

**PROPOSED REGULATION OF THE BOARD FOR THE
ADMINISTRATION OF THE SUBSEQUENT INJURY ACCOUNT FOR
SELF-INSURED EMPLOYERS**

EXPLANATION - Matter in italics is new; matter in brackets ~~omitted material~~ is to be omitted.

AUTHORITY: NRS 616B.551(1); 616B.554(6); 616B.554(8)(a); 616B.557(6); 233B.100(1); 233B.120; and SB 20.

Section 1. Chapter 616B.770 et. seq., of NAC, entitled "SUBSEQUENT INJURY ACCOUNT FOR SELF-INSURED EMPLOYERS" is hereby amended by adding thereto a new section to read as follows:

Requests for Continuances

- 1. Every request for a continuance, extension of time, or order shortening time shall be in writing and "filed" with Legal Counsel for the Board. If the request is for a continuance of a hearing before the Board, absent extraordinary circumstances, e.g., sudden illness, death in the family, or other events and circumstances of similar magnitude, the application must be filed no later than three business days prior to the date of the hearing. In the event that the Board is without Legal Counsel at the time of the request, it shall be filed with the Chairman of the Board in care of the Administrator, the Division of Industrial Relations (DIR).*
- 2. Every request for a continuance, extension of time, or order shall inform the Board of any previous extensions granted and state the reasons supporting the request for additional time. A request made after the expiration of the specified period shall not be granted unless the moving party, attorney, or other person demonstrates that the failure to act was the result of excusable neglect.*
- 3. A request shall be communicated by the Board's Legal Counsel to the Board's Chairman for disposition, unless the Chairman elects to refer the request to the entire Board for decision.*
- 4. Requests will only be granted upon a showing of good cause. A request to continue the Board's initial review and tentative ruling, as distinguished from a request to continue a "de novo" hearing, will be given strict scrutiny. If an application has been submitted to the Administrator, the Administrator has completed his review of the information supplied and the Administrator has made his recommendation to the Board at the tentative ruling stage, the Board will presume, although the presumption is rebuttable, that the applicant has given the Administrator all the information which the applicant believes was needed to support the application for reimbursement and that it is ready for disposition at the tentative ruling stage by the Board.*

Sec. 2. NAC 616B.770, supra, is hereby amended by adding thereto a new section to read as follows:

Selection Criterion of Applicable AMA "Guides"

In order to determine whether the 6% permanent impairment for the pre-existing condition of NRS 616B.557(3) has been satisfied, the following criterion will apply for the selection of Guides to make this determination:

- 1. When the pre-existing condition is industrially related and has been assigned a PPD rating which is no longer appealable, the Board may accept the rating for the preexisting industrial condition if established according to the American Medical Association's Guides to the Evaluation of Permanent Impairment and in any event, will apply to the preexisting industrial injury the Guides in effect at the time the preexisting industrial injury was rated.*
- 2. When the preexisting condition, whether industrially or non-industrially related, has not been rated at the time the application is before the Board for consideration, the Board will defer ruling on the application until the preexisting condition has been evaluated to determine whether it would support a rating of 6% or more based upon the whole person according to the Guides in effect at the time the subsequent industrial injury is rated.*
- 3. When the preexisting permanent physical impairment has been rated but the rating is not final at the time the application for reimbursement is before the Board, the Board will apply the set of Guides in effect at the time the preexisting condition was evaluated and defer consideration of the application until a rating has been finalized for the preexisting condition.*
- 4. The Board will not be bound by any agreement between the injured worker and employer regarding the rating for the preexisting impairment or subsequent injury. Similarly, the Board will not be bound by any agreement between the injured worker and the employer regarding which set of Guides should apply to rate either the preexisting impairment or the subsequent injury, including agreements concerning apportionment between the preexisting impairment and subsequent injury.*
- 5. The Board retains plenary authority over the disability rating for the preexisting impairment and subsequent industrial injury in order to determine eligibility for Subsequent Injury Account purposes.*

Sec. 3. NAC 616B.770, supra, is hereby amended by adding thereto a new section to read as follows.

Criterion for Consideration of Annuities

The Board may allow reimbursement of an approved annuity purchase as follows:

- 1. An otherwise qualified applicant may apply for reimbursement from the Account for the total amount actually paid by the applicant to purchase an annuity acquired by the self-*

insured employer to satisfy in whole or in part a claim approved by the Board for reimbursement to the applicant from the Subsequent Injury Account.

2. Reimbursement may be pursued annually on the anniversary of the date of purchase of the annuity.

3. Reimbursement against the cost of the annuity may occur more frequently than annually upon a showing of good cause, e.g., exigent financial circumstances of the applicant.

4. Reimbursement may not exceed the amount of compensation paid by the employer on behalf of the injured worker due to the subsequent industrial injury for the period of time covered by the application for reimbursement against the cost of the annuity.

5. An otherwise qualified applicant may continue to be reimbursed from the Account at the rate set out in the preceding subsection, until fully reimbursed for the actual amount the applicant paid to acquire the annuity, provided that in no event shall the reimbursement exceed the total amount of compensation actually paid on behalf of the injured worker for the subsequent injury.

6. The Board will not consider the following as costs eligible for reimbursement as a part of the purchase price of the annuity:

- (a) Interest because reimbursement may only be against the dollar amount actually paid on the purchase price of the annuity;*
- (b) Attorney's fees, including, without limitation, the cost of legal counsel to obtain the annuity; and*
- (c) Administrative expenses including, without limitation, copying records to obtain the annuity.*

Sec. 4. NAC 616B.770, supra, is hereby amended by adding thereto a new section to read as follows.

Notification of Proceedings; Service of Process

Notification of proceedings before the Board; service of the Administrator's recommendation to the Board and all other notices, documents, records and pleadings required to be served.

1. Each application for reimbursement must include the name and address of the person designated to accept service of the Administrator's recommendation to the Board regarding reimbursement based upon the application. Unless the Administrator and Board are notified in writing of a replacement designation, all notices, pleadings and other related documents will be served throughout upon the person who was designated in the application to accept service. An application will not be deemed complete unless it contains this information.

2. *Once an application is deemed complete and the Administrator's recommendation is submitted to the Board, the Administrator shall also simultaneously serve a copy of the Administrator's recommendation, together with a copy of the documents and records upon which the Administrator's recommendation is based, and the Administrator's list of witnesses who might be called to testify in support of the recommendation of the Administrator in any hearing or proceeding before the Board (collectively, the Administrator's recommendation), upon the person designated according to Subsection 1, above.*
3. *Service of the Administrator's recommendation and thereafter, all other notices, documents and pleadings required to be served, may be made by hand delivery, first class mail, or by electronic means consisting of facsimile or e-mail via the internet.*
4. *Unless otherwise specified, service by mail also means service by electronic means as defined in Subsection 3.*
5. *Service by mail is complete upon mailing, service by facsimile is complete upon successful transmittal of the facsimile, and service by e-mail is complete upon successful transmission of the e-mail by internet.*
6. *Delivery means handing the document, pleading or notice (document) being served to the person upon whom service is to be made, by leaving it at his office with his clerk or secretary or other person in charge of the office, or if the office is closed or the person to be served has no office, by leaving the document to be served at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.*
7. *Whenever the application is prosecuted by legal counsel or a lay advocate, the Board and the Administrator shall be notified in writing by personal service or by mail upon legal counsel for the Administrator and legal counsel for the Board. In the event the Board is without legal counsel, then, service of notification of representation shall be upon the Chairman of the Board in care of the Administrator.*
8. *Once notification is given that the application is being prosecuted by legal counsel or lay advocate, acting in the capacity of lawyer or representative for the party, the service shall be upon the attorney or lay advocate, only, in the manner prescribed in this regulation.*
9. *Whenever filing or service upon the Board is required in these regulations, filing or service according to the method prescribed shall be upon the Board's legal counsel. In the event, however, at any time the Board is without its own legal counsel, filing or service in the method prescribed shall be upon the Chairman of the Board in care of the Administrator of the Division of Industrial Relations.*
10. *Except for the initial application for reimbursement which shall be submitted according to the Administrator's policies and procedures, whenever by these regulations, service or filing is required upon the Administrator, service or filing according to the method prescribed shall be upon legal counsel to the Administrator.*

Sec. 5. NAC 616B.770, supra, is hereby amended by adding thereto a new section to read as follows.

Petition by Interested Parties for Declaratory Relief

- 1. Except as otherwise provided in subsection 4, an interested person may petition the Board for issuance of a declaratory order or advisory opinion concerning the applicability of a statute, regulation or decision of the Board.***
- 2. An original petition and seven copies must be filed with:***
 - (a) The Board's Legal Counsel by personal service at his office or by Registered Mail, addressed to him at his law office, return receipt requested; and***
 - (b) Within five (5) days of filing, one copy must also be served by personal service or service by Registered mail, return receipt requested, upon Legal Counsel for the Administrator, Division of Industrial Relations.***
- 3. The petition must include:***
 - (a) The name and address of the petitioner;***
 - (b) The reason for requesting the order or opinion;***
 - (c) A statement of facts and law supporting the petition; and***
 - (d) A clear and concise statement of the question to be decided by the Board and the relief sought by the petitioner.***
- 4. An interested person may not file a petition for a declaratory order or an advisory opinion concerning a question or matter that is an issue in an administrative, civil or criminal proceeding in which the interested person is a party.***

Petition for Declaratory Order or Advisory Opinion: Action by the Board; Record and Notice of Order or Opinion.

- 1. After written notice to the petitioner and a hearing, the Board may refuse to review a petition which requests the Board to issue a declaratory order or advisory opinion if:***
 - (a) The petitioner has not provided an original and seven copies of the petition;***
 - (b) The petition does not contain the information required in the preceding section;***
or
 - (c) The petitioner has not served a copy of the petition upon Legal Counsel for the Administrator by personal service or Registered mail, return receipt requested.***
- 2. Within 45 days following service of the petition upon the Administrator's Legal Counsel, the Administrator may file his response, if any, to the petition by service of the response by mail or personal service upon Legal Counsel for the Board. Within five (5) days***

of filing, the Administrator shall serve his response to the petitioner by mail at the petitioner's address as stated in the petition or by personal service upon petitioner.

3. In accordance with the Nevada Open Meeting Law and after written notice to the petitioner and the Administrator's legal counsel of any proceedings before the Board concerning the petition, the Board may:

- (a) Conduct an informal hearing to determine preliminary matters that might expedite disposition of the petition and may enter reasonable orders that govern the conduct of such a hearing on the merits of the petition.*
- (b) Request the petitioner to provide additional information or arguments relating to the petition, allowing the Administrator, also, the opportunity to respond, at the Administrator's discretion. The Administrator will serve a copy of any supplemental response upon the petitioner upon filing with the Board's Legal Counsel or as otherwise directed by the Board.*
- (c) Enter any reasonable order to assist in the review of the petition.*
- (d) Consider relevant decisions that have been issued by the Board which apply or interpret the statute, regulation or decision in question.*
- (e) Exercise plenary authority over the petition and its disposition.*
- (f) Issue, after a formal hearing, a declaratory order or an advisory opinion based upon the entire record developed before the Board in open hearing concerning the petition.*

4. The Board will maintain a record of the order or opinion that is indexed by subject matter and serve a copy of the order or opinion upon the petitioner and Administrator within 30 days after the Board has rendered its decision or advisory opinion.

5. In the event the petitioner is dissatisfied with the decision of the Board, the petitioner may seek judicial review based upon the record established before the Board by filing a petition for judicial review in the First Judicial District Court for the State of Nevada, in and for Carson City, within 30 days of service of the written decision from which the appeal is taken.

Sec. 6. NAC 616B.770, supra, is hereby amended by adding thereto a new section to read as follows.

Petition by Interested Parties to Amend Regulations

1. An interested person may petition the Board to adopt, file, amend or repeal a regulation governing the Board's administration of the Subsequent Injury Account for the Self-Insured Employers (the Account).

2. An original petition and seven copies must be filed with:

- (a) The Board's legal counsel by personal service upon him at his law office or by Registered Mail, addressed to him at his law office, return receipt requested.*

- (b) *Within 5 days of filing, one copy must be also be served by personal service or by registered mail, return receipt requested, upon legal counsel for the Administrator of the Division of Industrial Relations.*

3. The petition must include:

- (a) *The name and address of the petitioner;*
- (b) *A clear and concise statement of the regulation to be adopted, filed, amended or repealed;*
- (c) *The reason for the adoption, filing, amendment or repeal of the regulation; and*
- (d) *The legal authority for adoption, filing, amendment or repeal of the regulation.*

Hearing on Petition to Amend Regulations; Decision of Board

1. The Board will hear the petition requesting the adoption, filing, amendment or repeal of a regulation within 45 days after the petition is filed with the Board. No later than 15 days prior to the date of the hearing, the Administrator may file with the Board and serve upon the petitioner, at the name and address as stated in the petition, the Administrator's recommendation to the Board regarding the disposition of the petition.

2. After a hearing, the Board may refuse to review a petition which requests the adoption, filing, amendment or repeal of a regulation if:

- (a) *The petitioner has not provided seven copies of his petition;*
- (b) *The petition does not contain the information required by the preceding section;*
or
- (c) *The petitioner has not served a copy of the petition upon legal counsel for the Administrator by personal service or by registered mail, return receipt requested.*

3. In the event the Board determines that the requirements of subsection 1, above have been satisfied, the Board will proceed to hear the petition on its merits and take appropriate action, based upon the record developed before the Board after hearing. The burden of persuasion and proof by a preponderance of the evidence rests at all times with the petitioner. The hearing will be conducted consistent with these regulations, according to the Nevada Administrative Procedures Act. A relaxed version of the Nevada Rules of Evidence will apply.

4. Interested parties may file petitions to intervene provided application is made 20 days in advance of the hearing on the petition. Petitions to intervene must be filed in the same manner as the underlying petition and must be served upon legal counsel to the Administrator, at the time of filing. To be considered by the Board, the petition to intervene must set forth the basis for intervention and state the legal and factual basis for the position taken in intervention. Intervenors may not appear personally, but only through the intervention petition.

5. *In the event the Board declines to grant the petition, the Board shall notify the petitioner, Administrator, and intervenor(s), if any, by a written decision which briefly explains the Board's position and the reasons for the adverse decision.*

6. *In the event the petitioner or intervenor is dissatisfied with the decision of the Board, the petitioner or intervenor may seek judicial review based upon the record established before the Board by filing a petition for judicial review in the First Judicial District Court for the State of Nevada, in and for Carson City, within 30 days of service of the written decision from which the appeal is taken.*

7. *In the event the Board grants the petition and proceeds with the relief being sought, the process by which regulations may be amended will then be followed, commencing with a hearing to determine whether the proposed amendment to the regulations will have an adverse economic impact upon small employers, a notice of workshop concerning the proposed amendment to the regulations, and the workshop according to NRS 233B.010, "et. seq."*

Sec. 7. NAC 616B.770, supra, is hereby amended by adding thereto a new section to read as follows.

Definition of Written Record; Proof by Written Records; Retention

1. *For purposes of NRS 616B.578(4), the meaning of "written records" includes any written documentation generated in the ordinary course of business conducted by the injured worker's employer contemporaneous with the employee's hire or during the employee's continued employment.*

2. *An affidavit, letter, self-serving declaration or other written documentation that was prepared after the subsequent injury in contemplation of the employer's hearing on the application for reimbursement from the Account and which was not generated in the ordinary course of the employer's business will not satisfy the written record requirement of NRS 616B.557(4) for proof of the employer's knowledge of a permanent physical impairment defined by NRS 616B.557(3).*

3. *Excluding those records described in Section 2, above, the Board may consider in satisfaction of the written records requirement of NRS 616B.557(4), written documentation, regardless of its origin, which the employer of the injured worker can establish was a part of the employer's business records at the time the employer hired the injured worker or while the employer retained the injured worker in his employ.*

4. *The Board may consider any other written documentation in satisfaction of the written records requirement of NRS 616B.557(4), which the Board determines, provides an objective record of the employer's knowledge of the injured worker's permanent physical impairment defined by NRS 616B.557(3), at the time of hire or during the employee's continued employment.*

5. To satisfy the proof of knowledge by written records requirement of NRS 616B.557(4), the written records must show by a preponderance of the evidence that the employer knew when the injured worker was hired that the injured worker was already afflicted at the time of hire with a permanent physical impairment defined by NRS 616B.557(3), which then combines with the subsequent industrial injury to substantially increase the compensation paid the injured worker according to NRS 616B.557(1). Alternatively, the written records must show by a preponderance of the evidence that the employer knew, post-hire, while the injured worker was still working and employed by him, that the injured worker was already afflicted with a pre-existing permanent physical impairment defined by NRS 616B.557(3) and the employer continued the injured worker's employment, the knowledge of the pre-existing condition notwithstanding. The pre-existing condition about which proof of knowledge by written records is shown, must then combine with the subsequent injury to substantially increase the compensation paid the injured worker according to NRS 616B.557(1).

6. Discovery of the preexisting condition need not precede the occurrence of the subsequent injury, provided the injured worker is retained in employment after acquisition of knowledge of the preexisting impairment and the remaining provisions of NRS 616B.557 are met.

7. In the event that the injured worker's employment is interrupted due to the subsequent injury, the meaning of retention includes:

- (a) a return to the job-site and actual work with the same employer in the pre-injury position, with or without reasonable accommodation; or
- (b) a return to the job-site and actual work with the same employer in another regular position, provided there is proof the return to work was intended at the time to be a continuation of the employer-employee relationship in existence before the subsequent injury.

8. Examples of situations which ordinarily would not rise to the level of retention include, but are not limited to:

- (a) a return to work in a temporary, light duty position;
- (b) a return to work in a "make work" job of a menial, temporary nature; and
- (c) salary continuation without actual work.

9. The Board may consider on the issue of retention other information in written form generated in the ordinary course of the employer's business to show that the injured worker, in fact, returned to work under circumstances in furtherance of the purpose of the Account which includes incentivizing employers to hire or continue employing workers by spreading the risk in the event of a subsequent industrial injury for those otherwise eligible employers who hire or retain a worker with knowledge of the worker's preexisting permanent physical impairment.

Sec. 8. NAC 616B.770, supra, is hereby amended by adding thereto a new section to read as follows.

Lump Sum Reimbursement; Criterion; Authorization

1. Provided the requirements of NRS 616B.557 have been met, the Board for the Administration of the Subsequent Injury Account for Self-Insured Employers may allow reimbursement from the Account for the commutation of benefits in the form of lump sum buy outs using the following criterion:

- (a) For a permanent partial disability lump sum buy out, whether the provisions of NRS 616C.495 have been met;***
- (b) For a vocational rehabilitation lump sum buy out, whether the provisions of NRS 616C.590 and NRS 616C.595 have been met;***
- (c) In all cases, whether the lump sum buy out is reasonable as required by NRS 616D.120 and, therefore, in the best interests of the injured worker and will result in a lump sum buy out, where the right to compensation paid the injured worker will be extinguished, thereby eliminating any contingent future liability against the Account; and***
- (d) Whether the compensation paid was due.***

2. The Board will not authorize reimbursement from the Account when Board finds that the underlying transaction is a lump sum buy out prohibited by NRS 616C.410.

3. The Board may consider any other information that it deems relevant to the determination of reimbursement for the lump sum payment including the application of any other pertinent State law or regulation raised by the application for reimbursement.

4. The Board may not reimburse for contingent payments. Only lump sums already paid may be reimbursed by the Board.

Sec. 9. NAC 616B.7702 is hereby amended to read as follows:

NAC 616B.7702 Submission of Claim. (NRS 616A.400, 616B.554, 616B.557, NRS 616B.560)

1. A claim against the Subsequent Injury Account for Self-Insured Employers established pursuant to NRS 616B.554 must be submitted in writing ~~to~~ **and served upon** the Administrator for evaluation by the Board.

2. ~~[(A self-insured employer who submits a claim pursuant to subsection 1 shall include)]~~ **To submit a claim to the Board, the applicant must:**

- (a) Include with the claim:***
~~[(a) —The information]~~ ***a fully completed copy of the form entitled "D-37, Insurer's Subsequent Injury Checklist" that is prescribed by the Administrator;***
- (b) Organize the claim in the manner prescribed in form D-37; and***

- (c) *Include with the claim all information which is* necessary to establish that the claim should be paid from the ~~Subsequent Injury~~ Account ~~for Self-Insured Employers, including~~. *Such information must include, without limitation,* the medical records of the *injured* employee who is the subject of the claim ~~and~~
(b) ~~A completed copy of the form entitled "D-37, Insurer's Subsequent Injury Checklist" which is prescribed by the Administrator. A copy of the form~~.

3. *A copy of form D-37* may be obtained from the Administrator at no cost.

~~3. A claim submitted to the Administrator pursuant to subsection 1 must be organized in the manner prescribed in part 5 of Form D-37, Insurer's Subsequent Injury Checklist.~~

4. A self-insured employer who submits a claim pursuant to subsection 1 shall, upon the request of the Administrator:

- (a) Allow the Administrator to inspect the records maintained by the self-insured employer concerning the claim; or
- (b) Provide copies of those records to the Administrator.

5. *The provisions of this section do not affect the authority of the Administrator to obtain additional information related to the claim from the employer or any other source after the claim is deemed to be completed.*

6. *The Administrator need not process incomplete applications or applications that are not in compliance with form D-37 and may return the deficient application to the applicant.*

Sec. 10. NAC 616B.7704 is hereby amended to read as follows:

NAC 616B.7704 *Written Recommendation of Administrator* ~~concerning acceptance or denial of claim or related expenses~~; *Requirements*. (NRS 616A.400, 616B.554, 616B.557, *NRS 616B.560*)

1. Within ~~45~~60 days after a claim is submitted to the Administrator pursuant to NAC 616B.7702, the Administrator shall:

- (a) Submit to the Board his recommendation concerning the acceptance or denial of:
 - (1) The claim; and
 - (2) The self-insured employer's expenses related to the claim; and
- (b) Notify the self-insured employer who submitted the claim of that recommendation.

2. The Administrator shall ~~submit~~*include* with his recommendation ~~the information necessary for the Board to evaluate the claim and the expenses related to the claim.~~;

- (a) A statement of the issues of fact and law upon which the Administrator bases his recommendation;*
- (b) A copy of each document that was served to or obtained by the Administrator pursuant to NAC 616B.7702 and upon which the Administrator bases his recommendation; and*
- (c) A list of each witness, if any, whom the Administrator would likely call before the Board to support his recommendation, if contested.*

3. Upon receipt of the Administrator's recommendation and exercising its plenary authority, the Board will approve or disapprove in whole or in part:

- (a) Each claim made against the Account by an employer, if the claim is completed by the employer pursuant to the requirements set forth in this section; and*
- (b) Any expenses of the employer related to each such claim that the Administrator has verified pursuant to the provisions of NAC 616B.707.*