

ALASKA STATE LEGISLATURE
SENATE LABOR AND COMMERCE STANDING COMMITTEE

March 4, 2004

1:32 p.m.

TAPE(S) 04-19, 20

MEMBERS PRESENT

Senator Con Bunde, Chair
Senator Ralph Seekins, Vice Chair
Senator Gary Stevens
Senator Hollis French

MEMBERS ABSENT

Senator Bettye Davis

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."

MOVED SB 311 OUT OF COMMITTEE

HOUSE BILL NO. 340

"An Act relating to damages in an action for a defect in the design, construction, and remodeling of certain dwellings; and providing for an effective date."

HEARD AND HELD

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

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

BILL: HB 340

SHORT TITLE: DAMAGES IN CONSTRUCTION CLAIMS

SPONSOR(S): REPRESENTATIVE(S) MEYER

01/12/04	(H)	PREFILE RELEASED 1/2/04
01/12/04	(H)	READ THE FIRST TIME - REFERRALS
01/12/04	(H)	L&C, JUD
01/23/04	(H)	L&C AT 3:15 PM CAPITOL 17

01/23/04 (H) Moved CSHB 340(L&C) Out of Committee
 01/23/04 (H) MINUTE(L&C)
 01/26/04 (H) L&C RPT CS(L&C) 1DP 4NR
 01/26/04 (H) DP: ANDERSON; NR: CRAWFORD, LYNN,
 01/26/04 (H) GATTO, GUTTENBERG
 02/04/04 (H) JUD AT 1:00 PM CAPITOL 120
 02/04/04 (H) -- Meeting Canceled --
 02/09/04 (H) JUD AT 1:00 PM CAPITOL 120
 02/09/04 (H) Moved CSHB 340(JUD) Out of Committee
 02/09/04 (H) MINUTE(JUD)
 02/12/04 (H) JUD RPT CS(JUD) 5DP 1NR
 02/12/04 (H) DP: OGG, SAMUELS, HOLM, ANDERSON,
 02/12/04 (H) MCGUIRE; NR: GARA
 02/23/04 (H) TRANSMITTED TO (S)
 02/23/04 (H) VERSION: CSHB 340(JUD) AM
 02/25/04 (S) READ THE FIRST TIME - REFERRALS
 02/25/04 (S) L&C, JUD
 03/04/04 (S) L&C AT 1:30 PM BELTZ 211

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

WITNESS REGISTER

Mr. Douglas L. Smith
 Arctic Slope Regional Corporation
 Division of Energy Services
 Anchorage AK
POSITION STATEMENT: Supports SB 311.

Mr. Michael Jensen
 Anchorage AK
POSITION STATEMENT: Commented on SB 311.

Mr. Don Gray, Claims Administrator
 Arctic Slope Regional Corporation (ASRC)
 Anchorage AK
POSITION STATEMENT: Supports SB 311.

Mr. Dennis Mellinger
 Arctic Slope
 Anchorage AK

POSITION STATEMENT: Supports SB 311.

Ms. Laura Jackson, Claims Manager
University of Alaska
Anchorage AK

POSITION STATEMENT: Supports SB 311.

Representative Kevin Meyers
Alaska State Capitol
Juneau, AK 99801-1182

POSITION STATEMENT: Sponsor of HB 340.

Mr. Dave Dillard
321 Construction Inc.
Fairbanks AK

POSITION STATEMENT: Supports HB 340 and commented on SB 323.

Mr. Jeff DeSmet
Alaska Homebuilders Association
PO Box 83149
Juneau AK

POSITION STATEMENT: Supports HB 340.

Mr. Ray Hickel
Alaska State Homebuilder Association
Juneau AK

POSITION STATEMENT: Supports HB 340.

Mr. Larry Partusch
Partusch Plumbing and Heating and Northern Sheet metal
Fabricators
Juneau AK

POSITION STATEMENT: Supports HB 340.

Ms. Robin Ward, Legislative Chair
Alaska State Homebuilders Association
Anchorage AK

POSITION STATEMENT: Supports HB 340.

Mr. Mike Lessmeier
State Farm Insurance
Juneau AK

POSITION STATEMENT: Commented on SB 323.

ACTION NARRATIVE

TAPE 04-19, SIDE A

^#SB311

SB 311-INSURANCE & WORKERS' COMPENSATION SYSTEM

CHAIR CON BUNDE called the Senate Labor and Commerce Standing Committee meeting to order at 1:32 p.m. Present were Senators Gary Stevens, Ralph Seekins, Hollis French and Chair Con Bunde. Senator Bettye Davis was excused. The first order of business to come before the committee was SB 311.

MR. DOUGLAS L. SMITH, Arctic Slope Regional Corporation, Energy Services Division, supported SB 311 as it is written. "It does not sway the advantage to either company or employee, but, in fact, favors both." He did not have a copy of the proposed amendment.

CHAIR BUNDE said a copy of the amendment was being faxed to him.

MR. MIKE JENSEN, Anchorage attorney who specializes in representing injured workers in Alaska workers' compensation claims, said he has 20 years of experience in this area and three other attorneys, Chancy Croft, Joe Calamites and Steven Constantino have extensive experience as well. They have all looked at the proposed amendment and have some concerns.

We do not feel the current system is broken and should be fixed, especially if it means creating a new bureaucracy that is estimated to cost in excess of \$700,000 a year more than the current system.

The current system does provide for a representative of industry and a representative of labor. These proposed amendments would take that away - so that the decision maker would be solely a hearing officer at the initial administrative level and then three commissioned members who are selected by the administration.

As far as the current system and expediency, we do not think the amendments would add anything as far as expediency. The current system issues over 300 opinions per year. Of those, only 10 percent are ever appealed to the courts. Of those 10 percent, I would say only a third are ever reversed. In other words of the minority of appeals that are taken to the courts, the vast majority of those appeals wind up affirming what the board has done.

As far as the time concerns that the administration pointed out, they did cite the case of Bradbury v. Chugach Electric. That was the case in which I represented Mr. Bradbury whose wife died at work. The administration states that the time [indisc.] as the reason for making these proposed changes.

I should point out to Mr. Chairman and the other members of the committee...that decision, first of all, it wasn't 1,400 days. The administration was off by about a half a year and, of that time, over a third, if not more, was spent between the Superior Court waiting for the Supreme Court to issue its decision. As far as the board was concerned, it heard the case within six to nine months after the claim was filed and we don't see how creating an appeals commission would in any way speed that process up.

But, if the appeals commission is a good amendment to adopt, we feel it could be improved to make it less political in that we would urge the committee to require that the appeals commission have at least one representative who has experience with the practice of law representing industry and then let the other representative or member with experience represent labor. Then, of course, the third member could be either way. At least that way, there would be an assurance that at least depending upon who is in the administration, Democrat or Republican, that at least one representative of industry is always there as well as one representative of labor. It would thereby take out what I feel would otherwise politicize the commission.

In addition, we would propose that the commission members be given terms of up to a minimum of five years. That, again, would foster the idea of depoliticizing the commission. In addition, it would enlarge the pool of applicants that the administration could choose from in selecting commission members, because with five years, it's my understanding that the commission member would be vested in the PERS system thereby making it more attractive for members to be found.

There are some other changes that we would propose. As far as at the hearing level, we would recommend that instead of having the decision decided strictly by one hearing officer, that these cases be heard as the board is currently constituted with a representative of industry again and a representative of labor again with a hearing officer on that board. That would insure, again, that this process remains neutral, that it remains fair to both sides and that it depoliticizes the system.

MR. JENSEN said additional changes were stated in a letter that would be sent to the Legislature as soon as the other three lawyers had signed off on it. It asks that intent language states that nothing in the amendment changes the substance of law - clarifying that the changes are strictly procedural and, thereby, avoiding additional unnecessary litigation.

In addition, I think that if attorney's fees could be limited to \$400 without obtaining board or director approval of fees, that would allow a lot of needless litigation in that currently a lot of unrepresented injured workers are unable to get the advice of an attorney and then wind up filing claims that need to be litigated by industry. By allowing these workers to at least seek the advice of competent counsel, may avoid filing any unnecessary litigation that it caused from misinformation and misunderstanding of the act.

He said these changes would make a much fairer system and protect the interests of both industry and labor and depoliticize the system. He also understands that the ad hoc committee was not involved in the proposed changes and now that they are involved he thought:

By creating a permanent workers' compensation advisory council... with two members from industry and two members from labor, as well as the members from the guaranty association, the public or the Division of Insurance might assist the Legislature in getting competent advice and proposals to act upon.

MR. DON GRAY, Claims Administrator, Arctic Slope Regional Corporation, supported SB 311 as written and without the amendment. [Indisc.]

MR. DENNIS MELLINGER, Arctic Slope, supported SB 311.

MS. LAURA JACKSON, Claims Manager, University of Alaska, said she is also a member of the Multidisciplinary Insurance Association of Alaska and past president of the Alaska Adjusters Association. She is currently on the board of the Workers' Compensation Committee of Alaska and a member of the ad hoc committee. She said she was testifying on her own behalf today as a person who has assisted people through the Alaska Workers' Compensation system for over 17 years.

I am here to tell you that the Workers' Compensation system in Alaska is broken. It is cumbersome, confusing, slow-moving and not user friendly to either the employer or the employee. The recommended changes will simplify and clarify the process. Replacing the delays due to the lengthy Superior Court appeals process with an appeals commission comprised of people knowledgeable about the act and the process will speed the resolution of the disputes.

In addition, in response to Senator French's amendment, the decisions that come out of Superior Court are inconsistent as have been the decisions that come out of the board, itself, and their panels. I believe that people specifically knowledgeable about the act and the act as it was intended by the Legislature, you our representatives, when it was promulgated, that it would be a more consistent fair and expeditious process being heard by people who understand and know the act and are familiar with it. It is my belief that in short order we will all find a workers' compensation system that will indeed be more efficient and predictable. Therefore, it will decrease the cost to employers and the time delay to employees and more importantly result in fair and adequate compensation to our injured workers.

MS. JACKSON "put on her ad hoc hat" to read a letter into the record from the Alaska Labor Management Ad Hoc Committee on Workers' Compensation, dated March 4, 2004, addressed to Speaker of the House, Pete Kott, and Senate President, Gene Therriault.

Gentlemen:

The Ad Hoc Committee, which consists of representatives from industry and labor historically has met periodically to address issues that affect

substantive changes, issues that affect benefits in the Workers' Compensation Act. In January, management and labor decided that time had come to address such issues again. In the meantime, the administration proposed SB 311 and HB 450, which deal with procedural issues, issues regarding the makeup and management of the board. Although the Ad Hoc Committee had never dealt with such issues previously, labor recommended the Ad Hoc Committee consider the bill. The committee reached agreement on sections of the bill that refer to the Guaranty Fund, capping out-of-state workers' compensation at what the employees would have earned in-state, placing administrative responsibilities formerly rested in the board with the Workers' Compensation Division director, uninsured penalties and replace the Superior Court with an appeals commission. The committee has scheduled no further meetings on the issue. We do, however, anticipate meeting in the future on substantive issues of concern to both management and labor.

Sincerely,
Judith A. Peterson, President, WCCA
Kevin Dougherty, Alaska Laborers
Members of the Ad Hoc Committee

MR. KEVIN DOUGHERTY, Co-Chair, Ad Hoc Committee, said he is attorney for the Alaska District Council of Laborers and that they did reach agreement on the Guaranty Fund and the non-resident cost of living adjustment and agreed to preserve the board as it is, but have an appeals commission replace the Superior Court and added some uninsured employer penalties of a civil nature. They hadn't agreed on a number of issues and he suggested that those items not move forward.

I would like to point out that the Ad Hoc Committee has been in place for about 23 years. After legislation that we have worked on jointly with the employer, the decreases in premiums have added up to over 40 percent decrease in premiums. During that time, our goal has been to retain benefits and we go at it in the same sphere as here. So, it is critical that the administration's bill does nothing to impact benefits. That's, of course, why my organization, the Alaska Laborers, are opposed to section 9 of the bill and opposed to section 10 of the bill, which would have wiped out the bill. But, fortunately, we have the

news to report to you, as Ms. Jackson said, that we do have agreement on five solid issues which we hope will help the act overall.

CHAIR BUNDE asked if anyone else wanted to testify on SB 311. Seeing no one, he closed public testimony.

SENATOR FRENCH moved amendment 1.

23-GS2023\A.1
Craver

A M E N D M E N T 1

OFFERED IN THE SENATE
TO: SB 311

BY SENATOR FRENCH

Page 1, lines 10 - 11:

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

Page 1, line 12:

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

Page 2, lines 5 - 6:

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

Page 5, line 22:

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

Page 5, line 24:

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

Page 6, line 1:

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

Page 7, lines 21 - 22:

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

Page 7, line 27, through page 11, line 2:

Delete all material and insert:

"* **Sec. 11.** AS 23.30 is amended by adding a new section to read:

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 hearings office hears original petitions when a claim is filed under this chapter and has jurisdiction to hear appeals from decisions and orders of the director.

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

(c) The chief hearing officer may

(1) employ and supervise office staff and hearing officers and appoint a hearings office clerk;

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

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

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

(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 officers. To promote consistency among legal determinations, the chief hearing officer may review and circulate among the other hearing officers the drafts of formal decisions, decisions upon reconsideration, and other legal opinions of the other hearing officers 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 officers 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 shall award a successful party reasonable costs and, if the party is represented by an attorney, attorney fees that the hearings office determines to be fully compensatory and reasonable.

However, the hearings office may not make an award of attorney fees against an injured worker unless the hearings office finds that the worker's position on appeal was frivolous or unreasonable or the appeal was taken in bad faith.

(g) 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 13, line 9:

Delete "with the office of the commission [BY"

Insert "by a hearing officer ["

Page 14, line 9:

Delete "commission"

Insert "hearings office"

Page 29, lines 27 - 28:

Delete "office of the commission"

Insert "hearings office"

Page 30, line 3:

Delete "or commission"

Page 30, line 14:

Delete "office of the commission, and the office of the commission "

Insert "hearings office, and the hearings office"

Page 31, line 4, following "defense.", through line 17:

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 1:

Delete "office of the commission"

Insert "hearings office"

Page 32, lines 8 - 9:

Delete "office of the commission"
Insert "chief hearing officer"

Page 32, lines 27 - 28:

Delete "commission"
Insert "director"

Page 34, line 7:

Delete "commission"
Insert "hearings office"

Page 34, line 11:

Delete "partially exempt service under AS 39.25.120"
Insert "classified service under AS 39.25.100"

Page 34, lines 12 - 13:

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

Page 34, line 31:

Delete "commission"
Insert "hearings office"

Page 35, line 5:

Delete "commission"
Insert "hearings office"

Page 35, lines 30 - 31:

Delete "commission or"

Page 36, line 5:

Delete "commission or"

Page 36, line 6:

Delete "The commission clerk"
Insert "A hearing officer"

Page 36, line 9:

Delete "commission"
Insert "hearing officer"

Page 36, line 24:

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

Page 36, line 27:

Delete "office of the commission"

Insert "hearings office"

Page 37, line 2:

Delete "commission"

Insert "hearings office"

Page 37, line 4, through page 41, line 21:

Delete all material and insert:

*** Sec. 64.** 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. 65.** AS 23.30.125(c) is amended to read:

(c) If not in accordance with law, a compensation order **filed by a hearing officer 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. 66.** 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. 67.** 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 officer [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 officer [BOARD]."

Renumber the following bill sections accordingly.

Page 46, lines 4 - 11:
Delete all material.

Renumber the following bill sections accordingly.

Page 55, line 24:
Delete ", the commission,"

Page 56, lines 3 - 9:
Delete all material and insert:
 (35) "director" means the director of the
division of workers' compensation;
 (36) "division" means the division of workers'
compensation;
 (37) "hearing officer" means a hearing officer
employed under AS 23.30.112 to hear workers' compensation
claims and petitions under this chapter;
 (38) "hearings office" means the workers'
compensation hearings office established by AS 23.30.007."

Page 56, lines 13 - 20:
Delete all material and insert:
"* **Sec. 103.** AS 39.25.120(c) is amended by adding a new
paragraph to read:
 (20) the reemployment benefits administrator of
the division of workers' compensation in the Department of
Labor and Workforce Development."

Renumber the following bill sections accordingly.

Page 56, line 25:
Delete "and"
Insert " ; "
Following "AS 23.30.395(3)":
 Insert " ; and AS 39.50.200(b)(31) "

Page 56, line 28:
Delete "sec. 86"

Insert "sec. 87"

Page 56, line 29:

Delete "sec. 86"

Insert "sec. 87"

Page 57, lines 13 - 18:

Delete all material.

Renumber the following bill sections accordingly.

Page 58, line 13:

Delete "Section 110"

Insert "Section 109"

Page 58, line 14:

Delete "sec. 111"

Insert "sec. 110"

CHAIR BUNDE objected for discussion purposes.

SENATOR FRENCH explained that amendment 1 would remove the appeals commission that would replace the appeals function of the Superior Court. SB 311 calls for the appointment of three appeals commissioners who would be confirmed by the Legislature. The bill calls for two range 29 commissioners with the commission chair set at range 30.

Our committee heard testimony... that the Superior Court hears some 36 workers' comp appeals each year. Creating three new highly paid state employees to hear 36 appeals per year seems extravagant. The proposed amendment would keep the appeals function in the Superior Court.

The amendment also keeps the hearing officers in classified service. SB 311 as it stands would reclassify the hearing officers into partially exempt service. Keeping the hearing officers in classified service gives these decision makers greater autonomy. The proposed amendment does not alter the basic thrust of SB 311; it merely streamlines the reforms that the bill envisions. I'll close by saying that I believe the most apolitical appeals panel available is in the Superior Court. These are judges appointed to long terms. They are mostly isolated from the political process. They have all the autonomy in the world to

hear these appeals. From the testimony we heard from Mr. Wooliver [Alaska Court System], they're rarely overturned when those decisions go to the Supreme Court.

I also took to heart the part of his testimony about how a litigant feels facing an in-house appeals commission. I can just speak for myself - I'd want a guy in a black robe to decide my case. I'd want someone who isn't a state employer per se in the Department of Administration to hear my case. And I think what we're going to do is simply create this enormous pass-through of decisions through the appeals commission on to the Supreme Court clogging their calendar more. So, I think in these tough budget times to create three new - two range 29s and a range 30 - a range 30 is over \$100,000 per year. I just think that there are school districts all over the state that would love to have some of these employees that we're thinking about creating here.

For that reason and also for the reason of keeping the hearing officers in classified service, that's a way to give them some political cover for the tough decisions they make every day. Keep them in classified service and let them go about their business unsupervised, really, by a state supervisor who may be putting pressure on them to go one way or the other.

CHAIR BUNDE remarked that his concern about the cost resonates with him.

I, at this point, think that maybe the total cost to the public might be less avoiding the Superior Court, but again those are areas that I don't have a lot of personal experience. I would prefer to send the bill forward as it is and let Judiciary review that issue and continue my opposition to the amendment.

A roll call vote was taken on amendment 1. Senators Gary Stevens and Chair Bunde voted nay; Senator French voted yea. Amendment 1 was not adopted.

1:58 - 2:04 - at ease

CHAIR BUNDE said that SB 311 would be set aside for the moment.
#

^#HB340

HB 340-DAMAGES IN CONSTRUCTION CLAIMS

CHAIR CON BUNDE announced HB 340 to be up for consideration.

REPRESENTATIVE KEVIN MEYERS, sponsor, said that HB 340 limits damages that can be collected due to a construction defect to four things: the actual cost of the repairs necessary, the reasonable attorney costs and fees, reasonable costs of temporary housing and the reduction in market value, if any, caused by the construction defect.

What this bill doesn't do, it doesn't cap the cost that can be collected if the construction defect was done through gross negligence or if there was personal injury or death involved.

The reason we are bringing this bill forward is that, as you know, in the State of Alaska general liability insurance is a requirement for the folks in the homebuilding and construction industry. Unfortunately, it is extremely difficult for them to get this insurance. When they do get it, it is very limited and very costly. Unfortunately, those costs then get passed on to our constituents, the consumer, when they try to buy a new house. In fact, the State of Nevada has estimated that every time the insurance goes up \$1,000, - 1,400 people then do not qualify for a home and these folks are first-time homebuyers.

Currently, there are two companies writing insurance in Alaska. What we're hoping this bill will do is encourage more insurance companies to write. A question that is frequently asked is well, if we pass this bill, will the insurance rates go down and I can't guarantee that, Mr. Chairman, and I don't think anybody can. However, what we do know is that if you have more competition, then theoretically, the rates should come down.

As we all know, the price of housing is going up statewide and we certainly can't control labor costs and we can't control the price of goods that they have to pay for or even the availability of land. What we can do is attempt to control the cost of insurance,

which is a requirement that we have put on this industry.

The other thing I like about this bill, Mr. Chairman, is that it rewards the good builders and punishes the bad builders in the sense that this bill does not pertain to those builders out there who are in gross negligence, but it will help those who are trying to do good...and the industry would agree....

MR. DAVID DILLARD, 321 Construction, Inc., said he builds upper-end custom homes from \$150,000 to \$600,000 and about 5 - 6 per year. Jack Randall with State Farm Insurance has been his representative for 15 years. He has never had any claims. Last year workers' compensation cost him about \$6,500 per million, but this year the only company that talked to him so far wanted \$20,000 for less coverage. Another company wouldn't even talk to him for less than \$50,000. He didn't know how he could pay \$10,000 per house for insurance. He supported HB 340 although it isn't a cure-all bill. [Indisc.]

MR. JEFF DESMET, Alaska Homebuilders Association, said he is considered one of the better builders in the area, but he is considering getting out of the business next year because it's more and more difficult to be a small business owner, especially with increasing insurance premiums. Last year he was able to acquire insurance for this year, but for double the premium for less coverage. He supported everything Mr. Dillard said about the difficulty he faces as a builder. "I just want to go on record saying I support HB 340...."

MR. RAY HICKEL, Alaska Homebuilders Association, supported HB 340. [His testimony was indisc.]

MR. LARRY PARTUSCH, Partusch Plumbing and Heating and Northern Sheet Metal Fabricators, said that Representative Meyer did a great job with this bill. He put some numbers together on new construction homes and the cost of insurance for a \$220,000 home is 7 percent, which is really ridiculous. "Since 1982, I've plumbed about 6,000 houses and I've had one claim against my insurance and I've heated about 4,500. [Indisc.]"

MS. ROBIN WARD, Legislative Chair, Alaska State Homebuilders Association, said she supported all builders' previous comments and would answer questions.

CHAIR BUNDE said that her members were doing a good job for her. "You'd better be careful or they'll ask you for a refund." He asked Representative Meyer if he had any concluding comments. He indicated not. The chair said the bill would be held for a hearing next week.

SENATOR GARY STEVENS asked if any builders avoid carrying insurance and is that an issue.

REPRESENTATIVE MEYER replied, "That is the concern...."

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2:18 - 2:20 - at ease

^#SB311

SB 311-INSURANCE & WORKERS' COMPENSATION SYSTEM

CHAIR CON BUNDE announced SB 311 to be back before the committee and that public testimony had been closed. Amendments had been addressed.

SENATOR RALPH SEEKINS moved to pass SB 311 from committee with individual recommendations and attached fiscal note. SENATOR FRENCH objected. A roll call vote was taken. Senators Seekins, Gary Stevens and Chair Bunde voted yea; and Senator French voted nay; and SB 311 moved from committee. The chair noted that he would ask the Senate President for a Judiciary referral.

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^#SB323

SB 323-WORKERS COMPENSATION AND CONTRACTORS

CHAIR CON BUNDE announced SB 323 to be up for consideration.

SENATOR RALPH SEEKINS, sponsor, explained that it revises the workers' compensation acts as it applies to contractors and subcontractors.

The two principal modifications are really as follows: First, the responsibility for payment of workers' compensation is extended up the chain of contracts to include project owners. Secondly, injured parties in receipt of benefits under the Workers' Compensation Act would be barred from double dipping via a tort liability claim. Under AS 23.30.045(a), an injured employee only has recourse to workers' compensation benefits against his immediate employer and, if the

employer is a subcontractor, against the contractor who retained the subcontractor.

The proposed legislation allows recourse for payment of compensation benefits against project owners as well as contractors and subcontractors. This extension of the rights of injured employees is sensible inasmuch as the project owner is the beneficial user of the work performed by the injured employee. It should be noted that a project owner does not include individuals who have engaged the services of contractors to build or renovate a residential home.

Finally, the proposed legislation extends the exclusivity provision set forth in AS 23.30.055 to all parties in the contracting claim chain related to a project. This includes the employer of the injured employee and those parties that are upstream in the chain of contracts from the employer of the injured employee. In other words, if an injured employee works for a subcontractor, then the subcontractor, the contractor and project owner would be free of tort liability so long as the injured employee receives the benefits set forth in the Alaska Workers' Compensation Act.

SB 323 will encourage all parties participating in a project to identify and enforce strict safety standards for the benefit of all workers rather than deflecting responsibility through the use of indemnity agreements as is the common practice currently. At the same time, it insures that the injured workers will receive all benefits available under the Alaska Workers Compensation Act. It is intended, Mr. Chairman, to eliminate double dipping, but to make sure that every employee on a project is covered under the act.

CHAIR BUNDE explained that this would expand the requirement to carry workers' compensation insurance from the subcontractor and the contractor to the project manager.

SENATOR SEEKINS replied that everyone in the up chain must make sure that every worker on the job is covered no matter who they work for.

CHAIR BUNDE asked if currently you're a contractor, you need workers' compensation.

SENATOR SEEKINS replied yes, for employees.

CHAIR BUNDE said that subcontractors might not have the insurance because they might not be covered by the owner's insurance.

SENATOR SEEKINS responded that a subcontractor might be a sole proprietorship and might say he doesn't need to buy workers compensation.

CHAIR BUNDE wanted to go the other way and asked if the contractor has a policy, does the project manager have to have a policy as well.

SENATOR SEEKINS replied that the project manager has the responsibility to make sure that they are covered.

If that means they have to carry the policy, I guess they would have to. It's a downstream responsibility to make sure that every worker that's on that project is covered.... We're trying to avoid the situation that does exist where someone is injured and a subcontractor, for example, is saying that he is a sole proprietorship and doesn't need it. Then they're injured and they go and say we were really an employee and goes to the board saying we want coverage. In many cases that happens. [END OF TAPE]

TAPE 04-19, SIDE B

[SIDE B IS BLANK. GO ON TO TAPE 04-20, SIDE A]

TAPE 04-20, SIDE A

2:25 p.m.

SENATOR SEEKINS continued:

That means that the project owner, before he can hire that subcontractor or contractor has to make sure that those people are covered or carry that coverage, themselves.

CHAIR BUNDE said in all likelihood, the project manager wouldn't hire contractors who don't carry insurance or would require some kind of proof of coverage rather than purchase the insurance, themselves.

SENATOR SEEKINS said project managers generally sign an indemnification agreement. They don't care because their negligence can go right back to the contractor. Because of the way courts have ruled in some cases, project owners don't even want to get into whether the contractor is having safety meetings, etc., because then, they are knowingly involved.

SENATOR GARY STEVENS asked what kind of proof would be required so a project owner would not have to purchase it.

SENATOR SEEKINS replied, "Through certificates of insurance."

SENATOR FRENCH asked why people who build a residential home are excluded from the bill.

SENATOR SEEKINS answered:

I am excluding homeowners who may hire someone to come in to fix their driveway or fix their roof or fix their bathroom leak from being included in the definition of project owner.

SENATOR FRENCH asked if they would still have tort liability.

SENATOR SEEKINS said they are looking primarily at commercial applications.

MS. PAM LABOLLE, President, Alaska State Chamber of Commerce, said this issue was brought forward by her membership. Her personal experience in this area is limited, but she promised to take any questions she couldn't answer to the group.

We are in support, obviously, of this legislation.... This has been done in several other states. The risk of injury to employees engaged in work on a project is the same regardless of whether the employer works for a subcontractor, the contractor or the project owner. The immediate employer and other project participants are obligated to an injured employee's workers' compensation benefits regardless of fault in causing the injury. So, all project participants should be free of tort liability. The project participants take

an integrated approach to completion of the project; they are a part of it. Therefore, the price of the insurance is worked into the contract when someone contracts to build something for someone.... So the project owner is, in essence, paying part of the workers' compensation insurance. In the event a worker is injured, he or she is entitled to receive the compensation benefits regardless of fault. This includes situations where no one is at fault and where the injured employee, himself, is exclusively at fault. In exchange for accepting liability payments of workers' compensation benefits regardless of fault, the injured employees need an employer and all other parties who are potentially liable for the payments of workers' compensation benefits should enjoy the immunity from tort claims.

Evidently, in Alaska law, project owners were not historically liable for injuries caused by action or inaction of independent contractors they retained. For example, when the State of Alaska retains a qualified contractor as an independent contractor to construct a roadway, the state should not be liable for injuries suffered by the employees of the contractor. In that situation, by contract, the contractor represents that he has the necessary expertise to build the road, that he has the necessary tools and equipment and the experienced workmen to complete the work. Because the contractor, not the state, prosecutes the work, the state should be free of court liability in the event that an employee of the contractor is injured in his course of work.

In Alaska, the courts have substantially diminished the independent contractor rule by adoption of what is referred to as the retained control doctrine. Under the doctrine, parties other than an employee's immediate employer can be liable in tort for any injury to an employee of an independent contractor if the party retains any amount of control over the work, including the right to review the contractor's safety practices. That's one of the benefits that this bill would bring about. Right now, the project owner is better to have hands-off control over the contractors, including their safety practices, in order to protect themselves. With the passage of this legislation, the benefit would be that they would have more of a reason

and it would be to their benefit to make sure that all safety practices are followed.

Secondly, the Alaska Workers' Compensation Act is intended to provide injured workers with reasonable compensation for their work-related injuries without regard or fault. If the levels of compensation benefits are not adequate to fully compensate injured workers, then the amount and type of recoverable benefits should be reviewed. However, an injured worker should not be allowed to recover workers' compensation benefits and then be allowed to assert tort claims for that same work-related injury. Injured employees should be compensated only once for their work-related injuries and the Workers' Compensation system has been set up specifically to do just that.

Third, the tort claims based on the retained control doctrine burden the court system by allowing claims under the workers' compensation system and separate claims in state Superior Court based on tort law. The proposed amendment would encourage all parties participating in a project to identify and enforce strict safety standards for the benefit of all workers while at the same time insuring that injured workers will receive all benefits available under the Alaska Workers' Compensation Act. Job safety should be everyone's main concern and the proposed amendment is the best way to meet the goal while at the same time protecting the injured workers.

CHAIR BUNDE asked her if she was contending that if this passed, a project owner would demand proof under potential legal liability for loss that their contractor has workers' compensation and then the contractor would have the same demand on subcontractors. He wondered about the double coverage.

MS. LABOLLE replied that is her understanding, but she would check.

CHAIR BUNDE said if that were true, he thought that project owners should want to have some kind of workers' compensation coverage as well, in the event someone was fraudulent in their representation.

SENATOR FRENCH indicated to Ms. LaBolle that he was addressing his remarks to the people who do have expertise. He had some

issues with her statement from the State Chamber, especially the part about Alaska law and wanted their response.

I'll begin by saying that I read both the cases that the Alaska law section of your report refers to, both the *Martinson vs Arco* case and the *Miloso vs State* case. The real issue I have with some of the remarks in here specifically with respect to safety practices is this. The assertion is - in this section - that a project owner can be liable in tort for any injury to an employee of an independent contractor if the party retains any amount of control over the work including the right to review the contractor's safety practices.

After I read *Martinson* and after I read *Miloso*, I was left with the belief that that's just not true, at least under those two cases. That's absolutely not true. Indeed, the *Martinson* case says that everybody does have a common law duty to provide a safe worksite to independent contractor employees, if the employer supplies or controls the worksite. That's the retained control. So, if you supply the warehouse and you know there's a vat of poisonous waste inside the worksite, you should probably put a sign on there that says don't weld here, don't drill here, don't get in behind this poisonous vat. The *Martinson* case goes on to say that there are bright lines of what constitutes retained control. It further says that an employer does not retain control if the employer only reserves the right to inspect the work to see that the contract specifications are met - while the independent contractor controls how and when the work is done. Then it says an employer does retain control if the employer retains the right to direct the manner of the independent contractor's performance or assumes affirmative duties with respect to safety.

So, when I read in this synopsis of Alaska law that you can be sued in court for simply reviewing the contractor's safety practices, I find the statement almost directly in opposition to that in *Martinson*. So, I would appreciate it if you can go on to whoever wrote that and come back and say no, no, no, here's a better read on that. So, I guess my question is are there other cases that I'm unaware of besides these two that you've cited that I've gone ahead and read or is it simply the position of the author of this paper

that these cases really do stand for what's here in this write up. Thank you.

MS. LABOLLE said she would take that back to the author.

SENATOR SEEKINS said this bill makes project owners responsible to make sure that any of the workers that are hired either by a contractor or by a subcontractor are covered with workers' compensation insurance regardless of the area of responsibility, because that's a point that can be argued on both sides.

I've talked to some of the attorneys on both sides of the issue as well. But in this case, as I read this bill and the way we've put this bill together, it would now require that every employee on that site be covered with workers' compensation [insurance]. Am I correct?

MS. LABOLLE replied that is her understanding.

SENATOR SEEKINS asked if that is good public policy or bad.

MS. LABOLLE replied that she thought that is good public policy.

SENATOR SEEKINS continued his thought saying that it protects the employee at whatever level. He has had experience with people who have said they don't want any employees; all their employees were going to be subcontractors with subcontractor agreements - the idea being that they don't want to have to pay workers' compensation insurance. He asked if she had seen that happen.

MS. LABOLLE replied yes.

SENATOR SEEKINS said this bill absolutely makes that impossible to happen.

MS. LABOLLE replied that is her understanding.

SENATOR SEEKINS said:

That's what we're after. Whether we argue where the line of responsibility is, what we're trying to protect here, Mr. Chairman, is the employer who may be forced into a subcontractor situation because that's the kind of scumbag he might be working for as a contractor. We've all seen it done.... The intent here

is to say everyone is covered and you have an exclusive remedy.

CHAIR BUNDE said he had personal knowledge of people who have been creative in defining subcontractors to avoid insurance payments. He said there was a question earlier about the relationship of the homeowner contracting to have some repairs or to have a house built; he saw headshaking from the insurance section of the audience.

SENATOR SEEKINS responded:

Mr. Chairman, I wouldn't have any problem with that as long as the homeowner is willing to make sure that they provide workers' compensation for somebody on the same basis that a project owner would.

MR. MIKE LESSMEIER, State Farm Insurance, said he practiced law in this state for almost 25 years and could answer Senator French's question.

Right now under the law, if you hire a plumber to come into your house or an electrician or even a general contractor to build your house for you, it's hard for me to see how you would have any liability to someone that was injured on the job. The analysis that you talked about when you reviewed those two cases would probably be the analysis to go through. In other words, you would look to see if the homeowner retains sufficient control over the details of the work that is performed. I've rarely seen that kind of liability; I've rarely even seen the attempt to make homeowners liable under those sorts of circumstances. One of our concerns in looking at this bill was whether it was intended to cover homeowners and people, but it does not.

CHAIR BUNDE thanked him and asked if anyone else wanted to testify on SB 323.

MR. DAVE DILLARD, 321 Construction, asked, "Why can't we make a homeowner liable for whoever has worked on his house to build that house?"

CHAIR BUNDE replied, "I'm not sure why we can't. I'm sure we could. The question might be why would you want to, but."

MR. DILLARD replied:

Because technically, a homeowner can call up job service and have the people come out and start building the house and if he pays over \$600, he's got to hold back federal income tax and stuff, but technically, he doesn't have to cover them under liability workers' compensation. Why wouldn't we want him to cover that person?

CHAIR BUNDE answered that he would have to ask the insurance industry again, but he suspected there would be personal liability.

SENATOR SEEKINS inserted:

I wouldn't have a problem holding homeowners responsible provided - but here again we're getting into a situation where when I hire someone to work on my house, they're a sole proprietorship and under current law, as I understand it, as long as I haven't set a booby trap for them some way or another, they are the expert in what a safe workplace would be and I'm just a homeowner who may not be capable, or should not even be capable of, being able to assess that responsibility. But the professional holding himself out as professional has that additional responsibility....

MR. DILLARD said he could build one house a year as a homeowner and not have to pay any of that. His son and wife could build a house a year, too. He thought everyone should be able to build his own house, but he didn't see why they shouldn't have to take liability for people who were hired to work on it the same way a professional builder has to.

CHAIR BUNDE said, "I think if you're going to have a potential homeowner have workers' compensation, well, why would they ever have a general contractor then, because that's just doubling their expense?"

CHAIR BUNDE said this bill would be set aside for a future date. There being no further business to come before the committee, he adjourned the meeting at 2:50 p.m.

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