

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

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7 In re: Subsequent Injury Request for Reimbursement

8 Claim No. 03H34H488001
9 Date of Injury: November 15, 2003
10 Insurer: Las Vegas Metropolitan Police Department
11 Employer: Las Vegas Metropolitan Police Department
12 Third-Party Administrator: CCMSI
Submitted By: Daniel L. Schwartz, Esq.

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

17 This matter came on for hearing before the Board for the Administration of the
18 Subsequent Injury Account (the Board) on Thursday, August 23, 2007. A quorum of the Board
19 was present to decide the case consisting of Acting Chairman, RJ LaPuz, members Linda
20 Keenan, Tina Sanchez and Donna Dynek. Tr., 6;16-20¹. Member Dynek appeared by telephone.
21 The other Board members appeared in person. Chairman Victoria Robinson was absent from the
meeting. *Ibid.*

22 The Board rendered its tentative ruling on May 17, 2007. The applicant timely appealed
23 and was represented before the Board on appeal by Anthony Junker, Esq., of Santoro, Driggs,
24 Walch, Kearney, Johnson & Thompson. Tr., 6;3-8. The Administrator recommended denial of
25 the claim on the grounds that the applicant failed to satisfy the 6% requirement set forth in
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¹"Tr." stands for the transcript of the August 23, 2007 *de novo* hearing on this matter.

1 NRS 616B.557(3), quoted in the margin. Tr., 11;1-3.² The Administrator's recommendation for
2 denial was based upon the fact that the injured worker was seen for a permanent partial disability
3 rating (PPD) by James T. Overland, Sr., D.C., M.S., who assigned the injured worker a disability
4 rating of 15%, WPI. Tr., 10; 9-10, 11; 22-25, SR.³, 3, Exhibit G to SR., p. 7. It was argued, by
5 legal counsel for the applicant that Dr. Overland was unaware when he was conducting the
6 evaluation that he was actually reviewing two workers compensation claims. He was, therefore,
7 unaware, the applicant claims, he was supposed to then apportion between the first and
8 subsequent injuries, the preexisting and subsequent injuries. Tr., 10; 3-8, 11; 25, 12; 1-4, Exhibit
9 O to SR.

10 Instead of going back to Dr. Overland, Tr., 17; 1-4, however, to apportion between the
11 first back/neck injury and the second, when this was discovered, the third party administrator
12 elected to ask one of the injured worker's treating physicians, Joseph Schifini, M.D., to make an
13 allocation between the first and second injuries. Tr., 12; 23-25, 15; 20-25, 16; 1-4. In a letter
14 dated September 16, 2004, Dr. Schifini stated that the subsequent accident should be considered
15 two thirds of the injured worker's injury or health problem. He made this recommendation based
16 upon his assessment as a treating physician that the injured worker was suffering more pain
17 following the second injury than he did after the first injury. Exhibit H to SR. The third party
18 administrator did not send either the record or charts, however, back to Dr. Overland, to give him
19 the opportunity to make the apportionment. Tr., 15; 21-25, 16; 18-25, 167; 1-4.

20 The third party administrator then in a letter dated September 20, 2004, advised the
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22 ²NRS 616B.557 Payment of cost of additional compensation resulting from subsequent injury of
23 employee of self-insured employer. Except as otherwise provided in NRS 616B.560:

24 3. As used in this section, "permanent physical impairment" means any permanent condition,
25 whether congenital or caused by injury or disease, of such seriousness as to constitute a hindrance or
26 obstacle to obtaining employment or to obtaining reemployment if the employee is unemployed. For the
27 purposes of this section, a condition is not a "permanent physical impairment" unless it would support a
28 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.

³"SR" stands for the Staff Report of March 26, 2007 in evidence as Exhibit 2.

1 worker, a Las Vegas police officer, that the employer was offering to liquidate the injured
2 worker's claim with a lump sum payment based upon a compromise figure of 10% WPI. SR 6,
3 Exhibit I to SR. The injured worker accepted the offer and the claim was paid based upon this
4 arrangement. Tr., 17; 18-19.

5 Later, for purposes of applying for subsequent injury account reimbursement, the
6 applicant retained the services of Richard W. Kudrewicz, M.D., who conducted a record review.
7 Exhibit M, p. 1 to SR. Dr. Overland, however, had conducted an actual examination of the
8 injured worker, since his charge was to provide a disability rating for the injured worker. Exhibit
9 G, p. 1, to SR.

10 According to Dr. Kudrewicz, after completing his record review, the injured worker's
11 preexisting condition would have and should have been rated at 6% or more, thereby making the
12 injured worker's claim eligible for subsequent injury reimbursement since he would also allocate
13 50% to each injury. Exhibit M, p. 2 to SR. According to the Administrator, however, the
14 opinion of Dr. Kudrewicz should be disregarded. Tr., 14, 15. Instead, the evaluation upon which
15 the parties actually acted and the employer made payment in liquidation of the claim was the
16 allocation by Dr. Schifini. Exhibits H and I to SR. The Administrator also pointed out that
17 precedent for the Board has been to utilize the evaluation upon which the employer acted when
18 making employment decisions and making payment on claims since this is what reflects the mind
19 set of the parties at the time employment decisions are being made about the injured worker. Tr.,
20 14; 20-25, 15; 1-8.

21 The applicant, however, argued through legal counsel, that Dr. Schifini was not a rating
22 physician, that Dr. Kudrewicz is, Tr., 13; 6, and that the rating or allocation of Dr. Schifini
23 should, therefore, be disregarded and Dr. Kudrewicz's relied upon by the Board to approve the
24 application. Tr., 13; 16-20, 16; 1-5. The applicant's legal counsel also asserted or claimed that
25 the law requires a rating physician to be certified. Tr., 12; 11-13.

26 The Board, however, pointed out that the applicant/employer is the party who chose Dr.
27 Schifini to apportion the claim and that the applicant clearly had at its option, the ability to go
28 back to Dr. Overland, a certified rating physician, to apportion the claim. Tr., 15; 1-8, 16; 18-25,

17; 1-10. It was, therefore, the applicant's mistake in its use of Dr. Schifini, if it was a mistake, and the applicant should not be heard to complain that Dr. Schifini should not have been used, when it was the applicant who chose to use Dr. Schifini in the first place. Tr., 17; 6-10. The Board also pointed out that the applicant acted upon and made all of its personnel decisions at the time in the knowledge of the allocation assigned by Dr. Schifini. Tr., 17; 5-17. Since it was the applicant who chose to skip over Dr. Overland, chose Dr. Schifin, acted upon and paid the claim based upon the opinion of Dr. Schifini and got the injured worker to accept the payment allocations based upon the opinion of Dr. Schifin, the applicant should not be heard to complain, now that the opinion of Dr. Schifini was wrong, it should be disregarded and that an opinion of Dr. Kudrewicz, secured in contemplation of the pursuit of the application for reimbursement from the Account, should be accepted. Tr., 17; 1-17.

Ultimately, however, Dr. Overland was aware of both the preexisting and subsequent injuries to the back. He did not apportion, he states, because the condition of the injured worker's body parts involved were not significantly changed and as a result, there was no basis for apportionment, as well. Exhibit I, p. 7, to SR. Dr. Schifini, as stated, apportioned, as one of the injured treating physicians, allocating one third to the preexisting condition, and two thirds to the subsequent injury based upon pain. Dr. Kudrewicz allocated, 50% of the 15% to each condition. The Board had before it, therefore, these three allocations of the 15% WPI, the zero allocation of Dr. Overland, the one third, two thirds allocation by Dr. Schifini, and the 50/50 allocation of Dr. Kudrewicz. The Board chose to abide by Dr. Schifini, the allocation that the applicant relied upon when paying the claim for which the applicant seeks reimbursement.

The Board concluded that the Administrator's recommendation should be followed and the application should be denied, according to the Findings of Fact, Conclusions of Law and Decision that follow below.

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FINDINGS OF FACT

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2 1. This case was first heard by the Board on May 17, 2007, when the Board issued a
3 tentative ruling upholding the recommendation of the Administrator, Division of Industrial
4 Relations (DIR) to reject the application because the applicant failed to satisfy the requirements
5 of NRS 616B.557 (3).

6 2. The Las Vegas Metropolitan Police Department is the applicant and self-insured
7 employer in this matter. The third-party administrator is CCMSI. The matter was submitted by
8 Daniel L. Schwartz, Esq., Santoro, Driggs, Walch, Kearney, Johnson & Thompson.

9 3. In a letter dated May 20, 2007, transmitted by mail on May 21, 2007, the applicant
10 was notified by the Board's legal counsel, Charles R. Zeh, Esq., Zeh & Winograd, of the Board's
11 tentative decision to accept the Administrator's recommendation and deny the claim. Exhibit 1.

12 4. In a letter dated May 27, 2007, correctly addressed to the Board's legal counsel,
13 the applicant gave notice of its appeal of the tentative decision of the Board. Exhibit 2.

14 5. The applicant's notice of appeal of the tentative decision arrived at the office of
15 the Board's legal counsel within 30 days of the notice to the applicant of the tentative decision of
16 the Board from which the appeal has been taken.

17 6. The appeal was agendized for August 27, 2007, when the *de novo* hearing was
18 conducted and a vote taken by the Board.

19 7. Daniel L. Schwartz, Esq., appeared at the May 17, 2007, hearing on behalf of the
20 applicant. (Board Minutes)

21 8. Anthony Junker, Esq., Santoro, Driggs, Walch, Kearney, Johnson & Thompson,
22 appeared at the August 23, 2007, *de novo* hearing. Tr., 2;8, 5;22.

23 9. John F. Wiles, Esq., Legal Counsel for the Administrator, DIR, appeared on
24 behalf of the Administrator at the May 17, 2007, hearing on behalf of the Administrator. Tr., 2;5,
25 8;6.

26 10. Jacque Everhart, the Administrator's liaison to the Board, also appeared on behalf
27 of the Administrator at the hearing of May 17, 2007, Tr., 2;3.

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1 11. Acting Chairman, RJ LaPuz, members Linda Keenan, Tina Sanchez and Donna
2 Dynek, participated in the *de novo* hearing on August 23, 2007. Tr., 2; 2, 6, 7, 14. Chairman
3 Victoria Robinson was absent.

4 12. A quorum of the Board participated in the hearing concerning this matter.

5 13. The exhibits admitted into evidence without objection, Tr., 7, 18-20, 8; 13-17, are:

6 a. Letter from the applicant's counsel, Daniel L. Schwartz, Esq., dated May
7 25, 2007, appealing the tentative ruling of the Board made on May 17, 2007, in response to a
8 letter from the Board's legal counsel giving notice of the adverse tentative ruling. These are,
9 combined, Exhibit 1. Tr., 6; 20-25, 7; 1-3. The appeal notice was received at the office of the
10 Board's legal counsel on May 29, 2007. Tr., 7;1.

11 b. Staff Report (SR) dated March 26, 2007, consisting of the eight page
12 report plus attached Exhibits A through P, with a one page explanation of disallowances of some
13 costs. Tr., 7; 4-11.

14 14. The injured worker was hired as a police officer by the Las Vegas Metropolitan
15 Police Department on February 26, 1991. SR 1.

16 15. On October 24, 2002, he was involved in a motor vehicle accident, injuring his
17 thoracic strain. Following the injury he was released to work full duty with a diagnosis of
18 thoracic spine. SR 1,2.

19 16. Subsequently, the injured worker was seen by multiple doctors for treatment
20 including Joseph J. Schifini, M.D. SR 2,3. The injured worker remained working full duty all
21 the while. *Ibid.*

22 17. On November 15, 2003, the injured worker suffered yet another injury when his
23 car was rear ended by a hit and run driver. Once again, he reported injury to his neck and back.
24 *Id.*, at p., 3.

25 18. On this same date, Dr. Schifini reported that the injured worker was complaining
26 of increased pain in his neck, head and upper back regions. Dr. Schifini felt the injured worker
27 had symptoms consistent with his pre-existing cervical and thoracic disc pathology. *Ibid.* See
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1 also, Exhibit C to SR, consisting of a letter from Dr. Schifini dated November 15, 2003, and
2 consultation report of the same date from Dr. Schifini. An MRI was also ordered at this time, to
3 determine if there was any worsening of the preexisting conditions. *Ibid.*

4 19. In a letter dated December 16, 2003, Dr. Schifini reported that the results of the
5 MRI he had ordered showed the injured worker's exam remains unchanged and that the MRI of
6 the cervical and thoracic areas was essentially unchanged when compared to the previous studies
7 of May 29, 2003. Exhibit E to SR. Dr. Schifini stated that the injured worker would remain on
8 full duty. *Ibid.*

9 20. In a letter dated April 8, 2004, Dr. Schifini determined that the injured worker had
10 reached maximum medical improvement. He advised further that the injured worker's exam
11 results remain unchanged and the MRI findings of May 2003 and December 2004, remain
12 unchanged as well. He, thus, concluded: "I would consider his second injury on November 15,
13 2003 to have been an exacerbation of his preexisting injury on October 24, 2002; therefore, only
14 a permanent partial disability rating will be necessary." Exhibit F, p. 1 to SR. According to Dr.
15 Schifini, the injured worker did not suffer two, separate injuries. Rather, the second incident was
16 an exacerbation of the preexisting condition.

17 21. On May 17, 2004, the injured worker was then seen by Dr. Overland for a formal
18 permanent, partial disability examination and rating. Exhibit G, p. 1 to SR.

19 22. Dr. Overland concluded with the following, which tracts the opinion of Dr.
20 Schifini, that the subsequent incident was not a second, separate injury but an exacerbation of the
21 first, when Dr. Overland stated:

22 [T]he examinee was involved in two separate motor vehicle accidents. The second
23 accident was considered to be an aggravation (sic) of the injuries sustained in the
24 first accident. Since the examinee had not yet been rated for his first MVA [motor
25 vehicle accident] injuries and subsequent MRI studies were not significantly
26 changed, there is **no basis for apportionment as well.** (Emphasis added).
27 Exhibit G, p. 7 to SR.

28 23. Accordingly, Dr. Overland rated the injured worker's condition as one to be
adjudicated and closed with an award of 15% whole person impairment. *Ibid.*

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1 24. In a letter dated September 16, 2004, which was written, according to Dr. Schifini,
2 in response to specific questions propounded to him by the third party administrator, Dr. Schifini
3 recounted that the injured worker had been involved in two automobile accidents approximately
4 a year apart, sustaining injuries to his head, neck and upper back during both of these incidents.
5 According to Dr. Schifini, “[t]he second injury seemed like a re-exacerbation of the first injury.
6 ... His [the injured worker] MRIs of the cervical and thoracic spine remained stable over time,
7 but his pain seemed to be worse with the second accident.” Exhibit H to SR.

8 25. Dr. Schifini then stated:

9 Therefore, to address your question of an apportionment, I would state that the
10 initial accident should be considered one-third of his problem, and the second
11 accident be two-thirds of the problem since the problem seemed worse following
12 the second accident and his pain was easier to stabilize following the first
13 accident. *Ibid.*

14 Applying these percentages, then, the injured worker would be assigned a PPD for the first injury
15 of 5% and a PPD of 10% for the second injury.

16 26. This opinion on apportionment, thus, given by Dr. Schifini was at the request of
17 the third party administrator.

18 27. There is nothing in the record to show that the same request for an apportionment
19 was ever made of Dr. Overland, though his rating was given, it appears, with the letter of Dr.
20 Schifini dated April 8, 2004, in mind when Dr. Schifini stated that this was one injury and
21 apportionment was, therefore, unnecessary.

22 28. On September 20, 2004, the claims examiner for the third party administrator
23 offered to settle with the injured worker if he would accept a 10% permanent partial disability for
24 the subsequent injury. Exhibit I to SR.

25 29. The injured worker accepted the offer for this claim on the same date. SR 4, Tr.,
26 17; 15-19.

27 30. For purposes of a subsequent injury application, Richard W. Kudrewicz, M.D.,
28 conducted a records review of the claim on November 18, 2007. Exhibit M, p. 1 to SR. Upon
his review at this time, he stated that the PPD award given clearly supported a 6% PPD for the

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1 preexisting condition. He also believed that the cost of treatment and care between the first and
2 second or subsequent injuries could be split with 50% assigned to each. *Id.*, at 3,4.

3 31. The claims examiner for the third party administrator, however, went back to Dr.
4 Kudrewicz on January 10, 2007, for an explanation of why Dr. Overland did not apportion
5 between the preexisting and subsequent injury. Dr. Kudrewicz stated he was informed that the
6 evaluation of Dr. Overland was to cover both injuries, the first and second automobile collisions.
7 Exhibit N, p. 1, to SR.

8 32. In response to this second assignment, Dr. Kudrewicz advised based upon another
9 record review and not an examination of the injured worker, that since there were no real
10 anatomical differences in the injured worker following the second accident, he would assign 12%
11 of the 15% PPD to the first injury and 3% to the second injury. He would, however, apportion
12 the cost of treatment between the two injuries at 50% for the first and 50% for the second
13 incident. *Id.* at 2, 3 to SR.

14 33. The Board has, therefore, before it three medical opinions regarding the condition
15 of the injured worker and the relationship of the two automobile accidents involving the head,
16 neck and upper back regions of his body. The first was rendered by Dr. Overland, who
17 concluded the second injury was merely an aggravation of the first and they were so aligned that
18 apportionment was unnecessary and a 15% PPD award without differentiation between the first
19 and second injuries was indicated. The second was from the injured worker's treating physician,
20 Dr. Schifini. According to Dr. Schifini, there were no anatomical differences between the first
21 and second injuries and he considered the second injury a re-exacerbation of the first. It appears
22 that his view of the close alignment of the first and second collisions influenced Dr. Overland to
23 conclude that there was no basis for apportionment. When prompted by the third party
24 administrator's claims examiner, Dr. Schifini concluded that the second injury or incident was
25 worse than the first because the difference was in the degree of pain. The injured worker was in
26 greater pain with the second injury or re-exacerbation and therefore, he apportioned the two
27 injuries, one third to the first injury or a PPD of 5% and two thirds or a PPD of 10% to the
28 second injury.

34. The third medical opinion was given by Dr. Kudrewicz based upon a review of the medical records. He agreed that there was no anatomical difference between the first and second injuries and therefore, he allocated 12% of the PPD to the first injury and 3% of the PPD to the second, while allocating costs of treatment at 50% each for the first and second injuries or incidents.

35. The claims examiner, however, acted upon the advice of and relied upon the opinion of Dr. Schifini as the claims examiner offered a 10% disability and lump sum payment based upon a 10% PPD for the second incident. The injured worker also relied upon it because he accepted the offer based upon the 10% PPD.

36. Given that all the parties relied and acted upon the opinion of Dr. Schifini, given that Dr. Schifini's opinion was that of one of the injured worker's treating physicians, given that the allocation was not a disability examination or rating, to which other regulatory and statutory requirements might attach, given that the applicant set the wheels in motion by seeking out the opinion of Dr. Schifini and then acted upon it, and given that the claims examiner and third party administrator could have gone back to Dr. Overland if they thought there was a misunderstanding by him of his assignment in this matter, the Board, like the applicant's third party administrator, adopts the allocation given by Dr. Schifini that the apportionment should be one third, to the first injury and two thirds to the second injury, based upon the pain differential experienced by the injured worker.

37. When the claims examiner approached Dr. Schifini asking for his opinion and when the claims examiner offered 10% to the injured worker to settle the second industrial injury claim, he was acting within the course and scope of his agency on behalf of and was the agent of the applicant employer in this matter.

38. 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.

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

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

5 4. The applicant has given the Board three sets of opinions regarding the allocation
6 of the 15% PPD between the first and second motor vehicle accidents. The applicant procured
7 all three of the opinions. The opinion of Dr. Schifini was sought, however, in order to settle the
8 industrial injury claim for the second injury and to act upon it. The parties relied upon it as it
9 was offered by the applicant to the injured worker who, in turn, accepted a lump sum settlement
10 based upon the 10% PPD that was allocated to the second injury by Dr. Schifini. Dr. Schifini
11 was also a treating physician and reasoned that the pathology following the second injury, if there
12 had to be an allocation or apportionment, was worse than the first because the pain associated
13 with the second was greater than the first. Due to pain, he weighted and the subsequent injury
14 greater than the first.

15 5. Based upon the apportionment allocated by Dr. Schifini of two thirds for the
16 second incident and one third for preexisting condition, the preexisting condition was given by
17 the treating physician, Dr. Schifini, an apportioned 5% PPD or one third of the entire PPD of
18 15% given by Dr. Overland. This is the PPD rating the Board, therefore, accepts for the
19 preexisting permanent impairment of the injured worker.

20 6. No party raised any objection to the 15% PPD given by Dr. Overland, which the
21 Board also accepts as valid. No challenge was levied, either, to fact that Dr. Overland used the
22 5th Edition of the *Guides* to make his rating.

23 7. NRS 616B.557(3) requires that the injured worker's preexisting permanent
24 physical 6% or more WPI based upon the *Guides to the Evaluation of Permanent Impairment*.

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8. The Board, therefore, concludes that the applicant has failed to satisfy the burden or proof imposed to sustain a claim for reimbursement because the applicant has not shown that the threshold 6% preexisting permanent impairment requirement of NRS 616B.557(3) was satisfied. The Board, therefore, also accepts the Administrator's recommendation that the claim be denied for failure to satisfy NRS 616B.557(3).

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 hereby affirmed by the Board for the Administration of the Subsequent Injury Account for Self-Insured Employers. The applicant failed to establish by a preponderance of the evidence that NRS 616B.557(3) was satisfied. The application for reimbursement from the Account is hereby denied upon a motion by Tina Sanchez, seconded by Donna Dynek, made pursuant to NRS 616B.557(3) to deny the claim. With four of the five members participating and eligible to vote on the motion, a quorum was present. The motion was duly adopted. The vote was 4 in favor of the motion, none opposed.

Tr., 18; 9-25, 19; 1-6.

Further, at the meeting of the Board held on December 18, 2008, upon a motion by Tina Sanchez, seconded by Linda Kennan, Board members Vice-Chairman RJ LaPuz, members 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 and member, Donna Dynek was absent from the meeting.

Dated this 29th day of December, 2008.


Victoria Robinson, Board Chairman

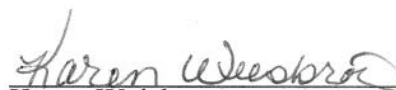
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CERTIFICATE OF SERVICE

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 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, Daniel L. Schwartz, Esq. Anthony A. Junker, Esq. Santoro, Driggs, Walch Kearney, Johnson & Thompson 400 South Fourth Street, Third Floor 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 7th day of January, 2009.



Karen Weisbrot

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