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STATE OF NEVADA

BOARD FOR THE ADMINISTRATION OF THE SUBSEQUENT INJURY ACCOUNT FOR ASSOCIATIONS OF SELF-INSURED PUBLIC OR PRIVATE EMPLOYERS

In re: Subsequent Injury Request for Reimbursement

Claim No: 5012-1319-2018-0710
Date of Injury: 03-29-18
Association Name: Builders Association of Western Nevada
Association Member: A1 Builder Investment, Inc.
Association Administrator: ProGroup management, Inc.
Third-Party Administrator: Associated Risk Management, Inc.
Submitted by: Associated Risk Management, Inv.

NOTICE OF ENTRY FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

PLEASE TAKE NOTICE that the FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER was entered on June 18, 2020 in the above-captioned matter, a copy of which is attached hereto.

Dated: June 23, 2020.

AARON D. FORD
Attorney General

By: /s/ Donald J. Bordelove
Donald J. Bordelove
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CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on this 23rd day of June 2020, I served a copy of the **NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** by mailing via US Certified Mail a true copy to the following:

Via US Certified Mail No. 7014 2120 0003 0405 4463
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/s/ Michele Caro
Employee of the State of Nevada
Office of the Attorney General

STATE OF NEVADA

BOARD FOR ADMINISTRATION OF THE SUBSEQUENT INJURY ACCOUNT FOR THE ASSOCIATIONS OF SELF-INSURED PUBLIC AND PRIVATE EMPLOYERS

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Third-Party Administrator: Associated Risk Management, Inc.
Submitted by: Associated Risk Management, Inc.

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

This matter came before the State of Nevada, Board for the Administration of the Subsequent Injury Account for the Associations of Self-Insured Public and Private Employers ("Board") for consideration and decision upon appeal by the applicant from the Subsequent Injury Account ("Account"). In its preliminary decision, the Board upheld the recommendation of the Administrator, Division of Industrial Relations, State of Nevada ("Administrator") to deny the claim on the grounds that the applicant failed to satisfy the requirements of NRS 616B.578(1) and (4).

This appeal was heard in a *de novo* hearing conducted on November 21, 2019. At the conclusion of the meeting, the Board voted to affirm the recommendation of the Administrator and deny the claim based upon the applicant's failure to satisfy the requirements of NRS 616B.578(1) and (4).

In May 2000, the employee suffered an industrial injury in New Mexico when a house frame fell on him. On September 25, 2000, he underwent a left knee arthroscopic ACL reconstruction with Achilles' allograft and partial lateral meniscectomy. On July 3, 2001, he had reached maximum medical improvement and had permanent restricts of no ladders, no climbing or heavy lifting. He also received a permanent partial disability (PPD) award of 10% WPI.

On November 21, 2015, while employed as a framer for the current employer, he was walking and his left knee "locked up." He was seen at the urgent care and diagnosed with swelling and a sprain.

A December 15, 2015 MRI showed disruption of the anterior cruciate graft, severe lateral compartment osteoarthritis, moderate to severe medial and patellofemoral compartment osteoarthritis.

On June 6, 2016, the employee was sent for an IME with Dr. Sobiek. Dr. Sobiek stated "the patient's acute industrial diagnosis is aggravation of severe underlying osteoarthritis, left knee, with possible disruption of previously reconstructed ACL." Dr. Sobiek recommended a lateral compartment unloading brace to stabilize the ACL-deficient knee and possibly get the employee back to full duty work. He did not recommend any type of ACL reconstruction in light of the severe arthritic changes. He did not believe a total knee replacement would be on an industrial basis due to his pre-existing arthritic changes. Dr. Sobiek completed an addendum on July 14, 2016 addressing causation indicating that it was unclear if the employee experienced a "twisting" injury or his knee "locked up" and this would determine causation. The employee began treatment with Dr. Uppal and received injections and physical therapy over the course of a few months. On December 15, 2016, Dr. Uppal deemed him at maximum medical improvement, stating "Ultimately, I do think he needs a total knee arthroplasty, but I think that is related to his initial injury in 2000."

The employee underwent a functional capacity evaluation on January 30, 2017. The physical therapist summary recommended referral back to the doctor "to discuss definitive management of the left knee arthritis, ACL deficiency both causing instability. From a clinical standpoint he strikes me as a patient who would likely benefit from a total knee replacement as definitive management." A job match of "Framing Supervisor" was noted. On February 2, 2017, Dr. Uppal agreed with the FCE. On March 28, 2017, Dr. Uppal approved the employee to return to work in the position of Framing Supervisor. A PPD report was prepared by Dr. Trujillo on April 22, 2017. He noted that the employee "may not be stable nor have reached MMI." Dr. Trujillo penned his addendum on July 17, 2017 finding that the employee qualified for 16% WPI, less the prior 10% WPI, leaving a net increase of 6% WPI.

In regards to the present claim, on April 2, 2018, the employee presented at Northeastern Nevada Regional Hospital. The hospital records state, "the patient presents with pain that is acute. The complaints affect the left knee. Context: The problem was sustained at home, resulted from an unknown cause. . . The patient has experienced similar episodes in the past, chronically, and the

symptoms today are exactly the same. . . He denies any recent injury. . . Problem is an ongoing problem." X-rays were taken and no fracture was noted, although degenerative changes were noted. A C-4 Form was completed on April 2, 2018. The date of injury that was originally written by the employee is "November 2015" (the date of the prior injury). That date is crossed off and in different handwriting "03-29-18" is written over the November 2015 date. Additionally, the address and phone number for the employer is whited-out. It appears that the same handwriting that overwrote the date of injury corrected the address and phone number for the employer. It did not appear to be the handwriting of the employee.

The employee was referred to Dr. Phipps on May 14, 2018 for a consultation. Dr. Phipps' opinion was that the ACL graft was no longer competent. It was impossible to tell whether it occurred in 2015 or some time before that. There was tremendous degenerative change in the joint and relatively gross instability; nothing short of a total knee replacement would significantly alleviate the symptoms of pain and instability. Dr. Phipps was not willing to perform the total knee replacement. The employee was seen by Dr. Dolan on June 22, 2019. He recommended surgery. The type of surgery was dependent on the results of the MRI he requested. On August 15, 2018, Dr. Dolan reviewed the July MRI results. The MRI showed the ACL to be completely torn, PCL to have injury, severe arthritis both medial and lateral joint space, prior ACL reconstruction which failed, severe osteophytes and areas of questionable avascular necrosis of the lateral femoral condyle. Dr. Dolan recommended proceeding with a left total knee replacement with possible hardware removal to be performed in the winter. On December 18, 2018, Dr. Dolan performed a left knee arthroplasty total replacement with hardware removal. The employee began rehabilitative physical therapy the week after his surgery. He underwent physical therapy for three months. He was released to full duty on April 22, 2019.

NRS 616.578(1) provides:

> If an employee of a member of an association of self-insured public or private employers has a permanent physical impairment from any cause or origin and incurs a subsequent disability by injury arising out of and in the course of his or her employment which entitles the employee to compensation for disability that is substantially greater by reason of the combined effects of the preexisting impairment and the subsequent injury than that which would have resulted from the subsequent injury alone, the compensation due must be charged to the Subsequent Injury Account for Associations of Self-Insured Public or Private Employers in accordance with regulations adopted by the Board.

Dr. Betz provided a rationale for subsequent injury relief:

> It does not appear that the patient suffered a significant subsequent injury but **rather filed a subsequent claim because of progressive symptoms related to his previously document [sic] advanced osteoarthritis and chronic instability** related to his initial significant intraarticular injury in 1998. As noted by Dr. Uppal in 2016, 2 years prior to the subsequent claim, [employee] would eventually need a total joint arthroplasty which was ultimately performed under the subsequent claim.
>
> Consequently, it is reasonable and appropriate to conclude that at least 98% of the cost of the subsequent claim was the result [of] the combined effects of prior pathologies and the subsequent injury, **if any**. 2% or less of the cost of the subsequent claim was the result of the subsequent injury alone.

In the 2015 claim, Dr. Uppal and the physical therapist who performed the FCE noted at the time of claim closure (January 2017) that the employee had knee instability and would need a total knee replacement. Additionally, when Dr. Trujillo performed the PPD in April 2017, he had concerns that the employee may not have been stable and ratable. Almost one year later, the employee presented to the emergency room with pain sustained **at home** from an **unknown cause**, noting his 2015 date of injury. It appears that the C-4 Form was altered and a new date of injury of March 29, 2018 was handwritten over the employee's signed form.

Moreover, while Dr. Betz states that 98% of the costs of the subsequent claim are attributed to the combined effects of the prior pathologies, he qualifies his statement with if there was "any" subsequent injury at all. Dr. Betz was of the opinion that the subsequent condition was not more than a progressive deterioration of the knee resulting from the injury in 2015. Inasmuch as it is well settled that a single deteriorating condition cannot combine with itself to substantially increase the compensation paid, NRS 616B.578(1) could not be satisfied.

Additionally, the injured worker stated that the subsequent condition occurred at home, not at work. The evidence establishes that the subsequent condition was also not industrially related, and therefore, NRS 616.578(1) could not be satisfied on this ground as well.

The Board finds that based on the facts of this case, as detailed above, the applicant failed to establish by a preponderance of the evidence that a subsequent disability was substantially greater by reason of the combined effects of the preexisting impairment and the subsequent injury than that which would have resulted from the subsequent injury alone.

. . .

. . .

. . .

Next, NRS 616B.578(4) provides:

> To qualify under this section for reimbursement from the Subsequent Injury Account for Associations of Self-Insured Public or Private Employers, the association of self-insured public or private employers must establish by written records that the employer had knowledge of the "permanent physical impairment" at the time the employee was hired or that the employee was retained in employment after the employer acquired such knowledge.

"[T]he employer satisfies the written record requirement by showing that the employee's preexisting condition 'could reasonably be due to one of the conditions [recognized by statute], even if the employer cannot precisely identify the specific medical condition.'" *N. Lake Tahoe Fire Prot. Dist. v. Bd. of Admin. of Subsequent Injury Account for Associations of Self-Insured Pub. or Private Employers*, 134 Nev. 763, 769, 431 P.3d 39, 44 (2018). "In other words, '[a]n employer is entitled to reimbursement … if it produces a written record from which its prior knowledge of the employee's qualifying disability can fairly and reasonably be inferred.'" *Id*. As such, "the employee's preexisting permanent physical impairment, which is recognized by statute, must be fairly and reasonably inferred from the written record." *Id*. The employer must provide written documentation that it had knowledge of the permanent physical impairment before the subsequent injury occurs. *See N. Lake Tahoe Fire Prot. Dist.*, 134 Nev. at 769, 431 P.3d at 44 ("'[a]n employer is entitled to reimbursement from the Second Injury Fund if it produces a written record from which its prior knowledge of the employee's qualifying disability can fairly and reasonably be inferred.'); *Holiday Ret. Corp. v. State, DI*R, 128 Nev. 150, 154, 274 P.3d 759, 762 (2012) ("an employer must acquire knowledge of an employee's permanent physical impairment before the subsequent injury occurs to qualify for reimbursement."). However, as indicated above, the applicant failed to meet its burden in this regard.

The applicant pointed to multiple pieces of correspondence showing that the employer was "cc'd" with the correspondence, though without address. The correspondence, however, was produced from the third party administrator's files, and it was not produced by the employer. The correspondence was not notated with anything indicating it was ever actually received by the employer,

and no envelope was produced showing that the correspondence was actually placed in the mail to the employer. There was no testimony from the employer that the correspondence was received by the employer or sent, testimony provided was only that it was assumed the employer received it. There was no presentation of witnesses or other evidence to lay the necessary foundation in this regard.

NRS 47.250 lists disputable presumptions including "[t]hat a letter duly directed and mailed was received in the regular course of the mail." The Board finds that this presumption does not apply as it was failed to be shown that the letter was duly directed and mailed. *See, e.g.*, *Broad. Music, Inc. v. Blueberry Hill Family Restaurants, Inc.*, 899 F. Supp. 474, 476 (D. Nev. 1995) (indicating that it was shown that letter were in fact mailed); *Rivera v. Am. Nat. Prop. & Cas. Co.*, 105 Nev. 703, 707, 782 P.2d 1322, 1325 (1989) (factual finding for whether letter mailed); *Luc v. Oceanic S. S. Co.*, 84 Nev. 576, 578, 445 P.2d 870, 871 (1968) ("affidavit [provided] stating that a copy of the motion was deposited in the mail"). Consequently, the applicant failed to put forth testimony or other evidence invoking the rebuttable presumption under NRS 47.250(13), that correspondence placed in the mail was actually received by the addressee. As such, the documentation relied upon by the applicant was insufficient to sustain its burden of proving knowledge of the preexisting condition by written record in the employer's possession prior to the date of the subsequent injury, if any. As such, NRS 616B.578(4) was not satisfied.

FINDINGS OF FACT

1. In May 2000, the employee suffered an industrial injury in New Mexico when a house frame fell on him.

2. On September 25, 2000, he underwent a left knee arthroscopic ACL reconstruction with Achilles' allograft and partial lateral meniscectomy.

3. On July 3, 2001, he had reached maximum medical improvement and had permanent restricts of no ladders, no climbing or heavy lifting.

4. He also received a PPD award of 10% WPI.

5. On November 21, 2015, while employed as a framer for the current employer, he was walking and his left knee "locked up."

6. He was seen at the urgent care and diagnosed with swelling and a sprain.

7. A December 15, 2015 MRI showed disruption of the anterior cruciate graft, severe lateral compartment osteoarthritis, moderate to severe medial and patellofemoral compartment osteoarthritis.

8. On June 6, 2016, the employee was sent for an IME with Dr. Sobiek. Dr. Sobiek stated "the patient's acute industrial diagnosis is aggravation of severe underlying osteoarthritis, left knee, with possible disruption of previously reconstructed ACL."

9. Dr. Sobiek recommended a lateral compartment unloading brace to stabilize the ACL-deficient knee and possibly get the employee back to full duty work.

10. He did not recommend any type of ACL reconstruction in light of the severe arthritic changes.

11. He did not believe a total knee replacement would be on an industrial basis due to his pre-existing arthritic changes.

12. Dr. Sobiek completed an addendum on July 14, 2016 addressing causation indicating that it was unclear if the employee experienced a "twisting" injury or his knee "locked up" and this would determine causation.

13. The employee began treatment with Dr. Uppal and received injections and physical therapy over the course of a few months.

14. On December 15, 2016, Dr. Uppal deemed him at maximum medical improvement, stating "Ultimately, I do think he needs a total knee arthroplasty, but I think that is related to his initial injury in 2000."

15. The employee underwent a functional capacity evaluation on January 30, 2017.

16. The physical therapist summary recommended referral back to the doctor "to discuss definitive management of the left knee arthritis, ACL deficiency both causing instability.

17. From a clinical standpoint he strikes me as a patient who would likely benefit from a total knee replacement as definitive management."

18. A job match of "Framing Supervisor" was noted. On February 2, 2017, Dr. Uppal agreed with the FCE.

19. On March 28, 2017, Dr. Uppal approved the employee to return to work in the position of Framing Supervisor.

20. A PPD report was prepared by Dr. Trujillo on April 22, 2017.

21. He noted that the employee "may not be stable nor have reached MMI."

22. Dr. Trujillo penned his addendum on July 17, 2017 finding that the employee qualified for 16% WPI, less the prior 10% WPI, leaving a net increase of 6% WPI.

23. On April 2, 2018, the employee presented at Northeastern Nevada Regional Hospital.

24. The hospital records state, "the patient presents with pain that is acute. The complaints affect the left knee. Context: The problem was sustained at home, resulted from an unknown cause. . . The patient has experienced similar episodes in the past, chronically, and the symptoms today are exactly the same. . . He denies any recent injury. . . Problem is an ongoing problem."

25. X-rays were taken and no fracture was noted, although degenerative changes were noted.

26. A C-4 Form was completed on April 2, 2018.

27. The date of injury that was originally written by the employee is "November 2015" (the date of the prior injury).

28. That date is crossed off and in different handwriting "03-29-18" is written over the November 2015 date.

29. Additionally, the address and phone number for the employer is whited-out.

30. It appears that the same handwriting that overwrote the date of injury corrected the address and phone number for the employer.

31. It did not appear to be the handwriting of the employee.

32. The employee was referred to Dr. Phipps on May 14, 2018 for a consultation.

33. Dr. Phipps' opinion was that the ACL graft was no longer competent.

34. It was impossible to tell whether it occurred in 2015 or some time before that.

35. There was tremendous degenerative change in the joint and relatively gross instability; nothing short of a total knee replacement would significantly alleviate the symptoms of pain and instability.

36. Dr. Phipps was not willing to perform the total knee replacement.

37. The employee was seen by Dr. Dolan on June 22, 2019.

38. He recommended surgery.

39. On August 15, 2018, Dr. Dolan reviewed the July MRI results.

40. The MRI showed the ACL to be completely torn, PCL to have injury, severe arthritis both medial and lateral joint space, prior ACL reconstruction which failed, severe osteophytes and areas of questionable avascular necrosis of the lateral femoral condyle.

41. Dr. Dolan recommended proceeding with a left total knee replacement with possible hardware removal to be performed in the winter.

42. On December 18, 2018, Dr. Dolan performed a left knee arthroplasty total replacement with hardware removal.

43. The employee began rehabilitative physical therapy the week after his surgery.

44. He underwent physical therapy for three months.

45. He was released to full duty on April 22, 2019.

46. In the 2015 claim, Dr. Uppal and the physical therapist who performed the FCE noted at the time of claim closure (January 2017) that the employee had knee instability and would need a total knee replacement.

47. Additionally, when Dr. Trujillo performed the PPD in April 2017, he had concerns that the employee may not have been stable and ratable.

48. Almost one year later, the employee presented to the emergency room with pain sustained **at home** from an **unknown cause**, noting his 2015 date of injury.

49. The C-4 Form was altered and a new date of injury of March 29, 2018 was handwritten over the employee's signed form.

50. While Dr. Betz states that 98% of the costs of the subsequent claim are attributed to the combined effects of the prior pathologies, he qualifies his statement with if there was "any" subsequent injury at all.

51. Dr. Betz was of the opinion that the subsequent condition was not more than a progressive deterioration of the knee resulting from the injury in 2015.

52. The injured worker stated that the subsequent condition occurred at home, not at work.

53. The applicant pointed to multiple pieces of correspondence showing that the employer was "cc'd" with the correspondence, though without address.

54. The correspondence, however, was produced from the third party administrator's files, and it was not produced by the employer.

55. The correspondence was not notated with anything indicating it was ever actually received by the employer, and no envelope was produced showing that the correspondence was actually placed in the mail to the employer.

56. There was no testimony from the employer that the correspondence was received by the employer or sent, testimony provided was only that it was assumed the employer received it.

57. There was no presentation of witnesses or other evidence to lay the necessary foundation in this regard.

58. If any of the foregoing findings is more appropriately construed as a conclusion of law, it may be so construed.

CONCLUSIONS OF LAW

1. It is well settled that a single deteriorating condition cannot combine with itself to substantially increase the compensation paid, NRS 616B.578(1) could not be satisfied.

2. The subsequent condition was also not industrially related, and therefore, NRS 616.578(1) could not be satisfied on this ground as well.

3. The applicant failed to establish by a preponderance of the evidence that a subsequent disability was substantially greater by reason of the combined effects of the preexisting impairment and the subsequent injury than that which would have resulted from the subsequent injury alone.

4. "[T]he employer satisfies the written record requirement by showing that the employee's preexisting condition 'could reasonably be due to one of the conditions [recognized by statute], even if the employer cannot precisely identify the specific medical condition.'"

5. "In other words, '[a]n employer is entitled to reimbursement … if it produces a written record from which its prior knowledge of the employee's qualifying disability can fairly and reasonably be inferred.'"

6. As such, "the employee's preexisting permanent physical impairment, which is recognized by statute, must be fairly and reasonably inferred from the written record."

7. NRS 47.250 provides lists disputable presumptions including "[t]hat a letter duly directed and mailed was received in the regular course of the mail."

8. The Board finds that this presumption does not apply as it was failed to be shown that the letter was duly directed and mailed.

9. The employer must provide written documentation that it had knowledge of the permanent physical impairment before the subsequent injury occurs.

10. The applicant failed to put forth testimony or other evidence invoking the rebuttable presumption under NRS 47.250(13), that correspondence placed in the mail was actually received by the addressee.

11. The documentation relied upon by the applicant was insufficient to sustain its burden of proving knowledge of the preexisting condition by written record in the employer's possession prior to the date of the subsequent injury, if any.

12. NRS 616B.578(1) was not satisfied.

13. If any of the foregoing conclusions is more appropriately construed as a finding of fact, it may be so construed.

ORDER

IT IS, THEREFORE, ORDERED the application for reimbursement for the above-referenced claim is DENIED.

Dated this 18th day of June, 2020.

BOARD FOR ADMINISTRATION OF
THE SUBSEQUENT INJURY ACCOUNT
FOR SELF-INSURED EMPLOYERS

By: /s/ Bryan Wachter
Bryan Wachter, Chair