

Reflections on the 2013 Reform and What's Ahead

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WHY DID PEOPLE HATE WORKERS' COMPENSATION?

When Abbie Hudgens was appointed Administrator for the Bureau of Workers' Compensation one of the first questions she was asked was "Why does everyone hate workers' compensation?"

In January 2012, Governor Bill Haslam authorized a **research project** on what might improve Tennessee's workers' compensation system. The project was conducted by a working group that was composed of representatives of the Bureau of Workers' Compensation, Department of Commerce and Insurance, and the Governor's office.

Over the course of the project, the working group met with over one hundred stakeholders, representing large and small employers, employees, medical and service providers, insurance companies, and attorneys. The working group researched the workers' compensation systems of other states, especially states in the southeast, and compared them to Tennessee's system. In July 2012, the State also hired consultants WorkComp Strategies to conduct a comprehensive study of Tennessee's workers' compensation system and recommend whether changes should be made to laws, rules, processes, and/or the administrative structure that would improve the state's system and outcomes for both employees and employers.

The working group presented its **recommendations to Governor Haslam** in September 2012, and they became the basis of the Workers' Compensation Reform Act of 2013, signed into law on April 29, 2013.

Governor Haslam later said,

“Our legislation brings clarity and fairness to the system and builds on our ongoing efforts to make Tennessee the No. 1 location in the Southeast for high quality jobs.”

PERCEIVED PROBLEMS

Several reform themes emerged repeatedly in the concerns voiced to the working group during the project. They included:

- The inherent fairness and **predictability** of the workers' compensation system needed improvement.
- Tennessee's workers' compensation **costs** were higher than the average of all states' costs.
- The workers' compensation system was **too complex**; it needed to be simpler.
- Injured workers were **away from their workplaces** for unacceptably lengthy periods.
- **Delays** in the delivery of indemnity (wage replacement) benefits and medical care occurred too often.
- Too often employees had to hire an attorney to navigate the system because it was so **complicated**.
- Too few settlements took place, and too many claims required **adjudication**.
- The definition of injury was **too vague** and led to claims unrelated to the job.

SOLUTIONS AND THEIR IMPACT

Court of Workers' Compensation Claims: The change that is most often associated with the reform act is the establishment of the Court of Workers' Compensation Claims within the Bureau of Workers' Compensation, which only hears workers' compensation cases.

Brian Hunt, Chief Operations Officer for Southern Champion Tray in Chattanooga, wrote the following in a letter to the Bureau:

"The creation of a Worker's Compensation Court created a more consistent and predictable outcome. Similarly, due to the singular focus of worker's compensation cases, faster claim resolution has occurred. Costly trials have been avoided, and disputed claims are minimal. The Worker's Compensation Court in **Tennessee should be a model for all states to follow.**"

Since its inception, the Court of Workers' Compensation Claims has earned a reputation for consistency, professionally written opinions, and expedience. All twelve judges in the eight bureau offices follow one set of rules, including the Tennessee Rules of Civil Procedure and Tennessee Rules of Evidence. Judges use status conferences to keep cases moving through the system and avoid the pre-reform problem of cases that languished for years, because pre-reform judges did not encourage attorneys to advance their cases.

A random sample of claims for the two-year period before the development of the reform bill showed the number of days from the time a worker reached maximum medical improvement to his/her trial ranged from 634 to 1,487 days. Reformed procedures also eliminated the much-criticized pre-reform practice dubbed the "race to the courthouse," where both sides would race to file their papers in the court they thought would be more favorable to their case. In the words of defense attorney Fred Baker of Wimberly Lawson in Cookeville,

"it was undignified and added unnecessary complications to an already complicated system."

An emphasis on quality in judges' opinions has been instrumental in their positive reputation. All opinions go through a formal peer review process to ensure that they are

consistent with the workers' compensation statute and case law. Judges receive annual training on legal writing, and outside writing experts evaluate samples of their writing each year.

The court also emphasizes timeliness in its operations. During the past ten months, judges released their opinions on average in 7.4 days – an exceptional record.

The impact of the court was summed up in the following statement from Mr. Hunt:

“For the rare situation where we have a disputed claim, having a Worker's Compensation Court that provides consistent and predictable judgments that are timely has been a **breath of fresh air.**”

Appeals Board: The careful structuring of the Court of Workers' Compensation Claims is mirrored in the Workers' Compensation Appeals Board. Its three judges established five core values for their operations: rule of law, equal justice for all persons, decisional independence, excellence, and accountability.

Beyond these values, the Appeals Board remains mindful of the impact of their judgments, which was expressed in the words of one of their former judges, Marshall Davidson, now with the Board of Judicial Conduct in Nashville. When he addressed a graduating class at the Nashville School of Law, Judge Davidson said,

“Be ever mindful that although much of the work you will do will be technical in nature, behind every case name and every docket number there are real people.”

Evidence of the impact of the Appeals Board is the **small number of their opinions** that are **appealed to the Supreme Court** and the extremely low percentage of those cases that are reversed. In 2021, only five post-reform opinions were appealed to the Supreme Court compared to forty-nine pre-reform cases in 2014. Of the five appealed opinions, the Supreme Court upheld the Appeals Board in full in two opinions and affirmed in part with two others. In addition, since 2014, seven of the Appeals Board's opinions have been fully adopted and incorporated into Supreme Court opinions.

Ombudsman Services: The reform act brought a more structured assistance program for parties (either employees or employers) who are not represented by legal counsel. This program has been welcomed by employers and employees alike.

The letter from Mr. Hunt also expressed a frequently heard opinion of the ombudsman program:

“[T]he creation of the Ombudsman Program has provided ‘neutral support’ for the injured worker who desires more guidance and advice. I have personally given the phone number to employees and had them return with a ‘Thank you.’ In one case, the employee told me that he just wanted someone to explain things to him, so he knew if the process was working appropriately and if the compensation was fair. The department deserves major accolades with the Ombudsman Program for the continued education and support for those involved.
Proactiveness at its best!”

What led to such a **positive opinion of the ombudsman program**? Part of the answer can be found in the numbers. In 2021, the ombudsman program made 14,482 contacts with unrepresented people on 11,650 issues. They provided information or education to 9,175 people and resolved 470 disputes. The more important answer is the level of service that ombudsmen provide. Throughout the last eight years, the Bureau received compliments almost monthly about the caring assistance ombudsmen provided to people who did not have an attorney and did not understand the process for making a claim.

In 2017, the statute established the ombudsman attorney position that allows the Bureau to provide limited legal advice to unrepresented parties. By the end of 2021, a 150% increase had occurred in the number of people who received services from the two ombudsman attorneys.

Even with these successes, the Bureau and stakeholders continue to have concerns that more needs to be done for unrepresented workers. Longtime member of the Tennessee Advisory Council on Workers’ Compensation, Bob Pitts of Associated Builders in Nashville, was asked recently if he could make one change in Tennessee’s workers’ compensation, what would it be? He said he would enable ombudsmen to provide more extensive assistance to workers and that he thought this change would contribute to increased success in the

workers' compensation system by sending the message that it treated both employees and employers impartially. For his part, Mr. Baker wrote,

“[T]he reform has resulted in a much higher number of unrepresented injured workers, which places a strain on the efficiency of the litigation system and places judges in an untenable position of conducting a hearing without giving any legal advice. Even with changes to the ombudsman program and the addition of attorney fee provisions in the statute, we still see a very high number of injured workers with attorneys.”

Enhanced Mediation: Several changes in the reform act have yielded improvements to the system. A Bureau mediator is now assigned to a post-reform claim immediately upon the filing of a petition for benefit determination. The mediator immediately contacts the parties to **facilitate an agreement**, not only at the outset of a dispute over temporary disability or medical benefits, but also later in the claim if a dispute arises about permanent disability benefits. Going further, the reform act requires that parties raise all issues during a mediation; they cannot delay the legal process unnecessarily by waiting to raise issues at the court hearing. The statute also requires each party to have someone at the mediation with the authority to settle the claim to avoid unnecessary delays in settlements.

The results are documented by the numbers. Mediations under the reform act, conducted by the Bureau's dedicated, highly trained mediators have an **impressive settlement rate** of 84% in the 3,493 cases they mediated in 2021, up from the 60% settlement rate in 2015.

Other Changes and Their Impact:

- The reform act included a **new definition of causation** that requires an injury to arise primarily out of employment. The statute states that an injury arises primarily out of employment “if it has been shown by a reasonable degree of medical certainty that it contributed more than fifty percent (50%) in causing the injury, considering all causes.” This was a significant change from the lower standard of medical causation for pre-reform claims. Mr. Baker commented,

“[T]he ‘primarily’ causation standard has added much-needed clarity for compensability determinations. While questions can

still arise, it is nice to have some specific statutory guidance about what it means for an injury to be work-related.”

This change contributed to a reduction in the number of compensable claims, and a debate continues as to whether this is the right definition of causation. The debate brings up arguments that go back to the early twentieth century and the foundation of workers’ compensation, which observers have called the “Grand Compromise” or “Grand Bargain.” Benefits for workers’ compensation are not determined like claims based on the negligence of another party. The law entitles workers to benefits if their injury was incurred in the course and scope of their job, even if the injury did not result from anyone’s negligence. Workers’ compensation is a tradeoff: benefits are available for all work-related injuries, but they are not as large as they would be if the employer’s negligence had caused the injury.

No universally accepted answer exists among the states about the “right” definition of causation. Some states have more liberal definitions than Tennessee, and some have stricter.

- The 2013 Reform changed the construction of the statute from liberally construed in favor of the injured worker to one that **favors neither the employee nor the employer**. Opinions vary on the impact of this change. Attorneys who represent injured workers have commented that the move away from a more liberal standard is a step backwards in public policy or even a “race to the bottom.” In contrast, employers maintain that it is a fairer standard because it moves away from court opinions that had routinely resolved all close questions in favor of the employee, and it is an approach used in other areas of civil law. This change contributed to a reduction in the frequency of compensable claims.
- The reform act simplified the determination of permanent partial disability benefits, which made the award of benefits **easier and quicker to determine**. Injured workers are eligible for permanent partial disability benefits when they reach maximum medical improvement but still have an impairment. Among the changes are:
 - Assessments of impairment became based on the “body as a whole” instead of either “body as a whole” or a lengthy list of “scheduled members,” such as

“one arm and the other hand” or “one eye and a foot.” This change **simplified the settlement process** and **lowered litigation costs**.

- After the reform, assessment of the impairment rating assigned by the treating physician is presumed accurate but can be overcome by a preponderance of the evidence. Before the reform, the treating physician’s rating was not presumed to be any more accurate than the rating of another physician, even if the physician had not treated the worker, which led to “doctor-shopping.”
- The **multiplier** for permanent partial disability benefits for an injured worker who returned to work changed from 1.5 times the impairment rating to 1.0 times the impairment rating.
- The **multiplier** for permanent partial disability benefits for an injured worker who was **not able to return to work** changed from a nonspecific multiplier of up to six times the impairment rating, to a formula that includes specific multipliers for the inability to return to the pre-injury job, age, education, and a high unemployment rate in the county in which the employee worked.
- The period for permanent partial disability benefits increased to 450 weeks from 400 weeks. This increase offset some of the impact of the lowered multipliers.
- Wide variances in benefits for similar injuries stopped.

These simplifications resulted in more consistent results and reduced the number of disputes over the calculation of benefits. Before the reform, the average multiplier was around three. After the reform, the maximum multiplier totaled a little more than three, which **reduced the total amount of permanent partial disability benefits paid** to injured workers in Tennessee for injuries that occurred after July 1, 2014.

While the general perception is that the latitude pre-reform judges had in decisions on the permanent partial disability multiplier led to awards that were often too high, the question remains whether the new formula adequately compensates injured workers who cannot return to their pre-injury jobs.

- **Treatment guidelines** were part of the reform act to improve the quality and timeliness of medical care by reducing time-consuming utilization reviews. A section of the reform act stated that any treatment that explicitly follows the treatment guidelines has a presumption of medical necessity, eliminating the need for utilization review.

The expected drop in utilization reviews has not occurred, however. Plaintiff attorney Tony Farmer, of Dreiser Law Group in Knoxville, commented that he continues to see **unreasonable delays in the delivery of medical care.**

“My belief then and my continued belief is the larger systemic problem in respect to the timeliness of benefit delivery is the unreasonable delays I consistently see in the delivery of medical benefits throughout the injured worker’s treatment course...There seems to be no tool to force employers to act in a timely manner to provide the necessary specialist treatment and testing, and I see this as a shortcoming that is costing not only injured workers in delayed treatment but employers in extended and unnecessary weekly benefits in many cases.”

For over a year, the Bureau and stakeholders analyzed the problems of utilization review, which led to new utilization review rules to alleviate identified problems. The rules have gone through a period of public comment and are now under review by the Office of the Attorney General.

The importance of access to quality and timely medical care continues to be a priority for the Bureau and is an important consideration in its initiatives.

DID THE REFORM ACT PROVIDE SOLUTIONS?

The answer depends on who is asked. **A pair of Tennessee employers, below, said yes:**

McKee Foods Corporation – Collegedale, TN

“The Tennessee Worker’s Compensation Reform of 2013 has been beneficial and important to both employees and employers

in the state. This reform allows employees to have a voice, and choices in their care, if they are injured on the job. It has helped create a better partnership and more alignment between employee and employer. We now have a system where we can focus on taking care of employees if injured on the job, all the while returning employees to work as soon as appropriate. It has allowed Tennessee to be a better place to work and to do business.”

Southern Champion Tray – Chattanooga, TN

“The good news for the State of Tennessee is that the 2013 Worker's Compensation Reform Act emerged with solutions for most of our concerns and delivered a more expedient solution for employees. The process is one built around the principle of fairness, predictability, and expedience.”

Mr. Farmer also expressed a favorable opinion:

“[T]he 2013 Reform Act has been a very successful transition from a judicial/administrative system to an administrative system for injured workers and employers, because the women and men with the BWC [Bureau of Workers’ Compensation] make it successful through hard work and commitment. The system is constantly being tweaked, with minor statutory and rule changes that are responsive to a process that is maturing and adapting to practical realities.”

Others, however, are not as positive about the result of the reform. Some attorneys for injured workers voiced concerns about reduced payments for permanent partial disability benefits, the smaller number of injured workers who have legal representation, and attorneys’ inability to add value to a case that would justify charging the injured worker a legal fee. Fewer of these attorneys accept workers’ compensation clients, but the number of attorneys who are accepting employees’ cases has begun to increase for the first time.

Physicians commented that they think the reform did not do enough to eliminate the headaches occasionally associated with treating workers' compensation patients, including utilization review practices and payment issues.

Advocates for injured workers voiced concerns that too many barriers are still in place: getting prompt medical treatment, benefits are too low, and not enough legal assistance is available for injured workers who are unable to hire attorneys.

A different viewpoint comes from one prominent attorney for injured workers, Mr. Farmer, who believes the answer for unrepresented workers is additional simplification.

"I would hope that as we go forward, a path to simplification of the process can be explored that would allow injured workers to process their claims and protect them from arbitrary and noncompliant behavior of insurers and insurer attorneys."

DID WORKERS' COMPENSATION COSTS GO DOWN?

Yes, according to multiple sources.

A pair of employers/carriers offered favorable comments. Michael Fann, president of the major insurer of Tennessee municipalities, Public Entity Partners, said,

"[T]he workers' compensation reform has provided the needed clarity on what constitutes a work-related injury, provided emphasis on getting injured employees back to the workforce, and allowed the local government employers that we work with to balance the total cost of work-related injuries with providing services to taxpayers. These factors have **allowed the PE Partners Board of Directors to reduce workers' compensation base rates** for the past four years in a row."

Likewise, Cary Rotter, CEO/President of WeCare Services, Inc. in Memphis and West Tennessee wrote,

“(D)iligent, results-oriented employers are saving significantly in workers’ compensation premiums due to the 2013 legislation.”

Empirical studies confirm their opinions. The Oregon Workers’ Compensation Premium Index Survey reported over the years in its bi-annual report that **Tennessee’s premium rate** per \$100 of payrolls **dropped from \$2.02** in 2012 **to \$1.09** in 2020. And the Department of Commerce and Insurance has approved reductions in loss costs of over 59 percent since the reform act.

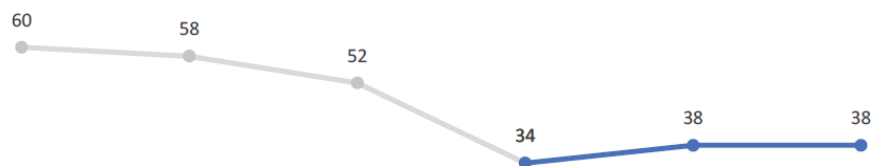
Governor Bill Lee stated,

“The decline of workers’ compensation insurance premiums is an important factor in creating a pro-business atmosphere in Tennessee, where companies can grow, employees can prosper, and our state can continue to attract high-paying jobs.”

No single reason accounts for the reduction in costs, but a decline in the number of claims is one explanation. The frequency of reported claims had been dropping for several years before the reform, but since the reform, the number has dropped from approximately 100,000 to 89,093 in 2021. Some of the decline can be explained by increased mechanization and safer workplaces, but the reform act also had an impact.

Changes in the definition of a compensable claim may account for part of the reduction, as does the elimination of the liberal construction of the statute. Increased timeliness of the claims system also contributes to lower costs. Changes in the calculation of permanent partial disability benefits have additionally cut costs.

The National Council on Compensation Insurance performed an analysis of claims for the last three pre-reform years compared to the first three reform accident years. It determined that the average number of weeks awarded for a permanent partial disability claim dropped from 60 to 38 weeks. Fewer weeks of permanent partial disability benefits means lower claims costs.



FAY 2012	FAY 2013	FAY 2014	FAY 2015	FAY 2016	FAY 2017
Pre-Reform			Post-Reform		

The reform did not affect all categories of benefits, however. No reduction in the amount of temporary total benefits has resulted. Similarly, no reduction in the amount of permanent total disability benefits occurred, other than a positive change that ensured that older recipients received at least five years of permanent partial disability benefits, even if they qualified for Social Security. Further, no reduction in the amount of death benefits has taken place. And a bill that provided a modest increase for funeral expenses was passed after the reform act.

THE 2013 REFORM'S LEGACY

Developing the legislation for the reform took more than a year, and that period was marked by frequent and in-depth discussions with multiple stakeholders. This interaction among stakeholders did not end with the passage of the reform bill. The emphasis on exchange of opinions on policy issues continues today, and the Bureau has earned a reputation for transparency and a willingness to engage in dialogue with stakeholders.

Among the initiatives implemented to improve the system after the passage of the reform act are:

- **Uninsured Employers Fund Benefit** for injured workers. Legislation established a limited benefit of up to \$40,000 for medical care and temporary total disability benefits to injured workers whose employers unlawfully failed to provide coverage. Penalties collected from noncompliant employers fund this benefit. The ultimate goal of this program is to provide statutory benefits to injured workers whose employers do not comply with the law.
- **Claims Adjuster Certification Program.** The Bureau improved the quality of claims processing through the implementation of a voluntary claims adjuster certification course. This program has certified six hundred claims adjusters to date. Each time the Bureau announces a new class, it is filled immediately. The classes have improved outcomes for employers and injured workers alike.
- **Vocational Assistance (Next Step) Program.** This is funded by the Subsequent Injury and Vocational Assistance Fund and offers up to \$5,000 per year (for up to four years) for education and vocational assistance to eligible workers who cannot return to their pre-injury jobs. These workers have used this program to **gain new careers** and stay in the workforce.

- **REWARD (Return Employees to Work and Reduce Disabilities) Program.** This is the Bureau's most recent initiative. It brings employers, adjusters, physicians, and injured workers together to help injured workers recover as soon as possible so they can get **back to their pre-injury lives and jobs**. The program includes an employer toolkit, free training courses for employers who want to establish more effective return-to-work programs, an employer support program, and a **physician certification program**. The REWARD program is based on the belief that all parties involved in workers' compensation can achieve great outcomes for both employees and employers through collaboration.

WHAT'S AHEAD?

The success of the 2013 Reform Act depended on the people in the Bureau of Workers' Compensation who implemented it and their commitment to the vision of a system that fulfilled "the promise of workers' compensation today and tomorrow." Its future success depends on maintaining the same high-quality, committed personnel.

One way to do this is to continue the rigorous process used to select the current judges of the Court of Workers' Compensation Claims. The process includes a lengthy questionnaire and interviews by a committee of representatives from the judicial branch, employers, labor, defense and plaintiff attorneys, before the final interview with the administrator. As a result, judges were appointed who established a court that is known for fairness, consistency, and excellence. As judges retire going forward, future administrators would do well to use similar care in the selection of new judges, so the positive impact of the court will continue.

The successful implementation of the non-judicial elements of the 2013 reform requires people who were also committed to the highest standards of quality and to continuing the spirit of the reform by developing and implementing additional improvements to the system. Ongoing success demands that this level of quality and commitment in the Bureau continues, as it transitions to the next generations of leaders, beginning with the appointment of a new administrator this summer.

Mr. Farmer echoed these sentiments about the importance of dedicated Bureau staff. He said,

“Whether our system is judicially based or administratively based, **the system will fail or succeed because of the people** who hold the positions that make the system function. In the eight years since the actual engagement of the 2013 reforms, I have been consistently impressed with the quality and commitment of the women and men who support and execute the workers compensation program as employees of the Bureau of Workers Compensation.”

FINAL THOUGHTS ON THE IMPACT OF THE 2013 WORKERS’ COMPENSATION REFORM ACT

The impact of the reform and the programs that have flowed from it are apparent in almost every area of Tennessee’s workers’ compensation system. Specifically:

- More disputed claims are now resolved without a lengthy court process. Those that proceed to court are resolved more quickly with more consistent and predictable outcomes.
- More employees are receiving valuable assistance if they do not have an attorney.
- More options are available for those employees who cannot return to their pre-injury jobs.
- A greater and earlier emphasis has been placed on helping employees recover and return to the workplace.
- The overall cost of workers’ compensation is lower.

Continuing the current trajectory of Tennessee’s workers’ compensation system will well-serve the citizens of Tennessee, its employers, and injured workers, as the system continues to enhance the programs that are working efficiently, and to identify solutions to the areas that need improving.

The results will continue to make “Tennessee the No. 1 location in the Southeast for high quality jobs.”



Abbie Hudgens

Abbie.Hudgens@tn.gov

Administrator

Troy Haley

Troy.Haley@tn.gov

Legislative Liaison

tn.gov/workerscomp



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