

**ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE**

April 7, 2003

1:25 p.m.

MEMBERS PRESENT

Representative Lesil McGuire, Chair
Representative Tom Anderson, Vice Chair
Representative Jim Holm
Representative Dan Ogg
Representative Ralph Samuels
Representative Les Gara
Representative Max Gruenberg

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

HOUSE BILL NO. 164

"An Act relating to the state's sovereign immunity for certain actions regarding injury, illness, or death of state-employed seamen and to workers' compensation coverage for those seamen; and providing for an effective date."

- HEARD AND HELD

HOUSE BILL NO. 92

"An Act relating to reports by members of the clergy and custodians of clerical records who have reasonable cause to suspect that a child has suffered harm as a result of child abuse or neglect."

- BILL HEARING POSTPONED TO 4/9/03

SENATE JOINT RESOLUTION NO. 10

Relating to the Pledge of Allegiance.

- BILL HEARING POSTPONED

CS FOR SENATE BILL NO. 45(JUD)

"An Act relating to the Legislative Budget and Audit Committee."

- BILL HEARING POSTPONED

PREVIOUS ACTION

BILL: HB 164

SHORT TITLE: CLAIMS BY STATE-EMPLOYED SEAMEN

SPONSOR(S): RLS BY REQUEST OF THE GOVERNOR

Jrn-Date	Jrn-Page		Action
03/05/03	0435	(H)	READ THE FIRST TIME - REFERRALS
03/05/03	0435	(H)	L&C, JUD, FIN
03/05/03	0435	(H)	FN1: ZERO(ADM)
03/05/03	0435	(H)	GOVERNOR'S TRANSMITTAL LETTER
03/14/03		(H)	L&C AT 3:15 PM CAPITOL 17
03/14/03		(H)	<Bill Hearing Postponed>
03/31/03		(H)	L&C AT 3:15 PM CAPITOL 17
03/31/03		(H)	Moved Out of Committee MINUTE(L&C)
04/02/03	0732	(H)	L&C RPT 1DP 5NR
04/02/03	0732	(H)	DP: ROKEBERG; NR: LYNN, GATTO,
04/02/03	0732	(H)	CRAWFORD, GUTTENBERG, ANDERSON
04/02/03	0733	(H)	FN1: ZERO(ADM)
04/02/03	0733	(H)	FN2: (LWF)
04/02/03		(H)	JUD AT 1:00 PM CAPITOL 120
04/02/03		(H)	Scheduled But Not Heard
04/07/03		(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

SUSAN COX, Chief Assistant Attorney General
Civil Division (Juneau)
Department of Law (DOL)
Juneau, Alaska

POSITION STATEMENT: Presented HB 164 on behalf of the
administration.

BRAD THOMPSON, Director
Division of Risk Management
Department of Administration
Juneau, Alaska

POSITION STATEMENT: Assisted with the presentation of HB 164.

DAVID MORRIS, Inlandboatmen's Union of the Pacific (IBU)
Juneau, Alaska

POSITION STATEMENT: Responded to questions during discussion of
HB 164.

PAUL GROSSI, Director
Division of Workers' Compensation
Department of Labor & Workforce Development
Juneau, Alaska

POSITION STATEMENT: Responded to questions during discussion of HB 164.

JAMES P. JACOBSEN, Attorney at Law,
Beard Stacey Trueb & Jacobsen, LLP
Seattle, Washington

POSITION STATEMENT: Provided comments during discussion of HB 164.

ACTION NARRATIVE

TAPE 03-32, SIDE A

Number 0001

CHAIR LESIL McGUIRE called the House Judiciary Standing Committee meeting to order at [1:25 p.m., stated as 2:25 p.m.]. Representatives McGuire, Holm, Ogg, Samuels, Gara, and Gruenberg were present at the call to order. Representative Anderson arrived as the meeting was in progress.

HB 164 - CLAIMS BY STATE-EMPLOYED SEAMEN

Number 0049

CHAIR McGUIRE announced that the only order of business would be HOUSE BILL NO. 164, "An Act relating to the state's sovereign immunity for certain actions regarding injury, illness, or death of state-employed seamen and to workers' compensation coverage for those seamen; and providing for an effective date."

Number 0076

SUSAN COX, Chief Assistant Attorney General, Civil Division (Juneau), Department of Law (DOL), explained that HB 164 will amend AS 09.50.250 to provide that the state assert its sovereign immunity on claims regarding injury, illness, or death of state-employed seaman, and to provide workers' compensation coverage for those injuries, illnesses, and deaths. The genesis for HB 164 comes from the 1990 Alaska Supreme Court case, State of Alaska, Department of Public Safety v. Robert Brown, which held that workers' compensation was not the exclusive remedy for a seaman who was employed by the state, and that if the state

wished to provide workers' compensation in lieu of allowing for suits under the Jones Act - "the traditional maritime Act of un-seaworthiness" - it could do so by amending AS 09.50.250. In other words, she added, the state would be asserting its immunity, withdrawing its consent to be sued for claims brought under the Jones Act or under traditional maritime remedies such as un-seaworthiness, maintenance and cure, or unearned wages.

MS. COX pointed out that HB 164 will not impose state law over federal law for seamen who are not state employees; thus it will not affect the remedies available to private-sector seaman. She mentioned that in the Robert Brown case, the court referred to a 1963 attorney general's opinion, which was written approximately one year after AS 09.50.250 was enacted. She mentioned that other jurisdictions have followed "the same approach." She also mentioned that there were other cases cited in the Robert Brown case, and that these cases are listed in a DOL memo in members' packets. She relayed that both Texas and New York have reached similar conclusions regarding sovereign immunity; Texas provides workers' compensation for state employees. She also relayed that a 2002 case in North Carolina reached the same conclusion as the "Robert Brown case" approach provided for in HB 164.

Number 0372

MS. COX noted that Alaska had provided workers' compensation for seaman as a result of collective bargaining agreements reached in 1983 with "ferry worker unions," adding, "We had an eight-year history of actually providing workers' compensation in lieu of traditional maritime remedies such as the ability to sue under the Jones Act, recover maintenance and cure, et cetera." In 1991, there was an adverse ruling by the Alaska Supreme Court case, Dale Brown v. State & Div. of Marine Highway Systems, which held that unions could not, as a matter of collective bargaining, prospectively contract away their members' right under federal law. As a result of the Dale Brown case, the state returned to the system of providing unearned wages, and maintenance and cure as no-fault remedies for injuries or illness that occur to state-employed seaman working aboard a vessel. She noted that under this system, the state can also be sued by state-employed seaman under a claim of un-seaworthiness or under the Jones Act for negligence.

MS. COX said that since 1991, the DOL has had a fairly extensive history of litigating "these matters," adding that HB 164 would "take us out of that litigation realm and get us into the workers' compensation realm, to provide a uniform scheme of

recovery for state employees injured on the job, whether they're seaman or otherwise." She anticipated that HB 164 would save the state money: it would save the costs of litigation, which are substantial; and it would also save money because sick leave would be used in most cases of illness rather than workers' compensation, which provides for a daily stipend of \$45 until recovery. She mentioned that there are advantages and disadvantages to both workers' compensation and traditional remedies, and that the details of those differences are listed to some extent in the Dale Brown case.

MS. COX said that under workers' compensation, "we won't have awards for pain and suffering, the extensive litigation costs, [Alaska Rules of Civil Procedure] Rule 82 fees, and those kinds of things." She opined that the approach taken in HB 164 is legally defensible, and noted that Legislative Legal and Research Services agrees.

REPRESENTATIVE GARA asked whether, for their maritime workers, other states have tried to get rid of the Jones Act rules and impose workers' compensation rules but have been told by the courts that they could not.

MS. COX said not that she was aware of any such instances. In response to a further question she said that in Texas, workers' compensation is the exclusive remedy for state-employed seamen. She made mention of a 1977 Texas Court of Appeals case, Lyons v. Texas A & M University, adding that there was also a U.S. Supreme Court case that spoke to the inability to sue the state under federal law. In response to further questions, she said that under HB 164, a state-employed seaman would have to file a workers' compensation claim for injuries on the job, as do all other state employees. Seamen not employed by the state would not have that same remedy; they would have no-fault remedies under the doctrines of maintenance and cure, which is a daily stipend paid until they are recovered from their injuries; they would get unearned wages until the end of the voyage; they would get any other benefits their employer provides; and they could also elect to sue their employer, under the Jones Act, for negligence, or the sue the vessel owner under the theory that the vessel was un-seaworthy.

Number 0930

REPRESENTATIVE GARA noted that under the Jones Act, a seaman could recover full compensation, but under workers'

compensation, there are limits to how much compensation can be recovered.

MS. COX pointed out, however, that under HB 164, state-employed seamen would be entitled to the same remedies as all other state employees and all other shore-based employees of any employer in Alaska including the Alaska Railroad, even though private-sector railroad employees would normally be covered under the Federal Employers' Liability Act (FELA). She acknowledged that awards under the Jones Act could potentially be larger because they could include items not normally compensated under workers' compensation claims, such as non-economic losses. Workers' compensation, on the other hand, is a no-fault remedy that does not ordinarily require litigation.

REPRESENTATIVE GRUENBERG asked whether state-employed seamen have the option of filing workers' compensation claims instead of seeking Jones Act remedies.

MS. COX said that since the Dale Brown decision invalidated the collective bargaining agreements, employees have pursued the no-fault remedies previously mentioned; in addition, employees could litigate and prove fault or un-seaworthiness of the vessel. In response to a further question, she explained that workers' compensation is not the equivalent of maintenance and cure. Maintenance and cure is a daily stipend and is theoretically meant to replace the value of food and lodging normally provided had the seaman been able to stay aboard the vessel. She also explained that there is not a federal workers' compensation Act that applies to seaman, adding that states and political subdivisions are exempt from the Longshore and Harbor Workers' Compensation Act and cannot opt to be included under it.

Number 1112

BRAD THOMPSON, Director, Division of Risk Management, Department of Administration, noted that in members' packets is a comparison of the costs and frequency of claims between Alaska Marine Highway System (AMHS) employees and other state employees. He noted that this comparison encompasses five fiscal years, is by vessel, and shows the frequency of claims on a per 100 full time equivalent (FTE) basis. The AMHS has frequency of claims of 41 per 100 FTEs; the state, overall, has a frequency of claims of 8 per 100 FTEs; and the top five high-risk departments including the Department of Public Safety (DPS), the rest of the Department of Transportation and Public

Facilities (DOT&PF), and the Department of Corrections (DOC) have a frequency of claims of about 10 per 100 FTEs. On a cost per 100 FTE basis, the AMHS shows an average cost of \$197,000; the other top five departments averaged \$64,145. He noted that the AMHS claims include illnesses that manifest aboard the vessel, such as the flu or a toothache, and these would not typically be seen in a "workers' compensation frequency." The average amount of \$197,000 reflects both compensation paid to the individual and litigation costs.

MR. THOMPSON noted that the difference is roughly \$132,000, and predicted that if this same average is projected forward and multiplied by 6.5, HB 164 would create a savings of roughly \$850,000. He explained that the reason his division does not have a fiscal note showing this possible savings is because it self ensures all programs and is funded on a cash-flow basis for claims that are expected to be paid in the next fiscal year. He said that the savings will be reflected in the division's premium assessment - cost of risk allocation. He elaborated: "When the Division of Risk Management obtains its funding, it's not directly from the general fund; it's from the agencies that we bill, based on their frequency and severity of [claims], and their exposures." The division's method of cost calculation reflects the actual claims experienced.

CHAIR McGUIRE asked whether the cost of claims is going up, whether more claims are being filed, and whether more claims are being settled.

MR. THOMPSON suggested that the data on the second page of the comparison reflects an increase from 1998.

CHAIR McGUIRE noted that there is a slight decrease in 2002 as compared to 2001. She asked him to estimate what they would be looking at for 2003.

MR. THOMPSON estimated that it would be "closer to 50" per 100 FTEs for 2003.

Number 1406

REPRESENTATIVE GARA asked whether the statistics presented by the division reflect the AMHS employees that are "desk job people as opposed to people who do physical labor."

MR. THOMPSON said that the AMHS statistics reflect only ship-based people; thus there could be some pursers included in the statistics.

REPRESENTATIVE GARA asked whether the statistics reflect the percentage of people who do physical work but are not employed by the AMHS.

MR. THOMPSON said that the fourth page of the comparison reflects AMHS employees and the employees from the other top five departments, which do not have the "desk component" that other departments do.

REPRESENTATIVE GARA noted that employees doing physical labor are more likely to be hurt. He surmised that the "AMHS pool of people you're measuring seem to be almost all people who do physical work, whereas the people you're comparing them to with the lower claims rate seem to be proportionally a mix between people who desk work and physical work." He said that if that is correct, he is wondering what the relevance of the comparison is.

MR. THOMPSON said that on a total unit basis, by department, the comparison tries to be fair and thus compares the AMHS with the DPS and DOC, which have higher injury rates "than the standard." He noted that the third page of the comparison shows all departments.

REPRESENTATIVE GARA pointed out, however, that one pool in the comparison consists of people who do physical labor, but it is not clear what the proportion of people doing physical labor is in the other pool. He asked whether the division's statistics regarding the number of claims filed under the Jones Act reflects both injury claims and maintenance and cure claims.

MR. THOMPSON said that the statistics reflect both illness and injury claims. He pointed out that the illness component is a unique remedy owed to seaman that is not available to other state employees. Thus the statistics reflect what he called "life illness" as opposed to "occupational illness"; under workers' compensation, "we would only be comparing the occupational illness and the injury arising from their ... scope of duty."

Number 1584

REPRESENTATIVE GARA asked whether a maintenance and cure claim and an injury claim arising out of the same incident would be counted as two separate claims by the division. In an attempt to clarify, he asked:

"Are all the claims that [an AMHS] person files for one injury - maintenance, cure, everything - is that all counted as one claim by these statistics? Or is that counted as more than one claim?"

MR. THOMPSON said, "For these statistics, it's one claim."

REPRESENTATIVE OGG asked if the illnesses have been broken down into type.

MR. THOMPSON said he only has a manual count of the claims in 2003: "roughly half of those are the illness type - ... bronchitis, the flu-like symptoms, ... a broken and/or infected tooth ... - as compared to the 'twisted right knee stepping through' ... injury."

REPRESENTATIVE OGG noted that in the first two years listed in the comparison, the average was in the low 30s, whereas in the latter two years, the average was in the low 50s. He asked whether there was a reason for such a dramatic jump.

MR. THOMPSON indicated that there did not appear to be any one thing responsible for such an increase in the number of claims.

REPRESENTATIVE ANDERSON posited that it is just such an increase in claims which has prompted the introduction of HB 164.

MR. THOMPSON agreed. In response to a question, he reiterated that the statistics presented reflect both injury and illness claims by AMHS employees, and although they are not listed separately, his estimate is that about half of the claims are illnesses such as colds, flu, toothaches, and the like.

REPRESENTATIVE GARA surmised, then, that if only half of the numbers shown are for injury, then the number of claims by AMHS is similar to claims by other departments.

MR. THOMPSON argued that the number of AMHS claims would still be double the claims from the other top five departments.

REPRESENTATIVE GARA asked whether Mr. Thompson could "back out the people who have desk jobs" in order to get a more accurate comparison with regard to job type.

MR. THOMPSON indicated that he would not be able to do that. He noted, however, that in 2002, the remainder of DOT&PF had [2629] employees with 251 claims, whereas the AMHS had [655] employees with 342 claims.

Number 2002

DAVID MORRIS, Inlandboatmen's Union of the Pacific (IBU), said that although there are lot of injuries, it's important to remember that AMHS employees are working on moving vessels; thus, there is a greater likelihood that during high seas/high winds, employees can get thrown around into equipment and metal bulkheads. Because of the working environment, AMHS employees are at greater risk for injury than state employees who are desk bound.

MR. MORRIS, in response to questions, explained that in the contained environment of a vessel, if crew or passengers come aboard with an illness - the flu, a cold, et cetera - that illness will quickly circulate amongst all crewmembers. With regard to Representative Ogg's comments about an increase in claims over the last couple of years, he posited that perhaps this increase in claims is due to the fact that some AMHS employees are older and getting ready to retire. He also noted that some vessels have had fires and other mishaps, all of which contribute to the number of injury claims.

MR. MORRIS opined that the number of claims due to safety issues are dropping as those issues become resolved. He also noted that the AMHS has a new ship, and surmised that during its five-year shakedown period, there may be an increase in injuries until crewmembers get used to that new working environment. He also surmised that some of the increase in injuries over the last couple of years could be due to the influx of new employees, adding that a lot of AMHS employees have been working onboard ship less than five years.

MR. MORRIS, in response to further questions, acknowledged that state employees receive better benefits than do similarly employed people in the private sector; they receive better health care and better retirement, and it is harder to get fired because of the processes that must be followed.

CHAIR McGUIRE mentioned that the governor is trying to look at ways in which agencies can reduce the cost of government. Therefore it becomes a policy choice regarding whether the state can afford to continue dealing with the illness/injury claims of state-employed seamen in the current manner.

TAPE 03-32, SIDE B

Number 2383

CHAIR McGUIRE said she is of the opinion that life is a risk. Therefore, people who chose to work for the state, and thus receive better benefits, may also have to live with the fact that their right to sue the state, as their employer, is limited. She asked Mr. Morris whether he thinks passage of HB 164 will "make or break" a seaman's decision to work for the state instead of in the private sector.

MR. MORRIS surmised that the remaining state benefits would still outweigh the benefits of working in the private sector. Turing back to the statistics provided by the Division of Risk Management, he noted that if a state employee from another department becomes sick, he/she can simply take one or two days off, whereas if an AMHS employee gets sick, because he/she works one and sometimes two weeks at a time, he/she will have to take the entire week or two weeks off. Thus the numbers in the comparison reflect that fact.

REPRESENTATIVE GARA asked for the IBU's position on HB 164.

MR. MORRIS said that there are good and bad points [to both types of remedy]. He elaborated:

As it is now, we're in maintenance and cure. That gives you \$45 a day while you're sick or injured, and that doesn't come close to what my wages are. So we compensate by using our sick leave. And our sick leave also comes out of the general fund because it's an unfunded liability. And if we're in the [workers' compensation] role, it would all come out of the [workers' compensation] and the insurance that you already pay.

And the only thing, the drawback that I see, that would be, is some cases where a rope will break, and one in the past years, and it took both the guy's legs off, and - not completely off, they were able to fix them so he could -- ... and he also was flipped up and

he lost his sense of smell and other things. And those are the large lawsuits that reflect into these things. And normally that's like less than 1 percent.

Number 2216

But if there is no recourse for people like that that get injured that severely, that are unable to do most things that they want to do for the rest of their lives - and in [workers' compensation there isn't recourse] because there's a cap on the dollar amount - that's ... one instance [when] litigation for things like that would be better. But it's less than 1 percent. So the [workers' compensation], for the majority of the people, would be better.

MR. MORRIS, in response to Representative Gara, indicated that the IBU is still undecided on whether it likes the provisions of HB 164. He again opined that for the majority of the people, those provisions would be better.

REPRESENTATIVE GARA relayed that his main concern is that under the workers' compensation system, an injured person gets partial compensation: the law puts a dollar figure on a person's lost leg of approximately \$60,000. He offered his belief that this is not acceptable. He said that initially his thoughts on HB 164 were that he did not want to balance the budget by giving somebody partial compensation for his/her life. On the other hand, he said, the views of the people that are going to impacted by HB 164 are also important to him. He asked to be informed of the IBU's position when it is arrived at, and he suggested that the IBU should weigh in quickly if it is to do so at all.

MR. MORRIS, in response to further questions, reiterated that the IBU's membership is still undecided on issue of HB 164, though he anticipates that they will have a position soon. He indicated that the IBU needs to hear from the 1 percent that would wind up having no recourse should HB 164 pass.

REPRESENTATIVE HOLM asked for information on the aforementioned workers' compensation cap.

Number 2071

PAUL GROSSI, Director, Division of Workers' Compensation, Department of Labor & Workforce Development, noted that workers'

compensation is a formula-driven system. It pays for all medical costs involved in an injury or occupational illness; for "temporary total disability benefits," it pays for 80 percent of one's spendable weekly wage, or 80 percent of net income. He added that various formulas are used to determine one's compensation rate. Once one has reached "medical stability," then he/she can be rated for a "permanent partial impairment." Depending on the type of injury or affliction, he explained, it's rated on the whole body and whatever percentage that comes up under the "AMA guides" [American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition]; then that's multiplied by \$177,000. However, if someone is seriously injured and unable to return to gainful employment, he/she can receive "permanent total disability," which is unlimited and can be paid for life. The person who loses both legs, for example, would be entitled to payment for life.

REPRESENTATIVE HOLM asked what that amount would be. He used the example of someone earning \$50,000 a year and getting both legs cut off.

MR. GROSSI indicated that for the rest of that individual's life, he/she would receive 80 percent of his/her spendable weekly wage. In response to a further question, he said that there is no cap on that.

REPRESENTATIVE HOLM relayed, however, that a constituent of his has told him that there is a cap.

MR. GROSSI ventured that that individual was perhaps referring to a "permanent partial impairment rating." He noted that although the amount of a benefit is formula driven, there is an appeal process available. For example, if the adjuster decides to "controvert" - or deny - a claim, the employee can take his/her case before the workers' compensation board.

REPRESENTATIVE GARA mentioned that there are two components to a workers' compensation claim: there is the portion that relates to a percentage of the wages one is entitled to until he/she can go back to work; and there is the portion, when one becomes medically stable, in which one's permanent disability is measured. For example, the loss of a leg has a value placed on it via a formula.

Number 1834

MR. GROSSI said that there are a number of different benefits. He elaborated:

If you're injured, you're entitled to full coverage on your medical benefits. Then, if you're ... unable to return to work and you're disabled for more than three days, ... then you'll be entitled to temporary total disability, which is 80 percent of your spendable weekly wage. You'll receive that up until the time you're able to return or you become medically stable, ... at which time, if you're unable to return to your job at the time of injury, or some other job, you may be entitled to reemployment benefits - or [a] retraining type of a benefit.

Or, ... if you're able to return to work ... you may be entitled to a permanent partial impairment benefit, which is a rating. You get a rating under the AMA guides, which ... gives a certain percentage of the whole body. ... Say it's ... an arm injury, and your rate would be 10 percent; well, then you take that 10 percent and you multiply it by \$177,000, which is just an arbitrary number that's been used ..., and ... the amount you [would] receive would be \$17,700.

REPRESENTATIVE GARA asked whether \$177,000 is the maximum one could receive were he/she to "lose everything" and not be able to do any kind of work.

MR. GROSSI said that if a person becomes permanently and totally disabled, he/she is entitled to compensation for life or at least until the time when he/she is no longer permanently and totally disabled. He confirmed that the maximum one can receive for "the disability rating" is \$177,000, and that that would be a one-time payment unless the person is eligible to receive reemployment/retraining benefits.

Number 1708

JAMES P. JACOBSEN, Attorney at Law, Beard Stacey Trueb & Jacobsen, LLP, offered the following testimony:

Let me give you a little bit of my background just so you know who you're speaking to. I spent five years as a Jones Act seaman, sailing in the waters of Alaska. My family's been involved and going to sea for many years; many members of my family are still

there. My nephew, at the current time, is on a tanker full of jet fuel headed for Kuwait - it's a civilian ship - he's a Jones Act seaman. I have served as [an] admiralty lawyer for the United States Department of Justice, and I've been in private practice representing seamen for many years. I'm a former member of the [IBU] and the Alaska Fishermen's Union (AFU). So I come at this from a perspective of having represented vessel owners, having sued vessel owners, and having spent a number of years at sea myself, and having my family there.

I think there's two questions that the committee's trying to address, which are both difficult. The first is the legal issue; the second is the practical issue. With regard to the legal issue, I think that the main problem with the bill so far is that the state's waiver of sovereign immunity is not in the statute. It's actually in the constitution. And the [proposed] statute merely permissively may state whether or not the court, or whether or not the legislature can set up a court of claims and whether or not these suits can be pursued in the [Alaska] Superior Court. And the only way for the state to revoke its waiver of sovereign immunity is through a constitutional amendment.

MR. JACOBSEN went on to say:

I've provided a legal brief to [Chair McGuire] that actually [has] attached to it the debate from the constitutional convention, and when you compare ... what was said about the meaning of the waiver of sovereign immunity and the way it ended up in the constitution, it's clear that the legislature, under the current constitution, may not revoke sovereign immunity by statute, but may only say what court that the claims can be filed in. And therefore, if the state is interested in trying to revoke sovereign immunity for (indisc.) court, it has to do so through a constitutional amendment.

Number 1599

The second major problem from a legal standpoint is, the United States Supreme Court has held that not even Congress, which typically has hegemony over maritime

matters, can apply state workers' [compensation] laws to merchant seamen. And that case was cited in ... our firm's legal brief to [Chair McGuire], and I've never seen the attorney general's office address that specific case and say why a state legislature can apply workers' [compensation to seamen] when nobody else can, including the federal legislature. The second problem with it is ... that the Alaska Supreme Court, in a 1981 case that's already ... been cited in the legal brief, has held that, constitutionally, Alaska's state workers' [compensation] law cannot be applied to Jones Act seamen.

These issues have never been addressed, that I'm aware of, by the attorney general's office as to why this is an exception or how this is going to work. Obviously, all the other cases that ... were cited by the attorney general's office in the letter to the Senate committee that looked at this [SB 120], none of those cases address that issue either. So, as far as I know, those issues have never been addressed in any court opinion, when it came to state seamen. And I'm not sure why that is, but they just haven't. I think those are the main ... legal problems that are represented by the bill.

Number 1520

MR. JACOBSEN continued:

I think I do have some insight into a lot of the questions that the committee had for Mr. Thompson and on the workers' [compensation] issue. I'd like to address a few of those that have come up. There was a question as to why there's been an increase in claims over the last few years. I think that I do have some insight into that because I have represented many of the seamen who have pursued claims either for maintenance and cure, which is a no-fault illness related issue, and/or for Jones Act claims for compensation, which are more serious.

My experience with these claims started in 1995, and I know that I spent a lot of time in say '95 to about ... 2000 dealing with the particular adjusting firm that the state had hired to adjust these claims for it. And a lot the work that I did at that point was

trying to get that particular adjusting firm to pay maintenance and cure on valid claims which they had denied. And it's hard for me to say how many claims that they didn't pay because they denied them and the seamen didn't know what to do after they denied them. I do know that recently, about the time that these claims increased, the state changed adjusting firms.

And from my perspective, they hired a much more professional adjusting firm, a firm that was actually paying, 99 percent of the time, the valid claims. And my need to intervene, and trying to get valid maintenance and cure claims paid, on a pro bono basis, has vastly diminished with the [administration] of Pacific Claims [Inc.]. So I would suggest to the committee that the change in the claims has been that previous there was an adjusting firm that was wrongfully denying claims and, therefore, these claims were never being paid and, subsequently, when they changed adjusting firms, that the valid claims were being paid in due course.

Number 1410

MR. JACOBSEN also said:

I think the other major distinction that needs to be kept in mind between a workers' [compensation] system and the federal maritime system is that the federal maritime system has a three-year statute of limitations, whereas if you don't bring a claim for an injury related to your work on the vessels in three years, you're forever time-barred from bringing that claim. On the other hand, I'm not a workers' [compensation] expert, but my understanding is ... that workers' [compensation] basically has no statute of limitations, and if you're injured on the ship in 1990 and you're disabled by 1993, you can still bring your claim.

The practical effect of this is that Jones Act liability is front-end loaded; in other words, it's paid on the front end. Your claim is either made - and either settled or litigated, and you're paid everything you're owed within that time period that is reflected within the statute of limitations - and/or if you don't bother to bring your claim, then you lose

your claim. But all the Jones Act liability is paid at one time, either through a judgment or a settlement; there's no future liability like there is in workers' [compensation] cases.

For example, the committee just had before it an example of somebody with permanent total disability where they could be paid for life. And if you take a man or woman working at sea, make them about 35 years old, have them doing an engine room job where they're making \$25 or \$30 an hour, and render them permanently totally disabled, if you pay them out to their projected life expectancy, which is about 76 for men and about 77 or 78 for women, you're going to end up paying that individual between, say, \$1.7 [million] and \$2 million over the time period that you're going to [be] paying that person, and you're going to be paying that person for 40-45 years. So this money's going to be spread out over a much longer time period.

Number 1323

MR. JACOBSEN added:

Another issue that this committee raised was the same issue that was raised in the Senate hearing that I'd attended over the Internet, and that was trying to know about the claims experienced between merchant seamen and people who work ashore. And in the Senate committee hearing, ... the representatives from the state were asked to actually give some statistics on comparing logging and construction claims versus the [AMHS] claims, because at least some of those committee members thought that that was perhaps the better analysis, was in the high-danger jobs, which seamanship falls into, is to compare these against the experience in logging [and] the experience in construction.

For example, our law firm has about five employees and we've never had a workers' [compensation] claim, ever. And we're office workers and it's pretty safe, but it is common knowledge that the occupations like logging and construction have extremely high insurance rates for workers' [compensation] premiums because there are so many injuries. And that's really the people to be comparing these seamen against, is people doing

dangerous work ashore and what is their workers' [compensation]. And we've never seen that.

With the legal brief that we gave to [Chair McGuire], we gave the only, quote, "scientific," [end quote], analysis comparing Jones Act liability to workers' [compensation]. That was done by a trade group - the American Waterways [Operators (AWO)] - who operates the tugboats, basically, throughout the river system of the United States and through the Gulf of Mexico. They did a comparison between Longshore and Harbor Workers' Compensation Act and Jones Act; they compared 371 files, and they determined that it was actually cheaper, overall, for the employers to compensate people under the Jones Act than it was under the workers' [compensation]. And that did have something to do, I think, with the statute of limitations.

Number 1219

MR. JACOBSEN continued:

Another point that came up, on the practical aspects of this, was trying to perhaps close the budget gap. The way the legislation is written, it's only going to apply to cases which arise after July 1, 2003, and there'll be a three-year retroactive, basically, statute of limitations still out there. So probably three years after this is enacted, the state will be in the business of having dual systems going, where they'll have to be defending and paying Jones Act lawsuits and maintenance and cure issues, while also running a workers' compensation system. So, for at least the first three years, there's going to be a dual system with the associated burden and expense.

Also, on the idea of burden and expense, before I became involved in representing a lot of these injured seamen, there were other lawyers doing it, and a lot of those lawyers were Seattle-based and they would file lawsuits against the State of Alaska in Whatcom County because there's a ferry terminal there. The state was in the business of having to hire private counsel at a very fine maritime law firm in Seattle by the name of Bauer Moynihan & Johnson [LLP], and paying hourly legal fees to those lawyers to defend the state because, obviously, the state didn't have attorney

generals down here. Occasionally, the state was successful in getting those cases dismissed and transferred to Alaska, but more recently, the last two I was aware of, they were not dismissed and transferred to Alaska.

There is a possibility, however this all shakes out, that the Alaska Supreme Court could hold that if the legislature, either through statute or constitution, can close the doors of the Alaska courts to their own seamen. But, nevertheless, they can't close the Washington state court doors. And then the state would be back in the business of hiring ... private legal counsel to defend it in the Whatcom County courts, which they have done in the past and I'm sure that somebody could probably speak as to how expensive it is to defend a substantial lawsuit that way. But certainly it's a lot more expensive to defend it with outside counsel than it is with experienced employees like Ms. Cox who know this area of law, or basically have become expert in it, and can do it while probably doing the work of two other people in addition to defending in these cases.

Number 1079

REPRESENTATIVE ANDERSON said he would have cut Mr. Jacobsen off a long time ago, though he acknowledged that Mr. Jacobsen's testimony is important and critical. He asked Mr. Jacobsen whether he is suggesting that they leave the system as is. He also asked Mr. Jacobsen how, if were he in the governor's position, he would go about resolving the issue regarding "these high level of claims" and the cost to the state.

MR. JACOBSEN said he would definitely leave the system the way it is. It's been the system throughout the United States for 83 years, and it applies to every other seaman who goes to sea and faces the aforementioned risks of working in high sea/high wind conditions. For those who are seriously injured, The Jones Act compensates at a better level than does workers' compensation. Therefore, he said, for those citizens of the state who risk their lives to go out and provide a marine highway for Alaska, if they're seriously injured at sea he thinks it should be the state's policy to fully compensate them, the same as is done for the people who are working for private ship owners. He noted that private ship owners find a way to economically and

successfully operate within the environment; thus he did not see any reason why the government couldn't do the same.

MR. JACOBSEN suggested that the committee read the cases he has cited in his legal brief, adding that as long ago as 1885 Oliver Wendell Holmes was railing on the issue of sovereign immunity, saying that it did not make a lot of sense, was unfair to those people who were injured by the wrongs of the government, and had no basis for treating American citizens like vassals of a ward. Sovereign immunity, he surmised, is based on a system that grew up in Britain but which the United States has rejected with regard to how the government relates to its citizenry. "So for those policy reasons, I'd say yes, you should leave it the way it is," he concluded.

CHAIR McGUIRE asked Mr. Jacobsen what percentage, on average, he receives in contingency fees for the aforementioned 1 percent of people who get seriously injured.

Number 0873

MR. JACOBSEN replied that his firm's fees range between 25 percent and 33 1/3 percent. He added that he never charged anything for all of the maintenance and cure work that he'd done for seamen working on the AMHS. To further clarify, he said that the maintenance and cure work was done pro bono publico. In response to further questions, he said that those who are seriously injured would do better under a Jones Act regime than they would under a workers' compensation regime, and although only a small number of the population would have the type of career-ending injuries offered as examples, those are the people that the legislature should be considering because those are the people that will experience the most devastating economic consequences of having served, as a public servant to the state, in a dangerous environment.

CHAIR McGUIRE said she did not disagree that the Jones Act would provide better compensation for serious injuries; however, when considering the testimony offered by the IBU representative, workers' compensation would provide a better remedy for a larger percentage of state-employed seamen. She indicated that because of the budget deficit the state is facing, it becomes a policy question of whether the state should curb some of its expenses by offering the majority of state-employed seamen a better remedy via workers' compensation.

MR. JACOBSEN opined that the percentage of seamen experiencing serious or career-ending injuries is much higher than the 1-percent figure proffered by Mr. Morris. He suggested that the percentage is probably closer to 30 percent; or, he added, going by Mr. Thompson's statistics, about eight claims a year. In response to the comment that the IBU representative said only about 1 percent of claims are for serious injuries, he noted that he's spoken with Mr. Tseu, Regional Director, Alaska Region, Inlandboatmen's Union of the Pacific (IBU), and surmised that had Mr. Tseu been present, he would have given testimony quite a bit different than what was offered by Mr. Morris. Mr. Jacobsen also suggested that Mr. Thompson would not agree with the 1-percent figure either, were he to further investigate the details of the claims used in the statistics he provided.

MR. JACOBSEN, in conclusion, observed that the case has still not been made, from a statistical standpoint, that HB 164 will really save the state money, reasoning that the wrong statistics have been given to the committee. "These people have not been compared to the injury rate of construction workers or loggers, which I think is more appropriate," he remarked, reiterating that passage of HB 164 will create a dual system for three years.

Number 0562

REPRESENTATIVE GRUENBERG turned to the governor's transmittal letter, and asked whether the committee is perhaps looking at the wrong issue. He suggested that rather than simply doing away with Jones Act remedies for state-employed seamen, perhaps instead the law should be amended to allow the state, via collective bargaining agreements, to offer seamen a choice of either Jones Act remedies or workers' compensation remedies. He asked whether there is anything precluding such an option.

MS. COX reiterated that in the Dale Brown case, the Alaska Supreme Court said that the unions could not, as a matter of collective bargaining, contract away members prospective rights to sue for federal remedy. Therefore, she surmised, statute could not be changed in order to affect the collective bargaining climate such that those federal rights could be bargained away. In response to a question, she noted that that decision has not yet been challenged.

REPRESENTATIVE GRUENBERG noted that the Dale Brown decision was arrived at before either the 1996 U.S. Supreme Court case, Seminole Tribe of Florida v. Florida, or the 1999 U.S. Supreme

Court case, Alden v. Maine. He asked whether Alden applied. He also asked whether the state has jurisdiction, or whether it is still trumped by federal law.

MR. JACOBSEN said that the cases cited in his firm's legal brief talk about the fact that state law may not be applied to Jones Act seamen. He noted that there is also an Alaska Supreme Court case "holding the same." He remarked that the question is whether Alden changes that.

REPRESENTATIVE GRUENBERG interjected to say that he is not aware of any cases that address Alden.

Number 0162

MR. JACOBSEN noted, however, that on page 8 of his firm's March 25 legal brief, there is a discussion of Alden, which in turn refers to the 1979 U.S. Supreme Court case, Nevada v. Hall. He said:

And it does talk about the fact that the constitutional immunity ... a [state] may assert for loss against lawsuits in their own court does not apply to courts of sister jurisdictions, for instance, Washington state. And there's a quote on page 8 that talks about the fact that states are still obligated by their good faith and their participation in the federal system to obey and to abide by federal law - applicable federal law.

REPRESENTATIVE GRUENBERG surmised, then, that Alden would prevent somebody from litigating in an Alaska court, and, thus, "they would have to give the business to Washington lawyers in the Washington courts.

MR. JACOBSEN said that that was one possibility. He added that another possibility is the fundamental issue that, with an Alaskan Supreme Court case saying that, constitutionally, "you cannot [provide] workers' [compensation] to seamen, the question is: 'Well, what do you do in those circumstances? How do you analyze that?'" It's a very difficult question, he opined, noting that perhaps because workers' compensation can't be applied, constitutionally, to seamen, then "we'd have to apply this, because it would offend the privileges and immunities clauses of the Alaska [State] Constitution not to make this law applicable to the state employees." There's another

constitutional issue being raised there, he said, but added that there is no ready answer.

TAPE 03-33, SIDE A

Number 0001

REPRESENTATIVE GRUENBERG asked Ms. Cox whether she agrees with the comments on page 8 of Mr. Jacobsen's legal brief, that comity would allow "these kinds of cases" to go forward in the state of [Washington].

MS. COX replied that under limited circumstances, it is certainly possible for someone to raise a suit in Washington. She opined, however, that both comity and Washington's personal jurisdiction rules would encourage the Washington courts to not keep those cases, particularly if the person bringing the suit is neither a resident of, nor injured in, Washington.

REPRESENTATIVE GRUENBERG asked whether it would be possible to have a case, even if it meets all of Washington's requirements and could be tried there, moved to an Alaskan court.

MS. COX opined that if HB 164 were to pass and if a state-employed seaman would prefer a Jones Act remedy instead of a workers' compensation remedy, he/she could hire an attorney such as Mr. Jacobsen to challenge this law in an Alaskan court, thus allowing the courts to ultimately decide the issues of constitutionality and state versus federal jurisdiction. She also opined that the vast majority of state-employed seamen will be satisfied with workers' compensation remedies. She said she did not anticipate that there would be many cases filed in Washington courts.

REPRESENTATIVE GRUENBERG predicted that passage of this proposed law will ultimately result in it being challenged in the U.S. Supreme Court. Therefore, he asked whether there should be a DOL fiscal note attached to HB 164 to cover the cost of such an eventuality.

MS. COX said she did not foresee that there would be any additional expenses for such a challenge, since handling suits against the state for one reason or another falls under the normal scope of her office's duties. She did acknowledge that Mr. Jacobsen is correct in that there would be three-year phase-out period if this bill passes.

REPRESENTATIVE GRUENBERG asked Ms. Cox whether the DOL would be hiring outside counsel if the proposed law were challenged in the U.S. Supreme Court.

Number 0582

MS. COX said it would depend on who won at the Alaska Supreme Court level, and thus she could not predict whether the DOL would hire outside counsel. She noted, however, that there are three other jurisdictions that already do as HB 164 is proposing, and those jurisdictions have not faced the U.S. Supreme Court because of it.

REPRESENTATIVE GRUENBERG asked whether those jurisdictions have gone to their highest court because of it. Would there be a potential split among the jurisdictions?

MS. COX said she does not know of any split, and has not run across contrary authority on the point of the state asserting its sovereign immunity with regard to Jones Act cases.

REPRESENTATIVE GARA asked whether it would be possible to create a system that made workers' compensation available for minor claims and the Jones Act available for serious injuries.

MS. COX indicated that she would give that concept some thought. She noted that with Jones Act cases, the claimant has the burden of proof and must hire a lawyer, so while it may seem as though the benefits are greater under the Jones Act, that system does have its downsides as well. With regard to career-ending injuries, she said it is important to remember that in addition to the workers' compensation benefits listed by Mr. Grossi, occupational disability benefits are available to most state employees through the Public Employees' Retirement System (PERS). Those additional benefits include 40 percent of prior wages and continued accrual of service credit until a person's regular retirement age.

REPRESENTATIVE GARA pointed out, however, that those benefits are not available to all state employees. He said he knew of a corrections officer who was told by his insurance company that his heart condition did not entitle him to any disability benefits because he could still work as a janitor.

MS. COX clarified that there is a difference between the occupational disability benefits available under PERS and the disability insurance that employees can purchase under the

Supplemental Benefits System (SBS). She said that an occupational disability has to be caused by one's work. She did acknowledge, however, that the Marine Engineers' Beneficial Association (MEBA) has opted out of PERS, and so occupational disability benefits available under PERS do not apply to those employees.

Number 0973

REPRESENTATIVE GARA said he would like to know whether the administration would be willing to compromise, either by adopting a bifurcated system such as he proposed earlier, or by offering a statutory change that would allow the state and unions to "negotiate in" a workers' compensation system.

MR. JACOBSEN, at the request of Representative Samuels, further reviewed the statistics provided by the Division of Risk Management, and clarified that his earlier estimate of how many claims were for career-ending injuries was too high.

MS. COX agreed that 30 percent was too high an estimate. She mentioned that in any given year, there are only 15-20 lawsuits filed under the Jones Act.

[HB 164 was held over.]

ADJOURNMENT

Number 1101

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 3:18 p.m.