

Sunset Public Hearing Questions for
ADVISORY COUNCIL ON WORKERS' COMPENSATION
Created by Section 50-6-121, *Tennessee Code Annotated*
(Sunset Termination June 2016)

1. Provide a brief introduction to the Advisory Council on Workers' Compensation, including information about its purpose, statutory duties, staff and administrative attachment.

The Advisory Council on Workers' Compensation, created pursuant to T.C.A. § 50-6-121, provides information, research and recommendations concerning workers' compensation issues to the Governor, the Tennessee General Assembly, the Department of Commerce and Insurance and the Department of Labor and Workforce Development (DLWFD), Workers' Compensation Division.

In general, the Advisory Council is authorized to monitor the performance of the workers' compensation system in the implementation of legislative directives, to make recommendations relating to the adoption of rules and legislation, and to make recommendations regarding the method and form of statistical collections. The Advisory Council also reviews the annual advisory prospective loss cost filing by the National Council on Compensation Insurance (NCCI) and provides comment and recommendation concerning the filing to the Commissioner of Commerce and Insurance. In addition, at the request of the General Assembly, the Advisory Council annually reviews and provides comments and recommendations on proposed workers' compensation legislation.

The Advisory Council on Workers' Compensation was initially created by the General Assembly in 1992. The Workers' Compensation Reform Act of 1996 terminated the existing Advisory Council and created a new Advisory Council on Workers' Compensation. The current Advisory Council is comprised of the State Treasurer who serves as Chair, three (3) voting members who represent employers; three (3) voting members who represent employees; ten (10) nonvoting members; and four (4) ex officio members. The Chair may vote only on matters related to the administration of the Advisory Council or the Council's 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.

In addition, the Advisory Council may:

- monitor the performance of the workers' compensation system in the implementation of legislative directives.
- develop evaluations, statistical reports and other information from which the General Assembly may evaluate the impact of the legislative changes to workers' compensation law.

- issue an annual report that includes a summary of significant Supreme Court decisions relating to workers' compensation.
- make recommendations for safe employment education and training regarding the development of employer-sponsored health and safety programs by the DLWFD.

Pursuant to T.C.A. § 50-60-121(g), the Advisory Council is attached to the Department of Treasury for all administrative matters relating to receipts, disbursements, expense accounts, budget, audit and other related items. The State Treasurer has administrative and supervisory control over the staff assigned to assist the Council. The State Treasurer, who also serves as 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. A workers' compensation administrator is assigned to carry out the duties and responsibilities of the program.

Treasury Staff

Lynn Schroeder

Administrator, Advisory Council

- 2. Provide a list of council members and describe how membership complies with Section 50-6-121, Tennessee Code Annotated. Indicate if there are any vacancies on the council and explain what is being done to fill those vacancies.**

<u>Voting Members:</u>	<u>Term of Appointment</u>	<u>Appointed by:</u>
David H. Lillard, Jr., Chair		Ex-Officio
Bob Pitts, Employers	July 1, 2014- June 30, 2018	Governor
Gary Selvy, Employers	July 1, 2012 - June 30, 2016	Senate Speaker
Kerry Dove, Employers	July 1, 2012 - June 30, 2016	House Speaker
Bruce D. Fox, Employees	March 4, 2015 - June 30, 2016	Governor
John M. Garrett, Employees	Feb. 27, 2015 - June 30, 2018	Senate Speaker
Paul Shaffer, Employees	Aug. 5, 2014 - June 30, 2018	House Speaker

<u>Non Voting Members</u>	<u>Term of Appointment</u>	<u>Appointed by</u>
John D. Burleson, Local Government	June 19, 2014 - June 30, 2017	Governor
Jerry Mayo, Insurance Company	July 1, 2011 - June 30, 2015	Governor
Sam Murrell, TN Medical Organizations	July 1, 2013 - June 30, 2017	Governor
Paula M. Claytore, TN Hospital Organizations	July 1, 2011 - June 30, 2015	Governor
Keith B. Graves, TN Chiropractor	July 1, 2013 - June 30, 2017	Governor
John Harris, TN Physical Therapist	Oct. 30, 2013 - June 30, 2017	Governor
Sandy Fletchall, TN Occupational Therapist	Dec.9, 2013-June 30, 2017	Governor
Gregory Ramos, Attorney	July 1, 2013 - June 30, 2017	Governor
Lynn Vo Lawyer, Defense Attorney	July 1, 2011 - June 30, 2015	Governor
Vacant, Employee Attorney	July 1, 2011 - June 30, 2015	Governor
Sen. Jack Johnson, Chair Senate Commerce and Labor		Ex-Officio
Rep. Jimmy Eldridge, Chair House Consumer and Human Resources		Ex-Officio
Abbie Hudgens, Administrator, Division of Work Comp Troy Haley, Designee, Attorney/Legislative Liaison		Ex-Officio
Commissioner Julie Mix-McPeak, Commerce and Insurance Mike Shinnick, Designee, Workers' Compensation Manager		Ex-Officio

The above membership complies with T.C.A. § 50-6-121. The Treasurer's office has informed the Governor's office of a vacancy in the Tennessee Association for Justice affiliated Employee Attorney, non-voting member position on the Council. The next term for said position is July 1, 2015-June 30, 2019.

3. Does the membership include public/citizen members? Female members? Members of racial minorities? Members who are 60 years of age or older?

The Council’s membership includes sixteen (16) public/citizen members, four (4) female members, two (2) members of a racial minority and at least seven (7) members who are sixty (60) years of age or older.

4. How many times did the council meet in fiscal year 2014 and to date in fiscal year 2015?

The Council met four (4) times in FY2014 and four (4) times in FY2015.

Fiscal Year	Meeting Date	Members Present		
		Voting	Non-Voting	Total
FY2014	Aug. 29	6	7	13
(7/1/13 - 6/30/14)	Oct. 31	7	8	15
	Feb. 6	5	10	15
	Feb. 27	5	10	15
FY2015	Aug. 28	6	9	15
(7/1/14 - 6/30/15)	Oct. 14	4	7	11
	March 16	7	10	17
	March 23	7	7	14

5. What per diem or travel reimbursement do council members receive? How much was paid to council members during fiscal year 2014 and to date in fiscal year 2015?

Members of the Advisory Council serve without compensation but receive reasonable reimbursement for actual and necessary travel expenses in accordance with the travel regulations promulgated by the Department of Finance and Administration.

For fiscal year 2014, the Treasury Department paid \$769.19 for travel expenses for Council members. For fiscal year 2015 through 4/30/15, the Treasury Department paid \$2,349.32 for travel expenses for Council members. The increase in expenses stems from the appointment of three new members who are located several hours away and travel into the Nashville area for meetings.

6. What were the council's revenues (by source) and expenditures (by object) for fiscal year 2014 and to date in fiscal year 2015? Does the council carry a fund balance and, if so, what is the total of that fund balance? If expenditures exceeded revenues, and the council does not carry a fund balance, what was the source of the revenue for the excess expenditures?

The Council does not carry a fund balance and derives its funding from an annual State Appropriation each year. If expenditures exceeded the appropriation, the main Treasury budget would be the source of further revenue.

The appropriation for fiscal year 2014 was \$208,100
For fiscal year 2014, the expenditures were: \$157,676
Payroll and benefits (% of Administrator's): \$43,660
Travel (mileage of council members): \$769
Printing, communications, shipping: \$612
Third party professionals (actuary and statistical): \$28,875
Supplies and office furniture: \$65
Training of State Employees: \$325
Professional services provided by other state agencies: \$83,370

The appropriation for fiscal year 2015 was \$176,000 due to the budget reduction
For fiscal year 2015 through 4/30/15, expenditures are: \$136,782
Payroll and benefits (% of Administrator's): \$36,240
Travel (mileage of council members): \$2,349
Printing, communications, shipping: \$791
Third party professionals (actuary and statistical): \$48,934.
Supplies and office furniture: \$0
Training of State Employees: \$0
Professional services provided by other state agencies: \$48,468

Increased expenses are due to Andrew Jackson Building office space rental, Legislative Plaza meeting room rental, and video streaming charges which began fiscal year 2015.

7. Is the council subject to Sunshine law requirements (per Section 8-44-101 et seq., Tennessee Code Annotated) for public notice of meetings, prompt and full recording of minutes, and public access to minutes? If so, what procedures does the council have for informing the public of its meetings and making its minutes available to the public?

Yes. The Advisory Council is subject to Sunshine law requirements for public notice of meetings, prompt and full recording of minutes, and public access to minutes. Public notices are physically posted at the Legislative Plaza and other state buildings, and are posted on the State of Tennessee's Public Participation Calendar and the Treasury Department's website.

We have solicited all interested persons to supply us with their email addresses, and we have a list of several hundred entities of the general public as well as

lobbyists to whom we provide such notices and other information as requested. In addition, email notifications including meeting dates, agendas and items to be reviewed or discussed are sent to interested parties for their review prior to our publicly held meetings.

All Council meetings are held in Legislative Plaza and are videostreamed on the General Assembly's website, which provides live public access as well as archiving for post-meeting review. Member information, agendas, minutes, presentations and other relevant documents are posted on the Treasury Department's website.

8. Has the council promulgated rules and regulations? If yes, please cite the reference.

The Council has not promulgated rules and regulations.

9. Does the council have a website? Is so, please provide the web address. What kind of public information is provided on the website?

The Council has a web site located at the following address: <http://treasury.tn.gov/claims/wcadvisory.html>. Council members' names, addresses, affiliations, meeting notices, minutes and Council reports are provided.

10. What were the major accomplishments of the council during fiscal year 2014 and to date in fiscal year 2015? Specifically describe the nature and extent of the council's activities as they relate to the council's advisory role as defined and authorized in Section 50-6-121(f), Tennessee Code Annotated.

In fiscal year 2014, the Council made two (2) rate filing recommendations, one experience and one law-only, to the Commissioner of the Department of Commerce and Insurance relative to the NCCI filings. The Council timely provided House and Senate committees with recommendations on five (5) bills, including a major overhaul of the Workers' Compensation System in Tennessee, generally referred to as the Reform of 2013, as well as other bills dealing with workers' compensation issues. The Council produced written reports with respect to those bills to the Committee Chairs of the Senate Commerce and Labor Committee and the House Consumer and Human Resources Committee. Additionally, it provided valuable input to the Workers' Compensation Division of the DLWFD on the proposed rule changes and creation of a Workers' Compensation Court. It provided an annual report of the significant Supreme Court decisions with respect to workers' compensation and an annual report of its activities.

In fiscal year 2015, the Council made a rate filing recommendation to the Commissioner of the Department of Commerce and Insurance relative to the NCCI experience filing. The Council timely provided House and Senate committees with recommendations on six (6) bills dealing with workers' compensation issues. The Council produced written reports with respect to those

bills to the Committee Chairs of the Senate Commerce and Labor Committee and the House Consumer and Human Resources Committee and Subcommittee. It provided an annual report of the significant Supreme Court decisions with respect to workers' compensation and an annual report of its activities.

The meetings of the Advisory Council are held in Legislative Plaza where they are open and accessible to the public. The meetings are videostreamed on the General Assembly's website, which provides live public access as well as archiving for the public's post-meeting review. The videos, along with Council member information, agendas, minutes, presentations, all reports referred to herein and other relevant documents are posted on the Treasury Department's website.

11. How many bills were reviewed at the request of the standing committees of the General Assembly, as authorized at Section 50-6-121(k), Tennessee Code Annotated, during fiscal year 2014 and to date in fiscal year 2015.

Twelve (12) bills were reviewed at the request of the Standing Committee in fiscal year 2014, along with Proposed Rules of the Workers' Compensation Program from the Workers' Compensation Division, TDLWFD. The Advisory Council produced written reports on those five (5) bills that advanced to final recommendation stage (others were withdrawn, combined, amended or sent for summer study) to the Committee Chairs of the Senate Commerce and Labor Committee and the House Consumer and Human Resources Committee, and written report to the Commissioner of DLWFD on the proposed rules.

Thirteen (13) bills were reviewed at the request of the Standing Committee in fiscal year 2015. The Advisory Council produced written reports on those six (6) bills that advanced to final recommendation stage (others were withdrawn, combined, amended or sent for summer study) to the Committee Chairs of the Senate Commerce and Labor Committee and the House Consumer and Human Resources Committee.

12. Please describe any reports prepared by the council during fiscal year 2014 and to date in fiscal year 2015 and specify to whom the reports are sent, including required reports (Section 50-6-121(e)(i)(j) and (l)), Tennessee Code Annotated, and authorized reports (Section 50-6-121(h)), Tennessee Code Annotated. Please attach copies of the reports.

Pursuant to T.C.A. §§ 50-6-121(e) and (l), the Council prepared annual reports of its findings and conclusions provided July 1, 2013 and July 1, 2014, and the annual reports of significant Supreme Court decisions relating to workers' compensation produced January 15, 2014 and January 15, 2015, as required by T.C.A. §50-6-121(i).

Summary reports required by T.C.A. §50-6-121(j) include the Council's recommendations on the bills reviewed along with individual Council member comments during the meetings, and are submitted to the Senate and House

Committee Chairs and members as soon as possible following meetings. Summaries for each bill the Council is asked to review are provided to the council members prior to their meetings and include the status of the law as it presently exists, the new language proposed, the fiscal note (if available) and its potential effects. These meeting materials are also sent to interested parties on the Council's email list in advance of the meetings in which they are to be discussed.

Through contracting with actuarial and statistical vendors, additional reports are generated for use by the Council and General Assembly annually. These include the actuarial review of NCCI's annual experience filing, actuarial reviews of any NCCI law-only filings, an annual analysis by the Council's statistician of data from the Department of Labor and Workforce Development, an annual report of the Assigned Risk Plan Data from its administrator (AON), and, an annual Overview of the Tennessee Workers' Compensation Market Conditions and Environment from the Tennessee Department of Commerce and Insurance. These reports are disseminated to Council Members, Committee Chairs of Senate Commerce and Labor Committee and the House Consumer and Human Resources Committee and Subcommittee, as well as the House and Senate Clerks and members of the General Assembly pursuant to T.C.A. §3-1-114.

The recommendations from the Council to the Commissioner of Commerce and Insurance with respect to the NCCI rate filings are in letter form to the Commissioner, and are copied to the members of the Advisory Council and the interested parties' list. All of the referenced reports are located on the Treasury Department's website as well.

Copies of any of the previously mentioned reports are available upon request.

13. Has the council developed and implemented quantitative performance measures for ensuring it is meeting its goals? (Please answer either yes or no). If the council has developed and implemented quantitative performance measures, answer questions 14 through 21. If the council has not developed quantitative performance measures, proceed directly to question 22.

No. There are no quantitative performance measurements available with respect to the Council.

The Advisory Council, which serves in an advisory capacity, strives to meet all statutory responsibilities and reporting requirements. It makes recommendations on legislation. It reviews and makes recommendations on the NCCI experience and law only filings. It monitors the performance of the workers' compensation system relative to implementation of legislative directives. The Council prepares an annual report of its activities. The Council provides required reporting in a timely manner.

- 14. What are your key performance measures for ensuring the council is meeting its goals? Describe so that someone unfamiliar with the program can understand what you are trying to measure and why it is important to the operation of your program.**
- 15. What aspect[s] of the program are you measuring?**
- 16. Who collects relevant data and how is this data collected (e.g., what types information systems and/or software programs are used) and how often is the data collected? List the specific resources (e.g., report, other document, database, customer survey) of the raw data used for the performance measure.**
- 17. How is the actual performance measure calculated? If a specific mathematical formula is used, provide it. If possible, provide the calculations and supporting documentation detailing your process for arriving at the actual performance measure.**
- 18. Is the reported performance measure result a real number or an estimate? If an estimate, explain why it is necessary to use an estimate. If an estimate, is the performance measure result recalculated, revised, and formally reported once the data for an actual calculation is available?**
- 19. Who reviews the performance measures and associated data/calculations? Describe any process to verify that the measure and calculations are appropriate and accurate.**
- 20. Are there written procedures related to collecting the data or calculating and reviewing/verifying the performance measure? Provide copies of any procedures.**
- 21. Describe any concerns about the council's performance measures and any changes or improvements you think need to be made in the process.**
- 22. Provide an explanation of any items related to the council that may require legislative attention, including your proposed legislative changes.**

The Council is not proposing any legislative changes.

- 23. Should the council be continued? To what extent and in what ways would the absence of the council affect the public health, safety, or welfare of the citizens of the State of Tennessee?**

Yes. The Advisory Council on Workers' Compensation functions in an advisory capacity and serves many, including the Governor, the General Assembly, the Workers' Compensation Division of the DLWFD and the Department of Commerce and Insurance. It supports the General Assembly by providing recommendations on workers' compensation issues and legislation, including the

impact on existing policy. Because the Advisory Council membership includes representatives from employers, employees, and the medical, legal, governmental and insurance communities, the in-depth review and discussion of the merits of legislation from all viewpoints is invaluable.

Voting members of the Council are all extremely knowledgeable in the area of workers' compensation, and one of the Council's key functions is to hear testimony from lobbyists, industry groups and reports from other State Departments, like the Departments of Commerce and Insurance and Labor and Workforce Development Division of Workers' Compensation, to engage in in-depth debate regarding each bill referred for consideration. This process is valuable because it is an alternative to members of the General Assembly being required to perform this process in Committees that are already overburdened with extensive issues to consider. Therefore, the Council's reports constitute an invaluable resource to members of the General Assembly in their consideration of workers' compensation issues. The non-voting members all represent specialized groups that are stakeholders in the workers' compensation process, and their knowledge of the impact of the possible changes in the law to their respective fields is invaluable in considering recommendation.

- 24. Please list all council programs or activities that receive federal financial assistance and, therefore are required to comply with Title VI of the Civil Rights Act of 1964. Include the amount of federal funding received by program/activity.**

The Advisory Council does not receive any federal financial assistance.

- If the council does receive federal assistance, please answer questions 25 through 32. If the council does not receive federal assistance, proceed directly to question 31.**

- 25. Does the council prepare a Title VI plan? If yes, please provide a copy of the most recent plan.**
- 26. Does the council have a Title VI coordinator? If yes, please provide the Title VI coordinator's name and phone number and a brief description of his/her duties. If not, provide the name and phone number of the person responsible for dealing with Title VI issues.**
- 27. To which state or federal agency (if any) does the council report concerning Title VI? Please describe the information your council submits to the state or federal government and/or provide a copy of the most recent report submitted.**
- 28. Describe the council's actions to ensure that association staff and clients/program participants understand the requirements of Title VI.**

29. Describe the council's actions to ensure it is meeting Title VI requirements. Specifically, describe any council monitoring or tracking activities related to Title VI, and how frequently these activities occur.

30. Please describe the council's procedures for handling Title VI complaints. Has the council received any Title VI-related complaints during the past two years? If yes, please describe each complaint, how each complaint was investigated, and how each complaint was resolved (or, if not yet resolved, the complaint's current status).

31. Please provide a breakdown of current council staff by title, ethnicity, and gender.

Lynn Schroeder, Administrator, Caucasian, female

32. Please list all council contracts, detailing each contractor, the services provided, the amount of the contract, and the ethnicity of the contractor/business owner.

The Advisory Council is party to two (2) contracts:

- By the Numbers Actuarial Consulting, Inc.
 - actuarial services surrounding NCCI filings
 - 5 year contract totaling \$83,250 signed in September of 2011
 - Caucasian female
- David Wilstermann
 - Statistical analyses of the DLWFD data
 - 5 year contract totaling \$295,000 signed in May of 2014
 - Caucasian male

*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:

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

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

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

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

***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, 2012-June 30, 2016)
Kenny McBride	(July 1, 2009-June 30, 2013)
Sam Murrell	(July 1, 2010-June 30, 2014)
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>

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

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; the 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 Ralliff*, 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.

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

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 108th 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:

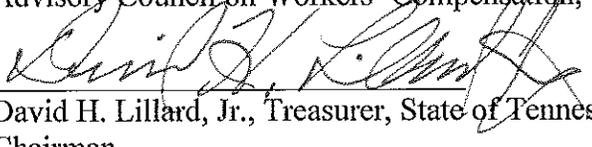
- (1) The amount of the construction services provider's payroll;
- (2) The number of the construction services provider's employees; or
- (3) Any of the construction services provider's employee's duties.

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

*Tennessee Advisory Council
On
Workers' Compensation*

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



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ANNUAL REPORT FOR  
JULY 1, 2013 – JUNE 30, 2014  
~~~~~

TENNESSEE TREASURY DEPARTMENT
STATE CAPITOL
NASHVILLE, TENNESSEE 37243-0225

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

STATE OF TENNESSEE
ADVISORY COUNCIL ON WORKERS' COMPENSATION
ANNUAL REPORT
JULY 1, 2013 – JUNE 30, 2014

Pursuant to *Tennessee Code Annotated* §50-6-121(e), the Advisory Council on Workers' Compensation hereby submits its annual report for July 1, 2013-June 30, 2014 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 Acts of 2004 and 2013 (Chapter Numbers 282 & 289 of the Public Acts of 2013), 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. 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 1087 of the Public Acts of 2010, and the Council's existence was extended to June 30, 2016 pursuant to Chapter Number 622 of the Public Acts of 2012. 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 by the Governor, Speaker of the Senate and Speaker of the House pursuant to §50-6-121(a)(1)(B). They appoint one employer and one employee voting member each, and the Governor appoints an additional ten non-voting Council members; they may choose to appoint from lists of suggested nominees provided by interested organizations as outlined in T.C.A. §50-6-121(a)(1)(D)(i-ii).

No new positions were added to the Advisory Council in 2013-2014, but several members' terms expired. The State of Tennessee thanked and acknowledged its appreciation for the dedication and years of service to voting employee labor representative, Mr. Jerry Lee, who generously served beyond his latest term and was honored by the members of the Tennessee General Assembly before the Council via HJR 0647 for his decades of service to the State. His successor, Mr. James Hale, was appointed in September of 2013. Tennessee physical therapist representative, Mr. David Davenport, generously served beyond his term and was succeeded by Mr. John Harris, whose appointment took place in November of 2013. Local government representative, Mayor Kenny McBride, served beyond his term and was succeeded by Mr. John D. Burlison who was appointed in June of 2014. A debt of gratitude, as well as congratulations, go to several Council members whom the Governor reappointed, namely, insurance company representative, Mr. Jerry Mayo, health care provider representative, Dr. Samuel E. Murrell III, chiropractor representative, Dr. Keith B. Graves, occupational therapist representative, Ms. Sandra Fletchall and attorney representative, Mr. A. Gregory Ramos. Their professionalism and dedication are greatly appreciated.

A chart outlining the members of the Advisory Council on Workers' Compensation as of June 30, 2014 is on the following page:

Advisory Council on Workers' Compensation's July 1, 2013-June 30, 2014 Report

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

Advisory Council on Workers' Compensation's July 1, 2013-June 30, 2014 Report

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

TERMS OF THE NON-EX-OFFICIO MEMBERS:

<u>Voting</u>	<u>Term of Position</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)
James Hale	(July 1, 2012-June 30, 2016)
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)
Sandra Fletchall	(July 1, 2013-June 30, 2017)
Bruce D. Fox	(July 1, 2011-June 30, 2015)
Keith B. Graves	(July 1, 2013-June 30, 2017)
John Harris	(July 1, 2013-June 30, 2017)
Lynn Vo Lawyer	(July 1, 2011-June 30, 2015)
Jerry Mayo	(July 1, 2011-June 30, 2015)
John D. Burleson	(July 1, 2013-June 30, 2017)
Samuel E. Murrell III	(July 1, 2013-June 30, 2017)
A. Gregory Ramos	(July 1, 2013-June 30, 2017)

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, 2013 - June 30, 2014 Council year, the Advisory Council met on four (4) occasions. Approved meeting minutes 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. Meetings were held August 29, 2013, October 31, 2013, February 6, 2014 and February 27, 2014.

On **August 29, 2013** the Council met to hear the following presentations (the below are excerpts from the meeting minutes):

Tennessee Department of Commerce and Insurance Commissioner Julie Mix-McPeak's, Designee and Advisory Council member, Mr. Mike Shinnick, reported on the **Workers' Compensation Market Conditions and Environment for 2012**. Mr. Shinnick advised that there would likely be two filings from the National Council of Compensation Insurance, ("NCCI") on or about September 6, 2013 for the Council's review and recommendation, the experience filing to be effective March 1, 2014 and a Law Only filing, representing the impact of the 2013 Workers' Compensation Reform Act to be effective July 1, 2014.

Mr. Shinnick discussed premium segment changes, key national indicators, national and state price changes, the 2013 Voluntary Weighted Average Loss Cost Multiplier, assigned risk trends and cyclical implications. He provided a preview of the likely 2014 assigned risk loss cost multiplier recommendation and discussed insolvency changes including a couple of new, fairly sizeable insolvencies. He presented the Council with a slide that showed the Tennessee A. M. Best ratings by premium concentration and the NCCI Annual Issues Symposium Summary. He indicated that medical severity and indemnity severity were very moderate, while frequency continued downward.

Mr. Shinnick did not have the Tennessee data with respect to combined ratios, since the filing had not yet been made. Employer representative Council member, Mr. Bob Pitts, requested an update for the State of Tennessee to be supplied to the Council after the Tennessee filing had been made (which was done) and inquired about a fourteen percent (14%) countrywide investment gain. Mr. Shinnick explained that investment gains associated with workers' compensation transactions (premium transactions and loss reserves over time) remained relatively flat at 14% in 2012, comparing favorably to the twelve percent (12%) average since 2001.

Mr. Pitts expressed concern that the countrywide operating ratio on workers' compensation was still the highest of all the lines. He indicated that since it is a State mandated program, it was concerning that it still has a high combined ratio. He indicated that his constituents would like to see the industry become actuarially sound in writing based on an appropriate level of return that is closer to one hundred percent (100%). Mr. Shinnick indicated that the market was recognizing those facts and responding.

Tennessee specific data indicated there has not been much change in the loss costs and the loss cost multiplier had been fairly flat until this year. In 2013 the weighted average loss cost multiplier went from 1.35 to 1.40. Mr. Shinnick explained that there was a total nineteen percent (19%) reduction in loss costs between 2004 and 2012.

Mr. Pitts surmised from the data presented that it appeared that the voluntary market was writing a larger premium, pricing for policies had increased and there had been growth in the assigned risk pool, although there were also signs that may be moderating. He further indicated that the picture presented portrays only premium and inquired as to whether there was any way to ascertain the number of policies the voluntary market carries versus the number of policies carried by the assigned risk pool on various years to indicate whether there is a company shifting. Mr. Shinnick indicated that another speaker, Mr. Tom Redel, would possibly be able to share some of that data. Mr. Shinnick's final subject was two new insolvencies to report, Lumbermen's and Ullico.

In summary, Mr. Shinnick reported that the results were a mixed bag. The negatives were underwriting results, the potential expansion of alternative systems for workers' compensation in light of what has transpired in two other states (opt out). Interest rates were low, the impact of the healthcare reform act is uncertain, and the pace of the economy is slow. The positives were that the premiums were increasing, frequency decline had resumed to a five point reduction countrywide, severity growth numbers were manageable and close to the rate of payroll growth in the industry. Additionally, the 2012 Tennessee accident year combined ratio had come in at a much improved 99.7, the industry's capital position was strong and the outlook had been described by NCCI's president, Steve Klingel, as "encouraging."

Chairman Lillard commented that Chairman Bernanke of the Federal Reserve Board was working on the interest rates being at historic lows which may help in the longer run, but noted that the bond market in the meantime was not necessarily in a helpful position as a result.

Mr. Shinnick's presentation may be viewed in its entirety @ <http://treasury.tn.gov/claims/wcac/August2013Workers'CompensationMarketConditionsa>

[ndEnvironment.pdf](#). It is also available on the Commerce & Insurance Department's website @ <http://www.state.tn.us/insurance/workcompcompanyRes.shtml>.

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**.

Mr. Redel reviewed the general organizational structure and complex administration and management of the Assigned Risk Plan including AON's relation to, and work relationships with, other entities. He explained the difference in servicing versus direct assignment carriers. He advised of the number of incoming calls and applications, and included a premium flow and trust accounts explanation. He explained that the data shows a snapshot on the first day of the policy. Premium and policy variances comparing 2011 to 2012 data indicated that, overall, the policies went up by 4.5%. He indicated that growth in the assigned risk pool was starting to level off.

Mr. Redel informed that the average policy size for 2012 was roughly \$5,200 and that this figure had grown slightly in 2013; all policy size categories had grown fairly significantly from what they were two to three years ago. There was high growth for policies over \$100,000 in premium, but the top 20 classes by premium had few changes. The charts in Mr. Redel's presentation show where and what types of businesses were moving into the Assigned Risk Plan. Construction classes have their own separate charts in the presentation and have shown significant change in the power line construction as well as the burglar alarm installation or repair categories.

Employee representative Council member, Mr. Pitts, pointed out that, regarding the construction industry, many end up in the Assigned Risk Pool ("Pool") because the private sector does not want to insure them.

Mr. Redel concluded by indicating that the Pool was small in 1998, had significant growth during 2001-2007, became small again and was now starting to grow somewhat again in the last two years. Mr. Redel's presentation may be viewed in its entirety @ <http://treasury.tn.gov/claims/wcac/August2013AssignedRiskPlanData.pdf>

Council member Mr. Pitts reminded the Council members of the upcoming expiration date of the present Council contract with statistician Mr. David Wilstermann and the need for continuing statistical information going forward on workers' compensation activity in the State. He indicated that the reforms going into effect July 1, 2014 would affect the types and location of data collected. He indicated that both the Advisory Council and Division of Workers' Compensation need to meet their responsibilities with respect to

providing reports to the legislature as well as preparing a new data collection (SD-1) form to be certain all the State's needs will be met including the close out with the courts.

The Council's final presentation was Mr. David Wilstermann's **Statistical Report on the 2012 Workers' Compensation Data** from the Tennessee Department of Labor and Workforce Development ("TDLWFD" or "Department"). Mr. Wilstermann advised that he first began looking at workers' compensation data in Tennessee in a study of 1996 trials analyzing the implementation of the 1992 reforms, more specifically the 2.5 times multiplier cap on "body as a whole, return to work" cases. It required driving around the state from courthouse to courthouse pulling files, reading through, and gathering information. After the Department started collecting data, information regarding settlements, as well as trials, became available. This was done through the many reforms, and it helped to provide insights as to their effects.

Mr. Wilstermann advised that since a major reform was just passed (2013), the present report would lay the groundwork for future comparisons. Council member attorney representative, Mr. Ramos, inquired as to when the Department started collecting that data and if Mr. Wilstermann had been doing the analysis since that time to which Mr. Wilstermann responded in the affirmative and that the year was 2000. He explained that there were trial studies of 1996-1998 and that 1999 may have been skipped since the SD-1 was being implemented. Mr. Pitts reiterated that Mr. Wilstermann had been the person collecting data since the beginning and he probably would have relevant comments to share with the Council and Department with respect to what the need will be and what may be attainable going forward.

To provide context for the rest of the data in his report, Mr. Wilstermann informed that from 2004-2012 there has been a drop in the number of cases from over 12,000 to 8,427. The percent of ways a case can be completed (which will no longer be required post 2013 Reform) indicates that from 2011-2012, joint petition settlements increased from 30-42% of all conclusion types. From 2006-2011 it was fairly consistent that 60% of cases were approved by the Department. That figure went down to 51% of the cases for 2012. Half of those were in Davidson County, so people were going to Davidson County Courts for approval of their settled cases rather than to the TDLWFD.

Mr. Wilstermann reported averages for age, compensation wage, average temporary total disability amounts, total number of weeks from injury to maximum medical improvement, and from date of injury to conclusion. He indicated that when the mean and the median are right on top of each other, it signifies a normal shaped bell curve that statisticians like to see in data. Workers' compensation usually does not comply with that, as the means and medians are usually far apart. For temporary total disability the

mean was \$10,000 per case, the median, \$5,700. A couple of years ago, repetitive injuries were addressed in legislation, so looking at carpal tunnel from 2005 to the present, the numbers go down to only 3% of the cases. The body parts were coded and graphed separately in the data. Some standardization should be part of the discussion as a new system is developed. Upon inquiry from Mr. Pitts regarding the trend of carpal tunnel, Mr. Wilstermann indicated that it is declining. From 2005 to 2012, it was 7.5% and now it is 3% of all the cases. Impairment ratings are going down for arms, especially for return to work cases.

It takes at least three years for a reform to be fully implemented; about 80% of the cases are concluded at three years. In the 2012 data, the return to work multiplier was fully at 1.5xs. The non-return-to-work was 3xs for legs, body as a whole was a little larger at 3.3xs. The average impairment rating is 6.7% to the body as a whole. With the new legislation there should be about a \$5,000 decrease in the amount of benefits being paid for a return to work case. Mr. Ramos inquired as to Mr. Wilstermann's analysis that the \$5,000 reduction in benefits to the employee came from taking the average impairment rating plus the new numbers of weeks provided under the 2013 Reform, which Mr. Wilstermann confirmed was accurate. There are about 2000 cases of body as a whole, return to work a year, so that translates into \$5-13 million in potential savings. Lastly, Mr. Wilstermann pointed out the percentage paid in dollars for all disability claims included the new right to close out future medicals.

Mr. Ramos asked about data from 2011 in light of a recently circulated report by the National Academy of Social Insurance indicating that Tennessee was one of 22 states where workers' compensation payments and costs to employers actually decreased in 2011. He asked if this was consistent with Mr. Wilstermann's report from last year, to which Mr. Wilstermann replied that it was correct and that savings have been seen mostly in the permanent disability piece, although the impairment ratings had gone down and the other categories had remained flat. Mr. Ramos pointed out that this trend existed prior to the 2013 Reform.

Employer representative Council member, Mr. Kerry Dove, commented on the valuable quality of the information presented and inquired on what data would be collected going forward, be it venue, litigated versus non-litigated cases or exactly what, so that the Council can drill down to this data and actually manage and make decisions with respect to the future. He stated that it was important to have data to report cause and effect for whatever had been changed over the years. Mr. Wilstermann indicated that much of the data has been absent since it comes into the Department from various sources.

Advisory Council on Workers' Compensation's July 1, 2013-June 30, 2014 Report

Mr. Wilstermann's presentation, including moving graphs may be viewed @ <http://treasury.tn.gov/claims/wcac/2013StatisticalReportTDLWFD2003-2012Data.pdf> and his supplement may be viewed @ <http://treasury.tn.gov/claims/wcac/2013+Statistical+Supplement+TDLWFD+2012+Data.pdf>

**NCCI's VOLUNTARY LOSS COSTS AND RATING VALUES
FILING & LAW ONLY FILING PROPOSED TO BE EFFECTIVE
MARCH 1, 2014 AND JULY 1, 2014**

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 September 6, 2013, the NCCI submitted its annual Voluntary Loss Costs and Rating Values Filing, with a proposed effective date of March 1, 2014 and an additional Law-Only Filing with a proposed effective date of July 1, 2014 reflecting the impact of Public Chapter 289 which will be effective July 1, 2014.

With respect to the annual experience filing, the NCCI proposed an overall change of -8.4%. While the change in loss costs varied depending on the employer's classification, the average change in the five industry groups was:

Manufacturing -10.5%; Contracting -10.1%; Office and Clerical -9.5%; Goods & Services -7.6%; and Miscellaneous -4.8%.

The Advisory Council met on October 31, 2013 to consider the filings as required by T.C.A. §50-6-402(b). After initial presentation of the filings 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 consulting actuary to the Department of Commerce and Insurance, Ms. Mary Frances Miller of Select Actuarial Services ("SAS").

Ms. Ayres noted that the proposed overall aggregate decrease of -8.4% loss cost rate filing is comprised of an average of changes in three key components: Experience and Trend (-8.8%); Benefits (+0.4%); and Loss-based Expenses (0.0%). Ms. Ayres described to the Council the methodology that was utilized by NCCI.

Council member insurance representative, Mr. Jerry Mayo, inquired as to whether the data collected also comes from carriers who have gone bankrupt. Ms. Ayres indicated that those carriers who are able to produce valuable data are taken into consideration, but when they reach a certain point in bankruptcy, they are no longer required to provide that data. There are then three areas of internal review: quality review; peer review; and management level review.

Council member TDLWFD representative, Ms. Abbie Hudgens, inquired as to how NCCI arrived at the decision to use two years. Ms. Ayres responded that NCCI had in the past used one policy year and one accident year, but after evaluation by NAIC in the 1990's, it was suggested to avoid volatility, that NCCI use two, which they have done since that time. In Tennessee, the latest two year period is deemed appropriate and, in some cases, is more responsive since it reflects the trend.

All historical experience is adjusted as if it was at today's loss cost levels. This is the second consecutive year of improvement. There is also improvement on the indemnity side. The trend includes loss ratios and includes claim frequency and claim severity, number and average cost of claims. On the medical side, there is no difference of actuarial opinion this year. NCCI agrees there is no medical trend, or 0% trend. Loss adjustment expense (LAE) is included in the loss cost in Tennessee. A total LAE provision of 19.8% is proposed.

Council member attorney representative, Mr. Gregg Ramos, inquired as to the -5.9% law-only filing if NCCI use actual cases and overlaid them with the new law to arrive at the figure. Ms. Ayres responded positively that it was done this way generally and was the case in this instance. Some provisions were not able to be quantified, however, due to lack of data.

Mr. Pitts inquired whether next year at this time there would be very little data on NCCI's report as an outgrowth of the reform. Ms. Ayres replied that next year's report will be data of 2013, none of which will be post-reform.

Council member Department of Commerce and Insurance representative, Mr. Mike Shinnick, indicated that it would be 2017 before the reform data will be reflected in the reporting.

Ms. Ayres' NCCI presentation may be viewed at @ <http://treasury.tn.gov/claims/wcac/NCCIPres31147114.pdf>

The Advisory Council on Workers' Compensation's Actuary, By The Numbers Actuarial Consulting, Inc. ("BYNAC"), Ms. Mary Jean King, stated that the NCCI proposed change of -8.4% for the Tennessee voluntary workers' compensation market was outside of the range she had calculated. She suggested that a 19.4% Loss Adjustment Expense ("LAE") figure was more appropriate than the 19.8% allowance proposed by the NCCI. She recommended an overall evaluation of a -5.5% instead of the -8.4% figure

recommended by NCCI. Additionally, she suggested for the second year in a row that the use of a longer experience period may be warranted.

Using the historical experience for a longer period than that used by NCCI would produce a .948 instead of NCCI's selected ratio of .916 for the experience, trend and benefits. With that difference and BYNAC's proposed LAE of 19.4% rather than NCCI's 19.8%, BYNAC's recommendation for changes in loss based expenses was an overall -5.5% rather than the -8.4% proposed by NCCI.

The Law Only July 1, 2014 filing of -5.9% which reflects the estimated impact of Public Chapter 289/Senate Bill 200, the Workers' Compensation Reform Act of 2013, was reasonably calculated in accordance with actuarial standards of practice. Most provisions are expected to result in savings or have a negligible effect. The change in determination of maximum medical improvement for mental injury could result in an increase in claim cost, but that was the only provision that BYNAC thought might have an increase. The overall effect of both filings is -13.8%.

Ms. King's BYNAC actuarial presentation may be viewed in its entirety @ <http://treasury.tn.gov/claims/wcac/BYNAC31147114NCCI.pdf>

The Department of Commerce and Insurance Actuary, Select Actuarial Services, Ms. Mary Frances Miller, explained that she also believed the proposed - 8.4% was beyond the lower end of a range of reasonable estimates of the indicated change from about -4% to about -7%. She applauded NCCI's recognition that there has been no positive trend in the medical loss ratio since 2004 and concurred with their selection of 0.0% accordingly. Her recommendation was an overall indication range from -4.6% to -6.4% using an 18.5% LAE. Additionally, she reiterated that the use of a five year experience history would be a more accurate trend predictor than the two year history presently being used by NCCI.

Ms. Miller explained that actuarial judgment was involved and was the reason for the differences in opinion. Overall judgments regarding NCCI methodology were reviewed at great length over a decade ago and usually produce good results.

In addressing the experience period, standard procedure is two policy years, but when there are significant gaps like there were this year, that should be a red flag not to just apply the standard judgments, but to look into the numbers further, which, when done, revealed that it is not in the indemnity loss ratios, but it's in the medical loss ratios. There was a 55.6 from 2011 and a 61.7 from 2010, which were unacceptably far apart to base an indication on, so Ms. Miller recommended using more years.

On the medical side, there has been no positive trend in medical loss ratios in Tennessee since the law reform. This is the first year NCCI has recognized that and is filing 0% trend. Ms. Miller concurred with NCCI's selection of 0% this year, and informed that 0% should have been selected two or three years ago.

Ms. Miller expressed concern that NCCI has proposed too big a decrease that will result in volatility in that a large reduction would be seen initially, followed by a large increase. A 20% decrease needs a 25% increase to get back to the same point. Therefore, Ms. Miller recommended using a longer experience period. She reminded the Council that she had recommended using a longer period of years last year as well and indicated that she would do so again every year. Ms. Miller recommended a four year average, explaining that it would provide a medical loss ratio just under 60% rather than what was filed at 57%, so the revised indication would be -5.4%, very close to BYNAC's figure. She reiterated that there really is not a trend. There has been volatility and no real measurable trend since the law change.

NCCI's calculations for loss adjustment expenses (LAE) have resulted in a consistent overstatement of the ultimate loss adjustment expense to losses ratio. In every case, the last year's estimate was higher than the present year's estimate. This points to an 18.5% provision, which is what Ms. Miller recommended. A reasonable range of indications would be somewhere from -4 to -7. The -8.4% is too aggressive. Ms. Miller recommended something between a -5% and -6%.

Ms. Miller believed the law-only filing was appropriately calculated. She noted that there are multiple components, most of which have been projected to have a positive impact, but the NCCI cannot measure them right now.

Council member insurance representative, Mr. Mayo, indicated that he would like to see NCCI have more data to give the rates some validity so the volatility will stop.

Ms. Miller's Select Actuarial Services' presentation may be viewed @ <http://treasury.tn.gov/claims/wcac/SASPres31147114NCCI.pdf>

Mr. Pitts explained that the two year period used by NCCI was brought about by request years ago due to the numbers historically always being a plus figure. At that time, the argument to the NCCI was that the data needed to be shortened enough to immediately reflect changes. Now that the numbers have reversed, a fresh look may need to be taken going forward. Mr. Pitts expressed that the Council has an obligation to make recommendations, even if they may be unpopular. Council member labor representative,

Mr. James Hale, expressed an issue with the figures and indicated they may not produce enough of a decrease since they were basing such recommendation on a time period when benefits were going to be heavily reduced. Ms. Miller pointed out that the NCCI has estimated that the law change was worth -5.9% and that was going to go into effect July 1, 2014 regardless of what was decided about the experience filing. It was noted that the data would not reflect the impact of the decrease in benefits until July of next year and with the multi-year cycle of the NCCI filing, actually would not be seen in hard data until 2017.

After consideration of the presentations by the three actuaries on the Experience Filing to be effective March 1, 2014, as well as the comments and discussion among the members, it was noted that there was consistency in the recommendations of the two non-NCCI actuaries that would provide significantly less reduction than that being proposed by NCCI, and that most agreed that a longer time period should be recommended, the voting members of the Advisory Council on Workers' Compensation unanimously adopted a formal recommendation to Commissioner Mix-McPeak of the Department of Commerce and Insurance, of -6.95% rate filing and additionally recommend an increase in the loss experience data period used to calculate trends from the two years presently being used by the NCCI, to a three year loss experience period, to more appropriately address the market and create less volatility in the rate filings.

Additionally, the Advisory Council heard and received comments from all three of the above named actuaries regarding the Law-Only Filing to be effective July 1, 2014. NCCI proposed a -5.9% based on the 2013 Reform Act with its effective date of July 1, 2014. Both reviewing actuaries were in agreement that the NCCI's figures were accurate according to the limited information presently available. Upon prompting from Mr. Dave Broemel for a formal recommendation, the voting members of the Advisory Council on Workers' Compensation unanimously agreed to formally concur with and recommend no change to the proposed -5.9% Law-Only rate.

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 2013 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 2014.

In calendar year 2013, the Tennessee Supreme Court held in *TIMMY DALE BRITT v. DYER'S EMPLOYMENT AGENCY, INC. ET AL.* No. W2011-00929-SC-WCM-WC - Filed January 22, 2013, that because the employer had neither returned the temporary employee to work, nor offered him an opportunity to return to work after his injury, nor terminated his employment for misconduct, the award of benefits was governed by the statute authorizing benefits up to six times the medical impairment rating, T.C.A. § 50-6-241(d)(2)(A).

In *JOSHUA COOPER, ET AL. v. LOGISTICS INSIGHT CORP., ET AL.* No. M2010-01262-SC-R11-CV - Filed January 16, 2013, the Court held that an employer's statutory subrogation lien for workers' compensation benefits against a third party tortfeasor who caused employee's injury does not include the cost of future medical benefits that may be paid on behalf of the employee. Justice Koch dissented, stating that the statute gives employers both a subrogation interest in the employee's recovery from a third party and also a credit on the employer's future liability as it accrues, so that this employer should have been entitled to both.

In *FURLOUGH v. SPHERION ATLANTIC WORKFORCE* No. M2011-00187-SC-WCM-WC - Filed February 22, 2013, the Court clarified procedures with respect to workers' compensation settlements approved by the Tennessee Department of Labor and Workforce Development by determining that it was the Department's responsibility, and not the court clerks', to make sure the SD-1 form was complete, and, if it was accepted as "complete" then the settlement was final.

In *WILLIAM H. MANSELL v. BRIDGESTONE FIRESTONE NORTH AMERICAN TIRE, LLC ET AL.* No. M2012-02394-WC-R3-WC - Filed August 20, 2013, the Court upheld the constitutionality of the workers' compensation law that gives priority to the opinion of an independent medical examiner, concluded that the law did not violate principles of due process and did not constitute an infringement by the legislative branch upon the exclusive powers of the judiciary.

In *VANDALL v. AURORA HEALTHCARE No. W2011-02042-WC-R3-WC - Filed April 24, 2013*, the Court affirmed the trial court's determination that the employee had sustained her burden of proving the injury to be work-related due to a sticky substance on the floor and therefor compensable rather than idiopathic in nature. The dissent's opinion was that it was the employee's improper shoes rather than a work hazard and should have been considered idiopathic and therefore not compensable.

The detailed 2013 Supreme Court report of workers' compensation decisions, complete with citations, may be viewed in its entirety @ <http://treasury.tn.gov/claims/wcac/2013+ACWC+Annual+Supreme+Court+Report+and+Letter.pdf>

TENNESSEE WORKERS' COMPENSATION LEGISLATION

The Council considered changes in Tennessee Workers' Compensation Laws as the 108th Tennessee General Assembly submitted bills for the members' review and recommendation.

Beginning with its **February 6, 2014** 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 Jimmy Eldridge.

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

HB1440/SB1645 (McCormick/Norris) was first presented to the Council on February 6, 2014 but was deferred to the next meeting.

Chapter 765 of the Public Acts of 2014 HB1441/SB1646 (McCormick/Norris)

Presentation of **HB1441/SB1646** (McCormick/Norris), which would be called the Uninsured Employers' Fund Benefit Provision Act, was made by Mr. Josh Baker, Administrative Attorney and Legislative Liaison, Division of Workers' Compensation ("Division"). A question regarding the bill was posed to Mr. Baker by council member employer representative, Mr. Bob Pitts, as to whether the recovery of the money spent by the Division would be a subrogation claim, to which Mr. Baker responded in the affirmative, adding that by payment of the judgment by the State, the State has satisfied a liability of the employer.

Further inquiry came from council member attorney representative, Mr. Gregg Ramos, as to what percentage of the current cases come under a situation where there is an on-the-job injury but the employer has no workers' compensation coverage. Mr. Baker indicated that the Division had preliminary numbers based on those cases that actually come to the division since not all of them do. He indicated that many of these injured employees do not seek recovery at all. Approximately 47 came to the attention of the Division and not all were necessarily compensable nor were all of the employers necessarily required to carry workers' compensation insurance. The Division's rough estimate is \$33,000 per claim, and that figure was derived from the average costs of

temporary disability combined with medical payment of claims overall in the 2011 and 2012 numbers.

Council member employee representative, Mr. Tony Farmer, inquired whether an irresponsible employer who was uninsured, but had assets, could use this proposed law as a shield. He pointed out that, in a serious claim, an uninsured employer could allow the Administrator to accept responsibility under this proposed provision, pay the capped benefit and then collect the \$40,000 from the employer. It appears that would cap the employer's liability under the proposed statute at \$40,000. Mr. Baker responded in the negative and indicated that the statute permits the employee to pursue any additional recovery against the employer. The employee would have to pursue the claim to completion and a normal judgment would be issued and they would have the opportunity to collect the additional amount.

Mr. Ramos inquired if, in the event there is some fault on the part of the employer but the employee goes ahead and takes advantage of these limited funds, there is a preclusion under the exclusive remedy provision. If the employee wants to maintain a negligence action against the employer for not having workers' compensation insurance in effect, Mr. Ramos asked whether the employee would be able to do that even after drawing these limited funds. Mr. Baker responded in the negative and indicated that the employee would have made an election of remedies at that time.

Mr. Pitts moved that the bill be recommended by the Council for approval, which was seconded by Mr. Farmer, resulting in a **unanimous vote to recommend the bill**.

Public Chapter 765 may be viewed in its entirety @ <http://state.tn.us/sos/acts/108/pub/pc0765.pdf>

HOUSE JOINT RESOLUTION 647 (Eldridge)

House Joint Resolution 647 (**HJR647/Eldridge**) was sponsored by Representative Jimmy Eldridge to recognize the Council's employee representative, Mr. Jerry Lee, for his many years of distinguished service to the Tennessee Advisory Council on Workers' Compensation. The Council expressed its **support of that resolution**. The resolution may be viewed in its entirety @ <http://www.capitol.tn.gov/Bills/108/Bill/HJR0647.pdf>

At the **February 27, 2014** meeting the Advisory Council heard from sponsors and stakeholders for the three remaining 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 Jimmy 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 three bills considered, recommendations made and laws passed:

Chapter 903 of the Public Acts of 2014
HB1440/SB1645 (McCormick/Norris)

The bill was filed as **HB1440/SB1645 (McCormick, Lundberg, Kevin Brooks, Ragan/Norris, Johnson)**, which became Chapter 903 of the Public Acts of 2014.

Presentation of the bill was made by Mr. Josh Baker, Administrative Attorney and Legislative Liaison, Division of Workers' Compensation. Section one provides a definition of specialty practice group. Section two clarifies that limited liability companies will continue to be treated similar to a partnership for purposes of exemptions. Section 3 concerns penalties collected by the Division being used to offset administration costs. Section 4 concerns medical billing disputes by the medical payment committee and provides that they only apply to those procedures occurring as of July 1, 2014.

Section 5 provides procedure for an employee to acquire a second opinion on surgery or diagnosis if no panel is provided by the employer. Section 6 MMI for mental injuries with a physical component is presumed to be whenever active medical treatment ends. Section 7 updates 50-6-242 and Section 8 corrects §50-6-242(b) to ensure that injuries before the effective date of July 1, 2014 are dealt with under the proper process. Section 9 is the civil penalty assessment, going from a pre-due process to a post-due process procedure. Sections 10 through 12 are language changes only to ensure conformity with Public Chapter 289. Section 13 is the enacting clause with an effective date of July 1, 2014 for all items except Section 9, penalty procedure, which will go into effect as soon as the bill is signed into law.

At the end of Mr. Baker's presentation, Council member voting employee representative, Mr. Tony Farmer asked Mr. Baker to expound on Section 7 which had been skipped for more detailed discussion at this point.

Mr. Baker explained that the proposed bill's Section 7 would revise T.C.A. §50-6-242. In the present law, if an employee is unable to return to work at 100% of his/her pre-injury employment, and he/she meets 3 of 4 criteria, the employee is entitled to extended benefits. The proposed revision would change the initial qualifying event to one of an employee who is unable to return to work and cannot find employment at 66 2/3% of his/her pre-injury wage. Additionally, the authorized treating physician has certified that

the employee, due to his/her injury, could never go back to performing their pre-injury occupation. Mr. Baker indicated that this section is rarely used.

Mr. Farmer inquired if the Division of Workers' Compensation had drafted this bill, to which Mr. Baker replied in the affirmative. He further inquired as to the logic behind the 66 2/3% and whether it was based on any statistical foundation or any empirical foundation or was arbitrarily chosen. Mr. Baker indicated that there was not a statistical study that showed that someone who loses a third of his/her income is going to be affected, but logically, it has a large effect, so that number was chosen.

Mr. Farmer then asked whether there was an indication that the 66 2/3% somehow represents a portion of those persons injured so seriously that they only go back to a job that pays above or below that 66 2/3%. He inquired if it was based on any fact, to which Mr. Baker responded that he was not aware of any study that showed such a fact. Mr. Farmer further inquired as to whether this was a compromise or a bargained number, to which Mr. Baker responded in the negative.

Mr. Farmer pointed out that, under the proposed bill, if an injured worker went back to work and was only able to work at a job that generated an income that was equal to 67% of what the worker earned before the injury, the worker would not be entitled to any of the additional benefits. He further indicated that this is a class of the most seriously injured Tennessee workers who are unable to return to work and who are not permanently and totally disabled, that is, unable to return to work at a wage equal to 66 2/3% of what the worker earned prior to their injury or more. Mr. Baker agreed that Mr. Farmer was correct on both counts.

Council member attorney representative, Mr. Gregg Ramos, inquired of Mr. Baker as to what prompted the need for this threshold to be lowered from 100% of wages to 2/3 of wages and expressed his concern that the legislation appeared to provide a solution to a problem that may not exist.

Mr. Farmer pointed out that the proposed 66 2/3% rather than 100% language does not limit the availability of extended benefits based on workers who have lost the ability to perform their former employment, but rather on arbitrary figures.

Council member voting employer representative, Mr. Bob Pitts, expressed his frustration regarding an inability to quantify the problem and address it to the point where there is a reasonable general level of satisfaction. He suggested that the Legislature be made aware that it is the wish of the Advisory Council that this bill be reviewed before the next legislative session and again at the subsequent session. He went on to indicate that there

seemed to be satisfaction with all sections of the bill except section 7; therefore, he made a motion for recommendation including section 7, with the proviso that the concerns expressed by the Council are specifically shared with the members of the Legislature. Council member and fellow voting employer representative, Mr. Gary Selvy, seconded the motion as long as the comments regarding the concerns specific to section 7 were forwarded to the Committees.

Council member voting employee representative, Mr. Tony Farmer, stated that he had been a member of the Advisory Council on the employee side for 16 years and this was the first time when the employees were completely excluded from any discussions or negotiations or preparations for this legislation. He continued: "I do not recognize the validity of a process of developing legislation to protect injured workers that excludes the injured workers' representatives and I will tell you, no [employee representative] voting member of this Council has been included in those discussions or negotiations since June of 2013 . . . none . . . it is troublesome to me that the preparation and negotiation of legislation this important would not include representatives of the injured worker."

The vote resulted in the **adoption of the motion to recommend the bill with extensive comment from all parties (above) regarding their concerns surrounding section 7.** Public Chapter 903 may be viewed in its entirety @ <http://state.tn.us/sos/acts/108/pub/pc0903.pdf>

Chapter 837 of the Public Acts of 2014 HB1786/SB2088 (Pody/Beavers)

The bill was filed as **HB1786/SB2088 with amendment (Pody/Beavers)** and became Chapter 837 of the Public Acts of 2014.

Representative Mark Pody presented the bill to the Council and explained that he wanted to accomplish two things with the bill - first, to codify language concerning the ombudsman so that any party will have assistance if he/she does not have an attorney representing him/her, and second, that the appointment of Workers' Compensation Appeals Judges, which now is listed as entirely by the Governor, be revised, upon the expiration of their first terms, to appointment, on a rotating basis, between the Speaker of the Senate, the Speaker of the House and the Administration/Governor from that point forward.

Council member voting employer representative, Mr. Bob Pitts, clarified that the amendment was moving along with the bill. Mr. Pitts stated that he was reluctant to attempt to tell the General Assembly how administrative law judges should be appointed;

however, he did state his belief that administrative judges operating within the Executive Branch are different from court system judges and the appointment process. He explained that the important issue in this reform effort is trying to have judges that conform to the system and who judge based on law and policy and rules that are established. He suggested that those appointment powers remain in the hands of the Governor. Administrative judges are different policy-wise than court judges, and a fair and balanced court is needed to hear cases under an administrative system. Mr. Pitts moved to oppose the bill unless that provision was removed since he believed that portion to be bad policy. The motion was seconded by Mr. Dove. The roll of the Council included three abstentions, so the bill left the Council **without recommendation, but with the comments of the members**. Public Chapter 837 may be viewed in its entirety @ <http://state.tn.us/sos/acts/108/pub/pc0837.pdf>

Chapter 633 of the Public Acts of 2014 HB2105/SB2251 (Haynes/Massey)

The bill was filed as **HB2105-SB2251 with amendment (Haynes/Massey)** and became Chapter 633 of the Public Acts of 2014. Under the bill, leased operators/owners must show that they have a contractual relationship with the employer and are covered under their workers' compensation insurance before payment of any workers' compensation claim may be permitted. Second, the venue for any dispute regarding such coverage will be in the Chancery Court in either the county where the contract was established or the county where the carrier's principal place of business is located. Mr. Baker clarified that the workers' compensation dispute would be heard by the Court of Workers' Compensation Claims; the contractual dispute only would be heard by the Chancery Court.

Council member voting employer representative, Mr. Bob Pitts, indicated that it was his understanding that, as amended, the bill was acceptable to all parties. The issue of contention was not one involving workers' compensation, but, rather, where the dispute regarding the contract would be heard and the two choices provided were acceptable. A call of the Council resulted in **unanimous vote to recommend the bill for approval**. Public Chapter 633 may be viewed in its entirety @ <http://state.tn.us/sos/acts/108/pub/pc0633.pdf>

PROPOSED RULES OF THE DIVISION OF WORKERS' COMPENSATION

On **August 29, 2013**, Mr. Josh Baker, attorney and legislative liaison for the Division of Workers' Compensation, made a presentation on the **Proposed Rules for Final Hearing Procedures**.

Mr. Baker briefly explained the rules that will govern the mediation proceeding and the hearings before the workers' compensation judges in the new Court of Workers' Compensation Claims. The rules apply only for dates of injury on or after July 1, 2014. The topics of scope, definitions, decisions on the record, dispute certification notice, expedited hearings, potential electronic filing and petitions for benefit determination were addressed. Further items addressed were the ombudsman program procedures, representation by counsel, fees due at end of claims, disclosure of records, requirements and procedures for alternative dispute resolution, and penalties for bad faith or failure to appear. Procedures regarding discovery, hearings and appeals were outlined as well. The Council took the proposed rules under advisement.

A second presentation regarding proposed rules was made on **February 6, 2014**, again, by Mr. Josh Baker, Administrative Attorney and Legislative Liaison for the Workers' Compensation Division, regarding proposed rules from the Tennessee Department of Labor and Workforce Development, Workers' Compensation Division, regarding Medical Panels, MIRR, enforcement procedures and penalty assessments, among others, set for Public Hearing February 14, 2014.

Mr. Baker spoke about the rules explaining that they mostly involved the penalty program. He explained that the rules concerned the enforcement mechanism for the Court of Workers' Compensation Claims, set to launch July 1, 2014. The rules provide for the penalty procedures for the enforcement of orders by workers' compensation judges and additional sections of the workers' compensation reform act. In addition, the rules provide a mechanism for the enforcement of the medical panel and for requiring employers who seek reimbursement from the Second Injury Fund to submit certain documentation with their request for reimbursement. Finally, the rules address the payment mechanism for penalties and a change to the medical impairment rating program concerning disputes of medical impairment. It makes that program more accessible

Chairman Lillard called for comments and discussion on the rules. Seeing none, the Chair, without objection, declared that the **Council was not making comment** on the rules.

TOSHA NEWS

The Tennessee Occupational Safety and Health Administration (TOSHA) partnered with construction trade associations across the state and held a Fall Protection Safety Stand Down on June 2, 2014 to discuss the prevention of fall protection injuries on all job sites utilizing materials provided by TOSHA and its partners. On that date, TOSHA and numerous construction trade associations together invited construction industry employers to stop work to engage their employees in discussions on preventing fall-related injuries.

Called 2014 Fall Protection Safety Stand Down, employers across the state stood down and ceased operations at their job sites to review with their employees the fine points of fall prevention. June is the beginning of the busiest period for construction activity. In the training sessions, employers stressed that fall prevention is preferable to fall arrest.

Employees provided feedback on the kinds of activities they perform that can result in fall injuries. They learned about unprotected edges and other work-site conditions requiring fall protection measures and provided feedback on the kinds of activities they perform that can result in fall injuries. Falls are the leading cause of fatalities in the construction industry, accounting for one-third of all deaths in the industry. Nationally over the past five years construction fatalities have averaged 287 each year.

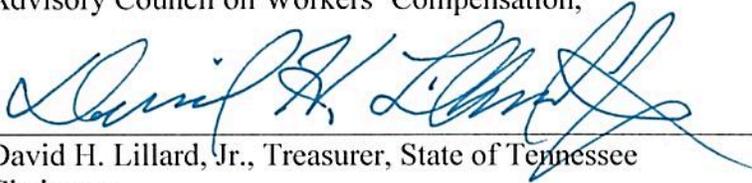
TOSHA continues to focus on the goal of reducing deaths in high-hazard industries with such programs. OSHA statistics show that weekly workplace deaths are down nationally over the past four decades from 38 a day in 1970 to 12 a day in 2012, at the same time that national employment has almost doubled.

TOSHA enforces the Tennessee Hazardous Chemical Right-to-Know Law containing requirements in addition to those in Hazard Communication. For further information about investigations, procedures, reporting and resources, you may access TOSHA's website @ <http://www.tn.gov/labor-wfd/tosha.shtml>.

CONCLUSION

The Advisory Council on Workers' Compensation met on four (4) occasions from July 1, 2013-June 30, 2014. This annual report provides a synopsis of the topics considered and appointments made 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,

A handwritten signature in blue ink, appearing to read "David H. Lillard, Jr.", is written over a horizontal line.

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

**Report of the Advisory Council on Workers' Compensation
To the Senate Commerce and Labor Committee**

Jack Johnson, Chair
Mark Green, 1st Vice-Chair
Charlotte Burks, 2nd Vice-Chair

Members

Dolores Gresham	Steve Southerland
Reginald Tate	Jim Tracy
Bo Watson	Ken Yager

The Advisory Council on Workers' Compensation met on February 6, 2014 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) business 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 the February 6, 2014 Council meeting for your review and information.

Two workers' compensation bills were on the Council's February 6, 2014 agenda. They were:

SB1645/HB1440 (Leader Norris/Leader McCormick)

Mr. Bob Pitts (Council Member Employer Representative) **moved to postpone review of the bill** for a week since there were some issues remaining to be resolved. Mr. Kerry Dove (Council Member Employer Representative) **seconded** the motion. Mr. Pitts indicated that he had spoken to the appropriate officials with the Administration and a one week delay did not trouble them. He further indicated that he had inquired of the Division of Workers' Compensation if they wished to speak on the bill and they decided that if deferral took place, they would prefer to comment at the next meeting. Chairman Lillard indicated that the bill would be **rolled** to the next meeting which would be coordinated as soon as possible, preferably within the week, which was **done without objection**.

SB1646/HB1441 (Leader Norris/Leader McCormick)

Presentation of the bill, which would be called the Uninsured Employers' Fund Benefit Provision Act, was made by Mr. Josh Baker, Administrative Attorney and Legislative Liaison, Division of Workers' Compensation. A question regarding the bill was posed to Mr. Baker by Mr. Bob Pitts (Council Member Employer Representative) as to whether the recovery of the money spent by the Division would be a subrogation claim, to which Mr. Baker responded in the affirmative, adding that by payment of the judgment by the State, the State has satisfied a liability of the employer.

Further inquiry came from Mr. Gregg Ramos (Council Member Tennessee Bar Association Representative) as to what percentage of the current cases come under a situation where there is an on-the-job injury, but the employer has no workers' compensation coverage. Mr. Baker indicated that the Division had preliminary numbers based on those cases that actually come to the division since not all of them do. He indicated that many of these injured employees don't seek recovery at all. Approximately 47 came to the attention of the Division and not all were necessarily compensable nor were all of the employers necessarily required to carry workers' compensation insurance. The Division's rough estimate is \$33,000 per claim and that figure was derived from the average costs of temporary disability combined with medical payment of claims overall in the 2011 and 2012 numbers.

Mr. Tony Farmer (Council Member Employee Representative) inquired whether an irresponsible employer who was uninsured, but had assets, could use this proposed law as a shield. He pointed out that, in a serious claim, an uninsured employer could allow the Administrator to accept responsibility under this proposed provision, pay the capped benefit and then collect the \$40,000 from the employer. It appears that would cap the employer's liability under the proposed statute at \$40,000. Mr. Baker responded in the negative and indicated that the statute permits the employee to pursue any additional recovery against the employer. The employee would have to pursue the claim to completion and a normal judgment would be issued and they would have the opportunity to collect the additional amount.

Mr. Gregg Ramos (Council Member Tennessee Bar Association Representative) inquired if, in the event there is some fault on the part of the employer, but the employee goes ahead and takes advantage of these limited funds, there is a preclusion under the exclusive remedy provision? If the employee wants to maintain a negligence action against the employer for not having workers' compensation insurance in effect, will the employee be able to do that even after drawing these limited funds? Mr. Baker responded in the negative and indicated that the employee would have made an election of remedies at that time.

Mr. Bob Pitts (Council Member Employer Representative) **moved that the bill be recommended** by the Council for approval, which was **seconded** by Mr. Tony Farmer (Council Member Employee Representative). Chairman Lillard called for the roll, first stating that the Chair is a voting member for procedural and administrative matters only, so would not be voting on this substantive motion. Roll resulted in a **unanimous vote to recommend the bill and the motion was adopted.**

**Report of the Advisory Council on Workers' Compensation
To the Senate Commerce and Labor Committee**

Jack Johnson, Chair
Mark Green, 1st Vice-Chair
Charlotte Burks, 2nd Vice-Chair

Members

Dolores Gresham	Steve Southerland
Reginald Tate	Jim Tracy
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The Advisory Council on Workers' Compensation met on February 27, 2014 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) business 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 the February 27, 2014 Council meeting for your review and information.

Three workers' compensation bills were on the Council's February 27, 2014 agenda. They were:

SB1645- HB1440 (Leader Norris/Leader McCormick)

Presentation of the bill was made by Mr. Josh Baker, Administrative Attorney and Legislative Liaison, Division of Workers' Compensation, after which Mr. Tony Farmer (Employee Representative) asked Mr. Baker to expound on Section 7.

Mr. Baker explained that the proposed bill's Section 7 would revise T.C.A. §50-6-242. In the present law, if an employee is unable to return to work at 100% of their pre-injury employment, and they meet 3 of 4 criteria, they are entitled to extended benefits. The proposed revision would change the initial qualifying event to one of an employee who is unable to return to work and cannot find employment at 66 2/3rds% of their pre-injury wage. Additionally, the authorized treating physician has certified that the employee, due to their injury, could never go back to performing their pre-injury occupation. Lastly, Mr. Baker indicated that this section is rarely used now and would probably be rarely used under the revision as well.

Mr. Farmer inquired if the Division of Workers' Compensation had drafted this bill to which Mr. Baker replied in the affirmative. He further inquired as to the logic behind the 66 2/3% and whether it was based on any statistical foundation or any empirical foundation or rather arbitrarily chosen.

Mr. Baker indicated that there was not a statistical study that showed that someone who loses a third of their income is going to be affected, but logically, it has a large effect, so that number was chosen.

Mr. Farmer then asked whether there was an indication that the 66 2/3% somehow represents a portion of those persons injured so seriously that they only go back to a job that pays above or below that 66 2/3%. He inquired if it was based on any fact, to which Mr. Baker responded that he was not aware of any study that showed such a fact.

Mr. Farmer (Employee Representative) inquired as to whether this was a compromise or a bargained number between competing interests. He indicated that he was having a hard time understanding since "the concept of being unable to return to your former employment has been a foundation of the workers' compensation statute for decades and now, all of a sudden, it's not able to return to your former employment or to any employment where the wage is 2/3rds of what you were earning. I don't see any rational basis for that and I'm not hearing you provide any demonstration that there's any rational basis other than that's what somebody agreed upon."

Mr. Baker indicated that, to his knowledge, it was not a compromise number.

Mr. Farmer pointed out that, under the proposed bill, if an injured worker went back to work and was only able to work at a job that generated an income that was equal to 67% of what they earned before their injury, they would not be entitled to any of the additional benefits. He further indicated that this is a class of the most seriously injured Tennessee workers who are unable to return to work, who are not permanently and totally disabled, that is, unable to return to work at a wage equal to 66 2/3% of what they earned prior to their injury or more."

Mr. Baker agreed that he was correct on both counts.

Mr. Gregg Ramos (Attorney Representative) inquired of Mr. Baker as to what had brought this about. "The reason I'm asking is that you, yourself, mentioned a few minutes ago that there aren't a whole lot of situations that have come up where even 3 of the 4 factors that were applicable under the prior law were used. I'm just wondering what is it that has happened now or recently or in the recent past that has motivated the need for this initial threshold to be lowered from 100% of wages to 2/3 of wages. In other words, it used to be if the employee had not returned to his pre-injury job, making the same wages that he was making before. Now we're talking about if the employee hasn't returned to any work which pays him at least 2/3 of what he was making before this threshold kicks in – what is it that brought it about if it wasn't used very much under old law. That's my question."

Mr. Baker indicated that the Division of Workers' Compensation was attempting to address proper benefits for people with vocational disability but not a severe impairment rating.

Mr. Ramos asked how often the old system didn't adequately address that situation and Mr. Baker indicated that all that exists on that provision of the law (T.C.A. §50-6-242) is appellate court decisions where we can see on a limited basis how often it has been used.

Mr. Ramos continued, "I guess one of the frustrations I have, not only with workers' compensation legislation, but any legislation, is where you try to provide a solution to a problem that may not exist and that is what I'm concerned with here."

Mr. Baker indicated that it was a very small class of individuals being discussed.

Mr. Tony Farmer (Employee Representative) pointed out that the proposed 66 2/3% rather than 100% language does not limit the availability of extended benefits based on workers who have lost the ability to perform their former employment, but rather on arbitrary figures.

Mr. Baker explained that someone who is making 99% of their wages are very close to what they were making pre-injury, so that's not something that would look as inequitable.

Mr. Farmer: "As someone making 67%?"

Mr. Baker: "I see your point."

Mr. Bob Pitts (Employer Representative) stated that there is a group of people that fall under workers' compensation that were not addressed under the old system to the degree that many people thought it should be and, even with the new proposal, there are still concerns from some segments from business and some segments of the employee community. He explained that his frustration is that no one seems to be able to get their arms around this subject, be able to quantify it and be able to address it to where there's a reasonable general level of satisfaction. "I've been through the last four reforms and the last 3-4 weeks has been as frustrating as a major reform effort. The bill, as presented, has raised consternation in some segments of the business community who believe that, as worded, it opens the door too wide, lets too many people in, and they are scared to death that there are going to be an incredible amount of appeals to come out of the standard application of the law into this special exception provision. On the other side, the employee community is frustrated as they, too, believe that there's this" . . . small group that ought to be well compensated, all resulting in a standoff.

Mr. Pitts continued to explain the time delay in that he had requested a one week delay which turned into three due to a lack of voting quorum of the Council, he reminded all that the Council is advisory, and that "the legislature has been kind enough to allow us an opportunity to place our comments with them before they consider bills". He indicated that he would like to see some action. He continued by stating that he found it inconceivable that a group of intelligent people couldn't get their arms around and properly define this group, and reasonably deal with a proper benefit level. He included that the legislature should be made aware that it is the wish of the Advisory Council that this bill be reviewed before the next legislative session and again at the subsequent session. That this is, in fact, either a small number, which, if it is, probably means we need reconsideration of the benefit level. If it's a runaway, it needs to be reined in, but in either respect it needs to be addressed.

Mr. Bob Pitts (Employer Representative) indicated that there seemed to be satisfaction with all sections of the bill except section 7, therefore, he made a **motion for recommendation including section 7, with the proviso that the concerns expressed by the Council are specifically shared with the members of the legislature.** **Mr. Gary Selvy (Employer Representative)** seconded the motion, thanked Abbie Hudgens for her good work and commented that the bill's intention is good, that he agrees with a motion to move it into the legislative debate process. "I want to make sure that included in that is

comments regarding some of the concerns specific to section 7 in that it is problematic to, at least the small business community and I want to make sure that we are on record with that and hopefully we'll have an opportunity to debate that in committee."

Mr. Tony Farmer (Employee Representative): "I have been a member of the Advisory Council on the employee side for 16 years and this is the first time in 16 years when the employees were completely excluded from any discussions or negotiations or preparations for this legislation." Very specifically, a year ago, when the Governor's 2013 Reform Act was presented to this Advisory Council after extended discussions, the employee voting members, at my recommendation, voted in favor of the 2013 Reform act because it had been represented to me that this very issue would be worked on jointly by all interested parties so that this year a provision could be brought forth that would protect this very class of injured workers.

Mr. Farmer continued: "I do not recognize the validity of a process of developing legislation to protect injured workers that excludes the injured workers' representatives and I will tell you, no [employee representative] voting member of this Council has been included in those discussions or negotiations since June of 2013 . . . none . . . I have worked with three Governors' administrations, I have worked as a member of this Council as an employee representative on every major workers' compensation reform that has taken place and employee representatives have participated in each of those reforms until this year and it is a serious concern of employee representatives who, in fact, represent injured workers." We hear a term frequently in the workers' compensation forums referring to the parties of interest or those people most affected by workers' compensation changes, and it is troublesome to me that the preparation and negotiation of legislation this important would not include representatives of the injured worker. I hope the legislature expresses and at least acknowledges the concerns that the employee representatives have that they have been excluded from the process of negotiation of legislation as important as this. It, in fact, impacts the most seriously injured workers who are unable to return to work and in this process they did not have a representative."

Mr. Kerry Dove (Employer Representative) took the opportunity to thank Abbie Hudgens and her staff for their hard work. "We know this has been a tough road and we think that the bill is good in intent and we think you guys have done a good job, but we do think there are some problems with section 7. It's problematic for some of the folks that I represent, however, we are very appreciative for all of the work that you've done on this."

A unanimous vote resulted in the adoption of the motion to recommend the bill with extensive comment from all parties (above) regarding their concerns surrounding section 7.

SB2088- HB1786 with amendment (Pody/Beavers)

Representative Mark Pody explained that he wanted to accomplish two things with the bill. First, to codify language concerning the ombudsman so that any party will have assistance if they do not have an attorney representing them, and second, that the appointment of Workers' Compensation Appeals Judges, which now is listed as entirely by the Governor, be revised, upon the expiration of their first terms, to appointment, on a rotating basis, between the Speaker of the Senate, the Speaker of the House and the Administration/Governor from that point forward.

Mr. Bob Pitts (Employer Representative) clarified that the amendment was moving along with the bill. Mr. Pitts stated that he was reluctant to attempt to tell the General Assembly how Administrative Law Judge's should be appointed. However, he did state his belief that administrative judges operating within the Executive Branch are different from court system judges and the appointment process. The important issue in this reform effort is trying to have judges that conform to the system, who judge based on law and policy and rules that are established. He suggested that those appointment powers remain in the hands of the Governor. Administrative judges are different policy-wise than court judges and we need a fair and balanced court to hear cases under an administrative system. **Mr. Pitts (Employer Representative) moved to oppose** the bill unless that provision was removed since he believed that portion to be bad policy. The motion was **seconded by Mr. Kerry Dove (Employer Representative)**. The roll of the Council included three abstentions, so the bill left the Council **without recommendation, but with the comments of the members**. Mr. Pitts continued by stating that was how he believed public policy should be on administrative judges. He thanked Representative Pody for his courtesy and explained that, although there would be no recommendation, which was not harmful to the bill, the committee would see the comments.

SB2251- HB2105 with amendment (Massey/Haynes).

Mr. Bob Pitts (Employer Representative) moved that the bill be recommended. He indicated that it was his understanding that, as amended, the bill was acceptable to all parties. The issue of contention was not one involving workers' compensation, but, rather, where the dispute regarding the contract would be heard and the two choices provided were acceptable. **Seconded by Mr. Kerry Dove (Employer Representative).** A call of the Council resulted in **unanimous vote to recommend the bill for approval.**

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

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

Jack Johnson, Chair
Mark Green, 1st Vice-Chair
Jim Tracy, 2nd 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.

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

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.**

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

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**.

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

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**.

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

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

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

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

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

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.**

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

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

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

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.

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

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.**

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

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.**

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

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**.

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

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

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

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.**