

TENNESSEE ADVISORY COUNCIL ON WORKERS' COMPENSATION MINUTES

Legislative Plaza, Room 30

Nashville, Tennessee

Thursday, March 24 2011

10:00 a.m.

Members Present:

Voting Members:

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

Anthony Farmer

Jack Gatlin

Jerry Lee

Bob Pitts

Dan Pohlgeers

Gary Selvy

Non-Voting Members:

Kitty Boyte

David Davenport

Bruce Fox

Stephen Johnson

Sam Murrell

Gregg Ramos

Bob Henningsen, Commissioner's Designee, Dept. of L&WFD

Mike Shinnick, Commissioner's Designee, Dept. of C&I

Lynn Ivanick, Administrator

Also Present:

Janice Cunningham, Chief of Staff, Treasury Department

Steve Curry, Assistant Treasurer for Programs, Treasury Department

Monica Fuqua, Division of Claims Administration, Treasury Department

And other persons and interested parties

Call to Order

Chairman Lillard called the meeting to order at 10:03 a.m. in Room 30, Legislative Plaza; Nashville, Tennessee, reminded everyone to use their microphones as the meeting was being videotaped, and explained the voting procedures. Ms. Lynn Ivanick completed the roll call. All voting members were present. Chairman Lillard declared a quorum.

Minutes

The first item of business was a review of the minutes for the Advisory Council's meeting of February 28, 2011 at which time Chairman Lillard advised that any suggestions on future form or comment regarding same be addressed to Ms. Ivanick. Mr. Gary Selvy made a **motion to approve the minutes**. Mr. Jerry Lee **seconded** the motion. The motion was **adopted unanimously** by a voice vote.

SB 1550 (Ketron)/HB 2030 (Curtiss)

Moving on to the new business of pending workers' compensation bills, Chairman Lillard explained that the Council considers and comments on those bills that are referred by the Chairmen of the respective committees in the House and Senate. Chairman Lillard then recognized Representative Curtiss who was there to present **SB 1550 (Ketron)/HB 2030 (Curtiss)**.

Representative Curtiss explained that meetings regarding this bill were held as recently as earlier that morning and amendments regarding five issues were in the process of being drafted, although not complete in time for presentation at the meeting. He went through each section of the amendment for the Council explaining its intent to clear up several items from last year's legislation.

Rep. Curtiss first noted that the Advisory Council had already recommended passage of the language having to do with General Contractors having the authority to select which construction service providers may use their exemptions on a commercial site.

For the second amendment issue, Rep. Curtiss explained that the amendment seeks to change individual exemptions for officers of corporations, LLC, LLP, partnerships or family run businesses from the current 3 to 5 and also to change anywhere "30% ownership" is currently referenced in the statute to "20% ownership" to so accommodate that change.

The third amendment issue, as explained by Rep. Curtiss is that of allowing owners of multiple businesses in the construction field to file for an exemption in each business. He explained that there is no need to make owners buy workers' compensation insurance on themselves. He indicated as well, that the Sponsors were working on some "affiliate" language for this section to prevent individuals from "stacking". He explained that the desired language would prevent an individual from starting up multiple companies and making employees "partners" in same to avoid paying workers' compensation insurance on them.

For the fourth change to the amendment, Rep. Curtiss explained that T.C.A. Section 50-6-902's language about "working with no compensation" was being deleted since, if someone owns the property and is acting as their own prime contractor, there is nobody there to sue, so there's no need to have them buy workers' compensation insurance just because they're drawing a salary from their own company.

The fifth and last item Representative Curtiss addressed was clarification of the section dealing with a sole proprietor or partner working directly for the owner. New language in the amendment is hopefully making it clear that the reference is to a construction service provider doing jobs that cost less than \$25,000 (below the threshold that requires a contractor's license). This is to clear up any misconception that multiple employees are all exempt because they work for the general contractor. With this item, Representative Curtiss concluded his presentation.

Chairman Lillard sought the will of the Council with respect to whether to take a vote or wait for the actual amendment to be prepared and reviewed. Mr. Pitts suggested going forward with a vote. Mr. Lee supported waiting on viewing the actual amendment before voting. Chairman Lillard looked for a **motion** to the effect of attempting to **schedule an earlier meeting** of the Council to address the amendment when it was ready. Mr. Farmer **so moved** and Mr. Pitts **seconded**. Seeing no objection the Chairman Lillard declared the **motion adopted**.

SB 1986 (Stewart)/HB 1758 (Pitts)

The next item of business was **SB 1986 (Stewart)/HB 1758 (Pitts)** which, by its language, broadens the scope of certain departmental enforcement responsibilities and applies to all industries rather than just the construction industry. Mr. Matt Capese, of the United Brotherhood of Carpenters and Joiners of America, was present on behalf of the Midsouth Regional Carpenters' Council, and spoke on the bill upon the Chair's recognition.

Mr. Capese explained that he'd been working on premium and payment fraud in the construction industry for 20 years, that businesses who were abiding by the rules and paying their workers' compensation, unemployment taxes, etc., were being severely disadvantaged by those businesses that were gaming the system and consequently not paying either. His findings have been that contractors "1099" their workers who are really employees or pay them cash without reporting or withholding properly. He explained that the suggested language of the proposed bill would make it clear that the new misclassification advisory task force which was put into effect March 1, 2011 would be able to engage in joint investigative work with all state agencies.

Chairman Lillard thanked the presenter for his remarks and queried the Council as to whether there were any questions for Mr. Capese.

Mr. Farmer inquired as to the Department of Commerce & Insurance's position with respect to the bill. Mr. Mike Shinnick of the Dept. of C&I indicated that Ms. Denise Lawrence would speak as to the position of the department.

Mr. Capese offered his opinion that the bill still only applied to the construction industry and to that, Mr. Pitts inquired, then, what exactly the bill did that was different from last year. Mr. Capese indicated that the new language would specifically state that the

agencies were to work together and not in a vacuum. Discussion transpired including Mr. Farmer, Mr. Pitts, Mr. Capese and Mr. Dan Pohlgeers that the ability to use the enforcement tools was already present, but not specifically mentioned in the previous legislation. It was summarized by Mr. Farmer as not really being a change as to what was intended by last year's legislation.

Ms. Lawrence of the Department of Commerce & Insurance, as well as Mr. Henningsen, from the Dept. of L&WFD both indicated that their respective departments did not have a position and would defer to the legislature on this bill. The Dept. of L&WFD indicated that letters about the Advisory Task Force had gone out and the work of the misclassification task force was about to begin per statute which made it effective March 1, 2011 with an initial reporting date of February, 2012. Chairman Lillard recognized Mr. Pitts who reiterated that the first report was not yet due and perhaps the task force should be permitted to start its work and report back before changes were made, or that the task force, itself, would be the more proper entity to request changes instead of making such changes right at its inception.

Mr. Farmer made a **motion to recommend** the bill for passage. Mr.'s Lee and Gatlin seconded. The roll was called resulting in the motion not achieving a majority, therefore the Chair declared the motion to have **failed** and that the bill would go forward **without a recommendation from Council**, but with the substance of the comments to be included in the report to the Committees.

SB 2023 (Stewart)/HB 1757 (Pitts)

The next item addressed was **SB 2023 Stewart/HB 1757 Pitts**, which, as proposed, extends authority of the Commissioner of the Department of Labor and Workforce Development to enjoin the operation of a business or to order monetary penalties to include workers compensation premium fraud by and employer. Mr. Capese was called upon to address this related topic as well.

Mr. Capese explained that the bill would assist the law abiding businesses in an industry where workers were improperly called subcontractors and being paid off the books. He explained that many of the contractors have minimal insurance policies so to fly under the radar, but don't cover a very high percentage of their employees and paid them off the books. Criminal enforcement and civil lawsuits are two avenues to use to enforce penalties for premium fraud. Since this rarely happens, however, this bill would give the TN Department of Labor and Workforce Development the ability to fine companies/people.

Mr. Pitts **moved to oppose the language** of the bill at this time and Mr. Selvy **seconded** the motion. Mr. Farmer asked for the opinions of the State Departments.

The Department of Labor was called on to speak to the issue and they informed via Mr. Landon Lackey, that they would defer on the bill. Mr. Lackey explained that the

Department checks for policy coverage but doesn't get into the misclassification issue once coverage is discovered to be in place.

The Department of Commerce and Insurance was called on for their comment, and Mr. Mike Shinnick explained that Since the Department of Commerce & Insurance regulates insurance companies and agencies, but not employers, their fraud investigations surround agent and agency fraud and do not go so far as to investigate the individual policyholders, which is where the misclassification takes place.

Mr. Capese pointed out that the agencies are usually unaware of other agencies' enforcement capabilities and the District Attorney's are historically not acting upon premium fraud infractions.

Mr. Gregg Ramos stated that this shed light on why there were so many cases of whether an individual was deemed to be an independent contractor or employee as well as why premium avoidance was so easy. He noted that there seemed to be no one from the State charged with actively regulating this fraud.

Mr. Bruce Fox noted that everyone on the Council was in agreement that their intent was to see to it that all workers were appropriately classified and covered by insurance, and that the only issue seemed to be how to accomplish that goal. Discussion was held about timing of this bill and timing of the Advisory Misclassification Task Force created by last year's legislation. Further discussion concerned allowing the task force to be in effect and be the entity to inform as to what was needed in the way of enforcement language once they'd had an opportunity to meet. It was discussed that they were in the process of forming and the first report is due February 2012. Mr. Pitts suggested allowing the task force to make the suggested future changes and pushing for criminal prosecution.

The **roll was called** for the motion which was on the floor resulting in its **failing to have a majority, so the motion fails**. There will be **no recommendation from the Council**, but the comments regarding the bill will be conveyed to the Committees.

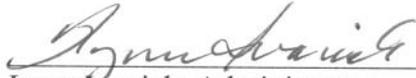
New Business

Addressing new business, Chairman Lillard discussed the timing of the next meeting, March 31 and April 4 were considered as potential dates and Ms. Ivanick was instructed to consult with the members about arranging for the next meeting date.

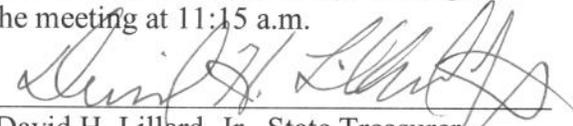
Mr. Farmer indicated the need for vigilance about **SB 1313 (Johnson)/HB 1300 (Eldridge)** which appears to be a caption bill concerning the Council itself. Chairman Lillard requested Ms. Ivanick inquire of the sponsors of that bill and report its status to the Members.

Adjournment

Motion to adjourn was made by Mr. Pitts, **and seconded** by Mr. Selvy. Seeing no objection, the Chairman Lillard **adjourned** the meeting at 11:15 a.m.



Lynn Vanick, Administrator
Advisory Council on Workers'
Compensation



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