

1                                   **THE BOARD FOR ADMINISTRATION OF THE**  
2                                   **SUBSEQUENT INJURY ACCOUNT**  
3                                   **FOR THE ASSOCIATIONS OF**  
4                                   **SELF-INSURED PUBLIC AND PRIVATE EMPLOYERS**

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6                   In re: Subsequent Injury Request for Reimbursement

7                   Claim No.:                   5001-0397-02-0001  
8                   Date of Injury:               8-24-2002  
9                   Association Name:           Nevada Transportation Network  
10                  Association Member:       Blakeley Excavation  
11                  Association Administrator: Pro/Group Management, Inc.  
12                  Third-Party Administrator: Associated Risk Management, Inc.  
13                  Application Submitted by: Pro/Group Management, Inc.  
14                  Attorney for Applicant:   Richard S. Staub

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

18                   This case came on for hearing before the Board for the Administration of the  
19                   Subsequent Injury Account for the Associations of Self-Insured Public and Private  
20                   Employers ("Board") upon appeal by the applicant, Nevada Transportation Network, of  
21                   the recommendation of the Administrator ("Administrator") of the Division of Industrial  
22                   Relations ("DIR") to the Board to deny the applicant's request for reimbursement from the  
23                   Subsequent Injury Account ( the "Account"). The Administrator determined the applicant  
24                   failed to show the pre-existing condition satisfied the 6% permanent physical or mental  
25                   impairment requirement of NRS 616B.578(3). The applicant disagreed and this appeal  
26                   ensued.

27                   The amount of reimbursement sought by the applicant was the sum of \$28,319.46.  
28                   The Administrator verified reimbursement in the amount of \$28,319.46, in the event that  
29                   the Board rejected the Administrator's recommendation and accepted the application for  
30                   reimbursement.

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1       The hearing from which this appeal is taken was conducted before a Court  
2 Reporter on May 4, 2005. The issue before the Board was whether the employer satisfied  
3 the 6% pre-existing permanent physical or mental impairment requirement of NRS  
4 616B.578(3). Ultimately, the question before the Board also implicated NRS  
5 616B.578(1), which requires the Board to reimburse applicants **only for the**  
6 **compensation that is due.**

7       More specifically, the Board had before it the evaluation of Alexander S. Janda,  
8 D.C., a chiropractor and certified disability rater, who examined the injured worker.  
9 Based upon the *AMA Guides*, 4<sup>th</sup> Edition, Dr. Janda rated the entire disability or  
10 impairment for both the pre-existing condition and subsequent injury at 3%. He then  
11 apportioned this determination at 1.5% for the pre-existing condition and 1.5% for the  
12 subsequent injury. Because the rating for the pre-existing permanent physical or mental  
13 condition then did not equal or exceed 6%, whole person impairment (WPI), NRS  
14 616B.578(3) could not be satisfied under the evaluation of Dr. Janda.

15       The subsequent injury happened on August 24, 2002. The pre-existing condition  
16 substantially pre-dated the subsequent injury, was in part, perhaps not industrially related,  
17 and was not rated until the subsequent injury occurred. Dr. Janda evaluated the injury on  
18 February 13, 2003.

19       The Board also had before it, a report from Colin Soong, M.D., offered by the  
20 applicant. Dr. Soong conducted a records review and produced a report dated January 4,  
21 2005. He evaluated the records of the injured worker against the 5<sup>th</sup> Edition of the *AMA*  
22 *Guides*, which were in effect by the time this matter was presented to Dr. Soong for his  
23 review. According to Dr. Soong, the injured worker would rate a 6% to 10% WPI, based  
24 upon the 5<sup>th</sup> Edition of the *Guides*. He stated further that a 6% WPI would attach to the  
25 pre-existing condition to the left knee. He then allocated 90% of the left knee disability  
26 to the pre-existing condition and only 10% of the left knee disability to the subsequent  
27 injury. According to the employer through Dr. Soong, the threshold requirement of NRS  
28 616B.578(3) had been satisfied.

The disability payments paid for which reimbursement was being sought were based upon the determination of Dr. Janda, rendered under the 4<sup>th</sup> Edition of the *AMA Guides*, the Edition in effect at the time of his evaluation and date of he rendered his opinion. Consequently, the Board had to determine which of the opinions given the Board by the Administrator and the applicant should be followed, and to ultimately determine what role, if any, the requirement that the Board pay only that compensation which is due would play in determining the outcome of this appeal. The Board has established precedent of applying the evaluation given the pre-existing condition at the time the subsequent injury is being evaluated for compensation purposes for the subsequent injury, where, as here, the pre-existing condition had not been evaluated independent of the subsequent injury, unless there is some fatal flaw in the report which precedent would indicate the Board should use. The Board has also always been mindful of the requirement to pay only the compensation that was due.

In this case, the compensation paid, and thus the compensation that was due for reimbursement from the Board was based upon the opinion of Dr. Janda using the 4<sup>th</sup> Edition of the *Guides*. The Board, thus, concluded that the applicant had failed to sustain its burden of proving that the 6% requirement of NRS 616B.578(3) had been satisfied. The Board voted to uphold the Administrator's recommendation of denial of the application for reimbursement.

The Board's disposition of the case is set out below in its Findings of Fact, Conclusions of Law and Decision.

## FINDINGS OF FACT

1. This case came on for hearing by the Board before a Court Report on May 4, 2005. Tr. 1.

2. The applicant in this matter is Nevada Transportation Network. The applicant was notified by mail of the Administrator's decision recommending denial of the application on March 21, 2005, SR p.6. The Staff Report (SR) explaining to the Board and applicant the basis for the Administrator's decision and recommendation is

1 dated March 21, 2005. SR p.1; Tr 4.

2 3. In a letter dated March 31, 2005, to the Board's attorney, the applicant gave  
3 notice that it was appealing the Administrator's recommendation of denial of the  
4 application.

5 4. The letter of the applicant giving notice of the appeal arrived at the office of  
6 legal counsel for the Board via facsimile on March 31, 2005. Notice of the appeal was  
7 received in the office of the Board's legal counsel within 10 days of the notice provided  
8 the applicant of the Administrator's recommendation.

9 5. Richard Staub, Attorney at Law, appeared on behalf of the applicant by  
10 telephone from Carson City, Nevada.

11 6. Stephen Smith, Esq., deputy legal counsel to the Administrator, appeared on  
12 behalf of the Administrator, as did Jacque Everhart, who presented the case for the  
13 Administrator to the Board.

14 7. Chairman Richard Iannone conducted the meeting from the Administrator's  
15 offices at 1301 North Green Valley Parkway, Henderson, Nevada. Members Emilia  
16 Hooks and Ron Ryan also attended the meeting in person. Vice-chairperson, Joyce  
17 Smith, attended by telephone from Carson City, Nevada.

18 8. The hearing was conducted so that each Board member had before him or  
19 her, all documents and records before the remaining Board members and each Board  
20 member could hear the proceedings and be heard during the proceedings as if each were  
21 present in person during the course of the hearing.

22 9. Before the hearing commenced, Vice-chairperson Smith advised that  
23 Richard Staub was also legal counsel to the association to which her business belongs but  
24 that the association before the Board as applicant in this matter was not her association.  
25 Therefore, she did not believe a conflict of interest presented itself. She would hear the  
26 case and participate in the Board's deliberations and decision.

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1           10.     Ron Ryan made the same disclosures *i.e.*, Richard Staub also represents his  
2 association but that his association is not the association before the Board in this matter.  
3 Consequently, he too, would participate in the decision of this case.

4           11.     There were no other disclosures offered and made before the hearing on the  
5 merits of this case was commenced.

6           12.     Admitted into evidence without objection were the Staff Report dated  
7 March 31, 2005, and Exhibits A through Q attached thereto, including the certificate of  
8 service dated March 21, 2005, memorializing service upon the applicant of the  
9 Administrator's decision and recommendation contained in the Staff Report. Tr. 4.  
10 Service was perfected by mail. SR p.6.

11           13.     Also admitted into evidence without objection was the applicant's pre-  
12 hearing statement dated April 22, 2005, consisting of two pages, with Exhibits A through  
13 C, attached. Attached to Exhibit A was Sub-exhibit T, taken from the Administrator's  
14 Staff Report, and attached to Exhibit B, was Sub-exhibit O, also taken from the  
15 Administrator's Staff Report. Exhibit C had no sub-exhibit attached. These exhibits and  
16 sub-exhibits were also admitted into evidence without objection. Tr. 4.

17           14.     No more exhibits or documentary evidence were offered into evidence,  
18 other than the documents and records identified in paragraphs 12 and 13, above.

19           15.     The total amount requested for reimbursement for this claim was the sum of  
20 Twenty Eight Thousand Three Hundred Nineteen dollars and 46 cents (\$28,319.46). The  
21 Administrator verified costs in the same amount, in the event the recommendation of  
22 denial was not accepted by the Board after hearing the case. SR, p. 1.

23           16.     From the Staff Report of March 21, 2005, the undisputed facts are that the  
24 injured worker first injured his left knee, the body part the subject of the subsequent  
25 injury, when he was 12 years old. Then, while working for Blakeley Excavation, his  
26 employer at the time of the subsequent injury, he again injured his left knee when  
27 jumping down from something and he felt his left knee cap dislocate. He was put in a  
28 brace, which he was to wear when participating in sports activity. SR p. 2.

1           17.    On December 28, 1995, while still working for Blakeley Excavation, the  
2 injured worker slipped down a dirt hill and twisted his left knee. By February 20, 1996,  
3 he was deemed stable and stationary. He was to be rated and his claim was closed. SR  
4 p. 2.

5           18.    On January 30, 1997, while still working for Blakeley Excavation, the  
6 injured worker stepped on a rock and twisted his left knee. By March 24, 1997, he was  
7 returned to work full duty and he was deemed stable and rateable. SR p. 2.

8           19.    In none of these prior incidents or pre-existing conditions was the injured  
9 worker given a disability rating for the trauma suffered to the left knee. SR p. 2.

10          20.    The subsequent injury occurred on August 24, 2002. While also working  
11 for Blakeley Excavation, the injured worker suffered another left knee injury which he  
12 twisted while climbing out of a backhoe. SR p. 2.

13          21.    This time surgery was recommended to the left knee and on September 25,  
14 2002, surgery was performed. SR p. 2.

15          22.    By October 14, 2002, Fred C. Redfern, M.D., the injured worker's surgeon,  
16 reported that the injured worker was doing well, and that he could return to light duty  
17 work at a sit down job. SR p. 2, Ex. M. The injured worker also attended several  
18 physical therapy sessions. SR p. 2.

19          23.    By January 20, 2003, Dr. Redfern released the injured worker to full duty.  
20 He was deemed stable and stationary and could be rated and the claim closed. SR p. 2.

21          24.    On February 13, 2003, the injured worker was seen by Alexander S. Janda,  
22 D.C., who rated the injured employee for permanent impairment. Dr. Janda determined  
23 that the claim qualified for a 3% WPI according to the *AMA Guides*, using the 4<sup>th</sup> Edition,  
24 for a non-displaced healed patellar fracture. SR p. 2.

25          25.    The injured worker underwent an anterior tibial tubercle osteotomy but this  
26 did not qualify for the proximal tibial osteotomy impairment. Addressing apportionment,  
27 Dr. Janda determined that 50% should be apportioned to the pre-existing conditions and  
28 therefore, 1.5% of the WPI allocated to the subsequent injury. SR p. 2



1           26.     The insurer offered an award to the injured worker based upon this  
2     determination of a 3% total disability and the allocation of 1.5% to the pre-existing  
3     condition and the assignment of 1.5% to the current, industrial injury. SR p. 2. This offer  
4     or award was accepted by the injured worker and was paid the injured worker on June 6,  
5     2003. SR p.3, Exhibit O.

6           27.     In a report dated January 4, 2005, Colin Soong, M.D., C.I.M.E., rendered  
7     his opinion concerning the disability of the injured worker. The conclusions he reached  
8     were based upon a record review conducted under the 5<sup>th</sup> Edition of the *AMA Guides*. SR  
9     p. 3, Exhibit P.

10          28.     Using the 5<sup>th</sup> Edition of the *Guides*, Dr. Soong concluded that the injured  
11     worker's pre-existing condition warranted a WPI rating of 6% to 10% of the left knee,  
12     based upon a patella avulsion fracture and residual instability with recurrent subluxation  
13     or dislocation of the left knee. Because the left knee was not normal prior to this most  
14     current injury, he believed that the subsequent injury was much worse. Absent the prior  
15     patellofemoral condition, little medical treatment would have been required due to the  
16     subsequent injury. SR p. 3.

17          29.     Dr. Soong, therefore, allocated the disability between the pre-existing  
18     condition and subsequent injury at 90% assigned to the pre-existing condition. SR p. 3.

19          30.     The *AMA Guides to Evaluation of Permanent Impairment*, 5<sup>th</sup> Edition,  
20     second printing, utilized by Dr. Soong, came into use by the Administrator, DIR, on  
21     October 1, 2003.

22          31.     There was no dispute over the remaining eligibility criterion for this  
23     application for reimbursement. The Administrator found that the requirements of NRS  
24     616B.578(1), (4) and (5) were satisfied by the applicant. The applicant did not dispute  
25     any of these findings.

26          32.     The applicant did not quarrel with the manner in which Dr. Janda applied  
27     the 4<sup>th</sup> Edition of the *Guides*, though the applicant offered that the qualifications for Dr.  
28     Soong as a medical doctor, exceeded the qualifications of Dr. Janda, a chiropractor. Tr.8.

33. The major dispute between the applicant, therefore, and the Administrator was the applicant's argument that the 5<sup>th</sup> Edition of the *Guides* should have been used because that was the Edition in effect as of the time the applicant submitted its claim for reimbursement, and there had been no disability rating of the injured worker at any point with reference to the pre-existing condition and/or injuries. The applicant took umbrage with Dr. Janda's use of the 4<sup>th</sup> Edition, even though it was the basis upon which an award was made to the injured worker upon being rated for the subsequent injury, work-related, and even though the 5<sup>th</sup> Edition was not in effect at the time Dr. Janda examined the injured worker and apportioned the disability rating between the pre-existing impairment and the subsequent, work-related injury.

34. The Administrator, however, also pointed out that Dr. Janda had actually examined the injured worker and rendered his opinion based in part upon that examination. Dr. Soong had not examined the injured worker, only the records of his injuries. Tr. 11. The Administrator also pointed out that Dr. Janda was a respected and certified rater for disability within the State's workers compensation system. Tr. 11.

35. To the extent that any of the following Conclusions of Law also constitute a finding of fact or mixed finding of fact and conclusion of law, they are incorporated herein.

## CONCLUSIONS OF LAW

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

2. Since the applicant's appeal, dated March 31, 2005, was received at the offices of the Board's legal counsel via facsimile on that date and the date of receipt is within 10 days of the date the Administrator's recommendation of denial was served upon the applicant the appeal is timely.

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1           3.     There being four members of the Board in attendance to hear this matter,  
2 none of whom had to recuse themselves, a quorum was present and convened to hear this  
3 case and render a decision of the Board. One position of the five member Board remains  
4 unfilled.

5           4.     There are several principles which guide the Board in reaching its decision  
6 in this matter, not the least of which is the rule that the burden of proof is upon the  
7 applicant to show entitlement to reimbursement. *See, Franklin v. Victoria Elevator Co.*,  
8 206 N.W.2d 555, 556 ( Mn., 1973); *O'Reilly v. Raymond Concrete Piling*, 419 N.Y.S.2d  
9 475, 476 (Ct. of Appeals, N.Y., 1979). The burden is upon the applicant in this case to  
10 show that the requirements of NRS 616B.578(3) are satisfied by a preponderance of the  
11 evidence. *McClanahan v. Raley's Inc.*, 117 Nev. 921, 34 P.2d 573, 576 (2001); *cf.*, NRS  
12 616C.150(1).

13           5.     This case involves the interpretation and application of NRS 616B.578(3)  
14 which defines "permanent physical impairment" as follows:

15                   As used in this section, "permanent physical impairment"  
16                   means **any** permanent **condition**, whether congenital or  
17                   caused by injury or disease, of such seriousness as to  
18                   constitute a hindrance or obstacle to obtaining employment or  
19                   to obtaining reemployment if the employee is unemployed.  
20                   For purposes of this section, a **condition** is not a "permanent  
21                   physical impairment" unless it would support a rating of  
22                   permanent impairment of 6 percent or more of the whole man  
23                   if evaluated according to the American Medical Association's  
24                   Guides to the Evaluation of Permanent Impairment as  
25                   **adopted and supplemented by the division [the**  
26                   **Administrator herein] pursuant to NRS 616C.110.**  
27                   (Emphasis added ).

28           6.     NRS 616C.110, which NRS 616B.578(3) directs must be followed, states:

1. [T]he division shall adopt regulations incorporating the  
American Medical Association's Guides to the Evaluation of  
Permanent Impairment by reference and may amend those  
regulations from time to time as it deems necessary. In  
adopting the Guides to the Evaluation of Permanent  
Impairment, the division shall **consider** the edition most  
recently published by the American Medical Association.

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1           7.       Additionally, NRS 616B.578(1) provides that if an injured worker suffers a  
2 subsequent, industrially related injury "...which entitles him to compensation for disability  
3 that is substantially greater by reason of the combined effects of the preexisting  
4 impairment and the subsequent injury than that which would have resulted from  
5 subsequent injury alone, **the compensation due must be charged to the subsequent**  
6 **injury account** for associations of self-insured public or private employers in accordance  
7 with regulations adopted by the Board." (Emphasis added.).

8           8.       Applying as the Board must, the plain meaning of NRS 616B.578(1), the  
9 Board concludes that the emphasized language, above, of NRS 616B.578(1) is both a  
10 duty and limitation imposed upon the Board. For eligible applicants, the Board must  
11 award the compensation which is due, and must award no more than the compensation  
12 which is due the applicant as a result of the industrially related subsequent injury.

13           9.       Here the compensation due the injured worker was determined based upon  
14 the 4<sup>th</sup> Edition of the *Guides*. This amount based upon the 4<sup>th</sup> Edition of the *Guides*, was  
15 what was offered by the employer to the injured worker for compensation. This amount,  
16 based upon the 4<sup>th</sup> Edition of the *Guides*, was the amount accepted by the injured worker  
17 as compensation for the subsequent, industrially related injury.

18           10.      Consequently, the Board finds and concludes that the compensation due for  
19 subsequent injury account purposes, is the amount paid as compensation based upon the  
20 4<sup>th</sup> Edition of the *Guides*. Since the Board may pay no more than the compensation which  
21 was due and the compensation due the amount actually paid the injured worker or on his  
22 behalf, was based upon the 4<sup>th</sup> Edition of the *Guides*, the 4<sup>th</sup> Edition of the *Guides* is the  
23 Edition upon which reimbursement of the applicant must be based for Subsequent Injury  
24 Account purposes.

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1           11.     The Administrator correctly concluded that the percentage of impairment  
2 for the pre-existing physical or mental impairment should be assessed based upon the 4<sup>th</sup>  
3 Edition of the *Guides* to determine whether the 6% requirement of NRS 616B.578(3) has  
4 been satisfied. The Administrator correctly rejected then, use of the 5<sup>th</sup> Edition of the  
5 *Guides* in this case to determine eligibility for reimbursement under NRS 616B.578.

6           12.     In addition, the Board may elect between competing medical opinions as  
7 long as there is credible evidence in the record to support the medical opinion chosen. In  
8 this case, Dr. Janda actually examined the injured worker before assessing the extent of  
9 the disability, in total, and then apportioning the injury to the industrial incident and the  
10 pre-existing condition. Moreover, the employer accepted this assessment, did not  
11 question it, and actually paid the injured worker based upon this assessment. The  
12 applicant, therefore, assigned credibility to the evaluation of Dr. Janda. Dr. Soong,  
13 however, based his opinion upon a record review, and did not see the injured worker.

14           13.     Furthermore, the pre-existing condition and the ultimate injury were not that  
15 serious in that after the previous two industrial related incidents and after the subsequent  
16 injury, the injured worker was allowed to return to full duty work without restrictions. SR  
17 p.2. Exhibit I.

18           14.     The applicant argued that the application for reimbursement is being made  
19 now, and therefore, the edition of the *Guides* presently adopted should be used, which,  
20 here, would be the 5<sup>th</sup> Edition. Tr. 9. Using the 5<sup>th</sup> Edition, Dr. Soong concluded that  
21 eligibility is achieved because the pre-existing condition ranges from 6% to 10% WPI and  
22 therefore, the 6% eligibility requirement of NRS 616B.578(3) is met. Tr.9.

23           15.     The applicant, however, conceded that the NRS 616B.578(3) does not give  
24 guidance as to which edition of the *Guides* should be used. Tr. 8-10.

25           16.     Additionally, based upon a plain reading of NRS 616B.578(2), and NRS  
26 616B.578(3) and NRS 616C.110, the Nevada Legislature gave the Administrator,  
27 Division of Industrial Relations, the authority to choose which set of *Guides* under the  
28 AMA shall apply when making this election. The Administrator is required to **consider**

1 the most recent Edition of the *Guides*. The Administrator is **not required to adopt** the  
2 most recent Edition in each and every case. From a plain reading of NRS 616C.110, the  
3 Administrator possesses the discretion exercised, here, to choose between the 4<sup>th</sup> and 5<sup>th</sup>  
4 Editions of the *Guides*.

5 17. Moreover, the statutory framework taken as a whole, provides guidance  
6 because NRS 616B.578(1) contains the "compensation which is due" clause, which  
7 directs the Board to follow the Administrator's recommendation and apply the 4<sup>th</sup> Edition  
8 for eligibility purposes, given that the compensation paid the injured worker and thus, the  
9 compensation which is due if the applicant is eligible for reimbursement, was determined  
10 using the 4<sup>th</sup> Edition of the *Guides*.

11 18. Other than to offer Dr. Soong's opinion about eligibility, the applicant has  
12 not shown why the 5<sup>th</sup> Edition of the *Guides* should apply over the 4<sup>th</sup> Edition of the  
13 *Guides*, in this case except to rely upon the fact that at the time Dr. Soong completed his  
14 record review and the application for reimbursement was finally filed, the 5<sup>th</sup> Edition of  
15 the *Guides* had been adopted by the Division of Industrial Relations.

16 19. Moreover, no one suggests, now, that the 4<sup>th</sup> Edition of the *Guides* should  
17 not have been used when deciding whether and to what the extent the worker suffered a  
18 subsequent, work-related injury and whether and to what extent the WPI should be  
19 allocated between the pre-existing conditions and the subsequent injury.

20 20. According to Dr. Soong, the applicant should be reimbursed for the  
21 subsequent injury only at the rate of .06% at the low end and 1% the high end. Yet, the  
22 compensation that was due, if the applicant was eligible, was calculated at 1.5%. The  
23 applicant was not offering to take less, calculated at the .06% to 1% range, than it had  
24 paid out, based upon the 1.5% allocation of Dr. Janda. Yet, to achieve the 6% threshold  
25 requirement under NRS 616B.578(3), it argued that the pre-existing impairment should be  
26 assessed at 6% to 10%, even though the entire WPI for determining the payment to the  
27 injured worker for the industrial injury was only 3%. Tr. 9. SR p. 3. Exhibit P.

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1           21.     Since the applicant has not shown in any respect whether Dr. Janda  
2 misapplied the 4<sup>th</sup> Edition of the *Guides* to render his opinion that the pre-existing  
3 impairment should be assigned a 1.5% WPI rating, given the deference that is  
4 legislatively to be accorded the Division of Industrial Relations through the Administrator  
5 to decide which Edition of the *Guides* should be applied in this case, and given that the  
6 applicant has not taken umbrage with the opinion of Dr. Janda, other than to complain  
7 that the 5<sup>th</sup> Edition of the *Guides* should apply, here, the Board is additionally compelled  
8 to accept the use of the 4<sup>th</sup> Edition of the *Guides* in this case and, therefore, to conclude  
9 that the only evidence properly before it or the preferred evidence before it on the  
10 question of the whole person impairment rating before the Board is the opinion of Dr.  
11 Janda that the pre-existing impairment is only a 1.5% WPI.

12           22.     The selective path to eligibility offered by the applicant, affirming the use  
13 of the 4<sup>th</sup> Edition of the *Guides* for deciding the compensation to be paid the injured  
14 worker and thus deciding the compensation due and to be reimbursed the applicant, on  
15 the one hand, and using the 5<sup>th</sup> Edition of the *Guides*, which yields an entirely different set  
16 of numbers for the same disability ratings to determine eligibility to be reimbursed the  
17 compensation which is due, cannot be countenanced. The amount that was due was  
18 calculated based upon a WPI of 1.5%. The Board may look no further and as a result,  
19 only another 1.5% is left to be allocated to the pre-existing condition, since the total WPI,  
20 with the pre-existing condition and subsequent injury combined, is 3%.

21           23.     Honoring its duty to compensate for only that which is due, the Board must  
22 reject the claim as the 6% requirement of NRS 616B.578(3) is not satisfied if the Board  
23 compensates based upon a 3% WPI, which the Board would be required to compensate as  
24 this is the percentage of disability for which the self-insured employer provided  
25 compensation when the disability was rated for compensation purposes and is, therefore,  
26 the amount that would be due from the Subsequent Injury Account if eligibility were to be  
27 established.

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24. The applicant's claim that the 5<sup>th</sup> Edition of the *Guides* should be used for determining eligibility for reimbursement from the Subsequent Injury Account when the amount to be reimbursed was decided under the 4<sup>th</sup> Edition of the *Guides* is rejected.

25. As the applicant offered only the disability impairment rating determined under an inappropriate edition of the *Guides*, the only credible evidence in the record, then, on disability impairment for the pre-existing impairment is the determination by Dr. Janda that the pre-existing impairment be assigned a 3% WPI disability impairment.

26. The applicant has failed, therefore, in its burden of showing that the requirements of NRS 616B.578(3) have been satisfied. The applicant has failed in its burden of satisfying an essential requirement of eligibility for reimbursement from the Subsequent Injury Account.

27. The application for reimbursement submitted from the Subsequent Injury Account is deficient by reason of a failure of proof on the part of the applicant to show that NRS 616B.578(3) has been satisfied.

## DECISION

Good cause appearing, the application for reimbursement submitted to the Board in the above-captioned case by Pro Group Management, Inc., the applicant, is hereby denied by a vote of 4-0. The application was rejected upon a motion to reject the claim and accept the Administrator's recommendation by Vice-Chairperson Joyce Smith, seconded by Emilia Hooks, on the 4<sup>th</sup> day of May, 2005.

Further, on November 10, 2005, with a quorum being present, upon a motion of Ron Ryan, seconded by Emilia Hooks, the Board voted 4 in favor and 0 against with 0 abstention(s), to approve these Findings of Fact, Conclusions of Law and Decision as the action of the Board.

Dated this 10<sup>th</sup> day of November, 2005.

By,   
Richard Iannone, Board Chairperson



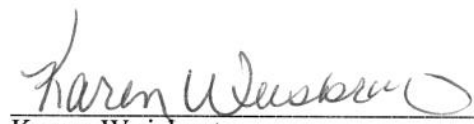
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**CERTIFICATE OF SERVICE**

\_\_\_\_\_ Pursuant to NRCP 5(b), I certify that I am an employee of the Law Offices of ZEH SAINT-AUBIN SPOO, 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, placed for collection and mailing in the United States Mail, at Reno, Nevada:
	Richard S. Staub Attorney at Law Post Office Box 392 Carson City, NV 89702  John F. Wiles, Division Counsel Department of Business and Industry Division of Industrial Relations 1301 North Green Valley Parkway, Suite 200 Henderson, NV 89104
	Personal delivery
	Telephonic Facsimile at the following numbers:
	Federal Express or other overnight delivery
	Reno-Carson Messenger Service
√	Certified Mail/Return Receipt Requested

*December 12, 2005.*  
Dated this ~~November 10~~, 2005.

  
\_\_\_\_\_  
Karen Weisbrot