U.S. Department of Labor

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

ROSALIE HODGE (Widow of ALEXANDER HODGE) Claimant-Petitioner v. DEE ENGINEERING COMPANY and ARGONAUT INSURANCE COMPANY Employer/Carrier- Respondents	)	BRB No. 20-0189 OALJ No. 2014-LHC-01360 OWCP No. 13-107387 DATE ISSUED: 04/29/2021
SUZANNE QUIROZ-GREENE and SERENA GREENE (Widow and daughter of LEJON C. GREENE) Claimant-Petitioner v. BAE SYSTEMS SAN FRANCISCO SHIP REPAIR and SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED Employer/Carrier	)	BRB No. 20-0190 OALJ No. 2013-LHC-01612 OWCP No. 13-107118

and	)	
	)	
SSA TERMINALS, LLC	)	
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DORIS HENDERSON	)	BRB No. 20-0203
(Widow of RAY F. HENDERSON)	)	OALJ No. 2014-LHC-00065
	)	OWCP No. 13-094429
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BAY CITIES ASBESTOS COMPANY LIMITED	)	
	)	
and	)	
	)	
FREMONT INDUSTRIAL INDEMNITY COMPANY	)	
	)	
Employer/Carrier	)	
	)	
MARGARET IRELAND	)	BRB No. 20-0205
(Widow of BERT F. IRELAND)	)	OALJ No. 2014-LHC-01186
	)	OWCP No. 13-107341
v.	)	
	)	
MOORE SECURITIES COMPANY	)	
	)	
and	)	
	)	
FIREMAN'S FUND INSURANCE COMPANY	)	
	)	
Employer/Carrier	)	

and	)	
	)	
COLBERG, INCORPORATED	)	
	)	
Employer	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION AND ORDER

Appeals of the Orders Disqualifying Counsel and the Order on Reconsideration [*Quiroz-Greene*] of Christopher Larsen, Administrative Law Judge, United States Department of Labor.

Alan R. Brayton and John R. Wallace (Brayton Purcell LLP), Novato, California, for Claimants.

Merri A. Baldwin (Rogers Joseph O'Donnell P.C.), San Francisco, California, for Brayton Purcell LLP.

Sarah B. Stewart and Judith A. Leichtnam (Thomas Quinn, LLP), San Francisco, California, for Dee Engineering Company and Argonaut Insurance Company.

Judith A. Leichtnam (Thomas Quinn, LLP), San Francisco, California, for SSA Terminals, LLC and Homeport Insurance Company.

Cynthia Liao (Elena S. Goldstein, Deputy Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

ROLFE, Administrative Appeals Judge:

Claimants appeal Administrative Law Judge Christopher Larsen's Orders Disqualifying Counsel and the Order on Reconsideration [*Quiroz-Greene*] (2013-LHC-01612, 2014-LHC-00065, 2014-LHC-01186, 2014-LHC-01360) rendered on claims filed

pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (Act).[1] We must affirm the administrative law judge'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).

The Decedents in these consolidated cases allegedly succumbed to work-related asbestos-related diseases. Claimants are the respective widows.[2] At some point, all hired the Brayton Purcell law firm (BP) to represent them in various third-party and Longshore Act claims. Before the administrative law judge, either Employers or the Director, Office of Workers' Compensation Programs (Director) filed motions for summary decisions (M/SD), contending Claimants are barred from recovery under the Act because they entered into third-party settlements and failed to comply with the requirements of Section 33(g), 33 U.S.C. §933(g).[3] The motions have yet to be decided.[4]

Instead, the administrative law judge became concerned that BP violated the California Rules of Professional Conduct (Rules or California Rules).[5] CA ST RPC Rule

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[1] By Order dated April 23, 2020, the Benefits Review Board granted Claimants' motion to consolidate these appeals for decision. By Order dated June 25, 2020, the Board accepted these interlocutory appeals.

[2] Claimants in *Quiroz-Greene* are Decedent's widow, Suzanne Quiroz-Greene, and daughter, Serena Greene. Serena was a minor at the time of Decedent's death; she has since reached an age of majority.

[3] Employers filed motions for summary decision in *Hodge* and *Quiroz-Greene*, and the Director filed motions in *Henderson* and *Ireland*.

[4] *Quiroz-Greene* was before the administrative law judge on remand from the Board, BRB No. 15-0194 (Apr. 18, 2016), after it had accepted Employer's interlocutory appeal alleging due process violations. To greatly simplify the Board's 2016 *Quiroz-Greene* holding, the Board vacated the denial of Employer's M/SD on the Section 33(g) issues and remanded for the administrative law judge to determine if the settled third-party claims were Suzanne's or Serena's and whether Section 33(g) applies. As with the other cases, the Section 33(g) issues have not been addressed.

[5] The administrative law judge found the 1992 version of the California Rules was in effect during the time the actions in these cases took place. *Hodge* Order at 5; *Quiroz-Greene* Order at 4; *Henderson* Order at 4; *Ireland* Order at 4. The Rules were revised in 2018, and he addressed both versions, concluding: "The change in rules does not appear to

3-310(C) (1992); *see Flatt v. Superior Court of Sonoma Cnty.*, 885 P.2d 950, 957 (Cal. 1995); *Forrest v. Baeza*, 58 Cal. Rptr. 4th 65, 74 (Cal. Ct. App. 1997) (the attorney owes the client a duty of loyalty); CA ST RPC Rule 1.7 (2019).[6] The administrative law judge

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have altered the substantive ethical requirements imposed on counsel in this regard." *Id.* at 6, 5, 5, 5, respectively. CA ST RPC Rule 3-310(C) (1992) stated:

> A member shall not, without the informed written consent of each client:
>
> (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or
>
> (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or
>
> (3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

Hodge Order at 5; *Quiroz-Greene* Order at 4; *Henderson* Order at 4; *Ireland* Order at 4. Under Rule 3-310(A), CA ST RPC Rule 3-310(A), "Informed written consent" means "the client's or former client's written agreement to the representation following written disclosure" and "Disclosure" means "informing the client o[r] former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client." *Hodge* Order at 5; *Quiroz-Greene* Order at 4; *Henderson* Order at 4; *Ireland* Order at 4.

[6] The amended rule, Rule 1.7 "Conflict of Interest: Current Clients," effective November 1, 2019, states in part:

> (a) A lawyer shall not, without informed written consent from each client and compliance with paragraph (d), represent a client if the representation is directly adverse to another client in the same or a separate matter.
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> (b) A lawyer shall not, without informed written consent from each affected client and compliance with paragraph (d), represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person, or by the lawyer's own interests.

found BP's dual representation[7] has the potential to jeopardize all the claims, as evidenced by the Section 33(g) bar applied in *Hale v. BAE Sys. San Francisco Ship Repair*, 52 BRBS 57 (2018), *rev'd*, 801 F. App'x 600 (9th Cir. 2020).[8] *Hodge* Order at 6-7; *Quiroz-Greene* Order at 7; *Henderson* Order at 6; *Ireland* Order at 6.

In each case now before us, the administrative law judge issued an Order to Show Cause (OSC) and directed Claimants and BP to produce documents memorializing Claimants' informed written consent allowing BP to continue its dual representations of each Claimant and the decedents' other heirs, and establishing compliance with the California Rules. Ultimately, the administrative law judge found the interests of the

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CA ST RPC Rule 1.7(a), (b). CA ST RPC Rule 1.0.1(e) provides:

> (e) 'Informed consent' means a person's agreement to a proposed course of conduct after the lawyer has communicated and explained (i) the relevant circumstances and (ii) the material risks, including any actual and reasonably foreseeable adverse consequences of the proposed course of conduct.
>
> (e-1) 'Informed written consent' means that the disclosures and the consent required by paragraph (e) must be in writing.

[7] BP represents the Decedents' heirs in third-party lawsuits, to which Claimants were previously joined and have since disclaimed, and Claimants in their claims under the Act.

[8] At the time the motions for summary decision were filed and the administrative law judge issued his orders, the Board's decision in *Hale*, 52 BRBS 57, was in effect. *Hale* involved a widow's claim for death benefits under the Act. The decedent's heirs filed a California wrongful death claim in which the widow purported to disclaim interest. Because California law requires all heirs to be parties to a wrongful death lawsuit, the claimant informed no one about her disclaimers, BP represented the claimant in the wrongful death claim and her Longshore widow's claim, and California contract law bound her to the wrongful death settlement, the Board affirmed the finding that she "entered" into the settlement for the purposes of Section 33(g). Consequently, as she did not obtain the employer's prior written approval of the settlement, it barred her recovery under the Act. *Hale*, 52 BRBS 57. Employers and the Director filed the motions for summary decision in the current cases, relying on the administrative law judge's and the Board's application of the Section 33(g) bar in *Hale*. In an unpublished decision, the Ninth Circuit has since reversed the Board's decision, holding the widow did not "enter into" the third-party settlement. *Hale*, 801 F. App'x 600.

widows and the decedents' other heirs are directly adverse, and there is no evidence of advanced written consent as the California Rules require.

Based on this violation, as well as what the administrative law judge considered BP's continuing failure to acknowledge any wrongdoing, he disqualified BP from representing Claimants in the Longshore cases. In *Hodge*, *Henderson*, and *Ireland*, he permitted BP to file a final pleading, such as a response to the M/SD or a request for an extension for new counsel to respond, so long as it obtains Claimants' written consent prior to taking action. *Hodge* Order at 4; *Henderson* Order at 3; *Ireland* Order at 3. In *Quiroz-Greene*, he ordered BP's immediate disqualification because the responsive pleadings already had been filed. *Quiroz-Greene* Order at 10-11. He denied the *Quiroz-Greene* Claimants' motion for reconsideration. In all cases, he ordered the docket clerk to transmit a copy of each decision to the State Bar for potential disciplinary action. *Hodge* Order at 10; *Quiroz-Greene* Order at 11; *Henderson* Order at 10; *Ireland* Order at 10.

Claimants and BP appeal the disqualification orders. Two Employers, Dee Engineering (in *Hodge*) and SSA Terminals (in *Quiroz-Greene*), respond separately but identically.[9] Employers inform the Board they took no position before the administrative law judge on the conflicts of interest issue, as they suffered no ill-effects or detriment. They agree, however, disqualifying BP will prolong these cases, and that is not in their best interests.[10]

The Director also responds. Because the administrative law judge's decisions were based on the now-reversed Board decision in *Hale*, the Director asserts the Board should vacate the disqualification orders and remand the cases for the administrative law judge to reconsider the conflict of interest issue. He argues that in light of the change in law, it is less clear there is a conflict and/or that the 2020 "Conflict Waiver and Consent" documents are insufficient.[11] Upon such reconsideration, the Director also asserts the administrative

[9] The employers/carriers in *Henderson* and *Ireland* are defunct, and the Director is defending the claims, as the Special Fund has the discretion to assume liability under Section 18(b) of the Act, 33 U.S.C. §918(b), in the event the claims are compensable.

[10] Employers also discuss a portion of the Section 33(g) issue. We decline to address it as the administrative law judge has not done so first.

[11] The Director states the administrative law judge should allow the parties to file supplemental briefing on the Section 33(g) issue or withdraw their motions for summary decision. He then asserts, if a conflict still exists, BP should be given an opportunity to

law judge should consider a less drastic remedy, particularly as Claimants have indicated they wish BP to continue to represent them. In reply, Claimants and BP seek reversal of the disqualification orders because no one objects to BP's continued representation; however, Claimants also assert they signed sufficient consent waivers in 2020 and further consideration of the conflicts issue is unnecessary.

Because of the Ninth Circuit's reversal of the Board's decision in *Hale*, which constitutes an intervening change in law, we vacate the disqualification orders. *See Stone v. Newport News Shipbuilding & Dry Dock Co.*, 29 BRBS 44 (1995); *Stokes v. George Hyman Constr. Co.*, 19 BRBS 110 (1986). The administrative law judge's conflict findings, particularly his conclusion that BP did not properly advise Claimants about the ramifications of Section 33(g), which could have prejudiced their Longshore cases, understandably rely heavily on the Board's decision in *Hale* and the administrative law judge's view of the law prior to the Ninth Circuit's decision. The administrative law judge noted, for example, that BP never disclosed that "[n]o surviving spouse has ever escaped the Section 33(g) bar by disclaiming her interest in the wrongful-death recovery while being jointly represented by the same lawyers who represent the heirs settling the third-party actions, purportedly on behalf of all the heirs." *Hodge* Disqualification Order at 9; *Ireland* Disqualification Order at 8; *Henderson* Disqualification Order at 9. That statement is no longer accurate. The Ninth Circuit's subsequent change of law materially alters a fundamental calculation underlying the administrative law judge's determination to disqualify BP from these cases. *Bukovi v. Albina Eng./Dillingham*, 22 BRBS 97 (1988).

At this time, we do not take a position on whether a violation still exists after the intervening change in law. But we agree with our dissenting colleague that based on the totality of current circumstances, even if a violation occurred, disqualification now is too harsh of a remedy. Disqualification of a party's attorney is "a drastic measure" and is not the only remedy for a conflict of interest violation. *Lennar Mare Island*, 105 F. Supp. 3d at 1107-1108 ("disqualification is . . . generally disfavored and should only be imposed when absolutely necessary"). Moreover, disqualification 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).

The administrative law judge has already referred this matter to the State Bar for disciplinary action. In addition, the administrative law judge may consider reducing an attorney's fee award should BP seek one at the close of the litigation in these cases if he

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comply with the California Rules. Dir. Br. at 8-9. Despite the slightly different situation in *Quiroz-Greene*, the Director argues the same logic applies.

reconsiders the issue and determines a violation occurred that affected the quality of attorney representation under 20 C.F.R. §702.132(a) -- if the issue arises. *Rodriguez v. Disner*, 688 F.3d 645, 653 (9th Cir. 2012); *Matter of Wiredyne, Inc.*, 3 F.3d 1125, 1128 (7th Cir. 1993); *Sheppard, Mullin, Richter & Hampton, L.L.C. v. J-M Mfg. Co., Inc.*, 425 P.3d 1, 23 (Cal. 2018). But, in the interim, the time has come to get on with these cases on the merits: none of the parties object to BP's continuation of representation; all agree that BP's disqualification will delay the cases even more. Disqualification under these circumstances thus most harms the interests that the California Rules are designed to protect.[12] *See generally Koo v. Rubio's Restaurants, Inc.*, 135 Cal. Rptr. 2d 415 (Cal. Ct. App. 2003).

On remand, the administrative law judge must determine if there are any remaining conflict of interest issues the Claimants are not aware of regarding BP's representation going forward, instruct them of that conflict, and determine whether they consent to BP's representation in light of it. If the administrative law judge determines there are no remaining issues going forward and Claimants have already consented to BP's continued representation, he must proceed with the cases on the merits, beginning with receiving briefing on the significance of *Hale* on the pending summary judgment motions.

[12] We disagree with our colleague's suggestion that we have held that the intervening decision in *Hale* "eliminates the original conflict" or the need "to comply with the Rules." We have done neither, as is apparent from a plain reading of our opinion. Rather, we have held that disqualification under the facts of these cases is too harsh, even if a violation still exists after *Hale* -- a finding our colleague agrees with. Given that the only other apparent remedies are reporting BP to the bar or cutting attorney's fees, it is senseless and unreasonable to delay these cases even further: BP has already been reported to the bar; attorney's fees are not now -- and may never be -- at issue. Notably missing from our colleague's dissent is any indication of what is expected of the administrative law judge should he find a violation after another time-consuming round of briefing over an issue that does not currently create a dispute in these cases.

Accordingly, we vacate the Orders Disqualifying Counsel and the Order on Reconsideration [*Quiroz-Greene*] and remand the cases to the administrative law judge for further consideration consistent with this decision, and any other necessary action in view of the reversal of the Board's decision in *Hale*, 52 BRBS 57.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

I concur:

DANIEL T. GRESH
Administrative Appeals Judge

JONES, Administrative Appeals Judge, concurring and dissenting:

While I concur with the majority's decision to vacate the administrative law judge's orders and remand the cases for consideration of a less drastic remedy, I disagree with my colleagues' conclusion that the change in law eliminates the original conflict. I would remand for consideration of the sufficiency of the existing waivers, signed in 2020, in light of *Hale v. BAE Sys. San Francisco Ship Repair*, 801 F. App'x 600 (9th Cir. 2020), *rev'g* 52 BRBS 57 (2018).

As the court stated in *In re Zamer G.*, 63 Cal. Rptr. 3d 769, 775 (Cal. Ct. App. 2007), "I don't want to seek a waiver. . . . It's not my business or job to resolve the conflict other than to make sure there is no conflict or whatever conflict exists. . . . I found there was a structural conflict problem. . . ." Substantial evidence supports the administrative law judge's ruling that a conflict exists. An attorney's duty of loyalty to his clients, along with the complementary duty to avoid conflicts, arises at the beginning of the attorney's representation. *Miller v. Alagna*, 138 F. Supp. 2d 1252, 1256 (D. Cal. 2000). BP concedes there was a "potential conflict" and any potential conflict of "undivided loyalty" requires informed written consent to continue representation. CA ST RPC Rule 1.7 (2019); CA ST RPC Rule 3-310(C) (1992). In a self-regulated profession, informed consent and waivers are necessary *at the time the conflict was created*. BP had an obligation to obtain Claimants' informed consent and waivers at the beginning of the representation – before it needed to submit them in response to an OSC – and it did not do so.

The later change in substantive law does not eliminate the original conflict or the need to comply with the Rules. At this juncture, in light of the Ninth Circuit's decision in

Hale, I would remand the case to ascertain whether BP has remedied its non-compliance and, if so, to proceed with the merits of each case. Because there was an ethical violation at the beginning of each of these cases, and the court's decision in *Hale* does not change that fact, the administrative law judge should determine which option, less drastic than disqualification, is appropriate considering the relevant factors: the gravity and timing of the violation, its willfulness, its effect on the value of the lawyer's work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies. *Rodriguez v. Disner*, 688 F.3d 645, 654-655 (9th Cir. 2012).

MELISSA LIN JONES
Administrative Appeals Judge