

**Industrial Commission's Advisory Committee
On Workers' Compensation
Minutes
May 10, 2017**

Members Present

Craig Mello, Chair
Ray Anchustegui
Dave Anderson
James Arnold
Connie Barnett
Dr. Paul Collins
Mike Haxby
Dane Higdem
Larry Kenck
Gardner Skinner
John Greenfield
Susan Veltman
Aaron White

Ex-Officios: Senator Jim Patrick; and
Representative Scott Syme

Members Absent

Brian Whitlock

Industrial Commission

Thomas E. Limbaugh, Chairman
Thomas P. Baskin, Commissioner
R. D. Maynard, Commissioner
Mindy Montgomery, Director

Opening Remarks and Introductions:

Chairman Craig Mello opened the meeting and introduced new member Ray Anchustegui. Chairman Mello summarized his professional background and thanked Mr. Anchustegui for his willingness to complete Roy Galbreath's term on the Committee as an Employer Representative. Mr. Mello next requested introductions of Committee members and public attendees.

Introduction of Special Member Representative Scott Syme:

Commissioner Tom Limbaugh, Commission Chairman, welcomed Representative Scott Syme as the new Special Member on the Advisory Committee and summarized Representative Syme's professional background.

Minutes:

The Minutes of February 8, 2017 were presented for review and approval. Ms. Susan Veltman moved to approve the minutes of February 8, 2017 as written, seconded by Mr. Gardner Skinner. The minutes were adopted as written.

Discussion of In-state Adjusting Requirement(s):

Attorney Mike Kane, Representative of Idaho Property & Casualty Insurers Association and a Member of the ICRMP, presented for Committee discussion the requirement that filed Idaho claims be 'housed' within the state of Idaho under Section 72-305, Idaho Code; and consideration for amending the statute to align more with current business practices. Mr. Kane

provided a handout of the current statutory language. The statute's original intent written in 1971 required a home office be within Idaho for the Commission to speak with adjusters in-house. The Association, comprised of 1,000 insurers nationwide, believes the practice is 'archaic.' Mr. Kane believes there remain just four or five states that have a similar in-state adjusting requirement, which is not a requirement in the property and casualty world. Mr. Kane stated that the physical storage of files is obsolete because most businesses utilize digital "cloud" storage technology. He proposed that the statutory requirement that adjusting be performed by a licensed Idaho adjuster within the state would remain. Mr. Kane requested the formation of a subcommittee to present proposed legislation in the 2018 legislative session. He expressed his willingness to meet and also to bring his subject-matter experts along to address the concerns of the Commission.

The Committee discussed at length the merits of Mr. Kane's proposal and requested further explanation from Mr. Kane for considering a change in the statute.

Dr. Collins expressed concern that Mr. Kane's proposal could affect other provisions of the statutory scheme, such as the medical supervision of the injured worker and requested that topic be included in any 'robust' discussions by a subcommittee.

Commissioner Baskin opined the requirement that adjusters' files are electronically available in Idaho already exists. Mr. Haxby concurred and understands that no hardcopy documents need to be stored in the Idaho facility, so long as the Commission is able to locate the adjuster in Idaho and documents can be reproduced. Mr. Tisdale interjected that 'cloud-based' servers would not meet the requirements currently under the statutory language, but those records would still be accessible within the state.

Commissioner Maynard inquired if Mr. Kane's proposal would impact the Commission's process for conducting on-site audits.

Mr. Kane interjected that the proposal would not change the concept of *adjusting within the state*; the change would resolve the problem that the home office location and location of files be at an in-state "actual brick-and-mortar" building where the files would be *housed*. For purposes of audits, a subcommittee would need to make sure the needs of the Commission are met in that regard. He understands there is a rule that speaks to this statute. Because insurance carriers also operate outside the state, this proposal would result in a more efficient process for doing business in the modern electronic age. He understands the process generally works but it also requires an extra layer that may not be necessary; for example, bringing in a third-party administrator as opposed to having the people adjust the claim from their work location.

Messrs. Higdem, Anderson and Skinner disagreed, stating that current business practices are working. Unless it can be demonstrated there is a problem, they do not believe the formation of a subcommittee to vet a statute change without first seeing draft language. Mr. Arnold suggested a possible solution would be eliminating the words "... *its own* ..." from the statute; however, his preference would be to see first some proposed language before forming a subcommittee.

Chairman Mello interjected that it may be premature to request a subcommittee without first having draft language. Commissioner Limbaugh expressed his interest in the full Committee forming a subcommittee with Mr. Kane's group to vet this issue. The subcommittee could report at our August 9th meeting.

Mr. Kane has been working on a rough draft but had no language ready to circulate at this time and expressed his appreciation to Commissioner Limbaugh, IIC Chairman, for his thoughts on the issue.

Public Comment: Mr. Richards interjected the tradition remains that the Advisory Committee encourages stakeholders and the public to utilize this Committee on issues.

Mr. Haxby suggested the Committee consider a plan of action to include this issue within the rulemaking process for the up-and-coming agenda.

Commissioner Limbaugh, IIC Chairman, reported that the Commission, for the purpose of meeting the Bulletin publication deadlines, was required to publish its rulemaking meetings for prompt claims rules and for medical fees; those meetings are set for June 20th and 22nd.

Chairman Mello called for consensus for the formation of a subcommittee to meet in advance of the next Advisory Committee meeting to vet the statutory requirement of IC § 72-305 and report to the full Committee on August 9, 2017. General consensus was reached to form a subcommittee. Subcommittee Members (Instate Adjusting Requirements - IC § 72-305): *Mike Kane, Mike Haxby, Ray Anchuestegui, Gardner Skinner, Woody Richards, Aaron White, James Arnold, Dr. Paul Collins, Dane Higdem, Richard Burleigh, Alan Gardner, Commissioners Tom Limbaugh, Tom Baskin, and R.D. Maynard, and Patti Vaughn.*

Scheduling the first Instate Adjusting Requirements - IC § 72-305 Subcommittee meeting will be coordinated by Commission Secretary Beth Kilian.

Discussion of Independent Contractor v General Contractor:

Commissioner Tom Limbaugh, IIC Chairman, introduced Representative Joe Palmer, District 20. Representative Palmer requested an opportunity on behalf of his constituents to present an issue concerning the exemptions under the requirements that general contractors carry Workers' Compensation insurance of independent contractors.

Representative Palmer summarized his professional background in the Idaho legislature and the construction industry. He summarized the issue brought to his attention last session from his constituents in the construction community. He seeks clarification on whether subcontractors, who have no employees but are working for a general contractor, need Worker's Compensation insurance. Representative Palmer had received different responses to inquiries made of the insurance industry and the Industrial Commission. He next reached out to the Attorneys General's Office for a better explanation on the coverage requirement for subcontractors with no employees. The Attorneys General's Office encouraged him to work through this Committee.

Commissioner Limbaugh, IIC Chairman, deferred to Deputy Attorney General Blair Jaynes to address the subject matter and to summarize for the public the Commission's requirements for employers to carry Workers' Compensation insurance. Mr. Jaynes reported the issue is two-fold: (1) the concept of the statutory employer that has been in law since 1917; and (2) the business arrangement of the surety. If a contractor has no employees, then the law does not require him/her to have insurance. The surety, however, may place provisions on policyholders not addressed by the Industrial Commission or in law. Mr. Jaynes provided a scenario to demonstrate the concept of the statutory employer who would be on the risk for payment of benefits of an injured worker. The misconception of some employers is they are not required to carry a policy of Workers' Compensation insurance on subcontractors they hire; however, upon investigation, these subcontractors are actually employees under the law. The State Insurance Fund may discover these employment relationships.

Representative Palmer reported that for new home construction, if subcontractors are also required to carry a workers' compensation policy, there would be a 20% increase in the price of the house.

Mr. Arnold gave his perspective on the issue and of the audits conducted by the State Insurance Fund. For instance, as a representative of claimants, he regularly sees workers learning post-injury that medical bills are unable to be paid because their employers did not carry workers' compensation coverage.

Commissioner Baskin summarized the implications in the law and expectation of the Commission. If an employer wants to avoid the obligation to insure for Workers' Compensation purposes, the independent contractor would be agreeable to provide a work product for recompense by a certain date, but it is left to the independent contractor of how and when that is accomplished -- start time of the work, the time for lunch, the work location of the project, and the end time of the work project.

Representative Palmer expressed disagreement with Commissioner Baskin's summation of the implication of the statute; and inquired, instead, if a definition of 'subcontractor' is needed in the statutory language.

Commissioner Limbaugh, IIC Chairman, further stated the issue is outside the Commission's authority of informing general contractors they cannot require their independent contractors to carry workers' compensation insurance. The general contractor would be responsible for determining the employment arrangement. The situation commonly seen by the Commission is that general contractors do not want to carry coverage for workers hired by subcontractors.

Commissioner Maynard shared the experience of a personal friend who is a general contractor.

Representative Palmer's concern is that a general contractor should not be required to carry workers' compensation insurance if he does not have employees.

Public Comment: Mr. Eidam interjected that because there is no advance notice of the identity of the independent contractor or employee at the start of a project, the requirement that general contractors have Workers' Compensation insurance before the commencement of a project protects all involved parties.

Public Comment: Mr. Kevin Amar is a general contractor and had contacted Representative Palmer on the issue. He shared his personal experience of an audit by the 'State' where he had been "fined" for non-coverage of two independent contractors. His insurer is Higgins and Rutledge Insurance Inc. He stated it was cheaper to pay for 'your' workers' compensation insurance than be fined every year by the Commission. He asked who he should speak to about his particular situation.

Mr. Jaynes responded that there have been no cases with issued penalties in his 19 years at the Commission. The State of Idaho does not sell insurance. The Idaho State Insurance Fund is a quasi-governmental entity that does sell insurance and may add a premium to a policy.

Ms. Barnett understands the construction rates continue to increase. She addressed Mr. Amar's concerns at great length and explained the carriers' position for the unlimited exposure when a workers' compensation policy is written. Insurance carriers have a responsibility to pick up premium for all of the exposure on a policy. The State Insurance Fund conducts audits (not, generally, on an annual basis) in order to determine the relationship between the worker and the company during the employment period. If it is demonstrated a worker is an independent contractor, the State Fund would not normally assess an additional premium in that scenario. The State Fund has seen a proliferation of employers, over the past many years, classifying employees as independent contractors to reduce their premiums. This is a "red flag" for the State Fund and any insurance carrier. Ms. Barnett expressed willingness to speak with the employer and determine the working relationship. The State Fund does assess additional premiums on a policy but does not assess fines. If the Fund picked up additional premium, it would be warranted.

Chairman Mello invited Mr. Amar and Ms. Barnett to meet following the meeting to further address Mr. Amar's concerns.

Representative Palmer opined there is a problem in the law that should be addressed because there would be thousands of subcontractors buying a policy for workers' compensation insurance who would not otherwise be covered under the policy in order to remain compliant. He expressed his willingness to propose language for amending the statute to provide a definition for "*subcontractor*." He acknowledged it would not be a "great" idea, but would alleviate business people being told to get a policy when it's not the right way of doing business. He states that statutes he writes are one line, and he understands the implications of his proposal to the insurance companies. He thanked the Committee and expressed hope for a solution.

There were no other questions or comments.

(Break.)

Industrial Commission Report:

Benefits Administration Manager Patti Vaughn requested a change in the order of her report and presented the following status updates.

➤ EDI Claims Release 3.0 Implementation – Proposed Rulemaking. At the last scheduled Committee meeting there was a lengthy discussion about the compressed time period allotted for testing EDI before the implementation date of July 1, 2017. On March 1st the Commission adopted a temporary rule extending the implementation date from July 1, 2017 to November 4, 2017, also a Saturday. Because of the delay in getting the Commission's vendor in place, the Commission agreed trading partners needed ample time to consider other vendors and to test their claims processes. The testing period is available now and will extend through October 13, 2017 ample time to get their claims process tested. All paper claims filed by 5:00pm Friday, November 3, 2017 will remain in paper form; all claim filings subsequent to 5:00pm Friday will require electronic submission. For the past several months, the Commission has been reviewing the trading partner registrations process and reaching out to multiple parties on outstanding trading partner agreements. The ISO vendor is ready to begin testing for trading partners who have completed registrations.

Ms. Vaughn provided handouts of the transition period and project trigger dates, and reminded users that all timelines are posted to the Commission's website at <https://iicedi.info>, a useful tool for information on the requirement tables, implementation guide, and for trading partners to complete registrations.

➤ Medical Fee Study – Negotiated Rulemaking. The Commission filed a Notice of Intent for Negotiated Rulemaking to take comments for updating the med fee schedule; that notice announced the scheduled meeting for Thursday, June 22, 2017 at 9:00am at the Commission's Main office location, 700 S. Clearwater Ln. in Boise. The Commission is working with a consultant for access to commercial group health carrier rates for the top medical services in Workers' Compensation as a benchmark to the fee schedule. A report and related information is being prepared and should be finalized and available for distribution at the June 22nd negotiated rulemaking meeting.

➤ IDAPA Rules on Prompt Claims Servicing – Negotiated Rulemaking. The Subcommittee on Prompt Claims Servicing had general consensus on a set of rules last autumn. The rules package was subsequently adopted as a temporary rules package by the Commission and submitted to the Governor's office for approval. The Governor's office, unfortunately, advised the Commission to wait until the legislative session had ended. In the interim, an Idaho Supreme Court decision in *Davis* created some confusion on benefit payments of permanent partial impairment. The Commission opined it would be more appropriate to bring through the negotiated rulemaking process; notice was submitted and will appear in the June 7th Bulletin Publication. The meeting date for negotiated rulemaking on prompt claims servicing is scheduled for Tuesday, June 20th at 1:00pm at the Main office, 700 S. Clearwater Ln. in Boise.

Mr. Haxby thanked the Commission for the last meeting on the compressed time frame for testing EDI Release 3.0, and on behalf of sureties expressed appreciation to the Commission

for the 120 day set back to complete trading partner registrations and testing of systems. Intermountain Claims has reached out to many sureties for completing registrations. Ms. Connie Barnett and Mr. Woody Richards concurred and especially thanked Patti Vaughn for all her work on these ‘monster’ issues.

Ms. Vaughn had nothing further to report.

➤ Other Issue. Commissioner Tom Baskin presented an issue the Commission has been working on regarding the treatment of PPI and disability. The Commission determined that the *Corgatelli v. Steel West* case has had greater implications and impact than was initially determined. Prior to the ruling in *Corgatelli*, that the expectation in the industry and the practice of the Commission was to credit a payment of PPI benefits against a subsequent disability award. This application of the law encouraged the payment of PPI following the date of medical stability for the continued income stream for the injured worker, while the issue of disability was worked through. This concept had a number of positive implications for the system. The Supreme Court in *Corgatelli* determined that PPI and PPD are separate and distinct classes of benefits and PPI cannot be credited against a subsequent award of disability. The Commission convened a small group of practitioners from both claimants and defense bars to draft a legislative fix to this problem. The *Ad hoc* committee comprised of *Jamie Arnold, Mike McPeek, Brad Eidam, Susan Veltman, and Woody Richards* has had two meetings to date and have addressed possible solutions to prevent gaps in the income stream to the injured worker and further to prevent an impact on premium that will, at some point, catch up with us. The group expects to have a draft available to present at the next Advisory Committee meeting. The language will recognize that PPI is a component part of PPD and restores the idea that PPI can be applied as a credit to a payment of PPD.

➤ Update: JRP Rule 9 Amendment – Attorneys Issuance of Subpoenas in WC Cases. Commissioner Tom Baskin updated the Committee on the matter of attorneys issuing subpoenas in Workers’ Compensation cases. The amendment to the Judicial Rules of Procedure-Rule 9 has been completed and posted to the Commission’s website, including the subpoena form, for attorneys to now print and sign their own subpoenas for issuance. Because *pro se* claimants are not officers of the courts, they would not be allowed to take advantage of the rule change and are still required to obtain subpoenas from Commission referees or a Commissioner (*see* change to the ‘Comment’ section of the rule for *pro se* claimants).

Public Comment: Mr. Richards complimented the Commission and members of the Advisory Committee and various subcommittees for their problem-solving skills and for working through this issue of *Corgatelli*. This is a good example of industry stakeholders working together in a non-confrontational manner for a sound Workers’ Compensation System.

On behalf of the Commission, Commissioner Baskin thanked Mr. Richards and all the other members of the *Ad hoc* committee who, in extreme good faith, have participated in the process.

➤ IC §72-212 – Statutory Clarification for Familial Relationship and Eligibility Requirements. Evan Sailor provided a narrative handout titled ‘Exemptions for family members’ and a new graph illustrating the familial relationship eligible for exemption under Section 72-

212(4) (5), Idaho Code. The standard has been applied since 1997, and the law updated in 1999 that included grandchildren. Compliance staff had been receiving an increase in the number of calls from the general public confused by the previous familial chart. In response, Compliance staff, with assistance from Deputy Attorney General Blair Jaynes, amended the old narrative and familial chart. Subsection 4 relates to family members who reside with the owner of the sole proprietor or limited liability Company taxed as a sole proprietorship. Subsection 5 only applies to a sole proprietorship. The amended narrative and chart were presented to the Commission for approval and have been posted to the Commission's website. There is a hyperlink in the narrative that links to the chart. Mr. Sailor confirmed for Senator Patrick there is a form for election of coverage for grandchildren working for a sole proprietor.

➤ Update: IIC WC Centennial. Director Mindy Montgomery reported that on March 16, 2017 Governor Otter signed the Proclamation recognizing the 100 Year Anniversary of the Idaho Worker's Compensation program. The signing ceremony was well-attended by industry stakeholders, including past Commissioner Gerald A. Geddes. Mr. John Greenfield also offered some words at the ceremony. The public were invited to view the Proclamation on display at the back table. The Industrial Commission will continue honoring the 100 Year Anniversary at our Annual Workers' Compensation Seminar on Thursday, October 26, 2017 at the Boise Centre on the Grove. More information on the seminar will be forthcoming.

Updates:

➤ Industrial Special Indemnity Fund ("ISIF"). Jim Kile introduced Kim Murphy to present the FY18 projected assessments report. Ms. Murphy reported the claims filings have increased 56 percent from complaints filed earlier. Six new beneficiaries have been added to the rolls. There is a ten percent decrease projected in assessments for next year, which is interesting for sureties, due to ISIF's management of the claims. The numbers will continue to be monitored in the last six weeks of the fiscal year and final assessment numbers will be presented at the next Committee meeting.

Preparation for Future Meetings:

➤ Nominations Subcommittee Interim Chairperson. Mr. Haxby requested a discussion of Mr. Galbreath's replacement as Chairman of the Nominations Subcommittee. Ms. Veltman volunteered as the interim Chairperson of the Nominations Subcommittee and will coordinate a meeting of the Subcommittee in preparation for elections at the August Advisory Committee meeting. Mr. Haxby thanked Ms. Veltman for volunteering as the Interim Chairperson on the Nominations Subcommittee.

Topics for Discussion at the Next Meeting

- Nominations and Elections of Members. Ms. Veltman informed the Committee she will not seek re-election to serve on the Advisory Committee due to conflicts with other commitments.

- Ad hoc Committee RE Treatment of Impairment & Disability. A draft of the text language will be made available to the full Committee in preparation for the August Committee meeting.

Next Meeting Dates: August 9, 2017 and November 8, 2017

Representative Syme informed the Committee he will be unavailable for the August meeting due to previous commitments.

Chairman Mello thanked Representative Syme for his participation today and willingness to serve on the Committee.

There being no further discussion, Mr. Skinner moved to adjourn the meeting; seconded by Messrs. Kenck and White.

There being no further business, the meeting adjourned at 10:55 am.