

## MINUTES

### TENNESSEE ADVISORY COUNCIL ON WORKERS' COMPENSATION

Legislative Plaza, Room 29

Nashville, Tennessee

Monday, February 28, 2011

10:00 a.m. meeting

#### Members Present:

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

#### Voting Members:

Anthony Farmer

Jack Gatlin

Jerry Lee

Bob Pitts

Dan Pohlgeers

Gary Selvy

#### Non-Voting Members:

Kitty Boyte

David Davenport

Bruce Fox

Keith Graves

Stephen Johnson

Jerry Mayo

Sam Murrell

Gregg Ramos

Bob Henningsen, Designee of the Commissioner of the Department of Labor and Workforce Development

Mike Shinnick, Designee of the Commissioner of the Department of Commerce and Insurance

Lynn Ivanick, Administrator

#### Also Present:

Janice Cunningham, Chief of Staff, Treasury Department

Steve Curry, Assistant Treasurer for Programs, Treasury Department

Anne Adams, Director, Division of Claims Administration, Treasury Department

Bridgett Dorse, Executive Secretary, Treasury Department

And other persons and interested parties

Chairman Lillard called the meeting to order at 10:06 a.m. in Room 29, Legislative Plaza; Nashville, Tennessee. Chairman Lillard declared there was a quorum of voting members present.

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The first item of business Chairman David Lillard introduced Ms. Lynn Ivanick as the new Administrator of the Advisory Council.

The next item of business was a review of the minutes for the Advisory Council's meeting of October 5, 2010. Mr. Bob Pitts made a motion to approve the minutes. Mr. Jerry Lee seconded the motion. The motion was adopted unanimously by a voice vote.

The next item of business was a report from Ms. Ivanick that the NCCI made no filings in the State of Tennessee for this reporting period.

For the final item of business, Ms. Ivanick presented a summary of the following Bills to the Council for discussion:

Mr. Bob Pitts informed the members that Senator Ketron requested SB1766/HB1983 be deferred to the Council's next meeting. Ms. Ivanick also informed the members that Representative Joe Pitts requested HB0163, HB1757, HB1758 and HB1870 be deferred to the Council's next meeting. Chairman Lillard asked if there were any objections, and seeing none, deferred the named bills to the Council's next meeting.

**SB0560(McNally)/HB0490(Eldridge)**, proposes language to allow action against third parties who cause injury in workers' compensation cases. Mr. Bruce Fox indicated that this clarifies current law and is not a change in the law. Mr. Gregg Ramos added that he was not aware of any problem in the past. Chairman Lillard agreed and suggested the legislation may have resulted from some nuance or case law. Mr. Fox agreed there was probably some confusion requiring clarification. Mr. Bob Pitts asked if it was appropriate to acknowledge in our comments that it's the Council's perception that it is not a problem. He also asked whether it was a caption bill. Mr. Tony Farmer indicated he was not aware of it being a caption bill. Ms. Kitty Boyte said she would like to know for sure. Chairman Lillard presented two options: the Council could defer the bill and have Ms. Ivanick contact the Sponsor to discuss the origin of the bill, or the Council could go forward with Mr. Pitts' suggestion relative to commenting on the bill. Mr. Pitts moved that this bill be placed on the next meeting agenda and that staff be instructed to contact the sponsors for clarification. Mr. Ramos seconded the motion. On a voice vote, the Chair declared the motion adopted.

**SB0471(Tracy)&SB1304(Johnson)/HB0506(Brooks H.)&HB1083(Eldridge)** provides that, in a certified Drug Free Workplace, a positive drug/alcohol test, or refusal to take the test, makes the injured employee ineligible for workers' compensation benefits related to the injury and removes the requirement for proximate causation. In response to Chairman Lillard calling for discussion, Ms. Boyte expressed concerns relative to employees who report injuries well after the fact and suggested the bill needs to be clarified. Mr. Farmer pointed out that this is the third session the Council has addressed this legislation and in the last two sessions the Council voted against recommending it. He also expressed his concern that this legislation is contrary to the intent of the workers' compensation statute, in that it bars coverage even if the injury has no relationship to the presence of drugs or alcohol in that injured worker's body. He stated that there is no need to change the law that

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has been in place since 1919. Mr. Fox commented that this appeared to be a knee jerk reaction to a recent case decided by the Workers' Compensation Panel where the cause of the injury was a co-worker and had nothing to do with the employee's positive test result. Mr. Stephen Johnson questioned if an employee's group health insurance will then provide coverage or does this leave a gap. Mr. Pitts stated that the bill, in this form, has not been before the Council; regardless, he has concerns about whether or not this language accords any level of due process. Dr. Sam Murrell expressed concern that employees in rehab or pain management programs for other non-injury reasons may find themselves ineligible for benefits. Mr. Farmer moved against adoption. Mr. Jerry Lee seconded the motion. On a voice vote, Chairman Lillard declared the motion adopted. Mr. Pitts' clarified that all the bill numbers should have the same remarks.

Chairman Lillard commented that the Council has 7 voting members. Only procedural matters are for chair to vote on. All substantive matters are voted on by the 6 voting members.

**SB1785/HB2047** changes the evidence requirement from a preponderance of the evidence to clear and convincing evidence for rebutting the presumption that drugs or alcohol were the proximate cause of an injury from a positive drug test result or the refusal to submit to a drug test. Mr. Pitts indicated that the previous two years the word "contributing" had been used and voted against by the Council, but this year the bill moves the standard of overcoming the presumption from a preponderance of evidence to clear and convincing, which makes it more difficult to overcome the presumption, but is more comfortable to him than the total abolition recommended in the previous bill. Mr. Farmer requested deferral to next break, which the Chair granted.

**SB0588 and 1839/HB0581&1870** was deferred upon request of Representative Pitts.

**HB0887** was withdrawn by the sponsor..

**SB2019/HB1045** allows an aggrieved party to appeal a workers' compensation specialist's order of future medicals in a workers' compensation case after judgment or settlement. Mr. Farmer commented that this proposal represents a dramatic change in direction and has the potential for creating significant delay in benefits. He called for comment from DLWFD regarding the timely delivery of services to injured workers and the efficient process of the administration of our system as it presently exists. Bob Henningsen, Deputy Commissioner of the DLWFD called up Assistant Administrator Teresa Bullington to respond. Ms. Bullington indicated that the program was working very well and should not be subject to a de novo appeal as that starts the process all over again. Ms. Bullington called up Mr. Richard Murrell, Assistant Director of the Benefit Review Program for the DLWFD to address the practical aspects and Mr. Murrell indicated that all open medical cases were being handled by a select few discovery attorneys and the process is working very well and being given greater deference by the Chancery Court accordingly. He agreed that a de novo appeal would cause significant delay for all sides. Ms. Boyte explained that injured workers come back for medical care years after an injury and the health care providers can't relate the medical need back to the original injury, so new lawsuits are

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springing up requiring further discovery. Mr. Murrell concurred and pointed out that the Department attorneys handling these claims are designated discovery attorneys allowing for that availability. Mr. Farmer reiterated that the option to go directly to court exists, but this bill would allow a party to go through both administrative and court routes causing significant harmful delay. Mr. Fox agreed regarding the delay and commented that the Council went to great lengths last year to clothe the department with authority to encourage people to seek administrative avenues as opposed to the court system. Mr. Ramos asked for clarification and indicated that he thought there should be a court option. Ms. Boyte indicated that it's not really an option for the employer or the insurance company since they usually don't find out about the issue until the option has been chosen. Ms. Bullington indicated that the Department's experience is that treatment has already been denied by the employer or carrier, so they are not generally caught off guard. Ms. Bullington expounded that the Department has resolved around 300 cases since last year's legislation and that those cases would still be working their way through the court system. Mr. Farmer moved that the Council recommend against passage of the bill. Mr. Lee and Mr. Gatlin seconded the motion. Chairman Lillard called for discussion or objection and, seeing none, declared the motion adopted and instructed that the comments be included.

**SB0932/HB1503** covers several subjects and was broken down for ease of discussion. On the subject of motor vehicle lease-operators or owner-operators always independent contractors, Mr. Farmer indicated that workers' compensation law has always been based on actual relationships and not universal classifications, so shouldn't be changed in that regard. Mr. Fox concurred. Mr. Landon Lackey, attorney with the DLWFD, pointed out that the sections were other than the workers' compensation chapter. Mr. Farmer moved that the first two sections be deferred to the next meeting.

The subject of closing of future medicals before the present three (3) years time limit was discussed next. Mr. Farmer asked if it applied to permanent and total disability cases to which Ms. Ivanick indicated that the language excluded permanent total disability claims. Mr. Farmer indicated that he opposed the closing of future medicals as this was an opportunity to abuse injured workers and burden Medicaid/Medicare systems. Mr. Lee pointed out that during the 2004 reform, the three (3) year term was already a compromise that did not need to be adjusted. Mr. Ramos expressed the need for flexibility for the facts of each case and the approvals required by the Department or Courts as a safeguard. Mr. Farmer indicated that the Courts were hearing too many settlements in a short time frame and unable to safeguard unrepresented employees' rights accordingly. Ms. Boyte concurred with Mr. Ramos that cases should be allowed to be decided on their individual facts. Mr. Farmer agreed that some cases would be appropriate to close future medicals. Mr. Ramos pointed out that sometimes all the parties are in agreement that future medicals should be closed. Mr. Fox concurred with Ms. Boyte and Mr. Ramos, but indicated the need for safety nets for unrepresented employees and suggested talking to the Sponsor about adding language requiring either representation or an affidavit from the treating physician that no future medical treatment is anticipated. Mr. Farmer agreed. Mr. Pitts agreed that there should be some mechanism by which the future medicals could be closed in certain circumstances and recommended that this portion of the bill be deferred to address the issue.

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On the subject of employers and their attorneys having contact with authorized treating physicians, Ms. Ivanick pointed out that much of the bill remained intact under the newly proposed language until section (iii). Ms Boyte inquired as to what changed. Mr. Terry Hill, Director of the Tennessee Self-Insured Association, indicated that the intent of the proposed language was to return the practice to the way it was before the Supreme Court case changed it. A fifteen minute break was requested and held, and upon return, the consensus was to defer the whole bill.

**SB1313/HB1300** changes appointment to this Council, from "names" to "nominees". Mr. Pitts expressed concern that this may be a caption bill and suggested that the Council recommend approval in its present form, but that if there are amendments, that it be sent back to the Council for comment. Mr. Lee and Mr. Farmer seconded and the motion was adopted.

**SB1810/HB1508**, requires local governments to participate in workers' compensation insurance coverage. Mr. Pitts questioned if this may be a caption bill. Mr. Farmer pointed out that it doesn't affect municipalities over 100,000 in population and inquired as to whether Tennessee Municipal League was aware of this bill since they represent them. Mr. Everett Sinor was called up from the audience and indicated that there has been a lot of talk from interests on both sides depending on what markets they service, but wasn't sure if it was a caption bill. Ms Boyte inquired as to whether the Council had a representative of local governments to which Chairman Lillard indicated that Mayor McBride from Carroll County was on the Council but was unavailable for this meeting. Mr. Lee moved to defer the bill to the next meeting. Mr. Pitts seconded the motion, and, without objection, it was deferred.

**SB1481/HB1527** proposes a conclusive presumption that a beryllium employee, employee with cancer or silicosis under the federal Energy Employees Occupational Illness Compensation Act of 2000 has an occupational disease for purposes of the state workers' compensation claims. Mr. Pitts pointed out that this is the same bill for the third year and recommended statements from last time be used since they would not have changed and the vote would be 3 to 3 again. Mr. Farmer moved for approval, seconded by Mr. Lee, to include previous comments. Chairman Lillard found the motion equally divided, therefore failing. Back on debate on the time, Chairman Lillard agreed it seemed appropriate to carry forward comments of last year's session and, seeing no objection, so ordered.

**SB1136/HB0163& HB856** was deferred at the request of the sponsor.

**SB2023/HB1757** was deferred at the request of the sponsor.

**SB1766/HB1983** was deferred at the request of the sponsor.

**SB0415/HB0163** was deferred at the request of the sponsor.

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**SB1307/HB1001** was identified as a caption bill. Chairman Lillard indicated that the Council would hold it on the docket at this time and instructed that the Sponsor be so notified.

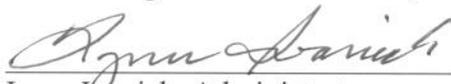
**SB1550, 1757, 1950/HB1191, 2030, 2107** A portion of the bill clarifies that the general contractor of a commercial construction project shall be the entity permitted to select the three construction services providers who may be exempt from workers' compensation coverage. Mr. Pitts indicated that the DLWFD was designating the first three providers to file as those allowed to use their exemptions. This language is to clarify that the General Contractor is permitted to make that selection instead. He moved that the Council recommend this portion of the bill, seconded by Mr. Lee. On a voice vote, the Chair declared the motion adopted. **SB1550/HB2030** The remaining portion of the bill allows for five (instead of three) corporate officers who are engaged in the construction industry to apply for an exemption from the requirements that they be covered by workers' compensation insurance. Mr. Lackey indicated that this bill has to do with the officers within each corporation who are allowed exemptions as opposed to the previous section of the bill dealing with service providers on a job site. It was discovered during the meeting that a more current version of the bill was needed; therefore, this portion of the bill was deferred.

**SB1986/HB1758** was deferred at the request of the sponsor.

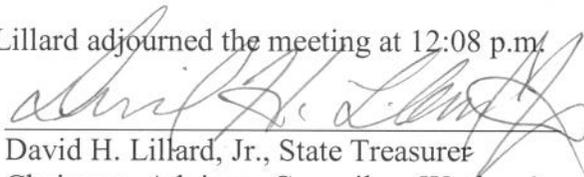
**SB0040/HB0205** excludes periods of temporary total disability under the workers' compensation law from calculation of the base period for purposes of unemployment compensation. Mr. Dart Gore, Legislative Liaison for the DLWFD explained the calculation for purposes of unemployment compensation figures. Mr. Pitts requested fiscal information and the fiscal note attached to the Council's packet was reviewed. Mr. Ramos pointed out that it appeared to benefit the employee. Mr. Pitts commented that the intent was to give employees a higher wage. Mr. Farmer moved that the Council recommend approval of the bill. Mr. Gatlin seconded the motion. On a voice vote, Chairman Lillard declared the motion adopted.

Mr. Farmer moved that Council recommend approval of **SB1785/HB2047** having to do with the standard of proof in drug testing situations, which had been deferred until after Council's break. Mr. Pitts seconded the motion. On a voice vote, resulting in two no's from Mr. Lee and Mr. Gatlin, the Chair declared the ayes to have it and the motion adopted.

There being no further business, Chairman Lillard adjourned the meeting at 12:08 p.m.



Lynn Ivanick, Administrator  
Advisory Council on Workers'  
Compensation



David H. Lillard, Jr., State Treasurer  
Chairman, Advisory Council on Workers'  
Compensation