



STATE OF TENNESSEE

WORKERS' COMPENSATION ADVISORY COUNCIL

Dale Sims, State Treasurer, Chair

ANALYSIS AND RECOMMENDATIONS
on
WORKERS' COMPENSATION LEGISLATION

2004 GENERAL ASSEMBLY

April 2004

INTRODUCTION

The Workers' Compensation Advisory Council met on Friday, March 26, 2004 to review, comment upon and make recommendations concerning pending workers' compensation legislation. As a preliminary matter, the members discussed how to approach the review of the bills this year as it might differ from preceding years. The members of the Workers' Compensation Advisory Council acknowledge that their review of proposed workers' compensation legislation this year differs from prior years because most people believe there will be a substantive, comprehensive workers' compensation reform proposal submitted in the coming weeks. However, the Advisory Council, in an effort to be responsive to the requests for its recommendations, seriously reviewed and discussed each bill prior to making recommendations concerning each. The Advisory Council respectfully submits the following opinions and recommendations.

The Advisory Council notes also that the individual bills reviewed herein may appear to have a positive impact on the workers' compensation system, but not in isolation. Therefore, the Workers' Compensation Advisory Council respectfully requests the members of the General Assembly to permit the Advisory Council to review any proposed comprehensive reform bill to determine how the proposed reforms would affect the positions taken with respect to the individual bills that have been filed to date.

There were several proposed bills that were not reviewed by the Advisory Council because the bill was being held on the desk as a caption bill in one of the houses of the legislature, because the sponsor elected not to have the bill reviewed or because the bill had been placed in the general subcommittee of a committee. Sponsors were advised prior to the meeting

of the bills that would not be reviewed. The following chart lists the bills that were not reviewed [in numerical order by Senate Bill number].

	SENATE BILL NUMBER	SENATE SPONSOR	HOUSE BILL NUMBER	HOUSE SPONSOR	STATUS OF BILL
1	2636	Ketron	2516	Eldridge	General Subcommittee in Senate Government Operations Committee
2	2652	Cooper	2907	West	Held on House desk as CAPTION bill
3	2841	Clabough	2851	Winningham	General Subcommittee in the Senate Commerce Committee
4	2847	Person, Curtis	2706	Ferguson	Held on House desk as CAPTION bill
5	2957	Burchett	3312	Hagood	General Subcommittee in Senate Commerce Committee
6	3035	Ketron	2611	DuBois	Held on House desk as CAPTION bill
7	3168	Clabough	3117	Curtiss	General Subcommittee in Senate Commerce Committee; Held on House desk as CAPTION bill
8	3424	Crutchfield	3531	McMillan	Held on Senate desk as CAPTION bill
9	3439	Herron	3473	Curtiss	Held on House desk as CAPTION bill

BILLS REVIEWED

Grouped by Subject

[Description is general and does not include all aspects of the bill.]

1	WORKERS' COMPENSATION APPLICABILITY & DEFINITIONS	SB#	Sponsor	HB#	Sponsor	DESCRIPTION	RECOMMENDATION
		2461	Dixon	3196	Jones, S.	Changes definition of injury to include gradually occurring injuries Deletes definition of mental injury	<p>THE ADVISORY COUNCIL UNANIMOUSLY RECOMMENDS AGAINST PASSAGE OF THE BILL. The reasons for this recommendation are as follows:</p> <ul style="list-style-type: none"> • Section 1 of the bill is already law in the state as a result of case law. • Section 2 of the bill would allow psychological overlay cases to be compensable. In 2002, the Advisory Council unanimously recommended a change in the definition of mental injury to assure psychological overlay cases were not compensable. The Advisory Council sees no reason to change the law to allow gradually occurring psychoses or neuroses.
		2465	Dixon	3273	Buck	Provides for reduction of subrogation claims in third party claims to account for negligence of employer and unnamed third party	<p>THE ADVISORY COUNCIL IS EQUALLY DIVIDED AND UNABLE TO REACH CONSENSUS ON THE BILL.</p> <p>>The employee representatives recommend passage because the issue of fault should not be considered in any manner related to a workers' compensation claim.</p> <p>>The employer representatives recommend against passage at this time because of the reasons outlined in the staff analysis and also because there are more pressing issues to be resolved currently in order to reform the workers' compensation system than the issue raised by the bill.</p>

		2491	Crutch-field	3274	Buck	Allows direct action against the employer for gross negligence or violation of industry or government standards	<p>THE ADVISORY COUNCIL UNANIMOUSLY RECOMMENDS AGAINST PASSAGE OF THE BILL. The reasons for this recommendation are as follows:</p> <ul style="list-style-type: none"> • The employee representatives support the concept of providing a safer workplace for employees but have concerns that the bill, as currently drafted, does not adequately define the standards and the representatives were not sure any “industry standards” exist. • The employer representatives express concern with the bill given the current discussions of a reform of the system and believe such a proposal will result in an inability of the parties to reach consensus on more substantive reform issues. • Both the employee and employer representatives have concerns the proposal would have a negative effect on the TOSHA program. • Both the employee and employer representatives believe if the bill is enacted it should provide that the employee must make a binding election as to whether he/she will pursue the tort remedy or the workers’ compensation remedy.
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		2808	Kyle	2917	West	Revises requirements re: noncoverage by sole proprietors and partners and imposes penalties	<p>THE ADVISORY COUNCIL UNANIMOUSLY RECOMMENDS AGAINST PASSAGE OF THE BILL. The reasons for this recommendation are as follows:</p> <ul style="list-style-type: none"> • The voting members of the Advisory Council recognize this is an area of concern in the industry that would benefit from some solution, but do not feel the bill is the proper solution. • The employee representatives expressed concerns that independent contractors who do not have coverage create an unlevel playing field with those who do and also this increases the number of employees who have no recourse when they sustain an injury. They favor elimination of the exemptions and providing coverage for everyone as this spreads the risk among all employers. • The employer representatives agree this is a problem for insurers and agents because it creates disputes about the premium that is due and an employer should know at the beginning of a policy what the premium will be as opposed to learning the total premium after an audit.
2	WORKERS' COMPENSATION SYSTEMS	SB#	Sponsor	HB#	Sponsor	DESCRIPTION	RECOMMENDATION
		2640	Dixon	2177	Turner, M.	Repeals workers' compensation law and eliminates common law defenses	<p>THE ADVISORY COUNCIL UNANIMOUSLY RECOMMENDS AGAINST PASSAGE OF THE BILL.</p> <p>>The voting members affirm their belief in the workers' compensation system and do not feel it should be abolished.</p>
		2641	Dixon	2175	Turner, M.	Repeals workers' compensation law	<p>THE ADVISORY COUNCIL UNANIMOUSLY RECOMMENDS AGAINST PASSAGE OF THE BILL.</p> <p>>The voting members affirm their belief in the workers' compensation system and do not feel it should be abolished.</p>

		2583	Ketron	2630	Hawk	Creates a Workers' Compensation Review Board	THE ADVISORY COUNCIL UNANIMOUSLY RECOMMENDS AGAINST PASSAGE OF THE BILL. The reason for this decision is they feel there are substantive laws that need to be revised first before consideration is given to adoption of an administrative system.
3	INSURANCE & SELF-INSURANCE	SB#	Sponsor	HB#	Sponsor	DESCRIPTION	RECOMMENDATION
		2463	Dixon	3195	Jones, Sherry	Increases required deposit for self-insured employers from \$150,000 to \$500,000	<p>THE ADVISORY COUNCIL UNANIMOUSLY RECOMMENDS AGAINST PASSAGE OF THE BILL. The reasons for this recommendation are as follows:</p> <ul style="list-style-type: none"> • The members acknowledge the issue of sufficient security for a self-insured employer is a serious problem that merits consideration and a broader approach to address all the issues, not just the amount of the bond to be required. • The members suggest there needs to be a more comprehensive approach to the problems of inadequately funded self-insured employers than the proposed bill including a consideration of how the bankruptcy of a self-insured employer will affect the delivery of benefits to an injured worker. • The members recognize the Department of Commerce and Insurance is working on a proposed amendment to more fully address the issues related to both self-insured employers and self-insured pools. The Advisory Council respectfully requests an opportunity to review and comment on the proposal when such an amendment is finalized.

		3199	Crutchfield	3183	Curtiss	Places additional requirements on self-insured trusts	<p>THE ADVISORY COUNCIL UNANIMOUSLY RECOMMENDS AGAINST PASSAGE OF THE BILL. The reasons for this recommendation are as follows:</p> <ul style="list-style-type: none"> • The members acknowledge the issue of sufficient security for a self-insured employer is a serious problem that merits consideration and a broader approach to address all the issues, not just the amount of the bond to be required. • The members suggest there needs to be a more comprehensive approach to the problems of inadequately funded self-insured employers than the proposed bill including a consideration of how the bankruptcy of a self-insured employer will affect the delivery of benefits to an injured worker. • The members recognize the Department of Commerce and Insurance is working on a proposed amendment to more fully address the issues related to both self-insured employers and self-insured pools. The Advisory Council respectfully requests an opportunity to review and comment on the proposal when such an amendment is finalized.
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4	WORKERS' COMPENSATION BENEFITS	SB#	Sponsor	HB#	Sponsor	DESCRIPTION	RECOMMENDATION
	Disability and Medical	2460	Dixon	3196	Jones, Sherry	Deletes case management system and removes hearing loss from schedule	<p>THE ADVISORY COUNCIL IS UNABLE TO REACH CONSENSUS AND IS EQUALLY DIVIDED.</p> <p>The proposed bill contains two sections that deal with very different issues. As a result, the voting members had differing views on the different sections. The following comments were made by members of the council during discussion of Section 1 related to the case management system:</p> <ul style="list-style-type: none"> • The representative of the Tennessee Defense Lawyers Association noted the case management system is the best process to put a liaison between the employee and all the other people they have to deal with throughout their claim. • The Tennessee Bar Association representative noted the TBA had taken the position that case management should be optional not mandatory. • The Tennessee Trial Lawyers' Association representative stated the case management system creates a hostile environment between the employee and the employer and interferes with the doctor-patient relationship. He noted the bill does not eliminate the case management system - it makes it optional rather than mandatory. • The representative for the insurance companies stated that case management is the best delivery system currently in place to assure the employee receives the benefits to which he or she is entitled and to make sure the employee gets the benefits timely. He noted the case management system is effective and if it is not mandatory there will be a dichotomy in the delivery of care to injured employees. <p>The following comments were made related to loss of hearing issue:</p> <ul style="list-style-type: none"> • The employee representatives expressed belief that the total loss of hearing has more value than just 150 weeks of benefits. • The employer representatives were reluctant to modify benefit levels in view of the anticipated comprehensive reform of the system.

		2462	Dixon	3199	Turner, Mike	Requires money from Uninsured Employers Fund to be used to pay benefits to employees whose employers are insolvent or have no insurance	<p>THE ADVISORY COUNCIL UNANIMOUSLY RECOMMENDS AGAINST PASSAGE OF THE BILL.</p> <p>>The voting members agree in spirit with the concept presented by the bill. However, they believe there are other issues that would have to be addressed as part of any legislation to accomplish this. In addition, they suggest assigning to some official or group the responsibility of studying the issue further and to recommend a structure or process to accomplish the intent of the bill.</p> <p>>The Advisory Council members note that in this study the definition of “uninsured” should be established.</p> <p>>The Advisory Council members suggest that an “underinsured employer” does not exist under the Tennessee system.</p>
		2464	Dixon	3198	Turner, Mike	Increases multiplier caps to 4.5 and 10	<p>THE ADVISORY COUNCIL IS UNABLE TO REACH CONSENSUS AND IS EQUALLY DIVIDED.</p> <p>>The employee representatives support the bill as it increases flexibility to appropriately compensate employees who have lesser permanent impairment ratings but greater vocational disability by allowing those employees to receive larger awards than they are able to receive under the current system.</p> <p>>The employer representatives feel the bill would significantly increase the costs to employers which is unacceptable to the employer community.</p>

		2503	Dixon	3197	Turner, Mike	Revises requirements re: Temporary Total Disability and allows specialists to arbitrate if parties agree	<p>THE ADVISORY COUNCIL UNANIMOUSLY RECOMMENDS AGAINST PASSAGE OF THE BILL <i>AS CURRENTLY DRAFTED</i>.</p> <p>The rationale for the decision is as follows:</p> <ul style="list-style-type: none"> • All voting members agree payments of benefits should be made timely and if not there should be penalties that attach. However, they are concerned the current language may not be broad enough to address all temporary benefits. The members feel that if a penalty mechanism is established the penalty should be paid to the employee, not to the state. • With regard to a mandatory hearing by a specialist on temporary issues, the members feel this should be viewed in the context of a broader discussion of the overall authority of a workers' compensation specialist and the issue of mandatory benefit review conferences. • With regard to the arbitration language, the members defer to the opinion of the Commissioner of Labor and Workforce Development on the issue. The members are reluctant to support arbitration through the Department without adequate staffing, funding and training.
		2927	Crutchfield	3275	Buck	Deletes Permanent Partial Disability multiplier [caps] statutes	<p>THE ADVISORY COUNCIL IS UNABLE TO REACH CONSENSUS AND IS EQUALLY DIVIDED ON THE BILL.</p> <p>>The employee representatives support passage as it would increase benefits to employees.</p> <p>>The employer representatives are against passage as it would add substantial costs to the system.</p>

		3312	McLeary	3401	Fitz-hugh	Revises provisions related to benefit review conferences, Permanent Partial Disability, penalties for late payment of benefits; requires the Workers' Compensation Advisory Council to study and report recommendations related to adoption of a medical fee schedule	<p>THE ADVISORY COUNCIL UNANIMOUSLY RECOMMENDS AGAINST PASSAGE AS CURRENTLY DRAFTED.</p> <p>The members acknowledge the proposed bill does contain many good ideas but it does not address all the issues that should be addressed in any reform of the system. The Advisory Council encourages the sponsors to consider the potential problems with the current language of the bill as identified in the analysis sections. Further, the Advisory Council respectfully requests that it be given an opportunity to review any amendment to the bill and provide recommendation at that time.</p>
5	DRUG-FREE WORKPLACE - RELATIONSHIP TO BENEFITS	SB#	Sponsor	HB#	Sponsor	DESCRIPTION	RECOMMENDATION
		3068	Ramsey	2403	Mum-power	Requires clear and convincing evidence for EE to overcome presumption that drugs/alcohol did not cause injury	<p>THE ADVISORY COUNCIL UNANIMOUSLY RECOMMENDS AGAINST PASSAGE OF THE BILL because no member had been made aware that this is a problem that was adversely affecting the workers' compensation system.</p>

		3169	Norris	3191	Garrett	Amends several provisions incl. those related to presumption of causation and changes general construction of the law	<p>THE ADVISORY COUNCIL UNANIMOUSLY RECOMMENDS AGAINST PASSAGE OF THE BILL <i>AS CURRENTLY DRAFTED</i>.</p> <p>The Advisory Council members also note that to the extent the bill addresses the same issues as Senate Bill #3312, the Council adopts the same comments.</p> <p><u>Note:</u> The Advisory Council received the proposed amendment shortly before it began its meeting on the morning of March 26th through no fault of its sponsor. Although the members discussed the proposed amendment the Advisory Council staff had not had an opportunity to fully review and analyze the proposed amendment for the members. Therefore, if the proposed bill is amended further, the Advisory Council respectfully requests an opportunity to review those additional amendments to this bill.</p>
6	STUDIES REQUIRED	SB#	Sponsor	HB#	Sponsor	DESCRIPTION	RECOMMENDATION
		2789	Cooper	2803	Curtiss	Requires comptroller to report to Joint Committee on Work Comp re: cost drivers for medical and indemnity costs	THE ADVISORY COUNCIL UNANIMOUSLY RECOMMENDS AGAINST PASSAGE OF THE BILL as the members feel the issue has been fully studied by the Council and the Workers' Compensation Research Institute.

7	MISC.	SB#	Sponsor	HB#	Sponsor	DESCRIPTION	RECOMMENDATION
		3211	Person, Curtis	3157	Hensley	Changes amount to be charged for medical records	THE ADVISORY COUNCIL UNANIMOUSLY RECOMMENDS AGAINST PASSAGE OF THE BILL because the proposed bill will increase the costs of medical records in workers' compensation cases.
8	OMNIBUS BILL	SB#	Sponsor	HB#	Sponsor	DESCRIPTION	RECOMMENDATION
		3003	Haynes	2956	Hargrove	Omnibus Bill revises sections of Advisory Council statute to correct errors.	THE ADVISORY COUNCIL UNANIMOUSLY RECOMMENDS PASSAGE AS NOW DRAFTED as these are housekeeping changes that are needed in the section of the law that creates the Advisory Council.
9	WORKERS' COMPENSATION ADVISORY COUNCIL	SB#	Sponsor	HB#	Sponsor	DESCRIPTION	RECOMMENDATION
		2527	Fowler	2507	Clem	Abolishes the Workers' Compensation Advisory Council	<p>THE ADVISORY COUNCIL RECOGNIZES IT IS A CREATURE OF THE GENERAL ASSEMBLY AND, THEREFORE, FEELS IT WOULD BE INAPPROPRIATE TO COMMENT ON THE PROPOSED LEGISLATION.</p> <p>The Advisory Council members respectfully suggest that if this proposed legislation proceeds through the legislative process that consideration be given to amending Section 8(b). As now drafted, in order to modify the loss cost filing, the modification by the Commissioner of Commerce and Insurance "shall be within the range established by the recommendation of the rate service organization in its filing". When there is only one recommendation, no range is established.</p>

		2537	Harper	2455	Kernell	Extends sunset date for Workers' Compensation Advisory Council to June 30, 2010	THE ADVISORY COUNCIL RECOGNIZES IT IS A CREATURE OF THE GENERAL ASSEMBLY AND, THEREFORE, FEELS IT WOULD BE INAPPROPRIATE TO COMMENT ON THE PROPOSED LEGISLATION.
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