IN THE SUPREME COURT OF THE STATE ON NEVADA

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NORTH LAKE TAHOE FIRE PROTECTION DISTRICT; PUBLIC AGENCY COMPENSATION TRUST; PUBLIC AGENCY RISK MANAGEMENT; AND ALTERNATIVE SERVICE CONCEPTS, LLC, **Appellants,** **vs.** **BOARD FOR ADMINISTRATION OF THE SUBSEQUENT INJURY ACCOUNT FOR THE ASSOCIATIONS OF SELF-INSURED PUBLIC OR PRIVATE EMPLOYERS, and ADMINISTRATOR OF THE NEVADA DIVISION OF INDUSTRIAL RELATIONS OF THE NEVADA DEPARTMENT OF BUSINESS AND INDUSTRY,** **Respondents.**	**Supreme Court No. 70592** **District Court Case No. A702463**

APPEAL FROM DISTRICT COURT, CLARK COUNTY, NEVADA
ADDENDUM TO RESPONDENT'S ANSWERING BRIEF

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

Dated this 12th day of September, 2017. The Law Offices of Charles R. Zeh, Esq.

By: _____

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Certificate of Service

Pursuant to NRCP 5(b), I certify that I am an employee of The Law Offices of Charles R. Zeh, Esq., and that on this date I served the attached *Addendum to Respondent's Answering 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: Robert F. Balkenbush, Esq. Thorndal Armstrong Delk Balkenbush & Eisinger 6590 S. McCarran Blvd., Suite B Reno, NV 89509 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 89074-6497
	Personal delivery
	Telephonic Facsimile at the following numbers:
	Federal Express or other overnight delivery
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Dated this 12th day of September, 2017.

Karen Kennedy

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

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NRS 616B.563 "Board" defined. As used in NRS 616B.563 to 616B.581, inclusive, unless the context otherwise requires, "Board" means the Board for the Administration of the Subsequent Injury Account for Associations of Self-Insured Public or Private Employers created pursuant to NRS 616B.569.

(Added to NRS by 1995, 2125; A 2001, 2760)

NRS 616B.569 Board for Administration of Subsequent Injury Account for Associations of Self-Insured Public or Private Employers: Creation; membership; officers; vacancies; members serve without compensation; legal counsel.

1. There is hereby created the Board for the Administration of the Subsequent Injury Account for Associations of Self-Insured Public or Private Employers, consisting of five members who are members of an association of self-insured public or private employers. The members of the Board must be appointed by the Governor.
2. The members of the Board shall elect a Chair and Vice Chair from among the members appointed. After the initial election of a Chair and Vice Chair, each of those officers shall hold office for a term of 2 years commencing on July 1 of each odd-numbered year. If a vacancy occurs in the office of the Chair or Vice Chair, the members of the Board shall elect a replacement for the remainder of the unexpired term.
3. Vacancies on the Board must be filled in the same manner as original appointments.
4. The members of the Board serve without compensation.
5. A legal counsel that has been appointed by or has contracted with the Division pursuant to NRS 232.660 shall serve as legal counsel of the Board.

(Added to NRS by 1995, 2125; A 2001, 2760)

NRS 616B.572 Board for Administration of Subsequent Injury Account for Associations of Self-Insured Public or Private Employers: Meetings; regulations; quorum; administration of Account.

1. The members of the Board may meet throughout each year at the times and places specified by a call of the Chair or a majority of the Board. The Board may prescribe rules and regulations for its own management and government. Three members of the Board constitute a quorum, and a quorum may exercise all the power and authority conferred on the Board. If a member of the Board submits a claim against the Subsequent Injury Account for Associations of Self-Insured Public or Private Employers, that member shall not vote on or otherwise participate in the decision of the Board concerning that claim.
2. The Board shall administer the Subsequent Injury Account for Associations of Self-Insured Public or Private Employers in accordance with the provisions of NRS 616B.575, 616B.578 and 616B.581.

(Added to NRS by 1995, 2125; A 1997, 593; 2001, 2760)

NRS 616B.575 Creation and administration of Subsequent Injury Account for Associations of Self-Insured Public or Private Employers; assessment rates, payments and penalties.

1. There is hereby created in the Fund for Workers' Compensation and Safety in the State Treasury the Subsequent Injury Account for Associations of Self-Insured Public or Private Employers, which may be used only to make payments in accordance with the provisions of NRS 616B.578 and 616B.581. The Board shall administer the Account based upon recommendations made by the Administrator pursuant to subsection 8.
2. All assessments, penalties, bonds, securities and all other properties received, collected or acquired by the Board for the Subsequent Injury Account for Associations of Self-Insured Public or Private Employers must be delivered to the custody of the State Treasurer.
3. All money and securities in the Account must be held by the State Treasurer as custodian thereof to be used solely for workers' compensation for employees of members of Associations of Self-Insured Public or Private Employers.
4. The State Treasurer may disburse money from the Account only upon written order of the Board.
5. The State Treasurer shall invest money of the Account in the same manner and in the same securities in which the State Treasurer is authorized to invest State General Funds which are in the custody of the State Treasurer. Income realized from the investment of the assets of the Account must be credited to the Account.
6. The Board shall adopt regulations for the establishment and administration of assessment rates, payments and penalties. Assessment rates must result in an equitable distribution of costs among the associations of self-insured public or private employers and must be based upon expected annual expenditures for claims for payments from the Subsequent Injury Account for Associations of Self-Insured Public or Private Employers.
7. The Commissioner shall assign an actuary to review the establishment of assessment rates. The rates must be filed with the Commissioner 30 days before their effective date. Any association of self-insured public or private employers that wishes to appeal the rate so filed must do so pursuant to NRS 679B.310.
8. The Administrator shall:

(a) Evaluate any claim submitted to the Board for payment or reimbursement from the Subsequent Injury Account for Associations of Self-Insured Public or Private Employers and recommend to the Board any appropriate action to be taken concerning the claim; and

(b) Submit to the Board any other recommendations relating to the Account.

(Added to NRS by 1995, 2126; A 1997, 128; 1999, 1773; 2001, 2450, 2761)

NRS 616B.578 Payment of cost of additional compensation resulting from subsequent injury of employee of member of association of self-insured public or private employers. Except as otherwise provided in NRS 616B.581:

1. If an employee of a member of an association of self-insured public or private employers has a permanent physical impairment from any cause or origin and incurs a subsequent disability by injury arising out of and in the course of his or her employment which entitles the employee to compensation for disability that is substantially greater by reason of the

combined effects of the preexisting impairment and the subsequent injury than that which would have resulted from the subsequent injury alone, the compensation due must be charged to the Subsequent Injury Account for Associations of Self-Insured Public or Private Employers in accordance with regulations adopted by the Board.

2. If the subsequent injury of such an employee results in his or her death and it is determined that the death would not have occurred except for the preexisting permanent physical impairment, the compensation due must be charged to the Subsequent Injury Account for Associations of Self-Insured Public or Private Employers in accordance with regulations adopted by the Board.

3. As used in this section, "permanent physical impairment" means 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 reemployment if the employee is unemployed. For the purposes of this section, a condition is not a "permanent physical impairment" unless it would support a rating of permanent impairment of 6 percent or more of the whole person if evaluated according to the American Medical Association's *Guides to the Evaluation of Permanent Impairment* as adopted and supplemented by the Division pursuant to NRS 616C.110.

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

5. An association of self-insured public or private employers must submit to the Board a claim for reimbursement from the Subsequent Injury Account for Associations of Self-Insured Public or Private Employers.

6. The Board shall adopt regulations establishing procedures for submitting claims against the Subsequent Injury Account for Associations of Self-Insured Public or Private Employers. The Board shall notify the Association of Self-Insured Public or Private Employers of its decision on such a claim within 120 days after the claim is received.

7. An appeal of any decision made concerning a claim against the Subsequent Injury Account for Associations of Self-Insured Public or Private Employers must be submitted directly to the district court.

(Added to NRS by 1995, 2126; A 2001, 2761; 2007, 393)

NRS 616B.581 Reimbursement of Association of Self-Insured Public or Private Employers for cost of additional compensation resulting from subsequent injury.

1. An association of self-insured public or private employers that pays compensation due to an employee who has a permanent physical impairment from any cause or origin and incurs a subsequent disability by injury arising out of and in the course of his or her employment which entitles the employee to compensation for disability that is substantially greater by reason of the combined effects of the preexisting impairment and the subsequent injury than that which would have resulted from the subsequent injury alone is entitled to be reimbursed from the Subsequent Injury Account for Associations of Self-Insured Public or Private Employers if:

(a) The employee knowingly made a false representation as to his or her physical condition at the time the employee was hired by the member of the Association of Self-Insured Public or Private Employers;

(b) The employer relied upon the false representation and this reliance formed a substantial basis of the employment; and

(c) A causal connection existed between the false representation and the subsequent disability.

➥ If the subsequent injury of the employee results in his or her death and it is determined that the death would not have occurred except for the preexisting permanent physical impairment, any compensation paid is entitled to be reimbursed from the Subsequent Injury Account for Associations of Self-Insured Public or Private Employers.

2. An association of self-insured public or private employers shall notify the Board of any possible claim against the Subsequent Injury Account for Associations of Self-Insured Public or Private Employers pursuant to this section no later than 60 days after the date of the subsequent injury or the date the employer learns of the employee's false representation, whichever is later.

(Added to NRS by 1995, 2127; A 2001, 2762)

IN THE SUPREME COURT OF THE STATE ON NEVADA

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I. Statement of Issues on Appeal

The issues raised by this appeal are:

1. Is there substantial evidence in the record to support the Board's finding that the preexisting condition was spondylolisthesis?

2. Is there substantial evidence in the record to support the Board's finding that spondylolisthesis was not discovered until after the date of the subsequent industrial injury?

3. Is there substantial evidence to support the Board's findings that the known insults to the injured worker's back which occurred prior to the date of the subsequent industrial injury would not support a rating of 6% or more, WPI, as required by NRS 616B.578(3) and, therefore, themselves were not preexisting permanent impairments which could justify approval of the claim for reimbursement?

4. Is the Board correct as a matter of law that the preexisting permanent physical impairment upon which an applicant for reimbursement relies must satisfy the 6% Rule as well as pose a hindrance to employment and then, combine

with the preexisting condition to substantially increase the compensation paid, as a condition precedent to eligibility?

5. Conversely, is the Board correct as a matter of law to take the position that even if the applicant can show, as alleged here, that the preexisting condition is a serious or long term condition, the applicant must fail unless it can also show that the condition would support a rating of 6% or more, WPI, *i.e.*, satisfy the 6% Rule of NRS 616B.578(3)?

II. Introduction and Statement of the Case

Nevada's Subsequent Injury Account for the Associations of Self-insured Public or Private Employers (the Account)[1] is a workers' compensation program that was created to encourage self-insured employer members of associations, as in this case, to hire or retain workers with preexisting disabling conditions.

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[1]The Account is administered by the Board for the Administration of the Subsequent Injury Account for Self-insured Public or Private Employers (the Board and Respondent herein). *See*, NRS 616B.563. The Administrator (Administrator) of the Division of Industrial Relations (DIR) makes recommendations to the Board for the acceptance or rejection of applications for reimbursement submitted by the member Associations. NRS 616B.575(8). In the exercise of its plenary authority, the Board approves in whole or in part, applications for reimbursement from the Account such as in the instant appeal. NRS 616B.575(1) and NRS 616B.578(6).

CRYSTAL M. MCGEE, BACKGROUND PAPER 01-1, A STUDY OF SUBSEQUENT INJURY FUNDS, Research Division Legislative Counsel Bureau (September 2000), p.1. This purpose is accomplished through economic relief provided to those employers who knowingly accept the risk associated with the hiring or retention in employment of already impaired workers. *See*, NRS 616B.578(4). This risk is minimized by reimbursement from the Account to the self-insured for the compensation paid in the event of a subsequent industrial injury, if the compensation paid the injured worker is substantially greater by reason of the combined effects of the preexisting permanent physical impairment and the subsequent industrial injury. *See*, NRS 616B.578(1) the "combined effects" Rule.

The District must show the presence of a preexisting permanent physical impairment before reimbursement may be had from the Account. *See*, NRS 616B.578(3) wherein the 6% Rule is found. According to NRS 616B.578(4), the District must prove that the District had knowledge of the preexisting impairment either at the time of hire, or while the employee was retained in employment, but before the subsequent industrial injury occurred. *See, Holiday Ret. Corp. v. State*

Div. of Indus. Rels., 274 P.3d 759 (2012).

This case revolves around an accident prone, retired member of the District. After a relatively incident free career with the District, the injured worker suffered four back injuries toward the end of his tenure. Though the District labels these four back injuries as abiding and serious conditions, JA Vol. 1, at 339;3-6, none, individually, or in concert supported a rating according to the *American Medical Association, Guides to the Evaluation of Permanent Impairment*, Sixth Edition, (2008) of 6% or more, PPD, whole person. JA Vol. 1, at 178, 179.

The appeal, itself, involves the meaning and application of the written knowledge requirement of NRS 616B.578(4) and the definition of a permanent physical impairment contained in NRS 616B.578(3). The District claims that a written record showing the employer had "general knowledge of a permanent impairment," *see*, Appellants' Opening Brief, p. ix., (AOB) is sufficient to satisfy the written knowledge requirement of NRS 616B.578(4), provided the condition is also a hindrance to the injured worker's employment. The District completely disregarded the role of the 6% Rule of NRS 616B.578(3), in the definition of a

permanent physical impairment. JA Vol. 2, at 337;21-25, 351;20-24. AOB, p. 9.[2] The District then asserts that the Board is in error because it incorrectly denied the application for reimbursement when it imposed upon the meaning of a "permanent physical impairment," a "narrow, hyper-specific" interpretation which would require the District to show by written record that it had knowledge of the diagnosis for the preexisting permanent impairment. AOB, p. ix.

The District further argues that the Board is in error in this case, claiming the Board decided for the District that spondylolisthesis was the preexisting permanent physical impairment. AOB, p. 15. Therefore, having spondylolisthesis forced upon it, the District was obliged to show by written record that it was aware that the injured worker's preexisting permanent physical impairment was spondylolisthesis, instead of showing it was simply aware of a serious condition

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[2]Actually, during the course of the hearing, counsel for the District told the Board that all the District had to do was prove it had knowledge that the injured worker had a low back condition that "was serious." JA Vol. 2, at 339; 3-6. The District also took the position it needed only to prove knowledge of a "permanent condition," meaning one that is "lasting" or "abiding," JA Vol 2, at 338;10-12, without regard for whether the lasting and abiding condition would also support a disability rating of 6% or more WPI, according to NRS 616B.578(3). JA Vol. 2, at 337;21-25, 351;20-22. This reading by the District of NRS 616B.578(3), disregarding the 6% Rule portion of the definition of a permanent physical impairment, irretrievably infects with error the District's argument on appeal.

related to the other multiple insults to the body which occurred prior to November 30, 2007, the date of the subsequent industrial injury. JA Vol. 2, at 351;20-22 (enough that the District knew of the four injuries).

The District, consequently, argues that the Board and the District Court committed error by rejecting the application for reimbursement because the District could not show proof by written record that it knew of the condition of spondylolisthesis, before the date of the subsequent industrial injury. Instead, the District asserts, the claim should have been approved because the District knew that the injured worker suffered from a "chronic lumbar condition," that knowledge of the "chronic lumbar condition" was sufficient to meet the knowledge requirement of NRS 616B.578(4), that the District knew of the "chronic lumbar condition" before the subsequent industrial injury occurred, that the "chronic lumbar condition" would support a rating of at least 10% whole person impairment, (WPI) and, therefore, because the "chronic lumbar condition" combined with the subsequent industrial injury, the District proved a claim under NRS 616B.578. *See,* JA Vol. 2, at 351;20-22.

The District, however, is the party who is mistaken. The record amply demonstrates that the District chose spondylolisthesis, as the preexisting condition, not the Board. *See*, JA Vol 1, at 179, JA Vol. 2, at 344;15-18. Spondylolisthesis had to be chosen because it was the only condition which the record shows would support a rating of 6% or more, WPI, as required by NRS 616B.578(3). JA Vol 1., at 178, 179, JA Vol. 2, at 344;8-13. The problem, however, for the District, first of all, is that spondylolisthesis, the preexisting permanent physical impairment, was not discovered until after treatment began for the subsequent industrial injury and, therefore, presented a condition that is ineligible for consideration to support a subsequent injury claim. JA Vol. 1, at 174, 178, JA Vol. 2, at 344;15-18. *See*, *Holiday*, *supra* at 762.

The other back insults suffered by the injured worker prior to the subsequent industrial injury can be summarized as low back pain, a herniated nucleus pulposus at L5-S1, lumbosacral sprain/strain with somatic dysfunction and myofascial pain, radiculopathy at the L5-S1 levels, and an L5 spasm. Hillari Fleming, M.D., added a minor degenerative bulge at L4-L5, without neural

compression, a non-significant, little lateral recess stenosis and a large L5-S1 bulge. JA Vol. 1, at 85. The District did not consider these the precursor to spondylolisthesis, JA Vol. 2, at 332;7-9, 333;4-8. None prevented the injured worker from returning to work, full duty. JA Vol. 2, at 333;12-14, 334;1-7. The radiating pain was secondary, not to spondylolisthesis, but to the HNP. JA Vol. 1, at 96.

These infirmities the District lumps together as if they were one condition labeled a "chronic lumbar condition." There was no "chronic lumbar condition, " *per se.* There were multiple conditions which, summarized above, neither individually, nor collectively, supported a rating of 6% or more WPI, (the 6% Rule). JA Vol. 1, at 56, 57, Vol. 2, at 302;12-18, *see also*, JA Vol. 1, at 173-179. Therefore, they do not meet the definition of a preexisting permanent physical impairment, *see*, NRS 616B.578(3) which could then combine with the subsequent industrial injury to sustain a claim for reimbursement. *See*, NRS 616B.578(1).

The Board was, thus, confronted with spondylolisthesis which, while it would support a rating of 6% or more, WPI, JA Vol. 1, at 179, could not be used

to support a claim for reimbursement because it was not discovered until after treatment for the subsequent injury began, JA Vol. 1, at 174, JA Vol. 2, at 351;21-22,(imaging after the subsequent industrial injury reveals spondylolisthesis) and therefore, could not be considered a preexisting condition. *See*, *Holiday, supra* at 762. Once spondylolisthesis was rejected as a preexisting condition due to *Holiday*, the Board was left to contend with the remaining insults to the injured worker's back. While they may be considered chronic bad back impairments that might be a hindrance to employment,[3] none would support a disability rating of 6% or more, WPI. *See*, JA Vol. 1, at 173, 179. Therefore, on its face, NRS 616B.578(3) bars their consideration as the preexisting permanent physical impairment since a condition is not a permanent physical impairment unless it will

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[3]In fact, the evidence was that these conditions were not a hindrance to employment. After each incident, the injured worker returned to work full-duty and when he was cross examined, the Chief of the Fire Department stated, he would not consider any of these conditions a barrier to employment by the Fire Department. JA Vol. 2, at 325;9-14, 326;1-7. The District, furthermore, concedes that an impairment is not a permanent physical impairment unless it is a hindrance to employment. *See*, JA Vol. 2, at 304;19-22. Thus, even according to the District's own understanding of the term permanent physical impairment, the various chronic back ailments do not amount to a permanent physical impairment based on the Chief's testimony that these conditions were not a hindrance to employment.

support a rating of 6% or more WPI.

It was totally unnecessary for the Board to read any exotic, or hyper-technical meaning into the written record knowledge requirement of NRS 616B.578(4) to arrive at the result the Board did in this case for the simple reason that the District's discovery of spondylolisthesis was untimely. It was a disqualified condition in the first place. Similarly, by simply following the plain meaning of NRS 616B.578(3), not every chronic back condition will suffice. The District must show that the condition would support a WPI of 6% or more, in addition to showing the condition was a hindrance to employment. None of the other insults, aside from spondylolisthesis, would support a rating of 6% or more, WPI. The 6% Rule of NRS 616B.578(3) cannot be ignored and because the record demonstrates the District was incapable of making that showing based upon its own witnesses and records, the Board correctly rejected the claim.

III. Statement of Facts

1. The injured worker was a very accident prone, long time EMT

member,[4] JA Vol. 1, at 84, of the North Lake Tahoe Fire Protection District (District). He suffered from sporadic bouts of injuries intermittently marked with significant periods of good health without incident or complaints about his low back region of that is subject of this claim. JA Vol. 1, at 174, 196.

2. After each injury, he returned to work, full duty, including his last injury when he returned to work and retired according to the Fire Chief for the Department. JA Vol. 2, at 314;1-3, 333;23-25, 334;1-7.

3. The medical history begins on September 18, 2001, revealing the injured worker was treated for L/S sprain, R/O L4-5 disc. JA Vol. 1, at 95.

4. No more is reported until August 22, 2002, when the worker was injured lifting a fire hose. JA Vol. 1, at 96. The C-4 stated it was a L-S spasm, with an MRI pending. JA Vol. 1, at 97. George Mars, M.D., in a report dated September 19, 2002, diagnosed lumbosacral sprain/strain with somatic dysfunction and myofascial pain for the body parts at issue, here. JA Vol. 1, at 102. A light duty work release was given with a follow up in two weeks. *Ibid.*

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[4]The injured worker first became employed with the District on October 1, 1981. JA 47.

An MRI dated November 4, 2002, was conducted and the results were L5-S1 large central disc protrusion and L4-L5 degenerative disc bulge. JA Vol. 1, at 103.

5. The injured worker was seen again by Dr. Mars and in his report of November 13, 2002, the impression was a large herniated nucleus pulposus (HNP) at L5-LS1. The HNP is the gelatin like core of the intervertebral discs. It is not a portion of the vertebra itself. *See*, *Intervertebral disc*, Wikipedia, (9/11/2017), https://en.wiki/Intervertebral_disc. The injured worker was doing well. Dr. Mars let the injured worker return to regular activity for a month to see how that went. JA Vol. 1, at 104.

6. Next, the injured worker was seen by Hillari L. Fleming, M.D. In her report of January 6, 2003, she said that the injured worker was a "...very pleasant gentleman, not in any acute distress. He moves around the examining room without any appreciable difficulty." She noted that the MRI revealed:

> ... minor degenerative bulge at L4-5 without any neural compression. There is a little lateral recess stenosis but appears non-significant. At L5-S1 he has a large central disk protrusion that is not causing significant stenosis, although it certainly does impinge upon the thecal sac. JA Vol. 1, at 106.

She also observed:

His L5 nerve roots, however, appear to be compromised within the foramina bilaterally, probably as a result of a very subtle listhesis of L5 on S1, as well as some collapse of the disk. JA Vol. 1, at 107.

7. The District claims Dr. Fleming found the "injured worker was a very good candidate for an L-5-S-1 decompression and fusion to be carried high enough to make sure the origin of the L5 roots were not impaired in the lateral recess region." *See*, Appellants' Opening Brief (AOB) p. 3. In fact, she stated:

> Finally, in terms of surgery, **if he [the injured worker] were to get to the point where his quality of life is impaired sufficiently,** ... then, he would be a good candidate ...[for surgery].... JA Vol. 1, at 86. (Emphasis added).

Then, Dr. Fleming added:

> Certainly at this stage, he [the injured worker] does not feel like he wants to consider surgery, **and in fact, I see no reason to recommended it**, unless his problems impair his life style to a greater extent than they are at present. *Ibid.* (Emphasis added).

Her diagnosis was:

> ...low back pain and resolving bilateral radiculopathy. I suspect the radiculopathy was L5, although it cannot be confirmed at this time, but those are the roots that are potentially most impinged. *Ibid.*

8. Even the District disagrees with the claim, in the Opening Brief, that the injured worker was a candidate for surgery as early as 2003. The District's third party administrator wrote to Dr. Mars the following:

> Nevertheless, from Dr. Fleming's consultation we gather that Mr. [the injured worker's redacted name] **was not a candidate for surgery, nor does he appear to be at the present time**. JA Vol. 1, at 90.

(Emphasis added).

9. Regardless, the District made no showing that Dr. Fleming's report with the reference to "listhesis" was in the possession of the District prior to November 30, 2007.[5] JA Vol. 2, at 350;19-25.

10. On May 3, 2003, the injured worker suffered a back strain, considered an exacerbation of the low back condition, resulting from twisting and bending through the center walkway of an ambulance. JA Vol. 1, at 90.

11. On May 7, 2003, the District's claims adjuster wrote to Dr. Mars to request that he review the claim and advise as to whether the employee should be given one or more permanent work restrictions or given retirement as the result of his HNP. JA Vol. 1, at 90. The letter also expressed concern that the HNP may predispose the injured worker to surgery. There is no evidence, however, in the record that this letter was ever received by the District prior to the subsequent industrial injury of November 30, 2007. JA Vol. 2, 354;12-21.

12. Dr. Mars response was to diagnose at L5-S1 a large central disc protrusion, low back pain, and recent exacerbation for the previous work related injury. He then released the injured worker to "regular duty" without restrictions.

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[5]In the District's Opening Brief, the District claims that the employer was aware of the notation to "listhesis" as early as 2003. AOB, p. 14, fn.5. The claim is untrue because, as indicated, the District has no proof Dr. Fleming's report made it to the District's file. JA Vol. 2, at 350;19-25.

JA Vol. 1, at 91, JA Vol. 2, at 333-334, 354-355.

13. The injured worker was eventually seen by Michael Shapiro, M.D., JA Vol. 1, at 95, who diagnosed discogenic lumbar pain, secondary to herniated disc at L5-S1, JA Vol. 1, at 96. In his July 17, 2003 report, Dr. Shapiro said that the injured worker was now doing "fantastic following his second epidural with me...." *Ibid.* The plan was a return to work full duty as a fireman following the results of a functional capacity examination. *Ibid.*

14. On July 28, 2003, Steven Hallan, P.T., performed a Functional Capacity Evaluation (FCE) of the employee. Mr. Hallan concluded that the testing placed the employee "...easily into the **Very Healthy physical demand level** consistent with his job demands." (Emphasis in original). JA Vol. 1, at 98.

15. In Dr. Shapiro's last report of August 1, 2003, his impression was: "Discogenic lumbar pain, herniated disc; resolved." JA Vol. 1, at 100.

16. On February 25, 2004, the employee slipped and fell on ice, injuring his tail bone, JA Vol. 1, at 102, or sacrum. This injury was diagnosed as a "soft tissue, strain injury." JA Vol. 1, at 103. He was ultimately released to full duty. JA Vol. 2, at 333;24-25, 334;1-7.

17. On July 15, 2007, JA 113, the injured worker slipped off the running board of a fire truck and injured his lower back, JA Vol. 2, 289;20-22, with a diagnosis of lumbar strain with radiculopathy. JA Vol. 1, at 110. After treatment,

the employee was released without restrictions, as was always the case. JA Vol. 2, at 333;24-25, 334;1-7.

18. Except for the reference by Dr. Fleming to "subtle listhesis," no health care professional was alerted by these conditions, prior to the date of the subsequent industrial injury, that spondylolisthesis was a presenting condition or a condition whose onset was imminent. JA Vol. 1, at 74-78, 80-83, 87-89, 91-97. Summarizing the diagnosis contained in these pages, the injured worker had low back pain, a herniated nucleus pulposus at L5-S1, lumbosacral sprain/strain with somatic dysfunction and myofascial pain, radiculopathy at the L5-S1 levels, and an L5 spasm. Dr. Fleming added a minor degenerative bulge at L4-L5, without neural compression, a non-significant, little lateral recess stenosis and a large L5-S1 bulge. JA Vol.1, at 85. The District did not consider these problems the precursor to spondylolisthesis, JA Vol. 2, at 332;7-9, 333;4-8, none of which prevented the injured worker from returning to work, full duty. JA Vol. 2, at 333;12-14, 334;1-7. The radiating pain is noted as secondary to the HNP. JA Vol. 1, at 96.

19. On November 30, 2007, the employee was injured while carrying someone up a flight of stairs in a chair designed for this purpose. JA Vol. 2, at 290;8-11. This injury lingered for some time and ultimately the employee sought care through worker's compensation on January 29, 2008. JA Vol. 1, at 119.

20. On January 5, 2009, Bruce E. Witmer, M.D., evaluated the

employee's lower back for the November 30, 2007 injury. Dr. Witmer felt the current industrial injury appeared to be an aggravation of a previously existing lumbar disc with radiculitis a component of pain as well as some local component of pain. The link was an inflammatory aggravation of the employee's prior disc abnormality resulting in radiculitis symptomatology as well as the local symptoms. JA 51. A light duty release was given to the employee. JA Vol. 2, at 293;2-12. No discussion of spondylolisthesis was evident.

21. On June 23, 2009, the employee fell off a fire engine. This resulted in low back pain with radiation into the employee's legs. JA Vol. 2, at 294;1-4.

22. On March 15, 2010, the employee had back surgery. JA Vol. 2, at 295;6-7. The procedure was a posterior decompression and fusion at the L4-5 and L5-S1 levels. JA Vol. 1, at 137.

23. On April 6, 2011, Dr. Hall opined that the employee could not return to work full duty because he was concerned that the patient's return to work as a firefighter would compromise personal and public safety and certainly result in re-injury. JA Vol. 2, at 296;2-11. A second FCE was recommended. *Ibid.*

24. In July of 2011, the employee saw Jay C. Morgan, M.D., on one or more occasions. JA Vol. 2, at 296;12-16. During this time period, a physician, presumably Dr. Morgan, gave the employee light duty restrictions but also, a full duty release effective on August 11, 2011. JA Vol. 2, at 296;15-16.

25. When the employee returned to work on August 11, 2011, after this latest incident, the return was to a full duty fireman status. JA Vol. 2, at 333;24-25, 334;1-7. He then retired the next day. JA Vol. 2, at 297;3-5.

26. In a report dated October 31, 2011, David D. Berg, D.C., C.I.C.E., conducted a permanent partial disability rating. JA Vol. 1, at 158-166. In the record review portion of his report, he noted according to Scott Hall, M.D., in an examination of February 19, 2008, the lumbar spine radiographs showed degenerative changes at L5-S1 and associated osteophytes at L3-4 and L4-5. The MRI study, according to Dr. Hall, showed an L5-S1 disc protrusion. JA Vol. 1, at 159.

27. According to Dr. Berg, the first that any "listhesis" was noted in his record review was on March 20, 2008, associated with severe degenerative changes at L5-S1. *Ibid.*

28. Spondylolisthesis was not first noted until April 3, 2008, according to Dr. Berg. *Ibid.*

29. Dr. Berg's diagnosis was post L4-5 and L5-S1 posterior decompression and fusion, JA Vol. 1, at 165. He rated the injured worker with a 21% PPD, with no apportionment for any preexisting condition as there was no prior history of injury to the examined body part. JA Vol. 1, at 166.

30. Jay E. Betz, M.D., was then called upon to review the injured worker's charts. JA Vol. 1, at 167-173. The incident of November 30, 2007 was

the injury that precipitated this report and analysis. JA Vol. 1, at 167.

31. In Dr. Betz's medical history, the first he noted "listhesis" was March 28, 2008. JA 168. Dr. Betz concluded, however, that spondylolisthesis was non-industrial and the preexisting condition. JA Vol. 1, at 172.

32. Dr. Betz was also of the opinion that the spondylolisthesis contributed to the surgery post, the November 30, 2007 incident, and therefore, justified apportionment for the 21% disability rating issued by Dr. Berg. According to Dr. Betz, 50% of the disability rating should be apportioned to the preexisting conditions, which would yield an apportionment of 11% to the preexisting conditions out of the 21% total disability rating of Dr. Berg. JA Vol. 1, at 173. Dr. Betz also stated that spondylolisthesis is a ratable condition, that ordinarily it would rate out at 7%-9% WPI, leaving 2% to 4% of the rating for the other preexisting back injuries suffered by the injured worker. JA Vol. 1, at 173.

33. Dr. Betz prepared another report for the District, entitled a "Subsequent Injury Fund (sic) Analysis." JA Vol. 1, at 174-180. According to Dr. Betz, preexisting spondylolisthesis was first revealed following the November 30, 2007, subsequent industrial injury. JA Vol. 1, at 174. He also opined that the District's claim was eligible for reimbursement because the spondylolisthesis preexisted the incident of November 30, 2007, and that spondylolisthesis would rate out at least a 7% WPI, therefore, meeting the "6% preexisting WPI threshold

required for Subsequent Injury Fund (sic) analysis." JA Vol. 1, at 179. That is, the condition that met the threshold requirement of NRS 616B.578(3), was spondylolisthesis. JA Vol. 1, at 179.

34. Since 4% or less WPI was assignable to the other conditions, given a rating of 21% WPI, with 11% apportioned to the preexisting conditions, none of the other conditions could rate out at 6% or more. JA Vol. 1, at 179.

35. Dr. Berg, being informed of Dr. Betz apportionment analysis, then, in an "Addendum" stated he agreed with Dr. Betz's analysis. JA Vol. 1, at 184.

36. The preexisting nature of the injured worker's spondylolisthesis, however, is not without question. G. Kim Bigley, M.D., neurology, issued a Permanent Partial Disability Evaluation, after seeing the injured worker on March 20, 2012. JA Vol. 1, at 186-198.

37. In his report, he reviewed the medical history of the injured worker prior to the date of the subsequent industrial injury of November 30, 2007. In this review, no reference is made to spondylolisthesis or a suggestion that the conditions mentioned, constitute symptoms forewarning of the onset of spondylolisthesis. JA Vol. 1, at 187, 195, 196.

38. The first reference to a "listhesis" according to Dr. Bigley occurred on March 20, 2008, upon review of x-rays of the lumbar spine. JA Vol. 1, at 190. Spondylolisthesis was first mentioned when, according to Dr. Bigley, the injured

worker was seen by Joseph Alivarez, P.A.C., on April 3, 2008. *Ibid.* He also quotes Steven Atcheson, who believed the etiology of the patient's instability was the "...natural progression of degenerative spondylolysis with progressive facet hypertrophy and not something that followed trauma." JA Vol. 1, at 192.

39. Dr. Bigley then quoted from Dr. Betz to the effect that traumatic spondylolisthesis "'...would be exceedingly rare as the vast majority of spondylolysis/spondylolisthesis are developmental and traumatic instabilities are generally surgically stabilized immediately.'" Bigley quoting Betz. Therefore, Dr. Bigley found apportionment inappropriate, as there was no spondylolisthesis as a preexisting condition. JA Vol. 1, at 197.

40. In further support, Dr. Bigley said:

> A prior lumbar MRI from 7/02 from a prior work-related injury indicated that ...[the injured worker]... had a herniated disc at L5/S1 but not spondylolisthesis. JA Vol. 1, at 197.

41. He also stated:

> He [the injured worker] initially had a central disc herniation at L4-5 in 2002 but not spondylolisthesis at that time and had no evidence of developmental spondylolysis or a pars interarticularis defect. His lumbar MRI scan from 3/28/08 revealed moderate facet joint degenerative changes and hypertrophy at L4-5 and L5/S1 with a posterior based disc bulge at L5/S1. The lumbar MRI then performed on 7/29/09 revealed the facet arthropathy at L4-5 and the 4 mm anterior listhesis at L4-5 and 6 mm anterior listhesis at L5 on S1. **This was not present on prior MRI scans.** He most likely developed the spondylolisthesis due to repetitive trauma which developed as a result of repeated industrial injuries dating to 2002

which are well documented in his records. **He did not have a congenital abnormality that resulted in the spondylolisthesis as it was not evident on prior lumbar MRI scans performed for his prior work-related injuries.** (Emphasis added). JA Vol. 1, at 197.

42. This further corroborates that prior to the subsequent industrial injury, spondylolisthesis was not evident or diagnosed until after the subsequent injury.

43. During the hearing, Mr. Balkenbush called to testify District Fire Chief Mike Brown and Sharon Cary, the District's business manager and human resource director. JA Vol. 2, at 306-335.

44. Ms. Cary testified that she had no independent recollection that the letter of May 7, 2003, upon which the applicant chooses to rely, was presented by Ms. Cary to any Fire Chief of the Department. Further, she only recalled discussing the letter of May 7, 2003, with Chief Brown, in preparation for the September 19, 2013 hearing. JA Vol. 2, at 319;7-18. She also did not know when the letter of May 7, 2003, became a part of the injured worker's file. JA Vol. 2, at 312;6-7, 313;12-16.

45. The applicant also called Fire Chief Mike Brown to testify. He was asked whether the HNP and other injuries to the back would have been a hindrance to obtaining a job or maintaining employment with the Department. *See*, JA Vol. 2, 325, 326. The Fire Chief admitted that as far as he was concerned, the information brought to the Chief's attention about the injured worker, would

not have prevented the injured worker from securing or maintaining a job as a fire fighter. JA Vol. 2, at 325;9-14, 326;1-7.

46. The Fire Chief conceded that after each pre-November 30, 2007, injury, the injured worker returned to work on a full duty status, JA Vol. 2, at 333;12-14, 22-25, 334;1-7, including upon retirement. JA Vol. 2, at 334;1-7.

47. Spondylolisthesis is the preexisting condition the District offers to justify reimbursement because it supports a rating of 6% or more PPD, according to the *Guides*. JA Vol 1, at 55, 157, 174, 179. It is the preexisting permanent physical impairment because Dr. Betz identified it as the only condition which met the minimum threshold of 6% WPI. JA Vol 1., at 178, 179.

48. Assuming that the spondylolisthesis was present prior to the November 30, 2007 industrial injury, the District could not have known of its existence because it was not discovered, according to Dr. Betz, until after November 30, 2007. JA Vol. 1, at 174 ("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.").

49. The District also failed to show that the various ailments endured by the injured worker prior to the subsequent industrial injury were a hindrance to securing a job or remaining at the job. JA Vol. 2, at 325;9-14, 326;1-7.

50. The condition of HNP and the other, interim back injuries suffered

prior to November 30, 2007, such as radiculopathy, a back sprain, lumbar disc abnormalities, and the like, did not rise to the level of a preexisting condition as required by NRS 616B.578(3). JA Vol. 1, at 56, 57, 173, 179, JA Vol. 2, at 302;12-18. At most, collectively, they warranted only a 4% WPI, given that apportionment left an 11% WPI for the preexisting conditions and spondylolisthesis consumed 7% or more of the 11% WPI. JA Vol. 1, at 173, 179.

51. The District concedes that HNP is a distinct and separate condition from spondylolisthesis. JA Vol. 2, at 353;23-25, 354;1-2.

52. At the conclusion of the testimony of the applicant's witnesses, Mr. Balkenbush summarized the applicant's argument by stating that he believed that the Administrator has required too much of the applicant stating:

> Now, what the administrator I think tried to do in this case is to require the employer to have exact medical knowledge of the preexisting permanent physical impairment. JA Vol. 2, at 339;11-13.

53. Mr. Balkenbush further informed the Board that the employer only had to know that the low back condition"was serious." JA Vol. 2, at 339;3-6.

54. The District bifurcates the meaning of the term, permanent physical impairment, whereby District counsel could claim that Dr. Betz's subsequent injury account analysis, where he concluded that spondylolisthesis was the preexisting condition as it would support a rating of 6%, was important only to "...determine whether or not there is a 6 percent whole person impairment as

required by the statute..." separate and apart from the definition of a permanent physical impairment. JA Vol. 2, at 304;14-22, 337;16-25, 344;10-13.

IV. Standard of Review on Appeal

The role of this Court addressing a petition for judicial review is the same as the District Court, *see*, *Wright v. State, Dep't. of Motor Vehicles*, 121 Nev. 122, 125, 110 P.3d 1066 (2005); *see also, Tighe v. Las Vegas Metropolitan Police Dep't.*, 110 Nev. 632, 634, 877 P.2d 1032 (1994), which is to determine whether substantial evidence exists to support the Board's decision and whether or not the Board's decision is "...infected by legal error." *Holiday, supra* at 761. *Holiday* recognizes that while pure questions of law receive a *de novo* review by the Court, deference is to be accorded the Board's statutory interpretation when it falls within "...the language of the statute." *Ibid.* And, for clear and unambiguous statutes, neither the Court nor Board may offer a construction beyond the "...meaning of the statute itself." *Ibid.* Thus, even when the Court might disagree with the policy set out in the statute or the outcome that the plain and ordinary meaning of the statute yields, "[i]t is the prerogative of the Legislature, not ... [the court], to change or rewrite a statute." *Ibid.*

The Board only adds that where, as here, an administrative body is charged by the Legislature with administering the statutory framework, *see*, NRS 616B.575(8); 578(6) including the promulgation of regulations, *see*, NRS

616B.572(1), NRS 616.575(6) NRS 616B.578(6), there is additional reason to give to deference to the administrative body's interpretation of the statutes. *See, Public Agency Compensation Trust (PACT) v. Blake*, 127 Nev. 863, 869, 265 P.3d 694, (2011). Thus, provided the Board's interpretation of NRS 616B.578 is not in conflict with the statutory provisions it is interpreting or does not exceed its statutory authority, deference should be accorded to the Board's view that NRS 616B.578 requires the District to show: (a) that at least one preexisting impairment would support a rating of 6% or more to satisfy NRS 616B.578(3); (b) that this is the condition which must combine with the subsequent industrial injury to substantially increase the compensation paid; and (c) that by written record the District knew before the date of the subsequent industrial injury of the permanent physical impairment which satisfied the 6% Rule and then combined with the subsequent industrial injury to satisfy NRS 616B.578(1).

V. Argument

The District's Bifurcation of the 6% Rule from the Definition of a Preexisting Permanent Physical Impairment as Defined by NRS 616B.578(4) Is Fatal to its Claim for Reimbursement from the Account and Inasmuch as the District Offered Spondylolisthesis as the Preexisting Permanent Physical Impairment and There Is Substantial Evidence to Support the Board's Finding That Spondylolisthesis Was Unknown Until After the Occurrence of the Subsequent Industrial Injury, the Board's Decision to Reject the District's Claim under Both NRS 616B.578(3) and 616B.578(4) Should Be Sustained on Appeal.

A. The Board Properly Rejected the District's Removal of the 6% Rule From the Definition of the Permanent Physical Impairment and Reading NRS 616B.578(3) Consistent With Its Plain Meaning Reached A Decision That Was Correct As A Matter Of Law and Supported by Substantial Evidence

The District's argument rises and falls on its attempt to truncate the definition of permanent physical impairment set out in NRS 616B.578(3). *See*, Addendum for the entire text. According to the District, to prove knowledge of a permanent physical impairment by written record, as required by NRS 616B.578(4), the District need only show knowledge of a permanent physical impairment which amounts to a serious condition or one that is abiding or long term, provided it is also a hindrance to employment. The District claims, proof of these elements satisfies the definition, without more, of a permanent physical impairment as defined in NRS 616B.578(3). JA Vol. 2, at 304;16-24, 337;16-25, 339;14-18, 340;23-25, 344;8-13, 351;20-23.

The District's removal of the 6% Rule from the definition of a permanent physical impairment contained in NRS 616B.578(3) eliminated, the District argues, the need to show that the permanent physical impairment would also support a rating of 6 % or more, WPI. District legal counsel explained that Dr. Betz's subsequent injury analysis was conducted simply to show "...whether or not there is a 6 percent whole person impairment as required by the statute." JA Vol.

2, at 344;11-13. The District does not read the "statute" to link the condition generating the 6% impairment with the permanent physical impairment that must also be a hindrance to employment or the retention of employment. The District makes the 6% Rule a stand alone requirement, to be satisfied separate and apart from the proof of a permanent physical impairment.

The District employed this artifice because the conditions which preceded the subsequent industrial injury of November 30, 2007, the various, nagging back injuries of this injury prone worker, neither individually, nor collectively, would support a rating of 6% or more, WPI. As Dr. Betz stated, apportionment left only an 11% WPI rating for the preexisting conditions, 7%-9% of which was consumed by spondylolisthesis, leaving only 4% or less, WPI, to be assigned to the insults to the back prior to September 30, 2007. JA Vol. 1, at 173,179. Simple math reveals these preexisting conditions do not satisfy the 6% Rule of NRS 616B.578(3).

These four back injuries, however, were the only conditions that the District can show it knew existed prior to the date of the subsequent industrial injury because it is beyond dispute that spondylolisthesis, the condition that satisfies the 6% Rule of NRS 616B.578(3), was not discovered, according to Dr. Betz, the District's own witness, until after the subsequent industrial injury of November 30, 2007. JA Vol. 1, at 174. If bifurcated from the definition of a preexisting permanent impairment, spondylolisthesis, therefore, can save the day for the

District. Spondylolisthesis meets the threshold 6% Rule, on the one hand, but due to the truncated definition of a permanent physical impairment, it is not the permanent physical impairment. Spondylolisthesis, therefore, avoids disqualification by *Holiday*, which requires knowledge of the preexisting permanent impairment before the date of the subsequent industrial injury.

Conversely, the artifice of the truncation of NRS 616B.578(3) enables the District to offer the four injuries which preceded the subsequent industrial injury to satisfy knowledge of the preexisting permanent physical impairment since they would not have to satisfy the 6% Rule which, under the truncation, is removed from the definition of a permanent physical impairment. Spondylolisthesis satisfies that stand alone requirement. JA Vol. 1, at 179. Thus, the District asserts, it has satisfied NRS 616B.578(3) and (4) and the Board and District Court committed reversible error for finding otherwise.

The District is wrong. The District's truncated view of NRS 616B.578(3) and, therefore, NRS 616B.578(4), is an affront to the plain reading of both statutes. NRS 616B.578(3) and (4) admit of no such an interpretation. Not just any condition will satisfy the 6% Rule.

An analysis of the plain wording of the statutory framework makes this clear, beginning with NRS 616B.578(1), *see,* Addendum. From the first sentence of the statute, it is impossible to dispute that an applicant must prove the self-

insured,

> ... employee has a **permanent physical impairment** from any cause or origin who then incurs a **subsequent disability** by injury arising out of and in the course of his employment .... NRS 616B.578(1) (emphasis added).

At the outset, an applicant must be able to prove the existence of a **permanent physical impairment** and a **subsequent industrial injury** or there is no claim. Since the industrial injury is "subsequent," the permanent physical impairment must be preceding.

Next, an applicant must prove that the injured worker is entitled,

> ... to compensation for disability that is **substantially greater** by reason of the **combined effects** of **the preexisting impairment** and **the subsequent injury** than that which would have resulted from the subsequent injury alone .... NRS 616B.578(1) (emphasis added).

This is the **combined effects** rule of NRS 616B.578(1) discussed above.

There are at least four key words or phases in this portion of NRS 616B.578(1). Taking the easiest to interpret first, NRS 616B.578(1) requires proof that the compensation paid is **substantially greater** than if there had been only the subsequent injury. Minor increases do not qualify.

The "combined effects rule" requires more than proof that the compensation paid was substantially greater. The "combined effects rule" also requires an applicant to show that the substantial increase in compensation was due to the

combined effects of **the** preexisting impairment and **the** subsequent injury.

What, then, is **the** preexisting impairment? From any fair and reasonable reading of this statute, the reference to **the preexisting impairment** in the **combined effects** clause can only be to the preexisting permanent physical impairment, which is **the** condition in the first part of NRS 616B.578(1) that precedes the subsequent injury. The term preexisting impairment is synonymous with the preexisting permanent physical impairment.

The preexisting permanent physical impairment, however, is not simply any pathology because the term is defined. NRS 616B.578(3) states that,

> ... a condition is not **a** 'permanent physical impairment' unless **it** would support a rating of permanent impairment of 6 percent or more of the whole man if evaluated according to the ... American Medical Association *Guides*. NRS 616B.578(3) (emphasis added).

Thus, while the injured worker may have many preexisting pathologies, they are irrelevant for subsequent injury purposes unless the District can show that the pathology supports a rating of 6% or more according to the *Guides*. Furthermore, the expression is stated in the singular. Consequently, the aggregation of conditions to equal a PPD rating of 6% or more will not do. At least one impairment must support a rating of 6% or more to state a claim for relief.

There is, however, more. The condition which satisfies the 6% rule as the preexisting permanent impairment must also be the preexisting condition which

combines with the subsequent industrial injury to precipitate a substantial increase in compensation. The pathology relied upon must satisfy both conditions. NRS 616B.578(1) admits of no other meaning. It explicitly requires proof that **the** preexisting permanent physical impairment of 6% or more, whole man, combined with **the** subsequent injury to substantially increase compensation.

This leaves, then, the knowledge requirement of NRS 616B.578(4). It is quite specific. It is also contained in a statute the analog of which the Nevada Supreme Court already determined was unambiguous. The interpretation, therefore, of the statute must be derived from the plain and ordinary meaning of the terms employed by the Legislature. *See, Holiday, supra* at 761. Specifically, an applicant must prove by written records knowledge of "... **the** 'permanent physical impairment' ...." NRS 616B.578(4). The knowledge is not, then, of **a** permanent physical impairment. The statute expressly refers to **the** permanent physical impairment.

What, then, is **the** permanent physical impairment? Unless one is to presume that the Legislature made reference in NRS 616B.578(4) to a permanent physical impairment that was entirely unrelated to the rest of the statute, the reference to **the** permanent physical impairment must be a reference to the condition that meets the definition of a permanent physical impairment as identified in NRS 616B.578(3). Since "... whenever possible ... 'statutes within a

statutory scheme ... [are to be interpreted] ... harmoniously with one another to avoid an unreasonable or absurd result...[,]" the phrase could have no other meaning. *Nevada Attorney for Injured Workers v. Nevada Self-insurers Ass'n,* 225 P.3d 1265, 1271, 126 Nev.Adv.Op. 7 (2010).

And, as explained, that condition, in turn, can only be, for purposes of NRS 616B.578, the permanent physical impairment which combines with the subsequent industrial injury to substantially increase the compensation paid. Stripped of all overburden, then, knowledge required by NRS 616B.578(4) must refer to a permanent physical impairment which: (a) meets the 6% threshold definition of NRS 616B.578(3); and (b) also combines with the subsequent industrial injury to substantially increase the compensation paid. Further, due to *Holiday*, knowledge must precede the subsequent injury.

Applying the explicit eligibility criterion of NRS 616B.578 to the conditions relied upon by the District to justify its application for reimbursement, they are patently statutorily insufficient. That is, spondylolisthesis, which the District offered before the Board as the preexisting permanent impairment, is inadequate because it was discovered after the subsequent injury occurred, according to Dr. Betz, whose reports were offered by the District to the Board in

support of the claim. JA Vol. 1, at 174. The four back injuries,[6] which the District claims it could prove knowledge of their existence pre-dating the subsequent industrial injury, are inadequate because none of those conditions, individually or in concert, satisfied the 6% rule of NRS 616B.578(3). JA Vol. 1, at 173, 179. Applying the plain meaning of NRS 616B.578(3) and (4) to these facts, the Board had no option but to reject the claim.

The District's claim survives only if the District's attempt to truncate the meaning of a preexisting permanent impairment in NRS 616B.578(3) is accepted. It should be soundly rejected. In plain English, NRS 616B.578(3) states that a preexisting condition is **NOT** a permanent physical impairment unless it will support a rating of 6% or more, WPI. Any claim otherwise, as the District makes, with its attempt to carve out the 6% Rule from the meaning of a permanent physical impairment, flies in the teeth of a statute that could not be more clear on

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[6]The District tries to duck this harsh reality by quoting only half the story. The District claims these conditions survive the 6% Rule because Dr. Betz apportioned half the 21% PPD rating of Dr. Berg to the "preexisting pathologies." AOB 17. That is the half truth. Actually, after apportioning half the 21% PPD rating to the preexisting condition, Dr. Betz went further and stated that of the 11% apportionment, 7%-9% would be consumed by spondylolisthesis. JA Vol. 1, at 173, 179. Simple math then reveals that the four back insults that actually precede the November 30, 2007 subsequent injury, collectively, would rate at 2%-4% WPI. Realizing this, Dr. Betz then concluded that the preexisting permanent physical impairment was spondylolisthesis, stating that because there is a 6% WPI condition, in his opinion, the case qualified for subsequent injury reimbursement, JA Vol. 1, at 179, because of spondylolisthesis.

its face. The District's truncation is an interpretation that rewrites a statute that is unambiguous, a rewrite under such circumstances that is impermissible. *Cf., PACT v. Blake, supra* at 866, *Employers Ins. Co. Of Nevada v. Chander,* 117 Nev. 421, 425, 23 P.3d 255 (2001); *Maxwell v. State Indus. Ins. Sys.*, 109 Nev. 327, 329, 849 P.2d. 267 (1993).

The Board's interpretation and application of the statue, however, are consistent with its plain wording, are entitled to deference because they rely upon the actual words used by the Legislature. No words are added to the statute by the Board's analysis or ignored by it. In contrast, the District's truncation of the definition of a permanent physical impairment marginalizes the 6% Rule requirement and flies squarely in the teeth of a statute that plainly states that "...a condition is not a 'permanent physical impairment' unless it would support a rating of ..." 6% or more, whole person impairment. NRS 616B.578(3). This, too, is impermissible. *See, Paramount Ins. v. Rayson & Smithy,* 86 Nev. 644, 649, 472 P.2d 530, 533 (1970) (no part of a statute should be rendered nugatory or mere surplusage if such can be avoided); *Chandler, supra* at 425 (statutes should be construed to give full meaning to all their parts).

This case is ultimately just that straight forward, the obfuscations of the District, notwithstanding. The Board applied the correct legal analysis to these facts and there is substantial evidence to support the underlying findings, as

further developed herein.

B. Substantial Evidence Supports the Board's Finding That Spondylolisthesis Is the Preexisting Condition

The District asserts that the Board erroneously chose spondylolisthesis as the permanent physical impairment, whereas, the four injuries that took place prior to the date of the subsequent industrial injury were the preexisting permanent physical impairments. AOB, pp. viii, ix. The Board concedes that it made a finding of fact that spondylolisthesis was the preexisting permanent physical impairment for purposes of NRS 616B.578(3) and (4). JA Vol. 1, at 6;9-10, 53, 56. *See also,* JA Vol. 1, at 16;11-13, 53, 178.

Being chastised for this finding is curious, inasmuch as the District actually offered spondylolisthesis to the Board as the preexisting permanent impairment, JA Vol. 1, at 174-179, through Dr. Betz, who chose spondylolisthesis, because it would support a rating of at least 7%, WPI. JA Vol. 1, at 173, 179. The District had no other option than to choose spondylolisthesis as the preexisting permanent impairment, unless the District's clearly erroneous bifurcation theory were to be followed. Spondylolisthesis was the only condition shown by the District that would support a rating of 6% or more under the *Guides*. Betz's analysis. JA Vol. 1, at 179. Furthermore, the subsequent industrial injury of November 30, 2007, also the District's choice of condition, was ultimately given a PPD rating of 21%.

This was, in turn, apportioned, 50% for the preexisting conditions, and 50% for the subsequent industrial injury. JA Vol. 1, at 173, 179. Dr. Betz then inveighed and stated that the spondylolisthesis of the injured worker would at least warrant a 7% or more PPD rating. Consequently, he declared that spondylolisthesis was the condition meeting the 6% WPI requirement that made the claim eligible for reimbursement from the Account in his opinion. JA Vol. 1, at 173, 179. Thus, simple math also reveals that the preexisting conditions attributed to the four back injuries and the HNP were left, in total, the 3-4% WPI residual after deducting the 7% WPI or more rating Dr. Betz gave spondylolisthesis.[7]

The Board, then, simply followed the District's lead to determine that spondylolisthesis was the preexisting permanent physical impairment the District offered the Board for consideration. JA Vol. 1, at 179. The Board also simply applied the information squarely in the record to conclude that none of the preexisting conditions such as the insults to the back and the HNP met the definition of a preexisting permanent impairment for their want of support of a PPD of 6% or more. These conclusions were not plucked out of thin air. Grounded in the record, substantial evidence supports the findings that

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[7]District's counsel also alleges that the Board committed reversible error by ignoring the "expert evidence" in the record that the preexisting pathology supported a whole person impairment of 6%. To the contrary, the Board followed the opinion of Dr. Betz regarding the rating of the preexisting conditions to a "t," as the above analysis reveals.

spondylolisthesis was the preexisting condition, the knowledge of which, the District was obliged to prove by written record it had acquired prior to September 30, 2007, the date of the subsequent industrial injury. *See, Holiday, supra* at 762.

C. Substantial Evidence Supports the Board's Finding That the Discovery of SpondyloListhesis Came After the Date of the Subsequent Industrial Injury Thereby Precluding Reliance Upon the 6% Condition of SpondyloListhesis For Support of the Claim For Reimbursement

Discovery of the preexisting permanent impairment, proven by written record, must precede the date of the subsequent industrial injury. *See*, *Holiday, supra*, at 762. The discovery of a condition following the occurrence of the subsequent industrial injury forecloses its use to justify reimbursement, even if the condition is a hindrance to employment and satisfies the 6% Rule.

The Board found that the District did not acquire knowledge of spondylolisthesis, the only condition the District can point to that satisfies the 6% Rule, until after the injured worker suffered from the subsequent industrial injury. *See*, JA Vol. 1, at 174. There is substantial evidence to support this finding. Dr. Betz, in his Subsequent Industrial Injury Analysis submitted by the District, said: "Imaging following the patient's subsequent injury on 11/30/2007 revealed preexisting spondylolysis with spondylolisthesis at the L4-5 and L5-S1 levels." JA Vol. 1, at 174.

Nothing more need be said. However, the analysis, below, further affirms

that the Board's finding that spondylolisthesis was not discovered until after the worker suffered from the condition the District relies upon as the subsequent industrial injury. Being delinquent in the discovery of spondylolisthesis, the District could not use spondylolisthesis to justify reimbursement. And as this was the only condition that met the test of the 6% Rule of NRS 616B.578(3), the Board had no recourse but to reject the claim because no eligible condition was presented that satisfied the 6% Rule.

D. No Hyper-Technical Reading Of NRS 616B.578(3) Was Required of the Board to Determine That the District Court Failed to Satisfy Its Burden Of Showing Satisfaction With Each Element of NRS 616B.578 Before An Award May Be Made From The Account

The burden is upon the District, as the applicant, to prove satisfaction with each element of NRS 616B.578 before reimbursement from the Account may be had. *See*, *United Exposition Service v. State Industrial Insurance System*, 109 Nev. 421, 424, 851 P. 2d 423 (1993). The District contends that the Board imposed a hyper-technical reading of NRS 616B.578(4) by requiring the District to prove it had knowledge of the diagnosis of spondylolisthesis, as the preexisting condition, when all the District was required under NRS 616B.578(4) was to prove that it knew that the injured worker suffered from a preexisting condition that was serious, abiding, or lasting condition. JA Vol. 2, at 304;19-20.

The District is again in error. The Board did not choose spondylolisthesis as

the preexisting permanent impairment. The choice was the District's. JA Vol. 1, at 173, 179. The Board simply took what the District offered, found that spondylolisthesis was not discovered until after the subsequent industrial injury and, applying *Holiday* concluded that spondylolisthesis could not satisfy the knowledge requirement of NRS 616B.578(4). Then, since spondylolisthesis was the only condition that would support a rating of 6% or more, WPI, the Board was compelled to deny the claim for failing to satisfy NRS 616B.578(1),(3) and (4).

Nothing exotic was required to reach this conclusion. It takes only a journeyman's analysis to read, understand and apply the requirements of NRS 616B.578.

E. Substantial Evidence Also Supports the Board's Findings That the Board's Characterization of the Various Other Minor Back Ailments Were Separate and Distinct from the Spondylolisthesis

The Board classified spondylolisthesis and the preexisting back ailments dating back to 2002, as separate and distinct from each other and, therefore, knowledge of these various sprains and back pains, the Board found, would not equate with knowledge of spondylolisthesis. The classification of conditions is a question of fact. *See, State Indus. Ins. System v. Swinney*, 103 Nev. 17, 20, 731 P.2d 359 (1987). Therefore, the Board's finding that the nagging back injuries were separate and distinct from spondylolisthesis must be affirmed on appeal if

these findings are supported by substantial evidence. *Maxwell, supra* 331.

Substantial evidence supports this classification beginning with the injured worker's HNP, which should never be confused with spondylolisthesis, the forward displacement of a vertebra. *See, Spondylolisthesis,* Wikipedia, (9/11/2017), https://en/wikipedia.org/wiki/Spondylolisthesi. As explained, the nucleus pulposus is the gel like center of the discs that separate the vertebral bodies from each other. The injured worker was diagnosed with HNP, a condition where the nucleus pulposus bulges out through the outer membrane that keeps the nucleus pulposus intact in the disc. *See, Spinal Disc Herniation*, Wikipedia, (9/11/2017), https://en.wikipedia.org/Spondylolisthesis. Perhaps knowing this distinction, the District concedes that a diagnosis of a HNP is separate from a diagnosis of spondylolisthesis. The District also concedes that a HNP is not symptomatic of spondylolisthesis. JA Vol. 2, at 352;22-25, 353;23-35, 354;1-2.

Then, none of the medical reporting from the doctors treating the injured worker for the four injuries that occurred, prior to the subsequent industrial injury, remotely hinted that the injuries were the precursors of spondylolisthesis. *See*, Statement of Facts, *supra*, ¶¶ 4-19. Dr. Flemming, as noted, mentioned listhesis. However, aside from the fact that her report never made it to the District, JA Vol. 2, 354;12-21, her ultimate diagnosis never mentioned either listhesis or spondylolisthesis. JA Vol. 1, at 86.

Dr. Betz, upon whom the District heavily relies, quoted Scott Hall, M.D., as of the opinion the injured worker's spondylolisthesis/spondylolysis was not caused by the industrial injury and he did not feel these conditions were preexisting. According to Dr. Betz, Dr. Hall did not think that the previous nagging back injuries caused the spondylolisthesis or spondylolysis but may have aggravated the condition. JA 176. *See also*, the reports of Drs. Rimoldi and Witmer. JA Vol. 1, at 139, 143. Also, according to Dr. Rimoldi, radiographs of the lumbar spine were taken on February 19, 2008, and they showed degenerative changes at L5-S1, but no mention at this time, either, of spondylolisthesis. JA Vol. 1, at 139.

The preexisting nature of the injured worker's spondylolisthesis, however, was also not without question. G. Kim Bigley, M.D., neurology, issued a report after seeing the injured worker on March 20, 2012. JA Vol. 1, at 186. In it he said, "A prior lumbar MRI from 07/02 from a prior work-related injury indicated that ... [the injured worker]...had a herniated disc at L5/S1 but not spondylolisthesis." JA Vol. 1, at 196.

Substantial evidence clearly supports the Board's classification of these conditions as separate and distinct from spondylolisthesis. Ample evidence exists to support the Board's finding that knowledge of the various nagging injuries to the back need not be equated with knowledge of spondylolisthesis and, therefore, would not allow the District to relate knowledge of the spondylolisthesis to a

period prior to the date of the subsequent industrial injury of November 30, 2007, in order to comply with the prior knowledge requirement of *Holiday*.

VI. Conclusion

The Board's disposition of this claim is consistent with the plain reading of NRS 616B.578 and is demonstrably supported by substantial evidence. The District's truncated reading of NRS 616B.578(3), which marginalizes the 6% Rule of the Statute and converts the 6% Rule into a stand alone requirement in derogation of the plain wording of an unambiguous statute, is irretrievably infected with legal error and should not be countenanced. The Board's decision should be sustained on appeal.

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

Dated this 12th day of September, 2017.

The Law Offices of Charles R. Zeh, Esq.

By: _____

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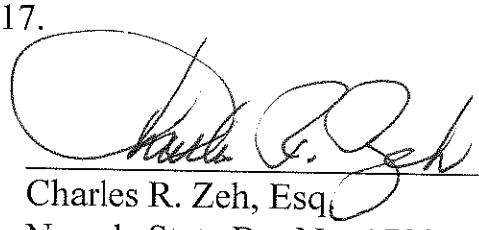
Certificate of Compliance

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: This brief has been prepared in a proportionally spaced typeface using Corel WordPerfect X8, version 18.0.0.200 software in 14 point Times New Roman font.

I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 10,326 words [per Corel WordPerfect X8's word count utility].

Finally, I hereby certify that I have read this Respondent's Answering 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.

Dated this 12th day of September, 2017.



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Certificate of Service

Pursuant to NRCP 5(b), I certify that I am an employee of The Law Offices of Charles R. Zeh, Esq., and that on this date I served the attached *Respondent's Answering 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: Robert F. Balkenbush, Esq. Thorndal Armstrong Delk Balkenbush & Eisinger 6590 S. McCarran Blvd., Suite B Reno, NV 89509 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 89074-6497
	Personal delivery
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Dated this 12th day of September, 2017.

Tara Kennedy

An employee of
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