Report of the Advisory Council on Workers' Compensation To the Senate Commerce & Labor Committee

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The Advisory Council on Workers' Compensation held a second meeting on February 22, 2016 to review pending workers' compensation bills, and, pursuant to T.C.A. §50-6-121(j), *"The advisory council on workers' compensation shall, within ten (10) days of each meeting it conducts, provide a summary of the meeting and a report of all actions taken and all actions recommended to be taken to each member of the consumer and human resources committee of the house of representatives and commerce and labor committee of the senate."* This is the report of that February 22, 2016 Council meeting for your review and information.

SB 1706 / HB 1869 (Gardenhire/Farmer) was **merged by an amendment with SB 2582 / HB 2416** (**Norris/Lynn)** and is discussed below under SB 2582.

SB 1758 / HB 1720 AMD 12573 (Green/White M) Council member Dr. Sam Murrell, III, (Tennessee Medical Association representative) indicated that, while he was happy that there is a bill addressing the issues of paying providers, he was disappointed that Amendment 12573 essentially removed the specific mandatory penalties of the original proposed bill and reverted back to the statutory penalties already in place and not being enforced. Additionally, the Amendment would remove the potential revenue which would have been produced as outlined in the Fiscal Note to the original bill. Not only does the Amendment concern him because the provider is not given payment as due under the fee schedule, but he suggested that it also takes what was a fiscally neutral bill and essentially removes the pay for the bill, namely the penalty. Dr. Murrell requested that his comments be included along with any recommendation. Mr. Bruce Fox (employee representative) **moved** that the

bill be approved with the amendment. Mr. Kerry Dove (employer representative) **seconded** the motion, which resulted in a **unanimous recommendation for passage of the amended bill** with the comments attached.

SB 1880 / HB 2038 (Johnson/Eldridge) This is a Caption Bill to be carried on the calendar.

SB 2482 / HB 2404 (Massey/Travis) Mr. Bradley Jackson of the Tennessee Chamber of Commerce and Industry informed the Council that this bill has been withdrawn and will not be heard this legislative session.

SB 2580 / HB 2194 (Norris/Coley) The bill calls for the apportionment of fault by the Courts in workers' compensation cases wherein there exists third party liability and the potential for employer subrogation recovery. The bill was summarized by Mr. Jim Summers, employer attorney from Memphis who indicated that in 1992, comparative fault became the law in Tennessee, then anomalies occurred from that point forward, resulting in a third party possibly being held 100% liable even if they are only 1% liable and the employer is 99% at fault. He indicated that the Tennessee Supreme Court has suggested the legislature look at third party allocation and do two things: #1, If an employee sues a third party, that third party should be able to allege comparative fault against the employer for its portion of fault, and #2, reduce, to the extent of the employer's negligence, their right to subrogate against the employee for whatever money is received. He believes that from a policy standpoint, it makes it fair, as someone should not pay a greater amount than that for which they are responsible.

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

Council member Mr. Bruce Fox (employee representative) asked the speaker if the fault of the employer reduced the recovery to the injured employee, to which Mr. Summers responded affirmatively as the employee would only get a reduced amount. Mr. Fox asked if the fault of the employee was not imputed to the employer, to which Mr. Summers responded in the negative, stating that an individual's fault is his fault. Mr. Fox inquired that if the employee's fault is stacked upon the employer's fault and

together they were over 50%, there would be no recovery from the third party. Mr. Summers did not think that was the way the bill was intended to be written. Mr. Fox indicated that, regardless of intent, that would be the result. Mr. Fox indicated that under the comparative fault scheme, the injured employee who may have a third party claim may not recover simply because the employer's fault is going to take them over 50%, but indicated that he needed time to review it before making a final decision.

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

Mr. David Broemel, on behalf of the American Insurance Association, employers and the people who insure them, indicated that they had a very different view of what this bill does because the employer has to pay the injured employee regardless of fault. Comparative fault or contributory fault does not come into the equation and the injured employee has the right to go after the tortfeasor, but the courts have been consistent in saying that the employer's subrogation interest, the employer's lien, should not be diminished because it is a no fault situation, and this bill will do away with that. Another inequity is that the courts have said that even though the employer may have an obligation to pay a huge amount in future medical treatment because the workers' compensation law gives the injured employee future medical treatment, the employer's position is going to be damaged by this and the courts have recognized it is not fair. Mr. Broemel urged the Council to vote against this bill to maintain equity. The chair asked if there were any questions for Mr. Broemel, and seeing none thanked him.

Council member Mr. Bob Pitts (employer representative) noted that from an historical perspective, a similar bill was brought up several years ago and rejected and that continued education on the issue seems to be desired, so **moved** that the bill go out with a negative recommendation, which was **seconded** by Council member Mr. Paul Shaffer (employee representative) which resulted in a unanimous vote to send the bill out with a negative recommendation.

SB 2582 / HB 2416 (Norris/Lynn) was **merged by an amendment with SB 1706 / HB 1869 (Gardenhire/Farmer)** There is no drafting code at the time of this report, but the amendment is two and one-half pages long and is labeled **House Consumer & Employee Affairs Subcommittee 1, Amendment 1 to HB 2416** sponsored by Representative Lynn. Council member Mr. Bruce Fox (employee representative) indicated that both sides that had issues with these bills merged the two and reached an agreement which is the Amendment. The substantive changes are that the notice provision has been reduced from 30 days to 15 days and that reasonable attorney's fees may be awarded under

section 3(d)(1)(B) when the employer wrongfully denies benefits. He suggested, as a housecleaning matter, that under Section 3(d)(1)(B) of the Amendment which starts with the sunset provision should be reversed, as it would make more sense to show that only what is above it is what is being sunsetted, not the entire previous portion of the bill. It was clarified that reversing the positioning of the provisions of 3(d) (1)(B)(1) and 3(d)(1)(B)(2) would be advised to make the amendment more comprehensible and to properly articulate the intent. The intent is only to sunset that section of 3(d)(1)(B) that deals with attorney's fees, not the entire bill. Council member, Mr. Bob Pitts (employer representative) **moved** to approve passage of the amended bill, **seconded** by Mr. Fox (employee representative) and a roll vote resulted in a **unanimous recommendation for passage as amended.**