

ORIGINAL

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

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5
6 In re: Subsequent Injury Request for Reimbursement

7 Claim No.: 03S01H371470
8 Date of Injury: October 7, 2003
9 Insurer: Harrah's Entertainment, Inc.
10 Employer: Caesar's Entertainment, Inc.
11 Third-Party Administrator: CCMSI
12 Submitted By: CCMSI

13 **FINDINGS OF FACT,**
14 **CONCLUSIONS OF LAW AND DECISION**

15 **INTRODUCTION AND SYNOPSIS**

16 This case came on for a *de novo* hearing before the Board for the Administration of the
17 Subsequent Injury Account (the Account) of Self-Insured Employers (the Board) on August 20,
18 2009. The case turned into a rare occasion when the applicant failed to meet nearly every
19 provision of NRS 616B.557, including the pre-2007 version of NRS 616B.557(5), which had to
20 be satisfied in order to qualify for reimbursement from the Account.

21 The employer sat idly from October 7, 2003, the date the employer claims the subsequent
22 industrial injury occurred, until January 13, 2009, when the employer finally got around to
23 applying for reimbursement from the Account. During this period, NRS 616B.557(5) was
24 amended in 2007 to eliminate the requirement that an applicant give notice of a possible claim
25 against the Account no later than 100 weeks following the subsequent industrial injury or death.
26 Although October 7, 2003 was listed by the employer as the date of the subsequent injury, the
27 employer never bothered to give the 100 week notice as the then version of NRS

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1 616B.557(5) required.¹ The deadline for giving notice of a subsequent injury with a date of
2 October 7, 2003, had expired long before the employer filed its request with the Administrator of
3 the Division of Industrial Relations (DIR) to be reimbursed from the Account. The applicant
4 concedes that it failed to satisfy the 100 week notice requirement of NRS 616B.557(5), as it was
5 in effect at the time of the subsequent injury and at the time the 100 week time limit for filing a
6 claim expired.

7 To resuscitate the claim that had become moribund by the time the applicant got around
8 to filing an application for reimbursement, the applicant argues that the pre-2007 version of NRS
9 616B.557(5), in effect when the 100 week deadline had expired for the subsequent injury the
10 employer dates as October 7, 2003, should not bar the instant claim because the 2007
11 amendment, removing the 100 week notice requirement, should apply retroactively. The 100
12 week notice requirement would, therefore, be eliminated even for claims like the instant
13 application which would otherwise be time barred and extinguished. According to the applicant,
14 the retroactive application of the 2007 amendment to NRS 616B.557(5), gives new life to
15 formerly expired claims like the pending application, enabling them to become eligible once
16 again for reimbursement from the Account.

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19 ¹NRS 616B.557 Payment of cost of additional compensation resulting from subsequent injury of employee
of self-insured employer. Except as otherwise provided in NRS 616B.560:

20 1. If an employee of a self-insured employer has a permanent physical impairment from any cause or origin and
21 incurs a subsequent disability by injury arising out of and in the course of his employment which entitles him to
22 compensation for disability that is substantially greater by reason of the combined effects of the preexisting
23 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.

24 ...

25 3. As used in this section, "permanent physical impairment" means any permanent condition, whether congenital
or caused by injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment
or to obtaining reemployment if the employee is unemployed. For the purposes of this section, a condition is not a
26 "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.

27 4. To qualify under this section for reimbursement from the Subsequent Injury Account for Self-Insured
Employers, the self-insured employer must establish by written records that the self-insured employer had
28 knowledge of the "permanent physical impairment" at the time the employee was hired or that the employee was
retained in employment after the self-insured employer acquired such knowledge.

5. A self-insured employer shall notify the Board of any possible claim against the Subsequent Injury Account
for Self-Insured Employers as soon as practicable, but not later than 100 weeks after the injury or death.

1 The Board disagreed. It concluded the 2007 amendments were not intended to apply
2 retroactively to resuscitate claims that were already time barred for failing to satisfy the 100
3 week notice requirement of NRS 616B.557(5). The resurrection of expired claims was not the
4 product of the 2007 amendment of NRS 616B.557(5). Claims which were late under the pre-
5 2007 version of NRS 616B.557(5), like the instant application for reimbursement, are still late.
6 They do not get a pass through due to the 2007 amendments to NRS 616B.557 and must be
7 rejected for failing to meet the 100 week notice of claim rule set out in the pre-2007 version of
8 NRS 616B.557(5).

9 The subsequent industrial injury in this case is bi-lateral carpal tunnel syndrome. Here,
10 the applicant also argued that carpal tunnel syndrome is systemic and, thus, the permanent partial
11 disability (PPD) ratings assigned the injured worker's right and left wrists (4% PPD, each) may
12 be added together to satisfy the 6% rule of NRS 616B.557(3), quoted in the margin, also. *See*,
13 footnote 1. Further, the petitioner argued that the onset of the carpal tunnel was the preexisting
14 condition, and that the deterioration of the carpal tunnel syndrome after variously, October 7,
15 2003, the surgery to the wrists, or April 5, 2004, became the subsequent industrial injury. The
16 petitioner claimed it was aware of the preexisting condition, the early onset of carpal tunnel, and
17 could prove knowledge of it by written record due to the permanent partial disability rating the
18 employer secured to pay the underlying worker's compensation claim. The employer then
19 asserted that retention, itself, was satisfied by sporadic references to a possible return to work by
20 the injured worker following the surgery on the left and right wrists. Thus, the applicant claimed
21 compliance with, NRS 616B.557(1),(3) and (4).

22 The Board disagreed. It found that the carpal tunnel syndrome was not systemic, the
23 injuries to each wrist may not be added together to meet the threshold statutory threshold of 6%
24 for proving a preexisting condition, there was no second or subsequent injury in the first place
25 because the carpal tunnel condition simply was for this injured worker, one deteriorating
26 condition, and thus, there was also no retention and knowledge given the absence of a
27 preexisting permanent physical impairment.

28 In the Board's view, the employer, thus, failed to satisfy the requirements of NRS
616B.557(1),(3) and (4). Since the applicant must prove by a preponderance of the evidence that

1 each of the criterion of NRS 616B.557 has been satisfied to justify reimbursement from the
2 Account, the application was denied. The Board's decision follows.

3 **STATEMENT OF FACTS**

4 1. This case was first heard by the Board on May 21, 2009, when the Board voted to
5 uphold in its entirety, the recommendation of the Administrator of the Division of Industrial
6 Relations (the Administrator) dated February 2, 2009, to deny the application for reimbursement
7 on grounds the applicant failed to satisfy the provisions of NRS 616B.557(1), (3), (4) and (5).
8 *See*, Exhibit 1, p. 1, admitted into evidence, Tr., 6;13-14.

9 2. The applicant was informed of the Board's preliminary decision in a letter from
10 the Board's legal counsel to the applicant, dated May 30, 2009, which was mailed to the
11 employer and the applicant's legal counsel, J. Michael McGroarty, on June 1, 2009. *Id.*, p. 2.

12 3. After multiple continuances, the case was finally brought before the Board for a
13 *de novo* hearing on August 20, 2009. Tr. 3; 16.

14 4. The exhibits admitted into evidence without objection by either party, Tr., 7; 23-
15 25, 8; 1-8, consisted of the following:

16 Exhibit 1, a letter dated May 30, 2009, from the Board's legal counsel to the applicant
17 and its legal counsel, J. Michael McGroarty, Lewis Brisbois Bisgaard & Smith, LLP, advising of
18 the Board's preliminary decision accepting the recommendation of the Administrator to deny the
19 claim based upon NRS 616B.557(1), (3), (4) and (5). Tr., 8; 23-24.

20 Exhibit 2, a letter from the applicant's legal counsel dated June 1, 2009, constituting the
21 employer's formal request for a *de novo* hearing regarding this matter. The letter was received at
22 the offices of the Board's legal counsel on June 3, 2009. Exhibit 2, reverse side of page 2.

23 Exhibit 3, the Staff Report (SR) of the Administrator, dated February 2, 2009, with 60
24 pages of exhibits attached plus a one page disallowance sheet.

25 Exhibit 4, the employer/applicant's pre-hearing statement with an affidavit of service by
26 mail dated the "blank" day of May, 2009, upon the Administrator's Liaison, Jacque Everhart, and
27 the Board's legal counsel, with 156 pages of exhibits attached. Tr., 6, 7, and 8.

28 5. Members of the Board who were present at the *de novo* hearing of August 20,
2009, and who participated in the hearing and disposition of the case were Chairman Victoria

1 Robinson, Vice-chairman RJ LaPuz, Member Tina Sanchez, and Member Donna Dynek.

2 6. Also present and participating in the hearing on August 20, 2009, were the
3 applicant's legal counsel, J. Michael McGroarty, Esq., Lewis Brisbois Bisgaard & Smith, LLP,
4 John F. Wiles, Esq., Legal Counsel to the Administrator, DIR, Jacque Everhart, the
5 Administrator's Liaison, and Charles R. Zeh, Esq., Zeh & Winograd, counsel to the Board.

6 7. The employer for this matter is Caesar's Entertainment, Inc.

7 8. The third-party administrator for this matter is Cannon Cochran Management
8 Services, Inc. (CCMSI).

9 9. The applicant sought reimbursement in the amount of \$83,023.10. The amount
10 requested was over by six cents and should have only been \$83,023.04. The verified,
11 reimbursable amount was, however, \$31,210.44, in the event that the application was approved.
12 Tr., 8; 25, 9; 1-3.

13 10. The request for reimbursement was first received by the Administrator on January
14 13, 2009. Tr., 9; 4-5.

15 11. The injured worker had been employed as a painter by the employer for 17 years
16 plus at the time of onset of the carpal tunnel syndrome, the condition that became the object of
17 this claim for reimbursement. SR Ex., p. 23. The injured worker began working for the
18 employer on December 23, 1986. SR., Ex., p. 21.

19 12. On May 15, 2003, the injured worker presented himself to Gabriella Gregory,
20 M.D., seeking treatment for numbness in his hands and feet. Tr., 9; 11-13.

21 13. Dr. Gregory noted at the time, several previous orthopedic surgeries. The most
22 recent consisted of surgery to the shoulders. *Id.*, at 9; 13-14. Carpal tunnel syndrome was
23 suspected by Dr. Gregory. *Id.*, at 9; 21.

24 14. On May 27, 2003, nerve conduction studies were completed. They showed mild
25 to moderate bilateral carpal tunnel syndrome. Lower extremities were normal. *Id.*, at 10; 3-5.

26 15. On July 24, 2003, Dr. Gregory noted that the injured worker suffered from carpal
27 tunnel syndrome and had been receiving conservative treatment of splints without success. The
28 injured worker was then referred to William Stewart, M.D., SR, Ex. 46, for injection therapy and
possible therapy. *Id.*, at 10; 8-12.

1 16. On October 2, 2003, an MRI of the right wrist was conducted. It showed mild
2 osteoarthritic changes at the radiocarpal joint. A mildly prominent signal was also present
3 within the median nerve in the carpal tunnel. The nerve was not significantly enlarged, however.
4 *Id.*, at 10; 15-20.

5 17. On the same date, October 2, 2003, Dr. Gregory reported that the carpal tunnel
6 syndrome was worsening on the right, more than the left wrist. *Id.*, at 10; 21-25.

7 18. Also on October 2, 2003, Dr. Gregory completed the C-4 form, which the injured
8 worker signed on October 3, 2003. *Id.*, at 11; 2-3. Under causation, the C-4 form stated:
9 "Repetitive movement + 7 years." *Ibid.*

10 19. The first treatment for the condition was listed as May 15, 2003, and the next
11 treatment was stated as October 2, 2003. *Id.*, at 11; 4-5.

12 20. Carpal tunnel syndrome was listed as the injury for this workers compensation
13 claim. *Id.*, at 11; 6-7.

14 21. The C-3 was signed by the employer on October 7, 2003. It was noted on the
15 form, the injured worker reported the injury on this date and the employer requested an
16 investigation of the claim. *Id.*, at 11; 8-11.

17 22. The C-1 form was completed and dated October 6, 2003. *Id.*, at 11; 12-13.

18 23. On November 5, 2003, the claim was denied on grounds the condition of carpal
19 tunnel syndrome was not work related. *Id.*, at 11; 14.

20 24. The employer listed the date of injury as October 7, 2003. *Id.*, at 11; 15; SR., Ex.,
21 pp., 21, 60.

22 25. While October 7, 2003, is the date of "injury" on the C-3, the cause of the injury
23 states: "Employee claims bilateral carpal tunnel."

24 26. The employer's worker's compensation C-3 form denotes no overt incident
25 associated with the date of injury, October 7, 2003, other than the fact that the C-3 form was
26 completed on that date and the injured worker had informed the employer of his condition or
27 complained, in other words, to his employer about his wrists on this date. Beyond the
28 completion of the C-3 form itself, there is nothing exceptional about October 7, 2003 as it relates
 to the employee's physical health and condition.

1 27. On December 15, 2003, the injured worker was seen by Andrew Bronstein, M.D.,
2 who first noted that the injured worker at this time was working full duty, full time. SR., Ex., p.
3 25.

4 28. Dr. Bronstein stated as a part of the patient history, the following:

5 Patient states that the onset of symptoms correlates to about a year ago [December
6 2002] when he moved to just finishing furniture with painting as opposed to large
7 painting. He states that the detail work has led to need for greater dexterity and
sustained awkward positions for longer periods of time. *Ibid.*

8 29. Dr. Bronstein then wrote: "Impression: Industrial bilateral carpal tunnel
9 syndrome." *Id.*, at p. 26.

10 30. He then stated as a Plan:

11 The patient's symptoms do correlate to the onset of a change of dosage [?] factors
12 at work suggestive that this is industrial and I cannot identify any nonindustrial
13 factors on today's evaluation with [a] reasonable degree of medical certainty. I do
14 think that this gentleman in the presence of neurogenic changes on his EMG is a
candidate for a carpal tunnel release....Surgery will be scheduled pending
insurance approval. *Ibid.*

15 31. Except for a post-surgery incident of no moment to this claim, the only change in
16 conditions at work which the injured worker attributed to the onset of his symptoms
17 subsequently diagnosed as bi-lateral carpal tunnel syndrome date back to December 2002.
18 Thereafter, however, there was no change in work circumstances noted in the file from the
19 applicant to which an exacerbation of the condition would correlate. Work continued and the
20 condition of the wrists correspondingly deteriorated with no overt incident, accident or incident
21 to which the continued deterioration in the condition of the injured wrists could be assigned by
22 either the injured worker or his treating physician beyond the repetitive nature of the work.

23 32. On December 24, 2003, surgery on the right wrist was performed. *Id.*, at pp. 27,
24 28.

25 33. On January 23, 2004, surgery for the left wrist was performed. *Id.*, at pp. 30, 31.

26 34. On February 19, 2004, Dr. Bronstein wrote he anticipated that the injured worker
27 would return to work full duty as of March 22, 2004. *Id.*, at p. 37.

28 35. On March 16, 2004, Dr. Bronstein delayed the injured worker's return to work full
duty until April 5, 2004. *Id.*, at pp. 38, 39.

1 36. On April 13, 2004, the injured worker was seen by Dr. Bronstein who said, the
2 right side (right wrist) was asymptomatic, the left side still had some problems where he had a
3 previous exacerbation along the ulnar nerve distribution, dating back to March 2004, that the
4 injured worker was back to full duty, and that he would be seen again in a month, when
5 maximum medical improvement would be anticipated. *Id.*, at p. 41.

6 37. In a note dated May 20, 2004, Dr. Bronstein recorded that the injured worker
7 informed him that:

8 ...although he has tried to work full duty he has taken a lot of personal time off
9 because he states that his other industrial injuries [unrelated to his wrists] , ... are
10 still significantly hampering him. He states that he regrets that he previously
closed his other claims without being retrained. *Id.*, at 42.

11 38. Dr. Bronstein then concluded:

12 At this time I think the patient is ready to move onto (sic) claim closure. He is
13 stable with rateable impairment due to his loss of grip strength. I do think
14 consideration should be given for the patient to either be retrained or be on a
permanent no climbing restriction. He is discharged from our care. He is
permanent and stationery. *Id.*, at 42.

15 39. The record is devoid of evidence establishing just how many days the injured
16 worker actually worked, if he actually worked, following the surgery on both wrists or which
17 identifies precisely what duties, be they light duties, regular duties or regular duties with
18 reasonable accommodation, were performed by the injured worker upon his return to work. The
19 applicant did not produce any payroll records showing days worked following the surgery to the
20 wrists. Tr., 48; 4-5.

21 40. The injured worker reportedly handed in his letter of resignation on June 14,
22 2004. SR., Ex., p. 48.

23 41. On June 18, 2004, the injured worker was examined by Genie Hults, Chiropractic
24 Physician and certified independent chiropractic examiner, for purposes of establishing a
25 disability rating for the injured worker. *Id.*, at p. 44.

26 42. The medical records that Dr. Hults had before her for this task began when the
27 injured worker was first seen by Dr. Gregory on May 23, 2003, through Dr. Bronstein's
28 discharge record of May 20, 2004. *Id.*, at 45-47.

43. Upon the completion of an oral history from the injured worker, the completion of

1 a physical examination of the injured worker and the review of the aforementioned medical
2 records, Dr. Hults concluded that the injured worker should be given a permanent partial
3 disability rating of 26% whole person impairment according to the Fifth Edition of the *Guides to*
4 *the Evaluation of Permanent Impairment*, for his bilateral carpal tunnel syndrome. *Id.*, at 50, 51.

5 44. On apportionment, Dr. Hults stated the following:

6 While the examinee [injured worker] had a right Navicular fracture in 1984 there
7 was no rating performed. There is no medical documentation to support the
8 existence of previous impairments. Therefore, apportionment is not an issue with
respect to this evaluation. *Id.*, at p. 52.

9 45. Since Dr. Hults had before her medical records beginning for this condition with
10 the visit to Dr. Gregory and ending with the discharge of the injured worker for his wrists by Dr.
11 Bronstein and since Dr. Hults then took the position that there was no prior medical reporting
12 with which to assess apportionment, it is clear that Dr. Hults considered the treatment that began
13 with Dr. Gregory and ended with Dr. Bronstein's discharge note, as the continuum of one injury,
14 for the left wrist and as the continuum of one injury for the right wrist. She saw no preexisting
15 condition, only the continued, simultaneous deterioration of the two wrists for carpal tunnel
16 syndrome.

17 46. Initially, the applicant rejected the injured worker's underlying workers
18 compensation claim for compensation, medical and disability benefits for his carpal tunnel
19 syndrome. *See*, SR., Ex., p. 23. Then, the claim was accepted after the Hearing Officer reversed
20 the employer's denial of the claim, Tr., 15; 9-13, and the employer/applicant, herein, paid the
21 injured worker's claim based upon the rating given by Dr. Hultz without challenge. *See*, Tr. 19;
22 6-7.

23 47. The applicant herein, never filed with the Administrator, a notice of claim as
24 required under the old version of NRS 616B.557(5). Tr., 17; 7-8. The applicant, further, admits
25 that the claim was stale, but for the amendment to NRS 616B.557(5), assuming that it would
26 apply retroactively, as the applicant wishes it would be. Tr., 53; 14-20.

27 48. By the time the application for reimbursement was filed by the applicant on
28 January 13, 2009, the 100 week time period of NRS 616B.557(5), for giving notice of the
possibility of a claim would have expired in August 2005, for a subsequent injury with a date of

1 October 7, 2003. *Ibid.* Having filed a claim for reimbursement, therefore, on January 13, 2009,
2 the applicant was delinquent by approximately four and a half years when assessed against the
3 pre-2007 version of NRS 616B.557 (5).

4 49. The applicant provided no explanation for the waiting so long to apply for
5 reimbursement without complying with the 100 week notice requirement. The applicant sat on
6 its hands with reference to compliance with the notice requirement of the pre-2007 version NRS
7 616B.557(5).

8 50. Through its legal counsel, the applicant admits that by the time the application
9 was submitted for reimbursement, the time for filing a notice of claim as required by the pre-
10 2007 version of NRS 616B.557(5) had elapsed and if the statute still applied to this application
11 for reimbursement, the application would have been barred as untimely. The applicant's legal
12 counsel stated:

13 [By] Mr. Zeh: I just wanted to clarify for Mr. McGroarty. But for the fact that
14 the statute [NRS 616B.557(5)] had been amended, would this claim have been
stale or—as of October 29, 2005.

15 [By] Mr. McGroarty: Yes, indeed, it would be stale but for the change in the
16 statute, and that's because the Employer here never sent a notice ever under the
100-week provision. Tr., 53; 12-20.

17 51. During the course of the hearing, the applicant was asked to identify the part of
18 the record the applicant relies upon to show that the injured worker actually returned to work
19 following surgery to the two wrists for the carpal tunnel syndrome. The applicant's response to
20 this questions was: "Page 148." Tr., 48; 8-18. The reference is to page 148 of Exhibit 4. Tr.,
21 48; 14-16.

22 52. This means the proof upon which the applicant relies to prove the injured worker
23 actually returned to work following the two wrist surgeries is contained in Dr. Hults' permanent
24 partial injury evaluation report of June 18, 2004. SR., Ex., pp. 44-51, or Exhibit 4, pp., 144-152.

25 53. There, Dr. Hults states: "The examinee has worked for Caesar's for 18 years as a
26 Painter. He reports handing in his letter of Resignation June 14, 2004." SR, Ex., p. 48.

27 54. From this, the Board apparently is to infer that the injured worker was actually,
28 physically performing his duties in the work place for the employer following the surgery to both
wrists.

1 55. When asked if the applicant had any payroll records to support the duration and
2 nature of the injured worker's actual employment during this period following the surgery to both
3 wrists, this exchange ensued:

4 [By Vice-Chairman LaPuz]: I don't believe I saw anything here that would show
5 me that the patient actually returned to work , you know, like payroll records and
6 things like that.

7 [By] Mr. McGroarty: I don't have payroll records, no; I didn't think that would be
8 necessary. Tr., 48; 1-6.

9 56. There are, however, also the "return to work" notes of Dr. Bronstein, set out
10 above, but they are countered or qualified by the injured worker's statements that although he
11 had tried to work full duty, he had taken off a lot of time due to other industrial injuries unrelated
12 to the two wrists. Tr., 49; 17-23.

13 57. When pressed for affirmative proof the injured worker returned to work, the
14 applicant explained that it didn't have any information that the injured worker didn't return to
15 work. The applicant takes the position, then, that its affirmative proof the injured worker
16 actually returned to work following the surgery to the two wrists is established because the
17 applicant has no information the injured worker did not return to work. The applicant is asking
18 the Board, therefore, to draw a positive inference from a void in information. Tr. 48; 19-22.

19 58. The significance of the period following the surgery to the two wrists is
20 established because the applicant makes it the line of demarcation for purposes of proving
21 retention in employment documented by written record pursuant to NRS 616B.557(4), quoted in
22 the margin, footnote 1, *supra*. The applicant stated: "557(4), we retained him in our employ
23 after the surgery full-time. Later he resigned. He did return to work for us and then chose to go
24 his own way." Tr., 19; 16-18.

25 59. On the element of proof by written record that the injured worker was retained by
26 the employer following knowledge of the preexisting permanent physical impairment, when
27 asked for proof this requirement had been satisfied, the applicant said: "I'm not going under the
28 written record requirement." Tr., 50; 13-14.

 60. On the same subject, the applicant then stated:

 "So yes, there is a requirement for prior written proof. But in this particular case
 we're not suggesting that we have prior written proof. We're suggesting that he
 [the injured worker] was retained in service after his injury – was treated and he

1 returned to work full duty." Tr., 51; 5-9.

2 61. When the employer submitted its application to the Administrator seeking
3 reimbursement for this claim, the employer listed on the application form the date of April 5,
4 2004, as the date of retention of the injured worker in its employ. SR., Ex., p. 60. This date
5 corresponds to the date listed by Dr. Bronstein in his note of March 15, 2004, as the date the
6 injured worker would be free, according to Dr. Bronstein, to return to work full duty. SR., Ex.,
7 p. 38.

8 62. Setting aside for the moment, whether there was actually a preexisting permanent
9 physical impairment, the employer claims it first knew of the preexisting permanent physical
10 impairment on November 5, 2003. SR., Ex., p. 60. This date, in turn, corresponds to the date of
11 the letter the employer sent to the injured worker, rejecting the injured worker's workers
12 compensation claim for carpal tunnel syndrome, on the grounds the condition was not job
13 related. SR., Ex., pp. 23,24.

14 63. Best case, therefore, for the applicant, is that there exists at least written records
15 of treatment for carpal tunnel starting in May 2003, but none before that period of time. The
16 written records exist through the final discharge by Dr. Bronstein in March 2004. Whether these
17 records landed in the hands of the employer at this time while treatment was being administered
18 is unclear. According to the Administrator, the first proof by written record of knowledge of the
19 carpal tunnel syndrome was the PPD report of Dr. Hults, *see*, SR., p. 5, which is dated June 18,
20 2004, or 4 days after the injured worker submitted his resignation. SR, Ex., pp. 44, 48.

21 64. The injured worker, the Board believes, worked regularly up to the time of the
22 surgery on the two wrists. The work history thereafter, through resignation on June 14, 2004, is
23 as stated above. The line of demarcation, however, the Board finds for the retention requirement
24 of NRS 616B.557(4), is the period following the second surgery to the wrist until June 14, 2004,
25 when the injured worker resigned. Tr., 19;16-18.

26 65. The applicant's other line of demarcation, however, is October 7, 2003, which is
27 the date the employer's C-3 form was completed and wherein, the date of injury is listed as
28 October 7, 2003. SR., Ex., p. 21. The employer also listed as the date of injury, October 7,
2003, in its application. SR., Ex., p., 60. Clearly, the employer believes October 7, 2003, is the

1 date of injury. Other than the completion of this form, however, there is nothing significant that
2 happened on a work related basis to the injured worker on October 7, 2003.

3 66. It is also the line of demarcation Richard W. Kudrewicz, M.D., used to assign an
4 8% PPD rating to the carpal tunnel wrist condition to establish that there was a preexisting
5 permanent condition, with the balance of Dr. Hults' PPD rating, then, becoming the subsequent
6 injury. The applicant thus stated:

7 Subsection 3 [of NRS 616B.557] – let's see. Whether or not it's a continuous OD
8 is irrelevant. It's whether or not we—that he had a prior condition. And based
9 upon Dr. Kudrewicz's reporting, he had a prior condition prior to the filing of the
claim, at least eight percent on the body basis. Tr., 18; 11-16.

10 67. To justify the carpal tunnel syndrome as both the preexisting permanent physical
11 impairment and subsequent injury, the applicant then explained:

12 So the fact that it's the same occupational disease is not determinative. It's
13 whether or not there's been a significant aggravation on the job, and obviously
14 there was. The cause was not determined to be other than occupational until Dr.
Bronstein came across the case and said yes, it's related to his workload, **the**
change of workload. (Emphasis added). Tr., 39; 13-19.

15 68. Aside from Dr. Kudrewicz, then, the applicant states that the injured worker's
16 carpal tunnel syndrome can be considered both the preexisting condition and subsequent injury
17 because there was during the time of the injured worker's employment, a change in his workload
18 that delineates the preexisting condition from the subsequent injury.

19 69. The applicant argued then further to the Board to show the presence of a
20 preexisting condition and subsequent injury out of the same condition, carpal tunnel syndrome,
21 the following:

22 Well, it is. Actually it's one continuum. But the problem is that the underlying
23 condition is carpal tunnel syndrome, which could be from any reason whatsoever,
24 systemic or something else, which was aggravated by the job. So he had the
preexisting condition, which is the underlying carpal tunnel syndrome. It's the
same pathology. It's carpal tunnel syndrome bilateral. Tr., 42, 18-25, 43; 1-5.

25 70. The applicant's reference, however, to Dr. Bronstein, must be to his report dated
26 December 15, 2003, where he states that the injured worker related the onset of his condition to a
27 year ago, or December 2002, when he was shifted from painting large projects to just finishing
28 work, where different positions and angles were required to perform the work. SR., Ex., p. 25.

71. The change in factors at work, therefore, pre-date May 2003, when the injured

1 worker started treating for carpal tunnel syndrome.

2 72. There were no changes in work following the commencement of treatment in May
3 2003, for the injured worker, to cause an aggravation. As the applicant concedes, from this date
4 forward and indeed before that, there was a continuum as the work was the same and the
5 repetition, heaped upon repetition of the same work, was what the injured worker confronted
6 daily until he relented and saw Dr. Gregory. SR., Ex., pp. 20, 22.

7 73. Further, there is no record that the injured worker was somehow predisposed by
8 reason of some systemic condition to be subjected to carpal tunnel syndrome.

9 74. It is well established that carpal tunnel syndrome can result from: "repetitive wrist
10 movements, trauma, carpal tunnel stenosis, arthritides (rheumatoid arthritis and crystal-induced
11 synovitis), diabetes mellitus, myxedema, pregnancy, birth control pill, acromegaly, and
12 infiltrative processes such as amyloidosis." *Medicine*, Second Edition, by Allen R. Myers (1994
13 Harvard Publishing), p. 564.

14 75. Other than the change in work in 2002, there was nothing remarkable about the
15 injured worker's situation. He went to work every day and painted small items beginning in
16 2002. There was no trauma experienced by the injured worker. He simply did his job until the
17 condition, due to repetitive motion, became noticeable and deteriorated to the point where he
18 finally went to see Dr. Gregory. SR., Ex., pp. 11, 19, 20, 21 and 22.

19 76. The injured worker had no history of thyroid disease, diabetes or any of the other
20 causes of carpal tunnel beyond coming to work every day, painting, and thus, experiencing the
21 repetitive motion that the occupation of painting entails. The record is devoid of medical
22 indication, the carpal tunnel syndrome was systemic or the cause was anything other than the
23 product of repetitive motion on a daily basis. SR. Ex., p., 25. As the applicant concedes, the
24 injured worker's condition is a continuum of a condition that grew progressively worse.

25 77. According to the Board, therefore, there was no second injury. The Board could
26 not see the second injury. The surgery could not be the second injury. The surgery was the cure.
27 The injured worker had carpal tunnel syndrome. It progressively got worse and surgery made it
28 better. Tr., 53; 24-25, 55; 2-7.

78. Richard W. Kudrewicz, M.D., was retained by the applicant to produce in 2008

1 for a condition with a date of injury of October 7, 2003, a subsequent injury analysis. SR., Ex.,
2 pp. 56-59.

3 79. According to Dr. Kudrewicz, the condition of the injured worker was eligible for
4 Subsequent Injury Account reimbursement because prior to October 7, 2003, the injured
5 worker's left wrist would rate out for a 4% PPD, the right wrist would rate out at 4% PPD and
6 added together, there is an 8% PPD, which exceeds the 6% PPD threshold of NRS 616B.557(3),
7 and thus, this element of NRS 616B.557 is satisfied. *Ibid.*

8 80. Dr. Kudrewicz, thus, concluded that for the purposes of having a preexisting
9 condition and subsequent injury, October 7, 2003, was the date of the subsequent injury. *Ibid.*

10 81. As the line of demarcation between the preexisting permanent physical
11 impairment, however, and the subsequent industrial injury for the purposes of establishing that
12 there was a second injury, October 7, 2003 is redolent of nothing. It is artifice. It correlates to
13 nothing on that date for the injured worker other than having the employer complete a C-3 form
14 about his condition, where October 7, 2003, is listed by the employer as the date of injury.

15 82. As was stated by the Board's Chairman during the course of the hearing: "I
16 would—simply from my perspective, I don't—I am not able to see the second injury." Tr., 53; 24-
17 25, 54; 1.

18 83. Member Sanchez found: "So I think—and Vicki [Chairman Robinson], that may be
19 along the lines that you were getting at, I think it's things like this that show that there wasn't two
20 separate incidences, that this was a continuation of – of one disease, one occupational disease."
21 Tr., 41; 5-9.

22 84. Then, Vice-Chairman LaPuz found:

23 To me, I'm interpreting it [the report of Dr. Kudrewicz] to mean that okay, the
24 underlying condition was bilateral carpal tunnel syndrome, and over time it
25 worsened, which necessitated the need for surgery, and as a result you have a
26 resulting condition of operated, you know, or carpal tunnel syndrome surgically
27 corrected. So that's just like a – one continuum from start to finish. Tr., 42; 12-
28 20.

27 85. A portion of Dr. Kudrewicz' report that prompted in part this finding from Vice-
28 Chairman LaPuz was Dr. Kudrewicz's observation that the condition of regarding the injured
worker's hands evolved over a period of time, when he began to notice numbness. SR., Ex., 22.

1
2 86. Additionally, Dr. Kudrewicz stated when describing the condition:

3 The date of the subsequent injury is listed at 10/7/03. In reality, the patient
4 apparently has some increase in his overall symptomatology left and right upper
5 extremities from his carpal tunnel syndrome gradually over time, and this was
6 considered a new injury as of 10/07/03. It is noted that the pathology is identical
7 to what was present before the 10/07/03 accident, i.e., bilateral carpal tunnel
8 syndrome. This gentleman simply continued with his ongoing activities, which
9 aggravated his underlying carpal tunnel syndrome to the point where he needed to
10 have something done surgically. SR., Ex., 58.

11 87. The Board readily points out further that Dr. Kudrewicz does not identify who it
12 was that considered the injured worker's condition "a new injury as of October 7, 2003." The
13 record doesn't bear this out either other than the employer's claim on the C-3 and the application
14 check list for Account reimbursement.

15 88. Furthermore, the employer agreed in part at least with Vice-Chairman LaPuz
16 when the applicant observed: "Well, it [the impairment] is. Actually it's one continuum. But the
17 problem is that the underlying condition is carpal tunnel syndrome, which could be from any
18 reason whatsoever, systemic or something else, which was aggravated by the job." Tr., 42; 20-
19 25.

20 89. The Board finds, however, that as Dr. Bronstein noted, the underlying cause of
21 this injured worker's carpal tunnel syndrome is not systemic, but the product of repetitive
22 motion.

23 90. As one continuum, therefore, the Board finds that there was no preexisting and
24 subsequent injury or condition, suffered by the injured worker. The carpal tunnel syndrome
25 experienced by this injured worker was the progression of one condition, carpal tunnel
26 syndrome, generated by repetitive motion that was aggravated on a daily basis over time at work,
27 and which occurred in each wrist independent of the other wrist.

28 91. Dr. Hults agrees, also, as she specifically decided that apportionment of the PPD
rating she gave was not indicated. Her decision against apportionment between a preexisting
condition and a subsequent injury was neither based upon the lack of medical records nor was it
based upon a murky medical record. Rather, she decided there could be no apportionment
because there was no preexisting condition in the first place. "There is no medical documentation

1 to support the existence of previous impairments. Therefore, apportionment is not an issue with
2 respect to this evaluation." SR., Ex., p. 52.

3 92. The Board, therefore, concludes that the addition of the 4% PPD for the left wrist,
4 prior to October 7, 2003, to the 4% PPD for the right wrist, prior to October 7, 2003 is artifice,
5 also, on several levels. Most importantly, however, because the carpal tunnel syndrome was not
6 systemic in origin, the repetitive motion worked separately on each wrist, independent of each
7 other and caused the injury to each wrist as a matter of fact. There is no basis, therefore, other
8 than artifice for justifying an award under the Account, by adding together the 4% PPD ratings
9 assigned to each wrist. The Board declines to accept this invitation, finding as a matter of fact,
10 that the injury to one wrist is separate from the injury of the other wrist.

11 93. As the injury to each wrist is a continuum of a deteriorating condition, the
12 applicant has not shown proof by written record of retention after acquiring knowledge of the
13 preexisting condition, because there was no preexisting condition about which to acquire
14 knowledge in the first place.

15 94. The applicant also fails on the question of retention, in any event, because the
16 employer has not shown that the injured worker actually returned to work, and if so, to what
17 extent or degree following treatment of the wrists, another point of demarcation relied upon by
18 the applicant to justify reimbursement. Tr., 51; 5-9.

19 95. To the extent that any of the following Conclusions of Law constitute findings of
20 fact, they are incorporated herein.

21 CONCLUSIONS OF LAW

22 1. To the extent that any of the preceding Findings of Fact constitute Conclusions of
23 Law, they are incorporated herein.

24 2. The applicant filed a timely request for a hearing to contest the Administrator's
25 recommendation of denial and the Board's tentative decision of May 21, 2009, NAC
26 616B.7706(1).

27 3. A quorum of the Board was present at all pertinent times for the Board to hear
28 this case and render its decision. NRS 616B.551(1).

4. The burden of proof lies with the applicant to show that each of the eligibility

1 criterion set out in NRS 616B.557 has been satisfied by a preponderance of the evidence. *See,*
2 *United Exposition Service v. State Industrial Insurance System*, 109 Nev. 421, 424, 851 P.2d 423
3 (1993); *McClanahan v. Raley's, Inc.*, 117 Nev. 921, 34 P.3d 573, 576 (2001).

4 5. There is, however, no real dispute in this case over the meaning of NRS
5 616B.557, except for the amendment in 2007 to Subsection 5. At that time, the Nevada
6 Legislature, all agree, deleted from the statute, the requirement that an applicant give notice of a
7 possible claim as soon as practicable but in no event more than 100 weeks from the date of the
8 subsequent injury.

9 6. Since there is no dispute over the meaning of NRS 616B.557(1), (3) and (4), the
10 outcome of the employer's application for reimbursement turns solely upon the facts of the case.

11 7. It is another matter, however, regarding NRS 616B.557(5), which turns upon the
12 significance of the Legislature's elimination of the 100 week notice requirement from NRS
13 616B.557(5) in 2007. For this Subsection of the statute, the case rises and falls upon the
14 interpretation of NRS 616B.557(5), after deletion in 2007 of the 100 week notice requirement by
15 the Nevada State Legislature since the applicant agrees that if the 100 week notice requirement
16 were to apply in this case, the application would be stale, and the application, therefore, would
17 have to be denied for failing to meet the pre-2007 version of NRS 616B.557 (5). With respect to
18 NRS 616B.557(5), this is a case of statutory interpretation.

19 8. For cases of statutory interpretation, it is well settled that the interpretation of a
20 statute begins with the wording of the statute, itself, as the place of origin for its meaning. *See,*
21 *Nevada Dep't. of Bus. and Industry v. Granite Co.*, 118 Nev. 83, 40 P.3d. 423, 426, (2002).
22 Also, when interpreting a statute, the words used are to be assigned their plain and ordinary
23 meaning. *See, Barrick Goldstrike Mines v. Peterson*, 116 Nev. 541, 545 (2000).

24 9. The Nevada Supreme Court also explains that a statute is ambiguous when
25 reasonably susceptible to more than one interpretation, or the statute is silent upon the specific
26 matter at issue. Conversely, if the statute addresses the question at issue and the statute is not
27 one that is reasonably susceptible of more than one interpretation, the statute is unambiguous.
28 *See, Nelson v. Heer*, 123 Nev. 217, 224, 163 P.3d 420 (2007). The Board believes that NRS
616B.557(5), as written before 2007 and as amended, falls within this latter category.

1 10. Consequently, the interpretation of NRS 616B.557(5) is subject to the rule that
2 when interpreting the statute, where the legislature's intent is clear, "...that is the end of the
3 matter; for the court as well as the agency [or in this case, the Board] must give effect to the
4 unambiguously expressed intent of Congress [or the legislature]." *Chevron U.S.A., Inc. v.*
5 *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984). Resort, therefore, to
6 legislative history or policy considerations one might like to apply is, therefore, improper. The
7 four corners of the statute establish its force and effect, applying the plain and ordinary meaning
8 of the words used.

9 11. It is also well settled in Nevada that when the Legislature includes a deadline for
10 pursuing judicial review or relief from an administrative decision, and the Legislature also
11 chooses to provide no waiver for the deadline imposed, the time limit is considered a mandatory
12 time limit that must be satisfied or the court or administrative body is ousted of jurisdiction to
13 hear the claim. The petitioner seeking relief must strictly comply with the deadline for seeking
14 administrative relief and a failure to meet the deadline must result in a dismissal of the pursuit of
15 judicial or administrative relief. *See, State Indus. Insur. System. v. Wrenn*, 104 Nev. 536, 539
16 (1988); *Reno-Sparks Convention & Visitor's Authority v. Jackson*, 112 Nev. 62, 66, (1996); *State*
17 *Indus. Insur. System v. Partlow-Hursh*, 101 Nev. 122, 124-125 (1985); *Dickinson v. Amer. Med.*
18 *Response*, __ Nev. __, 186 P. 3d. 878, 882 (2008); *Kame v. Employment Sec. Dep't.*, 105 Nev.
19 22, 25 (1989); *Crane v. Continental Telephone Co.*, 105 Nev. 399, 401 (1989). As stated by the
20 Nevada Supreme Court in *Partlow-Hursh*, "NRS 616.5422(1) is silent as to whether or not the
21 time limit can be excused. Where the statute is silent, the time period for perfecting an appeal is
22 generally considered to be mandatory, not procedural. *Id.*, at 124-125. Since NRS 616B.557
23 (5), before the 2007 amendments contained no waiver of the 100 week time limit, the
24 requirement was mandatory, and the statute, itself, was substantive and not mere procedural in
25 nature.

26 12. Equally significant for purposes of interpreting NRS 616B.557(5), as amended,
27 substantive changes in statutes are presumed to operate prospectively, only, absent clear
28 legislative intent to apply a statute retroactively. *Castillo v. State*, 110 Nev. 535, 540, 874 P.2d
1252, 1256 (1994). *See also, Fernancez-Vargas v. Gonzales*, 548 U.S. 30, 37, 126 S.Ct. 2422,

1 2428 (2006).

2 13. The Board concludes the amendments to NRS 616B.557(5) in 2007, deleting the
3 deadline for filing notice of a claim as a condition precedent to proceeding with an application
4 for reimbursement under the balance of NRS 616B.557, are substantive in nature and not
5 procedural.

6 14. In the Board's view, therefore, the presumption against retroactivity applies to the
7 2007 amendments to NRS 616B.557(5). The statute is clear on its face and nothing contained in
8 the language of the statute indicates any intention by the Legislature to depart from the
9 presumption against retroactivity in the case of the changes the Legislature made to the statute in
10 2007. Had the Legislature, moreover, have intended otherwise, it could have included language
11 such as that set forth in the Reviser's Note to NRS 616C.555, wherein the Legislature in 2003
12 expressly stated that the amendments to this statute would apply even if the industrial injury to
13 the employee took place prior to January 1, 2000, the date the amendments to NRS 616C.555
14 became effective. The Board may presume that the Legislature was aware that it included this
15 Reviser's Note in 2003 as a part of the amendment to NRS 616C.555, when it amended NRS
16 616C.557 (5). Since the Legislature did not attach such a reviser's note to the 2007 amendment
17 to NRS 616B.557 (5), the Legislature clearly did not intend that the 2007 amendment should
18 apply retroactively. *See, State Div. Of Insurance v. State Farm*, 116 Nev. 280, 295, 995 P.2d
19 482, 486 (2000). This presumption fortifies even further, the Board's conclusion the 2007
20 Amendments to NRS 616B.557 (5) were not intended to apply retroactively.

21 15. The Board, therefore, concludes that the 2007 amendments to NRS 616B.557(5)
22 involved substantive provisions of the old statute which have no retroactive effect. Applications
23 for reimbursement under NRS 616B.557 that would otherwise be subject to the 100 week rule of
24 NRS 616B.557(5), prior to the 2007 amendments, remain subject to the 100 week rule of the pre-
25 2007 amended version of NRS 616B.557(5).

26 16. Since the applicant concedes that if the 2007 amendments were not to be applied
27 retroactively, the applicant's claim would be deemed stale due to the failure to file the requisite
28 100 week notice of a possible claim, the Board finds that the application for reimbursement fails
to satisfy the pre-2007 version of NRS 616B.557(5). Because the pre-2007 version of the statute

1 applies to this 2003 claim of a subsequent injury and the applicant failed to comply with the 100
2 week notice requirement, the application for reimbursement must be denied on the basis of the
3 pre-2007 version of NRS 616B.557(5), alone. Even if the applicant were able to show the
4 remainder of NRS 616B.557 had been satisfied, the failure to meet the 100 week notice of
5 possible claim requirement operates to disqualify the application for reimbursement. As
6 explained further, however, the applicant fails to meet the remaining criterion for reimbursement
7 from the Account.

8 17. As the statute set forth in the margin also makes clear, see, footnote 1, *supra*, a
9 preexisting condition must support a rating of 6% or more, whole person, when measured
10 according to the *Guides to the Evaluation of Permanent Impairment*, as adopted and
11 supplemented by the DIR, in order to rise to the level of a preexisting permanent physical
12 condition.

13 18. The employee must then also prove that the preexisting permanent physical
14 impairment combines with the subsequent industrial injury to substantially increase the
15 compensation paid the injured worker. NRS 616B.557(1).

16 19. The employer must also be able to show by credible documentation in its
17 possession at the time of hire or afterwards, while the injured worker is retained in the applicant's
18 employ, that the applicant knew of the preexisting permanent physical impairment and the
19 applicant elected to hire or retain the injured worker, anyway, the knowledge of the preexisting
20 permanent physical impairment notwithstanding. NRS 616B.557 (4).

21 20. It cannot be denied, then, that if the self-insured employer proves only an
22 impairment that merely grows progressively worse over time, eligibility can not be had due to
23 the combined effects rule of NRS 616B.557 (1). One condition which merely grows worse is
24 incapable of satisfying the combined effect rule because the compensation paid would be entirely
25 due to the single condition which had simply grown worse.

26 21. This is intuitively obvious, also, given that these accounts are commonly known
27 as "Second Injury" or "Illness" Accounts. If there is no second injury or illness, there is no basis
28 for relief.

22. Stated another way, the obligation is upon the employer to prove both the

1 existence of a preexisting permanent physical impairment, as defined in NRS 616B.557 (3), plus
2 a subsequent industrial injury or illness which then combine to substantially increase the
3 compensation paid or there are no grounds for the Board to reimburse the applicant from the
4 account.

5 23. Here, the presenting condition is bilateral carpal tunnel syndrome. The pivotal
6 question then for the applicant is whether the bilateral carpal tunnel syndrome may be
7 characterized as one condition that merely grows worse over time or that the bilateral carpal
8 tunnel syndrome may be characterized as both a preexisting permanent physical impairment and
9 subsequent industrial injury or illness, capable of combining with each other to substantially
10 increase the compensation paid in order to satisfy the combined effects rule of NRS
11 616B.557(1).

12 24. This is a fact driven inquiry because "characterization" is a question of fact for the
13 Board to decide. *See, State Industrial Insur. System v. Swinney*, 103 Nev. 17, 20, 731 P.2d 359
14 (1987).

15 25. The conditions that were ripe for causing the carpal tunnel syndrome conceivably
16 appeared in December 2002, when the injured worker changed from large painting jobs to the
17 small painting of furniture. By history, the injured worker attributes the onset of his physical
18 condition to this change in his duties. His physical condition then progressed until it manifested
19 itself enough for the injured worker to seek treatment for the first time in May 2003. It
20 continued to deteriorate to the point where surgery was required in December 2003 and January
21 2004. The injured worker then resigned from employment on June 14, 2004.

22 26. The Board finds, first, that on the facts of this case, the condition presented by the
23 injured worker was one condition, that grew progressively worse over time. There was no
24 preexisting condition and subsequent industrial injury because there was only one industrial
25 condition that progressively deteriorated by reason of the repetitive nature of the work involved
26 with the condition of carpal tunnel syndrome.

27 27. The Board finds further that the condition of carpal tunnel syndrome in this
28 injured worker was not of a systemic origin but due to the repetitive nature of the work involved.

28 28. The Board also has found herein, as a matter of fact, that the injuries to the left

1 and right wrist are separate conditions, arrived at independently of each other. Each wrist was
2 rated, four years after the fact and solely to justify a subsequent injury application at 4% PPD.
3 To satisfy the 6% threshold requirement of NRS 616.557(3), the applicant's subsequent injury
4 physician added the two 4% PPD ratings together. As the left and right wrists are separate
5 conditions, they may not be added together to satisfy the 6% PPD requirement of NRS
6 616B.557(3). There is, therefore, no preexisting permanent physical impairment as the two
7 conditions or impairments relied upon by the applicant, the left and right wrists, do not meet the
8 6% PPD threshold of NRS 616B.557(3).

9 29. In any event, the Board also finds as a matter of fact that the impairments relied
10 upon by the applicant were not a preexisting and subsequent condition but one condition that
11 progressively grew worse over time, by reason of the repetitive nature of the work as a painter of
12 smaller objects. There is only one impairment for each wrist, which grew progressively worse.
13 There is no preexisting or subsequent impairment, therefore, and since there is only one
14 condition and not two, with respect to each wrist, eligibility cannot be had under a statutory
15 scheme that requires a preexisting condition and a subsequent impairment which are sufficiently
16 independent of each other that they may then combine to substantially increase the compensation
17 paid. NRS 616B.557(1) has not been satisfied.

18 30. The absence of a preexisting condition is seen further by reason of the fact that
19 Dr. Hults, when rating the injured worker upon reaching maximum medical improvement
20 (MMI), concluded that there was no preexisting condition to which any portion of the presenting
21 claim could be apportioned. She did not fail to apportion, because of a paucity of medical
22 records or an ambivalent medical record. To the contrary, she specifically found the presence of
23 only one condition which deteriorated to the point where the rating for disability was finally
24 reached.

25 31. This finding of fact is further supported by Dr. Kudrewicz when attempting to
26 explain his position. He stated, the pathology that was present prior to October 7, 2003, the date
27 chosen by the employer as the date of injury, was the same as after the date of injury,
28 exacerbated only by the repetitive nature of the injured worker's employment. SR., Ex., p. 58.

32. Furthermore, as indicated in the statement of facts, there is nothing in the medical

1 records of significance about October 7, 2003, which impacted the injured worker on this date.
2 It is an arbitrary line of demarcation that is redolent of nothing medically speaking about the
3 injured worker's condition, thereby further evincing the finding of fact that only one injury or
4 impairment occurred to each wrist which progressively grew worse, requiring more and more
5 treatment.

6 33. With only one impairment for each wrist, eligibility cannot be found for a
7 statutory scheme requiring a subsequent industrial injury or impairment, that combines with the
8 preexisting impairment to substantially increase the compensation paid.

9 34. Furthermore, since there was only one progressively worsening impairment, per
10 wrist, there can be no proof of knowledge of a preexisting permanent physical impairment,
11 which is required by NRS 616B.557(4), as there was only one impairment to be aware of in the
12 first place.

13 35. To be sure, this is not a knowledge at the time of hire case, one permissible prong
14 of eligibility under NRS 616B.557(4), since the injured worker had been employed for 17 years
15 at the time of the onset of the carpal tunnel syndrome. SR. Ex., p. 20.

16 36. The employer lists as the date of retention, April 5, 2004, see, SR., Ex., 60, a date
17 that corresponds with the date that Dr. Bronstein released the injured worker to full duty
18 employment. SR., Ex., 38, Dr. Bronstein's note dated March 16, 2004.

19 37. The employer, however, relies upon the notation in Dr. Hults disability
20 evaluation, *see*, SR., Ex., p. 48, *see also*, Ex. 4, p. 148, to show that the injured worker returned
21 to work. Tr., 48; 15. The note, however, proves little because it merely states, the injured worker
22 resigned as of June 14, 2004. It does not state, the injured worker actually returned to work for
23 the employer, following surgery until resignation.

24 38. The evidence is ambivalent at best that the injured worker actually returned to
25 work. The applicant failed to produce any payroll records, Tr., 48; 4-5, showing that the injured
26 worker actually returned to work following April 5, 2004, the date the employer lists as the
27 retention date. SR., Ex., 60.

28 39. Since the burden is upon the employer to remove ambiguity and show by a
preponderance of the evidence that there has been retention, the Board finds, also, as a matter of

1 fact that the evidence does not establish the retention requirement of NRS 616B.557 (4) was
2 satisfied.

3 40. The Board, therefore, concludes that the applicant has failed to satisfy NRS
4 616B.557(1), (3), (4) and (5). A failure to satisfy any of these requirements would result in
5 disqualification for reimbursement. The applicant has failed in its burden with respect to each.

6 **DECISION OF THE BOARD**

7 Based upon the Findings of Fact and Conclusions of Law set out above, the Board
8 decides as follows:

9 The recommendation of the Administrator of the Division of Industrial Relations is
10 affirmed. The applicant has failed to establish by a preponderance of the evidence that the
11 provisions NRS 616B.557(1), (3), (4) and (5) have been satisfied. Therefore, the application for
12 reimbursement from the Account is hereby denied upon a motion by Tina Sanchez, seconded by
13 Donna Dynek, made pursuant to NRS 616B.557(1), (3), (4) and (5), to deny the claim because
14 the applicant failed to satisfy each of these requirements that must be met to warrant
15 reimbursement from the Account. The vote was 4 in favor, and 0, against, with no abstentions.

16 Further, on August 17, 2010, with a quorum being present, upon a motion by RJ LaPuz,
17 seconded by Tina Sanchez, the Board voted to approve these Findings of Fact, Conclusions of
18 Law, and Decision of the Board as the action of the Board, accurately reflecting the Board's
19 rationale and basis for the decision of October 20, 2009, when the Board voted to deny the
20 application for reimbursement. The vote was 3-0, as Member Esposito, departed the meeting
21 and was not present for the vote. The motion included authority of the Board's legal counsel and
22 the Chairman to make any technical corrections to the Decision before service upon the
23 applicant.

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AFFIRMATION

Pursuant to NRS 239B.030

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

Dated this 17th day of September, 2010.

By: 
Victoria Robinson, Chairman

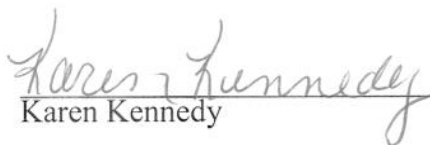
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CERTIFICATE OF SERVICE

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

√	<p>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:</p> <p>J. Michael McGroarty, Esq. Lewis Brisbois Bisgaard & Smith, LLP 400 South Fourth Street, Suite 500 Las Vegas, NV 89101</p> <p>John F. Wiles, Division Counsel Department of Business and Industry Division of Industrial Relations 1301 North Green Valley Parkway, Suite 200 Henderson, NV 89104</p>
	Personal delivery
	Telephonic Facsimile at the following numbers:
	Federal Express or other overnight delivery
	Reno-Carson Messenger Service
√	<p>Certified Mail/Return Receipt Requested</p> <p>J. Michael McGroarty, Esq. Lewis Brisbois Bisgaard & Smith, LLP 400 South Fourth Street, Suite 500 Las Vegas, NV 89101</p> <p>John F. Wiles, Division Counsel Department of Business and Industry Division of Industrial Relations 1301 North Green Valley Parkway, Suite 200 Henderson, NV 89104</p>

Dated this 27th day of September, 2010.


Karen Kennedy