

CLERK OF THE COURT

Electronically Filed
Jun 17 2016 01:50 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

1 NOTC

2 Robert F. Balkenbush, Esq.
3 Thorndal, Armstrong, Delk, Balkenbush & Eisinger
4 6590 S. McCarran Blvd., Suite B
5 Reno, Nevada 89509
6 Tel.: (775) 786-2882
7 Fax.: (775) 786-8004
8 Attorneys for: North Lake Tahoe Fire Protection District, Employer, and
9 Public Agency Compensation Trust, Insurer

7 DISTRICT COURT

8 COUNTY OF CLARK, NEVADA

10 NORTH LAKE TAHOE FIRE
11 PROTECTION DISTRICT AND PUBLIC
12 AGENCY COMPENSATION TRUST,

Case No. A-14-702-463-J

13 Petitioners,

Dept. No. XXXII

14 vs.

15 THE BOARD FOR ADMINISTRATION OF
16 THE SUBSEQUENT INJURY ACCOUNT
17 FOR THE ASSOCIATIONS OF SELF-
18 INSURED PUBLIC OR PRIVATE
19 EMPLOYERS, and ADMINISTRATOR OF
20 THE NEVADA DIVISION OF
21 INDUSTRIAL RELATIONS OF THE
22 NEVADA DEPARTMENT OF BUSINESS
23 AND INDUSTRY,

21 Respondents.

24 NOTICE OF APPEAL

25 Notice is hereby given that the above named Petitioners, North Lake Tahoe Fire Protection
26 District, and Public Agency Compensation Trust, by and through their counsel, THORNDAL,
27 ARMSTRONG, DELK, BALKENBUSH & EISINGER, hereby appeal to the Supreme Court of
28 Nevada from the District Court's May 3, 2006, decision and order that affirmed a decision made by

1 the Board of Administration of the Subsequent Injury Account For the Association of Self-Insured
2 Public or Private Employers to deny Petitioners' request for reimbursement from the subsequent
3 injury account. See, Exhibit No. 1 hereto annexed.
4

5 Notice of Entry of the herein referenced District Court decision and order was filed and
6 served on May 5, 2016.

7 **AFFIRMATION**

8 Pursuant to NRS 239B.030

9 The undersigned hereby affirms that the preceding document filed in above-entitled court
10 does not contain the social security number of any person.
11

12 DATED this 3rd day of June, 2016.
13
14

15 By: / Robert F. Balkenbush, Esq. /

16 ROBERT F. BALKENBUSH, ESQ.

17 Thorndal, Armstrong, Delk,

18 Balkenbush & Eisinger

19 6590 S. McCarran Blvd., Suite B

20 Reno, Nevada 89509

21 Attorneys for County of North Lake Tahoe

22 Fire Protection District and

23 Public Agency Compensation Trust
24
25
26
27
28

1 CERTIFICATE OF SERVICE

2 Pursuant to NRCP 5(b), I certify that I am an employee of Thorndal, Armstrong, Delk,
3 Balkenbush & Eisinger, and that on this day I deposited for mailing at Reno, Nevada, a true and
4 correct copy of the foregoing document, addressed to:
5

6 Charles R. Zeh, Esq.

7 NV State Bar No. 1739

8 The Law Offices Of Charles R. Zeh, Esq.

9 575 Forest Street, Suite 200

10 Reno, NV 89509

11 Phone: (775) 323-5700

12 Fax: (775) 786-8183

13 Attorney for Respondent

14 Donald C. Smith, Esq.

15 Nevada Bar No.: 000413

16 Jennifer J. Leonescu, Esq.

17 Nevada Bar No.: 006036

18 Department Of Business And Industry Division Of Industrial Relations

19 State of Nevada

20 1301 N. Green Valley Parkway, Suite 200

21 Henderson, Nevada 89074-6497

22 Phone: (702) 486-9070

23 Fax: (702) 990-0361

24 Attorney for Respondent

25 DATED this 3rd day of June, 2016.

26 /Marcy Benner/

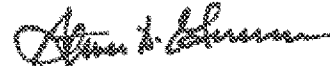
27 MARCY BENNER

EXHIBIT

1

EXHIBIT

1



CLERK OF THE COURT

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Charles R. Zeh, Esq.
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The Law Offices of Charles R. Zeh, Esq.
3 575 Forest Street, Suite 200
Reno, NV 89509
4 Phone: (775) 323-5700
Fax: (775) 786-8183
5

6 *Attorneys for Respondent The Board for Administration*
7 *of the Subsequent Injury Account for the Associations*
8 *of Self-insured Public or Private Employers*

9 EIGHTH JUDICIAL DISTRICT COURT

10 CLARK COUNTY, NEVADA

11 ***

12 NORTH LAKE TAHOE FIRE
13 PROTECTION DISTRICT and PUBLIC
14 AGENCY COMPENSATION TRUST,

15 Petitioners,

16 vs.

17 THE BOARD FOR ADMINISTRATION
18 OF THE SUBSEQUENT INJURY
19 ACCOUNT FOR THE ASSOCIATIONS
20 OF SELF-INSURED PUBLIC OR
21 PRIVATE EMPLOYERS, and
ADMINISTRATOR OF THE NEVADA
DIVISION OF INDUSTRIAL
RELATIONS OF THE NEVADA
DEPARTMENT OF BUSINESS AND
INDUSTRY,

22 Respondents.

Case No. A-14-702463-J

Department No. XXXII

23 NOTICE OF ENTRY OF ORDER

24 TO: ALL PARTIES OF INTEREST IN THE ABOVE-CAPTIONED MATTER

25 PLEASE TAKE NOTICE that the above-entitled Court entered on May 3, 2015, its
26 Decision and Order affirming the decision of the Board. A copy of the Order is attached.

27 ///

28 ///

1 The undersigned does hereby affirm that the preceding document does not contain the
2 social security number of any person.

3 Dated this 4th day of May, 2015. THE LAW OFFICES OF CHARLES R. ZEH, ESQ.

4
5 By: 

6 Charles R. Zeh, Esq.

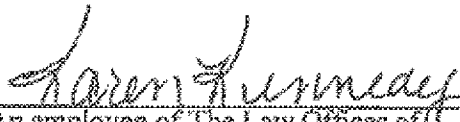
7 Attorneys for Respondent *The Board for*
8 *Administration of the Subsequent Injury Account for*
9 *the Associations of Self-insured Public or Private*
10 *Employers*

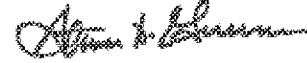
CERTIFICATE OF SERVICE

Pursuant to NRCF 5(b), I certify that I am an employee of The Law Offices of Charles R. Zeh, Esq., and that on this date I served the attached *Notice of Entry of Order*, on those parties identified below by:

| | |
|---|---|
| ✓ | Placing an original or true copy thereof in a sealed envelope, postage prepaid, placed for collection and mailing in the United States Mail, at Reno, Nevada: Donald C. Smith, Esq. Jennifer J. Leonescu, Esq. Department of Business and Industry Division of Industrial Relations 1301 North Green Valley Parkway, Suite 200 Henderson, NV 89074 |
| | Personal delivery |
| ✓ | Electronically filing <i>via</i> the Court's e-filing system. Robert F. Balkenbush, Esq., has consented to service of documents by electronic means through the Court's e-filing program on behalf of <i>North Lake Tahoe Fire Protection District and Public Agency Compensation Trust</i> @ at the following e-mail address: <u>rfb@thorndal.com</u> , <u>rbalkenbush@thorndal.com</u> , <u>psb@thorndal.com</u> . |
| | Federal Express or other overnight delivery |
| | Reno-Carson Messenger Service |
| | Certified Mail/Return Receipt Requested |

Dated this 5th day of May, 2016.


An employee of The Law Offices of
Charles R. Zeh, Esq.



CLERK OF THE COURT

1 ORDER

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5 *****

6
7 NORTH LAKE TAHOE FIRE
8 PROTECTION DISTRICT and
9 PUBLIC AGENCY
10 COMPENSATION TRUST,

CASE NO.: A-14-702463-J

DEPT. NO. 32

11 Petitioners,

12 vs.

13 BOARD FOR ADMINISTRATION
14 OF THE SUBSEQUENT INJURY
15 ACCOUNT FOR THE
16 ASSOCIATIONS OF SELF-
17 INSURED PUBLIC OR PRIVATE
18 EMPLOYERS, and
19 ADMINISTRATOR OF THE
20 NEVADA DIVISIONS OF
21 INDUSTRIAL RELATIONS OF
22 THE NEVADA DEPARTMENT
23 OF BUSINESS AND INDUSTRY,

24 Respondents.

25 DECISION AND ORDER

26 Procedural and Factual Background

27 This case arises from Petitioner Public Agency Compensation Trust's
28

1 (hereinafter "PACT") request for reimbursement filed with the Nevada Department of
2 Industrial Relations (hereinafter "DIR"). On May 13, 2013, the Administrator issued
3 a recommendation to deny reimbursement because the Administrator believed that
4 Petitioner failed to show compliance with NRS 616B.578(1), (3), and (4) for the
5 employee's shoulder and NRS 616B.578(4) for the employee's lower back. On
6 September 11, 2013, Petitioner, North Lake Tahoe Fire Protection District (hereinafter
7 "NLTFPD"), filed a Pre-Hearing Statement. On September 19, 2013, a hearing was
8 held before the Board for Administration of the Subsequent Injury Account for the
9 Associations of Self-Insured Public or Private Employers (hereinafter "Board"). On
10 May 14, 2014, the Board issued its Findings of Fact and Conclusions of Law and
11 Decision of the Board.

12 The Board found in relevant part as follows:

- 13 1. The injured worker was an accident prone fire fighter who suffered from four
14 lower back injuries between august of 2002 and July of 2007.
- 15 2. After each of these injuries, the employee was released to full duty.
- 16 3. The subsequent injury occurred on November 30, 2007.
- 17 4. PACT designated spondylolisthesis as the pre-existing permanent physical
18 impairment, a condition diagnosed and discovered upon treatment of the
19 subsequent industrial injury of November 30, 2007.
- 20 5. There is no proof in the record that the document containing Dr. Fleming's
21 diagnosis made it into the possession of the applicant prior to November 30,
22 2007.
- 23 6. After each of the injured worker's injuries, he was always returned to work, full
24 duty.
- 25 7. Spondylolisthesis is the pre-existing condition relied upon by the applicant to
26 justify reimbursement because it would support a rating of 6% or more PPD,
27 according to the American Medical Association's Guides to the Evaluation of
28

1 Permanent Impairment.

2 8. Assuming, *arguendo*, that the spondylolisthesis was present prior to the
3 November 30, 2007 industrial injury, the Board finds that the applicant
4 produced no proof by written record that it had knowledge that the injured
5 worker suffered from the pre-existing condition.

6 9. The applicant also failed to show that the various ailments endured by the
7 injured worker prior to the subsequent industrial injury were a hindrance to
8 securing a job or remaining at the job.

9 10. The pre-existing condition of spondylolisthesis was not discovered and proven
10 by written record until during the treatment of the injured employee's back
11 during treatment for the subsequent industrial injury.

12 Petitioners have respectfully asked this Court to review the Board's decisions by
13 means of a petition for judicial review.

14 **Conclusions of Law**

15 The district court's "role in reviewing an administrative decision is ... to review
16 the evidence presented to the agency in order to determine whether the agency's
17 decision was arbitrary or capricious and was thus an abuse of the agency's discretion."
18 *United Exposition Serv. Co. v. State Indus. Ins. Sys.*, 109 Nev. 421, 423, 851 P.2d 423,
19 424 (1993). A district court "may not substitute its judgment for that of the
20 administrative agency as to the weight of the evidence on questions of fact." *State,*
21 *Dept. of Motor Vehicles & Pub. Safety v. Becksted*, 107 Nev. 456, 458, 813 P.2d 995,
22 996 (1991). The district court "gives deference to an agency's interpretation of its
23 statutes and regulations if the interpretation is within the language of the statute."
24 *Holiday Ret. Corp. v. State, DIR*, 128 Nev. Adv. Op. 13, 274 P.3d 759, 761 (2012).
25 Therefore, the issue before this Court is whether the decision of the Board,
26 interpreting NRS 616B.578 and denying reimbursement from the Subsequent Injury
27 Account, constitutes clear legal error as a matter of law.
28

1 NRS 616B.578(4) states:

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

9 NRS 616B.578(3) defines "permanent physical impairment" as "any permanent
10 condition, whether congenital or caused by injury or disease, of such seriousness as to
11 constitute a hindrance or obstacle to obtaining employment or to obtaining
12 reemployment if the employee is unemployed." "[A] condition is not a 'permanent
13 physical impairment' unless it would support a rating of permanent impairment of 6
14 percent or more of the whole person if evaluated according to the American Medical
15 Association's Guides to the Evaluation of Permanent Impairment...." *Id.*

16 In this case, Dr. Berg found the injured employee to have a 21% whole person
17 impairment for his lumbar spine related to the November 30, 2007 incident. Dr. Berg
18 apportioned the 21% at 50% for the pre-existing condition and 50% for the
19 subsequent industrial injury. However, there is no evidence provided in the record to
20 show that the employer had knowledge of the "permanent physical impairment" at the
21 time employee was retained in employment after the employer acquired such
22 knowledge. The Petitioners argue that perfect knowledge of a pre-existing condition
23 is not required and that knowledge of general symptoms of the pre-existing condition
24 is sufficient to satisfy the knowledge requirement of NRS 616B.578(4); however,
25 Petitioners provide no Nevada case law to support this position.

26 "Where the language of a statute is plain and unambiguous and its meaning
27 clear and unmistakable, there is no room for construction, and the courts are not
28 permitted to search for its meaning beyond the statute itself." *Erwin v. State of
Nevada*, 111 Nev. 1535, 1538-39, 908 P.2d 1367, 1369 (1995) (quoting *Charlie*

1 *Brown Constr. Co. v. Boulder City*, 106 Nev. 497, 503, 797 P.2d 946, 949 (1990)).
2 This Court looks to the plain language of NRS 616B.578(3), which states in pertinent
3 part, "a condition is not a 'permanent physical impairment' unless it would support a
4 rating of permanent impairment of 6 percent or more of the whole person if evaluated
5 according to the American Medical Association's Guides to the Evaluation of
6 Permanent Impairment..." The Board found that the conditions or symptoms prior to
7 the subsequent injury were not serious enough to support a rating of six percent; thus,
8 these conditions did not constitute a pre-existing condition within the meaning of NRS
9 616B.578(3) and Petitioners cannot rely on the conditions or symptoms to show that
10 the employer had knowledge of the permanent physical impairment.

11 Accordingly, the decision of the Board is AFFIRMED.

12
13 Dated this 2 day of May, 2016.

14
15
16 
17 Rob Bare
18 Judge, District Court, Department 32

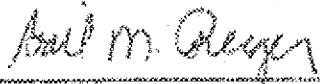
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26 ///
27 ///

CERTIFICATE OF SERVICE

I hereby certify that on the date filed, I placed a copy of this Order in the attorney's folder in the Clerk's Office, or mailed or faxed a copy to:

Robert F. Balkenbush, Esq.
6590 S. McCarran, Suite B
Reno, NV 89509
Attorney for Petitioners

Charles R. Zeh, Esq.
575 Forest Street, Suite 200
Reno, NV 89509
Attorney for Respondents



Gail M. Reiger
Temp Judicial Executive Assistant, Dept. 32



CLERK OF THE COURT

1 ASTA
2 Robert F. Balkenbush, Esq.
3 Thorndal, Armstrong, Delk, Balkenbush & Eisinger
4 6590 S. McCarran Blvd., Suite B
5 Reno, Nevada 89509
6 Tel.: (775) 786-2882
7 Fax.: (775) 786-8004
8 Attorneys for: North Lake Tahoe Fire Protection District, Employer, and
9 Public Agency Compensation Trust, Insurer

10 **DISTRICT COURT**

11 **COUNTY OF CLARK, NEVADA**

12 NORTH LAKE TAHOE FIRE
13 PROTECTION DISTRICT AND PUBLIC
14 AGENCY COMPENSATION TRUST,

Case No. A-14-702-463-J

Petitioners,

Dept. No. XXXII

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16 THE BOARD FOR ADMINISTRATION OF
17 THE SUBSEQUENT INJURY ACCOUNT
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20 EMPLOYERS, and ADMINISTRATOR OF
21 THE NEVADA DIVISION OF
22 INDUSTRIAL RELATIONS OF THE
23 NEVADA DEPARTMENT OF BUSINESS
24 AND INDUSTRY,

Respondents.

25 **CASE APPEAL STATEMENT**

26 COME NOW, Petitioners, North Lake Tahoe Fire Protection District, and Public Agency
27 Compensation Trust, by and through their counsel, THORNDAL ARMSTRONG DELK
28 BALKENBUSH & EISINGER, and hereby submit their Case Appeal Statement in accordance with
NRAP 3(a)(1).

1. Name of appellants filing this statement:

North Lake Tahoe Fire Protection District and Public Agency Compensation Trust

2. Identify the judge issuing the decision, judgment, or order appealed from:

District Court Judge Rob Bare. See Exhibit No. 1 attached hereto.

North Lake Tahoe Fire Protection District and Public Agency Compensation Trust are appealing from the May 3, 2016, decision and order entered by Judge Bare denying petition for judicial review. Notice of Entry of this decision and order was filed and served by mail and electronic filing on May 5, 2016. *Id.*

3. Identify each appellant and the name and address of counsel for each appellant:

North Lake Tahoe Fire Protection District; Public Agency Compensation Trust;

Robert F. Balkenbush, Esq., Thorndal Armstrong Delk Balkenbush & Eisinger, 6590 S. McCarran Blvd., Ste. B, Reno, NV 89509; (775) 786-2882; Attorneys for North Lake Tahoe Fire Protection District and Public Agency Compensation Trust

4. Identify each respondent and the name and address of counsel for each respondent:

The Board For Administration of the Subsequent Injury Account for the Self-Insured or Private Employers, and Administrator of the Nevada Division of Industrial Relations of the Nevada Department of Business and Industry, as required by NRS 233B.130(2)(a).

Charles Zeh, Esq., The Law Offices of Charles Zeh, 575 Forest Street, Suite 200, Reno, NV 89509; (775) 323-5700; Attorney for The Board of Subsequent Injury Account for the Self-Insured Public or Private Employer.

Donald C. Smith, Esq., and Jennifer J. Leonescu, Esq. Department of Business and Industry Division of Industrial Relations State of Nevada, 1301 N. Green Valley, NV 89074-6497; (702) 486-9070; attorneys for Administrator of the Nevada Division of Industrial Relations of the Nevada Department of Business and Industry.

1 5. Identify whether any attorney identified above in response to question 3 or 4 is not licensed
2 to practice law in Nevada and, if so, whether the district court granted that attorney permission to
3 appear under SCR 42 (attach a copy of the district court order granting such permission:
4

5 N/A - All attorneys are licensed attorneys in the State of Nevada.

6 6. Indicate whether appellant was represented by appointed or retained counsel in the
7 district court:

8 North Lake Tahoe Fire Protection District and Public Agency Compensation Trust were
9 represented by retained counsel, namely Thorndal Armstrong Delk Balkenbush & Eisinger, 6590 S.
10 McCarran Blvd., Ste. B, Reno, NV 89509.
11

12 7. Indicate whether appellant is represented by appointed or retained counsel on this appeal:

13 North Lake Tahoe Fire Protection District and Public Agency Compensation Trust are
14 represented by retained counsel, namely Thorndal Armstrong Delk Balkenbush & Eisinger, 6590 S.
15 McCarran Blvd., Ste. B, Reno, NV 89509.
16

17 8. Indicate whether appellant was granted leave to proceed in forma pauperis, and the date of
18 entry of the district court order granting such leave:

19 Petitioners, North Lake Tahoe Fire Protection District and Public Agency Compensation
20 Trust, did not seek leave to proceed in forma pauperis.

21 9. Indicate the date the proceedings commenced in the district court:

22 This matter commenced on or about June 3, 2014, with the filing of a Petition for Judicial
23 Review by North Lake Tahoe Fire Protection District and Public Agency Compensation Trust.
24

25 10. Provide a brief description of the nature of the action and result in the district court, including
26 the type of judgment or order being appealed and the relief granted by the district court:

27 Contested claim for reimbursement from the subsequent injury account (SIA). The governing
28 board for the SIA denied the claim for reimbursement made by the North Lake Tahoe Fire Protection

1 District and the Public Agency Compensation Trust (PACT). In turn, the District Court affirmed
2 the decision made by the governing board of the SIA.

3 11. Indicate whether the case has previously been the subject of an appeal to or original writ
4 proceeding in the Supreme Court and, if so, the caption and Supreme Court docket number of the
5 prior proceedings:
6

7 No, this case has not previously been the subject of an appeal or writ.

8 12. Indicate whether this appeal involves child custody or visitation:

9 N/A.

10 13. If this is a civil case, indicate whether the appeal involves the possibility of settlement:

11 North Lake Tahoe Fire Protection District and the Public Agency Compensation Trust do
12 not believe this appeal involves the possibility of settlement.
13

14 **AFFIRMATION**

15 Pursuant to NRS 239B.030

16 The undersigned hereby affirms that the preceding document filed in above-entitled court does
17 not contain the social security number of any person.
18

19 DATED this 3rd day of June, 2016.

20
21 By: /s/ Robert F. Balkenbush, Esq. /
22 ROBERT F. BALKENBUSH, ESQ.
23 Thorndal, Armstrong, Delk,
24 Balkenbush & Eisinger
25 6590 S. McCarran Blvd., Suite B
26 Reno, Nevada 89509
27 Attorneys for County of North Lake Tahoe
28 Fire Protection District and
Public Agency Compensation Trust

1 CERTIFICATE OF SERVICE

2 Pursuant to NRCP 5(b), I certify that I am an employee of Thorndal, Armstrong, Deik,
3 Balkenbush & Eisinger, and that on this day I deposited for mailing at Reno, Nevada, a true and
4 correct copy of the foregoing document, addressed to:
5

6 Charles R. Zeh, Esq.
7 NV State Bar No. 1739
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DATED this 3rd day of June, 2016.

/Marcy Benner/

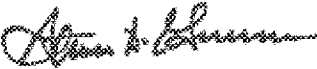
MARCY BENNER

EXHIBIT

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EXHIBIT

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6 Attorneys for Respondent *The Board for Administration*
7 *of the Subsequent Injury Account for the Associations*
8 *of Self-insured Public or Private Employers*

9 EIGHTH JUDICIAL DISTRICT COURT

10 CLARK COUNTY, NEVADA

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13 PROTECTION DISTRICT and PUBLIC
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16 vs.

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24 RELATIONS OF THE NEVADA
25 DEPARTMENT OF BUSINESS AND
26 INDUSTRY,

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Case No. A-14-702463-J

Department No. XXXII

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3 Dated this 4th day of May, 2015. THE LAW OFFICES OF CHARLES R. ZEH, ESQ.

4
5 By: 

6 Charles R. Zeh, Esq.

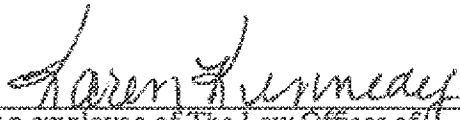
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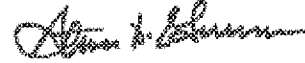
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| | |
|---|---|
| ✓ | Placing an original or true copy thereof in a sealed envelope, postage prepaid, placed for collection and mailing in the United States Mail, at Reno, Nevada: Donald C. Smith, Esq. Jennifer J. Leonescu, Esq. Department of Business and Industry Division of Industrial Relations 1301 North Green Valley Parkway, Suite 200 Henderson, NV 89074 |
| | Personal delivery |
| ✓ | Electronically filing via the Court's e-filing system. Robert F. Balkenbush, Esq., has consented to service of documents by electronic means through the Court's e-filing program on behalf of <i>North Lake Tahoe Fire Protection District and Public Agency Compensation Trust @</i> at the following e-mail address: <i>rfb@thorndal.com, rbalkenbush@thorndal.com, psb@thorndal.com.</i> |
| | Federal Express or other overnight delivery |
| | Reno-Carson Messenger Service |
| | Certified Mail/Return Receipt Requested |

Dated this 5th day of May, 2016.


An employee of The Law Offices of
Charles R. Zeh, Esq.



CLERK OF THE COURT

1 **ORDER**

2
3 **DISTRICT COURT**
4 **CLARK COUNTY, NEVADA**

5 *****

6
7
8 **NORTH LAKE TAHOE FIRE**
9 **PROTECTION DISTRICT and**
10 **PUBLIC AGENCY**
11 **COMPENSATION TRUST,**

CASE NO.: A-14-702463-J

DEPT. NO. 32

12 **Petitioners,**

13 **vs.**

14 **BOARD FOR ADMINISTRATION**
15 **OF THE SUBSEQUENT INJURY**
16 **ACCOUNT FOR THE**
17 **ASSOCIATIONS OF SELF-**
18 **INSURED PUBLIC OR PRIVATE**
19 **EMPLOYERS, and**
20 **ADMINISTRATOR OF THE**
21 **NEVADA DIVISIONS OF**
22 **INDUSTRIAL RELATIONS OF**
23 **THE NEVADA DEPARTMENT**
24 **OF BUSINESS AND INDUSTRY,**

25 **Respondents.**

26 **DECISION AND ORDER**

27 **Procedural and Factual Background**

28 This case arises from Petitioner Public Agency Compensation Trust's

1 (hereinafter "PACT") request for reimbursement filed with the Nevada Department of
2 Industrial Relations (hereinafter "DIR"). On May 13, 2013, the Administrator issued
3 a recommendation to deny reimbursement because the Administrator believed that
4 Petitioner failed to show compliance with NRS 616B.578(1), (3), and (4) for the
5 employee's shoulder and NRS 616B.578(4) for the employee's lower back. On
6 September 11, 2013, Petitioner, North Lake Tahoe Fire Protection District (hereinafter
7 "NLTFPD"), filed a Pre-Hearing Statement. On September 19, 2013, a hearing was
8 held before the Board for Administration of the Subsequent Injury Account for the
9 Associations of Self-Insured Public or Private Employers (hereinafter "Board"). On
10 May 14, 2014, the Board issued its Findings of Fact and Conclusions of Law and
11 Decision of the Board.

12 The Board found in relevant part as follows:

- 13 1. The injured worker was an accident prone fire fighter who suffered from four
14 lower back injuries between august of 2002 and July of 2007.
- 15 2. After each of these injuries, the employee was released to full duty.
- 16 3. The subsequent injury occurred on November 30, 2007.
- 17 4. PACT designated spondylolisthesis as the pre-existing permanent physical
18 impairment, a condition diagnosed and discovered upon treatment of the
19 subsequent industrial injury of November 30, 2007.
- 20 5. There is no proof in the record that the document containing Dr. Fleming's
21 diagnosis made it into the possession of the applicant prior to November 30,
22 2007.
- 23 6. After each of the injured worker's injuries, he was always returned to work, full
24 duty.
- 25 7. Spondylolisthesis is the pre-existing condition relied upon by the applicant to
26 justify reimbursement because it would support a rating of 6% or more PPD,
27 according to the American Medical Association's Guides to the Evaluation of
28

1 Permanent Impairment.

2 8. Assuming, *arguendo*, that the spondylolisthesis was present prior to the
3 November 30, 2007 industrial injury, the Board finds that the applicant
4 produced no proof by written record that it had knowledge that the injured
5 worker suffered from the pre-existing condition.

6 9. The applicant also failed to show that the various ailments endured by the
7 injured worker prior to the subsequent industrial injury were a hindrance to
8 securing a job or remaining at the job.

9 10. The pre-existing condition of spondylolisthesis was not discovered and proven
10 by written record until during the treatment of the injured employee's back
11 during treatment for the subsequent industrial injury.

12 Petitioners have respectfully asked this Court to review the Board's decisions by
13 means of a petition for judicial review.

14 **Conclusions of Law**

15 The district court's "role in reviewing an administrative decision is ... to review
16 the evidence presented to the agency in order to determine whether the agency's
17 decision was arbitrary or capricious and was thus an abuse of the agency's discretion."
18 *United Exposition Serv. Co. v. State Indus. Ins. Sys.*, 109 Nev. 421, 423, 851 P.2d 423,
19 424 (1993). A district court "may not substitute its judgment for that of the
20 administrative agency as to the weight of the evidence on questions of fact." *State*,
21 *Dept. of Motor Vehicles & Pub. Safety v. Becksted*, 107 Nev. 456, 458, 813 P.2d 995,
22 996 (1991). The district court "gives deference to an agency's interpretation of its
23 statutes and regulations if the interpretation is within the language of the statute."
24 *Holiday Ret. Corp. v. State, DIR*, 128 Nev. Adv. Op. 13, 274 P.3d 759, 761 (2012).
25 Therefore, the issue before this Court is whether the decision of the Board,
26 interpreting NRS 616B.578 and denying reimbursement from the Subsequent Injury
27 Account, constitutes clear legal error as a matter of law.
28

1 NRS 616B.578(4) states:

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

9 NRS 616B.578(3) defines "permanent physical impairment" as "any permanent
10 condition, whether congenital or caused by injury or disease, of such seriousness as to
11 constitute a hindrance or obstacle to obtaining employment or to obtaining
12 reemployment if the employee is unemployed." "[A] condition is not a 'permanent
13 physical impairment' unless it would support a rating of permanent impairment of 6
14 percent or more of the whole person if evaluated according to the American Medical
15 Association's Guides to the Evaluation of Permanent Impairment...." *Id.*

16 In this case, Dr. Berg found the injured employee to have a 21% whole person
17 impairment for his lumbar spine related to the November 30, 2007 incident. Dr. Berg
18 apportioned the 21% at 50% for the pre-existing condition and 50% for the
19 subsequent industrial injury. However, there is no evidence provided in the record to
20 show that the employer had knowledge of the "permanent physical impairment" at the
21 time employee was retained in employment after the employer acquired such
22 knowledge. The Petitioners argue that perfect knowledge of a pre-existing condition
23 is not required and that knowledge of general symptoms of the pre-existing condition
24 is sufficient to satisfy the knowledge requirement of NRS 616B.578(4); however,
25 Petitioners provide no Nevada case law to support this position.

26 "Where the language of a statute is plain and unambiguous and its meaning
27 clear and unmistakable, there is no room for construction, and the courts are not
28 permitted to search for its meaning beyond the statute itself." *Erwin v. State of*
Nevada, 111 Nev. 1535, 1538-39, 908 P.2d 1367, 1369 (1995) (quoting *Charlie*

1 *Brown Constr. Co. v. Boulder City*, 106 Nev. 497, 503, 797 P.2d 946, 949 (1990)).
2 This Court looks to the plain language of NRS 616B.578(3), which states in pertinent
3 part, "a condition is not a 'permanent physical impairment' unless it would support a
4 rating of permanent impairment of 6 percent or more of the whole person if evaluated
5 according to the American Medical Association's Guides to the Evaluation of
6 Permanent Impairment..." The Board found that the conditions or symptoms prior to
7 the subsequent injury were not serious enough to support a rating of six percent; thus,
8 these conditions did not constitute a pre-existing condition within the meaning of NRS
9 616B.578(3) and Petitioners cannot rely on the conditions or symptoms to show that
10 the employer had knowledge of the permanent physical impairment.

11 Accordingly, the decision of the Board is AFFIRMED.

12
13 Dated this 2 day of May, 2016.

14
15
16 
17 Rob Bare
18 Judge, District Court, Department 32

19 ///

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26 ///

27 ///

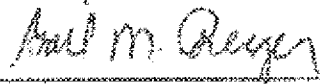
28

CERTIFICATE OF SERVICE

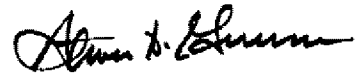
I hereby certify that on the date filed, I placed a copy of this Order in the attorney's folder in the Clerk's Office, or mailed or faxed a copy to:

Robert F. Balkenbush, Esq.
6590 S. McCarran, Suite B
Reno, NV 89509
Attorney for Petitioners

Charles R. Zeh, Esq.
575 Forest Street, Suite 200
Reno, NV 89509
Attorney for Respondents



Gail M. Reiger
Temp Judicial Executive Assistant, Dept. 32



CLERK OF THE COURT

1 NOTC

2 Robert F. Balkenbush, Esq.

3 Thorndal, Armstrong, Delk, Balkenbush & Eisinger

4 6590 S. McCarran Blvd., Suite B

5 Reno, Nevada 89509

6 Tel.: (775) 786-2882

7 Fax.: (775) 786-8004

8 Attorneys for: North Lake Tahoe Fire Protection District, Employer, and

9 Public Agency Compensation Trust, Insurer

10 **DISTRICT COURT**

11 **COUNTY OF CLARK, NEVADA**

12 NORTH LAKE TAHOE FIRE

13 PROTECTION DISTRICT AND PUBLIC

14 AGENCY COMPENSATION TRUST,

Case No. A-14-702-463-J

15 Petitioners,

Dept. No. XXXII

16 vs.

17 THE BOARD FOR ADMINISTRATION OF

18 THE SUBSEQUENT INJURY ACCOUNT

19 FOR THE ASSOCIATIONS OF SELF-

20 INSURED PUBLIC OR PRIVATE

21 EMPLOYERS, and ADMINISTRATOR OF

22 THE NEVADA DIVISION OF

23 INDUSTRIAL RELATIONS OF THE

24 NEVADA DEPARTMENT OF BUSINESS

25 AND INDUSTRY,

26 Respondents.

27 **NOTICE OF POSTING COST BOND**

28 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, concurrently with the filing of the Notice of Appeal, Petitioners, NORTH LAKE TAHOE FIRE PROTECTION DISTRICT and PUBLIC AGENCY COMPENSATION TRUST, by and through their counsel, THORNDAL ARMSTRONG DELK BALKENBUSH & EISINGER, are posting a bond of Five Hundred Dollars (\$500.00) pursuant to

1 NRAP 7.

2 AFFIRMATION

3 Pursuant to NRS 239B.030

4 The undersigned hereby affirms that the preceding document filed in above-entitled court
5 does not contain the social security number of any person.
6

7 DATED this 3rd day of June, 2016.

8 Thorndal Armstrong
9 Delk Balkenbush & Eisinger

10 By: / Robert F. Balkenbush, Esq. /
11 ROBERT F. BALKENBUSH, ESQ.
12 6590 S. McCarran Blvd., Suite B
13 Reno, Nevada 89509
14 Attorneys for County of North Lake Tahoe
15 Fire Protection District and
16 Public Agency Compensation Trust
17
18
19
20
21
22
23
24
25
26
27
28

1 CERTIFICATE OF SERVICE

2 Pursuant to NRCP 5(b), I certify that I am an employee of Thorndal, Armstrong, Delk,
3 Balkenbush & Eisinger, and that on this day I deposited for mailing at Reno, Nevada, a true and
4 correct copy of the foregoing document, addressed to:
5

6 Charles R. Zeh, Esq.
7 NV State Bar No. 1739
8 The Law Offices Of Charles R. Zeh, Esq.
9 575 Forest Street, Suite 200
10 Reno, NV 89509
11 Phone: (775) 323-5700
12 Fax: (775) 786-8183
13 Attorney for Respondent

14 Donald C. Smith, Esq.
15 Nevada Bar No.: 000413
16 Jennifer J. Leonescu, Esq.
17 Nevada Bar No.: 006036
18 Department Of Business And Industry Division Of Industrial Relations
19 State of Nevada
20 1301 N. Green Valley Parkway, Suite 200
21 Henderson, Nevada 89074-6497
22 Phone: (702) 486-9070
23 Fax: (702) 990-0361
24 Attorney for Respondent

25 DATED this 3rd day of June, 2016.

26 / Marcy Benner /
27 MARCY BENNER
28

OFFICIAL RECEIPT

District Court Clerk of the Court 200 Lewis Ave, 3rd Floor Las Vegas, NV 89101

Payor
Thorndal Armstrong Delk Balkenbush & Eisinger

Receipt No.
2016-54129-CCCLK

Transaction Date
06/6/2016

| Description | | Amount Paid |
|---|--------------|-------------|
| On Behalf Of North Lake Tahoe Fire Protection District | | |
| A-14-702463-J | | |
| North Lake Tahoe Fire Protection District, Plaintiff(s) vs. Board of Admin of the Subsequent Injury | | |
| Account for the Assoc of Self-Insured, Defendant(s) | | |
| Appeal Bond | | |
| Appeal Bond | | 500.00 |
| SUBTOTAL | | 500.00 |
| PAYMENT TOTAL | | 500.00 |
| Check (Ref #119865) Tendered | | 500.00 |
| Total Tendered | | 500.00 |
| Change | | 0.00 |
| 06/06/2016 | Cashier | Audit |
| 04:00 PM | Station AIKO | 35507232 |

OFFICIAL RECEIPT

DEPARTMENT 32
CASE SUMMARY
CASE NO. A-14-702463-J

North Lake Tahoe Fire Protection District, Plaintiff(s)
vs.
Board of Admin of the Subsequent Injury Account for the
Assoc of Self-Insured, Defendant(s)

§
§
§
§
§

Location: **Department 32**
Judicial Officer: **Bare, Rob**
Filed on: **06/13/2014**
Cross-Reference Case Number: **A702463**

CASE INFORMATION

Case Type: **Civil Petition for Judicial Review**
Subtype: **Worker's Compensation Appeal**
Case Flags: **Appealed to Supreme Court**

DATE

CASE ASSIGNMENT

Current Case Assignment

Case Number: A-14-702463-J
Court: Department 32
Date Assigned: 06/13/2014
Judicial Officer: Bare, Rob





PARTY INFORMATION

| | | |
|------------------|--|--|
| Plaintiff | North Lake Tahoe Fire Protection District | <i>Lead Attorneys</i> Balkenbush, Robert Francis <i>Retained</i> 7757862882(W) |
| | Public Agency Compensation Trust | Balkenbush, Robert Francis <i>Retained</i> 7757862882(W) |
| Defendant | Board of Admin of the Subsequent Injury Account for the Assoc of Self-Insured | Zeh, Charles R. <i>Retained</i> 7753235700(W) |
| | Nevada Division of Industrial Relations Dept of Business and Industry | Smith, Donald C. <i>Retained</i> 7023866066(W) |



DATE

EVENTS & ORDERS OF THE COURT













INDEX

| | | |
|------------|--|--|
| 06/13/2014 |  Petition for Judicial Review Filed by: Plaintiff North Lake Tahoe Fire Protection District <i>Petition for Judicial Review</i> | |
| 06/13/2014 | Case Opened | |
| 06/16/2014 |  Initial Appearance Fee Disclosure Filed By: Plaintiff North Lake Tahoe Fire Protection District <i>Initial Appearance Fee Disclosure</i> | |
| 06/19/2014 |  Notice of Intent to Participate Filed By: Defendant Nevada Division of Industrial Relations Dept of Business and Industry <i>Respondent Division of Industrial Relations' Notice and Statement of Intent to Participate - NRS 233B130(3)</i> | |
| 06/27/2014 |  Statement | |


DEPARTMENT 32
CASE SUMMARY
CASE NO. A-14-702463-J

| | |
|------------|---|
| | Filed by: Defendant Board of Admin of the Subsequent Injury Account for the Assoc of Self-Insured <i>Board's Statement of Intent to Participate in the Petition for Review</i> |
| 06/27/2014 |  Consent to Service By Electronic Means Filed By: Defendant Board of Admin of the Subsequent Injury Account for the Assoc of Self-Insured <i>Consent to Service by Electronic Means Through E-filing Program</i> |
| 07/01/2014 |  Consent to Service By Electronic Means Filed By: Plaintiff North Lake Tahoe Fire Protection District <i>Consent to Service by Electronic Means Through E-filing Program</i> |
| 07/23/2014 |  Transmittal of Record on Appeal Party: Defendant Board of Admin of the Subsequent Injury Account for the Assoc of Self-Insured <i>Transmittal of Record on Appeal (NRS 233B.131)</i> |
| 07/23/2014 |  Record on Appeal Party: Defendant Board of Admin of the Subsequent Injury Account for the Assoc of Self-Insured <i>Record on Appeal</i> |
| 07/23/2014 |  Record on Appeal Party: Defendant Board of Admin of the Subsequent Injury Account for the Assoc of Self-Insured <i>Record on Appeal Part 2</i> |
| 07/23/2014 |  Record on Appeal Party: Defendant Board of Admin of the Subsequent Injury Account for the Assoc of Self-Insured <i>Record on Appeal</i> |
| 07/23/2014 |  Certificate Filed By: Defendant Board of Admin of the Subsequent Injury Account for the Assoc of Self-Insured <i>Certificate of Transmittal</i> |
| 09/11/2014 |  Stipulation and Order Filed by: Plaintiff North Lake Tahoe Fire Protection District <i>Stipulation and Order for Extension of Time for Petitioners to File Opening Brief</i> |
| 09/18/2014 |  Notice of Entry of Order Filed By: Plaintiff North Lake Tahoe Fire Protection District <i>Notice of Entry of Order for Extension of Time for Petitioners to File Opening Brief</i> |
| 10/13/2014 |  Stipulation and Order Filed by: Plaintiff North Lake Tahoe Fire Protection District <i>Second Stipulation and Order for Extension of Time for Petitioners to File Opening Brief</i> |
| 10/13/2014 |  Notice of Entry of Order Filed By: Plaintiff North Lake Tahoe Fire Protection District <i>Notice of Entry of Order for Second Extension of Time for Petitioners to File to File Opening Brief</i> |
| 10/14/2014 | |

DEPARTMENT 32
CASE SUMMARY
CASE NO. A-14-702463-J

| | |
|------------|---|
| |  Brief Filed By: Plaintiff North Lake Tahoe Fire Protection District <i>Petitioners' Opening Brief</i> |
| 12/09/2014 |  Stipulation and Order Filed by: Defendant Board of Admin of the Subsequent Injury Account for the Assoc of Self-Insured <i>Stipulation and Order for Extension of time for Respondents to File Reply Brief</i> |
| 12/09/2014 |  Notice of Entry of Order Filed By: Defendant Board of Admin of the Subsequent Injury Account for the Assoc of Self-Insured <i>Notice of Entry of Order</i> |
| 12/29/2014 |  Reply Filed by: Defendant Board of Admin of the Subsequent Injury Account for the Assoc of Self-Insured <i>Reply Brief</i> |
| 02/06/2015 |  Reply Filed by: Plaintiff North Lake Tahoe Fire Protection District <i>Employer and Insurer's Reply Brief</i> |
| 02/12/2015 |  Order <i>Order Setting Chamber Hearing</i> |
| 02/13/2015 |  Request Filed by: Plaintiff North Lake Tahoe Fire Protection District <i>Request for Hearing</i> |
| 02/17/2015 |  Order <i>Order Setting Chamber Hearing</i> |
| 03/18/2015 | Hearing (3:00 AM) (Judicial Officer: Bare, Rob) |
| 05/03/2016 |  Decision and Order <i>Decision And Order</i> |
| 05/03/2016 | Order Denying Judicial Review (Judicial Officer: Bare, Rob) Debtors: North Lake Tahoe Fire Protection District (Plaintiff), Public Agency Compensation Trust (Plaintiff) Creditors: Board of Admin of the Subsequent Injury Account for the Assoc of Self-Insured (Defendant), Nevada Division of Industrial Relations Dept of Business and Industry (Defendant) Judgment: 05/03/2016, Docketed: 05/11/2016 |
| 05/05/2016 |  Notice of Entry Filed By: Defendant Board of Admin of the Subsequent Injury Account for the Assoc of Self-Insured <i>Notice of Entry of Order</i> |
| 06/03/2016 |  Notice of Appeal Filed By: Plaintiff North Lake Tahoe Fire Protection District <i>Notice of Appeal</i> |
| 06/03/2016 |  Case Appeal Statement |

DEPARTMENT 32
CASE SUMMARY
CASE NO. A-14-702463-J

| | | |
|------------|---|--|
| | Filed By: Plaintiff North Lake Tahoe Fire Protection District <i>Case Appeal Statement</i> | |
| 06/08/2016 |  Notice of Posting of Cost Bond Filed By: Plaintiff North Lake Tahoe Fire Protection District <i>Notice of Posting Cost Bond</i> | |

| DATE | FINANCIAL INFORMATION | |
|------|--|---------------|
| | Plaintiff North Lake Tahoe Fire Protection District | |
| | Total Charges | 294.00 |
| | Total Payments and Credits | 294.00 |
| | Balance Due as of 6/13/2016 | 0.00 |
| | Plaintiff Public Agency Compensation Trust | |
| | Total Charges | 30.00 |
| | Total Payments and Credits | 30.00 |
| | Balance Due as of 6/13/2016 | 0.00 |
| | Plaintiff North Lake Tahoe Fire Protection District | |
| | Appeal Bond Balance as of 6/13/2016 | 500.00 |

CIVIL COVER SHEET

-CLARK County, Nevada

A- 14- 702463- J

Case No.

XXXI I

(Assigned by Clerk's Office)

I. Party Information

Plaintiff(s) (name/address/phone): NORTH LAKE TAKE FIRE PROTECTION DISTRICT and PUBLIC AGENCY COMPENSATION TRUST,

Attorney (name/address/phone): Robert Balkenbush, Esq., Thorndal, Armstrong, Deik, Balkenbush & Eisinger, 6590 S. McCarran Blvd. #B, Reno, NV 89509; (775) 786-2882

Defendant(s) (name/address/phone): BOARD FOR ADMINISTRATION OF THE SUBSEQUENT INJURY ACCOUNT FOR THE ASSOCIATION OF SELF-INSURED PUBLIC OR PRIVATE EMPLOYERS, and ADMINISTRATOR OF THE NEVADA DIVISION OF INDUSTRIAL RELATIONS OF THE NEVADA DEPARTMENT OF BUSINESS AND INDUSTRY,

Attorney (name/address/phone): Chuck Zeh, Esq., 575 Forest Street, #209, Reno, NV 89509; Donald Smith, Esq., DIR, 1301 North Green Valley Parkway #200, Las Vegas, NV 89074

II. Nature of Controversy (Please check applicable bold category and applicable subcategory, if appropriate)☐ **Arbitration Requested****Civil Cases**

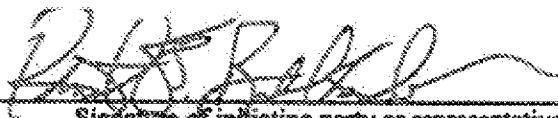
| Real Property | Torts | |
|---|--|---|
| <input type="checkbox"/> Landlord/Tenant <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Title to Property <input type="checkbox"/> Foreclosure <input type="checkbox"/> Liens <input type="checkbox"/> Quiet Title <input type="checkbox"/> Specific Performance <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property <input type="checkbox"/> Partition <input type="checkbox"/> Planning/Zoning | <input type="checkbox"/> Negligence <input type="checkbox"/> Negligence - Auto <input type="checkbox"/> Negligence - Medical/Dental <input type="checkbox"/> Negligence - Premises Liability (Slip/Fall) <input type="checkbox"/> Negligence - Other | <input type="checkbox"/> Product Liability <input type="checkbox"/> Product Liability/Motor Vehicle <input type="checkbox"/> Other Torts/Product Liability <input type="checkbox"/> Intentional Misconduct <input type="checkbox"/> Torts/Defamation (Libel/Slander) <input type="checkbox"/> Interfere with Contract Rights <input type="checkbox"/> Employment Torts (Wrongful termination) <input type="checkbox"/> Other Torts <input type="checkbox"/> Anti-trust <input type="checkbox"/> Fraud/Misrepresentation <input type="checkbox"/> Insurance <input type="checkbox"/> Legal Tort <input type="checkbox"/> Unfair Competition |
| Probate | Other Civil Filing Types | |
| Estimated Estate Value: _____ <input type="checkbox"/> Summary Administration <input type="checkbox"/> General Administration <input type="checkbox"/> Special Administration <input type="checkbox"/> Set Aside Estates <input type="checkbox"/> Trust/Conservatorships <input type="checkbox"/> Individual Trustee <input type="checkbox"/> Corporate Trustee <input type="checkbox"/> Other Probate | <input type="checkbox"/> Construction Defect <input type="checkbox"/> Chapter 40 <input type="checkbox"/> General <input type="checkbox"/> Breach of Contract <input type="checkbox"/> Building & Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Other Contracts/Acct/Judgment <input type="checkbox"/> Collection of Actions <input type="checkbox"/> Employment Contract <input type="checkbox"/> Guarantee <input type="checkbox"/> Sale Contract <input type="checkbox"/> Uniform Commercial Code <input checked="" type="checkbox"/> Civil Petition for Judicial Review <input type="checkbox"/> Foreclosure Mediation <input checked="" type="checkbox"/> Other Administrative Law <input type="checkbox"/> Department of Motor Vehicles <input checked="" type="checkbox"/> Worker's Compensation Appeal | <input type="checkbox"/> Appeal from Lower Court (also check applicable civil case box) <input type="checkbox"/> Transfer from Justice Court <input type="checkbox"/> Justice Court Civil Appeal <input type="checkbox"/> Civil Writ <input type="checkbox"/> Other Special Proceeding <input type="checkbox"/> Other Civil Filing <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Conversion of Property <input type="checkbox"/> Damage to Property <input type="checkbox"/> Employment Security <input type="checkbox"/> Enforcement of Judgment <input type="checkbox"/> Foreign Judgment - Civil <input type="checkbox"/> Other Personal Property <input type="checkbox"/> Recovery of Property <input type="checkbox"/> Stockholder Suit <input type="checkbox"/> Other Civil Matters |

III. Business Court Requested (Please check applicable category, for Clark or Washoe Counties only.)

- | | | |
|---|--|---|
| <input type="checkbox"/> NRS Chapters 78-88 | <input type="checkbox"/> Investments (NRS 104 Art. 8) | <input type="checkbox"/> Enhanced Case Mgmt/Business |
| <input type="checkbox"/> Commodities (NRS 90) | <input type="checkbox"/> Deceptive Trade Practices (NRS 598) | <input type="checkbox"/> Other Business Court Matters |
| <input type="checkbox"/> Securities (NRS 90) | <input type="checkbox"/> Trademarks (NRS 600A) | |

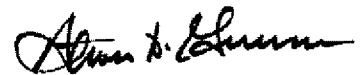
June 12, 2014

Date



Signature of initiating party or representative

See other side for family-related case filings.



CLERK OF THE COURT

1 **ORDR**

2
3 **DISTRICT COURT**
4 **CLARK COUNTY, NEVADA**

5 *****

6
7 NORTH LAKE TAHOE FIRE
8 PROTECTION DISTRICT and
9 PUBLIC AGENCY
10 COMPENSATION TRUST,

CASE NO.: A-14-702463-J

DEPT. NO. 32

11 Petitioners,

12 vs.

13 BOARD FOR ADMINISTRATION
14 OF THE SUBSEQUENT INJURY
15 ACCOUNT FOR THE
16 ASSOCIATIONS OF SELF-
17 INSURED PUBLIC OR PRIVATE
18 EMPLOYERS, and
19 ADMINISTRATOR OF THE
20 NEVADA DIVISIONS OF
21 INDUSTRIAL RELATIONS OF
22 THE NEVADA DEPARTMENT
23 OF BUSINESS AND INDUSTRY,

24 Respondents.

25 **DECISION AND ORDER**

26 **Procedural and Factual Background**

27 This case arises from Petitioner Public Agency Compensation Trust's
28

1 (hereinafter "PACT") request for reimbursement filed with the Nevada Department of
2 Industrial Relations (hereinafter "DIR"). On May 13, 2013, the Administrator issued
3 a recommendation to deny reimbursement because the Administrator believed that
4 Petitioner failed to show compliance with NRS 616B.578(1), (3), and (4) for the
5 employee's shoulder and NRS 616B.578(4) for the employee's lower back. On
6 September 11, 2013, Petitioner, North Lake Tahoe Fire Protection District (hereinafter
7 "NLTFPD"), filed a Pre-Hearing Statement. On September 19, 2013, a hearing was
8 held before the Board for Administration of the Subsequent Injury Account for the
9 Associations of Self-Insured Public or Private Employers (hereinafter "Board"). On
10 May 14, 2014, the Board issued its Findings of Fact and Conclusions of Law and
11 Decision of the Board.

12 The Board found in relevant part as follows:

- 13 1. The injured worker was an accident prone fire fighter who suffered from four
14 lower back injuries between august of 2002 and July of 2007.
- 15 2. After each of these injuries, the employee was released to full duty.
- 16 3. The subsequent injury occurred on November 30, 2007.
- 17 4. PACT designated spondylolisthesis as the pre-existing permanent physical
18 impairment, a condition diagnosed and discovered upon treatment of the
19 subsequent industrial injury of November 30, 2007.
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21 diagnosis made it into the possession of the applicant prior to November 30,
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26 justify reimbursement because it would support a rating of 6% or more PPD,
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28

1 Permanent Impairment.

2 8. Assuming, *arguendo*, that the spondylolisthesis was present prior to the
3 November 30, 2007 industrial injury, the Board finds that the applicant
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5 worker suffered from the pre-existing condition.

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7 injured worker prior to the subsequent industrial injury were a hindrance to
8 securing a job or remaining at the job.

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14 **Conclusions of Law**

15 The district court's "role in reviewing an administrative decision is ... to review
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17 decision was arbitrary or capricious and was thus an abuse of the agency's discretion."
18 *United Exposition Serv. Co. v. State Indus. Ins. Sys.*, 109 Nev. 421, 423, 851 P.2d 423,
19 424 (1993). A district court "may not substitute its judgment for that of the
20 administrative agency as to the weight of the evidence on questions of fact." *State,*
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25 Therefore, the issue before this Court is whether the decision of the Board,
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6 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.

7 NRS 616B.578(3) defines "permanent physical impairment" as "any permanent
8 condition, whether congenital or caused by injury or disease, of such seriousness as to
9 constitute a hindrance or obstacle to obtaining employment or to obtaining
10 reemployment if the employee is unemployed." "[A] condition is not a 'permanent
11 physical impairment' unless it would support a rating of permanent impairment of 6
12 percent or more of the whole person if evaluated according to the American Medical
13 Association's Guides to the Evaluation of Permanent Impairment...." *Id.*

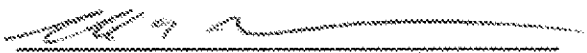
14 In this case, Dr. Berg found the injured employee to have a 21% whole person
15 impairment for his lumbar spine related to the November 30, 2007 incident. Dr. Berg
16 apportioned the 21% at 50% for the pre-existing condition and 50% for the
17 subsequent industrial injury. However, there is no evidence provided in the record to
18 show that the employer had knowledge of the "permanent physical impairment" at the
19 time employee was retained in employment after the employer acquired such
20 knowledge. The Petitioners argue that perfect knowledge of a pre-existing condition
21 is not required and that knowledge of general symptoms of the pre-existing condition
22 is sufficient to satisfy the knowledge requirement of NRS 616B.578(4); however,
23 Petitioners provide no Nevada case law to support this position.

24 "Where the language of a statute is plain and unambiguous and its meaning
25 clear and unmistakable, there is no room for construction, and the courts are not
26 permitted to search for its meaning beyond the statute itself." *Erwin v. State of*
27 *Nevada*, 111 Nev. 1535, 1538-39, 908 P.2d 1367, 1369 (1995) (quoting *Charlie*
28

1 *Brown Constr. Co. v. Boulder City*, 106 Nev. 497, 503, 797 P.2d 946, 949 (1990)).
2 This Court looks to the plain language of NRS 616B.578(3), which states in pertinent
3 part, "a condition is not a 'permanent physical impairment' unless it would support a
4 rating of permanent impairment of 6 percent or more of the whole person if evaluated
5 according to the American Medical Association's Guides to the Evaluation of
6 Permanent Impairment..." The Board found that the conditions or symptoms prior to
7 the subsequent injury were not serious enough to support a rating of six percent; thus,
8 these conditions did not constitute a pre-existing condition within the meaning of NRS
9 616B.578(3) and Petitioners cannot rely on the conditions or symptoms to show that
10 the employer had knowledge of the permanent physical impairment.

11 Accordingly, the decision of the Board is AFFIRMED.

12
13 Dated this 2 day of May, 2016.

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16 

17 Rob Bare
18 Judge, District Court, Department 32

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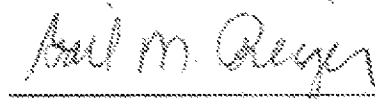
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CERTIFICATE OF SERVICE

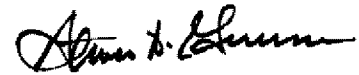
I hereby certify that on the date filed, I placed a copy of this Order in the attorney's folder in the Clerk's Office, or mailed or faxed a copy to:

Robert F. Balkenbush, Esq.
6590 S. McCarran, Suite B
Reno, NV 89509
Attorney for Petitioners

Charles R. Zeh, Esq.
575 Forest Street, Suite 200
Reno, NV 89509
Attorney for Respondents



Gail M. Reiger
Temp Judicial Executive Assistant, Dept. 32



CLERK OF THE COURT

Code: NOE
Charles R. Zeh, Esq.
NV State Bar No. 1739
The Law Offices of Charles R. Zeh, Esq.
575 Forest Street, Suite 200
Reno, NV 89509
Phone: (775) 323-5700
Fax: (775) 786-8183

*Attorneys for Respondent The Board for Administration
of the Subsequent Injury Account for the Associations
of Self-insured Public or Private Employers*

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

**NORTH LAKE TAHOE FIRE
PROTECTION DISTRICT and PUBLIC
AGENCY COMPENSATION TRUST,**

Petitioners,

vs.

**THE BOARD FOR ADMINISTRATION
OF THE SUBSEQUENT INJURY
ACCOUNT FOR THE ASSOCIATIONS
OF SELF-INSURED PUBLIC OR
PRIVATE EMPLOYERS, and
ADMINISTRATOR OF THE NEVADA
DIVISION OF INDUSTRIAL
RELATIONS OF THE NEVADA
DEPARTMENT OF BUSINESS AND
INDUSTRY,**

Respondents.

Case No. A-14-702463-J

Department No. XXXII

NOTICE OF ENTRY OF ORDER

TO: ALL PARTIES OF INTEREST IN THE ABOVE-CAPTIONED MATTER

PLEASE TAKE NOTICE that the above-entitled Court entered on May 3, 2015, its
Decision and Order affirming the decision of the Board. A copy of the Order is attached.

///

///

1 The undersigned does hereby affirm that the preceding document does not contain the
2 social security number of any person.

3 Dated this 4th day of May, 2015. THE LAW OFFICES OF CHARLES R. ZEH, ESQ.

4
5 By: 

6 Charles R. Zeh, Esq.

7 Attorneys for Respondent *The Board for*
8 *Administration of the Subsequent Injury Account for*
9 *the Associations of Self-insured Public or Private*
10 *Employers*

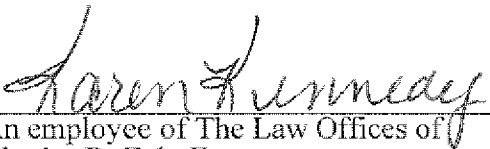
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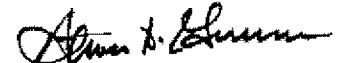
CERTIFICATE OF SERVICE

Pursuant to NRCp 5(b), I certify that I am an employee of The Law Offices of Charles R. Zeh, Esq., and that on this date I served the attached *Notice of Entry of Order*, on those parties identified below by:

| | |
|---|--|
| √ | Placing an original or true copy thereof in a sealed envelope, postage prepaid, placed for collection and mailing in the United States Mail, at Reno, Nevada: Donald C. Smith, Esq. Jennifer J. Leonescu, Esq. Department of Business and Industry Division of Industrial Relations 1301 North Green Valley Parkway, Suite 200 Henderson, NV 89074 |
| | Personal delivery |
| √ | Electronically filing <i>via</i> the Court's e-filing system. Robert F. Balkenbush, Esq., has consented to service of documents by electronic means through the Court's e-filing program on behalf of <i>North Lake Tahoe Fire Protection District</i> and <i>Public Agency Compensation Trust @</i> at the following e-mail address: <u>rfb@thorndal.com</u> , <u>rbalkenbush@thorndal.com</u> , <u>psb@thorndal.com</u> . |
| | Federal Express or other overnight delivery |
| | Reno-Carson Messenger Service |
| | Certified Mail/Return Receipt Requested |

Dated this 5th day of May, 2016.


An employee of The Law Offices of
Charles R. Zeh, Esq.



CLERK OF THE COURT

1 **ORDR**

2
3 **DISTRICT COURT**
4 **CLARK COUNTY, NEVADA**

5 *****

6
7 NORTH LAKE TAHOE FIRE
8 PROTECTION DISTRICT and
9 PUBLIC AGENCY
10 COMPENSATION TRUST,

CASE NO.: A-14-702463-J

DEPT. NO. 32

11 Petitioners,

12 vs.

13 BOARD FOR ADMINISTRATION
14 OF THE SUBSEQUENT INJURY
15 ACCOUNT FOR THE
16 ASSOCIATIONS OF SELF-
17 INSURED PUBLIC OR PRIVATE
18 EMPLOYERS, and
19 ADMINISTRATOR OF THE
20 NEVADA DIVISIONS OF
21 INDUSTRIAL RELATIONS OF
22 THE NEVADA DEPARTMENT
23 OF BUSINESS AND INDUSTRY,

24 Respondents.

25 **DECISION AND ORDER**

26 **Procedural and Factual Background**

27 This case arises from Petitioner Public Agency Compensation Trust's
28

1 (hereinafter "PACT") request for reimbursement filed with the Nevada Department of
2 Industrial Relations (hereinafter "DIR"). On May 13, 2013, the Administrator issued
3 a recommendation to deny reimbursement because the Administrator believed that
4 Petitioner failed to show compliance with NRS 616B.578(1), (3), and (4) for the
5 employee's shoulder and NRS 616B.578(4) for the employee's lower back. On
6 September 11, 2013, Petitioner, North Lake Tahoe Fire Protection District (hereinafter
7 "NLTFPD"), filed a Pre-Hearing Statement. On September 19, 2013, a hearing was
8 held before the Board for Administration of the Subsequent Injury Account for the
9 Associations of Self-Insured Public or Private Employers (hereinafter "Board"). On
10 May 14, 2014, the Board issued its Findings of Fact and Conclusions of Law and
11 Decision of the Board.

12 The Board found in relevant part as follows:

- 13 1. The injured worker was an accident prone fire fighter who suffered from four
14 lower back injuries between august of 2002 and July of 2007.
- 15 2. After each of these injuries, the employee was released to full duty.
- 16 3. The subsequent injury occurred on November 30, 2007.
- 17 4. PACT designated spondylolisthesis as the pre-existing permanent physical
18 impairment, a condition diagnosed and discovered upon treatment of the
19 subsequent industrial injury of November 30, 2007.
- 20 5. There is no proof in the record that the document containing Dr. Fleming's
21 diagnosis made it into the possession of the applicant prior to November 30,
22 2007.
- 23 6. After each of the injured worker's injuries, he was always returned to work, full
24 duty.
- 25 7. Spondylolisthesis is the pre-existing condition relied upon by the applicant to
26 justify reimbursement because it would support a rating of 6% or more PPD,
27 according to the American Medical Association's Guides to the Evaluation of
28

1 Permanent Impairment.

2 8. Assuming, *arguendo*, that the spondylolisthesis was present prior to the
3 November 30, 2007 industrial injury, the Board finds that the applicant
4 produced no proof by written record that it had knowledge that the injured
5 worker suffered from the pre-existing condition.

6 9. The applicant also failed to show that the various ailments endured by the
7 injured worker prior to the subsequent industrial injury were a hindrance to
8 securing a job or remaining at the job.

9 10. The pre-existing condition of spondylolisthesis was not discovered and proven
10 by written record until during the treatment of the injured employee's back
11 during treatment for the subsequent industrial injury.

12 Petitioners have respectfully asked this Court to review the Board's decisions by
13 means of a petition for judicial review.

14 **Conclusions of Law**

15 The district court's "role in reviewing an administrative decision is ... to review
16 the evidence presented to the agency in order to determine whether the agency's
17 decision was arbitrary or capricious and was thus an abuse of the agency's discretion."
18 *United Exposition Serv. Co. v. State Indus. Ins. Sys.*, 109 Nev. 421, 423, 851 P.2d 423,
19 424 (1993). A district court "may not substitute its judgment for that of the
20 administrative agency as to the weight of the evidence on questions of fact." *State*,
21 *Dept. of Motor Vehicles & Pub. Safety v. Becksted*, 107 Nev. 456, 458, 813 P.2d 995,
22 996 (1991). The district court "gives deference to an agency's interpretation of its
23 statutes and regulations if the interpretation is within the language of the statute."
24 *Holiday Ret. Corp. v. State, DIR*, 128 Nev. Adv. Op. 13, 274 P.3d 759, 761 (2012).
25 Therefore, the issue before this Court is whether the decision of the Board,
26 interpreting NRS 616B.578 and denying reimbursement from the Subsequent Injury
27 Account, constitutes clear legal error as a matter of law.
28

1 NRS 616B.578(4) states:

2 To qualify under this section for reimbursement from the Subsequent
3 Injury Account for Associations of Self-Insured Public or Private
4 Employers, the association of self-insured public or private employers
5 must establish by written records that the employer had knowledge of
6 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.

7 NRS 616B.578(3) defines "permanent physical impairment" as "any permanent
8 condition, whether congenital or caused by injury or disease, of such seriousness as to
9 constitute a hindrance or obstacle to obtaining employment or to obtaining
10 reemployment if the employee is unemployed." "[A] condition is not a 'permanent
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17 subsequent industrial injury. However, there is no evidence provided in the record to
18 show that the employer had knowledge of the "permanent physical impairment" at the
19 time employee was retained in employment after the employer acquired such
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21 is not required and that knowledge of general symptoms of the pre-existing condition
22 is sufficient to satisfy the knowledge requirement of NRS 616B.578(4); however,
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27 *Nevada*, 111 Nev. 1535, 1538-39, 908 P.2d 1367, 1369 (1995) (quoting *Charlie*
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1 *Brown Constr. Co. v. Boulder City*, 106 Nev. 497, 503, 797 P.2d 946, 949 (1990)).
2 This Court looks to the plain language of NRS 616B.578(3), which states in pertinent
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5 according to the American Medical Association's Guides to the Evaluation of
6 Permanent Impairment...." The Board found that the conditions or symptoms prior to
7 the subsequent injury were not serious enough to support a rating of six percent; thus,
8 these conditions did not constitute a pre-existing condition within the meaning of NRS
9 616B.578(3) and Petitioners cannot rely on the conditions or symptoms to show that
10 the employer had knowledge of the permanent physical impairment.

11 Accordingly, the decision of the Board is AFFIRMED.

12
13 Dated this 2 day of May, 2016.

14
15
16 
17 Rob Bare
18 Judge, District Court, Department 32

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28

CERTIFICATE OF SERVICE

I hereby certify that on the date filed, I placed a copy of this Order in the attorney's folder in the Clerk's Office, or mailed or faxed a copy to:

Robert F. Balkenbush, Esq.
6590 S. McCarran, Suite B
Reno, NV 89509
Attorney for Petitioners

Charles R. Zeh, Esq.
575 Forest Street, Suite 200
Reno, NV 89509
Attorney for Respondents

Gail M. Reiger
Gail M. Reiger
Temp Judicial Executive Assistant, Dept. 32

**DISTRICT COURT
CLARK COUNTY, NEVADA**

**Civil Petition for Judicial
Review**

COURT MINUTES

March 18, 2015

A-14-702463-J North Lake Tahoe Fire Protection District, Plaintiff(s)
vs.
Board of Admin of the Subsequent Injury Account for the Assoc of Self-
Insured, Defendant(s)

March 18, 2015 3:00 AM Hearing

HEARD BY: Bare, Rob **COURTROOM:** Chambers

COURT CLERK: Andrea Natali

RECORDER:

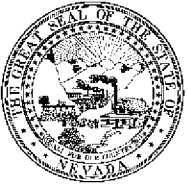
REPORTER:

PARTIES None - Minute Order Issued from Chambers

PRESENT:

JOURNAL ENTRIES

- Decision and Order issued May 3, 2015.



EIGHTH JUDICIAL DISTRICT COURT CLERK'S OFFICE
NOTICE OF DEFICIENCY
ON APPEAL TO NEVADA SUPREME COURT

ROBERT F. BALKENBUSH, ESQ.
6590 S. MCCARRAN BLVD., SUITE B
RENO, NV 89509

DATE: June 13, 2016
CASE: A-14-702463-J

RE CASE: NORTH LAKE TAHOE FIRE PROTECTION DISTRICT; PUBLIC AGENCY COMPENSATION TRUST vs. BOARD FOR ADMINISTRATION OF THE SUBSEQUENT INJURY ACCOUNT FOR THE ASSOCIATIONS OF SELF-INSURED PUBLIC OR PRIVATE EMPLOYERS; ADMINISTRATOR OF THE NEVADA DIVISION OF INDUSTRIAL RELATIONS OF THE NEVADA DEPARTMENT OF BUSINESS AND INDUSTRY

NOTICE OF APPEAL FILED: Not. Of Appeal File date

YOUR APPEAL HAS BEEN SENT TO THE SUPREME COURT.

PLEASE NOTE: DOCUMENTS **NOT TRANSMITTED HAVE BEEN MARKED:**

- ☒ **\$250 – Supreme Court Filing Fee (Make Check Payable to the Supreme Court)****
 - If the \$250 Supreme Court Filing Fee was not submitted along with the original Notice of Appeal, it must be mailed directly to the Supreme Court. The Supreme Court Filing Fee will not be forwarded by this office if submitted after the Notice of Appeal has been filed.
- ☐ **\$24 – District Court Filing Fee (Make Check Payable to the District Court)****
- ☐ **\$500 – Cost Bond on Appeal (Make Check Payable to the District Court)****
 - NRAP 7: Bond For Costs On Appeal in Civil Cases
- ☐ **Case Appeal Statement**
 - NRAP 3 (a)(1), Form 2
- ☐ **Order**
- ☐ **Notice of Entry of Order**

NEVADA RULES OF APPELLATE PROCEDURE 3 (a) (3) states:

"The district court clerk must file appellant's notice of appeal despite perceived deficiencies in the notice, including the failure to pay the district court or Supreme Court filing fee. The district court clerk shall apprise appellant of the deficiencies in writing, and shall transmit the notice of appeal to the Supreme Court in accordance with subdivision (e) of this Rule with a notation to the clerk of the Supreme Court setting forth the deficiencies. Despite any deficiencies in the notice of appeal, the clerk of the Supreme Court shall docket the appeal in accordance with Rule 12."

Please refer to Rule 3 for an explanation of any possible deficiencies.

*****Per District Court Administrative Order 2012-01, in regards to civil litigants, "...all Orders to Appear in Forma Pauperis expire one year from the date of issuance." You must reapply for in Forma Pauperis status.***

Certification of Copy

State of Nevada }
County of Clark } SS:

I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, does hereby certify that the foregoing is a true, full and correct copy of the hereinafter stated original document(s):

NOTICE OF APPEAL; CASE APPEAL STATEMENT; NOTICE OF POSTING COST BOND; DISTRICT COURT DOCKET ENTRIES; CIVIL COVER SHEET; DECISION AND ORDER; NOTICE OF ENTRY OF ORDER; DISTRICT COURT MINUTES; NOTICE OF DEFICIENCY

NORTH LAKE TAHOE FIRE PROTECTION
DISTRICT; PUBLIC AGENCY
COMPENSATION TRUST,

Plaintiff(s),

vs.

BOARD FOR ADMINISTRATION OF THE
SUBSEQUENT INJURY ACCOUNT FOR THE
ASSOCIATIONS OF SELF-INSURED PUBLIC
OR PRIVATE EMPLOYERS;
ADMINISTRATOR OF THE NEVADA
DIVISION OF INDUSTRIAL RELATIONS OF
THE NEVADA DEPARTMENT OF
BUSINESS AND INDUSTRY,

Defendant(s),

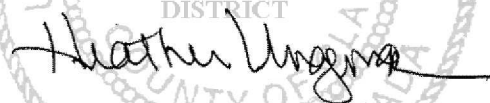
Case No: A-14-702463-J

Dept No: XXXII

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto
Set my hand and Affixed the seal of the
Court at my office, Las Vegas, Nevada
This 13 day of June 2016.

Steven D. Grierson, Clerk of the Court



Heather Ungermann, Deputy Clerk