

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

4                                   \* \* \* \* \*

5   In re: Subsequent Injury Request for Reimbursement

6   Claim No.:                   20040012  
7   Date of Injury:            March 16, 2004  
8   Insurer:                   Las Vegas Paving Corporation  
9   Employer:                  Las Vegas Paving Corporation  
10   Third-Party Administrator: A&M Claims Services, LLC  
11   Submitted By:             Wolfenzon Schulman & Ryan

12                               **FINDINGS OF FACT, CONCLUSIONS OF LAW**  
13                               **AND DETERMINATION OF THE BOARD**

14           The injured worker was hired as a truck driver by Las Vegas Paving on April 4, 2000.  
15   On March 16, 2004, while getting into his truck, his hand slipped off the handle. He was struck  
16   by the door and he fell to the ground. He suffered from a laceration to the scalp and fractured his  
17   right calcaneus (heel). He never returned to work after this injury. The employer also did not  
18   produce any information that it was aware of the injured worker's preexisting conditions at the  
19   time of hire, and did not produce any documentation showing knowledge of the preexisting  
20   conditions contemporaneous with the injured worker's employment. During the course of the  
21   hearing, the employer all but stipulated to the lack of evidence to support the "retention"  
22   requirement and proof of knowledge of the preexisting condition by written records requirement  
23   of NRS 616B.557(4). *See*, NRS 616B.557(4), quoted in the margin<sup>1</sup>. The employer satisfied the  
24   remaining requirements of NRS 616B.557, but the Board voted to deny the claim because the  
25   employer failed to satisfy the requirements of NRS 616B.557 (4). The application was  
26   accordingly denied after a *de novo* hearing conducted pursuant to NRS 233B.101, *et. seq.*, the  
27   Nevada Administrative Procedures Act. The Board's Findings of Fact, Conclusions of Law and  
28   Decision follow.

<sup>1</sup>4. To qualify under this section for reimbursement from the Subsequent Injury Account for Self-Insured Employers, the self-insured employer must establish by written records that the self-insured employer had 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).

## FINDINGS OF FACT

1. This matter came on for hearing before the Board on Thursday, October 18, 2007.

2. The Board members present to hear the matter were Chairperson Victoria Robinson, Vice-Chairperson, RJ LaPuz, and members Linda Keenan and Tina Sanchez, who attended the meeting in person. Also attending the meeting by telephone conference call was member Donna Dynek.

3. Jacque Everhart, the Administrator's Board liaison, appeared in person to present the Administrator's recommendation of denial based upon NRS 616B.557(4) to the Board.

4. The employer is Las Vegas Paving Corporation, the third-party administrator is A&M Claims Services, LLC, and this matter was submitted by the law firm of Wolfenzon, Schulman & Ryan.

5. The employer was represented before the Board by Marla Frederick, Wolfenzon, Schulman & Ryan.

6. Notice of the Board's adverse decision, accepting the Administrator's recommendation of denial pursuant to NRS 616B.557(4), was given to the applicant in a letter dated August 4, 2007, from Board legal counsel.

7. The applicant, through legal counsel, Marla Frederick, gave notice of its request for a contested hearing in a letter dated August 31, 2007, addressed to the Board's legal counsel.

8. At the commencement of the hearing, the following exhibits were admitted into evidence without objection, *see*, Tr., 42; 8,<sup>2</sup> of either party:

- \* Exhibit 1, the letter dated August 4, 2007, from Board legal counsel
- \* Exhibit 2, the letter dated August 31, 2007, from Ms. Frederick, to the Board's legal counsel.
- \* Exhibit 3, the Staff Report, dated July 10, 2007, with exhibits attached consisting of Exhibits A through Q, plus the attached statement of disallowance.

9. The injured worker was first employed by Las Vegas Paving on April 4, 2000. Staff Report (Staff Report dated July 10, 2007, hereinafter "SR") 2.

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<sup>2</sup>Tr. stands for the Transcript of the hearing, which is followed by the page number and line.

1           10.     While in the employ of Las Vegas Paving, the injured worker suffered his  
2 subsequent industrial injury on March 16, 2004, when he slipped, fell to the ground, lacerated his  
3 forehead, and broke his right calcaneus (heel). SR 2.

4           11.     The Administrator recommended denial pursuant to NRS 616B.557(4). SR 1.  
5 Specifically, the Administrator concluded that the employer, in its application, did not indicate  
6 when and how the employer became aware of the injured worker's preexisting permanent  
7 physical impairments, SR 5, venostasis and chronic heart failure (CHF). SR 4.

8           12.     The file did not contain any medical reports with a July 14, 2004, date of service  
9 or receipt of service. SR 5. The employer did not know of the preexisting conditions at the time  
10 of hire. *Ibid.* The employer could not show by written records, it knew of these preexisting  
11 impairments prior to the subsequent industrial injury.

12           13.     There was also no indication in the file that the employer retained the injured  
13 worker following the subsequent industrial injury. He collected compensation from the date of  
14 the injury until October 2004, at which time, he began collecting rehabilitation maintenance  
15 payments until he elected a lump sum buy out. *Ibid.* Given the date of termination, of either  
16 December 14, 2004 or December 16, 2004, the employer inexplicably states at one point, the  
17 date of retention for the injured worker was December 16, 2004, Exhibit Q to the Staff Report, or  
18 that the employer became aware of the preexisting conditions on July 14, 2004. Exhibit P to the  
19 Staff Report. The December 16<sup>th</sup> date is problematic for the applicant's claim of retention with  
20 knowledge of the preexisting condition, and the Staff Report and exhibits attached do not show  
21 by written record that the applicant had knowledge of the preexisting physical impairments as of  
22 July 14, 2004.

23           14.     Furthermore, given the injury to the right ankle which immobilized the right foot  
24 for driving purposes, Staff Report, Exhibit N, the record discloses that the injured worker never  
25 returned to work following the date of the subsequent injury. *Ibid.*, *see also* SR 5.

26           15.     The injured worker was terminated on December 14, 2004, *ibid* , or December  
27 16, 2004. *See*, Staff Report, Exhibit P.

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16. There is no evidence by written record that the employer had knowledge of the pre-existing condition at the time of hire or subsequently, after which the injured worker was retained in the applicant's employ. SR 5.

17. Member Tina Sanchez stated that the injured worker never returned to work following the subsequent injury and that this is consistent with the Temporary Total Disability (TTD) benefits that were paid and the vocational rehabilitation that was paid. Tr., 44; 17-19.

18. Member Sanchez also stated that even though Las Vegas Paving showed a termination date of December 16, 2004, the vocational rehabilitation record shows that the injured worker started participating in vocational rehabilitation as early as July 2004 and as a result, "I don't think there is any question here [that] there was no retention from the date of injury." *Ibid.*, 21-25.

19. After the completion of the Administrator's presentation, the applicant's legal counsel made a statement which amounted to a concession that the applicant did not have the evidence to support a claim for reimbursement as follows:

Honestly we believe that today we would have more information for you on the issues arising under 616B.557(4) and unfortunately we couldn't get further detail on that. While I don't have authority from my client to withdraw this appeal, I can tell you that we have nothing above and beyond what the board (sic) has already heard and any anything outside of what the DIR has already disclosed. Tr., 43; 19-25.

20. To the extent that any of the following conclusions of law constitute findings of fact or mixed findings of fact and conclusions of law, they are incorporated herein as additional findings of fact of the Board.

## CONCLUSIONS OF LAW

1. To the extent any of the preceding paragraphs constitute conclusions of law, they are incorporated herein.

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

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

4. The burden of proof lies with the applicant to show that each element of the eligibility criterion of NRS 616B.557 has been satisfied by a preponderance of the evidence. *See, United Exposition Service v. State Industrial Insurance System*, 109 Nev. 421, 424, 851 P.2d 423 (1993); *McClanahan v. Raley's Inc.*, 117 Nev. 921, 34 P.3d 573, 576, (2001; *cf.*, NRS 616C.150(1)).

5. The Board concludes that by a preponderance of the evidence, the applicant satisfied NRS 616B.557(1) through (3), as the Administrator recommended and as the Staff Report explains.

6. The Board concludes and the applicant essentially concedes that the applicant did not satisfy the retention requirement or the proof by written records requirement of NRS 616B.557(4) set out in the margin, *supra*.

7. Accordingly, the application for reimbursement must be denied. The applicant failed in its burden of showing satisfaction with each of the elements of NRS 616B.557, because the applicant failed to provide proof by a preponderance of the evidence that NRS 616B.557(4) had 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 for reimbursement from the Account is hereby denied upon a motion by member Tina Sanchez, seconded by member Donna Dynek, made pursuant to NRS 616B.557 (4) to deny the claim. With five out of five members participating and eligible to vote on the motion, a quorum was present. The motion was duly adopted. Tr., 45; 3-10. The vote was 5 in favor of the motion, none opposed. *Ibid.* The application for reimbursement is hereby denied.

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1 Further, at the meeting of the Board held on August 20, 2009, upon a motion by Tina  
2 Sanchez, seconded by Donna Dynek, Vice-chairperson RJ LaPuz and Board members Tina  
3 Sanchez and Donna Dynek, voted to adopt this written decision as the decision of the Board.  
4 One Board position remained vacant at the time of this vote. Chairperson Robinson was absent  
5 during the portion of the meeting when this matter was heard.

6 Dated this <sup>14<sup>th</sup></sup> day of October, 2009.

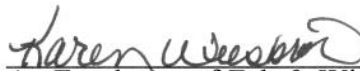
7  
8   
9 RJ LaPuz, Vice-chairperson

1 **CERTIFICATE OF SERVICE**

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

5 6 7 8 9 10 11 √	Placing an original or true copy thereof in a sealed envelope, postage prepaid, placed for collection and mailing in the United States Mail, at Reno, Nevada  Marla Frederick, Esq. Wolfenzon Schulman & Ryan 4530 South Eastern Avenue, Suite 9 Las Vegas, NV 89119  John F. Wiles, Division Counsel Department of Business and Industry Division of Industrial Relations 1301 North Green Valley Parkway, Suite 200 Henderson, NV 89074
12	Personal delivery:
13	
14	Telephonic Facsimile at the following numbers:
15	775.324.2999
16	Federal Express or other overnight delivery
17	Reno-Carson Messenger Service
18	Certified Mail/Return Receipt Requested

19 Dated this 22<sup>nd</sup> day of October, 2009.

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22 An Employee of Zeh & Winograd  
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