



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

ALUMINUM SHAPES, LLC,

Respondent.

OSHRC Docket No. 17-1380 & 17-0646

DIRECTION FOR REVIEW AND REMAND ORDER

Before: SULLIVAN, Chairman; ATTWOOD and LAIHOW, Commissioners.

BY THE COMMISSION:

On July 10, 2020, Administrative Law Judge Keith E. Bell issued a “Remand Decision” in response to the Commission’s May 15, 2020 Order regarding Respondent’s petitions for interlocutory review. The judge’s decision was docketed on July 13, 2020. Because the judge’s decision does not resolve the citations at issue in this case, we direct review and remand the case to the judge for further proceedings.¹ *See* Commission Rule 90(a), 29 C.F.R. § 2200.90(a) (“The

¹ We note that Commission Rule 90(b)(4)(i), 29 C.F.R. § 2200.90(b)(4)(i) permits a judge to correct “clerical errors arising through oversight or inadvertence in decisions, orders, or other parts of the record under Federal Rule of Civil Procedure 60(a)[.]” until the decision is either directed for review or becomes a final order of the Commission. 29 U.S.C. § 661(j).

Judge shall prepare a decision that . . . constitutes the final disposition of the proceedings.”).

SO ORDERED.

/s/
James J. Sullivan, Jr.
Chairman

/s/
Cynthia L. Attwood
Commissioner

/s/
Amanda Wood Laihow
Commissioner

Dated: July 31, 2020



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REMAND DECISION

This case is before the undersigned on remand from the Commission.² Respondent filed a timely interlocutory appeal from the undersigned's Three-Part Order dated April 10, 2020, pursuant to Rule 73 of the Occupational Safety and Health Review Commission Rules of Procedure. 29 C.F.R. § 2200.73.³ The Commission granted the interlocutory appeal for two parts of my Three-Part Order. Specifically, the Commission took review of: (1) my decision Denying Respondent's Motion for Summary Judgment On Its First Affirmative Defense For Breach Of Contract/Equitable Estoppel; and (2) my decision Granting Secretary's Motion for Partial

² In this context, "Commission" refers to the duly appointed Commissioners who hear and decide appeals from Occupational Safety and Health Review Commission administrative law judge decisions.

³ Rule 73 permits a party to petition for interlocutory review when:

...review involves an important question of law or policy that controls the outcome of the case, and that immediate review of the ruling will materially expedite the final disposition of the proceedings or subsequent review by the Commission may provide an inadequate remedy; or [the] the ruling will result in a disclosure, before the Commission may review the Judge's report, of information that is alleged to be privileged.

Summary Judgment. On May 15, 2020, the Commission issued a Remand Order (Order) directing the undersigned to review the cross-motions for summary judgment under the applicable standard of review. Order at 3. For the reasons set forth below, my initial decision to deny Respondent's Motion for Summary Judgment On Its First Affirmative Defense For Breach Of Contract/Equitable Estoppel STANDS on different grounds. Additionally, my initial decision to grant the Secretary's Motion for Partial Summary Judgment is VACATED.

Commission Remand Order

The Commission's Remand Order directed the undersigned to "determine whether, with respect to the equitable estoppel defense, there is 'no genuine dispute as to any material fact' and therefore one of the parties 'is entitled to judgment as a matter of law.'" Order at 3-4. In doing so, the Commission noted that the undersigned mistakenly interpreted Respondent's motion for summary judgment as a request to "review or enforce" the settlement agreement at the heart of this dispute. Order at 3. The Commission found that Respondent was instead "asking the judge to consider the Secretary's alleged failure to adhere to the agreement as evidence of affirmative misconduct, which is an element of the estoppel defense." *Id.*

Summary Judgment

Rule 56(a) of the Federal Rules of Civil Procedure states, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).⁴ A fact is considered "material" if it is of consequence in determining the existence of an element essential to a party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The Commission historically has not favored summary judgment, a position reinforced in *Ford Motor Company—Buffalo Stamping*

⁴ Rules 2(b) and 40(j) of the Commission's Rules of Procedure make Rule 56 of the Federal Rules of Civil Procedure applicable to motions for summary judgment filed with the Commission. 29 C.F.R. §§ 2200.2(b) and 2200.40(j).

Plant, 23 BNA OSHC 1593, 1594 (No. 10-1483, 2011), where the Commission reversed the ALJ's order granting summary judgment to the employer and remanded the case to the ALJ for further proceedings.

In *Ford*, the Commission set forth the standards for judges considering summary judgment motions:

In reviewing a motion for summary judgment, a judge is not to decide factual disputes. . . . Rather, the role of the judge is to determine whether any such disputes exist. . . . When determining if there is a genuine factual dispute, the fact finder must resolve all ambiguities and draw all reasonable inferences in favor of the non-moving party. . . . Thus, not only must there be no genuine dispute as to the evidentiary facts, but there must also be no controversy as to the inferences to be drawn from them. . . . These principles are not altered when both parties move for summary judgment, and each party's motion must be independently evaluated under them.

Id. at 1593-94. (citations and footnote omitted).

In *First National Bank of Arizona v. Cities Service Co.*, 88 S.Ct. 1575, 1592 (1968) (*Arizona*), the Supreme Court held:

“[i]t is true that the issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial.”

See also, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) (*Liberty Lobby*) (noting that a court should act with caution in granting summary judgment and may deny summary judgment “where there is reason to believe that the better course would be to proceed to a full trial”).

The facts of this case are derived from cross-motions of the parties, which included attachments, in addition to facts adduced at a two-day evidentiary hearing (September 24-25, 2019) through live testimony and documents admitted into evidence.⁵ Although the hearing was held to

⁵ The facts from my April 10, 2020 Three-Part Order are applicable and not restated here.

address the issue of “consent” for the January 23, 2017 OSHA inspection at Respondent’s worksite, the facts adduced and admitted into evidence are also relevant and material to the issues in these cross-motions. Not surprisingly, the facts in this case reveal differing versions of the truth.

Respondent’s Motion for Summary Judgment

On February 1, 2019, Respondent filed a Motion For Summary Judgment On Its First Affirmative Defense For Breach of Contract/Equitable Estoppel (MSJ) for Docket No. 17-1380. In its MSJ, Respondent asserted that OSHA must be estopped from pursuing its case on the grounds of equitable estoppel for the following reasons: 1) OSHA committed affirmative misconduct by breaching the terms of the Agreement and fraudulently gaining access to the facility⁶; 2) OSHA misrepresented the purpose and scope of the January 23, 2017 inspection in order to gain access to the facility to conduct an inspection in violation of the Agreement; and 3) Aluminum Shapes reasonably relied upon these misrepresentations to its detriment. Resp’t MSJ 1-2.

Estoppel Defense

The principle that a party's actions or conduct may preclude it from asserting a right or claim to which it would otherwise be entitled is known as equitable estoppel. This doctrine is intended to ensure that parties deal with each other in a manner that reflects a fundamental “consideration of justice and good conscience.” *U.S. v. Georgia–Pacific Co.*, 421 F.2d 92, 95 (9th Cir.1970).

To establish its estoppel defense, Respondent must prove: “(1) a misrepresentation by another party; (2) which he reasonably relied upon; (3) to his detriment.” *U.S. v. Asmar*, 827 F.2d

⁶ The “Agreement” herein referenced is a stipulated settlement agreement between the parties executed on May 10, 2016, which set the parameters for inspections occurring between July 15, 2016 and January 31, 2017. Three-Part Order Attachment A.

907, 912 (3d Cir.1987) (*Asmar*); see *Heckler v. Community Health Servs. of Crawford Cty.*, 104 S.Ct. 2218, 2223 (1984) (*Crawford*). Additionally, the Supreme Court recognized in *Crawford* that the Government may not be estopped on the same terms as any other litigant. *Crawford*, 104 S.Ct. at 2224. The Third Circuit, to which this case can be appealed, and several other federal circuit courts have determined that for the Government to be estopped there must be a showing of a fourth element called “affirmative misconduct.” *Asmar*, 827 F.2d at 911 n. 4, 912.

According to Respondent, OSHA proceeded with the follow-up inspection despite knowing of Aluminum Shapes’ position that it only agreed to be inspected under the terms of the 2016 stipulated settlement agreement. Regarding the misrepresentation element of an estoppel defense, Respondent asserts the Secretary misrepresented its intentions in an attempt to obtain entry to conduct a follow-up inspection. (R. Br. 21-23). Respondent further argues that OSHA misrepresented the purpose and scope of its January 23, 2017 inspection of Aluminum Shapes’ facility. Resp’t MSJ 17-18.

As evidence of the Secretary’s misrepresentation, Respondent asserts that OSHA’s attorney was unclear about the type of inspection agreed to on January 23, 2017. Instead of clearly stating the inspection was not a monitoring inspection under the settlement agreement, OSHA’s attorney, Mr. Kondo, stated that the legal effect of the inspection could be handled later.⁷ To the contrary, the Secretary asserts that Mr. Kondo was clear that the inspection that day would be a follow-up inspection outside the settlement agreement. (Tr. 234). This disputed fact must be resolved to determine whether the misrepresentation element has been satisfied.⁸

⁷ Mr. Kondo testified that “the disagreement was about what the legal effect if any OSHA discovering violations, what would happen afterwards. But I think we had a clear agreement that however characterized, the same physical result could happen that day that OSHA would be permitted to enter the premises and do the inspection.” (Tr. 233-34).

⁸ These disputed facts are derived from Secretary’s February 1, 2019 Statement of Undisputed Material Facts and Respondent’s February 15, 2019 Response to Secretary’s State of Undisputed Material Facts at paragraphs numbered 48, 53, 55, 57, 60, 67, 70, 78.

Additionally, Respondent asserts that evidence shows OSHA's area director intended the January 23, 2017 inspection to result in a comprehensive inspection. (Tr. 236-40). The Secretary disagrees and asserts the evidence shows the area director instructed compliance officers to conduct a follow-up inspection, not a comprehensive inspection. (Tr. 236-40). Again, resolution of this factual dispute is material to determine the existence of the misrepresentation element of an estoppel defense.

Regarding the affirmative misconduct element for an estoppel defense against the government, Respondent argues that OSHA engaged in affirmative misconduct by knowingly misleading Aluminum Shapes to obtain its consent to conduct the inspection, intentionally breaching the terms of its Agreement with Aluminum Shapes, and then issuing citations in violation of the Agreement. Resp't MSJ 10-11.

Respondent argues that when Aluminum Shapes' director of operations told OSHA a final time that only a monitoring inspection under the settlement agreement was allowed, the compliance officer's noncommittal response⁹ constituted misleading conduct that allowed the inspection to move forward. (Tr. 299-300). In contrast, the Secretary asserts that Respondent was clearly informed that OSHA was conducting a follow-up inspection not related to the settlement agreement and that it never agreed to a monitoring inspection. Resolving this factual dispute is material to determining whether there was affirmative misconduct.

Respondent also asserts that Secretary's actual entry into the facility, after being informed of Aluminum Shapes' position that the inspection must be covered by the settlement agreement, was affirmative misconduct that misled it to believe the Secretary had agreed to conduct a monitoring inspection under the Agreement. In contrast, the Secretary states Respondent was told

⁹ When being told a final time that Aluminum Shapes did not agree to a follow-up inspection, Compliance Officer Ladd put his hands in the air and remarked that the type of inspection was up to the attorneys. (Tr. 299, 337).

that it was a follow-up inspection not subject to the Agreement and Respondent did not object. This dispute must also be resolved to determine whether the affirmative misconduct element is satisfied.

These disputed facts are material to a determination that two of the elements for equitable estoppel, misrepresentation and affirmative misconduct, are established or not. Accordingly, Respondent's Motion For Summary Judgment On Its First Affirmative Defense For Breach of Contract/Equitable Estoppel is denied.

Secretary's Motion for Partial Summary Judgment

On February 1, 2019, the Secretary of Labor filed his Motion for Partial Summary Judgment. In the Secretary's motion, he sought to strike Respondent's sole affirmative defense in OSHRC Docket No. 17-1380 "Breach of Settlement Agreement/Equitable Estoppel," as well as Respondent's affirmative defenses of "estoppel" and "barred" for breach of settlement agreement in OSHRC Docket No. 17-0646. Sec'y MSJ 6, 29-30.

With respect to Docket No. 17-1380, the Secretary asserts that it clearly informed Aluminum Shapes that a follow-up inspection, not covered by the settlement agreement, was being conducted on January 23, 2017. As discussed above, material facts are disputed as to whether there was a misrepresentation and affirmative misconduct by the Secretary to obtain access to inspect Respondent's facility. Because these "differing versions of the truth" require resolution by a judge, summary judgment is not appropriate. *See Arizona*, 88 S.Ct. at 1592. The Secretary's Motion for Partial Summary Judgment for OSHRC Docket No. 17-1380 is Denied.

With respect to OSHRC Docket No. 17-0646, there is no dispute over the material facts related to an affirmative defense based on a breach of the settlement agreement. The underlying inspection for No. 17-0646 was a referral that occurred on September 8, 2016. The issue of breach

of the settlement agreement was related to OSHA's January 23, 2017 inspection, which occurred several months later, and was not related to the underlying inspection.¹⁰ Also, Respondent acknowledges that the underlying inspection was a "referral" inspection allowed under the settlement agreement's terms. Resp't Motion to Suppress 15. Nonetheless, given the Commission's preference for a decision on the merits, the undersigned finds that this defense should be allowed to proceed to hearing. *See Liberty Lobby*, 477 U.S. at 255 (a judge may act with caution and allow issue to proceed to trial); *DHL Express, Inc.*, 21 BNA OSHC 2179, 2180 (No. 07-0478, 2007) (*DHL*) ("Commission precedent follows the policy in law that favors deciding cases on their merits."). The Secretary's motion for summary judgment to strike the affirmative defenses of "estoppel" and "barred" for breach of settlement agreement in OSHRC Docket No. 17-0646 is Denied.

Motion to Strike

The Secretary also moved to strike Respondent's Second, Third, and Twelfth Affirmative Defenses, to the extent that they have not already been withdrawn, in OSHRC Docket No. 17-0646. Sec'y MSJ 29-30.

Pursuant to Federal Rule of Civil Procedure 12(f), a court "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." A court may act under Rule 12(f) "on its own" or "on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading." Fed. R. Civ. P. 12(f)(1)-(2). "Motions to strike are decided on the pleadings alone and should not be granted unless the relevant insufficiency is 'clearly apparent.'" *Stewart v. Keystone Real Estate*

¹⁰ The Commission acknowledged the citations acknowledge the citations in Docket No. 17-0646 were unrelated to the settlement agreement. Order 2.

Grp., LP, No. 4:14-CV-1050, 2015 WL 1471320, at *5 (M.D.Pa. Mar. 31, 2015) (Brann, J.) (quoting *Cipollone v. Liggett Grp., Inc.*, 789 F.2d 181, 188 (3d Cir.1986)).

Commission Rule 34(b) sets forth the pleading requirements for Answers filed with the Commission. 29 C.F.R. § 2200.34(b). Generally, Commission Rule 34 requirements have not been strictly construed. *See Del Monte Corp.*, 4 BNA OSHC 2035 (No. 11865, 1977) (pleadings rule not given strict construction when determining whether complaint was subject to dismissal for lack of particularity). Historically, the Commission has applied the notice pleading standard codified in Rule 8 of the Federal Rules of Civil Procedure. *See Commission's Rules of Procedure*, 57 Fed. Reg. 41,676, 41,678 (Sept. 11, 1992) (to be codified at 29 C.F.R. pt. 2200). The undersigned finds that Respondent's pleading was sufficient to meet the Commission's notice pleading standard.

Dismissal of a pleading is an extreme sanction that is not appropriate unless the record reveals prejudice. *See Berg Lumber Co.*, 1988 WL 212610, at *8 (No. 87-0397, 1988) (ALJ) (respondent did not demonstrate prejudice in its post-hearing request to have citation vacated for a lack of particularity, which the judge stated can be "cured by additional information provided during the pleadings, discovery and hearing stages of the proceedings"); *Meadows Indus., Inc.*, 7 BNA OSHC 1709, 1710-11 (No. 76-1463, 1979) ("the preferable course for the administrative law judge . . . was to compile a complete record and then [] determine whether the respondent was prejudiced by any lack of particularity in the citation").

Here, the Secretary makes no assertion that it is prejudiced by Respondent's Second, Third, and Twelfth Defenses asserted in OSHRC Docket No. 17-0646, and the undersigned finds no insufficiency that is clearly apparent from the pleadings. Moreover, it is well-settled Commission policy to decide cases based on their merits, rather than on procedural flaws. *DHL*, 21 BNA OSHC

at 2180 (Commission favors deciding cases on their merits); *Choice Elec. Corp.*, No. 88-1393, 1990 WL 186912, at * 4 (O.S.H.R.C., Nov.7, 1990) (“the Commission and the courts have consistently shown an antagonism toward the dismissal of cases on procedural grounds because this disposition deprives all of the parties of a resolution of contested citations on their merits”). The Secretary’s motion to strike these defenses is Denied.

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that:

1. The undersigned’s prior decision DENYING Respondent’s Motion For Summary Judgment On Its First Affirmative Defense For Breach of Contract/Equitable Estoppel STANDS.
2. The undersigned’s prior decision GRANTING the Secretary’s Motion for Partial Summary Judgment on Respondent’s Affirmative Defense 1, Breach of Settlement Agreement/Equitable Estoppel for Docket 17-1380 is VACATED, and the motion is DENIED.
3. The undersigned’s prior decision GRANTING the Secretary’s motion to strike Respondent’s Affirmative Defense that “[s]ome or all of Complainant’s claims are barred under the Stipulated Settlement in OSHRC Docket No. 15-1746, paragraph 8 and other paragraphs as applicable” for Docket 17-0646 is VACATED, and the motion is DENIED.
4. The Secretary’s Motion to Strike Respondent’s Second, Third, and Twelfth Affirmative Defenses for OSHRC Docket No. 17-0646, to the extent that they are not withdrawn, is DENIED.

SO ORDERED:

/s/ Keith E. Bell
Keith E. Bell
Judge, OSHRC

Dated: July 10, 2020

Washington, D.C.