



TENNESSEE BUREAU OF WORKERS' COMPENSATION
IN THE COURT OF WORKERS' COMPENSATION CLAIMS
AT NASHVILLE

Anvil Nelson, Jr.,) **Docket No. 2021-06-1121**
 Employee,)
v.)
QVS, Inc.,) **State File No. 26092-2021**
 Employer,)
And)
Wesco Insurance Company,) **Judge Kenneth M. Switzer**
 Carrier.)

DISQUALIFICATION ORDER

One cannot serve two masters. Anvil Nelson, Jr. asserts in this motion that opposing counsel in his workers' compensation case is attempting to do just that.

Mr. Nelson is both the injured worker and the owner/president of the employer, QVS, Inc. He claims that a conflict of interest has arisen and asks that Moore, Ingram, Johnson & Steele, counsel for Wesco Insurance Company, its third-party administrator, and QVS, be disqualified from the case. In the alternative, Mr. Nelson asks that Wesco be compelled to hire independent counsel to represent QVS alone.

For the reasons below, the Court finds a conflict exists and disqualifies Wesco's attorney from representing QVS only, but he and/or his law firm may continue representation of the carrier. Wesco shall hire independent counsel to represent QVS.

The Motion

Mr. Nelson contends that a concurrent conflict of interest has arisen because Wesco and its third-party administrator denied the claim, contrary to the wishes of QVS and himself.

The central issues are causation and medical causation. Mr. Nelson, in his capacity as owner and president of QVS, sent a letter to counsel for Wesco asking that it accept the

claim. It declined. He later sent another letter requesting that Wesco hire independent counsel to represent QVS. Wesco again declined, saying its attorney had based the decision on a review of the policy language, although neither party attached that to the motion.

Wesco intends to obtain an employer's examination and to depose Mr. Nelson. Mr. Nelson states that he is the corporate representative for most, but not all, of the topics on QVS's behalf. Mr. Nelson asserts that QVS's attorney will be questioning its own client during the discovery, which he says violates Rule 1.7 of the Rules of Professional Conduct. Wesco has not asked him, in his role as owner/president of QVS, to waive any potential conflicts of interest between him and the other parties.

Opposing counsel contends that no conflict exists because counsel represents not only the carrier but also QVS as a corporation, an entity separate from Mr. Nelson. The Workers' Compensation Law defines "employee" to include the "president" of a corporate employer. Wesco argues that Mr. Nelson has not exempted himself from the Workers' Compensation Law as a corporate officer. Wesco's attorney questions whether the motion was made for an improper purpose.

Mr. Nelson filed a reply, contending that he is "intricately intertwined" to the company. He attaches a declaration from a former Panel member of the Tennessee Board of Professional Responsibility, whose opinion supports his position.

Law and Analysis

This motion presents an issue of first impression, and therefore, contrary to Wesco's argument, the Court has little difficulty finding that the motion was not made for any improper purpose.

The initial question is whether a concurrent conflict of interest is present under Tennessee Supreme Court Rule 8, Rule 1.7 of the Rules of Professional Conduct.

The rule states that a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if "(1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client[.]"

The rule goes on to state that, notwithstanding the existence of a concurrent conflict of interest, a lawyer may represent a client if "the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation" and "each affected client gives informed consent, confirmed in writing[.]"

The Tennessee Court of Appeals summarized conflicts of interests, and the remedy when one exists, in *Moody v. Hutchison*, 247 S.W.3d 187, 200 (Tenn. Ct. App. 2007). An attorney may undertake “multiple” or “successive” representations, so long as there is no actual conflict of interest. *Id.* An actual conflict of interest is usually defined “in the context of one attorney representing two or more parties with divergent interests.” *Id.* In addition:

A test for determining a disqualifying conflict in that situation is whether the attorney “made a choice between possible alternative courses of action [that were] helpful to one client but harmful to the other.” The term has been described as “a situation in which regard for one duty tends to lead to [the] disregard of another.” In *Ford v. Ford*, 749 F.2d 681, 682 (11th Cir.), cert. denied, 474 U.S. 909, 106 S. Ct. 278, 88 L. Ed. 2d 243 (1985), the court declared a conflict of interest when an “attorney was placed in a position of divided loyalties.” Once an actual conflict of interest is shown, disqualification is the appropriate remedy.

Id.

Here, Mr. Nelson is an injured worker represented by an attorney. He is essentially suing his own company and its workers’ compensation carrier. He also repeatedly refers to himself as a “client” of Wesco’s attorney, because Mr. Nelson is the owner, president and corporate representative of QVS.

The Court agrees that under these circumstances, Mr. Nelson’s interests and those of QVS are intricately intertwined. The fact that Mr. Nelson did not elect as an officer to be excluded from workers’ compensation shows that he intended QVS’s policy to cover him in the event of a workplace accident, and as he reminds, he paid the premiums for this coverage.

Meanwhile, the attorney who represents Wesco also represents QVS. QVS’s corporate representative, Mr. Nelson, has interests directly adverse to the carrier’s interests. Wesco’s attorney cannot simultaneously contend that the claim is compensable, a position favorable to Mr. Nelson and the corporate representative, and defend against the claim as noncompensable, a position favorable to the carrier. Wesco’s attorney wishes to obtain an employer’s examination and to depose Mr. Nelson. This discovery will likely be highly adversarial, given the tenor of the litigation so far. Simply put, their interests could not be more diverse.

Significantly, Wesco’s attorney has not sought informed consent, in writing, from each affected client. The Court finds a concurrent, actual conflict of interest exists. Therefore, Wesco’s attorney and his firm should be disqualified from representation of QVS.

However, disqualification from the entire case, as Mr. Nelson asks, seems excessive. From a procedural standpoint, Mr. Nelson filed his petition on February 1, 2022. A dispute certification notice has issued, but the case is only in the initial phases of discovery. At a previous status hearing, Mr. Nelson's lawyer stated that medical causation is the central issue and he is treating on his own. Thus, the case will likely turn on doctors' opinions, which the attorneys have yet to obtain.

Mr. Nelson does not state other grounds that preclude Wesco's counsel's participation entirely. If he and his firm were disqualified, the parties would be returning to square one, which injects needless delay. Instead, allowing Wesco's counsel to remain in the case strikes the Court as consistent with a workers' compensation system that is "fair, equitable, expeditious, and efficient." *See* Tenn. Code Ann. § 4-3-1409(b)(2)(A) (2022); *McCord v. Advantage Human Resourcing*, 2015 TN Wrk. Comp. App. Bd. LEXIS 6, at *10 (Mar. 27, 2015).

Mr. Nelson's alternative, ordering that Wesco hire independent counsel to represent QVS, is the better option to keep the case moving. **Independent counsel shall file a notice of appearance within ten business days of entry of this order.**

The Court will enter orders on the other pending discovery disputes separately. The parties are reminded that the next status hearing will take place on **February 6, 2023, at 10:00 a.m. Central Time.** You must call 615-532-9552 or 866-943-0025 to participate.

ENTERED November 29, 2022.

Kenneth M. Switzer

JUDGE KENNETH M. SWITZER
Court of Workers' Compensation Claims

CERTIFICATE OF SERVICE

I certify that a copy of this Order was sent as indicated on November 29, 2022.

Name	Certified Mail	Regular Mail	Email	Service sent to:
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