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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.	20040010034499
Date of Injury:	June 2, 2004
Insurer:	Nevada System of Higher Education
Employer:	Community College of Southern Nevada
Third-Party Administrator:	Frank Gates Service
Submitted By:	Diversified Management

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

This case came before the Board for the Administration of the Subsequent Injury Account for Self-Insured Employers (the Board) for hearing on March 1, 2007 and August 23, 2007, upon appeal by the applicant of the Board's tentative ruling denying the applicant's request for reimbursement from the Subsequent Injury Account (the Account). In its tentative ruling, the Board upheld the recommendation of the Administrator, Division of Industrial Relations, State of Nevada, (the Administrator) to deny the claim on the grounds that the applicant failed to satisfy the requirements of sections one[1] and three[2] of NRS 616B.557. The text of each section is quoted in the margin.

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[1] If an employee of a self-insured employer has a permanent physical impairment from any cause or origin and incurs a subsequent disability by injury arising out of and in the course of his employment which entitles him to compensation for disability that is substantially greater by reason of the combined effects of the preexisting impairment and the subsequent injury than that which would have resulted from the subsequent injury alone, the compensation due must be charged to the Subsequent Injury Account for Self-Insured Employers in accordance with regulations adopted by the Board. NRS 616B.557 (1).

[2] 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.110. NRS 616B.557 (3).

This case involves a 74 year old woman who was working as a custodian for the Community College of Southern Nevada. She had a host or preexisting ailments at the time she was hired by the College on November 26, 2001, to work as a lady custodian. Those preexisting ailments included a fractured left hip suffered on February 9, 1999, SR 2[3], osteopenia, non-insulin dependant diabetes which was rated a 5% WPI (whole person impairment), neurologic impairment considered for tibialis posterior as part of her sciatic nerve, 1% WPI, and also 1% for the motor deficit right S-1 radiculopathy. SR 5. The osteopenia was never assigned a disability rating. SR 5.

While at work, she tripped when trying to get up from her chair on June 2, 2004. SR 2. She fell injuring her right side. She was seen in emergency and diagnosed then with a right hip fracture. SR 2, Exhibits J and K to the SR. The right hip was accepted immediately as an industrial injury and ultimately, was given a rating of 10% WPI. She was returned to full duty concerning her right hip on November 9, 2004. In the interim, she also had surgery to repair the right hip. SR 2,3. Ronald Kong, M.D., who was treating her right hip, also indicated that her other physical problems might prevent her from returning to full duty at her old position. SR 3. On December 30, 2004, Richard W. Kudrewicz, M.D., completed a PPD evaluation of the injured worker and rated the right hip at a 10% PPD, WPI, due to a loss of range of motion and stated that apportionment of any of this rating to the injured worker's other conditions was not indicated. SR 4.

Meanwhile, she also injured her right knee at the time of the fall, but this was not accepted as an industrial injury until December 2004. She was operated on for the right knee on March 22, 2005. On June 12, 2006, Dr. Kudrewicz rated the right knee for a PPD, and concluded that it should be given a 4% WPI, with no apportionment to any of the preexisting conditions. SR 5.

NRS 616B.557(1) requires an applicant to prove the presence of a permanent physical impairment which then combines with the subsequent injury to substantially increase the

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[3] SR is an abbreviation for the Staff Report dated November 21, 2006.

compensation paid the injured worker over what it might have been had there been no preexisting impairment. The phrase or term, "permanent physical impairment" is, however, a defined term. Its meaning is set forth in NRS 616B.557(3). A permanent physical impairment is an impairment that supports a rating of a permanent impairment of 6% or more, WPI, according to the *Guides to the Evaluation of Permanent Impairment*, as adopted by the Administrator of the Division of Industrial Relations (Administrator). *See*, NRS 616B.557(3).

The applicant must show, therefore, a substantial increase in compensation paid the injured worker, by reason of the combined effects of not just any preexisting physical impairment. Rather, the applicant must prove a permanent physical impairment with at least a 6% impairment rating, WPI, combined with the subsequent injury to substantially increase the compensation paid the injured worker. Moreover, since NRS 616B.557(1) used the word **the** in reference to the impairment, the applicant must be able to show that at least one impairment, on its own, reached the 6% impairment level which then combined with the subsequent injury to substantially increase the compensation paid.

It is equally clear, then, that since the modifier to permanent physical impairment was the word "the," a series of smaller percentage impairments cannot be aggregated to reach the 6% impairment level. Had the legislature intended otherwise, for example, it could have used the expression, the permanent physical impairments or any combination of impairments equaling at least 6%. Since the Legislature did not use such language, however, the Board looks to the applicant for proof that at least one permanent impairment of 6% or more, combined with the subsequent injury, to substantially increase the compensation paid the injured worker before eligibility could be established.

The problem this case presented for the Board was that it had to sort through the injured worker's myriad of preexisting ailments to determine if any reached or exceeded the 6% plateau and if so, then, which combined with the subsequent injuries to the right knee, right hip or both, to substantially increase the compensation paid. The Board determined that the applicant ultimately failed in this burden. The various ailments either did not reach a 6% rating, could not be combined to reach a 6% rating, or if the ailment(s) was/were rated at 6% or more, there was

no proof of combined effects with the subsequent condition to substantially increase the compensation paid the injured worker. The Board affirmed the Administrator's recommendation to deny the application for failing to satisfy the eligibility criterion of NRS 616B.557(1) and (3).

FINDINGS OF FACT

1. This case was first heard by the Board on December 20, 2006, when the Board issued its tentative ruling upholding the recommendation of the Administrator to reject the application for reimbursement because the applicant failed to satisfy the requirements of NRS 616B.557 (1) and (3).

2. Nevada System of Higher Education is the applicant and self-insured employer in this matter. 1 SR., 1. In a letter dated January 2, 2007, transmitted by mail on January 4, 2007, 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. 1 Tr[4]. 5; 20-23, Ex. 4.

3. In a letter dated January 25, 2007, addressed to the Board for Administration of the Subsequent Injury Account for Self-Insured Employers, in care of Charles R. Zeh, Esq., the applicant gave notice of its appeal of the tentative ruling of the Board. 1 Tr. 6; 10-18.

4. The applicant's notice of appeal of the tentative ruling 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.

5. On March 1, 2007, the Board conducted a *de novo* hearing, which was continued so that the Board could engage an orthopedic physician to review the file and give the Board a third opinion about the combined effects issue between the preexisting left hip and the current right hip and right knee industrial injuries. 1 Tr., p. 39, 21-25, 40; 1-5.

6. Bruce Acaiturri, Diversified Management Group, appeared on behalf of the applicant at the March 1, 2007, hearing , personally, 1 Tr., 2; 9, and the August 23, 2007, hearing, telephonically, 2 TR., 2;15, for the applicant.

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[4]"1Tr." refers to the transcript of the proceedings before the Board on March 1, 2007 and "2Tr." refers to the transcript of the hearing conducted on August 23, 2007.

7. John Wiles, Esq., legal counsel to the Administrator of the Division of Industrial Relations (DIR), was present for the August 23, 2007, hearing. 2 Tr. 2.

8. Jacque Everhart, the DIR Administrator's (hereinafter, Administrator) liaison to the Board, appeared at the March 1, 2007 and August 23, 2007 hearings. 1 Tr. 2; 8, 2 Tr. 2;3.

9. Bruce MacKay, Chairperson, RJ LaPuz and Tina Sanchez, participated in the hearing of this matter on March 1, 2007. 1 Tr., 2.

10. RJ Lapuz, Acting Chairperson at the time, Tina Sanchez, Linda Keenan and Donna Dynek (telephonically) were present at the hearing of this matter on August 23, 2007. 2 Tr., 2. Donna Dynek did not participate in the hearing and decision of this matter because she was not present for the hearing on March 1, 2007. 2 Tr., 56;13. Though Linda Keenan was not present for the hearing on March 1, 2007, she read the transcript and all of the materials offered into evidence for the hearing on that date, and therefore, was able to participate in the hearing on August 23, 2007, and in the decision of the case.

11. The following exhibits were admitted into evidence without objection:

Exhibit 1 — Letter from the from the Board's legal counsel, dated January 2, 2007, to the applicant advising of the Board's tentative decision to reject the applicant's request for reimbursement. 1 Tr., 6; 7-9.

Exhibit 2 — Letter from Bruce Acaturri, dated January 25, 2007, to the Board's legal counsel, giving notice of appeal of the Board's tentative decision rejecting the claim for reimbursement. 1Tr., 6; 10-18.

Exhibit 3 — DIR staff report dated November 21, 2006, with exhibits A through FF attached plus the explanation of disallowance dated November 21, 2006. 1 Tr., 6; 19-25, 7; 1-2.

Exhibit 4 — Insurer's Evidence Packet, with attachments as follows: SIF Board Determination; Insurer's Appeal Letter; Evidence Documents, Dr. Soong Subsequent Injury Fund Analysis, Insurer Application for Reimbursement, DIR Recommendation for Denial, Dr. Soong Addendum and Dr. Kudrewicz SIF Medical Analysis, marked 1 through 32. 1Tr. 7; 3-13.

Exhibit 5 — Letter of June 12, 2007, from Dr. Greenwald. 2 Tr., 55; 20-23.

12. The injured worker, a female who was 74 years old at the time of the subsequent injury, 1 SR 6, was hired by the Community College of Southern Nevada on November 26, 2001. Her employment was that of school custodian. 1 SR., 2.

13. Before she was hired, on February 19, 1999, while working as a porter at the Texas Station Casino, she fell when trying to avoid a group of people and tripped over a slot bucket. She landed on her left side and fractured her left hip. 1 SR 2, Exhibit A to 1 SR.

14. On the same day of the trip and fall, she was evaluated by Steven Thomas, M. D., who noted that the x-rays revealed an osteoponic bone left hip, see 1 SR, Exhibit B, and on February 10, 1999, she underwent open reduction and internal fixation of the left femoral neck fracture. *See,* 1 SR, Exhibit C. 1 SR 2.

15. On August 2, 1999, she was declared medically stable. In September 1999, she was written a prescription for a shoe lift due to left hip and right ankle pain. Despite the pain, she continued to work, full duty, as she attended physical therapy. 1 SR 2.

16. By April 24, 2000, she was deemed stable and ratable. In July 2000, she was still having pain in both hips. A cortcosteriod injection for the trochanteric bursitis was recommended and administered. 1 SR 2.

17. On June 24, 2000, Dr. Mackey rated the left hip. He gave the injured worker a 15% PPD for gait derangement under the Fourth Edition of the *Guides*. 1 SR 2, Exhibit H to 1 SR. The rating was not apportioned by reason of any preexisting conditions. *Ibid.*

18. While employed by the Community College of Southern Nevada, on June 2, 2004, the injured worker rose from her chair when the phone rang. She tripped and fell when she caught her leg in the chair. 1 SR 2, Exhibit K to 1 SR.

19. She was then cleared for surgery due to this injury, and accordingly, underwent an internal fixation of the right hip. *See,* Exhibit L to 1 SR, 1 SR 2. On June 8, 2004, she was transferred to rehabilitation. 1 SR 2.

20. On July 2, 2004, a chest x-ray showed osteopenia in the lumbar spine. *See,* Exhibit L to 1 SR, 1 SR 2, 3.

21. On August 19, 2004, Ronald Kong, M.D., reported the injured worker was doing well and released her to a sedentary, modified duty job. 1 SR 3, Exhibit N to 1 SR.

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22. On September 13, 2004, complaints about her right knee were noted, there were no complaints about the right hip, and the injured worker was released by Dr. Kong to modified duty. 1 SR 3, Exhibit P to 1 SR.

23. By October 11, 2004, the injured worker was continuing therapy on her right knee and Dr. Kong indicated, the injured worker continued her complaints of the right knee and complained of pain in the left hip. 1 SR 3. She was to continue therapy of the right knee, and Dr. Kong released her to work with restrictions. Exhibit T to 1SR.

24. On November 9, 2004, Dr. Kong released the injured worker to full duty with respect to her right hip, but Dr. Kong noted that she had other non-industrial conditions that might prevent her from returning to full duty. She was, however, at this time independent with mobility and was working eight hours per day. 1 SR 3, Exhibit U to 1SR. Dr. Kong released her from his care on this date, though he referred her back to James Dettling, M.D., to allay the injured worker's concern about her right knee. Exhibit U, to 1 SR, p. 2.

25. The injured worker was, therefore, returned to work, full duty, with respect to her right hip, five months after the date of injury of July 2, 2004. 2 Tr., 58; 13-17.

26. On December 29, 2004, the right knee was finally accepted as an industrial injury arising out of the fall on July 2, 2004. 2 Tr., 58; 18-20.

27. The injured worker then had surgery on the right knee on March 22, 2004. 2 Tr., 58; 22. She was released to work, modified duty, on April 4, 2005, or six weeks from the surgery on the right knee. 2 Tr., 58; 23-25.

28. The applicant states in attempting to minimize this recovery time:

> But one must remember that her full duty release was to a modified position, that she was working in a modified custodial position which the employer had developed for the claimant after her preexisting hip injury [the left hip fracture, non-industrial to this employer]. So this job was modified to accommodate her limitations.

29. The applicant, therefore, admits through its representative at the hearing, that the injured worker was able to return to the same job she had under the conditions by which she was employed prior to the fall that resulted in injury to the right knee and hip on July 2, 2004.

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30. By the time the right knee was first accepted in December 2004, and the injured worker, therefore, had surgery, it was only a total of four months that she had treatment from the time of the MRI of December 10, 2004, Exhibit X to 1 SR, p. 1, until the date of release, April 4, 2005, Exhibit Z to 1 SR, p.1, and it was only six weeks from the date of surgery to the date of release. 2 Tr., 1-5.

31. For the right knee, the surgery was performed by Dr. Dettling on March 22, 2005. Exhibit Y to 1 SR p. 1.

32. Thereafter, she was seen by Dr. Dettling on April 4, 2005, when Dr. Dettling stated:

> The patient is released to modified duties–temporary in nature–including no prolonged standing, no prolonged walking, no climbing ladders, no kneeling or stooping and to do sedentary activities only. Exhibit Z to 1 SR p. 1.

33. The injured worker presented again on May 23, 2005, to Dr. Dettling and he stated at this time: "Patient wishes to discuss her ability to return to her previous job as a custodian. She has strong reservations at this time regarding her ability to safely return."

34. Dr. Dettling also stated, however:

> Formal physical therapy [of the right knee] will be discontinued. ... The patient is released to modified duty–temporary in nature–to include no prolonged standing or walking. No climbing ladders. The patient will return to my clinic after having the Functional Capacity Evaluation.

35. On May 24, 2005, Dr. Dettling observed that the FCE would be cancelled because he was informed that the injured worker had retired. He found that as of this date, she was:

> "...maximally medically improved at this time." In addition, in lieu of her retirement, he placed her on permanent restrictions, of no prolonged walking or standing and no climbing of ladders. He said, finally, she **may** have suffered an impairment. Exhibit BB to 1SR, p. 1.

36. On June 12, 2006, the injured worker presented to Richard W. Kudrewicz, M.D., for a disability rating evaluation in his office for the right knee. Exhibit CC to 1 SR, p. 4. He noted at that time that the injured worker was on no pain pills or medication for the knee injury itself. She was not receiving physical therapy and she was not working. *Ibid.*

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37. Dr. Kudrewicz also noted that the patient has no history of previous problems with either the right or left knees. *Ibid.*

38. Furthermore, he noted she had a history of heart disease and was positive for diabetes in 1999. *Ibid.*

39. In rendering his opinion on the right knee, specifically, Dr. Kudrewicz observed that there was no qualifier for limb length discrepancy and that gait derangement did not apply. *Ibid.*

40. He also concluded that the injured worker had no impairment for flexion loss but had a 4% impairment whole man for loss of extension. He also found extensive degenerative disease in her right knee but he considered that preexisting. Exhibit CC to 1SR at pp. 5,6.

41. For an injured worker who was now a 76 year old female, he therefore concluded she had a 4% PPD, whole person, for the right knee for loss of range of motion, with claim closure recommended. In addition, apportionment did not apply to this disability or the right knee component of the subsequent injury because she apparently did not have " ... any significant loss of range of motion documented in her right knee before this accident and I will therefore not apportion her present losses." Exhibit CC to 1SR at p. 6.

42. The injured worker had also previously presented to Dr. Kudrewicz on December 30, 2004, for a disability rating of her right hip following the industrially related fracture of the right hip on July 2, 2004, and resultant surgery. Exhibit W to 1SR at p. 3. At that time, he noted that the injured worker had been seen on July 29, 2004, by Dr. Kong whose impression was "... fractured right hip, industrial, spinal stenosis, nonindustrial, left hip fracture, nonindustrial." *Ibid.* Dr. Kudrewicz was aware at the time he conducted his disability rating examination that the injured worker had previously fractured her left hip, unrelated to the present industrial injury. *Ibid.*

43. With respect to the left hip, he understood, further that there was no injury to the right leg or pelvis at the time the left hip was fractured and that the injured worker was left with no right leg residuals at that time. *Ibid.*

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44. Dr. Kudrewicz also knew when rendering his PPD rating that on November 9, 2004, Dr. Kong had released the injured worker back to full duty based upon the right hip fracture, but that she had other, non-industrial medical conditions that might prevent her from returning to work full duty. Exhibit W to 1SR at p. 2.

45. Dr. Kudrewicz, when giving his rating, stated that:

> At the present time there is no qualifier for limb length discrepancy referable to the right leg. The left leg is 3/4 inch shorter from previous surgery. There was no shortening of the right leg. Gait derangement does not apply in this particular case. The patient does have an abnormal gait, but does not have any documented arthritic change. Exhibit W to 1SR at p. 5.

46. Dr. Kudrewicz then rated the right hip at a 10% whole person impairment as he was able, he said, to "...establish what appears to be a legitimate 10% impairment whole man referable to losses of range of motion and I will use that [ROM] as my qualifier. **Apportionment is not indicated.**" *Ibid.* (Emphasis added.)

47. For the left hip, the injured worker had been given a 15% whole person rating for her PPD due to gait derangement. Exhibit DD to 1 SR at p. 5.

48. Colin Soong, M.D., conducted a file review for purposes of the application for reimbursement from the Subsequent Injury Account. *See,* Exhibit DD to 1 SR., p. 5 (file review).

49. According to Dr. Soong, the injured worker suffered from the following pertinent, preexisting conditions: a. 15% PPD, for the left hip; b. non-insulin dependent diabetes mellitus, 5% whole person; c. Neurologic impairment tibialis posterior as part of the sciatic nerve, 1% perhaps for motor deficit; and, d. right S-1 radiculopathy for 1 % motor deficit. *Ibid.*

50. He also noted osteopenic bone but it was not rated and not, thus, assigned a PPD.

51. Nevertheless, Dr. Soong said for apportionment purposes with reference to the osteopenia:

> Absent a precise percentage for apportionment, apportionment would require that the rater determine that at least 50% of the impairment was attributable to the non industrial (sic) condition. The file review does not support such a determination although it is very reasonable that preexisting osteonpenia contributed significantly to susceptibility of the hip to fracture and together with the trauma of a fall combine to increase the tendancy (sic) to fracture and therefore disability due to the injury. *Ibid.*

52. Commenting upon the length of time it would take to recover from surgery due to the lower extremity injury, Dr. Soong stated: "Under normal circumstances, in an individual with **no other preexisting conditions related to function of the lower extremities surgical recovery would be expected in four to six months**." Exhibit DD to 1 SR at p. 6 (Emphasis added)

53. To justify his recommendation that the right hip qualified for reimbursement from the Subsequent Injury Account, Dr. Soong, thus, opined:

> The combined effects of the preexisting medical condition described above [*i.e.*, the conditions listed above as identified by Dr. Soong] significantly affected disability from the 6/2/04 injury in terms of recovery and return of lower extremity function, *i.e.,* standing, climbing, ambulation, squatting, kneeling, bending, lifting, crawling (necessary for ADL's and work). In addition, preexisting osteopenia, a metabolic bone disease, as noted by the treating physician in the 1999 hip fracture (some fractures due to osteopenia are 'spontaneous'). **It is reasonable to attribute at least 50% of the combined effects to preexisting conditions**. Ibid.

54. Dr. Soong, therefore, aggregated the preexisting conditions to find that the combined effects substantially increased the compensation paid to the injured worker. He also did not differentiate between or among the different preexisting conditions so that the Board could determine which of the enumerated preexisting conditions, in and of themselves, would have combined with the subsequent injury or injuries to substantially increase the compensation paid the injured worker. In that regard, osteopenia, a condition that was not rated, was expressly included in the bundle of conditions that substantially contributed according to Dr. Soong to the preexisting condition. Moreover, Dr. Soong concluded that it was reasonable to conclude that osteopenia would be a significant contributor. Exhibit DD to 1SR, p. 5.

55. Dr. Kudrewicz was also asked to get involved a third time with this claim by giving a subsequent injury account analysis. *See*, pp. 28-32 of Exhibit 4, submitted by the applicant.

56. In his subsequent injury analysis, he states that the claim is eligible for subsequent injury account analysis because of the preexisting 15% injury to the left hip. *Id.* at p. 31.

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57. He defines, also, the preexisting pathology as, "... the left hip fracture with left leg shortening, as well as peripheral neropathy with sensory and motor changes as well as spinal stenosis lubosacral spine." *Ibid.*

58. He states that he would "...suspect that in a 75-year-old a fall onto her right side would probably result in a right hip fracture regardless of preexisting conditions in the opposite extremity." *Ibid.*

59. Dr. Kudrewicz acknowledges that he could not "...substantiate that the preexisting pathology actually caused ... [the injured worker] to sustain her subsequent injury and right hip fracture...." *Id.* at p. 32.

60. Dr. Kudrewicz then stated:

> I can certainly state that her post-fracture rehabilitation was prolonged and more complicated by virtue of the fact that she had abnormal gait in her left lower extremity with left lower extremity limb length shortening and loss of range of motion left hip as well as sensory and motor changes in her lower extremities, both from peripheral neuropathy and from her lumbar spine spinal stenosis. In addition her abnormal gait certainly increased her risk for difficulties to arise with her right knee in terms of meniscal tear and degenerative disease. *Ibid.*

61. His bottom line conclusion, however, was as follows:

> I would suggest that the majority of responsibility in this claim is due to the 06/02/04 accident but I would have to believe that **all** these **preexisting areas of pathology** significantly impacted her post right hip fracture rehabilitation and prolonged her overall case and increased her expenses. I would suggest that approximately two-thirds of the cost of diagnosis and treatment for the 06/02/04 accident refers to that accident and one-third relates to complications and increased time and expense relating to preexisting pathology [a term Dr. Kudrewicz defined in his report]. *Ibid.* (Emphasis added.).

62. Dr. Kudrewicz, therefore, also did not differentiate amongst the bundle of impairments of conditions included in the preexisting pathologies as defined by him, in order for the Board to determine which, amongst the conditions included within the meaning of preexisting impairments, combined with the subsequent injury to substantially increase the cost of the compensation paid the injured worker. Moreover, all but the left hip, are conditions that did not attain a 6% or more PPD rating under the *Guides*. Furthermore, his opinion is only in the form of a "suggestion." It is unclear whether he is aggregating the entirety of the conditions to get to the point where they might substantially effect the compensation paid due to the

subsequent injury, and finally, he only states that the injury to the left hip was contributory to the right hip rehabilitation. He did not find that the left hip injury combined with the subsequent injuries to substantially increase the cost of treatment and care.

63. Dr. Soong was then afforded by the applicant the opportunity to review the Administrator's recommendation in the Staff Report of November 21, 2006, in order to bolster his opinion. His response was, however, primarily to quote from his original report. *See,* Applicant's Exhibit 4, p. 26.

64. Since, according to Dr. Soong, the kind of subsequent injuries with surgery, as here, suffered by the injured worker, would normally take from four to six months for recovery, the right hip and right knee, therefore, required only a normal amount of time for recovery.

65. The applicant also admits that all the preexisting pathologies impacted the subsequent injuries: "She [the injured worker] had Type 2 diabetes and lumbar spinal stenosis and the doctor's saying all these things contributed to her length of treatment and care. And all these preexisting conditions effected the subsequent injury. They all say that." 2 Tr., 69;19-23.

66. The applicant's representative, therefore, also aggregates preexisting pathologies, claims that all contributed to the cost of treatment and care, and does not attempt to differentiate and identify whether one or if more than one, which conditions specifically combined with subsequent injury to substantially increase the compensation paid.

67. Furthermore, none of these conditions identified by the applicant's representative were assigned a rating of 6% or more, whole person, under the *Guides*.

68. The applicant failed to show that any one condition or preexisting pathology, with an impairment rating of 6% or more, according to the *Guides*, combined with the subsequent injuries to substantially increase the compensation paid the injured worker due to her subsequent injuries.

69. To the extent that any of the following Conclusions of Law also constitute findings of fact, they are incorporated herein.

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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. Nevada System of Higher Education 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 hear this case and render its decision. NRS 616B.551.

4. The burden of proof lies with the applicant to show 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).

5. NRS 616B.557 (1) and (3), quoted in the margin, *supra*, footnotes 1 and 2, are the statutes implicated by this appeal. The case is, moreover, a matter of statutory interpretation.

6. It is also well settled that when interpreting a statute, where the legislature's intent is clear, "... that is the end of the matter; for the court as well as the agency [or in this case, the Board] must give effect to the unambiguously expressed intent of Congress [or the legislature]." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U. S. 837, 843-844 (1984). Nevada is in accord.

7. Applying this principle to NRS 616B.557 (1) and (3), the two statutes at issue in this case, the Board will continue to require applicants, as here, to prove by a preponderance of the evidence the presence of at least one preexisting permanent physical impairment, with a rating of 6% or more, whole person, which then combines with the subsequent industrial injury so that compensation paid the injured worker for the subsequent industrial injury is substantially greater by reason of the combined effects of the preexisting impairment and the subsequent injury than it would have been had there been no preexisting permanent physical impairment. The aggregation of preexisting pathologies or permanent physical impairments that are, themselves, rated at less than 6% whole person, to reach the threshold requirement of 6% or more is not permitted under NRS 616B.557 (1). Had the Nevada Legislature intended otherwise, the Legislature would not have used in NRS 616B.557 (1) the term **the** to modify the phrase

preexisting impairment or the term impairment would have been written in the plural rather than the singular. Alternatively, the Legislature could have expressly stated in NRS 616B.557 (1) that it was permissible to prove **a** preexisting impairment or **any combination of preexisting impairments** to be eligible for relief under the statute. The Legislature did not opt for that route. Since the Legislature did not choose such options that were obviously available to it, the Board is left with no other conclusion than that the Legislature meant what it said, when it required the applicant to prove the existence of at least one permanent physical impairment, rated at 6% or more, which then combined with the subsequent injury to substantially increase the compensation paid the injured worker.

8. Thus, it is also insufficient to simply prove that the injured worker suffered from a preexisting impairment of 6% or more because NRS 616B.557 (1) additionally requires the applicant to prove that this preexisting impairment, with a rating of 6% or more whole person, then combined with the subsequent injury to substantially increase the compensation paid the injured worker.

9. Therefore, even if the preexisting condition, rated 6% PPD, whole person combined with the subsequent injury, such proof, in and of itself, would still be insufficient because there must also be a showing the results of the "combined effect" **substantially increased** the compensation paid above and beyond what would have been the compensation had there been only the subsequent injury alone.

10. The applicant, therefore, has failed in its burden in this case. With the exception of the injury to the left hip, none of the other preexisting pathologies carried with them ratings of greater than 6%, whole person. Since they also cannot be aggregated to reach this thresh hold level, none of these other preexisting impairments can be used as a preexisting permanent physical impairment.

11. The osteopenia, a condition which applicant claims substantially could have contributed to the subsequent injury, was, itself never rated and, therefore, cannot be used as a preexisting permanent physical impairment.

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12. The applicant, moreover, bundles together through its experts all of these conditions, including the osteopenia and the left hip condition, in an attempt to satisfy the combined effects rule and show that the compensation paid was substantially greater. The Board cannot tell, because the applicant did not differentiate in the proof, which, amongst the bundle of preexisting pathologies, substantially impacted, by itself, the amount of compensation paid. It could, therefore, have been the osteopenia that substantially contributed. This would fail for the applicant since the osteopenia was not a rated condition.

13. As for the left hip condition, which was rated at 15%, whole person and, therefore, was in excess of the 6% threshold, it fails, also, because of a lack of proof that the condition combined with the subsequent injuries to substantially increase the compensation paid. Dr. Soong only lumps or bundles the left hip with the other preexisting pathologies. Dr. Kudrewicz only "suggests" that the left hip was "contributory" to the right hip's rehabilitation difficulties. Dr. Kudrewicz did not state it combined with the subsequent injury to substantially increase the cost of compensation paid. The only quantifier he offered, moreover, was that all of the preexisting pathologies, combined, increased by a third, the cost of treatment and care. Here, too, it is impossible to discern whether the left hip combined with the right hip so that the combined effects of the two conditions substantially increased the compensation paid.

14. Furthermore, Dr. Soong stated that ordinarily, a 4 to 6 month recuperation period could be expected if there was nothing abnormal about these subsequent injuries to the right hip and right knee. Importantly, the applicant's own proof showed that the recuperation period for both of these conditions was six months or less. Consequently, the Board has before it, in addition to the vagaries of the proof supplied on the combined effects rule, proof from the applicant's medical witness that the recovery times for both the right hip and the right knee were within normal limits, thereby undercutting the claim there was a substantial increase in costs.

15. The letter of E. James Greenwald, M.D., does not alter these conclusions. He primarily stated that he agreed with the tact taken by Dr. Kudrewicz. He did not refine Dr. Kudrewicz' analysis. Furthermore, he stated, "... he was not sure the meniscal tear was caused by an abnormality in gait." Exhibit 5, p. 2.

16. Dr. Greenwald also said that when Dr. Kudrewicz suggested, the preexisting pathologies were increasing the cost of the treatment and care, this was completely logical. However, Dr. Greenwald did not quantify by stating that the combined effects substantially increased the cost of treatment. Furthermore, like Drs. Kudrewicz and Soong, Dr. Greenwald did not identify which pathology, amongst the preexisting pathologies, increased the cost of rehabilitation and, therefore, Dr. Greenwald may have relied upon either the osteopenia to make his observation or an aggregation of the preexisting conditions which did not rate at 6% or more, to reach his conclusion. Dr. Greenwald's observations are also insufficient for subsequent injury account analysis under NRS 616B.557.

17. The applicant has, therefore, failed in its burden of proof under NRS 616B.557(1) and (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 (1) and (3) were satisfied. Therefore, the application for reimbursement from the Account is hereby denied upon a motion by Linda Keenan, seconded by Tina Sanchez, made pursuant to NRS 616B.557 (1) and (3) to deny the claim. Upon a vote of three members in favor of the motion, with no members opposing the motion, and one (1) abstention (Dynek) and a quorum being present to vote upon the motion, the motion was duly adopted. 2 Tr., 71; 17-25, 72; 1-10.

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

Dated this 18th day of December, 2008.

Victoria L 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, Mr. Jon L. Hansen, Risk Manager Nevada System of Higher Education 2601 Enterprise Road Reno, NV 89512 Ms. Reggie Sommers Frank Gates Service Company 1771 East Flamingo Road #218A Las Vegas NV 89119 Mr Bruce Acaiturri Diversified Management Group Post Office Box 18599 Reno, NV 89511 James A. McCarty, Esq. Beckett, Yott & McCarty, Chtd. 6130 Plumas Street, Suite 200 Reno, NV 89519 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

Zeh & Sograd
575 Forest Sureet, Suite 200
Reno, Nevada 89509
Tel.: (775) 323-5700 FAX: (775) 786-8183

THE BOARD FOR ADMINISTRATION OF THE SUBSEQUENT INJURY ACCOUNT FOR SELF-INSURED EMPLOYERS

In re: Subsequent Injury Request for Reimbursement

Claim No.	20040010034499
Date of Injury:	June 2, 2004
Insurer:	Nevada System of Higher Education
Employer:	Community College of Southern Nevada
Third-Party Administrator:	Frank Gates Service
Submitted By:	Diversified Management /

AFFIDAVIT OF SERVICE

State of Nevada)
: ss.
County of Washoe)

Karen Weisbrot, under penalty of perjury, hereby affirms that the following assertions are true:

That affiant is, and was when the therein described mailing took place, a citizen of the United States, over 21 years of age, not a party to, nor interested in, the within action; that on the 5th day of January, 2009, affiant deposited in the United States Mail, *via* certified mail, in Reno, Nevada, a copy of the *Findings of Fact, Conclusions of Law and Determination of the Board*, enclosed in a sealed envelope upon which first class postage, certified fee and return receipt fee were fully prepaid, addressed to:

Ms. Reggie Sommers
Frank Gates Service Company
1489 W Warm Springs Rd., Suite 110
Henderson, NV 89104-7367

DATED 5th day of January, 2009.

Karen Weisbrot
Karen Weisbrot

SUBSCRIBED and SWORN to before me this 5th day of January, 2009.

Jo Ann C. Baumer
NOTARY PUBLIC

JO ANN C. BAUMER
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 99-57110-2 - Expires July 26, 2011

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 *Affidavit of Service* 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, Mr. Jon L. Hansen, Risk Manager Nevada System of Higher Education 2601 Enterprise Road Reno, NV 89512 Ms. Reggie Sommers Frank Gates Service Company 1489 W Warm Springs Rd., Suite 110 Henderson, NV 89104-7367 Mr Bruce Acaiturri Diversified Management Group Post Office Box 18599 Reno, NV 89511 James A. McCarty, Esq. Beckett, Yott & McCarty, Chtd. 6130 Plumas Street, Suite 200 Reno, NV 89519 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 5th day of January, 2009.

Karen Weisbrot

Karen Weisbrot