

**BEFORE THE**  
**STATE OF CALIFORNIA**  
**OCCUPATIONAL SAFETY AND HEALTH**  
**APPEALS BOARD**

In the Matter of the Appeal of:

LION RAISINS  
9500 South DeWolf Avenue  
Selma, CA 93662

Employer

Dockets. 08-R2D5-2253 and 2254

**DECISION AFTER  
RECONSIDERATION**

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 Lion Raisins (Employer) matter under submission, renders the following decision after reconsideration.

**JURISDICTION**

Beginning on October 16, 2007, the Division of Occupational Safety and Health (Division) conducted an accident inspection at a place of employment in Selma, California maintained by Employer. On November 14, 2007, the Division issued two citations to Employer alleging a violation of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.<sup>1</sup>

Citation 1 alleged a Serious violation of section 3210(b)(5) [fall protection from an elevated work location where employee is exposed to a fall over 4 feet]. Citation 2 alleged a violation of 3241(c) [Material, wherever stored, shall not create a hazard. It shall be limited in height and shall be piled, stacked, or racked in a manner designed to prevent it from tipping, falling, collapsing, rolling or spreading.]

Employer filed timely appeals of the citations.

Administrative proceedings were scheduled to be held before an Administrative Law Judge (ALJ) of the Board. Pre-trial discovery and settlement discussions took place between the parties. A settlement agreement between the parties was reached on May 3, 2010, which was approved by the ALJ. The Presiding ALJ issued an Order and Summary Table on June 14,

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<sup>1</sup> Unless otherwise specified, all references are to California Code of Regulations, Title 8.

2010 which modified the classification of Citation 1 to General, adjusted the penalty from \$18,000 to \$2500, and vacated Citation 2 in its entirety.

Employer timely filed a petition for reconsideration of the ALJ's Order.

The Division filed an answer to the petition.

### **ISSUE**

Did the Division engage in fraud which induced the Employer to enter into the settlement agreement, the terms of which are incorporated in the Order of June 14, 2010?

### **PROCEDURAL AND FACTUAL SUMMARY**

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration. We briefly summarize the relevant facts.

On October 16, 2007, the Division opened an inspection at Employer's facility in Selma, California, as a result of a serious injury to an employee. The accident was the result of a fall from a tall stack of bins, each roughly four feet tall, which Employer uses to store raisins. The injured employee was on the top of a large structure of these bins which were stacked nine bins tall and many bins wide, when the bins collapsed and the employee fell onto the concrete. The division issued two citations, Citation 1 referenced a violation of 3210(b)(5):

(b) Other Elevated Locations. The unprotected sides of elevated work locations that are not buildings or building structures where an employee is exposed to a fall of 4 feet or more shall be provided with guardrails. Where overhead clearance prohibits installation of a 42-inch guardrail, a lower rail or rails shall be installed. The railing shall be provided with a toeboard where the platform, runway, or ramp is 6 feet or more above places where employees normally work or pass and the lack of a toeboard could create a hazard from falling tools, material, or equipment.

Exceptions: (5) Elevated locations used infrequently by employees if the employees using them are protected by a fall restraint/fall arrest system used in accordance with the requirements in Article 24 of the Construction Safety Orders.

Division counsel made a motion to amend this citation on April 13, 2010, to section 3210(c), on the basis that the original citation reference was a typographical error. Section 3210(c) states:

(c) Where the guardrail requirements of subsections (a) and (b) are impracticable due to machinery requirements or work processes, an alternate means of protecting employees from falling, such as personal fall protection systems, shall be used.

Employer's counsel opposed the motion, and the ALJ ruled to deny the Division's motion to amend, finding that the amendment was time-barred, as section 3210(b)(5) and section 3210(c) require proof of substantially different facts. (*Granite Construction Co.*, Cal/OSHA App. 07-3611, Denial of Petition for Reconsideration (Jun. 22, 2010) [Because the two sections require proof of different elements, the proposed amendment of the citation would not relate back to the original citation, and thus is barred by the six-month statute of limitations in Labor Code section 6317].) The parties went forward without an amendment of the citations. Employer filed a motion for sanctions against Division counsel on the basis of the attempt to modify the citation. Employer also petitions for costs.

The parties have each submitted substantially the same chain of emails from the 2010 settlement discussions as exhibits to support their respective positions.

### **DECISION AFTER RECONSIDERATION**

In making this decision, the Board relies upon its independent review of the entire evidentiary record. 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.

Employer petitioned for reconsideration on the basis of Labor Code section 6617(b). Specifically, the Employer makes a number of claims asserting fraudulent actions by the Division and Division counsel's during the course of negotiations, and after the settlement was implemented.

Employer first alleges that the Division and its legal counsel falsely and intentionally misrepresented that the Employer violated Sections 3201(c) and 3241(c). The burden of proof to show that the settlement and Order was obtained by fraud is on the party asserting fraud. That burden is to show, through credible evidence, "...a false representation of material fact, made recklessly or without reasonable ground for believing its truth, with intent to induce reliance thereon, and on which the injured party justifiably relies." (*Concrete Wall Sawing Co., Inc.*, Cal/OSHA App. 97-1777, Decision After Reconsideration (Jun. 5, 2001).) Employer does not actually allege that a member of the Division made a false representation of material fact in order to issue the citations which are the basis of this dispute. Instead, the Employer's allegation is largely directed to the merits of the Division's citations, and the thoroughness of the Division's investigation. Employer, represented by counsel, should have been aware that it chose to forego the opportunity to argue factual issues such as these, which are related to the merits of the citations and do not constitute grounds for a finding of fraud, when it agreed to a settlement. (See, *Barbagelata Farms*, Cal/OSHA App. 09-2083, Denial of Petition for Reconsideration (Sep. 23, 2010).)

Employer next describes what it believes to be fraudulent statements in the negotiation process. Again, Employer fails to show how any of the statements were false representations of material fact, made recklessly, with the intent to induce reliance, and on which the Employer justifiably relied. (*F.P. Lathrop Construction Co.*, Cal/OSHA App. 81-0554, Decision After Reconsideration (Feb. 8, 1985).) The Board reviews all settlement agreements using the same rules of construction that are applied to any ordinary contract. (*Primary Steel*, Cal/OSHA App. 04-4105, Denial of Petition for Reconsideration (Mar. 14, 2007), citing *Vaillette v. Fireman's Fund Ins. Co.*, 18 Cal. App. 4th 680, 686 (4th Dist. Aug 1993).) While a contract is generally viewed as a complete integration of the terms of the parties agreement, parol evidence may be introduced to prove an instrument is void for fraud. (See, *Riverisland Cold Storage, Inc., v Fresno-Madera Production Credit Ass'n* (2013) 55 Cal. 4th 1169.) Even if Employer's assertions are presumed to be true, Employer is unable to show that Division counsel made the various statements recklessly or without reasonable ground for believing the statements were true at the time they were uttered (or written). The Division, in its answer to the Employer's petition, does not deny the statements, the bulk of which were over email, and were provided by both parties as attached exhibits.

Employer also fails to show intent to induce reliance on the part of the Division, or how Employer did in fact rely on these statements to its detriment. For example, Employer fails to show how Employer reliance was created when the Division stated "I will see you on Tuesday May 4<sup>th</sup> for hearing." While this statement ultimately ended up being inaccurate, the Division may have believed settlement discussions had hit a wall when it sent this message to Employer days before hearing was scheduled. Employer highlights the statement as evidence of fraud, but fails to describe any of the elements which

would allow the Board to find fraudulent conduct—such as, how the Division intended to induce reliance, or how the Employer relied upon the statement.

Similarly, when Division counsel told the Employer that she believed some in their industry had either abated or had variances, we will presume that Employer is correct, and that the Division's statement was false. Employer's argument fails, though, as Employer does not describe facts from which the Board could find that the Division's counsel and others within the Division both knew the statements were untrue and willfully conspired to suppress that truth from Employer. (See, *F.P. Lathrop Construction Co.*, Cal/OSHA App. 81-0819, Decision After Reconsideration on Petition for Costs (Feb. 8, 1985).) The burden is on the Employer to show that the Division engaged in this level of duplicitous conduct, with the intent to induce reliance.

While Employer would take it as evidence of fraud that some of its competitors are allegedly still out of compliance with the applicable safety orders for which it was cited, the Board has long held that the fact that an unsafe condition has thus far not caused an injury, the Division has not cited an employer in the past for the condition, or the industry as a whole has not suggested that any particular safety precaution be taken—these factors are irrelevant in deciding whether a citation is appropriate. (*Advanced Components Technology*, Cal/OSHA App. 91-1045, Decision After Reconsideration (Nov. 13, 1992), citing *Benicia Manufacturing Co.*, Cal/OSHA App. 76-806, Granting of Petition for Reconsideration and Decision After Reconsideration (Sep. 21, 1977).) Employer's assertions regarding the status of competitors do not prove fraud.

The settlement agreement itself is also in dispute. Employer argues that the Division fraudulently misrepresented the terms of the agreement during the course of negotiation—specifically, that the Employer is being made to engage in abatement, when it should not have to do so while applying for a variance under the terms of the agreement. The settlement agreement as emailed to the ALJ includes language regarding abatement, and a follow-up addendum addressing variances, with a timeline for each. There is no either-or language in the agreement. More to the point, Board precedent requires employers to be in compliance with the law while a variance application is pending, and an Employer cannot escape the duty to abate through a settlement agreement. (*Empire Pro-Tech Industries*, Cal/OSHA App. 07-2837, Denial of Petition for Reconsideration (Aug. 19, 2008).) The agreement states proper abatement “should be completed by June 3, 2010. Employer can seek consultation with Patrick Bell of Cal/OSHA for proper abatement.”

Employer alleges that the Division fails to recognize the Employer's option to seek a variance in lieu of abatement—this is a misunderstanding of the Employer's rights. Employer has always had a right under law to seek a variance from the Cal/OSHA Standards Board, and did not need a settlement agreement to begin the variance process. (See, Labor Code sections 143 through 143.2, and 8 CCR sections 401 through 427). An Employer in some

instances may wish to seek a variance before the Division ever inspects. The Employer may possibly find it helpful to seek a temporary variance, but where there is a violation, an application for a variance does not waive the obligation to abate the hazardous condition. (*Primary Steel*, Cal/OSHA App. 04-4105, Denial of Petition for Reconsideration, (Mar. 14, 2007).) The parties in settlement agreed to uphold the violation in Citation 1, which left Employer responsible for abatement. Presumably, if the variance was quickly granted before the abatement clock ran out, Employer would not have to abate, but there is no guarantee that the Standards Board will approve a variance application.

Employer does not argue that the Division misrepresented to Employer that the Division could waive Employer's legal duty to abate an unsafe condition; rather, Employer argues that the Division has failed to hold up its end of the settlement agreement. Employer may not have understood the full ramifications of the law-- or the agreement-- on this point. Ultimately, it is Employer's obligation to know the law; the Division's failure to inform the Employer's counsel of all applicable law is not fraudulent conduct. (See, *The Daily Californian/CalGraphics*, Cal/OSHA App. 90-929 Decision After Reconsideration, (Aug. 28, 1991), citing *South West Metals Company*, Cal/OSHA App. 80-068, Decision After Reconsideration (May 22, 1985).) Employer has multiple options, including asking for an extension of the time for abatement from the Division, or applying for a temporary variance, while it applies for a permanent variance and considers the most appropriate form of abatement.

Employer also argues that the Division fraudulently misrepresented the abatement assistance that the Division would provide, as well as the variance and abatement processes. Again, Employer fails to provide evidence showing how the Division engaged in a false representation of material fact as relates to any of these items. The settlement agreement states that the Employer may seek assistance from the Division in abatement. Absent misrepresentation, fraud or other grounds to void the agreement between Employer and the Division, the agreement remains effective, even if in hindsight, Employer is now less than pleased with the outcome. (*Westech Industries, Inc.*, Cal/OSHA App. 08-3717, Denial of Petition for Reconsideration (Oct. 25, 2012), citing *Jack Barcewski dba Sunshine Construction*, Cal/OSHA App. 06-1257, Denial of Petition for Reconsideration (Apr. 16, 2007).)

While the Division's assistance may not have been what Employer had hoped for, Employer has not demonstrated that Division acted fraudulently to coerce Employer into a settlement. The Board has made it clear that it is not improper conduct for the Division to offer abatement solutions that the Employer ultimately finds to be economically infeasible or otherwise lacking. (*The Daily Californian/CalGraphics*, Cal/OSHA App. 90-929, Decision After Reconsideration, (Aug. 28, 1991).) The Division has visited Employer's site and provided information it had available on private sector safety experts to the Employer. The Employer may also make its own inquiries, hire a private

expert, or seek advice from other sources—this is Employer’s right, and is also memorialized in the settlement.

Employer also argues that the Division acted fraudulently in not accepting, or failing to properly consider, the Employer’s abatement ideas. Employer does not claim that the settlement was fraudulently induced on a promise of its abatement proposal being accepted regardless of what the proposal contained. Why would the parties have spent so much time discussing assistance with abatement, if the Division had made an improper promise to accept whatever abatement program the Employer submitted? The Division has a responsibility to review, and must reject a means of abatement that does not meet the minimum standards of the safety order. Again, Employer’s claim does not rise to the level of fraud. (See, *Starcrest Products of California, Inc.*, Cal/OSHA App. 02-1385, Decision After Reconsideration (Nov. 17, 2004).)

The Employer also raises the issue of new evidence in its petition for reconsideration. (See Labor Code section 6671(d).) The new evidence that the Employer outlines is a summary of statements and events, some of which occurred during negotiations, and some after settlement. The Board may consider new evidence if a party demonstrates that it "could not, with reasonable diligence, have discovered and produced the evidence at the hearing." (Labor Code, section 6617(d); *Polvera Drywall Corp., dba Great Western Drywall*, Cal/OSHA App. 90-1246, Decision After Reconsideration (Sep. 6, 1991).) Employer has not attempted to make any such showing.

Employer points out that in their settlement agreement, the parties agreed to amend the section 3210(b)(5) citation to a “section 3210(c) citation referencing section 3210(b)(5)” which was not captured in the ALJ’s order. The Division agrees in its answer that the amendment was part of the overall settlement reached on May 3, 2010.

Employer also renews its April 29, 2010 motion for sanctions against Division Counsel, which was withdrawn as part of the settlement agreement of May 3, 2010, on the basis of willful misrepresentation of the Division’s position. Division Counsel maintains that the motion for amendment of section 3210(b)(5) to section 3210(c) was made to correct a clerical error. Employer submits transcripts from depositions taken by certain Division employees which it believes to be relevant to this issue. Sanctions may be imposed for discovery abuses under section 372.7, and contempt and bad faith actions and tactics under section 381. Employer withdrew the motion for sanctions as part of the settlement agreement entered into by the parties, and has failed to show fraud as a cause for the Board to set aside the agreement. Therefore, the Board will not disturb the settlement agreement by reopening the Employer’s motion for sanctions. (See, *Paramount Spring Engineering Co., Inc.*, Cal/OSHA App. 05-3641 Denial of Petition for Consideration (Nov. 19, 2007).)

Lastly, Employer petitions for costs. Under Labor Code section 149.5 the Board may award reasonable costs, including attorneys' fees, not to exceed five thousand dollars (\$5,000) total, if "(1) either the employer prevails in the appeal, or the citation is withdrawn, and (2) the Appeals Board finds that the issuance of the citation was the result of arbitrary or capricious action or conduct by the division." Employer has not "set forth specifically and in full detail" any grounds which would demonstrate that the Division acted arbitrarily or capriciously in issuing the citations, as discussed above. (See section 391.) (*Troy Gold Industries, Ltd.*, Cal/OSHA App. 81-1204, Denial of Petition for Reconsideration (Dec. 14, 1987).) Therefore, Employer will not be awarded costs.

### **DECISION AFTER RECONSIDERATION**

Employer's petition for reconsideration is denied in part. The Board issues the attached amended Summary Table reflecting the settlement agreement reached by the parties as regards Citation 1.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
FILED ON: NOVEMBER 26, 2013