



BRB No. 24-0139

SHIRLEY BATTS  
(Widow of JAMES BATTS, JR.)

Claimant-Petitioner

v.

BAY AREA CONTROLS,  
INCORPORATED

and

ARGONAUT INSURANCE COMPANY

Employer/Carrier-  
Respondents

**NOT-PUBLISHED**

DATE ISSUED: 12/05/2025

**DECISION and ORDER**

Appeal of the Order Disqualifying Counsel, Staying Proceedings, and Transferring Case of Steven Berlin, Administrative Law Judge, United States Department of Labor.

John R. Wallace (Brayton Purcell LLP), Novato, California, for Claimant.<sup>1</sup>

Before: GRESH, Chief Administrative Appeals Judge, JONES, Administrative Appeals Judge, and ULMER, Acting Administrative Appeals Judge.

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

GRESH, Chief Administrative Appeals Judge, and ULMER, Acting Administrative Appeals Judge:

Claimant<sup>2</sup> appeals Administrative Law Judge (ALJ) Steven Berlin's Order Disqualifying Counsel, Staying Proceedings, and Transferring Case (2015-LHC-00614 and 2019-LHC-00900) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (Act). We must affirm the ALJ's Order if it is rational, supported by substantial evidence, and in accordance with applicable law.<sup>3</sup> 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 361-362 (1965).

Decedent developed occupational asbestosis which led to his death in 2012. Prior to Decedent's death, the law firm Brayton Purcell LLP represented both Decedent and Claimant in separate California tort law claims for personal injury and loss of consortium; those claims resulted in several third-party settlements. Decl. of Alan Brayton at 2. Decedent appointed Claimant executrix of his will and left all his property to her. Decl. of John Wallace Ex. 6. However, Decedent indicated that if Claimant predeceased him or did not act as executrix of his will, all his property was to go to Claimant's daughter (Decedent's stepdaughter), Sherri Freeman Dover, who was to be appointed executrix of his estate. *Id.*

On April 10, 2013, an attorney from Brayton Purcell wrote Claimant regarding plans to pursue wrongful death and survivor tort claims on her behalf related to Decedent's death. Apr. 10, 2013 Letter. On May 29, 2013, a different attorney from Brayton Purcell wrote Claimant about plans to pursue a death benefits claim under the Act, but only if she signed a disclaimer to relinquish her right to recovery under any California wrongful death claims. May 29, 2013 Letter. On June 10, 2013, Claimant signed two disclaimers: one relinquishing her rights to any third-party recoveries in favor of her claim under the Act and a second relinquishing her interest in Decedent's estate as to any settlements or judgments accruing after his death. June 10, 2013 Disclaimer of Participation in Third-Party Lawsuit; June 10, 2013 Disclaimer of Interest in Estate. On June 24, 2013, Claimant,

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<sup>2</sup> Claimant is the widow of James Batts, Jr. (Decedent) who worked for Employer and died on October 31, 2012. *Batts v. Bay Area Controls, Inc.*, BRB No. 24-0139, slip op. at 1 n.1 (Aug. 15, 2024) (unpub.); CXs 1, 4.

<sup>3</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because Decedent worked for Employer in California and died in San Francisco, California. 33 U.S.C. §921(c); see *Roberts v. Custom Ship Interiors*, 35 BRBS 65, 67 n.2 (2001), *aff'd*, 300 F.3d 510 (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. §702.201(a).

through Brayton Purcell, filed a claim under the Act for death benefits due to her husband's employment-related asbestos exposure and death. Claimant's Exhibit (CX) 1.

Shortly thereafter, Brayton Purcell began representing Ms. Dover for purposes of pursuing separate wrongful death tort claims related to Decedent's injury and death.<sup>4</sup> Decl. of John Wallace Ex. 8. Ms. Dover, through Brayton Purcell, also made claims against and received recoveries from eight bankruptcy trusts and entered into one settlement agreement with another company that was not bankrupt, which together amounted to a total gross recovery of \$13,118.57. Decl. of John Wallace Ex. 2. From that total amount, Brayton Purcell received \$8,055.92 in costs and \$2,310.62 in fees, while Ms. Dover received \$2,752.03. *Id.* In addition, Brayton Purcell reached a resolution with another bankrupt company in February 2019 for a recovery of \$6,008.80, but that money had not been received or distributed at the time it filed its settlement status report with the ALJ. *Id.*

On February 27, 2017, ALJ William J. King issued a Decision and Order Awarding Death Benefits (D&O). ALJ King found Claimant established Decedent's exposure to asbestos while working for Employer hastened his death and awarded Claimant death benefits. D&O at 16. He held in abeyance the issue of whether Claimant's counsel (Counsel) is entitled to an attorney's fee pending investigation into a potential conflict of interest caused by his firm's simultaneous representation of both Claimant and Ms. Dover. *Id.* However, ALJ King subsequently left the Office of Administrative Law Judges (OALJ) without taking any further action in this case. Feb. 14, 2019 Order Re Partial Reconstruction of File & Re Att'y Fee Br. at 2.

The OALJ reassigned the case to the ALJ, who issued an Order to Show Cause on March 2, 2019, regarding the potential conflict of interest. Employer subsequently requested modification of the award, asserting Section 33(g) of the Act, 33 U.S.C. §933(g), barred Claimant's continued receipt of death benefits.<sup>5</sup> The ALJ consolidated Claimant's

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<sup>4</sup> On August 14, 2013, Ms. Dover signed a declaration identifying herself as Decedent's successor-in-interest to "allow [her] to continue and/or commence any and all actions related to decedent's exposure to asbestos which survive his death." Decl. of Sherri Freeman Dover at 1; Decl. of John Wallace Ex. 8 at 45.

<sup>5</sup> Section 33(g) of the Act mandates that a claimant, under certain circumstances, either give the employer and carrier notice of a third-party settlement or judgment in his or her favor or obtain their written approval prior to executing a third-party settlement. 33 U.S.C. §933(g); *Siver v. Kaiser Aluminum & Chem. Corp.*, 57 BRBS 11, 15 (2022), *aff'd mem.* (Feb. 21, 2024), *reh'g denied* (9th Cir. May 30, 2024). Failure to do so results in forfeiture of benefits under the Act. 33 U.S.C. §933(g)(2). The purpose of Section 33(g)'s requirements is to protect an employer's right to offset any third-party recovery against its liability for compensation under the Act and to "prevent the claimant from unilaterally

death benefits claim, 2015-LHC-00614, and Employer's motion for modification of that claim, 2019-LHC-00900, determining that the conflict of interest issue must be addressed before awarding Claimant's Counsel any attorney's fee and before ruling on Employer's motion for modification.

In an Order Disqualifying Counsel, Staying Proceedings, and Transferring Case dated December 29, 2023 (Order), the ALJ found Brayton Purcell's simultaneous representation of both Claimant and Ms. Dover for claims arising out of Decedent's asbestos exposure and related death constituted a conflict of interest and that Brayton Purcell failed to adequately obtain informed written consent from Claimant in accordance with the California Rules of Professional Conduct (CRPC). Order at 2, 9-22. While acknowledging that Claimant signed two disclaimers in 2013 and a waiver in 2019, the ALJ found Counsel's attempt to mitigate his firm's "ethical breach" insufficient as it failed to fully disclose the conflict of interest, thereby invalidating the waiver Claimant signed. *Id.* at 2, 14-15, 23-28; June 10, 2013 Disclaimer of Participation in Third-Party Lawsuit; June 10, 2013 Disclaimer of Interest in Estate; Sept. 5, 2019 Conflict Waiver & Consent. The ALJ found the disclaimers Claimant signed in 2013 did not constitute a conflict waiver, and the conflict waiver Claimant signed in 2019 was ineffective and was signed after resolution of the third-party claims. Order at 26-28, 34. Thus, the ALJ determined Counsel's representation of Claimant was "tainted by an undisclosed, unconsented conflict of interest beginning as soon as the firm undertook representation of [Ms.] Dover" in violation of the CRPC and therefore disqualified Brayton Purcell and each of its attorneys, including Counsel, from further representing any party in this claim. *Id.* at 22, 31. The ALJ stayed the case for thirty-five days to allow Claimant time to retain new counsel and transferred the case to the next available ALJ for "reasons of administrative necessity."<sup>6</sup> *Id.* at 38-39.

Claimant filed an interlocutory appeal of the ALJ's Order, moving to stay the proceedings pending further action or order by the Benefits Review Board. The Board accepted Claimant's interlocutory appeal because it is necessary to direct the course of the adjudicatory process. *Batts v. Bay Area Controls, Inc.*, BRB No. 24-0139, slip op. at 3 (Aug. 15, 2024) (unpub.); see 33 U.S.C. §923(a) (the Board is not bound by formal rules of procedure); *Pensado v. L-3 Commc'ns Corp.*, 48 BRBS 37, 37 (2014); *Baroumes v. Eagle Marine Servs.*, 23 BRBS 80, 82 (1989). The Board also granted Claimant's motion

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bargaining away funds to which the employer or its carrier might be entitled." *Siver*, 57 BRBS at 15.

<sup>6</sup> The OALJ reassigned the case to ALJ Evan H Nordby. Jan. 18, 2024 Notice of Assignment.

to stay all proceedings before the OALJ and set a briefing schedule. *Batts*, BRB No. 24-0139, slip op. at 4.

Claimant timely filed a brief with the Board, arguing the ALJ erred in disqualifying Counsel and Brayton Purcell from representing her in this case. She asserts “any conflict that existed was expressly waived” in the 2019 waiver she signed on the advice of independent counsel. Claimant’s Br. at 11. Thus, she argues the ALJ’s rejection of Claimant’s waiver was an abuse of discretion. *Id.* at 12-28. Employer has not filed a response brief.

Disqualification of a party’s attorney is “a drastic measure.” *Lennar Mare Island, LLC v. Steadfast Ins. Co.*, 105 F. Supp. 3d 1100, 1107-1108 (E.D. Cal. 2015) (“disqualification is . . . generally disfavored and should only be imposed when absolutely necessary”). 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 Board has reversed ALJs’ disqualifications of Brayton Purcell in cases involving similar facts. *See Hodge v. Dee Eng’g Co.*, BRB Nos. 20-0189, 20-0190, 20-0203, & 20-0205, slip op. at 8-9 (Apr. 29, 2021) (unpub.) (Jones, J., concurring and dissenting); *DeMoss v. Auxiliary Sys’s Inc.*, BRB No. 21-0387, slip op. at 6-7 (Mar. 30, 2022) (unpub.) (Jones, J., concurring and dissenting).

In *Hodge*, ALJ Christopher Larsen found Brayton Purcell’s representation of the claimants and their children in that case potentially jeopardized the claimants’ rights under the Act. *Hodge*, BRB Nos. 20-0189, 20-0190, 20-0203, & 20-0205, slip op. at 5-6. He ultimately concluded the interests of the widows and other heirs were directly adverse, and Brayton Purcell did not comply with the CRPC requiring advanced written consent and conflict waivers. *Id.* at 6-7. Thus, he disqualified Brayton Purcell from continued representation of the claimants. *Id.* at 7. The claimants and Brayton Purcell appealed to the Board, which held that disqualification was “too harsh of a remedy” considering the ALJ’s reasons for disqualification relied heavily on the Board’s decision in *Hale v. BAE Sys. S.F. Ship Repair*, 52 BRBS 57 (2018), which the United States Court of Appeals for the Ninth Circuit subsequently reversed, *Hale v. BAE Sys. S.F. Ship Repair*, 801 F. App’x 600, 602 (9th Cir. 2020).<sup>7</sup> *Id.* at 8, 11. Without deciding whether a CRPC violation existed,

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<sup>7</sup> *Hale v. BAE Sys. S.F. Ship Repair*, 52 BRBS 57 (2018), *rev’d* 801 F. App’x 600 (9th Cir. 2020), involved a widow’s claim for death benefits under the Act where the decedent’s heirs had also filed a California wrongful death claim in which the widow purported to disclaim any interest. The Board held the widow “entered” into the third-party settlement for purposes of Section 33(g) of the Act as she had not informed anyone

the Board vacated the ALJ's disqualification order<sup>8</sup> and remanded the case for the ALJ to determine any remaining conflict of interest issues and any other necessary action in view of the reversal of the Board's decision in *Hale*.<sup>9</sup> *Id.* at 9-10.

In *DeMoss*, Brayton Purcell represented both the claimant in her claim for death benefits under the Act in that case and the claimant and her sons in a separate state wrongful death claim. *DeMoss*, BRB No. 21-0387, slip op. at 3. The employer filed a motion for summary decision asserting the claimant's failure to notify it of third-party settlements and obtain its prior written approval barred the claimant from receiving death benefits under Section 33(g) of the Act. *Id.* Without addressing the employer's motion, the ALJ found Brayton Purcell had multiple potential and actual conflicts of interests, did not inform the claimant of those conflicts, and did not obtain the claimant's consent to continue its

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about her disclaimers, Brayton Purcell represented her in the separate wrongful death claim and the claim under the Act, and California law bound her to the wrongful death settlement. *Hale*, 52 BRBS at 64. Consequently, the Board held she was barred from recovery under the Act as she did not obtain the employer's prior written approval of the settlement. *Id.* The Ninth Circuit, in an unpublished decision, reversed the Board's decision, holding the widow did not "enter into" the third-party settlement. *Hale v. BAE Sys. S.F. Ship Repair*, 801 F. App'x 600, 602 (9th Cir. 2020).

<sup>8</sup> Administrative Appeals Judge Melissa Lin Jones dissented, in part, stating she would have remanded the case for the ALJ to consider "the sufficiency of the existing waivers . . . in light of *Hale*." *Hodge v. Dee Eng'g Co.*, BRB Nos. 20-0189, 20-0190, 20-0203, & 20-0205, slip op. at 10 (Apr. 29, 2021) (unpub.) (Jones, J., concurring and dissenting).

<sup>9</sup> In *Hodge*, the claimants' counsel, Brayton Purcell, subsequently again appealed the case to the Board, raising the issue of Counsel's entitlement to an attorney fee. The Board affirmed the ALJ's denial of an attorney fee for any work performed on the conflict issue and the ALJ's 50% reduction of the total lodestar amount of the fee requested based on the ALJ's finding that Brayton Purcell had a conflict of interest and failed to obtain informed written consent in accordance with the CRPC. *Hodge v. Dee Eng'g Co.*, BRB No. 23-0332, slip op. at 15 (Apr. 9, 2025) (unpub.); *see also McCue v. Colberg, Inc.*, BRB Nos. 15-0037, 17-0203, & 24-0003, slip op. at 15-16 (May 29, 2025) (unpub.) (affirming the ALJ's reduction of Brayton Purcell's costs for retaining outside counsel in response to its conflict of interest issue as its "own litigation strategies led to the need for outside counsel"); *but see Schubert v. Colberg, Inc.*, BRB Nos. 15-0415, 16-0023, & 24-0002, slip op. at 15-17 (May 12, 2025) (unpub.) (affirming the ALJ's decision not to reduce Brayton Purcell's attorney's fee for work performed addressing a conflict of interest issue).

representation in violation of the CRPC. *Id.* Therefore, the ALJ disqualified Brayton Purcell. *Id.* The claimant appealed to the Board, which again held disqualification was too harsh a remedy. *Id.* at 6-8. Again, without deciding whether a CRPC violation existed, the Board vacated the ALJ's disqualification orders and remanded the case for the ALJ to continue with proceedings on the merits.<sup>10</sup> *Id.* at 4-6.

This case involves essentially the same facts as those found in *Hodge* and *DeMoss*. As in those cases, we need not consider whether a CRPC violation occurred because disqualification would nevertheless be an unnecessarily harsh sanction based on the facts in this case.<sup>11</sup> The cases that the ALJ relied on are inapposite to the facts of this case because they involved an attorney jointly representing multiple plaintiffs which, as Claimant notes, could potentially have directly adverse interests among themselves in seeking the allocation of damages or have potential claims against each other. Claimant's Br. at 26. As Claimant asserts, those cases are distinguishable from this case, where Claimant consents to Brayton Purcell's continued representation and therefore this case does not "includ[e] the possibility of [Counsel's] clients asserting claims directly against each other." *Id.*

In 2019, Claimant unambiguously reiterated her desire to retain Counsel as her representative in a conflict waiver. Sept. 5, 2019 Conflict Waiver & Consent. In addition, in 2013, she previously disclaimed her interest in the separate state wrongful death claims to pursue a claim under the Act.<sup>12</sup> June 10, 2013 Disclaimer of Participation in Third-Party Lawsuit. Under these circumstances, disqualification would most harm Claimant's

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<sup>10</sup> Administrative Appeals Judge Jones again dissented, in part, stating she would have affirmed the ALJ's finding that Brayton Purcell violated the CRPC because the claimant's consent letter "does not act retroactively and cannot satisfy [Brayton Purcell's] obligation after the fact." *DeMoss v. Auxiliary Sys's Inc.*, BRB No. 21-0387, slip op. at 8 (Mar. 30, 2022) (unpub.) (Jones, J., concurring and dissenting).

<sup>11</sup> Unlike in *Hodge*, the ALJ in this case addressed the Ninth Circuit's decision in *Hale* and found it did not affect his conclusion because it is "unpublished and non-precedential." Order at 13. We need not address *Hale* because it did not involve a conflict of interest issue, and no Section 33(g) issue regarding a third-party settlement or judgment is before us.

<sup>12</sup> The time for filing a third-party claim has expired and the other third-party claims that were filed have been settled. Claimant's Br. at 23, 27-28; Decl. of John Wallace Ex. 6.

interests, which the CRPC are designed to protect.<sup>13</sup> *See generally Koo v. Rubio's Rests., Inc.*, 135 Cal. Rptr. 2d 415, 426-27 (Cal. Ct. App. 2003); *see also Lennar*, 105 F. Supp. 3d at 1114; Cal. Rules of Pro. Conduct Rule 3-310(A).

Accordingly, we reverse the ALJ's Order Disqualifying Counsel, lift the Order Staying Proceedings, and remand the case to the ALJ to continue with proceedings on the merits.

SO ORDERED.

DANIEL T. GRESH, Chief  
Administrative Appeals Judge

GLENN E. ULMER  
Acting Administrative Appeals Judge

JONES, Administrative Appeals Judge, concurring and dissenting:

I concur with the majority's decisions to reverse the ALJ's Order and to remand the case to the ALJ for further proceedings. However, for the reasons set forth in my opinions in *DeMoss v. Auxiliary Sys's Inc.*, BRB No. 21-0387 (Mar. 30, 2022) (Jones, J., concurring and dissenting) (unpub.), *Westbrook v. F. Rodgers Insulation*, BRB No. 20-0004 (May 18, 2021) (Jones, J., dissenting) (unpub.), and *Hodge v. Dee Eng'g*, BRB Nos. 20-0189, 20-0190, 20-0203, 20-0205 (Apr. 29, 2021) (Jones, J., concurring and dissenting) (unpub.), I write separately.

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

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<sup>13</sup> Contrary to our dissenting colleague's assertion, we have not taken any position on whether Brayton Purcell's actions violated CRPC Rule 1.7 as it is wholly unnecessary in order to reverse the ALJ's disqualification order, which was a clear abuse of his discretion based on the facts in this case.



that is what counsel did not do in this case.<sup>14</sup> *Miller v. Alagna*, 138 F.Supp.2d 1252, 1256 (D. Cal. 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 ALJ’s Order to Show Cause, Brayton Purcell acknowledged that when “one or more clients have a claim to a common fund of monies to be recovered on behalf of one of [sic] clients there is a potential conflict of interest amongst the clients.” Decl. of Alan Brayton at 3. Although it contends no conflict exists, Resp. to Order to Show Cause at 4-5, it conceded it “did not have to consider any potential or actual conflicts of interest” between Claimant and Ms. Dover because Brayton Purcell “had not yet begun its representation of Ms. Dover, in her capacity as successor in interest as personal representative of the estate.” Decl. of Alan Brayton at 3-4.

Consequently, I disagree with any implication in the majority opinion that Brayton Purcell has remedied its original non-compliance. Even a potential conflict, whether or not it comes to fruition, requires advanced written disclosure and consent. Cal. Rules of Pro. Conduct Rule 1.7(a), (b), 1.0.1(e) (2018); Cal. Rules of Pro. Conduct Rule 3-310(C) (1992). The 2019 waiver Claimant signed enables this case to continue. On that matter, I agree with my colleagues. However, that waiver does not act retroactively and cannot satisfy Brayton Purcell’s obligation after the fact – so I disagree with any implication that Brayton Purcell fully satisfied its obligations under the CRPC. Cal. Rules of Pro. Conduct 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

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<sup>14</sup> California Rules of Professional Conduct 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*.” Cal. Rules of Pro. Conduct Rule 3-310(A) (emphasis added).