Secretary of Labor, Complainant, v. Van Tassel Construction Corporation, Respondent.	OSHRC Docket No. 02-0643

Appearances:

Paul Spanos, Esq., Office of the Solicitor, U. S. Department of Labor, Cleveland, Ohio
For Complainant

Mr. Terry Romey, Consultant, Safe Concepts, Holland, Ohio
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Van Tassel Construction Corp. (Van Tassel) is a construction subcontractor. On March 6, 2002, Occupational Safety and Health Administration (OSHA) compliance officer Jeffrey Strain conducted an inspection of a shopping center on which Van Tassel was working in Holland, Ohio. As a result of Strain's inspection, the Secretary issued a two-item citation on March 22, 2002.

Item 1 of the citation alleges a serious violation of § 1926.20(b)(2) for failure to have a designated competent person make frequent and regular inspections of the job sites, materials, and equipment. Item 2 alleges a serious violation of § 1926.501(b)(13) for failure to provide fall protection for employees engaged in residential construction activities 6 feet or more above lower levels.

This case was assigned for E-Z proceedings. The hearing was held on August 27, 2002, in Toledo, Ohio. Van Tassel argues that it was in compliance with the terms of the cited standards. For the reasons set out below, item 1 of the citation is vacated, and item 2 is affirmed.

Background

On March 6, 2002, Van Tassel was engaged in construction at a strip shopping center located at the corner of Route 2 and Holland-Sylvania in Holland, Ohio. Van Tassel had been working on the project for at least a month at this time. Van Tassel's job was to give the shopping center a "facelift" by removing some of the old material and installing decorative trusses and an exterior plaster system for the facade of the center (Tr. 10, 75, 77).

Compliance officer Strain was driving to another inspection on March 6 when he observed from his car three of Van Tassel's employees working on the roof of the shopping center without fall protection. Strain parked his car and took several photographs of the employees at work (Exh. C-1; Tr. 10-11). Strain then held an opening conference with company owner Kip Van Tassel and interviewed Michael Sarvo, William Gomer, and Todd Jimerson, the three employees he had seen working on the roof (Tr. 10-11). The distance from the edge of the roof on which the employees were working to the ground measured 13 feet, 1 inch (Tr. 15). As a result of Strain's inspection, the Secretary issued the citation that gave rise to the instant case.

The Citation

The Secretary has the burden of proving her case by a preponderance of the evidence.

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

Atlantic Battery Co., 19 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Item 1: Alleged Serious Violation of § 1926.20(b)(2)

The Secretary alleges a serious violation of § 1926.20(b)(2), which provides:

> Such programs shall provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by employers.

Kip Van Tassel had worked in the construction industry for 17 years at the time of the hearing. He had owned and operated Van Tassel Construction for 10 years. Kip Van Tassel had attended 10- and 30-hour safety training programs (Tr. 57-58). He had implemented a written safety program for his company (Exh. C-5). Kip Van Tassel considered himself the designated competent person on the project (Tr. 59).

Kip Van Tassel conceded that he had not conducted an inspection the day Strain arrived at the site, but only because he had just arrived at the site himself when Strain approached him for an opening conference (Tr. 74). Strain stated that Van Tassel was in violation of the cited standard because Kip Van Tassel should have immediately conducted an inspection of the site the moment he arrived (Tr. 36): "As

soon as [Kip Van Tassel] was on the site, he should have been looking to make sure that his employees were doing the work with the procedures he puts forth in following all the safety requirements."

Section 1926.20(b)(2) requires the designated competent person to make "frequent and regular inspections" of the site. It does not necessarily require daily inspections, and it imposes no requirement that the inspection take place the moment the competent person sets foot on the site. During cross-examination of Kip Van Tassel, counsel for the Secretary implies such a requirement (Tr. 74):

> Q.: And, you agreed previously that you had not performed any inspection on March 6th?
>
> Van Tassel: I had not performed an inspection on these employees.
>
> Q.: Okay, thank you. And, would you agree with me that that is a failure to continually monitor compliance with the plan?
>
> Van Tassel: No, since I had just arrived on the job site, I had not had the chance to do that inspection.
>
> Q.: Nevertheless, the employees were working–
>
> Van Tassel: I had employees working all over that job.
>
> Q.: –without any inspection; is that right? But Mr. Sarvo, Mr. Jimerson and Mr. Gomer were working without there having been any inspection performed by a competent person; is that right?
>
> Van Tassel: That day.

The Secretary is reading requirements into § 1926.20(b)(2) that are not evident in the plain language of that standard. A violation cannot be found based on the fact that the competent person had not conducted an inspection of the site in the short time between when he arrived and when the compliance officer made his appearance. Item 1 is vacated.

Item 2: Alleged Serious Violation of § 1926.501(b)(13)

Section 1926.501(b)(13) provides:

> Each employee engaged in residential construction activities 6 feet (1.8m) or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection method. 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.

NOTE: There is a presumption that it is feasible and will not create a greater hazard to implement at least one fo 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 these systems.

Although the cited standard refers to "residential construction," OSHA has broadened its coverage to include certain types of non-residential construction. OSHA Directive STD 3-0.1A (Plain Language Revision of OSHA Instruction STD 3.1, Interim Fall Protection Compliance Guidelines for Residential Construction) provides (Exh. C-4, pp. 5-6, ¶ 8(1)):

8. AVAILABILITY OF ALTERNATIVE PROCEDURES. Alternative procedures are available to employers who are (1) engaged in residential construction, and (2) doing one of the listed activities.

1. Definition of "residential construction."

1. For purposes of this instruction, an employer is engaged in residential construction where the working environment, materials, methods and procedures are essentially the same as those used in building a typical single-family home or townhouse.

2. Residential construction is characterized by:

- Materials: Wood framing (not steel or concrete); wooden floor joists and roof structures.
- Methods: Traditional wood frame construction techniques.

3. In addition, the construction of a discrete part of a large commercial building (not the entire building), such as a wooden frame, shingled entranceway to a mall, may fit within the definition of residential construction. Such discrete parts of a commercial building would qualify as residential construction where the characteristics listed above are present.

2. Listed Activities and Alternative Procedures.

There are four groups of residential construction activities for which alternative fall protection plans are available. Each group has its own set of alternative procedures and will be discussed in Sections IX through XII. The groups are:

> 1. GROUP 1. Installation of floor joists, floor sheathing, and roof sheathing; erecting exterior walls; setting and bracing roof trusses and rafters.

The parties agree that Van Tassel was engaged in Group 1 activities at the time of Strain's inspection and thus was within the purview of § 501(b)(13). The cited standard applies. The Instruction states that the employer need not demonstrate the infeasibility of conventional methods of fall protection before implementing an alternative procedure (Exh. C-4, p. 4).

Van Tassel concedes that it was not using a conventional method of fall protection (i.e., a guardrail system, a safety net system, or personal fall arrest systems), but argues that it was using the alternative fall protection system authorized by STD 3-0.1A. The OSHA Directive provides (Exh. C-4, p. 6-7, ¶ 9):

> The alternative measures for [Group 1] are set out in Appendix E to Subpart M. Appendix E requires the employer to implement a Fall Protection Plan. Such a plan must lay out the safest procedures to be followed at the work site to prevent falls. Although the plan need not be in writing, it must be communicated to all employees on site who might be subject to fall hazards.

The Instruction goes on to list "General Requirements For Group 1 Activities. Training, Implementation/Supervision By Designated Individuals, Controlled Access Zones, Plan Administration (required for all Group 1 activities)" (Exh. C-4, p. 7). Van Tassel claims that it complied with the requirements set out for Group 1 by establishing a controlled access zone in accordance with STD 33-0.1A, which provides (Exh. C-4, p. 8):

> Controlled Access Zones.
>
> For purposes of this Instruction, a Controlled Access Zone (CAZ) restricts access to a clearly designated area where a Group One activity (installation of floor joists, floor sheathing, roof sheathing; erecting exterior walls; setting and bracing roof trusses and rafters) is taking place. The CAZ must meet the following requirements:
>
> a. Boundaries.
> The competent person shall determine the boundaries of the CAZ and clearly mark them with signs, wires, tapes, ropes or chains.
>
> b. Monitor.
> The crew supervisor/foreman shall monitor the workers in the CAZ to ensure that they do not engage in unsafe practices.

c. Restricted Access.
Access to the CAZ must be restricted to authorized entrants. An authorized entrant is a worker who has received the training described above. The competent person must identify each entrant as an authorized entrant after the employee has successfully completed the training.

d. Final Check.
Before work begins in the CAZ, the competent person must ensure that all protective measures in the Plan have been implemented.

Despite Van Tassel's claim that it had a CAZ in place, the record is devoid of any evidence that the company actually instituted any of the four steps set out above. Kip Van Tassel stated that his understanding of the Instruction was that, once the first two trusses were in place, employees could stand behind those trusses which would function as fall protection. The Instruction is clear that employees may do this only if a CAZ is already in place. The Instruction states: "Workers will remain on the top plate and use the previously stabilized trusses/rafters as support while the other trusses/rafters are erected." This paragraph appears under the section headed "*Additional* Requirements for Specific Group (1) Activities" (Exh. C-4, pp. 9-10; emphasis added). Kip Van Tassel made no other mention of setting up boundaries, monitoring the CAZ, restricting access or performing a final check (Tr. 57-82).

The only other Van Tassel employee who testified, foreman Michael Sarvo, also made no reference to the company's compliance with any of the CAZ requirements (Tr. 82-93). Exhibit C-3 is a photograph showing employees working on a roof that is taped off with warning tape. In its post-hearing brief, Van Tassel claims that it had "established a Controlled Access Zone as depicted in Exhibit C3" (Van Tassel's brief, p. 3). This is disingenuous. It is clear from the record that Exhibit C-3 depicts the worksite after Strain made his initial inspection and Van Tassel complied with his abatement suggestions. Strain stated that he took Exhibit C-3 approximately 2 hours after he arrived at the site: "C-3 is the abatement. . . . [T]his is the last photo I took at the site" (Tr. 45). When asked what Exhibit C-3 depicts, Strain responded, "This actually was the abatement that the company instituted at the inspection site. . . . [T]hey used warning tape to actually set off somewhat of a controlled access zone" (Tr. 21-22). Sarvo confirmed that the CAZ boundaries were not marked off with warning tape until after Strain told Van Tassel it needed to abate the fall hazard (Tr. 86).

One of the first photographs Strain took of the worksite, Exhibit C-1, was the subject of much analysis at the hearing. For the Secretary, it is prima facie evidence that the employee with his back to the camera (identified as Todd Jimerson) was standing at the extreme edge of the roof, exposed to a 13 foot fall (Tr. 17). At first glance, the photograph does seem to document that fact. Kip Van Tassel claimed that the photograph was misleading, and that Jimerson was actually standing 7 or 8 feet from the edge (Tr. 60). Sarvo agreed with Kip Van Tassel that Jimerson was not at the edge of roof at the time depicted in the photograph. Sarvo stated that the trusses were set 2 feet apart, and it appears to him that Jimerson is standing between the fifth and sixth truss, which would put him 8 to 10 feet from the edge of the roof (Tr. 92-93). The photograph is blurry and does not definitively support either party's position. It is determined that Exhibit C-1 does not conclusively show employee exposure to a fall hazard.

The record is sufficient, however, to otherwise support a finding of employee exposure. Strain initially stopped at the shopping center because he noticed from his car as he was driving past that the employees were working outside the trusses at the edge of the roof. Strain stated, "I myself saw the employees outside the confines of the roof trusses, getting equipment, moving around, standing at the edge of the roof and talking to each other" (Tr. 15). When Strain first parked in the parking lot in front of the worksite, he observed all three of the employees standing outside of the trusses at the edge of the roof (Tr. 47).

Statements the employees made to Strain indicate that the employees did not observe a CAZ and did not take care to stay behind the trusses. "Employees were really not aware of any type of set procedures or method. In fact, they told me generally–all three employees– that they don't worry about fall protection at these heights and with these roof slopes. . . [I]t's a small slope, three and twelve; four and twelve" (Tr. 26).

The Secretary has established a violation of § 1926.501(b)(13). Strain's testimony establishes that Van Tassel's employees were working at the edge of a roof, exposed to a 13 foot, 1 inch fall. Van Tassel did not establish that it was using a CAZ or any other means of fall protection. Van Tassel knew of the violation. The employees were working in plain view of Van Tassel's owner, and Van Tassel's foreman was one of the employees exposed. The violation exposed the employees to the hazard of falling 13 feet onto a concrete and asphalt surface (Tr. 29). The violation is serious.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

Van Tassel had 23 employees at the time of the inspection (Tr. 30). OSHA had not inspected Van Tassel within the previous 3 years (Tr. 31). Van Tassel is given no credit for good faith. Van Tassel made no attempt to implement fall protection at a height of 13 feet, 1 inch, because it decided that fall protection was not important at that height and slope. The gravity of the violation is moderately high. It is determined that the appropriate penalty for the violation of § 1926.501(b)(13) is $750.00

Findings of Fact and Conclusions of Law

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

Order

Based upon the foregoing decision, it is hereby ORDERED that:

1. Item 1, alleging a serious violation of § 1926.20(b)(2), is vacated and no penalty is assessed, and

2. Item 2, alleging a serious violation of § 1926.501(b)(13), is affirmed and a penalty of $750.00 is assessed.

/s/
NANCY J. SPIES
Judge

Date: October 7, 2002