U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 21-0387

MARIA ELENA DeMOSS (Widow of HAROLD DeMOSS, SR.) Claimant-Petitioner v. AUXILIARY SYSTEMS, INCORPORATED and COMMERCE AND INDUSTRY INSURANCE COMPANY Employer/Carrier-Respondent ALLIED TECHNOLOGY GROUP, INCORPORATED and THE PHOENIX INSURANCE COMPANY Employer/Carrier-Respondents	)	DATE ISSUED: 3/30/2022 ORDER

Appeal of the Order Disqualifying Brayton Purcell LLP and Its Attorneys; Order Staying Proceedings of Steven Berlin, Administrative Law Judge, United States Department of Labor.

Alan R. Brayton and John R. Wallace (Brayton Purcell LLP), Novato, California for Claimant.[1]

Joseph B. Guilbeau and Jeffrey I. Mandel (Juge, Napolitano, Guilbeau, Ruli & Frieman), Metairie Louisiana, for Auxiliary Systems, Incorporated, and Commerce Industry Insurance Company.

Judith A. Leichtnam (Thomas Quinn, LLP), San Francisco, California, for Allied Technology Group, Incorporated, and The Phoenix Insurance Company.

Before: BUZZARD, ROLFE, and JONES, Administrative Appeals Judges.

BUZZARD and ROLFE, Administrative Appeals Judges:

Claimant and her attorneys appeal Administrative Law Judge (ALJ) Steven Berlin's Order Disqualifying Brayton Purcell LLP and Its Attorneys; Order Staying Proceedings (2014-LHC-01595), rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (Act). We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Decedent last worked in shipyard employment in Virginia and retired in 2002. He was later diagnosed with lung cancer and died in North Carolina on December 1, 2008. Claimant, Decedent's widow, filed a claim for death benefits under the Act in San Francisco on November 30, 2010, claiming Decedent's death was due to work-related asbestos exposure.[2] Auxiliary Br. at 4-5; Cl. Br. at 2-3.

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[1] Merri A. Baldwin (Rogers Joseph O'Donnell), San Francisco, California, for Brayton Purcell LLP, is also on the same brief.

[2] The merits of Claimant's claim must be considered in accordance with the law of the United States Court of Appeals for the Fourth Circuit, as that is where the injury and death occurred. 33 U.S.C. §921(c); *Custom Ship Interiors v. Roberts*, 300 F.3d 510, 36 BRBS 51(CRT) (4th Cir. 2002), *cert. denied*, 520 U.S. 1188 (2003). However, the applicable law for the ethical question in this interlocutory appeal is that of the United States Court of Appeals for the Ninth Circuit, where the attorneys are licensed and where they practiced before the ALJ. *Wininger v. SI Management L.P.*, 301 F.3d 1115, 1122 (9th Cir. 2002); *Image Technical Serv., Inc. v. Eastman Kodak Co.*, 136 F.3d 1354, 1357 (9th Cir.1998) (California law controls whether an ethical violation occurred); 29 C.F.R.

Brayton Purcell (BP) represents Claimant in her claim for death benefits under the Act. 33 U.S.C. §909. Prior to his death, it also represented Decedent in civil litigation in California involving his allegedly work-related injuries due to asbestos exposure; after his death, it represented Claimant and her sons in wrongful death litigation in the state. Based on post-death third-party settlements in the civil case, Employers and their Carriers filed Motions for Summary Decision (M/SD) in the Longshore case asserting Claimant's failure to notify them of the third-party settlements and obtain their prior written approval bars her from receiving death benefits under the Act pursuant to Section 33(g), 33 U.S.C §933(g).

The ALJ concluded he must first address whether Claimant's counsel has been representing Claimant under an undisclosed conflict of interest between her and her sons before he can address those motions. He issued an Order to Show Cause (OSC) and invited briefing on the ethical concerns. Only BP, joined by its attorney, filed a responsive brief and documentary evidence.

Following review of the evidence submitted in response to the OSC, the ALJ found BP had multiple conflicts (potential or actual), did not inform Claimant of them, and did not obtain her consent to continue representation.[3] Unable to identify another reasonable remedy, he disqualified BP as counsel and issued a 60-day stay to allow Claimant time to retain new counsel. Order at 45. Claimant and BP, together, appeal the ALJ's Order disqualifying counsel. Two Employers, Auxiliary Systems, Inc., (Auxiliary) and Allied Technology Group, Inc., (Allied), and their carriers respond to the appeal. Claimant and BP filed a reply brief.

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§18.22(c) ("An attorney representative must adhere to the applicable rules of conduct for the jurisdiction(s) in which the attorney is admitted to practice.").

[3] The ALJ found BP violated the California Rules of Professional Conduct Rule 3-310, amended in 2018 to Rule 1.7, identifying a litany of purported potential and actual conflicts. Order at 9-13, 18-35; CA ST RPC Rules 1.7(a), (b), 1.0.1(e) (2018); CA ST RPC Rule 3-310(C) (1992). He also rejected a 2019 waiver Claimant signed, stating it is belied by the language in her 2010 disclaimer as well as her 2016 deposition. Order at 27. Therefore, he found BP was operating without having informed Claimant about its conflicts, its potential conflicts, or both; he also found BP failed to obtain her consent to continued representation, despite the conflicts. *Id.* at 37.

Initially, we accept this appeal of the ALJ's interlocutory order. It is necessary to direct the course of the adjudicatory process in this case.[4] *See Pensado v. L-3 Communications Corp.*, 48 BRBS 37 (2014); *Baroumes v. Eagle Marine Services,* 23 BRBS 80 (1989); *Niazy v. The Capital Hilton Hotel*, 19 BRBS 266 (1987).

Claimant asserts this is the "latest in a string of disqualification decisions" and should be overturned as were the consolidated cases in *Hodge et al. v. Dee Engineering, et al.*, BRB Nos. 20-0189, 20-0190, 20-0203, 20-0205 (April 29, 2021) (Jones, J., concurring and dissenting). Claimant and BP assert BP should not be disqualified. They argue it was error for the ALJ to find a conflict after Claimant opted-out of the wrongful death claims, disavowed any interest in their proceeds, and chose to pursue only her Longshore claim. Regardless, they argue *Hale v. BAE Sys. San Francisco Ship Repair, Inc.*, 801 Fed. App'x 600 (9th Cir. 2020) (unpub.), precludes the Section 33(g) bar. Finally, Claimant asserts she expressly waived any potential conflict at several times during BP's representation, including in a document she signed on April 30, 2019. Claimant and BP argue disqualification is, therefore, an abuse of discretion. They ask the Board to vacate the order and remand the case for proceedings on the merits.

Two Employers respond. Auxiliary states disqualification is a matter for the ALJ to decide and the ALJ "went to great lengths to explain" his duty and reasons for his decision. Auxiliary asserts the ALJ's decision protects the public trust in the system, BP did not expressly deny that its actions were meant to circumvent Section 33(g), and there was a conflict at the beginning of the representation which cannot be remedied by a future outcome. It asserts the *Hale* decision is limited on its facts and is of limited relevance to this case arising under the jurisdiction of the United States Court of Appeals for the Fourth Circuit. Auxiliary, however, takes no position on how the Board should rule on the disqualification issue.

[4] The Board ordinarily does not undertake review of non-final orders. *See, e.g., Arjona v. Interport Maintenance*, 24 BRBS 222 (1991). Generally, for a non-final order to be appealable, it must conclusively determine the disputed question, resolve an important issue which is separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988) ("collateral order doctrine"); *Newton v. P & O Ports Louisiana, Inc.*, 38 BRBS 23 (2004). If the order appealed from does not satisfy the aforementioned criteria, the Board, in its discretion, may grant review if it finds it necessary to properly direct the course of the adjudicatory process. *See Pensado v. L-3 Communications Corp.*, 48 BRBS 37 (2014); *Baroumes v. Eagle Marine Services,* 23 BRBS 80 (1989); *Niazy v. The Capital Hilton Hotel*, 19 BRBS 266 (1987).

Allied also responds to the appeal, urging affirmance. Allied asserts the ALJ correctly and rationally disqualified BP from continuing to represent Claimant because BP has taken "all possible steps to thwart the credit/subrogation rights of the employers/carriers[,]" and its divided representation can be expected to continue during the course of this case. Allied also argues *Hodge* is distinguishable and *Hale* is irrelevant.

In reply, Claimant and BP assert the Employers did not show how there would be a continuing negative effect by allowing BP to remain in the case given that its representation of Claimant's sons, which allegedly created the conflict at-issue, ended years ago.[5] BP argues it would hurt only Claimant to remove her attorneys now.

This case involves essentially the same facts as the cases in *Hodge*, an unpublished 2021 Board opinion reversing an ALJ's disqualification of BP, except, here, the ALJ addressed the Ninth Circuit's split decision in *Hale* and found it did not affect his conclusion.[6] Although Allied asserts *Hodge* is not Fourth Circuit law and is distinguishable, we reject its assertion. As stated above in footnote 2, Ninth Circuit law applies to this interlocutory appeal.

In *Hodge* and its companion cases, ALJ Christopher Larsen found BP's representation of the claimants and their children potentially jeopardized the claimants' rights under the Act. He issued an OSC and ultimately concluded the interests of the widows and other heirs were directly adverse, BP did not comply with the California Rules of Professional Conduct requiring advanced written consent and conflict waiver, and he disqualified BP from continued representation. The claimants and BP appealed. *Hodge*, slip op. at 6-7. A unified panel agreed disqualification was too harsh a remedy. *Id.* at 8, 11. Without deciding whether a Rule violation existed, the majority of the panel vacated the disqualification orders and remanded the cases for the ALJ to reconsider whether any conflict of interest issues remained, in light of the United States Court of Appeals for the Ninth Circuit's intervening decision in *Hale*. *Hodge*, slip op. at 9.

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[5] BP argues: "Even if there had been a conflict of interest between Felipe DeMoss and [Claimant] at the time the third party settlements were entered into, though, that alone could not justify disqualification of Brayton Purcell now, years later." Cl. Reply Br. at 3.

[6] The ALJ found *Hale* is "unpublished [and] non-precedential[,]" and the differing opinions demonstrate "risk existed" at the outset of the representation. Order at 36. We need not address *Hale*, as it did not involve a conflict of interest issue, and its Section 33(g) issue is not before us. We also note, *Hale* is not controlling precedent in the Fourth Circuit, and the facts of these two cases are potentially different.

As in *Hodge*, we need not consider whether a Rule violation occurred, because, regardless, disqualification would be an unnecessarily harsh sanction on these facts. Disqualification of a party's attorney is "a drastic measure." *Lennar Mare Island, LLC v. Steadfast Ins. Co.*, 105 F. Supp. 3d at 1100, 1107-1108 (E.D. Cal. 2015) ("disqualification is . . . generally disfavored and should only be imposed when absolutely necessary"). It is meant to be "prophylactic, not punitive," and is not required if the adjudicator's purpose is to "punish a transgression which has no substantial continuing effect on the judicial proceedings." *Chronometrics, Inc. v. Sysgen, Inc.*, 168 Cal. Rptr. 196, 203 (Cal. Ct. App. 1980). Claimant's brief thoroughly and persuasively distinguishes the authority relied on by the ALJ as involving actions "brought by an aggrieved party alleging a conflict in the form of representing parties with adverse interests in the same proceeding." Cl. Br. at 30-31 (collecting cases). And that is simply not the case here, where Claimant consents to BP's continued representation and any alleged conflict arises from "advice [a] law firm gave its client that allegedly implicated the interests of clients not parties to the present proceeding." *Id*.

In 2019, Claimant unambiguously reiterated her desire to retain her attorney, which she documented in a clear conflict waiver. EX 11. Well before then, in 2010, she expressly disclaimed her interest in the state wrongful death litigation to pursue a Longshore claim. EX 10. Under these circumstances,[7] disqualification would most harm Claimant's interest, which the California Rules are designed to protect.[8] *See generally Koo v. Rubio's Restaurants, Inc.*, 135 Cal. Rptr. 2d 415 (Cal. Ct. App. 2003); *see also Lennar*, 105 F. Supp. 3d at 1114; Rule 3-310(A).

[7] The time for filing a third-party claim has expired, and the third-party claims that were filed were settled long ago. Cl. Br. at 5-6; Resp. to OSC at Exh. 14.

[8] As we stated in *Hodge*, slip op. at 8, this law firm and its attorneys have already been reported to the California State Bar by this ALJ for his perception of an alleged conflict of interest violation. Nothing is gained by further delaying this case.

Accordingly, we reverse the ALJ's Order Disqualifying Brayton Purcell LLP and Its Attorneys, lift the Order Staying Proceedings, and remand the case to the ALJ to continue with the proceedings on the merits.[9]

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

JONES, Administrative Appeals Judge, concurring:

I concur with the majority's decisions to accept this interlocutory appeal, to reverse the ALJ's Order because disqualification is an unnecessarily drastic remedy, and to remand the case to him for further proceedings. However, for the reasons set forth in my opinions in *Westbrook v. F. Rodgers Insulation, Western MacArthur Co.*, BRB No. 20-0004 (May 18, 2021) (Jones, J., dissenting), and *Hodge et al. v. Dee Engineering, et al.*, BRB Nos. 20-0189, 20-0190, 20-0203, 20-0205 (April 29, 2021) (Jones, J., concurring and dissenting), I write separately.

The ALJ has the authority to address and remedy a conflict of interest issue. A conflict, be it potential or actual, generally occurs at the beginning of the representation; that is when informed written consent and waivers should be obtained, and that is what counsel did not do in this case.[10] *Miller v. Alagna*, 138 F.Supp.2d 1252, 1256 (D. Cal.

[9] Contrary to our dissenting colleague's assertion, we have not taken any position on whether BP's actions violated Rule 1.7 -- as it is wholly unnecessary to reverse the ALJ's disqualification order, which he entered in a clear abuse of discretion on these facts..

[10] California Rule 3-310(C) allows waiver of concurrent conflicts of interest by "informed written consent." "Informed written consent" is a client's "written agreement to the *representation following written disclosure*." Rule 3-310(A) (emphasis added).

2000) (duty of loyalty, along with the complementary duty to avoid conflicts, arises at the beginning of the attorney's representation).

In its response to the OSC, BP admitted a potential conflict "between clients to the extent that Claimant's decision whether to disclaim an interest in the wrongful death claims could potentially affect the recovery of one or more joint clients." Resp. to OSC at 6. BP also acknowledged "a type of potential conflict also arose in connection with Claimant's decision to disclaim her interest in the wrongful death claims and pursue only claims under the Act but denies that conflict ever actually materialized." *Id.* at 6-7. Consequently, I disagree with any implication in the majority opinion that counsel has remedied its *original* non-compliance. Even a potential conflict, whether or not it comes to fruition, requires advanced written disclosure and consent. CA ST RPC Rules 1.7(a), (b), 1.0.1(e) (2018); CA ST RPC Rule 3-310(C) (1992).

The 2019 consent letter Claimant signed, while not ideal, enables this case to continue. On that matter I agree with my colleagues. However, that letter does not act retroactively and cannot satisfy BP's obligation after the fact – so I disagree with any implication that BP did not violate the Rules initially or that it has fully satisfied its obligations under the California Rules.[11] CA ST RPC Rule 3-310(A); *see Lennar Mare Island, LLC v. Steadfast Ins. Co.*, 105 F. Supp. 3d 1100, 1114-1115 (E.D. Cal. 2015).

MELISSA LIN JONES
Administrative Appeals Judge

[11] This firm has already been reported to the State Bar, and that forum is better equipped to address BP's actions.