THE BOARD FOR ADMINISTRATION OF THE

SUBSEQUENT INJURY ACCOUNT

FOR THE ASSOCIATIONS OF

SELF-INSURED PUBLIC AND PRIVATE EMPLOYERS

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In re: Subsequent Injury Request for Reimbursement

Claim No.: C143-04-00193-04
Date of Injury: August 22, 2004
Association Name: Public Agency Compensation Trust
Association Member: Carson Tahoe Hospital
Association Administrator: Public Agency Compensation Trust.
Third-Party Administrator: Alternative Service Concepts, LLC
Application Submitted by: Alternative Service Concepts, LLC

The Board makes its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

The Board sets forth its Findings of Fact below. To the extent that portions of the Conclusions of Law, set out below, constitute Findings of Fact, those portions are incorporated herein by reference.

1. On February 9, 2006, the above-captioned matter came on for hearing before the Board for the Administration of the Subsequent Injury Account for the Associations of Self-Insured Public and Private Employers (the Board). All of the notices for the hearing were sent out and the applicant was duly noticed, as evidenced by signed waivers or certificates of service contained in the record of the matter.

2. On January 20, 2006, according to the Certificate of Service attached thereto, the Staff Report of the Administrator was sent to the applicant at the following addresses: Paul H. Aakervik, Alternative Service Concepts, LLC, 1755 East Plumb Lane, Suite 267, Reno, Nevada, 89502; and Wayne Carlson, Public Agency Compensation Trust, 201 South Roop Street, Suite 102, Carson City, Nevada, 89701.

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3. The Agenda, giving notice of the hearing, was received by Wayne Carlson, Public Agency Comp Trust, on February 3, 2006, and by Donna Squires, Alternative Service Concepts, Inc., on February 7, 2006, according to the Waivers of Hand Delivery and Certificate of Receipt of Notice of Meeting.

4. The Board members in attendance to hear the matter consisted of Chairman Richard Iannone and member Emilia Hooks, who attended, in person, at the offices of the Division of Industrial Relations ("DIR"), located at 1301 North Green Valley Parkway, Conference Room B, Henderson, Nevada. Vice-chairperson Joyce Smith appeared by telephone from Carson City, Nevada. Member Ron Ryan was absent. There remains one vacancy on the Board to be filled by appointment of the Office of the Governor, State of Nevada.

5. The meeting was held, accordingly, at the time and place as noticed in the Agenda, which was also duly posted for the hearing as evidenced by executed Notices of Posting contained in the file.

6. The meeting was conducted in such a manner that all members of the Board had before him or her, all written materials to be considered during the course of the hearing on this matter, and the meeting was conducted in such a manner that each member of the Board and public, if any, could hear all participants and all Board Members could participate in the deliberations and discussions.

7. No application for a contested hearing was made in this case by the Applicant, much less within 10 days of the date of the hearing scheduled for this matter.

8. The Association for this matter is Public Agency Compensation and Trust.

9. The Association member is Carson Tahoe Hospital, the association administrator is Public Agency Compensation Trust and the third party administrator is Alternative Service Concepts, LLC, who also submitted the application in this matter.

10. The amount requested for reimbursement was the sum of $22,188.86. The amount of reimbursement after costs were verified was $21,718.46. The Administrator recommended acceptance of this matter and payment of the verified amount of $21,718.46, pursuant to NRS 616B.581.

11. This section of the Nevada Revised Statutes was applied, according to the Administrator, because the injured worker misrepresented her prior medical history when she applied for work with the employer who employed her at the time of the subsequent incident. NRS 616B.581 is to be applied when a claim, as here, is made that the injured worker misled the employer at the time of application for employment.

12. The injured worker had a lengthy history of serious back problems which she failed to explain to the employer at the time of hire. Given the extraordinarily lengthy medical history involving the injured worker's back, it is inconceivable that the injured worker had simply forgotten about her medical history when seeking employment.

13. The injured worker must have intentionally misled the employer at the time of hire about her medical history.

14. The pre-existing condition presented by the injured worker was a lengthy history of back problems, including problems at the L4-5 level.

15. The subsequent injury, if there was a subsequent injury, purported to entail an injury to the left leg and possibly, a hamstring strain. Ex. FF, p. 3.

16. The subsequent injury was questioned by the Board, due to a memo in the file, appended to the Staff Report as Exhibit GG, from Smiddy Lamb, RN, DIR, discussing this claim. Memo dated 11/23/05. There, she states that the injured worker, "...injured her left leg/calf when moving a patient up in bed."

17. The left leg and knee were treated without satisfactory resolution. Her treating physicians thought that it might also be a hamstring strain.

18. Unbeknownst to the treating physicians, however, according to the memo, Ex. GG, the injured worker was "...suffering from lumbar disc disease with bulging at L4-5 and had previously been diagnosed with left L5 radiculopathy." Ex. GG.

19. Then, according to Ms. Lamb, RN, after the injured worker's physicians and a physician for the DIR had reviewed the injured worker's previous medical records:

> ...they concurred her knee pain/treatment was probably due to her lumbar pathology and not the 8/22/04 injury. While this could be correct, the medical documentation submitted for this subsequent injury review **does not indicate any**

lumbar complaints/symptoms, no treatment to the lumbar spine, all of the patient's complaints were centered on the knee without any radiation to other areas of the lower extremity and there was no current lumbar MRI. Ex. GG.(Emphasis added.)

20. This memo caused the Board to question whether or not a disabling injury or condition resulted from the subsequent incident. If, in other words, the injured worker only suffered a hamstring pull, or left leg/left knee strain with hamstring pull, without more in the record, these kind of injuries hardly seem to rise to the level of a subsequent, disabling injury. There was no discussion in the record, for example, that the pulled hamstring, if that is what occurred, was disabling.

21. Upon further review, however, by the physicians, according to Ms. Lamb, a knee strain or pulled hamstring was not what happened on August 22, 2004. Rather, the thought was that the complaints of pain were in reality, radiculopathy, originating from the old back problem at L4-5.

22. Given the history of back problems, this might rise to a disabling condition or disability. However, the problem with this source as a basis for eligibility under NRS 616B.581 is that at the time of the alleged incident of August 22, 2004, the injured worker had no complaints concerning her back.

23. Consequently, if there was an overt incident on August 22, 2004, at least according to the subjective complaints of the injured worker at that time, she did not complain of any stress on her back which would have triggered a flare up of her old back condition.

24. If the back was actually the issue, then, it might well have been the issue only because it was the continuation of a chronic back problem that manifested itself without reference to the events of August 22, 2004.

25. Also, the physicians themselves, never specifically identified a quantum of disability relating to the second incident. Rather, their discussion revolved around an allocation of the cost of treatment between the incident of August 22, 2004, and the pre-existing condition.

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26. This, too, raised issues because the range of allocation was between 95% for the cost of treatment following the subsequent injury, assigned to the pre-existing condition, to 100%, for the cost of treatment being assigned to the pre-existing condition.

27. If 100% of the cost of treatment is assigned to the pre-existing condition, the subsequent injury would not seem to be disabling in the least. Even if the assignment was 95% to the pre-existing condition, there is little room due to the subsequent injury for a disability to be assigned. Further, if the assignment is 100% to the pre-existing condition, is there, then, even a subsequent injury to consider?

28. Alternatively, if the assignment is 100% to the pre-existing condition, then, is the post-incident treatment no more than treatment in response to the chronic original back condition without regard for the incident of August 22, 2004, or did the incident of August 22, 2004, trigger the flare up of the pre-existing condition?

29. Here, however, the Board runs into the observation, again, of Ms. Lamb, that the injured worker/patient, expressed no complaints of any stress on her back on August 22, 2004, which might have triggered the flare up of the condition.

30. John Wiles, Esq., the Administrator's legal counsel, pointed out to the Board several instances in the record where the record was one of equivocation on these key questions. He highlighted in the record the following from one of the opining physicians:

> Pursuit of Subsequent Injury Fund relief in this case relies heavily on **the assumption** that the patient's diagnosis following the subsequent claim was erroneous and she was in reality suffering from recurrent radiculopathy or radiculitis. Ex. FF, p. 4.

31. Mr. Wiles pointed out that assumptions usually are not the quantum of proof required or expected of physicians who would ordinarily be expected to testify from at least a reasonable degree of medical probability.

32. The report continues with the observation:

> Consequently it is reasonable and appropriate to conclude that the patient's symptoms in her left leg following the subsequent injury were a recurrence of radiculitis and related to the pre-existing pathology well documented under her prior claims. Ex. FF, p. 4.

33. The report, however, does not indicate whether the symptoms were triggered by the incident of August 22, 2004, or were totally, symptoms that were on-going at the time, a reasonable question, given Ms. Lamb's comment upon the medical records that the injured worker had no complaints of stress on her back, or that she felt any problems with her back when adjusting the patient in bed on August 22, 2004.

34. No one on behalf of the applicant appeared to present evidence or to confront or cross examine evidence, during the course of the proceedings.

35. Jacque Everhart, DIR, appeared on behalf of the Administrator, presented a summary of the Administrator's position and submitted the Staff Report of the Administrator, with Exhibits attached into the record.

36. Because no one appeared on behalf of the applicant, the submission of the Staff Report, with Exhibits attached, went into evidence, without objection.

37. John Wiles, Esq., legal counsel for the Administrator, also appeared at the hearing.

CONCLUSIONS OF LAW

The Board sets out its Conclusions of Law as follows:

1. To the extent that portions of the preceding section constitute Conclusions of Law, those portions are incorporated herein by reference.

2. The Applicant was timely served with a copy of the Administrator's recommendation, which was contained in the Staff Report dated January 20, 2006.

3. Proper notice was given the applicant of the Agenda upon the applicant. Certificates of service and signed waivers of the Agenda and the Administrator's recommendation are contained in the file. No one on behalf of the applicant appeared to contest the certificates of service or waivers of the notice upon the applicant.

4. A quorum of the Board was present to hear this matter and decide the case upon the merits.

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5. The meeting was conducted in conformance with Nevada's Open Meeting Law.

6. It is well settled the Applicant has the burden of proof to show entitlement to reimbursement. *See, Franklin v. Victoria Elevator Co.,* 206 N.W.2d 555, 556 (Mn. 1973); *O'Reilly v. Raymond Concrete Piling, Inc.,* 419 N.Y.S.2d 475 (1979). Thus, in Nevada, the burden is upon the applicant to establish the requirements of NRS 616B.581. Furthermore there is no presumption favoring the employer in pursuit of this burden of proof. *Priscilla Jussila v. Dept. of Labor, supra* at 585.

7. It is, therefore, not the responsibility of the Administrator to make out a case for reimbursement on behalf of the applicant. This responsibility lies with the applicant, whether or not the Administrator has made a positive recommendation contained in the Staff Report. An applicant may not rest on the laurels of a positive recommendation of the Administrator, as the Administrator only recommends to the Board, and it is left to the Board to make the ultimate decision regarding claim acceptance. *See,* NRS 616B.575(8)(a).

8. Because this case arose out of a claim of fraud in the inception committed by the injured worker, NRS 616B.581applies. There is no dispute or conflict in the record, in other words, that the injured worker was deceptive when seeking employment. The health of the worker was kept from the employer at the time of hire, and the lengthy medical history regarding the employee's back condition was so extensive and severe, the failure to disclose could not have been anything but intentional.

9. NRS 616B.581 states in pertinent part as follows:

> 1. An association of self-insured public or private employers that pays compensation due to an employee who has a permanent physical impairment from any cause or origin **and incurs a subsequent disability by injury arising out of and in the course of his employment** which entitles him to compensation for disability that is substantially greater by reason of the combined effects of the preexisting impairment and the subsequent injury than that which would have resulted from the subsequent injury alone is entitled to be reimbursed from the subsequent injury account for associations of self-insured public or private employers if ... [the remaining sections of this statute are satisfied] (Emphasis added).

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10. Subsections 1(a),(b) and (c) of the statute go on to state that the employer must be able to show the employee knowingly made a false representation of his physical condition when hired by a member of the association, the employer relied upon the false representation, and there exists a causal connection between the false representation and the subsequent disability.

11. There is no dispute that subsections 1(a), false representation, and 1(b), employer reliance, have been satisfied. Subsection 1(c) makes reference to a subsequent "disability" and is tied, therefore, to the preamble to the statute quoted in full in paragraph 9, above. Satisfaction of this section rises and falls upon proof of a subsequent disability.

12. The preamble quoted above, to NRS 616B.581 is juxtaposed, by definition, upon the subsections to the statute. Subsections 1(a) through 1(c) of NRS 616B.581 are not therefore, even reached unless and until the preamble, which states the threshold requirement for reimbursement, is satisfied.

13. Parsing the threshold requirement, NRS 616B.581 states that an association seeking reimbursement must show payment of "...compensation due an employee who has a permanent physical impairment...and incurs a **subsequent disability by injury**...."(Emphasis added.). Absent proof of a **subsequent disability by injury**, the subsections of NRS 616B.581 are never reached.

14. Couched in other terms, an applicant does not establish the presence of a subsequent disability by injury satisfying subsections (a) through (c) of NRS 616B.581. Rather, the converse is true. The priority of proof under NRS 616B.581 requires the applicant to establish in the first instance, a **subsequent injury by disability**. Once this burden of proof is established, then, the applicant is permitted to make the showings required in the subsections to NRS 616B.581.

15. The burden is upon the applicant to make this showing of a **subsequent injury by disability**. In other words, the applicant must be able to show a significant injury that is so severe that the injury rises to the level of creating a disability in order to become eligible for

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reimbursement for a claim submitted under NRS 616B.581. Not every scratch, knee bruise, or case of sniffles satisfies the threshold requirement set out in NRS 616B.581. The threshold is a matter of proving the presence of a **subsequent injury by disability**.

16. Here, the subsequent injury was a hamstring pull and possible knee strain. Hamstring pulls and knee strains are not generally associated in the same breath with an injury that rises to the level of a disability. The injury would have to be massive, for this kind of injury to be considered a disability. Moreover, all, if not nearly all of the treatment which occurred following the subsequent injury, was related to the pre-existing condition (95% to 100%). At an allocation of 100% to the preexisting condition amounts, literally, to no subsequent injury at all, much less an injury that is so severe it amounts to a subsequent disability.

17. Furthermore, the original, or preexisting condition involved the back, an area not necessarily associated with hamstring pulls or knee strains. The issues addressed in the Lamb memo, Exhibit GG, reveal that if the injured worker suffered only a hamstring pull or left leg/left knee strain with hamstring pull, without more in the record, these kind of injuries would hardly rise to the level of a subsequent injury by disability. There was no discussion in the record, for example, that the pulled hamstring, if that is what occurred, was disabling.

18. Upon further review by the physicians, according to Ms. Lamb, a knee strain or pulled hamstring, was not what happened on August 22, 2004, the date of the subsequent injury. Rather, the thought was that the complaints of pain were in reality, radiculopathy, originating from the old back problem at L4-5. Given the history of back problems, this might rise to a disabling condition or disability. However, the problem with this source as a basis for eligibility under NRS 616B.581 is that at the time of the alleged incident of August 22, 2004, the injured worker had no complaints concerning her back. Consequently, if there was an overt incident on August 22, 2004, at least according to the subjective complaints of the injured worker, she did not complain of any stress on her back which would have triggered a flare up of her old back condition.

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19. If the back was actually the issue, then, on August 22, 2004, it might well have been the only issue because it was the continuation of a chronic back problem that continued to manifest itself without reference to any activity occurring on August 22, 2004.

20. The physicians, themselves, also never specifically identified a quantum of disability relating to the second incident. Rather, their discussion revolved an allocation of the cost of treatment between the incident of August 22, 2004, and the pre-existing condition.

21. This, too, undermines the applicant's quest for reimbursement because the range of allocation was between an allocation of 95% of the cost of treatment following the subsequent injury, assigned to the pre-existing condition, to 100% of the cost of treatment being assigned to the pre-existing condition.

22. If 100% of the cost of treatment is assigned to the pre-existing condition, the subsequent injury would not be disabling in the least. If 95% of the pre-existing condition is assigned the cost of treatment, whether the subsequent injury is disabling is highly suspect at the very least.

23. The burden is upon, as indicated, the applicant to clarify and establish the presence of a subsequent disability by injury, in the face of an allocation that between 95% and 100% of the cost of treatment due to the subsequent incident is assigned to the pre-existing condition and not the subsequent injury, if any.

24. The Board is of the firm conviction that the applicant has not satisfied its burden of showing that the incident of August 22, 2004, produced a subsequent injury which was so severe, it produced a subsequent disability. The record is devoid of a preponderance of evidence establishing the presence of a subsequent disability by injury as a result of the incident of August 22, 2004.

DECISION OF THE BOARD

Based upon the Findings of Fact and Conclusions of Law set out above, the Board declines to follow the recommendation of claim acceptance made by the Administrator. Rather, it was moved by Chairman Iannone, seconded by Vice-chairperson Smith, that the Administrator's recommendation of claim acceptance not be accepted and that the application for reimbursement

be denied. The motion was adopted upon a vote of 3 members voting in favor of the motion and 0 members voting against the motion, with one member absent, and one position remaining vacant. A quorum of the Board was present to vote upon this motion.

Dated this 13th day of April, 2006.

Richard Iannone, Chairperson

CERTIFICATE OF SERVICE

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

X	Placing an original or true copy thereof in a sealed envelope, *Certified Mail & U.S. Mail, Return Receipt Requested*, postage prepaid, placed for collection and mailing in the United States Mail, at Reno, Nevada Wayne Carlson Public Agency Comp Trust 201 S Roop Street, Suite 102 Carson City, NV 89701 Ms. Donna Squires Alternative Services Concepts, Inc. 1775 East Plumb Lane, Suite 267 Reno, NV 89502 Robert F. Balkenbush Thorndal Armstrong Delk Balkenbush & Eisinger 6590 South McCarran Blvd. #B Reno, NV 89509
	Personal delivery:
	Telephonic Facsimile at the following numbers: 702.382.7277
	Federal Express or other overnight delivery
	Reno-Carson Messenger Service
	Certified Mail/Return Receipt Requested

Dated this May 2, 2006

Karen Wuskro

Employee of Zeh Saint-Aubin Spoo