·p	· Þ	
	1	THE BOARD FOR ADMINISTRATION OF THE
	2	SUBSEQUENT INJURY ACCOUNT
	3	FOR THE ASSOCIATIONS OF
	4	SELF-INSURED PUBLIC OR PRIVATE EMPLOYERS
	5	***
	6	In re: Subsequent Injury Request for Reimbursement
	7	$Claim N_{2} = C142.11.05516.01$
	8	Claim No.: C143-11-05516-01 Date of Injury: January 6, 2011 Association Name: Public Agency Compensation Trust
	9	Association Member: Elko County
	10	Association Administrator: Public Agency Risk Management Service Third-Party Administrator: Alternative Service Concepts Application Submitted by: Robert Balkenbush, Esq.
	11	Application Subinitied by: Robert Barkenbush, Esq/
	12	FINDINGS OF FACT CONCLUSIONS OF LAW
	13	AND DETERMINATION OF THE BOARD
	14	This matter came on for hearing before the Board for the Administration of the
	15	Subsequent Injury Account for the Associations of Self-Insured Public or Private Employers on
	16	April 12, 2018. The association name for this matter is the Public Agency Compensation Trust.
	17	The association member for this matter is Elko County. The association administrator for this
	18	matter is the Public Agency Risk Management Services. The third party administrator for this
	19	matter is Alternative Service Concepts. This case was originally received from Robert
	20	Balkenbush, Esq., Thorndal Armstrong Delk Balkenbush & Eisinger, on December 26, 2017.
	21	Tr., p. 2;17-18. The total amount requested for reimbursement was \$117,657.36. Tr. p. 2;14-16.
	22	The amount of reimbursement after verified costs was the sum of \$9,049.43. Tr. p. 2;16-17.
	23	Board legal counsel advised that this matter had previously been continued for 60 days to
	24	give the applicant's legal counsel, Mr. Balkenbush, the opportunity to locate and submit
	25	additional evidence, Tr., p. 16;20-24. In a letter dated April 9, 2018, received by Board Legal
	26	counsel's office the afternoon of April 11, 2018, the day before the hearing, Mr. Balkenbush
	27	advised that he was submitting no further information beyond that already a part of the case.
	28	Board legal counsel also advised that Mr. Balkenbush had called Board legal counsel's office,

-1-

1 apologizing for the tardy delivery of his letter, but due to a personal family matter, it was not 2 possible to give notice any earlier, Tr., p. 17;1-6.

3 The Board members participating in person at the meeting were Chairman Brian Wachter and members Rebecca Fountain, Allen Walker and Deborah Collins, Vice-chairman Joyce Smith attended the meeting via telephone. As all five members of the Board were participating, either in person or by telephone, a quorum was present to hear and decide this matter.

Appearing by telephone on behalf of Mr. Balkenbush and the applicant was John Hooks, Esq., of Thorndal Armstrong Delk Balkenbush & Eisinger, Tr., p. 17;16-20. Mr. Hooks advised the Board that: "We will submit on the record as filed." Tr., p. 17;21-22.

Board counsel pointed out that in this matter, there was no request for a hearing in the 10 first place submitted by the applicant. Consequently, the case falls under NAC 616 B.7781(1)(a)which provides that when there has been no request for a hearing by the applicant, the Board will 12 proceed to hear the matter and approve or disapprove in whole or in part the recommendation of 13 the Administrator without allowing additional evidence, testimony, argument or rebuttal. Tr., p. 14 15 17;7-15.

Chairman Wachter nevertheless stated that he always gives everybody an opportunity just 16 to say something on a case. Consequently, without adjudicating the matter, he gave Mr. Hooks 17 the opportunity to say anything that he would like to add to the record. Tr., p. 18;1-3. Mr. Hooks 18 responded that he had nothing further to add. "I think we're going to rely basically on the 19 application as submitted with the recommendation of Jay Betz." Tr., p. 18;5-7. Mr. Hooks then 20 explained further, 21

I think there is a preexisting condition here that has been identified to the extent that they have found and addressed the condition and it was 95-100 percent closed. If they didn't address the event then, they didn't really have an option. So I think Betz clearly identifies a preexisting condition and will submit on the record. Tr., p. 18;7-12.

The hearing proceeded with the Administrator making a recommendation to deny this 25 request pursuant to NRS 616B.578 (1)(3)and(4) for the heart. The Board's Findings of Fact, 26 27 Conclusions of Law and Decision follow.

28 111

22

23

24

4

5

6

7

8

9

FINDINGS IN FACT

1. As the applicant submitted this case on the entire record consisting of the staff report from the Division of Industrial Relations with a recommendation from the Administrator and the attached exhibits, DIR 1 through 137. The Administrator's staff report was read into the record unopposed. It is attached hereto and incorporated herein as unopposed Findings of Fact in this case. *See*, Exhibit A, Staff Report (SR) 1-6. *See also*, Tr., pp. 2;12-12;1-19.

7 2. The injured worker's Atherosclerotic Coronary Artery Disease (CAD) was not
8 discovered until after December 20, 2010, when the injured worker experienced difficulties while
9 completing a treadmill test.

On January 6, 2011, Dr. Theodore B. Berndt performed a cardiac catheterization,
 finding normal left ventricle function but a high-grade stenosis of the proximal left anterior
 descending coronary artery for which he performed angioplasty with stenting. Subsequent injury
 analysis report of Jay E. Betz, M.D., DIR 135.

4. On or about March 18, 2014, Robert G. Berry, M.D., conducted a partial
disability examination for the injured worker. Rating him under Table 3-6, Class 2 of the
American Medical Association's *Guides to the Evaluation of Permanent Impairments*, Dr. Berry
concluded that the injured worker should be given a permanent partial disability of 20 % WPI for
the injured worker's coronary artery surgery, angioplasty and stent procedure, without
apportionment to any other condition. DIR 133, 134.

20 5. The award was offered and the award was paid the employee as rated. See, DIR
21 132-134.

6. When providing his subsequent injury analysis for the applicant, Dr. Betz
disregarded the opinion of Dr. Berry that there should be no apportionment. Dr. Betz observed
that Dr. Berry felt the injured worker qualified as a Class 2, Table 3-6a of the *Guides* with 20 %
whole person impairment, without mentioning the conclusion of Dr. Berry that apportionment
was not warranted.

27 11/

1

2

3

4

5

6

28 ///

7. Insofar as the prior injury/pathologies are concerned, Dr. Betz stated: "annual
 work related medical evaluations started in 2006 indicated that the [injured worker] had elevated
 total cholesterol, LDL, and triglycerides and was overweight." DIR 136.

4 8. He also found: "There is no indication of prior diagnosis of cardiovascular
5 disease." DIR 136.

9. Nevertheless, Dr. Betz would assign a disability rating of 9 % to a preexisting
condition because of his belief that there was a high grade stenosis existing prior to the discovery
of the coronary artery disease, itself. DIR 137.

9 10. As indicated, balanced against this, Dr. Berry found no basis for apportionment, a
10 position the employer apparently agreed to at the time, having paid the claim based upon Dr.
11 Berry's disability rating of 20 %, WPI, without apportionment.

12 11. Also, as indicated, Dr. Betz found no indication of prior diagnosis of
13 cardiovascular disease, the condition for which the injured worker filed for compensation and the
14 condition for which he was paid by the employer without apportionment. DIR 136.

15 12. The Board finds there is no subsequent disability in this case. There is only an
initial claim for a condition that developed over a period of years and was discovered in the
employee's annual physical examination following the treadmill test of December 20, 2010. As
Dr. Betz stated, there is no documented heart disease prior to the January 6, 2011 claim that was
filed due to CAD.

13. The CAD that developed and that was treated on January 6, 2011, was a product
of a deteriorating single condition that progressively worsened over the years. As Dr. Betz
stated: "It is commonly understood that the development of atherosclerotic coronary artery
disease, as found in this case, develops over a period of decades and remains undiagnosed until
the associated stenosis becomes critical as in this case." DIR 137.

25 14. To the extent any of the following Conclusions of Law constitute Findings of
26 Fact, they are incorporated herein.

-4-

27 ///

28 ///

CONCLUSIONS OF LAW

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

2. NRS 616B.578(1) sets forth the "combined effects rule." An employer or
applicant association must be able to establish that a preexisting permanent impairment
"combines with" a subsequent industrial injury to substantially increase the compensation paid to
the injured worker. As such, NRS 616B.578(1) clearly connotes the presence of both a
preexisting permanent impairment as defined by NRS 616B.578(3) and a subsequent industrial
injury which must then combine with each other to substantially increase the cost of the
compensation paid in order to establish eligibility for reimbursement.

11 3. It is also well established that a single injury or condition cannot combine with 12 itself to substantially increase the compensation paid to an injured worker. As stated in Rowe v. 13 Plastic Design, 655 A.2d 270, 273 (Conn. App., 1995), the concept of a single condition 14 combining with itself to substantially increase the cost of compensation is untenable. The Court 15 offered the obvious. "Simply stated, there cannot be a second injury until there is a first...." By 16 the same token, there cannot be a combined effect to satisfy NRS 616B.578(1) without two 17 separate and distinct conditions. Given no apportionment, the "combined effects rule" of NRS 18 616B.5678(1) cannot be satisfied.

4. The evidence establishes in this case that there is no preexisting permanent
 impairment. Dr. Berry rated the initial injury the subject of the C1 dated January 11, 2011,
 without any apportionment. This strongly suggests no preexisting condition because otherwise
 there would have had to have been an apportionment to a preexisting condition. *See*, NRS
 616C.440.

5. The evidence is also clear that the coronary artery disease (CAD) resulting in
surgery on January 6, 2011, was the result of, as Dr. Betz indicated, a development over a period
of decades which remained undiagnosed until, in this case, the incident of December 20, 2010
resulting in the surgery of January 6, 2011.

28 ///

1

2

6. NRS 616B.578(3) defines a permanent physical impairment as one which is a
 hindrance to employment AND would support a permanent impairment rating of 6 % or more
 whole man if evaluated according to the *American Medical Association Guides to the Evaluation* of *Permanent Impairments* as adopted and supplemented by the Division pursuant to NRS
 616C.110. Since Dr. Berry apportioned nothing to any preexisting condition, the preexisting
 condition of the injured worker, if any existed, would not support a rating of a permanent
 impairment of 6 % or more, no matter what the preexisting condition.

7. NRS 616B.578(4) requires an employer to establish by written record knowledge of a preexisting permanent physical impairment as of the date of hire or prior to the date of the occurrence of a subsequent industrial injury. See, Holiday Ret. Corp. v. State, DIR, 128 Nev. 150, 274 P.3d 759 (2012). In a situation here where there is no proof of a preexisting permanent impairment that would rate at 6 % or more, WPI, NRS 616B.578 (4) could not be satisfied, as no permanent physical impairment could be shown to exist by written record.

8. The Board accordingly is unable to approve this application for reimbursement. NRS 616Bb.578(1) has not been shown to be satisfied, as a single impairment cannot combine with itself to substantially increase the compensation to be paid. *See, Rowe, supra* at 273.

 The applicant also has failed to prove the presence of a preexisting permanent physical impairment defined by NRS 616B.578(3) as the claim was paid based upon a 20 %
 PPD, WPI, without apportionment to any preexisting condition as required by NRS 616C.440.

10. Finally, NRS 616B.578(4) has not been shown to be satisfied by the applicant inasmuch as there is no preexisting permanent impairment to which knowledge by written record could attach.

DECISION OF THE BOARD

Accordingly, the Board for the Administration of the Subsequent Injury Account for the
Association of Self-Insured Public or Private Employers hereby concludes that the applicant
association failed to establish by a preponderance of the evidence that NRS 616B.578 (1), (3),
and (4), for the heart, have been satisfied. The application for reimbursement received on
December 26, 2017 is hereby denied as member Deborah Collins moved to deny the

Association's application and as Vice-chairman Smith seconded the motion. A quorum being 2 present, a majority voted in favor of the motion on a vote of 5-0, with no abstentions.

3 Finally, on September 19, 2019, the Board met to consider adoption of this decision, as written or as modified by the Board, as the decision of the Board. Those present and eligible to 4 5 vote on this question consisted of three current Members of the Board, Vice-chairman Rebecca 6 Fountain and members Joyce Smith and Allen Walker. A guorum was, therefore, present and 7 eligible to vote on whether this draft decision accurately reflected the Board's rationale and action 8 taken by the Board. Upon the motion of Allen Walker, seconded by Joyce Smith, the Board 9 voted to approve this Decision of the Board as the action of the Board and to authorize the Board 10 Vice-Chairman, Rebecca Fountain, after any grammatical or typographical errors are corrected, to execute, without further Board review, this Decision on behalf of the Board for the 11 12 Administration of the Subsequent Injury Account for the Associations of Self-insured Public or 13 Private Employers. The motion was adopted. The vote was 3 in favor 0 against and 0 14 abstentions. As a majority of a quorum of the Board voted in favor of the motion, the motion 15 was adopted.

AFFIRMATION PURSUANT TO NRS 239B.030

-7-

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Dated this 30th day of September, 2019.

Refecca Fountain, Vice-chairman

1

16

17

18

19

20

21

22

23

24

25

26

27

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of The Law Offices of Charles R. Zeh, Esq., 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:

ŧ 5	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:
5	 Robert F. Balkenbush, Esq. Thorndal Armstrong Delk Balkenbush & Eisinger 6590 S. McCarran Blvd., Suite B Reno, NV 89509 Donald C. Smith, Division Counsel Department of Business and Industry Division of Industrial Relations 3360 West Sahara Avenue, Suite 250 Las Vegas, NV 89102
	Personal delivery
	Telephonic Facsimile at the following numbers: (775) 463-9182
	Federal Express or other overnight delivery
	Reno-Carson Messenger Service
	Certified Mail/Return Receipt Requested

Dated this $2^{\mu\nu}$ day of October, 2019.

Haren Kennedy

S:\Clients\SIA\Decisions\C143-11-05516-01\Decision R6.wpd