United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. AVCON, INC., VASILIOS SAITES, and NICHOLAS SAITES, Respondents.	OSHRC Docket Nos. 98-0755 and 98-1168

APPEARANCES:

Peter J. Vassalo, Jordana Wilson, and Laura Fargas, Attorneys; Daniel J. Mick, Counsel for Regional Trial Litigation; Donald G. Shalhoub, Deputy Associate Solicitor; Joseph M. Woodward, Associate Solicitor; Judith E. Kramer, Acting Solicitor; U.S. Department of Labor, Washington, DC
For the Complainant

Paul A. Sandars, III; Lum, Danzis, Drasco, Positan & Kleinberg, LLC, Roseland, New Jersey
For the Respondent

DECISION AND ORDER

Before: ROGERS, Chairman; THOMPSON and ATTWOOD, Commissioners.

BY THE COMMISSION:

Avcon Incorporated ("Avcon") is a New Jersey corporation engaged in the business of poured-in-place concrete construction. This case involves a worksite in Hackensack, New Jersey, where Avcon was building an eighteen-story apartment complex called "Excelsior II." Following an inspection of the worksite conducted between October 1997 and April 1998, the Occupational Safety and Health Administration ("OSHA") issued Avcon one serious citation and one willful citation alleging multiple violations of the Occupational Safety and Health Act of 1970 ("OSH Act" or "Act"), 29 U.S.C. §§ 651-678, with a total proposed penalty of $134,000

(Docket No. 98-0755).[1] After a second inspection of the same worksite conducted between April 1998 and June 1998, OSHA issued Avcon another serious citation with a total proposed penalty of $6,000 (Docket No. 98-1168). All of the citations were timely contested and the two matters were consolidated for consideration by Administrative Law Judge Covette Rooney.

On November 20, 1998, the Secretary filed motions to amend her complaints in both cases seeking to add two individuals as Respondents: Vasilios ("Bill") Saites, Avcon's president and director; and Nicholas ("Nick") Saites, Bill's son and an Avcon assistant superintendent. Thereafter, the Saiteses filed a response to the Secretary's amendment motions, urging the judge to deny the motions. The judge granted the Secretary's motions, and following a hearing on these matters, issued a decision in which she affirmed the nine citation items now at issue on review and assessed a total penalty of $77,800.[2]

In her decision, the judge again rejected claims by the Saiteses that they were not proper parties to these matters. She found that the record evidence established that the Saiteses "maintained control over the worksite [,]" and that they were "employers" within the meaning of section 3(5) of the OSH Act. According to the judge, "Avcon's corporate form was a mere formality" and, therefore, it was appropriate to hold the Saiteses individually liable for the OSHA citations and penalties at issue in both cases. For the following reasons, Bill and Nick Saites are dismissed from these cases as respondents, all but one of the nine citation items on review are affirmed, and a total penalty of $77,350 is assessed.[3]

ANALYSIS

I. Secretary's Motions to Amend

We turn first to the Respondents' threshold claim on review that the judge erred in allowing the Secretary to amend her complaints to add the Saiteses as parties to the case more than six months after the occurrence of the violations, contrary to section 9(c) of the OSH Act. Section 9(c) states that "[n]o citation may be issued . . . after the expiration of six months

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[1] The Secretary subsequently amended this proposed penalty amount to $121,800 to reflect an additional reduction for Avcon's size.

[2] These nine citations items arise solely under Docket No. 98-0755.

[3] We deny the motion for oral argument made by Respondents, as the record and briefs are sufficient to decide the case. *MetWest, Inc.*, 22 BNA OSHC 1066, 1067 n.2, 2008 CCH OSHD ¶ 32,942, p. 53,776 n.2 (No. 04-0594, 2007), *aff'd*, 560 F.3d 506 (D.C. Cir. 2009).

following the occurrence of any violation." 29 U.S.C. § 658(c). It is undisputed that the Secretary's motions to amend were filed approximately ten months from the date of the most recent violation observed in Docket No. 98-0755, and six months and eight days from the most recent violation observed in Docket No. 98-1168.[4]

Commission Rule 34 permits the Secretary to amend her citation or proposed penalty in her complaint. But neither this Rule nor any other Commission Rule provides a mechanism for the Secretary to amend her complaint once it has been filed and the amendment is sought after the statute of limitations has expired.[5] In the absence of a specific Commission Rule, the Federal Rules of Civil Procedure ("FRCP") must be applied. *See* 29 U.S.C. § 661(g); Commission Rule 2, 29 C.F.R. § 2200.2(b) (requiring application of FRCP in the absence of a specific Commission Rule). Here, the only rule under the FRCP that would allow the Secretary to amend her complaint more than six months after the occurrence of a violation is FRCP 15(c). *See Vergona Crane Co.*, 15 BNA OSHC 1782, 1783-84 n.3, 1991-93 CCH OSHD ¶ 29,774, p. 40,496 n.3 (No. 88-1745, 1992) ("even if Jo-Le-Ron had been the only appropriate entity to cite, an amendment of the pleadings to name it as employer would be permissible under" Rule 15(c)); *see also CMH Co.*, 9 BNA OSHC 1048, 1050-55, 1980 CCH OSHD ¶ 24,967, p. 30,821 (No. 78-5954, 1980) (allowing the Secretary "to conform the pleadings to the proof" to substitute a

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[4] The citations at issue under Docket No. 98-0755 were issued on April 7, 1998, and alleged violations that were observed between October 9, 1997 through January 7, 1998. The citations at issue under Docket No. 98-1168 were issued on June 23, 1998, and alleged violations that were observed between April 28, 1998 through May 12, 1998.

[5] Respondents claim on review that the Commission lacks jurisdiction to review this case under section 9(c) of the Act because the Secretary never actually issued citations to Bill or Nick Saites as individuals. This assertion is without merit. The Secretary did issue timely citations to Avcon for the violations alleged here and, as noted above, the Commission's rules allow the application of FRCP 15(c) to permit the Secretary to amend these citations through her complaint more than six months after the violation occurred. Indeed, the Commission has construed section 9(c) as a statute of limitations rather than an absolute jurisdictional bar to the issuance of a citation after six months. *See Duane Smelser Roofing Co.*, 4 BNA OSHC 1948, 1950, 1976-77 CCH OSHD ¶ 21,387, p. 25,674 (No. 4773, 1976) ("Section 9(c) prohibits the issuance, not the amendment, of an original citation more than six months after the occurrence of a violation."), *aff'd in part, rev'd in part*, 617 F.2d 448 (6th Cir. 1980); *see also Yelvington Welding Serv.*, 6 BNA OSHC 2013, 2016, 1978 CCH OSHD ¶ 23,092, p. 27,905 (No. 15958, 1978) ("The 180[-]day period is treated as a statute of limitation[s] . . . .").

new party more than six months after the occurrence of a violation by way of a Rule 15(c) amendment).

At the time the Secretary moved to amend her complaints in this case, FRCP 15(c) set forth the following requirements for an amendment to a pleading to relate back to the original pleading date:

> **(c) Relation Back of Amendments.** An amendment of a pleading relates back to the date of the original pleading when
> **(1)** relation back is permitted by the law that provides the statute of limitations applicable to the action, or
> **(2)** the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or
> **(3)** the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Fed. R. Civ. P. 15(c) (1998) (stylistic revisions made in 2007).[6] Respondents specifically claim that the Secretary's amendments failed to satisfy the requirements of FRCP 15(c)(3).[7] Based on

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[6] The Secretary filed her motions to amend under FRCP 15(a), which unlike FRCP 15(c), does not allow a party to relate its pleading back to the date of the original pleading. However, courts have inclusively considered all subsections of FRCP 15 when determining the propriety of an amendment. *See generally Dole v. Arco Chemical Co*., 921 F.2d 484 (3d Cir. 1990) (allowing the Secretary to amend her complaint under FRCP 15(a) to allege a violation of another standard beyond the six-month limitations period); *Arthur v. Maersk, Inc.*, 434 F.3d 196 (3d Cir. 2006) (considering an amendment under both subsections (a) and (c) of FRCP 15, notwithstanding the District Court's reliance solely on subsection (c)). Thus, we do not consider the Secretary's sole reliance on FRCP 15(a) to be determinative here.

[7] Unlike her colleagues, Commissioner Attwood would only reach the merits of Respondents' "relation back" claim under FRCP 15(c) after first determining whether the judge correctly found that Avcon was the Saiteses' alter ego. The record here shows that following the Secretary's issuance of the citations to Avcon—one of which she hand delivered directly to Nick Saites—Bill Saites filed both of Avcon's notices of contest using letterhead that identified Avcon's business address as a home that Bill Saites owned in which Nick Saites lived rent-free. The Secretary filed, and the judge granted, the motions to amend the complaints to add the Saiteses after the end of the limitations period but well before the hearing commenced. And there is no dispute that both the corporate and individual respondents fully participated in the litigation of all

our review of the record, we conclude that the Secretary has not met the "knowledge of mistake" requirement because she failed to show that the Saiteses knew or should have known that but for a mistake concerning identity they would originally have been cited individually.[8]

The Supreme Court recently addressed this specific requirement in *Krupski v. Costa Crociere*, 130 S.Ct. 2485 (2010). There, the Court held that relation back under FRCP 15(c) depends on what the party to be added knew or should have known, and not on the amending party's knowledge or its timeliness in seeking amendment. *Id.* at 2493-96. The Court instructed, "[w]hen the original complaint and the plaintiff's conduct compel the conclusion that the failure to name the prospective defendant in the original complaint was the result of a fully informed decision as opposed to a mistake concerning the proper defendant's identity, the requirements of

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issues. Particularly in these circumstances, Commissioner Attwood would find that if the record also establishes that Avcon was the Saiteses' alter ego under a veil-piercing analysis, the judge properly granted the Secretary's motions to amend the complaints to add the Saiteses as individuals under FRCP 15(a) (Amendments Before Trial). In this regard, Commissioner Attwood notes that "[w]hen a corporation is deemed the 'alter ego' of an individual, then those entities are considered to be one and the same under the law: 'the corporation's acts must be deemed to be [the individual's] own.' " *Patin v. Thoroughbred Power Boats, Inc.*, 294 F.3d 640, 653-54 & n. 18 (5th Cir. 2002) (citation omitted); *cf. Nelson v. Adams USA, Inc*., 529 U.S. 460, 465-68 (2000) (rejecting post-judgment amendment to impose liability against corporation's unnamed officer/owner, specifically noting that neither circuit court nor plaintiff sought to impose such liability by piercing the corporate veil); *Goodman v. Praxair, Inc*., 494 F.3d 458, 474-75 (4th Cir. 2007) (finding wholly-owned subsidiary of cited corporation "knew or should have known" within the limitations period that it was a proper party where its close relationship with cited entity and representation by same attorneys warranted imputing knowledge of the claim against it when original complaint was served). Indeed, as the Secretary explicitly argued below, if Avcon is the individual respondents' alter ego, the two are "indistinguishable." If the record here establishes that Avcon is, in fact, the Saiteses' alter ego, Commissioner Attwood would find that the judge permissibly exercised her discretion to grant the Secretary's motions to amend the complaints under FRCP 15(a), and that the relation-back provision contained in Rule 15(c) is inapposite. *See Krupski v. Costa Crociere*, 130 S.Ct. 2485 (2010) (noting that amendment under rule 15(a) is discretionary). Accordingly, Commissioner Attwood does not join in her colleagues' analysis below applying Rule 15(c), and would reach the merits of the veil-piercing issue in order to determine whether the judge properly granted the Secretary's motions to amend the complaints.

[8] The other two requirements of FRCP 15(c)(3) have been established here. The original complaints and the amended complaints involved the same contested OSHA citations. And it is undisputed that Nick Saites obtained notice of the first set of citations when they were hand-delivered to him, and that Bill Saites was aware of all the citations because he filed the notices of contest in each case.

Rule 15(c)[] are not met." *Id.* at 2496 Thus, the relevant inquiry here is whether the Saiteses should have realized that the Secretary's failure to name them in the original complaints was the result of a mistake by the Secretary as to the legitimacy of Avcon as the cited employer.

Here, we see nothing in the original complaints that would have alerted the Saiteses that the Secretary made a mistake in failing to name them. There is no language in these documents that suggests the Secretary was under a misimpression that Avcon was exclusively responsible for the violations and was issuing the citations to them for that reason. *Cf. Krupski*, 130 S.Ct. at 2497 (concluding that it was clear from original complaint "that Krupski meant to sue the company that 'owned, operated, managed, supervised and controlled' the ship on which she was injured [citation omitted] and also indicated (mistakenly) that Costa Cruise performed those roles . . . ."). Unlike the plaintiff in *Krupski*, the Secretary initially named Avcon, a party that was, in fact, legally responsible. *Cf. id.* ("because the face of the complaint plainly indicated such a misunderstanding, respondent's contention is not persuasive").[9]

The Secretary also failed to provide any basis in her motions to amend the complaints to even suggest that the Saiteses should have realized that her failure to cite them initially resulted from a mistake concerning the identity of the proper party. Both of the Secretary's amendment motions are supported by fundamentally the same affidavit of William G. Staton, an attorney with the U.S. Department of Labor. This affidavit simply lists a number of Saites-owned companies that have defaulted on payment of OSHA penalties in connection with more than thirty prior citations. Notwithstanding this pattern of default spanning a period of twenty-five years, the Secretary had never previously cited either one of the Saites individually and there is no information in the affidavits that would have led the Saiteses to believe that this particular time was different from any other, *i.e.*, that the Secretary "mistakenly" failed to cite them for these particular citations. Given her longstanding consistent behavior, it is more likely the Saiteses would have concluded that the Secretary intended to continue to cite the corporation. And as the Secretary has declined our invitation to brief this issue as specifically identified in the

[9] We note that when the Secretary moved to amend the complaints, she sought to *add*, rather than substitute, the Saiteses as Respondents.

Commission's briefing notice for this case, we are unaware of any basis to view the issue—for which she carries the burden—any differently.[10]

Under these circumstances, we conclude that the Secretary has failed to show there was a reason for the Saiteses to believe that her decision not to initially cite them was a "mistake" rather than "fully informed." *See Choice Electric Co.*, 14 BNA OSHC 1899, 1900, 1987-90 CCH OSHD ¶ 29,141, p. 38,940 (No. 88-1393, 1990) ("general rule in administrative proceedings [is] that the moving party has the burden of proof") (citing Section 7(c), Administrative Procedure Act, 5 U.S.C. § 556(d)); *see also Sarasota Concrete Co.*, 9 BNA OSHC 1608, 1612 and n.9, 1981 CCH OSHD ¶ 25,360, p. 31,531 and n.9 (No. 78-5264, 1981) (same), *aff'd*, 693 F.2d 1061 (11th Cir. 1982). Accordingly, we find that the judge erred in granting the Secretary's motions to amend the complaints to add Bill and Nick Saites as parties more than six months after the occurrence of the violations and dismiss both individuals from these cases as respondents.[11]

II. Serious Citation 1, Items 1a and 1b: 29 C.F.R. §§ 1910.1200(e)(1), (h)(1) (hazard communication)

The Secretary cited Avcon for two alleged serious violations of the hazard communication standard: for failing to "develop, implement, and/or maintain" a written hazard communication program under 29 C.F.R. § 1910.1200(e)(1) (Item 1a), and for failing to provide "effective information and training" to its employees regarding the hazardous chemicals at the

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[10] Although the Secretary did provide some analysis of the amendment issue before the judge in her opposition to Respondents' Motion to Dismiss Claims Against Vasilios N. Saites and Nicholas Saites, she did not indicate in her briefs on review that she wanted to rely on that analysis before the Commission. Even though Respondents addressed the amendment issue in their opening brief to the Commission, the Secretary did not respond to these arguments in her subsequently filed opening brief nor did she explain her reasons for not doing so.

[11] Because Bill and Nick Saites are no longer parties to this matter, the issue of their individual liability for the citations in question is moot. Likewise, we need not address the Secretary's Motion to Take Notice of Judicial Admissions in Related Proceedings, in which she asks us to take judicial notice of the Saiteses's testimony in the separate matter of *Avcon Inc., Altor, Inc., Vasilios Saites, and Nicholas Saites,* OSHRC Docket No. 99-0958. *See Thomas Indust. Coatings Inc.*, 21 BNA OSHC 2283, 2288-89, 2008 CCH OSHD ¶ 32,937, p. 53,735 (No. 97-1073, 2007) (citing *General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064, 2071, 1991-93 CCH OSHD ¶ 29,240, p. 39,163 (No. 82-630, 1991) (consolidated) (finding it unnecessary to decide whether employer's failure to provide access to exposure records was "serious" under the Act, where no party's rights would be adversely affected)).

worksite under 29 C.F.R. § 1910.1200(h)(1) (Item 1b). The Secretary grouped these items and proposed a penalty of $900. The judge affirmed the items as alleged and assessed the proposed penalty.

The hazard communication standard requires an employer to "develop, implement, and maintain at each workplace[] a written hazard communication program . . . ." 29 C.F.R. § 1910.1200(e)(1). The program must include a "list of the hazardous chemicals known to be present using an identity that is referenced on the appropriate material data safety sheet . . . ." 29 C.F.R. § 1910.1200(e)(1)(i). Employers must also "provide employees with effective information and training on hazardous chemicals in their work area" and inform them of the "location and availability of the written hazard communication program, including the required list(s) of hazardous chemicals . . . ." 29 C.F.R. §§ 1910.1200(h)(1), (h)(2)(iii).

At the outset, we note that Avcon has failed to address the hazard communication training item (Item 1b) in its briefs to the Commission, even though the company sought review of the item in its petition for discretionary review and our briefing notice specifically asked the parties to discuss it. Accordingly, we deem this item abandoned by Avcon. *See Midwest Masonry, Inc.*, 19 BNA OSHC 1540, 1543 n.5, 2001 CCH OSHD ¶ 32,428, p. 49,994 n.5 (No. 00-0322, 2001) (employer deemed to have abandoned argument permitted by Commission's briefing notice by not addressing it in brief on review); *Ragnar Benson, Inc.*, 18 BNA OSHC 1937, 1938, 1999 CCH OSHD ¶ 31,932, p. 47,371 (No. 97-1676, 1999) ("The Commission need not review an issue abandoned by a party.").

With respect to the hazard communication program item (Item 1a), the Secretary alleged, and Avcon does not dispute, that Avcon's written program lacked a list of the hazardous chemicals employees used at the worksite.[12] Instead, Avcon contends that the judge erred in affirming the item because she "ignored" Avcon's development and use of a written hazard communication program. However, it is Avcon that has ignored its own failure to include gasoline, oxygen, acetylene, and propane on its required list of onsite hazardous chemicals even though it also does not dispute that these substances are hazardous chemicals that were used by its employees. Indeed, as Nick Saites acknowledged, the program only "told the employees how to handle materials, and if there was an accident, what to do." Although he also testified that

[12] Neither party introduced the written hazard communication program into evidence.

material safety data sheets ("MSDS's") were kept in the same binder with Avcon's hazard communication program, the cited provision clearly differentiates between the hazardous chemicals list and the MSDS's, which are separately required. 29 C.F.R. § 1910.1200(e)(1)(i) (requiring that the list of hazardous chemicals reference the MSDS's that identify the chemicals); *see also Atl. Battery*, 16 BNA OSHC 2131, 2182, 1993-1995 CCH OSHD ¶ 30,636, p. 42,499 (No. 90-1747, 1994) (noting that the list must include "those chemicals for which the employer is required to obtain an MSDS"). Under these circumstances, we conclude that Avcon failed to develop and maintain a written hazard communication program that meets all of the requirements of the cited standard. *See Safeway Store No. 914*, 16 BNA OSHC 1504, 1514-15, 1993-1995 CCH OSHD ¶ 30,300, pp. 41,747-48 (No. 91-373, 1993) (affirming violation of § 1910.1200(e)(1) where employer failed to include a hazardous chemical present at its site in its hazard communication program list and affirming violation of separate MSDS requirement).

Avcon has challenged neither the characterization nor the penalty proposed for the grouped items. Accordingly, we affirm the items as serious and assess the $900 proposed penalty.

III. Serious Citation 1, Item 2: 29 C.F.R. § 1926.20(b)(1) (safety program)

In this item, the Secretary alleged that Avcon failed to maintain an adequate accident prevention program ("safety program"). The Secretary based this item on evidence that Avcon's supervisors permitted and participated in conduct that violated various OSHA standards, and on alleged insufficiencies in Avcon's written program, including its origin as an OSHA guidance document that "was in no way tailored or adapted to a company engaged in shoring, form work, or concrete pouring." The judge affirmed the violation, finding that management tolerated and participated in noncompliance with OSHA standards, "which . . . indicated that there was no program to bring workers into compliance," and that Avcon's safety program did not address measures for detecting and correcting hazards and was not communicated to employees "in a manner which [would] let the employees know what precautions to take when they encountered potentially dangerous situations." She assessed the $3,000 proposed penalty.

The cited standard requires an employer to "initiate and maintain" a safety program for its employees engaged in construction work. 29 C.F.R. § 1926.20(b)(1). Under the standard, "an employer may reasonably be expected to conform its safety program to any known duties" and the "safety program must include those measures for detecting and correcting hazards which

a reasonably prudent employer similarly situated would adopt." *Northwood Stone & Asphalt, Inc.*, 16 BNA OSHC 2097, 2099, 1993-1995 CCH OSHD ¶ 30,583, p. 42,349 (No. 91-3409, 1994) (citation omitted), *aff'd without published opinion*, 82 F.3d 418 (6th Cir. 1996); *R & R Builders, Inc.*, 15 BNA OSHC 1383, 1387, 1991-1993 CCH OSHD ¶ 29,531, p. 39,860 (No. 88-282, 1991). Evidence that an employer allows employees to work in unsafe conditions may indicate that an employer's safety program is inadequate under § 1926.20(b)(1). *E.L. Davis Contracting Co.*, 16 BNA OSHC 2046, 2048, 1993-1995 CCH OSHD ¶ 30,579, p. 42,338 (No. 92-35, 1994).

On review, Avcon argues that the judge erred in finding that the requirements of the cited provision were not met, claiming that the substance of its safety program was communicated to Avcon's foremen, who in turn discussed the contents with the employees. Avcon misses the point. First, Avcon fails entirely to address the judge's finding that its written program, which is in evidence, was generic and lacked site-specific guidance concerning the actual hazards employees could encounter on this worksite. Indeed, our review of the written program shows, for example, that it makes no mention of fall hazards from unprotected sides and edges—a principal issue at this worksite—and that it requires "<u>everyone</u> on the job" to wear hard hats "at <u>all</u> times," a requirement the evidence shows Avcon routinely ignored. As the judge found, "[g]eneral instructions, such as 'be safe' or 'think safe,' fall short of the standard's requirements." *See W.G. Fairfield Co.*, 19 BNA OSHC 1233, 1237, 2000 CCH OSHD ¶ 32,216, p. 48,866 (No. 99-0344, 2000) (finding "superficial" treatment of relevant hazard inadequate to establish compliance with safety program requirement), *aff'd,* 285 F.3d 499 (6th Cir. 2002). And, regardless of whether these communications took place, Avcon does not dispute the judge's findings that Avcon's supervisors tolerated and participated in noncompliance with OSHA standards and Avcon's own safety rules. Indeed, Compliance Officer ("CO") Angelo Signorile testified that throughout the inspection he observed various Avcon supervisors—including Bill and Nick Saites, as well as several foremen—in situations where they were exposed to fall hazards but did not use fall protection. Similarly, OSHA Assistant Area Director Phil Peist testified that Bill Saites failed to wear a hardhat during the inspection. Peist also testified that Avcon's foremen stood by and watched as employees violated OSHA standards, or committed violations themselves.

We conclude that Avcon supervisors' personal involvement in such pervasive safety violations demonstrates a severe weakness in Avcon's safety program that further supports a finding that Avcon failed to comply with the cited standard. *E.L. Davis*, 16 BNA OSHC at 2047-48, 1993-1995 CCH OSHD at pp. 42,337-38 (affirming serious violation of § 1926.20(b)(1) where employees, under direct supervision of company owner, worked in excavation without hardhats or safety shoes); *Archer-Western Contractors, Ltd.*, 15 BNA OSHC 1013, 1017, 1991-1993 CCH OSHD ¶ 29,317, p. 39,378 (No. 87-1067, 1991) ("A supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax."), *aff'd without published opinion*, 978 F.2d 744 (D.C. Cir. 1992).

Avcon has challenged neither the characterization nor the penalty proposed for this citation item. Accordingly, we affirm the violation as serious and assess the $3,000 proposed penalty.

IV. Serious Citation 1, Items 8a and 8b: 29 C.F.R. §§ 1926.451(b)(1), (e)(1) (scaffold)

The Secretary cited Avcon for failing to fully plank a scaffold under 29 C.F.R. § 1926.451(b)(1) (Item 8a), and for failing to provide the requisite access to that scaffold under 29 C.F.R. § 1926.451(e)(1) (Item 8b). The Secretary grouped these items and proposed a penalty of $900. The judge affirmed the items as alleged and assessed the proposed penalty.

On review, Avcon argues first that neither of the cited provisions applies because the equipment in question was not a "scaffold." Under 29 C.F.R. § 1926.450(a), a "scaffold" is defined as "any temporary elevated platform (supported or suspended) and its supporting structure . . . used for supporting employees or materials or both." 29 C.F.R. § 1926.450(b). "Platform" is defined as "a work surface elevated above lower levels . . . ." *Id.* CO Signorile testified that he observed an Avcon employee working from a single wooden plank that was on two brackets mounted to a formwork wall, approximately six feet above the floor of an elevator shaft. Between the formwork and the plank was an approximately 20-inch gap.

While this testimony provides only a rudimentary picture of the equipment and its use, we find it establishes that the equipment meets the standard's definition of a "scaffold." *See Armstrong Steel Erectors, Inc.*, 17 BNA OSHC 1385, 1389, 1995-1997 CCH OSHD ¶ 30,909, p. 43,032 (No. 92-262, 1995) ("[W]hether a surface constitutes a scaffold is a question of fact to be answered by comparing the definition of a scaffold to the characteristics of the surface in question."). This plank qualifies as a scaffold because it was elevated, served as a work surface

for the Avcon employee observed by the CO, and was also temporary, as it was attached to formwork that was installed for a limited purpose and time period. *Id.* (finding "painters' picks" were both platforms and scaffolds because they were "working spaces for persons, elevated above the surrounding floor" and "were moved frequently during the job and would be removed from the worksite when steel erection was completed")**.**

In arguing that CO Signorile's testimony is insufficient to establish that the plank was a scaffold, Avcon relies on testimony from Nick Saites that the plank was a "working platform" rather than a scaffold, "wasn't six feet off the ground," and that "it was part of the elevator form work and the form work had a horizontal member nailed to it and with uprights . . . ." These points are unavailing. First, Nick Saites did not explain what he meant by a "working platform"; he only distinguished this scaffold from other types of scaffolds used at the site that were made with metal pipes, frames, and cross braces. Second, although his testimony does differ from that of CO Signorile as to the precise height of the plank, Nick Saites indicated only that it was positioned at an elevation slightly less than 6 feet. Even if his testimony were credited, it fails to establish that the plank was not "elevated."[13] Finally, to the extent the CO testified that the plank was supported by two brackets mounted to the formwork, his testimony is consistent with the scaffold standard's definition of a "form scaffold."[14] Nick Saites's testimony, which was both that the platform was "part of the elevator form work" and was "a horizontal member nailed to [the formwork] and with uprights," lacks sufficient clarity to be considered inconsistent with the CO's testimony.[15] We therefore find that the equipment constitutes a scaffold under the standard.

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[13] Indeed, Commissioner Attwood notes that Nick Saites's testimony actually confirms that the platform was "elevated" and supports, rather than undermines, the Secretary's contention that the scaffold standard applies.

[14] A "form scaffold" is "a supported scaffold consisting of a platform supported by brackets attached to formwork." 29 C.F.R. § 1926.450(b).

[15] Commissioner Attwood notes that Nick Saites did not state that the platform *was* "a horizontal member nailed to [the formwork] with uprights," but stated that "the form work *had* a horizontal member nailed to it . . . ." (Emphases added.) And when subsequently asked to specifically describe how the "platform" "attached to th[e] form work," Saites testified that "[t]here were pieces of wood that were nailed to the form work for the wall, that extended out horizontally, and they had vertical posts beneath them and a plank on top." In Commissioner Attwood's view, not

Although the Secretary has established the general applicability of the scaffold standard, she has not shown that the cited planking provision applies as alleged under Item 8a. Section 1926.451(b)(1) requires that "[e]ach platform on all working levels of scaffolds shall be fully planked or decked between the front uprights and the guardrail supports . . . ." The provision assesses the "fully planked" criteria with respect to the space "between the front uprights and the guardrail supports." Here, the witnesses' sketchy descriptions of the scaffold—unaccompanied by photographs or illustrations—fail to demonstrate the existence or location of uprights or guardrail supports. The CO did not mention uprights at all, Nick Saites only cryptically referred to them in describing the brackets supporting the scaffold, and neither witness's testimony touched on guardrail supports. Without such evidence, we are unable to find that this scaffold was of the type intended to be covered by the cited provision and, therefore, vacate this item.

As to Item 8b, the cited provision prescribes the required means of employee access when the scaffold platform is more than two feet above or below a point of access.[16] 29 C.F.R. § 1926.451(e)(1). The testimony of both CO Signorile and Nick Saites establishes that the scaffold was more than two feet above the floor of the elevator shaft. The access requirements of § 1926.451(e)(1) were therefore applicable. As to whether these requirements were met, the CO testified that he observed an Avcon employee climbing "steel flanges [on the formwork] . . . like steps" to get onto the scaffold. These flanges were "approximately a half[-]inch wide" or less.

Avcon does not contend that it provided any of the means of access specified in the standard. Rather, it argues that there were no Avcon employees attempting to access the scaffold, which obviated the need for a ladder or other means of access. Relying on testimony from Nick Saites, Avcon asserts that, contrary to CO Signorile's testimony, there was no steel in the formwork wall except for "snap ties" that go through both the wall and its wooden walers, holding the wall together during the concrete pour. According to Nick Saites, these snap ties could not have been used for accessing the scaffold because each is only "an eighth[-]inch

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only is this testimony not inconsistent with the CO's testimony, it actually appears to corroborate it.

[16] For any scaffold platform more than two feet "above or below a point of access," the employer must use one of these means of access: "portable ladders, hook-on ladders, attachable ladders, stair towers (scaffold stairways/towers), stairway-type ladders (such as ladder stands), ramps, walkways, integral pre-fabricated scaffold access, or direct access from another scaffold, structure, personnel hoist, or similar surface . . . ." 29 C.F.R. § 1926.451(e)(1).

diameter piece of metal." Based on the judge's general credibility finding in favor of the CO and her implicit crediting of his testimony over that of Nick Saites on this issue, we find that the CO's testimony is sufficient to establish the violation. We therefore affirm this item.

Avcon challenged neither the characterization nor the penalty for this item. Accordingly, we affirm Item 8b as serious. Having vacated Item 8a, we find that a reduction of the proposed penalty amount is appropriate and, therefore, assess a penalty of $450 for this item. *See, e.g.*, *Manganas Painting Co.*, 21 BNA OSHC 1964, 2000, 2004-2009 CCH OSHD ¶ 32,908, p. 53,414 (No. 94-0588, 2007) (reducing penalty by pro-rata amount after vacating one item in each of two grouped items).

V. Citation 1, Item 9; Citation 2, Items 2a through 2c: 29 C.F.R. § 1926.501(b)(1) (fall protection)

Background

For the Excelsior II project, Avcon created three types of formwork into which it poured the concrete for the building's floors, supporting columns, and balconies. Vertical wooden "legs" were erected to support layers of horizontal wooden beams called "stringers" upon which plywood "decking" was placed. To the already formed interior and exterior columns whose plywood forms protruded through the decking from the completed floor below, Avcon added more plywood formwork, then placed rebar horizontally on the decking and vertically inside the column forms, before pouring concrete onto the decking and into the column forms. Avcon also formed and poured concrete for the balconies on each floor when that particular floor was being formed and poured.

This work was performed on a four-day cycle. On the first and second days, Avcon's carpenters installed the legs, stringers, decks and column forms, while its ironworkers inserted the rebar. On day three, Avcon employees poured concrete for 60 percent of the floor, while other employees continued framing the remaining portion of the floor, and on day four, employees poured concrete for the remainder of the floor. The employees then stripped the formwork from the hardened concrete for use on the next level, and installed additional vertical legs or "reshores" below the newly poured floor to provide support. These reshores were left in place for 28 days or until three floors were poured, whichever was greater. The concrete generally achieved 90 percent of its strength during this period.

On review are four citation items (Serious Citation 1, Item 9, and Willful Citation 2, Items 2a through 2c), each of which allege a violation of 29 C.F.R. § 1926.501(b)(1) based on

Avcon's failure to provide fall protection for employees erecting and stripping formwork near the unguarded perimeters of several floors. Under these citation items, the Secretary alleged a total of 24 violative instances, all of which were affirmed by the judge.[17] For the following reasons, we affirm all 24 instances.

Discussion

A. Applicability

The Secretary cited Avcon under each item for failing to provide guardrail systems, safety net systems, or personal fall arrest systems to "employee[s] on a walking/working surface . . . with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level," as prescribed by 29 C.F.R. § 1926.501(b)(1). On review, Avcon does not dispute that it failed to provide the specified fall protection to the employees in question and that it had knowledge of the alleged conditions. Avcon does, however, challenge the applicability of the "unprotected side or edge" provision of the standard to the cited conditions. Avcon claims that its employees were engaged in "leading edge" work and, therefore, a different provision, 29 C.F.R. § 1926.501(b)(2)(i), that specifically addresses employees engaged in leading edge work, would apply.[18] As defined by the standard, leading edge work occurs at "the edge of a floor, roof, or

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[17] Under Item 9, there are 16 instances at issue; under Items 2a through 2c, there are eight instances. We note that the judge's decision incorrectly references instances g and h in Citation 2, Item 2c as instances a and b.

[18] Avcon also contends that the judge erred in affirming the fall protection violations because the CO failed "to identify the floor where an alleged violation occurred, the number of employees affected and how close an employee was to the edge of the floor." This argument lacks merit. As the judge found, these facts were established by credible testimony from the CO. While Avcon's witnesses did offer a different interpretation of what the photographic and videotape evidence depicted, their testimony did not undermine the CO's testimony. Indeed, as the judge stated, most of the testimony presented by Avcon's witnesses was "based on what the witness believed the photo [or videotape] depicted when he viewed the[m] at the trial," and not on his observations at the time these were taken or recorded. The judge also found that the CO's testimony "was corroborated by the statements of other compliance officers," and the conditions depicted on a videotape recorded by CO Richard Brown were "confirmed by on-site visits and interviews." Although Avcon argues that the CO's testimony relative to employee exposure was unreliable because he "made his observations . . . from 100 to 400 feet," it cites no specific evidence to support its claim. *See A.L. Baumgartner*, 16 BNA OSHC 1995, 2001, 1994 CCH OSHD ¶ 30,554, pp. 42,276-77 (No. 92-1022, 1994) (rejecting the employer's arguments regarding the CO's alleged flawed observations and testimony in the absence of specific rebuttal evidence).

formwork for a floor or other walking/working surface (such as the deck) which *changes location as additional floor, roof, decking, or formwork sections are placed, formed or constructed*." 29 C.F.R. § 1926.500(b) (emphasis added). As discussed below, we conclude that the unprotected side or edge provision applies to some of the cited instances, and the leading edge provision applies to the others.

1. Unprotected Side or Edge Instances

Based on our review of the record, we find that in 19 of the 24 cited instances, the employees at issue were covered by the cited provision, which addresses fall protection from an unprotected side or edge. Contrary to Avcon's contention, none of the activities these employees were engaged in can be considered leading edge work. First, the evidence shows that the employees referenced in Citation 1, Item 9 (instances a, c, d, h, i, p, q), and in Citation 2, Item 2a (instances c and e) and Item 2c (instance g), were stripping formwork and removing excess concrete. Although Avcon maintains that leading edge work is not complete until after "all formwork and temporary components have been removed," the judge found this assertion to be inconsistent with the plain language of the "leading edge" definition set out in § 1926.500(b). We agree, as the reach of this provision is clear. By definition it is limited to circumstances in which the walking/working surface "changes location as additional floor, roof, decking, or formwork sections are placed, formed or constructed." It does not extend to the formwork stripping and reshore removal at a completed edge that was underway in the circumstances cited here. 29 C.F.R. § 1926.500(b); *see Unarco Commercial Prods.*, 16 BNA OSHC 1499, 1502, 1993-95 CCH ¶ 30,294, p. 41,732 (No. 89-1555, 1993) (stating "the test for the applicability of any statutory or regulatory provision looks first to the text and structure of the statute or regulations whose applicability is questioned") (citations omitted). Thus, we find that the employees at issue under these instances were not engaged in constructing a leading edge—they were working at an unprotected edge and, therefore, covered by the cited provision, § 1926.501(b)(1).

Second, the evidence shows that the employees referenced in Citation 1, Item 9 (instances b, f, g, and k) were setting up column forms, storing materials, installing steel stringers for a yet-to-be constructed balcony, and framing a balcony; and the employees in Citation 2, Item 2a (instance d), Item 2b (instance a), and Item 2c (instance h), were bending protruding rebar, picking up metal brackets, and picking up stripped lumber and steel brackets. Although

these activities occurred at the edge of either a floor or balcony, none of the employees were engaged in advancing the edge of the surface on which they were working. Rather, the record shows that these activities only took place after the surface had been fully poured. *See* 29 C.F.R. § 1926.500 (noting that "[a] leading edge is considered to be an 'unprotected side and edge' during periods when it is not actively and continuously under construction"). *See generally A.J. McNulty & Co., Inc.*, 19 BNA OSHC 1121, 1130, 2000 CCH OSHD ¶ 32,209, p. 48,810 (No. 94-1758, 2000) (finding a leading edge activity only where "a piece [of the leading edge] is actually being installed"), *aff'd*, 283 F.3d 328 (D.C. Cir. 2002). Thus, we find that the employees at issue under these instances were also not constructing a leading edge but rather were working at an unprotected edge and, therefore, covered by § 1926.501(b)(1).

Finally, the evidence shows that the employees referenced in Citation 1, Item 9 (instance j), and in Citation 2, Item 2a (instance b), were standing on the seventh floor—a completed surface—and were engaged in framing work as part of the process of constructing the eighth floor above them. Although these employees were, in a technical sense, "constructing a leading edge," they were not performing their work on the same level as the leading edge. Rather, these employees were working from the completed floor below "on a walking/working surface . . . with an unprotected side or edge." Under these circumstances, their work is covered by the literal wording of the cited provision, and it would be illogical to apply the leading edge provision. *See Manganas Painting Co.*, 21 BNA OSHC at 1977, 2004-09 CCH OSHD at p. 53,394 (noting principle of statutory interpretation that disfavors absurd results) (citation omitted). Thus, we find that the employees at issue under these instances were covered by the unprotected side and edge provision, § 1926.501(b)(1).

Accordingly, the conditions alleged in 19 of the 24 instances at issue under these citation items were properly cited as violations of the unprotected side or edge provision of the fall protection standard, § 1926.501(b)(1).

2. Leading Edge Instances

We find that the remaining five instances at issue all involve employees who were engaged in constructing a leading edge. Specifically, the record shows that the employees referenced in Citation 1, Item 9 (instances m and n), and in Citation 2, Item 2a (instance a) were

framing floor sections, and, in the case of instance n, also "setting up" or forming a balcony.[19] Because the edge of the floor or formwork changed location as these employees performed their work, their activities fall within the definition of leading edge work. Similarly, some of the employees referenced in Citation 1, Item 9 (instances *l* and o) were framing the floor or the deck and, therefore, were also performing leading edge activities. Therefore, the fall protection requirements of § 1926.501(b)(1) cannot apply to these instances. Rather, the nearly identical fall protection requirements of the leading edge provision, § 1926.501(b)(2)(i), cover these employees.[20] For the following reasons, we find it appropriate to amend the pleadings, *sua sponte*, to allege under each of these five instances a violation of this more specifically applicable provision. *See N.Y. State Elec. & Gas Corp. v. Sec'y of Labor*, 88 F.3d 98, 104 (2d Cir. 1996) (stating that FRCP 15(b) "requires no motion or formal amendment of the pleadings") (citing *Howell v. Cataldi*, 464 F.2d 272, 275 (3d Cir. 1972)).

The Commission has recognized that amendments, including those made *sua sponte*, " 'are routinely permissible where they merely add an alternative legal theory, but do not alter the essential factual allegations contained in the citation . . . .' " *N.Y. State Elec. & Gas Corp.*, 17 BNA OSHC 1129, 1132, 1993-95 CCH OSHD ¶ 30,745, p. 42,709 (No. 91-2897, 1995) (citation omitted), *aff'd in pertinent part*, 88 F.3d at 104. Amendments under FRCP 15(b)(1)[21]

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[19] Unlike instances g and k under Citation 1, Item 9, discussed above, there is no evidence with regard to instance n to indicate that the floor had been poured when this formwork was being set up. Indeed, Nick Saites testified that "the balconies [were] framed along with the deck as [Avcon employees were] going along."

[20] Section 1926.501(b)(2)(i) provides:

> (i) Each employee who is constructing a leading edge 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems, safety net systems, or personal fall arrest systems . . . .

[21] This rule provides:

> **(b) Amendments During and After Trial.**
>
> ***(1) Based on an Objection at Trial.*** If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

are allowed " '[e]ven if a party objects to the use of evidence in support of an unpleaded charge . . . *[provided] the objecting party does not suffer prejudice*.' " *Nuprecon LP dba Nuprecon Acquisition, LP*, 22 BNA OSHC 1937, 1938-1939, 2004-09 CCH OSHD ¶ 33,034, p. 54,386 (No. 08-1037, 2009) (emphasis added) (citation omitted); *see Morrison-Knudsen Co./Yonkers Contracting Co.*, 16 BNA OSHC 1105, 1113, 1993-95 CCH OSHD ¶ 30,048, p. 41,268 (No. 88-572, 1993) (rejecting employer's claim that *sua sponte* amendment to an uncited standard "deprived the employer of a defense, *i.e.*, the inapplicability of the cited standard, and thereby produced prejudice to the employer"); *see also A.L. Baumgartner Constr. Inc.*, 16 BNA OSHC 1995, 1997, 1994 CCH OSHD ¶ 30,554, p. 42,272 (No. 92-1022, 1994) (upholding post-hearing *sua sponte* amendment by the judge where no prejudice shown). In determining whether a party has been prejudiced, the Commission looks "at whether the party had a fair opportunity to defend and whether it could have offered any additional evidence if the case was retried." *Nuprecon*, 22 BNA OSHC at 1939, 2004-09 CCH OSHD at p. 54,386 (citations omitted).

Based on our review of the record here, we find that amending to the more specifically applicable standard would not implicate different facts or prejudice Avcon. The record shows that the material facts in each instance remain substantially the same. Avcon plainly admitted as much in its briefs, both before the Commission and the judge, noting that "the cited references [to the activities in the citations], *by their very terms*, related to leading edge work . . . ." (Emphasis added.) Moreover, these are the facts that the parties tried and that Avcon argued all along supported the applicability of the leading edge standard. The nearly identical requirements of the unprotected edge standard and the leading edge standard—employees "shall be protected from falling" by the use of conventional fall protection—further militate against a finding of prejudice. *See Dole v. Arco Chem. Co.*, 921 F.2d 484, 488 (3rd. Cir. 1990) (finding no prejudice where amended complaint "is based upon facts and circumstances which do not differ significantly from those underlying the Secretary's original [complaint]" and "[t]he evidence required to meet [the] new allegations is substantially similar to that which was originally required").

And because Avcon would not acquire any new affirmative defenses under the amended citations, it lost no opportunity to present any defense-related evidence beyond that which it already introduced. *See Morrison-Knudsen, Inc.*, 16 BNA OSHC at 1114, 1993 CCH OSHD at p. 41,269 (finding no prejudice, in part, because the defenses raised in the employer's post-

hearing brief and on review had equal application to the amended citation). Indeed, the primary defense Avcon raised to the original citations—infeasibility—has equal applicability to the leading edge standard. Although § 1926.501(b)(1), unlike § 1926.501(b)(2)(i), does not contain specific language regarding the infeasibility defense, its applicability to Subpart M as a whole is well-established. *See, e.g., A.J. McNulty & Co., Inc.*, 19 BNA OSHC at 1129, 2000 CCH OSHD at p. 48,810.

Accordingly, we amend *sua sponte* under FRCP 15(b)(1) Citation 1, Item 9 (instances *l*, m, n, and o), and Citation 2, Item 2a (instance a) to allege violations of § 1926.501(b)(2)(i).

B. Infeasibility

On review, Avcon contends that the judge erred in rejecting its affirmative defense of infeasibility. Before turning to the merits of its defense, we first address Avcon's challenges to the judge's rulings on two discovery requests regarding evidence of infeasibility—one filed by the Secretary, which the judge granted, and one by Avcon, which she denied. For the following reasons, we reject Avcon's challenges and affirm the judge's rulings.

1. Secretary's Request for Rebuttal Testimony

On April 7, 1999, the judge issued a scheduling order directing the parties to provide a joint prehearing statement by May 17, 1999, that included a list of all expert witnesses to be called at the hearing. In response, only Avcon listed an expert witness, who it identified as Leo DeBobes. During the hearing, which commenced in May 1999, the Secretary announced for the first time her intention to call an expert witness to rebut Avcon's infeasibility defense. Avcon objected to the Secretary's request and asked to depose the witness if the judge permitted the testimony. On September 23, 1999, the judge issued an order: (1) directing the Secretary to disclose the expert witness's identity if the "expert is being called solely to rebut testimony offered by [Avcon's] fact witnesses with regard to its affirmative defenses"; and (2) permitting Avcon to introduce surrebuttal evidence "[i]f any new issue is raised during the course of this witness's testimony."[22] The Secretary subsequently revealed to Avcon the identities of her two rebuttal witnesses, Matthew Burkart and Daniel Paine, and Avcon deposed both of them on

[22] This order was a clarification of an order the judge issued on the matter the previous day, September 22, 1999.

November 9 and 10, 1999. Burkart and Paine, accepted by the judge as experts, testified at the hearing on December 6 and 8, 1999.

On review, Avcon asserts that the judge's decision to allow the Secretary's rebuttal witnesses to testify impaired its ability to prepare and defend its claim that compliance with the cited standards was infeasible. This assertion lacks merit. Although Avcon initially objected to the judge's decision to allow the Secretary's rebuttal testimony by claiming prejudice, it did not request a continuance, which would have remedied any prejudice by providing Avcon the time needed to further prepare its defense. Because Avcon failed to seek a continuance, its claim of prejudice is unavailing. *See United Cotton Goods, Inc.*, 10 BNA OSHC 1389, 1390, 1982 CCH OSHD ¶ 25,928, p. 32,454 (No. 77-1894, 1982) (finding any prejudice to employer could easily have been cured by requesting a continuance) (discussing *Brown & Root, Inc., Power Plant Division*, 8 BNA OSHC 1055, 1059, 1980 CCH OSHD ¶ 24,275, p. 29,569 (No. 76-3942, 1980)).

We also find no merit in Avcon's claim that it was deprived of a reasonable opportunity to present its case because the Secretary's two rebuttal witnesses were allowed to testify on issues beyond the scope of Avcon's defense. As discussed below, the Secretary's rebuttal witnesses raised no new issues in their testimony, addressing only issues that had been raised by Avcon's own witnesses. Nor has Avcon explained how any resulting prejudice was not cured by it having been given an opportunity to depose the Secretary's witnesses nearly a month before their hearing testimony. "Prejudice arises where the moving party achieves an unfair advantage or where the opposing party is deprived of a fair opportunity to present evidence." *Bland Construction Co.*, 15 BNA OSHC 1031, 1042-43, 1991 CCH OSHD ¶ 29,325, p. 39,402 (No. 87-922, 1991) (citing *Dole v. Arco Chemical Co.*, 921 F.2d at 488). Neither of those circumstances was present here. Avcon's only specific claim of prejudice—that the judge allowed the Secretary to introduce exhibits that were not disclosed in pretrial submissions, but were "handed to [Avcon's] counsel just prior to disclosure at trial"—also fails because Avcon not only had advance notice of the Secretary's theories from earlier depositions, it also had an opportunity to cross-examine these witnesses regarding the exhibits introduced during their testimony. *See Brown & Root, Inc., Power Plant Division*, 8 BNA OSHC at 1059, 1980 CCH OSHD at p. 29,569 (finding Secretary's delay in making amendment does not warrant its denial because opposing party had adequate opportunity to prepare and present its defense) (citations

omitted); *cf. Reed Engineering Group Inc.*, 21 BNA OSHC 1290, 1291, 2004-09 CCH OSHD ¶ 32,862, p. 53,088 (No. 02-0620, 2005) (remanding case to allow employer additional time to conduct discovery where Commission found that judge's granting of Secretary's amendment prejudiced employer). Under these circumstances, there is no basis upon which to overturn the judge's decision to allow the Secretary's rebuttal witnesses to testify.

2. Avcon's Request for Surrebuttal Testimony

In a scheduling order issued to the parties on October 21, 1999, the judge stated that she would allow surrebuttal testimony only if: (1) the Secretary's rebuttal witnesses raise new issues broadening the scope of the case; or (2) any surrebuttal testimony could discredit the Secretary's rebuttal testimony. On November 10, 1999, Avcon sent a letter to the judge stating its intent to offer surrebuttal testimony by Louis Nacamuli, a professional engineer. In a subsequent order, the judge reiterated that she would only allow surrebuttal testimony if the Secretary's witnesses raise new issues and stated her intent to control the remainder of the trial so as not to permit any new issues. The Secretary then notified the judge by letter that she objected to allowing Avcon to present surrebuttal testimony. At the hearing, after one of the Secretary's rebuttal witnesses testified, Avcon renewed its surrebuttal request by asserting that the witness's testimony had raised new issues. The judge disagreed and rejected Avcon's request.

Avcon now asserts that "justice was not served" by the judge's denial of its request to allow surrebuttal testimony because the judge's rejection of its infeasibility defense was "based entirely on the [Secretary's] rebuttal [evidence]." This argument finds no support in the record. The judge made a specific finding that the testimony of Avcon's proffered expert, DeBobes, did not establish Avcon's infeasibility defense which, as discussed below, was Avcon's burden. Furthermore, the topics on which Avcon requested an opportunity to present surrebuttal were not "new," but involved issues that had already been addressed by its witnesses. *See Bowman v. General Motors Corp.*, 427 F. Supp. 234, 240 (E.D. Pa. 1977) (finding that a trial judge may limit rebuttal "testimony to that which is precisely directed to rebutting new matter or new theories . . . ."). Under these circumstances, there is no basis upon which to overturn the judge's decision to disallow surrebuttal testimony.

3. Merits of Infeasibility Defense

Avcon alleges that it was infeasible to provide the required fall protection for each of the instances listed in Serious Citation 1, Item 9 and Willful Citation 2, Items 2a through 2c for two

main reasons. First, it contends that the use of safety nets and fall arrest and restraint systems was infeasible because the plans and specifications for the project did not include structural embedments to allow for the installation of nets, and the form work and plywood decks were not designed to anchor fall arrest and restraint systems. Second, as a practical matter, Avcon maintains that embedding anchors in the concrete was not possible because the concrete was not sufficiently cured to support the use of safety nets, fall arrest or restraint systems.[23] Avcon further claims that it could only use guardrail systems in certain areas of the worksite.

Avcon's arguments implicate two related concepts of infeasibility. The first is the affirmative defense of infeasibility which, under Commission precedent, requires an employer to show that: "(1) the means of compliance prescribed by the applicable standard would have been infeasible, in that (a) its implementation would have been technologically or economically infeasible or (b) necessary work operations would have been technologically or economically infeasible after its implementation, and (2) there would have been no feasible alternative means of protection."[24] *V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1874, 1993-95 CCH OSHD ¶ 30,485, p. 42,109 (No. 91-1167, 1994) (citations omitted).

The second concept of infeasibility implicated here is an exception to the fall protection requirements of the leading edge standard. Under 29 C.F.R. § 1926.501(b)(2)(i), an employer is permitted to "develop and implement a fall protection plan which meets the requirements of paragraph (k) of § 1926.502," when the employer shows "that it is infeasible or creates a greater hazard to use" guardrail systems, safety net systems, or personal fall arrest systems.[25] 29 C.F.R.

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[23] Although Avcon also argues that use of these fall protection methods would have exposed its employees to a greater hazard, this issue was not included in our briefing notice and, therefore, we decline to address it here. *See Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1535 n.4, 1991-93 CCH OSHD ¶ 29,617, p. 40,097 n.4 (No. 86-360, 1992) (consolidated) ("Ordinarily the Commission does not decide issues that are not directed for review.").

[24] Because Avcon does not argue that compliance with the fall protection standard would cause a "severe adverse economic effect," we consider its claims as arising solely in the context of technological infeasibility. *See, e.g., State Sheet Metal Co.,* 16 BNA OSHC 1155, 1161, 1993-95 CCH OSHD ¶ 30,042, p. 41,227 (No. 90-1620, 1993) (consolidated) (noting that compliance was not economically infeasible where employer failed to demonstrate that complying with standard would have a "severe adverse economic effect").

[25] This provision notes that:

§ 1926.501(b)(2)(i). For the following reasons, we find that Avcon has not established the affirmative defense, nor has it proved the applicability of the exception to the leading edge standard.

To prove infeasibility, Avcon relied solely on the testimony of a number of lay witnesses, all of whom were its own employees, and on the testimony of DeBobes, the company's proffered expert witness. The judge found that Avcon's employee witnesses were ill-equipped to address the technical questions surrounding the conditions at the worksite. We agree with her decision to disregard this testimony. The record shows that the employees were clearly "unfamiliar with OSHA's fall protection standards" and their "opinions were offered without any supporting scientific or professional data or tests." *See Peterson Bros. Steel Erection Co.*, 16 BNA OSHC 1196, 1204, 1993-95 CCH OSHD ¶ 30,052, p. 41,304 (No. 90-2304, 1993) (stating that the Commission "cannot accept unsubstantiated conclusions as proof"), *aff'd*, 26 F.3d 573 (5th Cir. 1994).

Nor can Avcon rely on the testimony of DeBobes to establish infeasibility. We agree with the judge's conclusion that DeBobes "has no specialized knowledge . . . relevant to this case: the feasibility of fall protection on high-rise concrete construction projects." Indeed, DeBobes testified that: (1) he had worked on only one high-rise poured-in-place concrete construction project—a nuclear plant project that took place from 1977 to 1981; (2) he had never before designed a fall protection system or assessed the structural integrity of anchorage points to be used for fall protection on a multi-story poured-in-place concrete structure; and (3) he did not know the type of concrete Avcon used at the Excelsior II worksite. *See generally United States Steel Corp. v. OSHRC*, 537 F.2d 780, 783 (3d Cir. 1976) ("Expert testimony need not be accepted even if uncontradicted."). Given these deficiencies, we find that the record supports the judge's conclusion that DeBobes's testimony "does not establish the affirmative defense of

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

29 C.F.R. § 1926.501(b)(2)(i) (note).

infeasibility and/or impossibility." Indeed, DeBobes's testimony would not even make out a prima facie case of infeasibility, which is Avcon's burden whether it claims infeasibility as an affirmative defense to the unprotected side or edge provision, or as an exception to the leading edge provision of the fall protection standard. *A.J. McNulty & Co., Inc.*, 19 BNA OSHC at 1129-34, 2000 CCH OSHD at pp. 48,810-15 (imposing burden of proof on employer to establish infeasibility); *Modern Continental/Obayashi v. OSHRC*, 196 F.3d 274, 282 (1st Cir. 1999) (stating that " 'where a specific duty standard contains the method by which the work hazard is to be abated, the burden of proof is on the employer to demonstrate that the remedy contained in the regulation is infeasible under the particular circumstances' "); *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2194, 2000 CCH OSHD ¶ 32,134, p. 48,420 (No. 90-2775, 2000) ("The Commission has repeatedly held . . . that 'the party claiming the benefit of an exception to the requirements of a standard has the burden of proof of its claim.' ") (citations omitted), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001).[26]

Therefore, we conclude that Avcon failed to establish that the use of fall protection at the Excelsior II worksite was infeasible under either the affirmative defense or the standard's exception. Accordingly, we affirm Citation 1, Item 9[27] and Citation 2, Items 2a through 2c, as amended *supra*.

C. Willful Characterization

On review, Avcon challenges the judge's decision to affirm the Secretary's willful characterization of Citation 2, Items 2a through 2c. Specifically, Avon contends that the test for willfulness in the Third Circuit, to which this case could be appealed, places a higher burden of proof on the Secretary, which the judge did not consider and the Secretary failed to meet. Avcon also argues that the company simply had a "good faith disagreement with OSHA" regarding the

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[26] We note that even if Avcon had established a prima facie case, we agree with the judge's finding that the testimony of the Secretary's witnesses, Burkart and Paine, which showed that at least one of the required means of fall protection would have been feasible, "was very credible and . . . support[ed]" rejecting Avcon's infeasibility defense.

[27] We affirm the judge's characterization of Avcon's failure to provide prescribed fall protection under Citation 1, Item 9 as serious, noting that Avcon has not challenged the characterization of this item on review. *See KS Energy Servs. Inc.*, 22 BNA OSHC 1261, 1268 n.11, 2004-09 CCH OSHD ¶ 32,958, p. 53,925 n.11 (No. 06-1416, 2008) (affirming the alleged characterization where the issue was not in dispute).

interpretation and feasibility of the fall protection standard, which essentially negates any finding of willfulness. We reject both of these arguments and affirm these citation items as willful.

"The hallmark of a willful violation is the employer's state of mind at the time of the violation—an 'intentional, knowing, or voluntary disregard for the requirements of the Act or . . . plain indifference to employee safety.' " *Kaspar Wire Works, Inc.*, 18 BNA OSHC at 2181, 2000 CCH OSHD at p. 48,406 (citation omitted). "A willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of mind of conscious disregard or plain indifference . . . ." *Hern Iron Works, Inc.*, 16 BNA OSHC 1206, 1214, 1993-95 CCH OSHD ¶ 30,046, p. 41,257 (No. 89-433, 1993). This state of mind is evident where "the employer was actually aware, at the time of the violative act, that the act was unlawful, or that it possessed a state of mind such that if it were informed of the standard, it would not care." *AJP Constr. Inc. v. Sec'y of Labor*, 357 F.3d 70, 74 (D.C. Cir. 2004) (emphasis and citations omitted). A willful characterization is not justified, however, if an employer has " 'a good faith, albeit mistaken, belief that particular conduct is permissible.' " *Manganas Painting Co.*, 21 BNA OSHC at 1991, 2004-09 CCH OSHD at p. 53,406 (citation omitted).

Contrary to Avcon's assertion, both the Commission and the Third Circuit have held that the Third Circuit's definition of "willful" differs little from that used by the Commission and most other circuits. *See George Campbell Painting Corp.*, 17 BNA OSHC 1979, 1982, 1995-97 CCH OSHD ¶ 31,293, p. 43,978 (No. 93-984, 1997) (quoting *Universal Auto Radiator Manuf. Co. v. Marshall*, 631 F.2d 20, 23 (3d Cir. 1980) (holding that there is little, if any, difference between the approaches of the Third Circuit and other circuits); *see also Frank Irey, Jr., Inc. v. OSHRC*, 519 F.2d 1200, 1207 (3d Cir. 1975) (holding that a willful violation is characterized by a "deliberate [flouting] of the Act" or by "an obstinate refusal to comply"). Thus, we reject Avcon's claim that the Third Circuit's test for willfulness is inconsistent with the Commission's test.

Turning to the judge's analysis, we find that the evidence supports her characterization of these items as willful. As the judge found, Avcon had a heightened awareness of OSHA's standards requiring fall protection. This awareness was based on (1) discussions that CO Signorile had with the Saiteses and other supervisory personnel, and (2) both Bill and Nick Saites's awareness of OSHA's fall protection requirements from earlier OSHA inspections of other Saites-owned companies' worksites. Indeed, the record shows that during the first few

days of his inspection of the Excelsior II worksite in October 1997, CO Signorile personally explained the requirements of OSHA's fall protection standard to the Saiteses and other Avcon supervisors—Dominic Paniscotti and Bob Gallagher, who were foremen, Frank Cataliato, the carpenter shop steward, and Frank Georgiana, the general carpenter foreman at the worksite. *See Pentecost Contracting Corp.*, 17 BNA OSHC 1953, 1955, 1995-97 CCH OSHD ¶ 31,289, p. 43,964-65 (No. 92-3788, 1997) (finding Secretary established heightened awareness by CO's testimony that he reviewed the excavation standards with employer's supervisors). In fact, during an early conversation with Nick Saites, CO Signorile provided him with a copy of the fall protection standard, its preamble, and handouts pertaining to fall protection equipment. At that time, Nick Saites admitted that he was familiar with the need for employees to be tied off. And Signorile testified that during a subsequent conversation, foreman Gallagher admitted that he and other employees were not wearing fall protection and that he should have told the employees to wear fall protection.

The record also demonstrates that the Saiteses were well aware of the fall protection standard's requirements based on their prior work experience and previous interactions with OSHA. *See MJP Constr. Co.*, 19 BNA OSHC 1638, 1648, 2001 CCH OSHD ¶ 32,484, p. 50,308 (No. 98-0502, 2001) (finding supervisors are chargeable with knowledge of the standard's requirements based on their prior work experience, wherever that experience originates), *aff'd*, 56 F. App'x 1 (D.C. Cir. 2003) (unpublished). OSHA Assistant Area Director Peist testified that in 1986, he discussed fall protection with Nick Saites during his inspection of Cornicon, a Saites-owned company. And CO Brian Donnelly stated that he had similar discussions with the Saiteses during his December 1990 inspection of Saites-owned Astro Concrete's worksite. Both Cornicon and Astro Concrete were cited for serious violations of the fall protection requirements under 29 C.F.R. §§ 1926.105(a) and 1926.500(d)(1) (1979).[28]

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[28] Avcon asserts that the judge erred in relying on the prior citation history of other Saites-owned companies because these earlier citations were based on different fall protection standards than the one cited here. Although the language found in 29 C.F.R. § 1926.105(a) and 29 C.F.R. § 1926.500(d)(1) (1979) is not identical to that in the cited provision, these provisions are substantially similar and, therefore, were properly considered by the judge in assessing willfulness. *See Dakota Underground Inc. v. Sec'y of Labor*, 200 F.3d 564, 567 (8th Cir. 2000) (stating that "[p]ast violations of similar, but not necessarily identical, regulatory provisions" show an employer's knowledge as to the regulation's requirements and the consequences of a

As CO Signorile testified, despite this heightened awareness, Avcon management and supervisory personnel consciously disregarded OSHA's fall protection requirements on the three dates referenced under these citation items when both of the Saiteses as well as Avcon supervisors either observed, or themselves participated in, numerous fall protection violations. *See Calang Corp.*, 14 BNA OSHC 1789, 1791, 1793-94, 1987-90 CCH OSHD ¶ 29,080, p. 38,871 (No. 85-0319, 1990) (finding violation willful when employer "ignore[d] OSHA's requirements after the inspector correctly explained them to him") (citing *Donovan v. Williams Enterprises, Inc.*, 744 F.2d 170, 180 (D.C. Cir. 1984) (finding employer's failure to heed CO's "warnings and advice" establishes " 'intentional disregard of' and 'plain indifference to' OSHA's [requirements]")). This knowledge, conduct, and inaction on the part of Avcon's management is imputable to Avcon. *See Conie Constr. Co.*, 16 BNA OSHC 1870, 1872, 1993-95 CCH OSHD ¶ 30,474, p. 42,090 (No. 92-0264, 1994) (imputing foreman's knowledge of the violative condition to the company), *aff'd*, 73 F.3d 382 (D.C. Cir. 1995); *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814, 1991-93 CCH OSHD ¶ 29,807, p. 40,583 (No. 87-692, 1992) ("The actual or constructive knowledge of the employer's foreman or supervisor can be imputed to the employer.").

Finally, Avcon's contention that its failure to provide fall protection for its workers was based on a mere misunderstanding with OSHA finds no support in this record. The standards cited here required Avcon to provide fall protection to its employees, many of whom were working at heights above 60 feet. The only exception to this requirement—a showing that the use of such protection was infeasible—was not established here. Not only did Avcon fail to prove infeasibility, the record shows that it did not make a good faith attempt to provide an alternative method of protecting its employees against falls based on its alleged belief that fall protection was not feasible. Indeed, despite the life-threatening injuries that its employees would almost certainly have sustained if they had fallen from the heights that existed at this worksite, Avcon failed to take any serious steps toward compliance. It did not preplan for the use of fall

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failure to comply) (citations omitted); *see also Blue Ridge Erectors v. OSHRC*, 261 F. App'x 408, 412 (3d Cir. 2008) (unpublished) (finding that where employer had been previously cited for noncompliance with the steel erection standard applicable before 2001, it was not unreasonable for Commission to conclude that employer showed plain indifference by failing to comply with the subsequently promulgated steel erection standard).

protection, or consult with a professional engineer or any other knowledgeable person regarding safety options, other than inquiring into the cost of safety nets. Nor did Avcon seek permission from the project engineer on this site to embed anchorages or other fall protection equipment. In light of this, we cannot find that Avcon's alleged belief, that fall protection was infeasible, was held in good faith. Indeed, this evidence further supports our conclusion that Avcon had a cavalier attitude towards employee safety. *See Valdak*, 17 BNA OSHC 1135, 1139, 1993-95 CCH OSHD ¶ 30,759, p. 42,741 (No. 93-0239, 1995), *aff'd*, 73 F.3d 1466 (8th Cir. 1996). For all of these reasons, we affirm the judge's characterization of Items 2a through 2c as willful.

D. Penalties

Avcon has not challenged the penalty amounts proposed by the Secretary for Serious Citation 1, Item 9 and Willful Citation 2, Items 2a through 2c. Based on our review of the record and the penalty factors set forth under § 17(j) of the Act, 29 U.S.C. § 666(j), we find that the $3,000 proposed penalty for Serious Citation 1, Item 9, and the $70,000 proposed grouped penalty for Willful Citation 2, Items 2a through 2c, are appropriate here. *See generally KS Energy Servs. Inc.*, 22 BNA OSHC 1261, 1268 n.11, 2004-09 CCH OSHD ¶ 32,958, p. 53,925 n.11 (No. 06-1416, 2008) (assessing proposed penalty amount where issue not in dispute on review).

CONCLUSIONS OF LAW

The judge's ruling granting the Secretary's motions to amend the complaints to add Bill and Nick Saites as parties more than six months after the occurrence of the violations is vacated, and these two individuals are dismissed from the case as respondents. We affirm the judge's rulings on two motions regarding rebuttal and surrebuttal testimony, and affirm her rejection of Avcon's alleged infeasibility defense regarding the fall protection violations. In addition, we amend Citation 1, Item 9 (instances *l*, m, n, and o), and Citation 2, Item 2a (instance a) to allege violations of 29 C.F.R. § 1926.501(b)(2)(i). Finally, we conclude that Avcon committed willful violations of 29 C.F.R. §§ 1926.501(b)(1), (b)(2)(i), and serious violations of 29 C.F.R. §§ 1910.1200(e)(1), (h)(1), 1926.20(b)(1), 1926.451(e)(1), and 1926.501(b)(1), (b)(2)(i).

ORDER

We affirm Serious Citation 1, Items 1a and 1b, 2, 8b, and 9, and we vacate Item 8a. We also affirm Willful Citation 2, Items 2a through 2c. We assess a total penalty of $77,350, as follows: Serious Citation 1, Items 1a and 1b - $900 (grouped); Item 2 - $3,000; Item 8b - $450; and Item 9 - $3,000; Willful Citation 2, Items 2a through 2c - $70,000 (grouped).

SO ORDERED.

/s/_____
Thomasina V. Rogers
Chairman

/s/_____
Horace A. Thompson III
Commissioner

/s/_____
Cynthia L. Attwood
Commissioner

Dated: April 5, 2011

SECRETARY OF LABOR, Complainant, v. AVCON, INC., VASILIOS SAITES, and NICHOLAS SAITES, Respondents.	DOCKET NOS. 98-0755 and 98-1168

Appearances

William J. Staton, Esq.	Paul A. Sandars, III, Esq.
Noelle Fischer, Esq.	Lum, Danzis, Drasco, Positan &
Office of the Solicitor	Kleinberg, LLC
U.S. Department of Labor	103 Eisenhower Parkway
New York, New York	Roseland, New Jersey 07068

Before: Judge Covette Rooney

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). The respondent corporation, Avcon Inc, (Avcon) admits that it is an employer engaged in business affecting commerce and that it is subject to the requirements of the Act. At all times relevant to this action, Avcon maintained a worksite at Prospect Avenue in Hackensack, New Jersey. This worksite was an eighteen story, poured-in-place, reinforced concrete structure.

As the result of an inspection at Avcon's worksite on April 7, 1998, the Occupational Safety and Health Administration (OSHA) issued the respondent corporation one citation alleging sixteen serious violations and one citation alleging four willful violations (Docket No. 98-0755). The total proposed penalty for the citations was $134,00.00. As the result of a second OSHA inspection at the same construction worksite, on June 23, 1998 Avcon was issued one citation alleging four serious violations (Docket No. 98-1168). The total proposed penalty for these violations was $6,000.00.

Avcon timely contested all citations and the proposed penalties. On July 10, 1998, the Secretary filed her complaint in Docket No. 98-0755, and on August 26, 1998 she filed her complaint in Docket No. 98-1168. Avcon filed its answers on September 3, 1998 and October 19, 1998, respectively. On November 20, 1998, the Secretary moved to amend both complaints to add Vasilios Saites and Nicholas Saites as individual respondents. On December 21, 1998, Respondents filed a motion in opposition to this amendment. By order dated December 22, 1998, I granted the Secretary's motion. On January 28, 1999, Respondents' filed an answer to the amended complaint.

The hearing in this matter was held in New York, New York on May 24-28, June 1-4, July 20-23, September 13-17, October 18-19, November 1-5, and December 6-8, 1999. On May 26, 1999, the parties stipulated that Avcon employed less than 100 employees, and the Secretary amended the penalty proposed in Docket No. 98-0755 to reflect a 10% additional reduction for size (Tr. 437, 441-42). Accordingly, the total amended proposed penalty in Docket No. 98-0755 is $121,800, of which $102,000 is proposed for the alleged willful violations. Additionally, on September 13, 1999, the Secretary moved without objection to withdraw Citation 1, Item 6 in Docket No. 98-0755 (Tr. 2410). This Motion was granted. Both parties have submitted post-hearing briefs and reply briefs.

Background

The record shows that Vasilios ("Bill") Saites and his son Nicholas ("Nick") Saites have extensive experience in the concrete industry. They have each owned and/or worked with several reinforced concrete high rise construction companies, all of which were incorporated in New Jersey. Bill is presently the president, sole officer, and director of Altor, Inc. (Altor) and Avcon. Both companies build reinforced concrete high-rise structures, and were subcontractors on the Excelsior Two worksite. Nick has degrees in civil engineering and law. He is licensed as an attorney in New Jersey, and represents the shareholders of both Altor and Avcon. Both Bill and Nick were on the subject worksite on a regular basis (Tr. 25-28, 30-39,109-113, 289-90, 4118-24, 4139, 4151). Nick held the position of Assistant Superintendent for Avcon (Tr. 110). Although Bill was usually present at the Avcon worksite, during December 1997 he was not on site because he was in the hospital with pneumonia (Tr. 109, 280).

Bill is also the former president of two other reinforced concrete high rise construction companies, Astro Concrete, Inc. (Astro), where he worked between 1961 and 1983, and WNS Construction, Co. (WNS), where he worked in 1982 and 1983. As a student, Nick worked part-time, or during the summer, for these corporations. In 1982 or 1983, WNS filed for bankruptcy. In 1983, Bill sold to Astro to Nick. To this date, Nick remains owner and president of Astro. Between 1985 and 1991, Bill worked as a project superintendent, and also as an estimator, for Astro. In 1985 or 1986, Nick started a new concrete construction company, Cornicon, Inc.(Cornicon), of which he was the president, sole officer, director, and a shareholder. Cornicon stayed in business only until 1987. Bill worked at Cornicon in a supervisory position. The principal place of business of Avcon, Altor, and Astro, and the former place of business of WNS and Cornicon, is 193 Calvin Street, Westwood, New Jersey. This is also Nick's home address. (Tr.26-34, 38-53, 58, 123-25, 4124-25, 4118-20; Ex. C-4 and C-5)

The Excelsior Two Project

Excelsior Two is an eighteen story apartment building located near Excelsior One, another apartment building. A restaurant separates the two buildings. Excelsior Two has a swimming pool and health club below it, and a four-story parking garage in the back (Tr. 72). In 1987, Astro, which was then owned by Nick Saites, began construction of Excelsior Two. Bill Saites was a supervisor for Astro at the time (Tr. 46-47, 254-55). The general contractor for the Excelsior Two construction was Tenwood Construction (Tenwood), a company that Bill Saites had worked with on many occasions (Tr. 260-61). After completion of the foundation work on Excelsior Two, funding was lost and the project was discontinued for approximately ten years (Tr. 46-47, 71, 255). In 1997, the building owner obtained funding for completion of the project through the U.S. Department of Housing and Urban Development (HUD). Tenwood was again hired as general contractor (Tr. 46-47).

After Tenwood resumed duties on the Excelsior Two project in 1997, its president, James Canino, contacted Bill Saites regarding the reinforced concrete work (Tr. 43, 255). At that time, Bill was president of Altor. Bill had known Mr. Canino for almost thirty years as a result of doing business together (Tr. 255-56, 259). Their discussions regarding the Excelsior Two project concerned primarily the price for the reinforced concrete work (Tr. 256-57). Nick Saites read the proposed contract, discussed the contract price with his father, and made amendments to it (Tr. 38, 40, 42-44).

Nick and his father also discussed the fact that minority participation would be needed on this project because it had been financed by the Department of Housing and Urban Development. Subsequent to that conversation, In January 1997, Avcon was incorporated. It qualified as a minority contractor because Bill's wife, Cornelia, owned 51% of Avcon stock. (Tr.46, 288) Nick testified that the incorporation of Avcon came about as the result of several concerns, one being the need for participation by a minority contractor. Another concern was limiting personal liability, including potential OSHA

liability. This concern affected the allocation of Avcon stock. Nick explained:

> In this business there is a lot of individual liability, this is a perfect example. If OSHA were to obtain a judgment against my father, they would be able to take the shares of Avcon and if Avcon had been owed any money they would be able to levy on those receivables, so it's generally a good idea in this business if you work in this business not to own the shares of the company (Tr. 48).

Bill is not a shareholder of Altor (Tr. 305). Nick is not a shareholder of Altor or Avcon (Tr. 204).

On August 8, 1997, Altor entered into a subcontract with Tenwood to perform reinforced concrete work on the Excelsior Two project. (Ex. C- 4). On August 18, 1997, Altor subcontracted all labor and the use of a crane to Avcon. However, Altor retained responsibility for materials. Nick reviewed both contracts, and Bill executed the contracts for both parties in his capacity as president of both Altor and Avcon. (Tr. 38, 40, 45; Ex. C-5).

As noted above, the principal place of business of Altor and Avcon is Nick Saites' residence. Both companies are operated out of one large room in the basement of Nick's home. One full-time office employee works for both companies and is paid by both companies. Altor pays her salary and back-charges Avcon for any work she performs for that company. Other than one part-time worker, the remaining office workers are family members who work for Altor and whose salaries are paid by Altor (Tr. 53-57). Only Bill can sign checks for Altor or Avcon. However, a stamp with his signature can be used (Tr. 57-58). Cornelia, the majority shareholder of Avcon, performs office work (Tr. 292), but is not authorized to sign checks (Tr. 294).

Nick testified that both he and his father are paid minimal salaries in connection with the Excelsior Two project. Nick is paid $300 per week, and Bill $100. Nick acknowledged that one reason for such low salaries is to maintain cash flow in the

company. (Tr. 123-25). A journeyman carpenter on the Excelsior Two project is paid $24.00 per hour, or approximately $960.00 per week (Tr. 126). Nick Saites was not paid for the legal services he provided to Altor or Avcon (Tr. 232). However, he testified that he is hoping to receive some form of additional compensation for his work at the site from both Altor and Avcon (Tr. 135-36). Bill Saites testified that "whatever [money] is left" from the Excelsior Two project "I'm going to get" (Tr. 275-76).

In August 1997, Bill began to recruit foremen for the Excelsior Two project. He called Frank Georgiana and asked him to come and run the job as general carpenter foreman. (Tr. 2938, 3080-82, 3084). Bill and Frank had known each other since 1964, and Frank had worked as a general carpenter foreman for WNS and Astro (Tr. 268-69, 3055, 4136). Bill also contacted Robert Carbone, who he had known for 20 years, to join the Excelsior Two project as ironworker foreman (Tr. 268, 3392, 4136). Carbone had worked for Astro, WNS, and Cornicon (Tr. 3264-64). Bill then hired Jim Cavalier as laborer foreman, and Jerry O'Brien as cement finishing foreman. Bill had worked with them before, and had known Cavalier for fifteen years and O'Brien for 30 years. (Tr. 270-71, 4136) Employees for the Excelsior Two project were hired from a union hall (Tr. 65). The employees' wages were established by union contract (Tr. 304). Each trade had at least one foreman and a shop steward (Tr. 108-09). Avcon paid the salaries of the employees and their union benefits with checks signed by Bill Saites (Tr. 192, 303).

Avcon's Construction Process

Each floor of Excelsior Two is 306 feet 6 inches long and 80 feet wide, or approximately 24,000 square feet, with balconies protruding on all four sides of the building (Tr. 2095, 2100). Floors three through seventeen of the structure are identical, except that the third floor has no balconies (Tr. 2083, 2095). The height of each of these "typical" floors is eight feet one inch (Tr. 2094, 2104).

Excelsior Two was constructed with steel reinforced concrete. This type of construction involves pouring concrete into wooden form work, which is then removed,

or "stripped," from that level, dismantled, and lifted to another level, after which the process is repeated. Vertical 4" x 4" wooden poles, or "legs," are erected, which support layers of perpendicular, horizontal wooden beams called "low stringers," "high stringers," and "ribs." (Tr. 2083-84, 2087-91, 2104) This method of construction has been in use for approximately 40 years. (Tr. 2935-36, 3065-66)

Exhibit R-108 depicts a cross-section of the form work that was employed on the Excelsior Two project. Each leg is four feet on center (or one leg per sixteen square feet), thus requiring the installation of more than 1,000 legs per floor during the erection of the deck and the form work below the deck (Tr. 2095, 2098). Exhibit R-108 shows that 4' x 8' sheets of 5/8" plywood were laid out horizontally on top of the ribs to form the "deck" (Tr. 2084). Below the plywood deck, 145 interior and exterior columns were formed with plywood (Tr. 2100, 2103, 2109; Ex. R-109). The plywood had column holes cut in it through which the columns protruded (Tr. 2065). Two-thirds of the columns were located directly at the perimeter of the building (Tr. 2103, 2118). Reinforcing steel, or rebar, was placed vertically inside the column forms and horizontally on the deck before concrete was poured. The concrete was poured on the deck and into the column forms below at the same time. (Tr. 2105).

At the Excelsior Two project, concrete was poured on a "four day cycle." This meant that every four days the concrete work for an entire floor would be completed. (Tr. 2061, 2081). On the first and second days of the cycle, carpenters installed the legs, stringers, column forms, and deck, while ironworkers installed the rebar. On the third day of the cycle, 60% of the concrete was poured. On the fourth day, the remaining 40% of the concrete was poured. The same cycle was repeated for each floor (Tr. 2081-82).

After the concrete cured, carpenters stripped the wooden form work from the concrete surfaces - both from the vertical columns and from the deck - and removed all legs, stringers and ribs below the deck. (Tr. 2118-19) The stripped lumber was stacked by laborers in bays along one side of the building to be hoisted by crane to the next level

to be re-installed again. (Tr. 2118-19, 2127) After the stripping operation was completed, additional vertical legs, called "reshores," were erected below the newly poured deck. Reshores were left in place under each of the last three poured decks for twenty-eight days to distribute the weight of the concrete during curing. Concrete generally achieves 90% of its strength in 28 days (Tr. 2119, 4156, 4473). Some reshores were located along the perimeters of the building (Tr. 2121; Ex. C-65).

When concrete needed to be poured at the Excelsior Two worksite, it was delivered to the deck in a bucket that was hoisted by a tower crane (Tr. 2131). The same tower crane also delivered wood, reinforcing steel, clamps and other materials to the deck (Tr. 855-57). Buckets of concrete were received by laborers who released concrete from the bottom of the bucket and spread it on the deck (Tr. 2131). Ironworkers received bundles of reinforcing steel, sometimes in double loads, i.e., one bundle attached to a lower hook and another bundle directly over it attached to an upper hook (Tr. 2680-82). The operator of the tower crane received his directions from a signalman on the deck with whom he was in contact through a walkie-talkie (Tr. 2127).

DISCUSSION

A. Were Vasilos and Nicholas Saites properly cited as employers?

In examining this issue it is important to look at the congressional purpose and policy stated in the Act, which was "to assure as far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. §651(b). In order to carry out this purpose Congress has imposed upon employers the duty to furnish "each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. §655(a)(1). Furthermore, the enforcement scheme under the Act and the assessment of penalties is directed at employers. 29 U.S.C. §§652(b)(2), 655(a) and 666. Only an employer can be

found responsible for violations that affect the safety and health of its "employees," i.e., those with whom a party has an employment relationship. *Van Buren-Madawaska Corp.,* 13 BNA OSHC 2157, 2158 (No. 87-214, 1989). The Review Commission and the courts have recognized that officers and directors of a corporate entity may be "employers" within the meaning of the Act, along with the corporate entity itself. The existence of a corporate entity does not shield its officers and directors from personal liability where they exercise full control over the working conditions of the corporation's employees and have the authority to abate violations of the Act.

The Act defines the term "employer" as a person engaged in a business affecting commerce who has employees and the term "person" as "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of person." 29 U.S.C. §§652(4) and (5). The Review Commission *in Griffin & Brand of McAllen, Inc.*, 6 BNA OSHC 1702, 1702 (No. 14801, 1978) recognized that the term "employer" is a term of art contained in remedial legislation and, as such, is to be defined according to the statutory context in which it is found and the practical realities of the employment relationship being scrutinized. To effectuate the purpose of the Act, in considering whether an employment relationship exists, the Review Commission has placed primary reliance upon who has control over the work environment such that abatement of the hazards can be obtained. *Abbonizio Contractors, Inc.*, 16 BNA OSHA 2125, 2126 (No. 91-2929, 1994); *Vergona Crane Co.,* 15 BNA OSHC 1728, 1784 (No. 88-1745, 1992);*Loomis Cabinet Co.,* 15 BNA OSHC 1782, 1784 (88-1745*,* 1992); *Van Buren-Madawaska Corp.*, *supra; MLB Industries, Inc.,* 12 BNA 1525, 1527 (No. 83-321, 1985). In making such a determination, the Review Commission has applied an "economic realities test." This test involves consideration of the following questions: (1) whom do the workers consider their employer; (2) who pays the workers' wages; (3) who has the responsibility to control the workers; (4) does the alleged employer have the power to control the workers; (5) does the alleged employer have the

power to fire, hire, or modify the employment condition of the workers; (6) does the workers' ability to increase their income depend on efficiency rather than initiative, judgment, and foresight; and (7) how are the workers' wages established. *Griffin & Brand of McAllen, Inc.*, at 1703[1] Under this economic realities test, no single factor determines whether an employment relationship exists. *Van Buren, supra* at 2161.

The issue of control over the corporation and its operations by a corporate officer and director has been addressed by several district courts in the context of criminal proceedings arising under the Act. In *United States v. Pinkston-Holler, Inc.,* 76-33-CR6 (D. Kan. Aug.16,1976), an unofficially reported case at 4 BNA OSHA, 1697, 1699, a defendant, vice-president of the defendant corporation, sought to dismiss an information filed against him on the grounds that § 666(e) [2] prescribes penalties only for "employers" who violated the Act. He contended that he only conducted business for the defendant

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[1] An ALJ applied these same factors in determining what party was the employer in *Louis Sinisgalli et al,* 17 BNA OSHC 1849 (No. 94-2981, 1996). In that case the Secretary issued citations to five corporations and one individual following an accident at an excavation site. The cited individual, Louis Sinisgalli, maintained that, although he was the owner of three of the cited corporations, all of the workers at the site were employees of one of the cited corporations, Metro, for which he occasionally served as an unpaid consultant. However, Sinisgalli admitted that he hired several contractors, including Metro, to perform the work in question. Sinisgalli hired three individuals to work at the site, all of whom had previously performed work either for Metro or for one of several corporations he owned. These workers had been paid in cash either by Sinisgalli or by the owner of Metro. Sinisgalli instructed the workers on how to perform the work which resulted in the accident. The ALJ found that Sinisgalli maintained control of the working conditions at the trailer park on the days in question, and that he should be held responsible as the employer for all of the violations.

[2] Section 666(e) provides that "Any employer who willfully violates any standard, rule, or order promulgated pursuant to section 6 of this Act, or of any regulations prescribed pursuant to this Act, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than $10,000 or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by a fine of not more than $20,000 or by imprisonment for not more than one year, or by both."

corporation and did not employ anyone in his own right. The court recognized that it was first necessary to find that the corporate official was an "employer" within the meaning of the Act before applying the criminal sanctions of § 666(e). Again, in *U. S. v. Cusack,* 806 F. Supp. 47, 51 (D. NJ. 1992), the court was confronted with the issue of whether a corporate officer or director could be an "employer" within the meaning of the criminal sanctions provision of the Act, § 666(e). The court found that, although the defendant's business was incorporated, he ran this business as a sole proprietorship. The court concluded that:

> [A]n officer's or director's role in a corporate entity (particularly a small one) may be so pervasive and total that the officer or director is in fact the corporation and is therefore an employer under §666(e). To conclude that such a person cannot be held liable under OSHA'S criminal provisions would strip §666(e) of much of its force when applied to closely held corporations where, as in the present case, the owner and principal officer is also the person actively supervising the work in which OSHA regulations were violated. In such a case it would seem that Congress' intent is implemented by recognizing the reality of the situation and treating the officer and director as the employer.[3]

Additionally, the district court in *Cusack* cited with approval the holdings and dicta in *U.S. v. Doig*, 950 F.2d 411 (7th Cir. 1991) and *U.S. v. Shear*, 962 F.2d 488 (5th Cir. 1992), two cases in which company supervisors were unsuccessfully indicted under 18 U.S.C. § 2(a) for allegedly aiding and abetting criminal violations of the Act pursuant to §

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[3] The defendant alone hired and fired its employees and decided how much to pay them, he signed the employees' paychecks; he established his own pay and changed it at will; he made all the bids for jobs; he ordered all necessary materials; and directed where, when and how work would proceed; he ran the business out of his private home and had unrestricted discretion to operate the company as he saw fit; and when he abandoned the company, it ceased operations.

666(e). Although each court concluded that Congress did not intend to impose such liability on corporate employees under the aiding and abetting statute, each court also stated in dicta that a corporate officer or director could be an "employer" for purposes of violations pursuant to § 666(e).

In the context of civil enforcement proceedings, Chairman Cleary in *Life Science, supra*, similarly emphasized the importance of construing the employment relationship at issue in a manner which would effectuate the remedial purposes of the Act. Chairman Cleary made the following observation:

> Under these circumstances, it would be inadequate to look only to the corporate principal Life Science. We must also look directly to the executive officers and directors whose direction and influence over employees and their working conditions were as great as the titular employer. If they could not be held directly accountable for their actions in this case, the primary statutory relief -- the protection of the lives and health of the working men and women of the Nation -- would be frustrated [citation omitted].

In the present case, Respondents argue that there was not one person in control at the Excelsior Two worksite, and that the foremen and shop stewards controlled the work and abatement issues (Respondents' Post Trial Brief, p. 42, Tr. 2021). In support of this argument, Respondents adduced much testimony to show that union foremen and shop stewards handled the day to day activities on the worksite without having to consult with either Bill or Nick before taking any action. For example, employees were hired out of the union hall by business agents responding to requests from shop stewards and/or foremen; union employees only took direction from other union employees; union employees could only be fired by the shop steward and foremen; and foremen ordered

materials for the worksite and provided directions.to employees (Tr. 197, 211-12, 2842876, 2942, 2949,2955,3061, 3078, 3206-07, 3271-74, 3285, 3321-22, 3328, 3464-65, 3526-27, 3528, 3530-31, 3556, 3796, 4180). Nick and Bill, as nonunion employees, could not give directions or orders to union employees. If they wanted something to be done, they had to go to the general foreman for the trade (Tr. 2022).

I find that this evidence does not shield the Respondents from liability. The Commission has found that it is not unusual for a company to delegate to supervisory employees the authority to hire and fire employees. Therefore the authority of the operators to hire and fire does not conclusively establish that the workers considered the supervisors to be their employers. *Van Buren* at 2159.

In this case, the record establishes that both Bill and Nick maintained control over the worksite. Employees, including supervisors, viewed them as in charge. Bill and Nick testified that they were at the worksite just about everyday (Tr. 109-10, 279). Bill personally obtained the subcontracts and negotiated their prices with Nick's assistance. (Tr. 38, 97)

The project superintendent for the general contractor, Joseph Greco, coordinated and supervised the Excelsior Two construction activities with Bill and Nick (Tr. 73-75). In his testimony, Greco acknowledged that he was not aware of the existence of Avcon during the construction. He was under the impression that Astro - a company with which he knew Bill and Nicks were affiliated - was doing the work at Excelsior Two (Tr. 87-88). Once the Excelsior Two project was about to begin, Bill started hiring foremen for the job. Bill directed these foremen to go out and get men for the project (Tr. 2939, 3069-71, 3082-86, 3392, 4136-37). The foremen and shop stewards worked with a business agent at the union hall to staff the jobs. The nature of the Excelsior Two project was such that the work was repetitive, and once the foremen were made aware of the sequence of work it was unnecessary for them to report to Bill on a daily basis. Bill testified that he instructed Georgiana to make everyone aware of the safety program, and that he relied

upon the foremen to supervise their respective crews and institute the safety program (Tr. 211-12, 237-37, 311-14). Georgiana testified that Nick gave him the safety program and told him to keep a copy and make a copy for the shop steward (Tr. 3245). Nick and Bill ordered materials such as lumber, harnesses, brooms, shovels, and concrete. The foremen discussed their needs for material with Nick (Tr. 146-50, 156, 284-85, 1207, 1295). There were occasions Nick and the foremen discussed overtime work or stopping work early because of the weather (Tr. 152, 155).

The record reflects that, although employees testified that they were hired out of the union halls, they also viewed Bill and Nick as in control of the worksite. The general carpenter foreman, Georgiana, acknowledged that someone from Avcon had the authority to fire him (Tr. 3093). When the shop steward, Frank Cataliato, first came onto the site, he met with Bill and Nick (Tr. 3792, 3799, 3848-49). Another employee, ironworker Nicholas Aemisego, testified that he viewed Bill as the "overseer" for Avcon. He observed him on the worksite talking to people (Tr. 3607, 3626). One employee, William Kelly, testified that he believed that Nick and Bill were in charge. At the beginning of the job, in August, Bill gave out assignments in the absence of a foreman. Kelly said that Bill would answer questions about assignments, and if Bill had any special requests he would make them known to him (Tr. 1489-90). Kelly stated that as the job progressed Bill bounced around and he saw less of him, but he could still hear him because Bill always had a bull horn (Tr. 1491). He said that Bill was on the job every day, except when he was out in December. Bill was there when employees arrived for and left work (Tr. 1492). It is also undisputed that Bill signed all the pay checks on the site (Tr. 57, 287, 1205, 1224, 2939, 3077, 3795, 3807-08, 4131).

Bill monitored the employees from a number of locations. Bill was on the ground, as well as on the structure, overseeing and directing the work in the company of the foremen (Tr. 1100; Ex. C-101). For example, during one OSHA inspection Bill was observed on the jobsite with a bull horn talking to employees and assisting employees in

retrieving materials which had been hoisted onto the deck (Tr. 856, 1101; Ex. C-101). Employees testified that Bill used the bull horn to coordinate activities with the crane operator and to communicate with anyone on the worksite (Tr. 3480). He would also use the bull horn to call attention to something he did not like (Tr. 1491). Bill testified that he was at the job sometimes every day, sometimes three to four times a week, sometimes two times a week (Tr. 4139). He believed that some of his men thought he was a nuisance because he was picky. He would look around to make sure that things were right. He testified that the men would say "the Boss is here." He viewed himself as the boss of Avcon, the person who was running the company (Tr. 4139).

Although there is no doubt that, if an OSHA compliance officer had insisted that a foreman abate a hazard during the inspection, the abatement would have been done, the record indicates that it was Bill and Nick with whom abatement issues were discussed (Tr. 3229,3284-85, 3322, 3819-20). During the instant inspections the compliance officers discussed abatement issues with Bill and Nick (Tr. 482). Bill acknowledged during the hearing that the primary responsibility for job site safety was his (Tr. 281). Signorile testified that during the inspection he observed Nick directing employees to abate conditions which had been observed during the inspection. Nick also yelled at employees in an effort to have them remove themselves from hazardous conditions (Tr. 1244-45, 1865-66, 1876, 1880). During the inspection, Nick and the general contractor's superintendent, Salvatore Maino, discussed who was going to install the cable protection to abate the cited conditions (Tr. 1006,1872). Signorile said that during the inspection Dominic Paniscotti told him that Nick had given him instructions for a specific assignment (Tr. 1292). Frank Georgiana testified that Bill and Nick told him that they were making certain changes because the OSHA inspector had requested that they be made (Tr. 3148-49). Frank Cataliato testified that when he first started work he had received safety literature from Nick. (Tr. 3837) Carbone testified that he would have directed any questions about the safety program to either Bill or Nick (Tr. 3400). Nick

testified that he had directed the workers to tie off to "whatever" because the compliance officer wanted them tied off, and he was trying to comply with the compliance officer's wishes (Tr. 2157).

Nick and Bill acknowledged control over the worksite. Nick acknowledged that he was "the second in command after his father"(Tr. 2877). Nick stated that it was his impression that both he and his father could hire and fire someone if they desired (Tr. 123), although he qualified this statement by stating that in order to fire someone a final check had to be issued, which only his father had authority to issue (Tr. 247-50). Nick testified that with respect to the sites he is on, he hires, or the company hires, competent people. He also makes sure that all necessary safety equipment is provided, and that he, the foremen and his father repeatedly tell the men to observe safety rules and be safe (Tr. 2039). Nick acknowledged that, when his father was out ill for the month of December 1997, he was the person in charge. He also acknowledged that he coordinated matters involving other trades, and coordinated matters such as pours, arrangements for cement, and steel inspectors with the superintendent for the general contractor (Tr. 126-27).

I further find that the Act does not define the term "employer" so as to restrict that term to one "employer per worksite" for purposes of effectuating the provisions of the Act.[4] In considering Nick's involvement I believe that the entire picture must be examined. In *Labadie Coal Co. v. Black,* 672 F.2d 92 (D.C. Cir. 1982) the court was

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[4] See *Life Science Products Company et al,* 6 BNA OSHC 1053, 1059 (1977). In that case, a two member Review Commission was divided over the issue of the officers' personal liability under federal law in a decision which was accorded the precedential value of an unreviewed Judge's decision. While Commissioner Barnako would have vacated the citations as to the corporate officers based on his finding that the officers were not "employer" within the meaning of the Act, Chairman Cleary would have affirmed the violations as to both officers as well as the corporation. Chairman Cleary found the fact that Life Science was an "employer", does not mean that the individual respondents could not also be considered "employers". He noted that for for purposes of the Act, there was no reason why an employee could not have more than a single employer -- "a person, whether by virtue of his control over the physical conditions of the worksite or over the employees of another employer, may be considered to be a joint employer."

presented with the question of whether the corporation was in fact the alter ego or business conduit, *of the person in control.* The court recognized that

> In many instances, the person "controlling" a close corporation is also the sole, or at least a dominant, shareholder. In other cases, the controlling person may seek to avoid personal liability by not formally becoming a shareholder in the corporation. The question is one of control, not merely paper ownership.
>
> ** The fact that the stock may be in [the] wife's name rather than in his may be of little consequence in the court's consideration of the entire picture [footnote omitted].

Id at 97.[5] In this case, although Nick was not an owner, he was a dominant figure in the corporation. He is "one of two individuals" who controlled the worksite, and as such was an "employer" within the meaning of the Act.

Additionally, Respondent argues that the Secretary cannot assert personal liability against Bill and Nick based upon traditional methods of veil piercing. This argument is without merit. The alter ego concept has been defined as a "tool of equity that is appropriately utilized 'when the court must prevent fraud, illegality or injustice, or when recognition of the corporate entity would defeat public policy or shield someone from liability for a crime.'" *Kaplan v. First Options of Chicago, Inc. ,* 19 F.3d 1503, 1521 (3rd Cir. 1994). The Third Circuit, in which the present case also arises, has recognized that the corporate form may be disregarded whenever justice or public policy demands.

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[5] In Labadie the defendant was director, president, and sole employee of the subject corporation. He maintained he had no business relationship with the corporation in his individual capacity and could not be held liable for the corporation's obligations. His wife was the dominant shareholder, but the court found he was the dominant figure in the corporation and there was a identity of interests between him and the corporation.

"Whenever one in control of a corporation uses that control, or uses the corporate assets, to further his or her own personal interests, the fiction of the separate entity may be properly disregarded." *Ragan v. Tri-County Excavating, Inc.,* 62 F.3d 501, 508 (3d Cir. 1995), quoting *Ashley v. Ashley,* 482. Pa. 228, 393 A.2d 637, 641 (Pa. 1978).

The Third Circuit has also held that federal law, not state law, governs in matters involving the rights of the United States arising under nationwide federal programs. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726-27 (1979); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943); *N.L.R.B. v. Greater Kansas City Roofing*, 2 F.3d 1047, 1051 (10th Cir. 1993); *Board of Trustees of the Mill Cabinet Pension Trust Fund for Northern California v. Valley Cabinet & Mfg. Co.*, 877 F.2d 769, 771 (9th Cir. 1989); *United States v. Pisani,* 646 F.2d 83, 85-86 (3rd Cir. 1981). Accordingly, federal common law alter ego questions should be decided according to the policy of the applicable federal statute. In *Pisani, supra,* the Third Circuit examined this issue in a matter where the government brought an action pursuant to a federal statute (Medicare program) against a physician to recover Medicare overpayments made to a physician's solely owned corporation. In affirming the judgment against the physician, the court held that where a federal statute was the source of the government's right to recover, federal law, rather than state law, controlled the issue. The court held that in a matter involving a governmental program a uniform federal rule was needed since state law could frustrate specific objectives of the program. *Pisani* at 83.

The *Pisani* court helped fashion a federal rule for piercing the corporate veil, recognizing that it would be undesirable to let the rights of the Unites States change whenever state courts issued new decisions on piercing the corporate veil. The *Pisani* court and other courts have articulated various factors to help determine whether a corporate veil should be pierced. The factors noted by the courts are the failure to observe corporate formalities, nonpayment of dividends, the insolvency of the debtor corporation at the time of incorporation, siphoning of funds of the corporation by the

dominant stockholder, non-functioning of other officers or directors, the absence of corporate records, the fact that the corporation has been merely a facade for the operations of the dominant stockholder, and, in some cases, whether the corporation has been grossly undercapitalized. The courts have added that the situation "must present an element of injustice or fundamental unfairness." *Pisani,* at 83, 88 (3d Cir. 1981), quoting *DeWitt Trucks Brokers,* 540 F.2d 681, 686-87 (4th Cir. 1976). See also *Kaplan v. First Options of Chicago, Inc.,* 19 F. 3d 1503, 1521 (3rd Cir. 1994), aff'd, 514 U.S. 938 (1995). Additionally, the courts have also held that the application of the rule does not depend upon a finding of bad faith, fraud, or intent. *Id.*; *See also Labadie Coal Company* at 100 (D.C. Cir. 1982).[6]

There is also a line of cases which hold that, when a violation of a federal statute is at issue, as opposed to common law contract or tort controversy, individual liability must be assessed in light of the purposes of the public policies underlying the statute. Interests which are identified and protected by federal law should not be thwarted by each state's protective concern for local corporate enterprises. Federal policies are not to be defeated by deference to state limitations on corporate liability and reliance on the impenetrability of the corporate veil. The Supreme Court has provided some guidance on the issue of corporate veil piercing, and has indicated that the corporate form may not defeat overriding federal legislative polices. *See First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 630 (1962); *Bangor Punta Operations, Inc. v. Bangor & Aroostook R.R.,* 417 U.S. 703, 713 (1974)("[T]he corporate form may be

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[6] Various courts have viewed these factors as a two-prong inquiry to determine when piercing the corporate veil is appropriate: (1) is there such unity of interest and ownership that the separate personalities of the corporation and the controlling individual no longer exist; and (2) will adherence to the corporate fiction or the failure to disregard the corporate form result in fraud or injustice, i.e., if the acts are treated as those of the corporation alone, will an inequitable result follow. See *N.L.R..B. v. Greater Kansas City Roofing, supra* at 1052*., Matter of S.I. Acquisition, Inc.*, 817 F. 2d 1142, 1152 (5th Cir. 1987); *McKinney v. Gannett Co.,* 817 F.2d 659, 666 (10th Cir. 1987); *Labadie, supra., United States v. Standard Beauty Stores, Inc.,* 561 F. 2d 774, 777 (9th Cir. 1977).

disregarded in the interest of justice when it is used to defeat an overriding public policy.") The Third Circuit in *Pisani* also followed this theory of piercing the corporate veil in order to prevent circumvention of a statute or avoidance of a clear legislative purpose. *supra* at 88.

Other courts have had the opportunity to examine the issue of corporate veil piercing with regard to administrative enforcement actions. These courts have also applied the federal veil-piercing rule, and have held that the application of the rule does not depend upon a finding of bad faith, fraud, or intent. *Thomas v. Peacock,* 39 F.3d 493 (4th Cir. 1994) (ERISA suit filed against corporation and officer and shareholder of corporation based upon federal veil-piercing)**;** *N.L.R.B. v. Greater Kansas City Roofing, supra.* (enforcement of order sought seeking to hold individual shareholder as well as successor corporation liable for unfair labor practice judgement)**;** *Pel-Star Energy, Inc. v. Unites States Department of Energy, Inc. v. United States Department of Energy, et al,* 890 F.Supp. 532 (W.D. La.1995) (review of Federal Energy Regulatory Commission order finding owner personally liable by piercing the corporate veil); *William Valentine and Sons, Inc*., 1989 WL 260666*,* 46 F.E.R.C.¶ 61,252 (F.E.R.C., 1989), 1989 FERC LEXIS 454 (enforcement action under the Department of Energy Organization Act, where the three individuals were found jointly and severally liable for violations committed by a corporate entity on which they served in various corporate capacities as owners, directors and shareholders).

Guided by the principles set forth in *Pisani* and the other cases cited above*,* I find that Avcon was so closely tied to the personal interests of Bill and Nick Saites that its corporate form may be properly disregarded. The record establishes that Avcon merely facilitated the business affairs of Bill and Nick. Avcon did not exist but for the will of these two individuals. From the beginning, Avcon was merely a "payroll company" (Tr. 288) without a personality distinct from that of Bill and Nick.

In addition, I find that recognition of the corporate entity as the sole employer

would defeat public policy: specifically, the assurance of a safe working place for all employees. I believe it is necessary to pierce the corporate veil in order to prevent the avoidance of the clear legislative intent of the Act.

The Secretary's arguments regarding piercing the corporate veil, set forth in her Post Hearing Brief (pp. 32-34), are well founded. At the time Bill Saites was first contacted by James Canino of Tenwood Construction regarding the Excelsior Two project, Avcon did not exist. Nick testified that Avcon was subsequently formed for several reasons: (1) to create a minority-owned company for purposes of obtaining HUD financing, (2) to generally avoid certain liability, and (3) because he believed that his mother would outlive his father. To accomplish the first objective, 51% of Avcon's stock was placed with Bill Saites' wife, and he retained the remaining 49%. With respect to the second objective, Nick Saites testified that the succession of corporate entities owned by him and his father, and the absence of stock ownership by individuals generally, would effectively limit personal and corporate liability, including OSHA liability (Tr. 47-48, 178-79). Nick Saites also testified that "Avcon really had no money," and, therefore, a new corporation, Avcrete, Inc. (Avcrete), was formed "six months ago." (Tr. 176-79). Regarding the reasons for forming Avcrete, Nick Saites testified as follows (Tr. 178-79):

> You have to remember when OSHA fines you $150,000 on a case, you can't take the risk that on the next job you're going to make some money and then OSHA is going to come and they're going to take all your money.

Other evidence supports a finding that the companies formed by Bill and Nick Saites merely advanced their personal interests. 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 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.

As stated above, recognizing Avcon as the sole employer would frustrate at least one objective of the Act: holding responsible the entity or individuals in control of the health and safety of employees on a worksite. Although their actions do not appear to have been fraudulent, Bill and Nick Saites deliberately attempted to avoid liabilities such as the OSHA citations and penalties at issue in this case. For this reason, I believe that it is appropriate to hold them individually liable for the violations.

The Secretary’s Burden of Proof

The Secretary has the burden proving her case by a preponderance of the evidence. *See, e.g., Astra Pharmaceutical Prods.*, 9 BNA OSHC 2126, 2131 (No. 78-6247, 1981), *vac'd in part on other grounds*, 681 F.2d 69 (1st Cir. 1982). The Commission has defined "preponderance of the [*25] evidence" as "that quantum of evidence which is sufficient to convince the trier of fact that the facts asserted by a proponent are more probably true than false." *Ultimate Distrib. Systems, Inc.*, 11 OSHC 1569, 1570 (1982).

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer’s noncompliance with the standard’s terms, (c) employee access to the violative conditions, and (d) the employer’s actual or constructive knowledge of the violation (*i.e.* the employer either knew or, with the exercise of reasonable diligence, could have known

of the violative conditions). *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No, 90-1747, 1994)[7]

"In order for the Secretary to establish employee exposure to a hazard, she must show that it is reasonably predictable by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger."*Fabricated Metal Prods.,* 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997); *Miniature Nut and Screw Corp.,* 17 BNA OSHC 1557, 1560 (No 93-2535, 1996) (access to the condition may be shown by establishing that, during the course of their normal work duties, employees might be in the 'zone of danger' posed by the condition) The zone of danger is "that area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent."*RGM Constr. Co.,* 17 BNA OSHC 1229, 1234(No. 91-2107, 1995). It is sufficient for the Secretary to prove access to the zone of danger, rather than actual exposure to the immediate risk of injury or death. *Donovan v. Adams Steel Erection, Inc.*, 766 F.2d 804 , 811-812 (3rd Cir. 1985); *Phoenix Roofing, Inc.* 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995) (exposure to a violative condition may be established either by showing actual exposure or that access to the hazard was reasonably predictable.)

Review Commission precedent holds that the Secretary can satisfy the burden of knowledge of the violative condition by establishing that the employer knew, or with the exercise of reasonable diligence could have known, of the presence of the violative condition. The actual or constructive knowledge of the employer's foreman or supervisor can be imputed to the employer. *Jersey Steel Erectors*, 16 BNA OSHA 1162, 1164 (No.

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[7] "Reasonable diligence involves several factors, including an employer's 'obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence.' *Frank Swidzinski Co.,* 9 BNA OSHA 1230, 1233 (No. 76-4627, 1981). Other factors indicative of reasonable diligence include adequate supervision of employees, and the formulation and implementation of adequate training programs and work rules to ensure that work is safe. (citations omitted)." *Pride Oil Well Service*, 15 BNA OSHA 1809, 1814 (No. 87-692, 1992)

90-1307, 1993) and cases cited therein. Once the Secretary has made a prima facie showing that the employer knew or, with the exercise of reasonable diligence, could have known of the violative condition, the employer can seek to establish as an affirmative defense that it had a thorough safety program which was adequately communicated and enforced, and that the violative conduct of the employee was idiosyncratic and unforeseeable. *Tampa Shipyards, Inc.,* 15 BNA OSHC 1533, 1537 (No. 86-360, 1992).[8]

Docket 98-0755: Inspection No. 301057311

Citation 1, Item 9 and Citation 2, Items 2a-c: Fall Protection

> **29 C.F.R. § 1926.501(b)(1)**: Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

As a result of the OSHA inspections at respondents' worksite, respondents were issued a total of four (4) citation items alleging serious violations and willful violations of the fall protection standard. Citation 1, Item 9 sets forth a total of seventeen (17) serious

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[8] The Third Circuit's precedent on the burden of proof of knowledge is explained in *Pennsylvania Power & Light Co. v. OSHRC ("PP&L"),*737 F. 2d 350, 357-58 (3d Cir. 1984), where the court held that the Secretary of Labor may not shift to the employer ultimate risks of nonpersuasion in cases where the inference of an employer's knowledge of conduct violating the Act is raised only by a supervisor's misconduct. The court held that "the participation of the company's own supervisory personnel may be evidence that an employer could have foreseen and prevented a violation through the exercise of reasonable diligence, but it will not, standing alone, end the inquiry into foreseeability." *Id.* The court held that an employer will be "excused from responsibility for acts of its supervisory employees" upon a showing "that the acts were contrary to a consistently enforced company policy, that the supervisors were adequately trained in safety matters, and that reasonable steps were taken to discover safety violations committed by its supervisors."*Id.* (citation omitted). In this matter, Respondents have not raised the issue of supervisory misconduct in defense of any of the citations.

instances of employees working without fall protection while erecting form work, stripping form work, walking, and performing other duties in close proximity to the unprotected building perimeter. The alleged violations occurred on elevations ranging from the main lobby to the eleventh floor on dates between October 9, 1997 through December 15, 1997. Citation 2, Items 2a-2c set forth a total of eight (8) serious and willful instances of employees working without fall protection while engaged in erecting form work, stripping form work, and performing other duties in close proximity to the unprotected building perimeter. The alleged violations occurred on elevations ranging from the sixth floor to the thirteenth floor on dates between November 24, 1997 through January 7, 1998.

Applicability of standard

Respondents assert that the majority of the cited activity was leading edge work (except for instances (d), (e), and (f)), and thus, the cited standard is inapplicable. (Respondents' Post Trial Brief, p. 60) Respondents contend that the installation of form work or plywood decking is leading edge work, as is the removal or stripping of the sections. Respondent argues that the leading edge concept would also apply to the creation of form work on balconies, as well as the removal of form work on balconies. Respondents assert that this concept was confirmed by their expert, Mr. DeBobes who testified that, "leading edge work is completed . . . after all of the forms and all of the temporary components have been removed" (Tr.3971). Mr. DeBobes testified that leading edge includes not only the framing of the deck, but also the pouring of concrete, the stripping of forms and the installation and removal of reshores. (Tr. 3964-71, 4047).[9]

The term "leading edge" is defined within the fall protection standard as "the edge of a floor, roof, or form work for a floor or other walking/working surface (such as the deck) which changes location as additional floor, roof, decking, or form work sections are

[9] I find that Mr. DeBobes' opinion was not based upon any reliable foundation, and thus accord it no weight. See discussion *infra.*

placed, formed, or constructed." 29 C.F.R. § 1926.500(b). Leading edges that are not actively and continuously under construction are considered to be "unprotected sides and edges." Each employee who is constructing a leading edge six feet or more above lower levels must be protected from falling by conventional fall protection: guardrail systems, safety net systems, or personal fall arrest systems. 29 C.F.R. § 1926.501(b)(2). The leading edge standard presumes that it is feasible and will not create a greater hazard to implement at least one of the three specified conventional fall protection systems. If an employer does not implement one of these systems, it has the burden of establishing that it is appropriate to implement a fall protection plan which complies with §1926.502(k)[10].

I reject the Respondents' attempt to expand the term "leading edge" beyond its plain meaning. I find that the terms set forth in the definition of leading edge (except with respect to a roof) refer to the lower base of the yet-to-be-completed area (i.e., the floor and walking/working surface), and that the "edge" refers to the line where that area begins or ends. In the instant matter, the leading edge work involved the progressing of the plywood deck for each level - laying the deck and erecting the structure upon which the plywood deck rested. The leading edge changed each time an additional section of plywood deck was set in place. Once the plywood was placed, any further activity in the area became work at an unprotected side and edge, and remained such until an additional plywood section was added to the deck. My review of the instant matter indicates that no

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[10] The fall protection plan, which must be in writing, requires, inter alia, that the employer designate all areas where conventional fall protection systems cannot be used as controlled access zones, defined with control lines to form a visual and physical barrier preventing an employee from inadvertently entering the area immediately adjacent to the leading edge §1926.502(g). The plan must also implement a safety monitoring system in those zones if no other alternative measure has been implemented.§1926.502(h). Additionally, the plan must ocument the basis for the determination that fall protection cannot be used. §1926.502(k). I note that Nick testified that he had not ever read the provisions of Section 502(k) prior to or during the instant job (Tr. 2572, 2578).

citations were issued for a lack of protection on leading edges.[11] Rather, the citations were properly issued for failure to provide adequate fall protection on unprotected sides and edges.

I also find that each citation was issued for work on unprotected sides or edges which were six feet or more above the lower levels. In fact, the evidence shows that Respondents' employees worked at unprotected heights of up 115 feet. The Respondents did not dispute testimony that such falls would likely result in serious injuries or death (Tr. 894, 899, 914, 984, 992, 1003, 1007, 1013, 1017, 1021, 1028, 1029, 1032, 1037, 1039, 1042, 1046,1047-48).

The record also establishes that management and supervisory employees had knowledge of the violative conditions. The record discloses that the violations were in plain view and occurred in the presence of management and supervisory personnel, who in many instances were exposed to the same hazards (Tr.882, 887-88, 890, 894-95, 899, 905-07, 915, 978, 1011, 1016, 1023, 1037). The record shows that it was common practice for supervisory personnel to allow employees to work without fall protection (Tr. 1011, 2151, 3109, 3285, 3288, 3523 -24, 3569, 3878, 3892, 4250). During the course of the trial supervisors readily acknowledged that no nets were used on the project and that employees did not wear personal protective equipment (Tr. 952-53, 3285, 3405, 3565). This knowledge of the supervisory employees is imputed to the Respondents.

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[11] Furthermore, the record clearly established that during the seventeen (17) day OSHA inspections, Respondents did not bring up the subject of leading edges, and at the time of the inspections no leading edge plan was in place.(Tr. 234-37, 462, 692-93, 2154, 2578-87, 3119-20, 3447-48, 4298, 4579). Respondents apparently believe that it was incumbent upon OSHA to have brought up the subject. However, the language of the standard indicates otherwise. In view of the fact that OSHA presumes that it is feasible and will not create a greater hazard to implement conventional fall protection systems at leading edges, I find no error on OSHA's part in failing to bring up the subject. The standard places the burden on the employer to establish that it is not feasible and will create a greater hazard to implement a fall protection plan. I further find that the alleged unwritten"leading edge fall protection program" described by Nick failed to comply with the requirements of 1926.502(k).

In addition, I find no reason to excuse the Respondents from the acts of its supervisory employees. These acts occurred in plain view of Respondents without any objection. The record does not reflect that the cited conditions were contrary to any consistently enforced company policy. In fact, it is Respondents' position that the manner in which the employees were observed working was consistent with an unwritten company policy on working near edges (Tr. 2166-2208, 4151-52, 4176-78). I find no evidence that at the time of the inspection Respondents had in good faith promulgated any work rule or safety program addressing fall protection. Additionally, the record reflects that the foremen and sub-foremen were not trained in safety matters and were not familiar with safety requirements for fall protection (Tr. 3115-21, 3159, 3196, 3240, 3370-33, 3405). Furthermore, the record contains no evidence that Respondents took any steps to discover safety violations.

Next, I will address the specific violations of the fall protection standard. I find that the Secretary has proven by a preponderance of evidence that the cited standard was violated and that Respondents' employees were exposed to the cited conditions in each of the instances discussed below.

Before I address the specific violations of the fall protection standard, however, I note that at trial Respondents attempted to discredit compliance officer Signorile's testimony regarding his observations at the Excelsior Two worksite. Nonetheless, I find that Signorile's testimony is credible. Many of Signorile's observations were made during the course of a walkaround in the presence of the individual Respondents and supervisory personnel. Signorile testified to the events of the inspection and the statements which Respondents and their agents made during the course of the inspection. Respondent did not refute this testimony. Instead, Respondents merely elicited testimony which was aimed at critiquing and/or providing a different interpretation of what the photo or video tapes depicted. Additionally, a good portion of this testimony was adduced and crafted to support the theory that a fall protection plan existed at the time of the inspection (Tr.

2166-2240, 3169- 97.3757- 71, 3881-82,4203-05). Most of this testimony was not based upon observations that were actually made at the time the photograph or video tape was actually recorded, but was instead based on what the witness believed the photo depicted when he viewed the photo at trial. Because the record shows that a fall protection plan had not been established at the time of the inspection and that no employees were aware of the requirements for such a plan, I give very little weight to this testimony.

I find that Signorile's testimony is entitled to significant weight for a number of other reasons. In many instances, Signorile's testimony was corroborated by the statements of other compliance officers (Tr. 480-83, 688. 693, 4397-99, 4577-99, 4584-85, 4587). Signorile also identified photographs which documented areas where he had observed violative conditions. He explained that some photographs did not depict actual exposure to violative conditions because employees walked away when they saw him (Tr. 1002, 1004, 1006, 1020, 1025, 1032). Some of Signorile's observations were also corroborated by a video tape which was recorded by compliance officer Brown. The conditions recorded on video tape were confirmed by on-site visits and interviews, or the video tape was shown to Respondents and supervisory personnel, who confirmed the observations of the compliance officers (Tr. 745-773, 774, 849,980, 988, 1002, 1010, 1014-15, 1016, 1017-18, 1024, 1025, 1031-32, 1045, 1048). During these interviews Respondents never denied what Signorile and the other compliance officers said they had observed, and never mentioned a fall protection plan.

I will now address the specific violations of the fall protection standard.

> **Instance (a):** Second Floor, South/West Corner, Column #24: Two employees were stripping the wood frame off of column 24, near the open edge of the floor, on or about 10/9/97.

On the first day of his inspection, October 9, 1997, Signorile observed two

employees stripping the wood frame off column 24 near the open edge of the floor. These employees did not have belts or harnesses. Signorile testified that he pointed this condition out to Nick as they were walking outside the general contractor's trailer. Nick and the shop steward, Cataliato, identified the workers as Avcon employees. Signorile testified that the employees were within a foot of the edge, and about 12 feet above ground level (Tr. 978-79; Ex. C-60).[12]

> **Instance (b):** Main Lobby, West Area, column 37: One employee setting up forms for the columns was standing on steel flanges of the frame and was not protected from falling, on or about 10/9/97.

On October 9, 1997, an employee was observed setting up clamps by column #37 while standing and climbing on the steel flanges. Although he wore a harness, he was not tied off to anything (Tr. 986). During the inspection, Cataliato yelled at him to tie off, and the employee tied to a ring of the steel flange on which he was standing. Nick and Signorile disagreed over whether the employee should tie off to the steel flange. Signorile believed that if the steel flange came down, the employee would also. The fall distance was 10 feet (Tr. 987-88, 991, 2167; Ex. C-61).

> **Instance (c):** Second Floor, North/West Corner, Column #49: Two employees, working near the edge of the floor, were not protected from falling while stripping the column, on or about 10/14/97.

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[12] Ex. C-60 depicts one employee exposed to the cited condition. The photo was taken subsequent to his initial observation, when one of the two exposed employees had moved onto a higher elevation - the roof of the adjacent building. Signorile explained that although the photo is dated October 8, 1997, the photo was actually taken the first day of the inspection - October 9, 1997 (Tr. 979-81, 2164-65).

On October 14, 1997, Signorile observed two employees stripping a column in the northwest corner of the building without any fall protection (guard rails, safety net systems, or personal protective equipment). The fall distance was approximately 12 feet. Cataliato verified that the employees were working for him. Furthermore, Signorile testified that, on the first day of his inspection, he had observed one of the employees (Rob Benoit, who was wearing a red shirt) stripping a column without fall protection. Ex. C-62, a photo taken from ground level, depicts the two employees and the column they were observed stripping (Tr. 1000-02).[13]

> **Instance (d):** Entire Second Floor: perimeter protection was not provided along the open floor edge, exposing employees to falls of approximately 12 feet, on or about 10/14/97.

On October 14, 1997, Signorile noticed that the entire second floor lacked perimeter protection, such as wire cable or wood railings, along the open floor edge. This condition exposed employees to a potential twelve foot fall. Signorile observed employees stripping and walking by the edge of the floor without any fall protection. The shop steward, Cataliato, told him that the employees worked for Avcon (Tr. 1004-07). Nick said that the general contractor was responsible for perimeter protection, but admitted that he personally observed Avcon employees walking at the edge without any fall protection (Tr. 1006-07).

> **Instance (e):** Entire Third Floor: Perimeter protection was not provided along the open floor edge, exposing employees to a fall of approximately 24

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[13] Signorile testified that just prior to taking the photo, both employees were involved in stripping the column. However, when the second employee, who was wearing green, saw him, he walked away (Tr. 1002).

feet, on or about 10/14/97.

On the same day, the entire third floor lacked fall protection along the edge. Signorile testified that he had observed this condition on video, but could not recall seeing any employees working on the third floor (Tr. 1009). Given that Signorile was unable to point to any employee exposure, this item is vacated.

Instance (f): Second Floor, East Area: Perimeter floor protection had been removed from the edge of the floor, on or about 10/21/97.

On October 21, 1997, Signorile observed that the perimeter protection had been removed on the entire east side of the floor. He observed two employees, one the stripper foreman and the other an Avcon employee, bringing stripped material to the edge of the floor. The material would later be picked up by a crane. The two employees wore no belts or harnesses, and they were right at the edge of the floor. The shop steward, Cataliato, was with Signorile. Signorile asked the stripper foreman if this was the normal procedure of work -- stripping the material and bringing it to the edge of the floor and storing it. The stripper foreman said yes. Signorile asked Cataliato and the foreman if they tied off when they brought material to the edge of the floor or picked up a load from the crane, and they both replied "certainly." When Signorile asked the foreman why he was not wearing a belt, the foreman responded that he had forgotten to put it on. The employees were exposed to falls of 20-24 feet (Tr. 1010-13).

Instance (g): Third Floor East: Two employees working on installing stringers for a balcony, on or about 10/21/97.

On October 21, 1997, Signorile observed two employees in the third floor east

area who were exposed to falls. These employees were installing steel stringers for the balcony area, and were the same employees mentioned in Instance C above. Shop steward Cataliato was with Signorile and identified the employees. While Signorile talked to Cataliato the two employees walked away, but not before Signorile took a photo. One employee had his back toward the open side and was about 1 foot away from the opening. The other employee was 5-6 feet away from the open side. They were both kneeling as they performed their jobs. The fall distance was 30 to 35 feet. On that same day, Georgiana was monitoring this floor. Signorile brought this condition to Georgiana's attention, and inquired as to why the employees were not tied off. Georgiana replied that he had not seen any employees (Tr. 1014-17; Ex. C-63). Signorile testified that he had observed these employees in this area for approximately 3-4 minutes before he took the photo (Tr. 1017-18).

Instance (h): Third Floor, East and West Area: Cable perimeter protection had been removed from the edge of the floor, on or about 10/29/97.

On October 29, 1997, while on the ground level, Signorile observed employees working in the west area of the third floor. Perimeter protection had been removed from both the east and west sides of the third floor. Signorile learned that the cable perimeter protection had been removed when material had been stripped and employees forgot to put the perimeter cable back. Cataliato told Signorile that early in the morning he had told Nick and Bill to replace the cable protection, and they had told him that they would put it back (Tr. 1019-1020; Ex. C-64). Prior to taking a photograph of the condition, Signorile had observed employees stripping material approximately 1 foot from the edge of the floor. The fall hazard in this area was 30-35 feet. Signorile later learned from Cataliato and Greco that these employees worked for Avcon (Tr. 1020-22).

Instance (i): Fourth Floor, West Area: Cable perimeter protection had been removed from the edge of the floor, on or about 10/29/97

On October 29, 1997, Signorile observed two to three employees walking and stripping on the fourth floor without any fall protection. They were working approximately 1 foot from the edge of the floor and were exposed to approximately a thirty foot fall hazard. Signorile learned from Bill that the cable protection had been removed from the edge of the floor in order to strip the floors. Cataliato told Signorile that he had mentioned this condition to Bill and Nick, who said that they would have the cable protection reinstalled. Cataliato informed Signorile that the employees working on the fourth floor were Avcon employees (Tr. 1022-25; Ex. C-65- employees had been observed in area to the left of photo).

Instance (j): Seventh Floor, Column #27, South/West Corner: Three employees framing the eighth floor from the seventh floor were not protected from falling, on or about 11/17/97.

On November 17, 1997, Signorile observed three employees framing the 8th floor from the 7th floor, at column #27, without any fall protection. They were at the edge of the floor exposed to a seventy to eighty foot fall. Greco and Cataliato identified these persons as Avcon employees. Signorile testified that Greco had remarked early that morning that both he and Cataliato mentioned to these three individuals to tie off (Tr. 1028-29, 1082; Ex. C-101).

Instance (k): Seventh Floor, West Side Balcony: Three employees framing the balcony were not protected from falling, on or about 11/18/97.

While on the ground, Signorile observed three employees framing the balcony on the 7th floor without fall protection. Cataliato and Greco identified them as Avcon employees. Prior to taking the photograph of the condition, Signorile saw the employees working at the edge and exposed to a fall hazard of 70 to 75 feet. (By the time he took the photo, the employees had moved away.) (Tr. 1030-32: Ex. C-67).

Instance (l): Eleventh Floor, South/West Corner: Two employees framing and one employee marking the floor were not protected from falling, on or about 12/8/97.

On December 8, 1997, Signorile approached the site with compliance officers Peist and Brown. From the car they observed employees working at the edge of the 11th floor without any fall protection. One employee was marking something on the deck, and the others were framing, nailing something down right at the edge of the 11th floor (Tr. 1035). Nick later verified that these were employees of his company (Tr. 1036). The employees were exposed to a fall hazard of 110-115 feet. This condition was captured on video (Tr. 1037, 1082-83; Ex. C-101).

Instance (m): Eleventh Floor, Northwest Corner: An employee framing the floor was not protected from falling, on or about 12/11/97.

On December 11, 1997, Compliance Officers Signorile, Peist, Brown and Triscritti were approaching the jobsite, and from inside a car they observed an employee framing the floor. Later, they learned the name of the employee from Dominic Paniscotti. The employee was Jeff Georgiana, who was the son of Frank Georgiana, the general foreman on the job. The employee had no protection, and it was snowing that day He was right at the edge, exposed to a fall of 110-115 feet (Tr. 1038-39).

Instance (n): North Side, 11th Floor Balcony: One employee setting up a deck balcony with his back toward Prospect Ave. was not provided with fall protection, on or about 12/11/98.

On December 11, 1998, from the car, Signorile observed an employee performing framing activities on the deck balcony on the eleventh floor with his back toward the edge of the deck. The employee was exposed to a fall hazard of 110-115 feet. Signorile, who was with his supervisor, Peist, went to the site, met with Nick, and told him about the exposure. Nick told them that he could not believe it, because employees had been given belts. So Nick went back to the area where the employee had been seen with Signorile and Peist. The employee was working with his back toward them, at the edge of the balcony. Signorile, Nick, and Peist walked to the area where they had seen the employee. The employee was still there, with his back toward them at the edge of the balcony. Nick could not tell Signorile and Peist why the employee was not wearing a belt, and he expressed shock at the employee's action. Nick shouted to the employee to get off the balcony and get a belt (Tr. 1038-40).

Instance (o): Eleventh Floor, South/East Area, South/West Area, South Area: Employees building columns, framing the deck and marking out the deck, were not protected from falling, on or about 12/15/97.

The video tape of December 15, 1997 showed employees walking and performing various tasks at the edge of the south, southeast and southwest areas of the 11th floor. Employees were marking the deck, working on columns, and walking along the sides of the 11th floor. No fall protection was in use, although one employee was observed wearing a belt and lanyard. The fall distance was more than 100 feet to the ground level.

Nick was subsequently shown the video, and he identified the employees as Avcon employees. The video also depicted three employees performing work at the outer edge of the deck as they put on safety harnesses and attached their lanyards to reinforcing steel after OSHA personnel entered the site (Tr. 1043-46;1083-89; Ex. C-101).

Instance (p): Tenth Floor, South/East Area: One employee stripping the balcony was not protected from falling, on or about 12/15/97.

On December 15, 1997, Signorile observed an employee engaged in stripping activity at the edge of the balcony on the tenth floor. No fall protection was present, and the employee was exposed to a 100 foot fall hazard. Nick saw the video and identified the worker as an Avcon.employee (Tr. 1047; Ex. C-101- 05:11.16.25-05:11.49.17).

Instance (q): Ninth Floor, South/East Corner: One employee stripping the balcony was not protected from falling, on or about 12/15/97.

Upon viewing the video, Signorile observed an employee stripping and bending rebar at the edge of the balcony on ninth floor southeast corner. The employee wore no belt or harness and was not otherwise protected from falling over 100 feet below. Nick was shown the video and verified that the employee worked for Avcon (Tr. 1047-48, 1090-91; Ex. C-101).

Classification and Penalty

Section 17(k) of the Act, 29 U.S.C. §666(k), provides that a violation is "serious" if there is "a substantial probability that death or serious physical harm could result" from the violation. In order to establish that a violation is serious, the Secretary need not establish that an accident is likely to occur, but must show that an accident is possible and

it is probable that death or serious physical harm could result. *Flintco Inc., 16 BNA OSHA 1404, 1405 (No 92-1396, 1993).* In the present case, the citation for violating the fall protection standard was appropriately classified as serious because employees could have fallen more than 100 feet and suffered multiple injuries or death.

Once a contested case is before the Review Commission, the amount of the penalty proposed in the Citation and Notification of Proposed Penalties is merely a proposal. The Review Commission is the final arbiter of penalties. In determining appropriate penalties, "due consideration" must be give to the four criteria under Section 17(j) of the Act, 29 U.S.C., §666(j). These "penalty factors" are: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history. *J. A. Jones Construction Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993).

The gravity of the violation in the present case was considered high because of the nature of the expected injuries, and the probability of injury greater because employees were standing right at the edge of floors without fall protection (Tr.985). The gravity based penalty was adjusted to reflect the Respondent corporation's size, with a 20% reduction for this factor (Tr. 440, 985). No adjustment was allowed for good faith or history because of the presence of willful violations and Respondents' history of prior final orders (Tr. 443-44)[14]. Given these factors, I find that a penalty in the amount of $3,000.00 is appropriate for Citation 1, Item 9.

Citation 2 Item 2a

> **Instance (a):** Eighth Floor: Employees framing the floor were not protected from falling, on or about 11/24/97.

[14] These adjustments to the gravity-based penalty are reflected in the remaining proposed penalties in all of the affirmed citations in both dockets.

On November 24, 1997, through his binoculars Signorile observed approximately eleven employees, including the carpenter foreman, Dominic Paniscotti, framing and marking the 8th floor. The employees were not wearing belts or harnesses and were exposed to falls of seventy feet (Tr. 882-84;1104-05; Ex. C-101).

Instance (b): Seventh Floor, Employees framing the eighth floor from the seventh floor were not protected from falling, on or about 11/24/97.

On November 24, 1997, Signorile observed through his binoculars five employees framing the 8th floor from the 7th floor without any fall protection. These employees were one to two feet from the edge and the fall distance was 70 to 75 feet. When shown the video, Nick identified these employees as Avcon employees (Tr. 888-89;1101-02, 1105-06; Ex. C-101). Foremen were in the vicinity of the exposed workers (Tr. 895).

Instance (c): Seventh Floor, South/West Corner: Employees stripping the floor were not protected from falling, on or about 11/24/97.

On November 11, 1997, two employees, one the carpenter foreman, Dominic Paniscotti, were observed on the 7th floor southwest corner, stripping at the edge without fall protection. They were stripping a column and the bottom of the ceiling above. This activity was videotaped (Tr. 889-91,1106; Ex. C-101).

Instance (d): Sixth Floor Balcony, West Side Area: One employee bending steel rebars was not protected from falling, on or about 11/24/97.

Signorile observed on video tape that on November 24, 1997 one employee was one to two feet from edge of the sixth floor balcony, west area. He was using a pipe to

bend steel rebars that were protruding. (Tr. 891-92; 1107; Ex. C-101) Bill identified the worker as his employee. The employee was wearing a harness, but he was not tied off. (Tr. 892)

> **Instance (e):** Seventh Floor, West Side Area: Two employees stripping and/ or removing excess concrete were not protected from falling, on or about 11/24/97.

Signorile observed on video tape that on November 24, 1997, on the 7th floor, two (2) employees were using a hammer to remove excess concrete from the edge of the floor. They were leaning or kneeling over to the edge to remove the excess concrete, and were exposed to a seventy foot fall hazard. This violation was taking place in the presence of Bill Saites, the carpenter foreman, Georgiana, and the shop steward, Cataliato (Tr. 893-94;1097-1100; Ex. C-101, C-103).

Citation 2 Item 2b

> **Instance (a):** Ninth Floor, West Side: An employee was picking up metal brackets and was not protected from falling, on or about 12/8/97.

On December 8, 1997, while interviewing Bill on the 9th floor of the building Signorile and Peist observed a worker picking up metal brackets about one to two feet from the edge of the floor. As he traveled about 10 feet along the edge, he was exposed to a 90-95 foot fall. Bill identified the worker as his employee (Tr. 897-98). They discussed this condition with Bill, who said that he did not believe the employee needed to be tied off because he was not at the edge (Tr. 899).

Citation 2 Item 2c

> **Instance (a):** Tenth Floor, East Side: Three employees were stripping wood forms and were not protected from falling, on or about 1/7/98.

Signorile observed on video tape three employees stripping the tenth floor, east side on January 7, 1998. They were at the edge of the floor, and there was a single cable wire along the edge. The cable had more than three inches of slack , and there was no mid-rail. The employees crawled under the wire to work at the edge, and at times an employee leaned over the cable protection. No fall protection was in use, and the fall hazard was more than 100 feet. Georgiana, the foreman, acknowledged in the video he was directing the work and sometimes assisting the Avcon employees (Tr. 900-03, 1108-09; Ex. C-101).

> **Instance (b):** Thirteenth Floor, South Side Area: Three employees working near the edge of the floor were picking up stripped lumber and steel brackets and were not protected from falling, on or about 1/7/98.

On January 7, 1998, while approaching the jobsite, Signorile observed through his binoculars three employees leaning over and picking up stripped lumber and steel brackets near the edge of the floor. There was no fall protection, and the employees were exposed to a 130 foot fall hazard. Signorile recognized one of the employees as Bob Gallagher, a foreman whom he had met at the beginning of the inspection. When interviewed later, Gallagher acknowledged that he and two other employees were cleaning up the floor, and that they were not wearing fall protection. Gallagher said that he should have told the employees to wear fall protection (Tr. 903-07, 909-13; Ex. C-73).

Willfulness

A violation is willful if committed with intentional disregard for the requirements of the Act or with plain indifference to employee safety. *Williams Enterp., Inc.,* 13 BNA OSHC 1249, 1256 (No. 85-355, 1987). Thus, the focal point of a willful classification is the employer's state of mind when the violation was committed. *Brock v. Morello Bros. Constr.,* 809 F.2d 161, 164 (1st Cir. 1987); *Monfort of Colorado, Inc.,* 14 BNA OSHC 2055, 2062 (No. 87-1220, 1991). The Secretary must show that the employer had a "heightened awareness" of the illegality of the conduct at issue. *E.g., Pentecost Contrac. Corp.* 17 BNA OSHC 1953, 1955 (No. 92-3788, 1997); *Williams Enterp., Inc.,* at 1256-57. An employer who knows an employee is exposed to a hazard and fails to correct or eliminate the hazardous exposure commits a willful violation if the employer knows of the legal duty to act, because an employer's failure to act in the face of a known duty demonstrates the knowing disregard that characterizes willfulness. *See Sal Masonry Contrac., Inc.,* 15 BNA OSHC 1609, 1613 (No. 87-2007, 1992); *accord A. Schonbek & Co.,* 9 BNA OSHC 1189, 1191 (No. 76-3980, 1980), aff'd, 646 F.2d 799, 800 (2d Cir. 1981); *Tampa Shipyards, Inc.,* 15 BNA OSHC 1533, 1541, (No. 86-360, 1992). Alternatively, the Secretary can establish willfulness by showing that the employer had a state of mind such that, if informed of the duty to act, it would not have cared. *Morello,* 809 F.2d at 164. The state of mind of a supervisory employee - his or her knowledge and conduct - may be imputed to the employer for purposes of finding that the violation was willful. *Continental Roof Sys., Inc.,* 18 BNA OSHC 1070, 1071(No. 95-1716, 1997); *Conie Constr., Inc.,* 16 BNA OSHC 1870, 1872 (92-264, 1994), *aff'd,* 73 F.3d 382 (D.C. Cir. 1995). The Third Circuit, the jurisdiction in which the present case arises, has held that a willful violation is characterized by an "obstinate refusal to comply" with safety and health requirements. This test "differs little from" the Commission and majority-circuit test. *Universal Auto Radiator Mfg. Co. v. Marshall,* 631 F.2d 20, 23 (3d Cir. 1980) (quoting *Babcock & Wilcox v. OSHRC,* 622 F.2d 1160, 1167-68 (3d Cir. 1980)).

Respondents argue that the record does not show "heightened awareness" or a

"deliberate flaunting of the Act." (Respondents' Post-Trial Brief, p. 97) However, I find that at the time these violations were observed, Respondents had heightened awareness that the cited conduct was illegal. Respondents and their supervisory personnel were aware of OSHA standards requiring fall protection. There had been prior citations or other warnings regarding the need for fall protection on similar jobsites. Despite Respondents' knowledge of OSHA's fall protection standards, no meaningful safety program exited at the Excelsior Two jobsite which addressed these issues. The record indicates that on the first day of the inspection, October 9, Nick was present during the walkaround when two employees were observed stripping the column of the second floor without protection. Signorile brought this to the attention of Nick, and the employees were told to walk away and get some belts (Tr. 839). At that time Signorile discussed with Nick the choices the company had with regard to various conventional fall protection systems. Nick informed him that he was familiar with employees tying off (Tr. 885-86). Furthermore, on the first or second day of the inspection, in order to apprise Nick of the changes in OSHA's fall protection standards, Signorile provided Nick with a copy of OSHA's fall protection standard with its preamble. At that time Signorile reviewed the requirements of the standard with Nick (Tr. 4610-12; Ex. C-116). He also provided Nick with several handouts which pertained to available options for protecting workers on the top deck (lifeline systems and net systems), and which addressed Nick's concerns about the infeasibility of protecting these workers. Signorile explained that the standard contained several options with respect to fall protection (Tr. 4612-15; Exs. C-117 and 118). During the course of his inspection, Signorile had similar conversations with Bill, the foremen, and shop stewards (Tr. 886-87). Despite this information, Respondents and supervisory personnel continued to permit employees to work in the same manner which Signorile had informed them was in violation of the requirements of the standard.

I also find that Respondents' previous contacts with OSHA provided some

knowledge of OSHA's fall protection requirements. Companies owned and/or operated by Bill and Nick Saites had been cited for fall protection violations on several previous construction projects. Under the ownership and presidency of Bill Saites, Astro was issued three (3) serious citations, one (1) repeated citation, and three (3) willful citations for failing to guard open-sided floors in accordance with 29 C.F.R. § 1926.500(d)(1). These citations were issued between May 30, 1974 and June 11, 1980.[15] In addition, Astro Concrete was issued one serious citation on October 11, 1974 for violating the standard in 29 C.F.R. 1926.105(a) by failing to provide safety nets or other fall protection for workplaces more than 25 feet above ground.[16]

I also note that, after Astro was sold to Nick in 1983, this company was issued one (1) serious citation pursuant to 1926.500(d)(1)[17], and two (2) serious citations pursuant to 1926.105(a).[18] These citations were issued between December 20, 1989 and December

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[15] Ex. C-23 (Inspection No. 011173416); Ex. C-24 (Inspection No. 011087251); Ex. C-25 (Inspection No. 011180676); Ex. C-26 (Inspection No. 011065505); Ex. C-32 (Inspection No. 011168473); Ex. C-33 (Inspection No. 011167962); Ex. C-34 (Inspection No. 011167343).

The standard formerly codified at 29 C.F.R. 1926.500(d)(1) was revised on August 9, 1994 along with all of Subpart M ("Fall Protection") (Ex. C-116). In pertinent part, the standard at 1926.500(d)(1) previously provided as follows:

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

[16] Ex. C-33 (Inspection No. 011167962).

The standard at 29 C.F.R. 1926.105(a) provides as follows:

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

[17] Ex. C-11 (Inspection No. 109867689).

[18] Ex. C-11 (Inspection No. 109867689); Ex. C-14 (Inspection No. 101502029).

27, 1990. Three of the settlement agreements entered into by Astro were signed by Nick (Ex. C-36, C-37, C-39). During the December 1990 inspection, there were discussions with Bill and Nick regarding fall protection systems (Tr. 716-719)

Finally, when Nick owned Cornicon, this company was issued one (1) serious citation and one (1) willful citation pursuant to 1926.500(d)(1) between January 10, 1986 and April 29, 1986.[19] As a result of the serious citation issued January 10, 1986, Peist had a discussion with Nick about OSH standards were and what OSHA was looking for with regard to fall protection. Cornicon was also issued one (1) serious citation and one (1) one willful citation for violations of 1926.105(a) between April 29, 1986 and February 2, 1987.[20] In addition, when Bill Saites owned WNS Construction, the company was issued two (2) serious citations pursuant to 1926.500(d)(1) between June 14, 1982 and August 11, 1982.[21] All of the above-mentioned citations became final orders of the Review Commission (Tr. 358, 362, 367).

Despite their extensive history of OSHA citations and knowledge of OSHA requirements, respondents made no plans or preparations for the use of fall protection at the Excelsior Two site, nor did they enforce any procedures whatsoever for the use of fall protection. Respondents did not contact a professional engineer or other knowledgeable professional or supplier in the fall protection business (Tr. 301, 4253-56, 2605-06). Respondents did not review any literature regarding available fall protection equipment (Tr. 301, 166-68). Respondents did not seek permission from the project engineer to embed anchorages or other fall protection equipment into the concrete as it was poured (Tr. 4261-4264). Furthermore, the record establishes that the Respondents inquired about

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[19] Ex. C-44 (Inspection No. 017689993).This citation was issued by Respondents' current safety consultant, Joseph Rufolo, when he was Area Director of the Avenel, New Jersey, OSHA office (Tr. 371-76).

[20] Ex. C-41 (Inspection No. 101627610); Ex. C-43 (Inspection No. 017693771).

[21] Ex. C-46 (inspection No. 011090404); Ex. C-47 (Inspection No. 011268034).

the price of nets as a means of fall protection with regard to this project at the beginning of the job. Respondents found the cost of nets high, and then took no other action with regard to fall protection on the site (Tr. 297-300).

Additionally, when Signorile visited the site on October 14, 1998, several months into construction activities, he discovered that respondents had made no arrangements with the general contractor for the installation of perimeter cable on floors where Respondents' employees were exposed to fall hazards (Tr. 80-81, 1005-06). Nick Saites maintained that Avcon was not contractually responsible for the perimeter protection (Tr. 1005). However, the superintendent of the general contractor, Sal Manino, did not know which company was responsible for perimeter protection and indicated that he would "check with his office." When Signorile returned to the site several days later, he was informed that Tenwood and Avcon had agreed that Tenwood would purchase the perimeter cable, and Avcon employees would install it (Tr. 1006). When Signorile visited the site two weeks later, on October 29, he observed that the third and fourth floors of the building lacked perimeter protection even though Respondents' employees were engaged in stripping activities on those floors and were exposed to fall hazards. The shop steward informed Mr. Signorile that he had made a request to Nick Saites earlier in the day to replace the perimeter protection on those floors; however, the protection was not restored before the employees began working (Tr. 1018-19, 1023). The failure to even consider the general issue of perimeter protection in advance of the work activities -- and the failure to include such provisions in the contract -- demonstrates a callous disregard for the requirements of the Act. The record also establishes that guardrails were removed from column rebar in order to frame columns, and that entire floors of the structure were without perimeter guarding even though future work would be performed on these floors. (Tr. 2530, 2533)

Although safety belts were present at the site, they were kept in a gang box, and employees brought their own belts to the job (Tr. 2148). Belts were not required on the

job, and the use of safety belts and lanyards was left completely to the discretion of each employee. If the employee "found" an attachment point in his work area, he could choose to use fall protection. However, respondents had never devised any plans to provide adequate attachment points (Tr. 2591-97, 4249-50). Accordingly, employees were never required to use fall protection -- even under the close supervision of management. Indeed, management officials themselves were observed performing work at the edge of the building without fall protection (Tr. 890, 895, 1016, 1893-94). Management officials were also observed supervising employees who were crawling under perimeter cables (Ex. C-101 - 07:18.59.19-07:19.27.18). Employees were routinely assigned to perform tasks at the edge of the building which would expose them to falls in excess of 100 feet, without any procedures in place to provide fall protection. Employees who elected not to use fall protection were not disciplined. Management officials who elected not to use fall protection were also not disciplined (Tr. 2949-51). It is abundantly clear that Respondents did not require fall protection at this worksite.

William P. Kelly was a carpenter for Respondents at the Excelsior Two project for almost the entire duration of the job (Tr. 1484-86). Kelly had been a union carpenter for twenty years and had worked on a wide variety of construction projects, including high-rise buildings (Tr. 1513-14). Kelly had never seen safety belts at the Excelsior Two site until a worker fell 25 feet while framing a concrete beam early in the job (Tr. 1495-96, 1499). Belts were handed out after the accident, but their use was never enforced (Tr. 1499-1500). Belts were worn only when OSHA personnel were on-site (Tr. 1499). Bill Saites would warn everyone to put on their safety belts and to put up guardrails because "OSHA's here" (Tr. 1499, 1503). After OSHA personnel exited the site, guardrails were sometimes dismantled and the lumber was used for construction purposes (Tr. 1503). When OSHA inspectors were not on-site, nothing was said about the use of belts and their use was left up to the employee (Tr. 1500). Also, foremen were well aware that employees worked without fall protection (Tr. 1501). Kelly worked without fall

protection, under the direct supervision of a foreman, while standing one foot from the edge of the building on the fourteenth or fifteenth floor (Tr. 1517). I find that this conduct demonstrates a conscious disregard of the terms of the standard, and also shows disregard for the advice of compliance officers.

I further find that the willfulness of the violations is demonstrated by Respondents' failure to provide any form of fall protection for their employees during the course of this inspection - except when forced to do so by the presence of OSHA compliance officers (Tr. 1499, 3107, 3110, 3149-51, 3321-22, 3475-76, 3598-99, 4187;Ex. C-101 - 05:33.55.19 - 05:34.03.17; 103 - 04:29:38.20).

Classification and Penalty

The citations were properly classified as serious because an employee could have fallen more than 100 feet and suffered multiple injuries or death. The gravity of these violations was high. The severity of the violation was high because falls from the cited heights could have lead to death. The probability was greater because the employees were working right at the edge of the floors (Tr. 894-95, 916). In light of the gravity and willful nature of these violations, I find that no adjustment for size, history (the Saites' had a history of fall protection citations at prior jobsites) or good faith should be made (Tr. 443-45). I believe that the proposed penalty of $70,000.00 is necessary to deter future violations, and is consistent with the statutory criteria.

AFFIRMATIVE DEFENSES

In defense of these items, Respondents claim infeasibility of compliance. This defense requires the employer to show that the means of compliance set out in the standard was technologically or economically infeasible and that there was no feasible alternative means of protection. *V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1874 (No. 91-2267, 1997). The Third Circuit, where this case arose, analyzes this defense in terms of "impossibility" rather than infeasibility. That is, the employer must show that it was impossible to comply with the standard, or that compliance would have precluded

performing the work, and that no alternative protective means were available. *E & R Erectors, Inc. v. Secretary of Labor*, 107 F.3d 157, 163 (3d Cir. 1997)

It is Respondents' position that, at the time of inspection, nets were not possible because concrete curing time precluded the embedding of anchorages capable of maintaining the pour cycle. Respondents also argue that the plans and specifications on which Avcon bid did not contain structural embedding for fall protection nets. Finally, they claim that fall arrest/fall restraint systems were infeasible because the form work was not designed to anchor these devices and because anchorage strength and the curing time of concrete columns on the stripping floors were insufficient. Respondents presented lay testimony and expert testimony in support of their assertion that it was infeasible to provide conventional fall protection on the Excelsior Two jobsite.

After reviewing the record, I reject Respondents' infeasibility defense. As noted by the Secretary, there was no preplanning on the part of Respondents, no inquiry into available fall protection equipment, no consultation with qualified persons, and no development of a construction sequence which would accommodate available fall protection equipment. (Secretary's Post-Hearing Brief, p.63). The record shows that during the planning of this job Respondents ignored their obligation to provide fall protection, and made no attempt to comply with the fall protection standards. There was not even a clear understanding between Respondents and the general contractor as to who would provide guardrails on the site (Tr. 84, 1005). Prior to the start of this job, Respondents did not conduct any research to find out if fall protection standards had changed since their last construction job, in 1991 (Tr. 2550). Respondents acknowledge that there was some discussion about the costs of nets. However, no other inquiries were made (Tr. 2568-70, 4274-79). Respondents made no efforts to seek any other equipment for fall protection. The Commission has held that "we expect employers to exercise some creativity in seeking to achieve compliance."*Gregory & Cook Inc.,* 17 BNA OSHC 1189, 1191 (No. 92-1891, 1995); *Pitt -Des Moines, Inc.*, 16 BNA OSHC 1429, 1433 (No.

90-1349, 1993) ("The Commission has long recognized that standards will in some instances, require some creativity on the part of employers to achieve compliance.") I find that Respondents made no effort to achieve compliance with the fall protection standards. The record demonstrates that Respondents simply ignored their obligation to provide fall protection when planning work at the Excelsior Two site.

Respondents attempted to support their lack of action by eliciting testimony from lay witnesses which indicated that the methods involved in Respondents' type of work had not changed since the 1960's, and that there were no available methods of fall protection (Tr. 2935-38, 2952-53, 2957, 3016, 3057-58, 3062, 3130, 3280, 3790). Respondents' lay witnesses testified, on the basis of their construction experience, that wooden form work (i.e., column forms, legs, stringers, ribs) could not provide an adequate anchorage point for a personal fall arrest system.[22] They testified that safety nets could not be used in their "four-day pouring cycle" because supporting base plates could not be installed in the concrete floors until the concrete had cured for 28 days. Respondents' witnesses also testified that guardrails attached to column rebar must be removed when the column is framed, and that guardrails cannot otherwise be installed.[23]

I am unable to give weight to the testimony of Respondents' lay witnesses. The witnesses' opinions were offered without any supporting scientific or professional data or

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[22] This testimony was in reference to 29 C.F.R. §1926.502(d)(15), which provides as follows:

> Anchorages used for attachment of personal fall arrest equipment shall be independent of any anchorage being used to support or suspend platforms and capable of supporting at least 5,000 pounds (22.2 kN) per employee attached, or shall be designed, installed and used as follows:
>
> > (I) as part of a complete personal fall arrest system which maintains a safety factor of at least two; and
> >
> > (ii) under the supervision of a qualified person.

[23] Tr. 2101-02, 2116-17, 2159-60, 2952-54, 2969-70, 3978-79, 4154-57, 4162.

tests (Tr. 3121-23, 3308, 3405, 3520, 3523, 3565, 3700, 3748-50, 3858-59). Also, these witnesses were unfamiliar with OSHA's fall protection standards (Tr. 3115-17, 3121, 3240, 3370-7, 3405, 3407-09, 3497, 3502-03, 3572-73, 3590-92, 3597, 3636-37, 3693, 3747-48, 3833-34, 3837, 3853-55). I find that the Secretary's expert rebuttal witnesses refuted each of the contentions of Respondents' witnesses. See discussion *infra*. I also find that, because the language of the fall protection standards is precise, Respondents' attempt to use its witnesses testimony as evidence of industry custom and practice is of no consequence. *See Superior Rigging & Erecting,* Docket No 96-0126 (April 5, 2000) and cases cited therein (industry custom and practice are not relevant where the language of a standard, as defined by its legislative history, is clear and unambiguous).

EVALUATION OF EXPERT WITNESS TESTIMONY

In evaluating any witness testimony Fed. R. Evid. 104(a) requires that I make a preliminary determination concerning the qualification of a person to be a witness, and the admissibility of evidence. When presented with the proffer of expert testimony before admitting or excluding such testimony a preliminary determination governed by Fed. R. Evid. 702 must be made. This rule contains three major requirements: (1) the proffered witness must qualify as an expert by knowledge, skill, experience, training, or education; (2) the expert must testify to scientific, technical or specialized knowledge; and (3) the expert's testimony must assist the trier of fact [24] This preliminary task ensures that the expert testimony meets a minimum threshold resting on a reliable foundation and is relevant. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 595, 113 S. Ct. 2786, 2795-96 (1993), the Supreme Court provided a framework for judges to use

[24] Rule 702. Testimony by Experts
If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

when deciding whether to admit expert testimony pursuant to Rule 702. The "Daubert test" established a gatekeeping role for trial judges that requires them to determine the relevance and reliability of scientific expert testimony before allowing its admission. Id. at 597[25]. The Supreme Court confirmed in *Kumbo Tire Co. v. Carmichael*, 526 U.S. 137 , 119 S.Ct 1167 (1999) , that the *Daubert* inquiry is not limited to scientific experts, held that courts have an obligation to fulfill their *Daubert* gatekeeping responsibilities with regard to all expert testimony whether based on scientific or nonscientific knowledge. (See also *In re Paoli Railroad Yard PCB Litigation,* 35 F.3d 717 (3d Cir. 1994), cert. denied, 115 S. Ct. 1253 (1995).

Respondents have also attempted to show the infeasibility of fall protection through the testimony of Leo DeBobes, an expert witness. DeBobes is a certified safety professional who is involved in the recognition, identification, and control of safety hazards. DeBobes has a Bachelor of Science degree from the New York Institute of Technology, and a Masters degree in Occupational Safety and Health from New York University (1985). He is also a certified hazard control manager. DeBobes is certified by New York as a workplace loss prevention consultant. He is a member of American Society of Safety Engineers, the American Industrial Hygiene Association, and the National Safety Council He has received an award from the American Society of Safety Engineers (Tr. 3917-18). DeBobes began working in construction safety in 1977. He initially worked as a safety inspector, moved up to senior inspector, and eventualy supervised a group of inspectors at the Shore Nuclear Power Station - probably the largest construction project on Long Island. From there, he began work as a safety administrator for Estee Lauder. He then went to United Technologies Corp., becoming the manager of occupational safety and health engineering, a job in which he was responsible for

[25] The majority in *Daubert* wrote "the Rules of Evidence - especially Rule 702 - do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Id.*

multiple facilities. DeBobes subsequently worked as project engineer responsible for construction safety at Brook Haven National Laboratory. He later was Assistant Director, and then Director, of Environmental Health and Safety for the State University of New York at Stony Brook. DeBobes then served as head of Brook Haven National Laboratory's environment, safety and health program (Tr. 3918-19). As a consultant, DeBobes has worked primarily for attorneys, performing forensic work. DeBobes returned to Stony Brook this past April, and is now on special assignment at Stony Brook with responsibility for a number of areas (Tr. 3917-20, 3938-39).

Although DeBobes possesses general expertise in professional safety, he has no specialized knowledge in that aspect of professional safety relevant to this case: the feasibility of fall protection on high-rise concrete construction projects. Thus, I find that his testimony is entitled to little weight. DeBobes' experience on poured-in-place, high-rise construction projects is limited to one project during the years 1977-81 (Tr. 3929-31, 4038).[26] DeBobes acknowledged that he has never designed a fall protection system or a personal fall arrest system for a multi-story, poured-in-place structure, or assessed the structural integrity of anchorage (Tr. 3938-39). DeBobes also said that he has never talked to anyone who has designed anchor points for harnesses or belts for high-rise, poured-in-place concrete structures (Tr. 4037). Finally, although DeBobes testified that he has read professional journals which address fall protection on high-rise, poured-in-place concrete structures, he was not able to recall the names of any of these journals (Tr. 3932). I find that DeBobes' lack of knowledge regarding the evaluation of fall protection systems on high-rise structures is critical, and greatly reduces the weight of his testimony.

I also find that DeBobes' testimony regarding the feasibility of fall protection

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[26] His responsibilities on that project were to do field inspections, to do training for the various craft workers, to make sure the ppe was issued , to make sure that it was being used, to make sure workers abided all safety regulations - OSHA, NY State and contractors. Inspections of scaffolds, ladders, floor and wall openings and holes, rigging activities, crane hoisting operations, concrete pours, excavation and trenching, confined spaces. (Tr. 4026-27).

systems at the Excelsior Two worksite is entitled to little weight for a number of other reasons. DeBobes acknowledged that the only safety professional with whom he has discussed any of his opinions regarding fall protection on poured-in-place, high-rise concrete construction is Joe Rufulo, an in-court advisor to Respondents. DeBobes testified that he had also talked to a second individual, whom he could not identify. This person had been referred to him by Mr. Rufulo and Respondents' counsel. He testified that this person gave him no real information with regard to any of his inquiries (Tr. 3929- 36). I find that DeBobes' discussions with Rufalo and the unnamed individual were, at most, Respondents' attempts to educate DeBobes in the area of fall protection on high-rise buildings, and that these discussions do not strengthen his testimony.

I also note that DeBobes' opinions were not based upon any professional studies of or personal experience with reinforced concrete high-rise construction. DeBobes acknowledged that his opinion regarding the feasibility of nets at the Excelsior Two worksite had nothing to do with discussions he had with anyone in the business of installing or moving nets (Tr. 4080-81). He also testified that he had relied upon ANSI (American National Standards Institute) standard A10.9 in formulating his opinions, and testified regarding his interpretation of this standard (Tr.3958, 3989, 4024). However, DeBobes did not discuss his interpretation with anyone knowledgeable about the standard.[27] DeBobes also testified regarding his interpretation of several other OSHA standards (Tr. 3070-72, 3978, 4000). Again, DeBobes never discussed his interpretations with anyone from OSHA, or with any other safety professional. He also acknowledged that he knew of no literature which supported his interpretations (Tr. 3935-36, 4041, 4038, 4051, 4079).

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[27] He testified that he had relied upon ANSI 10.9 (which prohibits the use of reinforcing steel as guy attachments at deadman anchorage points) for the proposition that rebar cannot be used, but admitted that this was only his personal interpretation of a standard, and that he had no experience and had not discussed this interpretation with anyone in the field (Tr. 3989, 3997; Ex. C-115)

Finally, I note that much of DeBobes' testimony was not even relevant. The issue here is whether fall protection was feasible. DeBobes' testimony consisted for the most part of his interpretations of various OSHA terms, such as "leading edge" and "anchorage points." This testimony was not relevant, and would have been properly excluded.

Although I find that even DeBobes' uncontradicted testimony does not establish the affirmative defense of infeasibility and/or impossibility, I think it is important to comment upon the testimony of the expert witnesses whom the Secretary introduced on rebuttal. This testimony was very credible, and provides further support for my finding that Respondents have not established an infeasibility defense.

Matthew J. Burkart, a professional engineer, and Daniel Paine, a fall protection consultant with forty years of experience in the business, provided expert testimony regarding the feasibility of conventional fall protection at the Excelsior Two project. I find that the testimony of both Burkart and Paine is reliable and relevant.[28] Burkart is a consulting engineer whose firm has been providing engineering services in various capacities since 1975.[29] Burkart has a degree in civil engineering and previously worked as a union carpenter with reinforced concrete form work (Tr. 4444, 4447). His college course work in engineering included nine to twelve semester hours devoted to reinforced concrete (Tr. 4450). Burkart's consulting firm is engaged in, among other things, construction management services which include "manag[ing] the entire construction site, from working with the owner in the design phase through the management construction and final completion." (Tr. 4446-47) His company has provided consulting services for companies performing reinforced concrete construction (Tr. 4448-50). Most recently, his

[28] My findings mirror the Secretary's Post-Trial Brief at pp. 64-70.

[29] See Ex. C-113 - curriculum vitae

company designed a fall protection system on a reinforced concrete structure. [30] Almost all of the reinforced concrete structures that he has seen or worked on as an engineer have been multi-storied (Tr. 4462-63). Burkart's firm also provides safety training to contractors, and Burkart has lectured at technical and professional seminars around the world on the subject of construction safety (Tr. 4446, 4452). Burkart has served on ANSI committees and is a member of the American Concrete Institute and other professional organizations (Tr. 4450-51).[31] Burkart has taught a fall protection seminar and has advised contractors on fall protection systems (Tr. 4448-49, 4456).

Burkart testified that concrete generally achieves 90% of its ultimate strength in 28 days; however, contractors do not have to wait 28 days before anchorages or straps can be imbedded in the concrete (i.e., for personal fall arrest systems) or before base plates can be installed to support safety net systems (Tr. 4483-84). The manufacturer of the base plates, straps or anchorages will specify the degree of strength required by the concrete to support the devices, and that required strength may be achieved within several days (Tr. 4482). [32] If the required strength cannot be achieved within the time frame desired by the contractor, the contractor can accelerate the curing time of the concrete by modifying the composition of the concrete (i.e., the ratio of cement, sand, gravel and

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[30] A series of horizontal lifelines to reinforcing steel/rebar projecting from columns above the deck that they were framing, and then attached to either a retractable lifeline on a reel or sliding lifeline, to which employees attached their lanyards (Tr.4449-50, 4501).

[31] He explained that ANSI a-10, Section 3.5.3 does not prohibit the use of rebar to anchor a personal fall arrest system. This section prohibited the use, as a guy attachment, to steady other reinforcing steel. This would preclude using the reinforcing steel as a guy attachment for a dead-end anchorage attachment. He knew of no industry standard which prohibited the use of rebar to anchor a personal fall arrest (Tr. 4500).

[32] He testified that in his business he has reviewed drawings where something had to be attached to the structure and approval from design engineers was necessary. (Tr. 4465-66). He knows of no instances of the design engineer not giving permission to place embedment in concrete (Tr. 4467).

water) or by placing additives in the concrete mix (Tr. 4474-76, 4478-79; Ex. C-112). Alternatively, the contractor could use larger base plates or anchorages which would distribute support for the intended load over a larger area, which would require a lower compressive strength in the concrete and reduce the curing time (Tr. 4482-84).

Burkart also testified that contractors are required to design form work to withstand all anticipated vertical and lateral loads (Tr. 4486-88).[33] The desired support for lateral loads can be achieved through diagonal bracing within the shoring system (i.e., along the wood vertical shores or legs) (Tr. 4488-89, 4507-08). By increasing the size or number of diagonal braces, the lateral load-bearing capability of the form work would increase by distributing the load throughout the structure (Tr. 4489).

Finally, Burkart testified that a guardrail system could have been installed on the plywood deck at the Excelsior Two Project by extending the stringers beyond the spandrel beam and attaching metal brackets to support uprights to which the guardrails would be affixed (Tr. 4494-95). Mr. Burkart has observed the installation of such guardrail systems in conjunction with the building of the plywood deck (Tr. 4493-94). The employees engaged in the installation of the guardrail system could be protected by a "fall restraint system" consisting of a fixed line attached to a lanyard which would limit the distance that an employee could travel and prevent the employee from falling from the edge of the structure during erection of the guardrails (Tr. 4491-92, 4495-96). The fall restraint system could be anchored to various structures (i.e., the plywood deck itself, a stringer, a plate, etc.) because "it does not develop significant loads because you're not

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[33] The standard at 29 C.F.R. 1926.703(a)(1) provides, in pertinent part:

> Form work shall be designed, fabricated, erected, supported, braced and maintained so that it will be capable of supporting without failure all vertical and lateral loads that may reasonably be anticipated to be applied to the form work.
> ****

allowing the person to fall"(Tr. 4496-97).[34] Given this additional testimony, I find that any of the fall protection systems referenced in 29 C.F.R. § 1926.501 could have been successfully engineered and applied at the Excelsior Two project.

As noted above, Daniel Paine also testified as an expert witness. Paine is the president of a construction safety consulting firm which specializes in the development of fall protection systems in "every conceivable kind of construction project, from bridges, dams, high-rise buildings, concrete buildings, structural steel buildings . . . [j]ust about everything you can think of." (Tr. 4660-61; Ex. C-119). Paine has given testimony on fall protection in the development of Subpart R (Steel Erection) and Subpart M (Fall Protection), and has personally served as an expert witness in civil litigation related to fall protection issues (Tr. 4661-65). For 24 years Paine was the president of Safety and Industrial Net Company (SINCO), a designer and manufacturer of fall protection equipment (Tr. 4665). SINCO marketed "different kinds of fall arrest equipment, fall restraint equipment, guardrail equipment, and safety net equipment." (Tr. 4667). In connection with his consulting work, Paine has visited "hundreds" of poured-in-place, high-rise concrete buildings (Tr. 4672). Paine chaired or was a member of the ANSI A-10 committees which produced the construction industry fall protection standards (Tr. 4675-76).

Paine testified that the use of fall protection equipment on construction sites is a matter for "pre-planning." (Tr. 4693) Before deciding which fall protection systems it wants to use, the contractor must evaluate factors such as the equipment to be used, the construction sequence, the curing times of concrete, and the form work (Tr. 4693-94). In general, contractors use a combination of fall protection systems rather than a single system (Tr. 4694). In Paine's experience, alternatives to conventional fall protection

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[34] In addition to the three (3) forms of conventional fall protection referenced in 1926.502 (guardrail systems, safety net systems and personal fall arrest systems), OSHA has issued an official interpretation which also permits the use of a fall restraint system (Ex. C-114).

methods have only been used where bona fide "leading edge work" was being performed and employees were only exposed to less substantial interior falls. *Id*.

Paine also testified regarding the availability of pre-engineered fall protection systems and systems which require the contractor and/or its professional engineer to design the equipment to be used (Tr. 4696-99; Ex. C-120). According to Paine, "pre-engineered systems" have been tested by the manufacturer to meet specified criteria and only require the contractor's installation in accordance with the manufacturer's instructions (Tr. 4696-97). Pre-engineered systems exist for fall arrest, fall restraint, and guardrails. One of these systems is a tie-off system called "Safety Strap," in which a strap can be nailed through a plywood deck into a stringer with a three-inch double-headed nail, or imbedded into concrete as it is poured (Tr. 4697-98, 4701-04).

In addition, Paine testified as to the feasibility of safety net systems. He said that base plates can be installed in a structure which support a "post holder" - poles and cables to which the nets are attached (Tr. 4714-16). The base plates can be poured into the concrete, or bolted to the concrete (Tr. 4715). Paine testified that there are "lots of different choices" regarding the installation of posts to support safety nets, including a "clip-on method" and attachment to columns. *Id*. Safety nets could protect three floors of a structure at once, including a deck (Tr. 4719-23).[35] Base plates could be poured into the concrete every three floors, and the concrete would have 12 days of curing time before the nets would be moved up again (Tr. 4720, 4722-24, 4727-28, 4734). Using this procedure on actual worksites, Paine has found that safety nets installed in this fashion pass the "drop ball test" and that the concrete has achieved a compressive strength of at least 3,000 psi within a four-day pouring cycle - more than adequate to support base

[35] The standard at §1926.502(c)(1) provides that safety nets must be installed no more than 30 feet below the walking/working surface on which employees are working. Accordingly, since the height of each floor is approximately 8 feet, three floors could be protected by one safety net system.

plates (Tr. 4725-26, 4729-34).[36]

Paine concluded that all of the fall protection options outlined in 29 C.F.R. § 1926.501 were feasible at the Excelsior Two worksite. In his opinion, it would also have been feasible to have "retro fit[ted]" fall protection devices on the structure as it existed at the start of the OSHA inspection, even in the absence of any "pre-planning" on the part of the Respondents (Tr. 4747-48).[37]

For the reasons discussed *supra*, Respondents also cannot establish the affirmative defense of "greater hazard." To establish this defense, Respondents must show: (1) that the hazards created by complying with the standard are greater than those of noncompliance, (2) other methods of protecting their employees from hazards were unavailable, and (3) a variance is unavailable or that application for a variance is inappropriate. *Spancrete Northeast,Inc.,* 15 BNA OSHC 1020, 1022 (No. 86-521, 1991). Here, the record does not show that Respondents applied for a variance or that applying for a variance was inappropriate. Additionally, Respondents have made none of the other showings. As noted by the Secretary, Respondents' claim that the hazards of complying with the standard would have been greater than those on noncompliance assumes that lanyards would have been strewn haphazardly across the floor, causing tripping hazards, and affixed to structures which would be incapable of supporting the worker if he fell. Such conditions could only exist, however, where, as here, the use of fall protection was never incorporated into job-planning in the first place. I also note that, even in the absence of personal fall arrest systems or safety harnesses, Respondents still had a duty under the standard to provide either guardrail systems or safety net systems, which it

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[36] The "drop-test" is referenced in §1926.502(c)(4)(I) and requires that safety nets be tested by dropping a 400-pound bag of sand into the net from the highest elevation at which employees will be exposed to fall hazards.

[37] Although the Secretary called two expert witnesses in rebuttal, this should not be construed as any acknowledgment by the Secretary that Respondents adduced sufficient evidence with regard to the issue of infeasiblity to shift the burden of persuasion to the Secretary.

failed to do. The Secretary's experts established that numerous fall protection devices, and combinations thereof, could have been safely installed at the worksite to protect workers from fatal falls, and that the use of such equipment would not have exposed workers to hazards.

Citation 2 Item 1

29 C.F.R. § 1926.100(a) Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns, shall be protected by protective helmets.

> **Instance (a):** Fourth Floor, South/East Area: Eight employees were not wearing head protection while a crane bucket was passing overhead, on or about 10/21/97.

Compliance Officer Signorile testified that on October 21, 1997, he observed a bucket of concrete being lowered onto the top deck. He observed eight employees not wearing head protection while a bucket of concrete passed fifteen to twenty feet overhead. The employees were under the bucket waiting to receive the load of concrete. Signorile was concerned that if the door of the bucket opened, the cement would fall on top of their heads, causing serious injury. He was also concerned with the movement of the bucket because, as it was being lowered, it could have struck the employees. When Signorile called Nick's attention to the lack of head protection, Nick said that he provides hats to the workers but the hats fall off the workers' heads and, in any event, they do not like to wear them (Tr. 849, 1761; Ex. C-72).[38]

> **Instance (b)** Seventh Floor, West Side Balcony: Three

[38] The photo depicts several employees wearing hard hats, and three employees without hard hats. Signorile testified that some of the observed employees walked away as he took the photo (Tr. 850-51). I find that the compliance officer has provided credible testimony with regard to his observations throughout the trial. Thus, the fact that the photo does not depict all eight (8) employees and the bucket is of no consequence (Tr. 1754-58).

employees were not wearing head protection while framing the balcony and crane loads were passing overhead, on or about 11/18/97.

Signorile testified that, while outside the general contractor's trailer on November 18, 1997, he observed a crane load of wooded form work, plywood, and wood posts go from the east side of the building (where the crane was located) across the entire top deck to the where three employees were framing the balcony on the west side of the building. The load swung over the heads of these three individuals as it was being delivered to an adjacent area (Tr. 853, 1772). Signorile pointed out this condition to Joe Greco, Tenwood's Superintendent, and Frank Cataliato, shop steward, who both said that early in the day they had told these three individuals to tie off and wear their hard hats. The employees were working on the balcony, which was six to eight feet below the top deck. The crane passed over them a couple of times as it was maneuvering to unload the material. Signorile believed that if the sling of the crane gave way, the material would drop on the employees' heads and cause serious injury (Tr. 854-55).

Instance (c): Seventh Floor, East Side Area: Employees were not wearing head protection while steel material was being unloaded from a crane, on or about 11/24/97.

Signorile testified that on November 24, 1997 he observed, on video tape, employees not wearing head protection while working under loads of steel material (steel rebars and steel clamps) being delivered by crane. Bill Saites, who wore a cloth cap and no hard hat, was directly under the load (Tr. 855). As he viewed the videotape, Signorile counted four employees without head protection. He showed Bill the video, and Bill identified the employees as Avcon employees. In response to Signorile's question regarding his lack of head protection, Bill said "don't worry about my head, worry about yours."(Tr. 855-56). Signorile noted that if the sling carrying the materials gave way, Bill

and the employees would likely suffer serious injuries because they were right under the loads (Tr. 857, 1100-02; Ex. C-101).

> **Instance (d):** Eighth Floor, East Side Area: Employees framing the floor were not wearing head protection while loads of steel and wood were being unloaded from a crane, on or about 11/24/97.

On November 24, 1997, Signorile observed on video tape loads of steel rebar, wood posts, and plywood were being delivered by crane to the center of the eighth floor. Four (4) employees were framing that floor and unloading the material. These employees were exposed to the loads, which swung over their heads as they were lowered onto the floor. One of the exposed employees was the carpenter foreman, Dominic Paniscotti (Tr. 857-59,1103-05; Ex. 101). Foremen identified the other employees as Avcon employees (Tr. 872)

> **Instance (e):** Tenth Floor, East Side: An employee was not wearing head protection when stripping form work above his head, on about 1/7/98.

Signorile observed on video tape an employee at the edge of the floor not wearing head protection while stripping form work. There was also some stripping activity directly above this employee's head, which created a risk that he would be struck by debris, nails, wood material, hammers, crowbars, or even a sledgehammer (Tr. 870,1107-09; Ex. C-101). Georgiana, the general foreman, was standing beside the employee. Georgiana later identified the employee as an Avcon employee (Tr. 868-69, 1104, 1107; Ex. C-101).

> **Instance (f):** Twelfth Floor, East Side: An employee was not wearing head protection when stripping form work above his

head, on or about 1/7/98.

Signorile observed on video tape two employees stripping the bottom of the 13th floor using sledge hammers or crow bars. The material that was being removed consisted of wood poles and plywood, and some of this material contained nails. One of the employees wore no head protection. Georgiana later identified this individual as an Avcon employee (Tr. 871-72, 1792-94, 1104, Ex. C-101).

With regard to each of the instances just described, I find that the cited standard applies because Respondents were involved in construction. Respondents contend that the Secretary's photographs and video tapes did not show actual overhead exposure in any of the cited instances. (Respondents' Post-Trial Brief, pp.108-113). However, in *Adams Steel Erection, Inc.*, 766 F.2d 804, 12 BNA OSHC 1393, 1398 (3d. Cir., 1985), the court examined the plain language and purpose of this standard. The Third Circuit, relying upon the legislative history of the Act, recognized that "death and disability prevention is the primary intent" of the Act. (citations omitted). The Third Circuit continued: "requiring that the Secretary observe an employee being directly exposed to a hazard, such as falling objects, is regressive; it offers protection too late to prevent injury."The Third Circuit articulated a test that requires proof of an "access to zone of danger,"[39] rather than an "actual exposure" test. Thus, the Secretary need only prove that employees have access to an area of potential danger. *Id.* at 1399.

As noted above, the standard requires hard hats to guard against *possible* impact, including falling objects. I find that in each of the cited instances, the employees were exposed to possible impact or falling objects. For example, certain employees could have been hit by buckets of wet cement. Other employees could have been hit by the crane

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[39] The zone of danger is determined by the hazard presented by the violative condition and is normally that area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent. *Gilles & Cotting, Inc.,* 3 BNA OSHC 2002, 2003 (No. 504, 1976).

bucket, which could have swung into the side of someone's head (Tr. 476-68). Nails and parts of wood could have fallen on employees who were stripping above their heads. Employees who were on the deck while various materials were being moved, such as rebar, could have been hit by these materials. Finally, employees who were charged with unhooking loads could have been hit by a swinging hook. Given these instances of employee exposure to possible impact or falling objects, I find that the Secretary has established violations of the standard. I also find that the Secretary has established that Respondents knew of the violative conditions, because all of the cited instances were obvious and discernible by mere observation. Further, the violations were appropriately classified as serious, given that the injuries which might have resulted from these violations were concussions and severe lacerations (Tr. 874-76).

Willfulness

The Secretary argues that the violations were willful because Respondents knew of the requirements of the standard and were aware of the cited conditions and failed to correct or eliminate employee exposure. The Secretary contends that Bill and Nick were familiar with the regulation, noting that their other companies had been previously cited under the same standards. The previous citations had been settled, and final orders had been entered (Tr. 358, 362-63, 366-69, 372, 375, 378-81, 383-84). Additionally, the Secretary points to the fact that management was not wearing head protection (Tr. 876). This violation continued during the inspection, and persisted despite the fact that a sign had been posted at the entrance of the jobsite indicating that a hard hat was required on the jobsite. Another sign was present at the entrance to the building which was being constructed (Tr. 877-79; Ex. C-86).

The record indicates that Respondents had a company policy which required that hard hats be worn at all times while on the jobsite. Management constantly enforced this rule through oral reprimands, and even fired one employee for violating the rule

(Tr.2240-42, 2950, 3021-22, 3095, 3322-23, 3798, 3815). A supply of hard hats was kept on the job, and sometimes employees were given more than one hat because hard hats were always falling off. Although Bill may have yelled for everyone to put on their hard hats upon OSHA's arrival, the video taped evidence recorded while OSHA was offsite demonstrates that hard hats were routinely used on the jobsite (Tr.1499-50; Ex. C-101). Although I find that Bill's interpretation of what constituted an overhead hazard for employees unloading material from the sling hooks of the crane was erroneous, I also find that his actions did not show an obstinate refusal to comply with the standard or a plain indifference to employee safety (Tr. 4182-83, 4208-13).

My finding is also supported by Nick's testimony, in which he described how materials are landed on the deck and explained how the signal man warns workers that the concrete bucket is coming and that they should get out of the way (Tr. 2132, 2692-96). I note that the foreman observed without a hard hat was engaged in activity similar to that described by Nick (Tr. 1103-04; Ex. C-101). The evidence also indicates that management was constantly monitoring for hard hats which may have fallen off as a result of the employees' frequent bending (Tr. 2948-49, 3102-03, 3094, 3473, 3601, 3683, 3815, 3864).

Based on the video and photographic evidence, and the testimony of Respondents' witnesses, I find that Respondents made a good faith effort to comply with the standard, albeit not entirely effective or complete effort.[40] I therefore find that these violative

[40] Although I do not find that the Secretary has made a showing of willfulness, Commission precedent holds that an employer may defend against an initial showing that its state of mind was one of willfulness by adducing evidence to show that in fact it acted in good faith with respect to the requirements of the standard in issue. *Aviation Constructors Inc.,* 18 BNA OSHC 1917, 1920 (No. 96-0593, 1999). Such evidence may be presented by either (1) the employer establishing that as a factual matter the conditions in its workplace conformed to OSHA requirements, or (2) the employer introducing evidence to show that it took steps or made efforts to comply with those requirements. *Id.* at 1921(citations omitted).

conditions were not caused by plain indifference to, or intentional disregard of, employee safety. Neither were they the result of an obstinate refusal to comply with safety and health requirements. In conclusion, I find that the Secretary has not established by a preponderance of the evidence that the violations were willful.

Penalty

I find that a penalty in the amount of $5,600.00 is appropriate. This penalty is based upon the fact that the maximum penalty for a serious penalty is $7,000.00. I believe that the gravity of this violation reflects that the severity was moderate: injuries requiring hospitalization could be expected; but the probability of an event was low because of the manner in which employees worked, especially given the precautions that were taken as loads were brought up on the deck. This penalty has been adjusted for size. There is no adjustment for history because Respondents had previously been issued similar citations (Tr. 485)[41]. With regard to good faith, none was credited because management was involved in the violations.

Citation 1, Item 1a

29 C.F.R. § 1910.1200(e)(1): Employers shall develop, implement, and maintain at each workplace, a written hazard communication program which at least describes how the criteria specified in paragraphs (f), (g), and (h) of this section for labels and other forms of warning, material safety data sheets, and employee information and training will be met (Construction Reference §1926.59):

[41] Ex. C-35, Ex. C-33, Ex. C-23, Ex. C-22, Ex. C-49, Ex. C-47, Ex. C-44, Ex. C-43, Ex. C-41, Ex. C-31, Ex. C-14, Ex. C-36, Ex. C-12; Tr. 358, 362-63, 366-69, 372-75, 378-81, 383-84.

> Jobsite: Employees were handling hazardous chemicals including, but not limited to, gasoline, oxygen, acetylene and propane. The employer did not have a written hazardous communication program specific to this company, and they did not implement employee training. This violation occurred on or about 10/9/97.

Signorile testified that on his first day of the inspection he asked Nick for their written hazard communication program. Nick did not produce a program until a week or two later (Tr. 917). Signorile evaluated this program and found it was inadequate. The program he was given was under the company name Astro, and it did not have a list of all of the chemicals which Avcon had on site. Oxygen, acetylene, propane, and gasoline were present at the Excelsior Two site, and none of these chemicals were listed in the program which Nick gave him (Tr. 918, 1326-27, 1329-30). It is undisputed that Respondents' employees used gasoline, oxygen and acetylene and propane (Tr. 1329, 2322). Nick's statements concerning the existence of a hazard communication program indicate that through the exercise of reasonable diligence the deficiencies in this program could have been discovered (Tr. 2322-23). I find that the Secretary has met her burden of proof. The Respondents have not produced any evidence to rebut the Secretary's case. (Tr. 2322-23)

Citation 1, Item 1b

29 C.F.R. § 1910.1200(h)(1): Employers shall provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new physical or health hazard the employees have not previously been trained about is introduced into their work area. Information and training may be designed to cover categories of hazards (e.g., flammability, carcinogenicity) or specific chemicals. Chemical-specific information must always be available through

labels and material safety data sheets.

> Jobsite: Employees were handling hazardous chemicals including, but not limited to, gasoline, oxygen, acetylene and propane, and they had not been provided the required information and training, on or about 10/9/97.

Signorile observed employees in the area where oxygen and acetylene cylinders were stored. Based upon his interviews with employees, including an ironworker and a shop steward, he determined that there had been no training for the chemicals. Nick also stated that they had not done any training on-site (Tr. 921, 1329-30, 1344, 1347-48). Nick's statements show that Respondents were aware of this condition (Tr. 1330). I find that the Secretary has met her burden of proof. The Respondents have not produced any evidence to rebut the Secretary's case (Tr. 2322-23).

Classification and Penalty

Items 1a and 1b were grouped and classified as serious because the lack of information in Respondents' program could have resulted in employee exposure to an unsafe condition. First and second degree burns would likely have resulted had there been an explosion involving chemicals (Tr. 919, 921-22). The proposed penalty reflects a low gravity violation. Severity was low because no hospitalization was expected from the expected injuries. There was a lesser probability of the occurrence of an event. The proposed penalty reflects as adjustment for size.[42] In light of these factors, I find that the proposed penalty of $900.00 is appropriate.

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[42] This penalty and all of the remaining penalties reflect a 20% reduction for size and no adjustment for history and good faith based upon the findings previously set forth in this decision. *Supra.*

Citation 1 Item 2

29 C.F.R. § 1926.20(b)(1): Accident prevention responsibilities. It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part.

> Throughout Jobsite: An adequate safety and health program was not initiated and maintained by the employer. This was evidenced by the lack of use of fall arrest and head protection by employees, including management; improperly guarded floor holes; unsecured ladders; improperly stored compressed gases; and poor housekeeping; on or about 10/9/97.

The Secretary determined that Respondents did not have an accident prevention program, noting deficiencies such as the lack of a fall protection program and the lack of hard hats. Management was observed watching employees violate OSHA standards and took no action. Management employees were also observed exposing themselves to fall hazards and not wearing hard hats, which further indicated that there was no program to bring workers into compliance with fall protection standards (Tr. 450-51, 923). Respondents contend that they had a safety program which was provided to and discussed with all foremen. Respondents contend that the shop stewards discussed aspects of the safety program with employees daily, and on a one-to-one basis (Tr. 2327; Ex. C-6)[43].

[43] The record indicates that Nick had been given a copy of a sample safety program by OSHA during a previous inspection. The sample was to show what a program should contain. At that time, it was explained to Nick that the sample was not tailored for any particular type of work, and that he would have to tailor it for his company and its work (Tr. 446-7). During the course of this inspection, this same written sample program, with some modifications, was provided to inspectors. However, the written program did not specify the type of work involved,

"The Commission has held that, under § 1925.20(b)(1), an employer may reasonably be expected to conform its safety program to known duties and that a safety program must include those measures for detecting and correcting hazards which a reasonably prudent employer similarly situated would adopt." *Northwood Stone & Asphalt, Inc.,* 16 OSHC BNA 2097, 2099 (No. 91-3409, 1994), citing *J. A. Jones Constr. Co.,* supra. at 2206. In the present case, the evidence shows that Respondents' program failed to meet these requirements. Respondents' claim that it had an adequate safety program run by knowledgeable supervisory personnel is without merit. The record indicates that Respondents' program was not communicated to employees in a manner which let the employees know what precautions to take when they encountered potentially dangerous situations. General instructions, such as "be safe"or "think safe," fall short of the standard's requirements (Tr. 2946-47, 3118, 3245, 3397-3403, 3446, 3497).

I note that, although the evidence relied on by the Secretary concerns alleged violations of other, specific standards, this does not preclude a citation under § 1926.20(b)(1). *J. A. Jones Constr. Co.*, at 2207-08. The fact that the Secretary has demonstrated that the violations occurred is sufficient to support the citation.

Classification and Penalty

The violation was appropriately classified as serious because injuries ranging from multiple injuries to death could have been expected if an employee fell off a building or was struck in the head. The proposed penalty reflects a high gravity violation. The severity was high because the expected injuries were serious; the probability was great considering all the hazards on site: the lack of fall protection, hazardous materials, compressed gases, and the lack of hard hats (Tr. 925). Given these factors, I find that the

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and it had not been adapted for a company doing shoring, form work, concrete pouring (Tr. 451-52). In fact, the written plan produced had the name Astro on it (Tr. 487)

proposed penalty of $ 3,000.00 is appropriate.

Citation 1 Item 3

29 C.F.R. § 1926.25(a) During the course of construction, alteration, or repairs, form and scrap lumber with protruding nails, and all other debris, shall be kept cleared from work areas, passageways, and stairs, in and around buildings or other structures.

Respondents claim that this standard is inapplicable because the wooden form work was "work in progress." Respondents allege that the cited material was temporarily resting on the floor before it was picked up, de-nailed, and stacked for future use. Respondents direct my attention to Webster's Seventh New Collegiate Dictionary, which defines the term "debris" as "ruins." (Respondents' Post-Trial Brief, p. 114; Tr. 2334-39, 2346-48, 2358).

§ 1926.25(a) is concerned with housekeeping on construction sites, and requires that form and scrap lumber with protruding nails, and other debris, be kept cleared in *work areas,* as well as in walkways. In *Capform, Inc.* 16 BNA OSHC 2040 (No. 91-1613, 1994), citing precedent set forth in *Gallo Mechanical Contractors,* 9 BNA OSHC 1178, 1180 (No.76-4371, 1980), the Commission found that the relevant standard applied to a condition similar to that involved in the present case (In *Capform*, reusable lumber that was lying about was found to be "debris"). In *Gallo* the Commission examined the meaning of "debris," and held that the "[h]azards of tripping and falling, possibly resulting in sprains, fractures, and even concussions, can occur if matter is scattered about working or walking areas. . . . Accordingly, "debris" within the meaning of section 1926.25(a) includes material that is scattered about working or walking areas. *Whether the material has been used in the past or can or will be used in the future is irrelevant." Id.* at 1180 (Emphasis added).

Given these cases, I find that Respondents' wooden form work can be considered

"debris" within the meaning of § 1926.25(a). I also find that Respondents violated § 1926.25(a) by failing to clear wooden form work from the Excelsior Two site. My findings are supported by photographic evidence and the compliance officer's testimony, both of which indicate that wood was scattered about areas in which employees worked or walked, exposing these employees to the hazards of tripping and falling. I note that Respondents do not deny knowledge of the cited conditions, which were readily apparent during inspections of the jobsite.

Next, I will specifically address each of the instances in which Respondents were found to have violated § 1926.25(a).

> **Instance (a)** Ground Level and Second Floor: Wood debris was scattered on the floor and walkways creating a tripping hazard, on or about 10/9/97.

Signorile testified that he observed plywood, wood post plywood with nails, and aluminum posts at the ground level. These items were in the vicinity of a ladder just outside the general contractor's trailer, a ladder which the employees used to go to the second floor. On the second floor, a stripping floor, there was similar debris scattered throughout areas where employees were walking and working. There was no clear walkway or work area on that floor (Tr. 926-27, 929, 931; Ex. C-55: ground level - ladder was a few feet away from the right side of the photo).

> **Instance (b)** Third Floor, North/East Area: Wood debris was scattered over the floor and walkways creating a tripping hazard, on or about 10/21/97.

Signorile observed debris, wood debris, poles, and plywood in the walkway and work areas of the third floor. One employee was observed cutting forms for the building, and there was debris - numerous small pieces - in the area where he was working. Another employee was observed walking in this area. The shop steward and foreman identified the employees as Avcon employees (Tr. 933-36, 1399; Ex. C-56 and C-57). Two other employees were observed working in an area full of debris, in this case wood posts and plywood. The shop steward identified them as Avcon employees (Tr. 936, 1400; Ex. C-57).

Instance (c) Eighth Floor, West Area by elevator shaft: Wood debris was scattered over the floor and walkways creating a tripping hazard, on or about 12/8/97.

Signorile and Peist testified that in the area by the elevator shaft they saw wooden debris - wood material, wood, posters, plywood, and nails and poles - scattered over the floor and walkways, creating a tripping hazard (Tr. 453, 939; 1073 1409; Ex. C-101). They observed employees stripping some areas, and some employees were using ladders in the elevator shaft to go to the floor above. There was no walkway clear of debris, and employees had to climb over the debris (Tr. 453). Further, there was no other stairway or ladder way through which employees had access to this floor (Tr. 454). Bill Saites was observed walking over the debris, wood posts, and plywood when he came over to speak to the compliance officers. Bill identified the employees working in the eighth floor, west area as Avcon employees (Tr. 940, 1075-76; Ex. C-101).

Instance (d): Thirteenth Floor, East Area: Wood debris was scattered all

over the floor creating a tripping hazard, on or about 1/7/98.

Lorraine Cianfrone, an Avcon carpenter, was observed covering holes on the thirteenth floor on January 7, 1998. Wooden debris was scattered over the floor where she was working, creating a tripping hazard (Tr. 942-43, 1410-12, 1428; Ex. C-73).

Classification and Penalty

The citation was classified as serious because the employees had to step over debris, and could have tripped and fallen. Because the form work contained protruding nails, the employees could have suffered cuts, bruises, or lacerations. (Tr. 930, 938, 941, 943). The penalty for these items was grouped. The gravity of the violation was low. The severity was low because the injuries would not have required hospitalization, and the probability of an incident was lesser (Tr. 932). In light of these factors, I find that the proposed penalty of $900.00 is appropriate.

Citation 1 Item 4

29 C.F.R. § 1926.28(a): The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees.

12th Floor, East Side Area: Two employees were not wearing eye protection as required by 29 C.F.R. § 1926.102(a) while stripping floors, on or about 1/7/98.

Two employees were observed on video stripping the twelfth floor ceiling on January 7, 1998. The employees were using a sledgehammer or crowbar to bring down debris, wood, posts, and nails. They wore no eye protection, and thus were at risk for debris falling into their eyes (Tr. 944, 1077-78; Ex. C-101). Assistant Area Director Peist testified that eye protection was required because there was a "possibility of material entering the eye" (Tr. 486).

Respondents contend that their safety program did not require eye protection for this type of operation, and that in their industry goggles are not required for stripping. Additionally, they contend that because the stripping bar was more than four feet long and the wood being stripped was at least four feet away from the employee, there was a safe distance between the employee and the falling debris (Tr. 2374-81; Ex. C-6).

Under § 1926.28(a), the Secretary has the burden of showing that a hazardous condition was present and that another standard put the employer on notice that personal protective equipment would reduce the risk to employees. *L.E. Myers Co., High Voltage Sys. Div.,* 12 BNA OSHC 1609, 1619, (No. 82-1137, 1986), *aff'd in relevant part*, 818 F. 2d 1270, 1275 [13 BNA OSHC 1289], *cert. denied,* 484 U.S. 989 [13 BNA OSHC 1531](1987). At issue here is whether the Secretary has established that Respondents' employees were exposed to a hazardous condition because they did not wear safety goggles when they stripped materials from overhead. In determining whether Respondents should have been aware of the existence of a hazard requiring it to use protective equipment, Commission precedent requires us to look at the "well-established principle that a broad regulation must be interpreted in light of the conduct to which it is being applied, and external, objective criteria, including the knowledge and perceptions of a reasonable person, may be used to give meaning to such a regulation in a particular situation (citations omitted). The Secretary must show more than the mere possibility of or a potential for injury, but a 'significant risk of harm.' (citation omitted). Significant

risk may be shown by evidence of injury rates, expert and lay opinion testimony, evidence of industry custom and practice (citation omitted)." *Andrew Catapano Enterprises, Inc.,* 17 BNA OSHC 1776, 1782 (No. 90-0050, et al, 1996).[44]

I find that the Secretary has not shown what a reasonable person familiar with industry practices would have done in this situation, and that she has not met her burden of proving that Respondents' employees were exposed to "significant risk of harm." I specifically find that Peist's testimony regarding the need for eye protection does not, in itself, meet this burden of proof. In addition, my review of the video of this condition does not persuade me that the Secretary has met her burden of proof. Accordingly, this item is vacated.

Citation 1 Item 5

29 C.F.R. § 1926.153(j) Storage of LPG containers. Storage of LPG (liquefied petroleum gas) within buildings is prohibited.

> Eleventh Floor, Center/East Side: Ten containers of liquefied petroleum gas (LPG) were stored inside the building, on or about 1/7/98.

Signorile testified that the LPG containers were in the center and east areas of the 11th floor. The containers were not in use when he observed them, but they had been used. (Tr. 948). Signorile learned that there was LPG in the containers from Bill. Bill indicated that they had used the containers a couple of weeks earlier, when they had poured the concrete, because it was cold and they needed to use the propane to dry the floor after the concrete had been poured. The containers were there in case they had to

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[44] The Third Circuit recognized that with regard to the "reasonable person test," while industry custom and practice are relevant, the ultimate inquiry is whether a reasonable person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts unique to a particular industry, would recognize a hazard warranting the use of personal protective equipment. *Voegle Company,* 625 F.2d 1075 (3rd Cir., 1980)[8 BNA OSHC 1631].

use them again (Tr. 949). Signorile observed a few employees in the area cleaning the floor. These employees were five to six feet toward the west side of the building (Tr. 949).

The cited standard prohibits LPG cylinders within "buildings." The term "buildings" is not defined within the standard. Thus, the plain meaning of the term within the standard must be examined. Merriam-Webster's Online Collegiate Dictionary (2000) defines the term "building" as "a usually roofed and walled structure built for permanent use (as for a dwelling)." I find that, given this definition, the cited standard is inapplicable to the cited structure, which contained no walls or roof at the time the alleged violation was observed. The unrefuted evidence establishes that there were only floors and columns present (Tr. 2382). Accordingly, this item is vacated.

Citation 1 Item 7

29 C.F.R. § 1926.350(a)(10): Oxygen cylinders in storage shall be separated from fuel-gas cylinders or combustible materials (especially oil or grease), a minimum distance of 20 feet (6.1 m) or by a noncombustible barrier at least 5 feet (1.5 m) high having a fire-resistance rating of at least one-half hour.

> Parking Lot: Nine oxygen and three acetylene cylinders were stored together, on or about 10/9/97.

During his walkaround with Nick and Manino of Tenwood on the first day, Signorile came across oxygen and acetylene cylinders that were stored together in a parking lot. There was neither a noncombustible barrier nor a minimum distance of twenty feet between the oxygen cylinders and the acetylene cylinders. Signorile testified that one of the cylinders appeared to have been used, possibly that same day. The cylinders had gas in them(Tr. 965-68).

OSHA has determined that § 1926.350(a)(10) applies when cylinders are "in

storage," i.e., when it is reasonably anticipated that gas will not be drawn from the cylinder within the next twenty-four hours. Whether it is reasonably anticipated that gas will be drawn within that time frame depends on whether specific welding or cutting work is planned for that period and the number of gas cylinders expected to be required to do that work. *(See OSHA Standards Interpretation and Compliance Letter*, dated December 31, 1998, titled "Definition of 'in storage' and clarification of the requirements for intermittent use of gas cylinders.") Although an agency's interpretation of its own regulation is entitled to substantial deference so long as it is reasonable, *Martin v. OSHRC (CFI Steel Corp.)* 499 U.S. 144 [14 OSHC BNA 2097] (1991), in this case the Secretary has not produced any evidence regarding Respondents' intended use of the cylinders within the relevant twenty-four hour period. I therefore find that the Secretary has not met her burden of proof, and vacate the citation.

Citation 1 Item 8a

29 C.F.R. § 1926.451(b)(1): Each platform on all working levels of scaffolds shall be fully planked or decked between the front uprights and the guardrail supports as follows:
(i) Each platform unit (e.g., scaffold plank, fabricated plank, fabricated deck, or fabricated platform) shall be installed so that the space between adjacent units and the space between the platform and the uprights is no more than 1 inch (2.5 cm) wide, except where the employer can demonstrate that a wider space is necessary (for example, to fit around uprights when side brackets are used to extend the width of the platform).
(ii) Where the employer makes the demonstration provided for in paragraph (b)(1)(I) of this section, the platform shall be planked or decked as fully as possible and the remaining open space between the platform and the uprights shall not exceed 9 ½ inches (24.1 cm).

> Second Floor, Elevator Shaft: An employee was working from a scaffold platform, approximately six feet and five inches high, that was not fully

planked, on or about 10/9/97.

Signorile testified that on October 9, 1997 he observed an employee in the elevator shaft standing on a platform that was not fully planked. There were two brackets mounted on the form wall that the employee was building, and on these two brackets was the one plank on which the employee was working. There was a twenty inch space between the front of the plank and the wall that was being formed. The plank was six feet and three-quarters of an inch above the plywood (which acted as a floor) that was covering the elevator shaft. The platform should have been extended with another plank back to the wall. Signorile interviewed the employee, who said that he worked for Avcon (Tr. 971-972).

The cited standard is applicable.[45] It is undisputed that the platform was not fully planked and that the employee was exposed to fall created by the twenty inch opening. This condition was in plain view, and with the exercise of reasonable diligence Respondents could have known of the violative condition. The Secretary has proven this violation by a preponderance of the evidence.

Citation 1 Item 8b

29 C.F.R. § 1926.451(e)(1): When scaffold platforms are more than 2 feet (0.6 m) above or below a point of access, portable ladders, hook-on ladders, attachable ladders, stair towers (scaffold stairways/towers), stairway-type ladders (such as ladder stands), ramps, walkways, integral prefabricated scaffold access, or direct access from another scaffold, structure, personnel hoist, or similar surface shall be used. Cross braces shall not be used as a means of access.

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[45] § 1926.450 *Scope and application:* (b) *Definitions*: *Platform* means a work surface elevated above lower levels. Platforms can be constructed using individual wood planks, fabricated planks, fabricated decks, and fabricated platforms. *Scaffold* means any temporary elevated platform (supported or suspended) and its supporting structure (including points of anchorage), used for supporting employees or materials or both.

Second Floor, Elevator Shaft: A ladder or its equivalent was not provided for employee access to the scaffold platform, on or about 10/9/97.

This violation pertains to the same scaffold which was the subject of item 8a. Signorile testified that there were one-half inch wide steel flanges attached to the wall which the employee was using like steps to get onto the single planked platform on which he was working (Tr. 974). There was no other means of access to the scaffold platform, and the employee could have slipped because there was not enough footing to hold him (Tr. 975). This condition was obvious, and with the exercise of reasonable diligence Respondents could have known of it. The Secretary has proven this violation by a preponderance of the evidence.

Classification and Penalty

These items were appropriately classified as serious because an employee could have fallen into the space between the wall and the plank on which he was standing. Such an accident would have resulted in serious physical harm. The penalty reflected a low gravity violation. The severity was low because the expected injuries were lacerations and cuts requiring no hospitalization; the probability was lesser because the unlikely possibility of a fall (Tr. 973, 976). Given these factors, I find that the proposed penalty of $900.00 is appropriate.

Citation 1 Item 10

29 C.F.R. § 1926.501(b)(4)(I): Each employee on walking/working surfaces shall be protected from falling through holes (including skylights) more than 6 feet (1.8 m) above lower levels, by personal fall arrest systems, covers, or guardrail systems erected around such holes.

I find that, with respect to each of the cited instances, Avcon employees were exposed to a fall of six feet or more. These conditions were obvious, and with the exercise of reasonable diligence Respondents could have known of the violative

conditions.

Instance (a) Second Floor, Ladder Way: Employees were using ladders that were adjacent to a floor hole that was not properly guarded, on or about 10/29/97.

Signorile testified that Avcon employees, and other employees, were using the ladder in the second floor ladder way which was adjacent to a floor hole that was not properly guarded. Employees could have fallen through this hole while ascending or descending the ladder. The fall distance from landing to landing was about nine feet. This was the only way to access the upper floors. Ex. C-69 depicts Bill Saites coming down the ladder way from the third floor to the second floor. The floor hole opening is on the right side of the photo (Tr.1049-50). Signorile had advised Bill numerous times to cover part of the floor hole opening, or put a standard railing around the opening (Tr. 1051).

Instance (b): Seventh Floor, Elevator Shaft: The open sides of an elevator shaft were not properly guarded, on or about 11/24/97.

Signorile observed this condition while viewing the video. On the seventh floor, the open sides of the elevator shaft were not protected in any manner. Employees used the ladder in the shaft to reach the seventh floor. Signorile also observed on video an employee at the edge of the elevator shaft. Bill later identified the employee as an Avcon employee (Tr. 1053). The elevator shaft was approximately twenty feet long and ten feet wide. There was a nine foot drop from the seventh floor to the lower level (Tr. 1054,1091-92; Ex. C-101).

Instance (c): Eighth Floor, East Side; Employees constructing the eighth

floor deck were not protected from falling through six uncovered floor holes, on or about 11/24/97.

Signorile observed this condition while viewing the video. Employees were framing the eighth floor, and they were walking past openings which measured two feet by two feet. There was a nine foot drop to the floor below (Tr. 1054-55, 1092-93; Ex. C-101). Dominic Paniscotti, the carpenter foreman, was also working on this floor. Bill Saites was on the seventh floor, in plain view of all workers.

Instance (d): Tenth through Fourteenth Floors: Ladder ways had holes that were not properly guarded, on or about 1/7/98.

Signorile testified that the ladder ways had floor hole openings that were not properly guarded. Employees used these ladders to get to and from the floor on which they worked. There was no other access route to these floors. Employees could have fallen through the floor hole openings (Tr. 1055-58; Ex. C-70- floor opening of the ladder way on the tenth floor, Ex. C-71- floor opening of the ladder way on the thirteenth floor).

Classification and Penalty

These violations were properly classified as serious because employees could have fallen through the openings and suffered fractures and lacerations. The gravity of the violation was high. The severity was high because injuries resulting in fractures and lacerations were expected from such falls. The probability for falls was greater due to the fact that these ladder ways were the only means of moving from floor to floor (Tr.1052, 1054, 1055 1058). For these reasons, I find that the proposed penalty of $3,000.00 is appropriate.

Citation 1 Item 11

29 C.F.R. § 1926.502(I)(3): All covers shall be secured when installed so as to prevent

accidental displacement by the wind, equipment, or employees.

Second Floor, Elevator Shaft: Plywood covers for the elevator floor openings were not secured, on or about 10/9/97.

Signorile testified that the employee who was at the elevator shaft on the scaffolding (Items 8a and 8b above) was working over a piece of plywood laid over timbers. The plywood was eight feet long by four feet wide, and it was not secure. When Signorile brought this condition to Nick's attention, he had the Avcon employees nail down the plywood. Signorile believed that if the employee had fallen off of the single plank that he was standing on, the plywood would have opened up and the employee would have fallen through (Tr. 1058-59). However, Respondent presented unrebutted testimony that the plank was on top of four by fours which spanned the shaft (Tr. 2448). Respondent also presented unrebutted testimony that the plywood had been secured by nails, and that Avcon employees inserted additional nails only because Signorile did not believe that the plywood was secure enough. I find that the record does not contain evidence sufficient to meet the Secretary's burden of proof (Tr. 1058-59, 1721-23, 2446-47). I specifically find that the evidence does not support Signorile's conclusion that the plywood plank was not adequately secured. Accordingly, this item is vacated.

Citation 1 Item 12

29 C.F.R. § 1926.701(b): All protruding reinforcing steel, onto and into which employees could fall, shall be guarded to eliminate the hazard of impalement.

Instance (a): Column 28: Employees were exposed to falling onto vertical protruding rebars while going up or down a wood ladder from the first to the second floor, on or about 10/9/97.

Signorile testified that on his first day of inspection he noticed that employees were exposed to falls onto vertical protruding rebars when going up or down a wooden ladder from the first to the second floor (Tr. 1060). On that day, the ladder was the only way to move between floors. The protruding rebars were about thirty inches high and about three feet from the bottom of the ladder (Tr. 1061-62; Ex. C-55). The Review Commission has held that, "[a]ccess to unguarded rebars exists if there is a 'reasonable predictability' that employees 'will be, are, or have been in' the 'zone of danger.'" *Kokosing Construction Co., Inc.,* 17 BNA OSHC 1869, 1870 (No. 92-2596, 1996), citing *Capform, Inc.* 16 BNA OSHC 2020, 2041 (No. 91-1613, 1994). I find that the photographs and testimony adequately establish that employees had access to the danger of unguarded rebars. The conspicuous location of the unguarded rebars warrants a finding that Respondents had constructive knowledge of their presence. Respondents could have ascertained the existence of the cited condition through the exercise of reasonable care.

Instance (b): Seventh Floor, West Area: Two employees hammering excess concrete were exposed to protruding rebars, on or about 11/24/97.

Two employees were observed on video hammering excess concrete on the seventh floor, with protruding rebars right in front of them. The two employees were walking, kneeling down, and leaning over the rebars to remove the excess concrete. Bill identified the employees as Avcon employees. They were exposed to the hazard of impalement, which could have resulted had they fallen on top of the rebars (Tr.1064, 1097-99; Ex. C-101). The record establishes employee access to the unguarded rebars. The fact that the rebars were conspicuously located and readily observable warrants a finding that Respondents had constructive knowledge of their presence. Respondents could have ascertained the existence of the cited condition through the exercise of reasonable care.

Classification and Penalty

The citation was classified as serious because employees could have fallen on top of the steel rebars and been impaled, resulting in death or multiple injuries. The penalty proposed for these grouped items reveals that the gravity was medium. The severity was high because of the nature of the expected injuries: death or hospitalization for multiple injuries. The probability was lesser because it was not likely that an employee would have fallen (Tr. 1062, 1064). For these reasons, I find that the proposed penalty of $1,500.00 is appropriate.

Citation 1 Item 13

29 C.F.R. § 1926.1052(c)(12): Unprotected sides and edges of stairway landings shall be provided with guardrail systems. Guardrail system criteria are contained in subpart M of this part.

> Ground Level, Inside Building, stairs leading from the upper level to the lower level of the parking lot: One open side of the stairs was not provided with a guardrail, on or about 10/9/97.

Signorile testified that while he was talking to Frank Cataliato, he observed an employee, who Cataliato identified as Avcon's crane operator, use these stairs. One side of the stairs was open. It is undisputed that the stairs did not have a guard rail and that, as a result, employees were exposed to a fall hazard on that side. Cataliato told Signorile that employees used the stairs to go to the parking lot (Tr. 1065, 1741 2454-55). The conspicuous nature of the violative condition, along with Cataliato's statement, establishes employer knowledge. I find that the Secretary has met her burden of establishing the violation.

I also find that the violation was serious. If an employee fell from the open side of the stairs, he would have fallen nine to ten feet and most likely would have sustained

multiple injuries. The penalty for the violation reflects the fact that the hazard severity was medium, because hospitalization would be expected from such a fall. The probability was lesser because it was not likely such a fall would occur (Tr. 1066). Considering these factors and the remaining statutory criteria, I find that the proposed penalty of $1,200.00 is appropriate.

Citation 1 Item 14

29 C.F.R. § 1926.1053(b)(1): When portable ladders are used for access to an upper landing surface, the ladder side rails shall extend at least 3 feet (.9 m) above the upper landing surface to which the ladder is used to gain access; or, when such an extension is not possible because of the ladder's length, then the ladder shall be secured at its top to a rigid support that will not deflect, and a grasping device, such as a grabrail, shall be provided to assist employees in mounting and dismounting the ladder. In no case shall the extension be such that ladder deflection under a load would, by itself, cause the ladder to slip off its support.

This standard requires that siderails of portable ladders extend at least three feet above the upper level or surface to which the ladder is used to gain access. The requirement further provides an alternative to extending the ladder in this matter by stating that when such extensions are not possible because of the ladder length, the ladder shall be secured at the top to a rigid, nondeflecting support, and employees shall be provided with a grasping device such as a grabrail.

> **Instance (a):** Ground Level, West Side: Two wood ladders, were not secured, on or about 10/09/97.

Signorile testified that the ladder was not secured because it did not extend three feet above the landing area where one would step off onto the second floor. The ladder was on the west side of the job, and Signorile observed Avcon employees using this

ladder (Tr. 1067, 1743). The employees could have fallen while descending the ladder, or the ladder could have moved. The conspicuous location and the readily observable nature of the violative condition warrant a finding of constructive knowledge. Respondents could have ascertained the existence of the cited condition through the exercise of reasonable care. The Secretary has met her burden of proof in this instance.

> **Instance (b)**: Second Floor, Elevator Shaft: One wood ladder was not secured, on or about 10/09/97.

Signorile testified that this ladder extended from inside the elevator shaft to the third floor, where employees were framing the floor (Tr. 1069, 1745). He testified that the side rails extended three feet above the landing, and that ladder was not secured (Tr. 1070-71). Nick testified that the ladder was nailed at the top to some form work, but added that Signorile did not believe it was secure enough and wanted strapping placed around it (Tr. 2456).[46] My review of the record reveals that the cited ladder met the requirements of the standard. The standard provides that where a three foot extension is not possible, the ladder can be secured at its top to a rigid support that will not deflect. See 55 FR 47660, 47677 (1990). Thus, this instance is vacated.

Classification and Penalty

Instance (a) was appropriately classified as serious. The ladder's condition could have caused an employee to lose his or her balance. Also, the unsecured ladder could have swayed. There was debris underneath the ladder, and if an employee fell he or she would have fallen onto the debris and received multiple injuries. (Tr. 1068) The penalty

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[46] Lorraine Cianfrone testified that her job tasks included securing the ladders (Tr. 3670). She testified she used several means to secure the ladders. One method involved the use of wire and secured them with cut nails into the lumber. Another method involved securing the ladders on top with cut nails and putting a piece of five-quarter wood on the bottom so the ladders would stay steady (Tr. 3671).

of the violation reflects that the severity of the violation was medium, because hospitalization would have been expected from such a fall, and the probability lesser, because it was not likely such a fall would occur (Tr. 1069). In light of these factors and the remaining statutory criteria, I find that the proposed penalty of $1,200.00 is appropriate.

Docket No. 98-1168, Inspection No. 301950952

Citation 1 Item 1

29 C.F.R. § 1926.350(a)(9): Compressed gas cylinders shall be secured in an upright position at all times except, if necessary, for short periods of time while cylinders are actually being hoisted or carried.

Rear of the building: the five oxygen cylinders and two acetylene fuel gas cylinders which were stored together were not secured to prevent displacement, on or about 5/12/98.

Compliance Officer Donnelly testified that the five gas cylinders and two acetylene cylinders were stored together and not secured. In this condition, the cylinders could have been knocked over, causing the valve stem to break. If this happened, the cylinders could have exploded or been propelled forth "like a torpedo" (Tr. 1905-06; Ex. C-89). The cylinders were in the center of the yard area, in the vicinity of the trailer which was used to change in and store tools. The jobsite toilet was also in the area. There were also rebars stored behind the cylinders. Donnelly observed approximately nine employees walking back and forth to the trailer, using the toilet, and retrieving steel from behind the cylinders. There were also employees working in a nearby excavation site (Tr. 1907-09; Ex. C-89). Nick was working within a few feet of the unsecured cylinders. The conspicuous location and readily observable nature of the violative condition warrant a finding of constructive knowledge. Respondents could have ascertained the existence of the cited condition

through the exercise of reasonable care.

Respondent does not dispute the applicability of the standard, nor the identification of the cylinders. It is Respondents' position that the cylinders were awaiting pick up and were secured with a wire. Respondents argue that the compliance officer was never observed measuring the contents of the cylinders (Tr. 2465-66; Respondents' Post Trial Brief, pp. 138-39). However, on rebuttal the Secretary presented an enlarged photo of Ex. C-89, which did not depict any wire (Tr. 4415, Ex. C-107). Additionally, Donnelly testified on rebuttal that during the inspection he moved a couple of the cylinders and saw nothing securing them. He also looked at the gas gauge to determine that gas was in the cylinders (Tr. 4419). In light of this photographic evidence and testimony, I find that the Secretary has met her burden of proof.

This violation was appropriately classified as serious because employees could have incurred injuries such as fractures and minor burns if the cylinders exploded or were propelled forth. The penalty reflects that the gravity of the violation was low. The severity of the violation was low because hospitalization would not be expected as a result of any injuries; and the probability was lesser because it was unlikely that the cylinders would have been knocked over (Tr. 1912). Given these factors and the remaining statutory criteria, I find that the proposed penalty of $900.00 is appropriate (Tr. 1913).[47]

Citation 1 Item 2

29 C.F.R. § 1926.350(a)(10): Oxygen cylinders in storage shall be separated from fuel-gas cylinders or combustible materials (especially oil or grease), a minimum distance of 20 feet (6.1 m) or by a noncombustible barrier at least 5 feet (1.5 m) high having a fire-resistance rating of at least one-half hour.

[47] The basis for the penalty adjustments for size, history, and good faith are set forth in Docket No. 98-0755.

Rear of building: five oxygen cylinders and two acetylene fuel gas cylinders were stored together, on or about 5/12/98.

Donnelly testified that this violation referred to the cylinders described in item 1. Nick testified that these cylinders were not stored because they were awaiting pick up (Tr. 2467). Although the Respondents do not state at what time the pick up was to occur, I find that the Secretary has not produced any evidence with regard to the intended use of these cylinders within the following twenty-four hour period. Thus, the Secretary has not proven the applicability of this standard. I therefore vacate the citation.

Citation 1 Item 3

29 C.F.R. § 1926.652(a)(1): Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section except when:

(I) Excavations are made entirely in stable rock; or

(ii) Excavations are less than 5 feet (1.52 m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

Rear of Building, Excavations C18-21: The employees working in the excavations were not protected from the hazard of a cave-in by the use of shoring, sloping, or other protective systems, on or about 5/12/98.

It is undisputed that two Avcon employees were working in an excavation tying steel bands to the rebar. The excavation was more than eleven feet deep, without any protective system in use . To the right of the excavation was a bulldozer, and to the left was an excavator (Tr. 1919-20, 1922-23, 1937-38, 1940; Ex. C-89A, C-89B, C-89C). Both Nick and Georgiana were in the immediate vicinity of the excavation (Tr. 1940-41).

Donnelly, after talking to the excavator operator and determining where the soil from the excavation had been taken, took a soil sample from the spoil pile (Tr. 1930, 1962-63). The soil analysis showed that the excavation contained Type C soil, the least stable classified soil. This type of soil requires a slope of thirty four degrees (Tr. 1607-08, 1614; Ex. C-92). Although respondents attempted to show that the soil sample was not representative, the excavation itself contained fill material which constituted, at best, Type B soil. According to the Secretary's expert, Dr. Peck, this type soil would still require a protective system. *Id.* Dr. Peck also testified that the presence of water in the excavation and the evidence of truck traffic near the excavation would have an adverse effect on the stability of the soil (Tr. 1619, 1646-47).

Given the fact that the excavation was conspicuous and readily observable, and the fact that supervisory personnel were in its vicinity, I find that Respondents had knowledge of the violative condition. Respondents could have ascertained the existence of the cited condition through the exercise of reasonable care.

The violation was appropriately classified as serious because the employees were exposed to a cave-in hazard which could have resulted in fatal injuries (Tr. 1946). The penalty relects a high gravity violation. The severity was high because of the types of injuries expected from a cave-in; and the probability was greater because of the presence of the heavy equipment which subjected the area to vibrations affecting the stability of the trench (Tr. 1946). Given these factors, I find that the proposed penalty of $3,000.00 is appropriate (Tr. 1947-48).

Citation 1 Item 4

29 C.F.R. § 1926.1052(c)(1): Stairways having four or more risers or rising more than 30 inches (76 cm), whichever is less, shall be equipped with:

(I) At least one handrail; and

(ii) One stairrail system along each unprotected side or edge.

First floor to the roof: Throughout the building stairrails and/or handrails were not provided to protect employees from a fall hazard while working on or walking on the stairs, on or about 4/28, 4/29, and 5/1/98.

During the course of his inspection, which began on April 18, 1998, Donnelly observed two Avcon employees working on the stairways of the eighteenth floor. These employees were flash patching the walls where there were no stairrails. The employees were also using the stairs to exit the building. Generally, there was one handrail on the descending side (right hand side) of the stairs and no handrail on the other side. Donnelly also observed an Avcon employee using the unprotected stairway from the second to the third floor (Tr. 1949, 1953-57, 4419-20, Ex. C-90, C-90a). This condition exposed the employee to a fall hazard, and would have exposed other employees to the same hazard when they bent down to flash patch or walked up and down the landings or stairways (Tr. 1952; 1955-56). Falls on the upper floors would have been five feet because there was a landing in the middle. On the first and second floors, which were not typical floors (they were mezzanine and lobby areas), the fall would have been fifteen feet. (Tr. 1950-51) The fact that the stairways were conspicuously located and readily observable warrants a finding of knowledge. Respondents could have ascertained the existence of the cited condition through the exercise of reasonable care. The Secretary has met her burden of proof.

The violation was appropriately classified as serious because fractures would be expected if someone had fallen. The penalty reflects that the severity was medium because injuries resulting in some hospitalization would be expected; and the probability was lesser (Tr. 1959). In light these factors and the remaining statutory criteria, I find that the proposed penalty of $1,200.00 is appropriate. (Tr. 1959)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. (See Rule 52(a) of the Federal Rules of Civil Procedure.)

Order

Docket No. 98-0755

1. Citation 1, Items 1(a) and 1(b) alleging violations of 29 C.F.R. § 1910.1200(e)(1) and 29 C.F.R. § 1910.1200(h)(1) are Affirmed as Serious violations with a penalty of $900.00.

2. Citation 1, Item 2 alleging a violation of 29 C.F.R. § 1926. 20(b)(1) is Affirmed as a Serious violation with a penalty of $3,000.00.

3. Citation 1, Item 3 alleging a violation of 29 C.F.R. § 1926.25(a) is Affirmed as a Serious violation with a penalty of $900.00.

4. Citation 1, Item 4 is Vacated.

5. Citation 1, Item 5 is Vacated.

6. Citation 1, Item 6 has been Withdrawn by the Secretary.

7. Citation 1, Item 7 is Vacated.

8. Citation 1, Items 8 (a) and 8(b) alleging violations of 29 C.F.R. § 1926.451(b)(1) and 29 C.F.R. § 1926.451(e)(1) are Affirmed as Serious violations with a penalty of $900.00.

9. Citation 1, Item 9 alleging a violation of 29 C.F.R. § 1926.501(b)(1), instances (a) thru(d) and (f) thru (q) are Affirmed as Serious violations with a penalty of $3,000.00. Instance(d) is Vacated.

10. Citation 1, Item 10 alleging a violation of 29 C.F.R. § 1926.501(b)(4)(I) is Affirmed as a Serious violation with a penalty of $3,000.00

11. Citation 1, Item 11 is Vacated.

12. Citation 1, Item 12 29 C.F.R. § 1926.701(b) is Affirmed as a Serious violation with a penalty of $1,500.00

13. Citation 1, Item 13 alleging a violation of 29 C.F.R. § 1926.501(b)(4)(I) is Affirmed as a Serious violation with a penalty of $1,200.00.

14. Citation 1, Item 14, Instance (a), alleging a violation of 29 C.F.R. § 1926.1053(b)(1), is Affirmed as a Serious violation with a penalty of $1,200.00. Citation 1, Item 14, Instance (b) is Vacated.

15. Citation 2, Item 1 alleging a violation of 29 C.F.R. § 1926.100(a) is Affirmed as a Serious violation with a penalty of $5,600.00.

16. Citation 2, Items 2(a), 2(b), and 2(c) alleging violations of 29 C.F.R. § 1926.501(b)(1) are Affirmed as Willful violation with a penalty of $70,000.00.

Docket No. 98-1168

1. Citation 1, Item 1 alleging a violation of 29 C.F.R. § 1926.350(a)(9) is Affirmed as a Serious violation with a penalty of $900.00.

2. Citation 1, Item 2 is Vacated.

3. Citation 1, Item 3 alleging a violation of 29 C.F.R. § 1926.652(a)(1) is Affirmed as a Serious violation with a penalty of $3,000.00.

4. Citation 1, Item 4 alleging a violation of 29 C.F.R. § 1926.1052(c)(1) is Affirmed as a Serious violation with a penalty of $1,200.00.

/s/
Covette Rooney
Judge, OSHRC

Dated: August 25, 2000
Washington, D.C.