

**Industrial Commission's Advisory Committee
On Workers' Compensation
Minutes
May 8, 2013**

Members Present

Roy Galbreath, Chairman
James Alcorn
Clay Atwood
Paul Collins
John Greenfield
Mike Haxby
Larry Kenck
Susan Veltman
Representative Douglas Hancey

Members Absent

Susan Rhoades
Gardner Skinner
Rian Van Leuven
Senator John Tippets
James Arnold
Steve Millard

Industrial Commission

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

Opening Remarks:

Advisory Committee Chairman Roy Galbreath opened the meeting by asking for introductions of Advisory Committee members and public attendees.

Minutes:

The Minutes of February 13, 2013 were reviewed. Upon motion by Mike Haxby, seconded by Susan Veltman, the Minutes were unanimously approved as submitted.

Commissioner Baskin welcomes Beth Kilian to the Industrial Commission as the new Commission Secretary.

Claimant's attorneys fees – IDAPA 17.0208 – (Commissioner Baskin):

Commissioner Baskin presented for Committee consideration assemblage of an Attorney's Fees Subcommittee to revisit the current regulation. Mr. Baskin shared his thoughts on the Supreme Court Decision of *Seiniger vs. State of Idaho, Industrial Commission*, 2013 Opinion No. 46; and the case of *Rodriguez* (see IIC webpage for a copy). Mr. Baskin felt *Seiniger* did not provide the guidance that he hoped it might and it was too limiting on the issue of constitutionality. In the *Rodriguez* case, Commissioner Baskin described the Commission decision as not particularly "elegant." He said the Commission asked the question: "Did the retention of claimant's counsel actually have something do with this guy getting a benefit that he wouldn't otherwise get or get to him sooner than later?" In both case examples, claimant's attorney only had to demonstrate that his/her efforts were "primarily" or "substantially" responsible for securing the fund from which the attorney seeks payment of fees and costs.

Public Comment: After discussion, Mr. Greenfield suggested that practitioners on both sides of the bar be on the subcommittee. Mr. Haxby agrees that a discussion of subcommittee members would be of benefit.

The Volunteer Members as selected are Commissioner Baskin, Chairman, Dan Bowen, Mike McPeck, Brad Eidam, John Greenfield, Gardner Skinner, Jamie Arnold, and Mike Haxby.

Commissioner Baskin did not believe there would be enough time to dedicate a report at the next Advisory Committee meeting in August.

Proposed Legislation Regarding Professional Firefighters of Idaho – IC § 72-438 – (Roy Galbreath):

Chairman Galbreath presented a status update and legislative history of IC § 72-438 for the benefit of new members to the Committee. He explained the purpose of the bill was to provide that certain ailments to professional Firefighters be presumed to “arise out of their employment” and to be accepted as workers’ compensation claims, unless proven otherwise. Mr. Galbreath shared a few of the objections that were mentioned in committee, such as the potential for increased cost in the workers’ compensation premium; the time period allowed after retirement to make a claim; and the increased costs of physicals to employers. He went on to congratulate the Firefighters on a great job addressing those changes to the bill. Mr. Galbreath said a “*straw*” poll was conducted of the Subcommittee and the Advisory Committee but no consensus was reached for approving the legislation, and the Firefighters were informed of the poll result. Mr. Galbreath reported that the Subcommittee disbanded in November of 2011 and believes the Firefighters are proposing another bill in the 2013 legislature.

Public Comment: Representative Hartgen, Chairman of the House Commerce & Human Resources Committee, expressed his appreciation and opportunity to listen to the group discussion. He provided a summary report of HB 194 and the decision to “hold” the bill in committee. He said the House Commerce committee, that included Representative Hancey, met with various parties and Commission members to revisit the issue, both medically and legally, for any changes and to be familiar about the issues of a couple years previous. Representative Hartgen said he discussed this opportunity to re-address the proposed Firefighters legislation with Commissioner Limbaugh, and they agreed this should be an agenda item for the Advisory Committee. He said he is not aware of any new legislation being offered, but the commitment was made to listen to the parties before going forward with the bill.

Public Comment: Mr. Shoplock gave an introduction of his involvement in the Firefighters’ legislation that began four years ago and the legislative background of the bill and the discussions of “presumptive illness” for Firefighters. He said Chairman Galbreath put on a great subcommittee and that he learned a “ton” from those meetings. He reported that the word “*Act*” was changed in the standard 1582 section of the bill, so that the section read *National Fire Protection “Association.”* He said the Subcommittee went to the House with that one word change but were unsuccessful because the session was coming to a close. Mr. Shoplock said the legislation hasn’t changed from the Subcommittee, except for that one word in the standard 1582 section. Mr. Shoplock added that an additional debate came up on the potential for other industry claims, i.e., farming, and the application of the “presumption” analysis that is required

to qualify for a claim. He explained that annual physicals for firefighters is an industry requirement and meets the “presumption” analysis. He explained that for fire departments not requiring annual physicals they would be precluded from the “presumption” analysis. Mr. Shoplock also shared that the Firefighters are asking for a change to the “burden of proof,” based on the medical analyses studies of Dr. Reddy (John Hopkins) and NCCI that demonstrate that even with protective gear, yearly physicals and other safeguards, Firefighters’ risk factor for certain cancers are 2 to 3 times higher than for the “normal” person. He shared a case example of the 36 year old male firefighter diagnosed with testicular cancer. Mr. Shoplock said the Firefighters will run the bill in the coming session and thanked Chairman Hartgen and other members of the legislature for being present at today’s meeting.

Public Comment: Mr. Kenck thanked the Firefighters who serve and protect us, and shared his view of comparing “presumption” in other occupations to the firefighting men and women who provide a service of protection to the public with no forethought of personal harm, nor consideration of the affects of carcinogens or the smoke.

Public Comment: Mr. Shoplock further shared there are as many volunteer Firefighters as career firefighters, and the committee has tried to address the “presumptive” funding mechanism for volunteer firefighters in this legislation, as well as looking at the NCCI costs, but it is difficult to apply the same standards as for full-time career Firefighters. Mr. Shoplock also reported that the volunteer firefighters are researching access to federal funding to begin physicals for their volunteer members for inclusion in this legislation.

Chairman Galbreath asked Mr. Greenfield to speak on the occupational disease case law from claimant’s bar and the proof of exposure of an occupational disease. Mr. Greenfield expressed that there is not good case law, and to have a successful outcome, “presumption” is key to all these Firefighters across the country. Mr. Skinner shared a claimant’s asbestos exposure case he had where the doctor’s testimony was “key” in a finding for claimant of 85% exposure in the work place environment. He said he had only to prove a window of employment where the claimant was exposed to the asbestos and have a physician with supporting testimony. Chairman Galbreath asks if it’s necessary to determine the specifics of chemicals and a date of a fire. Mr. Greenfield responded that without a presumption, it’s difficult in looking at the entire picture, and understands Mr. Skinner’s view of relying on a doctor’s testimony in occupational disease cases. Commissioner Baskin reminded the Committee that there must be good medical basis, good medi-analysis and good science compiled that demonstrates a need to re-address this legislation. Mr. Kenck shared that the firefighting profession requires immediate reaction, and the Firefighters have an obligation that comes with the occupation which should be considered as we work with the science behind the medical problems that may exist or result from this profession.

Commissioner Baskin suggested a poll vote be taken to determine a need to convene a Subcommittee since these issues were last addressed in 2011 and there are new members on the Advisory Committee.

Public Comment: Mr. Shoplock confirmed that the Firefighters continue to work with Representative Hartgen and will take the bill to the legislature next year with the goal to pass it through the legislature.

After discussion, Chairman Galbreath called for a roll call vote to reconvene the Subcommittee for the purpose of re-addressing the legislation and provide advice to the Committee that the legislation is approved or otherwise. The Subcommittee members are Larry Kenck, Chairman; John Greenfield; Gardner Skinner; Susan Veltman; Mike McPeck; Rian Van Lueven; Rob Shoplock; Phil Barber; and Mike Kane.

Subcommittee Reports:

Healthcare Subcommittee IDAPA 17.0209: Subcommittee Chairman Steve Millard was not able to attend the Advisory Committee meeting. Medical Fee Schedule Analyst Patti Vaughn presented the Healthcare Subcommittee's update of its April 24, 2013 meeting and request for approval of the temporary rule. Ms. Vaughn reported that the Commission had adopted a pending rule updating the physician fee schedule, the new pharmaceutical fee schedule and conversion factors, but the approved rule contained an error in the range of codes that was subsequently corrected. Ms. Vaughn explained the formula for calculating the allowable standard pharmaceutical reimbursements. Ms. Vaughn reported that the Commission held a public hearing, had received no written or oral testimony from the pharmacies during the public comment period. However, testimony was brought to the legislative committees that dispensing fees were too low, and so the legislature agreed to approve the pending rule with the understanding that the Commission would meet with pharmacy associates and determine the appropriate dispensing fees, and then adopt a temporary rule to take effect on July 1st. Ms. Vaughn reported that on April 24th the Subcommittee meeting was held to discuss the dispensing fees and the role of third-party billers' entitlement to dispensing fees. Ms. Vaughn explained the third-party billing process and their role in pharmacy reimbursement. She further explained that the rule, as written, defines the "acceptable charge" and the same amount is owed whether or not it's a third party or the pharmacy billing for the pharmaceuticals. It was agreed that contracting with a third party is a business decision on the part of the pharmacy and, therefore, the pharmacy needs to factor that cost into their third party agreements. Ms. Vaughn reported that the Subcommittee was provided a table showing other states' allowed dispensing fees and the recommendation was for \$5 brand names and \$8 for generics, and that the differential between the two is to encourage the use of generic brands over brand names. She also reported that the Subcommittee recommended an allowable \$2 dispensing fee for prescribed over-the-counter medications billed by a pharmacy. Ms. Vaughn closed her comments by asking the Advisory Committee to accept the Subcommittee's recommendations for drafting a temporary rule with the allowable dispensing fees with an effective date of July 1st. After additional discussion of the Subcommittee's recommended dispensing fees and approval of the temporary rule, Chairman Galbreath called for a vote approving the Subcommittee's recommendation to adopt the temporary rule effective July 1st and approving the dispensing fees of \$5 for brand names, \$8 for generics, and \$2 for prescribed over-the-counter medications billed by a pharmacy in *IDAPA 17.0209*. A show of hands vote was called approving the recommendation to the Commission. The motion passed.

Uninsured Employers Fund: Mr. Kile presented an update of the Uninsured Employers Fund. He says the fund had been on "hiatus" since about November due to the legislature, but it's starting to crank up again. He reported that because of the current economic business climate the question of whether approval from the task force for additional taxation either on

employees, individually or collectively with the employers, or as a group, is a topic that's going to receive approval or passage in any event would need to be answered first before going forward. Commissioner Maynard requested Mr. Kile give some background about the fund's beginnings for newer members of the committee. Mr. Kile presented a historic summary of the Fund's origins and establishment to ensure injured employees, not otherwise covered by workers' compensation insurance, would have coverage. He explained that the original concept was that it be funded by all workers in the state for about \$2 a year per worker and have it self-sustaining, but he says the funding mechanism historically is an issue, and he has seen resistance from both labor and employers on funding. Mr. Kile is interested in a cross-section survey by the task force of a few attorneys, some legislators, and some business people to see if it's viable for additional taxation. His impression is that it might be best to let it rest and come back to it at a better time. Mr. Kile entertained questions.

Public Comment: Representative Hancey was interested to know what type of employers and employees fall under the category of no workers' compensation insurance coverage. Mr. Kile explained the necessity for businesses to have Workers' Compensation insurance coverage for their employees under all circumstances. He further explained that in Idaho there are few people that conduct business without Workers' Comp insurance. He said an indicator to find out if an employer has coverage, is when an injury occurs. Mr. Kile said that the construction industry and businesses in remote areas is difficult to track. He says that, for the most part, in his experience, employers are very fair and honest, and they cover their employees. Mr. Greenfield complimented the Commission's compliance department on their ability to "weed" out employers who do not have workers' compensation coverage. Mr. Kile explained that uninsured employers are penalized by a fine, but the fine does not always cover all the cost of an injury. Mr. Haxby also shared that there is an award against them to pay it, but then have no money to make those payments and that's where the problem lies. Commissioner Maynard concurred with Mr. Haxby but enforcement can be difficult if an employer files for bankruptcy, and under federal bankruptcy laws, the injured workers have no standing. Representative Hancey thanked the committee for their information on the topic.

Chairman Galbreath called for a short break. The meeting reconvened @ 11:00a.m.

Updates:

Industrial Specialty Indemnity Fund – James Kile: Mr. Kile provided a brief, humorous follow up of his report presented at the February meeting. He clarified that the fund is not heading towards an "Armageddon." He says the fund's budget is roughly \$7,000,000 to \$10,000,000 a year. Mr. Kile reported that he starts tracking @ mid-year December and after that about every two weeks. He reported that 35 complaints have been filed against the SIF this year compared to last fiscal year of 32 filed complaints. He believes there will be 30% more filings by the end of June. He also reported that there are about 30% more lump sums processed this year than last year -- eighteen (18) approved LSS so far this year and fifteen (15) LSS for the whole of last year. So the numbers are up and the expenses are up. Mr. Kile reported that for assessments he's looking at a 20% increase from previous history in the last three years. He concluded that the fund is active and there are a lot of cases that are currently in the works and everybody is employed.

Public Comment: Representative Hancey asked why there is an increase in assessments. Mr. Kile explained that with the implementation of a statute of limitations for the SIF, it has led to timely filing of their cases for quicker notice of claimant's and defense attorney's, as well as the economic impact and better awareness of the Fund have led to the increase. Representative Hancey asked if there is one area of the economy or an industry that seems to be growing in claims from previous history? Mr. Kile indicated there is no specific area. Representative Hancey inquires about the statutory time limit on filing a claim. Mr. Kile explained the five-year statute of limitations for filing a notice of claim. He said assessment figures will be provided to the Commission sometime in September.

There was no further discussion.

Industrial Commission Report:

Commissioner Baskin reported that there were no significant changes to the proposed amendments of the *Judicial Rules of Practice and Procedure*, since the last meeting vetted with constituents. He says the rules go into effect today. Mr. Baskin took a few moments to explain the lump sum settlement process and the required use of claimant's and defendant's templates that appear in the exhibits anticipated by the Rule 18 amendments. He says the Commission's goal is that the lump sum settlements are processed at seven (7) days from date of receipt by the Benefits Department. Commissioner Baskin says the Commission must be satisfied that every proposed lump sum settlement is in the best interests of the parties. Commissioner Baskin went on to explain the evolution of the "two-tiered" lump sum settlement approval process of the Benefits Department and the separate mediation process that was not contemplated by statute, IC § 72-404. He explained the intent of the mediation venue was to settle the "tough" cases. Mr. Baskin reported that Benefits Department is currently below seven (7) days for processing lump sum settlements through the Benefits Department. Commissioner Baskin re-assured the Advisory Committee that the use of the templates in the LSS process will help facilitate the processing for lump sum settlements, and the mediation process will be more consistent with IC § 72-404. He also explained that there's nothing different in the other amendments from what he had reported at the last session.

Public Comment: Mr. Greenfield said his use of the template was a good experience for him, and it was timely approved, but needed clarification of the forms, *Appendix 5b* and *Appendix 6b* in *Rule 18*. Mike Haxby inquired what precipitated that need to change the rule. He agreed that adjusters and practitioners have used the process and have overburdened the mediation process. Commissioner Baskin explained that for situations when a claimant is not present for a telephonic mediation, the Commission needs the assurance that the settlement process is properly vetted with a claimant, as required by statute. Mike Haxby thanked the Commission for their efforts to speed up the lump sum settlement process and to have a different solution for constituents, but he questions the perception folks in the insurance industry have about the mediated lump sum settlement approval process. Commissioner Baskin says not to view the mediated lump sum settlement process as a "lead-pipe safe cinch" that if it goes through mediation it's going to be approved, although there's a higher percentage of those that will be approved. Mr. Haxby expressed his appreciation and concurred with the Commission from that standpoint. He also indicated that he will talk to people that do this that it might not be a "lead-pipe safe cinch." Commissioner Limbaugh explained that every mediated lump sum settlement

is read. He trusts Benefits' recommendations to the Commission; however, because of the volume of mediated lump sums, he has on occasion seen errors in his review and has had questions and that delay can impact the approval process by more than seven (7) days. He believes Benefits falls below seven (7) days. Mr. Limbaugh stated that for any business, quality control is necessary, and processing through Benefits with the use of templates will help tremendously in speeding up the lump sum settlement process. Ms. Veltman asked for Commission clarification of the acceptable supporting documentation format in the current final Rule 18. Her interpretation of the rule is that supporting documentation is no longer accepted on disk but as paper-only, and she asks if this is applied to all mediated cases as well. The Commission confirmed that is the "correct" interpretation. Ms. Veltman thanked the Commission for clarifying the rule change. Mr. Gardner inquired of the Commission its process for distributing this information to the insurance industry -- on the web page, or as a separate bulletin. Mr. McDougall responded that the Commission has been working on the templates for more than a year and began testing it with various constituents, and sent by email a letter explaining the process and informing them of the pending effective date of May 8th to the contacts on the adjudication's mail list for attorneys and to all those who have gone through the IC certification course. Mr. Gardner indicated that he and most of his clients were unaware of the new lump sum settlement policy, but he is aware of the amendments to the Judicial Rules. He became aware of the new policy from Commissioner Baskin about a week ago. He asks that the interpretation and change in the statute and practice be clarified among the bar and the insurance companies.

Commissioners Baskin and Limbaugh provided clarification that all lump sum settlements must be accompanied by templates both through mediation and those that go through Benefits, but the LSS process through Benefits will begin in July or August, and there is no impact in the preparation of settlement documents. Mr. McDougall further clarified that the notice sent out two or three weeks ago did indicate the impending use of the templates for all lump sums whether or not they are mediated.

Other Issues/Announcements:

Status of Rules Presented to the 2013 Legislature – Commissioner Limbaugh: Commissioner Limbaugh deferred to Fiscal Officer Jane McClaran to present the draft rules and legislative changes for securing compensation for self-insured employers, *IDAPA 17.0210*, *IDAPA 17.0211*, and *IC § 72-301*, and called for the Committee to decide if there's a need to convene a Self-insured Subcommittee.

IDAPA 17.0211 Security for Compensation - Self-Insured Employers. Ms. McClaran presented the new language to the rules governing qualifications of a self-insured employer, *IDAPA 17.0211 Security for Compensation - Self-Insured Employers*. The additional language added to page 2, subsection 6, of the rule clarifies the expectation that a self-insured applicant would secure excess insurance coverage, and provides that no credit will be given for excess insurance coverage provided by a surplus line carrier. Ms. McClaran explained that the actual forms found at page 5, subsection 4(d), of the rule will be removed rather than having to revise the rules every time there is a change made to the form. She further explained that the forms are available on the IIC website, or can be obtained directly from the Commission. She further reported that under the section "Submit to Audits by the Industrial Commission," the language

now includes that the final authoritative source is going to be the Industrial Commission's database for determining contractor workers' compensation coverage. She reported that this discrepancy in the audit provisions occurred when the IDAPA rules 17.0210 and 17.0211 were split. Ms. McClaran reported that at page 7 under the "*Rule Governing Reporting Indemnity and Medical Payments and Making Payment ...*" of ISIF reporting, we are suggesting removal of the "form" in the rule since the form is available through the Commission or on its website.

IC § 72-301 Security for Payment of Compensation. Ms. McClaran next presented the proposed change to IC § 72-301 - Security for Payment of Compensation. She explained the changes reflect the rapidly expanding investment options in today's marketplace. She explained the difference between investments of "idle" funds through the state treasurer, *see* IC § 67-1210, and the maintenance of custodial security deposits between self-insured employers and the state treasurer's office.

Public Comment: Mr. Haxby asked for further explanation and purpose for removing the form in the rule and the Commission's methodology to distribute data to its constituents if there's a substantial change made to the form. Ms. McClaran says that it will eliminate the requirement to have new rules each and every time there's a "tweak" to the form, and she anticipates no change in the process but simply a way to avoid publishing it in the rule. Chairman Galbreath asked for a definition of a "surplus line carrier." Ms. McClaran explained that the surplus line carrier is an unauthorized insurer, governed and licensed in the state of Idaho, under § 41-1214 of the Department of Insurance, to export lines of insurance so there is no reporting requirements and no regulatory oversight. Mr. McPeck shared his opinion that derivatives and other "junk" as security are not, according to statute, permissible types of investment that can be posted as security with the state treasurer. He recalled that this issue came up in 2007 and 2008 when the financial industry persuaded the state treasurer to invest in derivatives. Mr. Haxby called on Mr. McPeck for his opinion of what the thought process of the self-insured employer community will be on this credit portion of § 72-301. Mr. McPeck said he only wanted to point out the logic of permissible investment types and let the Committee know what's going on within the state in the financial industry.

Commissioner Limbaugh suggests we vet from members of the Committee their concerns, comments, or questions and then reconvene a Subcommittee. Chairman Galbreath agrees and suggests the Committee seek some guidance from the financial industry. Mr. Haxby indicated he is in favor of reconvening for one (1) meeting. After further discussion, the Committee agreed to reconvene the Self-insured Subcommittee for the purpose of reviewing these proposed rule changes and allow for input from the Self-insured Community through any comments received from them and through public hearings on the rules. Chairman Galbreath instructed the Commission Secretary to send out the proposed rule changes for that committee and then provide feedback to Chairman Van Lueven to call a meeting based on the feedback.

Status of Rules Presented to 2013 Legislature – Commissioner Limbaugh

IDAPA 17.0204 – Police Officer and Detention Officer Temporary Disability Fund. Commissioner Limbaugh presented the rule change of IDAPA 17.0204 that extends the program until July 1, 2015 for the *Police Officer and Detention Officer Temporary Disability Fund*, IC §

72-1104. Ms. McClaran indicated that additional claims have been submitted for reimbursement that fall within the new sunset clause, but the Commission has not seen a trend in the fund.

§ 72-523 – Premium Tax Reduction. Commissioner Limbaugh reported on the statute change to § 72-523, the two-year extension of our premium tax reduction. He expressed his appreciation to the Chairman of the House Commerce Human Resource Committee and Senate Commerce Human Resource Committee for his assistance in pushing through the amendment. He said he expects to have an estimated \$1.6M revenue reduction in each of fiscal years 2015 and 2016 for a total impact of \$3.2M. He further reported that when added into the current year, we expect to see a \$5M total reduction in our fund. The fund will continue to be monitored so it doesn't continue to increase.

Emergency Hearing Procedure – James Arnold. Due to a conflict, Mr. Arnold was not able to attend and speak on the topic of emergency hearing procedures.

Preparation for Future Meetings:

Nominees for Election – Roy Galbreath

(Nominations Committee Members: Rian Van Lueven, Chairman, Mike Haxby and Roy Galbreath) Mr. Kenck moved that the committee of three stay in place and make available some candidates for the election in August. The motion was seconded and passed by majority vote.

Topics for Discussion at the Next Meeting: No additional topics were suggested for the next meeting.

Next Meeting Dates:

August 7, 2013, an election meeting; and
November 6, 2013.

There being no further business, the meeting was adjourned.