IN THE SUPREME COURT OF THE STATE OF NEVADA

NORTH LAKE TAHOE FIRE PROTECTION DISTRICT; AND PUBLIC AGENCY COMPENSATION TRUST, Appellants. vs. THE BOARD OF ADMINISTRATION OF THE SUBSEQUENT INJURY ACCOUNT FOR ASSOCIATIONS OF SELF-INSURED PUBLIC OR PRIVATE EMPLOYERS, AND ADMINISTRATOR OF THE NEVADA DIVISION OF INDUSTRIAL RELATIONS OF THE NEVADA DEPARTMENT OF BUSINESS AND INDUSTRY, Respondents.	**Supreme Court No. 70592** District Court Case No. A702463 On Appeal from the Eighth Judicial District Court of Nevada, Clark County, State of Nevada, The Honorable Rob Bare

APPELLANTS' OPENING BRIEF

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NRAP Rule 26.1 Disclosure by Appellants

The undersigned counsel of record for NORTH LAKE TAHOE FIRE PROTECTION DISTRICT and PUBLIC AGENCY COMPENSATION TRUST (collectively referred to as the Appellants), certify that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

1. NORTH LAKE TAHOE FIRE PROTECTION DISTRICT is a governmental entity, created and organized under NRS Chapter 474, et seq.
2. The PUBLIC AGENCY COMPENSATION TRUST is an association of self-insured Nevada public entities, which was formed under the Interlocal Cooperation Act, as set forth in Section 277.080, et seq.
3. No publically-held company own 10% or more of the NORTH LAKE TAHOE FIRE PROTECTION DISTRICT or the PUBLIC AGENCY COMPENSATION TRUST.
4. The names of the law firms whose partners or associates have appeared for Appellants are as follows: THORNDAL, ARMSTRONG, DELK, BALKENBUSH & EISENGER, 6590 S. McCarran, Suite B, Reno, Nevada 89509.

These representations are made in order that the judges of this court may evaluate possible disqualification and recusal.

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I.

JURISDICTIONAL STATEMENT

The North Lake Tahoe Fire Protection District (hereinafter "the District") and the Public Agency Compensation Trust (hereinafter "PACT") hereby appeal the May 3, 2016, Order entered by the Honorable Rob Bare of the Eighth Judicial District Court of Nevada, in which the District Court denied the Appellants Petition for Judicial Review, brought in accordance with NRS 233B.135. Specifically, the District Court's May 3, 2016, Order affirmed an administrative decision issued by the Board of Administration of the Subsequent Injury Account for the Association of Self-Insured Public or Private Employers (hereinafter "SIA Board"), in which the SIA Board denied the Appellants' request for reimbursement of costs arising from a workers' compensation claim made by a former-firefighter and District employee, hereinafter referred to as "Employee."

The written Notice of Entry of Order was served by regular mail on May 5, 2016, and the Appellants timely filed their Notice of Appeal on June 3, 2016. As such, this Court has jurisdiction over this matter pursuant to NRAP 3A(b)(1), NRS 233B.150 and NRAP 4(a).

II.

ROUTING STATEMENT

This matter pertains to an administrative agency appeal, and should presumptively be assigned to the Court of Appeals pursuant to NRAP 17(b)(4).

III.

STATEMENT OF THE ISSUES

At issue in the present appeal is a question of law regarding the statutory interpretation of NRS 616B.578, which governs reimbursement from Nevada's Subsequent Injury Account for self-insured public or private employers. As this Court is aware, Nevada's Subsequent Injury Account (SIA) was created for the purpose of rewarding employers for hiring and/or retaining workers that have pre-existing medical conditions. Pursuant to NRS 616B.578(4), an employer may qualify for reimbursement under the SIA in one of two ways: (1) by establishing with written records that the employer had knowledge of the "permanent physical impairment" at the time the employee was hired; or (2) by establishing with written records that the employer retained an employee after it acquired knowledge of a "permanent physical impairment." *See Holiday Ret. Corp. v. State Div. of Indus. Rels.*, 128 Nev. 150, 154, 274 P.3d 759, 761 (2012). The appeal at bar concerns the definition of "permanent physical impairment" under NRS 616B.578(3) and the general application of this definition within the context of NRS 616B.578(4) and NRS 616B.578(1).

It is undisputed that the Employee previously sustained multiple workplace injuries to his low back, before the November 30, 2007, subsequent workplace injury at issue. It is also undisputed that the Appellants had knowledge of the Employee's prior accidents, as well as the Employee's resulting lumbar

impairment, which was confirmed by written records. Moreover, it is also undisputed that the November 30, 2007, workplace injury resulted in an exacerbation of the Employee's low back pain and that the Employee's disability was substantially greater due to the combined effects of his preexisting impairment and the subsequent injury than that which would have resulted from the subsequent injury alone. Indeed, a disability rating examination was completed after the November 30, 2007, workplace injury and the Employee was assigned a 21% whole person impairment, half of which was attributed to the Employee's pre-existing lumbar impairment. As such, the record at bar irrefutably confirms that the Appellants were eligible for SIA reimbursement, because the Employee was retained even after the Appellants acquired knowledge of his serious and permanent lumbar condition. *See* NRS 616B.578(1).

Nevertheless, despite the foregoing, the SIA Board denied the Appellants' request for reimbursement on the basis that the Appellants failed to comply with NRS 616B.578(4), i.e. the requirement that employers establish knowledge of a "permanent physical impairment" by written record. JA: Vol. 1, at 20-22. Namely, the SIA Board denied reimbursement because, while the Appellants irrefutably had prior knowledge of the Employee's chronic lumbar condition and had provided written documentation to that effect, the Appellants supposedly failed to provide written records demonstrating prior knowledge of a *specific* low back diagnosis called "spondylolisthesis," which the SIA Board identified as the "permanent

physical impairment." *Id.* [1] As such, armed with its narrow and hyper-specific interpretation of "permanent physical impairment," the SIA Board found that the Appellants failed to comply with the knowledge requirement of NRS 616B.578(4) with respect to spondylolisthesis; therefore, the SIA Board denied the Appellants' entire claim for reimbursement. The SIA Board also erroneously disregarded the undisputed evidence in the record and determined that the Employee's pre-existing lumbar pathology was not serious enough to support a whole person impairment rating of 6% or more, despite the fact that the Employee's rating examination concluded that one-half of the Employee's 21% whole person impairment rating was attributable to his pre-existing lumbar pathology.

Accordingly, there are two separate issues in this present appeal. Initially, the **first issue** in the present appeal is whether NRS 616B.578(4) and the definition of "permanent physical impairment" under NRS 616B.578(3) should be construed so narrowly and with such heightened specificity as to require employers/insurers to establish by written record that they had knowledge of the exact medical diagnosis of an employee's prior condition (i.e. spondylolisthesis), as opposed to general knowledge of a permanent impairment (i.e. the Employee's lumbar

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[1] Spondylolisthesis is defined as "forward displacement of one vertebra over another, usually of the fifth lumbar over the body of the sacrum, or of the fourth lumbar over the fifth, usually due to a developmental defect in the pars interarticularis." Dorland's Illustrated Medical Dictionary 1567 (27th ed. 1988).

impairment). [2] The **second issue** asserted in the present appeal is whether the SIA Board committed a manifest abuse of discretion and legal error by disregarding undisputed expert evidence in the record and finding that the Employee's pre-existing lumbar pathology did not support a whole person impairment rating of 6% and therefore did not qualify as a "permanent physical impairment" under NRS 616B.578(3). Both of these issues will be analyzed in greater detail below.

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[2] The Appellant must note that the "construction of a statute is a question of law, and independent appellate review of an administrative ruling, rather than a more deferential standard of review, is appropriate." *Maxwell v. State Industrial Ins. Sys.*, 109 Nev 327, 849 P.2d 267 (1993)(citing *Nyberg v. Nev. Indus. Comm'n*, 100 Nev. 322, 324, 683 P.2d 3, 4 (1984); and *American Int'l Vacations v. MacBride*, 99 Nev. 324, 326, 661 P.2d 1301, 1302 (1983)).

IV.

STATEMENT OF THE CASE

The Employer is the North Lake Tahoe Fire Protection District. The Insurer is the Public Agency Compensation Trust and the third party administrator of the underlying workers' compensation claim is Alternative Service Concepts, LLC., (hereinafter, "ASC").

This appeal originally stems from a request for reimbursement filed by the Appellants with the SIA Board, in accordance with NRS 616B.578. On September 19, 2013, a hearing was held before the SIA Board and on May 14, 2014, the Board issued its Findings of Fact and Conclusions of Law and Decision, wherein the Appellants' request for reimbursement was denied. However, the SIA Board's Decision was the product of manifest legal error, specifically regarding the Board's flawed statutory interpretation of NRS 616B.578.

As such, the Appellant sought review by the District Court in accordance with NRS 233B.135 and on June 13, 2014, the Appellant filed their Petition for Judicial Review. On May 3, 2017, the District Court denied the Appellants' Petition for Judicial Review and affirmed the erroneous legal conclusions reached in the Board's May 14, 2014, Decision. The Appellants now respectfully asked this Court to reverse the SIA Board's flawed May 14, 2014, Decision, as well as the District Court's erroneous May 3, 2017, Order.

V.

STATEMENT OF FACTS

A. INJURIES AND MEDICAL TREATMENT PRIOR TO THE NOVEMBER 30, 2007 SUBSEQUENT INJURY.

The Employee was hired by the District on October 1, 1981. JA: Vol. 2, at 286. On August 22, 2002, almost twenty years into his career as a paramedic and firefighter, the Employee injured his back while lifting a fire hose. JA: Vol. 1, at 80. The Employee filed a claim for workers' compensation, which was accepted. *Id.* at 90.

On or about November 4, 2002, the Employee's underwent a magnetic resonance imaging examination (MRI) of his lumbar spine, which confirmed a large central disc protrusion at L5-S1 and a degenerative disc bulge at L4-L5. *Id.* at 82. On November 13, 2002, George Mars, M.D., reviewed the MRI and noted that the employee's spine had shown a large central disc protrusion at L5-S1, with possible contact on the bilateral L5 nerve root. *Id.* at 83. Dr. Mars' impression was that the Employee's suffered from a large herniated nucleas pulposus (HNP)at L5-S1, which is commonly referred to as a herniated or slipped disc. *Id.*.

On January 6, 2003, the Employee's low back was evaluated by Hilary L. Fleming, M.D. *Id.* at 84-86. Dr. Flemming noted low back pain with radiculopathy. *Id.* at 86. Dr. Fleming also stated that the Employee's L5 nerve roots appeared to be compromised within the foramina bilaterally, ***probably as a result of listhesis of L5***

on S1, as well as some collapse of the disk. *Id.* Dr. Fleming recommended the continuation of conservative care but noted that the Employee was a "very good candidate for an L5-S1 decompression and fusion to be carried high enough to make sure that the origin of the L5 roots were not impaired in the lateral recess region." *Id.* Conservative care continued through early 2003. *Id.* at 87-88.

On May 3, 2003, the Employee suffered a **second injury** to his back while entering an ambulance. *Id.* at 89-90. This injury was considered an exacerbation of the Employee's previous lumbar claim. *Id.*

On May 7, 2003, a claims adjuster with ASC, which was acting as the third-party administrator for PACT, wrote to Dr. Mars stating:

> [W]e note that this is the 3rd or 4th time he has exacerbated his low back since inception of this claim from performing seeming routine duties. We are concerned, however, due to the frequency and seeming ease of recurrence, that the underlying low back condition you have described as a large HNP at L5-S1, may predispose [the employee] to sustaining a severe worsening forcing surgery if he continues to work full duty as a firefighter.

Id. at 90. A courtesy copy of the above-described letter was then sent to the District. *Id.*

On May 7, 2003, Dr. Mars evaluated the Employee and noted that he suffered from a large central disc protrusion at LS-SI. *Id.* An epidural injection was recommended and on June 4, 2003, during a second appointment in response to Mr. Livermore's letter, Dr. Mars indicated that the Employee should have permanent restrictions and that the Employee would eventually need a disability retirement.

Id. at 92. Dr. Mars specifically stated that, "The patient and I had a long discussion about continued medical care and the fact that he wants to be off work. I feel at this point he really should be on permanent limits of probably 80 pounds. This would probably be a limit that he would have to adhere to for the rest of his life." *Id.* Dr. Mars continues, "[a]s far as working as a firefighter he currently is at risk for himself and other people. He would like to be on regular duty, that may be his choice but very likely due to the problems of his back and knees he is eventually going to have to have a disability retirement." *Id.*

Following this note from Dr. Mars, the Employee was seen for treatment and evaluation by Michael Shapiro, M.D., who diagnosed him with discogenic lumbar pain, secondary to a herniated disk at LS-S1. *Id.* at 93-94. Before Dr. Shapiro would agree to return the Employee to his job as a firefighter, Dr. Shapiro required the Employee to take a functional capacity examination, which he ultimately passed and returned to work. *Id.* at 97-99.

On February 25, 2004, the Employee suffered a **third injury** to his back, due to a slip and fall on ice, in which the Employee injured his tail bone/sacrum. *Id.* at 102-104. The Employee received conservative treatment and returned to work. *Id.* at 105-108.

On July 17, 2007, the Employee suffered a **fourth injury** to his back when he slipped off a running board of a fire truck. *Id.* at 109-114. The resulting diagnosis was lumbar strain with radiculopathy. *Id.* at 110. When seen at the

Incline Village hospital, the history and physical notes make reference to a bulging disk at L3-L4. *Id.* at 109-114. The Employee again received conservative treatment and returned to work. *Id.*

For all of these back injuries pre-dating the November 2007, subsequent injury, the Employee was employed with and filed claims for workers' compensation with the District. *Id.* at 75-76; 79; 90; 102-103; 104; 109-110; 113. The record confirms that ASC courtesy copied the District on claim determination letters relating to all of the Employee's prior workplace injuries. *Id.* Furthermore, undisputed testimony was presented to the SIA Board, in which it was confirmed that the District had actually maintained a workers' compensation file relating to the Employee's prior workplace injuries. JA: Vol. 2, at 307-308. In short, based on the written record of the Employee's workers' compensation claims, it is irrefutable that the Appellants had actual knowledge of the Employee's low back injuries and his resulting lumbar condition.

B. The Employee's Subsequent Injury of November 30, 2007.

On November 30, 2007, the Employee again injured his lower back while carrying someone up a flight of stairs in a chair designed for this purpose. JA: Vol. 1, at 115-117. The Employee was seen by Daniel Peterson, M.D. who noted a history of "chronic low back pain with recent exacerbation." *Id.* at 116. This November 2007 injury lingered for some time and the Employee ultimately sought care through workers' compensation on January 29, 2008. *Id.* at 119.

On January 5, 2009, Bruce E. Witmer, M D., evaluated the Employee's lower back. *Id.* at 176. Dr. Witmer felt that the current industrial injury appeared to be an aggravation of a previously existing lumbar disc abnormality, with lumbar radiculitis, spondylolisthesis and chronic pain. *Id.*

During 2009, the Employee underwent conservative care and injection to his back. *Id.* at 160-161. Surgery was then recommended and it was explained to the Employee that if he now underwent surgery, then he would likely not be able to return to work as a firefighter. *Id.* at 161. On March 15, 2010, the Employee finally underwent a posterior decompression and fusion at the L4-5 and L5-S1 levels, which was first recommended in 2003. *Id.*

On April 6, 2011, the Employee returned to Dr. Hall and discussed his ability to return to work and his "multiple work injuries to his lumbar spine in the past." *Id.* at 151. Dr. Hall opined that the Employee could not return to work full duty because he was concerned that the Employee's return to work would compromise personal and public safety, while almost certainly resulting in re-injury. *Id.* at 151; *see also* JA: Vol. 2, at 296.

On November 21, 2011, the Employee was evaluated by Jay Betz, M.D., who found that the Employee had sustained a 21% whole person impairment (WPI), **half of which was apportioned to the Employee's pre-existing pathologies** "leaving no more than 11% WPI associated with the patient's occupational injury of 11/30/2007." *Id.* at 173. David Berg, D.C., the rating chiropractor, agreed with

this assessment. *Id.* at 184.

On November 28, 2011, Dr. Betz performed a Subsequent Injury Fund Analysis. *Id.* at 174-180. Dr. Betz reiterated his findings, which apportioned the 21% WPI at 50% for the preexisting spinal pathologies and 50% for the subsequent industrial injury. *Id.* Thus, Dr. Betz apportioned at least 10% WPI to the Employee's pre-existing lumbar pathologies. *Id.* In Dr. Betz's opinion, 95% of the cost of the current claim was attributable to the preexisting pathology of the lumbar spine. *Id.* at 180. Therefore, in the opinion of Dr. Betz, this claim was clearly eligible for subsequent injury account reimbursement. *Id.* In his report, Dr. Betz specifically notes as follows:

> "[the Employee] has been evaluated and treated for low back problems at least as early as 2002 at which time an MRI apparently showed a disk protrusion at L5-S1. Surgical decompression and fusion was considered in 2003 but not pursued. [the Employee] was treated for recurrent low back problems in 2004 and 2006 and was diagnosed with radiculopathy in July 2007, 4 months before his subsequent injury. Imaging following the patient's subsequent injury on 11/30/2007 revealed preexisting spondylolysis with spondylolisthesis at the L4-5 and L5-S1 disc levels."

Id. at 174.

Dr. Betz also stressed that:

> "[the Employee]'s lumbar pathologies clearly predate his occupational subsequent injury. Not only did he have unstable spondylolysis with spondylolisthesis, which is a preexisting developmental problem, it is also well documented, that he was having significant symptoms from these pathologies dating back to at least 2002 and was considered for fusion to address his instability as early as 2003.

Id. at 179.

Accordingly, Appellants based their request for reimbursement on the "10%

lumbar spine" impairment confirmed by Dr. Betz, which was specifically attributed to the Employee's *pre-existing* lumbar pathologies. *Id.* at 211.[3]

VI.

LEGAL ARGUMENT

A. The SIA Board committed clear legal error when it narrowly construed the definition of "permanent physical impairment" when considering whether the Appellants were entitled to reimbursement.

As this Court is aware, the rationale behind the existence of the Subsequent Injury Account is to encourage employers to hire and retain workers who have pre-existing conditions and provide relief to employers who hire and retain workers with pre-existing conditions when such an worker sustains a subsequent compensable injury. *Holiday*, 274 P.3d 759. An employer may request such relief through the SIA, provided that the employer can satisfy various statutory conditions. *See* NRS 616B.578; *see also Holiday*, 274 P.3d at 760. One of these statutory conditions requires the employer to "establish by written records that the employer had knowledge of the 'permanent physical impairment' at the time the employee was hired or that the employee was retained in employment after the

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[3] Dr. Betz goes on to explain that this claim should qualify for subsequent injury account relief because the Employee clearly has at least 6% WPI impairment preexisting the subsequent injury. By way of example, he notes that symptomatic spondylolysis with spondylolisthesis alone is associated with at least 7% WPI. He also mentions that "To that would be combined any allowances for ROM [range of motion] loss which most certainly were present prior to the subsequent injury based on this patient's long history of pain requiring treatment." *Id.* at 179.

employer acquired such knowledge," as permanent physical impairment is defined in NRS 616B.578(3). *See* NRS 616B.578(4); *see also Holiday*, 274 P.3d at 760. The Nevada Supreme Court has held that the "knowledge requirement" within the context of the subsequent injury fund requires that an employer acquire knowledge of an employee's permanent physical impairment "before the subsequent injury occurs to qualify for reimbursement." *Holiday*, 274 P.3d at 760. Thus, an employer who obtains knowledge of an employee's "permanent physical impairment" and then hires or retains that employee would be entitled to relief under the SIA, given the various remaining requirements were met.

NRS 616B.578(3) defines "permanent physical impairment" as "any permanent condition, whether congenital or caused by injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining re-employment if the employee is unemployed." The question then arises what type of knowledge of an employee's "permanent physical impairment" is sufficient under NRS 616B.578(4): i.e. does Nevada law require that an employer demonstrate general knowledge of an employee's permanent impairment (such as the Appellants' knowledge of the Employee's lumbar impairment), or does Nevada law require an employer to demonstrate perfect knowledge of every single medical diagnosis.

As noted above, the SIA Board narrowly construed the definition of "permanent physical impairment" under NRS 616B.578(3) and found that, while

the Appellants certainly had knowledge of the Employee's pre-existing lumbar impairment, the Appellants did not prove it had specific knowledge of spondylolisthesis prior to the subsequent November 2007, industrial injury. *See* JA: Vol. 1, at 21; *see also* JA: Vol. 3, 476. However, the Appellants submit that neither NRS 616B.578(3) nor NRS 616B.578(4) require proof that the employer had perfect knowledge of every single specific medical diagnosis made with respect to an employee but merely that an employer has general knowledge of a permanent, pre-existing impairment which amounts to a hindrance or obstacle to obtaining employment or to obtaining reemployment (such as the Employee's pre-existing lumbar impairment). Not only does the plain language of NRS 616B.578(3) and NRS 616B.578(4) support a broad (and logical) interpretation of "permanent physical impairment," but case precedent and sound public policy suggest that NRS 616B.578(3) and NRS 616B.578(4) merely require that an employer demonstrate general knowledge of a permanent impairment which could pose a hindrance to employment/reemployment - not exacting knowledge of specific medical diagnoses. As such, the determination of the SIA Board constituted an unmistakable error of law and must be set aside.

Initially, the Appellants note that the plain language of NRS 616B.578(3) suggest that an employer's general knowledge of an employee's permanent impairment is sufficient to satisfy the knowledge requirement under NRS 616B.578(4). *See Washington v. State*, 117 Nev. 735, 738-39, 30 P.3d 1134, 1136

(2001) (statutes are interpreted based on their plain meaning and must be interpreted harmoniously with other statutes so as not to produce unreasonable or absurd results.) Nowhere does NRS 616B.578(3) instruct that a "permanent physical impairment" must be identified in precise medical terms, nor does NRS 616B.578(4) instruct that a employer must have knowledge of an employee's specific medical diagnoses. Instead, NRS 616B.578(3) and NRS 616B.578(4) merely require that an employer demonstrate knowledge of any impairment that is so serious that it poses a hindrance to employment or reemployment. In fact, it is noteworthy that even the term "permanent physical impairment" is broadly defined as "any" permanent condition which is of "such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining reemployment . . ." *See* NRS 616B.578(3).

A narrow interpretation of NRS 616B.578, such as that utilized by the SIA Board, would lead to absurd results and would defeat the clear intent of the overall statute, which is meant to reward employers for hiring/retaining an employee despite knowing that the employee has a serious pre-existing impairment. Moreover, since employers are not medical experts, it is patently unreasonable to demand that employers identify every permanent physical impairment in strict medical terms in order to qualify for reimbursement. As such, a narrow reading of NRS 616B.578(3) and NRS 616B.578(4), wherein employers must prove knowledge of precise medical diagnoses, is not only contrary to the plain meaning

the statute but would undeniable lead to unreasonable, absurd and contradictory results.

Simply put, to construe NRS 616B.578(3) and NRS 616B.578(4) in the narrow manner suggested by the SIA Board would be to prioritize form over substance and would create a vehicle whereby the SIA Board can arbitrarily deny reimbursement if an employer cannot prove specific knowledge of every single medical diagnosis made with respect to an injured employee. In fact, the matter at bar is the perfect example. The record on appeal irrefutably confirms that the Appellants were aware of the Employee's pre-existing lumbar impairment and voluntarily chose to retain the Employee despite that knowledge [4]; however, the SIA Board arbitrarily chose to deny reimbursement herein because the Appellants supposedly failed to demonstrate knowledge of one specific medical diagnosis made with regard to the Employee's lumbar spine (spondylolisthesis). Under these facts, the Appellant's general knowledge of the Employee's pre-existing lumbar pathology, which was confirmed by written record, should have been sufficient to satisfy the elements of NRS 616B.578(1) and NRS 616B.578(4).

Apart from the plain meaning of NRS 616B.578, persuasive case precedent from other jurisdictions also suggest that in order to seek reimbursement from the SIA an employer is **not** required to demonstrate perfect knowledge of every single medical diagnosis made with respect to an injured employee, but that general

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[4] JA: Vol. 1, at 75-76; 79; 90; 102-103; 104; 109-110; 113.

knowledge of a serious impairment is sufficient. *See Kennecott Copper Corporation v. Chavez*, 111 N.M. 366, 805 P.2d 633, 637-38 (App. 1990) ("An employer is not required to know the medical specifics of an impairment, as long as knowledge of the impairment is present."); *see also Denton v. Sunflower Elec. Co-Op,* 12 Kan. App. 2d 262, 740 P.2d 98 (1987) (knowledge of low back problems lasting ten years was sufficient without knowing that the problems were caused by degenerative disc disease); *Veco Alaska, Inc. v. State*, 189 P.3d 983, 989 (2008) ("In looking at what the employer needs to show to qualify for Second Injury Fund reimbursement, we previously held that the written record does not need to contain the exact medical terminology describing the condition."); *Kirchner v. Standard Rochester Brewing Co.*, 18 A.D.2d 1114, 238 N.Y.S.2d 1019 (1963). Scholarly treatises similarly instruct that "[i]t is clear that the employer does not have to know exactly what the employee's prior condition is in medical terms." 5 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 91.03[3] (2000). As such, these cases and treatises all present a general rule that if the written record shows that an employee had a permanent or chronic condition that could be a hindrance to employment, the knowledge requirement would be satisfied even if the employer did not precisely identify the specific medical condition at issue. Accordingly, with the foregoing persuasive precedent as a guide, the Appellants again submit that specific knowledge of "spondylolisthesis" was not required in the matter at bar, because it is undisputed that the Appellants did have knowledge of

the Employee's pre-existing lumbar impairment. JA: Vol. 1, at 75-76; 79; 90; 102-103; 104; 109-110; 113.

What is more, sound public policy also suggests that employers are not required to demonstrate specific knowledge of an employee's prior condition in medical terms because the clear purpose of the NRS 616B.578 is to reward employers for hiring/retaining disabled employees, regardless of whether the employer's knowledge of the disability is general or specific. In other words, the focus of NRS 616B.578 is on whether knowledge of a prior handicap (whether general or specific) has impacted the employer's hiring policy in a manner that favors employment of a disabled employees. However, requiring employers to provide evidence that they had specific knowledge of an employee's exact condition in precise medical terms will unreasonably hinder the ability of employers to seek reimbursement under the fund, which will logically impact employers' willingness to hire and retain disabled individuals - which is contrary to the entire point of the statute. As such, the Appellants submit that sound public policy confirms that employers need merely demonstrate general knowledge of a permanent impairment - not perfect knowledge of an employee's specific medical diagnosis. [5]

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[5] Even assuming arguendo that specific knowledge of a medical condition (in medical terms) is required for reimbursement under NRS 616B.578, the Employee's physicians specifically noted "listhesis" as far back as January 6, 2003. JA: Vol. 1, at 86. Furthermore, these same medical records were received by ASC on January 17,

Lastly, as an additional matter, the SIA Board also erred as a matter of law in unilaterally characterizing the prior permanent physical impairment at issue as the hyper-specific medical diagnosis of "spondylolisthesis." JA: Vol. 1, at 6. As noted previously, the "Subsequent Injury Checklist" submitted by the Appellants clearly states that the pre-existing permanent physical impairment at issue was an impairment of the "lumbar spine," not specifically spondylolisthesis. *Id.* at 211. As such, the SIA Board apparently decided, *sua sponte*, to selectively identify the condition upon which the employer knowledge test under NRS 616B.578(4) was to be applied; however, this was patently improper and the SIA Board has failed to cite any authority to support the notion that the SIA Board can unilaterally pick and choose the permanent physical impairment at issue. Furthermore, this error was irrefutably prejudicial to the Appellants, as the written record confirms that the Appellants did have knowledge of the Employee's pre-existing lumbar impairment - which clearly qualified as a permanent physical impairment NRS 616B.578(3). *Id.* at 174-180.

B. THE SIA BOARD COMMITTED LEGAL ERROR BY DISREGARDING THE UNCONTROVERTED EXPERT OPINIONS OF DR. BETZ AND RATING CHIROPRACTOR DAVID BERG.

The Nevada Supreme Court has specifically found that "[t]o be arbitrary and

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2003, which is well before the Employee's November 2007 subsequent injury. Thus, even under the SIA Board's narrow interpretation of NRS 616B.578(3) and NRS 616B.578(4), the Appellants are still entitled to reimbursement.

capricious, the decision of an administrative agency must be in disregard of the facts and circumstances involved." *Meadow v. Civil Service Bd. of LVMPD*, 105 Nev. 624, 627, 781 P.2d 772, 774 (1989). Likewise, courts in other jurisdictions have held that it is a fundamental abuse of discretion for a trier of fact to disregard relevant, uncontested facts. *See Roberts v. Whirlpool*, 284 S.W.3d 100, 103-04 (2008).

Here, the SIA Board erroneously disregarded the undisputed evidence in the record and determined that the Employee's pre-existing lumbar pathology was not serious enough to support a whole person impairment rating of 6% or more and, therefore, did not qualify as a permanent impairment under NRS 616B.578(3). JA: Vol. 1, at 22. Specifically, the SIA Board found that "[w]hile the injured worker was enduring lower back pain to November 30, 2007, he did not endure a lower back injury that was bad enough to satisfy NRS 616B.578(3), where the definition of preexisting permeant impairment is found." *Id.* Accordingly, the SIA Board found that the Employee's pre-existing lumbar condition did not satisfy the threshold requirements of NRS 616B.578(3) and, therefore, the Appellants had failed to demonstrate knowledge of a "permanent impairment" in accordance with NRS 616B.578(4). *Id.*

Simply put, the SIA Board's foregoing analysis is contrary to the undisputed evidence in the record and, as such, represents a manifest abuse of discretion and error of law. *See Meadow*, 105 Nev. at 627. As noted above, the Employee was

evaluated on November 21, 2011, by Dr. Betz, who found that the Employee had sustained a 21% whole person impairment (WPI), **half of which was apportioned to the Employee's pre-existing pathologies.** *Id.* at 173. Rating chiropractor David Berg later agreed with this assessment. *Id.* at 184. On November 28, 2011, Dr. Betz performed a Subsequent Injury Fund Analysis and specifically apportioned half of the 21% WPI to the Employee's preexisting spinal pathologies. *Id.* at 174-180. In fact, Dr. Betz concluded that 95% of the cost of the current claim was attributable to the preexisting pathology of the lumbar spine; therefore, in the opinion of Dr. Betz, this claim was clearly eligible for subsequent injury account reimbursement. *Id.* at 180. Dr. Betz also stressed that the Employee's "lumbar pathologies clearly predate his occupational subsequent injury" and that "[n]ot only did he have unstable spondylolysis with spondylolisthesis, which is a **preexisting** developmental problem, it is also well documented that he was having significant symptoms . . . dating back to at least 2002 . . ." *Id.* at 179. (Emphasis added).

The foregoing expert opinions are uncontroverted and, therefore, it is respectfully submitted that the SIA Board abused its discretion by wholly disregarded these uncontroverted expert opinions and thereby finding that the Employee's pre-existing lumbar condition was not serious enough to satisfy the definition of preexisting permeant impairment under NRS 616B.578(3). Furthermore, since the Employee's lumbar impairment irrefutably satisfies the definition of "permeant physical impairment" under NRS 616B.578(3), the

Appellants were entitled to reimbursement from the Subsequent Injury Account.

VII.

CONCLUSION

In accordance with the foregoing, the North Lake Tahoe Fire Protection District and PACT respectfully request this Court to enter an order reversing the May 14, 2014, Decision of the Board of Administration of the Subsequent Injury Account for the Association of Self-Insured Public or Private Employers, as well as the District Court's May 3, 2016, Order that affirmed said decision.

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word Perfect, Version 7, size 14, Times New Roman.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7)(A) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, and contains 4,369 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 5(b), I certify that I am an employee of Thorndal Armstrong Delk Balkenbush & Eisinger, and that on this date I caused the foregoing **APPELLANTS' OPENING BRIEF** to be filed electronically with the Nevada Supreme Court.

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