

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

LCB File No. R100-08

April 1, 2011

EXPLANATION – Matter in *italics* is new; matter in brackets ~~[omitted material]~~ is material to be omitted.

AUTHORITY: §§1-3 and 8-19, NRS 616B.554 and 616B.557; §§4 and 5, NRS 233B.100; §§6 and 7, NRS 233B.120.

A REGULATION relating to industrial insurance; authorizing reimbursement from the Subsequent Injury Account for Self-Insured Employers for the purchase of an annuity or payment of a lump sum; revising provisions governing the rating of permanent physical impairments; providing for petitions to the Board for the Administration of the Subsequent Injury Account for Self-Insured Employers to adopt, amend or repeal regulations; providing for petitions to the Board for the issuance of a declaratory order or advisory opinion concerning the applicability of a statute, regulation or decision of the Board; providing procedures for service upon self-insured employers, the Administrator of the Division of Industrial Relations of the Department of Business and Industry and the Board; amending provisions governing requests for continuances; and providing other matters properly relating thereto.

Section 1. Chapter 616B of NAC is hereby amended by adding thereto the provisions set forth as sections 2 to 15, inclusive, of this regulation.

Sec. 2. *1. A self-insured employer who purchases an annuity to satisfy, in whole or in part, a claim for a subsequent injury approved by the Board may apply to the Board for reimbursement from the Subsequent Injury Account for Self-Insured Employers for the purchase of the annuity.*

2. Except as otherwise provided in subsection 3, if the Board approves an application for reimbursement submitted pursuant to subsection 1, the self-insured employer may be

reimbursed from the Subsequent Injury Account for Self-Insured Employers in an amount not to exceed the amount of compensation received by the injured employee from the annuity. The self-insured employer may seek reimbursement annually on the anniversary date of the purchase of the annuity, or more frequently with good cause shown, but the aggregate amount of reimbursement paid to the self-insured employer must not, at any time, exceed the aggregate amount of the compensation that has been received by the injured employee from the annuity.

3. The Board will not approve an application for reimbursement submitted pursuant to subsection 1 for:

- (a) Any amount which, when added to the amount of any reimbursement already paid, exceeds the purchase price of the annuity;*
- (b) Attorney's fees relating to the purchase of the annuity; or*
- (c) Any administrative expenses or other expenses relating to the purchase of the annuity, including, without limitation, expenses for the copying of records.*

4. As used in this section, "good cause" includes, without limitation, a financial exigency or extraordinary circumstance acceptable to the Board.

Sec. 3. 1. *For the purpose of determining whether a preexisting injury is a permanent physical impairment:*

- (a) If the preexisting injury of an employee arose out of and in the course of his or her employment and the employee has been assigned a permanent physical impairment rating which is no longer appealable, the Board may choose to accept the rating for the preexisting injury if the rating was assigned based on the American Medical Association's Guides to the*

Evaluation of Permanent Impairment in effect on the date on which the preexisting injury was rated;

(b) If a claim against the Subsequent Injury Account for Self-Insured Employers has been submitted to the Board but the preexisting injury has not been rated, the Board may choose not to make a ruling on the claim until a determination has been made concerning the preexisting injury in accordance with the American Medical Association's Guides to the Evaluation of Permanent Impairment in effect on the date on which the subsequent injury is rated; and

(c) If a claim against the Subsequent Injury Account for Self-Insured Employers has been submitted to the Board and a rating has been assigned to a preexisting injury but the rating is not deemed final, the Board may choose not to make a ruling on the claim until the rating has been finalized in accordance with the American Medical Association's Guides to the Evaluation of Permanent Impairment in effect on the date on which the preexisting injury is evaluated.

2. The Board is not bound by any agreement between an injured employee and a self-insured employer concerning:

(a) The rating of permanent impairment assigned to a preexisting condition or a subsequent injury;

(b) Which version of the American Medical Association's Guides to the Evaluation of Permanent Impairment should be used to assign a rating of permanent impairment to a preexisting condition or subsequent injury; or

(c) Apportionment of the percentage of disability between the preexisting condition and the subsequent injury.

Sec. 4. 1. *An interested person may petition the Board to adopt, amend or repeal a regulation governing the administration of the Subsequent Injury Account for Self-Insured Employers by the Board.*

2. A petition filed pursuant to this section must include:

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

3. The original petition and seven copies of the petition must be filed with the Board by:

- (a) Personal service;*
- (b) Certified mail, return receipt requested; or*
- (c) Registered mail.*

4. Not later than 5 days after the petition is filed with the Board, the petitioner shall serve a copy of the petition on the Administrator by:

- (a) Personal service;*
- (b) Certified mail, return receipt requested; or*
- (c) Registered mail.*

Sec. 5. 1. *Except as otherwise provided in subsection 2, the Board will hold a hearing to consider a petition filed with the Board pursuant to section 4 of this regulation not later than 45 days after the petition is filed.*

2. The Board may refuse to hold a hearing on a petition that does not satisfy the requirements of section 4 of this regulation.

3. If the Board schedules a hearing on a petition filed pursuant to section 4 of this regulation, the Administrator may file with the Board a recommendation concerning the disposition of the petition not later than 15 days before the date of the hearing. Upon filing a recommendation with the Board, the Administrator shall serve a copy of the recommendation on the petitioner.

4. A person other than the petitioner who believes that he or she may be directly and substantially affected by the hearing may seek an order for leave to intervene in the hearing by filing a written motion to intervene with the Board. The motion to intervene must set forth the legal and factual bases for the belief that the person may be directly and substantially affected by the hearing. The motion must be filed with the Board not later than 20 days before the date of the hearing by:

- (a) Personal service;*
- (b) Certified mail, return receipt requested; or*
- (c) Registered mail.*

5. The Board may consider a motion to intervene filed with the Board pursuant to subsection 4, but the person seeking to intervene does not have a right to appear as a party before the Board.

6. In a hearing on a petition filed pursuant to section 4 of this regulation, the Board is not bound by the technical rules of evidence, and any informality in the proceeding or in the manner of taking testimony does not invalidate any order, decision, ruling or regulation made, approved or confirmed by the Board. The rules of evidence of courts of this State will be followed generally, but may be relaxed at the discretion of the Board if deviation from the technical rules of evidence will aid in determining the facts.

7. After the hearing, the Board will serve written notice of its decision on the petitioner, the Administrator and any intervenor. The notice of the decision will include a brief statement of the Board's decision and reasons supporting the decision.

8. If the Board grants a petition to adopt, amend or repeal a regulation, the Board will adopt, amend or repeal the regulation in accordance with the provisions of chapter 233B of NRS.

9. If the petitioner or an intervenor is dissatisfied with the decision of the Board, the petitioner or intervenor may seek judicial review of the decision in the District Court for the First Judicial District of the State of Nevada in and for Carson City not later than 30 days after service of notice of the decision on the petitioner or intervenor.

Sec. 6. *1. Except as otherwise provided in subsection 5, any interested person may petition the Board for the issuance of a declaratory order or advisory opinion concerning the applicability of a statute, regulation or decision of the Board.*

2. A petition filed pursuant to this section must include:

(a) The name and mailing address of the petitioner;

(b) The reason for the petition and a statement of the facts and law supporting the petition;

and

(c) A clear and concise statement of the question to be decided by the Board and the relief sought by the petitioner.

3. The original petition and seven copies of the petition must be filed with the Board by:

(a) Personal service;

(b) Certified mail, return receipt requested; or

(c) Registered mail.

4. Not later than 5 days after the petition is filed with the Board, the petitioner shall serve a copy of the petition on the Administrator by:

- (a) Personal service;*
- (b) Certified mail, return receipt requested; or*
- (c) Registered mail.*

5. A person may not petition the Board for the issuance of a declaratory order or advisory opinion concerning the applicability of a statute, regulation or decision of the Board if the applicability of the statute, regulation or decision of the Board is at issue in any administrative, civil or criminal proceeding in which the person is a party.

Sec. 7. *1. The Administrator may file with the Board a response concerning the disposition of a petition filed with the Board pursuant to section 6 of this regulation not later than 45 days after service of the petition on the Administrator. Not later than 5 days after filing a response with the Board, the Administrator shall serve a copy of the response on the petitioner.*

2. After providing written notice to the petitioner and the Administrator, the Board may:

- (a) Refuse to consider the petition if it does not satisfy the requirements of section 6 of this regulation.*
- (b) Conduct an informal hearing to determine any preliminary matters that might expedite the disposition of the petition and issue reasonable orders that govern the conduct of a hearing on the merits of the petition.*
- (c) Request that the petitioner submit additional information or arguments concerning the petition and allow the Administrator to file a response to any such additional information and*

arguments. Upon filing a response with the Board, or at such other time as may be prescribed by the Board, the Administrator shall serve a copy of the response on the petitioner.

(d) Enter any reasonable order to assist in the review of the petition.

(e) In reaching a decision, consider any other decisions issued by the Board which are relevant to the interpretation of the statute, regulation or decision in question.

(f) Conduct a formal hearing on the petition.

(g) After a formal hearing, issue a declaratory order or advisory opinion based upon the entire record developed before the Board.

3. Not later than 30 days after the Board issues a declaratory order or advisory opinion pursuant to this section, the Board will serve a copy of the declaratory order or advisory opinion on the petitioner and the Administrator.

4. The Board will maintain a record that is indexed by subject matter of each declaratory order or advisory opinion issued by the Board.

5. If the petitioner is dissatisfied with the decision of the Board, the petitioner may seek judicial review of the decision in the District Court for the First Judicial District of the State of Nevada in and for Carson City not later than 30 days after service of the copy of the declaratory order or advisory opinion on the petitioner.

Sec. 8. *A claim against the Subsequent Injury Account for Self-Insured Employers must include, without limitation, the name of the person designated to accept service on behalf of the applicant and the address and any facsimile number and electronic mail address at which the person may be served with notices, pleadings and other documents. Except as otherwise provided in section 10 of this regulation, all notices, pleadings and other documents,*

including, without limitation, any recommendation of the Administrator, must be served on the person designated in the claim.

Sec. 9. *At the time the Administrator determines that a claim against the Subsequent Injury Account for Self-Insured Employers is complete and submits a recommendation to the Board, the Administrator shall serve on the person designated in the claim pursuant to section 8 of this regulation a copy of the recommendation, a copy of each document and record upon which the Administrator primarily relied in making the recommendation and a list of the witnesses whom the Administrator may call to testify in support of the recommendation.*

Sec. 10. 1. *An applicant who is represented by legal counsel or a lay advocate shall, by service on the Board and the Administrator, provide notice of the name and business address of the legal counsel or lay advocate and any facsimile number and electronic mail address at which the legal counsel or lay advocate may be served with documents and pleadings.*

2. *If an applicant has provided such notice, all documents and pleadings must thereafter be served only on the designated legal counsel or lay advocate unless the applicant provides written notice to the Board and the Administrator of a change in representation.*

Sec. 11. *Service on the Board of any filing, pleading, notice or other document required by NAC 616B.770 to 616B.7714, inclusive, and sections 2 to 15, inclusive, of this regulation must be made on the legal counsel for the Board. If the Board does not have legal counsel, service must be made on the Chair of the Board in care of the Administrator.*

Sec. 12. *Except for the submission of a claim for reimbursement against the Subsequent Injury Account for Self-Insured Employers pursuant to NAC 616B.7702, service on the Administrator of any filing, pleading, notice or other document required by NAC 616B.770 to*

616B.7714, inclusive, and sections 2 to 15, inclusive, of this regulation must be made on the legal counsel for the Administrator.

Sec. 13. *1. Except as otherwise provided by specific regulation, service of any filing, pleading, notice or other document required by the provisions of NAC 616B.770 to 616B.7714, inclusive, and sections 2 to 15, inclusive, of this regulation may be made by hand delivery, first-class mail, electronic mail or facsimile.*

2. Service by hand delivery shall be deemed complete upon the delivery of the document to the person on whom service is to be made, to a person of suitable age and discretion and authority to accept service at the business address of the person on whom service is to be made or to a person of suitable age and discretion at the dwelling house or usual place of abode of the person on whom service is to be made.

3. Service by first-class mail shall be deemed complete 3 days after the date on which the document is correctly addressed and mailed to the business address, dwelling house or usual place of abode of the person on whom service is to be made.

4. Service by electronic mail shall be deemed complete upon successful transmission of the electronic mail to the electronic mail address of:

(a) The person on whom service is to be made which is provided pursuant to section 8 or 10 of this regulation; or

(b) The legal counsel or Administrator of the Board if service is made pursuant to section 11 of this regulation.

5. Service by facsimile shall be deemed complete upon successful transmission of the facsimile to the facsimile number of:

(a) The person on whom service is to be made which is provided pursuant to section 8 or 10 of this regulation; or

(b) The legal counsel or Administrator of the Board if service is made pursuant to section 11 of this regulation.

Sec. 14. *1. Except as otherwise provided in subsection 2, as used in NRS 616B.557, the Board will interpret the term “written records” to include any written documentation kept in the ordinary course of business by the employer contemporaneously with the hiring of the injured employee or during the continued employment of the injured employee by the employer. The Board may consider any other written documentation if the Board determines that the written documentation constitutes an objective record of the employer’s knowledge of the injured employee’s preexisting permanent physical impairment at the time the employer hired the injured employee or during the continued employment of the injured employee at any time before the employee suffered the subsequent injury.*

2. An affidavit, letter, self-serving declaration or other document prepared after the subsequent injury and in contemplation of a claim against the Subsequent Injury Account for Self-Insured Employers will not satisfy the requirement of proof of the employer’s knowledge that the injured employee suffered from a preexisting permanent physical impairment.

3. To satisfy the requirement set forth in subsection 4 of NRS 616B.557 that the self-insured employer establish by written records that the employer had knowledge of the preexisting permanent physical impairment of the injured employee, the employer must establish by a preponderance of evidence that the written records show that:

(a) The employer had knowledge of the permanent physical impairment of the injured employee at the time the injured employee was hired; or

(b) The employer became aware of the permanent physical impairment of the injured employee after the employee was hired and while the employee was still employed and that the employer continued to employ the employee notwithstanding the employer's knowledge of the permanent physical impairment.

4. In determining whether an employer retained an injured employee after acquiring knowledge of the employee's preexisting permanent physical impairment, the Board may consider any evidence and any written documentation generated in the ordinary course of the business of the employer which establishes that the injured employee returned to work under circumstances in furtherance of the purposes of the Subsequent Injury Account for Self-Insured Employers, including, without limitation, providing incentives to employers to hire or retain employees with the knowledge of the permanent physical impairments of the employees.

5. For the purposes of this section, the Board will find that an employer retained an injured employee if:

(a) The injured employee returned to the job site and performed work with the same employer in the same position as before the injury, with or without reasonable accommodation; or

(b) The injured employee returned to the job site and performed work with the same employer in another regular position, provided that the employer establishes that the return to work was intended at the time to be a continuation of the employment relationship existing before the subsequent injury.

6. For the purposes of this section, unless the employer provides evidence to satisfy the Board that a work assignment was made with the intent of restoring an injured worker to his

or her previous position with the employer or to another, regular position with the employer, the Board will find that the employer did not retain the injured employee if:

- (a) The injured employee returned to work in a temporary, light-duty position;*
- (b) The injured employee returned to work in a make-work job consisting of menial tasks;*

or

(c) The injured employee returned to any other work assignment which appears short-term in duration and which does not appear to be a genuine attempt to restore the injured worker to a regular position with the employer.

Sec. 15. 1. *Except as otherwise provided in this section or by specific statute, the Board may allow reimbursement from the Subsequent Injury Account for Self-Insured Employers for the commutation of benefits in the form of a lump-sum payment if:*

- (a) The applicant meets the requirements of NRS 616B.557;*
- (b) The compensation paid was due;*
- (c) The lump-sum payment is reasonable, in the best interest of the injured employee and will eliminate any contingent future liability against the Subsequent Injury Account for Self-Insured Employers; and*

(d) The lump-sum payment:

(1) Meets the requirements of NRS 616C.495, if being made for a permanent partial disability; or

(2) Meets the requirements of NRS 616C.590 or 616C.595, if being made for vocational rehabilitation services.

2. *The Board will not allow reimbursement from the Subsequent Injury Account for Self-Insured Employers for any transaction prohibited by NRS 616C.410.*

3. The Board will not allow reimbursement from the Subsequent Injury Account for Self-Insured Employers unless the lump-sum payment has been made to the injured employee.

4. In considering whether to allow reimbursement from the Subsequent Injury Account for Self-Insured Employers for the commutation of benefits in the form of a lump-sum payment, the Board may consider any information that it deems relevant, including, without limitation, the application of any statute or regulation.

Sec. 16. NAC 616B.770 is hereby amended to read as follows:

616B.770 As used in NAC 616B.770 to 616B.7714, inclusive, *and sections 2 to 15, inclusive, of this regulation*, unless the context otherwise requires, “Board” has the meaning ascribed to it in NRS 616B.545.

Sec. 17. NAC 616B.7702 is hereby amended to read as follows:

616B.7702 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 on* the Administrator for evaluation by the Board.

2. A self-insured employer who submits a claim pursuant to subsection 1 shall : ~~include with the claim:~~

(a) ~~The~~ *Include with the claim all* information necessary to establish that the claim should be paid from the Subsequent Injury Account for Self-Insured Employers, including the medical records of the *injured* employee who is the subject of the claim; ~~and~~

(b) ~~A~~ *Include with the claim 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 may be obtained from the Administrator at no cost.] ; and~~

(c) Organize the claim in the manner prescribed by Form D-37.

3. A ~~claim submitted to the Administrator pursuant to subsection 1 must be organized in the manner prescribed in part 5 of]~~ *copy of* Form D-37 ~~[, Insurer's Subsequent Injury Checklist,]~~ *may be obtained from the Administrator at no cost.*

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 Administrator may refuse to process a claim that is incomplete or does not conform to the requirements of Form D-37. If the Administrator refuses to process a claim, the Administrator shall return the claim to the applicant.

6. This section does not prohibit or limit the Administrator from requiring or obtaining from the self-insured employer or any other person any additional information relating to the claim.

Sec. 18. NAC 616B.7704 is hereby amended to read as follows:

616B.7704 1. ~~[Within 45]~~ *Not later than 60* days after a claim is submitted to the Administrator pursuant to NAC 616B.7702, the Administrator shall:

(a) Submit to the Board a 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 the recommendation the information necessary for the Board to evaluate the claim and the expenses related to the claim ~~[-]~~, *including, without limitation:*

(a) A statement of the issues of fact and law upon which the recommendation of the Administrator is based;

(b) A copy of each document primarily relied upon by the Administrator in making the recommendation; and

(c) A list of the witnesses who may testify before the Board in support of the recommendation of the Administrator.

3. *Upon receipt of the recommendation of the Administrator, the Board will approve or disapprove in whole or in part:*

(a) Each claim made against the Subsequent Injury Account for Self-Insured Employers by a self-insured employer; and

(b) Any expenses of the self-insured employer relating to the claim and verified by the Administrator.

Sec. 19. NAC 616B.7706 is hereby amended to read as follows:

616B.7706 1. If the Board denies a claim or any of the expenses related to the claim, the self-insured employer who submitted the claim may request a hearing before the Board by filing a written request with the Board's legal counsel within 30 days after the Board's ~~attorney~~ *legal counsel* notifies the self-insured employer of the decision of the Board.

2. The Board will conduct the hearing within 45 days after the request for a hearing is filed with the Board's legal counsel unless the Board grants a continuance. The Board may grant a

continuance upon its own motion or, for good cause shown, upon the request of the Administrator or the self-insured employer who submitted the claim.

3. A request for a continuance must:

- (a) Be in writing;*
- (b) State the reasons supporting the request;*
- (c) Include a statement of any extensions of time or continuances previously granted;*
- (d) Be filed by service on the Board; and*
- (e) Absent extraordinary circumstances or a finding of excusable neglect by the Board, be filed not later than 3 days before the date of the hearing.*

4. If the Board considers a request for a continuance and:

- (a) The self-insured employer has submitted a claim for reimbursement to the Administrator;*
- (b) The Administrator has completed a review of the claim and related information; and*
- (c) The Administrator has made a recommendation regarding the claim to the Board,*
↪ there is a rebuttable presumption that the self-insured employer has given the Administrator all the information which the self-insured employer believes is necessary to support the claim and that the self-insured employer is ready for disposition of the claim.