

**ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE**

April 2, 2004
9:10 a.m.

TAPE(S) 04-32,33

MEMBERS PRESENT

Senator Ralph Seekins, Chair
Senator Scott Ogan, Vice Chair
Senator Johnny Ellis
Senator Hollis French

MEMBERS ABSENT

Senator Gene Therriault

COMMITTEE CALENDAR

SENATE BILL NO. 319

"An Act relating to claims for personal injury or wrongful death against health care providers; and providing for an effective date."

SENATE BILL NO. 323

"An Act relating to a project owner's liability for workers' compensation and the exclusiveness of liability for workers' compensation."

SENATE BILL NO. 170

"An Act relating to the Code of Criminal Procedure; relating to defenses, affirmative defenses, and justifications to certain criminal acts; relating to rights of prisoners after arrest; relating to discovery, immunity from prosecution, notice of defenses, admissibility of certain evidence, and right to representation in criminal proceedings; relating to sentencing, probation, and discretionary parole; amending Rule 16, Alaska Rules of Criminal Procedure, and Rules 404, 412, 609, and 803, Alaska Rules of Evidence; and providing for an effective date."

PREVIOUS COMMITTEE ACTION

BILL: SB 319

SHORT TITLE: CLAIMS AGAINST HEALTH CARE PROVIDERS

SPONSOR(s): SENATOR(s) SEEKINS

02/11/04 (S) READ THE FIRST TIME - REFERRALS
02/11/04 (S) L&C, JUD
03/02/04 (S) L&C AT 1:30 PM BELTZ 211
03/02/04 (S) Heard & Held
03/02/04 (S) MINUTE(L&C)
03/11/04 (S) L&C AT 1:30 PM BELTZ 211
03/11/04 (S) Moved SB 319 Out of Committee
03/11/04 (S) MINUTE(L&C)
03/12/04 (S) L&C RPT 2DNP 3NR
03/12/04 (S) NR: BUNDE, SEEKINS, STEVENS G;
03/12/04 (S) DNP: FRENCH, DAVIS
03/17/04 (S) JUD AT 8:00 AM BUTROVICH 205
03/17/04 (S) Heard & Held
03/17/04 (S) MINUTE(JUD)

BILL: SB 323

SHORT TITLE: WORKERS COMPENSATION AND CONTRACTORS

SPONSOR(s): SENATOR(s) SEEKINS

02/13/04 (S) READ THE FIRST TIME - REFERRALS
02/13/04 (S) L&C, JUD
03/04/04 (S) L&C AT 1:30 PM BELTZ 211
03/04/04 (S) Heard & Held
03/04/04 (S) MINUTE(L&C)
03/09/04 (S) L&C AT 1:30 PM BELTZ 211
03/09/04 (S) Moved SB 323 Out of Committee
03/09/04 (S) MINUTE(L&C)
03/10/04 (S) L&C RPT 2DP 2NR 1AM
03/10/04 (S) DP: BUNDE, SEEKINS; NR: DAVIS,
03/10/04 (S) STEVENS G; AM: FRENCH
03/17/04 (S) JUD AT 8:00 AM BUTROVICH 205
03/17/04 (S) Heard & Held
03/17/04 (S) MINUTE(JUD)
04/02/04 (S) JUD AT 8:00 AM BUTROVICH 205

BILL: SB 170

SHORT TITLE: CRIMINAL LAW/SENTENCING/ PROBATION/PAROLE

SPONSOR(s): RULES BY REQUEST OF THE GOVERNOR

04/04/03 (S) READ THE FIRST TIME - REFERRALS
04/04/03 (S) JUD, FIN
04/11/03 (S) JUD AT 1:30 PM BELTZ 211

04/11/03 (S) <Bill Hearing Postponed to 4/14/03>
 04/14/03 (H) JUD AT 1:00 PM CAPITOL 120
 04/14/03 (S) Scheduled But Not Heard
 04/15/03 (S) JUD AT 5:00 PM BELTZ 211
 04/15/03 (S) Heard & Held
 04/15/03 (S) MINUTE(JUD)
 04/24/03 (S) JUD AT 4:00 PM BUTROVICH 205
 04/24/03 (S) Heard & Held
 04/24/03 (S) MINUTE(JUD)
 05/14/03 (S) JUD AT 0:00 AM BELTZ 211
 05/14/03 (S) -- Meeting Postponed to 5/15/03 --
 05/15/03 (S) JUD AT 8:45 AM BELTZ 211
 05/15/03 (S) -- Meeting Rescheduled from 5/14/03 --
 05/16/03 (S) JUD AT 1:00 PM BELTZ 211
 05/16/03 (S) <Above Item Removed from Agenda>
 05/16/03 (S) MINUTE(JUD)
 03/05/04 (S) JUD AT 8:00 AM BUTROVICH 205
 03/05/04 (S) <Bill Hearing Postponed>
 03/10/04 (S) JUD AT 8:00 AM BUTROVICH 205
 03/10/04 (S) Heard & Held
 03/10/04 (S) MINUTE(JUD)
 03/12/04 (S) JUD AT 8:00 AM BUTROVICH 205
 03/12/04 (S) Heard & Held
 03/12/04 (S) MINUTE(JUD)
 03/24/04 (S) JUD AT 8:00 AM BUTROVICH 205
 03/24/04 (S) Heard & Held
 03/24/04 (S) MINUTE(JUD)
 03/29/04 (S) JUD AT 8:00 AM BUTROVICH 205
 03/29/04 (S) -- Meeting Canceled --
 03/31/04 (S) JUD AT 8:00 AM BUTROVICH 205
 03/31/04 (S) Heard & Held
 03/31/04 (S) MINUTE(JUD)
 03/31/04 (H) JUD AT 1:00 PM CAPITOL 120
 03/31/04 (S) Heard & Held
 03/31/04 (S) MINUTE(JUD)

WITNESS REGISTER

MR. DEAN GUANELI, Chief Assistant Attorney General
 Criminal Division
 Department of Law
 PO Box 110300
 Juneau, AK 99811-0300

POSITION STATEMENT: Opposed amendment 2 and commented on
 Amendment 3 to SB 170.

MS. LINDA WILSON, Deputy Director
Public Defender Agency
Department of Administration
PO Box 110200
Juneau, AK 99811-0200
POSITION STATEMENT: Supports SB 170.

Ms. Kathy Dale CPA
Anchorage, Alaska
POSITION STATEMENT: Opposes SB 319.

Mr. Richard Louie
British Petroleum
Anchorage, AK
POSITION STATEMENT: Opposes SB 319.

Ms. Pamela LaBolle, President
Alaska State Chamber of Commerce
217 Second St. Ste. 201
Juneau, AK 99801
POSITION STATEMENT: Supports SB 323.

Mr. Jack Miller, Attorney
State Chamber of Commerce
217 Second St. Ste. 201
Juneau, AK 99801
POSITION STATEMENT: Supports SB 323.

Ms. Eden Larson, President & CEO
Associated Builders and Contractors
No address provided
POSITION STATEMENT: Supports SB 323.

ACTION NARRATIVE

TAPE 04-32, SIDE A

CHAIR RALPH SEEKINS called the Senate Judiciary Standing Committee meeting to order at 9:10 a.m. Senators Therriault, Ogan, French and Seekins were present. The first order of business to come before the committee was SB 170.

^#SB170

SB 170 - CRIMINAL LAW/SENTENCING/PROBATION/PAROLE

SENATOR OGAN moved to adopt version I as the working document before the committee. Without objection, the motion carried.

MR. DEAN GUANELI, Chief Assistant Attorney General, Criminal Division, Department of Law, thanked the committee for the hard work it has done on SB 170. He then offered to answer questions.

CHAIR SEEKINS asked Mr. Guaneli to standby because the committee was given two proposed amendments from the Public Defender's Office on short notice.

SENATOR OGAN referred to Section 17 on page 10 of version I, regarding violation of custodian's duties, and said he understands the intent but has spoken with foster parents who have ended up being third parties for foster children who got in trouble. He said the intent is to go after people who blatantly disregard their duty and are not diligent about holding the released party accountable. He said Senator French made some excellent points about the risk to the public when people fall down on those duties. He pointed out that in reality, some infractions do not get reported. For example, if the court orders the offender to be at home by 10:00 and the custodian does not report the offender at 10:01 for not being home, the custodian could be guilty of a class A misdemeanor if the offender was a felon. He expressed concern that the idea is to hold people accountable and not to criminalize every minor infraction, but the bill is not written that way.

MR. GUANELI said he had a couple of responses to Senator Ogan's concerns. He said he does not believe Section 17 covers a situation of foster parents whose children get in trouble. Line 12 specifically refers to a person released under AS 12.30, which are the bail statutes. He said theoretically that could involve someone under 18 who is charged with drunk driving, but most juvenile offenses are dealt with in juvenile court, which falls under Title 47. He continued:

If the court says something like 'be in at dark,' I think there's a range of reasonableness that has to be applied but if a judge thinks it's important enough that a person have a specific curfew at a specific hour, then I guess then the question is - and the judge directs the custodian, you know, if this person isn't in by 10:00, I'm ordering you to immediately report that to the police - are you willing to do that? Yes I am, your honor. You understand that there are penalties associated with that? Yes I do, your honor, and I'm still willing to do that.

I guess to me it's a judicial decision that 10:00 is more important than 10:01 and I'd rather leave it to the judge to make that decision than someone who has undertaken responsibility and given a promise to the judge that they would undertake that responsibility. And when you're talking about people who are released on felony offenses, I think that that is a weighty responsibility. I know the judge is always very good about making sure the custodian understands their duties so I guess I'd have to say I think the system works by allowing the judge to make a determination whether 10:00 is so important or whether daylight hours, which gives them a little more flexibility. That's my response.

CHAIR SEEKINS said he agrees that with adult offenses where the conditions of release are the conditions of imprisonment, they would have no leeway if they were in jail. He said if he agreed to take on a certain responsibility, he should live up to the terms of that agreement. He believes that provision was meant to protect the public as much as anything else. He then said when one talks about the boundaries of an infraction, the infraction becomes a whole new term.

SENATOR FRENCH said the Municipality of Anchorage has had this law on its books for a couple of years at least and he is not aware of any third party custodians being egregiously overcharged. He said the legislation is crafted to relate the penalty to the offense and every person has the right to go before a jury if charged with a crime. He doubted a jury would convict a person for not reporting a 10:01 violation on a 10:00 curfew.

SENATOR THERRIault said a constituent asked him to consider a potential amendment. The constituent is a referee who was assaulted by a parent as the result of his officiating a game. The constituent asked him to consider creating a heightened crime for assaulting a sports official. He countered by saying he would consider adding that crime to the list of aggravators for sentencing. The legal drafters suggested adding a number 31 to AS 12.55.155. He read the proposed amendment:

The defendant knowingly directed the conduct constituting the offense at a sports official or referee during or because of the exercise of duties as a sports official or referee.

He asked Mr. Guaneli if he had any comments on whether such an amendment would be workable.

MR. GUANELI said that when presumptive sentencing circumscribes the sentencing discretion, an aggravating factor can allow the judge to go beyond that. Aggravating factors currently apply to those who knowingly direct illegal conduct toward a police officer or emergency responder. He noted that a few bills were recently introduced to expand the coverage to include teachers, education officials and possibly clergymen. He said the concern is whether the legislature wants to expand aggravating factors that were provided for people involved in inherently dangerous occupations to a wider range of activities that people engage in. He said that is a matter of legislative policy. He concluded that when the judges feel the conduct is egregious enough, the judge has the sentencing authority to address that so he was not certain that expanding those protections to a referee is necessary to achieve justice.

SENATOR OGAN said he has trouble creating different classes of people for which a crime is elevated because of that particular class of person. He believes the elevated level is justified for police officers and emergency responders because they must put themselves in harms way.

SENATOR FRENCH shared Senator Ogan's concerns and said that judges know when an outrageous crime has happened in their communities, which could include a crime against a referee.

CHAIR SEEKINS jested that he has found sports officials to be very aggravating at times.

SENATOR THERRIault said he did not intend to distribute the amendment and was asking to determine the correct policy call.

SENATOR FRENCH moved to adopt Amendment 1, which reads as follows.

A M E N D M E N T 1

OFFERED IN THE SENATE

To: CSSB 170(JUD) Work Draft 23-GS1024\I 4/1/04

Page 9, line 15

1(4) with criminal negligence **and when as determined by a chemical test taken within four hours after the alleged offense**

was committed, there is 0.05 percent or more by weight of alcohol in the person's blood or 50 milligrams or more of alcohol per 100 milliliters of blood, or when there is 0.05 grams or more of alcohol per 210 liters of the person's breath, causes serious physical injury under AS 11.81.900(55)(B) to another person by means of a dangerous instrument.

CHAIR SEEKINS objected for the purpose of discussion and asked for a cross-reference to the correct page in version I.

SENATOR FRENCH said it would replace language on page 9, line 15. He then said the idea is to avoid prosecuting the "cell phone, make-up application on slippery roads" scenarios that could cause car collisions that might result in a charge of assault in the third degree. It narrows the scope of the bill to those instances where there's enough alcohol involved to justify a finding of criminal negligence. He said in his experience, .05 percent amounts to at least three or four beers.

MR. GUANELI read the definition as follows:

Serious physical injury means a physical injury caused by an act performed under circumstances that create a substantial risk of death or physical injury that causes serious and protracted disfigurement, protracted impairment of health, protracted loss or impairment of the function of a body member, organ or that unlawfully terminates a pregnancy.

He explained that as a practical matter, that often amounts to an injury more serious than a broken limb because most juries do not find a broken limb to be a protracted loss. He said the quintessential example of a serious physical injury is someone who ends up in a wheelchair.

SENATOR FRENCH said the annotated statutes say that a broken jaw constitutes a serious physical injury and a grand jury could find injuries to the eyes and skull to be serious physical injuries. He said the (a) subsection is more inclusive and the (b) subsection is fairly narrow.

CHAIR SEEKINS asked Ms. Wilson to testify.

MS. LINDA WILSON, Deputy Director, Public Defender Agency, Department of Administration, said the effort made to trim down the definition of "serious physical injury" is in subsection (a), which requires physical injury caused by an act performed

under circumstances that create a substantial risk of death. She said anything involving a car accident creates a risk of death so that could apply to any physical injury that resulted from an accident. She said the definition in (a) is overly broad and would include any scratch or bump that resulted from a car accident. She said limiting it to the (b) definition gets to the targeted group - that being people who sustain serious physical injuries. She disagrees with Mr. Guanelli about what qualifies as a serious physical injury. She added that including the alcohol requirement pinpoints the targeted group and avoids the unintended group, such as cell phone users.

SENATOR OGAN asked why it is narrowed to alcohol use only and does not include drug use. He noted he would like it to apply to marijuana and controlled substance use.

MR. GUANELI said, in regard to Senator French's comment that this would avoid prosecutions based on cell phone use, for example, he does not believe the state prosecutes anyone for collisions caused by cell phone use. Senator Ogan introduced a bill several years ago to at least allow the state to revoke a person's license if no crime was committed but a person died as a result of a crash. He spoke to Senator Ogan at that time about people driving too fast on slippery roads and causing a fatality as a result. The state simply cannot prosecute those cases because that behavior does not rise to a prosecution level under criminal negligence and the standard mental states. As a result, Senator Ogan's bill was enacted but it only gives a judge the discretion to take away someone's license. He said there is a much more serious offense called criminally negligent homicide but those prosecutions are very rare. He pointed out that prosecutors nationwide simply cannot prosecute every driver in a car crash that causes a death. Cases of death that result from car crashes are handled under wrongful death in civil courts or through insurance claims.

MR. GUANELI said with respect to narrowing the definition of serious physical injury, Ms. Wilson indicated that the elements could be met by minor injuries resulting from a car crash. He remarked that a horrendous car crash caused by a person acting with criminal negligence where the car is completely mangled but only minor injuries are sustained is equally deserving of punishment because it is only fortuitous that the person walked away with minor injuries. The Department of Law favors the original version. He believes this version is much too narrow and will frustrate the department because it will be unable to prosecute.

MS. WILSON said she sees two parts to Senator Ogan's question about controlled substances. She explained:

Controlled substances, I believe, if you're driving I believe with a controlled substance other than alcohol, I think you probably could be charged under the impairment statute, which would probably qualify for reckless. I think you could address controlled substances beyond alcohol, which seemed to be the targeted group with that. On the question about that the DAs or the prosecutors cannot prosecute, we never prosecute, I certainly want to caution against adopting that approach. The DAs have an incredible amount of discretion and, unfortunately, sometimes they charge things - they overcharge and I don't think anybody can dispute that. I keep hearing over and over again 'trust us, trust us, trust us' but our laws should not depend on the discretion of a DA, especially a single DA. These things are and can be overcharged and to say that they're not is disingenuous.

I haven't wanted to bring up the Wally Taslow (ph) case but that's a perfect example of overcharging. You had a vehicular accident, not much injury, and it was charged much higher than it should have been so to say that it's not overcharged is not very believable.

SENATOR OGAN said because he believed some cases were undercharged, he introduced legislation 10 years ago. He said it took him eight years to get that law changed.

CHAIR SEEKINS said in trying to figure out what is fair and right, regarding public safety, that to encourage selective prosecution is very dangerous. He said he must feel comfortable that the intent of the legislation is the right thing to do before he will pass the bill out of committee. He said he is attempting to do the right thing, not what is least controversial.

CHAIR SEEKINS reminded members that Amendment 1 was pending and asked if there was further discussion.

SENATOR FRENCH thanked members for the discussion on Amendment 1 but said he was persuaded by Mr. Guaneli that the law as written

can be used in the right way. He then withdrew Amendment 1 without objection.

SENATOR OGAN moved to adopt Amendment 2, which reads as follows.

A M E N D M E N T 2

OFFERED IN THE SENATE

To: CSSB 170(JUD) Work Draft 23-GS1024\I 4/1/04

Page 3, line 9:

Sec. 4 AS 04.11.491 is amended by adding a new subsection to read:

(g) If a municipality or established village has adopted a local option under (a)(1),(2),(3), or (4), or (b)(1),(2), or (3) of this section, the municipality or established village, as part of the local option question or questions placed before the voters, may

(1) adopt an amount of alcoholic beverages that may be imported that is less than the amounts set out in AS 04.11.150(g);

(2) adopt an amount of alcoholic beverages that would give rise to a presumption that the person possessed the alcoholic beverages for sale; the amounts adopted under this paragraph may be lower than those set out in AS 04.11.010(c);

(3) adopt an increased penalty for furnishing or delivery of alcoholic beverages to persons under 21 pursuant to AS 04.16.051(d)(3).

Page 4, lines 17-19:

Sec. 7 AS 04.16.051(d) is amended to read

(d) A person acting with criminal negligence who violates this section is guilty of a class C felony if

(1) within the five years preceding the violation, the person has been previously convicted under

(A) this section; or

(B) a law or ordinance of this or another jurisdiction with elements substantially similar to this section; [OR]

(2) the person who receives the alcoholic beverage negligently causes serious physical injury to or the death of another person while under the influence of the alcoholic

beverage received in violation of this section; in this paragraph,

(A) "negligently" means acting with civil negligence; and

(B) "serious physical injury" has the meaning given in AS 11.81.900; or

(3) the violation occurs within the boundaries of a municipality or the perimeter of an established village that has adopted a local option and the increased penalty of a class C felony under AS 04.11.491.

CHAIR SEEKINS objects for the purpose of discussion.

SENATOR OGAN says this amendment makes it a local option for people who live in areas who have voted to be "dry" to ratchet up the penalties for offenders who supply alcohol to minors. Since the community has identified alcohol as a particular problem, the "local option" part of the legislation would allow the local community to put it on the ballot and, for example, raise the offense from a misdemeanor to a felony.

MS. WILSON agreed that is exactly what the amendment does.

CHAIR SEEKINS asked Ms. Wilson to provide an explanation for the amendment and the purpose for proposing it.

MS. WILSON said the point of the amendment was to let the local option area choose how to deal with those who supply alcohol to a minor. It lets local areas choose whether or not they want to ratchet up the offense from a misdemeanor to a class C felony.

CHAIR SEEKINS asked Ms. Wilson if she is familiar with the definition of an established village under statute, and pointed out that it is any group of 25 people. He asked her if she believes that we should allow any group of 25 people, at their own discretion, to vary the state penalty.

MS. WILSON suggested tightening the definition of an established village.

SENATOR FRENCH asked if the municipality or village could set the infraction above a Class C felony, i.e., if the local option areas could label the offense as a Class B or Class A felony.

MS. WILSON referred to section 7, which allows an increased penalty if there are prior convictions. She suggested adding an

option in section 4 to allow for increased penalties and then limit the increase.

SENATOR OGAN recognized that local areas must already adopt the local option as law and questioned the criteria of an "established village" in regards to the ages of the village members. In that light, he is hesitant to extend too much leeway to village members for the purpose of law interpretation.

SENATOR FRENCH proposed to amend the amendment in Sec. 4, subparagraph 3, to read "adopt an increased penalty of a 'C' felony for furnishing or delivery of alcoholic beverages to persons under 21 pursuant to AS 04.16.051(d)(3)".

CHAIR SEEKINS asked and heard no objections but voiced concern regarding the change of the level of penalty and asked for further discussion.

MR. GUANELI said he understands from most village leaders that there are two purposes for the local option laws, which create immediate benefit to village society: 1) stops domestic abuse and crimes by adults therefore lessening social problems and 2) teaches young people that use of alcohol is unacceptable. The long-term goal of the villagers is to limit the use of alcohol, especially to young people. The original draft reflects these goals. Dry villagers are particularly offended by people supplying alcohol to minors since they made the deliberate effort to vote the village dry. He feels this current draft puts an additional burden on the villagers to hold additional elections.

TAPE 04-32 SIDE B

MR. GUANELI added that he thought we ought to uphold the intent of the villagers who voted to go dry; it ought to be an aggravated offense and recognized as such.

CHAIR SEEKINS iterated that he is most interested in the amendment, which could allow unincorporated groups to have too much leeway. He also questioned the need to revise the current penalty.

SENATOR OGAN stated the people in the villages should have the ability of self-determination to decide whether they have a problem and how to address the problem. This amendment serves that purpose.

SENATOR FRENCH clarified that currently, the law states the first offense is a misdemeanor and the second offense is a felony. He states that the effect of the amendment basically allows local areas the option of raising the level of the first offense to a felony or leaving it as a misdemeanor.

SENATOR FRENCH added - to the point that the local areas decide whether they want to be dry or not. He stated support for the amendment.

SENATOR OGAN opined that he is willing to give the local option but would rather the state set the penalties.

A roll call vote was taken. Amendment 2 failed with Senators Ogan and French voting in favor and Senators Therriault and Seekins voting against.

CHAIR SEEKINS referred to a letter received from Legal Services and the Revisor of Statutes regarding section 32 of the current bill.

A M E N D M E N T 3

****Sec 32** AS 47.12.310 (c) is amended to read:

- (c) A state or municipal law enforcement agency
- (1) shall disclose information regarding a case that is needed by the person or agency charged with making a preliminary investigation for the information of the court under this chapter;
 - (2) may disclose to the public information regarding a criminal offense in which a minor is a suspect, victim, or witness if the minor is not identified by the disclosure;
 - (3) may disclose to school officials information regarding a case as may be necessary to protect the safety of school students and staff or to enable the school to provide appropriate counseling and supportive services to meet the needs of a minor about whom information is disclosed.
 - (4) Or a state or municipal agency or employee may disclose to the public information regarding a case as may be necessary to protect the safety of the public; and
 - (5) May disclose to a victim or to the victim's insurance company information, including copies

of reports, as necessary for civil litigation or insurance claims pursued by or against the victim."

CHAIR SEEKINS heard no objections to the amendment, recognized there was also an amendment to the title and directed the committee's focus to Section 25, which was also included as a concern in the memorandum from Legal Services.

MR. GUANELI expressed concern over the suggested revised wording and would prefer to have time to review it. His main concern was about interpretation in a court of law and he wants to ensure that the language written in the document is clear.

CHAIR SEEKINS asked that Amendment 3 be withdrawn for the moment.

CHAIR SEEKINS asks for public testimony and hearing none SB 170 is moved out of committee.

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CHAIR SEEKINS announces a 3-minute recess.

^#SB319

SB 319 CLAIMS AGAINST HEALTH CARE PROVIDERS

CHAIR SEEKINS announced SB 319 to be up for consideration. Chair Seekins admitted the bill is not in its final form.

KATHY DALE, a CPA from Anchorage, said she was representing herself and family as victims of medical malpractice. She opposes SB 319, particularly Section 3(d). She testified regarding her husband and his routine rotator cuff surgery. During surgery her husband suffered permanent brain damage due to lack of oxygen to his brain. She stated that it was only due to being able to file a lawsuit that they were able to discover what had caused the brain damage. She said the bill protects doctors and harms the citizens of Alaska. She asked that the cap not be lowered and referred to the Medical Indemnity Corporation of Alaska (MICA) and suggested that the \$250,000 cap adjusted for inflation would exceed \$800,000 in today's economy. She said the stock market crash, along with Enron, Tyco, and World-com type fraud caused insurance companies to raise premiums in order to increase funds. She compared this with the state's problem with the PERS system and asked to consider forming a fund such as MICA.

SENATOR OGAN stated he is familiar with MICA but asked for clarification.

MS. DALE explained it as a self-insurance pool that the doctors owned and the state loaned them funds to get started. She said the pool was so successful that the dividend was too high and would impact the doctor's taxes so they asked that the pool be disbanded.

SENATOR OGAN asked if any other states have that type of system.

MS. DALE answered she is not aware of any others.

CHAIR SEEKINS stated that he is familiar with the history of MICA, and referred to a conversation with Senator Taylor that confirmed Ms. Dale's testimony regarding MICA.

SENATOR FRENCH asked Ms. Dale to talk about the financial impact resulting from her husband's injury.

MS. DALE said her husband was a business owner. He is no longer capable of doing even small jobs around the house. He is no longer employable, has limited memory, and needs daily care. He can drive a car.

CHAIR SEEKINS asked for clarification on Ms. Dale's testimony and asked, "Was the difference in cap how you were able to retain representation to bring the lawsuit?"

MS. DALE answered yes.

CHAIR SEEKINS asked, "What made the difference, the fee that would retain the attorney?"

MS. DALE answered no and stated it was the out-of-pocket expenses to send the records to experts in the field of anesthesiology to review what happened.

CHAIR SEEKINS asked who sent the records out.

MS. DALE answered "our attorneys."

CHAIR SEEKINS asked for any further comment and clarified that Ms. Dale was only representing herself and family and traveled to Juneau at her own expense.

CHAIR SEEKINS invited anyone else from out of town to testify at this time so that they would not be impacted if the committee holds this over.

DONNA MCCREADY testified and identified herself as a plaintiff's attorney who does some medical malpractice work. She stated she is representing the Alaska Academy of Trawlers. She said there are 2 different positions 1) those who want to lower the cap and 2) those who think there is not a medical malpractice crisis. She placed herself in the second category. She asked how the committee figures out [how to come out] its position on the bill. She stated there is no data to support that Alaska has a medical malpractice crisis, no data to support the statement that doctors are leaving the state due to this. She suggested that tons of data support the fact that malpractice carriers are doing very well financially and that there are two main carriers in this state NORCAL and MIEC (ph). She handed out material to committee members showing the financial status of both carriers and pointed out a report from the Legislative Research Department that shows data to support her claim of an increase of doctors actively practicing in Alaska. She cited Providence Insurance information, which shows that 70% of doctors practicing in Alaska are not recruiting doctors to work in the state but the 30% who are do not have trouble doing so. She stated that legislative research shows that doctors are attracted to working in Alaska because we don't have managed care here.

CHAIR SEEKINS said he has seen much of this information before but also recognizes they have never received one of the documents that she distributed, although the documents say they were delivered on Dec 18. He said he cannot use this data because it isn't detailed enough. "Someone threw me a pitch, but not where I can hit it."

MS. MCCREADY referred to the tort reform of 1997 and suggested the committee look to the Division of Insurance to explain the numbers.

CHAIR SEEKINS said he appreciated her bringing in the data and has seen much data regarding this issue but most of it is excerpted. He asked that all parties submit to the committee good data with the complete report, not just "page 9 page 13, page 15." He says he sees a huge gap between the number of licensed doctors and the number of practicing doctors.

MS. MCCREADY responded that in terms of the medical board, a survey with physicians 55 & older were asked if they felt their specialties were underrepresented and 66% answered no.

CHAIR SEEKINS said licensed may not mean practicing and he does not want to argue that point. He said the committee has one more witness who needs to speak today. He assured his willingness to look at all the data.

SENATOR FRENCH thanked Ms. McCready for her testimony and referred to a March 26 report regarding the old MICA Corporation on Page 8, which says an average of 210 doctors per year have been licensed to work in the state. He said new doctors don't usually get a license and then become inactive.

CHAIR SEEKINS recognized that they can be licensed in other states or numerous states even and don't ever practice here.

MS. MCCREADY pointed out that some doctors might practice in more than one state.

CHAIR SEEKINS said he knows a couple of doctors who come up for vacation and are specialists so they can make a little money while they are here.

MR. RICHARD LOUIE said he worked 20 years at BP as a scientist and auditor and stated his doctor did not inform him of risks. He asked the committee to vote no on SB 319.

SENATOR OGAN asked Mr. Louie if he was the gentleman who had a blood clot during an aircraft flight.

MR. LOUIE answered yes.

CHAIR SEEKINS asked for any further questions for Mr. Louie. Hearing none, he advised that the committee wants as much testimony as possible. He stated that the House is working on it as well and he doesn't want to duplicate the effort.

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^#SB323

SB 323 WORKERS COMPENSATION AND CONTRACTORS

CHAIR SEEKINS announced SB 323 to be up for consideration and informed the committee of a proposed CS, version\H.

SENATOR OGAN asked to have the changes explained before a motion is made.

CHAIR SEEKINS explained the changes are in language to make it clear that if a subcontractor does not carry workmen's compensation insurance, the contractor is liable for it. If the contractor does not carry workers compensation insurance then the project owner would be responsible. The next part clarifies who is a contractor and who is a project owner. He says we do have statutes that require contractors to be registered with the state. He states the intent of the bill is very clear.

MS. PAMELA LABOLLE said the Chamber of Commerce suggested the amendments that are contained in this committee substitute for the purpose of clarification. Discussions with many parties identified that the language caused confusion, which is now clarified. She says they want to make certain that all interested parties in a project will assure their employees are covered. She cited instances where injured employees received worker's compensation and then later under tort law and filed suits against other interested parties who were not clearly covered under the worker's compensation umbrella.

I think no one intended the worker's compensation law to be used this way. The idea is the worker be covered for their work-related losses. It's also important for the safety factor because the only way the project owner could stay out of the issue was if they were not actively involved. They could not assess or assure that the contractor and subcontractor had good safety practices because, in so doing, they became an involved person or involved party and they were then able to be sued because they did not directly have compensation coverage or had not assured that the other parties all had coverage. And so that was the purpose of the bill is to make sure that everybody in the chain was involved and insured. And secondly to eliminate the ability for them to go back and double dip and collect payments from two sources, from both the worker's compensation law and the courts for tort.

CHAIR SEEKINS asked for questions.

SENATOR FRENCH said:

I go back to a letter we got from Mr. Jack Miller a month or so ago regarding how this bill would change the obligation of parties to procure workman's compensation coverage and in his letter he said, 'The bill would have no effect on the obligation of parties to procure workman's compensation coverage. As you know with very few exceptions, current law requires all employees...'

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SENATOR FRENCH continued and said you're required to carry worker's compensation and that requirement is not affected by SB 323. He wondered whether something in the CS has changed the obligation of the parties to get worker's compensation coverage.

CHAIR SEEKINS said, "Mr. Miller is online but I don't think so."

MS. LABOLLE said no it does not change that. The employers have to have worker's compensation coverage.

SENATOR FRENCH said he has difficulty with the bill in that you get no more coverage but the worker is giving up his ability to sue project owners who may or may not be covering him with worker's compensation. He said what the worker is getting is no more coverage in exchange for giving up his right to sue in tort.

CHAIR SEEKINS said absolutely not.

SENATOR FRENCH said it strikes him that the worker is giving up his right to sue in tort in exchange for no more coverage. He doesn't see how a worker gains anything with this bill.

CHAIR SEEKINS stated that he has seen a number of instances that would relate to this bill, such as cases where someone claims to be a sole proprietor and then later claims to be an employee. He goes on to say that the project owner who hires a contractor or a contractor who hires a subcontractor will have to make sure that workmen's compensation exists because if they do not, the project owner has to provide it.

CHAIR SEEKINS asked for Mr. Miller online.

MR. JACK MILLER, attorney for the State Chamber of Commerce, said that even though state law requires everyone to have worker's compensation doesn't mean they all do. By extending the obligation to provide workmen's compensation coverage all the way up the project line to the project owner does enhance the benefits to the employees who suffer injuries. Under current law because of tort claim potential, project owners and contractors all refuse to take an integrated approach to project safety. He thinks the law is important because it gives an incentive for all parties involved in the project to integrate their safety practices and reduce work related injuries.

CHAIR SEEKINS announced the need to do some housekeeping and asked for a motion to consider the proposed CS, labeled version H, before the committee.

SENATOR THERRIAULT moved to adopt version H, dated 4/1/04, as the working document before the committee.

CHAIR SEEKINS heard no objections. He responded to Mr. Miller's announcement that he does not have a copy of version H by offering to get him a copy. He asked Mr. Miller to respond to Senator French's question regarding what is an employee getting by not being able to sue someone up the line.

MR. MILLER said they are getting two things: 1) if their employer does not have worker's comp coverage that obligation is transferred to the contractor and the project owner. Says there are situations where this has happened before and current law does not address that; 2) this is an opportunity to get rid of the disincentive for project owners, contractors, and sub-contractors to alienate themselves as far as state work practices go. This allows participants to coordinate safety activities. He believes this is an important opportunity to dramatically reduce work related injuries.

SENATOR OGAN asked how this affects a homeowner building his own house who has a sub-contractor do a few things.

MR. MILLER said it excludes anyone who is a project owner who is not engaged in business. A homeowner is not liable under this statute.

MS. EDEN LARSON identified herself as President and CEO of the Associated Builders and Contractors, an association with over 160 member companies who employ approximately 5000 employees

throughout the state. She supports SB 323 and adds further comment on Ms. LaBolle's statements.

What happens to a contractor when an employee receives a workman's compensation claim and then pursues tort remedies thru the project owner, the project owner in most cases today has included in his contract with the contractor an indemnification agreement. What happens is that if the tort claim is successful the contractor is then liable to the project owner to reimburse and indemnify the project owner for the cost of that tort settlement. The contractor is then consistently caught paying both the compensation costs as well as the court costs. And this is a remedy to that problem the situation that occurs regularly for construction today.

Chair Seekins asked for any further testimony. He said they are not going to move this bill at this time. Having no other witnesses, Chair Seekins announced they will carry the bill over and adjourned the judiciary committee.

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