

# Report to the Senate Commerce & Labor Committee from the Advisory Council on Workers' Compensation

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## Report of the Advisory Council on Workers' Compensation To the Senate Commerce & Labor Committee

**Jack Johnson, Chair**  
**Mark Green, 1<sup>st</sup> Vice-Chair**  
**Jim Tracy, 2<sup>nd</sup> Vice-Chair**

**Todd Gardenhire**  
**Dolores Gresham**  
**Steve Southerland**  
**Reginald Tate**  
**Bo Watson**  
**Ken Yager**

The Advisory Council on Workers' Compensation met on March 16, 2015 to review pending workers' compensation bills, and, pursuant to T.C.A. §50-6-121(j), *"The advisory council on workers' compensation shall, within ten (10) days of each meeting it conducts, provide a summary of the meeting and a report of all actions taken and all actions recommended to be taken to each member of the consumer and human resources committee of the house of representatives and commerce and labor committee of the senate."* This is the report of that Council meeting for your review and information.

### **SB0105/HB0094** (Norris/McCormick)

Mr. Haley (Attorney and Legislative Liaison for the Division of Workers' Compensation) explained that under the language of the proposed bill, there are several sections wherein there are changes to the existing law:

- first, utilization review firms will be required to have Utilization Review Accreditation Commission (URAQ) or the National Committee for Quality Assurance (NCQA) certification to improve overall medical treatment and provide a level playing field. The Division does not have the expertise or manpower to monitor utilization review providers;
- second, the definition of qualified physician for pain management purposes will now be the same as the Department of Health's pain management treatment guidelines;
- third, Second Injury Fund attorneys will be paid from the fund rather than the general fund;
- fourth, the Division of Workers' Compensation name would be changed to the Bureau of Workers' Compensation;
- fifth, the Court of workers' Compensation claims statute of limitations would be extended to two years if permanent partial disability payments were made to an employee in an attempt to settle a claim without the Court of Workers' Compensation approving that settlement;
- sixth, judges will be able to swear in witnesses, appoint guardians ad litem and enforce judgments on uninsured employers; and
- seventh, the Appeals Board duties and procedures are set forth in detail.

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There was a question from Council Member John Garrett (Employee representative) as to the reasoning of the addition of the appointment of guardians ad litem.

Mr. Haley explained that death cases previously had to be waived out to the court system. A death case presented itself this summer, which caused the Division to realize it was not properly addressed in the Code, so it needed to be added.

Council member Dr. Murrell (Tennessee Medical Association representative) posed a question about the language regarding URAC and NCQA accreditation. He inquired if individual providers are accredited during reviews or if it will be accreditation of the UR organization that then has an internal means of accrediting their reviewers. He further inquired as to what makes them accredited.

Council Member Abbie Hudgens (Administrator of Division of Workers' Compensation) responded that it would not come up at each review, but that the certification/accreditation would be for the utilization review companies, which then renew, once every 3 years.

Mr. Haley added that accreditation services go onsite, do an investigation and provide assistance and that a fairly substantial fee is paid - \$35,000 for 3 year accreditation for URAC, \$22,000 for 2 year with NCQA. He indicated that 80% of the Tennessee providers are already accredited.

Dr. Murrell further asked for clarification that it was providers, not individuals, to which Mr. Haley responded in the affirmative.

Council member Lynn Lawyer (Tennessee Defense Lawyers Association) inquired as to why the statute of limitations was being extended to 2 years.

Mr. Haley responded that it had come to the Division's attention that some insurance carriers were sending out a check along with documents for 1x the rating, stating that this was the settlement, without it first being approved. It is possible that the other multipliers had not kicked in yet and if the one year statute of limitations ran from when that initial check was cut, it may be beyond that one year date when some additional benefits came due.

A **Motion** made by Council member Mr. Pitts (Employer representative) to recommend approval to the General Assembly of the proposed bill. Mr. Pitts encouraged staff to consult with Workers' Compensation Counsel and make sure the standing committee understands the two points asked/answered.

**Seconded** by Council member Mr. Fox (Employee representative) and a roll call **resulted in a unanimous vote to recommend approval.**

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**SB0171/HB0558** (Ketron/Eldridge) was briefly presented by Ashley Arnold, (Insurers of Tennessee), who explained that the bill was being brought as a result of a Tennessee Court of Appeals case from last year, *Continental Casualty Company vs. Theraco, Inc.* Specifically, this bill will slightly amend the language in supplementary rate definition and the loss adjustment expense definition. To clarify, the defense costs incurred under a workers' compensation policy are already included in the rate determination and should not be collected through a separate premium charge. The intent of the bill is merely to qualify and codify how loss costs are calculated and to avoid full premiums being charged for persons who have been determined to be independent contractors. It does not change the seven factors for determining who is an independent contractor.

Council member Mr. Pitts (Employer representative) **moved** for a positive recommendation to the bill, which was **seconded** by both Council members Mr. Selvy (Employer representative) and Mr. Shaffer (Employee representative). A roll call vote resulted in a **unanimous vote to recommend approval**.

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**SB0174/HB0178** (Ketron/Lynn) adds cancellation and reinstatement dates of workers' compensation policies to the list of 3 other items to be open to the public. Ashely Arnold was present to answer any questions.

Council member Mr. Fox (Employee representative) **moved** to recommend the bill for approval, which was **seconded** by Council member Mr. Dove (Employer representative). The roll was called which resulted in an **unanimous vote to recommend approval**.

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**SB0506/HB0895** (Johnson/Brooks K) was noted to be a caption bill so Council **deferred recommendation until its next meeting.**

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**SB0581/HB0316** (Overbey/McDaniel) was noted to be a caption bill so Council **deferred recommendation until its next meeting.**

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**SB0644/HB0654** (Ketron/Eldridge) Council Member Representative Eldridge indicated that this bill was not going to be run this year, was going to be reviewed this summer, so **recommendation was deferred to the next meeting.**

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**SB0675/HB0821** (Dickerson/Doss) was noted to be a caption bill so Council **deferred recommendation until its next meeting.**

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**SB0721/HB0997** (Green/Durham) proposes a Tennessee Option for financially stable employers with at least 100 employees that would enable them to opt out of Chapter 6 of Title 50 under which the Division of Workers' Compensation has oversight for workers' compensation benefits, and design their own employee injury benefit plan with certain minimum requirements and caps per individual and occurrence. The language of the bill also proposes to establish, within the TN Insurance guarantee association, a Tennessee Option guarantee fund as a separate account.

Senator Green presented the Tennessee Option bill, explained what the states of Texas and Oklahoma (where they currently have an option) are experiencing, and that is employee satisfaction that is higher and costs that are significantly lower. He informed that insurance rates per \$100 of payroll in Tennessee are about \$1.30 as compared to those employers in Texas who opt out, who are at 60 cents. It results in less than half the cost and better employee satisfaction. Companies retain the employee and shepherd workers' compensation rehabilitation process helping the employee come back to work instead of an outside insurance companies handling claims.

Senator Green explained that companies are managing their own workers' compensation in Texas where there are no minimum benefits; however, the liability risk is on the employer. In Oklahoma they did the opposite, established minimums identical to the state plan, but the employee had no recourse.

Senator Green indicated that this bill combined the best of those two states' plans and included minimums as well as an amendment to address those issues the Administration raised. He indicated that the amendment was being drafted in legal, and that, although the Council has a summary, the amended bill is not yet available, but may be available March 17, 2015. He informed that the amendment brings the benefits to a better level in many aspects than the current workers' compensation system. Senator Green indicated that employee satisfaction in Texas is exceptional.

Council member Mr. Fox (Employee representative) asked for clarification that the Council did not have the final version of the bill.

Senator Green responded that that was correct.

Council member Representative Eldridge inquired if the amendment will remedy the issues presented by the lawsuit in Oklahoma.

Senator Green indicated that he was not certain of all the details of the Oklahoma lawsuit, but that others were present to answer legal details. He believed they had addressed all of the Administration's issues.

Council member Mr. Mayo (Insurance industry representative) inquired as to why there was a need for this option when the Reform just took place and its effects are not yet known.

Sen. Green explained that there are industries that still would prefer the option regardless of the Reform.

Council member Gregg Ramos (Tennessee Bar Association representative) also suggested that it would make sense to wait to see the effects of the reform.

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Sen. Green stated that even if the Reform works perfectly, there are businesses in the state of Tennessee that want to have the same rights as the municipalities.

Mr. Ramos expressed an interested in the source of the studies that Senator Green cited that showed satisfaction of employees in Texas. Mr. Ramos indicated that he was a member of a nationwide workers' compensation attorneys group, and the reports he had seen from Texas are almost universally not a state of satisfaction, but in condemnation of the workers' compensation system indicating that it was almost totally ineffective for employees.

Sen. Green indicated that he would get Mr. Ramos that information.

Mr. Fox **moved** that in light of the fact that the Council did not have the final version of the bill in front of it, that the Council defers any action on this bill or further discussion until it had the final version in front of it and an opportunity to evaluate and discuss it publicly. **Seconded** by Mr. Dove (Employer Representative). Roll call resulted in a **unanimous decision to defer recommendation on the bill to the next meeting.**

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**SB1061/HB0589** (Harris/Parkinson) proposes that prescription drugs that have not been prescribed by a TN licensed physician be added to the list of drugs for purposes of drug testing in the workplace. Further language proposes that the employer be certain that the drug was in the employee's system at the time of the incident.

Council member Ms. Hudgens (Administrator of the Division of Workers' Compensation) indicated that she was unsure how an employer would know what drugs were prescribed by an out of state physician. They may be the same drugs that are in the TDOT regulations, so it seems that the way it is written may cause more problems than it corrects.

Council member Mr. Pitts (Employer representative) inquired if a potential correction would be to make it clear that it is on Tennessee's drug list.

Ms. Hudgens indicated that it may not be more complicated than that, but that she was just looking at how practically that would work itself out in the workplace and it could almost make the employer have to do an investigation and there's no sign that the employer would even know what drugs were provided by an out of state physician.

Council member Mr. Fox (Employee Representative) asked for an explanation for what problem this proposed bill was intended to address. He noted that there are multiple cities that are on state lines, Chattanooga, Bristol, Memphis, Clarksville, where medical treatment may be received from someone just across the state line and within the same metropolitan area, so he questioned where this language would leave those individuals.

Ms. Hudgens indicated that she did not know the intent but saw a potential problem from the language.

Mr. Pitts recommended, that in light of the fact that the Council needed more information, that the bill be rolled to the next meeting to enable the Council to obtain additional information so as not to cause harm by taking uninformed action. Without objection, **consideration of the bill was deferred to the next meeting.**

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**SB1247/HB1246** (Green/Holt) proposes language that a volunteer firefighter's wages, for the purpose of Title 50, Chapter 6, shall be determined by multiplying their call rate times 40 hours, regardless of the actual number of hours worked.

Council member Mr. Fox (Employee representative) **moved** for approval, which was **seconded** by Mr. Shaffer. Discussion was held by council members.

Mr. Fox answered inquiry and explained that the rate that would be used for 40 hours would be the same rate as that of a regular employee of the fire department.

Council member Mr. Pitts (Employer representative) inquired about the hourly rate, where it would come from and whether that determined compensation rate for workers' compensation injury calculations.

Mr. Fox responded in the affirmative that it would establish the injured worker's compensation rate for temporary total disability (TTD) and permanent partial disability (PPD).

A roll call vote resulted in the three employee representatives voting for and the three employer representatives voting against the bill, thereby resulting in **no recommendation from the Council**.

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**SB1255/HB1024** (Stewart/Yarbro) was noted to be a caption bill so Council **deferred recommendation until its next meeting.**

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**SB1328/HB1073** (McKnally/Kane) proposes language that would allow entities that administer pharmacy benefits' programs for Tennessee Workers' Compensation to fall outside the definition of a pharmacy benefit plan or program and therefore be exempt from the requirements of itemized reporting on each individual claim under the Fair Disclosure of State Funded Payments for Pharmacists' Act.

Council member Mr. Pitts (Employer representative) inquired of Council member Ms. Hudgens (Administrator of the Division of Workers' Compensation) the position of the Division. Ms. Hudgens indicated that the Division deferred to the wisdom of the legislature. There was further discussion between the members that there are certain provisions related to TennCare expenditures that do not apply to workers' compensation, and this appeared to be a correction/clarification.

Council members asked for more information from the sponsor and for **consideration of the bill to be deferred to the next meeting.**