

Zeh Saint-Rubin Spoo
575 Forest Street, Suite 200
Reno, Nevada 89509
Tel.: (775) 323-5700 FAX: (775) 786-8183

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

In re: Subsequent Injury Request for Reimbursement

Claim No.:	7142000854
Date of Injury:	07/19/01
Association Name:	Public Agency Compensation Trust
Association Member:	Lander County School District
Association Administrator:	Public Agency Compensation Trust
Third-Party Administrator:	Alternative Service Concepts
Application Submitted by:	Alternative Service Concepts

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

This case came before the Board for the Administration of the Subsequent Injury Account for the Associations of Self-Insured Public and Private Employers (the "Board") upon appeal by the applicant of the recommendation of the Administrator ("Administrator") of the Division of Industrial Relations ("DIR") to the Board that it should deny the applicant's request for reimbursement from the Subsequent Injury Account (the "Account"). The Administrator based the recommendation upon the grounds that the information supplied by the applicant did not satisfy the requirements of NRS 616B.578(3). None of the other requirements of NRS 616B.578 are at issue in this case.

The association on behalf of whom the application was submitted for reimbursement is the Public Agency Compensation Trust ("PACT"). The applicant

1 sought reimbursement in the amount of Sixty Thousand One Hundred Sixty One Dollars
2 and 36/cents (\$60,161.36). The Administrator verified costs for reimbursement in the
3 amount of Fifty Nine Thousand Seven Hundred Thirty Dollars and 12/cents (\$59,730.12),
4 in the event that the Board approved the application.

5 On June 18, 2003, the Board conducted a hearing on PACT's application for
6 reimbursement. At the conclusion of the hearing, the Board determined to uphold the
7 recommendation of the Administrator and deny the application for reimbursement on the
8 grounds that the application had not satisfied the requirements of NRS 616B.557(1).

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

11 FINDINGS OF FACT

12 1. This case was heard by the Board on June 18, 2003. The case was
13 continued from April 9, 2003, to give the parties the opportunity to brief further the
14 meaning of NRS 616B.578(3), the section of NRS 616B.578 at issue before the Board.

15 2. The applicant in this matter is PACT. The applicant was notified by mail of
16 the Administrator's decision recommending denial of the application. The staff report
17 notifying the applicant of the Administration decision is dated January 31, 2003.

18 3. In a letter dated February 7, 2003, to the Board's attorney, the applicant
19 gave notice that it was appealing the Administrator's recommendation of denial of the
20 application.

21 4. The letter of the applicant giving notice of the appeal arrived at the office of
22 legal counsel for the Board via facsimile on February 7, 2003 and by U.S. mail on
23 February 10, 2003. Notice of the appeal was received in the office of the Board's legal
24 counsel within 10 days of the notice provided the applicant of the Administrator's
25 recommendation.

26 5. Robert S. Larsen, Esq., Story & Sertic, appeared for the applicant.

27 6. John Wiles, Esq., legal counsel to the DIR, appeared on behalf of the
28 Administrator.

1 7. Chairman Richard Iannone conducted the meeting. Member Joyce Smith
2 and Vice-Chairman, Gordon Hutting attended by telephone from Carson City, Nevada.
3 The remaining members were present in person with Chairman Iannone at the offices of
4 the DIR, the place where the hearing was noticed to be held. Vice-Chairman Gordon
5 Hutting did not participate in the hearing. He informed the Board that his employer was a
6 member of PACT and therefore, he recused himself on conflict of interest grounds.

7 8. Admitted into evidence in this matter without objection was the staff report
8 with attachments supplied by the DIR and the pre-hearing statement with attachments
9 from the applicant. Additionally admitted into evidence, was the Random House
10 Webster's College Dictionary page 283, containing the definition of the word "condition."

11 No other exhibits were offered by either party.

12 9. The total amount requested for reimbursement for this claim was the sum of
13 \$60,161.36. The amount of reimbursement after costs were verified was the sum of \$59,730.12,
14 the amount recommended by the Administrator in the event the recommendation of denial was
15 not accepted by the Board after hearing the case. DIR Staff Report, dated January 31, 2003, p. 1

16 10. From the Staff Report of January 31, 2003, the undisputed facts are that the
17 injured employee was first injured on May 30, 1997, while working as a special needs teacher for
18 the Lander County School District. *Id* at p. 2.

19 11. The initial injury was to the right shoulder and back caused when the some
20 students poured Gator Aid on him, striking his right shoulder and back with a heavy ice chest. As
21 a result of the incident, he injured his right shoulder and suffered an injury to the cervical spine.
22 *Id* at p. 2.

23 12. An MRI of the cervical spine showed C5-6 degenerative disc disease with a
24 moderate sized, broad based disc bulge or protrusion and moderate left foraminal narrowing at
25 C6-7, plus an extradural defect most consistent with a small disc protrusion at C7-T1. *Id* at p. 2.

26 13. The injury caused cervical radiculopathy which was resolved in May, 1998. A
27 permanent partial disability evaluation was performed and the injured worker was given a rating

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1 of 1 percent for the right shoulder and 5 percent for the cervical spine, which combined for a 6
2 percent whole person impairment. *Id* at p. 2.

3 14. The injured worker was again hurt and suffered a subsequent or second industrial
4 injury while playing frisbee with his class.

5 15. This time, the injured worker fell, catching himself with his left arm and hand. He
6 also jammed his neck. An MRI was performed which indicated two disc herniations at the C5-6,
7 C6-7 levels, with structural iliac bone graft from the left side. The MRI also revealed internal
8 fixation at the C5, C6 and C7 levels.

9 16. A permanent partial disability evaluation was conducted on January 8, 2002 by
10 Robert Brown, M. D., and the injured employee was found to have a DRE category III for the
11 cervical spine. The injured worker was awarded a 15 percent whole person impairment which,
12 after apportioning the previous 5 percent for the pre-existing cervical spine injury, resulted in a 10
13 percent whole person impairment.

14 17. Subsequently, the pain to the right shoulder worsened and the claims was
15 reopened. Surgery was performed on the right shoulder of decompression with resection of the
16 clavicle, resection of the acromion, and exploration of the rotator cuff. *Id* at p. 2.

17 18. A permanent partial disability evaluation of the reopened claim was conducted by
18 David Rovetti , D. C., on January 22, 2002. The injured worker was given an additional 13
19 percent impairment for the right shoulder. *Id* at p. 2

20 19. The applicant admits that these facts are not in dispute. PACT Pre-Hearing
21 Statement dated April 3, 2003, p. 3;2-4.

22 20. In addition, the applicant admits that this is a case where the injured worker
23 suffered from "...two separate pre-existing impairments to different body parts which separately
24 are less than 6% but together equal or exceed a 6% rating and the subsequent injury is only to one
25 of those body parts." PACT Supplemental Pre-Hearing Statement dated May 9, 2003,
26 p. 1;24-27.

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1 also, *Hernandez v. Gerber Group*, 608 A. 2d 87, 89 (Conn., 1992); *Jacques v. H.O. Penn*
2 *Machinery Co.*, 166 Conn. 352, 356, 349 A.2d 847 (Conn. 1974).

3 8. The Board considers applications for reimbursement under Nevada's
4 subsequent injury account with these premises in mind and applications are to be
5 approved which promote these salutary purposes.

6 9. Additionally, the burden of proof is upon the applicant to show entitlement
7 to reimbursement. *See, Franklin v. Victoria Elevator Co.*, 206 N.W.2d 555, 556 (Mn.,
8 1973); *O'Reilly v. Raymond Concrete Piling*, 419 N.Y.S.2d 475, 476 (Ct. of Appeals,
9 N.Y., 1979). The burden is upon the applicant in this case, therefore, to show that the
10 requirements of NRS 616B.578(3) are satisfied by a preponderance of the evidence.
11 *McClanahan v. Raley's Inc.*, 117 Nev. 921, 34 P.2d 573, 576 (2001); *cf.*, NRS
12 616C.150(1).

13 10. Quite clearly, the evaluation of an application for reimbursement from the
14 Subsequent Injury Account entails an exercise in the interpretation and application of the
15 statutory framework the Board is charged with administering. It is the Board's view that
16 when administering this statutory framework, the starting point for any analysis of an
17 application for reimbursement is the text of the statutory framework. *Cf., Connecticut*
18 *Nat. Bank v. Germain*, 503 U.S. 249, 253-254, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992).
19 Where the language of the statute is unambiguous and the words are clear, the Board's
20 inquiry should be limited to the plain meaning of the statutory framework, alone. *See,*
21 *Rubin v. United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 66 L.Ed.2d 633 (1981).

22 11. Couched in other terms:

23 The first and most important step in construing a statute is the
24 statutory language itself. *Chevron USA v. Natural Res. Def.*
25 *Council*, 467 U.S. 837, 843-44, 104 S.Ct. 2778, 81 L.Ed.2d
26 694 (1984). We look to the text of the statute to 'determine
27 whether the language at issue has a plain and unambiguous
28 meaning with regard to the particular dispute in the case.'
Robinson v. Shell Oil Col, 519 U.S. 337, 340, 117 S.Ct. 843,
136 L.Ed.2d 808 (1997). If from the plain meaning of the
statute congressional [and therefore also legislative] intent is

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1 clear, that is the end of the matter. *Chevron*, 467 U.S. at 843,
2 104 S.Ct. 2778. *Royal Foods Co. Inc. v. RJR Holdings Inc.*,
3 *T.G. I. Fridays, etc.*, 252 F. 3d 1102, 1107 (9th Cir., 2001).

4 12. *Royal* also advises:

5 There is a strong presumption that the plain language of the
6 statute expresses congressional [and therefore legislative]
7 intent, which is 'rebutted only in rare and exceptional
8 circumstances, when a contrary legislative intent is clearly
9 expressed.' *Ardestani v. I.N.S.*, 502 U.S. 129, 135-36, 112
10 S.Ct. 55, 116 L.Ed.2d 496 (1991) (citation omitted); *see also*
11 *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242,
12 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989).... *Id.* at 1108.

13 13. Then, *Royal* concludes:

14 Even where the express language of a statute appears
15 unambiguous, a court must look beyond that plain language
16 where a literal interpretation of this language would thwart
17 the purpose of the overall statutory scheme, *United States v.*
18 *Jersey Shore State Bank*, 781 F.2d 974, 977 (3rd Cir., 1986),
19 *aff'd.*, 479 U.S. 442, 107 S.Ct. 782, 93 L.Ed.2d 800 (1987),
20 would lead to an absurd result, *id.*, or would otherwise
21 produce a result 'demonstrably at odds with the intentions of
22 the drafters,' *Demarest v. Manspeaker*, 498 U.S. 184, 190,
23 111 S.Ct. 599, 112 L.Ed.2d 608 (1991) (quoting *Griffin v.*
24 *Oceanic Contractors, Inc.*, 458 U.S. 564, 571, 102 S.Ct.
25 3245, 73 L.Ed.2d 973 (1982). *Id.*, at 1108.

26 14. This case involves the interpretation of NRS 616B.578(3) which, for
27 purposes of NRS 616B.578(1), defines "permanent physical impairment" as follows:

28 As used in this section, "permanent physical impairment"
means **any permanent condition**, whether congenital or
caused by injury or disease, of such seriousness as to
constitute a hindrance or obstacle to obtaining employment or
to obtaining reemployment if the employee is unemployed.
For purposes of this section, a **condition** is not a "permanent
physical impairment" unless it would support a rating of
permanent impairment of 6 percent or more of the whole
man.... (Emphasis added).

15. Where the facts of the case are not in dispute, the issue before the Board
becomes purely a question of law as the authorities relied upon by the applicant hold.
See, Second Injury Fund v. Streator Chevrolet, 709 P.2d 1176, 1178 (Utah 1985). *See*
also, Shipp v. Treasurer, State of Missouri, Custodian to Second Injury Fund, 99 S.W.3d
44; 2003 Mo. App. Lexis, 211 (2/18/03).

1 16. Couched in other terms, where neither the facts of the case nor the findings
2 of impairment are in dispute, the case is limited in scope to a question of statutory
3 interpretation. *See, Otvos v. Industrial Insurance Commissioner of Utah*, 751 P.2d 263,
4 265 (Utah, 1988).

5 17. According to the applicant's Pre-Hearing Statement, neither the facts of the
6 case nor the findings of impairment are in dispute, here. The applicant states: "The facts
7 relevant to this application are not in dispute and are set forth in the Administrator's
8 Recommendation." PACT Pre-Hearing statement, p. 3;2-4.

9 18. Additionally, the applicant concedes that the injured worker suffered from
10 "...two separate pre-existing impairments to different body parts which separately are less
11 than 6% but together equal or exceed a 6% rating and the subsequent injury is only to one
12 of those body parts." PACT Supplemental Pre-Hearing Statement, p. 1;22-27.

13 19. There is also no question that there was neither a functional or causal
14 relationship between the injured worker's two pre-existing impairments. The injured
15 worker suffered a pre-existing injury to his right shoulder which was assigned a 1 percent
16 disability rating. *See*, PACT Pre-hearing Statement, p. 3; 5-7, and DIR, Memorandum, p.
17 2. He also suffered a pre-existing injury to his cervical spine, which was assigned a 5
18 percent disability rating.

19 20. Neither pre-existing disability nor impairment, independently generated a 6
20 percent impairment and therefore independently met the 6 percent threshold disability
21 requirement of NRS 616B. 578(3).

22 21. The subsequent injury suffered by the injured worker was to his cervical
23 spine. There is nothing in the record which shows that the injury to the right shoulder
24 either caused, was exacerbated by, or aggravated the subsequent injury. There is neither
25 cause nor some pathology linking the subsequent injury to the cervical spine and the right
26 shoulder injury.

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1 22. For the applicant, it is enough for the purpose of satisfying the 6 percent
2 threshold requirement of NRS 616B.578(3) if the two pre-existing injuries cumulatively
3 equal 6 percent, though independently neither gives rise to a 6 percent impairment.

4 23. The applicant, it appears, also believes the Administrator would require the
5 6 percent pre-existing requirement to be to the same body part as the subsequent injury.

6 24. The first part of the applicant's position staked out is a question of
7 "stacking" of independent body parts or injuries, to cumulatively reach the 6 percent
8 level, whether or not NRS 616B.578(3) would also impose a "same body part"
9 requirement. If "stacking" is not permitted, here, then the "same body part" question is
10 not even reached.

11 25. Taking the "stacking" question, then, first, it is a matter of statutory
12 interpretation involving the meaning of NRS 616B.578(3). The question is, does the
13 language of NRS 616B.578(3) admit of or allow the cumulation of or stacking of multiple
14 injuries which, themselves, do not meet the 6% threshold requirement of NRS
15 616B.578(3) in order to achieve in combination the 6 percent requirement of NRS
16 616B.578(3)?

17 26. Considering the plain language of NRS 616B.578(3), from the words
18 emphasized in paragraph 14 from the statute, it is clear the statute is not couched in terms
19 such as "the totality of conditions" or expressions like " after taking into account every
20 physical condition or impairment suffered by the injured worker" or such other
21 expressions which would indicate a clear intent in the statute to allow the applicant to
22 count a multiplicity of conditions and to combine them, whether related or unrelated, in
23 order to achieve the 6 percent threshold requirement of NRS 616B.578(3). On the
24 contrary, the statute is couched entirely in the singular, with the use of the terms like
25 "any," "a condition," "it," "a permanent physical impairment," and "a condition." The
26 word "it" is also the term used to identify that which is to satisfy the 6 percent rating and
27 the word "it" is clearly singular, especially when it's antecedents are "a condition" and "a
28 permanent physical impairment." Therefore, while "any" condition will satisfy the 6

1 percent requirement in the sense that it may be "congenital," or caused by "injury" or
2 "disease," the 6 percent must be achieved by a singular condition with an origin that is
3 congenital, or caused by injury or caused by disease. A combination of conditions caused
4 variously by a congenital condition, injury and disease which, when taken together,
5 amount to a 6 percent or better whole person impairment does not satisfy NRS
6 616B.578(3) upon the face of the statute, unless one or more, individually, but not in
7 concert, give rise to a 6 percent whole man rating. NRS 616B.557(3) is unambiguous on
8 this point.

9 27. Therefore, while "any" condition will satisfy the 6 percent requirement in
10 the sense that it may be "congenital," or caused by "injury" or "disease," the 6 percent
11 must be achieved by a singular condition with an origin that is congenital, or caused by
12 injury or caused by disease.

13 28. Several authorities from other jurisdictions were cited by the applicant for
14 the proposition that the stacking of disparate or independent pre-existing impairments
15 allowed in these other jurisdictions should, therefore, also be permitted in Nevada.
16 Comparing and contrasting, then, the statutory language of the statutory framework in
17 Utah with Nevada reveals the kind of language which could and should have been used in
18 Nevada if it was the intent of the Nevada legislature to allow for stacking to trigger
19 liability of the subsequent injury account, here.

20 29. In Utah, the subsequent injury account is concededly implicated without
21 regard to a percentage of impairment if the subsequent injury aggravates or is aggravated
22 by the subsequent injury. "Any" aggravation in either direction will do as it is deemed a
23 "substantially greater" situation, thus mandating subsequent injury account liability.

24 *Second Injury Fund v. Streator*, supra at 1180.

25 30. Where there is no aggravation, however, then, the Utah statutory scheme
26 turns to percentages to determine liability for the subsequent injury account. Second
27 injury account liability is established where there is no aggravation only if "...the
28 percentage of permanent physical impairment attributable to the industrial injury is 10%

1 or greater and the percentage of permanent physical impairment resulting from **all causes**
2 **and conditions, including the industrial injury, is greater than 20%...**" *Id* at 1180
3 (emphasis added).

4 31. The comparison and the contrast between the Nevada statutory scheme and
5 the Utah statute, which admits of stacking, could not be more striking and clear. In Utah,
6 the analysis expressly allows the consideration of **all causes and all conditions** including
7 the subsequent injury to get to the 20% threshold requirement. The statute is expressly in
8 the plural. It expressly invites consideration of **all causes**, without regard to a percentage
9 other than a total which includes the subsequent injury. The statute expressly invites the
10 consideration of **all conditions**, without regard to a percentage other than a total which
11 includes the subsequent injury. The statute also expressly allows both **causes and**
12 **conditions** in concert with each other. The accumulation or aggregation of a the totality
13 of the injured worker's health is plainly invited.

14 32. The Board is of the opinion that nothing even remotely approaching this
15 kind of language exists in NRS 616B.578(3). Furthermore, the Utah statute, 35-1-69, is
16 an example of the kind of language the Nevada legislature could have used had it wanted
17 to allow for the aggregation of independent or isolated injuries or conditions in order to
18 achieve the 6 percent level. The fact that the Nevada legislature could have used the kind
19 of language used in Utah but did not use such language is a strong indicator Nevada did
20 not intend for stacking to be permitted, then, in Nevada.

21 33. The threshold level of 6 percent versus 20 percent would also lead to the
22 same conclusion. Stacking would be the natural consequence of a threshold level as high
23 as 20 percent. Absent stacking, a 20 percent threshold would rule out all but the most
24 catastrophic of pre-existing conditions. Conversely, if stacking were permitted for a
25 threshold as minimal as 6 percent, even the most common, marginal afflictions, when
26 joined together, would give rise to second injury account liability. It would be as if there
27 were no threshold whatsoever.

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1 34. The concept, therefore, of stacking under the Nevada statutory scheme, the
2 Board concludes, is not permitted.

3 35. Therefore, interpreting and applying NRS 616B.578(3), the Board does not
4 understand the statute to permit the stacking of conditions to achieve the 6 percent
5 threshold the statute requires to be satisfied. This is, however, the request being made of
6 the Board by the applicant in this case. The Administrator, DIR, rejected the application
7 for failing to satisfy the 6 percent requirement because the subsequent injury was to the
8 lumbar spine and the pre-existing conditions relating to the lumbar spine did not give rise
9 to a rating of 6 percent or more. The Administrator's understanding of the meaning of
10 NRS 616B.557(3) is consistent with the Board's interpretation of NRS 616B.557(3)
11 according to the plain meaning of the statute.

12 **DECISION OF THE BOARD**

13 Based upon the Findings of Fact and Conclusions of Law set out above, the Board
14 makes it's decision as follows:

15 The determination of the Administrator of the Division of Industrial Relations is
16 affirmed by the Board for the Administration of the Subsequent Injury Account for Self-
17 Insured Employers. The applicant has failed to establish by a preponderance of the
18 evidence that NRS 616B.578(3) was satisfied. Therefore, the application for
19 reimbursement from the Subsequent Injury Account for Self-Insured Employers is hereby
20 denied. The application was denied upon a motion by Joyce Smith, seconded by Dennis
21 Barton, made pursuant to NRS 616B.578(3) for denial of the claim. The vote was 4-0-1,
22 in favor of the motion, with Gordon Hutting abstaining. As a majority of those voting
23 when a quorum of the Board was present voted in favor of the motion, the motion was
24 duly adopted.

25 Additionally, on October 23, 2003, the Board, having reviewed this Decision and
26 after due deliberation, upon the motion of Gail Gibson, seconded by Joyce Smith, voted
27 to adopt this Decision, with Findings of Fact and Conclusions of Law, as the Decision of
28 the Board.

1 The vote was 3-0-1-1, with Gordon Hutting abstaining because his employer is a
2 member of PACT, the applicant, and Dennis Barton being absent. As a majority of those
3 voting when a quorum of the Board was present voted in favor of the motion, the motion
4 was duly adopted.

5 Dated this 19 day of December, 2003.

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Richard Iannone, Board Chairperson

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Certificate of Service

Pursuant to NRCF 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: Robert S. Larsen, Esq. STORY & SERTIC 777 Sinclair Street, Suite 201 Reno, NV 89501 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

Dated this December 31, 2003.



Karen Weisbrot