

*Tennessee Advisory Council on Workers' Compensation*  
*MINUTES*  
*March 23, 2015, 10:00 a.m. Central*  
*Legislative Plaza, Room 31*  
*301 Sixth Avenue North*  
*Nashville, Tennessee*

**Members Present:**

Voting Members

Chair Designee, Christy Allen, Assistant Treasurer, Legal, Compliance & Audit

Kerry Dove

Bruce Fox

John Garrett

Bob Pitts

Gary Selvy

Paul Shaffer

Non-Voting Members

John Harris on phone

Abbie Hudgens

Lynn Lawyer

Jerry Mayo

Gregg Ramos

Mike Shinnick

Representative Jimmy Eldridge

Lynn Schroeder, Administrator

The Chair, Assistant Treasurer, Ms. Christy Allen, called the meeting to Order at 10:03 a.m. After roll was called, she noted that a physical quorum was present and that at least one non-voting member was present on the phone. She expressed the regrets of the Treasurer in not being able to attend as he was in Washington D.C. presiding over a National Association of State Treasurers Legislative Conference.

The Chair indicated that the order of business would be revised by moving the 3<sup>rd</sup> bill on the agenda to 2<sup>nd</sup>. She called the next item on the agenda which was the approval of the Minutes of the Council's March 16, 2015 meeting. Mr. Gary Selvy **moved** to approve the minutes, **seconded** by Mr. Paul Shaffer. A requested clarification to the minutes was made by Mr. Bob Pitts of Mr. Bruce Fox's comment concerning the Firefighters' Amendment to indicate that the concern of the employer representatives was the application of a forty hour wage to part-time volunteers. Mr. Fox had no objection to the clarification but pointed out that if a new employee is injured on the first day of a job, the present methodology utilized is to take the average weekly wage for a similarly situated employee and apply it to that person. Mr. Fox believed that was what the legislature was trying to accomplish by the proposed bill. The **motion was amended** to so reflect and **seconded to approve the minutes as so amended** and a roll call resulted in a **unanimous vote approving the amended minutes** of the Council's March 16, 2015 meeting.

The Chair called the next item on the agenda, **HB0589/SB1061 with Amendment** which was presented by Representative Parkinson who indicated that the amendment made the bill applicable to public employees only. He explained that the bill made provisions for those employees who are outside the drug free workplace act and outside the safety sensitive positions, but who have a drug test come back positive for drugs that were legally prescribed and ingested and which are not affecting the present condition of the employee (not under the influence in the workplace).

Council member Gregg Ramos inquired as to whether the statute would only apply to prescribed and not recreational drugs, to which Representative Parkinson responded in the affirmative. He gave the example of a person who may have used medical marijuana in a state where it is legal, via prescription, then traveled to work in Tennessee. The bill would prevent an employer from taking adverse action due to the residual amounts left in the system which do not cause the person to be under the influence while performing their job duties.

Council member Mr. Pitts inquired of the Administrator of the Division of Workers' Compensation, from an enforcement perspective, if there would be any way of knowing if the person ingested it from a prescription or had acquired it elsewhere and whether that information would be of any value. Ms. Hudgens suggested that it may set up a new area of litigation between employee and employer since they would foreseeably argue about whether the circumstances of an injury actually could be traced to the presence of marijuana or if it was just another factor. She indicated that it was hard to see that this bill would provide any meaningful relief.

Mr. Shaffer **moved** to recommend approval, but the motion failed for lack of a second. After further detailed discussion, Mr. Pitts, **moved** for a negative recommendation. **Seconded** by Mr. Selvy, a roll resulted in a unanimous vote **not to recommend approval**.

The Chair called the next item on the agenda, that being **HB1073/SB1328**, which proposed 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 requirement of itemized reporting on each individual claim under the Fair Disclosure of State Funded Payments for Pharmacists' Act.

Representative Kane sent a brief summary stating that this bill was to clarify language of last year's HB1787 which passed, and which, as originally drafted, was never meant to cover workers' compensation. The language indicated that anything as a result of accidents would not be included, but it also stated that if you were taking state funds you were subject to the requirements. Mr. Pitts explained that the proposed bill would prevent conflicts for the State in the operation of its workers' compensation system and its master contracts with pharmacy companies. He **moved** for a favorable recommendation on the bill. **Seconded** by Mr. Fox, roll resulted in a unanimous vote to **recommend approval**.

The Chair called the next item on the agenda, that being **HB0997/SB0721 with Amendment**, which 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 minimum requirements and caps per individual and occurrence. The language of the bill also proposes to establish, within the Tennessee Insurance Guarantee Association, a Tennessee Option guarantee fund as a separate account.

The Chair indicated that Senator Green had presented the Tennessee Option bill last week and discussed at some length at which time an amendment was pending and so action was deferred to this meeting which has now been received. She called for members from the audience who requested to address the Council.

Mr. Gary Moore, President of the Tennessee AFL/CIO, expressed his concern about negative impacts the proposed legislation has on employees in the original bill, as he was not in receipt of the weekend amendment. Medical expenses, death and dismemberment, permanent partial and total disability, custodial care, hearing aids, prosthetic devices for artificial limbs and funeral benefits were all less than under the present system. The employee has no say in their care, but the employer alone determines what is reasonable for that employee. There is no type of regulatory authority. The Governor went through a comprehensive Workers' Compensation Reform in 2013, and there is no data out yet to reflect how the system is working, so Mr. Moore expressed a need to wait to see how it functions.

Mr. Trey Gillespie, Senior Workers' Compensation Director for Property Casualty Insurers Association, indicated that his national trade association with over 1,000 members nationwide writes approximately 38% of the private workers' compensation insurance market. He presented a written handout raising issues about the Tennessee Option essentially turning into an ERISA program and the consequences that would have on the ability of Tennessee to oversee its workers' compensation injuries.

He indicated that the proposed Option violates the grand bargain that has been in place for workers' compensation for over 100 years. That grand bargain identifies an agreement between the legislature, employers, and employees that a no-fault system would be put into place that would provide limited, but certain, benefits in exchange for tort liability protection for the employer. The key to this bargain is the legislature that sets the benefits and all the conditions and limitations on eligibility to those benefits and the legislature also decides on what's covered by workers' compensation. This bill would remove that part of the bargain. Under this bill, the employer can unilaterally set the level of benefits, all the conditions and limitations on the benefits, set what the coverages are, while providing no meaningful dispute resolution system for the injured worker.

The state previously hired an independent consultant to look at the advisability of Opt Out and Work Comp Strategy's (WCS's) detailed report concluded that there would be an adverse impact on employee benefits.

Key to the proposed bill is the handling of the medical expenses. It only pays for "covered" medical expenses, and the employer can decide what medical expenses it will totally exclude. Consequently, the employee is liable for all medical expenses not covered by the plan and all

expenses in excess of the \$500,000 limit, all medical expenses incurred more than 156 weeks after the injury, and all medical expense incurred after the employer terminates medical benefits.

Mr. Gillespie stated that one of the extreme cruelties that shows up in this bill is that once the employer has been certified to be a qualified employer, open claims in the workers' compensation system are removed from government oversight and placed under the employer benefit plan. There is no provision for the employer to provide rehabilitation services. There is some indication that temporary total disability might be enhanced, but those benefits would be subject to payroll taxes and consequently the net to the injured worker is less than under the current system. The duration of temporary total benefits is limited to 156 weeks, which it is not under the current system. This undercompensates injured workers' who are part of a catastrophic event. Workers' compensation cannot exclude terrorist risks. 9-11 benefits were paid, for example. The employer under the Opt Out could exclude coverage for injuries from terrorist acts.

The death benefit is less. There is a chance ERISA would prevent the State from increasing the funeral benefit. Permanent partial and all forms of permanent disability are discretionary benefits. The employer sets all the terms and conditions, and employees have to sign an arbitration agreement to remain employed. You have to be an employee to get benefits. If a person is terminated after sustaining that injury, this may result in the loss of entitlement to those benefits. Employment at will states can terminate for good reason, bad reason or no reason.

There are no due process protections for dispute resolutions. If there is a dispute, the matter goes to binding arbitration. The employer may be permitted to select the arbitrator, and in some cases the employee must bear the cost of half of the arbitration and if they do not pay the expenses up front, they lose the right to arbitration. The arbitration may take place at a location that is burdensome for the employee, which discourages the ability to pursue dispute resolution even when there is a bona fide dispute. The employer has full authority and right to change the plan at any time for any reason. The rules can change at any time Mr. Gillespie also explained that there is no data reporting and no oversight.

WCS not only talked about the damage to the employees benefits, but also potential damage to employers left in the system. By and large, the opt out system will be very attractive to large employers, but the system would lose the impact of their robust safety plans on workers' compensation rates, Social Security Benefits and TennCare. WCS expressed further concern that the opt out system would undermine the workers' compensation reform. The reform should become fully matured to evaluate its impact and determine what adjustments may be needed.

Mr. Gillespie also discussed the effect of ERISA preemption. Section 514 preempts and supersedes any and all state laws insofar as they may now or hereafter relate to any employee benefit plan. The opt out bill creates an employee benefit plan by its express terms. Once an employer is certified to be a qualified employer and is subject to ERISA, there will be no option for regulatory oversight or statutory changes. Most state legislatures do not delegate what has been traditionally an area of concern for the state to the federal government, but this bill does that. It primarily mimics what was done in Texas and some of the Oklahoma bill that passed

which is under Constitutional attack. Mr. Gillespie urged the Council to not recommend this bill for approval.

Gregg Ramos inquired if the Texas employee satisfaction study cited by Senator Green in the previous meeting has been received by the Council, to which Ms. Schroeder indicated it had not.

Mr. Brian Bivens, government relations consultant for the Association of Responsible Alternatives to Workers' Compensation, stated that he understands that change is hard, but that there have been a number of Tennessee employers that have successfully run plans in Texas for years with better medical outcomes, higher employee satisfaction and lower cost. Mr. Mayo expressed his confusion as to how Mr. Bivens could say there would be better medical outcomes. Mr. Bivens indicated that since there is no Tennessee Option yet, statistical data from Texas would need to be analyzed; Mr. Mayo indicated this information is not available, and Mr. Bivens offered to provide it. Mr. Mayo asked why it is proposed to reduce benefits for employees. Mr. Bivens deferred to the sponsors.

Mr. John Peeler, president of Tennessee Association of Justice, trial lawyer and pharmacist, asked that the Council not allow this bill to become law and gave an example of one client who lived in Dickson. He was military, came out and became a welder, then a welding inspector. He was working in Memphis, fell twenty feet and severed his spine. He immediately incurred thousands of dollars of bills including spine surgery. The final result was total loss of function in the lower half of his body. His bills went over a million dollars, his hardware failed in his back and he had to have a second surgery. Unrelenting pain eventually led to surgery to cauterize all nerves in his back leaving him a paraplegic. He could no longer work; his bills approached two million dollars and he finally reached maximum medical improvement at six years. This client would have lost his house; his family vehicle, and his children would not have been able to go to school if the proposed bill was in effect at the time he was injured. Eventually, he would have found his way to get medical treatment, and the State of Tennessee would have picked up a portion of that cost.

Council member, Mr. Dove, expressed his appreciation for all the comments from both sides. He reiterated his respect for the high integrity businesses that support the bill and understood the speakers and the administration's point of view as well. He reminded all in summation that the Council had not received the requested information regarding Texas and Oklahoma on their performance, that the lengthy amendment was late in arriving, that significant changes had been made that very morning, that this was a serious bill, that the results of the 2013 Reform were not yet known, although he pointed out that this bill is independent of that in some ways. He continued that, given the seriousness and gravity of the bill, more information needs to be provided the Council regarding its consequences, not only administratively, but also to the citizens of our State and the workers of our state. He expressed concern that the Council could not make an informed decision without that information. He **moved** that the administration, public policy makers, regulatory officials, and interested parties engage a respected independent consultant to study this bill and present data to enable the Council to make an informed decision. Also, to consider if improvements can be incorporated in the existing workers' compensation act so to satisfy the needs of those high performing, high integrity

companies that have demonstrated that they are qualified to run a responsible program.

The Chair called for a second. Paul Shaffer **seconded**. Discussion from the Council continued. Mr. Mayo suggested that a consultant is not needed, but rather, the Council should consider having the bill mirror the workers' compensation act that is already in place. He further indicated that there are still issues on the Guaranty Fund that have not been addressed yet.

Mr. Pitts made an observation that the Council could leave up to the groups mentioned the liberty to decide if they want to hire a consultant, which might be offered as part of the recommendation, but missing from the motion is where the Council is with respect to the bill going forward to the standing committees for consideration this week.

Mr. Dove agreed that the parties listed should determine if they would like to go forward with a consultant and that the Council should not recommend the bill go forward at this time. This was considered an **amendment** to his motion, which **amendment** was **seconded** by Mr. Shaffer.

More discussion ensued when Mr. John Garrett solicited fellow Council member and Workers' Compensation Division Administrator Hudgens' comments on the bill.

Ms. Hudgens expressed to Senator Green and the sponsors that she very much appreciated the amendments presented Friday afternoon, as they came closer to, but were still not on par with what we provide in state law. Beyond that she expressed other concerns. The first is that the bill divides the current pool of employees into those who are eligible for benefits and protections under state law and those who are not. A concern is the fairness of what happens to those in that latter group, the employees of employers who have opted out. There are no protections or processes available from the State of Tennessee to help these employees if their employer is not fair in their dealings. The sponsors of the bill are responsible employers, the backbone of employment opportunities in Tennessee. However, this bill applies to every employer who becomes qualified, and the qualifications have nothing to do with how well they may treat their employees. Ms. Hudgens expressed concern for the need to protect all employees, not just those employees of those who decide to stay under the workers' compensation state law. She was concerned that employees' only option could be to commence a costly ERISA lawsuit which has a very low probability of success and an even lower probability of finding an attorney to represent them.

The workers' compensation system needs to balance the interest of employers and employees. That was one of the primary objectives of the 2013 Reform. The 2013 Reform was a reflection of the feeling that benefits had swung too far in the direction of employees and employers were interested in a more equitable spot. This bill seems to be moving in the opposite direction. There is concern that it will do a great deal of harm and what the State needs to do first of all, in all cases, is try not to do harm.

Mr. Ramos expressed appreciation for all the comments, and agreed with the recommendation that this bill not move forward.

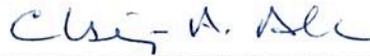
There was a unanimous vote **not to recommend** the bill.

Mr. Pitts **moved** that the paper documents presented by the speakers be added to the Council's report to the legislative Senate and House Committees. He reminded all that there had been no assessment of the possible transfer of a legitimate injured worker's financial treatment to Social Security Disability, Medicare and TennCare. He addressed the regulators in the room, reminding them that the Tennessee Division of Workers' Compensation and the Department of Commerce and Insurance both maintain serious concerns about this bill. The motion to add the paper documents was **seconded** by Mr. Fox, and resulted in a **unanimous vote to add the documents to the reports** to the Committees.

Chairman Allen called for any other business to come before the Council, and, seeing none, a **motion** to adjourn was made by Mr. Pitts, **seconded** by Mr. Fox, and the Council was **adjourned** at 11:25 a.m.



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