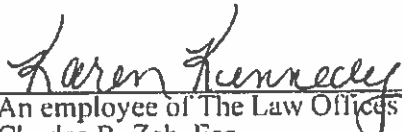


CERTIFICATE OF SERVICE

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 *Reply Brief*, 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 29th day of December, 2014.


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



CLERK OF THE COURT

1 RPLY

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 **EMPLOYER AND INSURER'S REPLY BRIEF**

28 COMES NOW, CITY OF FERNLEY, the employer, and PUBLIC AGENCY
COMPENSATION TRUST, the insurer, by and through their attorney, Robert F. Balkenbush, Esq.,
Thorndal, Armstrong, Delk, Balkenbush & Eisinger, and hereby submit their Opening Brief
pursuant to NRS 233B.133.

1 This Brief is supported by the following points and authorities, the record on appeal on file
2 herein, and all other papers and pleadings on file in this matter.

3 DATED this 6th day of February, 2015.

4 THORNDAL, ARMSTRONG,
5 DELK, BALKENBUSH & EISINGER

6
7 By /John D. Hooks, Esq./
8 ROBERT F. BALKENBUSH, ESQ.
9 JOHN D. HOOKS, ESQ.
10 Thorndal, Armstrong,
11 Delk, Balkenbush & Eisinger
12 6590 S. McCarran Blvd., Suite B
13 Reno, Nevada 89509
14 Tel.: (775) 786-2882
15 Fax.: (775) 786-8004
16 Attorneys for: North Lake Tahoe Fire Protection
17 District and Public Agency Compensation Trust
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATEMENTS OF ISSUES PRESENTED FOR REVIEW	iii
I. INTRODUCTION	1
II. LAW AND ARGUMENT	1
A. The Permanent Physical Impairment of NRS 616B.578 is the "Condition" of Permanent Impairment Existing in the Body Part to which the Subsequent Injury Occurs.	1
B. Assuming <i>Arguendo</i> , Even Under the Board's Characterization of Employee's Permanent Physical Impairment Reimbursement from the SIA is Warranted	5
III. CONCLUSION	10
IV. CERTIFICATE OF COMPLIANCE	12

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

PAGE NOS.

State Court Cases:

Country Wide Truck Serv. v. Industrial Comm'n (Walker), 181 Ariz.
410,891 P.2d 877 (1994). 7, 8

Holiday Ret. Corp. v. State Div. of Indus. Rels., 274 P.3d 759, 128 Nev.
Adv. Rep. 13 (2012) 2, 4, 6, 9

Kennecott Copper Corporation v. Chavez, 111 N.M. 366, 805 P.2d 633,
637-38 (App. 1990) 7

Special Fund Div. v. Industrial Comm'n (Morin), 182 Ariz. 341, 897 P.2d 643 (1994) 4, 6, 7

Scott Plaza, Inc. v. Clark County, 160 Nev. 320, 792 P.2d 398 (1990) 5

Special Fund Div. v. Industrial Comm'n, 191 Ariz. 149,953 P.2d (1997) 7

Special Fund v. Industrial Comm'n (Burrell), 189 Ariz. 162, 165, 939 P.2d 795, 798 (1997) . . . 7

Statutes:

NRS 463.400 5

NRS 616B.578 1, 2, 6, 7

Treatises:

5 Larson's Workers' Compensation Law § 91.03[3] 5, 6

1 **I. INTRODUCTION**

2 In the present case, there is uncontroverted evidence that the Employee had a permanent
3 physical impairment which was greater than 6% whole person impairment (WPI) to his lumbar spine
4 pre-existing his subsequent injury. ROA 130 and 135. Nothing in the record nor the Board's Reply
5 Brief can refute that fact. The Board has offered no authority to contradict the utilization of the
6 statutory definition of "permanent physical impairment" nor the vast authority cited addressing the
7 sufficiency of knowledge required under NRS 616B.578. The Board has only proffered linguistic
8 red herrings confusing a rather simple statutory scheme. Without citing any authority other than
9 citing the governing statute, the Board's Decision applies its own narrow subjective analysis as to
10 whether this employer knew about the particular diagnosis "spondylolisthesis." That is not the law
11 and constitutes legal error.
12

13
14 Numerous jurisdictions, including Nevada, have explained that the Employer is not charged
15 with knowledge of a particular medical diagnosis which underlies the "permanent physical
16 impairment" required under NRS 616B.578. As long as there is knowledge of a pre-existing
17 "permanent physical impairment," corroborated by written evidence, that constitutes a 6% whole
18 person impairment and that that impairment is of such seriousness as to likely be hinderance to
19 employment or reemployment, reimbursement from the SIA is proper. This is the case at hand.
20

21 **II. LEGAL ARGUMENT**

22 **A. The Permanent Physical Impairment of NRS 616B.578 is the "Condition" of**
23 **Permanent Impairment Existing in the Body Part to which the Subsequent**
24 **Injury Occurs.**

25 In the present case, there is uncontroverted evidence that the Employee had a permanent
26 physical impairment which was greater than 6% whole person impairment (WPI) to his lumbar spine
27 pre-existing his subsequent injury. An employer may request relief through the Subsequent Injury
28 Account, which provides reimbursement when an employee sustains an injury entitling him or her

1 to compensation for disability that is substantially greater due to the combined effects of a
2 preexisting impairment and the subsequent injury than that which would have resulted from the
3 subsequent injury alone, provided that the employer can satisfy various statutory conditions. NRS
4 616B.578; *see also, Holiday*, 274 P.3d at 760. One of these conditions requires the proof of a
5 “permanent physical impairment.” NRS 616B578(3). Permanent physical impairment “means any
6 permanent **condition**, whether congenital or caused by injury or disease, of such seriousness as to
7 constitute a hindrance or obstacle to obtaining employment or to obtaining reemployment if the
8 employee is unemployed.” *Id.* That “**condition** is not a “permanent physical impairment” unless it
9 would support a rating of permanent impairment of 6 percent or more of the whole person.” *Id.* The
10 permanent physical impairment is the condition of the body part involved prior to the subsequent
11 injury (e.g. time of hiring or retention). Permanent partial impairment is not some hyperspecific
12 diagnosis to be taken singularly and apart from other permanent impairments - from whatever source
13 - concurrently existing in that body part prior to the subsequent injury.

14
15
16 In the present case, two physicians have evaluated the nature and extent of the permanent
17 impairment of the Employee’s lumbar spine which pre-existed the subsequent injury. ROA at 130
18 and 135. Those opinions are consistent and have not been contradicted in the record. As highlighted
19 in the Opening Brief, we instructively turn to the language found in Dr. Jay E. Betz’s and the rating
20 physician, Dr. David Berg’s, opinions to confirm two facts uncontradicted in the record: (1) The
21 Employee has a total rating of a 21% whole person impairment to his lumbar spine following his
22 recovery from the subsequent injury upon which the instant request for reimbursement is based and
23 (2) 50% of that impairment to the lumbar spine existed *prior* to the subsequent injury - 10.5% WPI.
24 ROA 130 and 135. That 10.5% WPI is the undisputed “condition” of the permanent physical
25 impairment to his lumbar spine at the time of the subsequent injury. Dr. Betz makes this point very
26 clear:
27
28

1 A disability evaluation was then performed by Dr. David Berg, Chiropractor, on
2 10/19/11. He evaluated the patient under the range of motion section of *The Guides*
3 and concluded that there was 13% whole person impairment for the specific spine
4 disorders (Table 15-7) including 23% for single-level fusion with an additional 1%
5 for second level. He also found the patient had the range of motion limitations totaling
6 9% for a total of **21 % whole person impairment**.

7 ROA 130 (emphasis added).

8 Dr. Betz highlighted the fact that "Mr. _____ lumbar pathologies clearly predate his occupation
9 subsequent injury. **Not only** did he have unstable spondylolysis with spondylolisthesis, which is
10 preexisting developmental problem, **it is also well documented that he was having significant**
11 **symptoms from these pathologies dating back to at least 2002** and was considered for fusion to
12 address his instability as early as 2003. ROA 130 (emphasis added). Dr. Betz goes on to explain that
13 this claim should qualify for subsequent injury account relief because Burgess clearly has **at least**
14 **6% WPI** impairment preexisting the subsequent injury. **By way of example**, he notes that
15 symptomatic spondylolysis with spondylolisthesis **alone** is associated with at least 7% WPI. He also
16 stresses that, "To that would be combined any allowances for ROM [range of motion] loss which
17 most certainly were present prior to the subsequent injury based on this patient's long history of pain
18 requiring treatment." ROA 130. Dr. Betz further elaborates Mr. _____ **clearly had significant**
19 **ratable impairments affecting his low back prior to the subsequent injury**. The rating physician,
20 Dr. Berg, apportioned 50% of that 21% to the subsequent injury and **50% to the pre-existing**
21 **pathologies**. ROA 135.

22 These facts are undisputed in the record. The Board, however, spends almost its entire
23 Answering Brief trying to explain why it should have only considered the particular amount
24 specifically related to a diagnosis of "spondylolisthesis." This approach, however, is contrary to very
25 policy underlying the purpose of the Subsequent Injury Fund - to encourage employers to hire and
26 retain workers who have pre-existing conditions and provide relief to employers who hire and retain

1 workers' with pre-existing conditions when such an worker sustains a subsequent compensable
2 injury. *Holiday Ret. Corp. v. State Div. of Indus. Rels.*, 274 P.3d 759, 128 Nev. Adv. Rep. 13 (2012).
3 This approach is also contrary to the language of the governing statute utilizing the encompassing
4 term "condition" and contrary to common sense.

5
6 *Consistent with the Law*

7 As explained in the Opening Brief, and wholly unrefuted by any statutory or judicial
8 authority in the Board's Reply Brief, an employer in Nevada is not charged with having
9 knowledge of any particular diagnosis or "exactly what the employee's prior conditions is in medical
10 terms." *Special Fund Div. v. Industrial Comm'n (Morin)*, 182 Ariz. 341, 897 P.2d 643 (1994)¹. In
11 *Morin*, the employee, as part of employment application, completed a medical questionnaire in
12 which she "reported that she had "knee problems" in January 1982 and a "laminectomy" in June
13 1962." *See, Industrial Comm'n (Morin)*, 897 P.2d at 649 (1994). The court held, under an objective
14 standard, rather than a subjective standard, the existence of such evidence alone in the possession
15 of the employer created an inference that the employer knew about a pre-existing permanent
16 impairment (medically identified as degenerative dis disease and a ruptured disc) and decided to hire
17 her anyway. *Id.*

18
19
20 The fact that an employer is not charged with knowledge of any particular medical diagnosis
21 is consistent with the inclusive view that the "permanent physical impairment" pre-existing the
22 subsequent injury is the general permanent **condition** of the impairment of the lumbar spine as a
23 whole not that attributable to any particular, singular diagnosis.

24
25
26 ¹ The Nevada Supreme Court has not offered any insight into the sufficiency issue. The Court however, in
27 *Holiday*, relies on the interpretation provided by a jurisdiction with similar statutory language on the issue. *See, Holiday*,
28 274 P.3d at 761-2. Namely, the sole source cited by the Nevada Supreme Court for interpretational inspiration on the
such statutes was the majority trend identified in an Arizona opinion, *Special Fund Div. v. Industrial Comm'n*, 184 Ariz.
363, P.2d 430 (1995)(citing 1A, Arthur Larson, *The Law of Workers' Compensation* Sec. 59.33.a (1994). When
interpreting the nature and extent of employer knowledge required we instructively look to the same sources the Court
has utilized.

1 *Consistent with Common Sense and Nevada's Policy to Avoid Inconsistent Results*

2 The Board's logic cannot be applied to achieve rational results nor justice. For example, if
3 an employee had Injury A in 2000 for which he obtained a 4% WPI to his lumbar spine and Injury
4 B for which he obtained an additional 4% WPI to his lumbar spine and thereafter suffered a
5 subsequent injury, common sense would dictate that they be treated as one rating of 8% WPI under
6 a SIA analysis - because that is the "permanent physical impairment" of his lumbar spine prior to the
7 subsequent injury. The Board's Reply Brief admonishes such logic an impermissible cobbling while
8 citing absolutely no authority for that contention. Furthermore, as a matter of policy, Nevada, as
9 most jurisdictions, avoids interpreting statutes in a way that will lead to inconsistent and
10 unreasonable results. *See, Scott Plaza, Inc. v. Clark County*, 160 Nev. 320, 792 P.2d 398 (1990)(The
11 court reversed a district court's interpretation of a particular statute "[b]ecause the district court's
12 interpretation of NRS 463.400 yields inconsistent and unreasonable results."). To allow for the
13 employer of an injured employee with one prior 8% WPI injury to his lumbar spine to recover from
14 the SIA but to not allow the employer of an injured employee who has two separate prior 4% WPI
15 injuries to his lumbar spine to recover (failing the pre-existing 6% rule) would lead to inconsistent
16 results for identically situated employers through no fault of their own. Hence in the present case,
17 the undisputed records establishes that the Employee had a total permanent physical impairment of
18 10.5% WPI to the lumbar spine which preexisted the subsequent injury which forms the basis of the
19 instant claim for reimbursement.

20
21
22
23 **B. Assuming Arguendo, Even Under the Board's Characterization of
24 Employee's Permanent Physical Impairment Reimbursement from the SIA is
25 Warranted.**

26 The above logic also explains why reimbursement from the SIA should be allowed even
27 under the Board's characterization of his "permanent physical impairment" - which only takes into
28 account the pre-existing permanent impairment related to the "spondylolisthesis" - at least "7%."

1 ROA 130. The undisputed record reveals that the Employee had spondylolisthesis which pre-
2 existed his subsequent injury and that that spondylolisthesis represented at least a 7% WPI to his
3 lumbar spine. ROA 130. The Board suggests that the North Lake Tahoe Fire Protection District and
4 Public Agency Compensation Trust (hereinafter "NLTFPD") could not have knowledge of the
5 Employee's "permanent physical impairment" because the condition of spondylolisthesis was not
6 specifically diagnosed by a medical professional until after the subsequent injury. According to the
7 Nevada Supreme Court, the timing of the diagnosis of spondylolisthesis is a red herring as a
8 diagnosis is not the determining factor to establish employer knowledge. *See, Holiday*, 274 P.3d 759,
9 761-2, 128 Nev. Adv. Rep. 13 (2012) and *Special Fund Div. v. Indus. Com'n of Ariz.*, 184 Ariz. 363,
10 P.2d 430 (1995). The Court has emphasized that once the pre-existing permanent physical
11 impairment is established - as it has been here - the final questions to be asked are: (1) Did the
12 Employer have knowledge of the pre-existing permanent physical impairment prior to hiring or
13 retaining the Employee? and (2) Whether the permanent physical impairment is of such seriousness
14 as to constitute a hindrance or obstacle to obtaining employment or to obtaining reemployment if the
15 employee is unemployed? *See, Holiday*, 274 P.3d 759, 761-2, 128 Nev. Adv. Rep. 13 (2012) and
16 *Special Fund Div. v. Indus. Com'n of Ariz.*, 184 Ariz. 363, P.2d 430 (1995)².

20 *Employer Knowledge of Impairment*

21 As explained in Petitioners' Opening Brief, the timing of the diagnosis is irrelevant because,
22 in Nevada, an employer is not charged with knowledge of a specific diagnosis to satisfy the
23 knowledge requirement in NRS 616B.578 and receive reimbursement from the SIA. *Id.* Rather the
24 employer must have knowledge, corroborated by written evidence, of a "permanent physical
25 impairment" prior to hiring or retaining him. The governing statute, NRS 616B.578, has defined
26

28 ² See also, 5 *Larson's Workers' Compensation Law* § 91.03[3]; *Special Fund Div. v. Industrial Comm'n*
(*Morin*), 182 Ariz.341, 897 P.2d 643 (1994).

1 permanent physical impairment as "any permanent condition, whether congenital or caused by injury
2 or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or
3 to obtaining reemployment if the employee is unemployed." *Id.*

4 While the majority of jurisdictions hold that employer knowledge before the subsequent
5 injury is required, perfect knowledge is not. 5 *Larson's Workers' Compensation Law* § 91.03[3];
6 *Special Fund Div. v. Industrial Comm'n (Morin)*, 182 Ariz.341, 897 P.2d 643 (1994). Indeed, the
7 scholarly treatises on the issue treat this contention as a given, "It is clear that the employer does not
8 have to know exactly what the employee's prior condition is in medical terms." *Id.* The Arizona
9 Supreme Court has stressed that "we emphasize that the "writing requirement is *merely evidentiary*,
10 and must be sensibly construed so as not to defeat the statute's larger remedial purpose. The larger
11 purpose, of course, is to promote the hiring of disabled or handicapped workers. We therefore
12 interpret the statute in the manner that best carries out the legislative purpose." *See, Special Fund*
13 *Div. v. Industrial Comm'n*, 191 Ariz. 149, 953 P.2d (1997) (citing *Special Fund v. Industrial Comm'n*
14 *(Burrell)*, 189 Ariz. 162, 165, 939 P.2d 795, 798 (1997) (Fidel, J., dissenting) (emphasis in the
15 original) (citations omitted)). This objective analysis as to whether the record provides sufficient
16 evidence to prove that an employer had sufficient knowledge of a permanent physical impairment
17 is utilized throughout a majority of jurisdictions. *Kennecott Copper Corporation v. Chavez*, 111
18 N.M. 366, 805 P.2d 633, 637-38 (App. 1990) ("An employer is not required to know the medical
19 specifics of an impairment, as long as knowledge of the impairment is present.") and *Denton v.*
20 *Sunflower Elec. Co-Op*, 12 Kan. App. 2d 262, 740 P.2d 98 (1987)(knowledge of low back problems
21 lasting ten years is sufficient without knowing that the problems were caused by degenerative disc
22 disease).

23 *Seriousness of Impairment*

24 The courts have also adopted an objective standard in analyzing the final requirement, that

1 the permanent physical impairment be of such seriousness as to constitute a hindrance or obstacle
2 to obtaining employment or to obtaining reemployment if the employee is unemployed. *See, Country*
3 *Wide*, 891 P.2d at 879; NRS 616B.578(3). In *Country Wide*, the Administrative Law Judge, initially
4 determined that Walker's impairment did not constitute a hindrance to his employment or
5 reemployment "because it never caused him to be denied a job nor prevented him from doing his pre-
6 impairment job as a truck driver." *Country Wide*, 891 P.2d at 879. Country Wide argued and the
7 court agreed that the "subjective approach defeats apportionment's purpose of providing employers
8 an incentive to hire the handicapped." *Id.*

10 The court indeed adopted a more objective approach which "looks not to the particular
11 individual's ability to maintain employment, but rather to the nature of the preexisting impairment
12 and the likelihood that an employer would be less likely to hire someone with such an impairment
13 than one without." *Id.* The court in *Country Wide* found that this approach was consistent with the
14 policy considerations extolled by numerous jurisdictions and the Model Workers' Compensation and
15 Rehabilitation Law. *Country Wide*, 891 P.2d at 879.

17 In the present case, the NLTFPD presented written evidence of a spinal condition that pre-
18 dated the subsequent November 2007, industrial injury. The evidence reflects four substantial back
19 injuries all of which required treatment and all incurred with the same employer, the Applicant,
20 NLTFPD. For all of these back injuries pre-dating the November 2007, subsequent injury, the
21 Employee was employed with and filed claims against the NLTFPD. ROA 30-31; ROA 34; ROA
22 45; ROA 57-58; ROA 59; ROA 64-65; ROA 68. The NLTFPD was courtesy copied on claim
23 determination letters relating to all injuries. *Id.* Furthermore, undisputed testimony was presented
24 at the hearing before the board by Sharon Cary, the business manager and human resource director
25 for North Lake Tahoe Fire Protection District, swearing to the fact that the workers' compensation
26 documentation relating to Burgess' prior injuries and the May 7, 2003, was actually kept by the
27
28

1 employer in this instance. ROA 254-255 (Tr., p. 28;1-11 and p. 29;1-10). Most if not all of these
2 injuries required Burgess to miss work either in the form of disability or for treatment. The NLTFPD
3 was intimately aware of problems with Burgess back prior to November 2007.

4 The Decision of the Board is legally problematic in numerous areas, primarily, because it
5 does not apply the analysis endorsed by the Nevada Supreme Court. The Court expressed its reliance
6 on the majority analysis as articulated in *Special Fund Div. v. Indus. Com'n of Ariz.*³ See, *Holiday*,
7 274 P.3d at 761-2. This was the approach cited and endorsed in *Holiday*, the only Nevada judicial
8 authority on the issue of SIA reimbursement and employer knowledge. See, *Holiday*, 274 P.3d at
9 761-2. First, the Administrator's recommendation and the Board's subsequent adoption of that legal
10 analysis, unilaterally and improperly characterizes the prior permanent physical impairment as a
11 hyper-specific medical diagnosis of "spondylolisthesis." This is improper and neither the
12 Administrator nor the Board's Decision cites any authority enabling an administrator to *sua sponte*
13 identify the condition upon which the employer knowledge test is to be applied. The record will
14 dictate the condition of the back prior to the subsequent November 2007, industrial injury, not the
15 Administrator's narrow and unilaterally selected medical diagnosis.

16 Second, the Decision employs an incorrect subjective standard, not the proper objective
17 standard, both (1) to the analysis as to whether the employer had knowledge of the written evidence
18 and (2) to the analysis as to whether the permanent physical impairment is of such seriousness as
19 to constitute a hindrance or obstacle to obtaining employment or to obtaining reemployment if the
20 employee is unemployed, without any regard to the role of the applicable inferences analyzed above.

21 Without citing any authority other than citing the governing statute the Decision applies its
22 own narrow subjective analysis as to whether this employer knew about the particular diagnosis
23 "spondylolisthesis." That is not the law and constitutes legal error.

24
25
26
27
28

³ 184 Ariz. 363, P.2d 430 (1995).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

V. CONCLUSION

In accordance with all of the foregoing, the Fire Protection District and PACT respectfully request this Court to enter an order granting their petition for judicial review, reversing the Board's May 14, 2014, made under Claim No. C143-07-02558-01.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

AFFIRMATION

Pursuant to NRS 239B.030

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

DATED this 6th day of February, 2015.

THORNDAL, ARMSTRONG,
DELK, BALKENBUSH & EISINGER

By /s/ John D. Hooks, Esq.
ROBERT F. BALKENBUSH, ESQ.
JOHN D. HOOKS, ESQ.
Thorndal, Armstrong,
Delk, Balkenbush & Eisinger
Attorneys for: North Lake Tahoe Fire Protection
District and Public Agency Compensation Trust

1 IV. CERTIFICATE OF COMPLIANCE

2 I hereby certify that I have read this appellate brief, and to the best of my knowledge,
3 information, and belief, it is not frivolous or interposed for any improper purpose. I further certify
4 that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular
5 N.R.A. P. 28(e), which requires every assertion in the brief regarding matters in the record to be
6 supported by a reference to the page of the transcript or appendix where the matter relied on is to be
7 found. I understand that I may be subject to sanctions in the event that the accompanying brief is not
8 in conformity with the requirements of the Nevada Rules of Appellate Procedure.
9

10 DATED this 6th day of February, 2015.

11
12 THORNDAL, ARMSTRONG,
13 DELK, BALKENBUSH & EISINGER

14 By /s/ John D. Hooks, Esq.
15 ROBERT F. BALKENBUSH, ESQ.
16 JOHN D. HOOKS, ESQ.
17 Thorndal, Armstrong,
18 Delk, Balkenbush & Eisinger
19 Attorneys for: North Lake Tahoe Fire Protection
20 District and Public Agency Compensation Trust
21
22
23
24
25
26
27
28

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), on the 6th day of February, 2015, service of EMPLOYER AND
3 INSURER'S REPLY BRIEF was made upon each of the parties, listed below, via electronic
4 service through the Eighth Judicial District Court's Odyssey E-File and Serve system.
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 6th day of February, 2015.

26
27 /John D. Hooks, Esq./
28

RECEIVED

FEB 24 2015

THORNDAL, ARMSTRONG, DELK
BALKENBUSH & EISINGER

DISTRICT COURT

CLARK COUNTY, NEVADA

Electronically Filed
02/12/2015 04:40:31 PM

North Lake Tahoe Fire Protection
District,

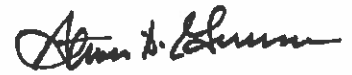
Plaintiff(s),

vs.

Board of Admin of the Subsequent
Injury Account for the Assoc of
Self-Insured,

Defendant(s).

Case No. A702463
Dept No. 32



CLERK OF THE COURT

ORDER SETTING CHAMBER HEARING

TO: Counsel/Parties,

A chamber hearing in the above-referenced matter has been scheduled in District Court, 200
Lewis Avenue, Department 32, for Wednesday, march 18, 2015, in chambers. No appearance
is necessary.

DATED February 9, 2015


Rob Bare

Judge, District Court, Department 32

I hereby certify that on the date filed, I mailed a copy to, or placed a copy in the attorney
folder of the following parties;

Robert Balkenbush, Esq.

Charles R. Zeh, Esq.

Donald C. Smith, Esq.


Tara Duenas
Judicial Executive Assistant

CLERK OF THE COURT
CLERK OF THE COURT

FEB 12 2015

FEB 10 2015

RECEIVED
RECEIVED

55
MC



CLERK OF THE COURT

1 **REQT**

2 Robert F. Balkenbush, Esq.

3 John D. Hooks, Esq.

4 Thorndal, Armstrong, Delk, Balkenbush & Eisinger

5 6590 S. McCarran Blvd., Suite B

6 Reno, Nevada 89509

7 Tel.: (775) 786-2882

8 Fax.: (775) 786-8004

9 Attorneys for: North Lake Tahoe Fire Protection District, Employer, and
10 Public Agency Compensation Trust, Insurer

11 **DISTRICT COURT**

12 **COUNTY OF CLARK, NEVADA**

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

Case No. A-14-702463-J

16 Petitioners,

Dept. No. XXXII

17 vs.

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

27 Respondents.
28 _____/

REQUEST FOR HEARING

29 COMES NOW, Employer, North Lake Tahoe Fire Protection District, and Insurer, Public
30 Agency Compensation Trust, hereby request a hearing in the above-entitled matter pursuant to
31 NRS 233B.133(4). As explained more fully in the previously filed briefs, this appeal concerns a
32 novel issue of statutory interpretation underlying the threshold requirements for reimbursement

1 from the Subsequent Injury Account. The North Lake Tahoe Fire Protection District would
2 respectfully request a hearing before this Court to be heard on this de novo review.

3 The undersigned attorney certifies that a copy of this request has been mailed to all
4 counsel of record.
5

6 **AFFIRMATION**

7 **Pursuant to NRS 239B.030**

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

10 DATED this 13th day of February, 2015.

11
12 THORNDAL, ARMSTRONG,
13 DELK, BALKENBUSH & EISINGER

14 By: /s/ John D. Hooks, Esq.
15 ROBERT F. BALKENBUSH, ESQ.
16 JOHN D. HOOKS, ESQ.
17 Attorneys for: North Lake Tahoe Fire
18 Protection District, and Public Agency
19 Compensation Trust,
20
21
22
23
24
25
26
27
28

1 CERTIFICATE OF SERVICE

2 Pursuant to NRCP 5(b), on the 13th day of February, 2015, service of REQUEST FOR
3 HEARING was made upon each of the parties, listed below, via electronic service through the
4 Eighth Judicial District Court's Odyssey E-File and Serve system.
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

26 DATED this 13th day of February, 2015.
27
28

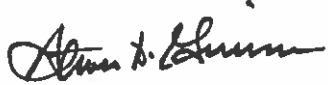
/s/ John D. Hooks, Esq.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Electronically Filed
02/17/2015 09:31:11 AM

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).)


CLERK OF THE COURT


Case No. A702463
Dept No. 32

ORDER SETTING CHAMBER HEARING

TO: Counsel/Parties,

A chamber hearing in the above-referenced matter has been scheduled in District Court, 200
Lewis Avenue, Department 32, for Wednesday, march 18, 2015, in chambers. No appearance
is necessary.

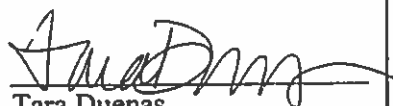
DATED February 9, 2015


Rob Bare
Judge, District Court, Department 32

I hereby certify that on the date filed, I mailed a copy to, or placed a copy in the attorney
folder of the following parties;

- Robert Balkenbush, Esq.
- Charles R. Zeh, Esq.
- Donald C. Smith, Esq.

RECEIVED
FEB 10 2015


Tara Duenas
Judicial Executive Assistant

55
MC

CLERK OF THE COURT
RECEIVED
FEB 10 2015
CLERK OF THE COURT



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
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.

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

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

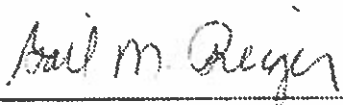
28

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 Code: NOE
2 Charles R. Zeh, Esq.
3 NV State Bar No. 1739
4 The Law Offices of Charles R. Zeh, Esq.
5 575 Forest Street, Suite 200
6 Reno, NV 89509
7 Phone: (775) 323-5700
8 Fax: (775) 786-8183

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,

14 Petitioners,

15 vs.

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

22 Respondents.

Case No. A-14-702463-J

Department No. XXXII

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 ///

Notice of Entry of Order

May 3, 2016

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*

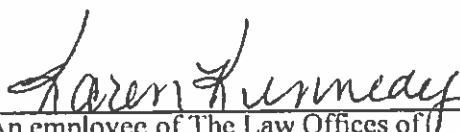
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

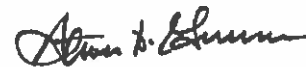
CERTIFICATE OF SERVICE

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 and Public Agency Compensation Trust @</i> at the following e-mail address: rlb@thorndal.com , rbalkenbush@thorndal.com , psb@thorndal.com .
	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
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.

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

19 ///
20 ///
21 ///
22 ///
23 ///
24 ///
25 ///
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 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

Petitioners,

Dept. No. XXXII

15 vs.

16 **THE BOARD FOR ADMINISTRATION OF
17 THE SUBSEQUENT INJURY ACCOUNT
18 FOR THE ASSOCIATIONS OF SELF-
19 INSURED PUBLIC OR PRIVATE
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 **NOTICE OF APPEAL**

26 Notice is hereby given that the above named Petitioners, North Lake Tahoe Fire Protection
27 District, and Public Agency Compensation Trust, by and through their counsel, THORNDAL,
28 ARMSTRONG, DELK, BALKENBUSH & EISINGER, hereby appeal to the Supreme Court of
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

8 **AFFIRMATION**

9 Pursuant to NRS 239B.030

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

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/

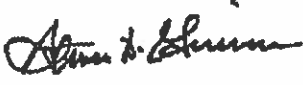
27 MARCY BENNER

EXHIBIT

1

EXHIBIT

1



CLERK OF THE COURT

1 Code: NOE
Charles R. Zeh, Esq.
2 NV State Bar No. 1739
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
AGENCY COMPENSATION TRUST,

14 Petitioners,

15 vs.

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

22 Respondents.

Case No. A-14-702463-J

Department No. XXXII

NOTICE OF ENTRY OF ORDER

23
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 ///

Notice of Entry of Order

May 3, 2016

The Law Offices of Charles R. Zeh, Esq.
575 Forest Street, Suite 200
Reno, Nevada 89509
Tel.: (775) 323-5700 FAX: (775) 786-8183

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.

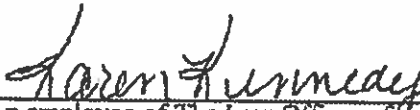
7 Attorneys for Respondent *The Board for*
8 *Administration of the Subsequent Injury Account for*
9 *the Associations of Self-insured Public or Private*
10 Employers
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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 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 **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
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.

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

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

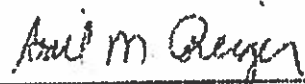
28

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 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

15 vs.

16 THE BOARD FOR ADMINISTRATION OF
17 THE SUBSEQUENT INJURY ACCOUNT
18 FOR THE ASSOCIATIONS OF SELF-
19 INSURED PUBLIC OR PRIVATE
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 N/A - All attorneys are licensed attorneys in the State of Nevada.

5
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.

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, 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
26
27
28

DATED this 3rd day of June, 2016.

/Marcy Benner/

MARCY BENNER

EXHIBIT

1

EXHIBIT

1



CLERK OF THE COURT

1 Code: NOE
Charles R. Zeh, Esq.
2 NV State Bar No. 1739
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
AGENCY COMPENSATION TRUST,

14 Petitioners,

15 vs.

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

22 Respondents.

Case No. A-14-702463-J

Department No. XXXII

NOTICE OF ENTRY OF ORDER

23
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 ///

Notice of Entry of Order

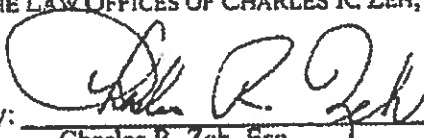
May 3, 2016

The Law Offices of Charles R. Zeh, Esq.
575 Forest Street, Suite 200
Reno, Nevada 89509
Tel.: (775) 323-5700 FAX: (775) 786-8183

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

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

By: 
Charles R. Zeh, Esq.

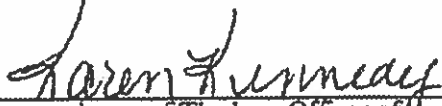
*Attorneys for Respondent The Board for
Administration of the Subsequent Injury Account for
the Associations of Self-insured Public or Private
Employers*

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 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: <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
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." *Ervin 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.

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

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

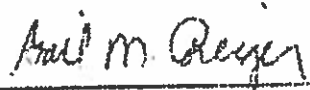
28

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
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

NRAP 7.

AFFIRMATION
Pursuant to NRS 239B.030

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

DATED this 3rd day of June, 2016.

Thorndal Armstrong
Delk Balkenbush & Eisinger

By: / Robert F. Balkenbush, Esq. /
ROBERT F. BALKENBUSH, ESQ.
6590 S. McCarran Blvd., Suite B
Reno, Nevada 89509
Attorneys for County of North Lake Tahoe
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, 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

Case No. 70592

IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Jun 14 2017 04:55 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

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

Appellants

vs.

THE 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,

Respondents

Appeal from District Court Decision and affirming Board decision denying
reimbursement from Subsequent Injury Fund Account
Eighth Judicial District Court
in and for the County of Clark
Department XXXII
Case No.: A-14-702463-J

**JOINT APPENDIX
VOLUME 3 of 3**

ROBERT F. BALKENBUSH, ESQ.
State Bar No. 1246
Thorndal, Armstrong,
Delk, Balkenbush & Eisinger
6590 South McCarran Blvd., Suite B
Reno, Nevada 89509
(775) 786-2882

Attorneys for Appellants

CHARLES ZEH, ESQ.
State Bar No. 1739
The Laws Offices of Charles R. Zeh
575 Forest Street, Suite 200
Reno, NV 89509
(775) 323-5700
Attorney for Respondent
Board of Administration of the
Subsequent Injury Account

DONALD C. SMITH, ESQ.
State Bar No. 00413
JENNIFER J. LEONESCU, ESQ.
State Bar No. 006036
Division of Industrial Relations
1301 N. Green Valley Parkway, # 200
Henderson, NV 89074
Attorneys for Respondent
Administrator, Division of Industrial
Relations

TABLE OF CONTENTS

DOCUMENT	VOLUME NUMBER	PAGE NUMBER
Board's Statement of Intent to Participate in the Petition for Review	1	30-32
Case Appeal Statement	3	502-516
Certificate of Transmittal	2	361-363
Consent to Service by Electronic Means Through E- filing Program	1	33-35
Consent to Service by Electronic Means Through E- filing Program	1	36-38
Decision and Order	3	474-479
Employer's and Insurer's Reply Brief	3	452-468
Initial Appearance Fee Disclosure	1	26-27
Notice of Appeal	3	489-501
Notice of Entry of Order	2	415-421
Notice of Entry of Order	3	480-488
Notice of Entry of Order for Extension of Time For Petitioners to File Opening Brief	2	368-373
Notice of Entry of Order for Second Extension of Time for Petitioners to File Opening Brief	2	378-383
Notice of Posting Cost Bond	3	517-520
Order Setting Chamber Hearing	3	469
Order Setting Chamber Hearing	3	473
Petition For Judicial Review	1	1-25
Petitioners' Opening Brief	2	384-410
Record On Appeal-Part 1	1	42-144
Record On Appeal-Part 2	1 2	145-225 226-248
Record on Appeal-Part 3	2	249-360
Reply Brief	2 3	422-450 451
Request for Hearing	3	470-472

1	Respondent Division of Industrial Relations' Notice	1	28-29
2	and Statement of Intent to Participate		
	NRS233B.130(3)		
3	Second Stipulation and Order for Extension of Time	2	374-377
4	for Petitioners to File Opening Brief		
5	Stipulation and Order for Extension of Time For	2	364-367
6	Petitioners to File Opening Brief		
7	Stipulation and Order for Extension of Time For	2	411-414
8	Respondents to File Reply Brief		
9	Transmittal of Record On Appeal (NRS 233B.131)	1	39-41

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

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
Email: crzeh@aol.com
Attorney for Respondent

DATED this 14th day of June, 2017.

25
26
27
28