

**Industrial Commission's Advisory Committee  
On Workers' Compensation  
Minutes  
August 14, 2013**

**Members Present**

Mike Haxby  
Rian Van Leuven  
Roy Galbreath  
Susan Veltman  
James Alcorn  
James Arnold

John Greenfield  
Steve Millard  
Gardner Skinner

**Members Absent**

Senator John Tippets  
Representative Douglas Hancey  
Clay Atwood  
Dr. Paul Collins  
Susan Rhoades  
Larry Kenck

**Industrial Commission**

Thomas P. Baskin, Chairman  
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 May 8, 2013 were reviewed. Mr. Millard called for a correction of listed attendees at the May 8<sup>th</sup> meeting. Chairman Galbreath called for other comments and entertained a motion to approve the minutes as corrected. Upon motion by Mr. Arnold, seconded by Ms. Veltman, the Minutes were unanimously approved as corrected.

**Subcommittee Reports:**

*Claimant's Attorney's Fees (IDAPA 17.0208) (Chairman Thomas Baskin, James Arnold, Brad Eidam, Dan Bowen, John Greenfield, Mike Haxby, Mike McPeek and Gardner Skinner)*

Subcommittee Chairman Thomas Baskin presented the Claimant's Attorney's Fees Subcommittee report to revisit the current regulations on approval of claimant's attorneys' fees in settled cases. Mr. Baskin said the Subcommittee met on July 2<sup>nd</sup> and July 29<sup>th</sup> to vet whether anything beneficially could be done to the regulation to "clean it up." The Subcommittee made no recommendations as to the terms "primarily" or "substantially," but several comments were made relating to other topics, such as an automatic reduction of attorneys' fees after 10 years of

periodic payments in temporary partial cases and consideration for increasing the presumption on an attorney fee award from 25% to 30%. Mr. Eidam and Mr. Greenfield agreed to poll some of the claimant's bar and vet this issue of increasing presumptions from 25% and 30% to 30% and 35%. Their results showed some support, but were soft for pursuing the change for increasing the presumption from 30 to 30%. However, there was support given for removing the reduction on total permanent disability after ten (10) years. The Subcommittee also reviewed Utah legislation enacted in 2013 allowing for claimant's attorney in med-only cases to be paid by the surety, if counsel is successful in a claim on prospective care, even in the absence of unreasonable denial.

Commissioner Baskin reported that the Subcommittee consensus was to not move forward with enacting any legislative change, recognizing the existing regulation is broad enough to grant the power to the Commission for appropriate solutions in "unusual" cases. The Subcommittee agreed not to plan additional meetings.

Mr. Arnold complimented Commissioner Baskin on an excellent summary report of the Subcommittee. He added that a previous subcommittee had looked at this issue of prospective attorneys' fees and were unable to come up with any degree of consensus on what an attorney fee structure would look like in prospective medical care cases. He also is in agreement with the Subcommittee that the current system works fairly well and that we should leave well enough alone.

Mr. Haxby also thanked Commissioner Baskin for his leadership on the selected Subcommittee and was appreciative that the stakeholders and the bar were involved to vet through a well done process.

Healthcare (IDAPA 17.0209) (Chairman Steve Millard, Paul Collins, Larry Tisdale, Patti Vaughn, Therese Cirelli, Thomas Howell, Woody Richards (proxy Kenton Brine), Commissioner Limbaugh, Mindy Montgomery, Senator Schmidt, Representative Hancey, Pam Eaton, Mike Haxby, and Jim Alcorn)

Mr. Millard thanked the Healthcare Subcommittee for their work in vetting through the pharmacy rule and medical fees for physicians and hospitals. He recognized some of the members who served on the Subcommittee.

Pharmacy and Physician Fee Schedule. Mr. Millard reported that the Subcommittee convened two meetings. The first meeting dealt with the physician fee schedule that is used by payors to pay doctors. He reported that by statute the Commission is required to review these fees on an annual basis and make recommendations to the Commission whether or not to increase or change the conversion factors. Mr. Millard also reported that the IMA House of Delegates passed a resolution supporting increases to the medicine categories while freezing the surgery categories. Mr. Millard reported that subsequent discussions revolved around periodic increases in the conversion factor made concurrent with Centers for Medicare & Medicaid Services increases to the RVUs over-inflated the reimbursement to primary care physicians. Mr. Millard reported that Patti Vaughn, with assistance from the IMA, did a great amount of research in reviewing the last five years of data and she found that fee schedule

allowables for office visits had increased over 30% in those five years. He reported that when the cost of living adjustment or other index is added, the result was a huge increase in the reimbursement to physicians. Some reports indicate that it is “out of line” with the rest of the country.

Mr. Millard reported that after discussion and analysis, the Subcommittee recommendation is to make no change to the physician fees for the coming year and would present the report to the Advisory Committee for consensus. He also reported that the IMA is comfortable with no increase in fees.

Hospital Fee Schedule: Mr. Millard reported that due to a lack of available data for determining fees of the hospitals, the Idaho Hospital Association surveyed members to obtain data for benchmarking, but the data was sparse, only four cases. The Subcommittee requested Mr. Alcorn and Mr. Haxby to supply paid percent-of-charge information reimbursed to hospitals. That information was provided to the Subcommittee; however, no feedback from the Subcommittee was provided to either Mr. Millard or Ms. Vaughn. The Subcommittee recommendation to this Advisory Committee is to maintain the “status quo,” that we do not move forward, but that the Subcommittee will continue to meet between now and next year and obtain the needed data for good benchmark decision-making.

Mr. Greenfield asked if the CMS increase in the RVU is similar to a cost-of-living adjustment, and he is in agreement with the Subcommittee recommendation.

Mr. Haxby reiterated the lack of data hampered the Subcommittee, and suggested the Subcommittee consider involving other insurance companies to expand that source of data so critically needed. He suggested Angela Harter as a contact representative of the insurance industry.

Mr. Arnold asks that the Subcommittee also look at inclusion of deposition fees and doctor visits in the hospital fee schedule similar to other states in their fee schedules, to address this issue of outliers.

Mr. Haxby indicated he would not be in favor of adding deposition fees and doctors visits into the fee schedule for this Healthcare Subcommittee to vet. He asked if a similar schedule would be better suited in the judicial rules, rather than as part of this medical fee conversion factor.

Mr. Millard agreed with Mr. Haxby’s suggestion and feels it would be more appropriate for the legal community to vet and present a proposal to the Advisory Committee.

Commissioner Baskin indicated that this should be vetted through the medical community and suggested the IMA also look at this issue.

Mr. Van Leuven is encouraged that the IMA and the Subcommittee are working jointly on formulating and compiling the data.

Mr. Greenfield said he views the depositions and medical fees as “apples and oranges” and agrees with the Subcommittee. Mr. Greenfield moves to adopt the Subcommittee’s recommendation to do nothing, given the increase in the CMS relative value units, seconded by Mr. Van Leuven.

Chairman Galbreath called for further discussion on the motion.

Mr. Arnold disagrees that depositions not be included with medical fees since it’s relative to injured workers, to the extent that it’s part of the workers’ compensation system.

Commissioner Maynard offered further comment and explanation on this issue of outliers and why the Commission was taking a look at drafting legislation.

Chairman Galbreath asked if this is a new focus for the Committee to present solutions to the Advisory Committee.

Mr. Arnold would like the doctor’s deposition fees included as part of next year’s Subcommittee vetting process in the medical fee schedule, for lack of alternatives, but does agree with the Subcommittee’s recommendation for this year.

Chairman Galbreath called for a consensus vote of the motion to accept the Healthcare Subcommittee’s recommendation that the Commission take no further action regarding the fee schedules for this year. The motion passed.

PFFI (IC § 72-438) (Chairman Larry Kenck, Susan Veltman, Rob Shoplock, Commissioner Baskin, Gard Skinner, Phil Barber, Representative Phylis King, Richard Owen)

Mr. Barber provided the Subcommittee report on behalf of Chairman Larry Kenck who could not attend the meeting. Mr. Barber reported that the representatives of the Firefighters put on a fairly compelling presentation. He reported that 43 states have a form of Firefighter occupational disease statute, and that the Firefighters’ proposal is patterned closely after legislation passed in New Mexico. There was considerable discussion and some positions were sympathetic to the Firefighters, but other committee members expressed concerns that we would be creating classes of workers, classes of claimants. Mr. Barber indicated that as a representative of the private surety industry, he does not have concerns about this legislation currently because it doesn’t affect his representative stakeholders.

Mr. Barber reported that the Subcommittee consensus is not to change the litigation model of proving causation, and there was no consensus reached by the Subcommittee in support of the legislation. He reported there was one definite “no” vote and his one abstaining vote. Mr. Barber further reported that, although the Subcommittee did not reach consensus in support of the overall bill, they agreed with Mr. Owen’s draft version of the proposed legislation with the recommended change to strike the language at page 2(13)(c), “...presented to the Idaho industrial commission... .” The Subcommittee members agreed that the original professional Firefighter’s bill created a potential cumbersome process for rebuttal on “presumption” that would require a hearing before the Commission. The Subcommittee unanimously thought it was

a good change to Mr. Owen's version of the bill and could support that change, but could not commit nor recommend to this Advisory Committee to support the bill.

Ms. Veltman reported that she was the one vote that could not support the bill. She congratulated Mr. Shoplock and Mr. Owen on their presentations and willingness to compromise. She said there are two categories of concern (1) the science of listing certain cancers based on research studies and metadata, and (2) creating a special class of claimants with a law that changes the burden of proof. Ms. Veltman agrees Firefighters have a higher risk based on the job as do certain other occupations, but remains opposed to a special statute based on employment. She doesn't believe there will be a lot of change in exposure in cases compensable under the current law.

Mr. Greenfield requested Mr. Owen to speak to his own opinion.

Public Comment

Mr. Owen, speaking on behalf of the Firefighters, has worked on this legislation for the past four years and has been very active with most of the committees vetting the statute several times. He addressed the most recent change to Section 14(c) striking the language requiring evidence be presented to the Commission before presumption could be rebutted, and agrees this is a rule of law. Mr. Owen also discussed other presumptions under the law and went on to explain the listing of certain cancers and the comprehensive physical screenings for firefighters. He said it's been an honor to represent the Firefighters.

Mr. Millard asked what studies were used for the listing of certain cancers included in the legislation.

Public Comment

Mr. Owen and Mr. Shoplock indicated that there were 40-50 different studies that were used for compiling part of the list of cancers. The studies were done in Canada, as well as at the Sinai Medical in New York, and at the Cornell University Hospital.

Commissioner Maynard asked if there is an assessment and documentation maintained of the kinds of chemicals or potential hazardous exposures that is documented as Firefighters respond to fires.

Public Comment

Mr. Shoplock indicated that there is not. Firefighters assess if the structure will collapse, and not more than that.

Mr. Owen indicated the Subcommittee discussed that kind of information gathering.

Mr. Gardner offered his view on risk of exposure to various cancers in varying industries, with some of the same chemicals and potential for exposure. In his view this could create

different categories and differentials causing a shift in the burden of proof standard in the workers' compensation arena.

Mr. Skinner indicated that he's been on the Subcommittee and does not have a lot of concern about the statute from a defense side. He says these types of cases will be litigated like all other cases, and that a physician's opinion is what is needed to rebut the presumption, and basically agrees with Mr. Owen's revised draft legislation.

Commissioner Baskin inquired if Mr. Skinner's understanding is that the physician's opinion is sufficient to rebut the presumption.

Mr. Skinner agreed that the physician opinion would be required.

Mr. Greenfield sees this legislation as a public policy matter involving a specific kind of employee, a public employee with a specific set of dangers, like a soldier.

Mr. Arnold agreed with Mr. Greenfield's comment.

Chairman Galbreath restated Mr. Barber's report that the Subcommittee could not come to consensus, and called for a motion.

Mr. Van Leuven moves that this Committee recommend moving forward and take a consensus vote on the Firefighter legislation, being mindful of Ms. Veltman's concerns.

Mr. Greenfield seconded the motion.

Mr. Van Leuven commented further on the issue of presumption.

Mr. Haxby recalled that this came back to the Subcommittee at the recommendation of the legislature because no consensus was reached last year. He indicated that it's a very complex issue but stands with Ms. Veltman on the issue of potentially creating a class of worker. Mr. Haxby wishes the Firefighters well going forward with their legislation.

Mr. Millard said he is undecided without seeing the science. He shared with Mr. Shoplock and Mr. Owen that the Idaho Hospital Association operates the cancer data registry of Idaho and collects every cancer in the state, which may or may not be helpful to their position. He further indicated that he intends reviewing with the program's staff employees the risk factors for those cancers and that may shed some light on this issue, but he is not in support of the legislation.

Mr. Van Leuven asks that the message to Representative Hartgen and his Committee be that the Firefighters have their opportunity to vet this out before the legislature.

Commissioner Limbaugh explained that since this Advisory Committee could not reach a consensus on this legislation, Representative Hartgen and his committee can request the minutes of the meeting, and make their own determination whether or not to proceed with the legislation.

Mr. Van Leuven withdrew his motion based on the additional comments of members.

Chairman Galbreath calls for Mr. Greenfield on the second.

Mr. Greenfield indicated his agreement to withdraw the second.

Chairman Galbreath asked that the record show that no vote was taken and the Committee has no consensus one way or the other regarding the legislation proposed by the Firefighters.

Mr. Shoplock, on behalf of the 1,200 Firefighters, offered his thanks and appreciation to everyone for the time and effort put into the legislation.

Chairman Galbreath thanked Mr. Shoplock for his work on a very difficult subject and wished him and the Firefighters well with this legislation.

***Break taken.***

Chairman Galbreath called for a change to the agenda and asked for the introduction of nominees and elections to accommodate the attending nominees.

**Election:**

Introduction and/or Review of Nominees for Election

Chairman Galbreath asked the three respective representatives of employers to introduce themselves to the Committee -- Ms. Jaime Haun, HR Assistant of Rosauers Corporate Office, Spokane, Washington; Mr. Craig Mello, Risk Manager, Agri-Beef Co., Boise, Idaho; and Ms. Robin Sexton, Registered Nurse Case Manager, Idaho Power Company, Boise, Idaho. The nominees spoke about their experience and backgrounds.

Nominations Subcommittee Chairman Mr. Van Leuven personally thanked Mr. Galbreath and Mr. Haxby for their work on the Nominations Subcommittee and for visiting with nominees. Mr. Van Leuven introduced Mike Batten of Plumbers and Pipefitters Local 648, the nominee for Representative Workers; and Susan Veltman as the next Advisory Committee Chairman.

Mr. Haxby expressed his appreciation to the nominees.

Chairman Galbreath called for other nominations.

Election of Advisory Committee Members

Voting ballots were distributed to the voting members. Chairman Galbreath explained that the majority ballots are submitted to the Commissioners for approval at an Administrative

Meeting, and then the announcements go out via email from the Commission Secretary to nominees and committee members announcing the results.

Chairman Galbreath thanked the candidates for their attendance at the meeting.

Security for Compensation (*Chairman, Rian VanLeuven, Bob Erickson Bruce Hock, Roy Galbreath, Jane McClaran, Blair Jaynes, Jeanne James, Kelly Paananen, Kent Rock, Lynn Thompson, Mike Haxby, Mike Kane, Woody Richards, Paul Jackson, Steve Haase, Steve Kahn, Tim Tucker*)

Mr. Van Leuven reported that the Subcommittee met on August 6<sup>th</sup> and August 13<sup>th</sup> with stakeholders and had lively debate in dealing with rules for security for compensation for insurance carriers and self-insured employers. The Subcommittee offered suggestions and proposed language to Mr. Jaynes and Ms. McClaran. Mr. Van Leuven called on Ms. McClaran to review the statute changes with the Committee.

**Proposed Legislation Regarding § 72-301 – Security for Payment of Compensation & Update: Proposed Revision(s) IDAPA 17.02.10 & 17.02.11 – Security for Compensation**

IC § 72-301 – Security for Payment of Compensation. Ms. McClaran reported that the statutory change to IC §72-301 accomplishes two objectives of the Commission. The first objective is to identify acceptable securities for deposit, as discussed in the May Advisory Committee meeting; however, since the May meeting, and there are additional revisions that are now reflected for both insurers and employers. And the second objective addresses the security deposit of liquidated insurers and creates an insolvent insurer fund and process for transferring and converting securities to cash to a new insolvent insurer fund. She reports that two additional sections were added in the statute -- Section 3 provides the process for securities to be converted to cash and transferred to the new insolvent insurer fund, after an insurer is liquidated; and Section 4 creates an insolvent insurer fund.

IDAPA Rule 17.0211- Self-Insured Employers. Ms. McClaran reported that the Subcommittee met twice to discuss the proposed rule changes for the Committee's consideration and recommendation to the Commission. She reports that the changes were suggestions from the Administrative Rules Office to be consistent with other state practices: (1) office hours and office location, (2) public records compliance, and (3) removal of the forms from the rule publication. She further explained the substantive changes to the (1) qualifications of an applicant to become self insured, (2) the form parent guaranty agreement, and (3) the use of the par value as the determiner for security adequacy, so that if the market value drops, additional securities may be required. She also reported that no credit is given for excess insurance coverage provided by a surplus line carrier, as is referenced by Title 41 of the Department of Insurance Code. Ms. McClaran reported that the Subcommittee discussed at length the form sample parent guaranty agreement and inserting the term "adverse" when speaking to a financial condition of a self-insured. She also did not believe the Commission would be resistant to that use of the term "adverse."

Mr. Van Leuven felt the use of the term “adverse” would mitigate some concerns. After some lengthy discussion of members, Ms. McClaran will include that term “adverse” in the proposed rule.

Ms. McClaran reported that the employer compliance database will be the final determiner for proof of coverage of contractors that perform work for self insured employers. This new language exists already in the insurance carrier rule.

Mr. Arnold expressed his concern about requiring an itemization of the types of benefits in the form guaranty. After some discussion, the listing in the form sample of benefits types will be changed.

IDAPA Rule 17.0210. Ms. McClaran next reported on the changes to the rules governing insurance carriers. She again reported that these changes are in compliance with the Public Records Act and that the forms have been removed from the rule but are referenced and can be found at the Commission’s webpage or through the Commission office. She explained that the changes are a result of EDI implementation and the reporting of deductible policies is a statutory obligation.

Mr. Haxby asked about information gathering for reporting of deductible policies from insurance carriers. He also asked if there is a Commission process to make consistent the reporting practices, especially for large insurance carriers who use many TPAs for adjusting, so all database information is accurate. He also suggested the Commission’s Claims and Benefits department might be the designated group to solve inconsistencies in the data.

Ms. McClaran indicated that currently the Department of Insurance provides the data as a courtesy to the Commission, and with the rule change it is a more formalized and detailed reporting of deductible policy information. After discussion, the Commission will take a look at information gathering of deductible policies for the database.

Mr. Van Leuven reported that the Subcommittee consensus and recommendation to the Advisory Committee is to move forward with the proposed changes in the IDAPA rules and statute.

Chairman Galbreath called for public comment and a vote of members approving these proposed rule and statutory changes. The vote carried.

Lunch Break taken.

**Updates:**

Industrial Special Indemnity Fund

Mr. Kile provided handouts and reported that the Second Injury Fund had a busy fiscal year, complaints are up 30% from the previous year, but SIF is settling 40% more lump sum settlement cases than the previous year. Mr. Kile reports that statutory benefits are increasing

and continue increasing. Mr. Kile reported that past discussions indicated dissolving the second injury fund. He reported that attorney expenses have dropped from 2008, but there is an increase in case load of about 30%. The administrative expenses decreased substantially in 2010 and 2011. Mr. Kile reports that assessments are at a plus 37% from last year. He indicates that he plans to provide the Commission, and others by statute, a semi-annual report with a narrative and chart figures based on fiscal year numbers and end-of-calendar year numbers.

### Uninsured Employers Fund

Mr. Kile presented the task for committee status report to discuss a funding mechanism for the Uninsured Employers Fund by employees, or employers, or jointly by both. He reported the task force comprised 9 to 12 persons of cross-industries and that following the spring legislative session, in lieu of assembling the task force again, he did an email survey with four questions posed to the task force group. The questions and answers are as follows:

- Question: Did they oppose in general the creation of such a fund under any circumstances?
- Answer: No was the unanimous response, and were okay with the general concept.
  
- Question: Would your constituents help pay for a part of it?
- Answer: A resounding no, whether from labor or small business.
  
- Questions: Would constituents instead pay the entire fund?
- Answer: No.
  
- Question: Would your answer be different on funding if the cost to each payee, whether labor or business, was the equivalent of a bottle of water at \$1.60 per year?
- Answer: No. (Comment: It's not the amount that they objected to, but the theory that someone has to pay.)

Mr. Kile further reported that he had received two really good comments: (1) that the fund be heavily subsidized by employers who don't carry the required insurance; and (2) establish removal of the exclusivity protection for employers who do not carry required workers' compensation insurance.

After a lengthy discussion of other states requirements for optional coverage, such as Texas, Mr. Kile reported that the task force reached "no consensus" on specific funding and the task force was disbanded but the Subcommittee remains intact. He asks if the Commission, since there is no specific funding source, would entertain the funding of this project from the uninsured employer's fund, with a portion of the funds or penalties from the employers' fund, which is the only source of funding. Mr. Kile inquired if there is a need to convene a subcommittee to create other ideas and for a funding mechanism going forward.

After lengthy discussion, Chairman Galbreath called for a vote to disband the Uninsured Employer Fund Subcommittee. The vote carried. The Subcommittee is discontinued.

### **Industrial Commission Report:**

Commissioner Baskin reported that the Industrial Commission has established internal procedural measures for processing lump sum settlements and the perceived obligations under statutory and regulatory schemes to be implemented September 3, 2013, the “go-live” date. He indicated that these measures will assure that all lump sums, whether mediated or otherwise, go through the same scrutiny and vetting process. He further explained the mandate of IC § 72-404, that settlements be approved only in the best interest of the parties. He further explained the obligations of the Commission under IC §72-802, and referenced the Williams decision, a subrogated claim and how undisputed medicals will be resolved, and he addressed approval of attorneys’ fees under IC § 72-803, and the special consideration that applies for total and permanent disabled claimant cases.

Commissioner Baskin thanked Dennis Burks for his mediation skills in settling tough cases. He further reported that the appropriate steps have been undertaken to appropriately address any time lag in the Benefits department and the Commission’s goal is to make sure no lump sum settlement vanquishes in office more than seven (7) days before it is treated in some fashion. Commissioner Baskin also explained that there is no two-tiered scrutiny process and processing of the paperwork will be completed by Benefits. Commissioner Baskin assured the Committee that this process will be closely monitored to preserve the seven (7) day processing time period; and, if necessary, manpower will be increased to ensure the timely processing of lump sum settlements. This change furthers the Commission’s statutory obligation to process lump sum settlements according to statute and return mediation to its historical role as a vehicle by which to reconcile tough cases.

Mr. Greenfield said he likes what he hears in the report.

Mr. Haxby thanked Commissioner Baskin for clarifying the expectation that lump sum settlements will be processed in the seven day time period.

Mr. Kile expressed concerns that lump sum settlements could not be processed in a seven-day time period.

Commissioner Baskin reiterated that, so long as the templates and supportive documents are submitted correctly, a lump sum settlement will be processed in seven days.

### Public Comment:

Ms. Bremer indicated that substantiation packages need to be complete in order for the process to work effectively.

Commissioner Baskin reminded practitioners and sureties the intent for mediation is that claimants be present, whether in person or telephonically; and if a claimant is not present at mediation, the Commission does not regard that as mediation.

### **Other Issues/Announcements**

Mr. Greenfield thanked Mr. Galbreath for his services on the committee, and inquired if he intends to remain active on the Advisory Committee.

Chairman Galbreath said he intends to be actively involved on the Advisory Committee, and thanked Commission Secretary Beth Kilian for her assistance.

### **Preparation for Future Meetings**

Chairman Galbreath called for agenda items for the next meeting.

The next Advisory Committee meeting is scheduled for **November 6, 2013**.

There being no further business, the meeting was adjourned.