

May 4, 2009

PROPOSED AMENDMENT(s) SB 2055 by Barnes / *HB 1899 by Pitts

Present Law

TCA §50-6113(f)(1) requires any person engaged in the construction industry (principal contractors, intermediate contractors and subcontractors) to carry workers' compensation insurance whether or not the person employs fewer than 5 employees. The law does not apply to a person building or repairing the person's own property for his own use and the statute exempts counties of a certain population.

In 2008, the General Assembly enacted Public Chapter 1041 that is to become effective on December 31, 2009. PC1041 requires all persons engaged in the construction industry (defined as a person or entity assigned to the Contracting Group as designated by the NCCI) to carry workers' compensation insurance. [Note: The National Council on Compensation Insurance (NCCI) has been designated by the Commissioner of Commerce and Insurance as the official rate-making entity for the State of Tennessee.]

Public Chapter 1041 exempts sole proprietors or partners engaged in the construction industry from carrying insurance on themselves if they are doing work directly for the owner of a dwelling/structure on the owner's own property. The law also deleted the county exemptions.

PROPOSED AMENDMENT (by sponsors of the Bill)

The proposed amendment to SB 2055/HB 1899 delays the effective date of Public Chapter 1041 from December 31, 2009 until December 31, 2010.

PRACTICAL EFFECT OF PROPOSED AMENDMENT #1 (by sponsors of the Bill)

The proposed amendment to the bill delays the effective date of Public Chapter 1041 for an additional year.

Comments of Advisory Council Members

Mr. John Morris, Assistant Commissioner, Department of Commerce and Insurance stated the department does not have a position regarding the amendment to extend the effective date of Public Chapter 1041.

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PROPOSED AMENDMENT(s) SB 2055 by Barnes / *HB 1899 by Pitts, cont.

MOTION re: Amendment by Sponsors

Mr. Jerry Lee [Voting Member, Employee Representative] made a motion to recommend against delaying the implementation of Public Chapter 1041 until December 31, 2010. The motion was seconded by Mr. Tony Farmer [Voting Member, Employee Representative].

Roll call vote was required:

The following voting members voted in favor of the motion:

Mr. Tony Farmer (Employee Representative)

Mr. Jack Gatlin (Employee Representative)

Mr. Jerry Lee (Employee Representative)

Mr. Stewart Meadows (Employer Representative)

Mr. Bob Pitts (Employer Representative)

Mr. Gary Selvy (Employer Representative)

RECOMMENDATION re: Amendment by Sponsors

The voting members of the Advisory Council **UNANIMOUSLY RECOMMEND AGAINST PASSAGE** of the amendment to delay implementation of Public Chapter 1041 until December 31, 2010.

SUGGESTED AMENDMENT

(by Mr. Bob Pitts, Voting Member of the Advisory Council, representing employers)

The proposed amendment suggested by Mr. Pitts addresses the issue of premium cost for sole proprietors, partners, and officers of a limited liability company (limited to three individuals) by requiring the premiums be computed under a specific construction classification code. The proposal requires these individuals to submit an affidavit that states he/she will not be performing actual construction work at the job site and if it is determined the individual did perform this type work during the policy period such action is to be considered a violation of the requirement to maintain workers' compensation coverage under TCA 50-6-405 and subjects the individual to the penalties for noncompliance (TCA 50-6-412).

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PROPOSED AMENDMENT(s) SB 2055 by Barnes / *HB 1899 by Pitts, cont.

Practical Effect of SUGGESTED AMENDMENT (by Mr. Bob Pitts)

The amendatory language suggested by Mr. Bob Pitts establishes a system by which the owner(s) of a construction business, who solely functions in a supervisory or managerial role when on a job site and does NOT perform the actual work being done on site, can be charged a workers' compensation premium based on a managerial loss costs and not the loss costs of the type of work being done by the employees.

Comments of Advisory Council Members regarding SUGGESTED AMENDMENT

Mr. Bob Pitts [Voting Member, Employer Representative]:

Mr. Pitts stated the suggested amendment is an attempt to address concerns expressed by various legislators concerning the large workers' compensation premium that owners of small businesses will pay as a result of Public Chapter 1041, which becomes effective on December 31, 2009. He said his proposal would permit a sole proprietor, partners of a partnership and officers (not to exceed 3) who do not perform any construction type work on the job site to pay a rate equal to the classification for a construction executive. He stated this proposal preserves the intent of Public Chapter 1041 that everyone in the construction industry be required to have workers' compensation coverage.

Mr. Gary Selvy [Voting Member, Employer Representative]:

Mr. Selvy said he understands the plight of the small business and urges the parties to work toward a solution that would offer relief from the high insurance costs.

Mr. John Morris, Assistant Commissioner, Department of Commerce and Insurance

Commissioner Morris stated the proposal that sets a class code by statute is a departure from longstanding practice. He suggested if cost is a concern to the legislature that it might be better to set the specific loss costs in statute rather than to designate a specific classification code as either the department or the NCCI could change the specific class code in the future so that it might no longer apply to construction.

Mr. Pete Halverstadt, Assistant Administrator, Division of Workers' Compensation

[Designee of the Commissioner of Labor and Workforce Development]

Mr. Halverstadt stated he had three concerns regarding the proposed amendment:

1. The term should be "limited liability company", not "limited liability corporation".
2. He suggested deleting the phrase "or other means" and permitting the insurance company to use only an audit to determine an individual did actually perform work on the job site.

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PROPOSED AMENDMENT(s) SB 2055 by Barnes / *HB 1899 by Pitts, cont.

Comments of Advisory Council Members regarding SUGGESTED AMENDMENT, cont.

3. It would be better to state a specific penalty - even one that mirrored the penalty that can be assessed under Title 50-6-412 rather than referencing the section as that statute assumes an individual/company does not have insurance and under this circumstance the person will have insurance but will not be paying the correct rate.

MOTION re: Amendment suggested by Mr. Bob Pitts

Mr. Bob Pitts [Voting Member, Employer Representative] made a motion that the voting members of the Council recommend passage of the amendment he proposed, with the following caveats: (1) that the Department of Commerce and Insurance work with the sponsors to clarify the language necessary for the specific class code or a Tennessee specific class code and (2) the Department of Labor and Workforce Development work with the sponsors to determine the best language to be used related to penalties and (3) the language of the proposed amendment be changed to eliminate the words " or other means" after the word "audit". The motion was seconded by Mr. Jerry Lee [Voting Member, Employee Representative].

Roll call vote was required:

The following voting members voted in favor of the motion:

Mr. Tony Farmer (Employee Representative)

Mr. Jack Gatlin (Employee Representative)

Mr. Jerry Lee (Employee Representative)

Mr. Stewart Meadows (Employer Representative)

Mr. Bob Pitts (Employer Representative)

Mr. Gary Selvy (Employer Representative)

RECOMMENDATION re: Amendment suggested by Mr. Bob Pitts

The voting members of the Advisory Council **UNANIMOUSLY RECOMMEND FOR PASSAGE** of the amendment proposed by Mr. Pitts, provided it is changed as indicated in the motion.

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SB 1574 by Norris / *HB 1472 by Casada

PROPOSED - - AMENDMENT #1 to AMENDMENT 1

Present Law

TCA §50-6-204 governs medical treatment, release of medical records and other issues related to medical treatment. TCA §50-6-204(a)(1)(B) provides that no relevant information developed in connection with treatment or examination for which compensation is sought by the employee shall be considered a privileged communication. The subdivision also provides that the employee's consent is not required for furnishing reports or records and no physician or hospital furnishing the reports or records shall incur any liability for furnishing the reports/records.

In June, 2008, The Tennessee Supreme Court issued its opinion in the case of *Overstreet v. TRW Commercial Steering Division, et al.*, S.W.3d (Tenn. 2008). In that case the employer filed a motion seeking permission to have an *ex parte* interview with the treating physician regarding the medical condition of the employee. The Supreme Court held that a covenant of confidentiality between the employee and the treating physician may be implied in law and should be applied to the physician-patient relationship in a workers' compensation claim.

The Supreme Court noted the Workers' Compensation Law addresses in detail how an employer may obtain medical information regarding the injured worker and how the doctor can disclose the information. However, the Court while much disclosure is required under the Workers' Compensation Act, none of the terms permit *ex parte* communications by the employer with the employee's treating physicians. The Court further stated it must infer, from this conspicuous absence, that the General Assembly did not intend such communications and had the General Assembly intended to eliminate all assurances of physician-patient confidentiality in the workers' compensation context...they would have been explicit.

In addition, the Supreme Court placed emphasis on the fact the General Assembly had enacted several statutes that convey a public policy favoring the confidentiality of medical information. The Court stated, "...Because the General Assembly has enacted a right of privacy in health care and provided a comprehensive statutory scheme for the disclosure of information under the Workers' Compensation Act, we hold that an implied a (sic) covenant of confidentiality in law exists under these circumstances."

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SB 1574 by Norris / *HB 1472 by Casada, cont.
[Proposed Amendment #1 to Amendment 1]

PROCEDURAL HISTORY

AMENDMENT 1 to SB1574/HB1472

This amended bill, commonly referred to as the "Overstreet Amendment", is a detailed change in the law that establishes the methods available to the parties for obtaining medical information and medical records for the administrative handling of a workers' compensation claim and for the development of information needed to analyze the claim.

The Senate passed the bill, as amended, on April 27 and the House received the bill on April 30. The House bill is set on the calendar of the Subcommittee on Employee Affairs on Tuesday, May 5, 2009.

PROPOSED AMENDMENT #1 to AMENDMENT 1 - submitted by the Tennessee Medical Association

<i>Present Language of Section v of Amendment #1 - passed by Senate</i>	<i>TMA Proposed Change in Language of Section v of Amendment #1 - passed by Senate</i> *added language is underlined deleted language is not indicated
(v) Any form of written communication by an employer to or with a medical provider as defined by this section, other than a request pursuant to subdivision (iv), is prohibited unless the employee and any attorney representing the employee are included as recipients of the written communication; are provided copies of any material or information provided to the medical provider; and are provided any response thereto from the medical provider within seven (7) calendar days of the employer's receipt of the response;	(v) Any form of written communication by an employer to or with a medical provider as defined by this section, other than a request pursuant to subdivision (iv), is prohibited unless the employee and any attorney representing the employee are included as recipients of the written communication; are provided copies of any material or information provided to the medical provider; <u>and the employer provides any response thereto from the medical provider to the employee or his attorney</u> within seven (7) calendar days of the employer's receipt of the response;

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SB 1574 by Norris / *HB 1472 by Casada, cont.
[Proposed Amendment #1 to Amendment 1]

Proposed Change of Amendment #1 to Amendment 1

The TMA proposed amendment adds language to the last phrase of subdivision (v) to specify the employer is to provide copies of any response from the medical provider to the employer's written communication.

Practical Effect of Amendment #1 to Amendment 1

The practical effect is basically outlined in the Proposed Change section above.

Informational Note:

To be internally consistent, it might be best that the language "to the employee or his attorney" contained in the TMA proposal be changed to "the employee and any attorney representing the employee".

Comments of Advisory Council Members

Bob Pitts [Voting Member, Employer Representative]:

Mr. Pitts noted the proposed amendment is a clarification of the intent of the original subdivision (v) and should be supported.

RECOMMENDATION OF WCAC VOTING MEMBERS

The voting members of the Advisory Council **UNANIMOUSLY RECOMMEND PASSAGE** of the proposed amendment (suggested by the Tennessee Medical Association) provided it is changed to reflect the correction suggested by staff of the Advisory Council.