

**Industrial Commission's Advisory Committee  
On Workers' Compensation  
Minutes  
August 25, 2010**

**Members Present**

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Judy Wise, Chair	James Arnold
John Greenfield	Rian Van Leuven
Roy Galbreath	Mike Haxby
David Whaley	Linda Sams
Steve Millard	James Alcorn
Rep. Pat Takasugi	

**Members Absent**

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Scott Jones  
Troy Watkins  
Max Sheils  
Glenna Christensen  
Senator Andreason

**Industrial Commission**

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Chairman R.D. Maynard  
Commissioner Thomas E. Limbaugh  
Commissioner Thomas P. Baskin  
Director Mindy Montgomery  
Secretary Nancy Beeson

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**MINUTES**

A motion was made and seconded to approve the Minutes of May 20, 2010. The motion carried.

**SUBCOMMITTEE REPORTS:**

Occupational Disease Laws: John Greenfield reported that nothing has happened regarding this subcommittee since the last Advisory Committee meeting. Mr. Greenfield stated that he has received no comments from any of the members, but he will contact the subcommittee members again in an effort to garner participation.

Proposed Legislative Changes to Close Industrial Special Indemnity Fund - James Kile, Manager of the Industrial Special Indemnity Fund (ISIF), distributed copies of an overview of proposed legislation to close the Industrial Special Indemnity Fund to new claims while continuing to pay benefits to its existing claimants. The primary concern, Mr. Kile explained, is the unfunded liability that continues to increase creating a burden on employers. Mr. Kile stated that if all of the current claims were paid out at today's dollars, the cost would be approximately thirty million dollars, and according to his calculations, every 6 years this debt will double. Mr. Kile reported that the major portion of this draft legislation is the same as submitted last year but with three major changes. 1) The subrogation language has been rewritten, not changing the

intent, but making it more understandable. 2) The “Wernecke” language has been taken out of the new draft. 3) The proposed draft now states that a complaint must be filed rather than a claim within two years of June 30, 2011. The litigation dealing with the complaints filed should be finalized in about four years, and the payouts are projected to continue for about 30 years according to Mr. Kile.

Questions were discussed regarding the subrogation language changes, the possibility of drastic premium increases for small and medium sized employers, the education of the germane committee on the proposed legislation, and the possible rate increase for a period of time as a result of the elimination of the second injury fund. Another issue raised was the unintended consequence for claimants. Attorneys currently have the flexibility of settling the employer portion of a total permanent claim to obtain some funds for the claimant to live on, and then pursue the ISIF for the remainder of the claim. Without this flexibility there is concern that families will be “starved out” as more claims will be litigated to the end through the hearing process and injured workers will end up settling for much less than what they are entitled to. Other issues raised were the unintended consequences for the last employer liable and the aging workforce that could bring about more total permanent claims, and as a result, could lead to future legislation to possibly cap the dollar amount for total permanent claims. John Greenfield, Rian Van Leuven, and Dave Whaley stated for the record that Labor is not for or against this proposed legislation, but Labor has concerns about employee blacklisting with this bill. They stated that if blacklisting becomes a problem, labor will want to re-visit this issue.

*Public Comment:* Jack Barrett noted that the same arguments and positions were presented at the legislature last year, and he is concerned the legislation may not be approved by the legislature again this year. Mr. Barrett commented that there is an alternative to addressing the concern of the drastic increases in unfunded liability of the ISIF. Mr. Barrett suggested that if the legislation to close the ISIF is not successful, the ISIF may want to look at making the fund more restrictive so it is less accessible than it currently is which would limit the exposure of the fund.

Chairperson Wise asked for consensus to go forward with the proposed legislation to close the Industrial Special Indemnity Fund to new claims. Consensus was reached with four members abstaining from the vote who chose to remain neutral on the proposed legislation.

Expert Medical Fees (Depositions/Testimony) – James Arnold, subcommittee Chair reported that at this point the subcommittee can be disbanded until it is known how successful the educational meetings being conducted around the state by the Industrial Commission may be. Mr. Arnold attended one of the presentations in eastern Idaho given by Industrial Commission staff to physicians and other health care providers on the provider’s role in the workers’ compensation system and the effect their actions have on the system. Mr. Arnold stated that the Industrial Commission presenters are addressing some of the concerns relating to deposition and testimony fees, so he would like to give this process a chance to work and then see if there is a need to re-establish the subcommittee. If the educational presentations don’t help, then Mr.

Arnold may call on the subcommittee to research the possibility of establishing guidelines in rule.

Security for Compensation – Rian Van Leuven - Mr. Van Leuven reported on the August 24<sup>th</sup> subcommittee meeting. The Commission's Financial Officer, Jane McClaran explained to the members the proposed changes to IDAPA 17.02.03 and 17.02.04 that includes separating the regulation of self-insured employers from insurance companies. Ms. McClaran also noted that defining outstanding and unpaid awards was a priority and is included in the proposed rules. Ms. McClaran explained that the separation of the rules is intended to add clarity for both the self-insured employers and insurance carriers. The self-insured rules define the qualification of employers to self-insure and how to apply to the Commission for self-insurance authority. Discussion was held on the possible need to amend statutes related to the proposed rule changes; if the rules could include requiring more adjusters to handle workloads by requiring a limited number of claims to be handled by an adjuster at one time; and how the Commission can deal with a recent trend related to delayed payments and change of status notices not being sent timely. It was noted, that if there are abuses of the system, then the Commission needs to be made aware of these issues.

Commissioner Maynard commented on the importance and timeliness of these amended rules being proposed as the Commission is receiving more and more applications for employers to self-insure. It is becoming more difficult for the Commission to approve employers for self-insurance without the safeguards contained in the proposed rules. Some of the Advisory Committee members involved in the subcommittee expressed concern that more work needs to be done on 17.02.03 and 17.02.04 before submitting the proposed changes to the legislature which may push submission of the rules into the following legislative session.

The subcommittee on *Security for Compensation* scheduled a meeting for October 15<sup>th</sup> at 9:30 a.m. to discuss further amendments to IDAPA 17.02.03 and 17.02.04.

Reasonable Payment of Medical Fees (Neel) – James Arnold – Mr. Arnold reported that the subcommittee held a two hour meeting with attorneys and insurance company representatives to discuss the issues resulting from the Neel Supreme Court decision. At this time, the subcommittee has nothing in writing on this issue and the ball has shifted to the Claimant's side of the court. No definitive conclusions have been made at this time, but Mr. Arnold plans to schedule more meetings.

### **Committee Membership Nominations and Election**

Nominations subcommittee Chairman Dave Whaley reported that there are no nominees for the physician representative or the employee representative at this time, but Mr. Whaley will submit a name for the employee representative to the Commission as soon as possible. Mr. Greenfield and Commissioner Baskin both have physician representatives they will talk with

about serving on the Advisory Committee. Ballots were handed out and a secret vote commenced. Nominees receiving the most votes will be recommended to the Commission for approval.

Mr. Van Leuven, speaking on behalf of the Advisory Committee members, thanked Judy Wise for her successful year as Advisory Committee Chairperson, and that her professional and well conducted meetings were very much appreciated.

### **Industrial Commission Report:**

#### Proposed Legislative Changes:

Idaho Code § 72-523 - Commissioner Limbaugh reported on the proposed changes to Idaho Code § 72-523 pertaining to premium tax. Commissioner Limbaugh explained that the last two legislative audits noted that the Commission had more than enough money in our fund to fund the Industrial Commission for more than a year. It was suggested that the Commission discuss with legislators the best way to reduce our fund. The Commission would like to go forward by reducing or giving a discount to carriers in a way that will keep the money in the employer's hands. Discussion was held on the mechanics of being able to waive the year's premium tax or reduce it.

Commissioner Limbaugh commented that in 2002 and 2003 the Commission fund balance was extremely low, and now the fund is finally back up and is over funded. With the economy the way it is, the Commissioner noted that there is a concern that the legislature could sweep our fund into the general fund, The Commission would rather get the money back to the employers. Commissioner Limbaugh reported that the proposed legislation to waive or reduce the premium tax has been submitted, but has not yet been approved by the Governor's office. Discussion was held on the best way to structure the reduction and the timeframes involved. Commissioner Limbaugh commented that if the Commission provides NCCI with the amount of the reduction by early summer, then NCCI may have time to include the reduction into the rate setting for the following year. The rate reduction would have to be for the entire year. Commissioner Limbaugh stated that the Commission will contact NCCI regarding their timelines. Rep. Takasugi noted that he was in favor of returning the money to those who paid into it rather than to have the legislature sweep the fund to bolster the general fund.

Consensus was asked for the proposed statute to proceed, and consensus was reached.

Idaho Code § 72-432 and § 72-804 – Commissioner Baskin presented his idea on two proposed legislative changes to §72-432 and §72-804 for simultaneous approval. Commissioner Baskin commented that the biggest impact would be in §72-432 which would provide the Commission authority to award reasonable attorney fees in specific workers' compensation cases. Currently, claimants who have been denied medical care are often unable to obtain legal representation to assist in pursuing a claim for prospective medical care because there is no

means by which attorneys can recover for their services if they are successful in securing such care for their client. This is not meant to be a windfall for claimant's attorneys; it is about guarantying access to the worker's compensation system.

Similarly, employers are unable to recover attorney fees when a worker's compensation claimant pursues a claim without reasonable grounds against the employer. This legislation amends §72-804, Idaho Code, to provide authority for the Commission to award reasonable attorney fees in such cases, just as the statute now allows the Commission to award attorney fees against employers who unreasonably contest a claim for compensation.

Discussion was held on how "reasonable" attorney fees would be determined and if it was fair to put the burden of payment on the claimant. Commissioner Baskin explained that an award of attorney fees would be contingent upon the involvement of the attorney to ensure that they were primarily and substantially responsible in obtaining an agreement.

Mike Haxby inquired if it was possible to include language in these rules in response to the Neel Supreme Court case. After discussion, it was decided that more discussion was needed and Commissioner Baskin asked for any comments regarding these proposals be given to him by phone or in writing after the meeting. These statutes are tabled and will not be submitted this legislative session.

Study of Proposed Legislative Changes – Christi Simon – Idaho Code § 72-102, *Definitions (Independent Contractor)*, Idaho Code § 72-318, *Invalid Agreements – Penalty*, Idaho Code § 72-319, *Penalty for Failure to Secure Compensation* - Christi Simon, Manager of Employer Compliance Division, requested that a subcommittee be formed to study proposed legislative changes amending the definition of independent contractors in §72-102, to add to the current right to control test and add an additional test of "customarily engages in an independent business" to more closely match the definition of the Department of Labor and the employment security law. Mr. Greenfield opined that that the proposed new language is somewhat inconsistent with the original definition. Ms. Simon reported that the Compliance Division has had a lot of problems with employers calling their employees "independent contractors" to avoid paying for workers' compensation insurance. Commissioner Baskin noted that there are Supreme Court cases that have been developed over the years that has tightened down what the meaning of an independent contractor is and understands the abuses of the system in this area. Ms. Simon gave some examples of the types of problems the Compliance division has recently had to deal with as far as employers avoiding paying the fees for having employees by taking advantage of employees and calling them independent contractors and making them buy their own workers' comp insurance. Mr. Alcorn reiterated that this problem is huge and is becoming very blatant.

The Advisory Committee members agreed that a subcommittee should be formed. The members are: Gardner Skinner, John Greenfield, Blair Jaynes, Christi Simon, Dave Whaley, James Alcorn, Linda Sams, Pat Takasugi.

IDAPA 17.02.08, and 17.02.09, Medical Fee Rules – Patti Vaughn – Ms. Vaughn discussed the latest significant changes to the proposed medical fee rules. Ms. Vaughn stated that the structure of the rules have been changed by carving out the medical fees into their own chapter. The reimbursement rates for hospitals and ambulatory surgery centers have been established in the new rules, and there have been changes to physician fee schedule as well including a reduction in the number of conversion factors groups. Ms. Vaughn reported that the overall effect of the hospital reimbursements according to her analysis was basically flat overall. The State Insurance Fund and Steve Millard have been helpful in providing analysis of the effects of the changes for hospitals. There are no changes to the reimbursement for smaller critical access hospitals. Ms. Vaughn stated that inpatient and outpatient hospital charges that were analyzed resulted in the Commission's number of about a 2% reduction from what hospitals are currently being paid, however some of the hospitals have reported higher reduction percentages.

Mr. Greenfield proposed that he would like some discussion on IDAPA 17.02.08, *Miscellaneous Provisions*, related to the attorney fee regulation related to a reduction of attorney fees on a permanent disability case that is awarded; the attorney receives 15% of the award and after 10 years the percentage is reduced. John will write a letter to the Commission regarding this issue and how he would like to see it changed.

The next meeting was scheduled for November 8, 2010.