

**Industrial Commission's Advisory Committee
On Workers' Compensation
Minutes
February 12, 2020**

Members Present

Dave Anderson, Chairman
James Arnold
Richard Burleigh
Brad Cederblom
Dr. Paul Collins
Dane Higdem
Joe Maloney
Shellie Martin
Mike McPeck
Darin Monroe
Mike Shuey
Brad Stoddard
Ex-Officio: Senator Jim Patrick

Members Absent

Ray Anchustegui
Craig Mello
Brian Whitlock
Ex-Officio: Representative Scott Syme

Industrial Commission

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

Opening Remarks and Introductions:

Chairman David Anderson opened the meeting at 9:01 a.m. and led with introductions. Mr. Anderson reminded attendees to sign in. Mr. Anderson next requested introductions of Committee members and public attendees.

Minutes of November 13, 2019:

The minutes of November 13, 2019 were presented for review and approval. Upon motion of Dr. Collins, seconded by Shellie Martin, the minutes of November 13, 2019 were approved. The minutes were adopted by unanimous vote.

Industrial Commission Report:

➤ Status of 2020 Rules and Legislation- Proposed and Temporary Rules. Commissioner Limbaugh stated the Commission's rules had passed both houses. Commissioner Limbaugh stated agencies are waiting to see if the omnibus rulemaking bill is passed this session. Commissioner Limbaugh thanked Senator Patrick for his help during testimony. Commissioner Limbaugh reported that the Commission had no legislation this year but were watching a couple of bills.

➤ Workers' Compensation Related Legislation. Commissioner Limbaugh stated there was some discussion about eliminating in-state adjusting that might be a topic for upcoming years.

HB373 which would be changing the definition of prisoners in training programs to defining them as trainees. These training programs would include agricultural work. Commissioner Limbaugh stated it would be interesting to see the tort ramifications.

Public Comment: Jim Kile inquired about the exception clause and its relation to workers' compensation or liability for these trainees. Chairman Baskin stated he did not know about the prison enhancement certification program and whether reclarifying them as trainees would make a liability difference. Commissioner Limbaugh summarized the PIE program which uses prisoners for agricultural work, PIE requires workers' compensation and paying IDOL. This legislation came from employers feeling it was too expensive to utilize.

Commissioner Limbaugh summarized SB1263 which removes the sunset clause from Idaho Code § 72-438 for the firefighter cancer presumption. Senator Patrick commented that the fear was workers' compensation costs would go up and that had not occurred, firefighters were deemed to be more at risk.

Mike McPeek asked to talk about SB1321 which is being sponsored by IAIC in relation to the *Gomez v. Crookham* Supreme Court decision. Mr. McPeek stated he was neither for nor against the legislation. Mr. McPeek had summarized his comments in a handout. Mr. McPeek summarizes the case, there is currently a motion for reconsideration pending. Mr. McPeek stated there was a concern among self-insured and what this legislation could mean. Mr. McPeek believes there are problems in the legislation with "clear and convincing evidence." Mr. McPeek pointed to Justice Stegner's concurrence which would replace conscious disregard with a substantial certainty test used in Ohio. Mr. McPeek stated the legislation is trying to find a negligence standard. Mr. McPeek thought the statement of purpose is misstated; the issue of "willful or unprovoked physical aggression" had been previously addressed by the Legislature. Claimant Attorneys also had concerns that the legislation went too far in eliminating language. Mr. McPeek expressed that he wished IACI had come to the Advisory Committee for help in drafting the language.

Senator Patrick had questions about agriculture injuries involving equipment. Mr. McPeek stated you must have intended to cause an injury. The unprovoked physical aggression is a high burden to meet without a clear standard in the legislation or in *Gomez*. Senator Patrick inquired about industry standards for willful or negligence. Joe Maloney stated that if OSHA fines an employer, that would seem like reasonable negligence. Mr. McPeek stated the legislation does not link to federal regulations.

Darin Monroe stated he was also concerned with the language. Mr. Monroe stated that he felt this disturbed the integrity of the grand bargain by not allowing language that was acceptable to everyone. Mr. Monroe stated he would like to form a subcommittee on the issue. Mr. Monroe made the motion to form a subcommittee on the SB 1321, Mr. McPeek seconded the motion. The motion carried by unanimous vote.

➤ IRIS Modernization. Shana Barrowclough updated the Advisory Committee on the IRIS budget. Ms. Barrowclough stated the project was contingent on the budget being approved.

Ms. Barrowlough stated the project had the support of the Governor and is before JFAC. The Commission is currently moving forward with the RFP to select a technology integrator.

➤ Medical Fee Schedule. Patti Vaughn updated the Advisory Committee on the Commission's progress on a medical fee report. Ms. Vaughn stated the Division of Purchasing had allowed the Commission to contract with Milliman as the RFP has not been successful. The deliverable date is April 17th. The question was posed if the Commission would be submitting a rule change for medical fees. Ms. Vaughn stated that they are unlikely to go forth with a rule change unless the criteria listed in the Executive Order were met.

Dr. Collins asked about out of network charges he has encountered in the workers' compensation field. Ms. Vaughn explained that the provider may have the right to dispute under the medical fee dispute process. Dr. Collins stated that some employers are hiring Physicians that have a lot of out of network charges that charge more. Jamie Arnold explained they see this issue a lot with workers who have moved out of state and there is an issue with dealing with jurisdictional medical fees. Mr. McPeek stated that they must get written permission that the out of state medical facility will abide by the Idaho medial fee schedule. Ms. Vaughn state that the statute protects the claimant and they should not be responsible for the charges.

➤ Staff Appointments. Director Montgomery announced that Law Clerk Sonnet Robinson had accepted the vacant Referee position and Tami Humiston had accepted the Financial Officer position. Sonnet Robinson introduced herself and summarizes her professional experience. Tami Humiston introduced herself and summarized her professional experience.

➤ Attorney Fees on MSAs. Chairman Baskin summarizes MSAs and the current problems with attorney fees on MSAs. Chairman Baskin stated that he had spoken at the ISB Worker's Compensation Seminar about the issue and how the Commission is looking at them. Chairman Baskin stated that this issue is brought to 18(D) hearings where the Commission decides on a case by case basis. Chairman Baskin asked if there was interest in forming a subcommittee on the issue to mull over possible solutions.

Public Comment: Brad Eidam stated that some insurance companies will force the parties to go to a hearing, and some counsel will take not fees and the medicals are left open. Chairman Baskin stated that it may warrant different compensation for different cases. Future medical can be addressed at hearing but you can't take fees if the medicals are left open. Mr. Eidam asked if CMS has been asked to the table. Chairman Baskin stated that any progress with CMS has been glacial.

Mr. McPeek stated that defendants negotiate a fee with claimant attorney for services and explained there is a substantial benefit to injured workers that have MSAs. Many of these negotiations include provisions for interest to go the claimant's estate.

Chairman Baskin stated that he can see the labor the surety undertakes to establish an MSA and the argument to be made that claimant's attorney is not responsible for securing the MSA.

Mr. Arnold stated that as the workforce gets older this will become a greater issue. Mr. Arnold outlined several examples he has encountered. Mr. Arnold stated he believed the cases should be examined on a case by case basis but was willing to have a discussion on the matter. Chairman Baskin stated the Commission is prepared to keep hearing them on case by case basis, mainly addressing attorney fees and disproportionate burden for claimants. The Commission would entertain other solutions. Darin Monroe stated that he was in favor of dealing with MSAs on a case by case basis and didn't know if there was a universal solution.

Chairman Baskin stated that he has not heard any real interest on thrashing this out and encourage anyone who would like to discuss this to reach out offline.

➤ Industrial Special Indemnity Fund- Annual Report FY19. Jim Kile summarized ISIF's annual report for FY19. Mr. Kile stated there were not many changes. Mr. Kile noted that Notice of Intent and monthly payouts were on the rise while attorney expenses are going down. Mr. Kile stated the projections show cost going down about 5%. Mr. Kile stated he would have another fiscal report in May. Mr. Kile asked if there were any questions. There were none.

Preparation for Future Meetings:

Chairman Anderson asked if there were topics for discussion at the next meeting. Mr. McPeek asked those interested in the subcommittee to stay after today. Mr. Burleigh asked the Commission if they can send the recommendation to the Senate Committee on Commerce and Human Resources. Chairman Baskin stated that if the subcommittee came up with language, it would be given to the Committee and IAIC. Senator Patrick stated he would be interested in hearing it tomorrow at the Committee hearing. Chairman Anderson thanked everyone for their work.

Next Meeting Date: May 20, 2020

There being no further discussion and no further business, Mr. McPeek moved to adjourn the meeting; seconded Mr. Arnold. The motion carried by unanimous vote. The meeting adjourned at 10:39 a.m.