

Minutes

*Tennessee Advisory Council on Workers' Compensation
Monday, February 22, 2016 at 11:00 a.m. Central
Legislative Plaza, Room 29
301 Sixth Avenue North
Nashville, Tennessee 37243*

Members Present:

Voting Members

Chairman David H. Lillard, Jr., State Treasurer

Kerry Dove

Bruce Fox

John Garrett – on telephone

Bob Pitts

Gary Selvy – on telephone

Paul Shaffer

Non-Voting Members

Jason Denton

Abbie Hudgens

John Harris – on telephone

Sam Murrell – on telephone

Gregg Ramos

Mike Shinnick

Representative Eldridge

Lynn Schroeder, Administrator

The Chair, State Treasurer David H Lillard, Jr. called the meeting to Order at approximately 11:00 a.m. Central and after the roll, noted that a physical quorum existed as well as there being members participating by telephone. He turned to the first item on the agenda which was the approval of the minutes of the Advisory Council's February 18, 2016 meeting. Council member Mr. Kerry Dove **moved** for approval, Council member Mr. Paul Shaffer **seconded** and a voice vote resulted in a **unanimous vote to approve**.

The Chair then called the first item under new business on the agenda, **HB 1720 / SB 1758 AMD 12573** (White M/Green). Council member Dr. Sam Murrell, III, indicated that, while he was happy that there is a bill addressing the issues of paying providers, he had reservations about the Amendment 12573 which he felt essentially removed the specific mandatory penalties of the original proposed bill and reverted back to the statutory penalties already in place and not

being enforced. Additionally, the amendment would remove the potential revenue which would have been produced as outlined in the Fiscal Note to the original bill. Not only does it concern him because the provider is not given payment as due under the fee schedule, but also it takes what was a fiscally neutral bill and essentially removes the pay for the bill, namely the penalty. Dr. Murrell requested that his comments be included along with any recommendation to which the Chair indicated they would and thanked him.

Mr. Bruce Fox **moved** for recommendation that the bill be approved with the amendment. Mr. Kerry Dove **seconded** the motion, which resulted in a **unanimous recommendation for passage of the amended bill** with the comments attached.

The Chair then called the next item on the agenda, that being **HB 1869 / SB 1706** (Farmer/Gardenhire) which he indicated was **merged by an amendment with HB 2416 / SB 2582** (Lynn/Norris) which is the last item on the agenda. There is no drafting code at this time, but the amendment is 2.5 pages long and all members have a copy of it. The Chair called for any discussion on the two bills, as amended, and noted for the record that the amendment is labeled **House Consumer & Employee Affairs Subcommittee 1, Amendment 1 to HB 2416** sponsored by Representative Lynn. Mr. Bruce Fox informed the Council that both sides that had issues with this bill merged the two and reached an agreement. The substantive changes are that the notice provision has been reduced from 30 days to 15 days and that reasonable attorney's fees may be awarded under section B when the employer wrongfully denies benefits. He suggested as a housecleaning matter, that under Section 3(d)(1)(B) of the Amendment which starts with the sunset provision should be reversed, as it would make more sense that way, to show then that what is above it is what is being sunsetted, not the previous portion of the bill. The Chair clarified that Mr. Fox was reversing the positioning of the provisions of 3(d)(1)(B)(1) and 3(d)(1)(B)(2). Mr. Fox responded affirmatively, that it would clean it up and make it more comprehensible for those who were not present while it was discussed or tried to articulate the intent. The intent is only to sunset that section of 3(d)(1)(B) that deals with attorney's fees, not the entire bill. The Chair called for any other discussion on the bills as amended. Mr. Pitts **moved** the amended bill, **seconded** by Mr. Fox, a roll vote resulted in a **unanimous recommendation for passage as amended.**

The Chair called the next bill **HB 2194 / SB 2580** (Coley/Norris) which calls for the apportionment of fault by the Courts in workers' compensation cases wherein there exists third party liability and the potential for employer subrogation recovery. The bill was summarized by Mr. Jim Summers, employer attorney from Memphis who indicated that in 1992, comparative fault became the law in Tennessee, then anomalies occurred from that point forward, and the law at this point results in a third party possibly being held 100% liable even if they are only 1% liable and the employer is 99% at fault. He indicated that the Tennessee Supreme Court has suggested the legislature look at third party allocation and do two things: #1, If an employee sues a third party, that third party should be able to allege comparative fault against the employer for its portion of fault, and #2, to make it fair, reduce, to the extent of the employer's

negligence, their right to subrogate against the employee for whatever money is received. He believes that from a policy standpoint, it makes it fair, as someone should not pay a greater amount than that for which they are responsible.

The proposed bill takes the existing workers' compensation statute (T.C.A. § 50-6-112) and adds two phrases, one that says an allocation of fault is authorized, and the employer's lien is reduced to the extent the employer is found at fault. Two years ago similar legislation was introduced but did not pass. Some of the issues that were raised were that it would change the no fault system as far as the employee is concerned. Mr. Summers suggested this only applies if the employee is injured and sues a third party, which is a different situation. Arguments against it are that it will make it harder for the employer and harder for the Third Party Administrator, and it will make it harder to resolve cases because now the employer has to be concerned about whether or not it is going to get its entire lien. He stated that he finds that when a third party is sued, they look at the employee to see if there is more than 50% fault to deny recovery. It is a roll of the dice if a jury is going to find sufficient fault to deny recovery. He believes this just adds another component and does not affect fault in the workers' compensation arena. He did indicate this bill would hold people accountable.

The Chair asked if there were any questions of Mr. Summers. Mr. Fox asked if the fault of the employer reduced the recovery to the injured employee. Mr. Summers responded affirmatively as the employee would only get a reduced amount. Mr. Fox asked if the fault of the employee was not imputed to the employer, to which Mr. Summers responded in the negative, stating that an individual's fault is his fault. Mr. Fox responded that if the employee's fault is stacked upon the employer's fault and together they were over 50%, there would be no recovery from the third party. Mr. Summers did not think that was the way the bill was intended to be written. Mr. Fox indicated that, regardless of intent, that would be the result. Mr. Fox indicated that under the comparative fault scheme, the injured employee who may have a third party claim may not recover simply because the employer's fault is going to take them over 50%, but indicated that he needed time to review it before making a final decision.

Mr. Gregg Ramos indicated that he had the same concerns as Mr. Fox and proffered the following hypothetical: An employee brings a lawsuit for a car accident against a third party, employee is determined to be 10% at fault, third party brings in the employer who is determined to be 41% at fault bringing it to a total of 51%. Mr. Summers is saying the faults are independent, so do not defeat the employee's claim, but the third party will only be paying 49%, which is its fault portion only. If the plaintiff himself is 51% or greater, however, they lose anyway. The chair thanked Mr. Summers for his remarks.

Mr. David Broemel, on behalf of the American Insurance Association, employers and the people who insure them, indicated that they had a very different view of what this bill does because the employer has to pay the injured employee regardless of fault. Comparative fault or contributory fault does not come into the equation and the injured employee has the right to go

after the tortfeasor, but the courts have been consistent in saying that the employer's subrogation interest, the employer's lien, should not be diminished because it is a no fault situation, and this bill will do away with that. Another inequity is that the courts have said that even though the employer may have an obligation to pay a huge amount in future medical treatment because the workers' compensation law gives the injured employee future medical treatment, the employer's position is going to be damaged by this and the courts have recognized it is not fair. Mr. Broemel urged the Council to vote against this bill to maintain equity. The chair asked if there were any questions for Mr. Broemel, and seeing none thanked him.

The Chair called for further remarks from the Council or the audience about this bill, then asked if there was any further discussion on the bill itself or a motion. Mr. Pitts noted that from an historical perspective, a similar bill was brought up several years ago and rejected and that continued education on the issue seems to be desired, so **moved** that the bill go out with a negative recommendation, which was **seconded** by Mr. Paul Shaffer which resulted in a unanimous vote to send the bill out with a negative recommendation. Mr. Fox requested further information be provided about the bill.

The Chair called the next bill **HB 2404 / SB 2482** (Travis/Massey) and indicated that the Council had been informed that the bill has been withdrawn and will not be heard this legislative session.

The Chair arranged for a date for the meeting for the Council to make recommendation on the NCCI Filing on Monday, March 21, 2016 at 1:30 p.m., thanked all the parties, asked if there was any other business to come before the Council, and seeing none, adjourned the meeting until the Monday March 21, 2016 at 1:30 p.m. or upon the call of the Chair.



Lynn Schroeder, Administrator
Advisory Council on Workers'
Compensation



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