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**THE BOARD FOR ADMINISTRATION OF THE
SUBSEQUENT INJURY ACCOUNT
FOR SELF-INSURED EMPLOYERS**

In re: Subsequent Injury Request for Reimbursement

Claim No. C617-001161
Date of Injury: August 22, 1991
Insurer: Viad Corp.
Employer: GES Exposition Services
Third-Party Administrator: Helmsman Management Services, Inc.
Submitted By: Helmsman Management Services, Inc.

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

This matter came to the Board for the Administration of the Subsequent Injury Account for Self-Insured Public and Private Employers along a tortured path. The matter was heard by an Appeals Officer and a Decision rendered, dated June 20, 1996, DIR-78, upholding the Administrator's denial, DIR-8, 9, of this application for reimbursement from the Subsequent Injury Account by GES Exposition Services, Inc. The matter was then taken up on appeal to the District Court. It ultimately came to the Board for a hearing on appeal as a result of a stipulation in the District Court and Order of the District Court, remanding the matter to this Board for disposition and dismissing with prejudice the appeal to the Eighth Judicial District (Clark County). DIR-15.

The Decision of the Appeals Officer, upholding the recommendation of the Administrator to deny the claim, was based upon the Appeals Officer's concurrence that the applicant had failed to sustain the burden of proof that the applicant had a "...pre-existing impairment of 6% or more whole man pursuant to the American Medical

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1 Association Guides to Evaluating Permanent Impairment." DIR¹-78. Thus, the Appeals
2 Officer concluded that the "...employer failed to satisfy NRS 616B.427(3)," the
3 predecessor to NRS 616B.557(3), which contains the same permanent physical
4 impairment requirement. By the time this matter reached the Board, Chapter 616B of the
5 Nevada Revised Statutes had been amended so that the appeal was actually heard under
6 NRS 616B.557, including Sections 1 and 3, whose antecedents were found at NRS
7 616B.427.

8 The applicant, the appellant before the Board, and the Administrator agreed in the
9 stipulation to remand this case to the Board for hearing, that the issue to be determined
10 was whether the applicant satisfied the 6% permanent impairment requirement for the
11 pre-existing condition. The parties agreed in the stipulation that the employer contended
12 that the injured worker had "a six (6) percent impairment, preexisting." DIR-13. The
13 parties also agreed that the Administrator contended that the injured worker suffered "...a
14 five and one-half (5.5) percent preexisting impairment, and therefore, the employer is not
15 entitled to reimbursement from the subsequent injury relief fund." DIR-13;14. The
16 parties therefore agreed, and the District Court concurred, that the matter be remanded to
17 this Board to determine "...whether the employer is entitled to reimbursement by
18 subsequent injury fund...." DIR-14.

19 This is the basis for the remand to the Board for hearing. The final disposition of
20 the Board on this matter was held on July 15, 1999, after which the Board decided to
21 uphold the decision of the Administrator to deny the claim and reject the application for
22 reimbursement. Like the Appeals Officer, the Board held that the applicant, GES
23 Exposition Services, Inc., failed to sustain its burden of showing that the injured worker

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28 ¹DIR refers to the Department of Industrial Relations' hearing packet and page number as admitted into evidence.

1 had a preexisting physical impairment of 6% or more whole man pursuant to the
2 American Medical Association Guides to Evaluating Permanent Impairment set forth in
3 NRS 616B.557(1) and (3). Tr²., 25;12-25, 26.

4 The Board's disposition of the case is set out more particularly below in its
5 Findings of Fact, Conclusions of Law and Decision.

6 FINDINGS OF FACT

7 1. As the matter came before the Board upon a Stipulation of the parties and
8 Order of Remand, all of the procedural prerequisites for perfecting an appeal to the Board
9 have been met. The Board has been directed to hear this case on remand. DIR 13,14.

10 2. The case was heard by the Board on July 15, 1999. Tr.,1.

11 3. The applicant for reimbursement is GES, Inc., or Greyhound Exposition
12 Services, Inc. DIR-13.

13 4. At the hearing, J. Michael McGroarty, Esq., McGroarty & Lane, Chartered,
14 at that time, appeared for the applicant and Nancy E. Wong, Esq., appeared for the
15 Administrator, as Division Counsel. Tr., ii.

16 5. Admitted into evidence at the hearing was the Department of Industrial
17 Relations' (DIR) evidentiary packet consisting of 80 pages. Tr., 2;1-6. Also admitted into
18 evidence was an evidentiary packet of the applicant consisting of 153 pages. Tr., 2;5-7.
19 The transcript of a prior hearing was also given each Board member for review and was,
20 therefore, a part of the record of this appeal. Tr., 3;1-7.

21 6. The testimony and presentation to the Board revolved around whether the
22 6% permanent physical impairment requirement of NRS 616B.557(3) was satisfied by the
23 applicant.

24 7. The pre-existing condition was the fracture to the navicular bone of the left
25 wrist, which, when the injury was discovered, showed a fracture without evidence of
26 healing. DIR-2, 3.

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28 ²"Tr." refers to the transcript of the hearing of July 15, 1999, and page and line numbers in the transcript.

1 8. The subsequent injury was a second injury to the left wrist which occurred
2 on August 22, 1991. DIR-2.

3 9. The preexisting impairment was discovered when x-rays were taken of the
4 left wrist following the subsequent injury. DIR-2. The injured worker was unaware that
5 he had previously hurt the left wrist in the manner discovered through the x-rays taken
6 during the course of treatment for the second injury. DIR-2. Paraphrasing, he indicated
7 he was unaware of any accident or injury that would have resulted in the old fracture to
8 the navicular bone. DIR-2.

9 10. Because the pre-existing injury to the left wrist was unknown even to the
10 injured worker until it was discovered during the treatment of the subsequent injury, the
11 pre-existing impairment had no impact upon the injured worker's employability and was
12 not a hindrance or obstacle to obtaining employment or finding employment.

13 11. For the same reason, there was no prior history of treatment for the pre-
14 existing fracture to the navicular of the left wrist or the preexisting impairment or injury.
15 As a result, in the opinion of Theodor A. D'Amico, D.O.,

16 ...there exists no history of accident or illness connected with
17 these [the prior and subsequent wrist trauma] anatomic parts,
18 [and therefore] there exists no basis for apportionment
 [between the prior and subsequent injuries]. DIR-63.

19 12. When stable and ratable, the injured worker was examined for disability
20 rating purposes by Ceylon T. Caszatt, D.O., who rated the subsequent injury at 6% whole
21 person impairment attributable to the "injury of date." DIR 54.

22 13. Dr. Caszatt gave further consideration to the disability rating of 6% which
23 he had previously opined and determined that the injured worker should be given a
24 disability rating of 7% for the current injury of date. DIR 57.

25 14. According to Dr. D'Amico, the injured worker has an impairment rating to
26 the left wrist of 11%, un-apportioned between the first and second left wrist trauma or
27 injuries, having had at his disposal, also, the evaluation of Dr. Caszatt. DIR-63, 64.

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1 15. For subsequent injury account purposes, the injured worker's chart was
2 given to Richard O. Kudrewicz, M.D., who conducted a records review. His first report
3 and opinion were issued on August 14, 1995. DIR 67.

4 16. In his initial report, Dr. Kudrewicz noted that according to Dr. Caszatt, the
5 injured worker had a 6% whole man impairment referable to the industrial (subsequent)
6 injury and that he had a 10% whole person impairment whole man, when the preexisting
7 condition was taken into account, but without any apportionment being recommended.
8 DIR-68.

9 17. Dr. Kudrewicz stated that the preexisting injury to the left wrist
10 substantially enhanced the extent of the injury and cost of treatment, thereby substantially
11 contributing to the compensation paid the injured worker. DIR-69.

12 18. However, Dr. Kudrewicz also stated:

13 The problem in this particular case is being able to establish at
14 least a 6 percent impairment whole man in this gentleman
15 prior to the industrial accident in question. If we look at the
16 maximum amount of percentage of impairment arrived at by
17 this gentleman's disability evaluation, it would be Dr.
18 Robbins' notation of a total of 11 percent impairment whole
19 man. There was no apportionment noted by Dr. Robbins in
20 this case. One can certainly at least make the assumption that
21 by virtue of his preexisting conditions, at least half of this
22 gentleman's total whole man impairment following his
23 industrial accident is attributable to preexisting pathology but
24 even this would bring us to a 5.5 percent impairment whole
25 man and would not allow this gentleman to qualify for
26 subsequent injury consideration. DI R-69, 70.

27 19. Dr. Kudrewicz continued and stated he did not think that apportionment
28 would be out of the question in this case. Nevertheless, he then concluded: "However,
even allowing this, [an apportionment analysis of the preexisting impairment], we fall
short of the 6 percent impairment whole man required for subsequent injury." DIR-70.

 20. Dr. Kudrewicz also allowed that he would be willing to revisit his opinion
that this individual's preexisting condition warranted only a 5.5% whole person
impairment if additional medical factors could be found. The additional medical factors
Dr. Kudrewicz had in mind were conditions other than involving the left wrist. This is

1 clear from the examples he gave such as diabetes, heart disease or other conditions. If
2 these could be found, Dr. Kudrewicz felt that they could then be combined with the pre-
3 existing condition to bring the pre-existing permanent physical impairment over the 6%
4 statutory threshold for subsequent injury account claims. DIR-70.

5 21. Dr. Kudrewicz clearly believed he had been presented, therefore, with all
6 the medical information available in connection with the industrial injury and preexisting
7 trauma to the left wrist.

8 22. In a two page addendum dated November 18, 1995, Dr. Kudrewicz
9 revisited his decision to rate the pre-existing impairment at less than 6%. DIR-71.

10 23. In his second analysis of the injured worker's preexisting injury to
11 determine whether the 6% hurdle could be achieved for subsequent injury account
12 purposes, Dr. Kudrewicz stated:

13 Overall, it was my impression that this gentleman did have a
14 significant preexisting component to his recent difficulties
15 involving his left wrist area. Unfortunately, there was no
16 documentation of the amount of preexisting impairment
17 which may have been present in this gentleman's left wrist
18 and therefore, it has become difficult to qualify him for
19 consideration. DIR-71.

20 24. Dr. Kudrewicz also stated:

21 At present time, there really is no specific way that I can
22 delineate the exact percentage of this gentleman's difficulties
23 which should be attributable to preexisting condition and the
24 exact percentage attributable to his industrial accident...
25 DIR-71.

26 25. Nevertheless, given this second chance at rendering an opinion, Dr.
27 Kudrewicz said he "can feel comfortable stating that perhaps the majority of this
28 gentleman's difficulties relate to preexisting condition and the minority relates to his
29 industrial accident in question." DIR- 48-49.

30 26. Therefore, Dr. Kudrewicz stated he did not "...think this is at all a stretch of
31 the imagination..." to assign more than 50% of the 11% whole man impairment to the
32 preexisting condition and less than 50% of the 11% whole man impairment to the
33 industrial injury in question or, in other words, to assign the preexisting condition with an

1 impairment of at least 6%, thereby satisfying the statutory threshold for subsequent injury
2 account eligibility. DIR-49 .

3 27. Upon a review of Dr. Kudrewicz' Addendum, it is evident that he did not
4 note, before revisiting his original opinion, the onset of diabetes, heart condition or any
5 other health condition unrelated to the left wrist trauma, the kind of additional medical
6 information he stated in his original report might justify revisiting his original
7 determination that the injured worker's preexisting condition did not reach the 6% whole
8 person impairment requirements for subsequent injury account eligibility.

9 28. In the decision of the Appeal's Officer when the application for subsequent
10 injury account reimbursement was considered at that level, Judge Nancy K. Richins, Esq.,
11 said about Dr. Kudrewicz' November 18th "Addendum" wherein he concluded that the 6%
12 requirement was met, that this "addendum is based on several unsupported assumptions
13 and lacks documentation." DIR-77.

14 29. To the extent that the Conclusions of Law which follow constitute Findings
15 of Fact, they are incorporated herein.

16 CONCLUSIONS OF LAW

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

19 2. The Board has jurisdiction to hear this appeal. All deadlines for pursuing
20 this application through this appeal were met.

21 3. A quorum of the Board was present to hear this matter and make its
22 decision.

23 4. It is well settled in matters of this nature that the burden of proof is upon the
24 applicant to show entitlement to reimbursement by establishing upon a preponderance of
25 the evidence that the eligibility requirements for reimbursement from the Subsequent
26 Injury Account have been met. Thus, the burden is upon the applicant in this case to
27 show that the requirements of NRS 616B.557(3) have been satisfied. *See, McClanahan v.*
28 *Raley's Inc.*, 117 Nev. 921, 34 P.3d 573, 576 (2001); *cf.*, NRS 616C.150(1).

1 5. NRS 616B.557(3) requires that the employer/applicant of the injured
2 worker show that the injured worker suffered from a preexisting physical impairment of
3 6% or more whole person prior to the occurrence of the subsequent industrial injury.

4 6. NRS 616B.557(3) also requires that the employer/applicant show that the
5 preexisting physical impairment constituted a hindrance or obstacle to employment.

6 7. NRS 616B.557(1) requires that the compensation due the injured worker for
7 the subsequent industrial injury be substantially greater by reason of the combined effects
8 of the preexisting impairment and the subsequent injury than from the subsequent injury
9 alone.

10 8. Before the eligibility requirements of NRS 616B.557(1) can be satisfied,
11 therefore, the employer/applicant for Subsequent Injury Account relief must be able to
12 show that the two elements of NRS 616B.557(3), namely, the 6% whole person disability
13 impairment, and the employment hindrance requirement have been satisfied.

14 9. The evidence is that the injured worker suffered an 11% whole person
15 disability rating, unapportioned between the preexisting impairment and the subsequent
16 industrial injury.

17 10. Dr. Kudrewicz originally concluded that the injured worker's preexisting
18 impairment warranted a 5.5% whole person impairment, and that the preexisting
19 impairment did not meet the 6% requirement for eligibility set forth in the Nevada
20 Revised Statutes.

21 11. Dr. Kudrewicz' second opinion that the preexisting impairment was at least
22 more than 50% of the 11% whole person impairment and that, therefore, the injured
23 worker's preexisting condition satisfied the 6% requirement for eligibility set forth in the
24 Nevada Revised Statutes lacks documentation and is based upon unsupported
25 assumptions. Moreover, it lacks any evidence of the kind of conditions such as diabetes,
26 heart condition, or other condition, not directly related to the injured wrist, which Dr.

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1 Kudrewicz cited in his first report that he would require before he could revisit the
2 preexisting condition and possibly find a preexisting impairment of 6% or more, whole
3 person.

4 12. The Board has been presented with no reasonable basis from which to
5 prefer Dr. Kudrewicz' second or "Addendum" to his first report where he concluded that
6 the 6% preexisting impairment threshold was not met, especially since Dr. Kudrewicz, in
7 his second report, cited none of the conditions which he said in his first report would be
8 required before he would revisit his evaluation and especially since his Addendum was
9 based upon a "stretch of the imagination" standard.

10 13. The employer has, therefore, failed in its burden of proving that the 6%
11 whole person physical impairment rating required by NRS 616B.557(3) as a condition
12 precedent to eligibility for reimbursement from the Subsequent Injury Account has not
13 been met.

14 14. The decision of the Administrator rejecting the application for
15 reimbursement from the Subsequent Injury Account submitted by GES, Inc., must be
16 affirmed and the application, therefore, rejected. No compensation is due the applicant in
17 reimbursement from the Subsequent Injury Account in connection with Claim number
18 C617-001161. The Claim is hereby denied.

19 **DETERMINATION OF THE BOARD**

20 GOOD CAUSE APPEARING, it was moved by Vice-Chairman MacKay, and
21 seconded by member Rod Sled, to accept the recommendation of the Administrator and
22 deny the application for reimbursement from the Subsequent Injury Account in Claim
23 number C617-001611.

24 Vote: Unanimous, with Chairperson Patricia Walquist, Vice-Chairperson Bruce
25 MacKay and member Victoria Robinson voting in favor the motion. Tr., 26.

26 Further, on February 2, 2006, with a quorum being present, and eligible to
27 vote on this matter, upon a motion by RJ LaPuz, seconded by Tina Sanchez, the Board
28 voted to approve these Findings of Fact, Conclusions of Law and Decision as the action

1 of the Board, upon a vote of 4 in favor, 0 against, with 1 abstention(s). Members RJ
2 LaPuz, Donna Dynek and Tina Sanchez read the record of the proceedings before the
3 Board and were, therefore, eligible to vote on this matter.

4 Dated this 3 day of March, 2006.

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8 Bruce MacKay, Chairperson

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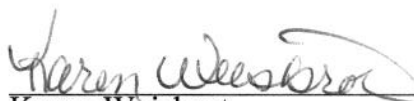
1 **CERTIFICATE OF SERVICE**

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

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7 <input checked="" type="checkbox"/>	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: 8 J. Michael McGroarty, Esq. 9 J. Michael McGroarty, Chartered 7381 West Charleston Blvd., Suite 130 10 Las Vegas, NV 89117-1571 11 Nancy Wong, Division Counsel Department of Business and Industry 12 Division of Industrial Relations 400 West King Street, Suite 210 A 13 Carson City, NV 89703 14 John F. Wiles, Division Counsel Department of Business and Industry 15 Division of Industrial Relations 1301 North Green Valley Parkway, Suite 200 16 Henderson, NV 89104
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18	Personal delivery
19	Telephonic Facsimile at the following numbers:
20	Federal Express or other overnight delivery
21	Reno-Carson Messenger Service
21	Certified Mail/Return Receipt Requested

22 Dated this 3rd day of March, 2006.

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26 Karen Weisbrot
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