

**TENNESSEE ADVISORY COUNCIL ON WORKERS' COMPENSATION MINUTES**  
**Legislative Plaza, Room 30**  
**Nashville, Tennessee**  
**Friday, April 8, 2011**  
**10:00 a.m.**

**Members Present:**

Voting Members:

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

Anthony Farmer – via telephone

Jack Gatlin – via telephone

Jerry Lee

Bob Pitts

Dan Pohlgeers

Gary Selvy

Non-Voting Members:

Kitty Boyte

Bruce Fox – via telephone

Keith Graves

Stephen Johnson

Sam Murrell – via telephone

Gregg Ramos

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

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

Lynn Ivanick, Administrator

**Also Present:**

Steve Curry, Assistant Treasurer for Programs, Treasury Department

Janice Cunningham, Chief of Staff, Treasury Department

Anne Adams, Administrator, Division of Claims, Treasury Department

Ben Simpson, Service Counselor, Division of Claims, Treasury Department

And other persons and interested parties

**Call to Order**

Chairman David Lillard called the meeting to order at 10:05 a.m. in Room 30, Legislative Plaza; Nashville, Tennessee, and reminded everyone to use their microphones as the meeting was being videotaped and several members were participating via telephone. All voting members were present either in person or via phone. Chairman Lillard declared a quorum. He further explained that roll would be called for all votes including a vote regarding the allowance of participation by telephone itself. The resolution regarding

allowance of member presence via telephone was read, **a motion** was made by Mr. Pitts that the Council be permitted to move forward with its meeting with members present via telephone, **seconded** by Mr. Lee, a roll call was taken and a unanimous vote in favor of **adopting the motion** resulted.

## **New Business**

### **SB 2019 (Stewart)/HB 1045 (Matheny)**

House Speaker Pro Tempore Matheny presented his bill and informed that there were two amendments. He indicated that Amendment 00588133 was being withdrawn, but would be spoken to by two guests today for future discussion purposes. Amendment 00593596, having to do with pain management, was handed out or e-mailed to participants for their review during the meeting and briefly discussed as well.

Attorney Richard Clark with the employer firm of Morgan & Akins addressed the Council about the appeal of Orders concerning open medical treatment in previously settled cases. He indicated that Employers and Insurance Carriers would prefer a de novo review of such Department of Labor Orders rather than judicial review of the record as the law now permits.

Attorney Richard Murrell of the TN Department of Labor indicated that some attorney's take advantage of processes available to produce transcripts of DOL hearings for review which obviates any need for a de novo review at the judicial level. Presently, judicial review is available on the record under the UAPA and each attorney hearing these matters for the DOL is a discovery attorney. Mr. Murrell indicated that the amendment's language calling for a de novo review diminishes the value of having the administrative process. He suggested there is no point in spending the resources at the administrative level if they're going to be duplicated in their entirety at the judicial level.

Attorney Mike Morgan, of Morgan & Akins, spoke to the same issue of appeal of an Order of medical treatment and indicated that his clients believe that the present law doesn't provide for due process from a procedural or substantive standpoint because, if an employee chooses to use the administrative route, then all the parties are stuck with an appeal only in the administrative system. He indicated that the proposed language would allow either party to pursue an appeal of the administrative system's Order to the court system.

Mr. Gregg Ramos held an exchange with Mr. Morgan wherein they indicated that the proposed language provides a 10 day expedited appeal window on the very narrow issue of compensability.

Mr. Bob Pitts inquired if there is a way to deal with these concerns by addressing the administrative system instead of going back to Court, which he considers a reversion in

the progress made by this Council over the last few years and contrary to what is taking place nationwide.

Speaker Matheny explained that the second amendment (#00593596) related to pain management. It specifically requires a drug test every 90 days while an injured worker is in a pain management program. The purpose is to prevent abuse, and drug testing violations would result in an individual's termination from the program.

Chairman Lillard pointed out that the Council had previously voted not to recommend passage of the base bill, but had not voted on either amendment and Speaker Matheny expressed that he intended to present the amendment to the Committees next week, although he wasn't expecting a vote today from the Council.

Ms. Kitty Boyte expressed her concern that abuse of pain management is a huge problem in Tennessee and particularly in the Workers' Compensation system and suggested testimony from pain management specialists to assist the legislators.

Ms. Teresa Bullington, Assistant Administrator for the Benefit Review Section of DOL indicated that there is some need for regulation since, some pain managers have testing provisions in place and others do not, resulting in mixed results. She additionally addressed the related problem the DOL has been experiencing. Once a pain manager refuses to see a patient/injured worker because of apparent abuse or lack of proper use of prescribed drugs, that worker is often left without medical treatment to which they are entitled under the statute.

Dr. Sam Murrell agreed that once noncompliance is established by a patient, it is very difficult, if not impossible, to find a physician who will agree to treat them. To which, Ms. Bullington and others discussed that there was no provision in the amendment nor elsewhere for getting such a patient back on track for possible non-narcotic or other required medical treatment.

Mr. Farmer inquired if the intent is to discontinue all workers' compensation benefits, and not just the pain management treatment, to which Speaker Matheny indicated all benefits would be suspended under the current language. It was discussed again that there was no provision for getting the patient/injured worker's benefits reinstated, or what appeal process might be available regarding any such unilateral suspension of benefits. Ms. Boyte agreed that none of the parties involved knew what to do with these workers who failed out of such programs. Rep. Matheny indicated he was looking for a long term fix and proper solution to the problem. Mr. Pitts indicated that it was indeed an important issue and all parties needed to participate. All seemed to be in agreement on that point.

### **SB 1550 (Ketron)/HB 2030 (Curtiss)**

Representative Curtiss presented via telephone, the different sections of his amendment which he had previously discussed in person at some length at Council's last meeting and

was now in final form before the Council Members. Some corrections were made and terms defined by Ms. Emily Urban, attorney for the legislature and Mr. Mike Shinnick with the Department of Commerce and Insurance.

Mr. Pitts inquired as to Representative Pitts' similar bill and whether it was encompassed in Representative Curtiss' bill, to which Representative Curtiss indicated that discussion between the Representatives had taken place and they were in agreement that Rep. Pitts' bill would be "held" if Rep. Curtiss' bill made it through Committee next week. After which Mr. Pitts **moved for recommendation** of the bill's language by the Council, and Mr. Lee **seconded**. Chairman Lillard called for a roll of the six voting members and the motion was **unanimously adopted and the bill recommended**.

#### **SB 0415 (Barnes)/HB 0163 (Pitts)**

This is the bill just referenced above and Representative Pitts expressed, via telephone, that Rep. Curtiss' had appropriately articulated their agreement that this bill would be taken off notice if Rep. Curtiss' bill survived Committee since Rep. Pitts' bill was encompassed in SB1550/HB2030, but Rep. Pitts requested a vote of the Council today in case SB1550 was held up for whatever reason.

Mr. Pitts **moved** that the Council **recommend** the bill, Mr. Lee **seconded** the motion, Chairman Lillard called for a roll and the vote **was unanimous for the council to recommend passage**.

#### **SB 1839 (Herron)/HB 0581 (McDaniel)**

The bill regarding religious exemption was briefly outlined and Ms. Boyte explained previous concerns of the Council regarding past years' discussions on similar bills to be the protection of injured workers' beneficiaries under the death statute. Ms. Boyte inquired as to whether the language had been changed to address those concerns, to which Mr. Pitts, Mr. Henningsen and others indicated that it had not to their knowledge.

Mr. Farmer expressed his concern that the bill would create an opportunity for manipulation and cost shifting to already overburdened State and Federal budgets, that which should fall under the workers' compensation system., and would be irresponsible on the part of the Council to recommend.

Mr. Lee moved for an **unfavorable recommendation** from the Council. Mr. Farmer **seconded** that motion. The roll call resulted in a **unanimous recommendation against** adoption of the bill.

**SB 0932 (Norris)/HB 1501 (Eldridge)**

This is a rather large bill with several subject matters still under amendment at the time of this meeting. Mr. Bradley Jackson, of the Chamber of Commerce & Industry was present to speak on the bill, however. Mr. Jackson explained that it was a work in progress because all sides were participating in an attempt to reach an acceptable bill for all interested parties. Mr. Jackson explained that there are three major provisions where improvements in the cost of the administrative process are being addressed in the bill.

One is the issue of the settlement of future medicals, which the 2004 Reform prohibits, but was previously permitted.

The second provision being addressed has to do with a subject matter termed the Overstreet issue having to do with the sharing of medical information and privacy rights. The law put into effect last year to deal with this Supreme Court 2009 decision, has proven to be cumbersome and the present legislation is an attempt to correct that issue.

The third provision addressed is that of the definition of "injury" itself. Other states seem to have more stringent definitions, and the goal with this language is to tie causation to a compensable injury event.

Ms. Boyte pointed out an area of specific language that didn't seem to fit categorically when referring to gradual/repetitive motion injuries and their compensability. She suggested Item 4 be part of the plain language of the bill rather than being in the list and Mr. Jackson agreed suggesting that may just be a drafting error,.

Dr. Samuel Murrell inquired as to whether the spine specifically and degenerative disease were going to be addressed in the new legislation. He indicated that physicians are now being asked to determine, in repetitive motion injury cases, whether degeneration from walking upright, or age, or the work injury is the cause of the need for medical treatment. Mr. Jackson explained that they were seeking the establishment of a proximate relationship to the job function and the injury. He agreed that it was a complex area and also pointed out that language regarding cumulative trauma was also being considered.

Dr. Keith Graves expressed his concern that listing particular diagnoses that will not be covered becomes dangerous and such decisions should be left to the discretion of the physician who knows the patient's history, etc. Mr. Jackson pointed out that studies showed that another state ended up defending numerous general liability claims when specific diseases were omitted from their workers' compensation arena and that was not a desirable outcome either as Dr. Graves was suggesting. He indicated that the bill was a work in progress and that the Sponsors have encouraged them to work on it and get it right.

## Minutes

Chairman Lillard ask for a review of the minutes of the Advisory Council's meeting of March 24, 2011. Chairman Lillard inquired as to the need for any changes, additions or for comment. There were none. Mr. Lee made a **motion to approve the minutes**. Mr. Selvy **seconded** the motion. The motion was **adopted unanimously** by a roll call vote.

## Other Business

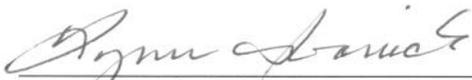
Addressing other business, Chairman Lillard referred to the future meeting date of April 18, 2011 and indicated Ms. Ivanick would be in touch with Members shortly about other required dates or arranging for a possible conference call meeting after the Treasurer's office had an opportunity to consult with the Senator and Representative's respective offices regarding timing issues of their bills.

Chairman Lillard recognized **Deputy Commissioner Bob Henningsen** who will be **retiring** April 29, thanked him for his years of service and the wealth of experience he brought to the Department of Labor and Workforce Development. Mr. Henningsen was proud to have been an integral part of the Reform of Workers' Compensation in the State of Tennessee which has saved Employers hundreds of millions of dollars since its inception. He indicated his pleasure with having been part of the organization, thanked his members who were present and thanked all for the opportunity.

Chairman Lillard commended the NCCI Commissioner McPeak quarterly report to the members for their attention.

## Adjournment

**Motion to adjourn** was made by Mr. Lee, and **seconded** by Mr. Pitts. Seeing no objection, Chairman Lillard **adjourned** the meeting at 11:40 a.m.



Lynn Ivanick, Administrator  
Advisory Council on Workers'  
Compensation



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