ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE
April 14, 2004
8:08 a.m.

TAPE(S) 04-38,39

MEMBERS PRESENT

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

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

SENATE BILL NO. 311
"An Act providing for a special deposit for workers' compensation insurers; relating to the board of governors of the Alaska Insurance Guaranty Association; relating to covered workers' compensation claims paid by the Alaska Insurance Guaranty Association; stating the intent of the legislature, and setting out limitations, concerning the interpretation, construction, and implementation of workers' compensation laws; relating to restructuring the Alaska workers' compensation system; eliminating the Alaska Workers' Compensation Board; establishing a division of workers' compensation within the Department of Labor and Workforce Development and assigning certain Alaska Workers' Compensation Board functions to the division and the Department of Labor and Workforce Development; establishing a Workers' Compensation Appeals Commission; assigning certain functions of the Alaska Workers' Compensation Board to the Workers' Compensation Appeals Commission; relating to agreements that discharge workers' compensation liability; providing for hearing officers in workers' compensation proceedings; relating to workers' compensation awards; relating to an employer's failure to insure and keep insured or provide security; providing for appeals from compensation orders; relating to workers' compensation proceedings; providing for supreme court jurisdiction of appeals from the Workers' Compensation Appeals Commission; providing for a maximum amount for the cost-of- living adjustment for workers' compensation

benefits; providing for administrative penalties for employers uninsured or without adequate security for workers' compensation; relating to assigned risk pools and insurers; and providing for an effective date."
HEARD AND HELD

SENATE BILL NO. 318
"An Act relating to the individual right of Alaska residents in the consumptive use of fish and game."
SCHEDULED BUT NOT HEARD

PREVIOUS COMMITTEE ACTION

BILL: SB 311
SHORT TITLE: INSURANCE & WORKERS' COMPENSATION SYSTEM
SPONSOR(s): RULES BY REQUEST OF THE GOVERNOR

02/09/04	(S)	READ THE FIRST TIME - REFERRALS
02/09/04	(S)	L&C, FIN
02/10/04	(S)	L&C AT 1:30 PM BELTZ 211
02/10/04	(S)	Heard & Held
02/10/04	(S)	MINUTE(L&C)
02/19/04	(S)	L&C AT 1:30 PM BELTZ 211
02/19/04	(S)	Heard & Held
02/19/04	(S)	MINUTE(L&C)
02/26/04	(S)	L&C AT 1:30 PM BELTZ 211
02/26/04	(S)	Heard & Held
02/26/04	(S)	MINUTE(L&C)
03/04/04	(S)	L&C AT 1:30 PM BELTZ 211
03/04/04	(S)	Moved SB 311 Out of Committee
03/04/04	(S)	MINUTE(L&C)
03/05/04	(S)	L&C RPT 1DP 1DNP 2NR
03/05/04	(S)	DP: BUNDE; DNP: FRENCH; NR: SEEKINS,
03/05/04	(S)	STEVENS G
03/12/04	(S)	JUD REFERRAL ADDED AFTER L&C
03/26/04	(S)	JUD AT 8:00 AM BUTROVICH 205
03/26/04	(S)	Heard & Held
03/26/04	(S)	MINUTE(JUD)
04/05/04	(S)	JUD AT 8:00 AM BUTROVICH 205
04/05/04	(S)	Heard & Held
04/05/04	(S)	MINUTE(JUD)
04/07/04	(S)	JUD AT 5:30 PM BUTROVICH 205
04/07/04	(S)	-- Meeting Canceled --
04/14/04	(S)	JUD AT 8:00 AM BUTROVICH 205

BILL: SB 318
SHORT TITLE: CONSUMPTIVE USE OF FISH AND GAME

SPONSOR(s): SENATOR(s) SEEKINS

02/11/04	(S)	READ THE FIRST TIME - REFERRALS
02/11/04	(S)	RES, JUD
03/01/04	(S)	RES AT 3:30 PM BUTROVICH 205
03/01/04	(S)	Heard & Held
03/01/04	(S)	MINUTE(RES)
03/24/04	(S)	RES AT 3:30 PM BUTROVICH 205
03/24/04	(S)	Heard & Held
03/24/04	(S)	MINUTE(RES)
03/29/04	(S)	RES AT 3:30 PM BUTROVICH 205
03/29/04	(S)	Heard & Held
03/29/04	(S)	MINUTE(RES)
04/02/04	(S)	JUD AT 8:00 AM BUTROVICH 205
04/02/04	(S)	Scheduled But Not Heard
04/07/04	(S)	RES AT 3:30 PM BUTROVICH 205
04/07/04	(S)	-- Rescheduled to 4 pm 04/07/04 --
04/08/04	(S)	RES RPT CS 3DP 2DNP 1NR 1AM NEW TITLE
04/08/04	(S)	DP: OGAN, SEEKINS, STEVENS B;
04/08/04	(S)	DNP: ELTON, WAGONER; NR: LINCOLN;
04/08/04	(S)	AM: DYSON
04/14/04	(S)	JUD AT 8:00 AM BUTROVICH 205

WITNESS REGISTER

Mr. John Giuchici
Fairbanks, AK
POSITION STATEMENT: Stated support for Amendment 1 to version D of SB 311

Ms. Kristin Knudsen
Assistant Attorney General
Department of Law
PO Box 110300
Juneau, AK 99811-0300
POSITION STATEMENT: Presented version D of SB 311 and answered questions

Mr. Chuck Undeen
National Liberty Insurance
No address provided
POSITION STATEMENT: Stated support for version D of SB 311 without Amendment 1

Mr. Mike Jensen
No address provided

POSITION STATEMENT: Sees no need to change the existing workers' compensation board system

Mr. Scott Nordstrand
Deputy Attorney General
Department of Law
PO Box 110300
Juneau, AK 99811-0300
POSITION STATEMENT: Suggested changes to Amendment 1

ACTION NARRATIVE

TAPE 04-38, SIDE A

CHAIR RALPH SEEKINS called the Senate Judiciary Standing Committee meeting to order at 8:08 a.m. Senators Ogan, French, Ellis and Chair Seekins were present. The first order of business to come before the committee was SB 311.

SB 311-INSURANCE & WORKERS' COMPENSATION SYSTEM

CHAIR SEEKINS announced that at the last hearing on SB 311, the committee considered a proposed committee substitute (CS), labeled 23-G2. Since that time, Legislative Legal and Research Services redrafted that version, which is now labeled 23-GS2023\D and referred to as version D.

SENATOR OGAN moved to adopt version D as the working document before the committee.

CHAIR SEEKINS announced that without objection, version D was adopted. He noted that at the last meeting, the committee reviewed the points of agreement between the Administration and labor representatives on the bill and was considering an amendment [Amendment 1], which reads as follows.

23G-2
4/2/2004
(1:51 PM)

A M E N D M E N T 1

OFFERED IN THE SENATE BY_____
JUDICIARY COMMITTEE
TO: Proposed CSSB 311(JUD)(23-G2)

Page 38, lines 2-4:

Delete “testimony presented by a witness who appears in a hearing. When credibility is disputed, the hearing panel’s determination of credibility must be supported by specific findings.”

Insert “a witness. A finding by the hearing panel concerning the weight to be accorded a witness’s testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the hearing panel are subject to the same standard of review as a jury’s finding in a civil action.”

Page 41, line 4:
Delete “, hearing panel,”

Page 41, lines 5-10:

Delete “Unless not supported by specific findings, a hearing panel’s findings regarding the credibility of testimony of a witness who appeared in the hearing is binding on the commission, but all other findings, including the weight to be accorded medical testimony and reports, may be set aside by the commission. The findings of the hearing panel, if not set aside by the commission, are conclusive.”

Insert “When reviewing decisions of a hearing panel, the commission shall use the same standard of review as that established by the Alaska Supreme Court in workers’ compensation cases.”

CHAIR SEEKINS noted that Amendment 1 was originally drafted for incorporation into version 23-G2, therefore the page and line numbers will have to be adjusted to mesh with version D, however the content of the amendment remains the same.

SENATOR FRENCH moved to adopt Amendment 1.

SENATOR OGAN objected for the purpose of discussion.

CHAIR SEEKINS said that Amendment 1 was proposed by the labor representatives, and asked Mr. John Giuchici to speak to it.

MR. JOHN GIUCHICI, representing the IBEW, told members that without Amendment 1, the legislation would be an injustice to the whole workers’ compensation process. He stated:

> If the hearing panel and the hearing officer are not afforded any weight for future appeals or reconsideration and all of the fact finding and judgmental and credibility issues that are addressed at the hearing panel level are not taken into account in any appeal process, that is just totally unfair to both parties. There doesn't appear to be any other administrative bodies that totally ignore all of the evidence and fact-finding done by the [indisc.] panel to make the decision. For someone to just substitute judgment at a later date and discount any factual evidence that was used to determine something is just totally unfair.

SENATOR OGAN asked to hear from the Administration.

CHAIR SEEKINS asked Mr. Giuchici how Amendment 1 will change the structure of the process.

MR. GIUCHICI explained that section .122 of the current bill, Credibility of witnesses, is currently written to give the hearing panel the sole power to determine the credibility of testimony presented by a witness who appears at a hearing. That would allow a carrier to bring in a witness who does not even actively practice medicine, and acts as a "hired gun." That witness's testimony would supersede a deposition by an attending physician, employees, witnesses, or medical records. He believes it is totally lopsided to allow a carrier to hire someone to testify, especially if that person's credentials are questionable and whose testimony will discard the practicing medical doctor's deposition. He said that most of the language in Amendment 1 has been in statute for many years and has worked well. It requires all the evidence to be considered. He cautioned that some people make a living off of writing an opinion for the carrier after reviewing the records. They testify and slant the information anyway they want to. Meanwhile, the attending physician might not be able to leave his practice for an entire day to testify and instead does a deposition. Amendment 1 will require the deposition from the attending physician to carry equal weight to any expert the carrier wants to bring in.

SENATOR OGAN declared a potential conflict of interest as he has an active workers' compensation claim in progress.

MS. KRISTIN KNUDSEN, assistant attorney general, Department of Law (DOL), told members that she has worked for DOL for 15 years

in the workers' compensation arena. She represented plaintiffs in workers' compensation cases and worked as a workers' compensation hearing officer for the State of Oregon prior to that. She asked to address a point made by Mr. Giuchici, and said it involves an area of the law that is subject to a lot of misinformation and misunderstanding. That is, the concept that if a carrier brought a witness in that person's testimony would override a physician's testimony. She pointed out that two things are at issue. The first is known as the standard for reviewing findings of credibility. Credibility has to do with whether or not a witness is telling the truth. The second area is the weight of the evidence; that is which evidence is more persuasive. The fact that a physician testified in person would not give more weight to testimony given by deposition or to reports that are detailed and explain the physician's opinion. She continued:

> So the first thing I would like to do is to reassure Mr. Giuchici that under this current system, it is not ... something that he should worry about – a carrier bringing in a live witness and sort of automatically overriding the report and any deposition testimony of a practicing physician who treated the patient. Instead the hearing panel would have to go in and weigh the evidence. I have, for the purposes of clarity, attempted to give to the committee a chart in a question and answer format on this subject of the standard of review.

CHAIR SEEKINS announced that Senator Therriault joined the committee some time ago.

MS. KNUDSEN referred to the chart she provided [entitled Current System – Proposed System] and explained that under the current system, the credibility of a witness is determined by the workers' compensation board; that would not change under the proposed system. In view of the Supreme Court's decision in the Whitesides case, DOL felt the right of a witness to have his or her credibility determined by the immediate trier of fact in hearing is very significant. DOL wished to retain that power in the hearing panel. The hearing panel would have the power to weigh the evidence and make findings of fact and conclusions of law. What is different is that on review by the Workers' Compensation Appeals Commission, the commission would have the power to review the whole record and look at whether the evidence was carefully and rationally examined and to decide whether to reweigh that evidence in the record. She pointed out

that there would be no new hearing or new evidence, which is known as administrative review de novo on the record.

CHAIR SEEKINS asked if, under the proposed system, [the appeals commission] would not call in new witnesses or take new testimony, it would only review the record of the proceeding before the panel.

MS. KNUDSEN said that is correct and has been in SB 311 from the beginning: no new evidence would be presented to the commission and no new hearing would take place. That system differs from the current system, in which the Superior Court may exercise its discretion to hold a new trial and take new testimony if it wished to do so. In that respect, the commission is constrained to the record. If the commission is concerned that the evidence is inadequate, the commission could remand the case to the hearing panel for the purpose of gathering more evidence. She repeated there will not be a disregard for the evidence taken by the hearing panel; instead the hearing panel will control the intake of evidence.

MS. KNUDSEN again referred to the chart and told members that the rule of conclusiveness basically says that when a court is reviewing an administrative agency's decision, it should look for substantial evidence in light of the record to determine whether or not that agency made an appropriate decision – it does not reweigh the evidence. In the current system, the workers' compensation board is entitled to the rule of conclusiveness under section .122. She described:

> Now when we went to the hearing panel system, there was some concern about,...in our current act, the board is the only thing that's referred to and it's the board that acts. The hearing panels act for the whole board...and to eliminate any question as to whether or not the hearing panels were in fact acting for the whole board, that it was a single tier agency, .122 was inserted in 1982.
>
> Here we have a single administrative agency in our current system. What we are going to in this proposed system is a two-tiered administrative agency where you have two tiers of adjudicatory authority. You have your hearing panel and then you have the commission. The commission is not a court. It is an administrative agency and as the top tier of that administrative agency under basic principles of administrative law,

it is the one to which the courts must give deference in terms of its finding and that's why the current bill is written the way it is.

SENATOR FRENCH asked if that is exactly the danger for the employee who is appearing in front of the panel in that the evidence that the panel weighs could be reweighed by the appeals commission and then set in stone when it goes up on appeal to the Supreme Court. Therefore, the appeals commission could undo the victory that the worker won with the hearing panel and the Supreme Court could not reweigh that evidence because the appeals commission already did that.

MS. KNUDSEN said the proposed Workers' Compensation Appeals Commission could reweigh the evidence but it does not have to. Its decision would also be subject to review. The commission must have substantial evidence in the record to support its finding and the commission's findings are subject to Supreme Court review.

CHAIR SEEKINS asked if the hearing panel makes a finding and the commission changes the finding because it determines that the record supports a different conclusion, the only avenue of appeal would be to the Supreme Court, which would examine the entire record in the same way the commission did.

MS. KNUDSEN said the Supreme Court would examine the entire record, but its focus would be to determine whether the commission's findings were supported with substantial evidence in light of the entire record. The court, however, would not disturb the findings on credibility because those findings are binding on the commission. Therefore, if a worker were to testify that an unwitnessed event occurred and that witness's credibility was disputed, the proposed hearing panel's determination of the worker's credibility would be binding.

SENATOR THERRIAULT asked whether the appeals commission would have to substantiate its conclusion if it differed from the hearing panel's conclusion. He pointed out in the current system, a commissioner who reaches a different conclusion does not have to substantiate that conclusion. If DOL then has to represent the state in that case, it has no written findings on which to base its case. For that reason, another piece of legislation that deals with hearing panels proposes that all conclusions be in writing.

MS. KNUDSEN said the commission is statutorily required to issue written decisions based on findings of fact and conclusions of law. The statute specifies that if the commission does not disturb the findings of the hearing panel, those findings are considered as adopted if the case is not appealed to the Supreme Court.

SENATOR FRENCH felt the question regarding the written decisions and the record made in front of the workers' compensation board right now deserves examination so that the committee does not proceed on a false premise. He looked at decisions on the workers' compensation board's website and found them to be quite comprehensive. He distributed two of those decisions to show members the thoroughness of the work done by the current board and that workers do not win all cases. He said he was responding to Senator Therriault's comment that sometimes the record is unwritten or unsubstantiated.

SENATOR THERRIAULT clarified that the other legislation he referred to does not apply to the workers' compensation board. His goal is to assure that the same standard of documentation that the legislature would be requiring for other appeals processes is the same as the workers' compensation board.

MR. GIUCHICI interjected to ask what the objection is to using the standard of review used by a jury in a civil action.

MS. KNUDSEN explained that the current statutory standard is the standard applied by the Supreme Court when it is reviewing the board's decision. She continued:

> What we are talking about is not really changing the Supreme Court's standard of review. The reviewing court's standard of review, looking down, isn't really changing. What is changing is which tier of this proposed administrative agency that standard is applied to. Getting to Senator Therriault's point, it's a very basic principle of administrative law that the – what we call the conclusiveness, the standard of review that's applied, the findings of fact, are entitled to the same as a jury - that kind of thing, is applied to the director's decision or the commissioner's decision if it's a regular administrative appeal through an administrative body and...the commissioner's decision, the one that's appealed into the court and precisely because of the problem that Senator Therriault raised, it's sometimes

difficult to figure out what the commissioner's findings of fact were. In this situation, what is being proposed is simply that the proposed commission as the highest level of this administrative body would be subject to that standard of review instead of the lowest body of this administrative body. We don't, as a rule...it would not be an orthodox way of looking at an administrative structure.

Number two, this idea of the higher body having the rule of conclusiveness, the standard of review that is articulated here, is the majority rule. As Larson has said, this is the majority rule and in its most orthodox form no exception is made even for determinations of credibility. We are modifying that here into what is called the modified majority rule because we are making an exception for determinations of credibility, which really, you know, need to be by this hearing panel so that witnesses, a claimant, or an employer coming before the hearing panel has the opportunity to go face-to-face with the person who is determining credibility.

The other thing is that this kind of a system, this two-tiered administrative system that we're proposing here, promotes the consistency that we're looking for. It also is in line with what the National Commission on State Compensation Law report provided. It provides an error check, if you will, a check by experts in the field who are going in this proposed bill, this committee substitute, going to be drawn from varied backgrounds so [there will] be an employee attorney on this panel, there will be an employer attorney on the panel. So there is a balance on the commission itself, as well as a balance on the hearing panel....

I just wanted to add one more final point, and that is that for some reason some attorneys have mentioned that they're concerned with the idea this change in the standard of review might somehow bleed over and somehow change the standards for a stay pending appeal and I just wanted to reassure the members of the committee that that was not intended. The assignment of conclusiveness to review by the highest level of the adjudicatory agency does not alter the standards for the grant of a stay pending review by the

commission and that there was no intent to repeal Olson Logging versus Larson.

SENATOR FRENCH said his question goes to a fundamental point that has been raised repeatedly about the appeals commission, and that is that DOL is looking for consistency. He asked what evidence DOL can provide that the decisions issued by the workers' compensation board are inconsistent and whether that evidence is backed by a high reversal rate at the court level.

MS. KNUDSEN said she has not counted reversal rates but she tried to prepare for the committee some information illustrating why the commission should have the discretion to review and reweigh evidence. She said she could provide copies of decisions after the meeting, but did not want to disclose the names of employers. She noted in one case, an employee worked at a remote site and was later diagnosed with hepatitis C by a local physician. He also obtained a "checkbox" letter, which is a letter written by his attorney to the physician asking whether the physician believed the disease was work related. The physician believed it was. In the meantime, a second employee was diagnosed with hepatitis C in the field. The employer had that employee examined by experts at Stanford University. That examination was disputed so the board sent the second man to Scripps Institute in La Jolla. The experts from Stanford and Scripps testified that it was very unlikely that employee had contracted hepatitis C at the remote site, though it was remotely possible. The board found in its decision the checkbox letter to be more definitive than the expert testimony. The board believed the close temporal relationship was important, even though the experts testified that hepatitis C can be asymptomatic for a very long time. The board's decision was also based on the fact that the employer could not prove the employee contracted the disease elsewhere.

MS. KNUDSEN said in that type of a situation, the appellant might want to ask the commission to reweigh the evidence. In that case, the other co-worker gave permission for his lab results to be presented to the board, which the board cannot compel. Those results showed the two men to have different genotypes of the virus. The following year, the board determined that it was medically impossible for the first employee to have contracted the disease [from the other employee]. She told members that "medically impossible" is not the standard an employer has to meet.

MS. KNUDSEN said in the next case that she looked at, which contained similar characteristics with expert examination and a checkbox letter, the board said the checkbox letter had no indicia of reliability. She said that is the kind of inconsistency that will be addressed by the commission.

SENATOR OGAN asked Ms. Knudsen if she believes that inconsistency is due to the structure of the existing system and that Amendment 1 would undermine that.

MS. KNUDSEN said she does. The idea of the CS is to provide a binding level of review by experts in the field at an administrative level before the case goes to the courts. DOL feels the commission needs the discretion to reweigh evidence or to remand the case to the hearing panel to gather more evidence.

CHAIR SEEKINS asked what the commission would do, if in the case she mentioned, the review got to the commission and it questioned the decision based on the evidence.

MS. KNUDSEN said she could argue before the commission that it should remand the case to the hearing panel for more evidence or that the evidence should be reweighed.

CHAIR SEEKINS asked if the commission overturned the hearing panel's decision and the case was appealed to the Supreme Court, what the Supreme Court would review.

MS. KNUDSEN said the Supreme Court would review the commission's findings of fact.

TAPE 04-38, SIDE B

She continued to explain the commission would be bound by the credibility determinations, for example the testimony of the worker, so the credibility determinations would "go up" with the commission's findings of fact. The Supreme Court would look at the commission's findings of fact and determine whether those findings were supported with substantial evidence. She added that in that case, the presumption of compensability was overcome and "they are in the mode of weighing the evidence." She further explained that would not happen if the presumption of compensability was not overcome.

SENATOR FRENCH stated that if the workers' compensation board is making inconsistent decisions, something more than an anecdote would prove Ms. Knudsen's case. He asked her to provide the

committee with statistics showing the decisions are all over the map. He then commented the current system is a three-tiered system: workers' compensation board, Superior Court, Supreme Court. Because people see this legislation as removing the middle layer of review, he suggested keeping the current standard of review in place to increase confidence in the new system for the time being. That way, people will know what legal rules and standard of review will apply when they go in front of the appeals commission.

CHAIR SEEKINS took public testimony.

MR. CHUCK LUNDEEN (ph), chief counsel Liberty Northwest Insurance, said, in response to both Mr. Giuchici and Senator French's concern about fairness, he read the proposed CS and finds that it clearly states that there has to be a full review of all of the evidence at the appeals commission level. He feels fairness to both employers and employees would be part of the de novo review process. Everyone will have an open shot at reviewing a lower level decision and reweighing the evidence. He stated support for the bill but opposition to Amendment 1.

MR. MIKE JENSEN told members he represents injured workers before the workers' compensation board and in the long shore workers and federal workers' compensation system. He noted he submitted written testimony to the committee expressing his concerns with the bill but further stated:

> The amendment dealing with the credibility issue is .122. The way we read the credibility amendment is that the hearing panel will only have the power to determine the credibility of testimony presented by a witness. Now testimony presented by a witness – it adds the words who appears in a hearing, which, in other words, means that a hearing panel will not have the authority to decide credibility issues on anybody who is not present at the hearing, whose testimony is presented through deposition or who submits medical reports. So, for example, treating doctors, their credibility could not be determined unless they testified at a hearing. Employer experts – their credibility could not be determined unless they testified at a hearing. Employers – their credibility could not be determined unless they testified at a hearing. And, for that matter, injured workers, their credibility could also not be determined by the hearing panel unless they testified at a hearing. By

> leaving the present language in the current act in place, the hearing panel has the power to consider the weight to be accorded witness testimony, including medical testimony and reports. It does not limit itself to those people who testify at a hearing. We think that change is very important, not just for employees, but also for employers. What we're trying to prevent here is the increasing costs that currently injured workers have to bear when pursuing their compensation case. But, in effect, and this is unusual for me to say representing injured workers, we're also trying to save the industry some of the costs by adopting these changes the way we see it. Both parties will have two bites of the apple. There will be no disincentive to either party to go and retry their cases, in effect, or re-present their cases and their arguments to the commission. I was concerned that it would greatly increase the amount of time it takes to resolve a claim, which is in nobody's interest. Number two, it would greatly increase the cost of pursuing a claim, which again is in nobody's interest. In addition, that's just the cost to the parties – in addition there's the cost to the State of Alaska of creating a new bureaucracy that this bill entails.

MR. JENSEN said in response to the case Ms. Knudsen referred to, bad facts make bad law and the legislature should not make the changes dealing with credibility and the weight of evidence based upon one case. There is no guarantee a commission will be any better. Any changes should be based on empirical data. He said the current system is fair and he sees no need for change.

CHAIR SEEKINS asked Ms. Knudsen if it is DOL's intent, in relation to section .122, that the hearing would not have the same opportunity to weigh the evidence of a witness that does not appear before it, for example, testimony in the form of reports or records.

MS. KNUDSEN said it is not the intent to deprive the hearing panel of the power to exercise its authority to determine credibility, whether that be through depositions. The issue that DOL was addressing by inserting "at a hearing" was not to limit the hearing panel's authority but to clarify that the witnesses' right to have their credibility determined at a hearing was protected by that credibility determination being binding all

the way up. She said credibility determinations by the trier of fact are generally subject to a very high standard of review.

SENATOR OGAN asked for a yes or no answer to the question of whether the witness must be present at the hearing.

MS. KNUDSEN said the witness does not have to be present to have a credibility determination by the hearing panel. She said the words “at a hearing” were included in response to the Whiteside decision.

CHAIR SEEKINS maintained that if a person appears before the panel, that panel is the sole determiner of credibility.

MS. KNUDSEN agreed and said the panel is the sole determiner regardless, however if the person appears before the panel, that determination is binding and cannot be changed by the commission.

CHAIR SEEKINS asked Mr. Giuchici if that was his understanding.

MR. GIUCHICI said it was not. He questioned, if that is the case, why the current language is unacceptable.

MS. KNUDSEN said the current law does two things in one statute. It addresses credibility and it addresses the conclusiveness of a finding of fact that being the weight assigned by the board to particular evidence. Credibility and weight differ; credibility goes to truthfulness while weight is based not only on truth but on opinion. Lay witnesses can also have honest differences in perception or recall without those differences impacting their credibility. She said the credibility issue is not disturbed in the proposed CS.

SENATOR THERRIAULT pointed to Section 61 on page 37 and said the language could be clarified.

MS. KNUDSEN said she would take a look at rewriting it.

CHAIR SEEKINS asked Ms. Knudsen to tell members what standard is used in a jury’s finding in a civil action, which Mr. Giuchici referred to.

MS. KNUDSEN said the Supreme Court’s standard of review in relation to the workers’ compensation board is that the Supreme Court upholds the findings of fact of the board if they are supported by substantial evidence in light of the entire record.

Substantial evidence is evidence that is relevant and that a reasonable mind might expect to support the conclusion.

CHAIR SEEKINS jested that everyone who agrees with him is reasonable.

MS. KNUDSEN said different standards apply to overturn a jury verdict. For a new trial, there must have been such slight or no evidence to support the jury verdict. For a directed verdict, the standard is something that no reasonable minds could differ about.

CHAIR SEEKINS asked Ms. Knudsen if DOL's intent was to not allow the determination of the credibility of a witness who appeared before a hearing panel to be questioned at a higher level.

MS. KNUDSEN said that is correct because the witness's right is being protected.

SENATOR FRENCH asked Ms. Knudsen, as she works on that language, to address the credibility determination with respect to a deposition or medical report. He then said that Amendment 1 does that well and will give people confidence that the hard work done at the trial level in the workers' compensation system will not be tampered with as it moves up the chain.

CHAIR SEEKINS commented that everyone wants justice, not something to be tampered with.

SENATOR FRENCH acknowledged that "tampering" was a poor choice of words.

MS. KNUDSEN asked that Mr. Nordstrand speak to the "at the hearing" issue.

MR. SCOTT NORDSTRAND, Deputy Attorney General, Civil Division, Department of Law, said that phrase goes to the theory that the determination of credibility of a witness should be deferred to the people who actually see the witness and watch the witness's reaction to questions in the courtroom. He said in contrast, a deposition can be in written transcript form or a pre-made video, which is the reason for the distinction between witnesses who give testimony in person. He suggested that a good compromise would be to remove "at the hearing" so as to include depositions and reports. He noted that differs from Senator French's amendment because it addresses both credibility and weight.

CHAIR SEEKINS referred to the second sentence of Amendment 1, "When credibility is disputed, the hearing panel's determination of credibility must be supported by specific findings," and asked if the panel would have to support its determination of credibility based on findings when determining credibility among witnesses whose testimony conflicts.

MR. NORDSTRAND said that is correct and explained that to get to the deferential standard, the panel must give reasons for its credibility determination. Under the existing system, if the facts are not there, the Supreme Court can overturn that determination.

CHAIR SEEKINS asked Mr. Giuchici his understanding of that sentence.

MR. GIUCHICI said he still does not understand why the words "who appears at a hearing" must be included.

CHAIR SEEKINS noted Mr. Nordstrand suggested that phrase be removed. He then said it appears that this section deals with the process before the hearing panel, not the review process later on.

MS. KNUDSEN said that is correct.

CHAIR SEEKINS asked if [the current board] supports its determinations of credibility with findings when two witnesses are in opposition.

MR. GIUCHICI said absolutely.

CHAIR SEEKINS said in effect, the CS codifies the existing practice.

MS. KNUDSEN affirmed that is correct. She noted the Supreme Court brought this issue to the fore in the Hawk (ph) case.

SENATOR THERRIAULT asked Ms. Knudsen if she added that phrase in response to a particular court case.

MS. KNUDSEN said it was added because of DOL's concerns about the Whitesides case, however she does not believe removing that phrase will impair the hearing panel's ability to comply with Whitesides.

CHAIR SEEKINS asked if, in the second sentence of Amendment 1, the credibility dispute must be confined to the hearing process.

MS. KNUDSEN said that is correct and is simply a codification of the current state of the law.

CHAIR SEEKINS asked if removing the words "who appears at a hearing" will do any damage to DOL's intent.

MS. KNUDSEN said it will not.

The committee took a 3-minute recess at 9:35 a.m. Upon reconvening, Senators French, Therriault and Seekins were present.

CHAIR SEEKINS asked both Mr. Giuchici and Mr. Nordstrand if they were agreeable to that change, as well as changing the second sentence of Amendment 1 by adding "before the hearing panel" after "disputed". He said that would confine this process to what happens in front of the hearing panel.

MR. GIUCHICI said he is comfortable with that language, with Section .122

MR. NORDSTRAND was also agreeable to that change.

CHAIR SEEKINS announced a brief recess to await the arrival of other members. Upon reconvening, members discussed amending Amendment 1, made several attempts to do so and discussed rewriting Amendment 1 altogether for the purpose of clarity.

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A roll call vote was taken on Amendment 1. The motion to adopt Amendment 1 failed with Senators Ellis and French in favor and Senators Ogan, Therriault and Seekins opposed.

SENATOR THERRIAULT moved to adopt Amendment 2, to rewrite Sec. 122 on lines 26 through 29 on page 37 to read:

Sec. 23.30.122 Credibility of witnesses. The hearing panel has the sole power to determine the credibility of testimony presented by a witness. When credibility is disputed in a procedure before the hearing panel, the panel's determination of credibility must be supported by specific findings.

CHAIR SEEKINS announced that Amendment 2 was adopted with no objection.

SENATOR FRENCH moved to adopt Amendment 3, which reads as follows. [Amendment 3 contains the content of lines 10 through 22 of Amendment 1. Page and line numbers will need correction.]

A M E N D M E N T 3

Page 41, line 4:
Delete ", hearing panel,"

Page 41, lines 5-10:

Delete "Unless not supported by specific findings, a hearing panel's findings regarding the credibility of testimony of a witness who appeared in the hearing is binding on the commission, but all other findings, including the weight to be accorded medical testimony and reports, may be set aside by the commission. The findings of the hearing panel, if not set aside by the commission, are conclusive."

Insert "When reviewing decisions of a hearing panel, the commission shall use the same standard of review as that established by the Alaska Supreme Court in workers' compensation cases."

SENATOR THERRIAULT objected for the purpose of discussion.

SENATOR FRENCH told members the thrust of Amendment 3 is to have the appeals commission use the Superior Court's standard of review; the Supreme Court would retain its standard of review. He said that will give the players in the system confidence that the same legal standards that apply now to the workers' compensation board will apply in the future.

MR. GIUCHICI said that is the intent of the claimants, representatives and labor folks he has spoken with.

MS. KNUDSEN pointed out that Amendment 3 creates some incongruity because the director of the division of workers' compensation makes some decisions. Senator French's proposal would not apply to those decisions while the hearing panel's decisions would be subject to a different standard of review. She advised that the administrative system will have to work as a whole. In that system, the commission will be the top decision maker, therefore the commission's findings should be subjected

to the deference accorded by the courts to the final decision maker in an administrative proceeding. She emphasized this is an administrative/agency system, not a court system, so the same basic principles of administrative law should apply to the entire system.

CHAIR SEEKINS said Amendment 3 would apply to a review, not a hearing.

MS. KNUDSEN said that is correct. No new hearing, testimony or trial is contemplated. In that respect, it is very different from the court system because it can hold an entirely new hearing.

MR. GIUCHICI responded:

> I disagree with Kris in the respect that the director has administrative decisions made and that's all fine with us with self-insured certificates and that nature. The panel still [indisc.] jury in the decision making process so I just think that those types of acts should be reserved and not confused with the director's [indisc.].
>
> I think that the director doing administrative work is totally separate from the hearing panel that is acting as a sort of jury and coming up with decisions for lawyers and plaintiffs.

10:00 a.m.

CHAIR SEEKINS asked if Amendment 3 is a restatement of what the committee just discussed about the hearing panel's findings being binding on the commission.

MS. KNUDSEN said it is the original language of the bill and was intended to restate the requirements in section .122. With the adoption of Amendment 2, the deletion would not affect the requirement of specific findings that need to be made by the commission. She clarified that it is a redundancy but is intended to re-emphasize that the hearing panel determines credibility.

SENATOR THERRIAULT asked Senator French why he would want to delete the phrase, "Unless not supported by specific findings, a hearing panel's findings regarding the credibility of testimony of a witness who appeared in the hearing is binding on the

commission," since the committee had a lengthy discussion about the fact that the determination of credibility would be binding. He thought leaving that language intact would provide extra comfort.

SENATOR FRENCH responded by saying he did not prepare the amendment himself, but the crucial issue is the weight to be accorded medical testimony and the other findings. He explained that the heart of the issue is that the winning side does not "get some cement, if you will, poured over that win and then it goes forward under a tighter standard of review."

He then moved to amend Amendment 3 to delete (on lines 14-16):

AMENDMENT TO AMENDMENT 3

> Delete "Unless not supported by specific findings, a hearing panel's finings regarding the credibility of testimony of a witness who appeared in the hearing is binding on the commission,"
>
> And begin Amendment 3 with the word "but" on line 16,

CHAIR SEEKINS referred to line 31 on page 40 of version D and noted the phrase, "unless not supported by specific findings" is not in version D.

SENATOR FRENCH offered to redraft Amendment 3 and withdrew his motion to adopt it.

10:10 a.m.

CHAIR SEEKINS agreed and recessed the meeting until 5:30 p.m.