

MINUTES

SENATE COMMERCE & HUMAN RESOURCES COMMITTEE

DATE: Tuesday, January 22, 2013

TIME: 1:30 P.M.

PLACE: Room WW54

MEMBERS PRESENT: Chairman Tippetts, Vice Chairman Patrick, Senators Cameron, Goedde, Guthrie, Martin, Lakey, Schmidt and Durst

ABSENT/ EXCUSED:

NOTE: The sign-in sheet, testimonies, and other related materials will be retained with the minutes in the committee's office until the end of the session and will then be located on file with the minutes in the Legislative Services Library.

CONVENED: **Chairman Tippetts** called the meeting to order at 1:31 p.m.

MOTION: **Senator Goedde** moved, seconded by **Vice Chairman Patrick** to approve the minutes of January 17, 2013. The motion carried by **voice vote**.

PASSING OF GAVEL: **Chairman Tippetts** passed the gavel to **Vice Chairman Patrick** to introduce the presenters for the review of the rules being heard.

DOCKET NO. 07-0301-1202 **Rules Review - DIVISION OF BUILDING SAFETY - 07.03.01 - Rules of Building Safety.**

Steve Keys, Deputy Administrator of Operations, said the Building Code Board through the Collaborative Committee, continues to work on reaching agreement on the adoption of the remaining codes, but this rulemaking does contain amendments to the 2009 International Residential Code brought forward through the Collaborative Committee. The changes consist of provisions clarifying flue damper requirements for wood-burning fireplaces and limits requirements for the installation of carbon monoxide detectors.

Mr. Keys referred to subsection 1, starting on page 41, which outlines the exceptions to the installation requirements for the installation of carbon monoxide detectors in existing dwellings; essentially, work done on the exterior of the dwelling or to the non-combustion plumbing or mechanical systems does not trigger the mandatory installation of a carbon monoxide detector.

He stated that subsection L on page 42 and subsection B up to section 4 on the same page, replaces the current language in the International Residential Code and the energy code with language contained in the 2012 editions of both codes that require tight-fitting flue dampers in lieu of the previously-required gasketed doors. The gasketed door requirement has been problematic.

Chairman Tippetts said he saw language in two locations on page 42, numbers 2L and 3B, and he wanted to know why there was a requirement for wood-burning fireplaces to use outdoor combustion air. **Mr. Keys** said the change was already reflected in the 2009 International Code. **Chairman Tippetts** said he needed more details regarding the flue damper and why there were problems caused by the door gaskets. **Mr. Keys** said that door gaskets deteriorate over time and the flue damper is a generally accepted practice. **Chairman Tippetts** and **Mr. Keys** had a discussion regarding wood burning stoves versus fireplace inserts and dampers being installed in a fireplace insert that slides into a brick fireplace. **Mr. Keys** said that under the UL (Underwriters Laboratories) listing, a fireplace insert of the type **Chairman Tippetts** described is classified as a stove.

MOTION: **Senator Durst** moved, seconded by **Senator Lakey** to adopt Docket No. 07-0301-1202. The motion carried by **voice vote**.

DOCKET NO. 17-0204-1201 **Rules Review - INDUSTRIAL Commission - 17.02.04 - Administrative Rules of the Industrial Commission Under the Workers' Compensation Law - Benefits**

Jane McClaran, Financial Officer, made a presentation regarding the Workers' Compensation Law - Docket No. 17-02-04-1201 Benefits Pages 89 - 90 Senate Commerce & Human Resources 2013 Pending Rule Book. This pending rule change is a housekeeping measure resulting from the passage of H570 from the last session. That legislation, proposed by a representative of the Idaho Fraternal Order of Police, amended *Idaho Code* §72-1104 on compensation and costs associated with the Peace and Detention Officer Temporary Disability Reimbursement Fund. The Industrial Commission administers that fund and the language added under this rule mirrors that used in the amended statute, including the July 1, 2015 sunset clause.

Senator Lakey asked why there was a sunset clause. **Ms. McClaran** said that when the legislation was proposed by the representative industry and not by the Commission, the fiscal impact was unknown so this expanded the eligibility criteria. They wanted to give it a couple of years to find out what the impact would be on the fiscal part. **Senator Lakey** referred to the new language "that the injury was caused by the actions of another person", and asked how that wording was interpreted or applied. **Ms. McClaran** said that expansion was the result of an actual incident where an officer was injured (hit by a vehicle), but did not meet either of the two existing criteria: (1) responding to an emergency or (2) pursuit of an actual or suspected violator of the law. They wanted to have the ability to bring those types of claims forward. **Senator Lakey** said his question was about the word "cause". If there was fault on both sides, is the evaluation in determining whether that was caused by the actions of another person used? **Ms. McClaran** said the language does not relate to what degree of cause would be applied to either party. **Senator Lakey** said we would see how it works during the trial period.

MOTION: **Senator Schmidt** moved, seconded by **Senator Durst**, to adopt Docket No. 17-0204-1201. **Senator Guthrie** said it would be interesting upon the sunset date to see if there were times when, in an accident situation, the fault was totally that of the officer. **Senator Guthrie** said the officer would still be eligible for workers' compensation and he was wondering if there would be a breakdown as to who was at fault. **Senator Goedde** said he would advise the Commission to take another look at the language and if there is a problem they should bring back a change to the committee for review next year. The motion carried by **voice vote**.

DOCKET NO. 17-0209-1201 **17.02.09 - Medical Fees.**

Patti Vaughn, Medical Fee Analyst, said this rule, located on page 91, reduces the number of conversion factors and provides the annual adjustment of the medical fee schedule for physician reimbursement in accordance with *Section 72-803, Idaho Code*; which creates a pharmaceutical fee schedule for pharmacies and dispensing physicians; and standardizes the required coding sets used by providers for billing medical services. She said that *Idaho Code* §72-803 requires physician payments for workers' compensation medical services to be based on the Resource Based Relative Value Scale (RBRVS) reimbursement method used by the Centers for Medicare and Medicaid Services (CMS). There are two components under this scale: (1) a numerical relative value unit assigned by CMS to each coded procedure weighted according to the work, practice, and malpractice expenses associated with providing that service; and (2) a monetary conversion factor. The allowable amount for a particular medical service under the fee schedule is its assigned relative value unit multiplied by its monetary conversion factor.

Adjustments were made to the proposed physician conversion factors to minimize the negative financial impact to some providers. The definition for pharmacy was changed to coincide with the definition found in *Section 54-1705, Idaho Code*. A requirement for identification of the individual components with the original manufacturer's National Drug Code (NDC) for compound medications was added.

The RBRVS scale was designed to account for the complexity of the procedure in the relative value unit, which is converted into a monetary value by a single conversion factor. In order to preserve access for care to certain specialists who refused to treat injured workers, the Commission's early fee schedules adopted the multiple conversion factor. Although multiple conversion factors pacified those specialists, other physicians noted the distortion of the relative value scale when using multiple conversion factors. The complexity need not be accounted for in the conversion factor, as it is already reflected in the relative value unit. The Commission recognized the need to reduce both the disparity among the conversion factors as well as the number. **Ms. Vaughn** said that in 2007 the fee schedule included 35 conversion factors; the fee schedule now has seven.

She referred to the conversion tables on pages 96 and 97 of the Pending Rule Book (17.02.09.031 - Physicians) assigned to each medical service category. These changes to the physician fee schedule were determined in collaboration with representatives from the medical and insurance communities participating on the Healthcare Subcommittee of the Commission Citizens' Advisory Committee. The subcommittee endorsed a proposal to eliminate two conversion factors, but subsequent written testimony received from some affected specialists reported the reduction was too severe and would again jeopardize access to care. She indicated this table reflects the elimination of one conversion factor and the Commission's ongoing efforts to reduce both the number of conversion factors, as well as the disparity between the specialties, without jeopardizing access to care for Idaho's injured workers. **Ms. Vaughn** said the changes include an overall inflationary increase of 2.3 percent.

Senator Goedde asked which area dealt with general practitioners. **Ms. Vaughn** answered that general practitioners were most often found in Medicine Group 2. **Senator Goedde** said it appeared the Commission was trying to level the playing field and that practitioners would be returning injured workers back to the job. **Ms. Vaughn** said due to the new Affordable Care Act, there was a concern about getting access to family practice physicians. The Commission wanted to make sure physicians are reimbursed fairly.

Chairman Tippetts asked **Ms. Vaughn** to explain how the conversion factor works. She said the conversion factor adjusts the standard rate. For each billable procedure that is done, CMS assigns the relative value unit and takes into account the work, practice expenses, and fees. Also taken into consideration is the time it takes a physician to perform, training that is involved, the physical and mental effort, as well as the overhead and malpractice expenses. Then this procedure is considered relative to other procedures. A less complex procedure will have a lower value. The relative value unit scale takes into consideration the complexity. When the conversion factor is added in, a monetary conversion factor turns it into a payment that is a fixed dollar amount. There are some procedures that are assigned a higher conversion factor and it may be reimbursed at a higher rate. **Chairman Tippetts** asked **Ms. Vaughn** to tell him what is done with this \$135 figure shown for Surgery Group 1 and how does that impact the rate. **Ms. Vaughn** said rather than adding the figure, we multiply.

Senator Guthrie queried that prior to Groups 3 and 4 being merged, what were the respective rates in those Groups. **Ms. Vaughn** explained that Group 3 is currently \$113.52 and Group 4 is \$87.72; those were merged together and they are currently in Group 4 and are actually seeing an increase. **Senator Martin** asked why pathology and laboratory expenses were "to be determined". **Ms. Vaughn** responded that Medicare and CMS has not assigned relative value units to the majority of those codes, so currently under the rule, those services would be allowed as "usual and customary" charges. This is something the Commission will look at in the future.

Ms. Vaughn said the Commission proposes a new pharmaceutical fee schedule using the benchmark of the Average Wholesale Price (AWP). The AWP is the price reported by the pharmaceutical manufacturers to industry publications as a benchmark for cost to the dispensing provider for each drug, as identified by its National Drug Code (NDC) number. Although the AWP is the price reported as paid by pharmacies, it is not an exact benchmark as pharmacies may have negotiated volume discounts or received rebates from the manufacturer that are not reflected in the AWP. It is not a perfect benchmark for establishing a cost basis, but it is currently the best existing alternative. Approximately 32 states are using the AWP as the benchmark for their workers' compensation pharmaceutical fee schedules. Under the proposed pharmacy fee schedule beginning on page 98 (17.02.09.033 - Pharmacies), the standard for the acceptable charge is the AWP plus a \$2 dispensing fee for brand drugs and a \$5 dispensing fee for generic drugs. Compound drugs will be allowed the sum of the AWP for each drug included in the compound medicine, plus a \$5 dispensing fee and a \$2 compounding fee. Over-the-counter drugs will be allowed a reasonable charge without dispensing fees.

Ms. Vaughn said the pharmaceutical fee schedule (noted on page 98 - 17.02.09.031.08 - Dispensing Physicians) will also be applicable to physicians dispensing medications following the warnings of industry organizations, including the National Council for Compensation Insurers (NCCI), the Workers' Compensation Research Institute (WCRI) and the International Association of Industrial Accidents Board (IAIABC). Their research has revealed physician-dispensing of pharmaceuticals to be a significant cost-driver to the workers' compensation systems in multiple other states resulting in increased cost to employers. Dispensing physicians are often paid a much higher amount than a pharmacy for the same medication. Pharmaceutical repackaging companies who are not the original manufacturers, are assisting physicians with repackaging drugs from their original form, assigning a new NDC code and then repricing the drug, often at markedly elevated prices. WCRI reports indicate some drugs may be marked up as much as 500 percent.

However, the Commission has received no specific information to indicate similar behavior by Idaho physicians, but available data does indicate an additional cost to employers of at least 30 percent for repackaged drugs. As other states adopt stricter regulations on physician dispensing, it may cause Idaho to be considered a friendly market to the re-packagers who market to physicians. The Commission believes it is prudent to adopt preventative measures to avoid increases in premiums for Idaho employers. Further, the Commission received testimony from some Idaho physicians' offices who report they have resorted to using repackaging services as a necessary means to get paid an amount at or above their cost. The Commission believes this fee schedule will benefit both providers and payers by establishing a standard for reimbursement that eliminates such uncertainty about what is owed.

Therefore, reimbursement to physicians who dispense pharmaceuticals will be the amount equivalent to what would be allowed under the pharmacy fee schedule, without the dispensing fees. Drugs that have been repackaged from the original manufacturer's form will be allowed the AWP for the medicine prior to repackaging as identified by the original manufacturer's NDC number.

It is important to note that the rule does not prohibit physicians from dispensing medications; it merely equalizes the reimbursement between pharmacies and dispensing physicians. The Commission has no reason to believe that injured workers will be denied appropriate care as a result. Research conducted in a state where similar reforms were passed showed no significant reduction in physician dispensing patterns. Medication compliance is also not expected to be affected since injured workers are most often prescribed medications for the relief of pain. There is no available evidence suggesting a higher compliance rate with physician versus pharmacy dispensed medications.

TESTIMONY: **Tom Limbaugh**, Commissioner of the Idaho Industrial Commission, said when they testified in front of the House when adopting the proposed and pending rule, they found out they had a miscommunication with the Idaho Pharmacy Association on dispensing fees. They discussed asking for a temporary rule from the Governor's office. Since then, they have come up with fees that are fair for everyone. **Mr. Limbaugh** has asked that the committee adopt the rule as written and the Commission has agreed to sit down with the Association and go forward following this session with a temporary rule. This rule goes into effect July 1 and the temporary rule goes into effect the same day. They want to come up with a fair solution regarding the pharmaceutical fees.

TESTIMONY: **Senator Goedde** asked **Dennis Stevenson**, Rules Coordinator for the State, to outline how to adopt a temporary rule during the session. **Mr. Stevenson** said there were certain circumstances when rules can be adopted during the session. The temporary rule adopted prior to the session must be submitted for extension and it expires at the end of the session. Those adopted after the end of the session, do not have to be extended and can be adopted. **Senator Goedde** asked if there were certain circumstances that will allow a temporary rule to be adopted. **Mr. Stevenson** said as long as the temporary rule meets the criteria allowed in statute, they can be allowed. **Senator Goedde** commented he thought there was a way, under some circumstances, to adopt a temporary rule and it sounded like there is time after session before it goes into effect.

A discussion ensued between **Senator Cameron** and **Mr. Limbaugh** regarding the fact the Commission did not participate in negotiated rulemaking with the pharmacy organizations and if this would have been done, would that have prevented this dilemma. **Mr. Limbaugh** said the Commission was working primarily on the fee schedule for providers and they did attempt to contact the stakeholders; for some reason, there was a miscommunication with the pharmaceutical organizations. **Senator Cameron** asked if the committee were to accept the rules, what would be the harm since the Commission does not want to lose the rest of the rules because of this one little problem. **Mr. Limbaugh** said they did not want to lose the rule, but especially the repackaging component. They do not foresee any problem if the Governor will approve a temporary rule with an effective date of July 1.

Senator Cameron said he had two concerns, but they are minimized by his confidence in **Mr. Limbaugh**. The first concern was that he hopes he won't leave this session and hear from pharmacists in his district that are upset because this committee allowed this rule to be approved. He hopes this message gets portrayed loud and clear. Secondly, from a negotiated standpoint, if we pass this rule, it puts the Commission in a better situation than the pharmacists and they are not negotiating from an equal playing field. He believes **Mr. Limbaugh** will be fair that the rule is negotiated properly. **Mr. Limbaugh** stated that since they are the regulators and not the payers, he does not think this would put them in any kind of situation or problem in adjusting the set fees. He indicated they were looking at other states when they set the fees and looking for a common fee amount, they received no input and they thought they were fair. If this would have been taken care of beforehand this issue would have never come up.

Senator Guthrie asked a question about the dispensing fee on pages 98-99. He wanted to know if the \$5 generic fee was offset at a greater margin than existed in the brand arena or was it to help direct traffic to the generic. **Mr. Limbaugh** referred to **Ms. Vaughn**. **Ms. Vaughn** said the intent of the differential between the brand and the generics was to encourage the use of generics.

Chairman Tippetts said he wanted to understand the repackaging concept when the doctor prescribed a prescription and was he going to sell it through his office, apparently through a repackaging company. **Ms. Vaughn** said recently, the advent of software has made it easier for repackaging companies to set up physician practices with software. Physicians know how to report and obtain a new NDC number and reprice it. The same drug may be used with different quantities, broken up into new packaging and assigned a new number and price. They are not the manufacturers and they are able to charge whatever price they want. With respect to physicians, the Commission received testimony that repackaging was a benefit to some of the Idaho physicians. Without the use of repackaging, physicians were being reimbursed less than the cost of the drug. **Chairman Tippetts** asked if a licensed physician can prescribe drugs, are they allowed legally to dispense drugs. **Ms. Vaughn** said that the physician who is dispensing to the patient must be licensed by the Idaho State Board of Pharmacists.

Ms. Vaughn said that on page 100 (17.02.09.035 - Billing and Payment Procedures) changes are proposed to the required coding sets for medical billing. The Centers for Medicare and Medicaid Services (CMS) will require providers to migrate from the ICD-9 to the ICD-10 (International Classification of Diseases, 9th edition) diagnostic coding set in October 2014. The changes in this rule will help providers and payers in using a common coding language. Approval of this rule is requested to help ensure adequate access to medical services for Idaho's injured workers as well as containment of medical costs that may result in additional costs to Idaho employers.

MOTION:

Senator Goedde moved, seconded by **Senator Tippetts**, to adopt Docket No. 17-0209-1201. **Senator Goedde** said that physicians try to make money when they have the opportunity. There were some physicians in Idaho who were getting paid five times as much as physicians from the state of Washington, while performing the same procedure prior to adoption of RBRVS payments. This was not typical of the whole medical community, but he said this works well and helps stabilize workers' compensation rates. He said he appreciates the Commission trying to move towards the single payer factor because that is how it was originally intended. The piece about physicians dispensing is another opportunity for us to stop a problem before it starts in Idaho. The motion carried by **voice vote**.

PASSING OF GAVEL:

Vice Chairman Patrick passed the gavel back to **Chairman Tippetts**.

MOTION: **Senator Cameron** moved, seconded by **Vice Chairman Patrick**, to approve the minutes of January 15, 2013. The motion carried by **voice vote**.

Chairman Tippetts reminded everyone about the committee photo that will be taken Thursday at 1:00 p.m. He encourage all to sign up.

ADJOURNED: There being no further business, **Chairman Tippetts** adjourned the meeting at 2:24 p.m.

Senator Tippetts
Chairman

Linda Kambeitz
Secretary