

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

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6 In re: Subsequent Injury Request for Reimbursement

7 Claim No. CK0100950
8 Date of Injury: 2-12-2001
9 Insurer: Clark County
10 Employer: Fire Department
11 Third-Party Administrator: CDS CompFirst
12 Submitted By: CDS CompFirst

13 **FINDINGS OF FACT,**
14 **CONCLUSIONS OF LAW**
15 **AND DETERMINATION OF THE BOARD**

16 This case came before the Board for the Administration of the Subsequent Injury
17 Account for Self-Insured Employers (the Board), upon the appeal by the applicant of the
18 Board's preliminary decision to deny the applicant's request for reimbursement from the
19 Subsequent Injury Account (the Account). In its preliminary decision of March 20, 2003,
20 the Board upheld the recommendation of the Administrator, Division of Industrial
21 Relations to deny the claim on the grounds that the applicant did not satisfy the
22 requirements of NRS 616B.557 (1), (3) and (4).

23 Clark County is the applicant and self-insured employer. On August 28, 2003, the
24 Board heard Clark County's appeal of the Board's preliminary decision to uphold the
25 recommendation of the Administrator and deny the claim. In the interim between the
26 Board's tentative decision, and the hearing on appeal, the Administrator received
27 additional information on the claim and amended, in part, his recommendation. Based
28 upon the Administrator's review of the additional information, the Administrator
determined that NRS 616B.557 (1) and(3) were now satisfied. The Administrator

1 continued to recommend denial of the claim, however, on the grounds that the applicant
2 failed to satisfy the requirements of NRS 616B.557(4). As the Board concurred with the
3 Administrator that the applicant had satisfied the requirements of NRS 616B.557 (1) and
4 (3) by the time of the hearing on appeal, the question remaining for the Board to consider
5 on appeal was whether the applicant had satisfied NRS 616B.557(4), which requires a
6 showing by the applicant (employer) that the applicant either had knowledge of the
7 injured worker's pre-existing impairment at the time of hire or that the applicant retained
8 the injured worker in its employ after the applicant acquired knowledge of the pre-
9 existing impairment.

10 In this case, the injured worker was a retired Clark County fireman. His pre-
11 existing impairment was discovered subsequent to his retirement from the Clark County
12 Fire Department. The specific question, then, in this case is whether an employer can
13 recover under subsequent injury account analysis when the pre-existing impairment is
14 discovered after the injured worker has retired and the retired former employee never
15 worked following discovery of the pre-existing impairment.

16 FINDINGS OF FACT

17 1. This case was first heard by the Board on March 20, 2003, when the Board made
18 its tentative decision upholding the recommendation of the Administrator that the
19 application should be rejected because the applicant, Clark County, failed to satisfy the
20 requirements of NRS 616B.557 (1), (3) and (4).

21 2. Clark County is the applicant and self-insured employer in this matter. In a letter
22 dated March 28, 2003, from the offices of legal counsel for the Board, Charles R. Zeh,
23 Esq., Zeh Saint-Aubin Spoo, Clark County was informed of the Board's tentative
24 decision.

25 3. In a letter dated April 1, 2003, from Daniel Schwartz, Esq., Santoro, Driggs,
26 Walch, Kearney, Johnson & Thompson, legal counsel to the applicant, the applicant
27 appealed the tentative decision of the Board made on March 20, 2003. Legal counsel for
28 the Board received the notice of appeal on April 3, 2003.

- 1 4. The applicant's notice of appeal of the tentative ruling of the Board arrived at the
2 office of the Board's legal counsel within 30 days of the date of the tentative ruling from
3 which the appeal was taken.
- 4 5. This case was heard by the Board on appeal on August 28, 2003.
- 5 6. Daniel Schwartz, Esq., appeared for the applicant.
- 6 7. John Wiles, Esq., legal counsel to the Administrator, appeared on behalf of the
7 Administrator, as did Jacque Everhart, of the DIR.
- 8 8. Board Chairperson, Patricia Walquist, conducted the meeting. Members Victoria
9 Robinson, Donna Dynek and RJ LaPuz also personally appeared and heard the case.
10 Vice-chairperson, Bruce Mackay was absent from the meeting.
- 11 9. Four members out of a total of five members of the Board were personally present
12 and heard the appeal.
- 13 10. The applicant was seeking reimbursement in the amount of \$6,807.07. Tr., 11;3.
14 The amount of reimbursement verified by the Administrator and recommended to the
15 Board in the alternative in the event the Board approved the application was the sum of
16 \$5,834.18. Tr. 11;4.
- 17 11. The application for reimbursement was received from the applicant by its then
18 third party administrator on February 25, 2002. Tr., 11;5-6.
- 19 12. Clark County hired the injured worker on March 18, 1986, Tr., 11;6-7.
- 20 13. The following were offered and admitted into evidence without objection.
21 Tr., 10; 8-9:
- 22 a. Exhibit 1 offered by the DIR consisting of 24 pages, including staff reports,
23 records submitted by Mr. Schwartz, and subsequent staff memo from
24 Smiddy Lamb, RN, DIR.
- 25 b. Letter dated March 28, 2003 from the Board's legal counsel to the applicant
26 advising of Board's tentative decision.
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1 c. Letter dated April 1, 2003, from Daniel Schwartz, Esq., to legal counsel of
2 the Board notifying the Board of the appeal by the applicant of the Board's
3 tentative decision of March 20, 2003.

4 14. The injured worker was a 59 year old male who was a fireman from 1968 until he
5 voluntarily retired from employment as a fire fighter from the Clark County Fire
6 Department on August 2, 1994. Tr., 11; 10-13.

7 15. The injured worker had a previous history of an oral carcinoma discovered in 1992
8 which resulted in a left modified radical neck dissection. Tr., 11; 14-16.

9 16. The retired fire fighter was also a cigarette smoker for over 43 years at the rate of
10 four cigarette packs per day. Tr., 11; 16-17.

11 17. Subsequent to his retirement, it was discovered that the fire fighter suffered from
12 numerous, serious afflictions when he was admitted to the hospital on February 12, 2001,
13 for alcohol withdrawal seizures, mild congestive heart failure, uncontrolled atrial
14 fibrillation, and obstructive pulmonary disease with acute renal insufficiency.
15 Tr. 11:18-22.

16 18. On March 3, 2001, CT guided biopsy of the left lower lobe of the fire fighter's
17 lung was performed which revealed squamous cell carcinoma. Tr., 11;24-25, 12;1.

18 19. As of April 5, 2001, the retired fire fighter was diagnosed as suffering from stage
19 3B squamous cell carcinoma of the left lung. Tr., 12; 5-7.

20 20. The retired firefighter expired from his lung cancer in 2002. Tr., 16;2.

21 21. Aside from smoking, itself, the applicant makes no claim that it had knowledge of
22 any of the physical afflictions set out above at the time of hire. Tr. 29;13-15.

23 22. According to the applicant, the conditions at issue in support of the application are
24 two, namely, chronic obstructive pulmonary disease or COPD, and lung cancer. Both the
25 COPD and the squamous cell carcinoma discovered in the left lung are **diseases of the**
26 **lungs**, according to the applicant. Tr., 28; 11-14.

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1 23. The deceased fire fighter also suffered from the neck lesions, cancer and smoke
2 related, but as the lesion did not impact the lungs, the neck lesions are unrelated to the
3 condition of the lungs. The neck lesions "...just show that ...[the deceased fire fighter] ...
4 was already at risk because he was already developing cancerous cells." Tr., 28; 22-24.
5 The lesions were not, however, in the lungs. Tr. 29;3-4.

6 24. According to the subsequent injury check list which begins at page 21 of Exhibit
7 1, admitted into evidence, the applicant admits that the date of discovery of the pre-
8 existing impairment was February 12, 2001. Tr., 38;16-18, Tr., 39;1.

9 25. The condition upon which the applicant relies as the pre-existing impairment is the
10 lung condition of chronic obstructive pulmonary disease (COPD) which was discovered
11 on February 12, 2001, when the deceased fire fighter was admitted to the hospital for
12 multiple conditions including seizures and COPD. Tr., 50; 10-25, 51: 1-4. See, also,
13 42; 2-5.

14 26. The subsequent injury, then, relied upon by the applicant to support the claim for
15 reimbursement was the squamous cell carcinoma or cancer in the left lung which first
16 appeared on March 3, 2001. At least, the applicant makes no claim that the squamous
17 cell carcinoma was present when the applicant was first admitted to the hospital for
18 examination and observation on February 12, 2001. Tr., 42;2-4.

19 27. The applicant admits that smoking, itself, is not a disease and, therefore, itself,
20 does not qualify for subsequent injury analysis. Tr. 51;11-14.

21 28. The Board does not believe that it has any medical evidence in the record to refute
22 the Administrator's recommendation that NRS 616B.557 (1) and (3) were satisfied. Tr.,
23 57;10-22.

24 29. The applicant admits that under the Board's previous interpretation of the term
25 "retain" as found in NRS 616B.557(4) and also according to "...probably any
26 interpretation for the term retention as its defined in the statute ...[, NRS 616B.557 (4)],
27 no one could ever qualify. ...[S]imply put, there is no way for us to retain permanently a
28 retired person...." Tr. 58; 8-13.

1 30. The pre-existing impairment of COPD was discovered by the applicant after the
2 deceased fire fighter had retired. As a result, the deceased fire fighter was not kept in or
3 retained in the employ of the applicant following discovery of the pre-existing
4 impairment of COPD, relied upon by the applicant to support the claim for
5 reimbursement from the Subsequent Injury Account.

6 31. Notwithstanding the discovery of either the COPD or lung cancer subsequent to
7 the deceased fire fighter's retirement from employment on the Clark County Fire
8 Department, as conditions of the lungs, the conditions were presumed to be work related
9 and compensable under the State of Nevada workers compensation statutory framework,
10 because the retired individual had been a fire fighter for more than five consecutive years,
11 he suffered from and/or died of a lung disease (the COPD and the cancer to the lung) and
12 NRS 617.455 creates an irrebutable presumption that the lung condition was work related
13 and, thus, compensable. Tr., 52;6-9; 20-25, 53: 1-8, 55; 17-20.

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

18 CONCLUSIONS OF LAW

19 1. To the extent any of the preceding paragraphs constitute conclusions of law, or
20 mixed statements of fact and conclusions of law, they are incorporated herein.

21 2. The applicant filed a timely appeal of the tentative disposition of the Board.

22 3. A quorum of the Board was present allowing the Board to hear this case and
23 render its decision.

24 4. There are several principles which guide the Board when deciding this appeal
25 beginning with the requirement that the burden of proof is upon the applicant to show
26 entitlement to reimbursement. *See, Franklin v. Victoria Elevator Co.*, 206 N.W.2d 555,
27 556 (Minn. 1973); *O'Reilly v. Raymond Concrete Piling*, 49 N.Y.S.2d 475, 476 (Ct. of
28 Appeals, N.Y., 1979). The burden is one of a showing made by a preponderance of the

1 evidence. *McClanahan v. Raley's Inc.*, 117 Nev. 921, 34 P.3d 573, 576 (2001); cf., NRS
2 616C.150(1).

3 5. Quite clearly, the evaluation of an application for reimbursement from the
4 Subsequent Injury Account is an exercise in the interpretation and application of the
5 statutory framework the Board is charged with administering. It is the Board's view that
6 the starting point for any analysis of an application for reimbursement is the text of the
7 statutory framework. Cf., *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254,
8 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992). Where the language of the statute is
9 unambiguous and the words are clear, the Board's inquiry should be limited to the plain
10 meaning of the statutory framework, alone. See, *Rubin v. United States*, 449 U.S. 424,
11 430, 101 S.Ct. 698, 66 L.Ed.2d 633 (1981).

12 6. Couched in other terms:

13 The first and most important step in construing a statute is the
14 statutory language itself. *Chevron USA v. Natural Res. Def.*
15 *Council*, 467 U.S. 837, 843-44, 104 S.Ct. 2778, 81 L.Ed.2d
16 694 (1984). We look to the text of the statute to 'determine
17 whether the language at issue has a plain and unambiguous
18 meaning with regard to the particular dispute in the case.'
19 *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S.Ct. 843,
136 L.Ed.2d 808 (1997). If from the plain meaning of the
statute congressional [and therefore also legislative] intent is
clear, that is the end of the matter. *Chevron*, 467 U.S. at 843,
104 S.Ct. 2778. *Royal Foods Co. Inc. v. RJR Holdings Inc.*,
T.G. I. Fridays, etc., 252 F. 3d 1102, 1107 (9th Cir., 2001).

20 7. *Royal* also advises:

21 There is a strong presumption that the plain language of the
22 statute expresses congressional [and therefore legislative]
23 intent, which is 'rebutted only in rare and exceptional
24 circumstances, when a contrary legislative intent is clearly
25 expressed.' *Ardestani v. I.N.S.*, 502 U.S. 129, 135-36, 112
S.Ct. 55, 116 L.Ed.2d 496 (1991) (citation omitted); see also
United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242,
109 S.Ct. 1026, 103 L.Ed.2d 290 (1989).... *Id.* at 1108.

26 8. Then, *Royal* concludes:

27 Even where the express language of a statute appears
28 unambiguous, a court must look beyond that plain language
where a literal interpretation of this language would thwart
the purpose of the overall statutory scheme, *United States v.*

1 *Jersey Shore State Bank*, 781 F.2d 974, 977 (3rd Cir., 1986),
2 *aff'd*, 479 U.S. 442, 107 S.Ct. 782, 93 L.Ed.2d 800 (1987),
3 would lead to an absurd result, *id.*, or would otherwise
4 produce a result 'demonstrably at odds with the intentions of
5 the drafters,' *Demarest v. Manspeaker*, 498 U.S. 184, 190,
6 111 S.Ct. 599, 112 L.Ed.2d 608 (1991) (quoting *Griffin v.*
7 *Oceanic Contractors, Inc.*, 458 U.S. 564, 571, 102 S.Ct.
8 3245, 73 L.Ed.2d 973 (1982). *Id.*, at 1108.

9 9. There is no dispute over whether the applicant satisfied the requirements of NRS
10 616B. 557 (1) and (3). The Board accepts the recommendation, therefore, of the
11 Administrator that these sections have been satisfied by the information submitted to the
12 Administrator in support of the application.

13 10. The sole remaining issue before the Board revolves around NRS 616B.557(4). As
14 the applicant does not claim knowledge of a pre-existing impairment at the time of hire,
15 the question before the Board for the applicant to satisfy is whether or not the applicant
16 "retained" the deceased fire fighter in its employ following knowledge of the pre-existing
17 impairment which, in this case, was the chronic obstructive pulmonary disease or COPD,
18 discovered on February 12, 2001, when the deceased fire fighter was hospitalized for
19 diagnosis, observation and treatment for what turned out to be multiple problems
20 including COPD.

21 11. The deceased fire fighter was a 43 year, four pack a day smoker. The applicant
22 admits and the Board finds as a matter of law that the mere act of smoking, itself, is not a
23 physical impairment for purposes of subsequent injury analysis under NRS 616B.557.

24 12. The subsequent injury in this matter is the squamous cell carcinoma, left lung,
25 discovered on March 3, 2001.

26 13. As both the squamous cell carcinoma, left lung, or cancer of the left lung and
27 COPD are conditions of the lung, there is an irrebutable presumption that they are
28 compensable conditions under NRS 617.455, given that the deceased fire fighter had been
29 employed continuously for more than five consecutive years as a fire fighter.

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1 14. Notwithstanding, as the applicant admits, the applicant, under the facts and
2 circumstances, is incapable of satisfying the "retention" requirement of NRS
3 616B.557(4), one of the mandatory requirements which must be satisfied in order to
4 establish eligibility for subsequent injury account reimbursement. The applicant must
5 "retain" the injured worker in its employ following the discovery of the pre-existing
6 impairment.

7 15. NRS 616B.557(4) states as follows:

8 To qualify under this section for reimbursement from the
9 subsequent injury account for self-insured employers, the
10 self-insured employer must establish by written records that the
11 self-insured employer had knowledge of the "permanent physical
impairment" at the time the employee was hired or that the
employee was retained in employment after the self-insured
employer acquired such knowledge.

12 16. The Board believes that there is nothing ambiguous about the use of the word
13 "retain" in the statute and, therefore, it should be accorded its plain and ordinary meaning
14 as can be derived from the face of the statute.

15 17. The Board, therefore, understands the word "retain" as found in NRS 616B.557(4)
16 to mean at least that once an injured worker is released to work in some capacity, the
17 applicant/employer must offer a reasonable opportunity to the injured worker to return to
18 work in order for the applicant to be eligible for reimbursement from the Subsequent
19 Injury Account. The employer must do at least this much if any respect is to be accorded
20 a statutory framework intended to keep injured workers in the work force and
21 employable.

22 18. Here, the statutory framework, plain reading of the statute, NRS 616B.557(4) and
23 the basic premise of the subsequent injury concept of keeping injured workers in the work
24 force or employing an impaired worker in the first place are totally inapposite to the
25 situation where, as here, the fire fighter was retired when the pre-existing impairment was
26 discovered in that the fire fighter retired on August 2, 1994, and the chronic obstructive
27 pulmonary disease was not discovered until February 12, 2001, six years after the fire
28 fighter last worked.

1 19. There is no evidence in the record that the fire fighter actually suffered from
2 COPD while employed at the Clark County Fire Department. Nonetheless, because of
3 the irrebutable statutory presumption under Nevada law that conditions of the lungs
4 deemed work related for firemen who have, as here, been employed for five consecutive
5 years as fire fighters, the COPD is deemed work related and thus compensable.

6 20. However, while the impairment may be deemed work related, the subsequent
7 injury account analysis requires the additional condition of "retention" by the employer
8 once the pre-existing impairment is discovered. Despite the presumption in the statute
9 relating the condition of COPD back to the time of employment, there is no evidence in
10 the record that Clark County had any knowledge that the fire fighter suffered from COPD
11 and Clark County then kept the fire fighter employed, nevertheless.

12 21. The "retention" requirement, furthermore, is not met simply because the employer
13 may have been aware that the decedent fire fighter smoked while in Clark County's
14 employ. No empirical evidence or data was presented to the Board that smoking should
15 be notice that the employee suffers from a disease or disability. Thus, knowledge of
16 smoking is not notice of a pre-existing impairment since smoking is an activity, not a
17 condition.

18 22. Where, as here, the pre-existing condition is discovered after the fire fighter has
19 retired, there is no evidence that the employer knew of the COPD before retirement and
20 there is no evidence the employer kept the fire fighter in its employ nevertheless, the fire
21 fighter, though suffering from a lung condition that statutorily relates back to the time of
22 employment whether or not there is any actual proof that the condition existed during the
23 period of employment, was not retained in employment after discovery of the pre-existing
24 impairment. The applicant has not satisfied the retention requirement of NRS
25 616B.557(4). The application must, therefore, be rejected.

26 **DECISION OF THE BOARD**

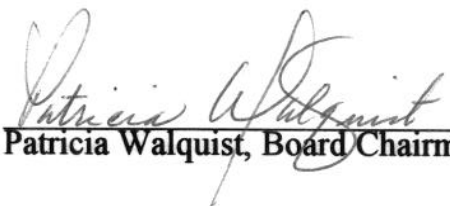
27 Based upon the Findings of Fact and Conclusions of Law set out above, the Board
28 makes its decision as follows:

1 The determination of the Administrator of the Division of Industrial Relations
2 rejecting the application for failing to satisfy NRS 616B.557(4) is affirmed by the Board
3 for the Administration of the Subsequent Injury Account for Self-Insured Employers.
4 The applicant has failed by a preponderance of the evidence to establish that the
5 "retention" requirement of NRS 616B.557(4) was satisfied. Therefore, the application for
6 reimbursement from the Subsequent Injury Account for Self-Insured Employers is hereby
7 denied. The application was denied upon a motion of Victoria Robinson, seconded by RJ
8 LaPuz, made pursuant to NRS 616B.557(4) for denial of the claim. The vote was 4 - 0
9 in favor of the motion with one member absent. As a majority of the Board voted in
10 favor of the motion, while a quorum of the Board was present, the motion was duly
11 adopted.

12 Additionally, on January 8, 2004, the Board, having reviewed this Decision and
13 after due deliberation, upon the motion of Victoria Robinson, seconded by Donna Dynek,
14 voted to adopt this Decision, with Findings of Fact and Conclusions of Law, as the
15 Decision of the Board.

16 The vote was 4-0-1, with member MacKay abstaining as he was absent when the
17 hearing on this case was held. Since a quorum of the Board was present when a majority
18 of the Board voted in favor of the motion, the motion was duly adopted.

19 Dated this 17th day of March, 2004.

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22 Patricia Walquist, Board Chairman
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the Law Offices of ZEH 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, certified mail/return receipt requested, and placed for collection and mailing in the United States Mail, at Reno, Nevada, Elizabeth Ayers Clark County 500 South Grand Parkway # 3062 Las Vegas, Nevada 89155-17111 Nevada CompFirst 325 South Third Street, Suite 1 Las Vegas, NV 89101 Daniel L. Schwartz, Esq. Santoro, Driggs, Walch, Kearney, Johnson & Thompson 400 South Fourth Street, Third Floor Las Vegas, NV 89101 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 11th day of March, 2004.



Karen Weisbrot