

# REGULAR MEETING OF THE OKLAHOMA WORKERS' COMPENSATION COMMISSION

Thursday, August 21, 2014  
1:30 p.m.  
Commission Chambers  
1915 N. Stiles Ave.  
Oklahoma City, Oklahoma  
www.wcc.ok.gov

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## *AGENDA*

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**CALL TO ORDER..... Mr. Wilson, Chair**

**ROLL CALL ..... Mr. Wilson, Chair**

**NOTICE OF COMPLIANCE..... Holly Miller**

### **MINUTES**

- a. The drafted Minutes of Regularly Scheduled Commission Meeting on July 17, 2014, will be considered for approval.
- b. The drafted Minutes of Special Commission Meeting on August 6, 2014, will be considered for approval.
- c. Clarification on the December 17, 2013 Minutes. The Minutes state "Chairman Wilson called for a vote on action taken in Executive Session." The executive session minutes have been reviewed and no action was taken. Consideration will be given to adopting an addendum to the December 17, 2013 Minutes clarifying no action was in fact taken in Executive Session.

**BUSINESS ..... Mr. Wilson, Chair**

**THE FOLLOWING MATTERS ARE PRESENTED FOR CONSIDERATION AND ACTION, IF ANY, DEEMED APPROPRIATE BY THE COMMISSION.**

1. **Possible Executive Session for the Purpose of Confidential Communications Between the Commission and Its Attorneys Concerning Pending Litigation and Related Claims and Charges Filed With the U.S. Equal Employment Opportunity Commission**

Pursuant to 25 O.S. § 307(B)(4), an Executive Session is proposed for the purpose of conducting confidential communications between the Commission and its attorneys concerning pending lawsuits and claims against the Commission, including *Angela Sanders v. The Oklahoma Workers' Compensation Commission* and *Kartral McKnight*,

*et al., v. The Oklahoma Workers' Compensation Commission*, and related claims and charges filed with the U.S. Equal Employment Opportunity Commission.

The Commission's counsel from the Attorney General's Office have advised that public disclosure of the communications relating to these claims and lawsuits will seriously impair the ability of the Commission and their counsel to respond to the litigation and claims.

- a. **Motion and Vote to (A) Determine That Disclosure Will Seriously Impair the Ability of the Commission to Respond to the Claims and Lawsuits, and (B) to go Into Executive Session for the Purposes Stated Above**
- b. **Vote to Reconvene in Open Session**

**Possible Action:**

No action is anticipated nor will be taken by the Commission.

2. **Commission's Construction of the Provisions of 85A O.S. §§ 19 and 22, as They Relate to the Power of the Commission Chair to Employ Administrative Staff for the Commission**

Under the provisions of Title 85A, Section 19, Subsection E, the Chair of the Commission is vested with various powers, including the power, "to employ administrative staff for the Commission . . ." Commission's general appointment powers are set forth at Title 85A, Section 22(B) which provides, "Commission may appoint as many people as may be necessary to be administrative law judges and in addition, may appoint such examiners, investigators, medical examiners, clerks, and other employees as it deems necessary to effectuate the provisions of this act." As noted in the Review from the Attorney General's Office presented to the Commission at its last meeting, the provisions regarding the Chair's power to act as the appointing authority is subject to more than one interpretation. Senior Assistant Attorney General Neal Leader has advised that it is his best legal judgment that the most fair and reasonable interpretation of the provisions is to consider the language in Section 22 as the granting of broad appointing powers to the Commission, and the provisions of Section 19 vesting the Commission Chair with appointment power, as one of the means by which the Commission can exercise its appointing authority—in this case by action of the Chair. Mr. Leader further advises that the Chair's Section 19 appointment power extends to the employment of all of the Commission's "administrative staff," and that because of the broad definitions of the words "administrative" and "administration," the term "administrative staff" is best broadly construed to confer upon the Chair the power to hire and fire all Commission employees that serve administrative functions, as opposed to decision-making or policy-making functions.

**Possible Action:**

Possible action may include, but is not limited to: taking no action, continuing the matter, adopting Mr. Leader’s recommended construction of 85A, Sections 19(E) and 22(B), conferring upon the Chair the power to hire and fire all Commission employees that serve administrative functions, as opposed to decision-making or policy-making functions, or adopting another construction of the provisions.

3. **Commission’s Recognition of the Chair’s Power to Enter into VBO’s, Accept Resignations and Terminate Commission Employees**

In July, the Commission Chair entered into VBO’s and accepted the resignation of the following positions:

<b><u>Position</u></b>	<b><u>Employee’s Name</u></b>
Clerk II	Fuller, Janis R.
Strategic Process Facilitator	Hall Jr., Thomas P.
Court Reporter	Jones, Cynthia K.
Court Reporter	Massey, Kimberly J.
Docket Clerk	Mendoza, Juanita Maria
Clerk II	Mitts, Devin
Docket Clerk	Parker, Carolyn J.
Court Reporter	White, Michelle
Business Manager I	Twyman, Vicky
Clerk II	Pike, Lori E.

In July, the Commission Chair terminated Commission employees occupying the following positions:

<b><u>Position</u></b>	<b><u>Employee’s Name</u></b>
Administrative Technician I	Anderson, Kara D.
Microfilm Operator	Carrier, Rewa L.
Computer Programmer	Gray, Debbie L.
Court Reporter	Idleman, Kevin L.
Clerk III	McKnight, Katral U.
Data Processing Encoder II	Sanders, Angela D.

The issue presented under this agenda item, is the Commission’s determination whether to recognize the Chair’s power to enter into VBO’s, accept resignations and terminate the incumbents holding the positions listed above as falling within the term “administrative staff,” and therefore, falling within the Chair’s hiring and firing powers under Title 85A, Section 19.

**Possible Action:**

Possible action may include, but is not limited to: taking no action, continuing the matter, determining that some or all or none of the positions at issue fall within the term “administrative staff,” and thus fell within the Chair’s “hiring and firing” power.

4. **Commission Termination of Commission Employees**

It is clear that if any of the above terminated employees did not fall within the term “administrative staff,” that Section 19 did not confer upon the Chair the power or ability to hire or fire such employees. In such an instance—if any—the Chair’s termination action may well be found to be void or voidable. Accordingly, any action in which back pay is sought, challenging the Chair’s termination actions, in which a Court ultimately determined that the Chair’s action was either void or voidable, the Commission’s liability for back pay could extend well beyond the date of the Chair’s actions. In recognition that the statutes are subject to more than one construction, the Commission, out of an abundance of caution, and in order to limit any potential back pay liability, will consider taking action to terminate those employees.

**Possible Action:**

Possible action may include, but is not limited to: taking no action, continuing the matter, or terminating some, all or none of the above named employees out of an abundance of caution.

5. **Ratifying the Hiring of Commission Employees**

Since February the Commission has announced the hiring of various employees. The following are Commission employees hired after February 1, 2014:

Clif Cypert, Deputy Director	Dana Esparza, Paralegal
Dr. Jay Cannon, Medical Director	Ann Campbell, Counselor
Kim Bailey, Law Clerk	Teresa Allen, Counselor
Andrea Bair, Deputy Director of Insurance	Thomas Lewis, Administrative Officer

The issue presented is whether the Commission ratifies the hiring of these employees.

**Possible Action:**

Possible action may include, but is not limited to: taking no action, continuing the matter, or ratifying some, all or none of the listed employees.

6. **Exercise of the Commission’s Power, Under Title 85A, Section 19, to Prescribe Additional Duties and Responsibilities of the Commission Chair**

Under the provisions of Section 19 of Title 85A, Subsection E, the Commission is empowered to impose various additional duties and responsibilities upon the Chair. The Commission will consider whether to impose the following duties and responsibilities upon the Commission Chair:

- a. **Vesting the Chair with the Duty and Responsibility of Hiring, Firing and Fixing the Salary of All Commission Employees Except the Executive Director, Administrative Law Judges, Attorney/Law Clerks, and the Medical Director.**
- b. **Vesting the Chair with the Power and Responsibility of Entering Into All Leases, and Contracts Involving Expenditures of \$50,000 or less, and,**
- c. **Empowering the Chair to Make Task and Report Assignments, and Establish Deadlines for the Performance of a Task, or Submission of a Report**
- d. **Empowering the Chair to Organize the Reporting Relationships of All Staff**

**Possible Action:**

Possible action may include, but is not limited to: taking no action, continuing the matter, taking action to impose all, some or none of these additional duties and responsibilities upon the Chair.

7. **Proposed Delay in Contracting for and Installation of the Electronic Data Interchange (EDI) System Until Next Fiscal Year**

Because the procurement process for acquiring an EDI system has been greatly delayed and because it was impossible to acquire and install the EDI system prescribed, or to do so in the near future, the Commission will consider a vote to delay that system, and use the monies from this fiscal year which would have been used to acquire the system, to hire employees to perform some of the functions that the EDI system would have performed.

Although 85A O.S. §101(B) states EDI shall be implemented by July 1, 2014, that statutory deadline was impossible to achieve from the start. Implementing an EDI system generally is an 18 month process. Implementation will likely be accomplished more quickly once the Commission has the funding next fiscal year and is able to avail itself of the statutory resources provided. The statute provides for the assistance of the Insurance Commissioner and an Advisory Committee appointed by the Governor.

**Possible Action:**

Possible action may include, but is not limited to: taking no action, continuing the matter, voting to delay the acquisition and implementation of the EDI system to the next fiscal year, voting not to delay, or delay it for a different period.

8. **Delegation of Commission’s Consideration and Actions on Third-Party Administrator, Self-Insurance and Group Self-Insurer Permit Applications and Related Sanctions to Commission Administrative Law Judge**

Under the provisions of Section 21 of Title 85A, the Commission may delegate to an administrative law judge the ability to hear and decide the rights of interested parties—except the Commission’s authority to hear appeals of decisions from administrative law judges—to an administrative law judge. Here the Commission will consider whether to authorize the chair to delegate the review and action on Applications for Third Party Administrators, Self-Insurance and Group Self-Insurer Permits and the imposition of sanctions to an administrative law judge.

**Possible Action:**

Possible action may include, but is not limited to: taking no action, continuing the matter, authorize the chair to delegate the duty to consider and act on third party administrator, self-insurance and group self-insurer permit applications and related sanctions to an administrative law judge, or refusing to make such delegation.

9. **Adoption of an Internal Policy and Procedure for Preparation of Commission Agenda and Minutes**

Proposed for the Commission’s consideration is the following internal procedure for preparation of Commission Agendas:

Any Commissioner wishing to have an item placed on an Agenda should make that request by presenting it, in writing, to the Commission’s Executive Director; the requested item must be described with specificity. Requests must be presented no later than 10 days before a regular scheduled meeting, and as soon as possible when a special meeting is being called. All requests will be considered by the Chair and the Executive Director who shall agree on which items should appear on the Agenda. If they cannot reach an agreement, the decision of the Chair shall control.

Minutes of open meetings will be prepared by the Executive Director or designee of the Executive Director. The Chair will assign the person to take minutes in executive session at the time of the executive session.

**Possible Action:**

Possible action may include, but is not limited to: taking no action, continuing the matter, adopting the proposed internal agenda and minutes preparation policy as stated, or adopting a different agenda and minutes’ preparation procedure.

10. **Commission’s Construction of the “Three Year Experience and Competency” Requirement for Independent Medical Examiners in Commission Rule 810:15-9-1**

One of the eligibility requirements imposed on those seeking to become an independent medical examiner under Commission Rule 810:15-9-1, is that a physician must, “have at least three (3) years’ experience and competency in the physicians specific field of experience and in the treatment of work-related injuries . . .” An issue that has arisen is whether in calculation of the “three year experience requirement,” a physician’s functioning as a resident should be considered. Here the Commission is asked to interpret the Rule.

**Possible Action:**

Possible action may include, but is not limited to: taking no action, continuing the matter, or adopting a construction of the Rule’s “three (3) year experience requirement.”

11. **Commission Consideration of Sponsorship of Educational Programs for Independent Medical Examiners**

Under Commission Rule 810:15-9-1, one of the requirements is that Independent Medical Examiners must attend “Commission sponsored education programs at least once every two (2) years . . .” Presented for the Commission’s consideration are the following programs with additional programs to be considered at future meetings:

- a) Oklahoma Annual Workers’ Compensation Commission Educational Conference
- b) AMA Guides- Sixth Edition Training on September 5<sup>th</sup> in Oklahoma City

**Possible Action:**

Possible action may include, but is not limited to: taking no action, continuing the matter, approving some or all of the above listed programs for Commission sponsorship.

12. **Proposed Approval of Dr. Joshua Carey As an Addition to the Independent Medical Examiners for the Commission**

Title 85A OS §112 requires the Workers' Compensation Commission to create, maintain and review a list of licensed physicians who shall serve as independent medical examiners (IME). The Commission shall, to the best of its ability, include the most experienced and competent physicians in the specific fields of expertise utilized most often in the treatment of injured employees. Dr. Joshua Carey, who specializes in general surgery, has been vetted by the Medical Director and recommended to be added as an IME for the Commission.

**Possible Action:**

Possible action may include, but is not limited to: taking no action, continuing the matter, approving Dr. Joshua Carey as an IME for the Commission or disapproving Dr. Joshua Carey as an IME.

13. **Commission Approval of the Multiple Injury Trust Fund Assessment Rate**

May 1, 2014, each mutual or interinsurance association, stock company, CompSource Oklahoma, or other insurance carrier writing workers' compensation insurance in this state, and each employer carrying its own risk, including each group self-insurance association were notified of the assessment rate in effect from July 1, 2014 - June 30, 2015, in accordance with 85A O.S. §31(A)(5). The Multiple Injury Trust Fund (MITF) assessment rate to be charged in accordance with 85A O.S., §31 for the four-quarter period of July 1, 2014 through June 30, 2015 is six percent (6.00%) of anyone of the following:

- Gross direct premiums written for workers' compensation for risks located in this state (for insurance carriers and CompSource Oklahoma);
- Normal premiums (for group self-insurance associations); or
- Actual paid losses (for individual self-insured employers).

The rate was calculated using a statutory formula. The formula involves dividing the gross direct written premium, normal premium and actual paid losses reported by workers' compensation payors for calendar year 2014 (\$1,014,897,799) into \$98,740,000 [the sum of the MITF's outstanding obligations for calendar year 2015 (\$96,190,000), as reported by the MITF, and \$2,550,000 fixed by law for funding various state programs related to worker safety and workers' compensation fraud prosecution].

Assessments are due on the 15th day of the month following the end of the calendar quarter and are based on the payor's premiums or losses (as applicable) during the quarter. The new six percent (6.00%) rate applies beginning July 1, 2014 (i.e. the third quarter of calendar year 2014) until June 30, 2015.

**Possible Action:**

Possible action may include, but is not limited to: taking no action, continuing the matter, or approving the assessment rate of six percent (6.00%).

14. **Commission Ratification of Lease Agreements and Contracts**

From February 1, 2014 through August 21, 2014, the Commission through the Chair has entered into the following lease agreements and contracts:

<u>Lease or Contract</u>	<u>Amount</u>
OMES Lease on Davison 3 <sup>rd</sup> Floor FY-14	\$20,628.99
OMES Lease on Davison 3 <sup>rd</sup> Floor FY-15	\$82,515.96

OMES Lease on 50 NE 23 <sup>rd</sup>	\$17,381.02
OMES Lease in Tulsa FY-15	\$5,294.23
OMES Lease on Davison 2 <sup>nd</sup> Floor FY-15	\$0
OMES Agency Business Services FY-15	\$19,440
OMES Human Capital Management FY-15	\$15,000
OMES ISD	\$137,170
OMES VOBO agreement	\$176,540.02
Operating Agreement with CEC FY-14	\$0
Department of Labor MOU on Compliance Officer Transfers	\$0
WorkComp Strategies for EDI Consulting	\$2,400
Jason Smitherman for EDI Forms Consulting	\$4,500
NCCI for Proof of Coverage Database	\$0
Pen-Write Communications for Communications Plan	\$4,500
Prodigy Group for Communications Audit	\$1,500
Candor Media for Public Relations Assistance	\$4,800
Attorney General's Office for legal services FY-14	\$51,408.75

**Possible Action:**

Possible action may include, but is not limited to: taking no action, continuing the matter, or approving some, all or none of the lease agreements and contracts listed.

15. **Proposed FY-2015 Contract between the Commission and the Oklahoma Office of the Attorney General**

The Commission will consider a proposed contract engaging the legal services of the Oklahoma Office of the Attorney General for FY-2015. The cost of the contract is \$123,381.00.

**Possible Action:**

Possible action may include, but is not limited to: taking no action, continuing the matter, or approving the contract with the Attorney General's Office in the amount of \$123,381.00.

**ADJOURNMENT.....Mr. Wilson, Chair**