THE STATE of ALASKA
GOVERNOR BILL WALKER

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Mr. Curtis Thayer
President and CEO
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Mr. John MacKinnon
Executive Director
Associated General Contractors of Alaska

Mr. Chuck Brady
President
Workers' Compensation Committee of Alaska

Sent via email only

Dear Sirs:

Thank you for meeting with the department yesterday to discuss concerns regarding HB 79. I believe it was a productive discussion. To recap, I think the department can resolve concerns regarding certain sections of HB 79 by making a few tweaks to the bill. Specifically:

- **Sections 9 & 35** (misclassification/premium audit issue) would be revised to remove a penalty for inadvertent misclassification. I suggest the following revision, which would make it very clear that the division will not assess a penalty against an employer if they did not know or should have not known that the specific conduct at issue amounted to misclassification or deceptive leasing practices.

  *** Sec. 9.** AS 23.30.080(f) is repealed and reenacted to read:

  (f) If, after an investigation, the division finds substantial evidence that an employer has failed to insure or provide security as required by AS 23.30.075 or **was** [IS] underinsured as a result of misclassifying employees or engaging in deceptive leasing practices as defined in AS 23.30.250, the division may assess a civil penalty of up to three times the workers' compensation insurance premium that the employer would have paid if the employer had insured, provided the required security, [OR] properly classified employees**, or not engaged in deceptive leasing practices**. The division shall calculate the premium based on

the employer's payroll, including payments that would be considered wages if the employer had not misclassified employees or engaged in deceptive leasing practices under AS 23.30.250, and the assigned risk rates approved by the division of insurance in effect at the time the employer was uninsured or underinsured. The division shall apply aggravating and mitigating factors adopted in regulation to set the penalty amount. Notwithstanding AS 23.30.250(e), a civil penalty under this subsection may be assessed against an employer that misclassifies employees or engages in deceptive leasing practices, even if the employer does not do so knowingly and with the purpose of evading full payment for workers' compensation insurance premiums. **If, after an investigation, the division finds substantial evidence that an underinsured employer misclassified employees or engaged in deceptive leasing practices under AS 23.30.250, but that the underinsured employer did not know and reasonably should not have known the conduct was misclassification or deceptive leasing practices, the division shall issue a written warning to the employer and may not assess a civil penalty.**

- **Section 13** (fines for failing to timely file proof of insurance) would be revised to make it clear that the *insurer*, and not the *employer*, files proof of insurance and is thus subject to a penalty for untimely filing. As industry board member Dave Kester (who spoke on behalf of himself based on his 30+ years in the workers' compensation industry and 14 years on the board) mentioned in the meeting and in his letter to the Senate Finance Committee dated April 18, 2018, Section 13 is necessary as it is the practice of insurance companies to prioritize filing notices in states that impose late fees and fines. With the onset of electronic filing, the issue is not about notices getting lost in the mail but rather an issue of timely filing. I suggest the following revision to make it clear that insurers (and not employers) must timely file or face a penalty for failing to do so:

*** Sec. 13.** AS 23.30.085 is repealed and reenacted to read:

Sec. 23.30.085. Duty of [EMPLOYER OR] insurer to file evidence of employer's compliance. (a) An [EMPLOYER OR] insurer **that issues, reinstates, or renews an insurance policy to an employer under** [SUBJECT TO] this chapter shall, not later than 30 days after **issuance, reinstatement, or renewal of the** [ACQUIRING] insurance **policy**, [INITIALLY] file with the division, in the format prescribed by the director, evidence of **the employer's** compliance with the insurance provisions of this chapter. [THE EMPLOYER OR INSURER ALSO SHALL, NOT LATER THAN 30 DAYS AFTER THE EXPIRATION OR TERMINATION, FILE EVIDENCE OF COMPLIANCE WITH THE INSURANCE PROVISIONS OF THIS CHAPTER.] The requirements in this section do not apply to an employer who has certification

from the division of the employer's financial ability to pay compensation directly without insurance.

(b) If an [EMPLOYER OR] insurer fails, refuses, or neglects to comply with this section, the [EMPLOYER OR] insurer is subject to a civil penalty of $100 for each day the [EMPLOYER OR] insurer is late. Total penalties under this subsection may not exceed $1,000 for each late filing and $10,000 for each [EMPLOYER OR] insurer each year for late filings under this section.

- **Section 23** (7-day grace period for paying benefits) would be revised by either reverting back to the current statutory language (14 days to pay with 7-day grace period) or 21 days to pay with no grace period. The department would be neutral on any amendment offered to that effect.

- **Section 26** (penalty for failure to act on preauthorization request) would be revised by replacing the 25% penalty with the consequence of automatic approval if timely action is not taken to either approve or deny the requested treatment. The department's initial concern with this suggestion was that if treatment is approved by inaction, the consequence for an employer or insurer inadvertently missing a deadline would be automatic approval of what could be very expensive treatment such as surgery, including all follow-up surgeries and follow-up care, even if the treatment is clearly not work-related. However, the industry stakeholders felt that automatic approval is a fair consequence for failing to take action as required by law. The department would be neutral on any amendment offered that would replace the 25% penalty with the consequence of automatic approval.

I believe there was consensus that the other sections referenced in HB 79 would remain as they are. Specifically:

- **Section 11** (fines for failing to produce records) – As Dave Kester mentioned yesterday and in his letter to the Senate Finance Committee, unscrupulous employers know how to game the system and refuse to provide the information necessary to curb fraud. Some stakeholders suggested the division resolve this issue by criminally prosecuting a non-cooperative employer for contempt or otherwise pursue cooperation through the court system. The suggested alternative of pursing a court remedy for contempt is not quick, efficient, or at a reasonable cost. Further, the department does not seek to find employers criminally liable for failing to insure; rather, it seeks compliance with the law through civil means.

- **Section 19** (time limit for scheduling a hearing) – It appears there was a misunderstanding about the removal of the two-year time limit for requesting a hearing, as some industry stakeholders thought HB 79 removed a statute of limitations on filing claims. HB 79 does not eliminate any statute of limitations for filing claims. As explained in the meeting, current

law provides that once an injured worker files a claim, an employer must accept or deny the claim. If the employer denies the claim, AS 23.30.110(c) requires the injured worker request a hearing on the claim (or additional time to prepare for hearing) within two years. If the worker does not do so, the claim is denied as a matter of law. This process has led to protracted and expensive litigation, and wasted division resources. A lack of any type of scheduling order allows both claimant and defense attorneys to litigate a claim piecemeal with no end date in sight. Under HB 79, instead of waiting for the parties to tell the board when they are done litigating, the board would issue a scheduling order like nearly every other jurisdiction and tribunal in the country. The scheduling order would set discovery deadlines and a hearing date, among other things. This would curb the current practices of both claimant and defense attorneys, where there are multiple full board hearings just on discovery issues (there have even been hearings solely to decide the issue of whether a hearing should be scheduled). This ineffective practice drags out resolution of workers' compensation claims for years and years, and needs to stop. It is not quick, efficient, fair, predictable, or at reasonable cost. Implementation of a scheduling order should result in curbing the costs of workers' compensation litigation. In 2016, the amount of claimant attorney fees totaled $5.4 million, while employer attorney fees totaled $8.7 million. Because the board would schedule the hearing after a claim is filed, the requirement for a claimant to request a hearing in two years is unnecessary.

- Sec. 36 (definition of knowingly) – "Knowingly" has already been defined in case law for purposes of workers' compensation fraud.

The changes described above would, I believe, resolve industry stakeholder concerns with HB 79 as drafted. If that is not the case, please let me know.

At the end of our meeting yesterday, some stakeholders voiced support for including provisions in HB 79 relating to direct employer cost savings (such as those proposed in SB 112). While HB 79 is titled an "omnibus" bill, the title is unfortunate (and didn't come from the department- lessons learned!) since it was never intended to be a comprehensive reform bill. As the department has repeatedly stated at every opportunity, this bill was meant to tackle efficiencies in the workers' compensation system. By design, it does not address direct substantive benefit increases for injured workers (such as those proposed by HB 38) or direct substantive cost savings to employers (such as those proposed by SB 112). Instead, it focuses on efficiencies in the workers' compensation system, which will indirectly benefit all stakeholder groups. As Dave Kester stated, substantive benefits are best addressed by both labor and industry coming to the table together and working on a balanced approach, as has been done in the past with the workers' compensation ad hoc committee.

As was stated in committee, there are weight limits on ships, and sometimes if things get too heavy, they sink. The department worries that adding controversial substantive benefit issues to HB 79 will sink the proverbial ship.

If you have any questions, please don't hesitate to reach out to me directly, or contact Division Director Marie Marx.

Sincerely,

Heidi Drygas
Commissioner