WORKERS' COMPENSATION COMMITTEE OF ALASKA

P.O. BOX 241911 | ANCHORAGE, ALASKA 99524 | E-MAIL: INFO@WCCAK.ORG

February 17, 2017

Representative Sam Kito
House Labor & Commerce Committee Chair
State Capitol, Room 403
Juneau, AK 99801

RE: Senate Bill 40/House Bill 79

Dear Representative Kito:

The Workers' Compensation Committee of Alaska (WCCA) is an employer advocacy group dedicated to helping educate and advocate for Alaska employers on issues regarding workers' compensation. We thank the governor for taking an interest in the workers' compensation system and introducing legislation meant to improve the delivery of benefits to injured workers, deter workers' compensation fraud, ensure compliance with the requirement to carry workers' compensation insurance, and provide adequate funding for administration of the system.

WCCA has reviewed the bill and we would like to share some of our thoughts with you:

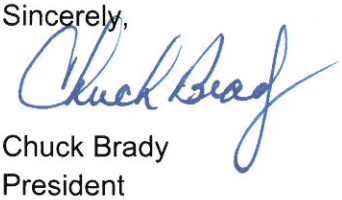
- We welcome efforts at speeding up dispute resolution before the Workers' Compensation Board. Although setting a hearing within 30 days after a claim is filed would move things along, it may not allow sufficient time for employers to do a proper investigation. We think there should also be a provision for mandatory mediation.
- Ending the practice of allowing non-attorneys to represent parties before the Board is a good move, but we would like to see the language amended to allow paralegals under the direct supervision of an attorney to represent parties.
- We oppose eliminating the statute of limitations under AS 23.30.110 (c).
- Eliminating Board approval of attorney fees on settlements that are effective upon filing (don't require Board approval) is a positive step.
- The bill's attempt to speed up medical care is well-intended, but the requirement to authorize or controvert treatment within 60 days of receipt of a provider's written request is problematic for employers and will likely result in a significant increase in controversions and litigation, further

delaying the delivery of medical care. We would rather see the bill state that pre authorization of treatment is allowed, but not required.

- We applaud the bill's effort to prevent workers' compensation fraud. We support the affirmative duty of injured workers to report the receipt of wages and other types of wage-replacement benefits.
- Regarding the misclassification of employees, the WCCA agrees that employers should not attempt to defraud insurance carriers by misclassifying employees, but there should be safeguards against pursuing employers who inadvertently misclassify employees without malicious intent.
- The WCCA agrees with the bill's intent to further clarify the definition of "independent contractor," but we are concerned that the proposed definition is too limiting. Some of the language ignores the economic realities of certain sole proprietors and owner-operators and would result in the disruption of accepted business practices that have been in place in Alaska and around the country for decades.
- The WCCA agrees with the bill's intent to limit civil penalties against uninsured employers to three times the amount of the workers' compensation premium that would have been paid.
- We agree with the bill's intent to reduce administrative costs by allowing payment of benefits electronically, mandating electronic filing of certain reports, and eliminating the requirement that corporate officers get Division approval to opt out of workers' compensation coverage for themselves. We also agree with incorporating medical publications and amended future versions into Department regulations. We do not support the imposition of a penalty for employers and insurers who don't file timely proof-of-insurance.
- The WCCA at this time is not taking a position on the phasing out of the Second Injury Fund. However, we are concerned about what happens to any surplus funds once all claims are paid and closed. Because this money is paid directly by employers and insurance companies specifically for the purpose of paying claims against the Fund, any surplus should either be returned to employers and insurance carriers or applied to some other purpose that would result in a reduction of premium taxes or WSCAA assessments.
- The WCCA doesn't necessarily oppose a greater percentage of the annual service fees going to fund the Department of Labor and Workforce Development. However, we maintain that the Department of Labor and Workforce Development still needs to implement efficiencies and reform measures designed to reduce costs, such as repealing AS 23.30.005 in whole or in part, before WCCA members are willing to support a change.

As always, the WCCA is available to provide input and guidance on workers' compensation issues. The WCCA believes that comprehensive workers' compensation reform is what Alaska employers need...desperately! Please let us know how we can help.

Sincerely,



Chuck Brady
President

cc: Commissioner Heidi Drygas
Alaska Department of Labor & Workforce Development
P.O. Box 111149
Juneau, AK 99811

Alaska Trucking Association, Inc.
3443 Minnesota Drive · Anchorage, Alaska 99503 · Phone (907) 276-1149 · Fax (907) 274-1946
www.aktrucks.org
The authoritative voice of the trucking industry in Alaska

HB79 OMNIBUS WORKERS' COMPENSATION
House Labor and Commerce Committee
3:15 pm, February 20, 2017
Aves D. Thompson, Executive Director
Alaska Trucking Association

Thank you. Mr. Chair and members of the committee, I am Aves Thompson, Executive Director of the Alaska Trucking Association. The Alaska Trucking Association is a state wide organization representing the interests of our nearly 200 member companies from Barrow to Ketchikan. Freight movement represents a large chunk of our economy and impacts all of us each and every day. The simple truth is that "if you got it, a truck brought it."

HB79 proposes changes in AS 23.30.230(a)(11) to add language to define the "tests" to determine when a person is an independent contractor for purposes of workers compensation coverage. The Alaska Trucking Association has some concerns about these tests. The independent contractor or owner operators business model has played an important role in the trucking industry for decades.

Owner-operators serve a valued function within the trucking industry. They are small business owners who rely on their own prudent decision-making and hard work to earn a living and build a business. They offer

professionally-staffed hauling and delivery capacity to motor carriers. Their revenues and profit are directly tied to their level of effort and business judgments – that is, choosing the right truck (make, model and condition) for their operations; deciding how best to finance that truck; selecting repair and maintenance vendors; and deciding whether to hire drivers and substitute drivers. But those initial decisions are only the tip of the iceberg, ongoing business decisions must be made regarding fueling times and vendors; software use including routing programs; insurance coverages, and a wide variety of other needed products-and-services. One of the most critical decisions that owner-operators make is their selection of a motor carrier partner. They must select a carrier whose operations and procedures fit the contractor's business plan. Then as the business grows, the owner-operator must decide the utility of acquiring additional trucks and hiring more drivers and decide whether to partner with multiple carriers.

Motor carriers can rely on the owner-operator's independent motivation and business skills without having to apply the constant and detailed control necessary with the carriers' employee-drivers. The basic bargain the owner-operator strikes with each of its motor-carrier customers turns on the potential for mutual profit. If the owner-operator works hard and makes smart business decisions, he or she profits. The motor carrier profits by the professional, timely, and efficient delivery of freight by this self-motivated independent contractor. The motor carrier can conserve its management resources for other key tasks such as business generation, customer service and financial management.

Alaska Trucking Association, Inc.
3443 Minnesota Drive · Anchorage, Alaska 99503 · Phone (907) 276-1149 · Fax (907) 274-1946
www.aktrucks.org
The authoritative voice of the trucking industry in Alaska

Owner operators are an effective method for the industry to quickly respond to changing customer or market demands by allowing expansion and contraction of the work force.

It is also important to note that equipment and driver leasing in the trucking business is heavily regulated by both Federal Statute, 49 USC 14102, Leased Motor Vehicles and US DOT regulation, 49 CFR part 376, Lease and Interchange of Vehicles.

The proposed changes to the WC statute essentially preclude the use of owner operators in the trucking business in a number of different ways. The rules or tests proposed in HB79 dealing with economic reality in (11)(A) rules out an owner operator who works primarily for one motor carrier although the owner operator may work occasionally for other motor carriers. The second instance is in (11)(E), which leaves open interpretation of "direction of the motor carrier to the contractor" or owner operator and does not clearly specify that many times direction is given to the owner operator that results from customer demands or the requirement of some level of governmental law or regulation. The third instance is found in (11)(F) that prohibits a motor carrier from hiring an owner operator to haul a load of freight.

Our first recommendation is to provide an exemption in AS 23.30.230(a) that will exempt truck drivers from the provisions of this act in the same way that taxi drivers and network transportation drivers are exempted in current law and in SB14. This will clearly establish the truck driver owner operator business model in Alaska law.

Alaska Trucking Association, Inc.
3443 Minnesota Drive · Anchorage, Alaska 99503 · Phone (907) 276-1149 · Fax (907) 274-1946
www.aktrucks.org
The authoritative voice of the trucking industry in Alaska

Our second recommendation (ATA#1) is the adoption of a distinct truck driver independent contractor/owner operator definition and set of tests. We have provided specific language to the Commissioner of the Department of Labor and Workforce Development to accomplish our recommendation.

Thirdly, we have provided proposed changes to the language contained in HB79 that will help to address our issues but not as effectively as our first recommendation. (ATA #2)

We are happy to work with the proposers of the changes to assist in clarifying the issues.

Thank you for your time and I will try to answer any questions.

Aves Thompson
Executive Director

ATA
#1

American Trucking Associations

INDEPENDENT CONTRACTOR MODEL DEFINITION LANGUAGE

PROPOSED BLANKET EXEMPTION

General Exemption:

An independent contractor is an individual who owns or holds under a bona fide lease a motor vehicle which the individual leases to a motor carrier and who personally operates such leased equipment under a written agreement with the motor carrier that specifies that such operations involve an independent contractor relationship.

PROPOSED FACTOR TEST

Independent Contractor Determination

A person operating a motor vehicle for a carrier of property under this chapter shall be considered an independent contractor and not an employee if each of the following factors is substantially present:

a. The person makes a material investment or incurs a material obligation related to equipment contracted to the carrier and used in performing service.
b. The person has direction and control in meeting and performing contract obligations subject to conformance with governmental dictates, lawful requirements of third parties relative to the transport or other contractual obligations undertaken, and any reasonable administrative and clerical procedures needed for contract administration.
c. The person has the principal burden of the operating costs and personal expenses related to contract work.
d. The person's compensation is based primarily on factors related to contract work and not on the number of hours worked and affords the person the opportunity to realize a profit or loss based on the relationship of business receipts and expenditures.
e. The person is responsible for hiring or otherwise engaging and paying the necessary personnel to operate the equipment and meet any contract obligations related to it.
f. A written contract governs the relationship and specifies the relationship of the parties to be that of independent contractor and not an employer-employee relationship.

ATA #2

* Sec. 31. AS 23.30.230(a) is amended to read:

(a) The following persons are not covered by this chapter:

Al

(2) a cleaning person;

(3) harvest help and similar part-time or transient help;

(4) a person employed as a sports official on a contractual basis and who officiates only at sports events in which the players are not compensated; in this paragraph, "sports official" includes an umpire, referee, judge, scorekeeper, timekeeper, organizer, or other person who is a neutral participant in a sports event;

(5) a person employed as an entertainer on a contractual basis;

(6) a commercial fisherman, as defined in AS 16.05.940;

(7) an individual who drives a taxicab whose compensation and written contractual arrangement is as described in AS 23.10.055(a)(13), unless the hours worked by the individual or the areas in which the individual may work are restricted except to comply with local ordinances;

(8) a participant in the Alaska temporary assistance program (AS 47.27) who is engaged in work activities required under AS 47.27.035 other than subsidized or unsubsidized work or on-the-job training;

(9) a person employed as a player or coach by a professional hockey team if the person is covered under a health care insurance plan provided by the professional hockey team, the coverage is applicable to both work related and nonwork related injuries, and the coverage provides medical and related benefits as required under this chapter, except that coverage may not be limited to two years from

the date of injury as described under AS 23.30.095(a); in this paragraph, "health care insurance" has the meaning given in AS 21.12.050; [AND]

(10) a person working as a qualified real estate licensee who performs services under a written contract that provides that the person will not be treated as an employee for federal income tax or workers' compensation purposes; in this paragraph, "qualified real estate licensee" means a person who is required to be licensed under AS 08.88.161 and whose payment for services is directly related to sales or other output rather than the number of hours worked; and

(11) a person employed as an independent contractor; a person is an independent contractor only if the person

[(A) maintains a licensed business; [, THE SUCCESS OR PROFITABILITY OF WHICH DOES NOT DEPEND EXCLUSIVELY OR PRIMARILY ON THE INDIVIDUAL FOR WHOM OR THE ENTITY FOR WHICH SERVICES ARE PERFORMED;]

(B) has a federal employer identification number issued by the Internal Revenue Service or has filed business or self-employment income tax returns with the Internal Revenue Service the previous tax year, or, for a new business that was not operating in the previous tax year, intends to file business or self-employment tax returns with the Internal Revenue Service;

(C) has an express contract to perform the services;

(D) maintains liability insurance or other insurance policies necessary to protect the employees, financial interests, and customers of the person's business;

(E) is free from direction and control over the means and manner of providing services, subject only to the right of the individual for whom or entity for which the services are provided to specify the desired results, completion schedule, or range of work hours[;] and any work rules provided by any governmental rule, statute or regulation;

[(F) IS ENGAGED IN A TRADE, OCCUPATION, PROFESSION, OR BUSINESS TO PROVIDE SERVICES THAT ARE OUTSIDE THE USUAL COURSE OF BUSINESS FOR THE INDIVIDUAL FOR WHOM OR THE ENTITY FOR WHICH THE SERVICES ARE PERFORMED;]

[(G)] (F) incurs most of the expenses for materials, tools, equipment, labor, and other operational costs necessary for the person's business;

[(H)] (G) has the opportunity for profit and may suffer loss based on the management of revenue and expenses with the person's business;

[(I)] (H) does not work as part of a team of individuals or entities on a singular task, such as painting a building or installing a roof, where the work performed by the person cannot be clearly isolated form the work performed by other individuals or entities;

[(J)] (I) hires, pays, controls, and fires any employees required to perform the work for which the person was hired; and

[(K)] (J) maintains a business location separate from the location of the individual for whom or the entity for which services are performed.

2017 Workman's' Comp Issues

I am Shelly Erickson, a small family business owner of multiple business types. I have been the recipient of claims against my workman's comp policies. It has been frustrating that the State of Alaska laws in this area are all written in favor of the employee, no matter what the situation.

Please address the following as you are working on issues with SB29 and HB69 Repeal Workers' Comp Appeals Commission:

1. New Hires need to reveal or release workman's comp records
    a. Problem
        i. New hire physicals are expensive
        ii. The applicant can and will lie to the medical world
        iii. Repeat workman's comp claimants continue to abuse the system and employers because of lack of accountability by the law
2. There needs to be laws in place to protect the small businesses from the abuse of employees not following the policies for safety set in place or using the safety gear they are instructed to use.
    a. The law assumes that the business is irresponsible.
    b. There is no accountability for the employee in the law who disobey the safety rules repeatedly or intentionally.
    c. Many small businesses in Homer can share similar complaints.
    d. Insurance agents have to deal with the FRAUD yearly. There are many examples around Homer and the State of Alaska.
3. Boat owners are assumed to be negligent.

    The law is in the deckhands favor – doesn't matter what the deckhand does, the boat owner is negligent.

    Insurance has to cave to the fraud because of the law, even when they know there is fraudulent case.

4. Workman's Comp Insurance rates

a. A very costly system for a small business owner, as the insurance has to settle for amounts in extreme of the problem.
b. FRAUD is the cause of high insurance rates

5. There needs to be fair consequences to anyone on either side – employer/employee. This one sided system is wrong and the more desperate people are in their private lives, the more they are looking at ways to get around the law and find money. The State needs to have a place to bring these fraudulent cases to and have them dealt with in a fair way for both the employer and employee. If the law cannot be written so these issues can be fixed within the insurance industry, then the state needs to provide a place for the abuse that is happening within the law to be addressed and make it fair for both sides.

6. People need to buy disability insurance so if they get hurt off the job and become disabled, they use that instead of using workman's comp.

Please include this in your public testimony. I would be more than happy to talk with you or look for creative solutions to improve the workman's comp laws. I know that other business owners and insurance industry would too. This cannot be a political issue, because it is literally about the health and wealth of our small businesses.

Shelly Erickson

PO Box 3695

Homer, AK 99603

AMERICAN INSURANCE ASSOCIATION

WESTERN REGION
1201 K Street
Suite 1850
Sacramento, CA 95814
916-442-7617
www.aiadc.org

To: The Honorable Governor Bill Walker

From: Katherine Pettibone, Vice President Western Region
American Insurance Association

Re: SB 40 and HB 79 Worker's Compensation Bills

Position: **SUPPORT**

The American Insurance Association is pleased to support SB 40 and HB 79, which streamline procedures in the worker's compensation and reduce the occasions of employees going without coverage. The measures, among other things, eliminate the second injury fund on a prospective basis, provide more clarity in defining a worker as an employee or independent contractor, allow payments by debit card or electronic funds transfer, strengthen penalties on premium fraud and misclassification of employees, and clarify a medical provider's requirement to provide a written request for medical treatment. These measures provide notable improvements to Alaska's worker's compensation system that alleviate unnecessary friction and costs in the system.

The bills contain various improvements helping to provide accountability and adequate coverage for employees. Among other changes, the measures will reduce potential for misclassification of employees and questionable leasing practices, which unfortunately some employers have used to reduce coverage requirements. AIA is very supportive of the independent contractor test contained in the bill, as carriers seek clarity on whether an individual is an employee or an independent contractor.

The legislation also strengthens requirements for employees to report wages they receive while receiving workers' compensation benefits, as well as expanding liability among those employers who are shown to be evading workers' compensation requirements. Helping transparency and accountability will help make sure that both sides of the equation are being accounted for.

Other benefits include streamlining dispute resolution by speeding up the hearings and ending a practice of allowing non-attorneys to represent claimants in hearings. Employers must also authorize medical treatment for an injured worker on a providers' request and the bill ends uncertainty following a 2014 state Supreme Court decision over when treatment must be authorized by employers.

Finally, we endorse the elimination of the Second Injury Fund. The measures would eliminate the second injury fund on a going forward basis. Second injury funds are inconsistent with the

principle that costs should be internalized and, instead, require that all employers subsidize, via the assessment, benefits paid to claimants who were injured at another employer's workplace. Second injury funds tend to generate transaction costs and disputes as questions arise whether a claim properly belongs in the second injury fund. In addition, second injury funds often accumulate large unfunded deficits as the funds' are financed on a pay as you go process through assessments for current benefit payments.

For these reasons, we are pleased to support these measures and thank you for your efforts to improve the worker's compensation system.

Dear Committee Members,

I have been a member of the Alaska Bar since 1977. Some years ago I became aware of a rather chilling practice in the Workers Compensation process that I found inexcusable, and I have been pursuing a "fix" with my local Anchorage Representatives since. Representatives Gara and Spohnholz have been very gracious with their time in addressing this matter with me and the Administration and HB79 would provide minimal resolution of the problem.

Specifically, some Alaska Workers Compensation insurers have refused to provide medical service providers preauthorization for medical services after a claim has been accepted, and this has resulted in employees not receiving medical major procedures for months. Consider the following example. Janet is injured in the workplace and files an uncontested workers comp. claim. Her doctors order shoulder surgery. The doctors' office contacts the insurer and requests preauthorization as they would with respect to any other insurer. The insurer orders a second medical opinion but refuses to provide preauthorization. The doctors will not proceed with the treatment without the preauthorization, and the insurer, claiming no actual legal obligation to provide a preauthorization, refuses to provide one.

The insurers argue that since bills for accepted claims must be paid, and there is no specific requirement that preauthorization be provided, preauthorization is not necessary. This results in medical providers refusing to provide services as they are concerned that the insurer may refuse to pay for services after the service is provided, despite the provisions of the law that the bill must be paid. Second opinions are usually obtained through out-of-state itinerant doctors and may take months to obtain, and even then, insurers will not issue preauthorization. In other words, while purporting to have accepted the claim, the insurer/employer is in fact intimidating and/or chilling medical providers into not providing services for fear that the bills will not be paid.

This practice has been the subject of numerous cases and most recently the Alaska Supreme Court has agreed with the Alaska Workers Compensation Board that this practice is unlawful and amounts to a controversion because payments for medical services are essentially payable under Alaska law at the time the services are prescribed. Nevertheless, insurers continue to engage in these practices, and the worst bit is that faced with the fact that these companies are simply thumbing their noses at Alaskan workers, the previous Administration knowingly determined to take no action with respect to this conduct.

The current Administration argued that any solution should be statutory, and with the Supreme Court decision in Bockus (attached), the Department included in this session's Omnibus Bill, HB79) a provision that would require preauthorization where the claim is not contested. This modest correction of our statutes is critical in order to ensure that the intent of the underlying law is addressed. The current loophole affords insurers an unholy and wholly unacceptable opportunity to delay treatment, in the ghoulish anticipation that treatment will become unnecessary (death comes to us all, eventually).

Fix this, please.

Marc Grober, Esq.

p.s. I have also made the attachments available here:
http://alaskapolicy.net/PublicRecords/HB79/
This directory includes the Workers Comp Board Bockus decision and the eventual Supreme Court ruling on it, the Kamitchis Board decision and the M-K River Supreme Court decision, all pertinent to any discussion of the preauthorization issue.