

**BEFORE THE NORTH CAROLINA OCCUPATIONAL  
SAFETY AND HEALTH REVIEW COMMISSION  
RALEIGH, NORTH CAROLINA**

**FILED**

JUN 27 2023

COMMISSIONER OF LABOR OF THE )  
STATE OF NORTH CAROLINA )  
 )  
COMPLAINANT, )  
 )  
v. )  
 )  
CONTAMINANT CONTROL, INC. DBA )  
CCI ENVIRONMENTAL SERVICES and )  
its successors, )  
 )  
RESPONDENT. )  
\_\_\_\_\_ )

NC OSH Review Commission  
**DOCKET NO. OSHANC: 2020-6335**  
**INSPECTION NUMBER: 318201167**  
**CSHO ID: L1173**

**ORDER**

THIS MATTER came on for hearing and was heard remotely before the undersigned on May 22, 2023, pursuant to a notice of remote hearing. Complainant was represented by Jonathan D. Jones, Associate Attorney General, North Carolina Department of Justice, Labor Section, and Respondent was represented by Carl B. Carruth and Nathaniel T. Quirk, Burr & Forman, LLP. No stipulations were agreed to by the parties. No employees appeared other than Tim Parker, noted below.

Complainant’s witnesses were Ted Hendrix, CSHO, N.C. Department of Labor, and Tim Parker, Vice President of Industrial Services for Respondent. After the testimony of the above-two witnesses and the admission into evidence of Complainant’s exhibits, Complainant rested its case. Respondent then moved for the dismissal of the Citation and Notification of Penalty at issue on the grounds that Complainant had failed to prove prima facie evidence of the alleged violation. For the reasons set forth below, the undersigned granted Respondent’s motion and dismissed the alleged violation based upon the evidence presented at the hearing and with due consideration of the contentions of both parties and hereby makes the following Findings of Fact and Conclusions of Law.

## ISSUE PRESENTED

The sole issue presented is whether Complainant met its burden of establishing a prima facie case that Respondent violated 29 CFR 1910.28(b)(1)(i) as alleged in the Citation and Notification of Penalty by not ensuring that each employee on a walking-working surface with an unprotected side or edge that is 4 feet or more above a lower level was protected from falling by one or more of the following: guardrail systems, safety net systems, or personal fall protection systems at the Respondent's solidification pit, exposing employees to a fall of four or more feet. The Citation and Notification of Penalty alleged that the alleged violation occurred on or about the day the inspection was made - August 13, 2020.

## SAFETY STANDARD AT ISSUE

29 CFR 1910.28(b)(1)(i) which is part of 29 CFR Part 1910, Subpart D, provides as follows:

- (b) Protection from fall hazards
  - (1) Unprotected sides and edges.
    - (i) Except as provided elsewhere in this section, the employer must ensure that each employee on a walking-working surface with an unprotected edge that is 4 feet (1.2 m) or more above a lower level is protected from falling by one or more of the following:
      - (A) Guardrail system;
      - (B) Safety net systems; or
      - (C) Personal fall protection systems, such as personal fall arrest, travel restraint, or personal systems.

The term "lower level" as it is used above is defined at Part 1910, Subpart D, §1910.21(b)

Definitions, as follows:

*Lower level means a surface or area to which an employee could fall. Such surfaces or areas including, but are not limited to, ground levels, floors, roofs, ramps, runways, excavations, pits, tanks, materials, water.*

*equipment, and similar surfaces and structures, or portions thereof.  
(emphasis added)*

### **FINDINGS OF FACT**

1. Complainant, Commissioner of Labor of the State of North Carolina (herewith Complainant or Commissioner) is charged by law with responsibility for compliance with and enforcement of the provisions of the N.C. Gen. Stat. §§95-126, et seq., the Occupational Safety and Health Act of North Carolina (the Act) as well as the regulations and standards adopted pursuant thereto.

2. Respondent, Contaminant Control, Inc. dba CCI Environmental Services, hereinafter Respondent, was at all times relevant to the case, a corporation in the business of providing environmental services, including but not limited to the disposal of nonhazardous waste into landfills and is authorized to do business in North Carolina. Respondent is an “employer” within the meaning of N.C.D.S. §95-127(10).

3. Respondent filed a timely notice of contest to the alleged violation. Accordingly, the North Carolina Occupational Safety and Health Review Commission, and the undersigned Hearing Officer, have jurisdiction over this matter.

4. On August 13, 2020, Complainant’s authorized representative, Compliance Safety and Health Officer (CSHO), Ted Hendrix, conducted an inspection of Respondent’s solidification pit at its workplace at 281 Lane Parkway, Salisbury, North Carolina. Accompanying Hendrix was Trainee CSHO Amber Hartis.

5. The purpose of the solidification pit was to solidify liquid nonhazardous waste so that it could be disposed of by depositing it into a nonhazardous waste landfill.

6. The solidification pit was constructed from a metal cylindrical shaped tank which was 42 feet long with a diameter of 10 feet (5 foot radius). The cylindrical tank had been cut in half

lengthwise to form an open top pit 42 feet long, 10 feet wide and 5 feet deep at its deepest point at the center of its rounded bottom.

7. The liquid waste, which was an opaque mixture of water, non-hazardous oil, hydraulic fluid, municipal waste, wood, latex paint, and debris, was deposited into the pit. Absorbent material, such as powdered sawdust, was added to the pit to absorb the liquid. This process continued until the mixture reached the top of the pit. When the pit was full, the top 2-3 feet of the solidified waste at the center of the pit was dug out by the use of an excavator and was taken to a landfill. More liquid waste and sawdust would then be deposited into the pit.

8. The excavator did not remove the solidified matter near the sides or bottom of the pit in order to eliminate the risk of the excavator's claw bucket damaging the sides or bottom of the metal pit and causing a leak.

9. On the day the inspection occurred, the top of the liquid waste, sawdust and other waste material within the pit was not more than 2-3 feet below the top of the pit.

10. Photographs taken by CSHO Hendrix during the inspection show that the liquid, sawdust and other solid material within the pit was approximately 2 feet from the top of the pit at the time of the inspection.

11. CSHO Hendrix admitted that in evaluating the condition to determine if a violation of 29 CFR 1910.28(b)(1)(i) occurred, he considered the "lower level" to which an employee could fall to be the bottom of the pit and not the surface of the material within the pit because if an employee fell into the pit he would likely sink through the contents to the bottom of the pit. CSHO Hendrix admitted that if the surface of the water and other material within the pit was considered to be the lower level, no violation of the standard occurred. (00:57:27) He admitted that if he considered water to be a lower level surface, he would not have considered that a violation occurred. (00:53:52) He further admitted

that the fall distance at the time of the inspection from the top of the pit to the surface of the water and sludge material in the pit was less than four feet. (01:03:10)

### CONCLUSIONS OF LAW

1. The foregoing findings of fact are incorporated by reference as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.

2. Respondent is subject to the provisions of the Act.

3. The term “lower level” as used within 29 CFR 1910.28(b)(1)(i) is defined at 29 CFR §1910.21(b) as follows:

Lower level means a surface or area to which an employee could fall. Such surface or areas include, but are not limited to, ground levels, floors, roofs, ramps, runways, excavations, pits, tanks, materials, water, equipment, and similar surfaces and structures, or portions thereof. (emphasis added)

4. The contents of the pit constituted “materials”, “water” and “similar surfaces” within the meaning of the above. Therefore, the surface of the pit’s contents constituted the “lower level” within the meaning of the standard at issue.

5. Complainant failed to present any evidence that a walking-working surface with an unprotected edge four feet or more above a lower level existed to require the use of fall protection as set forth at 29 CFR §1910.28(b)(1).

6. The above conclusions are consistent with the conclusion reached by Federal Administrative Law Judge Patrick Augustine in Secretary of Labor v. A.H. Beck Foundation Co., Inc., 22 OSHC 1910, 2009 BL 421202 (OSHRC Docket No. 08-0626) that the Secretary failed to establish a violation of 29 CFR 1926.501(b)(7)(ii) with respect to a fifty-five foot hole that was filled with liquid mud. Judge Augustine held,

However, the Secretary failed to present sufficient evidence to establish that the terms of the cited standard were violated. The Secretary argues

that the depth of the hole, for the purpose of analyzing this alleged fall protection violation, was 55 feet. I disagree. "OSHA has consistently held that Subpart M addresses the hazards of falling from a walking/working surface to any kind of lower level (e.g., solid, liquid, or colloid)." 59 F.R. 40, 681. The Secretary's own promulgation language concerning 1926.50(b) anticipates fall hazards to a liquid surface, not through a liquid surface. Therefore, the relevant distance in this alleged violation is measured from the top edge of the hole to the surface of the mud level in the hole. (emphasis added)

7. Because Complainant failed to establish prima facie evidence that a violation of 29 CFR 1910.28(b)(1)(i) occurred, Respondent's motion to dismiss was properly granted.

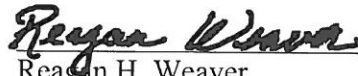
#### DISCUSSION

It is clear from the above definition of "lower level" that the surface of the liquid waste, sawdust, and any other material deposited within the solidification pit would constitute the "lower level" within the meaning of §1910.28(b)(1)(i). It is obvious from the photographs taken during the inspection and from testimony that the alleged "unprotected edge" of the solidification pit at issue is not 4 feet or more above said lower level. If an employee were to fall into the pit, the fall distance would only be 2-3 feet at the most – not four or more feet. Respondent's citation of the *A.H. Beck Foundation Co., Inc.* case, while not binding precedent, is persuasive. Thus, no violation of the standard existed and the citation must be vacated.

#### ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that the Citation and Notification of Penalty at issue herein is hereby VACATED in its entirety.

This the 27 day of June, 2023.

A handwritten signature in black ink, appearing to read "Reagan H. Weaver". The signature is written in a cursive style and is positioned above a horizontal line.

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Reagan H. Weaver  
Hearing Officer  
North Carolina Occupational Safety and Health  
Review Commission

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this date served a copy of the foregoing ORDER upon:

CARL B CARRUTH  
BURR FORMAN LLP  
1221 MAIN ST STE 1800  
COLUMBIA SC 29201

By depositing same in the United States Mail, Certified Mail, Return Receipt Requested, postage prepaid at Raleigh, North Carolina, and upon:

JONATHAN JONES  
NC DEPARTMENT OF JUSTICE  
LABOR SECTION  
PO BOX 629  
RALEIGH, NC 27602-0629

By depositing a copy of the same in the United States Mail, first class, postage prepaid at Raleigh, North Carolina, and upon:

NC DEPARTMENT OF LABOR  
LEGAL AFFAIRS DIVISION  
1101 MAIL SERVICE CENTER  
RALEIGH, NC 27699-1101  
carla.rose@labor.nc.gov

via email.

THIS THE 28 DAY OF June 2023.



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Karissa B. Sluss  
Docket and Office Administrator  
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