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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.	CK0990125
Date of Injury:	09/14/98
Insurer:	Clark County
Employer:	Clark County
Third-Party Administrator:	CDS CompFirst
Submitted By:	CDS CompFirst

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

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

Clark County is the applicant and self-insured employer. On May 29, 2003, the Board heard Clark County's appeal of the Board's preliminary decision to uphold the recommendation of the Administrator and deny the claim. There were two questions before the Board on appeal. The first was whether the applicant provided proof to satisfy the requirement that the injured worker had a pre-existing permanent physical impairment which would support a rating of "...permanent impairment of 6 percent or more of the whole man if evaluated..." as required by NRS 616B.557(3). The second question was

whether or not the applicant satisfied the requirement that the injured worker was "...retained in employment after the self-insured employer [the applicant] acquired ..." knowledge of the injured worker's pre-existing permanent physical impairment. NRS 616B.557(4). No claim was made that the employer [the applicant] knew about the pre-existing impairment at the time of hire of the injured worker.

The Board's disposition of these issues is set out below in its Findings of Fact, Conclusions of Law and Decision.

FINDINGS OF FACT

1. This case was first heard by the Board on March 3, 2003, when the Board made a preliminary determination or its tentative ruling upholding the recommendation of the Administrator, DIR, to reject the application on the grounds the applicant failed to satisfy the requirements of NRS 616B.557 (3) and (4).

2. Clark County is the applicant and self-insured employer in this matter. In a letter dated March 28, 2003, mailed by Charles R. Zeh, Esq., the applicant was notified of the decision of the Board to accept the recommendation of the Administrator and deny the claim.

3. In a letter dated April 1, 2003, addressed to legal counsel for the Board, the applicant gave notice of its appeal of the tentative or preliminary decision.

4. The applicant's notice of appeal of the tentative or preliminary decision arrived at the office of legal counsel for the Board within 30 days of the notice provided the applicant of the preliminary decision from which the appeal has been taken.

5. After multiple continuances, this case was finally heard on May 29, 2003.

6. Daniel Schwartz, Esq., appeared on behalf of the applicant.

7. John Wiles, Esq., legal counsel to the Administrator, appeared on behalf of the Administrator, as did Jacque Everhart, DIR, and Smiddy Lamb, RN, DIR.

8. Board Chairman, Patricia Walquist, conducted the meeting. Vice-Chairman, Bruce Mackay, attended by telephone conference call from Reno, Nevada. Together with Chairman Walquist, members Victoria Robinson and RJ LaPuz, attended

the meeting in person at the DIR office in Henderson, Nevada. Member Donna Dynek was absent from the meeting.

9. Four members out of a total of five members were present in person or by telephone to participate in the hearing.

10. The applicant was seeking reimbursement in the amount of $144,021.53. The Administrator verified costs in the amount of $137,892.69, in the event the Administrator's recommendation was not accepted by the Board.

11. The following were offered by DIR and admitted into evidence without objection:

Exhibit A. Staff Report, DIR, with attachments.

Exhibit B. Memo from Luisa Carpenelli dated 1/15/03, with attachments.

Exhibit C. Memorandum from Timothy Deneau. O.D., to Tina Sanchez, dated January 15, 2003.

12. The following exhibits were offered by the applicant through Mr. Schwartz and admitted into evidence without objection:

Exhibit D. Work History Inquiry including payroll records from Clark County consisting of 9 pages.

Exhibit E. Insurer's Subsequent Injury check list.

Neither side offered other exhibits for admission into evidence.

13. On September 14, 1998, while employed by Clark County as a custodial specialist for the Clark County Department of Aviation, the injured worker suffered the subsequent injury giving rise to the instant claim. The injury was initially diagnosed as thoracic and L-S strain, cervical strain. *See,* Ex. C. to DIR Report, Ex. A. *See also,* Mashhood report, Ex. E., p. 3, to the DIR Report, Ex. A.

14. The accident occurred when the injured worker was riding an elevator at work. The elevator jerked and dropped at least 4 to 5 times, jolting the injured worker. *Id.*, Ex. C to DIR Report.

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15. Ultimately, the condition was diagnosed as an acute annular tear which then required surgery. *See,* DIR Staff Report, p. 3, Ex. A.

16. At the time of the subsequent injury, the injured worker was afflicted with multiple pre-existing health conditions. According to the report of Firooz Mashood, M.D., who examined the injured worker and wrote up his findings on December 9, 1998, the injured worker suffered from bilateral spondylosis at the L5 level with grade I spondylolisthesis associated with degenerative disc changes at L5-S1 and to a lesser degree at L4-5. These, Dr. Mashhood believed, were responsible for the pre-existing chronic back pain that the injured worker was presenting when seen by Dr. Mashhood and when he presented to be seen by William Smith, M.D., on September 10, 1998, four days prior to the subsequent injury incident. Mashhood report, Ex. E, pp. 4,6, to the DIR Report, Ex. A.

17. Additionally, according to Dr. Mashhood, the injured worker suffered from poliomyelitis, left leg and a left leg length discrepancy. This, too, contributed to the chronic back pain, pre-existing the elevator incident. *Id.,* at p. 6.

18. According to Dr. Mashhood, none of the pre-existing conditions exaggerated or aggravated the industrially-related injury of September 14, 1998. *Id.,* at p. 6.

19. Dr. Mashhood noted, further, that the injured worker told him that Morton Hyson, M.D., advised the injured worker that his back problems were not the result of the injury of September 14, 1998. *Id.,* at p. 2.

20. Additionally, per Dr. Mashhood, the injured worker, according to the examination and testing of Dr. Hyson, suffered from radiculopathy, secondary, to the polio. No abnormalities were noted which could be attributed to the industrial injury. *Id.,* at p. 2.

21. When seen by Dr. Mashhood, the injured worker presented with complaints of lower back pain without complaints of radiculopathy. *Id.,* at p. 6.

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22. Because of complaints of lower back pain, the injured worker had previously been seen on September 10, 1998, just prior to the industrial injury, by William Smith, M.D. Also, on August 17, 1998, the injured worker had an x-ray of the spine which showed Grade I anterior spondylolisthesis of L5-S1, per a report attached to the letter of Dr. Smith, Ex. A, p. 2, to the DIR Staff Report, Ex. A.

23. The injured worker was seen by C. Thomas Gott, M.D. The report of Dr. Gott, dated January 14, 1999, marked the first time an annular tear was noted at L4-5. Gott Report, Ex. F, p. 2 to DIR Staff Report, Ex. A.

24. The injured worker was seen also on April 6, 1999, by Patrick McNulty, M.D., who, in his report of April 6, 1999, repeated the finding of Dr. Hyson, who completed an EMG and nerve conduction study, that the injured worker had chronic left sided L4, L5 and S1 radiculopathy, likely secondary to polio. McNulty Report, Ex. G, p. 3, to DIR Staff Report, Ex. A.

25. Dr. McNulty, in his report, further substantiates the annular tear as his diagnosis and states additionally, that the patient does "...not have any left sided radicular type findings other than those consistent with chronic polio." *Id* at p. 5.

26. Further, Dr. McNulty noted the leg length discrepancy of one half inch, which he said had not been "a significant contributory factor to his preinjury back pain or his current back pain." *Id* at p. 6.

27. The injured worker was subsequently operated on posteriorly and anteriorly for the annular tear. McNulty Operative report, Ex. H, p. 2, to DIR Staff Report, Ex. A.

28. On January 25, 2003, Dr. McNulty again performed surgery on the injured worker to remove the hardware that had been placed in the injured worker's back on or about July 1, 1999. Impairment Evaluation, Sam D. Colarusso, D.C., C.I.C.E. Ex. I, p. 7 to DIR Staff Report, Ex. A.

29. When seen by Doctor Colarusso for his rating evaluation, Doctor Colarusso, quoting Dr. McNulty, stated that the annular tears were work related. The

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cervical condition had no impairment and was given no rating. All other conditions were non-industrially related. *Id.* at pp. 9, 10.

30. When seen by Doctor Colarusso, D.C., he also wrote that the injured worker had not returned to work since the date of the incident. *Id.*, at p. 2.

31. Per the report of Dr. Mashhood, the injured worker was off work from the time of the injury through when he presented to Dr. Mashhood, on December 9, 1998.

32. The injured worker never returned to employment with Clark County following the date of the industrial injury. *See*, DIR Staff Report, p. 5, Ex. A.

33. The injured worker completed vocational rehabilitative training as a Medical Dental Office Assistant. *See,* DIR Staff Report, p. 5, Ex. A.

34. UMC hospital is a Clark County facility. *See,* Tr. p. 79.

35. No evidence or testimony was presented that Clark County ever offered employment to the injured worker once he completed vocational training. *See,* Tr., pp. 68, 77.

36. The injured worker was considered stable and ratable on April 28, 2000, *See,* Sam D. Colarusso, D.C., CICE, report, Dated July 21 2000.

37. On April 28, 2000, the injured worker was finally released to work with restrictions. *See,* Sam D. Colarusso, D.C, C.I.C.E report, dated July 21, 2000, p. 7, Ex. A.

38. There was nothing in the record to explain why the injured worker did not return to work at Clark County following the completion of the rehabilitation program.

39. There was no evidence or testimony presented that the injured worker declined to make himself available to work at any time pertinent to his complaint.

40. As of April 28, 2003, the injured worker was considered stationary and rateable. *Id.* at p. 7.

41. 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. The applicant timely filed an appeal of the preliminary decision of the Board.

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

4. There are several principles which guide the Board in reaching its decision. Their discussion precedes the Board's analysis and explication of its decision.

5. Due to the absence of case law in Nevada addressing the State's various subsequent injury accounts, the Board must look to other jurisdictions for guidance. There it is revealed that the rationale for creating such funds is three-fold. First, subsequent injury funds have been created to help prevent discrimination against disabled persons by easing the impact which the threat of a subsequent injury holds by providing a pooled source of funds to underwrite the cost of the subsequent injury which might occur. Secure in the knowledge that a pooled subsequent injury fund exists, employers are thought to be encouraged to employ or retain in its employ the already disabled/injured worker.

6. Subsequent Injury Accounts are created to relieve employers from the hardship of liability for those consequences of compensable injury not attributable to the injured worker's current employment.

7. Finally, it is the intent of the subsequent injury account that "[e]ach employer's premium should reflect his own cost experience in order to reward, and thereby encourage, safety as well as to avoid an unfair burden on other employers." *Jussila v. Department of Labor and Industries*, 370 P.2d 582, 586 (Wash., 1962). *See also, Hernandez v. Gerber Group,* 608 A. 2d 87, 89 (Conn., 1992); *Jacques v. H.O. Penn Machinery Co.*, 166 Conn. 352, 356, 349 A.2d 847 (Conn. 1974).

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8. The Board considers applications for reimbursement under Nevada's subsequent injury account with these premises in mind and applications are to be approved which promote these salutary purposes.

9. Additionally, 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). The burden is upon the applicant in this case, therefore, to show that the requirements of NRS 616B.557(3) and (4) are satisfied by a preponderance of the evidence. *McClanahan v. Raley's Inc.*, 117 Nev. 921, 34 P.3d 573, 576, (2001); *cf.* NRS 616C.150 (1).

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

11. Couched in other terms:

> The first and most important step in construing a statute is the statutory language itself. *Chevron USA v. Natural Res. Def. Council*, 467 U.S. 837, 843-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). We look to the text of the statute to 'determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.' *Robinson v. Shell Oil Col*, 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).

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12. *Royal* also advises:

> There is a strong presumption that the plain language of the statute expresses congressional [and therefore legislative] intent, which is 'rebutted only in rare and exceptional circumstances, when a contrary legislative intent is clearly 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.

13. Then, *Royal* concludes:

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

14. This case involves the meaning of the word "retain" in NRS 616B.557(4). To be eligible for subsequent injury account reimbursement, NRS 616B.557(4) requires the employer to "retain" the injured worker in employment after the self-insured employer acquires knowledge of the pre-existing "permanent physical impairment" and there is a subsequent industrial injury, if, as here, the employer had no knowledge of the pre-existing "permanent physical impairment" at the time of hire.

15. The applicant states this requirement was satisfied because the injured worker was provided vocational rehabilitation after concluding treatment for the subsequent injury and because the injured worker was kept on the payroll for about a year following the subsequent injury while the employee was being treated and then enrolled in vocational rehabilitation. *See,* Tr. p. 71.

16. The Administrator states that the applicant failed to satisfy the requirement of NRS 616B.557(4) to retain the injured worker in the employment because the injured worker was not employed by the applicant once the injured worker was rated for

permanent partial disability and allowed to return to work with the limitations associated with the permanent partial disability rating.

17. The Administrator, in other words, states that vocational rehabilitative training does not satisfy the duty to "retain" the employee because the word "retain" means to keep. *See,* Tr. p. 83. Since the applicant, ultimately, did not "retain" or "keep" the injured worker in its employ other than for the period of vocational rehabilitation, the plain meaning of NRS 616B.557(4) is not satisfied. *See,* DIR Staff Report, p. 5, Ex.A.

18. The applicant concedes that it does not know why, for purposes of this hearing, the injured worker did not return to work once given his disability rating. *See,* Tr. p. 77.

19. The applicant admits that it had no information to impart at the hearing to show whether or not a job was even offered by the applicant to the injured worker once the injured worker received his disability rating. *See,* Tr. 77.

20. The applicant admits that the UMC medical facility is a Clark County facility. *See,* Tr. p. 79. The injured worker was retrained through vocational rehabilitation in the field of health care, *see,* Tr. p. 12, and so it was not inconceivable, at least, that after being retrained, the applicant would have had the ability to offer employment in the injured worker's field as newly established through vocational rehabilitation training.

21. It must be reiterated, here, the employer/applicant has the burden of proof showing compliance with the requirements of NRS 616B.557(4). Statements, therefore, at the hearing that the employer does not know whether jobs were offered become the state of the record on the issue. It is not, in other words, the duty of the Administrator to dredge up information on the elements of NRS 616B.557(4). If the applicant does not know, the applicant must accept the consequences of the failure to produce evidence on the issue, not the Administrator. *See, McClanahan v. Raley's Inc., supra* at 576.

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22. The Board understands the word "retain" as found in NRS 616B.557(4) to mean at least that once an injured worker is released to return to work in some capacity, the applicant/employer must offer a reasonable opportunity to the injured worker to return to work in order to be eligible for reimbursement from the Subsequent Injury Account. The employer must do at least this much if any respect is to be accorded a statutory framework intended to keep injured workers in the work force and employable. Since the applicant could not provide proof this minimal requirement was met, the Board concludes NRS 616B.557(4) was not satisfied.

23. In fact, the sequence was, the injured worker was retrained. Then, at the conclusion of the training, when it came time to go to work, there is no proof a job was offered. The injured worker did not return to work. The applicant never worked again for the applicant, once he suffered from the subsequent injury. He, therefore, was not "retained in employment" and NRS 616B.557(4) was not satisfied, when, as here, the employer had no knowledge of the pre-existing impairment at the time of hire.

24. As for the other ground for rejecting the application and upholding the Administrator, the Board recognizes that it is the Board's prerogative to select inferences from the evidence which are most reasonable. *DIR, Workers Compensation v. Newport News,* 134 F.3d 134, 143 (4th Cir., 1998).

25. Additionally, when considering the evidence before it, "the testimony of a non-examining, non-treating physician should be discounted and is not substantial evidence [if it is] totally contradicted by other evidence in the record." *Gordon v. Schweiker,* 725 F.2d 231, 235 (4th Cir., 1984). In Nevada, the opinion of examining physicians are entitled to deference over non-examining physicians. *McClanahan v. Raley's, Inc., supra* at 576.

26. The subsequent injury which caused the painful symptoms requiring extended treatment ultimately proved to be an annular tear at the L4-5 level. *See,* DIR Staff Report, p. 3, Ex. A.

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27. There were multiple pre-existing conditions which included bilateral L5 spondylosis and slight lumbosacral spondylolisthesis. The injured worker also suffered from mild spondylolysis at the L4-5 as well as at L5-S1. His pre-existing condition also included poliomyelitis, and left leg length discrepancy, the left leg being the leg where he suffered from poliomyelitis.

28. Per the testing of Morton Hyson, M.D., there was as of November 13, 1998, chronic radiculopathy probably secondary to polio, with no abnormality found that could be attributed to the industrial injury.

29. When seen by physiatrist Firooz Mashhood, M.D., on December 9, 1998, however, the injured worker presented with complaints of lower back pain without radicular leg pain. The examination at that time was positive for "restriction of range of motion of the lumbosacral spine, atrophy of the left lower extremity, diminution of reflexes of the left lower extremity, and a short leg on the left side." Mashhood report, 12/9/98 at p. 6, Exhibit E to DIR Staff Report. Ex. A

30. Dr. Mashhood also stated that the preexisting conditions "...have not been exaggerated or aggravated by the industrially-related injury sustained on 09/14/98." Mashhood report, *supra*, p. 6.

31. On April 6, 1999, the injured worker was seen by Patrick McNulty, M.D., for an orthopedic evaluation. According to Dr. McNulty, "...the MRI suggesting an annular tear would further substantiate an acute annular tear which could explain the patient's significant increase in symptoms, and the fact that the symptoms are bilateral, by MRI the tear is fairly central and posterior." McNulty report, p.5, Exhibit G to DIR Staff Report, Ex. A.

32. Then, significantly, Dr. McNulty stated: "The patient does not have any left sided radicular type findings other than those consistent with chronic polio." McNulty report, *supra*, p. 5.

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33. The question this case presents on the second issue before the Board is whether these pre-existing conditions give rise to a finding of a 6% "permanent physical impairment" within the meaning of NRS 616B.557(3) to, therefore, satisfy the combined effects requirement of NRS 616B.557(1) in order to establish eligibility for reimbursement from the Account.

34. Richard W. Kudrewicz, M.D., was called to testify by the applicant. He conducted a record review, only, and rendered an opinion that NRS 616B.557(3) had been satisfied without having examined the injured worker.

35. Dr. Kudrewicz stated in his report that if the lower back were considered, only, the injured worker would qualify "minimally" for a category 2 DRE 5% whole man impairment for the lumbosacral spine due to the spondylolisthesis, loss of range of motion, and marked muscle spasm, the conditions revealed as of September 10, 1998, when seen by William Smith, M.D., four days prior to the industrial accident. *See,* Kudrewicz Report, Ex. B, p. 4, to DIR, Staff Report, Ex. A.

36. Dr. Kudrewicz also stated in his written report that he understood his assignment to be to determine whether or not this patient would "... qualify for a pre-existing 6% impairment whole man referable to his pre-existing difficulties with back and poliomyelitis...." *See,* Kudrewicz Report, Ex. B, p. 4, to DIR, Staff Report, Ex. A.

37. In Dr. Kudrewicz's opinion the injured worker suffered from a 6% permanent physical impairment, even though he rated at only 5% the lower back condition. Dr. Kudrewicz reaches the six percent figure by observing that because of the multi-level radiculopathy secondary to polio in the injured worker's left leg, the injured worker would qualify for a lower extremity neurologic deficit. *See,* Kudrewicz Report, pp. 4-5. In his report, he then stated: "Even if we use the minimum estimate of a 10% multiplier he would end up with at least a 3% impairment whole man based upon his motor difficulties pre-existing in the left lower extremity." *See,* Kudrewicz Report, Ex. B, p. 5, to DIR, Staff Report, Ex. A.

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38. Dr. Kudrewicz then combines the 3% rating for deficit attributed to the lower level extremity by reason of the radiculopathy secondary to the polio with the pre-existing lower back difficulties, *i.e.*, the problems of spondylolisthesis and spondylosis at the L-4-5 and L5-S1 levels, to reach the 6% level. Combined, Dr. Kudrewicz assigns a whole person impairment of 8% due to the polio with radiculopathy and the pre-existing lower back condition. *See,* Kudrewicz Report, Ex. B, p. 5, to DIR, Staff Report, Ex. A.

39. Dr. Kudrewicz testified to the same effect during the hearing. He was asked by John Wiles, the Administrator's legal counsel, whether he was describing two different pre-existing conditions. Dr. Kudrewicz' answer to the question of Mr. Wiles was to state: "Correct." Tr. p. 24.

40. He went on to testify further:

> Q. [By Smiddy Lamb, RN] On the preexisting impairment, certainly I don't think there's any confusion, at least on my part, with your 5 percent for the DRE Category II, the 2 percent neurologic deficit. This is where you're coming into the 8 percent and meeting the 6 percent preexisting. That, again, is for the condition of polio in the lower extremity. Correct.?
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> A. [By Dr. Kudrewicz] Correct.
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> Q. It has nothing to do with the spinal condition?
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> A. Correct." Tr. pp. 24,25.

41. Then, in response to questioning from the applicant's attorney, Dr. Kudrewicz stated:

> Q. [By Mr. Schwartz] I anticipate the argument Mr. Wiles is going to make. And that is that you're actually not saying he's got a 6 percent impairment that affected this claim, but rather he's got a 5 percent impairment that affected this claim plus this other 1 to 3 or 4 percent impairment that has nothing to do with this claim?
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> A. [By Dr. Kudrewicz] Well, that's correct. I have a gentleman who had an obvious 5 percent for his back. And he also has an abnormality in his left lower extremity from his polio, which does come into play in terms of subsequent injury. That's true. He has a 5 percent from his back. And the additional impairment is not from his back, but it does effect his lower extremities, which come into play. Tr. pp. 25, 26.

42. Smiddy Lamb, RN, then states the Administrator's position before the Board. She testified as follows:

> I don't disagree with the 10 percent at all. And I feel that Dr. Kudrewicz was saying the same thing. We're talking, if you will, two different conditions. You have a lumbar condition, and then you also have polio. And it was the combined of the two that meets the preexisting 6 percent; in other words, just not the lumbar alone. If you took away the polio, he would not meet the preexisting 6 percent. That's where my problem is. It isn't with percentages that were given at all.
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> ...
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> I did not consider–it's one of them, yes. But I'm dealing with the lumbar as a subsequent injury. Therefore, I'm looking at the preexisting lumbar permanent impairment. Tr. pp. 35,36.

43. This colloquy between Smiddy Lamb, RN, and Richard Kudrewicz, M.D., outlines the differences between the applicant and the recommendation of denial by the Administrator, DIR. For the Administrator, the radiculopathy is associated with the injured worker's polio, is confined to his lower extremities, and as Dr. Kudrewicz concedes, is a condition that has nothing to do with the spine. Tr. p. 25. The subsequent injury was to the lower spine. The pre-existing impairment to the lower spine, as Dr. Kudrewicz has stated, amounted to a rating of 5% on a whole man basis. Therefore, since the subsequent injury was to the lower spine, the pre-existing impairment to the lower spine rated at 5% whole man, and the radiculopathy secondary to polio had, in Dr. Kudrewicz's own words, nothing to do with the spine, the applicant failed to satisfy NRS 616B.557(3) as the pre-existing impairment of the lower spine, the area of the body the subject of the subsequent injury, did not rate at 6% or more, whole person.

44. Though the radiculopathy secondary to polio was a separate condition, Tr. p. 24, and had nothing to do with the spinal column, the applicant seeks to combine with or stack the rating for radiculopathy secondary to polio (a 3% rating) upon the rating for the pre-existing lower back condition (a 5% rating) to come up with an 8% whole person rating for the pre-existing health of the injured worker. Upon this basis alone, the applicant claims the requirements of NRS 616B.557(3) were satisfied.

45. NRS 616B.557(3) states in pertinent part:

> 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.... (emphasis added)

46. From the words emphasized, above, in the statute, it is clear the statute is not couched in terms such as "the totality of conditions" or expressions like " after taking into account every physical condition or impairment suffered by the injured worker" or such other expressions which would indicate a clear intent in the statute to allow the applicant to count a multiplicity of conditions and to combine them, whether related or unrelated, in order to achieve the 6 percent threshold requirement of NRS 616B.557(3). On the contrary, the statute is couched entirely in the singular, with the use of the terms "any," "a condition," "it," "a permanent physical impairment," and "a condition." The word "it" is also the term used to identify that which is to satisfy the 6 percent rating and the word "it" is clearly singular, especially when it's antecedents are "a condition" and "a permanent physical impairment." Therefore, while "any" condition will satisfy the 6 percent requirement in the sense that it may be "congenital," or caused by "injury" or "disease," the 6 percent must be achieved by a singular condition with an origin that is congenital, **or** caused by injury **or** caused by disease. A combination of conditions caused variously by a congenital condition, injury and disease which, when taken together, amount to a 6 percent or better whole person impairment does not satisfy NRS 616B.557(3) upon the face of the statute, unless one or more, individually, but not in concert, give rise to a 6 percent whole man rating. NRS 616B.557(3) is unambiguous on this point.

47. Consequently, the Board, when interpreting and applying NRS 616B.557(3), does not understand the statute to permit the stacking of conditions to achieve the 6 percent threshold the statute requires to be satisfied. This is, however, the

request being made of the Board by the applicant in this case. The Administrator, DIR, rejected the application for failing to satisfy the 6 percent requirement because the subsequent injury was to the lumbar spine and the pre-existing conditions relating to the lumbar spine did not give rise to a rating of 6 percent or more. The Administrator's understanding of the meaning of NRS 616B.557(3) is consistent with the Board's interpretation of NRS 616B.557(3) according to the plain meaning of the statute.

48. Moreover, there are no facts in this case which might compel the Board to hold otherwise, and allow a whole man rating based upon the totality of conditions, as the applicant through its own witness, admits that the radiculopathy secondary to polio was a separate condition and had nothing to do with the spinal condition, Dr. Mashhood, who examined the injured worker, stated that the pre-existing conditions had not been exaggerated or aggravated by the industrially related injury, Mashhood, *supra* at p. 6, Dr. Hyson found radiculopathy secondary to polio, with no abnormality attributed to the industrial injury, Gott report, Exhibit F to DIR Report, p. 2, Exhibit A, and Dr. McNulty stated that the injured worker had no "left sided radicular type findings other than those consistent with chronic polio." McNulty report, Exhibit G to DIR Report, p. 5, Ex. A.

49. Upon these facts, the Board concludes that NRS 616B.557(3) forecloses the stacking of separate conditions to achieve a 6 percent rating under the statute, that the applicant was asking that the Board allow the stacking of the separate conditions in order to achieve a 6 percent rating under NRS 616B.557(3), and since the only way the applicant might achieve a 6 percent rating under NRS 616B.557(3) was to stack separate conditions, the applicant failed in its burden of proving that NRS 616B.557(3) had been satisfied.

DECISION OF THE BOARD

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

The determination of the Administrator of the Division of Industrial Relations is affirmed by the Board for the Administration of the Subsequent Injury Account for Self-

Insured Employers. The applicant has failed to establish by a preponderance of the evidence that NRS 616B.557(3) and (4) were satisfied. Therefore, the application for reimbursement from the Subsequent Injury Account for Self-Insured Employers is hereby denied. The application was denied upon a motion by Victoria Robinson, seconded by RJ LaPuz, made pursuant to NRS 616B.557(3) and (4) for denial of the claim. The vote was 3 - 1, in favor of the motion with one member absent. As a majority of those voting when a quorum of the Board was present voted in favor of the motion, the motion was duly adopted.

Dated this 16th day of October, 2003.

Patricia R. Walquist

Patricia Walquist, Board Chairman

CERTIFICATE OF SERVICE

Pursuant to FRCP 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: 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 October 24, 2003.

Karen Weisbrot

Karen Weisbrot