

**WORKERS' COMPENSATION ADVISORY COUNCIL  
MINUTES ~ ~ JANUARY 13, 2006 MEETING [10:00 A.M.]  
710 JAMES ROBERTSON PARKWAY  
HEARING ROOM, FIRST FLOOR  
ANDREW JOHNSON TOWER  
NASHVILLE, TENNESSEE**

The meeting was called to order at 10:10 a.m. by Mr. Dale Sims, State Treasurer

The members made a determination that it was necessary to conduct the meeting electronically and that the matter(s) to be considered were such that timely action was necessary and the physical presence by a quorum of the voting members was not practical.

The Executive Director called the roll. The following lists each member of the Advisory Council and indicates whether they attended the meeting:

**\*CHAIR:** Dale Sims, State Treasurer - Present

**\*VOTING MEMBERS:**

Employee Representatives

>Jack A. Gatlin - Present (Via Telephone Conference Call)

>Jerry Lee - Absent/Present

(Arrived at approximately 10:45 a.m.; had to leave at approximately 11:50 a.m.)

>Mr. Othal Smith, Jr. - Present

Employer Representatives

>Mr. Ronnie Hart - Present

>Bob Pitts - Present

>Employer Representative - Position Vacant on 1/13/06

**\*NONVOTING MEMBERS:**

Kitty Boyte [TDLA representative] - Present

Health care providers representative - Position Vacant

Jackie Dixon [TBA representative] - Absent

Tony Farmer [TTLA representative] - Present (Via Telephone Conference Call)

Kenny McBride [Local governments representative] - Present

Jerry Mayo [insurance companies representative] - Absent

David Stout [health care providers representative] - Absent

**\*EX OFFICIO MEMBERS**

Senator Joe Haynes - Absent  
Representative Jere Hargrove - Absent  
Commissioner Paula Flowers - Absent  
Commissioner Jim Neeley - Present

Chairman Sims welcomed Mayor Kenny McBride (Carroll County) as the Governor's appointee to represent local governments.

**1. APPROVAL OF MINUTES**

The draft minutes for the September 29, 2005, meeting had been provided to the members prior to the meeting for review. Ms. Hughes noted the draft minutes contained an error on the date of the meeting and it was noted the name of Mr. Neil Nevins should be eliminated and substituted with the name of Mr. Ronnie Hart.

**>ACTION: Mr. Pitts made the motion the September 29 minutes be approved, as amended; Mr. Smith seconded the motion. Mr. Gatlin, Mr. Hart, Mr. Pitts, and Mr. Smith all voted to approve the motion.**

**2. REPORT Re: CLASS CODES FILING**

\* Ms. Cathy Booth, State Relations Executive, Regulatory Services  
National Council on Compensation Insurance

Ms. Booth updated the Council members regarding a recent NCCI filing submitted to the Department of Commerce and Insurance (Item B-1399 -- Revisions to Basic Manual Classifications for the Aviation Industry). This filing is to be effective as of July 1, 2006, and is being made in all NCCI states. Ms. Booth stated one of the responsibilities of the NCCI is the maintenance of the classification system and, as part of this responsibility, NCCI has an ongoing process for the review of and the modernization, consolidation or elimination of certain classification codes. NCCI conducted an extensive review of the aviation industry and is proposing changes in seven of the classes and proposing the elimination of two classes.

Ms. Booth stated that NCCI is always concerned with the insureds that may have rate impacts as a result of the changes in the classifications. She explained one change in the classification code will result in a rate increase for insured employers in Tennessee and the NCCI has included in the filing a two year transition program for the rate changes to minimize the effect of the changes to the insured employers. Ms. Booth indicated the number of affected Tennessee employers and employees is relatively small. At the request of the members of the Advisory Council, Ms. Booth agreed to provide a summary of the number of employers who will be affected by the changes and the value of the premiums affected by the proposed changes. Ms. Booth stated that the aviation industry had

requested the NCCI to review the classification for possible changes. She indicated Arkansas and Kentucky have approved the filing for these proposed changes.

**>ACTION: No specific action was required to be taken by the members regarding this agenda item. Mr. Pitts did request that in the future these materials be provided to members prior to the meeting so the members would have an opportunity to review them so they could ask appropriate questions.**

### **3. UPDATE ON IMPLEMENTATION OF "REFORM ACT OF 2004"**

The Advisory Council has requested Commissioner James G. Neeley to provide a brief update of the implementation of the "Reform Act of 2004" at each meeting.

Commissioner Neeley reported that as of January 1, 2006, all aspects of the 2004 Reform Act have been implemented. He stated that all rules have been submitted; hearings were conducted on all the proposed rules and the Department is in the process of responding to the comments received at the hearings. They will then be resubmitted to the Attorney General and at that time the Department will send copies of the comment responses to the Advisory Council.

Commissioner Neeley submitted a document to the members that included statistics related to the Penalty Program and the Benefit Review Program. He also reported other statistics, including a 61% increase in requests for assistance regarding resolution of temporary disability and medical benefit issues; a 23% increase in the number of conducted mediations (of final settlements); and a 9% increase in the number of settlement approvals by the Department. Commissioner Neeley stated that with regard to penalties, the insurance industry seems to be the biggest culprit. He said he has met with the Insurors of TN and with representatives of the major insurance carriers. He also stated he has plans to require claims adjusters to be registered and to have regular continuing education related to Tennessee workers' compensation law. Commissioner Neeley said he has advised the insurance industry of this plan and that when the Department brings this forward, they will submit copies to the Advisory Council. He said that a number of issues have occurred with the insurance industry and he believes these have been the result of adjusters not knowing Tennessee law and not realizing the impact of the recent reforms. Commissioner Neeley advised the Council that Chancellor Billy Joe White has held in a Campbell County case that the mandatory benefit review conference provisions of the Reform Act and the statute that lowered the multiplier from 2.5 to 1.5 are unconstitutional. The Attorney General's office plans to file an appeal.

Ms. Kitty Boyte raised several areas of concern regarding the operation of the benefit review process (BRC) including: allowing the submission of an independent medical examination (IME) report within 72 hours of a scheduled benefit review process; allegations by specialists that the employer representative is acting in bad faith when they do not attend a mediation with more authority than has already been offered to the employee prior to the mediation; and requiring a mediation within 60 days of a request when both parties agree depositions are required and cannot be scheduled within that time frame. Ms. Teresa Bullington, Manager of the BRC Program,

responded that the IME problem is not occurring frequently and when the specialists have a problem with a prior offer it is usually when the employer has not offered an amount equal to the impairment rating by the treating physician. Commissioner Neeley stated that he, as chief administrator of the program, has taken a hard position that the department will comply with the statutory requirement that a BRC be conducted within 60 day. Ms. Boyte also requested the Department to divide the reported penalty statistics into the categories of penalties assessed in claims that have been denied and in claims that have been accepted as compensable. Commissioner Neeley agreed to so this in the future. Mr. Smith reminded the members that TCA 50-6-237(c) authorizes a penalty of \$50 to \$5,000 when someone attends a BRC without the full authority to settle the claim.

Mr. Tony Farmer commented that the specialists in East Tennessee do an outstanding job and that he does not have the problems in East Tennessee that Ms. Boyte has discussed. In his opinion, the program is operating superbly.

Mr. Sims asked the Department to explain the case load of the specialists. Ms. Bullington responded that the work load varies throughout the state depending on the number of specialists in a particular office because cases are assigned depending on the county the employee lives in and certain counties feed into the area offices. She stated that generally, on temporary disability cases, which require more investigation, they try to keep no more than 25 new cases per month and to resolve 25 cases per month, although they are not usually the same cases. Ms. Bullington said that the specialists carry more mediation cases because more are considered as "pending", but generally each specialist conducts 20-25 mediations per month. She indicated that if the case load in a specific office is too large, they will redistribute the cases to other offices.

Mr. Sims asked the Department to update the Council on the implementation of the independent medical evaluation program. Mr. Jeff Francis, who administers the Medical Impairment Rating Registry, was recognized to answer questions and he stated:

- \* 115 physicians have been approved as registry physicians and several more have applied but have not yet met all qualifications for the registry as most have not completed the required training program;

- \* The program received its first request for an evaluation (on a claim that arose on or after July 1, 2005) in December but it is pending until it is determined whether the claim meets the other qualifications for participation in the program;

- \*Geographically, the 115 registry physicians are distributed throughout the state; about 40 in Middle Tennessee; and 30-35 in East and West Tennessee;

- \*Approximately 40% of the physicians are orthopedic specialists and there are 8-10 different types of specialists on the registry, including neurologists and psychiatrists;

- \*The statute says only claims that arise on or after July 1, 2005 are eligible for the MIR program and the Department defines a "dispute as to ratings" to be competing ratings (two or more), an initial rating of 0% or no rating is given but permanent restrictions are assigned by the doctor as due to the work related injury. The parties cannot agree to go directly to the MIR program to seek an impairment rating. If the treating physician has given an impairment rating that is more than 0%, neither the employer nor employee can request to go through the MIR program without obtaining and paying for a second impairment rating from another physician that is not evaluating the employee through the registry program.

Mr. Sims questioned whether the intent of the legislation that created the independent medical evaluation program was to force the parties to obtain multiple impairment ratings before they could utilize the department's MIR program. He stated he thought the intent, from listening to discussions regarding the proposal before the statute was passed, was to permit the parties to agree to go directly to the state's MIR program without obtaining an impairment from the treating physician or, if the treating physician had given an impairment rating, to allow a party to go to the state program without the necessity of obtaining a rating from another doctor not on the registry. Mr. Sims requested the Department to look into this issue and Commissioner Neeley agreed to do so.

Mr. Francis stated that if an employer representative and an employee representative agree they do not want to utilize the treating physician's rating, they would be allowed to come to the Department to obtain a list of the doctors on the registry and if they agree on one from the list provided by the Department, then the presumption will attach to the rating given by the chosen doctor. If, however, the parties agree on a specific registry doctor to perform the evaluation, without going through the Department's program, the presumption will not attach to the rating given by that doctor. Mr. Smith questioned as to why the presumption would not apply in the situation where the parties chose and agreed on a specific "registry" doctor without coming through the program. Ms. Sue Ann Head, Administrator, stated the issue would be looked at by the Department. Mr. Sims requested the Executive Director to be sure that another discussion is scheduled on the issue within the next sixty days.

Mr. Sims questioned the Department regarding the penalties program related to nonpayment of benefits. This program is currently complaint driven. According to statistics given to the members, penalties are being imposed in approximately half of the claims being referred for investigation. Mr. Pete Halverstadt, manager of the penalties program, stated the decision whether to order penalties is fact dependent in each case that is referred. He said the review is basically a two part process: (1) how was the claim managed and were the Claims Handling Standards and the statute followed; and (2) if the claim was not paid, why not - was there factual or medical proof to justify the denial or was the claim handler just sloppy? Mr. Halverstadt indicated if a decision is made that penalties are not to be ordered, the decision is communicated to all parties. Ms. Boyte asked whether penalties are ordered on disputed cases and Mr. Halverstadt replied that if the employer can produce a reasonable basis for disputing a case, then penalties will not be ordered. If the employer does not have facts to support a denial, then, in Mr. Halverstadt's opinion, the denial is not reasonable. Mr. Halverstadt, stated that if an unrepresented employee calls in for assistance and a specialist determines benefits are due, the specialist refers the claim to the penalty program for investigation.

Mr. Juan Villasenor, Assistant Attorney General, is defending all the constitutional challenges to the 2004 Reform Act and he briefed the Council on the lawsuits. He stated there are approximately 45-50 constitutional challenges filed by attorney David Dunaway. The majority of these cases are pending in Campbell County or in other counties within that judicial district. The lawsuits challenge the constitutionality of the reduction in the multipliers and the mandatory benefit review conference prior to suit being filed. On January 11, 2006, four of these cases were consolidated and heard by Chancellor White. The Chancellor struck down the mandatory benefit review conference on several grounds: it violates the separation of powers doctrine of the Tennessee constitution; it violates both procedural and substantive due process guarantees provisions of the

Tennessee and United States constitutions; it violates Tennessee Supreme Court Rule 11; and it is inconsistent with other parts of the statute. Chancellor White struck down the multiplier statute on multiple grounds: it violates procedural and substantive due process; it violates the Tennessee Handicap Act; and it violates the Tennessee Human Rights Act. General Villasenor indicated it is the intent of his office to appeal these cases and Chancellor White agreed to certify the matter as final for appeal purposes.

Ms. Boyte stated that the normal appeals process for a workers' compensation case takes approximately 1.5 years from date of final order in the trial court until the Appeals Panel issues a decision. She inquired as to whether the Attorney General has a more speedy way to have the appeal of these cases heard. General Villasenor indicated he would make every effort to speed up the appeals process. Mr. Tony Farmer stated it is his opinion that filing a workers' compensation lawsuit under the current law is malpractice on the part of the plaintiff's lawyer.

Mr. Pitts requested the Commissioner to provide the Council with a written document containing other statistics the Commissioner mentioned during his comments that were not included on the distributed materials (for example, the number of claims in which no attorney is involved, etc.). Commissioner Neeley agreed to do this.

Mr. Pitts also commented to Commissioner Neeley that one area of interest to him is to assure the workers' compensation specialists' decisions are consistent throughout the State and that a specialist is not carving an individual "fiefdom/kingdom" which has been a criticism of the judicial process. Mr. Othal Smith stated that the concern is whether there is peer review or quality control over the process. Commissioner Neeley assured the members there are supervisors performing this process and because of the Department's computerization, the Department is producing reports all the time pulling out things to be sure what is going on in the division.

Ms. Boyte questioned whether there is a second review by a specialist before an order regarding benefits is sent out. Ms. Sue Ann Head, Administrator, said that a process has begun in Nashville, is being utilized in West Tennessee offices and probably will begin in Knoxville by which all specialists in an office review a claim before an order for benefits is issued and that a Worker' Compensation Specialist IV (an attorney) also reviews the claim before the order is sent out.

**>ACTION: No action was required to be taken by the members regarding this agenda item.**

#### **4. CONSIDERATION OF DRAFT REPORT - "SUMMARY OF SIGNIFICANT SUPREME COURT DECISIONS" & APPROVAL FOR PUBLICATION**

The Draft report regarding significant court decisions had been sent to the Advisory Council members for review prior to the meeting. The Executive Director, Linda Hughes, advised the members of a grammatical correction to be made on page 3 and then she summarized each of the cases contained in the report. She requested the members to specifically determine if changes should be made in the remarks regarding the indicated impact of each case and whether the case should be included in the report. During the discussion of the case of *Long v. Mid-Tennessee Ford Truck*

*Sales, Inc., et al.*, 160 S.W.3d 504 (Tenn., Mar. 18, 2005), it was noted the opinion is not clear as to whether the announced decision would be a change in current law and it was the consensus that the case should not be included in the report as being a change in the law governing temporary total disability benefits. Otherwise, no other changes were suggested.

**>ACTION: The voting members present, Mr. Gatlin, Mr. Hart, Mr. Pitts, and Mr. Smith, voted unanimously to request the Executive Director to remove the *Long* decision from the report in the section related to temporary total disability benefits and approved the report, as amended, to be sent to the General Assembly.**

## **5. DISCUSSION OF PROPOSED 2006 MEETING DATES**

Ms. Hughes distributed proposed meeting dates for calendar year 2006. The Chair requested the members to review the dates and to notify the Executive Director of their availability on the dates in question.

Mr. Sims, without objection, adjourned the meeting of the Advisory Council at 12:15 p.m.