

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 18, 2016 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 human resources committee of the house of representatives and commerce and labor committee of the senate."* This is the report of that February 18, 2016 Council meeting for your review and information.

SB 1706 / HB 1869 (Gardenhire/Farmer)

The bill was rolled without objection to the next meeting since the Council was advised that amendments were in the process of preparation.

SB 1758 / HB 1720 (Green/White M)

Ms. Julie Griffin of the Tennessee Medical Association briefly explained silent preferred provider organizations as a process by which insurance companies buy and sell access to discounts that providers have agreed to in other contracts. Previous legislation required transparency so the providers could track how they were being paid under the workers' compensation system and how access to these discounts were being applied. Some members feel there have been problems with various entities not providing the transparency as provided by law and when it was brought to the attention of the Bureau of Workers Compensation (BWC) there was a concern that they had no ability to deal with a violator.

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BWC Administrator Abbie Hudgens had all the payors and providers in her office and they jointly produced an Amendment, but not everyone has signed off on it as of yet.

Under the amendment, a provider can file a complaint with the BWC or the Department of Commerce and Insurance (DC&I) which would allow BWC to investigate the complaint and forward it to the DC&I with findings from their investigation for licensed entities. If it is an unlicensed entity, then the authority would be given to the BWC to assess those penalties upon them. The amendment does not change anything in the statute by the proposed language, but provides an avenue to seek redress for violations.

The Council had not yet received that amendment. Mr. Everett Sinor, General Counsel of Brentwood Services, informed that the providers/payors agreed in principle at the meeting in Ms. Hudgens' office, on language which would give the providers some comfort that the current statute is going to be enforced. Since that time, negotiations regarding the specific language have been taking place amongst the interested parties and they had just received an amendment this morning which they had not had sufficient time to properly review. Since there was an outstanding amendment still under discussion, the bill was rolled to the next meeting.

SB 1880 / HB 2038 (Johnson/Eldridge)

This is a Caption Bill to be carried on the calendar until such time as it is called up and given to council administrator, Ms. Lynn Schroeder.

SB 2318 / HB 1795 (Kyle/Mitchell)

Council member Mr. Bob Pitts (employer representative) moved that it would be inappropriate for the Advisory Council to attempt to instruct the General Assembly on how it should organize to deal with workers' compensation issues, but it is appropriate to remind them of the history of this issue. There was previously a Joint Committee and the members, themselves, recommended that it be done away with and the reasons were; #1 that they felt their work duplicated the work that the Advisory Council was doing and #2 that the Advisory Council performed additional tasks that they did not, those being a) engaging an actuary and making comment on the NCCI Loss Cost and Law Only Filings, b) commenting on proposed rules and regulations, and c) engaging a statistician in the cooperative effort between the Advisory Council and the BWC on the compilation and reporting on workers' compensation statistical information for the legislature. Mr. Pitts (employer representative) moved that the Council make these comments back to the General Assembly which motion was seconded by Mr. Fox (employee representative) which resulted in a unanimous vote to report out the bill with no recommendation with an attachment of the summary of the historical comments attached thereto.

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SB 2482 / HB 2404 (Massey/Travis)

Mr. Bradley Jackson of the Tennessee Chamber of Commerce and Industry explained that the bill includes retaliatory discharge for filing a workers' compensation claim and introduced attorney Ms. Sally Barren, with the law firm of Jackson, Lewis out of Memphis, Tennessee to comment about the bill and its origination.

Ms. Barren explained that the proposed bill was to clarify what may be regarded as a loophole in the Tennessee Human Rights Act (THRA) amendment that took place last summer. The intent was to abrogate common law causes of action for retaliatory discharge and streamline claims under the whistleblower act. While there was probably an intent to preserve the employees right to file a claim for retaliatory discharge, if it was under the Act, then they will have the same standard of proof, that being, if the termination was "solely" for filing a claim for workers' compensation. She indicated that the word "solely" was being added and that the Council did not have the amendment as complete in front of them today. She went on to indicate that there is additional language proposed which clarifies what happens with employers with fewer than 8 employees as the THRA doesn't apply to employers with fewer than 8 employees. Council member Mr. Gregg Ramos (attorney representative) asked about the loophole to which Ms. Barren referred and what this new proposed language would change.

Ms. Barren indicated that there were amendments to the THRA that unified the standard of proof, that did away with the common law claims for retaliatory discharge and violations of the whistleblower act. The last sentence of the bill as it stands says that this section (g) abrogates and supersedes the common law with respect to any claim that could have been brought under this section. She indicated that this is a pro-employer statute because now employees have to meet the burden of proof of the "sole" cause and had to file their claims under the statute and follow the procedures laid out therein. The common law claims had a lower standard of proof wherein a plaintiff could succeed if they proved that an impermissible reason was a substantial factor in their discharge. So now we will have this statute which says "sole" cause. The Council was not provided with a copy of the statute with the "sole" language included at the meeting.

Ms. Barren continued by stating that her employer firm was receiving lawsuits for retaliation for filing workers' compensation claim. In the past those claims were based on common law, specifically the Cain-Sloan case. This statute will do away with the common law Cain-Sloan avenue and force everyone to file under the statute. She continued by stating that with this proposed language, the employer bar is not trying to get away with retaliatory discharge for filing a workers' compensation claim altogether, they are just trying to have the same burden of proof that applies under the whistleblower act.

Mr. Ramos (attorney representative) inquired about what caps on damages are already in existence. Ms. Barren indicated that they are already in the THRA, but the Act did not address the employer with less than eight employees. Under the proposed law, employers with eight employees

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and under have no exposure for a retaliatory discharge claim whatsoever. Or another way to accomplish that would be to define an employer as one that has more than eight employees.

Council member Mr. Bruce Fox (employee representative) affirmed and pointed out that the new proposal is eliminating the claim for retaliatory discharge for employers with eight or fewer employees. Mr. Jackson agreed that the bill was expected to bring vibrant debate in the legislature. Mr. Fox inquired if the intent of the bill is that if an injured worker is pursuing a retaliatory discharge for filing a workers' compensation claim that it has to be the sole reason for the discharge which would be changing the standard of proof, to which Ms. Barren replied affirmatively that the employer bar is trying to eliminate the common law avenue under the Cain-Sloan case and under which standard of proof the employee only had to prove that the impermissible reason was a "substantial factor" rather than the "sole cause".

Mr. Fox pointed out that the language being presented to the Advisory Council today does not include that "sole cause" language and asked when the amendment was going to be done. Mr. Jackson replied it would be ready whenever the first subcommittee had it on notice.

Mr. Ramos inquired as to whether this would be heard under the Workers' Compensation Court or under the Circuit courts and stated that if the word "solely" is inserted, it really changes the standard of proof. Ms. Barren replied that Mississippi does not even allow for these types of claims, so Tennessee would still be a little bit employee friendly while still maintaining the employment at will theory.

Mr. Fox inquired if by "employment at will" she meant "termination at will", to which Ms. Barren responded affirmatively, that employers should be able to terminate employees for good reason, bad reason, any reason at all and we have these exceptions due to public policy of which one is whistleblowing.

Mr. Ramos indicated that the proposed bill substantially changed the law and his recommendation would be that it go forward with a recommendation that it be denied.

Mr. Fox again asked when an amendment would be available and if it would be available by the next meeting, to which Mr. Bradley said he thought it could, so **Mr. Fox** (employee representative) **moved** to have it rolled to the next meeting, **seconded** by council member **Mr. Bob Pitts** (employer representative) and it was **moved to the next meeting to await the updated amendment** without objection.

SB 2563 / HB 1559 (Norris/McCormick)

Mr. Troy Haley, attorney and Legislative Liaison for the Bureau of Workers' Compensation described the administration's bill, explained portions of the previously provided summary describing its contents, and provided answers to the most frequently asked questions he has received about the proposed legislation. He explained that the proposed changes are clarifications to correct

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inconsistencies in the present language. The proposal also changes the name of the Workers' Compensation Appeals Board to the Court of Workers' Compensation Appeals to eliminate confusion and to allow full faith and credit to Orders under the Uniform Enforcement of Foreign Judgements Act. The extraordinary awards sunset date will be removed to always allow Judges to award more than the formula maximum if deemed appropriate. The bill provides a clarification, but not a change of the mathematical formula for Permanent Partial Disability awards.

Retired businessman, Mr. Mark Gill, of Rodgers Capital Group, addressed the Council and explained that, although he supports the Workers' Compensation Reform and the Workers' Compensation Bureau itself, there is more work that needs to be done soon. He explained the numerous problems encountered with the present system by his injured worker son as; a lack of medical care for 133 days even though entitled; inaccurate diagnosis delaying proper care, conflicts in permanent restrictions from different providers, a complete denial of pain management, and enormous delay without recourse. He asked that a remedy to 'delay by providers' be considered and expressed the need for stronger enforcement against insurer abusers. He informed the Council that the present system is not easy to navigate and the good intent of the Reform is being thwarted by some third party administrators and physicians. Lastly, he informed that rogue players are subverting the goals of the business community to have an efficient, fair workers' compensation program.

Council member, Mr. John Michael Garrett (employee representative) stated that he echoed Mr. Gill's sentiments, noting that his experience has been that physicians deny injured workers' procedures such as MRI's and then insurance companies put up road blocks even when MRI's come back showing an injury.

Council member, Mr. Bruce Fox (employee representative) stated that his law firm receives calls from individuals experiencing similar issues every week and they have to tell them that there is no mechanism by which attorneys can be paid to assist injured workers to get the benefits to which they are entitled. He indicated it is a statewide issue.

Council member, Mr. Gregory Ramos (attorney representative) inquired of Mr. Gill his experience with the Ombudsman of the Bureau of Workers' Compensation to which Mr. Gill responded that the Ombudsman repeatedly ran into walls that were beyond their capability which eventually forced him to hire legal counsel as the ombudsmen were not permitted to give him legal advice.

Council member, Mr. Jason Denton (attorney representative) indicated that he was experiencing the same issues and saw the problem as there being no rules or guidelines for a quick resolution to the problem of failure to quickly provide medical treatment. Under the old system there were motions for medical treatment. Now the attorneys have to go through the process of an expedited hearing and putting on proof. He asked Mr. Gill how much pain and suffering his son endured without the medical treatment for so many days.

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Mr. Gill stated that he did not know how to measure that, but what he was confident did occur was that the soft tissue injury became worse due to the insufficient/non-medication guidelines of the workers' compensation insurer and their physician. Ten months from injury his son has still not been properly treated medically to aid in his recovery.

Mr. Denton commented that his law office has been keeping track of the injured worker calls since the new law went into effect, and of over 700 cases, they have taken only 21 due to the new laws and the attorneys' inability to be paid or do anything more for the claimant than they could get on their own.

Mr. Ramos indicated that a different bill from Senator Gardenhire, HB 1869/SB 1706, does discuss the award of attorney's fees, which is a start, but only where the denial of benefits had been provided for in a settlement or a judgement under the workers' compensation law. He noted that this would not address Mr. Gill's situation because he is still in the midst of the process. In conclusion, Mr. Gill requested that some provision be instituted to hold people accountable who are thwarting the law.

Council member, **Mr. Bob Pitts** (employer representative) **moved** that the bill be recommended for passage which was **seconded** by **Mr. Fox** (employee representative) and resulted in a **unanimous vote to recommend the bill be approved.**

SB 2580 / HB 2194 (Norris/Coley)

The bill was summarized and Mr. Bob Pitts (employer representative) asked that the vote be postponed since there was known to be ongoing discussion on it among several parties, which postponement was done to await an updated amendment without objection.

SB 2582 / HB 2416 (Norris/Lynn)

The council was advised this bill had an amendment coming forth and so rolled it to the next meeting to wait for the updated amendment.