

Tennessee Advisory Council On Workers' Compensation

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Annual Report for
July 1, 2017 - June 30, 2018

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

Larry Scroggs, Administrator

**STATE OF TENNESSEE
ADVISORY COUNCIL ON WORKERS' COMPENSATION
ANNUAL REPORT
JULY 1, 2017 - JUNE 30, 2018**

Pursuant to *Tennessee Code Annotated*, Section 50-6-12l (e), the Advisory Council on Workers' Compensation hereby submits its annual report for July 1, 2017 through June 30, 2018, 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, 2017, Governor Bill Haslam re-appointed non-voting members Gregg Ramos, John Harris, Sandra Fletchall, Dr. Sam Murrell, and Dr. Keith Graves to new terms ending June 30, 2021. Governor Haslam also appointed Joy Baker as a non-voting member to a term ending June 30, 2021. Ms. Baker replaces John Burleson as a representative of local governments. Mr. Burleson's service is greatly appreciated. Jerry Mayo, a non-voting member representing insurance companies, resigned effective January 1, 2018, after faithfully serving as a Council member since 1996. His service is also greatly appreciated.

Two voting members, Bob Pitts (representing employers) and Paul Shaffer (representing employees), will complete their current terms on June 30, 2018. However both Mr. Pitts and Mr. Shaffer are being reappointed to new four-year terms ending June 30, 2022. Governor Haslam is reappointing Mr. Pitts. House Speaker Beth Harwell is reappointing Mr. Shaffer. Their dedicated service as voting members of the Council has been invaluable and is greatly appreciated.

A chart outlining the members of the Advisory Council on Workers' Compensation as of June 30, 2018 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
Brian Hunt	Voting Member	Employers
Bob Pitts	Voting Member	Employers
Paul Shaffer	Voting Member	Employees
Joy Baker	Non-Voting	Local Governments
Jerry Mayo (resigned 1/1/18)	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 Bureau of Workers' Compensation
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, 2016 - June 30, 2020
Bruce D. Fox	July 1, 2016 - June 30, 2020
John M. Garrett	February 27, 2015 - June 30, 2019
Bob Pitts	July 1, 2018 - June 30, 2022
Brian Hunt	October 26, 2016 - June 30, 2020
Paul Shaffer	July 1, 2018 - June 30, 2022
Non-Voting	Term of Position
Joy Baker	July 1, 2017 - June 30, 2021
Pam Smith	July 1, 2015 - June 30, 2019
Sandra Fletchall	July 1, 2017 - June 30, 2021
Keith B. Graves	July 1, 2017 - June 30, 2021
John Harris	July 1, 2017 - June 30, 2021
Lynn Vo Lawyer	July 1, 2015 - June 30, 2019
Jerry Mayo (resigned)	July 1, 2015 - June 30, 2019
Samuel E. Murrell, III, M.D.	July 1, 2017 - June 30, 2021
A. Gregory Ramos	July 1, 2017 - June 30, 2021
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, 2017 through June 30, 2018 Council year, the Advisory Council met on three occasions. Meetings were held September 6, 2017, October 11, 2017, and March 1, 2018. Approved meeting minutes may be viewed at the Advisory Council's website treasury.tn.gov/claims/wcadvisory.html under the "Meetings" tab. The agenda and video of each meeting are also available at the same location.

Summary of Meetings

The three Advisory Council meetings between July 1, 2017 and June 30, 2018 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 September 6, 2017

Chairman David Lillard called the meeting to order and welcomed new Council member, **Joy Baker**, Director of Risk Management for the City of Johnson City, Tennessee. Council member Baker will serve as a non-voting member and representative of local governments. She was appointed by **Governor Bill Haslam**.

The Chairman explained that several agenda items related to actuarial and analytical reports.

Council ex officio 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*. Mr. Shinnick provided members copies of his PowerPoint presentation, which may be viewed at <http://treasury.tn.gov/claims/wcac/Overview-Tennessee-Workers-Compensation-Market-Conditions-Environment.pdf>

David Wilstermann, analyst and consultant to the Advisory Council, presented a statistical analysis of workers' compensation data collected and compiled for calendar years 2009-2016 by the Tennessee Department of Labor and Workforce Development ("TDLWFD"). Mr. Wilstermann also provided members with copies of his power point presentation and full report. The power point may be viewed at <http://treasury.tn.gov/claims/wcac/Tennessee-Workers-Compensation-Data-2016.pdf> and the full report is at <http://treasury.tn.gov/claims/wcac/TN-Workers-Comp-Data-2009-2016.pdf>

Eddie Herrera, Director of Plan Administration for the National Council of Compensation Insurance ("NCCI") presented the *Workers' Compensation Residual Market Administration Plan Report*. Mr. Herrera's presentation was made available to members and may be viewed at treasury.tn.gov/claims/wcac/Tennessee-Workers-Compensation-Residual-Market-Administration.pdf

Ann Marie Smith, actuary of NCCI, presented, via telephone conference, an Overview of the *Voluntary Loss Cost and Assigned Risk Rate Filing* proposed to be effective March 1, 2018. **Amy Quinn** of NCCI, who

was present, assisted. Ms. Smith's overview was provided to members and may be viewed at treasury.tn.gov/claims/wcac/Voluntary-Loss-Cost-Assigned-Risk-Rate-Filing.pdf

Following the presentations, Council members discussed whether a workers' compensation "crisis" ever existed in Tennessee and whether the *2013 Workers' Compensation Reform Act* was necessary. Council member **Gregg Ramos** raised the issue and stated that based on the presentations, the workers' compensation insurance market had remained strong for several years dating back to 2012.

"Medical costs and indemnity were going down and stabilizing (under the 2004 Act). I agree certain fixes were necessary and had a positive impact, but contrary to objective evidence, we went overboard. Throwing out the old system created the biggest bureaucracy that Tennessee has now. The reforms were done on the backs of working men and women."

Council member **Bob Pitts** responded that in his experience over 25 or 30 years there had been "times of real trauma with workers' compensation." "Just about every year there have been adjustments made in the General Assembly that have had a positive impact, before and including the (2013 Reform Act), but to conclude that "just because insurance companies didn't lose money did not mean reforms were unnecessary." Mr. Pitts also said part of the effort behind the 2013 Reform Act was to bring Tennessee in line with the cost of workers' compensation in other southeastern states. "We were anti-competitive and it was killing us in economic recruitment."

The Chairman next recognized **Troy Haley** of the Bureau of Workers' Compensation ("BWC") for an explanation of a proposed new Statistical Data form (SD-2). Mr. Haley asked the Council members to review the proposed form and respond within two weeks with any suggestions, comments and concerns.

The Chairman thanked each presenter and invited the Council members to review all presentations and documents in preparation for making a formal recommendation to the Commissioner of the Department of Commerce & Insurance relative to the Voluntary Loss Cost Filing at the next scheduled meeting of the Advisory Council on October 11, 2017.

Meeting on October 11, 2017

Upon convening the meeting, the **Chair, Assistant Treasurer Christy Allen** informed the Council members that **Treasurer David Lillard** had a conflicting commitment and as his designee she would be chairing the meeting. The Chair noted that at the previous meeting on September 6, 2017, representatives of the National Council on Compensation Insurance (NCCI) presented an overview of the Voluntary Loss Cost and Assigned Risk Rate Filing proposed to be effective March 1, 2018. Documentation was made available to members present at the September 6, 2017 meeting, and was also distributed to members subsequent to the meeting.

The Chair called upon **Mary Jean King**, representing the Advisory Council's actuary, *By the Numbers Actuarial Consulting, Inc.* ("BYNAC"). Ms. King presented an actuarial review of the Tennessee Voluntary Loss Cost Filing by the National Council on Compensation Insurance ("NCCI"). BYNAC's power point presentation may be viewed at the Advisory Council's website at treasury.tn.gov/claims/wcac/bynac-presentation-tacwc.pdf. Ms. King indicated the NCCI proposed decrease of -12.6% for the Tennessee voluntary workers' compensation insurance market had been reasonably calculated in accordance with actuarial standards of practice, considering the two-year period relied upon by NCCI in its projected decrease. Ms. King stated that BYNAC reviewed paid as well as paid+ case development and experience for policy years 2012 and 2013 in addition to the 2014 and 2015 policy years underlying the filing in order to test the assumptions of NCCI in

selecting the data and development methods for its review. Ms. King said she preferred a longer experience period of four years. Using years 2012-2015, BYNAC's experience indication for the voluntary market loss cost level is -8.1%, compared to NCCI's -12.6%. BYNAC's actuarial report may be viewed at <http://treasury.tn.gov/claims/wcac/tacwc-bynac-review-3-1-18-ncci-filing-issued-10-2-17.pdf>

The Chair then recognized **Chris Burkhalter**, the actuary for the Department of Commerce and Insurance ("DC&I"). Mr. Burkhalter, representing *Bickerstaff, Whatley, Ryan & Burkhalter Consulting Actuaries* ("BWRB"), also presented an analysis of the NCCI voluntary market loss cost filing. After pointing out that there had been an actual 21% decrease in loss cost in Tennessee over a four-year period, the DC&I actuary stated he had no objection to the adoption of the loss cost filing as proposed. Mr. Burkhalter noted that BWRB had used a longer experience period of five years in arriving at its own overall indication of an -8.7% loss cost decrease. BWRB's full actuarial report may be viewed at http://treasury.tn.gov/claims/wcac/TN-NCCI-Rate-Analysis-2018_03_01-BWRB-Analysis.pdf

The Chair then recognized **Ms. Ann Marie Smith**, the *National Council on Compensation Insurance* ("NCCI") actuary, for comment and response to the actuaries' presentations relative to the Voluntary Loss Cost and Assigned Risk Rate Law-Only filing proposed to be effective March 1, 2018. The NCCI power point presentation may be viewed at the following link: <http://treasury.tn.gov/claims/wcac/ACWC-Hearing-3-1-18-filing.pdf>

Following discussion, Council member **Bob Pitts** moved that the Advisory Council formally notify DC&I **Commissioner Julie Mix-McPeak** that the NCCI loss cost filing proposed to be effective March 1, 2018 was viewed **favorably** by the Council and should be adopted. Council member **Bruce Fox** seconded the motion. The four voting members in attendance voted unanimously to approve the motion.

Note: On October 13, 2017, Chairman Lillard sent a letter to Commissioner McPeak informing her of the Advisory Council's concurrence with the proposed increase in the assigned risk plan loss cost multiplier (LCM).¹

Meeting on March 1, 2018

Upon convening the meeting, **Chairman David Lillard** noted the primary purpose was for the Advisory Council to fulfill its statutory duty to consider and make recommendations on proposed legislation introduced in the Second Session of the 110th General Assembly affecting the workers' compensation system. The Chairman indicated eight bills had been referred to the Council by the Senate Commerce and Labor Committee and the House Consumer and Human Resources Committee, and that the Council's recommendations would be reported to the respective committees in accordance with T.C.A. § 50-6-121(k).

The Chair called upon **Kathleen Murphy**, representing *Tennessee Professional Firefighters Association*, for a presentation on **HB1491/SB1798 (Reedy-Ketron)** which creates a rebuttable presumption that any of 10 specific types of a cancer diagnosed in a firefighter that causes a disabling health condition is a result of the firefighter's duties. During the presentation and ensuing discussion, Council member **Pitts** expressed reservations about creating a presumption that would apply to a particular class of individuals that could open the door to similar requests by other public servants who also perform under difficult and potentially hazardous conditions. Council member **Joy Baker** noted the presumption would be a departure from the causation standard established by the *Workers' Compensation Reform Act of 2013*, and she also questioned the fiscal impact of the proposal on local governments as well as the state workers'

¹ A copy of Chairman Lillard's 10/13/17 letter to Commissioner McPeak is posted on the Advisory Council's website.

compensation system. After discussion Council member **Fox**, seconded by Council member **Paul Shaffer**, moved the legislative proposal be given a favorable recommendation for passage. The motion failed 2-3. Council member **Pitts**, seconded by Council member **Kerry Dove**, that the proposal be given an **unfavorable recommendation**. The **motion was approved** on a 3-2 vote. (**Note:** The General Assembly deferred action on this bill until 2018)

The Chair recognized **Troy Haley**, legislative liaison for the BWC, for comments on **SB1615/HB1714 (Johnson-Lynn)**. BWC Administrator **Abbie Hudgens**, an *Ex Officio* member of the Council, was also present. The proposed legislation removes the requirement that every insurer providing workers' compensation insurance in Tennessee be required to maintain a claims office or contract with a claims adjuster located in the state. Both Mr. Haley and BWC Administrator Hudgens noted there was general consensus the bill would be helpful and was agreeable to all interested parties. On motion by Council member **Pitts**, seconded by Council member **Brian Hunt**, the bill was given a **favorable recommendation for passage** on a 5-0 vote. (**Note:** The legislation became Public Chapter 709)

The Chair recognized **Rep. Curtis Halford** on **HB2105/SB2142 (Halford-Gresham)**. The proposed legislation would allow farm and agricultural employers to accept the workers' compensation chapter by purchasing a workers' compensation insurance policy and would also allow the employers to withdraw acceptance at any time by canceling or not renewing the policy and providing notice to their employees. Following discussion, Council member **Pitts**, seconded by Council member **Fox**, moved that the bill be given a **favorable recommendation for passage**. The motion was approved 5-0. (**Note:** The legislation became Public Chapter 629)

With permission of the **Chair**, Council member **Fox** presented **SB2475/HB2304 (Roberts-Beck)**. The proposed legislation amends T. C. A. § 50-6-226 (d)(1)(B). Mr. Fox explained he had been working with the sponsors and other interested parties on the bill. The termination date on recovery of attorneys' fees and other costs would be removed when a judge finds at an expedited or a compensation hearing that certain workers' compensation benefits were in fact owed and denial was wrongful although an employer had timely filed a notice of denial of a claim. Council member **Fox's** presentation was based on an amendment with drafting code No. 013698. As discussion ensued it became apparent there was some disagreement whether the amendment addressed all pending issues. The Chair asked Council member **Fox, Bradley Jackson** of the *Tennessee Chamber of Commerce & Industry*, and other interested parties to attempt to resolve any differences during a recess. Upon reconvening, Council member **Fox** stated an oral agreement had been reached on an amendment (later reduced to writing in amendment with drafting code No. 014188), providing that "wrongful" means erroneous, incorrect, or otherwise inconsistent with the law or facts. The sunset provision would be extended two years, or until June 30, 2020. Council member **Pitts**, seconded by Council member **Fox**, that the legislation, as amended, be given a **favorable recommendation for passage**. On that basis the Council members **approved** the motion 5-0. (**Note:** The legislation became Public Chapter 757)

No sponsor or other presenter appeared to explain the scope of **SB2544/HB2333 (Tate-Cooper)**, a proposed bill aimed at preventing retaliatory discharge by an employer or another person for conduct related to filing a workers' compensation action. Upon motion by Council member **Pitts**, seconded by Council member **Dove**, that the proposal be given an **unfavorable recommendation**, the motion was approved 3-2. (**Note:** The General Assembly deferred action on this bill.)

A similar measure relative to retaliatory discharge, **SB2543/HB2411 (Tate-Thompson)**, prescribed that certain damages be available to prevailing plaintiffs. In the absence of a sponsor or other representative, the **Chair** asked **David Broemel**, a well-respected insurance regulatory attorney, for

comment. Mr. Broemel cited existing Tennessee case law, specifically the decision in *Clanton v. Cain-Sloane Co.*, 677 S.W.2d 441 (Tenn. 1984), in which the Tennessee Supreme Court first recognized a cause of action for retaliatory discharge, and a right to seek punitive damages in lawsuits to follow. (Punitive damages were not allowed for the plaintiff in *Cain-Sloane* since it was a case of first impression.) Mr. Broemel was asked by Council members **Fox** and **Gregg Ramos** if enactment of the proposed bill would effectively codify and enhance the holding in *Cain-Sloane*. Mr. Broemel responded that in his opinion existing case law was sufficient and the bill was unnecessary. Council member **Pitts**, seconded by Council member **Hunt**, moved that the bill be given an **unfavorable recommendation**. The motion was approved 3-2. (**Note:** The General Assembly deferred action on this bill.)

The **Chair** recognized **Rep. Pat Marsh** on **HB1978/SB1967 (Marsh-Watson)**, a proposed bill providing that a marketplace contractor who acts as a broker or representative of a customer seeking services from a marketplace platform such as Amazon is an independent contractor. **Rep. Marsh** based his presentation on an amendment with drafting code No. 013964. He explained the need to clarify that a marketplace contractor was an independent contractor, not an employee of the marketplace platform. Council member **Pitts**, seconded by Council member **Hunt**, moved that the proposed legislation as incorporated in the amendment be given a **favorable recommendation for passage**. The motion was approved 5-0. (**Note:** The legislation became Public Chapter 648.)

In the absence of a sponsor or other presenter, the **Chair** recognized **Troy Haley** of the Bureau of Workers' Compensation ("BWC"), to comment on **SB2088/HB2392 (Kyle-Miller)**. The proposed legislation rewrites the *Healthy Workplace Act of 2014* (T. C. A. § 50-6-501 et seq.) to designate certain acts of harassment, intimidation, or bullying as unlawful employment practices and to require employers to adopt policies prohibiting those acts. It gives the Commissioner of Labor & Workplace Development the same authority as the Administrator of the BWC under T. C. A. § 50-6-128 to assess a \$500 penalty against employers who cause compensable workers' compensation claims to be paid by health insurance or who fail to provide necessary treatment. Council member **Pitts** stated the comprehensive nature of the bill warranted further study. He moved, seconded by Council member **Dove**, that the proposal be given **no recommendation** with the hope the respective legislative committees would study the measure after the current Session. The motion was approved 5-0. (**Note:** The General Assembly deferred action on this bill.)

At the conclusion of the meeting the Chair announced the actions of the Advisory Council relative to the foregoing proposed legislation would be transmitted to the Senate Commerce and Labor Committee and the House Consumer and Human Resources Committee.²

² The Advisory Council submitted its report concerning its action on the proposed legislation to the respective House and Senate Committees on March 5, 2018.

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 2017 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 2018.

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).

Three recent cases in which the Tennessee Supreme Court ("Court") adopted and affirmed Memorandum Opinions of the Special Workers' Compensation Appeals Panel illustrate the type of issues that are currently being considered by the Court. A brief synopsis and link to the full opinions follow:

TriStar Centennial Medical Center v. Dana C. Pugh

No. M2016-02470-SC-R3-WC, filed February 15, 2018

The employee and the employer settled a claim for a compensable back injury to the employee after participating in and failing to resolve their dispute at a Benefit Review Conference (BRC). Later the employee filed a motion to compel the employer to approve a back surgery procedure recommended by her authorized physician and for attorney's fees. The employer approved the back surgery after another physician reviewed the employee's medical records. The employee subsequently reset her motion and the trial court awarded her attorney's fees. The employer's appeal was referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law. The Panel concluded the trial court did not have jurisdiction, vacated the judgment and dismissed the case.

The issue presented on appeal was whether the Circuit Court of Davidson County had subject matter jurisdiction over the case. The point under consideration was whether the BRC that reached an impasse on June 22, 2015 was sufficient to provide the trial court with subject matter jurisdiction over an issue that arose after the BRC. The Panel held the BRC, which could not have involved any mediation on the employee's request for back surgery, was an insufficient exhaustion of the BRC process, and that the trial court therefore lacked subject matter jurisdiction. The Panel cited *Robertson v. Roadway Express, Inc.*, No. E2011-01384-WC-R3-WC, 2013, WL 2054170, at *3 (Tenn. Workers' Comp. Panel June 8, 2012) (quoting *Staats v. McKinnon*, 206 W.W.3d 532, 542 (Tenn. App. 2006), which stated, "[i]t is a settled rule that where a statute provides an administrative remedy, such remedy must first be exhausted before the courts will act."

The scope of the required BRC is outlined in T. C. A. § 50-6-239(b) (2008) (applicable to injuries occurring prior to July 1, 2014), which reads:

(a) In all cases in which the parties have any issues in dispute, whether the issues are related to

medical benefits, temporary total disability benefits, or issues related to the final resolution of a matter, the parties shall request the department to hold a benefit review conference.

- (b) The parties to a dispute shall attend and participate in a benefit review conference that addresses all issues related to a final resolution of the matter as a condition precedent to filing a complaint with a court of competent jurisdiction . . .

It was undisputed that the BRC was held on June 22, 2015 and that no additional BRC was held before the employee's motion to compel was filed March 18, 2016. The Panel noted the back surgery issue did not exist at the time of the BRC, and was therefore incapable of being addressed then. The trial court would only have subject matter jurisdiction "if the BRC was sufficient to satisfy T. C. A. § 50-6-203 for the subsequent medical issues which have arisen."

In *Robertson* the Supreme Court had held that since a BRC was not requested, the BRC process was never exhausted, thus the trial court lacked subject matter jurisdiction. Similarly, in *Holland Group v. Southerland*, 2009 WL 1099275, the Supreme Court affirmed the trial court's judgment that it lacked subject matter jurisdiction because "[t]he law is clear that '[o]nly when the parties cannot reach an agreement at the benefit review conference may they proceed to court.'" A BRC process was never initiated in *Holland*. The Panel concluded that a BRC held on some issues does not satisfy the exhaustion requirement for other issues before the court that are not presented at the BRC.

[**Note:** The Panel explained that the issue in the case was limited to pre-2014 amendments, in that the current version of T. C. A. § 50-6-203(a) requires a mediator to issue a dispute certification notice certifying issues in dispute before a request can be filed for a hearing before a workers' compensation judge.]

The opinion may be accessed at

http://www.tncourts.gov/sites/default/files/tristarcentennialmedicalv.pugh_opnjo.pdf

Billy W. Tankersley v. Batesville Casket Company, Inc., et al.

No. M2016-02389-SC-R3-WC, Filed January 26, 2018

A 37-year employee sustained right shoulder and arm injuries on December 20, 2012, and ultimately could not return to work. The Chancery Court of Coffee County found the employee permanently and totally disabled. The award was apportioned 90% to the employer and 10% to the Second Injury Fund. The employer appealed, contending the disability that prevented the employee from returning to work was caused in large part by preexisting medical conditions and that more liability should have been apportioned to the Second Injury Fund. The Second Injury Fund's liability outlined in T. C. A. § 50-6-208(a)(1) (2014) and applicable to injuries prior to July 1, 2014, provides that employers should only be responsible for "the disability that would have resulted from the subsequent injury, and the previous injury shall not be considered in estimating the compensation . . ."

In affirming the decision of the trial court, the Panel stated that when applying this section a trial court must "make an explicit finding of fact regarding the extent of the vocational disability attributable to the subsequent or last injury, without consideration of any prior injuries." (Citing *Bomely v. Mid-Am. Corp.*, 970 S.W.2d 929, 934 (Tenn. 1998). "Essentially, "the trial court must find what disability would have resulted if a person with no preexisting disabilities, in the same position as the plaintiff, had suffered the second injury but not the first." *Allen v. City of Gatlinburg*, 36 S.W.3d 73, 77 (Tenn. 2001). In this case, the trial court found the employee retained a 90% disability as a direct result of his work-related right shoulder/arm injury, and that together with his preexisting congestive heart failure he was "totally incapacitated from working at an occupation which brings him income." The trial court noted the

employee was able to work without restrictions despite his preexisting condition before the right shoulder/arm injury. The employer contended the employee's heart condition prevented surgical treatment for the shoulder that might have enabled him to return to work, and asserted the trial court had not properly taken this into account. The panel disagreed, pointing out that the work restrictions and a 100% vocational disability were based solely on the shoulder and arm injuries, and that the trial court properly considered the effect of the other medical issues in apportioning 10% liability to the Second Injury Fund.

The opinion may be accessed at http://www.tncourts.gov/sites/default/files/tankersley-batesville_opn.pdf

Michael Mayuric v. Huff & Puff Trucking, Inc., et al.

No. M2017-00102-SC-R3-WC, Filed January 4, 2018

The employee, a 34 year old truck driver, developed post-traumatic stress disorder after an accident. The Circuit Court of Coffee County found the employee had an 80% permanent partial disability as a result of the accident. The employer appealed, contending the trial court erred in accepting the opinion of one psychiatrist over another and in awarding a vocational disability in excess of another physician's opinion. The Panel affirmed the trial court's judgment.

The Panel acknowledged the trial court had accredited the testimony of a psychiatrist who treated the employee over a significantly longer period of time than the other. One psychiatrist, Dr. Griffin, had treated the employee over a four month period and had diagnosed PTSD. Two years later Dr. Griffin conducted an independent examination and changed his diagnosis. The Panel observed, "[t]he trial court was clearly troubled that Dr. Griffin changed his diagnosis after he was rehired by Employer. Likewise, the trial court noted Dr. Griffin's indifferent attitude toward his patient." "When medical testimony differs, it is within the discretion of the trial judge to determine which expert to accept." *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333, 335 (Tenn. 1996). "After reviewing the testimony of both physicians in this case, we find the record more than supports the trial court's assessment of Dr. Griffin's lack of credibility when compared to that of Dr. Kyser."

On the issue of disability, the employer argued that the trial court was obligated to accept a physician's finding of 40% vocational disability because it had rejected another expert's finding of 100%. The Panel cited *Reeves v. Olsen*, 691 S.W.2d 527 (Tenn. 1985) and *Sutton v. McKinney Drilling Co.*, 2013 W. L. in holding that a trial court "is not required to accept or reject in its entirety the testimony of any particular expert." The Panel concluded the trial court's finding of 80% disability was appropriate, taking into consideration the employee's limited education, work history, and the dramatic changes in his behavior due to the effects of the PTSD resulting from the accident.

The opinion may be accessed at

http://www.tncourts.gov/sites/default/files/mayuric_v_huffpuff_opn.pdf

Note: During calendar year 2017 the Supreme Court and its Special Workers' Compensation Appeals Panels issued opinions in 36 cases. Thirty-one of the opinions involved "old law" cases, or those in which the work-related accidents were prior to July 1, 2014, the effective date of the *Workers' Compensation Reform Act of 2013*. Through June 8, 2018 the Special Panel has issued 12 opinions, providing some indication that fewer "old law" cases are working their way through the appeals process. Direct appeals to the Supreme Court should continue to decrease as more "new law" cases are resolved in the Court of Workers' Compensation Claims and the Workers' Compensation Appeals Board.

TOSHA NEWS

The Bureau of Labor Statistics reported 122 work-related fatalities in Tennessee in 2016, compared to 112 in 2015, reflecting an increase of 9%. According to the Bureau's 2016 non-fatal occupational injury and illness statistics Tennessee's incidence rate of 2.9 per 100 full time workers in the *private* sector is not statistically different from the national average of 3.2. Tennessee is one of 16 states and the District of Columbia to experience a decrease in the private sector occupational injury and illness incidence rate or to have a rate not statistically different from the national rate.³ The overall incidence rate for nonfatal occupational injuries and illnesses in Tennessee for all industries, including state and local government, is 3.0. State government has the lowest incidence rate at 1.7, and local governments have the highest incidence rate, at 4.6 recordable incidents per 100 full-time equivalent workers.

³ 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 <https://www.tn.gov/content/dam/tn/workforce/documents/majorpublications/reports/2016TNOSHSPublication.pdf>

CONCLUSION

The Advisory Council on Workers' Compensation met on three (3) occasions from July 1, 2017 through June 30, 2018. 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,

/s/ David H. Lillard, Jr.

David H. Lillard, Jr.

Treasurer, State of Tennessee

Chairman