

*Tennessee Advisory Council  
On  
Workers' Compensation*

<http://treasury.tn.gov/claims/wcadvisory.html>



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ANNUAL REPORT FOR  
JULY 1, 2012 – JUNE 30, 2013  
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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**  
**JULY 1, 2012 – JUNE 30, 2013**

Pursuant to *Tennessee Code Annotated* §50-6-121(e), the Advisory Council on Workers' Compensation hereby submits its annual report for July 1, 2012-June 30, 2013 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 Act of 2004, are recorded at *Tennessee Code Annotated* ("T.C.A.") §50-6-121, which outlines the authority of the Council, its specific responsibilities and its general duties. Pursuant to Chapter Number 1087 of the 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. Pursuant to Chapter Number 622 of the Public Acts of 2012, the existence of the Advisory Council was extended to June 30, 2016.

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 Commissioner of Labor and Workforce Development and the Commissioner of Commerce and Insurance relating to the enactment, 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 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 (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 represent employees, and three (3) voting members 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 that constitutes the making of a policy recommendation to the Governor or to the General Assembly.

Appointments to the Council are presently made pursuant to Chapter Number 622 of the Public Acts 2012. The Governor, Speaker of the Senate and Speaker of the House appoint one employer and one employee voting member each, and the Governor appoints an additional ten non-voting Council members by choosing from suggested nominees provided by interested organizations as outlined in T.C.A. §50-6-121.

No new positions were added to the Advisory Council in 2012-2013, but several members' terms expired; one has been reappointed and a new member was appointed.

The State of Tennessee thanks and appreciates the dedication and years of service of Jerry Lee, who continues to serve the Council as the voting employee labor representative until such time as a successor is appointed. A debt of gratitude, as well as congratulations, go to Jerry Mayo for his service and reappointment to another term as the council member representing insurance companies. Their professionalism and dedication are greatly appreciated.

Congratulations and welcome were extended this year to newly appointed Council member Kerry Dove of Nissan North America as a voting employer business representative.

A chart outlining the members of the Advisory Council on Workers' Compensation as of June 30, 2013 is on the following page:

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<b>NAME</b>	<b>MEMBER TYPE</b>	<b>REPRESENTING</b>
<b>David H. Lillard, Jr. State Treasurer</b>	<b>Chairman Administrative Voting Member</b>	<b>State Treasurer Ex Officio member</b>
<b>Kerry Dove</b>	<b>Voting Member</b>	<b>Employers</b>
<b>J. Anthony Farmer</b>	<b>Voting Member</b>	<b>Employees</b>
<b>Jack Gatlin</b>	<b>Voting Member</b>	<b>Employees</b>
<b>Jerry Lee</b>	<b>Voting Member</b>	<b>Employees</b>
<b>Bob Pitts</b>	<b>Voting Member</b>	<b>Employers</b>
<b>Gary Selvy</b>	<b>Voting Member</b>	<b>Employers</b>
<b>Mayor Kenny McBride</b>	<b>Nonvoting Member</b>	<b>Local Governments</b>
<b>Jerry Mayo</b>	<b>Nonvoting Member</b>	<b>Insurance Companies</b>
<b>Samuel E. Murrell, M.D.</b>	<b>Nonvoting Member</b>	<b>Health Care Providers: Tennessee Medical Association</b>
<b>Paula Claytore</b>	<b>Nonvoting Member</b>	<b>Health Care Providers: Tennessee Hospital Association</b>
<b>Keith B. Graves, D.C.</b>	<b>Nonvoting Member</b>	<b>Health Care Providers: Licensed TN Chiropractor</b>
<b>David Davenport</b>	<b>Nonvoting Member</b>	<b>Health Care Providers: Licensed TN Physical Therapist</b>
<b>Sandra Fletchall</b>	<b>Nonvoting Member</b>	<b>Health Care Providers: Licensed TN Occupational Therapist</b>
<b>Bruce D. Fox</b>	<b>Nonvoting Member</b>	<b>Attorney: Tennessee Association for Justice</b>
<b>Lynn Vo Lawyer</b>	<b>Nonvoting Member</b>	<b>Attorney: Tennessee Defense Lawyers Association</b>
<b>A. Gregory Ramos</b>	<b>Nonvoting Member</b>	<b>Attorney: Tennessee Bar Association</b>

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<b>Chairman, Senator Jack Johnson</b>	<b>Ex Officio Nonvoting Member</b>	<b>Senate Commerce and Labor Committee</b>
<b>Chairman, Representative Jimmy Eldridge</b>	<b>Ex Officio Nonvoting Member</b>	<b>House Consumer and Human Resources Committee</b>
<b>Commissioner Burns Phillips* Designee Abbie Hudgens</b>	<b>Ex Officio Nonvoting Member</b>	<b>TN Dept. of Labor &amp; Workforce Development</b>
<b>Commissioner Julie Mix-McPeak Designee, Mike R. Shinnick</b>	<b>Ex Officio Nonvoting Member</b>	<b>TN Dept. of Commerce &amp; Insurance</b>

**\*Commissioner Karla Davis through 2/13  
Commissioner Burns Phillips 2/13-present**

**TERMS OF THE NON-EX-OFFICIO MEMBERS:**

	<u>Term of Position</u>
<u>Voting</u>	
Kerry Dove	(July 1, 2012-June 30, 2016)
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)
Gary Selvy	(July 1, 2012-June 30, 2016)
<u>Non-Voting</u>	
Paula Claytore	(July 1, 2011-June 30, 2015)
David Davenport	(July 1, 2009-June 30, 2013)
Sandra Fletchall	(July 1, 2009-June 30, 2013)
Bruce D. Fox	(July 1, 2011-June 30, 2015)
Keith B. Graves	(July 1, 2009-June 30, 2013)
Lynn Vo Lawyer	(July 1, 2011-June 30, 2015)
Jerry Mayo	(July 1, 2011-June 30, 2015)
Kenny McBride	(July 1, 2009-June 30, 2013)
Sam Murrell	(July 1, 2009-June 30, 2013)
Gregory Ramos	(July 1, 2009-June 30, 2013)

## ACTIVITIES OF THE ADVISORY COUNCIL

The Advisory Council is required by statute to meet at least two (2) times per year. Throughout the July 1, 2012 - June 30, 2013 Council year, the Advisory Council met on four (4) occasions. Approved meeting minutes for all but the most recent meeting 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.

On **August, 23, 2012** the Council met to hear presentations on the Workers' Compensation Market Conditions and Environment from Mike Shinnick of the Department of Commerce and Insurance, a presentation by Tom Redel of AON Risk Services, Central, Inc. on the Annual Assigned Risk Plan Data and the Statistical Analysis and Report Concerning Tennessee Workers' Compensation Data for Calendar Year 2011 by David Wilstermann.

Commissioner Julie Mix-McPeak's Designee and Council member, Mr. Mike Shinnick, reported on the Workers' Compensation Market Conditions and Environment for 2011. Mr. Shinnick indicated that workers' compensation loss costs for the State of Tennessee have decreased since 2010 and it is comparable to the national average. Mr. Shinnick further explained that despite decreasing workers' compensation loss costs in Tennessee, nationally, the increase in overall costs in 2011 for workers' compensation insurance is more than the increase observed in other property and casualty lines of insurance. While there is no underwriting profit for workers' compensation insurance in Tennessee, premiums are increasing.

Mr. Shinnick also discussed the apparent decline in workers' compensation premium tax revenues and explained that with respect to the premium history of the Assigned Risk Plan, it is cyclical with the marketplace. The Council discussed the market trend relative to writing accounts and the correlation to price. Mr. Shinnick also explained the statutory duty of the Commissioner of Commerce and Insurance to establish annually the loss cost multiplier for the assigned risk plan based on an estimate of the cost of providing services, as well as recognizing the level of loss cost multipliers in the voluntary market.

Mr. Shinnick reported on reducing the tabular surcharge and explained the effect thereof. He further explained that there is no anticipated need for adverse selection or adverse deviation. The Department of Commerce and Insurance recently implemented a tail plan as a retrospective rating plan designed for policies with a two hundred fifty thousand dollar (\$250,000.00) standard premium or more, which is similar to a program implemented by The National Council on Compensation Insurance ("NCCI") that is effective in in seventeen (17) states.

Mr. Shinnick reported that there have been no additions this year to the listing of carriers with insolvencies of one million (\$1,000,000.00) or more.

Advisory Council on Workers' Compensation's July 1, 2012-June 30, 2013 Report

Mr. Shinnick reported that the Commissioner of Commerce and Insurance suspended Lumberman's Mutual Group (previously known as the Kemper Group) in 2005 and that the premium has been running off. The company was placed in formal rehabilitation as of June 26, 2012, which terminated the runoff program. The unpaid losses as of December 31, 2011 for Tennessee are seven million dollars (\$7,000,000).

Mr. Mayo informed that an assessment is not anticipated and that the \$7,000,000 is expected to go into the guaranty fund.

Mr. Shinnick reported that with respect to the experience rating plan, the primary and excess split has been five thousand (\$5,000) for over twenty (20) years, and during that period of time, the average claim increase has tripled, so there was a need for an adjustment of this plan. The split point beginning next year is ten thousand dollars (\$10,000) to be transitioned over a three (3) year basis from ten thousand dollars (\$10,000) to thirteen thousand five hundred dollars (\$13,500) indexed to fifteen thousand (\$15,000) dollars, from March 1, 2013. Mr. Shinnick also reported on the tail plan, which is the large account incurred loss premium adjustment plan, as another significant filing.

The presentation with accompanying statistical graphs may be viewed in its entirety at

<http://treasury.tn.gov/claims/wcac/August%202012%20Workers'%20Compensation%20Market%20Conditions%20and%20Environment.pdf>

Mr. Thomas G. Redel, CPCU, Senior Vice President, AON Risk Services, Central, Inc., which serves as the administrator of the Tennessee Assigned Risk Plan, presented an annual report regarding the Tennessee Assigned Risk Plan Data at the August meeting as well. As general background information, Mr. Redel indicated that all insurance companies that write workers' compensation plans are required to participate and support the Assigned Risk Plan. The direct assignment carriers are approved by the Tennessee Department of Commerce and Insurance for that purpose and are responsible for all the losses that are incurred under those policies. The servicing carriers go through a competitive bid process, and they are hired to service the business on behalf of the assigned risk plan; however, all the losses and the premium (less the servicing expenses) go to the Tennessee Workers' Compensation Insurance Plan ("TWCIP").

Mr. Redel explained that the sources of data ensure the proper allocation between direct assignment carriers and servicing carriers. He also presented information concerning the premium level, the number of policies, the reporting methodology as well as the historical and projected amounts of assessed deficit or surplus.

The report in its entirety may be viewed at

<http://treasury.tn.gov/claims/wcac/August%202012%20Assigned%20Risk%20Plan%20Data.pdf>

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The Council's final presentation of its August meeting was Mr. David Wilstermann's Statistical report on the 2011 Workers' Compensation Data from the Department of Labor and Workforce Development. Mr. Wilstermann indicated that the data that he used to compile his statistical report was derived from closed cases and from SD1 forms, followed up by data from the Tennessee Department of Labor and Workforce Development ("TDLWFD"). Mr. Wilstermann's report revealed that Department-approved workers' compensation settlements are approximately sixty percent (60%) of the total workers' compensation cases, which is consistent with the percentage of settled cases in past years. The data also revealed that settlements where a complaint has been filed are decreasing, and trials constitute less than one percent (1%) of total cases.

Mr. Wilstermann also indicated the following: the number of weeks from the date of injury to the date of conclusion remains consistent with that from past years; some of the factors that go into the permanent partial disability amount are all slowly increasing.; he average age of worker's compensation claimants is slowly increasing; the compensation rate remains consistent with inflation and the level of education for workers' compensation claimants is also increasing. The number of cases at the maximum compensation rate was at 11.5% in 2011, the lowest since 2004.

The data translates to about \$10,000 per case on average for 2011. There is a continued steady decline in permanent partial disability amounts due, in part, to changes in the AMA guides and 2004 statutory changes to a 1.5 multiplier. The total number of cases with permanent disability has declined (in 2004 there were 12,000 cases; in 2011, there were approximately 7,900 cases). The total dollar amount going toward permanent disability cases in Tennessee is much less than when the 2004 reform was enacted.

Both reports may be viewed on the Advisory Council's site, the first at

<http://treasury.tn.gov/claims/wcac/2012%20Tennessee%20Workers'%20Compensation%20Data%20for%20Calendar%20Years%202002-2011.pdf>

and the supplement thereto may be viewed at

<http://treasury.tn.gov/claims/wcac/2012%20Statistical%20Report%20DLWFD%202011%20Data%20Supplement.pdf>

## **NCCI's VOLUNTARY LOSS COSTS AND RATING VALUES FILING PROPOSED EFFECTIVE MARCH 1, 2013**

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 submits a written comment to the Commissioner for Advisory Prospective Loss Costs Filings pursuant to T.C.A. §50-6-402(b), (c) and (d).

On August 10, 2012, the NCCI submitted its annual Voluntary Loss Costs and Rating Values Filing, with a proposed effective date of March 1, 2013. The NCCI proposed an overall increase of 2.3%. While the change in loss costs varies depending on the employer's classification, the average change in the five (5) industry groups is: Manufacturing +3.4%; Contracting +1.5%; Office & Clerical -0.5%; Goods & Services +2.2%; and Miscellaneous +3.4%.

The Advisory Council met on Monday, **October 1, 2012** to consider the filing as required. After initial presentation of the filing by NCCI actuary Ms. Karen Ayres, the Advisory Council received comments from its consulting actuary, Ms. Mary Jean King of By the Numbers Actuarial Consultants, Inc. ("BYNAC") and from the consulting actuary to the Department of Commerce and Insurance, Ms. Mary Frances Miller of Select Actuarial Services ("SAS").

Ms. Ayres's presentation contained the following: an overview of the filing; a summarization of the methodology underlying the filing; the factors and selections that were different than used in previous filings; and the trend and loss adjustment expense, which was an area of concern raised by the reviewing actuaries in last year's filings

Ms. Ayres noted that the proposed overall aggregate increase of 2.3% loss cost rate filing is comprised of an increase in four key components: Experience and Trend (+1.4%); Benefits (+0.1%); Offset for Change in EL Factors (+0.7%); and Loss-based Expenses (+0.1%).

Ms. Ayres described how NCCI arrived at costs and rating values and explained a methodology change used by NCCI. This new methodology incorporated into this filing, combined with the new year of data, showed a slight decrease in the tail factors. She next explained that there is actuarial judgment involved in predicting trend. Items reviewed for trend analysis include indemnity and medical loss ratios and frequency and severity. She indicated that the frequency has been declining for years and has increased for the last few years in Tennessee, which is similar to other experiences throughout the nation. For the last several years, the claim severity has been declining consistent with the nationwide trend toward smaller claims. Considering the frequency and severity together, the indemnity loss ratio is still declining. On the medical side, the frequency is the same, while severity has been more volatile.

Council member Ramos inquired about whether the 2010 average medical is as low as it has been with the exception of the 2003 figure. Ms. Ayres responded in the affirmative and indicated that the proposal did not indicate a change in the current trends.

Council member Shinnick inquired about medical trends within eight (8) years since the 2004 reforms instead of the twelve (12) and fifteen (15) year bases presented. In response, Ms. Ayres indicated that all numbers about medical trends have been adjusted to reflect the rates (the loss costs and benefit levels) currently in effect. The numbers reflected all historical data as though the 2004 reforms had been in effect at that time.

Ms. Ayres explained NCCI's methodology for determining Loss Adjustment Expense ("LAE") and explained how selections within that methodology have been modified to address concerns the other actuaries had expressed. In the current approved loss cost, there is a provision for the defense and cost containment expense ("DCCE") of 12.2% and 7.5% for Adjusting and Other Expense ("AOE"), which produced a total LAE provision of 19.7%.

In the presentation which followed, Ms. King (BYNAC) explained that her purpose was to analyze the methodology used by NCCI in calculating this change in loss cost and adjustment expense. Although she found the NCCI's proposed 2.3% increase was reasonably calculated in accordance with the actuarial standards of practice, Ms. King stated the NCCI proposed increase of 2.3% for the Tennessee voluntary workers' compensation market was higher and outside of the range she had calculated. She suggested a 19.0% LAE figure was more appropriate than the 19.8% recommended by NCCI as LAE ratios have been decreasing over time. There is a 19.4% average if a five year period is evaluated, but if keeping consistent with the two (2) years used by NCCI, a 19.0% LAE would be the appropriate figure. She recommended an overall indication of a 1.6% increase instead of the 2.3% increase recommended by NCCI. She further advocated for a greater number of years of information to be included in NCCI's technical supplements in the future.

In the final presentation, Ms. Miller (SAS) explained that she agreed the proposed increase of 2.3% was too high given the LAE as well as the fact that no trend had been established on the medical side since the reform of 2004. Additionally, she suggested that the use of a five (5) years history would be a more accurate trend predictor than the two (2) year history that NCCI has used for the past two (2) years. She indicated that this seemed to be an unannounced change in the underlying methodology used for decades. NCCI used the latest two (2) policy years, averaging +7% and -2.3%, or 9.3 percentage points apart. She indicated that was a huge gap considering the average is under 5%. Accordingly, this gap should have been considered a "red flag", and should have caused NCCI to consider looking beyond the two (2) most recent policy years.

Ms. Miller fielded questions from Council member Pitts regarding the lack of a medical trend, to which she responded that she was surprised that we don't have a

medical trend, which, in her opinion, makes Tennessee a “gold star state”. She indicated that Tennessee has a fee schedule that has been consistently enforced, which may account for the lack of a medical trend. Ms. Miller indicated that prior to the 2004 law reform, medical loss ratios were steadily increasing. After the 2004 amendments to workers' compensation laws, there was a 7% decrease in medical loss ratios. Despite this decrease, there was no effect on the trend because NCCI adjusts the years accordingly. Currently, enough data has been obtained for those years post-reform to indicate that there is no measurable trend. Because there is no positive trend, if one were to use a 0% change, meaning no trend, rather than a .5% medical loss ratio trend, that would change the indication from +2.3% to +1.1%. Additionally, one could reasonably conclude that the 2004 law reform was meaningful legislation.

Ms. Miller indicated that the filed 2.3% was outside the range of reasonable estimates of what the experience is going to be in 2013 and that she would have selected something between a .5 decrease and nothing. Although her recommendation was initially for a negative to a 0% change, she was comfortable with the suggested overall indication of 1.7% using a 19.1% LAE.

After consideration of the presentations by the three actuaries, as well as the comments and discussion among the members, the voting members of the Advisory Council on Workers' Compensation unanimously recommended adopting BYNAC's recommendation, thereby using the medical factor of 0.5% and the LAE of 19.0%, resulting in a final recommendation from the Council to the Commissioner of Commerce and Insurance of an increase of 1.6% instead of the 2.3% from the NCCI filing.

## **WORKERS' COMPENSATION 2012 TENNESSEE CASE LAW UPDATE**

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

An annual case law update of the 2012 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 2013.

In 2012, the Tennessee Supreme Court held that the limitations period for workers' compensation cases pursuant to T.C.A. §50-6-203(b)(1) does not commence until a plaintiff discovers or, in the exercise of reasonable diligence, should have discovered, that he has a claim. *Gerdau Ameristeel, Inc. v. Steven Ratliff*, 368 S.W.3d 503 (2012).

In *Lacey Chapman v. Davita, Inc.*, 380 S.W.3d 710 (2012), the Court held that, despite the Department of Labor's failure to respond to a request for assistance, a trial court does not have subject matter jurisdiction in a workers' compensation case until the plaintiff-employee has exhausted the benefit review conference process.

The Court considered the issue of willful failure to use a safety appliance in the *Troy Mitchell v. Fayetteville Public Utilities*, 368 S.W.3d 442 (2012) case. A majority found that the employee had knowledge of a regularly enforced safety rule, understood the rationale for the rule, and willfully failed to comply, holding that the injuries he suffered were not compensable under T.C.A. §50-6-110(a). Justice Holder dissented, stating that although the employee's conduct may have risen to the level of negligence or recklessness, it did not amount to a finding of "willfulness" as defined by the law.

The Court determined, in *Roger Dale Williamson v. Baptist Hospital of Cocke County, Inc.*, 361 S.W.3d 483 (2012) that a resignation based upon an unreasonable or otherwise unsubstantiated fear does not qualify as a denial of a meaningful return to work,. As a result, the Court capped the employee's award at one-and-one-half times the medical impairment rating.

It was insinuated that the cap would not have been applied in *Walter Word v. Metro Air Services, Inc. et al.*, 377 S.W.3d 671 (2012) wherein the Court reaffirmed that caps on disability awards are not appropriate when the pre-injury employer is purchased by or merged with another entity. The Court never formally addressed the merger issue due to a preliminary issue of jurisdiction in the circumstance of dueling time stamps. The Court has repeatedly addressed the indignities created by the race to the courthouse, the arbitrary results that may occur due to nonsynchronous court clerk clocks, and reiterated that it is the legislature, and not the courts, that must resolve the issue.

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The detailed 2012 Supreme Court report of workers' compensation decisions, complete with citations, may be viewed in its entirety on the Advisory Council's website under the Reports tab: <http://treasury.tn.gov/claims/wcac/2013-01-14ACWCCourt%20Cases1.pdf>

Some of the Tennessee Supreme Court's recommendations were addressed in the workers' compensation bills proposed and reviewed by Council. The following section will outline the bills.

**THE TENNESSEE WORKERS' COMPENSATION  
REFORM ACT OF 2013  
AND OTHER WORKERS' COMPENSATION LEGISLATION**

The Advisory Council considered significant changes in Tennessee Workers' Compensation Laws as the 108<sup>th</sup> Tennessee General Assembly submitted bills for the members' review and recommendation. Several of the bills were combined to create what was referred to by Council members as the most considerable reform to workers' compensation laws in the state of Tennessee since their inception in 1919 and the most important and far reaching the Council had considered since 1994.

Beginning with its **February 28, 2013** meeting, the Council heard from sponsors and stakeholders for the bills related to workers' compensation for the State of Tennessee which were presented to it for recommendation by the Senate Commerce and Labor Committee, chaired by Senator Jack Johnson, and the House Consumer and Human Resources Committee, chaired by Representative Eldridge.

The Council discussed, reviewed and made recommendation on each to the legislative committees for their benefit and use. The following is a synopsis of the legislative reform and other bills considered, recommendations made and laws passed:

**Public Chapter Number 289**

This law converts the workers' compensation system of the State of Tennessee from a hybrid system to an agency based judicial system and will be referred to as **The Workers' Compensation Reform Act of 2013** ("Reform Act", "Act", "Reform").

The bill was filed as **SB0200** (Norris, Johnson, Kelsey) and **HB0194** (McCormick, Kevin Brooks, Eldridge, Dennis, Todd, Kane, Hall). Upon receiving a presentation by a Department of Labor and Workforce Development representative, the Advisory Council **voted unanimously to recommend the bill for passage upon three recommended conditions:** 1) extend the implementation date to July 1, 2014 to allow sufficient time; 2) proposed rules should be evaluated by the Advisory Council; and 3) judge selection should be reviewed by the Advisory Council. This new law was signed by the Governor on April 29, 2013 and became effective that day for purposes of rulemaking, appointing the administrator of the division and making the division an autonomous unit. For all other purposes it will take effect on July 1, 2014.

A brief summary of the new law follows, but the formal document may be viewed in its entirety as Public Chapter 289 on the Tennessee Secretary of State website at <http://state.tn.us/sos/acts/108/pub/pc0289.pdf>

After review and discussion, Council member Farmer explained the Council's position by pointing out that each of the following three (3) items would be a condition of

recommending the bill for passage. First, that with the impact that these changes will have on all employees and employers as well as the dramatic demands that training, staffing, rulemaking, and public education will have on the Division of Workers' Compensation, the Council recommended that an implementation date of July 1, 2014 be attached to the bill because a later date would more likely assure all affected individuals and entities will have a smoother transition to the new system.

Second, it has been the past practice of the Workers' Compensation Division to provide the Advisory Council with any proposed rules or rule revisions prior to initiating the statutory rulemaking process for consideration and comment by the Council, and the legislation should include a provision providing for this practice.

Third, since the transition from a court-based hybrid system to an agency-based judicial system under bill would require, for the first time, the selection and hiring of a number of judges to preside over the courts and court clerks, no appointment of a judge created under the bill should be made without review and comment by the Council.

Following the vote recommending passage with conditions, the original bill and amendment presented to the Council (Amendment Drafting Code 003177) had more than a dozen proposed additional amendments, some of which were adopted, some deferred, but most withdrawn or defeated as the bill worked its way through the legislative committees and full houses.

In general, the task of changing from a hybrid administrative and court system, to a judicial administrative system includes changing functions such as claims processing, settlement or mediation, the addition of legal staff and administrative judges. The Act, as passed in final form, changes timelines and dates within which employees may file for benefits after alternative dispute resolution, changes dates within which entities that cease participation in the second injury fund may elect to assume liability for a claim, and changes the date within which a sole proprietor or partner must elect to be covered as an employee prior to injury in order to be insured. The new law permits members of LLCs to elect to be exempt from workers' compensation in the same manner that corporate officers are authorized to make such an election under present law. Insurers no longer need to file written notice of claims over \$5,000 to employers and changes the timeline within which an employee must report an occupational disease to the employer, tying that timeline to the first distinct manifestation of the disease.

The Act provides that the law be construed fairly, impartially and in accordance with basic principles of statutory construction without favor to either employee or employer. It makes the Division of Workers' Compensation an autonomous unit that will be attached to the Department of Labor and Workforce Development for administrative matters only. It authorizes the division to assess penalties for failure to mediate in good faith, to comply with timeframes or orders of a judge, for contempt, for failure to timely provide recommended medical treatment, failure to timely provide a physician panel,

wrongful failure to pay temporary total disability payments, wrongful failure to satisfy an approved settlement and refusal to cooperate with an ombudsman service.

The administrator of the autonomous Workers' Compensation Division will be appointed by the Governor and may be removed for nonperformance of duties or for cause. The administrator will be responsible for using the rulemaking process to adopt guidelines by January 1, 2016 for the diagnosis and treatment of commonly occurring workers' compensation injuries; for adopting rules for electronic submission and processing of medical bills; for instituting an education/training system for mediators, judges and ombudsmen who will be hired under the reform; and for assessing a fee for appeals of a utilization review decisions.

The administrator will appoint two advisory committees, 1) the medical payment committee to hear disputes on medical bill payments between providers and insurers and advise the administrator on issues relating to the fee schedule and care costs, and 2) the medical advisory committee to assist in the development of treatment guidelines, advise on issues relating to medical care, and serve as consultants in formulating the guidelines for the diagnosis and treatment of commonly occurring workers' compensation injuries. They will further review and make recommendations on the adoption of new editions of the American Medical Association guides for evaluating impairment, which will only be adopted upon approval by the general assembly.

With respect to causation, the Act provides that an injury will be compensable only if it arises primarily out of and in the course and scope of employment. In other words, considering all causes, the employment must have contributed more than fifty percent in causing the injury.

An employer will provide its injured employee with a panel of three (3) independent physicians for treatment, unless the injury requires a practitioner of orthopedic or neuroscience medicine, in which case the employer may appoint a panel of five independent orthopedic or neuroscience physicians or surgeons. Authorization for chiropractors to be included on panels is within the employer's discretion, and the preset limit on the number of chiropractic visits has been removed. It is presumed that an injured employee accepts as its authorized treating physician any panel physician from whom the employee receives care after being presented with the panel.

If an authorized treating physician refers an injured employee to a specialist, the employer will be deemed to have accepted the referral unless the employer provides a panel of at least three (3) specialists within three (3) business days of the initial referral. An injured employee will remain under the care of any specialist to whom the authorized treating physician refers the injured employee until such time as the specialist releases the injured employee back to the care of the authorized treating physician.

Employers and case managers may communicate with authorized treating physicians and providers will release treatment records to all parties within thirty (30) days of treatment.

An injured employee (other than for mental injury) will be considered to be at Maximum Medical Improvement (MMI) when the treating physician ends all active medical treatment and the only treatment remaining is of pain. The maximum total benefit to which a worker may be entitled is four hundred fifty (450) weeks. Temporary total disability benefits (TTDs) paid to an injured worker for the time period before the worker attains MMI will not be included in calculating the maximum total benefit.

Impairment ratings for permanent partial disability (PPD) will be expressed as a percentage of the body as a whole and multiplied by 450 weeks. Additionally, if there is not a meaningful return to work for any employer at a minimum of the pre-injury wage at the time the injured employee's weekly PPD benefits are exhausted, the injured employee may file a claim for additional benefits unless they are not authorized to work in the U.S. legally. The authorization for extraordinary benefits, not to exceed 450 weeks total, may be awarded to an injured employee who cannot return to work if the injured employee meets certain factors.

The statute of limitations for filing a petition for a benefit determination is one year from the latter of the date of the injury, the date of the last voluntary payment, or the last treatment date

All impairment ratings will be assigned by the authorized treating physician, will be defined as a percentage of the body as a whole and will not take into consideration complaints of pain unless allowances for pain are specifically provided by the applicable edition of the AMA guides. Either party may request an independent medical evaluation (IME) from the registry of independent medical evaluators to resolve a medical impairment dispute, but a preponderance of the evidence is required to overcome the treating physician's given impairment rating.

For those who are not represented by an attorney, but are injured or disabled employees, persons claiming death benefits or employers, there will be established an ombudsman program to assist in protecting rights, resolving disputes, and obtaining information under the workers' compensation laws.

Parties who settle their claims prior to mediation must have their agreement approved by a workers' compensation judge. Division mediators are not authorized to order the provision of benefits but will attempt to settle claims prior to adjudication. Parties reaching an impasse in mediation will receive a certification notice setting forth the unresolved issues for hearing before a workers' compensation judge. The statute of limitations for a request for a hearing with the division is sixty (60) days from the issuance of a dispute certification notice. Responsibility for the adjudication of workers' compensation issues and claims lies with workers' compensation judges in the court of workers' compensation claims. The employee is the party that bears the burden of proving every element of the claim by a preponderance of the evidence.

The administrator will appoint and remove workers' compensation judges and employ a chief judge who will administer the day to day operations of the court. The

Tennessee Code of Judicial Conduct, Rule 10, Canons 1 through 4, of the Rules of the Tennessee Supreme Court, and any subsequent amendments thereto, will apply. The Tennessee Rules of Civil Procedure, the Tennessee Rules of Evidence and the rules adopted by the division will apply to hearings conducted in the court of workers' compensation claims.

A decision of a workers' compensation judge at the hearing level may be appealed to the workers' compensation appeals board appointed by the Governor. An order from an interlocutory appeal set at seven (7) days, means "business" days. Appeals of actions decided by the court of workers' compensation claims will continue to be filed with the Tennessee Supreme Court which has authorization to refer such cases to the special workers' compensation appeals panel. The amount of interest that attaches to an appeal is two percent less than the formula rate per annum published by the commissioner of financial institutions.

The Act provides that the Division review the impact of this bill by July 1, 2015, and annually thereafter report the findings to the members of the General Assembly.

Two companion bills to the reform bill which were initially presented to the Council did not ultimately require a vote since one was technical in nature, only cleaning up language (**SB1275** (Norris) **HB1159** (McCormick, Brooks K, Eldridge) and passed without controversy, and the other remained an unused caption bill (**SB1185** (Tracy) **HB0439** (Marsh)).

#### **Public Chapter Number 282**

The Council was informed that **SB1275** (Norris) **HB1159** (McCormick, Brooks K, Eldridge) was a companion bill to the reform bill with the sole purpose of removing language from the current law that would be inconsistent with the language contained in the Reform bill and making other non-substantive changes to the current law. Accordingly, it **was not voted on by the Council**. It amends TCA Title 50, Chapter 6.

In addition to changing language, the law also provided that if an employer terminates an injured or disabled employee's right to pain management through the prescription of controlled substances pursuant to alleged violations of the formal agreement, the employee may file a petition for benefit determination. It was also clarified that prior to filing any request for reconsideration, a petition for benefit determination must be filed.

#### **Public Chapter Number 367**

Attorney John Lyell presented **SB0432** (Overbey) **HB0864** (Lollar, Dennis) with two amendments. The Council voted **unanimously in favor of recommending passage**. This new law specifies that the exclusive remedy provision of the Workers' Compensation Act does not limit third party actions against tortfeasors. It amends

current law by establishing a process that addresses temporary employees while they are working for up to fourteen (14) days out-of-state consecutively, or twenty-five (25) days total in a year out-of-state. The rates are set on Tennessee rates. The temporary employee does not usually live in the other state; but, rather works in the other state for only a short period of time. The employee would be covered under Tennessee workers' compensation.

### **Public Chapter Number 210**

Representative Evans presented **SB1174** (Bowling, Ketron, Summerville, Yager, Bell, Burks, Tracy, Mr. Speaker Ramsey) **HB0626** (Evans), which amends TCA Title 50, Chapter 6 and was signed by the Governor April 23, 2013. The Council voted to **recommend the bill be moved on to the legislative committees** with the provision that the concerns it raised and the potential implications be noted for the benefit of the legislative committees.

The law redefines firefighters to include "any member or personnel of a fire department, volunteer fire department, rescue squad or volunteer rescue squad, including, but not limited to, a junior member, a board member or an auxiliary member of the department or squad." Concern was expressed by numerous Council members (Pitts, Hudgens, Shinnick, Mayo and Dove) who explained that this could include some new job classifications that would require workers' compensation insurance coverage. Consequently, insurance companies would not have the ability to exercise the option of covering these new employees, and inquired about potential unforeseen circumstances. The Council articulated a number of other concerns, which were conveyed to the respective legislative committees after the Council's vote. Discussion was held and the Council voted to move the bill on to the legislative committees with those concerns expressed in the meeting attached thereto for the legislative committees' review and ultimate decision.

The concerns include: 1) this could bring into coverage some new job classifications that may not have been covered before; 2) this could then make it mandatory for all departments to cover these new classifications; 3) DLWFD relies on the statutory definition, and this could change the existing definition for all fire and rescue departments; 4) the provision of making it "optional" could be problematic from an insurance company and coverage standpoint; 5) any inconsistencies between the statutory language and a department policy may present a problem in terms of whether the employee should have received workers' compensation coverage; 6) fire department could be in some jeopardy to be responsible for a claim where the statute includes the individual but the insurance policy does not; 7) if the statute is changed, then all volunteer fire departments would be responsible for injuries as workers' compensation injuries for their junior members, their board members and their auxiliary members; 8) if a department chose not to purchase the insurance, the department could still have that

liability; 9) the bill could cause some even more serious problems by mandating that everyone in the state who falls in one of those classes be subjected by State law to have workers compensation coverage; 10) questions were raised as to what other consequences this could have with other organizations that use volunteer services had been considered; and 11) concern for setting a precedent providing an opportunity for further action. These concerns were presented to the legislative committees in the Advisory Council's report prior to their votes on the bill.

Each bill which was recommended for passage or moved on by the Council, were enacted into law. Most were effective upon their signing, some as of the fiscal year beginning July 1, 2013 and some had several dates within them. The Reform Act, in particular, contained various dates of enactment at progressive stages of the reform, the final date of full effectiveness being July 1, 2014.

**There were two bills which the Council unanimously chose to roll without objection and without taking a vote.**

It was recognized by the Council as well as the sponsors that, if the reform bill passed, some of the other bills before it would be encompassed by the reform bill. Consequently, a formal vote was not taken on those particular bills and they were appropriately rolled to an "as needed" status.

By way of example, Representative Curtiss presented **SB0616** (Yager) **HB0327** (Curtiss) which would remove certain medical conditions from the definitions of injury, personal injury and occupational diseases under the workers' compensation law, thereby amending TCA Title 50, Chapter 6. Specifically, it sought to provide that if someone has a heart attack on the job, it is not automatically a workers' compensation claim, except in the case of a firefighter. Representative Curtiss explained that there are a few occupations that need to retain the present language, but for others, a heart attack should have to be proven to be work related and not automatically covered as a workers' compensation injury. The Council members discussed whether recommending approval of this bill would create confusion because the Council had already recommended approval of the administration's reform bill, which contained similar provisions. Representative Curtiss stated that this bill would not be needed if the administration's bill resolves the issue. Chairman Lillard stated that with the Representative's approval and without objection, this bill would be **rolled to the next meeting**. The bill was eventually moved by its sponsors to General Subcommittee for future evaluation.

Likewise, **SB1185** (Tracy) **HB0439** (Marsh) was presented by Mr. David Broemel of the American Insurance Association, who informed that he had discussed the bill with Representative Marsh, who informed him it was a caption bill to be used in the

event that the Governor's bill did not move. Chairman Lillard suggested that the bill be **rolled to the next meeting**, which was done without objection.

**There were three bills which the Council unanimously voted against recommending.**

**Public Chapter Number 476**

The first bill the Council **voted unanimously against recommending** was **SB0519** (Burks Bowling, Stevens) **HB0549** (Curtiss, Eldridge, Faison) which provided an exemption from workers' compensation coverage for individuals who are religiously opposed to accepting insurance benefits. The Council voted against this bill because it could result in a worker not being eligible for benefits. The bill was enacted into law and allows individuals to be exempt from the workers' compensation requirements if such individual is a member of a recognized religious sect or division teachings of such sect or division by reason of which such individual is conscientiously opposed to the acceptance of the benefits provided by the workers' compensation laws.

The second was **SB1364** (Tate) **HB1102** (Odom) which would amend TCA Title 50 by authorizing psychologists licensed in Tennessee to provide impairment ratings for mental injuries in workers' compensation cases, and creates penalties, such as stop work orders and financial penalties if a stop work order is ignored. The remainder of the language in the bill was contained in an employee misclassification bill that was considered by the Council.

The first portion of the bill permitting psychologists to provide impairment ratings was amended to add the requirement to use the American Medical Association Guidelines, but was still **unanimously voted against** recommendation by the Council. The Council has historically voted against allowing someone who is not a trained physician to establish an impairment rating. The bill was moved by its sponsors to the General Subcommittee for future evaluation.

The Council originally discussed **SB0509** (Hensley) **HB1149** (Pody) based on what it understood to be the summary of the bill and voted to recommend passage, but, upon receiving further requested information, met once again on **March 7, 2013** to reconsider this third bill which it **unanimously voted against** recommendation. It was discussed that the language as written did not properly address the problem posed by the Tennessee Supreme Court's Justice Holder, may not properly be under Title 50, and may create more problems for both employees and employers than it creates solutions. The bill might require a separate lawsuit in each instance for the employer to protect themselves, thereby creating an additional burden. A discussion was held about the proposed language regarding the apportionment of fault and reduction of subrogation of benefits and its effect on employers and their insurance companies.

Several insurance representatives expressed their concern that the language as proposed would allow the settlement of a matter, and, without a carrier or employer knowing about the settlement, may apportion fault to them and then reduce their lien for benefits without their even having notice. It was further discussed that the bill could harm employers in that employers' rates are based on modification factors which in turn are based on experience, and this language could have an adverse impact on rates without employers having had an opportunity to be heard.

There was a general consensus by Council members, insurance representatives and employers present at the meeting, that an apportionment of fault in a "no fault" system could create more problems than it would solve. The bill did not survive the legislative committees. It was sent to the General Subcommittee for future evaluation on March 19, 2013.

**Workers' Compensation related bills which didn't come before the Council because they were under different legislative committees' purview:**

**Public Chapter Number 50**

**SB 0124** (Ketron, Tracy) **HB 0136** (Eldridge, Sargent) went before the Government Operations Committee, so was not part of the package presented to the Council and accordingly **no vote was taken**. It was signed by the Governor on March 26, 2013 and amends TCA Title 10, Title 50 and Title 56, relative to insurance. This law authorizes the Commissioner of Labor and Workforce Development to request and obtain information regarding employer workers' compensation insurance policies in order to ensure compliance with the law under T.C.A. §50-6-421. Any information relating to workers' compensation insurance policies obtained by the commissioner pursuant to this bill would be deemed confidential and would not constitute a public record with the exception of those items listed below. Additionally, the information may be used by any state agency, or vendor designated by the state, for the purpose of ensuring compliance with the law.

The following information obtained by the commissioner **would** constitute a public record and thus be discoverable upon proper request: (1) Employer name and business address; (2) Workers' compensation insurance carrier name and business address; and (3) Workers' compensation insurance policy number, policy effective date and policy expiration date.

**SB0777** (Dickerson) **HB0666** (Carr D) attempted to amend TCA § 50-6-623 to repeal the Workers' Compensation Review Committee. It was assigned to the Government Operations Committee February 6, 2013 and sent to the General Subcommittee February 20, 2013 for further evaluation. Consequently, **no vote was taken** by the Council.

## EMPLOYEE MISCLASSIFICATION ADVISORY TASK FORCE

### Public Chapter 424

**SB0833 (Ketron) HB0551 (Curtiss, Eldridge)** amended TCA Title 50 and Title 56 by creating a civil penalty of up to the greater of one thousand dollars (\$1,000.00) or one and one-half times the average yearly workers' compensation premium for any construction services provider who misclassifies employees to avoid proper premium calculations.

This bill subjects any construction services provider who misclassifies employees to avoid proper workers' compensation insurance premium calculations. The penalty will also apply to any construction services provider who materially understates or conceals:

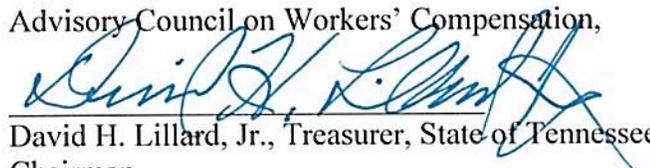
- (1) The amount of the construction services provider's payroll;
- (2) The number of the construction services provider's employees; or
- (3) Any of the construction services provider's employee's duties.

An individual or entity that is not a successor-in-interest or a principal of a construction services provider who is in violation of this bill will not be liable for the monetary penalties in this bill. Amendments to the bill specify that the funds collected by the Commissioner of Labor and Workforce Development for penalties imposed by this bill will be deposited in the employee misclassification education and enforcement fund to be used for the purchase of computer software and hardware designed to identify potential employee misclassification activity and for the hiring of additional employees to investigate potential employee misclassification activity in addition to the expenditures allowed under present law. The provisions in bill also made the referral of cases to the TBI or district attorney mandatory instead of discretionary.

### CONCLUSION

The Workers' Compensation Advisory Council met on four (4) occasions from July 1, 2012-June 30, 2013. This Annual Report provides 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 great State of Tennessee.

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

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