
SECRETARY OF LABOR,
Complainant,

v.

N. M. SAVKO & SONS, INC.,
Respondent.

OSHRC Docket No. 95-1276

APPEARANCES:

Kenneth Walton, Esquire
Office of the Solicitor
U. S. Department of Labor
Cleveland, Ohio
For Complainant

F. Benjamin Riek, III, Esquire
Riek & Associates
Cleveland, Ohio
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

N. M. Savko & Sons, Inc. (Savko), contests two citations issued by the Secretary on July 17, 1995. The Secretary issued the citations following an inspection of Savko's worksite conducted by Occupational Safety and Health Administration (OSHA) compliance officers Richard Burns, Anthony Lowe, and Carrie Speers on June 5 and 6, 1995.

Item 1 of Citation No. 1 alleges a serious violation of § 1926.21(b)(6)(i), for failing to instruct employees required to enter into confined spaces as to the nature of hazards involved. Item 2 of Citation No. 1 alleges a serious violation of § 1926.651(k)(2), for failing to have its competent person remove employees from a trench that had the potential to cave-in. Item 1 of Citation No. 2 alleges a repeat violation of § 1926.652(a)(1) for failure to provide an adequate protective system for employees in trenches.

Savko disputes all aspects of the Secretary's citations and proposed penalties.

Background

Savko, an excavating contractor, was in the process of installing a new 15-inch concrete sewer at its worksite in Columbus, Ohio (Tr. 13, 407). Savko's worksite was a trench located on Westland Avenue north of the intersection at Fair and Westland Avenue (Tr. 156-157). Savko began work on the project on May 22, 1995 (Tr. 14, 17, 412).

A typical day at the worksite would begin with foreman Bill Day removing the manhole lids from the manholes on the sewer line which Savko was replacing. After approximately one hour, pipe-layer Billy Day (no relation to foreman Bill Day) would tie a rope around his waist and enter the manhole to install the laser, which would determine the line and grade of the pipe to be laid that day. The process took about one minute to complete (Tr. 98-99, 108).

Savko used a backhoe to excavate the trench. Billy Day would dig the trench to a predetermined depth and grade the bottom of the trench so that it was flat. Savko then sprinkled in gravel (designated as 57, which refers to its size). Billy Day would spread the 57 gravel by hand. Savko then installed the pipe and sprinkled gravel around it to secure its position. Savko would dump 57 gravel on top of the pipe until the gravel was approximately 5 feet from the ground's surface. Savko would then dump crushed 304 limestone, which is a larger size gravel, on top of the 57 gravel. Savko would use "J taps" to compact the 304 gravel (Tr. 424-427).

On June 5, 1995, the OSHA compliance officers arrived at Savko's worksite at approximately 10:15 a.m. (Tr. 27). Steve Savko, president of Savko, was at the site, along with the two Days (Tr. 159-160). Terry Haldeman, an inspector for the City of Columbus, was also at the site (Tr. 26). Compliance officer Burns observed a trench with gravel in it and Billy Day working out of and off to the side of the trench (Exh. J-2; Tr. 158-159). Based upon information gathered in Burns's interviews with Savko's employees, the Secretary issued the citations that gave rise to this case.

Citation No. 1

Item 1: Alleged Serious Violation of § 1926.21(b)(6)(i)

The Secretary alleges that Savko committed a serious violation of § 1926.21(b)(6)(i), which provides:

All employees required to enter into confined or enclosed spaces shall be instructed as to the nature of the hazards involved, the necessary precautions to be taken, and in the use of protective and emergency equipment required. The employer shall comply with any specific regulations that apply to work in dangerous or potentially dangerous areas.

Section 1926.21(b)(6)(ii) provides:

For purposes of paragraph (b)(6)(i) of this section, *confined or enclosed space* means any space having a limited means of egress, which is subject to the accumulation of

toxic or flammable contaminants or has an oxygen deficient atmosphere. Confined or enclosed spaces include, but are not limited to, storage tanks, process vessels, bins, boilers, ventilation or exhaust ducts, sewers, underground utility vaults, tunnels, pipelines, and open top spaces more than 4 feet in depth such as pits, tubs, vaults, and vessels.

The Secretary has the burden of proving his 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., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Savko disputes the applicability of § 1926.21(b)(6)(i) to the cited condition. Savko argues that the sewer that Billy Day was required to enter via the manholes was not a confined space because it was not subject to the accumulation of toxic or flammable contaminants, nor did it have an oxygen deficient atmosphere. Savko bases this argument on the testimony of Dan Longo, a soils engineer, who testified that old "combination" sanitary/storm sewers in residential areas contain at least 80 percent storm water, so that there is little chance of hazardous accumulation of toxic or flammable gases in the sewer (Tr. 352-353).¹

Savko's argument is rejected. The space in question is an eight-foot manhole connected to a sanitary/storm sewer (Tr. 260). Based upon smell, OSHA industrial hygienist, Anthony Lowe, observed what he considered to be sewage running through the bottom of the manhole into the sewer (Tr. 265). Section 1926.21(b)(6)(ii) specifically includes sewers in its definition of confined spaces. Longo's opinion that the sewer is not subject to the hazardous accumulation of toxic or flammable gases is not credited. Longo is a soils engineer who is president of Geotechnical Consultants Incorporated, a company whose services "consist of soil laboratory testing, analysis of soils, foundation test borings, [and] trench evaluations" (Tr. 345). Longo demonstrated no knowledge or training that would qualify him as an expert in what constitutes confined spaces.

¹ A "combination" system was originally built for storm water run-off prior to World War II. Taps into the system were later added to accommodate septic effluent (Tr. 351).

Longo asserted that because a combination sanitary/storm sewer is open, it is ventilated and not subject to the hazardous accumulations that a closed system is. But it is because the system is open that it is subject to hazardous accumulations. It is not possible to predict what people will choose to inject into the system. People may flush or pour down their drains all kinds of flammable, hazardous, or toxic substances. Similarly, the storm drains and vented manhole lids may allow dumping of toxic and flammable substances, such as gasoline or other fluids. If employees enter a manhole that is in proximity to one of these atypical, but not unforeseeable, additions to the sanitary/storm sewer system, they could be exposed to toxic or flammable gases. The sewer that Billy Day entered was a confined space, to which § 1926.21(b)(6)(i) is applicable.

The Secretary contends that Savko was in noncompliance with the terms of § 1926.21(b)(6)(1). The citation lists four specific inadequacies with Savko's confined space program:

- (1) No entry permit was issued that documented the conditions, including testing for atmospheric hazards, and authorized the entry of a permit space;
- (2) No training was conducted on the understanding, knowledge, and skills necessary for safe performance of the authorized entrants, attendants, and entry supervisor;
- (3) No training was conducted for employees on procedures in the event that rescue and emergency service are required. The local fire department can be used to enter permit spaces to perform rescue services; and
- (4) To facilitate non-entry rescue, no chest or full body harness with a retrieval line attached at the center of the entrant's back or above the entrant's head was used in conjunction with a mechanical device to retrieve personnel from vertical type permit spaces more than 5 feet deep.

At the hearing, industrial hygienist Lowe clarified that Savko's confined space program, as written, was adequate (Tr. 293-294). The Secretary argues that it was Savko's training that was inadequate under § 1926.21(b)(6)(i).

In *Baker Tank Company/Altech, A Division of Justiss Oil Co., Inc.*, 17 BNA OSHC 1177, 1178 (No. 90-1786S), the Secretary charged Baker with violating § 1926.21(b)(6)(i) "because its employees who were required to enter a confined space had not been instructed about the nature of the hazards they might confront, the precautions they should take, or the protective equipment they

should use against these hazards.” This charge is similar to what Savko is charged with here, except that the confined space at issue in *Baker* was an empty crude oil storage tank.

In *Baker*, the Review Commission held:

Evidence of an industry’s practice may be relevant in determining whether an employer had an adequate notice of what it must do to comply with a broadly-worded regulation such as section 1926.21(b)(6), which does not specify the particular hazards, precautions, or equipment that the required instructions are to address. . . . In determining the scope of an employer’s duty under another broadly-worded standard, 29 C.F.R. § 1926.20(b)(1), the Commission held that an employer may reasonably be expected to conform its safety program to any known duties and that a safety program must include those measures for detecting and correcting hazards that a reasonably prudent employer similarly situated would adopt We conclude that it is appropriate to apply the same criteria in determining whether there has been a violation of § 1926.21(b)(6)(i); the Secretary may establish a violation of that standard by showing that the employer did not instruct its employees about the hazards, precautions, and protective measures as a reasonably prudent employer in the industry would do, evidence as to current industry practice is relevant, but it is not dispositive if industry practice is shown to be inadequate.

Id. at 1178-1179

Steve Savko testified that he hired two different safety consultants and required his employees to attend tool box meetings which included instruction in confined space safety (Tr. 483-486). The testimony of Billy Day demonstrates, however, that Savko’s instruction fell far short of what a prudent employer would do. Billy Day, who had worked with Savko for 18 years at the time of the hearing, was the employee assigned the task of entering the sewer and setting up the laser. Billy Day testified that he had received training in confined spaces only after the June 5, 1995, OSHA inspection (Tr. 129-130). He testified that prior to the OSHA inspection, his confined space training consisted of watching his foreman (Tr. 130). Billy Day’s account of his training exposed a general lack of knowledge regarding confined spaces (Tr. 131-133):

Q.: Okay. To you, based on your training, what hazards are present in confined spaces? What hazards are you concerned about?

Day: What do you mean hazards?

Q.: Are there any hazards associated with a confined space based on your training?

Day: I don't understand what you say about hazards.

...

Q.: Are you aware of any dangers related to entering a confined space?

Day: What do you mean by dangers? I mean, are you saying some kind of hazard or something down in the manhole or something like that?

Q.: I used the word "hazard" previously. You didn't understand. I am trying to find a word you understand. Are there any concerns that you have associated with entering a confined space based on your training?

Day: Based on my training--you know, the foreman always checks it out.

Q.: Why?

Day: Because there might be something poison or something down in the hole. He wouldn't let me go in there if something is wrong The guy's got 40 years of knowledge. I think he should know what's right and wrong by now. . . . The foreman would say it would be okay if I go down there or not. I leave it all up to him.

Savko did not instruct Billy Day in the nature of the hazards involved, the necessary precautions to take, or the use of protective and emergency equipment required. Billy Day left all of these concerns to his foreman. The standard requires that "[a]ll employees required to enter into confined spaces shall be instructed," not that they should rely unquestioningly on their foremen. Savko was in noncompliance with the terms of § 1926.21(b)(6)(i).

Billy Day was exposed to the violative condition every time he entered a manhole to install a laser in the sewer. Savko knew that it had failed to instruct Billy Day in confined space safety.

The Secretary has established the Savko violated § 1926.21(b)(6)(i). Savko's failure to instruct its employee in confined space safety could result in his death or serious injury if he unknowingly entered a confined space that contained toxic or flammable gases. The violation is serious.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. Under § 17(j) of the Act, in determining the appropriate penalty the Commission is required to find and give "due

consideration” to (1) the size of the employer’s business, (2) the gravity of the violation, (3) the good faith of the employer, and the history of previous violations. The gravity of the violation is the principal factor to be considered.

Savko had from 40 to 50 employees at the time of the inspection (Tr. 511). The company had previously been cited for violations of the Act (Tr. 181). The Secretary presented no evidence of bad faith on the part of Savko. The gravity of the violation is high. Billy Day was required to enter the sewer on almost a daily basis, yet he knew next to nothing about the hazards involved. A penalty of \$1,125.00 is assessed.

The Trenching Violations

The Secretary charges Savko with a serious violation of § 1926.651(k)(2) (item 2 of Citation No. 1) and a repeat violation of § 1926.652(a)(1) (item 1 of Citation No. 2).

Section 1926.651(k)(2) provides:

Where the competent person finds evidence of a situation that could result in a possible cave-in, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions exposed employees shall be removed from the hazardous area until the necessary precautions have been taken to ensure their safety.

Section 1926.652(a)(1) provides:

Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section except when:

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

The basis for these two items is Burns’s belief that Billy Day had been working in the trench the morning of the inspection, without any form of protective system. If, as Savko contends, its trench box was in place when Billy Day was spreading gravel in the trench prior to OSHA’s arrival, then Savko was in compliance with the two cited standards. Burns conceded as much in his testimony (Tr. 175). If, however, the Secretary can prove that Billy Day was in the trench without the trench box, Savko was in violation of the standards.

The day of the inspection, June 5, 1995, was a Monday. Savko's crew had not done any substantive work the Friday before because of heavy rains. It had also rained heavily the night before the inspection (Tr. 158). The portion of the trench in issue ranged in depth from 5 to 7½ feet (Tr. 162). Because the excavation was along a city street and adjacent to private property, there was insufficient room to slope the trench sides. As a result, the walls were almost vertical (Tr. 163, 421). The trench, excavated in previously disturbed soil, was 7 feet wide at the bottom and 13 feet wide at the top (Tr. 461).

Savko had a trench box that it used on the project. Due to the limited space at the excavation site, Savko stored the trench box two blocks away in a city park's gravel parking area when it was not in use. Steve Savko estimated that the trench box was 1,500 feet and 3 minutes away from the site of the OSHA inspection (Tr. 460, 473, 512).

Burns testified that foreman Bill Day told him that Savko had not used the trench box that morning when Billy Day was in the trench (Tr. 162). This is the only evidence adduced by the Secretary to support its allegation that Savko violated the two trenching standards. Bill Day denied making this statement to Burns. He testified that the trench box was in the trench that morning when Billy Day spread the gravel (Tr. 92-93). Billy Day also testified that the trench box was in place when he was in the trench (Tr. 135).

Steve Savko and Burns both arrived at the site after Billy Day had completed his work in the trench. Neither of them had personal knowledge regarding whether the trench box had been used that morning (Tr. 225-226, 502). Terry Haldeman, who was on the site when OSHA arrived, gave ambiguous testimony as to whether he was on the site when Billy Day was in the trench and whether a trench box was used (Tr. 28-29, 70). The only witnesses who were actually present at the site at the time in question were Bill Day and Billy Day. Although the overall testimony of neither was a model of clarity, both emphatically stated that the trench box was used.

The Secretary's case is weakened by the notes taken by compliance officers Burns (Exh. R-3) and Carrie Speers (Exh. R-2). The notes were contemporaneous with the interviews taken on June 5, 1995. Burns's notes read in pertinent part (Exh. R-3):

One guy in trench today to spread gravel.
Over 6½ feet on gravel.
Uses a trench box--said around corner.

One would expect the notes to document Day's alleged statement that the trench box was not used. Speers's notes, "[t]rench box used per Mr. Bill Day," also demonstrate the absence of Day's alleged incriminating statement (Exh. R-4). One reading of the compliance officers' notes would be that Bill Day stated that Savko used a trench box, and that it was stored around the corner at the time of the OSHA's arrival at the site. Nothing in the notes indicates that Bill Day admitted to the compliance officers that an employee had been in the trench that morning without the trench box. While the notes do not prove that Day did not make this statement, they fail to support Burns's testimony on this crucial issue.

The Secretary has the burden of proof. A violation will not be found in this case solely upon Burns's assertion that Day admitted not using a trench box, when the only two witnesses actually on the site at the time in question aver that an available trench box was used. The Secretary has failed to establish a violation of §§ 1926.651(k)(2) and 652(a)(1).

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. The citation for item 1 of Citation No. 1 is affirmed and a penalty of \$1,125.00 is assessed;
2. The citation for item 2 of Citation No. 1 is vacated and no penalty is assessed; and
3. The citation for item 1 of Citation No. 2 is vacated and no penalty is assessed.

NANCY J. SPIES
Judge

Date: May 8, 1997