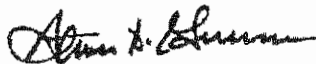


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DISTRICT COURT

COUNTY OF CLARK, NEVADA

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

14 Petitioners,

15 vs.

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

25 Respondents.

CASE NO. A-14-702463-J  
DEPT. NO. XXXII

SECOND STIPULATION AND ORDER  
FOR EXTENSION OF TIME FOR  
PETITIONERS TO FILE OPENING  
BRIEF

26 COMES NOW, Petitioners, North Lake Tahoe Fire Protection District and Public  
27 Agency Compensation Trust, by and through their counsel of record, THORNDAL,  
28 ARMSTRONG, DELK, BALKENBUSH & EISINGER, and the Respondent, 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, by and through their respective attorneys,

1 Charles Zeh, Esq. and Donald C. Smith, Esq./Jennifer Leonescu, Esq., and hereby stipulate and  
2 agree to extend the time for Petitioners' to file their Opening Brief, up to and including October  
3 14, 2014.

4 The undersigned counsel for the Petitioners specifically represent that the requested  
5 extension of time to file Petitioners' Opening Brief is not made for the purposes of delay or  
6 dilatory tactics.

7 **THORNDAL, ARMSTRONG,  
8 DELK, BALKENBUSH & EISINGER**

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18 DEPARTMENT OF BUSINESS AND  
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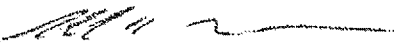
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1 Second Stipulation and Order for Extension of Time for Petitioners to File Opening Brief  
2 Case No, A-14-702463-J  
3  
4

5 ORDER

6 IT IS HEREBY ORDERED that the Petitioners' time to file their Opening Brief extended  
7 up to and including October 14, 2014.  
8


9 DATED: This 7<sup>th</sup> day of October, 2014.  
10

11   
12 District Court Judge

13 SUBMITTED BY:

14 ROSE BARE  
JUDGE DISTRICT COURT DEPARTMENT

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DISTRICT COURT

COUNTY OF CLARK, NEVADA

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

Petitioners,

vs.

THE BOARD FOR ADMINISTRATION OF  
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FOR THE ASSOCIATIONS OF SELF-  
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RELATIONS OF THE NEVADA  
DEPARTMENT OF BUSINESS AND  
INDUSTRY,

Respondents.

CASE NO. A-14-702463-J

DEPT. NO. XXXII

NOTICE OF ENTRY OF ORDER FOR  
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BRIEF

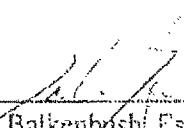
NOTICE OF ENTRY OF ORDER FOR SECOND EXTENSION OF TIME FOR  
PETITIONERS TO FILE OPENING BRIEF

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that an Order for  
Extension of Time for Petitioners to File Opening Brief was entered in the above-entitled action

1 on October 13, 2014, a copy of which is attached hereto.  
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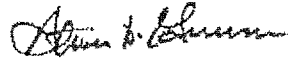
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COUNTY OF CLARK, NEVADA

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

Petitioners,

vs.

THE BOARD FOR ADMINISTRATION OF  
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Respondents.

CASE NO. A-14-702463-J

DEPT. NO. XXXII

SECOND STIPULATION AND ORDER  
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BRIEF

COMES NOW, Petitioners, North Lake Tahoe Fire Protection District and Public  
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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  
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000380

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7 **THORNDALE, ARMSTRONG,  
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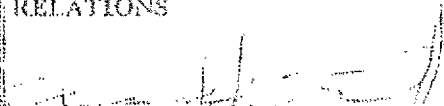
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24 RELATIONS

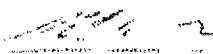
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26 Donald C. Smith, Esq.  
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1 Second Stipulation and Order for Extension of Time for Petitioners to File Opening Brief  
2 Case No. A-14-702463-J  
3  
4

5 ORDER  
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8 up to and including October 14, 2014.  
9

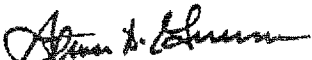
10 DATED: This 7 day of October, 2014.  
11

12   
13 District Court Judge  
14

15 SUBMITTED BY:  
16

17 FILED EARL  
18 JUDGE DISTRICT COURT - CLARK COUNTY

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12 Public Agency Compensation Trust, Insurer

13 DISTRICT COURT

14 COUNTY OF CLARK, NEVADA

15 NORTH LAKE TAHOE FIRE  
16 PROTECTION DISTRICT AND PUBLIC  
17 AGENCY COMPENSATION TRUST, Case No. A-14-702-463-J  
18  
19 Petitioners, Dept. No. XXXII  
20 vs.  
21

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

31 Respondents.

32 PETITIONERS' OPENING BRIEF

33 COMES NOW, NORTH LAKE TAHOE FIRE PROTECTION DISTRICT, and PUBLIC  
34 AGENCY COMPENSATION TRUST, Petitioners, by and through their attorney, Robert F.  
35 Balkenbush, Esq., Thorndal, Armstrong, Delk, Balkenbush & Eisinger, and hereby submit their

1 Opening Brief pursuant to NRS 233B.133.

2 This Brief is supported by the following points and authorities, the record on appeal on file  
3 herein, and all other papers and pleadings on file in this matter.  
4

5 DATED this 14th day of October, 2014.

6 THORNDAL, ARMSTRONG,  
7 DELK, BALKENBUSH & EISINGER

8 By /John D. Hooks, Esq./

9 ROBERT F. BALKENBUSH, ESQ.

10 JOHN D. HOOKS, ESQ.

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17 Attorneys for: North Lake Tahoe Fire Protection

18 District and Public Agency Compensation Trust  
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23	NRS 239B.030 . . . . .	19
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## STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the decision of the Board<sup>1</sup> interpreting NRS 616B.578, to deny reimburse from the Subsequent Injury Account, based on undisputed facts, constitutes clear legal error as a matter of law?

---

<sup>1</sup> The Board for Administration of the Subsequent Injury Account for the Associations of Self-Insured Public or Private Employers (hereinafter "Board")



1 POINTS AND AUTHORITIES

2 I. STATEMENT OF THE CASE

3 The injured employee or worker cannot be named due to legal principles governing privacy,  
4 but will be hereinafter referred to as "employee" or "firefighter." The Employer or Association  
5 Member in this matter is the North Lake Tahoe Fire Protection District (hereinafter "NLTFPD").  
6 The Self-Insured Association in this matter is the Public Agency Compensation Trust (PACT), and  
7 the third party administrator of the firefighter's workers' compensation claim herein at issue is  
8 Alternative Service Concepts, LLC., (ASC). This Petition stems from the PACT's Request for  
9 reimbursement filed with the Nevada Department of Industrial Relations (hereinafter "DIR"),  
10 Workers' Compensation Section, on October 3, 2012. See, ROA 001. On May 13, 2013, the  
11 Administrator issued a recommendation to deny reimbursement pursuant to NRS 616B.578(4). See,  
12 ROA 001-021. On September 11, 2013, the NLTFPD filed a Pre-Hearing Statement. See, ROA 182-  
13 186. On September 19, 2013, a hearing was held before the Board. On May 14, 2014, the Board  
14 issued its Findings of Fact and Conclusions of Law And Decision of the Board (hereinafter  
15 "Decision") and the NLTFPD and PACT have respectfully asked this Court to review that Decision  
16 by means of a petition for judicial review. See, ROA 204-226.

17 II. STATEMENT OF THE FACTS

18 *Injuries and Medical Treatment Prior to Subsequent Injury of November 2007*

19 The Firefighter was hired by the NLTFPD on October 1, 1981. ROA 233 (Tr., p. 7;7). On  
20 August 22, 2002, almost twenty years into his career as a paramedic and firefighter, the employee  
21 injured his back while lifting a fire hose. ROA 233 (Tr., p. 7;10-11); ROA 035. The firefighter filed  
22 a workers' compensation claim for a back injury and insurance coverage of his claim was granted.  
23 ROA 045. On or about November 6, 2002, the employee had a magnetic resonance imaging  
24 examination (MRI) of his lumbar spine. ROA 037. The examination found a large central disc  
25  
26  
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28

1 protrusion at L5-S1 and a degenerative disc bulge at L4-L5. *Id.* On November 13, 2002, George  
2 Mars, M.D., reviewed the MRI and noted that the employee's spine had shown a large central disc  
3 protrusion at L5-S1 with possible contact of the bilateral L5 nerve root. ROA 038. Dr. Mars'  
4 impression was that the employee suffered from a herniated nucleus pulposus (HNP) at L5-S1. *Id.*  
5 On January 6, 2003, the employee's low back was evaluated by Hilari Fleming, M.D., Ph.D. ROA  
6 039-041. She noted low back pain with radiculopathy. *Id.* Dr. Fleming stated that the employee's  
7 L5 nerve roots appeared to be compromised within the foramina bilaterally, probably as a result of  
8 listhesis of L5 on S1, as well as some collapse of the disk. ROA 41. Dr. Fleming recommended the  
9 continuation of conservative care and considered him to be a "very good candidate for an L5-S1  
10 decompression and fusion to be carried high enough to make sure that the origin of the L5 roots were  
11 not impaired in the lateral recess region." ROA 041. The firefighter was a surgical candidate for a  
12 lumbar decompression and fusion as early as 2003. *Id.* Conservative care continued through early  
13 2003. ROA 042-043. On May 3, 2003, the firefighter suffered a second injury to his back while  
14 entering an ambulance. ROA 044-045. This injury was considered an exacerbation of the previous  
15 claim. *Id.*

16  
17 On May 7, 2003, Michael Livermore, claims adjuster with ASC, the third-party administrator  
18 of the employee's initial or 2002 workers' compensation claim with the NLTFPD, wrote to Dr. Mars  
19 stating:

20  
21 [W]e note that this is the 3<sup>rd</sup> or 4<sup>th</sup> time he has exacerbated his low back since  
22 inception of this claim from performing seeming routine duties. We are concerned,  
23 however, due to the frequency and seeming ease of recurrence, that the underlying  
24 low back condition you have described as a large HNP at L5-S1, may predispose  
25 [the employee] to sustaining a severe worsening forcing surgery if he continues to  
26 work full duty as a firefighter.

27 A courtesy copy of this letter was sent to the firefighter's employer, NLTFPD. ROA 045.

28 On May 7, 2003, Dr. Mars evaluated the firefighter, and noted the firefighter suffered from  
a large central disc protrusion at LS-S1. *Id.* An epidural injection was recommended. *Id.* On June

1 4, 2003, during a second appointment in response to Mr. Livermore's letter, Dr. Mars indicated that  
2 the firefighter should have permanent restrictions and further that the employee would eventually  
3 need a disability retirement. ROA 047. Dr. Mars stated that, "The patient and I had a long discussion  
4 about continued medical care and the fact that he wants to be off work. I feel at this point he really  
5 should be on permanent limits of probably 80 pounds. This would probably be a limit that he would  
6 have to adhere to for the rest of his life."

8 Dr. Mars continues, "As far as working as a firefighter he currently is at risk for himself and  
9 other people. He would like to be on regular duty, that may be his choice but very likely due to the  
10 problems of his back and knees he is eventually going to have to have a disability retirement." As  
11 early as 2003, the firefighter is told to quit full duty work to save his back.

13 Following this note from Dr. Mars, the injured worker was seen for treatment and evaluation  
14 by Michael Shapiro, M.D., who repeatedly diagnosed the injured worker with discogenic lumbar  
15 pain, secondary to a herniated disk at L5-S1. ROA 049. Before Dr. Shapiro would agree to return  
16 him to his job as a firefighter required the employee to take a functional capacity examination. *Id.*  
17 The firefighter managed to pass the test and returned to work. ROA 053. On February 25, 2004, the  
18 employee slipped and fell on ice, injuring his tail bone/sacrum. ROA 057-059. The firefighter  
19 received some conservative treatment and returned to work. ROA 060-063.

21 On July 17, 2007, the employee slipped off a running board of a fire truck and injured his  
22 lower back. ROA 064-069. The diagnosis was lumbar strain with radiculopathy. ROA 065. When  
23 seen at the Incline Village hospital, the history and physical notes make reference to a bulging disk  
24 at L3-L4. ROA 064-069. The firefighter received some conservative treatment and returned to work.  
25 *Id.*

27 For all of these back injuries pre-dating the November 2007 subsequent injury, the firefighter  
28 was employed with and filed claims against the NLTFPD. ROA 30-31; ROA 34; ROA 45; ROA 57-

1 58; ROA 59; ROA 64-65; ROA 68. The NLTFPD was courtesy copied on claim determination  
2 letters relating to all injuries. *Id.* Furthermore, undisputed testimony was presented at the hearing  
3 before the board by Sharon Cary, the business manager and human resource director for NLTFPD,  
4 attesting to the fact that the workers' compensation documentation relating to the firefighter's prior  
5 injuries and the May 7, 2003, letter from Mike Livermore was actually kept by NLTFPD in this  
6 instance. ROA 254-255 (Tr., p. 28;1-11 and p. 29;1-10). The NLTFPD was intimately aware of  
7 problems with the firefighter's back prior to November 2007.  
8

9 *Subsequent Injury of November 2014*

10  
11 On November 30, 2007, the employee was injured while carrying someone up a flight of  
12 stairs in a chair designed for this purpose. ROA 070-072. He was seen by Daniel Peterson, M.D.,  
13 who noted a history of "chronic low back pain with recent exacerbation." ROA 071. This injury  
14 lingered for some time and ultimately the employee sought care through worker's compensation on  
15 January 29, 2008. *Id.*; ROA 074.

16  
17 On January 5, 2009, Bruce Witmer, M.D., evaluated the employee's lower back for the  
18 November 30, 2007 injury. ROA 240 (Tr., p. 14;2-12). Dr. Witmer felt the year 2007 work-related  
19 injury appeared to be an aggravation of a previously existing lumbar disc with radiculitis a  
20 component of pain, as well as some local component of pain. *Id.* The link was an inflammatory  
21 aggravation of the employee's prior disc abnormality resulting in radiculitis symptomatology, as well  
22 as the local symptoms. *Id.* A light duty release was given to the employee. *Id.* During 2009, the  
23 firefighter underwent conservative care and injections to his back. ROA 111-112. Surgery was  
24 recommended and it was explained to the firefighter that if he did not undergo surgery he would  
25 likely not be able to return to work as a firefighter. ROA 100.  
26

27 On March 15, 2010, the employee finally agreed to have the back surgery that was  
28 recommended in 2003. ROA 112; ROA 242 (Tr., p. 16;6-7). The procedure was a posterior

1 decompression and fusion at the L4-5 and L5-S1 levels of his lumbar spine. ROA 100.

2 On April 6, 2011, the firefighter returned to Dr. Hall wherein they had a discussion regarding  
3 his ability to return to work and his "multiple work injuries to his lumbar spine in the past." ROA  
4 102. Dr. Hall opined that the employee could not return to work full duty because he was concerned  
5 that the patient's return to work as a firefighter would compromise personal and public safety and  
6 certainly result in re-injury. *Id.*; ROA 243 (Tr., p. 17;2-11). In July of 2011, the firefighter saw Jay  
7 C. Morgan, M.D., on one or more occasions. ROA 102. During this time period, a physician,  
8 presumably Dr. Morgan, gave the employee light duty restrictions. *Id.*

10 On November 21, 2011, the firefighter was evaluated by Jay Betz, M.D. who found that the  
11 firefighter had sustained a 21% whole person impairment (WPI), 50% of which was apportioned to  
12 the firefighter's pre-existing pathologies "leaving no more than 11% WPI associated with the  
13 patient's occupational injury of 11/30/2007." ROA 124. Rating physician, David Berg, D.C., agreed  
14 with this assessment. ROA 135. On November 28, 2011, Dr. Betz performed a Subsequent Injury  
15 Fund Analysis. ROA 125-131. In this analysis, Dr. Betz reiterated his findings, apportioning the  
16 21% WPI at 50% for the preexisting spinal pathologies and 50% for the subsequent industrial injury.  
17 *Id.* Thus, Dr. Betz apportioned at least 10% WPI to pre-existing pathologies. *Id.* In Dr. Betz's  
18 opinion, 95% of the cost of the year 2007 or current claim was attributable to the preexisting  
19 pathology in the employee's lumbar spine. ROA 131. Therefore, in the opinion of Dr. Betz, this  
20 claim was eligible for subsequent injury account reimbursement. *Id.* In his reports Dr. Betz notes  
21 that,

22  
23  
24  
25 "The firefighter has been evaluated and treated for low back problems at  
26 least as early as 2002 at which time an MRI apparently showed a disk protrusion at  
27 L5-S1. Surgical decompression and fusion was considered in 2003 but not pursued.  
28 [The firefighter] 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."

1 ROA 125.

2 Dr. Betz also stressed that:

3 "[The firefighter]'s lumbar pathologies clearly predate his occupational subsequent  
4 injury. Not only did he have unstable spondylolysis with spondylolisthesis, which  
5 is a preexisting developmental problem, it is also well documented, that he was  
6 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.

7 ROA 130 (Emphasis added).

8 The PACT based their request for reimbursement from the Subsequent Injury Account, in  
9 part, on the "10% lumbar spine" that "Dr. Betz" attributed to the firefighter's pre-existing  
10 pathologies. ROA 162 (emphasis added).<sup>1</sup>

11  
12 **III. SUMMARY OF ARGUMENT**

13 The Decision of the Board is legally problematic in a number of areas, but primarily, because  
14 it does not apply the analysis endorsed by the Nevada Supreme Court. The Court expressed its  
15 reliance on the majority analysis articulated in *Special Fund Div. v. Indus. Com'n of Ariz.*<sup>2</sup> See,  
16 *Holiday Ret. Corp. v. State Div of Indus. Rels.*, 274 P.3d 759, 761-62, 128 Nev. Adv. Rep. 13  
17 (2012). This was the analysis cited and endorsed in *Holiday*, the only Nevada judicial authority on  
18 the issue of SIA reimbursement and employer knowledge. See, *Holiday*, 274 P.3d at 761-2.

19  
20 First, the Administrator's recommendation, and the Board's subsequent adoption of that legal  
21 analysis, unilaterally and improperly characterizes the prior permanent physical impairment as a  
22 hyper-specific medical diagnosis of "spondylolisthesis." This unilateral characterization is improper  
23 and neither the Administrator nor the Board's Decision cites any authority enabling an administrator  
24

25 Dr. Betz goes on to explain that the year 2007 claim should qualify for subsequent injury account relief  
26 because the firefighter clearly has at least 6% WPI preexisting the subsequent injury. By way of example, he notes that  
27 symptomatic spondylolysis with spondylolisthesis alone is associated with at least 7% WPI. He also mentions that "To  
28 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." ROA 130

<sup>2</sup> 184 Ariz. 363, P.2d 430 (1995)

1 to *sua sponte* identify the condition upon which the employer knowledge test is to be applied. The  
2 record will dictate the condition of the back prior to the subsequent November 2007, industrial  
3 injury, not the Administrator's narrow and unilaterally selected medical diagnosis.

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

#### 10 IV. LEGAL ARGUMENT

##### 11 A. Standard of Review

12 The parameters of judicial review are established by statute. Judicial review of a final  
13 decision of an agency must be conducted by the Court without a jury and confined to the record. *See*,  
14 NRS 233B.135(1). The burden of proof is on the party attacking the decision to show that the final  
15 decision is invalid. *Id.* Generally, an agency's conclusions of law, which will necessarily be closely  
16 related to the agency's view of the facts, are entitled to deference, and are not to be disturbed if they  
17 are supported by substantial evidence. *Jones v. Rosner*, 102 Nev. 215, 217, 719 P.2d 805, 806  
18 (1986). However, where an agency decides pure issues of law (i.e. statutory construction), it is  
19 appropriate for the reviewing court to make an independent and *de novo* judgment. The  
20 Nevada Supreme Court has long stressed that "[t]he construction of a statute is a question of  
21 law, and independent appellate review of an administrative ruling, rather than a more  
22 deferential standard of review, is appropriate." *Maxwell v. State Industrial Ins. Sys.*, 109 Nev  
23 327, 849 P.2d 267 (1993)(citing *Nyberg v. Nev. Indus. Comm'n*, 100 Nev. 322, 324, 683 P.2d 3, 4  
24 (1984); and *American Int'l Vacations v. MacBride*, 99 Nev. 324, 326, 661 P.2d 1301, 1302 (1983)).

1 At issue in the present case, as explained more fully below, is the interpretation of NRS  
2 616B.578, a statute governing the entitlement to reimbursement from the Subsequent Injury Account.  
3 The facts in the underlying litigation are generally not disputed and no re-weighting of the facts is  
4 necessary or requested. Indeed, the Decision of Board itself notes that it is wrestling with the issue  
5 of "statutory interpretation." *See*, ROA 219, line 7. The Decision states, "The applicant's position  
6 before the Board, therefore, raises a question of statutory interpretation, namely, exactly what must  
7 be known by the employer about the injured worker to satisfy NRS 616B.578(3) and the knowledge  
8 requirement of NRS 616B.578(4)." *Id.* As set forth in the next section of this brief, the SIA Board's  
9 interpretation of NRS 616B.578, to bar reimbursement on the undisputed facts of this case  
10 constitutes clear legal error. As such, this Court reviews the legal issue involved independently and  
11 without deference to the underlying May 14, 2014, Decision, made by the SIA Board.

14 **B. The Administrator's Recommendation as adopted by the Board in its Decision**  
15 **Improperly Characterizes the Firefighter's Preexisting Permanent Physical Low**  
16 **Back Impairment and Fails to Apply the Proper Objective Test to the Employer**  
**Knowledge Requirement Found in NRS 616B.578.**

17 As this Court is well aware, the rationale behind the existence of the Subsequent Injury  
18 Account (SIA) is to encourage employers to hire and retain workers who have pre-existing  
19 conditions and provide relief to employers who hire and retain workers' with pre-existing conditions  
20 when such an worker sustains a subsequent compensable injury. *Holiday Ret. Corp. v. State Div. of*  
21 *Indus. Rels.*, 274 P.3d 759, 128 Nev. Adv. Rep. 13 (2012). An employer may request such relief  
22 through the SIA, which provides reimbursement when an employee sustains an injury entitling him  
23 or her to compensation for disability that is substantially greater due to the combined effects of a  
24 preexisting impairment and the subsequent injury than that which would have resulted from the  
25 subsequent injury alone, provided that the employer can satisfy various statutory conditions. *See*,  
26 NRS 616B.578; *see also*, *Holiday*, 274 P.3d at 760. One of these conditions requires the employer  
27 to "establish by written records that the employer had knowledge of the 'permanent physical  
28



1 impairment' at the time the employee was hired or that the employee was retained in employment  
2 after the employer acquired such knowledge," as permanent physical impairment is defined in NRS  
3 616B.578(3). *See*, NRS 616B.578(4); *see also*, *Holiday*, 274 P.3d at 760. The Nevada Supreme  
4 Court has held that the "knowledge requirement" within the context of a subsequent injury fund  
5 requires an employer acquire knowledge of an employee's permanent physical impairment "before  
6 the subsequent injury occurs to qualify for reimbursement." *Holiday*, 274 P.3d at 760. Thus an  
7 employer who obtains knowledge of an employee's permanent physical impairment and then hires  
8 or retains that employee would be entitled to relief under the SIA, assuming that the various  
9 remaining requirements are also satisfied.<sup>3</sup>

11  
12 The question then arises what information qualifies as sufficient knowledge of an employee's  
13 permanent physical impairment. NRS 616B.578(3), defines "permanent physical impairment" as  
14 "any permanent condition, whether congenital or caused by injury or disease, of such seriousness as  
15 to constitute a hindrance or obstacle to obtaining employment or to obtaining reemployment if the  
16 employee is unemployed." NRS 616B.578(3). The Nevada Supreme Court has not offered any  
17 insight into the sufficiency issue. The Court however, in *Holiday*, relies on the interpretation  
18 provided by a jurisdiction with similar statutory language on the issue. *See*, *Holiday*, 274 P.3d at  
19 761-62. Specifically, the Court looked to the majority trend identified in an Arizona opinion,  
20 *Special Fund Div. V. Industrial Comm'n*, 184 Ariz. 363, P.2d 430 (Ariz. Ct. App. 1995)(citing 1A,  
21 Arthur Larson, *The Law of Workers' Compensation* Sec. 59.33.a (1994). Hence, when interpreting  
22 the nature and extent of employer knowledge required we instructively look to the same sources the  
23 Nevada Supreme Court utilized.

24  
25  
26  
27 <sup>3</sup> While *Holiday* deals with the interpretation of NRS 616B.587 and the instant claim was analyzed under NRS  
28 616B.578, the wording of the pertinent subsections is identical. The only difference is the type of entity/party to whom  
the statute is directed. NRS 616B.587, governs employees of employer insured by private carrier, whereas and NRS  
616B.578 governs employees of a member of an association of self-insured public or private employers.

1        While the majority of jurisdictions hold that employer knowledge before the subsequent  
2 injury is required, perfect knowledge is not. 5 *Larson's Workers' Compensation Law* § 91.03[3];  
3 *Special Fund Div. v. Industrial Comm'n (Morin)*, 182 Ariz.341, 897 P.2d 643 (1994). Indeed, the  
4 scholarly treatises on the issue treat this contention as a given, "It is clear that the employer does not  
5 have to know exactly what the employee's prior condition is in medical terms." *Id.* The Arizona  
6 Supreme Court has stressed that "we emphasize that the "writing requirement is *merely evidentiary*,  
7 and must be sensibly construed so as not to defeat the statute's larger remedial purpose. The larger  
8 purpose, of course, is to promote the hiring of disabled or handicapped workers. We therefore  
9 interpret the statute in the manner that best carries out the legislative purpose." *See, Special Fund*  
10 *Div. v. Industrial Comm'n*, 191 Ariz. 149, 953 P.2d (1997) (citing *Special Fund v. Industrial Comm'n*  
11 *(Burrell)*, 189 Ariz. 162, 165, 939 P.2d 795, 798 (1997) (Fidel, J., dissenting) (emphasis in the  
12 original) (citations omitted)).

15        In *Morin*, the employee, as part of employment application, completed a medical  
16 questionnaire in which she "reported that she had "knee problems" in January 1982 and a  
17 "laminectomy" in June 1962." *See, Industrial Comm'n (Morin)*, 897 P.2d at 649 (1994). The court  
18 held, under an objective standard, rather than a subjective standard, the existence of such evidence  
19 alone in the possession of the employer created an inference that the employer knew about a pre-  
20 existing permanent impairment (medically identified as degenerative dis disease and a ruptured disc)  
21 and decided to hire her anyway. *Id.*

24        In *Country Wide*,<sup>4</sup> the only written evidence entailed a form from the employer's benefits  
25 representative which, next to the question regarding prior similar condition contained a box marked  
26 "yes" and the "Lumbar Lam. 1973; Posterior Cervical Fusion 1982." *Country Wide*, 891 P.2d at 879.

28  
<sup>4</sup> *Country Wide Truck Serv. v. Industrial Comm'n (Walker)*, 181 Ariz. 410, 891 P.2d 877 (1994).

1 The court held that the existence of such evidence was sufficient to establish the employer's  
2 knowledge of a pre-existing permanent impairment prior to his subsequent injury. In support of this  
3 contention the court cites opinions from other persuasive jurisdictions; *Kennecott Copper*  
4 *Corporation v. Chavez*, 111 N.M. 366, 805 P.2d 633, 637-38 (App. 1990) ("An employer is not  
5 required to know the medical specifics of an impairment, as long as knowledge of the impairment  
6 is present.") and *Denton v. Sunflower Elec. Co-Op*, 12 Kan. App. 2d 262, 740 P.2d 98  
7 (1987)(knowledge of low back problems lasting ten years is sufficient without knowing that the  
8 problems were caused by degenerative disc disease).

9  
10 Lastly, the courts have also adopted an objective standard in analyzing the final requirement,  
11 that the permanent physical impairment be of such seriousness as to constitute a hindrance or  
12 obstacle to obtaining employment or to obtaining reemployment if the employee is unemployed. *See*,  
13 *Country Wide*, 891 P.2d at 879; NRS 616B.578(3). In *Country Wide*, the Administrative Law Judge,  
14 initially determined that Walker's impairment did not constitute a hindrance to his employment or  
15 reemployment "because it never caused him to be denied a job nor prevented him from doing his pre-  
16 impairment job as a truck driver." *Country Wide*, 891 P.2d at 879. *Country Wide* argued and the  
17 court agreed that the "subjective approach defeats apportionment's purpose of providing employers  
18 an incentive to hire the handicapped." *Id.*

19  
20 The court indeed adopted a more objective approach which "looks not to the particular  
21 individual's ability to maintain employment, but rather to the nature of the preexisting impairment  
22 and the likelihood that an employer would be less likely to hire someone with such an impairment  
23 than one without." *Id.* The court in *Country Wide* found that this approach was consistent with the  
24 policy considerations extolled by numerous jurisdictions and the Model Workers' Compensation and  
25 Rehabilitation Law. *Country Wide*, 891 P.2d at 879. The court further noted that,

26  
27 Nothing in the statute implies that there must be a case-by-case determination of the  
28 amount of hindrance to employment which flows from any scheduled pre-existing

1 condition. If such an implication were to be drawn, it could seriously impede the  
2 functioning of the statutory scheme. If the statute is simply applied according to its  
3 terms, then employers and their insurance carriers may compute their potential  
4 liability, and the premiums to be paid for insurance coverage, in reliance on the  
5 statute.  
6 *Country Wide*, 891 P.2d at 879 (citing *Employers Commercial Union Insurance Group v. Christ*, 513  
7 P.2d 1090, 1093 (Alaska 1997)).  
8 The court in *Country Wide* also addressed the red herring argument that "because the employee in  
9 this case was fully able to discharge his duties there is no practical reason to permit resort to the  
10 fund." *Id.* The court noted that the refutation of that contention was to be found in the statutory  
11 language itself. *Id.* The court reasoned the "language covers not only those physical impairments  
12 likely to be a hindrance or obstacle to obtaining employment, but also those which might be a  
13 hindrance in 'obtaining reemployment if the employee should become unemployed.' Thus, the court  
14 continued "even though [the employee] had no difficulty keeping his job with the [employer], he  
15 might well have had difficulty finding another job in the event that he became unemployed." *Id.*  
16 Hence, the court will objectively look at the evidence of the permanent physical impairment and  
17 evaluate if such evidence would present a likelihood that an employer would be less likely to hire  
18 someone with such an impairment than one without.<sup>5</sup> See, *Country Wide*, 891 P.2d at 879.<sup>6</sup>

21 <sup>5</sup> The Administrator and the resulting Decision of the Board seem to make the same red herring issue by  
22 indicating that the firefighter's release to full duty, however substantiated that is in the record and whether he made full  
23 duty for other reasons than his health condition one day before his retirement aside, should be a determining factor as  
24 to whether the employee's permanent physical impairment was of such seriousness as to constitute a hindrance or  
25 obstacle to obtaining employment or to obtaining reemployment if the employee is unemployed. However, as explained  
above, the courts have labeled this argument as a red herring when applying the proper objective employer knowledge  
analysis. The analysis, rather, centers on whether the permanent physical impairment would present a likelihood that  
an employer would be less likely to hire someone with such an impairment than one without. To the extent that the  
Decision relies on this allegation as a determining factor in this case it constitutes clear legal error.

26 <sup>6</sup> It should be noted that Nevada Supreme Court in *Holiday* relies on an Arizona opinion in *Special Fund Div*  
27 *Industrial Comm'n*, 184 Ariz. 636, in its analysis of the requirements of the statute governing reimbursement from the  
28 Subsequent Injury Account, NRS 616B.578. This reliance is persuasive due to the fact that both courts were analyzing  
similar statutes instituted by the legislature to address the same policy considerations regarding reimbursement from a  
fund for subsequent injuries. While the two statutes necessarily have their differences, the Nevada Supreme Court's  
reliance was justified as the necessary requirements were the same and have not been previously interpreted in Nevada  
(e.g. written notice requirement prior to subsequent injury).

1 In the present case, The Decision of the Board is legally problematic a number of areas, but  
2 primarily, because it does not apply the analysis endorsed by the Nevada Supreme Court. The Court  
3 expressed its reliance on the majority analysis as articulated in *Special Fund Div. v. Indus. Com'n*  
4 *of Ariz.*<sup>1</sup> See, *Holiday*, 274 P.3d at 761-2. This was the approach cited and endorsed in *Holiday*, the  
5 only Nevada judicial authority on the issue of SIA reimbursement and employer knowledge. See,  
6 *Holiday*, 274 P.3d at 761-62.

8 First, the Administrator's recommendation, and the Board's subsequent adoption of that legal  
9 analysis, unilaterally and improperly characterizes the prior permanent physical impairment as a  
10 hyper-specific medical diagnosis of "spondylolisthesis." This is unilateral characterization is  
11 improper and neither the Administrator nor the Board's Decision cites any authority enabling the  
12 Administrator to *sua sponte* identify the condition upon which the employer knowledge test is to be  
13 applied. The record will dictate the condition of the low back prior to the subsequent November  
14 2007 industrial injury, not the Administrator's narrow and unilaterally selected medical diagnosis.

16 Second, the Decision employs an incorrect subjective standard, not the proper objective  
17 standard, both (1) to the analysis as to whether the employer had knowledge of the written evidence  
18 of previous permanent physical impairment and (2) to the analysis as to whether the permanent  
19 physical impairment is of such seriousness as to constitute a hindrance or obstacle to obtaining  
20 employment or to obtaining reemployment if the employee is unemployed.

22 In the present case, the NLTFPD presented evidence of a spinal condition that pre-dated the  
23 subsequent November 2007 industrial injury. The evidence reflects four substantial back injuries  
24 all of which required treatment and all incurred with the same employer, the Applicant, the  
25 NLTFPD, numerous diagnostic testing revealing physical injuries to the spine with various medical  
26 diagnoses, all of which pre-date the subsequent injury.

28  
<sup>1</sup> 184 Ariz. 363, P.2d 430 (1995)

1 The firefighter was hired by the NLTFPD on October 1, 1981. ROA 233 (Tr., p. 7;7). On  
2 August 22, 2002, almost twenty years into his career as a paramedic and firefighter, the employee  
3 injured his back while lifting a fire hose. ROA 233 (Tr., p. 7;10-11); ROA 035. The firefighter filed  
4 a workers' compensation claim for a low back injury and insurance coverage of this claim was  
5 granted. ROA 045. On or about November 6, 2002, the employee had a magnetic resonance imaging  
6 examination (MRI) of his lumbar spine. ROA 037. The examination found a large central disc  
7 protrusion at L5-S1 and a degenerative disc bulge at L4-L5. *Id.* On November 13, 2002, George  
8 Mars, M.D., reviewed the MRI and noted that the employee's spine had shown a large central disc  
9 protrusion at L5-S1 with possible contact on the bilateral L5 nerve root. ROA 038. Dr. Mars'  
10 impression was that the employee suffered from a herniated nucleus pulposus (HNP) at L5-S1. *Id.*

13 On January 6, 2003, the patient's low back was evaluated by Hilari Fleming, M.D., Ph.D.  
14 ROA 039-041. She noted low back pain with radiculopathy. *Id.* Dr. Fleming stated that his L5 nerve  
15 roots appeared to be compromised within the foramina bilaterally, probably as a result of listhesis  
16 of L5 on S1, as well as some collapse of the disk. ROA 41. Dr. Fleming recommended the  
17 continuation of conservative care and considered him to be a "very good candidate for an L5-S1  
18 decompression and fusion to be carried high enough to make sure that the origin of the L5 roots were  
19 not impaired in the lateral recess region." ROA 041. The firefighter was a surgical candidate for a  
20 lumbar decompression and fusion as early as 2003. *Id.*

22 On May 7, 2003, Michael Livermore, claims adjuster with ASC, the third-party  
23 administrators of his initial claim with the NLTFPD, wrote to Dr. Mars stating:

25 [W]e note that this is the 3<sup>rd</sup> or 4<sup>th</sup> time he has exacerbated his low back since  
26 inception of this claim from performing seeming routine duties. We are  
27 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.

28 ROA 045.

1        A courtesy copy of this letter was sent to the firefighter's employer, NLTFPD. ROA 045.

2        On May 7, 2003, Dr. Mars evaluated the firefighter whose notes the firefighter suffered from  
3 a large central disc protrusion at LS-S1. *Id.* An epidural injection was recommended. *Id.* On June  
4 4, 2003, during a second appointment in response to Mr. Livermore's letter, Dr. Mars indicated that  
5 the patient should have permanent restrictions and further that the employee would eventually need  
6 a disability retirement. ROA 047. Dr. Mars stated that, "The patient and I had a long discussion  
7 about continued medical care and the fact that he wants to be off work. I feel at this point he really  
8 should be on permanent limits of probably 80 pounds. This would probably be a limit that he would  
9 have to adhere to for the rest of his life."

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11  
12        Dr. Mars continues, "As far as working as a firefighter he currently is at risk for himself and  
13 other people. He would like to be on regular duty, that may be his choice but very likely due to the  
14 problems of his back and knees he is eventually going to have to have a disability retirement." As  
15 early as 2003, the firefighter is told to quit full duty work to save his back.

16  
17        Following this note from Dr. Mars, the injured worker was seen for treatment and evaluation  
18 by Michael Shapiro, M.D., who repeatedly diagnosed the injured worker with discogenic lumbar  
19 pain, secondary to a herniated disk at LS-S1. ROA 049. Before Dr. Shapiro would agree to return  
20 him to his job as a firefighter he be required him to take a functional capacity examination. *Id.* The  
21 firefighter managed to pass the test and returned to work. ROA 053. On February 25, 2004, the  
22 employee slipped and fell on ice, injuring his tail bone/sacrum. ROA 057-059. The firefighter  
23 received some conservative treatment and returned to work. ROA 060-063.

24  
25  
26        On July 17, 2007, the employee slipped off a running board of a fire truck and injured his  
27 lower back. ROA 064-069. The diagnosis was lumbar strain with radiculopathy. ROA 065. When  
28 seen at the Incline Village hospital, the history and physical notes make reference to a bulging disk

1 at L3-L4. ROA 064-069. The firefighter received some conservative treatment and returned to work.  
2 *Id.* For all of these back injuries pre-dating the November 2007 subsequent injury, the firefighter  
3 was employed with and filed claims against the NLTFPD. ROA 30-31; ROA 34; ROA 45; ROA 57-  
4 58; ROA 59; ROA 64-65; ROA 68. The NLTFPD was courtesy copied on claim determination  
5 letters relating to all injuries. *Id.* Furthermore, undisputed testimony was presented at the hearing  
6 before the board by Sharon Cary, the business manager and human resource director for North Lake  
7 Tahoe NLTFPD, attesting to the fact that the workers' compensation documentation relating to the  
8 firefighter's prior injuries and the May 7, 2003, from Mike Livermore was actually kept by the  
9 employer in this instance. ROA 254-255 (Tr., p. 28; 1-11 and p. 29; 1-10). Most, if not all of these  
10 prior low back injuries required the firefighter to miss work either in the form of disability or for  
11 treatment. The NLTFPD was intimately aware of problems with the firefighter's back prior to  
12 November 2007. Furthermore, the NLTFPD was courtesy copied on May 7, 2003, letter from Mr.  
13 Livermore at ASC highlighting the seriousness of the employee's low back condition in 2003,  
14 stating:  
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17  
18 [W]e note that this is the 3<sup>rd</sup> or 4<sup>th</sup> time he has exacerbated his low back since  
19 inception of this claim from performing seeming routine duties. We are  
20 concerned, however, due to the frequency and seeming ease of recurrence, that  
21 the underlying low back condition you have described as a large HNP at L5-S1,  
22 may predispose [the employee] to sustaining a severe worsening forcing surgery  
23 if he continues to work full duty as a firefighter.

24 ROA 045.

25 Pursuant to *Holiday* and the majority analysis as articulated by the Arizona Supreme Court in *Special*  
26 *Fund Div. v. Industrial Com'n of Ariz.*, the Board must apply the analysis endorsed by the Nevada  
27 Supreme Court. The Court expressed its reliance on the majority analysis as articulated in *Special*  
28 *Fund Div. v. Indus. Com'n of Ariz.*<sup>8</sup> See, *Holiday*, 274 P.3d at 761-2. This was the approach cited

<sup>8</sup> 184 Ariz. 363, P.2d 430 (1995).



1 and endorsed in *Holiday*, the only Nevada judicial authority on the issue of SIA reimbursement and  
2 employer knowledge. *See, Holiday*, 274 P.3d at 761-2. The Administrator's recommendation, and  
3 the Board's subsequent adoption of that legal analysis, unilaterally and improperly characterizes the  
4 prior permanent physical impairment as a hyper-specific medical diagnosis of "spondylolisthesis."

5 This unilateral characterization is improper and neither the Administrator nor the Board's Decision  
6 cites any authority enabling an administrator to *sua sponte* identify the condition upon which the  
7 employer knowledge test is to be applied. The record will dictate the condition of the low back prior  
8 to the subsequent November 2007, industrial injury, not the Administrator's narrow and unilaterally  
9 selected medical diagnosis. Here the record shows written evidence of numerous low back injuries  
10 and a letter detailing the seriousness of the firefighter's low back condition in 2003. The May 7,  
11 2003, letter actually articulates genuine concern regarding the firefighter's ability to perform any job  
12 as a firefighter, stating, "We are concerned, however, due to the frequency and seeming ease of  
13 recurrence, that the underlying low back condition you have described as a large HNP at L5- S1, may  
14 predispose [the employee] to sustaining a severe worsening forcing surgery if he continues to work  
15 full duty as a firefighter." ROA 45. All of this written evidence was forwarded to the NLTFPD prior  
16 to the occurrence of the November 2007, subsequent injury.

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20 As explained in *Morin*, the Board must then first ask, under an objective standard, does the  
21 existence of such evidence alone in the possession of an employer create an inference that the  
22 employer knew about a pre-existing permanent impairment and decided to retain him in employment  
23 anyway. *Id.* Second the Board must ask, under an objective standard, if such evidence would present  
24 a likelihood that an employer would be less likely to hire someone with such an impairment than one  
25 without. Here the answer to both questions is yes.

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28 In this case, however, the Board not only failed to apply the necessary standards, but  
impermissibly and unilaterally identifies the condition upon which the employer knowledge test is

1 to be applied as solely "spondylolisthesis." As outlined above, the written record will dictate the  
2 condition of the low back prior to the subsequent November 2007 industrial injury, not the  
3 Administrator's narrow and unilaterally selected medical diagnosis. As explained above, the courts  
4 have made it very clear that the employer is not charged with having written knowledge of a  
5 particular condition. NRS 616B.578(3) and (4) requires that an employer have knowledge of a  
6 permanent physical impairment, which scholarly treatises and judicial authority have interpreted to  
7 mean the condition of the affected body part(s) as evidenced in written form prior to the subsequent  
8 injury.<sup>9</sup> The Decision scrutinizing the NLTFPD's knowledge of "spondylolisthesis" constitutes clear  
9 legal error. The pre-existing condition of the firefighter's back is well-documented and written  
10 evidence of that condition was in the possession of the NLTFPD before the occurrence of the  
11 November 2007 subsequent injury there is an inference of such knowledge. Furthermore, the written  
12 evidence reflects that the permanent physical impairment presents a likelihood that an employer  
13 would be less likely to hire someone with such an impairment than one without. Without citing any  
14 authority, other than citing the governing statute, the Decision applies its own narrow subjective  
15 analysis as to whether this employer knew about the particular diagnosis "spondylolisthesis." Such  
16 is not the law and constitutes legal error.<sup>10</sup>

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23 <sup>9</sup> *Industrial Comm'n (Morin)*, 897 P.2d at 649; *Country Wide Truck Serv. v. Industrial Comm'n (Walker)*, 181  
24 Ariz. 410, 891 P.2d 877 (1994); *Kennebec Copper Corporation v. Chavez*, 111 N.M. 366, 805 P.2d 633, 637-38 (App.  
25 1990) ("An employer is not required to know the medical specifics of an impairment, as long as knowledge of the  
impairment is present.") and *Denton v. Sunflower Elec. Co-Op*, 12 Kan App. 2d 262, 740 P.2d 98 (1987) (knowledge  
of low back problems lasting ten years is sufficient without knowing that the problems were caused by degenerative disc  
disease).

26 <sup>10</sup> Assuming knowledge of a specific condition would be required, listhesis was indicated as far back as Dr  
27 Fleming's January 6, 2003, medical report. The notation on the record indicated that this record was received by ASC  
28 on January 17, 2003. ASC was the third party administrator for the NLTFPD at time of each of the firefighter's prior  
back injuries. ROA 30-31; ROA 34; ROA 45; ROA 57-58; ROA 59; ROA 64-65; ROA 68 ASC was certainly aware  
of the condition of the firefighter's back prior to the occurrence of November 2007 subsequent injury and aware of  
listhesis diagnosis. Even if this particular record was not given to the NLTFPD, as a matter of law ASC's knowledge  
of all medical records/diagnosis in possession of ASC is imputed to NLTFPD under the principles of agency.

1    **V.    CONCLUSION**

2           In accordance with all of the foregoing, the NLTFPD and PACT respectfully request this  
3    Court to enter an order granting their petition for judicial review, reversing the Board's May 14,  
4    2014, made under Claim No. C143-07-02558-01.

6                                   **AFFIRMATION**

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

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

11           DATED this 14th day of October, 2014.

13                                   THORNDAL, ARMSTRONG,  
14                                   DELK, BALKENBUSH & EISINGER

16                                   By John D. Hooks, Esq./  
17                                   ROBERT F. BALKENBUSH, ESQ.  
18                                   Thorndal, Armstrong,  
19                                   Delk, Balkenbush & Eisinger  
20                                   6590 S. McCarran Blvd., Suite B  
21                                   Reno, Nevada 89509  
22                                   Tel.: (775) 786-2882  
23                                   Fax.: (775) 786-8004  
24                                   Attorneys for: City of Fernley  
25                                   and Public Agency Compensation Trust

1 VI. CERTIFICATE OF COMPLIANCE

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

10  
11 DATED this 14th day of October, 2014.

12 THORNDAL, ARMSTRONG,  
13 DELK, BALKENBUSH & EISINGER  
14

15 By: /John D. Hooks, Esq./  
16 ROBERT F. BALKENBUSH, ESQ.  
17 JOHN D. HOOKS, ESQ.  
18 Attorney for Petitioners  
19  
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Thorndal, Armstrong, Delk, Balkenbush & Eisinger, and that on this 14<sup>th</sup> day of October 2014 service of PETITIONERS' OPENING BRIEF was made upon each of the parties via electronic service through the Eighth Judicial District Court's Odyssey E-File and Serve System addressed to and I deposited for mailing at Las Vegas, Nevada, a true and correct copy of the foregoing document, addressed to:

Charles R. Zeh, Esq.

NV State Bar No. 1739

The Law Offices Of Charles R. Zeh, Esq.

575 Forest Street, Suite 200

Reno, NV 89509

Phone: (775) 323-5700

Fax: (775) 786-8183

Attorney for Respondent

Donald C. Smith, Esq.

Nevada Bar No.: 000413

Jennifer J. Leonescu, Esq.

Nevada Bar No.: 006036

Department Of Business And Industry Division Of Industrial Relations

State of Nevada

1301 N. Green Valley Parkway, Suite 200

Henderson, Nevada 89074-6497

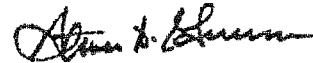
Phone: (702) 486-9070

Fax: (702) 990-0361

Attorney for Respondent

DATED this 14th day of October, 2014.

/John D. Hooks, Esq./



CLERK OF THE COURT

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

9  
10 Attorneys for Respondent *The Board for Administration*  
11 *of the Subsequent Injury Account for the Associations*  
12 *of Self-Insured Public or Private Employers*

13 EIGHTH JUDICIAL DISTRICT COURT

14 CLARK COUNTY, NEVADA

15 NORTH LAKE TAHOE FIRE  
16 PROTECTION DISTRICT and PUBLIC  
17 AGENCY COMPENSATION TRUST,

18 Petitioners,

19 vs.

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

Respondents.

Case No. A-14-702463-J

Department No. XXXII

STIPULATION AND ORDER FOR  
EXTENSION OF TIME FOR  
RESPONDENTS TO FILE REPLY  
BRIEF

Come Now, respondents, the Board for Administration of the Subsequent Injury Account for the Associations of Self-insured Public or Private Employers, by and through its attorney of record, Charles R. Zeh, Esq., The Law Offices of Charles R. Zeh, Esq., and the Administrator of

1 the Nevada Division of Industrial Relations of the Nevada Department of Business and Industry,  
2 by and through its attorney of record, Donald C. Smith, Esq., Jennifer Leoneseu, Esq.,  
3 Department of Business and Industry Division of Industrial Relations, and petitioner, North Lake  
4 Tahoe Fire Protection District and Public Agency Compensation Trust, Robert F. Balkenbush,  
5 Esq., Thorndal, Armstrong, Delk, Balkenbush & Eisinger, and hereby stipulate and agree to  
6 extend the time for Respondents to file their Reply Brief, up to and including, December 29,  
7 2014

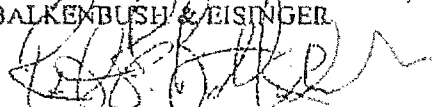
8 The undersigned counsel for the respondents specifically represents that the requested  
9 extension of time to file respondents' reply brief is not made for the purpose of delay or dilatory  
10 tactics. This is the first request for an extension in this matter by respondents.

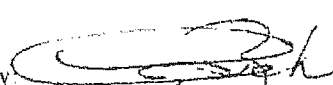
11 Dated: November 14, 2014

Dated: 11/14/2014

12 THORNDAL, ARMSTRONG, DELK,  
13 BALKENBUSH & EISINGER

THE LAW OFFICES OF CHARLES R.  
ZEH, ESQ.

14   
15 By: /s/ Robert F. Balkenbush  
16 Robert F. Balkenbush, Esq.

By:   
Charles R. Zeh, Esq.

17 *Attorneys for North Lake Tahoe Fire*  
18 *Protection District and Public Agency*  
19 *Compensation Trust*

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

20 Dated: 11 17 - 2014

21 DEPARTMENT OF BUSINESS AND  
22 INDUSTRY DIVISION OF INDUSTRIAL  
23 RELATIONS

24 By: \_\_\_\_\_  
Donald C. Smith, Esq.

25 *Attorneys for Administrator of the Nevada*  
26 *Division of Industrial Relations of the Nevada*  
27 *Department of Business and Industry*

28 ///

///

1 the Nevada Division of Industrial Relations of the Nevada Department of Business and Industry,  
2 by and through its attorney of record, Donald C. Smith, Esq., Jennifer Leonescu, Esq.,  
3 Department of Business and Industry Division of Industrial Relations, and petitioner, North Lake  
4 Tahoe Fire Protection District and Public Agency Compensation Trust, Robert F. Balkenbush,  
5 Esq., Thorndal, Armstrong, Delk, Balkenbush & Eisinger, and hereby stipulate and agree to  
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10 tactics. This is the first request for an extension in this matter by respondents.

11 Dated: November 14, 2014

Dated: \_\_\_\_\_

12 THORNDAL, ARMSTRONG, DELK.  
13 BALKENBUSH & EISINGER

THE LAW OFFICES OF CHARLES R.  
ZEH, ESQ.

14  
15 By: /s/ Robert F. Balkenbush  
16 Robert F. Balkenbush, Esq.

By: \_\_\_\_\_  
Charles R. Zeh, Esq.

17 *Attorneys for North Lake Tahoe Fire*  
18 *Protection District and Public Agency*  
19 *Compensation Trust*

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

20 Dated: 14 Nov 2014

21 DEPARTMENT OF BUSINESS AND  
22 INDUSTRY DIVISION OF INDUSTRIAL  
23 RELATIONS

24 By:   
Donald C. Smith, Esq.

25 *Attorneys for Administrator of the Nevada*  
26 *Division of Industrial Relations of the Nevada*  
27 *Department of Business and Industry*

28 ///

///

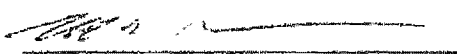


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ORDER

IT IS HEREBY ORDERED that the respondents' time to file their reply brief(s) is hereby extended to December 29, 2014.

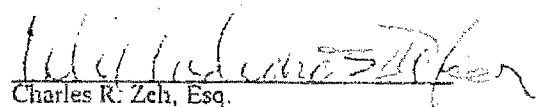
Dated this 2 day of <sup>Dec</sup> November, 2014.



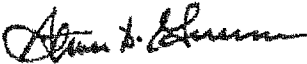
District Court Judge

FOR NAME  
JUDGE, DISTRICT COURT DEPARTMENT 02

SUBMITTED BY:



Charles R. Zeh, Esq.  
The Law Offices of Charles R. Zeh, Esq.  
575 Forest Street, Suite 200  
Reno, NV 89509

  
CLERK OF THE COURT

1 Code: NEOJ  
2 Charles R. Zeh, Esq.  
3 NV State Bar No. 1739  
4 The Law Offices of Charles R. Zeh, Esq.  
5 575 Forest Street, Suite 200  
6 Reno, NV 89509  
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9 Attorneys for Respondent *The Board for Administration*  
10 *of the Subsequent Injury Account for the Associations*  
11 *of Self-insured Public or Private Employers*

12 EIGHTH JUDICIAL DISTRICT COURT

13 CLARK COUNTY, NEVADA

14 \*\*\*

15 NORTH LAKE TAHOE FIRE  
16 PROTECTION DISTRICT and PUBLIC  
17 AGENCY COMPENSATION TRUST,

18 Petitioners,

19 vs.

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

Respondents.

Case No. A-14-702463-J

Department No. XXXII

NOTICE OF ENTRY OF ORDER

-1-

Notice of Entry of Order

December 9, 2014

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

000415

1 TO: ALL PARTIES OF INTEREST IN THE ABOVE-CAPTIONED MATTER  
2 PLEASE TAKE NOTICE that the above-entitled court entered on December 2, 2014, an  
3 Order for Extension of Time for Respondents to File Reply Brief. A copy of the Order is  
4 attached, hereto.

5 The undersigned hereby affirms this document does not contain a social security number.

6 Dated this 9<sup>th</sup> day of December, 2014. THE LAW OFFICES OF CHARLES R. ZEH, ESQ.

7  
8 By: 

9 Charles R. Zeh, Esq.


10 Attorneys for Respondent *The Board for*  
11 *Administration of the Subsequent Injury Account for*  
12 *the Associations of Self-insured Public or Private*  
13 *Employers*  
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# CERTIFICATE OF SERVICE

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

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

Dated this 9<sup>th</sup> day of December, 2014.

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

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

1 Code: SOA  
2 Charles R. Zeh, Esq.  
3 NV State Bar No. 1739  
4 The Law Offices of Charles R. Zeh, Esq.  
5 575 Forest Street, Suite 200  
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9  
10 Attorneys for Respondent *The Board for Administration*  
11 *of the Subsequent Injury Account for the Associations*  
12 *of Self-insured Public or Private Employers*

13  
14 EIGHTH JUDICIAL DISTRICT COURT  
15 CLARK COUNTY, NEVADA

16 NORTH LAKE TAHOE FIRE  
17 PROTECTION DISTRICT and PUBLIC  
18 AGENCY COMPENSATION TRUST,

19 Petitioners,

20 vs.

21 THE BOARD FOR ADMINISTRATION  
22 OF THE SUBSEQUENT INJURY  
23 ACCOUNT FOR THE ASSOCIATIONS  
24 OF SELF-INSURED PUBLIC OR  
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26 ADMINISTRATOR OF THE NEVADA  
27 DIVISION OF INDUSTRIAL  
28 RELATIONS OF THE NEVADA  
DEPARTMENT OF BUSINESS AND  
INDUSTRY,

Respondents.

Cause No. A-14-702463-J

Department No. XXXII

STIPULATION AND ORDER FOR  
EXTENSION OF TIME FOR  
RESPONDENTS TO FILE REPLY  
BRIEF

26 Come Now, respondents, the Board for Administration of the Subsequent Injury Account  
27 for the Associations of Self-insured Public or Private Employers, by and through its attorney of  
28 record, Charles R. Zeh, Esq., The Law Offices of Charles R. Zeh, Esq., and the Administrator of

Stip for Extension of Time

-1-

November 14, 2014

000418

1 the Nevada Division of Industrial Relations of the Nevada Department of Business and Industry,  
2 by and through its attorney of record, Donald C. Smith, Esq., Jennifer Leonescu, Esq.,  
3 Department of Business and Industry Division of Industrial Relations, and petitioner, North Lake  
4 Tahoe Fire Protection District and Public Agency Compensation Trust, Robert F. Balkenbush,  
5 Esq., Thorndal, Armstrong, Delk, Balkenbush & Eisinger, and hereby stipulate and agree to  
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7 2014.

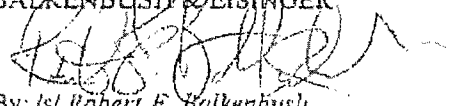
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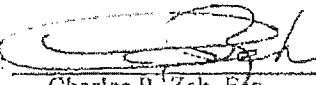
11 Dated: November 14, 2014

Dated: 11/14/2014

12 THORNDAL, ARMSTRONG, DELK,  
13 BALKENBUSH & EISINGER

THE LAW OFFICES OF CHARLES R.  
ZEH, ESQ.

14   
15 By: /s/ Robert F. Balkenbush/  
16 Robert F. Balkenbush, Esq.

By:   
Charles R. Zeh, Esq.

17 *Attorneys for North Lake Tahoe Fire*  
18 *Protection District and Public Agency*  
19 *Compensation Trust*

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

20 Dated: 11-17-2014

21 DEPARTMENT OF BUSINESS AND  
22 INDUSTRY DIVISION OF INDUSTRIAL  
23 RELATIONS

24 By: Donald C. Smith, Esq.

25 *Attorneys for Administrator of the Nevada*  
26 *Division of Industrial Relations of the Nevada*  
*Department of Business and Industry*

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28 ///

1 the Nevada Division of Industrial Relations of the Nevada Department of Business and Industry,  
2 by and through its attorney of record, Donald C. Smith, Esq., Jennifer Leonescu, Esq.,  
3 Department of Business and Industry Division of Industrial Relations, and petitioner, North Lake  
4 Tahoe Fire Protection District and Public Agency Compensation Trust, Robert F. Balkenbush,  
5 Esq., Thorndal, Armstrong, Delk, Balkenbush & Eisinger, and hereby stipulate and agree to  
6 extend the time for Respondents to file their Reply Brief, up to and including, December 29,  
7 2014.

8 The undersigned counsel for the respondents specifically represents that the requested  
9 extension of time to file respondents' reply brief is not made for the purpose of delay or dilatory  
10 tactics. This is the first request for an extension in this matter by respondents.

11 Dated: November 14, 2014

Dated: \_\_\_\_\_

12 THORNDAL, ARMSTRONG, DELK,  
13 BALKENBUSH & EISINGER

THE LAW OFFICES OF CHARLES R  
ZEH, ESQ.

14  
15 By: /s/ Robert F. Balkenbush  
Robert F. Balkenbush, Esq.

By: \_\_\_\_\_  
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18 *Protection District and Public Agency*  
19 *Compensation Trust*

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

20 Dated: 14 Nov 2014

21 DEPARTMENT OF BUSINESS AND  
22 INDUSTRY DIVISION OF INDUSTRIAL  
RELATIONS

23  
24 By: [Signature]  
Donald C. Smith, Esq.

25 *Attorneys for Administrator of the Nevada*  
26 *Division of Industrial Relations of the Nevada*  
*Department of Business and Industry*

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ORDER

IT IS HEREBY ORDERED that the respondents' time to file their reply brief(s) is hereby extended to December 29, 2014.

Dated this 2 day of <sup>Dec</sup> November, 2014.

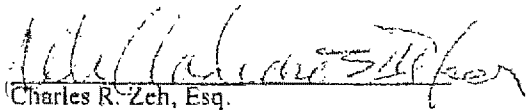


District Court Judge

FOR BARE

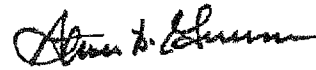
JUDGE, DISTRICT COURT DEPARTMENT 32

SUBMITTED BY:



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CLERK OF THE COURT

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7 *of the Subsequent Injury Account for the Associations*  
8 *of Self-insured Public or Private Employers*

9 EIGHTH JUDICIAL DISTRICT COURT

10 CLARK COUNTY, NEVADA

11 \*\*\*

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

15 Petitioners,

16 vs.

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

27 Respondents.

Case No. A-14-702463-J

Department No. XXXII

28  
REPLY BRIEF

Reply Brief

December 29, 2014

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1 **I. INTRODUCTION**

2 Nevada's Subsequent Injury Account for the Associations of Self-insured Public or  
3 Private Employers (the Account)<sup>1</sup> is a workers' compensation program that was created to  
4 encourage self-insured employer members of associations, as in this case, to hire or retain  
5 workers with preexisting disabling conditions. CRYSTAL M. MCGEE, BACKGROUND PAPER 01-1,  
6 A STUDY OF SUBSEQUENT INJURY FUNDS, Research Division Legislative Counsel Bureau  
7 (September 2000), p. 1. This purpose is accomplished through economic relief provided to those  
8 employers who knowingly accept the risk associated with the hiring or retention in employment  
9 of already impaired workers. See, NRS 616B.578(4).<sup>2</sup> This risk is minimized by reimbursement  
10 from the Account to the self-insured for the compensation paid the injured worker in the event of  
11 a subsequent industrial injury, if the compensation<sup>3</sup> paid the injured worker is substantially  
12 greater by reason of the combined effects of the preexisting permanent physical impairment and  
13 the subsequent industrial injury. See, NRS 616B.578(1) the "combined effects" rule.<sup>4</sup>

---

16 <sup>1</sup>The Account is administered by the Board for the Administration of the Subsequent Injury  
17 Account for Self-insured Public or Private Employers (the Board and Respondent herein), see, NRS  
18 616B.563 the members of which are appointed by the Governor of the State of Nevada. NRS 616B.569.  
19 The Administrator (Administrator) of the Division of Industrial Relations (DIR) makes recommendations  
20 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).

21 <sup>2</sup>To qualify under this section for reimbursement from the Subsequent Injury Account for Private  
22 Carriers, the private carrier must establish by written records that the employer had knowledge of the  
23 "permanent physical impairment" at the time the employee was hired or that the employee was retained  
in employment after the employer acquired such knowledge. NRS 616B.578(4).

24 <sup>3</sup>Compensation includes both medical and disability benefits. See, NRS 616A.090.

25 <sup>4</sup>If an employee of an employer who is insured by a private carrier has a permanent physical  
26 impairment from any cause or origin and incurs a subsequent disability by injury arising out of and in the  
27 course of his or her employment which entitles the employee to compensation for disability that is  
28 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 Private Carriers in accordance with regulations adopted  
by the Administrator. NRS 616B.578(1).

1       Petitioners concede that they must show the presence of a preexisting permanent  
2 impairment before reimbursement may be had from the Account. *See*, NRS 616B.578(3).<sup>3</sup> They  
3 do not dispute, either, that according to NRS 616B.578(4), *see*, footnote 2, they must prove that  
4 they had knowledge of the preexisting impairment either at the time of hire, or while the  
5 employee was retained in employment but before the subsequent industrial injury occurred. *See*,  
6 *Holiday Ret Corp v. State Div of Indus Rels*, 274 P.3d 759, 2012 Nev. LEXIS 33; 128  
7 Nev.Adv.Rep. 13; 2012 WL 1136405.

8       According to the petitioners, however, NRS 616B.578(4), is satisfied upon proof the  
9 employer had prior knowledge of "... a lasting or abiding condition" which, they claim, was  
10 satisfied in this case because the self-insured employer knew the injured worker "... had four prior  
11 low back injuries," ROA 298;11-14, of some type of lasting condition, ... "which the employer  
12 also knew would be a 'hindrance' or 'obstacle' to employment." ROA 250;23-25, 251;1-4. *See*  
13 *also*, ROA 251;10-25. They bootstrap themselves into being able to make this claim because  
14 petitioners construe the meaning of a preexisting permanent impairment as that which is "... a  
15 hindrance or obstacle to obtaining employment or to obtaining reemployment if the employee is  
16 unemployed." NRS 616B.578(3)." Petitioners' Opening Brief (PB), p. 9;14-16. *See also*, ROA  
17 251;17-20. This enables them to assert that NRS 616B.578(3) and NRS 616B.578(4) can be  
18 satisfied upon proof that the employer had "... knowledge of a permanent physical  
19 impairment...[.]" PB, p. 18;6-7 (emphasis added), that "was serious." ROA 286;7.

20       Petitioners are mistaken. Not just any preexisting disabling condition will justify  
21 reimbursement as the rest of NRS 616B.578(3), which the petitioners conveniently disregard,  
22 makes clear. There, the Legislature determined that,

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25       <sup>3</sup>As used in this section, "permanent physical impairment" means any permanent condition,  
26 whether congenital or caused by injury or disease, of such seriousness as to constitute a hindrance or  
27 obstacle to obtaining employment or to obtaining reemployment if the employee is unemployed. For the  
28 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. NRS 616B.578(3).

1 ... a condition is not a 'permanent physical impairment' unless it would support a  
2 rating of 6 percent or more of the whole man if evaluated according to the  
3 American Medical Association *Guides to the Evaluation of Permanent*  
4 *Impairment* [the *Guides*] as adopted and supplemented by the Division pursuant to  
5 NRS 616C.110. NRS 616B.578(3).

6 Whether or not the preexisting condition is serious on some objective or subjective scale is of no  
7 moment unless the preexisting permanent physical impairment supports a PPD rating of 6% or  
8 more, according to the *Guides*. A preexisting condition is not serious enough unless it meets the  
9 test of this "6% rule."

10 The petitioners also mistakenly assert that the "knowledge" requirement of NRS  
11 616B.578(4) is satisfied if they are aware of "a" preexisting permanent physical impairment. PO  
12 p., 18;6. The statutory framework admits of no such license. Because of the "combined effects"  
13 rule of NRS 616B.578(1), the only permanent physical impairment of import is the permanent  
14 physical impairment, defined by NRS 616B.578(3), which combines with the subsequent  
15 industrial injury to substantially increase the compensation paid the injured worker as a result of  
16 the subsequent industrial injury. In turn, the knowledge requirement is explicitly that of "the  
17 permanent physical impairment." Thus, unless the phrase "the permanent physical impairment"  
18 found in NRS 616B.578(4) was intended to have a meaning entirely different from the meaning  
19 assigned the identical phrase used throughout the rest of NRS 616B.578, it is patently clear, the  
20 knowledge requirement of NRS 616B.578(4) is not of "a" permanent impairment but of "the"  
21 permanent physical impairment which fulfills the "combined effects" rule of NRS 616B 578(1).  
22 Since words and phrases in a statute are to be interpreted harmoniously with each other to avoid  
23 unreasonable results, this could hardly be otherwise. See, *Nevada Attorney for Injured Workers*  
24 *v. Nevada Self Insurers Ass'n*, 225 P.3d 1265, 1271, 126 Nev. Adv. Op. 7 (2010).

25 These were the choices made by the Legislature when deciding to impart with the State's  
26 largesse. Since these choices made by the Legislature are the product of the plain language of the  
27 statute, they may not be disregarded or the statute rewritten, see, *Holiday, supra* at 761, as  
28 attempted by petitioners. They have the burden of proving satisfaction with each of the  
requirements of NRS 616B 578. See, *United Exposition Service Co. v. State Industrial Insurance*  
*System*, 109 Nev. 421, 424, 851 P.2d 423 (1993).

1 This case revolves around an accident prone, retired member of the North Lake Tahoe  
2 Fire Protection District (NLTFPD). After a relatively incident free career as a firefighter and  
3 emergency medical personnel, the injured worker suffered several nagging back injuries toward  
4 the end of his tenure. Though the petitioners label these four back injuries as abiding and serious  
5 conditions, ROA 286;3-6, none, individually, or in concert supported a rating according to the  
6 *Guides* of 6% or more, PPD, whole person. ROA 129, 130.

7 The preexisting permanent physical impairment which the petitioners chose to satisfy the  
8 6% PPD threshold requirement of NRS 616B.578(3) was spondylolisthesis. ROA 130. Since the  
9 other conditions to the back would not have supported a rating of 6% or more according to the  
10 *Guides*, *see*, ROA 129, 130, the petitioners had no choice but to offer up spondylolisthesis as the  
11 preexisting condition upon which to base its claim for reimbursement. NRS 616B.578(3). It is  
12 beyond dispute that spondylolisthesis was not discovered until after the subsequent industrial  
13 injury had occurred. ROA 125. Under *Holiday*, therefore, the knowledge of spondylolisthesis  
14 was delinquent and ineffectual to justify reimbursement. *Holiday*, *supra* at 762.

15 Petitioners' misconceptions outlined above, therefore, are the artifice they deployed to  
16 forge a claim that because they knew of these other nagging injuries to the injured worker's lower  
17 back before the date of the subsequent industrial injury of November 30, 2007, they meet the test  
18 of NRS 616B.578(4) even though knowledge of spondylolisthesis, the only condition that  
19 actually meets the definition of a preexisting permanent physical impairment, was not obtained  
20 until after the date of the subsequent industrial injury. ROA 291;15-18. Stated another way,  
21 petitioners offer conditions to justify relief that are unworthy of rewarding the risk against which  
22 NRS 616B.578 was intended to provide a hedge. Spondylolisthesis is unworthy because it was  
23 discovered after the subsequent industrial injury and, thus, the decision to hire or retain was made  
24 without knowledge of this condition. To reward the employer under those circumstances would  
25 be akin, as stated in *Holiday*, to permitting the petitioners to purchase casualty insurance in the  
26 face of a statute that was intended to encourage risk-takers. NRS 616B.578(4); *Holiday*, *supra* at  
27 762.

28 ///



1 The four other back injuries are unworthy of rewarding risk because either individually or  
2 in concert, the risk they pose is insufficient. The statute rewards risk only if the preexisting  
3 permanent physical impairment, of which the petitioners must have knowledge, evinces a  
4 condition serious enough to support a PPD of 6% or more. NRS 616B.578(3).

5 In short, the cobbling of unworthy conditions do not a worthy application make.

## 6 **II. STATEMENT OF CASE**

7 See, the Introduction, in particular, page 4, lines 15-28, page 5, lines 1-4.

## 8 **III. JURISDICTION ON APPEAL**

9 NRS 616B.578(7) allows for a direct appeal to the District Court of a final decision of the  
10 Board.

## 11 **IV. ISSUES ON APPEAL**

12 1. Whether the Board was correct when it determined that a preexisting condition, in  
13 this case, spondylolisthesis, which meets the definition set out for a permanent physical  
14 impairment in NRS 616B.578 but whose discovery was delinquent because it was diagnosed after  
15 the date of the subsequent industrial injury, may not be cobbled together with other conditions,  
16 known to exist prior to the date of the subsequent industrial injury but which, either individually  
17 or in concert, do not rise to the level of a preexisting permanent impairment, to establish  
18 eligibility for reimbursement from the Account.

19 2. Whether substantial evidence supports the Board's finding that the preexisting  
20 permanent physical impairment was spondylolisthesis and that it is a separate and distinct  
21 condition from the various back ailments such as a herniated nucleus pulposus, that were known  
22 to the self-insured prior to the occurrence of the subsequent industrial injury.

23 3. Whether the Board correctly determined that the cobbling together of statutorily  
24 deficient impairments do not a whole claim make.

## 25 **V. STANDARD OF REVIEW ON APPEAL**

26 The Court's function in this case is to determine whether substantial evidence exists to  
27 support the Board's decision and whether or not the Board's decision is "...infected by legal error."  
28 *Holiday, supra* at 761. *Holiday* recognizes that while pure questions of law receive a *de novo*

1 review by the Court, deference is to be accorded the Board's statutory interpretation when it falls  
2 within "...the language of the statute." *Ibid.* And, for clear and unambiguous statutes, neither the  
3 Court nor Board may offer a construction beyond the "...meaning of the statute itself." *Ibid.*  
4 Thus, even when the Court might disagree with the policy set out in the statute or the outcome  
5 that the plain and ordinary meaning of the statute yields, "[i]t is the prerogative of the Legislature,  
6 not ... [the court], to change or rewrite a statute." *Ibid.*

7 *Holiday* quoted NRS 616B.587(4), an analog to NRS 616B.578(4), a statute central to this  
8 case. The Court concluded that the provision in NRS 616B.587(4) requiring the carrier to  
9 "...establish by written records that the employer had knowledge of the 'permanent physical  
10 impairment' at the time the employee was hired or that the employee was retained in employment  
11 after the employer acquired such knowledge ..." was "... language that is plain and unambiguous."  
12 *Id.*, at 761. Thus, the Court concluded that "... neither the appeals officer [nor Board, here] nor  
13 this court is permitted to search for meaning beyond the statute itself." *Ibid.*

14 The Board only adds that where, as here, an administrative body is charged by the  
15 Legislature with administering the statutory framework, including the promulgation of  
16 regulations, *see*, footnote one, *supra*, there is additional reason to give to deference to the  
17 administrative body's interpretation of the statutes. *See Public Agency Compensation Trust*  
18 *(PACT) v Blake*, 265 P.3d 694, 2011 WL 5878138 (Nev.), at 2, 127 Nev. Adv. Op. 77 at 4. Thus,  
19 provided the Board's interpretation of NRS 616B.578 is not in conflict with the statutory  
20 provisions it is interpreting or exceeds its statutory authority, deference should be accorded to the  
21 Board's view that NRS 616B.578 requires petitioners to establish: (a) that at least one preexisting  
22 impairment would support a rating of 6% or more in satisfaction of NRS 616B.578(3); (b) that it  
23 is this condition which must combine with the subsequent industrial injury to substantially  
24 increase the compensation paid, NRS 616B.578(1); and, (c) that petitioners are able to establish  
25 by written record they had knowledge of the permanent physical impairment which combined  
26 with the subsequent industrial injury to satisfy NRS 616B.578(1).

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1 VI. STATEMENT OF FACTS

2 1. The employee the subject of the underlying workers' compensation claim was a  
3 very accident prone, long time EMT member,<sup>6</sup> ROA 039, of the North Lake Tahoe Fire  
4 Protection District (NLTFPD). He suffered from sporadic bouts of injuries intermittently marked  
5 with significant periods of good health without incident or complaints about his low back, the  
6 area, also, of the injured worker's body that is subject of this claim. ROA 125, 147. After each  
7 injury, he returned to work, full duty, including his last injury when he returned to work and  
8 retired according to the Fire Chief for the Department. ROA 261;1-3, 280;23-25, 281;1-7.

9 2. The medical history begins on September 18, 2001, where the medical report  
10 reveals the injured worker was treating for L/S sprain, R/O L4-5 disc. ROA 029.

11 3. Nothing further is reported until August 22, 2002, when the injured worker hurt  
12 his back lifting a fire hose. ROA 030. The C-4 stated it was a L-S spasm, with an MRI pending.  
13 ROA 031. George Mars, M.D., in a report dated September 19, 2002, diagnosed lumbosacral  
14 sprain/strain with somatic dysfunction and myofascial pain for the body parts at issue, here. ROA  
15 036. A light duty work release was given with a follow up in two weeks. *Ibid.* An MRI dated  
16 November 4, 2002, was conducted and the results were L5-S1 large central disc protrusion and  
17 L4-L5 degenerative disc bulge. The remainder of the examination was unremarkable. ROA 037

18 4. The injured worker was seen again by Dr. Mars and in his report of November 13,  
19 2002, the impression was a large herniated nucleus pulposus (HNP) at L5-S1. The HNP is the  
20 gelatin like core of the intervertebral discs. It is not a portion of the vertebra itself. *See,*  
21 *Intervertebral disc*, Wikipedia, the free encyclopedia. There was some pathology but he was  
22 doing well. Dr. Mars was going to let the injured worker return to regular activity for a month to  
23 see how that went. ROA 038.

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28 <sup>6</sup>The injured worker first became employed with the NLTFPD on October 1, 1981. ROA 002

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

5                 ... minor degenerative bulge at L4-5 without any neural compression. There is a  
6                 little lateral recess stenosis but appears non-significant. At L5-S1 he has a large  
7                 central disk protrusion that is not causing significant stenosis, although it certainly  
8                 does impinge upon the thecal sac. ROA 040.

9           She also observed: "His L5 nerve roots, however, appear to be compromised within the foramina  
10 bilaterally, probably as a result of a very subtle listhesis of L5 on S1, as well as some collapse of  
11 the disk." ROA 041.

12           6.       In their opening brief, petitioners baldly attribute to Dr. Fleming that the "...  
13 firefighter was a surgical candidate for a lumbar decompression and fusion as early as  
14 2003." See, Petitioners' Opening Brief (PB) p. 2, 13-14. (Emphasis added). Petitioners strain  
15 credulity, here. They cropped key portions of Dr. Fleming's statement. She actually stated:  
16 "Finally, in terms of surgery, if he [the injured worker] were to get to the point where his  
17 quality of life is impaired sufficiently, ... then, he would be a good candidate for surgery."  
18 ROA 041. (Emphasis added). She added: "Certainly at this stage, he [the injured worker] does  
19 not feel like he wants to consider surgery, and in fact, I see no reason to recommended it,  
20 unless his problems impair his life style to a greater extent than they are at present." ROA 041.  
21 (Emphasis added). Her diagnosis was "...low back pain and resolving bilateral radiculopathy. I  
22 suspect the radiculopathy was L5, although it cannot be confirmed at this time, but those are the  
23 roots that are potentially most impinged." ROA 041.

24           7.       Even the petitioners disagree with the claim, in the Opening Brief, that the injured  
25 worker was a candidate for surgery as early as 2003. The petitioners' third party administrator  
26 wrote to Dr. Mars the following: "Nevertheless, from Dr. Fleming's consultation we gather that  
27 Mr. [the injured worker's redacted name] was not a candidate for surgery, nor does he appear  
28 to be at the present time." ROA 045. (Emphasis added).

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1 8. Regardless, petitioners made no showing that Dr. Fleming's report with the  
2 reference to "listhesis" was in the possession of the NLTFPD prior to November 30, 2007. ROA  
3 297;19-25. It was, however, the only document produced which made any reference to a  
4 "listhesis" before the discovery of the allegedly preexisting permanent impairment,  
5 spondylolisthesis, which was discovered after the subsequent industrial injury, the incident of  
6 November 30, 2007. ROA 088 (an MRI which commented that there was "no anterolisthesis on  
7 the prior standing film of 03/20/08"), 125, 127, 141, 147, 148.

8 9. On May 3, 2003, the injured worker suffered a back strain. The third party  
9 administrator considered the injury an exacerbation of the low back condition, resulting from  
10 twisting and bending through the center walkway of an ambulance. ROA 044.

11 10. On May 7, 2003, Mike Livermore, the claims adjuster with Alternative Services  
12 Concepts, LLC, wrote to Dr. Mars ("the first Livermore Letter") to request that he review the  
13 claim and advise as to whether the employee should be given one or more permanent work  
14 restrictions or given retirement as the result of his HNP. ROA 045. The applicant placed  
15 significant emphasis on this letter at the hearing, apparently, because of the following contents:

16 We are concerned, however, due to the frequency and seeming ease of recurrence,  
17 that the underlying low back condition you have described as a large HNP at L5-  
18 S1, may predispose [the employee] to sustaining a severe worsening forcing  
19 surgery if he continues to work full duty as a firefighter. We note from your 11-  
13-2002 report that you have already considered this and therefore inquire now  
whether or not [the employee] should [sic be] placed on permanent work  
restrictions to prevent that outcome. ROA 045.

20 11. Petitioners' reliance on the first Livermore Letter to Dr. Mars in the Opening Brief,  
21 notwithstanding, there is no evidence in the record that this letter was ever received by the  
22 NLTFPD prior to the subsequent industrial injury of November 30, 2007. ROA 301, 12-21.

23 12. Dr. Mars did not subscribe to Mr. Livermore's characterization of the injured  
24 worker. His response was to diagnose at L5-S1 a large central disc protrusion, low back pain,

25  
26  
27 <sup>7</sup>Petitioners claim in their Opening Brief that a courtesy copy of this first Livermore Letter was  
28 sent to the NLTFPD. See, OB, p. 2;26. There is no proof, however, in the record that this, in fact,  
occurred or if it did, that it occurred in a timely manner. No one was produced by the petitioners who  
could testify as to when this document actually arrived in the NLTFPD files.

1 and recent exacerbation for the previous work related injury. He then released the injured worker  
2 to "regular duty" without restrictions, according to the note dictated May 13, 2003. ROA 046.

3 13. Under these circumstances, the Board could well believe that even if the applicant  
4 was in possession of these documents, ROA 045 and 046, they would not have alerted the  
5 applicant to a serious back condition, much less, one of spondylolisthesis, given the focus on the  
6 separate condition of HNP, ROA 302;1-4, and the fact that the injured worker was promptly  
7 returned to work, full duty by Dr. Mars. ROA 280;12-14, 22-25, 281;1-7, 301;17-20, 302;4-10.

8 14. The injured worker was eventually seen by Michael Shapiro, M.D. ROA 050,  
9 who diagnosed discogenic lumbar pain, secondary to herniated disc at L5-S1. ROA 051. In his  
10 July 17, 2003 report, Dr. Shapiro said that the injured worker was now doing "fantastic following  
11 his second epidural with me..." ROA 051. The plan was a return to work full duty as a fireman  
12 following the results of a functional capacity examination. *Ibid*

13 15. On July 28, 2003, Steven Hallan, P.T., performed a Functional Capacity  
14 Evaluation (FCE) of the employee. Mr. Hallan found that the employee was capable of  
15 performing his pre-injury job without restrictions. He completed the Firefighter Selection, Inc.,  
16 Physical Ability Standards above and beyond stated levels without any production of symptoms  
17 ROA 053. Mr. Hallan concluded that the testing placed the employee "...easily into the Very  
18 **Healthy physical demand level** consistent with his job demands." *Ibid*. (Emphasis in original).

19 16. In Dr. Shapiro's last report of August 1, 2003, his impression was: "Discogenic  
20 lumbar pain, herniated disc; resolved." ROA 055.

21 17. On February 25, 2004, the employee slipped and fell on ice, injuring his tail bone,  
22 ROA 057, ROA 236;10-11, or sacrum. This injury was diagnosed as a "soft tissue, strain injury."  
23 ROA 058. He was ultimately released to full duty. ROA 280;24-25, 281;1-7.

24 18. On July 15, 2007, ROA 068 the injured worker slipped off a running board of a  
25 fire truck and injured his lower back, ROA 236;20-22, with a diagnosis of lumbar strain with  
26 radiculopathy. ROA 65, 236;20-22. After treatment, the employee was released without  
27 restrictions, as was always the case. ROA 280;24-25, 281;1-7.

28 ///

1           19.     Except for the reference by Dr. Fleming to "subtle listhesis," no health care  
2 professional was alerted by these conditions prior to the date of the subsequent industrial injury  
3 that spondylolisthesis was a presenting condition or a condition whose onset was imminent.  
4 ROA 029-033, 035-038, 042-044, 046-052. Summarizing the diagnosis contained in these pages,  
5 the injured worker had low back pain, a herniated nucleus pulposus at L5-S1, lumbosacral  
6 sprain/strain with somatic dysfunction and myofascial pain, radiculopathy at the L5-S1 levels,  
7 and an L5 spasm. Dr. Fleming added a minor degenerative bulge at L4-L5, without neural  
8 compression, a non-significant, little lateral recess stenosis and a large L5-S1 bulge. ROA 040.  
9 Furthermore, the petitioners did not consider these back problems the precursor to  
10 spondylolisthesis, ROA 279;1 7-9, 280;4-8, none of which prevented the injured worker from  
11 returning to work, full duty. ROA 280;12-14, 281;1-7. The radiating pain is noted as secondary,  
12 not to spondylolisthesis, but to the HNP. ROA 051.

13           20.     On November 30, 2007, when the subsequent industrial injury occurred, ROA  
14 108, 109, the employee was injured while carrying someone up a flight of stairs. ROA 237;8 11.  
15 This injury lingered for some time and ultimately the employee sought care through workers'  
16 compensation on January 29, 2008. ROA 074.

17           21.     Following this incident, the injured worker was seen by Michael Salas, M.D. Dr.  
18 Salas' impression was low back pain, lumbar radiculopathy and a history of L5-S1 herniated disc  
19 and lumbar degenerative disc disease. This was the diagnosis as of March 18, 2008. There was  
20 no mention in the examination report of spondylolisthesis. An MRI was also ordered by Dr.  
21 Salas. ROA 077-078.

22           22.     On March 19, 2008, Mr. Livermore wrote another letter (the second Livermore  
23 Letter) in which he takes note of the reference from Scott Hall, M.D., ROA 126, of increased low  
24 back symptoms. Mr. Livermore also references the lumbar disc injury previously established.  
25 The letter says nothing, however, about spondylolisthesis. ROA 079.

26           23     On January 5, 2009, Bruce E. Witmer, M.D., evaluated the employee's lower back  
27 for the November 30, 2007 injury. Dr. Witmer felt the current industrial injury  
28 ///

1 ... appeared to be an aggravation of a previously existing lumbar disc with  
2 radiculitis a component of pain as well as some local component of pain. The link  
3 was inflammatory aggravation of the employee's prior disc abnormality resulting  
4 in radiculitis symptomatology as well as the local symptoms. Medical, epidural  
injection, physical therapy and consideration of surgery were recommended. A  
light duty release was given to the employee. ROA 240;2-12.

5 No discussion of spondylolisthesis was evident.

6 24. On March 15, 2010, the employee had back surgery. ROA 242;6-7. A posterior  
7 decompression and fusion at the L4-L5-S1 levels were performed. ROA 092.

8 25. On April 6, 2011, Dr. Hall opined that the employee could not return to work full  
9 duty because he was concerned that the patient's return to work as a firefighter would  
10 compromise personal and public safety and certainly result in re-injury. ROA 243;2-11. A  
11 second FCE was recommended. *Ibid.*

12 26. Beginning in July of 2011, the employee saw Jay C. Morgan, M.D., on one or  
13 more occasions. ROA 243;12-16. During this time period, a physician, presumably Dr. Morgan,  
14 gave the employee light duty restrictions but also, a full duty release effective August 11, 2011.  
15 ROA 243;15-16.

16 27. When the employee returned to work on August 11, 2011, it was to a full duty  
17 fireman status. ROA 280;24-25, 281;1-7. He then retired the next day. ROA 244;3-5.

18 28. After multiple disability rating examinations and subsequent injury reviews, the  
19 employee was found to have a 21% whole person impairment for his lumbar spine for the  
20 November 30, 2007 incident. *See*, report of David D. Berg, D.C., C.I.C.E., ROA 134. Further,  
21 concurring in what he thought Jay E. Betz, M.D., had opined when Dr. Betz conducted his  
22 "subsequent injury review," ROA 124-130, Dr. Berg apportioned the 21% at 50% for the  
23 preexisting condition and 50% for the subsequent industrial injury. *Ibid.* In Dr. Betz's opinion,  
24 95% of the cost of the current claim was attributable to the preexisting pathology of the lumbar  
25 spine. ROA 130, 244-247. Therefore, in the opinion of Dr. Betz, this claim was eligible for  
26 subsequent injury account reimbursement, since Dr. Betz was also of the opinion, rendered on  
27 November 28, 2011, ROA 123, that (a) spondylolisthesis was the preexisting condition, (b) it pre-  
28 dated the injury of November 30, 2007, ROA 129, and (c) that the spondylolisthesis "...is



1 associated with at least 7% whole person impairment (WPI)...." Consequently, according to Dr  
2 Betz, this case met the 6% preexisting WPI threshold required for Subsequent Injury Fund  
3 analysis. ROA 130.

4 29. By contrast, all of the other conditions, combined, such as the herniated nucleus  
5 pulposus, would support at the most, a 4% PPD under the *Guides*.

6 30. The medical reporting contemporaneous with the decision to hire or retain which  
7 the employer would have seen, therefore, clearly would not have suggested to the employer that it  
8 was dealing with an injured worker whose presenting symptoms were the symptomatic of  
9 spondylolisthesis or who was already suffering from spondylolisthesis.

10 31. During the hearing, Mr. Balkenbush called, as witnesses, NLTFPD Fire Chief  
11 Mike Brown and Sharon Cary, the District's business manager and human resource director.  
12 ROA 253-282.

13 32. Ms. Cary testified that she had no independent recollection that the letter of May  
14 7, 2003, upon which the applicant chose to rely, was presented by Ms. Cary to any Fire Chief of  
15 the Department. She also did not know when the letter of May 7, 2003, became a part of the  
16 injured worker's file. ROA 259;6-7, 260;12-16.

17 33. Chief Brown was questioned about whether the IINP and other injuries suffered  
18 by the injured worker to the back would have been a hindrance to obtaining a job or maintaining  
19 employment with the Department. *See*, ROA 272, 273. He stated that as far as he was  
20 concerned, the information brought to the his attention about the injured worker, would not have  
21 prevented the injured worker from securing or maintaining a job as a firefighter. ROA 272;9-14,  
22 273;1-7. He also admitted that after each injury suffered prior to the injury of November 30,  
23 2007, the injured worker returned to work on a full duty status, ROA 280;12-14, 22-25, 281;1-7,  
24 and when the injured worker retired, he had been released to work, full duty. ROA 281;1-7.

25 34. Assuming, *arguendo*, that spondylolisthesis was present prior to the November 30,  
26 2007 industrial injury, the recitation of the injured worker's health history reveals no proof by  
27 written record that it had knowledge that the injured worker suffered from the preexisting  
28 condition, spondylolisthesis, prior to November 30, 2007. The first written mention of

1 spondylolisthesis does not appear until it was captured by Reynold Rimoldi, M.D., referencing a  
2 note of March 20, 2009, from Dr. Witmer. Dr. Rimoldi's report is dated August 20, 2011. ROA  
3 092, 098, 099.

4 35. It was during the treatment for this injury that spondylolisthesis was first  
5 discovered. Imaging, according to Jay E. Betz, M.D., was the source of the discovery during the  
6 course of treatment for the November 30, 2007 incident. ROA 125.

7 36. The reference to "listhesis" in the Fleming report never became part of the  
8 applicant's written records, before the occurrence of the subsequent industrial injury. ROA  
9 297;19-25.

10 37. The applicant has failed to prove by written record, knowledge of a preexisting  
11 permanent impairment, as defined by NRS 616B.578(3) and explained by *Holiday*.

12 38. The condition of IINP and the other, interim back injuries suffered prior to  
13 November 30, 2007, such as radiculopathy, a back sprain, lumbar disc abnormalities, and the like,  
14 do not rise to the level of a preexisting condition as required by NRS 616B.578(3). ROA 11, 12,  
15 130, 249;12-18. None was ever thought to support a rating of 6% or more, PPD, according to the  
16 *Guides* and, thus, they could not meet the threshold requirement of a preexisting permanent  
17 physical impairment as defined by NRS 616B.578(3) ROA 130.

18 39. The applicant concedes that IINP is a distinct and separate condition from  
19 spondylolisthesis. ROA 300;23-25, 301;1-2.

20 40. At the conclusion of the testimony of the applicant's witnesses, Mr. Balkenbush  
21 stated: "Now, what the administrator I think tried to do in this case is to require the employer to  
22 have exact medical knowledge of the preexisting permanent physical impairment." ROA 286;11-  
23 13. Mr. Balkenbush further informed the Board that the employer only had to know that the  
24 employee had a low back condition that "was serious." ROA 286;3-6.

25 41. The Board deliberated. Vice-chairman Wachter provided his thoughts:

26 There's no evidence to suggest that DIR 18, 19, and 20 [ROA 039-041] was given  
27 to the fire department. And after every incident - - [the employee] was returned to  
28 regular duty and the doctor didn't say that there was a problem. So I don't see how  
the fire department would have recognized that there was a - - more serious  
problem. ROA 301;13-20.

1 42. Chairman Iannone agreed that NLTFPD produced no proof it had written  
2 knowledge of a preexisting serious condition prior to the subsequent industrial injury. ROA  
3 301;24-25, 302;1-8.

4 43. Member Smith moved to uphold the Administrator's recommendation because the  
5 applicant failed to prove knowledge under Subsection 4 of a condition that satisfies the definition  
6 of Subsection 3. ROA 305;4-16. The motion was adopted. ROA 305;25, 306;1 306;4-14.

7 **VII. Argument**

8 **The Court Should Sustain the Board's Determination That the Cobbling Together of**  
9 **Physical Impairments That Are Individually, Statutorily Deficient in an Attempt to**  
10 **Mold a Statutorily Sufficient Claim for Reimbursement Does Not Satisfy the**  
**Eligibility Requirements of NRS 616B.578 (In the Case of NRS 616B.578, the Sum of**  
**Deficient Parts Does Not Make Whole a Claim for Reimbursement).**

11 **A. Cobbling of Statutorily Deficient Impairments Does Not Make a Statutorily**  
12 **Sufficient Claim for Reimbursement under NRS 616B.578.**

13 Petitioners try to cobble together statutorily inadequate impairments to fashion a condition  
14 that justifies reimbursement from the Account. Spondylolisthesis is the preexisting condition  
15 because Dr. Betz claims it would support a rating of 7% or more, in satisfaction of the 6% rule of  
16 NRS 616B.578(3). Spondylolisthesis is statutorily, however, insufficient. It runs afoul of  
17 *Holiday*, because the condition was not discovered by the self-insured until after the subsequent  
18 injury occurred. ROA 125.

19 Therefore, petitioners offer various nagging back injuries which occurred prior to the  
20 subsequent industrial injury to satisfy the *Holiday* timing requirement for proof of knowledge of a  
21 preexisting permanent impairment. These conditions, however, are statutorily deficient because  
22 none, ROA 130, would support a PPD rating of 6% or more, to meet the definition of a  
23 preexisting permanent impairment.

24 Thus, petitioners ask the Board and this Court to accept the cobbling of these individually  
25 deficient conditions to make whole, a claim for reimbursement. This cobbling does not satisfy  
26 the eligibility requirements of NRS 616B.578. Analysis begins with NRS 616B.578(1), quoted in  
27 the margin. *See*, footnote 3, *supra*. From the first sentence of the statute, it is impossible to  
28 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

1 out of and in the course of his employment ...." NRS 616B.578(1) (emphasis added). At the  
2 outset, then, an applicant must be able to prove the existence of a **permanent physical**  
3 **impairment** and a **subsequent industrial injury** or there is no claim.

4       Next, petitioners must prove that the injured worker is entitled "... to compensation for  
5 disability that is **substantially greater** by reason of the **combined effects of the preexisting**  
6 **impairment and the subsequent injury** than that which would have resulted from the  
7 subsequent injury alone ...." NRS 616B.578(1) (emphasis added). This is the **combined effects**  
8 rule of NRS 616B.578(1) discussed above. There are at least four key words or phases in this  
9 portion of NRS 616B.578(1). Taking the easiest to interpret first, NRS 616B.578(1) requires  
10 proof that the compensation paid is **substantially greater** than if there had been only the  
11 subsequent injury. Minor increases do not qualify.

12       The "combined effects rule," however, requires more than proof that the compensation  
13 paid was substantially greater. The "combined effects rule" also requires an applicant to show  
14 that the substantial increase in compensation was due to the combined effects of the preexisting  
15 impairment and **the** subsequent injury.

16       What, then, is the preexisting impairment? From any fair and reasonable reading of this  
17 statute, the reference to **the preexisting impairment** in the **combined effects** clause can only be  
18 to the preexisting permanent physical impairment, which is **the** condition in the first part of NRS  
19 616B.578(1) that precedes the subsequent injury. The term preexisting impairment is  
20 synonymous with the preexisting permanent physical impairment.

21       The preexisting permanent physical impairment, however, is not simply any pathology  
22 because the term is defined. NRS 616B.578(3) states that "... a condition is not a 'permanent  
23 physical impairment' unless it would support a rating of permanent impairment of 6 percent or  
24 more of the whole man if evaluated according to the ... " *American Medical Association Guides*  
25 NRS 616B.578(3) (emphasis added). Thus, while the injured worker may have many preexisting  
26 pathologies, they are irrelevant for subsequent injury purposes unless the petitioner can show that  
27 the pathology supports a rating of 6% or more according to the *Guides*. Furthermore, the  
28 expression is stated in the singular. Consequently, the aggregation of conditions to equal a PPD

1 rating of 6% or more will not do. At least one impairment must be shown to support a rating of  
2 6% or more to state a claim for relief.

3       There is, however, more. The condition, therefore, which satisfies the 6% rule as the  
4 preexisting permanent impairment must also be the preexisting condition which combines with  
5 the subsequent industrial injury to precipitate a substantial increase in the compensation paid.  
6 The pathology relied upon must satisfy both conditions. NRS 616B.578(1) admits of no other  
7 meaning since it explicitly requires proof that the preexisting permanent physical impairment of  
8 6% or more, whole man, combined with the subsequent injury to substantially increase  
9 compensation.

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

17       What, then, is the permanent physical impairment? Unless one is to presume that the  
18 Legislature made reference in NRS 616B.578(4) to a permanent physical impairment that was  
19 entirely unrelated to the rest of the statute, the reference to the permanent physical impairment  
20 must be a reference to the condition that meets the definition of a permanent physical impairment  
21 as identified in NRS 616B.578(3). Since "... whenever possible ... 'statutes within a statutory  
22 scheme ... [are to be interpreted] ... harmoniously with one another to avoid an unreasonable or  
23 absurd result...[,]" the phrase could have no other meaning. *Nevada Attorney for Injured*  
24 *Workers, supra* at 1271

25       And, as explained, that condition, in turn, can only be for purposes of NRS 616B.578, the  
26 permanent physical impairment which combines with the subsequent industrial injury to  
27 substantially increase the compensation paid. Stripped of all overburden, then, knowledge  
28 required by NRS 616B.578(4) must refer to a permanent physical impairment which: (a) meets

1 the 6% threshold definition of NRS 616B.578(3); and (b) also combines with the subsequent  
2 industrial injury to substantially increase the compensation paid. Further, due to *Holiday*,  
3 knowledge of, must precede the subsequent injury.

4 Applying the explicit eligibility criterion of NRS 616B.578 to the conditions relied upon  
5 by the petitioners to justify their application for reimbursement, they are patently statutorily  
6 insufficient. That is, spondylolisthesis is inadequate because it was discovered after the  
7 subsequent injury occurred. ROA 125. The four back injuries which the petitioners claim they  
8 could prove knowledge of their existence pre-dating the subsequent industrial injury, are  
9 inadequate because none of those conditions, individually or in concert, satisfied the 6% rule of  
10 NRS 616B.578(3). ROA 130. Petitioners' claim must be rejected unless the Court is of the mind  
11 to reject the interpretation given by the Board to NRS 616B.578 which precludes the cobbling of  
12 otherwise statutorily deficient conditions into a valid claim for reimbursement.

13 The simple fact of the matter is, the Board's interpretation is first, correct, and secondly  
14 entitled to deference in contrast with the interpretation urged by the petitioners on the Court. The  
15 Board's interpretation is correct because it is consistent with the plain meaning of the terms the  
16 Legislature deployed in NRS 616B.578. It originates or flows from the plain meaning of the  
17 terms employed in a statute the Nevada Supreme Court determined was unambiguous.

18 The interpretation is also entitled to deference because it relies upon the actual words used  
19 by the Legislature. No words are added to the statute by the Board's analysis and by the same  
20 token, no section is read out of the statutes by the Board's interpretation. In contrast, the  
21 petitioners' interpretation disregards key language of the statutes. Petitioners, as indicated, assert  
22 that the pursuit of a claim involves proof of a preexisting permanent physical impairment, *see*,  
23 PO p., 18;6, when NRS 616B.578(4) requires proof of the permanent physical impairment, a  
24 defined term in the statute. The petitioners inject the word "a" when the statute uses "the" as the  
25 modifier of preexisting permanent condition in NRS 616B.578(4).

26 Similarly, petitioners try to rewrite NRS 616B.578(3) by reading or writing out of the  
27 statute the "6% rule" it contains. When they defined a preexisting permanent physical  
28 impairment, they completely ignored in their brief and in argument to the Board, the "6% rule."

1 arguing only that proof of a hindrance to employment was the lynchpin to the statute. PO, p.  
2 9;13-16. This lead them to obsess with a lengthy discussion of the distinction between objective  
3 and subjective knowledge. Whether a condition was a hindrance to employment, however, is of  
4 no moment, if the condition would not support a PPD rating of 6% or more under the *Guides*.  
5 The petitioners occupation over subjective or objective standard for deciding whether the  
6 condition is a hindrance to employment is meaningless, if the condition does not first satisfy the  
7 6% rule.

8         Petitioners' cobbling effort must, therefore, be rejected because it requires for its survival  
9 a rewrite of NRS 616B.578. A rewrite, however, is plainly impermissible inasmuch as the  
10 *Holiday* case, as indicated, stated that the exact analog of NRS 616B.578(4) was unambiguous.  
11 See, *Maxwell v. State Indus. Ins. Sys.*, 109 Nev. 327, 849 P 2d 267 (1993) (where the statute is  
12 plain and unambiguous, a court "... should not 'add to or alter [the language] ....'") Furthermore,  
13 no one could seriously argue, either, that NRS 616B.578(3), where the 6% rule is found, is even  
14 slightly ambiguous. A statute is ambiguous if it is susceptible to more than one interpretation or  
15 it is silent on the issue before the court. *Nelson v. Heer*, 123 Nev. 217, 224, 163 P.3d 420  
16 (2007). There is nothing which smacks of ambiguity in NRS 616B.578(3). Disregarding an  
17 entire segment of NRS 616B.578(3) or going outside the statute by changing words, as petitioners  
18 attempt, may not be countenanced.

19         Statutes, indeed, are to be construed by courts to give full meaning to all their parts and  
20 language. See, *Employers Ins. Co. v. Chandler*, 117 Nev. 421, 425, 23 P.3d 355 (2001). Statutes,  
21 also, should be construed to avoid rendering portions of it nugatory. Cf., *Clark v. Doumani*, 114  
22 Nev. 45, 51 (1998). The petitioners approach to NRS 616B.578 transgresses both of these canons  
23 of statutory interpretation. Thus, unless the Court were to add a third definition to NRS  
24 616B.578 into the mix, the interpretation given by the Board to NRS 616B.578, generally, and in  
25 particular, to NRS 616B.578(1), (3) and (4) should be accepted by the Court. Petitioners'  
26 cobbling of statutorily inadequate conditions to make a statutorily sound claim must be rejected.

27 ///

28 ///

1           **B. Substantial Evidence Supports the Board's Determination That Spondylosis**  
2           **Is the Preexisting Permanent Physical Impairment.**

3           Petitioners state in their opening brief that the Board "...unilaterally and improperly  
4 characterizes the prior permanent physical impairment as a hyper-specific diagnosis of  
5 'spondylolisthesis.'" PO, p. 6:21-23. The criticism is mystifying inasmuch as the petitioner chose  
6 spondylolisthesis as the preexisting permanent impairment. ROA 125-130.

7           Petitioners also had no other option. Spondylolisthesis was the only condition shown by  
8 the petitioners that would support a rating of 6% or more under the *Guides*. ROA 130. Betz's  
9 analysis, ROA 130. Furthermore, the subsequent industrial injury of November 30, 2007, also  
10 the petitioners' choice of condition, was ultimately given a PPD rating of 21%. This was, in turn,  
11 apportioned, 50% for the preexisting conditions, and 50% for the subsequent industrial injury.  
12 ROA 130. Dr. Betz then inveighed and stated that the spondylolisthesis of the injured worker  
13 would at least warrant a 7% or more PPD rating, according to the *Guides*. ROA 130. Thus,  
14 simple math reveals that the preexisting conditions attributed to the various strains and the HNP  
15 were left, in total, the 3-4% residual from the assignment of the 7% or more rating Dr. Betz gave  
16 spondylolisthesis.

17           The Board, then, simply followed the petitioners lead to determine that spondylolisthesis  
18 was the preexisting permanent physical impairment the petitioners offered the Board for  
19 consideration. ROA 130. The Board also simply applied the information squarely in the record  
20 to conclude that none of the preexisting conditions such as the strains to the back and the HNP  
21 met the definition of a preexisting permanent impairment for their want of support of a PPD of  
22 6% or more. These conclusions were not plucked out of thin air. Grounded in the record,  
23 substantial evidence supports the findings that petitioners cobbled together statutorily insufficient  
24 conditions to justify a claim for reimbursement. *See, Maxwell, supra* at 331.

25           **C. Substantial Evidence Also Supports the Board's Findings That (a) the**  
26           **Spondylolisthesis Did Not Become Known until after the Subsequent**  
27           **Industrial Injury and (b) the Board's Characterization of the Various Other**  
28           **Minor Back Ailments Are Separate and Distinct from the Spondylolisthesis**

Conceivably, petitioners will assert, if they have not already, that the nagging back



1 was present.

2 On December 19, 2011, addendum was done by  
3 Dr. Berg. He agreed with Dr. Betz's evaluation and  
4 apportioned the PPD by 50 percent. He recommended 11  
5 percent whole person impairment for the current claim,  
6 leaving 10 percent whole person impairment for the prior  
7 pathology.

8 As of March 7, 2012, Dr. Morgan suggested preop  
9 through Dr. Peterson since the patient agreed to have the  
10 hardware removed.

11 On March 20, 2012, the patient had another PPD  
12 evaluation with Dr. Bigley. Table 15-7 of the Guides  
13 allowed 12 percent whole person impairment for the fusion  
14 with another 1 percent for the second level. Range of  
15 motion loss was found to be 13 percent. Combined, the total  
16 impairment was 25 percent whole person impairment.  
17 Dr. Bigley did not feel apportionment was indicated since  
18 the patient suffered repetitive industrial injuries that  
19 resulted in spondylolisthesis and fusion.

20 The patient has exposure and removal of hardware  
21 at L4-5 and L5-S1 on March 28, 2012. He was discharged in  
22 stable condition and would follow up with Dr. Morgan in six  
23 weeks.

24 On April 11, 2012, the Hearing Officer's Decision  
25 and Order found a medical question existed concerning the

1     apportionment of the PPD evaluations. She ordered a third  
2     evaluation and the new rating physician would also review  
3     the prior reports from Drs. Berg, Betz, and Bigley. The  
4     evaluation would not be scheduled until after the injured  
5     employee was deemed MMI after hardware removal.

6             On March 8, 2013, the injured employee entered  
7     into a Stipulated Agreement before the Appeals Office  
8     regarding the PPD award. The parties agreed that the  
9     injured employee would accept an 11 percent PPD. They also  
10    agreed that he would be paid \$12,796.75 in a lump sum as  
11    settlement for the claim.

12            The documents in this request appear to support a  
13    substantial increase in the costs of the claim concerning  
14    the lumbar spine. This gentleman treated conservatively for  
15    low back and lower extremity pain for three years before he  
16    finally had surgery. He continued to treat after surgery  
17    for recurrent low back pain and had hardware removal in  
18    2012. He was rated at 21 percent whole person impairment  
19    for the lumbar spine, 10 percent of that was the result of  
20    the prior pathology.

21            Dr. Betz opined that 95 percent of the costs of  
22    the current claim were due to the preexisting pathology in  
23    the lumbar spine.

24            The left shoulder required minimal treatment and  
25    had no prior pathology associated with it. The injured

1 employee only treated for several months before he was  
2 released for this particular body part. The file does not  
3 support a substantial increase in the costs of the claim due  
4 to the right shoulder -- this should say left shoulder, I  
5 think -- since there was no prior pathology present in the  
6 current claim.

7 Dr. Betz did not render an opinion at all for the  
8 left shoulder.

9 NRS 616B.578(1) has been satisfied for the lumbar  
10 spine and has not been satisfied for the left shoulder.

11 The injured employee was rated under the current  
12 claim and was found to have 10 percent whole person  
13 impairment for the preexisting, nonindustrial  
14 spondylolisthesis.

15 The left shoulder was not rated and carries no  
16 prior impairment.

17 NRS 616B.578(3) has been satisfied for the lumbar  
18 spine and has not been satisfied for the left shoulder.

19 The employer was aware that the injured employee  
20 had several lumbar strain injuries over the course of nine  
21 years. None of the injuries required more than conservative  
22 treatment and none of them were rated for permanent  
23 impairment.

24 The Insurers' Subsequent Injury Checklist, Form  
25 D-37, indicated the employer became aware of the preexisting

1 permanent physical impairment as of the 2002 MRI and this is  
2 when the employee was retained in employment. This report,  
3 dated November 4, 2002, does not indicate it was ever  
4 received by the employer.

5 The earliest note that would have been sent to the  
6 employer was a May 7, 2003, letter to Dr. Mars from the  
7 third-party administrator. They noted the patient was not a  
8 candidate for surgery but they were concerned about the  
9 underlying back condition described as a large HNP at L5-S1  
10 may predispose the injured employee to severe worsening  
11 forcing surgery if he were to continue working as a  
12 firefighter. Please note that the HNP was not the condition  
13 that was rated in final impairment after the 2007 date of  
14 injury.

15 As previously noted, the injuries that this  
16 injured employee sustained were strain/sprain and all were  
17 treated conservatively.

18 The left shoulder never had any previous injury or  
19 treatment so there was never an opportunity for the employer  
20 to be made aware of a prior impairment.

21 NRS 616B.578(4) has not been satisfied for the  
22 lumbar spine and has not been satisfied for the left  
23 shoulder.

24 The date of injury was after the October 1, 2007,  
25 change in the requirements of this subsection. This claim

1 does not have to meet those requirements in order to be  
2 considered for reimbursement under subsection 5.

3 MR. IANNONE: Mr. Zeh, do you have any comments?

4 MR. ZEH: Not at this time.

5 MR. IANNONE: Mr. Balkenbush?

6 MR. BALKENBUSH: Thank you, Mr. Chairman. I just  
7 want to give the Board a brief opening statement, and that  
8 is as follows: The administrator had effectively concluded,  
9 and I think rightfully concluded, that of the four  
10 requirements for reimbursement for the lumbar spine, that  
11 three of the four conditions have been satisfied. Only one  
12 has not. And that has to do with knowledge on the part of  
13 the employer of the lumbar spine condition. And that's the  
14 only issue that we're going to argue today on the lumbar  
15 spine.

16 We are not pursuing -- the association is not  
17 pursuing today the administrator's recommendation to deny a  
18 reimbursement for the left shoulder condition. We believe  
19 that the administrator's recommendation is aptly supported  
20 and supports a denial of reimbursement for the left shoulder  
21 condition.

22 So our presentation today is going to be limited  
23 to whether the employer had knowledge of some type of  
24 lasting condition in Mr. -- in the injured employee's lumbar  
25 spine prior to the occurrence of the November 2007

1 work-related injury, and whether that knowledge would have  
2 operated as a hindrance or obstacle had this employee come  
3 in even before the November 2007 injury and be hired in the  
4 first instance or rehired by the fire district.

5 I want to also indicate that I was present in  
6 listening to the last hearing that was conducted by the  
7 Board today and listened to Board counsel indicate to the  
8 Board in referring to the operative statute, the subsection  
9 of the statute, NRS 616B.578, and the subsections would be 3  
10 and 4 of -- the fourth subsection is the requirement that  
11 the employer must establish by written record that it had  
12 knowledge of the, quote, permanent physical impairment  
13 either at the time the employer was hired or at the time the  
14 employee was retained in employment as the employer acquired  
15 such knowledge. What permanent physical impairment is is  
16 quoted, and that's in subsection 3. And in terms of  
17 employer knowledge, the only part of that statute we believe  
18 is relevant and applied today is that they have to have  
19 knowledge of some type of permanent condition, which by  
20 definition is some type of lasting condition, whether  
21 congenital or caused by injury or disease of such  
22 seriousness as to constitute a hindrance or obstacle to  
23 obtaining employment or obtaining reemployment if the  
24 employee is unemployed. Knowledge, as Board counsel  
25 indicated, does not have to be perfect.

1           What the records clearly indicate in this case,  
2           and we will argue more fully at the end, is they -- the  
3           employer by written record had knowledge of the year 2002,  
4           the year 2003, year 2004, and the July 2007 low back  
5           injuries suffered by this injured employee, and that's  
6           established through C-4 Forms and C-3 Forms.

7           There was also a -- and we will go to the pages of  
8           the record when I argue the case, but they also had  
9           knowledge in -- by a letter from the claims administrator  
10          dated May 7, 2003, of the seriousness of the low back  
11          condition, and the potential that this could have on this  
12          injured employee, including a disability, retirement, and  
13          surgery.

14          And we have two witnesses today that will testify  
15          on the phone. I think Sharon Cary, who is the business  
16          manager and human resource director for the North Lake Tahoe  
17          Fire Protection District. And we also have Fire Chief Mike  
18          Brown. He is the fire chief of the North Lake Tahoe Fire  
19          Protection District. And both of them would testify, one,  
20          to confirm that the employer had knowledge of the prior  
21          injuries, and then Chief Brown will testify that the -- that  
22          knowledge of those prior injuries had this injured employee  
23          come to the district just prior to the November 2007  
24          subsequent injury or work injury. And those -- knowledge of  
25          those prior injuries would have -- would have constituted a

1 hindrance or obstacle to this injured employee obtaining  
2 employment with the fire district or being rehired by the  
3 fire district. And with that opening statement, I'm  
4 prepared to put on a little bit of witness testimony.

5 MS. LEONESCU: I waive open.

6 MR. IANNONE: Go ahead. Mr. Zeh, do you have any  
7 comments?

8 MR. ZEH: I have no opening argument. I'm here to  
9 represent the Board.

10 MR. IANNONE: Okay. Mr. Balkenbush.

11 MR. BALKENBUSH: Thank you, Mr. Chairman. Sharon  
12 Cary, are you on the phone?

13 MS. CARY: I am, yes.

14 MR. BALKENBUSH: All right. Could the court  
15 reporter swear the witness?

16 SHARON CARY,  
17 having been first duly sworn, was  
18 examined and testified as follows:

19 EXAMINATION

20 BY MR. BALKENBUSH:

21 Q. Ms. Cary, are you currently employed?

22 A. Yes. With North Lake Tahoe Fire Protection  
23 District.

24 Q. And what is your position with the North Lake  
25 Tahoe Fire Protection District?



1           A.    I am the business manager and human resource  
2 director.

3           Q.    And would you describe for the Board what those  
4 job duties entail?

5           A.    Yes.   The business manager.   I am the chief  
6 financial officer of the district, which oversees basically  
7 every financial transaction.   As human resource director,  
8 I'm involved with every personnel issue, which includes  
9 workers' compensation claims, reviewing of the claims, and  
10 discussing with the third-party administrator the dealings  
11 of those claims.

12          Q.    All right.   And in -- in your position as business  
13 manager and human resource director, how long have you been  
14 in that position with the fire district?

15          A.    Nine years.

16          Q.    Okay.   So that would put you back to around 2004  
17 or so?

18          A.    Yes.

19          Q.    Did you commence employment with the fire district  
20 in 2004?

21          A.    Yes.

22          Q.    In reviewing the records of the fire district in  
23 connection with this -- the injured employee that's the  
24 subject of this claim for reimbursement, were you able to  
25 confirm that the fire district had in its records --

1 workers' compensation records that you maintain evidence of  
2 a low back injury in 2002, 2003, 2004, and July 2007, and,  
3 in fact, November 2007?

4 A. Yes. We do have those records here at the  
5 district.

6 Q. And in the -- what has been admitted Exhibit 1 in  
7 this case, there was a letter from the claims administrator,  
8 Mike Livermore, dated May 7, 2003. Does the -- did the fire  
9 district have possession of that letter?

10 A. Yes.

11 Q. Okay. Now, in --

12 MR. ZEH: The letter you referenced, what is the  
13 DIR citation?

14 MR. BALKENBUSH: Page 24.

15 MR. ZEH: And then the court reporter did not  
16 catch your -- the question you were about -- or in the  
17 process of asking your witness. So if you could repeat your  
18 question.

19 Q. (BY MR. BALKENBUSH) Ms. Cary, would you just  
20 describe for the Board what your role is with respect to the  
21 hiring or nonhiring of firefighters at the fire protection  
22 district?

23 A. Certainly. My role, basically, is to go through  
24 every applicant's application, verify that there is all of  
25 their certification, that they are legal -- legally able to

1 be employed by the district, reviewing all of their records,  
2 their I-9s, all of those types of things. It's just to  
3 verify that every piece of information that we require as a  
4 fire district for the employment as a firefighter paramedic  
5 has been met. And then with that, after all of the  
6 variation of all of the documents, letting the fire chief  
7 know that, yes, in fact, this employee, this applicant, has  
8 cleared his physical, his drug screening, and all of his  
9 records are verified.

10 Q. All right. If I understood you, you would make  
11 sure that all the paperwork for being hired was completed  
12 and all the processes for employment were followed, and then  
13 you would make a recommendation that the paperwork and the  
14 processes were followed to the fire chief, but you would not  
15 make a decision on hiring or firing, that would be the fire  
16 chief himself?

17 A. Yes, that is correct.

18 Q. Okay. That's all I have from this witness.

19 MR. IANNONE: Ms. Leonescu?

20 MS. LEONESCU: I think he asked my big question.

21 EXAMINATION

22 BY MS. LEONESCU:

23 Q. So in this case, the fire chief made the decision  
24 about hiring this particular applicant back in the early  
25 '80s?

1           A.    The fire chief at that time, yes, would have hired  
2 this person in the '80s.

3           Q.    And do the employees come up for regular physical  
4 exams during the course of their employment?

5           A.    If I understood the question correctly, I was  
6 asked whether annually a firefighter had a physical. By NRS  
7 statute, firefighter paramedics are required to have an  
8 annual physical.

9           Q.    And what is included in that physical?

10           MR. BALKENBUSH: I'm going to object to the  
11 question. It's calling for an answer that's irrelevant.

12           MS. LEONESCU: It's relevant to the point of  
13 whether they had records of a preexisting physical condition  
14 related to the spine in the course of their -- in the course  
15 of his -- his retention in employment.

16           MR. IANNONE: Go ahead and answer, please.

17           MR. ZEH: The objection was denied. You are to  
18 answer the question, please.

19           THE WITNESS: The physical is getting a complete  
20 urinalysis, complete blood draw. They have to go through,  
21 depending on their age, an EKG, stress EKG. It's a complete  
22 physical. They have to do a heart/lung questionnaire. I  
23 can't think of anything else right off the top of my head.

24           Q.    (BY MS. LEONESCU) So they don't do an examination  
25 of his -- of his spine or MRIs or X-rays, that type of

1 thing; is that correct?

2 A. That, I do not know in their annual physical.  
3 They are going to get an X-ray of their lungs, yes. But as  
4 of their spine -- if that's what you asked?

5 Q. Right.

6 A. No. Not necessarily.

7 Q. Does an EMT like this gentleman come up for  
8 reevaluation for continued employment?

9 A. Yes.

10 Q. And you testified that you received what's been  
11 marked as Exhibit 1, page 24, the May 7, 2003, letter from  
12 Mike Livermore to Dr. Mars; is that correct?

13 A. That is correct. Yes.

14 Q. Did you convey that information to the fire chief?

15 A. I'm sorry. I didn't hear that question.

16 Q. Did you convey that letter or the contents of that  
17 letter to the fire chief?

18 A. I was not employed here at that time, but I was --  
19 I would assume the person that was here prior to my  
20 employment would have done that -- would have notified the  
21 fire chief.

22 Q. Why would that be -- why would they notify the  
23 fire chief?

24 A. Because of the issue of workers' comp, the fire  
25 chief reviews all of that. I speak to the fire chief

1 currently. Right now with any workers' comp claim, he is  
2 involved in the whole process also.

3 Q. And you testified that you reviewed your files and  
4 this letter was in there?

5 A. Yes.

6 Q. Do you have a date that you received this letter?

7 A. I don't have the file in front of me, but I can  
8 certainly get that for you.

9 Q. Just give me one moment, please.

10 Prior -- excuse me. How many -- let me try to  
11 rephrase this.

12 Prior to the subsequent injury in this case, did  
13 you have any rating evaluations regarding this particular  
14 claimant?

15 MR. BALKENBUSH: I'm going to object to the  
16 vagueness of the phrase "subsequent injury" for this  
17 witness.

18 MS. LEONESCU: Well, that was the question. What  
19 is the subsequent injury, Bob?

20 MR. BALKENBUSH: Mr. Chairman, I'm making the  
21 objection because I know what counsel is asking, but I'm not  
22 sure the witness would know. So if you referred to the  
23 subsequent injury with a date, that would probably be more  
24 helpful.

25 MR. IANNONE: Would you try to do that, please?

1 MS. LEONESCU: I'm trying. My file is a mess.

2 MR. IANNONE: That's okay.

3 Q. (BY MS. LEONESCU) Prior to -- prior to August --  
4 excuse me, November 30, 2007, did the file contain any  
5 permanent partial disability ratings?

6 A. Prior to 2007, I'm not positive of it. I know  
7 after that, yes, there's all kinds of ratings and all types  
8 of correspondence to AFC and ourself, and a rating of  
9 firefighter paramedic Burgess. I would have to go back and  
10 look at the files for ratings prior to 2007, but I -- I have  
11 certainly seen all kinds of ratings for him.

12 MR. IANNONE: So what's your answer to the direct  
13 question? You do not know?

14 MS. CARY: Prior to 2007, no. Currently, no, I  
15 don't know. I would have to go back and look. I haven't  
16 studied this file recently.

17 Q. (BY MR. IANNONE) Okay. That's fine. Give me one  
18 second. What is your knowledge of what the -- this  
19 particular employee's impairment was that resulted in his  
20 retirement from the fire department?

21 A. I heard resulting in his retirement -- I didn't  
22 hear the first part of it.

23 Q. What is your awareness as to what the condition of  
24 this particular firefighter was that resulted in his  
25 retirement from the force or department?

1           A.     Scott Burgess was released to full duty the day  
2 before he retired from the fire district. So he retired of  
3 his own volition, so I don't know that he -- I don't know  
4 why he retired. All I know is that he retired to give his  
5 retirement papers. I don't -- I didn't question his -- why  
6 he wanted to retire. So I don't know that he retired  
7 because of his injuries.

8           MS. LEONESCU: I'll pass the witness.

9           MR. IANNONE: Mr. Balkenbush?

10          MR. BALKENBUSH: I have no further questions of  
11 this witness, Mr. Chairman.

12          MR. ZEH: Could I ask a couple questions,  
13 Mr. Chairman?

14          MR. IANNONE: Yes, sir.

15                   EXAMINATION

16 BY MR. ZEH:

17          Q.     Ms. Cary, this is Chuck Zeh. I'm counsel to the  
18 Board. Directing your attention to that letter of May 7,  
19 2003, do you recall the first time that you saw that letter?

20          A.     Probably in review of his injury in 2004, I  
21 believe. In just reviewing his file. Specifically, the  
22 dates that I saw that letter, I couldn't -- I couldn't give  
23 you a date.

24          Q.     Have you -- did you ever convey that -- a copy of  
25 that letter to the chief of the fire department?



1           A.    As I said, that at the time of the receipt of the  
2 letter, I would assume this person that was in my place  
3 prior to me would have done that, but I don't know that the  
4 fire chief at that time saw the letter. I don't know that.

5           Q.    But my question was did you ever convey this  
6 letter to the fire chief?

7           A.    Oh, yes. The chief knows that that letter has  
8 been attached to this file.

9           Q.    And you conveyed it to him?

10          A.    Not specifically. But the chief has seen his file  
11 and it's in there. I didn't specifically say, "Here is the  
12 letter."

13          Q.    So if the chief read the file and he read every  
14 page in the file, then you're assuming that he would have  
15 seen this letter?

16          A.    Yes.

17          Q.    But it's not a letter that you personally gave to  
18 him to look at?

19          A.    No.

20          Q.    It's not something you personally brought to his  
21 attention?

22          A.    No, it is not.

23          Q.    Did you ever discuss the letter with the chief?

24          A.    No. Not until recently.

25          Q.    And "recently" being subsequent to this claim

1 being made; is that correct?

2 A. Yes.

3 Q. Or in anticipation -- or in anticipation of this  
4 hearing?

5 A. Yes.

6 Q. Okay.

7 MR. ZEH: That was it.

8 MR. IANNONE: Go ahead, Mr. Balkenbush.

9 FURTHER EXAMINATION

10 BY MR. BALKENBUSH:

11 Q. I have one follow-up question based on what  
12 Mr. Zeh asked you, Ms. Cary, and that is the -- your habit  
13 and practice as the human resource director and business  
14 manager at the fire district concerning workers'  
15 compensation injuries would be to -- was and is to notify  
16 the fire chief of injuries and any developments in the --

17 MS. LEONESCU: Objection. Leading. Could you  
18 just shorten it up a little bit?

19 MR. BALKENBUSH: I'm trying to do that with a  
20 leading question. Just bear with me. I'll wait for a  
21 ruling on the objection.

22 MR. IANNONE: I'm not sure I understand the  
23 objection.

24 MR. ZEH: He is asking a question that suggests  
25 the answer.

1 MR. IANNONE: Could we try to avoid that,  
2 Mr. Balkenbush?

3 MR. BALKENBUSH: What's that, Mr. Chairman?

4 MR. IANNONE: Would you try to rephrase the  
5 question, please?

6 MR. BALKENBUSH: All right.

7 Q. (BY MR. BALKENBUSH) Ms. Cary, in terms of the  
8 responsibility you have to -- with workers' compensation  
9 claims with the district, and your communications with the  
10 fire chief, what is your -- since you started working for  
11 the fire district, what has been your habit and practice?

12 A. Basically, every time there is a claim, that he is  
13 notified either verbally or is via an email letting him know  
14 what happened, and what the outcome of those claims are. We  
15 just had a discussion recently about one of our employees.  
16 My every day routine when we get a claim, he is made aware  
17 of it and the outcomes of the claim. I don't have a  
18 specific -- yeah, I just -- when we get a claim, he knows  
19 about it.

20 Q. That's fine. The follow-up question is this. Did  
21 you -- was that a new habit and practice of the fire  
22 district, or was that the habit and practice that you were  
23 taught or made aware of when you started your job?

24 A. You know, I know that my predecessor spoke to the  
25 former fire chief about certain workers' comp cases. I

1 don't know that my predecessor informed the former fire  
2 chief about every workers' comp case. But I know that she  
3 did speak to the former fire chief of that specific one.  
4 That, I am aware of. It's just been my practice in my  
5 employment and my former employment that the employer  
6 knows -- or my supervisor knows what's going on with  
7 workers' comp claims.

8 Q. All right. Now, in this case, you are -- you had  
9 indicated that you -- it would be your -- I guess an  
10 assumption that when this injured employee had a year 2004  
11 low back injury that that probably would have been the time  
12 that you became familiar with the letter that was written on  
13 May 7, 2003, by Mike Livermore to Dr. Mars; is that correct?

14 A. Yes. More than likely, yes.

15 Q. Consistent with your habit and practice, would  
16 that have been something, then, in terms of the year 2004  
17 work-related injury that you would have discussed with the  
18 current fire chief Mike Brown?

19 A. He wasn't the current chief at the time. The  
20 former fire chief, yes. But he wasn't the fire chief at  
21 that time.

22 Q. Who was that?

23 A. James Leonardo.

24 Q. All right.

25 MR. BALKENBUSH: I don't have any further

1 questions of this witness.

2 MR. IANNONE: Ms. Leonescu?

3 MS. LEONESCU: Nothing from me.

4 MR. IANNONE: Mr. Zeh?

5 FURTHER EXAMINATION

6 BY MR. ZEH:

7 Q. Correct me if I'm wrong, but I believe it was your  
8 testimony, Ms. Cary, that you have no independent  
9 recollection of discussing the letter of May 7, 2003, with  
10 the then existing fire chief; is that correct?

11 A. Specifically the letter, no. Just -- yeah, that  
12 is my testimony. Specifically discussing the 2003 letter  
13 with the current fire chief, knowing that I was coming into  
14 this -- here. Prior to today.

15 Q. That's the only time that you recall actually  
16 discussing this letter of 2003 with a fire chief was in  
17 connection with preparing for this hearing?

18 A. Yes.

19 Q. Thank you.

20 MR. IANNONE: Just a minute --

21 FURTHER EXAMINATION

22 BY MR. BALKENBUSH:

23 Q. Ms. Cary, do you recall the approximate date that  
24 Mike Brown became fire chief for the fire protection  
25 district? The year would be fine.

1 A. 2005.

2 Q. Thank you.

3 MR. IANNONE: Mr. Wachter, do you have a question?

4 MR. WACHTER: My question was close to what  
5 Mr. Balkenbush's question was.

6 EXAMINATION

7 BY MR. WACHTER:

8 Q. How many fire chiefs have there been since 2003?

9 A. Two. I mean, it was Chief Leonardo and then  
10 Chief Brown. And I think Chief Brown became fire chief in  
11 2006.

12 MR. IANNONE: That's it?

13 MR. WACHTER: Thank you, Mr. Chairman.

14 MR. IANNONE: Mr. Balkenbush, continue, please.

15 MR. BALKENBUSH: That's all the questions I have  
16 of this witness.

17 MR. IANNONE: Okay. Anybody else have a question?  
18 I didn't think so.

19 You may proceed, Mr. Balkenbush.

20 MR. BALKENBUSH: Ms. Cary, do we have Fire Chief  
21 Brown on the phone?

22 MS. CARY: I believe he is. Chief Brown?

23 MR. BROWN: Chief Brown here. Hello.

24 MR. BALKENBUSH: I need to have him sworn in as a  
25 witness. Mike Brown is his name.

1 MIKE BROWN,

2 having been first duly sworn, was

3 examined and testified as follows:

4 EXAMINATION

5 BY MR. BALKENBUSH:

6 Q. Mr. Brown, are you currently employed by the Fire  
7 Protection District?

8 A. Currently the fire chief of North Lake Tahoe Fire  
9 Protection District.

10 Q. And how long have you been employed by the Fire  
11 Protection District?

12 A. Combined years, 26 years.

13 Q. And what year did you become the fire chief?

14 A. October of 2006.

15 Q. Would you just describe for the Board in general  
16 terms what the duties of the fire chief are?

17 A. Yeah. My position is CEO of the organization. I  
18 am in charge of the day-to-day activities when it comes to  
19 response, oversight of our budget as well as all authority  
20 over the employees when it comes to hiring and firing and  
21 maintaining staff level for our district.

22 Q. All right. Now, in this case, we are talking  
23 about a specific injured employee, and one of the questions  
24 I have for you is when you became the fire chief, when there  
25 were new workers' compensation claims or developments -- new

1 developments in existing workers' compensation claims, was  
2 that information communicated to you by someone else  
3 employed by the fire district and could you describe the  
4 process?

5 A. Yes. Any time one of our employees incurs an  
6 injury on the job, I am notified. As a follow-up to those  
7 notifications, I'll check with office staff as well as staff  
8 who was involved with the intake, and the employee's outcome  
9 so I can see exactly what is going on with the employee, and  
10 then review the paperwork to see what we can do to ensure or  
11 to try to train and try to ensure we don't receive any  
12 claims or episodes of that type.

13 Q. All right. Now, Fire Chief Brown, we have both by  
14 written records and by the testimony of Ms. Cary, I believe,  
15 established that the fire district has records of low back  
16 injuries to this injured employee in year 2002, that would  
17 be DIR -- exhibit for the Board it's DIR -- or Exhibit  
18 No. 1, pages 9 and 10. We have evidence that the fire  
19 district had knowledge of a low back injury to this injured  
20 employee in 2003. That would be Exhibit 1, page 23. We  
21 have both written record and testimony from Ms. Cary that  
22 the fire district had knowledge of a year 2004 low back  
23 injury to this injured employee, that is Exhibit 1, pages 36  
24 and 37. And we have knowledge that the fire district had  
25 both by written record and testimony of Ms. Cary knowledge



1 of an injury to his low back in July 2007. That would be  
2 Exhibit 1, pages 43 and 44. In preparation for today's  
3 hearing, are you aware of these injuries?

4 A. Yes, I am.

5 Q. Okay. Now, there was another injury that this  
6 injured worker suffered in November 2007. With knowledge of  
7 the year -- the year 2002, year 2003, year 2004, and July  
8 2007 low back injuries --

9 MS. LEONESCU: Objection. Let me interject an  
10 objection that that's not what the prior testimony was. And  
11 it hasn't been established that any knowledge from anybody  
12 has been imputed to the employer at this point. So I object  
13 that that lacks foundation.

14 MR. BALKENBUSH: We can argue about that --

15 MS. LEONESCU: -- it a question.

16 MR. BALKENBUSH: -- chairman rule on the  
17 objection.

18 MR. IANNONE: Explain the objection to me, please.

19 MS. LEONESCU: That the prior person could not  
20 speak to 2003, 2004, 2005, and 2007 --

21 MR. IANNONE: The prior person who gave testimony?

22 MS. LEONESCU: Correct. And she could not tell  
23 you when that document -- the letter from Mr. Livermore was  
24 received by the fire department. So there's a lack of  
25 foundation to establish that the -- what Mr. Balkenbush is,

1 in fact, testifying that the fire department had knowledge  
2 of a low back condition through the prior testimony of the  
3 witness. There lacks foundation. I think he needs to  
4 establish that through this witness what this witness knows.

5 MR. IANNONE: Let's try that, Mr. Balkenbush.

6 MR. BALKENBUSH: If the Board could look at  
7 Exhibit 1, page 9. That is a Form C-3 from the fire  
8 district about the 2002 low back injury. That's already in  
9 evidence and it was admitted without objection. If the  
10 Board wants to look at page 36, that is a C-3 Form from the  
11 fire district for a year 2004 low back injury. And at page  
12 23 of Exhibit 1, there is a C-1 Form filled out by the fire  
13 district and the injured employee that documents a year 2003  
14 low back injury. And at page -- Exhibit 1 at page 43, there  
15 is a Form C-3 from the fire district documenting a July 2007  
16 low back injury. That's already in evidence. And Ms. Cary  
17 testified that there was -- those records were already in  
18 the fire district's file. And my question is based upon  
19 that information.

20 MR. IANNONE: Okay.

21 MR. BALKENBUSH: All right. May I proceed with  
22 the question?

23 MR. IANNONE: Yes, sir.

24 MR. BALKENBUSH: Yes, sir?

25 MR. IANNONE: Yes, you may.

1 MR. BALKENBUSH: Thank you, Mr. Chairman.

2 Q. (BY MR. BALKENBUSH) Fire Chief Brown, with  
3 knowledge of the prior low back injuries in year 2002, year  
4 2003, year 2004, and July 2007, with that knowledge prior to  
5 the injury in November 2007, would knowledge of those prior  
6 low back injuries have served as an obstacle or hindrance in  
7 any decision you would make if your employee had come to the  
8 fire district to be hired in the first instance or rehired?

9 A. To answer your question, if he was an employee of  
10 the district, as a district employee we are to do everything  
11 we can to maintain his employment with that district. The  
12 information that you're asking about has nothing in there  
13 saying that we should have discontinued his employment with  
14 the organization from my knowledge of that paperwork.

15 Q. But if he had come to you before the injury in  
16 November of 2007, with the knowledge of these preexisting  
17 low back injuries, would that knowledge have -- if he had  
18 come to you to be hired or rehired right before the injury  
19 in November of 2007, would your knowledge of those prior low  
20 back injuries have operated some type of a hindrance or  
21 obstacle to your decision to hire or rehire him?

22 A. Potentially, yes --

23 Q. Explain to the Board why.

24 MR. IANNONE: He didn't finish the answer. He  
25 said two words and you interrupted. He said -- if he has

1 more to add to that first question, let him add to it.

2 A. (By Chief Brown) If any of those documents or if  
3 the employee would have stated to me as the fire chief that  
4 he had an injury that was not consistent with his employment  
5 in the fire district, then he would not have been hired.  
6 But I did not ever see any evidence of that with any of the  
7 documentation that I had.

8 MR. IANNONE: Okay. Thank you.

9 Q. (BY MR. BALKENBUSH) Now, there is -- so based  
10 solely upon the documents of the work-related injuries, is  
11 your answer to the question that that information alone  
12 would not have been an obstacle or hindrance to your hiring  
13 or rehiring him --

14 MS. LEONESCU: Objection. Asked and answered.

15 MR. IANNONE: Mr. Balkenbush.

16 MS. LEONESCU: Objection. Asked and answered.

17 MR. IANNONE: And I think that's true, it was  
18 asked and answered. So let's not ask that question.

19 MR. BALKENBUSH: I just didn't hear him. We are  
20 on the telephone. That's the reason I reasked it, it didn't  
21 come across very clearly.

22 MR. IANNONE: That's all right. So she objected.  
23 I sustained that objection. So please go on.

24 MR. BALKENBUSH: Thank you.

25 Q. (BY MR. BALKENBUSH) Now, Fire Chief Brown,

1 Ms. Cary indicated that there is in the fire protection  
2 district's file a letter from a Mike Livermore with  
3 Alternative Service Concepts, which is a claims  
4 administrator, a letter dated May 7, 2003, to Dr. George  
5 Mars concerning this injured employee and his previous low  
6 back injuries. Are you aware of that letter?

7 A. Yes.

8 Q. Do you have any recollection independently today  
9 of when you may have first reviewed that letter?

10 A. Sometime throughout my career as the fire chief, I  
11 have reviewed his entire file. I cannot state a date or  
12 time. I cannot recall that.

13 Q. In preparation for today's hearing, did you have  
14 an opportunity to review that?

15 A. Yes, I did.

16 Q. Now, does the -- does any of the information in  
17 this letter, does that -- would that have had any influence  
18 whatsoever in the decision you might have hypothetically had  
19 if he -- if this injured employee had come to you in late  
20 October 2007 or early November 2007 and asked to be hired or  
21 rehired?

22 A. You know, I cannot recall the entire letter  
23 itself. I did read it yesterday when I received it. I  
24 cannot -- I cannot give you a clear answer on that question  
25 right now.

1 Q. Okay. But you're aware that that letter is in the  
2 injured worker's file?

3 A. Correct.

4 Q. Okay.

5 MR. IANNONE: Mr. Brown? Mr. Brown?

6 MR. BROWN: Yes, sir.

7 MR. IANNONE: I'm the chairman -- Richard Iannone,  
8 the chairman. When did you become aware that this letter  
9 was in the file?

10 MR. BALKENBUSH: He asked and answered that,  
11 Mr. Chairman, already.

12 MR. ZEH: Are you objecting to the Chairman's  
13 question?

14 MR. IANNONE: He said he couldn't recall; right?

15 MR. BALKENBUSH: Correct.

16 MR. IANNONE: Okay. Go ahead. You may proceed.

17 MR. BALKENBUSH: Thank you, Mr. Chairman.

18 Q. (BY MR. BALKENBUSH) Just to make the record  
19 clear, Fire Chief Brown, you became the fire chief in  
20 October 2006; is that correct?

21 A. Correct. Yes.

22 Q. And at some point when you became the fire chief  
23 in 2006, you would have reviewed this injured employee's  
24 workers' compensation file as part of your duties; is that  
25 correct?

1 A. Correct.

2 Q. All right. Now, would you have -- when would you  
3 normally have reason to review an injured employee's file?

4 A. If they have another occurrence.

5 Q. Okay. We know in this case that there was a low  
6 back injury by the written records in this in July of 2007.  
7 There was -- there were -- there was a claim filed. Based  
8 upon what you just stated, would it -- would it be likely or  
9 probable with the occurrence of the July 2007 low back  
10 injury that you would have -- as your habit and practice  
11 would have reviewed the file, workers' compensation file, of  
12 this injured employee?

13 A. I couldn't make a comment to that because when an  
14 injury has occurred, that's when I look at files of past  
15 injury. Mr. Burgess was off for quite some time, all the  
16 way up to 2007.

17 Q. Can you describe just your -- yeah, your basic  
18 understanding of a recollection as to this -- this worker's  
19 work status?

20 MS. LEONESCU: At what point in time?

21 MR. IANNONE: Ask that question again,  
22 Mr. Balkenbush.

23 Q. (BY MR. BALKENBUSH) Fire Chief Brown, could you  
24 briefly discuss your recollection of this injured employee's  
25 work status both in your status as fire chief and prior to

1 that?

2 A. As employee --

3 MS. LEONESCU: Objection. I don't know what time  
4 you're referring to.

5 MR. IANNONE: What time frame, Mr. Balkenbush?

6 MR. BALKENBUSH: I think we established that he  
7 became -- I will ask it in two parts, if he can do that.

8 Q. (BY MR. BALKENBUSH) Fire Chief Brown, are you  
9 able -- this is year 2013. Are you able to separate in your  
10 mind your knowledge as to this injured employee's work  
11 status from the time you became the fire chief in October  
12 2006 as opposed to your entire employment with the fire  
13 district?

14 A. Yes, I can.

15 Q. You can? Okay. That's amazing. Can you  
16 separately then -- can you just describe for the Board your  
17 recollection of this injured employee's work status from the  
18 time you became a fire chief in October 2006 forward?

19 A. From 2006 forward, this employee had numerous  
20 dates that he was not present at work due to injuries on the  
21 job. We received information back from the physicians that  
22 were treating him on his work restrictions, and several of  
23 those work restrictions made him unavailable to perform at  
24 his level as a fire fighter paramedic. And that continued  
25 from 2006 until he existed as a retired employee.



1 MR. IANNONE: Which was when?

2 Q. (BY MR. BALKENBUSH) Prior to October 2006, what  
3 is your recollection as to this injured employee's work  
4 status?

5 A. Prior to 2006, I was the assistant fire chief,  
6 from 2003 to 2006. I had to deal with daily operations,  
7 which also had to do with staffing. The same employee that  
8 we are discussing had numerous missed days at work due to  
9 on-the-job injuries. And, again, those were all a basis of  
10 the work restrictions as dictated by the physicians that he  
11 was seeing.

12 Q. And do -- as you sit here today, do you recall  
13 that those injuries included injuries to this employee's low  
14 back?

15 A. Yes.

16 MR. BALKENBUSH: I will pass the witness.

17 MR. IANNONE: Do you have any questions,  
18 Ms. Leonescu?

19 EXAMINATION

20 BY MS. LEONESCU:

21 Q. Chief Brown, who ultimately does the actual firing  
22 of each firefighter paramedic for the department?

23 A. The fire chief does. I do.

24 Q. Okay. And was that -- do you know whether that  
25 was the process in place back when this particular employee

1 was hired in the early '80s?

2 A. Yes, it is. That's per statute. The fire chief  
3 has the ability to hire and terminate.

4 Q. What is your understanding for the reason -- what  
5 is your understanding of this particular firefighter  
6 paramedic's condition prior to 2007, physical condition?

7 A. That he still had recurrent problems associated  
8 with on-the-job injuries, one of which includes the lower  
9 back problems.

10 Q. And what kind of -- what do you understand his low  
11 back problem to be?

12 MR. BALKENBUSH: I'm going to object to the extent  
13 that this question calls for some type of medical answer,  
14 absent a foundation that this fire chief has got medical  
15 qualifications to provide such an answer.

16 MS. LEONESCU: I was asking his understanding of  
17 what --

18 MR. IANNONE: I'm going to let her ask that  
19 question because she is not asking it in a technical way.  
20 She is not asking for a doctor's opinion, just as a layman's  
21 opinion. Go ahead, please.

22 Q. (BY MS. LEONESCU) I'm just asking what your  
23 understanding of his condition was, whether it would be a  
24 strain, a sprain, or something else.

25 A. Again, I'm going to object. That is asking for

1 some type of a medical description. It's not a layman's  
2 description.

3 MR. IANNONE: Go ahead and answer, sir.

4 MR. BROWN: He had limitations in his ability to  
5 lift, to twist, and to use his upper motions as required by  
6 the job of a firefighter paramedic due to lower back  
7 injuries. That's what my recollection is of his work  
8 restriction.

9 Q. (BY MS. LEONESCU) Are you aware whether or not  
10 this particular firefighter was released to full duty prior  
11 to his retirement from the fire department?

12 A. Yes. I received notice that he was released to  
13 full duty, and a notice from him that he would be retiring  
14 the next day.

15 MS. LEONESCU: I'll pass the witness.

16 MR. IANNONE: Mr. Balkenbush, anything else?

17 MR. BALKENBUSH: Nothing further at this point  
18 from me, Mr. Chairman.

19 MR. IANNONE: Board members have any questions?  
20 Mr. Zeh?

21 EXAMINATION

22 BY MR. ZEH:

23 Q. Chief Brown, this is Chuck Zeh. I'm counsel to  
24 the Board. I've got one question. You testified that  
25 frequently this injured worker was off work and then would

1 return to work and then he would be off work and return to  
2 work. Is that a fair assessment of his job status from 2003  
3 until his retirement?

4 A. Yes, sir.

5 Q. On those occasions when he returned to work, did  
6 he return to work full duty?

7 A. Yes.

8 MR. ZEH: Thank you.

9 MR. IANNONE: Mr. Balkenbush?

10 MR. BALKENBUSH: I have no further questions of  
11 this witness.

12 MR. IANNONE: Okay. Any board members have  
13 questions?

14 (No response)

15 Okay. You may pass the witness.

16 MR. BALKENBUSH: If there are no further  
17 questions, I would allow this witness to potentially leave  
18 the hearing by hanging up.

19 MR. IANNONE: That's fine.

20 MR. ZEH: If you're asking him if he can be  
21 excused?

22 MR. BALKENBUSH: Yes.

23 MR. IANNONE: Yes.

24 MR. ZEH: He may be excused. The Chairman said he  
25 may be excused.

1 MR. BALKENBUSH: Fire Chief Brown, you're welcome  
2 to -- this is a public hearing. You're welcome to stay on  
3 the line and listen to the rest of the hearing, but the  
4 Mr. Chairman has permitted you to leave the hearing if you  
5 so choose. By leaving the hearing, all you have to do is  
6 hang up.

7 MR. BROWN: Okay. I appreciate it. Thank you.

8 MS. LEONESCU: Thank you.

9 MR. IANNONE: Thank you. Mr. Balkenbush?

10 MR. BALKENBUSH: Are we asking for closing  
11 argument now, Mr. Chairman?

12 MR. IANNONE: That's what I'm asking for.

13 MR. BALKENBUSH: Mr. Chairman, are we asking for  
14 closing statements?

15 MR. ZEH: I think where it's at, Bob, is do you  
16 have anything else you want to present. Or if you're not --  
17 if you're resting, then --

18 MR. BALKENBUSH: I'm not putting on any further  
19 testimony. Our case is contained in the documents and the  
20 witness testimony. So I would rest our case in chief.

21 MS. LEONESCU: I have no witnesses to present.

22 MR. IANNONE: Anybody else have any questions  
23 here?

24 (No response)

25 Okay. Anybody want to specifically discuss this

1 matter?

2 MR. ZEH: I think Mr. Balkenbush wants to make a  
3 closing argument.

4 MR. IANNONE: I thought you said you didn't.

5 MR. BALKENBUSH: No, Mr. Chairman, I did want to  
6 make a brief closing statement.

7 MR. IANNONE: I misunderstood you. Please go  
8 ahead.

9 MR. BALKENBUSH: And I respectfully request at the  
10 end of the statement to let the Board know that I'm free to  
11 try to answer any questions that might come up as the Board  
12 discusses the case.

13 First, I want to thank Jacque Everhart for the --  
14 her determination letter and all of the records that she put  
15 together to assist the Board in this case. But effectively,  
16 this case, the DIR has essentially found that three of the  
17 four elements necessary for reimbursement from the  
18 subsequent injury account have been satisfied. The only  
19 element that the administrator has advised and recommended  
20 has not been satisfied as respect to the lumbar spine is the  
21 requirement in NRS 616B.578(4). In that statute, if that  
22 statute simply -- the board had this in the prior hearing,  
23 simply has to -- the applicant has to prove that the  
24 association prove by written records that the employer had  
25 knowledge of the, quote, permanent physical impairment at

1 the time the employee was hired or that the employee was  
2 retained in his employment after the employer acquired such  
3 knowledge.

4 That permanent physical impairment that's quoted  
5 is defined in Subsection 3 of that statute, NRS 616B.578.  
6 Now, the only portion of subsection 3 of that statute that  
7 would be relevant -- or, I mean, that could apply to  
8 employer knowledge in general would be the first half of  
9 that statute. Not the second half. On the first half of  
10 subsection 3 of that statute. That Subsection 3 reads "as  
11 used in the section, 'permanent physical impairment' means  
12 any permanent condition, whether congenital or caused by  
13 injury or disease, of such seriousness as to constitute a  
14 hindrance or obstacle to obtaining employment or to  
15 obtaining reemployment if the employee is unemployed."

16 Second half of that subsection says, "For the  
17 purposes of this section, a condition is not a 'permanent  
18 physical impairment' unless it would support a rating of  
19 permanent impairment of 6 percent or more of the whole  
20 person if evaluated according to the AMA Guides."

21 Now, it is the position of the association that  
22 the second half of Subsection 3 is not proven by the  
23 employer, it's proven generally by a permanent impairment  
24 evaluation or an expert opinion by someone familiar with the  
25 AMA Guides, a physician, that the prior permanent physical

1 impairment would qualify for 6 percent or more. The  
2 administrator has conceded that that's already been proven  
3 in this case, and we believe the records establish that.  
4 The part that is in contest in this case is what is the  
5 knowledge of the employer. Does it have knowledge of -- as  
6 the statute defines it, permanent physical impairment.

7           What I think the records in this case establish is  
8 that the -- the employer had not perfect medical knowledge,  
9 but had knowledge of -- in the language in the statute a  
10 permanent condition. The word "permanent" is defined by  
11 dictionary definition to mean a lasting or abiding  
12 condition.

13           In this case, clear back in 2000 and -- I think it  
14 was 2003 -- actually, it was before 2003, there is -- there  
15 was a record of an MRI that demonstrated that this employee  
16 had a large herniated disc at L5-S1. Now, the employer  
17 didn't necessarily -- they may have actually had a copy of  
18 that record, but they would not necessarily have known what  
19 that meant, but there is a record of a -- of a low back  
20 condition that is serious. And more importantly, they have  
21 records of a low back injury on multiple occasions before  
22 the subsequent injury in this case.

23           As I had indicated initially, there was evidence  
24 from the fire district that they had documentation of a low  
25 back injury in 2002, 2003, 2004, and July 2007. And I



1 provided those during the hearing, but for the Board it's  
2 pages 9 and 10 of Exhibit 1, page 23, page 36 through 37 of  
3 Exhibit 1, and pages 43 and 44. And so they had knowledge  
4 that he had a condition that continues to be -- a low back  
5 that continues to be injured, and problems with that low  
6 back. And the medical records establish that the -- that  
7 the nature of that condition was -- was serious. And,  
8 ultimately, when he had the subsequent injury in November of  
9 2007, ultimately that results in a two-level fusion of the  
10 low back and -- and, hence, this claim.

11 Now, what the administrator I think tried to do in  
12 this case is to require the employer to have exact medical  
13 knowledge of the preexisting permanent physical impairment,  
14 but the statute doesn't require perfect knowledge. The  
15 statute simply requires as Board counsel advised the Board  
16 in the previous hearing, is they typically have to have  
17 knowledge of some type of permanent condition or lasting  
18 condition. As the records demonstrate, including the record  
19 from the claims administrator dated May 7, 2003, at  
20 Exhibit 1, page 24, the -- they had -- they did have  
21 knowledge that this employee had a lasting or abiding low  
22 back condition. As Fire Chief Brown testified, his personal  
23 knowledge as the person responsible for hiring and firing  
24 had indicated that he was aware of the repeated low back  
25 injury before the subsequent injury, and those limitations

1 included limitations in lifting and twisting and the things  
2 necessary to do the job.

3 And the question -- the question that still  
4 remains is whether or not that particular condition would --  
5 was of such seriousness as to constitute a hindrance or  
6 obstacle to obtaining employment or obtaining re-employment.  
7 And we phrased that question to Chief Brown, who has the  
8 authority to hire and fire, as to whether the knowledge of  
9 the fire district of the prior low back injuries to this  
10 injured employee before November 2007, and if he had come in  
11 before 2007, say in October 2007 or early November 2007, and  
12 asked for a job, that is, to be hired or rehired, as to  
13 whether or not that would operate as a hindrance or  
14 obstacle, and his answer, I think, was -- from -- was  
15 potentially yes. And we would argue that the record  
16 establishes, based upon the absolute medical records that  
17 this -- that that -- that that requirement has been  
18 satisfied. It is satisfied both by the actual records of  
19 the injuries, the medical records, the letter from the  
20 claims administrator to the fire district, and then  
21 ultimately -- and ultimately, therefore, that the  
22 administrator has made an error in concluding that the  
23 employer does not have knowledge of a lasting or abiding low  
24 back condition that was of such seriousness as to constitute  
25 a hindrance of getting a job or getting rehired.

1           One factual thing I wanted to note for the Board  
2 is in the DIR determination, there was an indication that --  
3 to the exact medical condition that somehow the condition in  
4 the low back at L4-5 and L5-S1 called in medical literature  
5 a spondylolisthesis, that it was some type of a new  
6 condition, and I wanted to point out just in terms of the  
7 exact medical records in Exhibit 1, page 20, which was a  
8 neurosurgical consultation, begins at Exhibit 1, page 18 --  
9 18, 19, 20, and 21 -- excuse me, 18, 19, and 20. And  
10 Exhibit 1, page 20, and this is a medical progress note of  
11 Dr. Hillary Fleming. At the top of page 20 in her  
12 radiographic review, she states his L5 nerve roots appear to  
13 be compromised within the foramina bilaterally probably as a  
14 result of a very subtle listhesis of L5 on S1 as well as  
15 some collapse of the disc.

16           So this was a report dated January 6, 2003. This  
17 is a medical report on specific medical conditions that  
18 would indicate that there was already some listhesis at the  
19 L5-S1 level. In other words, it wasn't completely new. But  
20 the record I think in this case on behalf of the  
21 association, I think, establishes -- well establishes that  
22 this employer retained this employee in their employment  
23 despite the fact that he had four prior low back injuries  
24 before the final one in November 2007, which cascaded into  
25 essentially a two-level fusion, and a two-level fusion was

1 done at the level -- at the previous herniated disc was --  
2 was located, and there was prior listhesis.

3 So we think that the district in this case has  
4 satisfied all the requirements, including the knowledge  
5 requirement that the administrator has simply made an error  
6 in concluding that the fire district did not have knowledge  
7 of a lasting or abiding low back condition before the  
8 subsequent injury.

9 MR. IANNONE: Ms. Leonescu?

10 MS. LEONESCU: What's interesting in this case is  
11 that all his prior conditions or what happened in the past  
12 was not the condition that resulted in his permanent  
13 physical impairment.

14 He had lumbar strain, lumbar sprain, and then  
15 culminated into -- in November of 2007, which if you read  
16 Dr. Betz's report, which starts on page 103 of the  
17 administrator's 1, (Reading) Imaging following the patient's  
18 subsequent injury on November 30, 2007, revealed preexisting  
19 spondylosis with spondylolisthesis at L4-5 and L5-S1.

20 The previous herniated pulposus was not the reason  
21 for this gentleman's permanent physical impairment. After  
22 every accident, he treated and was released to full duty at  
23 a very high level. After every accident, he was released.  
24 Keeps going, keeps going, keeps going. And then in 2007, he  
25 had this -- it revealed a preexisting spondylosis.

1           At that point, the employer did not become aware  
2 of that until they -- until that radiography at the latest.  
3 But, again, the permanent physical condition has to create a  
4 hindrance to employment. And Chief Brown was quite clear  
5 that a review of this employee's records, it would not have  
6 prevented him from hiring or retaining this particular  
7 employee. That was his testimony.

8           And at this case, the permanent physical  
9 impairment was not industrial, the spondylolisthesis, which  
10 came -- which was revealed in 2007, and that's what resulted  
11 in his surgery. But even at that point, he was released to  
12 full duty. He was released. So where is the -- where is  
13 the obstacle to employment?

14           The part of physical impairment has to be -- the  
15 condition has to result in permanent impairment. In this  
16 case, it was the spondylosis. All the prior ones he  
17 recovered from. And then he has this -- he has this injury,  
18 which finally reveals the spondylosis, and he requires  
19 surgery, and then he is released to full duty.

20           So they didn't become aware of this until after  
21 the subsequent injury. So for that reason, that's why the  
22 claim was denied. You don't need to know the exact  
23 condition, but you need to know what condition resulted in  
24 the permanent physical impairment. In this case, they  
25 didn't become aware of that until afterwards. And he was

1 still re-employable at the same position, even according to  
2 testimony of the witness. So I will leave it at that.

3 MR. IANNONE: Mr. Balkenbush?

4 MR. BALKENBUSH: Just in terms of the medical  
5 condition, I think that the administrator basically  
6 contradicts their recommendation. The administrator has  
7 concluded that the preexisting condition or preexisting  
8 impairment was a spondylolysis and spondylolisthesis at both  
9 the L4-5 and L5-S1 levels. At page 103 of Exhibit 1 is what  
10 they cited, and the Board can look at that. This is a  
11 Subsequent Injury Fund Analysis by Dr. Betz. This is simply  
12 to determine whether or not there is a 6 percent whole  
13 person impairment as required by the statute.

14 Under the prior claims pathology, that paragraph  
15 on page 103 of Exhibit 1 says, (reading) imaging following  
16 the patient's subsequent injury on November 30, 2007,  
17 revealed preexisting spondylolysis with spondylolisthesis at  
18 L4-5 and the L5-S1 disc levels.

19 They have -- that's what the doctor has stated.  
20 The administrator has agreed with that. That is pathology  
21 which the -- that's specific medical pathology that they  
22 have adopted to find that the 6 percent preexisting low back  
23 impairment existed, as required by Subsection 3.

24 The only thing that's left in the case is -- is  
25 whether or not the employer had knowledge of some type of a

1 low back condition, some type of a low back problem that  
2 this employee had that was lasting or abiding. And I think  
3 that's clear. I think the records establish that, that he  
4 had four prior injuries before the November 2007. And they  
5 had a letter from the claims administrator that was in their  
6 file dated May 2003. And I gave you the -- I gave the Board  
7 that information.

8           So they have information from the claims  
9 administrator. They have information from prior injuries.  
10 All they have to know is that there is some type of a  
11 serious low back condition that's lasting and abiding. Now,  
12 whether it's a hindrance or obstacle to obtaining employment  
13 is the only potential issue here, and I think they tried to  
14 play that up. But I think what Chief Brown's testimony was  
15 is that this employee that had the prior low back injuries,  
16 that's the subject of this claim, he was already an employee  
17 of the district. And what he -- if I understood his  
18 testimony, he stated they do everything they can to retain  
19 or maintain that employee in their employment. And they  
20 did.

21           Now, I asked him, because it has to be a  
22 hypothetical, that -- all it can be in this case is  
23 hypothetical, because they maintained him in employment, was  
24 whether their knowledge -- whether his knowledge as a lay  
25 person of the prior low back injuries and the knowledge that

1 they got from the claims administrator, whether or not if  
2 that employee had walked in the door in late October 2007 or  
3 early November 2007, whether that knowledge on the part of  
4 the fire district would have served as a hindrance or  
5 obstacle to him getting hired or rehired. And I understood  
6 his answer, and maybe I misunderstood on the telephone, but  
7 he -- what I got from him was potentially yes --

8 MR. IANNONE: Well, Mr. Balkenbush --

9 MR. BALKENBUSH: -- it would not have prevented  
10 him from hiring this employee. I don't remember his  
11 testimony to be that. I remember it was potentially yes,  
12 and then he tried to speak of his recollection of the actual  
13 injuries that may have been documented in the C-3s and C-4s.

14 So what I would submit to the Board is that is, I  
15 think, sufficient evidence under the totality of the  
16 evidence in this case to satisfy that requirement of  
17 essentially employer knowledge of a lasting or abiding low  
18 back condition.

19 This record is clear and replete. This employee  
20 had a bad low back problem, he wanted to stay as long as he  
21 could, and he did, almost a little over 26 years, and then  
22 he finally had to retire. And I think this is a case just  
23 on both -- the policy of this law is to reward employers who  
24 retain in employment persons who have been previously  
25 injured, and they did that in this case all the way up to



1 the point of his retirement. This is a case that should be  
2 rewarded for the actions of the employer, and ask the Board  
3 to reverse the administrator's recommendation to deny  
4 reimbursement for the lumbar spine condition.

5 MR. IANNONE: Are you through, sir?

6 MR. BALKENBUSH: I am.

7 MR. IANNONE: Discussion by Board members?

8 (No response)

9 I'll ask a question. My notes on Chief Brown's  
10 testimony are that it would not be a hindrance to hire this  
11 man. That's the note I took. Is that what you people  
12 heard? That's what I heard.

13 MR. ZEH: The court reporter can't take down nods  
14 of heads.

15 MR. IANNONE: No, but it's different than what  
16 Mr. Balkenbush said in his argument there, and it's  
17 important, and I just want to know. Is that what you -- did  
18 my fellow board members hear the same thing I heard?

19 MR. WACHTER: Can we ask the court reporter to  
20 reference his testimony?

21 (Discussion off the record)

22 MR. BALKENBUSH: Mr. Chairman, maybe -- I think --  
23 I circled my notes based on your statement. I think the  
24 question that I was asking the fire chief was -- and maybe  
25 it wasn't the most artful question, but would the fire

1 district's knowledge of the prior low back injuries have  
2 been a hindrance or obstacle to obtaining -- to hiring him  
3 or rehiring him. I think initially he said it potentially  
4 was yes, and then I think what he said was it would not have  
5 prevented his hiring of the employee. I think he said it  
6 would not have prevented.

7           So my -- my reading of that, listening to the  
8 evidence, is this: It doesn't -- as long as it concerned --  
9 potentially is a hindrance or obstacle, but not necessarily  
10 if it wouldn't have prevented -- in other words, the statute  
11 doesn't say it would have prevented him from hiring if it  
12 would have been a hindrance or obstacle, and his answer is  
13 potentially yes, but would not have prevented his hiring. I  
14 don't think that means or is translated -- can be translated  
15 into that doesn't satisfy that those -- that that low  
16 back -- that those prior low back injuries and the  
17 consequences of those would not have been a hindrance or  
18 obstacle to be hired or rehired. I think he said  
19 potentially yes, but then he said it would not have  
20 prevented.

21           And, of course, that gets into the whole issue of  
22 ADA and -- the Americans with Disabilities Act and whether  
23 they can do the job with or without accommodation. So I  
24 don't think that his answer actually undercuts our proof of  
25 the requirement of hindrance or obstacle. Potentially yes

1 is probably sufficient.

2 And as a matter of common sense, when you look at  
3 this record as a whole, I think the Board should not have  
4 any difficulty conceptually seeing that that -- that that  
5 statutory requirement has been satisfied.

6 MR. IANNONE: Thank you. Mr. Wachter?

7 MR. WACHTER: On DIR 24, the letter dated May 7,  
8 2003, it seems to me that this letter is a -- is kind of a  
9 request for information from the doctor verifying whether or  
10 not the existing problems or the incidents actually lead to  
11 a serious underlying condition. It's saying could you --  
12 could you review this case. And then I think most  
13 importantly to me, then, is DIR 25, which seems to be the  
14 response from the doctor to ASC where he says he's released  
15 to regular duty and doesn't -- I don't think the doctor  
16 substantiates the claim that there's a serious underlying  
17 condition. I think the third-party administrator is saying,  
18 you know, it's been ongoing, can you give us an opinion, and  
19 the doctor comes back and releases him to regular duty. So  
20 I'm not sure what knowledge the employer would have had that  
21 would have substantiated a serious --

22 MR. IANNONE: Let's let him finish.

23 MR. WACHTER: Okay.

24 MR. IANNONE: Okay. Mr. Balkenbush, do you have  
25 anything more to add?

1 MR. BALKENBUSH: Just this. I think the -- in  
2 terms of the seriousness of the condition, at that time -- I  
3 think Bryan is the Board member that made the observation --  
4 he had a large herniated nucleus pulposus, but by the  
5 medical evidence that was a compressing nerve root at the L5  
6 level of his spine bilaterally and Dr. Fleming, who was a --  
7 who was a neurosurgeon, on January 6, 2003, which was  
8 Exhibit 1, 18 through 20, had stated that his nerve roots  
9 appeared to be compromised within the foramina, those are  
10 the openings for the nerve roots, bilaterally, probably as a  
11 result of very subtle listhesis of L5-S1 as well as some  
12 collapse of the disc. And he states he is currently  
13 suffering from low back pain and resolving bilateral  
14 radiculopathy. I suspect the radiculopathy was at L5. To  
15 think that that's not a serious medical condition, it -- I  
16 think it would be -- constitute a misapprehension of what  
17 the medical records actually mean and state.

18 MR. IANNONE: Thank you. Okay.

19 MR. ZEH: I just have one question. Getting back  
20 to this exhibit, the January 6, 2003, report from  
21 Dr. Fleming, DIR 18 through DIR 20, was that -- was this a  
22 record that was in the file of the fire department?

23 MR. BALKENBUSH: I don't know. I don't know that.  
24 All I can say is -- that's a good question. Maybe it's a  
25 good question. I don't know if it is a good question. I

1 think based on the testimony is that -- just the general  
2 testimony of Sharon Cary is that their files include the  
3 entire workers' compensation file including medical  
4 reporting. I didn't ask her specifically if this report was  
5 in there.

6 But I -- in terms of the -- in terms of the  
7 disposition of the case, Mr. Zeh, I don't -- this I think  
8 helps -- should help the Board understand the seriousness of  
9 the medical condition. Whether or not the fire district  
10 understood -- they had perfect knowledge of what that  
11 medical condition was is not what is required. What's  
12 required is simply knowledge of a lasting or abiding  
13 condition, and they did have that. He had four prior low  
14 back injuries.

15 And, ultimately, they have -- the records  
16 establish that he had preexisting spondylolisthesis and  
17 spondylolysis prior to the November 2007 injury that was  
18 documented by Dr. Betz and concurred in by the  
19 administrator.

20 So whether the medical records can completely  
21 flush that all out, what you can say is they had knowledge  
22 of four low back conditions. The fire chief said that he  
23 was -- he had limitations with twisting and -- that was his  
24 recollection of all the repetitive injuries. Limitations  
25 with lifting, twisting, and doing the job of a firefighter.

1 And that's all they have to know. They don't have to know  
2 all the medical specifics. That would require the  
3 impossible. The statute as you indicated in the first part  
4 of Subsection 3, I think, defines what their knowledge has  
5 to be. I think they had that by knowledge of consistent,  
6 recurrent low back injuries and low back condition with  
7 resulting limitations off and on.

8 MR. ZEH: Is there any medical records or  
9 testimony that would equate HPN with spondylolisthesis?

10 MR. BALKENBUSH: Well, in some ways that report,  
11 page 20 -- this is a report in January 2003. And I  
12 indicated it to you -- if you look at page 20 -- you go back  
13 to the bottom of page 19 of Exhibit 1, it talks about  
14 radiographic review, and it's reviewing the lumbar MRI. It  
15 says -- bottom of page 19, at L5-S1, he has a large central  
16 disc protrusion that is not causing significant stenosis,  
17 that central canal stenosis, the spinal cord, although it  
18 does certainly impinge upon the thecal sac. His L5 nerve  
19 roots, however, appear to be compromised within the foramina  
20 bilaterally probably as a result of a very subtle listhesis  
21 of L5 on S1 as well as some collapse of the disc.

22 MR. ZEH: Okay. But is HPN equated with  
23 spondylolisthesis?

24 MR. BALKENBUSH: What they are is they're distinct  
25 medical conditions, both they're occurring -- according to

1 this report, both of those conditions are present in January  
2 2003. And she indicates that the nerve roots were  
3 compromised as a result of a very subtle listhesis of L5 on  
4 S1 as a slide-in of one vertebra over the other, as well as  
5 a collapse of the disc, which is from the HNP at L5-S1. And  
6 he has radiculopathies secondary to that. That's what she  
7 says is her diagnostic impression. And she's already  
8 thinking surgery, but let's hold off until his quality of  
9 life gets sufficiently impaired.

10 And, ultimately, he goes on and has another injury  
11 in 2004, another low back injury in 2007, in July. And then  
12 the final straw that broke the camel's back, the one in  
13 November 2007. And, ultimately, the conclusion is that that  
14 listhesis condition and the disc and the fusion was done at  
15 that level, the same level as the disc, and the same level  
16 as the listhesis that was present in January 2003 that he  
17 ends up having. According to Dr. Betz, there was listhesis  
18 also at the L4-5 level.

19 MR. ZEH: I misspoke. It should have been HPN,  
20 not HNP -- I mean, it should have been HNP not HPN. Having  
21 said that --

22 MR. BALKENBUSH: Herniated nucleus pulposus.

23 MR. ZEH: Right. Exactly. And HNP is not a  
24 symptom of spondylolisthesis; correct? It's a separate  
25 condition?

1 MR. BALKENBUSH: Right. They distinct conditions.  
2 Listhesis is a sliding of one vertebra over another.

3 MR. ZEH: I'm aware of that. I just want to make  
4 sure we are clear on the record.

5 MR. BALKENBUSH: Yeah.

6 MR. IANNONE: Okay. Thank you, Mr. Balkenbush.

7 The ball is in our court now. I welcome you guys  
8 to talk first this time. I will, but I would be interested  
9 in hearing your impressions as Board members.

10 MS. HOOLIHAN: I'm confused, really.

11 MR. IANNONE: That's okay.

12 MR. WACHTER: Looking at DIR 20, the physician  
13 says, I see no reason to recommend surgery. There's no  
14 evidence to suggest that DIR 18, 19, and 20 was given to the  
15 fire department. And after every incident -- and I go back  
16 to the DIR 25, which responds to DIR 24, I think, which is  
17 he was returned to regular duty and the doctor didn't say  
18 that there was a problem. So I don't see how the fire  
19 department would have recognized that there was a -- a more  
20 serious problem. And in writing at least, which I've  
21 learned is important.

22 MR. IANNONE: I'm kind of in the same spot.  
23 Especially my recollection of Chief Brown's testimony. And  
24 I've had back surgery. It's been suggested again. Most of  
25 us have bulges and herniations, and some affect others worse



1 than others, and we get through life. So my point of that  
2 is it's not necessarily a terrible condition to have a bulge  
3 or a herniation. It can be, but it's not necessarily that.  
4 The fact that he was returned to full duty all those times  
5 makes me think it wasn't a terrible situation for the guy.  
6 I hate to see anybody have that. I don't think it rose to  
7 the level of a serious condition that the employer had  
8 knowledge. That's my opinion. I'm more than welcome to  
9 hear everybody else's thoughts on it.

10 (No response)

11 Well, if no one is talking --

12 MR. ZEH: Let me just throw a couple ideas for you  
13 to chew on. It appears to me that the preexisting condition  
14 actually has a name, spondylolisthesis. Okay. And HNP is  
15 separate from spondylolisthesis. I think that the evidence  
16 is pretty clear that everybody knew this guy had a bad back.  
17 Okay. Now, does knowledge of having a bad back equate to or  
18 get you close enough to the knowledge of a preexisting  
19 condition, which is spondylolisthesis, which generated a 6  
20 percent or more. And then I think that it's clear that --  
21 in knowledge of a bad back, it is clear that there was  
22 knowledge that he -- of some -- of the symptoms of the bad  
23 back, and some of those symptoms are actually described in  
24 the administrator's report, including chronic pain,  
25 sciatica, and radiculopathy. And, all right, are those

1 consistent with spondylolisthesis or just generally bad  
2 back?

3           So, I mean, one question would be just knowledge  
4 of generally bad back, is that sufficient to make the hurdle  
5 of knowledge for Subsection 4, and Subsection 3, which  
6 defines what a permanent condition is -- permanent physical  
7 impairment is, or is knowledge of these symptoms that are  
8 related in the administrator's report, are they close enough  
9 to spondylolisthesis to suggest that's what the problem was,  
10 and so then they had knowledge -- not perfect knowledge, but  
11 they had knowledge.

12           So I just toss those suggestions out. And it  
13 would have been nice or more helpful to, I think, the  
14 applicant's case had there been some record showing that DIR  
15 18 through 20 happened to be in the file with the fire  
16 department, because it does make reference to listhesis,  
17 which is a reference to that condition of sliding discs in  
18 one's back. But we -- the testimony is not there on that  
19 particular issue.

20           I don't know that -- the letter of DIR 24 sounds  
21 like we're talking bad back, not spondylolisthesis or this  
22 is trending toward spondylolisthesis. And I believe the  
23 testimony was that each time this gentleman came back from  
24 work, he came back full duty. And testimony from the fire  
25 department -- the fire chief, it wasn't that this was going

1 to bar him from employment, this condition. So I think  
2 those are the facts you have in front of you to decide  
3 whether they may be the hurdle here.

4 MR. IANNONE: Joyce, do you have any comments?

5 MR. BALKENBUSH: Are you asking me, Mr. Chairman,  
6 or the Board members?

7 MR. ZEH: Joyce.

8 MR. BALKENBUSH: What, Chuck?

9 MR. ZEH: The question was to Joyce Smith.

10 MR. BALKENBUSH: Oh, okay.

11 MR. ZEH: Joyce, are you there?

12 MS. SMITH: Like I said the first time around,  
13 that I don't see retention and he just had a bad back that  
14 was ongoing.

15 MR. IANNONE: Anybody else care to speak, of the  
16 Board?

17 MR. ZEH: Did I help you or confuse you?

18 MR. IANNONE: To me, it was a different way of  
19 saying what I said, how I heard it. So that's good for me.  
20 Okay. Would anyone care to make a motion?

21 MR. BALKENBUSH: Mr. Chairman, just before you do,  
22 could I make one response --

23 MR. IANNONE: I'm not sure you can because we are  
24 deliberating right now. Okay?

25 MR. BALKENBUSH: Fine.

1 MR. IANNONE: If you don't want to make a motion,  
2 I don't know, but we've got to do something.

3 MR. ZEH: The buck does stop here.

4 MS. SMITH: Okay. I will motion to deny.

5 MR. IANNONE: Okay. Let's craft that exactly,  
6 Mr. Zeh.

7 MS. SMITH: Mr. Zeh, would you give me a hand  
8 here? I will motion to deny C143-07-02558-01.

9 MR. ZEH: Is it your thought process that they  
10 have failed to prove knowledge under Subsection 4 of a  
11 condition that satisfies the definition of Subsection 3?

12 MS. SMITH: Yes.

13 MR. ZEH: That they have not shown knowledge of  
14 the permanent physical impairment, which turned out to be  
15 spondylolisthesis?

16 MS. SMITH: Yes.

17 MR. IANNONE: Okay. So that's --

18 MR. ZEH: And that in any event, that even if it  
19 was spondylolisthesis, it appeared not to be a hinderance to  
20 employment because he continued to come back to work full  
21 duty?

22 MS. SMITH: True.

23 MR. IANNONE: Does anybody have any questions as  
24 to what the motion is?

25 MR. WACHTER: I will provide a second,

1 Mr. Chairman.

2 MR. IANNONE: We have a second. All in favor,  
3 aye.

4 MR. WACHTER: Aye.

5 MS. HOOLIHAN: I abstain.

6 MR. ZEH: You either are -- unless there is a  
7 reason like you're recusing yourself -- if you don't think  
8 that that's an appropriate motion, you can vote no.

9 MS. HOOLIHAN: I vote aye.

10 MR. IANNONE: I assume you voted aye, Joyce?  
11 Joyce?

12 MS. SMITH: Are you speaking to me?

13 MR. IANNONE: Yes, ma'am. I assume you voted yes.

14 MS. SMITH: Yes, I did.

15 MR. ZEH: Sorry, Joyce. We couldn't hear you.

16 MR. IANNONE: All right. Thank you,  
17 Mr. Balkenbush.

18 MR. BALKENBUSH: Thank you, Mr. Chairman. Thank  
19 you, Board members.

20 (Proceedings were concluded at 1:20 p.m.)

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REPORTER'S DECLARATION

STATE OF NEVADA     )  
                          ss:  
COUNTY OF CLARK    )

I, Cynthia L. Gloe, CCR No. 607, declare as follows:

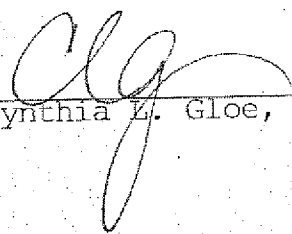
That I reported the taking of the proceeding,  
commencing on Wednesday, September 18, 2013, at 11:22 a.m.

That I thereafter transcribed my said shorthand notes  
into typewriting and that the typewritten transcript of said  
proceedings is a complete, true, and accurate transcription  
of said shorthand notes taken down at said time.

I further declare that I am not a relative or employee  
of any party involved in said action, nor a person  
financially interested in this action.

Dated at Las Vegas, Nevada, this 4th day of

October, 2013.

  
Cynthia L. Gloe, RPR, CCR 607



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1 Code: CRTF  
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10 Attorneys for Respondent *The Board for Administration*  
11 *of the Subsequent Injury Account for the Associations*  
12 *of Self-Insured Public or Private Employers*

13 EIGHTH JUDICIAL DISTRICT COURT

14 CLARK COUNTY, NEVADA

15 \*\*\*

16 NORTH LAKE TAHOE FIRE  
17 PROTECTION DISTRICT and PUBLIC  
18 AGENCY COMPENSATION TRUST,

Case No. A-14-702463-J

Department No. XXXII

19 Petitioners,

20 vs.

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

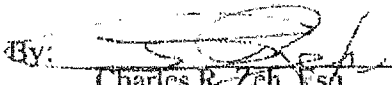
Respondents.

CERTIFICATE OF TRANSMITTAL

1 I, Charles R. Zeh, Esq., The Law Offices of Charles R. Zeh, Esq., attorney for the  
2 Board for Administration of the Subsequent Injury Account for the Associations of Self-  
3 Insured Public or Private Employers and the custodian of the current official files before  
4 the Board, do hereby certify that the attached transmittal contains a full, true and correct  
5 copy of all documents (including pleadings, exhibits and correspondence) entered into the  
6 record before me in matter bearing Claim Number C143-07-02558-01.

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

9 Dated this 21<sup>st</sup> day of July, 2014. THE LAW OFFICES OF CHARLES R. ZEH, ESQ

10  
11 By:   
12 Charles R. Zeh, Esq.

13 Attorneys for The Board for Administration of the  
14 Subsequent Injury Account for the Associations of  
15 Self-insured Public or Private Employers

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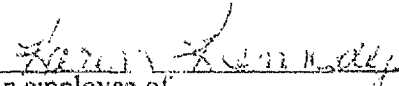


# **CERTIFICATE OF SERVICE**

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

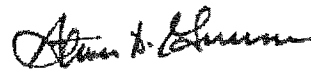
✓	Placing an original or true copy thereof in a sealed envelope, postage prepaid, placed for collection and mailing in the United States Mail, at Reno, Nevada:  Donald C. Smith, Esq. Jennifer J. Leonescu, Esq. Department of Business and Industry Division of Industrial Relations 1301 North Green Valley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

Dated this 23<sup>rd</sup> day of July, 2014.

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

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DISTRICT COURT

COUNTY OF CLARK, NEVADA

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

Petitioners,

vs.

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

Respondents.

CASE NO. A-14-702463-J

DEPT. NO. XXXII

STIPULATION AND ORDER FOR  
EXTENSION OF TIME FOR  
PETITIONERS TO FILE OPENING  
BRIEF

COMES NOW, Petitioners, North Lake Tahoe Fire Protection District and Public  
Agency Compensation Trust, by and through their counsel of record, THORNDAL,  
ARMSTRONG, DELK, BALKENBUSH & EISINGER, and the Respondent, 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, by and through their respective attorneys,

1 Charles Zeh, Esq. and Donald C. Smith, Esq./Jennifer Leonescu, Esq., and hereby stipulate and  
2 agree to extend the time for Petitioners' to file their Opening Brief, up to and including October  
3 6, 2014.

4 The undersigned counsel for the Petitioners specifically represent that the requested  
5 extension of time to file Petitioners' Reply Brief is not made for the purposes of delay or dilatory  
6 tactics.

7 **THORNDAL, ARMSTRONG,  
8 DELK, BALKENBUSH & EISINGER**

9  
10  
11 Robert B. Balkenbush, Esq.  
12 Nevada Bar No. 1246  
13 John D. Hooks, Esq.  
14 Nevada Bar No. 11605  
15 Thorndal, Armstrong,  
16 Delk, Balkenbush & Eisinger  
17 6590 S. McCarran Blvd., Suite B  
18 Reno, Nevada 89509  
19 Telephone No.: (775) 786-2882  
20 Facsimile No.: (775) 786-8004  
21 Attorneys for Petitioner

**THE LAW OFFICES OF CHARLES R.  
ZEH, ESQ.**

22 Charles R. Zeh, Esq.  
23 NV State Bar No. 1739  
24 The Law Offices Of Charles R. Zeh, Esq.  
25 575 Forest Street, Suite 200  
26 Reno, NV 89509  
27 Phone: (775) 323-5700  
28 Fax: (775) 786-8183  
29 Attorney for Respondent

**DEPARTMENT OF BUSINESS AND  
INDUSTRY DIVISION OF INDUSTRIAL  
RELATIONS**

30  
31 Donald C. Smith, Esq.  
32 Nevada Bar No.: 000413  
33 Jennifer J. Leonescu, Esq.  
34 Nevada Bar No.: 006036  
35 Department Of Business And Industry  
36 Division Of Industrial Relations  
37 State of Nevada  
38 1301 N. Green Valley Parkway, Suite 200  
39 Henderson, Nevada 89074-6497  
40 Phone: (702) 486-9070  
41 Fax: (702) 990-0361  
42 Attorney for Respondent

Charles Zeh, Esq. and Donald C. Smith, Esq./Jennifer Leonescu, Esq., and hereby stipulate and agree to extend the time for Petitioners' to file their Opening Brief, up to and including October 6, 2014.

The undersigned counsel for the Petitioners specifically represent that the requested extension of time to file Petitioners' Opening Brief is not made for the purposes of delay or dilatory tactics.

**THORNDAL, ARMSTRONG,  
DELK, BALKENBUSH & EISINGER**

**THE LAW OFFICES OF CHARLES R.  
ZEH, ESQ.**

Robert F. Balkenbush, Esq.  
Nevada Bar No. 1246  
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Reno, Nevada 89509  
Telephone No.: (775) 786-2882  
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Attorneys for Petitioner

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

**DEPARTMENT OF BUSINESS AND  
INDUSTRY DIVISION OF INDUSTRIAL  
RELATIONS**

*7/4/14*  
Donald C. Smith, Esq.  
Nevada Bar No.: 000413  
Jennifer J. Leonescu, Esq.  
Nevada Bar No.: 006036  
Department Of Business And Industry  
Division Of Industrial Relations  
State of Nevada  
1301 N. Green Valley Parkway, Suite 200  
Henderson, Nevada 89074-6497  
Phone: (702) 486-9070  
Fax: (702) 990-0361  
Attorney for Respondent

1 Stipulation and Order for Extension of Time for Petitioners to File Opening Brief  
Case No, A-14-702463-J  
2  
3

4 ORDER

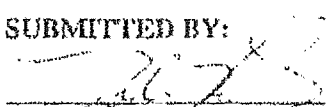
5 IT IS HEREBY ORDERED that the Petitioners' time to file their Opening Brief extended  
6 up to and including October 6, 2014.  
7

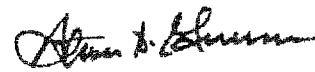
8  
9 DATED: This 9 day of September, 2014.  
10

11  
12   
District Court Judge

13 SUBMITTED BY:

14 ROB BARE  
JUDGE DISTRICT COURT, DEPARTMENT 32

15   
16 John D. Hooks, Esq.  
Nevada Bar No. 11605  
17 Thorndal, Armstrong, Delk, Balkenbush & Eisinger  
6590 S. McCartan Blvd., Suite B  
18 Reno, Nevada 89509  
Telephone No.: (775) 786-2882  
19 Facsimile No.: (775) 786-8004  
Attorneys for Petitioners  
20  
21  
22  
23  
24  
25  
26  
27  
28



CLERK OF THE COURT

NEOJ

Robert F. Balkenbush Esq.

Nevada Bar No. 1246

John D. Hooks, Esq.

Nevada Bar No. 11605

Thorndal, Armstrong, Delk, Balkenbush & Eisinger

6590 S. McCarran Blvd., Suite B

Reno, Nevada 89509

Telephone No.: (775) 786-2882

Facsimile No.: (775) 786-8004

Attorneys for Petitioners

**DISTRICT COURT**

**COUNTY OF CLARK, NEVADA**

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

Petitioners,

vs.

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

Respondents.

CASE NO. A-14-702463-J

DEPT. NO. XXXII

**NOTICE OF ENTRY OF ORDER FOR  
EXTENSION OF TIME FOR  
PETITIONERS TO FILE OPENING  
BRIEF**

**NOTICE OF ENTRY OF ORDER FOR EXTENSION OF TIME FOR PETITIONERS  
TO FILE OPENING BRIEF**

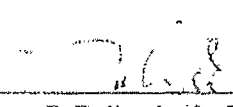
TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that an Order for

Extension of Time for Petitioners to File Opening Brief was entered in the above-entitled action

1 on September 11, 2014, a copy of which is attached hereto.  
2  
3  
4  
5  
6  
7  
8

THORNDAL, ARMSTRONG,  
DELK, BALKENBUSH & EISINGER

  
Robert F. Balkenbush, Esq.  
Nevada Bar No. 1246  
John D. Hooks, Esq.  
Nevada Bar No. 11605  
Thorndal, Armstrong,  
Delk, Balkenbush & Eisinger  
6590 S. McCarran Blvd., Suite B  
Reno, Nevada 89509  
Telephone No.: (775) 786-2882  
Facsimile No.: (775) 786-8004  
Attorneys for Petitioner

ORIGINAL

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09/11/2014 03:47:34 PM

*Alvin L. Blum*

CLERK OF THE COURT

1 SAO

2 Robert F. Balkenbush Esq.

3 Nevada Bar No. 1246

4 John D. Hooks, Esq.

5 Nevada Bar No. 11605

6 Thorndal, Armstrong, Delk, Balkenbush & Eisinger

7 6590 S. McCarran Blvd. Suite B

8 Reno, Nevada 89501

9 Telephone No. (775) 786-2882

10 Facsimile No. (775) 786-8001

11 Attorneys for Petitioners

DISTRICT COURT

COUNTY OF CLARK, NEVADA

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

CASE NO. A-14-70246 (J)

DEPT. NO. XXXII

15 Petitioners,

16 vs.

STIPULATION AND ORDER FOR  
EXTENSION OF TIME FOR  
PETITIONERS TO FILE OPENING  
BRIEF

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

26 Respondents.

27 COMES NOW, Petitioners, North Lake Tahoe Fire Protection District and Public  
28 Agency Compensation Trust, by and through their counsel of record, THORNDAL,  
29 ARMSTRONG, DELK, BALKENBUSH & EISINGER, and the Respondent, Board For  
30 Administration Of The Subsequent Injury Account For The Associations Of Self Insured Public  
31 Or Private Employers, and Administrator Of The Nevada Division Of Industrial Relations Of  
32 The Nevada Department Of Business And Industry, by and through their respective attorneys

000370



1 Charles Zeh, Esq. and Donald C. Smith, Esq./Jennifer Leonescu, Esq., and hereby stipulate and  
2 agree to extend the time for Petitioners' to file their Opening Brief, up to and including October  
3 6, 2014

4 The undersigned counsel for the Petitioners specifically represent that the requested  
5 extension of time to file Petitioners' Reply Brief is not made for the purposes of delay or dilatory  
6 tactics.

7 **THORNDAL, ARMSTRONG,  
8 DELK, BALKENBUSH & EISINGER**

9  
10  
11 Robert J. Balkenbush, Esq.  
12 Nevada Bar No. 1226  
13 John D. Hooks, Esq.  
14 Nevada Bar No. 11605  
15 Thorndal, Armstrong,  
16 Delk, Balkenbush & Eisinger  
17 6590 S. McCarran Blvd., Suite B  
18 Reno, Nevada 89509  
19 Telephone No.: (775) 786-2662  
20 Facsimile No.: (775) 786-8004  
21 Attorneys for Petitioner

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ZEH, ESQ.

22 Charles R. Zeh, Esq.  
23 NV State Bar No. 1739  
24 The Law Offices Of Charles R. Zeh, Esq.  
25 575 Forest Street, Suite 200  
26 Reno, NV 89509  
27 Phone: (775) 323-5700  
28 Fax: (775) 786-8183  
Attorney for Respondent

29 **DEPARTMENT OF BUSINESS AND  
30 INDUSTRY DIVISION OF INDUSTRIAL  
31 RELATIONS**

32 Donald C. Smith, Esq.  
33 Nevada Bar No. 000413  
34 Jennifer J. Leonescu, Esq.  
35 Nevada Bar No. 006036  
36 Department Of Business And Industry  
37 Division Of Industrial Relations  
38 State of Nevada  
39 1301 N. Green Valley Parkway, Suite 100  
40 Henderson, Nevada 89074-6497  
41 Phone: (702) 486-9070  
42 Fax: (702) 990-0361  
43 Attorney for Respondent

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THORNDAL, ARMSTRONG,  
DELK, BALKENBUSH & EISINGER

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Attorney for Respondent

DEPARTMENT OF BUSINESS AND  
INDUSTRY DIVISION OF INDUSTRIAL  
RELATIONS

7/4/4  
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Attorney for Respondent

1 Stipulation and Order for Extension of Time for Petitioners to File Opening Brief  
Case No. A-14-702463 J

2  
3  
4 ORDER

5 IT IS HEREBY ORDERED that the Petitioners' time to file their Opening Brief extended  
6 up to and including October 6, 2014.

7  
8 DATED: This 2 day of September, 2014.

9  
10  
11  
12 \_\_\_\_\_  
District Court Judge

13 SUBMITTED BY:

14 \_\_\_\_\_  
JUDGE DISTRICT COURT DEPARTMENT 32

15 John D. Hocher, Esq.  
16 Nevada Bar No. 11605  
17 Thorndal, Armstrong, Delk, Balkenbush & Pringer  
18 6890 S. McCarran Blvd. Suite B  
19 Reno, Nevada 89509  
20 Telephone No.: (775) 786-2887  
21 Facsimile No.: (775) 786-8004  
22 Attorneys for Petitioners  
23  
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**c. Schedule of next Meeting(s).**

Joyce Smith advised the Board that she will not be in attendance at the October meeting of the Board.

**14. Public Comment.**

There was no other public comment.

**16. Adjournment.**

It was moved by Joyce Smith, seconded by Shannon Hoolihan, to adjourn the meeting.

**Motion adopted.**

**Vote: 4-0.**

S:\Clients\SIA\Minutes\2013\Draft Minutes 9.19.2013 R6.wpd

# The Law Offices of Charles R. Zeh, Esq.

Attorneys and Counselors at Law

Charles R. Zeh, Esq.  
Robert G. Berry, Esq.  
Pete Cladianos III, Esq.  
James Barnes, Esq.

575 Forest Street  
Reno, Nevada 89509  
Phone (775) 323-5700  
Fax (775) 786-8183  
Office e-mail: Karen@crzehlaw.com

Sender's e-mail address  
CRZeh@aol.com

October 11, 2013

## Via Certified Mail

Robert F. Balkenbush, Esq.  
Thorndal Armstrong  
Delk Balkenbush & Eisinger  
6590 South McCarran Blvd., Suite B  
Reno, NV 89509

Re: Subsequent Injury Request for Reimbursement

Claim No.	C143-07-02558-01
Date of Injury:	November 30, 2007
Association Name:	Public Agency Compensation Trust
Association Member:	North Lake Tahoe Fire Protection District
Association Administrator:	Public Agency Risk Management Services
Third-Party Administrator:	Alternative Service Concepts
Submitted By:	Robert F. Balkenbush, Esq.

Dear Mr. Balkenbush:

This letter is a courtesy confirmation regarding the outcome of the hearing conducted on, September 19, 2013, according to NAC 616B.7783, wherein the applicant appealed the Administrator's recommendation to the Board concerning the above-referenced claim.

The Board voted to deny the application seeking reimbursement pursuant to NRS 616B.578. According to NAC 616B.7783 (6), a written decision will follow from the Board, which shall include Findings of Fact and Conclusions of Law. A copy of the decision will be served upon you after review by the Board. Not later than 10 days after the date the decision is served, the Association may serve upon legal counsel for the Board written objections to the decision. Any appeal of the decision of the Board shall be directed to the district court. *See* NRS 616B.578 (7). You are advised, however, to familiarize yourself with the pertinent sections of the Nevada Administrative Code and Nevada Revised Statutes and to rely upon your own understanding of the them in the prosecution of an appeal, if any.

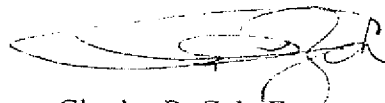
Robert F. Balkenbush, Esq.  
Thorndal Armstrong  
Delk Balkenbush & Eisinger  
October 9, 2013  
Page 4

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Should you have any questions, please do not hesitate to contact me.

Sincerely,

THE LAW OFFICES OF CHARLES R. ZEH, ESQ.



Charles R. Zeh, Esq.

CRZ/kdk

cc: Jacque Everhart, *Via Facsimile*  
Donald C. Smith, Esq., *Via Facsimile*  
Richard Iannone, *Via Facsimile*

**CERTIFICATE OF SERVICE**

I certify that I am an employee of The Law Offices  
of Charles R. Zeh, Esq., and on this date I served this  
letter on the parties as indicated.

Date: October 9, 2013 

# SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Robert Balkenbush, Esq.  
Thorndal Armstrong Delk  
Balkenbush & Eisinger  
6590 South McCarran Blvd., Suite B  
Reno, NV 89509

# COMPLETE THIS SECTION ON DELIVERY

A. Signature

*[Signature]*

- ☐ Agent
- ☐ Addressee

B. Received by (Printed Name)

*[Printed Name]*

C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes  
If YES, enter delivery address below: ☐ No

3. Service Type

- ☒ Certified Mail ☐ Express Mail
- ☐ Registered ☐ Return Receipt for Merchandise
- ☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee)

☐ Yes

2. Article Number

(Transfer from service label)

7011 2970 0000 6740 4840

PS Form 3811, February 2004

Domestic Return Receipt

102595-02-M-1540

U.S. Postal Service<sup>TM</sup>

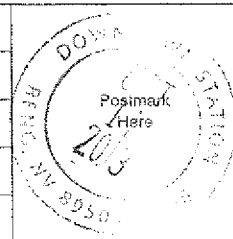
# CERTIFIED MAIL<sup>TM</sup> RECEIPT

(Domestic Mail Only; No Insurance Coverage Provided)

For delivery information visit our website at [www.usps.com](http://www.usps.com)

OFFICIAL USE

Postage	\$ 46
Certified Fee	3.10
Return Receipt Fee (Endorsement Required)	2.55
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	\$ 6.11



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Robert Balkenbush, Esq.  
Thorndal Armstrong Delk  
Balkenbush & Eisinger  
6590 South McCarran Blvd., Suite B  
Reno, NV 89509

for instructions

000229

# The Law Offices of Charles R. Zeh, Esq.

Attorneys and Counselors at Law

Charles R. Zeh, Esq.  
Robert G. Berry, Esq.  
Pete Cladianos III, Esq.  
James Barnes, Esq.

575 Forest Street, Suite 200  
Reno, Nevada 89509  
Phone (775) 323-5700  
Fax (775) 786-8183  
Office e-mail: Karen@Crzehlaw.com

Sender's e-mail address  
CRZeh@aol.com

September 9, 2013

Robert Balkenbush, Esq.  
Thorndal, Armstrong, Delk,  
Balkenbush & Eisinger  
6590 S. McCarran Blvd., Suite B  
Reno, NV 89509

Re: Subsequent Injury Request for Reimbursement

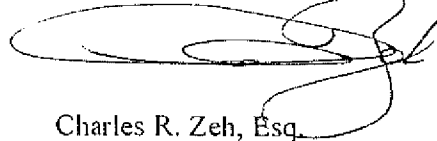
Claim No. C143-07-02558-01  
Date of Injury: November 30, 2007  
Association Name: Public Agency Compensation Trust  
Association Member: North Lake Tahoe Fire Protection District  
Association Administrator: Public Agency Risk Management Services  
Third-Party Administrator: Alternative Service Concepts  
Submitted By: Robert Balkenbush, Esq.

Dear Mr. Balkenbush:

This letter will confirm that at the August 15, 2013, Board meeting for the Subsequent Injury Account for Associations of Self-insured Public or Private Employers, the above-referenced matter was continued following the approval of your request for continuance. Therefore, this matter has been continued to the September 19, 2013, Board meeting. Formal notice of the meeting will also be provided.

Sincerely,

THE LAW OFFICES OF CHARLES R. ZEH, ESQ.




Charles R. Zeh, Esq.

CRZ/jlp

## CERTIFICATE OF SERVICE

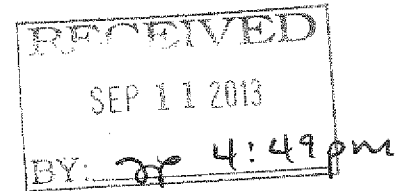
cc: Richard Iannone, *Via Facsimile*  
Jacque Everhart, *Via Facsimile*

I certify that I am an employee of The Law Offices of Charles R. Zeh, Esq., and on this date I served this letter on the parties as indicated. ~

Date: 09/11/2013 



Robert F. Balkenbush, Esq.  
Thorndal, Armstrong, Delk, Balkenbush & Eisinger  
6590 S. McCarran Blvd., Suite B  
Reno, Nevada 89509  
Tel.: (775) 786-2882  
Fax.: (775) 786-8004



Attorneys for: North Lake Tahoe Fire Protection District, Public Agency Compensation Trust

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

In the Request for Reimbursement	Claim No.:	C143-07-02558-01
	Date of Injury:	11/30/07
From the	Insurer:	PACT
	Employer:	North Lake Tahoe FPD
Subsequent Injury Account	Third Party Admin.:	Alternative Service Concepts, LLC

**PUBLIC AGENCY COMPENSATION TRUST'S  
PRE-HEARING STATEMENT**

**I  
DOCUMENTARY EVIDENCE**

North Lake Tahoe Fire Protection District (hereinafter "NLTFPD"), as the Employer and Public Agency Compensation Trust (hereinafter "PACT"), as the Insurer, will rely on the Administrator's 140-page documentary exhibit (DIR 1 through DIR 140) submitted with the Administrator's written recommendation to deny the NLTFPD's within SIF claim. The NLTFPD reserves the right to supplement its initial documentary submission in this contested matter.

**II  
STATEMENT OF ISSUES OF FACT AND LAW**

1. The Administrator has erred both in fact and law in concluding that the PACT's request for SIF reimbursement does not satisfy the legal requirement set forth in NRS 616B.557(4).

**III**  
**WITNESSES**

The PACT may call one or more of the following witnesses to testify may testify in person or by telephone by telephone about various aspects of the claim:

1. The Injured Employee or claimant in the workers' compensation claim at issue in the Self-Insured Employer's request for SIA reimbursement, will testify about the occurrence of his work-related August, 2002 low back injury, and his May, 2003 work-related low back injury, contemporaneous communication of this injury to his employer (the NLTFPD), and any accommodations by the NLTFPD or himself for the purpose of treatment and recovery from these injuries in order to continue to perform his duties as a fire fighter for the NLTFPD. employment.

2. The following representatives from NLTFPD may testify concerning the injured employee's pre-existing known conditions as such relate to the PACT's within request for SIA reimbursement:

Sharon Cary, NLTFPD, Business Manager and Human Resources Director, will testify that the injured employee contemporaneously informed them of the occurrence of his work-related August, 2002 and May, 2003 low back injury, and any sequelae of which they were aware. Ms. Cary will further testify about the hiring policies of NLTFPD.

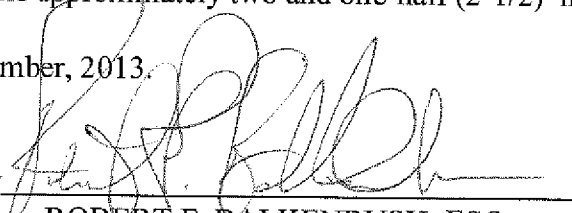
Michael Brown, Fire Chief of NLTFPD, will testify of his personal knowledge of the work-related low back injuries of the injured employee, and any sequella of which he was aware. Michael Brown will further testify about the hiring policies of NLTFPD.

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**IV  
ESTIMATED TIME**

The PACT's presentation will take approximately two and one-half (2-1/2) hours.

DATED this 11<sup>th</sup> day of September, 2013.

By   
ROBERT F. BALKENBUSH, ESQ.

Attorney for the North Lake Tahoe Fire Protection District,  
employer, and Public Agency Compensation Trust, Insurer

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Thorndal, Armstrong, Delk, Balkenbush & Eisinger, and that on this day I caused to be served by Hand-Delivery a correct copy of the foregoing documents, addressed to:

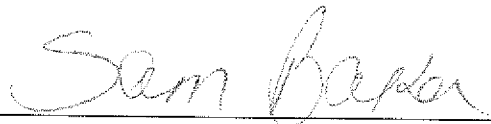
Charles R. Zeh, Esq.  
Board Counsel  
575 Forest Street, Suite 200  
Reno, Nevada 89509

Pursuant to NRCP 5(b), I certify that I am an employee of Thorndal, Armstrong, Delk, Balkenbush & Eisinger, and that on this day I caused to be served by facsimile and regular U.S. Mail, in Reno, Nevada, a true and correct copy of the foregoing document, addressed to:

Donald Smith, Esq.  
Legal Counsel  
Administrator  
Department of Industrial Relations  
1301 Green Valley Parkway, Suite 200  
Henderson, NV 89074

Department of Industrial Relations  
DIR - Workers' Compensation Section  
1301 Green Valley Parkway, Suite 201  
Henderson, NV 89074  
ATTN: Jacque Everhart

DATED this 11 day of September, 2013.

  
\_\_\_\_\_  
SAM BAKER

**AFFIRMATION**

**Pursuant to NAC 616B.7783(1)(c)(2)**

The undersigned hereby affirms that the preceding document filed in above-entitled court does not contain the name, social security number, date of birth, or address of the injured worker.

DATED this 11<sup>th</sup> day of September, 2013.

THORNDAL, ARMSTRONG,  
DELK, BALKENBUSH & EISINGER

By: 

Robert F. Balkenbush, Esq.  
6590 S. McCarran Blvd., Suite B  
Reno, Nevada 89509  
Attorneys for the Association

**THORNDAL, ARMSTRONG, DELK,  
BALKENBUSH & EISINGER**

A PROFESSIONAL CORPORATION  
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**FAX COVER SHEET**

DATE: August 5, 2013  
TO: Charles Zeh, Esq.  
FAX NO: (775) 786-8183  
FROM: Robert F. Balkenbush, Esq.

PAGES TRANSMITTED (excluding cover sheet): 1

SUBJECT: *Insurer: Public Agency Compensation Trust*  
*Claim No: C143-07-02558-01*  
*Employer: North Lake Tahoe Fire Protection District*  
*Date of Injury: 11/30/07*  
*DIR-WCS Recommendation to deny SIF reimbursement, 05/13/13*

**NOTICE OF CONFIDENTIALITY**

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JOHN L. THORNDAL  
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August 5, 2013

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via **FACSIMILE (775) 786-8183**  
Charles R. Zeh, Esq.  
Zeh & Winograd  
575 Forest Street, Suite 200  
Reno, NV 89509

**RE: Insurer: Public Agency Compensation Trust**  
**Claim No: C143-07-02558-01**  
**Employer: North Lake Tahoe Fire Protection District**  
**Date of Injury: 11/30/07**  
**DIR-WCS Recommendation to deny SIF reimbursement, 05/13/13**

Dear Mr. Zeh:

As you know, our office represents *Public Agency Compensation Trust*. Our office is requesting a continuance of the SIF hearing scheduled for August 15, 2013, at 10:00 a.m. We are requesting a continuance of this matter, as we are in the process of obtaining additional documents in this matter. Further, we are requesting a continuance as I have a calendar conflict for August 15, 2013.

We shall await your response.

Very truly yours,

ROBERT F. BALKENBUSH, ESQ.  
RFB/sb

cc: File

ORIGINAL



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May 15, 2013

JOHN L. THORNDAL  
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CRAIG R. DELK  
STEPHEN C. BALKENBUSH  
PAUL F. EISINGER  
CHARLES L. BURCHAM  
BRIAN K. TERRY  
BRENT T. KOLVET  
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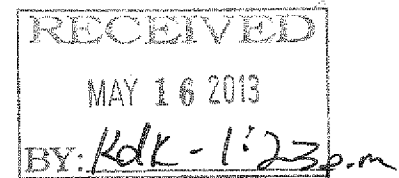
ELKO

919 IDAHO STREET  
ELKO, NV 89801  
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**SENT VIA HAND-DELIVERY**

Charles R. Zeh, Esq.  
Zeh & Winograd  
575 Forest St. Suite 200  
Reno, NV 89509

**RE: Insurer: Public Agency Compensation Trust**  
**Claim No: C143-07-02558-01**  
**Employer: North Lake Tahoe Fire Protection District**  
**Date of Injury: 11/30/07**  
**DIR-WCS Recommendation to deny SIF reimbursement, 05/13/13**



Dear Attorney Zeh:

We are hereby requesting a hearing before the SIF Board pursuant to NAC 616B.7771(2) with regards to DIR's recommendation to deny our request for SIF reimbursement.

The insurer will be represented by Attorney Bob Balkenbush at the hearing and he will need sufficient time to prepare the SIF case and obtain additional evidence to submit.

Hence, please schedule the hearing before the Board that will allow 120 - 160 days for preparation.

If you have any questions or need further information, you may contact our office at the number above.

Very Truly Yours,

Robert F. Balkenbush, Esq.

RFB:psb

cc: ASC  
File



## Karen Kennedy

---

**From:** Karen Kennedy  
**Sent:** Monday, June 03, 2013 8:56 AM  
**To:** Jacque Everhart (everhart@business.nv.gov)  
**Cc:** Charles R. Zeh Esq. (crzeh@aol.com)  
**Subject:** SIA claim C143.07.0255801  
**Attachments:** Balkenbush 5.15.2013 Letter.pdf

Jacque,

Attached is a copy of the letter that we received from Mr. Balkenbush, on May 16, 2013, he has requested the hearing to be scheduled for the September 2013 Board meeting. I do not have any additional matters, do you have anything?

If you should have any questions, please do not hesitate to contact this office. Thank you.

Karen Kennedy  
Legal Assistant to Charles R. Zeh, Esq.

The Law Offices of Charles R. Zeh, Esq.  
575 Forest Street, Suite 200  
Reno, NV 89509

Phone: 775.323.5700  
Facsimile: 775.786.8183

Under requirements imposed by the IRS, we inform you that, if any advice concerning one or more U.S. federal tax issues is contained in this communication (including any attachments), such advice was not intended or written to be used, and cannot be used, for the purpose of (1) avoiding penalties under the Internal Revenue Code or (2) promoting, marketing or recommending to another party any transaction or tax-related matter addressed herein.

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## STATE OF NEVADA

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

### NOTICE OF MEETING

The Board for the Administration of Subsequent Injury Account for the Associations of Self-insured Public or Private Employers will hold a public meeting on March 18, 2014, 10:00 a.m., at 1301 North Green Valley Parkway, Conference Room B, Henderson, Nevada. The public is advised that some of the members of the Board may participate in the meeting *via* telephone.

### AGENDA

**Notice:** (1) Items on the Agenda may be taken out of order; (2) the Board may combine two or more Agenda items for consideration; and (3) the Board may remove an item from the Agenda or delay discussion relating to an item on the Agenda at any time.

1. Roll Call.
- \*\* 2. Public Comment. The opportunity for public comment is reserved for any matter listed below on the Agenda as well as any matter within the jurisdiction of the Board. No action on such an item may be taken by the Board unless and until the matter has been noticed as an action item. Comment from the public is limited to three minutes per person.
- \* ✓ 3. Approval of Posting of Agenda. **For Possible Action**
- \* 4. Approval of Agenda. **For Possible Action**
- \* ✓ 5. Approval of the Minutes for January 21, 2014. **For Possible Action**
- \* ✓ 6. Action on the Recommendation of the Administrator of the Division of Industrial Relations for denial of the following request(s) for reimbursement from the Subsequent Injury Account for the Associations of Self-insured Public or Private Employers. The following claim(s) for reimbursement will be adjudicated by the Board pursuant to the Nevada Administrative Procedures Act, NRS 233B.010, *et. seq.*
  - a. C143-03-00548-01 North Lake Tahoe Fire Protection  
**For Possible Action**

- \* ✓7. Action on the Recommendation of the Administrator of the Division of Industrial Relations for acceptance of the following supplemental request(s) for reimbursement from the Subsequent Injury Account for the Associations of Self-insured Public or Private Employers in the amount verified by the Administrator.

a. C143-00-00055-01

White Pine County  
**For Possible Action**

- \* ✓8. Discussion and disposition of Findings of Fact, Conclusions of Law and Determination of the Board, regarding Fortress Construction, Inc., Claim No. 5012-0806-2011-0619. Direction to Board's Counsel. **For Possible Action**

- \* ✓9. Discussion and disposition of Findings of Fact, Conclusions of Law and Determination of the Board, regarding North Lake Tahoe Fire Protection District, Claim No. C143-07-02558-01. Direction to Board's Counsel. **For Possible Action**

- \* ✓10. Continued Discussion and Review of Draft Letter Regarding the Apparent Drop off in the Submission of Claims to the Board for the Administration of the Subsequent Injury Account for Associations of Self-insured Public or Private Employers. Possible Direction to Board's Legal Counsel. **For Possible Action**

- \* ✓11. Continued Review and Analysis of Proposed Amendments to Regulations and Possible Additional Regulations; Possible Approval for Referral to the Director's Office; Determination as to Whether the Forgoing Would Have an Adverse Economic Impact upon Small Employers, *i.e.*, less than 150 Full-time or Part-time Employees; *See*, NRS 233B.0608(1); Possible Finding of No Adverse Impact and Referral to the Director's Office of Said Finding. Discussion of Workshop and/or Hearing. **For Possible Action**

- \* 12. Additional Items:

- \*\* a. General Matters of Concern to Board Members Regarding Matters Not Appearing on the Agenda.

- \*\* b. Old and New business.

- \* c. Schedule of next Meeting. The Following Dates Have Been Scheduled in Advance but Are Subject to Change at Any Time: April 15, 2014; May 20, 2014; June 17, 2014; July 15, 2014; August 19, 2014; September 16, 2014; October 14, 2014; November 18, 2014 and December 16, 2014. **For Possible Action**

- \*\* 13. Public Comment. The opportunity for public comment is reserved for any matter within the jurisdiction of the Board. No action on such an item can be taken by the Board unless and until the matter has been agendized as an action item. Comment from the public is limited to three minutes per person.
- \* 14. Adjournment. **For Possible Action**

Single-asterisked items are matters upon which the Board may take possible action.

Double-asterisked items are matters upon which the Board may take no action until the matter itself has been specifically included on an agenda as an item upon which action may be taken.

Any person with a disability as defined by the Americans with Disabilities Act who requires special assistance to participate in the meeting may contact, at least two days prior to the meeting, Jacque Everhart at the Division of Industrial Relations, 1301 North Green Valley Parkway, Suite 200, Henderson, Nevada, 89074, or by calling (702) 486-9089 to arrange for reasonable accommodations.

This Notice has been posted at the following locations:

Division of Industrial Relations, 1301 North Green Valley Parkway, Suite 200, Henderson, Nevada, 89014.

Division of Industrial Relations, 400 West King Street, Suite 400, Carson City, Nevada, 89710.

Division of Industrial Relations, Occupational Safety and Health Enforcement Section, 4600 Kietzke Lane, Building F, Suite 153, Reno, Nevada, 89502

Grant Sawyer Building, 555 East Washington Avenue, Las Vegas, Nevada, 89101.

As a courtesy to the public in general and in order to disseminate information about the Board's activities as broadly as possible, the Board intends that this Agenda be posted to the Nevada Department of Business and Industry's website. Such posting is not required, however, in the Board's opinion, by the Nevada Open Meeting Law. A failure of the Agenda to be posted on the Business and Industry website will not prevent the Board from conducting a Board meeting, provided the Agenda had been correctly posted and notice otherwise given according to the Nevada Open Meeting law, which shall govern the adequacy of posting and notice of the Board's meeting.

Dated this 7<sup>th</sup> day of March, 2014.

By: /s/ Charles R. Zeh, Esq.  
Charles R. Zeh, Esq.  
Counsel for the Board

### CERTIFICATE OF PERSONAL SERVICE

I certify that I am an employee of The Law Offices of Charles R. Zeh, Esq., and that I served the Notice of Meeting/Agenda for the March 18, 2014, State of Nevada, Board for the Administration of the Subsequent Injury Account for the Associations of Self-Insured Public or Private Employers' on Robert F. Balkenbush, Esq., by personal delivery upon Sam Baker, on the 7<sup>th</sup> day of March, 2014, at the offices of Thorndal Armstrong Delk Balkenbush & Eisinger, located at 6590 South McCarran Blvd., Suite B, Reno, NV 89509.

Dated this 7<sup>th</sup> day of March, 2014.

  
\_\_\_\_\_  
Karen Kennedy

S:\Clients\SIA\Service of Agenda\3.18.2014 Cert of Service.wpd

**STATE OF NEVADA**  
**Board for the Administration of the**  
**Subsequent Injury Account for**  
**Associations of Self-insured Public or Private Employers**

**Meeting Minutes**  
**For the Meeting of March 18, 2014**  
**Meeting of the Board**  
**Henderson, Nevada**

A meeting of the Board for the Administration of the Subsequent Injury Account for the Associations of Self-insured Public or Private Employers was convened on March 18, 2014. The meeting was duly noticed in compliance with the Nevada Open Meeting Law to take place at 1301 North Green Valley Parkway, Room B, Henderson, Nevada, the offices of the Division of the Industrial Relations ("DIR"). Vice-chairman Bryan Wachter and member Emilia Hooks attended the meeting in person. Members Joyce Smith and Shannon Hoolihan attended the meeting *via* telephone conference call. Chairman Richard Iannone was absent. The meeting was conducted so that each member of the Board and public, if any, could hear all participants and all Board members could participate in the deliberations and discussions. Each Board member participating in the meeting also had before him or her all written materials to be considered during the deliberations of the Board meeting or was obliged to refrain from voting if not in their possession.

**1. Roll Call.**

Vice-chairman Bryan Wachter and member Emilia Hooks attended the meeting in person. Members Joyce Smith and Shannon Hoolihan attended the meeting *via* telephone conference call. Chairman Richard Iannone was absent. As four of the members were present throughout the meeting, a quorum was present to conduct the Board's business.

Also present in person were Jacque Everhart, the Liaison to the Board for the Administrator of the Division of Industrial Relations (DIR), Donald C. Smith, Esq., legal counsel to the Administrator, and Charles R. Zeh, Esq., The Law Offices of Charles R. Zeh, Esq., legal counsel to the Board.

Participating for part of the meeting by phone was Robert F. Balkenbush, Thorndal Armstrong Delk Balkenbush & Eisinger.

**2. Public Comment.**

There was no public comment.

**3. Approval of the Posting of Agenda.**

Vice-chairman Wachter called this matter to be heard and requested a motion regarding the posting of the Agenda. It was then moved by Emilia Hooks, seconded by Joyce Smith, to approve the posting of the notification of the meeting. **Motion adopted.**

**Vote: 4-0.**

**4. Approval of Agenda.**

Vice-chairman Wachter called this matter to be heard and requested a motion regarding the Agenda. It was moved by Emilia Hooks, seconded by Shannon Hoolihan, to approve the Agenda. **Motion adopted.**

**Vote: 4-0.**

**5. Approval of the Minutes for January 21, 2014.**

Vice-chairman Wachter called the minutes of January 21, 2014, to be heard. It was moved by Emilia Hooks, seconded by Shannon Hoolihan, to approve the minutes as presented. **Motion adopted.**

**Vote: 4-0.**

**6. Action on the Recommendation of the Administrator of the Division of Industrial Relations for Denial of the Following Request(s) for Reimbursement from the Subsequent Injury Account for the Associations of Self-insured Public or Private Employers. The Following Claim(s) for Reimbursement Will Be Adjudicated by the Board Pursuant to the Nevada Administrative Procedures Act, NRS 233b.010, *et. seq.***

**a. C143-03-00548-01**

**North Lake Tahoe Fire Protection**

Vice-chairman Wachter next called this matter for hearing. The association name for this matter is Public Agency Compensation Trust. The association member for this matter is North Lake Tahoe Fire Protection. The association administrator for this matter is Public Agency Risk Management Services. The third-party administrator for this matter is Alternative Service Concepts, LLC. The matter was submitted by Robert F. Balkenbush, Esq., Thorndal Armstrong Delk Balkenbush & Eisinger.

The Administrator recommended denial of this request pursuant to NRS 616B.578(1),(3) and(4) for the heart. The amount of reimbursement requested was \$30,163.01. The amount of reimbursement after costs were verified was \$29,560.39.

Robert F. Balkenbush, Esq., appeared on behalf of the applicant. Mr. Balkenbush had submitted a letter on behalf of his client, requesting a hearing as the applicant indicated



through its counsel, Mr. Balkenbush, that it intended to challenge the recommendation of the Administrator to deny this claim. A court reporter was present to record the proceedings, and the Administrator was prepared to proceed as if the Administrator's decision was under siege from the applicant.

The record reflected that this matter was first scheduled to be heard on February 18, 2014, but that late in the day on February 15, 2014, a Friday, the applicant, through its counsel, Mr. Balkenbush, advised that a 90 to a 120 day continuance was being requested through Board counsel. Saturday morning, Board counsel then attempted to contact the Chairman about the request for a continuance, inasmuch as the request was being made so late in the day prior to the hearing date of February 18, 2014. Board counsel advised Mr. Balkenbush by e-mail, Saturday morning, February 16, 2014, that he had attempted to contact the Chairman, but to no avail. Subsequently, however, the Board Chairman, that Saturday morning, contacted Board counsel and advised, he would grant a 30 day extension of time to March 18, 2014, to have this matter heard.

This was the end of it save and except, as the record shows, on March 7, 2014, Mr. Balkenbush was served through his office with a formal notice of the hearing for the 18<sup>th</sup> of March, 2014. Then, at the outset of the hearing of March 18, 2014, and without any prior notice to the Board, Mr. Balkenbush advised for the first time that his client was withdrawing its request for a hearing, thereby allowing the Board to decide this matter without challenge by the applicant. Board counsel then asked Mr. Balkenbush if that meant, his client was conceding that the applicant should be denied. Mr. Balkenbush advised, the applicant was not conceding that point, inasmuch as the applicant, according to Mr. Balkenbush, was still reserving its right to appeal the disposition of the claim. As a matter of fact, having withdrawn its request for a hearing, the applicant forfeited its opportunity to be heard, unless the Board directed questions specifically to the applicant, requesting a response thereto.

Also, it is noted that inasmuch as it has become standard practice for the Board to require the presence of a court reporter when an applicant, as here, requests a hearing to challenge the application for reimbursement, Mr. Balkenbush should have known that a court reporter was going to be present and, thus, the cost of the presence of a court reporter would be incurred. Nonetheless, Board counsel advised that under the circumstances, the court reporter should not be sent home, but should continue to report the content of the proceedings. The Chairman so directed and then asked Jacque Everhart, the Administrator's liaison to the Board, to present the Administrator's recommendation to the Board.

The recommendation was presented and at the conclusion of the presentation, based upon the staff report, the discussion before the Board and other good cause appearing, it was moved by Emilia Hooks, seconded by Shannon Hoolihan, to accept the Administrator's recommendation and, therefore, to deny the claim. **Motion adopted.**

**Vote: 4-0.**

7. **Action on the Recommendation of the Administrator of the Division of Industrial Relations for Acceptance of the Following Supplemental Request(s) for Reimbursement from the Subsequent Injury Account for the Associations of Self-insured Public or Private Employers in the Amount Verified by the Administrator.**

a. **C143-00-00055-01**

**White Pine County**

Vice-chairman Wachter next called this matter for hearing. The association name for this matter is Public Agency Compensation Trust. The association member for this matter is White Pine County. The association administrator for this matter is Public Agency Compensation Trust. The third-party administrator for this matter is Alternative Service Concepts, LLC. The matter was submitted by Robert F. Balkenbush, Esq., Thorndal Armstrong Delk Balkenbush & Eisinger.

The Administrator recommended acceptance of this eighteenth supplemental request pursuant to NRS 616B.578 for the lumbar spine. The amount of reimbursement requested was \$31,280.30. The amount of reimbursement after costs were verified was \$29,198.20.

Robert F. Balkenbush, Esq., Thorndal Armstrong Delk Balkenbush & Eisinger, appeared on behalf of the applicant. After the Administrator finished her presentation, Mr. Balkenbush was asked if he had anything to add. He advised, he had nothing further to say.

Based upon the staff report, the discussion before the Board and other good cause appearing, it was accordingly moved by Joyce Smith, seconded by Emilia Hooks, to accept the recommendation of the Administrator and approve the claim in the verified amount of \$29,198.20. **Motion adopted.**

**Vote: 4-0.**

8. **Discussion and Disposition of Findings of Fact, Conclusions of Law and Determination of the Board, regarding Fortress Construction, Inc., Claim No. 5012-0806-2011-0619. Direction to Board's Counsel.**

Vice-chairman Wachter next called this matter for hearing. The association name for this matter is Builders Association of Western Nevada. The association member for this matter is Fortress Construction, Inc. The association administrator for this matter is ProGroup Management, Inc. The matter was submitted by the third-party administrator, Associated Risk Management, Inc.

Richard Staub, Esq., was not present, although receiving notification of this matter. Joyce Smith advised that she would recuse herself as her business is a member of the Builders Association of Western Nevada. As Emilia Hooks was absent from the meeting when this claim was denied, she could not vote on the claim, either. Therefore, with Chairman Iannone absent, this left only two remaining members present at this meeting to

vote on this draft decision. A quorum was, therefore, lost and the matter was continued to the next meeting.

**9. Discussion and Disposition of Findings of Fact, Conclusions of Law and Determination of the Board, Regarding North Lake Tahoe Fire Protection District, Claim No. C143-07-02558-01. Direction to Board's Counsel.**

Vice-chairman Wachter next called this matter for hearing. The association name for this matter is Public Agency Compensation Trust. The association member for this matter is North Lake Tahoe Fire Protection District. The association administrator for this matter is Public Agency Risk Management Services. The third-party administrator for this matter is Alternative Service Concepts. The matter was submitted by Robert F. Balkenbush, Esq., Thorndal Armstrong Delk Balkenbush & Eisinger.

Robert F. Balkenbush, Esq., remained on the phone for participation in this item, the approval of the draft decision, disposing of the claim according to the action taken by the Board and mirroring its rationale for the disposition set out in the draft decision. Board counsel again explained that this was not the time to re-litigate the case. The only issues before the Board were whether the decision accurately re-stated the actual action taken by the Board and then, whether the decision actually captured the Board's rationale in disposing of the claim.

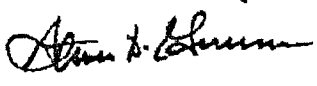
Board counsel explained the contents of the decision. Mr. Balkenbush was given the opportunity to inject his observations into the proceedings. He declined, stating that he was only there to monitor the disposition of this matter on behalf of his client.

Member Emilia Hooks pointed out that she was absent from the meeting on this date and, therefore, could not vote on this case. It was accordingly moved by Joyce Smith, seconded by Shannon Hoolihan, to approve the draft decision as the decision of the Board on the grounds that it accurately re-stated the action taken and accurately reflected the sense of the Board in denying the claim. **Motion adopted.**

**Vote: 3-0-1 (Hooks abstaining as she was absent from the meeting when this matter was decided).**

**10. Continued Discussion and Review of Draft Letter Regarding the Apparent Drop off in the Submission of Claims to the Board for the Administration of the Subsequent Injury Account for Associations of Self-insured Public or Private Employers. Possible Direction to Board's Legal Counsel.**

Vice-chairman Wachter then called this matter to be heard, the issue of the under-utilization of the Account by applicants. He asked Board counsel to explain. Board counsel advised that in the packet was a letter recommended by Richard Staub, Esq., on behalf of his client, Mike Livermore, PACT and ARMI. This letter included the recommendation that the Board refrain from contacting the employers constituting the various associations at this time but to direct correspondence to the board members or

  
CLERK OF THE COURT

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

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

13 EIGHTH JUDICIAL DISTRICT COURT

14 CLARK COUNTY, NEVADA

15 \*\*\*

16 NORTH LAKE TAHOE FIRE  
17 PROTECTION DISTRICT and PUBLIC  
18 AGENCY COMPENSATION TRUST,

19 Petitioners,

20 vs.

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

Respondents.

Case No. A-14-702463-J

Department No. XXXII

RECORD ON APPEAL  
(NRS 233B.010, *et. seq.*)  
Part 3  
ROA 000200-000307

RECORD ON APPEAL  
(NRS 233B.010, *et. seq.*)

The Law Offices of Charles R. Zeh, Esq.  
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2 NV State Bar No. 1246  
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5 6590 S. McCarran, Suite B  
6 Reno, NV 89509

7 *Attorneys for Petitioners, North Lake Tahoe*  
8 *Fire Protection District and Public Agency*  
9 *Compensation Trust*

Donald C. Smith, Esq.  
NV State Bar No. 0413  
Jennifer J. Leonescu  
NV State Bar No. 6036  
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*Attorneys for Respondent, Administrator of*  
*the Nevada Division of Industrial relations of*  
*the Nevada Department of Business and*  
*Industry*

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*Account for the Associations of Self-insured*  
*Public or Private Employers*

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### Description of Documents

### Date Stamp ROA

Memorandum, dated May 13, 2013, from the Department of Business and Industry Division of Industrial Relations Workers' Compensation Section

000001-000162

September 19, 2013, Notice of Meeting/Amended Agenda

000163-000165

Certificate of Personal Service

000166

Re: September 19, 2013, Notice of Meeting/Amended Agenda

State of Nevada Board for the Administration of the Subsequent Injury Account for the Associations of Self-Insured Public or Private Employers, Meeting Minutes, for September 19, 2013

000167-000177

Letter to Robert F. Balkenbush, Esq., from Charles R. Zeh, Esq., dated October 11, 2013

000178-000180

Letter to Robert F. Balkenbush, Esq., from Charles R. Zeh, Esq., dated September 9, 2013

000181

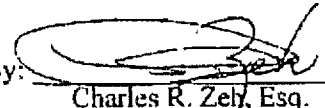
Public Agency Compensation Trust's Pre-Hearing Statement, dated September 11, 2013.

000182-000186

1	Letter to Charles R. Zeh, Esq. From Robert F. Balkenbush, Esq., dated	000187-000188
2	August 5, 2013	
3	Letter to Charles R. Zeh, Esq. From Robert F. Balkenbush, Esq., dated	000189-000190
4	May 15, 2013	
5	March 18, 2014, Notice of Meeting/Agenda	000191-000194
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7	Re: March 18, 2014, Notice of Meeting/Agenda	
8	State of Nevada Board for the Administration of the Subsequent Injury	000196-000203
9	Account for the Associations of Self-Insured Public or Private	
10	Employers, Meeting Minutes, for March 18, 2014	
11	Findings of Fact, Conclusions of Law and Decision of the Board, dated	000204-000226
12	May 13, 2014	
13	Reporter's Transcript of Proceedings, Taken on Thursday, September 19,	000227-000307
14	2013	

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

14 Dated this 21<sup>st</sup> day of July, 2014. THE LAW OFFICES OF CHARLES R. ZEH, ESQ.

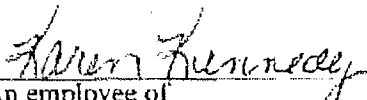
15  
16 By:   
17 Charles R. Zeh, Esq.  
18 Attorneys for The Board for Administration of the  
19 Subsequent Injury Account for the Associations of  
20 Self-insured Public or Private Employers  
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# CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of The Law Offices of Charles R. Zeh, Esq., and that on this date I served the attached *Record of Appeal (Part 3)*, on those parties identified below by:

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

Dated this 23<sup>rd</sup> day of July, 2014.

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

trustees of the associations, as the starting point. Mr. Staub had composed a letter with that thought in mind.

The draft letter, itself, clearly needed some stylistic and grammatical changes. The Board's consensus, however, was to proceed at the trustee or board member level of the associations, and to contact them about the Account, as had been recommended by Mike Livermore, at ARMI and PACT. The Board then remanded Mr. Staub's letter to Shannon Hoolihan, who had volunteered to work on drafting a letter to help address this under-utilization issue. She said, she was comfortable with discarding the letter she had previously drafted and to proceed to tweak Mr. Staub's letter. The Board asked her when she was done with her refinements of the letter, to forward it to Board counsel for his further review, also, after which, the letter will be submitted to the Board for final review and approval. No motion was needed to proceed with this consensus of the Board. Ms. Hoolihan asked Board counsel if his office could e-mail to her another copy of Mr. Staub's letter. Board counsel agreed to do so.

**11. Continued Review and Analysis of Proposed Amendments to Regulations and Possible Additional Regulations; Possible Approval for Referral to the Director's Office; Determination as to Whether the Forgoing Would Have an Adverse Economic Impact upon Small Employers, i.e., less than 150 Full-time or Part-time Employees; See, NRS 233B.0608(1); Possible Finding of No Adverse Impact and Referral to the Director's Office of Said Finding. Discussion of Workshop and/or Hearing.**

Vice-chairman Wachter next called the matter of the Board's Small Business Impact Statement to be considered, a draft copy of which had been provided to the Board. The Vice-chairman again asked Board counsel to explain and update the Board. Board counsel advised that a Small Business Impact Statement must be provided to accompany the regulation process, in the event that there is a finding by the Board of an adverse or negative financial impact of a draft regulation upon small businesses. No such statement must be provided, however, in the event that there is no finding of an adverse financial impact by the amended or new regulations upon a small business. It is required, however, also for the Board to explain how it arrived at whatever conclusion the Board reaches about the prospects of an adverse economic impact upon small employers by the amended or new regulations. Some statement on this issue is, therefore, required.

Board counsel had prepared such a statement and finding for the Board to consider as the starting place for this discussion. The draft concluded that because the fundamental thrust of the draft regulations was to streamline, simplify and make more intelligible the process before the Board, it seemed highly unlikely that this could have an adverse negative impact on small businesses. The draft statement also included a description of the process by which the Board reached the conclusion.

A discussion then ensued, particularly from Vice-chairman Wachter, suggesting that instead of the Board making this decision in a vacuum, the Board reach out to all of the small employers and actually ask them, what they think. Member Emilia Hooks



questioned the notion that this was being done in a vacuum, inasmuch as the Board has considerable experience, now, dealing with this issue and also, inasmuch as the Board members are, themselves, small employers. The Board members know enough from both sides of the fence, to arrive at the conclusion that regulations which so clearly streamline, simplify and expedite the process could be anything but financially positive, as distinguished from a financially negative experience for small businesses.

A discussion then followed until the question was called. It was moved by Emilia Hooks, seconded by Joyce Smith, to find that the draft regulations will have no adverse economic consequences for small employers, to adopt the draft Small Business Impact Statement as the statement of the Board, and to adopt, further, the description contained therein, as the method by which the conclusion was reached by the Board that there would be no negative, adverse economic consequences and, therefore, to submit this draft statement to the Director of Business and Industry, as the Board's finding and statement on this issue. **Motion adopted.**

**Vote: 3-1 (Wachter opposing).**

The Board then reviewed with Board counsel, the draft regulations. The draft regulations which were provided the Board the day before the hearing, March 14, 2014, reflected the deletion of the word "claim" or the word "claimant," in the regulations to be replaced by the word "application" or "applicant." The terms "claim" or "claimant," in the vernacular, refer to the injured worker in pursuit of a workers compensation claim. The words application or applicant, however, refer to the level that entails pursuit of reimbursement by an employer or association before the Board. To be consistent or clear, it was thought that the regulations dealing with Board reimbursement should, thus, use the terms "application" or "applicant" throughout, as the Employer Board had already decided to do.

The other set of draft regulations that had been previously sent to the Board reflected the revisions of the last meeting of the Board in January 2014. Those changes were more comprehensive and substantive. The Board agreed, however, with the rewrite of both sets of revised regulations, and directed the Board counsel to make the changes as set out in the draft regulations before the Board, the re-drafts for the versions labeled "R.10."

It was accordingly moved by Emilia Hooks, seconded by Joyce Smith to approve the draft regulations with the changes referenced in the two red-lined versions, and to direct the Board counsel to come back at the next meeting of the Board with a clean version making these changes as shown in the draft and as further refined during the meeting. **Motion adopted.**

**Vote: 4-0.**

In connection with this discussion, however, the Board also directed Board counsel to provide some language for its consideration, to address the situation such as the circumstances encountered, today, when the Board retained a court reporter, at its

expense, anticipating that there would be a formal hearing, wherein the applicant challenged the Administrator's recommendation. The applicant did not file a pre-hearing statement as is required and in all likelihood, then, had decided in advance of the hearing that it was not going to challenge, with a formal hearing, the Administrator's decision, and, therefore, knew that there would be no need for a court reporter. Nonetheless, the applicant, through its legal counsel, allowed the Board to require the presence of a court reporter and needlessly, then, under the circumstances, incur this expense. The Board would like to know if there is some fee shifting prospects to be applied in this situation.

It is noted, here, that sometime after item 8 was heard, Mr. Balkenbush terminated his participation in the meeting.

Also, Member Hoolihan said she had to make an appointment at noon and, therefore, at this time she concluded her participation in the meeting.

**12. Additional Items:**

**a. General Matters of Concern to Board Members Regarding Matters Not Appearing on the Agenda.**

There were no matters of concern discussed.

**b. Old and New Business.**

There was no old or new business discussed.

**c. Schedule of next Meeting(s).**

No changes in the meeting schedule were noted but Member Emilia Hooks advised, she would not be in attendance at the meeting of April 15, 2014.

**13. Public Comment.**

There was no public comment.

**14. Adjournment.**

It was moved by Emilia Hooks, seconded by Joyce Smith, to adjourn the meeting.  
**Motion adopted.**

**Vote: 3-0.**

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1 Procedures Act under NRS 233B.010, *et. seq.*, Robert F. Balkenbush Esq., appeared by telephone  
2 on behalf of PACT.

3 The injured worker in this case was an accident prone fire fighter who suffered from four  
4 lower back injuries between August of 2002 and July of 2007. Tr., pp. 7-10. After each of these  
5 injuries, the employee was released to full duty. Tr., pp. 54;24-25, 55;1-7. At the hearing on this  
6 matter, the applicant was able to substantiate the receipt of documents which showed that the  
7 employee suffered from multiple insults to the lower back (spine), including a herniated nucleus  
8 pulposus (HNP). Tr., pp. 53;4-25, 54;1-8.

9 The subsequent injury occurred on November 30, 2007. Tr., p. 11;8-11. PACT  
10 designated spondylolisthesis, SR 8, 11, as the preexisting permanent physical impairment, a  
11 condition diagnosed and discovered upon treatment of the subsequent industrial injury of  
12 November 30, 2007. DIR 104.

13 The applicant's counsel conceded during the hearing that HNP and spondylolisthesis are  
14 distinct conditions. Tr., pp. 74;23-25,75;1-2. Thus, the Board was faced with the question of  
15 whether knowledge of various insults to the lower back, including HNP and multiple back  
16 injuries over the years which PACT collectively labeled "serious," Tr., p. 60;3-6, satisfied NRS  
17 61B.578(3) and the "knowledge by written record requirement" of NRS 616B.578(4), when the  
18 preexisting condition upon which the applicant relied was spondylolisthesis, a specific diagnosis  
19 that is different from the injured worker's other back ailments that were known to the applicant  
20 prior to the subsequent industrial injury of November 30, 2007.

21 Knowledge of the prior back insults is the fulcrum of the applicant's claim because the  
22 knowledge acquired must be that of **the** preexisting condition, defined in NRS 616B.578(3),  
23 quoted in the margin,<sup>4</sup> and this knowledge must be acquired prior to the date of the subsequent  
24 injury to satisfy the retention requirement of NRS 616B.578(4). *Holiday Ret. Corp. v. State Div.*

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25  
26 <sup>4</sup>As used in this section, "permanent physical impairment" means any permanent condition,  
27 whether congenital or caused by injury or disease, of such seriousness as to constitute a hindrance or  
28 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. NRS 616B.578(3).

1 of *Indus. Rels.*, 274 P.3d 759, 762, 2012 Nev. LEXIS 33, 128 Nev. Adv.Rep. 13, 2012 WL  
2 1136405 (Nev. 2012). The preexisting condition, spondylolisthesis, was not, however,  
3 discovered until treatment was administered to the subsequent industrial injury. DIR 104.  
4 Therefore, to avoid disqualification due to the holding in *Holiday*, the applicant asserted that  
5 knowledge about the injured worker's bad back, equated with knowledge of spondylolisthesis. If  
6 this were true, the applicant argued that knowledge of spondylolisthesis should relate back to the  
7 time prior to the subsequent injury thereby avoiding the disqualification of *Holiday*. By  
8 implication, then, this argument concedes by contrast that if such knowledge of a bad back with  
9 HNP is not akin to knowledge of spondylolisthesis, *Holiday* forecloses a finding that the  
10 requirements of NRS 616B.578(4) had been satisfied.

11 Stated alternatively, key questions posed by the case include whether general knowledge  
12 of "serious" lower back issues, including HNP, satisfied the "proof by written record"  
13 requirement of NRS 616B.578(4), when the preexisting condition, spondylolisthesis, is a specific  
14 condition apart from HNP and the other "serious" lower back problems, Tr., pp.73;8-9, 24-25,  
15 74;1-2, 23-25, 76;1-2, when there was no proof that HNP and the other serious lower back  
16 problems were symptomatic of spondylolisthesis, when it was never shown that the HNP and  
17 general back conditions supported a rating of 6% or more and thus, themselves, could rise to the  
18 level of a preexisting condition and when, after each of these intervening insults to the spine, the  
19 injured worker returned to work, on a full duty fireman status. Tr., pp. 54;12-14, 22-25, 55;1-7.  
20 See, NRS 616B.578(3). The Board is of the opinion that even if the HNP and series of back  
21 insults could be described as a serious lower back condition, under these circumstances, the  
22 requirements of NRS 616B.578(1), (3) and (4) are not satisfied. Denial of the claim for  
23 reimbursement is, therefore, warranted as elucidated by the Findings of Fact, Conclusions of Law  
24 and Decision of the Board.

## 25 FINDINGS OF FACT

26 1. The Administrator recommended that the Board deny the request pursuant to NRS  
27 616B.578(4). SR 11-12. The Administrator concluded that the HNP located at L5-S1, was not  
28 the rated condition discovered after the 2007 injury. SR 11.

1           2.       The Administrator served its recommendation on the Public Agency  
2 Compensation Trust on May 13, 2013. SR 16.

3           3.       Public Agency Compensation Trust (PACT) timely appealed the DIR's  
4 recommendation with the Board of the Subsequent Injury Account (SIA) on May 15, 2013. *See*,  
5 Exhibit 2, admitted into evidence without objection.

6           4.       The Board placed the appeal on its meeting agenda for August 15, 2013. At the  
7 request of the applicant, the hearing on this matter was continued until September 19, 2013. *See*,  
8 Exhibit 3, admitted into evidence without objection.

9           5.       The matter came for hearing on September 19, 2013. Personally present at this  
10 meeting were Chairman Richard Iannone, Vice-chairman Bryan Wachter and member Shannon  
11 Hoolihan. Member Joyce Smith attended the meeting by telephone conference call from Carson  
12 City, Nevada. Member Emilia Hooks was absent. Also personally present were Jacque Everhart,  
13 Board Liaison for the Administrator of the Division of Industrial Relations (DIR), Jennifer  
14 Leonescu, Deputy Legal Counsel to the Administrator, DIR, and Charles R. Zeh, Esq., The Law  
15 Offices of Charles R. Zeh, Esq., Legal Counsel to the Board. Robert F. Balkenbush Esq.,  
16 appeared by phone on behalf of the applicant.

17           6.       Three exhibits were admitted into evidence without objection:

18           Exhibit 1:     Staff report dated May 13, 2013, with 140 pages of attachments plus 5  
19                             pages of disallowances.

20           Exhibit 2:     Letter dated May 15, 2013, requesting a hearing in this matter, including a  
21                             request that the matter not be set for hearing for the next 120-160 days.

22           Exhibit 3:     Letter dated August 5, 2013, asking for a continuance of the August 15,  
23                             2013, hearing.

24           7.       A quorum was present for the Board to convene and conduct its business on  
25 September 19, 2013. Tr., p. 2.

26           8.       Jacque Everhart presented the Administrator's recommendation to the Board and  
27 the applicant. Tr., pp. 6-24.

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1           9.       The total amount requested for reimbursement was One Hundred Forty-eight  
2 Thousand Three Hundred Eighteen Dollars and 87/cents (\$148,318.87). The amount of  
3 reimbursement after costs were verified was One Hundred Fifteen Thousand Four Hundred  
4 Twenty-nine Dollars and 03/cents (\$115,429.03). SR 1.<sup>5</sup>

5           10.      This employee was hired by the North Lake Tahoe Fire Protection District  
6 (NLTFPD or the District) on October 1, 1981. Tr., p. 7;7.

7           11.      On August 22, 2002, the employee injured his back while lifting a fire hose. Tr.,  
8 p. 7;10-11.

9           12.      On or about November 6, 2002, the employee had a magnetic resonance imaging  
10 examination (MRI) of his lumbar spine. DIR 16. The examination found a large central disc  
11 protrusion at L5-S1 and a degenerative disc bulge at L4-L5. *Ibid.*

12           13.      On November 13, 2002, George Mars, M.D., reviewed the MRI and noted that the  
13 employee's spine had shown a large central disc protrusion at L5-S1 with possible contact on the  
14 bilateral L5 nerve root. DIR 17. Dr. Mars' impression was that the employee suffered from a  
15 herniated nucleus pulposus (HNP) at L5-S1. *Ibid.*

16           14.      On January 6, 2003, the patient's low back was evaluated by Hilari L. Fleming,  
17 M.D., Ph.D. She noted low back pain with resolving radiculopathy. DIR 18-20. At the top of  
18 page 3 of her radiographic review, she stated "his L5 nerve roots, however, appear to be  
19 compromised within the foramina bilaterally, probably as a result of a very subtle listhesis of L5  
20 on S1, as well as some collapse of the disk." DIR 20. Dr. Fleming further noted that physical  
21 therapy and chiropractic treatment were helping and should be continued. An epidural injection  
22 was also considered. *Ibid.* After treatment, the employee was ultimately released to full duty.  
23 Tr., pp. 54;24-25, 55;1-7.

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28           <sup>5</sup>There is nothing in the record that separates the amount of funds requested for the employee's  
shoulder from the amount requested for the back injury. However, since no relief was given for either  
injury, this difference is not relevant.

1           15.     There is no proof in the record that the document containing this diagnosis by Dr.  
2 Fleming made it into the possession of the applicant prior to November 30, 2007. Tr., p. 71;19-  
3 25. It was, however, the only document produced which referenced "listhesis" prior to the  
4 discovery of spondylolisthesis during treatment of the subsequent industrial injury.

5           16.     On May 3, 2003, the employee suffered a second injury to his back while entering  
6 an ambulance. Tr., p. 8;17-19. This injury was considered an exacerbation of the previous  
7 claim. Tr., p. 8;19-20.

8           17.     On May 7, 2003, Michael J. Livermore, claims adjuster with Alternative Services  
9 Concepts, LLC, wrote to Dr. Mars ("Livermore Letter") to request that he review the claim and  
10 advise as to whether the employee should be given one or more permanent work restrictions or  
11 given retirement as the result of his HNP. DIR 24. The applicant placed significant emphasis of  
12 this letter at the hearing, apparently, because of the following contents:

13                 We are concerned, however, due to the frequency and seeming ease of recurrence,  
14 that the underlying low back condition you have described as a large HNP at L5-  
15 S1, may predispose [the employee] to sustaining a severe worsening forcing  
16 surgery if he continues to work full duty as a firefighter. We note from your 11-  
13-2002 report that you have already considered this and therefore inquire now  
whether or not [the employee] should [sic be] placed on permanent work  
restrictions to prevent that outcome. DIR 24.

17           18.     The applicant's emphasis on this letter of May 7, 2003, to Dr. Mars,  
18 notwithstanding, there is no evidence in the record that the letter was ever received by the  
19 applicant prior to the subsequent industrial injury of November 30, 2007. Tr., p. 75; 12-21.

20           19.     On May 7, 2003, Dr. Mars evaluated the employee pursuant to Mr. Livermore's  
21 request. DIR 25. Dr. Mars' impression was that the employee suffered from a large central disc  
22 protrusion at L5-S1. *Ibid.* An epidural injection was recommended. This treatment was  
23 administered on May 27, 2003. Thereafter, the employee reported 30 to 40 percent  
24 improvement. Tr., p. 9;1-4.

25           20.     Despite the gravity of the concern raised in the Livermore Letter of May 3, 2007,  
26 Dr. Mars released the injured worker to regular duty. No restrictions were listed. DIR 25.

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1           21.     Under these circumstances, the Board could not conclude that even if the  
2 applicant was in possession of these documents, DIR 24 and 25, they would have alerted the  
3 applicant to a serious back condition, much less, one of spondylolisthesis, given the focus on the  
4 separate condition of HNP, Tr., p. 76;1-4, and the fact that the injured worker was always  
5 returned to work, full duty. Tr., pp. 54;12-14, 22-25, 55;1-7, 75;17-20, 76;4-10.

6           22.     On June 4, 2003, during a second appointment, Dr. Mars indicated that the patient  
7 should have permanent restrictions and further that the employee would eventually need a  
8 disability retirement. Tr., p. 9;4-8, DIR 26.

9           23.     Following this note from Dr. Mars, the injured worker was seen for treatment and  
10 evaluation by Michael Shapiro, M.D., who repeatedly diagnosed the injured worker with  
11 discogenic lumbar pain, secondary to a herniated disk at L5-S1. DIR 27-30. In his July 17, 2003  
12 report, Dr. Shapiro said that the injured worker was now doing "fantastic following his second  
13 epidural with me...." DIR 30. The plan was a return to work full duty as a fireman following the  
14 results of a functional capacity examination. *Ibid.*

15           24.     On July 28, 2003, Steven Hallan, P.T., performed a Functional Capacity  
16 Evaluation (FCE) of the employee. Therein, Mr. Hallan found that the employee was certainly  
17 capable of performing his pre-injury job without restrictions. He completed the Firefighter  
18 Selection Inc. Physical Ability Standards above and beyond stated levels without any production  
19 of symptoms. DIR 32. Mr. Hallan went on to conclude that the testing placed the employee  
20 easily into the **Very Healthy Physical demand level** consistent with his job demands. *Ibid.*  
21 (Emphasis in original). DIR 32.

22           25.     On February 25, 2004, the employee slipped and fell on ice, injuring his tail bone,  
23 DIR 36, Tr., p. 10;10-11, or sacrum. This injury was also referred to as a "soft tissue, strain  
24 injury." DIR 37. He was ultimately released to full duty. Tr., pp. 54;24-25, 55;1-7.

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1           26.     On July 17, 2007, the employee slipped off a running board of a fire truck and  
2 injured his lower back. Tr., p. 10;20-22. The diagnosis was lumbar strain with radiculopathy.  
3 DIR 44. When seen at the Incline Village hospital, the history and physical notes make reference  
4 to a bulging disk at L3-L4. After treatment, the employee was again released without  
5 restrictions. Tr., pp. 54;24-25, 55;1-7.

6           27.     None of the reports or physicians notes from Dr. Shapiro and Mr. Hallan or the  
7 charts for the slip on the sacrum and the running board incident make reference to  
8 spondylolisthesis. They do not refer to the conditions as symptomatic of the onset of  
9 spondylolisthesis, they do not contain a diagnosis of spondylolisthesis and they do not  
10 foreshadow spondylolisthesis. The radiating pain is noted as secondary, not to spondylolisthesis,  
11 but to the bulging disc, or HNP.

12           28.     Except for the reference by Dr. Fleming to "subtle listhesis," none of these  
13 conditions alerted the various treating physicians during this period prior to the date of the  
14 subsequent industrial injury that spondylolisthesis was a presenting condition or a condition  
15 whose onset was imminent. DIR 8-12, 14-17, 21-23, 25-31. Furthermore, the applicant did not  
16 consider these back problems the precursor to spondylolisthesis, Tr., pp. 53;7-9, 54;4-8, none of  
17 which prevented the injured worker from returning to work, full duty. Tr., pp. 54;12-14, 55;1-7.

18           29.     On November 30, 2007, the employee was injured while carrying someone up a  
19 flight of stairs in a chair designed for this purpose. Tr., p. 11;8-11. This injury lingered for some  
20 time and ultimately the employee sought care through worker's compensation on January 29,  
21 2008. DIR 53.

22           30.     On January 5, 2009, Bruce E. Witmer, M D., evaluated the employee's lower back  
23 for the November 30, 2007 injury. Dr. Witmer felt the current industrial injury appeared to be an  
24 aggravation of a previously existing lumbar disc with radiculitis a component of pain as well as  
25 some local component of pain. The link was an inflammatory aggravation of the employee's  
26 prior disc abnormality resulting in radiculitis symptomatology as well as the local symptoms. SR  
27 6. A light duty release was given to the employee. Tr., p. 14;2-12. No discussion of  
28 spondylolisthesis was evident.

1           31.     On June 23, 2009, the employee fell backwards off a fire engine. This injury  
2 resulted in low back pain with radiation into the employee's legs. Tr., p. 15;1-4.

3           32.     On March 15, 2010, the employee had back surgery. Tr., p. 16;6-7. The  
4 procedure was a posterior decompression and fusion at the L4-5 and L5-S1 levels. DIR 71.

5           33.     On April 6, 2011, Dr. Hall opined that the employee could not return to work full  
6 duty because he was concerned that the patient's return to work as a firefighter would  
7 compromise personal and public safety and certainly result in re-injury. Tr., p. 17;2-11. A  
8 second FCE was recommended. *Ibid.*

9           34.     In July of 2011, the employee saw Jay C. Morgan, M.D., on one or more  
10 occasions. Tr., p. 17;12-16. During this time period, a physician, presumably Dr. Morgan, gave  
11 the employee light duty restrictions but also, a full duty release effective on August 11, 2011.  
12 Tr., p. 17;15-16.

13           35.     As these incidents are, however, post the subsequent industrial injury of  
14 November 30, 2007, they are not directly pertinent to the instant claim.

15           36.     When the employee returned to work on August 11, 2011, after this latest  
16 incident, the return was to a full duty fireman status. Tr., pp. 54;24-25, 55;1-7. He then retired  
17 the next day. Tr., p. 18;3-5.

18           37.     After multiple disability rating examinations and subsequent injury reviews, the  
19 employee was found to have a 21% whole person impairment for his lumbar spine. *See*, report of  
20 David D. Berg, D.C., C.I.C.E., DIR 113. Further, concurring in what he thought Jay E. Betz,  
21 M.D., had opined when he conducted his "subsequent injury review," DIR 103-109, Dr. Berg  
22 apportioned the 21% at 50% for the preexisting condition and 50% for the subsequent industrial  
23 injury. *Ibid.* In Dr. Betz's opinion, 95% of the cost of the current claim was attributable to the  
24 preexisting pathology of the lumbar spine. DIR 109, Tr., pp. 18-21. Therefore, in the opinion of  
25 Dr. Betz, this claim was eligible for subsequent injury account reimbursement, since Dr. Betz  
26 was also of the opinion, rendered on November 28, 2011, DIR 102, about a condition presenting  
27 in 2007, that the spondylolisthesis, the preexisting condition, pre-dated the injury of November  
28 30, 2007. DIR 108.

1           38.     The preexisting nature of the injured worker's spondylolisthesis, however, is not  
2 without doubt. G. Kim Bigley, M.D., neurology, issued a report after seeing the injured worker  
3 on March 12, 2012. In it, he said, "A prior lumbar MRI from 7/02 from a prior work-related  
4 injury indicated that ...[the injured worker]... had a herniated disc at L5/S1 but not  
5 spondylolisthesis." DIR 126.

6           39.     He also stated:

7           He [the injured worker] initially had a central disc herniation at L4-5 in 2002 but  
8 not spondylolisthesis at that time and had no evidence of developmental  
9 spondylolysis or a pars interarticularis defect. His lumbar MRI scan from 3/28/08  
10 revealed moderate facet joint degenerative changes and hypertrophy at L4-5 and  
11 L5/S1 with a posterior based disc bulge at L5/S1. The lumbar MRI then  
12 performed on 7/29/09 revealed the facet arthropathy at L4-5 and the 4 mm  
13 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). DIR 126.

14          40.     Furthermore, an x-ray report comparing current results to the results of x-rays  
15 taken on March 20, 2008, found that compared to "... the prior film [the March 20, 2008 film],  
16 there is more anterolisthesis of L4 on L5. Anterolisthesis now measures about 8 to 9 mm. There  
17 is no anterolisthesis on the prior standing film...." DIR 67. The report, therefore, concludes:  
18 "New finding of anterolisthesis of 8 to 9 mm at L4-L5." DIR 68.

19          41.     This is at least, further corroboration that prior to November 30, 2007, the date of  
20 the subsequent industrial injury, spondylolisthesis was nowhere evident to be found or  
21 diagnosed.

22          42.     Moreover, in Dr. Shaprio's last report of August 1, 2003, his impression was:  
23 "Discogenic lumbar pain, herniated disc; resolved." DIR 34.

24          43.     The medical reporting that the employer would have seen, therefore, clearly would  
25 not have suggested to the employer that it was dealing with an injured worker who had a  
26 diagnosis of spondylolisthesis or was currently suffering from the conditions foreshadowing  
27 spondylolisthesis.

28     ///

1           44.     During the hearing, Mr. Balkenbush called two current NLTFPD employees as  
2 witnesses, Fire Chief Mike Brown and Sharon Cary, the District's business manager and human  
3 resource director. Tr., pp. 27-56.

4           45.     Ms. Cary testified that the Fire Chief had the authority to hire and fire employees  
5 of the District. Tr., pp. 29;19-25, 30;1-17. Ms. Cary also explained that it is standard business  
6 practice for the current Fire Chief to review any employee's file after an injury. Tr., p. 38;7-19.  
7 However, Ms. Cary was unaware if her predecessor had the same practice. Tr., pp. 38;20-25,  
8 39;1-7.

9           46.     She also had no independent recollection that the letter of May 7, 2003, upon  
10 which the applicant chooses to rely, was presented by Ms. Cary to any Fire Chief of the  
11 Department. Further, she only recalled discussing the letter of May 7, 2003, with Chief Brown,  
12 in preparation for the September 19, 2013 hearing. Tr., p. 40;7-18. She also did not know when  
13 the letter of May 7, 2003, became a part of the injured worker's file. Tr., pp. 33;6-7, 34;12-16.

14           47.     The applicant also called Fire Chief Mike Brown to testify. Through no fault of  
15 his, however, Chief Brown's testimony proved to be somewhat tangential to the issues. The Fire  
16 Chief never was asked by applicant's legal counsel, whether he was aware before the subsequent  
17 injury of November 30, 2007, if the injured worker suffered from spondylolisthesis.

18           48.     The applicant's avoidance of this issue in the questioning of Fire Chief Brown  
19 speaks volumes that the District, through its hiring and firing authority, Chief Brown, was  
20 unaware before the subsequent injury that the injured worker suffered from spondylolisthesis. It  
21 also reveals that the Department had no written record to show such knowledge, prior to the  
22 subsequent industrial injury.

23           49.     Analysis of the medical records reveals that the reason for the silence, of course,  
24 was that such medical record reporting did not exist before November 30, 2007, of  
25 spondylolisthesis or any condition considered to be precursors to spondylolisthesis. The  
26 applicant could not produce that which did not exist.

27 ///

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1           50.     Instead, the questioning of the Fire Chief revolved around whether the HNP and  
2 other injuries to the back would have been a hindrance to obtaining a job or maintaining  
3 employment with the Department. *See*, Tr., pp. 46, 47. The Fire Chief was candid in his  
4 statement that as far as he was concerned, the information brought to the Chief's attention about  
5 the injured worker, would not have prevented the injured worker from securing or maintaining a  
6 job as a fire fighter. Tr., pp. 46;9-14, 47;1-7.

7           51.     The Fire Chief also candidly conceded that after each injury suffered prior to the  
8 injury of November 30, 2007, the injured worker returned to work on a full duty status, Tr., pp.  
9 54;12-14, 22-25, 55;1-7, and when he retired, he had been released to work, full duty. Tr., p.  
10 55;1-7.

11          52.     Spondylolisthesis is the preexisting condition relied upon by the applicant to  
12 justify reimbursement because it would support a rating of 6% or more PPD, according to the  
13 *Guides*. SR 8, DIR 108.

14          53.     Assuming, *arguendo*, that the spondylolisthesis was present prior to the  
15 November 30, 2007 industrial injury, the Board finds that the applicant produced no proof by  
16 written record that it had knowledge that the injured worker suffered from the preexisting  
17 condition, spondylolisthesis, prior to November 30, 2007.

18          54.     The applicant also failed to show that the various ailments endured by the injured  
19 worker prior to the subsequent industrial injury were a hindrance to securing a job or remaining  
20 at the job. Tr., pp. 46;9-14, 47;1-7.

21          55.     There is no evidence adduced during the hearing that the applicant believed that  
22 the symptoms of HNP, radiculitis, radiculopathy, pain secondary to HNP foreshadowed the onset  
23 of spondylolisthesis.

24          56.     The preexisting condition of spondylolisthesis, was not discovered and proven by  
25 written record until during the treatment of the injured employee's back during treatment for the  
26 subsequent industrial injury. DIR 104.

27     ///

28     ///

1           57.     The reference to "listhesis" in the Fleming report, the applicant has failed to show,  
2 ever became a part of the applicant's written records, before the occurrence of the subsequent  
3 industrial injury. Tr., p. 71;19-25.

4           58.     The applicant has failed to prove by written record, knowledge of a preexisting  
5 permanent impairment, as defined by NRS 616B.578(3).

6           59.     The condition of HNP and the other, interim back injuries suffered prior to  
7 November 30, 2007, such as radiculopathy, a back sprain, lumbar disc abnormalities, and the  
8 like, do not rise to the level of a preexisting condition as required by NRS 616B.578(3). SR 11,  
9 12, Tr., p. 23;12-18. None was ever thought to support a rating of 6% or more, PPD, according  
10 to the *Guides* and, thus, they could not meet the threshold requirement of a preexisting permanent  
11 physical impairment as defined by NRS 616B.578(3).

12          60.     The applicant concedes that HNP is a distinct and separate condition from  
13 spondylolisthesis. Tr., pp. 74;23-25, 75;1-2.

14          61.     The condition of HNP and the various other back injuries, such as the back  
15 strains, low back pain secondary to the HNP and back sprains, are not so closely aligned to  
16 spondylolisthesis such that knowledge of these conditions amount to knowledge of  
17 spondylolisthesis. They are not equated conditions.

18          62.     The same is true of knowledge pertaining to chronic pain, sciatica and  
19 radiculopathy. These conditions did not suggest to the treating physicians prior to November 30,  
20 2007, that the injured worker was suffering from spondylolisthesis or the precursors of  
21 spondylolisthesis. Excepting Dr. Fleming, whose report, the applicant is unable to show ever  
22 landed in its records before the subsequent industrial injury occurred, Tr., p. 71;19-25, none of  
23 the other treating physicians equated these conditions to spondylolisthesis or the onset thereof.  
24 Pain was secondary to the HNP. *See*, DIR 28, 30, 31, and 34. *See also*, Dr. Bigley report, that  
25 the spondylolisthesis did not present until after November 30, 2007. DIR 126. *See also*, the x-ray  
26 reports comparing current conditions to the conditions of March 20, 2008, where no listhesis was  
27 present. DIR 67, 68.

28     ///

1           63.     At the conclusion of the testimony of the applicant's witnesses, Mr. Balkenbush  
2 summarized the applicant's argument by stating that he believed that the Administrator has  
3 required too much of the applicant stating: "Now, what the administrator I think tried to do in  
4 this case is to require the employer to have exact medical knowledge of the preexisting  
5 permanent physical impairment." Tr., p. 60;11-13. Mr. Balkenbush further informed the Board  
6 that the employer only had to know that the employee had a low back condition that "was  
7 serious." Tr., p. 60;3-6.

8           64.     Ms. Leonescu then presented the case of the Administrator:  
9           What's interesting in this case is that all his prior conditions or what happened in  
10 the past was not the condition that resulted in his permanent physical impairment.

11           He [the employee] had lumbar strain, lumbar sprain, and then culminated into...  
12 spondylosis with spondylolisthesis at L4-5 and L5-S1.

13           The previous herniated pulposus was not the reason for this gentleman's  
14 permanent physical impairment. After every accident, he treated and was released  
15 to full duty at a very high level. After every accident, he was released. Keeps  
16 going, keeps going, keeps going. And then in 2007, he had this -- it revealed a  
17 preexisting spondylosis. Tr., p. 63;10-25.

18           65.     Ms. Leonescu continued:

19           And at this case, the permanent physical impairment was not industrial, the  
20 spondylolisthesis, which came -- which was revealed in 2007, and that's what  
21 resulted in his surgery. But even at that point, he was released to full duty. He  
22 was released. So where is the -- where is the obstacle to employment?

23           **The part of physical impairment has to be - - the condition has to result in**  
24 **permanent impairment. In this case, it was the spondylosis.** All the prior ones  
25 he recovered from. And then he has this -- he has this injury, which finally  
26 reveals the spondylosis, and he requires surgery, and then he is released to full  
27 duty.

28           So they didn't become aware of this until after the subsequent injury. So for that  
reason, that's why the claim was denied. **You don't need to know the exact**  
**condition, but you need to know what condition resulted in the permanent**  
**physical impairment.** In this case, they didn't become aware of that until  
afterwards. And he was still re-employable at the same position, even according  
to testimony of the witness. Tr., pp. 64;8-25, 65;1-2 (Emphasis added).

66.     The Board then deliberated. Vice-chairman Wachter provided his thoughts about  
the District's proof of knowledge of the preexisting condition by written record:

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1 There's no evidence to suggest that DIR 18, 19, and 20 was given to the fire  
2 department. And after every incident - - [the employee] was returned to regular  
3 duty and the doctor didn't say that there was a problem. So I don't see how the fire  
department would have recognized that there was a - - more serious problem. Tr.,  
p. 75;13-20.

4 67. Chairman Iannone agreed that he did not believe that NLTFPD produced proof it  
5 had written notice of a preexisting serious condition prior to the subsequent industrial injury. Tr.,  
6 pp. 75;24-25, 76;1-8.

7 68. Member Smith then moved to uphold the Administrator's recommendation  
8 because the applicant failed to prove knowledge under Subsection 4 of a condition that satisfies  
9 the definition of Subsection 3. Tr., p. 79;4-16.

10 69. The motion was seconded by Vice-chairman Wachter. Tr., pp. 79;25, 80;1.

11 70. The motion was approved unanimously. Tr., p. 80;4-14.

12 71. To the extent that any of the following Conclusions of Law constitute Findings of  
13 Fact, they are incorporated herein.

#### 14 CONCLUSIONS OF LAW

15 1. To the extent that any of the preceding Findings of Fact constitute Conclusions of  
16 Law, they are incorporated herein.

17 2. The applicant filed a timely request for a hearing. NAC 616B.7779(2).

18 3. A quorum of the Board was present at all times to hear and decide this matter.  
19 NRS 616B.572(1).

20 4. The burden of proof lies with the applicant to show that the eligibility criterion  
21 justifying reimbursement from the Account have been satisfied. *See, United Exposition Service*  
22 *v. State Industrial Insurance System*, 109 Nev. 421, 424, 851 P.2d 423 (1993).

23 5. This case revolves around the burden of proof surrounding NRS 616B.578(4),  
24 which requires that the employer establish by written record that the employer had knowledge of  
25 the employee's permanent physical impairment at the time the employee was hired or that the  
26 employer retained the injured worker after it acquired knowledge of the preexisting condition  
27 before the occurrence of the subsequent industrial injury. *Ibid. See also, Holiday, supra* at 762.

28 ///

1           6.       The case also implicates NRS 616B.578(3), where the definition of a preexisting  
2 permanent impairment is set forth.

3           7.       Even though the preexisting condition is the specific diagnosis of  
4 spondylolisthesis, the applicant argues to the Board that knowledge of generalized symptoms of  
5 chronic pain, sciatica, and radiculopathy are sufficient to fulfill the knowledge requirement of  
6 NRS 616B.578(3) and (4). The applicant's position before the Board, therefore, raises a question  
7 of statutory interpretation, namely, exactly what must be known by the employer about the  
8 injured worker to satisfy NRS 616B.578(3) and the knowledge requirement of NRS 616B.578(4).  
9 In this case, the applicant believes that knowledge of a "serious" low back condition that has  
10 some degree of permanence to it, Tr., pp. 7;23-24, 58;1-3, is sufficient to satisfy the "retention  
11 with knowledge" requirement of NRS 616B.578(4). Tr., p. 60;3-6.

12           8.       In *Holiday*, the Nevada Supreme Court also concluded that the language  
13 contained in NRS 616B.587(4), the analog to NRS 616B.578(4), was unambiguous. *Holiday*,  
14 *supra* at 761, 762.

15           9.       The Board concurs that the language of NRS 616B.578(4) pertinent, here, to the  
16 issues, is unambiguous and, therefore, requires an applicant to prove by its contemporaneous  
17 written record that it had knowledge of a preexisting permanent physical impairment as defined  
18 in NRS 616B.578(3) and therefore, that the preexisting impairment upon which it relies would  
19 support a rating of 6% or more, PPD, according to the American Medical Association, *Guides to*  
20 *the Evaluation of Permanent Impairment*. See, NRS 616B.578(3).

21           10.      Spondylolisthesis meets the test of NRS 616B.578(3) because as the record shows  
22 in this case, it would support a rating in excess of 6% PPD, according to the *Guides*. DIR 102.  
23 Nevertheless, spondylolisthesis fails as a qualifying condition because there is no proof by  
24 written record that the applicant knew of spondylolisthesis, until after the subsequent industrial  
25 injury occurred, a circumstance fatal to the applicant's reliance upon spondylolisthesis to satisfy  
26 NRS 616B.578(4). See, *Holiday, supra*, at 762, requiring that the knowledge of the preexisting  
27 condition must precede the date that the subsequent injury occurs. On its face, NRS 616B.578(4)  
28 has not been satisfied by the applicant's reliance upon spondylolisthesis.

1           11.     The applicant tries, however, to circumvent this problem by arguing that perfect  
2 knowledge of a preexisting condition is not required, Tr., pp. 25;24-25, 60;11-14, and that  
3 knowledge of general symptoms of the preexisting condition is sufficient, Tr., p. 25;17-19, (some  
4 type of "permanent, lasting condition") to satisfy the knowledge requirement of NRS  
5 616B.578(4). Tr., pp. 59;13-22, 60;3-6.

6           12.     The applicant's problem here is that the plain wording of NRS 616B.578(3) and  
7 (4) does not admit that knowledge of the "symptoms" of a condition or that knowledge of a  
8 permanent, lasting condition or severe lower back problem, satisfies the applicant's burden of  
9 proof. Because both statutes plainly turn upon knowledge of the preexisting permanent condition  
10 that is defined by NRS 616B.578(3), as distinguished from the "symptoms" of a condition,  
11 knowledge of "symptoms" is insufficient when the knowledge that is required is of the  
12 preexisting condition.

13           13.     The applicant, however, also argues that in effect, it knew of the  
14 spondylolisthesis, because knowledge of symptoms, such as sciatica, radiculopathy, and a back  
15 strain, amount to knowledge of spondylolisthesis, except without the label. Because the  
16 applicant knew of these symptoms, *Holiday* would then be satisfied because the applicant was  
17 aware of these conditions or symptoms prior to the date of the subsequent industrial injury.  
18 Knowledge of the symptoms of spondylolisthesis, the applicant seems to argue, related  
19 knowledge of spondylolisthesis, itself, back in time to before the subsequent industrial injury  
20 occurred. Tr., p. 26;1-6.

21           14.     As a matter of fact, it was not shown by the applicant that knowledge of these  
22 general symptoms of the back were akin to knowledge of spondylolisthesis. The applicant  
23 concedes that HNP was a separate and distinct condition from spondylolisthesis. Tr., pp. 73;8-9,  
24 74;22-25, 75;1-5. The medical records generated prior to the subsequent industrial injury do not  
25 suggest that the onset of spondylolisthesis was imminent or that the treating physicians were  
26 concerned these conditions were foreshadowing the onset of spondylolisthesis before the  
27 subsequent industrial injury of November 30, 2007, when, in 2002 and 2003, they were treating  
28 the other injuries. DIR 8-12, 14-17, 21-23, 25-31.

1           15. Dr. Shapiro's reports, as indicated, relate the lower back pain as secondary to the  
2 HNP, not to spondylolisthesis. DIR 31.

3           16. The x-ray reports, DIR 67 and 68, and Dr. Bigley's report, DIR 126, make clear  
4 that spondylolisthesis did not appear until well after the November 30, 2007 injury. In fact,  
5 spondylolisthesis was not seen in the x-rays dated March 20, 2008. DIR 67.

6           17. No plausible basis exists, then, for accepting the applicant's "relation back" theory.  
7 HNP, the other injuries, and the other symptoms experienced prior to the subsequent industrial  
8 injury of November 30, 2007, were not the precursors of spondylolisthesis nor were they  
9 foreshadowing the onset of spondylolisthesis and therefore, knowledge of these prior conditions  
10 was not, in effect, knowledge of spondylolisthesis. The applicant's "relation back" theory does  
11 not save the application.

12           18. While the applicant need not necessarily know at the time when it is hiring or  
13 retaining the injured worker that his preexisting condition would support a rating of 6% or more,  
14 the conditions relied upon as the preexisting condition, or the severe back, or the "symptoms"  
15 must ultimately be shown to support a rating of 6% or more. Otherwise, the condition fails to  
16 generate a claim for reimbursement because NRS 616B.578(3) admits of no less.

17           19. The conditions or symptoms, themselves, such as the HNP, were, therefore, not  
18 serious enough inasmuch as none were identified as a condition that would support a rating of  
19 6% or more, PPD. SR 11, 12, Tr., p. 23;12-18. These conditions, therefore, do not constitute a  
20 preexisting condition, within the meaning of NRS 616B.578(3). While the injured worker was  
21 enduring bad lower back pain to November 30, 2007, he did not endure a lower back injury that  
22 was bad enough to satisfy NRS 616B.578(3), where the definition of a preexisting permanent  
23 impairment is found. Moreover, the injured worker returned to work, full-duty, after each injury.  
24 The applicant could well have thought that it was simply employing a very accident prone,  
25 unlucky firefighter. This threshold requirement of NRS 616B.578(3), was not met to achieve the  
26 level of a serious condition, justifying reimbursement by any of the "myriad" of symptoms upon  
27 which the applicant also tries to rely in satisfaction of NRS 616B.578(4).

28 ///

20. Finally, the applicant's position is not saved by Dr. Fleming's opinion about listhesis. The applicant concedes that it cannot show when the document became a part of the applicant's records and, thus, it must be disregarded as proof by written knowledge that the injured worker suffered from spondylolisthesis before the November 30, 2007 subsequent industrial injury. Tr., p. 71;18-25.

21. As a matter of fact and law, the application for reimbursement must be denied as the applicant has failed to show that either NRS 616B.578(3) and (4) have been satisfied. Furthermore, when it is apparent, as here, that NRS 616B.578(3) has not been satisfied, there can be no showing that NRS 616B.578(1) has been satisfied, either, as NRS 616B.578(1) depends upon the presence of a preexisting impairment defined by NRS 616B.578(3).

22. The Board is obliged to reject the claim for reimbursement.

### DECISION OF THE BOARD

Accordingly, the Board for the Administration of the Subsequent Injury Account for the Association of Self-insured Public or Private Employers hereby concludes that the applicant association has failed to establish by a preponderance of the evidence that NRS 616B.578(1)(3) and (4) have been satisfied. Therefore, the application for reimbursement received on October 3, 2012, is denied.

Member Joyce Smith moved to deny the association's application. Vice-chairman Bryan Wachter, seconded the motion. The vote was 4 in favor of the motion with 0 against and 0 abstentions. Tr., pp. 79;4-25, 80;1-14. As a quorum was present and a majority voted in favor of the motion, the motion was duly adopted.

Finally, on March 18, 2014, the Board met to consider adoption of this decision, as written or as modified by the Board, as the decision of the Board. Those present and eligible to vote on this question consisted of the three current Members of the Board, Vice-chairman, Bryan Wachter, Joyce Smith and Shannon Hoolihan. Emilia Hooks abstained from voting as she was absent from the meeting when this matter was decided. A quorum was, therefore, present and eligible to vote on whether this draft decision accurately reflected the Board's rationale and action taken by the Board. Upon the motion of Joyce Smith, seconded by Shannon Hoolihan, the Board

1 voted to approve these Findings of Fact, Conclusions of Law and Decision as the action of the  
2 Board and to authorize the Acting Board Chairman, Bryan Wachter, after any grammatical or  
3 topographical errors are corrected, to execute, without further Board review, this Decision on  
4 behalf of the Board for the Administration of the Subsequent Injury Account for the Associations  
5 of Self-insured Public or Private Employers. The vote 3 in favor 0 against and 1 abstentions. As  
6 a quorum of the Board voted in favor of the motion, the motion was adopted.

7 On March 18, 2014, this Decision is, therefore, hereby adopted and approved as the  
8 Decision of the Board. The application for reimbursement in this case is hereby rejected.

9 **AFFIRMATION PURSUANT TO NRS 239B.030**

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

12 Dated this 13<sup>th</sup> day of May, 2014.

13  
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15 By: 

Bryan Wachter, Vice-Chairman  
and Acting Chairman  
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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, *Findings of Fact, Conclusions of Law and Decision of the Board*, on those parties identified below by:

√	Placing an original or true copy thereof in a sealed envelope, and mailed both standard U.S. mail and certified mail/return receipt requested, 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, Division Counsel Department of Business and Industry Division of Industrial Relations 1301 North Green Valley Parkway, Suite 200 Henderson, NV 89074
	Personal delivery
	Telephonic Facsimile at the following numbers:
	Federal Express or other overnight delivery
	Reno-Carson Messenger Service

Dated this 14<sup>th</sup> day of May, 2014.

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

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1. Article Addressed to:

Robert F. Balkenbush, Esq.  
Thorndal Armstrong Delk  
Balkenbush & Eisinger  
6590 S. McCarran Blvd., Suite B  
Reno, NV 89509

**COMPLETE THIS SECTION ON DELIVERY**

A. Signature X ☐ Agent ☐ Addressee

B. Received by (Printed Name) Thorndal Armstrong Delk C. Date of Delivery 5/14/04

D. Is delivery address different from item 1? ☐ Yes  
If YES, enter delivery address below: ☐ No

3. Service Type

- ☒ Certified Mail ☐ Express Mail
- ☐ Registered ☐ Return Receipt for Merchandise
- ☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number 7012 2920 0001 0527 4927

(Transfer from service label)

PS Form 3811, February 2004 Domestic Return Receipt

102595-02-M-1540

C143-07-02558-01



0764 2250 1000 0262 2102

**SECTION ON DELIVERY**

☐ Agent  
☐ Addressee

inted Name) Things C. Date of Delivery 5/10

is different from item 1? ☐ Yes  
 livery address below: ☐ No

☐ Express Mail  
☐ Return Receipt for Merchandise  
☐ C.O.D.

ry? (Extra Fee) ☐ Yes

7 4910

Postage \$ 1.82  
 Certified Fee 3.30  
 Return Receipt Fee (Enforcement Required) 2.90  
 Restricted Delivery Fee (Enforcement Required) 7.82  
 Total Postage & Fees

Donald C. Smith, Division Counsel  
 Department of Business and Industry  
 Division of Industrial Relations  
 1301 North Green Valley Parkway, Suite 200  
 Henderson, NV 89074

PS Form 3811, February 2004

Domestic Return Receipt 102595-02-M-1540

**DER: COMPLETE THIS SECTION**

Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. Print your name and address on the reverse so that we can return the card to you. Attach this card to the back of the mailpiece, on the front if space permits.

Article Addressed to:  
 Donald C. Smith, Division Counsel  
 Department of Business and Industry  
 Division of Industrial Relations  
 1301 North Green Valley Parkway, Suite 200  
 Henderson, NV 89074

**COMPLETE THIS SECTION ON DELIVERY**

A. Signature ☒ X ☐ Agent ☐ Addressee

B. Received by (Printed Name) C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes  
 If YES, enter delivery address below: ☐ No

3. Service Type  
☒ Certified Mail ☐ Express Mail  
☐ Registered ☐ Return Receipt for Merchandise  
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

Article Number 7012 2920 0001 0527 4910

Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

0143 - 02 - 02555 - 01

BEFORE THE STATE OF NEVADA  
BOARD FOR THE ADMINISTRATION OF THE SUBSEQUENT INJURY  
ACCOUNT FOR THE ASSOCIATION OF SELF-INSURED PUBLIC OR  
PRIVATE EMPLOYERS

**ORIGINAL**

In re: )  
 )  
NORTH LAKE TAHOE FIRE )  
PROTECTION DISTRICT, Claim )  
No. C143-07-02558-01 )  
 )

REPORTER'S TRANSCRIPT OF PROCEEDINGS  
Taken on Thursday, September 19, 2013

At 11:22 a.m.

At 1301 North Green Valley Parkway  
Conference Room B  
Henderson, Nevada 89012

Reported by: Cynthia L. Gloe, RPR, CCR No. 607

## A P P E A R A N C E S

RICHARD IANNONE, Chairman

CHARLES R. ZEH, Esq.

BRYAN WACHTER, Director of Public & Government Affairs

SHANNON HOOLIHAN, Board member

JACQUE EVERHART, State of Nevada

JENNIFER LEONESCU, Esq.

ROBERT BALKENBUSH, Esq. (via telephone)

JOYCE SMITH (via telephone)

SHARON CARY, North Lake Tahoe Fire Protection Dist. (phone)

GARY LEFEVER, Tahoe Douglas Fire (via telephone)

## P R O C E E D I N G S

\* \* \* \* \*

MR. IANNONE: The next item is 7b  
C143-07-02558-01, North Lake Tahoe Fire Protection District.

This is the continuation of a contested hearing  
before the Board for the Administration of the Subsequent  
Injury Account for the Associations of Self-Insured Public  
and Private Employers.

This hearing will be conducted, as before,  
according to Chapter 233 B of the Nevada Revised Statutes,  
the Nevada Administrative Procedures Act.

This means the parties to the hearing will be  
given the opportunity to present witnesses, offer  
documentary evidence, confront and cross examine witnesses  
and to present oral argument to the Board.

The parties and the Board may be represented by  
legal counsel throughout these proceedings. A Court  
Reporter is present to continue recordation of the  
proceedings and will generate a printed transcript of the  
matter presently before the Board.

As this matter is being recorded by a Court  
Reporter, all participants in these proceedings are again  
admonished that the Court Reporter cannot take down two  
people talking at the same time. Therefore, do not start  
talking, please, until the other person has finished so that

1 we can have a complete and accurate record of these  
2 proceedings.

3 A relaxed version of the Nevada Rules of Evidence  
4 will apply. All evidentiary questions will be submitted to  
5 the Chairperson of the Board and upon deliberation with the  
6 remainder of the Board, the Chairperson shall make rulings  
7 upon admissibility.

8 In the event the Board's decision is adverse to  
9 the applicant, a written decision with findings of fact and  
10 conclusions of law will be prepared by the Board's counsel.  
11 The written decision will be served upon the parties and the  
12 decision is subject to appeal to the District Court, State  
13 of Nevada.

14 A summary of the case from the DIR has already  
15 been presented. It need not be repeated. Therefore, does  
16 the Board's legal counsel have anything to add?

17 MR. ZEH: Thank you, Mr. Chairman. I do. I have  
18 some documents that have been submitted for possible  
19 admission into evidence in the record of this matter. The  
20 first being the staff report dated May 13, 2003, with 140  
21 pages of attachments, plus five pages of disallowances. And  
22 that's marked for identification as Exhibit 1.

23 Exhibit 2 is a letter addressed to our office  
24 dated May 15, 2003, from Mr. Balkenbush requesting a hearing  
25 before this board and asking that the matter be set out for

1 hearing 120 to 160 days. From the date of that letter, I  
2 think we have satisfied that request. But the point being  
3 that a timely request for hearing was -- was made.

4 Third -- marked for Exhibit No. 3 is a letter from  
5 Mr. Balkenbush to our office asking that this matter be  
6 continued from August 15th because of a conflict -- 2013,  
7 because of a conflict in calendar of counsel for the  
8 applicant.

9 And then as a part of the record, but not admitted  
10 into evidence, is the prehearing statement of the applicant,  
11 which is dated September 11, 2013. And served on our office  
12 on that same date, September 11, 2013. And by mail on  
13 Mr. Smith and the DIR, Jacque Everhart, on September 11,  
14 2013. And so those are the documents that I've been  
15 presented thus far.

16 Does either the applicant or the administrator  
17 have any additional documents they wish to offer into  
18 evidence at this time?

19 MR. BALKENBUSH: None for the applicant.

20 MS. LEONESCU: None for the administrator.

21 MR. ZEH: Is there any objection to the admission  
22 of Exhibits 1 through 3 into evidence?

23 MR. BALKENBUSH: No objection from the applicant  
24 to the admission of Exhibits 1 through 3.

25 MS. LEONESCU: No objection.

1 MR. ZEH: Mr. Chairman, with your permission, I  
2 would suggest that Exhibits 1 through 3 be admitted into  
3 evidence without objection.

4 MR. IANNONE: Let's do that.

5 MR. ZEH: And I will turn it back to you. That's  
6 all I have to say.

7 MR. IANNONE: Do you have anything to say,  
8 Ms. Everhart?

9 MS. EVERHART: This is for Claim  
10 No. C143-07-02558-01. The association is Public Agency  
11 Compensation Trust. The association member is North Lake  
12 Tahoe Fire Protection District. The third-party  
13 administrator is Alternative Service Concepts. And the  
14 claim was submitted by Robert Balkenbush, Esquire.

15 It is the Administrator's recommendation to deny  
16 this request pursuant to NRS 616B.578(4) for the lumbar  
17 spine and 616B.578(1)(3)(4) for the left shoulder.

18 The total amount requested for reimbursement is  
19 \$148,318.87. The amount of reimbursement, after costs were  
20 verified, is \$115,429.03.

21 This request was received from Robert Balkenbush,  
22 Esq., on October 3, 2012. The claim was found to be  
23 incomplete. The Administrator contacted the submitting  
24 party on that date and requested additional information from  
25 the employer. The file indicated the patient would be

1 re-rated after he completed treatment. The injured employee  
2 had been rated three times previously but did not accept any  
3 award. The file would be held in abeyance until the injured  
4 employee completed treatment and was rated a final time and  
5 accepted his award. As of the date of this recommendation,  
6 no additional information has been provided.

7 This gentleman was hired by this employer on  
8 October 1, 1981. The file contained a physical therapy  
9 report dated September 18, 2001. The patient was treating  
10 for lumbosacral sprain.

11 On August 22, 2002, he injured his low back and  
12 knee while lifting a hose. The C-4 Form indicates the date  
13 of injury is September 10, 2002. Diagnosis was L-S spasm  
14 pending MRI with no prior history noted. The claim was  
15 accepted for low back strain and knee strain.

16 Neurodiagnostic study was done September 30, 2002,  
17 and showed bilateral sensory radiculopathy at L5-S1 and  
18 possibly another level. Unable to read the report. There  
19 was also a 50 percent right to left deviation found at L4  
20 suggestive of dysfunction at this level.

21 Dr. Mars reported lumbosacral sprain/strain with  
22 somatic dysfunction and myofascial pain, left knee  
23 patellofemoral syndrome with previous history of ACL and  
24 internal derangement not work related. The patient was sent  
25 to the chiropractor and placed on light duty.



1 MRI of the lumbar spine showed L5-S1 large central  
2 disc protrusion and L4-5 degenerative disc bulge. The  
3 patient reported an 80 percent improvement in his symptoms.  
4 Dr. Mars recommended regular activity and possible  
5 Functional Capacity Evaluation.

6 On January 6, 2003, the patient was evaluated by  
7 Dr. Fleming for his low back. She noted low back pain with  
8 resolving radiculopathy. Physical therapy and chiropractic  
9 treatment were helping and the patient should continue with  
10 this. Epidural injection was considered. Dr. Fleming  
11 wanted to wait until his quality of life was sufficiently  
12 impaired before considering surgery.

13 Dr. Mars recommended acupuncture and continued  
14 physical therapy and chiropractic treatment. He maintained  
15 a full duty release. He had several electroacupuncture  
16 treatments with minimal improvement.

17 On May 3, 2003, the employee completed an  
18 Industrial Injury Report and noted low back injury while  
19 entering an ambulance. The claim was considered an  
20 exacerbation of the August 22, 2002 claim. The May 7, 2003  
21 letter to Dr. Mars indicated the patient was not a surgical  
22 candidate but he did have a large herniated nucleus pulposus  
23 at L5-S1. They wanted Dr. Mars to review the claim and  
24 advise regarding permanent work restrictions or a change in  
25 his position with his employer versus retirement.

1           On May 7, 2003, the patient saw Dr. Mars and his  
2 impression was exacerbation of the patient's low back pain.  
3 Epidural injection was recommended. This was done May 27,  
4 2003. The patient reported 30 to 40 percent improvement.  
5 He wanted to be taken off work for three weeks so he could  
6 heal and avoid other injuries. Dr. Mars felt the patient  
7 should have permanent restrictions. He felt the patient  
8 would eventually need a disability retirement. Transfer of  
9 care was need to Dr. Shapiro.

10           Dr. Shapiro evaluated this gentleman on June 5,  
11 2003. The patient noted a 50 percent improvement in his  
12 symptoms. Additional injection was recommended along with  
13 home exercise. The patient was referred back to Dr. Mars  
14 for additional treatment.

15           Dr. Shapiro continued to treat the injured  
16 employee. On June 18, 2003, the patient reported a 60 to 70  
17 percent improvement since the first injection. Dr. Shapiro  
18 continued to recommend additional injections. A second  
19 surgical opinion with Dr. Fry was requested.

20           A second injection was done and on July 17, 2003,  
21 the patient reported 95 percent improvement in his symptoms.  
22 He would keep his appointment with Dr. Fry and have an FCE.  
23 He was released to light duty. As of July 24, 2003, the  
24 patient was pain-free. Apparently the patient was released  
25 to full duty by Dr. Fry and Dr. Shapiro agreed once the FCE

1 results were in. He also wanted the patient to be cleared  
2 by the therapist.

3 The FCE was done July 28, 2003, and the patient  
4 could return to his pre-accident position without  
5 restrictions. He was placed in the very heavy physical  
6 demand category. Dr. Shapiro reported the patient had been  
7 back to work for three weeks without any issues. He had  
8 reached MMI and had no residual disability from the injury.  
9 The claim was closed in September 2003.

10 On February 25, 2004, the employee was walking on  
11 ice and fell. He suffered injury to his low back. The  
12 claim was accepted for low back strain only, and the  
13 preexisting chronic low back discogenic pain and HNP were  
14 excluded from liability.

15 The patient was evaluated at the hospital and  
16 physical therapy was recommended. He was evaluated in  
17 Dr. Atcheson's office for second opinion on April 8, 2004.  
18 The pain was located in the lumbar spine and did not  
19 radiate. Diagnosis was low back strain.

20 On July 15, 2007, the injured employee filed a  
21 claim for injury to his low back. He slipped off a running  
22 board. The C-4 Form indicated lumbar strain with  
23 radiculopathy. No prior history was noted. The claim was  
24 accepted for lumbar strain. On October 15, 2007, the claim  
25 was closed.

1           Please note the entries that follow, that do not  
2 contain page numbers, are noted in Dr. Rimoldi's August 20,  
3 2011, Independent Medical Evaluation. For the entries that  
4 have page numbers, these can be found as the referenced  
5 attachment. In an effort to reduce the number of  
6 attachments, Dr. Rimoldi's report is being used to verify  
7 the reporting referred to in this section.

8           On November 30, 2007, this employee was carrying  
9 an individual upstairs in a stair chair. The chair became  
10 unbalanced causing the employee to have to stabilize the  
11 chair while maintaining the load on the chair. Reporting  
12 dated December 10, 2007, noted the patient had low back pain  
13 and was going to re-open his claim. As of January 7, 2008,  
14 the patient continued to have complaints of severe back  
15 discomfort.

16           On January 29, 2008, the patient went to the  
17 emergency room and a C-4 Form was completed. Diagnosis was  
18 low back pain, sciatica with radiculopathy and left shoulder  
19 pain, rotator cuff. He was kept off work for 10 days and  
20 attended physical therapy for the back and left shoulder.

21           On February 15, 2008, the patient saw Dr. Peterson  
22 and continued to complain of pain in the left arm and low  
23 back. He had been referred for an orthopedic consultation.  
24 The patient continued to see his physiatrist for depression.

25           Dr. Hall evaluated the patient on February 19,

1 2008. Reporting noted improvement in the low back pain  
2 after the use of medication. The patient reported a prior  
3 left shoulder rotator cuff injury and examination findings  
4 were consistent with rotator cuff tendonitis. Dr. Hall did  
5 not see any evidence of a prior tear. Physical therapy was  
6 recommended. Regarding the low back, the patient felt he  
7 aggravated his preexisting sciatica. Lumbar strain was the  
8 diagnosis and the symptoms were at baseline. Modified duty  
9 was recommended.

10 The patient was evaluated by Dr. Rupp for the left  
11 shoulder. Past medical history was positive for right  
12 shoulder injury but no prior injury to the left shoulder was  
13 noted. Diagnosis was impingement syndrome and an MRI was  
14 requested to rule out rotator cuff tear.

15 On March 18, 2008, the patient had a physiatry  
16 evaluation by Dr. Salas. Diagnostic studies were ordered  
17 for the low back along with physical therapy. Follow up  
18 with the patient's primary care physician and orthopedics  
19 was recommended for the left shoulder.

20 On March 19, 2008, the claim was denied.

21 Dr. Rupp diagnosed impingement syndrome with  
22 acromioclavicular arthritis of the left shoulder based upon  
23 result from an MRI. The patient could follow up as needed.  
24 Dr. Hall reported 80 to 90 percent improvement in the left  
25 shoulder as of March 31, 2008. He noted the patient had

1 acupuncture for his low back pain with some improvement.

2 The patient could return to work full duty in about a week  
3 concerning both body parts.

4 The patient was evaluated by Dr. Lynch's office on  
5 April 3, 2008, for his low back pain. Bilateral lower  
6 extremity EMG studies were recommended. On May 6, 2008, the  
7 patient was evaluated by Dr. Morgan for his low back  
8 symptoms. He noted another physician had recommended  
9 surgery. Dr. Morgan indicated surgery might be beneficial  
10 if worse came to worse but did not recommend anything at  
11 this time. The patient had two epidural injections during  
12 this time frame.

13 On June 25, 2008, Dr. Rappaport evaluated this  
14 gentleman for his low back. Lumbar stabilization fusion was  
15 recommended. The patient was working full duty and wasn't  
16 sure if the pain warranted surgical treatment.

17 On July 14, 2008, the claim was accepted based  
18 upon a Hearing Officer's decision. The claim was accepted  
19 for aggravation only of the preexisting lumbar and right  
20 shoulder conditions.

21 Dr. Salas reported the patient wanted to maximize  
22 conservative treatment at this time. Physical therapy was  
23 prescribed. Dr. Hall saw the patient on October 21, 2008.  
24 The patient continued to have increased low back pain. The  
25 patient wanted to continue with conservative treatment. He

1 would maintain a full duty release.

2 On January 5, 2009, the patient saw Dr. Witmer for  
3 his low back. Dr. Witmer felt the current industrial injury  
4 appeared to be an aggravation of a previously existing  
5 lumbar disc with radiculitis component of pain as well as  
6 some local component of pain. The link was an inflammatory  
7 aggravation of this prior disc abnormality now resulting in  
8 radiculitis symptomatology as well as the local symptoms.  
9 Medical, epidural injection, physical therapy and  
10 consideration of surgery were recommended. That probably  
11 should say medication. A light duty release was given to  
12 the patient.

13 In February, Dr. Witmer noted the injection was  
14 helpful. The patient would continue with a home stretching  
15 program and medication.

16 On April 8, 2009, Dr. Halki evaluated this patient  
17 for surgical consideration. Microdiscectomy was  
18 recommended. The patient indicated the pain was tolerable  
19 and would consider his options.

20 EMG and nerve conduction studies showed no  
21 evidence of lumbar radiculopathy. Reporting from Dr. Witmer  
22 indicated several epidural injections and referral to  
23 Dr. Tearman for behavioral management. Physical therapy and  
24 a revisit for surgical opinion with Dr. Halki were planned.  
25 The patient continued to follow up with Dr. Witmer.

1           A June 23, 2009, emergency room record indicated  
2 the employee fell backwards off a fire engine. Reporting  
3 indicated low back pain with radiation into the bilateral  
4 legs. On June 30, 2009, the patient was seen by Dr. Halki.  
5 Surgical intervention was discussed and the patient would be  
6 scheduled for discograms. X-rays showed a new finding of  
7 anterolisthesis of L4-5 when compared to the March 2008  
8 films. The L5-S1 disc was severely narrowed with moderate  
9 narrowing at L4-5. There was slight superior endplate  
10 concavity at L2 and L3 with no definite fracture.

11           On June 30, 2009, Dr. Halki recommended discograms  
12 due to the patient's significant leg pain. The patient also  
13 continued to follow up with Dr. Halki.

14           Dr. Morgan saw the patient on July 1, 2009. He  
15 suggested full decompression and fusion but noted the  
16 patient was not at the point of having surgery yet. He also  
17 followed up with Dr. Morgan.

18           On July 21, 2009, decompression and fusion at L4-5  
19 and L5-S1 was recommended. The patient was going to  
20 consider his options. On July 29, 2009, Dr. Witmer  
21 recommended physical therapy and consideration of epidural  
22 injection. MRI was done and findings showed severe facet  
23 arthropathy at L4-5 with four millimeters of anterolisthesis  
24 of L4 on L5 and 6 millimeters of L5 on S1 with moderate  
25 neuroforaminal stenosis of the lower lumbar spine.



1           On July 30, 2009, the patient was seen by  
2 Dr. Lewandowski for a behavioral and psychosocial  
3 evaluation. Outpatient cognitive behavioral pain management  
4 sessions were recommended. He also felt the patient would  
5 be a surgical candidate if treatment options came to that.

6           Surgical intervention took place on March 15, 2010  
7 and included L4-5 and L5-S1. The patient followed with  
8 Dr. Morgan's office. The patient was off all pain  
9 medication and was getting ready to start physical therapy  
10 in April. In June, the patient noted persistent left leg  
11 pain. MRI was requested and findings did not show any  
12 significant problems. The patient was kept off work. In  
13 November, the patient was improving and his activity level  
14 was increased. In December, the patient indicated he was 70  
15 percent improved. He was released to light duty and  
16 physical therapy was continued. In March 2011, the pain had  
17 increased. CT scan was ordered as well as physical therapy.  
18 The patient was taken off work. And CT results showed the  
19 instrumentation was stable.

20           In a February 28, 2011 report, a vocational  
21 rehabilitation report indicated they tried contacting the  
22 injured employee several times but were unsuccessful until  
23 this date. The injured employee planned on retirement from  
24 the fire department.

25           On April 4, 2011, Dr. Morgan felt the patient was

1 unable to return to work with the fire department.

2 On April 6, 2011, Dr. Hall addressed a request  
3 from Dr. Morgan about the patient's ability to return to  
4 work as a firefighter. The physical therapist indicated no  
5 substantial gains in function had been made in some time and  
6 she was not recommending additional therapy. Dr. Hall felt  
7 the patient could not return to work full duty and no  
8 additional surgical intervention was supported. He was  
9 concerned that the patient's return to work as a firefighter  
10 would compromise personal and public safety and certainly  
11 result in reinjury. An FCE was recommended.

12 The patient continued to follow up with  
13 Dr. Morgan. In July 2011, the patient was considering  
14 hardware removal. The patient was given light duty  
15 restrictions. There was a full duty release in the file  
16 effective August 11, 2011.

17 On August 20, 2011, the patient saw Dr. Rimoldi in  
18 hopes of rendering a medical opinion concerning his lumbar  
19 spine and alleged injuries sustained on November 30, 2007.  
20 Dr. Rimoldi felt the patient had reached MMI with a  
21 permanent impairment. He did not recommend any additional  
22 treatment or surgery. Dr. Rimoldi did not feel the patient  
23 could return to work as a firefighter EMT and should have an  
24 FCE to determine permanent work restrictions.

25 On August 24, 2011, Dr. Morgan reported that the

1 patient had back pain and pain that radiated into the left  
2 buttock. This was a new symptom for him and MRI was  
3 requested along with X-rays. The patient went back to work  
4 on August 11, 2011, and then retired effective August 12,  
5 2011. On October 14, 2011, the patient reported bilateral  
6 leg pain and low back pain. Dr. Morgan did not feel the  
7 patient had reached MMI. He did think he had a ratable  
8 impairment and agreed with the 13 percent noted by  
9 Dr. Rimoldi. MRI was again recommended with the possibility  
10 of hardware removal.

11 On October 31, 2011, Dr. Berg performed a PPD  
12 evaluation for the lumbar spine. Interestingly enough, the  
13 patient reported no prior back injuries or problems to the  
14 rating physician. Dr. Berg found 12 percent whole person  
15 impairment under Category IV D with 1 percent additional for  
16 the two-level surgery. Loss of range of motion was  
17 9 percent whole person impairment and no neurological  
18 deficit was found. Together, the patient had 21 percent  
19 whole person impairment. No basis of apportionment was  
20 found.

21 Dr. Betz performed a file review on November 21,  
22 2011. He disagreed with Dr. Berg's assessment that there  
23 was no basis for apportionment. Dr. Betz opined that the  
24 patient clearly had longstanding issues with his low back  
25 including chronic pain, sciatica and radiculopathy years

1 prior to his November 2007 date of injury. All of these  
2 symptoms were related to unstable spondylolisthesis at L4-5  
3 and L5-S1. Spondylolisthesis is a ratable impairment that  
4 yields 7 to 9 percent whole person impairment. This would  
5 be combined with range of motion loss and based on this, he  
6 agreed with Dr. Betz regarding apportionment of the PPD  
7 award at 50 percent.

8           On November 28, 2011, Dr. Betz penned a Subsequent  
9 Injury Fund Analysis. He noted that it was the preexisting  
10 spondylolisthesis with its associated instability which  
11 resulted in the patient's chronic low back pain and ultimate  
12 need for a stabilization procedure at two levels. He felt  
13 that absent the preexisting pathologies, the patient would  
14 have only required a brief course of conservative care for  
15 the low back strain. Dr. Betz opined that 95 percent of the  
16 costs of the subsequent claim were the result of the  
17 combined effects of the subsequent injury and the  
18 preexisting pathology in the lumbar spine.

19           The injured employee returned to Dr. Morgan on  
20 December 1, 2011, with complaints of increased low back and  
21 lower extremity pain. Hardware removal was indicated along  
22 with MRI and reopening of the claim. MRI showed L3-4 broad  
23 bulging disc resulting in moderate indentation of the thecal  
24 sac, accentuated by ligamentum flavum hypertrophy and facet  
25 degenerative changes. Bilateral neural foraminal narrowing

<b>TO AVOID PENALTY, THIS REPORT MUST BE COMPLETED AND MAILED TO THE INSURER WITHIN 6 WORKING DAYS OF RECEIPT OF THE C-4 FORM</b>				Please Type or Print		<b>EMPLOYER'S REPORT OF INDUSTRIAL INJURY OR OCCUPATIONAL DISEASE</b> alternative Service Concepts L.L.C. 1755 E. Plumb Lane #267 Reno, Nevada 89502				
EMPLOYER	Employer's Name <b>North Lake Tahoe Fire</b>			Nature of Business (mfg., etc.) <b>Fire Protection</b>			SIC Code		Insured Acct. Number <b>Location #6230</b>	
	Office Mail Address <b>866 Oriole Way</b>			Location ... If different from mailing address <b>873 Tanager Street</b>			OSHA Log # <b>N/A</b>			
	City State Zip <b>Incline Village, NV 89451</b>			City State Zip <b>Incline Village, NV 89451</b>			Telephone <b>831-0351</b>			
	First Name M.I. Last Name <b>E. . .</b>			Social Security Number <b>12 86 51</b>			Age <b>52</b>		Primary Language Spoken <b>English</b>	
EMPLOYEE	Home Address (Number) <b>P.O. Box</b>			Sex <input checked="" type="checkbox"/> Male <input type="checkbox"/> Female			Marital Status <input checked="" type="checkbox"/> Single <input type="checkbox"/> Married <input type="checkbox"/> Divorced <input type="checkbox"/> Widowed			
	City State Zip <b>Incline Village NV 89450</b>			Was the employee paid for the day of injury? (if applicable) <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No			How long has this person been employed by you in Nevada? <b>10/81</b>			
	In which state was employee hired? <b>NV</b>			Employee's occupation (job title) when hired or disabled <b>FF/PM</b>			Department in which regularly employed: <b>NA</b>			
	Telephone			Is the injured employee a corporate officer? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No			... sole proprietor? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		... partner? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
ACCIDENT	Date of Injury (if applicable) <b>02 25 04</b>		Time of injury (Hours; Minute AM/PM) (if applicable) <b>11:30 p.m.</b>		Date employer notified of injury or O/D <b>12 25 04</b>		Supervisor to whom injury or O/D reported <b>Captain Don Bluhm</b>			
	Address or location of accident (Also provide city, county, state) (if applicable) <b>Hwy 431 Roadway Incline Village, Washoe Co. NV</b>							Accident on employer's premises? (if applicable) <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		
	What was this employee doing when the accident occurred (loading truck, walking down stairs, etc.)? (if applicable) <b>Attempted to reach motorist walking on icy street, fell on tailbone</b>									
	How did this injury or occupational disease occur? Include time employee began work. Be specific and answer in detail. Use additional sheet if necessary. <b>Attempted to reach motorist in distress and fell on tailbone</b>									
INJURY	Specify machine, tool, substance, or object most closely connected with the accident (if applicable)				Witness		Was there more than one person injured in this accident? (if applicable) <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No			
	Part of body injured or affected <b>Back</b>		If fatal, give date of death		Witness					
	Nature of Injury or Occupational Disease (scratch, cut, bruise, strain, etc.) <b>Back strain</b>				Witness					
	If validity of claim is doubted, state reason <b>N/A</b>				Did employee return to next scheduled shift after accident? (if applicable) <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No <b>Yes</b>		Will you have light duty work available if necessary? <input type="checkbox"/> Yes <input type="checkbox"/> No			
	Treating physician/chiropractor name <b>Dr. Higgins</b>				Location of Initial Treatment <b>Incline Village Health Center</b>		Emergency Room <input type="checkbox"/> Yes <input type="checkbox"/> No			
	Hospitalized <input type="checkbox"/> Yes <input type="checkbox"/> No									
LOSS OF TIME	<b>IMPORTANT</b>		How many days per week does employee work?		From <b>8am</b> <input checked="" type="checkbox"/> am <input type="checkbox"/> pm To <b>8</b> <input type="checkbox"/> am <input type="checkbox"/> pm		Last day wages were earned		<b>/ /</b>	
	Scheduled days off		S M T W T F S Rotating		Are you paying injured or disabled employee's wages during disability? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No					
	Date employee was hired <b>10 01 1981</b>		Last day of work after injury or disability <b>02 25 04</b>		Date of return to work <b>02 26 04</b>		Number of work days lost <b>0</b>			
	Was the employee hired to work 40 hours per week? <input type="checkbox"/> Yes <input type="checkbox"/> No		If not, for how many hours a week was the employee hired? <b>Average 56 hours per week</b>		Did the employee receive unemployment compensation any time during the last 12 months? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		Do Not Know			
For the purpose of calculation of the average monthly wage, indicate the employee's gross earnings by pay period for 12 weeks prior to the date of injury or disability. If the injured employee is expected to be off work 5 days or more, attach wage verification form (D-8). Gross earnings will include overtime, bonuses, and other remuneration, but will not include reimbursement for expenses. If the employee was employed by you for less than 12 weeks, provide gross earnings from the date of hire to the date of injury or disability. In addition, if the employee was absent from work during the period for which payroll information is requested for any of the reasons listed below, please provide the date(s) absent and, from the following list, indicate, by numeral, the reason(s) for the absence(s). Gross earnings must not include wages earned after the date of injury or disability. 1. Certified illness or disability. 2. Institutionalized in hospital or other institution. 3. Enrolled as a full-time student, not employed on days when attending classes. 4. In military service other than that training duty conducted on weekends. 5. Absent because of an officially sanctioned strike. 6. Approved FMLA absence.										
Pay period <input checked="" type="checkbox"/> SUN <input type="checkbox"/> TUE <input type="checkbox"/> THUR <input type="checkbox"/> SAT and on: <input type="checkbox"/> MON <input type="checkbox"/> WED <input type="checkbox"/> FRI		Employee <input type="checkbox"/> WEEKLY <input type="checkbox"/> MONTHLY <input type="checkbox"/> OTHER is paid: <input checked="" type="checkbox"/> BI-WEEKLY <input type="checkbox"/> SEMI-MONTHLY		On the date of injury or disability the employee's wage was: <b>\$19.9182</b> per <input checked="" type="checkbox"/> Hr <input type="checkbox"/> Day <input type="checkbox"/> Wk <input type="checkbox"/> No						
ADDITIONAL INFORMATION	I affirm that the information provided above regarding the accident and injury or occupational disease is correct to the best of my knowledge. I further affirm the wage information provided is true and correct as taken from the payroll records of the employee in question. I also understand that providing false information is a violation of Nevada law.				Employer's Signature and Title <b>[Signature]</b>				Date <b>3/4/04</b>	
	Claim is: <input type="checkbox"/> Accepted <input type="checkbox"/> Denied <input type="checkbox"/> Deferred <input type="checkbox"/> 3rd Party				Deemed Wage		Account No.		Class Code	
	Claims Examiner's Signature				Date		Status Clerk		Date	

Form C-3 (Rev. 8/02)

ORIGINAL - EMPLOYER

PAGE 2 - INSURER/TPA

PAGE 3 - EMPLOYEE

DIR 3

FORM C-4

PLEASE TYPE OR PRINT

EMPLOYEE'S CLAIM - PROVIDE ALL INFORMATION REQUESTED							
First Name <u>S</u>	M.I. <u></u>	Last Name <u></u>	Birthdate <u>12/25/51</u>	Sex <input checked="" type="checkbox"/> M <input type="checkbox"/> F	Claim Number (Insurer's Use Only)		
Home Address <u>PO</u>	City <u>INCINE</u>		State <u>NO</u>	Zip <u>89450</u>	Age <u>52</u>	Height <u>58</u>	Weight <u>178</u>
Telephone <u>831 0351</u>					Social Security Number		
Physical Address <u>INCINE NV</u>					City <u>INCINE NV</u>	State <u>NO</u>	Zip <u>89450</u>
INSURER <u>SINASC</u>					THIRD-PARTY ADMINISTRATOR <u>ALTERNATIVE SVCS.</u>		
Employer's Name/Company Name <u>NORTH INCINE FIRE</u>					Employee's Occupation (Job Title) When Injury or Occupational Disease Occurred <u>GMT</u>		
Office Mail Address (Number and Street) <u>866 ORIOLE</u>					Telephone <u>831 0351</u>		
Date of Injury (if applicable) <u>2/28/04</u>	Hours Injury (if applicable) <u>am 1130 pm</u>	Date Employer Notified <u>2/28/04</u>	Last Day of Work After Injury or Occupational Disease		Supervisor to Whom Injury Reported <u>BCCWM</u>		
Address or Location of Accident (if applicable) <u>WY 431 @ DOUGWAY</u>							
What were you doing at the time of the accident? (if applicable) <u>WALKING ON ICE - ASSIST TO MOTORIST</u>							
How did this injury or occupational disease occur? (Be specific and answer in detail. Use additional sheet if necessary) <u>FALL ON ICE</u>							
If you believe that you have an occupational disease, when did you first have knowledge of the disability and its relationship to your employment? <u>NEW INJURY TO SACRUM</u>						Witnesses to the Accident (if applicable)	
Nature of Injury or Occupational Disease <u>BACK PAIN</u>				Part(s) of Body Injured or Affected <u>Back</u>			
<p>I CERTIFY THAT THE ABOVE IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND THAT I HAVE PROVIDED THIS INFORMATION IN ORDER TO OBTAIN THE BENEFITS OF NEVADA'S INDUSTRIAL INSURANCE AND OCCUPATIONAL DISEASES ACTS (NRS 616A TO 616D, INCLUSIVE OR CHAPTER 617 OF NRS). I HEREBY AUTHORIZE ANY PHYSICIAN, CHIROPRACTOR, SURGEON, PRACTITIONER, OR OTHER PERSON, ANY HOSPITAL, INCLUDING VETERANS ADMINISTRATION OR GOVERNMENTAL HOSPITAL, ANY MEDICAL SERVICE ORGANIZATION, ANY INSURANCE COMPANY, OR OTHER INSTITUTION OR ORGANIZATION TO RELEASE TO EACH OTHER, ANY MEDICAL OR OTHER INFORMATION, INCLUDING BENEFITS PAID OR PAYABLE, PERTINENT TO THIS INJURY OR DISEASE, EXCEPT INFORMATION RELATIVE TO DIAGNOSIS, TREATMENT AND/OR COUNSELING FOR AIDS, PSYCHOLOGICAL CONDITIONS, ALCOHOL OR CONTROLLED SUBSTANCES, FOR WHICH I MUST GIVE SPECIFIC AUTHORIZATION. A PHOTOSTAT OF THIS AUTHORIZATION SHALL BE AS VALID AS THE ORIGINAL.</p>							
Date <u>2/26/04</u>	Place <u>HOME</u>	Employee's Signature <u>[Signature]</u>					
THIS REPORT MUST BE COMPLETED AND MAILED WITHIN 3 WORKING DAYS OF TREATMENT							
Place <u>ED</u>	Name of Facility <u>INCINE VILLAGE COMMUNITY HOSPITAL</u>						
Date <u>2/26/04</u>	Diagnosis and Description of Injury or Occupational Disease <u>fell on ice, landing on buttocks and twisting L-5 spine</u>			Is there evidence that the injured employee was under the influence of alcohol and/or another controlled substance at the time of the accident? No <input checked="" type="checkbox"/> Yes (if yes, please explain)			
Hour <u>1738</u>	Treatment <u>rest, six physical therapy sessions, medication</u>			Have you advised the patient to remain off work five days or more? Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> If yes, please specify dates: from <u>2/26/04</u> to <u>3/1/04</u>			
X-Ray Findings <u>none indicated</u>			If modified duty, specify any limitations/restrictions: <u>None</u>				
From information given by the employee, together with medical evidence, can you directly connect this injury or occupational disease as job incurred? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No							
Is additional medical care by a physician indicated? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No							
Do you know of any previous injury or disease contributing to this condition or occupational disease? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No (Explain if yes)							
Date <u>2/26/04</u>	Print Doctor's Name <u>DIANNE HIGGINS</u>			I certify that the employer's copy of this form was mailed to the employer on: <u>2-26-04</u>			
Address <u>880, AIDER AVE</u>				INSURER'S USE ONLY			
City <u>INCINE NV</u>	State <u>NO</u>	Zip <u>89457</u>	Provider's Tax I.D. Number <u>946004062</u>	Telephone <u>775 833 4100</u>			
Doctor's Signature <u>Dianne Higgins MD</u>				Degree <u>MD</u>			

ORIGINAL - TREATING PHYSICIAN OR CHIROPRACTOR

PAGE 2 - INSURER/TPA

PAGE 3 - EMPLOYER

PAGE 4 - EMPLOYEE

Form C-4 (rev 01/01)

DIR 37

000103

Electronically Filed  
May 01 2018 09:49 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

**IN THE SUPREME COURT OF THE STATE ON NEVADA**

\* \* \*

**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**

**ERRATA TO JOINT APPENDIX VOLUMES I and II**

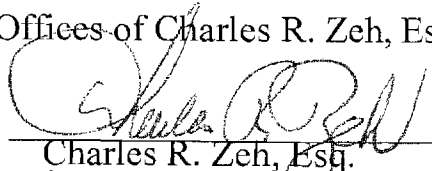
Please remove unreadable pages 102 and 103 in Volume 1 and replace with 000102 and 000103 and 226 through 445 in Volume 2 and replace them with pages 000226 through 000445.

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

1 Dated this 30<sup>th</sup> day of April, 2018.

The Law Offices of Charles R. Zeh, Esq.

2  
3 By:

  
Charles R. Zeh, Esq.

State Bar No. 1739

575 Forest Street, Suite 200

Reno, NV 89509

*Attorneys for Respondent*

The Board for the Administration of

the Subsequent Injury Account for

Self-insured Public and Private

Employers



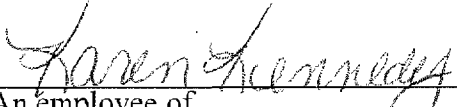
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## Certificate of Service

Pursuant to NRCP 5(b), I certify that I am an employee of The Law Offices of Charles R. Zeh, Esq., and that on this date I served the attached *Errata to Joint Appendix Volume 2* on those parties identified below by:

√	Placing an original or true copy thereof on a CD disk, 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
	Reno-Carson Messenger Service
	Certified Mail/Return Receipt Requested

Dated this 30<sup>th</sup> day of April, 2018.

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