

**Report of the Advisory Council on Workers' Compensation
To the Senate Commerce and Labor Committee**

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The Advisory Council on Workers' Compensation met on February 27, 2014 to review pending workers' compensation bills and, pursuant to T.C.A. §50-6-121(j) *"The advisory council on workers' compensation shall, within ten (10) business days of each meeting it conducts, provide a summary of the meeting and a report of all actions taken and all actions recommended to be taken to each member of the consumer and human resources committee of the house of representatives and commerce and labor committee of the senate."* This is the report of the February 27, 2014 Council meeting for your review and information.

Three workers' compensation bills were on the Council's February 27, 2014 agenda. They were:

SB1645- HB1440 (Leader Norris/Leader McCormick)

Presentation of the bill was made by Mr. Josh Baker, Administrative Attorney and Legislative Liaison, Division of Workers' Compensation, after which Mr. Tony Farmer (Employee Representative) asked Mr. Baker to expound on Section 7.

Mr. Baker explained that the proposed bill's Section 7 would revise T.C.A. §50-6-242. In the present law, if an employee is unable to return to work at 100% of their pre-injury employment, and they meet 3 of 4 criteria, they are entitled to extended benefits. The proposed revision would change the initial qualifying event to one of an employee who is unable to return to work and cannot find employment at 66 2/3rds% of their pre-injury wage. Additionally, the authorized treating physician has certified that the employee, due to their injury, could never go back to performing their pre-injury occupation. Lastly, Mr. Baker indicated that this section is rarely used now and would probably be rarely used under the revision as well.

Mr. Farmer inquired if the Division of Workers' Compensation had drafted this bill to which Mr. Baker replied in the affirmative. He further inquired as to the logic behind the 66 2/3% and whether it was based on any statistical foundation or any empirical foundation or rather arbitrarily chosen.

Mr. Baker indicated that there was not a statistical study that showed that someone who loses a third of their income is going to be affected, but logically, it has a large effect, so that number was chosen.

Mr. Farmer then asked whether there was an indication that the 66 2/3% somehow represents a portion of those persons injured so seriously that they only go back to a job that pays above or below that 66 2/3%. He inquired if it was based on any fact, to which Mr. Baker responded that he was not aware of any study that showed such a fact.

Mr. Farmer (Employee Representative) inquired as to whether this was a compromise or a bargained number between competing interests. He indicated that he was having a hard time understanding since "the concept of being unable to return to your former employment has been a foundation of the workers' compensation statute for decades and now, all of a sudden, it's not able to return to your former employment or to any employment where the wage is 2/3rds of what you were earning. I don't see any rational basis for that and I'm not hearing you provide any demonstration that there's any rational basis other than that's what somebody agreed upon."

Mr. Baker indicated that, to his knowledge, it was not a compromise number.

Mr. Farmer pointed out that, under the proposed bill, if an injured worker went back to work and was only able to work at a job that generated an income that was equal to 67% of what they earned before their injury, they would not be entitled to any of the additional benefits. He further indicated that this is a class of the most seriously injured Tennessee workers who are unable to return to work, who are not permanently and totally disabled, that is, unable to return to work at a wage equal to 66 2/3% of what they earned prior to their injury or more."

Mr. Baker agreed that he was correct on both counts.

Mr. Gregg Ramos (Attorney Representative) inquired of Mr. Baker as to what had brought this about. "The reason I'm asking is that you, yourself, mentioned a few minutes ago that there aren't a whole lot of situations that have come up where even 3 of the 4 factors that were applicable under the prior law were used. I'm just wondering what is it that has happened now or recently or in the recent past that has motivated the need for this initial threshold to be lowered from 100% of wages to 2/3 of wages. In other words, it used to be if the employee had not returned to his pre-injury job, making the same wages that he was making before. Now we're talking about if the employee hasn't returned to any work which pays him at least 2/3 of what he was making before this threshold kicks in – what is it that brought it about if it wasn't used very much under old law. That's my question."

Mr. Baker indicated that the Division of Workers' Compensation was attempting to address proper benefits for people with vocational disability but not a severe impairment rating.

Mr. Ramos asked how often the old system didn't adequately address that situation and Mr. Baker indicated that all that exists on that provision of the law (T.C.A. §50-6-242) is appellate court decisions where we can see on a limited basis how often it has been used.

Mr. Ramos continued, "I guess one of the frustrations I have, not only with workers' compensation legislation, but any legislation, is where you try to provide a solution to a problem that may not exist and that is what I'm concerned with here."

Mr. Baker indicated that it was a very small class of individuals being discussed.

Mr. Tony Farmer (Employee Representative) pointed out that the proposed 66 2/3% rather than 100% language does not limit the availability of extended benefits based on workers who have lost the ability to perform their former employment, but rather on arbitrary figures.

Mr. Baker explained that someone who is making 99% of their wages are very close to what they were making pre-injury, so that's not something that would look as inequitable.

Mr. Farmer: "As someone making 67%?"

Mr. Baker: "I see your point."

Mr. Bob Pitts (Employer Representative) stated that there is a group of people that fall under workers' compensation that were not addressed under the old system to the degree that many people thought it should be and, even with the new proposal, there are still concerns from some segments from business and some segments of the employee community. He explained that his frustration is that no one seems to be able to get their arms around this subject, be able to quantify it and be able to address it to where there's a reasonable general level of satisfaction. "I've been through the last four reforms and the last 3-4 weeks has been as frustrating as a major reform effort. The bill, as presented, has raised consternation in some segments of the business community who believe that, as worded, it opens the door too wide, lets too many people in, and they are scared to death that there are going to be an incredible amount of appeals to come out of the standard application of the law into this special exception provision. On the other side, the employee community is frustrated as they, too, believe that there's this" . . . small group that ought to be well compensated, all resulting in a standoff.

Mr. Pitts continued to explain the time delay in that he had requested a one week delay which turned into three due to a lack of voting quorum of the Council, he reminded all that the Council is advisory, and that "the legislature has been kind enough to allow us an opportunity to place our comments with them before they consider bills". He indicated that he would like to see some action. He continued by stating that he found it inconceivable that a group of intelligent people couldn't get their arms around and properly define this group, and reasonably deal with a proper benefit level. He included that the legislature should be made aware that it is the wish of the Advisory Council that this bill be reviewed before the next legislative session and again at the subsequent session. That this is, in fact, either a small number, which, if it is, probably means we need reconsideration of the benefit level. If it's a runaway, it needs to be reined in, but in either respect it needs to be addressed.

Mr. Bob Pitts (Employer Representative) indicated that there seemed to be satisfaction with all sections of the bill except section 7, therefore, he made a **motion for recommendation including section 7, with the proviso that the concerns expressed by the Council are specifically shared with the members of the legislature.** **Mr. Gary Selvy (Employer Representative)** seconded the motion, thanked Abbie Hudgens for her good work and commented that the bill's intention is good, that he agrees with a motion to move it into the legislative debate process. "I want to make sure that included in that is

comments regarding some of the concerns specific to section 7 in that it is problematic to, at least the small business community and I want to make sure that we are on record with that and hopefully we'll have an opportunity to debate that in committee."

Mr. Tony Farmer (Employee Representative): "I have been a member of the Advisory Council on the employee side for 16 years and this is the first time in 16 years when the employees were completely excluded from any discussions or negotiations or preparations for this legislation." Very specifically, a year ago, when the Governor's 2013 Reform Act was presented to this Advisory Council after extended discussions, the employee voting members, at my recommendation, voted in favor of the 2013 Reform act because it had been represented to me that this very issue would be worked on jointly by all interested parties so that this year a provision could be brought forth that would protect this very class of injured workers.

Mr. Farmer continued: "I do not recognize the validity of a process of developing legislation to protect injured workers that excludes the injured workers' representatives and I will tell you, no [employee representative] voting member of this Council has been included in those discussions or negotiations since June of 2013 . . . none . . . I have worked with three Governors' administrations, I have worked as a member of this Council as an employee representative on every major workers' compensation reform that has taken place and employee representatives have participated in each of those reforms until this year and it is a serious concern of employee representatives who, in fact, represent injured workers." We hear a term frequently in the workers' compensation forums referring to the parties of interest or those people most affected by workers' compensation changes, and it is troublesome to me that the preparation and negotiation of legislation this important would not include representatives of the injured worker. I hope the legislature expresses and at least acknowledges the concerns that the employee representatives have that they have been excluded from the process of negotiation of legislation as important as this. It, in fact, impacts the most seriously injured workers who are unable to return to work and in this process they did not have a representative."

Mr. Kerry Dove (Employer Representative) took the opportunity to thank Abbie Hudgens and her staff for their hard work. "We know this has been a tough road and we think that the bill is good in intent and we think you guys have done a good job, but we do think there are some problems with section 7. It's problematic for some of the folks that I represent, however, we are very appreciative for all of the work that you've done on this."

A unanimous vote resulted in the adoption of the motion to recommend the bill with extensive comment from all parties (above) regarding their concerns surrounding section 7.

SB2088- HB1786 with amendment (Pody/Beavers)

Representative Mark Pody explained that he wanted to accomplish two things with the bill. First, to codify language concerning the ombudsman so that any party will have assistance if they do not have an attorney representing them, and second, that the appointment of Workers' Compensation Appeals Judges, which now is listed as entirely by the Governor, be revised, upon the expiration of their first terms, to appointment, on a rotating basis, between the Speaker of the Senate, the Speaker of the House and the Administration/Governor from that point forward.

Mr. Bob Pitts (Employer Representative) clarified that the amendment was moving along with the bill. Mr. Pitts stated that he was reluctant to attempt to tell the General Assembly how Administrative Law Judge's should be appointed. However, he did state his belief that administrative judges operating within the Executive Branch are different from court system judges and the appointment process. The important issue in this reform effort is trying to have judges that conform to the system, who judge based on law and policy and rules that are established. He suggested that those appointment powers remain in the hands of the Governor. Administrative judges are different policy-wise than court judges and we need a fair and balanced court to hear cases under an administrative system. **Mr. Pitts (Employer Representative) moved to oppose** the bill unless that provision was removed since he believed that portion to be bad policy. The motion was **seconded by Mr. Kerry Dove (Employer Representative)**. The roll of the Council included three abstentions, so the bill left the Council **without recommendation, but with the comments of the members**. Mr. Pitts continued by stating that was how he believed public policy should be on administrative judges. He thanked Representative Pody for his courtesy and explained that, although there would be no recommendation, which was not harmful to the bill, the committee would see the comments.

SB2251- HB2105 with amendment (Massey/Haynes).

Mr. Bob Pitts (Employer Representative) moved that the bill be recommended. He indicated that it was his understanding that, as amended, the bill was acceptable to all parties. The issue of contention was not one involving workers' compensation, but, rather, where the dispute regarding the contract would be heard and the two choices provided were acceptable. **Seconded by Mr. Kerry Dove (Employer Representative).** A call of the Council resulted in **unanimous vote to recommend the bill for approval.**