

Tennessee Advisory Council On Workers' Compensation

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Corrected Annual Report for
July 1, 2020 - June 30, 2021

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, 2020 - JUNE 30, 2021**

Pursuant to *Tennessee Code Annotated*, Section 50-6-121 (e), the Advisory Council on Workers' Compensation hereby submits its annual report for July 1, 2020 through June 30, 2021, 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. Chapter Number 41 of the Public Acts of 2021 extended the Council's existence to June 30, 2025. 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 Commerce 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).

Effective July 1, 2020, Governor Bill Lee reappointed Bruce Fox of Knoxville as a voting member representing employees. On or about April 1, 2021, Mr. Fox found it necessary to resign from the Advisory Council due to other commitments. Mr. Fox served multiple terms on the Council and was a valued and effective member. Governor Lee will likely soon appoint a new voting member to represent employees.

The current terms of voting members Kerry Dove and Brian Hunt expired June 30, 2020. Although Advisory Council members “hold over” until either their reappointment or the appointment of a successor to their position, Mr. Dove indicated his desire to forego reappointment and retire. Mr. Dove has also served multiple terms as a voting member representing employers and has been a dedicated and valued member as well. House Speaker Cameron Sexton is the appointing authority for Mr. Dove’s position. Senate Speaker and Lieutenant Governor Randy McNally is the appointing authority for Mr. Hunt’s position. The current terms of nonvoting members Joy Baker, Sandra Fletchall, Dr. Keith Graves, D. C., John Harris, Dr. Samuel Murrell, M. D., and Gregg Ramos expire on June 30, 2021. As noted above, Governor Lee is the appointing authority for nonvoting members. Most of these members are expected to be reappointed.

A chart outlining the members of the Advisory Council on Workers' Compensation as of June 30, 2021 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 (Retired)	Voting Member	Employers
Bruce D. Fox (Resigned)	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 Kevin Vaughan, Chairman	Ex-Officio Non-Voting	House Commerce Committee
Abbie Hudgens, Administrator Troy Haley, Designee	Ex-Officio Non-Voting	TN Bureau of Workers' Compensation
Commissioner Carter Lawrence Mike Shinnick, Designee	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 (retired)	July 1, 2016 - June 30, 2020
Bruce D. Fox (resigned)	July 1, 2020 - June 30, 2024
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, 2020 through June 30, 2021 fiscal year, the Advisory Council met on four occasions. The Council convened on August 28, 2020, October 16, 2020, March 18, 2021, and June 1, 2021. 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

Three Advisory Council meetings between July 1, 2020 and June 30, 2021 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. The Advisory Council meeting on June 1, 2021 was for the administrative purpose of adopting a new written conflict of interest policy for Council Members. Meeting summaries describe the Advisory Council's activity.

Meeting on August 28, 2020

Chairman David Lillard called the meeting to order at 10 a.m. (CDT) and welcomed Council members and those in attendance. A quorum was established. The Chairman noted that the meeting was a *virtual* meeting, conducted via telephone and videoconference due to the current pandemic. The Chairman read a *Statement of Necessity* for the virtual meeting, indicating that in order to conduct the meeting via telephone and videoconference the Advisory Council must make a determination that a necessity exists. **Brian Hunt**, seconded by **Paul Shaffer**, moved that the Advisory Council adopt the Statement of Necessity. The voting members present approved the motion. The Chairman addressed the next agenda item, which was to approve the minutes of the Advisory Council's previous meeting on February 27, 2020. **Brian Hunt** moved approval of the minutes. **Kerry Dove** seconded. The voting members present approved the motion. **The Chairman** then noted that the National Council on Compensation Insurance (NCCI) yesterday had filed its prospective *loss costs and rating values* for the Tennessee Voluntary Workers' Compensation insurance market, and *rates and rating values* for the Assigned Risk market, to become effective March 1, 2021. Advisory Council members received copies of the filing for review in preparation for the next scheduled 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 three-year period is stable at a 3.7% increase; medical lost-time

severity should decrease to 3% for 2019; claim frequency should decline to -4% for 2019; and pretax operating gain for carriers is reflecting the best results over a 21-year period, at 26%. In the Tennessee voluntary workers' compensation market, premiums for 2019 totaled \$709,695,881, representing a -6.9% decrease in direct premium written in 2019, which correlated with a -19% loss cost filing in 2018. **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 2019. He reported that *Bright Horizons*, an assigned risk depopulation initiative, was helping reduce premium cost in the assigned risk market in Tennessee.

The Chairman then addressed the second 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 10,761 policies issued in 2019, with a premium volume of \$53,512,643. The average workers' compensation insurance premium is \$4,290. Sixty-one percent (61%) of the policies have an average premium of less than \$2,500. Policies written for construction of residential dwellings not exceeding three stories occupy the top rank at 16%. Tennessee has three servicing carriers and seven direct assignment carriers in the residential market, and will select another servicing carrier in 2022.

The Chairman addressed the third agenda item under New Business, recognizing **Hannah Wohltjen** and **Jessica Benton** of *Elevate Consulting, LLC*, statistical data analysts for the Advisory Council. They presented a *Statistical Analysis of 2009-2018 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 46. Sixty-two percent (62%) had a high school diploma or equivalent. Thirty-five percent (35%) of the injuries occurred in Middle Tennessee. Medical expenses, temporary total disability and permanent partial disability (PPD) were the most common types of benefits from 2009-2018. Most 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 member **Gregg Ramos** asked if the current SD-2 form, which collects post-Reform Act data, could be revised to reflect an employee's return to work for the same employer. Presently, SD-2 indicates only that an employee returned to work for any employer. Bureau of Workers' Compensation (BWC) Administrator **Abbie Hudgens** responded that form changes were a long process but that she was willing to discuss the matter and consider it further. **Ms. Hudgens** did state that an employee's return to work for any employer was itself a very significant factor in calculating permanent partial disability benefits.

The Chairman next addressed the fourth agenda item, which was an *Update on Tennessee Workers' Compensation FY 2019-2020*, by BWC Administrator **Abbie Hudgens**. She noted that disputes in workers' compensation claims are low, with only 4.3% of disputed claims in FY 2019-20. Progress under the *Workers' Compensation Reform Act of 2013* is continuing, with four general information ombudsmen and two attorney ombudsmen who provide limited legal advice. There is new assistance for unrepresented

employees through a Chat Box system. Disputed claims are being resolved for both represented and unrepresented litigants in the 82-83% range. Opinions from the *Court of Workers' Compensation Claims* (CWCC) judges normally issue within 11 days of the compensation hearings. CWCC judges conducted 150 trials and approved 7,659 settlements in FY 2019-20. The Tennessee Supreme Court is largely upholding the *Workers' Compensation Appeals Board* (WCAB) opinions. Improvements in the timeliness of adjudication have resulted in benefits getting to injured workers sooner, lower administrative costs for employers, and reduced friction between employers and employees. Challenges facing the BWC include developing rules for telehealth, combating employers who do not provide legally required workers' compensation coverage, and reducing the number of employees who leave the workforce due to work-related injuries. **Ms. Hudgens** noted that as of August 20, 2020, reports of COVID-19 claims totaled 2,081.

The Chairman addressed the fifth agenda item, which was an overview of the *Tennessee Workers' Compensation Voluntary Loss Cost Filing*, proposed to be effective March 1, 2021. NCCI filed its loss cost projection on August 27, 2020. The presentation was by **Dan Cunningham**, Director and Actuary for NCCI. **Mr. Cunningham** explained that NCCI's loss cost projection filed yesterday indicated an overall voluntary market loss cost level of -9.2%, compared to the NCCI filing of -7.1% that became effective March 1, 2020. The March 1, 2021 projection results from an analysis of experience and development, trend, benefits and loss-based expense for policy years 2017 and 2018. 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.

Mr. Cunningham said Tennessee indemnity and medical loss ratios were continuing to trend downward as has been the case for several years, despite a slight increase in 2017. In determining loss ratios, he explained the two components considered are claim frequency and average claims severity. Claims severity reflects both medical and indemnity loss ratios. Medical loss has increased somewhat while indemnity has remained flat. **Mr. Cunningham** noted the Assigned Risk Rate Filing of -7.2% indicates an increase in the residual market loss cost to be effective March 1, 2021. This compares with last year's -4.6%. The assigned risk loss cost differential is increasing from 1.400 to 1.450, since the risk is likely to be somewhat greater in the residual market. The assigned risk loss cost multiplier (LCM) which became effective March 1, 2020 was 1.753. The LCM to become effective March 1, 2021 is 1.791. **Mr. Cunningham** indicated the COVID-19 pandemic has posed a significant concern for NCCI. However, no COVID-19 data is included in the proposed filing because the pertinent years of 2017 and 2018 precede the pandemic. He stated the combined impact and direction of direct and indirect COVID-19 related forces is unknown.

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 16, 2020. **The Chairman** asked if any Council members or any member of the public in attendance had questions or comments. No additional comments were forthcoming. The meeting adjourned at 12:43 p.m.

Meeting on October 16, 2020

Chairman David Lillard convened the meeting at 10 a.m. (CDT) and welcomed the members and those in attendance. A quorum of voting members was established. **The Chairman** noted that this meeting was to be *virtual*, via telephone and videoconference, due to the current pandemic. **The Chairman** asked the Administrator to read a *Statement of Necessity*, due to the need to conduct the meeting virtually. The motion to adopt the Statement of Necessity by Council member **Bruce Fox** with second by Council

member **Paul Shaffer** passed unanimously. A motion by Council member **Bob Pitts**, with second by Council member **Shaffer**, to approve the minutes of the August 28, 2020 Council meeting passed unanimously. **The Chairman** noted that at the previous meeting on August 28, 2020, representatives of the National Council on Compensation Insurance (NCCI) presented an overview of the Voluntary Loss Cost and Assigned Risk Rate Filing proposed to be effective March 1, 2021. Documentation relative to the filing was available to members present at the August 28, 2020 meeting and distributed electronically to members subsequent to the meeting.

The Chairman addressed the next agenda item, and recognized **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 proposed decrease of -9.2% 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 that BYNAC reviewed paid as well as paid+ case development and experience for policy years 2015 and 2016 in addition to the 2017 and 2018 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 2015-2018, BYNAC's experience indication for the voluntary market loss cost level is -8.4%, compared to NCCI's -9.2%. **Ms. King** noted the most recent data evaluated by NCCI covered the period of January 1, 2018 to December 31, 2018, which preceded the COVID-19 pandemic. Council member **Misty Williams** observed that from an insurer's perspective, the Advisory Council should consider the possible impact of large loss medical claims and COVID-19 claims. **Ms. King** responded that insurers should certainly anticipate and factor in the possible impact even though the experience period used by the actuaries in their analyses did not contain any COVID-19 claims.

The Chairman then addressed the next agenda item, 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 -8.2% loss cost decrease. However, he said TBG agreed that NCCI's projected decrease of -9.2% is actuarially sound based on the anticipated market conditions, considering NCCI used only policy years 2017 and 2018 in its evaluation. **Mr. Burkhalter** noted an increase in medical severity of claims in the last two years as one reason he considered a longer evaluation period appropriate.

The Chairman recognized **Dan Cunningham**, Director and Actuary for the *National Council on Compensation Insurance* (NCCI), Actuarial and Economic Services. During his comments, **Mr. Cunningham** indicated policy years 2017 and 2018 better measure the current Tennessee market conditions, but that a longer evaluation period could be considered whenever there is volatility in the period utilized. **Mr. Cunningham** said NCCI had not found volatility to be a factor. He also noted that indemnity costs had remained flat and that medical severity loss ratios were relatively stable. He acknowledged NCCI had not evaluated the possible impact of COVID-19 claims since policy years 2017 and 2018 preceded the pandemic.

The Chairman thanked the presenters for their presentations and opened the floor for further discussion by Council members as well as questions and comments from the members of the public 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 -**8.4%** in line with the recommendations of the actuaries for the Council and the Department of Commerce and Insurance, rather than the NCCI recommendation of -9.2%. Council member **Bruce Fox** seconded the motion. Council member **Pitts** explained his motion took into account three factors: (1) Loss costs have been declining in Tennessee for a decade, (2) the actuaries were closer together in their opinions than at any time during that period, and (3) BYNAC's indication of -8.4% offered flexibility relative to some anticipated large claim losses. The voting members in attendance **voted unanimously to adopt the motion**. (Note: a letter dated October 19, 2020 to **Commissioner Mainda** from the **Chairman** reflected the Advisory Council's recommendation.)

The Chairman recognized BWC Administrator **Abbie Hudgens** for a report on the *Tennessee Drug Free Workplace* program. **Ms. Hudgens** stated the NCCI had recently concluded there was a greater loss cost experience among participants in Drug Free Workplace programs. She said the BWC would research the matter and further report when appropriate. **Ms. Hudgens** also said the BWC would soon make certain recommendations for modifying the current workers' compensation medical fee schedule.

The meeting adjourned at 11:04 a.m.

Meeting on March 18, 2021

Upon convening the *virtual* meeting at 1:30 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 a recommendation on proposed legislation introduced in the First Session of the 112th General Assembly affecting the workers' compensation system. The **Chairman** indicated one bill had been referred to the Council by **Representative Kevin Vaughan**, Chairman of the House Commerce Committee, and that the Council's recommendations would be reported to both the House Commerce 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, Bob Pitts, and Paul Shaffer**) may vote on such matters.

The Chairman then read a *Statement of Necessity* that explained a *virtual* meeting of the Council via telephone and videoconference was required because of the current pandemic. **The Chairman** moved, seconded by Council member **Pitts**, that the Council adopt the Statement of Necessity. The motion carried unanimously.

The Chairman addressed the first item on the agenda, which was to approve the minutes of the Council's meeting on October 16, 2020. A motion to approve by Council member **Fox**, seconded by Council member **Shaffer**, carried unanimously.

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

The Chairman addressed **HB0553/SB0995 (Whitson – Gardenhire)**, and recognized the House sponsor, **Rep. Sam Whitson** for the presentation. **Rep. Whitson** explained that the bill would add to the acquired infectious diseases for which an emergency rescue worker receives a rebuttable presumption that his or her disability occurred in the line of duty. If enacted, "infectious disease" would include

a virus or other communicable disease for which the *World Health Organization* (WHO) or the federal centers for disease control and prevention declare a pandemic, and for which the Governor has declared a state of emergency. **Rep. Whitson** also presented some written comments from the *Tennessee Municipal League* (TML), indicating the bill would not have a significant fiscal impact.

Advisory Council members asked several questions about the proposed legislation. **Paul Shaffer** asked for clarification whether the bill would apply to any pandemic and not just the current COVID-19 situation. **Dr. Sam Murrell** asked if the bill would apply retroactively to individuals who had already contracted the coronavirus. He drew a distinction between the different routes of spread of blood borne infections such as HIV and Hepatitis C and a virus like COVID-19. He stated that infections known to reoccur such as COVID-19 could present multiple future episodes whereas HIV and Hepatitis C were one-time diagnostic events. **Dr. Murrell** said there were indications “long haulers” affected by COVID-19 could manifest several different health conditions over time and that the bill therefore raised questions about which of the potential illnesses were included. **Rep. Whitson** said he did not believe the bill would apply retroactively. **Misty Williams** expressed concerns about potentially increased financial costs to insurers, as well as coverage issues, in view of the known long-term effects of COVID-19. She stated any form of presumption is of concern to insurers. **Gregg Ramos** asked **Rep. Whitson** if a particular event or circumstance prompted introduction of the bill or if it was due to the current pandemic. **Rep. Whitson** indicated he was unaware of a particular event or circumstance. Other discussion points included whether the bill would apply to future pandemics involving other viruses.

Council member **Pitts** moved, seconded by **Kerry Dove**, that the Advisory Council report an unfavorable recommendation on **HB-553/SB0995**. In support of his motion, **Mr. Pitts** stated that historically, the Advisory Council has considered presumption bills problematic since they open the door for similar future bills. He noted the impact on local government likely would be very significant, and certainly not a minimal effect relative to workers’ compensation premiums, claims and costs. He characterized the bill as “open ended,” that it would potentially apply to any number of future infectious diseases, and would commit the workers’ compensation system to pay for unpredictable costs. Noting the possibility of multiple recurrences due to long-term effects of COVID-19, **Mr. Pitts** maintained just because a rescue worker contracts the coronavirus does not mean it was work-related.

After further discussion, the four voting members present unanimously adopted the motion to report an *unfavorable recommendation* on **HB0553/SB0995**.

The Chairman addressed the next agenda item, which was a proposed new written *Conflict of Interest Policy* for the Advisory Council. **The Chairman** recognized **Assistant Treasurer Alison Cleaves** for comments on the policy draft. **Ms. Cleaves** explained that other boards and commissions attached administratively to the Department of Treasury have policies with similar language. **Mr. Pitts** asked what prompted the introduction of the policy. **The Chairman** and **Ms. Cleaves** explained that the Comptroller of the Treasury staff has recently inquired of the Department generally whether boards and commissions have written conflict of interest policies. In light of that inquiry, the Department wanted to make sure all of the boards and commissions administratively attached to Treasury have a conflict of interest policy. In addition, the Comptroller recently elicited the Advisory Council’s response to questionnaires, which included the conflict policy question, in connection with sunset hearings conducted by the Joint Subcommittee on Government Operations on June 18, 2019 and September 16, 2020. The purpose of the hearings was to help facilitate a decision whether to extend the Advisory Council’s existence for an additional four-year period.

Council member **Bruce Fox** said he and other members needed some additional time to consider the

proposed policy. **The Chairman** indicated he was agreeable but believed it would be appropriate to convene again before the end of the current fiscal year so the Advisory Council could formally adopt a policy. In response to a question, **Ms. Cleaves** said the policy would only apply to voting members.

The meeting adjourned without objection at 2:05 p.m. [Note: A written report on the action by the Advisory Council on the proposed legislation considered on March 18, 2021, was reported to **Chairman Kevin Vaughan** of the *House Commerce Committee* and to **Chairman Paul Bailey** of the *Senate Committee on Commerce and Labor*, and the members of their respective committees on March 23, 2021.]

Meeting on June 1, 2021

Chairman David Lillard convened a *virtual* meeting of the Advisory Council on Workers' Compensation at 1:30 p.m. Council voting members **Brian Hunt, Bob Pitts, Paul Shaffer,** and **the Chairman** constituted a quorum. **The Chairman** read a *Statement of Necessity* for the virtual meeting by telephone and videoconference because of the current pandemic. A motion to adopt the Statement of Necessity by **the Chairman**, seconded by Council member **Brian Hunt**, carried unanimously. A motion by **Mr. Hunt**, seconded by Council member **Bob Pitts**, to approve the minutes of the Council meeting on March 18, 2021 also carried unanimously.

The Chairman explained the purpose of the meeting was administrative in nature, and related to considering and adopting a new written *Conflict of Interest* policy for Council members. **The Chairman** observed that under T. C. A. §50-6-121(a)(1)(B), he could vote on the matter under consideration because the subject of the meeting involved administrative matters and did not relate to recommendations on legislation or executive branch policies. **The Chairman** recognized **Assistant Treasurer Alison Cleaves** for comments on the policy draft, as modified from the original draft provided on March 18, 2021. **Ms. Cleaves** explained, based on legal research and an inquiry with another state agency, that a conflict policy should apply to all voting and nonvoting members except for the two *ex-officio* members who are legislators, and thus are subject to the conflict of interest rules and requirements for members of the General Assembly.

The Chairman opened the floor for discussion, questions and comments from Council members and members of the public in attendance. A motion by Council member **Pitts**, seconded by Council member **Shaffer**, that the Advisory Council adopt the subject written Conflict of Interest policy carried unanimously by the voting members present.

Without objection, the meeting adjourned at 1:42 p.m.

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 2020 calendar year to the General Assembly in January 2021 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).

Three 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:

Latoya Paris v. McKee Foods Corp.

No. E2020-00358-SC-R3-WC, filed February 16, 2021

In 2005, the employee injured her left wrist while working with pallets for McKee Foods. She underwent multiple surgeries for a triangular fibro-cartilage injury. Her authorized treating physician (ATP) assigned a three percent permanent partial impairment rating and gave the employee lifting restrictions. The employee settled her PPD claim on September 17, 2009. Her right to future medical treatment was preserved. After leaving her employment with McKee Foods, she went to work for Amazon. In 2012, the employee experienced pain in her left wrist while lifting an item. After seeing her ATP, she viewed her wrist pain as a continuation of the original injury. McKee Foods took the position she had sustained a new injury that relieved it of responsibility. She did not file a workers' compensation claim against Amazon. By 2015, the employee was working for another company, T. R. Moore. While working there, she experienced significant left wrist pain. Her original ATP recommended she elevate the wrist and wear a brace as needed. Again, McKee Foods contended she had sustained a new injury and denied further treatment with the ATP. After seeking administrative review, the employee's ATP examined her and found no change in her condition. The employee filed a WC claim against McKee Foods, seeking medical treatment benefits. The ATP opined that the employee had not sustained a new injury in either of the work incidents at Amazon or T. R. Moore. He also testified that the lifting restriction he imposed applied only to her left hand and that the employee was capable of lifting more using both hands. At trial McKee Foods contended the employee exceeded her lifting restrictions, which constituted an intervening cause that "broke the chain of causation." The trial court agreed. The employee appealed, arguing the trial court had erroneously applied the ***intervening and independent cause rule***, absent a finding of a subsequent injury.

On appeal, the Special Panel agreed that the Supreme Court's "consistent description of the intervening cause principle indicates the presence of a new injury, or at least an aggravation of the original injury, is a premise of the rule." (Quoting *McAlister v. Methodist Hosp. of Memphis*, 550 S.W.2d 0, 245 (Tenn. 1977)). The Panel held if the employee's activity results "in only an increase in pain, but there is no new injury or

aggravation of the original injury, the independent intervening cause principle is not applicable to relieve the original employer of liability.”(Citing *Trosper v. Armstrong Wood Prods., Inc.*, 273 S.W.3d 598, 607 (Tenn. 2008)). The Panel found no evidence of either a new injury or aggravation of the original injury and no progression of the original injury or anatomical change. The Panel **reversed** the trial court’s holding on intervening cause, and **affirmed** the holding that there was no new injury or an aggravation of her existing condition. It also rejected the employer’s assertion of the equitable doctrine of **unclean hands**. The employer contended the purported violation of lifting restrictions constituted unconscionable conduct. The Panel upheld the ruling of the trial court that a lifting violation “does not amount to the kind of ‘unconscientious, inequitable, or immoral conduct’ that would warrant invocation of the doctrine of unclean hands.”

The full opinion is available at

https://www.tncourts.gov/sites/default/files/e2020-358_opinion.pdf

Memphis Light, Gas & Water Division v. Charles Nesbit

No. W2019-02275-SC-WCM-WC, Filed March 26, 2021.

A 30-year employee working as a bucket truck driver who repaired street lights, experienced pain in his right knee while stepping into a bucket on April 19, 2013. He reported the injury and saw several orthopedic surgeons through his workers’ compensation coverage. The physicians advised he needed a knee replacement but that his condition was not work-related. He had knee replacement surgery through his private insurance on March 4, 2014. Several months later, his operating surgeon opined that the right knee replacement was necessary because of the repetitive work the employee performed, and that he needed a left knee replacement as well. The employee did not make a workers’ compensation claim until December 11, 2014. The employer asserted the claim was time-barred and denied workers’ compensation benefits.

The medical history showed the employee had a right knee injury 2005 and that he injured his left knee in 2009. Physicians had indicated he had degenerative changes and underlying osteoarthritis. At trial, an occupational expert testified the employee had a 77% vocational impairment. The operating surgeon assigned a 37% permanent partial impairment to the right lower extremity, and confirmed the repetitive work aggravated or accelerated pre-existing arthritis, although the degenerative changes were not work-related. He did state the surgery was necessary because of pain and an anatomical change in the knee. Other orthopedic surgeons testified they attributed the need for knee replacement to degenerative changes and arthritis, not work injuries, and that they observed no anatomical or structural changes due to injuries. The employer maintained the employee’s claim was untimely.

The trial court found the employee suffered a compensable, gradually occurring injury at work. The Special Panel **reversed**, finding a reasonably prudent person in the employee’s position who knew he had significant knee problems that worsened with time, would not wait nine months after replacement surgery to take any action. The employee had argued he could not have known he had experienced a work-related injury earlier because physicians he saw under his workers’ compensation coverage had not established a causal connection. The Panel observed that while the employee did see the physicians for the April 19, 2013 acute work injury, the instant action related to a separate claim for a *gradually occurring injury*. The Panel distinguished two Supreme Court opinions relied upon by the employee, *Pentecost v. Anchor Wire Corp.*, 695 S.W.2d 183 (Tenn. 1985) and *Livingston v. Shelby Williams Industries, Inc.*, 811 S.W.2d 511 (Tenn. 1991). In both cases, the employees had given notice within 30 days (*Pentecost*) and “immediately after learning his condition could have been caused” by his work injury

(Jenkins).

The full opinion is available at

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

Angela Varner Nickerson v. Knox County, Tennessee

No. E20209-01286-SC-R3-WC, filed June 8, 2021.

The employee filed a workers' compensation claim in June 2018, alleging she had sustained a cumulative mental injury from exposure to traumatic crime scenes while working as a forensics technician with the sheriff's department from 1998 to 2011. She claimed she did not know her injury was disabling until a PTSD diagnosis in 2018. The employer denied the claim, contending it was time-barred by the statute of limitations, and sought summary judgment. The Court of Workers' Compensation Claims (CWCC) denied summary judgment. The Workers' Compensation Appeals Board (WCAB) vacated the trial court's judgment and remanded the case for determination whether the CWCC could exercise subject matter jurisdiction based on the date of injury. The employer filed a renewed motion for summary judgment based on lack of subject matter jurisdiction and the statute of limitations. The CWCC denied the motion due to the "cumulative" mental injury claim. The WCAB reversed the trial court and remanded for entry of dismissal based on lack of subject matter jurisdiction. The sole issue on appeal before the Special Panel was **whether the CWCC had subject matter jurisdiction based on the date of mental injury**. The Panel **affirmed** the judgment of the WCAB and adopted its opinion.

The employer had transferred to another department in 2011. After leaving the forensics division in 2011 she began experiencing nightmares and depression that worsened over time although she had no additional precipitating or aggravating work-related events after her transfer. Before March 2015, a primary physician told the employee she might have PTSD and that it was possible her work experiences in forensics had contributed to her mental health issues. She saw a psychiatrist in September 2015 and although they discussed PTSD, she did not return to him until April 2018 due to health insurance issues. The psychiatrist diagnosed PTSD on May 7, 2018. The employee identified her injury date as June 12, 2018. In response to the employers' denial of benefits and summary judgment motion, the employee argued the statute of limitations was suspended by the discovery rule, and alternatively that the injury was gradual to which the "last day worked" rule applied. The employer contended she knew or should have known the work-related nature of her mental injury in 2015 when she sought mental health treatment related to her work experiences.

The WCAB analyzed the subject matter jurisdiction issue. The CWCC did not possess original and exclusive jurisdiction for workers' compensation claims for alleged injuries occurring on or before July 1, 2014. The WCAB noted it must distinguish the determination of the "date of injury" from the date the statute of limitations began to run. It first defined mental injury in this case as an "identifiable work-related event resulting in a sudden or unusual stimulus." The phrase, "date of injury," is not defined under Tennessee Workers' Compensation Law, although an injury by accident is perceived as one occurring close in time to the event. A cumulative, or gradually occurring, injury can be determined by the last day worked rule if the evidence "clearly establishes a date prior to the last day worked where injurious exposure ceased, the testimony clearly establishes that no further deterioration of the employee's condition occurred as a result of a workplace injury after the last day of injurious exposure, and the employee ceased working for the employer for reasons unrelated to the workplace injury." (Quoting *Hix v. TRW, Inc.*, 2009 LEXIS 285 (Tenn. Workers' Comp. Panel June 12, 2009)). The Panel observed the last day worked likely might not be the last day of an employee's exposure to work that caused the injury.

Significantly, the WCAB noted the Supreme Court had previously declined to recognize “compensability of mental injuries caused by gradual or cumulative work-related stress which is not abnormal or unusual in nature.” *Goodloe v. State*, 36 S.W.3d 62, 67 (Tenn. 2001). The WCAB observed that a mental injury under Tennessee law occurs when there is “a loss of mental faculties or a mental or behavioral disorder, arising primarily out of a physical injury or an identifiable work-related event resulting in sudden or unusual stimulus.” (T. C. A. § 50-6-102(17)). Here, there was no physical injury, and the events forming the basis of the claim occurred in or before 2011, well prior to the subject matter jurisdiction of the CWCC.

The full opinion is available at

https://www.tncourts.gov/sites/default/files/nickerson_vs_knox_county_opinion.pdf

Note: During calendar year 2020, the Supreme Court and its Special Workers’ Compensation Appeals Panels issued opinions in 16 cases between January 22, 2020 and December 11, 2020. Twelve 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*. Four opinions were issued in “new law” cases. Two of those involved appeals from the *Court of Workers’ Compensation Claims* and one came directly from the *Workers’ Compensation Appeals Board*. One came from the *Tennessee Claims Commission*. Through June 8, 2021, the Special Panel has issued three 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 124 work-related fatalities in Tennessee in 2019, compared to 122 in 2018, reflecting an increase of approximately 2%. The highest number of fatal occupational injuries (34) involved workers in the major occupational groups of transportation and material moving.

According to the Bureau's 2019 non-fatal occupational injury and illness statistics, Tennessee's incidence rate was 2.7 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 2.9. State government had the lowest incidence rate at 2.2, and local governments had the highest incidence rate, at 4.6 recordable incidents per 100 full-time equivalent workers.

In 2019, of approximately 18,360 non-fatal occupational injuries and illnesses resulting in actual days away from work, 59.9% involved male workers and 39.7% involved female workers. Approximately 22.7% of the injuries and illnesses requiring days away from work occurred to those between 45 and 54 years of age. Some 20.4% 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/2019OccupationalInjuries.pdf>

CONCLUSION

The Advisory Council on Workers' Compensation met on four (4) occasions from July 1, 2020 through June 30, 2021. 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,

/s/ _____
David H. Lillard, Jr.
Treasurer, State of Tennessee
Chairman

/s/ _____
Larry Scroggs
Administrator