

**PROPOSED REGULATION OF THE
DIVISION OF INDUSTRIAL RELATIONS OF
THE DEPARTMENT OF BUSINESS AND INDUSTRY**

LCB File No. R060-12

**WORKERS' COMPENSATION SECTION FOR THE ADMINISTRATION OF THE
SUBSEQUENT INJURY ACCOUNT FOR PRIVATE CARRIERS**

April __, 2012

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

NRS 616B.584, 616B.587 AND 616B.590; NRS 233B.100; NRS 233B.120.

A REGULATION relating to industrial insurance; authorizing reimbursement from the Subsequent Injury Account for Private Carriers revising provisions governing the rating of permanent physical impairments; providing procedures for service upon the private carrier or designated agent, the Administrator of the Division of Industrial Relations of the Department of Business and Industry; 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 10, inclusive, of this regulation.

Sec. 2. 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 Administrator 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 Private Carriers has been submitted to the Administrator but the preexisting injury has not been rated, the

Administrator 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 Private Carriers has been submitted to the Administrator and a rating has been assigned to a preexisting injury but the rating is not deemed final, the Administrator 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 Administrator is not bound by any agreement between an injured employee and a private carrier 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. 3. *A claim against the Subsequent Injury Account for Private Carriers made pursuant to NRS 616B.587 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 5 of this regulation, all notices, pleadings and other documents, including, without limitation, any recommendation of the Administrator, will be served on the person designated in the claim.

Sec. 4 1. *At the time the Administrator determines that a claim against the Subsequent Injury Account for Private Carriers is complete, and the claim for reimbursement has been accepted, in whole or in part, the Administrator shall serve on the person designated in the claim pursuant to sections 3 and 5 of this regulation a copy of the determination and a list of the witnesses whom the Administrator may call to testify in support of the determination.*

2. If the claim has been denied, in whole or in part, the Administrator shall serve on the person designated in the claim pursuant to sections 3 and 5 of this regulation, a copy of the determination and a copy of each document and record upon which the Administrator primarily relied in making the determination and a list of the witnesses whom the Administrator may call to testify in support of the determination.

Sec. 5. 1. *An applicant who is represented by legal counsel or a lay advocate shall, by service on the Administrator, provide notice of the name and business address of 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 will thereafter be served only on the designated legal counsel or lay advocate unless the applicant provides written notice to the Administrator of a change in representation.

Sec. 6. *Except for the submission of a claim for reimbursement against the Subsequent Injury Account for Private Carriers pursuant to NAC 616B.760, service on the Administrator of any*

filing, pleading, notice or other document required by NAC 616B.760 to 616B.766, inclusive, and section 7 of this regulation must be made on the legal counsel for the Administrator.

Sec. 7 1. *Except as otherwise provided by specific regulation, service of any filing, pleading, notice or other document required by the provisions of NAC 616B.760 to 616B.766, inclusive, 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 sections 3 and 5 of this regulation; or

(b) The Administrator or legal counsel of the Administrator, if service is made pursuant to section 6 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 sections 3 and 5 of this regulation; or

(b) The Administrator, or legal counsel of the Administrator, if service is made pursuant to section 6 of this regulation.

Sec. 8. 1. Except as otherwise provided in subsection 2 hereof, as used in NRS 616B.587, the Administrator interprets 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 Administrator may consider any other written documentation if the Administrator 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 for which reimbursement is sought.

2. An affidavit, letter, declaration or other document prepared after the subsequent injury and in contemplation of a claim against the Subsequent Injury Account for Private Carriers may 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.587 that the private carrier establish by written records that the employer had knowledge of the preexisting permanent physical impairment of the injured employee, the private carrier must establish by a preponderance of evidence that the contemporaneous 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 Administrator 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 Private Carriers, 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 Administrator may 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 private carrier provides evidence to satisfy the Administrator 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 Administrator 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. 9 1. *Subsection 3 of NRS 616B.587, when read in conjunction with the other subsections of NRS 616B.587, creates a threshold requirement that cannot be satisfied by adding the permanent impairment rating for two or more body parts, organ systems or organ function to reach a six percent whole person impairment rating. A condition is not a “permanent physical impairment” unless it would support a rating of permanent impairment of six percent or more of the whole person if evaluated according to the American Medical Association's Guides to the Evaluation of Permanent Impairment.*

2. The American Medical Association's Guides to the Evaluation of Permanent Impairment defines impairment as “a loss of use, or derangement of any body part, organ system or organ function.” A permanent impairment is defined as “an impairment that has reached maximum medical improvement, meaning it is well stabilized and unlikely to change substantially in the next year with or without medical treatment.”

3. The Combined Values Chart of the American Medical Association's Guides to the Evaluation of Permanent Impairment states; “If impairments from two or more organ systems are to be combined to express a whole-person impairment, each must first be expressed as a

whole-person impairment percent.” The term “impairment” is plainly used to refer to a singular body part and “impairments” to refer to multiple body parts.

4. The Administrator will use the American Medical Association's Guides to the Evaluation of Permanent Impairment as a reference for determining the definition of a six percent pre-existing permanent physical impairment requirement contained in NRS 616B.587. Multiple body parts unrelated to the subsequent injury, will not be considered as one impairment, and each body part, organ system or organ will have to satisfy the definition a “permanent physical impairment” in order for all body parts under a subsequent injury claim to qualify for reimbursement.

Sec. 10. 1. *Except as otherwise provided in this section or by specific statute, the Administrator may allow reimbursement from the Subsequent Injury Account for Private Carriers for the commutation of benefits in the form of a lump-sum payment if:*

(a) The applicant meets the requirements of NRS 616B.587;

(b) The compensation paid was due;

(c) A 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 Private Carriers; and

(d) A 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 NRS 616C.595, if being made for vocational rehabilitation services.

2. The Administrator will not allow reimbursement from the Subsequent Injury Account for Private Carriers for any payment prohibited by NRS 616C.410.

3. The Administrator will not allow reimbursement from the Subsequent Injury Account for Private Carriers 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 Private Carriers for the commutation of benefits in the form of a lump-sum payment, the Administrator may consider any information that it deems relevant, including, without limitation, the application of any statute or regulation.

Sec. 11. NAC 616B.010 is hereby amended to read as follows:

1. Except as otherwise provided in NAC 616B.013, copies of all claim files maintained by an insurer, third-party administrator or organization for managed care pursuant to chapters 616A to 617, inclusive, of NRS or regulations adopted pursuant thereto must be maintained in one of its offices located in this State.

2. *Every Form C-4 submitted to an insurer or third-party administrator that concerns a claim for compensation that is being administered pursuant to chapters 616A to 617, inclusive, of NRS or regulations adopted pursuant thereto must be addressed to the insurer or third-party administrator at one of its offices located in this State.* All *other* correspondence and other documents submitted to an insurer, third-party administrator or organization for managed care that concern a claim for compensation that is being administered pursuant to chapters 616A to 617, inclusive, of NRS or regulations adopted pursuant thereto must be addressed to the insurer, third-party administrator or organization for managed care at one of its offices located in this State~~[,]~~, *or to a facility outside this State for the sole purpose of*

electronic scanning of documents to the claim file. The correspondence and documents shall be deemed to be officially received only if they have been so addressed.

Sec. 12. NAC 616B.760 is hereby amended to read as follows:

616B.760 1. A claim against the Subsequent Injury Account for Self-Insured Employers established pursuant to NRS 616B.587 or 616B.590 must be submitted in writing to the Administrator.

2. A private carrier who submits a claim pursuant to subsection 1 shall: ~~include with the claim;~~

(a) ~~The~~ *Include with the claim* all documents contained in the file of the claim and any other supporting documents that the private carrier relies upon or deems important for the determination 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~~ *completed copy of Form D-37 must be included with the request for reimbursement. A copy of Form D-37* ~~[Insurer's Subsequent Injury Checklist.] may be obtained from the Administrator at no cost.~~

4. 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 claim shall be returned to the applicant with an explanation of why the claim is incomplete, pursuant to sections 3 and 5 of this regulation.

5. This section does not prohibit or limit the Administrator from requiring or obtaining from the private carrier, or any other person, any additional information relating to the claim.

Sec. 13. NAC 616B.763 is hereby amended to read as follows:

616B.763 1. The Administrator will not consider ~~[the following expenditures to be]~~ expenditures for claims for which a Private Carrier may receive reimbursement from the Subsequent Injury Account for Private Carriers *if such expenditures are not authorized in NAC 616B.707* ~~;~~

~~(a) Amounts held in reserve for any anticipated expense in connection with a claim;~~

~~(b) Money paid in excess of the compensation calculated pursuant to NRS 616C.440, 616C.475, 616C.490, or 616C.500 or NAC 616C.577 for a temporary total, temporary partial, permanent total, or permanent partial disability or vocational rehabilitation maintenance.~~

~~(c) Legal expenses, including, without limitation, court costs, attorney's fees, costs for depositions, investigations or hearings.~~

~~(d) Payment of an award of interest.~~

~~(e) Administrative expenses, including, without limitation, expenses incurred for:~~

~~(1) Copying records;~~

~~(2) Reviewing any report of a physician or chiropractor contained in a file relating to a claim; or~~

~~(3) Services relating to the management of costs of medical care.~~

~~(f) Costs incurred in a claim that is ultimately denied.]~~

2. The value of accident benefits furnished by a private carrier for industrial injuries or illnesses must be computed and reported pursuant to the schedule of fees and charges for

accident benefits adopted pursuant to subsection 2 of NRS 616C.260 *in effect at the time the payments were made.*

Sec. 14. NAC 616B.766 is hereby amended to read as follows:

616B.766 1. The Administrator will examine a claim against the Subsequent Injury Account for Private Carriers and not later than ~~[90]~~ *120* days after ~~[his]~~ receipt of the claim will *notify the private carrier of the disposition of the claim according to sections 3 and 5 of this regulation.* ~~;~~

~~(a) Notify the private carrier that a determination on the claim cannot be made and reasons therefore.;~~ ~~or~~

~~[Notify the private carrier of the acceptance or denial of the claim; and]~~

~~[(c) If the claim is accepted, notify the private carrier of the verified amount of reimbursement and that the claim will be processed for payment by the State Controller.]~~

2. An appeal from a determination of the Administrator concerning a claim against the Subsequent Injury Account for Private Carriers must be made in writing and sent directly to the *Department of Administration Appeals Office* ~~[appeals officer]~~ within 30 days after the date of the Administrator's determination.

Sec. 15. NAC 616C.082 is hereby amended to read as follows:

1. An insurer, third-party administrator or organization for managed care shall ensure that all documents concerning claims that it receives pursuant to chapters 616A to 617, inclusive, of NRS or regulations adopted pursuant thereto indicate *on the front of the document* the date of receipt *utilizing manual or electronic date stamp by the entity receiving the document.*

2. All claims filed with the insurer, third-party administrator or organization for managed care pursuant to subsection 1 and all documents concerning such claims must be acted upon in the chronological order of their filings, insofar as possible.

3. All documents which constitute the record of a claim filed with the insurer, third-party administrator or organization for managed care pursuant to subsection 1, including investigative reports, medical reports, and records evidencing payments of benefits, compensation or awards, remain the property of the insurer.

Sec. 16. NAC 616C.1162 is hereby amended to read as follows:

1. If an insurer or employer requests that an injured employee who has filed a claim for compensation submit to a medical examination pursuant to NRS 616C.140, the insurer or employer shall notify the injured employee, in writing, of the time and place of the medical examination:

(a) At least 10 days before the date of the medical examination, if the employee resides within the state in which the medical examination will be conducted; or

(b) At least 15 days before the date of the medical examination, if the employee resides outside of the state in which the medical examination will be conducted~~[]~~, *unless the advance notification specified in subsection (a) or subsection (b) has been waived by the injured employee or his representative. This waiver must be confirmed in writing, sent to the injured employee or his representative and documented in the claim file.*

2. An insurer that requests an injured employee to submit to a medical examination pursuant to NRS 616C.140 shall provide a copy of the written notification required pursuant to subsection 1 to the employer of the injured employee at the same time at which written notification is provided to the injured employee.

3. An employer that requests an injured employee to submit to a medical examination pursuant to NRS 616C.140 shall provide a copy of the written notification required pursuant to

subsection 1 to the insurer of the employer at the same time at which written notification is provided to the injured employee.