

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

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6 In re: Subsequent Injury Request for Reimbursement

7 Claim No. 02S01L167907
8 Date of Injury: April 19, 2002
9 Insurer: Harrah's Entertainment, Inc.
10 Employer: Harrah's Las Vegas
11 Third-Party Administrator: CCMSI
12 Submitted By: J. Michael McGroarty, Chartered
13 _____/

14 **FINDINGS OF FACT,**
15 **CONCLUSIONS OF LAW**
16 **AND DETERMINATION OF THE BOARD**

17 This case came before the Board for the Administration of the Subsequent Injury Account
18 for Self-Insured Employers (the Board) upon appeal by the applicant of the Board's preliminary
19 decision denying the applicant's request for reimbursement from the Subsequent Injury Account
20 (the Account). In its preliminary decision, the Board upheld the recommendation of the
21 Administrator, Division of Industrial Relations, State of Nevada, (the Administrator) to deny the
22 claim on the grounds that the applicant failed to satisfy the requirements of NRS 616B.557(4).

23 The insurer for this claim is Harrah's Entertainment, Inc., the employer is Harrah's Las
24 Vegas, the third party administrator is CCMSI, and the application was submitted by the
25 applicant's legal counsel, J. Michael McGroarty, Esq., whose firm at the time of the application
26 was J. Michael McGroarty, Chartered. The applicant shall be referred to interchangeably as
27 Harrah's.

28 The appeal was first heard in a *de novo* hearing conducted on August 30, 2005. A
decision was rendered upon the conclusion of the hearing. However, due to technical problems
with the recording equipment, a complete transcript of the hearing could not be produced. Since

1 the contents of the hearing could not be reconstructed, the Board's decision was rendered moot.
2 1 Tr., 4; 13-16, 37; 24-25, 38; 5-10, 2 Tr., 31; 1-22.¹

3 The matter was then reheard, *de novo*, on March 23, 2006. At the conclusion of the
4 meeting, the Board voted to affirm the recommendation of the Administrator and deny the claim
5 based upon the applicant's failure to satisfy the requirements of NRS 616B.557(4).
6 Subsequently, the Board, *sua sponte*, 2 Tr., 5; 8-10, conducted another hearing on April 19, 2007,
7 in order to give the applicant an additional chance to convince the Board that the requirements of
8 NRS 616B.557(4) had been satisfied. The applicant was allowed to submit additional
9 documents and records into evidence to the Board at this hearing, if it chose to do so. The
10 applicant declined the invitation. 2 Tr., 10-14. At the conclusion of the April hearing, the Board
11 voted again to affirm the recommendation of the Administrator on the grounds the applicant had
12 still not satisfied the requirements of NRS 616B.557(4). 2 Tr., 30; 7-19.

13 NRS 616B.557(4), the statute at issue, requires the self-insured employer to prove by
14 written record that the employer knew of the worker's preexisting permanent physical
15 impairment, defined by NRS 616B.557(3), at the time of hire, or that the employer acquired
16 knowledge of the injured worker's permanent physical impairment while the injured worker was
17 in the self-insured's employ and retained the injured worker after learning of the preexisting
18 permanent physical impairment. *See*, NRS 616B.557(4). The text is quoted in the margin.²

19 If the self-insured employer can carry the burden of proof set out in NRS 616B.557(4)
20 and the self-insured employer is otherwise eligible for reimbursement, the Board is obliged to
21 approve the applicant's request for reimbursement. If the applicant fails, however, in its burden
22 of proof set out in NRS 616B.557(4), then, the Board must reject the claim because the burden is
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25 ¹"1Tr." refers to the transcript of the hearing of August 30, 2005, and "2Tr." refers to the
hearing of April 19, 2007.

26 ²To qualify under this section for reimbursement from the Subsequent Injury Account for
27 Self-Insured Employers, the self-insured employer must establish by written records that the self-insured
28 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).

1 upon the applicant to prove all the eligibility requirements set out in NRS 616B.557 by the
2 Nevada Legislature.

3 The injured worker suffered a preexisting, non-industrial injury to the right knee while
4 already in Harrah's employ. The injury was the result of an accident that occurred November 14,
5 1998. The subsequent industrial injury was also to the right knee. This occurred April 19, 2002.
6 The injured worker lost time at work at Harrah's due to the original injury to the right knee. She
7 also missed work due to the personal injury action that was brought on account of the non-
8 industrial injury to the right knee.

9 The applicant submitted leave request records to show the missed time at work. The
10 applicant also produced a *subpoena duces tecum* and a letter from her lawyer advising of the
11 need to have time off from work due to the personal injury litigation. The leave request records
12 did not reveal the nature of the injury. Similarly, neither the *subpoena duces tecum* nor the letter
13 from legal counsel show the nature of the injury. No person from Harrah's testified, either, about
14 the knowledge Harrah's might have had about the physical condition of the injured worker at the
15 time of the accident on November 14, 1998, and afterwards, while she was in Harrah's employ.
16 The evidence, at best, shows that Harrah's knew from these documents the injured worker needed
17 time off from work for health related reasons.

18 If generalized knowledge that the injured worker had some health problems around
19 November 14, 1998, is insufficient to satisfy the knowledge requirement of NRS 616B.557(4),
20 then, the critical period of time becomes June 25, 2003, the date that the applicant first learned
21 about the preexisting physical impairment to the right knee. The work history prior to June 25,
22 2003, is of no moment because NRS 615B.557(4) requires the applicant to retain the injured
23 worker in its employ **after acquiring knowledge of the preexisting permanent physical**
24 **impairment.** If the work history of the injured worker is incomplete or non-existent following
25 June 25, 2003, the date the applicant learned of the preexisting permanent physical impairment,
26 the application for reimbursement is not saved by the injured worker's employment history prior
27 to June 25, 2003.

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1 The Board confirmed that proof the employer had some generalized knowledge of the
2 worker's health condition does not satisfy the requirement of knowledge of a preexisting
3 permanent physical impairment required by NRS 616B.557(4). Consequently, the employer's
4 knowledge that the injured worker was having physical problems in 1998, in all likelihood had
5 sued over them and had given the employer leave requests and a *subpoena duces tecum* for an
6 unspecified reason(s) other than perhaps a health issue, did not satisfy NRS 616B.557(4).

7 The employer, the Board concluded, had to rely upon the work history of the injured
8 worker, following the discovery of knowledge of the preexisting permanent physical impairment
9 to the right knee on June 25, 2003. The burden of proof is upon the applicant to show, it retained
10 the injured worker in its employ once it learned on June 25, 2003, the injured worker had also
11 injured her right knee in 1998. The Board concluded that the applicant did not carry this burden
12 because the proof of employment history following June 25, 2003, was indifferent or ambiguous
13 at best, even after the applicant had been given two chances to provide payroll records, a live
14 witness, or any other form of credible evidence which could show that this individual had been
15 retained in Harrah's employ after Harrah's finally learned of the preexisting permanent physical
16 impairment to the right knee, the body part that was the subsequent industrial injury. The Board
17 then concluded that NRS 616B.557(4) foreclosed acceptance of the claim in this case and denied
18 the application for subsequent injury as further explained below.

19 FINDINGS OF FACT

20 1. This case was first heard by the Board on March 23, 2005, when the Board issued
21 its tentative ruling upholding the recommendation of the Administrator to reject the application
22 for reimbursement because the applicant failed to satisfy the requirements of NRS 616B.557(4).

23 2. Harrah's is the applicant and self-insured employer in this matter. 1 SR., 1.³ In a
24 letter dated April 1, 2005, transmitted by mail on the date of the letter, the applicant was notified

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27 ³There were two staff reports. The first is dated January 4, 2005, and is denoted 1 SR, followed
28 by a page number. The second is dated February 14, 2005 and is denoted 2 SR and then the page
number.

1 by the Board's legal counsel, Charles R. Zeh, Esq., Zeh & Winograd, of the Board's tentative
2 decision to accept the Administrator's recommendation and deny the claim. 1 Tr. 5; 20-23, Ex. 4.

3 3. In a letter dated April 6, 2005, correctly addressed to legal counsel for the Board,
4 the applicant gave notice of its appeal of the tentative decision of the Board. 1 Tr. 5; 24-25, 6;1,
5 Ex. 5.

6 4. The applicant's notice of appeal of the tentative decision arrived at the office of
7 the Board's legal counsel within 30 days of the notice to the applicant of the tentative decision of
8 the Board from which the appeal has been taken. 1 Tr. 5; 24-25, 6;1

9 5. The appeal was first heard on August 30, 2005. However, because the recording
10 equipment used at that time to record the proceedings, malfunctioned, a complete transcript of
11 the hearing could not be generated. Since it was impossible to reconstruct the record without a
12 complete transcript, the results of the hearing of August 30, 2005, the Board concluded that the
13 case must be heard all over again. 2 Tr., 30; 24-25, 31, 1-22.

14 6. On March 23, 2006, the Board heard the matter again, and conducted a *de novo*
15 hearing, as if the previous hearing never took place. 1 Tr. 3-4. At the conclusion of this hearing,
16 the Board voted to affirm the decision of the Administrator and, therefore, to reject the
17 application for reimbursement.

18 7. Pending the drafting of a decision for the Board's review and execution after the
19 *de novo* hearing, however, the Board, *sua sponte*, decided to hear the case again. On April 19,
20 2007, the case was heard, *de novo*, for the third time, the second time as a matter of record, given
21 the recording equipment malfunction the first time the Board heard this case on appeal. 2 Tr. 3-
22 5; 30;22-25, 31;1-15.

23 8. The applicant, therefore, on three separate occasions, had the opportunity to
24 address the Board's concerns about the application for reimbursement, following the Board's
25 tentative decision.

26 9. J. Michael McGroarty, then of J. Michael McGroarty, Chartered, appeared at the
27 March 23, 2005 and April 19, 2007 hearings for the applicant. 1 Tr. 2; 10, 2 Tr. 2;9.

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1 10. John F. Wiles, Esq., legal counsel to the Administrator, appeared on behalf of the
2 Administrator, as did Jacque Everhart, the Administrator's liaison to the Board. 1 Tr. 2; 5, 2 Tr.
3 2;10.

4 11. Bruce MacKay, Chairperson, Victoria Robinson, RJ LaPuz, Tina Sanchez, and
5 Donna Dynek (telephonically) participated in the hearing of this matter on April 19, 2007. 1 Tr.,
6 2, 2 Tr., 2.

7 12. Bruce MacKay, Acting Chairperson, at the time, Victoria Robinson, Tina
8 Sanchez, RJ LaPuz and Donna Dynek (telephonically) participated in the hearing and decision of
9 this matter on March 23, 2006. 1 Tr., 2.

10 13. All five members of the Board participated either in person or by telephone in the
11 hearing of this matter on both occasions.

12 14. The following exhibits were admitted into evidence without objection: 1 Tr., 4-7.

13 Exhibit 1 DIR staff report dated January 4, 2005, with exhibits A through AA
14 attached, including the statement of disallowances.

15 Exhibit 2 DIR staff report dated February 14, 2005, with exhibits attached consisting
16 of status reports provided by the applicant dated June 16, 1999, July 7,
17 1999, and July 21, 1999.

18 Exhibit 3 Letter from the applicant's legal counsel, dated March 17, 2005, with an
19 attached orthopedic evaluation with a date of examination of March 11,
20 2003.

21 Exhibit 4 Letter dated April 1, 2005, from the Board's legal counsel to the applicant
22 advising of the Board's tentative decision to reject the applicant's request
23 for reimbursement.

24 Exhibit 5 Letter dated April 6, 2005, to the Board's legal counsel from the applicant's
25 legal counsel, giving notice of appeal of the Board's tentative decision
26 rejecting the claim for reimbursement.

27 Exhibit 6 Memo from the Board's legal counsel to the Board members advising that
28 the applicant had timely taken its appeal in this case.

 Exhibit 7 Letter from the applicant's legal counsel, attaching his written argument.
The written argument, itself, was not admitted into evidence. However, the
exhibits attached were and they consisted of status reports, dated June 16,
1999, July 7, 1999, a letter from Simonne Miozzo to a Mr. Wynn, dated
December 3, 2001, with attached deposition notice and subpoena duces
tecum. In addition, attached was an orthopedic evaluation from Michael S.
Bradford dated March 11, 2003, a report from Rehab Results, Inc., for the
period of September 9, 2003 through October 17, 2003, and a lump sum

request with a "received date of October 2003. This is a two page document. Further, attached were a lump sum agreement and stipulated settlement agreement. 1 Tr., 6; 5-25, 7; 1-2, 2 Tr., 6; 20-25, 7; 1-9.

15. The injured worker was hired by the petitioner, Harrah's, on July 6, 1998. 1 SR., 2.

16. It is undisputed that on November 14, 1998, the injured worker, five months into her employment at Harrah's, sustained a non-industrial injury when the bus she was riding in stopped suddenly and she fell and hit her right knee. 1SR., 1.

17. The worker was placed on light duty following this incident, see, 1 SR., Ex. I, and then, ultimately returned to her pre-incident job, without any restrictions or limitations. See, 2 SR., Ex. I, report dated 7/21/99⁴

18. To show prior knowledge of the pre-existing condition by written record, the applicant pointed to two medical excuses its employee, the injured worker, gave to Harrah's. They were submitted to Harrah's following the injury to justify time off from work. See, 1 Tr., 12-13, 2 Tr., 9.

19. Harrah's also pointed to a letter from the injured worker's legal counsel in the personal injury litigation on account of the non-industrial accident, requesting that the injured worker be excused from work for a deposition in the case. See, 1 Tr., 6, Ex. 7, letter dated 12/3/2001.

20. Harrah's also offered into evidence and relied upon a copy of a *subpoena duces tecum* from the same litigation to establish knowledge by written record of the pre-existing injury to the right knee. Ex. 7, Subpoena dated 2/10/2003.

21. The element common to the medical leave requests, the letter from legal counsel, and the *subpoena duces tecum*, is that none mentioned the injury to the right knee or described a serious health condition with reference to the right knee. 1 Tr., 6, Ex. 7, SOFs 19, 20, *supra*.

22. It is impossible to tell from this documentary evidence, the time slips, the letter from legal counsel, and the *subpoena duces tecum*, that the right knee was the object of the medical treatment or the litigation, or the need for time off from work. *Ibid*.

⁴2 Sr., Ex ___, means Exhibit ___ to the February 14, 2005, Staff Report and 1 Sr., Ex ___, means Exhibit ___ to the January 1, 2005 Staff Report.

1 23. Harrah's did not produce anyone to testify who understood on Harrah's behalf the
2 significance of the legal documents in relation to the injury suffered, or the reasons that the
3 employee had to take sick leave from Harrah's following the incident. No one from Harrah's
4 appeared to testify at all, much less, on behalf of Harrah's that they had knowledge which could be
5 imputed to Harrah's. *See*, 2 Tr., 16; 6-8, 18; 2-4, 38; 1-16.

6 24. On April 19, 2002, while still employed at Harrah's, the injured worker was
7 carrying some pans and walking through the kitchen, when the subsequent industrial injury
8 occurred. The injured worker tripped over a drain, fell and injured her right knee, the same knee
9 she injured on November 14, 1998. 1 SR., 2.

10 25. Following the injury, the reports were variously about the injured worker's return to
11 work, that she was "...released to return to work light duty capacity," Mashood report, 5/17/02,
12 Ex. M, that "...she could continue with light duty," Nevada Orthopedic & Spine Center, report
13 dated August 13, 2002, Ex. O, that she had arthroscopic surgery on November 4, 2002, after
14 which she was temporarily disabled from November 4, 2002, through November 22, 2002,
15 Nevada Orthopedic & Spine Center, Ex. Q, that she "...probably cannot do any prolonged walking
16 or standing, stooping or any significant climbing, kneeling or squatting," report of Michael S.
17 Bradford, M.D., as of an examination of December 20, 2002, Ex. R, without identifying the
18 restrictions, that she "...continues with the same restrictions at work," Bradford report, January 17,
19 2003, Ex. S, and that she "... was at work where she was doing her normal duties [a term
20 undefined] and having trouble with this... [such that] she then went to light duty and they are now
21 discussing possible vocational rehab with her." Bradford report, March 11, 2003, Ex. T. Each of
22 these exhibits were attached to the Staff Report dated January 4, 2005 (1 Sr.).

23 26. As of March 11, 2003, Dr. Bradford further wrote:

24 With her normal job she had to use the knee a lot with kneeling, crawling to do
25 cleaning and I do not feel that she can do this type of activity any longer. She
26 cannot do prolonged walking, standing. She cannot do climbing or kneeling. She
 cannot put excessive stress on the knee. No heavy lifting. These restrictions are
 permanent. *Ibid.*

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1 27. The proof of wages supplied by Harrah's covered the time frame ending with April
2 20, 2002, the day after the subsequent injury. 1 Sr., Ex. Z.

3 28. According to the Vocational Closure memo dated October 17, 2003, a buyout for
4 vocational rehabilitation was approved by the insurer on September 22, 2003, and that the injured
5 worker opted for the buy out because she could not survive during training on payments of
6 \$40.95, daily. Vocational Closure Report, 10/17/03. 2 Sr., Ex. 7.

7 29. Harrah's listed on the insurer subsequent injury check list that the employer's date
8 of knowledge of impairment was August 19, 1999, the date the injured worker was released from
9 treatment by Gary Latourette, M.D., the treating orthopedic surgeon for the preexisting injury to
10 the right knee. 1 Sr., Ex. X.

11 30. Harrah's, however, did not receive the medical reporting from Dr. Latourette about
12 the original right knee injury, the injury relied upon by Harrah's as the preexisting permanent
13 physical impairment, until June 25, 2003, the date the report is stamped received from Dr.
14 LaTourette. 1 Sr., Ex. H.

15 31. June 25, 2003, is the date that Harrah's has proof by written record it had
16 knowledge of the preexisting right knee injury, the condition that Harrah's claims is the
17 preexisting permanent physical impairment as required by NRS 616B.557(3). *Ibid.*

18 32. Except for the discussion of the vocational rehabilitation buyout, evidence or
19 reporting of the injured worker's employment with Harrah's after June 25, 2003, the date that
20 Harrah's learned of the preexisting right knee injury, is non-existent. There is no showing the
21 injured was working for Harrah's and, thus, retained by Harrah's after June 25, 2003.

22 33. On the question of knowledge about the preexisting permanent physical
23 impairment and the proof of it by self-insured's written records, Harrah's admitted:

24 We do know [speaking of the preexisting injury] she was off work for medical
25 reasons. We have established that, but we don't – we can't establish that it was the
26 knee. 2 Tr., 16; 6-8.

26 34. Harrah's also stated:

27 All we do have is the off work slip and back to work slips, [speaking of the
28 preexisting impairment], I believe. Something like that, but does not mention the
knee or anything like that. 2Tr., 18; 2-4.

1 35. In addition, Harrah's admits:

2 Yeah, Dr. Latourette's [discharge report, the document, 1 Sr., Ex. H, relied upon to
3 show knowledge of the preexisting condition, the original right knee injury] but
4 that wasn't—we can't prove we had that until after the subsequent injury. We don't
5 have the date stamp showing we had it prior to that. 2 Tr., 19; 2-5. See, also, 2
6 Tr., 15; 8-10, where Harrah's concedes it can't prove it had Dr. LaTourette's report
7 about the original surgery to the right knee until after June 25, 2003.

6 36. Harrah's also concedes:

7 And admittedly, our written evidence prior to the industrial injury, the subsequent
8 injury, here is weak [speaking in reference to written evidence of the preexisting
9 permanent physical impairment]. But it is there. It shows that we have a
10 knowledge that something was going on with her [the injured worker] physically.
11 2 Tr., 14; 20-23.

10 37. On the question of the individual's actual work history following the subsequent
11 industrial injury, Harrah's admitted it did not produce any payroll records documenting the injured
12 work history after the date of the subsequent injury. 2 Tr., 23; 12-13.

13 38. When Harrah's was questioned about what proof the employer had that the injured
14 worker was returned to her normal duties following the subsequent injury, how long, if at all, the
15 injured worker returned to her normal duties, how much and how long the injured worker returned
16 to work light duty following the subsequent injury, and when vocational rehabilitation became the
17 focus of the interaction with the injured worker, Harrah's responded:

18 No, we don't have those records. All we have is the doctor indicating that's the
19 situation. 2 Tr., 21; 2-4.

20 39. It was Harrah's position it met the proof of knowledge requirement as follows:

21 Nonetheless, I think there is enough, enough information there to put a supervisor
22 on notice that somebody was significantly injured. The problem is nobody ever
23 mentioned that it was the right knee, I don't think. I think that's the difference. All
24 we need to know is there was a significant medical problem that affected an
25 employee. 1 Tr., 15; 16-22.

24 40. June 25, 2003, is the date Harrah's can show by proof through written record that
25 Harrah's knew the injured worker suffered a preexisting injury to the right knee which injury
26 Harrah's claims is the preexisting permanent physical impairment.

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41. After June 25, 2003, Harrah's offered no credible evidence of an employment history for the injured worker other than the effort to move the injured worker into vocational rehabilitation which became a lump sum vocational buy out.

42. To the extent any of the following Conclusions of Law, also constitute findings of fact or mixed findings of fact and conclusions of law, they are incorporated herein.

CONCLUSIONS OF LAW

1. To the extent any of the preceding Findings of Fact constitute conclusions of law or mixed findings of fact and conclusions of law, they are incorporated herein.

2. Harrah's filed a timely appeal of the tentative decision of the Board. NAC 616B.7706(1).

3. A quorum of the Board was present to hear the case and render its decision. NRS 616B.551.

4. This is a retention in employment case, and not a hire case as provided for in NRS 616B.557(4). The preexisting permanent physical impairment, the right knee injury and surgery, occurred after the injured worker had already commenced employment with Harrah's. This case presents the question, therefore, of whether Harrah's can prove by written record it retained the injured worker in its employ after acquiring knowledge of the preexisting permanent physical impairment. NRS 616B.557(4).

5. The burden of proof lies with the applicant, Harrah's, here, to prove that the eligibility criterion set forth in NRS 616B.557(4) have been satisfied. *See, United Exposition Service v. State Industrial Insurance System*, 109 Nev. 421, 424, 851 P.2d 423 (1993).

6. To show prior knowledge of the preexisting condition, by written record, the applicant, in the first instance, pointed to the two medical excuses, 2 Tr., Ex. 7, the injured worker gave Harrah's. These medical excuses were submitted by the injured worker following the original injury to the right knee to justify time off from work.

7. The applicant also pointed to a letter to Harrah's from the injured worker's legal counsel in the personal injury case which arose out of the non-industrial accident, requesting that the injured worker be excused from work for a deposition in the litigation spawned by the non-

1 industrial injury. The applicant offered into evidence, also, a copy of the *subpoena duces tecum*
2 served on Harrah's regarding the same litigation to establish knowledge by written record of the
3 preexisting condition. *See*, 2 Tr., Ex. 7.

4 8. Harrah's argued these documents satisfied the requirements of knowledge shown
5 by written records required by NRS 616B.557(4), because the combination of the off work slips,
6 the letter from legal counsel about the deposition, and the *subpoena duces tecum* alerted Harrah's
7 to the fact that the injured worker must have had serious health problems. 2Tr., 16.

8 9. Harrah's was left with no other argument. It is not possible to tell from these
9 Exhibits that the right knee was the object of the medical treatment or the litigation, or the need
10 for time off from work.

11 10. Harrah's position before the Board was, as a consequence, the following:

12 The simple argument is that the statute [NRS 616B.557(4)] does not require that
13 the employer have written knowledge of the specific condition, therefore,
14 knowledge of a medical condition is reasonably inferred from any of the three sets
of document(sic). (Emphasis added.) Harrah's Statement of the Case, 2 Sr., Ex. 7,
p. 2.

15 11. The Board disagrees. While perfect knowledge of the pre-existing condition is not
16 required, the plain language of NRS 616B.557(4), makes clear the knowledge required must be
17 referable to the preexisting condition that is implicated with the subsequent injury. NRS
18 616B.557(4) states that the self-insured employer be in possession of "...knowledge of **the**
19 permanent physical impairment..." (emphasis added) at the time of hire or subsequently, when the
20 employee was retained in its employ.

21 12. The statute does not admit of knowledge of "a" or "any" physical impairment. Not
22 any condition or impairment will do. Rather, the knowledge must be specific to **the** permanent
23 physical impairment which, in turn, is capable of a disability rating of 6% or more, whole person,
24 according to the American Medical Association *Guides to the Evaluation of Permanent*
25 *Impairment* as adopted and supplemented by the DIR pursuant to NRS 616C.110. *See*, NRS
26 616B.557(3), incorporated by reference into NRS 616B.557(4).

27 13. Case law also supports the position that knowledge must be more than knowledge
28 of some sort of undefined or generalized serious health problem. In *Alaska International*

1 *Constructors, etc., v. State of Alaska, Second Injury Fund*, 755 P.2d 1090, 1094 (1988), the Court
2 held that while knowledge couched in statutory medical terminology is not required, the written
3 record establishing prior knowledge must be sufficient to show that prior knowledge of the injured
4 worker's qualifying disability may be fairly inferred.

5 14. The written record that Harrah's relies upon, the medical excuse slips, the letter
6 from the attorney, and the *subpoena duces tecum*, is the only bundle of documentation that
7 Harrah's offers to prove the written record requirement of NRS 616B.557(4).

8 15. These documents Harrah's cites, the Board finds are devoid of any reference to the
9 preexisting permanent physical impairment, a point that Harrah's admits. 1 Tr., 16; 4-8, 18; 1-4,
10 2 Tr., 15; 9-24. Therefore these documents are insufficient to show knowledge of a preexisting
11 permanent physical impairment for purposes of satisfying the requirements of NRS 616B.557(4).

12 16. If petitioner were to succeed with its claim Harrah's must be able to point to other
13 written documentation which shows knowledge of the preexisting permanent impairment, which
14 knowledge is then followed by proof Harrah's retained the injured worker in its employ.

15 17. Such a written record exists, however, in this case. The Board finds that the
16 records stamped received by Harrah's on June 25, 2003, from Dr. Latourette's office, satisfy the
17 proof by written record requirement of NRS 616B.557(4). These are the only other records
18 offered or suggested by the applicant to satisfy the proof by written knowledge requirement of
19 NRS 616B.57(4).

20 18. June 25, 2003, is the critical date, therefore, for purposes of establishing proof that
21 NRS 616B.557(4) has been satisfied. It is the date, the self-insured employer showed by written
22 record it knew of the preexisting condition. The applicant is obliged to establish that after June
23 25, 2003, it retained the injured worker in its employ. This is the earliest date, June 25, 2003, that
24 Harrah's could possibly have had the injured worker in its employ, in the knowledge, shown by
25 written record, of the preexisting condition.

26 19. Correspondingly, anything Harrah's did prior to that date to employ the injured
27 worker is of no moment, whatsoever, because Harrah's has not shown prior to June 25, 2003,
28 proof by written record, it had knowledge of the preexisting permanent physical condition.

20. The Board concludes that Harrah's failed in this burden also. The only evidence of employment by the injured worker are the doctor's reports and the payroll records. The payroll records stop as of April 20, 2002, the date of the subsequent injury. If anything, the fact that no more payroll records were supplied, gives rise to an inference that employment ceased as of that date because Harrah's cannot or did not produce records to show otherwise. The void in proof creates the inference that there are no such records because employment ceased as of that date.

21. The medical records vaguely describing employment in the period following the subsequent injury stop, however, in March 2003, about three months before Harrah's can show by written record it knew of the preexisting permanent physical impairment. SOF 25.

22. Moreover, the last record, the report from Dr. Bradford, is dated March 11 , 2003. There, he wrote that the focus was already upon vocational rehabilitation rather than a realistic return to work at Harrah's. Bradford report, 3-11-2003, 1 Sr., Ex. T.

23. The Board, therefore, also holds that the proof of employment submitted by Harrah's fails to establish Harrah's retained the injured worker in its employ following June 25, 2003, the only date which Harrah's can show by written record that it knew of the preexisting permanent physical impairment to the right knee.

24. Certainly, focus upon vocational rehabilitation and a vocational rehabilitation buyout does not equate with retention in employment as contemplated by NRS 616B.557(4). These two concepts are the opposite of the retention of the injured worker in the self-insured's employ.

25. The applicant has, therefore, failed in its burden of showing that the criterion of NRS 616B.557(4) have been satisfied.


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(4) was satisfied. Therefore, the application

1 for reimbursement from the Account is hereby denied upon a motion by Victoria Robinson,
2 seconded by Donna Dynek, made pursuant to NRS 616B.557(4) to deny the claim. Upon a vote
3 of five members in favor of the motion, with no members opposing the motion, and with a
4 quorum being present to vote upon the motion, the motion was duly adopted. 2 Tr., 40; 1-6.

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

10 Dated this 18th day of December, 2008.


11
12 
13 Victoria Robinson, Board Chairman

1 **CERTIFICATE OF SERVICE**

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

5 6 7 8 9 10 11 12 13 14 15 16 17	<p>√</p> <p>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,</p> <p>J. Michael McGroarty, Esq. Lewis Brisbois Bisgaard & Smith LLP Attorneys at Law 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 89074</p>
	Personal delivery
	Telephonic Facsimile at the following numbers:
	Federal Express or other overnight delivery
	Reno-Carson Messenger Service
	Certified Mail/Return Receipt Requested

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19 Dated this 19 day of December, 2008.

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Karen Weisbrot

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