 2) the efficiency with which Avcon was completing the poured-in-place concrete would grind to a halt so as to permit the nets to "catch-up."

The testimony supports a finding that the strength of the concrete would be critical to net installation and would not be feasible given the chosen concrete pouring method employed and

perfected by Avcon. The developer of the project never asked the structural engineer to design anchorage points for fall protection net base-plates into the building. Moreover, the installation of anchor plate embedments would require approval by the design engineer and Respondents' expert, Lou Nacamuli, P.E., who testified that he would not allow external forces, such as plate embedments, to be applied to the structure. (Tr. 1473:25 – 1474:20).

It is noteworthy that OSHA never issued a notice of imminent danger nor in any way attempted to shut down the project. Avcon could not feasibly install the nets without the appropriate embedments. Therefore, Avcon wisely chose to use guardrails for fall protection together with alternative fall protection methods for leading edge work, which preceded guardrail installation. These methods were more feasible and unquestionably much safer than safety nets, which would never protect workers due to the unavailability of cured concrete close enough to the workers to provide appropriate net anchorage strength.

2. Fall Arrest/Fall Restraint Systems.

Similarly, fall arrest/fall restraint systems were equally infeasible on the Mariner Highrise project. The required anchorage for fall arrest and fall restraints systems could not be met by attaching the systems to formwork. Formwork is not intended for, nor designed to be used as an anchor point. Personal fall arrest systems and positioning device systems are infeasible protection alternatives with regard to Avcon's work because they require anchorages, used for attachments, which cannot support the minimum weight resistance required. 29 CFR 1926.502(d)(15) requires the anchorage to support a load of at least 5,000 pounds per employee attached for personal fall arrest systems, and 29 CFR 1926.502(e)(2), requires that such devices must secure to an anchorage capable of supporting at least twice the potential impact load of an employee's fall or 3,000 pounds, whichever is greater for the positioning device systems. In either case, neither the plywood deck

nor the formwork will sustain any such lateral load since such formwork was not intended for, designed or installed with anchorage capability in mind. Formwork, by OSHA's own definition, is temporary in nature and not intended to be used as an anchor point. Thus, nailing a lanyard to a stringer or rib will not provide sufficient anchorage for such use. In addition, attaching a lanyard to formwork would violate 29 CFR 1926.501(d)(11) which provides "[l]ifelines shall be protected against being cut or abraded."

OSHA contends that the Canadian manufactured "Safe-T-Strap" would provide a sufficient anchor point. Safe-T-Straps were designed primarily for residential construction in Canada, whose fall protection standards are entirely different. The formwork would not provide sufficient anchorage that satisfies OSHA requirements cited above. Thus, OSHA failed to prove feasibility of using fall arrest or restraint systems for work which precedes the installation of guardrails.

Based on all of the above, OSHA has failed to demonstrate feasibility of any method other than guardrails for fall protection on this particular project. Alternatively, Respondents met their burden and established that the fall arrest and restraint systems are not feasible for framing or deck work which precedes the installation of guardrails. Avcon established that there was clearly a guardrail system in place, and the alternative fall protection plan was limited to those activities preceding the installation of guardrails. Avcon's use of its alternative fall protection plan was adequate and appropriate under the circumstances. It is noteworthy, in light of the courts holding in Seibel, that Bill and Nick Saites have been involved with corporations that have used these methods on over 200 high-rise projects over a period of 40 years. Accordingly, Avcon's alternate fall protection plan, albeit not in writing during this project, is time-tested and extraordinarily effective.

3. Nets and Fall Restraint Systems Posed A Greater Hazard.

A greater number of employees would be exposed to a great danger installing, relocating and removing nets than the limited number of employees exposed to the building edge for a brief period of time. In addition, OSHA requires that safety nets be drop-tested after initial installation and before being used as a fall protection system "whenever relocated." 29 CFR 1926.502(c)(4)(i). As a consequence of the foregoing requirement, members of the installation crew will need to drop-test each installation at each floor by throwing a 400 pound bag of sand over the edge of the building into the net to see if it will hold. The drop-testing procedure itself will expose more people to a greater hazard. OSHA also requires that safety nets be inspected at least once a week for wear. Moreover, because of the 3-day pour cycle on the Mariner Highrise project, Avcon would have to reserve employees for safety net installation, testing and maintenance. Avcon's system of guardrails and catch platforms protected those employees working on the deck. Safety nets were not the chosen fall protection method on this project and it made little sense for Avcon to install nets to protect a few carpenters while exposing dozens of installers, de-installers, re-installers, drop testers and inspectors to catastrophic falls.

The fall restraint systems favored by the Secretary would also expose Avcon employees to a greater hazard. Bill Saites, having more than 40 years experience in constructing poured-in-place highrise concrete structures and an incident free record², testified that attaching lanyards to concrete columns would constitute a greater hazard because of threat of an employee tripping on the lanyards. (Tr. 1018:6, 1581:18). Leo DeBobes also testified that personal fall arrest systems would have exposed workers to the hazard of tripping over lines. Thus, the fall restraint systems themselves may very well be the cause of the falls they are intended to restrain.

² By "incident-free" Respondent means incidents involving falls from structures.

The Secretary failed to appreciate the greater harm posed by safety nets and fall restraint systems in poured-in-place concrete projects. More importantly, Judge Yetman committed reversible error when he failed to deem such safety precautions infeasible.

B. Judge Yetman Committed Reversible Error In Classifying Citation 2 Items 2 Through 7 As Willful Violations.

Contrary to the Secretary's assertions, Judge Yetman's willful penalty classification with regard to Citation 2, items 2 through 7 is unsupported by the facts established at trial. As discussed above, Avcon had guardrail systems in place at the site. Often, the guardrails were redundant because the deck extended 6 feet past the point where workers were required to work. Avcon's alternative fall plan was used when guardrails were infeasible. The Secretary did not cite Avcon for defective guardrails, although OSHA described them as "incomplete"; she instead chose a more lucrative violation. OSHA's own employees have testified that there were guardrail systems in place at the site and the video depicts the guardrail and stanchions. Where vertical guardrails were infeasible, such as on the stripping/stacking floor, because they would be continually damaged, Avcon constructed a catch platform (referred to as "outriggers") to serve the dual purpose of providing fall protection and retaining stripped material. (Tr. 879:13-15, 1100:5-8). Avcon instructed its employees to place the outriggers two feet apart so as to replicate a vertical guardrail on a horizontal plane. This forethought is definitive proof that the alleged violations were not willful.

OSHA inspectors did not even recognize the presence of the wood outriggers during their inspection. Video sequences were shown during several days of trial depicting the wood outriggers neatly placed at specified intervals and protruding from the building. Even after being questioned several times by Judge Yetman during the video presentation, the OSHA inspector, Donnelly was unable (or perhaps unwilling) to identify any purpose for the outriggers shown and stated he

believed the lumber was stripped from the ceiling above and fell to the floor in that organized manner. (Tr489, 490, 656, 657)

Respondents rely on the precedent of the Third Circuit, under whose jurisdiction, the instant matter lies. The Third Circuit requires a showing of a "deliberate flaunting of the Act" or an "obstinate refusal to comply" on the employer's part in order to find willfulness. Frank Irey, Jr. Inc. v. OSHRC, 519 F.2d 1200 (3rd Cir. 1975). Any alleged violations in the instant case were simply not intentional, nor were they committed with knowing or voluntary disregard of the requirements of the Act, and, therefore the violations should not have been classified as willful. Avcon had a bona fide, good faith disagreement with OSHA concerning the interpretation of the fall protection regulation for which OSHA chooses to persecute the Saites and any corporation with which they are associated.

In the instant matter, the record before Judge Yetman clearly established that Respondents' installed the only feasible fall protection, a guardrail system, and Respondents' workers were told to tie off where feasible. The disagreement between OSHA and Respondents regarding the feasibility of alternative fall protection methods does not rise to the level of what is required by law to evidence willfulness. (See generally Irey, supra). A difference of opinion between the employer and OSHA as to whether a violation existed in a given factual situation "should not be construed as constituting a willful violation of the Act merely because labor holds a contrary opinion on the facts and advises the employer of that opinion." Keco Industries, Inc. 13 BNA OSHC 1161 (1987). The Commission will refuse to find a willful violation merely because an employer disagrees with the view expressed by OSHA. Id. The facts and precedent cited herein supports a finding that Judge Yetman erred in ruling that Avcon's alleged violation

was willful. Accordingly, Judge Yetman's ruling must be vacated, and the violations, if any, be reclassified as serious.

C. Judge Yetman Committed Reversible Error In Failing To Find That The Citation 2, Items 2 Through 7 Should Have Been Grouped As One Item.

Respondents acknowledge that the Commission has wide discretion in assessing separate penalties for multiple violations of a standard when the final penalty assessed is "appropriate." However, Respondent's respectfully submit that Judge Yetman erred in not exercising that discretion in favor of Respondents.

In determining the appropriateness of assessing separate penalties for multiple violations, due consideration must be given to the size of the employer, the gravity of the violation and the employer's good faith and history of previous violations. See J.A. Jones Construction Co., 15 BNA OSHC 2201, CCH OSHD ¶ 29, 964 (No. 87-2059, 1993). The gravity of the offense, the principle factor, includes consideration of 1) the number of employees exposed to the risk of injury, 2) the duration of exposure, 3) the precautions taken against injury, if any; and 4) the degree of probability of occurrence of injury. See Kus-Tum Builders, Inc., 10 BNA OAH C 1049, 1981 CCH OSHP ¶ 25, 738 (No. 76-2644, 1981).

Here, the Secretary did not establish the number of Avcon's employees that were exposed to the alleged fall hazards on the Mariner Project. Judge Yetman found that the number of such employees was "undetermined." Decision & Order at 35. In light of Avcon's size and the Secretary's inability to ascertain the number of employees that were exposed to fall hazards, the Commission must find that this factor favors Respondents. (Tr. 415:5).

The additional factors also support a finding that the gravity of the violation was not "high." With regard to the degree of probability of occurrence of injury, it must be noted that there were no accidents on this, or any previous, Avcon project or any other project involving

corporations associated with Bill or Nick Saites (Tr. 1000:6-12; Decision & Order at 35). While the duration of the exposure was intermittent during three weeks (October 23rd through November 16, 1998) the project itself lasted months. Additionally, albeit not the precautions that the Secretary preferred, Avcon did take various and premeditated safety precautions against injury.

Respondent's accident-free history and the Secretary's inability to establish the number of workers exposed to hazards, are sufficient to find that the gravity of the violation was not high. Also, the duration of exposure and Avcon's good-faith safety measures further support such a finding.

The other factors considered in assessing separate penalties for multiple violations – size of the employer and the employer's good faith and history of previous violations – also favor Respondents. As mentioned above, Avcon, with less than 100 employees, is a small company. Furthermore, a finding that Avcon's alternative safety plan was non-compliant with OSHA's standards does not support a finding of bad faith. Moreover, although Avcon had been previously cited, no final decision has ever been rendered against it.

After considering Avcon's size and good faith, the gravity of the violations, and the absence of previous final decisions, Judge Yetman should have exercised his discretion and found that assessing separate penalties for the multiple citations was not appropriate.

D. Judge Yetman Failed to Adequately Reduce The Proposed Combined Penalties.

Respondents established that a review of the facts and circumstances supports a finding that Judge Yetman erred in, 1) finding that the leading edges constituted a "hazard," 2) affirming Citation 2, Items 2 through 7, 3) classifying such violations as "willful," and 4) assessing separate penalties for each Items 2 through 7. If, arguendo, the Commission affirms Judge

Yetman's findings, Respondent agrees with that portion of the Judge's decision in which he reduced the proposed combined penalties, but asserts that the penalties should be further reduced to the minimum of \$5,000 per violation, given the repetitive nature of the alleged instances, the fact of abatement and the lack of any injuries resultant therefrom, .

In the matter at hand, Avcon was not cited on an instance-by-instance basis under the Secretary's "egregious" penalty policy. Although Judge Yetman should not have assessed separate penalties for the multiple citations for the reasons set forth above, Judge Yetman accurately concluded that the Secretary's basis for combining the 31 violations into six hypothetical groups – each of which "could have been abated with a single net on all four sides of the building" – was "unsupportable" in that it failed to reflect her litigation position, and was thereby, excessive. (See Decision and Order at page 36). Accordingly, if the Commission affirms Judge Yetman's prior decisions regarding Citation 2, Items 2 through 7, it should further reduce the proposed combined penalty of \$336,000, to \$30,000 (6 x \$5,000). (See § 17 (j) of the OSH Act).

VII. JUDGE YETMAN COMMITTED REVERSIBLE ERROR IN AFFIRMING CITATION 2, ITEM 8 FOR FAILURE TO ASSURE PROTECTION FROM FALLING THROUGH HOLES.

Respondent established compliance with § 1926.501(b)(4)(i) at trial. Section 1926(b)(4) provides,

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

A. OSHA failed to prove the violations set forth in Instance a).

Instance a) concerns the ladderway openings on the 1st through 10th floors. The alleged violation is that the ladderway openings, "were not provided with standard guardrails at the unused

portion of the opening to protect the employees from fall hazards, on or about 10/23/98 and 10/24/98.”

Nicholas Saites testified that the elevator shafts were completely planked over except for a hole, approximately 3x3 feet, which was used for ladderways. (Tr. 1275). The elevator shaft cover provided a raised platform, which served as a warning to those approaching the ladderway opening. Additionally, pursuant to general practice, the ladders were staggered, thus providing additional safety. (Tr.1277). No such falls through ladderways were recorded. However, hypothetically, if someone stepped into a ladderway they would not fall to the lower level. Instead, because of the staggered ladders, they would step onto the ladder. (Tr. 1279). Despite its firm belief that the aforementioned precautions greatly reduced (if not eliminated) any risks, Avcon complied with CO Donnelly’s request to place guardrails around the cited ladderways. (Tr. 1279).

B. OSHA failed to prove the violations set forth in *Instance b*.

Instance b) states. “Floors 11 and 13: The elevator shaft and stairway openings were not provided with standard guardrails or covers to protect the employees from fall hazards, on or about 10/23/98 and 11/3/98.”

The photographs of the elevator shaft depict wooden cross-members installed for safety reasons. The subject stairway was under construction when it was photographed. Moreover, the stairway photographs were taken after working hours with no employees present, thus no employees were exposed to the alleged hazard. The photograph proffered by the Secretary herself, which depicts the protection plywood leaning on the reinforcing steel, supports respondent’s assertion that the stairway is covered during working hours. (Tr. 1284). It is noteworthy that CO Donnelly stood at the edge of the opening and testified that he was not “in danger.” (Tr. 717).

Considering CO Donnelly's exculpatory testimony, Judge Yetman's finding as to *Instance b)* was erroneous and should be reversed.

C. **OSHA failed to prove the violations set forth in *Instances c) & d)*.**

Instance c) states, "[f]loors 4, 5, 6, 7 and 9: The stairway openings were not provided with standard guardrails or covers to protect the employees from fall hazards, on or about 10/23/98 and 10/24/98."

Instance d) states, "5th floor: The stairway opening was not provided with standard guardrails or a cover to protect the employee from a fall hazard, on or about 10/24/98."

Judge Yetman erred in affirming citation 2, item 8 with regard to *instances c & d*. Nick Saites testified that Avcon covered the floor openings, however, non-Avcon personnel often removed the covers. (Tr. 1291). In his decision, Judge Yetman acknowledged the trial testimony in which it was stated that the covers for the stairway openings, "on the lower floors were routinely removed by other subcontractors." (emphasis added). (See Decision and Order at page 29) Moreover, other than revealing that the stairways were not secured on that one day, 10/24/98, the Secretary provided no testimony or evidence that Avcon failed to replace the covers in a timely fashion. Nonetheless, Judge Yetman found that the Secretary established these violations.

Based on all of the above, Respondents assert that OSHA has failed to demonstrate that Avcon violated § 1926.501(b)(4)(i) and that Judge Yetman's decision in affirming said violations was reversible error. Adequate safety measures were taken with respect to the instances cited in citation 2, item 8. Nevertheless, as acknowledged by Judge Yetman, Avcon abated the majority of the cited violations by instituting what OSHA considered to be the appropriate abatement measures. (See Decision and Order at page 39).

D. Judge Yetman Correctly Rejected The Secretary's Argument Of Willfulness.

Respondents believe that a review of the facts and circumstances support its belief that Judge Yetman erred in affirming Citation 2, Item 8. Assuming, arguendo, that this Commission upholds Judge Yetman's decision with regard to Citation 2, Item 8, the Commission should also affirm Judge's ruling in which he held that the Secretary failed to show willfulness.

Willful violations are those committed, "with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." Valdak Corp., 17 BNA OSHC 1135, 1136, 1993-95 CCH OSHD ¶ 30,759, p. 42,740 (No. 93-239, 1995), aff'd, 73 F.3d 1466 (8th Cir. 1996). The floor holes for which Avcon was cited were of different types and in various locations. Absent a showing of a pattern, practice or course of conduct, the Commission has been hesitant to infer willfulness from dissimilar violations. See S.E. Staley Mfg. Co., 19 BNA OSCH 1199, 2000 CCH OSHD ¶ 32,229 (Nos. 91-0637, 91-0638, 2000). In light of the Secretary's failure to establish that Avcon made a deliberate decision not to comply with OSHA regulations regarding protecting floor holes, Judge Yetman correctly found that the evidence was insufficient to support a willful classification with respect to Citation 2, Item 8. Accordingly, Judge Yetman's decision that willfulness has not been established should be affirmed.

VIII. JUDGE YETMAN COMMITTED REVERSIBLE ERROR IN NOT FINDING THAT THE SECRETARY SELECTIVELY ENFORCED OSHA'S STANDARDS AGAINST RESPONDENTS.

During trial, substantial evidence was elicited proving that respondents were the victims of selective prosecution of OSHA regulations. Judge Yetman committed reversible error in failing to find that OSHA was guilty of misconduct and in failing to find there was a claim of selective enforcement as against respondents.

There was ample, unrefuted testimony at the time of trial in the instant matter revealing that citations were never issued to the other subcontractors, the general contractor and the owner of the Mariner project for incidents violating OSHA requirements. Avcon was cited for willful fall protection violations with regard to ladderway openings, notwithstanding that Nick Saites testified that all of the contractors working on this project use the same ladderways, none of the others were cited. (Tr. 1060).

During trial, the videographers each testified that citations should have been issued for the numerous violations depicted on the video and committed by other subcontractors and the general contractor. Judge Yetman viewed the videotape during trial and saw this for himself, yet still failed to find "selective enforcement." One of the "excuses" provided by OSHA for not citing the other subcontractors and the general contractor was their failure to identify the employees committing the violations depicted on the video. Why then did OSHA choose to cite Avcon and Altor (and Bill and Nick individually)? It is because Avcon had a bona fide disagreement with OSHA concerning the fall protection regulations and considering the size of the penalties assessed, OSHA wanted a guarantee of payment by Altor, Bill and Nick. Even more disturbing is the fact that Altor had no employees on the site. Altor's president, Bill Saites, was on the site daily, usually at the ground level. He seldom ventured near the building because of his advanced age and medical problems. Yet Altor was cited for each and every instance that Avcon was. However, neither the general contractor nor the owner were cited for those violations.

In his opinion, Judge Yetman stated as follows:

It is well settled that the conscious exercise of some selectivity and enforcement is not in itself a violation of due process. Relief is available only if the decision to prosecute is shown to have been deliberately based on an unjustifiable standard such

as race or religion or other arbitrary classification. (citations omitted)

(Decision and Order at 40). The selective enforcement against respondents by OSHA denied them due process of law. Contrary to Judge Yetman's opinion, respondents presented evidence that OSHA was motivated to prosecute them based upon their Greek heritage. Of all the citations issued by OSHA, the Secretary selectively and subjectively decided to issue individual citations to Bill Saites, Nick Saites and Michael Polites; all of Greek heritage. OSHA's enforcement was based upon an unjustifiable standard. This had a discriminatory effect upon the respondents. Accordingly, Judge Yetman's decision on selective enforcement must be overturned.

In analyzing a selective enforcement claim, OSHA commissioners have relied on federal court decisions regarding selective prosecution. See, for example, DeKalb Forge Company (1987) citing Wayte v. United States, 105 S.Ct. 1524 (1985); United States v. Mitchell, 778 F.2d 1271 (7th Cir. 1985). In order prevail on such a claim, the decision to enforce the regulation must be based on an unjustifiable basis, such as race, religion or some other arbitrary classification and said enforcement must have been motivated by a discriminatory purpose resulting in a discriminatory effect. "... a claim of selective prosecution is judged by ordinary equal protection standards, under which it must be shown that the alleged selective enforcement had a discriminatory effect and was motivated by a discriminatory purpose ..." See Vergona Crane Co., Inc. (1992). In Vergona, the respondent based its selective prosecution claim on the fact that the Secretary withdrew violations for the same offense vis-à-vis another contractor working at the same site. However, Vergona is even stronger precedent because in Vergona the violations were withdrawn. OSHA did not even issue any citations to any of the subcontractors or general contractor in the matter sub judice, notwithstanding, the compliance officers' testimony that the videotape depicted fall protection violations being committed by such

subcontractors' employees. However, OSHA has cited individually only those with a Greek national origin or descendant therefrom. There is no factual basis for such selective prosecution of the OSH Act, save national heritage discrimination against the Respondents.

Accordingly, Judge Yetman's decision on selective enforcement must be reversed.

CONCLUSION

For all the foregoing reasons, Respondents respectfully request that the Review Commission affirm in part and reverse in part Judge Yetman's Decision and Order in accordance with the foregoing.

Respectfully submitted,

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