SECRETARY OF LABOR, Complainant, v. C.T. TAYLOR COMPANY, INC., and ESPRIT CONSTRUCTORS, INC., Respondents.	OSHRC Docket Nos. 94-3241 & 94-3327

DECISION

Before: RAILTON, Chairman; ROGERS and STEPHENS, Commissioners.

BY THE COMMISSION:

Before us is a decision of Administrative Law Judge Ken S. Welsch in which he determined that C.T Taylor Company ("Taylor") and Esprit Constructors, Inc. ("Esprit") were for the purposes of this case a single business entity. Both Taylor and Esprit were cited as a result of an investigation by OSHA of an accident in which two workers lost their lives.

They were cited separately for two willful violations of the fall protection standard at 29 C.F.R. § 1926.105(a).[1] Both employers also received separate citations alleging serious citations of the accident prevention and safety program standards at 29 C.F.R. §§ 1926.20(b)(1) and 1926.21(b)(2).[2] In addition, Esprit also received a citation alleging willful violations of the general duty clause of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act").[3] The Secretary proposed the maximum penalties of $70,000 for each alleged willful violation and $7,000 for each alleged serious violation.

[1]That provision states: "Safety nets shall be provided when workplaces are more than 25 feet above the ground or water surface or other surfaces where the use of ladders, scaffolds, catch platforms, or temporary floors, safety lines or safety belts is impractical."

[2] The first provision states: "[I]t shall be the responsibility of the employer to initiate and maintain such [safety and health] programs as may be necessary to comply with this part." The second provision states: "The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control eliminate any hazards or other exposure to illness or injury."

[3]The provision states: "Each employer…shall furnish to each of his employees employment and a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

The judge affirmed one fall protection citation and the two serious citations as to the single business entity, and he affirmed one willful citation of the general duty clause with regard to Esprit. The Secretary petitioned for review of the judge's decision, alleging that he erred by: (1) treating Taylor and Esprit as a single business entity; (2) failing to assess the maximum penalties which had been proposed; and (3) failing to affirm two willful general duty citations against Esprit.

On review, the Secretary does not challenge the judge's finding that only one fall protection violation was established. The Secretary does, however, take issue with the judge's decision to treat Taylor and Esprit as one business entity. In addition, the Secretary advocates for a reversal of the Commission's decision in *Arcadian Corp.*, 17 BNA OSHC 1345, 1995-97 CCH OSHD ¶ 30,856 (No. 93-3270, 1995), *aff'd*, 110 F.3d 1192 (5th Cir. 1997), and seeks reinstatement of her proposed penalties. Respondent does not dispute the judge's findings; it essentially argues for affirming the judge's decision. We affirm the judge's decision that Taylor and Esprit are a single business entity in the circumstances of this case.[4] Accordingly, we affirm the judge's findings that Taylor and Esprit as a single entity committed a willful violation of the fall protection standard. We also affirm the judge's determinations regarding the serious citation and the single willful

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[4]Furthermore, Chairman Railton takes issue with Commissioner Rogers' assertions made in footnote three of her dissenting opinion. The Chairman finds nothing inconsistent in the majority's decision here with his separate opinion in *Safeway, Inc.*, OSHRC Docket No. 99-0316 (March 12, 2003), *petition for review filed*, No. 03-9546 (10th Cir. April 18, 2003). What Commissioner Rogers fails to mention is that in *Safeway*, she would have amended the citation to include a more specific standard under which the Secretary refused to prosecute. In *Safeway*, the Chairman stated that "[i]t is undoubtedly not the province of the Commission to elect the theory of prosecution." Again, consistent with his separate opinion in *Safeway*, the Chairman notes that it is not the Commission's job to act as the prosecutor, but rather its role is to be a "neutral arbiter and determine whether the Secretary's citations should be enforced." *Cuyahoga Valley Ry. v. United Transp. Union*, 474 U.S. 3, 6-7 (1985). Here, the Commission has agreed with the judge that the facts pleaded and shown by the Secretary establish Taylor and Esprit as a "single employer" under Commission precedent.

Moreover, here, the Chairman finds that the Commission is presented with a different issue than the one presented in *Safeway*. What the Commission is presented with here is its authority to raise *sua sponte* a question of statutory jurisdiction. Clearly, questions of statutory jurisdiction can "be raised at any time during Commission proceedings." *Hudson Wood Recycling, Inc.*, 17 BNA OSHC 1638, 1639, 1995-97 CCH OSHD & 31,069, p. 43,330 (No. 95-1767, 1996). In sum, the Chairman views the judge's decision to raise *sua sponte* the issue of the respondents' status as "an employer" under the Act as being within his discretion.

violation of the general duty clause, but we extend his order in that regard to include Taylor, based on our finding that Taylor and Esprit operated as a single entity here. For each of these violations, we assess the maximum penalty allowed under the Act. Finally, we reject the Secretary's invitation to revisit our decision in *Arcadian.*

BACKGROUND

In 1994, Taylor bid on and won the steel erection work for a proposed warehouse extension to a Consolidated Plastics ("Consolidated") plant located in Twinsburg, Ohio. The project involved erecting a single story, 100,000 square foot structural steel addition to an existing warehouse. Taylor supervised the steel erection work, but Esprit provided the labor and a foreman. Esprit is incorporated as a separate entity from Taylor. However, both companies are owned and controlled by Charles Taylor. They operate from the same office. Esprit's financial, payroll, and workers compensation recordkeeping is performed by Taylor.

Esprit's employees are hired either by Charles Taylor or Taylor's general manager, Paul Mills. Mills supervised the work performed by Esprit employees on smaller projects. He assigned Esprit's employees to those projects, and he designated the foremen. Mills had the authority to hire, fire, and discipline Esprit's employees. He was also responsible for providing them with safety and health training. Esprit's employees believed they were also employed by Taylor.

Taylor used Esprit laborers on the steel erection job for the extension of Consolidated's warehouse. Mills had overall responsibility for the job, and he assembled the crew from Esprit. He selected the foreman, Mark Goch. Taylor also supplied the equipment used by Goch's crew including a crane, welder machines, and the like.

Steel erection on this job was to be completed in ten days. Work began on a Tuesday, when the crew unloaded steel components at the job site. On Wednesday, the crew started setting vertical columns connected by joist girders and tie joists to form a bay. The bays usually measured 40 feet by 40 feet although there were some 50-foot bays. After the bays were erected, bar joists were placed horizontally to span the bay and welded to joist girders. Bridging was then to be welded between the bar joists to provide lateral support. After completing the frame, metal decking was to be installed covering the bays, forming the roof.

Mills visited the site on Wednesday. He observed two Esprit employees working 39 feet above the ground floor. The workers were not tied off by safety belts and lanyards. Mills instructed Goch to install a safety cable across the joist girders, but Goch testified he thought the fall protection was to be installed after the bays were erected.

The work continued on Thursday and Friday. Taylor's vice president, John Hitchcock, stopped by on Friday morning. He did not see any fall protection devices and asked Goch if he planned to install fall protection. Goch told him that fall protection was the "next order of business."

Mills also visited the site early Friday morning. He was concerned that delays might be experienced due to possible bad weather. Accordingly, he determined that the crew should work on Saturday. Goch informed Mills that he anticipated having all steel components in the air by the end of Friday and that bridging and decking could be performed on Saturday.

Mills hired a new employee on Friday to work on Goch's crew. The employee had worked previously as an elevator installer, and he was accustomed to working at heights. On Friday, his first day of employment, he worked on the ground.

By the end of Friday, the crew had set 25 bays, including welding the bar joists to the joist girders in most bays. No bridging or decking had been installed. On Saturday, Goch determined to finish lifting in place the remaining steel on the ground rather than perform bridging and decking. He also decided to complete placing bar joists in the bays that had been erected on Friday. Goch assigned the new employee, who had not previously worked in the air, and one other man to work on the steel girders. The two men "spred" (shook out) the bar joists across the bay. However, unlike the preceding three days, the bar joists were not welded to the joist girders as they were placed in position. No bridging was installed in any of the bays.

Bundles of decking weighing about 5,000 pounds were then placed across the ends of the unwelded bar joists parallel to the joist girder. The first bundle landed without incident. The second bundle was lifted and the load was set down on the unwelded bar joists. As it was being unhooked by one of the two workers, everything fell apart. The two employees were not tied off and fell 39 feet; both men died as a result of their fall.

The bar joists used at the site contained warning tickets and bundle tags instructing steel erectors not to land construction loads on joists that were not completely installed

and bridged. The record also discloses that the construction plans for the Consolidated project required that no loads be placed on bar joists unless the joists were welded and bridged. In addition, the engineering drawings specifically advised that all horizontal and diagonal bridging be completely installed prior to placing any construction loads on joists.

I. TAYLOR AND ESPRIT WERE A SINGLE ENTITY ON THE CONSOLIDATED JOB SITE

The judge, in finding that Taylor and Esprit were a single entity,[5] relied on long standing Commission precedent, which essentially adopted the "single employer" concept of the National Labor Relations Board. *Trinity Indus., Inc.*, 9 BNA OSHC 1515, 1518-19, 1981 CCH ¶ 25, 297, p. 31,322 (No. 77-39, 1981) (citing *Advance Specialty Co.*, 3 BNA OSHC 2072, 2075-76, 1975-76 CCH OSHD ¶ 20,490, p. 24,484 (No. 2279, 1976)) (opinion of Commissioner Cleary) ("[T]he [NLRB] has consistently held that when two business entities have a combination of most or all of the following factors: a common worksite, a common president or management, a close interrelation and integration of operations and a common labor policy, it will treat the two as one for the purposes of the National Labor Relations Act."). In *Advance Specialty*, the Commission held that "when… two companies share a common worksite such that 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*." *Advance Specialty*, 3 BNA OSHC at 2076, 1975-76 CCH OSHD at p. 24,484 (emphasis added). *See also Vergona Crane Co.*, 15 BNA OSHC 1782, 1783, 1992 CCH OSHD ¶ 29,775, p. 40,497 (No. 88-1745, 1992) (same). *Cf. Schenley Distillers Corp. v. United States*, 326 U.S. 432 (1946) (reason for disregarding mere technical distinctions between related corporations is to effectuate clear legislative purpose).

We agree. The record clearly shows that Taylor and Esprit acted as a single

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[5] The Secretary argues that the judge erred in raising the "single employer" issue *sua sponte* in his decision. However, the factual issue of the close inter-relationship of Taylor and Esprit was at issue in these cases from the beginning. The Secretary herself introduced the evidence that shows the two entities were highly inter-related and integrated in order to place responsibility on Taylor for Esprit's actions. The judge here merely recognized that the facts pleaded and shown by the Secretary led to the legal conclusion that Taylor and Esprit functioned as a "single employer" under Commission precedent. *See A.L Baumgartner Constr., Inc.*, 16 BNA OSHC 1995, 1997, 1993-95 CCH OSHD ¶ 30,554, p. 42,272 (92-1022, 1994) (amendments to a complaint are routinely permissible where they merely add an alternative legal theory but do not alter the essential factual allegations contained in the citation). The Secretary has not alleged that she could present further evidence to show that the two entities actually operated separately on the cited project. Therefore, we find no error and no prejudice to the Secretary's case due to the judge's treatment of this issue.

employer on the cited worksite with Taylor fully in charge of Esprit's operations. In addition to relying on the relationship and interconnections set out by the judge, we find that treating these two companies as one is an effective way of addressing the fact that, on this particular worksite, Taylor and Esprit handled safety matters as one company.

As described above, Mills, Taylor's general manager, controlled and directed the work activities of Esprit's employees on the Consolidated job. He picked out Esprit's first line supervisor, Goch. He provided the equipment to Goch, and he dictated the days of work. Goch and the Esprit crew clearly did not operate as an independent contractor on the Consolidated Plastics job. Mills and Taylor's vice-president also directly intervened regarding the safety of Esprit's employees. Both managers inquired about the use of a safety line, and Mills went so far as to order its installation. In other words, Taylor assumed the responsibility for employee safety on the job.

Moreover, we note that on previous occasions, the Secretary has issued citations solely to Taylor regarding several steel erection worksites where Esprit was performing steel erection work for Taylor.[6] We see no justification for taking a contrary approach here.

[6] All three prior citations to Taylor that the Secretary mentions here involved Esprit as the steel erection subcontractor. On January 31, 1990, OSHA issued a citation for a serious violation of fall protection alleging that "(two) employees working on top of a structural beam tower were not wearing fall protection (safety lanyards) to prevent them from falling 38' to the ground." Taylor did not contest the citation or the penalty. On September 28, 1993, the Secretary issued Taylor a citation for a section 5(a)(1) violation at a worksite in Macedonia, Ohio, because two steel erection employees were exposed to a 14 foot, 10 inch fall with no fall protection. Finally, on September 30, 1993, the Secretary issued Taylor another section 5(a)(1) citation, regarding an Aurora, Ohio worksite, because a steel erection employee was exposed to a 15 foot 8 inch fall and was not using fall protection. In a settlement agreement, Taylor agreed to correct both of those violations "as cited."

The purposes of the Act, including effective enforcement, are well served by holding Taylor as equally responsible as Esprit for the cited violations.[7] If these two entities were treated as separate employers, Taylor would avoid a degree of responsibility and penalties for the willful actions of its handpicked foreman. *Cf., e.g., Donovan v. Capital City Excavating Co.*, 712 F.2d 1008, 1010 (6th Cir. 1983) ("actions of Company supervisors are imputed to the Company"). Indeed, because Taylor and Esprit operated as a single employer on this project, Taylor becomes liable for the section 5(a)(1) violation for Goch's failure to secure and bridge the bar joists before landing loads on them. However, if we were to treat Taylor as a separate entity, the record shows that it had none of its own employees (such as general manager Mills) onsite at the time of the accident. *See, e.g., U.S. v. Pitt-Des Moines, Inc.*, 168 F.3d 976, 982 (7th Cir. 1999) ("the words 'his employees' indicates that the duty imposed by [section 5(a)(1)] is limited to an employer's own employees") (citing *Brennan v. OSHRC*, 513 F.2d 1032, 1038 (2d Cir. 1975)).

Furthermore, penalizing Taylor and Esprit more than a comparable single entity doing the same work essentially creates an uneven enforcement scheme. Citing multiple employers to abate the same violation does not always promote the purposes of the Act. *See, e.g., Anning-Johnson Co. v. OSHRC*, 516 F.2d 1081, 1089 (7th Cir. 1975). Indeed, treating these employers as one entity will not impede the Secretary's enforcement efforts. Esprit and Taylor are bound by their position on review that they are a single employer, and they have taken that position in a subsequent pair of cases – *Esprit Constructors, Inc., and C. T. Taylor Co.*, OSHRC Docket Nos. 96-730 & 96-731 (June 4,

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[7] Based on the facts here, we do not go so far as to hold Taylor solely responsible for the violations. *Compare MLB Indus.*, 12 BNA OSHC 1525, 1984-85 CCH OSHD ¶ 27,408 (No. 83-231, 1985) (where cited subcontractor on construction project acted merely as conduit for labor used by general contractor who controlled the working conditions, general contractor was only employer of laborers for purposes of Act). But as *MLB* teaches, the governing consideration is who "assumed responsibility for the employees' activities, had control of the worksite, and provided the supervision of the work." *Id.* at 1530, 1984-85 CCH OSHD at p. 35,512. Such responsibility, control and supervision may vest within one or the other employing entities, or they may be shared as in the case of closely integrated operations. The instant case falls into the latter category. *Home Supply Co.*, 1 BNA OSHC 1615, 1616, 1973-74 CCH OSHD ¶ 17,521, p. 21,978 (No. 69, 1974).

We disagree with the dissent's characterization of our decision as assessing a single penalty for two sets of citations issued to two employers. Where we have found Taylor and Esprit to be a single employer for the purposes of this case, only one set of citations and one corresponding penalty can be reasonably sustained. *See Advance Specialty*, 3 BNA OSHC at 2076, 1975-76 CCH OSHD at p. 24,484 (where two integrated entities are treated as one, resulting entity is responsible for one violation).

Contrary to the dissent, our ruling does not mean that if Esprit operates independently of Taylor on a different project, it cannot be considered a separate employer for the purposes of the Act. Accordingly, the Secretary will be free to use the records in this and previous cases involving these entities as evidence in any future proceedings under the Act against Taylor or Esprit individually, or whenever the two entities operate as a single employer.

1997) (final order) ("*Taylor-Esprit II*"). Moreover, both Taylor and Esprit are subject to the abatement orders issued here. Thus, we will treat Taylor and Esprit as we find them in this case: a single employer with a total of about 105 employees.[8]

II. WE ARE NOT PERSUADED TO DEPART FROM *ARCADIAN*

The Secretary argues vigorously that the Commission wrongly decided *Arcadian* and asks the Commission to reconsider and overturn the precedent. In *Arcadian*, the Commission was faced with the issue whether section 5(a)(1) of the Act prescribed individual units of prosecution on a per employee basis when those employees were exposed to a "recognized hazard." The Commission considered the plain language of section 5(a)(1) and concluded that the general duty clause unambiguously provides that employers should be fined on a per-violation basis rather than a per-employee basis. *Arcadian*, 17 BNA OSHC at 1348, 1995-97 CCH OSHD at p. 42,917. The Commission's opinion was affirmed by the U.S. Court of Appeals for the Fifth Circuit. *Arcadian Corp.*, 110 F.3d 1192 (5th Cir. 1997).

The Fifth Circuit similarly read section 5(a)(1) to focus on the employer's duty to prevent hazardous conditions from developing in the employment itself or the workplace. *Id.* at 1194. It went on to note that reviewing courts in their decisions construing the general duty clause have found that the elements for proving the violation all focus on the alleged recognized hazard. *Id.* at 1197-98. Thus, it must be shown that the employer failed to free its workplace of a hazard that is "recognized" and "causing or...likely to cause death or serious physical harm...." As the court observed, a fourth element of proof is that the hazard can be eliminated through some feasible and useful means of abatement. *Id.* at 1197, n. 3. There is nothing in these elements that focuses on any particular employee. *Id.* at 1197. The court for these and other reasons, therefore, agreed with the Commission majority that the plain meaning of the statute prescribes the unit of violation

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[8] The Secretary relies on Commission decisions that have held one contractor on a multi-employer worksite responsible for creating or failing to eliminate violative conditions based on the exposure of another contractor's employees to those conditions. *Flint Eng'g & Constr. Co.*, 15 BNA OSHC 2052, 2054-55, 1991-93 OSHD ¶ 29,923, p. 40853 (No. 90-2873, 1992), and cases cited therein. *See also R.P. Carbone Construction Co. v. OSHRC*, 166 F. 3d 815 (6th Cir. 1998). However, because Taylor and Esprit functioned as a single employer, cases involving multiple but distinct employers are inapposite.

The Secretary also relies on decisions where more than one employer had responsibility for the safety of particular employees. *See, e.g., Southwest Refractory, Inc. v. Secy. of Labor*, 74 F.3d 1250 (10th Cir. 1996) (unpublished) (cited employer contracted with crane company so that both companies shared safety responsibility for that employee). Again, however, such multi-employer cases are inapposite because Taylor and Esprit functioned as a single employer.

as the recognized hazard. *Id.* The court went on to indicate that it is the Commission alone that has statutory authority to assess penalties based upon the record developed in the hearing process. *Id.* at 1199. The court noted that agreement with the Secretary's position would place it in the position of "usurping the Commission's statutorily ordained power to assess penalties," which the court declined to do. *Id.*

We note that the position of the Secretary, if accepted, would essentially undermine the Commission's statutory role in other respects. It is the Commission's function to decide in each case, based upon the record developed, the extent to which the Secretary's citations and penalty proposals are meritorious. That function would be undercut to the extent that the Secretary as a prosecutor can predetermine the outcome. For instance, section 17(a) of the Act, 29 U.S.C. § 666(a), prescribes a minimum penalty of $5,000 for each willful violation. In this case that conceivably means the Commission must assess a minimum penalty of $10,000 under a per-employee theory of prosecution since two employees were involved.

Nothing advanced by way of argument in this case persuades us to depart from the precedent set forth in *Arcadian.* The plain language of the statute, taken with the history of decisional law, favors the construction at which both the Commission and the Fifth Circuit arrived. The Secretary merely reargues the same position that was previously presented and rejected.[9]

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[9] Commissioner Stephens notes that in this case the Secretary has cited additional authority to support her position. She relies on a number of circuit court decisions that found statutory provisions unambiguous in permitting a separate conviction for each separate criminal act, even though those acts may have been part of a single course of conduct. *See Castaldi v. United States,* 783 F.2d 119 (8th Cir.) (each denomination of postage stamp counterfeited was separate violation of statute that made it crime to counterfeit "any postage stamp"), *cert. denied,* 476 U.S. 1172 (1986); *United States v. Nichols,* 731 F.2d 545 (8th Cir.) (simultaneous possession of rifle and silencer was two separate violations of statute proscribing receipt or possession of unregistered firearm), ` ` ` `, 469 U.S. 1085 (1984); *United States v. Davis,* 656 F.2d 153 (5th Cir. 1981) (statute that criminalized possession of "a controlled substance" was violated twice by simultaneous possession of two separate controlled substances), *cert. denied,* 456 U.S. 930 (1982); *United States v. Billingslea,* 603 F.2d 515, 520-21 (5th Cir. 1979) (each stolen check was separate offense even though all were deposited to defendant's account at same time); *Ebeling v. Morgan,* 237 U.S. 625 (1915) (each mail bag robbed was separate violation of statute prohibiting cutting of "any mail bag"). However, these cases generally involve criminal provisions whose language bears not the slightest resemblance to section 5(a)(1) and therefore provide no support for the Secretary's reading of the general duty clause. To the extent that any of these decisions may have relevance, they demonstrate only that in *some* instances, Congress intends to prohibit each of several distinct but related acts as separate crimes separately punishable. But in other instances, congressional intent was divined to sanction only a

III. PENALTY ASSESSMENT

In assessing penalties, the Commission considers the gravity of the violations, as

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course of conduct, not the distinct and separate acts that form the parts of the conduct. *See, e.g., Ladner v. United States*, 358 U.S. 169, 176-77 (1958); *Bell v. United States*, 349 U.S. 81 (1955). It is within the prerogative of the legislative branch to decide in a given circumstance whether to criminalize an entire transaction or alternatively to penalize each of its component parts. *See Morgan v. Devine*, 237 U.S. 632, 639 (1915) ("It [is] within the competency of Congress to say what shall be the offenses against the law....") Having opted for the latter approach with respect to certain prohibited conduct is no indication that Congress must adopt the same approach, or necessarily has done so, with respect to other kinds of behavior.

The Secretary also points to the civil penalty provisions of several other laws: The Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6921-6939e; the Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629 ("TSCA"); the Oil Pollution Act of 1990, 33 U.S.C. § 1321 ("Oil Pollution Act"), and a provision of a Department of Agriculture statute governing milk price supports. 7 U.S.C. §§ 1446(d)(5)(B)(ii)-(v). In the cited environmental statutes, per-instance penalties are set out explicitly and clearly. Each violation of RCRA's hazardous waste requirements carries a potential civil penalty of up to $25,000, and *each day* a violation continues carries a separate penalty. 42 U.S.C. § 6928(c). TSCA has the same civil penalties. 15 U.S.C. § 2615(a). Violations of the Oil Pollution Act carry civil penalties of up to $1000 *per barrel of oil spilled*, or $3000 per barrel if the spill results from gross negligence or willful misconduct. 33 U.S.C. §§ 1321(b)(7) (A), (D). Similarly, the Department of Agriculture statute governing milk price supports, 7 U.S.C. §§ 1446(d)(5)(B)(ii)-(v), allows a civil penalty of up to $5,000 *per cow* for dairy farmers who break certain agreements with the Secretary of Agriculture regarding herd reduction, or who make false statements regarding the cattle to the Department of Agriculture. However, in Commissioner Stephens' view, none of these foregoing statutes provides compelling justification for engrafting onto the OSH Act a new unit of penalty. The OSH Act has no comparable penalty language regarding General Duty Clause violations. Only section 17(d), 29 U.S.C. § 666(d), establishes a per-day unit of penalty for failure-to-abate violations. If any inference is to be drawn in comparing the OSH Act with these statutes it is that Congress knows how to specify units of penalty, whether it be per-employee, per-day, per-barrel, or even per-cow. When it intends to impose a penalty on a particular basis, it does so explicitly; in the absence of such language, it is reasonable to conclude that Congress did not intend to impose per-employee units of penalty as a sanction for violating section 5(a)(1). Compare the Fair Labor Standards Act ("FLSA") amendment in the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388, 1388-29 (November 5, 1990), which added a specific per-employee penalty for child labor violations, section 3103(1)(B) (codified at 29 U.S.C. § 216(e)). The FLSA provision replaced the previous $1000 maximum penalty for each child labor violation with "a civil penalty of not to exceed $10,000 for *each employee* who was the subject of such a violation. *See Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 57 (1987) (phrase "to be in violation" has prospective orientation because, among other factors, "Congress has demonstrated in yet other statutory provisions that it knows how to avoid this prospective implication by using language that explicitly targets wholly past violations").

well as the employer's size, good faith, and history of OSHA violations. *See* § 17(j), 29 U.S.C. § 666(j). The judge reduced the two $70,000 and two $7,000 proposed penalties by a factor of 20 percent, based on the small size of the combined entity. There is no basis in the record for such a reduction. We find that the circumstances of these violations make maximum penalties appropriate. As set forth in detail below, these factors include: (1) prior warnings to Taylor that its chosen foreman on this project was prone to hasty and dangerous practices; (2) the foreman's disobedience of repeated instructions and reminders to provide fall protection; (3) the culpable failure to heed the warnings on the bundles of bar joists and the engineering drawings for the job, which made clear that bridging must be installed on all bar joists before placing construction loads on them; (4) three prior OSHA citations to Taylor for lack of fall protection in steel erection work being performed by Esprit; (5) the foreman's false statements during the accident investigation, attempting to shield Taylor from responsibility; and (6) the ongoing failure of both entities to develop adequate safety rules and to adequately communicate and enforce the rules they adopted.

A. The warnings, the accident, and the investigation

On the second day of the project, Taylor general manager Mills observed two Esprit employees connecting joist girders, 39 feet above ground, without tying off with safety belts and lanyards. He instructed Esprit foreman Goch to install a safety cable across the joist girders so that employees could tie off. Mills again reminded Goch about fall protection two days later, before the ironworkers left the ground, as did Taylor vice-president Hitchcock. Although Goch told Hitchcock that fall protection would be the "next order of business," he never provided a safety cable, and no other means of fall protection was available.

No Taylor or Esprit personnel checked to make sure that the safety cable was actually installed. Such a check would have been prudent, if only because there had been complaints about Goch's risk-taking as a foreman on previous steel erection jobs. For example, a crane operator had complained to Taylor's owner that on one job Goch wanted to continue erecting steel when the operator felt it was too windy; as a result, the operator refused to continue working. Charles Taylor testified that he supported the crane operator's decision. Also, an Esprit employee had told Mills that Goch had disregarded his warning not to pull a bolt out of a joist that was suspended by a crane because the crane or boom was not positioned right. As a result, the joist drifted and struck a tank. Mills warned Goch, "We are not to be in such a hurry out here. We're going to get somebody hurt." Mills and Charles Taylor also discussed this situation. Further, Goch had balked on one job when Mills told him to tie off to a cable system on the rafters because

of the time it took to move the cables. Mills told him that the cable system is "part of the job." However, Mills never evaluated how well Goch complied with Taylor's or Esprit's fall protection policies.

On the day of the accident, the crew first set bar joists in place across certain bays. However, unlike the previous days and contrary to what Goch had told Mills he would do, Goch neither had the bar joists welded to the joist girders, nor was any bridging installed. Instead, Goch directed the crane operator to lift the 5,000-pound bundles of decking and land them across the ends of the unwelded bar joists, parallel to the joist girders. As noted, the unwelded joists failed, causing the two employees to fall to their deaths.

During the accident investigation, Goch told OSHA that his supervisor worked for Esprit, although Taylor general manager Mills was his actual supervisor. Goch testified that Charles Taylor told him to name the Esprit employee as his supervisor. Goch also told OSHA that Esprit employees are instructed to tie off at all times possible. At the hearing, however, Goch testified that he had known otherwise. He admitted at the hearing that he had attempted to mislead OSHA, and he testified without contradiction that Charles Taylor had encouraged him to make those statements.

B. The violations

Taylor and Esprit do not challenge the judge's fact-findings on the merits of the violations, and those findings are well supported by the evidence. Although Taylor had various written safety materials in its possession, the judge found that neither company had an adequate safety program as required by section 1926.20(b)(1). With no evidence that any Esprit employees at the worksite received any instruction on fall protection matters, the judge also affirmed a serious violation of section 1926.21(b)(2).

As to the fall protection item, section 1926.105(a), the judge found that Goch's failure to provide fall protection to the ironworkers was willful because he had received numerous reminders, including Mills' instructions that it was essential. The judge also rejected the companies' claims that they should be relieved of responsibility because Goch's misconduct was unpreventable:

> [N]either Mills nor Hitchcock took any action to verify that their instructions were followed despite Taylor having received previous employee complaints that Goch operated unsafely. Also, there is no

> showing of any disciplinary action taken against employees for failing to tie off….Taylor and Esprit's safety program and training regarding fall protection were deficient. Employees testified that fall protection was discretionary for the ironworkers. Even…an employee called by Taylor, acknowledged seeing employees on other jobs not tied off….

Finally, as to the section 5(a)(1) violation, the judge found that landing 5,000-pound bundles of decking on unsecured and unbridged bar joists is a recognized hazard in the steel erection industry, based on specifications of the Steel Joist Institute, the American National Standards Institute ("ANSI") Steel Erection Standard, ANSI A10.13-1989 (§ 11.1.11), and other factors. He termed Goch's decision to do so willful:

> The engineering drawings for the project specifically required the installation of bridging. Similarly, the warning tags and delivery ticket for the bar joists required bridging before placing construction loads including bundles of decking. Hitchcock expressed the attitude that such requirements were merely a manufacturer's standard disclaimer which he apparently felt could be second-guessed….The decision of Goch to land 5,000 pounds of decking on bar joists that were neither secured nor bridged constitutes a disregard of industry requirements and shows an indifference to employee safety.

C. Summary of penalty factors

The gravity of the violations here was severe, as the two fatalities underscore. Further, Taylor had several prior fall protection violations on steel erection projects, at least two of them involving Esprit ironworkers. Taylor failed to show good faith during the inspection, misleading OSHA about Taylor's involvement in the job. Taylor's failure to develop an adequate safety program, to instruct the employees on the worksite regarding fall protection, and even to instruct its foreman not to land loads on unsecured bar joists, indicate a lack of good faith effort to protect its employees.

Treating Taylor and Esprit as a single entity, the judge reduced each assessed penalty by 20 percent, because the combined entity was relatively small with about 105 employees. In view of the many aggravating factors here, however, we find that assessing the maximum penalties is more appropriate. Taylor and Esprit failed to respond properly to strong warnings about their foreman's inattention to safety and to several prior fall protection violations. The foreman's failure to heed the instructions on the engineering drawings and the bundles of bar joists regarding bridging reveals a gross recklessness for which Taylor is responsible.

We therefore affirm the judge's findings of violations by Taylor and Esprit as a single employer – serious violations of § 1926.20(b)(1) and § 1926.21(b)(2) and willful violations

of section 1926.105(a) and of section 5(a)(1) of the Act. We assess the maximum permissible

penalty for each violation – $7,000 for each of the two serious violations and $70,000 for each of the two willful violations. The total penalty assessed is $154,000.

SO ORDERED.

/s/
W. Scott Railton
Chairman

/s/
James M. Stephens
Commissioner

Dated: April 26, 2003

ROGERS, Commissioner, concurring and dissenting:

I concur with my colleagues' conclusion that respondent Esprit Constructors is liable for only one violation of section 5(a)(1) in light of the cited hazard at issue here. Notably, in *Arcadian Corp.*, 17 BNA OSHC 1345, 1995-97 CCH OSHD ¶ 30,856 (No. 93-3270, 1995)("*Arcadian*"), *aff'd*, 110 F.3d 1192 (5th Cir. 1997), the Review Commission, and the Fifth Circuit on review, disallowed per-employee citation in an analogous case. The *Arcadian* decision clearly controls the outcome here and I am constrained to follow it.[1]

I must respectfully dissent, however, from the majority's conclusion that the Secretary erred in issuing separate sets of citations to C.T. Taylor (Taylor) and Esprit Constructors (Esprit) for their violations of the fall protection standard at 29 C.F.R. § 1926.105(a) and their failure to have an adequate safety program and train employees under 29 C.F.R. § 1926.20(b)(1) and (21)(b)(2). The majority finds that for Occupational Safety and Health Act purposes, Taylor and Esprit functioned on the Twinsburg jobsite as a single employer with respect to their obligations and liabilities. In my view, this decision contravenes settled precedent concerning the treatment of corporate structure and undercuts the Secretary's lawful exercise of prosecutorial discretion to achieve the remedial purposes of the Act.

Taylor and Esprit were involved in a construction project in Twinsburg, Ohio, for which Taylor performed as the general contractor/developer, and Esprit worked as the construction subcontractor. On June 11, 1994, two Esprit employees died after a 39-foot fall caused by the collapse of overloaded unsecured bar joists. Following an investigation, the Secretary of Labor issued separate sets of citations to Taylor and Esprit, each set containing allegations of several violations. The cases were assigned separate

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[1] I believe there is some merit in former Chairman Weisberg's analysis in his *Arcadian* dissent, to the extent he suggests that separate citation may be appropriate under the general duty clause when the hazard alleged "involves acts uniquely individual in nature." *Arcadian*, 17 BNA OSHC at 1361, 1995-97 CCH OSHD at p. 42,930. But the hazard alleged here - setting bundles of steel decking on unsecured and unbridged joists - is more akin to the missing guardrail in *Hartford Roofing Co.*, 17 BNA OSHC 1361, 1995-97 CCH OSHD ¶ 30,857, (No. 92-3855, 1995), than the failure to perform respirator fit tests in *Sanders Lead Co.*, 17 BNA OSHC 1197, 1993-95 CCH OSHD ¶ 30,740 (No. 87-260, 1995), and does not involve acts individual in nature.

docket numbers, though they were consolidated for trial. Taylor and Esprit were each represented by their own attorneys throughout the proceedings below, and each admitted in its answer to the complaints that it was an "employer employing employees in said business at the aforesaid workplace." The parties tried the cases on the understanding that Taylor and Esprit were separate corporations, and each company filed its own post-hearing brief. Nonetheless, although the judge acknowledged that the two companies are "separate legal entities," he found that they were a single integrated enterprise and therefore, *on his own motion,* treated them as one for penalty purposes.

The Secretary petitioned the Commission for review on several grounds, including the judge's failure to affirm separate penalties for both corporations. On review, Taylor and Esprit are represented by one attorney and now argue that they should be treated as a single employer to "avoid the unjust result of punishing what is, in effect, the same company, twice, for one violation."

In deciding to affirm the judge, my colleagues argue that their decision to treat Taylor and Esprit as one entity is based on the "single employer" doctrine derived from the National Labor Relations Board, which the Commission applied in *Advance Specialty Co.*, 3 BNA OSHC 2072, 2075, 1975-76 CCH OSHD ¶ 20,490, p. 24,484 (No. 2279, 1976)("*Advance*"). Under that doctrine, the Board will treat interrelated companies as one where they "have a combination of most or all of the following factors: a common worksite, a common president or management, a close interrelation and integration of operations, and a common labor policy." *Id.* at 2075-76, 1975-76 CCH OSHC at p. 24,484.

The single employer doctrine was developed to assess the existence of an employer-employee relationship for establishing jurisdiction under the National Labor Relations Act, and is a species of "piercing the corporate veil," which, as the Commission noted in *Advance Specialty*, permits "corporate entities [to] be disregarded in order to effectuate a clear legislative purpose," *citing Schenley Distillers Corp. v. United States,* 326 U.S. 432, 437 (1946). *Advance,* 3 BNA OSHC at 2075, 1975-76 CCH OSHC at p. 24,484. *See also Parklane Hosiery Co.*, 203 NLRB 597, 612, *amended on other grounds,* 207 NLRB 991 (1973) (single employer concept "reflects a judgment that two or more nominally separate business entities may properly be considered sufficiently integrated to warrant their unitary treatment, *for various statutory purposes*") (emphasis added). As

the Supreme Court explained in *Schenley*:

> While corporate entities may be disregarded where they are made the implement for avoiding a clear legislative purpose, they will not be disregarded where those in control have deliberately adopted the corporate form in order to secure its advantages and where no violence to the legislative purpose is done by treating the corporate entity as a separate legal person. One who has created a corporate arrangement, chosen as a means of carrying out his business purposes, does not have the choice of disregarding the corporate entity in order to avoid the obligations which the statute lays upon it for the protection of the public.
> The fact that several corporations are used in carrying on one business does not relieve them of their several statutory obligations more than it relieves them of the taxes severally laid upon them.

Schenley, 326 U.S. at 437.

The principles articulated in *Schenley* are reiterated in the general rule that "absent highly unusual circumstances, the corporate entity will not be disregarded." *P.F. Collier & Son Corp. v. FTC*, 427 F.2d 261, 267 (6th Cir. 1970) (citations omitted).[2] There are recognized exceptions in which a court will "pierce the corporate veil" to achieve a legislative purpose, such as "when the corporate device is used to defraud creditors, create a monopoly, [or] circumvent a statute" but neither the circumstances of this case nor the procedural foundation established below would warrant such action here. *Boggs v. Blue Diamond Coal Co.*, 590 F.2d 655, 662 (6th Cir. 1979), *cert. denied*, 444 U.S. 836 (1979). *See also Hazard Coal Corp. v. Ky. W. Va. Gas Co., L.L.C.*, 311 F.3d 733 (6th Cir. 2002) ("if a business wishes to reap the benefits of establishing separate corporations, it must also accept the burdens [ ] companies cannot be separate for some purposes and lumped together for others at their whim or convenience").

Taylor and Esprit voluntarily chose to establish themselves as two separate corporate entities and each held itself out to the public as an independent enterprise for the purpose of conducting business. Each company has its own employees and admits to being an employer as that is defined by the Act. Moreover, as Esprit president and owner Charles Taylor testified, Esprit performs steel erection work for companies other than Taylor. Nonetheless, Taylor and Esprit now seek to reinvent themselves as a single

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[2]This case can be appealed to the Sixth Circuit, 29 U.S.C. § 660(a) & (b), whose law the Commission would therefore ordinarily follow. *Farrens Tree Surgeons*, 15 BNA OSHC 1793, 1794-95, 1991-93 CCH OSHD ¶ 29,770, p. 40,489 (No. 90-998, 1992).

employer for the sole purpose of eliminating half of their penalty exposure for the violations committed here. Our acceptance of this charade would allow these companies to reap the benefits of separate incorporation without bearing its burdens.

The dispositive factor under *Schenley* for ignoring the corporate form is not whether two separate companies are so integrated that they really *are* one, but, rather, whether two such companies *may be treated as one under the law*. Not only is there no legitimate legislative purpose served by disregarding Taylor's and Esprit's chosen corporate form, the purposes and policies of the Occupational Safety and Health Act would best be served by affirming the separate citations and issuing separate penalties and abatement orders to these two separate companies that sometimes work together and sometimes do not. Since Esprit independently engages in activities covered by the Act, a separate penalty for its violative conduct in addition to an abatement order issued to it are appropriate and necessary to induce Esprit's future compliance and avoid the possibility for Esprit to later escape any legal consequences of its behavior here, such as a future repeat citation. *See Joel Yandell d/b/a Triple L Tower*, 18 OSHC 1623, 1629 n. 9, 1999 CCH OSHD ¶ 31,782, p. 46,543 n. 9 (No. 94-3080, 1999)(possibility of repeated characterization, with higher penalty, provides additional incentive to comply with Act).

My colleagues claim that the Act is well served by holding Taylor "equally responsible" for the Section 5(a)(1) violation, and suggest that unless we treat Taylor and Esprit as a single employer, Taylor would avoid responsibility for Esprit supervisor Goch's willful conduct. What my colleagues fail to acknowledge, however, is that the Secretary did not cite Taylor for the 5(a)(1) violation, there is no separate penalty being assessed for Taylor's new-found liability with respect to it. The net effect of their decision is to vacate one set of the fall protection and accident prevention/safety program citations along with the ensuing penalties. The Secretary separately cited Taylor and Esprit for the violations of these standards, each entity is a statutory employer, and Esprit's own employees were exposed to the cited conditions. Yet, my colleagues have ostensibly vacated one of these two sets of citations, precluding the assessment of a reasonable penalty for conduct that they agree was violative. While any common control of labor relations or overlap in the other incidents of employer status among these two companies, *see Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992), might show a dual employment relationship, that would not negate the applicability of the cited

standards to either Taylor or Esprit.

The majority opinion also asserts that it "see[s] no justification" for the separate citations to Taylor and Esprit because the Secretary has "issued citations solely to Taylor regarding several [previous] steel erection worksites where Esprit was performing steel erection work for Taylor." Any argument or suggestion that the Secretary's previous decisions to refrain from citing both entities precludes her ability to do so here wholly misconstrues and misunderstands prosecutorial discretion and so straitjackets its exercise as to make it non-existent. In fact, these events merely reflect the Secretary's reasoned exercise of her prosecutorial discretion to achieve the remedial purposes of the Act. As the Secretary argues, she decided to cite both Taylor and Esprit here because in the face of three prior citations to Taylor alone, the violative conduct continued. There is no question that the Secretary had the authority to independently cite each employer, and no claim that she abused her discretion in doing so. *See Cuyahoga Valley R. Co. v. UTU*, 474 U.S. 3, 5-7 (1985). Accordingly, the Commission's role is limited to deciding whether the Secretary established each of the elements of a violation with respect to each citation, and assessing an appropriate penalty. *Caterpillar v. Herman*, 131 F.3d 666, 668 (7th Cir. 1997).

In cases such as this involving more than one employer at a common construction site, the Commission has held that more than one employer may be held responsible for a single violation. *E.g., McDevitt Street Bovis Inc.*, 19 BNA OSHC 1108, 1109, 2000 CCH OSHD ¶ 32,204, p. 48,780 (No. 97-1918, 2000) (citations omitted)("an employer who either creates or controls the cited hazard has a duty . . . to protect not only its own employees, but those of other employers 'engaged in the common undertaking'"). *See also R.P. Carbone Constr. Co.* v. *OSHRC*, 166 F.3d 815 (6th Cir. 1998). This doctrine serves to allocate responsibility and liability among multiple corporate actors. Indeed, in a subsequent set of cases involving Taylor and Esprit, Administrative Law Judge Michael J. Schoenfeld rejected respondents' belated efforts to be treated as an integrated operation and applied long-standing Commission precedent establishing the multi-employer worksite doctrine to uphold the validity of separate citations to each of them.

> Respondents argue that only one penalty for each violation is appropriate because Taylor and Esprit were operating as an integrated operation. This argument does not withstand scrutiny. First, Respondents raise the argument for the first time in the post-hearing brief. It was not identified

> prior to the hearing in their pre-hearing statement of issues. The issue was not identified during the hearing thus was not tried by consent. Moreover, Taylor and Esprit are, by their own design separate legal entities with separate employees. They are individual employers. Each agreed in its separate answer to the Secretary's complaints that it was an employer. Finally, there is no bar to citing and penalizing more than one employer for a single violation. It is a practice long ago approved by the commission. *Anning-Johnson, Co.*, 4 BNA OSHC 1193 (No. 3694, 1976); *Grossman Steel & Alum. Corp.*, 4 BNA OSHC 1185 (No. 12775, 1976) (consolidated).

Esprit Constructors, Inc., and C. T. Taylor Co., 18 BNA OSHC 1179, 1183 (digest), 1995-97 CCH OSHD ¶ 31,373 (digest), slip op. at 7-8 (No. 96-730, 1997) (consolidated) (ALJ).

Judge Schoenfeld's well-reasoned approach was correct on the merits and in addressing a procedural issue common to both cases as well. Taylor and Esprit never raised the single employer "defense" in this case, urging its applicability only after Judge Welsch addressed it *sua sponte* in his decision. As the Secretary argues, the issue of employer status was not tried by consent. On the contrary, it was seemingly resolved when each respondent admitted employer status in its answer to the complaints. The Secretary was thereby deprived of an opportunity to introduce evidence on the relationship between the two companies, and to develop a record as to whether separate treatment would best effectuate the remedial purposes of the Act. The resulting prejudice to the Secretary's case should preclude our consideration of respondents' argument on review, and alone warrants reversal of Judge Welsch's decision to treat Taylor and Esprit as a single employer. *See ConAgra Flour Milling Co.*, 15 BNA OSHC 1817, 1822, 1991-93 CCH OSHD ¶ 29,808, p. 40,592 (No. 88-2572, 1992)(factors in assessing prejudice include "whether the party had a fair opportunity to defend and whether it could have offered any additional evidence if the case were retried"); *MBI Motor Company, Inc. v. Lotus/East, Inc.*, 506 F.2d 709, 713 (6th Cir. 1974)(vacating lower court's judgment based on theory not raised by either party, as defendant was deprived of opportunity to proffer evidence opposing new theory).

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[3]I note that Chairman Railton's position here regarding the permissibility of a post-trial amendment is seemingly at odds with his approach in another recently decided case, *Safeway, Inc.*, No. 99-0316 (March 12, 2003), *petition for review filed*, No. 03-9546 (10th Cir. April 18, 2003). In *Safeway*, the Chairman voted to vacate a citation because, he found, the Secretary did not cite under a more narrowly applicable standard. The Chairman sidestepped the issue of amending the citation to allege a violation of the other standard,

In sum, I am troubled by the majority's decision to vacate one of the two sets of citations issued to these two employers, which, in the circumstances of this case, usurps the prosecutorial discretion that Congress has explicitly accorded solely to the Secretary of Labor. The Secretary's lawful exercise of that discretion here should remain unhindered by this adjudicative body. The Supreme Court has warned that for "the Commission to make both prosecutorial decisions and to serve as the adjudicator of the dispute" would be "a commingling of roles that Congress did not intend." *Cuyahoga*, 474 U.S. at 7. Since my colleagues have not heeded that warning, I must dissent.

/s/
Thomasina V. Rogers
Commissioner

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however, where the alternative standards had identical substantive requirements and raised identical factual issues, and where there would have been no prejudice to Safeway.