

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

5                   \*\*\*

6                   In re: Subsequent Injury Request for Reimbursement

7                   Claim No.: 5001-0316-01-0001  
8                   Date of Injury: November 29, 2001  
9                   Association Name: Nevada Transportation Network  
10                  Association Member: KL Transport  
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

---

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

18                  This matter 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 (the Board) on June 8, 2005. The Administrator for the Division of Industrial  
21                  Relations (Administrator) recommended to the Board that it deny this claim for  
22                  reimbursement submitted by ProGroup Management, Inc., for the Nevada Transportation  
23                  Network. The Administrator advised the Board that the applicant had failed to satisfy the  
24                  requirements of NRS 616B.578(4), which requires the Association to show by written  
25                  records that the employer had knowledge of the pre-existing "permanent physical  
26                  impairment" at the time of hire or that the employee (injured worker) was retained in  
27                  employment after the employer acquired such knowledge. NRS 616B.578(4).

28                  In this case, no other eligibility requirements were at issue in connection with the  
29                  application for reimbursement. Because the requirement of proof of knowledge by  
30                  written record was not satisfied, the question of retention was not reached. Once the  
31                  injured worker suffered the subsequent industrial injury, however, the injured worker  
32                  went out on disability, received a vocational lump sum buy out, and never returned to  
33                  work. SR 6. The dispute in this case revolved around the question of whether the

1 employer could show by written records it had knowledge of the pre-existing condition.  
2 There was also a dispute over the related question of whether the entity, KL Transport,  
3 the association member, was the employer at the time of the subsequent injury. The  
4 other "employers" of the injured worker were not members of an association that was a  
5 contributing member of the Subsequent Injury Account. Eligibility for reimbursement  
6 was at issue on this ground, as well.

7 At the conclusion of the hearing, the Board sided with the Administrator and  
8 rejected the application for reimbursement for failure to satisfy the "written knowledge"  
9 requirement of NRS 616B.578(4). The Board's findings of fact and conclusions of law  
10 in support of its decision are set forth below.

### 11 FINDINGS OF FACT

12 1. The case came on for hearing before the Board on June 5, 2005. Tr. 2.

13 2. The Association member of the Subsequent Injury Account for the  
14 Associations of Self-Insured Public and Private Employers is the Nevada Transportation  
15 Network. SR 1.

16 3. The Association member is KL Transport, the Association Administrator is  
17 ProGroup Management, Inc., the Third-Party Administrator for this claim is Associated  
18 Risk Management, Inc., and the application was submitted by ProGroup Management,  
19 Inc. SR 1.

20 4. The Administrator recommended denial of this request for reimbursement  
21 pursuant to NRS 616B.578(4). SR 1

22 5. The amount requested for reimbursement by the applicant was the sum of  
23 \$82,371.43. The amount of reimbursement that should have been requested was the sum  
24 of \$82,387.08. The amount of reimbursement after verification of costs which the  
25 Administrator recommended to the Board in the event the Board decided to uphold the  
26 claim was the sum of \$82,143.09. SR 1.

27 6. The request was received by the Administrator from ProGroup  
28 Management, Inc., on February 15, 2005. SR 1.

1           7.     The applicant submitted its appeal to legal counsel for the Board, which  
2 appeal was received at the office of the Board's legal counsel on April 7, 2005. Tr. 5;10-  
3 14. The Staff Report containing the Administrator's recommendation of denial was dated  
4 March 31, 2005. *Id.* at 12, 13.

5           8.     The members of the Board hearing this matter consisted of Chairman  
6 Richard Iannone, Vice-chairperson, Joyce Smith, (telephonic), member Ron Ryan, and  
7 member Emilia Hooks. Tr. 2.

8           9.     Richard Staub, Esq., 1971 California Street, Carson City, Nevada, appeared  
9 by telephone for the applicant. Tr. 2.

10          10.    Jacque Everhart, Subsequent Injury Account Coordinator, appeared for the  
11 Administrator. Tr. 2.

12          11.    Charles R. Zeh, Esq., Zeh Saint-Aubin Spoo, 575 Forest St., Suite 200,  
13 Reno, Nevada, 89509, appeared on behalf of the Board. Tr. 2.

14          12.    Member Ron Ryan advised that Richard Staub, Esq., was legal counsel to  
15 the Association to which Mr. Ryan belongs. This Association was not the Association  
16 making application for reimbursement in this case and therefore, he did not believe a  
17 conflict of interest presented itself and he would hear the case. Tr. 23;1-4.

18          13.    Similarly, Vice-chairperson Joyce Smith advised that Mr. Staub was legal  
19 counsel to her Association, the Association before the Board, today, was different from  
20 her Association, and that therefore she did not believe she would be conflicted and would  
21 hear the pending matter. Tr. 23; 11-13.

22          14.    The documents admitted into evidence without objection, Tr. 5; 3-9, were:

- 23           a.     Administrator's Staff Report (SR) dated March 31, 2005;  
24           b.     Exhibits A through EE attached to the Staff Report;  
25           c.     Verification of Costs chart prepared by the Administrator;  
26           d.     Letter "To whom it may concern," dated May 6, 2004, from Ken Lewis,  
27                 Vice President, also Exhibit BB to the Staff Report, and attached to the  
28                 applicant's pre-hearing statement;

- e. Applicant's pre-hearing statement;
- f. Affidavit of Ken Lewis dated June 2005, and
- g. Exhibit A to the affidavit, Skill Performance Evaluation Certificate, dated November 14, 2001. Tr. 3-5.

15. The issue before the Board according to the Administrator, was whether the employer could show knowledge, proven by written record, of a pre-existing condition at the time of hire or whether, following hire, the employer acquired knowledge, proven by written record, of the pre-existing condition and then, retained the employee in its employment following acquisition of such knowledge of the pre-existing condition. See, NRS 616B.578(4). SR 6, Tr. 6; 4-25, 7; 1-18.

16. According to the Administrator and not disputed by the applicant, the preexisting condition involved the region of the spine because the subsequent injury involved a motor vehicle accident resulting in a back injury (spine condition), in particular, a fracture of the T-12 (thoracic) area of the back. SR 6; Tr. 6;14-18, 9; 19-25, 10; 1-6, 18-22, 11, 12; 1-2.

17. The injured worker did not return to work following the subsequent injury. Lewis affidavit, ¶ 10; SR 6.

18. Therefore, the question was whether the employer could produce proof of knowledge through written record of the pre-existing condition at the time of hire, or could produce proof of knowledge through written record of the pre-existing impairment, acquired some time after the date of hire but while the injured worker was still gainfully employed with the employer prior to the subsequent injury, *e. g.*, retained the injured worker in its employ following acquisition of written records showing knowledge of the pre-existing, physical impairment upon which the applicant relies to justify reimbursement from the Account.

19. The employer asserted that the affidavit dated June 2005, from Ken Lewis, President of KL Transport, Inc., *see*, Lewis Affidavit, ¶ 1, and the employment status certification form from the U. S. Department of Transportation (DOT), showed

1 knowledge by a written record of **the** pre-existing condition. Tr. 2; 7-25, 13; 5-14. Lewis  
2 Affidavit, generally.

3 20. The DOT certificate discussed the injured worker's leg amputation, as a pre-  
4 existing condition. The applicant was asked during the course of the hearing whether the  
5 DOT certificate discussed any other physical impairment or disability other than the  
6 injured worker's leg amputation. The response was that the DOT certificate discussed no  
7 other disability or physical impairment or made no reference to any other impairment  
8 other than the amputated leg. The DOT certificate provided no written proof that the  
9 employer or applicant had knowledge of a pre-existing impairment relating to the injured  
10 worker's back, the body part relied upon to establish a subsequent injury. Tr. 15; 13-23.

11 21. The applicant also relied upon the letter of May 6, 2004, from Ken Lewis,  
12 discussing the health history of the injured worker to show prior knowledge of several  
13 other pre-existing conditions upon which the employer sought to rely to establish  
14 eligibility under the Subsequent Injury Account. The letter, itself, however only makes  
15 reference to "health problems, including diabetes, an amputated leg, cancer **etc.**" Letter  
16 dated May 6, 2004. The letter therefore makes no reference to the injured worker's back,  
17 talks about "health problems," and references "etc." Neither the term "health problems"  
18 nor the expression "etc." show knowledge of a permanent impairment of the spine and the  
19 letter itself, is devoid of reference to "written" documentation establishing knowledge that  
20 there had been a prior history of back problems, the body part that constitutes the  
21 subsequent injury.

22 22. The letter of May 6, 2004 offered into evidence by the applicant, and also a  
23 part of the exhibits attached to the Administrator's staff report and therefore a document  
24 offered into evidence by both parties, *see* Tr. 4; 15-24, as Exhibit "BB," importantly states  
25 as follows: "He [the injured worker] **never did work for KL Transport Inc., his [the**  
26 **injured worker's] accident happened before I started this company.**" Exhibit BB to  
27 the SR.

28 ///

1           23.     The applicant also specifically relied upon or highlighted paragraphs 6, 7,  
2 and 8 of the Lewis affidavit. Tr.13; 18-19. Paragraph 6 contains references to laryngeal  
3 cancer, severe left hip degenerative arthritis, left hip replacement, diabetes as well as  
4 problems of the low back. Lewis affidavit, ¶ 6.

5           24.     Paragraph 7 of the Lewis affidavit refers to hip replacement problems  
6 requiring time off from work. Lewis affidavit, ¶ 7.

7           25.     Paragraph 8 references complaints about low back pain and how it effected  
8 the injured worker's ability to drive trucks. Lewis affidavit, ¶ 8. The applicant, however,  
9 had no proof by written records to support the naked statement contained in the affidavit  
10 that the injured worker had complaints of low back pain. No written record existed to  
11 support the allegation, therefore, in the affidavit that the injured worker had low back  
12 pain and/or low back problems, whether generally, or specifically in relation to the T-12  
13 area of the back, or areas that might be impacted pathologically by a fracture at T-12. Tr.  
14 13; 5-14; 18-19, 16;1-10.

15           26.     Similarly, the applicant made no showing it had proof by written records of  
16 knowledge by the employer of the impairments described in paragraph 6 of the Lewis  
17 affidavit. Tr. 16; 11-17. None was offered for paragraph 7 of the Lewis affidavit, either.  
18 Tr. 13; 5-14; 18-19, 16.

19           27.     The Lewis affidavit also establishes that following the subsequent injury,  
20 the injured worker never returned to work. Lewis affidavit, ¶ 10. *See also*, SR 6.

21           28.     The Lewis affidavit is the only "document" relied upon by the applicant to  
22 show proof of knowledge by written record of the pre-existing impairment of the spine.  
23 This is, according to the applicant, the written record. Tr. 13; 15-19. There is, therefore,  
24 no proof of knowledge by written records of a pre-existing back condition.

25           29.     The affidavit also establishes in concert with the letter of May 6, 2004, that  
26 KL Transport was never the injured worker's employer. The affidavit states that the  
27 injured worker was first employed by L & L Express and subsequently hired by L & H  
28 Express in January 2001. Lewis affidavit, ¶ 9.



1           30.     KL Transport was not in existence, at the time of the subsequent injury.  
2     Lewis letter dated May 6, 2004, Exhibit BB. See also, Tr. 17;24-25.

3           31.     While KL Transport was a contributor to the applicant association, Nevada  
4     Transport Network, neither L & L Express nor L & H Express, the two potential  
5     employers of the injured worker at the time of the subsequent injury, were contributors to  
6     an association which belonged to the Subsequent Injury Account for the Associations of  
7     Self-insured Public and Private Employers. Tr. 17; 18-22.

8           32.     KL Transport, the employer and member of the applicant association,  
9     Nevada Transport Network, is a different entity than L & L Express and L & H Express.  
10    Tr. 17; 8-17.

11          33.     As KL Transportation came into existence following the accident causing  
12    the compression factors to the spine at T-12, KL Transportation could have no prior  
13    knowledge of a pre-existing condition of the spine, or even knowledge contemporaneous  
14    with the subsequent injury, itself.

15          34.     The Board took the position through the Chairman that the primary  
16    question, here, in this matter was the issue of proof by written record that the employer  
17    either knew that there was a pre-existing back condition, at the time of hire, or that the  
18    employer had provided proof by written record, that the employer knew that there was a  
19    pre-existing back condition and kept the injured worker in its employ following  
20    acquisition of such knowledge. Tr. 22;1-4.

21          35.     The Board also was interested in how an entity, not the employer, could  
22    submit a request for reimbursement from the Subsequent Injury Account, when the  
23    employer at the time of the subsequent injury was not a contributor to the Subsequent  
24    Injury Account, nor a member of an association contributing to the Subsequent Injury  
25    Account. The Board felt, however, it was unnecessary to reach this question, because of  
26    a failure of proof by written knowledge, that the employer knew of a pre-existing back

27    ///

28    ///

1 condition. The Board believed there was proof of prior knowledge of a leg amputation,  
2 but that had nothing to do with the subsequent injury claim as the subsequent injury claim  
3 was to an entirely different body part or region of the body. Tr. 22; 9-25, 23; 1.

4 36. To the extent the following conclusions of law constitute findings of fact or  
5 mixed conclusions of law or findings of fact, they are incorporated herein.

#### 6 **CONCLUSIONS OF LAW**

7 1. To the extent any of the preceding paragraphs constitute conclusions of law  
8 or mixed statements of fact and conclusions of law, they are incorporated herein.

9 2. The applicant filed a timely appeal of the Administrator's recommendation,  
10 preserving the right to challenge before the Board all or any portion of the Administrator's  
11 recommendations.

12 3. As four members of the Board participated in the hearing by phone or in  
13 person, a quorum of the Board was present to hear and decide the application for  
14 reimbursement.

15 4. While the application was submitted, listing KL Transport as the employer  
16 of the injured worker at the time of the subsequent injury to the injured worker's back, a  
17 fracture of the back at the thoracic level, T-12, the employer at the time of the subsequent  
18 injury was not KL Transport. Moreover, the employer, whether it be L & L Express or L  
19 & H Express, was not a member of an association that contributed to and was a  
20 participating member of the Subsequent Injury Account for Self-Insured Public and  
21 Private Employers.

22 5. NRS 616B.578(4) was the only section of the Nevada Revised Statutes  
23 which the Administrator found the applicant failed to satisfy with its application. All  
24 other eligibility requirements under NRS 616B.578, the section of the Nevada Revised  
25 Statutes setting out a series of specific eligibility requirements for securing  
26 reimbursement from the Account, were satisfied by the applicant according to the  
27 Administrator.

28 ///



1           6.       There are several principles which guide the Board when deciding this  
2 appeal beginning with the requirement that the burden of proof is upon the applicant to  
3 show entitlement to reimbursement. *See, Franklin v. Victoria Elevator Co.*, 206 N.W.2d  
4 555, 556 (Minn. 1973); *O'Reilly v. Raymond Concrete Piling*, 49 N.Y.S.2d 475, 476 (Ct.  
5 of Appeals, N.Y., 1979). The burden is one of a showing made by a preponderance of the  
6 evidence. *McClanahan v. Raley's Inc.*, 117 Nev. 921, 34 P.3d 573, 576 (2001); *cf.*, NRS  
7 616C.150(1).

8           7.       NRS 616B.578(4) states:

9                   To qualify under this section for reimbursement from the  
10                   subsequent injury account for associations of self-insured  
11                   public or private employers, the association of self-insured  
12                   public or private employers must establish by written records  
13                   that the employer had knowledge of the "permanent physical  
14                   impairment" at the time the employee was hired or that the  
15                   employee was retained in employment after the employer  
16                   acquired such knowledge.

17           8.       Because the subsequent injury was a fracture of the vertebrae at the T-12  
18 level, the spine constitutes the body part or region of the body of controlling import for  
19 subsequent injury purposes because the pre-existing physical impairment and the  
20 subsequent injury must have a combined effect which causes the compensation due the  
21 injured worker to be substantially greater than if the injured worker only suffered from  
22 the injury or impairment which comprises the subsequent injury. NRS 616B.578(1).

23           9.       That is to say, a pre-existing injury or physical impairment to just any part  
24 of the body will not suffice for subsequent injury purposes. The pathology of the pre-  
25 existing impairment and the subsequent injury must be so related as to combine to cause  
26 the compensation to be substantially increased due to the subsequent injury than if there  
27 had been no pre-existing condition and the injured worker only suffered from the  
28 impairment or injury that now constitutes the subsequent injury in this Subsequent Injury  
Account claim. NRS 616B.578(1).

///

///

1           10.    The burden of proof is upon the applicant to establish by written record,  
2 knowledge of the pre-existing impairment at the time of hire or to show by a  
3 preponderance of the evidence it acquired knowledge after hire, established by written  
4 record, of the pre-existing impairment, and that the employer retained the injured worker  
5 in its employ after acquiring such knowledge.

6           11.    As the knowledge of the pre-existing impairment must be of an impairment  
7 whose pathology combines with the subsequent injury to cause the compensation paid the  
8 injured worker to be substantially greater than if there had only been the subsequent  
9 injury alone, a claim that the employer knew the injured worker had a pre-existing  
10 amputated leg, without more, when the subsequent injury is a fractured vertebrae at the  
11 T-12 level, resulting from a collision involving the truck in which the injured worker was  
12 riding (collision with a snowbank, throwing the injured worker from the sleeper of the  
13 Cab, SR 3), fails to establish that the employer had proof of knowledge of the pre-existing  
14 impairment which satisfies the combined effects requirement of NRS 616B.578(1).  
15 There was no proof this amputated leg caused or was effected by the truck collision in  
16 that the spine injury resulting from the accident was exacerbated because the leg had been  
17 amputated previously. To the extent that the employer, therefore, attempts to rely upon  
18 the injured worker's amputated leg, the application is deficient. The amputated leg was  
19 remote from the compression fracture at T-12, caused by a sudden impact due to the truck  
20 accident.

21           12.    The employer also claims to have knowledge that the injured worker  
22 complained in the past of "back problems" and complaints of "etc.," meaning, the injured  
23 worker had frequent complaints of health problems. This, too, is insufficient, as general  
24 complaints of health problems do not satisfy the specific knowledge requirements that  
25 exist by reason of NRS 616B.578(1) and (4), who operate in concert.

26           13.    Further, even if such knowledge satisfies the "knowledge" requirement of  
27 NRS 616B.578(1) and (4), in concert, the applicant still fails, here, because the only  
28 showing by a written record that the injured worker had a pre-existing condition, was the

1 amputated leg, a body part remote to the injured back. Other than the amputated leg, the  
2 applicant made no showing it had a written record to establish it possessed the knowledge  
3 it was required to have about a pre-existing impairment, to justify reimbursement from the  
4 Account. Of all the various impairments, ailments or afflictions offered by the applicant,  
5 the only impairment for which there was proof of knowledge by a written record was the  
6 leg amputation. Since proof of knowledge of the leg amputation, without more, does not  
7 satisfy the combined effects requirements of NRS 616B.578(1) and (4), the applicant fails  
8 in its burden of proof, assuming that the applicant had standing in the first place to submit  
9 the claim.

10 14. However, inasmuch as KL Transport did not exist at the time of the  
11 subsequent injury and L & H and L and L Express companies, one or both of whom  
12 was/were the employer of the injured worker at the time of the subsequent injury, did not  
13 contribute through a participating Association to the Subsequent Injury Account, KL  
14 Transport had no standing to submit the claim in the first place. As KL Transport was not  
15 in existence at the time of the industrial accident, it must also lack knowledge and  
16 therefore, fail the written record requirement of NRS 616B.578(4).

17 15. In addition, NRS 616B.575(3) requires that:

18 [a]ll money and securities in the [Subsequent Injury Account  
19 for the Associations of Self-Insured Public and Private  
20 Employers] ... must be held by the state treasurer as custodian  
21 thereof to be **used solely** for workers' compensation for  
**employees of members of associations of self-insured  
public or private employers.**" (Emphasis added.).

22 16. Applying, as the Board must, the plain meaning of this statute which is clear  
23 on its face, the Board must come to the conclusion that since KL Transport was not even  
24 founded at the time of the subsequent injury and neither L & H nor L & L Express were  
25 members of associations participating in the account, the injured worker was not an  
26 employee of a member of an association of self-insured public and private employers.

27 17. Therefore, the funds in the Account could not be used to reimburse the  
28 applicant, here, because the injured worker was not an employee of a member of an

1 association of self-insured public and private employers and the funds in the Account can  
2 **only** be used to reimburse in connection with such injured workers who were employed  
3 by employers of a member of an association that belongs to the Account. KL Transport  
4 should not have submitted the application to the Administrator in the first place because it  
5 lacks standing to seek reimbursement from the Account for this claim.

6 18. The applicant has failed to satisfy the proof of knowledge by written record  
7 requirement set forth in NRS 616B.578(4). The applicant has failed in its burden of  
8 proving a claim and is not entitled to reimbursement from the Account. Furthermore,  
9 based upon NRS 616B.575(3), the applicant lacked standing to submit the claim in the  
10 first place.

11 19. The application must therefore be rejected.

#### 12 **DECISION OF THE BOARD**

13 Good cause appearing and the Board being fully advised in the premises as set out  
14 in the Board's Findings of Fact and Conclusions of Law, the Board makes its decision as  
15 follows:

16 The recommendation of the Administrator of the Division of Industrial Relations  
17 to the Board that it should reject the application for reimbursement is accepted. The  
18 Board concludes that the application fails to satisfy NRS 616B.578 (4). In addition,  
19 based upon NRS 616B.575(3), the applicant lacked standing to submit an application for  
20 reimbursement in the first place.

21 The application was denied upon a motion of Vice-chairperson Joyce Smith,  
22 seconded by Emilia Hooks, to accept the Administrator's recommendation and deny the  
23 application for reimbursement. The vote was 4 members voting in favor of the motion,  
24 and none voting against the motion. The motion therefore passed upon a vote of 4 in  
25 favor and 0 members voting against the motion. Tr. 23;18-25, 24;1-4. As a quorum of  
26 the Board was present on June 8,2005, the motion was duly voted upon and passed by the  
27 vote tally, as stated. Tr. 1.

28 ///

1           Additionally, on December 13, 2005, the Board, having reviewed this Decision  
2 and after due deliberation, upon the motion of Ron Ryan, seconded by Joyce Smith, voted  
3 to adopt this written Decision as the Findings of Fact, Conclusions of Law and Decision  
4 of the Board. The vote was 3 voting in favor of the motion and 0 voting against the  
5 motion. As 3 members of the Board were present and voted on the motion, a quorum of  
6 the Board was present when the vote was taken and the motion was therefore duly  
7 adopted as an action of the Board.

8 Dated this 9th day of February, 2006.

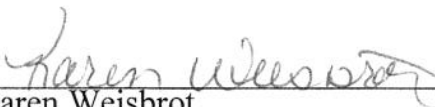
9  
10  
11   
12 Richard Iannone, Board Chairman

1 **CERTIFICATE OF SERVICE**

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

6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28	<div>√</div> <div>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</div>
	Personal delivery
	Telephonic Facsimile at the following numbers:
	Federal Express or other overnight delivery
	Reno-Carson Messenger Service
<div>√</div>	Certified Mail/Return Receipt Requested

Dated this 27<sup>th</sup> day of March, 2006.

  
Karen Weisbrot