STATE OF TENNESSEE

WORKERS' COMPENSATION ADVISORY COUNCIL

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ANALYSIS, COMMENTS & RECOMMENDATIONS

re:

2010 WORKERS' COMPENSATION LEGISLATION

MARCH 9, 2010

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

M. Linda Hughes, Executive Director

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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	TN Defense Lawyers Association (TDLA)
David Davenport	Nonvoting Member	Health Care Providers (Physical Therapist)
Bruce Fox	Nonvoting Member	TN Association For Justice (TAJ)
Keith Graves, D.C.	Nonvoting Member	Health Care Providers (Chiropractor)
Stephen Johnson	Nonvoting Member	Health Care Provider (THA)
Kenny McBride	Nonvoting Member	Local Governments
Jerry Mayo	Nonvoting Member	Insurance Companies
Sam Murrell, M.D.	Nonvoting Member	Health Care Provider (TMA)
Dan Pohlgeers	Nonvoting Member	Health Care Provider (Occupational Therapist)
A. Gregory Ramos	Nonvoting Member	Tennessee Bar Association (TBA)
James G. Neeley, Commissioner, Labor/WFD	Ex Officio Member	
Leslie Newman, Commissioner, Commerce & Insurance	Ex Officio Member	
Sen. Jim Tracy Chair, Joint Committee	Ex Officio Member	
Rep. Charles Sargent Vice-Chair, Joint Committee	Ex Officio Member	

TABLE OF GENERAL WORKERS' COMPENSATION BILLS
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***SB 2559 by Haynes / HB 2869 by Hackworth**

Caption: Title 50, Chapter 6relative to workers' compensation.

Present Law

TCA §50-6-102(3)(A) defines "average weekly wages" (hereinafter referred to as AWW) as the injured employee's earnings in the employment in which he/she was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury divided by 52 *or*, if the employee lost more than 7 days, then the earnings for the remaining 52 weeks are to be divided by the number of weeks remaining after subtracting the lost time. [The term "earnings" is not defined in the statute.]

TCA §50-6-102(3)(B, C and D) set out the methods for computing AWW when the employment has been less than 52 weeks; when the employment has been very short and how allowances made "in lieu of wages" per the wage contract are to be included in the employee's earnings. [The statute does not define "wage contract".]

As is the case with many statutes, the courts have had to resolve many questions that are not specifically addressed by the statutes and have held:

- the compensation award is determined by the amount of wages the employee earns and not by the rate of the wage;
- computation of a part-time employee's AWW is based on the actual part-time earnings during the year divided by the number of weeks during which the employee received wages;
- to compute the AWW only the earnings in the employment in which the employee was working when injured are considered (if the employee was working two jobs, only the earnings from the job on which the injury occurred is considered);
- earnings include anything received by the employee under the terms of his employment contract from which he realizes economic gain;
- gifts are not earnings;
- the value of fringe benefits are not included in the calculation of AWW;
- bonuses received by the employee are included in the calculation;
- where both the employee and employer considered tips should be retained by the employee as part of his compensation then the tips should be taken into account when calculating the AWW;
- the method of computing AWW of a regular employee is to total the earnings and divide by 52 and in deciding which "lost" days can be deducted from the 52 weeks, only sickness, other disabilities and fortuitous events can be considered;

***SB 2559 by Haynes / HB 2869 by Hackworth, continued.**

Present Law, cont.

- weeks an injured employee spent on strike are considered voluntary absences and are not to be excluded when using the 52 week formula for calculating the AWW;
- weeks during which the employee was on leave of absence due to illness are excluded from the calculation (any disability benefits are also not included in the calculation).

Proposed Change

SB 2559/HB 2869 deletes *TCA* §50-6-102(3) in its entirety and establishes a new statutory scheme for determining an injured employee's AWW.

The bill states that "employment contract' or "contract of hire" does not require a written document but can be implied by the terms of the agreement between the employer and the employee as to the monetary compensation and/or allowances in lieu of wages the employee is to receive for performing the work he was hired to do. The bill also defines "earnings" to be anything the employee receives under the terms of the employment contract or contract of hire from which the employee realizes economic gain and includes allowances made "in lieu of wages".

The bill defines "average weekly wages" as

- actual weekly earnings of an employee under the employment contract or contract of hire in effect at the time of injury,
- **PLUS** any overtime earnings or bonuses actually paid to the employee (to be computed by dividing the overtime earnings and the bonuses by the number of weeks worked by the employee in the same employment under the employment contract or contract of hire in force at the time of injury, not to exceed 52 weeks prior to the accident.

The bill also provides that the average weekly wages are not to be computed on less than a full-time workweek in the employment.

The bill also contains a method for computing the AWW if - because of exceptional circumstances - the employee's AWW cannot be fairly and justly determined by the other provisions of the subdivision: utilize the AWW earned by a person in the same grade/classification employed at the same work by the same employer or if such a similar employee does not exist, the usual wage paid in the vicinity of the employer for the same or similar services, provided the results are just and fair to both the employee and the employer.

***SB 2559 by Haynes / HB 2869 by Hackworth, continued.**

Practical Effect

The bill establishes a new method by which an employee's AWW will be computed. The AWW computation utilizes the employee's actual weekly earnings at the time of injury rather than the average of the preceding 52 weeks of earnings. The bill also requires adding the yearly average of any bonuses or overtime when computing the "average weekly wage". The bill 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.

Informational Note

It appears this bill 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 included 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 stated the bill creates a definition of average weekly wage under the workers' compensation statute that is more consistent with today's work environment rather than the current definition that is a reflection of economic times when the original workers' compensation law was enacted. There are any number of employees whose job situation are adversely affected by the current calculation method, including teachers who do not typically work 52 weeks a year yet the average weekly wage is not a fair calculation. Mr. Farmer requested any NCCI analysis include a comparison of the cost of the change in the definition in comparison with the cost savings that resulted from the 2004 Reform.

Jerry Mayo - Nonvoting member, Insurance Companies Representative

Mr. Mayo stated the insurance companies are for a fair system but expressed concern that the ultimate cost to the system is not known from a rate standpoint. He suggested a cost analysis by the NCCI would be helpful and how other states have been impacted. Mr. Mayo said the industry wants rules that are fair and equitable and that provide a bright line for determining the employee's weekly wage.

***SB 2559 by Haynes / HB 2869 by Hackworth, continued.**

Comments of Advisory Council Members, cont.

Bruce Fox - Nonvoting member, TAJ Representative

Mr. Fox urged passage of the bill on behalf of injured workers and to bring fairness to the system. It would take care of categories of workers such as teachers, workers out on strike, workers who took FMLA to care for family members, workers who have lost work due to illness and as a result did not work for the 52 weeks prior t an injury. The intent is to treat these workers in a more fair way than the current system treats them. [Mr. Ramos joined in the recommendation that the bill be passed. Mr. Lee also conand Mr. Lee concurred

Jerry Lee - Voting member, Employee Representative

Mr. Lee agreed with the comments made by Mr. Fox and expressed concerns that workers in the construction industry may not work a full 52 weeks per year and it is not fair to reduce their benefits as a result.

Kitty Boyte - Nonvoting member, TDLA Representative

Ms. Boyte commented the current method of calculation of the average weekly is relatively easy to calculate and the bill appears to create a more difficult calculation method, especially for employees do not work a consistent number of hours each week.

Gregg Ramos - Nonvoting member, TBA Representative

Mr. Ramos stated the proposal could penalize an employee in the event the employee works a different number of hours each week. Mr. Ramos joined Mr. Fox in urging that the bill be passed.

Bob Pitts - Voting member, Employer Representative

Mr. Pitts noted while this bill (and SB3163) may have merit, the circumstances of the early cutoff in the Senate for amendments has resulted in the various interest groups having insufficient time to become comfortable with the ramifications of the bills. He stated the business community believes the issue of calculation of the average weekly wage should be reviewed but under the current time situation for processing the issue there is not sufficient time to achieve consensus on the issue.

Gary Selvy - Voting member, Employer Representative

Mr. Selvy concurred with the comments of Mr. Pitts.

***SB 2559 by Haynes / HB 2869 by Hackworth, continued.**

RECOMMENDATION of Advisory Council Voting Members

The voting members **unanimously recommend**, in view of the issues raised by the insurance industry, the Tennessee Defense Lawyers Association and Employer representatives, that the sponsor **defer this bill** to permit the parties additional time to further study and investigate the issue with the goal of an equitable resolution of the issue.

***SB 3750 by Bunch / HB3557 by Rowland**

Caption: Title 50, Chapter 6, relative to workers' compensation.

Present Law

TCA §50-6-102(10)(D) contains the factors to be considered to determine whether an individual is an "employee" or a "subcontractor". The factors to be considered are:

- right to control the conduct of the work
- right of termination
- method of payment
- freedom to select and hire helpers
- furnishing of tools and equipment
- self-scheduling of working hours
- freedom to offer services to other entities

The Supreme Court has repeatedly stated that no single factor is determinative; however, it has emphasized the importance of the right to control and the relevant inquiry is whether the right existed, not whether the right was exercised. The burden of proof is on the employer to show the worker was an independent contractor and not an employee. The case law also states any doubt as to whether an individual is an employee or an independent contractor must be resolved in favor of finding the individual is an employee.

Proposed Change

SB 3750 / HB 3557 re-writes *TCA* §50-6-102(10)(D). The bill retains the current language of the subsection that sets out the factors to be considered in the determination of employee or independent contractor. Pursuant to the bill, if the court finds one (1) but less than three (3) of the factors tend to prove the individual is an "independent contractor" and not an "employee", a rebuttable presumption is created that the individual is an "independent contractor". If the court finds three (3) or more factors tend to prove the individual is an "independent contractor" and not an "employee', then the individual ***shall be considered to be*** an "independent contractor" and not an "employee" for purposes of this chapter".

It would appear the employer would have the burden of proving at least one (1) factor tends to prove an individual is an "independent contractor" and then, the court would apparently have to make that finding and advise that the burden of proof has shifted to the individual who is claiming to be an employee entitled to workers' compensation benefits.

***SB 3750 by Bunch / HB3557 by Rowland, continued.**

Informational Note

It is unclear what the phrase "shall be considered to be" means in legal terms. Also, an internal inconsistency may be exist regarding the number of factors necessary to create a rebuttable presumption.

Comments of Advisory Council Members

Bruce Fox - Nonvoting member, TAJ Representative

Mr. Fox stated the Tennessee Association for Justice opposes the bill. He indicated these cases are very fact specific and the bill handcuffs the courts, allowing the courts no discretion to make its own determination whether a person is an employee or independent contractor after hearing all the proof. He opined the bill will cause fewer workers to be covered by the workers' compensation act and more companies will try to find ways to meet one or two of the criteria to meet the statutory exclusion when in reality the person should be an employee.

Tony Farmer - Voting member, Employee Representative

Mr. Farmer stated the bill will impact a larger population of workers than just the construction industry and will have far reaching results that extend beyond the construction industry. Mr. Farmer indicated he concurred with the points made by Mr. Fox and believes the bill creates significant inequity. He also expressed concern regarding the wording of the bill that transfers the burden of proof to the worker. Mr. Farmer said he opposes the bill vehemently.

Bob Pitts - Voting member, Employer Representative

Mr. Pitts said he agreed with Mr. Fox and Mr. Farmer that the bill reaches far beyond the construction industry. He suggested the goal of the General Assembly with respect to the construction industry is to tighten the rules as to who must pay workers' compensation and who should be exempt. He stated one of the problem areas is the sole proprietor/independent contractor issue. He said the bill will further increase the number of independent contractors. He suggested the current criteria in the statute is the same as used by the IRS and he is bothered by adopting one public policy for tax purposes and a different public policy for purposes of workers' compensation. Mr. Pitts stated this would be very dangerous public policy and that he has a problem with the bill as currently drafted.

***SB 3750 by Bunch / HB3557 by Rowland, continued.**

Comments of Advisory Council Members, cont.

Jerry Lee - Voting member, Employee Representative

Mr. Lee stated he shares the concerns expressed by Mr. Fox, Mr. Farmer and Mr. Pitts.

RECOMMENDATION of Advisory Council Voting Members

The voting members unanimously **recommend against passage** of the bill.

***SB 3175 by Herron / HB 3514 by McDonald**

Caption: Title 50, Chapter 6, relative to exempting certain employers and employees from provisions of Workers' Compensation law on religious grounds.

Present Law

TCA §50-6-103 requires every employer subject to the workers' compensation law to pay compensation for injuries/death that are caused by accident arising out of and in the course of employment without regard to fault. *TCA* §50-6-102(12) defines employer as any individual or entity who uses the services of not less than five (5) persons for pay, with two exceptions. An employer engaged in the mining and production of coal and a person engaged in the construction industry (*TCA* §50-6-113) with one (1) employee are subject to the workers' compensation law.

Proposed Change

SB 3175 / HB 4514 adds a new section to Title 50, Chapter 6, Part 1. The bill permits an employer to file an application with the Department of Labor/WFD to be excepted from the workers' compensation law with respect to certain employees. The application shall include:

(1) a written waiver by the employee of all benefits under the workers' compensation law;
(2) an affidavit from the employee that he/she is a member of a recognized religious sect or a division of a sect and an adherent to established tenets or teachings such that the employee is conscientiously opposed to acceptance of the benefits of any public or private insurance which makes payments in the event of death, disability, old age or retirement or makes payments toward the cost of, or provides services for medical bills, including the benefits of any insurance system established by the Federal Social Security Act.

The department is to promulgate a form to be used for the waiver and affidavit. The application is to be granted by the Department if it finds proof that the employee has an approved exemption from the federal internal revenue service for social security and medicare taxes, pursuant to internal revenue service Form 4029 (which must accompany the application for exemption). The federal exemption is to be considered by the Department as prima facie proof of compliance with the requirements of subsection (c) of the bill.

If the employee is a minor, the waiver and affidavit may be made by a guardian of the minor. The exception granted as to a specific employee shall be valid for all future years unless such employee or sect ceases to meet the requirements of the subsection (a) of the bill.

***SB 3175 by Herron / HB 3514 by Ferguson, continued.**

Proposed Change, cont.

Additionally, the bill provides that any employee exempted from the provisions of the workers' compensation law shall still be counted when determining whether an individual or entity is an "employer" who uses the services of not less than five (5) persons for pay, except as provided in 50-6-113 and in the case of an employer engaged in mining and production of coal, one (1) employee for pay.

Practical Effect

The bill creates a mechanism by which employers can exempt themselves from paying workers' compensation benefits to certain employees who meet the criteria set out in the bill. A guardian can submit the waiver and affidavit on behalf of a minor. It requires the department to grant the application for exemption if the employee has an approved exemption from the Internal Revenue Service. It also requires the exempt employees to be counted when determining whether the employer is required to obtain workers' compensation coverage.

Informational Note

Is the employee required to attach a copy of Form 4029, the federal "Exemption From Social Security and Medicare Taxes and Waiver of Benefits" to the application for exemption submitted to the department? While is appears this may be the intent, the language of the subsection (c) does not expressly require that.

Comments of Advisory Council Members

Bob Pitts - Voting member, Employer Representative

Mr. Pitts expressed concern that the bill does not have a procedure by which a member of the religious sect could notify the department they no longer wished to be exempt.

Bruce Fox - Nonvoting member, TAJ Representative

Mr. Fox noted the bill creates an opening for coercion of employees to sign the waiver in order for the employer to lower costs. He also expressed concerns the public will bear the expense of catastrophic injuries which require emergency room care.

***SB 3175 by Herron / HB 3514 by Ferguson, continued.**

Comments of Advisory Council Members, cont.

Kitty Boyte - Nonvoting member, TDLA Representative

Ms. Boyte expressed concerns about whether the bill will permit a parent to sign the waiver on behalf of a minor.

Tony Farmer - Voting member, Employee Representative

Mr. Farmer joined in the comments of Mr. Fox concerning the potential for abuse by employers. He expressed concerns an employer would coerce an employee to sign the waiver in order to reduce premiums. He also stated there is a concern for the dependents in the event of the death of an employee. Mr. Farmer said it would not be good public policy to enact a bill that may result in the public bearing the cost of acute level medical care in the event the employee requires emergency room care and treatment.

Jerry Lee - Voting member, Employee Representative

Mr. Lee said it would be tempting for one who is not a member of the religious order to sign the waiver in order to obtain a job.

Jerry Mayo - Nonvoting member, Insurance Companies Representative

Mr. Mayo stated the issue has been raised and discussed for several years and it raises more questions than answers.

RECOMMENDATION of Advisory Council Voting Members

The voting members unanimously **recommend against passage** of the bill.

SB 3732 by Haynes / HB3143 by Stewart

Caption: Title 50, Chapter 6, relative to workers' compensation.

Present Law

TCA §50-6-106 is the statute that lists the employments to which the Tennessee workers' compensation law does not apply. Subsection (1)(A) states that no common carrier by motor vehicle, operating pursuant to a certificate of public convenience and necessity is the employer of a leased-operator or owner-operator of a motor vehicle or vehicles under a contract to such common carrier. Subsection (1)(B) provides that a leased operator or a leased owner/operator under this type contract may elect to be covered under a workers' compensation policy insuring the common carrier but must file written notice of such election with the Division of Workers' Compensation. Either the carrier or the operator can terminate the coverage but notice must be filed with the Division.

Proposed Change

SB 3732/HB 3143 deletes the provision of *TCA* §50-6-106(A) referenced above and deletes *TCA* §50-6-106(1)(B) in its entirety.

Practical Effect

Section 1 of the bill will eliminate the exemption for common carriers regarding leased-operators or owner-operators under contract to the common carrier. A common carrier could be determined an employer of the leased-operator if the other facts of the specific situation supports a determination of employer-employee status and not independent contractor status. Under Section 2 an owner-operator would not be able to elect coverage under the carrier's policy because the carrier would be required to include the person as an employee under the carrier's policy.

Informational Note

This bill appears to be a response to the case of *Moore v. Howard Baer, Inc.*, Slip Copy, 2009 WL 3321377, Tenn. Workers Comp Panel, October 15, 2009 (NO. M200802357WCR3WC). In this case the employee was a leased-operator but the other facts of the case clearly showed him to be a borrowed servant of the defendant Baer. The Panel concluded it had no choice but to hold that Baer was not liable but found the statute creates a "result which is inequitable, unfair, and at odds with the overall purpose of the workers' compensation statute." The Panel then stated:

SB 3732 by Haynes / HB3143 by Stewart, continued.

Informational Note, cont.

> The language of the statute, however, is unambiguous. Baer is a common carrier, and Mr. Moore was clearly a leased-operator. Unfortunately for Mr. Moore and regrettably for us, we have no choice but to affirm the decision of the trial court, and leave it to the General Assembly to review section 50-6-106 and, if it deems it appropriate to do so, revise it in a manner that will prevent similar inequitable results in the future.

Id. at p.5.

Comments of Advisory Council Members

Tony Farmer - Voting member, Employee Representative

Mr. Farmer stated that since 2008, the Advisory Council has maintained the policy to include as many workers under the workers' compensation law as possible. He said the bill eliminates the exclusion of a class of workers that should be eliminated so the statute is more consistent with the policy to include as many workers under the Act. Mr. Farmer suggested there is no reason to apply the policy to the construction industry and no rational basis to not apply it to a separate industry. He stated it would be equitable to bring this industry under the workers' compensation system.

Bruce Fox - Nonvoting member, TAJ Representative

Mr. Fox concurred with the statements of Mr. Farmer.

Gary Selvy - Voting member, Employer Representative

Mr. Selvy expressed concern that if the bill is enacted that adequate notification is made to the industry so they can prepare for the effective date of the bill so we don't run into the same problem as was experienced in the construction industry with Public Chapter 1041.

Bob Pitts - Voting member, Employer Representative

Mr. Pitts indicated he was unable to support the bill at the present time because it eliminates an exemption in its entirety.

SB 3732 by Haynes / HB3143 by Stewart, continued.

RECOMMENDATION of Advisory Council Voting Members

The voting members unanimously **recommend** the sponsor of the bill **defer the bill** to permit time to consider other options and possible revisions to address concerns raised by the Supreme Court Panel and members of the Council.

AMENDED **SB 3731 by Haynes / HB3582 by Coleman**
Caption: Title 50, Chapter 6, relative to workers' compensation.

Present Law

TCA §50-6-204(g)(2) provides all cases of dispute as to the value of the services shall be determined shall be determined by the tribunal with jurisdiction of workers' compensation.

TCA §50-6-204(b)(2) provides that a court may award attorney fees and reasonable costs to include reasonable and necessary court reporter expenses and expert witness fees for depositions and trials incurred when the employer fails to furnish appropriate medical treatment pursuant to a settlement or judgment.

Proposed Change - Bill & Amendment

The original bill rewrites *TCA* §50-6-204(g)(2) in its entirety and addresses a different subject. The bill creates a voluntary procedure for handling disputes involving future medical treatment for the employee after either a trial or an approved settlement.

The bill provides if an employer denies it is required to provide or refuses to provide medical care and treatment, medical services or medical benefits that an employee contends they are entitled to pursuant to a trial judgment or a settlement agreement approved by the court or the department then:

- either the employer or employee (or attorney) may request the assistance of a specialist to determine if the benefits are appropriate [form to be promulgated by the department];
- the specialist is given authority to determine whether the benefits should be provided [authority includes - but is not limited to - authority to order specific medical care and treatment, medical services or medical benefits, or both AND any authority granted to a specialist in 50-6-238.

The specialist is required to review available information and enter an order, as follows:

- if the employer/insurer agrees it will provide the medical benefits, the specialist is required to issue an agreed order specifying the medical care to be provided and if the employer does not comply with the agreed order, then the specialist shall enter and order directing the employer/insurer to provide specific medical treatment;

AMENDED SB 3731 by Haynes / HB3582 by Coleman, continued.

Proposed Change, cont.

- if the employer does not agree to provide the medical treatment, then the specialist shall issue an order as to whether the employer is required to furnish treatment and the specific treatment to be provided.

If either the employee or the employer disagrees with the decision of the specialist the following procedure shall apply:

- if the request for assistance relates to treatment ordered by a trial judgment, either the employer or the employee may appeal the specialist's order to the original trial court and a copy of the specialist's order shall be attached to any request for review filed in the trial court and review by the trial court shall be de novo;
- if the request for assistance involves a settlement approved by either a court or the department then the aggrieved party may request administrative review and if administrative review is not requested the specialist's order is considered a final order for administrative purposes and if administrative review is requested, the order of the administrator/designee shall be considered a final order for administrative purposes if not otherwise stated in the order.

The *amendment* adds authority for the specialist to order the payment of attorney fees and reasonable costs to include reasonable and necessary court reporter expenses and expert witness fees for depositions. This is the same authority granted to a court in the statute.

Practical Effect - Bill & Amendment

The bill creates a permissive procedure for addressing disputed future medical treatment issues - it does not require either an employer or employee (or attorneys) to utilize the administrative procedure. The bill grants authority to a workers' compensation specialist to issue orders directing specific medical care and treatment post trial and post settlement approval and provides appeal mechanisms. The bill grants the same authority to the specialist as a court has to award attorney fees and expenses to the employee who pursues medical treatment through this administrative process.

AMENDED SB 3731 by Haynes / HB3582 by Coleman, continued.

Comments of Advisory Council Members

Tony Farmer - Voting member, Employee Representative

Mr. Farmer noted the bill resolves a longstanding issue as to whether the Department of Labor/WFD has the authority to enforce post-settlement or post-judgment medical issues. He stated that it remains clear that an employee or an employee's attorney still will have the option under current law to take a post-settlement issue or post-judgment issue to a court for resolution; the bill creates an opportunity to pursue either an administrative remedy or court remedy following a settlement or judgment. Mr. Farmer emphasized the amendment concerning the department's authority to order attorney fees and costs is more in the nature of a penalty as the court or the department will have found the employer or the insurer has failed to abide by an agreement they entered into or a judgment order entered by a trial court. He suggested this should not be viewed as adding costs to the system. Mr. Farmer stated the bill allows an employee the opportunity to overcome the arbitrary behavior of employers or insurers in refusing to provide medical treatment.

With regard to the issue of attorney fees, Mr. Farmer stated the department would have the decision on the rules of the Supreme Court that sets out specific factors to be considered in determining whether fees are appropriate.

Kitty Boyte - Nonvoting member, TDLA Representative

Ms. Boyte stated there are many situations in which it is true that the department can alleviate a problem with a person obtaining future medical treatment involving ancillary issues. However, with regard to whether the requested medical treatment is reasonable and necessary (whether the need for medical treatment is related to the original work-related injury), she expressed concern that either side be able to request the assistance of a court in making the determination as to whether the treatment is reasonable and necessary. Ms. Boyte said she did not think only the employee - and not the employer - should be given the right to choose to request assistance from the department with no appeal right to a court. She stated either the employer or employee should have the right to appeal any decision of the department regarding the medical benefits to a court.

With regard to the discussion concerning attorney fees, Ms. Boyte stated it has been her experience that employee attorneys have asked for fees they request an hourly rate that is about twice as high as any attorney usually charges for workers' compensation cases. She stated the requests are arbitrary and varied.

AMENDED SB 3731 by Haynes / HB3582 by Coleman, continued.

Comments of Advisory Council Members, cont.

Gregg Ramos - Nonvoting member, TBA Representative

Mr. Ramos stated he believes the bill to be a good practical way to handle the issue and recommended passage of the bill. He agreed the amendment should be adopted and concurred with statements made by Mr. Fox regarding the amendment.

Bruce Fox - Nonvoting member, TAJ Representative

Mr. Fox strongly urged recommended passage of the bill, with the amendment. He stated the amendment that gives the department authority to award expenses and attorney fees gives the department teeth to ensure agreements and judgments are complied with. Mr. Fox said the amendment will allow an employee who was unrepresented at the time of settlement to get assistance from a specialist to be able to prove their case and to recoup the expenses of the proving the right to medical treatment, including the recoupment of the expenses of depositions, court reporter fees, etc.

Bob Pitts - Voting member, Employer Representative

Mr. Pitts expressed concerns regarding the amendment. He stated he would be more comfortable with the amendment if the fees were subject to rulemaking by the department or - the department already has authority to order attorney fees when approving a settlement agreement. Mr. Pitts strongly suggested that if the department is to be given the authority to order attorney fees there should be some process to be used by the specialist to uniformly determine the attorney fees to be awarded.

RECOMMENDATION of Advisory Council Voting Members

The voting members unanimously **recommend passage** of the bill and amendment **provided** the sponsor considers adding language to the bill that provides guidance to the department as to how to assess attorney fees and reimbursement of costs.

AMENDED **SB 2928 by Johnson / *HB 3015 by Sargent**

Caption: Title 50, relative to workers' compensation.

Present Law

TCA §50-6-207 sets out the "Schedule of compensation" and 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.

TCA §50-6-207(1)(D) was enacted in 2009. It provides an employee claiming a mental injury on or after July 1, 2009, is conclusively presumed to be at maximum medical improvement (MMI) at the earliest of the following dates: (1) the date the treating psychiatrist concludes the employee has reached MMI; or (2) 104 weeks after the employee has reached MMI for the physical injury or illness that is the proximate cause of the mental injury; or (3) 104 weeks after the date of the injury in the case of mental injuries with no underlying physical injury.

Proposed Change (the amendment makes the bill)

Amended SB 2928/HB 3015 adds a new subdivision (E) to §50-6-207(1) that permits a treating physician who determines an injured worker's pain is persisting beyond an expected period for healing to refer the worker for pain management (that encompasses pharmacological, non-pharmacological and other approaches to reduce or stop pain sensations). Such a worker is presumed to have reached maximum medical improvement (MMI) at the earliest of: (1) the date the treating physician determines the injured worker has reached MMI or (2) 104 weeks after commencement of pain management pursuant to the referral of the treating physician.

Practical Effect

The amendment addresses three issues. First, it specifically permits the treating physician to refer an injured worker for pain management if the treating physician determines the pain is persisting beyond an expected period for healing. Second, the amendment sets forth the types of pain management treatment that is permitted. Third, it establishes a finite time limit as to when an employee who is referred to pain management is deemed to have reached MMI - the maximum time is 104 weeks from the date pain management treatment begins. It could be earlier if the doctor determines the employee has reached MMI.

AMENDED SB 2928 by Johnson / *HB 3015 by Sargent, continued.

Informational Note

The amendment, as drafted, does not restrict its application to injuries that are sustained on or after a specific date in the future. As drafted, the amendment becomes effective on July 1, 2010 - - however, it will apply to ALL injuries - not just those that occur on or after that date. This could cause some confusion - for example....would it apply to an injured employee who had been referred to pain management in August, 2008?

Comments of Advisory Council Members

Kitty Boyte - Nonvoting member, TDLA Representative

Ms. Boyte stated the bill will probably be more applicable to the situations where the employee has not been surgically treated but has been referred to pain management. She said the bill does not resolve the issues in which the parties disagree as to whether temporary total disability benefits are due to the employee when the surgeon has placed the employee at maximum medical improvement but the pain management physician has not.

Sam Murrell, M.D. - Nonvoting member, Health Care Representative

Dr. Murrell suggested the language of the amendment is redundant.

RECOMMENDATION of Advisory Council Voting Members

The voting members of unanimously **recommend passage** of the bill, as amended, **provided** language is added to make it **applicable to injuries that occur on or after July 1, 2010.**

AMENDED **SB 2943 by Norris / *HB 2928 by Sargent**

Caption: Title 50, relative to workers' compensation.

Present Law

TCA §50-6-241 sets maximum permanent partial disability benefits an employee may receive when the pre-injury employer returns the employee to work at a job making the same or higher pay as when the injury occurred. For injuries that occurred on/after August 1, 1992 and before July 1, 2004, the maximum is 2.5 times the medical impairment rating. For injuries that occur on or after July 1, 2004, the maximum is 1.5 times the medical impairment rating. If the pre-injury employer does not return the employee to work at same or greater pay, the maximum permanent partial benefit is capped at 6 times the medical impairment rating.

For injuries [August 1, 1992 - June 30, 2004] that are subject to this "cap", if the employee subsequent loses his/her job with the pre-injury employer within 400 weeks he/she may seek reconsideration of the permanent partial disability benefits. For injuries on or after July 1, 2004 the employee may seek reconsideration of permanent partial disability benefits [within 400 weeks if it was a body as a whole injury; number of weeks of benefits for schedule member injuries covered by the schedule] if he/she loses their job UNLESS the loss of employment is due to voluntary resignation or retirement (not related to the injury) or due to employee's misconduct connected to employment.

In 2000, the Supreme Court held in *Powell v. Blalock Plumbing & Elec. & HVAC*, 78 S.W.3d 893 (Tenn. 2000) that the word "wage", as used in TCA §50-6-241(a)(1), means the hourly rate of pay for an employee who is compensated on an hourly basis.

The Supreme Court has held TCA §50-6-241(a)(1) does not apply unless the employer makes a meaningful offer of employment to the employee. The "multiplier caps" will also be applied if the employer makes a meaningful offer of employment to the employee but the employee unreasonably refuses to return to work. The courts have looked at the facts of each claim to determine whether the actions of both the employer and the employee are reasonable.

Proposed Amendment (the amendment makes the bill)

SB 2943/ HB 2928 amends *TCA* §50-6-241(a)(1) by prohibiting an employee from filing a claim for reconsideration of permanent disability in the event the employee has had a "reduction in pay or a reduction in hours" due to economic conditions and at least 50% of the hourly employees have been similarly impacted.

AMENDED SB 2943 by Norris / *HB 2928 by Sargent, continued.

Practical Effect

The proposed amendment prohibits reopening of a claim that had been subject to the multiplier caps **IF** the employee's pay or number of hours worked is reduced below his/her pay or work hours at the time the employee returned to work **AND IF** at least 50% of the hourly employees are similarly affected.

Informational Note

The right to reopen a "capped" claim is a substantive right and this cannot be changed by retroactive application of a law. Thus, the amendment should be limited to injuries that occur on or after the effective date of the bill.

Comments of Advisory Council Members

Tony Farmer - Voting member, Employee Representative

Mr. Farmer stated one issue is not explicitly addressed by the bill that should be specifically addressed. He suggested workers who elect to terminate their employment with the pre-injury employer as a result of the employer's decision to reduce the hourly rate or to reduce the number of hours worked should be excluded from the application of the bill. He explained these workers' should not be eliminated from filing a request for reconsideration of permanent partial disability benefits. Mr. Farmer stated if this is added to the bill, the bill has merit in the changing economic times.

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

Dr. Murrell suggested the closing of a business might be included in the application of the bill as any closing of a business will affect at least 50% of the workforce.

Kitty Boyte - Nonvoting member, TDLA Representative

Ms. Boyte questioned whether an employee should be able to pursue reconsideration when the employee voluntarily quits a job due to the reduction in hours or rate of pay. She suggested the availability to request reconsideration increases the costs to the system.

Gregg Ramos - Nonvoting member, TBA Representative

Mr. Ramos stated current law does not permit reconsideration if the hourly rate of pay is reduced.

AMENDED SB 2943 by Norris / *HB 2928 by Sargent, continued.

RECOMMENDATION of Advisory Council Voting Members

The voting members unanimously **recommend passage** of the bill **provided** the sponsor consider amending the bill (as amended) to:

(1) clarify the bill does not apply when a business closes;

(2) exclude application of the bill to employees who elect to terminate employment based on the reduction of the hourly rate or the reduction of hours worked ; AND

(3) make it applicable to injuries that occur on or after July 1, 2010.

SB 3163 by Johnson / *HB 3043 by Sargent

Caption: Title 50, Chapter 6, relative to workers' compensation.

Present Law

TCA §50-6-206(a)(2)(A) prohibits the parties to a settlement of a workers' compensation claim from closing future medical benefits for a period of three years after the settlement of the claim. Pursuant to *TCA* §50-6-206(a)(2)(D), this prohibition does not apply if the injury is to a schedule member not subject to *TCA* §50-6-241(d)(1)(A), the multiplier caps statute (i.e, schedule members whose maximum disability is less than 200 weeks).

TCA §50-6-206(a)(2)(C) prohibits the settlement of future medical benefits at any time if the employee is permanently totally disabled.

TCA §50-6-206(a)(2)(B) provides that after the expiration of the three year period, the parties may mutually agree to compromise and settle the issue of future medical benefits. The agreement can be approved by a court or the commissioner/commissioner's designee.

TCA §50-6-206(b) permits the closing of future medical benefits in specified cases:

- there must be a dispute between the parties on the issue of compensability or the issue of the amount of disability and
- the amount paid to the employee cannot exceed 50 times the minimum weekly benefit rate (currently, $5,707.50).

In those instances the statute provides the employee is not entitled to any future medical benefits.

Proposed Change

Section 1 of the bill states that if a claim is settled by the parties the parties cannot agree to compromise and settle the issue of medical benefits for a period of one (1) year from the date of settlement approval, except as provided in the new (a)(2)(C) established by Section 3 of the bill.

Section 2 of the bill provides that after the expiration of the one (1) year period "and when for all uncontested compensable injuries a statement is required from the authorized treating physician that no future medical care related to the injury is anticipated", the parties may mutually agree to settle the issue of future medical benefits.

SB 3163 by Johnson / *HB 3043 by Sargent, continued.

Proposed Change, cont.

Section 3 of the bill deletes the current language of *TCA* §50-6-206(a)(2)(C) that prohibits future medical benefits from being terminated in cases of permanent total disability.

Section 3 of the bill creates a new (a)(2)(C) that grants the trial court or workers' compensation specialist approving the settlement the authority to terminate the employee's right to future medical benefits upon a finding - **based upon clear and convincing evidence** - that compensability is a contested issue and has been raised in good faith as a potentially valid defense by the employer.

Practical Effect

The bill alters the 2004 Reform Act provisions related to the settlement of future medical benefits. The bill will permit the parties to close future medical benefits in claims where the employee is permanently totally disabled. The bill will permit the trial court or a workers' compensation specialist to approve a settlement of future medical benefits upon a finding of **clear and convincing evidence** that the employer contested the compensability of the claim in good faith as a potentially valid defense.

Informational Note

The language used in Section 2 appears to suggest an intent to require the authorized treating physician to provide a statement that the employee will require no future medical benefits before permitting the parties to settle the issue of future medical benefits. The language also appears to tie this to uncontested compensable injuries. However, the language used in the bill is not clear and a court may not be able to determine what is really required by the section.

RECOMMENDATION of Advisory Council Voting Members

The voting members **unanimously recommend**, in view of the complexity of the issue and the inadequate time the interested groups have had to discuss and explore the issue, that the sponsor **defer this bill** to permit the parties additional time to further study and investigate the issue with the goal of an equitable resolution of the issue.

AMENDED SB 3730 by Haynes / *HB 3358 by Fincher

Caption: Title 50, Chapter 6, relative to workers' compensation.

Present Law

TCA §50-6-206 relates to "Settlements". *TCA* §50-6-206(a)(1) provides the parties have a right to settle all matters of compensation but before the settlements are binding, they must be reduced to writing and approved by the judge of the circuit court or chancery court of the county where the claim for compensation is entitled to be made. *TCA* §50-6-225 requires the claim to be filed in the county in which the employee resides or in which the alleged injury occurred or in cases in which the employee resides in another state and the injury occurred in another state, in the county in which the employer maintains an office. *TCA* §50-6-206(c) permits a settlement agreement to be approved by the Commissioner of Labor/WFD or the commissioner's designee. *TCA* §50-6-206(c)(3) requires settlements in which the employee is represented by counsel to be submitted to the department for approval and requires settlements in which the employee is not represented by an attorney to seek approval of a court -UNLESS the parties agree otherwise.

In instances in which the employee is entitled to seek reconsideration of permanent partial disability benefits pursuant to *TCA* §50-6-241, the statute requires the employee to file a complaint, but the statute is silent as to what court has jurisdiction of the matter. The Supreme Court held in *Freeman v. Marco Transp. Co.*, 27 S.W.3d 909 (Tenn. 2000) that a "motion for a request for reconsideration" must be filed in the court that originally exercised jurisdiction over the workers' compensation claim. No case has addressed which court would have jurisdiction when a settlement had been approved by the department.

Proposed Amendment (the amendment makes the bill)

The amendment to SB 3730/HB358 totally rewrites the bill. The amendment revises *TCA* §50-6-206(a)(1). The bill will retains the requirement that the settlement agreement be reduced to writing and approved by the judge of the circuit court or the chancery court of the county where the claim for compensation is entitled to be made or by the commissioner/designee.

Section 1 of the amendment provides that only settlements in which both the employer and employee are represented by counsel may be submitted to a court of competent jurisdiction for approval. Other portions of this section merely divide other portions of the current language of *TCA* §50-6-206(a)(1) into specific subdivisions but do not change the wording of the current statute.

AMENDED SB 3730 by Haynes / *HB 3358 by Fincher, continued

Proposed Amendment (the amendment makes the bill), cont.

Section 2 of the amendment requires any settlement agreement in which the employee is not represented by counsel to be submitted to the department for approval. It specifies a court does not have the jurisdiction to approve such a settlement agreement.

Section 3 addresses the issue of where a complaint is to be filed when an employee seeks reconsideration of permanent partial disability benefits in cases where the original "award" or "settlement" was capped pursuant to *TCA* §50-6-241. It the original award was a result of a trial, then the complaint for reconsideration is to be filed in the same court. If the employee received the original "award" as a result of a settlement agreement approved by either a court or the department, then the employee is required to file the reconsideration complaint in a court of competent jurisdiction pursuant to *TCA* §50-6-225(a)(2)(A) - generally, in the circuit or chancery court in the county where the employee resides or the injury occurred.

Practical Effect

The amended bill requires all settlement approvals in which the employee does not have an attorney to be submitted to the department for approval. The amended bill specifically states a court does not have jurisdiction to approve such a settlement. If both the employer and the employee are represented by an attorney, then the settlement agreement may be presented to a court for approval. If both are represented by attorneys they may submit the settlement to the department for approval.

The amended bill also specifies what court has jurisdiction to hear a complaint filed by an employee in which the employee seeks reconsideration of the issue of permanent partial disability benefits.

Comments of Advisory Council Members

Tony Farmer - Voting member, Employee Representative

Mr. Farmer stated the clear intent of this bill (as amended) is to rely on the department to look into the facts and circumstances of every proposed settlement agreement. He stated the bill is an unfortunate reaction to the consistent failure of the courts to follow their statutory duty when approving settlement agreements. Mr. Farmer suggested it is impossible to compel a judge to follow the law and this bill gives an alternative for unrepresented workers.

AMENDED SB 3730 by Haynes / *HB 3358 by Fincher, continued

Comments of Advisory Council Members, cont.

Tony Farmer - Voting member, Employee Representative, cont.

He stated the proposed amendment addresses concerns raised by representatives of the Tennessee Defense Lawyers Association, the Tennessee Association for Justice and the Tennessee Bar Association regarding the original bill's prohibition of approvals based on an affidavit of the employee rather than personal appearance. He suggested the procedure established by the amendment addresses the concerns regarding the inconvenience to the professional athlete and over the road drivers that personal court appearance would cause.

Bruce Fox - Nonvoting member, TAJ Representative

Mr. Fox explained there are defense attorneys from Davidson County who contact employees who reside in East Tennessee and obtain the affidavit of the employee and have the settlement agreement approved by a Davidson County court. He suggested this procedure denies the Court the opportunity to discuss with the employee their rights under the workers' compensation law. He stated this permits the defense attorney to pick the jurisdiction that will have authority over any request for reconsideration of permanent partial disability benefits and provides all other post-judgment issues must come before the Davidson County court and, in his opinion, this is wrong.

Kitty Boyte - Nonvoting member, TDLA Representative

Ms. Boyte stated there may be some abuse of the current system but the amendment goes too far in addressing the abuse.

Gregg Ramos - Nonvoting member, TBA Representative

Mr. Ramos expressed concern that the proposal is an unprecedented encroachment of the trial court's authority to approve proposed settlement agreements. He suggested if there are problems with judges not following the law, the Court of the Judiciary is the appropriate venue. He stated, in his opinion, the courts do a good job protecting employees and there are other ways to address the issue than suggested by the proposed amendment. Mr. Ramos urged the rejection of the proposed amendment.

Bob Pitts - Voting member, Employer Representative

Mr. Pitts noted his concern is a system that is fair to all the parties.

AMENDED SB 3730 by Haynes / *HB 3358 by Fincher, continued

RECOMMENDATION of Advisory Council Voting Members

The voting members unanimously **recommend passage of the bill, as amended**.

***SB 3162 by Johnson / HB 3948 by Matheny**

Caption: Title 50, Chapter 6, Part 2 relative to the payment of workers' compensation medical payments and the provision of workers' compensation preferred provider organization services.

Present Law

A comprehensive medical fee schedule (MFS) has been in effect in Tennessee since 2005. Pursuant to *TCA* §50-6-204(i)(4)(A) an employer, trust or pool, or insurer is permitted to negotiate medical fees lower than the MFS. *TCA* §50-6-204(i)(4)(B) defines a "contracting agent" as any person in direct privity of contract with a medical provider to reimburse the provider for medical services to injured workers less than the MFS.

TCA §50-6-204(i)(4)(C) and (D) apply as of January 1, 2008 to any contracts entered into or renewed on/after that date. Every contracting agent that sells, leases, assigns, transfers, or conveys its list of contracted health care providers and their contracted reimbursement rates shall:

- disclose in a specific section of the contract whether the list of contracted providers can be sold/leased, etc. to other payors, including workers' compensation insurers or self-insured employers (4)(C);
- disclose whether these payors may pay the provider's contracted rate, if less than the MFS (4)(C)
- allow providers to decline to participate in networks solely to serve workers' compensation payors that are sold/leased, etc (4)(C)
- maintain a web page, updated at least twice a year, that contains a complete list of customers to whom the network has been sold/leased, etc. (4)(C)
- maintain a toll-free telephone number the provider may use to obtain payor summary information and a list of lessees of the network (4)(C)
- disclose on the explanation of benefits (EOB) or explanation of review (EOR) the identity of the network that has a written agreement with the provider that permits the payor to pay a preferred rate for services (4)(D)(i);
- reply to a written request from a provider who has received a claim payment from a payor within 30 business dates of the receipt of the request provided the request includes a statement explaining why the payment is not at the correct contracted rate for the services provided (4)(D)(ii).

***SB 3162 by Johnson / HB 3948 by Matheny, continued.**

Present Law, cont.

TCA §50-6-204(i)(4)(D)(ii) provides that a workers' compensation payor is deemed to have demonstrated it is entitled to pay a contracted rate if it identifies the contracting agent who has contracted with the medical provider to pay the reimbursement at the contracted rate.

Proposed Change

SB 3162 / HB- - - deletes *TCA* §50-6-204(i)(4)(B), (C) and (D). It creates a new section in Title 50, Chapter 6, Part 2 to be known as the "Rental and Assignment of PPO Network Rights". The new section includes the language of the current *TCA* §50-6-204(i)(4)(B) - definition of "contracting" agent and adds a definition of "workers' compensation payor". That definition is: an employer, workers' compensation trust, workers' compensation pool or insurer responsible pursuant to *TCA* §50-6-405 for paying a medical provider for the delivery of workers' compensation related health care services.

The bill also clarifies the references to "provider" in the current statute by adding the modifying word "medical" and clarifies references to "payor" by adding the modifying words "workers' compensation". The bill includes the current language of *TCA* §50-6-204(i)(4)(C).

The primary change introduced by the bill is a revision of *TCA* §50-6-204(i)(4)(D)(i) that pertains to what is required to be included on the EOB/EOR and how a medical provider can request clarification. The bill provides each EOB/EOR transmitted to the medical provider shall include:

- employer's name
- injured worker's name
- name of the workers' compensation payor and the name of the third party administrator (TPA) if one is used - the telephone number of the payor if a TPA is not used; otherwise the telephone number of the TPA
- name a telephone number of the entity that analyzes the medical provider's bill for the purpose of assuring the bill complies with the medical fee schedule (MFS)
- name and telephone number of the contracting agent that has the written contract with the medical provider by which the contracting agent or third party is entitled to access and pay rates other than the MFS rates
- name and telephone number of the entity that analyzes the medical provider's bill for the purpose of reducing the billed amount below the MFS pursuant to a preferred provider organization network contract, unless the entity is the contracting agency

***SB 3162 by Johnson / HB 3948 by Matheny, continued.**

Proposed Change, cont.

- amount billed by the medical provider
- amount permitted by the MFS and
- amount of payment.

The bill also permits a medical provider to submit in writing - to a workers' compensation payor - an EOP or EOR that does not comply with the items required to be listed and the entity that originally generated the EOB/EOR shall issue an new one that complies with the law within 20 calendar days of the submission of the noncompliant EOB/EOR. The bill retains the current language of *TCA* §50-6-204(i)(4)(d)(ii).

Practical Effect

The bill creates a new section in Title 50, Chapter 6, Section to address PPO/Silent PPO issues. The primary change is the vastly expanded information that is required to be included in an EOB/EOR.

Comments of Advisory Council Members

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

Dr. Murrell believes transparency is good but is concerned the bill permits the medical provider to decline to participate in the discounted rates only upon the initial signing or a contract or upon renewal of a contract and this can be a very long period of time. He suggested it would be better to notify the medical provider about the sale of the contracted rates to a third party and permit the medical provider thirty days to opt out of the contracted rate or to permit continued payment at the fee schedule amount. He also suggested the website should be updated more often than twice a year as the contracted rate could be sold several times during this period.

Dan Pohlgeers - Nonvoting member, Health Care Provider Representative

He stated it is beneficial that the bill implies that those entities doing bill review are now required to provide information on how the providers can contact them. Mr. Pohlgeers noted, however, while a medical provider may want to contract with a specific company there is concern about the contracted rates being available to others who were not in privy to the original contract. He suggested the bill should permit a health care provider who has

***SB 3162 by Johnson / HB 3948 by Matheny continued.**

Comments of Advisory Council Members, cont.

Dan Pohlgeers - Nonvoting member, Health Care Provider Representative, cont.

entered into a contract that permits the health care provider to opt out of any assignment, the provider has the option to enforce the opt out provision against any entity to whom it has been assigned.

Keith Graves, D.C. - Nonvoting member, Health Care Provider Representative

Dr. Graves suggested a provision be added to the bill that requires notification to the health care provider each time the contract is assigned to a third party and a notification as to the discounted rate of reimbursement that will be made to the provider.

RECOMMENDATION of Advisory Council Voting Members

The voting members unanimously **recommend passage** of the bill with the expressed request that the interested parties consider the comments of the nonvoting members.

AMENDED *SB 2977 by Berke / HB 3299 by McCormick

Caption: Title 50 and Title 56, relative to association captive insurance companies.

Present Law

Part 7 of Title 50, Chapter 6 addresses INTERLOCAL AGREEMENTS BY ELECTRIC COOPERATIVES AND MUNICIPAL UTILITIES. *TCA* §50-6-705 states the part is to be liberally construed to permit electric cooperatives and municipal utilities to enter into agreements to pool their resources to provide for satisfaction of obligations under the workers' compensation law as if electric cooperatives were governmental entities or public agencies. This part was enacted in 1995. *TCA* §56-6-702(3) defines "interlocal agreement" as an agreement authorized by title 12, chapter 9 "or by this part, or by both". *TCA* §12-9-101, *et seq*. is titled the "Interlocal Cooperation Act", enacted in 1967. Its purpose is to permit local governmental units to cooperate with other localities to provide services and facilities that will accord best with the needs and development of local communities.

Title 56, Chapter 13 is the "Tennessee Captive Insurance Act" and it was enacted in 1978. *TCA* §56-13-101states the purpose of the chapter is to establish procedures for the organization and regulation of the operations of captive insurance companies in Tennessee. Under the provisions of this chapter, an association captive insurance company may make workers' compensation insurance.

Proposed Amendment (amendment makes the bill)

Section 1 of amended SB 2977/ HB 3299 adds language to *TCA* §50-6-702 to permit an interlocal arrangement administered by an association captive insurance company to provide for the insuring or self-insuring of obligations and liabilities arising under the federal Longshoremen's and Harbor Workers' Compensation Act as long as the company has obtained necessary approvals from the appropriate federal agencies.

Section 2 of the bill adds a new subsection to *TCA* §56-13-121 to permit an association captive insurance company to hold any interest in qualified headquarters property [defined as including the real property and building in which the principal office of the association captive insurance company is located and includes improved and unimproved real property of the association captive insurance company located within 1500 feet of its principal office] provided the net book value is not in excess of 2.5 million and the company maintains an accumulated surplus of at least 50% of the net book value of the headquarters property.

AMENDED *SB 2977 by Berke / HB 3299 by McCormick, continued.

Practical Effect

The amended bill will permit an electric cooperative and municipal utility interlocal agreement that is administered by an association captive insurance company to insure/self-insure workers' compensation liabilities under federal Longshoremen's and Harbor Workers' Compensation Act. It also permits an association captive insurance company to hold interest in real property where its headquarters is located provided certain requirements are met.

Comments of Advisory Council Members

Mr. John Morris, Deputy Commissioner, Department of Commerce & Insurance

Commissioner Morris told the members the Department appreciated the opportunity to work with the sponsors of the legislation and the Department feels the amendment accomplishes the goals of Distributors Insurance Company and at the same time leaves in place protections the Department feels are important with respect to making sure they are a solvent company with the ability to pay their claims. He also stated the Department was contacted by the federal agency regarding the bill's effect on the agency's authority to approve who can write coverage. Therefore, language was added to the bill to address this issue.

RECOMMENDATION of Advisory Council Voting Members

The voting members voted unanimously to **recommend passage** of the bill, as amended.

***SB 3468 by Stewart / HB 3127 by Shepard**

Caption: Title 50, Chapter 6, relative to workers' compensation.

Present Law

TCA §50-6-124 relates to the utilization review system established by the Commissioner of Labor and Workforce Development. Subsection (e) provides that any health care provider who is found by the commissioner to have rendered excessive or inappropriate services may be subject to:

(1) forfeiture of the right to payment for the services found to be excessive or inappropriate;

(2) a civil penalty not less than $100 and not more than $1,000; or

(3) a temporary or permanent suspension of the right to provide medical care services for workers' compensation claims if the provider has established a pattern of violations.

Proposed Change

While the language of SB 3127/ HB 3468 deletes *TCA* §50-6-124(e) in its entirety, the only provision that is changed is to increase the possible civil penalties to "not less than $200 nor more than $2000.

Practical Effect

The bill increases the civil penalties the commissioner can assess to a health care provider for rendering excessive or inappropriate services.

Comments of Advisory Council Members

Sue Ann Head - Ex Officio member - Designee for Department of Labor and Workforce Development

Ms. Head stated the department had not been contacted by anyone regarding the proposed legislation.

RECOMMENDATION of Advisory Council Voting Members

The voting members noted the bill appears to be a caption bill and, if it is not, the Advisory Council will be willing to consider the bill at a later time.

***SB 3605 by Ketron / HB3157 by Curtiss**

Caption: Title 50, Chapter 6, relative to workers' compensation.

Present Law

TCA §50-6-121 is the statute that creates the Advisory Council on Workers' Compensation. Subsection (e) authorizes the Advisory Council to retain staff and professional assistance, such as consultants and actuaries *subject to budgetary approval in the general appropriations act*.

Proposed Change

SB 3605/HB 3157 amends subsection (e) by maintaining the authorization to retain staff and professional assistance [*TCA* §50-6-121(e)(1)(A)]. It then adds new funding language in a new subdivision *TCA* §50-6-121(e)(1)(B). The change allocates a *sum sufficient* from the premium taxes collected pursuant to *TCA* §50-6-401(b) to provide for the administration of the Advisory Council.

Practical Effect

The bill allocates money from the premium taxes collected on workers' compensation insurance policies, a direct funding source, to provide for the administration of the Council.

Comments of Advisory Council Members

Bob Pitts - Voting member, Employer Representative

Mr. Pitts noted the current funding for the administration of the Advisory Council comes from the general appropriations budget. He also noted the collected premium taxes go to the general fund and there is authority in statute that the operation of the regulatory functions of the Insurance Division of the Department of Commerce and Insurance is funded from the premium tax. In addition, a portion of the premium taxes are designated for the Second Injury Fund. Mr. Pitts stated all the bill does is to make a policy statement that permits the excess of the premium taxes over the regulatory funding for the Division to be used for funding of the administrative costs of the Advisory Council through the general appropriations budget.

RECOMMENDATION of Advisory Council Voting Members

The voting members unanimously **defer to the will of the General Assembly** on this bill.

ANALYSIS, COMMENTS & RECOMMENDATIONS
Re: WORKERS' COMPENSATION LEGISLATION

[related to Public Chapter 1041/Construction Industry]

INTRODUCTION

The First Extraordinary Session of the General Assembly convened on January 12, 2010 and adjourned sine die on January 25, 2010. During that session, the legislature passed a bill that rolled back the language of *TCA* §50-6-113(f) to the language in effect before PC1041 became effective on December 31, 2009. The Governor signed the bill into law on January 22, 2010.

The Chair of the House Committee on Consumer and Employee Affairs referred the following bills to the Advisory Council for review, comment and recommendation. The following table lists the bills (by Senate numerical order), the sponsors, the caption and the general description.

TABLE OF BILLS RELATED TO CONSTRUCTION INDUSTRY

2383	Beavers	2420	Weaver	Removes requirement that certain sole proprietors and certain partnerships engaged in the construction industry carry workers' compensation coverage. **NOTE:** This bill was filed in late October, 2009 and is identical to SB2384/HB2428.
2384	Beavers	2428	Weaver	Removes requirement that certain sole proprietors and certain partnerships engaged in the construction industry carry workers' compensation coverage. **NOTE:** This bill was filed in mid-November, 2009 and is identical to SB2383/HB2420.
2554	Ketron	2583	Curtiss	Allows up to three officers of a corporation engaged in the construction industry to be exempt from workers' compensation provisions by filing written notice with the department of labor and workforce development. **NOTE:** This bill was filed in mid-January, 2010 during the extraordinary session.
2840	Stewart	2844	Matheny	Lengthens suspension of requirement that sole proprietors and partners maintain workers compensation insurance on themselves from March 28, 2011, until April 1, 2012.
2841	Stewart	2845	Matheny	Lengthens suspension of requirement that sole proprietors and partners maintain workers compensation insurance on themselves from March 28, 2011, until April 1, 2012.

2862	Black	2932	Pitts	Allows any sole proprietor or partner engaged in the construction industry, or a member of an LLC engaged in the construction industry, to elect to be exempt from the operation of this chapter, provided that no more than three members of an LLC may make such election.
3336	Herron	3525	Maddox	Makes permanent the temporary suspension imposed by HB7/SB1 of the 2010 Extraordinary Session of the requirement that independent contractors in the construction industry obtain workers compensation insurance.
3500	Beavers	3628	Weaver	Makes permanent the exemption that sole proprietors and partners engaged in the construction industry do not have to carry workers compensation insurance on themselves.
3591	Ketron	3163	Curtiss	Creates a procedure for sole proprietors, partners, officers of corporations, and members of limited liability companies engaged in the construction industry to file for an exemption from obtaining workers compensation insurance to cover themselves.
3603	Ketron	3162	Curtiss	Lengthens suspension of requirement that sole proprietors and partners maintain workers compensation insurance on themselves from March 28, 2011, until June 30, 2011.

Present Law re: Construction Industry Bills

The **"Present Law"** section of the analysis is the same for each bill that addresses amendments to TCA 50-6-113. Therefore, it will not be repeated for each bill. In addition, similar bills will be grouped together for the **"Proposed Change"** and **"Practical Effect"** sections of the analysis.

Present Law

Prior to December 31, 2009

TCA §50-6-113(f)(1) required 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. Sole proprietors and partners were not required to carry workers' compensation insurance on themselves. The law did not apply to a person building or repairing the person's own property for his own use and the statute exempted counties of a certain population. The statute also contained a definition of "a person engaged in the construction industry" that was a listing of types of services provided certain types of construction activities.

December 31, 2009 through January 21, 2010
...and beginning again at 12:01 a.m. on March 28, 2011.

In 2008, the General Assembly enacted Public Chapter 1041 that became effective on December 31, 2009. PC1041 required all persons engaged in the construction industry (defined as a person or entity assigned to the Contracting Group as designated by NCCI) to carry workers' compensation insurance. This included sole proprietors and partners unless these persons were doing work directly for the owner of a dwelling/structure on the owner's own property. The law also deleted the county exemptions.

January 22, 2010 until 12:01 a.m. on March 28, 2011

As of January 22, 2010, TCA 50-6-113(f) was returned to the pre-December 31, 2009 language.

Construction Industry Bills, continued.

NOTE: The Advisory Council members discussed the bills related to the construction industry in general and is providing its comments and recommendations in general terms rather than addressing each specific bill. However, following the comments and recommendations, an analysis of each bill ["Proposed Change" and "Practical Effect"] is presented.

Comments of Advisory Council Members re: Construction Industry Bills

The members of the Advisory Council discussed the general concepts included in the various construction industry bills rather than the details of each specific bill. Some specific concerns were voiced by various members and those concerns and/or statements are reported following the person's name.

The members noted that the concept of requiring 30% ownership interest in order to be exempt from the workers' compensation law that is included in several of the bills cannot be applied to the sole proprietor as, by definition, a sole proprietor form of business has only **one** owner.

Jerry Mayo - Nonvoting member, Insurance Companies Representative

Mr. Mayo expressed concern that any bill that is passed not affect an insurance company's ability to conduct a premium audit after the end of the term of the policy. He also stated the insurance industry has concerns regarding whether the courts will still consider a person entitled to receive workers' compensation benefits despite the person having signed an affidavit acknowledging no right to receive such benefits.

Mike Shinnick - Ex Officio member - Designee for Department of Commerce & Insurance

Mr. Shinnick stated that regarding any legislation to replace Public Chapter 1041, the Department would like to see a bright line on definitions to assist those conducting premium audits in determining whether the person is an owner, independent contractor, sole proprietor or an employee. [Mr. Mayo stated the insurance industry shares the Department's concerns.]

Sue Ann Head - Ex Officio member - Designee for Department of Labor and Workforce Development

Ms. Head expressed concern regarding any bill that requires a state entity to prepare a written document of exemption that is sent to the "exempt" person as a piece of paper can be duplicated, altered, and/or changed to defeat the purpose of the law. She suggested an

Construction Industry Bills, continued.

Comments of Advisory Council Members re: Construction Industry Bills, cont.

Sue Ann Head - Ex Officio member - Designee for Department of Labor and Workforce Development, cont.

electronic format for a current listing of exempt persons would be a better process than paper exemptions and it would provide the opportunity for an up to date list that anyone could access to determine if an exemption is valid or whether it had been revoked.

RECOMMENDATION of Advisory Council Members (Voting and Nonvoting)

Note: The Advisory Council recognizes the General Assembly may move forward with one bill that addresses the various issues related to the construction industry and, if the standing committees so desire, the Advisory Council is willing to review any additional legislation on the subject or assist in any way it can.

The members of the Advisory Council expressed their concern that none of the bills presently under consideration contain specific directives sufficient to avoid judicial interpretation that a person who has a "certificate of exemption" can still be determined to be an employee and covered by the Tennessee workers' compensation law. The members noted a greater potential for abuse exists as the business entities who may obtain exemptions is extended beyond corporations and LLCs.

Because of the complexity of all the issues involved, the voting members (and nonvoting members) of the Advisory Council recommend any bill that is enacted include the following concepts:

- an effective date that is as soon as possible in order to provide clear guidance for the construction industry;
- as broad coverage as practical - that as many people in the construction industry be covered for workers' compensation as possible and that exemptions be limited;
- all entities in the construction industry that have employees be required to provide workers' compensation coverage for those employees;
- the issuance of a "Certificate of Exemption" be conditioned upon the due diligence of the regulatory entity conduct an examination, investigation and review of the documents submitted with the exemption request to validate the documents before issuing the certificate rather than a blanket approval of the exemption upon receipt of the request;

Construction Industry Bills, continued.

RECOMMENDATION of Advisory Council Members (Voting and Nonvoting), cont.

- inclusion of specific bright line definitions of business entities and other pertinent construction industry terms to provide as much clarity as possible in order to assist regulators, the insurance industry and/or the construction industry in following the law;
- require a sole proprietor in the construction industry to own 100% of the business (rather than 30% of the business);
- require the persons requesting an exemption to obtain a FEIN and to register to pay unemployment compensation;
- restrict the number (or percentage) ownership interest of a person (other than a sole proprietor) claiming an exemption;
- clarify that persons who obtain a "certificate of exemption" may not necessarily be free from liability for workers' compensation; and
- clarify the requirement regarding the number of business entities that are permitted to be on a "job site" at a given point in time in residential versus commercial.

NOTE: An analysis of each of the bills related to the construction industry is contained on the following pages.

SB 2383 (Beavers) / HB 2420 (Weaver)
SB 2384 (Beavers) / HB 2427 (Weaver)
SB 3500 (Beavers) / HB 3628 (Weaver)
SB 3336 (Herron) / HB 3525 (Maddox)

Proposed Change

The first two bills were filed prior to the enactment of Public Chapter 1; therefore, will probably not be used as the captions are not broad enough to accomplish the apparent intent of the sponsors.

SB 3500/HB3628 and SB3336/HB3525 were both filed after passage of PC 1. Both bills delete the section of PC1 that re-establishes the requirement for sole practitioners and partners in the construction field to cover themselves with work comp insurance. The only difference in the two bills is how they amend Section 3 - the enactment clause. Both retain current law (i.e. Section 1 of the public chapter) as permanent.

Practical Effect of SB2383/HB2420 and SB2384/HB2427

These bills appear to have been rendered moot by the passage of Public Chapter 1 (2010 Extraordinary Session).

Practical Effect of SB 3500/HB3628 and SB3336/HB3525

These two bills were filed after passage of PC 1. They will permanently return the law to pre-December 31, 2009 requirements.

SB 2840 (Stewart) / HB 2844 (Matheny)
SB 2841 (Stewart) / HB 2845 (Matheny)
****Note: The first two bills are identical.**
SB 3603 (Ketron) / HB 3162 (Curtiss)

Proposed Change

The first two bills delete "March 28, 2011" in PC1 and replaces it with "April 1, 2012". SB3603/HB3162 replaces "March 28, 2011 with "June 30, 2011".

Practical Effect

The first two bills change the effective dates of PC1 by extending the exemption provided for sole proprietors/partners from the requirement to have workers' compensation coverage on themselves for an additional year and 3 days.

The third bill extends the exemption for an additional 94 days.

SB 2862 (Black) / HB 2931 (Pitts)

Proposed Change

The first three sections of the bill amend PC1. As drafted, the bill will keep the current language of 50-6-113(f)(1)(B) in the law. This section states that sole proprietors and partners are not required to carry workers' compensation coverage on themselves.

This bill permits any sole proprietor or partner or (up to three) members of a limited liability company engaged in the construction industry to "elect to be exempt from the operation of" the workers' compensation law. The department is to devise a form for the "election to be exempt" and is to devise a uniform affidavit to be signed and submitted annually by the person(s) who elect to be exempt.

The bill requires the exempt person(s) to provide a copy of the exemption form and affidavit to each contractor for each individual contract under which the exempt member intends to work prior to commencing the work. The bill provides that the person(s) who files a "notice of election of exemption" is not eligible for workers' compensation coverage under Title 50, Chapter 6 and the person(s) forgoes the right to sue to establish or reestablish workers' compensation coverage during the time the election is in effect. If the person(s) wishes to revoke the exemption, he/she must file a notice with the department and the notice must be filed 30 days before any accident/injury sustained by the person(s).

The bill also increases the **first** penalty for failure of an individual in the construction industry to obtain workers' compensation coverage from 1½ times to 3 times the annual average premium avoided. The bill does not alter the second penalty. The bill also requires the department to notify the state board of licensing contractors if the employer fails to obtain coverage as ordered by the department a second or subsequent time and, if the employer is licensed, the board is required to revoke the employer's contractor's license.

Practical Effect

First, the bill states sole proprietors and partners are not required to carry workers' compensation coverage on themselves; yet, then provides a way for those persons (plus up to 3 members of a LLC) to exempt themselves from the workers' compensation law.

SB 2862 (Black) / HB 2931 (Pitts), continued.

Practical Effect, cont.

The bill increases the first monetary penalty for failure of an employer in the construction industry to maintain workers' compensation coverage but does not address the second penalty.

Informational Note:

TCA §50-6-412(f)(4) needs to be changed to reflect the addition of the "construction industry" penalty. The bill states the amount of time a contractor's license may be revoked is for a time to be determined by the "department". The word "department" in Title 50, Chapter 6 references the Department of Labor/WFD, not the Department of Commerce & Insurance.

SB 2554 (Ketron) / HB 2583 (Curtiss)

Proposed Change

The bill contains new definitions applicable to persons subject to *TCA* §50-6-113:

- employee (will include an independent contractor working in construction industry)
- corporate officer (includes LLC member who has at least 10% ownership)
- partner (two or more persons as co-owners of a business with proportional sharing of profits and losses; must participate fully in management of partnership and be personally liable for its debts
- sole proprietor (natural person who owns a form of business in which the person owns all business assets and is solely liable for all debts of the business

The bill amends the section of the law that permits a corporate officer to elect to be exempt from the workers' compensation law (*TCA* §50-6-104) to provide:

- notice of election to be exempt must contain fraud warning (violator guilty of Class D felony and must be personally signed by each person who wishes to claim exemption
- no more than 3 officers of corporation (or a group of affiliated corporations) involved in the construction industry may elect to be exempt and they must be shareholders of at least 10% of the stock of the corporation and listed as an officer of the corporation with the Secretary of State

The bill also requires the notice of election to be exempt filed by a corporate officer to:

- list name of officer, FEIN, social security number, list of all registered licenses
- be accompanied by copy of licenses, registration number of corporation and copy of stock certificate showing ownership interest
- identify each corporation that employs the person electing exemption
- certify any employees of the corporation whose officer elects exemption are covered by workers' compensation
- provide the officer electing exemption is not entitled to benefits under the workers' compensation law

The bill sets a fee of $50 to be paid to the Department of Labor/WFD when the notice of election is filed with the department and the department is required to issue a "Certificate of Election" which is to be valid (on its face) for a 2 year period. The certificate must list name of corporation listed in the request for exemption and a copy of the certificate of election must be sent to each workers' compensation carrier identified in the request for exemption.

SB 2554 (Ketron) / HB 2583 (Curtiss), continued.

Practical Effect

The bill sets out a more detailed set of definitions applicable to the construction industry and establishes a more stringent set of rules to permit corporate officers of construction industry corporations to elect to be exempt.

SB 3591 (Ketron) / HB 3163 (Curtiss)

Proposed Change

The first three sections of the bill amend PC1. As drafted, the bill will keep the current language of *TCA* §50-6-113(f)(1)(B) in the law until July 1, 2010. This section states that sole proprietors and partners are not required to carry workers' compensation coverage on themselves.

The bill amends *TCA* §50-6-113(f)(1) in its entirety. The new provisions require any person or entity engaged in the construction industry to carry workers' compensation insurance on any employee, regardless of the number of employees, as well as any subcontractor not otherwise covered by a work comp policy. The bill requires sole proprietors, partners, officers of corporations and members of limited liability companies to carry workers' compensation on themselves **except**

- sole proprietors, partners, officers of corporations and members of LLCs engaged in the construction industry as "contractors" defined in *TCA* §62-6-102 may exempt themselves from coverage **provided**:
  - each owns at least 30% of such contractor
  - only serves in a supervisory role while attending the work site without engaging in any sub-classifications for the building construction categories promulgated in Rules by the Tennessee board for licensing contractors
- sole proprietors, partners, officers of corporations and members of limited liability companies engaged in the construction industry as "residential contractors" as defined in *TCA* §62-6-102 or as "small commercial" as defined in Rules by the board for licensing contractors may exempt themselves **provided**:
  - each owns at least 30% of such contractor
  - only serves in a supervisory role while attending the work site without engaging in any sub-classifications for the building construction categories promulgated in Rules by the Tennessee board for licensing contractors

The bill requires a request for election to be exempt be filed with the department and requires specific information be provided in the request. A filing fee of $50 is assessed; the department issues a "certificate of election to be exempt" that is effective for 2 years.

In addition, the bill provides such person(s) electing (requesting??) exemption is not permitted to recover compensation under Title 50, Chapter 6 for themselves from the property owner or any other contractor. The bill also provides the requirement for all persons (unless exempt under the law) in

SB 3591 (Ketron) / HB 3163 (Curtiss), continued.

Proposed Change, cont.

the construction industry to purchase work comp coverage does not apply to a person building a structure, performing maintenance, repairs or additions on the person's own property for their own use and for which the person receives no remuneration.

The bill also states there can be no more than 3 independent contractors - with no employees - who have exempted themselves from the law on any one project.

Lastly, the bill amends *TCA* §62-6-102(7) by making it clear - for purposes of the Tennessee workers' compensation law - that a person building, repairing, maintaining on the person's own property is not to be considered a "residential contractor".

Practical Effect

The bill rewrites *TCA* §50-6-113(f).