

Tennessee Advisory Council on Workers' Compensation

<http://treasury.tn.gov/claims/wcadvisory.html>



Annual Report for
July 1, 2015 - June 30, 2016

State of Tennessee
Treasury Department
State Capitol
Nashville, Tennessee 37243-0225

David H. Lillard, Jr., State Treasurer, Chair
Larry Scroggs, Administrator

**STATE OF TENNESSEE
ADVISORY COUNCIL ON WORKERS' COMPENSATION
ANNUAL REPORT
JULY 1, 2015 - JUNE 30, 2016**

Pursuant to *Tennessee Code Annotated*, Section 50-6-121 (e), the Advisory Council on Workers' Compensation hereby submits its annual report for July 1, 2015 through June 30, 2016, including statistical reports and Tennessee workers' compensation data.

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**STATUTORY DUTIES AND RESPONSIBILITIES
OF THE TENNESSEE ADVISORY COUNCIL
ON WORKERS' COMPENSATION**

The Advisory Council on Workers' Compensation (the "Advisory Council" or "Council") was initially created by the General Assembly in 1992. The Workers' Compensation Reform Act of 1996 terminated the then existing Council and created a new Advisory Council on Workers' Compensation. Subsequent amendments, including those in the Reform Acts of 2004 and 2013 (Chapter Numbers 282 and 289 of the Public Acts of 2013), are recorded at *Tennessee Code Annotated* ("T.C.A."), Section 50-6-121, which outlines the authority of the Council, its specific responsibilities and its general duties. The administration of the Council was transferred from the Tennessee Department of Labor and Workforce Development to the Tennessee Department of Treasury pursuant to Chapter Number 1087 of the Public Acts of 2010, and the Council's existence was extended to June 30, 2016 pursuant to Chapter Number 622 of the Public Acts of 2012. Chapter Number 608 of the Public Acts of 2016 extended the Council's existence to June 30, 2020. The Council is authorized to:

- Make recommendations to the Governor, the General Assembly, the Senate Commerce and Labor Committee, the House Consumer and Human Resources Committee, the Administrator of the Bureau of Workers' Compensation and the Commissioner of Commerce and Insurance relating to the promulgation or adoption of legislation or rules;
- Make recommendations to the Administrator of the Bureau of Workers' Compensation and the Commissioner of Commerce and Insurance regarding the method and form of statistical data collection; and
- Monitor the performance of the workers' compensation system in the implementation of legislative directives and develop evaluations, statistical reports and other information from which the General Assembly may evaluate the impact of legislative changes to workers' compensation law.

Further responsibilities of the Advisory Council are provided in T.C.A., Titles 50 and 56. These provisions, among other things, direct the Council to provide the Commissioner of Commerce and Insurance with a recommendation regarding advisory prospective loss cost filings made by the National Council on Compensation Insurance, Inc. ("NCCI"), the authorized Tennessee rating bureau.

ADVISORY COUNCIL MEMBERS AND TERMS

The current Advisory Council is composed of seven voting members, ten non-voting members and four ex-officio members. The State Treasurer is the Chair and a voting member. Three voting members represent employers, and three voting members represent employees. The non-voting members represent local government, insurance companies, medical organizations, hospital organizations, chiropractors, physical and occupational therapists and attorneys, all in Tennessee. The Chair may vote only on matters related to the administration of the Council or its research; the Chair is not permitted to vote on any matter that constitutes the making of a policy recommendation to the Governor or to the General Assembly.

Appointments to the Council are made by the Governor, Speaker of the Senate and Speaker of the House pursuant to T.C.A. § 50-6-121 (a)(1)(C). They respectively appoint one employer and one employee voting member each, and the Governor appoints the additional ten non-voting Council members. The Governor may choose to appoint from lists of suggested nominees provided by interested organizations as outlined in T.C.A. § 50-6-121(a)(1)(E)(i-ii).

Effective July 1, 2015, Governor Bill Haslam appointed Ms. Pam Smith as the new Tennessee Hospital Association representative, succeeding Ms. Paula Claytore, whose term expired June 30, 2015. The Governor also appointed Jason Denton as a new attorney representative, effective July 1, 2015, and reappointed Jerry Mayo, insurance representative, and Lynn Lawyer, attorney representative.

The terms of voting members Kerry Dove, Bruce Fox and Gary Selvy were due to expire on June 30, 2016. While their colleagues anticipate some or all of them may be reappointed, they are most grateful for the service and expertise they have rendered to the Advisory Council during their current terms.

A chart outlining the members of the Advisory Council on Workers' Compensation as of June 30, 2015 is on the following page:

MEMBERS OF THE ADVISORY COUNCIL

NAME	MEMBER TYPE	REPRESENTING
David H. Lillard, Jr. State Treasurer	Chairman Administrative Voting Member	State Treasurer Ex-Officio Member
Kerry Dove	Voting Member	Employers
Bruce D. Fox	Voting Member	Employees
John M. Garrett	Voting Member	Employees
Bob Pitts	Voting Member	Employers
Gary Selvy	Voting Member	Employers
Paul Shaffer	Voting Member	Employees
John D. Burleson	Non-Voting	Local Governments
Jerry Mayo	Non-Voting	Insurance Companies
Samuel E. Murrell, III, M.D.	Non-Voting Member	Health Care Providers: TN Medical Association
Pam Smith	Non-Voting Member	Health Care Providers: TN Hospital Association
Keith B. Graves, D.C.	Non-Voting Member	Health Care Providers: Licensed TN Chiropractor
John Harris	Non-Voting Member	Health Care Providers: Licensed TN Physical Therapist
Sandra Fletchall	Non-Voting Member	Health Care Providers: Licensed TN Occupational
Jason Denton	Non-Voting Member	Attorney: TN Association for Justice
Lynn Vo Lawyer	Non-Voting Member	Attorney: TN Defense Lawyers
A. Gregory Ramos	Non-Voting Member	Attorney: TN Bar Association
Senator Jack Johnson, Chairman	Ex-Officio Non-Voting	Senate Commerce and Labor Committee
Representative Jimmy Eldridge, Chairman	Ex-Officio Non-Voting	House Consumer and Human Resources Committee
Abbie Hudgens, Administrator Troy Haley, Designee	Ex-Officio Non-Voting	TN Workers' Compensation Bureau
Commissioner Julie Mix-McPeak Designee, Mike R. Shinnick	Ex-Officio Non-Voting	TN Department of Commerce and Insurance

TERMS OF THE NON-EX-OFFICIO MEMBERS	
Voting	Term of Position
Kerry Dove	July 1, 2012 - June 30, 2016
Bruce D. Fox	March 1, 2015 - June 30, 2016
John M. Garrett	February 27, 2015 - June 30, 2018
Bob Pitts	July 1, 2014 - June 30, 2018
Gary Selvy	July 1, 2012 - June 30, 2016
Paul Shaffer	August 5, 2014 - June 30, 2018
Non-Voting	Term of Position
John D. Burleson	July 1, 2013 - June 30, 2017
Pam Smith	July 1, 2015 - June 30, 2019
Sandra Fletchall	December 9, 2013 - June 30, 2017
Keith B. Graves	July 1, 2013 - June 30, 2017
John Harris	October 30, 2013 - June 30, 2017
Lynn Vo Lawyer	July 1, 2015 - June 30, 2019
Jerry Mayo	July 1, 2015 - June 30, 2019
Samuel E. Murrell, III, M.D.	July 1, 2013 - June 30, 2017
A. Gregory Ramos	July 1, 2013 - June 30, 2017
Jason Denton	July 1, 2015 - June 30, 2019

ACTIVITIES OF THE ADVISORY COUNCIL

The Advisory Council is required by statute to meet at least two times per year. During the July 1, 2015 through June 30, 2016 Council year, the Advisory Council met on six occasions. Approved meeting minutes may be viewed at the Advisory Council's website <http://treasury.tn.gov/claims/wcadvisory.html> under the "Meetings" tab. The agenda and video of each meeting are also available at the same location. Meetings were held August 27, 2015, October 15, 2015, February 18, 2016, February 22, 2016, February 29, 2016 and March 21, 2016.

Comment [CA1]: Can this be made a hyperlink?

Comment [CA2]: Can this be made a hyperlink?

Summary of Meetings

Comment [CA3]: The font and spacing in this section differ from the rest of the document. Can this section be made consistent?

The six Advisory Council meetings between July 1, 2015 and June 30, 2016 were devoted to receiving reports from consultants, reviewing proposed legislation and procuring information from documentation and presentations. The primary sources of pertinent information were citizens, legislators, other state officials, and representatives of business and professional entities essential to the fair, efficient and effective administration of Tennessee's workers' compensation system. A brief meeting synopsis describes the Advisory Council's activity.

Meeting on August 27, 2015

Council member **Mike Shinnick**, Workers' Compensation Manager of the Department of Commerce and Insurance (DCI), presented An Overview of Tennessee Workers' Compensation Market Conditions and Environment. The Council also considered a letter from DCI Commissioner **Julie Mix McPeak** stating her intent to increase the assigned risk plan loss cost multiplier from 1.58 to 1.66 effective March 1, 2016.

The Council made the presentations¹ part of the record and approved a motion to submit a positive recommendation supporting the Commissioner's proposed action.

Comment [CA4]: I am unable to place this comment in the footnote, but it would be great if each time we refer to the website, it could be shown as a hyperlink since this document will be transmitted only in electronic form.

Meeting on October 15, 2015

David Wilstermann presented a statistical analysis of Tennessee workers' compensation data for 2014. He noted the data reflected about 8,000 cases but only 46 had injury dates post-Reform. Thus, the post-Reform data is insufficient to draw conclusions about trends.

State relations representative **Amy Quinn** and actuary **Ann Marie Smith** of the *National Council of Compensation Insurance* ("NCCI") addressed the Voluntary Loss Cost Filing proposed to be effective March 1, 2016. The overall loss cost change proposed is -0.9%, based on a loss adjustment expense ratio (LAE) of 19%. The projected -2.7% impact expected to result from a closed formulary is not included. Decreases in claim frequency are outpacing severity, resulting in favorable loss ratio trends.

Mary Jean King, representing *By the Numbers Actuarial Consulting, Inc.* ("BYNAC") also presented relative to the proposed Voluntary Loss Cost Filing. BYNAC recommended a 19.8% (LAE) which differed slightly from NCCI's 19% LAE but agreed the NCCI number was acceptable.

¹ Reports and correspondence received at the 8/27/15 meeting are posted on the Advisory Council's website at <http://www.treasury.tn.gov/claims/wcadvisory.html>

Chris Burkhalter, representing DCI actuary *Bickerstaff, Whatley, Ryan & Burkhalter Consulting Actuaries* (“BWRB”), spoke concerning the proposed Voluntary Loss Cost Filing. He noted a remarkable stability in the Tennessee workers’ compensation market and an economically driven three year drop of 18%. BWRB calculated an LAE of 18.5% and resulting -0.4% loss cost change but agreed the NCCI recommendation was reasonable.

The Council made all presentations² part of the record and upon discussion, approved a motion to recommend to DCI Commissioner McPeak that the LAE be set at 19.5% with appropriate recalculations for a loss cost change in the range of -1.2%.

Note: On October 22, 2015, Chairman Lillard sent a letter to Commissioner McPeak informing her of the Advisory Council’s recommendation.³

Meeting on February 18, 2016

Proposed legislation was reviewed and presentations were made by bill sponsors, state officials and attorneys and representatives of industry groups.⁴

The Advisory Council recommended as follows:

1. HB1559/SB2563 (McCormick - Norris) This Administration bill revises various provisions of the Workers’ Compensation Law, mainly involving settlement procedures. **[Council unanimously recommended passage.** As amended by SA 2, SB2563 became Pub. Ch. 816 on April 26, 2016]
2. HB1720/SB1758 (White M - Green) [Bill rolled to 2/22/16 meeting – amendment in process]
3. HB1795/SB2318 (Mitchell-Kyle) This bill recreated the special joint committee on workers’ compensation issues, composed of eight members each of the House and Senate, to monitor the Workers’ Compensation Reform Act of 2013 and subsequent reforms and initiatives. **[Council considered the bill to be within the exclusive purview of the General Assembly and unanimously voted to report bill out without recommendation.** No action was taken on the House Bill and the Senate Bill was assigned to the General Subcommittee of the Government Operations Committee on March 16, 2016]
4. HB1869/SB1706 (Farmer-Gardenhire) [Bill rolled to 2/22/16 meeting – amendments in process]
5. HB2038/SB1880 (Eldridge-Johnson) [Caption bill to be placed on calendar when ready]
6. HB2194/SB2580 (Coley-Norris) [Bill rolled to 2/22/16 meeting – amendment in process]
7. HB2404/SB2482 (Travis-Massey) [Bill rolled to 2/22/16 – amendment in process]
8. HB2416/SB2582 (Lynn-Norris) [Bill rolled to 2/22/16]

² All referenced reports, correspondence and documentation received at the 10/15/15 meeting are posted on the Advisory Council’s website at <http://www.treasury.tn.gov/claims/wcadvisory.html>

³ A copy of Chairman Lillard’s letter dated 10/22/15 to Commissioner McPeak is posted on the Advisory Council website at <http://www.treasury.tn.gov/claims/wcadvisory.html>

⁴ A detailed discussion of proposed legislation, including presentations by sponsors, attorneys and consultants, is incorporated into the official minutes of the meetings of the Advisory Council and posted at its website at <http://www.treasury.tn.gov/claims/wcadvisory.html>

Meeting on February 22, 2016

Proposed legislation was reviewed and presentations were made by bill sponsors, state officials and attorneys and representatives of industry groups.

The Advisory Council recommended as follows:

1. HB1720/SB1758 (White M – Green) SA 1 rewrote this bill authorizing the Workers' Compensation Bureau (WCB) to investigate complaints alleging certain disclosure and payment requirements related to rental and assignment of PPO network rights. Alleged violations by those licensed by the Department of Commerce and Insurance (DCI) will be directed to DCI along with WCB investigatory materials for appropriate enforcement action, including penalties and license revocation. The WCB is authorized to investigate alleged violations by those not licensed by DCI, and to collect civil penalties set by WCB rules. **[Council unanimously recommended passage.** As amended, SB1758 became Pub. Ch. 826 on April 26, 2016.]
2. HB1869/SB1706 (Farmer – Gardenhire) Merged with HB2416/SB2582 (Lynn-Norris) SA 1 to SB2582 rewrote this bill which decreases the time period for notice required of an employee after an accident from 30 to 15 days as well as for injury from gradual or cumulative events or trauma when an employee reasonably knows the work injury has resulted in permanent physical impairment. The bill also provides for attorneys' fees and reasonable costs against an employer who fails to furnish appropriate medical care under a settlement or judgment or wrongfully denies a claim if at a subsequent expedited hearing a workers' compensation judge finds benefits are owed. **[Council unanimously recommended passage.** As amended, SB 2582 became Pub. Ch. 1056 on May 5, 2016.]
3. HB2194/SB2580 (Coley – Norris). The proposed bill would allow a court to apportion fault to an employer who covered an employee under workers' compensation when the employee sues a third-party. It would reduce the employer's subrogation recovery to the extent of the employer's allocated fault. **[Council unanimously voted to report bill out with a negative recommendation.** No formal action was taken on the bill during the remainder of the Legislative session.]
4. HB2404/SB2482 (Travis – Massey) Bill withdrawn.

Comment [CA5]: Would be good to use acronyms consistently. DCI or DC&I.

Meeting on February 29, 2016

Proposed legislation was reviewed and presentations were made by bill sponsors, state officials and attorneys and representatives of industry groups.

The Advisory Council recommended as follows:

1. HB2038/SB1880 (Eldridge – Johnson) SA 1 to SB1880 rewrote the bill which requires WCB certification of case managers who coordinate medical care services provided to employees claiming benefits. The WCB administrator shall establish minimum standards for professional practice of case managers and a procedure for obtaining certification. The bill authorizes the administrator to enforce the standards by assessing civil penalties. **[Council unanimously recommended passage.** As amended, SB1880 became Pub. Ch. 803 on April 26, 2016.]

Meeting on March 21, 2016

The primary agenda item was a presentation by a NCCI representative and actuary of the Voluntary Loss Cost and Assigned Risk Rate Law-Only Filing proposed to be effective August 28, 2016.

Ms. Ann Marie Smith, representing NCCI, stated the proposed filing estimated the impact of the recent Tennessee rule implementing a drug formulary and medical treatment guidelines. Specifically, NCCI estimates the drug formulary will result in a decrease of 2.7% in overall system costs. The implementation of medical treatment guidelines is expected to produce some additional savings but is not reflected in this estimate.

Ms. Mary Jean King, representing the Council's actuary, BYNAC, said the proposed filing had been reviewed by her firm and found to be reasonable based on actuarial standards of practice.

Mr. Chris Burkhalter of BWRB, which serves as actuary for DCI, stated his firm had no objections to the proposed filing, having found after review no defect in the data or the calculations, and having concluded the overall approach to be reasonable and within actuarial standards of practice.

The Council made all presentations part of the record, and upon discussion, unanimously approved a motion to notify DCI Commissioner McPeak that the Council concurred with the proposed filing.⁵

Note: On March 31, 2016, Chairman Lillard sent a letter to Commissioner McPeak informing her of the Advisory Council's concurrence with the proposed filing.⁶

⁵ The referenced filing, reports, documents and correspondence submitted at the 3/21/16 meeting by presenters for NCCI, BYNAC and BWRB are posted on the Advisory Council's website at <http://www.treasury.tn.gov/claims/wcadvisory.html>

⁶ A copy of Chairman Lillard's 3/31/16 letter to Commissioner McPeak is posted on the Advisory Council's website.

TENNESSEE CASE LAW UPDATE

Throughout the year, the Advisory Council followed the Tennessee Supreme Court, reviewing its decisions and suggestions regarding the need for specific changes in the law.

An annual case law update of the 2015 calendar year from the Tennessee Supreme Court, including select cases from the Tennessee Supreme Court Workers' Compensation Panel, was submitted by the Advisory Council to the General Assembly in January of 2016.

Appeals of trial court decisions in cases involving workers' compensation are referred directly to the Supreme Court's Special Workers' Compensation Appeals Panel ("Panel") for hearings. The Panel gives considerable deference to a trial court's decision with respect to credibility of witnesses since the lower court has the opportunity to observe them testify. The Panel reports its findings of fact and conclusions of law and such judgments automatically become the judgment of the full Tennessee Supreme Court 30 days thereafter, barring the grant of a motion for review. Tennessee Supreme Court Rule 51 and T.C.A. § 50-6-225(a)(1).

In a 2015 decision, the Tennessee Supreme Court ("Court") adopted and affirmed a Memorandum Opinion of the Special Workers' Compensation Appeals Panel, making it the judgment of the Supreme Court that a workers' compensation employee failed to carry the burden of proof where there were conflicts in medical testimony based on timing of diagnoses. A brief synopsis and link to the full case follows:

***William Watters, Jr. v. Nissan North America, Inc., et al.,
No. M2014-00539-SC-R3-WC – Filed March 24, 2015***⁷

The employee alleged he had sustained bilateral thoracic outlet syndrome, bilateral shoulder injuries and a herniated disc in his neck resulting from his work and that he was permanently and totally disabled. The employer denied the neck injury was work-related and denied the employee was totally disabled. The trial court found his neck injury was not compensable and awarded 80% permanent partial disability for the other injuries. On appeal the employee contended the evidence preponderated against the trial court's finding relative to the neck injury, and the employer contended the award was excessive. The appeal was referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law pursuant to Supreme Court Rule 51. The Special Panel affirmed the judgment of the trial court. The Supreme Court accepted and approved its action, making the Memorandum Opinion the judgment of the Supreme Court.

The employee was forty-three years old when the trial took place on August 30, 2010. His job involved assembling engine heads and attaching them to engine blocks. In late 2006 the employee noticed unusual fatigue in his arms and shoulders as he worked. He felt a sharp pain in his right arm on January 11, 2007, and reported the incident to his supervisor. A long series of medical encounters began at that point. The employee first saw Dr. Blake Garside, an orthopedic surgeon. Dr. Garside treated him conservatively and later referred him for evaluation to Dr. Robert Clendenin, a physical medicine and rehabilitation specialist. In March 2007, Dr. Clendenin ordered an MRI and performed an EMG, with normal results. The employee was examined in April 2007 by Dr. Richard Berkman, a neurosurgeon. Dr. Berkman considered his symptoms to be "classic" for thoracic

⁷ To see the full opinion, go to http://www.tncourts.gov/sites/default/files/wattersnissan.corr_.opnjo_.pdf

outlet syndrome and found no cervical lesion in his neck at that time. The employee continued to work but experienced a painful pinching sensation in his shoulders that increased until he could not continue. His last day of work was April 11, 2007.

In May 2007 the employee was referred to Dr. Thomas Naslund, a vascular surgeon, who diagnosed bilateral thoracic outlet syndrome. Dr. Naslund surgically removed a portion of the left first rib in June 2007. The procedure only partially relieved the employee's symptoms and Dr. Naslund recommended against a similar procedure on the right side.

The employee returned to Dr. Berkman in September 2007, who ordered another MRI. This time the results indicated a herniated disc at the C6-7 level. A discectomy and fusion was performed by Dr. Richard Davis, a neurosurgeon, in January 2008. A year later in January 2009 it was determined the fusion of the two vertebrae was not complete and a second surgery was performed in March 2009. The employee was referred to another physical medicine and rehabilitation specialist, Dr. Jeffrey Hazelwood in October 2009.

The employee also returned to Dr. Garside in December 2009 for further evaluation of his shoulder symptoms. Dr. Garside diagnosed bilateral impingement syndrome and performed an arthroscopic decompression and distal clavicle resection in February 2010.

The pivotal issue concerned objective medical evidence that the employee's neck injury discovered in September 2007 was not present in March and April 2007. Dr. Clendenin, who had seen the employee in March and April 2007, and Dr. Berkman, who had also seen employee in April 2007, testified there were no symptoms of a C6-7 disc rupture in that timeframe.

Dr. Robert Landsberg, an orthopedic surgeon, performed an independent evaluation at the request of the employee's attorney in September 2012. Dr. Landsberg concluded the disc injury "must have started" in March 2007 based on the employee's statement, but indicated he did not know what a cervical MRI taken in May, June or July of 2007 would have shown.

Dr. David Gaw, also an orthopedic surgeon, made two medical record reviews at the request of the employee's attorney. At first he opined all of the employee's shoulder, arm, thoracic and neck problems were work related, but later changed his opinion based on the different results in the March and September 2007 MRIs.

The various doctors had differing opinions about the employee's degree of impairment but the trial court found the employee had sustained an eighty percent permanent partial disability to the body as a whole and that the neck injury was not compensable.

On appeal the Special Panel concluded it was undisputed the employee did not have a cervical injury on March 16, 2007, the date of the MRI ordered by Dr. Clendenin. The Court acknowledged the various doctors agreed the employee's several medical conditions had overlapping symptoms that made definitive diagnosis difficult.

"We agree that all of these considerations would permit an inference that some kind of nexus existed between his job and the neck injury. However, causation is ultimately a matter to be determined by examining the expert medical proof." (Citing *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 676 (Tenn. 1991).

The Court observed that Dr. Berkman had examined the employee on April 13, 2007, two days after the employee's last day at work. Dr. Berkman repeatedly stated the employee did not have a disc injury on that date. The Court noted the trial court had chosen to accept the opinions of the two doctors who had examined the employee nearest to the time he alleged his injury occurred. The Court concluded the evidence did not preponderate against the trial court's finding that the employee did not sustain a compensable neck injury.

***Kighwaunda M. Yardley v. Hospital Housekeeping Systems LLC,
No. M2014-01723-SC—Filed August 21, 2015***⁸

Rule 23 Certified Question of Law from the United States District Court for the Middle District of Tennessee, No. 3:13-cv-00622, Aleta A. Trauger, Judge

In a case of first impression the Tennessee Supreme Court accepted a question of law certified by the U. S. District Court (M.D TN) to determine whether a job applicant has a cause of action under the Tennessee Workers' Compensation Act against a prospective employer for failure to hire if the prospective employer failed to hire the job applicant because the applicant had filed or is likely to file, a workers' compensation claim against a previous employer, and if such a cause of action exists, what standard should apply. The Supreme Court held there is no cause of action for failure to hire under the Tennessee Workers' Compensation Act.

Kighwaunda M. Yardley began working as a housekeeping aide at the University Medical Center in Lebanon, Tennessee in 1998. In 2010 Ms. Yardley was hurt on the job and began receiving workers' compensation benefits. She received medical treatment between June 2010 and September 2012. As of July 1, 2012, she was performing light duty work, expecting to return to her regular position when released to full duty.

On January 1, 2012, the hospital contracted with Hospital Housekeeping Systems for housekeeping services beginning July 1, 2012. The new company hired most of the current housekeeping employees, but did not interview Ms. Yardley because she was still on light duty. Upon her release from medical treatment, Ms. Yardley tried to return to work and was referred to the new company. In August 2012 Ms. Yardley was told the new company would not hire anyone receiving workers' compensation benefits. Since she had been out on a work related injury before the new contract became effective, there was a concern that "bringing her on board would seem to be a workers' comp claim waiting to happen." When she was not hired, Ms. Yardley sued Hospital Housekeeping Systems in federal court.

The following certified question of law was accepted by the Tennessee Supreme Court:

"If a prospective employer refuses to hire a job applicant because that applicant had filed, or is likely to file, a workers' compensation claim incurred while working for a previous employer, can that applicant maintain a cause of action under the Workers' Compensation Act against the prospective employer for failure to hire, and if such claim exists, should courts apply the motivating factor standard of causation, as they do in retaliatory discharge claims?"

Supreme Court Rule 23 allows the Court to answer questions of Tennessee law certified by any federal court "when there are questions of law in this state which will be determinative of the cause and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme

⁸ To see the full opinion, go to [http://www.tncourts.gov/sites/default/files/yardleyk.opn .pdf](http://www.tncourts.gov/sites/default/files/yardleyk.opn.pdf)

Court of Tennessee.”

The Supreme Court noted initially there is no statutory or common law cause of action for retaliatory failure to hire and that Ms. Yardley was asking the Court to “create this cause of action.”

Relying on public policy grounds and retaliatory discharge cases from Tennessee and other jurisdictions, Ms. Yardley argued if employers can lawfully refuse to hire because job applicants have filed, or are likely to file, workers’ compensation claims, this will have a chilling effect on workers’ decisions to file claims and obtain their rightful remedies. It would also frustrate the purpose of the Second Injury Fund [see T.C.A. § 50-6-208 (2014)], established to encourage the hiring of workers who have had previous injuries. Amicus curiae Tennessee Employment Lawyers Association argued an employer’s failure to hire because the applicant asserted a claim for compensation against a previous employer would constitute a device relieving the employer of an obligation under the Workers’ Compensation Act. Such devices are prohibited by T.C.A. § 50-6-114 (2014).

The company and amicus curiae Tennessee Defense Lawyers Association opposed the creation of a cause of action for retaliatory failure to hire, arguing no employer-employee relationship existed between the company and Ms. Yardley, and that no exception should be made to Tennessee’s employment at will doctrine.

The Supreme Court traced the history of workers’ compensation laws and noted their necessary interaction with Tennessee’s employment laws. “Tennessee recognizes the employment-at-will doctrine as “the fundamental principle controlling the relationship between employers and employees,” citing *Mason v. Seaton*, 942 S.W.2d 470, 474 (Tenn. 1997), and stated that both job applicants and prospective employers may freely choose whether to enter into the employer-employee relationship.

The Court explained that one exception to the employment-at-will doctrine is that an at-will employee may not be fired for taking an action encouraged by public policy. Filing a workers’ compensation claim is an action encouraged by public policy and firing an employee for filing such a claim violates public policy. Enforcement of this public policy is afforded by the cause of action of retaliatory discharge.

The Court analyzed T.C.A. § 50-6-114 and its holding in *Clanton v. Cain-Sloan Co.*, 677 S.W.2d 441 (Tenn. 1984) where retaliatory discharge was considered a prohibited device, and concluded that since Ms. Yardley was not an employee of the company *Clanton* had no application and the company was not obligated to her under the Workers’ Compensation Act.

The Court distinguished retaliatory discharge cases from the situation where Ms. Yardley was not an employee of the company.

“Ms. Yardley was not an employee of the Company, and thus, there was never a relationship. This is an important distinction. The employer-employee relationship involves mutual acquiescence, and certain levels of trust and dependence are created on its formation. Both parties have rights and responsibilities that naturally flow from that relationship and which are not present before the relationship is formed. For this reason, failure to hire cannot be equated with termination of employment, as employees and job applicants are on different footing.” (At p.6)

In response to Ms. Yardley’s contention that if employers may legally refuse to hire because of applicants’ prior claims employees will be discouraged from filing, the Court said the alleged harm was too speculative to justify an exception to the employment-at-will doctrine. The Court also noted the intent of the legislature in establishing the Second Injury Fund was to encourage, not require, the hiring of persons

who had suffered prior work-related injuries.

Thus, the Supreme Court declined to create an exception to the employment –at-will doctrine, and held a job applicant does not have a cause of action under the Workers' Compensation Act against a prospective employer for failure to hire if the prospective employer refused to hire the applicant because the applicant had filed, or is likely to file, a workers' compensation claim against a previous employer.

The detailed 2015 Supreme Court report of workers' compensation decisions, complete with citations, may be viewed in its entirety at

<http://treasury.tn.gov/claims/wcac/SignedTNACWCSupCt2015AnnualWCReport.pdf>

TOSHA NEWS

The Bureau of Labor Statistics reported 124 work-related fatalities in Tennessee in 2014, compared to 95 in 2013, reflecting an increase of 22%. According to the Bureau's 2014 non-fatal occupational injury and illness statistics Tennessee's 3.2 incidence rate per 100 full time workers remains just below the national average. Tennessee is one of 26 states and the District of Columbia to experience a decrease in the private sector occupational injury and illness incidence rate from 3.3 in 2013 to 3.2 in 2014.⁹

⁹ To view the report prepared by the Tennessee Department of Labor and Workforce Development in cooperation with the U. S. Department of Labor, Bureau of Labor Statistics, see <http://www.tn.gov/workforce/article/workforce-occupational-injuries-illnesses-and-fatalities>

CONCLUSION

The Advisory Council on Workers' Compensation met on six (6) occasions from July 1, 2015 through June 30, 2016. This annual report provides a synopsis of the topics considered and appointments made during that time period. The Advisory Council appreciates the opportunity to be of service to the Governor, the General Assembly and Executive Departments, as well as the employers and employees of the great State of Tennessee.

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

David H. Lillard, Jr.
Treasurer, State of Tennessee
Chairman

Comment [CA6]: Treasurer's signature typically does not appear until after he reviews/approves the final draft.