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THE BOARD FOR ADMINISTRATION OF THE

SUBSEQUENT INJURY ACCOUNT

FOR SELF-INSURED EMPLOYERS

* * * * *

In re: Subsequent Injury Request for Reimbursement

Claim No.	**CR04-00059**
Date of Injury:	**July 1, 2002**
Insurer:	**City of Reno**
Employer:	**City of Reno**
Third-Party Administrator:	**Nevada CompFirst**
Submitted By:	**Nevada CompFirst**

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

This case came to the Board for a *de novo* hearing on September 20, 2007. At conclusion of the hearing, the Board continued the matter to give the applicant another chance to address the Administrator's (Administrator of the Division of Industrial Relations) recommendation to reject the claim for the right knee, outright, and to deny the claim for both the right and left knees (the entire claim) on the grounds the applicant failed to satisfy the 100 week notice requirement of NRS 616B.557(5). The case was heard again on October 18, 2007. At the commencement of this second hearing, the applicant offered additional documents which were admitted into evidence. Toward the end of the hearing, the Administrator withdrew its recommendation of outright denial of the claim for the right knee.

Upon the record before it, the Board affirmed the amended recommendation of the Administrator. While accepting the right knee as a part of the claim, the Board voted to reject the entire claim on the grounds that the applicant still failed to satisfy the 100 week notice requirement of NRS 616B.557(5), which states that applicants for reimbursement shall give notice to the Administrator of a possible subsequent injury claim as soon as practicable but in no event later than 100 weeks after the injury. The Board's Findings of Fact, Conclusions of Law and Decision follow.

FINDINGS OF FACT

1. This case was first heard by the Board on March 22, 2007, when the Board tentatively upheld both the Administrator's recommendation to reject the application for reimbursement for the right knee and in addition, the recommendation to reject the entire claim (both the right knee and left knee) because the notice requirements of NRS 616B.557(5) were not satisfied. *See*, Exhibits 1 and 3, p. 1.

2. The City of Reno (Reno) is the applicant and self-insured employer in this matter. In a letter dated April 3, 2007, transmitted by mail on April 4, 2007, the applicant was notified by the Board's legal counsel, Charles R. Zeh, Esq., Zeh & Winograd, of the Board's tentative decision to accept the Administrator's recommendation and deny the claim. Ex. 1.

3. In a letter dated April 20, 2007, correctly addressed to the Board's legal counsel, the applicant gave notice of its request for a *de novo* hearing following the tentative decision of the Board. Ex. 2.

4. The applicant's request for the *de novo* hearing arrived at the office of the Board's legal counsel within 30 days of the notice to the applicant of the tentative decision of the Board. 1Tr., 5; 14-18. [1]

5. The *de novo* hearing was commenced on September 20, 2007. At the conclusion of the hearing, the Board continued the matter in response to the applicant's request to provide additional documentation about both the right knee issue and the notice requirement of NRS 616B.557(5). 1 Tr., 57, 58.

6. The matter was then heard again on October 18, 2007, when the *de novo* hearing was concluded and a vote taken by the Board. 2Tr., 38; 2-16.

7. At both hearings, Chairman Victoria Robinson, Vice-Chairman RJ LaPuz, and the other Members of the Board at the time, Tina Sanchez, Donna Dynek and Linda Keenan, participated. 1Tr., 2, 2Tr., 2.

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[1] "1Tr" stands for the transcript of the hearing conducted on September 20, 2007, and "2Tr" stands for the transcript of the hearing conducted on October 18, 2007.

8. Timothy E. Rowe, Esq., of Mc Donald Carano and Wilson, appeared at the *de novo* hearings on behalf of the applicant. *Ibid.*

9. John F. Wiles, Esq., Legal Counsel for the Administrator, DIR, appeared on behalf of the Administrator at both *de novo* hearings, as did Jacque Everhart, the Administrator's liaison to the Board. *Ibid.*

10. A quorum of the Board was present to hear the case.

11. Admitted into evidence without objection on September 20, 2007, were the following exhibits:

Exhibit 1 Letter dated April 3, 2007, giving the applicant notice of the tentative decision to deny the application.

Exhibit 2 Letter dated April 20, 2007, from the applicant giving notice of a request for *de novo* hearing.

Exhibit 3 Staff Report dated July 1, 2002, with Exhibits A through U attached, and a notice of disallowance. 1Tr., 5,6.

12. Admitted into evidence without objection on October 18, 2007, were the following exhibits:

Exhibit 4 City of Reno Exhibit packet consisting of 62 pages.

Exhibit 5 Division of Industrial Relations packet consisting of 16 pages.

13. The injured worker was employed by the Truckee Meadows Fire Protection District at the time of the initial industrial injury. He was still employed there when, in 2000, the Department merged with the City of Reno (Reno) Fire Department. Reno's Fire Department was the surviving entity for whom the injured worker then became employed. The injured worker became directly covered for workers compensation by Reno on July 1, 2002, when the City went self-insured for workers compensation. Staff Report (SR), Exhibit 3, pp. 2,3.

14. The Appeals Officer's decision overturning the rejection of the fire fighter's multiple workers compensation claims recounts the claim's history. Pertinent to this claim, while the injured worked was employed by the Fire District, Employer's Insurance Company of Nevada (EICN) was its workers compensation carrier. His knees, however, were injured on multiple occasions prior to employment with the District. The condition of his knees continued

to deteriorate during his employment by the District and thereafter. Applying "the last injurious exposure rule," the Appeals Officer found that while on duty with Reno, the fire fighter continued aggravating the problems with his knees after July 1, 2002, when Reno became self-insured. Therefore, because these problems were aggravations, as distinguished from recurrent problems, the "last injurious exposure rule" assigned Reno responsibility for the treatment of the knees. Conversely, the "last injurious exposure rule" relieved EICN, the insurer prior to July 1, 2002, of further liability for the firefighter's industrial injury claim for the knees as of July 1, 2002, the date Reno became self-insured. SR Ex. U, pp. 13,14.

15. According to the Appeals Officer's decision, beginning in July 2002, the injured worker managed or fought 30 to 40 fires. The aggravating incidents giving rise to additional knee problems thus commenced as early as July 2002, since the knee problems were work related and resulted from the fire fighter's continuing, stressful firefighting duties. *Id.*, p. 5. The aggravating incidents continued through 2004. Petitioner's legal counsel, however, argued that these fire fighting duties even extended into 2005. 2Tr., 30; 3-8.

16. Reno's notice of a possible claim against the Account by reason of this fire fighter's injuries is dated September 28, 2005. 2Tr., 21; 13. *See also*, SR Ex. S. There is no proof that it was actually served upon the Administrator, 2Tr., 17, 18, but allowing three days for mailing, the notice would have been placed in the Administrator's possession by October 3, 2005, since October 2, 2005 is a Sunday. 2Tr., 29. For purposes of this decision, the Board assumed that the notice was actually received by the Administrator on or about this time. 2Tr., 37; 19-24.

17. The Employer's Wage Verification form Reno completed, lists the date of injury for this injured worker as July 1, 2002. The form is dated November 28, 2006. Ex. 5, p. 15.

18. The Nevada Wage Calculation form Reno completed lists July 1, 2002, for the date of injury. The form is dated November 28, 2006. *Id.*, p. 16.

19. The Reno Preliminary Injury Report completed on this injured worker is dated September 22, 2003. The space for the date of injury is left blank. Stephen Dow, M.D., is listed as the treating physician. The body parts listed as injured were both the right and left knees.

This form was signed by Chief Lowden, the Chief of the Reno Fire Department at the time and the person the form lists as the fire fighter's supervisor. The form states that Chief Lowden, as supervisor, was notified of the injury to the fire fighter on September 16, 2003. The date last worked at the time was September 9, 2003, although the incident was labeled a "no lost time injury" as of this date. Ex. 4, p. 1.

20. On September 22, 2003, Stephen Dow, M.D., saw the injured fire fighter for bilateral knee degeneration. Dr. Dow signed the workers compensation form C-4 on September 23, 2003. The place for the entry of the date of injury on this C-4 form is left blank. SR Ex. B. *See*, 1Tr., 9; 11-14.

21. The C-4 shows that the fire fighter's condition included industrial accidents, resulting in surgery, which have created a degenerative condition in both knees. The fire fighter's reason for seeing Dr. Dow involved both the right and left knees. SR Ex. B. The C-4 form, dated September 22, 2003, documenting the extensive deterioration in the injured worker's knees, purportedly communicated this information to the City of Reno, when received as of March 8, 2004. *Ibid.*

22. Reno completed the C-3 Employer Report of Industrial Injury form on September 19, 2003, for this injured worker. The Reno Fire Department received the C-3 on September 22, 2003. The third party administrator received it on October 3, 2003. *Id.*, Ex., C. *See*, 1Tr. 9; 10-19. The C-3 indicates the employer was notified of the injury the subject of the form on September 16, 2003. Using the same verbiage found in the C-4, the C-3 describes the deteriorating condition of the fire fighter's knees, stating that the fire fighter had suffered past industrial accidents which resulted in surgeries that caused a degenerative condition in both knees and the need for further treatment. *Id.*, Ex. C. Since this form was received by the Reno Fire Department on September 22, 2003, the City of Reno must have known of the serious deterioration in the fire fighter's knees as early as September 22, 2003, if not September 16, 2003, as stated in the form. *Ibid.*

23. According to the Administrator, therefore, the notice, dated September 28, 2005, and conceivably received by the Administrator on October 3, 2005, of a possible claim was

given approximately 222[2] weeks from July 1, 2002, the date the City of Reno states was the date of injury. 1Tr., 10; 13-14. *See also*, SR Ex. 5, pp. 14, 15, 16.

24. According to the Administrator, the notice of a possible claim was given approximately 106 weeks and 3 days weeks from September 19, 2003, the date of the C-3 form was completed by Reno. *Id.*, 10; 14. *See also*, SR Ex. C.

25. The notice of the possible claim was given 81 weeks and 5 days from March 9, 2004, the date the City's Third Party Administrator received the C-4 form completed by Dr. Dow. *Id.*, 10; 17-18. *See also*, SR Ex. B.

26. In the firefighter's claim number 2001013333421 before the Appeals Officer, EICN moved to join Reno in those proceedings involving the injuries at issue on appeal in a document dated October 17, 2003. The Order joining Reno to the proceedings was dated October 21, 2003. 2 Tr., 14; 7-15. The motion was served by mail upon Michelle Parvin, City of Reno, on October 17, 2003. Ex. 4, p. 44. The Order joining the City of Reno in this case was served by mail upon Michelle Parvin on October 21, 2003. *Id.*, p. 46.

27. By October 21, 2003, therefore, Reno was added as a party to the fire fighter's workers compensation appeal he was pursuing for injuries to the knees that are the subject of the application for reimbursement before the Board.

28. Allowing three days for mailing, by October 24, 2003, Reno, at the very least, must have known the injured worker/fire fighter had multiple problems with his knees exposing Reno to worker's compensation liability for their condition under the last injurious exposure rule since the points and authorities in support of the motion to join the City of Reno, specifically reference the last injurious exposure rule as the justification for joinder. *Id.*, at 42.

29. The evidence documents, however, that as early as September 16, 2003, the petitioner knew that the injured fire fighter was suffering from injuries to his knees bilaterally. SR Ex. C., Ex. 4, p. 1.

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[2]While the Board, Administrator, and self-insured employer accepted 222 weeks as gospel, it is an incorrect figure. Actually, there are 170 weeks between July 1, 2002 and October 3, 2005. The error is immaterial because 170 weeks is still 70 weeks in excess of the 100 week limit of NRS 616B.557(5).

30. Petitioner gave notice to the Administrator of a possible claim for reimbursement from the Subsequent Injury Account, therefore, 102 weeks after having been served with a copy of the motion to join and possibly be deemed liable for the fire fighter's injured knees, beginning July 1, 2002, under the last injurious exposure rule. This calculation assumes three days for service by mail of the motion dated October 17, 2003.

31. Petitioner gave notice to the Administrator, of a possible claim for reimbursement from the Subsequent Injury Account, therefore, 106 weeks and 6 days from September 16, 2003, the date Reno documented knowledge of the injuries to the firefighter's knees, bilaterally.

32. Reno, through legal counsel, argues that July 1, 2002, is a fiction as no injury actually happened on that date, even though the documents Reno submitted to the Board to support its application specifically list the date of injury as July 1, 2002. Reno claims the date is significant only because it coincides with the date Reno became self-insured and absorbed the Truckee Meadows Fire District fire fighters into the pool of employees it self-insured for workers compensation. As Reno claims this date is unrelated to any specific injury, Reno argues it should not be the date that triggers the duty to give notice as the 100 week notice requirement commences as soon as practicable but in no event later than 100 weeks of the injury. 1Tr., 15;1-5, 16; 1-7.

33. The petitioner argues instead that the date of injury could be any one of the incidents of aggravation that the appeals officer determined justified imposing worker's compensation liability as of July 1, 2002, under the last injurious exposure rule. Petitioner asserts that the dates of the fires that were fought, wherein, the fire fighter most certainly had aggravated his preexisting knee problems, could be used as various dates of injury. 2Tr., 30, 31.

34. Counting backwards 100 weeks from the date of the notice of a possible claim, October 3, 2005, petitioner argued through legal counsel during the hearing before the Board, that several of the fires the injured worker fought would have come within the 100 week period, thereby making the application for reimbursement timely in satisfaction of NRS 616B.557(5). 2Tr., 22; 19-25, 23; 1, 24; 1-2, 29;13-25, 30; 1-8; 31;1-8, 10-20.

35. Reno concedes through legal counsel, that it has not identified which of these so-called subsequent injury producing fires fell within the 100 week period from the date notice was given and which fell outside the period. Therefore, Reno did not identify for the Board which of the purported "subsequent injuries" resulting from the so-called subsequent injury producing fires fell within the 100 week period prior to the date petitioner gave notice to the Administrator of the possible subsequent injury claim. 2Tr., 32; 19-25, 33; 1-2.

36. In Reno's report written by Charles E. Quaglieri, M.D., he stated that July 1, 2002, was established administratively as the date of injury, and the line of demarcation between the preexisting condition and subsequent injury or disease. Anything that occurred before July 1, 2002, became the preexisting permanent physical impairment which he then used to decide whether the 6% rule of NRS 616B.557(3) was satisfied. Anything after July 1, 2002, became the subsequent industrial condition. SR Exhibit Q, pp. 2, 3.

37. Because of the bone on bone condition of the knees, Dr. Quaglieri gave the fire fighter a 20% whole person impairment (WPI) permanent partial disability rating for the preexisting condition *Ibid.*

38. According to Dr. Quaglieri, the subsequent condition was not, however, a subsequent industrial injury. Rather, he stated the fire fighter suffered from industrially related severe degenerative joint disease. He also stated this condition manifested itself as early as July 1, 2002, because the injured worker was already being treated by Dr. Dow with Synvisc by then. SR Exhibit Q p., 3.

39. Furthermore, Dr. Quaglieri noted in the medical history for the injured worker, there was no additional trauma to the knees after July 1, 2002, only continued deterioration as outlined in his report. SR Ex. Q, pp., 2,3.

40. The last C-4 in the file indicating physical trauma induced injury to the knees is for an incident with April 26, 2001, as the date of injury. SR Ex. A, p. 30.

41. The preexisting permanent physical impairment, according to the petitioner, consists of all the trauma and problems of the knees prior to July 1, 2002, as the pre-July 1, 2002 condition or conditions is/are the condition(s) which Dr. Quaglieri rated and gave a 20% PPD,

WPI according to the *American Medical Association Guides for the Evaluation of Permanent Impairment* to qualify the petitioner's application for reimbursement from the Subsequent Injury Account. SR Ex. Q., p. 2. SR p. 6.

42. The subsequent industrial injury for purposes of NRS 616B.557(1) is the degenerative joint disease, with a discovery date which actually predates July 1, 2002, but which Dr. Quaglieri states was manifest as of July 1, 2002, when the disease was already evident. SR Ex. Q, p. 3.

43. Petitioner offers belatedly that the injured firefighter suffered subsequent injuries or exacerbations because, for purposes of the last injurious exposure rule, he was exposed to conditions which could have been harmful to his knees when he fought the fires mentioned in the Appeals Officers' decision. The Appeals Officer did not indicate which, however, of the fires actually caused additional harm. The decision does not indicate, either, whether the additional harm amounted to new injuries or an exacerbation of the occupational disease of degenerative joint disease. The decision tagged Reno under the last injurious exposure rule, not because of any specific, new injury but because there was a continued aggravation of the occupational disease of degenerative joint disease which caused further deterioration. SR Ex. T, pp. 2; 11-13, 3;25-26, 5; 1-7, 5; 15-17, 7; 22-24, 8; 24-28, 11; 10-13.

44. Here, the **only** subsequent industrial injury identified by the record produced by the petitioner was the occupational disease of degenerative joint disease.

45. Aside from the question of whether an occupational disease falls within the meaning of a "subsequent industrial injury" for purposes of NRS 616B.557, the occupational disease of degenerative joint disease, the condition offered up as the subsequent industrial injury, has July 1, 2002, as the date of onset and the date of injury. SR Ex. Q, p. 3.

46. According to Dr. Quaglieri, the degenerative joint disease was a condition known on July 1, 2002, as the fire fighter was being treated for the condition as of that date. *Ibid.*

47. The petitioner knew of the fire fighter's degenerative condition of the knees at least by September 16, 2003, *see,* SR Exs. B and C, if not by September 11, 2003. *See,* Ex. 4, p. 1.

48. The petitioner gave notice to the Administrator of a possible subsequent injury account claim 106 weeks and 3 days from September 16, 2003, a date when the petitioner was aware of the fire fighter's subsequent industrial injury of degenerative joint disease in the knees, bilaterally.

49. The petitioner gave notice to the Administrator of a possible subsequent injury account claim 107 weeks and 4 days from September 11, 2003, another date when the petitioner was aware of the fire fighter's subsequent industrial injury of degenerative joint disease in the knees bilaterally.

50. More than 100 weeks elapsed between the date of October 3, 2005, when the petitioner gave notice to the Administrator of a possible subsequent injury account, and the date of the subsequent industrial injury and the date when the petitioner acknowledges by its own written record that it was aware the fire fighter suffered from the subsequent industrial injury of degenerative joint disease.

51. To the extent any of the Conclusions of Law set forth below also constitute Findings of Fact, they are incorporated herein by reference.

CONCLUSIONS OF LAW

1. To the extent any of the preceding Findings of Fact also constitute Conclusions of Law, they are incorporated herein by reference.

2. The applicant filed a timely appeal of the tentative decision of the Board. NAC 616B.7706(1).

3. A quorum of the Board was present at all pertinent times for the Board to render its decision. NRS 616B.551.

4. NRS 616B.557(5) requires the applicant to give notice to the Administrator of a possible claim for reimbursement from the Account **as soon as practicable** but no later than 100 weeks following the injury.

5. It is well established that the applicant must show that each of the eligibility criterion NRS 616B.557 must be satisfied. *See, United Exposition Service, Co. v. State Industrial Insurance System,* 109 Nev. 421, 424, 851 P.2d 423 (1993).

6. The onus is on the applicant, therefore, to show that notice of a possible claim against the Account was given to the Administrator as soon as practicable but in no event later than 100 weeks from the subsequent industrial injury in order to be eligible for reimbursement.

7. In the information provided the Administrator when applying for reimbursement from the Account, Reno, on at least three occasions, stated that the date of the subsequent industrial injury was July 1, 2002.

8. Dr. Quaglieri stated the subsequent industrial injury was the fire fighter's degenerative joint disease, bilaterally for his knees. He, also, stated that the date of this injury was July 1, 2002, because the fire fighter was being treated by Stephen Dow, M.D., for this condition as of that date.

9. Applying the plain meaning of NRS 616B.557(5), as the Board must, *see, Barrick Gold Strike Mines v. Peterson*, 116 Nev. 541, 545 (2000), *see also, Nelson v. Heer*, 123 Nev 26, 63 P.3d 420 (2007), one of the critical dates for assessing the timeliness of the notice of a possible claim to be given the Administrator is the date of injury.

10. Another critical date is the day when it became reasonably practicable for a claimant to give notice of a possible claim NRS 616B.557(5).

11. The petitioner's date of notice to the Administrator of a possible claim is October 3, 2005, and since the date of subsequent industrial injury is July 1, 2002, petitioner's notice is delinquent because it was given 170 weeks after the date of the subsequent industrial injury and therefore, the notice was not given within 100 weeks of the date of the injury.

12. Applying NRS 616B.557(5) in its most straight forward terms, it has not been satisfied because the notice was given by the petitioner to the Administrator more than 100 weeks after the injury.

13. Even if either September 11, 2003, or September 16, 2003, the earliest dates the petitioner admits knowledge of the subsequent industrial injury, is used, petitioner's notice is delinquent, as it also falls outside the 100 week limit because 107 weeks and 4 days and 106 weeks and 6 days, respectively elapsed between the dates of knowledge and October 3, 2005, the date of notice.

14. Petitioner, however, relies upon the Appeals Officer's finding that the City of Reno is responsible as a self-insured employer for the injuries to the fire fighter predicated upon the last injurious exposure rule. Reno became self-insured as of July 1, 2002, and this was the date the Appeals Officer determined, based upon the last injurious exposure rule, Reno's liability for this fire fighter should commence. SR Ex.T, pp. 9, 10, 13, 14.

15. The Appeals Officer made the determination of liability upon a finding that there were continuing aggravations causing a deterioration in the condition of the knees, bilaterally, of the fire fighter by virtue of the demands of the job as he continued fighting fires and carrying out his duties as a fire fighter. *Id.,* pp. 5, 13, 14.

16. The medical records do not reveal any new trauma, *per se*, only a continued degeneration of the joints of the knees or, as Dr. Quaglieri labeled it, degenerative joint disease. SR Ex. T, pp. 5-7, SR Ex. Q, pp. 2, 3, SR Ex. N, pp. 3, 4.

17. The Appeals Officer attributed the degeneration of the condition of the knees to the major fires the injured worker fought after July 1, 2002, without specifying which fire caused continued degeneration or in which amounts. SR Ex. T, p. 5.

18. The subsequent industrial injury is, therefore, by petitioner's admission, an occupational disease with a manifested onset of July 1, 2002, which deteriorated over time, as the fire fighter carried out his duties as a fire fighter by continuing to fight fires.

19. The continued deterioration, aggravation, or degeneration in the condition of the fire fighter's knees might be sufficient for the assignment of liability to a particular employer, or a new or different insurer, for purposes of the last injurious exposure rule. *See, Dils Medical Center v. Menditto,* 121 Nev. 278, 112 P.3d 1093 (2005).

20. The last injurious exposure rule has its own requirements, however, just as the Subsequent Injury Account has its own requirements and those tie notice to the date of injury. Even assuming the subsequent industrial injury can be and was, the occupational condition of degenerative joint disease, its onset or date of injury, as indicated, was, according to Dr. Quaglieri, July 1, 2002, unless a date of injury for this degenerative condition could be assigned to each and every deterioration in the condition of the injured worker's knees which would then,

in turn, present a new opportunity for the petitioner to give notice to the Administrator of the potential claim each time it can be shown there was a deterioration in the condition of the knees. Each deterioration, in other words, might start the clock ticking anew, for purposes of giving notice under NRS 616B.557(5).

21. This was Reno's theory of recovery or eligibility under NRS 616B.557(5). It is not, however, a theory Reno espouses in practice because Reno's counsel seems also to argue that it could count backwards 100 weeks from the date of notice to the Administrator, and then give only one notice to the Administrator that embraces each fire within the 100 weeks even though the clock started ticking for each aggravation as a separate, new injury that also triggered Reno's liability under the last injurious exposure rule. 2 Tr., 24; 7-15, 30;20-25, 32; 1-7. Reno wants it both ways because while arguing that for this degenerative joint disease, each aggravation amounts to a new injury that could trigger the time to give notice of a possible claim, in the same breath, Reno believes only one notice is needed to cover all the new injuries or aggravations that fall within 100 weeks after notice has been given. 2 Tr., 24; 7.15. The upshot of Reno's theory is that while there may be multiple injuries yielding multiple opportunities to start the clock on the 100 weeks, these multiple opportunities then become only one condition, after the notice is served, since only one notice is sufficient to embrace each new aggravation.

22. The Board rejects Reno's notion of how NRS 616B.557(5) operates first, because the last injurious exposure rule is a method of convenience created by the judiciary for the benefit of injured workers who are seeking workers compensation relief where there are multiple employers or workers compensation insurance carriers and the worker suffers from a condition (illness or injury) which evolves over time. *See, Dils, supra* at 283-286. Deciding when an injury occurs for purposes of assigning liability to a particular employer or carrier in a string of employers or carriers is not necessarily dispositive of when an employer, seeking the protection of NRS 616B.557(5), should have given notice that a particular condition, injury or disease might constitute a subsequent industrial injury giving rise to a possible claim for reimbursement under the Second Injury Account.

23. Second, in this case, only one condition was identified by Dr. Quaglieri, and it was not an injury but a condition which he diagnosed as degenerative joint disease. The condition was treated on multiple occasions after July 1, 2002, the date of the injury. The condition, as degenerative, however was only one condition that continued to require treatment as the condition was aggravated and deteriorated and was known to the petitioner, at least as of either September 11, 2003 or September 16, 2003.

24. NRS 616B.557(5) states, however, that self-insureds like the petitioner: "...**shall** notify the board of **any possible claim** against the subsequent injury account ... **as soon as practicable,** but **not later than 100 weeks after the injury** or death." (Emphasis added.)

25. Therefore, self-insured employers are charged with the responsibility of giving notice as soon as practical. The 100 week period is only the outer limit for giving notice. From any plain reading of this statute, it is clear that if notice could be given before the 100 weeks would have expired, notice must be given, then, if the words, "as soon as practicable," have any meaning. NRS 616B.557(5) turns upon the "sooner" time line, not the later time line.

26. The Board, therefore, concludes that even if the subsequent injury is a degenerative condition which continues to deteriorate over time, once the deteriorating condition becomes known and it is practicable thereafter to give notice, the duty to give notice is triggered under NRS 616B.557(5) by virtue of the mandate to give notice as early as practicable. If it becomes practical to give notice after the 100 weeks have expired, a notice given is then untimely. On the other hand, once it is practical to give notice of the condition, it must be given, as the statute does not invite the applicant to wait for the 100 weeks nearly expire before notice is given. Furthermore, once the moment when it becomes practical to give notice has passed, a self-insured employer misses the boat for satisfying NRS 616B.557(5).

27. This clearly eliminates according multiple opportunities for giving notice about a single condition which is in a deteriorating state. When the deteriorating state becomes known, there is no excuse for not moving with alacrity to give notice, as NRS 616B.557(5) plainly requires. Requiring notice to be given as soon as practicable admits of no other conclusion.

28. In this case, notice could have been given as of September 11, 2003 or September 16, 2003, because the condition that continued to deteriorate was known on these dates.

29. At the very least, it became practicable for the petitioner to give notice once it was served with the order joining Reno in the hearing before the Appeals Officer regarding the fire fighter's knees as this motion clearly was intended to assign liability to the petitioner under the last injurious exposure rule. At that time, Reno would have had knowledge of the degenerative condition of the knees and the prospect that it would be held liable for the condition under the last injurious exposure rule. The joinder order was served upon Reno on October 24, 2003, or 101 weeks and 3 days before the October 3, 2005, the date notice was given. At that time, also, Reno had been served with the points and authorities in support of the motion upon which the order was based.

30. The Board concludes that it would, therefore, have been practicable for petitioner to give notice at the very least by October 24, 2003, the date it was served with the joinder order, as Reno would have had knowledge of the degenerating condition and the motive to give notice which was the possibility that Reno would be assigned liability for the condition.

31. Notice was not given by October 24, 2003, when it was first practicable for the petitioner to have given notice the Administrator and, thus, the petitioner missed this date, too.

32. Reno's notice to the Administrator of a possible claim against the Account was delinquent because it was not given as soon as practicable as NRS 616B.557(5) requires, whether or not 100 weeks had expired at the time notice was given. The application must be rejected because the petitioner did not satisfy the requirements of NRS 616B.557 (5).

DECISION OF THE BOARD

Based upon the Findings of Fact and Conclusions of Law set out above, the recommendation of the Administrator of the Division of Industrial Relations for the State of Nevada to deny the application for reimbursement is affirmed by the Board for the Administration of the Subsequent Injury Account for Self-Insured Employers. The applicant failed to establish by a preponderance of the evidence that NRS 616B.557(5) was satisfied. Therefore, the application for reimbursement from the Account is hereby denied upon a motion

by RJ LaPuz, seconded by Tina Sanchez, made pursuant to NRS 616B.557 (5) to deny the claim. With five members participating and eligible to vote on the motion, a quorum was present. The motion was duly adopted. 2 Tr., 37, 38. The vote was 5 in favor of the motion, none opposed. 2 Tr., 38.

Further, at the meeting of the Board held on February 18, 2010, upon a motion by RJ LaPuz, seconded by Tina Sanchez, three members of the Board voted to adopt this written decision as the decision of the Board. Since three members of the Board were in attendance and considered the motion, a quorum was present. The vote was 3-0-1, with member Esposito abstaining because he did not participate in the hearings on this case. One position of the Board was vacant because it had not formally been filled as of February 18, 2010.

Dated this 23rd day of ~~January~~ JUNE, 2010.

Victoria Robinson, Board 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 *Findings of Fact, Conclusions of Law and Decision of the Board for the Administration of the Subsequent Injury Account for Self-insured Employers*, 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, Timothy E. Rowe, Esq. McDonald Carano Wilson LLP 100 West Liberty Street,10th Floor Post Office Box 2670 Reno, NV 89050 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 Timothy E. Rowe, Esq. McDonald Carano Wilson LLP 100 West Liberty Street,10th Floor Post Office Box 2670 Reno, NV 89050 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 29th day of June, 2010.

Karen Kennedy

Karen Kennedy

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