

ORIGINAL

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

4 In re: Subsequent Injury Request for Reimbursement

5
6 Claim No.: 7143010499
7 Date of Injury: January 12, 2001
8 Association Name: Public Agency Compensation Trust
9 Association Member: Elko County
 Association Administrator: Public Agency Compensation Trust
 Third-Party Administrator: Alternative Service Concepts
 Application Submitted by: Alternative Service Concepts

10 **FINDINGS OF FACT**
11 **CONCLUSIONS OF LAW**
12 **AND DETERMINATION OF THE BOARD**

13 This case came before the Board for the Administration of the Subsequent Injury
14 Account for the Associations of Self-Insured Public and Private Employers (the Board) for a *de*
15 *novo* hearing on December 7, 2007, upon the applicant's challenge to the recommendation of the
16 Administrator, Division of Industrial Relations, (Administrator) that the Board deny the
17 application because the applicant failed to show that the requirements (the 6% rule) of NRS
18 616B.578 (3), quoted in the margin¹, had been satisfied. The Administrator concluded the
19 applicant failed to show the injured worker's preexisting condition would support a rating of 6%
20 or more, whole person impairment, and therefore, advised the Board that the application for
21 reimbursement should not be sustained.

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25 ¹As used in this section, "permanent physical impairment" means any permanent condition,
26 whether congenital or caused by injury or disease, of such seriousness as to constitute a hindrance or
27 obstacle to obtaining employment or to obtaining reemployment if the employee is unemployed. For the
28 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 person if evaluated according to the
American Medical Association's Guides to the Evaluation of Permanent Impairment as adopted and
supplemented by the Division pursuant to NRS 616C.110. NRS 616B.578 (3).

1 The injured worker suffered the subsequent industrial injury to his back on January 12,
2 2001. In settling the underlying industrial injury claim due to this subsequent work-related
3 injury and disbursing payments thereon, the applicant secured a permanent partial disability
4 evaluation completed by Paul R. Pirruccello, DC, DABCO, who determined, after he conducted
5 a physical examination of the injured worker, that the injured worker's back injury rated out at a
6 total of 10%, whole person, permanent partial disability (PPD). Dr. Pirruccello then
7 apportioned this global disability rating at 5% PPD for the preexisting, non-industrial back
8 condition and 5% PPD for the current industrial injury. Based upon this 5 % PPD rating,
9 compensation was then paid the injured worker. No additional compensation was paid or offered
10 the injured worker, thereafter.

11 This rating was determined under the requirements set forth in the 4th Edition of the
12 American Medical Associations's Guides to the Evaluation of Permeant Impairment (the
13 *Guides*), the Edition of the *Guides* in effect at the time the examination and evaluation were
14 conducted by Dr. Pirruccello. See, NRS 616C.110. The Administrator, thus, concluded that
15 while the application for reimbursement satisfied the remaining elements of NRS 616B.578, the
16 application should be rejected for failing to satisfy the 6% rule for preexisting conditions
17 established in NRS 616B.578(3).

18 When the applicant finally got around to filing an application for reimbursement from the
19 Account, it secured a "second opinion" from Jay E. Betz, M.D., dated June 27, 2007, of the
20 injured worker's condition. He did not conduct a physical examination of the injured worker.
21 His evaluation was a record review only. As he was reviewing records in 2007, he used the 5th
22 Edition of the *Guides* , the Edition of the *Guides* in effect at the time of this record review. He
23 concluded that had the injured worker's preexisting, non-industrial injury been evaluated
24 according to the 5th Edition of the *Guides*, the preexisting condition would have been rated under
25 the Range of Motion Model of the 5th Edition, itself, at well over 10%, whole person, PPD.

26 The Board was, thus, confronted by the applicant with two permanent partial disability
27 ratings for the same condition. The first was secured at the time of the subsequent injury in
28 2001, and was the rating the applicant used to compensate the injured worker for his industrial

1 injury. The second was secured by record review, five years later to try and satisfy the 6% rule
2 of NRS 616B.578, in order to justify being reimbursed for the compensation paid the injured
3 worker based upon the rating in 2002 by Dr. Pirruccello, which the applicant now asks the Board
4 to disregard.

5 As explained below, the Board rejected the applicant's sophistry and followed the
6 Administrator's recommendation to reject the application for reimbursement based upon the
7 Board's conclusion that the applicant had not satisfied the 6% rule of NRS 616B.578(3).

8 FINDINGS OF FACT

9 1. This case was heard by the Board on December 7, 2007, when the Board
10 conducted a *de novo* review, with a Court reporter being present to record the proceedings, of the
11 applicant's challenge to the Administrator's recommendation that the application be rejected for
12 failing to satisfy the 6% rule of NRS 616B.578(3).

13 2. The Association and applicant for this claim is the Public Agency Compensation
14 and Trust. The Employer is Elko County², Tr., 5; 16-18. The application was received from
15 Alternative Service Concepts on July 17, 2007. Exhibit 2, p. 1.

16 3. The applicant was notified of the Administrator's recommendation for denial by a
17 Staff Report dated August 8, 2007, Exhibit 2, p. 1, and served upon the applicant by mail on
18 August 8, 2007. *See*, affidavit of service attached to Exhibit 2.

19 4. In a letter dated August 21, 2007, addressed to Charles R. Zeh, Esq., and
20 delivered to the Board's legal counsel, the Law Offices of Zeh & Winograd, on the same date,
21 the applicant gave notice of its disagreement with the Administrator's recommendation. Tr., 3;
22 18-21.

23 5. Allowing 3 days for the mailing of the Administrator's Staff Report containing the
24 Administrator's recommendation of denial, the applicant's contest of the Administrator's
25 recommendation arrived at the office of the Board's legal counsel within 10 days of the notice to
26 the applicant of the Administrator's recommendation for denial of the application.

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28 ²Tr." is a reference to the transcript of the hearing, followed by the page and line where the
annotation is found in the transcript of the proceedings.

1 6. At the hearing of December 7, 2007, Robert F. Balkenbush, Esq., Thorndal
2 Armstrong Delk Balkenbush & Eisinger, appeared by telephone on behalf of the applicant. Tr.,
3 2; 13.

4 7. John Wiles, Esq., legal counsel to the Administrator of the Division of Industrial
5 Relations (DIR), was present in person at the hearing. Tr. 2; 9.

6 8. Jacque Everhart, the DIR Administrator's liaison to the Board, was present in
7 person at the hearing. Tr. 2; 8.

8 9. Richard Iannone, Chairman, and Board Members, Ron Ryan (deceased) and
9 Emilia Hooks, attended in person the hearing. Tr., 2; 4, 10, and 11. Vice-Chairman Joyce Smith
10 appeared by telephone. Tr., 2; 12.

11 10. The following exhibits were admitted into evidence without objection:

12 Exhibit 1: the letter from the applicant dated August 21, 2007; and

13 Exhibit 2: the Staff Report with Exhibits A through L and the disallowance form. 2
14 Tr., 3; 22-25, 4; 1-16.

15 11. The injured worker had a history of lumbar spine issues in the L3-4 to L4-5 area
16 of the lumbar spine and by history, had two lumbar spine surgeries, according to Mellonese
17 Harrison, M.D., who described two lower back surgeries dating back to October 2, 1996. Exhibit
18 2, p. 2. *See also*, Exhibit K to the Staff Report³, p. 3, the PPD Evaluation of Dr. Paul Pirruccello,
19 D.C., DABCO.

20 12. The industrial claim of the injured worker was due to an injury to his back
21 suffered on January 12, 2001, when, while working for Elko County, as a Buildings and Grounds
22 Supervisor, he was shoveling snow and experienced low back pain and muscle spasms. Exhibit
23 2, p. 2.

24 13. Ultimately, surgery on the injured worker's lumbar area previously injured was
25 performed on two occasions, on January 20, 2001 and on September 21, 2001.

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28 ³Hereinafter, the notation Staff Report will be omitted. A reference to an exhibit followed by a
"letter" such as here, the letter "K," will be to an exhibit attached to the Staff Report, Exhibit 2.

1 14. On March 11, 2002, the injured worker was determined to be stable and rateable
2 for his industrial injury. Exhibit K, p 3. He then presented himself to Dr. Pirruccello, for a
3 physical examination for purposes of securing a permanent partial disability rating for his
4 subsequent industrial injury. Exhibit K, p. 1.

5 15. Upon review of the injured worker's previous medical condition, the medical
6 history of the subsequent industrial injury, a medical history taken directly from the injured
7 worker, and a physical examination of the injured worker, Dr. Pirruccello determined that the
8 injured worker's disability rating should be 10% PPD. He then apportioned the total of the 10%
9 PPD rating for his current, presenting condition to be 5% PPD for the preexisting condition and
10 5% PPD for the subsequent industrial injury. Exhibit K, pp. 1-6 (rating and apportionment at
11 page 6).

12 16. Dr. Pirruccello arrived at the rating and apportionment as follows:

13 [The injured worker] has had a total of four low back operations. The last two
14 were resulting from a low back injury sustained while on the job. In speaking
15 with [the injured worker] **he says that he was fully functional prior to this on**
16 **the job injury.** He is left with a permanent disability as a result of the low back
17 injury. Due to this, I would go to table 70 [of the 4th Edition of the *Guides*] on
18 page 108. Towards the bottom it states, "Previous spine operation without loss of
motion segment integrity or radiculopathy." With choices of category II, III, IV,
the category that best describes ...[the injured worker's] condition at this time is a
DRE lumbosacral category III, which is a 10 percent whole person impairment.
Exhibit K, p. 6 (Emphasis added.).

19 17. The 4th Edition of the *Guides* also states: "The evaluator assessing the spine
20 should use the Injury Model [DRE or Diagnosis-related Estimates Model], if the patient's
21 condition is one of those listed in Table 70 (p. 108).

22 18. Table 70 of the 4th Edition of the *Guides*, states at category III: "Previous spine
23 operation *without* loss of motion segment integrity or radiculopathy."

24 19. The Board agrees with Dr. Pirruccello that: (a) the injured worker had previous
25 surgery to the lumbar spine region; and (b) that since he **was fully functional** prior to the
26 subsequent industrial injury, he was without radiculopathy or loss of motion segment integrity,
27 thereby placing the injured worker on Table 70, with a category range of II, III and IV. 4th

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1 Edition, *Guides* p. 108. The injured worker's condition is described, therefore, in Table 70, page
2 108 of the *Guides*.

3 20. The Board finds, further, that the subsequent industrial injury was caused by
4 injury, rather than illness.

5 21. The 4th Edition of the *Guides*, also states: "The Range of Motion Model should
6 be used only if the Injury Model is not applicable, or if more clinical data on the spine are
7 needed to categorize the individual's spine impairment." *Guides*, p. 112.

8 22. The Range of Motion Model is the second method of evaluating a spinal injury
9 for disability rating purposes. It was the method of evaluation apparently relied upon by Dr.
10 Betz, when he made his record review recommendation on disability rating and apportionment.
11 Exhibit L, p. .

12 23. The Injury Model was not, however, inapplicable to the injured worker's
13 industrial back injury and, therefore, according to the 4th Edition of the *Guides*, the Injury Model
14 was the method to be applied for assessing the injured worker's industrial claim.

15 24. The injured worker was compensated based upon the rating given by Dr.
16 Pirruccello.

17 25. No additional compensation was paid to the injured worker based upon the
18 subsequent injury assessment given by Dr. Betz. Tr., 14;25, 15; 1-9, 27; 19-25, 28; 14-25, 29; 1.

19 26. Similarly, no attempt was made by the applicant or employer to compensate the
20 injured worker according to the subsequent injury assessment given by Dr. Betz. *Ibid*.

21 27. The applicant, however, now requests the Board to reimburse it the compensation
22 it paid the injured worker based upon the rating given by Dr. Pirruccello while in the same
23 breath, it asks the Board to disregard Dr. Pirruccello's rating and accept the different ratings
24 which Dr. Betz assigned to the preexisting condition and subsequent industrial injury.

25 28. The applicant wants it both ways, then, asking the Board to accept Dr.
26 Pirruccello's rating because it was good enough to justify the amount of compensation paid the
27 injured worker and, therefore, to establish the amount the applicant wants to be reimbursed, on
28 the one hand, while on the other, the applicant wants the Board to ignore, reject or disregard Dr.

1 Pirruccello's rating and adopt Dr. Betz recommended ratings, instead, to justify reimbursement
2 for the dollar amount based upon the rating that the applicant wants the Board to disregard.

3 29. As for Jay E. Betz, M.D., CIME, CHCQM, his report, dated June 27, 2007,
4 describes a record review of the injured worker. The injured worker was not seen by Dr. Betz.
5 Exhibit L, p. 1.

6 30. According to Dr. Betz, the subsequent injury was caused by injury, and not
7 illness. Exhibit L, p. 2.

8 31. According to Dr. Betz, when he conducted his record review, he was forced to
9 state that much of the injured worker's previous medical history, pre-dating the subsequent
10 injury, was not available. Exhibit L, p. 1.

11 32. Dr. Betz characterized the previous injury, however, as that of "...significant
12 problems with his low back ..." and that he had been "...experiencing chronic pain in his lumbar
13 spine...." Exhibit L, p. 1. Since he did not have the benefit of an examination of the injured
14 worker to secure from him a history of his past and current condition, he did not have the benefit
15 of hearing from the injured worker that prior to the subsequent industrial injury, the injured
16 worker said he was fully functional. Exhibit K, p. 6.

17 33. Dr. Betz, therefore, arrived at his conclusion without the benefit of much of the
18 previous medical history and without hearing directly from the injured worker that he was
19 completely functional before the subsequent industrial injury, when he rendered his opinion
20 about the extensiveness of the preexisting condition.

21 34. Using the "subjective tense," Dr. Betz nonetheless stated in a section he labeled
22 "Qualification," that "...**had** ...[the injured worker]... undergone a rating evaluation following his
23 treatment for his prior pathology [the preexisting condition] and before the subsequent claim [the
24 industrial injury], he would have been assessed under the Range of Motion Section of the
25 Guides, considering that the patient had multilevel and recurrent operations on this lumbar
26 spine." Exhibit L, p. 3.

27 35. Dr. Betz then also felt confident enough to state:

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1 First referring to Table 17-7 (sic) on Page 404 of the Guides, he [the injured
2 worker] would have been allowed 10% whole person under Section 2E (sic) for a
3 surgically treated disc lesion with residuals. An additional percentage would have
4 added for the additional levels and an additional 2% for a second operation. To
5 that would have been combined any range of motion impairments and neurologic
6 impairments if they existed. ... Clearly this patient would have exceeded the 6%
7 whole person impairment threshold required for Subsequent Injury Fund
8 consideration. Exhibit L, p. 3.

6 36. Several facts emerge from this, beginning with the references to the *Guides*
7 themselves. There is no Table 17-7. The correct reference is to Table 15-7. There is also no
8 Section 2E. It is Section II.E. From these references, however, it is evident that Dr. Betz was
9 using the 5th Edition of the *Guides* to arrive at his opinion. See, 5TH Edition *Guides* p. 404.

10 37. Dr. Betz goes on to indicate that in his opinion 80% of the total amount of
11 disability suffered by the injured worker, should be attributable to the preexisting condition and
12 20% to the industrial injury. *Ibid.*

13 38. The opinion, however, of Dr. Betz is unclear as to the total disability from the
14 preexisting condition and subsequent injury combined. He never gives a total disability rating,
15 which is then apportioned. It appears, however, Dr. Betz is assigning a total of 14% PPD to the
16 preexisting condition alone, under the Range of Motion approach, and not the Diagnostic-
17 Related Estimate (DRE) approach of the 5th Edition of the *Guides*. Exhibit L, p. 3.

18 39. It is unclear whether he is saying that 80% of this 14% should be apportioned to
19 the preexisting condition and 20% of this 14% is to be apportioned to the subsequent industrial
20 injury or the 20% attributable to the subsequent industrial injury is 20% of some undefined total
21 amount of disability to be then added on top of the 14% already identified for the preexisting
22 condition, to arrive at a total disability for the injured worker consisting of the preexisting
23 condition and subsequent injury combined.

24 40. The opinion of Dr. Betz is either vague or incomplete as written, other than it is
25 clearly his belief, based upon information he concedes is incomplete, that the injured worker's
26 preexisting condition should rate out at more than 6% PPD, whole person impairment.

27 41. Dr. Betz does not indicate in his report that he was aware that the injured worker
28 reported himself to be fully functional prior to the subsequent industrial injury.

42. Since the preexisting condition was non-industrial, it was never rated when the preexisting conditions presented themselves. The preexisting conditions, however, date back to the 1980's, Exhibit A, Harris Report dated 4/7/98, and had they been assessed as if they were industrial injuries at that time, there is no indication which edition of the *Guides* would have been in effect at that time, if any, to assess the condition.

43. Dr. Betz's subsequent injury opinion does not constitute an examination for a permanent partial disability. It was an analysis, for purposes of supporting a subsequent injury account application. TR., 20; 13-25, 21; 1-8, 32; 20-25, 33, 34; 1-16. *See also*, NRS 616C.110.

44. The employer/applicant at no time challenged the permanent partial disability rating and apportionment given by Dr. Pirruccello as permitted by NAC 616C.103(7).

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

CONCLUSIONS OF LAW

1. To the extent 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. NRS 616B.578(3), quoted previously in the margin, and NRS 616C.110, quoted
2 in the margin,^{4,5} below, are the statutes implicated by this case. The applicant's reliance upon the
3 opinion of Dr. Betz regarding the 6% Rule of NRS 616B.578(3) in derogation of the subsequent

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5 ⁴In 2002, NRS 616C.110 stated:

6 Adoption of American Medical Association's Guides to the Evaluation of Permanent Impairment.

7 1. For the purposes of NRS 616B.557, 616C.490 and 617.459, the division shall adopt
8 regulations incorporating the American Medical Association's Guides to Evaluation of Permanent
9 Impairment by reference and may amend those regulations from time to time as it deems necessary. In
10 adopting the Guides to the Evaluation of Permanent Impairment, the division shall consider the edition
11 most recently published by the American Medical Association.

12 2. If the Guides to the Evaluation of Permanent Impairment adopted by the division contain
13 more than one method of determining the rating of any impairment, the administrator shall designate by
14 regulation the method which must be used to rate an impairment pursuant to NRS 616C.490.

15 ⁵ In 2007, NRS 616C.110 stated:

16 American Medical Association's *Guides to the Evaluation of Permanent Impairment*: Duty of Division to
17 adopt *Guides* by regulation; determination of appropriate version of *Guides* to apply.

18 1. For the purposes of NRS 616B.557, 616B.578, 616C.490 and 617.459:

19 (a) Not later than August 1, 2003, the division shall adopt regulations incorporating the
20 American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 5th edition, by
21 reference. The regulations:

22 (1) Must become effective on October 1, 2003; and
23 (2) Must be applied to all examinations for a permanent partial disability that are
24 conducted on or after October 1, 2003, regardless of the date of the injury, until regulations incorporating
25 the 6th edition by reference have been effective pursuant to paragraph (b).

26 (b) Beginning with the 6th edition and continuing for each edition thereafter, the Division
27 shall adopt regulations incorporating the most recent edition of the American Medical Association's
28 *Guides to the Evaluation of Permanent Impairment* by reference. The regulations:

 (1) Must become effective not later than 18 months after the most recent edition is
published by the American Medical Association; and

 (2) Must be applied to all examinations for a permanent partial disability that are
conducted on or after the effective date of the regulations, regardless of the date of injury, until
regulations incorporating the next edition by reference have become effective pursuant to this paragraph.

2. After adopting the regulations required pursuant to subsection 1, the Division may amend those
regulations as it deems necessary, except that the amendments to those regulations:

 (a) Must be consistent with the edition of the American Medical Association's Guides to the
Evaluation of Permanent Impairment most recently adopted by the Division;

 (b) Must not incorporate any contradictory matter from any other edition of the American
Medical Association's Guides to the Evaluation of Permanent Impairment; and

 (c) Must not consider any factors other than the degree of physical impairment of the whole
man in calculating the entitlement to compensation.

3. If the edition of the American Medical Association's *Guides to the Evaluation of Permanent
Impairment* most recently adopted by the Division contains more than one method of determining the
rating of an impairment, the Administrator shall designate by regulation the method from that edition
which must be used to rate an impairment pursuant to NRS 616C.490.

1 industrial injury examination, the resultant rating by Dr. Pirruccello of the industrial injury and
2 his apportionment of the injured worker's condition between the preexisting condition and
3 subsequent industrial injury challenges the meaning of these two statutes.

4 6. In Nevada, it is well settled that when interpreting a statute, the Board must give
5 the words used their plain and ordinary meaning. See, *Barrick Goldstrike Mines v. Peterson*,
6 116 Nev. 541, 545 (2000). See also, *Nelson v. Heer*, 123 Nev. 217, 163 P.3d 420, 425 (2007).

7 7. It is also well settled that when interpreting a statute, where the legislature's intent
8 is clear, "...that is the end of the matter; for the court as well as the agency [or in this case, the
9 Board] must give effect to the unambiguously expressed intent of Congress [or the Legislature]."
10 *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1994).
11 See also, *Nelson*, *supra* at 425. The language of the statute controls and the Board may look no
12 further for its meaning.

13 8. A statute is ambiguous, however, where it does not address the issue before the
14 court or Board, see, *Nelson*, *supra* at 425, in which case, the meaning of the statute may be
15 determined from: "...legislative histories, reason, and considerations of public policy...." The
16 meaning of the words used may [also] be determined by examining the context and the spirit of
17 the law or the causes which induced the legislature to enact it." [footnote omitted]. *Ibid*.

18 9. In this case, the applicant argues that Dr. Betz' analysis should be applied because
19 the application was filed in 2007, Dr. Betz was asked to conduct his review of the claim in 2007,
20 and that by reason of NRS 616C.110, all examinations conducted for workers compensation
21 purposes beginning in 2007, must be conducted according to the 5th Edition of the *Guides*. Tr.,
22 13,; 8-16.

23 10. Indeed, it is the applicant's position that if he had not used the 5th Edition of the
24 *Guides*, he would have in effect been breaking the law, namely, NRS 616C.110. *Id.*, 13; 24-25,
25 14; 1-2.

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1 11. Dr. Pirruccello's examination was conducted in 2002, shortly following the
2 subsequent injury, and his apportionment was made according to the examination he conducted
3 at that time, and since the examination was conducted before 2003, at a time when the 4th Edition
4 of the *Guides* was in place, his use of the 4th Edition of the *Guides* was appropriate. *Id.*, 7; 6-8.

5 12. In fact, no one disputes that Dr. Pirruccello's choice of the 4th Edition of the
6 *Guides* was inappropriate. Tr., 29; 7-11.

7 13. Similarly, no one claimed Dr. Pirruccello's application of the *Guides* was
8 inappropriate as indeed, the applicant accepted his decision, never challenged Dr. Pirruccello's
9 opinion under NAC 616C.103(7), and paid the claim based upon the disability rating he gave
10 and the apportionment of 5% of the total PPD to the preexisting condition and 5% of the PPD of
11 the industrial injury. Tr., 21; 1-3, 22; 20-25, 27; 25.

12 14. The Administrator's position was in this case that the disability rating upon which
13 the compensation was paid the injured worker should govern, as the amount of money sought in
14 reimbursement is based in part upon the disability rating of Dr. Pirruccello, and the
15 apportionment of the total PPD rating between the two conditions. The amount of money sought
16 in reimbursement, in other words, is directly related to the opinion of Dr. Pirruccello. Tr., 19;
17 15-25, 20, 21, 22; 20-25, 23; 1-10.

18 15. The applicant, however, is now asking the Board on the one hand, to completely
19 disregard the opinion of Dr. Pirruccello and to rely upon the different opinion of Dr. Betz, to
20 justify eligibility for reimbursement from the Account, while at the same time, the applicant is
21 asking to be reimbursed the amount that was paid based upon the opinion of Dr. Pirruccello. His
22 opinion, in other words, was good enough to pay the claim and set the amount being asked for
23 reimbursement. It is not good enough, however, for purposes of determining satisfaction with
24 the 6% disability rule of NRS 616B.578(3).

25 16. The only difference or change in circumstances, however, with respect to the
26 claim is the passage of time, which resulted in a new edition of the *Guides* published. Had the
27 applicant been prompt and filed its request for reimbursement in 2002, and asked Dr. Betz to
28 look at the situation, at that time, there would have been no question, he would have gone

1 directly to the 4th Edition of the *Guides* to assess the condition and render his subsequent
2 industrial injury opinion.

3 17. The Board does not believe that meaning of NRS 616B.578(3) was intended to
4 rise and fall upon the vagaries of the date an applicant might choose, as here, to eventually get
5 around to filing a claim and what set of *Guides* might be in effect at that time. Instead, the
6 Board believes that NRS 616B.578(3) was intended to reward those employers who acted upon
7 the knowledge handed to them at the time they were making decisions about employment as
8 required by NRS 616B.578(4) on the retention issue. Tr., 35; 1-17.

9 18. As the opinion of Dr. Pirruccello was the basis by which the compensation was
10 paid the injured worker, this is the figure which the applicant is asking to be reimbursed. Tr., 19;
11 15-25, 20; 1-20. It makes no sense to the Board, then, to reject the opinion of Dr. Pirruccello,
12 now, for purposes of eligibility, when, in the same breath, the opinion was good enough to arrive
13 at the amount of compensation paid for which reimbursement is being sought. If Dr.
14 Pirruccello's opinion about disability and apportionment was good enough to base the
15 compensation paid, it is good enough for use to determine eligibility. The fact that the
16 compensation paid for which reimbursement is being sought is based upon Dr. Pirruccello's
17 determination of disability, transports his opinion into the present to govern the question of
18 eligibility.

19 19. The Board, furthermore, contrary to the applicant's view, *see*, Tr., 30; 1-4, does
20 not believe that NRS 616B.578(3) was intended to leave eternally open the question of eligibility
21 for reimbursement, while the clock ticks and conceivably, another edition of the *Guides* might
22 come along. The Board believes that a certain sense of finality and repose is appropriate, which
23 the Board's approach to NRS 616B.578(3) would promote. Tr., 38; 23-25, 39; 1-4.

24 20. Further, the applicant misreads NRS 616C.110, which expressly addresses the
25 *Guides* to be applied for purposes of "...all examinations for a permanent partial disability."
26 NRS 616C.110 (1)(a)(2) (2007 version). The Board believes the statute is clear on its face. Dr.
27 Betz's subsequent injury analysis was simply **not** an examination for purposes of a permanent
28 partial disability. It was not an examination, in the first place, because its expressly consisted of

1 a record review, and concededly an incomplete record review, at that. *See* Exhibit L, p. 1., *see*
2 *also*, Tr., 20, 21; 1-24, 32; 20-25, 33; 1-11.

3 21. There was only one examination for a permanent partial disability presented in
4 this matter and it was conducted by Dr. Pirruccello. Since he conducted his examination in
5 2002, he was obliged to apply the 4th Edition of the *Guides* because NRS 616C.110, as currently
6 written, would not have applied at that time to Dr. Pirruccello's examination of the injured
7 worker. Tr., 20; 7-12, 21; 1-24.

8 22. Furthermore, given that Dr. Betz's review was admittedly based upon incomplete
9 medical records and he did not have the benefit of taking a medical history directly from the
10 injured worker or examining him, the Board would place greater reliance upon the opinion of Dr.
11 Pirruccello.

12 23. Therefore, based upon the plain reading of NRS 616C.110, both as written in
13 2002 and presently the Board's interpretation of NRS 616B.578(3), the policy considerations
14 outlined above, and the context within which the compensation paid is determined in relation to
15 the disability rating assigned, the Board concludes that the applicant is mistaken when it argues
16 that the Board must use the 5th Edition of the *Guides* to assess eligibility in this case and that the
17 Board is foreclosed from, therefore, using Dr. Pirruccello's opinion because it was not based
18 upon the 5th Edition of the *Guides*. Tr., 34; 24, 25, 35; 1-10.

19 24. The Board finds, further, that the only examination purposes of permanent partial
20 disability conducted and before the Board in this case is the rating and apportionment of Dr.
21 Pirruccello. *Ibid.*, *see also*, Tr., 20; 13-25, 21; 1-8.

22 25. Further, no serious challenge to Dr. Pirruccello's rating and apportionment was
23 raised by the applicant other than the fact that it was based upon the 4th Edition and not the 5th
24 Edition of the *Guides*. Indeed, the applicant would be hard pressed to levy such a challenge,
25 having accepted it and paid the compensation at issue based upon it.

26 26. The Board also declined to have Dr. Betz called for, according to the offer of
27 proof, his opinion that the results would have been the same in his opinion had the Range of
28 Motion approach been applied under the 4th Edition of the *Guides*. Tr., 36; 9-18. This type of

1 challenge to the opinion of Dr. Pirruccello was, however, too late in the day as NAC
2 616C.103(7), plainly establishes. Such a challenge would have been, therefore, irrelevant.
3 However, the Board believes the results would have been the same because under the 4th Edition
4 of the *Guides*, Dr. Betz, like Dr. Pirruccello, would have been obliged to apply the DRE
5 approach to the injured worker's injury and, therefore, should have come to the same conclusion,
6 a 10% PPD, whole person combined, apportioned 5% to each of the preexisting and subsequent
7 injuries would have been warranted. Tr., 38; 23-25, 39; 1-24.

8 27. Accordingly, the PPD evaluation and apportionment rendered by Dr. Pirruccello,
9 is the preferred and appropriate assessment of the injured worker's condition upon which to base
10 the applicant's eligibility for reimbursement.

11 28. Based upon the assessment, evaluation and examination of Dr. Pirruccello, which
12 the applicant accepted and then used to pay the claim, the PPD for the injured worker was
13 correctly determined to be 10% PPD, whole person, apportioned at 5% PPD to the preexisting
14 condition and 5% PPD to the subsequent industrial injury.

15 29. A 5% PPD, whole person rating for the preexisting condition does not satisfy the
16 6% eligibility criterion of NRS 616B.578(3). The application for reimbursement must be
17 rejected, then, because the applicant has not satisfied each of the eligibility requirements of NRS
18 616B.578, as is required of the applicant. Tr., 40; 1-12.

19 30. The application for reimbursement is therefore denied, because the applicant
20 failed to satisfy the requirements of NRS 616B.578(3).

21 **DECISION OF THE BOARD**

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


24 The determination of the Administrator of the Division of Industrial Relations is affirmed
25 by the Board for the Administration of the Subsequent Injury Account for Self-Insured
26 Employers. The applicant has failed to establish by a preponderance of the evidence that NRS
27 616B.578(3) was satisfied. Therefore, the application for reimbursement from the Subsequent
28 Injury Account for Self-Insured Public and Private Employers is hereby denied. The application

1 was denied upon a motion by Ron Ryan, seconded by Emilia Hooks, made pursuant to NRS
2 616B.578(1) for denial of the claim. The vote was 4, in favor of the motion, none against the
3 motion, with no abstentions. As a majority of those voting when a quorum of the Board was
4 present voted in favor of the motion, the motion was duly adopted.

5 Additionally, on July 8, 2010, the Board, having reviewed this Decision and after due
6 deliberation, upon the motion of Emilia Hooks, seconded by Joyce Smith, voted to adopt this
7 Decision, with Findings of Fact and Conclusions of Law, as the Decision of the Board.

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

11 Dated this 6th day of August, 2010.


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14 Richard Iannone, Chairperson
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Certificate of Service

Pursuant to NRCP 5(b), I certify that I am an employee of the Law Offices of Zeh & 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: Robert F. Balkenbush, Esq. Thorndal Armstrong Delk Balkenbush & Eisinger 6590 South McCarran Blvd. #B Reno, NV 89509 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 Robert F. Balkenbush, Esq. Thorndal Armstrong Delk Balkenbush & Eisinger 6590 South McCarran Blvd. #B Reno, NV 89509 John F. Wiles, Division Counsel Department of Business and Industry Division of Industrial Relations 1301 North Green Valley Parkway, Suite 200 Henderson, NV 89104

Dated this 16th day of August, 2010.


Karen Kennedy

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