

1 **THE BOARD FOR ADMINISTRATION OF THE**
2 **SUBSEQUENT INJURY ACCOUNT**
3 **FOR SELF-INSURED EMPLOYERS**

4 *****

4 In re: Subsequent Injury Request for Reimbursement

5 Claim No.: 51C540740
6 Date of Injury: December 30, 2005
7 Insurer: Viad Corp
8 Employer: GES Exposition Services, Inc.
9 Third-Party Administrator: Nevada Alternative Solutions, Inc.
10 Submitted By: Nevada Alternative Solutions, Inc.

11 **FINDINGS OF FACT, CONCLUSIONS OF LAW**
12 **AND DETERMINATION OF THE BOARD**

13 **I. Introduction**

14 This case came on for hearing before the Board for the Administration of the Subsequent
15 Injury Account for Self-Insured Employers on August 28, 2008 and October 18, 2008. The
16 question this case raises is whether the self-insured employer may take two, unrelated conditions
17 of less than 6% each, whole person impairment (WPI), and add them together, arithmetically to
18 achieve a total of more than a 6% WPI to satisfy the definition of a permanent physical
19 impairment set forth in NRS 616B.557(3).¹ Stated another way, does the addition of two
20 unrelated conditions that themselves do not support a rating of 6% or more, WPI, but when
21 added together, total, simply as a matter of arithmetics, more than 6%, satisfy the "6% rule" of
22 NRS 616B.557(3) in order to sustain a claim for reimbursement from the Subsequent Injury
23 Account for Self-Insured Employers? Secondly, then, may NRS 616B.557(1) be satisfied by
24 adding up two, unrelated conditions with ratings of less than 6% WPI as the means to meet or

25 ¹As used in this section, "permanent physical impairment" means any permanent condition,
26 whether congenital or caused by injury or disease, of such seriousness as to constitute a hindrance or
27 obstacle to obtaining employment or to obtaining reemployment if the employee is unemployed. For the
28 purposes of this section, a condition is not a "permanent physical impairment" unless it would support a
 rating of permanent impairment of 6 percent or more of the whole man if evaluated according to the
 American Medical Association's Guides to the Evaluation of Permanent Impairment as adopted and
 supplemented by the Division pursuant to NRS 616C.110. NRS 616B.557(3)

1 exceed the 6% requirement of NRS 616B.557(3) when NRS 616B.557(1)² requires the self-
2 insured employer to show that the injured worker:

3 ... has a preexisting permanent physical impairment [which then combines
4 with the subsequent industrial injury to entitle the injured worker to
5 compensation].... for disability that is substantially greater by reason of the
6 combined effects of the preexisting impairment and the subsequent injury than
that which would have resulted from the subsequent injury alone...[?] (Emphasis
added). NRS 616B.557(1).

7 The Board found that the impairments added together by the self-insured employer to
8 equal or exceed the 6% requirement of NRS 616B.557 were unrelated. The Board concluded,
9 further, that NRS 616B.557 requires that there be at least one permanent physical impairment
10 which would support a rating of 6% or more, WPI, and therefore, because the self-insured
11 employer could only achieve a rating of 6% or more by adding up the ratings of two, unrelated
12 impairments, the application for reimbursement must be denied pursuant to NRS 616B.557(1)
13 and (3). Further, because the self-insured employer failed the burden of proof imposed by these
14 two statutes, the Board found it unnecessary to address the retention requirement and proof by
15 written records of knowledge of the preexisting condition requirement of NRS 616B.557(4). Tr.,
16 61; 19-25, 62; 1-2.

17 The Board's Findings of Fact, Conclusions of Law and Decision are set forth, below.

18 FINDINGS OF FACT

19 1. This case was first heard by the Board on June 17, 2008, when the Board issued
20 its tentative ruling upholding the recommendation of the Administrator to reject the application
21 for reimbursement because the applicant failed to satisfy the requirements of NRS 616B.557 (1),
22 (3) and (4).

23 ///

24 ///

26 ²If an employee of a self-insured employer has a permanent physical impairment from any cause
27 or origin and incurs a subsequent disability by injury arising out of and in the course of his employment
28 which entitles him to compensation for disability that is substantially greater by reason of the combined
effects of the preexisting impairment and the subsequent injury than that which would have resulted from
the subsequent injury alone, the compensation due must be charged to the Subsequent Injury Account for
Self-Insured Employers in accordance with regulations adopted by the Board. NRS 616B.557(1).

2. GES Exposition Service, Inc., is the applicant and self-insured employer in this matter. SR.³ In a letter dated June 20, 2008, transmitted by mail on June 23, 2008, the applicant was notified by the Board's legal counsel of the Board's tentative decision to accept the Administrator's recommendation and deny the claim. 1Tr. 5; 22-25, 6; 1-4, Ex. 2.⁴

3. In a letter dated July 2, 2008, addressed to this Board in care of the Board's legal counsel, the applicant gave notice of its request for a hearing *de novo* in light of the Board's adverse tentative ruling. 1Tr., 6; 6-11. Ex. 3.

4. The applicant's request for a *de novo* hearing arrived at the office of the Board's legal counsel within 30 days of the notice to the applicant of the tentative decision of the Board. 1Tr., 6; 9-11.

5. On August 28, 2008, the case was first heard on a *de novo* basis. Due to the volume of material submitted in support of this application that was submitted to the Board on the day of the hearing, and because the documents were not Bate-stamp paginated, it was agreed that after acknowledging which documents were being admitted into evidence, the matter should be continued to give the Board members the opportunity to study the materials submitted. 1Tr., 11;3 through 13;18.

6. The following documents were admitted into evidence without objection of any party at the initial hearing.

- Exhibit 1: Waiver of hand delivery and certificate of receipt of the notice of meeting, signed by Dan Schwartz, dated June 6, 2008.
- Exhibit 2: Affidavit of mailing signed by Karen Weisbrot, and a copy of a letter dated June 20, 2008, addressed to Vice-President Cull and copied to Charles R. Nort, informing of them of the Board's tentative decision.
- Exhibit 3: Letter dated July 2, 2008, from Mr. Schwartz's office to Mr. Zeh's office advising that the applicant requested a *de novo* hearing.
- Exhibit 4: DIR's Staff Report dated March 11, 2008.
- Exhibit 5: Exhibit (large) submitted by the Applicant (585 pages).
- Exhibit 6: Exhibit (small) submitted by the applicant 12 pages).

1Tr. pp. 4-10.

³SR stands for the Staff Report submitted by the Administrator.

⁴"1Tr." refers to the transcript of the hearing of the Board on this matter conducted on August 28, 2008, and "2Tr." refers to the transcript for the hearing on October 18, 2008.

1 7. Given the large volume of materials presented to the Board by the applicant at the
2 start of the hearing which the Board members had no chance to read and evaluate, this case was
3 continued and the hearing reconvened on October 16, 2008. 2Tr., 3. At the commencement of
4 the hearing, legal counsel for the Board clarified that Exhibit 5, previously admitted, consisted of
5 Bate stamped pages 1 through 585, and that Exhibit 6, previously admitted, consisted of Bate
6 stamped pages 1 through 12. 2Tr., 10-15.

7 8. Daniel Schwartz, Esq., appeared for the applicant at the hearing of August 28,
8 2008, 1Tr., 2; 10, and then, again for the applicant at the hearing of October 16, 2008. 2Tr.,
9 2;10.

10 9. John F. Wiles, Esq., legal counsel to the Administrator, the Division of Industrial
11 Relations (DIR), was present for the August 28, 2008, hearing and also, again at the hearing of
12 October 16, 2008. 1Tr., 2;9, 2Tr., 2; 9.

13 10. Jacque Everhart, the Administrator's Liaison to the Board, appeared at both
14 hearings. 1Tr., 2; 8, 2Tr., 2; 8.

15 11. Chairman Victoria Robinson, Vice-Chairman RJ LaPuz, and Board Members
16 Tina Sanchez, Donna Dynek, and Linda Keenan participated in both meetings. 1Tr., 2, 2Tr., 2.

17 12. Sexual dysfunction is one of the two preexisting conditions relied upon by the
18 petitioner to satisfy the requirements of NRS 616B.557(3), the 6% rule, and NRS 616B.557(1),
19 which turns upon proof of a preexisting condition as defined by NRS 616B.557(3). 2Tr., 17;1-3.

20 13. The sexual dysfunction, pre-existing, however, was intermittent erectile
21 dysfunction and a problem established by history, only, from the injured worker. Ex. 6, p. 2, SR
22 Exhibits pp. 47-49, 50, 52.

23 14. The spine was the other preexisting condition relied upon by the petitioner to
24 satisfy the requirements of NRS 616B.557(1) and (3). Specifically, the injured worker had
25 multilevel degenerative disc disease, lumbar spine, degenerative scoliosis, lumbar spine, and
26 isthmie lytic spondylolisthesis, L5-S1. He was asymptomatic for all of these conditions prior to
27 the subsequent industrial injury. 2Tr., 17; 4-7, SR Exhibits, p. 57.

28 15. The injured worker suffered the subsequent industrial injury on December 30,

1 2005, while working construction as a member of the Teamster's Union, working for GES, the
2 self-insured employer. On this day, he was erecting 10 foot walls and was in a hurry to complete
3 the work, when he felt a twinge in his low back area, which moved down his hamstring. He saw
4 a doctor the same day. He finished the convention work for GES and then, started working for
5 Opportunity Village. SR Exhibits pp., 11, 48.

6 16. Sexual dysfunction was partially apportioned out of the subsequent industrial
7 injury rating and assigned a rating of 4% preexisting. SR Exhibits pp. 57,58; 2Tr., 19;16-19.

8 17. As for the spinal injury, it was partially apportioned out of the subsequent
9 industrial injury rating with 1% deducted each for the surgical intervention for the preexisting
10 conditions regarding T10-11, T11-12, T12-L1, and L1-L2 for a total of 4% preexisting for
11 problems of the spine. *Ibid.*, 2Tr., 17; 17-19.

12 18. The applicant then aggregated the sexual dysfunction rating of 4% and the spinal
13 column problem rating of 4% (added them together, mathematically) to reach and 8% PPD
14 rating, preexisting or, stated another way, petitioner took these two conditions, added their
15 apportioned ratings of 4% each together to get a total of 8% and then asserted that combined,
16 they exceeded the 6% rule of NRS 616B.557(3), and therefore, the preexisting permanent
17 physical impairment requirement of NRS 616B.557(1) was satisfied. SR Exhibits, p. 58; 2Tr.,
18 19; 16-25.

19 19. The indication of sexual dysfunction, preexisting, is based upon the medical
20 history taken from the injured worker according to Richard W. Kudrewicz, M.D., the physician
21 who did the original disability rating for the subsequent industrial injury and then was hired by
22 the applicant to provide a "subsequent injury account" analysis in order to support the applicant's
23 claim. Exhibit 6, pp. 2,3, SR Exhibits pp. 44, 47,48, 49, and 57.

24 20. There is no proof in the record that the sexual dysfunction, preexisting, was
25 related to the preexisting spinal problems, either causing them or the result of the preexisting
26 spinal problems.

27 21. In fact, apart from a very terse history from the patient, Exhibit 6, pp. 2,3, there is
28 no medical evidence other than history in the record to establish the extent or degree to which he

1 suffered from the preexisting condition of intermittent erectile dysfunction, the actual form of
2 preexisting sexual dysfunction. Exhibit 6, pp. 2,3, SR Exhibits 44, 47, 48, 49, 57.

3 22. While the generic term, sexual dysfunction, was included in the subsequent
4 industrial injury disability claim, there is no medical indication that the preexisting condition,
5 intermittent erectile dysfunction, either caused the subsequent form of sexual dysfunction,
6 retrograde ejaculation, the spinal injury, or both.

7 23. In Dr. Kudrewicz's evaluation for the injured worker's disability rating, he
8 mentions a problem with retrograde ejaculation (sexual dysfunction), but then relates the
9 problem to the surgery of the spine, following the subsequent industrial injury. "He does have
10 retrograde ejaculation as well since his injury/surgery." *Id.*, at 48.

11 24. Another reference to sexual dysfunction in Dr. Kudrewicz's disability rating
12 report consists of an observation from the injured worker's orthopedic surgeon, Mark B. Kabins,
13 M.D. After seeing the injured worker post-spinal surgery, Dr. Kudrewicz quotes Dr. Kabins as
14 stating that the injured worker "may have retrograde ejaculations." *Id.* at 47. Again, this was a
15 post-surgery observation and the Board understands the reference to mean that a side effect of
16 the surgery was the retrograde ejaculation.

17 25. In Dr. Kudrewicz's disability rating report, he states: "It is noted that pre-accident,
18 the patient did have some difficulty with erection, intermittently. Post-accident and surgery he
19 **now** has retrograde ejaculation." (Emphasis added.) SR Exhibits p. 49. Applying the plain and
20 ordinary meaning to this very ordinary and commonly used word, the Board understands the use
21 of the word, **now**, by Dr. Kudrewicz to mean that the injured worker did not have retrograde
22 ejaculation, before the surgery, only after the surgery.

23 26. Parsing this observation further, the reference to erectile dysfunction is in the past
24 tense as Dr. Kudrewicz states that the injured worker "did have" difficulties intermittently. It
25 does not state that he currently has difficulties intermittently, or that the frequency of the
26 intermittent erectile dysfunction had increased following surgery for the injured back or
27 following the injury to the back, itself. The issue of erectile dysfunction according to this
28 statement either remained the same following the injury to the back on December 30, 2005, or it

1 went away.

2 27. The predominant post-accident, post-surgery form of sexual dysfunction,
3 retrograde ejaculation, appeared, then, for the first time after surgery.

4 28. In addition, Dr. Kudrewicz was given a second opportunity by the self-insured
5 employer to expand upon his knowledge of the erectile dysfunction, pre-operative and post-
6 operative. Dr. Kudrewicz wrote: "I have been asked how I became aware of the fact that this
7 gentleman preoperatively had some difficulty with erection.

8 ...

9 I have reviewed my handwritten notes, and this gentleman was asked the question
10 specifically on the date of examination [for the disability rating that Dr.
11 Kudrewicz issued, including the apportionment to the preexisting conditions]. He
12 [the injured worker] indicated that before his accident he did have some difficulty
13 with erections intermittently. **That was the extent of his answer and it came
14 about based upon direct questioning referable to any pre-accident of
15 12/30/05 sexual dysfunction.**" (Emphasis added). Exhibit 6, p. 2.

16 29. The Board fails to see how this answer suggests that the surgery for the injured
17 worker's back problems in any way amplified the erectile dysfunction suffered by this injured
18 worker. The injured worker's silence with respect to on-going erectile problems in this statement
19 would, on the other hand, suggest at the very least that there was no **amplification** of the
20 problem following the back injury or surgery.

21 30. Moreover, the injured worker was apparently unaware he even had back problems
22 prior to the accident because he was asymptomatic until the accident of December 30, 2005, and
23 it was noted that "...he has never seen a physician for back discomfort or pain, never missed time
24 from work because of back injuries in the past. He [the injured worker] has never been told he
25 had back problems." SR Exhibits p. 46. Not knowing he had any back problems, the injured
26 worker would, therefore, not have related his erectile dysfunction, intermittent, to a back
27 condition.

28 31. Problems with an erection, intermittently, should never be confused with
retrograde ejaculation. Retrograde ejaculation means, in a word, a misdirected flow of semen to
the urinary bladder instead of outside the body. The fact that a person has intermittent problems
with an erection, therefore, does not suggest that the individual suffers from retrograde

1 ejaculation, a separate condition entirely. "Retrograde ejaculation." By Mayo Clinic Staff.

2 32. There is no medical indication in the record which shows that the preexisting
3 sexual dysfunction, intermittent erectile dysfunction, exacerbated either the subsequent form of
4 sexual dysfunction, retrograde ejaculation, or the spinal injury which is to state, there is also no
5 medical evidence in the record to show that the preexisting intermittent erectile dysfunction
6 combined with the subsequent industrial injuries to substantially increase the compensation paid.
7 SR Exhibits p. 58.

8 33. Dr. Kudrewicz devoted almost an entire page of his "subsequent injury report or
9 analysis" to whether the preexisting condition substantially contributed to the cost of treatment
10 and care for the subsequent injury. While he concluded that this was the case, his conclusion
11 was entirely devoid of any reference to the preexisting sexual dysfunction, intermittent erectile
12 dysfunction, which made up 50% of the 8% aggregated preexisting condition upon which the
13 self-insured employer, through Dr. Kudrewicz, wishes to rely to justify a subsequent injury claim
14 to the Board. *Ibid.*

15 34. Dr. Kudrewicz concluded: "I would suggest that the vast majority of the cost [of
16 the treatment for the subsequent industrial accident] relates to the preexisting condition,
17 asymptomatic degenerative disease which was aggravated by relatively minor industrial
18 accident." *Ibid.* Dr. Kudrewicz does not mention, therefore, the worker's alleged preexisting
19 sexual dysfunction. Precisely, therefore, one half of the 8% aggregated "preexisting condition"
20 had no impact upon increasing the cost of treatment and, therefore, did not support any finding
21 that the combined effects rule of NRS 616B.557(1) had been satisfied.

22 35. At best, only 50% of the 8% aggregated "preexisting condition" or, therefore,
23 only a preexisting condition of 4% WPI for the spinal problems, supported a finding of
24 combined effects as required by NRS 616B.557(1).

25 36. A preexisting condition of less than 6% is, therefore, all the self-insured employer
26 has to offer to satisfy NRS 616B.557(3), the 6% rule, and to satisfy the proof of a preexisting
27 permanent physical impairment requirement of NRS 616B.557(1) which is defined by NRS
28 616B.557(3) since the other half of the 8%, the 4% WPI attributed to the preexisting condition of

1 intermittent erectile dysfunction, joined with nothing to satisfy the combined effects portion of
2 NRS 616B.557(1).

3 37. The 4% preexisting sexual dysfunction condition, intermittent erectile
4 dysfunction, cannot stand on its own to satisfy either NRS 616B.557(1) and (3) since it is a
5 condition that does not support a rating of 6% WPI or more, the minimum threshold of NRS
6 616B.557(3) and it fails to combine with the subsequent condition to substantially increase the
7 compensation paid as required by NRS 616B.557(1).

8 38. The 4% preexisting spinal problems cannot stand as a preexisting condition on its
9 own, either, to satisfy NRS 616B.557(1) and (3) because the spinal problems do not support a
10 rating of 6% or more as required by NRS 616B.557(3). Therefore, it fails under NRS
11 616B.557(1), also, because this statute turns upon the presence of preexisting permanent
12 physical impairment as defined by NRS 616B.557(3). Since the spinal condition, preexisting,
13 will only support a rating of 4% if evaluated against the *Guides*, as here, it does not meet the
14 definition of a preexisting permanent physical impairment as defined by NRS 616B.557(3).
15 Therefore, the application of NRS 616B.557(1) is not triggered because a 4% preexisting spinal
16 condition fails to rise to the level of a preexisting permanent physical impairment.

17 39. The evidence in the record shows that the 4% rating for sexual dysfunction,
18 retrograde ejaculation, that is included in the subsequent industrial claim was a non-existent
19 condition until after the surgery. Simple mathematics bears this out since Dr. Kudrewicz
20 assigned a PPD of 9 % for sexual dysfunction. He then apportioned it, 50% to the preexisting
21 condition and 50% to the subsequent condition. Due to rounding, this came to 4% for the
22 preexisting condition and 4% for the subsequent condition. Since the problem of retrograde
23 ejaculation did not occur until after the surgery on the back following the back injury, this means
24 that the entire 4% preexisting had to be assigned to the preexisting intermittent erectile
25 dysfunction which leaves the remaining 4% for the retrograde ejaculation, the subsequent
26 industrial condition. SR Exhibits pp. 44-48, 51, 57,58. Dr. Kudrewicz actually concurs. SR
27 Exhibits p. 51.

1 40. Based upon the medical records before the Board, the Board concludes that the
2 preexisting sexual dysfunction of intermittent erectile dysfunction was unrelated to the
3 preexisting spine problems. The Board characterizes the two preexisting conditions, the spinal
4 problems and the intermittent erectile dysfunction, as conditions that are neither one and the
5 same nor related by pathology. Instead, the Board concludes that the preexisting spinal and
6 problem of intermittent erectile dysfunction existed independently of each other.

7 41. The preexisting sexual dysfunction condition or impairment warrants the
8 conclusion that at the most, it would support a rating of 4% WPI, if evaluated according to the
9 *Guides*.⁵

10 42. The preexisting degenerative spinal condition or impairment warrants the
11 conclusion that at the most, it would support a rating of 4% WPI, if evaluated according to the
12 *Guides*.

14
15 ⁵The Board took the position, during the course of the hearing, that the evidence was so strong
16 that NRS 616B.557(1) and (3) were not satisfied, it did not need to make any findings on the question of
17 whether the self-insured employer could prove by written records that it had knowledge of the preexisting
18 condition and that the self-insured employer retained the injured worker after acquiring this knowledge as
19 required by NRS 616B.557(4). The Board, however, wishes to point out that there is no proof by written
20 record the self-insured employer knew of the alleged preexisting condition of intermittent erectile
21 dysfunction until it is mentioned in Dr. Kudrewicz's disability rating report dictated January 20, 2007. SR
22 Exhibit , p. 53. The injured worker's last day of work for GES was January 4, 2007. This date precedes
23 the date this written record was generated, much less shown to the self-insured employer. Ex. 6, p.7.
24 Since the self-insured employer argues that the preexisting sexual dysfunction condition's disability rating
25 of 4% can be added to the 4% for the spine to equal or exceed the 6% threshold of NRS 616B.557(3), by
26 a parity of reasoning, the self-insured employer must be able to prove by written record that it had
27 knowledge of both the preexisting sexual dysfunction condition and the spinal problems and retained the
28 injured worker thereafter if the self-insured employer is going to add their ratings together in order to
satisfy NRS 616B.557(4). Proof by written record of one of the preexisting conditions being aggregated
to meet the threshold of NRS 616B.557(3) but not the other would perforce, be insufficient under the
applicant's aggregate theory of compliance with NRS 616B.557(1) and (3). Since knowledge of the
preexisting condition of sexual dysfunction was not acquired until after the injured worker stopped
working for the employer and therefore, was not retained under NRS 616B.557(4), the self-insured's
application must fail even if its own view of NRS 616B.557(1) and (3) was accepted. The self-insured
employer cannot have it both ways. If it wants to aggregate multiple conditions to arrive at the 6%
threshold of NRS 616B.557(3), then, it must prove knowledge and retention under NRS 616B.557(4) for
each of the conditions that the self-insured employer wishes to aggregate to reach the 6% threshold.
Since the applicant has failed to make that kind of showing for the sexual dysfunction portion of the
aggregation of conditions and it relies upon the sexual dysfunction portion of the aggregation to make the
6% threshold, the self-insured's application would have to be rejected, also, under NRS 616B.557(4).

43. To the extent any of the following Conclusions of Law constitute findings of fact, they are incorporated herein.

CONCLUSIONS OF LAW

1. To the extent any of the preceding Findings of Fact constitute conclusions of law, they are incorporated herein.

2. GES Exposition Services, Inc., filed a timely request for a *de novo* hearing of the tentative decision of the Board. NAC 616B.7706(1).

3. A quorum of the Board was present at all times to hear and decide this matter.
NRS 616B.551.

4. The burden of proof lies with the applicant to show that the eligibility criterion justifying reimbursement from the Account have been satisfied. *See, United Exposition Service v. State Industrial Insurance System*, 109 Nev. 421, 424, 851 P.2d 423 (1993).

5. NRS 616B.557(1) and (3), quoted in the margin, *supra*, footnotes 1 and 2, are the statutes implicated by this case. The self-insured employer's application challenges the meaning of these two statutes.

6. In Nevada, it is well settled that when interpreting a statute, the Board must give the words used their plain and ordinary meaning. See, *Barrick Goldstrike Mines v. Peterson*, 116 Nev. 541, 545 (2000). See also, *Nelson v. Heer*, 123 Nev. 26, 163 P.3d 420, 425 (2007).

7. It is also well settled that when interpreting a statute, where the legislature's intent is clear, "...that is the end of the matter; for the court as well as the agency [or in this case, the Board] must give effect to the unambiguously expressed intent of Congress [or the Legislature]." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1994). *See also, Nelson, supra* at 425. The language of the statute controls and the Board may look no further for its meaning.

8. Applying these principles to NRS 616B.557 (1) and (3), the two statutes at issue in this case, the Board will continue to require applicants, as here, to prove by a preponderance of the evidence the presence of at least one preexisting permanent physical impairment, with a rating of 6% or more, whole person, which then combines with the subsequent industrial injury

1 so that compensation paid the injured worker for the subsequent industrial injury is substantially
2 greater by reason of the combined effects of the preexisting impairment and the subsequent
3 injury than it would have been had there been no preexisting permanent physical impairment.
4 The aggregation of preexisting pathologies or permanent physical impairments that are,
5 themselves, rated at less than 6% whole person, to reach the threshold requirement of 6% or
6 more is not permitted under NRS 616B.557 (1). Had the Nevada Legislature intended otherwise,
7 the Legislature would not have used in NRS 616B.557 (1) the term **the** to modify the phrase
8 preexisting impairment or the term impairment would have been written in the plural rather than
9 the singular. Alternatively, the Legislature could have expressly stated in NRS 616B.557 (1)
10 that it was permissible to prove **a** preexisting impairment or **any combination of preexisting**
11 **impairments** to be eligible for relief under the statute. The Legislature did not opt for that route.
12 Since the Legislature did not choose such options that were obviously available to it, the Board
13 is left with no other conclusion than that the Legislature meant what it said, when it required the
14 applicant to prove the existence of at least one permanent physical impairment, rated at 6% or
15 more, which then combined with the subsequent injury to substantially increase the
16 compensation paid the injured worker.

17 9. Thus, it is also insufficient to simply prove that the injured worker suffered from a
18 preexisting impairment of 6% or more because NRS 616B.557 (1) additionally requires the
19 applicant to prove that this preexisting impairment, with a rating of 6% or more whole person,
20 then combined with the subsequent injury to substantially increase the compensation paid the
21 injured worker.

22 10. Therefore, even if the preexisting condition would support a rating of 6% or more,
23 WPI, such proof, in and of itself, would still be insufficient because there must also be a
24 showing that the preexisting condition combined with the subsequent industrial injury to
25 **substantially increase** the compensation paid above and beyond what would have been the
26 compensation had there been only the subsequent injury alone.

27 11. The applicant has failed in its burden of proof in this case. The self-insured
28 employer fails in the first instance because the attempts to satisfy the 6% rule of NRS

1 616B.557(3) by aggregating two, separate and distinct conditions of a 4% PPD rating to achieve
2 an aggregated 8% PPD rating or a rating in excess of the threshold 6% PPD requirement of NRS
3 616B.557(3), will not be countenanced.

4 12. There is no showing in the medical records that the intermittent erectile
5 dysfunction caused or was related to the spinal problems. There is no showing of the converse,
6 either. The facts are that these are unrelated conditions. The application must be denied because
7 there is no plausible factual basis in the record for treating these physical problems as one
8 condition. Since neither of the preexisting conditions supports, on its own, a rating of 6% WPI or
9 more, the application must be denied because the "6% rule" of NRS 616B.557 (3) has not been
10 satisfied. Neither of the preexisting conditions meet the definition of a preexisting permanent
11 impairment as defined by NRS 616B.557(3).

12 13. The application must be denied, also, because there is no proof that the
13 preexisting intermittent erectile dysfunction was shown to be a hindrance to employment as
14 required by NRS 616B.557(1). 2Tr., 10; 15-20. The same is true of the spinal problems, given
15 the record is clear that the injured worker was asymptomatic for his back, and never missed a
16 day of work prior to the subsequent industrial injury. SR Exhibits, pp., 45, 46, 48. Neither
17 condition, therefore, meets the definition of a preexisting permanent physical impairment as
18 further defined by NRS 616B.557(3).

19 14. The application must also be denied because there is no showing of a combined
20 effect between the preexisting condition and the subsequent injury. The simple fact of the matter
21 is that the preexisting sexual dysfunction was, as stated, intermittent erectile dysfunction. There
22 is no proof, as indicated, in the record that this condition was either caused by or caused the
23 spinal problems of the back which were essentially degenerative in nature. There is no proof,
24 either, that the preexisting sexual dysfunction, intermittent erectile dysfunction, caused or
25 contributed to the subsequent form of sexual dysfunction, retrograde ejaculation.

26 15. Retrograde ejaculation should never be confused with intermittent erectile
27 dysfunction. Furthermore, its cause in this case was the back surgery, itself. It never arose out
28 of the subsequent industrial injury. SR Exhibits, p. 34. In addition, Dr. Kudrewicz's

1 apportionment of the sexual dysfunction problems, also reveals that they are mutually exclusive
2 conditions, with independent bases and causes, when he apportioned each to the exclusion of the
3 other. SR Exhibits p. 51.

4 16. Thus, at least 50% of the preexisting conditions that the applicant wishes to
5 aggregate to achieve the threshold 6% WPI requirement had no combined effects with the
6 subsequent industrial injury to substantially increase the compensation paid. The subsequent
7 sexual dysfunction rating was entirely the retrograde ejaculation, which was the result of
8 surgery, not the presence of intermittent erectile dysfunction, the preexisting sexual dysfunction
9 condition.

10 17. The self-insured employer also concedes that if the preexisting sexual dysfunction
11 was unrelated to the subsequent sexual dysfunction, the self-insured employer has no case and
12 should not be standing before the Board arguing for reimbursement.

13 18. During the course of the hearing, the Chairman asked the following: "Tell me
14 how this is different that if the person had been injured in a fall three years ago and gotten four
15 percent on an arm and four percent on a foot and then had a subsequent foot injury. Because, in
16 essence, sexual dysfunction one way or the other is certainly not going to affect ... the
17 subsequent injury to his back." 2Tr., pp. 32; 21-25, 33;1-4.

18 19. The self-insured employer agreed with the premise that if the conditions are
19 unrelated and do not substantially combine with the subsequent injury, there is no combined
20 effects and eligibility for reimbursement cannot be sustained. The applicant's counsel stated:
21 "So, I see your point if this was a symptom that arose solely from the surgery. Then how am I
22 sitting here arguing this was something from before?" *Id.*, at p. 35; 2-4.

23 20. The self-insured employer then went on to state that these were not the facts
24 because the sexual dysfunction existed in the before condition and then, continued in the after
25 condition. *Id.*, at p. 35; 5-7.

26 21. The self-insured, however, is simply wrong on the facts, by failing to take into
27 account that the preexisting sexual dysfunction was entirely separate in scope, kind and cause
28 from the subsequent sexual dysfunction condition. The retrograde ejaculation did not exist in the

1 before condition, only existed in the after condition, and was not caused by the preexisting
2 erectile dysfunction but by the surgery on the back. SR Exhibit p. 34. The retrograde
3 ejaculation arose solely from the surgery and, therefore, the applicant should not have been
4 before the Board asking for reimbursement in reliance upon this condition.

5 22. The applicant has failed to show on the facts that NRS 616B.557(1) and (3) have
6 been satisfied. As a matter of law, the aggregation of multiple conditions cannot be combined to
7 achieve the 6% threshold level of NRS 616B.557(3). As a matter of fact, the erectile dysfunction
8 and the multiple degenerative back problems are unrelated. They are separate and distinct
9 conditions, that therefore cannot be combined to achieve the 6% threshold of NRS 616B.557(3).
10 As these are the only conditions that the self-insured employer offers to meet the 6% threshold of
11 NRS 616B.557(3), and neither on its own, satisfies the requirement of NRS 616B.557(3), the
12 application must be rejected.

13 23. In addition, neither preexisting condition relied upon by the self-insured employer
14 was so severe as to constitute a hindrance to employment. *See*, NRS 616B.557(1). There is
15 nothing in the record to suggest that intermittent erectile dysfunction is a condition that amounts
16 to a hindrance to employment. Similarly, the record is clear that the injured worker was
17 asymptomatic of his back problems and that they had not caused him to lose a day's work. The
18 back problems were also not a hindrance to injured worker's employment. The application must
19 be rejected on these grounds as well. NRS 616B.557(1).

20 24. Finally, the self-insured worker failed to prove the "combined effects" rule had
21 been satisfied as the self-insured employer admits it must satisfy as a condition of
22 reimbursement. The retrograde ejaculation was not preexisting, and was not caused by any
23 condition that preexisted the subsequent injury. The intermittent erectile dysfunction is
24 unrelated to the condition of retrograde ejaculation. Retrograde ejaculation was a condition
25 caused by the surgery on the back due to the subsequent industrial injury. Thus, as the self-
26 insured employer admits, there is no proof of combined effects which NRS 616B.557(1)
27 requires. NRS 616B.557(1) has also therefore not been satisfied.

25. The applicant failed in its burden of proof under NRS 616B.557(1) and (3) and the application must consequently be denied.

DECISION

Based upon the Findings of Fact and Conclusions of Law set out above, the recommendation of the Administrator of the Division of Industrial Relations for the State of Nevada to deny the application for reimbursement is hereby affirmed by the Board for the Administration of the Subsequent Injury Account for Self-Insured Employers. The applicant failed to establish by a preponderance of the evidence that NRS 616B.557 (1) and (3) were satisfied. Therefore, the application for reimbursement from the Account is hereby denied upon a motion by Tina Sanchez, seconded by Linda Keenan, made pursuant to NRS 616B.557 (1) and (3) to deny the claim. Upon a vote of five members in favor of the motion, with no members opposing the motion, and no abstentions and a quorum being present to vote upon the motion, the motion was duly adopted. 2Tr., 62; 1-13.

Further, at the meeting of the Board held on February 18, 2010, upon a motion by Tina Sanchez, seconded by RJ LaPuz, three members of the Board voted to adopt this written decision as the decision of the Board. Since three members of the Board were in attendance and considered the motion, a quorum was present. The vote was 3-0-1, with member Esposito abstaining because he did not participate in the hearings on this case. One position of the Board was vacant because it had not formally been filled as of February 18, 2010.

Dated this 23rd day of June, 2010.

Victoria J. Robinson
Victoria Robinson, Chairman of the Board

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Zeh & Winograd and that on this date I served the attached *Findings of Fact, Conclusions of Law and Determination of the Board*, on those parties identified below by:

√	Placing an original or true copy thereof in a sealed envelope, postage prepaid, placed for collection and mailing in the United States Mail, at Reno, Nevada Daniel Schwartz, Esq. Lewis Brisbois Bisgaard & Smith LLP 400 South Fourth Street, Suite 500 Las Vegas, NV 89101 John F. Wiles, Division Counsel Department of Business and Industry Division of Industrial Relations 1301 North Green Valley Parkway, Suite 200 Henderson, NV 89074
	Personal delivery:
	Telephonic Facsimile at the following numbers:
√	Certified Mail/Return Receipt Requested Daniel Schwartz, Esq. Lewis Brisbois Bisgaard & Smith LLP 400 South Fourth Street, Suite 500 Las Vegas, NV 89101 John F. Wiles, Division Counsel Department of Business and Industry Division of Industrial Relations 1301 North Green Valley Parkway, Suite 200 Henderson, NV 89074

Dated this 20th day of June, 2010.


An Employee of Zeh & Winograd

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