

LEGAL SERVICES

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MEMORANDUM

March 25, 2010

SUBJECT: Workers' compensation; exclusive liability for project owners and contractors (SB 303, Work Order No. 26-LS1089\R)

TO: Senator Joe Paskvan
Chair of the Senate Labor and Commerce Committee
Attn: Jeff Stepp

FROM: Dennis C. Bailey
Legislative Counsel

This memorandum is in response to your request for a memo that provides short answers to the questions posed in the memorandum to your office dated March 23, 2010, and an additional question related to whether the exclusive remedy provisions of AS 23.30.055 apply when the actions of an owner or contractor constitute criminal negligence.¹

1. May an owner or general contractor assert the exclusive remedy of the Alaska Workers Compensation Act, based on the last sentence of AS 23.30.055, to avoid liability for an injury to an employee of a subcontractor that occurs during employment?

The short answer is yes, based on the analysis in my prior memorandum.

2. Are the "intentional injury" and "illegally employed minor" exceptions the only recognized exception to the workers' compensation exclusive remedy statute?

The short answer is yes.²

3. Do the exclusive remedy provisions of AS 23.30.055 protect a project owner or general contractor from liability for the injuries to a subcontractor's employee if the owner or general contractor acts with criminal negligence?³

¹ My conclusions are based on existing law, not addressing the changes to AS 23.30.055 proposed in SB 303.

² My research of the Alaska case law did not reveal an additional exception to AS 23.30.055.

³ The material provided describes criminal negligence as follows: "the risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation."

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The short answer is yes.⁴

4. Do the exclusive remedy provisions of AS 23.30.055 protect an employer who intentionally injures an employee, or who violates child labor law?

The short answer is no, based on the analysis in my previous memo.

If I may be of further assistance, please advise.

DCB:med
10-057.med

⁴ I am unable to locate caselaw, an administrative opinion, or an attorney general opinion in Alaska that addressed criminally negligent conduct in the context of a workers compensation claim. Absent intentional conduct, it is unlikely that a court would find criminally negligent conduct on the part of an employer to be the kind of conduct that should be outside of the operation of workers' compensation statutes. See 6-103 *Larson's Workers' Compensation Law*, sec. 103.03

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MEMORANDUM

March 23, 2010

SUBJECT: Questions regarding workers' compensation exclusive remedy provisions (SB 303, Work Order No. 26-LS1089\R)

TO: Senator Joe Paskvan
Chair of the Senate Labor and Commerce Committee
Attn: Jeff Stepp

FROM: Dennis C. Bailey
Legislative Counsel

This memorandum responds to your questions concerning the exclusive liability provisions of the existing Alaska Workers' Compensation Act.

*May an owner or a general contractor assert the exclusive remedy provisions of the Alaska Workers' Compensation Act to avoid liability for an injury to an employee of a subcontractor that occurs during employment?*¹

AS 23.30.055 sets out the exclusive liability provisions in the Alaska Workers' Compensation Act; the section reads:

Sec. 23.30.055. Exclusiveness of liability.

The liability of an employer prescribed in AS 23.30.045 is exclusive and in place of all other liability of the employer and any fellow employee to the employee, the employee's legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from the employer or fellow employee at law or in admiralty on account of the injury or death. The liability of the employer is exclusive even if the employee's claim is barred under AS 23.30.022. However, if an employer fails to secure payment of compensation as required by this chapter, an injured employee or the employee's legal representative in case death results from the injury may elect to claim compensation under this chapter, or to maintain an action against the employer at law or in admiralty for damages on account of the injury or death. In that action, the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of the employment, or that the injury was due to the contributory negligence

¹ Workers' compensation is "payable irrespective of fault as cause for the injury." AS 23.30.045(b).

of the employee. In this section, "employer" includes, in addition to the meaning given in AS 23.30.395, a person who, under AS 23.30.045(a), is liable for or potentially liable for securing payment of compensation.

Under AS 23.30.055, an employer's liability to secure workers' compensation under AS 23.30.045² is the exclusive liability of an employer for an injury to the employee. The last sentence of AS 23.30.055 adds to the definition of an "employer" a person who is potentially liable for securing workers' compensation payment. Under AS 23.30.045(a), a subcontractor, a contractor, or a project owner are each potentially liable for securing workers' compensation payments; therefore, any of them may assert the exclusive liability provisions of AS 23.30.055 as a defense.

Do the exclusive remedy provisions of AS 23.30.055 protect an employer who intentionally injures an employee or who violates child labor laws?

The Alaska Supreme Court has recognized an intentional injury exception to the exclusive remedy provisions in AS 23.30.055. The Alaska Supreme court has

held that [the] exclusive remedy provision does not apply where an employee commits an intentional tort against a fellow worker. We found that the "socially beneficial purpose of the work[ers'] compensation law

² AS 23.30.045 provides:

Sec. 23.30.045. Employer's liability for compensation.

(a) An employer is liable for and shall secure the payment to employees of the compensation payable under AS 23.30.041, 23.30.050, 23.30.095, 23.30.145, and 23.30.180 - 23.30.215. If the employer is a subcontractor and fails to secure the payment of compensation to its employees, the contractor is liable for and shall secure the payment of the compensation to employees of the subcontractor. If the employer is a contractor and fails to secure the payment of compensation to its employees or the employees of a subcontractor, the project owner is liable for and shall secure the payment of the compensation to employees of the contractor and employees of a subcontractor, as applicable.

...

(f) In this section,

(1) "contractor" means a person who undertakes by contract performance of certain work for another but does not include a vendor whose primary business is the sale or leasing of tools, equipment, other goods, or property;

(2) "project owner" means a person who, in the course of the person's business, engages the services of a contractor and who enjoys the beneficial use of the work;

(3) "subcontractor" means a person to whom a contractor sublets all or part of the initial undertaking.

would not be furthered by allowing a person who commits an intentional tort to use the compensation law as a shield against liability." We have permitted recovery for intentional torts "on the theory that the harm is not accidental and therefore not covered by the act."

Fenner v. Municipality of Anchorage, 53 P.3d 573, 575 (Alaska 2002) (internal cites omitted). The exception is limited to those cases where an employer has a specific intent to injure an employee. *Id.* at 577. *See also Williams v. Mammoth of Alaska*, 890 P.2d 581 (Alaska 1995) (exclusive remedy bars employee's common law tort claim against partner where partner's negligence arises within partnership business); *Elliott v. Brown*, 569 P.2d 1323 (Alaska 1977) (where employer hit and shoved employees, actions were intentional enough to take case outside workers' compensation system); *Van Bien v. ERA Helicopters, Inc.*, 779 P.2d 315 (Alaska 1979) (aviation firm dispatching pilots without adequate sleep was gross negligence or wilful and knowing violation of FAA regulations, but not the type of intentional tort actionable outside of the workers' compensation system).

With regard to your question concerning the application of child labor laws to the exclusive liability provisions of the Alaska Workers' Compensation Act, if an employer violates child labor laws, AS 23.30.055 does not bar a common law action for damages brought against an employer by a person who was employed in violation of child labor laws at the time of the injury. *Whitney-Fidalgo Seafoods, Inc. v. Beukers*, 554 P.2d 250 (Alaska 1976).

In the *Beukers* case, the Alaska Supreme Court found that the Alaska Workers' Compensation Act does not specifically address the question which remedies are available to illegally employed minors injured in the course of their employment. *Id.* at 252. However, the court held, as a matter of public policy, that

where an employer has knowingly entered into an illegal contract of employment with a child, in express violation of a statute, the employer will not be permitted to insist that a child is an "employee" within the terms of the workmen's compensation act, so that the child can no longer assert its common law rights against the employer.

Id. at 253.

If I may be of further assistance, please advise.

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