

**IDAHO INDUSTRIAL COMMISSION
NEGOTIATED RULEMAKING – PROMPT CLAIMS SERVICING
DOCKET # 17-0208-1701; 17-0210-1701; 17-0211-1701**

MEETING MINUTES
Tuesday, June 20, 2017
1:00 pm
700 S. Clearwater Ln., Boise, Idaho
1st Floor Conference Room

The Industrial Commission conducted Negotiated Rulemaking, pursuant to IC §§ 67-5220(1) and (2) and as authorized by IC §§ 72-508 and 72-806 regarding Docket #s 17-0208-1701; 17-0210-1701; and 17-0211-1701 on Tuesday, June 20, 2017.

Public Attendees: Lene O’Dell, Gallagher Bassett; Scott McDougall; Angela Richards, Attorney Lobbyist; NCCI Representatives Cynthia Wood and Susan Schulte (via conference call); Attorney Joseph Jarzabek (via conference call)

Industrial Commission: Chairman Tom Limbaugh, Commissioners Tom Baskin and R. D. Maynard; Director Mindy Montgomery; Benefits Administration Manager Patti Vaughn; Gayle Roark; Richelle Flores; and Public Information Specialist Nick Stout

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Welcome & Introductions:

Benefits Administration Manager Patti Vaughn opened the meeting at 1:00pm (MT) and led with introductions of participants. (*See* handout of Attendance Roster.)

Purpose of Meeting:

The Commission is seeking public input to amend the rules governing prompt servicing of workers’ compensation claims.

Ms. Vaughn provided a summary background of events leading up to today’s public meeting for the referenced IDAPAs. A working group of the Commission’s Advisory Committee had vetted the language and discussed at length the duration of the time period for which a compensability determination could be made and the calculations for payments of benefits, specifically payment of PPI benefits. General consensus was reached by the working group, except for the remaining issue on the (28) day provision to “start the clock” running for determining the acceptance or denial of a workers’ compensation claim. The working group presented the Option A language to the Commission’s Advisory Committee for further vetting of the language and for recommendation to the Commission (*see* Option A text language) to move forward with a temporary rules package. The Commission had submitted a temporary rules package for consideration in the 2017 Legislature; unfortunately, the Governor’s office did not approve the Commission moving forward with the temporary rules, since it was too close to the

start of the session. In addition, a couple of recent Supreme Court decisions have impacted how PPI and PPD are treated which are being addressed in the Option B drafts dealing with payment of impairment. The Options A and B drafts available today are a result of the working product for which the Commission is seeking feedback.

Materials:

Handouts were provided to participants labeled as Option A and Option B of the changes to IDAPAs 17.02.04, 17.02.08, 17.02.10 and 17.02.11 for consideration. Attendees participating via conference phone were provided the text language by email at the start of the meeting session.

Ms. Vaughn presented an overview of the text language in Option A compared to Option B. She read into the record the amendments to each of the IDAPAs; and requested participants to provide their comment on the text language and to indicate their Option preference.

1. **IDAPA 17.02.04.271. Rule Governing Impairment Ratings.** Ms. Vaughn summarized the change to each of the Options. Option A allowed for the payment to claimant to be based on an average of two or more impairment ratings for the same injury that the payment of would be based on the average of the ratings; and where no ratings are averaged notice would be given to claimant. Option B deals with the impairment payment to claimant. Commissioner Baskin further clarified the change in Option B. The issue of the payment of PPI benefits falls under the implications as a result of the Supreme Court decision of *Mayer v. TPC Holdings*, where the claimant in this case received benefits based on his impairment rating. Idaho law makes no provision for payments of an impairment rating, however, disability benefits are payable. **Participants had no comments or preference between the two Options.**

2. **IDAPA 17.0208-1701- Rule Governing Notice to Claimants of Status Change Pursuant to Section 72-806, Idaho Code:** Ms. Vaughn summarized the changes in Option A vetted by the working group that added the triggering notice provision for a change of status; there were no changes for Option B. **Participants had no comment changes to the language in IDAPA 17.0208-1701.**

3. **IDAPA 17-0210-1701- Insurance Carriers and IDAPA 17-0211-1701 – Self-Insured Employers:** (051.09 – Requirements for Maintaining Idaho Workers’ Compensation Claims Files – Prompt Claims Servicing)

Ms. Vaughn summarized the changes and indicated the Chapters 10 and 11 mirror each other. She called for comments.

Mr. McDougall expressed concern that actions of the surety could be a controlling factor on notice provision of an accident or occupational disease injury; there could be a ‘gaming of the system’ by surety or employer. There could be a number of reasons or simple oversight on the part of the surety.

Mr. Jarzabek expressed concern that a lot of lower wage earners know very little about workers' compensation insurance and the complex process of workers' compensation. He does not believe 28 days would be a fair time period. Under IC 72-307 - Knowledge of Employer to Affect Surety, a worker friendly statute, shows it is not the duty of the employee to make sure the employer gives notice. In his opinion, the burden is on employers and insurance carriers.

Commissioner Baskin agreed with Mr. Jarzabek that IC § 72-307 is worth thinking about for these discussions. Employer = Surety and vice versa. He also shared the concerns that were expressed by the insurance community in our working groups. There are some claims, such as occupational disease cases, where it is difficult to make a determination whether to accept or deny the claim within 28 days. Members of the adjusting community wanted more time to accept or deny complex claims. The Claimants' bar was included in those discussions when we were thrashing through this rule, which, by the way, consumed most of the time of the working group. At the end of the day, all players seemed to agree that 28 days was a fair compromise.

Mr. Jarzabek shared his reason for participating in the negotiated rulemaking session is because his practice is geared to workers, and he would want awards of attorney's fees, under 72-804, that surety would be assessed an amount at five weeks or four weeks (plus) for non-compliance under this 28 day provision that is being suggested in the rules language.

Mr. McDougall recalled that the claimants' attorneys helped draft the rules and so the beneficiaries would be the attorneys and in-state adjuster so that the liability would run to the surety. He shared his recollection that there is an unwritten standard in the industry of the 28 day provision that the time starts from the day of receipt of the claim by the in-state adjuster; but there is leeway in the rules to say, "This is becoming outrageous." Then an audit would be conducted and if there is a finding of non-compliance, the Commission could pull the ticket of the surety. Mr. McDougall asked: "Does the Commission propose an alternative to 09.a, the date of notice to the employer so responsibility would lie with the employer?"

Commissioner Baskin recalled that under 72-602, employer has 10 days to file a FROI; if employer waits to file a FROI on the 9th day, the same date surety learns of the accident, then that would give 38 days to accept or deny the claim. Would it be more appropriate to impute employer's knowledge to surety per 72-307 and require action within 28 days of the date either entity learned of an accident? Mr. McDougall agreed with Commissioner Baskin under that scenario when applying 72-307 jurisdiction.

Ms. Vaughn asked Mr. McDougall if he looked at the scenario Commissioner Baskin shared as a self-imposed punishment.

Mr. McDougall opined that in a worst-case scenario a penalty would be imposed of what you owed, plus attorneys' fees, since there are not many cases that get to that point.

Commissioner Baskin shared his thoughts that some claims take six months to make a determination on the claim. He inquired of Mr. McDougall if he held to the premise that some

line in the sand needs to be drawn to hold people accountable? Mr. McDougall agreed; yes, there needs to be some accountability.

Mr. McDougall inquired whether the Commission had conducted surveys of other jurisdictions that have reporting periods of similar time frames on the notice to surety. He recalled the 2014 WCRI report indicated no other jurisdictions have a time frame of less than 28 days; they direct to the date of disability.

Commission Chairman Tom Limbaugh shared recent surveys. State of Utah has a 21 day reporting requirement after learning of the injury for employer to report; and 24 days added for difficult claims. The state of Oregon allows 60 days for reporting of the injury.

Mr. McDougall responded that he is happy to see 28 days was settled on. Chapter 8 provides for the notice of a change of status. Sometimes the last payment is sent out but no notice is sent to the injured worker, or is not sent in a timely manner.

Commissioner Baskin shared that statute tells the employer to file the notice of injury under 72-602, or risk penalty of a misdemeanor.

Mr. McDougall would like the Commission to reinforce the requirement of employers reporting timely. He further inquired whether the Commission has data available of the average number of days on reporting under prompt payments since the Commission receives information on the First Reports of Injury. Is there a trend? Is it getting worse? He recollected the State Insurance Fund at one time tracked the data.

Mr. Jarzabek suggested the focus should be on the worker and that the 28 day time runs from the date of injury. He shared his experience of a worker who was asked by employer not to report the injury; and for fear of losing job, did not. He wants the law kept simple - 28 days from date of injury of when employer learned of the injury. Burden is on the employer and surety and removes the Commission and the worker from the formula. Commissioner Baskin thanked Mr. Jarzabek for making this good point. IC 72-307 dovetails into 72-602 and places the obligation for employer to take action after knowledge of the accident.

Mr. Jarzabek agreed in general with Commissioner Baskin's summation of 72-307. He expressed concern with how the payment of TTDs would be handled.

Commission Chairman Tom Limbaugh shared reporting statistics from various other states: State of Colorado FROI must be filed in 10 days from date of knowledge of the accident; and 20 days from FROI filing for determination of the claim. Montana the worker has 30 days to report; then insurance carrier has 30 days from date FROI filed to accept or deny the claim.

Ms. O'Dell inquired if the Commission was still working through having audit guidelines completed in conjunction with the rules amendments on the 28 days that surety is still on the hook on audit findings.

Ms. Vaughn and Commissioner Baskin both responded that it is important the audit guidelines be completed but is complicated by the fact that the rules are not in place yet since they go hand-in-hand. Ms. Vaughn called for further comments to the insurance carrier and self-insured employer IDAPA rules. **Participants had no further comments to the text language of the 28 day notice provision.**

IDAPA Section 17.02.10.09.c. Ms. Vaughn called for comments.

Commissioner Baskin summarized the change and discussed the specific provision under 72-317 that allows payments of income benefits on other than a weekly basis at the discretion of the Commission. The current practice is not consistent with requirements of statute. The Commission worked at figuring a way to address the issue, see new at subsection 051.09.c.i.ii.iii.

Participants had no additional comments.

IDAPA Section 17.02.10.09.d. Ms. Vaughn inquired if participants had any preference for the language, comparing Option A to Option B. Ms. O'Dell preferred the change in Option B; however, she asked for further clarification in the language to the two options which she finds contradictory when calculating the first payment of income benefits. Ms. Vaughn summarized the change from Option A to Option B. Option A includes the reference to permanent partial impairment paid as income benefits every 28 days under subsection 09.c.i. Option B removed the reference to permanent partial impairment as paid income benefits and identifies permanent impairment as the basis for PPD benefits payments. Ms. Vaughn asked for any preference to include or not include that change. Miss O'Dell's preference is to include the change at Option B.

IDAPA 17.02.11. Ms. Vaughn reiterated the changes in 17.02.10 are 'mirrored' in Chapter 11; and asked for any additional comments of participants.

No other comments were shared.

Procedures:

Ms. Vaughn summarized the next process is for the Commission to meet and review the comments. Any written comments will be accepted until June 28th and shared with participants. Any draft language and comments of this meeting will be given to the Commission's Advisory Committee on Workers' Compensation for their further vetting and recommendation to the Commission before any final proposed rules language is submitted no later than September 1st.

Mr. Jarzabek thanked the Commission for the opportunity to participate in today's negotiated rulemaking session.

No further meetings were scheduled. There being no further discussion, the meeting adjourned at 1:59 pm.

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