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2	IN THE SUPREME COU	RT OF THE STATE OF NEVADA
3	WILLIAM POREMBA	Electronically Filed
4		Mar 27 2015 08:57 a.m.
5	Petitioner,	Case No.: 66888 Clerk of Supreme Court
6	vs.	) )
7	SOUTHERN NEVADA PAVING; S&C CLAIMS SERVICE and	
8	DEPARTMENT OF ADMINISTRATION,	
9	APPEALS OFFICER,	) )
10	Respondent.	) )
11		
12	$\underline{\mathbf{A}}$	PPENDIX
13	$\mathbf{V}^{\prime}$	OLUME IV
14		
15	MATTHEW S. DUNKLEY, ESQ.	
	Nevada Bar No. 6627 MARK G. LOSEE, ESQ.	
	Nevada Bar No. 12996 DUNKLEY LAW	
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1	APPENDIX TO APPELLANT'S OPENING BRIEF	?
2	TITLE	PAGE NO.
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4	Order Transferring Hearing to Appeals Office	APP003
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6	Insurer's Motion for Summary Judgment	APP006-012
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20	Z:\Files Open\260710 Poremba vs SNP (WC)\AppealSupremeCt\Append2.wpd	

NEVADA DEPARTMENT OF ADMINISTRATION

BEFORE THE APPEALS OFFICER

In the Matter of the Contested Industrial

Claim No.: 739255

Insurance Claim

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Appeal No.: 1306201-SL

Employer:

WILLIAM POREMBA 168 RED ARCHES COURT HENDERSON, NV 89014, SOUTHERN NEVADA PAVING

3101 E. CRAIG ROAD N. LAS VEGAS, NV 89030

Claimant.

of

ORDER DENYING INSURER'S MOTION FOR SUMMARY JUDGMENT

After careful review and consideration of the Insurer's Motion for Summary

Judgment and good cause appearing,

IT IS HEREBY ORDERED that the Insurer's Motion for Summary Judgment is

Appeals Officer

DENIED.

DATED this \_\_\_\_\_ day of March, 2013.

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Submitted by:

LEWIS BRISBOIS BISGAARD & SMITH LLP

ALYS&A M. FISCHER, ESQ.

400 S. Fourth Street, Ste. 500

Las Vegas, Nevada 89101

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Fax: (702) 366-9689

Attorneys for Insurer

APR 1 8 2015

APP191 dd

#### **CERTIFICATE OF MAILING**

2 The undersigned, an employee of the State of Nevada, Department of 3 Administration, Appeals Division, does hereby certify that on the date shown below, a true and 4 correct copy of the foregoing ORDER DENYING INSURER'S MOTION FOR SUMMARY 5 JUDGMENT was duly mailed, postage prepaid OR placed in the appropriate addressee runner 6 file maintained by the Division, 2200 South Rancho Drive, Suite 220, Las Vegas, Nevada, to the 7 following: 8 Alyssa M. Fischer, Esq. Lewis, Brisbois, Bisgaard & Smith LLP 400 S. Fourth Street, Ste. 500 Las Vegas, NV 89101 11 Matthew Dunkley, Esq. 12 1522 W. Warm Springs Road Henderson, NV 89014 13 14 Julie Wood S&C Claims Service 15 9075 W. Diablo Drive, #140 Las Vegas, NV 89148 16 William Poremba 17 168 Red Arches Court 18 Henderson, NV 89012 19 Southern Nevada Paving 3101 E. Craig Road 20 N. Las Vegas, NV 89030 21 day of <del>March</del>, 2013. 22 23

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An employee of the State of Nevada

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## NEVADA DEPARTMENT OF ADMINISTRATION

#### BEFORE THE APPEALS OFFICER

In the Matter of the Contested Industrial Insurance Claim

Claim No.: 739255

Appeal No.: 1306201-SL

of

Employer:

WILLIAM POREMBA,

SOUTHERN NV PAVING

Claimant.

DOH: 10/30/13 at 11:00 A.M.

#### **INSURER'S APPEAL MEMORANDUM**

COMES NOW the Insurer, BUILDERS INSURANCE COMPANY, by and through its counsel, ALYSSA M. FISCHER, ESQ., and LEWIS BRISBOIS BISGAARD & SMITH LLP, and submits its Appeal Memorandum for the hearing on the instant matter currently set to be heard on October 30, 2013 at 11:00 A.M. In support of its position, the Insurer states as follows:

That there is no medical, legal or factual basis upon which to order claim reopening in this matter and the Claimant cannot prove that he has spent his third party proceeds on medical treatment in this case.

WHEREFORE, the Insurer, BUILDERS INSURANCE COMPANY, respectfully requests that the Appeals Officer provide the following relief:

1. That the Appeals Officer affirm the November 8, 2012 determination denying claim reopening.

#### **DOCUMENTS TO BE INTRODUCED AT HEARING**

The Insurer shall rely upon its Index of Documents, filed separately herein and any supplements filed by the Insurer thereto. The Insurer may rely upon any documents produced by the Claimant, subject to objection and may supplement it documents between this date and the date of hearing.

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#### STATEMENT OF THE ISSUES

The following issue is before the Appeals officer for review:

Whether the denial of reopening is proper.

#### WITNESSES

The Insurer does not anticipate calling any witnesses at this time. However, the Insurer reserves the right to call the Claimant himself, together with any treating or examining physicians of the claimant, for rebuttal and other purposes at the time of hearing. The Insurer also reserves the right to call rebuttal witnesses which cannot be anticipated at this time.

### TIME ESTIMATED FOR HEARING

It is estimated that the time for hearing of the Insurer's case as Respondent will be one (1) hour or less.

#### STATEMENT OF FACTS

This is the claimant's appeal of denial of reopening dated November 8, 2012.

There was not one page of evidence supporting the request to reopen made by Claimant's counsel. (Exhibit p. 117).

Claimant was involved in a vehicle-heavy equipment accident on or about July 22, 2005. He sought medical treatment and filled out a C-4 three days later on July 25, 2005. He was diagnosed with thoracic, cervical strains; a face contusion and a knee contusion. (Insurer's Document Packet, p. 4).

A follow up appointment at Concentra on July 29, 2005 produced the same diagnosis. (Insurer's Document Packet, p. 9).

Claimant treated on his own outside of worker's compensation arena on August 2, 2005. (Insurer's Document Packet, p. 11-12).

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Claimant was informed by the Insurer that he could not treat with non-preferred
providers and could only have one treating physician. (Insurer's Document Packet, p. 13-15).
Care was transferred to Dr. Angela Thomas. (Insurer's Document Packet, p. 16).

On August 12, 2005, the claim was accepted for cervical strain, lumbar strain and left knee sprain. (Insurer's Document Packet, p. 20). The scope of the claim was never appealed.

On August 12, 2005, Dr. Thomas documented that claimant had a **non-industrial** history of **chronic low back pain.** (**Insurer's Document Packet**, **p. 22**). Physical therapy was recommended.

Claimant and his counsel were informed of the Insurer's lien in August 2005. (Insurer's Document Packet, p. 24). Several MRIs were performed.

Dr. Thomas recommended physical therapy.

On November 7, 2005, Dr. LaTourette opined that Claimant would need knee surgery in the future. (Insurer's Document Packet, p. 42-43).

The Insurer sent a claim closure letter on January 27, 2006. (Insurer's Document Packet, p. 46). The claim closed.

On October 5, 2010, the Insurer sought recovery of its worker's compensation lien. (Insurer's Document Packet, p. 45).

On November 3, 2010 Claimant sought to reopen his claim, more than one year after it closed. Claimant provided a one page letter from Sudir Khenika MD which did not have ANY medical records attached. The letter asks for reopening since the Claimant has had increased pain complaints. (Insurer's Document Packet, p. 50).

On November 8, 2010 the Insurer denied reopening as the Claimant has not proven that he has exhausted his third party recovery which he must do before the Insurer would be responsible to pay for reopening and future medical treatment. (Insurer's Document Packet, p. 51).

In November 2010 Claimant returned to the Las Vegas Pain Institute for neck and low back pain. (Exhibit p. 53). He was told to continue home exercises. (Exhibit p. 55).

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1	The Claimant received a settlement of \$63,500 from a responsible third party who	
2	caused his accident. (Exhibit p. 59). Claimant received close to \$20,000 personally, there is	
3	no evidence that said money has been exhausted prior to this reopening request as is	
4	required in Nevada. (Exhibit pp. 59-60).	
5	Claimant previously appealed the denial of reopening of his claim. On March 7,	
6	2011 the Hearing Officer properly denied the request for reopening. (Exhibit pp. 91-95).	
7	Claimant appealed to the Appeals Office. (Exhibit p. 103).	
8	On May 6, 2011 the Insurer filed a Motion for Summary Judgment in the	
9	matter on appeal. (Exhibit pp. 108-114).	
10	On May 17, 2011, the Appeals Officer GRANTED the Insurer's Motion for	
11	Summary Judgment. (Exhibit p. 115-116).	
12	Claimant waited over a year and on November 8, 2012 his counsel once again	
13	requested claim reopening. There is no new medical reporting to support this request and	
14	again the Claimant has not proven that he has exhausted his third party proceeds before	
15	asking the Insurer to pay for more benefits under the industrial claim.	
16	Not surprisingly, on November 8, 2012 the Insurer denied the request for	
17	reopening. (Exhibit p. 118).	
18	The Claimant appealed and the parties agreed to by pass the Hearing Officer.	
19	The Insurer filed a Motion for Summary Judgment, which this Appeals Officer	
20	denied. This hearing follows.	
21	<u>ARGÚMENT</u>	
22	I.	
23	CLAIMANT BEARS THE BURDEN	
24	It is the <u>claimant</u> , not the Employer who has the burden of proving his case, and	
25	that is by a preponderance of all the evidence. State Industrial Insurance System v. Hicks, 100	

Nev. 567, 688 P.2d 324 (1984); Holley v. State ex rel. Wyoming Worker's Compensation Div.,

798 P.2d 323 (1990); Hagler v. Micron Technology, Inc., 118 Idaho 596, 798 P.2d 55 (1990).

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In attempting to prove his case, the Claimant has the burden of going beyond speculation and conjecture. That means that the claimant must establish the work connection of his injuries, the causal relationship between the work-related injury and his disability, the extent of his disability, and all facets of the claim by a preponderance of all of the evidence. To prevail, a claimant must present and prove more evidence than an amount which would make his case and his opponent's "evenly balanced." Maxwell v. SIIS, 109 Nev. 327, 849 P.2d 267 (1993); SIIS v. Khweiss, 108 Nev. 123, 825 P.2d 218 (1992); SIIS v. Kelly, 99 Nev. 774, 671 P.2d 29 (1983); 3, A. Larson, The Law of Workmen's Compensation, § 80.33(a).

NRS 616A.010(2)makes it clear that:

A claim for compensation filed pursuant to the provisions of chapters 616A to 616D, inclusive, or chapter 617 of NRS must be decided on its merit and not according to the principle of common law that requires statutes governing worker's compensation to be liberally construed because they are remedial in nature.

Based upon the present information, the Insurer's determination to deny reopening is proper.

II.

## **REOPENING WAS PROPERLY DENIED**

First and foremost, the Claimant has failed to prove that he has expended the money he received from his third party settlement on medical care and treatment before he sought reopening. The case of EICON v. Chandler, 23 P.3d 255 (Nev. 2001) case clearly stands for this proposition. The Nevada Supreme Court held in Chandler that: "An insurer is entitled to withhold payment of medical benefits for a work-related injury until an employee has exhausted any third-party settlement proceeds..." Id. at 258. A copy of the Chandler case is provided in the Insurer's evidence packet at 96-99).

In this case Claimant hasn't even paid the worker compensation insurer's lien. In <u>Chandler</u> that lien was paid back and still benefits were denied until he exhausted the money he received from his third party case. The present facts are even stronger in the **Insurer's favor.** Thus, the denial of reopening is proper.

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Furthermore, even assuming arguendo that the merits of the reopening could be addressed, Claimant has not met his burden of proof to prove reopening. He has a letter from his counsel, that is it! There is not even a letter from a doctor this time—nothing but subjective complaints of pain. This falls well below the Claimant's legal burden of proof.

Claimant's own assertions prove that he cannot prevail. He admits that he recovered close to \$64,000 in his third party settlement. He claims that he has spent \$14,000 in medical treatment relating to his industrial accident. First, this is not enough. He has to show that he spent ALL of the money he got in the third party case and he has to prove that he spent it on medical treatment that the Insurer would otherwise be liable for. Secondly, he has to show that he **spent** this money AFTER he got it. Claimant's assertion that he is going to need a surgery in the future does NOT meet the requirement because he has not spent that money yet.

Moreover, the Claimant admits that he spent his third party settlement on "mortgage payments and living expenses for himself and his family." While noble, this does not meet the requirements for reopening. He has to spend the money he got on medical benefits that the Insurer would otherwise be liable for if the claim were reopened. He clearly cannot show this.

Finally, the bills that the Claimant did produce to this court are mostly for services incurred BEFORE the third party settlement. These monies are not considered for the offset before reopening is proper. The letter to Mr. Poremba regarding his settlement is dated September 25, 2009. Thus, any medical bill incurred BEFORE this date does not count for the offset. The offset proves that the money was spent AFTER the settlement.

Additionally, Claimant previously appealed the denial of reopening of his claim. On March 7, 2011 the Hearing Officer properly denied the request for reopening. (Exhibit pp. 91-95). This appeal is based on the same OLD medical evidence that was insufficient in the last attempt to reopen. On May 17, 2011, the prior Appeals Officer GRANTED the Insurer's Motion for Summary Judgment. (Exhibit p. 115-116).

1	In this attempt to reopen the Claimant is relying on Dr. Khanka's report		
2	from October 22, 2010. This evidence has already been deemed insufficient by a prior		
3	Appeal Officer.		
4	Claimant needs a medical report that is at LEAST newer than the last summary		
5	judgment order filed against him denying reopening.		
6	The Affidavit filed by the Claimant opposing the Motion for summary judgment		
7	is clearly on point for why reopening must be denied in this case. He has not spent his third		
8	party proceeds on medical treatment associated with this claim.		
9	For all of these reasons, the Insurer asks that the denial of reopening be affirmed.		
10	CONCLUSION		
11	Based upon the foregoing points and authorities, it is clear that the Insurer		
12	properly denied reopening in this case.		
13	WHEREFORE, the Insurer, BUILDERS INSURANCE COMPANY, respectfully		
14	requests that the Appeals Officer provide the following relief:		
15	That the Appeals Officer affirm the November 8, 2012, determination denying		
16	reopening in this claim.		
17	DATED this 22 day of October, 2013.		
18	Respectfully submitted,		
19	LEWIS, BRISBOIS, BISGAARD & SMITH, LLP		
20	702-583-6005		
21	By: ALYSSA M. FISCHER, ESQ.		
22	Nevada Bar No. 5709 2300 W. Sahara Ave, Ste 300, Box 28		
23	Las Vegas, NV 89102 Attorneys for the Insurer		
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## **CERTIFICATE OF MAILING**

Matthew Dunkley, Esq. 2450 St. Rose Pkwy, Ste 210 Henderson, NV 89074

Danny Thorn S & C Claim Services 9075 W. Diablo Drive, Ste 140 Las Vegas, NV 89148

An employee of LEWIS BRISBOIS BISGAARD & SMITH, LLP

				To the second se
1	BEFORE THE A	<u>PPEA</u>	LS OFFICER	NOV 01 2013 APPEALS OFFICE
2   3	In the Matter of the Contested Industrial Insurance Claim of:	)	Claim No:	739255
4	WILLIAM POREMBA,	)	Appeal No:	1306201-SL
5	Claimant. )			
7	NOTICE OF RESETTING			
8	TO ALL PARTIES-IN-INTEREST:			
9	PLEASE TAKE NOTICE that the abo	വുക ദേ	ntioned matter	r will now be heard in front of
10			•	will now be neard in front of
11	the Appeals Officer for a TIME CERTAIN HE			
12	DATE: WEDNESDAY, JANUARY 29	9, 2014		
13	TIME: 1:00 – 2:00 P.M.  PLACE: DEPARTMENT OF ADMINISTRATION 2200 SOUTH RANCHO DRIVE #220 LAS VEGAS, NV 89102  PLEASE TAKE FURTHER NOTICE that previously scheduled hearing dates in this			
14				
15				
16	matter, if any, are hereby vacated and reset to the above referenced date and time.			
17	#	###		
18	CONTINUANCE OF THIS SCHEDULED	HEA	RING DATE	SHALL ONLY BE
19	CONSIDERED ON WRITTEN APPLICATION SUPPORTED BY AFFIDAVITS.			
20		<del>!</del> # #		
21	,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,	,, ,,		
22	IT IS SO ORDERED this 1 <sup>st</sup> day of November, 2013.			
23	Aharly Donner			
24				
25			NDSEY, ESC	).
26	APPEAL	S OF	TCER	
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NOV 0 4 2013 APP201

## **CERTIFICATE OF MAILING**

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2 3 4 5	The undersigned, an employee of the State of Nevada, Department of Administration, Hearings Division, does hereby certify that on the date shown below, a true and correct copy of the foregoing <b>NOTICE OF RESETTING</b> was duly mailed, postage prepaid <b>OR</b> placed in the appropriate addressee runner file at the Department of Administration, Hearings Division, 2200 S. Rancho Drive, #220, Las Vegas, Nevada, to the following:
6 7 8	WILLIAM POREMBA 168 RED ARCHES CT HENDERSON NV 89012-6004
9 10 11	MATTHEW S DUNKLEY ESQ DUNKLEY LAW 2450 ST ROSE PKWY STE 210 HENDERSON NV 89074
12 13	SOUTHERN NEVADA PAVING 440 FREHNER RD NORTH LAS VEGAS NV 89030
14 15	S & C CLAIMS SERVICES INC 9075 W DIABLO DR STE 140 LAS VEGAS NV 89148
<ul><li>16</li><li>17</li><li>18</li></ul>	ALYSSA M FISCHER ESQ LEWIS BRISBOIS BISGAARD & SMITH LLP 2300 W SAHARA AVE STE 300 BOX 28 LAS VEGAS NV 89102-4375
19 20	Dated this 1 <sup>st</sup> day of November, 2013.
21 22	Diane Gagliano, Legal Secretary II Employee of the State of Nevada
23	