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

THE BOARD FOR ADMINISTRATION OF THE

SUBSEQUENT INJURY ACCOUNT

FOR SELF-INSURED EMPLOYERS

***

In re: Subsequent Injury Request for Reimbursement

Claim No.	C617-001960
Date of Injury:	June 15, 1994
Insurer:	GES Exposition Services, Inc.
Employer:	The Dial Corp
Third-Party Administrator:	Helmsman Management Services, Inc.
Submitted By:	McGroarty and Lane, Chartered

_____/

DECISION UPON REMAND

I. Introduction

The above-captioned matter came on for hearing on October 22, 2009, upon a remand to the Board by the District Court of a portion of the Board's decision dated March 3, 2006. The District Court affirmed the Board's decision pursuant to NRS 616B.557, but remanded the case for further deliberations under NRS 616B.560.

The Board understood the questions upon remand to be as follows:

1. The Board believed that the District Court wanted it to review the record of the original proceedings to determine whether the applicant had been unduly restricted in the presentation of its case in light of the Court's determination that the Board's interpretation of NRS 616B.560 was too narrow because the Board held that the knowledge of the Union in this Union Hall hiring case could not be imputed to the employer when determining whether the fraud provisions of NRS 616B.560 could be established. The District Court held that if the Union was the hiring agent for GES, knowledge acquired by the Union about the injured worker during the interaction of the Union and worker in this Union Hall hiring case could be imputed to the employer when determining whether NRS 616B.560 had been satisfied.

Upon a review of the original record from the perspective of the correct legal standard as stated by the District Court, if the Board determined that the employer had been cut off and unduly restricted in the presentation of its case before the Board because of the Board's view of

NRS 616B.560, then the Board was to conduct a further evidentiary hearing in order for the employer to be given the full opportunity to be heard before the Board. If, however, upon further review of the record, the Board concluded that the employer had not been unduly limited in its presentation by the legal standard the Board had applied to NRS 616B.560, then, no further evidentiary hearing would be necessary. 3Tr., 4,5[1].

2. The Board was also required upon remand to review the record, either as it stood or as amplified by further evidentiary hearing, based upon what the District Court perceived was the correct legal standard, where the knowledge of the Union in the hiring process could be imputed to the self-insured employer and upon review after applying the correct legal standard:

a. affirm the Board's original decision, in light of the correct legal standard, or,

b. reject its original decision, in light of the correct legal standard, and issue a new decision. 3 Tr. 6.

The Board proceeded to address these issues accordingly.

II. Proceedings Upon Remand

1. The applicant, self-insured employer is GES Exposition Services, Inc., (GES), ROA 000078, who was represented by J. Michael McGroarty, Esq., now of the law firm of Lewis Brisbois Bisgaard & Smith, LLP.

2. Jennifer Leonescu, Deputy Legal Counsel to the Administrator, Division of Industrial Relations (DIR), appeared on behalf of the Administrator. 3Tr.

3. Jacque Everhart, Administrator's Liaison to the Board, was also present. 3Tr.

4. The Board had before it the entire Record on Appeal to the District Court and the transcripts of the two prior evidentiary hearings of January 15, 1998 and July15, 1999. 3 Tr., 45; 15-18.

5. The Board members present and able to hear this matter were: Victoria Robinson, Chairman, RJ LaPuz, Vice-Chairman, and Tina Sanchez, Member. 3 Tr. Member Donna Dynek abstained from participation in the case.

---

[1]"3 Tr." stands for th transcript of the hearing of October 22, 2009, on remand to the Board. "1 Tr." stands for the transcript of the hearing conducted on January 15, 1998 and "2 Tr." stands for the transcript of the hearing held on July 15, 1999.

6. Three members of the Board constituted a quorum, enabling the Board to proceed to hear this matter upon remand. NRS 616B.551(1). There was one vacant position on the Board as of October 22, 2009, the date of the hearing upon remand.

III. The Question of Whether the Applicant Was Unduly Constrained in Its Presentation When the Case Was Initially Heard, Because the Board Had Applied A Too Narrow Standard for Applying NRS 616B.560, or Question Number One, Above.

1. The Board first considered the question of whether the applicant had been cut off in its presentation because of the legal standard the Board had applied to the proceedings when the case was originally heard.

2. Thanks to the applicant, short shrift may be made of this question.

3. The applicant's legal counsel was asked if the applicant was unduly limited in the original proceedings, because the District Court found the Board had applied an incorrect legal standard:

> [Question by Vice Chairman LaPuz:]What, [Mr. McGroarty] ...additional testimony, ...or new evidence [do] you believe you were denied the opportunity to present at the time this case was initially heard in January of 1998 and then again heard...in July of 1999 that you would now like to present. 3 Tr., 41; 18-24.
>
> ...
>
> VICE CHAIRPERSON LAPUZ: I was asking what additional testimony or evidence you believe you were denied the opportunity to present at the time this case was [originally heard] ... "3 Tr., 42; 13-16.

4. "[Answer by] MR. MCGROARTY: I don't think I was denied any opportunity, okay?" 3Tr., 17.

5. Based upon the candor of this response, the Board finds the applicant was not unduly restricted by the legal standard it applied during the original hearings on this case.

6. The Board therefore, concludes that no further evidentiary hearing is necessary to decide this case.

///

///

///

///

IV. The Second Question, Applying The Legal Standard Laid Out By The District Court On Remand, the Board Finds That Even Under This Standard, The Applicant Failed to Show By A Preponderance of the Evidence That The Elements Of NRS 616B.560, and In Particular, NRS 616B.560(1) Were Satisfied By The Applicant And As A Result, The Board's Original Decision Still Stands

SUPPLEMENTAL FINDINGS OF FACT

Upon the results of the Board's hearing on remand held on October 22, 2009, the Board supplements the Findings of Fact set out in its Decision dated March 3, 2006, as follows:

1. The self-insured employer, GES Exposition Services, Inc., (GES), the petitioner before the District Court and applicant before the Board, continues to insist that under the Collective Bargaining Agreement between GES and the Teamsters Union, GES has no right to inquire into whether the Union, in fact, questioned the injured worker about his past health conditions and his current readiness to perform the job for which the referral was about to be made in response to the Union Hall call out by GES. 3Tr., 46; 20-24.

2. On remand, GES continued to take the position that "we" must presume, 3 Tr. 52; 24-25, 53; 1-2, that the Union did its job, and effectively screened the injured worker and others who are being referred to the prospective employer, in this case, GES, upon call out to the Union for employees to come to work for GES. 3Tr., 32; 1-7.

3. According to the petitioner's legal counsel, GES relies upon the Union as its agent, to do the vetting of the referred employees. 3 Tr., 10; 22,23.

4. The Union then gives the referred worker, here, the injured worker, a transfer or referral slip to hand to the prospective employer, in this case, GES.

5. This transfer slip, while stating nothing about the injured worker's ability or condition to do the job constitutes, according to GES, a representation by the Union that the injured worker is ready, willing and able to do the job for which the referral is being made and for which the employer, here, GES, made the call for workers to the Union. 3Tr., 10; 24,25, 11; 1, 13; 9-12, 13; 8-14, 19; 21-24.

6. This representation is sufficient, according to GES, for purposes of proof of an intentional misrepresentation, under NRS 616B.560, according to GES's legal counsel. 3Tr., 13; 8-14, 18; 17-22.

7. According to GES, the referral slip, one way or the other, is the key to the proof of misrepresentation. 3 Tr., 57; 2.3.

8. The employer, according to GES, then relies upon the representation being made by the presentation of the referral slip from the Union through the referred workers, the injured worker, herein, that the injured worker is able to do the job. 3Tr., 11; 1-4.

9. While GES relies greatly upon the referral slip as proof that deception has occurred about the injured worker's ability to do the job for which he was referred, GES admits that the slip itself, contains no affirmative representation about the injured worker's capacity to perform the job for which the referral was made. 3Tr., 43; 24-25, 44; 1-8. See, also, ROA 128.

10. Additionally, the referral slip contains nothing that smacks of a description setting out the physical demands and mental requirements for the job. Nowhere are these elucidated on the referral slip. 3Tr.,44; 1-8. See, also, ROA 128.

11. It was also GES's or the employer's position that for purposes of proof of NRS 616B.560, "when, as here, the employer relies for hiring upon another, the other is the employer's veritable agent ... and the other's [agent's] knowledge should be held to satisfy the employer's need for knowledge in order to claim the benefits of reimbursement upon hiring." 3 Tr. 12; 20-25, 13; 1-2.

12. In this case, then, it was also GES's position that the proof required under NRS 616B.560 concerned the interaction between the injured worker and Union, when the Union was vetting the injured worker before referring him to GES, and whether the injured worker misrepresented to the Union during this vetting that the injured worker could do the job for which he was being referred when he in fact, knew that he could not do the job.

13. The knowledge that the Union acquired during this vetting process and the deception thus imposed, if any, upon the Union could then be imputed to the employer, 3Tr., 43; 1-5, so that if the Union had been deceived within the meaning of NRS 616B.560, the employer would be deceived also, and the employer through the imputation of this knowledge, would accordingly be eligible for reimbursement from the Account based upon NRS 616B.560. 3Tr., 12; 20-25, 13; 1-2.

14. For the purposes of vetting the injured worker and others being referred to GES under the CBA pursuant to the call out for workers, the Union was acting as the agent, 3Tr., 13; 8, for GES since GES, according to GES's legal counsel, had ceded to the Union, the vetting process for qualifying workers in response to the employer's call out for workers from the Union under the CBA. 3Tr., 28; 8-12. GES, furthermore, must rely upon the Union and presume, 3Tr., 52, 24-25, 53; 1-2, that the Union did its job because GES has no way of determining if the vetting process took place, and therefore presumes, 3Tr., 53, 6-8, that it happened properly. 49; 11-23.

15. According to the employer, GES was prohibited at the time by the CBA from going behind the scenes to determine whether, in fact, the Union actually was vetting the workers, 3Tr., 40; 21-25, before referring them to GES pursuant to GES's call out for workers. 3 Tr., 24; 17-18. The vetting process was beyond GES's control, according to the terms of the CBA, GES contends. 3Tr., 25; 5-8, 28; 9-12, 31; 6-7.

16. In fact, GES did not know at the time, whether the Union even had a screening process for vetting the injured worker and others upon referral to GES pursuant to a call out for workers by GES under the CBA. 3Tr., 24;25, 25;1, 13-21.

17. For a worker to be referred by the Union, the prospective union member, who comes in off the street, need only pay $35 and sign up for placement on the hiring list for a referral. The vetting process for Union referrals is no more complex than "...to come off the street, [pay] the 35 bucks, and he's a member of the union." 3Tr., 25; 19-21. This is the Union vetting process as far as GES is aware.

18. It is also, according to GES, unreasonable and unprecedented to require GES to prove whether the Union actually vetted the injured worker about the job before referring him, and to prove whether the injured worker misrepresented his capacity to perform the job, before the Union made the referral to the employer. 3Tr., 20; 9-12.

19. The Board, according to GES, must presume that the vetting process was actually conducted by the Union before referring the injured worker to GES. 3Tr., 32; 4-5, 53; 6-9. GES assumes it took place. 3Tr., 48; 15-18, 49; 18-20.

20. According to GES, the employer has no obligation to prove the interaction between the Union and the injured worker before the Union referred the injured worker to GES in response to GES's call out for workers. 3Tr., 20; 9-12, 20; 6-12, 35; 4-8, 37; 17-20, 38; 1-9, 40; 21-25, 46;, 19-25, 48; 12-18, 48; 18-21, 53; 3-9.

21. According to GES, the presentation of the referral slip to GES when the injured worker reported for work was the knowing misrepresentation that the injured worker was ready, willing and able to do the job, 3Tr., 28; 13-16, 30; 19-22, 31; 1-7, 43; 24-25, 46; 1-8, 57; 2-4. Petitioner was not particularly clear, however, whether the misrepresentation, manifested by the introductory slip, was being made by the Union or the injured worker when the slip was being handed to GES. *Ibid.*

22. According to GES, further, non-verbal forms of communication may constitute an intentional, knowing misrepresentation of an employee's ability to perform the job, including the mere act of reporting for work if, when reporting for work, the injured worker knew he or she was physically unable to perform the job for which he was referred. 3Tr., 32; 13-14.

23. In response to the question of the Chairman, asking GES's legal counsel what proof GES had that "...the employee knowingly made a false representation as to his physical condition at the time he was hired," GES said: "The introductory slip I guess will generally concede it did exist." 3Tr., 30; 19-23.

24. GES then characterized the misrepresentation through the introductory slip as follows:

> Is it a misrepresentation? Maybe not by the union. He [the injured worker] may have misrepresented the facts to the union. So the union is not misrepresenting what is said, but it is representing what the injured worker, or what Mr. S. told them, but that process is beyond our control. 3Tr., 3-7.

25. Believing the answer unresponsive, the Chairman asked again, "Did he [the injured worker] knowingly misrepresent his ability? That's my question." 3Tr., 33; 6-7.

26. Eventually, the response to this line of inquiry was as follows from the petitioner:

> I'm not sure we have to prove his condition before he was employed. I don't know if we even have to prove his prior condition, other than the fact that he had a prior condition that would have affected it. 3Tr., 35;3-8.

See also, 3Tr., 37; 17-20, 38; 1-15, for more of GES's claim, it need not trouble itself with proof of the extent of the preexisting condition in order to show a misrepresentation by the injured worker at present, about his ability to perform the work to which he was assigned.

27. Specifically, however, on the proof of knowledge and whether GES could prove that the injured worker misrepresented himself to the Union during the vetting process, GES admitted and claimed: "Basically he [the injured worker] either lied to the union or he didn't, **but we don't know**, and we can't know under the union contract." 3 Tr., 35; 15-17.

28. GES concedes, therefore, it has no knowledge of any representations, if any, made by the injured worker to the Union about his physical ability to do the job for which GES issued the call out for workers.

29. GES concedes, and the Board continues, also, to find, that GES has no knowledge, 3 Tr., 48; 16-18, of the interaction, if any, between the injured worker and the Union before the Union referred the injured worker to GES for the call out for workers, including, whether and to what extent the Union communicated to injured worker the physical and mental qualifications for the position to which the injured worker was being referred.

30. The medical records in the file and the injured worker's work history before the Board show that the injured worker, while having suffered previous back injuries, was well and symptom free with his back since the back surgery 10 years before the subsequent industrial injury at GES. 3Tr., 36; 4-7, ROA 000027, 000090, 000091, 000097.

31. In addition, the medical and work history before the Board showed that the injured worker had been working consistently for the past 10 years until the back problem that gave rise to the instant claim for subsequent injury relief by GES. 3Tr., 36; 8-11.

32. GES offered no evidence to counter the record that the injured worker was well and symptom free for the 10 years following the preexisting back injury, which were, also, the 10 years immediately preceding the subsequent industrial injury to the back.

33. In an effort to give GES another chance to prove its case, the Chairman then asked:

///

> Nevertheless, you [Mr. McGroarty] still need to prove that the person [injured worker or worker subject to NRS 616B.560] lied. I think that's what we're all saying here. You need to demonstrate to us that he lied. I haven't seen anything that said he lied. Show me where he lied. 3Tr., 43; 12-16.

34. The answer from GES was that the injured worker lied by and through the introductory slip identified and described above: "It's the introductory slip, says coming from Teamsters Local No. 631." 3 Tr., 43; 24-25, 44; 1.

35. GES's legal counsel then explained further introductory slip: "This is the job referral under the union contract. That is the representation. ...says he's qualified to perform the work for which he's been referred." 3Tr., 44; 11,12.

36. The introductory slip, however, is devoid of any description of the requirements for the job and it is devoid of any description of the injured worker's or the referred employee's ability to perform the job for which the referral is being made. ROA 128. In fact, the closest that the introductory slip might come is an admonition to the employee to bring his tools to the job when he shows up for work. ROA 128, 3 Tr., 44; 1-8.

37. While relying upon the introductory slip for the misrepresentation, GES also concedes at the same time that the slip, itself, contains nothing in the document that GES considered or believed to be a lie. 57; 13-14.

38. GES then claimed that the case ultimately distilled to the following:

> So I guess what it comes down to is whether you consider the introductory document to be a representation by the claimant through his union to the employer that I'm ready, willing and able, and qualified to work. If you do not consider that, then vote it down. If you do consider that to be a misrepresentation, then grant the claim. It's that simple. 3Tr., 46; 1-8.

39. In response to a question from the Board suggesting that the inquiry was not that simple and that the employer must show what interaction existed between the Union and the injured worker which led to the referral of the injured worker to GES and whether, therefore, there was any misrepresentation by the injured worker about his ability to do the job which would trick or induce the Union to make the referral, GES took the position, again:

> I'm not sure that we have to produce a written misrepresentation that was given to the union, no, if that's what you're asking for. Secondly, we couldn't even if it did exist. **We don't know if it does or doesn't.** As Mr. Quist explained, **he doesn't know.** He **assumes this, or assumes that.** (Emphasis added). 3Tr., 48; 12-18.

40. GES, however, also eventually took the position that the misrepresentation manifested by the introductory slip that the injured worker was competent, ready, willing and able to work and perform the job for which the injured worker was performed, was a "...representation by the union...." 57; 4-9.

41. As for the injured worker's health condition that he presented at the time of hire, GES was asked by Board Member Sanchez, whether, in light of his prior back surgery, "...[he had] any permanent restriction that prevented him from doing this [job] which might be a knowing misrepresentation?...—if there was no restriction preventing him from doing this work, how would that be a misrepresentation of his ability?" 3Tr., 57;25, 58; 1-4.

42. The employer's answer was again, that it had no information about the injured workers preexisting physical condition and his knowledge of it in reference to the job requirements at hand. Mr. McGroarty stated: "We went through this before. We have no way of knowing." 3Tr., 58; 21-22.

43. The Board took the broadest possible view of the misrepresentation, allowing proof that the employee lied to the Union or GES or even that they were interchangeable. 3Tr., 32; 17-21.

44. The Board also went beyond any written requirement of a misrepresentation from the injured worker, advising GES during the course of the hearing that the Board was not requiring a writing, only "...some demonstration that he [the injured worker] knowingly lied, and the fact that he is a liar in other avenues does not necessarily mean that he lied in this one." 3Tr., 39; 5-9.

45. There is no proof in the record that the injured worker had explained to him by the Union or employer the physical and mental requirements of the job before he accepted the position with GES that led to the subsequent back injury.

46. There is no proof in the record, whether there was, in fact, any interaction between the injured worker and the Union regarding the injured worker's physical capacity to perform the position for which GES issued the call to the Union for workers.

///

47. There is no proof in the record that there was any verbal or written communication from injured worker to GES regarding the injured worker's physical capacity to perform the position for which GES issued the call to the Union for workers.

48. The only communication between the injured worker and either the Union or GES about the injured worker's ability to perform the job for which he was referred by the Union and hired by GES, was non-verbal, namely, the fact that he showed up for the referral and then for work, assuming, for the sake of argument, that one's physical presence constitutes, itself, a form of communication

49. The scope of this non-verbal form of communication, however, is unclear because there is no proof in the record that the physical requirements or demands of the job were ever communicated to the injured worker prior to his referral for the position by the Union or his acceptance of the position when offered by GES.

50. The record is devoid of proof the Union ever vetted the injured worker about his ability to perform the position for which he was being referred, just as the record is devoid of any proof that the Union even had a vetting process in the first place.

51. The record is clear, GES had no clue if the Union had a vetting process for screening workers before referring the union member to the employer for work, and there was no evidence in the record, any such attempt by the Union was made to screen the injured worker in this case.

52. The injured worker had been "well" and "symptom free" of back problems and had been working for the 10 year period immediately preceding the Union's referral of the injured worker under the CBA and his employment by GES.

53. It was reasonable for the injured worker under the circumstances of the state of his health and employment history for the 10 years immediately preceding his referral to GES to believe that he was physically able to work when the Union referred him to GES and GES decided to hire him.

///

///

54. The record is devoid of any showing that either the Union or GES asked the injured worker any specific questions about his health, his ability to perform the job, or his ability, generally, to perform manual labor, when the Union made the referral and the GES made the decision to hire the injured worker.

55. The record is devoid of evidence that the injured worker was given any opportunity to affirmatively represent to the Union or GES, either orally or in writing, his ability to perform physically demanding labor at the time the Union made the referral and GES decided to hire the injured worker.

56. The record is devoid of credible proof of the injured worker's scienter, namely, that he knew when he was being referred by the Union or when he was hired by GES, that because of his pervious back problems, he was physically unable to perform the job for which he was being referred, without placing his health, in particular, his back, at substantial risk of injury beyond the usual, ambient exposure to injury any other employee might face.

57. The CBA does not remove the employer's prerogatives regarding the selection of quality workers and leaves the final decision for employment up to GES. The CBA specifically states:

> Management Rights Clause
>
> The Employer shall have the exclusive right to determine its policies and to manage its business, including:
>
> ...
>
> 3. The right to hire, promote, ... workers.... ROA 000047.

In addition, the CBA states: "The Employer **is the sole judge** as to the competency of all his employees **and applicants for employment**. The Employer **may reject any worker referred by the Union**...." (Emphasis added). ROA 000052.

58. The Board incorporates into these Findings of Fact, the Findings of Fact previously made by the Board in this matter as they pertain to NRS 616B.560, because GES presented no credible evidence which would require the Board to amend its Findings of Fact previously issued.

59. As before, the petitioner failed to prove the injured worker's requisite scienter, required by NRS 616B.560.

60. To the extent that any of the following Conclusions of Law or mixed Findings of Fact and Conclusions of Law, they are incorporated herein.

CONCLUSIONS OF LAW

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

2. NRS 616B.560 is the pertinent statute at issue on remand. It provides in pertinent part as follows:

> NRS 616B.560 Reimbursement of self-insured employer for cost of additional compensation resulting from subsequent injury.
>
> 1. A self-insured employer who 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 Self-Insured Employers if:
>
> (a) The **employee knowingly made a false representation as to his physical condition** at the time he was hired by the self-insured employer;
>
> (b) The self-insured employer relied upon the false representation and this reliance formed a substantial basis of the employment; and
>
> (c) A causal connection existed between the false representation and the subsequent disability. (Emphasis added).

3. Upon review of this statute, the Board finds that the language pertinent to this inquiry is unambiguous. Therefore, the interpretation of NRS 616B.560 begins with the wording of the statute, itself, as the place of origin for its meaning. *See, Nevada Dept. of Bus. and Industry v. Granite Co*, 118 Nev. 83, 40 P.3d 423, 426 (2002).

4. In addition, as an unambiguous statute, the words used are to be assigned their plain and ordinary meaning. *See, Barrick Goldstrike Mines v. Peterson,* 116 Nev. 541, 545 (2000).

///

5. Moreover, it is the petitioner's burden to show by a preponderance of the evidence that the elements of NRS 616B.560 have been satisfied. *See, McClanahan v. Raley's, Inc.,* 117 Nev. 921, 34 P.3d 573, 576 (2001).

6. Also, when interpreting unambiguous contracts, the plain and ordinary meaning of the words used shall be applied to determine its meaning and the interpretation of the contract is to be gleaned from within the four corners of the instrument, alone. *See, Watson v. Watson,* 95 Nev. 495, 496-97, 596 P.2d 507, 508 (1979); *Reno Club v. Young Inv. Co.,* 64 Nev. 312, 325, 182 P.2d 1011 (1947).

7. These are some of the pertinent legal principles which guide the Board in this case.

8. Petitioner argues variously that it should not be required to prove whether the injured worker made any misrepresentations to the Union about his physical ability to perform the job for which he was referred, because the CBA prohibits GES from inquiring into the vetting process conducted by the Union to determine if the injured worker was fit for the position. It is, indeed, the petitioner's position that the barrier created by the CBA between GES and the Union's vetting process is so complete, that GES does not even know, in the first place, if there is a vetting process for clearance of the injured worker's physical ability to perform the job.

9. The Board disagrees with GES's view of the CBA. The Board finds that the CBA is unambiguous and expressly leaves management's prerogatives to GES including the selection of employees. GES is not compelled to take anyone referred by the Union, and may review the worker's qualifications before hire, including the worker's physical ability to perform the job, just as other employers may pursue such inquiry. 3 Tr. 36;19-25, 37; 1-7, 39;18-25, 40; 1-11.

10. The Board will assume, however, for the sake of argument that GES is prohibited, as it claims, from assessing on its own the worker's physical abilities to do the job, and that GES is prohibited from assessing whether and to what extent the Union has vetted the workers it refers to GES because GES has ceded to the Union this function.

///

11. The Board will also assume, for the sake of argument, that when the Union refers the worker, the Union is warranting that he worker is ready, willing, able and qualified to do the job for which the referral is made.

12. For purposes of this remand, the Board will follow the legal standard elucidated by the Court and, therefore, will consider the evidence from the perspective that the knowledge gleaned by the Union about the injured worker in the hiring and referral process may be imputed to the employer. Therefore, the employer can rely upon the knowledge gleaned by the Union about the injured worker to prove that NRS 616B.560 has been satisfied. Stated another way, the Board will proceed from the perspective that the Union stands in the shoes of the employer, GES, for purposes of proving that NRS 616B.560 has been satisfied.

13. Finally, the Board will assume, for the sake of argument, that non-verbal forms of communication may be sufficient to prove an intentional misrepresentation within the meaning of NRS 616B.560 and that non-verbal forms of communication may, depending upon the circumstances, arise from the fact that a worker has showed up for work upon referral.

14. Giving, therefore, GES the benefit of the doubt with all of these assumptions including, specifically, that the knowledge of the Union may be imputed to the employer and that therefore, that the Union stands in the shoes of GES for purposes of proving the misrepresentation required of NRS 616B.560, the Board finds upon remand that its original decision must stand. GES still has not shown that the elements of NRS 616B.560 have been satisfied.

15. Taking GES's claim that it should be allowed to impute to GES knowledge the Unions gleaned by its interaction with the injured worker during the referral process in order to satisfy NRS 616B.560, GES's application fails because GES concedes it does not know if the Union even had a vetting process through which it could acquire knowledge about the injured worker to be imputed to GES. 3 Tr., 49; 18-22. The record is so spartan, whether there was even any interaction is itself, a fact not in evidence. There is, therefore, nothing GES was aware of with respect to the vetting process, including whether there even was a vetting process, which could be imputed to it by the Union to satisfy NRS 616B.560.

16. If GES now contends that because the injured worker showed up at the Union hall holding himself out to work, this holding himself out to be able to physically perform the job is the misrepresentation, GES also fails. GES fails because there is no proof in the file that the injured worker was informed of the physical demands of the job for which he was being referred.

17. Similarly, there is no proof in the file that the injured worker should have currently doubted his physical ability to perform manual labor because he had been experiencing no physical symptoms of a back problem and had been well for the 10 year period of time, immediately preceding the referral by the Union to GES. ROA 000027, 000090, 000091, 000097.

18. Therefore, the mere fact that the injured worker suffered an injury to his back 10 years prior to the subsequent injury at GES would not necessarily have indicated to the injured worker that he knew he was presently unable to do the job, given his symptom free medical history during the 10 year interim.

19. Similarly, there is no proof in the record that following the back injury to the injured worker, 10 years prior to the subsequent injury, the injured worker had been given any work restrictions or limitations following his original injury to the back.

20. These circumstances do not rise to the level which would require a determination by the Board that the injured worker knowingly and intentionally misrepresented himself simply by showing up and holding himself out as ready and able to do a job that he knew he could not physically perform. The kind of scienter required to prove the knowing misrepresentation contemplated by NRS 616B.560 requires more. The petitioner must establish that the injured worker must have known he was physically at risk because the physical demands for the position to which referral was made were communicated to the injured worker, he was cognizant of his own physical limitations and he knew or must have known they would expose him to injury beyond the ambient exposure one might otherwise expect of the job. *Cf., Raad v. Fairbanks North Star School Dist.,* 323 F.3d 1185, 1197, (9th Cir., 2003). Since GES takes the position that it cannot know what happened between the Union and worker in the vetting and referral process, and since GES offered no proof on its own that it told the injured worker about the physical

demands of the job, critical elements of proof are lacking. The Board does not believe that it could be shown that the injured worker knowingly and intentionally misrepresented his ability to perform the job if he is not told at the outset what the physical demands of the job happen to be and for the 10 years immediately preceding the commencement of the new job, the worker had been "well" and symptom free of back problems.

21. GES seems, also, however, to suggest that the introductory slip, itself, constituted a misrepresentation to GES when it was handed to GES because it implies satisfaction with the Union's duty under the CBA to warrant that only qualified employees are being provided. 3 Tr., 25; 12-15, 27; 10-12, 17-23, 28; 10-16, 55; 19-24, 31; 3-7. Great reliance is placed upon the introductory slip, as GES labeled it the hallmark of the Union contract. 3Tr., 57; 2-3. Conceivably, then, GES is arguing, here, the Union has misrepresented because it delivered a worker, the injured worker, warranting implicitly by the introductory slip that he is ready, willing and able to do the job after the Union fully vetted him. In that respect, perhaps, here, GES is asserting that there is a double misrepresentation, namely, that the Union actually had a vetting process that was applied to the worker and that the vetting process yielded a worker who was ready, willing and able to perform the job when (a) there was no vetting process and (b) therefore, the Union could not have known whether the injured worker was physically able to do the job, even though the Union warranted that he could.

22. This position of GES is also unavailing because NRS 616B.560 is not concerned with representations and warranties running directly from the Union to the employer, here, GES. Rather, NRS 616B.560 is plain on its face that the knowing and intelligent misrepresentation must originate from the injured worker.

23. This leaves, then, the prospect that the misrepresentation with respect to the delivery of the introductory slip flows from the injured worker, who delivers the introductory slip to the GES. 3 Tr., 31; 3-7.This, too, must fail for GES because the slip itself, is devoid of any description of the injured worker's ability to perform the job, just as it is devoid of any description of the duties and physical demands of the job. 3 Tr., 57; 10-14. The slip, itself, would therefore not alert the injured worker that in delivering it to GES, the injured worker was

warranting his ability to do the job. Furthermore, there is no other proof in the record that the injured worker understood in any other way that the introductory slip he was handing to GES amounted to an implied representation from the injured worker that he could perform the physical demands of the job. There is no proof, therefore, in the record that the injured worker understood the mere fact that when he handed the introductory slip to GES, this act, itself, was a representation of anything originating from the injured worker about the injured worker.

24. GES is then left with the claim that there was a misrepresentation running from the injured worker to GES by reason of the non-verbal form of communication consisting of the fact that the injured worker showed up for work as if he were ready, willing and able to perform the physical demands of the job even though he knew he could not do the job. For the same reasons set out above, in the discussion of the possible interaction between the worker and the Union, a claim that the injured worker's presence at the job site to go to work constitutes a non-verbal form of intentional misrepresentation also fails muster. There is no proof that the the physical demands of the job were conveyed to the injured worker before he started work. There is no proof that he should have doubted his physical ability to perform manual labor, but then, proceeded to go to work anyway. The evidence is that the injured worker could well have believed that when he showed up for work, his back was sound enough to go to work because he had been well for the 10 years immediately preceding his employment by GES. ROA 000027, 000090, 000091, 000097.

25. The Board, therefore, concludes that GES failed to prove the scienter required of the injured worker, which the knowing and intentional misrepresentation requirement of NRS 616B.560 demands. This is true, moreover, no matter what level or stage in the hiring process GES wishes to rely upon to prove its claim. NRS 616B.560 is not satisfied according to the record before the Board and the application for reimbursement must be denied.

///

///

///

///

26. GES contends, however, that requiring GES to prove what happened between the Union and injured worker in order to sustain its claim and to prove that the injured worker's condition must have been so bad, he must have known that he could not do the job would impose an unprecedented burden upon GES and raise the bar of proof beyond recognition. 3 Tr. 20; 9-11.

27. GES also further takes the position that because of the CBA, we must presume that the Union did its job and asked all the right questions of the injured worker from which to be able to glean that the injured worker lied to the Union and, therefore, imputing this lie to GES, GES can then, based upon a presumption that the Union did its job, prove that NRS 616B.560 has been satisfied. 3 Tr., 32; 1-7.

28. To require anything more of GES would then be tantamount, according to GES, to reading employers in the Union hall hiring context out of NRS 616B.560, 3 Tr., 38; 10-15, because such employers could never satisfy the statute since they cannot go behind the Union referral process to determine what information, if any, really was exchanged between the worker and Union about the worker's ability to physically perform the essential functions of the job. 3 Tr., 49; 18-25.

29. GES is mistaken, here, also on all counts. First, GES is not an aggrieved party without a remedy. If the Union is warranting that its referrals have been fully vetted and that its referrals are ready willing, and able to perform the functions of the job for which the Union is making referrals and if the CBA requires all of this, GES may well have a breach of contract claim, or be able to file an unfair labor practice claim, if the Union has no vetting process and has not the slightest clue whether the worker being referred is one who can perform the essential functions of the job without the risk of severe injury. 3 Tr., 27; 17-23. GES is not necessarily without a remedy, if it cannot access the subsequent injury account relief because it has contracted itself into a box from which it cannot comply with the requirements of NRS 616B.560. 3 Tr., 27; 17-23.

///

///

30. The Board's interpretation of NRS 616B.560 is not, furthermore, an unwarranted interference with the labor practices of GES and the National Labor Relations Act, 29 U.S.C. §§ 151, *et. seq.* There is nothing about the CBA or the National Labor Relations Act which purports to control how the State of Nevada or any other State might allocate its own largesse such as the criterion by which subsequent injury account benefits are disbursed. While the NLRA may occupy the field in the area of labor relations, states such as Nevada are free to decide whether and to what extent it may want to dispense the State's largesse through reimbursement support to employers who hire or retain workers with preexisting permanent physical impairments.

31. Finally, in effect, it is GES who wants to rewrite NRS 616B.560 and put itself on a pedestal. It is crystal clear that in the ordinary case, every self-insured employer must show a knowing misrepresentation has taken place and is established in the record in order to satisfy the criterion of NRS 616B.560. No exception is set forth in the statute. Because of the Union hiring hall situation, however, GES argues that it must be allowed to presume, 3Tr., 32; 1-7, 53; 6-9, that the facts exist from which to conclude that there was a knowing and intentional misrepresentation by the injured worker as the means of proving NRS 616B.560 was satisfied.

32. No other employer in the non-hiring hall situation gets that kind of break. 3 Tr., 40; 1-11. GES argues, however, that we should presume that there was some sort of interaction between the Union and the worker from which one could conclude that the worker lied to the Union about his ability to do the job. GES even wants the Board to presume that the Union had a vetting process for workers in the first place, even though it has no idea that one exists, in order to show that NRS 616B.560 has been satisfied, because the CBA prohibits GES from going behind the scenes to determine if the worker really was qualified for the job upon referral[2]. 3 Tr., 46; 19-25, 47; 1-4, 49; 18*-25, 53; 3-9. No other employer gets the benefit of such a presumption, 3 Tr., 40; 1-11, and there is no indication in NRS 616B.560 that GES should have the benefit of a reading of NRS 616B.560 which would permit GES to prove its case by a

---

[2]GES' claim about the interpretation of the CBA is totally unsupported by the plain wording of the Agreement. However, for the sake of argument, this is not challenged because a challenge is unnecessary to the decision rendered.

presumption of the facts needed to establish a claim. It is GES, therefore, who wants to interfere with the legislative process by engrafting an exception to NRS 616B.560 which would excuse GES from the rigors of the proof required by requiring the Board to presume the facts that would give rise to a finding of an intentional misrepresentation under NRS 616B.560.

33. GES has failed, therefore, to prove satisfaction with the requirements of NRS 616B.560.

34. The application for reimbursement submitted to the Board must be denied on remand as GES has not sustained its burden of proving the essential element of a knowing misrepresentation as required by NRS 616B.560.

DECISION UPON REMAND

Good cause appearing, for the reasons set out above, the application of GES for reimbursement from the Subsequent Injury Account for Self-Insured Employers is hereby denied upon remand. The action of the Board to reject the application for reimbursement was based upon a vote of 3 - 0, with one vacant position of the Board and Member Donna Dynek abstaining. The vote was upon the motion of Member Tina Sanchez, seconded by Vice-chairman LaPuz. Chairman Victoria Robinson, Vice-chairman RJ LaPuz and Member Sanchez voted in favor of the motion. A quorum of the Board was present and voted on the motion. The vote was taken on October 22, 2009.

Further, on May 12, 2010, with a quorum being present, upon a motion by Vice-chairperson LaPuz, seconded by Member Sanchez, the Board voted to approve these Findings of Fact, Conclusions of Law, and Decision of the Board as the action of the Board, accurately reflecting the Boards rationale and basis for the decision made by the Board on October 22, 2009, when the Board voted upon remand to deny the application for reimbursement. The vote was 3-0-2, with new member Esposito, and member Dynek, taking no part in this action of the Board. Chairman Robinson, Vice-chairman LaPuz, and Member Sanchez voted in favor of the motion. The motion included direction of the Board's legal counsel to inform the Court, Department I, of the Eighth Judicial District, Judge Kenneth C. Cory, of the Board's decision on remand. The motion included authority of the Board's legal counsel and the Chairman to make

any technical corrections to the Decision before submission to the Court and the petitioner by and through its legal counsel.

Dated this 30th day of July, 2010.

By: _____
Victoria Robinson, Chairman

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 *Decision Upon Remand,* 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. Lewis Brisbois Bisgaard & Smith, LLP 400 South Fourth Street, Suite 500 Las Vegas, NV 89101 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
√	Certified Mail/Return Receipt Requested: J. Michael McGroarty, Esq. Lewis Brisbois Bisgaard & Smith, LLP 400 South Fourth Street, Suite 500 Las Vegas, NV 89101 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

Dated this 6th day of August, 2010.

Karen Kennedy

Karen Kennedy