

TENNESSEE ADVISORY COUNCIL ON WORKERS' COMPENSATION MINUTES

Legislative Plaza, Room 31

Nashville, Tennessee

Monday, April 25, 2011

1:00 p.m.

Members Present:

Voting Members:

David H. Lillard, Jr., State Treasurer, Chair

Anthony Farmer

Jack Gatlin – via telephone

Jerry Lee

Bob Pitts

Dan Pohlgeers

Gary Selvy – via telephone

Non-Voting Members:

Kitty Boyte

Bruce Fox

Stephen Johnson – via telephone

Sam Murrell – via telephone

Gregg Ramos

Alisa Malone, Commissioner's Designee, Dept. of L&WFD

Mike Shinnick, Commissioner's Designee, Dept. of C&I

Lynn Ivanick, Administrator

Also Present:

Steve Curry, Assistant Treasurer for Programs, Treasury Department

Janice Cunningham, Chief of Staff, Treasury Department

Anne Adams, Director Division of Claims, Treasury Department

Ben Simpson, Claims Examiner, Division of Claims, Treasury Department

Bradley Jackson, Tennessee Chamber of Commerce & Industry

Rocky McElhaney, Tennessee Association for Justice, Workers' Compensation

Practice Committee Chair

And other persons and interested parties

Call to Order

Chairman David Lillard called the meeting to order at 1:00 p.m. in Room 31, Legislative Plaza; Nashville, Tennessee. All voting members were present either in person or via phone. Chairman Lillard declared a quorum. He explained that roll would be called for all votes including a vote regarding the allowance of participation by telephone. A

resolution regarding the allowance of member presence via telephone was read. A **motion** was made by Mr. Farmer to allow the Council to meet with members present via telephone. The motion was **seconded** by Mr. Pohlgeers. A roll call resulted in a unanimous vote in favor of **adopting the motion**.

Chairman Lillard introduced and welcomed the newest member of the Council, Deputy Commissioner Alisa Malone of the Department of Labor and Workforce Development.

The next item was the **approval of the minutes** of the April 8, 2011 meeting. Chairman Lillard explained that the minutes had previously been distributed and a suggestion had been made to move the indication of a quorum in the minutes to a point prior to any vote, which is accurate and will be done. A **motion to approve** the minutes as so modified was made by Mr. Lee and **seconded** by Mr. Pitts. A roll call resulted in a unanimous vote and the Chair declared the **minutes approved**. Chairman Lillard explained for those new to this Council's meetings that, as the seventh voting member, the Chair only votes on administrative matters and not substantive issues.

New Business

SB 0932 (Norris)/HB 1503 (Eldridge)

A summary of the amendment which makes the bill was given by Ms. Lynn Ivanick, identifying several of the topics covered therein, including the settlement of future medical claims, new language regarding communications between authorized treating physicians and employer representatives, the redefinition of injury to include repetitive motion or cumulative trauma conditions to be sure they are work related, the lifting of the cap of 50x's the minimum weekly benefit in doubtful and disputed claims, among other items.

Chairman Lillard called upon the presenter of the bill to come to the podium and give a brief summary of the final amendment for all parties' benefit.

Mr. Bradley Jackson of the Tennessee Chamber of Commerce & Industry spoke briefly on the bill as amended, as he had previously addressed the Council in greater detail on April 8, 2011. He indicated that desired changes to the Tennessee system had been narrowed to three major provisions with the help of the Department of Labor and other interested parties. Sections 3, 4, 5 & 6 address the first issue, which is that of closing future medicals. He indicated that there is a lot of appetite in the business community to be able to settle future medicals on a claim. The revisions that happened in Tennessee Workers' Compensation law in 2004 prohibited this, whereas before that, settlements were allowed to a certain degree.

Mr. Jackson went on to explain that Section 7 addresses what is termed the *Overstreet* decision. In 2009, the Tennessee Supreme Court issued a decision making the sharing of medical documentation in workers' compensation cases similar to that of Medicare information under HIPPA with respect to privacy rights. The Chamber felt this put

employers, employees, and insurance company staff in a position where it cut off any kind of information sharing in the processing of a workers' compensation claim. A bill was passed last year to address these issues and, although it allowed the sharing of information and noted that there is no right to privacy when processing a workers' compensation claim, it also added a number of requirements such as prior notification of conversations and summaries thereof, notification of sharing copies, written statements, time deadlines, etc. Now that the law has been in effect about a year, the Chamber has been informed that it is a very cumbersome, burdensome process with the provisions that were put into place just last session. The Chamber's goal here is to revert back to the law as it was before the changes were made last year.

Lastly, Mr. Jackson explained that Sections 8 and 9 have caused a lot of debate and discussion, and deals with the definition of "injury" as well as the weight to be given opinions of physicians. He suggested that, after researching, it was discovered that Tennessee's definition of injury differed from surrounding states in that others had tighter or more stringent definitions. In other states, repetitive motion or cumulative trauma injuries need to be proven to be work related to be considered covered injuries. He explained that the Chamber's goal with this proposed legislation is to limit what is a considered a compensable injury and tie proximity or causation closer to an event. With respect to that causation, when there are two physicians' opinions, both an Independent Medical Examiner (IME), and an Authorized Treating Physician (ATP), employers felt there was a need for language to address which one should be given greater weight. The proposed language gives a presumption of correctness to the ATP regarding causation to be overturned only by clear and convincing evidence to the contrary. Having had input from various sources, he explained that the point of contention with the proposed language seems to revolve around placing that very high standard in the language.

Mr. Tony Farmer inquired how addressing the evidentiary standard of proof with respect to medical testimony is related to the definition of "injury" since they seemed to be tied together for some reason by this legislation. He pointed out that "injury" is not only being redefined but the amendment is also adding in a special consideration for the physician chosen from the Employer's panel. He inquired as to other states' language concerning the weight to be given the panel physician opinion on causation and cited the State of California as one example. Mr. Farmer had spoken to the Director of the Workers' Compensation Research Institute which, it was agreed, is primarily driven by Employers, Insurers, and Third Party Administrators and is known to provide reliable data. He indicated that he was informed that California put similar language into effect for four years, and then reverted back to a "preponderance of evidence" standard because the "clear and convincing" standard caused a significant increase in system cost associated with additional expert testimony, additional litigation, protraction of litigation and delay in the delivery of benefits. He pointed out that since all parties agreed one of the objectives is to reduce litigation cost, that this proposed language seemed to be contrary.

Mr. Jackson indicated that he would like an opportunity to see and review that study as he was unaware of it, but would be happy to bring in others more knowledgeable to

address any of Council's issues. Ms. Katherine Boyte pointed out that the clear and convincing language is already used in the MIR section of the Statute. Mr. Farmer indicated that the section to which Ms. Boyte referred only applies to impairment ratings and not causation.

Mr. Bruce Fox expressed his concern if such language was put into effect that a Primary Care Physician (PCP), who isn't a specialist, makes a determination and somehow becomes a "gatekeeper" regarding causation. He pointed out that PCP's in clinics to which employees are often directed by Employers, don't have the equipment nor the expertise in some areas to properly address causation, yet that PCP's opinion would inappropriately be given the status of "super opinion" under this language and that would be problematic.

Mr. Fox expressed further concern with respect to the *Overstreet* portion of the bill and the production of documents only 10 days prior to deposition. He proposed that the Employee be given copies 7 days from submission (as in the present law) to the physician regardless of whether there's going to be a deposition. He indicated that if information is withheld, the doctor's opinion could be tainted due to the submission of inaccurate or insufficient information and the employee would have no opportunity to respond. Once the doctor's opinion has been poisoned or misdirected through a lack of all the information or incorrect information, then it's too late for the employee to do anything about it 10 days out from the doctor's deposition. This will cause the cancellation of the deposition with its associated fees and will drive up costs for both sides.

The next speaker, Mr. Rocky McElhaney, Chair of the Tennessee Association for Justice's Workers' Compensation Practice Committee, was called to the podium. He stated his organization's position that this proposed bill represents sweeping reform and is overreaching. He quoted statistics from the time period of the 2004 Reform to August of 2010: Business and insurers in Tennessee have saved \$562 Million, Workers' Compensation claims that go to trial decreased 66%, the average Permanent Partial Disability benefit paid to workers has decreased 21%, direct written premiums have decreased by 26%, and NCCI indicates that disability payments to injured workers' in total have decreased 25%.

With respect to the language about closing future medicals, Mr. McElhaney indicated that the bill is empty of language to protect injured workers. After a settlement, if an employee later needs surgery, closing future medical treatment in that settlement will result in the loss of coverage for the employee and create a burden on TennCare and state budgets. The bill doesn't protect unrepresented workers.

With reference to the anti-*Overstreet* portion of the proposed legislation, it allows private communications between Employer attorneys, insurance company representatives and treating physicians all of which can be hidden from the worker until 10 days before a specific doctor's deposition. It allows the Employer/Carrier to provide information under the cloak of secrecy and it contrary to employees' interest. The employer/carrier picks the doctors for the panels, can provide the doctor with information out of the sight of the

employee, then that doctor's opinion is presumed correct. These provisions are fundamentally unfair to the worker and are far too one sided. More statistics were quoted which showed that the only party that has taken a "hit" since the 2004 revisions is the worker.

Ms. Boyte engaged in conversation with Mr. McElhaney regarding four points: 1) "unrepresented" is a status of choice, 2) there are a small percentages of cases where information given to doctors actually swayed the doctor's opinion, 3) the Employer is equally stuck with the opinion the doctor, and 4) they disagreed as to there being many conditions that are being covered by workers' compensation that are neither caused by nor contributed to by work activities.

Mr. Dan Pohlgeers and the speaker agreed that the best case scenario is when all parties are working together to get that injured employee back to gainful employment as soon as possible. He pointed out that over the last several years, the NCCI has shown that medical loss cost and indemnity loss cost continue to trend downward. He pointed out that the medical fee schedule is tied to CMS and to the RVRVU's. He questioned the statistics being quoted and questioned where else the cost for returning injured employees to work should properly fall if not on medical loss cost. Lastly, he pointed out that there are additional factors that cause some of these repetitive motion diseases, such as carpal tunnel, that are not related to the workforce, but they are inappropriately being treated as such. Mr. McElhaney responded that the bill includes all repetitive motion injuries and not just the limited carpal tunnel injury that has been addressed.

Dr. Sam Murrell indicated that as a treating physician, he hasn't seen an increase in payment for treating patients under the workers' compensation fee schedule. Additionally, he doesn't believe doctors are swayed by outside information provided by either party, stating that physicians determine for themselves what is relevant and what is not. He offered his opinion that other repetitive diseases, such as degenerative disc disease should be added to the language of this bill and agreed that many of these named diseases are not work related and the physician should provide that opinion. One concern he expressed about the *Overstreet* language was whether it includes medical records from physicians other than an authorized treating physician.

Chairman Lillard asked if there were any further questions for the speaker or comments from the audience and, seeing none, called for debate and discussion on the bill as amended before the Council.

Mr. Bob Pitts explained that before there was an Advisory Council, groups of 10-20 lobbyists descended on the Representatives and Senators to press their case. For the last 4-5 years, due largely to this Council, the bills which have been brought before the Committees have been signed off on by both sides due to the fact that they've been discussed and changed prior to getting there. Turning to this particular bill, he noted that it is collectively a significant piece of legislation and the major dispute seems to be the

“clear and convincing” language. He indicated that there is a lot of good in this bill and it should not be lost.

Mr. Pitts pointed out that although there are those who claim that more weight is already given to an authorized treating physician, there is nothing in the statute covering the subject, so the debate seems to be whether you go with a “preponderance of the evidence” or “clear and convincing” standard to overturn that ATP’s opinion on causation. He suggested that if lowering the standard to a “preponderance of the evidence” would allow passage of the bill this year, then he’s for it because it’s a reasonable step forward in light of all the other good things in this legislation. He also expressed concern that if WCRI is correct that after having a “clear and convincing” standard as part of the language in California, they’ve repealed it, then he’s not in support of the higher standard. He indicated that he was encouraged by the ability of the parties to work together, especially over the last four years to achieve some significant reform in the workers’ compensation area and hoped that would continue. He is encouraged by the past several years wherein progressive substantive legislation has been passed.

Mr. Gregg Ramos concurred that there are good portions of the bill regarding tightening up the definition of injury as well as addressing the problems relating to the *Overstreet* decision. His main problem was the heightened standard regarding the authorized treating physician. He indicated that he would like to see that reduced, especially since the judges already give the appropriate weight to various physicians’ opinions.

Chairman Lillard called for further discussion, introduced and thanked Chairman Jimmy Eldridge of the House Consumer and Employee Affairs Committee for his presence today. Without objection a ten minute recess was called for and taken at 2:15 p.m.

The meeting was reconvened at 2:25 p.m. by Chairman Lillard calling for a continuation of discussion and debate. The Chair recognized Mr. Farmer who moved to close the discussion and consider dispositive motions. A second was made for that procedural motion by both Mr. Pitts and Mr. Pohlgeers and seeing no objection, the Chair called for the Council to move to dispositive motions dealing with their recommendations.

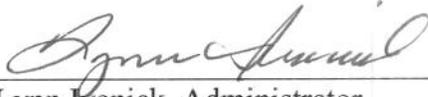
Mr. Farmer **moved that the Council recommend passage of this bill under the condition** that the Sponsors **revise the language** in sections 8 & 9 dealing with the standard of proof necessary to overcome the authorized treating physician’s opinion on causation to a “**preponderance of the evidence**”, thereby deleting the language requiring “**clear and convincing evidence**”. Mr. Jerry Lee **seconded** the motion.

Upon a roll call resulting in five votes for the Motion and one vote against, Chairman David Lillard declared the motion to have received a majority vote and the **Motion was thereby adopted.**

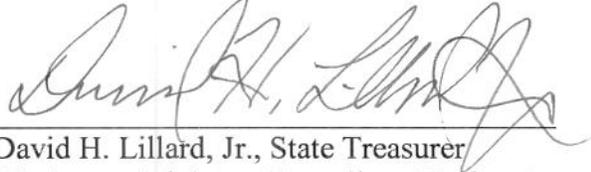
Chairman Lillard indicated that this was the last scheduled meeting of this legislative session unless some other referral comes along, thanked the members of the council as

well as the audience participants for their service to the State. He has appreciated working with Council.

There was a **motion to adjourn** made by Mr. Farmer, **seconded** by Mr. Pitts. Seeing no objection, Chairman Lillard **adjourned** the meeting at 2:40 p.m.



Lynn Ivanick, Administrator
Advisory Council on Workers'
Compensation



David H. Lillard, Jr., State Treasurer
Chairman, Advisory Council on Workers'
Compensation