

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

3 ***

4 In re: Subsequent Injury Request for Reimbursement

5 Claim No.: 5004.0234.2007.0898
6 Date of Injury: February 1, 2007
7 Association Name: Nevada Retail Network
8 Association Member: Vitality Center
9 Association Administrator: Pro Group Management, Inc.
10 Third-Party Administrator: Associated Risk Management, Inc.
11 Application Submitted by: Pro Group Management, Inc.

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

14 **INTRODUCTION AND SYNOPSIS**

15 This case came on for hearing before the Board (the Board) for the Administration of the
16 Subsequent Injury Account for the Associations of Self-Insured Public and Private Employers
17 (the Account) on April 14, 2009. The Administrator (Administrator) of the Division of
18 Industrial Relations (DIR) recommended denial of the application on the grounds that the
19 applicant failed to prove the alleged preexisting permanent physical impairment would support a
20 permanent partial disability rating of 6% or more, the threshold requirement for proving the
21 presence of a preexisting permanent physical impairment required by NRS 616B.578(3), quoted
22 in the margin¹. Absent proof of a preexisting permanent physical impairment, eligibility for

23 ¹NRS 616B.578 Payment of cost of additional compensation resulting from subsequent injury of employee
24 of member of association of self-insured public or private employers. Except as otherwise provided in NRS
25 616B.581:

26 1. If an employee of a member of an association of self-insured public or private employers has a permanent
27 physical impairment from any cause or origin and incurs a subsequent disability by injury arising out of and in the
28 course of his or her employment which entitles the employee to compensation for disability that is substantially
29 greater by reason of the combined effects of the preexisting impairment and the subsequent injury than that which
30 would have resulted from the subsequent injury alone, the compensation due must be charged to the Subsequent
31 Injury Account for Associations of Self-Insured Public or Private Employers in accordance with regulations adopted
32 by the Board.

33 2. If the subsequent injury of such an employee results in his or her death and it is determined that the death
34 would not have occurred except for the preexisting permanent physical impairment, the compensation due must be
35 charged to the Subsequent Injury Account for Associations of Self-Insured Public or Private Employers in
36 accordance with regulations adopted by the Board.

37 Footnote 1, continued on next page

1 reimbursement cannot be had from the Account. *See*, NRS 616B.578, footnote one. The
2 Administrator, therefore, also recommended denial of the application based upon NRS
3 616B.578(1), which turns upon the presence of a preexisting condition as defined by NRS
4 616B.578(3).

5 There is no dispute in this case of the meaning of NRS 616B.578. This dispute rises and
6 falls upon whether as a matter of fact, the applicant proved eligibility for reimbursement from
7 the Account according the eligibility criterion set out by NRS 616B.578.

8 For subsequent injury Account purposes, the injured worker was assigned a 5% PPD for
9 the preexisting back condition. The question this case posed for the Board was whether this 5%
10 PPD could be enhanced from 1% to 3% because activities of daily living (ADL) were impacted
11 by the preexisting condition. *See, Nevada Attorney for Injured Workers v. Nevada Self-Insurers*
12 *Ass'n*, 126 Nev. ___, 225 P.3d 1265 (2/25/10). Activities of daily living include walking,
13 talking, breathing and the like. They do not include working. *See, Id.*, at 1267. The applicant
14 argued that the injured workers ADLs were negatively impacted by the preexisting permanent
15 condition by at least 1% and, therefore, adding the 1% PPD to the 5% PPD previously assigned
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18 *Footnote 1, continued.*

19 3. As used in this section, "permanent physical impairment" means any permanent condition, whether congenital
20 or caused by injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment
21 or to obtaining reemployment if the employee is unemployed. For the purposes of this section, a condition is not a
22 "permanent physical impairment" unless it would support a rating of permanent impairment of 6 percent or more of
23 the whole person if evaluated according to the American Medical Association's Guides to the Evaluation of
24 Permanent Impairments as adopted and supplemented by the Division pursuant to NRS 616C.110.

25 4. To qualify under this section for reimbursement from the Subsequent Injury Account for Associations of
26 Self-Insured Public or Private Employers, the association of self-insured public or private employers must establish
27 by written records that the employer had knowledge of the "permanent physical impairment" at the time the
28 employee was hired or that the employee was retained in employment after the employer acquired such knowledge.

5. An association of self-insured public or private employers must submit to the Board a claim for
reimbursement from the Subsequent Injury Account for Associations of Self-Insured Public or Private Employers.

6. The Board shall adopt regulations establishing procedures for submitting claims against the Subsequent Injury
Account for Associations of Self-Insured Public or Private Employers. The Board shall notify the Association of
Self-Insured Public or Private Employers of its decision on such a claim within 120 days after the claim is received.

7. An appeal of any decision made concerning a claim against the Subsequent Injury Account for Associations
of Self-Insured Public or Private Employers must be submitted directly to the district court.

1 the preexisting condition, a 6% PPD is achieved for the preexisting condition and the minimum
2 6% threshold defining the presence of a preexisting permanent physical impairment is satisfied.
3 Eligibility for reimbursement would, therefore, be established since the remaining elements of
4 NRS 616B.578 had been satisfied.

5 The Board disagreed. It concluded as a matter of fact, that the record lacked proof the
6 preexisting condition had a deleterious impact upon the injured worker's ADLs. The rating of
7 the preexisting condition could not, therefore, be enhanced by 1-3% and, thus, the applicant
8 failed to satisfy the requirements of NRS 616B.578(1) and (3). Since the burden of proof is upon
9 the applicant to prove each element of NRS 616B.578, is satisfied, the Board denied the
10 application.

11 The Board's Findings of Fact, Conclusions of Law and Decision follow.

12 **FINDINGS OF FACT**

13 1. This case was heard by the Board on April 14, 2009, when the Board voted to
14 uphold in its entirety the recommendation of the Administrator to deny the application for
15 reimbursement on the grounds the applicant failed to satisfy the requirements of NRS 616B.578
16 (1) and (3).

17 2. The applicant was informed of the Administrator's recommendation by the
18 Administrator's Staff Report (SR) dated March 6, 2009. *See*, Exhibit 6, p. 1, admitted into
19 evidence, Tr., 6; 24-25, 7;1.

20 3. The Staff Report was served upon the applicant by mail on March 6, 2009, by
21 Jacque Everhart, the Administrator's Liaison to the Board. SR., p. 9.

22 4. The applicant then in a letter dated March 13, 2009, addressed to the Board's legal
23 counsel and received at the offices of the Board's legal counsel on March 17, 2009, appealed the
24 Administrator's recommendation contained in the Staff Report of March 6, 2009. *See*, Ex., 5,
25 admitted into evidence. Tr., 6; 24-25, 7;1.

26 5. The exhibits admitted into evidence without objection by either party, *Ibid*,
27 consisted of the following:

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1 Exhibit 1, a letter dated March 19, 2009, from David J. Trujillo, D.C., entitled,
2 "Addendum to Report of 7/01/2008;"

3 Exhibit 2, a letter dated March 23, 2009 to David J. Trujillo, D.C., M.S., LAT, ATC,
4 from Jill Valdez, Claims Analyst, Associated Risk Management, Inc.;

5 Exhibit 3, a letter dated March 31, 2009, from David J. Trujillo, D.C., to Jill Valdez;

6 Exhibit 4, a letter dated March 26, 2009, from Richard Staub, Esq., to the Board's legal
7 counsel, forwarding the executed Waiver of Hand Delivery and Certificate of Receipt of Notice
8 of Meeting for this claim;

9 Exhibit 5, a letter dated March 13, 2009, from Richard Staub, Esq., to the Board's legal
10 counsel, appealing the recommendation of the Administrator in this case; and

11 Exhibit 6, the Administrator's Staff Report dated March 6, 2009, containing the
12 Administrator's denial of the application for reimbursement, together with 59 pages of exhibits
13 and a two page notice of disallowances attached to the Staff Report. Tr., 5; 10-25, 6; 1-17.

14 6. Neither party opted to offer into evidence any other documents and records at the
15 outset of the hearing. Tr., 6; 16-23.

16 7. The exhibits tendered were admitted into evidence without objection by either
17 party. Tr., 6; 24-25, 7; 1-5.

18 8. As this hearing was initiated by Richard Staub, Esq., and because he was not
19 present for the hearing on this date, the Board's legal counsel clarified with the applicant that the
20 applicant was willing to proceed without the presence of or representation in this matter on this
21 date by Mr. Staub. The Board was informed by Kris Louisiana, who was present on behalf of
22 the applicant, that the hearing could proceed as far as the applicant was concerned without the
23 presence of Mr. Staub. Tr., 7; 4; 21-25, 5; 1-9.

24 9. This is a *de novo* hearing before the Board, conducted pursuant to NRS 233B.010,
25 the Nevada Administrative Procedures Act. Tr., 3.

26 10. The Board members participating in the hearing were Richard Iannone, Board
27 Chairman, Joyce Smith, Vice-Chairman of the Board, by telephone, and Emilia Hooks,
28 Member. Tr., 2.

1 11. Also present were Jennifer Leonescu, Esq., Deputy Legal Counsel to the
2 Administrator, and Jacque Everhart, the Administrator's Liaison to the Board. *Ibid.*

3 12. Present by telephone on behalf of the applicant was Kris Louisiana. *Ibid.*

4 13. The Board's legal counsel, Charles R. Zeh, Esq., Zeh & Winograd, also personally
5 attended the meeting. *Ibid.*

6 14. The association for this matter is Nevada Retail Network. SR., p. 1.

7 15. The association member for this matter is Vitality Center. *Ibid.*

8 16. The third party administrator for this matter is Associated Risk Management, Inc.
9 *Ibid.*

10 17. The application for reimbursement was submitted by the association
11 administrator, Pro Group Management, Inc., and was first received by the Administrator on
12 February 2, 2009. *Ibid.*

13 18. The applicant sought reimbursement in the amount of \$77,101.42. The verified,
14 reimbursable amount, however, was \$71,396.36, in the event that the application was approved.
15 *Ibid.*

16 19. The injured worker was hired by the applicant on June 20, 2005, when, on
17 October 6, 2005, after bending over to pick up a container of files, she stood up and felt muscles
18 pull in her lower back. Tr., 8; 14-18.

19 20. Her lumbar spine, thereafter, was x-rayed. The x-rays revealed minimal
20 degenerative changes. The injured worker was diagnosed with acute lumbosacral strain and
21 placed on light duty. Tr., 8; 19-23. This was a no loss of time incident. SR., Ex. 3.

22 21. The specific diagnosis at Battle Mountain General Hospital was minimal
23 degenerative changes of the lumbar spine as of October 7, 2005. *Id.*, Ex. 6.

24 22. The injured worker was seen by Sharon Malotte, M.D., of the Battle Mountain
25 Clinic. According to Dr. Malotte, by history, the injured worker was off work for a week and as
26 of October 27, 2005, " the numbness and tingling had completely gone away." Her back was
27 still sore, however, on the right side. *Id.*, at Ex. 7.

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1 23. A November 17, 2005, MRI report showed generally, no significant abnormality,
2 but with the impression of a disc protrusion being more prominent to the left of the midline at
3 L5-S1, with possible nerve impingement and posterior disc bulging or minimal disc protrusion at
4 the L4-L5 centrally with only mild spinal stenosis and without foraminal narrowing. *Id.*, at Ex. 8.

5 24. As of December 5, 2005, the injured worker was continuing to complain of back
6 pain and as a result, Dr. Malotte referred the injured worker to a neurosurgeon for further
7 evaluation and treatment. Other than the pain, however, there was no restriction in activity noted
8 or prescribed. Discussion of any ADL limitations is totally absent. The injured worker also
9 refused pain medications. *Id.*, at Ex. 9.

10 25. On January 21, 2006, the injured worker was seen by an orthopaedist, Richard W.
11 Blakey, M. D., who noted that the injured worker continued working as a substance abuse
12 counselor in a sedentary job. She was taking at the time, no pain medication. The injured
13 worker complained to him of low back pain and right leg pain. Here, too, the doctor's notes are
14 devoid of any discussion of limitations on ADLs. Upon examination, the injured worker was
15 able to walk on her heels and her toes, was somewhat tender in the area of her low back and she
16 did not have too much apparent pain when flexing forward or doing side bends. *Id.*, at Ex. 10.

17 26. The next available report is dated August 14, 2006. At this time, the injured
18 worker was seen by Robert Morrill, PA-C, for Steven Gunnell, D.O. The injured worker
19 continued to complain of low back pain that was worse than the leg pain, and that the leg pain
20 radiated down into both lower extremities and her toes. Epidural injections were agreed upon.
21 The injured worker continued working full duty. There is, again, no discussion of the ADLs
22 being limited or restricted in any way. *Id.*, at Ex. 11.

23 27. On September 21, 2006, the injured worker was seen by Phelps C. Kip, M.D. The
24 chief complaint was lower back pain and bilateral leg pain, with 95% of the pain associated with
25 her lower back. The pain was described as minor in the legs. His diagnosis was probable
26 discogenic pain. He recommended epidural injections and discussed the possibility of surgery.
27 No discussion of limitations on ADLs is evident. There is no indication that the individual was
28 or was not working. No limitation on work activity, however, was prescribed. *Id.* at Ex. 13-14.

1 28. The injured worker was then seen by Dallin L. DeMordaunt, M.D., upon referral
2 from Dr. Kip. According to Dr. DeMordaunt's report, epidural injections would be tried and if
3 the symptoms continued, diagnostic studies would be continued. The injured worker was on
4 Ibuprofen, p.r.n., and she was working regular duty. The report from Dr. DeMordaunt also does
5 not discuss the ADLs and he prescribed no limitations upon her activities. *Id.*, at Ex. 15-17.

6 29. On January 19, 2007, the injured worker saw Dr. DeMordaunt, again. He noted
7 that she reported a 50% improvement after the epidural injection. She felt her strength was good
8 and she was not taking any pain medications. The pain across her back was occasional, and she
9 still had some tingling. He allowed her to stay on regular duty. ADLs were not discussed. *Id.*,
10 at Ex. 18-19.

11 30. On February 1, 2007, the injured worker fell while walking down a wheel chair
12 ramp at work. She landed on her left side. She reported for treatment the same day and was
13 diagnosed with back pain and released to full duty. The initial x-rays at this time of the thoracic
14 and lumbar spine showed minimal degenerative changes. Tr., 11; 12-19. She was prescribed
15 Motrin, p.r.n., and was returned to work full duty. *Id.*, at Ex. 28.

16 31. On February 2, 2007, she coincidentally saw Dr. DeMordaunt, once again. She
17 was there on follow-up for low back pain. She complained that she had fallen at work the day
18 before. She had actually been feeling pretty good and reported that the physical therapy had
19 been helpful. The fall the previous day, however, re-aggravated some of her pain in her back,
20 and there was still numbness down the left leg and on occasion, down the right leg. She was
21 now taking Motrin for pain relief, apparently from the fall on February 1, 2007. Upon
22 examination, she had good trunk flexion and extension without pain. She also had normal gait
23 and tone. The impression was again, lumbosacral strain and possible discogenic pain at L4-5
24 and L5-S1. Physical therapy should be resumed and she could remain on regular duty. Also, she
25 was on Ibuprofen, p.r.n. ADLs were not discussed and the doctor prescribed no limitations on
26 activities. *Id.*, at Ex., 20-22.

27 32. The injured worker was then seen by Dr. DeMordaunt on March 2, 2007, and
28 reported to him that she had no significant improvement and did not feel that the physical

1 therapy had been helpful. The epidural injection gave her 20% -30% improvement but she had
2 the set back from the second fall. Nonetheless, she remained on regular duty at work. Her
3 diagnosis remained the same and Dr. DeMordaunt estimated that she should be at maximum
4 medical improvement (MMI) in the next three to four weeks. In responding to the question,
5 from the worker's compensation provider, asking him to state the injured worker's limitations on
6 activity and if they were permanent or temporary, Dr. DeMordaunt stated: "The patient is on
7 regular duty." *Id.*, at Ex. 23-24.

8 33. Dr. DeMordaunt then saw the injured worker for the original back injury again on
9 March 28, 2007. She reported to him no change in her condition, save and except that she felt
10 that after she fell on February 1, 2007, she had a different injury which her primary care
11 physician was treating. He found her, however, at MMI, stating she was permanent and
12 stationary. He said, she still reports paresthesias although she had a negative EMG, she could
13 remain on regular duty and she could continue the Ibuprofen, p.r.n. No restrictions on ADLs or
14 work activity were noted. *Id.*, at Ex. 25, 26.

15 34. The injured worker was never rated for this original claim. Tr., 11; 10-11.

16 35. Following the second fall on February 1, 2007, an MRI was performed.
17 According to the radiological report, minimal degenerative changes were evident for the thoracic
18 and lumbar spine, the areas imaged. *Id.*, at Ex. 29.

19 36. On March 26, 2007, she was seen by Insan Habib, M.D., who was treating her for
20 the consequences of the second fall. He noted that her past medical history was significant for
21 herniated disc and low back pain. In her present state, however, he said: "**She is able to**
22 **perform her daily activities.**" *Id.* at Ex. 31. (Emphasis added).

23 37. According to the MRI of July 26, 2007, performed for Dr. Habib, there was an
24 L4-5 focal posterior disk protrusion that was impressing upon the thecal sac, and at L5-S1, there
25 was a disc herniation extending posterior and slightly to the left of midline that was impressing
26 upon the thecal sac, and may be impressing upon the nerve root at this level as well. *Id.* at Ex.

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1 38. On October 2, 2007, she was again seen by Dr. Habib, with more complaints of
2 back pain. She also complained of neck pain, but this was not a part of this claim. She had been
3 referred to a neurosurgeon and surgery was again discussed with a recommendation that she see
4 a Dr. Walker, a neurosurgeon. Dr. Habib prescribed, however, that she follow up with him as
5 needed and he prescribed Percocet, #20, only, and Motrin, p.r.n. *Id.* at Ex. 33.

6 39. On December 19, 2007, she returned to Dr. DeMordaunt and was seen, again, by
7 him. He noted that the injured worker was working regularly. The provocative tests indicated
8 little discomfort at the end of the range of seated straight leg raise, in her lower back, and there
9 was no radiation in her legs. The MRI of her spine appeared to be fairly similar to MRIs for the
10 previous back injury, the thoracic was negative and she was seen for the lumbar, only. He did
11 not think that there was anything significant. She was to follow up after an epidural, and wanted
12 to arrange for more therapy. No limitations were prescribed and ADLs were not noted to be
13 limited. *Id.*, at Ex. 35, 36.

14 40. The epidural was injected on January 7, 2008, Tr., 12; 18-19, and when she was
15 seen by Dr. DeMordaunt again on January 18, 2008, he reported to Associated Risk
16 Management, Inc., that the injured worker reported a 40% improvement following the epidural.
17 Upon examination, she had good range of motion without reports of discomfort in her lumbar
18 spine. Dr. DeMordaunt reported that her restrictions were "regular duty." She therefore
19 continued on regular duty as of this date. No ADLs were otherwise mentioned. *Id.*, at 38-39.

20 41. She was then seen again by Dr. Kip on February 25, 2008, who reported that
21 surgery at the L4-L5, L5-S1 levels was an option. Tr., 13; 1-3.

22 42. On March 25, 2008, Dr. Kip performed surgery on the injured worker. The pre-
23 op and post-op diagnosis were the same, stenosis L4-5 with radiculopathy bilaterally, and
24 herniated nucleus pulposus, left-sided, L5-S1, with radiculopathy. A laminectomy, facetomy,
25 and foraminotomy bilaterally, L4-5, and left-sided discectomy, L5-S1 were performed. SR., Ex.
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1 43. By April 15, 2008, the injured worker was back at work, performing on a
2 temporary assignment, and working as she could tolerate. Tr., 13;10-12.

3 44. By June 9, 2008, Dr. Kip released the patient to full duty without restrictions, SR.,
4 Ex. 46, and stated she was stable and rateable. Tr., at 13; 12-14.

5 45. The injured worker was then seen by David J. Trujillo, D.C., who performed a
6 PPD evaluation for the subsequent industrial injury of February 1, 2007, SR., Ex. 47, set forth in
7 a report dated July 1, 2008. He gave her a PPD rating of 20%, whole person impairment. *Id.*, at
8 Ex. 52.

9 46. Dr. Trujillo also stated that because of a medical note indicating a long history or
10 previous lower back pain, apportionment may apply in this case. He then asked that he be
11 provided the past medical records. *Id.*, at Ex. 50.

12 47. The insurer apparently did nothing in response to Dr. Trujillo's request for
13 additional medical records on the apportionment issue. Instead, the insurer/employer opted to
14 pay the 20% whole person disability impairment to the injured worker. Tr., 13; 13-15.

15 48. Jay Betz, M.D., was then retained by Associated Risk Management, Inc., to
16 conduct a chart analysis of the injured worker's condition, and provide a subsequent injury fund
17 analysis in order to support the claim for reimbursement from the Account. SR., Ex. 53.

18 49. His report is dated July 24, 2008, and from the report, it is evident only a record
19 review was completed. Dr. Betz did not see the injured worker. *Id.* at Ex. 53-59.

20 50. Though somewhat confusing in his analysis, Dr. Betz ultimately agreed that Dr.
21 Trujillo appropriately combined the impairments to the injured worker's spine to arrive at the
22 final whole person impairment of a 19% PPD, for the final condition. *Id.*, at Ex. 57.

23 51. As for the preexisting condition, however, Dr. Betz stated:

24 Regarding apportionment, it is clear that the lumbar pathologies treated under the
25 subsequent claim were the same as those identified under the prior claim. It is not
26 entirely clear as to why a new claim was accepted as it appears that the prior
claim was still open at the time of the subsequent injury/aggravation of her low
back complaints and she was not found to have any new pathology. *Id.*, at Ex.
58.

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1 52. Dr. Betz stated further:

2 Ms. _____ [the injured worker] did not undergo a rating evaluation for her
3 prior claim and did not receive any prior award. Also, I do not have any
4 documentation of significant back problems prior to October 2005 or prior
 imaging pathologies prior to 2005. Considering these issues and that both claims
 were occupational injuries, it does not seem appropriate to apportion. *Ibid.*

5 53. The Board thus, could find, here, that there is only one injury that was aggravated
6 and that as a result, there was no subsequent industrial injury and preexisting permanent physical
7 impairment. Absent both a preexisting permanent physical impairment and subsequent industrial
8 injury, no eligibility for reimbursement may be had. NRS 616B.578(1) and (4).

9 54. Nonetheless, Dr. Betz attempted to assess the injured worker's condition prior to
10 the February 1, 2007, second slip and fall, in order to assign a value to the second slip and fall
11 that might equal or exceed 6% whole person impairment in order to justify a reimbursement
12 award under the Account pursuant to the threshold definition of a preexisting permanent physical
13 impairment. *See*, NRS 616B.578(3). SR., Ex. 58.

14 55. Looking backward, using February 1, 2007, as the line of demarcation between
15 the old condition and the new, the second slip and fall, Dr. Betz said he would give the injured
16 worker a rating of 5% to 8% whole person impairment under the Fifth Edition of the *Guides*.
17 SR., Ex. 58. *See*, the American Medical Association's *Guides to the Evaluation of Permanent*
18 *Impairment*, Fifth Edition.

19 56. He then noted that according to the *Guides*, if activities of daily living were
20 negatively impacted, a PPD could be enhanced by 1% to 3% depending upon how severely the
21 ADLs were limited due to the preexisting permanent physical impairment. He noted, further,
22 that at this time, the Administrator was prohibited from increasing PPD awards to take into
23 account limitations on activities of daily living or ADLs. SR., Ex. 58, 59.

24 57. He then commented that if even only a 1% increase in the PPD rating for the
25 preexisting permanent physical impairment could be applied in this case, the applicant would be
26 eligible for reimbursement because the preexisting permanent physical impairment would then
27 rate out at 6%, satisfying the minimum threshold requirement for establishing a preexisting
28 permanent physical impairment. SR., Ex. 58, 59.

1 58. Dr. Betz then observed that in the medical charts for this injured worker, the
2 activities of daily living for this injured worker were specifically not reviewed. *Id.*, at Ex. 58.

3 59. Nonetheless, Dr. Betz would enhance the 5% PPD for the preexisting condition to
4 attain the 6% PPD rating for the preexisting condition, by the following rationale:

5 Those activities [the ADLs] were certainly impaired significantly early on in the
6 case and following the subsequent injury, and if one would reasonably conclude
7 that an additional 1% whole person impairment related to activities of daily living
8 was appropriate, then the patient would meet the 6% pre-existing whole person
9 impairment threshold for Subsequent Injury Fund Analysis and relief. *Id.*, at Ex.
10 58, 59.

11 60. Dr. Betz, thus, in the first instance, looks to the impact upon the ADLs, caused by
12 the subsequent injury, to find sufficient impairment of the ADLs to add the 1%. Since the
13 ADLs, as impacted, must relate to the preexisting condition, he is stretching inappropriately, to
14 achieve a 6% PPD for the preexisting impairment, by resorting to the effects of the subsequent
15 industrial injury. If the ADLs were negatively impacted further by the subsequent injury, their
16 impact should be applied only to the analysis of the subsequent condition that caused the adverse
17 impact upon the ADLs.

18 61. Dr. Betz, however, also notes in the same breath when he attempts to enhance the
19 5% PPD for the preexisting condition, the following:

20 Dr. DeMordaunt's last note before the subsequent injury is dated January 19,
21 2007, at which time he noted the patient was reporting 50% improvement from
22 her most recent epidural, but was still having some tingling in her legs. He noted
23 that her range of motion was excellent without pain and that she was
24 neurologically intact and symmetrical. She was doing normal work and not
25 taking any medications. SR., Ex., 58.

26 62. Dr. Betz' attempt to enhance the 5% PPD by the ADLs is equivocal and
27 speculative, given that he concedes the reports do not address ADLs. SR., Ex. 58. He simply
28 states, "if" one could enhance the 5% PPD by the ADLs, then the 6% eligibility threshold is
reached. He does not come right out and state, however, there is enough evidence of ADL
impairment to actually enhance the 5% PPD for the preexisting condition by 1%-3%, to reach
the 6% eligibility benchmark.

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1 63. Furthermore, the impact on ADLs he notes as conceivably present, are transitory,
2 and not permanent, since he only notes impairment significantly early on in the injury cycle.

3 64. The Board, however, disagrees with Dr. Betz's assessment that the impairments
4 were significant early on, given that prior to the subsequent injury, this was a no time lost injury.
5 The injured worker remained on full duty throughout. She was also without pain medication
6 until the second slip and fall.

7 65. The Board finds that assuming there were two conditions and not just one injury
8 that was aggravated by the second slip and fall, the preexisting condition was not enhanced
9 because there was no showing that the ADLs were actually materially impacted to a degree
10 sufficient to add even a 1% increase in the impairment rating for the preexisting condition.

11 66. The record is devoid of information from which to reasonably conclude that the
12 original injury was so severe that the injured worker's activities of daily living were materially
13 impacted. Dr. Betz's observations are merely in the form of a question instead of an actual
14 finding or even declaratory statement on his part.

15 67. That is to say, activities of daily living consist of walking, breathing, sleeping,
16 bathing, going shopping, and the like. *See, Nevada Attorney for Injured Workers, supra* at 1267.
17 The record is silent on the issue of whether any of these activities were adversely effected.

18 68. The correspondence, Exhibits 1-3, the applicant generated after the fact to boost
19 its claim for reimbursement does not alter this conclusion for the Board.

20 69. Exhibit 1 offered by the applicant simply states that Dr. Trujillo agrees that there
21 could be apportionment and further, he agrees with Dr. Betz that the injured worker could
22 receive a 5% PPD for the preexisting permanent physical impairment. Ex. 1.

23 70. After having had explained to him by Associated Risk Management, Inc., that he
24 did not quite get the point of the inquiry that had been made of him, *see*, Exhibit 2, Dr. Trujillo
25 then said, he agrees that 1% could be added to Dr. Betz's 5% for the impact upon the activities of
26 daily living to reach the 6% eligibility threshold for reimbursement from the Account. *See*,
27 Exhibit 3.

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71. At no point in his response to Associated Risk Management, Inc., does Dr. Trujillo explain how he arrived at the conclusion that the ADLs were adversely impacted and thus, should and could be used to enhance by 1% the 5% PPD assignment of Dr. Betz to the preexisting condition.

72. The Board has reviewed the entire record before it and based upon the entire record, the Board finds insufficient evidence in the record as a matter of fact, from which to conclude that the ADLs were negatively impacted to the degree that a 1% enhancement of the preexisting conditions rating is justified. As stated, this was a no loss of time injury, for an individual who had a range of motion that was excellent and without pain, who was neurologically intact and symmetrical, who was doing normal work and throughout this time until the second slip and fall, was not taking any medications.

73. The Board, therefore, finds that the ADLs were not impacted by the preexisting condition to the point that they could justify a 1% enhancement of a PPD award, if they were impacted at all and that as a result, the preexisting condition remains at a 5% PPD as rated by Dr. Betz.

74. To the extent that any of the following Conclusions of Law constitute Findings of Fact, they are incorporated herein.

CONCLUSIONS OF LAW

1. To the extent that any of the preceding Findings of Fact constitute Conclusions of Law, they are incorporated herein.

2. The applicant filed a timely request for a *de novo* hearing of the tentative decision of the Board. NAC 616B.7779(2).

3. A quorum of the Board was present at all times to hear and decide this matter.

NRS 616B.572(1).

4. The burden of proof lies with the applicant to show that the eligibility criterion justifying reimbursement from the Account have been satisfied. *See, United Exposition Service v. State Industrial Insurance System*, 109 Nev. 421, 424, 851 P.2d 423 (1993).

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1 5. It is now established in Nevada that the Administrator may enhance a PPD rating
2 of an injured worker by 1% to 3% upon proof by an applicant that the activities of daily living of
3 the injured worker have been adversely impacted by the injury being rated. *See, Nevada*
4 *Attorney for Injured Workers, supra* at 1266.

5 6. The Board, however, when considering this matter, believed that it already had
6 the authority to enhance a disability rating in the amount of from 1% to 3% if the Board could
7 find that the activities of daily living had been sufficiently adversely impaired in relation to the
8 injury or condition being rated.

9 7. The Board, therefore, took the concept of activities of daily living into account
10 when deciding whether the applicant had presented sufficient evidence that a preexisting
11 permanent impairment had been proven because the preexisting condition would support a rating
12 of 6% or more according to the appropriate edition of the *Guides* in effect according to NRS
13 616B.578(3). Tr., 29; 19-25, 20; 1-7, 35; 18-25, 36; 1-6.

14 8. There is no dispute in this case that an applicant must establish a preexisting
15 condition exists that supports a 6% or more rating according to the *Guides* as stated in NRS
16 616B.578(3).

17 9. No one could also seriously dispute that NRS 616B.578(1) requires proof that a
18 preexisting condition, as defined by NRS 616B.578(3), combines with the subsequent industrial
19 injury to substantially increase the compensation paid the injured worker. Absent proof of a
20 preexisting condition as defined by NRS 616B.578(3), there can be no proof of the requisite
21 combination of preexisting condition and subsequent injury to substantially increase the
22 compensation paid the injured worker, and therefore, NRS 616B.578(1) is not satisfied.

23 10. The applicant relies upon the injury to the lower spine of the injured worker that
24 occurred on October 6, 2005, which Dr. Betz rated at 5% as the preexisting condition that the
25 applicant also contends before the Board constitutes the preexisting permanent impairment.
26 Since NRS 616B.578(3) defines a preexisting impairment as a condition that at least supports a
27 rating of 6% or more, whole person impairment, the applicant is 1% short of meeting this
28 threshold requirement unless the activities of daily living can be used to enhance by at least 1%

1 the rating Dr. Betz assigned to the preexisting condition. Without the 1% enhancement, this
2 requirement of NRS 616B.578(3) is not satisfied.

3 11. The only question, therefore, to be decided by the Board in this case is whether
4 the activities of daily living can be used as a matter of fact, here, to enhance the disability rating
5 assigned to the pre-existing condition, the injured worker's injury to the lower spine. If activities
6 of daily living were impaired to a degree which would justify enhancement of the rating assigned
7 the pre-existing condition, proof of a preexisting permanent physical impairment would be
8 shown and the application should be accepted for reimbursement. If the activities of daily living
9 were not sufficiently adversely impaired to justify an enhancement of the rating assigned the
10 preexisting condition, then, there is a failure of proof that a preexisting permanent physical
11 impairment, as defined by NRS 616B.578(3), has been shown, and the consequences of that
12 failure for the applicant would then ensue.

13 12. The Board expressly finds that the 5% PPD rating assigned by Dr. Betz to the
14 preexisting condition, the injury to the lower spine, may not be enhanced by 1% to 3% due to the
15 activities of daily living because the record is deficient of proof by the applicant that as a matter
16 of fact, the injured worker's activities of daily living were negatively impacted to the degree that
17 would warrant an enhancement by 1% or more of the 5% PPD rating for the pre-existing
18 condition of the spine rated by Dr. Betz and relied upon by the applicant to show the presence of
19 a preexisting permanent physical impairment.

20 13. Since the preexisting condition of the spine supports only a 5% PPD rating, the
21 applicant has failed to meet the threshold requirement of NRS 616B.578(3) for proof of the
22 presence of a preexisting permanent physical impairment.

23 14. Without proof of a preexisting permanent physical impairment as defined in NRS
24 616B.578(3), the applicant has also failed to prove that NRS 616B.578(1) has been satisfied
25 because satisfaction of the statute turns upon proof of the existence of a preexisting permanent
26 physical impairment which then combines with the subsequent industrial injury to substantially
27 increase the compensation paid the injured worker.

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15. The applicant has, therefore, failed to satisfy the requirements of NRS 616B.578(1) and (3). As the applicant must prove by a preponderance of the evidence that each requirement of NRS 616B.578 has been satisfied, the applicant is ineligible for reimbursement from the Account. The application is deficient when measured against NRS 616B.578.

16. The application for reimbursement must be denied because the applicant has failed to show that NRS 616B.578 (1) and (3) were satisfied.

DECISION OF THE BOARD

Based upon the Findings of Fact and Conclusions of Law set out above, the Board makes its decision as follows:

The determination of the Administrator of the Division of Industrial Relations is affirmed by the Board for the Administration of the Subsequent Injury Account for the Association of Self-Insured Public and Private Employers. The applicant has failed to establish by a preponderance of the evidence that NRS 616B.578 (1) and (3) were satisfied. Therefore, the application for reimbursement from the Subsequent Injury Account for the Association for Self-Insured Public and Private Employers is hereby denied. The application was denied upon a motion by Joyce Smith, seconded by Emilia Hooks, made pursuant to NRS 616B.578 (1) and (3), for denial of the claim. The vote was 3, in favor of the motion, none against the motion, with no abstentions. As a majority of those voting when a quorum of the Board was present voted in favor of the motion, the motion was duly adopted. Tr., 35; 10-25, 36; 1-19.

Additionally, on August 18, 2010, the Board, having reviewed this Decision and after due deliberation, upon the motion of Emilia Hooks, seconded by Joyce Smith, voted to adopt this Decision, with Findings of Fact and Conclusions of Law, as the Decision of the Board and to authorize the Chairman to sign this Decision after the Board's legal counsel completes the clerical corrections needed to finalize this document.

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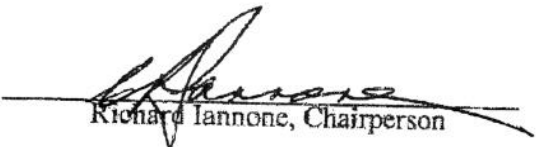
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The vote was 3 in favor and 0 against with 2 abstentions. Members Lau and Hoolihan
abstained because they were not members of the Board when this matter was heard and decided.
They took no part in the deliberations of this motion.

Dated this 7 day of ~~September~~ ^{October}, 2010.


Richard Iannone, Chairperson

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AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the instant document does not contain the social security number of any person.

Dated this 3rd day of October, 2010.

Zeh & Winograd

By: 

Charles R. Zeh, Esq.

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Certificate of Service

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

✓	Placing an original or true copy thereof in a sealed envelope, postage prepaid, 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 89704
✓	Certified Mail/Return Receipt Requested: 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 89704
	Personal delivery
	Telephonic Facsimile at the following numbers:
	Federal Express or other overnight delivery
	Reno-Carson Messenger Service

Dated this 8th day of October, 2010.


Karen Kennedy

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