

Report to the Senate Commerce & Labor Committee from the Advisory Council on Workers' Compensation

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

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The Advisory Council on Workers' Compensation met on February 28, 2013 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) 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 employee affairs committee of the house of representatives and commerce, labor and agriculture committee of the senate.* This is the report of that Council meeting for your review and information.

Workers' Compensation Senate Bills in numerical order
SB0200 – HB0194 & SB1275 – HB1159 Joint Bills re WC Reform Amendment
SB0432 – HB0864
SB0509 – HB1149
SB0519 – HB0549
SB0616 – HB0327
SB1174 – HB0626
SB1185 – HB0439
SB1364 – HB1102

SB0200/HB0194 & SB1275/HB1159 (Norris/McCormick) Joint Bills Amendment (Drafting Code 003177)

Presentation of the bill was made by Ms. Abbie Hudgens, Administrator of the Tennessee Department of Labor and Workforce Development (“TDLWFD”) (Council Member TDLWFD Representative).

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Afterward, questions regarding the bill were posed to Ms. Hudgens by Mr. Farmer (Council Member Employee Representative). Ms. Hudgens and Mr. Farmer agreed that cost was a primary area of concern and that the proposed bill was crafted to lower costs to employers. They also agreed that 67% of each dollar spent in Tennessee for workers' compensation is in medical cost. Mr. Farmer inquired as to why no part of the bill dealt with medical costs, to which Ms. Hudgens replied that medical fee issues would be dealt with through rules. Although the bill does not itself reduce medical cost, Ms. Hudgens believed it ultimately would, through treatment guidelines, improved utilization review, the newly created ombudsman and mediation programs.

Mr. Farmer inquired as to how the government could oversee the quality of care to injured workers and further indicated that he did not see how a treatment guidelines and rulemaking that must be implemented by 2016 reduces the cost of workers' compensation to employers this year or next year. Ms. Hudgens agreed it would take a while for cost savings to be recognized.

Mr. Farmer next inquired as to why safety is not mentioned in the bill. Ms. Hudgens informed that the TDLWFD looks to TOSHA for safety issues. He asked if there was any provision to reward employers for worker safety. She responded that the usual incentive is to lower their costs. Hudgens and Farmer agreed that there are reports that show that the average benefit an injured worker receives has fallen consistently since 2004. Mr. Farmer indicated they have fallen on average 41% since 2004 and that the major focus of this bill is to reduce injured worker benefits further.

Ms. Hudgens indicated there is a tradeoff between the PPD [permanent partial disability] and the factors that are in the bill. The average benefit now is 3.2, and this bill will create somewhat less. Graduation rates from high school are increasing and would lower the amounts over time.

Mr. Farmer noted that there appears to be a presumption that by lowering costs of workers' compensation in Tennessee there would be more jobs created, to which Ms. Hudgens replied that is our hope. Mr. Farmer asked which study showed that and Ms. Hudgens indicated this was based on anecdotal information from employers who were taken at their word.

Mr. Farmer inquired if there had been any evaluation of the impact that lowering benefits and lowering the number of employees eligible for workers' compensation, would have on Tennessee's safety net systems, TennCare for instance.

Ms. Hudgens indicated that no study had been done but the hope was that by taking some of the friction out of the system, the process would be shortened, medical care improved and more employees will get back to work. Mr. Farmer inquired if that was based on anecdotal information also, to which Ms. Hudgens replied that it was based on theory.

Mr. Pitts (Council Member Employer Representative) indicated that the business community issue which is the subject of this bill is to be competitive with other states in this part of the country. He made the point that the injured workers would be getting benefits more quickly, be able to take home more of their benefit checks, and be restored to sufficient health to return to work. He pointed out that the

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incentive for legitimate businesses in this state is premium costs. Severity of injury and frequency both play an important role in what the premium is for an individual company and those figures transport directly to the bottom line. The business community has historically taken the position that all they are looking for is parity with other states in our region. He continued to explain that there is more than anecdotal evidence since every industrial recruitment guide has within the top five items, the cost of workers' compensation in the state as either an incentive or a detriment to whether a company considers Tennessee. He stated that he and the chamber know of companies that have chosen to build plants in other states purely because of Tennessee's workers compensation costs.

Dr. Graves (Council Member Health Care Representative) noted that in 2004, chiropractic was included as "for back injury" as one of the choice of four on the panel for back injuries and asked whether chiropractic would have a similar role in the bill or the guidelines. Dr. Graves also noted the bill contains no specific reference to any specific kind of doctor or who is going to be included on the panels. Ms. Hudgens replied that representation from all the various disciplines that tend to treat workers' compensation cases is needed. Ms. Hudgens further stated that chiropractic has always been represented on the panels, but the drafters were attempting to have the panels described as simply as possible.

Dr. Graves asked what the difference in the Medical Payment Committee and the Medical Advisory Committee would be and what representation would be on the committees. Ms. Hudgens replied that currently, there is a Medical Cost Containment and Care Committee that evaluates with issues related to the fee schedule, but primarily the Committee reviews issues that are disputes between payors and providers of medical care. The Medical Payment Committee will deal with the latter issue. The Medical Advisory Committee will be the committee that will be involved in the development of treatment guidelines as the primary committee. Presently, the Cost Containment Committee has grown very large, and payors' issues are often not heard for a long time. The thought was that by dividing it as it is in the bill would provide for more effective and timely resolution of those issues.

Dr. Graves asked who would be allowed to determine impairment ratings and asked about the medical impairment registry

Ms. Hudgens explained that the MIRR [Medical Impairment Rating Registry] is a group of doctors who have undergone training on the appropriate use of the AMA [American Medical Association] disability guides and have been certified to be on the MIRR. Currently and in the future, if the attending physician gives an impairment rating and the employee goes to a different doctor and gets a different impairment rating and the two parties cannot agree, then they may go to the MIRR to select a doctor who will serve as the tie breaker. That role will continue under the new system.

Question from unnamed Council Member on the phone came in inquiring if Physical Therapists would be permitted to provide impairment ratings.

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Landon Lackey (Attorney for the Workers' Compensation Division and prior supervisor of the MIRR program) responded that Physical Therapists are not able to provide impairment rating and will not be in future in this administrative process, as it has been deemed in the past not to be admissible in court.

Dr. Murrell (Council Member Health Care Representative) asked whether it the intent to try to adopt a pre-existing guide to develop independent guides and wondered who would bear the cost of providing those guides to the treating physicians who would be expected to use them.

Ms. Hudgens stated that her office receives requests to use off-the shelf treatment guidelines, while others suggest there should be state-specific guidelines. Then are also questions about who would bear the cost. Ms. Hudgens indicated she had done research, but more information is needed before decisions are made.

Dr. Murrell asked about the composition of the Medical Advisory Committee and whether the Committee could become large and unwieldy.

Ms. Hudgens replied that there was flexibility to get the appropriate expertise on the Committee but they were cognizant of needing to keep matters moving forward. Dr. Murrell mentioned the clear and convincing evidence standard to challenge the treatment guidelines and asked about the appeal process. Dr. Murrell asked which party would be responsible for paying the \$250 appeal fee.

Ms. Hudgens stated that the fee will be paid by the employer or insurance company.

Ms. Fletchall (Council Member Health Care Representative strongly urge and advocate for the involvement of physical therapists knowledgeable in helpful areas of workers' compensation diagnosis and development of treatment guidelines and asked whether this had been considered. Ms. Hudgens stated it had been considered and that is a complex issue; thus, the effective date of 2016 to give sufficient time to consider all available information.

Mr. Dove (Council Member Employer Representative) asked for examples of how this bill will bring simplicity, clarity and uniformity to such a complex system.

Ms. Hudgens indicated the friction reduction, improved utilization review, medical treatment guidelines, the omnibus and mediation programs would simplify the process.

Mr. Fox (Council Member Attorney Representative) noted the section on PPD [permanent partial disability], and asked whether the factor for unemployment rate of 1.3 still only applies to four counties in Tennessee. Miss Hudgens indicated that the latest figures from employment security indicated that it would now affect 30 counties. Mr. Fox asked if the factors in the plan have removed exertion to which Ms. Hudgens responded that it had.

Mr. Fox gave the following example: if the worker is 39 years of age, graduated from high school, lives in Davidson County and has a catastrophic injury resulting in paralysis from the waist down, but can do sedentary work, that worker gets the impairment rating only.

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Ms. Hudgens replied in the negative, stating the worker gets the factor of 1.35 if not considered totally permanently disabled.

Mr. Fox asked whether there is factor that considers vocational disability in this formula.

Ms. Hudgens replied that while there is no per se vocational factor, it is possible it could be considered through the education and age factors.

Mr. Fox clarified his understanding that for someone who graduated from high school that is under 40 there's no vocational factor, and Ms. Hudgens agreed.

Mr. Farmer acknowledged that the current legislation proposed is the most significant change in the workers' compensation laws in the State of Tennessee since their adoption in 1919 and the most important changes considered by the Advisory Council since 1994 and made the following statement:

- 1 With the impact that these changes will have on all employees and employers as well as the dramatic demands that training, staffing, rulemaking, public education will have on the Division of Workers' Compensation, the Workers' Compensation Advisory Council recommends that an implementation date of July 1, 2014 be attached to this legislation in that it will more likely assure all affected individuals and entities will have a smoother transition to such a radically different system. I want to point out that each of these three parts as part of my motion would be a condition of the recommended position.
- 2 It has been the past practice of the Workers' Compensation Division to provide the Workers' Compensation Advisory Council with any proposed rules or rule revisions prior to initiating the statutory rulemaking process for consideration and comment by the Advisory Council, and the Workers' Compensation Advisory Council recommends that as a condition to this legislation that the current legislation include a provision providing for this practice and that it be made a part of the legislation itself.
- 3 The transition from a court based judicial system to an agency based judicial system under the proposed legislation, will require for the first time, the selection and hiring of a number of judges to preside over the courts and court clerks. It is the recommendation of the Advisory Council on Workers' Compensation that the Advisory Council on Workers' Compensation be included in the selection process to the extent that no appointment of a judge created under this legislation shall be made without review and comment by the Advisory Council on Workers' Compensation.

Mr. Farmer made a **motion** that the Advisory Council **recommend the legislation with these three recommendations thereto**. Mr. Pitts **seconded** the motion. Dr. Murrell asked for comments to be attached to the vote for the Legislative Committees. Roll was called resulting in a **unanimous vote to recommend the bill for passage with the three recommendations**.

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SB0432/HB0864 (Overbey/Lollar)

Attorney John Lyell presented the bill and explained that the bill as originally filed was a caption bill and that he has filed two amendments which replace the original bill. It deletes the original bill in its entirety and sets up a process that addresses temporary employees while they are working out of state. California, Ohio, Florida and one other state have a provision in their law that says if anybody is out there working even temporarily for one day, and gets injured, the matter is considered under the California workers' compensation law. This establishes a process that addresses temporary employees that are only working for up to 14 days in their location consecutively, or 25 days in a year. This is needed in part because California does not have a statute of limitations, so it cannot be determined how Tennessee should apply California law. The rates are set on Tennessee rates. The temporary employee does not usually live in the other state but rather works in the other state for only a day or two. The employee would be covered under workers comp, and the bill does not change that.

Mr. Farmer (Council Member Employee Representative) made a **motion that the Council recommend approval of this legislation.**

Second by Mr. Pitts (Council Member Employer Representative) to recommend the bill. Chairman Lillard called the roll, and the Council voted **unanimously in favor of recommending passage.**

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SB0509/HB1149 (Hensley/Pody)

The Council discussed the bill based on what it understood to be the summary and voted to recommend passage, but has since expressed a desire to reconsider its action and will be meeting March 7, 2013 to do so.

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SB0519/HB0549 (Burks/Curtiss)

Representative Curtiss presented the bill which would exempt individuals from coverage under workers' compensation insurance if they were conscientiously opposed to acceptance of the benefits and explained that it would be applicable to two religious sects in Tennessee that do not pay into social security if the members can provide membership at the applicable church. Representative Curtiss discussed a possible amendment that would limit to 5.

Mr. Farmer (Council Member Employee Representative) expressed concern that this type of exemption could be abused and result in a worker not being eligible for benefits.

Mr. Pitts (Council Member Employer Representative) explained that the Council has consistently voted against recommending this kind of legislation and encouraged him encourage Representative Curtiss to look at some thoughts that were raised in 2010 about this issue. Mr. Farmer moved **that the Council vote against recommendation** on this particular piece of legislation. **Seconded** by Mr. Lee (Council Member Employee Representative)

Chairman Lillard called for the vote which was **unanimous against recommendation of the bill.**

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SB0616/HB0327 (Yager/Curtiss)

Representative Curtiss presented the bill and explains that it seeks to provide that if someone has a heart attack or something on the job, it is not automatically a workers' comp claim, except in the case of a firefighter. Representative Curtiss explained his background as a fire chief and the danger associated with the job and further explained that there are a few occupations out there that this needs to remain in, but for others, it should be proven to be work-related and not automatic.

The Council members discussed whether, having recommended approval of the administration's bill, recommending approval of this bill would create confusion. Representative Curtiss stated that this bill would not be needed if the administration's bill resolves the issue.

Chairman Lillard stated with the Representative's approval and without objection **HB0327/SB0616 is rolled to the next meeting.**

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SB1174/HB0626 (Bowling/Evans)

Representative Joshua Evans presented the bill and explained that this is a clarification of the current firefighter definition that is in the code for workers' compensation purposes.

Council Administrator Ivanick explained that the bill itself redefines firefighters to include a junior member, a board or auxiliary member of the department, and there is an amendment that adds rescue squad and volunteer rescue squad. That language was originally left out of the bill.

Mr. Pitts (Council Member Employer Representative) asked for input from the Department of Labor and Workforce Development.

Ms. Hudgens (Council Member TDLWFD Representative) explained that the bill stems from an actual case involving a minor and that the issue appeared to be insurance-related.

Mr. Shinnick (Council Member Tennessee Department of Commerce & Insurance Representative) stated that currently, for volunteer firefighters, there is a charge of up to \$300/per individual per year, so the charge is very little on a payroll basis. The bill would bring into the premium calculations the classes of volunteer firefighters that are enumerated in the bill. This would bring into coverage some new job classifications that had not been covered before.

Mr. Pitts asked whether this would then make it mandatory then, and Mr. Shinnick replied in the affirmative. Mr. Pitts asked whether this is the sponsor's intention, and Representative Evans stated that it does not require them to be covered now, but if they were to be covered, if they chose to cover all their firefighters it would include these additional members under that definition.

Mr. Pitts asked whether the bill leaves it to the individual entities to decide whether or not as to whether they want coverage .

Representative Evans replied that individual fire departments make the choice now as to whether to cover their explorers, their board members or their auxiliary.

Mr. Pitts asked whether they understand that if they don't have the coverage, it isn't going to solve the problem on them having an accident, and Representative Evans replied in the affirmative. Mr. Shinnick asked Ms. Hudgens how her office differentiates between who is and is not covered.

Ms. Hudgens stated her office relies on the statutory definition, and this would change the existing definition.

Mr. Jerry Mayo (Council Member Insurance Representative) stated that the provision of making it optional is problematic from an insurance company and coverage standpoint. Mark Bowery (Volunteer Firemen's Insurance Services) spoke on behalf of the bill, stating that since the 80's, his organization has been insuring, junior members and auxiliary members in the same classification. Mr. Bowery described the bill as a housekeeping effort to address a situation where the insurance

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company determined that a junior firefighter was not a firefighter. Ms. Hudgens raised a concern that if the statute is changed to include these additional members, and there was a policy, and the department was allowed to exclude a board member in that policy, and there was an incident, and the statute said that the board member was, by definition, an employee, it could present a problem. The volunteer fire department could be in some jeopardy to be responsible for a claim where the statute includes the individual but the insurance policy does not.

Mr. Bowery explained that the enumerated individuals are already included and that this bill is intended to provide clarification. Ms. Hudgens stated that if the statute is changed, then all volunteer fire departments would be responsible for injuries as work comp injuries for their junior members, their board members and their auxiliary members. If a department chose not to purchase the insurance, the department would still have that liability.

Mr. Pitts expressed concern that the bill could cause some even more serious problems by mandating that everyone in the state who falls in one of those classes be subjected by State law to have workers comp coverage. Representative Evans explained his understanding that the bill reflects current practice but also stated that if the bill results in costs that local departments are not paying, that could be raised at a later Committee meeting. Representative Evans asked the Council to review the bill from the workers' comp standpoint of including these individuals in the definition and whether that would have a negative impact from the workers' comp standpoint.

Mr. Dove (Council Member Employer Representative) asked whether other consequences this could have with other organizations that use volunteer services had been considered. Mr. Dove expressed concern for setting a precedent providing an opportunity for further action. Ms. Hudgens replied that this was possible, but the bill as written only addresses firefighters, so the immediate result would only involve firefighters or volunteer firefighters and rescue squads.

Mr. Pitts moved to **recommend that the bill move out** with an assurance that staff will include in its report the concerns that have been raised and the potential implications. Mr. Lee (Council Member Employee Representative) **seconded** the motion.

Chairman Lillard called the roll. The Council voted unanimously to recommend the bill and asked the report reflect all of the comments **asserted during discussion**

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SB1185/HB0439 (Tracy/Marsh)

Deletes obsolete language regarding annual reports to be conducted between 2007 and 2010.

Mr. Dave Broemel (American Insurance Association) spoke on the bill and stated he had discussed the bill with Representative Marsh, who informed him it was a caption bill to be used in the event that the Governor's bill did not move.

Chairman Lillard suggested that the bill be **rolled to the next meeting**, which was **done without objection**.

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SB1364/HB1102 (Tate/Odom)

The first section of the bill authorizes psychologists to provide impairment ratings for mental injuries in workers' compensation cases.

The second section of the bill creates penalties including stop work orders and financial penalties which include recurring daily penalties if a stop work order is ignored.

Mr. Pitts (Council Member Employer Representative) **moved** that the Council **recommend against** this legislation for two reasons. First, the first part of the bill would allow someone to establish an impairment rating that is not a trained physician. The second part dealing with misclassification, the appropriate part is being handled in another bill that I believe is already passed the Senate. It is the bill that has been agreed to by the industry and recommended by the Tennessee Department of Labor and Workforce Development. Mr. Farmer (Council Member Employee Representative): **seconded** the motion.

Chairman Lillard called the roll, and the Council voted **unanimously to recommend against adoption of HB1102/SB1364.**