



**Nevada Public Agency Insurance Pool
Public Agency Compensation Trust**
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**Minutes of Meeting of the
Claims Committee of
Nevada Public Agency Insurance Pool
Date: October 24, 2007
Time: 9:00 A.M.
Place: Legislative Building
Room 3137
401 S. Carson Street
Carson City, NV 89701**

1. Roll

Committee members present: Mike Rebaleati, Claudette Springmeyer, Mike Mitchell, Roger Mancebo and Steve West

Others present: Keith Loomis, general counsel to committee; Scott Brooke, counsel for Incline Village General Improvement District; Justin Pfrehm, coverage counsel for Nevada Public Agency Insurance Pool (NPAIP); Wayne Carlson, Executive Director of NPAIP; Donna Squires, Claims Manager for Alternative Service Concepts (ASC); Dan Hamlin, Adjuster ASC; Ann Wiswell, Risk Management Specialist from NPAIP

Chairman Rebaleati noted that a quorum was present and called the meeting to order at 9:00 a.m. after verifying that the recording device was working.

2. Action Item: Consideration of Appeal from Incline Village General Improvement District of Claims Determination by Nevada Public Agency Insurance Pool in the matter of Burdick Excavating Co., Inc. v. Incline Village General Improvement District

Chairman Rebaleati indicated that the hearing process would involve hearing from each party and asked Keith Loomis to advise the committee about the process. Chairman Rebaleati then asked Scott Brooke to proceed with his presentation first.

Scott Brooke presented an overview of his previously submitted written statement and offered the committee to contact Stephen Balkenbush, defense counsel for the underlying case, if there were specific questions regarding the facts of the case that would assist the committee in its decision. He then proceeded to explain his view that the Burdick arbitration demand included both tort and contractual claims. He argued that the summary of claim exhibit revealed that amounts in item 2 were the only contract dispute amounts and that the amounts under items 1 and 3-7 were tort claims as a result of the allegation of intentional or unintentional misrepresentation by Incline Village General Improvement District.

Mr. Brooke asserted that coverage applied as a Wrongful Act (misfeasance, malfeasance or nonfeasance) as defined in the coverage form; however, he also acknowledged that contract

disputes are not covered. He then asserted that the coverage analysis prepared by Mr. Pfrehm explained that if there was a potential for coverage, NPAIP would be obligated at least to provide a defense; thus, because of the misrepresentation tort (torts are covered), defense should be provided. He also indicated that the committee could decide the issue of defense, then if the arbitrator awarded tort damages, IVGID could come back to the committee for a decision on indemnity for tort damages.

Mr. Brooke responded to a question about the status of the contract arbitration to which he responded that it was still pending.

Chairman Rebaleati then asked Mr. Pfrehm to present the NPAIP position. Mr. Pfrehm referred the committee to his written presentation and offered to respond to questions. He indicated that the allegations of tort damages should be examined in light of the coverage form exclusion that excludes "any liability arising out of breach of contract." He explained that he evaluated the arbitration demand with the question whether the claims sounded in contract or in tort. He said that in this case there would be no tort but for the contract, thus the liability arises out of a breach of contract and would be excluded.

Chairman Rebaleati then asked Mr. Brooke to present his rebuttal. Mr. Brooke reiterated that his view was that because there was a potential for coverage, defense should be provided. He said that there was more of an upside potential for damages for the plaintiff with a tort claim than a contract claim. He suggested partitioning a decision regarding defense from indemnity and expressed confidence that they would prevail on the underlying claim so indemnity may be a moot issue. He suggested deciding on defense now and then, if IVGID lost the underlying claim, it could present the indemnity argument subsequently. He responded in the affirmative to a question from Roger Mancebo about the scope of the arbitrator's decision-making power and whether it included determining which were contract and which were tort claims.

In response to a question from Claudette Springmeyer about whether the arbitration was binding, Mr. Brooke said that it was. Mr. Brooke responded to a question from Roger Mancebo about IVGID's intent following the arbitration by saying that if the arbitrator ruled against them on the tort claims that they then would present that issue to the committee.

Chairman Rebaleati then asked Mr. Pfrehm for his rebuttal. Mr. Pfrehm noted that the committee's decision today would not affect the underlying case. He stated that in looking at the exclusion for any liability arising out of a breach of contract, it was clear that all of the claims arose out of the breach and thus were not covered.

Wayne Carlson responded to a question regarding the legislative change in the tort cap amount by saying that the higher amount of \$100,000 went into effect on October 1, 2007, but did not affect the IVGID case since it occurred prior to that time. He noted that the cap is \$50,000 per claim or cause of action and that the attorneys would have to evaluate how many claims or causes of action would apply in this case.

Roger Mancebo asked whether the tort of misrepresentation was excluded. Mr. Brooke responded that intentional acts were separately excluded and that the alleged misrepresentation arose out of the breach of contract and thus also was excluded.

Mike Mitchell asked for clarification of the specific breach that indicates that the exclusion applies. Mr. Pfrehm responded that all of the allegations arose out of the breach of contract and thus were excluded.

Steve West summarized that four of the claims related to DOT permit issues, one regarded interest and two related to faulty plans. He expressed that the bigger issues seemed to be the DOT permit dispute and whether the owner was obligated to obtain the permit. He asked whether this was an omission issue for the exclusion or a breach issue. Mr. Brooke responded that he agreed with this assessment and referred to Exhibit 3 of the NPAIP response commenting that the work zone issue is not a breach but an alleged misrepresentation and presented by the contractor this way in order to get out of a contract dispute and into a tort. Mr. Pfrehm replied that the breach of contract exclusion broadly addresses this issue. He said that if the obligation would not exist, but for the contract, it is excluded. Mr. West asked about the list in the demand for arbitration and Mr. Pfrehm said that the exclusion is inclusive of the list. Mr. West then asked whether the contractor's attempt to make the claim into a \$2,500,000 demand by his allegations made it a tort. Mr. Brooke responded that Burdick used a percentage in order to leverage the amount upwards and thus made it a tort. Mr. West then asked for clarification regarding negligent misrepresentation and breach of contract. Mr. Brooke cited an insurance case as supportive of IVIGD.

Mr. Mitchell asked whether faulty plans and specifications inadequacy was excluded and Mr. Pfrehm said yes.

Chairman Rebaleati then called for a recess since several committee members wanted to ask general counsel questions. Keith Loomis clarified that since this issue involved threatened or pending litigation, they could go into closed session with general counsel, but could not deliberate the issue, and that deliberation and vote must be in open session. The committee recessed at 10:00 a.m. for an anticipated 15 minutes to confer with general counsel.

Chairman Rebaleati called the committee back into session at approximately 10:15 a.m. He asked whether there were any further questions and seeing none, he asked for a motion to either accept the appeal by IVGID or to uphold the denial of coverage made by ASC.

Roger Mancebo moved to support the claims administrator's denial of coverage; Claudette Springmeyer seconded; the motion carried with 5 ayes and no nays.

3. Public comment

Chairman Rebaleati called for public comment. None was forthcoming.

4. Action Item: Adjournment

On motion and second to adjourn, the committee adjourned at approximately 10:20 a.m.

The Agenda was posted at the following locations:

**N.P.A.I.P.
201 S. Roop
Carson City, NV 89701**

**Carson City Courthouse
885 E. Musser Street
Carson City, NV 89701**

**Eureka County Courthouse
10 S. Main Street
Eureka, NV 89316**

**Churchill County Courthouse
155 North Taylor Street
Fallon, NV 89406**