

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

LCB File No. R132-14

August 6, 2014

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

AUTHORITY: §§1-10, 12 and 13, NRS 616A.400, 616B.584, 616B.587 and 616B.590; §§11 and 15, NRS 616A.400; §14, NRS 616A.400, 616B.584 and 616B.587.

A REGULATION relating to industrial insurance; establishing guidelines for acceptance of ratings for permanent physical impairment and rulings on claims against the Subsequent Injury Account for Private Carriers; establishing requirements for service of certain documents on or by claimants; establishing certain methods of proving an employer's knowledge of an employee's preexisting permanent physical impairment; establishing guidelines for determining a permanent physical impairment; providing for the reimbursement of certain benefits paid in the form of a lump-sum payment; revising provisions relating to the maintenance of claim files; authorizing the Administrator of the Division of Industrial Relations of the Department of Business and Industry to refuse to process incomplete claims and to obtain additional information; identifying expenditures which may be eligible for reimbursement from the Subsequent Injury Account for Private Carriers; extending the time in which the Administrator will examine and provide a disposition of a claim; 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 purposes of determining whether a preexisting impairment is a permanent physical impairment:*

(a) If the preexisting impairment of the employee arose out of and in the course of his or her employment and the employee has been assigned a rating of permanent impairment which is no longer appealable, the Administrator may choose to accept the rating for the preexisting impairment if the rating was assigned based on the edition of the American Medical

Association's Guides to the Evaluation of Permanent Impairment that was in effect on the date on which the preexisting impairment was rated;

(b) If an application against the Subsequent Injury Account for Private Carriers has been submitted to the Administrator but the preexisting impairment has not yet been given a rating, the Administrator may choose not to make a ruling on the application until a determination has been made concerning the preexisting impairment in accordance with the edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment that was in effect on the date on which the subsequent impairment is rated; and

(c) If an application against the Subsequent Injury Account for Private Carriers has been submitted to the Administrator and a rating has been assigned to a preexisting impairment but the rating is not deemed final, the Administrator may choose not to make a ruling on the application until the rating has been finalized in accordance with the edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment in effect on the date when the preexisting impairment 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 edition 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 a subsequent injury; or

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

Sec. 3. An application for reimbursement against the Subsequent Injury Account for Private Carriers submitted pursuant to NAC 616B. 760 must include, without limitation, the name of the person designated to accept service on behalf of the private carrier submitting the claim and the address and any facsimile number and electronic mail address at which that 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 determinations of the Administrator, must be served on the person designated in the application pursuant to this section.

Sec. 4. 1. At the time the Administrator makes a determination regarding an application against the Subsequent Injury Account for Private Carriers, the Administrator will serve on the person designated pursuant to sections 3 and 5 of this regulation, as applicable, 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 application has been denied by the Administrator, in whole or in part, in addition to the documents served pursuant to subsection 1, the Administrator will serve on the person designated pursuant to sections 3 and 5 of this regulation a copy of each document and record upon which the Administrator primarily relied in making the determination.

Sec. 5. 1. A private carrier 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 the legal counsel or lay advocate, as applicable, and any facsimile number and electronic mail address at which the legal counsel or lay advocate must be served with notices, pleadings and other documents.

2. If a private carrier has provided the notice required by subsection 1, the Administrator will thereafter serve all notices, pleadings and other documents on the legal counsel or lay advocate designated pursuant to subsection 1, as applicable, exclusively, unless the private carrier 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, 616B. 763 and 616B.766 and sections 2 to 10, inclusive, of this regulation must be made on the legal counsel for the Administrator.

Sec. 7. 1. Except as otherwise provided by a specific regulation, service of any notice, pleading or other document required by NAC 616B.760, 616B. 763 and 616B. 766 and sections 2 to 10, inclusive, of this regulation, must 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 pursuant to sections 3 and 5 of this regulation, as applicable, to a person of suitable age and discretion who has the 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 place of residence of the person upon whom service is to be made pursuant to sections 3 and 5 of this regulation, as applicable.

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 or place of residence of the person upon whom service is to be made pursuant to sections 3 and 5 of this regulation, as applicable.

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

(a) The person upon whom service is to be made pursuant to sections 3 and 5 of this regulation, as applicable, 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 the successful transmission of the facsimile to the facsimile number of:

(a) The person upon whom service is to be made pursuant to sections 3 and 5 of this regulation, as applicable; 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, as used in NRS 616B.587, the Administrator interprets the term "written records" to include:

(a) Any written documentation kept by the employer in the ordinary course of business:

(1) Contemporaneously with the hiring of the injured employee, or

(2) During the continued employment of the injured employee and prior to the date of the subsequent injury.

(b) 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:

(1) At the time the employer hired the injured employee.

(2) During the continued employment of the injured employee.

(3) At any time before the employee suffered the subsequent injury for which reimbursement is being requested.

2. An affidavit, letter, declaration or other document prepared after the subsequent injury regarding the preexisting impairment does 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 record that the employer had knowledge of the preexisting permanent physical impairment of the injured employee, the private carrier must establish by a preponderance of the evidence that the contemporaneous written records show that:

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

(b) The employer:

(1) Became aware of the preexisting permanent physical impairment of the injured employee after the employee was hired and prior to the date of the subsequent injury; and

(2) Continued to employ the employee notwithstanding the employer's knowledge of the preexisting 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 preexisting permanent physical impairments of any such employee.

5. For the purposes of this section:

(a) The Administrator may find that an employer retained an injured employee if:

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

(2) 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 work was intended at the time to be a continuation of the employment relationship existing before the subsequent injury.

(b) Unless a private carrier provides evidence to satisfy the Administrator that a work assignment was made with the intent of restoring an injured employee 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:

(1) The injured employee returned to work in a temporary, light-duty position;

(2) The injured employee returned to work in a make-work job consisting of menial tasks; or

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

Sec. 9. 1. For the purposes of subsection 3 of NRS 616B.587, the ratings of permanent impairment of two or more body parts, organ systems or organ functions may not

be added together to reach a rating of permanent impairment of 6 percent or more of the whole person to qualify a condition as a permanent physical impairment.

2. The Administrator will use the American Medical Association's Guides to the Evaluation of Permanent Impairment as a reference for determining whether a rating of permanent physical impairment totals 6 percent or more of the whole person to qualify a condition as a permanent physical impairment pursuant to NRS 616B.587. Multiple body parts unrelated to a subsequent injury will not be considered as one impairment. Each body part, organ system or organ included within a subsequent injury application must satisfy the definition of "permanent physical impairment" to qualify the body part, organ system or organ for reimbursement under the application.

Sec. 10. 1. Except as otherwise provided in subsection 2 or by specific statute, the Administrator will authorize 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) If being made for a permanent partial disability, meets the requirements of NRS 616C.495; or*
 - (2) If being made for vocational rehabilitation services, meets the requirements of NRS 616C.590 or 616C.595.*

2. The Administrator will not authorize reimbursement from the Subsequent Injury Account for Private Carriers for:

(a) Any payment that is prohibited by NRS 616C.410; or

(b) A lump-sum payment that was not made to an injured employee.

3. In considering whether to authorize reimbursement from the Subsequent Injury Account for Private Carriers for the commutation of benefits in the form of a lump-sum payment pursuant to this section, the Administrator may consider any information that he or she deems relevant, including, without limitation, the application of any statute or regulation.

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

616B.010 1. Except as otherwise provided in **subsection 2 and NAC 6168.013**, 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. Any Form C-4, Employee's Claim for Compensation/Report of Initial Treatment, submitted to an insurer or third-party administrator that concerns a claim for compensation which is being administered pursuant to chapters 616A to 617, inclusive, of NRS or any 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 ~~[-The]~~ **or to a facility located outside this State for the sole purpose of electronic**

scanning of the correspondence and documents to the claim file. All 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}~~ ***An application*** against the Subsequent Injury Account for Private Carriers pursuant to NRS 616B.587 or 616B.590 must be submitted, in writing, to the Administrator.

2. A private carrier who submits ~~{a-claim}~~ ***an application*** pursuant to subsection 1 shall include with the claim:

(a) 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 ~~{a-claim}~~ ***an application***; 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 may be obtained from the Administrator at no cost.

3. ~~{A-claim}~~ ***An application*** submitted to the Administrator pursuant to subsection 1 must be organized in the manner prescribed in Form D-37, Insurer's Subsequent Injury Checklist.

4. The Administrator may refuse to process an application that is incomplete or does not conform to the requirements of Form D-37, Insurer's Subsequent Injury Checklist.

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 an application submitted pursuant to subsection 1.

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

616B.7631. The Administrator will ~~[not]~~ consider ~~[the following expenditures to be]~~ ~~[those]~~ *the expenditures and disallowances set forth in NAC 616B.707 [as]* when determining *reimbursable* expenditures for ~~[claims]~~ *applications* for which a private carrier may receive reimbursement from the Subsequent Injury Account for Private Carriers. ~~†~~

- ~~— (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 and 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]~~ *that was:*

- (a) *Adopted* pursuant to subsection 2 of NRS 616C.260~~[.]~~; *and*
- (b) *In effect at the time the payments were made.*

Sec. 14. NAC 6168.766 is hereby amended to read as follows:

616B.766 1. The Administrator will examine ~~{a claim}~~ *an application* against the Subsequent Injury Account for Private Carriers and not later than ~~{90}~~ *120* days after receipt of the claim ~~{will}~~:

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

~~(b) Notify~~ *notify* the private carrier of the ~~{acceptance or denial}~~ *disposition* of the ~~{claim}~~ *application* ~~{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.} in accordance with sections 3 and 5 of this regulation, as applicable.~~

2. An appeal from a determination of the Administrator concerning ~~{a claim}~~ *an application* against the Subsequent Injury Account for Private Carriers must be made in writing and sent directly to the appeals officer *at the Department of Administration* within 30 days after the date of the Administrator's determination. *As used in this subsection, "appeals officer" has the meaning ascribed to it in NAC 616A.040.*

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

~~616C.082 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] are date-stamped, either manually or electronically, indicating {+} by the entity that received the documents.~~

~~{1. 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.~~

~~2. 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.]~~