STATE OF TENNESSEE

WORKERS' COMPENSATION ADVISORY COUNCIL

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REPORT TO

SENATE COMMERCE, LABOR AND AGRICULTURE COMMITTEE

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ANALYSIS OF AND COMMENTS REGARDING

WORKERS' COMPENSATION LEGISLATION

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TABLE OF CONTENTS
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GENERAL REMARKS REGARDING REVIEW OF LEGISLATION

Senator Jerry Cooper, Chair of the Senate Commerce, Labor and Agriculture Committee, referred proposed workers' compensation legislation that had been assigned to the committee to the Workers' Compensation Advisory Council for review and comment. The Committee advised the Senate sponsors of the legislation that the bills had been referred to the Advisory Council. The Advisory Council members met on Friday, March 4, 2005 and on March 18, 2005 to review the bills.

Sponsors of the legislation were advised of the meeting dates and invited to attend if they wished to do so. On March 18, 2005, the following legislators appeared to discuss the identified legislation: Rep. Lynn (SB550 / HB1885)

Rep. Sharp (SB662 / HB521)

Rep. Odom (SB486 / HB477 and SB1130 / HB762)

A portion of the Reform Act of 2004, codified in *TCA* §50-6-121(i), provides the following concerning the Advisory Council's review of legislation: ... "The comments of the council shall not include recommendations for or against passage of the proposed legislation but shall describe the potential effects of the proposed legislation on the workers' compensation system and its operation and any other information or suggestions which the council may think helpful to the sponsors, the standing committees or the general assembly." Therefore, the following report contains a summary of the present law, the proposed change in the law as a result of the bill and an explanation of the practical effect of the proposed legislation on the current workers' compensation law and system. Following these summaries, the comments of the individual members of the Advisory Council concerning the proposed workers' compensation legislation is included.

NUMERICAL INDEX OF SENATE BILLS REVIEWED

NUMERICAL INDEX OF HOUSE BILLS REVIEWED

PLEASE NOTE: DESCRIPTION OF THE BILL IN THE FOLLOWING TABLE IS A LIMITED DESCRIPTION AND DOES NOT DESCRIBE ALL ASPECTS OF THE BILL.

1	WORKERS' COMPENSATION APPLICABILITY & DEFINITIONS pp. 10 - 14	SB#	Sponsor	HB#	Sponsor	DESCRIPTION
		1811 p. 10	Herron	287	Borchert	Permits employer to request exception from coverage for employees who are members of recognized religious sect opposed to acceptance of such benefits
		2141 p. 13	Herron	2076	Maddox	Mandates that subcontractor is liable for work comp benefits to any of its employees; provides general contractor or intermediate contractor or other subcontractor not liable for work comp benefits. Excludes counties with 1990 census of between 6700 - 6950 and 44,500 - 45,000.
2	INSURANCE & SELF-INSURANCE pp. 15 - 19	SB#	Sponsor	HB#	Sponsor	DESCRIPTION
		550 p. 15	Black	1885	Lynn	Deletes language of (11) and permits coverage of excess insurance for self-insured work comp pools entered into prior to 3-31-99 under the TN Guaranty Ins. Association Act.
		2117 p. 19	Kyle	2004	Maddox	Requires insurance carrier to pay legal fees to employer when carrier assesses a premium later determined by admin appeal or by court to be erroneous or "unreasonably assessed"

3	PENALTIES pp. 20 - 23	SB#	Sponsor	HB#	Sponsor	DESCRIPTION
		238 p. 20	Kurita	203	Briley	Makes penalty for noncompliance discretionary - Commissioner or designee may change penalty
		981 p. 22	Bryson	676	Maddox	Requires Commissioner of Labor to promulgate rules for prompt pay of work comp health claims by Insurers and Self-Insured Employers - References 56-7-109; Sets 25% APR penalty
4	MEDICAL CARE AND COST CONTAINMENT COMMITTEE pp. 24 - 27	SB#	Sponsor	HB#	Sponsor	DESCRIPTION
		462 p. 24	Williams	1550	West	Requires 1 of the members of the medical care and cost containment committee to represent self insurance pools Bill being held on House desk as Caption.
		486 p. 26	Bryson	477	Odom	Increases membership of Medical Care and Cost Containment Committee by adding a chiropractor
5	MEDICAL FEE SCHEDULE p. 28	SB#	Sponsor	HB#	Sponsor	DESCRIPTION
		1578 p. 28	Norris	1638	Overbey	Delays implementation of medical fee schedule until July 1, 2006; requires medical care and cost committee to approve all rules promulgated or they are invalid

6	WCAC pp. 30 - 31	SB#	Sponsor	HB#	Sponsor	DESCRIPTION
		801 p. 30	Burchett	1354	Ferguson	Requires the Advisory Council to annually review all rules that affect work comp insurers, self-insurers and pools and make recommendations to the commissioners
		1448 p. 31	Jackson	1177	Buck	Changes time for Advisory Council to review any revisions to the Claims Handling Standards from 60 days to 45 days.
7	DRUG FREE WORKPLACE PROGRAM pp. 32 - 35	SB#	Sponsor	HB#	Sponsor	DESCRIPTION
		850 p. 32	Harper	144	Turner, M.	Adds section to law to require specimen to be divided into 2 parts and 2 containers, one to be tamper proof. Tamper proof container given to the employee. Prohibits disciplinary action unless a positive result is reported on specimen in employees control.
		852 p. 35	Harper	136	Turner, M	Requires person testing for drugs or alcohol to be in good standing as licensed or certified health care professional NOTE: This bill was reviewed in error as it is not assigned to Senate Commerce Committee - analysis left in report as WCAC did review the bill.
8	WORKERS' COMPENSATION BENEFITS - SUBROGATION p. 36 - 38	SB#	Sponsor	HB#	Sponsor	DESCRIPTION
		662 p. 36	Fowler	521	Sharp	Eliminates subrogation in third party claims related to asbestosis and pneumoconiosis

9	WORKERS' COMPENSATION BENEFITS -Disability and Medical pp. 39 - 51	SB#	Sponsor	HB#	Sponsor	DESCRIPTION
		776 p. 39	Burchett	713	Hargrove	Authorizes employee to seek court relief to compel ER to pay medical treatment when the insurance company is insolvent
		876 p. 42	Burchett	1257	Turner, M	Adds language to the occupational disease section related to diseases covered by the Federal Energy Employees Occupational Injury Compensation Act of 2000
		1130 p. 44	Cooper	762	Odom	Deletes the sunset date(6-30-05) of the chiropractor section; authorizes employer to allow more than 12 visits
		1449 p. 46	Jackson	1176	Buck	Provides if death of employee is due to violation of TOSHA Act then maximum total death benefit is three times amount payable if death did not result from violation Bill being held on House desk as Caption
		1581 p. 48	Norris	732	Harrison	Requires the work comp carrier or self insured employer to pay for the initial evaluation of an injured employee even if the claim is later denied as non-compensable.
		1631 p. 50	Norris	756	Clem	Prohibits compensation for any period of disability resulting from injury during which worker is confined in jail due to conviction

10	CLAIMS COMMISSION p. 52	SB#	Sponsor	HB#	Sponsor	DESCRIPTION
		998 p. 52	Haynes	1529	McMillan	Requires claims by state employees to be submitted to benefit review process as provided in 50-6-239
11	MISCELLANEOUS pp. 53 - 54	SB#	Sponsor	HB#	Sponsor	DESCRIPTION
		1614 p. 53	Norris	485	Overbey	Increases charge for report from $10 to $20; increases length of report from 20 pages to 40 pages; maintains pages in excess of 20 charged 25¢ per page
12	ADMINISTRATION BILL pp. 55 - 58	SB#	Sponsor	HB#	Sponsor	DESCRIPTION
		2321 p. 55	Kyle	2337	McMillan	Makes several housekeeping changes to various compensation statutes

AMENDED SB 1811 by Herron *HB 287 by Borchert

Present Law

TCA §50-6-103 requires every employer subject to the workers' compensation law to pay compensation for injuries/death that are caused by accident arising out of and in the course of employment without regard to fault. *TCA* §50-6-102(12) defines employer as any individual or entity who uses the services of not less than five (5) persons for pay, with two exceptions. An employer engaged in the mining and production of coal and a person engaged in the construction industry (*TCA* §50-6-113) with one (1) employee are subject to the workers' compensation law.

Proposed Change (as amended)

SB1811/HB287 adds a new section to Title 50, Chapter 6, Part 1. It would permit an employer to file an application with the Department of Labor/WFD to be excepted from the workers' compensation law in respect to those employees who are not receiving any form of either state or federal compensation.
The application shall include:
(1) a written waiver by the employee of all benefits under the workers' compensation law;
(2) an affidavit from the employee that states he/she is a member of a recognized religious sect or division thereof and is an adherent of established tenets or teachings of such sect/division by reason of which he/she is conscientiously opposed to acceptance of the benefits of any public or private insurance that makes payments in the event of death, disability, old age or retirement, or makes payments toward the cost of or provides services for medical benefits, including the Federal Social Security Act;
(3) a written statement of the employee (a) relieving the employer of all liabilities associated with the workers' compensation law and (b) granting permission to the employer not to issue any workers' compensation benefits in response to a claim filed by an employer (sic??) seeking a waiver or to pay health care or other benefits in the event a workers' compensation claim is filed by the employer (sic??) seeking a waiver.

The employee shall have also waived benefits under any insurance system established by the federal Social Security Act and shall have secured an exemption from paying social security taxes under federal law.

AMENDED SB 1811 by Herron *HB 287 by Borchert, continued.

Proposed Change (as amended), continued.

The department is to promulgate a form to be used for the waiver and affidavit. The Department is required to grant the application if:
(a) the employee is a member of a sect or division having the established tenets or teachings outlined above;
(b) the employee is exempt from paying social security taxes under federal law;
© it has been the practice for four (4) years for the members of the sect/division to make provision for their dependent members which in its judgment is reasonable in view of their general level of living.

The employer who files the application with the department shall have the salary of the employees who relinquish liability against the employer excluded from the total salaries submitted to the insurance carrier.

Practical Effect

The bill creates a mechanism by which employers can exempt themselves from paying workers' compensation benefits to certain employees who meet the criteria set out in the bill.

Informational Note:

(1) The bill does not address whether the "exempt employees" shall be counted in determining whether the employer is subject to the workers' compensation law. For instance, assume the employer has 6 employees to whom he/she pays wages, but 4 of the employees have signed the waiver permitted by this chapter. Is the employer required to comply with the workers' compensation law by purchasing insurance or becoming an authorized self-insured?
(2) The bill refers to the federal social security taxes yet the federal application is titled: "Application for Exemption From Social Security and Medicare Taxes and Waiver of Benefits". It might be better to add "Medicare" to the bill in the appropriate places.
(3) There is also a question about the language "who are not receiving any form of either state or federal compensation" that was added to subsection (a). The word "compensation" is not defined and there is no other reference to state compensation in the bill. If the sponsors are referring to Medicare or TennCare then it should be spelled out and is probably better referred to as "benefits".
(4) It is unclear as to the references to a claim filed by the "employer" in subdivision (a). Claims are, by their terms, usually filed by an injured employee.

AMENDED SB 1811 by Herron *HB 287 by Borchert, continued.

Comments of Advisory Council Members:

The Council members questioned whether this bill creates a waiver or an exemption. Mr. Othal Smith, employee representative, noted the bill requires promulgation of a "waiver form"; therefore, it is a waiver. Mr. Steve Turner, employer representative, questioned whether this bill would permit waiver of a wife's entitlement to death benefits and whether the husband could waive those benefits payable to the wife. Mr. Tony Farmer, attorney representative, stated an employee husband cannot waive the wife or dependent's claim for death benefits. Mr. Turner stated he has concerns as an employer as to how he is to handle receipt of a "waiver form" from one of these employees in the daily operation of his business.

Mr. Bob Pitts, employer representative, stated he did not have strong feelings about the issue, but is concerned about the drafting of the bill. Mr. Pitts noted consideration should be given to adding language to the bill to require the religious exempted employer to have workers' compensation coverage for the non-believer employees.

Mr. Othal Smith, employee representative, noted when you allow some individuals to be exempt from paying for workers' compensation coverage this causes an unfair business advantage when competing with other employers who are required to pay for workers' compensation coverage. He questioned whether this concept could have been used when the Tony and Susan Alamo Foundation was operating in Nashville.

Mr. Jack Gatlin, employee representative, questioned how this would apply if a non-sect member was employed by the religious sect.

Mr. Tony Farmer, attorney representative (TTLA), cautioned that the language of the bill should be carefully considered as to whether the employee is waiving workers' compensation benefits or whether the religious sect employer is exempt from having workers' compensation coverage. He stated if it is an exemption, it probably refers to the business; if it is a waiver, it would refer to the employee.

Mr. Pitts suggested the bill should contain a provision that the "religious sect" employer be required to purchase workers' compensation coverage for all "non religious sect" employees.

SB 2141 by Herron *HB 2076 by Maddox

Present Law

TCA §50-6-113 provides that a principal, or intermediate contractor or subcontractor shall be liable for compensation to any employee injured while in the employ of any of the subcontractors of the principal, intermediate contractor or subcontractor and engaged upon the subject matter of the contract to the same extent as the immediate employer.

Proposed Change

While the bill re-writes all of *TCA* §50-6-113, it in effect changes only the portion dealing with the vertical liability of contractors, intermediates and subcontractors. It leaves intact the sections related to the requirement of coverage for all in the construction industry.

The bill provides that a subcontractor is liable for workers' compensation benefits to its employee while engaged upon the subject matter of a contract with a principal, intermediate contractor or other subcontractor. A principal, intermediate contractor or other subcontractor shall not be liable to pay benefits to the injured employee of another subcontractor or intermediate contractor provided the injury occurs on, in or around the premises on which the subcontractor had undertaken to execute work or which are otherwise under the subcontractor's control or management.

The bill permits a subcontractor to elect to be covered by the general contractor's policy of workers' compensation insurance provided a form is filed by the general contractor with the Division of Workers' Compensation. However, if the general contractor fails to file the form and the subcontractor can prove payment of premiums to the insurance company, the insurance company is still liable for payment of benefits.

Practical Effect

The bill eliminates vertical liability and makes the subcontractor responsible for the injuries sustained by the sub's employees. However, current law provides immunity from tort claims to the general contractor or other contractors up the chain from the subcontractor. This bill extinguishes immunity and, by implication, permits the employee of a subcontractor to sue a general contractor or any other entity up the chain for personal injuries in tort.

SB 2141 by Herron *HB 2076 by Maddox, continued.

Comments of Advisory Council Members:

Mr. Bob Pitts, employer representative, stated the bill will eliminate vertical liability between various levels of contractors and violates the historical principle that the general contractor is the ultimate responsible party in the event a subcontractor is not covered. Mr. Pitts said there is not a construction trade organization in favor of this bill. He indicated he is not aware of any state that has eliminated vertical liability and it would be destructive to the workers' compensation process.

Mr. Jerry Mayo, insurance company representative, says the way Tennessee currently treat this issue is the norm in all states and the bill will deviate substantially from the standard.

***SB 550 by Black HB 1885 by Lynn**

Present Law

TCA §56-12-101, *et seq.* is the "Tennessee Insurance Guaranty Association Act". *TCA* §56-12-103 lists the types of insurance to which the law is NOT applicable and this includes "(11) Excess Insurance". Therefore, under current law a reinsurer is not allowed to participate in and have claims paid by the Tennessee Insurance Guaranty Association (TIGA).

Proposed Change

SB828/HB1795 would allow the TIGA Act to apply to excess insurance covering all self-insured workers' compensation pools under policies of insurance entered into prior to March 31, 1999.

Practical Effect

This proposed bill would expand the liability of the TIGA. Under this proposal if any self-insured pool(s) had purchased reinsurance (excess insurance) prior to March 31, 1999 and the reinsurer or excess carrier became or becomes insolvent, then TIGA would be responsible for payment of the claims. Under this proposal, the claims could have been incurred several years ago, but liability of TIGA would attach as of the date the bill became effective.

It would appear that if the proposed bill passes, the self-insured workers' compensation pools could avoid joint and several liability as to claims they had ceded to a reinsurer prior to March 31, 1999 if the reinsurer became insolvent in the past or becomes insolvent in the future if the insurance contract is still in effect. The liability of the insolvent reinsurer and the pool would be shifted to the Tennessee Insurance Guaranty Association, which would first be paid by all workers' compensation insurers licensed and doing business in the state and ultimately by the Tennessee general fund through credits against premium taxes.

Comments of Advisory Council Members:

Mr. Nevins, employer representative, noted there is a misconception that the Tennessee Insurance Guaranty Fund, prior to March 1999, provided coverage for excess insurance. Mr. David Broemel, manager of TIGA, explained to the Advisory Council that TIGA has never provided coverage for excess workers' compensation insurance. From its inception in 1971, it applied only to primary insurance.

Advisory Council Comments, continued.

In 1999, the Act was re-drafted and because of litigation ongoing in the State of Florida, the statute was amended to make certain the law would not be construed to cover excess workers' compensation coverage. Mr. Broemel explained that there exists an Attorney General opinion that concurred with the TIGA's pre-1999 policy of non-coverage. When the TIGA has had to assess workers' compensation insurers due to insolvency of a carrier, the pools have never been assessed. Assessments by TIGA have a substantial impact on the State of Tennessee because any amount assessed to an insurance carrier is able to be offset against premium taxes.

Mr. Jerry Mayo, insurance company representative (also serves as the President of the TIGA Board of Directors) submitted the following comments in writing:

* As Neil Nevins pointed out, it has always been the position of TIGA that excess insurance is not a covered line because it is not direct insurance, but rather reinsurance over a primary self-insured pool.
* Excess was added to the list of 11 excluded lines in 1999 to clear up any doubt, not change the law.
* The Tennessee Insurance Guaranty Association was set up to protect the "little guy" in the insured marketplace.
* The self-insureds have access to sophisticated risk managers who advise their clients.
* TIGA has never assessed excess carriers for the program in question. TIGA has never assessed excess carriers for any of the programs in question.
* The Attorney General was asked if the Reliance reinsurance/excess coverage in question was covered by TIGA and they said "no" in a five page opinion on March 7, 2002, No. 02-026. The Attorney General examined several cases on both sides of the issue and concluded that "It is not clear . . ." whether excess is direct insurance or not, but stated that the question had been settled by the 1999 amendment.
* TIGA will continue to pay millions of dollars to injured workers on direct policies of worker's compensation insurance, but it is not fair to pass legislation on a retroactive basis for a few policyholders.
* This type of legislation will have an adverse impact on the worker's compensation system in several ways: It will encourage bad decision making; managers can obtain a bailout on a retroactive basis. It will also burden a system that has been hit hard by recent insolvencies and

***SB 550 by Black HB 1885 by Lynn, continued**

Advisory Council Comments, continued.

ultimately, taxpayers and policyholders will be forced to pick up the increased expense. If TIGA ends up paying, this is a reduction in the premium tax that will have to be made up somewhere else.

At the March 18, 2005, meeting Mr. Mayo stated the bill is an attempt to bail someone out who made a bad decision by choosing to provide workers' compensation coverage through a pool that was recommended to them that is not subject to Guaranty Fund protection. He said it would set a horrible precedent to agree to bail someone out several years later.

Mr. Steve Turner, employer representative, inquired as to the difference between a high deductible insurance policy and an excess policy and whether the difference is recognized in the industry. Mr. Mayo explained with a high deductible policy, the insurance company pays the claims and then seeks reimbursement from the employer and in an excess policy, the employer pays the claims up to a certain amount of money and after that amount has been paid by the employer, then the excess carrier steps in to pay the claims. Mr. Mayo noted this distinction is well understood both by the insurance industry and insurance regulators. Mr. Mayo also noted there are eleven (11at ocean marine insurance is also excluded from the TIGA fund and this bill is like a ship sinking and then the owner of the ship asking the TIGA for help paying for the loss.

Mr. Othal Smith, employee representative, stated he did not hear the proponents of the bill say the Logic Pool was misled by Reliance Insurance Company. He indicated a pool agrees to be responsible for all of its members' claims. He stated, "It seems to me that price may have driven these entities in this direction -but you can't get something for nothing. I am sorry they made the decision, but the cheap way out may not be the right decision after all. You don't ask someone else fix your bad decisions."

Mr. Dale Sims, State Treasurer and Chair of the Advisory Council questioned the attorney members of the Council as to what would happen to the concept of joint and several liability of those who agreed to self-insure through pools if this bill passed. Mr. Tony Farmer, attorney member (TTLA) said the practical effect of the bill is to make the excess policy written by Reliance to the Pool into a direct policy and then there would be entitlement to assistance from the Guaranty Fund. Ms. Kitty Boyte, attorney member (TDLA) stated for TIGA to exist the insurance carriers pay money for the direct insurance contracts written and they do not pay money for the excess policies they write. The

***SB 550 by Black HB 1885 by Lynn, continued**

Advisory Council Comments, continued.

bill is asking TIGA to help pay the claims, although Reliance did not pay into TIGA for excess coverage. Mr. Mayo stated the bill would in effect rewrite the outcome of the excess insurance contract issued by Reliance to the pool. Mr. Smith commented that the pool is asking the other carriers in TIGA to pick up liability they did not agree to pick up - to come back retroactively and tell these other entities they have to pay the claims that were not intended to be covered. He said this is a retroactive amendment to the Tennessee Insurance Guaranty Association Act that the people who participated under that legislation did not contract to take on and now we are asking them to pick up liability they did not agree to pay when the fund was created. It amounts to an ex-post facto statute that re-writes history.

Commissioner James G. Neeley stated that if this bill passes, then the General Assembly will have to address a lot of issues regarding pools in general and the obligations the pools have accepted and this would open a large window of problems as it relates to the ability to create pools and the obligations the pools accept.

Mr. Jerry Lee, employee representative, and Mr. Bob Pitts, employer representative, indicated they concur with the remarks and comments made by the other members.

SB 2117 by Kyle *HB 2004 by Maddox

Present Law

There is no current law that addresses the subject of the bill.

Proposed Change

SB2117/HB2004 adds a new section to Title 50, Chapter 6, Part 4 which is the "Insurance" part of the workers' compensation law. The new section would require an insurance company to pay an insured employer's legal fees incurred in any successful defense of an additional premium assessment after an insurance company's audit provided a court or administrative appeal process determines the premium to have been erroneously or unreasonably assessed.

Practical Effect

The bill would allow recovery of legal fees which might be a deterrent to overzealous audit results.

Comments of Advisory Council Members:

Mr. Jerry Mayo, insurance company representative, questioned whether the premium is determined to have been properly assessed will the insured pay the attorney fees of the carrier. He stated there are many flaws with the bill.

Mr. Tony Farmer, attorney representative (TTLA), stated the workers' compensation law is full of penalties for unreasonable behavior and insurance companies should not be excluded. The bill is consistent with the workers' compensation system that provides for recovery of an attorney fees in litigation required to obtain post judgment medical treatment.

Mr. Pitts noted if attorney fees are assessed, this will increase workers' compensation costs because the attorney fees will be added to the loss costs.

AMENDED ***SB 238 by Kurita HB 203 by Briley**

Present Law

TCA §50-6-412 was amended in 2000 to provide specific penalties when an employer fails to secure compensation as required by the workers' compensation law. The penalties were tied to the amount of premium the employer should have paid and is also tied to whether the employer responded to the notice from the Department. The statutory penalty is mandatory if the employer has failed to comply with the law. The Department has no discretion to consider any factors other than the fact the employer did not have coverage as required by the law.

Proposed Change - Amendment

The amendment provides a definition of the term "secure payment of compensation" and grants the Commissioner of Labor/WFD or designee authority to deviate upwards or downwards from the penalty produced by using the statutory formula.

Practical Effect

The amended bill would change the penalty from mandatory to discretionary.

Comments of Advisory Council Members:

Mr. Othal Smith, employee representative, stated he believed the law should be strict liability as it was originally drafted and there should be no politics in it. Either the employer buys the required coverage or they should pay the penalty for failure to have coverage. He said there are enough temptations in life and the general public thinks badly enough already about the government and the people that run it that he hates to see a commissioner of labor have the authority to waive these penalties as this would lead to allegations that he did it for the wrong reason, or it was someone's political buddy or someone's cousin, or the constituent of some legislator. He said if he were the commissioner he would not want the ability to waive the penalty.

Mr. Bob Pitts, employer representative, stated he is uncomfortable with the bill. He said he does not like the idea of the employer having no workers' compensation coverage regardless of whether the employer would be liable in tort if the employer's fault caused the injury. Mr. Pitts stated it is not good policy to in any way encourage an employer to avoid purchasing workers' compensation

Advisory Council Comments, continued.

coverage. He said that it might be appropriate to add language to the law to clarify that there is a process as to how an employer can contest the amount of a premium and still maintain coverage. However, he stated he did not want to take any action that would encourage employers not to have workers' compensation coverage. Mr. Pitts said he is ok with the current law, but if there is to be change, then he opposes giving the commissioner authority to deviate upward from the statutory penalty.

Ms. Jackie Dixon, attorney representative (TBA), stated that when the employer fails to purchase workers' compensation insurance, the employee will not be able to obtain timely medical benefits if they elect to pursue a tort action.

Mr. Dale Sims, State Treasurer and Chair of the Advisory Council, stated in the instances when an employer feels they have been charged inaccurately, there is a mechanism in place where the employer can pay the prior year's premium, file a notice of protest and the coverage can be continued. However, in the current instance, as the bill would allow, instead of doing that, the employer elects not to pay anything until the conclusion of an audit and during this period of time the employer is exposing every worker to potential injury for which there is no workers' compensation coverage available. Mr. Sims stated the current statute that assesses penalties for noncompliance has been in effect for four years and he would hate to see action taken that sends a message that it is not important to have workers' compensation coverage and to encourage an employer to decide not to purchase insurance and come in and make a case in the sole discretion of one person that the penalty should be waived, depending on who you are. The reason for the significant penalty that is in the current law (1.5 times the amount of premium that should have been paid) was to send a clear message that it is cheaper to comply with the law than to not comply with the law. He stated if there is any beneficial trend from the current law, he would hate to see movement away from the current policy.

SB 981 by Bryson *HB 676 by Maddox

Present Law

Department of Labor/WFD Rule 0800-2-14-.07 (Claims Handling Standards) requires all medical costs owed under the Tennessee Workers' Compensation Law to be paid within forty-five (45) days of receipt of the bill or invoice. If additional information is needed in order to pay the bill, the information must be requested within forty-five (45) days. The rule provides there is no obligation to make payment until adequate documentation is received.

Proposed Change

SB981/HB676 adds a new section to Title 50, Chapter 6, Part 4. It requires the Commissioner of Labor/WFD to promulgate rules that set standards governing the prompt payment of workers' compensation health claims by insurers and self-insured employers. The statute requires the standards to follow those set out in Title 56 governing timely reimbursement of health insurance claims. The bill also requires the Commissioner to promulgate rules relative to the processing of the payment of health care claims for providers and to contend with an entity that does not comply with the requirements. The rules are to include authority for the Commissioner to assess a civil penalty equal to 25% of the unpaid or untimely paid benefits owed to a health care provider when the Commissioner determines the bills were due and were either paid late or not paid. The penalty assessment is to be conducted under and appeals permitted pursuant to the UAPA.

Practical Effect

The bill requires the Commissioner to promulgate rules governing payment of medical bills on a timely basis; establishes a 25% penalty for late or unpaid bills and requires the rules to include the method of penalty assessment and appeals.

Comments of Advisory Council Members:

Ms. Kitty Boyte, attorney representative (TDLA), noted when medical bills are placed through the audit process delay in payment may occur but the promulgation of the medical fee schedule should alleviate the problem.

***SB 981 by Bryson HB 676 by Maddox, continued**

Advisory Council Comments, continued.

Mr. Bob Pitts, employer representative, requested that it be called to the sponsors' attention there is already a law that exists dealing with the issue of when medical bills are to be paid in workers' compensation matters (Claims Handling Standards). He also stated that it is hoped the implementation of the medical fee schedule will reduce the audit process and eliminate any problems that exist and while it may need to be looked at in the future it is untimely to address the issue at this time.

***SB 462 by Williams HB 1550 by West**

Present Law

The Medical Care and Cost Containment Committee, established by *TCA* §50-6-125, is comprised of fourteen (14) voting members: three (3) physicians; three (3) representatives of employers; three (3) representatives of employees; three (3) representatives of hospitals; one (1) pharmacist; and one (1) representative of the health insurance industry.

Proposed Change

SB462/ HB1550 adds another member to the Medical Care and Cost Containment Committee to represent self insurance pools.

Practical Effect

The bill would add a representatives of those entities who pool their workers' compensation liability to the MCCC.

Comments of Advisory Council Members:

The members of the Advisory Council noted that the Medical Care and Cost Containment Committee was created in the 1996 Reform for the purpose of assisting the department in administering the workers' compensation law regarding medical expenses and resolving disputes as to whether the expenses charged were usual and customary in the community. It has been described by the Medical Director as a "nuts and bolts working committee". The members questioned whether additional members to the Medical Care and Cost Containment Committee would add to the purpose of the committee given the adoption of a medical fee schedule.

In addition, the members noted this bill is viewed as a Caption Bill in the house as it opens all of Title 50. The Council noted, however, that if the intent of the bill is to add members to the Medical Care and Cost Containment Committee, then the following would probably have the same interest in serving on the committee: self-insured pools; the assigned risk plan insurers and commercial insurers; and other medical care providers not currently represented.

***SB 462 by Williams HB 1550 by West, continued**

Advisory Council Comments, continued.

Mr. Bob Pitts, employer representative, expressed concern from an organizational point of view about what size committees can work effectively. He stated a chiropractor representative probably should be added to the Committee if the Committee is asked to review the fees charged by a chiropractor. However, he noted, if this is the direction in which the policy is going, then with respect to the interest groups that have multiple representation on the Committee maybe it is time to consider reducing their representation and adding other entities who have fees that will be evaluated by the Committee.

The voting members unanimously requested that the sponsors of the bill be advised that the Advisory Council is happy to review any amendments which may be made to the bill that remove its designation as a "Caption Bill" in the House.

***SB 486 by Bryson HB 477 by Odom**

Present Law

The Medical Care and Cost Containment Committee, established by *TCA* §50-6-125, is comprised of fourteen (14) voting members: three (3) physicians; three (3) representatives of employers; three (3) representatives of employees; three (3) representatives of hospitals; one (1) pharmacist; and one (1) representative of the health insurance industry.

Proposed Change

SB486/ HB477 adds a chiropractor as a member of the Medical Care and Cost Containment Committee.

Practical Effect

The current statute permits only physician members; the bill would permit chiropractors to have a representative on the MCCC.

Comments of the Advisory Council Members:

It was noted by the Advisory Council at its meeting on March 4, 2005, that in addition to chiropractors, there exist other providers who are authorized to provide services in workers' compensation cases who would have the same interest in serving on the MCCC. These providers would include physical therapists, home health care professionals and nurses. Therefore, the members suggest the legislators consider the balance of the Medical Care and Cost Containment Committee [MCCC] and its primary purpose regarding review of workers' compensation disputes regarding billing when determining whether additional members should be added to the MCCC.

At the March 18, 2005, meeting, Mr. Othal Smith, employee representative, stated he felt it would be a good thing to put a chiropractor on the Medical Care and Cost Containment Committee.

Mr. Bob Pitts, employer representative, expressed concern from an organizational point of view about what size committees can work effectively. He stated a chiropractor representative probably should be added to the Committee if the Committee is asked to review the fees charged by a chiropractor. However, he noted, if this is the direction in which the policy is going, then with

Advisory Council Comments, continued.

respect to the interest groups that have multiple representation on the Committee maybe it is time to consider reducing their representation and adding other entities who have fees that will be evaluated by the Committee.

***SB 1578 by Norris HB 1638 by Overbey**

Present Law

TCA §50-6-233© authorizes the Commissioner of Labor/WFD to promulgate rules that (1) ensure health care providers' compliance with *TCA* §50-6-204(a)(4) [currently limits the employer's liability for payment of medical care to "charges as prevail for similar treatment in the community where the injured employee resides".] and (2) provide an appeal procedure for health care providers who has had payment withheld for charging amounts found to be excessive. *TCA* §50-6-125 (a) and *TCA* §50-6-233(c)(7) require these rules/regulations to be approved by the Medical Care and Cost Containment Committee before they can be sent to the secretary of state.

TCA §50-6-204(I) requires the Commissioner of Labor/WFD to establish a medical fee schedule by rule and subdivision 204(i)(5) provides the medical fee schedule rules will be effective on July 1, 2005.

Proposed Change

SB1578/HB1638 changes the effective date of the medical fee schedule from July 1, 2005 to July 1, 2006 and provides that the Medical Fee Schedule rules must be approved by the Medical Care and Cost Containment Committee before they can be sent to the secretary of state.

Practical Effect

The bill delays implementation of the medical fee schedule for one year and declares any rules that establish a medical fee schedule that are not approved by the MCCCC to be invalid and unenforceable.

Comments of Advisory Council Members:

Commissioner James Neeley stated it would be very difficult to promulgate and make changes to the medical fee schedule in the manner required by the bill. He noted, for the record, if the Medical Care and Cost Containment Committee's recommendation regarding the medical fee schedule had been adopted, it would have resulted, not in a savings, but an increase of between 8 and 9% in medical costs above the current cost. He also indicated a delay in the implementation of the medical fee schedule until July 1, 2006, would result in the reforms implemented to the system in 2004 being unbalanced.

***SB 1578 by Norris HB 1638 by Overbey, continued.**

Advisory Council Comments, continued.

Mr. Othal Smith, employee representative, noted the Department gave the medical care providers the opportunity to be involved in the implementation of the medical fee schedule and he regrets the position the providers took. He stated for them to make a recommendation that resulted in an increase is unconscionable. He said he did not think an increase of between 8 and 9 percent in medical costs above the current costs to the system was what was intended by the 2004 Reform Act.

Mr. Bob Pitts, employer representative, noted the bill results in giving veto power to a group of workers' compensation providers over a fee schedule developed by the Department of Labor and Workforce Development. He stated a delay in the implementation of the medical fee schedule imposes an additional cost to business and will result in increases in premiums and delays in the workers' compensation reform efforts.

***SB 801 by Burchett HB 1354 by Ferguson**

Present Law

TCA §50-6-121(d)(1) authorizes the Workers' Compensation Advisory Council to make recommendations concerning the promulgation or adoption of legislation or rules. Other sections of the section requires certain reporting requirements of the Advisory Council.

Proposed Change

SB801/HB1354 adds a requirement for the Advisory Council to annually review all rules that affect workers' compensation insurers, self-insurers and pools and to make recommendations concerning the review.

Practical Effect

The bill, as written, would require an annual review of all rules promulgated by the division of workers compensation of the department of labor and workforce development because all rules related to workers' compensation will affect insurers, self-insurers and pools. In addition, all rules promulgated by the department of commerce and insurance that affect these entities would have to be reviewed. This would include general rules governing insurance carriers.

Comments of Advisory Council Members:

The members concurred they believe the current statute, TCA §50-6-121, authorizes the Council to review rules and regulations at any time and, while the Council serves at the pleasure of the General Assembly, a mandated annual review of all rules and regulations would require a significant amount of time and effort for each member and the staff of the Council.

The Advisory Council members also noted the bill's caption opens the entire workers' compensation law, and therefore, the bill appears to be a caption bill. If the sponsors intend to amend the proposed bill, the Advisory Council will be happy to review any amendment to the bill.

***SB 1448 Jackson HB1177 by Buck**

Present Law

TCA §50-6-419, enacted in 1996, required the Commissioner of Labor and Workforce Development to set standards by rule governing the adjustment and settlement of workers compensation claims. The statute directed the rules be submitted to the Advisory Council on or before October 1, 1996 and allowed the Advisory Council a period of sixty (60) days to comment on the standards. These standards were promulgated and are known as the "Claims Handling Standards".

Proposed Change

SB1535/HB0496 adds an additional sentence at the end of *TCA* §50-6-519(d) that requires the Advisory Council to comment within forty-five (45) days on any revision of the claims handling standards that may be proposed after July 1, 2005.

Practical Effect

The practical effect is to require the Advisory Council to comment on any revisions to the "Claims Handling Standards" made after July 1, 2005 within 45 days of receipt of the proposed revisions.

Informational Note

The current bill does not direct the Commissioner of Labor and Workforce Development to submit any proposed revisions to the standards to the Advisory Council prior to promulgating changes. Staff would suggest this be added to the language of the bill to maintain clarity of action.

In addition, the original standards were to be provided to the Joint Committee although it was not required to comment on the standards. The amendment does not include the Joint Committee as a recipient of revisions.

Comments of Advisory Council Members:

The Advisory Council members noted they are happy to review any amendments which may be made to the bill that remove its designation as a "Caption Bill" in the House.

SB 850 by Harper *HB 144 by Turner, Mike

Present Law

Title 50, Chapter 9 governs Tennessee's workers' compensation drug-free workplace programs. *TCA* §50-9-107 (a) requires all specimen collection and testing to be performed in accordance with the procedures provided by the federal DOT rules for workplace drug and alcohol testing.

TCA §50-9-103 contains the definitions applicable to the chapter. The definitions include: "chain of custody" (designated as a method for tracking substances for the purpose of maintaining control and accountability from initial collection to final disposition); "confirmation test" (a second analytical procedure that must be different in scientific principle from the initial test procedure; "specimen" (tissue, fluid or a product of the human body capable of revealing the presence of drug or alcohol).

The promulgated rules of the "Drug Free Workplace Programs" includes an additional definition: "Split specimen" (the procedure by which each urine specimen is divided in two and put into a primary specimen container and a secondary or "split" specimen container) The primary specimen is opened and used for the initial screening and confirmation test. The split specimen container remains sealed and stored at the testing laboratory.

Proposed Change

SB850/HB144 requires:

- The collected specimen be divided into two parts and placed into two containers. One is to be sealed in a tamper proof container and returned to the specimen donor. The other specimen is used for testing.
- The employee must be notified of the test results within 72 hours of the time the specimen is supplied to the testing laboratory.
- If the test result is positive, the employee may have a test performed on the specimen that was given to the employee if there is no evidence of tampering with the seal on the container.
- The employee must make the decision to have the second specimen tested on the day the employee receives notification of the positive test results
- The test must be performed by a certified lab in accordance with the drug free workplace law.
- The employer may take no disciplinary action until the employee receives the results of the results on the second specimen and then only if the test results are positive.

Practical Effect

The proposed bill would permit an employee to have custody of the specimen and to decide whether to have a test performed on the "tamper-proof" specimen following a reported positive test result. One assumes this is to give the employee comfort in knowing the test was not "fixed".

Informational Note

The current statute requires all specimen collection and testing to be performed in accord with the federal DOT rules and regulations. The proposed bill appears to conflict with current statute and rules related to chain of custody, the definition of "specimen" and the definition of "split specimen".

The proposed bill does not limit its applicability to a urine sample. As written, if the specimen was blood or other tissue, the specimen would be divided in two. In addition, the proposed bill does not indicate who is to bear the cost of the test on the "tamper-proof" specimen and the timing of the reporting of the results of the second test.

Comments of Advisory Council Members:

The members noted the current process is an attempt to be consistent with the Federal DOT testing regimen that includes split specimens and has chain of custody procedures within it and the proposal weakens this process. The bill would make it more difficult for an employer to comply with the federal rules and a separate system for the state program.

The members of the Council requested the statements made by Mr. Jim Farmer, Director of the Drug Free Workplace Program, at the March 4, 2005 meeting of the Advisory Council be included in the comments to the Senate Commerce, Labor and Agriculture Committee. The following is a summary of Mr. Farmer's remarks:

> The bill would conflict with existing Department of Transportation regulations. The current procedure in the Tennessee Drug Free Workplace program is to divided a specimen and place it into two containers. Both containers are required to be sealed in the presence of the employee and sent to a certified laboratory for testing. The first sealed specimen is tested. If the result is positive, the laboratory conducts a second confirming test on the first specimen. The second specimen container remains sealed and in the custody of the laboratory. The Department considers the laboratory as an

Advisory Council Comments, continued.

independent third party. The procedure by which a specimen is handled in the Tennessee program conforms with the DOT rules.

Mr. Farmer noted as the bill is written there are issues regarding giving the second sealed specimen to the employee. These issues include the environment in which the specimen is stored and whether the specimen can be contaminated. He noted, as a practical matter, the call he receives most often from an employee is to ask whether they can have a second test conducted and they mean a test conducted on a new, second specimen. When they are advised this is not permitted and that the second test is conducted on the original split specimen, they lose interest in pursuing the second test.

SB 852 by Harper *HB 136 by Turner, Mike

Present Law

Title 50, Chapter 9 governs Tennessee's workers' compensation drug-free workplace programs. *TCA* §50-9-107 (a) requires all specimen collection and testing to be performed in accordance with the procedures provided by the federal DOT rules for workplace drug and alcohol testing.

Proposed Change

SB852/HB136 adds language at the beginning of *TCA* §50-9-107(a) to require the individual who collects a specimen for drug or alcohol testing to be a licensed or certified health care professional in good standing. It further requires that the person shall not have been convicted of any alcohol or drug-related offense.

Practical Effect

The proposed bill will require employers to have health care professionals collect all samples for testing under the drug free workplace program. It will also require the employer to inquire as to whether the individual has ever been convicted of an alcohol or drug-related offense.

Informational Note

It would appear to be very difficult, if not impossible, for an employer to comply with the requirement to conduct an investigation into the person's licensure and conviction status.

Comments of Advisory Council Members:

The members of the Advisory Council noted the provisions of this bill runs contrary to the Department of Transportation rules and regulations.

AMENDED ***SB 662 by Fowler** **HB 521 by Sharp**

Present Law

TCA §50-6-301, *et seq.* is the part of the workers' compensation law that deals with "occupational diseases". *TCA* §50-6-302 prohibits a claim for an occupational disease in existence prior to March 12, 1947 and also provides that in claims for coal worker's pneumoconiosis for total disability followed by death, all presumptions, criteria and standards of the Federal Act shall be used and if entitled to Federal benefits, they are to be considered totally disabled under state law.

TCA §50-6-112 provides that an employer/insurer has a right of subrogation to an employee's claim against a third party for the same injuries. The statute permits the employer/insurer to recover from the employee the amount of workers' compensation benefits paid when the employee receives money from a third party. In 2000, the Supreme Court held the "made whole doctrine" is not applicable to a workers' compensation claim.

Proposed Change

SB662/HB521 eliminates the employer/insurer's rights to recover benefits paid if the employee recovers for disability or death due to asbestos-related diseases or coal workers' pneumoconiosis.

Practical Effect

This bill would permit an employee to receive all monetary damages that may be awarded (trial or settlement) against a third party that may have caused or contributed to the employee's resulting disability from asbestos or black lung disease. In other words, under the proposed law, if the employer had paid $400,000 in work comp benefits and the employee sued a manufacturer of an asbestos product and recovered 600,000 for the injuries, the employee would not we required to pay the employer back for the work comp benefits.

Comments of Advisory Council Members:

Ms. Kitty Boyte, attorney representative (TDLA), indicated she has handled about 75 asbestos cases and in her opinion whether the workers' compensation case moves forward independently of the third party product liability claim is up to the employee's attorney. She stated she has not experienced delay in the workers' compensation claim in middle or west Tennessee when the

Advisory Council Comments, continued.

employee also has a product liability claim. It is the employee's right to seek workers' compensation benefits and at the same time to file a separate claim against a third party for tort damages due to asbestos exposure. In those cases, the workers' compensation benefits are paid in full and if the employee files a third party claim then the insurance carrier or employer is entitled to subrogation against the third party who caused the injuries. She acknowledged there are logistics problems in the third party product liability case because of bankruptcies, merger of companies and closure of plants; however, the workers' compensation benefits are not paid to the employee at a discounted rate for these asbestos related diseases. She said that delay in the third party lawsuit and difficulty in proving fault in the third party action should not be a reason to take away the employer's right to subrogation. The subrogation statute is intended to prevent duplication of benefits to the employee.

Mr. Steve Turner, employer representative, commented that this issue would not be limited to only asbestos cases but would also apply in other instances where the third party was in bankruptcy.

Mr. Jerry Mayo, insurance company representative, said the proposed bill is taking away a property right of the insurance carrier to recover workers' compensation benefits when the employee recovers from the third party whose fault caused the injury. Mr. Mayo expressed concern that this bill would set a dangerous precedent in taking subrogation rights away from the insurance carrier.

Mr. Dale Sims, State Treasurer and Chair of the Advisory Council, questioned whether this legislation would carve out an exception that would have precedential value in applying to other occupational diseases.

Mr. Bob Pitts, employer representative, expressed concern with the bill because subrogation has been an important principle of the Tennessee Workers' Compensation System and if it is taken away in the case of asbestos claims this will result in future erosions in the system for other types of claims. He pointed out these are difficult decisions and it does not mean you are unfeeling as to the injuries sustained by workers. However, imbedded in the management of any system are certain core principles and if they are not retained, it becomes destructive to the process as a whole. As a result, the no fault system of workers' compensation system is changed so its basic purpose is no longer served due to the "carve-outs". It is obvious, the bill will raise costs because the inability to seek

Advisory Council Comments, continued.

reimbursement of workers' compensation benefits from the at-fault third party will impact the employers' modification rates.

Mr. Othal Smith, employee representative, agreed the bill will result in an increase in workers' compensation premiums when the insurance carrier is no longer able to seek subrogation from the at-fault third party to recover the workers' compensation benefits paid. He indicated that businesses that employ organized labor are already burdened cost-wise and to add more cost may jeopardize these businesses. Everyone needs to understand the bill will increase the cost to the employer. Mr. Smith stated while the General Assembly may decide that it should be the public policy of the State of Tennessee not to permit subrogation in the case of an injured workers everyone needs to understand this will result in an increased cost to the businesses enterprise and as long as everyone understands the ramifications, he is all right with the decision. However, he noted to the extent the bill is going to be applied to pending claims then he has a problem with the retroactive application because it does not give the business enterprise to make the necessary adjustments due to a change in the law from something that decreases costs to a system that increases costs. In his opinion, the bill will result in cost shifting to the employers and insurance carriers and away from the third party actor.

Mr. Jerry Lee, employee representative, stated it is difficult to prove liability in an asbestos case where the exposure happened many years prior to the injury. He indicated this is a problem in the construction industry where the employee worked on so many different jobs. Everybody has gone bankrupt and the settlements from the third parties are egregious.

SB 776 by Burchett *HB 713 by Hargrove

Present Law

Title 50, Chapter 6, Part 4 pertains to insurance. It addresses many insurance related issues, including (but not limited to) the following: authority to write workers' compensation insurance, classification of risks, premium taxes, requirement of workers' compensation insurance or self-insurance, certificates of compliance, advisory prospective loss costs, rating plans, penalties for non-compliance, mandatory policy provisions.

TCA §50-6-408 and 409 address mandatory policy provisions and provide that an insurer is bound by and subject to the awards, orders or judgments rendered against the employer. Pursuant to these sections, an injured employee may file a first party claim against the employer's workers' compensation insurance carrier. No specific workers' compensation statute addresses the remedy for an injured employee against the employer when the insurer has been determined to be insolvent.

Title 56, Chapter 9 addresses the process by which insurers are placed into rehabilitation or liquidation. Title 56, Chapter 12 created the Tennessee Insurance Guaranty Association (hereinafter, TIGA). According to *TCA* §56-12-102, its purpose is "to provide a mechanism for the payment of covered claims under insurance policies to avoid excessive delay in payment and to avoid financial loss to claimants or policyholders because of the insolvency of an insurer...."

Under the TIGA act an injured employee would be considered a claimant who has a covered claim (provided the claimant or insured is a resident of the state). For workers' compensation claims, TIGA is required to pay all benefits to which the injured workers is entitled and there is no monetary cap.

Exclusive venue for actions brought against TIGA for benefits is in the circuit or chancery court in Davidson County, unless TIGA waives venue. When an insurer is declared to be insolvent, all claims for which TIGA is obligated are stayed for at least six months from the date of insolvency to permit the association to properly defend the cases.

Proposed Change

SB0981/HB0980 adds a new section to Title 50, Chapter 6, Part 4. This new section creates a new remedy for an injured employee against the employer for medical benefits when the employer's

Proposed Change, continued.

insurer has been declared insolvent and neither the insurer nor the employer has provided medical care to the injured employee. The proposed bill would allow the injured employee to petition a court to obtain an order compelling the employer to provide the medical care and treatment needed by the employee.

Current Procedure

The following is the current procedure by which an injured employee is able to obtain assistance regarding medical treatment that the employer is failing to provide:

1. An injured employee is able to obtain assistance regarding medical treatment through the Division of Workers' Compensation's Benefit Review Section by calling its toll-free number.
2. A workers' compensation specialist investigates the claim to determine if the employer is subject to the workers' compensation law and to determine if the employee is entitled to benefits.
3. If the specialist determines the insurance carrier for the insured employer is insolvent, the claim is referred to the Tennessee Insurance Guaranty Association for processing of the claim.
4. If the specialist determines the employer is self-insured and has declared bankruptcy, the claim is referred to the Department of Commerce and Insurance, which functions as the receiver for the claims against the bankrupt employer to make sure the benefits are provided to which the employee is entitled.
5. If it is determined the employer's insurer is solvent and the claim is compensable, the specialist will order benefits to be provide to the injured employee. The specialist has the authority to order medical benefits to be provided. If the employer/insurer does not comply with the order, there is a substantial penalty assessed against the employer/insurer.

Practical Effect

This proposed bill would allow an injured employee to file suit against an employer for medical benefits even if the employer's insurer has been declared to be insolvent and would circumvent the changes enacted by the 2004 Workers' Compensation Act that prohibits filing a claim in court until

Practical Effect, continued.

exhaustion of the benefit review conference process. Also, since the law requires an employer to have workers' compensation insurance or be self-insured, this creates an additional liability for the employer and would have the effect of allowing an employee to avoid the statutory stay related to a claim for benefits against TIGA.

Informational Note

Under the proposed bill, the employer would be personally liable notwithstanding the fact they/it had complied with the workers' compensation law by purchasing insurance coverage. This bill may undermine the reforms enacted in 2004.

Also, this bill would probably have an effect on the entire structure that has been established for instances in which the insurer is declared insolvent. TIGA pays all workers' compensation claims (from assessments made to all solvent workers' compensation carriers on a prorated basis). Then the individual carrier is allowed a credit for these payments against their annual premium tax payments. Therefore, the public policy in Tennessee is that the Tennessee General Fund will ultimately pays the claims, not the employers.

Comments of Advisory Council Members

The Advisory Council wants the sponsors to be aware of the current process for resolving these issues. The Advisory Council members cannot identify any problems with the current process.

AMENDED ***SB 876 by Burchett HB 1257 by Turner, Mike**

Present Law

TCA §50-6-302 pertains to occupational diseases. The current law does not have any specific language regarding specific occupational diseases except for coal worker's pneumoconiosis.

Proposed Change

SB876/HB1257, as amended, makes a disease or condition covered by the federal "Energy Employees Occupational Injury Compensation Program Act", parts (B), (D) or (E) which an employee had prior to July 1, 2005 compensable as an occupational disease for state workers' compensation benefits. The bill makes a positive determination findings in the federal conclusive proof as to causation and prohibits an employer from raising issues related to: notice, causation, statute of limitations.

The amendment to the bill clarifies that a DOE facility employee/survivor is not entitled to claim: (a) benefits against the second injury fund; (b) benefits against the State of Tennessee as a state employee; and © medical benefits against any entity (for past, present or future medical treatment). The amendment also prohibits inclusion of these state workers' compensation claims in the employer's experience modification factors or the loss history.

Practical Effect

For those employees/survivors of a DOE facility who receive a positive determination in the federal claim for benefits due to illnesses contracted as a result of work at the DOE facility, the employers (DOE contractors) are prohibited from defending a state workers' compensation claim for permanent disability benefits. The proposal does clarify the second injury fund and the State of Tennessee shall have no liability for these illnesses. In addition, paid claims will not be used in calculation of the employers' modification factors and will not be included in their loss history.

Comments of Advisory Council Members:

Mr. Tony Farmer, attorney representative (TTLA), explained the purpose of the bill to members of the Advisory Council. He indicated this bill would provide fairness because the employee is unable

Advisory Council Comments, continued.

to prove causation in the state workers' compensation cases because the evidence needed to prove causation is still classified and cannot be discovered by the injured employees. He stated that without this bill, the employees who are diagnosed with an injury would not be able to prove a state claim for workers' compensation benefits because there was no access to the old records that are classified.

Mr. Jerry Mayo, insurance company representative, inquired as to whether the federal law limits attorney fees. Mr. Farmer stated the fees are limited in the federal claim.

Mr. Dale Sims, State Treasurer and Chair of the Advisory Council, noted the issue in the state claim will be limited to the nature and degree of the disability and how much money the employee is entitled to receive since liability is admitted because of the bill. Mr. Farmer noted in some cases there will be legitimate question as to what compensation benefit rate will be applicable to the claim.

Mr. Bob Pitts, employer representative, noted the passage of the bill basically makes the case for the employee's attorney and that it would not be appropriate for the employee's attorney to receive the amount of fee that is usual in a state workers' compensation claim. He suggested, if the bill goes forward, that the sponsors consider imposing the same limit on attorneys' fees in the state claims as is imposed in the federal claim. Mr. Sims noted the attorney fee limitation in the federal claims is 2% if the claim is honored and 10% if an issue has to be pursued.

SB 1130 by Cooper *HB 762 by Odom

Present Law

TCA §50-6-204(a)(4)(B) requires the employer/insurer to provide a panel choice of 4 physicians or surgeons when the employee sustains a back injury. The list of 4 must include a doctor of chiropractic. The statute also limits the number of chiropractic visits to 12, with no statutory exceptions. The statute excludes state or local government employees and workers' compensation pools.

Note: Public Chapter 433, which became effective on March 12, 2004, amended (B) and included a final sentence which was not codified. The sentence was "The provisions of this subdivision (a)(4)(B) shall be repealed on June 30, 2005. Instead, at the beginning of the subdivision, the following is included in brackets [This provision of the law expires as of June 30, 2005.].

Proposed Change

SB1138/HB762 eliminates the two-year sunset cycle of this provision and makes it a permanent part of the workers' compensation law. The change does not alter the current exclusions. In addition, the bill adds language to permit the employer to approve more than 12 chiropractic visits.

Practical Effect

This bill will eliminate the bi-annual review of the chiropractic panel for back injury cases. It also allows the employer the flexibility to approve more than 12 visits to the chiropractor if the employer felt it was appropriate.

Comments of Advisory Council Members:

Mr. Tony Farmer, attorney representative (TTLA), raised the issue that the bill as drafted creates a potential problem that the employee will be caught in the middle when there is a conflict between the employer and the insurer in instances where the employer authorizes more than 12 visits without the approval of the insurance company. In this instance, the employee could be held responsible for paying the chiropractic treatment because there are many employers who would not know to consult with the insurance company for authorization. Mr. Farmer indicated the way to cure the problem is to change the word "employer" to "employer/insurance carrier".

Advisory Council Comments, continued.

With regard to the portion of the bill regarding the sunset of the chiropractic care provision, the Advisory Council members made no comments. Ms. Kitty Boyte, attorney representative (TDLA) noted there are more issues than are addressed by the bill. She identified there is an issue as to what happens when the employee has had 12 visits to the chiropractor and is not well. At this point, what happens? Is the employer/insurer required to send the employee for additional care? There is no uniformity as to what happens after the 12 visits have been exhausted.

Commissioner James G. Neeley stated that if other treatment is needed, other than chiropractic treatment, there is nothing in the statute that relieves the employer from the obligation to provide treatment to the employee.

***SB 1449 Jackson HB1176 by Buck**

Present Law

TCA §50-6-209(b) relates to the maximum compensation payable in the event of the death of an employee. Currently, if an employee is injured or killed as a result of a work-related injury the maximum benefit depends on whether the employee was survived by dependents. If there are dependents, the maximum benefit is 66 2/3% of the employee's average weekly wage, not to exceed the maximum weekly benefit. [If the deceased employee's income would entitle the dependents to receive the current maximum weekly benefit of $638.00, the maximum death benefit would be $255,200]. If there are no dependents, the death benefit is $20,000 payable to the estate. At present, whether a violation of the Tennessee Occupational Safety and Health Act [TOSHA - codified in *TCA* §50-3-101, *et seq.*] is involved in the cause of the death is of no consequence in the determination of the amount of workers' compensation death benefits which are due.

Proposed Change

SB1449/HB1177 adds a new subdivision to *TCA* §50-6-209(b) that creates an additional workers' compensation death benefit. For those employees whose deaths are determined to have resulted from a TOSHA violation, the applicable death benefit would be tripled.

Practical Effect

The proposed bill increases substantially the potential liability of an employer/insurer for the death of an employee. The bill does not limit the TOSHA violation to activities under the control of the employer. The proposed bill would serve as an additional incentive for an employer to provide a safe workplace for its employees. The bill would probably increase insurance premiums as the insurance carrier will be responsible for paying the treble damages even though the conduct of the employer will be the deciding factor in whether or not treble damages are payable to the employee's dependents or estate.

Inasmuch as the entitlement to treble damages is based on the conduct of the employer [or possibly other employees], the "no-fault" underpinnings of the workers' compensation system would be eroded by the proposed bill. The bill introduces a fault element to an otherwise "no-fault" benefit system. Currently, the entitlement to workers' compensation benefits does not relate to the fault of the employer in causing the injury. The only exception to the "no-fault" concept is that

***SB 1449 Jackson HB1176 by Buck, continued**

Practical Effect, continued.

compensation is not allowed for a death due to the employee's willful misconduct, intentional self-inflicted injury, intoxication, illegal drugs, or willful failure or refusal to use a safety appliance or perform a duty required by law.

Comments of Advisory Council Members:

Mr. Jerry Mayo, insurance company representative, questioned who would be required to pay the triple benefit. He stated if it is the insurance company, and he assumes it is, why is the insurance company penalized for the insured employer's behavior and violation of TOSHA rules when the insurance company does not know about the employers' conduct.

Mr. Bob Pitts, employer representative, made the following comments:

- Workers' compensation is set up as a no fault system. The law states specifically how benefits are to be determined. The proposal is trying to change this by introducing TOSHA penalties into consideration of a workers' compensation case and this is not appropriate. The proponents of the bill are trying to put fault back into a no-fault system.
- TOSHA is a work place safety system. The penalties are against the employer and the assessed fines are paid to the state if the work place is unsafe. The intent of the TOSHA program is not designed to give benefits to the workers.
- The bill poses a serious danger that people will be trying to influence TOSHA decisions because of personal interests and benefits. The proposal puts unfair pressure on the TOSHA program and creates dangers to the integrity of the TOSHA program.

Mr. Dale Sims, State Treasurer and Chair of the Advisory Council, noted if the sponsors pursue the legislation, they should clarify whether the fact that a TOSHA violation is cited should be conclusive proof that treble damages are to be awarded and if there is no TOSHA citation for a violation, whether this is an issue for adjudication by a court that a citation for a TOSHA violation should have been issued. In addition, if the intent is to punish the employer for the employer's action, then the bill should provide this is a liability which the employer cannot insure and for which the workers' compensation carrier has no responsibility.

SB 1581 by Norris *HB 732 by Harrison

Present Law

TCA §50-6-226(a)(4) provides that the fees of physicians and charges of hospitals are subject to approval of the commissioner or the court before which the matter is pending, as appropriate. Unless a fee/charge is contested it is to be deemed reasonable by the department. If the fee is contested, the department is required to permit the party to seek review of the contested fee in any court with workers' compensation jurisdiction.

Proposed Change

SB1581/HB732 adds a new subdivision to TCA §50-6-226(a)(4) that requires an insurance company or self-insured employer to pay for initial examinations and treatment authorized by an insurance carrier or self-insured employer. The bill prohibits reimbursement by either the provider, the employee or any medical insurance program even if the injury or condition is later determined to be non-compensable. The bill excludes situations delineated in TCA §50-6-110 which provides no compensation shall be allowed for injury/death due to (a) willful misconduct (b) intentional self-inflicted injury (3) intoxication or illegal drugs (4) willful failure or refusal to use a safety appliance or perform duty required by law. The bill authorizes the Commissioner of Labor/WFD to promulgate rules to effectuate the purposes of "**this act".** (Emphasis added by staff of the Advisory Council.)

Practical Effect

The bill would require a carrier or self-insured employer to pay for initial exams or treatment they had authorized and prohibits the carrier or self-insure employer from obtaining reimbursement from either the provider, employee or a health insurance plan if the claim is determined to be not compensable under the workers' compensation law. It appears if the injury is later determined to be a result of one of the causes listed in the section then the insurer/self-insured employer could attempt to recoup payment from the employee or health insurance. Staff is unsure how they could recover the payment from the provider. Since the bill authorizes the promulgation of rules, staff assumes the rules could define "initial exams or treatment"; otherwise, this might be difficult to determine, especially in a hospital setting.

SB 1581 by Norris *HB 732 by Harrison, continued.

Comments of Advisory Council Members:

Ms. Kitty Boyte, attorney representative (TDLA) suggested a monetary limit be placed on the amount of treatment for which the insurance company or self-insured employer is to have liability. Mr. Steve Turner, employer representative, also noted there needs to be a limitation on the liability for the initial treatment because as the bill is drafted, the employee could have suffered a stroke that is determined not to be work related and the carrier be responsible for many years of medical costs.

Mr. Jerry Mayo, insurance company representative, suggested the prohibition against submitting the claim to the health insurance company when the injury is not work related should be removed from the Tennessee workers' compensation law.

Ms. Jackie Dixon, attorney representative (TBA), suggested the sponsors consider adding language to the bill that the insurance company or self-insured employer is not prohibited from submitting the medical bills to the health care insurer if the injury is determined not to be a work related injury.

Mr. Bob Pitts, employer representative, noted the health care providers, who are probably supporting this bill, does not care what program the claim is submitted under, workers' compensation or health care, as long as they got paid. He suggested to keep the business community from submitting the claim under the health care plan would raise opposition to the bill.

Mr. Turner noted the term "initial examination and treatment" needs to be defined.

SB 1631 by Norris HB 756 By Clem

Present Law

TCA §50-6-205(a) provides that no compensation shall be allowed for the first 7 days of disability resulting from injury, excluding the day of injury, except for medical benefits. It further provides that if the disability extends beyond the 7 day period, then compensation commences with the 8th day. If, however, disability exists for as much as 14 days then compensation is allowed beginning the first day after the injury. *TCA* §50-6-207 provides an injured employee is eligible to receive four types of compensation/disability benefits: temporary total disability; temporary partial disability; permanent partial disability and permanent total disability.

Proposed Change

SB1006/HB0971 adds a new subsection to *TCA* §50-6-205(a). It provides no compensation shall be allowed for any period of disability resulting from the injury during which the worker is confined in a jail or correctional institution as a result of a conviction. [Note, underlined portion is new language added to the 2003 proposed bill.]

Practical Effect

It appears the sponsors wish to prevent any employee from receiving any type of workers' compensation benefit if the person has been convicted of a crime and is incarcerated. Under Tennessee law, reading *TCA* §50-6-205(a) and *TCA* §50-6-207 together, it is clear the term "compensation" applies to both temporary and permanent indemnity benefits. Therefore, the language of the proposed bill would apply equally to all forms of disability benefits, even those the employee may be receiving as a result of an court order or approved settlement.

Informational Note

It is not clear if this proposal would prevent any settlement of a claim by an injured employee during a period of incarceration following conviction. Also, it is not clear if the sponsors intend to affect cases which have been settled or tried prior to the period of incarceration and the worker is receiving periodic permanent disability benefits (either total or partial). If the bill is enacted and an employer/insurer has been permitted to forego the payment of compensation during the period of incarceration, is the employee entitled to receive the withheld benefits at the time of his/her release?

Informational Note, continued.

Another issue arises in those instances in which the employee was awarded a lump sum of disability benefits and dies prior to the payment being made to the employee because of the incarceration. Is the estate or family entitled to receive the unpaid compensation benefits?

Comments of Advisory Council Members:

Mr. Tony Farmer, attorney representative (TTLA) noted workers' compensation benefits are assignable for child support purposes and the proposed bill would eliminate this assignment for the benefit of the children of the injured employee/inmate.

The members generally expressed concern as to whether the right to permanent partial disability benefits would be a property right or contractual right when the result of a settlement of trial order. In addition, they noted temporary total disability benefits are treated differently from permanent partial disability benefits and one might argue that if the employee is unable to return to work because of the incarceration, then these benefits would not be due because the employee did not return to work.

Ms. Jackie Dixon, employer representative (TBA) is of the opinion the bill is a bad one for workers and this would add expenses to the insurance industry to keep up with whether the employee is incarcerated or not.

Mr. Steve Turner, employer representative, stated the bill appears to be outside the workers' compensation system as it appears to be a criminal law issue as it assesses an additional penalty on someone and is more like "piling on". He noted if there is an issue related to workers' compensation, he does not see the relationship.

Mr. Othal Smith, employee representative, stated the bill seeks to inject fault into a system that is a no fault system and fault that is not even related to the workers' compensation benefits itself. The employee had the workers' compensation benefits before entering jail. Mr. Jerry Mayo agreed with Mr. Smith.

***SB 998 by Haynes HB 1529 by McMillan**

The Advisory Council was advised by Mr. Dale Sims, State Treasurer and Chair of the Advisory Council, that an amendment to this bill is being drafted. The Advisory Council has not received a copy of the amendment to review and has made no comments concerning the proposed legislation.

Present Law

Claims by state employees for workers' compensation benefits are required to be filed with the Claims Commission within the statute of limitations that was in effect prior to the enactment of the 2004 Workers' Compensation Act.

Proposed Change

SB998/HB1529 requires a state employee claiming workers' compensation benefits to first exhaust the benefit review conference process prior to filing an action with the Claims Commission. The proposed bill also includes housekeeping changes to the portion of the law governing workers' compensation claims against the states by amending the sections of the workers' compensation laws that will not apply to the state.

Practical Effect

This bill will require all state employees to participate in the benefit review conference process before filing a formal action with the claims commission. It basically tracks the statute of limitations for workers' compensation claims that was enacted last year. It also appears to be a vehicle for some housekeeping changes for the claims commission's jurisdiction over workers' compensation claims and what portions of the workers' compensation law will apply in the claims commission.

SB 1614 by Norris *HB 485 by Overbey

Present Law

TCA §50-6-204(a)(1) requires a physician, upon request and within thirty (30) days after examination or treatment of an employee, to furnish a complete medical report at a charge not to exceed $10.00 for reports of 20 pages or less and $.25 per page for each page copied after the first 20 pages. *TCA* §50-6-204(a)(2)(A) requires any hospital in which the employee may have been hospitalized to release, within 30 days of admission, its medical records upon request of the employer or employee or their representatives.

Title 68, Part 11 relates to the furnishing of hospital records at reasonable costs. Section 68-11-304(a)(2)(iii) presumes the following charges are reasonable: retrieval fee of $15.00 that includes the first 5 pages of the records; a per page charge of $.75 for pages 6 through 50; a per page charge of $.50 for pages 51 through 250 and a per page charge of $.25 for all pages after 250. The hospital is required to provide the requested record within 30 days of the request. The statute also requires a request for medical records to include a medical or anatomical impairment rating if available and states such records request are subject to the limits on charges established by §68-11-304. Another part of the section provides the statute shall not be construed as prohibiting a hospital from statute does provide that the section shall not supercede any provision of law that establishes specific costs for reproduction, copying or mailing of records.

Proposed Change

SB3211/HB3157 changes the amount of money that can be charged for a "complete medical report".

Practical Effect

The bill would increase the charge for a "medical report" from $10.00 for 20 pages or less to $20.00 for 40 pages or less.

Comments of Advisory Council Members:

The attorney representatives noted a medical report will never be twenty pages as it usually is just the doctor's office notes. Each time the records are requested, and they have to be requested several

Comments of Advisory Council Members, continued:

times during the life of a case, the parties have to pay again and, again, the records are usually very few pages. This is especially costly to an injured worker.

The voting members unanimously expressed concern the bill will, in effect, double the employee's current cost of obtaining the medical records without any additional pages being provided.

SB 2321 by Kyle *HB 2337 by McMillan

Present Law

SECTION 1: *TCA* §50-6-110(c)(1) provides that if an employer has implemented a drug free workplace pursuant to Chapter 9 of Title 50 and the employee tests .10 for alcohol, it is presumed the alcohol is the cause of the work-related injury.

SECTION 2: *TCA* §50-6-118 outlines different penalties the Division of Workers' Compensation can implement by rule. These include failure to provide workers' compensation coverage or qualify as a self-insured; late filing of accident reports; bad faith denial of claims, etc.

SECTION 3: *TCA* §50-6-121 is the statute that creates the Workers' Compensation Advisory Council and sets the terms of the members.

SECTION 4: *TCA* §50-6-129 requires the Commissioner of Labor/WFD to promulgate rules/regulations to implement the provisions of *TCA* §§13-7-117 and 13-7-211 pertaining to certificates of compliance with county zoning ordinances.

SECTIONS 5 & 6: *TCA* §50-6-203 sets forth the statute of limitations applicable to workers' compensation cases and since the Reform Act of 2004, the law refers to "instances where the employer has not voluntarily paid workers' compensation". [An issue has apparently arisen when the Department orders payment of benefits and the employers/insurers are saying these are not voluntary payments.]

SECTION 7: *TCA* §50-6-208 relates to the second injury fund and how a claim is made against the fund.

SECTION 8: *TCA* §50-6-236(i) authorizes a workers' compensation specialist, as part of a benefit review conference, to refer matters to a specially designated attorney for the purpose of conducting discovery , at the request of either party.

SECTION 9: *TCA* §50-6-405(b)(1)(G)(ii) relates to certificates of deposits by self-insured employers.

SB 2321 by Kyle *HB 2337 by McMillan, continued.

Present Law, continued.

SECTIONS 10 & 11: *TCA* §50-6-405(b)(2) requires a self-insured to file an annual certified financial statement no later than 60 days after the company's immediately preceding fiscal year.

SECTION 12: *TCA* §50-6-401 requires insurers to pay a tax on workers' compensation premiums.

SECTION 13: *TCA* §50-6-501 requires an employer that has an experience modification rate in the top 25% of all covered employers' modification factors to establish and administer a safety committee.

SECTION 14: *TCA* §50-9-105(a)(7) requires an employer who decides to implement a drug free workplace program to give all employees and job applicants a written policy statement that covering several topics. One of the requirements is a statement that if an employee/applicant who receives a positive confirmed test result may contest or explain the result to the medical review officer within five (5) working days after receiving **written** notification of the test result. The written policy statement is to be given only one (1) time prior to testing.

Proposed Change

SECTION 1: Changes the .10 of alcohol to .08 to conform with federal law.

SECTION 2: Adds a new section to the law that outlines the manner in which the Commissioner may assess penalties. Requires the employer/employee or entity to be penalized to be given an opportunity for a hearing. If a hearing is requested, the commissioner, commissioner's designee or agency member appointed by the commissioner may hear the matter as a contested case and the authority to hear the administrative appeal of an agency decision. The burden of proving the penalty should not have been assessed is on the party requesting the hearing.

SECTION 3: Changes a mistake in the expiration year for three of the voting members of the Advisory Council from 2005 to 2006.

SECTION 4: Deletes the section.

SB 2321 by Kyle *HB 2337 by McMillan, continued.

Proposed Change, continued.

SECTIONS 5 and 6: Deletes the word "voluntary" to measure the time from payment of benefits whether the benefits were ordered or paid by the insurer/employer without an order to do so.

SECTION 7: Establishes a method to include the Second Injury Fund in the mandatory mediation process.

SECTION 8: For the purpose of conducting discovery, the change permits a specialist to refer matters to the "discovery attorney" without a request from a party. Also eliminates the requirement that the discovery be "part of a benefit review conference".

SECTION 9: Corrects an error in a section referenced in the statute.

SECTION 10: Increases the time within which a self-insured employer has to file the certified financial statement from 60 days to 6 months from the end of the preceding fiscal year.

SECTION 11: Corrects an error in a section referenced in the statute.

SECTION 12: Enacts a statute that requires a self-insured group to pay premium taxes by a certain date.

SECTION 13: Changes the reference from "top 25% of all covered employers" to a modification factor greater than 1.20.

SECTION 14: Deletes the word "written" so the notice provided the employee following a positive result can be oral.

Practical Effect

The preceding section effectively describes the practical effect of each section.

SB 2321 by Kyle *HB 2337 by McMillan, continued.

Comments of Advisory Council Members:

Commissioner James Neeley indicated the intent of the legislation is housekeeping.

The members' discussion centered on Section 14 that changes the mandated written notice to the employee of the test results to oral notice. Mr. Dale Sims, State Treasurer and Chair of the Advisory Council, stated he hoped before action was taken against the employee that the employee would receive written notice of the positive test results and the procedures applicable as a result of the positive test. The other members concurred with this statement.

Commissioner Neeley stated the federal DOT regulations permit oral notice but nothing prohibits the state Drug Free Workplace program from having a more restrictive requirement for notice to the employee. Mr. Bob Pitts, employer representative, suggested the written notice requirement in the current law be retained unless the change is being made in order to comply with federal law as opposed to conforming with federal law.