

ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE

April 14, 2004

5:45 p.m.

TAPE(S) 40,41

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. 379

"An Act providing that public members of the Board of Trustees of the Alaska Permanent Fund Corporation may be removed only for cause; and providing for an effective date."

MOVED CSSB 379(JUD) OUT OF COMMITTEE

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."

MOVED CSSB 311(JUD) OUT OF COMMITTEE

SENATE BILL NO. 323

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

HEARD AND HELD

SENATE BILL NO. 354

"An Act relating to complaints filed with, and investigations, hearings, and orders of, the State Commission for Human Rights; making conforming amendments; and providing for an effective date."

SCHEDULED BUT NOT HEARD

PREVIOUS COMMITTEE ACTION

BILL: SB 379

SHORT TITLE: PERM FUND BOARD PUBLIC MEMBER REMOVAL

SPONSOR(S): RULES BY REQUEST OF THE GOVERNOR

03/26/04	(S)	READ THE FIRST TIME - REFERRALS
03/26/04	(S)	JUD, FIN
04/05/04	(S)	JUD AT 8:00 AM BUTROVICH 205
04/05/04	(S)	Heard & Held
04/05/04	(S)	MINUTE(JUD)
04/14/04	(S)	JUD AT 5:30 PM BUTROVICH 205

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
 04/14/04 (S) Heard & Held

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
 04/02/04 (S) Heard & Held
 04/02/04 (S) MINUTE(JUD)
 04/07/04 (S) JUD AT 8:00 AM BUTROVICH 205
 04/07/04 (S) Heard & Held

04/07/04 (S) MINUTE(JUD)
04/14/04 (S) JUD AT 5:30 PM BUTROVICH 205

WITNESS REGISTER

Mr. Robert Storer
Alaska Permanent Fund Corporation
PO Box 25500
Juneau, AK 99802-5500
POSITION STATEMENT: Answered questions about SB 379

Mr. Mike Barnhill
Assistant Attorney General
Department of Law
PO Box 110300
Juneau, AK 99811-0300
POSITION STATEMENT: Answered questions about SB 379

Ms. Kristen Knudsen
Assistant Attorney General
Department of Law
PO Box 110300
Juneau, AK 99811-0300
POSITION STATEMENT: Answered questions about the proposed amendments to SB 311

Mr. Scott Nordstrand
Deputy Attorney General
Department of Law
PO Box 110300
Juneau, AK 99811-0300
POSITION STATEMENT: Answered questions about the proposed amendments to SB 311

Mr. Paul Lisankie
Division of Workers' Compensation
Department of Labor & Workforce
Development
PO Box 21149
Juneau, AK 99802-1149
POSITION STATEMENT: Answered questions about the proposed amendments to SB 311

Mr. John Giuchici
IBEW
Fairbanks, AK

POSITION STATEMENT: Answered questions about the proposed amendments to SB 311

Mr. Steve Constantino
No address provided

POSITION STATEMENT: Opposed to the de novo review provision in SB 311

Ms. Constance Lucie
No address provided

POSITION STATEMENT: Supports the de novo review provision in SB 311

Mr. Chancy Croft
Anchorage, AK

POSITION STATEMENT: Expressed concern about the absence of time limits for decisions in SB 311

Ms. Pam LaBolle
Alaska State Chamber of Commerce
217 Second Street
Juneau, Alaska 99801

POSITION STATEMENT: Supports CSSB 311(JUD) and opposes Amendment 4b

Mr. Matthew Maxner
No address provided

POSITION STATEMENT: Supports the de novo review provision in SB 311

Mr. Jack Miller
Counsel
Alaska State Chamber of Commerce
217 Second Street
Juneau, Alaska 99801

POSITION STATEMENT: Answered questions about the CS to SB 323

Mr. Todd Larkin
Juneau, AK

POSITION STATEMENT: Answered questions about Amendment 1 to CSSB 323(JUD)

ACTION NARRATIVE

TAPE 04-40, SIDE A

CHAIR RALPH SEEKINS reconvened the Senate Judiciary Standing Committee meeting at 5:45 p.m. All members were present. Chair Seekins noted that at the morning meeting, the committee was considering amendments to SB 311. He said the committee would set SB 311 aside for a few minutes and take up SB 379.

^#SB379

SB 379-PERM FUND BOARD PUBLIC MEMBER REMOVAL

CHAIR SEEKINS reminded members that at the last meeting on SB 379, a question was raised about what constitutes a criminal offense of moral turpitude. A memorandum in response to that question was distributed to members.

SENATOR FRENCH noted assault in the third degree, a class C felony, is not listed. He suggested that the committee might want to add that offense. He then moved to adopt Amendment 1:

A M E N D M E N T 1

On page 1, lines 8-9 delete, "involving moral turpitude"

CHAIR SEEKINS asked for an example of an assault in the third degree.

SENATOR FRENCH explained that typically it involves putting a person in fear of imminent serious physical injury by means of a dangerous instrument, such as pointing a knife at a person.

SENATOR THERRIAULT objected to Amendment 1.

SENATOR OGAN asked if the legislature confirms the members of the Board of Trustees of the Alaska Permanent Fund Corporation (APFC) and whether that is set in the Constitution.

CHAIR SEEKINS said the legislature does not confirm the board members.

MR. STORER told members that the Board of Trustee appointments are not addressed in the Constitution.

SENATOR THERRIAULT recalled a lengthy debate three or four years ago that involved an issue that prohibits the legislature from requiring confirmation by statute.

CHAIR SEEKINS did not believe that issue had anything to do with removal for cause.

SENATOR THERRIAULT added:

I think where the constitution specifically allows the legislature to have confirmation powers, that's where we have it because it's an infringement on the executive's power. So I think, if I'm remembering correctly, because we're not granted that power specifically for this board, we can't assume that power just by statute, if I remember the debate. Because I think we had this issue before us when we had the proposal to require confirmation and that was the hurdle that we had to get over.

SENATOR OGAN was satisfied with that explanation and said if he changes his mind after doing some research, he will offer an amendment at a later date.

SENATOR THERRIAULT moved CSSB 379(JUD) and its accompanying fiscal notes from committee with individual recommendations.

CHAIR SEEKINS announced that without objection, the motion carried.

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^#SB311

SB 311-INSURANCE & WORKERS' COMPENSATION SYSTEM

[The committee heard SB 311 at its April 14, 2004 8:00 a.m. meeting, at which time it adopted version D of SB 311 and addressed Amendments 1-3.]

SENATOR FRENCH distributed copies of his proposed amendments and moved to adopt Amendment 4, which reads as follows.

A M E N D M E N T 4

OFFERED IN THE SENATE BY Senator Hollis French
TO: CS SB 311(JUD), Draft Version "D"

Page 40, line 30
Following "determining"
Insert: ", "

Page 41, line 1
Following "witness"
Delete: "who appeared in the hearing is"

Insert: "are"

Page 41, lines 2-3

Following "commission"

Delete: ", but all other findings, including the weight to be accorded medical testimony and reports, may be set aside by the commission"

SENATOR THERRIAULT objected for the purpose of discussion.

SENATOR FRENCH told members that the first part of Amendment 4 is a grammatical correction. The second part deletes ", but all other findings, including the weight to be accorded medical testimony and reports, may be set aside by the commission" so that the panel's determination on all of the other findings would also be binding. He added that the reason for a trial is to let the trier of fact set the weight of the evidence as necessary and to let the appellate body review questions of law.

MS. KRISTEN KNUDSEN, Assistant Attorney General, Department of Law (DOL), told members that the grammatical change is due to a drafting preference by the legal drafter. The change to page 41, line 1, is a conforming amendment to an amendment adopted earlier. She said the heart of the issue, regarding the weight of the evidence, is on lines 10 through 14 of Amendment 4 [beginning "page 41, lines 2-3"] and that subject was thoroughly hashed out earlier today. She repeated that a basic principle of administrative law requires that the higher level of an administrative body be given the rule of conclusiveness, which says the higher-level body is permitted to reconsider and reweigh all of the evidence.

MR. SCOTT NORDSTRAND, Deputy Attorney General, Department of Law (DOL), said he did not feel the need to reiterate the argument about the need for de novo review. He clarified that courts give deference to administrative agencies for the standard of review they apply because courts do not necessarily have the expertise in all areas of administrative law. He noted a Superior Court judge's job is to be a generalist, while the workers' compensation appeals commission consists of very specialized people who are the most experienced people in government adjudicating these cases. He thought it would be ludicrous to have the commission defer to the expertise of those below, except on the issue of credibility.

SENATOR THERRIAULT moved to divide Amendment 4 into two parts. Amendment 4a would consist of lines 1-9, while Amendment 4b would consist of lines 10-14.

CHAIR SEEKINS announced there was no objection to dividing Amendment 4.

SENATOR THERRIAULT moved to adopt Amendment 4a, which reads:

Page 40, line 30

Following "determining"

Insert: ", "

Page 41, line 1

Following "witness"

Delete: "who appeared in the hearing is"

Insert: "are"

CHAIR SEEKINS noted that without objection, Amendment 4a was adopted.

SENATOR FRENCH moved to adopt Amendment 4b, which reads:

Page 41, lines 2-3

Following "commission"

Delete: ", but all other findings, including the weight to be accorded medical testimony and reports, may be set aside by the commission"

SENATOR THERRIAULT objected and said he tends to agree with Mr. Nordstrand that the commission is comprised of experts in the field with legal backgrounds in labor and management issues. He thought the commission will be the group to develop the highest level of expertise in the entire system.

SENATOR OGAN said his understanding is that contention arises around the fact that if the specialist hired by the commission [to give a second medical opinion] continually rules in favor of the employee, that specialist will no longer be hired. He asked for feedback on that perception.

MS. KNUDSEN said the commission does not hire experts; that would be done prior to the hearing by the director's office. Those specialists come from a panel, but have no contract and

are not paid for by the Department of Labor. She pointed out that when weighing the evidence, the board is going to look at a lot of things besides level of expertise. For example, in some cases, familiarity with the patient will be more important. In other cases that involve a rare disease, the physician who specializes in that disease may be given greater weight. She said the determination of weight varies depending on what kind of question is before the panel, the relevancy of the evidence and other factors.

SENATOR OGAN said from his discussions with constituents, he suspects that most claimants who go to a doctor appointed by the agency for a second opinion believe that doctor's opinion may be slanted.

MS. KNUDSEN said that two types of independent medical examinations take place; Amendment 4b would not change that. An employer can order an independent medical examination after 90 days. The second type is known as a second independent medical evaluation and is done by a panel selected by the director, with input from employer and employee attorneys. She said the second independent medical evaluation will not be affected by Amendment 4b.

SENATOR THERRIAULT referred to Sec.23.30.128 beginning on page 40 and asked what the actual impact would be if Amendment 4b was adopted.

MS. KNUDSEN said the language in Amendment 4b was included in version D as a failsafe redundancy to specify the weight to be accorded medical testimony. She asked that Mr. Lisankie also address that question.

MR. PAUL LISANKIE, Director of the Division of Workers' Compensation, told members that he agrees with Ms. Knudsen's assessment.

SENATOR THERRIAULT asked, "Is it a - Mr. Chairman - you'd like to have but not a gotta have?"

MS. KNUDSEN said it would be a "like to have" but because the final sentence will remain in that section, the commission will continue to have the power to set aside the findings of the hearing panel.

CHAIR SEEKINS asked if objection to Amendment 4b was maintained. Hearing none, he announced that Amendment 4b was adopted.

CHAIR SEEKINS asked Mr. Giuchici to comment.

MR. GIUCHICI said his only concern was how the weight of the medical records and testimony was going to be addressed and what the commission would set aside. As a workers' compensation board member for many years, he said the panels have always wanted to have as much information as possible to reach a decision. He feels it is contrary to have a newly created appeals commission over the hearing panel that may or may not consider the facts and decisions reached by the hearing panel, which is closer to the players. He noted people have spoken of the appeals commission as the panel of experts, but their only dealing with workers' compensation will be slanted one way or the other because not many attorneys represent both sides. He felt the interpretations will change over time, depending on the administration that appoints them. He believes the system now is a happy medium with one industry and one labor representative and a fairly neutral hearing officer.

CHAIR SEEKINS asked Ms. Knudsen to describe how the members of the appeals commission are selected and the criteria for selection.

MS. KNUDSEN said they will be appointed by the governor and confirmed by the legislature. They must have five years of experience in the field of workers' compensation and admitted to practice law in Alaska. They are appointed for five years and can be removed for cause. [Page 8-9 of version D.]

CHAIR SEEKINS asked if there is any requirement to appoint an attorney who has represented plaintiffs and an attorney who has represented defendants.

MS. KNUDSEN said yes, in Sec. 23.30.007(b). That language came from the State of Illinois.

MR. NORDSTRAND said, in response to Mr. Giuchici's comment and questions about the commission being too political, DOL had extensive discussions with labor representatives on that issue. The reality is that the commission members will be selected in an identical way to which the current workers' compensation board is selected. He said people that come to the current board actually work for labor or as risk managers for industry. He thought it is disingenuous to suggest that using the same process with the same criteria would create a slanted commission.

CHAIR SEEKINS said he would not consent, either in the bill or during confirmation hearings, to a selection process that creates an imbalanced board or commission.

MR. GIUCHICI had no further comments at this time.

MR. STEVE CONSTANTINO told members he served on the workers' compensation board as a hearing officer and currently represents claimants before that board. He stated opposition to the de novo review by the appellate commission provision in the bill. He said he has not heard any discussion on the pragmatic effects of that provision and said by allowing a second administrative body to reweigh the evidence, every non-prevailing party will have an incentive to take "a second bite of the apple." If one of his clients did not prevail in front of the board, he would have every incentive to appeal since the appeals commission can reweigh the evidence and come to a different conclusion. He cautioned that will result in a dramatic increase in the number of appeals. He said in 1982, the legislature, at the urging of business, wanted finality at the hearing level. The current law makes the findings of fact and the weight to be ascribed at the hearing level conclusive. The courts are only allowed to review board decisions on the substantial evidence standard; in effect that is a determination of whether the board made a rational judgment.

MR. CONSTANTINO said what concerns him most is that he represents people whose workers' compensation benefits are a matter of health and economic survival. The insurance companies have substantially greater resources than his clients and, unlike clients, typically benefit from delay. He anticipates that every claim he wins in a contested matter before a hearing officer will be appealed to the new commission and that his clients will be "starved out" because they will be unable to last the additional 6 to 9 months awaiting a decision. If his clients prevail in front of the board, he fears they will be forced into disadvantageous settlement agreements because they simply cannot wait any longer to get a final decision. He expressed concern that he has not heard any discussion on the committee's part about the pragmatic effects that the "second bite of the apple" will have on the justice of the workers' compensation setting. In addition, the legislature is contemplating revising a system that has served Alaska well since Statehood.

MS. CONSTANCE LUCIE (ph), told members she has practiced workers' compensation law in Alaska for 16 years, primarily representing employers. Regarding a previous comment made about the function and role of the appeals commission, she urged the committee to not allow the function of the appeals commission to be reduced to a powerless rubber stamp. She believes this body will be composed of people with significant expertise. Their ability to weigh the evidence on review is important. She disagreed with Mr. Constantino that the de novo review will be a "second bite of the apple." She believes that would occur if the parties were able to introduce new evidence. The appeals commission will have the ability to look again at the record already made. She said the credibility determinations should never be disturbed because the hearing panel applies the "eyeball" test to the witnesses. However, weighing evidence is entirely different and means looking at the range of medical opinions, for example, and deciding that some credentials are superior to others. She urged members to move the CS for SB 311 as it stands from committee and to not gut the function of the appeals commission.

CHAIR SEEKINS asked whether there is any time limit for the decision once the appeal is taken to the commission.

MS. KNUDSEN said the outside range of time is 90 days, which is half of the time allowed to the Superior Court right now. She said one benefit of the new system is that it will reduce the cost of preparation of records.

TAPE 04-40, SIDE B

MR. CHANCY CROFT, representing himself, told members that the previous CS adopted by the committee [version 23-G2] says, in Sec. 23.30.120(a), commission proceedings must be completed within 90 days after the written briefing on the appeal is completed or the oral argument is held but there are no time limits on when the commission must have the record completed, transcripts prepared, notification, or the time lapse between when the appeal is filed and briefs are due. He emphasized that there is not a timeframe, as exists now, for how quickly a case can be heard by the commission so it is wide open for delay.

MS. KNUDSEN responded that DOL anticipates the commission to establish timeframes through its own regulations. She said she was speaking to a reduction in the amount of time required because copying the entire record will be necessary.

CHAIR SEEKINS said he was concerned because he did not see any timeframes other than after a written briefing on appeal is completed or oral arguments are heard, whichever is later. That could take up to 90 days, and then reconsideration could take another 30 days so the process could be dragged out for quite some time.

MR. NORDSTRAND said the timeframes that Mr. Croft is referring to, in terms of appeals to the Superior Court, are governed by the appellate rules. The commission is charged with preparing its own rules of business, just as the court has established such rules for Superior Court. He thought the committee will have to have faith, to some degree, that the commission will have an interest in having this process expedited as quickly as the Superior Court does now. He reminded members that other than moving the record from the hearing panel's purview to the commission, the other things that need to be done are not done by the commissioners, i.e., writing briefs, requesting extensions, etc., therefore lawyers could cause delays, not the commissioners.

CHAIR SEEKINS said he understands that but was questioning whether the [panell] is mandated by statute to complete the pre-hearing briefings.

MR. NORDSTRAND said it is not.

SENATOR OGAN expressed concern about the legislature putting an arbitrary time limit on the process. He then suggested putting in a provision so that commissioners do not get paid if too many delays occur, similar to withholding judges' pay.

SENATOR FRENCH offered that once a judge has all of the information, s/he has to make a decision in six months. Mr. Croft's point was that nothing forces the commissioners to get to that decision point in a reasonable amount of time.

CHAIR SEEKINS felt that is a good point.

MR. NORDSTRAND countered that nothing forces a Superior Court judge to do it either.

CHAIR SEEKINS said he was looking for a way to prevent a delay from unnecessarily hurting someone with a legitimate appeal.

SENATOR OGAN said the committee has heard conflicting opinions about the unintended consequences of this procedure and

suggested including a sunset provision in the bill or requiring a report to the legislature for the purpose of review.

6:45 p.m.

CHAIR SEEKINS said he is also concerned about how this will go into effect.

MS. KNUDSEN told members that version D contains a provision on page 11 that requires the chair of the commission to prepare an annual report that includes data on time periods. DOL anticipated concerns from legislators and the public about the effectiveness of this new system.

SENATOR OGAN replied:

With all due respect, we've got more reports than Carters has pills and I want to meet the person - the [Senate] President might be the only one that reads most of the stuff that goes over his desk, I'm not sure, because I know him by reputation, he's very diligent about that but I don't think he's Superman - he can read it all. I know I'm not. So I would be a little more comfortable with something besides a report...that's why we put sunsets in some laws, so we have to bring that law before us so that commission or that board or that whatever and say yea, things seem to be working fine, move it on. Or, two years from now, you know what? Maybe we need to put it in the ALJ panel if that's law, or maybe this thing had a bunch of unintended consequences and we need to go back to the old system. At least it puts it at the fore.

MS. PAM LABOLLE, President of the Alaska State Chamber of Commerce [the Chamber], stated support for the CS and opposition to Amendment 4b. She expressed concern that Amendment 4b will dramatically limit the review of the hearing panel decision by the appeals commission. Amendment 4b would make the entire bill worthless, therefore, if Amendment 4b is adopted, the Chamber would oppose the entire bill. On behalf of Thyges Schaub, who represents the Associated General Contractors (AGC), she said the AGC's board voted yesterday to support the CS and oppose Amendment 4b.

SENATOR FRENCH moved to adopt Amendment 5, which reads as follows.

A M E N D M E N T 5

23-GS2023\D.1
Craver

OFFERED IN THE SENATE BY SENATOR FRENCH
TO: CSSB 311(JUD), Draft Version "D"

Page 1, lines 9 - 10:

Delete "**Workers' Compensation Appeals Commission**"
Insert "**workers' compensation hearings office**"

Page 1, line 11:

Delete "**Workers' Compensation Appeals Commission**"
Insert "**workers' compensation hearings office**"

Page 2, lines 4 - 5:

Delete "**providing for supreme court jurisdiction of appeals from the Workers' Compensation Appeals Commission;**"

Page 4, line 27:

Delete "**Workers' Compensation Appeals Commission**"
Insert "**workers' compensation hearings office**"

Page 4, lines 29 - 30:

Delete "**Workers' Compensation Appeals Commission**"
Insert "**workers' compensation hearings office**"

Page 5, line 6:

Delete "**Workers' Compensation Appeals Commission**"
Insert "**workers' compensation hearings office**"

Page 6, lines 20 - 21:

Delete "**Workers' Compensation Appeals Commission**"
Insert "**workers' compensation hearings office**"

Page 7, line 14:

Delete "**chair of the commission**"
Insert "**chief hearing officer**"

Page 8, line 16, through page 11, line 30:

Delete all material and insert:

"Sec. 23.30.007. Workers' compensation hearings office. (a) There is established in the Department of Labor and Workforce Development a workers' compensation hearings office. The hearing examiners and hearing panels hear original petitions when a claim is filed under this

chapter and have jurisdiction to hear appeals from decisions and orders of the director.

(b) The commissioner shall appoint a chief hearing officer and hearing examiners.

(c) The chief hearing officer may

(1) employ and supervise hearing office staff, hearing examiners, and hearing panels and appoint a hearings office clerk;

(2) establish and implement a time management system for the hearings office, staff, and hearing examiners;

(3) assign the work of the hearing examiners, hearing panels, and staff so that hearings and appeals are resolved as expeditiously and competently as possible, including designating hearing examiners to hear preliminary matters; and

(4) prepare an annual budget of the hearings office and hearing panels.

(d) The hearings office, in its administrative capacity, shall maintain, index, and make available for public inspection the final administrative decisions and orders of the hearing examiners and hearing panels. To promote consistency among legal determinations, the chief hearing officer may review and circulate among the other hearing examiners the drafts of formal decisions, decisions upon reconsideration, and other legal opinions of the other hearing examiners of the hearings office. The drafts are confidential documents and are not subject to disclosure.

(e) The hearings office, in its administrative capacity, may adopt regulations implementing its authority and duties under this chapter, including rules of procedure and evidence for proceedings before hearing examiners and hearing panels in workers' compensation proceedings under AS 23.30.090 and 23.30.110 and for the adjudication of all claims and petitions under this chapter. The provisions of AS 44.62 (Administrative Procedure Act) apply to the adoption of regulations by the hearings office.

(f) The hearings office, in its administrative capacity, may adopt and alter an official seal and do all things necessary, convenient, or desirable to carry out the powers expressly granted or necessarily implied in this chapter."

Page 14, line 6:

Delete "with the office of the commission [BY"

Insert "by a hearing examiner or hearing panel ["

Page 15, line 6:

Delete "commission"
Insert "hearings office"

Page 30, line 23:

Delete "commission"
Insert "hearings office"

Page 30, lines 25 - 26:

Delete "office of the commission"
Insert "hearings office"

Page 31, line 1:

Delete ", hearing panel, or commission"
Insert "or hearing panel"

Page 31, line 13:

Delete "commission, and the commission clerk "
Insert "hearings office, and the hearings office"

Page 32, line 3, following "defense.", through line 16:

Delete all material.

Insert "[IF A DISCOVERY DISPUTE COMES BEFORE THE BOARD FOR REVIEW OF A DETERMINATION BY THE BOARD'S DESIGNEE, THE BOARD MAY NOT CONSIDER ANY EVIDENCE OR ARGUMENT THAT WAS NOT PRESENTED TO THE BOARD'S DESIGNEE, BUT SHALL DETERMINE THE ISSUE SOLELY ON THE BASIS OF THE WRITTEN RECORD. THE DECISION BY THE BOARD ON A DISCOVERY DISPUTE SHALL BE MADE WITHIN 30 DAYS. THE BOARD SHALL UPHOLD THE DESIGNEE'S DECISION EXCEPT WHEN THE BOARD'S DESIGNEE'S DETERMINATION IS AN ABUSE OF DISCRETION.]"

Page 32, line 31:

Delete "office of the commission"
Insert "hearings office"

Page 33, line 9:

Delete "commission clerk"
Insert "chief hearing officer"

Page 34, line 1:

Delete "commission"
Insert "director"

Page 35, line 11:

Delete "commission"
Insert "hearings office"

Page 35, line 16:

Delete ", but is not a public employee for purposes of AS 23.40"

Page 36, line 3:

Delete "commission"
Insert "hearings office"

Page 36, line 10:

Delete "commission"
Insert "hearings office"

Page 37, lines 8 - 9:

Delete "the commission, a hearing panel, or a hearing examiner ["
Insert "a hearing panel or hearing examiner [THE"

Page 37, lines 14 - 15:

Delete "the commission, a hearing panel, or a hearing examiners ["
Insert "a hearing panel or hearing examiner [THE"

Page 37, line 17:

Delete "commission clerk"
Insert "chief hearing officer"

Page 37, line 19:

Delete "commission"
Insert "chief hearing officer"

Page 38, line 3:

Delete "office of the commission"
Insert "hearings office"

Page 38, line 6:

Delete "office of the commission"
Insert "hearings office"

Page 38, line 12:

Delete "commission"
Insert "hearings office"

Page 38, line 14, through page 43, line 3:

Delete all material and insert:

"* **Sec. 63.** AS 23.30.125(a) is amended to read:

(a) A compensation order becomes effective when filed with the director [IN THE OFFICE OF THE BOARD] as provided

in AS 23.30.110, and, unless proceedings to suspend it or set it aside are instituted as provided in (c) of this section, it becomes final on the 31st day after it is filed.

* **Sec. 64.** AS 23.30.125(c) is amended to read:

(c) If not in accordance with law, a compensation order filed by a hearing examiner or hearing panel as provided in (a) of this section may be suspended or set aside, in whole or in part, through injunction proceedings in the superior court brought by a party in interest against the division [BOARD] and all other parties to the proceedings [BEFORE THE BOARD]. The payment of the amounts required by an award may not be stayed pending final decision in the proceeding unless upon application for an interlocutory injunction the court on hearing, after not less than three days' notice to the parties in interest and the director [BOARD], allows the stay of payment, in whole or in part, where irreparable damage would otherwise ensue to the employer. The order of the court allowing a stay must [SHALL] contain a specific finding, based upon evidence submitted to the court and identified by reference to it, that irreparable damage would result to the employer, and specifying the nature of the damage.

* **Sec. 65.** AS 23.30.125(d) is amended to read:

(d) If an employer fails to comply with a compensation order making an award that has become final, a beneficiary of the award or the director [BOARD] may apply for the enforcement of the order to the superior court. If the court determines that the order was made and served in accordance with law, and that the employer or the officers or agents of the employer have failed to comply with it, the court shall enforce obedience to the order by writ of injunction or by other proper process to enjoin upon the employer and the officers and agents of the employer compliance with the order.

* **Sec. 66.** AS 23.30.125(f) is amended to read:

(f) Subject to an employer's or employee's burden of proof, a finding of fact made by the hearing examiner or hearing panel [BOARD] as a part of a compensation order is conclusive unless the court specifically finds that a reasonable person could not have reached the conclusion made by the hearing examiner or hearing panel [BOARD]."

Renumber the following bill sections accordingly.

Page 47, lines 15 - 22:

Delete all material.

Renumber the following bill sections accordingly.

Page 57, line 4:

Delete ", the commission,"

Page 57, lines 22 - 23:

Delete all material.

Renumber the following paragraphs accordingly.

Page 58, lines 10 - 11:

Delete "Appeals Commission (AS 23.30.007) and Workers' Compensation"

Page 58, line 19:

Delete "sec. 85"

Insert "sec. 86"

Page 58, line 20:

Delete "sec. 85"

Insert "sec. 86"

Page 59, lines 26 - 27:

Delete: "WORKERS' COMPENSATION APPEALS COMMISSION AND"

Page 59, line 28, following "BOARD.", through page 60, line 1, following the first occurrence of "(b)":

Delete all material.

Page 60, line 18:

Delete "chair of the commission"

Insert "chief hearing officer"

Delete "commission"

Insert "hearings office"

Page 60, line 19:

Delete "commission"

Insert "hearings office"

Page 60, line 20:

Delete "commission"

Insert "hearings office"

Page 60, lines 28 - 29:

Delete all material.

Renumber the following paragraphs accordingly.

Page 61, line 19:

Delete "sec. 108"

Insert "sec. 109"

Page 61, line 31:

Delete "Workers' Compensation Appeals Commission"

Insert "workers' compensation hearings office"

Page 62, lines 1 - 2:

Delete "under AS 23.30.008, enacted by sec. 10 of this Act"

Page 62, line 4:

Delete "Section 113(a)"

Insert "Section 114(a)"

Page 62, line 5:

Delete "sec. 114"

Insert "sec. 115"

SENATOR THERRIAULT objected for the purpose of discussion.

SENATOR FRENCH explained that Amendment 5 essentially removes the appeals commission and leaves in place the hearing office, as set forth in the CS. Under Amendment 5, the essential reforms of the bill would be retained but appeals would be taken to Superior Court. He believes the appeals commission is oversized for the number of appeals it will hear and he has not seen any hard evidence of inconsistent decisions being issued from the existing hearing office. He pointed out that the appeals commission will consist of three individuals earning combined salaries of about \$300,000 per year hearing on average 36 cases per year and at most 60 cases. He noted that 60 cases equal 10 percent of the caseload of any single Superior Court judge. He then announced a conflict because if Amendment 5 fails, he may consider applying for a job with the appeals commission.

CHAIR SEEKINS asked Senator French if he has five years of experience in workers' compensation law.

SENATOR FRENCH clarified the bill requires five years of bar membership and experience in workers' compensation law. He joked that he would cite these hearings as experience. He maintained that frankly, he believes the proposed appeals

commission is too expensive and too big of an idea for a small state.

With no further discussion, a roll call vote was taken. Amendment 5 failed with Senators French and Ellis in favor and Senators Ogan, Therriault and Seekins opposed.

SENATOR FRENCH offered Amendment 6, which reads as follows.

A M E N D M E N T 6

OFFERED IN THE SENATE

BY Senator Hollis French

TO: CS SB 311 (JUD), Draft Version "D"

Page 8, line 21:

Following "governor":

Insert "from among two or more persons nominated as most qualified by the Alaska Judicial Council"

SENATOR FRENCH told members the purpose of Amendment 6 is to put into the law the idea that the members of the appeals commission have highly important jobs with enormous oversight and would be nominated using the same method as judges and tax court masters are, that being by the Alaska Judicial Council. The council would do a poll and select three nominees from the candidates who score highest on the poll. The governor can then select a candidate from the three names or reject all of the names.

SENATOR THERRIAULT asked for a response from the administration.

CHAIR SEEKINS said he does not understand Amendment 6 because the governor would have three names from which to choose, yet the Alaska Judicial Council would only be required to submit two.

SENATOR OGAN clarified that the Alaska Judicial Council will nominate at least two candidates for each of the three seats.

SENATOR FRENCH agreed that is the intent of Amendment 6.

CHAIR SEEKINS asked if the Alaska Judicial Council is required to submit more than two names for each position.

SENATOR FRENCH said it must submit at least two and that is how judicial appointments are made now.

SENATOR THERRIAULT asked Senator French how he would envision the balance between employer and employee through this process.

SENATOR FRENCH replied:

It would be as the bill imagines. You would be looking for either the at-large - or the chair, who is not of either [indisc.- coughing] or the two other members and you would select, you'd be - when you put out the request or the nomination advertisement, which they do right now, they advertise a new seat in, you know, Palmer Superior Court or Ketchikan Superior Court, that's kind of the idea. They'll put out a nomination and say, hey, we need an employer member of the appeals commission and so all you people who think you fit into that category apply and then there will be an interview process at the Judicial Council and they'll talk to all those folks who consider themselves candidates and they'll pick the two or three that should go up to the governor for selection.

SENATOR THERRIAULT asked who makes the determination as to whether the application is the "round peg fitting in the round hole."

SENATOR FRENCH said the decision, regarding whether the applicant fits the "employer" description for the employer seat if the person qualified for both seats, would be a dual one. The Judicial Council would vet that and the governor would have the ultimate say.

CHAIR SEEKINS expressed concern that the current Judicial Council process is a popularity contest, even when selecting judges. He questioned how that could be prevented.

SENATOR FRENCH said the current process is not a popularity contest and noted that Susan Parkes got the highest bar poll results but was not nominated by the Judicial Council. He said Alaska's system of selecting judges is recognized as amongst the best in the nation.

CHAIR SEEKINS wondered how bad the selection process is in other states.

Several people responded "Terrible."

SENATOR OGAN said he would feel better if the nominees had to be confirmed by the legislature.

CHAIR SEEKINS affirmed they would be, according to section b on page 8.

SENATOR OGAN said legislative confirmation will act as a circuit breaker, whereas that does not occur with judicial appointments. He noted if no legislative confirmation was required he would have supported Amendment 6.

CHAIR SEEKINS asked if Amendment 6 is intended, in part, to address the rumor that three seats have already been selected.

SENATOR FRENCH said it is not. He believes it is a good idea in general. He added if he were working for a living in the legal profession, he would seriously consider applying because these will be high paying jobs with low caseloads.

SENATOR THERRIAULT clarified that unless directly spoken to in the constitution, the legislative power to confirm attaches itself to those positions that are quasi-judicial or regulatory. He added:

It's about the power issue where the function that the individual is playing is not just administrative but bleeds over into a semi-judicial and so the legislature does have the power to confirm and that's what these people would be doing and so that's why we do have confirmation powers here. Getting back to the previous bill, the trustees of the permanent fund exercise none of those powers and that's why we're barred from having confirmation hearings.

With no further discussion on Amendment 6, the roll was called. Amendment 6 failed with Senators Ellis and French in favor, and Senators Therriault, Ogan and Seekins opposed.

SENATOR FRENCH moved to adopt Amendment 7, which reads as follows.

A M E N D M E N T 7

OFFERED IN THE SENATE

BY Senator Hollis French

TO: CSSB 311 (JUD), Draft Version "D"

Page 35, line 15

Following: "AS 39.27.011(a)":

Delete ", but is not a public employee for purposes of
AS 23.40"

SENATOR THERRIAULT objected for the purpose of discussion.

SENATOR FRENCH referred to the language on page 35, line 15 of version D, and said it pertains to how hearing examiners fit into state law with respect to their personnel status. They would be classified employees, which means they can only be discharged for cause, but they are not public employees for the purpose of AS 23.40, which means they have no union protection. Therefore, if they are involved in a dispute concerning their job function, they could be fired. With union protection, they could engage in a grievance process and arbitration. Amendment 7 would give the hearing officers more protection in their jobs and more flexible ways to deal with personnel problems during the course of their jobs. He pointed out these employees will be making high dollar decisions, some of which may be adverse to the state. Therefore, they need as much independence as possible.

7:05 p.m.

CHAIR SEEKINS asked if the classification of these employees was discussed.

MR. NORDSTRAND said this provision was discussed at length with representatives of the AFL-CIO and their affiliated unions. All agreed these employees should not be subject to PERA. The only other hearing examiner in this classification they could find is a classified employee at the Department of Revenue. Version D is consistent with the current status. He said for the sake of avoiding the appearance of impropriety, it is inappropriate to have members of the GGU hear cases of union employees.

CHAIR SEEKINS referred to the second page of the comparison chart and noted that all parties agreed that those positions should be classified but excluded from PERA. He then asked Mr. Nordstrand if he is aware of any judicial or quasi-judicial positions that are included in PERA.

MR. NORDSTRAND was not.

SENATOR THERRIAULT maintained his objection to the adoption of Amendment 7, therefore a roll call vote was taken. Amendment 7 failed with Senators Ellis and French voting in favor, and Senators Ogan, Therriault and Seekins opposed.

SENATOR FRENCH moved to adopt Amendment 8, which reads as follows.

A M E N D M E N T 8

OFFERED IN THE SENATE

BY Senator Hollis French

TO: CS SB 311 (JUD), Draft Version "D"

Page 35, line 1:

Following (j):

Insert: "The hearing panel may order payment of interim compensation and medical benefits paid pending a final compensation order when the presumption of compensability in AS 23.30.120 has not been overcome and the claimant is otherwise entitled to compensation.

(k) "

SENATOR THERRIAULT objected for the purpose of discussion.

SENATOR FRENCH explained that Amendment 8 says that inasmuch as the sentences following (j) say that the hearing panel can award summary judgment against the claimant, the hearing panel can award summary judgment in favor of the claimant. In other words, if it appears the claimant has an abnormally strong claim, there is no reason to hold up payment while the claim is being adjudicated throughout the system.

SENATOR THERRIAULT questioned how the money would be returned if the claimant lost the case.

SENATOR FRENCH said the payor could sue.

MS. KNUDSEN said there would be no way to get the money back. The Supreme Court, in Cross vs. Panalaska (ph), decided that compensation can only be recouped from future payments for compensation on the same claim. She then clarified that (j) says that a party may petition for summary decision on all or part of a claim and, if all reasonable discovery has been done, a party

may obtain summary judgment, which includes claimants so Senator French's concern has already been addressed.

SENATOR FRENCH asked what happens if that award is appealed.

MS. KNUDSEN said in the current system, a Supreme Court decision from Olson Logging vs. Larson (ph), sets out that continuing payments of compensation are treated differently for the purpose of allowing continued payment of compensation, whereas a lump sum, which cannot be repaid, is treated with a different standard. Version D would continue the Olson Logging vs. Larson standard so that a person who receives a continuing award would still receive continuing payments of compensation while the case is under appeal.

SENATOR FRENCH maintained the presumption of compensability means a person hurt while working is due workers' compensation. Amendment 8 will allow the payment of benefits to an injured worker so that worker does not have to wait for the process to be completed.

SENATOR THERRIAULT said Ms. Knudsen just said the current system allows that worker to get some money if he is receiving periodic payments. However, it prevents lump sum payments because there is no way to recover those payments if the claimant loses.

MR. NORDSTRAND explained that summary judgment means that a person is entitled to a judgment. That is very different from suggesting that prior to a hearing and presentation of evidence or decision on the merits, an employer is required to pay. That is way outside of the ballpark of what is done now and raises issues of due process.

CHAIR SEEKINS asked if any time requirement to publish findings exists.

MS. KNUDSEN said this kind of a petition is treated in the same manner as any other petition, under section 110. A response must be issued in 20 days and, if there is no objection, the claimant would go in front of the hearing panel and the decision would be made in 30 days.

CHAIR SEEKINS asked Senator French how he envisions the hearing panel would presume compensability without first going through that process.

SENATOR FRENCH said the presumption attaches in any workers' compensation claim at the moment of the injury. He indicated the bargain of the workers' compensation system is that the worker has given up his right to sue in court in exchange for presumption of compensability.

CHAIR SEEKINS asked if medical benefits would be due on day one unless the presumption is overcome.

SENATOR FRENCH said it must be upon order of a hearing panel.

CHAIR SEEKINS felt it would be risky to pay up front before the hearing panel has reviewed the case.

SENATOR THERRIault asked if this would apply to all workers' compensation cases and the percentage of cases in which claimants are found to qualify.

MS. KNUDSEN estimated about 20,000 notices of injury come into the system for which no litigation occurs. Approximately 770 claims were filed last year.

MR. LISANKIE said he could not provide those numbers at this time. However, in 2002, almost 26,000 reports of injury were filed. Of that number, only 1500 workers' compensation claims were filed.

SENATOR THERRIault asked if some of the 1500 claims were filed because those injured workers did not feel they were receiving enough compensation.

MR. LISANKIE said yes, but there are claims that revolve around whether the worker is entitled to any compensation.

SENATOR THERRIault asked for estimated numbers.

MS. KNUDSEN said from her own case list of 76 active cases, five to ten revolve around whether the employee is entitled to any compensation or around the range of compensation. They do not revolve around whether the claim is compensable.

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MS. KNUDSEN said in her experience, a very low percentage revolves around that kind of an issue. She added that given the fact that compensation paid cannot be recouped except out of future payments, it must be paid at no more than 20 percent of

the payment. She cautioned that interim compensation awards would raise serious due process concerns, particularly when there is a valid defense because they require employers to pay compensation and medical benefits without the possibility of recouping those payments.

CHAIR SEEKINS said if he was a workers' compensation attorney, he would automatically file a claim for interim compensation.

SENATOR THERRIAULT maintained his objection to the adoption of Amendment 8, therefore a roll call vote was taken. Amendment 8 failed with Senators French and Ellis in favor, and Senators Ogan, Therriault and Seekins opposed.

SENATOR FRENCH moved to adopt Amendment 9, which reads as follows.

A M E N D M E N T 9

OFFERED IN THE SENATE

BY Senator Hollis French

TO: CS SB 311 (JUD), Draft Version "D"

Page 39, line 23:

Following "damage."

Insert: "Requiring payment of an award of continuing compensation or medical benefits is not per se irreparable damage. The commission must also find that the defendant/carrier likely will prevail on appeal before a stay of continuing benefits may be granted."

SENATOR THERRIAULT objected for the purpose of discussion.

SENATOR FRENCH explained that Amendment 9 pertains to the logging case discussed today and makes explicit that requiring payment of an award of continuing compensation of medical benefits is not per se reparable damage. Therefore, if a claimant has won a case at the panel level and the case is appealed, the employer must pay continuing compensation. Amendment 9 makes explicit the Supreme Court's decision in the logging case.

MS. KNUDSEN responded that the intent expressed earlier was that the Olson Logging vs. Larson decision will not be impacted by this bill. She continued:

The intent was that this would continue to be the standard in Olson Logging that would be applied by the commission in looking at appeals. I would point out, however, that the amendment does not precisely track the Supreme Court's statement in Olson Logging and I think goes beyond it. So I would suggest if our concern here is that Olson Logging remain in place, that the statement of intent here is appropriate legislative history to be cited but that we should probably leave the Supreme Court to speak for itself in using its own words.

MR. NORDSTRAND pointed out that the language in the CS is essentially identical to the language from the appellate rule, which is the standard to be applied in workers' compensation cases seeking a stay. DOL took the very same rule that the Supreme Court applied in that case and plugged it into this statute. DOL had no intention of changing the Olson Logging case decision. He cautioned that if the committee adds language, it could inadvertently change the result of Olson Logging by changing the standard that was applied.

SENATOR THERRIAULT asked Senator French if his intent is to go beyond the findings in the Olson Logging case.

SENATOR FRENCH replied:

I read the case and, to me, this is what the case says is that simply paying continuing compensation is not irreparable damage. A lump sum may be but not continuing benefits and I'm trying to avoid the situation where someone has been injured on the job, has won his case in front of the hearing panel, is due his continuing benefits, and suddenly now he's going to be appealed to an appeals commission and the employer's going to say, and besides the fact that I'm going to win here I shouldn't have to pay this injured worker any money because that could be irreparable damage, me having to pay out this money that we now know you can't get back. So I'm trying to make certain that you can't simply argue that having to pay benefits that you are due under the workers' comp stat that you've been deemed to owe under a hearing in front of a panel is not the only reason that you stop paying someone when you go to the appeals commission.

7:30 p.m.

SENATOR THERRIAULT responded that other testimony countered that is the outcome of the court system's application of the Olson Logging standard.

MS. KNUDSEN said her concern is the second sentence of Amendment 9 as it is not exactly what the Supreme Court said in Olson Logging. She said the outcome from that case is that it is very difficult to obtain a stay of continuing benefits.

CHAIR SEEKINS asked Senator French if he sees Amendment 9 as a restatement of the Olson Logging decision.

SENATOR FRENCH said that is correct.

CHAIR SEEKINS asked Ms. Knudsen if it is her contention that Amendment 9 expands the Olson Logging decision.

MS. KNUDSEN said it is.

CHAIR SEEKINS asked if the Olson Logging decision is not disturbed by this legislation, Senator French's intent will be carried out.

MS. KNUDSEN said it will.

SENATOR FRENCH said Amendment 9 cannot extend the Olson Logging decision. He asked members to determine whether Amendment 9 is a good idea, based on its own merits, and to consider:

...whether it is or is not a good idea to make certain that an employer cannot get a stay on the money that he owes an injured worker under the workers' comp statutes in a favorable decision in front of a hearing panel. And I think we're all in agreement that that's not a good idea, that you want to make certain that that employer begins to pay the damages and begins to pay the workers' comp money that he owes an injured worker. And furthermore, you want to make certain that before a stay is issued, that someone has said hey you've got a good chance of winning before we're going to give you a stay. And I think both of those common sense ideas are embodied in this amendment and that they are worthy of passage.

SENATOR THERRIAULT said he would feel much more comfortable with the amendment if it was drafted by Legislative Legal and Research Services.

SENATOR FRENCH said he would be happy to run this amendment through Legislative Legal and Research Services, as well as to examine putting the appeals commission on a tight leash to make sure it is rendering timely decisions.

SENATOR THERRIAULT suggested, if Senator French's intent is to make sure that Olson Logging is not disturbed, including a letter of intent instead of amending the bill.

MR. NORDSTRAND responded:

My opinion is that the nuances involved here are so precise and that to try to do something different than say what the appellate rule says, with regard to these stays, could run us into trouble. All we did was use the standard that Olson Logging used, under their own appellate rules, and plug it into the statute word for word. Doing more could create folly. We do not intend, and we'll be happy to tell anybody who wants to hear it, that Olson Logging remains in effect and we're not intending to change it in any way.

CHAIR SEEKINS said he agrees with the concept of Amendment 9 but he is unsure about its construction. He then shared Senator French's concern about the timeframe and those people who could be adversely affected if the Olson Logging decision is subverted, but he does not think it is necessary to restate it.

With no further discussion, a roll call vote was taken on Amendment 9. The amendment failed to be adopted with Senators Ogan, Therriault, and Seekins opposed, and Senators French and Ellis in favor.

MR. MATTHEW MAXNER (ph), representing himself, said his main concern with this legislation is that no new evidence can be introduced at the appeals level. He believes a party should be able to introduce new evidence at that level because a claimant could get a third or fourth medical opinion that disputes prior opinions.

CHAIR SEEKINS recapped that Amendments 2, 4a and 4b were adopted today.

SENATOR OGAN stated his intent to make an effort to see how the changes this legislation will make are working in the future, specifically to see whether the workers' compensation system should be changed to an independent administrative hearing panel.

SENATOR THERRIAULT moved CSSB 311(JUD) and its accompanying fiscal notes out of committee with individual recommendations.

SENATORS ELLIS and FRENCH objected.

CHAIR SEEKINS commented that this legislation has been challenging and that he plans to review Amendment 9. If he finds it will do no harm, he will propose it in the next committee of referral. He thought all members have attempted to find a balance between fairness and efficiency and to do no harm to the injured worker with a legitimate claim. He commended all participants for their hard work.

CHAIR SEEKINS asked for a roll call vote. The motion to move CSSB 311(JUD) from committee carried with Senators Therriault, Ogan and Seekins in favor, and Senators French and Ellis opposed.

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The committee took a brief at-ease at 7:55 p.m.

TAPE 04-41, SIDE B

^#SB 323

SB 323-WORKERS COMPENSATION AND CONTRACTORS

CHAIR SEEKINS informed members that a proposed committee substitute to SB 323, labeled version I, was before the committee.

SENATOR THERRIAULT moved to adopt version I as the working document before the committee.

CHAIR SEEKINS noted the only change made in version I was the definition of a project owner on page 2, which was suggested by Jack Miller.

SENATOR OGAN expressed concern, on behalf of a former constituent, that it may be impossible to pursue the original employer of a subcontractor and that the State of Alaska, being the largest project owner in the state, could be liable for workers' compensation if someone doesn't do their homework.

CHAIR SEEKINS asked what statute the constituent cited.

SENATOR OGAN replied AS 23.30.045.

CHAIR SEEKINS noted the only liability is for compensable damage. He then asked Mr. Miller to comment.

MR. JACK MILLER, counsel to the Alaska State Chamber of Commerce [the Chamber], said he spoke with the risk manager for the State of Alaska who had input on this bill. He said the current law requires that if contractors and subcontractors don't secure workers' compensation coverage for their employees, the payment obligation is pushed "upstream" to the project owner to enhance protection for injured workers. At the same time, the statute requires all employers to have workers' compensation coverage, which includes contractors and subcontractors who contract on state projects. If that coverage has not been obtained, the state is authorized to withhold payment to secure that insurance. Therefore, the state, municipalities and private companies are fully protected through the standard indemnity provisions in private contracts.

SENATOR OGAN said, from personal experience as a contractor and subcontractor, there are ways to get around that requirement. This will require due diligence on the part of a project owner. He expressed concern that a lot of folks work without workers' compensation coverage because it is expensive and this legislation will now transfer that liability to the project owner. He questioned whether this bill will motivate contractors and subcontractors to "skate" more because they will not be liable in the end.

MR. MILLER told members:

...In fact there is no relief of liability of the subcontractor for the payment if for a short period of time or if for a longer period of time, the subcontractor can't actually secure the payments or illegally did not obtain workers' compensation insurance. The current law now imposes that payment liability on contractors and this bill simply runs that up the line to project owners. I can say that the State of Alaska, all the municipalities, the State Chamber of Commerce members and the members of the Associated Builders and Contractors of Alaska all fully support this law because it provides enhanced

protection for injured workers and at the same time recognizes that receipt of workers' compensation benefits is the exclusive remedy for injured workers and they cannot pursue court remedies against parties involved in their project.

8:00 p.m.

SENATOR OGAN said that the trial attorneys go after the "deep pockets" so although a subcontractor might be legally liable, the subcontractor may have no assets.

MR. MILLER responded that in reality, the trial attorneys in fact assert tort claims against project owners after a contractor has paid workers' compensation benefits for an injured worker. He explained:

This bill recognizes that workers' compensation benefits are reasonable compensation for work related injuries, and forecloses the possibility of tort claims against the deep pocket companies that - essentially project owners or the State of Alaska or municipalities in the State of Alaska. I think you also have to recognize that under current practice, the state, municipalities, and private companies all, through indemnity provisions - insurance provisions, impose the liability for both the workers' comp payments and the tort remedies back onto the contractor that has essentially paid the workers' compensation benefits to the contractor's employee so they have a double liability under current law. We're trying to work through this bill to prevent that. I think that this is a very good balance for the business community and it enhances protection for injured workers and it's fully supported by the business community, the State of Alaska and municipalities in Alaska

CHAIR SEEKINS announced that a proposed amendment [Amendment 1], prepared by Representative Holm, had been distributed (labeled D.4) that addresses a concern expressed at an earlier hearing about sole proprietors.

SENATOR OGAN declared a conflict of interest, as he is a sole proprietor.

CHAIR SEEKINS offered to sponsor Amendment 1 and moved its adoption. He clarified that Amendment 1 says that a sole proprietor or a member of a partnership who agrees in writing with a project owner or contractor that neither have an obligation to secure workers' compensation, can opt out of having to purchase workers' compensation.

SENATOR OGAN asked if a sole proprietor or partner will not need workers' compensation coverage as long as the project owner is indemnified and agrees.

CHAIR SEEKINS said that is correct.

SENATOR FRENCH objected to Amendment 1.

SENATOR THERRIault asked if he subcontracted as a sole proprietor with a housing developer, he could, by written agreement, release the housing developer from having to carry workers' compensation on him.

CHAIR SEEKINS said that the sole proprietor would be releasing the housing developer of any upstream claim so that the sole remedy for the sole proprietor, if he was injured, would be against himself.

SENATOR THERRIault asked if the sole proprietor would have to obtain coverage for any employees he had.

CHAIR SEEKINS said that is correct. It only exempts the sole proprietor himself, or the member of the partnership.

SENATOR OGAN said during the many years he did not have workers' compensation, he would not have dreamed of suing someone else if he got injured. He believes if people are willing to take the risk and take responsibility, they should be able to opt out.

CHAIR SEEKINS said that is what Amendment 1 accomplishes.

SENATOR FRENCH clarified that the sole proprietor or partner has not given up his right to sue the project owner if injured through negligence of the project owner.

CHAIR SEEKINS said he asked that the amendment be drafted so that the sole proprietor or partner would have no claim except against him or herself but he would make sure that is the case.

SENATOR THERRIAULT asked if he was a sole proprietor and was injured because another employee dropped something on his head, he would have no right to get compensation.

MR. TODD LARKIN, representing himself as a sole proprietor, said, in response to Senator French's statement, that regarding a tort against a project owner, the sole proprietor would fall under standard civil actions. The burden of proof would be on the sole proprietor. [Ms. Craver] said the standard is fairly high to bring a tort claim.

CHAIR SEEKINS responded:

Well, we're going to have to amend that because basically the instructions that we were trying to give to them was that the - if you're injured on that job and you were covered under workers' comp, workers' comp would cover you and that protects everyone up the line because your sole remedy is workers' comp. In this case we would want your sole remedy, if you choose not to carry workers' comp, to be against yourself and not to the project owner of the company. I'm going to clarify that with the drafter.

MR. LARKIN said that was the original intent of the language.

CHAIR SEEKINS offered to speak with Ms. Craver. He clarified the intent was that if a sole proprietor who chose not to carry workers' compensation, no one else would be required to carry it for that person and his or her sole remedy would be against him or herself.

SENATOR THERRIAULT said employers carry workers' compensation to spare themselves tort claims. Therefore, if two parties agree there will be no workers' compensation coverage but the right to bring tort claims is held against the employer, there would be no reason for the employer to not just add the sole proprietor to his workers' compensation policy.

CHAIR SEEKINS repeated that he would check with the drafter.

MR. MILLER suggested that since HB 311 has already passed out of the House Labor and Commerce Committee, which specifically deals with this issue, the committee not adopt Amendment 1 and deal with this issue when HB 311 moves to the Senate.

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CHAIR SEEKINS withdrew his motion to adopt Amendment 1. He then adjourned the meeting at 8:15 p.m.

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