



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
ZENITH TECH, INC.
Respondent.

OSHRC DOCKET
NO. 94-1552

**NOTICE OF DOCKETING
OF ADMINISTRATIVE LAW JUDGE'S DECISION**

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on March 17, 1995. The decision of the Judge will become a final order of the Commission on April 17, 1995 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary on or before April 6, 1995 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
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Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
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Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr. / RHD

Ray H. Darling, Jr.
Executive Secretary

Date: March 17, 1995

DOCKET NO. 94-1552

NOTICE IS GIVEN TO THE FOLLOWING:

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Benjamin R. Loye
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SECRETARY OF LABOR,
Complainant,

v.

ZENITH TECH, INC.,
Respondent.

OSHRC DOCKET
NO. 94-1552

APPEARANCES:

For the Complainant:

Helen J. Schuitmaker, Office of the Solicitor, U.S. Department of Labor,
Chicago, Illinois

For the Respondent:

Timothy G. Costello, Esq., Janice M. Pogorelec, Esq., Krukowski and
Costello, Milwaukee, Wisconsin

Before: Administrative Law Judge Benjamin R. Loye

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").

Respondent, Zenith Tech Inc. (Zenith), at all times relevant to this action maintained a worksite at the Airport Freeway Project in Milwaukee, Wisconsin, where it was engaged in bridge demolition. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On April 25, 1994, pursuant to an investigation of Zenith's airport freeway work-site, the Occupational Safety and Health Administration (OSHA) issued a citation, together with proposed penalties, alleging violation of §1926.500(d)(1) of the Act. By filing a timely notice of contest Respondent brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On December 1, 1994 a hearing was held in Milwaukee, Wisconsin. The parties have submitted briefs on the issues and this matter is ready for disposition.

Alleged Violation

Serious citation 1, item 1a alleges:

29 CFR 1926.500(d)(1): Opensided floors or platforms, 6 feet or more above adjacent floor or ground level, were not guarded by a standard railing or the equivalent on all open sides:

- (a) Employee(s) working on the North end of the bridge deck burning rebar and removing concrete slabs, were not protected from falling into the opening created by the slab of concrete deck that had been removed.

Facts

On April 14, 1994, as he approached Respondent's worksite, OSHA Compliance Officer (CO) Donald Zehm observed Zenith employees standing on the far side of a broom that was approximately five feet from an unguarded opening in the bridge being demolished (Tr. 28, 51). Zehm stated that employees sweeping within five feet of the unguarded hole would be exposed to a fall hazard (Tr. 56, 62).

A chain sling had been wrapped around the parapet, or concrete barricade, which projected up from the edge of the bridge surface (Tr. 39). CO Zehm did not take any measurements, but estimated that the employee who hooked up the chain would be within two to three feet of the opening in the bridge (Tr. 42, 49, 62).

Zehm also noted an employee, Dan Steel, on his knees in the area cutting rebar with an oxygen acetylene torch (Tr. 28-39, 60). Zehm testified that employees walking back and forth in the area to adjust the gas cylinders supplying the cutting torch, which were located in a rubber tire vehicle parked on the bridge, would pass near the bridge hole (Tr. 47).

The distance from the bridge to the grass embankment below was approximately 15 feet (Tr. 41).

Zenith's job foreman, Harvey Mann, testified that the chain sling was centered on the cut length of bridge parapet (Tr. 99). The length of parapet was between 16 and 19 feet long; each of the two chains comprising the sling were approximately a foot and one half to two feet off the center (Tr. 99, 108; Exh. R-1B, R-1C). Mann estimated that the distance from the chains to the unguarded bridge opening was approximately seven feet (Tr. 99; See also testimony of Dan Steel, Tr. 124). Mann further testified that the swept area noted by the CO was cleaned off before the first slab of pavement was removed, creating the cited opening (Tr. 103), and that a guarded walkway for the passage of employees had been created on the other side of the rubber tire vehicle (Tr. 49-50).

Steel testified that when CO Zehm arrived on the worksite, he was cutting rebar to enable the removal of the next slab of pavement, approximately 16 feet from the unguarded opening (Tr. 123). The controls for the burning torch Steel was using are located on the torch wand (Tr. 99-100).

Discussion

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 employees had access to the violative condition. See, e.g., *Walker Towing Corp.*, 14 BNA OSHC 2072, 1991 CCH OSHD ¶29,239 (No. 87-1359, 1991). In order to show employee exposure, the Secretary must prove that employees have been, are, or will be in the "zone of danger" either during their assigned working duties, their personal comfort activities while on the jobsite, or their movement along normal routes of ingress to or egress from their assigned workplaces. *Kaspar Electroplating Corp.* 16 BNA OSHC 1517, 1994 CCH OSHD ¶30,303 (No. 90-2866, 1993).

Here, the zone of danger is that area from which an employee might fall through the open bridge hole. The CO testified, and this judge agrees, that an employee of average height, between five and six feet, would be exposed to the fall hazard in an area extending approximately five feet from an unguarded edge. However, the CO did not actually see any employees standing closer than what he estimated to be five feet from the unguarded edge; moreover, his estimates of distance were made from a half block

away (Tr. 51), and were contradicted by employees with first hand knowledge of the working conditions and procedures.

Complainant failed to establish that Zenith's employees actually came, or could have reasonably been expected to come closer than approximately seven feet from the unguarded bridge hole. The Secretary failed to prove employee exposure to the cited hazard. The citation must, therefore, be dismissed.

Findings of Fact and Conclusions of Law

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

ORDER

1. Serious citation 1, item 1a, alleging violation of §1926.500(d)(1) is VACATED.



Benjamin R. Loye
Judge, OSHRC

Dated: March 10, 1995