

Tennessee Advisory Council on Workers' Compensation
MINUTES

Monday, March 12, 2012, 9:00 a.m.

Legislative Plaza, Room 30

Nashville, Tennessee

Members present:

Voting Members

Chairman David H. Lillard, Jr.

J. Anthony Farmer

Jerry Lee

Bob Pitts

Gary Selvy

Nonvoting Members

Paula Claytore

Bruce Fox

Dr. Keith Graves

Abbie Hudgens

Lynn Lawyer

Dr. Samuel Murrell - via telephone

Gregg Ramos

Mike Shinnick

Lynn Ivanick, Administrator

Also present from Treasury, introduced, presenting or available to speak:

Christy Allen, Assistant Treasurer, State Treasury Department

Anne Adams, Claims Administrator, State Treasury Department

Ben Simpson, Claims Service Counselor, State Treasury Department

Alison Cleaves, Staff Attorney, State Treasury Department

B. Jeff Francis, Dept. of Labor & Workforce Development

Landon Lackey, Dept. of Labor & Workforce Development

Kim Jefferson, Dept. of Labor & Workforce Development

John Lyell, Lyell Law Firm

Bradley Jackson, Chamber of Commerce

Terry Hill, Manier & Herod, TNSIA

Amy Quinn, NCCI

At 9:00 a.m., Chairman, Treasurer David H. Lillard, Jr., called the meeting to order. Roll was called by Ms. Ivanick, and Chairman Lillard declared a quorum was present.

Approval of the minutes from the September 20, 2011 meeting was brought for consideration. Mr. Bob Pitts made a **motion** to accept the minutes, which was **seconded** by Mr. Jerry Lee. Chairman Lillard called for a voice vote, and the minutes were approved.

Mr. Mike Shinnick of the Department of Commerce & Insurance introduced Tennessee's new NCCI representative, Ms. Amy Quinn. Chairman Lillard welcomed her.

The next item of business was the NCCI 4th Quarter 2011 summary filing. Chairman Lillard called for Council comment or question and, seeing none, so noted and acknowledged the summary filing for the record.

Chairman Lillard proceeded to the next agenda item, which was the review of pending bills.

HB2706* - SB2691, T.C.A. 50-6-912, Representative Turner M., Senator Haynes. The Council made no recommendation on the bill, deferring the bill to its next agenda.

The bill creates an exception for *sole proprietors* such that they would not be required to pay fees to the Secretary of State for registration, renewal or amendments to the Workers' Compensation Exemption Registry. Present law requires all construction service providers to pay fees outlined in §50-6-912. The fiscal memo indicates the financial impact to the State. The practical effect would be to offer financial relief to individual business owners.

Chairman Lillard gave a brief summary of the purpose and procedures of the Council then opened the floor for discussion.

Mr. Bob Pitts stated, "Mr. Chairman, in light of the fact that this whole area of workers' comp and revised law went through two agonizing years of study and refinement, and due to the fact of the significant fiscal impact, and further the fact that I know of no logical reason why one business segment should be excluded, I would make a **motion** that the Council recommend opposition to this bill for those reasons."

Chairman Lillard called for a second to the motion and, seeing none, declared that the motion died for lack of a second. Chairman Lillard called for any further discussion. Seeing none, the failure of action of the Council on this bill constitutes no recommendation. Mr. Pitts' remarks were to be made part of the record and added to the minutes of the meeting pursuant to his request and without objection.

Later in the meeting, but placed here for consistency regarding subject matter per request at Council's following meeting, is the further discussion held on this bill.

Mr. Pitts inquired whether discussion could be held about **HB2706* - SB2691**. There was no objection. Mr. Pitts stated, "I'm concerned that the way that wound up going down is that we've got no position. I simply want to remind everyone that the legislature spent two years wrestling with the various interest groups as it pertains to the construction industry and setting up the process. We're now not going to take a position on a bill that takes one business entity out of the mix of all the business entities that are required to deal with the Secretary of State and say we don't have a position? That's a little bit discouraging. It may be too broad a step to ask for reconsideration and see what

a vote would be today, but I would like to suggest that we think about, if we're not prepared to take a position, to defer this for further consideration at the next meeting rather than simply saying we have no position for failure of a second."

Mr. Farmer **moved** to defer the bill to the next meeting. Chairman Lillard rules that reconsideration was not necessary because the Council had not previously taken a formal position, a motion to defer HB2706*-SB2691 to the next agenda was proper. Mr. Pitts **seconded**, and without objection, the bill was **deferred** to the next agenda.

HB2808* - SB2923, T.C.A. 50-6-225, Representative Dennis, Senator Overbey. The Council voted to give the bill a positive recommendation.

The bill permits either party to file suit in court following exhaustion of the administrative process in the county of claimant's residence *at the time of injury*. Current law permits either party to file in the county of claimant's residence, but does not specifically provide that the party files in the county of residence at the time of injury. The practical effect is to secure a venue in the event a claimant moves during the process. Attorney John Lyell stated that it was a simple bill correcting the language to its original intent.

Ms. Lynn Lawyer inquired as to whether one could still file in the county where the injury occurred as well as the claimant's residence at the time of the injury, and Mr. Lyell responded that both venues would still be available.

Mr. Farmer indicated that he believed Mr. Lyell was correct with respect to the intent and so **moved** that the Council recommend approval of this bill. Mr. Lee **seconded** the motion. Chairman Lillard called for discussion and seeing none, called for the vote. A majority of the voting members of the Council voted in favor of the motion to recommend approval of the bill.

HB3250* - SB3019, T.C.A. 50-9-101, et seq., Representative Butt, Senator Campfield. The Council voted to give the bill a negative recommendation.

The original bill adds a list of additional job categories to the routine drug testing section under Chapter 9, Drug Free Workplace Programs. The amendment, which makes the bill, requires employers who participate in the workers' compensation assigned risk plan to implement a drug-free workplace program. Present law does not contain this requirement. This would add a new section (Section 115) to Title 50, Chapter 9.

Chairman Lillard opened the floor for discussion. Mr. Farmer requested comment from the Department of Labor & Workforce Development ("DLWFD") on the expense of implementing a drug free workplace program, particularly for small employers.

Ms. Abbie Hudgens, Administrator of DLWFD, responded that she did not think the expense to the employer was great, but the expense to the department could be addressed by Mr. Landon Lackey, Director, Drug Free Workplace Program. She further informed that DLWFD does not have a position on the legislation.

Mr. Lackey indicated that there is no charge to employers in connection with the application process, so DLWFD would not gain revenue; however, additional resources would be expended because presently there are approximately 3,000 active drug free workplace members of the total 9,000 members in the plan. No hard numbers were available to estimate cost to employers because employers sign their own contracts with testing labs in their area; however, it was assumed that large employers, who send more individuals for testing, would have a lower cost per person than smaller employers.

Mr. Pitts stated, "If I remember correctly, we sort of have two kinds of populous in the assigned risk pool. We have a lot of small companies who, in many instances, the private market is not inclined to provide a market, and then we have people in there who are bad risk that no one wants to provide coverage. So, it's a marketplace for them. Did you have any conversation with the company that's handling the assigned risk pool. Do they have any observations with respect to either the administration or how a bill in this area might look?"

Mr. Shinnick expressed his concern for the small policy holders in the assigned risk plan and that there may not be enough expense dollars to fund the implementation of the program. He indicated that 25% of all assigned risk policies are minimum premium policies, so there are numerous such policies in the plan.

Mr. Bruce Fox suggested that passage of this bill might encourage small businesses to go bare if another burden of this expense were added. They would be facing either the penalty as an expense or the implementation of the plan as an expense and they may not be able to afford either.

Mr. Pitts stated, "I guess this question is back to Mike. Obviously, at this point apparently the DLWFD does not have a position, but, taking it from the position that obviously some people, somewhere, think the assigned risk pool is for only people with bad risk (would be my guess), it seems to me to be two other issues in connection with trying to put a bill together. The first one is if this became a new requirement, it would seem to me that the effective date in this bill would cause all kinds of problems as people attempt to gear up to meet the July 1 deadline. And then secondly, if you were to make the argument that people who are forced into assigned risk because of bad experience, where should one draw the line on what would be the cutting point of how bad is 'bad enough' to force you to mandatory drug free workplace testing program."

Council members further discussed the bill and questioned whether the language was consistent with the sponsor's intent because of the number of small policies that are not the high risk in the plan.

Chairman Lillard noted the Council could either take action or defer action and ask the sponsors to explain the bill and their intention. Mr. Selvy **moved** that the Council reject the bill as written because it does not meet the objective the sponsors intended. This was **seconded** by Mr. Farmer. Chairman Lillard called for further discussion and there being

none called for the vote. A majority of the voting members approved the motion to recommend against passage of the bill.

Mr. Pitts was recognized and requested that his comments be placed in the record. Mr. Pitts stated, "If it's the legislative intent to move forward with this bill, [then] consideration [should] be given to applying it only to the person[s] in the assigned risk pool that are there due to bad experience and not against small businesses who simply are there because there's no other market. That would be my first point, and second point is I have concerns with the bill as drafted that we're not allowing sufficient time, should the bill go forward in its present form, to effectively and fairly plan to provide for such a program at the company level and conform with the deadline in the bill. That would need to be, in my opinion, extended out further into the future. Third observation might be, if it is legislative intent to move forward, that it might be something that they would consider in giving authority to the DLWFD to divine a plan and determine what an appropriate bad experience level might be. An EMR above a certain figure would be under a mandatory program. All of those points are relative should the legislature decide that it wants to proceed with legislation."

Chairman Lillard indicated that Ms. Ivanick will summarize remarks in minutes, but specifically include Mr. Pitts' remarks without objection.

HB3351* - SB3676, T.C.A. 50-6-412(e)(5), Representative L. Miller, Leader Kyle. The Council deferred this bill to the next agenda.

This bill allows the Department of Labor & Workforce Development 90 days to schedule a show cause hearing for an entity's failure to secure compensation coverage. Current law allows for 60 days. The practical effect is to allow an additional 30 days for the scheduling of the hearing.

Chairman Lillard indicated that this is a caption bill, and sponsors do not have their amendment ready; the Council deferred consideration of the bill to the next calendar, without objection.

HB3372* - SB3315, T.C.A. 50-6-102(17), 122(a)(1) and 204, Representative White, Senator Johnson. The Council recommended approval of this bill.

The amendment, which makes the bill, has generally been referred to as the pain management bill and includes three sections. The first revises the definition of Utilization Review; the second addresses prescription drug abuse; and the third defines termination language in contracts between injured employees and pain management physicians.

Bradley Jackson, on behalf of the Tennessee Chamber of Commerce & Industry and the Tennessee Self-Insurers' Association presented the bill indicating that the amendment seeks to solve the problems regarding pain management.

Ms. Ivanick inquired as to whether any changes had been made between the amendment that was delivered for the council March 9, 2012 and the one received this morning with the drafting code. Mr. Jackson indicated that it should be the same, and if not, he would come back to the Council again with changes.

Mr. Terry Hill, a member of the defense bar, also head of the Tennessee Self Insurers' Association, was recognized to explain the bill in more detail, Mr. Hill addressed the geographic distance between acceptable pain management doctors and concerns regarding improper use of prescribed drugs. Mr. Hill also discussed requirements of pain management contracts between the prescriber and the injured worker.

Mr. Pitts **moved** that the Council support the bill as offered. The amendment drafting code is # 01436596. Mr. Farmer **seconded** the motion. Chairman Lillard called for further discussion, and seeing none, called for the vote. Having received a majority of the votes of the voting members of the Council, the bill with the amendment was recommended for adoption and passage.

HB3806 - SB2830*, T.C.A. 50-6-106 & 29-20-106, Representative White, Senator Ketron. The Council moved to defer this bill to their next agenda.

The original bill eliminates the state, counties and municipal corporations' exemption from the workers' compensation law. The amendment makes the bill and eliminates the right to withdraw from coverage under the workers' compensation system with 30 days written notice once coverage has been accepted by a state, county or municipal corporation. The fiscal memo indicates significant "permissive" impact. Mr. Nathan Green was unable to introduce the bill as anticipated, so Mr. Pitts' made a **motion** to defer this bill to the next meeting, which was **seconded** by Mr. Selvy. Without objection, the motion to defer was adopted.

Mr. Pitts recommended that appropriate State and Local officials be notified of their opportunity to attend. Chairman Lillard indicated staff would so advise the Tennessee Municipal League and the Tennessee Services Association.

The Council next discussed the annual report and recommendation of the **Employee Misclassification Advisory Task Force**. Chairman Lillard recognized Ms. Hudgens, who reported that the task force recommended enforcement of civil penalties against those employers who are found to misrepresent individuals working as independent contractors or in classifications that are inconsistent with the work performed by the individuals. The task force also recommended legislation authorizing the department to issue stop work orders in addition to the assessment. Ms. Hudgens thanked the Carpenters Union for their preliminary legislation and explained that time constraints did not permit legislation this year. She indicated that Speaker Pro Tempore Matheny plans to start bringing people together as soon as the legislature has adjourned for the session to work on this bill. Chairman Lillard called for other questions or comments.

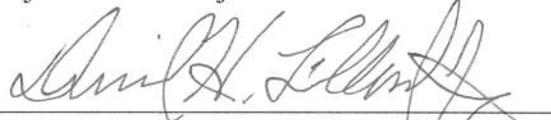
Mr. Pitts was complimentary of the task force in its assistance to clarify what can be done administratively by the department and what should be referred to district attorneys for prosecution, all of which needs to be properly addressed in legislation.

Chairman Lillard called for further discussion, and seeing none, thanked Ms. Hudgens and all involved in the task force and informed that the Council would be in touch about a future meeting date. He reminded the audience that there is a list of individuals who are interested in the proceedings of the Council to whom staff regularly sends documents and information including meeting notices; those desiring to be on the list should contact Ms. Ivanick.

The Council adjourned at 9:55 a.m. without objection and subject to call of the Chair.



Lynn Ivanick, Administrator
Advisory Council on Workers'
Compensation



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