

*Tennessee Advisory Council on Workers'
Compensation*



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ANNUAL REPORT FOR YEAR  
JULY 1, 2010 – JUNE 30, 2011  
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TENNESSEE TREASURY DEPARTMENT
STATE CAPITOL
NASHVILLE, TENNESSEE 37243-0225

David H. Lillard, Jr., State Treasurer, Chair
Lynn Ivanick, Administrator

STATE OF TENNESSEE
ADVISORY COUNCIL ON WORKERS' COMPENSATION
ANNUAL REPORT FOR
YEAR JULY 1, 2010 – JUNE 30, 2011

Pursuant to *Tennessee Code Annotated* §50-6-121(c), the Advisory Council on Workers' Compensation hereby submits its report for year July 1, 2010-June 30, 2011 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") was initially created by the General Assembly in 1992. The Workers' Compensation Reform Act of 1996 terminated the existing Council and created a new Advisory Council on Workers' Compensation. Subsequent amendments, including the Reform Act of 2004 are recorded at *Tennessee Code Annotated* ("T.C.A.") §50-6-121, which also outlines the authority of the Council, its specific responsibilities and its general duties. Pursuant to Public Chapter 1087, Public Acts of 2010, the administration of the Council was transferred from the Tennessee Department of Labor & Workforce Development to the Tennessee Department of Treasury.

The Council is authorized to:

- Make recommendations to the Governor, the General Assembly, the Special Joint Committee on Workers' Compensation, the Senate Commerce, Labor and Agricultural Committee and the House Consumer and Employee Affairs Committee, the Commissioner of Labor and Workforce Development and the Commissioner of Commerce and Insurance relating to the promulgation or adoption of legislation or rules;
- Make recommendations to the Commissioner of Labor and Workforce Development and the Commissioner of Commerce and Insurance regarding the method and form of statistical data collections; and
- Monitor the performance of the workers' compensation system in the implementation of legislative directives. 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 (7) voting members, ten (10) non-voting members, and four (4) ex-officio members. The State Treasurer, is the Chair and a voting member, three (3) voting members who represent employees; three (3) voting members who represent employers. 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 which constitutes the making of a policy recommendation to the Governor or to the General Assembly.

No new positions were added to the Advisory Council in fiscal year 2010-2011. On December 28, 2010, Speaker of the House, Kent Williams appointed Mr. Daniel Pohlgeers as an Employer Representative voting member to complete the term of Mr. Stewart Meadows who relocated outside the State. Mr. Pohlgeers' term is for the remainder of Mr. Meadows' unexpired term, or until June 20, 2012. Mr. Pohlgeer's prior position as a Tennessee Licensed Occupational Therapist non-voting member is vacant.

Additionally, we experienced the retirement of several ex officio members of the Department of Labor and Workforce Development in Sue Ann Head, Bob Henningsen and Commissioner James Neely to whom the Council expresses its thanks for their service to the State of Tennessee. From the Department of Commerce and Insurance we thank Commissioner Leslie Newman for her years of service as well. We welcome new members Commissioner Karla Davis of the Department of Labor & Workforce Development, her designee, Deputy Commissioner Alisa Malone and Commissioner Julie Mix-McPeak of the Department of Commerce & Insurance.

A chart outlining the members of the Advisory Council on Workers' Compensation as of June 30, 2011 with exploratory notes of changes in membership during the fiscal year 2010-2011, follows:

NAME	MEMBER TYPE	REPRESENTING
David H. Lillard, Jr. State Treasurer	Chairman Administrative Voting Member	Ex Officio member
J. Anthony Farmer	Voting Member	Employees
Jack Gatlin	Voting Member	Employees
Jerry Lee	Voting Member	Employees
Bob Pitts	Voting Member	Employers
Daniel Pohlgeers	Voting Member	Employers
Gary Selvy	Voting Member	Employers
Katherine D. Boyte	Nonvoting Member	Tennessee Defense Lawyers Association
David Davenport	Nonvoting Member	Licensed Physical Therapist
Bruce D. Fox	Nonvoting Member	Tennessee Association for Justice
Keith B. Graves, D.C.	Nonvoting Member	Licensed Chiropractor
Stephen E. Johnson	Nonvoting Member	Healthcare Provider
Mayor Kenny McBride	Nonvoting Member	Local Governments
Jerry Mayo	Nonvoting Member	Insurance Companies
Samuel E. Murrell, M.D.	Nonvoting Member	Tennessee Medical Association
A. Gregory Ramos	Nonvoting Member	Tennessee Bar Association
Commissioner James Neely [Designees Sue Ann Head & Bob Henningsen] Commissioner Karla Davis [Designee Alisa Malone] (1)	Ex Officio Nonvoting Member	Dept. of Labor & Workforce Development
Commissioner Leslie Newman, Commissioner Julie Mix- Mc-Peak [Designee for both, Mike R. Shinnick](2)	Ex Officio Nonvoting Member	Dept. of Commerce & Insurance
Senator	Ex Officio Nonvoting Member	Chairing Joint Committee on Workers' Compensation
Representative	Ex Officio Nonvoting Member	Co-Chairing Joint Committee on Workers' Compensation
Vacant	Nonvoting Member	Licensed Occupational Therapist

(1) Commissioner James Neely's term expired and the term of Commissioner Karla Davis commenced on January 15, 2011. Sue Ann Head served as Designee for the Labor and Commissioner of Workforce Development until her retirement on February 1, 2011.

**Bob Henningsen served until his retirement on April 15, 2011.
Alisa Malone served as Designee from April 25, 2011 until year end.**

(2) Commissioner Leslie Newman's term expired and the term of Commissioner Julie Mix-McPeak commenced on January 15, 2011.

Terms of the Non-Ex-Officio Members follow:

	<u>Term of Position</u>
J. Anthony Farmer	July 1, 2010-June 30, 2014
Jack A. Gatlin	July 1, 2010-June 30, 2014
Jerry Lee	July 1, 2008-June 30, 2012
Bob Pitts	July 1, 2010-June 30, 2014
Daniel Pohlgeers	Dec. 28, 2010-June 30, 2012
Gary Selvy	June 21, 2008-June 30, 2012
Katherine D. Boyte	July 1, 2007-June 30, 2011
David Davenport	Oct. 1, 2009-June 30, 2013
Bruce D. Fox	July 1, 2007-June 30, 2011
Keith B. Graves	July 1, 2009-June 30, 2013
Stephen E. Johnson	July 1, 2007-June 30, 2011
Kenny McBride	July 1, 2009-June 30, 2013
Jerry Mayo	July 1, 2009-June 30, 2011
Sam Murrell	July 1, 2010-June 30, 2013
Gregory Ramos	July 1, 2009-June 30, 2013
Occupational Therapist	Sept. 29, 2009-June 30, 2013

ACTIVITIES OF THE ADVISORY COUNCIL

The Advisory Council is required by statute to meet at least two times per year. Throughout this July 1, 2010-June 30, 2011 Council year, the Advisory Council met on six (6) occasions: August, 17, 2010; October 5, 2010; February 28, 2011; March 24, 2011; April 8, 2011 and April 25, 2011.

All approved meeting minutes may be reviewed at the Advisory Council's website <http://treasury.tn.gov/claims/wcadvisory.html> under the Meetings tab. The agenda and video of each meeting is available on the same page.

Throughout the year, the Advisory Council considered several issues impacting the Tennessee workers' compensation system. The following is a synopsis of the subjects which received the most attention

WORKERS' COMPENSATION CASELAW UPDATE

A caselaw update of the 2010 calendar year from the full Tennessee Supreme Court as well as select cases from the Tennessee Supreme Court Workers' Compensation Panel was submitted by the Advisory Council to the General Assembly in January of 2011.

In 2010, the Supreme Court addressed issues of neutral assault, street risk, and the presumption favoring compensability in the *Padilla* case. In *Nichols*, the Court addressed the circumstances in which a layoff is deemed to be a loss of employment. In *Henderson* the Justices discussed the requirements to set aside judgments approving settlements. Other evidentiary hearsay exceptions were addressed in *Carter* and *Arias*. *Excel* outlined the weight to be given to various expert witness testimony.

The report, complete with citations, may be viewed in its entirety via the Advisory Council's website by accessing <http://treasury.tn.gov/claims/wcac/1-14-11Memo.pdf>

WORKERS' COMPENSATION LEGISLATION

During the 2011 legislative session, the Advisory Council reviewed at the request of the 107th General Assembly approximately 19 bills with subject matters directly affecting or touching upon the Tennessee Workers' Compensation Laws.

Three of those bills directly affecting the Tennessee Workers' Compensation Act passed the Senate and House Committees, and the General Assembly. The Advisory Council recommended them for passage. All three were signed by the Governor and are summarized as follows:

Senate Bill 0932 (Senator Norris) / House Bill 1503 (Representative Eldridge)

This bill made various revisions to the Tennessee workers' compensation law including the elimination of the three year waiting period to settle future medical treatment claims and the revision of procedures regarding contact between Authorized Treating Physicians ("ATPs") and Employers or Carriers and their representatives. It provides a presumption that an ATP's decision regarding causation is correct unless shown to be otherwise by a preponderance of the evidence. It further eliminates repetitive motion injuries from coverage unless the employment is shown to be the primary cause of the injury or the injury arose from specific occurrences of the employment.

The Advisory Council recommended approval of the bill with several suggested amendments. After passage by the General Assembly, it was signed by Governor Haslam becoming **Public Chapter 416**. It is effective for injuries occurring on or after June 6, 2011.

Senate Bill 1550 (Senator Ketron) / House Bill 2030 (Representative Curtiss)

This bill clarified that the general contractor of a commercial construction project is the designee permitted to select the three construction service providers who may use their exemptions from workers' compensation coverage.

It further permits five instead of three corporate officers who are engaged in the construction industry to apply for an exemption from coverage under workers' compensation insurance.

It removes the restriction prohibiting an affiliate of an exempt construction services provider from obtaining an exemption themselves.

The Advisory Council recommended approval with amendments suggested by the Advisory Council. After passage by the General Assembly, Governor Haslam signed the bill into law that which was designated **Public Chapter 422** with an effective date of October 1, 2011.

Senate Bill 1785 (Senator Ketron) / House Bill 2047 (Representative Brooks, H.)

This bill changed the standard of proof 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 when a test was either positive or refused. This new standard applies for all employers who are members of the State Drug Free Workplace Program. The Advisory Council recommended approval. After passage by the General Assembly, Governor Haslam signed into law that which was designated **Public Chapter 203**. It takes effect July 1, 2011.

NCCI ADVISORY PROSPECTIVE LOSS COST FILING

The National Council on Compensation Insurance, Inc. ("NCCI") files advisory prospective loss cost and rating values with the Commissioner of the Department of Commerce and Insurance, who presents same to the Advisory Council for recommendation before approving or modifying. The Advisory Council makes written comment to the Commissioner for Advisory Prospective Loss Costs Filings pursuant to T.C.A. §50-6-402(b-d).

The Advisory Council made recommendations regarding NCCI's annual advisory prospective loss cost filing which was submitted to the Commissioner of Commerce and

Insurance on August 13, 2010 and discussed during the Council's August 17th and October 5th, 2010 meetings. Actions regarding this filing are outlined below.

The Council at its August 17, 2010 meeting considered a report from Commissioner Newman's Designee, Mr. Mike Shinnick, on the Workers' Compensation Market Conditions and Environment. Mr. Shinnick reported a favorable -5.1% overall loss cost filing. He advised that lost time frequency continues to decline nationally which is typical in recessionary times, that industry reserve deficiencies were moderate and that company failure rate had been low. He explained that the Tennessee residual market is the smallest in ten years and remains competitive with pricing. He reported that negative factors include an underwriting loss, that further deterioration in the underwriting cycle is possible, and low investment returns continue to pressure those results. The report may be viewed in its entirety by accessing <http://treasury.tn.gov/claims/wcac/8-2010-MarketCond.pdf>

Mr. Thomas G. Redel, CPCU, Senior Vice President, AON Risk Services Central, which serves as the administrator of the Tennessee Assigned Risk Plan, presented an annual report regarding the Tennessee Assigned Risk Plan Data. Mr. Redel explained that although there had been a premium decrease of 25% in 2009, that the 2010 rate of decrease had only been 15% so far, so the rate of decline was decreasing. The report may be viewed in its entirety at http://treasury.tn.gov/claims/documents/assignedriskdataplan_aug2010.pdf

Proposals with supporting trend selections, provisions for loss adjustment expenses, selection of loss development factors and class indications were all presented for review at the October 5, 2010 Council meeting.

Mr. David Wilstermann's Statistical report of the 2009 Workers' Compensation Data revealed that the utilization of the Tennessee Department of Labor and Workforce ("TDLWFD") to settle cases had leveled off at 60%, having been 20% in 2000. Trials are occurring in 1% of cases. The number of weeks to conclusion has reduced from the prior year and, after displaying initial post reform decreases, permanent partial disability percentage amounts, multipliers and medical costs are leveling off or decreasing.

Mr. Kirt Dooley and Ms. Cathy S. Booth of NCCI, Regulatory Services Division, presented a Summary of Tennessee's Voluntary Market Loss Cost Filing proposed to be effective March 1, 2011 indicating a 5.1% decrease.

The Advisory Council received comments from the Council's consulting actuary. Mr. Gregory Alff of Willis of Tennessee, Inc., noted that Tennessee data shows good experience resulting in a recommended negative change in the loss cost. However, Mr. Alff recommended a smaller decrease of -4.7% based upon several factors. (1) he saw the indemnity loss development factor as higher in the most recent three periods and accordingly recommended selecting higher indemnity loss development factors. This adjustment, if implemented alone, would result in an indicated loss cost change of -4.5%.; and (2) he suggested consideration of a revision of the factor to load for loss based expense. He believed the estimated loss adjustment expense of 20.3% as proposed by the NCCI should be adjusted and suggested a lesser factor of 20.0% be considered, thereby resulting in an indicated loss cost change of -5.3% if considered alone. The two adjustments combined would result in an aggregate adjustment of -4.7%.

The consulting actuary for the Department of Commerce & Insurance, Ms. Laura Sprouse, of Select Actuarial Services, made her recommendation to modify the filing of the NCCI to a range from -5.5% to -4.9%. This stemmed from Select's belief that (1) based on their own trending, the medical loss ratio trend should be 0 rather than +.5 predicted by NCCI and (2) the loss adjustment expense (LAE) ratio was more than 21% rather than the 20.3% that was proposed. Using a 1.8% annual trend based on the latest four years of data, they projected LAE to be 21.2%. Ms. Sprouse acknowledged that the standard methodologies used by NCCI were sound and the filing reflected Tennessee experience over the most recent two full policy periods (policies effective from 1/1/2007 through 12/31/2008).

After consideration of the presentations and the comments and discussion amongst the members, the voting members of the Advisory Council recommended adoption of a -5.3% change in loss cost to become effective on March 1, 2011 for the voluntary market. The Council made no further recommendations with respect to the remainder of NCCI's filing.

CONCLUSION

The Workers' Compensation Advisory Council met on six (6) occasions from July 1, 2010 to June 30, 2011. This Annual Report is intended to give a synopsis of the topics considered during that time period. The Advisory Council appreciates the opportunity to be of service to the Governor and the General Assembly as well as the employees and employers of the State of Tennessee.

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



David H. Lillard, Jr., Treasurer, State of Tennessee
Chairman



Lynn Ivanick
Administrator

APPENDIX: 2011 LEGISLATIVE RECOMMENDATIONS OF COUNCIL

The following is a list of recommendations from the Advisory Council regarding bills filed in the 2011 Session of the 107th General Assembly:

SB 0040 (Faulk)/HB 0205 (Harrison) recommended **approval** of this bill on 2/28/11.

SB 0415 (Barnes)/HB 0163 (Pitts) encompassed in SB1550, recommended **approval** of this bill on 4/8/11.

SB 0471 (Tracy)/HB 0506 (Brooks) recommended **against** passage of this bill on 2/28/11.

SB 0560 (McNally)/HB 0490 (Eldridge) bill allowing suit vs. third party tortfeasors, Council commented on 2/28/11 that it did not change present law.

SB 0932 (Norris)/HB 1503 (Eldridge) recommended **approval** on 4/25/11 **provided** the standard of proof was changed from “clear & convincing” to “a preponderance of the evidence” in Sections 8 & 9, which was done.

SB 1304 (Johnson)/HB 1083 (Eldridge) recommended **against** passage of the bill.

SB 1313 (Johnson)/HB 1300 (Eldridge) recommended **approval** 2/28/11, but if amended, want amendments to come back to Council.

SB 1481 (Marrero)/HB 1527 (Turner, M.) failed to achieve a majority vote on 2/28/11, so **no recommendation** from Council.

SB 1550 (Ketron)/HB 2030 (Curtiss) recommended **approval** for passage of this bill on 4/8/11 after final review of amendment.

SB 1757 (Ketron)/HB 1191 (Curtiss) recommended **approval** for passage of this bill on 2/28/11.

SB 1785 (Ketron)/HB 2047 (Brooks, H.) recommended **approval** of this bill on 2/28/11.

SB 1839 (Herron)/HB 0581 (McDaniel) religious exemption, recommended **against** passage of the bill on 4/8/11.

SB 1950 (Southerland)/HB 2107 (Curtiss) recommended **approval** for passage of this bill on 2/28/11.

SB 1986 (Stewart)/HB 1758 (Pitts) failed to achieve a majority vote on 3/24/11, therefore **no recommendation** from the Council.

SB 2019 (Stewart)/HB 1045 (Matheny) recommended **against** passage of the original bill on 2/28/11. Sponsor amended the bill to include a pain management section and presented at the 4/8/11 meeting just requesting comments and not a vote. Sponsor sending to summer study.

SB 2023 (Stewart)/HB 1757 (Pitts) failed to achieve a majority vote on 3/24/11, therefore **no recommendation** from the Council.