

**WORKERS' COMPENSATION APPEALS BOARD  
STATE OF CALIFORNIA**

**NIKOLAS FERIOLO, *Applicant***

**vs.**

**NATIONAL STEEL AND SHIPBUILDING COMPANY, *Permissibly Self-Insured,*  
*Defendants***

**Adjudication Number: ADJ10385820  
San Diego District Office**

**OPINION AND ORDER  
DENYING PETITION  
FOR REMOVAL**

We have considered the allegations of the Petition for Removal and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and the presiding WCJ's report which we adopt and incorporate by reference, we will deny removal.

Subsections (b) and (c) of WCAB Rule 10788 require a party requesting reassignment to act within a certain timeframe from when the "parties are first notified of the identity of the workers' compensation judge." (Cal. Code Regs., tit. 8, §10788(b), (c).) In this case, the parties were first notified of the identity of the trial judge when the matter was first set for an expedited hearing. Because Labor Code section 5700 requires that a trial be conducted by a single judge, the trial judge is assigned the first time a case is set for a trial or an expedited hearing. Absent unusual circumstances, that judge will be assigned to all trials and expedited hearings. Permitting a party to obtain automatic reassignment of a judge every time a new hearing is set would lead to unnecessary delays and gamesmanship. Pursuant to Rule 10788(c), defendant had an opportunity to request automatic reassignment within 5 days of the Notice of Hearing identifying the workers' compensation judge. Additional notices of hearings before the same judge are not new notifications of the identity of that judge.

For the foregoing reasons,

**IT IS ORDERED** that the Petition for Removal is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**I CONCUR,**

**/s/ DEIDRA E. LOWE, COMMISSIONER**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**January 21, 2022**

**SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.**

**ENGLAND PONTICELLO  
HINDEN ROTT  
NIKOLAS FERIOLI**

**MWH/oo**

*I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. o.o*

**REPORT ON PETITION  
FOR REMOVAL**

The petitioner, National Steel and Shipbuilding Company, failed a timely verified Petition for Removal on October 13, 2021. The petitioner is aggrieved by the September 23, 2021 order denying the defendant's petition for automatic reassignment.

**RECOMMENDATION**

It is respectfully recommended that the petition be denied.

**SUMMARY OF THE FACTS**

The applicant, Nicholas Ferioli, was employed by National Steel and Shipbuilding Company during the period of August 1, 2013 - August 1, 2014 as an outside machinist in San Diego, California. He claims to have sustained injury in the form of non-Hodgkin's lymphoma, diabetes, and skin disorder (Joint Pre- Trial Conference Statement filed October 15, 2021).

The case was set for an expedited hearing before Judge Atcherley for October 18, 2021.

On September 21, 2021, the defendant filed a Petition for Automatic Reassignment.

On September 23, 2021, an order issued denying the Petition for Automatic Reassignment on the basis that the petition was untimely. The case had previously been set for an expedited hearing before Judge Atcherley on March 22, 2021.

Neither party exercised their right to request automatic reassignment under CCR 10788. The March 22, 2021 expedited hearing was taken off-calendar at the joint request of the parties (Minutes of Hearing dated March 16, 2021.)

**POSITION OF THE PETITIONER**

The petitioner contends that because the March 22, 2021 expedited hearing was taken off-calendar at the joint request of the parties, and no testimony was taken, no "proceeding" occurred. Therefore, the parties preserved their rights to request automatic reassignment when the case was subsequently set for expedited hearing before the same Judge.

The petitioner notes that the October 18, 2021 expedited hearing before Judge Atcherley was a "new discrete hearing," involving different issues. Therefore, the petitioner contends that the Petition for Automatic Reassignment filed on September 21, 2021 was timely and should have been granted.

## **RIGHT TO AUTOMATIC REASSIGNMENT**

CCR 10788 provides for the automatic reassignment of the Judge assigned to conduct a trial or expedited hearing. The defendant is entitled to one reassignment of a Judge (10788 (a)).

The right to request reassignment must be exercised upon first notice of the identity of the Judge assigned for the trial or expedited hearing. If a party is given notice of the identity of the Judge assigned for the trial or expedited hearing during a conference, the party must make an oral motion immediately upon hearing the name of the Judge (10788(b)).

If a party is first notified of the identity of the Judge assigned to the trial or expedited hearing by a Notice of Trial served by mail, the right to automatic reassignment must be exercised by filing a petition not more than five days after receipt of the notice. The Presiding Judge rules on any Petition for Automatic Reassignment (10788(c)).

The defendant was notified by a Notice of Hearing dated February 25, 2021 that the case was set for an expedited hearing before Judge Atcherley on March 22, 2021 (Petition for Removal, page 2, lines 9 - 14). Neither party exercised their right to request automatic reassignment.

On March 16, 2021, the parties jointly requested that the March 22, 2021 expedited hearing go off -calendar, and the request was granted (Minutes of Hearing dated March 16, 2021.)

Having failed to exercise the right to have the March 22, 2021 expedited hearing reassigned from Judge Atcherley to a different Judge, the defendant exercised the right to automatic reassignment to challenge the assignment of Judge Atcherley to conduct the October 18, 2021 expedited hearing. The request was rejected as untimely (Order Denying Petition for Reassignment dated September 23, 2021).

When a party fails to exercise the right to reassignment when first notified of the identity of the Judge assigned to conduct the trial or expedited hearing, the party may not exercise the right to reassignment when the same Judge is assigned for a subsequent trial or expedited hearing. This is true regardless of whether the first matter actually was heard or decided by the Judge.

The act of the assignment of the Judge for trial or expedited hearing invokes the right to reassignment under CCR 10788.

If the defendant did not want Judge Atcherley to be the Judge for trial or for expedited hearing, the time to exercise the right to automatic reassignment was when the defendant received the February 25, 2021 Notice of Hearing for the March 22, 2021 expedited hearing, which identified Judge Atcherley as the trial Judge.

There are multiple cases directly on point, including an Appeals Board en banc decision in *Bennett v. County of San Luis Obispo* (1979) 44, Cal.Comp. Cases 835.

In *Bennett*, a hearing was scheduled before a Judge without objection by either party. The hearing was taken off- calendar. The case was subsequently set for hearing with the same Judge. The defendant filed a Petition for Reassignment five days after the receipt of the second Notice of Hearing.

The Appeals Board held:

" If a party with knowledge of the Workers' Compensation Judge to whom the case is assigned fails to file a Petition for Reassignment..., that party is not entitled to file a Petition for Reassignment when, after continuance or order taking off-calendar, a new Notice of Hearing is served unless the case has been assigned to another Workers' Compensation Judge. "

Had the defendant exercised the right to request reassignment when the case was originally assigned to Judge Atcherley for expedited hearing, Judge Atcherley could not be the Judge for the subsequent expedited hearing.

Having failed to request reassignment when the matter was originally set before Judge Atcherley for expedited hearing in March 2021, the defendant's reassignment request filed in advance of the October 2021 expedited hearing before the same Judge must be regarded as untimely.

### **RECOMMENDATION**

It is respectfully recommended that the Petition for Removal be denied.

Date: Dec. 31, 2021

CLIFFORD LEVY  
PRESIDING WORKERS' COMPENSATION JUDGE