



## STATE OF TENNESSEE

### WORKERS' COMPENSATION ADVISORY COUNCIL



#### REPORT ON SELECTION AND CHANGE OF THE TREATING PHYSICIAN IN WORKERS' COMPENSATION CASES



#### INTRODUCTION

Public Chapter 952, Section 30, codified as *TCA* §50-6-121(j), requires the Advisory Council to: "...review the provisions of Section 50-6-204(a)(4), particularly as they relate to the restrictions contained therein on the injured employee's choice of treating physician and make recommendations to the governor and the speakers of the house and senate concerning any proposed changes to the section. The following constitutes the Advisory Council's report on this issue.

It is true that the treating physician in a workers' compensation claim has substantial influence on many factors involved in a claim including, but not limited to: the course of care, the duration of the treatment and return to work issues, the medical cost of the claim, the outcome and

satisfaction experienced by the employee, and the extent of disability and, therefore, the monetary indemnity award. It is probably safe to state that in the national workers' compensation arena the question of who should select the treating physician in a claim is a fundamental issue that affects the case substantially and is an issue that has no universal resolution. The states approach this concept in various ways and advocates for the interested parties line up on the different sides of the issue. It is no different in the State of Tennessee.

### **CURRENT TENNESSEE LAW**

The portion of Tennessee workers' compensation law that relates to the provision of medical treatment to injured employees is codified in *Tennessee Code Annotated* §50-6-204(a)(4), which provides as follows:

The injured employee shall accept the medical benefits afforded hereunder; provided, that the employer shall designate a group of three (3) or more reputable physicians or surgeons not associated together in practice, if available in that community, from which the injured employee shall have the privilege of selecting the operating surgeon or the attending physician; and, provided further, that the liability of the employer for such services rendered the employee shall be limited to such charges as prevail for similar treatment in the community where the injured employee resides. The above listing of physicians or surgeons may include doctors of chiropractic within the scope of their licenses.

It should also be noted that other provisions of *TCA* §50-6-204 contain additional limitations on the designation and selection of the "operating surgeon" or "attending physician" [the term

“treating physician” will be used in this report]. For example, the statute requires an additional choice/name if the injury is to the back and contains restrictions on the panel list as it relates to doctors who practice together.

Tennessee case law has also added restrictions or requirements in areas where the statutory language is silent. For instance, the statute does not address how a change in the treating physician is to be handled. However, Tennessee court decisions have held that the intent of the statute is the employer - in the first instance - has the right to choose such medical services as are to be provided to the employee and the employee should consult his employer before incurring the expenses called for by the statute if the employee expects the employer to pay for the medical expenses. Generally, more recent case law has concluded:

1. Where the employer fails to provide the required panel and the employee is justified in choosing a doctor of his own, the employer is liable for the medical expenses. The issue becomes whether the employee acted reasonably in selecting his own doctor.
2. An employer that denies liability for an accident and injury claimed by an employee is in no position to insist upon the provisions respecting the choice of physicians; denial of liability without an adequate investigation may be determined to be provided a reasonable excuse for the employee to choose the treating physician. However, the violation of the requirements of the section by the employer does not give the employee the right in every case to select a physician without consulting the employer, nor does the statutory violation automatically make the employer liable for the medical expenses incurred by the employee. The determination is made on the

facts of each case.

3. Once an employee has engaged a treating physician, following the denial of a claim, the employer has been held not to have the right to require the employee to select a doctor from a panel.
4. If an employee is dissatisfied with the medical services being furnished by the employer the employee may: request the appointment of a neutral physician, consult with the employer and permit the employer to make other arrangements or go to a physician of his or her own choice [and face the possibility of incurring the costs, if the action is deemed not to be reasonable.

### **OTHER STATES' LAWS re: CHOICE OF PROVIDER**

#### **Countrywide**

There is no uniformity among the states in the manner by which an injured employee initially obtains medical treatment or by which a change is made. The following chart summarizes the methods used in the United States for selection of providers or changing providers in workers' compensation cases. The information is taken from or extrapolated from the WCRI publication: *Managed Care and Medical Cost Containment in Workers Compensation - A National Inventory, 2001-2002* (Tanabe and Murray, 2001):

<b>INITIAL CHOICE OF PROVIDER</b>	<b>NUMBER OF JURISDICTIONS</b>
Employee Selects	14
Employee selects, or within managed care arrangement if one exists	12
Employee chooses from list developed by employer or insurer	4
Employer or insurer selects	17
Combination	4 [ Arizona, California, Nebraska and New Mexico]
<b>CHANGE OF PROVIDER</b>	<b>NUMBER OF JURISDICTIONS</b>
<b>*EMPLOYEE INITIATES CHANGE</b>	
Employee is unrestricted	3
Employee unrestricted for 1 change [may be limits in subsequent changes]	7
Employee restricted from making any change [usually by requirement of either employer/insurer or the agency, or is restricted to change within an MCO if such arrangement exists or is restricted by time limit on any change]	38
Employee cannot change	2
	*New Mexico not included because right to change depends on who has initial choice
<b>*EMPLOYER OR INSURER INITIATES CHANGE</b>	
Employer is unrestricted	7
Employer is restricted	9
Employer cannot change	34
	*New Mexico not included because right to change depends on who has initial choice

## Contiguous States

When studying a specific workers' compensation issue, it is often helpful to review how the states that are contiguous to Tennessee approach the issue. Therefore, the following chart provides more specific information as to how medical providers are selected or changed during the course of a workers' compensation claim.

STATE	INITIAL CHOICE	EMPLOYEE CHANGE	EMPLOYER CHANGE
ALABAMA	Employer or insurer selects	Once - from the employer or insurer list	None allowed
ARKANSAS	Employer/insurer selects	Once - with agency approval or within MCO	Agency approval
GEORGIA	Employer/insurer lists: 4 or 10 physicians or MCO if subject	Once from list of 6; once within 60 days if panel of 10, or only once if within MCO without approval	Agency approval
KENTUCKY	Employee selects or MCO if subject	Once, then Agency approval or within MCO	With Agency approval
MISSISSIPPI	Employee selects	Employer/insurer or Agency approval	None allowed
MISSOURI	Employer/insurer selects	None allowed or within MCO	Unrestricted
NORTH CAROLINA	Employer/insurer selects	Employer/insurer or Agency approval	None allowed

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TENNESSEE	Employer/insurer list, 3 or more physicians	Employer/insurer approval	Agency approval  *note: this is taken from the publication; doubtful was true at time of publication
VIRGINIA	Employer/insurer list, 3 physicians per specialty	Employer/insurer or agency approval	None Allowed

### ADVISORY COUNCIL COMMENTS

It is clear that there is no uniform approach to the issue of the selection/change of the treating physician in a workers' compensation case. No specific studies have been identified that have attempted to determine if one approach or another is more beneficial to the system and the system participants.

The Workers' Compensation Research Institute is currently in the "peer review" of a study on the issue. The WCRI anticipates publication of the study in the Spring of 2005. The Advisory Council will review the WCRI study and, if indicated, will issue a revised report on this issue.

The Advisory Council is comprised of members who represent various stakeholders in the Tennessee workers' compensation system. As a result, each representative has individual opinions as to how the current Tennessee system should or should not be altered and how any alteration would impact the system as a whole. The members point out that the advent of a medical fee schedule in Tennessee, as required by July 1, 2005, will have unknown ramifications on provider selection.

Therefore, at the current time, the members of the Advisory Council have no recommendations to make concerning Tennessee law's restrictions on the injured employee's choice of treating physician,

Respectfully submitted on behalf of the  
Workers' Compensation Advisory Council,

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Dale Sims, State Treasurer  
Chair