

# Tennessee Advisory Council On Workers' Compensation

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Annual Report for  
July 1, 2016 - June 30, 2017

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State of Tennessee  
Treasury Department  
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Nashville, Tennessee 37243-0225

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

*Larry Scroggs, Administrator*

**STATE OF TENNESSEE**  
**ADVISORY COUNCIL ON WORKERS' COMPENSATION**  
**ANNUAL REPORT**  
**JULY 1, 2016 - JUNE 30, 2017**

Pursuant to *Tennessee Code Annotated*, Section 50-6-12l (e), the Advisory Council on Workers' Compensation hereby submits its annual report for July 1, 2016 through June 30, 2017, including statistical reports and Tennessee workers' compensation data.

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## **STATUTORY DUTIES AND RESPONSIBILITIES OF THE TENNESSEE ADVISORY COUNCIL ON WORKERS' COMPENSATION**

The Advisory Council on Workers' Compensation (the "Advisory Council" or "Council") was initially created by the General Assembly in 1992. The Workers' Compensation Reform Act of 1996 terminated the then existing Council and created a new Advisory Council on Workers' Compensation. Subsequent amendments, including those in the Reform Acts of 2004 and 2013 (Chapter Numbers 282 and 289 of the Public Acts of 2013), are recorded at *Tennessee Code Annotated* ("T.C.A."), Section 50-6-121, which outlines the authority of the Council, its specific responsibilities and its general duties. The administration of the Council was transferred from the Tennessee Department of Labor and Workforce Development to the Tennessee Department of Treasury pursuant to Chapter Number 1087 of the Public Acts of 2010, and the Council's existence was extended to June 30, 2016 pursuant to Chapter Number 622 of the Public Acts of 2012. Chapter Number 608 of the Public Acts of 2016 extended the Council's existence to June 30, 2020. The Council is authorized to:

- Make recommendations to the Governor, the General Assembly, the Senate Commerce and Labor Committee, the House Consumer and Human Resources Committee, the Administrator of the Bureau of Workers' Compensation and the Commissioner of Commerce and Insurance relating to the promulgation or adoption of legislation or rules;
- Make recommendations to the Administrator of the Bureau of Workers' Compensation and the Commissioner of Commerce and Insurance regarding the method and form of statistical data collection; and
- Monitor the performance of the workers' compensation system in the implementation of legislative directives and develop evaluations, statistical reports and other information from which the General Assembly may evaluate the impact of legislative changes to workers' compensation law.

Further responsibilities of the Advisory Council are provided in T.C.A., Titles 50 and 56. These provisions, among other things, direct the Council to provide the Commissioner of Commerce and Insurance with a recommendation regarding advisory prospective loss cost filings made by the National Council on Compensation Insurance, Inc. ("NCCI"), the authorized Tennessee rating bureau.

## **ADVISORY COUNCIL MEMBERS AND TERMS**

The current Advisory Council is composed of seven voting members, ten non-voting members and four ex-officio members. The State Treasurer is the Chair and a voting member. Three voting members represent employers, and three voting members represent employees. The non-voting members represent local government, insurance companies, medical organizations, hospital organizations, chiropractors, physical and occupational therapists and attorneys, all in Tennessee. The Chair may vote only on matters related to the administration of the Council or its research; the Chair is not permitted to vote on any matter that constitutes the making of a policy recommendation to the Governor or to the General Assembly.

Appointments to the Council are made by the Governor, Speaker of the Senate and Speaker of the House pursuant to T.C.A. § 50-6-121 (a)(1)(C). They respectively appoint one employer and one employee voting member each, and the Governor appoints the additional ten non-voting Council members. The Governor may choose to appoint from lists of suggested nominees provided by interested organizations as outlined in T.C.A. § 50-6-121(a)(1)(E)(i-ii).

Effective July 1, 2016, House Speaker Beth Harwell re-appointed Kerry Dove to a new term ending June 30, 2020 as a voting member representing employers. On October 26, 2016, Lt. Governor Ron Ramsey appointed Brian Hunt as a new voting member representing employers, to a term ending June 30, 2020. Mr. Hunt replaced voting member Gary Selvy, whose term expired June 30, 2016. Mr. Selvy's service is greatly appreciated.

The terms of non-voting members John Burleson, Sandra Fletchall, Dr. Keith Graves, John Harris, Dr. Sam Murrell and Gregg Ramos were due to expire on June 30, 2016. While their colleagues anticipate some or all of them may be reappointed, they are most grateful for the service and expertise they have rendered to the Advisory Council during their current terms.

A chart outlining the members of the Advisory Council on Workers' Compensation as of June 30, 2017 is on the following page:

## MEMBERS OF THE ADVISORY COUNCIL

NAME	MEMBER TYPE	REPRESENTING
David H. Lillard, Jr. State Treasurer	Chairman Administrative Voting Member	State Treasurer Ex-Officio Member
Kerry Dove	Voting Member	Employers
Bruce D. Fox	Voting Member	Employees
John M. Garrett	Voting Member	Employees
Brian Hunt	Voting Member	Employers
Bob Pitts	Voting Member	Employers
Paul Shaffer	Voting Member	Employees
John D. Burleson	Non-Voting	Local Governments
Jerry Mayo	Non-Voting	Insurance Companies
Samuel E. Murrell, III, M.D.	Non-Voting Member	Health Care Providers: TN Medical Association
Pam Smith	Non-Voting Member	Health Care Providers: TN Hospital Association
Keith B. Graves, D.C.	Non-Voting Member	Health Care Providers: Licensed TN Chiropractor
John Harris	Non-Voting Member	Health Care Providers: Licensed TN Physical Therapist
Sandra Fletchall	Non-Voting Member	Health Care Providers: Licensed TN Occupational
Jason Denton	Non-Voting Member	Attorney: TN Association for Justice
Lynn Vo Lawyer	Non-Voting Member	Attorney: TN Defense Lawyers
A. Gregory Ramos	Non-Voting Member	Attorney: TN Bar Association
Senator Jack Johnson, Chairman	Ex-Officio Non-Voting	Senate Commerce and Labor Committee
Representative Jimmy Eldridge, Chairman	Ex-Officio Non-Voting	House Consumer and Human Resources Committee
Abbie Hudgens, Administrator Troy Haley, Designee	Ex-Officio Non-Voting	TN Bureau of Workers' Compensation
Commissioner Julie Mix-McPeak Designee, Mike R. Shinnick	Ex-Officio Non-Voting	TN Department of Commerce and Insurance

## TERMS OF THE NON-EX-OFFICIO MEMBERS

Voting	Term of Position
Kerry Dove	July 1, 2016 - June 30, 2020
Bruce D. Fox	July 1, 2016 - June 30, 2020
John M. Garrett	February 27, 2015 - June 30, 2018
Bob Pitts	July 1, 2014 - June 30, 2018
Brian Hunt	October 26, 2016 - June 30, 2020
Paul Shaffer	August 5, 2014 - June 30, 2018
Non-Voting	Term of Position
John D. Burleson	July 1, 2013 - June 30, 2017
Pam Smith	July 1, 2015 - June 30, 2019
Sandra Fletchall	December 9, 2013 - June 30, 2017
Keith B. Graves	July 1, 2013 - June 30, 2017
John Harris	October 30, 2013 - June 30, 2017
Lynn Vo Lawyer	July 1, 2015 - June 30, 2019
Jerry Mayo	July 1, 2015 - June 30, 2019
Samuel E. Murrell, III, M.D.	July 1, 2013 - June 30, 2017
A. Gregory Ramos	July 1, 2013 - June 30, 2017
Jason Denton	July 1, 2015 - June 30, 2019

## ACTIVITIES OF THE ADVISORY COUNCIL

The Advisory Council is required by statute to meet at least two times per year. During the July 1, 2016 through June 30, 2017 Council year, the Advisory Council met on five occasions. Meetings were held August 23, 2016, October 4, 2016, February 27, 2017, March 20, 2017, and April 3, 2017. Approved meeting minutes may be viewed at the Advisory Council's website <http://treasury.tn.gov/claims/wcadvisory.html> under the "Meetings" tab. The agenda and video of each meeting are also available at the same location, with the exception of the August 23, 2016 meeting which was informational only.

### Summary of Meetings

The five Advisory Council meetings between July 1, 2016 and June 30, 2017 were devoted to receiving reports from consultants, reviewing proposed legislation and procuring information from documentation and presentations. The primary sources of pertinent information were citizens, legislators, other state officials, and representatives of business and professional entities essential to the fair, efficient and effective administration of Tennessee's workers' compensation system. A brief meeting synopsis describes the Advisory Council's activity.

#### Meeting on August 23, 2016

After convening the meeting **Chairman David Lillard** indicated that due to the lack of a physical quorum of voting members, the August 23, 2016 meeting must be considered *informational only*.

The Chairman first recognized **Abbie Hudgens**, Administrator of the Bureau of Workers' Compensation ("BWC"), for an announcement about an upcoming forum on *The Future of Workers' Compensation*, specific to Tennessee, to be held on October 21, 2016.

The next several agenda items related to actuarial and analytical reports.

**Council ex officio member Mike Shinnick**, Workers' Compensation Manager of the Department of Commerce and Insurance ("DCI"), presented *An Overview of Tennessee Workers' Compensation Market Conditions and Environment*. Mr. Shinnick provided members copies of his PowerPoint presentation.

**David Wilstermann**, analyst and consultant to the Advisory Council, presented a statistical analysis of workers' compensation data collected and compiled for calendar years 2009-2015 by the Tennessee Department of Labor and Workforce Development ("TDLWFD"). Mr. Wilstermann also provided members with copies of his analysis.

**Jim Nau** of the National Council of Compensation Insurance ("NCCI") presented the *Workers' Compensation Insurance Plan Report*. Mr. Nau's presentation was made available to members.

**Ann Marie Smith**, actuary of NCCI, presented an Overview of the *Voluntary Loss Cost and Assigned Risk Rate Filing* proposed to be effective March 1, 2017. Ms. Smith's overview was provided to members.

Because of the lack of a physical quorum of voting members, the minutes, agenda, video and documents provided by the actuaries and consultants during the presentations could not be made a part of the record and posted to the Advisory Council's website. The Chairman explained it would therefore be appropriate for the Advisory Council to act on the recommendations of the actuaries and consultants at

the next official meeting.

The Chairman next recognized **Troy Haley** of the Bureau of Workers' Compensation ("BWC") who explained the procedural status of approved and pending rules. *Case Management* rules have been adopted by the Bureau, to be effective August 29, 2017. Rules pending approval include *Utilization Review*, set to be reviewed in a public rule making hearing August 31, 2017, and expected to be approved in late September 2016. The Attorney General is presently reviewing the proposed *Mediation and Hearing Procedure Rules*. The *Medical Impairment Rating Registry Program Rules* are also in a review process with the Secretary of State, the Attorney General and the Government Operations Committees of the Legislature.

The Chairman then recognized Council member **Gregg Ramos**, who brought up for discussion a recent opinion by the Supreme Court Special Workers' Compensation Appeals Panel. Mr. Ramos explained that in *Carlos Martinez v. Steve Lawhon, et al.*, No. M2015-00635-SC-R3-WC, issued August 19, 2016, the Panel upheld the trial court's ruling that the statutory provision potentially limiting an undocumented employee's award to one and one-half times the medical impairment rating was unconstitutional because of federal exemption. The challenged statute, T.C.A. § 50-6-241(e), imposed the 1.5 cap due to the inability of the employer to return the undocumented worker to work because of federal immigration law. The statute, enacted in 2009, placed a civil penalty against an employer who knowingly hires undocumented workers. However, civil and criminal penalties are expressly preempted by the federal statute, 8 U.S.C. § 1324 (h)(2). **Mr. Ramos** noted the opinion referenced legislative hearings concerning the 2009 legislation.

### **Meeting on October 4, 2016**

Upon convening the meeting, **Chairman David Lillard** noted that at the informational meeting on August 23, 2016, representatives of the National Council on Compensation Insurance (NCCI) presented a detailed overview of the Voluntary Loss Cost and Assigned Risk Rate Filing proposed to be effective March 1, 2017. Documentation was made available to members present at the August 23, 2016 meeting, and was also distributed to member subsequent to the meeting. The Chairman also informed members that he had received a letter dated October 3, 2016 from **Julie Mix McPeak**, Commissioner of the Department of Commerce and Insurance ("DC&I"), formally stating her intent to increase the assigned risk rate plan loss cost multiplier (LCM) from 1.66 to 1.70 effective March 1, 2017.

The Chair called upon **Mary Jean King**, representing the Advisory Council's actuary, *By the Numbers Actuarial Consulting, Inc.* ("BYNAC"), for comments concerning the proposed filing by NCCI. Ms. King indicated the proposed decrease of 12.8% for the Tennessee Voluntary Workers' Compensation Market had been reasonably calculated in accordance with actuarial standards of practice, considering the two year period NCCI relied upon in reaching its calculation of a 12.8% decrease. Ms. King indicated BYNAC reviewed paid as well as paid + case development and experience for policy years 2010 through 2012 in addition to the policy years underlying the filing of 2013 and 2014 to test the assumptions made by NCCI in selecting the data and development methods for review. She noted NCCI's indication of a dramatic improvement in the 2013 policy year experience since the March 1, 2016 filing and said in her opinion the large swing supports the need for a longer experience period. BYNAC's own experience indication, based on a five year review, is -9.3%. BYNAC's actuarial report may be viewed at the Advisory Council's website at <http://treasury.tn.gov/claims/wcac/bynac-presentation-for-tacwc-10-4-16.pdf>

The Chair then asked for comment by the actuary for the Department of Commerce and Insurance (“DC&I”). **Mr. Chris Burkhalter**, representing *Bickerstaff, Whatley, Ryan & Burkhalter Consulting Actuaries* (“BWRB”), stated he and other members of his firm had reviewed the proposed filing, detected no defect in the data or the calculations, and found the overall approach to be reasonable and within actuarial standards of practice. Accordingly, the DC&I actuary had no objection to the adoption of the loss cost filing as proposed. Mr. Burkhalter also pointed out that BWRB had used a five-year average in arriving at its own overall indication of an -8.7% decrease. BWRB’s letter of review may be viewed at the Advisory Council’s website at the following link: [http://www.treasury.tn.gov/claims/wcac/TN-NCCI-Rate-Analysis-2017\\_03\\_01-BWRB%20Analysis.pdf](http://www.treasury.tn.gov/claims/wcac/TN-NCCI-Rate-Analysis-2017_03_01-BWRB%20Analysis.pdf)

The Chair then recognized **Ms. Ann Marie Smith**, the *National Council on Compensation Insurance* (“NCCI”) actuary, for comment and response to the actuaries’ presentations relative to the Voluntary Loss Cost and Assigned Risk Rate Law-Only filing proposed to be effective March 1, 2017. The NCCI presentation may be viewed at the following link: <http://treasury.tn.gov/claims/wcac/ACWC-Hearing-Presentation-3-1-17.pdf>

Following discussion, Council member **Kerry Dove** moved that in view of the unanimity of the actuaries, the recommendation to the DC&I Commissioner be that the Advisory Council concurs with the proposed filing. The motion was seconded by Council member **John Garrett**, and passed unanimously on a roll call vote.

**Note:** On October 19, 2016, Chairman Lillard sent a letter to Commissioner McPeak informing her of the Advisory Council’s concurrence with the proposed increase in the assigned risk plan loss cost multiplier (LCM).<sup>1</sup>

### **Meeting on February 27, 2017**

Upon convening the meeting, Chairman David Lillard noted the primary purpose was for the Advisory Council to fulfill its statutory duty to consider and make recommendations on proposed legislation affecting the workers’ compensation system. The Chairman indicate six bills had been referred to the Council by the Senate Commerce and Labor Committee and the House Consumer and Human Resources Committee, and that the Council’s recommendations would be reported to the respective committees in accordance with T.C.A. § 50-6-121(k).

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 on while on the job. It also reduces the employer’s subrogation recovery proportionate to his fault. The bill applies the tort-based doctrine of comparative fault, adopted in Tennessee in 1992. There would be no change to the current system permitting no-fault recovery by an employee in a workers’ compensation claim against his employer. Attorney **Jim Summers** of Memphis provided a detailed explanation of the proposed legislation. Council member **Bruce Fox** asked Mr. Summers whether the bill if enacted would impose an unfair burden on an employee to defend an employer where the employee lacked the necessary resources to do so effectively. He also asked if Senator Norris would consider amending the bill to deny subrogation recovery to an employer found to be 50% or more at fault. Senator Norris indicated he was amenable. Council member **Fox**, seconded by Council member **Bob Pitts**, moved to report the Council’s **favorable recommendation** for passage, with the suggested amendment. The Council unanimously approved the motion. [**Note:** On April 4, 2017 the

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<sup>1</sup> A copy of Chairman Lillard’s 10/19/16 letter to Commissioner McPeak is posted on the Advisory Council’s website.

Senate bill was moved to the Senate Calendar Committee by a vote of 8-1-0]

The Chair then recognized **Representative Jay Reedy** for a presentation on **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. Representative Reedy stated the cause of the 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 firefighting activities. In the ensuing discussion, Council member **Pitts** expressed reservations about creating a presumption that would apply to a particular class of individuals. Council member **Fox** made a motion, seconded by Council member **Paul Shaffer**, to report a favorable recommendation for passage. The Council initially voted 4-2 *for* the motion. Immediately after the vote was taken, Council member **Brian Hunt** asked to change his vote to *no*, resulting in a 3-3 tie vote. Therefore the motion failed and the Council made **no recommendation** on the bill but did submit its comments to the respective committees. [**Note**: The General Assembly deferred action on this bill until 2018]

The Chair recognized **Michelle Consiglio-Young**, Assistant General Counsel/Legislative Liaison for the Administrative Office of the Courts ("AOC"), on **SB0261/HB0939**. Ms. Young presented an overview of the legislation which she indicated was brought 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. Questions were posed concerning the elimination of the appeal by right by Council members **Fox** and **Ramos**. Council member **Pitts** said employers would have similar concerns. Upon motion by **Mr. Pitts**, seconded by **Mr. Fox**, the bill was deferred for further consideration at the next Council meeting.

The Chair noted that at the sponsors' request, **SB1214/HB0325**, an *Administration* bill, was being deferred until the next Council meeting, pending further discussion and negotiation. *Ex Officio* member **Abbie Hudgens**, Administrator of the BWC, and **Troy Haley**, BWC legislative liaison, were both present and Mr. Haley provided a brief overview of the proposed legislation.

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

**Representative Jimmy Eldridge**, House Sponsor and *Ex Officio* member of the Council, asked that HB0157/SB0177, a caption bill, be deferred to the next Council meeting.

### **Meeting on March 20, 2017**

Upon convening the meeting, **Chairman David Lillard** explained the purpose was for the Advisory Council to consider and make recommendations on four remaining bills affecting the workers' compensation system.

The Chair recognized **Troy Haley**, legislative liaison for the BWC, for a presentation on SB1214/HB0325 (Norris-Hawk). BWC Administrator **Abbie Hudgens**, an *Ex Officio* member of the Council, was also present. This *Administration* bill would: (1) eliminate unnecessary filing of coverage forms with the BWC; (2) establish a vocational recovery assistance program for workers injured on the job who are unable to return to their former occupation; (3) address certain time frame issues in the Workers' Compensation Appeals Board determination process and add an opportunity for oral argument before the Appeals Board; (4) establish fines for entering false information on a construction service provider's application

to the Secretary of State's Exemption Registry; and (5) establish a requirement for construction service providers to provide proof of workers' compensation insurance coverage at job sites.

Following discussion, Council member **Fox** moved, seconded by Council Member **Kerry Dove**, to report to the respective legislative committees the Council's favorable recommendation for passage of the legislation. The motion was unanimously **approved** by the Council members present. [**Note**: This bill became Public Chapter 344]

The Chair recognized **Representative Jimmy Eldridge**, *Ex Officio* member of the Council and House bill sponsor, who advised the members that **SB0177/HB0157** (Overbey-Eldridge), a caption bill, should be **taken off notice** from the Council's calendar.

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

The Chair recognized **Representative Mike Carter** and **Michelle Consiglio-Young**, Assistant General Counsel/Legislative Liaison for the AOC, on **SB0261/HB0939** (Johnson-Carter). After discussion, **Representative Carter** asked the bill be **deferred** until the next Council meeting.

The Chair next recognized **BWC Administrator Abbie Hudgens**, *Ex Officio* member of the Council, for a presentation on the BWC's Draft Revision of the **Medical Fee Schedule Rules for Treatment**. Administrator Hudgens indicated the BWC had been engaged in a three-year review and planning process for revision of the schedule. The objectives were to: (1) reduce complexities in the current fee schedule and simplify billing; (2) provide new codes for services needed for appropriate care; (3) clarify when Medicare definitions should apply; (4) increase clarity and consistency; (5) make changes revenue neutral; (6) change penalty provisions to be consistent with statute; and (7) provide provisions for e-billing, which is part of the 2013 reform. Three packets of detailed proposed revisions prepared for Rulemaking Hearings were distributed to Council members. Upon discussion and after multiple questions by members to Administrator Hudgens and **BWC Medical Director Dr. Robert Snyder**, further consideration of the revisions was **deferred** to the next Council meeting.

### **Meeting on April 3, 2017**

Upon convening the meeting, **Chairman David Lillard** noted the Council had two bills remaining for consideration and recommendations to the Senate Commerce and Labor Committee and the House Consumer and Human Resources Committee.

The Chair recognized **Senator Richard Briggs**, Senate sponsor of **SB0297/HB0666** (Briggs-Hill M), who explained that a proposed amendment with drafting code No. 006753 had been distributed to members of the Advisory Council present. Senator Briggs noted the proposed amendment to the bill as introduced resulted from a collaborative effort by representatives of the affected parties. The bill as amended would in part impact the system of Utilization Review. **Dr. Robert Snyder, BWC Medical Director**, recommended further amendatory language be inserted to clarify that the system of utilization review would not apply to "diagnostic studies recommended by the treating physician in the event the initial treatment regimen, *non-surgical and without diagnostic procedures*, is not successful in returning the injured worker to employment." **Senator Briggs** agreed to the amendatory language. Upon motion by Council member **Pitts**, seconded by Council member **Fox**, the Council members present voted unanimously for the legislation to receive a **favorable recommendation for passage**, with the agreed amendatory language. [**Note**: This bill, as amended, became Public Chapter 380]

The Chairman next recognized **Representative Mike Carter** and **Michelle Consiglio-Young**, Assistant General Counsel/Legislative Liaison for the AOC, on **SB0261/HB0939** (Johnson-Carter). Council members again focused on the bill's central feature, the proposed elimination of the *appeal by right* under current law. Upon motion by Council member **Pitts**, seconded by Council member **Dove**, the Advisory Council voted 3-2 that the legislation receive a **favorable recommendation for passage, conditioned upon** preserving the current *appeal by right* by deleting proposed Section 2(D) of the bill. [**Note:** The Legislature deferred action on this bill until 2018]

The Chairman then recognized **BWC Administrator Abbie Hudgens** for a presentation on the BWC's Draft Revision of the **Medical Fee Schedules for Treatment**. Administrator Hudgens expanded her previous explanation of the major proposed changes, including, (1) changing payments to hospitals and Level 1 trauma centers to simplify billing; (2) adding billing codes for payment to physicians for a causation opinion, for drug and alcohol counseling, or for extra time spent with a case manager; (3) disallowing charges for a records search if no records are found; (4) changing definitions to align with the most recent changes to Medicare definitions; (5) adding language for compliance with e-billing; and (6) removing the mandate for utilization review for physical and occupational therapy after 12 visits, psychological treatments, and retrospective review of emergency ambulance transport.

Following discussion, upon motion by Council member **Pitts**, seconded by Council member **John Garrett**, the Council voted unanimously to **favorably recommend for adoption** the BWC's proposed Draft Revision to the **Medical Fee Schedules for Treatment**.

## TENNESSEE CASE LAW UPDATE

Throughout the year, the Advisory Council followed the Tennessee Supreme Court, reviewing its decisions and suggestions regarding the need for specific changes in the law.

An annual case law update of the 2016 calendar year from the Tennessee Supreme Court, including select cases from the Tennessee Supreme Court Workers' Compensation Panel, was submitted by the Advisory Council to the General Assembly in January of 2017.

Appeals of trial court decisions in cases involving workers' compensation are referred directly to the Supreme Court's Special Workers' Compensation Appeals Panel ("Panel") for hearings. The Panel gives considerable deference to a trial court's decision with respect to credibility of witnesses since the lower court has the opportunity to observe them testify. The Panel reports its findings of fact and conclusions of law and such judgments automatically become the judgment of the full Tennessee Supreme Court 30 days thereafter, barring the grant of a motion for review. Tennessee Supreme Court Rule 51 and T.C.A. § 50-6-225(a)(1).

Two recent cases in which the Tennessee Supreme Court ("Court") adopted and affirmed Memorandum Opinions of the Special Workers' Compensation Appeals Panel, and one opinion from the full Supreme Court illustrate the type of issues that are currently being considered by the Court. A brief synopsis and link to the full opinions follow:

***Tony Gray v. Vision Hospitality Group, Inc., et al.***  
**No. M2016-00116-SC-R3-WC – Filed January 26, 2017**

The employee was chief engineer for the Hyatt Place Hotel Airport in Nashville. Although he had some supervisory responsibility, he was regularly required to perform hands-on physical labor. On August 6, 2013 he injured his back while lifting and moving thirty rolls of carpet padding. He was diagnosed with a back strain and prescribed physical therapy. After being released to return to work on September 6, 2013, he was fired four days later for alleged poor work. The employee's back symptoms worsened, requiring back surgery at L4-5 on January 29, 2014, and he was not able to return to work thereafter. By the time of trial he was 58. Based on the employee's physical injuries, the trial court found him permanently and totally disabled, considering his age, skills, training, education, job opportunities in the immediate and surrounding communities, and the availability of work suited for his particular disability. The employer appealed, contending the trial court erred in its determination of permanent and total disability. The appeal was referred to the Special Workers' Compensation Appeals Panel, which **affirmed** the trial court's judgment.

The Panel cited *Fritts v. Safety Nat'l Cas. Corp.* 163 S.W.3d 673, 681 (Tenn. 2005), which referenced T. C. A. § 50-6-207(4)(B)(1999), which held that "an individual is permanently and totally disabled when he or she is incapable of 'working at an occupation that brings [him or her] an income.'" The Court looks to "a variety of factors such that a complete picture of an individual's ability to return to gainful employment is presented to the Court." (Citing *Hubble v. Dyer Nursing Home*, 188 S.W.3d 525, 535 (Tenn. 2006). The Supreme Court noted the employee's own assessment of his or her overall physical condition, including the ability or inability to return to gainful employment is 'a competent testimony that should be considered.' *Cleek v. Wal-Mart Stores, Inc.*, 19 S.W.3d 770, 774 (Tenn. 2000). This was a key factor in the decision to affirm. Both parties presented the testimony of vocational experts. Neither expert found the employee had a 100% loss of access to employment. However, the employee's work history indicated he

had almost exclusively performed physically demanding jobs involving hands-on maintenance and repair. He testified that his age, limited education and the physical restrictions from his injuries excluded him from almost every job he had held in his life, and that for the few possible jobs remaining, his use of a cane and his inability to stand, sit or walk for extended periods of time without pain would make work nearly impossible. The trial court agreed with the employee's expert that his appearance, slow gait, and demeanor eroded his employability. The Special Panel affirmed the judgment after concluding the trial court had correctly weighed the appropriate factors in considering the employee's skills, training, education, age, job opportunities and availability of work. The Panel particularly noted the trial court's opportunity to observe the employee's appearance and to assess the credibility of his testimony.

To read the full opinion, go to [http://www.tncourts.gov/sites/default/files/gray.t.opnjo .pdf](http://www.tncourts.gov/sites/default/files/gray.t.opnjo.pdf)

**Billy Joe Brewer v. Dillingham Trucking, Inc., et al.**  
**M2016-00611-SC-R3-WC – Filed April 11, 2017**

The employee, a truck driver, fell while climbing into the cab of the employer's truck, which was parked at the employee's home. The employer initially accepted the claim as compensable but later denied it, claiming the employee was not in the course of his employment when the injury occurred. The trial court found the injury to be compensable and awarded benefits. The employer's appeal was referred to the Special Workers' Compensation Appeals Panel, which **affirmed** the judgment except for an order to pay the cost of the employee's independent medical evaluation (IME).

The employee, 53, was a longtime truck driver for different employers. He drove a dedicated route Monday through Friday. He would leave his home in Lawrenceburg, drive to the FedEx terminal there, pick up a trailer, drive to Nashville, pick up another trailer and drive to Cookeville and then bring a trailer back to Nashville. He would then return to his home in the employer's truck which he kept parked there between work days. From the beginning of his employment with the employer he had followed the same routine. At trial the employer testified the employee was not allowed to drive the truck home, but the employee maintained the employer knew he did so and never prohibited the practice.

The employee regularly completed required pre-trip inspections at his home prior to beginning his route, checking the oil, air lines, tires and cleaning the windows. While performing the inspection on September 16, 2013 he slipped on the top step and fell four feet to the ground, injuring his left leg. He was diagnosed with an ACL tear and had surgery on December 9, 2013. Upon being cleared to return to work on June 3, 2104 the employee was informed by the employer the dedicated route was no longer available. The employer did offer a driving position with an affiliated company that would have required the employee to travel to different places every day with no guarantee of a daily run. The employee declined the offer. He applied with another company but could not pass the physical due to blood pressure issues. He then applied for Social Security Disability benefits, citing his left knee injury, high blood pressure and mini strokes. On appeal the employer's main issue was *whether the trial court erred in finding the employee was performing an act in the course of employment when injured*. The employer relied on the "coming and going" rule. The employer also challenged the trial court's finding of causation and that the employee had no meaningful return to work.

The Panel noted Tennessee has recognized certain exceptions to the "coming and going" rule, which is that "an injury received by an employee on his way to or from his place of employment does not arise out of his employment and is not compensable, unless the journey itself is a substantial part of the services for which the workman was employed and compensated." *Smith v. Royal Globe Ins. Co.*, 551 S.W.2d 679 (Tenn. 1977). One exception to the "coming and going" rule applies to injuries sustained by employees

traveling in a vehicle furnished by the employer while going to and from work. “(w)here transportation is furnished by the employer as an incident of the employment, an injury suffered by an employee while going to or returning from his work in the vehicle furnished arises out of and is within the course of the employment.” *Eslinger v. F & B Frontier Constr. Co.*, 618 S.W.2d 742, 744 (Tenn. 1981). The Panel agreed with the trial court’s finding that the employee was hurt when getting the employer’s vehicle ready for work, and that the employer’s stated prohibition on employees driving its vehicle home was never enforced against the employee. The Panel cited *Wait v. Travelers Indem. Co. of Ill.*, 240 S.W.3d 220, 226 (Tenn. 2007) in holding that when injured, the employee “already had commenced work by completing the mandatory pre-check of Employer’s vehicle and was preparing to travel in that vehicle to the FedEx terminal to pick up his first load of the evening.” In *Wait* the Supreme Court had stated, “An injury occurs in the course of employment ‘when it takes place within the period of employment, at a place where the employee reasonably may be, and while the employee is fulfilling work duties or engaged in doing something incidental thereto.’”<sup>2</sup>

To read the full opinion, go to [https://www.tncourts.gov/sites/default/files/brewer-dillinghamopnjo.opn\\_.pdf](https://www.tncourts.gov/sites/default/files/brewer-dillinghamopnjo.opn_.pdf)

**Judy Kilburn v. Granite State Insurance Company, et al.**  
**M2015-01782-SC-R3-WC – Filed April 10, 2017**

The employee, a trim carpenter, sustained several injuries in a motor vehicle accident in the course of his employment. He had cervical spine surgery for his neck injuries. His authorized physician recommended lumbar spine surgery for his back pain but the request was denied through the utilization review process. The physician’s request for epidural steroid injections was also denied. The employee was referred to a pain management clinic by his treating physician. At some point the employee began taking prescribed oxycodone to relieve his back pain. Six months after the cervical spine surgery the employee died due to an overdose of oxycodone combined with alcohol. The Chancery Court found the death was compensable.

The employer’s appeal was first referred to the Special Panel but was subsequently transferred to the full Supreme Court for review. The Supreme Court **reversed** the judgment, holding that the *employee’s failure to consume his medication in accordance with his doctor’s instructions was an independent intervening cause of his death*. In a footnote, the Court emphasized the narrowness of the holding in this case, stating, “We do not conclude that an individual can never prove that an overdose is the direct and natural result of the original compensable injury when a dependency or addiction to narcotics develops. We merely conclude that based on the facts and testimony in this case, the evidence preponderates against the trial court’s finding that (the employee’s) death was a direct and natural consequence of his original injury.”

The employee had been evaluated by a pain management specialist whose notes reflected his concerns that the patient was consuming alcohol while taking his prescribed medication. The specialist required the employee to sign an agreement stating he would control his medications as directed by his physician. Another physician conducted an independent medical examination (IME), also indicating his concerns about the employee’s oxycodone dosage. Testimony during trial indicated the employee had become anxious and upset after being denied back surgery. His widow stated he “felt worthless because he couldn’t get out and earn a living and take care of his family,” that he was still in a lot of pain, and “seemed somewhat depressed.” She said she believed her husband supplemented his medication with alcohol because it helped with his pain when he was skipping doses of his medication to make it last longer. She did say that before the accident her husband sometimes drank during the week and more often on weekends. She asserted he suffered from anxiety and depression but conceded he had never been diagnosed with either condition. The medical examiner’s report specified the cause of death was acute oxycodone toxicity with contributing causes of hypertension, tobacco use, and alcohol use.

Both parties presented deposition testimony by physicians who had examined the employee’s medical records.

The claimant's doctor testified it was possible the employee was suffering from severe pain or anxiety which might have impaired his judgment and contributed to his risk of overdose. He opined the employee was not addicted but had become dependent on opiates, which could cause anxiety and intensify pain upon withdrawal. The Supreme Court stated his conclusions were very equivocal. The employer's physician stated there was nothing in the record to show the employee suffered from anxiety or withdrawal symptoms that could cloud his judgment.

The Court cited its holding in *Anderson v. Westfield Grp.*, 259 S.W.3d 690, 696 (Tenn. 2008) with reference to the basic rule that "all medical consequences and sequelae that flow from the primary injury are compensable," noting that the rule has a limit that "hinges on whether the subsequent injury is the result of independent intervening causes, such as the employee's own conduct." In *Anderson* the Court had modified the willful or deliberate conduct standard to include an employee's "negligence as the appropriate standard for determining whether an independent intervening cause relieves an employer of liability for a subsequent injury purportedly flowing from a prior work-related injury" *Id.* at 698-99. Application of the intervening cause principle is not an affirmative defense but, rather, is a "way of assessing the scope of an employer's liability for injuries occurring after a compensable injury." *Id.* at 697.

The issue before the Court was whether the employee's behavior terminated the causal link between his work-related injury and his death. The Court referenced *Simpson v. H. D. Lee Co.*, 793 S.W.2d 929, 931-32 (Tenn. 1990), where it had concluded an employee's death after his failure to take his pain medication according to his physician's instructions was no longer causally related to his employment. As in *Simpson*, the Court here held the employee's death was no longer causally related and that his overdose was an independent intervening cause.

To read the full opinion, go to [https://www.tncourts.gov/sites/default/files/kilburn.judy\\_.opn\\_.pdf](https://www.tncourts.gov/sites/default/files/kilburn.judy_.opn_.pdf)

## TOSHA NEWS

The Bureau of Labor Statistics reported 112 work-related fatalities in Tennessee in 2015, compared to 124 in 2014, reflecting a decrease of 9%. According to the Bureau's 2015 non-fatal occupational injury and illness statistics Tennessee's incidence rate of 3.1 per 100 full time workers in the private sector is not statistically different from the national average of 3.0. Tennessee is one of 20 states and the District of Columbia to experience a decrease in the private sector occupational injury and illness incidence rate or to have a rate not statistically different from the national rate.<sup>3</sup> Over the past ten years, the incidence rate for nonfatal occupational injuries and illnesses in the United States private sector has declined from 4.4 to 3.0 recordable incidents per 100 full-time equivalent workers.

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<sup>3</sup> To view the report prepared by the Tennessee Department of Labor and Workforce Development in cooperation with the U. S. Department of Labor, Bureau of Labor Statistics, see <http://www.tn.gov/workforce/article/workforce-occupational-injuries-illnesses-and-fatalities>

## CONCLUSION

The Advisory Council on Workers' Compensation met on five (5) occasions from July 1, 2016 through June 30, 2017. This annual report provides a synopsis of the topics considered and appointments made during that time period. The Advisory Council appreciates the opportunity to be of service to the Governor, the General Assembly and Executive Departments, as well as the employers and employees of the great State of Tennessee.

Respectfully submitted on behalf of the Advisory Council on Workers' Compensation,

/s/ \_\_\_\_\_  
David H. Lillard, Jr.  
Treasurer, State of Tennessee  
Chairman