

**Industrial Commission's Advisory Committee  
On Workers' Compensation  
Minutes  
November 10, 2021**

**Members Present**

Dave Anderson  
James Arnold  
Richard Burleigh  
Dr. Paul Collins  
Joe Maloney  
Andrew Marcham  
Shellie Martin  
Darin Monroe  
Matt Pappas  
Mike Shuey  
Brad Stoddard  
Brian Whitlock, Chairman

**Members Absent**

Brad Cederblom  
Dane Higdem  
Craig Mello  
Ex-Officio: Senator Jim Patrick  
Ex-Officio: Representative Scott Syme

**Industrial Commission**

Aaron White, Chairman  
Thomas E. Limbaugh, Commissioner  
Thomas P. Baskin, Commissioner  
Mindy Montgomery, Director  
Kamerron Slay, Secretary

**Opening Remarks and Introductions:**

Chairman Brian Whitlock led the meeting by opening the meeting at 9:00 a.m. Introductions were not done due to the meeting being held via Zoom videoconferencing.

**Minutes of August 4, 2021:**

The minutes of the August 4, 2021 meeting were presented for review and approval. Upon motion of Dr. Paul Collins, seconded by Shellie Martin, the minutes of August 4, 2021 were approved. The minutes were adopted by unanimous vote.

**Industrial Commission Report:**

2022 Legislation. Chairman White stated that due to legislative inactivity, executive agencies readopted their rules as temporary.

The Commission conducted negotiated rulemaking for EDI 3.1 and Medical Records. The Commission took all comments received into consideration. Due to scheduling conflicts between parties, the EDI 3.1 implementation date was moved to December 1, 2022. Aside from EDI 3.1 and Medical Records, the Commission made no additional changes to the current rules. The Commission provided notice of its rulemaking into two Omnibus Proposed Rulemaking Notices, one for fees and one for non-fees. These notices were published on October 20, 2021 in the Idaho Administrative Special Bulletin. Today, November 10, 2021, is the last day to make public comment on these proposed changes. The Commission will submit these proposed rules as pending rules to the State Legislature's 2022 session. Chairman White asked if there were any questions,

there were none. Chairman White also made a few announcements: that Director Mindy Montgomery will be retiring in January 2022 and recognized her for her long service with the Commission. Chairman White also announced the retirement of Deputy Attorney General Counsel Blair Jaynes on December 1, 2021. Chairman White thanked Mr. Jaynes for his service to the Commission. Ms. Montgomery gave a few parting remarks. Mr. Jaynes also gave a few parting remarks and thanked the Committee for their work.

*IRIS Modernization.* Shana Barrowclough updated the committee on the IRIS project. Ms. Barrowclough reported that the Commission has partnered with a local technology integrator and is currently wrapping up the first business application for the Employer Compliance Department. They expect user-acceptance testing to begin by the end of November 2021, with initial compliance application release scheduled for the first quarter of 2022. As they wrap up the Compliance Department, they have begun on the Benefits application redesign, consisting of lump sum settlement, EDI, and medical fee dispute process. Adjudication is due up after that, with an expected initial release in the third quarter of 2022. Ms. Barrowclough asked if there were any questions on the update, and there were none.

*Subrogation Memo.* Commissioner Baskin provided a summary of how the Commission views subrogation issues that arise in worker's compensation cases. This memorandum was prepared based on a request for written guidance on the Commission's treatment of the issue. In September 2021, the Commission met with representatives of both claimants and insurance industries to discuss what this guidance might look like. They reviewed a proposed draft of that guidance and incorporated comments made by interested parties into this memorandum. Commissioner Baskin presented the memorandum itself to the attendees of the meeting, and a copy of it had been attached to the meeting's agenda. Commissioner Baskin asked for questions. James Arnold commented that this merits additional discussion because there was only one subcommittee meeting, and asked that there be at least one more meeting to vet the memorandum detailing how to satisfy subrogation issues in lump sum settlements. Mr. Arnold argued that the language about subrogation in the Supreme Court case, *Williams*, was dicta, and that a subrogee should not be considered a "party" under the statutory language that a settlement be in the "best interest of the parties." Mr. Arnold felt that the Commission was delaying approval of lump sum settlements because of the interests of a non-party (the subrogee). Mr. Arnold proposed that there be at least one additional subcommittee meeting to discuss the proposed draft of the guidance in more detail. Commissioner Baskin expressed his disagreement with Mr. Arnold's interpretation of *Williams* and recommended to Mr. Arnold that there were a variety of avenues available to determine what the Court meant in its ruling in *Williams*. However, Commissioner Baskin was amenable to holding another subcommittee meeting to discuss Mr. Arnold's issues. The Commission will reach out to members and hold another subcommittee meeting on the proposed guidance.

Chairman Whitlock asked for any public comment before proceeding.

***Public Comment:*** no public comment was made at this time.

**Other Issues/Announcements:**

Subcommittee on I.C. § 72-208. Andrew Marcham summarized issues regarding interplay of intoxication and worker's compensation. Can benefits be denied if employee caused the work accident due to employee's intoxication? Many states deny benefits completely if the employee's intoxication *caused* the injury. Mr. Marcham remarked that employers are concerned with paying medical benefits of an employee where the employee's intoxication caused the injury. Mr. Marcham was considering convening a subcommittee to discuss possible revisions to Idaho Code § 72-208 to remove medical care/benefits for the intoxicated employee. Dr. Collins expressed his interest in working with Mr. Marcham on this issue. James Arnold, Richard Burleigh, Joe Maloney, Shellie Martin, Dr. Paul Collins, Darin Monroe, Matt Pappas, Brian Whitlock, and Mike Shuey all stated that they would serve on the subcommittee. A motion was made by James Arnold, seconded by Dr. Paul Collins, to form a subcommittee to discuss this issue. The motion was approved by unanimous vote.

Vaccine Related Accidents and Injuries Legislation. Representatives Bruce Skaug and Jason Monks drafted a proposed bill dealing with employees who suffer adverse reactions or effects from an employer-required vaccine. Matt Andrew from Skaug Law presented the proposed legislation for the meeting. Mr. Andrew asked for comments or ideas with regard to the proposed legislation and then he would forward these comments or concerns to Mr. Skaug. The proposed legislation would create a presumption, in the absence of substantial evidence to the contrary, that such injury arose in the course of employment. Richard Burleigh asked if the state or federal government mandated the vaccine, as opposed to an employer, would the statute still apply? Mr. Andrew did not know the answer to that question, Mr. Burleigh suggested that the language of the proposed statute should be more clear on that point. Chris Wagner with Intermountain Claims stated that the proposed legislation is unnecessary because he has dealt with situations where an employer-required flu shot that caused adverse reactions in employee was covered. Mr. Wagner also took issue with the presumption in the proposed legislation because it puts an undue burden on the employer to prove what the actual cause of the adverse reaction was. Shellie Martin agreed with Mr. Wagner's comments that the proposed bill was unnecessary and also disfavored the presumption language used in the proposed legislation. Darin Monroe stated that the legislation was unnecessary because there are already existing laws that cover the situation, but if it was enacted, paragraph (2) use of language "accident, injury, or illness that is or *may be* related to the employee's receipt of such vaccine" is way too broad and should not be included. Brad Stoddard commented that he agreed that the proposed legislation was unnecessary because these situations are already covered under existing law. Brian Whitlock added that the language in paragraph (3) of "construed in the light most favorable to an employee" gave him some concern. Commissioner Baskin commented that the Supreme Court has admonished the Commission to construe the law in the employee's favor, but that the language in paragraph (3) was not necessary. Commissioner Baskin commented on the presumption and also stated that current law covers vaccine-related claims, and noted that there are 53 vaccine-related claims that have been filed, most were medical only claims. 11 of the 53 claims were denied, he did not know the reasons for the denials. Indemnity benefits of approximately \$3,285 have been paid on these vaccine-related injury claims. Matt Pappas stated that he feels the issue is adequately addressed with current law. In response to a question, Mr. Andrew stated that the proposed legislation does not have a bill number, and confirmed that the proposed legislation had not been printed yet. Mr. Whitlock also expressed his concern that the legislation is too broad because it addresses "all" vaccinations, and not simply the COVID-19 vaccine. Mr. Monroe asked how the Advisory Committee can express its concerns

with proposed legislation to the State Legislature. Commissioner Baskin stated that in the past they have operated on a consensus basis. Mr. Jaynes recalled that the consensus basis is how the Advisory Committee operates. Mr. Monroe requested that something be done in order to allow the Committee to inform the State Legislature of their position on proposed legislation. Mr. Jaynes explained that the Advisory Committee's role is to assist and provide advice to the Industrial Commission. However, the Legislature has looked to the Advisory Committee for input. And if there is consensus among the Advisory Committee (whether to support or oppose a proposed legislation), that can be considered. Mr. Whitlock explained that the proposed legislation is simply a draft, and has not officially been introduced to the Legislature, and that Mr. Skaug was looking for our opinion on the draft before any such proposed legislation was brought before the Legislature. Mr. Andrew confirmed that that was Mr. Skaug's intent. Mr. Jaynes reviewed the charter and said that the Advisory Committee could have a role in providing input to the Legislature to support or oppose proposed legislation. Mr. Whitlock asked if there was any motion or additional comment in relation to this proposed legislation, and there was none.

RS 29034 – Liability of ISIF & Approval of Lump Sum Payments. Matt Andrew summarized this proposed legislation (which unlike the vaccine-related proposal, has a routing slip). Mr. Andrew stated that it essentially changes the process to approve lump-sum settlements. In pro se cases, the Commission will approve if in the “best interest of parties” but otherwise, it would mandate the Commission to approve a lump sum settlement, absent clear and convincing proof of fraud. The proposed legislation also adjusts the approval of lump sums with the ISIF, effectively overruling the Supreme Court case of *Wernecke*. Mr. Andrew asked for feedback, comments, and/or questions. Mr. Monroe commented in regard to ISIF provisions, he asked about Supreme Court language in *Wernecke*, and that ISIF must stipulate to the elements of ISIF liability in that case. This process has made it difficult to enter into settlements with ISIF. Mr. Monroe stated that *Wernecke* was in response to the practice of ISIF settling cases for a mere \$5,000, and an employee would give up all rights from ISIF in the future. Mr. Monroe is concerned of overruling *Wernecke* and removing the Commission's oversight of approving lump-sum settlements would be bad for the system and take us back to pre-*Wernecke* issue of claimants settling for far less than they should. Mr. Monroe stated that it is a good safety net for workers to continue to require Commissioner approval of the lump-sum settlement process under current law. Mr. Monroe acknowledged the issues with subrogation can sometimes stymie or delay a settlement, but there must be a better solution than legislation to simply get rid of the Commission's oversight on approving lump sum settlements. Mr. Monroe expressed concern that changing workers compensation law might lead to a case where attorneys are hindered from getting fees and effectively getting rid of the claimant's bar and/or defendant's bar, as the case has been in Texas and Arkansas. He feels it is bad policy to change the statute. Kim Murphy, Manager of the ISIF, stated that post-*Wernecke*, the ISIF has been able to settle a number of claims, either by lump-sum, or monthly benefits, or modified benefits. Over the last 16 months, they have seen the Commission implement a more narrow interpretation of *Wernecke*, where only full-benefits gets approved. Ms. Murphy approved the proposed changes in the legislation relating to ISIF. She noted a recent dissent by Commissioner Baskin that brought up issues with approving a lump-sum with ISIF in light of *Wernecke*. James Arnold commented that he agreed with Ms. Murphy's comments. He dislikes the all-or-nothing approach with ISIF (i.e. have a hearing to get full statutory benefits or no benefits at all), he does not feel that is in the best interest of claimants. There are legitimate reasons that injured workers are better served when a settlement is involved. Mr. Arnold would

like to see further discussion on this issue and what can be done to soften the effect of the *Wernecke* case. Commissioner Baskin responded that he feels that *Wernecke* is unambiguous, the Commission only has jurisdiction to approve a settlement with ISIF when all elements of ISIF's liability are met. The Commission has indicated circumstances when they will approve a settlement where a claimant takes less than statutory benefits via a lump sum settlement. For example, a claimant wants to take a lump-sum settlement, instead of lifetime benefits, in order to provide for dependents via a trust or will, etc. Commissioner Baskin indicated that practitioners should read the *Archie Havens* case to find out the scenarios where the Commission will approve a lump sum settlement with ISIF. Brad Eidam stated that "Section 4" of the proposed bill would not be a new section, but actually an amendment. He feels that the proposed legislation is essentially an end-run around the *Williams* case. Under the proposed legislation, the Commission would be required to approve a settlement even if there are outlying issues involving subrogees, etc. Mr. Eidam was concerned that it would put all the money in the hands of a claimant, even if there are subrogees with interest in that money, without having the lawyer make sure that all those obligations are satisfied before settlement. Mr. Eidam was concerned how health care providers would react if they felt that they are not getting paid on their subrogated interests, and how they would react to this situation.

*PTSD Legislation.* Joe Maloney and Jason Hudson presented draft of legislation dealing with psychological accidents and injuries. A few years ago, legislation was passed that allowed first responders to be compensated for PTSI etc. in certain situations. The proposed legislation would extend coverage of PTSI to other occupations. It is modeled after the legislation for first responders (Idaho Code 72-451). We have data, under the § 72-451 statutory scheme, to see how the system is processing these claims. Approximately 28 employees, nearly \$1 million in benefits provided. Dr. Paul Collins felt that the bar should be set very high for claimants to get coverage for PTSI, concerned that over time it will be too expansive. Andrew Marcham also expressed the same concerns as Dr. Collins. Mr. Marcham suggested that there be a bar to personal impairment on a PTSI claim in order to deal with concerns about this coverage being too extensive and/or expensive. Chris Wagner commented that he has handled claims involving first responders, and some of his concerns about that legislation have come into play, roughly 50% of claims are denied, but it is becoming expensive, so if it is expanded to all occupations, it will be too costly. Mr. Jaynes commented that the limitations in § 72-451, such as there must be accompanying physical injury or accident for compensation for PTSI, are not included in the proposed legislation. Shellie Martin agreed with Mr. Wagner's comments that this proposed legislation would open a "Pandora's Box" on stress-related claims. It would effectively render the statutory requirement that there be a physical injury null and void and put too much of a burden on the worker's compensation fund. Mike Shuey also agreed with Mr. Wagner's and Ms. Martin's comments. Brad Eidam commented that we should be cognizant of worker's psychological issues, along with physical injuries, and that an employee would not be able to simply make it up, and they must carry a burden of proof to recover for PTSI etc. Dave Anderson made a comment in the chat function stating that this is an issue we should look into because it does affect someone if they witness a co-worker undergo a tragic accident etc. Mr. Wagner mentioned that there should be some caveat about pre-existing PTSI.

*Idaho Workers' Compensation Rates.* Todd Johnson presented updates on NCCI Idaho Workers Compensation Rate. Overall, Rates will be decreasing 7% for 2022. Idaho's Premium Volume has

been increasing since 2012, and was approximately \$436 million in 2020. Mr. Johnson presented all the data, opened it up for questions. Dr. Collins asked if NCCI had any perspective if and/or how COVID would affect rates. Mr. Johnson stated that NCCI is unsure if COVID would affect rates going into the future. Mr. Johnson said that it is generally good news that rates will be dropping for most employers.

***Public Comment:*** Mr. Whitlock asked for any public comments. There were none.

**Preparation for Future Meetings:**

*Topics for Next Meeting.* Mr. Whitlock asked if there were any additional comments or issues. Mr. Whitlock asked members to pay attention to proposed legislation from the ongoing legislative session scheduled to meet next week.

Dr. Collins wanted to discuss the subcommittee on intoxication for the next meeting.

**Next Meeting Date: February 9, 2022**

Dr. Paul Collins moved to end the meeting, seconded by Joe Maloney. The motion carried by unanimous vote. There being no further discussion and no further business, the meeting adjourned at 11:20 a.m.