

## *Minutes*

*Tennessee Advisory Council on Workers' Compensation  
Monday, February 27, 2017 at 2 p.m. Central  
Legislative Plaza, Room 29  
301 Sixth Avenue North  
Nashville, Tennessee 37243*

### **Present:**

#### **Voting Members**

State Treasurer David H. Lillard, Jr., Chairman

Kerry Dove

Bruce Fox

John Garrett

Brian Hunt – by telephone

Bob Pitts

Paul Shaffer

#### **Non-Voting Members**

Jason Denton

Keith Graves

Sam Murrell

Gregg Ramos

Pam Smith – by telephone

#### **Ex Officio Members**

Representative Jimmy Eldridge

Abbie Hudgens, Administrator, Bureau of Workers' Compensation

Mike Shinnick, as designee for Commissioner Julie McPeak

#### **Also present:**

Christy Allen, Asst. State Treasurer (Legal, Compliance & Audit)

Troy Haley, Legislative Liaison, Bureau of Workers' Compensation

Larry Scroggs, Administrator, Advisory Council

**Chairman David Lillard** called the meeting to order at approximately 2 p.m. Central. After the roll was called and a physical quorum established, the Chair welcomed the members of the Advisory Council and others in attendance, including **Senate Majority Leader Mark Norris**, **Representative Jay Reedy** and **Representative Ron Gant**. The Chairman noted that the primary purpose of the meeting was for the Advisory Council to fulfill its statutory duty to consider and make recommendations relative to proposed legislation affecting the workers' compensation system. The Chairman indicated six (6) bills had been referred to the Advisory Council by the

**Senate Commerce and Labor Committee** and the **House Consumer and Human Resources Committee**, and that the Advisory Council's recommendations would be reported back to the respective committees in accordance with T.C.A. § 50-6-121(k).

The Chair then addressed the first item on the agenda which was the approval of the minutes of the Advisory Council's October 4, 2016 meeting. **Council member Kerry Dove** moved for approval. His motion was seconded by **Council member Paul Shaffer**. The Chair asked for a roll call vote which resulted in a **unanimous vote to approve the minutes** of the October 4, 2016 meeting.

The Chair called upon **Senator Mark Norris**, the Majority Leader, to present **SB1237/HB0451**, which allows a court to apportion fault to an employer who covered an employee under workers' compensation when the employee sues a third-party tortfeasor for damages resulting from an accident in which the employee is injured while on the job. It also reduces the employer's subrogation recovery to the extent the employer is allocated fault. Leader Norris explained that the bill applies the tort-based doctrine of *comparative fault*, adopted in Tennessee in 1992. He stated the bill does not restrict, reduce or otherwise affect an employee's rights under workers' compensation law. There would be no change to the current system permitting no-fault recovery by an employee in a workers' compensation claim against his employer. The bill amends T. C. A. § 50-6-112(a) and (c); and § 62-6-123.

**Attorney Jim Summers** of Memphis provided a detailed explanation of the proposed legislation. He noted that under current law the exposure of third-party defendants in tort litigation is not reduced by the negligence of employers, even if the employers' negligence contributes significantly to the cause of the employee's injuries and damages. Mr. Summers stated that even though an employer's negligence can be a principal factor in causing an accident, current law excuses the employer and can leave a third-party defendant liable for a disproportionately large share of the liability exposure. Mr. Summers referenced opinions of the Tennessee Supreme Court which have commented on the inequities resulting from shielding employers from apportionment of fault in tort litigation.

**Council member Bruce Fox** asked Mr. Summers whether the proposed legislation would place an unfair burden on an employee to defend an employer where the employee lacked the necessary resources to do so effectively. **Council members Jason Denton and Gregg Ramos** also sought clarification of the same point, and asked whether employers presently have any incentive to help defend tort actions. Mr. Summers said in his experience employers and insurers almost always intervene in high dollar tort litigation brought by employees to protect their subrogation interests. **Council member Fox** asked Senator Norris if he would consider amending the proposed bill to deny subrogation recovery to an employer found to be 50% or more at fault. Senator Norris indicated he was amenable to such an amendment.

**Council member Fox** moved, seconded by **Council member Pitts**, to report to the respective legislative committees **the Council's favorable recommendation for passage of the bill**,

**provided it is amended as discussed.** The motion was **unanimously approved** on a voice vote by the Advisory Council.

The Chair then called upon **Representative Jay Reedy** to present **HB0580/SB0932**, which creates a rebuttable presumption that a firefighter's cancer that causes a disabling health condition is a result of the firefighter's duties as a firefighter. The bill amends by adding a new section to T. C. A. Title 7, Part 2. Representative Reedy stated the cause of a firefighter's cancer would still be a matter of proof, since the presumption could be rebutted by a preponderance of the evidence that the cancer was not caused by the firefighter's duties.

**Council member Fox** moved, seconded by **Council member Shaffer**, to report to the respective legislative committees the Council's favorable recommendation for passage of the bill. In the ensuing discussion, **Council member Bob Pitts** expressed reservations about creating a presumption that would apply to a particular class of individuals, noting that such legislation frequently leads to expansion of the class. The Advisory Council took a brief recess, at which point Chairman Lillard excused himself to attend another meeting. **Assistant State Treasurer Christy Allen** assumed the Chair.

Upon reconvening, the Council first voted **4-2** to approve Mr. Fox's motion. Voting *for* the motion were **Council members Fox, John Garrett, Brian Hunt and Shaffer**. Voting *against* the motion were **Council members Dove and Pitts**. Immediately after the vote was taken, **Council member Hunt** stated he wished to change his vote from affirmative to negative, resulting in a **3-3** tie vote. Not having obtained a majority vote the motion failed. Therefore, **the Council made no recommendation on the proposed bill** but does submit its comments to the respective committees.

The Chair recognized **Michelle Consiglio-Young**, Assistant General Counsel/Legislative Liaison for the Administrative Office of the Courts, on **SB0261/HB0939**. Ms. Consiglio-Young presented an overview of the proposed legislation which she stated had been introduced on behalf of the Tennessee Supreme Court. As introduced, the bill requires workers' compensation cases appealed from the Court of Workers' Compensation Claims to proceed through the Workers' Compensation Appeals Board before seeking a *discretionary* appeal, instead of an *appeal by right* (current law), to the Supreme Court. It amends T.C.A. § 9-8-307 and 403, § 50-6-217, 225, 239 and other sections. Questions were posed regarding the issue of eliminating the existing *appeal by right* by **Council members Fox and Ramos**. **Council member Pitts** stated that employers would have the same concerns as employees' representatives in that they would be reluctant to relinquish the *appeal by right*. On a motion by **Council member Pitts**, seconded by **Council member Fox**, the bill was deferred until the next meeting of the Council in order to permit further discussion and development of possible amendments.

The Chair noted that at the request of its sponsors, **SB1214/HB0325**, an Administration bill, was being deferred until the next meeting of the Advisory Council, pending further discussion and negotiation. **Abbie Hudgens**, Administrator of the Bureau of Workers' Compensation, and *Ex*

*Officio* member of the Advisory Council, and **Troy Haley**, Legislative Liaison and Director of Administrative Legal Services of the Bureau were both present and Mr. Haley gave a brief informational overview of the proposed legislation.

The Chair also noted that at the request of its Senate sponsor, **Senator Richard Briggs, SB0297/HB0666** was being deferred to the next meeting of the Advisory Council.

**Representative Jimmy Eldridge**, House sponsor and *Ex Officio* member of the Advisory Council, asked that **HB0157/SB0177**, presently a caption bill, be deferred until the next meeting of the Advisory Council to allow determination by its sponsors whether it will need to move forward this legislative session.

The Chair asked if there was any other business to come before the Advisory Council, and seeing none, entertained a motion by **Council member Dove** to adjourn, seconded by **Council member Shaffer**. The meeting was adjourned at approximately 3:45 p.m. without objection. The Chair thanked the members for their service to the State of Tennessee as members of the Advisory Council.

/s/ \_\_\_\_\_  
Larry Scroggs, Administrator,  
Advisory Council on Workers'  
Compensation

/s/ \_\_\_\_\_  
David H. Lillard, Jr., State Treasurer  
Chairman, Advisory Council on  
Workers' Compensation