

IDAHO INDUSTRIAL COMMISSION
NEGOTIATED RULEMAKING- Attorney Fees on MSA
1st MEETING MINUTES

Tuesday, July 24, 2018

10:30 a.m.

700 So. Clearwater Ln., Boise, Idaho

1st Floor Conference Room

Interested Parties:

Daniel Luker- Goicoechea Law
Avery Roberts- ITLA
Woody Richards- Insurance Entities
Lisa Kerns- State Insurance Fund
Brad Eidam- Claimant's Attorney
Darin Monroe- Attorney
Matt Andrew- Claimant's Attorney
Edward Dindinger- Dindinger & Kohler, PLLC
Cindy Weigel- Intermountain Claims
Randy Schmitz- Skaug Law
Mike Haxby- State Insurance Fund
Tracey Rolfsen- State Insurance Fund
Matt Vook- Petersen, Parkinson & Arnold
Shellie Martin- Travelers
James Arnold- Claimant's Attorney (V)
Michael Kessinger- (V)

Industrial Commission:

Chairman Tom Limbaugh
Commissioner Aaron White
Commissioner Tom Baskin
Secretary Kamerron Monroe
Referee Alan Taylor
Blair Jaynes, DAG
Claire Sharp-Minert, Law Clerk
Patti Vaughn, Benefits Manager
Matt Shriver, Benefits Analyst
Richelle Flores, Benefits Analyst

Welcome and Introductions

Commissioner Tom Baskin called the meeting to order at 10:34 a.m. and began with introductions.

Handouts:

(1) WCMSA Reference Guide pages 58-59; (2) Rule Writer's Manual pages 8-10

Discussion:

Commissioner Baskin summarized the background regarding the rule. Attorney's fees are not payable on Medicare Set-Asides (MSA); taking a fee leaves the MSA underfunded. Commissioner Baskin gave examples of cases the Commission has seen. Commissioner Baskin looked at other jurisdictions to see how they handle this issue and came across *Hinsinger v. Showboat Atlantic City*. In *Hinsinger*, the New Jersey court allowed plaintiff's attorney's fees to be deducted from an MSA allocation.

Commissioner Baskin also commented that claimant attorneys do not get paid years later when a claimant undergoes surgery. Ms. Shellie Martin stated that in Montana they do.

Commissioner Baskin stated that it is hard to get paid for future medicals you helped obtain. If the surety wants to close the file, then there is an argument to be made that the surety should be required to pay an additional 5% of the funded amount. Ms. Martin opined that attorneys have to agree to settlements; the surety would not be underfunding them. Commissioner Baskin cautioned that the Commission would not be approving lump sums that are underfunded.

The claimant attorneys present mutually agreed that Idaho Code § 72-804 (Attorney's Fees Punitive Costs in Certain Cases) was the only place that the Commission can make an award of fees. Mr. Darin Monroe opined that, the Commission should not approve MSAs unless they are fully funded and let the parties deal with it. Commissioner Baskin commented that by doing that, it leaves the claimant bearing a disproportional amount of responsibility for attorney fees. Mr. Brad Eidam stated that it is the surety that benefits by MSAs; when MSAs are done, the responsibility shifts from the surety to the claimant to manage the MSA/medicals. Claimant attorneys also stated that if an MSA does not cover all the cost, the claimant still has to come up with some money.

Ms. Martin commented that MSAs seem extremely liberal; she questioned how often an MSA is fully used. Mr. Eidam stated that once the settlement and MSA are funded they don't hear from claimants. MSAs only include what's payable by Medicare and they don't have everything. Commissioner Baskin inquired if the MSAs are based off a fee schedule. Mr. Darin Monroe stated it was on a fee schedule, it will make those payments on that cash value or fee rate of that jurisdiction. Mr. Eidam added that the injured worker has to figure out those number fees and they don't know how the claimant is going to manage it. Mr. Monroe stated it is always based off fee schedule and we have to negotiate. Claimant attorneys understand that sureties pay at medical fees schedule and feel that claimants should too. Ms. Cindy Weigel asked if Medicare scrutinize MSAs. Ms. Martin indicated that they have to submit paperwork every year on the MSA funds. Commissioner Baskin opined that Mr. Eidam seems to say it's on surety, and then surety should pay a premium on this.

Mr. Eidam stated he did not charge a fee on MSAs; sureties get the vendor to calculate the funded amount. Commissioner Baskin stated that the problem seems to arise years later, after the lump sum is done and sureties want to close medicals by way of an MSA. There is no way to take a fee when the settlement is the same amount of the MSA. Mr. Jamie Arnold opined that from his side there are less and less MSAs coming through and inquired as to how many the Commission sees. Commissioner Baskin stated that they come in waves, approximately 30-40 MSAs a year. Ms. Patti Vaughn stated that the Benefits Department sees more than that. Ms. Martin commented that if sureties leave the medicals open, then attorneys do not get paid at all. Mr. Monroe opined that it is not about getting paid, it's about the clients. If Mr. Monroe does nothing to help secure the MSA he takes no fee. The State Insurance Fund will leave medicals open if there is a Medicare issue or underfunding for prescriptions. Mr. Eidam stated that the fundamental issue is that Medicare and workers' compensation cover everything, not just Medicare. [To Ms. Weigel's question as to whether CMS is enforcing it, is a moot point because when they do look at enforcing that regulation then Mr. Monroe is going to be looking at lawsuits all those year later.] Mr. Eidam stated that CMS does not audit until bills are submitted. Ms. Weigel stated that she liked the idea of leaving it open to negotiations. Commissioner Baskin stated that there are numerous different situations, and the Commission is trying to arrive

at a global settlement. With a rule like Ms. Weigel's, it has to be recognized that there is some scrutiny by Commission that claimant is bearing or paying a disproportionate cost of the attorney fees. Mr. Monroe stated that attorneys and sureties could negotiate attorney fees in a settlement as another line item. Commissioner Baskin opined that CMS should be bearing some of the fees, and suggested we could try to do it like in *Hinsinger*.

Mr. Michael Kessinger stated that claimants never get what they want, bottom line is he never settles a case that the claimant doesn't want but in a denied case attorneys should get fees. Mr. Kessinger thinks taking away the flexibility we currently have would be counterproductive.

Mr. Woody Richards asked if the current rule needs to be changed for the parties to negotiate. Commissioner Baskin indicated that the Commission will not approve underfunded MSAs and advised that the Commission will be scrutinizing fees on such settlements and await explanation. Mr. Jasen Carrier stated that we should leave negotiation open; attorneys have contracts with their clients in regards to fees. Commissioner Baskin stated that the Commission has the obligation to make sure settlements are in the best interest of the parties. Mr. Carrier insisted that having sureties be a part of negotiations is counterproductive.

Mr. Matt Andrew opined that his position is they are not interested in closing out MSAs unless it is fully funded. If the parties can negotiate and come to an agreement then it should meet the necessary criteria. Commissioner Baskin stated that as long as the settlement can be made to appear to the Commission that the claimant is not bearing a disproportionate share of fees, it would help the settlement get approved. The Commission will be looking at them on a case-by-case basis. Mr. Andrew suggested adding in a line for the fees in the lump sum agreement and an explanation. Mr. Arnold commented a rule change would not be helpful because there are too many variations making it hard to conform a singular rule to cover the bases. Commissioner Baskin stated that the Commission will be issuing a guidance memorandum that explains the Commission's position on the issue.

Next Meeting:

Commissioner Baskin stated that the comment period would be extended until August 1, 2018. Commissioner Baskin asked if there were more comments. Hearing none, the meeting was adjourned at 11:49 a.m. No additional meetings were scheduled at this time.