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. ALTOR, INC., and/or AVCON, INC., and/or VASILIOS SAITES, individually, and d/b/a ALTOR, INC., and/or AVCON, INC., and NICHOLAS SAITES, individually, and d/b/a ALTOR, INC., and/or AVCON, INC., Respondents.	OSHRC Docket No. 99-0958

APPEARANCES:

Howard Radzely, Acting Solicitor; Joseph M. Woodward, Associate Solicitor; Kenneth Hellman, Senior Trial Attorney; Jordana W. Wilson, Trial Attorney; U.S. Department of Labor, Washington, DC
For the Complainant

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

DECISION AND ORDER

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

BY THE COMMISSION:

Altor, Inc. ("Altor") and Avcon, Inc. ("Avcon") are New Jersey corporations engaged in the business of poured-in-place concrete construction. Both companies are operated by Vasilios ("Bill") Saites and his son Nicholas ("Nick") Saites. In 1998, Altor contracted to perform concrete construction work for a high-rise residential building located in Edgewater, New Jersey. Altor then subcontracted the crane services and labor for this project to Avcon.

Following an inspection of the Edgewater worksite, the Occupational Safety and Health Administration ("OSHA") issued three citations to Bill Saites and Nick Saites,

individually and doing business as Altor and/or Avcon, alleging willful, serious and other than serious violations of the Occupational Safety and Health Act of 1970 ("Act" or "OSH Act"), 29 U.S.C. §§ 651-678. OSHA proposed a total penalty of $424,000 for the alleged violations. In her complaint, the Secretary amended the citations to also name Altor and Avcon as respondents.

After a hearing, former Administrative Law Judge Robert A. Yetman issued a decision dismissing the Saiteses as individual respondents, rejecting the Secretary's theory that the "corporate veil" should be pierced to reach the Saiteses because, in his view, Altor and Avcon were "lawful and viable" and veil piercing was "premature" in a proceeding before the Commission. He also concluded that Altor and Avcon ("the Companies") together constituted a single employer and affirmed all eight willful citation items, one of which he recharacterized as serious, as well as four of the five serious citation items.[1] He assessed a total penalty of $196,000.

Both parties petitioned for review of the judge's decision, which was granted. On review, Respondents challenge the judge's decision to find the Companies liable as a single employer.[2] In addition, Respondents claim that the judge erred in affirming the

[1] The judge also affirmed the single other than serious citation item. This item is not before us on review.

[2] Respondents contend that the judge erred in rejecting their claim that the Secretary selectively enforced the OSH Act against them and, for the first time on review, allege that the Secretary "was motivated to prosecute them" because of the Saiteses' Greek heritage. *See DeKalb Forge Co.*, 13 BNA OSHC 1146, 1153, 1986-87 CCH OSHD ¶ 27,842, p. 36,451 (No. 83-299, 1987) (emphasizing selective enforcement is judged "by ordinary equal protection standards, under which it must be shown that the alleged selective enforcement had a discriminatory effect and was motivated by a discriminatory purpose" (footnote omitted)); *see also United States v. Torquato*, 602 F.2d 564, 569 n.8 (3d Cir. 1979) (noting that defendant claiming selective prosecution " 'bears the heavy burden' " of proving that claim (citation omitted)). Although Respondents did not raise selective prosecution as an affirmative defense in their Answer, the judge ruled that Respondents could elicit testimony on the defense. Despite this opportunity, Respondents never specified any discriminatory bias as a motivating factor before the judge. As a result, the record is silent as to the Saiteses' national heritage—Respondents only identified it in their brief on review. They now attempt to augment their claim of selective prosecution by asserting that the citations arose from OSHA's intent to harass "only those with a Greek national origin or descendant therefrom." At most, the record establishes that Saites-owned companies have been cited by OSHA on multiple occasions for violations similar to the ones alleged here. And there is nothing in the record to even

willful citation items, including the one he recharacterized as serious.[3] The Secretary claims that the judge erred in recharacterizing that citation item as serious and also challenges the judge's decision to dismiss the Saites as individual respondents.

For the reasons that follow, we dismiss the Saiteses as individual Respondents and affirm the judge's conclusion that the Companies constituted a single employer at the Edgewater worksite. We also affirm all of the citation items before us on review as willful and assess a total penalty of $412,000.[4]

ANALYSIS

I. Veil Piercing

The Secretary asks us to disregard the corporate form of Altor and Avcon, and hold that Bill Saites and Nick Saites are employers under the OSH Act, rendering them personally responsible for the cited violations, including the payment of penalties. In his decision, the judge declined to reach this issue, finding that ruling on it would be premature when no final order assessing a penalty against the Companies had yet been issued. He noted that if the Companies later refused to pay the penalties assessed in any final order, federal district court would be the appropriate forum for the Secretary to seek the remedy of veil piercing. *See* section 17(*l*) of the OSH Act, 29 U.S.C. § 666(j); *H.M.S. Direct Mail Serv., Inc*., 752 F.Supp. 573, 580-81 (W.D.N.Y. 1990).

While the judge is correct that this procedure is available to the Secretary under such circumstances, his decision fails to recognize that the Commission has the statutory

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suggest that the Secretary's decision to cite Respondents for such violations here was not within her discretion. *See DeKalb Forge*, 13 BNA OSHC at 1153, 1986-87 CCH OSHD at p. 36,451 (noting that Secretary's use of her "broad prosecutorial discretion" is not a constitutional violation simply because of "the conscious exercise of some selectivity in enforcement"). Accordingly, we reject the Respondents' claim.

[3] Although Respondents sought review of the judge's decision to affirm Serious Citation 1, Items 1, 2, 4, and 5 and these items were included in our briefing notice, Respondents did not address these items in their briefs to the Commission. Accordingly, we deem these items abandoned and do not consider them on review. *See Don Davis*, 19 BNA OSHC 1477, 1477 n.1, 2001 CCH OSHD ¶ 32,402, p. 48,894 n.1 (No. 96-1378, 2001) (treating party's argument as abandoned where not addressed on review despite Commission's request).

[4] We deny Respondents' motion for oral argument, as the record and briefs are sufficient to decide the case. *MetWest, Inc.*, 22 BNA OSHC 1066, 1067 n.2, 2004-09 CCH OSHD ¶ 32,942, p. 53,776 n.2 (No. 04-0594, 2007), *aff'd*, 560 F.3d 506 (D.C. Cir. 2009).

authority and responsibility to determine initially if a cited party is in fact an employer. Sections 2(b)(3), 17(j) of the OSH Act, 29 U.S.C. §§ 651(b)(3), 666(j); *Sturm Ruger & Co. v. Chao*, 300 F.3d 867, 874 (D.C. Cir. 2002); *see also Eric K. Ho*, 20 BNA OSHC 1361, 1366-69, 2002-04 CCH OSHD ¶ 32,692, pp. 51,577-80 (No. 98-1645, 2002) (consolidated cases), *aff'd*, 401 F.3d 355, 364-66 (5th Cir. 2005). Indeed, the Secretary may seek to pierce the corporate veil to hold an individual responsible as an "employer" not just as a means to collect defaulted penalties, but also to serve as a predicate for future abatement orders as well as repeat characterizations of future violations. Sections 5(a), 9(a), 17 of the OSH Act, 29 U.S.C. §§ 654(a); 658(a), 666. Piercing the corporate veil also enables an individual's complete OSH Act violation history to be taken into account when determining an appropriate penalty. Section 17(j) of the OSH Act; 29 U.S.C. § 666 (j). Thus, the availability of a civil enforcement action through section 17(*l*) is not a substitute for the Commission exercising its statutory authority to determine responsibility under the OSH Act. Sections 2(b)(3), 10 of the OSH Act, 29 U.S.C. §§ 651(b)(3), 659.[5]

In the Third Circuit, where this case arises, piercing the corporate veil requires a showing, by clear and convincing evidence, that a company has not operated as an entity separate from its shareholders and that the situation presents an element of injustice or fundamental unfairness.[6] *United States v. Pisani*, 646 F.2d 83, 88 (3d Cir. 1981); *Tr. of Nat'l Elevator Indus. Pension, Health Benefit and Educ. Funds v. Lutyk*, 332 F.3d 188, 194 (3d Cir. 2003); *Kaplan v. First Options of Chicago, Inc.*, 19 F.3d 1503, 1522 (3d Cir. 1994), *aff'd on other grounds*, 514 U.S. 938 (1995). The corporate entity should be

[5] Just as the availability of a proceeding under section 17(*l*) of the OSH Act does not supplant our responsibility to determine if the Saiteses are employers under the Act, we emphasize that our decision here does not preclude the Secretary from any future attempt to make the necessary showing for veil piercing in a section 17(*l*) proceeding to collect the penalties assessed here.

[6] Altor and Avcon are New Jersey corporations, and the alleged violations occurred in that state. We note that New Jersey and the Third Circuit have delineated similar tests for evaluating the appropriateness of piercing the corporate veil. *Compare Pisani*, 646 F.2d at 88, *with State Dep't of Envt'l Prot. v. Ventron Corp.*, 94 N.J. 473, 501 (Sup. Ct. 1982) (applying two-part veil piercing test examining first whether the dominated corporation has no separate existence, and, if so, whether recognizing the corporate form would perpetuate fraud or injustice, or otherwise circumvent the law).

recognized and upheld unless specific, unusual circumstances call for an exception. *Gardner v. The Calvert*, 253 F.2d 395, 398 (3d Cir. 1958); *Am. Bell Inc. v. Fed'n of Tel. Workers of Pennsylvania*, 736 F.2d 879, 887 (3d Cir. 1984). Indeed, the requirements for corporate veil piercing are demanding ones. *Am. Bell*, 736 F.2d at 886. To determine whether a separate corporate personality no longer exists, the Third Circuit weighs several factors: (1) gross undercapitalization; (2) insolvency; (3) failure to observe corporate formalities; (4) non-payment of dividends; (5) siphoning of funds of the corporation by the dominant stockholder; (6) non-functioning of other officers or directors; (7) absence of corporate records; and (8) corporation acts as a mere facade for the operations of the dominant stockholder or stockholders. *Pisani*, 646 F.2d at 88. Generally, these factors relate either to the handling of corporate finances or to the nature of the corporate structure.

After examining these factors, we find that the Secretary has failed to show in this proceeding that either Bill or Nick Saites was an employer under the OSH Act. With respect to the Third Circuit's factors relating to corporate finances, our inquiry is hampered by the Secretary's failure to put forth or elicit sufficient testimony explaining the various fragments of financial information in the record.[7] *See Erik K. Ho,* 20 BNA OSHC at 1367, 2002-04 CCH OSHD at p. 51,578 (discussing the failure of the Secretary to put forth evidence to allow the Commission to determine if corporate funds were improperly diverted). The record does contain facts that may indeed be pieces of the Secretary's required demonstration. However, without further evidence to fill out and link these facts in a meaningful way, we cannot conclude that the Companies were inadequately capitalized, insolvent, or otherwise manipulated to preclude the payment of corporate obligations. *See Lutyk*, 332 F.2d at 197. For example, the record includes

[7] We share our dissenting colleague's concern about the Respondents' conduct in the discovery phase of the case with respect to their financial and business information. However, we see no basis to address that issue given the Secretary's failure to preserve her objections before either of the judges that were assigned to this matter below. *See* Commission Rule 92, 29 C.F.R. § 2900.92; *MasTec, N. Am., Inc*., 20 BNA OSHC 1900, 2002-04 CCH OSHD ¶ 32,727 (No. 99-0252, 2004) (declining to address issues not directed for review); *Williams Enters., Inc.*, 4 BNA OSHC 1663, 1976-77 CCH OSHD ¶ 21,071 (No. 4533, 1976) (error not preserved is not properly an issue for review). Presumably in recognition of that failure, the Secretary has raised no objections in her briefs on review to any of the rulings made by both judges in addressing this issue below.

some information on the finances of Altor and Avcon, but there is no evidence as to the amount of capital required for a similarly sized company in the same industry as the Respondents. Likewise, the Secretary questions where the profits from the Edgewater project went, but provides no evidence to effectively counter Respondents' explanation that the funds were used for project expenses and legal fees. She argues that the minimal salaries drawn by Bill and Nick Saites show a lack of arm's length negotiations between them and the Companies, but does not explain how the Saiteses abused the corporate form to enrich themselves at the expense of corporate obligations. *See id.* at 195. And even if Avcon had minimal assets at the time of the hearing, the Secretary has not shown that the Saiteses manipulated the Companies' affairs to unfairly insulate themselves personally from corporate financial obligations.[8] *Id.* at 197. Finally, although the record shows that the Companies never paid a dividend, there is no evidence establishing that this inured to the benefit of the Saiteses.[9]

With respect to the Third Circuit's factors relating to corporate structure, the record does show that the Companies did not rigidly adhere to the observation of all corporate formalities. For instance, shareholder meetings were informal and no minutes were kept. Nonetheless, the Secretary does not dispute that the Companies were duly incorporated and remained in existence at the time of the citation.[10] *See* N.J.S.A. § 14A:5-2 (failure to hold stockholder meeting does not dissolve corporation); *cf. Moore v. OSHRC*, 591 F.2d 991, 996 (4th Cir. 1979) (attaching personal liability where

[8] The Secretary points out that, at the time of the hearing, Altor owed Avcon approximately $139,000, but does not explain why this delayed payment weighs in favor of piercing the corporate veil to impose individual liability.

[9] We note that the failure to pay dividends is typically less significant in cases involving closely held corporations like Altor and Avcon. *See Lutyk*, 332 F.3d at 196-98 (with a closely held corporation, the failure to pay dividends by itself is not particularly persuasive.

[10] The Third Circuit has afforded varying weight to a closely held company's failure to observe corporate formalities. *Compare Lutyk*, 332 F.3d at 196 (not a strong factor) and *Zubik v. Zubik*, 384 F.2d 267, 271 n.4 (3d Cir. 1967) (citing Pennsylvania and New York cases holding that the lack of formalities in a closely held corporation has often not been found to be consequential), *with Pisani*, 646 F.2d at 88 (focusing on sole shareholder's failure to maintain a separate corporate identity). The Secretary herself acknowledges on review the diminished importance of corporate formalities with closely held or family corporations.

corporation had been dissolved at the time of violation). In addition, the Companies filed taxes, produced profit and loss statements, and kept payroll and other records. *See Kaplan*, 19 F.3d at 1521-23 ("Not every disregard of corporate formalities or failure to maintain corporate records justifies piercing the corporate veil."); *cf. Pisani*, 646 F.2d at 88 (piercing veil where witness incredibly claimed that all corporate records were stolen). While the Secretary makes much of Nick Saites' admitted desire to limit personal liability as one of the reasons he advised his father to incorporate Avcon, the record is inconclusive regarding whether the Saiteses sought to limit personal liability in conjunction with an effort to render the Companies unable to pay debts. *Lutyk*, 332 F.3d at 195 (organizing a corporation to avoid personal liability, by itself, does not justify piercing the corporate veil).

Finally, we acknowledge that the record establishes a close alignment between the Saites family and the Companies. In fact, there is no evidence of anyone outside of the Saites family taking an active role in the management of the Companies. Bill Saites is the sole officer and director of both Altor and Avcon, and Nick Saites is a supervisory employee of Avcon, who routinely performed legal services for the Companies, and represented Altor's shareholders. While such an alignment can serve as a platform for abuse of the corporate form, the Secretary has not demonstrated how the Saiteses improperly used it. For example, there is no evidence showing that the Saiteses ever siphoned funds from the Companies, comingled personal and business expenses, or misled anyone into thinking they were dealing with individuals rather than a corporation. *See Lutyk*, 332 F.3d at 196 (piercing veil where, among other factors, president used corporate funds to pay for personal entertainment expenses); *Pisani*, 646 F.2d at 88 (piercing veil when no corporate formalities observed); *Santa Fe Elec. Co. v. Gen. Elec. Co.*, 52 F.2d 603, 604 (3d Cir. 1931) (finding corporate structure not disregarded merely because all of the stock is controlled by one person). In sum, we find that the Secretary has failed to meet her burden of showing, by clear and convincing evidence, that the corporate veil should be pierced.

Accordingly, we dismiss Bill and Nick Saites from this case as individual respondents.

II. Single Employer

The judge held that under Commission precedent, Altor and Avcon "must be regarded as a single entity," which constitutes the "employer" for purposes of the OSH Act. On review, Respondents argue that he erred in this regard because the two corporations are distinct in that they had separate worksites and Avcon performed fieldwork, while Altor focused on administrative functions. For the following reasons, we agree with the judge that Respondents constituted a single employer at this worksite.

Under Commission precedent, separate entities have been regarded as a single employer when three elements are present: (1) a common worksite; (2) interrelated and integrated operations; and (3) a common president, management, supervision, or ownership.[11] *Vergona*, 15 BNA OSHC at 1783, 1991-93 CCH OSHD at p. 40,496; *accord C.T. Taylor*, 20 BNA OSHC at 1086-88, 2002-04 CCH OSHD at pp. 51,340-41. In *Vergona*, the Commission held that two companies constituted a single employer where both corporations operated out of the same office, one corporation relied on the other's staff, the same family owned both corporations, and both corporations' names appeared on equipment leases. 15 BNA OSHC at 1783, 1991-93 CCH OSHD at p.

[11] At the Commission's request, the parties' briefs in this case included discussion of the Supreme Court's decision in *United States v. Bestfoods*, 524 U.S. 51 (1998) (applying common law to question of parent-subsidiary liability for cleanup costs under the Comprehensive Environmental Response, Compensation, and Liability Act). We note at the outset that under the OSH Act, application of the single employer doctrine is well established. *See e.g., C.T. Taylor Co.*, 20 BNA OSHC 1083, 1086-88, 2002-04 CCH OSHD ¶ 32,659, pp. 51,340-41 (No. 94-3241, 2003) (consolidated), *Vergona Crane Co.*, 15 BNA OSHC 1782, 1783, 1991-93 CCH OSHD ¶ 29,775, p. 40,496 (No. 88-1745, 1992); *Trinity Indus.*, 9 BNA OSHC 1515, 1518-19, 1981 CCH OSHD ¶ 25,297, pp. 31,322-23 (No. 77-3909, 1981), *overruled in part on other grounds by Loretto-Oswego Residential Health Care Facility*, 23 BNA OSHC 1356, 2011 CCH OSHD ¶ 33,113 (No. 02-1164, 2011) (consolidated). Moreover, our decision here is consistent with post-*Bestfoods* decisions that have continued to apply the single employer doctrine. *Torres-Negron v. Merck & Co., Inc.*, 488 F.3d 34, 40-43 (1st Cir. 2007) (and cases cited therein) (finding evidence sufficient to leave triable issue as to whether entities comprise "one single employer for purposes of Title VII liability"); *Taylor Milk Co. v. Int'l Bhd. of Teamsters*, 248 F.3d 239, 245 (3d Cir. 2001) (applying single employer test under the Labor Management Relations Act); *cf. Fabi Constr. Co. v. Sec'y of Labor*, 508 F.3d 1077, 1090 (D.C. Cir. 2007) (declining to address single employer issue, but noting that had the employer not waived the argument, there was substantial evidence for treating the two companies as a single employer for OSH Act purposes).

40,496. We find that the record here establishes the same degree of commonality between Altor and Avcon.

First, both companies shared a common worksite—the site of the Edgewater construction project—at which Altor provided materials as well as daily supervision by its president Bill Saites, and Avcon provided labor. *See C.T. Taylor*, 20 BNA OSHC at 1087, 2002-04 CCH OSHD at p. 51,340 (finding two companies to be single employer where one provided labor at the worksite while the other supervised). In addition to sharing this jobsite, both entities shared a single-room office in the basement of a building owned by Bill Saites. The office staff, two of whom were members of the Saites family, provided administrative support to both entities. *See Vergona*, 15 BNA OSHC at 1783, 1991-93 CCH OSHD at p. 40,496.

Second, the operations of Altor and Avcon were plainly interrelated and integrated. Although the Companies claim their division of responsibilities between office work and fieldwork militates against viewing them as a single employer, this arrangement actually demonstrates that they were structured to function as one business with interconnected operations. Indeed, each company depended on the other to fulfill distinct functions. For instance, the record shows that Avcon was completely reliant upon Altor for all of its business. *See Advance Specialty Co.*, 3 BNA OSHC 2072, 2074, 1975-76 CCH OSHD ¶ 20,490, p. 24,482 (No. 2279, 1976) (identifying two entities as single employer where "great majority" of one entity's work came from the related entity) (Cleary, Comm'r); *see also Trinity*, 9 BNA OSHC at 1519, 1981 CCH OSHD at pp. 31,322-23 (remanding for application of delineated single employer principles and those in Cleary opinion in *Advance Specialty Co.*). This interdependence was evident on the Edgewater project, with Altor obtaining the contract from the general contractor, Daibes Brothers ("Daibes"), and then dividing the work with Avcon.[12] Bill Saites signed the contract with Daibes on Altor's behalf, and also signed the contract between Altor and Avcon on behalf of both parties, essentially contracting with himself. The Secretary also claims the Saiteses may have deliberately manipulated payments to limit the assets

[12] We note that at the time of Avcon's incorporation, Bill Saites's wife was made the majority stockholder. According to Bill Saites, this has allowed Altor to become eligible for contracts that required subcontracting a percentage of the work to minority-owned businesses.

held in Avcon. Specifically, she points out that about two years after Avcon completed work on the Edgewater project, Altor still owed Avcon approximately $139,000. At the hearing, Bill Saites initially testified that Altor had not paid Avcon because Daibes had not yet disbursed its payment to Altor. But after being pressed by the judge on this issue, Bill Saites admitted that Daibes had already paid Altor, and it would pay Avcon "in due course." We find that Avcon's apparent willingness to allow this debt to remain unpaid stands as further evidence of the Companies' integration.

Finally, the Companies shared a common president, management, and supervision.[13] Bill Saites served as president, sole officer, and sole director of both entities. He worked at the Edgewater worksite as a supervisor. His son, Nick Saites, was a supervisory employee of Avcon who routinely performed legal services for Altor and Avcon and represented Altor's shareholders.

Under these circumstances, we find that the evidence supports all three elements considered by the Commission when determining whether two entities constitute a single employer. Accordingly, we affirm the judge's conclusion that Altor and Avcon operated as a single employer at this worksite.

III. Willful Citation 2, Item 1: 29 C.F.R. § 1926.100(a) (head protection)

Under this citation item, the Secretary alleges a violation of 29 C.F.R. § 1926.100(a) that encompasses thirteen alleged instances of Respondents' failure to ensure that their employees were wearing protective helmets in areas of the worksite where there was a possible danger of head injury. The Secretary alleged that this violation was willful and proposed a penalty of $32,000. The judge affirmed the violation as willful and assessed the proposed penalty.

The cited standard requires an employer to protect its "[e]mployees working in areas where there is a possible danger of head injury from impact, or from falling or

[13] The Secretary established that the Saites family has a financial interest in both Altor and Avcon. Bill Saites, with his wife, owns all of Avcon's shares, while Nick Saites has an indirect ownership interest in Altor. The judge reviewed additional information on the ownership of Altor *in camera* and placed it under seal. Neither party has asked us to review the sealed information and we have not done so. We note, however, that although Nick Saites did not divulge the details of the sealed information, he admitted at the hearing that he "indirectly shares in the profit and los[s]es of Altor" and that he "has an indirect interest in the ownership of Altor."

flying objects" by providing them with hard hats or other protective helmets. 29 C.F.R. § 1926.100(a). On review, Respondents contend that the Secretary failed to produce evidence that any employee observed not wearing a hard hat was, at that time, "faced with a possible danger of head injury." Respondents also challenge the judge's characterization of the violation as willful and his decision to assess the proposed penalty. For the following reasons, we affirm the judge.

A. Threshold Issue and Merits

Respondents argue, as a threshold matter, that the cited standard is void for vagueness "because it does not define whether the 'possible' danger of head injury is a possibility in terms of remoteness or reasonableness." We agree with the Third Circuit that the cited hard hat standard requires a showing of "access to an area of potential danger," not actual exposure to overhead hazards. *Donovan v. Adams Steel Erection, Inc.*, 766 F.2d 804, 812 (3d Cir. 1985) (noting that under "the language of the [cited] standard and the clear import of the legislative scheme to prevent occupational deaths and serious injuries," access is the "proper test"). Thus, we find that the cited standard is not impermissibly vague.

With respect to the merits, Respondents argue that "[t]here were no facts produced at trial which supported a finding that at a particular date and time an Avcon employee, not wearing a hard hat, was faced with a possible danger of head injury." As discussed above, the Secretary establishes a *prima facie* case of exposure under § 1926.100(a) by showing access to an area of potential danger. *Id.* Exposure can be shown even where "the hazard of being struck . . . was remote and [where] hardhats may not have offered much protection." *Hackensack Steel Corp.*, 20 BNA OSHC 1387, 1390, 2002-04 CCH OSHD ¶ 32,690, p. 51,556 (No. 97-0755, 2003). Here, the record evidence clearly demonstrates that the employees identified in the citation, including Bill Saites and foreman Frank Georgiana, lacked hard hats when working at onsite locations where they had access to areas containing overhead struck-by hazards. As CO Donnelly described and the Secretary's video exhibit corroborated, employees worked on the top-most floor (referred to during construction as the "deck"), interior floors, and the ground near the perimeter of the building, without hard hats. The CO testified, without rebuttal, that the bucket of the crane used to hoist materials to the deck and its contents presented

overhead struck-by hazards to employees working on the deck. He also testified that he observed employees underneath or near the crane's path, and saw other employees near the floor edges on other floors and along the building's ground perimeter, locations where materials could fall as a result of formwork stripping and other operations taking place at higher floors. The record also shows that employees worked near interior floor holes, which were subject to the same struck-by hazards as the edges, and through which employees transported construction materials and equipment posing hazards addressed by the cited standard.

Contrary to Respondents' claim that any occurrences of employees not wearing hard hats were short-lived, the record establishes that the Companies' failure to enforce the use of head protection in these locations commenced on the first day of the inspection and persisted over a three-week period. Moreover, even a "comparatively brief" exposure is sufficient to support a violation. *Capeway Roofing Systems, Inc.*, 20 BNA OSHC 1331, 1339, 2002-04 CCH OSHD ¶ 32,695, p. 51,622 (No. 00-1968, 2003). And Bill Saites—referenced under one alleged instance for his failure to wear a protective helmet while subject to struck-by hazards—admitted that the Companies' employees would not wear hard hats for sustained periods. Accordingly, we find that the Secretary established that the Companies failed to comply with the cited standard and exposed their employees to the alleged overhead hazards.

The record also establishes that the Companies had knowledge of the hard hat violation. *See A.P. O'Horo Co., Inc.*, 14 BNA OSHC 2004, 2007, 1991-93 CCH OSHD ¶ 29,223, p. 32,128 (No. 85-369, 1991) ("[T]he Secretary must prove that a cited employer either knew, or, with the exercise of reasonable diligence, could have known of the presence of the violative condition."). Here, the violative condition was the failure of the Companies to ensure that employees wore hard hats when they had access "to an area of potential danger" from overhead struck-by hazards. *Adams Steel*, 766 F.2d at 812. The record shows that employees working without hard hats—including Bill Saites and foreman Georgiana—had such access. In these circumstances, the Companies' managerial and supervisory personnel had actual knowledge of their own noncompliance with the standard's requirements, and had at least constructive knowledge that other employees worked in such areas without hard hat protection. And this knowledge is

imputed to the Companies. *See N & N Contractors, Inc.*, 18 BNA OSHC 2121, 2123, 2000 CCH OSHD ¶ 32,101, p. 48,239 (No. 96-0606, 2000) ("[A]ctual or constructive knowledge of a foreman or supervisor can be imputed to the employer."), *aff'd*, 255 F.3d 122 (4th Cir. 2001); *Conie Constr. Inc.*, 16 BNA OSHC 1870, 1872, 1993-95 CCH OSHD ¶ 30,474, p. 42,090 (No. 92-0264, 1994) (imputing owner's knowledge to corporation), *aff'd*, 73 F.3d 382 (D.C. Cir. 1995).

Moreover, the record also demonstrates that the conduct of these supervisors was entirely foreseeable, as both Nick and Bill Saites were well aware that their employees, including Bill Saites himself, did not always wear hard hats while engaged in construction activities. *See Otis Elevator Co.*, 21 BNA OSHC 2204, 2208, 2004-09 CCH OSHD ¶ 32,920, p. 53,547 (No. 03-1344, 2007) (noting that under Third Circuit precedent Secretary must establish violation was foreseeable to impute supervisor's knowledge); *Jersey Steel Erectors*, 16 BNA OSHC 1162, 1164 n.2, 1993-95 CCH OSHD ¶ 30,041, p. 41,216 n.2 (No. 90-1307, 1993) (finding hard hat violations foreseeable where practice of not wearing them was well known), *aff'd without published opinion*, 19 F.3d 643 (3d Cir. 1994); *see also Pa. Power & Light Co. v. OSHRC*, 737 F.2d 350, 357-58 (3d Cir. 1984). Bill Saites even testified that if he had to fire every employee who removed their hard hat, he would have had no one left to do the job. *See Atl. & Gulf Stevedores, Inc. v. OSHRC*, 534 F.2d 541, 555-56 (3d Cir. 1976) (holding that employer retains responsibility for employees' head protection even if employees systematically refuse to wear hard hats). Under these circumstances, we find the Companies had knowledge of the cited conditions.[14]

Accordingly, we affirm a violation of § 1926.100(a).

B. Willful Characterization

"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.*,

[14] Although Respondents asserted the unpreventable employee misconduct affirmative defense before the judge, who considered and rejected it, they have abandoned that claim on review. *See Don Davis*, 19 BNA OSHC at 1477 n.1, 2001 CCH OSHD at p. 48,894 n.1; *supra* n.3.

18 BNA OSHC 2178, 2181, 2000 CCH OSHD ¶ 32,134, p. 48,406 (No. 90-2775, 2000) (citation omitted), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001).

> [I]t is not enough for the Secretary to show that an employer was aware of conduct or conditions constituting the alleged violation; such evidence is already necessary to establish any violation . . . . 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, pp. 41,256-57 (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 citation omitted). "[A]n employer's prior history of violations, its awareness of the requirements of the standards, and its knowledge of the existence of violative conditions are all relevant considerations in determining whether a violation is willful in nature." *MJP Constr. Co.*, 19 BNA OSHC 1638, 1648, 2001 CCH OSHD ¶ 32,484, p. 50,307 (No. 98-0502, 2001), *aff'd without published opinion*, 56 F. App'x 1 (D.C. Cir. 2003).

On review, Respondents challenge the judge's willful characterization of the hard hat violation, claiming that (1) the Companies provided hard hats to "every employee"; (2) Avcon's policy required that these hard hats be worn "at all times"; and (3) Avcon's employees performed the type of work during which "hard hats will obviously fall off." Thus, according to Respondents, any moments when employees lacked head protection were not deliberate.[15]

[15] Respondents also contend that these situations were merely "temporary lapses of head gear" and that OSHA had observed only a few instances "spread out over" a six-month period, warranting reclassification to a *de minimis* violation. We disagree. As noted above, this violation persisted over a three-week period and affected numerous employees. "Under the Act, a violation [is] classified as *de minimis* when there is a technical noncompliance with a standard, but the departure bears such a negligible relationship to employee safety or health as to render inappropriate the assessment of a penalty or the entry of an abatement order." *Cleveland Consol. Inc.*, 13 BNA OSHC 1114, 1118, 1986-87 CCH OSHD ¶ 27,829, p. 36,429 (No. 84-696, 1987); section 9(a) of the Act, 29 U.S.C. § 658(a) (defining "*de minimis*" violations as those having "no direct or immediate relationship to safety or health"). Based on the evidence discussed above, including the CO's testimony that the crane bucket presented overhead struck-by

The record demonstrates that the Companies had a heightened awareness of the cited head protection standard's requirements but permitted multiple employees on multiple days to work without hard hats even in areas with obvious struck-by hazards. As the judge noted, the multiple exhibits summarizing OSHA citations previously issued to Saites-owned companies submitted into evidence here include alleged violations of the cited head protection standard. *See Revoli Constr. Co.*, 19 BNA OSHC 1682, 1685-86, 2001 CCH OSHD ¶ 32,497, pp. 50,377-78 (No. 00-0315, 2001) (finding employer had heightened awareness of requirements of a standard where it had received citations in prior years alleging violations of the same standard). The Saiteses had also been informed of OSHA's hard hat requirements several months before the Edgewater inspection when Avcon received a citation alleging a hard hat violation at a worksite located in Hackensack, New Jersey. Additionally, OSHA Assistant Area Director Philip Peist testified that he had personally discussed the cited head protection standard with the Saiteses at multiple prior worksites. And on the first day of the Edgewater inspection, OSHA inspectors warned the Saiteses that their employees were not wearing hard hats and advised them to ensure hard hat use onsite.

Yet, despite Bill Saites's acknowledgment that he knew the cited standard's requirements, he refused to put on a hard hat when warned by the CO and was observed without a hard hat at different locations on the worksite on multiple days. We find that these actions alone demonstrate " 'an obstinate refusal to comply' " with, and a conscious disregard of, the requirements of the cited standard. *Univ. Auto Radiator Mfg. Co.*, 631 F.2d 20, 23 (3d Cir. 1980) (citation omitted); *see Active Oil Serv. Inc.*, 21 BNA OSHC 1092, 1098-99, 2004-09 CCH OSHD ¶ 32,802, p. 52,488 (No. 00-0482, 2005) (finding employer displayed conscious disregard by condoning practice that it knew was hazardous). And this knowledge, conduct, and inaction on the part of Bill Saites is clearly imputable to the Companies. *See Conie Constr. Co.*, 16 BNA OSHC at 1872, 1993-95 CCH OSHD at p. 42,090 (imputing foreman's knowledge of the violative condition to the company; *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814, 1991-93

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hazards and employees were exposed to falling materials from upper floors, we find that this violation was hardly "negligible" or "technical" in nature but instead had a direct relationship to employee safety.

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.").

Moreover, despite the prior citations and cumulative warnings, the steps the Companies took in response to prevent these violations from recurring on succeeding days of the inspection were clearly insufficient. Indeed, CO Donnelly subsequently observed employees working without hard hats on multiple days of the inspection. *See Williams Enters., Inc.*, 11 BNA OSHC 1410, 1420, 1983-84 CCH OSHD ¶ 26,542, p. 33,880 (No. 79-843, 1983) (finding willful violation of safety belt standard where CO observed employees without belts on one day, spoke to the supervisor about it, but saw employees on succeeding days still not using belts), *aff'd in pertinent part*, 744 F.2d 170 (D.C. Cir. 1984). These violations continued despite a policy requiring hard hat use that Respondents insisted was "very stringent," but which the Saiteses admitted was openly disobeyed by employees because they disliked wearing hard hats. Yet the Companies persisted in failing to enforce this policy even after being warned of these problems by OSHA. This evidences a cavalier attitude towards employee safety and provides further support for our conclusion that the Companies willfully violated the head protection standard. *See Valdak Corp.*, 17 BNA OSHC 1135, 1139, 1993-95 CCH OSHD ¶ 30,759, p. 42,743 (No. 93-0239, 1995), *aff'd*, 73 F.3d 1466 (8th Cir. 1996). And from this evidence we also infer, in circumstances where the Companies might have had constructive rather than actual knowledge of a particular instance of noncompliance, that they would not have cared. *Gen. Motors Corp.*, 22 BNA OSHC 1019, 1045, 2004-09 CCH OSHD ¶ 32,928, p. 53,625 (No. 91-2834E, 2007) (consolidated) (affirming willful violation in absence of actual knowledge where circumstances support inference that had employer known of violative condition it would not have cared).

Our conclusion that the hard hat violation was willful is not undercut by the efforts that the Companies made to comply with the standard. Although unsuccessful efforts to prevent a violation may forestall a finding of willfulness in certain circumstances, the record here demonstrates that the Companies' efforts were so deficient that a willful finding is not obviated. *Caterpillar Inc.*, 17 BNA OSHC 1731, 1733, 1995-97 CCH OSHD ¶ 31,134, p. 43,483 (No. 93-373, 1996) (finding employer "not spared from a willfulness finding by employing abatement procedures that were patently

inadequate"), *aff'd*, 122 F.3d 437 (7th Cir. 1997). Respondents' attempt to emphasize the effectiveness of the hard hat policy is belied by Bill Saites's own failure to wear a hard hat and his acknowledgment that the Companies' employees routinely did not wear them. And the record plainly shows that this policy did little to accomplish its purpose. Indeed, the CO took note that hard hats were lifted in the crane's bucket to employees working on the deck in response to OSHA's arrival at the worksite. And while Bill Saites testified that at previous worksites Avcon had reprimanded and fired employees who did not wear hard hats, no such actions were taken at this worksite.

Accordingly, we affirm the judge's characterization of this violation as willful.

C. Penalty

The judge assessed the Secretary's proposed penalty of $32,000 for this willful violation. In assessing a penalty, the Commission gives due consideration to four factors: (1) the employer's size; (2) the gravity of the violation; (3) the employer's good faith; and (4) the employer's prior history of violations. Section 17(j) of the Act, 29 U.S.C. § 666(j). In determining the gravity of a violation, which is "typically the principal factor" for penalty purposes, the Commission "considers (1) the number of exposed employees; (2) the duration of their exposure; (3) whether precautions have been taken against injury; (4) the degree of probability that an accident would occur; and (5) the likelihood of injury." *Mosser Constr. Inc.*, 23 BNA OSHC 1044, 1047, 2010 CCH OSHD ¶ 33,049, p. 54,475 (No. 08-0631, 2010).

Respondents challenge the judge's penalty assessment, claiming that (1) Avcon's hard hat policy is "very stringent," (2) no injuries occurred onsite, and (3) the "nature of the incidents cited" was minimal and therefore, if affirmed as willful, this violation should be penalized with the minimum statutory $5,000 penalty. The mere existence of Avcon's unenforced and ineffective safety policy would not support a reduction in penalty, particularly because the Saiteses knew that their employees were not wearing hard hats. *See Manganas Painting Co.*, 21 BNA OSHC 1964, 1999-2000, 2004-09 CCH OSHD ¶ 32,908, pp. 53,427-28 (No. 94-0588, 2007) (rejecting good faith credit for penalty assessment purposes where employer ignored its own safety program). Further, a lack of injuries is not a measure for determining gravity or any other penalty factor. *See Centex-Rooney Constr. Co.*, 16 BNA OSHC 2127, 2131, 1993-95 CCH OSHD ¶ 30,621,

p. 42,412 (No. 92-0851, 1994) (noting that lack of injuries is not a statutory factor the Commission considers in assessing a penalty); *see also Lee Way Motor Freight, Inc. v. Sec'y of Labor*, 511 F.2d 864, 870 (10th Cir. 1975) ("One purpose of the Act is to prevent the first accident."). Finally, the Companies' violation of the head protection standard was hardly minimal: it encompassed thirteen separate instances describing multiple employees exposed on multiple days to the hazard of being struck by falling objects. Even Bill Saites conceded that OSHA inspectors had observed Avcon employees working without hard hats for sustained periods of time. Based on our review of the record and the statutory penalty factors, we find that a $32,000 penalty is appropriate for this violation.

IV. Willful Citation 2, Items 2 through 7: 29 C.F.R. § 1926.501(b)(1) (fall protection)

In Items 2 through 7, the Secretary identifies 31 separate instances involving eight different floors of the Edgewater project where Respondents failed to provide fall protection for employees working at the sides and edges of floors ranging from 79 to 152 feet above the ground. The Secretary grouped these instances based on the availability of a single abatement method—the installation of safety nets capable of providing fall protection for up to three floors at one time—and proposed a $56,000 penalty for each citation item. The judge affirmed all six items as willful, but reduced the penalty he assessed for each item to $25,000, for a total penalty of $150,000.

On review, Respondents do not dispute that they failed to provide the specified fall protection to the employees in question and that they had knowledge of the alleged conditions. Instead, Respondents argue that: (1) the cited standard is not applicable to the alleged violative conditions; (2) they established the affirmative defenses of infeasibility and greater hazard; (3) the violations were not willful; and (4) if affirmed, the penalty for each citation item should be reduced to $5,000. For the following reasons, we reject the affirmative defenses of infeasibility and greater hazard, affirm Items 2 through 7 as willful, and assess the proposed penalty of $56,000 for each item.

A. Applicability

In each of the six items, the Secretary alleged that Respondents failed 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." 29 C.F.R. § 1926.501(b)(1). Respondents claim that their employees were engaged in "leading edge" work and, therefore, a different fall protection provision, 29 C.F.R. § 1926.501(b)(2), that specifically addresses employees engaged in leading edge work, would apply. As defined by the standard, leading edge work occurs at "the edge of a floor, roof, or formwork for a floor . . . *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).

The poured-in-place concrete construction process used by the Companies on the Edgewater project was performed on a three-day pouring cycle. On the first and second days, employees created frames for the floor and vertical support columns using wooden formwork, including plywood decking, into which rebar was placed. On day three, after framing a floor to its intended edges, concrete was poured over the horizontal decking and into the vertical columns. Then, on the following day, employees began stripping the floor and column formwork, and installing vertical reshores. According to Respondents, this entire process constitutes leading edge work, which they claim is not complete until all of the formwork has been stripped.

But the coverage of the leading edge standard does not extend this far. The provision only addresses 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 apply to formwork stripping at a completed edge. *See Avcon, Inc.*, Nos. 98-0755 & 98-1168, slip op. at 16 (Apr. 5, 2011) (rejecting applicability of leading edge standard to similar poured-in-place construction work activities); *see also Agra Erectors, Inc.*, 19 BNA OSHC 1063, 1066, 2000 CCH OSHD ¶ 32,175, pp. 48,606-07 (No. 98-0866, 2000) (noting "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" (citation omitted)), *aff'd*, 276 F.3d 575 (3d. Cir. 2001). Here, all of the activities that are the subject of Items 2 through 7—pouring and finishing concrete; carrying lumber; stripping formwork; and installing rebar, reshores, column clamps, and metal bracing—occurred *after* the floor framing had been completed.[16] They

[16] We note that the employees referenced under Item 3, instance b were standing on the tenth floor—a completed surface—while constructing the eleventh floor above them.

were not part of the process of "actively" and "continuously" changing the location of the floor edge because in each instance the floor edge had already been extended to its final dimensions, which means that all leading edge work was complete. Respondents' argument that the leading edge standard applies because of the presence of wooden catch platforms and formwork extensions that continued past the edge of the building also fails. Indeed, none of the cited instances involved work done while these platforms or extensions were being constructed.

For all of these reasons, we find that the employees exposed to fall hazards under all six citation items were not engaged in constructing a leading edge—they were working at unprotected edges and, therefore, were covered by the cited provision, § 1926.501(b)(1).

B. Infeasibility and Greater Hazard

Respondents claim that the use of fall protection on the Edgewater project was infeasible. Specifically, Respondents contend that the use of guardrails was not feasible at every unprotected side and edge at the worksite and, therefore, guardrails could only be installed to the extent practical as part of an "alternative means of fall protection," which also included the form extensions and catch platforms. In addition, Respondents assert that the use of safety nets, and fall arrest and restraint systems, was infeasible because the still-curing concrete would not have been strong enough to hold the embedded anchors required with these fall protection systems.

To establish infeasibility as an affirmative defense, an employer must 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." *V.I.P. Structures, Inc.*, 16 BNA

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 Avcon*, slip op. at 17 (applying § 1926.501(b)(1) to identical work activity).

OSHC 1873, 1874, 1993-95 CCH OSHD ¶ 30,485, p. 42,109-10 (No. 91-1167, 1994). The standard cited here requires employers to protect employees from unprotected sides and edges "by the use of guardrail systems, safety net systems, or personal fall arrest systems." 29 C.F.R. § 1926.501(b)(1). Thus, to prove the first element of the infeasibility defense, Respondents must show that each one of the standard's specified systems was infeasible.

As the judge found, however, the record evidence does not support Respondents' claim of infeasibility with regard to the use of guardrails at the Edgewater worksite. Indeed, Respondents admit that they were able to install guardrails along the edge of the deck. As to the other floors, not only did the Secretary's expert witnesses testify that it was feasible to install guardrails that would abate the hazard posed by each unguarded edge at issue here, Respondents' own expert, Louis Nacamuli, admitted that guardrails could have been used throughout the worksite. Because Respondents point to no other evidence in the record to support their claim that this means of compliance was infeasible, their affirmative defense of infeasibility fails. As such, there is no need to consider Respondents' claims that the standard's other prescribed methods of abatement were infeasible.

We also find that the judge properly rejected Respondents' greater hazard defense. To establish this defense, an employer must demonstrate that: (1) the hazards of compliance with the standard are greater than noncompliance; (2) alternative means of protecting employees were either used or were not available; and (3) an application for a variance under section 6(d) of the Act would be inappropriate. *Peterson Bros. Steel Erection Co.*, 16 BNA OSHC 1196, 1204, 1993-95 CCH OSHD ¶ 30,052, p. 41,304 (No. 90-2304, 1993), *aff'd*, 26 F.3d 573 (5th Cir. 1994). Here, Respondents have not applied for a variance and have failed to explain why doing so would have been inappropriate. *See Spancrete Northeast, Inc.*, 15 BNA OSHC 1020, 1022-23, 1991-93 CCH OSHD ¶ 29,313, p. 39,356 (No. 86-521, 1991) ("We need not inquire whether [the employer] has proved the first two elements of the defense, because it is clear that the company has introduced no evidence on the third."); *Gen. Elec. Co.*, 576 F.2d 558, 560-561 (3d Cir. 1978) (discussing significance of variance application element). Therefore, we reject Respondents' allegation of a greater hazard.

Accordingly, we affirm Items 2 through 7.

C. Willful Characterization

On review, Respondents challenge the judge's decision to affirm the Secretary's willful characterization of Items 2 through 7. Respondents argue that the judge failed to take into account their alternative fall protection system that consisted of guardrails, form extensions, and platforms. Respondents also argue that they simply had a good faith disagreement with OSHA regarding the interpretation and feasibility of the cited standard, which would essentially negate willfulness. We reject both of these arguments and affirm all of these citation items as willful.

The record establishes that both Bill and Nick Saites had a heightened awareness of OSHA's fall protection requirements. As the judge noted, the multiple exhibits summarizing OSHA citations previously issued to Saites-owned companies include alleged violations of fall protection standards. *See Revoli Constr. Co.*, 19 BNA OSHC at 1685-86, 2001 CCH OSHD at p. 50,377 (finding employer had heightened awareness of requirements of a standard where it had received citations in prior years alleging violations of the same standard); *MJP Constr. Co.*, 19 BNA OSHC at 1648, 2001 CCH OSHD at p. 50,307 (finding supervisors are chargeable with knowledge of the standard's requirements based on their prior work experience, wherever that experience occurred). Indeed, just six months prior to OSHA's inspection of the Edgewater worksite, Assistant Area Director Peist discussed the fall protection requirements under § 1926.501(b)(1) with the Saiteses during OSHA's inspection of the Hackensack worksite, which also involved poured-in-place concrete construction. *See Pentecost Contracting Corp.*, 17 BNA OSHC 1953, 1955, 1995-97 CCH OSHD ¶ 31,289, p. 43,965 (No. 92-3788, 1997) (finding Secretary established heightened awareness by CO's testimony that he reviewed the excavation standards with employer's supervisors). Following that inspection, OSHA cited Avcon for alleged violations of § 1926.501(b)(1) based on its failure to use fall protection at unprotected sides and edges. In addition, Peist discussed fall protection requirements with Nick Saites during OSHA's 1986 inspection of Cornicon, and with Bill Saites during OSHA's 1982 inspection of WNS, both Saites-owned companies. These two companies, as well as a third Saites-owned company—Astro Concrete—were

cited for alleged violations of the fall protection requirements under 29 C.F.R. §§ 1926.105(a) and 1926.500(d)(1) (1979).[17]

Despite this longstanding heightened awareness of OSHA's fall protection requirements under these standards, the Companies chose to ignore these requirements at the Edgewater worksite. On the first day of the OSHA inspection, CO Brian Donnelly personally discussed OSHA's fall protection requirements with both of the Saiteses and pointed out to them that those requirements were being violated on the Edgewater worksite. Yet OSHA observed employees working without adequate fall protection on six different days over a one-month period during the inspection. When CO Donnelly asked about missing guardrails on the deck during the inspection, Bill Saites claimed that the Companies had run out of the brackets used to install the guardrails. And when CO Donnelly pointed out on a subsequent day that guardrails were missing on part of a different deck, Bill Saites refused to halt construction and bring up the additional equipment needed to install more guardrails. These responses from the Companies' president and onsite supervisor to a warning of serious hazards on the project plainly demonstrate a cavalier attitude towards employee safety that we find is indicative of a willful state of mind. *See Valdak Corp.*, 17 BNA OSHC at 1139, 1993-95 CCH OSHD at p. 42,743.

Respondents claim that their fall protection policies changed after the Hackensack inspection in an effort to satisfy the alternative fall protection plan requirements of 29 C.F.R. § 1926.502(k). While use of a § 1926.502(k) plan is a means of complying with the standard where the employer demonstrates infeasibility and the employees are engaged in "leading edge" work, as discussed above, the employees at issue here were not engaged in that type of work at the time of the violation. 29 C.F.R. § 1926.502(k) ("This option is available only to employees engaged in leading edge work, precast concrete erection work, or residential construction work . . . ."). Moreover, any such plan must be put in writing, which Respondents admit was not done here. *Id.* Finally, Respondents' purported reliance on their revised fall protection policies made no impact

[17] Although the language found in §§ 1926.105(a) and 1926.500(d)(1) is not identical to that of the cited provisions, these provisions are substantially similar and, therefore, were properly considered by the judge in assessing willfulness. *See Avcon*, slip op. at 27 n.28.

on their compliance efforts at the Edgewater worksite. As discussed above, fall protection violations continued for one month past the CO's conversation with Bill Saites about the lack of fall protection at the worksite. Based on these facts, we can only conclude that by relying on clearly inadequate fall protection policies and consistently disregarding OSHA's fall protection standards, the requirements of which the Saiteses were well aware, Respondents willfully violated § 1926.501(b)(1). *MJP Constr. Co.*, 19 BNA OSHC at 1648, 2001 CCH OSHD at p. 50,307 ("[A]n employer's prior history of violations, its awareness of the requirements of the standards, and its knowledge of the existence of violative conditions are all relevant considerations in determining whether a violation is willful in nature.").

We also reject Respondents' claim that they were acting in good faith. *Froedtert Mem'l Lutheran Hosp., Inc.*, 20 BNA OSHC 1500, 1510, 2004-09 CCH OSHD ¶ 32,730, p. 51,911 (No. 97-1839, 2004) (noting that "willfulness will be obviated by a good faith, albeit mistaken, belief that particular conduct is permissible"). As discussed above, Respondents' contention that it believed the requirements of the leading edge standard applied here is simply without foundation. Indeed, the leading edge standard requires the same fall protection measures called for under the cited standard, unless Respondents can show that conventional fall protection methods were infeasible or created a greater hazard. Neither of these claims was proved here. And despite the life-threatening injuries that their employees would almost certainly have sustained had they fallen from the heights to which they were exposed at this worksite, the Companies failed to take any serious steps toward compliance. As the record establishes, the Companies failed to even comply with their own alternative fall protection plan. Under these circumstances, we find that Respondents' beliefs regarding compliance could not possibly have been held in good faith. *See V.I.P. Structures*, 16 BNA OSHC at 1875, 1993-95 CCH OSHD at p. 42,110 (finding violation of standard requiring safety nets for fall protection willful where employer made nets available but record contained evidence that superintendent let employees work without nets to "keep the job moving"). Accordingly, we affirm the judge's characterization of Items 2 through 7 as willful.

D. Penalty

The Secretary proposed a $56,000 penalty for each citation item, giving a reduction only for size. The judge assessed a penalty of $25,000 for each item. He concluded that the gravity of these violations was high, and that reductions for good faith and prior history were not warranted. But he also found the Secretary's rationale for bundling the violations under six separate items—her belief that the violations in each item could have been abated by the use of safety nets—unsupportable and her total proposed penalty for these items excessive.

On review, Respondents argue that these violations should be grouped into one item and assessed a single penalty of $5,000. We disagree. Based upon our consideration of the Act's section 17(j) factors, we conclude that the Secretary's proposed penalty amount for each item is appropriate. The most significant factor to be considered in assessing an appropriate penalty is gravity. *Hackensack Steel Corp.*, 20 BNA OSHC at 1394-95, 2002-04 CCH OSHD at pp. 51,559-60. We agree that the gravity of these violations was high considering the serious, potentially fatal, consequences in the event that an employee fell 79 feet or more. In addition, we find no basis to disturb the Secretary's decision to cite these various instances under six separate citation items where the violations involve conditions observed at different times and locations. *See Major Constr. Corp.*, 20 BNA OSHC 2109, 2110-11, 2004-09 CCH OSHD ¶ 32,860, p. 53,041 (No. 99-0943, 2005) (upholding similar penalty grouping method for multiple violations of the same standard based on different times and locations); *see also Chao v. Saw Pipes USA, Inc.*, 480 F.3d 320 (5th Cir. 2007) (rejecting single penalty for multiple willful violations where total amount failed to satisfy statutory minimum penalty for each violation). Accordingly, we assess a penalty of $56,000 each for Items 2 through 7.

V. Willful Citation 2, Item 8: 29 C.F.R. § 1926.501(b)(4)(i) (floor holes)

Under this item, the Secretary alleges a violation of 29 C.F.R. § 1926.501(b)(4)(i) that encompasses four instances of Respondents' failure to protect employees from falling through unprotected floor hole openings: ladderway openings created within elevator shafts on ten floors (instance a); elevator shafts and stairway openings on the deck (instance b); and stairway openings on five floors (instances c and d). The Secretary

characterized this violation as willful and proposed a penalty of $44,000. The judge affirmed the violation but recharacterized it as serious and assessed a $4,400 penalty.

The cited standard requires that "(e)ach 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." 29 C.F.R. § 1926.501(b)(4)(i). On review, Respondents challenge the judge's affirmance of the violation, and the Secretary challenges the characterization and penalty. For the following reasons, we affirm the violation. Chairman Rogers and Commissioner Attwood characterize the violation as willful and assess the penalty proposed by the Secretary.

A. Merits

Instance a concerns elevator shaft openings in which the Companies inserted ladders to allow employees to move between floors. On review, Respondents do not dispute either knowledge of or exposure to the cited conditions. Instead, Respondents contend that the openings were compliant because each one was "completely planked over" with a "cover," except for an approximately 3-foot by 3-foot area in each shaft left open for employees to use the ladder. Under the standard, a "hole" requiring fall protection is a "gap or void 2 inches (5.1 cm) or more in its least dimension, in a floor, roof, or other walking/working surface." 29 C.F.R. § 1926.500(b). The standard contains no exception for ladderways or other forms of ingress and egress. Therefore, each 3-foot-square open area was a "hole" that required the use of fall protection. While the cited standard does permit the use of covers, the planking used here was plainly incomplete because it did not cover these 3-foot-square holes.

Respondents' assertion that the partial covering "provided a raised platform, which served as a warning to those approaching the ladderway opening" also lacks merit. Such a "warning" is not among the fall protection methods prescribed in the cited standard. Likewise, the staggered alignment and angle of the ladders in each opening that Nick Saites claimed would prevent an employee from falling through the ladderway openings does not qualify as fall protection under the cited standard. Accordingly, we reject Respondents' claims that the floor holes at issue under instance a complied with § 1926.501(b)(4)(i).

Instance b involves the deck, which had unprotected elevator shafts and stairway openings that were observed by the CO on two separate days. Respondents claim that these openings were compliant, relying on photographic exhibits depicting "wooden cross-members" in the elevator shaft and "plywood leaning on reinforcing steel" in the stairway openings, as well as Nick Saites's testimony that reinforced steel embedded in concrete crossing the stairway openings "provides a type of fall protection." However, as with the planking for the ladderways, these measures were insufficient because they left the elevator shafts and stairway openings replete with holes large enough to require covering under the cited standard. Although Respondents contend that the Secretary's photographs of these holes "were taken after working hours with no employees present," the CO testified that he observed Avcon employees pouring and finishing concrete, and tying steel within inches of these unguarded holes on two different days. Respondents do not dispute that they had knowledge of the conditions described in this instance and that the record demonstrates that these openings were located in plain view of the Companies' supervisors. Accordingly, we reject Respondents' claims that the floor holes at issue in instance b complied with § 1926.501(b)(4)(i).

Instance c references the CO's observations, over the course of two days, of employees on multiple floors working within inches of stairway openings that lacked fall protection. Instance d refers to an Avcon employee observed by the CO rolling up the hose for an oxygen acetylene torch inches away from an unguarded, uncovered stairway opening. On review, Respondents only claim that their employees covered these openings but had to frequently "replace" the covers after "non-Avcon personnel" removed them. But this explanation fails to excuse Respondents' repeated failures to keep the openings covered. The Commission has long held that an employer "must inspect the area to determine what hazards exist or may arise during the work before permitting employees to work in an area, and the employer must then give specific and appropriate instructions to prevent exposure to unsafe conditions." *Automatic Sprinkler Corp.*, 8 BNA OSHC 1384, 1387, 1980 CCH OSHD ¶ 24,495, p. 29,927 (No. 76-5089, 1980) (holding that an employer must make a reasonable effort to anticipate the particular hazards to which its employees may be exposed in the course of their work). On this record, even though the Respondents were well aware of the standards governing floor

openings, their inspection of the areas in question was limited to what might be discovered through happenstance. Not surprisingly, as the CO testified, OSHA personnel had to "continually . . . ensure" that the Companies took steps to cover these unprotected openings throughout the multi-day inspection. Based on Respondents' failure to conduct even rudimentary monitoring of the floor openings, we find that the Secretary has established a violation of the cited standard in instances c and d. We therefore affirm a violation of § 1926.501(b)(4)(i) based on all four instances.

B. Willful Characterization

The judge affirmed this violation as serious. In rejecting the Secretary's willful characterization, he found that the record lacked sufficient evidence to determine whether Avcon had the requisite heightened awareness. The judge also stated that the Commission "has been reluctant to infer willfulness from the existence of a number of dissimilar violations unless those disparate violations are part of a pattern, practice, or course of conduct," relying on *A.E. Staley Manufacturing Co.*, 19 BNA OSHC 1199, 1212, 2000 CCH OSHD ¶ 32,220, p. 48,908 (No. 91-0637, 2000) (consolidated). Finding that the record here lacked evidence of a "deliberate course of conduct" permitting the unguarded floor hole openings, the judge concluded that the record was insufficient to establish willfulness.

On review, the Secretary argues that the judge erred in rejecting the willful characterization of the violation. According to the Secretary, the record shows that the Saiteses had a heightened awareness of the standard based on (1) receipt of prior "numerous citations" for violations of the predecessor floor hole protection standard, § 1926.500(b)(1); (2) Avcon's receipt of a previous citation that included an alleged violation of the current standard, cited here; and (3) discussions on the first day of the inspection with OSHA personnel regarding the specific violations at issue here. The Secretary argues that despite this heightened awareness, the Companies "did not take 'positive steps' to prevent the recurrence of the violative conditions," and were therefore "plainly indifferent to the standard and the hazard." Finally, the Secretary asserts that the judge "misapplied" *Staley* because in this case, "the number of unguarded floor openings found over the course of the inspection evinced a pattern of violations from which plain

indifference can be inferred." For the following reasons, Chairman Rogers and Commissioner Attwood agree with the Secretary and, therefore, reverse the judge.

As with the other willful violations at issue in this case, Chairman Rogers and Commissioner Attwood find that the record shows that the Saiteses had a heightened awareness of the illegality of these violative conditions, which can be imputed to the Companies. *See Caterpillar Inc.*, 17 BNA OSHC at 1732-33, 1995-97 CCH OSHD at p. 43,482-83 (finding heightened awareness established by imputing knowledge of supervisory personnel to employer). On the first day of the Edgewater inspection, CO Donnelly alerted both Saiteses to the fall protection hazards created by these unguarded, uncovered floor holes, and "continually discussed this issue" with them "throughout the course of the safety inspection." *See Donovan v. Williams Enters., Inc.*, 744 F.2d 170, 180 (D.C. Cir. 1984) (finding construction violation willful where OSHA's repeated warnings and advice on correcting violation went unheeded by employer's supervisors); *Pentecost Contracting Corp.*, 17 BNA OSHC at 1955, 1995-97 CCH OSHD at pp. 43,964-65 (basing heightened awareness finding for trenching violation on inspections of same worksite where OSHA inspector spoke to employer's supervisor about alleged trenching violations and citation for previous inspection did not issue until after instant inspection).

The Saiteses had also been informed of OSHA's fall protection requirements several months before the Edgewater inspection when Avcon received a citation alleging fall protection violations under the identical standard based on unguarded ladderways, unprotected elevator shafts, and unguarded floor holes. Moreover, the multiple exhibits in evidence summarizing OSHA citations previously issued to Saites-owned companies include alleged violations of the predecessor floor hole protection standard. *See Revoli Constr. Co.*, 19 BNA OSHC at 1685-86, 2001 CCH OSHD at pp. 50,377-78 (finding employer had heightened awareness of requirements of the cited trenching standard where it had received "four previous citations in four years alleging violations of the same standard"). The judge found these exhibits unavailing as a basis for establishing that Saites-owned companies had received citations involving violations similar to those alleged here. But these exhibits plainly identify the precise sub-paragraph of the predecessor standard cited for each alleged violation, and those sub-paragraphs each

pertained to a more specific type of floor hole, which together addressed the range of fall hazards that the Secretary alleged to be present here. 29 C.F.R. § 1926.500(b)(1) (1980) ("floor openings" larger than 12 inches in one dimension); § 1926.500(b)(2) (1980) (ladderway floor openings); § 1926.500(b)(8) (1980) ("floor holes" between 1 to 12 inches in one dimension).

Despite this heightened awareness of the standard's requirements and Nick Saites's admission that he was personally aware that the holes at this worksite were unguarded, the Companies continued to allow their employees to be exposed to the recurring hazard of unprotected floor hole openings. Chairman Rogers and Commissioner Attwood conclude that such continuing disregard demonstrates a state of mind that supports a willful finding. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2209, 1991-93 CCH OSHD ¶ 29,964, p. 41,029 (No. 87-2059, 1993) ("[A] willful violation can be found where an employer has been previously cited for violations of the standards in question, is aware of the requirements of the standards, and is on notice that violative conditions exist."); *see Revoli Constr.*, 19 BNA OSHC at 1686, 2001 CCH OSHD at p. 50,378 (finding that prior citations of employer for similar violations "left no doubt about what should be done" and established its plain indifference to employee safety); *Falcon Steel Co.*, 16 BNA OSHC 1179, 1188, 1993-95 CCH OSHD ¶ 30,059, p. 41,336 (No. 89-2883, 1993) (consolidated) (" 'Once an employer has been cited for an infraction under a standard . . . [it is on] alert . . . that special attention may be required to prevent future violations of that standard.' " (citation omitted)); *Calang Corp.*, 14 BNA OSHC 1789, 1791, 1987-90 CCH OSHD ¶ 29,080, p. 38,870 (No. 85-0319, 1990) (finding intentional disregard and willfulness where employer "intentionally ignore[d] OSHA's requirements after the inspector correctly explained them to him"). Indeed, one of the hazards cited in instance b was still present eleven days after the CO's warning to the Saiteses that these particular openings were not protected as the standard required. *See Aviation Constructors, Inc.*, 18 BNA OSHC 1917, 1920, 1999 CCH OSHD ¶ 31,933, p. 47,377 (No. 96-0593, 1999) ("[A]n employer who has notice of the requirements of a standard and is aware of a condition which violates that standard but fails to correct or eliminate employee exposure to the violation demonstrates knowing disregard for purposes of establishing willfulness."). To the extent that Nick Saites's testimony suggests that the

Companies relied on wooden cross-bracing partially covering the elevator shaft openings and horizontal reinforced steel in the stairway openings to protect their employees—structures that do not come even close to meeting the cited standard's requirements—Chairman Rogers and Commissioner Attwood conclude that it serves as further evidence of the Companies' indifference to and disregard of the requirements of the standard. *See AJP Constr. Inc.*, 357 F.3d at 74 (affirming willful violation where employer knew of standard's requirements from prior citations, was alerted to compliance deficiencies at the worksite, and took steps to address deficiencies that "were incomplete, ineffective, and unenforced.").

Finally, Chairman Rogers and Commissioner Attwood agree with the Secretary that in rejecting the alleged willful characterization of this violation, the judge's reliance on *Staley* was misplaced. In *Staley*, the Commission rejected a "general determination of willfulness" for dozens of affirmed violations in the absence of item-specific evidence of willfulness or proof of a "pattern, practice, or course of conduct" to violate the Act. 19 BNA OSHC at 1212, 2000 CCH OSHD at p. 48,908. But *Staley* does not make showing a pattern, practice, or course of conduct a prerequisite for finding willfulness as to any single item. Indeed, in *Staley*, the Commission found several individual items willful based on the employer's heightened awareness of and failure to correct specific hazardous conditions even though it found no overall pattern, practice, or course of conduct. *Id.* at 1213. And here the Secretary does not seek a general determination of willfulness. Instead she introduced evidence showing that the CO identified the floor openings at issue to the Companies—explaining that they lacked required fall protection—and that the Companies nonetheless chose to ignore the warnings. In these circumstances, a willfulness finding here is consistent with applicable precedent. Accordingly, this violation is characterized as willful.[18]

[18] Unlike his colleagues, Commissioner Thompson would affirm the judge's decision to characterize Item 8 as serious. In his view, the evidence supports finding that the floor hole violation arose from mere negligence, a state of mind that falls short of that required for the Secretary to prove willfulness. *See, e.g.*, *Am. Wrecking Corp. v. Sec'y of Labor*, 351 F.3d 1254, 1264 (D.C. Cir. 2002) (holding mere negligence or lack of diligence not sufficient to establish willfulness). The record shows that the Companies made good faith efforts to cover openings not in use and to abate those conditions when alerted that covers had been removed by other employers' employees onsite, as the CO himself

C. Penalty

The Secretary proposed a $44,000 penalty for this willful violation and Respondents do not challenge the penalty amount on review. Based on a review of the record and the penalty factors set forth under section 17(j) of the Act, 29 U.S.C. § 666(j), the $44,000 proposed penalty for this item is appropriate.

CONCLUSIONS OF LAW

Based on the foregoing analysis, we conclude that Vasilios Saites and Nicholas Saites are not individually liable as employers in this matter and, therefore, dismiss both of them as Respondents. In addition, we conclude that Respondents Altor and Avcon acted as a single employer in this case, and willfully violated 29 C.F.R. §§ 1926.100(a), 1926.501(b)(1), and 1926.501(b)(4)(i).

ORDER

We affirm Willful Citation 2, Items 1 through 8 as willful and assess a total penalty of $412,000.

SO ORDERED.

/s/_____
Thomasina V. Rogers
Chairman

/s/_____
Horace A. Thompson III
Commissioner

Dated: April 26, 2011

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acknowledged. *See Stanley Roofing Co., Inc.*, 21 BNA OSHC 1462, 1465-66, 2004-09 CCH OSHD ¶ 32,792, pp. 52,430-31 (No. 03-0997, 2006) (rejecting willful characterization where employer "made some efforts to ensure" fall protection provided and visited site at commencement of job to "assess the hazards" and "provide safety training"); *Wright & Lopez, Inc.*, 10 BNA OSHC 1108, 1113-1114, 1981 CCH OSHD ¶ 25,728, pp. 32,078-79 (No. 76-256, 1981) (rejecting willful characterization of trenching violation where efforts made to comply, though violative, were inadequate to establish intentional disregard). While the Companies' efforts were certainly incomplete and support a floor hole violation, they are clearly inconsistent with a finding of indifference and stand in sharp contrast with the Companies' lax fall protection measures at this worksite. Accordingly, Commissioner Thompson agrees with the judge that the Secretary failed to establish that the violation of § 1926.501(b)(4)(i) was willful.

ATTWOOD, Commissioner, concurring in part and dissenting in part:

I concur with the analysis, factual findings, and legal conclusions in all portions of the decision in this case, other than the order to dismiss Bill Saites individually as a Respondent.[1] With respect to the question of Bill Saites's individual liability, I agree with the Secretary's contention that the record before us warrants piercing the corporate veil, and conclude that the cited Companies are Bill Saites's alter ego. Therefore, I would find that Bill Saites was properly cited as an employer and is individually responsible for the affirmed violations.[2]

Recognition of the limited liability of a properly incorporated company is the norm, and piercing the corporate veil to impose liability on an individual is reserved for exceptional circumstances. *E.g., Am. Bell Inc. v. Fed'n of Tel. Workers of Pa.*, 736 F.2d 879, 886 (3d Cir. 1984) ("The court may only pierce the veil in 'specific, unusual circumstances', lest it render the theory of limited liability useless." (citation omitted)); *see United States v. Pisani*, 646 F.2d 83, 88 (3d Cir. 1981) (enumerating eight veil piercing factors). Nonetheless, the Supreme Court has "consistently refused to give

[1] As indicated in the lead opinion, I also join with Chairman Rogers in affirming Citation 2, Item 8 as willful.

[2] I am persuaded that the record in this case fully supports my conclusion that the Companies were Bill Saites's alter ego. And although, as my colleagues observe, the Secretary did not preserve any evidentiary objections, it is important to note that the Secretary's repeated attempts to obtain financial and other business information about the Companies were frustrated by Respondents' obfuscation and delay, and an apparent unwillingness of two administrative law judges, one who presided over pre-trial matters and another who presided over the trial, to allow ample development of the record on the veil piercing issue. As described in more detail below, it was during Bill Saites's testimony, after the trial judge expressed his frustration with the Saiteses' obvious lack of candor on the stand, that he ordered Respondents to produce relevant business records. And although that judge made it clear that he wanted detailed original documents and not summaries, Respondents provided only two hand-written summary profit and loss statements and three-months' worth of bank statements. In addition, following Respondents' failure to produce subpoenaed tax returns before the hearing commenced, they were ordered to produce the returns by the end of that week. However, Respondents failed to produce the returns until the following Monday, at which point the judge denied the Secretary's request for time to review them. *See Labadie Coal Co. v. Black*, 672 F.2d 92, 94-95 (D.C. Cir. 1982) (finding it "grossly unfair for the [trial] court to allow [the defendant] to produce corporate documents in the last hours of trial which plaintiff had been demanding throughout pretrial discovery").

effect to the corporate form where it is interposed to defeat legislative policies" and has held that "where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created, . . . one may be held liable for the actions of the other." *First Nat. City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 630 (1983) (citations omitted); *see Bhd. of Locomotive Eng'rs v. Springfield Terminal Ry.*, 210 F.3d 18, 26 (1st Cir. 2000) ("the [veil piercing] rule in federal cases is founded only on the broad principle that 'a corporate entity may be disregarded in the interests of public convenience, fairness and equity.' " (citation omitted)); *Labadie Coal Co.*, 672 F.2d at 96 (noting that "when the incentive value of limited liability is outweighed by the competing value of basic fairness to parties dealing with the corporation—courts may look past a corporation's formal existence to hold shareholders or other controlling individuals liable for 'corporate' obligations" (citation omitted)). And even in the Third Circuit, the inviolability of the corporate form may yield to a showing that "recognition of the corporate entity would defeat public policy . . . ." *Zubik v. Zubik*, 384 F.2d 267, 272 (3d Cir. 1967). In my view, application of the *Pisani* veil piercing factors to the circumstances of this case warrants disregarding the corporate form and imposing individual liability on Bill Saites, the president, board member, and director of both Altor and Avcon, Avcon's shareholder, and the Companies' Edgewater project superintendent. *See DeWitt Truck Brokers v. W. Ray Flemming Fruit Co.*, 540 F.2d 681, 684 (4th Cir. 1976) (noting that circumstances found significant in considering whether to disregard corporate fiction " 'vary according to . . . each case,' and every case where the issue is raised is to be regarded as '*sui generis*' " (citation omitted)).

Following Altor's 1991 incorporation, Bill Saites became its president, sole board member, and sole director. But despite his acknowledged comprehensive role in Altor's operation, Bill Saites—who is not himself a shareholder and repeatedly denied that he knew the identity of Altor's shareholders—testified that he had never attended a shareholder's meeting, and could not remember ever seeing any corporate by-laws.[3]

[3] Respondents failed to make available a witness who could identify Altor's shareholders, but they stipulated that Bill Saites's son, Nick Saites, had an "indirect ownership interest" in Altor and "indirectly share[d] in [Altor's] profits and losses." The names of Altor's shareholders remain under seal. But in response to Bill Saites's protestations of ignorance, the judge noted that, as Altor's president, Saites had "a remarkable lack of

Moreover, Bill Saites testified that he had not even been aware that he was being considered for the position of sole board member until informed of his appointment. He also professed a lack of direct knowledge of his subsequent yearly reelection to the board; assuming that he had been reelected simply because he had not been fired. Avcon was not incorporated until 1997 and, in contrast to his role in Altor, Bill Saites, along with his wife, was one of Avcon's two shareholders. Otherwise, his role in Avcon was identical to the role he held in Altor.

Neither Altor nor Avcon kept minute books or recorded minutes of shareholder meetings. Nor were there any written waivers of the requirements to hold such meetings or record matters in a minute book. *See Pisani*, 646 F.2d at 88 (piercing veil in absence of requisite corporate formalities); *Labadie Coal Co.*, 672 F.2d at 98 ("If [the corporation] ha[d] been viewed as a separate and distinct entity, one would expect appropriate records to be kept. If it is merely a separately-named business conduit for defendant's own activities, a 'd/b/a' in all practicality, such records would not be as important and therefore might not be carefully maintained."); *see also U.S. v. Golden Acres, Inc.*, 702 F.Supp. 1097, 1105 (D.Del. 1988) (noting that *Pisani* court "implicitly rejected an earlier statement made by the Third Circuit [in *Zubik*] that corporate formalities are 'of little consequence' in the context of closely held corporations."). There were also no corporate audits. Further, although the Companies filed income tax returns, they reported either a net loss or no taxable income on each of their yearly returns for the three years covered by the returns they produced. Nick Saites testified that Altor's initial capitalization was $10,000. But Altor's 1996-1998 tax returns—which are in evidence—show only $1,000 in shareholder equity, which suggests that Altor's initial capitalization was only $1,000. *See Pisani*, 646 F.2d at 88 (finding that gross undercapitalization at time of closely-held entity's incorporation supported piercing the corporate veil); *Anderson v. Abbott*, 321 U.S. at 362 ("An obvious inadequacy of capital, measured by the nature and magnitude of the corporate undertaking, has frequently been an important factor in cases denying stockholders their defense of limited liability."); *see also U.S. v. Golden Acres*, 702 F.Supp. at 1104 & n.4 (noting *DeWitt* alter ego analysis

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information about this corporation," which the judge found "incredible, absolutely incredible."

repeatedly applied in Third Circuit since being adopted by *Pisani* court and that *DeWitt* emphasized inadequate capitalization as particularly significant with closely held corporations).

When asked about the financial affairs of the Companies at the hearing, Bill Saites expressed little knowledge. But he did state that Avcon's shareholder meetings consisted of conversations with his wife over the breakfast table and emphatically declared that nothing was ever put into writing as a result of those meetings. Although his wife was Avcon's majority shareholder, Saites indicated that she had no authority over any of the company's business matters—she could not sign checks, and Bill Saites could not remember whether he had even told her about the Edgewater project contracts before he signed them.

Nick Saites, who served as the Companies' lawyer, expressed similar ignorance. He knew nothing of their profits and losses and had no idea how Altor financed the first sixty days of the Edgewater construction project which, as discussed below, was not financed by any payment from Daibes, the general contractor, until after that time. And despite his role as the Companies' attorney, he had no knowledge about their tax returns. Finally, Nick Saites did not even remember whether he had billed Altor or Avcon for any of the legal work he performed on their behalf. Indeed, in one of many pre-hearing orders relating to discovery of the Companies' business dealings, the judge initially assigned to the case stated:

> Vasilios Saites was deposed . . . but had little or no knowledge of the subjects identified in the notice of deposition, although he was the sole officer and sole board member of Altor. Thereafter, Nicholas Saites . . . testified on behalf of Altor, but he also could provide little or no information on these subjects. Complainant maintains that Altor's failure to designate deponents with knowledge of the requested information has prevented her from discovering relevant information and preparing for trial. Respondent argues unconvincingly that the requested information was provided in the two depositions, but fails to support its argument with citations to the deposition transcripts . . . . *It was up to Altor to seek representatives capable of testifying on the specified subjects. It designated two individuals who occupied positions of importance in the corporation and their testimony goes well toward showing that Altor doesn't know how it governs itself or conducts its business.*

(Emphasis added.)[4]

Nonetheless, despite his professed ignorance about Altor's affairs and finances, Bill Saites essentially admitted that he treated Altor's operation as his exclusive personal domain, testifying unequivocally that "[n]obody directs my work activities. I run the jobs." Similarly, when Bill Saites was asked whether Nick Saites might have reviewed contracts as a representative of Altor's shareholders, rather than as his personal attorney, he responded: "I execute the contracts. I sign the contracts. I negotiate the contracts. Nobody else. I do that. I don't need any more ideas." Bill Saites also testified that he had never prepared any written reports or information for the shareholders, had never been informed of any limitations on his authority to conduct business for Altor, and could choose to enter into any contracts on Altor's behalf without notifying the shareholders. Although Bill Saites stated that he reported to his son about his business dealings on Altor's behalf, he also contended that he was not required to do so. He did not even know whether the shareholders had been notified of Altor's contract with Daibes. Indeed, Bill Saites testified that he had the authority to subcontract the "whole Edgewater job" to Avcon—the company he and his wife owned—even if that meant that the Altor shareholders—which did not include Bill Saites or his wife—would receive no profit at all from the project. Bill Saites summed up by stating that "[a]s president of the corporation, I have the authority to run the corporation the way I see fit."

The financial dealings between Bill Saites, Altor and Avcon—to the extent the record reveals them—also undermine the legitimacy of the Companies' existence as separate from Bill Saites.[5] First, the record shows that Bill Saites must have provided his

[4] Inexplicably, this judge also found that "Complainant has not established grounds to compel another deposition with attendant delays in the hearing date. She has not shown that the additional information she seeks would provide further probative evidence on any material issue."

[5] Both the Secretary and the trial judge attempted to obtain answers from the Saiteses regarding the Companies' finances. After Bill Saites testified that he did not know how much profit was made on the Edgewater project, the judge ordered Respondents to produce "everything about the profit and loss of Altor, Avcon, I guess those two companies, for this job by tomorrow morning . . . . And by the way, I want the actual documents, not just excerpts. I want the actual documents brought in." After further colloquy with Respondent's counsel, the judge stated: "If we have to, we'll bring [all of the documents] in . . . . . We can't get any information out of [Bill and Nick Saites] . . . .

services to the Companies essentially for free. Neither company ever declared a dividend. Moreover, Bill Saites received no direct payment for his services to Altor. Although he explained that his compensation was to come from Avcon's profits from the project, more than two years after the end of the project Avcon had yet to declare any profits and had a mere $9.88 in its bank account. And he testified that the only compensation he received from Avcon for his work on the project was a bare $100 per week. *Labadie Coal Co.*, 672 F.2d at 99 (identifying asset diversion as factor in veil piercing that "indicat[es] that the corporation is not being treated as an entity separate from [the individual]" and which "may be inferred from disproportion between the salaries paid and the services actually rendered to the corporation.").

With respect to other financial irregularities between Bill Saites and the Companies, Bill Saites testified that he had agreed that Altor would not receive *any* payment from the general contractor for the first sixty days of the project contract. Yet during that period the Companies would have been spending large amounts of money on materials and been responsible for over a million dollars in labor costs. The financing clearly did not come out of the Companies' capital or retained earnings as the tax returns indicate that the Companies had insufficient funds to cover these expenses. Finally, when the hand-written profit and loss statements for Altor and Avcon were ultimately produced pursuant to the judge's order, Altor's statement revealed that two years after the project's completion it still owed Avcon over $139,000. When Bill Saites was asked to explain Altor's continuing indebtedness to Avcon he equivocated, first stating that "Altor had not received all the money from Daibes," but finally admitting under pressure from the judge that Daibes had paid Altor in full and Avcon would be paid "in due course[,] . .

We need the information. We're going to get the information one way or the other." After the judge announced that he was "having . . . doubts" as to whether the Companies were legitimate corporations, he ordered Respondents to produce bank records for Altor and Avcon, and reiterated that "we have to get this information . . . one way or the other . . . . I feel a great deal of frustration this morning about this testimony, so I want the bank records for both Avcon and Altor and also the other internal documents that I've already requested." *See Labadie Coal Co.*, 672 F.2d at 94-95 (noting that failure to produce "ordinary corporate records" by corporation's director, president, and sole employee "would have justified drawing the normal inferences against [him] as one who should have been able to produce those documents.").

. maybe [in] the next three months . . . ." The only logical inference here is that the individual[s] behind the corporate façade were involved in funding the Companies' operations and were manipulating the Companies' finances to suit their own needs. There is no evidence in this record to the contrary. *See e.g., A.G. Mazzocchi Inc.*, 22 BNA OSHC 1377, 1386-87, 2009 CCH OSHD ¶ 32,988 (No. 98-1696, 2008) (drawing reasonable inference from circumstantial evidence); *Kaspar Wire Works, Inc. v. Sec'y of Labor*, 268 F.3d 1123, 1128 (D.C. Cir. 2001) (upholding Commission's factual finding based on its reasonable inference from circumstantial evidence).

In these circumstances I conclude that the evidence shows that Bill Saites dominated the Companies. *DeWitt,* 540 F.2d at 688 (upholding veil piercing where, *inter alia*, there was "a complete disregard of 'corporate formalities' in the operation of the corporation" and the sole stockholder made "all the corporate decisions and dominated the corporation's operations."). And I find, from the evidence actually produced and Respondents' obfuscations that frustrated production of further evidence, that Bill Saites organized this bifurcated operation to minimize holding financial assets in Avcon—the entity performing the actual construction work—while utilizing Altor, which had no employees onsite, as a vehicle for receiving and transferring funds to pay for the project. Indeed, Nick Saites admitted that Avcon was insolvent at the end of this phase of the Edgewater construction project, and Avcrete—another Saites-owned company with Bill Saites at the helm as sole shareholder, president and board member—was formed to undertake the next phase of construction at the Edgewater worksite.

The Secretary alleges that the Saiteses operated in this way so that the various Saites-owned construction companies would be insulated from having to satisfy the multiplying penalties and abatement orders resulting from their failures to comply with the OSH Act.[6] *Cf., Reich v. Sea Sprite*, 50 F.3d 413, 418 (7th Cir. 1995) (noting that sole

[6] Specifically, the Secretary contends in her post-hearing brief that "when the activities of the Saites[es] in establishing and abandoning corporations over a period of decades are looked at as a unified whole, it is clear that Bill and Nick are using the corporations to conduct the family business . . . . Indeed, Avcon was first incorporated by the Saites[es] in order to 'manufacture' a minority contractor for the purpose of securing HUD financing for the Hackensack Project. By the end of [the Edgewater] project, Avcon had already been abandoned in favor of Avcrete . . . . The Saites[es] candidly admit that new

stockholder and president of cited entity who operated without observing corporate formalities and "had drained the firm of assets and transferred [the] operations to a newly formed corporation was "indubitabl[y]" its alter ego). The trial judge saw fit to quote Nick Saites's testimony in which Saites acknowledged that "[y]ou have to remember when OSHA fines you $150,000 in a case, you can't take the risk that on the next job you're going to make some money and then OSHA is going to come and they're going to take all your money." And the judge found that "[b]ased upon the past practices of Respondents, the Secretary has reason to believe that the corporate entities may default in paying assessed penalties." Indeed, the record shows that the Saites family owned and operated at least seven concrete construction companies beginning in 1962, and that those companies have received many OSHA citations leading to Commission final orders. Although the companies have paid some of the penalties assessed in these cases, by the time of the hearing in this case a portion of the outstanding assessments remained unpaid. The Saites-owned companies have been defaulting on OSHA penalties for years and, as the willful violations in this case demonstrate, have been undeterred in their continuing failure to comply with applicable OSHA standards. *See First Nat. City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. at 630 (noting that Court will not give effect to the corporate form "where it is interposed to defeat legislative policies"); *Zubik v. Zubik*, 384 F.2d at 272 (acknowledging that corporate entity will not be recognized when it would defeat public policy). Based on all of the evidence in this case, I am convinced that the Companies were "merely a separately-named business conduit" for

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companies are formed, in part, to facilitate their business interests and to evade certain types of liability."

Bill Saites's "own activities [and were] a 'd/b/a' in all practicality . . . ." *Labadie Coal Co.*, 672 F.2d at 98.[7] Accordingly, I would find that Bill Saites is an employer and would hold him personally responsible for the violations affirmed herein.

/s/_____
Cynthia L. Attwood
Commissioner

Dated: April 26, 2011

[7] The Third Circuit, one of the circuits to which this case could be appealed, requires that the veil piercing factors be supported by "clear and convincing" evidence. But this standard does not appear to be the norm in other circuits with respect to cases arising under federal statutes, and was derived from a case involving an allegation of fraud, an element that need not be shown under the Third's Circuit's own veil piercing test. *Compare Kaplan v. First Options of Chicago, Inc.*, 19 F.3d 1503, 1522 (3d Cir. 1994) (applying "clear and convincing" standard of proof because fraud theory was alleged) *with Tr. of Nat'l Elevator Indus. Pension, Health Benefit and Educ. Funds v. Lutyk*, 332 F.3d 188, 194 (3d Cir. 2003) (applying "clear and convincing" standard despite finding that circuit's "test does not require proof of actual fraud as a prerequisite for piercing the corporate veil"); *see Anderson v. Abbott*, 321 U.S. 349, 362 (1944) (noting that although fraud cases make up part of the exception allowing the corporate veil to be pierced, "they do not exhaust it.").

SECRETARY OF LABOR, Complainant, v. ALTOR, INC., and/or AVCON, INC., and/or VASILIOS SAITES, individually, and d/b/a/ ALTOR, INC., and/or AVCON, INC., and NICHOLAS SAITES, individually and d/b/a ALTOR, INC., and/or AVCON, INC., Respondent.	OSHRC DOCKET NO. 99-0958

APPEARANCES:

For the Complainant:
William G. Staton, Esq., Noelle B. Fisher, Esq., Office of the Solicitor, U.S. Department of Labor, New York, New York

For the Respondent:
Paul A. Sandars, III, Esq., Lum, Danzis, Drasci, Positan & Kleinberg, LLC, Roseland, New Jersey

Before: Administrative Law Judge: Robert A. Yetman

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondents, Altor, Inc., and/or Avcon, Inc., and/or Vasilios SAITES, individually, and d/b/a/ Altor, Inc., and/or Avcon, Inc., and Nicholas Saites, individually and d/b/a Altor, Inc., and/or Avcon, Inc. (Avcon), at all times relevant to this action maintained a place of business at the Mariners High Rise building, Edgewater, New Jersey, where they were engaged in poured-in-place concrete construction. Respondent, Avcon, Inc., admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act. Respondents Vasilios Saites, Nicholas Saites and Altor, Inc. deny that they are employers within the meaning of the Act (answer to complaint; affirmative defenses Nos. 19, 20, 21 and 22) and vigorously assert that neither individual nor Altor have any responsibility for the violations alleged by Complainant.

On October 23 through April 19, 1999 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Avcon's Edgewater, New Jersey work site. As a result of that inspection, Avcon was issued one willful, one serious, and one other than serious citation alleging multiple violations of the Act together with proposed penalties. By filing a timely notice of contest

Avcon brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On January 17-30, 2001, a hearing was held in New York, New York. During the hearing, the Secretary's counsel indicated that citation 1, item 3 had been withdrawn (Tr. 344-45). The parties have submitted briefs on those items remaining at issue, and this matter is ready for disposition.

BACKGROUND

On October 23, 1998, the Occupational Safety and Health Administration (hereinafter "OSHA") commenced an inspection of the worksite known as the Mariner High Rise located at Edgewater, New Jersey. The worksite was a sixteen story poured in place reinforced concrete residential apartment building owned by Ferry Plaza North LLC. The general contractor for the construction site was Daibes Brothers, Inc. which subcontracted the poured in place concrete work to Altor, Inc. Altor, in turn, subcontracted that work to Avcon, Inc., according to Respondent Nick Saites, for "risk management" reasons. Pursuant to that subcontract, Altor supplied all the necessary materials and supplies and Avcon performed the work with union supplied workers. As far as can be determined on this record, the only employee of Altor, Inc. present at the site was Vasilios Saites, the president of that company. All of the exposed employees relevant to this matter were employed by Avcon, Inc.

As a result of the October 23, 1998 inspection, a citation was issued to Vasilios (Bill) Saites and Nicholas Saites, individually and doing business as Altor, Inc. and/or Avcon, Inc. A timely notice of contest was filed and by an amended complaint, Altor, Inc. and Avcon Inc. were added as individual Respondents. Respondents' answer denies generally the allegations contained in the complaint and, in particular, denies liability on the part of Altor, Inc. and personal liability of Vasilios and Nicholas Saites. Complainant asserts, however, that the facts of this case justify piercing the corporate veil of Altor, Inc and Avcon, Inc. and assessing personal liability in this matter against Vasilios and Nicholas Saites as the "alter ego" of those corporations.

Based upon the testimony at the hearing as well as the stipulations and other submissions of the parties, the following facts have been established regarding the personal liability issue and the liability of Altor, Inc. Vasilios Saites is a civil engineer with approximately thirty years experience in the construction industry. His son, Nicholas, is also a civil engineer and an attorney qualified to practice law within the State of New Jersey. Nicholas represents his father in his various business activities including the drafting and review of construction contracts and the review and drafting of documents necessary for the incorporation of construction businesses within the State of New Jersey. Although Nicholas is an

attorney at law, it appears that his only clients are his father and his various businesses. Moreover, the majority of his work activity is as an engineer at the various construction projects performed by corporations owned by him or his father. Over the years Vasilios has been owner and president of Astro Concrete, Inc., Cornicon, Inc., WNS Construction and more recently Altor, Inc., Avcon, Inc. and Avcrete, Inc. However, ownership of one or more of these corporations has been transferred to Nicholas. All of the corporations were formed and operated in accordance with the laws of the State of New Jersey. Avcrete was incorporated subsequent to the inspections which resulted in this action and is owned by Vasilios Saites.

The corporate office of all of the aforesaid corporations was and is located at the personal residence of Vasilios Saites and his wife. From the record, it is clear that these corporations are closely held by the Saites and are created to limit liability at the various job sites and to meet other legal requirements. For example, Avcon, Inc. was created with Vasilios's wife as the majority stockholder in order to qualify that firm as a minority owned business for Housing and Urban Development financed projects. Although Respondents freely admit that the various corporations were created to limit potential liability, there is nothing in this record which supports the conclusion that the formation and operation of the various corporations violated any laws of the State of New Jersey. There is evidence, however, that some of the corporations became inactive after completion of various jobs and others filed for bankruptcy. On the other hand, it appears that Altor, Inc. and Avcon, Inc. were legitimate and active corporations at the time of the inspection and the hearing in this matter. There is no dispute between the parties, and the record supports the conclusion that Avcon, Inc. was the employer of the employees exposed to hazards at the worksite. At the request of Avcon, various unions supplied all of the labor for the job and wages were paid to these employees by Avcon, Inc. As far as can be determined on this record, Complainant does not allege that Altor, Inc. is a responsible party under the multi-employer worksite theory; that is, no exposed employee was employed by Altor nor did any representatives of that firm control the worksite in relation to work performed by Avcon employees. It is undisputed that Vasilios Saites is the president and sole member of the board of directors of both firms; however, there is no evidence that Nicholas Saites held any corporate position within either firm other than as an employee (assistant superintendent) of Avcon, Inc. Based upon the evidence in this case as well as the demeanor of Vasilios and Nicholas at the hearing, it is clear that there was and is a close working relationship between the father and son and Vasilios relies heavily upon the advice of his son. Both were present at the worksite on a regular basis and provided oversight for the work activities of Avcon employees.

On these facts Complainant seeks, for the first time in almost thirty years of OSHA enforcement[1], to pierce the corporate veil of a legitimate, viable corporation[2] to assess personal liability against an officer/owner of that corporation (Vasilios Saites) and his son (Nicholas Saites) who has no official connection with either Altor, Inc. or Avcon, Inc. other than as an employee of Avcon, Inc. Complainant's counsel explained the reason for this citation as follows:

> [the courts] also talked about whether or not observing the corporate shield would frustrate public policy, and that's really more pertinent here. To the extent that OSHA issues citations to individuals who periodically change the name of the company under which they're doing business, it makes it impossible for the Secretary then to follow up on these inspections and get abatement violations, to collect penalties when, in fact, we have a judgment against a corporate entity that no longer exists or has been abandoned because the principals have now moved on to form a new corporation under which they're doing business now. So that there's no effective way for us to accomplish the objectives of the statute under those kinds of circumstances. (Tr. 29).

The theory underlying the action taken by the Secretary in this case raises fundamental questions concerning the jurisdiction of the Review Commission to grant the relief sought. Initially, the Secretary must establish, by credible evidence, the identity of the "employer" of exposed employees. Section 3(5) of the Act defines "employer" as "a person engaged in business effecting commerce who has employees . . ." Section 3(4) of the Act defines "person" as "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives or any organized group of persons." The Review Commission is charged with the responsibility of determining the identity of the employer and, based upon the evidence submitted by the Secretary in this case, it is concluded that Avcon, Inc. was the employer of employees exposed to hazards alleged to exist at the worksite by the Secretary. *Usery v. Lacy,* 628 F2d 1226 (9th Cir. 1980); *Clarence M. Jones,* 11 BNA OSHC 1529, 1983 CCH OSHD ¶26,516 No. 82-516 (1983). Moreover, the evidence establishes that Altor, Inc. and Avcon, Inc. are closely related companies having interrelated and integrated operations with a common president, management, supervision and ownership performing services at a common worksite. Under these circumstances, both corporations must be regarded as a single entity and, therefor, constitute the "employer" for purposes of OSHA enforcement at the worksite. *Advanced Specialty Co*., 3 BNA

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[1] In a recent case involving similar facts against the same Respondents, *Avcon Inc., Vasilios Saites and Nicholas Saites,* Docket Nos. 98-0755 and 98-1168, Judge Rooney found personal liability against the individual Respondents. That decision is currently on review before the Review Commission.

[2] *Compare*: *United States v. Pisani* 646 F2d 83 (3rd Cir. 1981); *Life Science Products,* 6 BNA OSHC 1053, 1977 CCH OSHC ¶22,313 No. 14910 (1977).

OSHC 2072, 1975-76 CCH OSHD ¶20,490 No. 2279, (1976). *See also; Trinity Industries, Inc.,* 9 BNA OSHC 1515, 1981 CCH OSHD ¶25,297 No.77-3909, (1981).

The more difficult issue is whether a corporate official and an individual having no formal relationship to the lawful viable corporate entities other than as an assistant superintendent may be found to be "employers" within the meaning of the Act. The position of the Secretary is reflected in the following colloquy:

> JUDGE YETMAN: Mr. Staton, I understand the overall concept. We both have dealt with this for many years. I want to deal with just the Occupational Safety and Health Act and if it's the Secretary of Labor's position today that personal liability may attach to corporate officials.
>
> I'm trying to determine from you what officials may be held liable. What tests would I have to apply to determine which officials to hold responsible and those which are not responsible? . . .
>
> MR. STATON: Your Honor, in answer to your questions, it is the Secretary's position that under the definition of employer in the Occupational Safety and Health Act, which references persons/individuals as constituting employers, that that term would cover an individual who is, in fact, the alter ego of a company which receives a citation.
>
> And we believe, under the circumstances present in this case, that Bill Saites and Nicholas Saites are, in fact, the alter egos of the companies for which they assert they were working at the time that the citation was issued (Tr. 19, 20).

Thus, rather than seeking a finding that Congress intended within the four corners of the statute[3] for corporate officials to be personally liable for corporate civil violations of the OSHA Act, the Secretary seeks to have the Review Commission "pierce the veil" of a viable, lawful corporation under the circumstances of this case and find personal liability for compliance with the Act and, more importantly, personal responsibility for the payment of assessed penalties.

As previously stated, the Review Commission is charged with the responsibility of determining, based upon the evidence, the identity of the employer of exposed employees. That finding has been made above and as seen *infra*, violations have been found and penalties assessed for those violations against the employers, Avcon, Inc. and Altor, Inc. Under the civil enforcement scheme of the Act, the only means available to encourage compliance with the Act, other than an imminent danger petition in the federal district court, is by way of a civil penalty. Accordingly, upon a final order of the Review Commission and/or the exhaustion of all appeal rights where findings of violations and assessment of

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[3] *Compare*: The Fair Labor Standards Act which defines an employer as including "*any person acting directly or indirectly* in the interest of an employer in relation to an employee . . .". 29 U.S. C.§203(d) (emphasis added).

penalties remain, those penalties become a debt owed to the Treasury of the United States and, pursuant to sections 17(L) of the Act, a civil action may be brought by the Secretary in the appropriate federal district court to recover the unpaid debt.

It is clear that the Secretary is concerned that the individuals controlling the corporations involved in this matter may engage in activities to avoid the payment of penalties that may be assessed by filing bankruptcy proceedings or merely leaving the corporations as inactive shells without assets. This position has some justification based upon the statement of Nicholas Saites that:

> "You have to remember when OSHA fines you $150,000 in a case, you can't take the risk that on the next job your going to make some money and then OSHA is going to come and they're going to take all your money." (Ex. C-255, pp. 178-79).

Based upon the past practices of Respondents, the Secretary has reason to believe that the corporate entities may default in paying assessed penalties. Congress, however, did not grant authority to the Review Commission to enforce its final orders. Upon assessment of a penalty via a final order, Complainant may not seek collection of the penalty by petitioning the Review Commission. Rather, as previously stated, the penalty becomes a debt owed to the government collectable by filing a civil action in the district court which has the authority to determine whether a debt is owed, in what amount and by whom. In this case, the identity of the debtor (Altor, Inc. and Avcon, Inc.) has been established as well as the amount of the penalty. Nothing more needs to be done by this Commission because the Secretary's fears have not come to fruition at this time. As this case runs its course and, presumably, findings of violations and assessment of penalties are affirmed, Respondent may or may not come into compliance and pay the penalty. The Secretary seeks extraordinary relief from the Review Commission at this time in anticipation of an event or events which may not occur. Moreover, the Secretary has provided no authority and none has been found to support the conclusion that the Review Commission has the authority to pierce the veil of a lawful viable corporation or, in the event that such action is taken, that the federal district court is bound by such a finding either by *res judicata*, judicial notice, comity or otherwise in a subsequent action to recover the debt.

In this case, the Secretary is asking the Review Commission to engage in a premature and an extra jurisdictional act. While it is true that the past actions of Vasilios and Nicholas Saites and their corporations[4] may provide sufficient grounds for a district court to pierce the corporate veil to collect a

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[4]The history of previous citations for corporations controlled by Vasilios and Nicholas Saites is as follows: WMS Corp. - 2 citations, Cornican, Inc. - 3 citations, Astro Concrete - 11 (continued...)

debt owed to the government, that decision does not fall within the jurisdiction of the Review Commission when the Respondent employer is a lawful and viable corporation, as in this case, at the time of decision. The Review Commission cannot speculate as to future events. Accordingly, Vasilios Saites and Nicholas Saites are DISMISSED as individual Respondents and as individuals doing business as Altor, Inc and Avcon, Inc.

Alleged Violation of §1926.100(a)

Willful citation 2, item 1 alleges:

29 CFR 1926.100(a): Employees were not protected by protective helmets while working in areas where there was a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns:

a) 10th floor: The employees pouring the concrete on the deck were not wearing protective helmets, on or about 10/23/98.

b) Yard area north side: The employee working in the yard area erecting the concrete formwork for the columns was not wearing a protective helmet, on or about 10/23/98.

c) 9th floor north side: The employee installing the shoring was not wearing a protective helmet, on or about 10/23/98.

d) 9th floor east side: The employee clamping the concrete column was not wearing a protective helmet, on or about 10/23/98.

e) 10th floor: The employees landing the concrete form work on the deck were not wearing protective helmets, on or about 10/23/98.

f) 8th floor north side: The employee stacking the plywood was not wearing a protective helmet, on or about 10/24/98.

g) 10th floor: The carpenter foreman who was supervising the employees was not wearing a protective helmet, on or about 10/24/98.

h) 13th floor: The employees pouring the concrete on the deck were not wearing protective helmets, on or about 11/3/98.

i) 12th floor south side: The employee clamping the concrete column was not wearing a protective helmet, on or about 11/3/98.

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[4](...continued)
citations, and Avcon, Inc. - 1 prior citation on review to the Review Commission.

j) 12th floor south side: The employee measuring the deck was not wearing a protective helmet, on or about 11/3/98.

k) 11th floor south side: The employee carrying lumber was not wearing a protective helmet, on or about 11/3/98.

l) 12th floor south side: The employees standing at the edge of the building below the employees pouring concrete were not wearing protective helmets, on or about 11/3/98.

m) Throughout the jobsite: The company president, who was supervising construction activities throughout the project was not wearing a protective helmet while there were overhead hazards during the cast-in-place construction of the building, on or about the following dates 10/23/98, 10/24/98, 10/27/98, 10/29/98, 11/3/98, 11/4/98, 11/10/98 and 11/16/98.

Facts

Instance a). CO Donnelly testified that on October 23, 1998 he observed 10 to 15 Avcon employees standing on the 10th floor deck of the Mariner building while concrete was being poured (Tr. 372, 375). The suspended bucket of concrete moved over the heads of the workers in the immediate area, several of whom were not wearing hard hats (Tr. 372-73, 376, 386; Exh. C-196, C-275, 01:39:08-01:39:34, 04:25:33-04:23:10). CO Donnelly believed that the workers could be struck by material falling off of the bucket, or hit with the bucket itself (Tr. 373-74).

Instance b). On the same day Donnelly saw an employee identified as an Avcon concrete worker on the ground adjacent to the building working without a hard hat (Tr. 379, 386; Exh. 275; 04:06:41-04:06:55). ***Instances c) and d).*** He observed two additional Avcon employees without hard hats working on the 9th floor, installing shoring, and clamping a concrete column, one of whom was videotaped (Tr. 379, 386; Exh. C-275, 04:04:65-04:05:35). ***Instance e).*** Donnelly further observed employees landing formwork on the 10th floor without hard hats (Tr. 379-80, 386; Exh. C-275, 01:56:15-01:56:59).

Instances f) and g). On October 24, 1998, Donnelly observed an Avcon employee on the 8th floor stacking plywood, and Frank Georgiana, the carpenter foreman, on the 10th floor. Neither employee wore a hard hat (Tr. 381).

Instance h). On November 3, 1998, Donnelly again saw Avcon employees pouring concrete, now on the 13th floor, without wearing hard hats (Tr. 381, 387; Exh. C-275, 02:35:45-02:36:42). ***Instances i), j) and l).*** Donnelly also noted employees on the 12th floor clamping concrete columns, measuring the deck, and having coffee, who were not wearing hard hats (Tr. 381-84, 387; Exh. C-275, 02:22:54-

02:28:35, 03:01:19-03:01:52). ***Instance k).*** On the 11th floor, the stripping floor, an Avcon employee did not wear a hard hat as he carried lumber (Tr. 382l, 387; Exh. C-275, 02:39:15-02:40:54).

Instance m). Finally, Donnelly stated that Bill Saites refused to wear a hard hat at any time during the OSHA inspections, which took place on October 23, 24, 27, and 29, and on November 3, 4, 10 and 16, 1998 (Tr. 384-85; Exh. 275; 02:04:32-02:04:44). Donnelly testified that the cited employees were exposed to a hazard in that construction materials can fall through floor holes and/or shafts. He believed that the danger from falling materials is inherent in any construction job (Tr. 383, 385).

Bill Saites testified that hard hats were generally unnecessary on the Edgewater site. Although the ironworkers and the carpenters kept the crane in constant use, a signalman was in place on the top floor to warn employees to move out of the way of overhead loads (Tr. 999). Nonetheless, Avcon supplied hard hats to employees on the site (Tr. 991). Bill Saites admitted that the OSHA COs might well have seen eleven instances of noncompliance with the hard hat rule over the course of their inspection. According to Saites, the men don't like to wear the hard hats, and find excuses not to (Tr. 996-98). Nicholas Saites was also aware that employees continually removed their hard hats (Tr. 1040).

Discussion

The cited standard requires:

> 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.

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991-93 CCH OSHD ¶29,239, p. 39,157 (No. 87-1359, 1991), *citing Astra Pharmaceutical Products, Inc.*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶25,578, pp. 31,899-31,900 (No. 78-6247, 1981).

Avcon argues that the Secretary failed to prove the applicability of the cited standard, in that she did not show that there was a possible danger of head injury from impact or from falling or flying objects on the job site. The Commission has held that this standard by its express language applies whenever employees are exposed to a *possible* danger of head injury. *Skepton Contracting, Inc.,* 1997 CCH OSHD ¶31,405 (No. 97-0208, 1997). Thus, the standard requires proof of an access to zone of danger

rather than actual exposure test. *Adams Steel Erection, Inc.*, 766 F.2d 804, 12 BNA OSHC 1393, 1398 (3d. Cir., 1985).

As CO Donnelly testified, the danger from falling materials is inherent in any construction job. Here, the videotape demonstrates a number of specific overhead hazards. Both concrete and construction materials were hoisted overhead; stripping operations brought overhead materials down onto the work floors and to the ground around the building below. There is no doubt that the employees on the Mariner high rise work site were exposed to a possible danger of head injury. It is undisputed that the employees listed in ***instances a) through m)*** worked without hard hats in violation of the standard. The record further establishes that Avcon knew its employees habitually removed their hard hats and Bill Saites was not surprised to learn that employees had been observed working with their heads unprotected. Saites also refused to wear a hard hat. Although the cited violations of §1926.100(a) have been established, Nicholas Saites characterized the violations as instances of employee misconduct (Tr. 1105).

Employee Misconduct

Facts

Avcon's safety program requires that: " Hard hats shall be worn by everyone on the job at all times." (Tr. 377-78; Exh. C-6, R-2). At the hearing, Nicholas Saites noted that Avcon's program requires the use of hard hats at all times and maintained that its foremen enforced the rule with verbal reprimands (Tr. 1039-40, 1105). Nicholas Saites stated that he wore a hard hat himself and if he saw an employee without a hard hat, he would tell the employee to put one on (Tr. 1106-07); however, beyond supplying hard hats, Avcon could do nothing to ensure that the workers always wore their hard hats. Both he and Bill Saites maintained that it was not Avcon's responsibility to establish or enforce safety rules (Tr. 391, 797, 968, 991).

Both Saites testified that Avcon had no authority to discipline employees, and union stewards and foremen were solely responsible for enforcing safety rules and regulations (Tr. 797, 802-07, 968, 991, 1038, 1439). Bill Saites testified that, although he was the superintendent on the Edgewater job, the carpenter's shop steward and carpenter's foreman were in charge of safety (Tr. 968, 991). Nicholas Saites admitted that all authority flowed from his father to the foremen on the job; nonetheless, he maintained that the foremen and shop stewards, who are representatives of the workers' unions, are solely responsible for the workers' safety (Tr. 797, 802-07, 1439).

Bill Saites testified that he had no authority to hire or fire employees, and that he would have to go through the union foreman, Frank Georgiana, to discipline an employee (Tr. 994). However,

Nicholas Saites testified that his father could hire and fire employees. Both Saites testified that Bill Saites had fired workers in the past for violating safety rules, in particular for violating the hard hat rule (Tr. 860-61, 992, 1105, 1442). Finally, Bill Saites testified that Frank Georgiana had been working for him since 1963 or 1964 and would not argue with him if he wanted an employee off the site (Tr. 995, 1005). If Bill Saites was unhappy with Georgiana or any other foreman on site, he had the authority to fire the foreman (Tr. 1026).

Discussion

In order to establish an unpreventable employee misconduct defense, the employer must establish that it had: established work rules designed to prevent the violation; adequately communicated those work rules to its employees (including supervisors); taken reasonable steps to discover violations of those work rules; and effectively enforced those work rules when they were violated. *New York State Electric & Gas Corporation*, 17 BNA OSHC 1129, 1995 CCH OSHD ¶30,745 (91-2897, 1995). Moreover, it is well settled that the Act places ultimate responsibility for compliance with its requirements on the employer. The employer cannot delegate those duties or abdicate its responsibilities to another party. *See, e.g.*, *Baker Tank Company/Altech*, 17 BNA OSHC 1177, 1180, 1995 CCH OSHD 30,734, p. 42,684 (No. 90-1786-S, 1995); *Tri-State Steel Constr., Inc.,* 15 BNA OSHC 1903, 1916 n.23, 1991-93 CCH OSHD P 29,852, p. 40,740 n.23 (No. 89-2611, 1992), aff'd on other grounds, 26 F.3d 173 (D.C. Cir. 1994), *cert. denied,* No. 94-921 (Mar. 20, 1995).

Avcon admits it was the employer of the employees at the Mariners high rise site. (Respondent's post-hearing brief, p. 15). The record establishes that Avcon did have the authority to hire, fire, and discipline employees, either directly, or through union representatives, though it rarely exercised its authority. Avcon had a work rule which required the use of hard hats at all times, which, if adequately communicated to employees and enforced, would have prevented the cited violation. However, the record establishes that Avcon abandoned all responsibility for either communication or implementation of the rule, claiming to have no responsibility for employee safety or authority to enforce safety rules. Avcon introduced no evidence tending to show that it conducted any training or made any effort to discover or to correct violations of its safety rules.

Avcon failed to establish the affirmative defense of employee misconduct.

Willful

Facts

CO Donnelly testified that he discussed OSHA hard hat requirements with Bill and Nicholas Saites at the beginning of the Edgewater inspection (Tr. 395). However, the Saites were already aware that hard hats were to be worn at all times on the construction site. Other companies owned by the Saites were cited at least twelve times for violations of the hard hat rule between 1974 and 1989 (Exh. C-12, C-14, C-22, C-23, C-33, C-35, C-36, C-41, C-43, C-44, C-47, C-49). Each of the citations became a final order of the Commission (Exh. C-54). In addition, Avcon itself was cited for 6 instances alleging violations of §1926.100(a) at its work site in Hackensack, New Jersey only months before the Edgewater inspection.

As set forth above, Avcon knew its employees routinely disregarded its stated hard hat policy and worked without head protection. According to CO Donnelly, when he and other COs came onto the site, hard hats would "suddenly" be hoisted up to the deck where employees were working without head protection (Tr. 393). Nicholas Saites told CO Donnelly that he wasn't going to fire employees who wouldn't wear head protection (Tr. 391). Avcon's owner, Bill Saites, refused to wear a hard hat even when directly confronted by OSHA's CO (Tr. 384, 391, 393).

Discussion

The Commission has defined a "willful" violation as one "committed with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *Valdak Corp.*, 17 BNA OSHC 1135, 1136, 1993-95 CCH OSHD ¶30,759, p. 42,740 (No. 93-239, 1995), *aff'd,* 73 F.3d 1466 (8th Cir. 1996). The Secretary must differentiate a willful violation by showing that the employer had a heightened awareness of the illegality of the violative conduct or conditions, and demonstrating that the employer either consciously disregarded OSHA regulations or was plainly indifferent to the safety of its employees. *Propellex Corporation (Propellex),* 18 BNA OSHD 1677, 1999 CCH OSHD ¶31,792 (No. 96-0265, 1999). In *Propellex,* the Commission provided examples of an employer's heightened awareness, citing cases where an employer with actual notice of the cited violative conditions has previously been cited for violations of the standards in question, or has otherwise been made aware of the requirements of the standards. *Id.*

Here, there can be no question that Avcon was aware not only of its duty to ensure the use of hard hats under OSHA's head protection standard, but of its employees' habitual violation of the standard. Despite its familiarity with OSHA requirements and its employee's misconduct, Avcon failed to take any measures to ensure that its employees used head protection. Though OSHA warned Avcon about hard hat violations on the Edgewater site on October 23 and 24, 1998, employees were observed without hard hats on November 3, 1998. Bill Saites, Avcon's superintendent, refused to take any action

to train or to discipline employees, and refused to wear a hard hat himself. Avcon's history of repeated violations of the cited standard demonstrates its heightened awareness of its duty under the Act. Bill Saites refusal to comply with the Act's requirements, or to enforce Avcon's employees' compliance constitutes a deliberate disregard for those requirements. Accordingly this violation is properly classified as willful.

Penalty

CO Donnelly believed the gravity of the cited violation was high. Numerous instances of non-compliance were observed. An employee struck by either a concrete bucket or by falling construction materials could suffer lacerations, contusions, concussions or death (Tr. 389). Donnelly testified that the gravity based penalty was originally set at $40,000.00 (Tr. 390). A 20% adjustment was made based on Avcon's size (Tr. 390). A penalty of $32,000.00 was proposed for this item.

There is no mitigating evidence in the record. The proposed penalty of $32,000.00 is deemed appropriate, and is assessed for the violation.

Alleged Violations of §1926.501(b)(1)

Willful citation 2, item 2 alleges:

29 CFR 1926.501(b)(1): Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which was 6 feet (1.8 m) or more above a lower level was not protected from falling by the use of guardrail system, safety net system, or a personal fall arrest system:

a) 8th floor east side: The employees stripping the concrete formwork and installing reshores at the unprotected edge of the floor were exposed to a fall hazard, on or about 10/23/98.

b) 8th floor south side: The employees installing reshores at the unprotected edge of the building were exposed to a fall hazard, on or about 10/23/98.

c) 8th floor south side: The employee cleaning off a piece of plywood with his back to the unprotected edge of the building was exposed to a fall hazard, on or about 10/23/98

d) 8th floor north side: The employee stripping the concrete formwork at the unprotected edge of the building was exposed to a fall hazard, on or about 10/23/98.

e) 8th floor south side: The employees walking along the unprotected edge of the building were exposed to a fall hazard, on or about 10/23/98.

f) 8th floor north side: Employees picking up the lumber at the unprotected edge of the building were exposed to a fall hazard, on or about 10/24/98.

g) 8th floor south side: Employee carrying plywood at the unprotected edge of the building was exposed to a fall hazard, on or about 10/24/98.0

The Violation

Facts

In constructing the 16 floor Mariners building in Edgewater, New Jersey, Avcon utilized a poured-in-place concrete technique (Tr. 213, 877). Concrete forms consisting of vertical wooden posts supporting horizontal ribs, or cross-braces and beams, were constructed for each floor. The framework was covered with plywood decking, and concrete poured into the forms (Tr. 213, 979). As the concrete sets, or hardens, the formwork for the next floor was constructed (Tr. 213). Nicholas Saites testified that each floor was constructed in a three day pour cycle. During the first and second days forms were framed and reinforcing steel installed (Tr. 878; *See also,* testimony of Bill Saites, Tr. 980). On the third day the entire floor was poured (Tr. 878). The day after the pour, vertical framing for columns and/or side beams was stripped (Tr. 878, 1398-99) and "reshores," vertical wood members supporting the concrete floor were installed while the rest of the form work remained in place (Tr. 772, 1396). Two days after the pour, the vertical members supporting the plywood decking, "legs" and "stringers," and most of the horizontal ribs were taken down (Tr. 1397), and plywood on the bottom of the deck stripped away (Tr. 878, 1397). According to Nicholas Saites, the stripped lumber lays on the floor below the concrete deck until it can be collected and sorted (Tr. 1088; Exh. C-200, C-201). The nails are removed from the lumber, which is then stacked at the edge of the building and lifted to the next floor for re-use (Tr. 1088, 1090).

Nicholas Saites testified that Avcon employees were required to work within six feet of the edge of the poured concrete on the Edgewater job (Tr. 770). Except where balconies extended out past the building's edge, poured columns were located only six inches from the edge of the concrete (Tr. 771), and employees would work within a couple of feet of the poured edge (Tr. 775). Employees erecting legs and installing reshores would work approximately twelve inches from the concrete's edge (Tr. 771-73). When removing reshores workers may use a stripping tool which allows them to stand three or four feet back from the edge (Tr. 774).

Although employees routinely worked near the edge of the poured concrete floor at the Edgewater site when erecting and stripping formwork and reshores, no personal fall protection was required for those employees (Tr. 878-79). Nicholas Saites specifically stated that strippers did not use personal fall protection nor were safety nets provided (Tr. 879). According to Saites, fall protection on the stripping floor was provided by 16 foot long 3 x 4 lumber outriggers, which were installed when the stripping of vertical members approached the exterior of the building (Tr. 1398-1400). The lumber was

placed flat on the concrete floor, and a 16 foot 3 x 4" placed across the back of the outrigger to hold it in place. The beam across the back of the outriggers was wedged into place with a minimum of two vertical shores (Tr. 1402). The outriggers extended approximately six feet beyond the edge of the poured concrete and was intended to catch formwork that would otherwise fall to the ground during the stripping operation (Tr. 879-80, 1100, 1396, 1400, 1408, 1448, 1450-51, 1457-59; Exh. C-190). Nicholas Saites testified that he and the carpenter's foreman, Frank Georgiana, intended for the outriggers to be placed less than two feet apart (Tr. 1404-05). However, Saites and Avcon's safety expert, DeBobes, admitted that the outriggers appeared to be more than two feet apart (Tr. 1262, 1608; Exh. C-228).

On the framing floor above, plywood decking covered the horizontal ribs approximately three to four feet past the pour area. The uncovered ribs extended two to three feet past the plywood (Tr. 987, 1448, 1450, 1457-59). According to Saites, "leading men," who are not afraid, and who know how to work at the edge, are assigned to work at the edge of the concrete (Tr. 1001-02, 1022). Saites testified that employees begin framing from the center of the building, work their way to the edge and are exposed to the fall hazard. Employees working at the edge are instructed to crouch or keep their center of gravity low (Tr. 1435).

CO Donnelly testified that on October 23 and 24, 1998, he observed Avcon employees stripping concrete formwork and installing reshores on the eighth floor of the Mariners building (Tr. 396-397, 404, 413; Exh. C-275). There was no fall protection on the perimeter of the east side of the eighth floor where employees were working without personal fall protection (Tr. 404). Donnelly testified that on October 23, 1998 he noted: ***Instance a)*** An Avcon employee working approximately two feet from the unguarded edge who was exposed to falls of 80 to 90 feet to the yard below. The employee was videotaped removing shoring with his back to the building's edge. Removing the shoring involved strenuous physical activity; the employee was videotaped losing his balance and falling over plywood and other lumber on the stripping floor (Tr. 396-97, 402, 409-10; Exh. C-201, C-202, C-275, 01:02:32-01:03:07, 01:07:25-01:10:22); ***Instance b)*** Two employees installing reshores on the south side of the building worked approximately two feet from the unprotected edge of the building without personal fall protection (Tr. 400, 405, Exh. 275, 01:14:19-01:16:54). Nicholas Saites and Thomas DiPasquale, the shop steward, identified the exposed workers as Avcon employees (Tr. 401); ***Instance c)*** An employee identified as an Avcon laborer was moving lumber away from the unprotected edge of the building without the benefit of fall protection. The employee is seen in shadows behind the line of columns (Tr. 401, 405-06; Exh. 275; 01:50:32-01:51:16); ***Instance d)*** An Avcon employee was stripping concrete

formwork within approximately two feet of the unprotected north edge. Complainant's videotape shows the employee leaning out over the edge of the concrete floor throwing a piece of lumber onto outriggers that were more than two feet apart (Tr. 403, 406; Exh. 275; 04:05:35-04:06:00); ***Instance e)*** A worker identified as an Avcon employee was walking within approximately two feet of the unprotected south edge of the building. This employee also appears in shadows moving behind the line of columns (Tr. 403; Exh. 275, 01:24:23-01:24:46). On October 24, 1998 CO Donnelly observed employees exposed to a fall hazard of 79 feet, 6 inches, including: ***Instance f)*** up to six Avcon employees picking up lumber within inches of the unprotected north edge of the building. One of the employees leaned over the outside of the building (Tr. 403, 407); ***Instance g)*** An Avcon employee was carrying plywood within three feet of the unprotected south edge of the building (Tr. 404, 408).

Discussion

The cited standard provides:

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

As noted above, in order to prove a violation of section 5(a)(2) of the Act, the Secretary must show that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *Walker Towing Corp., supra.*

As a threshold matter, Avcon argues that the cited standard is not applicable because Avcon is engaged in leading edge work. Avcon argues that the standard applicable to its work is §1926.501(b)(2)(i) *Leading edges.* That standard provides:

> Each employee who is constructing a leading edge 6 feet (1.8 m) or more above lower levels shall be protected from falling by the use of guardrails systems, safety net systems, or personal fall arrest systems: Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of §1926.502.[5]

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[5] Pursuant to subparagraph (k), an alternative fall protection plan must fulfill a number of requirements including:

> (1) The fall protection plan shall be prepared by a qualified person and developed specifically for the site where the leading edge work. . . is being performed and the plan must be maintain up to date.
>
> (2) Any changes to the fall protection plan shall be approved by a qualified person.

(continued...)

NOTE: 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.

Section 1926.500(b) states:

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

The evidence establishes that on October 23, 1998, the eighth floor of the Mariners building was the "stripping floor." The ninth floor was the framing floor and was complete. Concrete was being poured on the tenth floor deck. Neither the eighth nor the ninth floor was "actively" or "continuously" under construction. There were, therefore, no leading edges on either floor. The edge of concrete floor on the eighth floor of the Mariners building was properly designated as an "unprotected side and edge," and the cited standard is applicable.

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[5](...continued)

(3) A copy of the fall protection plan with all approved changes shall be maintained at the job site.
(4) The implementation of the fall protection plan shall be under the supervision of a competent person.
(5) The fall protection plan shall document the reasons why the use of the conventional fall protection systems (guardrail systems personal fall arrest systems or safety nets systems) are infeasible or why their use would create a greater hazard.
(6) The fall protection plan shall include a written discussion of other measure that will be taken to reduce or eliminate the fall hazard for workers who cannot be provided with protection from the conventional fall protection systems. . ..
(7) The fall protection plan shall identify each location where conventional fall protection methods cannot be used. These locations shall then be classified as controlled access zones and the employer must comply with the criteria in paragraph (g) of this section.
(8) Where no other alternative measure has been implemented, the employer shall implement a safety monitoring system in conformance with §1926.502(h).
(9) The fall protection plan must include a statement which provides the name or other method of identification for each employee who is designated to work in the controlled access zones. No other employees may enter the controlled access zones. . . .

It is undisputed that Avcon management knew that there was neither a guardrail system, safety net system, or personal fall arrest system in use at the Mariners high rise; however, Avcon disputes CO Donnelly's estimates of the distances Avcon employees worked from the unguarded edges. At the hearing, Nicholas Saites estimated that all the cited employees were more than six feet away from the edge of the concrete based on his viewing of the videotape (Tr. 1244-54). However, the record supports the conclusion that CO Donnelly's estimates are more credible than those of Nicholas Saites. The evidence establishes that Avcon management knew its employees would, in the course of their duties, work near the edge of the concrete on the stripping floor, *i.e.,* within a foot to a "couple" of feet of the edge. Even when using a stripping tool, strippers can only stand back three to four feet from the edge. The videotaped evidence comports with Avcon's description of its employees job duties in the main and establishes that the Avcon employees on the stripping floor cited did work within six feet of the unguarded edge of the building.

Avcon argues, however, that workers within six feet of the edge were not working in the "zone of danger" posed by the unprotected side or edge. In order to establish employee exposure the Secretary must show either that Respondent's employees were actually exposed to the violative condition or 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, 1998 CCH OSHD ¶31,463, pp. 44,506-07 (No. 93-1853, 1997). The zone of danger is "that area surrounding the violative condition that presents the danger to employees the standard is intended to prevent." *RGM Constr. Co.*, 17 BNA OSHC 1229, 1234, 1993-95 CCH OSHD ¶30,754, p. 42,729 (No. 91-2107, 1995). Avcon's own safety expert, Leo DeBobes, testified that workers within six feet of an unguarded edge are generally considered to be at risk of falling (Tr. 1569-71). Moreover, in this case the cited employees were engaged in physical labor, swinging a stripping tool, pulling down large sheets of plywood from the bottom of the deck above and moving lengths of lumber. The employees working the stripping floor were constantly exposed to the tripping hazard posed by the loose lumber on the floor while their attention was directed upward towards the decking being stripped. Complainant's videotape shows an employee tripping and falling [though not, in this case, over the unguarded edge] while performing his job. The record establishes that it was reasonably predictable that Avcon employees would inadvertently, or while performing the jobs described in citation 2, item 2, instances (a) through (g), be exposed to the fall hazard addressed by §1926.501(b)(1).

The Secretary has established the cited violations.

Affirmative Defenses

Despite the inapplicability of §1926.501(b)(2)(i), Respondent raises the affirmative defenses of infeasibility and greater hazard. Nicholas Saites testified that he, his father and Frank Georgiana were aware of the three means of fall protection required under the cited standard (Tr. 1372) and required foremen and shop stewards to determine when it was feasible to use safety harnesses and lanyard and require their use when appropriate (Tr. 1431). Early on, however, Saites and the foremen decided among themselves that tying off to the formwork was not appropriate, and would create a greater hazard for employees (Tr. 1433). Workers were told, therefore, not to tie off (Tr. 1434). Saites stated that he conferred with net manufacturers and determined that safety nets were infeasible based on the amount of time it took to install and remove them (Tr. 1372-76, 1380). Avcon admits that guardrails were feasible on the pour deck and were used there (Tr. 420-21, 881, 988, 1447; Exh. 275); however, there is nothing in the record indicating that Avcon considered the use of guard rails on the framing or stripping floors or found them to be infeasible.

Infeasibility

To establish the affirmative defense of infeasibility, an employer must 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) either an alternative method of protection was used or there was no feasible alternative means of protection. *V.I.P. Structures, Inc.,* 16 BNA OSHC 1873, 1994 CCH OSHD ¶30,485 (No. 91-1167, 1994).

Nets. Louis Nacamuli, a licenced professional engineer and owner of Nacamuli Associates, testified that his firm was retained by Daibes Construction to provide the structural engineering for the Mariners building (Tr. 1467, 1469-70; Exh. R-6). According to Nacamuli, concrete must cure to three quarter strength or for approximately 14 days before any employer could ensure that the concrete could adequately support the base plates needed to anchor safety nets (Tr. 1491-92). On the Mariners construction site, where a new floor was poured approximately every three days, it was impossible to keep a net anchored 30 feet or less below the advancing fall hazard (Tr. 1491). Two or three day old concrete has reached only 10-15 percent of its desired strength, and cannot be guaranteed to support the anchorage for a net requiring 18,000 foot pounds to support it (Tr. 1474, 1479, 1488). However, Matthew Burkart, a professional engineer with Aegis Corp, a construction consulting firm (Tr. 1624, 1634; Exh. C-290) and Daniel Paine, president of Innovative Safety, a safety and health consulting firm,

(Tr. 1690-91; Exh. C-291) both testified that after seven days nets could be attached to the partially cured concrete floor with a C-clamp (Tr. 1649, 1651-52, 1667-69, 1696, 1740-41, 1751). The nets are jumped, in order to keep up with the advancing work, which adds two floors every week (Tr. 1651-53, 1667-1669, 1740-41).

Personal fall protection. Bill Saites maintained that the use of personal fall protection was infeasible on the stripping and framing floors, because anchorages were not available (Tr. 987). According to Bill Saites, the vertical formwork is designed to support the vertical load imposed by the weight of the concrete, but not lateral loads (Tr. 982). Saites admitted that formwork *could* be designed to withstand lateral loads so as to provide adequate anchorages for a fall protection system (Tr. 1010). Louis Nacamuli testified, however, that a substantial modification would be required to provide fall protection anchorages (Tr. 1472). Removing the reinforced formwork would take an "inordinate amount of time" (Tr. 1473). Moreover, according to Saites. Avcon was prohibited from embedding any anchorages into the concrete for a fall arrest system (Tr. 984, 1012). He admitted however, that industry literature describes the means of embedding anchorages in concrete work for fall protection systems (Tr. 1012-15). Saites testified that embedding anchorages was not practical, where a floor was poured every two to three days because the concrete would not set up before the work moved on (Tr. 1012; *See*, concurring testimony of L. Nacamuli, Tr. 1479, 1518-19).

Both Burkart and Paine testified that it *was* feasible to install anchorages for a safety *restraint* system, which prevents falls by keeping employees from approaching the unguarded edge too closely (Tr. 1645-47, 1716). Unlike a fall arrest system, the restraint system does not require significant anchorages (Tr. 1646-48). According to Paine, nylon straps with looped ends may be placed around rebar in the pour deck and dropped to the floor below (Tr. 1716-17, 1726). After the concrete is poured, the nylon straps provide overhead attachment points for a personal restraint system (Tr. 1723, 1726). The straps are cut off with a knife once construction is completed (Tr. 1717-18). However, Mr. Nacamuli stated that he had never seen harnesses and lanyards in use on either the framing or stripping floors in poured-in-place erection (Tr. 1480). Nacamuli testified that personal fall protection systems were impractical because employees must navigate "literally a forest of shores" (Tr. 1482). In addition, the lanyard might limit an employee's ability to get out of the way if formwork started to come down from the deck above (Tr. 1486). Matthew Burkart agreed that a personal arrest system, though feasible to install, would be difficult to work with because of the volume of material coming down from the overhead deck (Tr. 1676).

Guardrails. Louis Nacamuli testified that he would recommend guardrails for fall protection on the floor being poured as well as the stripping and framing floors (Tr. 1484). Nacamuli stated that guardrails are practical for poured-in-place concrete construction such as the Mariners building, and that guardrails are normally used by concrete contractors (Tr. 1475, 1496). According to Nacamuli, guardrails may be attached to the concrete floor by way of clamps, but are generally placed in brackets which are shored to the concrete slab outside the columns. One flange on the base of the bracket is wedged beneath an outrigger, while a vertical shore wedged between the concrete floor and the floor above holds the other flange in place (Tr. 1476).

Burkart agreed that guardrails could have been installed on the pour deck as well as on the floors below. He stated that guardrails could be attached to the structure using either temporary stanchions, or, once the columns were stripped, by wrapping or clamping cables to the concrete columns (Tr. 1643-44, 1678). Burkart stated that it was common for contractors to leave the original guardrails in place on the poured deck while erecting the formwork for the next floor (Tr. 1644, 1646, 1677). The guardrails provide protection for the framers, who install new guardrails on stanchions slightly outside of the perimeter columns before the old ones are pulled down from below with the rest of the form work (Tr. 1644-45, 1670). Daniel Paine also testified that guardrails are the preferred fall protection method for poured-in-place concrete construction (Tr. 1712-14, 1747). Normally, Paine stated, the guardrails erected on the pour deck are left in place until the perimeter columns are ready to be stripped and the guardrails replaced with wire cable, ensuring 100% fall protection (Tr. 1714).

Leo DeBobes, a safety and health expert presently acting as a special assistant to the vice president of the State University of New York (Tr. 1545-46; R-5) testified that guardrails were practical on the top or pour floor (Tr. 1578). DeBobes did not claim that installation of guardrails on the lower floors was infeasible, stating only that it wouldn't be practical to have the same type of guardrail system on those floors (Tr. 1581, 1592). However, DeBobes maintained that guardrails would hinder employees in the performance of stripping operations which include pulling down materials that extend beyond the edge of the building (Tr. 1591, 1596). However, Burkart did not believe that guardrails would significantly hinder the stripping operation, stating that there is very little material outside the building perimeter (Tr. 1649, 1680). Burkart testified that smaller areas might have to be stripped to prevent material falling onto the guardrails and outside the building, but stated that stripping operations would not be significantly slowed (Tr. 1680-81). Finally, Burkart stated that temporary stanchions are generally replaced with metal cables strung between the stripped columns before the plywood deck is pulled down to eliminate the danger of damaging the guardrail (Tr. 1670-72). Paine agreed that the

stripping operation need not interfere with the guardrails (Tr. 1748). He testified that by adding a few extra nails to the formwork the contractor can guide sections of formwork inside the stripping floor by hand, thus preventing them from falling either outside the building or onto existing guardrails (Tr. 1749-50, 1752-54). Paine did not believe that bringing the stripped material down by hand would prohibitively expand the stripping operation, stating that it was the preferred method in the industry (Tr. 1750, 1755-56).

Discussion

The record is replete with evidence that guardrails, the primary means of abatement specified in §1926.501(b)(1), were feasible on the eighth floor of Avcon's Edgewater work site, *i.e.,* the stripping floor. Both Complainant's and Respondent's expert witnesses testified that guardrails were the standard and were generally used to provide fall protection during poured-in-place concrete construction. Louis Nacamuli, Matthew Burkart and Daniel Paine all described in detail the means by which guardrails could be installed and maintained during the cycle of framing, pouring and stripping. Avcon, which bears the burden of proof on this issue, presented no evidence whatsoever in support of its contention that guardrails were infeasible. Though Avcon maintains that guardrails would continually be damaged by the stripping operation on the eighth floor, its counsel provides not a single cite to the record in support. DeBobes, the only expert witness testifying to the infeasibility of guardrails, never claimed that guardrails could not be maintained on the stripping floor stating only that the guardrails would "hinder" employees stripping the formwork. DeBobes' bald assertion cannot establish, in the face of the overwhelming expert testimony to the contrary, that guardrails were infeasible on the stripping floor. Thus, Avcon failed to sustain its affirmative defense. Because the record establishes the feasibility of guardrails on the Edgewater site, there is no need to address the feasibility of either safety nets or personal fall protection.

Greater Hazard

Facts

The only testimony supporting Avcon's contention that guardrails constituted a greater hazard was offered by Leo DeBobes (Tr. 1578). DeBobes testified that workers reaching through guardrails to pull down formwork outside of perimeter columns could overreach and fall over the railing (Tr. 1578-79). Matthew Burkart, however, pointed out that it was more dangerous to reach out with no guardrail, than to reach out over a guardrail providing some protection (Tr. 1674).

Discussion

In order to establish the affirmative defense of a greater hazard, the employer must show that 1) the hazards of compliance are greater than the hazards of non-compliance; 2) alternative means of protection are unavailable; and 3) an application for a variance would be inappropriate. *See Walker Towing Corp.*, 14 BNA OSHC 2072, 2078, 1991-93 CCH OSHD ¶29,239, p. 39,161 (No. 87-1359, 1991). While the hazards associated with both safety nets and personal fall arrest systems were exhaustively briefed in Avcon's post hearing submission, no hazards associated with guardrails are mentioned. It is clear that an employee's occasional need to reach over established guard rails cannot outweigh the advantage of providing 100% fall protection for employees during the remainder of the stripping operation. In any event, Bill Saites admitted, without explanation, that no one from Avcon applied for a variance based on the perceived hazard (Tr. 1371). The Commission has held that where an employer does not explain its failure to apply for variance for regularly performed operations, the first two elements of the defense need not be addressed. *Spancrete Northeast, Inc.*, 15 BNA OSHC 1020, 1991 CCH OSHD ¶29,313 (No. 86-521, 1991).

Based upon the record, Avcon failed to establish the affirmative defense of greater hazard.

Conclusion

Where, as here, the cited standard's required means of protection were not infeasible and did not create a greater hazard, it is unnecessary to address whether Respondent's use of outriggers as catch platforms, either alone or in conjunction with any other measures, constituted an alternative means of fall protection. The Commission has held that where a required means of protection is feasible and safe, employers cannot substitute an alternative means. *A.J. McNulty & Co., Inc.,* 19 BNA OSHC 1121, 2000 CCH OSHD ¶32,209 (No. 94-1758, 2000)*, citing, R & R Builders, Inc.*, 15 BNA OSHC 1383, 1390-91, 1991-93 CCH OSHD ¶29,531, pp. 39,863-64 (No. 88-282, 1991).

Willful citation 2, item 3 alleges:

29 CFR 1926.501(b)(1): Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which was 6 feet (1.8 m) or more above a lower level was not protected from falling by the use of guardrail system, safety net system, or a personal fall arrest system:

> a) 10th floor east side: The employees working at the edge of the building pouring concrete were exposed to a fall hazard. The employer failed to install an adequate guardrail system, only one wooden railing at a height of 24 inches was installed around the deck, on or about 10/23/98.
>
> b) 10th floor west side: The employees working on the deck bending rebar with a pipe with their backs to the edge of the building were exposed to a fall hazard, in that the

employer installed only one wooden railing at a height of 24 inches around the deck nor was there any other fall protection system in use, on or about 10/23/98.

c) 10th floor west side: The employees working at the edge of the floor, placing the wooden concrete form work over the protruding rebar and erecting the 1lth floor deck, were not protected from a fall hazard in that the employer installed only one wooden railing at a height of 24 inches around the deck nor was there any other fall protection system in place, on or about 10/23/98 and 10/24/98.

d) 10th floor south side: Employees removing the concrete form work (curbing) at the edge of the building were not protected from a fall hazard in that the employer installed only one wooden railing at a height of 24 inches around the deck nor was there any other fall protection system in place, on or about 10/23/98.

e) 10th floor west side: The employee standing with his back to the edge of the building while he was operating the transient was not protected from a fall hazard in that the employer installed only one wooden railing at a height of 24 inches around the deck nor was there any other fall protection system in place, on or about 10/23/98.

f) 9th floor southeast corner: Employees working at the unprotected edge of the building installing a clamp on the column were exposed to a fall hazard, on or about 10/23/98.

g) 9th floor east side: The employee standing on a milk crate at the unprotected edge of the building working on the column was exposed to a fall hazard, on or about 10/23/98.

h) 9th floor northwest corner: Employees working on the concrete formwork installing metal bracing at the unprotected edge of the building were exposed to a fall hazard, on or about 10/23/98.

i) 9th floor northeast corner: The employee installing the wooden shoring at the unprotected edge of the building was exposed to a fall hazard, on or about 10/23/98.

j) 9th floor east side: The employee standing on a milk crate working on the concrete formwork at the unprotected edge of the building was exposed to a fall hazard, on or about 10/23/98.

k) 9th floor north side center: The employee installing the reshoring at the unprotected edge of the building was not protected from a fall hazard, on or about 10/27/98.

Facts

Both Nicholas and Bill Saites testified that guardrails were required on the edge of the top floor where employees were engaged in pouring concrete (Tr. 881, 988, 1431, 1447). Bill Saites testified that Avcon rents brackets and attaches them to 4 x 4 "stringers," which are part of the formwork (Tr. 988-89). Rails consisting of 2 x 4s are dropped into the brackets (Tr. 988-89). On October 23, 1998, CO Donnelly observed that a single wooden railing at a height of 24 inches had been installed around the

deck of the tenth, or top floor (Tr. 420-22). The brackets supporting the 24 inch high midrail were designed to hold a top rail, however, the top rail had been omitted (Tr. 427; Exh. C-275, 01:52:29-01:52:33). Approximately 10 to 15 workers pouring concrete and finishing the top floor were identified as Avcon employees by Nicholas Saites and Avcon's cement finisher foreman, Jerry O'Brien (Tr. 420-22).

Employees exposed to the fall hazard included: ***Instance a)*** employees pouring concrete at the perimeter of the tenth, or top floor of the building (Tr. 423, 430-31; Exh. C-194); ***Instance b)*** employees working at the column line, within a couple of feet of the edge of the deck, bending rebar with a pipe with their backs to the edge of the building (Tr. 423, 428; Exh. C-275, 01:52:29-01:54:08); ***Instance c)*** employees working within a couple of feet of the edge of the west side of the top floor, placing the wooden concrete form work over the protruding rebar and erecting the 11th floor deck (Tr. 424, 428; Exh. C-275, 01:58:29-0:59:50); ***Instance d)*** employees removing the concrete form work (curbing) at the south edge of the building (Tr. 424, 428; Exh. C-275, 01:55:21-01:55:48); ***Instance e)*** Nicholas Saites standing within a couple of feet of the west side of the building with his back to the edge of the building while he was operating the transient (Tr. 424, 428; Exh. C-275, 01:52:29-01:54:08).

On October 23, 1998, Nicholas Saites and employee DiPasquale identified workers on the ninth floor as Avcon employees to CO Donnelly (Tr. 425). Donnelly testified that he observed: ***Instance f)*** employees working at the unprotected edge of the south east corner of the building installing a clamp on the column (Tr. 424-25, 433-34; Exh. 190); ***Instance g)*** employee standing on a milk crate at the unprotected east edge of the building working on the column (Tr. 425, 442-43); ***Instance h)*** employees working on the concrete formwork installing metal bracing at the unprotected northwest edge of the building (Tr. 425, 429; Exh. C-275, 01:26:03-01:26:40); ***Instance i)*** employees installing the wooden shoring at the unprotected north west edge of the building (Tr. 425, 438-40). ***Instance j)*** An employee standing on a milk crate working on the concrete formwork at the unprotected edge of the building (Tr. 426, 429; Exh. C-275, 01:44:11-01-45:15). On October 27 Donnelly observed ***Instance k)*** employee installing the reshoring at the unprotected edge of the ninth floor (Tr. 426, 435-38; Exh. C-227, C-228).

Discussion

Avcon does not specifically address any of the items alleged at citation 2, item 3 in its brief. At the hearing Nicholas Saites argued that cited employees on the pour deck never worked past the edge of the concrete stops. According to Saites, the formwork, to which the guardrails were attached, extended six feet past the edge of the stops. Employees working in the pour area, therefore, were never within six

feet of the edge of the formwork. Saites also maintained that the employees working on the ninth floor were further than six feet from the unguarded edge (Tr 1254-63).

It is clear from the record that employees on the deck worked right at the edge of the pour area and well within six feet of the inadequate guardrails. As noted above, formwork extensions are not provided for in the standard, and may not be substituted for standard guardrails. *A.J. McNulty & Co., Inc., supra.* Employees on the ninth floor also appear to be well within the six foot zone of danger posed by the building's edge.

Bill Saites argued that the guardrails merely provide a visual reminder for employees, warning them that they are near the edge (Tr. 989). He did not believe the guardrails would actually prevent an employee from falling because the guardrail "doesn't hold that much" (Tr. 1007; *See also* testimony of Nicholas Saites, Tr. 1073-77). According to Saites a man could fall below the 22 inch high midrail, through the 22 inch gap between the midrail and the 44 inch high top rail (Tr. 990). Nicholas Saites believed the guardrails were redundant because the formwork on the top floor also extended out further than the pour area (Tr. 881; Exh. C-190).

As noted above, the record establishes that it was feasible to install guardrails on the pour deck, the framing floor and the stripping floor. None of the experts testifying, *i.e.* Nacamuli, DeBobes, Burkart, and Paine, doubted that OSHA compliant guardrails capable of resisting 200 pounds of lateral pressure could successfully be attached to concrete formwork (Tr. 1475, 1588-90, 1643-45, 1713). Based on the testimony at hearing, Avcon appears to question the necessity of the cited standard, suggesting that guardrails are both unnecessary and futile. It is well settled however, that the employer may not use the adjudicatory process to challenge the wisdom of a required safety measure. *See, Austin Engg. Co.*, 12 BNA OSHC 1187, 1188, 1984-85 CCH OSHD ¶27,189, p. 35,099 (No. 81-168, 1985). If the employer disagrees with the need for regulation, it may either challenge a proposed standard through the rule making process, or it may apply for a variance excusing it from compliance with an existing rule. *Carabetta Enterprises, Inc.,*15 BNA OSHC 1429, 1991-93 CCH OSHD ¶29,543 (No. 89-2007, 1992). Avcon did neither, choosing instead to substitute its own opinion as to the efficacy of guardrails. The Secretary has established that a number of employees were exposed to fall hazards on the ninth floor and the pour deck of the Mariners building, described in ***Instances a*** through ***k***. Since Avcon raises no cognizable defenses to this item[6], it is affirmed.

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[6] At the hearing, Nicholas Saites testified that the absence of a top rail on the pour floor on October 23 was the result of employee misconduct (Tr. 1077). That affirmative defense was not briefed, and is deemed

(continued...)

Willful citation 2, item 4 alleges:

29 CFR 1926.501(b)(1): Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which was 6 feet (1.8 m) or more above a lower level was not protected from falling by the use of guardrail system, safety net system, or a personal fall arrest system:

> a) 11th floor, south side: The employer did not provide fall protection for the employees installing the rebar on the deck at the unprotected edge of the building, the employees were exposed to a fall hazard, on or about 10/27/98.
>
> b) 10th floor, south side: The employees clamping the concrete form work and installing the wooden shoring at the unprotected edge of the building were exposed to a fall hazard, on or about 10/27/98.

Facts

CO Donnelly testified that on October 27, 1998, he observed ***Instance a),*** Avcon employees laying rebar on the 11th floor pour deck (Tr. 454, 459-61; Exh. C-225; C-226). Although adequate guardrails had been erected around approximately half of the deck, there was no perimeter guarding in the area where the cited employees were working (Tr. 457-61). Nicholas Saites admitted that ironworkers on the pour deck would probably go within a foot or two of the concrete stop (Tr. 1264). According to CO Donnelly, Bill Saites told him that he didn't have enough brackets to install guardrails around the entire deck (Tr. 457-61). Donnelly also noted ***Instance b),*** two Avcon employees moving along the edge of the 10th floor, clamping columns. Donnelly photographed the area, but was unable to photograph the men working (Tr. 457-59, 462, 464).

Discussion

Avcon does not separately discuss the two instances addressed at item 4. However, because formwork may not be utilized as an alternative protective measure, as discussed above, and because Avcon failed to make out its affirmative defenses of infeasibility and greater hazard, item 4 is affirmed.

Willful citation 2, item 5 alleges:

29 CFR 1926.501(b)(1): Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which was 6 feet (1.8 m) or more above a lower level was not protected from falling by the use of guardrail system, safety net system, or a personal fall arrest system:

> a) 12th floor north side: The employees carrying and tying the rebar at the unprotected edge of the deck were not protected from a fall hazard, on or about 10/29/98.

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[6](...continued)
abandoned.

b) 12th floor south side: The employees working at the unprotected edge of the building, clamping the columns were exposed to a fall hazard, on or about 11/3/98.

c) 11th floor south side: Employee picking up pieces of lumber at the unprotected edge of the building was exposed to a fall hazard, on or about 11/3/98.

d) 1lth floor south side: The employee swinging the sledge hammer to strip the concrete form work with his back to the unprotected edge of the building was not protected from a fall hazard, on or about 11/3/98.

e) 11th floor north side: The employee standing on top of the stripped lumber installing reshores at the unprotected edge of the building was exposed to a fall hazard, on or about 11/3/98.

f) 11th floor south side: The employees stripping the formwork and carrying lumber at the unprotected edge of the building was not protected from a fall hazard, on or about 11/3/98.

g) 11th floor south side: The employee working at the unprotected edge of the building picking up pieces of lumber was exposed to a fall hazard, on or about 11/4/98 .

Facts

On October 29, 2001, CO Donnelly observed ***Instance a)***; Avcon employees were working on the north side of the 12th floor carrying and tying rebar (Tr. 466). As on October 27, 2001, the deck was only partially guarded, and the employees were working beyond the end of the guard rails (Tr. 467-68, 485-86). Donnelly testified that Bill Saites told him that he was not going to stop work to bring up more brackets and lumber for guardrails (Tr. 467).

On November 3, 1998, Donnelly observed: ***Instance b)*** two Avcon employees working a few feet from the edge of an unguarded balcony at the south edge of the 12th floor, clamping columns (Tr. 468-70, 477, 479-80, 482-84; Exh. C-275, 02:19:03-02:19:50; Exh. C-232); ***Instance c)*** an employee picking up pieces of lumber at the unprotected south edge of the 11th floor (Tr. 470, 481; Exh. C-275, 03:11:30-03:13:05); ***Instance d)*** an employee swinging a sledge hammer to strip the concrete form work with his back to the unprotected south edge of the 11th floor (Tr. 471-72, 481; Exh. C-275, 02:33:52-02:34:22); ***Instance e)*** an Avcon employee standing on top of stripped lumber installing reshores at the unprotected north edge of the 11th floor (Tr. 472-73); ***Instance f)*** two employees stripping the formwork and carrying lumber at the unprotected south edge of the 11th floor (Tr. 473-74, 488-89; Exh C-275, 02:39:15). On November 4, CO Donnelly noted ***Instance g)***; an employee picking up pieces of lumber at the unprotected south edge of the 11th floor (Tr. 474-75, 488; Exh. 247).

Discussion

Avcon does not discuss the specific instances addressed at item 5; however, at the hearing Nicholas Saites testified that the employees cited at ***Instances b), c) and g)*** were working at the back of a balcony that extends out six feet six inches further than the building's edge (Tr. 1267-73). The videotape does not support Saites' testimony in that the men shown in ***Instance b)*** were clamping both the inside and the outside of the columns. The outside edge of the column is less than six feet from the intersection of the extended balcony and the building's edge. Although the video for instances (c) and (d) indicates that the employees remained between the two columns; the obsevations of the compliance officer remain unrebutted. Thus, the record establishes by a preponderance of the evidence that the employees cited at ***Instances a), b), d) e) and f)*** were exposed to the cited fall hazard. Avcon fails to establish its affirmative defenses of infeasibility and greater hazard. Accordingly, item 5 is affirmed.

Willful citation 2, item 6 alleges:

29 CFR 1926.501(b)(1): Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which was 6 feet (1.8 m) or more above a lower level was not protected from falling by the use of guardrail system, safety net system, or a personal fall arrest system:

a) 12th floor south side: The employees working at the unprotected edge of the building stripping the columns were exposed to a fall hazard, on or about 11/4/98.

b) 13th floor south and north sides: Standard guardrails or other means of fall protection were not provided to protect the employees stripping the curbing at the unprotected edge of the building from a fall hazard, on or about 11/4/98 .

Facts

CO Donnelly testified that on November 4, 1998, he observed ***Instance a),*** *i.e.,* four Avcon employees stripping curbing at the edge of the unguarded south side of the 12th floor (Tr. 500-02). On the same day, Donnelly observed ***Instance b),*** an additional three employees stripping curbing on the 13th floor (Tr. 502-04; Exh. C-246).

Discussion

Avcon does not raise any defenses specific to the instances addressed at citation 2, item 6. As noted above, Avcon failed to make out its general affirmative defenses of infeasibility and greater hazard. Item 6 is affirmed.

Willful citation 2, item 7 alleges:

29 CFR 1926.501(b)(1): Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which was 6 feet (1.8 m) or more above a lower level was not protected from falling by the use of guardrail system, safety net system, or a personal fall arrest system:

a) 16th floor north and south sides: The employees installing the rebar at the unprotected edge of the deck were exposed to a fall hazard, on or about 11/16/98.

b) 15th floor south side: the employee working at the unprotected edge of the floor clamping the concrete column was exposed to a fall hazard, on or about 11/16/98.

Facts

On November 16, 1998 CO Donnelly observed ***Instance a)*** Avcon employees installing rebar at the edge of the 16th floor pour deck (Tr. 512). As on an earlier occasion, the employees were working past the end of an incomplete guardrail system (Tr. 515-16; Exh. C-275; 03:12:50-03:13:05). Donnelly also observed ***Instance b)*** an Avcon employee clamping columns at the south edge of the 15th floor (Tr. 513-14, 517; Exh. C-251).

Discussion

Avcon does not discuss the specific instances addressed at citation 2, item 7, and the observations of the compliance officer are unrebutted in the record. Accordingly, this item is affirmed.

Willful

As noted above, a willful violation is one "committed with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *Valdak Corp., supra.* A willful violation is differentiated by the employer's heightened awareness of the illegality of the violative conduct or conditions. A violation will be found willful where the Secretary demonstrates that the employer either consciously disregarded OSHA regulations or was plainly indifferent to the safety of its employees. *Propellex, supra.*

In this case, there can be no question that Avcon was aware of its duty to provide fall protection under OSHA's fall protection standards. CO Donnelly testified that both Bill and Nicholas Saites have "an extensive history" of safety and health inspections, and both were familiar with OSHA requirements (Tr. 415). According to Donnelly, only six months before the Edgewater inspection, OSHA concluded an inspection of another Saites' jobsites where fall protection was an issue (Tr. 243, 416, [identified by the Secretary as a 1997-98 inspection in Hackensack, New Jersey, which resulted in citations issued to Avcon for 17 serious and 8 willful violations of §1926.501(b)(1), *see* Secretary's post-hearing memorandum, pp. 2, 55; referencing *Secretary v. Avcon, Inc., Vasilios Saites and Nicholas Saites*, OSHRC Docket Nos. 98-0755 and 98-1168, currently pending before the Commission]). Donnelly testified that he reviewed the OSHA fall protection standards in depth with both Nicholas and Bill Saites at the time of the earlier inspection.

In addition, despite OSHA's presence on the Edgewater site between October 23 and November 16, 1998, the same kind of fall protection violations continued to be observed. CO Donnelly testified that Avcon had been cautioned about inadequate guardrails erected on the pour deck on October 23, yet workers were again found working outside of incomplete guardrails on October 29, 1998 (Tr. 494-95; *see,* citation 2, items 2 and 5). On October 29, Bill Saites refused to interrupt work to move lumber and brackets necessary to complete guard rails on the pour deck (Tr. 492-495, 498). CO Donnelly testified that Avcon did not refuse to put up guardrails once he pointed out the need for them; however, it is clear from the record that no guardrails were erected on a floor until after it was stripped (Tr. 499; Exh. C-228, C-246, C-247).

Finally, the Secretary introduced evidence of a number of fall protection citations issued to companies owned and operated by Bill and/or Nicholas Saites, dating from 1974 to 1990 (Exh. C-11, C-14, C-23, C-24, C-25, C-26, C-32, C-33, C-34, C-36, C-37, C-39, C-41, C-43, C-44, C-46). Those citations contained seven serious, one repeat and four willful citations alleging violation of §1926.500(d)(1) which requires that "[e]very 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 . . .," as well as four serious and one willful violation of §1926.105(a), which states that:

> 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.

All the citations introduced by the Secretary have become final orders of the Commission (Exh. C-54, pp. 358, 362, 367).

As the Secretary points out, the record is replete with evidence that Avcon abandoned its responsibility to enforce OSHA fall protection requirements on its site, refusing to fulfill its obligation to control the manner and means by which its work was accomplished where employee safety, and particularly fall protection, was concerned (Secretary's post hearing memorandum pp. 57-59). During the hearing, Nicholas Saites testified that Avcon's fall prevention program did address fall protection, providing for the use of personal fall protection (Tr. 1086, 1429-30). Avcon maintained that it provided safety harnesses for employees working at heights. Foremen on site were to determine when it was appropriate to tie off and to ensure that employees did, in fact, tie off when appropriate (Tr. 1431).[7] However, the Saites' did not believe that Avcon management had any responsibility to ensure that fall

[7] Both Donnelly and a second CO, Phil Peist, testified that there were not enough harnesses on the site for the workers. Only after OSHA began its inspection did harnesses begin appearing on the site (Tr. 214, 417).

protection was actually used. According to CO Donnelly, Nicholas Saites told him that his employees were grown men and that he was not going to "babysit" them (Tr. 416). Nicholas Saites told Donnelly that he wasn't going to fire his men for not wearing safety harnesses (Tr. 419). As noted above, the Saites' consistently testified at trial that Avcon had no authority to discipline employees and that union stewards and foremen were solely responsible for enforcing safety rules and regulations (Tr. 797, 802-07, 968, 991, 1439).

Under Respondent's final theory of its case, however, Avcon never intended their men to wear personal fall protection or to provide either of the other two fall protection measures provided for in §1926.501 (b)(2)(i). Instead, Avcon now maintains it developed an alternative fall protection plan including: 1) outriggers that extended six feet beyond the edge of the poured concrete floor on the stripping floor; 2) the retention of formwork three feet beyond the poured concrete floor on the framing floor; and 3) guardrails on the pour deck. Avcon asserts that it held a good faith belief that it could rely on such an alternative fall protection plan pursuant to the standard at §1926.501(b)(2)(i) *Leading edges* (Tr. 1428; Respondent's post-hearing brief, pp. 34-35).

The Commission has held that a finding of willfulness is not justified if an employer has made a good faith effort to comply with a standard, believing that the violative conditions conformed to the requirements of the cited standard, even though the employer's efforts are not entirely effective or complete. The test of good faith for these purposes is an objective one. The employer's belief concerning a factual matter or concerning the interpretation of a standard must have been reasonable under the circumstances. *Calang Corp.*, 14 BNA OSHC 1789, 1987-90 CCH OSHD ¶29,080 (No. 85-319, 1990). Moreover, an employer is not necessarily spared from a finding of willfulness by taking *any* measure, regardless how minimal, to enhance employee safety. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201, 1991-93 CCH OSHD ¶29,964 (No. 87-2059, 1993). Based on the evidence in the record, there is no support for the conclusion find that Avcon had a good faith belief that §1926.501(b)(2)(i) was applicable to its work place or that it's unwritten fall protection plan complied with the standard.

Nicholas Saites testified that he and his father disagreed with OSHA about the need for fall protection on the Hackensack site but changed Avcon's fall protection policies following the Hackensack citations (Tr. 1370-71). The change in "policy" Nicholas Saites referred to was (a) the decision to extend the ribs and stringers out beyond the edge of the concrete pour area so that employees on the framing floor would be working further from the edge, (b) the requirement that only experience men work at the edge, and (c) the decision to begin framing from the interior of the building (Tr. 1371, 1435). Saites then testified, conversely, that the Edgewater plan was the same plan that Avcon

employed on the Hackensack job (Tr. 1436). Nicholas Saites testified that, although he wasn't aware of the specific requirements for developing an alternative fall protection plan set forth in §1926.502(b)(2)(i) and 502(k), Avcon's unwritten procedure was intended to satisfy the requirements of those standards (Tr. 1435-36). At the time of the hearing Nicholas Saites did not know whether the plan as he described it fulfilled the requirements of 502(k) (Tr. 1437).

In fact, Avcon's plan did not come close to fulfilling the requirements set forth at §1926.502(k), set forth fully above. Leo DeBobes, Avcon's expert witness testified that to comply with subparagraph (k), a fall protection plan must be in writing (Tr. 1611, 1615). Moreover, a compliant plan would include demarcation of the controlled access zones, training for workers allowed inside those zones, and the use of a safety monitor (Tr. 1576, 1598, 1606, 1611). DeBobes believed that the outriggers, though admittedly providing no fall protection themselves, (Tr. 1610), provided an "awareness barrier," which would alert workers that they were approaching the edge of the poured concrete floor (Tr. 1573). DeBobes admitted that he was never at the Edgewater job site, and had no first hand knowledge about any other elements of Avcon's alleged fall protection plan (Tr. 1613). The evidence in the record, which includes both Nicholas Saites own description of the plan, and the photographic evidence of the alleged plan's implementation, establishes that there was no written plan, or designated safety monitor. Avcon did not attempt to show that employees were trained to work with safety monitors within controlled access zones.

Given Nicholas Saites' failure to assess the feasibility of guardrails, his unfamiliarity with the requirements of §1926.502(k), and the disparity between Avcon's alleged fall protection plan and a 502(k) compliant plan, it is clear that Avcon failed to make a good faith effort to comply with OSHA regulations. Moreover, Respondents had a heightened awareness of the illegality of their actions and consciously disregarded their obligation to comploy with the cited regulations. Accordingly, citation 2 items 2 through 7 are affirmed as willful violations.

Penalty

Six combined penalties of $56,000.00 were proposed for Avcon's failure to provide required fall protection on the eighth through sixteenth floor of the Mariners high rise. The gravity of the violations was high. Many employees were shown to have been exposed to fall hazard in excess of 79 feet from October 23 through November 16, 1998 (Tr. 396-414, 426, 453, 465, 491, 510-11, 519). A fall from 79 feet or above would certainly result in an employee's death (Tr. 414, 452, 465). CO Donnelly believed that the probability of an accident occurring was high because of the amount of debris on the floor (Tr. 414). However, no accidents were actually reported on this or any of the Saites' previous jobs (Tr.

1000). CO Donnelly testified that the cited fall protection violations were separated into six separate groups because for each group cited a single remedial measure, *e.g.,* the installation of a safety net on all four sides of the structure would have abated all the violations observed (Tr. 399). Each $56,000.00 penalty reflects a 20% reduction based on Avcon's size (Tr. 415, 454, 466).

Avcon objects to the Secretary alleging the separate fall hazards. Avcon argues that OSHA's objection is to Avcon's fall protection as a whole and maintains that all the alleged fall protection violations should have been grouped into a single citation with a single proposed penalty (Respondent's post-hearing brief, pp. 40-41). Avcon further claims that the Secretary did not prove that the violations were "egregious," in that Avcon did not met the criteria[8] set forth by the Secretary's CPL 2.80.H.2.b.1. for **Handling of Cases To Be Proposed for Violation-By-Violation Penalties** (Exh. R-16). Avcon asserts that it was improper, therefore, for the Secretary to cite it on an "instance by instance" basis (Respondent's post-hearing brief, p. 38-40).

First, it is well settled that it is within the Secretary's discretion to issue separate citations for multiple violations of a standard so long as the plain language of the standard can be read to permit multiple units of prosecution. Further, it is within the Commission's discretion to assess separate penalties for multiple violations of a standard when the final penalty assessed is "appropriate," given the gravity of the violations and the size, history and good faith of the employer. *E.g.; Andrew Catapano Enterprises, Inc. ,* 17 BNA OSHC 1776, 1778, 1996 CCH OSHD ¶31,180(90-0050 *et al*, 1996); *Caterpillar, Inc.,* 15 BNA OSHC 2153, 2172, 1993 CCH OSHD ¶29,962 (No. 87-0922, 1993). Moreover, the Commission has specifically found that separate penalties may be assessed for individual violations of the fall protection standards. *J.A. Jones Construction Co. (J.A. Jones),* 15 BNA OSHC 2201, CCH OSHD ¶29,964 (No. 87-2059, 1993)[dealing with multiple citations for violations §1926.500 **Guardrails, handrails, and covers]**. Under Commission precedent, it is irrelevant whether the multiple violations of a standard result from a single management decision or if they potentially could

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[8] CPL 2.80 H.2.b requires that at least one of seven criteria be met, including:
(2) The violations resulted in worker fatalities, a worksite catastrophe, or a large number of injuries or illnesses.
(3) The violations resulted in persistently high rates of worker injuries or illnesses.
(4) The employer has an extensive history of prior violations of the Act.
(5) The employer has intentionally disregarded its safety and health responsibilities.
(6) The employer's conduct taken as a whole amounts to clear bad faith in the performance of his/her duties under the Act.
(7) The employer has committed a large number of violations so as to undermine significantly the effectiveness of any safety and health program that might be in place.

be abated by a single action. *See, Hartford Roofing Co.*, 17 BNA OSHC 1361, 1366-1367; 1995 CCH OSHD ¶30,857 (No. 92-3855, 1995).

However, it is clear that Avcon was *not* cited on an instance by instance basis under the Secretary's "egregious" penalty policy. Under that policy, each employee exposure to a cited hazard is cited as a separate violation, and a separate penalty proposed. *See,* CPL 2.80.H.3.d.3.b. Citation 2, items 2 through 7 involve 31 factually distinguishable violations; many of violations exposed multiple employees to fall hazards. As is clear from the face of the citation and from CO Donnelly's testimony at trial, the 31 separate violations were grouped and six combined penalties were proposed. Grouping separate violations for purposes of proposing combined penalties is well within the Secretary's discretion. *See; A. E. Staley Mfg. Co.*, 19 BNA OSHC 1199, 2000 CCH OSHD ¶32,220 (Nos. 91-0637, 91-0638, 2000).

The Commission, however, is the ultimate arbiter in determining an appropriate penalty; has wide discretion in assessing penalties and has the authority to group distinct but overlapping violations for the purpose of assessing an appropriate penalty. *E. L. Davis Contracting Co.,* 16 BNA OSHC 2046, 1994 CCH OSHD ¶30,580 (No. 92-35, 1994); *H. H. Hall Construction Co.,* 10 BNA OSHC 1042, 1046, 1981 CCH OSHD ¶25,712 (No. 76-4765, 1981). As noted above, due consideration must be given to the size of the employer, the gravity of the violation and the employer's good faith and history of previous violations. *J.A. Jones, supra.* The gravity of the offense is the principle factor to be considered. In determining the gravity consideration must be given to: (1) the number of employees exposed to the risk of injury; (2) the duration of exposure; (3) the precautions taken against injury, if any; and (4) the degree of probability of occurrence of injury. *Kus-Tum Builders, Inc.* 10 BNA OSHC 1049, 1981 CCH OSHD ¶25,738 (No. 76-2644, 1981).

An undetermined number of Avcon's employees were exposed to fall hazards on the 8th through the 16th floors of the Mariners high rise between October 23 through November 16, 1998. Each of the fall hazards were in excess of 79 feet; a fall would likely result in death. Though there was no evidence of prior accidents involving fall hazards, Avcon's employees were repeatedly exposed to the unguarded edge during physically demanding stripping operations. Loose lumber created a tripping hazard on the site which increased the probability that an accident would occur. The outriggers on the stripping floor, euphemistically discribed as"vertical guardrail[s] on a horizontal plane," may have acted as an awareness barrier, but would not have arrested a fall. Some of the employees exposed to the fall hazards on the pour deck were partially protected by a 24 inch high midrail. It is clear, however, that a 24 inch midrail would not prevent a fall. While portions of the formwork appear to remain in place on the framing deck,

see, Exh. 190, which depicts the violation alleged at citation 2, item 3, ***instance f***, in other portions of the video, *i.e.,* depicting the alleged violations at citation 2, item 3, ***instances h*** and ***j*** all formwork has been removed. Employees working from the edge of the concrete floor remain in the zone of danger even where three feet of formwork extend out from the concrete's edge.

The gravity of the cited violation is deemed high. Avcon has an extensive record of prior violations and has made no good faith attempts to develop an OSHA compliant fall protection policy. As noted above, the cited violations were willful in nature. However, the Secretary's rationale for combining the 31 violations into six hypothetical groups, each of which the Secretary maintains could have been abated with a single net on all four sides of the building is unsupportable. The Secretary convincingly argued that the most viable method of fall protection consisted of an evolving system of guardrails wherein temporary rails in brackets would be moved from the formwork to the edge of the concrete floor, and eventually replaced with wire cable. The Secretary's proposed penalties, however do not reflect her litigation position. Moreover, in proposing six separate violations of §1926.501(b)(1), the Secretary proposes combined penalties of $336,000.00 for the cited fall hazards. Based upon the factors set forth at section 17 (j) of the Act, the proposed penalty is excessive. Taking into account the relevant factors, it is concluded that a combined penalty of $150,000.00 ($25,000 for each citation) for the violations cited at willful citation 2, items 2 through 7 is appropriate, and is assessed.[9]

Alleged Violations of §1926.501(b)(4)(i)

Willful citation 2, item 8 alleges:

29 CFR 1926.501(b)(4)(i): Each employee on walking/working surfaces was not protected from failing through holes (including skylights) more than 6 feet above lower levels by personal fall arrest systems, covers, or guardrail systems erected around such holes:

> a) lst floor through the 10th floor: The ladderway openings were not provided with standard guardrails at the unused portion of the opening to protect the employees from fall hazards, on or about 10/23/98 and 10/24/98.
>
> b) Floors 11 and 13: The elevator shaft and stairway openings were not provided with standard guardrails or covers to protect the employees from fall hazards, on or about 10/23/98 and 11/3/98.
>
> c) Floors 4, 5, 6, 7 and 9: The stairway openings were not provided with standard guardrails or covers to protect the employees from fall hazards, on or about 10/23/98 and 10/24/98.

[9] Pursuant to the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 1 of 508, §3101 (1990), a minimum mandatory penalty of $5,000.00 must be assessed for each willful violation.

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

Facts

On October 23 and 24, 1998 CO Donnelly observed ***Instance a),*** the ladderway openings on the 1st through the 10th floor were not provided with standard guardrails on the three unused sides of the openings (Tr. 520, 535-539; Exh. C-275, 02:00:05 through 02:14:49). Donnelly testified that the ladderways, which measured approximately 30" x 30", were used by Avcon employees for access to and egress from the building (Tr. 521). Donnelly stated that an employee could step or back into the openings and fall 9 feet, 2 inches to the floor below (Tr. 522, 537).

Nicholas Saites testified that ladderways are constructed in elevator shafts (Tr. 1275). The shafts are planked over and a hole, approximately 3 x 3 feet, is left in one end of the center shaft (Tr. 1275). An inclined ladder in the hole provides employee access (Tr. 1276). Saites testified that he believes the ladderways are as safe as possible. The planking over the elevator shaft is raised creating a platform which employees must step over when approaching the ladderway openings (Tr. 1278; Exh. R-50). The openings are so small that employees have trouble fitting through them (Tr. 1277). Moreover, Saites claimed an employee would not fall 9 feet 2 inches to the floor below. If an employee stepped into the open hole, his fall would be broken by the ladder (Tr. 1279). Finally, Nicholas Saites testified that guardrails were placed around the cited ladderways when CO Donnelly asked for them (Tr. 1279).

Donnelly stated that on October 23, 1998 the elevator shaft and stairway openings on the 10th floor[10] had not been guarded (Tr. 545-550; Exh. C-194 through C-198) and on November 3, 1998, the elevator shaft and stairway openings on 13th floors had not been provided with standard guardrails or covers (Tr. 522, 551; Exh. C-233). Both instances were cited at ***Instance b)***. Donnelly testified that he observed Avcon employees tying steel and pouring and finishing concrete within inches of the unguarded floor holes (Tr. 525-28). The elevator shafts were 26 feet long and 6 feet, 9 inches wide (Tr. 523). The stairway openings measured 5' x 8'2" (Tr. 524).

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[10] Donnelly testified that the citation erroneously referred to the 11th floor. Complainant averred that a motion to amend the complaint to conform to CO Donnelly's testimony had been made (Tr. 524). In addition, it is clear from the record that there was no 13th floor on October 23, 1998, and that concrete pouring on the 10th floor had been completed by November 3, 1998. To the extent that CO Donnelly's testimony suggests otherwise, it is discounted (Tr. 525-28).

Nicholas Saites testified that the cross-members pictured in the elevator shaft opening provided fall protection for workers on the 10th floor deck as well as maintaining size of the elevator opening (Tr. 1280-81; Exh. C-194-C-196). Moreover, Nicholas Saites testified the employees do not actually need to stand next to the opening while operating the concrete finishing machine (Tr. 1282). He stated that employee couldn't fall through the stairway openings because the reinforcing steel running through the stairwell opening provided fall protection (Tr. 1285-86; Exh. C-197, C-233). Saites further testified that elevator shaft and stairway openings would have been covered once employees began to frame the floor (Tr. 1284, 1290).

On October 23 and 24, 1998 Donnelly noted ***Instance c)***, stairway openings on floors four, five, six, seven and nine were not provided with standard guardrails or covers (Tr. 528-29, 540, 542, 552; Exh. C-199, C-275; 02:12:51, 02:18;39). Donnelly testified that employees were near the openings working on the reshores and moving lumber around (Tr. 529, 540, 542, 553-54).

Mr. Saites knew the openings on the lower floors did not always stay covered, pointing to Complainant's Exhibit C-199, where the reinforcing steel extended only about four feet into the unguarded opening. Plywood resting on the rebar covers little of the floor hole (Tr. 1291; Exh. C-199). However, Saites maintained that his men were not working on the on the fourth, fifth sixth or seventh floors on October 23-24, 1998 (Tr. 1290). He testified that Daibes and the plumbing, electrical and sheetrock subcontractors were working on the third floor on that date (Tr. 1302-04). Saites identified workers cleaning up the fifth or sixth floor on the unedited videotape as Daibes workers and workers erecting perimeter cables on the sixth floor as employees of the sheetrock subcontractor (Tr. 1304-06).

On October 24, 1998 Donnelly saw an Avcon employee, Norman Vanderhagen, rolling up a hose for an oxygen acetylene torch inches from the fifth floor stairway opening (Tr. 530, 544; Exh. 217). That incident was cited at ***Instance d)*** because the stairwell was not provided with standard guardrails or a cover (Tr. 542, 554-57; Exh. C-215, C-216, C-275, 02:09:07). Mr. Saites admitted that the acetylene cart Donnelly photographed on the fifth floor belonged to Avcon (Tr. 1293). CO Donnelly testified that he spoke to Nicholas Saites about the unguarded openings (Tr. 530) and Saites assured him the openings would be covered (Tr. 531). Frank Georgiana told Donnelly that he put covers on the openings, but someone kept taking them off (Tr. 531).

Discussion

The cited standard provides:

> Each employee on walking/working surfaces shall be protected from falling though 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.

The evidence establishes that Avcon employees used floor holes approximately 3 feet x 3 feet as ladderways to access their work floors. The openings, or holes, through which the ladders extended were sufficient to allow the passage of employees. The holes were not covered and no guardrail was erected to prevent employee falls into the opening. Employees using the ladderways were not protected by personal fall arrest systems. Avcon was aware of the cited condition but chose not to guard the ladderways. Respondent asserts that employees were not in danger of falling to the floor below because of the small size of the openings and the ladder prevented falls to the floor below. Moreover, employees could not approach the openings without stepping onto a raised platform.

It is undisputed that the installation of guardrails around the unused three sides was feasible and guardrails were installed at CO Donnelly's request. As noted above, where a required means of protection is feasible and safe, employers cannot substitute an alternative means. *A.J. McNulty & Co., Inc., supra.* The violation alleged in ***Instance a)*** has been proven.

The evidence further establishes that elevator shafts and stairway openings on the 10th and 13th floors were not provided with standard guardrails or covers and that Avcon employees worked in the vicinity of those fall hazards. The unguarded openings were on the pour deck in plain sight of Avcon's supervisory personnel, who should have known of the hazard. Covers and/or guardrails, the required means of protection, were feasible. Accordingly, the violation alleged in ***Instance b)*** has been established.

Avcon knew that the covers for stairway openings on the lower floors were routinely removed by other sub-contractors during the course of the job. Nicholas Saites' contention that no Avcon employees worked on the lower floors cannot be credited. First, Saites admitted that Avcon was working on the 9th floor, which is included in ***instance c).*** Though some employees on floors four through seven were videotaped cleaning or installing perimeter cables, others were observed working with Avcon's reshores and lumber. During his testimony regarding ***instance c),*** CO Donnelly specifically identified an Avcon employee he observed on the fifth floor rolling up hoses on Avcon's welding cart. ***Instances c) and d)*** have been established.

Selective Prosecution

Avcon maintains that it was unfairly cited for the floor hole violations cited at Willful citation 2, item 8. According to Nicholas Saites, all the subcontractors on this job used the ladderways and worked on the floors where unguarded stairway openings were located (Tr. 1289-90, 1295). Saites testified that

none of the other subcontractors were cited (Tr. 1290, 1295, 1305, 1306, 1314), although he also testified that he believed the sheetrock subcontractor was cited for fall protection violations (Tr. 1311). In its brief, Avcon argues that OSHA's selective enforcement of the Act deprived it of its right to due process under the law.

It is well settled that the conscious exercise of some selectivity in enforcement is not in itself a violation of due process. Relief is available only if the decision to prosecute is shown to have been deliberately based on an unjustifiable standard such as race or religion or other arbitrary classification. *Cuyahoga Valley Ry. V. United Tansportation Union*, 474 U.S. 3, 106 S.Ct. 286 (1985), or was unreasonably initiated with the intent to punish the employer for his exercise of a constitutionally protected right. *Futernick v. Sumpter Township*, 78 F.3d 1051 (6th Cir.), *cert denied,* 117 S. Ct. 296 (1996). Avcon does not ascribe any motive to OSHA's alleged misconduct. In order to state a claim for selective enforcement the employer must allege that the challenged governmental action was based on an illegal basis, such as race or religion, as noted above, or for exercising a protected right. Because Avcon has alleged no such improper motivation for OSHA's prosecution, no claim of selective enforcement can stand.

Willful

As stated previously, a willful violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety. A willful violation is differentiated from a non-willful violation by an employer's heightened awareness of the illegality of the conduct or conditions and by a state of mind, *i.e.*, conscious disregard or plain indifference for the safety and health of employees. *Propellex, supra.*

Complainant maintains that Avcon was familiar with OSHA requirements for covering floor holes. Companies owned by Bill and Nick Saites received numerous citations for violations of §1926.500(b)(1), an earlier version of 1926.501(b)(4)(i), which became final orders of the Commission (Exh. C-9, C-22, C-23, C-33, C-34, C-43, C-47). CO Donnelly testified that Avcon received citations for the same or similar standards following the OSHA inspection of its Hackensack work site in March, 1998. According to Donnelly, OSHA's area director, Phil Peist, and the CO conducting the inspection discussed the requirements of the standards with Avcon at that time (Tr. 563-64). Donnelly stated that he told Nick and Bill Saites about the requirements for guarding floor openings on October 23, when he initiated the Edgewater inspection (Tr. 564). During the course of the construction, guardrails were installed and floor holes were covered.

Unlike the violations cited in Willful citation 2, items 2 through 7, Complainant has not shown that Avcon made a deliberate decision not to comply with OSHA regulations regarding floor holes. There is no evidence in the record suggesting that Avcon considered and rejected compliance with OSHA guarding requirements before designing its ladderways. The summaries of prior violations introduced by Complainant's at Exhibits C-9, C-22, C-23, C-33, C-34, C-43, and C-47 do not detail the basis of the citations and it cannot determine whether any of the prior violations specifically involved guarding ladderways, where the floor hole was used for access and could not be covered or completely guarded. There is simply not enough in the record to determine whether Avcon had the required heightened awareness of its duties regarding ***Instance a).***

With regard to ***Instances b), c), and d),*** there is no evidence that Avcon's failure to promptly cover stairwells and/or elevator shafts, and ensure that they remained covered resulted from a deliberate company policy decision. The majority of the cited violations were abated when called to Avcon's attention. The Secretary's willful classification rests on CO Donnelly's belief that Avcon complied reluctantly (TR 533, 564-65) and on his discovery of a subsequent violation on the 13th floor pour deck where the newly created elevator shaft and stairway openings had not yet been guarded. Avcon was not shown to have had actual knowledge of the November 3, 1998 violation.

The violations cited involve different types of floor holes in various locations throughout the Edgewater site. Different methods of abatement were employed in abating the floor hole hazards. There is no evidence that the individual floor hole violations cited here were part of a deliberate course of conduct. The Commission has been reluctant to infer willfulness from the existence of a number of dissimilar violations unless those disparate violations are part of a pattern, practice, or course of conduct. *A.E. Staley Mfg. Co.,* 19 BNA OSHC 1199, 2000 CCH OSHD ¶32,229 (Nos. 91-0637, 91-0638, 2000). In *Staley,* the Commission found that general evidence of poor compliance with OSHA regulations does not, in itself, sufficiently demonstrate the employer's intent to circumvent the Act so as to support a blanket finding of willfulness.

The evidence is insufficient to support a willful classification for these items.

Penalty

A combined penalty of $44,000.00 was proposed for these violations. The proposed penalty is based on the CO's gravity based penalty, with a multiplier of 10 for willful violations. CO Donnelly testified that the proposed penalty reflects a 20% reduction for Avcon's size (Tr. 566).

The violations, though not found willful, are "serious" violations of the Act, in that employees falling into or through an unguarded floor hole would in all likelihood sustain serious injury such as bone

fractures (Tr. 566). Though insufficient to support a finding of willfulness, Avcon's history with OSHA, its familiarity with OSHA regulations, and the number of violations discovered during OSHA's inspection of the Edgewater site are all relevant to a determination of good faith and the appropriate penalty for these violations. *Staley, supra.* Taking into account the relevant factors, it is concluded that the CO's proposed gravity based penalty, minus the willful multiplier, is appropriate. A penalty of $4,400.00 is assessed.

Alleged Violation of §1926.20(b)(1)

Serious citation 1, item 1 alleges:

29 CFR 1926.20(b)(1): The employer did not initiate and maintain such accident prevention programs to provide compliance with the general safety and health provisions of the standard:

> a) Throughout the job site: An adequate safety and health program was not initiated and maintained by the employer as evidenced by the lack of the use of fall arrest and head protection by employees, including management, unguarded floor holes, improperly stored materials and poor housekeeping, on or about 10/23/98.

Facts

Nicholas Saites testified that Avcon had a written safety program, which he developed based upon a sample program supplied by OSHA CO Phil Peist in 1990 (Tr. 1036-39, 1086, 1427; Exh. C-6, R-2). Saites testified that the written plan was given to each foreman and shop steward and was posted in the construction trailer (Tr. 1427).

Avcon's safety program states, *inter alia*:

> The Project Superintendent/Assistant Superintendent will coordinate the following activities where necessary:
>
> * * *
>
> (5) Seeing that all necessary personal protective equipment and job safety materials are available.
> (6) Instructing the foreman that safe practices are to be followed and safe conditions maintained throughout the job.
>
> * * *
>
> The Foreman will:
> (1) See that all workmen follow safe practices.
> (2) Making sure that unsafe conditions are corrected int their work area.
> (3) Making sure that protective equipment is on hand and used.. . .
>
> * * *
>
> **MINIMUM SAFETY RULES FOR EMPLOYEES**
>
> All employees have a safety responsibility to themselves and to the fellow workers around them. These safety rules apply to all employees on the jobs. Special additional rules may be established by the Project Superintendent or foreman.
>
> * * *

> 36. Any questions regarding safety or safety equipment should be directed to supervision.

CO Brian Donnelly testified that the safety program was inadequate in that it did not contain any requirements for fall protection (Tr. 316). Donnelly stated that the safety program was also deficient in that it made no provision for training employees or for informing them of the hazards present on their work site (Tr. 318-20). Finally, Donnelly testified that the program did not provide for job site inspections to discover violations of the safety rules and that there was no enforcement of the safety program (Tr. 318-21).

Fall Protection. Nicholas Saites testified that the written safety plan covered fall protection requirements for employees in the section dealing with personal protective equipment (Tr. 1086, 1429-30). Saites maintained that Respondent provided safety harnesses for employees working at heights and foremen on site were to determine when it was appropriate to tie off. Foreman were also responsible for ensuring that employees did, in fact, tie off when appropriate (Tr. 1431). Moreover, Saites testified that Avcon had a "totally separate" unwritten fall protection plan which was communicated to the foremen and shop stewards (Tr. 1429, 1431-32, 1446). As discussed above, Nicholas Saites testified that Avcon believed it could comply with OSHA fall protection requirements by developing alternative methods of protecting its workers from fall hazards (Tr. 1436). According to Saites, the unwritten plan required the use of guardrails on the top floor, the extension of formwork past the edge of the concrete on the framing floor and the installation of outriggers on the stripping floor (Tr. 1431, 1434, 1447-48). In lieu of using personal protective equipment, employees were to begin framing from the center of the building and work their way to the edge. Employees were not to turn their backs to the fall hazard. Only experienced workers were allowed to work at the edge. Employees working at the edge were to crouch or keep their center of gravity low (Tr. 1435).

Both Nicholas and Bill Saites maintained, however, that it was not Avcon's responsibility to establish or enforce a safety program (Tr. 797, 968, 991). Bill Saites testified that, although he was the superintendent on the Edgewater job, the carpenter's shop steward and carpenter's foreman were in charge of safety (Tr. 968, 991). Nicholas Saites admitted that all authority flowed from his father to the foremen on the job; nonetheless, he maintained that the foremen and shop stewards, who are representatives of the workers' unions, are solely responsible for the workers' safety (Tr. 797, 802-07, 1439). According to Nicholas Saites the foremen and shop stewards are solely responsible for enforcing safety rules on the site (Tr. 807, 1038, 1439).

Avcon provided safety harnesses on the Edgewater site, but delegated all responsibility for determining when personal fall protection was required and ensuring its use to Frank Georgiana, the foreman from the carpenter's union (Tr. 968-70, 991, 1017, 1022, 1025). Bill Saites testified that he had no authority to hire or fire employees and he would have to go through the union foreman, Georgiana, to discipline an employee (Tr. 994). However, Nicholas Saites testified that his father could hire and fire employees and had fired workers in the past for violating safety rules (Tr. 860-61, 992, 1105, 1442). Moreover, Frank Georgiana had been working for Bill Saites since 1963 or 1964, and would not argue with him if he wanted an employee off the site (Tr. 995, 1005). If Bill Saites was unhappy with a foreman on site, he had the authority to fire the foreman (Tr. 1026).

Discussion

The cited standard provides:

General safety and health provisions.

* * *

(b) *Accident prevention responsibilities.* (1) It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part.

As noted above, to establish a violation the Secretary must show that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *Walker Towing Corp., supra.* Specifically, the Commission has held that under §1926.20(b)(1), the Commission has held that an employer may reasonably be expected to develop safety programs conforming to any known duties under the Act. To comply with the standard the employer's safety program must include those measures for detecting and correcting hazards which a reasonably prudent employer similarly situated would adopt. *W.G. Fairfield Co.*, 19 BNA OSHC 1233, 2000 CCH OSHD ¶32,216 (No. 99-0344, 2000).

Avcon was the employer of the employees involved in the poured-in-place operation at the Mariners high rise (Respondent's post-hearing brief, p. 15), and was obligated to comply with the provision of §1926.20(b)(1). The Act places ultimate responsibility for compliance with its requirements on the employer; the employer cannot delegate those duties or abdicate its responsibilities to another party. *See, e.g.*, *Baker Tank Company/Altech*, *supra*. The standard is, therefore, applicable. To comply with §1926.20(b)(1) a safety program must address known hazards and set forth such corrective measures as are adopted by the employer. The abatement measures must conform to OSHA requirements and be at least as effective as those of a similarly situated employer. In this case, Avcon

was aware that its employees would be exposed to fall hazards when constructing and stripping forms and while pouring concrete, yet its safety program fails to set forth an OSHA compliant fall protection plan or prescribe any specific means of addressing fall hazards.

Avcon's written safety program merely cautions supervisory personnel to follow safe job practices and to maintain safe condition throughout the job site. The unwritten program, as explained by Nicholas Saites, calls for the installation of guardrails on the pour deck but provides for no other fall protection. Neither the temporary retention of formwork on the framing floor nor the installation of outriggers on the stripping floor complies with OSHA fall protection requirements set forth under Subpart M which specifies guardrails, nets or personal fall protection. Neither of the measures utilized by Avcon provide adequate alternative fall protection. Avcon's admonitions to be careful while working, *i.e.,* "don't turn your back to the edge," "keep your center of gravity low," likewise fail to conform to OSHA requirements or to provide effective fall protection.

As discussed fully above, the evidence establishes that compliance with OSHA fall protection standards was feasible and safe. There is ample evidence in the record establishing that the erection of guardrails is standard in Avcon's business, *i.e.* poured-in-place concrete construction. Under the circumstances of this case a reasonably prudent employer engaged in the industry would have developed a safety program that included instructions describing the proper installation of guardrails during poured-in-place concrete construction

Employee training/discipline. Section 1926.20(b)(2) goes on to clarify §1926.20(b)(1), stating that "[s]uch programs shall provide for frequent and regular inspections of the job sites, materials and equipment to be made by competent persons designated by the employers." Section 1926.21(b)(2) further requires employers to "instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment. . ." The Secretary argues that Avcon failed to initiate and maintain a program of regular job site inspections necessary to comply with subparagraph .20(b)(2) or to institute employee training programs necessary to comply with subparagraph .21(b)(2). According to Complainant, Avcon abandoned any responsibility for employee training or for ensuring compliance with applicable safety requirements on the job site.

Nothing in Avcon's written safety plan provides for employee training. The written plan does not provide for inspections of the job site by competent persons. Avcon maintains that the union foremen and shop stewards were responsible for conducting employee training. Based upon the foregoing, this item is affirmed as a serious violation.

Penalty

CO Donnelly testified that the gravity of the cited violation was high. He stated that Avcon had about 70 employees, and that a 40% reduction for size is reflected in the proposed penalty of $3,000.00 (Tr. 324-26). No additional reductions were afforded for either good faith or for history, as the Saites' have received serious citations from OSHA (Tr. 325). Accordingly, a penalty in the amount of $3,000.00 is assessed for the violation.

Alleged Violation of §1926.25(a)

Serious citation 1, item 2 alleges:

29 CFR 1926.25(a): During the course of construction, form or scrap lumber with protruding nails was not kept clear:

> a) Floors 6, 7 and 8: Scrap lumber with protruding nails was not removed from the work areas, on or about 10/23/98 and 10/24/98.

Facts

On October 23, 1998, CO Donnelly observed and videotaped Avcon employees stripping the decking and cleaning up lumber from the eighth floor (Tr. 330, 342). Donnelly testified that the floor was covered with form lumber (Tr. 330, 338; Exh. C-192, C-200, C-201, C-275). Nicholas Saites testified that Complainant's exhibit C-200 accurately depicts how a floor typically looks after the decking has been stripped from the ceiling and before the lumber is collected, nails removed and the lumber sorted and stacked at the edge of the building (Tr. 1088, 1095-96; Exh. C-275). Respondent maintains that because the stripped decking is reused, it is not "debris." Moreover, he stated that it is impossible to strip the formwork and remove the nails at the same time (Tr. 1078). According to Saites, clean up of the used forms takes place a couple of hours after the deck is stripped (Tr. 1089). Saites further testified that no work takes place on the stripping floor between stripping and clean up (Tr. 1090).

Donnelly testified that on October 24, 1998, he found debris, including lumber with protruding nails, strewn about the sixth and seventh floors of the Edgewater site (Tr. 326, 328). Donnelly testified that on each of the sixth and seventh floors approximately four men were moving lumber around and pounding wedges into some reshores (Tr. 328-30, 333-37). Donnelly videotaped scrap lumber on both floors while accompanied by Nicholas Saites (Tr. 330-33, 343-44; Exh. C-216, C-275). He testified that Saites told him that Avcon employees were doing the reshoring, shoring, stripping, steel and concrete

(Tr. 332-33). Donnelly stated that employees left the work area when he began to videotape and he was unable to tape any workers on the sixth or seventh floors (Tr. 336).

According to Nicholas Saites, no Avcon employees should have been working on the sixth or seventh floor on October 24 (Tr. 1092-93). and it was the responsibility of the general contractor, Daibes, to conduct any clean-up required after Avcon had completed work on a floor (Tr. 1093).

Discussion

The cited standard provides:

> 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.

The cited standard specifically refers to form lumber with protruding nails and requires that such lumber be kept cleared from work areas. It is undisputed that employees perform stripping on an entire floor before nails are removed from the lumber stacked. The hazard posed by Avcon's stripping procedure is clear from the videotaped evidence, cited at willful citation 2, item 2(a), where an employee performing stripping operations in an area crowded with fallen plywood is shown tripping and falling onto the lumber. Avcon was aware of the cited hazard but maintains that immediately removing nails from the formwork or clearing the formwork from the areas where stripping is ongoing would unreasonably disrupt operations. However, No evidence supports that contention. Avcon's argument raises the affirmative defense of infeasibility and it bears the burden of establishing that protective measures required under Section 1926.25(a) are infeasible as well as showing there were no alternative feasible means of protecting its workers from the tripping and puncture hazards created by leaving the form work lying in work areas. *See; Seibel Modern Mfg & Welding Corp.*, 15 BNA OSHC 1218, 1991-93 CCH OSHD ¶29,442 (No. 88-821, 1991). Avcon has not sustained its burden of proof. With regard to the eighth floor stripping operation, the violation is affirmed.

It has been previously established that Avcon workers continued to perform work on floors below the three top floors where Avcon was actually engaged in framing, pouring and stripping operations. CO Donnelly observed men on the sixth and seventh floor working with reshores, a work activity assigned to Avcon employees. CO Donnelly's testimony, as well as the videotape, establishes that lumber debris remained on those floors. Accordingly, the violation has been established with regard to floors six and seven as a serious violation.

Penalty

Employees could fall and suffer puncture wounds in the cited areas. The proposed penalty included a 40% reduction based on Avcon's size. Because of Avcon's history of OSHA violations and the number of violations on the site, no credit for history or good fail is appropriate. The Secretary's proposed penalty of $2,100.00 is assessed.

Alleged Violation of §1926.404(b)(1)(i)

Serious citation 1, item 4 alleges:

29 CFR 1926.404(b)(1)(i): Employer did not use either ground fault circuit interrupters as specified in paragraph (b)(1)(ii) of this section, or an assured equipment grounding conductor program as specified in paragraph (b)(1)(iii) of this section to protect employees on construction sites:

> a) 3rd and 7th floors: The employees operating the portable electric Skilsaws were not protected from an electrical hazard by either a ground fault circuit interrupter or the assured grounding conductor program while using temporary receptacles, on or about 10/24/98.

Facts

On the third and seventh floors, CO Donnelly found Avcon employees, Matt York, Gus Protus, Loraine Cinafrone and Tom DiPasquale, using portable electric saws that were plugged into temporary wiring (Tr. 345, 348, 353-54; Exh. 275). Donnelly tested the electrical circuits and found that there was no ground fault interrupter in use (Tr. 346-47). Donnelly stated that the saws were not color coded to indicate that presence of an assured grounding conductor program (Tr. 347). Nicholas Saites testified that it was impossible to tell whether there was a ground fault interrupter on the site because it could be located anywhere in the building (Tr. 1098). Donnelly testified, however, that Saites never investigated whether a ground fault circuit interrupter had been installed on the site (Tr. 346). At the hearing, Saites admitted that he had never tested any of the electrical wiring at the site (Tr. 1442). However, Saites testified that he did not know Gus Protus and could find no reference to an employee by that name in Avcon's records (Tr. 1098-99). He further testified that Matt York was an apprentice carpenter and was not authorized to use the power tools (Tr. 1099).

Discussion

Section 1926.404(b)(1)(i) requires:

> The employer shall use either ground fault circuit interrupters as specified in paragraph (b)(1)(ii) of this section, or an assured equipment grounding conductor program as specified in paragraph (b)(1)(iii) of this section to protect employees on construction sites.

The evidence establishes that at least three of Respondent's employees operated electrical hand saws which were not protected with a ground fault circuit interrupter and exposed to electrical shock in violation of the cited standard. With the exercise of reasonable diligence Avcon could have ascertained whether a ground fault system had been installed on the electrical wiring at the site. Avcon admits it failed to test the site's wiring.

A violation of the cited standard has been established as a serious violation.

Penalty

CO Donnelly testified that an employee could be electrocuted should an accident occur. The proposed penalty included a 40% reduction based on Avcon's size. Because of Avcon's history of OSHA violations, and its failure to inspect the site for electrical hazards, no credit for history or good faith is appropriate. The Secretary's proposed penalty of $1,500.00 is assessed.

Alleged Violation of §1926.501(c)(1)

Serious citation 1, item 5 alleges:

29 CFR 1926.501(c)(1): When an employee was exposed to falling objects, the employer did not have each employee wear a hard hat and implement one of the following measures; (1) Erect toeboards, screens, or guardrail systems to prevent objects from falling from higher levels; or, (2) Erect a canopy structure and keep potential fall objects far enough from the edge of the higher level so that those objects would not go over the edge if they were accidentally displaced; or, (3) Barricade the area to which objects could fall, prohibit employees from entering the barricaded area, and keep objects that may fall far enough away from the edge of a higher level so that those objects would not go over the edge if they were accidentally displaced:

> a) Throughout building: Materials such as lumber and steel pins used for the concrete formwork were observed falling off the building thus exposing employees working and walking below to the hazard of being struck by falling materials, on or about 10/23/98 - 11/16/98.

Facts

CO Donnelly testified that between October 23 and November 16, 1998, he observed numerous instances of lumber and other material falling off the building (Tr. 357-58, 360). Donnelly stated that employees working in the yard adjacent to the building below the stripping operation including ironworkers, carpenters and laborers, were all exposed to the falling debris (Tr. 354-58). Donnelly stated that the area adjacent to the building was neither partially nor completely barricaded off and workers were observed entering and exiting the building from different locations. No discrete entry/exit area had been demarcated and no canopy had been erected to protect employees entering or leaving the building (Tr. 357-60).

Nicholas Saites testified that there was a canopy installed on the north side of the Edgewater site (Tr. 1094, 1358; Exh. R-48). Saites also stated that Avcon assigned an employee to go down to ground level and monitor the area where stripping was taking place. The assigned employee was to watch for employees in the area and warn them away from areas where there was a danger of falling debris (Tr. 1102).

Discussion

Section 1926.501(c) provides:

> *Protection from falling objects.* When an employee is exposed to falling objects, the employer shall have each employee wear a hard had and shall implement one of the following measures:
> (1) Erect toeboards, screens, or guardrail systems to prevent objects from falling from higher levels; or
> (2) Erect a canopy structure and keep potential fall objects far enough from the edge of the higher level so that those objects would not go over the edge if they were accidentally displaced; or
> (3) Barricade the area to which objects could fall, prohibit employees from entering the barricaded area, and keep objects that may fall far enough away from the edge of a higher level so that those objects would not go over the edge if they were accidentally displaced.

CO Donnelly's testimony establishes that Avcon complied with neither subparagraph (c)(1), (c)(2), or (c)(3) and no attempt was made to keep objects from falling over the ledge. It is clear from the testimony and from the videotape of the work site that Avcon expected stripping materials to go over the edge of the building. Some attempt was made to catch larger pieces of formwork on the stripping floor outriggers, however, Avcon knew that debris fell to the ground during stripping operations. Although Avcon maintains that a canopy was erected on the north side of the building, stripping operations took place over the entire length of all four sides of the building. No barricades were erected to prohibit employee access to the areas not protected by the canopy. CO Donnelly's testimony establishes that employees entered and exited the building from all areas.

The cited violation is established as a serious violation.

Penalty

CO Donnelly testified that an employee could be killed by debris falling from the eighth floor or above (Tr. 361). The proposed penalty included a 40% reduction based on Avcon's size. Because of Avcon's history of OSHA violations no credit for history or good fail is appropriate. The Secretary's proposed penalty of $3,000.00 is assessed.

Alleged Violation of §1926.502(d)

Serious citation 1, item 6 alleges:

29 CFR 1926.502(d): Personal fall arrest systems and their use did not comply with provisions set forth effective January 1, 1998, in that a body belt was used as part of a fall arrest system:

a) North side of building, mezzanine level: The employee working on top of the bricklayers' multi-point suspended scaffold was wearing a body belt as part of a personal fall arrest system rather than the safety harness required, on or about 11/16/98.

b) West side of building, 16th floor: The employee working on top of the bricklayers' multi-point suspended scaffold was wearing a body belt as part of a personal fall arrest system rather than the safety harness required, on or about 1/24/99.

Facts

CO Donnelly testified that, on two different dates, he observed Philip Armstrong wearing a body belt while working on a bricklayer's scaffold (Tr. 364-67, 370-71; Exh. C-275). Donnelly stated that Bill Saites acknowledged that Armstrong was an Avcon employee (Tr. 367, 369). At the hearing, Bill Saites denied telling Donnelly that Armstrong worked for him (Tr. 1000). Saites testified that Armstrong had worked for him as a laborer on previous jobs, however, on the Mariners high rise, Armstrong worked for the general contractor, Daibes (Tr. 1000-01). Nicholas Saites testified that Philip Armstrong was not employed by Avcon on November 16, 1998 or January 24, 1999 (Tr. 1102-03, 1442). According to Saites, Armstrong was employed by the general contractor, Daibes, as a bricklayer (Tr. 1103).

Discussion

Avcon argues that the named employee did not work for Avcon during the relevant periods. Avcon was engaged to install concrete form work and to pour concrete for the Mariners building (*See,* Avcon's Subcontract Agreement, Exh. C-114, Exhibit B, p. 30). Philip Armstrong was occupied as a bricklayer both times Donnelly saw him. Because there is evidence that Avcon performed only poured-in-place concrete work on the Edgewater site, the record supports the conclusion that Armstrong was not an Avcon employee. Accordingly, this item is vacated.

Alleged Violation of §1926.703(a)(2)

Other than serious citation 3, item 1 alleges:

29 CFR 1926.703(a)(2): Drawings or plans, including all revisions, for the jack layout, formwork (including shoring equipment), working decks, and scaffolds were not available at the jobsite:

a) Jobsite: The shoring layout drawings were not available, on or about 10/24/98.

Facts

CO Donnelly testified that Nicholas Saites told him that there was no shoring layout plan for the concrete form work on the Edgewater site (Tr. 568, 570-72). This evidence was not rebutted by Respondent. Accordingly, the violation is affirmed as an other than serious violation. No penalty was proposed by the Secretary. Accordingly, no penalty is assessed.

FINDINGS OF FACT

All findings of fact relevant and necessary to a determination of the contested items have been made above Fed R. Civ P. 52(a). All proposed findings of fact inconsistent with this decision are denied.

CONCLUSION OF LAW

1. Respondent, Avcon Inc., is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act.

2. Respondent, Altor Inc., is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act.

3. Respondents' Avcon Inc. and Altor Inc. are closely related companies having interrelated and integrated operations and are a single entity for purposes of this matter and jointly constitute an employer within the meaning of the Act.

4. Nicholas Saites and Vasilios Saites are not employers within the meaning of the Act in relation to this matter and are dismissed as individual Respondents.

ORDER

1. Serious citation 1, item 1, alleging violation of §1926.20(b)(1) is AFFIRMED, and penalty of $3,000.00 is ASSESSED.

2. Serious citation 1, item 2, alleging violation of §1926.25(a) is AFFIRMED and a penalty of $2,100.00 is ASSESSED.

3. Serious citation 1, item 3 is WITHDRAWN.

4. Serious citation 1, item 4, alleging violation of §1926.404(b)(1)(i) is AFFIRMED and a penalty of $1,500.00 is ASSESSED.

5. Serious citation 1, item 5, alleging violation of §1926.501(c)(1) is AFFIRMED and a penalty of $3,000.00 is ASSESSED.

6. Serious citation 1, item 6, alleging violation of §1926.502(d) is VACATED.

7. Willful citation 2, item 1, alleging violations of §1926.100(a) is AFFIRMED and a penalty of $32,000.00 is ASSESSED.

8. Willful citation 2, items 2 through 7, alleging violations of §1926.501(b)(1) are AFFIRMED and a combined penalty of $150,000.00 is ASSESSED.

9. Willful citation 2, item 8, alleging violations of §1926.501(b)(4)(i) is AFFIRMED as a serious violation and a penalty of $4,400.00 is ASSESSED.

10. Other than Serious citation 3, item 1, alleging violation of §1926.703(a)(2) is AFFIRMED without penalty.

A total penalty in the amount of $196,000.00 is assessed for the aforesaid violations.

/s/
Robert A. Yetman
Judge, OSHRC

Dated: December 17. 2001