BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: OWENS-ILLINOIS GLASS CONTAINER INC. 3600 Alameda Avenue Oakland, CA 94601 Employer	Dockets. 09-R1D4-2021 & 2022 **DECISION AFTER RECONSIDERATION and ORDER OF REMAND**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken the petition for reconsideration filed by the Division of Occupational Safety and Health (Division) matter under submission, renders the following decision after reconsideration.

JURISDICTION

Beginning on September 23, 2008, the Division of Occupational Safety and Health (Division) conducted an accident inspection at a place of employment in Oakland, California maintained by Owens-Illinois Glass Container Inc. (Employer). On March 11, 2009, the Division issued two citations to Employer alleging violations of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.[1]

Citation 1 alleges a Serious violation of section 3308 [inadequate guarding on forming machines with hot surfaces]. Citation 2 alleges a Serious violation of section 4002(a) [insufficient guarding of machines with moving parts]. A penalty of $5,060 was proposed for each violation.

Employer filed timely appeals of the citations.

Administrative proceedings were held, including a contested evidentiary hearing before an Administrative Law Judge (ALJ) of the Board. After taking testimony and considering the evidence and arguments of counsel, the ALJ issued a Decision on April 6, 2010. The Decision granted Employer's appeal of both citations and vacated the proposed civil penalties.

[1] Unless otherwise specified, all references are to California Code of Regulations, Title 8.

The Division timely filed a petition for reconsideration of the ALJ's Decision. The Employer filed an answer to the petition.

ISSUE

1. Did Employer prove the existence of equitable estoppel?

2. Has Employer shown that section 3314(c)(1), rather than section 4002(a), applies to its Individual Sections forming machines?

EVIDENCE

The Decision summarizes the evidence adduced at hearing in detail. We summarize that evidence briefly below, focusing on the portions relevant to the issue presented.

Employer manufactures glass containers in its Oakland facility, which is a 24 hours a day, 7 days a week operation. Both citations were issued for groupings of machines known as "individual sections" (or "IS") forming machines, which manufacture various types of glassware, such as wine bottles, baby food jars, beer bottles, and the like, depending on what the IS is set up to produce at that time.

Donald Carter, an Executive Officer with the Glass Molders, Pottery, Plastics and Allied Workers International Union, who had been a journeyman operator in the glass industry for over 25 years, and had worked for Employer prior to his full-time appointment with the union, testified as to how the IS machine functions. A furnace in one location melts ingredients which are heated up to 3500 degrees Fahrenheit. This molten liquid is channeled through a feeder into an orifice where the liquid is then cut into gobs. These gobs are delivered down to the back side (or "blank side") of the IS machine, where different mechanical parts of the IS, including mold sets, a baffle arm, and funnel arm give the molten glass its initial shape.

Once this process is complete, the blank side opens up, and the container is transferred over to the front of the IS (referred to as the "mold side") where a mold is closed around the glass. The forms around the glass are hot, which prevents the molten glass from sticking to them. A final shot of air is given to expand the glass into shape, and an arm moves the newly made glass onto a conveyor belt away from the IS machine. Much of the IS is extremely hot, as is the glass, which may be up to 1800 degrees Fahrenheit and is still about 600 degrees Fahrenheit when placed on the conveyor belt to leave the IS machine. The mold sets, which are near the exterior edge of the IS's frame, are about 500 degrees Fahrenheit.

Carter, as well as Charles Craig, Employer's former regional health and safety administrator, testified that the operator of the IS has a variety of duties: she is constantly monitoring, making running and quality adjustments and other corrections as the glass flows, and applying lubricant to the machine. The lubrication process is referred to as swabbing-- the molds are swabbed with a lubricant about every fifteen minutes, according to the testimony of the Division's Senior Safety Engineer, Patrick Bell. The machine has a computer operator interface (called the "Com-Soc") with a swab cycle button; when hit, it stops the machinery from moving long enough for the worker to swab. The swabbing ensures that glass does not stick to the mold. Glass becoming stuck can cause the machine to malfunction, and the glass itself is a fire hazard.

Employer introduced testimony and evidence related to four prior citations involving the IS machine: citations in 1991 and 1996-97 in Oakland, a 2005-06 citation issued by the Modesto District office in Tracy, and a Federal OSHA citation. Unrebutted testimony established that the IS machines in use during these time periods at the California locations were nearly identical to the machines in use in Oakland discussed here.

In 1991, the Oakland Division District Manager issued Employer a "Notice of No Accident Related Violation After Investigation" after conducting an investigation of an injury accident. Lawrence Callahan, Employer's former senior regional safety and health manager, testified that he had some recollection of a discussion on guarding the IS machine, and Employer explained to the Division it had evaluated the possibility of guarding, but the operator had to get into the machine. In 1996, after another accident and investigation on the IS, another "Notice of No Violation After Inspection" was issued to Employer. Callahan had some memory that Employer did discuss with the Division ways to keep the operator away from the IS, but ultimately guarding was not an issue, as the operator needed to get in and do various tasks. Callahan also testified that Employer believed, based on the 1997 "Notice of No Violation," that it needed to continue to do the training it was already doing, and that the message from the Division was to strengthen the training and enforcement program, which it did. Both notices included a pre-printed statement informing the recipient that:

> This notice relates solely and exclusively to the investigation of the industrial accident(s) and/or occupational illness(es) described above. It does not relate to any other conduct, condition, or activity existing at the above-described place of employment either on the date of the investigation or presently.[2]

Employer's Tracy plant received a citation in 2005 following an injury investigation conducted by the Division's Modesto office; the citation alleged a

[2] This language is from the 1991 citation. The 1997 notice has somewhat changed language: "This notice relates solely and exclusively to the inspection on the above date, which was not necessarily a comprehensive inspection of the worksite. Due to the transitory nature of worksite conditions, violations

section 4002(a) violation, for failure to ensure the activating arms of the blank container forms of the IS machine were guarded. Employer representatives, including Craig, met with the Division. Craig testified that Modesto Division District Manager John Caynak was present. At that meeting, Craig testified that Caynak agreed to amend the citation to refer to section 3314 rather than section 4002(a), and lower the penalty.[3]

Ronald Roy, a senior regional safety and health administrator for Employer, also testified regarding a federal OSHA inspection of IS machines at a plant Employer operates in Illinois. According to Roy, after an informal conference, at which Roy and OSHA personnel discussed the issue, OSHA did not pursue the citation further.

DECISION AFTER RECONSIDERATION

In making this decision, the Board relies upon its independent review of the entire evidentiary record in the proceeding. The Board has taken no new evidence. The Board has also reviewed and considered Employer's petition for reconsideration and the Division's answer to it.

Labor Code section 6617 sets forth five grounds upon which a petition for reconsideration may be based:

(a) That by such order or decision made and filed by the appeals board or hearing officer, the appeals board acted without or in excess of its powers.
(b) That the order or decision was procured by fraud.
(c) That the evidence does not justify the findings of fact.
(d) That the petitioner has discovered new evidence material to him, which he could not, with reasonable diligence, have discovered and produced at the hearing.
(e) That the findings of fact do not support the order or decision.

The Division petitioned for reconsideration on the basis of Labor Code section 6617(a).

Citation 2 alleges a violation of section 4002(a):

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can occur occasionally or routinely and may be undetected by any given inspection. This notice does not preclude the issuance of citations on any future inspections." (Ex.s H, I)

[3] The Division objected to testimony regarding this meeting as a settlement discussion being admitted at hearing, citing Evidence Code section 1154: Evidence that a person has accepted or offered or promised to accept a sum of money or any other thing, act, or service in satisfaction of a claim, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove the invalidity of the claim or any part of it. The ALJ admitted the testimony over that objection. (Decision, p. 12).

> All machines, parts of machines, or component parts of machines which create hazardous revolving, reciprocating, running, shearing, punching, pressing, squeezing, drawing, cutting, rolling, mixing or similar action, including pinch points and shear points, not guarded by the frame of the machine(s) or by location, shall be guarded.
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> Violation: On 3-5-09 in the forming area, the blank (south side) of the D-1 individual section forming machine did not have sufficient guarding to prevent accidental contact from moving parts, which included mold sets, invert arm, and baffle arm. The moving parts were not guarded by the frame of the machine or by location.

The Employer asserted several defenses to the citation, including an equitable estoppel defense, which it argues prevents the Division from citing Employer for a section 4002(a) violation of the IS machine under these circumstances, as there has been reliance on the Division's prior representations that the machines are governed by section 3314. The ALJ concluded from the record that equitable estoppel applied.

1. Equitable Estoppel as a Defense to a Citation Issued by the Division

The Division, in its petition for reconsideration, contests the ALJ's granting of the Employer's equitable estoppel argument. Specifically, the Division objects to the ALJ considering out-of-court statements allegedly made by the Division's Modesto District Manager, John Caynak.[4] The Division also argues that Employer did not carry its burden in proving each element of an estoppel defense.

In *Underground Construction Co., Inc.*, Cal/OSHA App. 09-3518 Denial of Petition for Reconsideration (Mar. 22, 2012) the Board described the conditions that must be present for the doctrine of equitable estoppel to apply: 1) the party to be estopped must be apprised of the facts; 2) that party must intend that its conduct shall be acted upon; 3) the other party must be ignorant of the true state of facts; and 4) he must rely upon the first party's conduct to his injury. (Citing, *City and County of San Francisco v Grant Co.* (1986) 181 Cal.App.3d 1085, 1091). This doctrine of equitable estoppel is one we have borrowed from the civil courts, and we look to the jurisprudence of the courts for further guidance in crafting the appropriate analysis to an estoppel claim such as the one before us.

[4] Although not necessary to the outcome of this decision, the Board finds that the ALJ erred in admitting evidence related to settlement discussions under Evidence Code sections 1152 and 1154. As the California Appellate Court has noted, there are significant policy considerations for encouraging settlement discussions, and for promoting candor between parties as they seek to negotiate a compromise. (*Zhou v. Unisource Worldwide* (2007) 157 Cal. App. 4th 1471, 1477-1478).

In order to be successful in a claim of estoppel, the representation at issue must generally be a statement of fact, according to the longstanding rule of California's Supreme Court. (*May v. City of Milpitas* (2013) 217 Cal.App.4th 1307, 1338, citing, *McKeen v. Naughton* (1891) 88 Cal. 462, 467). Here, Employer appears to allege that the two prior notices of "no violation" issued by the Division and one prior settlement between the parties are the "facts" that created Employer's belief that the IS machines did not need to be guarded, or that the machines were covered by section 3314, rather than section 4002(a). However, these are more accurately described as statements of legal conclusion—the Employer is describing reliance on what it understands to be the Division's interpretation of safety regulations issued by the Standards Board.

The question is whether there are any *facts* involved, which the Division would be in a position to misrepresent with either "careless and culpable negligence" or an "express intention to deceive." (*Long Beach v. Mansell*, (1970) 3 Cal.3d 462, 490, citing *Biddle Boggs v. Merced Mining Co.* (1859) 14 Cal. 279, 367-368). Based on the scant record of what occurred between the parties during the course of these three investigations, Employer does not appear to allege that the Division misrepresented a material fact, but takes issue with the Division's allegedly shifting interpretation of the regulations it is entrusted to enforce. This is generally not an issue for equitable estoppel. As stated in another decision, "where the material facts are known to both parties and the pertinent provisions of law are equally accessible to them, a party's inaccurate statement of the law… cannot give rise to an estoppel." (*Jordan v. City of Sacramento* (2007) 148 Cal.App.4th 1487, 1496). This is particularly disfavored where both parties are represented by legal counsel, and each may interpret the application of the regulation to facts at hand. (*May v. City of Milpitas*, supra).

Nor has Employer demonstrated that the Division intended any statements made in the course of the three inspections to be relied upon by Employer. Employer may have believed that the Division decided to settle for a section 3314 violation due to Employer's presentation of its evidence regarding the difficulty of its machines to guard, but no statement from the Division to Employer stating as much, is in the record. There is no evidence that Division's representatives ever explained why they chose not to issue citations to Employer in two of the inspections, or chose to settle for a lesser penalty in one instance. The "Notice of No Accident Related Violation After Investigation," documents speak to the Division's intention to put Employer on notice that the "no violation" should not be relied upon as precluding future citations. Employer has failed to show that the Division made any assurances that Employer's machine was not subject to the provisions of section 4002(a), with either an express intent to deceive Employer, or with careless and culpable negligence amounting to fraud. (*Long Beach v. Mansell*, supra).

Element three of equitable estoppel is shown by Employer; it appears from the testimony and evidence that Employer was unaware of the true state of facts, and did not believe that its machines required guarding under section 4002(a). This was demonstrated through testimony of several of Employer's witnesses, including Craig and Callahan, who were of the opinion that the machines are impossible to guard, and that Employer's actions through other safety means were more than sufficient to make up for the lack of guarding defined in section 4002(a).

While Employer was able to demonstrate element three, it has failed to establish the fourth criterion of the estoppel test. A party must rely on the conduct of the party to be estopped to his detriment; Employer argues that it has relied upon its understanding of the Division's interpretation of the safety orders, but has not shown any loss as a result of this reliance. (*Honeywell v. Workers' Comp. Appeals Bd.* (2005) 35 Cal.4th 24, 37). Employer provided testimony that it has had essentially the same IS machines for many years, and did not pinpoint any expenditure made in reliance on information received from the Division, or opportunity it chose to forgo. It has updated and made the machines larger, and added new safety features-- namely various automated computer components—but did not testify that these updates were made in reliance on advice of the Division.

Although Employer provided limited testimony from Pam Hernandez, its Industrial Relations Director, regarding expenditures on improvements to the Oakland facility, including safety training and safety equipment, she also suggested that at least some of that safety expenditure was the result of negotiations with the union representing Employer's workers. Fernandez was unable to definitively describe choices in expenditure that Employer made based on its understanding of the safety orders as received from the Division over the three visits discussed here.

California courts have long held that public policy must be a primary consideration when estoppel is asserted against a government agency. The courts will not apply estoppel to a public agency, such as the Division, "if the result will be the frustration of a strong public policy." (*Phelps v. State Water Resources Control Bd.* (2007) 157 Cal.App.4th 89, 115), *citing, Bib'le v. Committee of Bar Examiners of The State Bar* (1980) 26 Cal.3d. 548, 553 [162 Cal. Rptr 426, 606 P.2d 733].) Where the elements of estoppel are met, the Board will then weigh the equities and consider the impact on the public policy of ensuring workplace health and safety in granting an estoppel defense in a given case. Each situation must be weighed by its own facts:

> It is settled that "[the] doctrine of equitable estoppel may be applied against the government where justice and right require it. (Citations

> omitted.)" (Citations omitted.) Correlative to this general rule, however, is the well-established proposition that an estoppel will not be applied against the government if to do so would effectively nullify "a strong rule of policy, adopted for the benefit of the public, . . ." *(County of San Diego v. Cal. Water etc. Co.* (1947) 30 Cal.2d 817, 829-830 [186 P.2d 124, 175 A.L.R. 747], see also cases there cited.) The tension between these twin principles makes up the doctrinal context in which concrete cases are decided. (*Long Beach v. Mansell* (1970) 3 Cal.3d 462, 493).

In this instance, as Employer's estoppel argument fails, the Board need not reach the public policy considerations. However, the Board does note that while we recognize that the Employer may have compelling reasons for failing to meet the demands of section 4002(a), the Occupational Safety and Health Act recognizes that every employer and its operations may not neatly fit into the regulatory scheme. For this reason, under Labor Code section 6450, an employer may apply to the Division for a temporary variance from an applicable standard, and under section 143, an employer may apply to the Standards Board for a permanent variance by showing it has an alternate program of equal or superior safety to that presented by the safety order. The Board encourages Employer to make use of this procedure.

2. The Decision of the ALJ Did Not Reach the Issue of the Applicability Section 3314(c)(1), Rather Than Section 4002(a), to the Individual Sections Forming Machines.

As discussed above, the Board finds that the Employer is unable to prevail on its estoppel defense. The ALJ's decision, which addressed the merits of that defense, did not reach the issue of the potential violation of section 4002(a), the Employer's defense of the applicability of section 3314(c)(1), or other defenses raised. In light of the Board's rejection of Employer's estoppel defense, we remand this case to hearing operations for a determination of the remaining issues raised, including any further proceedings as may be deemed appropriate by the ALJ.

ART CARTER, Chairman
ED LOWRY, Board Member
JUDITH S. FREYMAN, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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