

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

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5  
6     In re:   Subsequent Injury Request for Reimbursement

7     Claim No.                                 T033471  
8     Date of Injury:                         June 2, 2005  
9     Insurer:                                 Caesar's Entertainment, Inc.  
10    Employer:                                Bally's Las Vegas  
11    Third-Party Administrator:     Sedgwick CMS  
12    Submitted By:                         Nancy E. Helmbold, Esq.

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

16   **INTRODUCTION**

17                    This case involves the interpretation of the "retention in employment" requirement of  
18     NRS 616B.557(4). The employer argued that the retention requirement of NRS 616B.557(4)  
19     was satisfied when the employer retained the injured worker in a light duty position made  
20     available to the employee for a 30 day period within which the employee is afforded the  
21     opportunity to locate a position with the employer that is suitable to the employee's diminished  
22     capacity for work in light of the employee's health and physical condition. Tr., 26, 27;1-5.  
23     Under this program, the employee is terminated if the employee is unable to find other work  
24     compatible with the employee's work limitations. The Board believes that this kind of work  
25     limitation does not satisfy the requirement of NRS 616B.557(4) that the employee be retained in  
26     the self-insured's employ following knowledge of the preexisting permanent physical  
27     impairment. The Board accordingly, upheld the recommendation of the Administrator, the

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<sup>1</sup>"Tr." refers to the transcript of the proceedings before the Board on June 17, 2008, followed by the page number and line or lines where the reference to the transcript is located.

1 Division of Industrial Relations (DIR) to deny the claim for failing to satisfy the retention  
2 requirement of NRS 616B.557(4).

3 The Board's Findings of Fact, Conclusions of Law and Decision follow.

4 **FINDINGS OF FACT**

5 1. Caesar's Entertainment, Inc., is the applicant and self-insured employer in this  
6 matter. SR., p. 1.

7 2. This claim was first considered by the Board on April 11, 2008, when the Board  
8 issued its tentative ruling upholding the recommendation of the Administrator to reject the  
9 application for reimbursement because the applicant failed to satisfy the requirements of NRS  
10 616B.557 (4).

11 3. In a letter dated May 6, 2008, transmitted by mail on May 7, 2008, the applicant  
12 was notified by the Board's legal counsel, Charles R. Zeh, Esq., Zeh & Winograd, of the Board's  
13 tentative decision to accept the Administrator's recommendation and deny the claim. Tr. pp.  
14 8;25, 9;1-3; Hearing Exhibit 1.

15 4. In a letter dated May 12, 2008, addressed to the Board for Administration of the  
16 Subsequent Injury Account for Self-Insured Employers, in care of Charles R. Zeh, Esq., the  
17 applicant gave notice of its appeal of the tentative ruling of the Board. Tr. 9; 4-7.

18 5. The applicant's notice of appeal of the tentative ruling arrived at the office of the  
19 Board's legal counsel within 30 days of the notice to the applicant of the tentative decision of the  
20 Board from which the appeal has been taken.

21 6. On June 17, 2008, the Board conducted a *de novo* hearing on the merits of the  
22 application for reimbursement.

23 7. Nancy Helmbold, Esq., Lewis Brisbois Bisgaard & Smith LLP, appeared on  
24 behalf of the applicant. Tr., p. 2.

25 8. John Wiles, Esq., legal counsel to the Administrator of the Division of Industrial  
26 Relations ( DIR), appeared on behalf of the Administrator. *Ibid.* Jacque Everhart, the DIR  
27 Administrator's liaison to the Board, also appeared at the hearing of June 17, 2008. *Ibid.*

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1           9.       Victoria Robinson, Chairperson, RJ LaPuz and Tina Sanchez, participated in the  
2 hearing of this matter. Members Donna Dynek and Linda Keenan were absent from the meeting.  
3 *See*, June 17, 2008, Meeting Minutes, p. 1.

4           10.      At the hearing of June 17, 2008, the following exhibits were offered for admission  
5 into evidence without objection:

6 Exhibit 1      Letter from the from the Board's legal counsel, dated May 6, 2008, to the  
7 applicant advising of the Board's tentative decision to reject the applicant's  
8 request for reimbursement.

8 Exhibit 2      Letter from the applicant's legal counsel to the legal counsel for the Board, dated  
9 May 12, 2008, giving notice of a request for hearing on the tentative ruling of the  
10 Board.

10 Exhibit 3      Administrator's recommendation, dated February 28, 2008, with 77 pages of  
11 attachments, plus the list of disallowances.

11 Exhibit 4      The applicant's pre-hearing memorandum (7 pages) dated June 9, 2008, consisting  
12 of seven pages with 112 pages attached.

13 Exhibit 5      Memo dated March 26, 2008, to John Wiles, Esq., from Jacque Everhart. Tr., p.  
14 17; 5-21.

15           11.      These exhibits were admitted into evidence without objection from either party.  
16 Tr.,17; 19-25.

17           12.      On August 20, 2009, the Board, of its own motion, brought this case back before  
18 the Board to determine whether additional proceedings should be conducted because of state of  
19 the record following the hearing of June 17, 2008. Upon a motion by Tina Sanchez, seconded by  
20 Donna Dynek, the Board voted to conduct another hearing to clarify the record and give the  
21 applicant the additional opportunity to be heard.

22           13.      In a letter dated August 21, 2009, the applicant was given notice, following the  
23 hearing of August 20, 2009, of the Board's intention to consider whether it should conduct  
24 further proceedings regarding this matter.

25           14.      In a duly noticed meeting, on September 17, 2009, the Board conducted the  
26 hearing it voted on August 20, 2008, to hold in order to clarify the record.

27           15.      Those Board members present on September 17, 2009, and eligible to hear this  
28 matter were Chairman Victoria Robinson, Vice-chairperson RJ LaPuz, and member Tina

1 Sanchez. Donna Dynek was ill and unable to attend the meeting. There is one vacant position  
2 on this Board. 2 Tr.<sup>1</sup> 2.

3 16. As three members of the Board were present and eligible to hear and vote on this  
4 matter, a quorum was present to proceed.

5 17. Present on behalf of the applicant at the hearing of September 17, 2009, was J.  
6 Michael McGroarty, Esq., Lewis Brisbois Bisgaard & Smith LLP, who appeared for Nancy  
7 Helmbold, Esq., of Lewis Brisbois Bisgaard & Smith LLP, who was unable to attend because of  
8 a hearing at the same time in District Court. 2 Tr., 2.

9 18. Appearing for the Administrator were John Wiles, Esq., and Jacque Everhart, the  
10 DIR Administrator's liaison to the Board. *Ibid.*

11 19. Mr. Zeh was present on behalf of the Board. *Ibid.*

12 20. Produced to testify as a witness on behalf of the applicant was Dennis  
13 Lindenbach, Risk Manager for Bally's and Paris. He was sworn to testify under oath before  
14 being called to testify in this matter. 2Tr., 13; 16-25.

15 21. At the start of the hearing, the Board Chairman outlined the areas of interest  
16 which the Board believed would aid it in reaching a decision. Those areas were:

- 17 1. The retention issue. Whether the employer retained the injured worker  
18 following acquisition of knowledge of the pre-existing condition;
- 19 2. The retention issue. When did the employer acquire knowledge of the  
20 pre-existing condition, what were the written records relied upon to satisfy  
21 the requirement of NRS 616B.557(4), the proof of knowledge by written  
22 record requirement of that statute and when did these records become a  
23 part of the written records of the applicant; and
- 24 3. Pre-existing condition. Whether the pre-existing condition identified by  
25 the Applicant meets the definition of a pre-existing condition as set forth  
26 in NRS 616B.557(3). 2Tr., 3; 17-25, 4; 1-5.

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28 <sup>1</sup>2Tr., refers to the transcript of the proceedings before the Board conducted on  
September 17, 2009

1           22.     Before proceeding to the merits, the applicant offered for admission into evidence  
2 an additional exhibit consisting of Bate stamped pages 113 through 245. 2Tr., 5; 1-4. This  
3 exhibit was admitted into evidence without objection as Exhibit 6. *Id.*, at 5; 23-25, 6; 1-2.

4           23.     The Administrator had nothing further to offer into evidence at this stage in the  
5 proceedings. *Id.*, at 5; 17-20.

6           24.     Subsequently, during the course of the hearing, Exhibit 7, a FAX cover sheet  
7 dated March 31, 2006 to Dana from Desert Orthopaedic Center (DOC), was admitted into  
8 evidence without objection. *Id.*, at 58; 1-8.

9           25.     The injured worker was hired by the employer/applicant on November 12, 2003.  
10 The preexisting permanent physical impairment occurred six to seven years prior before his  
11 employment by the applicant, when the injured worker fell down some stairs and injured his  
12 lower back. This apparently resulted in a discectomy to the L4-5 region of the back. The  
13 injured worker noted that the pain had resolved. Staff Report (SR) 2, Exhibit 3, p. 10 (DIR 10).

14           26.     The subsequent industrial injury of June 2, 2005, occurred when, while working  
15 as a Kit Worker for the applicant, the injured worker was lifting heavy carpets. He felt a sudden  
16 pain in his lower back, reported for treatment, and was diagnosed with lumbar strain/sciatica. X-  
17 rays revealed levoscoliosis, grade I retrolisthesis of the L4-5, without spondylolysis and  
18 degenerative disc changes from L3 through S1.

19           27.     The worker was released to light duty on June 2, 2005, the same day as the  
20 incident. Tr.,19;2-3, SR 2; DIR 1-4.

21           28.     The payroll history for this injured worker supports that the injured worker  
22 returned to work for the employer immediately following the injury of June 2, 2005. He then  
23 continued working for the employer through March 9, 2006, 2Tr., 47; 13-25, 48; 1-20, when he  
24 stopped working in anticipation of back surgery for the subsequent injury. Exhibit 4, pages 19  
25 and 20.

26           29.     Due to the subsequent back injury, on March 14, 2006, the injured worker was  
27 operated on by Thomas Dunn, M.D., for traumatic disk disruption, L4-5 and L5-S1, which, post-  
28 operatively, was a confirmed diagnosis by diskogram studies. DIR 43-45.

1           30.     Following the March 2006, surgery, the injured worker remained off work, Tr.,  
2 19;14-15, until August 3, 2006, 2Tr., 64; 25, 65; 1-2, when he returned to work, reported for  
3 light duty employment in the Brass Polishing Room, and agreed to accept light duty work on this  
4 date. DIR 48, Exhibit 3, p. 8.

5           31.     On August 31, 2006, the injured worker was given permanent work restrictions  
6 by Dr. Dunn. DIR 49.

7           32.     On September 28, 2006, the injured worker was released by Dr. Dunn from his  
8 care and told he had reached maximum medical improvement (MRI). DIR 50.

9           33.     On October 24, 2006, the injured worker was seen by Rick Hallgren, B.S., D.C.,  
10 C.I.C.E., for a permanent partial disability examination. DIR 58. According to the Addendum  
11 to the initial evaluation, the injured worker was given a 20% WPI permanent partial disability  
12 rating for his back condition, apportioned, 50% to the preexisting condition and 50% to the  
13 subsequent industrial injury or a 10% WPI for the subsequent industrial injury. *Ibid.*

14          34.     On November 14, 2006, the applicant terminated the injured worker. DIR 32.

15          35.     According to the applicant's subsequent injury check list completed and submitted  
16 to the Administrator by the employer as a part of its application for reimbursement, the employer  
17 listed June 2, 2005, as the date the employer became aware of the preexisting permanent physical  
18 impairment with awareness due to a lumbar spine x-ray.<sup>2</sup> DIR, 77. The employer also then  
19 states the date of retention was November 14, 2006, DIR 77, which is also the date the employer  
20 terminated the injured worker. DIR 32.

21          36.     During the first hearing of June 17, 2008, the employer took the position that  
22 Exhibit 4, pages 109 and 110 prove the employer had knowledge of the preexisting condition by  
23 written records as of June 2, 2005, the date of the subsequent injury. Tr., 23; 18-25, 24; 1-7.

24          37.     Page 109 is a FAX cover sheet from Jennifer Daros consisting of 28 pages,  
25 referencing "Sedgwick James" communications. Exhibit 4, page 109.

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27 \_\_\_\_\_  
28           <sup>2</sup>The C-4 makes reference to an x-ray. The lumbar spine x-ray, however, was never offered into  
evidence, if it existed. Tr., 32; 19-25, 33; 1-4.

1           38.     Page 110 contains an explanation of what was being conveyed when Ms. Daros  
2 purports to state: " Hi Nancy, Attached is a copy of the file that the employer has maintained  
3 throughout the life of this claim. Is there anything in here that can help us with SIA recovery?"  
4 Exhibit 4, page 110.

5           39.     The applicant's legal counsel then explained that pages 104 through 107 of  
6 Exhibit 4 were part of what was enclosed with the FAX referenced above. She explained further  
7 that these pages 105 through 107 were included in the employer's file that was "maintained  
8 throughout the life of this claim." Tr., 24; 8-22.

9           40.     Reliance upon the statement in the letter from Ms. Daros, if it was from Ms.  
10 Daros, for the truth of its own contents that these records were a part of the file the employer  
11 kept from the beginning is hearsay and may be disregarded by the Board. There was no showing  
12 that Ms. Daros was unable to be present to testify regarding the contents of her memo and the  
13 position she took therein.

14           41.     In addition, there is a lack of foundation for the content of the statement attributed  
15 to Ms. Daros. No showing was made that Ms. Daros was in any position to assert that these  
16 documents and records had been in the employer's possession "throughout the life of the claim"  
17 as she was apparently a claim representative for CCMSI, Exhibit 4, page 110, rather than an  
18 employee of the applicant/employer.

19           42.     The reliance upon these faxes from Ms. Daros is hearsay heaped upon hearsay,  
20 because it was legal counsel for the Board who provided the further explanation that pages 104,  
21 105, 106, and 107 were documents that were a part of the record maintained by the employer  
22 throughout the claim. Tr., 24. There is nothing on the face of pages 109 and 110 or  
23 alternatively, pages 104 through 107, which could establish that pages 104 through 107  
24 accompanied the 28 page FAX and therefore were documents in the employer's file "throughout  
25 the life of the claim." The Board is not compelled to accept hearsay heaped upon hearsay for the  
26 establishment of a pivotal part of the employer's claim.

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1           43.     The documents identified by legal counsel at the June 17, 2008, hearing as pages  
2 104 through 107 of Exhibit 4, consisted of the C-4 for the June 2, 2005 injury, page 104, a  
3 progress note dated June 6, 2005, page 105, a progress note dated August 12, 2005, page 106,  
4 and a worker's compensation note dated August 12, 2005, page 107. Tr., 24; 23-25, 25; 1-2.

5           44.     Although these pages of Exhibit 4 were offered as proof that the employer knew  
6 and could establish by written record as early as the C-4, dated June 2, 2005, that the injured  
7 worker had a preexisting permanent physical impairment within the meaning of NRS  
8 616B.557(4), Tr., 24; 15-25, 25; 1-5, during the hearing of September 17, 2009, however, Mr.  
9 Lindenbach, the Risk Manager for Bally's and Paris, the employer, was questioned about each.

10          45.     When asked whether the C-4 was a document that the employer relied upon to  
11 establish knowledge by written record of the preexisting permanent physical impairment and if  
12 so, what language in the document he could identify to show the presence of the preexisting  
13 permanent physical impairment, 2Tr., 49; 1-16, his answer was that he could not point out what  
14 language, if any, on the C-4 would show that the injured worker had a preexisting permanent  
15 physical impairment. *Id.*, at 49; 18-20, 50; 1-3.

16          46.     Therefore, the applicant was not relying upon the C-4 to show knowledge by  
17 written record. *Id.*, at 49; 21-24.

18          47.     Mr. Lindenbach was then asked the same series of questions concerning pages  
19 105 and 106 of Exhibit 4. His answer was the same for each, namely, that he could not identify  
20 any language in either of these documents that would show that the injured worker suffered from  
21 a preexisting permanent physical impairment. *Id.*, at 50; 4-19.

22          48.     Mr. Lindenbach was also asked the same series of question regarding page 107 of  
23 Exhibit 4. To this, he responded that there was language in the Exhibit at page 107 that showed  
24 the presence in writing of a preexisting permanent physical impairment. 2Tr., 50; 19-25.

25          49.     He was then asked what language was contained in page 107, Exhibit 4, that he  
26 could point to that established knowledge of a preexisting permanent physical impairment.

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1 Specifically, Mr. Lindenbach was asked if he relied upon the following where it said:

2 "'Degenerative disk disease of the lumbosacral spine,' parenthesis, 'pre-existing,' closed

3 parenthesis?" 2Tr., 51; 7-9. His answer to this question was: "Yes, I am." *Id.*, at 51; 10.

4 50. He was asked if there was any other language in page 107 that would indicate to  
5 him knowledge of the preexisting permanent physical impairment. His answer, here, was: "No."  
6 *Id.*, at 51; 14.

7 51. Finally, Mr. Lindenbach was asked if there was any other document other than  
8 Exhibit 4, page 107, he relied upon to show by written record, knowledge of the preexisting  
9 permanent physical impairment. His answer was: "No, not—no." *Id.*, at 62; 11.

10 52. He was then questioned regarding the date that this document, Exhibit 4, page  
11 107, was placed in the employer's records such as on or about the date of the record, August 12,  
12 2005, since Mr. Lindenbach did not come to Bally's and Paris his position of Risk Manager until  
13 November 7, 2006, or thereabouts. 2Tr., 51; 20-25.

14 53. The only definitive statement he could give about his knowledge of when this  
15 document found its way into the employer's records was as follows: "[By Mr. Zeh:] Q: So what  
16 you know and can testify to is that ... you believe that as of November 2006, this document  
17 [Exhibit 4, page 107] was in the file; is that correct? [By Mr. Lindenbach] A: Yes." 2Tr., 54; 9-  
18 12.

19 54. Mr. Lindenbach also tried to establish the date that Exhibit 4, page 107 became a  
20 part of the employer's written record by reference to the FAX date at the top of the page of the  
21 document. 2Tr., 52, 53. He had to admit, however, that there was no phone number indicated on  
22 the top of the page of Exhibit 4, page 107 that indicated the document was FAXED to the  
23 employer. 2Tr., 53; 8-11.

24 55. Finally, he responded as follows: "[By Mr. Zeh] Q: As I understood what you told  
25 me before the break is that the earliest that you can pinpoint that Exhibit B—I'm sorry—Exhibit 4,  
26 page 107, landed in the records at Bally's was March 31, 2006, based upon this fax transmittal  
27 sheet [Exhibit 7]; is that correct? [By Mr. Lindenbach] A: That's correct."

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1           56.     The only definitive statement, then, about the earliest date that the employer could  
2 show that Exhibit 4, page 107, the document the employer relies upon to show prior knowledge  
3 of the preexisting condition was a part of the employer's records was, March 31, 2006.

4           57.     As of March 31, 2006, the employer's records show that the injured worker was  
5 off work and recuperating from the surgery on his back that took place on March 14, 2006.

6           58.     Member Sanchez, reviewing the file on her own, pointed out that the pages  
7 accompanying the FAX of March 31, 2006, included a report, Exhibit 6, page 156, that talked  
8 about the surgery the injured worker endured with reference to his preexisting condition and that  
9 therefore, at the very least, as of March 31, 2006, she believed the employer could prove by  
10 written record, the employer knew of the preexisting condition because the report was of  
11 sufficient specificity to put the employer clearly on notice, and the record was also clear, this  
12 document was a part of the employer's records as of March 31, 2006. 2 Tr. 62;23-25, 63; 1-4.

13           59.     It was clear in Member Sanchez' mind, then, that the employer had established  
14 knowledge by written record of the preexisting condition from the employer's files at least as of  
15 March 31, 2006. 2Tr., 63; 23-25, 64; 1;4.

16           60.     Member Sanchez stated, also, that based upon her experience, the type of reports  
17 represented by Exhibit 4, pages 104 through 107, would have been presented contemporaneously  
18 to the employer because they are records the employer needs to make work assignments and  
19 decisions regarding the injured worker. 2Tr., 72; 6-19. Since the injured worker returned to  
20 work immediately after the subsequent injury of June 2, 2005, the retention requirement could be  
21 satisfied because these documents are dated in June, 2005 and August 2005, and the injured  
22 worker continued to work until March 9, 2006, provided these documents were sufficient to give  
23 the employer notice of a preexisting permanent physical impairment. 2Tr., 73; 1-13.

24           61.     If they were not sufficient to give notice, then, the employer, according to  
25 Member Sanchez, would have to rely upon the written record associated with the FAX of March  
26 31, 2006, 2 Tr., 72-73, and then be able to show that following the receipt of this information as  
27 of March 31, 2006, the injured worker was brought back to work in such a way that satisfied the  
28 meaning of "retention" in NRS 616B.557(4). Tr., 72,73.

1           62.     The Administrator stated that the employment history reveals the following:

2           There is no indication in the file that the employer offered ... [the injured worker]  
3           a permanent, light-duty position within the restrictions outlined. There are  
4           payroll records in the file that indicate ... [the injured worker] was working  
            through November 14, 2006 ...[the date of his termination from employment]....  
            Tr., 19;25, 20; 1-5.

5           63.     Also, the Administrator said: "Vocational rehabilitation was started on October - -  
6           in October 2006 and the injured worker eventually accepted a lump sum buy out." Tr., 20; 6-8.

7           64.     According to the applicant, its return to work policy for employees, who suffer  
8           from industrial accidents while in the applicant's employ, is as follows: "The Employer's  
9           [applicant's] policy is to allow claimant's who receive permanent restrictions thirty (39)(sic) days  
10          to transfer to another job where permanent restrictions can be accommodated." Exhibit 4,  
11          Applicant's pre-hearing statement, p. 5; 17-20.

12          65.     During the hearing of September 17, 2009, Chairman Robinson questioned Mr.  
13          Lindenbach about the return to work policy for injured worker's once, as here, the injured worker  
14          receives permanent work restrictions. The policy states that the employer "...is to allow an  
15          injured worker who receives permanent restrictions 30 days to try and transfer to another job  
16          where permanent restrictions can be accommodated before terminating the employee." 2Tr.,  
17          41;22-25.

18          66.     According to Mr. Lindenbach, while the employer makes job assistance available  
19          for the injured worker to locate other employment within the company, world-wide, it is, in fact,  
20          the employee's responsibility to find another job with the company compatible with his or her  
21          work restrictions. 2Tr., 42,43.

22          67.     Mr. Lindenbach was then asked if the employer kept any statistics that show the  
23          success rate for injured employees with permanent work restrictions when they sought  
24          employment within their limitations with the employer. He said, no such information was  
25          maintained. 2Tr., 43;21-23. He said, further, when asked if he had any sense of how successful  
26          employees were in securing transfers to other positions within the company under these  
27          circumstances, that transfers happened "infrequently." 2Tr., 44;1. The majority of injured  
28          worker's who have permanent work restrictions or limitations wind up in vocational

1 rehabilitation if eligible for it. *Id.*, at 44; 5. This means, the injured worker leaves the  
2 employer's employ if unable to find another position within the allotted 30 days.

3 68. The injured worker returned to work following surgery on August 3, 2006, when  
4 he was assigned light duty "...polishing silverware within what we call the varnishing room.  
5 That was the actual light duty assignment that he was given where he was able to meet all his  
6 restrictions." 2 Tr., 46; 23-25, 47; 1-2.

7 69. According to a FAX cover sheet in the records, Exhibit 6, page 240, the injured  
8 worker was given a light duty offer assignment on August 3, 2006. See, Exhibit 4, p. 8.

9 70. According to the payroll records, the injured worker returned to work and  
10 completed work for the pay period that ended August 21, 2006. Exhibit 4, p. 19.

11 71. His light duty sign up sheets commenced on September 26, 2006. Exhibit 6,  
12 pages 241-244. According to the light duty sign up sheets, the injured worker was assigned to a  
13 special worker's compensation unit as the time sheets indicate.

14 72. On September 28, 2006, the injured worker was declared at maximum medical  
15 improvement (MMI) and he was given permanent maximum medical improvement. DIR 50.

16 73. From the payroll records, the injured worker was then enrolled in the 30 day  
17 program for finding alternative work, in light of his permanent, prophylactic work restrictions as  
18 of September 26, 2006. Exhibit 6, page 241.

19 74. In a letter dated November 15, 2006, to the injured worker from Sedgewick CMS,  
20 the applicant's third party administrator of its worker's compensation claims, the injured worker  
21 was advised that his employer, Harrah's Entertainment, was unable to accommodate his work  
22 restrictions. Exhibit 4, page 42.

23 75. As of November 14, 2006, the injured worker had already been terminated from  
24 his employment with the applicant employer. DIR 32.

25 76. Following surgery, then, at most, the injured worker returned to work from  
26 August 3, 2006, to November 14, 2006, and during this period of time, from September 26,

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1 2006, through November 14, 2006, he was enrolled in the work restriction program where the  
2 injured worker is required to find other employment within the constraints of his permanent  
3 work restrictions, or be subject to dismissal within 30 days.

4 77. The injured worker, according to the sign-in sheets, worked a total of 13 days  
5 with one day off for holidays under the "find other work" program. Exhibit 4, pages 83 through  
6 86.

7 78. The injured worker, however, was paid from the payroll period ending August 21,  
8 2006 through the pay period ending November 17, 2006, Exhibit 4, pages 9 through 19, until  
9 termination on November 14, 2006. DIR 32.

10 79. To the extent that any of the following Conclusions of Law also constitute  
11 Findings of Fact or mixed Findings of Fact and Conclusions of Law, they are incorporated  
12 herein.

### 13 CONCLUSIONS OF LAW

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

16 2. The request for a *de novo* hearing in this matter was timely. NAC 616B.7706(1).

17 3. At all pertinent times, a quorum of the Board was present to hear the case and  
18 render its decision. NRS 616B.551.

19 4. The burden of proof lies with the applicant to prove by a preponderance of the  
20 evidence that each element of NRS 616B.667 has been satisfied. *See, United Exposition Service*  
21 *v. State Industrial Insurance System*, 109 Nev. 421, 424, 851 P.2d 423 (1993).

22 5. This is a retention in employment case arising under NRS 616B.557(4). The  
23 employer satisfied the remaining requirements of NRS 616B.557. *See, SR 5-7*. The only  
24 question presented by this case involves whether the employer retained the injured worker in its  
25 employ, as that term is understood in NRS 616B.557(4), after the date the employer is able to  
26 show by written records, it became aware of the injured worker's preexisting permanent physical  
27 impairment.

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1           6.       The employer's first attempt to satisfy NRS 616B.557(4) rises and falls with the  
2 content of Exhibit 4, page 107, the only document offered by the employer to satisfy the proof by  
3 written record requirement of NRS 616B.557(4). The document is dated August 12, 2005, and  
4 since the injured worker returned to work immediately following the subsequent injury of June  
5 6, 2005, and continued working until March 9, 2006, such employment would meet the  
6 definition of retention, and satisfy NRS 616B.557(4), provided the employer can show: (a) that  
7 the document was contained in the employer's files contemporaneous with the continued  
8 employment of the injured worker; and (b) the document itself, provides sufficient information  
9 to put the employer on notice of the preexisting permanent physical impairment, *i.e.*, provides  
10 sufficient information so that the employer had "knowledge" by a written record of the  
11 preexisting permanent impairment. 2Tr., 72, 73.

12           7.       The Board believes that the "knowledge" requirement of NRS 616B.557(4) does  
13 not require "perfect knowledge" of the preexisting permanent physical impairment.

14           8.       Nevertheless, the Board is also of the opinion that NRS 616B.557(4), makes clear  
15 the information provided the employer about the preexisting condition must at least be referable  
16 to the preexisting condition that is implicated with the subsequent injury. NRS 616B.557(4)  
17 states that the self-insured employer must be in possession of "...knowledge of **the** permanent  
18 physical impairment...." (Emphasis added). Furthermore, not just any garden variety physical  
19 ailment will do. NRS 616B.557(3) defines the impairment about which knowledge must be  
20 acquired as a condition that is of "...such seriousness as to constitute a hindrance or obstacle to  
21 obtaining employment or to obtaining reemployment if the employee is unemployed." NRS  
22 616B.557(3). Information imparted to the employer that suggests a preexisting condition of a  
23 very minor nature does not rise to a level that satisfies the knowledge requirement of NRS  
24 616B.557(4). Not every ailment for which there is knowledge makes the grade for purposes of  
25 NRS 616B.557(4).

26           9.       Case law also supports the position that knowledge must be more than knowledge  
27 of generalized health problem. In *Alaska International Constructors, etc., v. State of Alaska,*  
28 *Second Injury Fund*, 755 P.2d 1090, 1094 (1988), the Court held that while knowledge couched

1 in statutory medical terminology is not required, the written record establishing prior knowledge  
2 must be sufficient to show that prior knowledge of the injured worker's qualifying disability may  
3 be fairly inferred.

4 10. The information imparted by Exhibit 4, page 107, consists of is as follows.  
5 "Assessment: 1. Lumbosacral Strain. 2. Degenerative Disc Disease of the Lumbosacral Spine  
6 (Preexistent)."

7 11. The rest of the document describes the on-going treatment administered for the  
8 current or subsequent injury.

9 12. The employer relied upon this document because of the word "Preexistent."  
10 There was nothing further in this document which the employer relied upon to show knowledge  
11 of the preexisting condition. 2Tr., 14. From the juxtaposition of the word on the page, it appears  
12 the term "preexistent" was intended to refer to the diagnosis of degenerative disc disease of the  
13 lumbosacral spine.

14 13. A reference to degenerative disc disease is not the kind of statement, therefore,  
15 which would alert the employer to the preexisting condition that is of such severity as to cause a  
16 hindrance to finding employment or reemployment.

17 14. Even if this document, page 107, Exhibit 4, was in the employer's file  
18 contemporaneously with the employment of the injured worker for the period of June 6, 2005  
19 through March 9, 2006, it would not have provided sufficient information to put the employer on  
20 notice that the injured worker's preexisting back condition was so severe he had surgery, a  
21 lumbar disectomy with residual S-1 radiculopathy. Exhibit 6, page 156.

22 15. There is, however, also no credible proof that this document, Exhibit 4, page 107,  
23 was contained in the files of the employer contemporaneous with the subsequent injury and  
24 employment of the injured worker following the subsequent injury and prior to his back surgery  
25 on March 14, 2006.

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1           16.     This leaves, then, page 156, Exhibit 6, where there is a more pointed discussion of  
2 the injured worker's preexisting condition. There, the following is stated: "[H]e has a well-  
3 healed incision scar in the lumbar spine ... . He has had a previous lumbar diskectomy with  
4 residual S-1 radiculopathy."

5           17.     The Board finds that this discussion was sufficient to alert the employer to the  
6 fact that it was dealing with an employee who had a preexisting back problem that was a  
7 permanent physical impairment, within the meaning of NRS 616B.557(3) and (4).

8           18.     The earliest that the employer can establish knowledge provided by this  
9 document, Exhibit 6, page 156, is March 31, 2006, a date that followed the period of continued  
10 employment from June 2, 2005 through March 9, 2006, when the injured employee worked for  
11 the employer up to just prior to his surgery.

12           19.     The employer must therefore rely upon the injured worker's employment for the  
13 August 3, 2006 through November 14, 2006, when he was terminated, to prove "retention"  
14 within the meaning of NRS 616B.557 (4).

15           20.     The employer argues that NRS 616B.557(4) has, therefore, been satisfied because  
16 there is no time limit included in the term "retention" and therefore, on the plain meaning of the  
17 statute on its face, retention in employment for one day would satisfy the retention requirement  
18 of NRS 616B.557(4). 2Tr., 7-13. Since employment, albeit light duty, lasted for parts of four  
19 months, the applicant's argument goes that the "retention" requirement was clearly satisfied by  
20 the employer.

21           21.     The Board disagrees with the employer's statutory analysis. Were the employer  
22 correct, then, employment for even a second would suffice if it followed "knowledge." There is  
23 no difference between one day and one second if quantity and quality of time the injured worker  
24 is retained cannot be factors in deciding whether the employer has satisfied the requirement of  
25 NRS 616B.557(4) and retained the worker in its employ in the knowledge that the injured  
26 worker had a preexisting permanent physical impairment.

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1           22.     The Board believes that both the quality of the return to work and the length of  
2 time the injured worker is returned to work following the employer's acquisition of knowledge  
3 of the preexisting permanent physical impairment are factors the Board may consider when  
4 determining whether the "retention" requirement of NRS 616B.557(4) has been met.

5           23.     Applying this standard, the Board concludes that the employer, here, failed to  
6 satisfy the retention requirement of NRS 616B.557(4). The employee was returned to work  
7 following surgery to light duty for a period of approximately three months. However, once he  
8 achieved maximum medical improvement (MMI) and his permanent work restrictions were  
9 established, he was moved to the special worker's compensation unit and given a 30 day period  
10 to find other employment with his employer that was compatible with his permanent work  
11 restrictions.

12           24.     The testimony, however, is that he was therefore assigned to a program where the  
13 odds are against the injured worker successfully being able to find other suitable employment  
14 with the applicant that is consistent with his permanent work restrictions. Employee's only  
15 "infrequently" are able to find other suitable employment with the applicant upon assignment to  
16 this "program."

17           25.     Furthermore, though it is only infrequently that employees find other work and  
18 are able to, therefore, hang onto a job with the applicant, the applicant disdains directly helping  
19 the injured worker find other work with the applicant and then, be able to hang onto employment  
20 with the applicant. The injured worker is expected to find other work within the organization on  
21 his own and suffer the loss of employment, if unsuccessful.

22           26.     Because the injured worker in this case could not on his own find another job  
23 within the organization which was within his work restrictions given him due to his physical  
24 condition following the subsequent industrial injury, the injured worker was terminated on  
25 November 14, 2006.

26           27.     Leaving the injured worker to his own devices to find other work consistent with  
27 his permanent work restrictions under circumstances where the success rate for finding work  
28 after a 30 day search infrequently occurs and then terminating the injured worker if he cannot

1 find another job within the organization consistent with his work limitations do not constitute  
2 "retention in employment" within the meaning of NRS 616B.557(4).

3 28. Having left the employee in this case to his own devices to find suitable work  
4 within the organization compatible with the employee's work restrictions through a program  
5 where the success rate is "infrequent" for finding other work, and then firing him, because he  
6 was unable to find alternative employment within the organization, the Board believes, is  
7 inconsistent with the retention requirement of NRS 616B.557(4).

8 29. The Board concludes that the injured worker in this case was not retained within  
9 the meaning of NRS 616B.557(4) under these circumstances. NRS 616B.557(4) has not been  
10 satisfied.

11 30. The application for reimbursement must accordingly be denied because the  
12 applicant has not satisfied all of the criterion of NRS 616B.557(4), as required in order to sustain  
13 an application for reimbursement from the Account.

#### 14 **DECISION OF THE BOARD**

15 Based upon the Findings of Fact and Conclusions of Law set out above, the  
16 recommendation of the Administrator of the Division of Industrial Relations for the State of  
17 Nevada to deny the application for reimbursement is affirmed by the Board for the  
18 Administration of the Subsequent Injury Account for Self-Insured Employers because the  
19 applicant failed to establish by a preponderance of the evidence that NRS 616B.557(4) was  
20 satisfied. The application for reimbursement from the Account was first denied after the hearing  
21 conducted on June 17, 2008, upon a motion by Vice-chairman RJ LaPuz, and seconded by Tina  
22 Sanchez. The motion was adopted by a vote of 3 in favor and none against. Chairman Robinson,  
23 Vice-Chairman LaPuz and Member Sanchez participated in the hearing. Tr., 36; 1-18.

24 Then, following the decision of the Board to reconsider the disposition of the case made  
25 by the Board after the June 17, 2008 hearing, the Board reached the same conclusion September  
26 17, 2009, that it had previously concluded in this case. Member Tina Sanchez moved and Vice-  
27 chairman LaPuz seconded the motion made pursuant to NRS 616B.557(4), to deny the claim on  
28 the grounds that the employer failed to satisfy the retention requirement of NRS 616B.557(4).

1 The motion was adopted by a vote of 3 in favor and none against. Chairman Robinson, Vice-  
2 Chairman LaPuz and Member Sanchez participated in the hearing. Member Donna Dynek was  
3 absent due to illness. There is one vacant position on the Board. 2 Tr., 75; 23-25, 76; 1-20.

4 Finally, at the meeting of the Board held on October 22, 2009, upon a motion by RJ  
5 LaPuz, seconded by Tina Sanchez, Board members, Chairman Victoria Robinson, Vice-  
6 chairman RJ LaPuz and Member Tina Sanchez, voted to adopt this written decision as the  
7 decision of the Board, to give the Board's legal counsel authority to complete any clean up work  
8 in the drafting of the decision, and to authorize the Board Chairman to execute the final draft of  
9 the decision as the Findings of Fact, Conclusions of Law and Decision of the Board. The  
10 motion was adopted by a vote of 3 in favor and none against. Member Donna Dynek abstained  
11 because she had taken no part in the hearing of this case. There is one vacant position on the  
12 Board.

13 Dated this 19<sup>th</sup> day of November, 2009.

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16 Victoria Robinson, Chairman

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1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of the Law Offices of Zeh &  
3 Winograd, and that on this date I served the attached *Findings of Fact*,  
4 *Conclusions of Law and Determination of the Board* on those parties identified below by:

5 6 7 8 9 10 11 12 13	<p>√ 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:</p> <p>Nancy E. Helmbold, Esq. J. Michael McGroarty, Esq. Lewis Brisbois Bisgaard &amp; Smith LLP 400 South Fourth Street, Suite 500 Las Vegas, NV 89101</p> <p>John F. Wiles, Division Counsel Department of Business and Industry Division of Industrial Relations 1301 North Green Valley Parkway, Suite 200 Henderson, NV 89104</p>
	Personal delivery
	Telephonic Facsimile at the following numbers:
	Federal Express or other overnight delivery
	Reno-Carson Messenger Service
	Certified Mail/Return Receipt Requested

14 Dated this 9<sup>th</sup> day of December, 2009.

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22 Karen Weisbrot

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