STATE OF TENNESSEE

WORKERS' COMPENSATION ADVISORY COUNCIL

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ANALYSIS & COMMENTS

re:

WORKERS' COMPENSATION LEGISLATION

APRIL 7, 2009

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

M. Linda Hughes, Executive Director

WORKERS' COMPENSATION ADVISORY COUNCIL

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STAFF ANALYSIS
re:
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~2009~

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ADVISORY COUNCIL MEMBERS & REPRESENTATION

NAME	MEMBER TYPE	REPRESENTING
David H. Lillard, Jr. State Treasurer	Chair Nonvoting Member	
J. Anthony Farmer	Voting Member	Employees
Jack Gatlin	Voting Member	Employees
Jerry Lee	Voting Member	Employees
Stewart Meadows	Voting Member	Employers
Bob Pitts	Voting Member	Employers
Gary Selvy	Voting Member	Employers
Kitty Boyte	Nonvoting Member	Tennessee Defense Lawyers Association (TDLA)
Bruce Fox	Nonvoting Member	TN Association For Justice (Formerly Tennessee Trial Lawyers Association)
Stephen Johnson	Nonvoting Member	Health Care Providers
Kenny McBride	Nonvoting Member	Local Governments
Jerry Mayo	Nonvoting Member	Insurance Companies
Sam Murrell, M.D.	Nonvoting Member	Health Care Providers
A. Gregory Ramos	Nonvoting Member	Tennessee Bar Association (TBA)
James G. Neeley, Commissioner Dept. Labor/WFD	Ex Officio Member	
Leslie Newman, Commissioner Dept. Commerce & Insurance	Ex Officio Member	
Sen. Jim Tracy Chair, Joint Committee	Ex Officio Member	
Rep. Charles Sargent Vice-Chair, Joint Committee	Ex Officio Member	

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(BY SUBJECT MATTER)

NOTE: The description of the bill and/or amendment in the following table is a limited description and does not describe all aspects of the bill.

INSURANCE & SELF-INSURANCE	**SB#**	**Sponsor**	**HB#**	**Sponsor**	**DESCRIPTION**
	1364	Johnson	1993	Sargent	AMENDED The bill permits the Commissioner to permit the Road Builders Association Pool to be terminated and the liabilities transferred to the mutual insurance company that currently insures its members
	2055	Barnes	1899	Pitts	Bill amends Public Chapter 1041 enacted in 2008 by delaying effective date from December 31, 2009 to July 1, 2012 (required all contractors to have coverage)
	2299	Kyle	2268	Turner, M	AMENDED Authorizes Department of Commerce & Insurance to establish - by rule- types of securities permitted by self-insured employers; establishes penalties for failure of the self-insured employer to pay premium taxes timely; requires self-insured to file actuarial report annually instead of every two years.
WORKERS' COMPENSATION - APPLICABILITY ***PENALTIES FOR NON-COMPLIANCE** ***INJURIES NOT COVERED**	**SB#**	**Sponsor**	**HB#**	**Sponsor**	**DESCRIPTION**
	0487	Burchett	1564	West	PENALTIES Makes any abated workers' compensation penalties for failure to have workers' compensation coverage void after one year if employer maintains coverage during the year
	1828	Kyle	1408	Ferguson	PENALTIES Deletes monetary penalties for failure to have workers' compensation coverage

	545	Norris	0900	Casada	INJURIES NOT COVERED Revises definition of injury - injury does not arise out of and in course of employment if the injury occurs while employee is in the employee's residence or on employee's property unless employee is actively engaged in a defined work activity within an established immediate work area.
	0661	Stanley	0256	Casada	INJURIES NOT COVERED Restricts coverage of injuries that occur during recreational activities - no liability if employer did not require the participation and the recreational activities did not directly benefit the employer
	1500	McNally	1229	Fitzhugh	IDENTICAL TO SB 0661/HB025 INJURIES NOT COVERED Restricts coverage of injuries that occur during recreational activities - no liability if employer did not require the participation and the recreational activities did not directly benefit the employer
	1909	Norris	1500	Fitzhugh	INJURIES NOT COVERED Prohibits compensation for injury/death due to employee's voluntary participation in recreational, social, athletic or exercise activities UNLESS specific circumstances exist
	2081	Johnson	1964	Sargent	INJURIES NOT COVERED Prohibits compensation for injury occurring when during travel to or from medical treatment AFTER employee's claim has been finalized through settlement or trial, even though medical benefits remained open
	1524	Burchett	1604	Brooks, H	INJURIES NOT COVERED Prohibits compensation for injury due to intoxication or drug use that is contributing cause of injury instead of the proximate cause of the injury. For DFWP employer, positive test is presumed to be contributing cause of injury - can be rebutted.

FILING OF LAWSUITS -VENUE	**SB#**	**Sponsor**	**HB#**	**Sponsor**	**DESCRIPTION**
	2292	Kyle	2253	Turner, M	AMENDMENT The original bill and the amendment changes the venue statute - attempts to address Supreme Court opinion critical of current "race to the courthouse".
ACCESS TO MEDICAL REPORTS ***Overstreet*** **Issue**	**SB#**	**Sponsor**	**HB#**	**Sponsor**	**DESCRIPTION**
	1574	Norris	1472	Casada	AMENDED The bill establishes parameters for obtaining medical records and information from authorized treating providers in response to recent Supreme Court decision
AMA GUIDES	**SB#**	**Sponsor**	**HB#**	**Sponsor**	**DESCRIPTION**
	0430	Bunch	1574	West	Changes "AMA Guides" from Sixth Edition to Fifth Edition.
WORKERS' COMPENSATION BENEFITS	**SB#**	**Sponsor**	**HB#**	**Sponsor**	**DESCRIPTION**
	824	Marrero. B	765	Turner, M	Makes occupational diseases covered by 2000 federal act [parts (B)(D)(E)] a compensable state work comp claim (all presumptions, etc of federal act are to be used in state claim); >positive determination in federal case to be conclusive proof of causation in state claim; >exempts second injury fund, state employees and municipal and county employees (if accepted work comp law) >excludes medical benefits >provides claims not to be included in experience rating for employer
	1567	Norris	1471	Casada	AMENDED The amendment addresses two issues regarding reconsideration: reconsideration not permitted where pre-injury employer is sold/acquired and employee does not lose job and reconsideration limited to most recent injury

	2000	Haynes	1777	Hackworth	AMENDED The amendment changes the definition of maximum total benefit and establishes maximum medical improvement date for mental injury claims.
	2001	Haynes	1776	Moore	AMENDED The amendment creates a new definition of "average weekly wage".
	2162	Tracy	1963	Sargent	AMENDED The amendment restricts amount of PPD benefits that an employee can receive if employee was not eligible or authorized to work in the United States at the time of injury provided employer did not know of employee's work status
	2231	Southerland	2102	Sargent	Establishes limited benefits that can be awarded to an employee who sustains an injury but who was not eligible or authorized to work in the United States at the time of injury provided employer did not know of employee's work status
MEDICAL EXPENSES & PAYMENTS FEE SCHEDULE	**SB#**	**Sponsor**	**HB#**	**Sponsor**	**DESCRIPTION**
	1376	Johnson	1459	Mumpower	Increases amount of medical expenses for a claim before insurer required to report to Commissioner of Labor & WFD
	1297	Crowe	857	Mumpower	SILENT PPO - Bill requires any payment lower than the medical fee schedule to be made pursuant to contract/agreement directly between health care provider and employer/ trust/pool, insurer or PPO Network. Prohibits assignment of contract to any other party. Prohibits application of commercial health policy reimbursement rates to work comp unless contract clearly stipulates they are applicable.
	1680	Ketron	1192	Mumpower	SILENT PPO Bill virtually identical to SB1297

MEDICAL CARE AND COST CONTAINMENT COMMITTEE	**SB#**	**Sponsor**	**HB#**	**Sponsor**	**DESCRIPTION**
	877	Ketron	734	Matheny	Increases the number of physicians on the Committee from 3 to 6 NOTE: WCAC was advised the bill is a caption bill; therefore, the WCAC did not review the bill.
	1924	Tate	1839	Todd	Requires the 3 physician members to represent a different specialty practice area NOTE: WCAC was advised the bill is a caption bill; therefore, the WCAC did not review the bill.
WORKERS' COMPENSATION ADVISORY COUNCIL	**SB#**	**Sponsor**	**HB#**	**Sponsor**	**DESCRIPTION**
	607	Finney, L	461	Odom	Adds a nonvoting health care provider representative chosen from list submitted by TN Chiropractic Association
	792	Overbey	751	Montgomery	Requires at least one member to be a representative from self-insured pools

AMENDED ***SB 1364 by Johnson / HB 1993 by Sargent**

Present Law

TCA §50-6-405(c)(1) permits employers of the same group (with permission of a trade or professional association) to enter into agreements to pool their workers' compensation liabilities to qualify as self-insurers. According to the Department of Commerce & Insurance rules and regulations, this entity is known as a self-insurance pool. The statute sets forth certain requirements for the pools and also provides that the sponsoring association is not liable or responsible for any act or omission of the pool.

Proposed Change **NOTE: The amendment "makes the bill".**

The Amendment to SB 1364/HB 1993 states that the pool is terminated upon the association providing evidence satisfactory to the commissioner that the association has created and is operating a mutual insurance company which insures members of the association. The amendment provides that the assets or liabilities of the pool are transferred to such mutual insurance company.

Practical Effect

The amendment appears to permit the commissioner to allow the road builders association to be terminated if the association provides satisfactory evidence to the commissioner that the association has created and is operating a mutual insurance company that insures the members of the road builders association.

Informational Note

The amendment uses the word "commissioner", which according to the definitions statute refers to the Commissioner of Labor and Workforce Development. Also, the amendment uses the term "self insured trust" which is not a term used in the statute.

Comments of Advisory Council Members

Bob Pitts - Voting member, Employer Representative

Mr. Pitts explained the Road Builders has had a self-insured pool for many years and to the extent they can close the pool they have done so and are now providing services through a mutual insurance company. He stated he believes the amendment should be favorably reported as he is entirely confident the Road Builders do not intend to go forward with the legislation unless they can reach an agreement that the Department of Commerce & Insurance is comfortable with to permit closing out the liabilities of the pool and placing it under the jurisdiction of the mutual insurance company.

AMENDED ***SB 1364 by Johnson / HB 1993 by Sargent, continued.**

Comments of Advisory Council Members, cont.

Mike Shinnick - Ex Officio Member, Workers' Compensation Manager [Dept. Commerce & Insurance Designee]

Mr. Shinnick stated the Department is concerned for the injured employees who still have open claims with the Road Builders Self-Insured Pool and the Department wants to protect their interests and does not want to rush into anything. He stated the Department has concerns that moving the liabilities to Builders Mutual Insurance Company could potentially jeopardize the protection of the employees.

RECOMMENDATION OF WCAC VOTING MEMBERS

The voting members of the Advisory Council *UNANIMOUSLY RECOMMEND PASSAGE* of the bill *provided* the bill is amended to address the issues identified in the Informational Note and *provided* the Commissioner of Commerce & Insurance concurs and supports passage of the bill.

SB 2055 by Barnes / *HB 1899 by Pitts

Present Law

TCA §50-6-113(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 (a person or entity assigned to the Contracting Group as designated by NCCI) to carry workers' compensation insurance. The Public Chapter 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 Change

SB 2055/HB 1899 delays the effective date of Public Chapter 1041 from December 31, 2009 until July 1, 2012.

Practical Effect

The bill delays the implementation of Public Chapter 1041 for an additional 2 ½ years.

Comments of Advisory Council Members

Bob Pitts, Voting member, Employer Representative:

Mr. Pitts stated the issue of coverage for those working in the construction industry has been a problem in Tennessee for over 20 years; we have tried multiple approaches to find solution to problem of appropriate coverage and every attempt resulted in massive evasion. Therefore, two years ago, the representatives of all the construction industry associations, the Department of Commerce & Insurance and the Department of Labor/WFD worked together to craft a solution. Those parties could find no solution to the problem except to require everyone to carry workers' compensation insurance coverage. Out of concern for the impact on small employers, the bill that passed contained an 18 month delay in its effective date. He stated the problem remains, that the State of Tennessee needs employers to have workers' compensation coverage in good times or in bad economic times for the protection of workers. The proposed bill adds 2 ½ years until the implementation of this legislation in order to

SB 2055 by Barnes / *HB 1899 by Pitts, continued.

Comments of Advisory Council Members, cont.

address a fundamental problem in Tennessee will equal a delay of 4 years from passage of the original bill and is unrealistic.

Jerry Lee, Voting member, Employee Representative:

Mr. Lee stated the passage of the original legislation in 2008 was one of those rare instances when all parties agreed on the bill. It is a good bill that included a reasonable delay in its effective date. He stated it might be reasonable to extend the effective date a little bit, but the proposed 4 years is a long time.

RECOMMENDATION OF WCAC VOTING MEMBERS

The voting members of the Advisory Council *UNANIMOUSLY RECOMMEND AGAINST* passage of the bill as currently written.

AMENDED **SB 2299 by Kyle / *HB 2268 by Turner, M**

Present Law

TCA §50-6-405(b)(1) permits the Commissioner of Commerce and Insurance to issue a certificate of authority for an employer to self-insure its liability for workers' compensation upon satisfactory proof of its ability to pay the claims. The statute sets forth in (b)(1)(D through H) the specific types of security the Commissioner of Commerce and Insurance may impose on self-insured employers and outlines other requirements governing the securities. TCA §50-6-405(b)(2) requires a self-insured employer to provide the Commissioner of Commerce and Insurance evidence of the employer's losses and adequacy of reserves biennially, certified by an actuary.

TCA §56-4-207 requires a self-insured employer to pay a tax of 4% (and a surcharge of 0.4% of the premiums to be earmarked for TOSHA) on the premium that the employer would be required to pay if the employer carried the full coverage insurance called for with licensed insurance companies. The tax is required to be paid on or before June 30 of each year.

TCA §56-4-216 establishes a penalty for insurance companies for late payment of premium taxes in an amount equal to five percent (5%) for the first month or fractional part of the first month of delinquency; provided, that should the period of delinquency exceed one (1) month, the rate of penalty will be an additional five percent (5%) for the second month or fractional part of the second month and penalty thereafter at the rate of one half of one percent (0.5%) per month of the amount of tax due, the maximum penalty not to exceed ten thousand dollars ($10,000) for any company not more than three (3) days delinquent. All delinquencies shall bear interest at the rate of ten percent (10%) per annum from the date the amount was due until paid. The penalty and interest shall apply to any part of the tax unpaid by the due date and no penalty or interest may be waived.

Proposed Change by Amendment **NOTE: The amendment makes the bill.**

The Amendment to SB 1364/HB 1993:

- allows the Department to receive an annual actuarial statement for employers that self-insure to assure these employers have the ability to pay claims as the statute requires;
- clarifies the ability of the Department to levy a penalty and fine for the late payment of premium taxes by the self-insured employers;
- provides the premium taxes are due on or before the last day of the sixth month following the end of the employer's fiscal year; and
- deletes the current statutory language that sets out the different types of security the self-insured employer can have and gives the Department statutory rulemaking authority to determine the types of acceptable security a self0insured employer can provide to the Department.

AMENDED **SB 2299 by Kyle / *HB 2268 by Turner, M, continued.**

Practical Effect of Amendment

The proposed amendment makes changes to the statutes governing employers that are authorized to self-insure workers' compensation liability. The amendment deletes all statutorily permitted types of security to be posted by the self-insured employer and instead grants full authority to the Commissioner of Commerce and Insurance to determine the types of security acceptable for self-insured employers by rule making authority.

The amendment also adopts statutes in Title 56, the insurance code section, as applicable to workers' compensation self-insured employers instead of setting forth the requirements in Title 50, Chapter 6, the workers' compensation statute.

Informational Note:

The amendment establishes a different date by which a self-insured employer is required to pay its taxes and surcharges than set forth in TCA §56-4-207.

Comments of Advisory Council Members

NOTE: John Morris, Assistant Commissioner, Department of Commerce & Insurance told the members it is the intent of the Department to change the amendment by deleting the provision establishing the due date of the premium taxes from self-insured employers and to make it consistent with the language of Title 56.

Bob Pitts - Voting member, Employer Representative

Mr. Pitts noted in light of the recent Attorney General opinion, he has concerns about where the balance of power is in the rulemaking process. As he understands the opinion, the Government Ops Committee of the legislature has been severely limited in what it can do restricted as to what it can do about holding up rules, etc. He stated the movement of executive agencies toward more and more creating policy through rulemaking rather than it being defined in statute causes him great concern especially if there existed a runaway department and there is no where to take the case on the balance of powers issue. He noted he is not attacking this bill, but rather is using the bill as an opportunity to bring up the issue in the hopes the legislature finds some way to address the issue.

Mr. Morris responded to Mr. Pitts' expressed his personal opinion (he stated he is unaware as to whether the Department has a position on the issue) that he does not disagree with Mr. Pitts, but stated with regard to this amendment, it is an absolutely proper method of rulemaking as the issue as to the type of securities that are to be permitted and the manner by which the securities are to be placed with the Department is a very technical one and is the exact type of issue that should be done by rulemaking as opposed to statutory change.

AMENDED **SB 2299 by Kyle / *HB 2268 by Turner, M, continued.**

RECOMMENDATION OF WCAC VOTING MEMBERS

The voting members of the Advisory Council *UNANIMOUSLY RECOMMEND PASSAGE* of the amendment provided it is changed as indicated by Commissioner Morris.

***SB 487 by Burchett / HB 1564 by West**

Present Law

TCA §50-6-405 requires every employer who is subject to the workers' compensation law to secure payment of compensation by either purchasing insurance or qualifying as a self-insured employer. *TCA* §50-6-406 requires each employer or insurer to file notice with the division of workers' compensation that it has complied with the law and if the employer fails to comply, the employer is either liable to the injured employee for workers' compensation benefits or for damages in tort.

TCA §50-6-412 establishes **mandatory** monetary penalties for an employer who is subject to the workers' compensation act but has failed to obtain insurance. When the department determines an employer is required to have workers' compensation insurance, the following occurs:

* the department notifies the employer by certified letter and gives notice of possible monetary penalties
* the employer has 10 days to respond to the certified letter
* if employer responds to letter: (1) no monetary penalty if employer proves either that it has coverage or it is not required to have insurance OR (2) monetary penalty equal to 1 ½ times average yearly premium if the employer obtained insurance after receipt of the certified letter
* if employer does not respond to certified letter or responds but does not submit affidavit not subject to law, then the department issues a show cause order and notice of hearing and assesses TWO penalties: one equal to 1 ½ times average yearly premium and one equal to the average yearly premium for such employer
* if employer appears at the show cause hearing and has NOT secured insurance both penalties are due
* if employer appears at the show cause hearing and shows it has secured insurance prior to the hearing OR obtains insurance within 5 days of the hearing, the first monetary penalty of 1 ½ times average yearly premium is due, but the second penalty (equal to the average yearly premium for such employer) is held in abeyance for a period of 2 years.

TCA §50-6-412(b)(3) pertains to any abated penalty. The period of abeyance is two years for any abated penalty. Any abated penalty becomes void upon expiration of the two year period if the employer continues to be subject to the work comp law and continuously has insurance during that period. If the employer can show within the two year period that it is no longer subject to the work comp law and the department agrees, the penalty is void. If the employer fails to secure insurance during the two year period when required to be insured, any abated penalty becomes due immediately.

***SB 487 by Burchett / HB 1564 by West, continued.**

Proposed Change

SB 487 / HB 1564 deletes *TCA* §50-6-412(b)(3) in its entirety and substitutes instead:

* any monetary penalty assessed pursuant to *TCA* §50-6-412 against an employer SHALL be held in abeyance;
* period of abeyance is one year;
* any abated penalty becomes void upon expiration of the one year period PROVIDED the employer remained subject to the work comp law and continuously had insurance during the year period;
* any abated penalty becomes void if within the one year period the employer shows it is no longer subject to the law and the department concurs;
* if an employer that is subject to the work comp law ceases to be insured within the one year period, any abated penalty becomes due and payable immediately, within thirty (30) days of the monetary penalty being imposed.

Practical Effect

The bill requires all monetary penalties assessed pursuant to other subsections of *TCA* §50-6-412 to be held in abeyance - - both the initial penalty of 1 ½ times the average yearly premium and the second penalty that is equal to the average yearly premium for such employer. No penalty will be paid by any employer who has been determined to be in noncompliance with the law provided the employer obtains insurance after discovered by the department and keeps it for a year.

The bill may create an incentive for an employer to decide not to purchase any insurance for the protection of its workers and run the risk they will never be discovered by the department. In addition, the bill undermines the rationale for the 1999 enactment of significant penalties for failure to comply with the workers' compensation law.

Prior to the enactment of *TCA* §50-6-412 mandating specific monetary penalties based on the premiums that the employee should have paid during the time of noncompliance, there was no ***SB** significant deterrent to employers who failed to obtain workers' compensation insurance coverage. If this bill becomes law, the deterrent will be abolished in practicality. Employer who decide to run the risk and not purchase workers' compensation insurance coverage will save money. However, the injured employee will have no recourse except to sue the employer for benefits and the employer may file bankruptcy to prevent any recovery by the employee.

***SB 487 by Burchett / HB 1564 by West, continued.**

Informational Note

While the language of *TCA* §50-6-412 mandates a specific monetary penalty depending on how long the employer was not in compliance with the law, the Department of Labor/WFD does negotiate payment plans for payment of the assessed penalties and sometimes agrees to lower penalties than provided in the statute.

Comments of Advisory Council Members

Tony Farmer, Voting member, Employee Representative

Mr. Farmer noted under the current penalty format, the Council continues to see page after page of Tennessee employers still do not purchase workers' compensation insurance and put thousands of Tennessee workers at risk. He said to change the law and allow more of an incentive for Tennessee employers not to provide workers' compensation insurance and is a move in the absolute wrong direction.

Bob Pitts, Voting member, Employer Representative

Mr. Pitts agreed with the opinions expressed by others. He also stated, as a reminder, that in the process of adopting the 2004 Reform Act3, all the major parties to support changing the law in Tennessee went on record to give the Department authority and staff to enforce employers having workers' compensation coverage. In his opinion, the bill would be a step back.

Sam Murrell, M.D., Health Care Provider Representative

Dr. Murrell noted this bill would permit a repeat offender to escape the requirements of the law.

Sue Ann Head, Administrator, Division of Workers' Compensation [Commissioner's Designee]

Ms. Head stated the Department of Labor/WFD does not support the bill.

RECOMMENDATION OF WCAC VOTING MEMBERS

The voting members of the Advisory Council *UNANIMOUSLY RECOMMEND AGAINST* passage of the bill.

AMENDED **SB 1828 by Kyle / *HB 1408 by Ferguson**

Present Law

TCA §50-6-103 requires every employer and employee subject to the workers' compensation law to pay and accept compensation for personal injury or death by accident arising out of and in the course of employment without regard to fault.

TCA §50-6-405 requires every employer who is subject to the workers' compensation law to secure payment of compensation by either purchasing insurance or qualifying as a self-insured employer.
TCA §50-6-406 requires each employer or insurer to file notice with the division of workers' compensation that it has complied with the law and if the employer fails to comply, the employer is either liable to the injured employee for workers' compensation benefits or for damages in tort.
TCA §50-6-412 (a) grants authority to the commissioner to issue a subpoena to require an employer doing business in the state to produce any and all books, documents, etc. that may be relevant to determine if the employer is subject to the workers' compensation law, if the employer has complied with the law, and to determine the amount of penalty required to be assessed as a result of noncompliance. The remainder of section 412 establishes **mandatory** monetary penalties for an employer who is subject to the workers' compensation act but has failed to obtain insurance. When the department determines an employer is required to have workers' compensation insurance, the following occurs:

- the department notifies the employer by certified letter and gives notice of possible monetary penalties
- the employer has 10 days to respond to the certified letter
- if employer responds to letter: (1) no monetary penalty if employer proves either that it has coverage or it is not required to have insurance OR (2) monetary penalty equal to 1 ½ times average yearly premium if the employer obtained insurance after receipt of the certified letter
- if employer does not respond to certified letter or responds but does not submit affidavit not subject to law, then the department issues a show cause order and notice of hearing and assesses TWO penalties: one equal to 1 ½ times average yearly premium and one equal to the average yearly premium for such employer
- if employer appears at the show cause hearing and has NOT secured insurance both penalties are due
- if employer appears at the show cause hearing and shows it has secured insurance prior to the hearing OR obtains insurance within 5 days of the hearing, the first monetary penalty of 1 ½ times average yearly premium is due, but the second penalty (equal to the average yearly premium for such employer) is held in abeyance for a period of 2 years
- the period of abeyance is two years for any abated penalty
- any abated penalty becomes void upon expiration of the two year period if the employer continues to be subject to the work comp law and continuously has insurance during that period

AMENDED **SB 1828 by Kyle / *HB 1408 by Ferguson, continued.**

Present Law, cont.

- if the employer can show within the two year period that it is no longer subject to the work comp law and the department agrees, the penalty is void
- if the employer fails to secure insurance during the two year period when required to be insured, any abated penalty becomes due immediately.

TCA §50-6-412(g) permits the Commissioner of Labor and Workforce Development to seek an injunction in the Chancery Court of Davidson County to prohibit an employer from operating its business until compliance with an order regarding penalties for noncompliance and until coverage is obtained.

Proposed Change by Amendment

Note: The amendment to SB 1828/ HB 1408 purports to add a new subsection (a) to *TCA* §50-6-412 without deleting or amending the current subsection (a). The amendment does give the department the authority to issue and serve subpoenas for production of business records - does not limit the reason for which the subpoena can be issued.

The amendment defines "securing the payment of workers' compensation (for purposes of section 412 only) as "obtaining coverage that meets the requirements of this chapter and title 56". The bill clarifies that an employer has failed to secure payment of workers' compensation if the employer:

- materially understates or conceals payroll;
- materially misrepresents or conceals employee duties so as to avoid proper classification for premium calculations; or
- materially misrepresents or conceals information pertinent to the computation and application of an experience rating modification factor.

The bill requires the "department" to enforce workers' compensation coverage requirements and grants the "department" the power to:

1. Conduct investigations;
2. Enter and inspect businesses at reasonable times;
3. Examine and copy business records;
4. Administer oaths and affirmations;
5. Certify to official acts;
6. Issue and serve subpoenas for attendance of witnesses or production of documents and records;
7. Issue stop-work orders, ***"penalty assessment orders"*** and other orders necessary for the administration of Section 412;
8. Enforce stop-work orders;

AMENDED SB 1828 by Kyle / *HB 1408 by Ferguson, continued.

Proposed Change by Amendment, cont.

9. Levy and pursue actions to ***"recover penalties"***;
10. Seek injunctions and other appropriate relief.

The "department" is to designate representatives who may serve subpoenas and other process issued by the department. A court is given jurisdiction to enforce these items and failure to comply with the court order may be punished by the court as contempt, either civil or criminal contempt.

The bill also requires the issuance of a stop-work order within 72 hours if the department determines an employer has failed to secure payment of workers' compensation or failed to produce required records within 5 business days after receipt of the written request of the department. This failure is deemed an immediate serious danger to public health, safety or welfare to justify a stop-work order.
The bill sets out the specifics as to how the stop-work order is to be enforced and how long it is to remain in effect. The department is to assess a penalty of $1,000 penalty for each day the employer conducts business in violation of a stop-work order. Also, an employer conducting business in violation of a stop-work order is guilty of a Class E felony.

The department is authorized to bring action in circuit court to recover penalties assessed under this section and is permitted to recover reasonable interest and attorney's fees. The bill also authorizes any law enforcement agency - at the department's request - to render any assistance to carry out the section.

Practical Effect of Amendment

The bill would enact stringent penalties not only for employers who fail to purchase workers' compensation but also for employers who misrepresent their payroll, employee duties or any other information pertinent to establishing a proper workers' compensation premium.

Informational Note

The term "department" is not defined in Title 50, Chapter 6. Most statutes refer to the commissioner of labor and workforce development having duties, powers, etc.

Comments of Advisory Council Members

Jerry Lee - Voting member, Employee Representative

Mr. Lee stated labor does perceive there is a serious problem with the mis-classification of workers and they have tried to address some of the issues by requiring independent contractors to

AMENDED SB 1828 by Kyle / *HB 1408 by Ferguson, continued.

Comments of Advisory Council Members, cont.

have workers' compensation insurance. He said he feels the issue needs serious consideration and he agrees the issue needs further study before proceeding with legislation but fully believes this is necessary.

Bob Pitts - Voting member, Employer

Mr. Pitts told the members of the Advisory Council that he has had a number of concerns about this bill and has engaged in a number of conversations with the proponents of the bill. He acknowledged the bill is a sincere attempt by the proponents to address a perceived problem; however, he does not know if it is a problem that exists in Tennessee. He expressed deep concern that, as the bill is drafted, there has been no coordination with either of the two departments as the bill to address the conflicts with existing laws regarding which department has jurisdiction over the issue. He said, in his opinion, the bill comes too late and tries to do too much and there is not enough time this year to give the issue the consideration it deserves. He stated his hope that the Council would recommend that the two departments, the affected parties, labor and business representatives could sit down and really look at the totality of this issue, the extent that the regulators believe it is a problem in Tennessee and what is the appropriate course of action.

Mr. Pitts gave one example of the scope of the conflicts in the bill with current law. He stated the bill gives the authority to the Department of Labor to issue stop work orders, to make determinations about misclassification of workers for appropriate workers' compensation premium, yet at the present time in Tennessee, under the contract with NCCI, any appeal on a workers' compensation classification first goes to NCCI, appealable to an administrative law judge for the Department of Commerce & Insurance and finally appealable to the Commissioner of Commerce & Insurance. There are overlapping responsibilities and jurisdictions that have not been addressed by this legislation and if passed in its present form would leave all these statutes still pending.

Mike Shinnick - Ex Officio Member, Workers' Compensation Manager
[Commissioner of Commerce & Insurance Designee]

Mr. Shinnick agreed that Mr. Pitts stated the issues well; that there are concerns between both departments on matters on premium classifications and experience modifications that have been the purview of the Department of Commerce & Insurance and if this is going to be transferred to the Department of Labor, then Commerce is willing to assist them. He concurred with Mr. Pitts' references to jurisdictional issues that would have to be addressed.

RECOMMENDATION OF WCAC VOTING MEMBERS

The voting members of the Advisory Council *UNANIMOUSLY RECOMMEND AGAINST PASSAGE* of the bill at this time and UNANIMOUSLY RECOMMEND the Department of Labor/WFD and the Department of Commerce & Insurance form an interdepartmental task force that will include representatives of all interested parties to study the issue and to recommend possible solutions.

***SB 545 by Norris / HB 900 by Casada**

Present Law

TCA §50-6-102(12) defines "injury" and "personal injury" as an injury by accident that arises out of and in the course of employment that causes disablement or death; the definition includes occupational injuries and mental injuries. "Mental injury" is further defined in *TCA* §50-6-102(15).

Proposed Change

SB 545 / HB 900 adds a qualifying phrase to the definition of "injury" and "personal injury" to provide that an injury/personal injury does not arise out of and in the course of employment while the employee is in the employee's residence or otherwise on the employee's property UNLESS the employee is engaged in a defined work activity within an established immediate work area.

Practical Effect

The proposed change prohibits the recovery of workers' compensation benefits for an employee who is either a "telecommuter" who works from the employee's home or who is performing work at home unless the injury occurs when the employee is engaged in a specific work activity within the employee's immediate work area. The bill also applies to any property of the employee, not just the residence.

Informational Note

The bill appears to be a response to the recent Supreme Court opinion in *Wait v. Travelers Indem. Co. of Illinois*, 240 S.W.3d 220 (Tenn. 2007), which was issued in November, 2007. In that case the Supreme Court held the injuries suffered by an employee who worked from a home office, with permission of the employer, as a result of a physical assault by an acquaintance during the employee's lunch break DID arise in the course and scope of her employment but DID NOT arise out of her employment. Therefore, the Court held the employee was not entitled to receive workers' compensation benefits.

NOTE: The bill purports to amend *TCA* §50-6-102(13). However, the subsection is incorrect because last year the Code Commission combined two definitions and now the definition of "injury and personal injury" is contained in *TCA* §50-6-102(12).

Comments of Advisory Council Members

Tony Farmer - Voting member, Employee Representative

Mr. Farmer noted although the interest of workers today requires we continue to study 21st Century employment as compared to employment in 1919 when the Workers' Compensation Act was adopted, this proposal substantially reduces the rights of workers who work at home as

***SB 545 by Norris / HB 900 by Casada, continued.**

Comments of Advisory Council Members, cont.

compared to workers in the normal workplace. For this reason, he feels there is no basis to reduce the rights of workers who, with the consent of their employers or at the instruction of their employers, work out of their homes. He acknowledged there is need to refine or update the definition of accidental injury given the current workplace and the changes in the workplace; however, this bill does not accomplish this.

Stewart Meadows - Voting member, Employer Representative

Mr. Meadows stated this is a critical issue that is going to continue and is one that has to be addressed as telecommuting will continue to increase. He pointed out that a person working in his/his home, is very different than working specifically in a place of business. Mr. Meadows stated the issue has to be addressed to adopt parameters around the factual basis of each claim. The issue needs to be addressed.

Steve Johnson - Nonvoting Member, Health Care Representative

Mr. Johnson noted homes are not maintained in accord with Occupational Health and Safety Act (OSHA) standards that traditional work environments are maintained.

Jerry Mayo - Nonvoting Member, Insurance Company Representative

Mr. Mayo cautioned against any provision that will make it a burden on an employer to permit telecommuters or that will increase the employer's liability for a telecommuter.

Bob Pitts - Voting member, Employer Representative

Mr. Pitts stated the Supreme Court decision, although it reached the correct conclusion, raised a realization among the parties that the issue of telecommuters is a whole new world for the workers' compensation system that needs to be studied extensively due to the complex nature of the issue. He suggested the Council continue to study the issue; however, the time is not right for the bill to move forward.

Gregg Ramos - Nonvoting Member, Attorney Representative

Mr. Ramos suggested the issue of telecommuters is very factually intensive and this is the reason the statute permits trials. He feels this is very hard to legislate. His recommendation would be against passage of the bill because each case is so fact intensive.

Bruce Fox - Nonvoting Member, Attorney Representative

Mr. Fox concurred with the comments of Mr. Ramos.

***SB 545 by Norris / HB 900 by Casada, continued.**

RECOMMENDATION OF WCAC VOTING MEMBERS

The voting members of the Advisory Council UNANIMOUSLY agree the bill in its present form is not complete or extensive enough to adequately deal with a very difficult subject.

The voting members also UNANIMOUSLY agree the telecommuting issue is a timely and very important issue that should be studied *and* the Advisory Council volunteers to conduct a study of the issue report its recommendation on the revision of the definition of accident and injury as it relates to telecommuting to the General Assembly prior to the legislative session in 2010, if the sponsors of the bill and the General Assembly agree.

PROCEDURAL NOTE re: RECREATIONAL INJURY BILLS

Three workers' compensation bills addressing the issue of work-related injuries associated with recreational activities were referred to the Advisory Council for review, comment and recommendation. They were:

1. **SB 661 by Stanley/*HB 256 by Casada** [BILL IS IDENTICAL TO SB1500/HB1229]
2. **SB 1500 by McNally/*HB 1229 by Fitzhugh** [BILL IS IDENTICAL TO SB661/HB256]
3. **SB 1909 by Norris/*HB 1500 by Fitzhugh**

The Advisory Council noted it was obvious the issue is obviously important to several legislators and various parties or three bills would not have been filed. Although the Advisory Council usually reviews bills in the numerical order by Senate sponsor, it decided to first discuss SB 1909(Norris)/*HB 1500 (Fitzhugh) first as it was of the opinion it most comprehensively addressed the recreational injury issue.

Therefore, all three bills are grouped for the "Present Law", "Proposed Change", "Practical Effect" and "Informational Note" sections of the analysis. The comments and recommendation of members of the Advisory Council will be reported for only SB1909/HB1500.

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SB 661 by Stanley/*HB 256 by Casada [BILL IS IDENTICAL TO SB1500/HB1229]
SB 1500 by McNally/*HB 1229 by Fitzhugh [BILL IS IDENTICAL TO SB661/HB256]
SB 1909 by Norris/*HB 1500 by Fitzhugh

Present Law

TCA §50-6-103 requires the employer to pay for personal injury or death by accident arising out of and in the course of employment without regard to fault. There is no other statute that specifically addresses the compensability of injuries incurred during recreational activities. Tennessee courts have dealt with this issue and have found some injuries during recreational activities to be compensable and some not to be - depending on the specific facts of each case.

TCA §50-6-110 is the statute that addresses injuries that are not covered: injuries due to willful misconduct; intentional self-inflicted injury; intoxication or drug use; or refusal to use a safety appliance or perform a duty required by law.

Proposed Change

A new provision is added to *TCA* §50-6-110. Under the bills, injuries incurred during an employee's recreational activities are not compensable unless

- participation was expressly required by the employer (SB1905 adds the words "or impliedly"); or

SB 661 by Stanley/*HB 256 by Casada [BILL IS IDENTICAL TO SB1500/HB1229]
SB 1500 by McNally/*HB 1229 by Fitzhugh [BILL IS IDENTICAL TO SB661/HB256]
SB 1909 by Norris/*HB 1500 by Fitzhugh, continued.

Proposed Change, cont.

- made the activity part of the services of the employee; or
- the employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health or morale;
- SB 1900 also includes the language that the injury occurred due to an unsafe condition during voluntary participation using facilities designated by, furnished by or maintained by the employer on or off the employer's premises and the employer had actual knowledge of the unsafe condition and failed to curtail the activity or program or cure the unsafe condition.

Practical Effect

The bill adds injuries that will not be held compensable under Tennessee's workers' compensation law - injuries that are incurred during recreational activities at work under certain circumstances.

Informational Note

It appears the bill is a response to the Supreme Court's holding in *Gooden v. Coors Technical Ceramic Co.,* 236 S.W.3d 151, Tenn. 2007, that the death of the employee due to exertion from playing basketball during a work break to be compensable because the employer knew the employees played on break and the employees were not permitted to leave the employer's premises during breaks. The Court held that each case involving injuries during recreational activities is decided on the individual facts of each case.

In *Gooden*, the employer did not permit the employees to leave the employer's premises during their breaks; a basketball goal was erected by the employees on the employer's premises and each night during break, the employees, including supervisors, would play basketball. The employee, Mr. Gooden, had a heart attack as a result of the exertion of the basketball game. The Supreme Court upheld the award of death benefits based on the facts of the case: employees were not permitted to leave during break; the employer was aware of the basketball games; supervisors participated in the basketball games.

In other recreational cases workers' compensation benefits have been denied to an employee who was injured during a recreational activity. One case, *McCammon v. Neubert*, 651 S.W.2d 702 (Tenn. 2005) involved an injury to an employee while participating in a three leg race at the employer- sponsored company picnic. The Court held the injury did not occur during the course of employment as the picnic was held on Saturday outside work hours, at a public park and not on the employer's premises.

SB 661 by Stanley/*HB 256 by Casada [BILL IS IDENTICAL TO SB1500/HB1229]
SB 1500 by McNally/*HB 1229 by Fitzhugh [BILL IS IDENTICAL TO SB661/HB256]
SB 1909 by Norris/*HB 1500 by Fitzhugh, continued.

Comments of Advisory Council Members re: SB1909/HB1500

Bob Pitts - Voting member, Employer Representative

Mr. Pitts observed SB1909/HB1500, as well as the other two bills filed on the subject, were a result of a Tennessee Supreme Court case. He explained that since the Supreme Court's decision, there has been recognition by both the employee and employer groups that the issue is one that needs. He stated of the three bills pertaining to recreational injuries, SB 1909/HB1500 is the most comprehensive, most complete, most thorough addressing of the subject matter.

Tony Farmer - Voting member, Employee Representative

Mr. Farmer stated he agreed with Mr. Pitts' observation that of the three bills, SB1909/HB1500 best addresses the issue.

RECOMMENDATION OF WCAC VOTING MEMBERS

The voting members of the Advisory Council *UNANIMOUSLY RECOMMEND PASSAGE* of SB1909/HB1500 as its contents are the most comprehensive and most complete in addressing the issue of recreational injuries.

SB 2081 by Johnson / *HB 1964 by Sargent

Present Law

TCA §50-6-103 requires the employer to pay for personal injury or death by accident arising out of and in the course of employment without regard to fault.

Proposed Change

SB 2081/HB1964 adds a new section to Title 60, Chapter 6. It prohibits any injury the employee sustains as a result of an accident or incident that occurs during authorized medical treatment or travel to or from any authorized medical treatment, or both after the employee has concluded his/her workers' compensation claim, through settlement or trial judgment, from being considered as arising out of and in the course of employment with the original employer. The bill prohibits the subsequent injury from being a new claim against the original employer or a reason to re-open the closed claim against the original employer.

Practical Effect

The bill applies to situations in which the employee's medical benefits remain open after the claim is settled or tried before a court and the employee sustains an injury during authorized medical treatment or traveling to or from authorized medical treatment. In a situation where the employee's claim had been settled or tried, any subsequent injury sustained during medical treatment or travel to or from authorized medical treatment due to the "future medical treatment" provisions of the law would not be a compensable injury.

As written, the bill would permit recovery for an injury that occurred during medical treatment and/or travel to or from such treatment provided the claim for the original injury had not been concluded.

Informational Note

This bill appears to be a response to the case of *Manuel v. Davidson Transit Organization*, an opinion issued by the Special Workers' Compensation Appeals Panel in April, 2008. In that case the employee had sustained a work-related injury in May, 2005. In December, 2005 she was still temporarily totally disabled but no longer employed by Davidson Transit. In December, 2005, she had attended a physical therapy session and on her way home she went to a pharmacy to pick up medicine that was not for her work-related injury. After she obtained the medicine she left the pharmacy and was proceeding on her way home using her normal route when she fell asleep and ran off the road sustaining a neck injury. She claimed the neck injury was a work-related injury for which Davidson Transit was liable because she was on her way home from attending medical treatment for the compensable May, 2005 injury.

SB 2081 by Johnson / *HB 1964 by Sargent, continued.

Informational Note, cont.

The Appeals Panel agreed the December injury was compensable holding:

> ...traveling to and from authorized medical treatment for a compensable injury should be considered a "special errand" connected with the employee's employment that subjects the employee to the "street risks" inherent in such travel. (Citations omitted) ...The fact that Ms. Manuel was no longer employed by Davidson Transit does not, in our view, alter the rationale for application of the special errand rule. Her need for medical treatment was a direct result of a compensable injury and, thus, was a partial continuation of the employment relationship. We, therefore, conclude that the trial court did not err in finding that her additional injury arose from and in the course of her employment.

Comments of Advisory Council Members

Tony Farmer - Voting member, Employee Representative

Mr. Farmer stated he sees no rational basis to distinguish between incidents that occur before or after a claim is resolved when it comes to injuries arising out of medical treatment administered or arising out of travel to/from medical treatment. Mr. Farmer stated the fact the underlying workers' compensation claim had been settled should not limit the employer's liability for injuries that occur going to or from authorized medical treatment.

Bob Pitts - Voting member, Employer Representative

Mr. Pitts stated he believes this is a fairness issue - when reforms were passed one of the agreements was to be very liberal in making sure an injured worker's medical benefits remained open to assure the workers are taken care of. He stated the Panel's decision is unfair when the employee's claim has been settled except for the right to lifetime medical treatment and the employer should not be held liable for any injury sustained by the employee going to or from medical treatment.

Stewart Meadows - Voting member, Employer Representative

Mr. Meadows stated he sees an issue as one of fundamental fairness and when an employee is injured going to or from authorized medical treatment such an injury does not arise out of and occur in the course of employment and the employer should not be liable for this type injury.

Gregg Ramos - Nonvoting member, Attorney Representative

Mr. Ramos stated that but for the workers' compensation injury and the subsequent treatment, the employee would not have been required to drive to medical treatment; therefore, the fact of a settlement is not relevant.

SB 2081 by Johnson / *HB 1964 by Sargent, continued.

Comments of Advisory Council Members, cont.

Jerry Mayo - Nonvoting member, Insurance Companies Representative

Mr. Mayo stated in the instance where the employee sustains an injury in the manner of the facts of the Panel decision, the insurance company would consider it a "new injury" not arising in the course and scope of employment.

Kitty Boyte - Nonvoting member, Attorney Representative

Ms. Boyte suggested the insurance company at the time of the original injury would be required to pay the benefits as a result of the "new injury".

RECOMMENDATION OF WCAC VOTING MEMBERS

The voting members of the Advisory Council were equally divided in their opinions as to whether this bill should become law. The Employer Representatives *UNANIMOUSLY RECOMMEND PASSAGE* of the bill. The Employee Representatives *UNANIMOUSLY RECOMMEND AGAINST PASSAGE* of the bill.

***SB 1524 by Burchett / HB 1604 by Brooks, H**

Present Law

TCA §50-6-110(a) provides that no compensation shall be allowed for an injury or death **due to**

- the employee's willful misconduct;
- the employee's intentional self-inflicted injury';
- the employee's intoxication or illegal drug usage; or
- the employee's willful failure to use a safety appliance or perform a duty required by law.

TCA §50-6-110(c)(1) provides in those instances where the employer has implemented a drug-free workplace (DFWP) pursuant to Title 50, Chapter 9, it the injured employee has, at the time of injury, a blood alcohol greater than .08% for non-safety sensitive positions or .04% for safety-sensitive positions OR if the injured employee has a positive test for drugs (as defined in the DFWP Act) it is presumed that the drug or alcohol was the **proximate cause** of the injury. The presumption can be rebutted by the employee by a preponderance of the evidence that such drug or alcohol was not the **proximate cause** of the injury.

Proposed Change

SB 1524 / HB 1604 rewrites *TCA* §50-6-110(a) in its entirety and deletes the first two sentences of *TCA* §50-6-110(c)(1).

The bill, as drafted, eliminates the provision of *TCA* §50-6-110(a) that does not allow compensation for injury/death due to an employee's willful failure to use a safety appliance or perform a duty required by law. The new language of *TCA* §50-6-110(a) would read:

> "No compensation shall be allowed for an injury or death due to the employee's willful misconduct or intentional self-inflicted injury, or in which the employee's intoxication or illegal drug usage was a contributing cause of the injury."

The bill changes the presumption in *TCA* §50-6-110(c)(1) from "the proximate cause of the injury" to a "contributing cause of the injury".

The bill changes the standard by which compensation can be denied in circumstances where an employee tests positive for drugs or alcohol. While current law requires proof that the intoxication /drugs *proximately caused* the injury, the new law will prohibit payment of compensation if the employee's intoxication/drug use *contributed to* the injury.

***SB 1524 by Burchett / HB 1604 by Brooks, H, continued.**

Informational Note

The bill appears to be a response to the Supreme Court's opinion in *Interstate Mechanical Contractors, Inc. v. McIntosh*, 229 S.W.3d 674 (Tenn. 2007) which held the employee's injury must be caused by the drug or alcohol use in order to deny benefits; drug use alone does not defeat a claim for benefits. In that case there was testimony that the employee's marijuana use may have slowed his reaction time and prevented his ability to avoid his injuries but there was also testimony that there was no time for him to react before the machine, activated by an employee in training, crushed his hand.

Comments of Advisory Council Members

Tony Farmer - Voting member, Employee Representative

Mr. Farmer stated historically when the Drugfree Workplace legislation was discussed and a compromise reached in 1996, there was substantial discussion about the remaining protection for the employee was the proximate cause issue. He said this was the centerpiece in the negotiation of that portion of the 1996 Reform Act and to change this would significantly undermine the intent of the parties and no change in circumstances has occurred since that time.

Jerry Lee - Voting member, Employee Representative

Mr. Lee stated a law that applies a "one size fits all" approach is not appropriate when some drugs stay in a person's system for 30 days or more while others are in and out of the person's system in 72 hours. He explained just because a worker tests positive for marijuana does not mean the worker is under its influence sufficient to alter his ability to work. Mr. Lee stated he is against the bill, as written, as it applies to every situation and he feels the individual circumstances of an injury cannot be categorized in one rule or in one way.

Kitty Boyte - Nonvoting member, Attorney Representative

Mr. Boyte noted bill, as drafted, is an unbelievably ripe field for lots of litigation as you try to nail down "contributing cause" of injury.

Gregg Ramos - Nonvoting member, Employee Representative

Mr. Ramos agreed with the comments of Ms. Boyte as the bill will cause more problem than it will solve. These type cases are fact dependent.

Sue Ann Head - Administrator, Division of Workers' Compensation
[Ex officio Member, Commissioner of Labor/WFD Designee]

Ms. Head stated the Department of Labor/WFD does not support the bill.

***SB 1524 by Burchett / HB 1604 by Brooks, H, continued.**

RECOMMENDATION OF WCAC VOTING MEMBERS

The voting members of the Advisory Council *UNANIMOUSLY RECOMMEND AGAINST PASSAGE* of the bill as written.

AMENDED **SB 2292 by Kyle / *HB 2253 by Turner, M**

NOTE: The original bill appears to be an Administration Bill. During discussion of the original bill, members of the Council expressed concern the proposal did not fully address the venue issue. Subsequent to the first meeting of the Advisory Council at which the original bill was discussed, the Council received a proposed amendment to the original bill that made substantive changes to the original bill and another proposed amendment that made the corrections suggested in the analysis of the original bill.

Present Law

TCA §50-6-225(a)(2)(A) sets forth the appropriate venue where either the employee or the employer may file a workers' compensation complaint in the event the benefit review process does not result in the settlement of the matter. Suit may be filed in the circuit or chancery court in the county in which the employee resides or in which the alleged injury occurred. If the employee resides outside of Tennessee, and the injury occurred out of state, the complaint is to be filed in any county where the employer maintains an office.

TCA §50-6-225(a)(2)(B) governs suits against a county or municipal corporation that has accepted the workers' compensation law. In those cases, suit can be filed in the county in which the governmental entity is located or in the county in which the injury arose.

Note: The caption of this bill also opens *TCA* §4-29-230 "Governmental entities terminated on June 30, 2009.". The section provides in part:

(a) The following governmental entities shall terminate on June 30, 2009:
...
(2) Advisory council on workers' compensation, created by § 50-6-121;
...

The body of the bill, as drafted, makes no changes to *TCA* §4-29-230. [There is a bill pending before the Government Operations Committee to extend the Advisory Council for a year to June 30, 2010.]

Original Bill: Proposed Change to Current Law

The original language of SB 2292 / HB2253 re-wrote the venue statute as follows:

- if the employee resides in Tennessee, the suit is to be filed in the circuit or chancery court of the county in which the employee resides;
- if the employee resides outside of Tennessee, the suit is to be filed in the circuit or chancery court of the county in which the injury occurred;
- if the employee resides in Tennessee and the injury occurred outside of Tennessee, suit is to be filed in the circuit or chancery court where the employer maintains an office;

AMENDED **SB 2292 by Kyle / *HB 2253 by Turner, M, continued.**

Original Bill: Proposed Change to Current Law, cont.

- if venue is not determined by the foregoing...suit is to be filed in the circuit or chancery court of Davidson County.
- if the employer is a governmental entity, suit must be filed in the circuit or chancery court in which the governmental entity is located.

AMENDMENTS to Original Bill **Both amendments make the bill.**

Proposed Change by Amendment #1

The first amendment changes the venue statute as follows:

- Only the employee may file a complaint seeking workers' compensation benefits;
- If the employee's injury occurred in the State of Tennessee, the employee must file the complaint in the Chancery or Circuit Court of the county in which the employer's business, at which the employee was employed at the time of the injury, is located;
- If the injury occurred outside Tennessee and the employee was not a resident of Tennessee at the time of the injury, the complaint shall be filed in the Chancery or Circuit Court in any county where the employer is located;
- If venue is not determined by the above, the complaint shall be filed in the Chancery or Circuit Court in Davidson County;
- If the employer is a county or municipal corporation that has accepted the provisions of the workers' compensation law, the employee may file in the Chancery or Circuit Court of the county in which the governmental entity is located.

Practical Effect of Amendment #1

The amendment permits ONLY the employee to file suit which should eliminate the race to the courthouse by the employee's attorney and the employer's attorney following a failed benefit review conference. Venue is limited to only one county, therefore, the amendment restricts the number of courts in which a complaint can be filed. The amendment does not change the jurisdiction of the circuit and chancery courts over workers' compensation matters. The parties may still "forum shop" but only as to the specific court, not the county.

Proposed Change and Practical Effect of Amendment #2

The second amendment maintains the provisions of the original bill (i.e., either the employer or the employee may file suit) and makes changes to the language of the bill that were suggested in the Advisory Council's analysis of the original bill.

AMENDED **SB 2292 by Kyle / *HB 2253 by Turner, M, continued.**

NOTE:

Amendment #1 does not address specifically the situation in which the injury occurred outside the State of Tennessee but the employee is a resident of Tennessee. Under the language of Amendment #1, venue would probably fall under the last subdivision that places venue in Davidson County. Also, use of the phrase "at which the employee was employed at the time of the injury" in (A)(i) may not be clear in circumstances pertaining to construction when the employer's presence may be a construction site, not the employer's main office. Also, this language may be open to interpretation in circumstances where a truck driver works out of a terminal in one city but the actual home office is in another county.

Informational Note

Both the original bill and the amendment appear to be in response to *West v. Vought Aircraft Industries, Inc., et al.*, 256 S.W.3d 618 (Tenn. 2008) and *Thompson v. Peterbilt Motor Company and/or Paccar, Inc.,* 256 S.W.3d 618 (Tenn. 2008). In those consolidated cases, the parties had not been able to resolve the issues at the benefit review conference and when an impasse report was issued, the attorneys for the parties called a colleague who was waiting at the clerk's office and requested a previously prepared complaint be filed. As a result, two complaints were filed - each in a different court - and at a different time (in one case, the complaint was not time dated). The issue for the Supreme Court was to decide which case would be permitted to proceed based on the "prior suit pending" doctrine.

In the decision, the Supreme Court, in dicta, first commented on the legal framework and practices that gave rise to the consolidated cases. The Court noted the Tennessee Workers' Compensation Law permits lawsuits to be filed in either the employee's county of residence or in the county in which the accident occurred. Therefore, when the employee lives in one county and the injury occurred in another, the lawsuit may be filed in either county. The Court also noted the Workers' Compensation Law permits either the employer or the employee to initiate the claim by filing a complaint.

The Supreme Court stated: "The availability of multiple forums combined with the right of either party to file has resulted in parties attempting to secure the forum of their choice by being the first to file." The Supreme Court acknowledged parties have long raced to select their choice of forum. However, the Court pointed out the 2004 amendment to the Workers' Compensation Law that requires the parties to exhaust the benefit review conference process before filing a lawsuit appears to have "increased the frequency and fervor of this occurrence".

The Court stated the conclusion of a benefit review conference without a settlement provides a definitive moment when the complaint can be filed and this has increased the pressure upon attorneys to file their lawsuits quickly. The Court referred to the unsuccessful completion of a benefit review conference as the "starting gun in the race to the courthouse".

AMENDED **SB 2292 by Kyle / *HB 2253 by Turner, M, continued.**

Informational Note, cont.

The Supreme Court stated:

> We find the process of racing to the courthouse unseemly. It reflects attorneys' lack of confidence in the judiciary of this state to apply the Workers' Compensation Law in an evenhanded manner and demonstrates that lack of confidence to clients and the public at large. Furthermore, this process engages attorneys in the undignified spectacle of literally racing to secure perceived procedural advantages. Such gamesmanship does little to improve the image of attorneys in the eyes of the public.
> ...
> Understandably, attorneys will seek to fulfill their duty to represent their clients zealously by attempting to gain those advantages that are ethically and legally permissible. Furthermore this Court cannot prevent attorneys from doing that which the Workers' Compensation Law plainly allows them to do....In short, this is a problem in want of a legislative rather than a judicial solution.

Thus, the amendment eliminates the "race to the courthouse" which the Supreme Court found to be unseemly.

Comments of Advisory Council Members

Tony Farmer - Voting member, Employee Representative

Mr. Farmer recognized the Department of Labor/WFD efforts to eliminate the problem but observed the bill does not eliminate the race to the courthouse and consequently he joins in Mr. Pitts' suggestion that the sponsors not pursue either amendment.

Bob Pitts - Voting member, Employer Representative

Mr. Pitts stated he understands the Supreme Court is very concerned over the issue of the race to the courthouse and there is no doubt some of this was brought about by the 2004 Reform that instituted mandatory benefit review prior to filing suit. This issue was battled out in the 2004 reform movement and as a result there are multiple jurisdictions where a suit can be filed. He respectfully noted to the Supreme Court that as a result of the 2004 Reform the number of cases going to court has been significantly reduced but what has increased has been the race to the courthouse to file the suit.

Mr. Pitts stated as both employer and employee representatives are able to compete in that contest he senses that no one is willing to give up their respective position at the present time which means once again there would be a fight on this issue. He respectfully observed that he suspects the first time the interested parties will be able to deal with the issue is when State

AMENDED **SB 2292 by Kyle / *HB 2253 by Turner, M, continued.**

Comments of Advisory Council Members

adopts a workers' compensation commission. He stated he feels this is the answer to the issue and respectfully suggested to the sponsors that they not try to pursue the bill as he does not see any possibility for compromise.

RECOMMENDATION OF WCAC VOTING MEMBERS

The voting members of the Advisory Council *UNANIMOUSLY RECOMMEND AGAINST PASSAGE* of the original bill and against passage of either of the amendments for the reasons outlined by Mr. Pitts and Mr. Farmer.

AMENDED ***SB 1574 by Norris / HB 1472 by Casada**

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. (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."

Proposed Change by Amendment **NOTE: The amendment makes the bill.**

Amended SB 1574/ HB 1472 deletes the current language of *TCA* §50-6-204(a)(1) and *TCA* §50-6-204(a)(2) and substitutes the language of the amendment. The amendment addresses issues raised by the *Overstreet* opinion by affirmatively stating there is no implied covenant of confidentiality, prohibition against *ex parte* communications or privacy of medical records of authorized treating physicians with respect to case managers, employers, insurance companies or their attorneys ***provided*** the specified provisions are met.

AMENDED ***SB 1574 by Norris / HB 1472 by Casada, continued.**

Proposed Change, cont.

The following is an outline of the provisions of the amendment as they relate to the specified party:

A. EMPLOYEE:

> The employee claiming workers' compensation benefits is required to provide the employer and/or the Division of Workers' Compensation with a signed, written medical authorization form for injuries occurring on or after July 1, 2009, that is addressed to a specific provider authorized by the employer and permits the release of **only medical records**; the authorization form shall note qualifying language on its face.[(B)(1)]

> The employee claiming benefits or any attorney representing the employee shall be entitled to obtain medical information, records or reports or to communicate in writing with the medical provider only if the appropriate written authorization is provided. [(B)(2)]

B. EMPLOYER

> The word "employer" is defined to include the employer, the employer's attorney, the employer's insurance carrier and/or third party administrator, a case manager and any utilization review agent during the employee's treatment for the work related injury. [(B)(2)]

> Any **request** for medical information, medical records and/or medical reports pertaining to the claimed injury **shall be in writing** and a **copy of the written request shall be provided to the employee** (attorney) at the time the written request is sent to the provider.
[(B)(5)]

> **Any form of WRITTEN communication** by the employer to or with a medical provider - other than a request pursuant to *subdivision (B)(4)* **-** is **prohibited unless** (1) employee/attorney are included as recipient of the written communication; AND (2) copies of material or information provided to the medical provider are given to the employee/attorney; AND (3) a copy of any response from the medical provider is sent to employee within 7 calendar days of receipt of the response.
[(B)(6)]

> Oral communication, including, but not limited to, telephone or face-to-face conversations **"by the employer, other than an attorney representing the employer"** with an authorized medical provider - is **permitted** if the employer representative provides the employee/ attorney with a written summary of any opinions or statements of the medical provider regarding the employee within seven days of a request by the employee/attorney.
[(B)(7)]

AMENDED ***SB 1574 by Norris / HB 1472 by Casada, continued.**

Proposed Change, cont.

> Any form of oral communication **by an attorney representing the employer** with an authorized medical provider is **permitted** if the employee/attorney has received written notice of the intended communication at least 7 days in advance of the intended oral communication AND if an oral communication occurs, the employer representative SHALL PROVIDE the employee/attorney with a written summary of all opinions and statements of the medical provider during the oral communication within 7 days of the oral communication.
> [(B)(8)]

C. MEDICAL PROVIDER

> Any medical provider authorized by the employer who has treated the employee **is prohibited** from communicating - orally or in writing - with the employer or department except in the manner permitted by the subdivision.
> [(B)(4)]

> Any response by the medical provider to a request from the department for medical records must be in writing.
> [(B)(9)]

D. DEPARTMENT

> If a request for assistance has been filed by either the employee or employer, any request by the department for medical records may be oral or in writing.
> [(B)(9)]

> If the department receives any records or written response(s) from the medical provider related to the request for assistance, the department SHALL notify the employee, employer and any attorney within 14 days of receipt that they may review and/or copy the material.
> [(B)(9)]

> If the department is involved in a utilization review appeal, the department is authorized to communicate with the medical provider orally or in writing and shall notify the employee, employer and any attorney they may review and/or copy the documents or responses.
> [(C)]

In addition, subdivision (D) provides no relevant information developed in connection with authorized medical treatment or examination provided pursuant to 50-6-204 for which compensation is sought by the employee shall be considered a privileged communication and no medical provider shall incur any liability as a result of providing medical information, medical records, or medical reports as outlined by the subdivision **provided** the applicable provisions of the subdivision are followed by the provider.

AMENDED ***SB 1574 by Norris / HB 1472 by Casada, continued.**

Practical Effect of Amendment

The amended bill:

- requires an employee to provide the employer and/or division of worker' compensation a signed medical authorization form to obtain the release of medical records only and requires the authorization form to contain specific written provisions and restrictions;
- permits an employee/employer to obtain medical information, medical records or medical reports from or to communicate in writing or in person with any authorized medical provider provided the employee executes and provides the appropriate written authorization;
- requires any request by employer for medical information, medical records, and/or medical reports to be in writing and requires a copy of the written request be sent to the employee and attorney at the time the request is sent to the provider;
- permits any form written communication by an employer to or with an authorized medical provider - other than a request for records - ***provided*** the employer sends the employee a copy of the written communication to the provider and copies of any material or information provided to the medical provider, and provides the employee copies of any response from the medical provider.
- permits the employer, **other than an attorney representing the employer**, to communicate orally with an authorized medical provider and requires the employer representative to provide a written summary of the opinions or statements of the medical provider to the employee/attorney within 7 days of a request by the employee/attorney.
- permits the attorney representing the employer to communicate orally with an authorized medical provider **IF** the employee/attorney is provided at least 7 days advance notice of the intended oral communication AND the employer representative provides a written summary of all opinions and statements of the medical provider to the employee/attorney within 7 days of the oral communication.
- establishes parameters for the department to obtain medical records, medical information, medical reports and/or medical opinions from or to communicate with a medical provider in cases of a request for assistance or an appeal of a utilization review issue.
- eliminates the concept of "privileged communication" for all relevant information developed in connection with treatment or examination by an authorized medical provider for which the employee seeks compensation.
- provides a medical provider with exemption from liability for providing medical information, medical records or medical reports provided the statute is followed.

AMENDED ***SB 1574 by Norris / HB 1472 by Casada, continued.**

Comments of Advisory Council Members

Bob Pitts - Voting member, Employer Representative

Mr. Pitts observed since the Supreme Court opinion in *Overstreet*, all the interested parties and the Department of Labor/WFD that administers the workers' compensation system have been uncomfortable about whether they are in compliance with the opinion. He stated he believes the proposed amendment goes a long way toward addressing issues that are satisfactory to both employers and employees. He said he is aware there is probably the need for some clarifying language to be added and he is aware this is continuing to be worked on, but he believes the clarifying language does not do anything substantial to the basic content or tenor of the bill. Obviously, the clarifying language could be submitted to the sponsors of the legislation.

Tony Farmer - Voting member, Employee Representative

Mr. Farmer stated the problems that have arisen in the efficient functioning of the workers' compensation system in Tennessee following the Overstreet decision have, in the opinion of the employee representatives, created significant problems for employees who have been injured in obtaining effective and efficient medical treatment and expedited return to work. He said a major part of the problem is the perceived inability of the medical providers to communicate with the insurors and employers in returning the employee to work and in obtaining necessary medical treatment. Because of the problems that have arisen since the Overstreet decision, we feel the two tiered determination of accessibility - one tier being human resources, employer representatives, case managers and adjusters who need vital information in order for the system to effectively work delineated from attorneys representing employers in litigation or other adversarial settings is a critical distinction in addressing the issue of providing employees with information, advising employees ahead of time of contacts and in providing employees or their representatives with information that is being provided to treating physicians. We feel this legislation will improve quality of care provided to injured workers and will expedite injured workers' opportunities to return to work. Right now substantial delays are arising out of confusion about contacts between providers, insurers, case managers and employers. We feel this is not only an improvement on the current situation but given the various provisions it is an improvement over the pre-Overstreet status of both employees and employers in Tennessee and is a critical improvement of the entire system.

Sam Murrell, M.D. - Nonvoting Member, Health Care Provider Representative

Dr. Murrell stated as a physician and provider he agrees with Mr. Farmer's comments as the court decision can be a huge hindrance to care. He said providers feel communication is vital and it can cut both ways as far as instances that will lead to care being denied or provided. He explained one problem area he sees currently is that attorney type concerns are now being submitted to the provider by the case managers and as this bill is set up this can continue and there is not method for the employee to object to it.

AMENDED ***SB 1574 by Norris / HB 1472 by Casada, continued.**

Comments of Advisory Council Members, cont.

Kitty Boyte - Nonvoting Member, Attorney Representative

Ms. Boyte questioned whether the amendment is purposefully drafted to prevent pre-deposition conferences with the provider who is being deposed. [Staff of the Advisory Council indicated the impact of the language of the amendment, as drafted, does prevent the pre-deposition conference which is a practice in Middle Tennessee but the amendment does permit an attorney to schedule a pre-deposition conference with the deponent provided it is done sufficiently in advance of the date of the deposition to permit compliance with the notice provisions of the amendment. Ms. Boyte also questioned why the amendment should be applicable only to injuries occurring after July 1, 2009.

NOTE: Gregg Ramos [Nonvoting Member, Attorney Representative] suggested the medical authorization permit obtaining medical records, medical information, and medical reports rather than be limited to only medical reports. At that point a lengthy discussion among the members ensued regarding revision of the amendment to make the authorization more inclusive to permit broader access to the medical information concerning the employee.

RECOMMENDATION OF WCAC VOTING MEMBERS

The voting members of the Advisory Council *UNANIMOUSLY RECOMMEND PASSAGE* of the amendment and suggest the parties who are interested in the amendment consider the comments of the members regarding the issues identified by the members and fashion a solution to the issues raised during the discussion (the claims to which the amendment will be applicable and the suggestions made that the medical authorization be expanded to permit more than just medical reports to be obtained).

***SB 430 by Bunch / HB 1574 by West**

Present Law

Amended in 2008 by Public Chapter 1025, *TCA* §50-6-102(2) defines "AMA guides" as the 6th edition of the AMA Guides until a new edition is designated by the General Assembly in accord with *TCA* §50-6-204(d)(3)(C). *TCA* §50-6-204(d)(3) requires any physician or chiropractor who is providing an impairment rating to utilize the applicable edition of the AMA Guides as established in *TCA* §50-6-102, or in cases not covered by the AMA Guides, an impairment rating by any appropriate method used and accepted by the medical community.

TCA §50-6-204(d)(3)(C), as amended in 208 by Public Chapter 1025, changed the manner by which any new edition of the AMA Guides would be adopted. Upon publication of a new edition, the Commissioner of Labor and Workforce Development is required to conduct an evaluation of the new edition within six months of its publication and report the findings and recommendations to the General Assembly. Until a new edition is designated by the General Assembly, the edition defined in *TCA* §50-6-102 [i.e., the 6th Edition at this time] remains in effect.

Prior to the changes made in 2008, the law provided the "most recent edition" governed impairment ratings. The 6th edition of the AMA Guides was published in December, 2007 and became effective on January 1, 2008 for injuries on or after that date. Therefore, at the time Public Chapter 1025 became law on May 28, 2008, the 6th Edition had been in effect for several months.

Proposed Change

SB 430/ HB 1574 amends the definition of "AMA Guides" in *TCA* §50-6-102(2) to adopt the 5th Edition of the AMA Guides as applicable to Tennessee workers' compensation claims. The bill deletes any reference to *TCA* §50-6-204(d)(3)(C) in the definition section, but does include any amendment to that section.

Practical Effect

The bill adopts the 5th Edition of the AMA Guides as applicable to Tennessee workers' compensation claims. However, the bill does not delete the requirement of the study to be conducted by the Commissioner in the event a new edition is adopted. One would have to assume the term "new edition" would refer to an edition published by the AMA after the 6th Edition.

Informational Note

This bill is identical to a bill filed in 2008 prior to the passage of PC1025. The bill provides it will be effective "upon becoming a law". Currently, the 6th Edition has been in effect since January 1,

***SB 430 by Bunch / HB 1574 by West, continued.**

Informational Note, cont.

2008 and applies to all claims that have occurred on or after that date. The bill does not state to which claims it will apply - only to those that arise after its passage or to claims pending at the time of its passage. If the bill is not amended, great confusion will be created as to which claims will be governed by which edition of the Guides.

Comments of Advisory Council Members

Tony Farmer - Voting member, Employee Representative

Mr. Farmer stated that despite the Sixth Edition of the AMA Guides being applicable to Tennessee workers' compensation claims since January 1, 2008, there exists no empirical, objective evidence to determine which edition - the Fifth or the Sixth - is the best Guides to be applicable to Tennessee workers' compensation claims.

RECOMMENDATION OF WCAC VOTING MEMBERS

The Advisory Council is cognizant there exist diverse opinions as to which of the two editions of the AMA Guides is the best for the Tennessee workers' compensation system. However, without a clear showing of substantial justification that a return to the Fifth Edition provides substantial benefits to the system, it is believed a change would result in tremendous confusion that would be detrimental to the system.

Therefore, the voting members of the Advisory Council *UNANIMOUSLY RECOMMEND AGAINST PASSAGE* of the bill because (a) the Sixth Edition of the AMA Guides has been in effect since January 1, 2008, (b) a return to the Fifth Edition would result in numerous problems in the administration of the system and (c) there is no clear showing of substantial justification that a change to the Fifth Edition would benefit the Tennessee workers' compensation system.

SB 824 by Marrero, B / *HB 765 by Turner, M

Present Law

TCA §50-6-302 pertains to occupational diseases. The current law does not have any language regarding specific occupational diseases except for coal worker's pneumoconiosis.

Proposed Change

SB 824 / HB 765 applies only to occupational diseases involving a disease or condition covered by the federal "Energy Employees Occupational Illness Compensation Program Act of 2000, parts (B), (D) or (E)". The bill makes these diseases or conditions compensable as an occupational disease for Tennessee state workers' compensation benefits. The bill makes positive determination findings pursuant to the Federal Act conclusive proof as to causation for a state claim and prohibits an employer from raising issues related to: notice, causation, statute of limitations.

The bill provides that it is not applicable to workers' compensation claims made by a state employee or by a municipal or county employee, whether it has accepted the Workers' Compensation Act or not. The bill also provides:

- neither the employee, employee's survivors/beneficiaries nor the employer shall be entitled to make a claim for benefits against the Second Injury Fund;
- there shall be no entitlement to medical benefits (past, present or future) for these diseases or conditions pursuant to *TCA* §50-6-204;
- state workers' compensation awards paid by reason of this law are not to be included in the employer's experience factors for changes in the employer's loss history to the extent the employer is reimbursed or indemnified by the federal government for benefits paid.

Practical Effect

For those employees (usually an employee of a DOE facility or the employee's survivors or beneficiaries) who receive a positive determination in the federal claim for benefits due to illnesses contracted as a result of work at the employer, it is conclusively presumed that the illness or condition is causally related to the employee's occupation and the employer shall be prohibited from raising the defenses of notice, causation or statute of limitations in a claim for state workers' compensation benefits.

The bill makes it clear that an employee or employer is prohibited from seeking any recovery against the Second Injury Fund and that employees of the State of Tennessee or counties/municipalities are not entitled to state workers' compensation benefits for these diseases or conditions. Finally, the bill provides that to the extent an employer is reimbursed or indemnified for state workers' compensation

SB 824 by Marrero, B / *HB 765 by Turner, M, *continued.*

Practical Effect, cont.

benefits paid pursuant to this law, the payments are not to be considered in the employer's loss history for computation of the experience modification factors.

Informational Note

The bill references Part(D) which is no longer contained in the Federal Act.

Comments of Advisory Council Members

Tony Farmer - Voting member, Employee Representative

Mr. Farmer disclosed he has a personal interest in the bill; he drafted the bill initially and lobbied for the bill initially and he noted he has always disclosed his personal interest in this issue when the bill has been proposed in past years.

Mr. Farmer noted the bill will apply to only employees at the Oak Ridge Y-12, K-25 and Oak Ridge National Laboratory who have been awarded Federal benefits. The Federal law was enacted in 2000 permitting recovery of damages for the injuries sustained by the employees who were working at these facilities. The Federal Act says that it recognizes the employees are entitled to state workers' compensation laws and the positive determination of causation in the Federal claim becomes a conclusive presumption of causation in the state claim. He stated the Federal Government has determined the specified diseases were caused by work at these facilities.

Jerry Mayo - Nonvoting Member, Health Care Provider Representative

Mr. Mayo suggested since the bill makes acceptance of a claim for Federal benefits an irrebuttable presumption and the employee will not be required to prove causation, then the attorney fees for the employee's state workers' compensation claim should be limited to not more than 2% and the employee's attorney should not be permitted to receive the statutory attorney fees permitted by Tennessee law.

Bob Pitts - Voting member, Employer Representative

Mr. Pitts agreed with the suggestion of Mr. Mayo regarding a restriction upon the attorney fees.

Kitty Boyte - Nonvoting Member, Attorney Representative

Ms. Boyte questioned whether the bill would open the door to other situations where an employee is entitled to Federal benefits - i.e, adoption of a law that states qualification for Federal Social Security Disability benefits will create an automatic presumption the employee is entitled to workers' compensation benefits.

SB 824 by Marrero, B / *HB 765 by Turner, M, *continued.*

RECOMMENDATION OF WCAC VOTING MEMBERS

The voting members of the Advisory Council were equally divided in their opinions as to whether this bill should become law. The Employee Representatives *UNANIMOUSLY RECOMMEND PASSAGE* of the bill. The Employer Representatives *UNANIMOUSLY RECOMMEND AGAINST PASSAGE* of the bill.

The voting members note if the bill does go forward, it should be amended to delete the reference to Part "D" of the Federal Act.

AMENDED ***SB 1567 by Norris / HB 1471 by Casada**

Present Law

TCA §50-6-241(d)(1)(A) restricts the permanent partial disability benefits an employee can receive to a maximum of 1½ times the medical impairment rating for injuries occurring on or after July 1, 2004 when the pre-injury employer returns the employee to work at the same or equal pay. Subdivision (B) establishes the right of an employee [whose permanent partial disability benefits were subject to the multiplier cap] to seek reconsideration, within a specified number of weeks, if the employee is subsequently no longer employed by the pre-injury employer.

Subdivision (B)(iii) sets forth two circumstances when the employee will not be entitled to reconsideration. They are:

(1) loss of employment due to the employee's voluntary resignation or retirement, provided they do not result from the work-related disability; and

(2) loss of employment due to the employee's misconduct connected with the employee's employment.

Proposed Change **NOTE: The amendment makes the bill.**

The amendment to SB 1567 / HB 1471 makes two changes to *TCA* §50-6-241(d)(1)(B)(iii). The first section of the amendment provides that an employee is not entitled to reconsideration when he/she is no longer employed by the pre-injury employer because of sale or acquisition of the employer *provided* the employee continues to be employed by the subsequent employer and receives the same or higher pay.

The second section of the amendment adds a sentence at the beginning of (B)(iii) that restricts the right to seek reconsideration to the most recent injury for which the employee received a settlement or award of permanent partial disability.

The proposed amendment will apply to all injuries occurring on or after July 1, 2004. Section 1 of the amendment prohibits reconsideration in those instances where the ownership of the employer/business changes but the employee continues to be employed by the successor business with no change in pay. Section 2 of the amendment restricts the right of reconsideration of a permanent partial disability award(s) where the employee has sustained more than one injury with the employer but each injury was subject to the 1½ multiplier cap.

Informational Note

With regard to Section 2, the amendment does not address the circumstance where the employee is subsequently discharged by the successor employer/business within the number of weeks the employee can seek reconsideration. Does the original employer pay the "reconsideration" award or

AMENDED ***SB 1567 by Norris / HB 1471 by Casada, continued.**

Informational Note, cont.

is the successor employer/business responsible to pay the award? If the employee is entitled to reconsideration, which insurance carrier is liable for the award of additional permanent partial disability benefits?

Section 3 will apply to an employee who has continued to work for an employer although the employee has sustained multiple workers' compensation injuries since July 1, 2004. In this scenario, if the employee loses his/her job the right of reconsideration is limited to a review of only the "most recent injury for which the employee received a settlement or award for permanent disability". As drafted, the "most recent injury" is not limited to those injuries that were subject to the multiplier cap (body as a whole and scheduled injuries of 200 weeks. The "most recent injury" may be to a finger or to another scheduled body part less than 200 weeks. Also, as drafted, the amendment does not limit the "most recent injury" to one that occurred during employment with the pre-injury employer.

Comments of Advisory Council Members

Tony Farmer - Voting member, Employee Representative

Mr. Farmer stated he opposes the adoption of Section 3 of the amendment as it is a dramatic deviation from the intent of the legislature when the entire system of multiplier caps were adopted. He said the rationalization and justification for capping injuries was the availability of reconsideration of each injury in the event the employee lost their employment and any attempt at this point to restrict the right of reconsideration to the "most recent injury" undermines the intention of all parties, both employer and employee, at the time the system of caps was adopted. He observed that in 2004 when the actual multipliers were amended, the rationalization continued to be that the employees retained the opportunity to have their disability reconsidered by a court in the event they lost their employment and that rationality applies to each injury. He said this bill represents a substantial deviation from what has been represented to employees at least since 1992.

With regard to Section 2 of the amendment, he stated if the amendment goes forward, it should and must say that in the event of employment by the successor employer, the right of reconsideration is not triggered because it is not a loss of employment and should not begin the running of the employee's statute of limitations but in the event the employment with the successor employer is terminated, then the right of reconsideration is triggered.

AMENDED ***SB 1567 by Norris / HB 1471 by Casada, continued.**

Comments of Advisory Council Members, cont.

Bob Pitts - Voting member, Employer Representative

Mr. Pitts stated he would like to see Section 2 of the bill move forward with an amendment to it that the insurance company liable for the award should be the one that was liable for the award at the time of the original injury. He said he is in support of Section 2 because of a fairness issue that was not properly thought out in the original reform act in those circumstances in which the employee continues to be employed by a successor company making the same or higher salary, it would be unfair to subject the employer with reconsideration when the employee has not lost any money.

With regard to Section 3, Mr. Pitts said it has so many facets to it that it is unrealistic to believe they could be addressed this year.

Bruce Fox - Nonvoting member, Attorney Representative

With regard to Section 2, Mr. Fox stated he thinks placing the liability for any reconsideration award on the previous employer or its insurance company invites the successor employer to discharge the employee as the consequences are nil to the successor employer. He said the reason for the caps is to give an incentive to the employer to keep the injured worker in the workforce and this would open the door for the successor employer to discharge every worker who ever filed a workers' compensation claim with the previous employer without it costing anything. Mr. Fox stated he objects to the adoption of Section 3.

Kitty Boyte - Nonvoting member, Attorney Representative

Ms. Boyte suggested Section 2 of the amendment should also include a provision that applies the 1.5 multiplier cap in the event the employee sustained an injury for the previous employer and at the time of settlement for the injury the employee is working for the successor employer for same or higher pay.

RECOMMENDATION OF WCAC VOTING MEMBERS

With regard to Section 2, the voting members of the Advisory Council *UNANIMOUSLY SUPPORT THE EQUITABLE CONCEPT addressed by the proposed amendment and support enactment PROVIDED the issues identified in the comments by the members are adequately addressed in any final bill.*

With regard to Section 3, the voting members of the Advisory Council *UNANIMOUSLY RECOMMEND AGAINST PASSAGE* this year as the issue deserves further study.

AMENDED **SB 2000 by Haynes / *HB 1777 by Hackworth**

Present Law

TCA §50-6-102(13) defines "maximum total benefit" as the sum of all weekly benefits to which an employee may be entitled. Subdivision (13)(C) states that for injuries on/after July 1, 1992, the maximum total benefit shall be 400 weeks times the maximum weekly benefit except in instances of permanent total disability.

TCA §50-6-102(14) addresses the maximum weekly benefit. Since July 1, 2004, the maximum weekly benefit for permanent partial disability benefits has been capped at 100% of the state's average weekly wage, as determined by the department. The maximum weekly benefit for temporary disability benefits has been 110% of the state's average weekly wage since July 1, 2005.

In 2005, the Supreme Court held in *Wausau Ins. Co. v. Dorsett*, 172 S.W.3d 538 (Tenn. 2005) that the maximum total benefit limitation is applicable not only to permanent partial disability benefits but also to temporary total disability benefits. The maximum total benefits calculated by the Court was 400 times the employee's weekly compensation rate.

TCA §50-6-102(12) defines "injury" and "personal injury" - - it includes a mental injury arising out of and in the course of employment. TCA §50-6-102(15) defines "mental injury" as a loss of mental faculties or a mental or behavioral disorder where the proximate cause is a compensable physical injury resulting in a permanent disability, or an identifiable work-related event resulting in a sudden or unusual mental stimulus. A mental injury does not include a psychological or psychiatric response due to the loss of employment or employment opportunities.

TCA §50-6-207 sets out the "Schedule of compensation". Subsection 1 deals with Temporary Total Disability (TTD). The subsection addresses the amount of TTD benefits an injured employee is to receive; permits an employer to continue to pay the injured employee his/her regular salary during the period of TTD; and requires a person who has drawn unemployment compensation benefits and subsequently receives TTD benefits to repay the unemployment benefits received.

Proposed Change by Amendment **NOTE: The amendment makes the bill.**

The first three sections of the amendment to SB 2000/HB 1777 amend TCA §50-6-102(13). The first two sections make changes in punctuation and the third section adds a new subdivision (D) to be applicable to injuries occurring on or after July 1, 2009. For those injuries, the definition of "maximum total benefit" is 400 times 100 % of the state's average weekly wage (SAWW) as set annually by the Division of Workers' Compensation, except in instances of permanent total disability. The amendment includes a separate sentence that states temporary total disability benefits paid to the injured worker shall not be included in calculating the maximum total benefit.

AMENDED **SB 2000 by Haynes / *HB 1777 by Hackworth, continued.**

Proposed Change, cont.

Section 4 of the amendment adds a new subdivision "D" to TCA §50-6-207(1) that applies to an employee claiming a mental injury occurring on or after July 1, 2009. For those mental injury claims, the amendment establishes a conclusive presumption that the employee is at maximum medical improvement (MMI) at the time the treating psychiatrist concludes the employee has reached MMI or

- 104 weeks after the employee has reached MMI as a result of the physical injury or illness that is the proximate cause of the mental injury OR
- in the case of mental injuries where there is no underlying physical injury 104 weeks after the date of injury.

Practical Effect

Sections 1, 2 and 3 creates a statutory provision that temporary total disability benefits are not to be included in the calculation of "maximum total disability". These sections address the Supreme Court's decision, *Wausau Ins. Co. v. Dorsett*, 172 S.W.3d 538 (Tenn. 2005), that held temporary total disability benefits are to be included in the calculation of "maximum total benefit". In the *Dorsett* case, the Supreme Court stated: "...this Court has no authority to alter the statutory definition of maximum total benefit. Whether this statutory definition should be revised to exclude temporary total disability from the 400-week limitation is a question for the legislature, not the judiciary." In *Dorsett* the employee had never reached maximum medical improvement before the expiration of 400 weeks of temporary total disability benefits. Thus, she would not have been entitled to any permanent partial disability at the time she reached maximum medical improvement.

Sections 1, 2 and 3 of the amendment also address the definition of "maximum total benefit". On one hand, the amendment can be viewed as increasing the maximum total benefit from that which has been interpreted by the Supreme Court in recent years (i.e, 400 weeks times the employee's compensation rate). On the other hand, the amendment can be viewed as returning the law to the original legislative intent of the definition of "maximum total benefit" as it existed before the maximum weekly benefit was tied to the state's average weekly wage, beginning on August 1, 1992. For instance, TCA §50-6-102(13)(A) states the maximum total benefit for injuries occurring between 7-1-90 and 6-30-91 is $109,200. TCA §50-6-102(14) states the maximum weekly benefit for that same time period is $273.00. Therefore, it appears if you multiply the maximum weekly benefit of $273 times 400, the result is $109,200.

Section 4 of the amendment adds a provision to the law that establishes a specific period of time for which an employee claiming a mental injury (on or after July 1, 2009) is conclusively presumed to have reached maximum medical improvement.

AMENDED SB 2000 by Haynes / *HB 1777 by Hackworth, continued.

Comments of Advisory Council Members

Stewart Meadows - Voting member, Employee Representative

Mr. Meadows stated the proposed amendment is an opportunity to clarify issues surrounding claims for mental injuries by determining to which claims the statutory change will apply, by clarifying the difference between mental injuries that arise out of a physical injury and a mental injury that arises out of a specific mental stimulus.

Tony Farmer Meadows - Voting member, Employee Representative

Mr. Farmer noted since the Supreme Court's decision in *Dorsett* in 2005, each year a bill has been filed to address the potential and obvious inequities of the Court's interpretation of the definition of maximum total benefit has been introduced and this year there has been substantial discussion among all interested parties focused on resolving the inequities created by the *Dorsett* opinion.

Mr. Farmer suggested language should be added to clarify that MMI occurs at the date which first occurs - the date the treating psychiatrist concludes the employee has reached MMI or the expiration of the 104 week time period.

Bob Pitts - Voting member, Employer Representative

Mr. Pitts stated this amendment seems to be a reasonable solution to an issue that has concerned employee representatives.

RECOMMENDATION OF WCAC VOTING MEMBERS

The voting members of the Advisory Council *UNANIMOUSLY RECOMMEND PASSAGE* of the bill, *provided* (D) is amended to read as follows:

(D) (1) An employee claiming a mental injury as defined by 50-6-102(15) occurring on or after July 1, 2009, shall be conclusively presumed to be at maximum medical improvement (MMI) upon the earliest occurrence of the following:

i. at the time the treating psychiatrist concludes the employee has reached maximum medical improvement; or

ii one hundred-four (104) weeks after the employee has reached maximum medical improvement as a result of the physical injury or illness that is the proximate cause of the mental injury; or

iii one hundred-four(104) weeks after the date of injury in the case of mental injuries where there is no underlying physical injury.

AMENDED ***SB 2001 by Haynes / HB 1776 by Moore**

Present Law

TCA §50-6-102(3) defines "average weekly wages" as the earnings of the employee (in the employment in which the injured employee was working at the time of the injury) during the period of 52 weeks immediately preceding the date of injury divided by 52. The statute provides that time lost in excess of 7 days is to be deducted and the result divided by number of weeks actually worked. If the employment has not lasted 52 weeks, then the earnings are divided by the number of weeks and parts of weeks actually worked. If the employment has been short, then the employee's average weekly wages is computed by using the earnings of a person in the same grade doing the same work at the employer or elsewhere in the "district".

Proposed Change **The amendment makes the bill.**

Amended SB 2001 / HB 1776 creates a new definition of "average weekly wage" - - as the actual weekly earnings of an employee PLUS the average of any overtime earnings and/or bonuses actually paid t the employee to be determined by dividing the overtime and/or bonus earnings by the number of weeks worked by the employee in the same employment under the contract of hire n force at the time of injury. The amendment also provides that the average weekly wages shall not be computed on less than a full-time workweek.

The amendment also defines "earnings" as anything received by the employee from with the employee realizes economic gain and includes allowances made in lieu of wages. The amendment makes it clear that the "employment contract" or "contract of hire" does not have to be in writing but can be implied by the terms of agreement between the employee and employer as to the compensation to be received for performing the work for which the employee was hired.

The amendment also addresses the circumstances in which the employee's average weekly wages cannot be fairly determined. In those instances, the average weekly wages earned by a person in the same grade or classification are to be used or if a similar employee does not exist, then the usual wage paid in the vicinity of the employer for the same or similar services.

Practical Effect

The amended bill computes the "average weekly wage" by utilizing the employee's actual weekly earnings at the time of injury rather than the average of the preceding 52 weeks of earnings. The amendment adds in the yearly average of any bonuses or overtime when computing the "average weekly wage". The amendment keeps basically the same formula for computing the "average weekly wage" if the employee's earnings cannot be fairly and justly determined by utilizing the formula set out in the statute.

AMENDED ***SB 2001 by Haynes / HB 1776 by Moore, continued.**

Informational Note

It appears this amendment is a response to the Supreme Court's opinion *Goodman v. HBD Industries, Inc., et al.*, 208 S.W.3d 373 (Tenn. 2006). In *Goodman*, the Supreme Court deleted weeks the employee missed work during the preceding 52 weeks due to a strike when computing the average weekly wage. The Court held the absence to be voluntary which resulted in an average weekly wage substantially below the employee's actual wages received per week while working.

Comments of Advisory Council Members

Tony Farmer - Voting member, Employee Representative

Mr. Farmer said he understands this amendment, which makes the bill, was submitted very late and several people with significant understanding of the system have raised issues that the bill addresses either directly or indirectly. He noted it appears more complications have arisen as a result of this proposed amendment than were anticipated by the sponsors and he suggested the Council propose to the sponsors that this very significant issue be studied more closely and an effort be made in the next session of the legislature to address this issue.

RECOMMENDATION OF WCAC VOTING MEMBERS

The voting members of the Advisory Council *UNANIMOUSLY RECOMMEND AGAINST PASSAGE* of the bill at this time and, after additional study the issue be addressed in the next session of the legislature.

AMENDED **SB 2162 by Tracy / *HB 1963 by Sargent**

Present Law

TCA §50-6-241 establishes the maximum permanent partial disability benefits that can be awarded to an employee for injuries to the body as a whole and to certain scheduled member (any injury for which the maximum benefits total 200 weeks or more). If the employer returns the employee to work at the same or higher wage, the PPD benefits are capped at 1 ½ times the medical impairment rating determined under the provisions of *TCA* §50-6-204(d)(3). If the employer does not bring the employee back to work, the employee can receive up to 6 times the medical impairment rating. [Under certain specific criteria, the caps will not be applied - see *TCA* §50-6-242.]

Original Bill - Proposed Change to Current Law

SB 2162 / HB 1963 takes notice that federal law prohibits an employer from permitting an employee to return to work when the employee is not eligible or authorized to work in the United States. For injuries that occur on or after July 1, 2009, the bill limits the amount of permanent partial disability benefits payable to the employee to "up to 1 ½ times the impairment rating", provided the employer can prove it complied with federal law in the hiring process and did not know the employee was not eligible to work in the United States.

If the employee can show, by clear and convincing evidence, that the employer had actual knowledge of the employee's unauthorized status at either the time of hire or the time of injury, the employer must pay benefits equal to 5 times the medical impairment rating to be paid: (a) a sum equal to 1 ½ times the impairment rating to the employee and (b) the remainder to be paid to the uninsured employers fund.

In addition, the bill provides that *TCA* §50-6-242 will not be applicable to injuries sustained on or after July 1, 2009, by an employee not authorized to work in the United States.

Original Bill - Practical Effect

The bill establishes a separate statute governing permanent partial disability benefits that can be awarded when a worker is injured but is not legally able to work in the United States under federal law. An employer cannot elect to bring such a worker back to work in order to gain the benefit of the lower cap in permanent partial disability benefits because that would be a violation of the law. The bill makes it clear that neither the undocumented worker nor the employer should benefit by the employer's knowingly hiring a person who was not authorized to work in the United States.

AMENDED **SB 2162 by Tracy / *HB 1963 by Sargent, continued.**

AMENDMENT to Original Bill

The amendment changes only certain portions of the original bill.

Amended SB 2162 / HB 1963 corrects the drafting of the original bill n two ways. First, it changes the language to create a presumption that is alluded to in a later portion of the bill. Second, it changes the burden of proof from "clear and convincing" to "preponderance of the evidence" when an employee elects to show the employer knew at the time of hire or at the time of the injury that the employee was an undocumented worker.

Comments of Advisory Council Members

Note: Comments made when the original bill was discussed and when the amendment was reviewed have been merged for inclusion in this report.

Bob Pitts - Voting member, Employer Representative

Mr. Pitts expressed his feeling that the issue is one of fundamental fairness for a business that does everything it can do to assure its employees have complied with Federal law. He explained that under the 2004 Reform Act, there is a distinction between the amount of money an employee can receive for permanent partial disability benefits based on whether the pre-injury employer returns the employee to work and the employer would be violating Federal law to return the employee to work if it was discovered post injury that the employee was not legally permitted to work in the United States. He stated the employee should not be permitted to recover the larger benefit of 5x the multiplier because he could not return to work. He noted what the bill simply says is that the employee will receive the benefits as an employee who does return to work if the employee is not legally authorized to work in the United States.

Mr. Pitts stated at the time the 1992 reform occurred, this particular issue was not envisioned in the drafting of the legislation. Mr. Pitts suggested when an employer has done all it can do to determine the employee is permitted to work in the United States and it later turns out the employee was not legally permitted to work, it is unreasonable to permit a higher multiplier than 1.5 when the employer is prohibited by Federal law from returning the employee to work.

Gregg Ramos - Nonvoting Member, Attorney Representative

Mr. Ramos stated he believes the bill is redundant because under current law the employer would have the benefit of the lower multiplier since the employee could not legally accept an offer to return to work. He said the employer could terminate the employee for cause - that the employee does not have the legal status to work in the United States and termination for cause will permit the application of the 1.5 multiplier.

AMENDED **SB 2162 by Tracy / *HB 1963 by Sargent, continued.**

Comments of Advisory Council Members, cont.

Mr. Ramos questioned why the employee should have to rebut the presumption created by the bill by "clear and convincing" evidence instead using the preponderance of the evidence standard. He suggested the bill should be changed to use a preponderance of the evidence standard.

Mr. Ramos stated he appreciated the change made in the amendment regarding the burden of proof. Mr. Ramos respectfully submitted that the bill is unnecessary because if the employer cannot return the employee to work under Federal law, the employer has the opportunity to say to the employee that a job is available if the employee submits proper documentation and if the documentation is not forthcoming, the employer is entitled to terminate the employee because he cannot be legally employed and the 1.5 multiplier cap would apply. Mr. Ramos suggested there would be more incentive to show the employer knew of the status of the employee at the time of hire if the "penalty" portion of the award (if the presumption is overcome) is paid to the employee.

Stewart Meadows - Voting member, Employer Representative

Mr. Meadows stated he attends many Benefit Review Conferences in which the issue is whether the employee was terminated for cause. He said if the law is more clear, then the employer is not required to deal with the issue. He explained an employer should have a clear indication in the law that it should not have to pay the higher multiplier.

Tony Farmer - Voting member, Employee Representative

Mr. Farmer stated he agrees with the comments of Mr. Ramos regarding the applicability of the 1.5 multiplier to the situation. Mr. Farmer also noted the employee representatives cannot support any bill that penalizes undocumented workers.

Sue Ann Head - Administrator, Division of Workers' Compensation

In response to a question by Mr. Pitts, a Department representative stated that in Benefit Review Conferences when the circumstances involve an undocumented worker, the parties may negotiate the issue as to whether the employee is limited to the 1.5 multiplier cap or whether the higher cap would apply.

RECOMMENDATION OF WCAC VOTING MEMBERS

The voting members of the Advisory Council *UNANIMOUSLY RECOMMEND PASSAGE* of the bill, provided the bill is crafted to make it clear that the insurance company for the employer is obligated to pay the award/settlement equal to (up to) 1.5 times multiplier to the employee whether or not it is proven the employer knew the worker was not permitted to work in the United States at the time of hire and the employer, but not the insurance carrier, would be required to pay the remainder of the award after the insurance carrier pays the initial 1.5 times portion.

SB 2231 by Southerland / *HB 2102 by Sargent

Present Law

TCA §50-6-106 provides that the workers' compensation law does not apply to:

- any common carrier doing interstate business when the carrier's liability is governed by Federal Law;
- casual employment;
- domestic servants and employers of domestic servants;
- farm or agricultural laborers and employers of those laborers;
- cases where the employer employs fewer than 5 employees - except in the construction industry;
- any governmental entity who has not accepted the provisions of the Tennessee workers' compensation law;
- a person performing voluntary service as a ski patrolperson who receives no monetary compensation.

Otherwise, Tennessee law does not differentiate regarding the types of employees who are covered by the workers' compensation statute [i.e., minors, workers who are not legally eligible to work in the United States].

TCA §50-6-209 establishes the death benefits to which either the dependents or the employee's estate are entitled. If the employee leaves no dependents (not married, no dependent children) the estate is limited to $20,000 for death benefits. If there are dependents, the amount of money payable is 66 2/3 of the decedent's average weekly wage, subject to the maximum weekly benefit and the maximum total benefit exclusive of medical, hospital and funeral benefits. These death benefits are paid at various percentages dependent on the number and type of dependents.

TCA §50-6-204(c) provides burial expenses not to exceed $7500.

Proposed Change

SB 2231/HB 2102 sets out the intent of the General Assembly in adopting this legislation as follows:

- to adopt statutes related to workers' compensation that preserve the tradition of legal immigration while seeking to close the doors to illegal workers in Tennessee;
- to encourage Tennessee employers to comply with federal immigration laws in the hiring or continued employment of individuals not authorized to work in the United States.

The bill limits the benefits payable to a person, or the person's dependents or estate, who is not legally eligible or legally authorized to work in the United States in the following manner. The bill

SB 2231 by Southerland / *HB 2102 by Sargent, continued.

Proposed Change, cont.

creates a rebuttable presumption that an employer did not knowingly hire an individual who is not legally eligible to work in the United States if the employer can show - by a preponderance of he evidence - that the employer required the completion of a Form I-9; reviewed the documents provided by the prospective worker; and made a good faith determination the documents appeared genuine and to apply to that worker.

If the employer did not knowingly hire an unauthorized worker, then the employer is not required to provide (a) temporary partial disability benefits: (b) permanent partial disability benefits; (c) permanent total disability benefits; or (d) death benefits to the employee's estate and/or dependents.
The presumption can be rebutted by the employee upon clear and convincing evidence the employer had actual knowledge of the unauthorized status of the employee at time of hire or time of injury. If the presumption is rebutted, death benefits will be limited, notwithstanding any provision of the law to the contrary. The death benefits payable would be:

- up to $7500 for burial expenses;
- a sum of $20,000 if the worker was not married at the time of death - to be first distributed equally to any surviving children under the age of 18 and, if none, then distributed in accord with Tennessee intestate succession laws;
- a sum of $40,000 if the worker was survived by a spouse "and/or" children under the age of 18, to be distributed under the Tennessee intestate succession laws.

Practical Effect

If the presumption is not rebutted, the employer shall be liable to pay only medical benefits and temporary total disability benefits to a worker who suffers a work-related injury; and the employer is not required to pay any other type of disability or death benefits. If the presumption is rebutted and the employee did not die as a result of the accident, the employee would be entitled to all disability benefits that would be applicable to the claim. However, with regard to death benefits, if the presumption is rebutted, the death benefits are restricted.

Informational Note

The language of subsection (f)(3)(B) of the bill appears to create a potential conflict between two subdivisions. Subdivision (i) applies to the death of an employee who was not married and may have had some children or no children. Under that subdivision, the death benefit is limited to $20,000. As drafted, subdivision (ii) is applicable if the deceased employee is survived by a spouse and children under age 18 **OR** who is survived by children under age 18. Thus, it could be argued if the employee was not married at the time of death but was survived by children under age 18, the children may be able to collect $40,000 and would not be limited to $20,000.

SB 2231 by Southerland / *HB 2102 by Sargent, continued.

Informational Note, cont.

The bill's enactment clause makes it effective upon becoming law but does not indicate whether its provisions apply only to claims arising on or after a specific date.

Comments of Advisory Council Members

Bob Pitts - Voting member, Employer Representative

Mr. Pitts stated in light of the reaction of members of the Advisory Council to SB 2162 (Tracy) / *HB 1963 (Sargent), it is his suggestion that the employer representative should recommendation that the employer representatives

Gregg Ramos - Nonvoting member, Attorney Representative

Mr. Ramos stated he would recommend the bill not be passed.

RECOMMENDATION OF WCAC VOTING MEMBERS

The voting members of the Advisory Council were equally divided in their opinions as to this bill. The Employee Representatives *UNANIMOUSLY RECOMMEND AGAINST PASSAGE* of the bill. The Employer Representatives *UNANIMOUSLY RECOMMEND THIS BILL SHOULD NOT MOVE FORWARD AT THIS TIME* as it needs additional work.

***SB 1376 by Johnson / HB 1459 by Mumpower**

Present Law

TCA §50-6-204(a)(3) requires an insurer to file written notice with the workers' compensation division when the medical benefits for a claim will exceed $5,000; the division then is required notify the employer.

Proposed Change

SB 1376 / HB 1459 increases the amount requiring notification from $5,000 to $10,000.

Practical Effect

The bill will require fewer notifications to the division and fewer notifications by the division to employers.

Comments of Advisory Council Members

Sam Murrell, M.D. - Nonvoting Member, Health Care Provider Representative

Dr. Murrell stated he believes most medical expenses will exceed $10,000 and the reporting requirement is not needed.

Sue Ann Head - Administrator, Division of Workers' Compensation [Commissioner of Labor/WFD Designee]

Ms. Head suggested the requirement of reporting when medical expenses exceed a specific amount should be deleted from the statute because it is generally ignored and its purpose has been replaced by other methods of reporting.

RECOMMENDATION OF WCAC VOTING MEMBERS

The voting members of the Advisory Council *UNANIMOUSLY RECOMMEND TCA §50-6-204(a)(3) BE DELETED FROM THE STATUTE.*

SB 1297 by Crowe / *HB 857 by Mumpower
SB 1680 by Ketron / *HB 1192 by Mumpower

PROCEDURAL NOTE:
Because the bills are virtually identical, the Advisory Council combined the bills for purposes of analysis, review, comment and recommendation. SB 1680/HB1192 contains a few differences that appear to have been made to add clarification to a few provisions of SB1297/HB857. These changes will be noted in "bold, all caps" in the analysis.

Present Law

TCA §50-6-204(i)(4), as initially adopted in 2004, stated the medical fee schedule (MFS) did not prohibit an employer, trust or pool, or insurer from negotiating in its own medical fee agreements fees lower than those established by the MFS. In 2007, the subsection was amended to add the following:

- defines contracting agent as one in direct privity of contract with a medical provider to reimburse the provider for services rendered at rates different from the MFS;
- makes it clear negotiated rates could not exceed the MFS
- as of January 1, 2008 - requires a portion of any a new contract or renewal of a contract with a medical care provider to contain a section titled "assignment or assignability" or similar title that discloses whether the list of contracted providers can be sold, leased (etc.) to other payors or agents [including insurers and self-insured employers]; requires the contracting agent to permit the provider to decline participation in a workers' compensation networks that are sold or leased; and requires the contracting agent to maintain a web page listing all the customers to whom the network is sold.
- as of January 1, 2008 - requires the payor's explanation of benefits (EOB) to identify the name of the network that has the written contract with the provider showing the payor can pay preferred rate for services; requires the payor to demonstrate, within 30 days of a request from a provider, the payor's right to pay the contracted rate; the provider is required to include in the request a statement explaining why the payment is not at the contracted rate for the services provided; provides that the payor's identification of contracting agent that has contracted with the provider to pay the reimbursement at he contracted rate is sufficient response to provider's request.

Proposed Change

The bill adds a new subdivision to TCA §50-6-204(i)(4) - to become effective on January 1, 2010 - that:

- prohibits payment for medical services at less than the MFS without a direct contract between the medical provider and the employer, trust/pool, insurer, or **PREFERRED PROVIDER ORGANIZATION** (PPO) network;

SB 1297 by Crowe / *HB 857 by Mumpower
SB 1680 by Ketron / *HB 1192 by Mumpower, continued.

Proposed Change, cont.

- prohibits an employer, trust/pool, and insurer **OR PPO NETWORK WHICH** signed the contract from assigning (or making accessible) the contractually negotiated rates for workers' compensation services to any other party;
- prohibits a PPO network contracted by an employer to manage its workers' compensation program from assigning or making the negotiated rates accessible to any other PPO Network;
- requires a company marketing itself as a workers' compensation PPO to be able to produce a signed contract on demand between the named PPO entity and the provider;
- provides in the absence of an existing contract or agreement with the provider, all payments will be at the **MAXIMUM** medical fee schedule reimbursement rates;
- prohibits application of negotiated reimbursement rates for commercial health insurance to be applied to payment to health care providers **FOR** workers' compensation services *unless* the contract clearly and expressly stipulates that fees payable under commercial health insurance rates will apply to workers' compensation **SERVICES**.

Practical Effect

The bill adds a provision to the law - as of January 1, 2010 - to require a DIRECT contract between the payor of medical services and the specific medical provider if rates lower than the MFS are to be paid. The bill does not change the requirements added to the law in 2007 that became effective on January 1, 2008.

Informational Note

If the sponsors intend a reference to fees less than the medical fee schedule, the current language of the initial phrase of the bill may not be sufficient. Perhaps the following language would assure the proper interpretation: "Provided, however, that any fees paid for medical services on or after January 1, 2010, that are lower than the comprehensive medical fee schedule ...".
[Underlined language indicates the change suggested.]

Comments of Advisory Council Members

Bob Pitts - Voting member, Employer Representative

Mr. Pitts noted when the 2007 statute was enacted all parties worked together to craft a solution to the problem. He stated the system will always have bad actors and there is a provision for monetary penalties for those entities. He said the current bill creates additional

SB 1297 by Crowe / *HB 857 by Mumpower
SB 1680 by Ketron / *HB 1192 by Mumpower, continued.

Proposed Change, cont.

problems. He said if problems continue to exist with inappropriate reimbursement regulators, the PPO industry and the medical providers should work together to craft a solution. He noted, however, it is not practical to require each individual self-insured group to have a separate contract with each doctor or medical provider. Mr. Pitts also suggested this a matter of contract and if the contract does not specifically permit the payor to sell or transfer the contracted rate, then the contract would require renegotiation or the parties would be in violation of the contract.

Sam Murrell, M.D. - Nonvoting Member, Health Care Provider Representative

Dr. Murrell stated he felt the bill would help in obtaining the correct reimbursement to medical providers. He stated despite the 2007 amendment, providers are still having a problem obtaining the correct payment from those paying the bill. He said often a board certified orthopaedic surgeon is reimbursed at the lower rate for a general surgeon and the law does not provide a remedy for the provider to recover the amount owed from an entity with whom they do not have a contract.

Steve Johnson - Nonvoting Member, Health Care Provider Representative

Mr. Johnson stated the proposed bill would greatly help the system. He stated often the payor with which the hospital does not have a contract, will pay based on usual and customary rather than under the Medical Fee Schedule.

RECOMMENDATION OF WCAC VOTING MEMBERS

The voting members of the Advisory Council *UNANIMOUSLY RECOMMEND AGAINST* PASSAGE of the bill.

SB 877 by Ketron / *HB 734 by Matheny

Present Law

TCA §50-6-125 is the statute that establishes the Medical Care and Cost Containment Committee [MCCCC]. The Commissioner of Labor appoints all members -nomination lists submitted by specific groups. The current membership of the MCCCC is 15 and includes:

- 3 licensed physicians [nominee list to be submitted by the Tennessee Medical Association];
- 2 persons representing employers [nominee list to be submitted by the Tennessee Chamber of Commerce and Industry];
- 1 person representing employers [nominee list to be submitted by the Associated Builders and Contractors];
- 3 persons representing employees [nominee list to be submitted by the Tennessee AFL-CIO Labor Council];
- 3 persons representing hospitals [nominee list to be submitted by the Tennessee Hospital Association];
- 1 pharmacist [nominee list to be submitted by the Tennessee Pharmacists Association];
- 1 person representing the health insurance industry; and
- 1 chiropractor [nominee list to be submitted by the Tennessee Chiropractic Association].

Proposed Change

SB 877 / HB 734 amends *TCA* §50-6-125 to increase the membership of the MCCCC by adding three (3) additional physicians [to be nominated by the Tennessee Medical Association].

Practical Effect

The bill changes the composition of the MCCCC by requiring the majority of the members to be physicians.

Comments of Advisory Council Members r

NOTE: WCAC was advised the bill is a caption bill; therefore, the WCAC did not review the bill.

***SB 1924 by Tate / HB 1839 by Todd**

Present Law

TCA §50-6-125 is the statute establishes the Medical Care and Cost Containment Committee [MCCCC]. The Commissioner of Labor appoints all members -nomination lists submitted by specific groups. The current membership of the MCCCC is 15 and includes:

- 3 licensed physicians [nominee list to be submitted by the Tennessee Medical Association];
- 2 persons representing employers [nominee list to be submitted by the Tennessee Chamber of Commerce and Industry];
- 1 person representing employers [nominee list to be submitted by the Associated Builders and Contractors];
- 3 persons representing employees [nominee list to be submitted by the Tennessee AFL-CIO Labor Council];
- 3 persons representing hospitals [nominee list to be submitted by the Tennessee Hospital Association];
- 1 pharmacist [nominee list to be submitted by the Tennessee Pharmacists Association];
- 1 person representing the health insurance industry; and
- 1 chiropractor [nominee list to be submitted by the Tennessee Chiropractic Association].

Proposed Change

SB 1924 / HB 1839 requires the three physician members of the MCCCC to represent a different specialty practice area.

Practical Effect

The bill assures the physician members will not be licensed o practicing in the same specialty.

Comments of Advisory Council Members

NOTE: WCAC was advised the bill is a caption bill; therefore, the WCAC did not review the bill.

SB 607 by Finney L / *HB 461 by Odom

Present Law

TCA §50-6-121 created the Workers' Compensation Advisory Council. At present, the Council is composed of the following:

- seven (7) voting members
  - State Treasurer, Chair
  - three to represent employees
  - three to represent employers;
- seven (7) nonvoting members
  - one to represent local governments
  - one to represent insurance companies
  - two to represent health care providers
  - three attorneys

Proposed Change

SB 607 / HB 461 would add a chiropractor as a nonvoting member of the Advisory Council. The nominees to be submitted to the Governor by the Tennessee Chiropractic Association.

Practical Effect

The bill increases the number of nonvoting members of the Advisory Council to add a chiropractor as a healthcare provider representative.

RECOMMENDATION OF WCAC VOTING MEMBERS

The voting members of the Advisory Council *UNANIMOUSLY DEFER TO THE GENERAL ASSEMBLY REGARDING PASSAGE* of the bill.

The members of the Advisory Council note, however, the current membership of the Advisory Council numbers 18 and it is aware of other health care provider groups that have expressed similar interest in membership on the Advisory Council. It fears at some point an increasing number of members will limit its effectiveness.

SB 792 by Overbey / *HB 751 by Montgomery

Present Law

TCA §50-6-121 creates the Workers' Compensation Advisory Council. Subdivision (a)(1)(B) provides:

- who is to appoint each voting member [The Speaker of the House of Representatives, Speaker of the Senate and the Governor each appoint one to represent employees and one to represent employers.];
- permits representatives, officers and employees from labor organizations or business trade organizations to be appointed;
- requires the appointing authorities, in making the appointments of the employer representatives, to strive to ensure a balance of a commercially insured employer, self-insured employer or an employer who operates a small business;
- requires one employee representative to be from organized labor selected from a list of three (3) names provided by the state labor council of the AFL-CIO.

Proposed Change

SB 792 / HB 751 adds a provision to *TCA* §50-6-121(a)(1)(B) to require one employer representative to be a representative from self-insured pools.

Practical Effect

The bill does not change the number of voting members of the Advisory Council but it does add a requirement to one employer representative positions on the Advisory Council.

RECOMMENDATION OF WCAC VOTING MEMBERS

The voting members of the Advisory Council *UNANIMOUSLY RECOMMEND PASSAGE* of the bill as drafted.