

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

SECRETARY OF LABOR,
United States Department of Labor,

Complainant,

v.

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

Respondents.

OSHRC Docket No.
99-0958

REPLY BRIEF FOR THE SECRETARY OF LABOR

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REPLY BRIEF FOR THE SECRETARY OF LABOR

SUMMARY OF THE CASE

As previously discussed in the Secretary's Opening Brief ("Sec OB"), Respondent Vasilios ("Bill") Saites, his son, Respondent Nicholas ("Nick") Saites, and their families have owned and operated seven concrete construction companies¹ that have received numerous citations, which are final Commission orders, pursuant to the Occupational Safety and Health Act (the "OSH Act" or "Act"), 29 U.S.C. § 651, *et seq.* This case arises from an inspection at the Mariner High Rise, a sixteen-story, poured-in-place, reinforced concrete apartment building in Edgewater, New Jersey (the "Edgewater Project"). On April 20, 1999, the Secretary issued to Bill and Nick Saites, Altor, and Avcon willful citations of 29 C.F.R. § 1926.100(a) for failing to assure the use of hard hats (Citation 2, Item 1); 29 C.F.R. § 1926.501(b)(1) for failing to assure fall protection for employees working on unprotected sides and edges (Citation 2, Items 2 through 7); and 29 C.F.R. § 1926.501(b)(4)(i) for failing to assure that employees were protected from falling through floor holes (Citation 2, Item 8).

This is the second case involving Bill and Nick Saites and Avcon that is before the Commission. In the first case, ALJ Covette Rooney held that Nick and Bill Saites were individually liable on three grounds as follows: the Saites were "employers" within the definition of the Act; Avcon was used by Bill and Nick Saites as their "alter ego or business conduit;" and the case required the disregard of the corporate form in the interest of justice pursuant to the teaching of *First Nat. City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 628-30 (1983) ("*Banco Para*"). The ALJ also affirmed willful citations for violations of 29 C.F.R. § 1926.100(a)(hard hats) and 29 C.F.R. § 1926.501(b)(1)(fall protection). *Avcon, Inc.*,

¹ Astro Concrete, Inc. ("Astro"); WNS, Inc. ("WNS"); Cornicon, Inc. ("Cornicon"); Altor, Inc. ("Altor"); Avcon, Inc. ("Avcon"); Avcrete, Inc. ("Avcrete"); and 724 Walnut Corp. *See*, Decision and Order of ALJ Robert A. Yetman ("DO"), p. 3; "Sec Open Brf", pp. 1-4.

Vasilios N. Saites, and Nicholas Saites, 2000 WL 1466090 (Nos. 98-0755 and 98-1168, consolidated, 2000)(*"Avcon I"*).

In this second case, ALJ Yetman held that Altor and Avcon together constituted an "employer" under the Act, but unlike ALJ Rooney he held that the Commission lacked authority to determine whether Bill and Nick Saites were also employers under the Act. DO, pp. 5-7. Like ALJ Rooney, ALJ Yetman affirmed willful violations of the hard hat and fall protection standards. ALJ Yetman also affirmed violations of 29 C.F.R. § 1926.501(b)(4)(i) for failing to assure that employees were protected from falling through floor holes, but he affirmed the citation as serious, not willful. The ALJ assessed total penalties of \$196,000. Of the total, \$182,000 was for the willful violations.

In her Opening Brief, the Secretary showed that ALJ Yetman correctly ruled as follows: that Altor and Avcon constituted a single employer under the Act; that Citation 2, Item 1 (hard hats) and Items 2 through 7 (fall protection) were willful; that individual penalties were proper for the willful citation items; and that the Secretary had not selectively enforced the Act against the Saites. The Secretary also showed that the ALJ erred in the following ways: in holding that the Commission lacks authority to pierce the corporate veil; in failing to hold that the Secretary's action in citing the Saites is consistent with well-established precedent imposing individual liability for violation of remedial labor laws; in failing to affirm Citation 2, Item 8 as willful; and in failing to affirm the penalties as proposed.

Point 1. The Secretary's interpretation that the OSH Act permits the "piercing of the corporate veil" does not mean that every corporate officer or person who controls a family-owned business is individually liable for OSHA penalties.

Respondents argue that ninety percent of all corporations are closely held companies and that it is common, particularly in real estate development, to incorporate to limit a project's

liability to the assets of the project. They argue that "[t]o 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." Respondents' Opening Brief, served March 7, 2003 ("Resp OB"), pp. 25; *see also* pp. 28, 37. It is the Saites, however, not the Secretary, who seek an "unfettered" right. They seek the unfettered right to manipulate the corporate form to continue to ignore their duty to comply with the OSH standards.

As made clear during the hearing and before the Commission, the Secretary does not seek to impose individual liability on every corporate officer of a closely held corporation or, indeed, every person who actually controls its affairs. In both this case and *Avcon I*, the Secretary used as her legal test, a very stringent one, that is, the nine factor-test set forth in *United States v. Pisani*, 646 F.2d 83 (3d Cir. 1981).² Moreover, and most importantly, the Secretary only sought to impose individual liability in this case and *Avcon I* after a long history of demonstrated disregard of the OSH standards and assessed penalties by Bill and Nick Saites and the Saites companies. *See* Sec OB, pp. 4-5, 31-32, 51.

Respondents argue the Secretary is unable to link up this long history with the present citations. They cite Nick Saites' explanation of how the circumstances of one of the former fall protection citations differ from the present citations. Resp OB, p. 2, citing Tr. 861-62. They fail, however, to explain how the other thirteen citations, including repeat and willful citations that were issued to Altor's and Avcon's predecessors, Astro Concrete, WNS, and Cornicon, differ. Sec OB, pp. 4-5, 45. *See* the Secretary's Post-Hearing Brief ("Sec P-H Brf"), pp. 55-57, for a more detailed history of the former citations. Nick Saites made no attempt to explain how the numerous former hard hat citations (DO, p. 12; Sec OB, pp. 4-5, 31; Sec P-H Brf, pp. 84-85) differ from the present citation (Tr. 861-62).

² *See also, Major Constr. Corp. and M.J. Polites*, 2001 WL 392470, *20 (No. 99-0943, ALJ Bober, 2001).

In addition to this demonstrated history of disregard for OSHA and the standards, there is also a demonstrated manipulation of the corporate form to attempt to avoid this past history and its consequences. Although there were five previous corporations, only more recently have the Saites begun to divide up the projects among multiple corporations.³ And, contrary to what Respondents claim is normal real estate practice, they have not limited their activities to separate incorporation for each project. The Hackensack project was split between two corporations. Astro acted as the general contractor, making the bid, entering into the contract with the project developer and "real" general contractor, and ordering the material. Avcon acted as a "payroll" company, hiring and paying the employees. Not content with dividing a project between two corporations, Bill Saites split the Edgewater project among three. The first part of the project, the construction of the apartment was split along the same lines as the Hackensack project with Altor acting as "general contractor" and Avcon acting as the "payroll company." The second part of the project, however, the construction of the garage, was awarded to Bill Saites' new company, Avcrete, by Bill Saites acting for Altor (Tr. 901).

In addition to this fragmentation of the Saites' concrete construction business, Bill Saites manipulated the payment of Avcon's portion of the profits. *See* Sec OB, p. 21. In answering questions of why Avcon had not received the \$139,000 remaining from the Edgewater project, Bill Saites disingenuously testified that Altor had not received all the money owed to it by the developer and general contractor, Daibes Bros. (Tr. 1123). He only admitted that Altor had been paid and that Avcon would be paid in "due course" after being questioned by the ALJ (Tr. 1122,

³ Bill Saites testified that Avcon was originally set up to create a minority subcontractor to qualify for HUD contracts. But, after two cranes collapsed and cost them \$1,000,000, they "found out it's good business, it's a good practice to have several companies overall" (Tr. 952-53).

1125, 1129).⁴ And, it was only after further pressure from the ALJ that Bill Saites testified Avcon would be paid in three months, two years after the conclusion of the Mariner project (project concluded December 1998 (Tr. 733-34, 736); hearing began in January 2001).⁵ This line of testimony shows that Bill Saites is not interested in workplace safety, but is only interested in continuing to do business as he always has, not complying with the OSH standards, but avoiding the consequences of his failures.

In sum, the Secretary does not seek to impose liability on all corporate officers or family members who exercise control and direction over the work performed by a family-owned corporation. The Secretary seeks only to impose it against individuals who own a business with a long history of demonstrated disregard of OSHA and the OSHA standards and who have manipulated the corporate form to attempt to avoid that history and the payment of penalties.

Point 2: The record does not show that the Secretary exercised misconduct, nor that the citations were issued as a result of bias or a vendetta, nor that the Secretary selectively enforced the Act against the Saites.

Respondents accuse the Secretary of various forms of bias and misconduct as follows: they assert that the Secretary demonstrated bias by videotaping the violations and failing to confront Respondents and their supervisors about the violations; they assert that the Secretary was more interested in collecting penalties than workplace safety; they assert that the Secretary intentionally misquoted testimony and twisted the truth; and they assert that the Secretary

⁴ See also *Avcon I*, in which Nick Saites testified that "Avcon really had no money," and, therefore, a new corporation, Avcrete, was formed. 2000 WL 1466090, *11. These excerpts show that Bill Saites and Nick Saites were not forthcoming in their testimony.

⁵ Respondents claim that the lack of assets is due to paying \$1,000,000 in legal and expert fees to defend against the citations in the two cases. Resp OB, p. 27. Respondents, however, do not cite to any evidence in the record to substantiate their claim. *Id.* Moreover, if Respondents had followed the advice of their own expert, Louis Nacamuli, and complied with the standard, installing and maintaining guardrails, they would not have received thirty-one fall protection violations against which to defend. See DO, p. 22 ("Louis Nacamuli, . . . described in detail the means by which guardrails could be installed and maintained during the cycle of framing, pouring and stripping. Avcon, which bears the burden of proof on this issue, presented no evidence whatsoever in support of its contention that guardrails were infeasible.").

selectively enforced the standards against them because they are of Greek heritage. Resp OB, pp. 5-9, 57-60. The record supports none of Respondents' assertions.

OSHA scheduled the inspection leading to the present case after receiving complaints that there were a lack of perimeter fall protection and unguarded floor openings at the worksite (Tr. 201). OSHA videotaped the worksite just prior to attempting entry in the event a warrant would be needed, a wise decision, because Bill Saites refused entry (Tr. 186-87, 203-04, 310). Upon receiving permission to enter from Daibes Bros., and entering three hours later, OSHA explained the complaint items and the apparent violations to Bill and Nick Saites (Tr. 203-09, 310). OSHA then conducted a walk around of the worksite (Tr 209-10). On several occasions during the inspection, OSHA discussed the violations that it had observed with Bill and/or Nick Saites (Tr. 393, 416-417, 492-494). During these discussions, OSHA Compliance Officer ("CO") Donnelly repeatedly emphasized the need for fall protection for employees working at the unprotected perimeter of the building or in close proximity to floor openings (Tr. 416-417, 457, 467, 492-494); *see* DO, p. 30 ("CO Donnelly testified that Avcon had been cautioned about inadequate guardrails erected on the pour deck on October 23, yet workers were again found working outside of incomplete guardrails on October 29, 1998."). The ALJ recounts the Saites' responses to OSHA's admonitions to protect the employees against falls as follows: "On October 29, Bill Saites refused to interrupt work to move lumber and brackets necessary to complete guard rails on the pour deck;" and "Nicholas Saites told him [CO Donnelly] that his employees were grown men and that he was not going to 'babysit' them." DO, pp. 30-31. On October 24, near the start of the inspection, when CO Donnelly "explained that men were working at the edge without any protection," Nick Saites responded that "he didn't know about it and didn't care" (Tr. 416-17). It is difficult to conceive of a more callous disregard for OSHA, the OSHA standards,

and employee safety. Contrary to Respondents' assertions and implications, OSHA did not merely videotape violations from afar with a view to building a high-penalty case. OSHA conducted an on-site inspection, repeatedly admonishing Bill and Nick Saites to comply.

Notwithstanding, the surveillance videotape made outside the worksite did not offend either the Fourth Amendment or the OSH Act. *L.R. Willson and Sons, Inc. v. OSHRC*, 134 F.3d 1235, 1237-40 (4th Cir. 1998).

Respondents' assertion that the Secretary is only interested in a large penalty case and not interested in safety is refuted by the record. As demonstrated by OSHA's conduct at the worksite in response to the complaints, OSHA is trying to deter the individuals who control these companies from future violations, because clearly the past, small penalties coupled with education and lenient enforcement have had no effect on the Saites (Tr. 259). *See, e.g., Reich v. Sea Sprite Boat Co., Inc.*, 50 F.3d 413, 416 (7th Cir. 1995)(In its decision holding the president and sole shareholder of the employer in contempt, the Seventh Circuit wrote, "The Department of Labor has shown undue forbearance toward this scofflaw, which has answered generosity with ingratitude by failing to pay even a dime of the modest penalty levied . . . [and with continued violations.] Additional lenity is unwarranted."). The Secretary "must rely on the threat of money penalties to compel compliance by employers." *Reich v. OSHRC (Jacksonville Shipyards, Inc.)*, 102 F.3d 1200, 1203 (11th Cir. 1997), *followed, Joel Yandell*, 18 BNA OSHC 1623, 1627 (No. 94-3080, 1999). Because here the threat of money penalties is meaningless to the Saites companies, the Secretary must rely on penalties against Bill and Nick Saites as individuals to deter them from continuing to manage companies that continue to violate the law.

Respondents also claim that the Secretary has "intentionally misquoted testimony" in her vendetta against the Saites and "twisted the truth." Resp Open Brf, pp. 8, 27. As an initial

matter, Respondents offer no alternative quotations, nor do they expand the quotations. They do not offer alternative inferences except to argue that "a person is entitled to incorporate as many times as he or she wishes. . . ." *Id.* at 8, 27, 28. Moreover, the Secretary's use of the quotations and similar quoted testimony is consistent with ALJ Rooney's in *Avcon I.* 2000 WL 1466090, *11. Nick Saites admitted that Avcrete was formed to avoid \$150,000 in penalties from the previous project. *Id.* And, as discussed above, the Saites did not seek to limit liability to the assets of their project; they sought to limit it to less by fragmenting the business. Certainly, a person can incorporate however often and whenever he or she wants, but if the effect is to blunt the deterrent effect of federal civil money penalties and to remove any incentive to comply, then clearly the law will not recognize the incorporations in the interest of justice. *Banco Para*; *see also, Sea-Roy Corp. v. Parts R Parts, Inc.*, 173 F.3d 851 (unpublished), 1999 WL 111281, *4 (4th Cir. 1999)(excessive fragmentation of a single enterprise into separate corporations is a factor in whether to pierce the corporate veil).

Finally, as the ALJ held, Respondents failed to show that the Secretary selectively enforced the Act against them. DO, p. 40; *see* Sec OB, pp. 57-59. In support of their contention, Respondents claim that only persons of Greek heritage have been individually issued citations. Resp OB, pp. 57-60.

As the Secretary noted in her Opening Brief, Respondents introduced no evidence showing that the Secretary was motivated to cite the Saites because they are of Greek heritage. Sec OB, pp. 59; *see also*, DO, p. 40. Indeed, the ALJ stated that Respondent did "not ascribe any motive to OSHA's alleged misconduct." DO, p. 40. Respondents also introduced no proof that either they or Michael Polites are of Greek heritage (Tr, *passim*).

Furthermore, it is incorrect that Bill Saites, Nick Saites, and Michael Politis are the only individuals owning closely held or family-owned corporations that OSHA has cited individually. There is another case currently pending before the Commission involving citations issued to an individual and his closely held corporations, to wit: *Eric K. Ho individually, d/b/a Ho Ho Ho Express, Houston Fruitland, Ho Ho Ho Express, Inc., and Houston Fruitland, Inc.*, 1999 WL 956196 (Nos. 98-1645, 98-1646, consolidated, ALJ Barkley, 1999). The citations in that case were issued against an individual who patently is not of Greek heritage. Although that case involves "reverse piercing," it illustrates the ways in which individual business owners attempt to manipulate the fiction of corporate separateness to avoid compliance with the law. The Commission should avoid being whipsawed by the fiction.

In sum, Respondents did not show misconduct. Nor did they show that the Secretary was biased against them or had a vendetta.⁶ Finally, Respondents introduced no evidence (or even a consistent, coherent theory) that the Secretary selectively enforced the Act against them. *See Vergona Crane Co.*, 15 BNA OSHC 1782, 1787-88 (No. 88-1745, 1992).

Point 3: The ALJ did not err in holding that Altor and Avcon constitute a single employer.

The ALJ wrote, "The evidence establishes that Altor, Inc. and Avcon, Inc. are closely related companies having interrelated and integrated operations with a common president, management, supervision and ownership performing services at a common worksite." DO, pp. 4-5. Citing well-established Commission case law, the ALJ held that "both corporations must be regarded as a single entity and, therefore, constitute the 'employer' for purposes of OSHA

⁶ The record also shows that there was no vindictive prosecution. *See, National Engineering & Contracting Co.*, 18 BNA OSHC 1075, 1077-78 (No. 94-2787, 1997), *aff'd*, 181 F.3d 715, 723 (6th Cir. 1999); *Cleveland Constr. Inc. v. OSHRC*, 18 BNA OSHC 2028, 2032 (6th Cir. 1999)(unpublished decision)("Even the alleged history of animosity between OSHA and . . . [the employer] does not, by itself, establish that the prosecution at issue in this case was vindictive.").

enforcement at the worksite." *Advanced Specialty Co.*, 3 BNA OSHC 2072 (No. 2279, 1976); *Trinity Ind., Inc.*, 9 BNA OSHC 1515 (No. 77-3909, 1981).

Respondents argue that Altor and Avcon did not share a common worksite, their operations were not interrelated and integrated, and they did not share common supervision and ownership. Resp OB, pp. 10-13. Like the ALJ, the Commission should reject these arguments.

Respondents argue that the two companies did not share a common worksite. Altor's worksite was the corporate office,⁷ they argue, but Avcon's was the Edgewater project. Resp OB, pp. 11-12. This argument completely ignores Bill Saites' testimony that Altor was the general contractor and material supplier for the Edgewater project. This argument also ignores the facts that Bill Saites was the president, sole executive officer, and director for both Altor and Avcon (Tr. 736, 820, 918); that he was at the Edgewater project "every day" (Tr. 783); and that he controlled and directed the activities of both companies at the worksite (Tr. 968 ("I run the job")). Bill Saites determined the method of construction (Tr. 978, 1046-47). He refused OSHA permission to enter Avcon's worksite (Tr. 203). He identified the employees on the worksite as Avcon's (Tr. 211-12). He explained to OSHA that the reason for an unfinished guardrail was that Avcon had run out of brackets (presumably to be supplied by Altor)(Tr. 224-25, 457, 459, 461). Two days later, when asked by OSHA, he refused to provide guardrails for the ironworkers (Tr. 492-94). When told the guardrail needed to be extended completely around the deck, he refused "to stop . . . pouring concrete . . . to bring the material up onto the deck" (Tr. 467, 494). This evidence shows that there was no separation among Bill Saites, Altor, and Avcon. Notwithstanding, at a minimum, it shows that Altor was present at the worksite through Bill Saites.

⁷ This office is the corporate office for all the Saites corporations including Avcon and the former residence of Bill Saites and his wife (Tr 791, Ex. C-1, C-2, C-3, C-255, p. 53). DO, p. 3.

This evidence also refutes Respondent's arguments that the two companies lacked interrelated and integrated operations. In addition, the facts that Altor bid on the project, subcontracted the labor to Avcon, and ordered material, and Avcon acted as the "payroll" company show that their operations were integrated (Tr. 912-16). The facts that Avcon's only business since its incorporation has been its contracts with Altor (Tr. 736-37) and that Avcon and Altor share a common office and office staff further buttress the conclusion that their operations were interrelated and integrated.

The record also refutes Respondent's argument that there was no common ownership. Bill Saites had unfettered control over Altor, giving no information about the affairs of Altor to its shareholders, not even about the Edgewater contract (Tr. 904-06, 940-41).⁸ Nick Saites "indirectly shares in the profit and losses of Altor" and "has an indirect interest in the ownership of Altor" (Tr. 1115). These facts show that Altor is simply another family-owned company that was set up to try to insulate a share of the profits from the potential liabilities of the Saites company performing the contract, in this case Avcon (Tr. 914-15, 953).⁹

⁸ See, e.g., Tr. 904 (he provided no information about the business affairs of Altor to its shareholders); Ex. C-255, p. 57 (only Bill had signatory authority over Altor's accounts); Tr. 788, 938 (he directed Nick Saites to write the Altor/Avcon contract and executed it on behalf of both companies).

⁹ See also ALJ Rooney's discussion concerning Bill and Nick Saites' interrelationship and the ownership and control of the Saites companies as follows:

Bill and Nick had been doing business together for many years. Their business relationships fell into a pattern. When Bill owned Astro, Nick worked for his father (Tr. 30). When Nick purchased Astro, Bill worked for his son (Tr. 31). Bill also worked as a supervisor for Cornicon after Nick formed the company in 1985 or 1986 (Tr. 34). Bill assumed the presidency of Avcon in 1997, and Nick became his "assistant superintendent" (Tr. 110). Bill testified that his son also "bestowed" upon him the title of president of Altor, and that he reported only to Nick, who was the lawyer for Altor (Tr. 290, 294). I also find it significant that Bill did not know if his wife had ever seen the contract between Altor and Avcon before he executed the contract as president of both companies, and that his wife, the majority shareholder of Avcon, was not paid a salary and had no authority to sign checks (Tr. 289, 295). These factors provide further support for my finding that Avcon's corporate form was a mere formality.

In sum, the record in this case, corroborated by the record in *Avcon I*, and the case law overwhelmingly support the ALJ's ruling that Altor and Avcon constituted an employer under the Act. 29 U.S.C. § 652(5); *Trinity*, 9 BNA OSHC 1518; *Advance*, 3 BNA OSHC 2072; *Home Supply Co.*, 1 BNA OSHC 1615 (No. 69, 1974).

Point 4: Respondents' arguments that the ALJ correctly held that the Commission lacks authority to pierce the corporate veil are not supported by Commission and court precedent.

Although the ALJ held that Altor and Avcon together constituted an "employer" under the Act, he held the Commission lacked authority to determine whether Bill and Nick Saites were also employers. DO, pp. 5-7. He believed the Secretary sought to hold Bill and Nick Saites liable only to prevent the corporations from avoiding penalties. DO, p. 6. He opined that the Secretary must wait until she files a collection action in federal district court to attempt to pierce the corporate veil to collect the penalties from individuals. *Id.* Although the ALJ acknowledged that the record could support piercing the corporate veil,¹⁰ he declined to decide whether the Saites were "employers" within the meaning of the Act and held that the Commission lacked jurisdiction to pierce the veil to hold the Saites individually liable. *Id.*

In her Opening Brief, the Secretary showed that the Commission is the proper forum to determine whether the Saites are employers in this case. Sec OB, pp. 14-18. The Secretary cited Commission cases in which the Commission decided whether a particular person fell within the Act's definition of "employer." *Joel Yandell*, 18 BNA OSHC 1626 (employer who had gone out of business and did not have employees when the citation was issued was nevertheless "employer" under the Act); *MLB Ind., Inc.*, 12 BNA OSHC 1525 (No. 83-231, 1985)(company

¹⁰ The ALJ wrote, "While it is true that the past actions of Vasilios and Nicholas Saites and their corporations may provide sufficient grounds for a district court to pierce the corporate veil to collect a debt owed to the government, that decision does not fall within the jurisdiction of the Review Commission when the Respondent is a lawful and viable corporation, as in this case, at the time of decision." DO, pp. 6-7 (emphasis added).

that loaned employees to another and did not control their working conditions was not an "employer" for purposes of the Act); *University of Pittsburgh*, 7 BNA OSHC 2211 (No. 77-1290, 1980) (state-related university met Act's definition of "employer" because it was not a political subdivision of Pennsylvania). *See also, Advance Specialty*, 3 BNA OSHC 2072, where the Commission applied a type of veil piercing analysis.

Respondents do not address the Commission precedent. Resp OB, pp. 14-25. Instead, in the initial part of its argument, Respondents rely on *Major Constr.*, 2001 WL 392470, an unreviewed ALJ decision, that is before the Commission on other issues. In *Major*, ALJ Bober held that the president of the employer corporation was not an employer of the employees. *Id.* at *18. He questioned whether in the absence of a showing that a person was an employer, the Commission had jurisdiction to pierce the corporate veil. *Id.* at *20 The ALJ held, nevertheless, that there were insufficient facts in that case to warrant piercing the corporate veil. *Id.*

There are many obvious ways in which *Major* differs from this case, not the least of which is that the record in this case shows that Bill and Nick Saites actively supervised Avcon's employees and were employers under the Act.¹¹ Notwithstanding, the Secretary submits that a more appropriate unreviewed ALJ decision for the Commission to consider is *Avcon I* in which ALJ Rooney held that Bill and Nick Saites were individually liable as employers under the Act. *Avcon I*, 2000 WL 1466090, *12.

The next part of Respondents' argument discusses the criminal cases: *United States v. Cusack*, 806 F. Supp. 47 (D. N.J. 1992); *United States v. Shear*, 962 F.2d 488 (5th Cir. 1992);

¹¹ The record discussed above clearly shows that Bill Saites exercised control over the Avcon worksite. The record also shows that Nick Saites exercised control. Nick Saites identified himself to OSHA representatives as the "Assistant Superintendent" at the Mariner Project (Tr. 267-68). He instructed employees to put on hard hats and construct missing guardrails; he instructed employees not to talk to OSHA; and he stated that he would not fire employees who refused to wear hard hats (Tr. 267-68, 333, 391). Nick developed the noncomplying alternative fall protection plan that allegedly was in place at the Edgewater worksite. *See* DO, p. 32.

and *United States v. Doig*, 950 F.2d 411 (7th Cir. 1991), cases in which the courts opined that an individual could be liable for criminal penalties under the OSH Act even though a corporation was the ostensible employer. Respondents' attempt to distinguish the cases as criminal cases that are governed by another provision of the Act (Resp OB, p. 19) fails, because criminal liability under the Act depends in the first instance upon the same defined term, *i.e.*, "employer," that governs this case. 29 U.S.C. §§ 652(4), 652(5), 652(6), 666(e).

Respondents argue that Nick Saites could not be criminally sanctioned under the teaching of *Doig*, because he was not a corporate officer of Altor and Avcon. Resp OB, p. 16. This argument ignores the evidence showing that Bill and Nick Saites together managed the Saites construction business. Nick Saites held corporate offices in at least two of the corporations. In 1983, he bought Astro Concrete from his father. Nick Saites became president and signed three settlement agreements on its behalf (Ex. C-36, p. 27, Ex. C-37, C-38, Ex. C-255, pp. 30-32). Nick Saites was the president, sole officer and sole director of Cornicon (Ex. C-255, p. 33); Bill Saites was a supervisory employee (*id.* at 34). Respondents' argument elevates form over substance, a result clearly not intended by Congress in enacting the Act, a remedial labor law, nor by the Commission in adopting the common-law test established in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992), a test designed to determine who actually controls the work product of the employee. *Rockwell Int'l Corp.*, 17 BNA OSHC 1801, 1804 (No. 93-45, 1996).¹²

Respondents criticize the Secretary's reliance on *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), and *Sturm Ruger & Co. v. Chao*, 300 F.3d 867 (D.C. Cir. 2002), on the ground that these cases do not hold that the Commission has the authority to apply veil-piercing principles. Resp OB, pp. 20-21. Respondents misapprehend the courts' teaching. It is the

¹² The test is the "right to control the manner and means by which the product is accomplished," *Rockwell*, 17 BNA OSHC at 1804, quoting *Darden*, 503 U.S. at 323-24.

Commission's function to adjudicate under the Act. *Martin v. OSHRC*, 499 U.S. 144, 147 (1991); see *Sturm Ruger*, 300 F.3d 867 ("interpretation of the parties' rights and duties under the Act and its regulations . . . falls squarely within the Commission's expertise")(internal quotations omitted). Thus, it is the Commission's responsibility in the first instance, not that of the federal courts, to determine whether the person cited is an "employer" under the OSH Act.

A corporation is nothing more than a state law fiction. Although "limited liability" has important economic and social benefits, this state-created fiction cannot be used to avoid the command of Congress to provide employees with safe workplaces. See, *Pearson v. Component Technology Corp.*, 247 F.3d 471, 484, n. 2, 488 (3d Cir.), cert. denied, 122 S.Ct. 345 (2001) (state corporate laws may not be permitted to frustrate federal objectives); see also *Alman v. Danin*, 801 F.2d 1, 3-4 (1st Cir. 1986) ("deferring too readily to the corporate identity may run contrary to the explicit purposes of the Act"); *Capital Telephone Co. v. FCC*, 498 F.2d 734, 738 (D.C. Cir. 1974)("a corporate entity may be disregarded in the interests of public convenience, fairness, and equity"); *Lowen v. Tower Asset Mgmt., Inc.*, 653 F. Supp. 1542, 1548-53 [quote at 1551] (S.D. N.Y. 1987) ("the remedial thrust of ERISA is not to be frustrated by meticulous emphasis upon the corporate form"), *aff'd on other grounds*, 829 F.2d 1209 (2d Cir. 1987).

Respondents' remaining arguments emphasize state law and also case law analyzing individual liability under other statutes. These arguments and cases do not, however, refute the basic principle that the Commission in a citation contest is the proper body to decide whether a cited individual is an employer under the Act and to pierce the corporate veil if necessary to make that determination.

In sum, the Commission has the authority to determine whether Bill and Nick Saites are employers under the OSH Act. In addition, for the reasons discussed above and in her Opening

Brief, the Secretary submits that the record fully supports the piercing of the corporate veil in this case to hold Bill and Nick Saites individually liable.

Point 5: The ALJ did not err in affirming Willful Citation 2, Item 1 (hard hats).

The ALJ found to be undisputed the thirteen alleged instances of employees working without hard hats in violation of the standard. DO, p. 10. The ALJ also found that Respondents had not shown employee misconduct. *Id.* at 11. The ALJ accordingly affirmed Citation 2, Item 1. Finding that Bill Saites demonstrated a "deliberate disregard" for the standard's requirements and finding "no mitigating evidence" in the record, the ALJ held that the violations were willful and he assessed the Secretary's proposed penalty. *Id.* at 13.

Respondents argue that Avcon employees were not exposed to the danger of head injury while failing to wear a hard hat. The record evidence, however, overwhelmingly refutes this argument. Avcon employees were exposed to the risk of head injury from, among other items commonly found at a construction site, falling lumber and parts of the formwork. Sec OB, pp. 28-29 (Tr. 360-61, 377).¹³

Respondents also argue that the violation was not willful, because Avcon had a policy requiring the use of hard hats that it enforced. Avcon, they argue, was not therefore indifferent to its obligations. Resp OB, pp. 39-42. This argument is thoroughly refuted by the record evidence. Bill and Nick Saites have a "heightened awareness" of the standard and their obligations. Beginning **thirty years** ago, Saites companies have received numerous citations for violating the standard that are Commission final orders (Ex. C-12, C-22, C-23, C-33, C-35, C-36, C-41, C-43, C-44, C-47, C-49). Avcon received a willful citation of the standard during the

¹³ The standard requires protection where the nature of the work gives rise to "a possible danger of head injury." *Donovan v. Adams Steel Erection, Inc.*, 766 F.2d 804, 811 (3d Cir. 1985)(emphasis in original). It does not "require that employees **actually** be exposed to injury." *Id.* (emphasis in original). See *Franklin R. Lacy (Aqua View Apartments)*, 9 BNA OSHC 1253 (No. 3701, 1981).

Hackensack Project inspection, *Avcon I*, 2000 WL 1466090, * 32 - *35. At the beginning of the inspection in this case, CO Donnelly discussed the need for hard hats with both Bill and Nick Saites (Tr. 395). Despite this admonition, OSHA observed thirteen instances of employees failing to wear their hard hats over three inspection days (Tr. 372-96, 1071, Ex. C-196, C-275).¹⁴ Nick Saites admitted that he did not enforce Avcon's purported rule; and Bill Saites refused categorically to wear a hard hat. Indeed, he laughed and shrugged when CO Donnelly confronted him about the need to wear one (Tr. 384-85).

In sum, the evidence overwhelmingly supports the ALJ's holding that the violations were willful. The evidence also overwhelmingly supports his affirming a penalty of \$32,000 on the ground that there was "no mitigating evidence in the record." DO, p. 13.

Point 6: The ALJ did not err in affirming Citation 2, Items 2 through 7 (fall protection) as willful.

The ALJ affirmed thirty-one willful violations of 29 C.F.R. § 1926.501(b)(1) requiring fall protection on unprotected sides and edges. DO, pp. 13-33. The record evidence, as detailed in the ALJ's decision and the Secretary's Opening Brief, overwhelmingly supports his holdings. DO, pp. 13-33, Sec OB, pp. 33-49.

Respondents argue that the ALJ erred in that he applied the wrong standard. They argue that the ALJ should have applied 29 C.F.R. § 1926.501(b)(2), which applies to "leading edges," on the ground that the formwork was being constructed during the time that the cited exposures occurred. Resp OB, p. 43. As discussed, however, in the ALJ's decision and the Secretary's Opening Brief, none of the cited items involved leading edge work, because the walking/working

¹⁴ They argue the limited number of violations observed over the six-month construction project show that the citation was *de minimus* in nature. Resp OB, p. 41. The record reflects, however, thirteen cited instances over three days (Tr. 372, 380-82, 384-85). Notwithstanding, "[A]n otherwise safe workplace does not prevent findings of willfulness with respect to those violations that do occur." *A.E. Staley Mfg v. Secretary of Labor*, 295 F.3d 1341 (D.C. Cir. 2002).

surface on which the employees were working did not change location. Employees were either working on a wooden deck or the poured concrete floor. They were not laying the wood deck. DO, pp. 16-17, Sec OB, pp. 33-36. In sum, there is no principled argument that the employees were working on the leading edge when the cited instances occurred.

Respondents also argue that they established the infeasibility of conventional fall protection systems. Resp OB, pp. 43-49. In this section of their argument, they strenuously argue that nets and fall arrest and fall restraint systems were infeasible. *Id.* They do not argue, however, that guardrails were infeasible for the cited work activities. *Id.* As the ALJ observed, the Secretary's experts, Matthew Burkart and Daniel Paine, and Respondents' expert, Louis Nacamuli, "all described in detail the means by which guardrails could be installed and maintained during the cycle of framing, pouring and stripping." DO, p. 22. "Avcon, which bears the burden of proof on this issue, presented **no evidence whatsoever** in support of its contention that guardrails were infeasible." *Id.* (emphasis added). In sum, the evidence overwhelmingly supports the ALJ's ruling that conventional fall protection was feasible for the cited work activities.¹⁵

Respondents argue that the violations were not willful, because Avcon utilized a guardrail "system" consisting of not only "vertical guardrails," but also "outriggers." Resp OB, p. 50. These outriggers were, they allege, horizontal beams that extended past the edge and that were placed two-feet apart to "replicate a vertical guardrail on a horizontal plane." *Id.* They argue that because Avcon believed it was complying with the standard, it had a "bona fide, good faith disagreement with OSHA concerning the interpretation" of the standard. *Id.* at 51(emphasis deleted). The violations, they argue, were not therefore willful. *Id.*

¹⁵ In her Opening Brief, the Secretary showed that nets and fall arrest and restraint systems were also feasible. Sec. OB, pp. 40-41, 42-43.

Both the ALJ's decision and the Secretary's Opening Brief show how Nick Saites' testimony about his various schemes and theories do not show that Avcon made a good faith effort to comply. DO, pp. 32-33 ("it is clear that Avcon failed to make a good faith effort to comply with OSHA regulations"); Sec OB, pp. 46-47. As discussed in the Secretary's Opening Brief, the "outriggers" or "horizontal guardrails" claim is not credible. Outriggers are built to catch falling debris and formwork (Tr. 1400, 1760). Outriggers would not prevent an employee from falling and they do not constitute adequate fall protection (Tr. 1576, 1610, 1788). Notwithstanding, as also explained in the Secretary's Opening Brief, Respondents failed to assure that they were spaced every two-feet as Respondents claim. Nick Saites admitted that some of the outriggers were as much as three-and-one-half-feet apart (Tr. 1261-62; 1607-08). He also admitted that there was no process for checking the spacing (Tr. 1405-06).

Moreover, even were the outriggers actually placed two-feet apart, the violations were willful. An employer who decides to implement a measure believing it to be as safe as the standard's, but who, nevertheless, disregards the standard's requirements acts willfully. *Williams Enter., Inc.*, 13 BNA OSHC 1249, 1257 (No. 85-355, 1987); accord *Reich v. Trinity, Inc.*, 16 F.3d 1149, 1153 (11th Cir. 1994)(employer who implemented a hearing protection plan that did not comply with the OSHA standard, but which it believed to be better, acted willfully.); *RSR Corp. v. Brock*, 764 F.2d 355, 363 (5th Cir. 1985); *Fluor Daniel v. OSHRC*, 295 F.3d 1232 (11th Cir. 2002). Respondents deliberately disregarded the OSHA standard to install "horizontal guardrails." The failures to comply were therefore willful.

In sum, the record evidence overwhelmingly supports the ALJ's holding that Citation 2, Items 2 through 7 were willful in character.

Respondents also argue that the ALJ erred in affirming Citation 2, Item 8 (floor holes) and that the penalties should be reduced. For the reasons discussed in the ALJ's decision and the Secretary's Opening Brief, the Commission should affirm Citation 2, Item 8, but as a willful citation and assess the penalties proposed by the Secretary. Respondents' other arguments are addressed in the Secretary's Opening Brief and the ALJ's decision.

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Washington, D.C.

Respectfully submitted,

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