

**Industrial Commission's Advisory Committee
On Workers' Compensation
Minutes
August 8, 2018**

Members Present

James Arnold, Chairman
Dave Anderson
Richard Burleigh
Brad Cederblom
Dr. Paul Collins
John Greenfield
Dane Higdem
Gardner Skinner
Shellie Martin
Joe Maloney
Ex-Officio: Senator Jim Patrick
Ex-Officio: Representative Scott Syme

Members Absent

Craig Mello
Brian Whitlock
Ray Anchustegui
Mike McPeck

Industrial Commission

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

Opening Remarks and Introductions:

Chairman James Arnold opened the meeting at 9:00 a.m. and led with introductions. Mr. Arnold next requested introductions of Committee members and public attendees.

Minutes of May 9, 2018:

The minutes of May 9, 2018 were presented for review and approval. Mr. Gardner Skinner stated he was incorrectly noted as present in the Minutes. Commission Secretary Kamerron Monroe stated she would amend the minutes to reflect the correction. Upon motion of Dr. Paul Collins, seconded by Ms. Shellie Martin the minutes of May 9, 2018 were approved with the correction. The minutes were adopted by unanimous vote.

Subcommittee Report(s):

➤ Suspension or Reduction of Compensation- Injurious Practice. Mr. Richard Burleigh presented the report on Suspension or Reduction of Compensation. The Subcommittee looked at Idaho Code 72-435; there were two meetings to discuss how to address injurious practices. This Subcommittee arose out of a case from the State Insurance Fund; Mr. Burleigh gave background on the case and the problem the State Insurance Fund ran into while trying to address the compensation of an injured worker who had impeded his return to work by injurious practices. Mr. Burleigh stated a letter outlining the procedure to suspend or reduce compensation is the outcome of the Subcommittee's work. Mr. Burleigh stated it was a positive outcome for all involved and the Subcommittee was pleased with the outcome. Mr. Burleigh asked if there were any questions. There were none.

Industrial Commission Report(s):

Chairman Limbaugh thanked everyone who participated in negotiated rulemaking this year. Chairman Limbaugh explained that the next step in the rulemaking process, according to the Idaho Rule Writer's Manual, was proposed rulemaking. The Commission submits an AARF for each rule to the Governor's Office, who has the authority to approve or reject the rule. The Industrial Commission's target date is the October 3, 2018 Administrative Bulletin for publication. Chairman Limbaugh stated that there is still time to make changes to the rules; we may have a public hearing on some of the proposed rules. The next step after finalizing the proposed rules is adopting pending rules.

➤ Negotiated Rulemaking-Average Weekly Wage: Chairman Limbaugh explained the background of this rule; an injured worker who suffered a second injury after returning to work following a significant recovery period did not feel his TTDs had been fairly calculated. Chairman Limbaugh summarized the negotiated rulemaking meeting. After a lengthy discussion, it was the consensus at the negotiated rulemaking meeting not to move forward with the rule.

Mr. Joe Maloney asked what happens when the situation arises again. Chairman Limbaugh explained that in this instance there were extenuating circumstances, and the worker was fairly compensated. The worker was represented by legal counsel and could have filed a Complaint for Commission review. Commissioner Baskin stated that there are provisions under Idaho Code § 72-419 which provide a mechanism to address a situation like this.

Representative Syme stated that it was mentioned that the participants saw the situation differently, and asked whether they interpreting the rule incorrectly. And if so, does that need to be dealt with? Mr. Jamie Arnold stated that during the meeting there was a lengthy discussion that there is not really a way to make a rule that will universally work. If there is a dispute, it really needs to be adjudicated, creating a rule would have made more problems. It is really up to the surety to interpret the rule, and if the injured worker does not agree, they should file a Complaint. Representative Syme asked if a statute change is needed or does a situation like this just need to be adjudicated. Chairman Limbaugh stated that sureties try to find the highest 13 week period to apply; hypothetically if the injured worker was off for a year, had a heart attack, and comes back to work on light duty then gets injured again it would be hard to say. Representative Syme states it is interpreted differently. Commissioner Baskin stated that we can review these situations but we have to know of them.

➤ Negotiated Rulemaking-Medical Fees: Ms. Vaughn summarized the negotiated rulemaking meeting on Medical Fees. A Milliman representative was present for the meeting and available to explain their report. All of the handouts are available on our website. Ms. Vaughn reported that the comments received were split. The Industrial Commission will not be proposing an increase at this time.

➤ Negotiated Rulemaking- EDI Housekeeping: Ms. Vaughn summarized the negotiated rulemaking meeting on EDI Housekeeping. Ms. Vaughn explained that with the implementation of EDI 3.0 last November, the IDAPAs need to be cleaned up to comply. The Industrial Commission will be going forward with the proposed EDI Housekeeping.

➤ Negotiated Rulemaking- Electronic Payments: Ms. Vaughn summarized negotiated rulemaking on electronic payments. Ms. Vaughn indicated that there was broad support for both electronic payments and debit cards. The Industrial Commission will be having a public hearing on Wednesday October 10th from 2:00-3:30 p.m. here at the main Boise Office. Testimony and oral comments will be allowed. Senator Patrick inquired about electronic payments and checking balances. Ms. Vaughn stated that those issues had been apart of the discussion with most participants indicating that injured workers could bank online and could look at the balance online.

Public Comment: Mr. Woody Richards asked if it would require consent from both parties. Ms. Vaughn stated that everybody seemed to be the position to require mutual agreement and that it could be suspended at any time. Mr. Arnold stated that the mutual consent arose out of the concern of the attorneys.

Public Comment: Mr. Mike Haxby inquired about the proposed rule. Ms. Vaughn indicated that it was not on our website yet; it still has to be submitted and may not go through. Mr. Richard asked if the draft language was available. Ms. Vaughn stated that we have not finalized the draft yet, but the draft will add language to include debit cards.

➤ Negotiated Rulemaking- Averaging Impairments: Commissioner Baskin provided a background on this rule. A temporary rule was proposed last year to abolish the averaging of impairments due to physicians giving inflated numbers. The Commission received a lot of negative feedback last year so we put it through negotiated rulemaking this year and continued to receive pushback. The Commission will do nothing and leave it as is, to be dealt with on a case by case basis. Commissioner Baskin asked if there were any questions. There were none.

➤ Negotiated Rulemaking- Attorney Fees on MSAs: Commissioner Baskin summarized the background on this rule; workers' compensation Medicare Set-Asides (MSA) must be fully funded but attorneys can't receive a fee for their work on securing the MSAs. Commissioner Baskin stated that our statute recognizes that Claimant attorneys get something of value for their efforts so it would make sense if you settle a case, the claimant's attorney should get a fee. But, leaving an MSA underfunded is a problem for all the parties involved. When the Commission sees a lump sum where the claimant attorney is trying to get a fee on the MSA, it makes the Commission nervous of the repercussions. The Commission tried to think of a way to solve this issue. Through negotiated rulemaking, the Commission found there was no enthusiasm for a change. The Commission will not move forward with the rules and will issue a guidance memo that the Commission will look extremely disfavorable on lump sums that do not fully fund MSAs. The Commission will continue to look on a case by case basis and will not allow the claimant to bear a disproportional amount. Commissioner Baskin asked if there were any questions. There were none.

Other Issues/Announcements:

➤ Industrial Special Indemnity Fund Annual Report for FY18. Special Indemnity Fund Manager James Kile presented the FY18 Annual report for the ISIF. Mr. Kile went through

the varying increases or decreases of filings of notice of intents and complaints. Mr. Kile reported on the increased costs paid out including benefits payments and lump sum settlements. Mr. Kile stated the legal cost paid had gone down since last year and reported on the litigation costs. Mr. Kile stated that overall their numbers had remained consistent. Mr. Arnold suggested that an explanation of the increase in monthly benefits payments and how the ISIF settles cases. Mr. Kile stated that occasionally in some cases the ISIF will make monthly payments in lieu of a lump sum and guarantee the money for 5-10 years to help the claimant's family in case of death or if the claimant is not able to manage their money. After the guaranteed money runs out, the ISIF will pay for a lifetime.

Senator Patrick interjected that it was mentioned the ISIF would determine a claimant is not able to manage their money, how do you determine that. Mr. Kile stated that they try to attend the deposition of the claimants to get to know them, their medical records, and the attorneys or spouse to a great extent; it has worked out so far.

Ms. Shellie Martin asked if there was an average age of injured workers who make claims against the ISIF. Mr. Kiel stated it was a very broad range; this year they had a claimant who was 17 all the way up to 77. Mr. Kile estimated that most claimants are in the mid to late 40s.

Mr. Brad Cederblom asked when the ISIF guarantees the money is it in an annuity? Mr. Kile stated the ISIF acts as an annuity due to the cost. The ISIF usually has 2 years of costs in their fund. Mr. Kile asked if there were anymore questions. There were none.

➤ Discussion of Outworker: Deputy Attorney General Blair Jaynes requested a subcommittee to be formed to discuss amending the definition of outworkers. Mr. Jaynes explained that the Compliance Department has been running into a problem enforcing out of state employers to get workers' compensation policies for remote telecommute employees in Idaho. Mr. Jaynes believes the solution is to update the outworker definition in regard to telecommunications. Mr. Jaynes also stated that the definition of independent contractors may need to be updated. Mr. Jaynes commented that there was a subcommittee years ago that was working together on independent contractor language to mirror the Department of Labor's.

Brad Cederblom asked if the Commission goes after civil fees or criminal. Mr. Jaynes stated that it was a civil proceeding and if they violate the order, than it is contempt, which does have criminal sanctions like jail time but jurisdiction is the problem.

Public Comment: Mr. Richards asked if the fines are less than obtaining a policy and suggested raising the fines to be more meaningful to increase compliance. Mr. Jaynes stated it has been our experience that the fines are adequate and most companies will comply. The problem remains the companies outside of Idaho.

Public Comment: Ms. Stephanie Butler asked if the subcommittee would be looking at both issues, outworkers and independent contractors. Mr. Jaynes indicated that it would. Mr. Arnold asked for participants for the subcommittee. *Chair: Blair Jaynes Members: Woody*

Richards, Al Gardner, Brad Cederblom, Stephanie Butler, Brad Eidam, Joe Maloney, Dane Higdem.

➤ OPD Opioid Meeting. Ms. Vaughn reported that last December the Industrial Commission partnered with the Office of Drug Policy for a panel discussion on opioids. Opioids are a big problem in Idaho. We will again do a new series of meetings; the first of three will be here at the Industrial Commission with registration now open. The second session will be at the Workers' Compensation Annual Seminar on October 25th. Public Information Specialist Nick Stout stated that registration for the Seminar opens next week and the opioid discussion will be in the 11:00 a.m. time slot. Ms. Vaughn stated the last meeting will be December 5th with more information to come. If there were any questions about the Opioid Meeting, Michelle Wong should be contacted.

10:10 Break

Mr. Arnold called the meeting back to order at 10:27 a.m. Mr. Arnold stated that if anyone needed a copy of the ISIF report it is on their website.

Committee Membership and Elections: *(Nominations Subcommittee Members: Chairperson Dane Higdem, Shellie Martin, John Greenfield, Dave Anderson)*

➤ Announcements of Member Nominations and Elections: Mr. Arnold explained that his term as Chairman was up and Mr. Dane Higdem had agreed to serve as Chairman next year. Mr. Higdem reported the Nomination Subcommittee had the following recommendations for nominees for positions whose terms expire: Dane Higdem, representing Employers; Richard Burleigh, representing the Insurance Industry; Brad Cederblom, representing Workers; and Brian Whitlock, representing Hospitals. Mr. Higdem indicated that he would serve as Chairman of the Advisory Committee if elected.

➤ Ballot Election of Advisory Committee Members: Mr. Higdem, Mr. Burleigh, and Mr. Cederblom introduced themselves and summarized their professional background. Mr. Higdem explained that Mr. Brian Whitlock could not be here today but he is from the Idaho Hospital Association. Election ballots were distributed to the voting members of the Committee.

Preparation for Future Meetings:

➤ Topics for Future Meetings: Mr. Arnold asked if there were topics for future meetings. Representative Syme asked if we would be going over the rules at the November meeting. Chairman Limbaugh stated we would be. Chairman Limbaugh extended their appreciation to Mr. Arnold for serving as the Committee Chairman this last year.

Next Meeting Date: November 14, 2018

There being no further discussion and no further business, Mr. Skinner moved to adjourn the meeting; seconded by Ms. Martin. The motion carried by unanimous vote.

The meeting adjourned at 10:45 am.