

Tennessee Advisory Council On Workers' Compensation

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Annual Report for
July 1, 2019 - June 30, 2020

State of Tennessee
Treasury Department
State Capitol
Nashville, Tennessee 37243-0225

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

Larry Scroggs, Administrator

STATE OF TENNESSEE
ADVISORY COUNCIL ON WORKERS' COMPENSATION
ANNUAL REPORT
JULY 1, 2019 - JUNE 30, 2020

Pursuant to *Tennessee Code Annotated*, Section 50-6-121 (e), the Advisory Council on Workers' Compensation hereby submits its annual report for July 1, 2019 through June 30, 2020, 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 Tennessee General Assembly established the Advisory Council on Workers' Compensation (the "Advisory Council" or "Council") 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 and 289 of the Public Acts of 2013), are recorded at *Tennessee Code Annotated* ("T.C.A."), Section 50-6-121, which outlines the authority of the Council, its specific responsibilities, and its general duties. The General Assembly transferred administration of the Council from the Tennessee Department of Labor and Workforce Development to the Tennessee Department of Treasury pursuant to Chapter Number 1087 of the Public Acts of 2010, and extended the Council to June 30, 2016 pursuant to Chapter Number 622 of the Public Acts of 2012. Chapter Number 608 of the Public Acts of 2016 extended the Council's existence to June 30, 2020. Chapter Number 637 of the Public Acts of 2020 extended the Council's existence to June 30, 2021. T. C. A. § 50-6-121 (f)-(l) authorizes the Council to:

- Make recommendations to the Governor, the General Assembly, the Senate Commerce and Labor Committee, the House Consumer and Human Resources Committee, the Administrator of the Bureau of Workers' Compensation, and the Commissioner of Commerce and Insurance relating to the promulgation or adoption of legislation or rules;
- Make recommendations to the Administrator of the Bureau of Workers' Compensation 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 included 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 voting members, ten non-voting members and four ex-officio members. The State Treasurer is the statutory chair and a voting member for administrative purposes. Three voting members represent employers and three voting members represent employees. The non-voting members represent local government, insurance companies, medical organizations, hospital organizations, chiropractors, physical and occupational therapists, and attorneys, all in Tennessee. The chair may vote only on matters related to the administration of the Council or its research; the chair may not 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 made by the Governor, Speaker of the Senate, and Speaker of the House pursuant to T.C.A. § 50-6-121 (a)(l)(C). They each appoint one voting member representing employers and one voting member representing employees. The Governor appoints the additional ten non-voting Council members. The Governor may choose to appoint from lists of suggested nominees provided by interested organizations as outlined in T.C.A. § 50-6-121(a)(l)(E)(i-ii).

On July 25, 2019, Lieutenant Governor Randy McNally appointed **Dail R. Cantrell** of Clinton, Tennessee as a voting member representing employees. His term will expire June 30, 2022. Mr. Cantrell succeeded John M. Garrett who completed his term on June 30, 2019. In August 2019, Governor Bill Lee appointed **Misty D. Williams** of Brentwood, Tennessee as a non-voting member, to succeed Jerry Mayo as a representative of insurance companies. In October 2019, Governor Lee appointed **Teresa (Terry) Horn** of Hermitage, Tennessee as a non-voting member to succeed Pam Smith as a representative of hospital organizations. Governor Lee also reappointed non-voting members **Jason Denton** (representing justice organizations as an attorney for employees) and **Lynn Lawyer** (representing defense lawyer organizations). The terms of Ms. Williams, Ms. Horn, Mr. Denton, and Ms. Lawyer will expire June 30, 2022.

The current terms of voting members Kerry Dove, Bruce Fox, and Brian Hunt expire June 30, 2020. Governor Lee is the appointing authority for Mr. Fox's position. Lieutenant Governor McNally is the appointing authority for Mr. Hunt's position and House Speaker Cameron Sexton is the appointing authority for Mr. Dove's position.

A chart outlining the members of the Advisory Council on Workers' Compensation as of June 30, 2020 is on the following page:

MEMBERS OF THE ADVISORY COUNCIL

NAME	MEMBER TYPE	REPRESENTING
David H. Lillard, Jr. State Treasurer	Chairman Administrative Voting Member	State Treasurer Statutory Member
Dail Cantrell	Voting Member	Employees
Kerry Dove	Voting Member	Employers
Bruce D. Fox	Voting Member	Employees
Brian Hunt	Voting Member	Employers
Bob Pitts	Voting Member	Employers
Paul Shaffer	Voting Member	Employees
Joy Baker	Non-Voting	Local Governments
Misty D. Williams	Non-Voting	Insurance Companies
Samuel E. Murrell, III, M.D.	Non-Voting Member	Health Care Providers: TN Medical Association
Terry Horn	Non-Voting Member	Health Care Providers: TN Hospital Association
Keith B. Graves, D.C.	Non-Voting Member	Health Care Providers: Licensed TN Chiropractor
John Harris	Non-Voting Member	Health Care Providers: Licensed TN Physical Therapist
Sandra Fletchall	Non-Voting Member	Health Care Providers: Licensed TN Occupation Therapist
Jason Denton	Non-Voting Member	Attorney: TN Association for Justice
Lynn Vo Lawyer	Non-Voting Member	Attorney: TN Defense Lawyers
A. Gregory Ramos	Non-Voting Member	Attorney: TN Bar Association
Senator Paul Bailey, Chairman	Ex-Officio Non-Voting	Senate Commerce and Labor Committee
Representative Clark Boyd, Chairman	Ex-Officio Non-Voting	House Consumer and Human Resources Committee
Abbie Hudgens, Administrator Troy Haley, Designee	Ex-Officio Non-Voting	TN Bureau of Workers' Compensation
Commissioner Hodgen Mainda Designee, Mike R. Shinnick	Ex-Officio Non-Voting	TN Department of Commerce and Insurance

TERMS OF THE NON-EX-OFFICIO MEMBERS

Voting	Term of Position
Dail Cantrell	July 25, 2019 - June 30, 2022
Kerry Dove	July 1, 2016 - June 30, 2020
Bruce D. Fox	July 1, 2016 - June 30, 2020
Bob Pitts	July 1, 2018 - June 30, 2022
Brian Hunt	October 26, 2016 - June 30, 2020
Paul Shaffer	July 1, 2018 - June 30, 2022
Non-Voting	Term of Position
Joy Baker	July 1, 2017 - June 30, 2021
Terry Horn	September 2019 - June 30, 2022
Sandra Fletchall	July 1, 2017 - June 30, 2021
Keith B. Graves	July 1, 2017 - June 30, 2021
John Harris	July 1, 2017 - June 30, 2021
Lynn Vo Lawyer	July 1, 2019 - June 30, 2022
Misty Williams	August 2019 - June 30, 2022
Samuel E. Murrell, III, M.D.	July 1, 2017 - June 30, 2021
A. Gregory Ramos	July 1, 2017 - June 30, 2021
Jason Denton	July 1, 2019 - June 30, 2022

ACTIVITIES OF THE ADVISORY COUNCIL

By statute, the Advisory Council must meet at least two times per year. During the July 1, 2019 through June 30, 2020 fiscal year, the Advisory Council met on three occasions. The Council convened on August 27, 2019, October 10, 2019, and February 27, 2020. Approved meeting minutes are available at the Advisory Council's website <https://treasury.tn.gov/Explore-Your-TN-Treasury/About-the-Treasury/Boards-and-Commissions/Advisory-Council-on-Workers-Compensation> under the "Meetings" tab. The agenda and video of each meeting are also available at the same location.

Summary of Meetings

The three Advisory Council meetings between July 1, 2019 and June 30, 2020 were devoted to receiving reports from consultants, reviewing proposed legislation, and procuring information from documentation and presentations. The primary sources of pertinent information were citizens, legislators, other state officials, and representatives of business and professional entities essential to the fair, efficient, and effective administration of Tennessee's workers' compensation system. Meeting summaries describe the Advisory Council's activity.

Meeting on August 27, 2019

Chairman David Lillard called the meeting to order at 1:35 p.m. (CDT) and welcomed Council members and those in attendance. He noted that voting member **Bob Pitts** was then en route, and that a quorum of voting members would exist upon his arrival. A physical quorum requires the presence of three voting members in addition to the Chairman. The Chairman explained that the meeting today would be informational until Mr. Pitts' arrival. The Chairman noted that the National Council on Compensation Insurance (NCCI) today had filed its prospective *loss costs and rating values* for the Voluntary Workers' Compensation insurance market, and *rates and rating values* for the Assigned Risk market, to become effective March 1, 2020. Advisory Council members have received copies of the filing for review in preparation for the next meeting of the Council.

The Chairman explained that today's agenda items, which consist of reports and overviews of workers' compensation market conditions and the filing by NCCI are pertinent to the Council's responsibility to make suitable recommendations to the Commissioner of Commerce and Insurance at the next meeting. The Chairman invited questions and comments from those attending the meeting as each presentation proceeded.

Council ex officio member Mike Shinnick, Workers' Compensation Manager of the Department of Commerce and Insurance ("DCI"), presented *An Overview of Tennessee Workers' Compensation Market Conditions and Environment*. Mr. Shinnick said preliminary data confirmed that national property and casualty underwriting results for private carriers were continuing to trend favorably and since 2008, workers' compensation insurers reflected similar results. Other significant points by Mr. Shinnick: the average indemnity claim severity over a two-year period is stable at a 3.7% increase; claim frequency is continuing to decline; and pretax operating gain for carriers is reflecting the best results over a 20-year period, at 26%. In the Tennessee voluntary workers' compensation market, premiums for 2018 totaled \$757,789.88. Mr. Shinnick also cited the recent stable history of the Tennessee assigned risk or residual workers' compensation insurance market. There were no insolvencies among assigned risk carriers in 2018. He noted *Bright Horizons*, an assigned risk depopulation initiative, was helping reduce premium cost in the assigned risk market in Tennessee.

Mr. Pitts arrived at 2 p.m., permitting a physical quorum, with voting members **Kerry Dove, Brian Hunt,** and **Mr. Pitts. Bruce Fox** participated by telephone. The Chairman returned to the first agenda item, which was to approve the minutes of the previous Advisory Council meeting on March 18, 2019. A motion to approve the minutes by **Mr. Pitts**, seconded by **Mr. Hunt**, passed unanimously.

The Chairman addressed the second agenda item under New Business, recognizing **Hannah Wohltjen** and **Jessica Benton** of *Elevate Consulting, LLC*, as the new statistical data analysts for the Advisory Council. They presented a *Statistical Analysis of 2018 Workers' Compensation Data*, based on data compiled by the Bureau of Workers' Compensation, Tennessee Department of Labor and Workforce Development. Their report addressed six key questions: Who is receiving workers' compensation? What types of benefits are individuals receiving? Are individual recipients returning to work? What are trends in conclusion types? Are cases progressing in a timely manner? How much compensation are injured workers receiving?

Their conclusions were generally that: the median age of employee-claimants with permanent injury claims concluded from 2009 to 2018 is 47. Sixty-two percent (62%) had a high school diploma or equivalent. Thirty-six percent (36%) of the injuries occurred in Middle Tennessee. Medical expenses and permanent partial disability (PPD) were the most common types of benefits from 2009-2018. The majority of those receiving workers' compensation benefits returned to work. The vast majority of cases conclude by settlement. The median number of weeks from injury to conclusion was 68. The median total compensation amount for pre-Workers' Compensation Reform Act of 2013 claims exceeded that of post-Act claims, and the median number of weeks for receiving benefits for pre-Act claims exceeded that of post-Act claims. Claimants who received the highest median compensation were between 45-59 years old, with less than a high school education, who reside in Middle Tennessee.

Council members **Jason Denton, Gregg Ramos, Bob Pitts, Brian Hunt,** and **Kerry Dove** asked questions about the method of data collection, population factors and demographic changes. In response to Council member Denton's specific question about SD1 and SD2 forms, Ms. Benton responded that SD1 forms generally apply to pre-Act claims, but some post-Act claims were included on SD1 forms before the SD2 forms came into regular use for such claims. This suggests that another full year of data collection would provide a clearer picture of pre and post-Act data, according to Ms. Benton.

The Chairman then addressed the third agenda item, a presentation by **Eddie Herrera**, Director of Plan Administration for the National Council of Compensation Insurance ("NCCI"). Mr. Herrera presented the *Workers' Compensation Plan Report*. He focused on the residual or assigned risk market. Some 12,659 policies issued in 2018, with a premium volume of \$65,742,426. The average workers' compensation insurance premium is \$3,830. Sixty-seven percent (67%) of the policies have an average premium of \$1,059. Policies written for construction of residential dwellings not exceeding three stories occupy the top rank at 13.8%. Tennessee has three servicing carriers and seven direct assignment carriers in the residential market. Note: The residential market written premiums of \$65.7 million for 2018 represent a market share of 8%. **Mr. Pitts** asked Mr. Herrera if Tennessee's premium level, exceeded only by Georgia, Illinois and Virginia, was a problem. Mr. Herrera noted Mr. Shinnick's presentation indicated premiums were decreasing in Tennessee so he was not sure there was a problem. **Mr. Shinnick** responded that a possible factor that may increase Tennessee's premium amount is that temporary help firms make up 50% of the residual market and that a high level of construction activity in the state may also be a contributing factor.

The Chairman addressed the fourth item under New Business, which was an overview of the *Tennessee*

Workers' Compensation Voluntary Loss Cost Filing, proposed to be effective March 1, 2020. The presentation was by **Dan Cunningham**, Director and Actuary for NCCI. Mr. Cunningham explained that NCCI's loss cost projection filed today indicated an overall voluntary market loss cost level of -9.5%, compared to the NCCI filing of -19% that became effective March 1, 2019. The March 1, 2020 projection results from an analysis of experience and development, trend, benefits and loss-based expense for policy years 2016 and 2017. Policy year data consists of the premium and losses derived from all policies written in a given year. Mr. Cunningham said the use of the two policy years accurately reflects premium volume and is responsive to recent trends. In response to a question by Council member Ramos, Mr. Cunningham confirmed there has been a steady decline in indemnity and medical loss ratios since 2010. A similar trend is evident in claim frequency, although the decrease for the last year reviewed was not as low as some years. Mr. Cunningham said he had noted a slight increase in claim severity that may not hold. Mr. Cunningham explained that an Assigned Risk Rate Filing has not yet occurred but he anticipates a slight increase in the loss cost multiplier (LCM) proposed to be effective March 1, 2020. The assigned risk LCM that became effective March 1, 2019 was 1.707.

The Chairman thanked each presenter and invited the Council members to review all presentations and documents in preparation for making a formal recommendation to the Commissioner of the Department of Commerce & Insurance relative to the Voluntary Loss Cost Filing at the next scheduled meeting of the Advisory Council on October 10, 2019. The meeting adjourned at 3:25 p.m.

Meeting on October 10, 2019

The Chairman, David Lillard, convened the meeting at 1:35 p.m. (CDT) and welcomed the members and those in attendance. A quorum of voting members was established. (Thereafter, Council member **Bob Pitts** arrived at 1:45 p.m.). **The Chairman** noted that at the previous meeting on August 27, 2019, representatives of the National Council on Compensation Insurance (NCCI) presented a brief overview of the Voluntary Loss Cost and Assigned Risk Rate Filing proposed to be effective March 1, 2020. Documentation relative to the filing was available to members present at the August 27, 2019 meeting and was distributed to members subsequent to the meeting.

The Chairman addressed the first item on the agenda, which was to approve the minutes of the Council's August 27, 2019 meeting. On motion by Council member **Brian Hunt**, seconded by Council member **Bruce Fox**, the minutes were approved on a unanimous voice vote.

The Chairman addressed the next item under New Business, recognizing **Dan Cunningham**, Director and Actuary for the *National Council on Compensation Insurance* (NCCI), Actuarial and Economic Services. Mr. Cunningham first presented an analysis of the effect of recent workers' compensation medical fee schedule changes by the *Bureau of Workers' Compensation* that became effective September 10, 2019. The changes had not been addressed in NCCI's **Tennessee Workers' Compensation Voluntary Loss Cost Filing** of August 27, 2019. Subsequently, on October 3, 2019, NCCI provided the Council with an impact statement relative to the medical fee schedule changes. Mr. Cunningham indicated the medical fee schedule changes necessitated a modification of NCCI's loss cost projection by **+1.5%**, resulting in a revised loss cost filing of **-8.2%**, down from **-9.5%**, proposed to be effective March 1, 2020. During his comments, Mr. Cunningham indicated policy years 2016 and 2017 better measure the current Tennessee market conditions, and that a longer evaluation period could be considered whenever there is volatility in the period utilized.

The Chairman addressed the next agenda item under New Business, and called upon **Mary Jean King**, representing the Advisory Council's actuary, *By the Numbers Actuarial Consulting, Inc.* ("BYNAC"). Ms.

King presented an actuarial review of the Tennessee Voluntary Loss Cost Filing by the National Council on Compensation Insurance (“NCCI”). Ms. King indicated NCCI’s original proposed decrease of -9.5% for the Tennessee voluntary workers’ compensation insurance market had been reasonably calculated in accordance with actuarial standards of practice, considering the two-year period relied upon by NCCI in its projected decrease. Ms. King stated the proposed change by NCCI of +1.5% due to the revised medical fee schedules was also reasonably calculated in accordance with actuarial standards of practice. Ms. King stated that BYNAC reviewed paid as well as paid+ case development and experience for policy years 2014 and 2015 in addition to the 2016 and 2017 policy years underlying the filing in order to test the assumptions of NCCI in selecting the data and development methods for its review. Ms. King said she preferred a longer experience period of four years. Using years 2014-2017, BYNAC’s experience indication for the voluntary market loss cost level is -5.4%, compared to NCCI’s -9.5% before factoring in the impact of the medical fee schedule changes. Ms. King stated the medical fee schedule changes resulted in a revision of BYNAC’s experience indication to -4.0%. In response to questions by Council member Pitts, Ms. King said the difference between the NCCI and BYNAC projections was due to trend selection. She agreed the trend currently indicates lower claims frequency and lower costs but that a longer evaluation period would provide a better measure.

The Chairman then addressed the next agenda item under New Business, recognizing **Chris Burkhalter**, the actuary for the *Department of Commerce and Insurance* (“DC&I”). Mr. Burkhalter, representing *The Burkhalter Group* (“TBG”), also presented an analysis of the NCCI voluntary market loss cost filing. Mr. Burkhalter noted that TBG also used a longer experience period of five years in arriving at its own overall indication of an -5.3% loss cost decrease. However he said TBG agreed that NCCI’s original projected decrease of -9.5% is actuarially sound based on the anticipated market conditions, considering NCCI used only policy years 2016 and 2017 in its evaluation. After factoring in the medical fee schedule changes, Mr. Burkhalter indicated TBG had revised its projection to -3.9%. Mr. Burkhalter also noted an increase in medical severity of claims in the last two years as one reason he considered a longer evaluation period appropriate. Council member **Misty Williams** asked Ms. King and Mr. Burkhalter how the projections compared with the previous year. They responded that the projections for the March 1, 2019 filing were NCCI -19.0%, TBG -10.2% and BYNAC -9.1%.

The Chairman thanked the presenters and opened the floor for further discussion of the presentations by Council members. **The Chairman** also invited public comment from those in attendance.

Following further discussion, Council member **Pitts** moved that the Advisory Council formally notify DC&I Commissioner **Hodgen Mainda** that the Council recommended a loss cost decrease factor of **-4.0%** in line with the recommendations of the actuaries for the Council and the Department of Commerce and Insurance, rather than the NCCI recommendation of -8.2%. Council member **Bruce Fox** seconded the motion. The voting members in attendance **voted unanimously to adopt the motion.** (Note: a letter dated October 24, 2019 to Commissioner Mainda from the Chairman reflected the Advisory Council’s recommendation.)

The meeting adjourned at 3:05 p.m.

Meeting on February 27, 2020

Upon convening the meeting at 1 p.m., and upon establishing a quorum, **Chairman David Lillard** noted the primary purpose was for the Advisory Council to fulfill its statutory duty to consider and make recommendations on proposed legislation introduced in the Second Session of the 111th General Assembly affecting the workers’ compensation system. The **Chairman** indicated six bills had been referred to the Council by **Representative Clark Boyd**, Chairman of the House Consumer and Human

Resources Committee, and that the Council's recommendations would be reported to both the House Consumer and Human Resources Committee and the Senate Commerce and Labor Committee accordance with T.C.A. § 50-6-121(k). **The Chairman** explained his role as chairman of the Advisory Council is primarily administrative in nature, pursuant to T. C. A. § 50-6-121 (a)(1)(B), and that he is not permitted to vote on any matter that constitutes the making of a policy recommendation to the Governor or the General Assembly. Accordingly, for purposes of today's meeting, only the voting members participating (**Kerry Dove, Bruce Fox, Brian Hunt, Bob Pitts and Paul Shaffer**) may vote on such matters.

The Chairman addressed the first item on the agenda, which was to approve the minutes of the Council's meeting on October 10, 2019. Upon motion by Council member **Fox**, seconded by Council member **Dove**, the minutes were approved on unanimous voice vote.

The Chairman addressed the next item under New Business, which was consideration of six legislative proposals affecting the workers' compensation system.

The Chairman first addressed **HB2101/SB2761 (Russell – Bell)**, and recognized the House sponsor, **Rep. Lowell Russell** for the presentation. **Rep. Russell** explained that the bill would allow physicians' assistants and registered nurses to be included on panels from which injured employees choose to receive treatment for injuries in workers' compensation cases. It would amend T. C. A. Title 50, Chapter 6. **Rep. Russell** cited lower physician coverage in rural areas and a desire to make the workers' compensation system more effective and efficient as the rationale for the bill. *Physicians' Assistant Academy* and *Advanced Practice Registered Nurses* representatives also spoke in favor of the legislation. Advisory Council members **Terry Horn** and **Gregg Ramos** expressed concerns whether there would be sufficient physician oversight of PAs and RNs if they were included as panel members.

BWC Administrator and *Ex Officio* Council member **Abbie Hudgens** observed if a panel consisted only of PAs and RNs there would be challenges to the presumption of correctness afforded authorized treating physicians and protracted litigation relative to causation opinions and impairment ratings. Council member Dr. Sam Murrell emphasized the different levels of education and training required for physicians in contrast to PAs and RNs. Dr. Murrell stated PAs and RNs render invaluable services but they require direct physician oversight to be most effective. He said adding PAs and RNs to panels would essentially change the definition of healthcare provider. He also cited the likelihood of increased litigation relative to opinions on causation and impairment.

Rep. Clark Boyd, an *Ex Officio* Council member, asked if any data is available from other states about the scope of practice of PAs and RNs serving on panels. **The Chairman** asked if any other persons in attendance wished to address the Advisory Council on the bill. **Yarnell Beatty**, Vice-President of the *Tennessee Medical Association*, expressed significant concerns about the proposed legislation, including the absence of any mention of the role of a collaborating physician.

Upon further discussion, Council member **Fox**, seconded by Council member **Dove**, moved that the Advisory Council provide an **unfavorable recommendation** on the proposed bill. The motion was adopted **5-0**.

The Chairman next recognized **House Majority Leader William Lamberth**, House sponsor of **HB2256/SB2189 (Lamberth – Johnson)**. The proposed legislation, in part, requires workers' compensation coverage for construction services performed in Tennessee, excludes such providers from certain provisions of the workers' compensation law, and imposes liability on a successor in interest of a penalized provider. An amendment (drafting code **015003**) defines "successor in interest" of a penalized

construction services provider and confirms the successor's liability for a penalty assessed against a former provider. After discussion, Council member **Pitts**, seconded by Council member **Paul Shaffer**, moved that the Advisory Council provide a **favorable recommendation for passage**. The motion was adopted **5-0**.

The Chairman then recognized **Majority Leader Lamberth**, House sponsor on **HB2257/SB2190 (Lamberth – Johnson)**. With a trailing amendment, the proposed legislation would revise the time for filing for increased benefits and lengthen the time following an injury an employee has to provide notice of the injury to the BWC and of the failure of an employer to secure payment of compensation. The sponsor indicated that in view of the amendment in process, sections 1 and 4 of the original bill as introduced were to be stricken. Upon discussion, it was determined that the sponsor was interested in working with stakeholders on portions of the proposed bill and that a study group would be appropriate. Council member **Pitts**, seconded by Council member **Fox**, moved that the Advisory Council provide a **favorable recommendation for passage**, with the exception of original sections 1 and 4, and with the understanding that a study group would be forming to complete the legislation. The motion was adopted **5-0**.

The Chairman next recognized **Rep. Dwayne Thompson**, House sponsor of **HB2628/SB2404 (Thompson – Kyle)**. The proposed bill revises penalties for noncompliance with workers' compensation insurance coverage and deals with the problem of employee misclassification. The sponsor explained that he and the Senate sponsor do not plan to move the bill forward in the current session. Rather, they desire discussions with stakeholders and request a working group to study the noncompliance issues. During discussion, a recommendation emerged that the BWC provide the necessary supervision and organizational structure for a study group to recommend appropriate legislation in the next session of the General Assembly. Administrator **Hudgens** stated the BWC would be willing to assist in the effort. Council member **Pitts**, seconded by Council member **Fox**, moved that the Advisory Council provide a **favorable recommendation for study** by an appropriate group of stakeholders, assisted by the BWC, for completion in time for consideration by the legislature in the next session. The motion was adopted **5-0**.

The Chairman next recognized **Rep. John Ragan**, House sponsor of **HB2577/SB2691 (Ragan – Briggs)**. **Rep. Ragan** presented the bill, which creates a presumption that a public safety employee diagnosed with PTSD sustained the injury in the line of duty for purposes of workers' compensation. It also expands the definition of public safety employee. It amends T. C. A. Titles 7, 8, 33, 50 - Chapter 6 and Title 56. The sponsor noted that public safety employees experience multiple trauma situations, that suicide is prevalent among them, and that brain scans show PTSD is a true brain injury. Council member **Joy Baker** commended the work of public safety employees but said those injured at work already have access to workers' compensation benefits. She stated the legislation, if enacted, would be an unfunded mandate and would place a heavy burden on local governments. Council member **Pitts** said the Advisory Council had never recommended passage of presumptive injury legislation. He said he was concerned that such legislation would open the door for other presumptive injury bills. After further discussion, Council member **Fox** moved, seconded by Council member **Shaffer**, that the Advisory Council provide the bill with a favorable recommendation for passage. The motion failed on a 2-3 vote. Following the vote, Council member **Fox** inquired if an amendment to make the presumption rebuttable might make the legislation palatable. Council member **Pitts** reiterated his concern that expanding presumptive injuries would be detrimental to the workers' compensation system. **The Chairman** observed that in view of the motion posture and outcome the proposed legislation would necessarily move from the Advisory Council with **no recommendation**.

The Chairman recognized **Rep. Clark Boyd**, House sponsor of **HB2154/SB2861**. With an amendment (drafting code **015575**), the proposed bill would limit attorney fees in certain instances where legal action on behalf of an injured employee is required to pursue wrongfully denied or withheld workers' compensation benefits. The amendment would require the trial court to make specific findings to support an award of attorney fees. Council member **Ramos** commented that limiting fee awards was against the interest of employees facing protracted litigation to enforce prior court orders that granted them future medical treatment benefits. He said most attorneys who previously handled workers' compensation cases were no longer doing so because there was no incentive for an attorney to be an advocate because of limitations on benefit awards and fees under the *Workers' Compensation Reform Act of 2013*. The sponsor responded that one purpose of the bill was to put guardrails in place for outlier cases in which excessively large attorney fees were possible; and secondly that the legislative intent is to extend the fee structure for wrongfully denied benefit claims for another two years. After further discussion, Council member **Pitts** moved, seconded by Council member **Fox**, that the Advisory Council provide a **favorable recommendation for passage**. The motion was adopted **5-0**.

The meeting adjourned at 2:40 p.m. [Note: The action by the Advisory Council on the proposed legislation considered on February 27, 2020, was reported to **Chairman Clark Boyd** of the *House Committee on Consumer and Human Resources* and **Chairman Paul Bailey** of the *Senate Committee on Commerce and Labor* and the members of their respective committees on March 6, 2020.]

TENNESSEE CASE LAW UPDATE

Throughout the year, the Advisory Council followed the Tennessee Supreme Court, reviewing its decisions and suggestions regarding the need for specific changes in the workers' compensation law.

The Advisory Council submitted an annual case law update for the 2019 calendar year to the General Assembly in January 2020 that included all workers' compensation opinions from the Tennessee Supreme Court.

The Supreme Court's *Special Workers' Compensation Appeals Panels* ("Special Panel" or "Panel"), which each include one Justice and two other assigned judges, hear virtually all appeals of trial court decisions in workers' compensation cases. The Special Panel gives considerable deference to a trial court's decision regarding witness credibility since the lower court has the opportunity to observe testimony. The Panel reports its findings of fact and conclusions of law and its judgments automatically become the judgment of the full Tennessee Supreme Court 30 days thereafter, barring the grant of a motion for review. Tennessee Supreme Court Rule 51 and T.C.A. § 50-6- 225(a)(1).

Four recent Panel opinions adopted by the Supreme Court illustrate the types of contemporary workers' compensation issues coming before the Court. A brief synopsis and link to the full opinions follow:

Estate of Clarence Turnage, et al. v. Dole Refrigerating Co., Inc.

No. M2019-00422-SC-R3-WC, filed February 12, 2020

The employee died August 3, 2017, because of injuries from a work accident. He was unmarried but lived with and had an out-of-wedlock child, EJT, with Megan Black. It was undisputed EJT was entitled to

workers' compensation death benefits as a *conclusively presumed wholly dependent child* under T. C. A. § 50-6-210 (a)(2). Previously, the employee had two other children out-of-wedlock with another woman. Prior to his death, the employee had surrendered his parental rights to NRT and SMT, and his own mother had adopted the children. NRT and SMT sought workers' compensation death benefits as either *conclusively presumed wholly dependent children* of the employee under §50-6-210 (a)(2), or alternatively, as *partial dependents* under §50-6-210 (d). The Court of Workers' Compensation Claims determined NRT and SMT were not entitled to benefits, either as presumed wholly dependent children or as partial dependents, and awarded EJT benefits equal to 50% of the employee's average weekly wage. NRT and SMT appealed. The Special Workers' Compensation Appeals Panel **affirmed** the judgment.

The proof before the trial court indicated that while the employee was living in Florida with their mother, he left NRT and SMT at home alone after he got into trouble, for which he was required to serve six months in jail. Their mother had also left the home. Initially, the Florida Department of Children's Services placed the children in separate foster homes. Later, the employee's mother took custody of NRT and SMT and they came to live with her in Tennessee. Some years later, the employee's mother adopted the two children. When the employee returned to Tennessee after his release, he moved in with Ms. Black, with whom he had EJT. The employee sporadically provided only limited financial support for NRT and SMT and the two children occasionally spent weekends with the employee. However, his mother usually provided the food for the children during those visits. In the four months before his death, the employee did not interact with NRT and SMT or provide any support, allegedly due to a verbally abusive confrontation he had with his mother in front of the children. On appeal, NRT and SMT tried to analogize their status as parentally surrendered and adopted children to *stepchildren* or *illegitimate children* for purposes of the statutory presumption of wholly dependent children under §50-6-210 (a)(2). The Panel noted the Tennessee Supreme Court had addressed the issue in *Wilder v. Aetna Casualty & Surety Co.*, 477 S.W.2d 1 (Tenn. 1972). The Panel observed "(T)he employee indisputably surrendered all parental rights, and the children were adopted prior to employee's death." NRT and SMT alternatively claimed to be within the class to which subsection (d) applied as either the employee's children or *his brother and sister* because of their adoption by his mother. The Panel determined that *Wilder* controlled the decision, in that the evidence failed to establish they regularly derived part of their support from the wages of the employee at the time of death and for a reasonable time immediately prior to his death. Noting the employee provided no support during the four-month period before his death, the Panel held "It is the absence of support from employee, which served to disqualify NRT and SMT from the receipt of benefits under this subsection [(d)]."

The full opinion is available at

<https://www.tncourts.gov/sites/default/files/20200212083245.pdf>

Floyd McCall v. Ferrell Paving, et al.

No. W2018-01676-SC-WCM-WC, Filed January 22, 2020.

The employee, a cement truck driver, sustained injury in a fall at work on October 6, 2014. He received authorized medical treatment for the injury, paid for by the employer. He also received temporary total disability benefits from October 7, 2014 to February 5, 2015. After his release by his authorized treating physician (ATP), he received *unauthorized* medical treatment, including cervical spine surgery. The employee then sought additional temporary total disability benefits and medical benefits, permanent disability benefits and future medical benefits. The Court of Workers' Compensation Claims determined the employee was not entitled to any additional workers' compensation benefits. On appeal by the employee, the Special Panel **affirmed** the trial court's judgment.

The proof at trial reflected the employee's work injury occurred when he lost his balance and fell while standing on the tire of his dump truck as he performed a pre-trip inspection. He landed on his left side, hitting his head, shoulder, elbow and the side of his hip. His ATP treated him with physical therapy and work hardening. After a normal functional capacity evaluation, the ATP released him to return to work without restrictions on April 13, 2015. The ATP concluded based on his diagnostic studies that the employee had a mild progressive degenerative arthritic condition due to age, with no fractures, ruptured discs or abnormal radiculopathy. The ATP testified the employee's neurologic, strength, reflex, and range of motion examinations were all normal, although the employee did have some impingement in his left shoulder that resulted from the degenerative condition and not the fall at work. The ATP testified he saw no reason the employee should need surgery for his left shoulder, left elbow or cervical spine.

When the employee tried to return to work, his employer advised things were slow and gave him an unemployment card. He then worked three or four months for Nike through a staffing agency. His job involved loading boxes of shoes from a conveyor belt onto pallets. The boxes weighed up to 15 pounds. He had an independent medical evaluation in April 2015, but did not tell the physician about the physical requirements of his Nike job. He then began working for Ingersoll Rand, packaging parts that were continuously coming down a conveyor belt. He also operated machinery. All his work required repetitive light lifting. He saw a neurosurgeon in 2016, who recommended cervical spine surgery.

At trial, the employee maintained he had no problems with his neck, shoulder, or elbow before his fall on October 6, 2014, but now had pain, numbness and tingling in his left shoulder, arm, and hand. Since the cervical surgery, he said he had no neck pain. Testimony from the neurosurgeon indicated that by January 13, 2017, the employee had spondylosis and a disc osteophyte complex at C6-7, and that stenosis was worsening. He performed surgery on March 23, 2017, testifying the surgery was medically necessary because of the employee's work injury on October 6, 2014. The proof indicated neither the evaluating physician nor the neurosurgeon had any information about the type of repetitive lifting performed by the employee after his release by the ATP. Both physicians agreed the objective medical test results compiled by the ATP were significantly different from the tests they later ordered and reviewed. The trial court ruled the medical proof of the employee failed to rebut the statutory presumption of correctness of the conclusions by the ATP that the cervical spine issues were unrelated to the work injury. The Panel concurred that the ATP's unequivocal testimony supported by diagnostic studies, including MRIs and EMGs taken soon after the employee's fall at work, revealed no cervical issues that required surgery. A neurosurgeon who testified on behalf of the employer supported the ATP's conclusions.

The full opinion is available at

https://www.tncourts.gov/sites/default/files/mccallopn.docx_.pdf

Kevin W. Taylor v. G.UB.MK Constructors

No. R2019-00461-SC-R3-WC, filed June 2, 2020.

The employee, who worked as a union boilermaker from 1999 to November 2013, filed a workers' compensation claim on January 10, 2018, alleging permanent hearing loss because of his working environment. The employee contended he learned of the causal connection between his work and his hearing loss on June 30, 2014 and promptly gave notice to his employer in July 2014. The trial court determined the hearing loss claim was compensable and based on a 14.1% anatomical impairment rating, awarded the employee 56.4% permanent vocational disability. The employer appealed. The Special Panel agreed the claim was compensable, but **modified** the vocational disability to 30%.

At trial, the employee testified of his exposure to loud industrial noise over a long working career as a

certified welder, millwright and boilermaker, as well as his 20-years' service with the Army National Guard where he was required to participate in target practice with an M-16 rifle. As a boilermaker for his last 13 years of work with the employer, he performed maintenance of machinery and equipment at fossil-fuel steam plants. According to the employee and the testimony of a coworker, the noise in a steam plant was loud and confined, and pneumatic tools used by boilermakers created loud continuous popping sounds like a "Jake brake" on a tractor-trailer. The noise level was so high workers had to use hand signals to communicate with each other. By the time of his trial on February 27, 2019, the employee said he was necessarily using closed captioning on his television set and having significant difficulty hearing and understanding people in person and on a telephone. The proof indicated his employers began to be more stringent about requiring hearing protection by 2006, and he began using earplugs, which "helped some." In his earlier years of working as a boilermaker, he had no hearing protection. After his last assignment with his employer, the employee could not find work and retired on March 1, 2014. His inability to find work was due more to problems with his heart, back, shoulder and knee that made it hard for him to walk, climb, squat, or lift over 40 pounds. He had never turned down or left a job because of hearing problems. Expert proof at trial confirmed that the employee had suffered permanent, noise-induced hearing loss in both ears. It was not clear that noise levels at the employee's various work locations were distinguishable or whether the conditions at his last assignment site were the primary cause of the hearing loss or made it worse. The trial court found the cause of the hearing loss to be the employee's cumulative noise exposure during his work as a boilermaker over several years.

The employer contended the employee failed to give timely notice, failed to file his claim within the statute of limitations, and did not prove his hearing loss was attributable to the period from October to November 2013, his final stint with the employer. The evidence indicated the employee had worked for the employer by assignment on 23 occasions over 14 years, and although medical evidence did not establish a single incident or time-period, his noise exposure as a boilermaker over several years caused a progressive problem. The Panel observed that with hearing loss and other gradually occurring injuries, the timeframes applicable to notice and the statute of limitations are "difficult to determine because these injuries tend to occur over lengthy periods of time." In these types of cases, the statute of limitations begins "to run 'at that time when the employee, by a reasonable exercise of diligence and care, would have discovered that a compensable injury had been sustained.'" *Gerdau Ameristeel, Inc. v. Ratliff*, 368 S.W.3d 503, 509 (Tenn. 2012). "Therefore, an employee who sustains a gradually occurring injury may be relieved of the notice requirement until a medical diagnosis confirms the injury." *Banks v. United Parcel Service, Inc.*, 170 S.W.3d 556,561 (Tenn. 2005). The Panel explained the purpose of the "last day worked" rule is to prevent employees with gradually occurring injuries from losing the opportunity to bring workers' compensation claims due to the running of the statute of limitations. *Barker v. Home-Crest Corp.*, 805 S.W.2d 373, 375 (Tenn. 1991). Since the trial court did not make specific findings of fact as to the extent the employee's hearing loss impaired his earning capacity, the Panel determined it could make its own determination based on the preponderance of the evidence. It found other factors affected the employee's earning capacity, such as age, education, physical limitations, and medical conditions, rather than just his hearing loss, and modified the vocational disability award.

The full opinion is available at

https://www.tncourts.gov/sites/default/files/taylorkevin_filed.opn.pdf

The employee, a Georgia resident, drove a truck for a Tennessee employer. He was hurt in a vehicle accident in Tennessee on November 3, 2016. He reported the injury to his employer, who filed a first report of injury and paid for his emergency treatment. The employer paid no additional benefits. In January 2017, the employee filed a claim seeking benefits with the Georgia State Board of Workers' Compensation. The defendants argued the Georgia Board did not have subject matter jurisdiction. In October 2017, while still pursuing benefits in Georgia, the employee filed a claim for workers' compensation benefits in Tennessee. In January 2018, after the parties had engaged in discovery, the Georgia Board held a hearing, and without addressing the merits, dismissed the employee's claim for lack of subject matter jurisdiction. Six months later, the employee filed an amended claim in Tennessee. The Defendants moved for summary judgment, asserting the affirmative acts taken by the employee to obtain workers' compensation benefits in Georgia barred him from receiving such benefits in Tennessee under the *election of remedies doctrine*. The employee responded the doctrine did not apply because the Georgia Board lacked subject matter jurisdiction. The *Court of Workers' Compensation Claims* (CWCC) denied the motion for summary judgment. The Georgia Board never addressed the merits of the claim, according to the CWCC. It further found that instead of unfairly manipulating the Tennessee legal system, the employee was just seeking to have a determination on the merits.

The *Workers' Compensation Appeals Board* (WCAB) reversed the denial of the motion for summary judgment in a split decision. The lead majority opinion emphasized the employee had pursued benefits under the Georgia system by engaging in extensive discovery, participating in a hearing, and offering testimony and documentary evidence on the merits of his case. Because the employee knowingly elected to pursue benefits in Georgia, the majority held his failure to establish subject matter jurisdiction did not prevent application of the election of remedies doctrine in Tennessee. The dissenting opinion viewed the majority's opinion as "an unduly strict and unnecessarily harsh interpretation" of Tennessee's election of remedies doctrine that left the employee without a remedy. The Special Panel **reversed** the WCAB and **remanded** for further proceedings in the CWCC, finding the election of remedies doctrine did not apply under the facts and circumstances. Even though the employee pursued workers' compensation benefits in Georgia, that state lacked subject matter jurisdiction. Thus, the employee did not have a remedy to elect in Georgia. The employee relied on *Gray v. Holloway Construction Co.*, 834 S.W.2d 277 (Tenn. 1992). In *Gray*, the Tennessee Supreme Court held the election of remedies doctrine barred an employee who actively pursues a claim *in a venue that has jurisdiction* from filing a subsequent claim in Tennessee. For the doctrine to apply there must be one or more available remedies for the party to choose. Two later cases relied upon by the defendants, *Bradshaw v. Old Republic Ins. Co.*, 922 S.W.2d 503 (Tenn. 1996) and *Eadie v. Complete Co.*, 142 S.W.3d 288 (Tenn. 2004) omitted the "venue with jurisdiction" element set forth in *Gray*. The Panel held the omission did not modify the *Gray* doctrine because the lack of subject matter jurisdiction or of any other venue were not issues in *Bradshaw* and *Eadie*. "In sum, an injured employee cannot elect a remedy that is unavailable." (p. 5)

The full opinion is available at

http://www.tncourts.gov/sites/default/files/goodwin_unsigned_opinion.pdf

Note: During calendar year 2019, the Supreme Court and its Special Workers' Compensation Appeals Panels issued opinions in 28 cases between January 16, 2019 and December 19, 2019. Eighteen of the opinions involved "old law" cases, or those in which the work-related accidents were prior to July 1, 2014, the effective date of the *Workers' Compensation Reform Act of 2013*. Ten opinions issued in "new law" cases. Five of those involved appeals from the *Court of Workers' Compensation Claims* and four came

directly from the *Workers' Compensation Appeals Board*. One came from the *Tennessee Claims Commission*. Two *Court of Appeals* cases and one interlocutory appeal to the Supreme Court were also included in the Advisory Council's report of significant workers' compensation decisions in 2019. Through June 15, 2020, the Special Panel has issued five opinions involving "old law" cases, indicating that far fewer of them are working their way through the appeals process. Direct appeals to the Supreme Court should continue to decrease as more "new law" cases resolve in the *Court of Workers' Compensation Claims* and the *Workers' Compensation Appeals Board*.

TOSHA NEWS

The Tennessee Department of Labor and Workforce Development, in cooperation with the U. S. Bureau of Labor Statistics, reported 122 work-related fatalities in Tennessee in 2018, compared to 128 in 2017, reflecting a decrease of approximately 4.7%. The highest number of fatal occupational injuries (45) involved workers in the major occupational groups of transportation and material moving.

According to the Bureau's 2018 non-fatal occupational injury and illness statistics, Tennessee's incidence rate was 2.8 per 100 full time workers in the *private* sector, statistically in line with the national average of 2.8. The overall recordable case incidence rate for nonfatal occupational injuries and illnesses in Tennessee for all industries, including state and local government, was 3.0. State government had the lowest incidence rate at 2.8, and local governments had the highest incidence rate, at 4.4 recordable incidents per 100 full-time equivalent workers.

In 2018, of approximately 19,130 non-fatal occupational injuries and illnesses resulting in actual days away from work, 59.8% involved male workers and 39.9% involved female workers. Approximately 23.7% of the injuries and illnesses requiring days away from work occurred to those between 45 and 54 years of age. Some 21.7% involved employees between 25 and 34 years of age.

The Tennessee Department of Labor and Workforce Development report is available at <https://www.tn.gov/content/dam/tn/workforce/documents/majorpublications/reports/2018TNCensusFatalOccupationalInjuries.pdf>

CONCLUSION

The Advisory Council on Workers' Compensation met on three (3) occasions from July 1, 2019 through June 30, 2020. This annual report provides a synopsis of the topics considered and appointments made within that time. The Advisory Council appreciates the opportunity to be of service to the Governor, the General Assembly and Executive Departments, as well as the employers and employees of the great State of Tennessee.

Respectfully submitted on behalf of the Advisory Council on Workers' Compensation,

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

/s/ Larry Scroggs
Larry Scroggs
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