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THE BOARD FOR ADMINISTRATION OF THE

SUBSEQUENT INJURY ACCOUNT

FOR SELF-INSURED EMPLOYERS

In re: Subsequent Injury Request for Reimbursement

Claim No.	00S01L105851
Date of Injury:	July 19, 2000
Insurer:	Harrah's Entertainment, Inc.
Employer:	Harrah's Laughlin
Third-Party Administrator:	CCMSI formerly Sedgwick CMS
Submitted By:	J. Michael McGroarty, Chartered

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FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND DETERMINATION OF THE BOARD

This case first came on before the Board for hearing on March 1, 2007. It was continued because the Board sought expert technical help on the question of the difference, if any, between the Fourth and Fifth Editions to the *Guides to the Evaluation of Permanent Impairment*, in their treatment of single and multi-level spinal fusions. The Board understood that under the Fourth Edition of the *Guides*, single and multi-level fusions of the spine were treated the same. It made no difference in the rating if there was a multi-level fusion, whereas under the Fifth Edition, the Board understood that multi-fusions were given a bonus or higher rating. 1Tr., 60; 10-18. In this case, the injured worker had a multi-level fusion of the spine. Whether the preexisting condition was evaluated under the Fourth or Fifth Edition of the *Guides* could make a difference, then, in the disability rating assigned.

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[1]"1Tr." denotes the transcript for the hearing of March 1, 2007, and "2Tr." denotes the transcript for the hearing held on August 23, 2007.

After pursuit of this technical help, the Board then reconvened and heard the claim for a second time on August 23, 2007. In the interim, Board member Linda Keenan read the transcript and all of the exhibits offered into evidence at the previous hearing, enabling her to participate in the disposition of this matter. 2Tr., 21;2-10. A quorum was, therefore, present at both hearings to resolve this application for reimbursement. *Id.*, at 21; 11-14.

This case involved the application of NRS 616B.557 (3) and (4). The Administrator recommended denial in part on the grounds that the applicant failed to prove that the preexisting back condition supported a rating of 6% of more, whole person under the *Guides*, because the injured worker had received a disability rating for the subsequent injury of 10%, which Scott Forbes, D.C., then apportioned, 50% to the preexisting back condition and 50% to the subsequent injury. The applicant accepted this rating and offered the injured worker disability benefits based upon the apportioned 5% rating for the subsequent industrial injury. The apportioned rating for the preexisting impairment was, therefore, the remaining 5% of the 10% total rating for the back or an impairment which did not support a rating of 6% or more. NRS 616B.557(3) was therefore not satisfied.

The applicant argued, however, that by the time it got around to applying for subsequent injury reimbursement, the Fifth Edition of the *Guides* had been adopted and that under the Fifth Edition, the preexisting condition would have been rated in excess of 6% according to Richard W. Kudrewicz, M.D., who rendered his opinion in support of the application for reimbursement from the Account. The applicant argued, further, that the 10% permanent partial disability rating was not a *final* rating, binding upon the employer/applicant.

The applicant also argued that the rating physician, Scott Forbes, D.C., did not have the surgery records before him, when rating the injured worker at 10%, apportioned at 50%, between the preexisting condition and subsequent industrial injury. The applicant argued further the apportionment was based upon the history given by an inarticulate injured worker, and should be disregarded as based upon incomplete and inaccurate information.

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On the other hand, when conducting the record review to render his opinion, Dr. Kudrewicz, the applicant claims, had available to him more information than was before Dr. Forbes, when Dr. Kudrewicz rendered his opinion that the injured worker should have been given a rating of at least 20%. He used the DRE method under the Fifth Edition of the *Guides* to arrive at the recommended disability rating.

Dr. Forbes, however, actually examined the injured worker, and assessed his range of motion (ROM) when determining his rating. Using the ROM to differentiate the proper category, Category II, III, or IV, according to Table 75 of the *Guides*, the claimant was most appropriately placed by Dr Forbes in Category III or a 10% whole person impairment according to Table 72.

The Administrator, therefore, recommended that because the applicant, itself, had accepted Dr. Forbes' rating impairment of 5%, by offering disability benefits based upon this rating, and because Dr. Forbes actually examined the injured worker, before assigning the rating, as the Fourth Edition of the *Guides* was also the Edition adopted by DIR at the time the disability rating was made, Dr. Forbes' rating should be used by the Board in reaching its decision.

The Administrator also recommended denial because there was no proof that the injured worker had been retained in the applicant's employ following discovery of the preexisting condition in derogation of NRS 616B.557(4). NRS 616B.557(4) requires the employer in part to retain the injured worker in its employ following acquisition of knowledge the worker suffers from a preexisting permanent impairment, which NRS 616B.557(3) defines. There was no claim, in this case, that the employer knew of the preexisting permanent condition at the time of hire.

According to the Administrator, the injured worker was only retained in the applicant's employ, for four (4) days in July 2000, and two (2) weeks in October 2000, following the subsequent injury which occurred on July 19, 2000. The preexisting condition involved the lumbar spine, as did the subsequent industrial injury. The preexisting condition relates back to May 1992.

According to the Subsequent Injury Check List, the applicant/employer stated it became aware of the prior condition upon receipt of the C-4 for the subsequent industrial injury on July

27, 2000. Since this followed the subsequent industrial injury and since, the injured worker never was retained in the applicant's employ following the subsequent injury, the Administrator recommended denial of the application for failing to satisfy the retention requirement of NRS 616B.557(4).

The applicant offered during the hearing, a medical history form completed by Robert W. Patti, M.D., who treated the injured worker for a separate industrial injury to the knee which occurred prior to the subsequent injury for which the applicant sought reimbursement. The form refers under the injured worker's medical history to lumbar surgery. The Administrator claims this form was received by the applicant's risk management director during the evaluation of the knee injury which happened on August 26, 1999. The injured worker was returned to work following the injury to the knee and, therefore, NRS 616B.557 (4) was satisfied according to the applicant.

The Administrator challenged the recollection of the risk management person as vague, pointed out that there was no fax stamp on the documentation from Dr. Patti, showing when it was faxed and received by the applicant, and pointed out that the applicant unequivocally said in its application it had only acquired knowledge of the preexisting lumbar condition following the subsequent industrial injury to the back. Since the injured worker did not return to work other than as stated, above, for four (4) days and then, two (2) weeks, following the subsequent injury, the Administrator concluded that the applicant failed to satisfy the retention with knowledge requirement of NRS 616B.557(4).

The Board accepted the recommendations of the Administrator and denied the application for reimbursement as explained in the Board's Findings of Fact, Conclusions of Law and Decision in support of its decision.

FINDINGS OF FACT

1. This case was first heard by the Board on November 21, 2006, when the Board issued a tentative ruling upholding the recommendation of the Administrator, Division of Industrial Relations (DIR) to reject the application because the applicant failed to satisfy the requirements of NRS 616B.557(3) and (4). Ex. 1.

2. Harrah's Laughlin is the applicant and self-insured employer in this matter. In a letter dated December 13, 2006, transmitted by mail on the same date, the applicant was notified by the Board's legal counsel, Charles R. Zeh, Esq., Zeh & Winograd, of the Board's tentative decision to accept the Administrator's recommendation and deny the claim. Hearing Ex. 1.

3. In the Notice of Appeal, dated January 10, 2007, correctly addressed to the Board's legal counsel, the applicant gave notice of its appeal of the tentative decision of the Board. Ex. 2.

4. The applicant's notice of appeal of the tentative decision 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 from which the appeal has been taken. Ex. 2.

5. The appeal was first heard on March 1, 2007. The Board, however, at the conclusion of the hearing, chose to continue the matter to seek technical help to resolve a question regarding the difference, if any, between the Fourth and Fifth Edition of the *Guides to the Evaluation of Permanent Impairment*, as adopted by the Board, in the ratings for multi-fusions of the spine. 1 Tr., pp. 80; 16-25, 81; 1-2.

6. The matter was then heard again on August 23, 2007, when the *de novo* hearing was concluded and a vote taken by the Board. 2Tr., 48; 12-25, 49; 1-4.

7. Linda Keenan did not participate in the March 1, 2007, hearing before the Board. However, she read the transcript and reviewed all of the material offered into evidence at the March 1, hearing, and was therefore able to participate in the hearing of August 23, 2007. 2 Tr., 21; 5-10.

8. J. Michael McGroarty, Esq., then of J. Michael McGroarty, Chartered, appeared at the March 1, 2007 and August 23, 2007, hearings on behalf of the applicant. 1 Tr., p. 2; 10, 2 Tr., 2; 10.

9. John F. Wiles, Esq., Legal Counsel for the Administrator, DIR, appeared on behalf of the Administrator at the August 23, 2007, hearing. 2 Tr., p.2; 5.

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10. Jacque Everhart, the Administrator's liaison to the Board, appeared on behalf of the Administrator at both the hearing of March 1, and August 23, 2007. 1 Tr., p. 2; 8, 2 Tr., p. 2; 3.

11. Carla Talamantz, Harrah's risk manager person, testified on behalf of the applicant at the March 1, 2007 hearing. 1 Tr., p. 2; 14.

12. RJ LaPuz, acting Chairman and Vice Chairman of the Board, Tina Sanchez and Linda Keenan, participated in the hearing of August 23, 2007. 2 Tr., p. 2:1-14.

13. Bruce McKay, Tina Sanchez and RJ LaPuz participated in the hearing of March 1, 2007. 1 Tr., p. 2; 1, 11, 12.

14. A quorum of the Board participated in both hearings of the Board concerning this matter.

15. Admitted into evidence without objection were the following exhibits: 1 Tr., 44; 12-25, 45, 46, 47;1-4.

Exhibit 1 Letter dated December 13, 2006, advising of tentative decision of the Board, served by mail on December 13, 2006 upon applicant's legal counsel, amongst others.

Exhibit 2 Harrah's notice of appeal dated January 10, 2007.

Exhibit 3 Administrator's Staff Report dated March 23, 2006, with exhibits A through NN and a disallowance report attached.

Exhibit 4 Harrah's Brief in Support of Application, with nine pages of exhibits attached.

Exhibit 5 Complex Comprehensive Consultation authored by Robert Patti, M.D., dated February 8, 2000, consisting of two pages.

Exhibit 6 Letter of Charles Quaglieri dated June 18, 2007

16. The injured worker was hired by Harrah's on July 1, 1999. SR 2[2]

17. Prior to his employment by Harrah's, on or about May 14, 1992, the injured worker injured his back in some unstated manner which required surgery and a multi-level fusion at the L-4 to S-1 levels with iliac crest bone graft. SR 2.

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[2]"SR" refers to the Staff Report, Exhibit 3, in evidence, dated March 23, 2006.

18. Following surgery, the injured worker was discharged after an unremarkable hospital course. SR 2.

19. Upon his release from the hospital, the injured worker also reported no additional injury to or additional problems with his lumbar spine and denied any other medial problems regarding his back prior to the work related injuries he ultimately experienced while at Harrah's. Forbes Evaluation, Exhibit CC, p. 3.

20. On August 26, 1999, the injured worker hyper-extended his left knee, industrially related. Patti report, Ex. 5, p. 1. He ultimately returned to work without limitation at Harrah's. SR, Ex. E.

21. On July 19, 2000, the claimant suffered the subsequent industrial injury, when he caught his leg and twisted his back. SR 2

22. Following the incident and after being seen by a physician, he was released to full duty on July 27, 2000. SR 2

23. Then, on August 6, 2000, Dr. Irwin evaluated the patient at the hospital and released the injured worker to modified duty. SR 2.

24. The injured worker's employment history following the incident, however, is that he worked for four (4) days in July 2000 and he worked for two (2) weeks in October 2000. SR 7.

25. On March 21, 2002, the injured worker had reached maximum medical improvement and a permanent partial disability evaluation was scheduled. SR 5.

26. On March 28, 2002, Scott Forbes, D.C., performed a PPD evaluation and examined the injured worker. SR 5.

27. In addition to the patient history, Dr. Forbes had available to him x-rays, an MRI, a CT scan and the reports of multiple physicians who had seen the injured worker since the injury of July 19, 2000. Exhibit CC, pp. 1-2.

28. Dr. Forbes also had before him a functional capacity evaluation performed on January 23, 2002. *Id.*, p. 2.

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29. Dr. Forbes also had the benefit of an independent medical evaluation completed by James Rappaport, M.D., on October 4, 2001. *Ibid.*

30. The injured worker presented on March 28, 2002, for his evaluation. *Ibid.*

31. To render his permanent partial disability rating, Dr. Forbes conducted a physical examination of the injured worker and took a patient history. *Id.* at pp., 2,3.

32. In arriving at his opinion, Dr. Forbes utilized the Fourth Edition of the *Guides*, *Id.*, at 4, which was the set of *Guides* in effect at the time of the disability evaluation. 1 Tr., p. 48;20.

33. Because he was able to physically examine the injured worker, Dr. Forbes used the range of motion (ROM) model to differentiate the proper disability category for the multi-level fusion of the spine. The ROM issues, moreover, were specifically called out by Dr. Forbes in his evaluation. Exhibit CC, p. 4.

34. Dr. Forbes stated:

> Based upon the Diagnostic Related Estimates (DREs), given the information in Table (sic) 70, 71, 72, and p. 102 of the AMA *Guides*, the claimant would be categorized as having a 'previous spine operation without loss of motion segment integrity or radiculopathy". (sic) This is due to the fact that the claimant had a pre-existing two level fusion of the lumbar spine. **Additionally, the claimant has findings of a specific injury, including muscle guarding and range of motion restriction.** However, during my examination, I found no significant objective neurologic deficit, no loss of structural integrity, no upper motor neuron signs, and no loss of bladder function. Under the DREs, this would place him in either Category II, III, or IV. **This necessitates use of the Range of Motion Model to differentiate the proper category.** (Emphasis added) *Ibid.*

35. Dr. Forbes accordingly concluded:

> According to Table 75, in the lumbar section, under section IV, spinal stenosis, segmental instability, fracture, etc., this claimant previously underwent a two-level spinal fusion at L4-5 and L5-S1 in 1992, and has residual signs and symptoms. This is 14% whole person impairment per Table 75, page 113. 14% whole person impairment in the ROM Model is closest to 10% whole person impairment in the Diagnoses Related Estimates (Category III) that is under consideration in this case. Therefore, the claimant is most appropriately placed in the DRE Category III impairment category. Again, DRE Category III is 10% whole person impairment per Table 72. *Ibid.*

36. On the question of apportionment, Dr. Forbes then stated:

> The claimant had a previous L4-5 and L5-S1 fusion in 1991 with a resultant pseudoarthrosis apparently caused by the injury of 7-19-00. Therefore, I feel it is proper to reduce by 50% the impairment for the lumbar region. Therefore, the

claimant should only receive 5% whole person impairment for the injury of 7-19-00. *Ibid.*

37. The applicant accordingly offered disability benefits to the injured worker based upon this evaluation which apportioned a total 10% disability rating, of 5% to the preexisting lumbar condition or permanent physical impairment and 5% to the current lumbar injury or industrial injury. 1 Tr., p. 49; 2-5.

38. The applicant did not appeal the PPD rating of 5% given by Dr. Forbes. 1 Tr., 50;8-25, 51;1-12, 2 Tr., 25; 12-23, 29; 7-9, 35; 7-23.

39. The applicant did not request a second opinion of the PPD rating rendered by Dr. Forbes and instead proceeded to act on the 5% rating. *See,* paragraph 38, *infra. See also,* 2 Tr., 36; 14-21, 37; 20-25, 38; 1-3, 47; 9-25.

40. It was not until January 17, 2003, ten (10) months after the issuance of Dr. Forbes' PPD rating and its acceptance by the applicant, that the injured worker, through his attorney, requested permanent, total disability status. SR 5, Ex. II.

41. The applicant rejected the injured worker's request for certification as permanently and totally disabled. SR 5, Ex. JJ.

42. On June 9, 2004, the vocational rehabilitation counselor reported that the injured worker completed his vocational rehabilitation schooling, thereby indicating that the injured worker had been receiving vocational rehabilitation assistance. SR 5,6.

43. On August 27, 2004, an Appeals Officer decision was rendered granting the injured worker permanent, total disability. SR 6.

44. On April 5, 2005, Richard W. Kudrewicz, M.D., conducted a file review for purposes of the applicant's subsequent injury account application. *Ibid. See also*, Exhibit NN, p. 1. As this was a file review, only, Dr. Kudrewicz did not under the Fifth Edition of the *Guides* use the ROM model to differentiate as Dr. Forbes was able to do, since he had actually examined the injured worker. Dr. Kudrewicz was, therefore, left to conduct an evaluation without the aide of the ROM model.

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45. Dr. Kudrewicz had some minimal medical records dating back to when the injured worker originally injured his lumbar spine, the area at issue in this case. *See*, SR Exhibits, A-C (8 pages) . They go back to a "report" at the time of the original injury to the lumbar spine in 1992, which appears to be the admission report at that time to the hospital. Dr. Kudrewicz had a post operative diagnosis following surgery which parallels the opinion of Dr. Forbes, noting the multi-level fusion. He also reviewed an MRI in 1997 of the cervical area, a part of the spine not at issue. The medical records then jump to the injury of July 19, 2000. *Ibid.*

46. The medical records reviewed by Dr. Kudrewicz then essentially track the medical records reviewed by Dr. Forbes, save and except that Dr. Kudrewicz is more wordy in his description of them and in addition, Dr. Kudrewicz had the advantage of being able to review the permanent partial disability evaluation for the same injury by Dr. Forbes, since his disability evaluation preceded Dr. Kudrewicz's record review by two (2) years.

47. In his report, he noted, as did Dr. Forbes, that the injured worker in 1992 was operated upon for intertransverse fusion L4 -L5 and L5-S1, the same surgery noted by Dr. Forbes. He also noted the right posterior iliac crest bone graft and L4-L5 spinous process for a postoperative diagnosis of low back pain, nonradicular, with degenerative disc disease L4-L5 and L5 and S1. *Id.* at p. 4. He also assumed that the injured worker had excellent results. *Ibid.* These findings track the findings of Dr. Forbes, save and except, he understood from the patient's history, also, that the injured worker had excellent results following surgery in 1992. *See,* Exhibit CC, p. 2, 3. *See also*, Exhibit NN, p. 4.

48. On April 4, 2005, Dr. Kudrewicz assigned a total disability for the preexisting and subsequent injury combined of 20%. Exhibit NN, p. 4.

49. To arrive at this rating, however, of 20%, Dr. Kudrewicz said the following:

> Assuming ...excellent results, ... with no neurologic residuals, this gentleman would be rated out under the Fifth Edition, AMA Guides as having a preexisting DRE categvory IV with 25% to 28% impairment whole man. We would normally use range of motion model to assess his impairment percentage **but we do not have the ranges of motion available so we will do the next best thing, which is to approximate his impairment using the DRE Classification.** This will probably minimize the level of his disability percentage but gives us a **baseline estimate.** The DRE category IV would be a 20% impairment whole person at a minimum. He therefore meets the initial qualifier of at least a 6%

impairment whole man present prior to the 2000 accident. (Emphasis added). *Ibid.*

50. Therefore, in addition to using a different edition of the *Guides,* the Fifth Edition, than was used by Dr. Forbes, who used the Fourth Edition, Dr. Kudrewicz did not physically examine the injured worker. As he stated, Dr. Kudrewicz then resorted to **the next best thing to having the patient present, to be able to examine the injured worker.** Dr. Kudrewicz instead was forced to approximate the impairment.

51. Dr. Forbes, however, had the injured worker present himself for examination. Instead of using the **next best thing,** Dr. Forbes **used the best thing,** according to Dr. Kudrewicz a measured range of motion to establish a disability impairment.

52. Dr. Forbes used the best method, in Dr. Kudrewicz's own words, to measure disability and Dr. Kudrewicz used, in his own words, the next best method for establishing disability.

53. Aside from arguing that Dr. Forbes should not have used the Fourth Edition of the *Guides* to assess disability and aside from arguing that the evaluation under the Fourth Edition should be tossed altogether, because by the time the application for subsequent injury account reimbursement was submitted, the Fifth Edition of the *Guides* was in place, *see,* 2 Tr., 29;20, 30; 19-25, 31; 1-2, the record is devoid of any claim that Dr. Forbes misapplied the Fourth Edition.

54. The applicant's major dispute is that the Fifth Edition, with its more favorable rating levels for multi-fusion spine surgery, should have been used and the applicant is entitled to have the DIR and Board disregard or toss out the PPD rating set forth under the Fourth Edition. 1 Tr., 59; 5-25, 60, 61; 1, 2 Tr., 29; 23-25, 30; 1-3.

55. Dr. Kudrewicz then goes on to state that the injured worker somewhere along the line, developed pseudoarthrosis and that he did not think the industrial exposure of July 2000 caused it. He also noted all that somewhere along the line, the injured worker developed significant facet disease, and these conditions, operated in concert to make the outcome of the July 2000 industrial exposure more severe than it would ordinarily have been. He therefore

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"would suggest" that the cost of treatment and care be apportioned, 80% to the preexisting back problems and 20% to the current industrial injury. Exhibit NN, p. 5.

56. The applicant wrote in its application for reimbursement that it discovered the preexisting condition to the back upon receipt of the C-4 on July 27, 2000. SR 7, *see also,* Exhibit D, the D-37 form, p. 1 ("7/27/00 Receipt of C-4"). The applicant's stated date of retention is September 22, 2000. Exhibit D, p. 1.

57. The injured worker was not retained in employment following the incident of July 19, 2000, as he worked only four days under temporary modified duty, immediately following the incident and then, worked only two more weeks in October 2000. Other than brief, intermittent and temporary periods, he did not work at Harrah's following the industrial injury of July 19.

58. The injured worker was not retained in the applicant's employ following the date the applicant asserted it first learned of the subsequent injury on July 27, 2000, with the receipt of the C-4 as explained in the D-37 application form.

59. During the hearings, the applicant shifted gears and asserted that it met the retention requirement because it learned about the preexisting lumbar surgery as far back as February 23, 2000, when it was mentioned in the report issued by Dr. Patti, who was treating the injured worker for the other industrial injury, the left knee injury that occurred in 1999. 1 Tr., 62; 4-6. The applicant states that obviously the retention requirement was met because the injured worker returned to his job with Harrah's following the left knee injury where he worked until he hurt is back on July 19, 2000. 1 Tr., 52;19-25, 60;1.

60. A question, arose, however, at the hearing regarding whether the report of Dr. Patti containing the reference to the preexisting lumbar spine was actually received by Harrah's prior to July 19, 2000, and therefore, at a time when the injured worker was still working for the applicant.

61. Exhibit 5, admitted into evidence, is the report of Robert Patti, M.D., the treating physician for the left knee injury of August 26, 1999. Exhibit 5, p. 1.

62. At page two of the report, there is a reference to a past surgical history of Lumbar spine. *Id.*, p. 2.

63. This is the report that was purportedly faxed to the risk management people at Harrah's. 1 Tr., pp. 61;4-6, 65;14.

64. An inspection of the report offered into evidence by Harrah's at the hearing, 1 Tr. 50; 19-25, 51; 1-4, 70; 1-8, reveals that it has no phone number displayed at the top or bottom of the two page document, indicating either the facsimile phone number of the sender or the facsimile phone number of the receiving party. *See*, Exhibit 5. This was noted by the Administrator's liaison and brought to the Board's attention. *Ibid.*

65. The applicant called Carla Talamantez, Harrah's risk manager at the Laughlin property, 1 Tr. 64;3-7, to testify about the form. When asked when she had received the Patti report, Exhibit 5, she didn't directly answer the question. Rather she said:

> Q: [By Mr. McGroarty] When did you receive a copy of that document [the Patti Report dated February 8, 2000]?
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> A: [By Ms. Talamantez] On my record it shows February 23rd, 2000. 1 Tr. 65;12-14.

66. Then, later, when interrogated by Board Member Sanchez, she stated:

> I haven't answered yet. It looks like this is a copy [Exhibit 5, the Patti memo] that came–there's a couple of date stamps on here. One says fax to, February 23, 2000. That looks like my stamp that I stamp on it. And then it looks like this copy may have come back to me from the third-party administrator showing that they received it on March 14th. 1 Tr. 69; 20-25, 70; 1-2.

67. The testimony of Ms. Talamentez is less than direct, especially when compared to the declaration contained in the D-37 where the employer verified that it first knew of the preexisting impairment on July 27, 2000, and that the employer retained the injured worker on September 22, 2000. 2Tr., 49;12-14.

68. The applicant attempted to diminish the effect of Dr. Forbes' evaluation by arguing that Dr. Forbes did not have the surgical reports available to Dr. Kudrewicz when he conducted his records review. 2 Tr., 26; 4-7; 21-25. There is, however, only one surgical report, SR, Exhibit B, consisting of two pages plus a signature page.

69. The applicant then tried to diminish the impact of Dr. Forbes' report, by further arguing that Dr. Forbes only learned of the preexisting surgery to the lumbar area of the spine by reason of the medical history given by an inarticulate injured worker and by the claim that Dr.

Forbes "...does not have any documentation..." to support the analysis of the original injury to the lumbar spine and surgery at that time. 2Tr., 34; 20-21. The applicant stated:

> It's my [the applicant's legal counsel] understanding that the claimant told the doctor [Dr. Forbes] about his preexisting condition and preexisting surgery. He wasn't too articulate about the details of it, and that's the conclusion that Dr. Forges made based on the information that he had at the time. 2 Tr., 32; 18-23.

70. There is no support in the record for this proposition in paragraph 69. This is pure speculation of on the part of the applicant's legal counsel and is not evidence, as the ruminations of legal counsel are not to be regarded as evidence by the Board. These claims of the applicant's legal counsel undermine the applicant's credibility.

71. Analysis of Dr. Forbes' report reveals furthermore, that Dr. Forbes had the benefit of an MRI and a CT scan. In addition he had multiple reports about the injured worker's physical condition including an independent medical examination and functional capacity evaluation. SR Exhibit CC, pp. 1,2.

72. The applicant's assault upon Dr. Forbes lacks credibility. 2 Tr. 40; 7-20, 41; 1-21.

73. The applicant also claimed that Dr. Forbes' evaluation should be discounted because he did not have sufficient information to apportion based upon actual conditions, and therefore, lacking sufficient information, took the standard way out of splitting the preexisting condition and subsequent injury arbitrarily at 50% each. 2 Tr., 42; 10.

74. Since Dr. Forbes was able to assess the injured worker's condition based upon, according to Dr. Kudrewicz, the preferred method, an actual examination which tested range of motion, and Dr. Forbes also had before him numerous reports including the MRI and CT scan, when he made the apportionment determination, there is nothing in Dr. Forbes' report to suggest that he could not evaluate the preexisting condition and subsequent injury according to NAC 616C.490. 2 Tr. 40; 7-20, 41;1-21, SR CC, pp. 1-3. It is, therefore, the applicant's claims through its legal counsel that must be discounted as less than creditable.

75. The applicant also claims that it should not be stuck with the Fourth Edition and should be allowed to rely upon the Fifth Edition of the *Guides* for evaluating the percentage disability, here, since it was only fortuitous that the Fourth Edition was used and secondly, the

evaluation of the Fourth Edition was not a "final" order, and therefore was not binding upon the applicant. Further, the applicant claims it was not an aggrieved party and could therefore not appeal the PPD evaluation completed by Dr. Forbes. 2 Tr., 44; 17-25, 45, 46.

76. The applicant could have challenged the PPD award, should it have chosen to do so. The applicant, however, accepted the PPD, acted upon the PPD awarded by Dr. Forbes as if it was valid, and has only challenged the PPD award now that it is convenient, given that the Kudrewicz evaluation was concluded April 4, 2005, for purposes of justifying a subsequent injury account application for reimbursement. 2 Tr., 47; 11-25, SR Exhibit NN, p. 4. Furthermore, Dr. Forbes was obliged to use the Fourth Edition, according to the requirements of NRS 616C.110, as the statute was then written.

77. To the extent any of the Conclusions of Law set forth below also constitute Findings of Fact, they are incorporated herein by reference.

CONCLUSIONS OF LAW

1. To the extent any of the preceding Findings of Fact also constitute Conclusions of Law, they are incorporated herein by reference.

2. The applicant filed a timely appeal of the tentative decision of the Board. NAC 616B.7706(1).

3. A quorum of the Board was present at all pertinent times to decide this case and for the Board to render its decision. NRS 616B.551.

4. This is a retention case arising under NRS 616B.557(4) and in addition, the case arises under the definition of a permanent physical impairment set forth at NRS 616B.557(3). The term permanent physical impairment is also expressly incorporated into NRS 616B.557(4).

5. The preexisting permanent physical impairment was the lumbar spine, the portion of the injured worker's body that was also the subject of the industrial accident. The preexisting permanent physical impairment to the lumbar spine occurred in 1992, before the injured worker was employed by the applicant. The applicant, however, does not claim knowledge of the lumbar condition at the time of hire. Thus, this is a retention case.

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6. The Administrator recommended to the Board that NRS 616B.557(4), the retention statute, was not satisfied because the applicant did not discover the preexisting condition until following the industrial injury to the lumbar spine and the injured worker never returned to work following the industrial injury. Thus, according to the Administrator, the retention requirement of NRS 616B.557(4) was not satisfied by the applicant. SR, p. 7. NRS 616B.557(4) is quoted in the margin.[3]

7. The Administrator also recommended denial of the application because the PPD award upon which the applicant administered the claim, rated the lumbar spine at 10% for the preexisting condition and subsequent industrial injury to the lumbar spine, combined, and when apportioned, according to Dr. Forbes, the rating chiropractor, the preexisting lumbar condition rated at 5% whole person according to the Fourth Edition of the *Guides*. Consequently, NRS 616B.557(3) was also not satisfied because the preexisting permanent condition did not rate at least a 6% permanent partial disability. NRS 616B.557(3) is also quoted in the margin.[4]

8. Dr. Forbes was required to use the Fourth Edition of the *Guides*, to conduct the examination for a permanent partial disability. See the version of NRS 616C.110, then in effect.

9. Because he conducted an actual physical examination of the injured worker, he was able to differentiate using the range of motion (ROM) technique or preferred method, according to Dr. Kudrewicz, *see,* Exhibit NN, p. 9, under the DRE in the *Guides* to assign a total PPD rating and to apportion between the preexisting and subsequent industrial injury.

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[3]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 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. NRS 616B.557(4).

[4]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 "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. NRS 616B.557(3).

10. Dr. Kudrewicz used the Fifth Edition to the *Guides*. He did not conduct an examination for permanent partial disability because he did not examine the injured worker and only conducted a records examination. He therefore could not utilize the preferred method, the range of motion method (ROM), to differentiate and assign a PPD rating and apportion.

11. The applicant accepted the PPD rating given by Dr. Forbes and offered to the injured worker the PPD rating Dr. Forbes assigned. The applicant never challenged the rating Dr. Forbes gave the injured worker and the applicant paid disability benefits to the injured worker based upon the PPD rating given by Dr. Forbes. 2 Tr., 28; 22, SR 5.

12. The question of permanent total disability status did not arise until the letter dated January 17, 2003, from the injured worker's lawyer, approximately nine months after Dr. Forbes rated the injured worker. SR 5.

13. The applicant never exercised during this period, its right to challenge Dr. Forbes' disability rating of March, 28, 2002. *See,* NRS 616C.490, NAC 616C.103.

14. Whether the rating of Dr. Forbes was "final" or not, as claimed by the applicant, 1Tr., 54;25, the applicant treated it as final and acted upon it until the applicant finally got around to applying for reimbursement under the subsequent injury account and employed Dr. Kudrewicz to make his subsequent injury assessment dated April 4, 2005, which came five (5) years plus after the date of the subsequent industrial injury. SR Exhibit NN, p. 1.

15. Since the applicant failed to timely challenge Dr. Forbes' disability rating and then acted upon it in its treatment of the injured worker, Dr. Forbes' rating was final as to the applicant. *See*, NRS 616C.490; NAC 616C.103.

16. The burden of proof lies with the applicant to prove that the eligibility criterion set out in NRS 616B.557 have been satisfied. *See, United Exposition Service v. State Industrial Insurance System*, 109 Nev. 421, 424, 851 P.2d 423 (1993).

17. The Board was given two different statements from the applicant regarding the date the applicant first learned of the preexisting lumbar impairment. One was found in the application, form D-37, Exhibit D, which the applicant submitted to the Administrator. The other came during testimony before the Board at the hearing of March 1, 2007.

18. The statement in the D-37 and the testimony at the hearing about the date the applicant first learned about the preexisting lumbar impairment are irreconcilable.

19. The Board is confronted with the task of deciding which of the statements the applicant supplied describing when the applicant first learned of the preexisting lumbar condition is the most credible.

20. The Board chooses as most credible and reliable, the applicant's unequivocal statement in the D-37 application form, Exhibit D to SR, that the applicant first learned of the preexisting permanent physical impairment to the lumbar spine upon receipt of the C-4 on July 27, 2000, over the hesitant and equivocal testimony of the risk manager, whose memory seemed clouded over time, when she testified that Harrah's knowledge of the prior lumbar surgery dates back to her claim she received the Patti report, referencing the worker's surgery, by fax, which she thinks she received on February 23, 2000.

21. The critical date from which the retention issue is assessed is July 27, 2000. The applicant is obliged to show under NRS 616B.557(4), it retained the injured worker in its employ following this date, the date the applicant first learned of the injured worker's prior injury to the lumbar area.

22. There is no dispute that following the subsequent industrial injury to the lumbar spine on July 19, 2000, the injured worker returned to work for the employer at a temporary, modified duty for four (4) days in July 2000, and for two (2) weeks in October 2000. SR 7. The injured worker also at some point, then focused upon an attempt at a vocational rehabilitation program. SR 5, see, also, Exhibit LL to SR.

23. The applicant, therefore, did not retain the injured worker in its employ, following the industrial incident of July 19, 2000, because employment in a temporary, modified position for four (4) days in July 2000, and for two (2) weeks in October 2000, and a refocus upon vocational rehabilitation do not constitute retention in employment for purposes of NRS 616B.557(4).

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24. The applicant therefore failed to satisfy the requirements of NRS 616B.557(4) because the applicant first learned of the preexisting permanent physical impairment, the lumbar spine injury, on July 27, 2000, and the injured worker never returned to work in way that satisfies the retention requirement of NRS 616B.557(4) on or after that date.

25. The applicant failed to satisfy the requirements of NRS 616B.557(4), and the application for reimbursement must be rejected on these grounds alone.

26. The application also must be rejected on the grounds there was a failure of proof satisfying the 6% or more permanent impairment requirement of NRS 616B.557(3).

27. While the applicant claims that the disability rating of Dr. Forbes was never a "final" rating, see, 2 Tr., 29; 7-8, as a matter of law, by the time the applicant got around to submitting an application to the Administrator for reimbursement from the Account, the rating was final at least as to the applicant. *See,* NRS 616C.490, NAC 616C.103.

28. In addition, the applicant acted as if the rating of Dr. Forbes was final, proceeding to pay benefits and disregarding any appeal or challenge to the rating until the applicant hired Dr. Kudrewicz to give an opinion for purposes of submitting an application to the Administrator for reimbursement from the account. 2 Tr., 47; 9-25, 48; 1-2.

29. While the applicant argues it was merely fortuitous that the Fourth Edition of the *Guides* used by Dr. Forbes, there is no dispute that the Fourth Edition of the *Guides* was in effect at the time he completed his permanent partial disability rating examination. As a result, the Board and Dr. Forbes were compelled to utilize the Fourth Edition of the *Guides* for the examination to establish a permanent partial disability rating. *See,* NRS 616C.110, *see also*, NRS 616B.557(3). The predecessor version of NRS 616C.110, adopted in 1999 stated:

> 1. For the purposes of NRS, 616B.557, 616C.490 and 617.459, the division shall adopt regulations incorporating the American Medical Association's Guides to the Evaluation of Permanent Impairment by reference and may amend those regulations from time to time as it deems necessary. In adopting the Guides to the Evaluation of Permanent Impairment, the division shall consider the edition most recently published by the American Medical Association.
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> 2. If the Guides to the Evaluation of Permanent Impairment adopted by the division contain more than one method of determining the rating of an impairment, the administrator shall designate by regulation the method which must be used to rate an impairment pursuant to NRS 616C.490. (Amended 2003).

30. Dr. Kudrewicz did not conduct an examination of the injured worker to establish a permanent partial disability rating. Rather, his was a record review of the injured worker's condition.

31. Since Dr. Kudrewicz did not examine the injured worker, he used the less than preferred method of establishing a disability rating under the Fifth Edition of the *Guides.* five years, plus, after the industrial injury.

32. Dr. Forbes, however, used, according to Dr. Kudrewicz, the preferred method, an examination which incorporated an analysis of range of motion (ROM) to differentiate impairments, rate and apportion disability percentages.

33. At no point, did the applicant ever show or argue that Dr. Forbes misapplied the *Guides* in examining the injured worker and assigning a permanent partial disability rating. In fact, Dr. Kudrewicz had Dr. Forbes' evaluation before him, noted its existence and did not criticize the manner in which Dr. Forbes applied the Fourth Edition of the *Guides*, though he clearly had the opportunity to do so. *See,* Exhibit NN, p. 3.

34. The Fourth Edition is the correct version of the *Guides* to assess disability in this case.

35. The preexisting condition of the lumbar spine was rated at a disability of 5% whole person, according to the Fourth Edition of the *Guides* according to Dr. Forbes.

36. Since Dr. Forbes utilized the Fourth Edition of the *Guides* and Dr. Kudrewicz used the Fifth Edition of the *Guides* and since Dr. Forbes used the preferred method of the range of motion approach (ROM) to assign a disability rating, and Dr. Kudrewicz did not use the preferred ROM method of assigning disability, the Board adopts and relies upon the rating of 5% given by Dr. Forbes for the preexisting condition.

37. The application must also, therefore, be rejected by reason of NRS 616B.557(3). The applicant failed to satisfy the requirement of NRS 6161B.557(3) that the preexisting permanent impairment, the injury prior 1992 and resultant surgery to the lumbar spine, had a disability rating of 6% or more, whole person because Dr. Forbes assigned the preexisting 1992

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lumbar condition a 5% impairment rating, which the Board has accepted over the higher rating assigned by Dr. Kudrewicz.

38. The applicant has, therefore, failed in its burden of proof under NRS 616B.557(3) and (4).

DECISION OF THE BOARD

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 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(3) and (4) 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 (3) and (4) to deny the claim. With three members participating and eligible to vote on the motion, a quorum was present. The motion was duly adopted. 2 Tr., 48; 6-25, 48;1-3. The vote was 3 in favor of the motion, none opposed and with one (Dynek) abstention. 2 Tr., 48; 22-25, 49; 1-3.

Further, at the meeting of the Board held on November 25, 2008, upon a motion by Linda Keenan, seconded by Tina Sanchez, Board members Vice-chairman RJ LaPuz, Tina Sanchez, and Linda Keenan, voted to adopt this written decision as the decision of the Board. Chairman Victoria Robinson abstained as she took no part in the original deliberations. Member Donna Dynek was absent.

Dated this 16th day of December, 2008.

Victoria J. Robinson

Victoria Robinson, Board Chairman

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 Determination of the Board* on those parties identified below by:

√	Placing an original or true copy thereof in a sealed envelope, postage prepaid, certified mail/return receipt requested, and placed for collection and mailing in the United States Mail, at Reno, Nevada, J. Michael McGroarty, Esq. Lewis Brisbois Bisgaard & Smith LLP Attorneys at Law 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:
	Federal Express or other overnight delivery
	Reno-Carson Messenger Service
	Certified Mail/Return Receipt Requested

Dated this 19 day of December, 2008.

Karen Weisbrot

Karen Weisbrot

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