

*Tennessee Advisory Council
On
Workers' Compensation*

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

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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

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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.

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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.

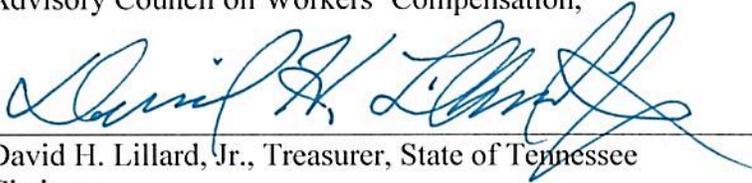
TOSHA continues to focus on the goal of reducing deaths in high-hazard industries with such programs. OSHA statistics show that weekly workplace deaths are down nationally over the past four decades from 38 a day in 1970 to 12 a day in 2012, at the same time that national employment has almost doubled.

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