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THE BOARD FOR ADMINISTRATION OF THE

SUBSEQUENT INJURY ACCOUNT

FOR SELF-INSURED EMPLOYERS

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In re: Subsequent Injury Request for Reimbursement

Claim No.	C617-001563
Date of Injury:	June 3, 1993
Insurer:	GES Exposition Services, Inc.
Employer:	The Dial Corporation
Third-Party Administrator:	Helmsman Management Services, Inc.
Submitted By:	Helmsman Management Services, Inc.

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND DETERMINATION OF THE BOARD FOR THE ADMINISTRATION OF THE SUBSEQUENT INJURY ACCOUNT FOR SELF-INSURED PUBLIC AND PRIVATE EMPLOYERS

GENERAL OVERVIEW

This matter came on for hearing before the Board on January 15, 1998, and again on July 15, 1999. The injured worker suffered a work related injury on June 3, 1993, which was initially diagnosed as a lumbosacral strain. His x-rays at the time revealed an L5-S1 disc narrowing. Subsequently, an MRI of the lumbar spine on June 16, 1993, revealed a small herniation to the right side abutting the right S1 nerve root. Impingement was unlikely. The MRI also revealed an L4-5 bulging of the annulus without herniation and degenerative disc disease at the L4-5 and L5-S1 levels.

The injured worker denied any previous accidents, injuries or illnesses to these body parts. He also denied any prior insurance company settlements from the State Industrial Insurance System (SIIS) or from any private or industrial carrier in relation to his back.

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The injured worker was previously treated for a back strain about 4 years prior to the industrial injury the subject of this application for subsequent injury reimbursement. He claimed he experienced a pulling sensation in his back while employed, then, by Smith's Foods. Eventually, he left Smith Foods, and secured employment with Greyhound Exposition Services (GES), his employer at the time of the subsequent industrial injury. There is nothing in the file to indicate that the injured worker was evaluated for a disability rating as a result of the Smith back strain incident. It does not appear, either, that this incident prevented the injured worker from securing employment, as the job with GES following his employment at Smith's was fairly strenuous. The current injury occurred when the injured worker was lifting a heavy jewelry box.

The back sprain which occurred while the injured worker was employed at Smith's is not the pre-existing condition relied upon by the applicant to secure subsequent injury reimbursement. Rather, ankylosing spondylitis is the pre-existing condition relied upon by the applicant for this subsequent injury claim. Ankylosing spondylitis was discovered during the course of the treatment for the subsequent injury suffered on June 3, 1993. Ankylosing spondylitis is a progressive, congenital condition unrelated to trauma.

The injured worker was seen by Theodore A. D'Amico, D.O., to rate his subsequent injury for workers compensation purposes. According to Dr. D'Amico, the injured worker was stable and ratable when he saw him on February 8, 1994. Applying the 2nd Edition of the AMA Guidelines, *Guides to the Evaluation of Permanent Impairment, Second Edition,* Dr. D'Amico gave the injured worker a 10% whole person impairment (WPI) for the parts of the spine identified above. He was unable to apportion, however, the injury to any pre-existing condition because of the absence of medical records establishing the extent of any pre-existing condition or conditions.

The employer did not object to the analysis given by Dr. D'Amico and therefore, offered the award to the injured worker, based upon the 10% disability, unapportioned between any pre-existing condition and the subsequent injury to the lower back as a result

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of the incident of June 3, 1993. The injured worker picked up the award check on April 1, 1994.

In a recommendation dated October 22, 1996, the Administrator, also using the 2nd Edition of the AMA *Guides,* denied the claim for reimbursement based upon NRS 616B.557(1)(3) and (4). According to the Administrator, the applicant failed to show that there was any connection between the condition of ankylosing spondylitis and the subsequent back injury which might have caused a substantial increase in compensation due the injured worker by reason of the combined effects of the subsequent back injury and the ankylosing spondylitis. *See*, NRS 616B.557(1). The Administrator could find no evidence of combined effects which this statute requires.

Also according to the Administrator, the condition of ankylosing spondylitis is not listed as a condition or injury in the *Guides.* Consequently, the condition was incapable of being rated, and therefore, NRS 616B.557(3) could not be satisfied because there could be no showing that the pre-existing condition constituted a physical impairment of 6% or more.

Finally, according to the Administrator, GES could not show that it knew of the ankylosing spondylitis at the time of hire and failed to show the injured worker was retained in employment after the pre-existing condition was discovered during the course of the treatment received for the subsequent injury. Consequently, NRS 616B.557(4), which requires the employer to show by written records it had knowledge of the pre-existing impairment at the time of hire, or that the employee was retained in employment after the employer acquired such knowledge, had not been satisfied. This portion of the Administrator's recommendation was dropped by the time of the hearing on July 15, 1999.

The Board affirmed the recommendation of the Administrator, and denied the application for reimbursement at the conclusion of the hearing on July 15, 1999. The rationale for the Board's decision is set forth below in its Findings of Fact, Conclusions of Law and Decision.

FINDINGS OF FACT

1. Greyhound Exposition Services (GES), Inc., is the employer and insurer submitting the claim for reimbursement in this matter.

2. The injured employee was working for GES as a Teamster when he sustained the industrial injury to his lower back while lifting a jewelry case.

3. The case was first heard by the Board for the Administration of the Subsequent Injury Account for Self-insured Public and Private Employers (the Board) on June 5, 1998. A final hearing of the Board on this matter was conducted on July 15, 1999, whereupon the Board denied the application for reimbursement.

4. Nancy Fong Wong, Esq., Deputy Attorney General, appeared for the Administrator. John McGroarty, Esq., then of McGroarty & Lane, Chartered, appeared for the applicant. John Wiles, Esq., Deputy Attorney General, was also present to help officiate the proceedings.

5. Chairperson Patricia Walquist convened the meeting to hear this matter. Also in attendance were Bruce MacKay, Vice-chairperson, Mark Serbin, Member, and Rod Sled, Member. No members were absent. Four members of the Board heard the case.

6. At the hearing of July 15, 1999, the following were admitted into evidence:

a. DIR # 1 consisting of an Industrial Insurance Regulation Section Injury Fund index of 19 pages, Tr 2;

b. DIR # 2 consisting of a Division of Industrial Relations packet evidence packet of 27 pagesm Tr 2; and

c. Insurer # 1 consisting of an 80 page evidence packet, Tr 3.

7. The applicant's evidence packet included copies of several lower court decisions, signed and unsigned, which were the subject of an objection of admissibility into evidence, made by the Administrator's legal counsel. The entire packet, however, was made a part of the record, with the decisions included, not as evidence but as a record of previous positions which had been taken regarding matters purportedly similar in

import to the case before the Board. The insurer agreed to allow the Administrator the right to oppose any reliance upon these decisions. Tr 5.

8. No objection was raised about the timeliness of the appeal of this matter to the Board.

9. No objection was raised over the timeliness of the insurer's submission to the Administrator of the application for reimbursement.

10. The subsequent injury took place on June 3, 1993. Staff Report (SR) 1.

11. The application for reimbursement was received by the Administrator on June 8, 1995. SR 1.

12. The Division of Industrial Relations received notice of a possible claim against the Account on February 1, 1994. This was 35 weeks after the date of injury. SR 4.

13. The total amount requested for reimbursement was the sum of $43,316.74. The amount of reimbursement after costs had been verified was the sum of $42,980.23.

14. The Administrator's original determination of this claim was made on December 19, 1995. SR 2. The Administrator denied the claim initially pursuant to NRS 616B.557(1)(3) and (4). SR 1. At the time of the final hearing on this matter, the Administrator dropped the objection to the claim based upon NRS 616B.557(4). Tr 6.

15. This matter wound its way to the Board through the workers compensation statutory appeals process in place at the time, and came to the Board for disposition upon a stipulation between the insurer and the Administrator that the Board hear and decide the request for reimbursement. SR 2.

16. The injured worker was seen by Michael Colletti, M.D., some time around October 8, 1993. DIR # 1, pp. 8-10. According to Dr. Colletti, the injured worker, at age 27, experienced a pulling sensation in his back while employed at Smith's Foods. DIR # 1, p. 8. He was treated by Stephanie Youngblood, D.C., for the injury. He was then seen at Lynn Maguire Therapy for treatment, but continued to have low back pain, especially on the right side, radiating down the right leg. *Id.* at 8.

17. Then he changed jobs, doing fairly strenuous work building booths for GES Expositions. On June 3, 1993, while lifting a jewelry case, the injured worker suffered the industrial injury the subject of the subsequent injury claim. *Id.* at 8. While he was lifting the jewelry box, the injured worker felt a pulling sensation which exacerbated his back pain.

18. Dr. Colletti reviewed the injured worker's chart, x-ray reports and MRIs, "etc.," before seeing the injured worker following the incident of June 3, 1993. Dr. Colletti stated, a question of ankylosing spondylitis had been raised by the time he saw the injured worker. *Id.* at 8.

19. Dr. Colletti's impression was the injured worker was positive for ankylosing spondylitis, HLA-B27 positive, and that this was "probably present for several years and gradually increasing, consistent with the natural history of ankylosing spondylitis." *Id.* at 10.

20. According to Dr. Colletti, "...much [of the injured worker's] pain was probably exacerbated by this injury he sustained on 6/3/93, **but I expect him to recover fully from that aspect of it and have chronic back pain upon the basis of ankylosing spondylitis**." (Emphasis added.) *Id.* at 10.

21. For the injured worker. Dr. Colletti proposed a plan that stated: "Ankylosing is a pre-existing condition. It is a genetic disorder which is inherited. It is **never caused** by an industrial injury but **certainly could** be aggravated by an injury." (Emphasis added). *Id.* at 10.

22. Dr. Colletti also stated, "I would expect, however, [that the injured worker] would **fully recuperate from his back trauma of 6/3/93.**" (Emphasis added). *Id.* at 10.

23. The injured worker was also seen on or about February 14, 1995, by Mark O. Reed, M.D., P.C., for purposes of an independent medical examination (IME)due to a second back injury. Dr. Reed conducted a medical review in addition to conducting a physical examination of the injured worker. Insurer # 1, p. 24.

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24. According to Dr. Reed, the injured worker presented with a recurrent back problem. *Id.* at 28.

25. Dr. Reed stated he agreed with Dr. Colletti, that "...ankylosing spondylitis is an inherited genetic disease, progressive in nature, **and not directly related to his back problem [the lower, lumbosacral problem] in question**." *Id.* at 28.

26. According to Dr. Reed, the injured worker "...was returned back to work in 1993 with the ankylosing spondylitis having been positively diagnosed at that time." *Id.* at 28.

27. Dr. Reed also stated: "I feel that a lot of this man's problems are related to the non-industrial, genetically inherited ankylosing spondylitis...." *Id.* at p. 29.

28. The injured worker was also seen by David G. Toeller, D.O., F.A.O.C.P.M., Fellow of the American Academy of Disability Evaluating Physicians. According to Dr. Toeller, who conducted a record review of the injured worker, Insurer # 1, p. 49, the incident of June 3, 1993, did not cause the pain or injury experienced by the injured worker. Rather, it was another bout of ankylosing spondylititis that was responsible for the sensation felt by the injured worker in his back.

> In summary, it appears to me that this is a gentleman who is going through a very normal and predictable evolution whereby a rather severe disease is afflicting him in his third decade of life, exactly as it is predicted to do in those persons genetically inclined at the time of his first bout with back pain he was treated by a chiropractor in 1988. At the time of his second bout in 1993, he *assumes* that the pain was due to the lifting at work. Now that we have the knowledge of his HLA B27 disease, it seems much more reasonable **that his pain was not from the lifting, but that it was from this subsequent bouts (sic) of ankylosing spondylitis**." (Italics in original, bold emphasis added.) *Id.* at 51.

29. Dr. Toeller also offered the following opinions and conclusions regarding the injured worker's ankylosis spondylitis (AS):

a. AS has been studies (sic) extensively. 'Trauma' is conspicuously absent as a listed cause for AS. **The AS is not worsened by trauma and not aggravated (sic) by trauma. In fact, the 1993 was not clearly associated with trauma.** (Emphasis added.) *Id.* at 54.

b. The disease is HLA-B27. **Even in a pre 1993 claim, there is no scientific reason to believe that the lifting at work has contributed any part of this person's back problems**. (Emphasis added.) *Id.* at 54.

30. In a letter dated January 24, 1994, Vincent G. Cedarblade, M.D., F.A.C.S., gave his opinion after conducting a file review of the injured worker. According to Dr. Cedarblade, ankylosing spondylitis "...is a pre-existing condition. It is a genetic disorder which is inherited. It is **never** caused by an industrial injury but **could** be aggravated by such." (Emphasis added). *Id.* at 10. Dr. Cedarblade was agreeing with what he perceived was a comment by the rheumatologist, Dr. Colletti. *Id.* at 9.

31. Dr. Cedarblade reviewed the file for subsequent injury account purposes, after the injured worker had been rated for disability payment purposes by Theodore D'Amico, D.O. DIR at pp. 6.7, 15-19. Dr. Cedarblade did not find that the injured worker actually had spondylolisthesis, grade II, as set forth in the *Guides*, when making his assessment. Insurer # 1, at p. 10. He felt that ankylosing spondylitis was certainly a condition as bad as spondylolisthesis, grade II, which is found in the *Guides*. Even though ankylosis spondylitis was not found in the *Guides*, Dr. Cedarblade would find subsequent injury account eligibility based upon this analogy because spondylolisthesis, grade II in the 2nd Edition of the *Guides* rated a 20% disability and he would give a 20% disability rating, at least, to the ankylosis spondylitis based upon this analogy. As the ankylosis spondylitis was pre-existing, therefore, to the June 3, 1993, work related incident, and the June 3, 1993, incident was otherwise so minor, according to Dr. Cedearblade, the quantum of treatment required due to the June 3, 1993 incident had to be 75% related to the ankylosis spondylitis. Subsequent injury account eligibility was, therefore, established according to Dr. Cedarblade. *Id.* at 11.

32. Aside from this analogy, however, Dr. Cedarblade made no assessment of the quantum by which the ankylosis spondylitis had actually progressed as a congenital disease, at the time he based his conclusions or offered his opinion for subsequent injury account analysis. Dr. Cedarblade acknowledged that "[n]one of the doctors felt that his small herniated disc played any part in his back pain, and surgery would not relieve his

back pain." *Id.* at 13. This led Dr. Cedarblade to state that "...one must conclude that his present injury was nothing more than a strain of his back, which **may** have aggravated his ankylosing spondylitis." *Id.* at 14.

33. When Dr. D'Amico performed his disability rating of the injured worker, he conducted a record review and actually performed an examination of the injured worker. DIR #1, p. 15.

34. Based upon the review of the charts for the injured worker and the examination, Dr. D'Amico assigned the injured worker a 10% disability rating for the June 3, 1993, work related incident. *Id.* at 19.

35. According to Dr. D'Amico, the patient "...denies any preceding accidents, injuries or illnesses connected with these body parts, [the L5-S1, lumbosacral area of the lower back and sciatic nerve] and denies any prior insurance company settlements or awards from SIIS or any private or industrial carriers." *Id.* at 16.

36. Also, according to Dr. D'Amico, the injured worker "...states he has back pain. His back pain is aggravated by **any** type of excessive activity, he gets referred pain into his right lower extremity with a numbness and tingling." (Emphasis added). *Id.* at 17.

37. Dr. D'Amico evaluated the injured worker with specific reference to a:

> ...herniated nucleus pulposus at the L5-S1 level, nonoperative, with significant neurological residuals, a 3% whole person impairment regarding range of motion findings in the dorsolumbar spine, and a 2% whole person impairment as indicated by sensory deficit along the course of the L5-S1 dermatomes in the right lower extremity, the combined total equals a 10% whole person impairment. *Id.* at 18.

38. Dr. D'Amico actually conducted range of motion studies to make this assessment. *Id.* at 17.

39. Significantly, Dr. D'Amico concluded:

> **Since there exists no history of accident or illness connected with this anatomic part, there exists no basis for apportionment**. (Emphasis added.) *Id.* at 18.

40. When given an opportunity to comment upon the subsequent injury analysis of Dr. Cedarblade, Dr. D'Amico stated:

> I appreciate Dr. Cedarblade's opinion that due to this patient's ankylosing spondylitis, that he should be eligible for coverage under the Subsequent Injury Fund (sic). I have reviewed the AMA Guides many times and I know of no ratable impairment associated with ankylosing spondylitis. *Id.* at 6.

41. Significantly. Dr. D'Amico then explained:

> **Ankylosing spondylitis is a serious progressive disease; however, in a man as young as <u>[intentionally left blank]</u> , it is highly unlikely that there was any significant underlying impairment prior to his industrial injury**." (Emphasis added.). *Id.* at 6.

42. Equally important, Dr. D'Amico stated:

> The patient does have a small disc herniation which does abut the nerve root and is reported by Dr. Thalgott to be the cause of the patient's S1 radiculopathy. The patient's neurological changes are consistent with the sciatic described by Dr.Gordon, as well as the radiculopathy sited by Dr. Thalgott. Though this patient is not a surgical candidate due to the underlying ankylosing spondylitis, **there is no indication that there is any level of impairment which can be apportioned** based on the minimal previous treatment. (Emphasis added.) *Id.* at 6.

43. Dennis P. Gordon, M.D., was the treating orthopedist following the June 3, 1993, incident. *Id.* at 11, 12. According to Dr. Gordon, the injured worker tested positive for ankylosing spondylitis, he should be seen by a rheumatologist for that condition and that he, Dr. Gordon, had little to offer this gentlemen. On the relationship of ankylosing spondylitis to the present condition, Dr. Gordon stated that "[t]here is always a question as to whether ankylosing spondylitis can be precipitated by a work injury and **I really do not have a strong opinion on this question**." (Emphasis added). *Id.* at 11.

44. Finally, the injured worker was also seen in 1993 by John S. Thalgott, M. D. According to Dr. Thalgott, as of December 13, 1993, the injured worker had "...symptoms compatible with a right sided S1 radiculopathy. He has a very small herniated disc at L5-S1 and ...[Dr. Thalgott did not]...believe that he [the injured worker, was]...surgical." Insurer #1 at p. 5. He also diagnosed that the injured worker had a "...5-1 (sic) small herniated disc which appears to barely touch his S1 nerve root, however, this is when he is lying down. He may have more of a dynamic disc problem

when he is standing." *Id.* at 8. Finally, Dr. Thalgott stated that the injured worker had been diagnosed with ankylosis spondylitis, with x-rays showing sclerosis of the injured worker's SI joints. "This may indeed be contributing." *Id.* at 5. Due to the ankylosing spondylitis, Dr. Thalgott thought it may not be in the injured worker's best interests to continue his career as a teamster. *Id.* at 5.

45. Albert Peterman, M. D., reviewed the reports and evaluations of Dr. Cedarblade and Dr. D'Amico, as well as the medical records for the injured worker. DIR # 2, pp. 26-27.

46. According to Dr. Peterman:

> It is my impression that in order for a claim to be considered for the Subsequent Injury Fund, there must be a medical documentation of a prior impairment, which is not present in this case. (Emphasis in original.). *Id.* at 26.

47. Additionally, Dr. Peterman stated: "There is no question that this man has ankylosing spondylitis, which is a significant impairment in and of itself, and might contribute to some limited range of motion of the thoracolumbar spine. However, it does not contribute to the L5-S1 radiculopathy nor to the disc rupture." *Id.* at 26.

48. According to Dr. Peterman: "I therefore must disagree with Dr. Cedarblade and state that the majority of the costs of this man's current illness is, in fact, due to the disc rupture and radiculopathy, and not to the ankylosing spondylitis." *Id.* at 27.

49. Thus, according to Dr. Peterman:

> **I do not feel there is any documentation of the pre-existing 6% or more impairment, and as such, do not feel that this claim is, in fact, eligible for the Subsequent Injury Fund**. (Emphasis added). *Id.* at 27.

50. Dr. Peterman was also of the opinion that Dr. Cedarblade believed that the injured worker suffered from spondylosis, Grade II, of the AMA *Guides*. *Id.* at 26.

51. The Administrator denied the claim and continued to argue at the hearing on this matter that contrary to Dr. Cedarblade's "finding," there was no documentation to establish that the injured worker suffered from a Grade II, spondylolisthesis, and that

therefore, there was no medical documentation to show that the pre-existing condition of ankylosis spondylitis combined with the subsequent injury to cause an allocation of 75% of the current cost of care to the pre-existing condition. Consequently, NRS 616B.557(1), which requires a showing that the combined effects of the pre-existing condition and subsequent injury would cause the compensation due to be substantially greater than from the subsequent injury alone, had not been satisfied.

52. The Administrator also denied the claim and continued to argue at the time of the hearing that Dr. D'Amico had correctly found that the subsequent injury was assessed at 10% WPI, and that there was no pre-existing condition to which any of the subsequent incident could be allocated. Consequently, there was no pre-existing condition that had a rating of 6% or more, WPI, according to the AMA *Guides* then in effect and utilized by the Administrator to evaluate claims. Tr. 8; 8-9. The requirement of NRS 616B.557(3) that the injured worker be shown by the employer to have a pre-existing physical impairment of 6% or more prior to the subsequent injury could not be satisfied. Tr. 6, 7.

53. The Administrator dropped the claim that the employer had failed to retain the injured worker in its employ following discovery of the pre-existing condition of ankylosing spondylitis, as the record showed that the injured worker was retained following the injury of June 3, 1993. Tr. 4; 6-8.

54. Whether or not it is appropriate to analogize between ankylosing spondylitis and spondylolisthesis in order to assign a disability rating to the ankylosing spondylitis of 20% WPI and therefore show a pre-existing physical impairment with a rating of 6% or more under the *Guides* as required by NRS 616B.557(3), the Board finds that on balance, the proof is that it is more likely than not that the ankylosing spondylitis and the injuries to the body parts identified by Dr. D'Amico, the body parts that were evaluated for the subsequent injury, were unrelated.

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55. Dr. Toeller stated that "trauma," which is asserted as the cause of the subsequent injury to the lower back, is conspicuously absent as a cause for ankylosing spondylitis. Insurer # 1 at p. 54.

56. Dr. Toeller also stated that there is no scientific reason to believe that lifting at work, the stated cause of the subsequent injury to the lower back, contributed to any part of the injured worker's back problems. Insurer # 1 at p. 54.

57. Dr. Thalgott concluded that the cause of the patient's S1 radiculopathy was caused by the small disc herniation which abuts the nerve root. Insurer # 1, pp. 8, 16.

58. Ankylosing spondylitis, on the other hand, is a congenital condition, which ultimately results in a stiffening of the spine. DIR # 2, p. 3. It is a progressive, genetic disease, and not the product as stated above, of trauma.

59. Dr. D'Amico stated, given the age of the injured worker, and the timing of the pathology for ankylosing spondylitis, progressing in an individual beginning in their 20's and 30's, it was highly unlikely that there was any underlying impairment prior to the discovery of the ankylosing spondylitis, which was uncovered during the period of examination and treatment for the injury of June 3, 1993. Insurer # 1, p. 18.

60. Also, according to Dr. D'Amico, there was no indication that the lower back had previously been injured such that there was no history of illness or injury to this anatomical part of the body to which a portion of the subsequent injury could be apportioned. Insurer #1, p. 16. The lower back, therefore, could not become the pre-existing impairment whose condition was exacerbated by the work related lifting incident of June 3, 1993.

61. Ankylosing spondylitis is a congenital condition that is progressive, and in this case, the progression was of recent origin. It is not, therefore, caused by trauma, and was not exacerbated by trauma. Insurer #1, pp.18, 54.

62. The lower back injury involving a herniated nucleus pulposus at the L5-S1 level, nonoperative, with significant neurological residuals, a 3% whole person impairment as indicated by range of motion findings in the dorsolumbar spine, and a 2%

whole person impairment as indicated by sensory deficit along the course of the L5-S1 dermatomes in the right lower extremity, are impairments independent of ankylosing spondylitis. Insurer #1, pp. 16, 17, 53, 54.

63. There is sparse indication, if any, that these body parts had been injured to any measurable degree prior to the incident of June 3, 1993. *Id.* at pp. 16, 18.

64. The ankylosing spondylitis, given the nature of its progression and the age of the injured worker, was also of recent origin as of the time of the subsequent injury of June 3, 1993. *Id.* at p. 18.

65. The subsequent injury of June 3, 1993, to the specific body parts identified in paragraph 62, above, did not cause, and was not exacerbated by the injured worker's ankylosing spondylitis, a progressive and congenital condition. *Id.* at pp. 16, 18, 53, 54.

66. It is more likely than not that the injuries identified in paragraph 62 and the ankylosing spondylitis exist independent of each other. *Id.*

67. Dr. Cedarblade's analogy between spondilolisthesis and ankylosing spondylitis is the only indication of a pre-existing condition in the record with 6% or more physical impairment. But for Dr. Cedarblade's analogy, there is no other indication in the record of a pre-existing impairment of 6% or more.

68. To the extent any of the following conclusions of law constitute findings of fact or mixed findings of fact and conclusions of law, they are incorporated herein as additional findings of fact of the Board.

CONCLUSIONS OF LAW

1. To the extent any of the preceding paragraphs constitute conclusions of law, they are incorporated herein.

2. All of the procedural prerequisites to proceeding with this appeal have been satisfied. A quorum of the Board was present to hear the matter, and the appeal taken was timely.

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3. When considering applications for reimbursement from the Subsequent Injury Account for Self-insured Public and Private employers, the Board subscribes to the rule that the burden of proof is upon the applicant 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*, 419 N.Y.S. 2d 475, 476 (Ct. of Appeals, N. Y., 1979).

4. The burden is upon the applicant, therefore, in this case to show that the requirements of NRS 616B.557(1) and (3) have been satisfied by a preponderance of the evidence. *See, McClanahan v. Raley's Inc.*, 117 Nev. 921, 24 P.3d 573, 576 (2001); *cf.*, NRS 616C.150(1).

5. NRS 616B.557(1) states:

> If an employee of a self-insured employer 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, the compensation due must be charged to the subsequent injury account for self-insured employers in accordance with regulations adopted by the board.

6. NRS 616B.557(3) states:

> 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 the 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 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.

7. These statutes act in concert and require in reverse order, that the applicant establish the presence of a pre-existing physical impairment of 6% or more, as determined by the *Guides*, as adopted by the Administrator, DIR.

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8. The pre-existing physical impairment may be from any cause or source, *i.e.*, the pre-existing condition need not be industrially related and may be congenital in origin.

9. The pre-existing condition and the subsequent injury, however, must interact in some manner with each other such that their combined effects cause the compensation due the injured worker to be substantially greater, not marginally greater, than would have been caused by the subsequent injury, alone.

10. The pre-existing condition and the subsequent injury cannot exist in a vacuum or independent of each other for subsequent injury purposes. Their pathologies must be linked in some way, to substantially increase the compensation due the injured worker over what the injured worker would have received, had the injured worker only been left to contend with the subsequent injury.

11. Whether or not it would be appropriate to create a disability rating by analogy as argued by the applicant in reliance upon Dr. Cedarblade, the application is still lacking. By a preponderance of evidence, it is apparent that the body parts evaluated by Dr. D'Amico, which the Board finds the applicant designates as the subsequent injury, suffered injury and disability independent of ankylosing spondylitis. Ankylosing spondylitis is the pre-existing condition upon which the applicant relies, also, to justify subsequent injury reimbursement.

12. Furthermore, by a preponderance of the evidence, the Board concludes that the lower back area evaluated by Dr. D'Amico could not have also been the source of the pre-existing condition because Dr. D'Amico specifically found that there was a paucity of medical information showing that the lower back had previously suffered trauma to the degree that the subsequent injury of June 3, 1995, could be allocated in any way to a previous condition.

13. It is evident, also, that Dr. D'Amico reached the same conclusion with respect to the ankylosing spondylitis condition in that as a progressive and congenital condition, it had only begun to manifest itself, given the age of the applicant and the pathology of the condition, typically having onset at age twenty or thirty. The extent of

impairment, therefore, from ankylosing spondylitis, as of June 3, 1993, suffered or experienced by the injured worker would not have manifested itself to a degree justifying an apportionment or allocation, either. According to Dr. D'Amico, it was unlikely that there was any significant underlying impairment prior to the industrial injury of June 3, 1993, and therefore, the applicant failed by a preponderance of the evidence to establish a 6% impairment based upon any of the presenting conditions. The applicant similarly failed to establish a nexus between the ankylosing spondylitis and the trauma to the lower back, linking them to the degree that their pathologies would result in a substantial increase in the compensation due the injured worker.

14. Moreover, the applicant concurred in this assessment. The award for worker's compensation at 10%, unapportioned to any pre-existing condition, was offered by the applicant to the injured worker.

15. Though unnecessary to the Board's decision, the Board also states that it agrees with the position taken by the Administrator that the recognition of an impairment under the *Guides* by analogy is not warranted by either the 2nd Edition of the *Guides*, the edition applied to this case by the Board and Administrator when the matter was heard, or NRS 616B.557(3) and NRS 616C.110. NRS 616C.110 is particularly instructive, as the Legislature has clearly vested considerable discretion and authority in the Administrator, to interpret, adopt and apply the *Guides*. Deference should therefore be accorded to the Administrator's interpretation of the *Guides*, especially where the interpretation is not at odds with the statutory framework, and the statutory framework amounts to an invitation by the Nevada Legislature for the Administrator to use his best judgment in deciding which *Guides* are to be applied and how they should be applied to applications for reimbursement. *See, State of Nevada, Department of Bus. and Indust. v. Granite Const.*, 118 Nev. 83, 40 P. 3d 423,428 (2002), quoting *Elliot v. Resnick*, 114 Nev. 25, 32 n. 1, 952 P. 2d 966 n. 1 (1998).

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16. The Board acknowledges that it is vested with the final authority for deciding these cases and that the Administrator only makes recommendations to the Board for decisions like the instant matter. However, those recommendations are entitled to deference for the reasons explained, above.

17. Moreover, NRS 616B.557(3) is plain on its face that the obligation of the applicant is to show that the permanent physical impairment relied upon to support the subsequent injury claim would support a rating of 6% or more if evaluated according to the *Guides*. If the *Guides* cannot be shown to support the claim, then, a claim of impairment cannot be sustained, unless it can be sustained according to regulations adopted by the division through the Administrator pursuant to NRS 616C.110. Since the Administrator of the division charged with interpreting, adopting and applying the *Guides* has concluded that ratings by analogy are inappropriate under the *Guides* and the applicant has not shown where, under the *Guides*, impairment ratings by analogy are permitted, whether under the 2nd Edition, or the 4th Edition, which was the Edition in effect at the time of the hearing, *see*, Tr. 26, the Board further concludes that impairment ratings by analogy where the condition to be rated is not found in the *Guides* is inappropriate.

DETERMINATION OF THE BOARD

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

The recommendation of the Administrator to the Board that it should reject the application for reimbursement under the Subsequent Injury Account for failure on the part of the applicant to satisfy the requirements of NRS 616B.557(1) and (3) is hereby affirmed by the Board. The applicant has failed to show by a preponderance of the evidence that the requirements of NRS 616B.557 (1) and (3) have been satisfied. Therefore, the application for reimbursement from the Account is hereby denied.

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The application was denied upon a motion of Vice-chairperson MacKay, seconded by member Rod Sled. The motion was carried, with three members voting in favor of the motion and member Mark Serbin voting against the motion.

Further, on February 2, 2006, with a quorum being present, and eligible to vote on this matter, upon a motion by Donna Dynek, seconded by Tina Sanchez, the Board voted to approve these Findings of Fact, Conclusions of Law and Decision as the action of the Board, upon a vote of 4 in favor, 0 against, with 1 abstention(s). Members Donna Dynek, RJ LaPuz and Tina Sanchez read the record of the proceedings before the Board and were, therefore, eligible to vote on this matter.

Dated this 3 day of March, 2006.

By: Robert D MacKay
Bruce MacKay, 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, 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: J. Michael McGroarty, Esq. J. Michael McGroarty, Chartered 7381 West Charleston Blvd., Suite 130 Las Vegas, NV 89117-1571 Nancy Wong, Division Counsel Department of Business and Industry Division of Industrial Relations 400 West King Street, Suite 210 A Carson City, NV 89703 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 3rd day of March, 2006.

Karen Weisbrot

Karen Weisbrot