ALASKA STATE LEGISLATURE
FREE CONFERENCE COMMITTEE ON SB 130
May 20, 2005
3:44 p.m.

MEMBERS PRESENT

Senator Gene Therriault, Chair
Senator Charlie Huggins
Senator Hollis French

Representative Norm Rokeberg, Vice Chair
Representative Tom Anderson
Representative Eric Croft

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

CONFERENCE CS FOR SENATE BILL NO. 130(fld H)
"An Act relating to workers' compensation and to assigned risk pools; relating to the Alaska Insurance Guaranty Association; establishing the Task Force on Workers' Compensation; amending Rule 45, Alaska Rules of Civil Procedure; and providing for an effective date."

HEARD AND HELD

PREVIOUS COMMITTEE ACTION

BILL: SB 130
SHORT TITLE: WORKERS' COMPENSATION/ INSURANCE
SPONSOR(s): RULES BY REQUEST OF THE GOVERNOR

03/03/05	(S)	READ THE FIRST TIME - REFERRALS
03/03/05	(S)	L&C, FIN
03/08/05	(S)	L&C AT 1:30 PM BELTZ 211
03/08/05	(S)	Heard & Held
03/08/05	(S)	MINUTE(L&C)
03/10/05	(S)	L&C AT 1:30 PM BELTZ 211
03/10/05	(S)	Heard & Held
03/10/05	(S)	MINUTE(L&C)
03/15/05	(S)	L&C AT 1:30 PM BELTZ 211
03/15/05	(S)	Heard & Held
03/15/05	(S)	MINUTE(L&C)

03/17/05	(S)	L&C AT 1:30 PM BELTZ 211
03/17/05	(S)	Heard & Held
03/17/05	(S)	MINUTE(L&C)
03/22/05	(S)	L&C AT 1:30 PM BELTZ 211
03/22/05	(S)	Heard & Held
03/22/05	(S)	MINUTE(L&C)
03/24/05	(S)	L&C AT 2:00 PM BELTZ 211
03/24/05	(S)	Heard & Held
03/24/05	(S)	MINUTE(L&C)
03/29/05	(S)	L&C AT 1:30 PM BELTZ 211
03/29/05	(S)	-- Meeting Canceled --
03/31/05	(S)	L&C AT 1:30 PM BELTZ 211
03/31/05	(S)	Moved CSSB 130(L&C) Out of Committee
03/31/05	(S)	MINUTE(L&C)
04/01/05	(S)	L&C RPT CS 2DP 1NR 2AM NEW TITLE
04/01/05	(S)	DP: BUNDE, STEVENS B
04/01/05	(S)	NR: SEEKINS
04/01/05	(S)	AM: DAVIS, ELLIS
04/01/05	(S)	JUD REFERRAL ADDED AFTER L&C
04/05/05	(S)	JUD AT 8:30 AM BUTROVICH 205
04/05/05	(S)	Heard & Held
04/05/05	(S)	MINUTE(JUD)
04/06/05	(S)	JUD AT 8:30 AM BUTROVICH 205
04/06/05	(S)	Heard & Held
04/06/05	(S)	MINUTE(JUD)
04/07/05	(S)	JUD AT 8:30 AM BUTROVICH 205
04/07/05	(S)	Heard & Held
04/07/05	(S)	MINUTE(JUD)
04/08/05	(S)	JUD RPT CS FORTHCOMING 1DP 4NR
04/08/05	(S)	DP: SEEKINS
04/08/05	(S)	NR: FRENCH, GUESS, THERRIAULT, HUGGINS
04/08/05	(H)	JUD AT 8:00 AM CAPITOL 120
04/08/05	(S)	Moved CSSB 130(JUD) Out of Committee
04/08/05	(S)	MINUTE(JUD)
04/08/05	(S)	FIN AT 9:00 AM SENATE FINANCE 532
04/08/05	(S)	<Pending Referral>
04/11/05	(S)	FIN RPT CS 5DP 1NR 1AM NEW TITLE
04/11/05	(S)	DP: GREEN, WILKEN, BUNDE, DYSON, STEDMAN
04/11/05	(S)	NR: HOFFMAN
04/11/05	(S)	AM: OLSON
04/11/05	(S)	JUD CS RCVD NEW TITLE
04/11/05	(S)	FIN AT 9:00 AM SENATE FINANCE 532
04/11/05	(S)	Moved CSSB 130(FIN) Out of Committee
04/11/05	(S)	MINUTE(FIN)

04/14/05	(S)	TRANSMITTED TO (H)
04/14/05	(S)	VERSION: CSSB 130(FIN) AM
04/15/05	(H)	READ THE FIRST TIME - REFERRALS
04/15/05	(H)	L&C, JUD, FIN
04/15/05	(S)	FIN AT 9:00 AM SENATE FINANCE 532
04/15/05	(S)	Moved Out of Committee 4/11
04/15/05	(S)	MINUTE(FIN)
05/04/05	(H)	L&C RPT HCS(L&C) 2DP 3NR 2AM (FORTHCOMING)
05/04/05	(H)	DP: KOTT, LEDOUX;
05/04/05	(H)	NR: CRAWFORD, LYNN, GUTTENBERG;
05/04/05	(H)	AM: ROKEBERG, ANDERSON
05/04/05	(H)	L&C AT 2:00 PM CAPITOL 17
05/04/05	(H)	Moved HCS CSSB 130(L&C) Out of Committee
05/04/05	(H)	MINUTE(L&C)
05/05/05	(H)	HCS(L&C) NT RECEIVED
05/05/05	(H)	JUD AT 1:00 PM CAPITOL 120
05/05/05	(H)	Failed To Move Out Of Committee
05/05/05	(H)	MINUTE(JUD)
05/05/05	(H)	FIN AT 1:30 PM HOUSE FINANCE 519
05/05/05	(H)	<Pending Referral>
05/06/05	(H)	JUD RPT HCS(JUD) NT 3DP 3NR 1AM
05/06/05	(H)	DP: KOTT, COGHILL, GARA;
05/06/05	(H)	NR: GRUENBERG, DAHLSTROM, MCGUIRE;
05/06/05	(H)	AM: ANDERSON
05/06/05	(H)	FIN RPT HCS(JUD) NT 9NR
05/06/05	(H)	NR: HAWKER, HOLM, FOSTER, STOLTZE, CROFT, WEYHRAUCH, JOULE, MOSES, MEYER
05/06/05	(H)	JUD AT 1:00 PM CAPITOL 120
05/06/05	(H)	Moved HCS CSSB 130(JUD) Out of Committee
05/06/05	(H)	MINUTE(JUD)
05/06/05	(H)	FIN AT 1:30 PM HOUSE FINANCE 519
05/06/05	(H)	<Pending Referral>
05/08/05	(H)	BEFORE THE HOUSE
05/08/05	(H)	VERSION: HCS CSSB 130(JUD) AM H
05/09/05	(S)	CONCURRENCE MESSAGE READ AND HELD
05/09/05	(S)	CONFERENCE COMMITTEE APPOINTED
05/09/05	(S)	B. STEVENS (CHAIR), SEEKINS, GUESS
05/09/05	(H)	SPECIAL SESSION BILL - SEE H. JOURNAL PAGE 1854
05/09/05	(H)	RECEDE MESSAGE READ
05/09/05	(H)	CONFERENCE COMMITTEE APPOINTED
05/09/05	(H)	HARRIS, COGHILL, GUTTENBERG
05/09/05	(S)	SPECIAL SESSION BILL - SEE S. JOURNAL PAGE 1493

05/11/05	(H)	130 AT 7:00 PM BUTROVICH 205
05/11/05	(H)	<Meeting Canceled>
05/12/05	(H)	130 AT 5:30 PM BUTROVICH 205
05/12/05	(H)	-- Meeting Canceled --
05/13/05	(S)	LIMITED POWERS FREE CONFERENCE GRANTED
05/13/05	(S)	CC REPORT: CCS SB 130
05/13/05	(S)	CC RPT ADPTD Y11 N6 E3 CCS SB 130
05/13/05	(H)	LIMITED POWERS FREE CONFERENCE GRANTED
05/13/05	(H)	CC REPORT READ
05/13/05	(H)	130 AT 9:00 AM BUTROVICH 205
05/13/05	(H)	Moved CCS SB 130 Out of Committee
05/13/05	(H)	MINUTE(130)
05/17/05	(H)	CC REPORT FAILED Y20 N20
05/19/05	(S)	FREE CONFERENCE COMMITTEE APPOINTED
05/19/05	(S)	THERRIAULT (CHAIR), HUGGINS, FRENCH
05/20/05	(H)	130 AT 3:00 PM BUTROVICH 205

WITNESS REGISTER

Mr. Paul Lisankie
Division of Workers' Compensation
Department of Labor & Workforce
Development
PO Box 25512
Juneau, AK 99802-1149
POSITION STATEMENT: Answered questions on SB 130

Mr. Dave Florsinger
Assistant Attorney General
Department of Law
PO Box 110300
Juneau, AK 99811-0300
POSITION STATEMENT: Answered questions on SB 130

Mr. Douglas A. Wooliver,
Administrative Attorney
Alaska Court System
303 K St.
Anchorage, AK 99501-2084
POSITION STATEMENT: Answered questions on SB 130

Mr. Don Bullock,
Legislative Legal and Research Services
Legislative Affairs Agency
Alaska State Capitol
Juneau, AK 99801-1182
POSITION STATEMENT: Responded to questions on SB 130

ACTION NARRATIVE

SB 130-WORKERS' COMPENSATION/ INSURANCE

CHAIR GENE THERRIAULT called the Free Conference Committee on SB 130 meeting to order at 3:54:18 PM. Senators Huggins, French, and Therriault and Representatives Croft, Anderson and Rokeberg were present.

He noted that the last conference committee version of SB 130 that failed to be adopted on the House floor was distributed for consideration, as well as a packet of amendments. He asked Mr. Lisankie and Mr. Florsinger to come forward to answer questions. He asked Representative Croft if he had any more amendments he planned to propose.

REPRESENTATIVE ERIC CROFT said he might propose some conceptual amendments.

3:55:34 PM

REPRESENTATIVE NORMAN ROKEBERG moved to adopt Amendment 1, labeled R.5, which reads as follows:

24-GS1112\R.5
Bullock

A M E N D M E N T 1

TO: CCSSB 130

Page 52, lines 11 - 20:
Delete all material and insert:

"*** Sec. 83.** The uncodified law of the State of Alaska is amended by adding a new section to read:

TRANSITION: MEDICAL SERVICES REVIEW COMMITTEE STUDY, REPORTS, AND RECOMMENDATIONS. (a) The medical services review committee appointed under AS 23.30.095(j), as amended by sec. 34 of this Act, shall proceed to study medical and related benefits provided under AS 23.30 to determine the appropriateness, necessity, and cost of the benefits.

(b) The medical services review committee appointed under AS 23.30.095(j), as amended by sec. 34 of this Act, shall assist the Task Force on Workers' Compensation established in sec. 77 of this Act and make recommendations for medical procedure guidelines

to the task force, not later than December 1, 2005, which may be included in the written findings and proposed legislation under sec. 77(d)(4) of this Act."

REPRESENTATIVE CROFT objected.

REPRESENTATIVE ROKEBERG explained that Amendment 1 deletes Section 83 on page 52 of the bill and replaces it with a new section of uncodified law. It expands the charge of the medical services review committee and requires it to make recommendations for medical procedure guidelines to the task force by no later than December 1, 2005. He pointed out that Amendment 1 was recommended by Representative Kott. The House believes that it is good tune-up because it would require the medical service review committee to look at national guidelines to give it direction for recommendations to the legislative task force to contain medical costs. Also, the date certain tightens up the delivery time for the group to report to the task force.

REPRESENTATIVE CROFT removed his objection.

CHAIR THERRIAULT announced that without further objection, Amendment 1 was adopted.

3:57:46 PM

REPRESENTATIVE ROKEBERG moved to adopt Amendment 2, labeled R.21. He noted R.21 is a revision of R.4.

CHAIR THERRIAULT clarified that Representative Rokeberg was referring to R.4

REPRESENTATIVE ROKEBERG said Amendment 2 is merely a technical correction: line 1 on R.4 should read Page 42, lines 19-21 rather than lines 19-20.

REPRESENTATIVE ROKEBERG moved to adopt Amendment 2 as corrected, which reads as follows:

24-GS1112\R.4
Bullock

A M E N D M E N T 2

TO CCS SB 130

Page 42, lines 19 - 21:

Delete "**, including an employee, an employer, a representative of a person, a physician, or a medical provider,**"

REPRESENTATIVE CROFT objected.

REPRESENTATIVE ROKEBERG said his understanding is that the intent when drafting the original bill was to make the definition of “person” as specific in statute as possible regarding whom it would apply to. Under the current law, the definition of a “person” reads, “including an employee, an employer, a representative of a person, a physician, or a medical provider,”. He told members the House Labor Commerce Committee has discussed this issue many times and, according to the legal drafting manual, the term “a person” is all-inclusive. Therefore, the House recommends that language be deleted to avoid clouding who would be included under the statute.

CHAIR THERRIAULT noted the impact of Amendment 2 is to return to the current statutory language rather than to list who is included and run the risk of excluding someone.

REPRESENTATIVE CROFT agreed that the word "including" could be read as “limited to” and said he had no objection to Amendment 2.

CHAIR THERRIAULT announced that Amendment 2 was adopted without objection.

4:01:23 PM

REPRESENTATIVE ROKEBERG moved to adopt Amendment 3, labeled R.3, which reads as follows:

24-GS1112\R.3
Bullock

A M E N D M E N T 3

TO: CCS SB 130

Page 15, lines 10 - 11:
Delete "give written notice **under oath, on a form provided by the board,** to the"
Insert "**file a statement under oath with the board, on a form prescribed or approved by the board, to notify the**"

Page 15, line 13, following "**subsection.**":
Insert "**The notice of the election is effective upon service to the administrator and the employer.**"

Page 15, line 15, following "**the**":
Insert "[GIVE WRITTEN NOTICE TO THE]"

REPRESENTATIVE CROFT objected.

REPRESENTATIVE ROKEBERG explained that Amendment 3 specifies that the form required under .041(q) must conform to the new section of statute so that when an individual waives his/her future rights in exchange for a lump sum payment for retraining benefits, that individual has filled out the proper form developed by the board. He asked Mr. Lisankie to elaborate.

MR. PAUL LISANKIE, Division of Workers' Compensation, Department of Labor and Workforce Development, said Representative Rokeberg's explanation is essentially correct. Amendment 3 was brought about by a concern that if someone gives up his or her right to a benefit, the board should prescribe the form to make sure it describes in full the benefits that are being given up and the ramifications of doing so. He pointed out that Section .041(q) already gives the board the authority to make that form. Amendment 3 is consistent with current practice and just makes it explicit in the new section.

SENATOR HOLLIS FRENCH asked about the difference between the existing and proposed language.

CHAIR THERRIAULT asked, "Didn't we default to and copy the language that appears elsewhere in the statutes?"

MR. LISANKIE thought that was correct.

SENATOR FRENCH asked if the change is a matter of style.

MR. LISANKIE said it could be described as that but some folks expressed concern that the language in the bill doesn't require the board to prescribe the specific form.

CHAIR THERRIAULT recalled when that concern was last discussed and the new sentence to be inserted was created, the debate centered on whether the board merely provided the form or whether the board had control over the content of the form. He said this language is just a restatement of language that

appears elsewhere in the statutes to clarify that the board controls the form.

REPRESENTATIVE ROKEBERG added that he feels it is important that the format of the documentation be consistent and also that an employee who does not have counsel and waives that right is fully apprised.

SENATOR FRENCH said from that standpoint, he believes lines 3 and 4 are a good addition. He asked if the sentence on line 7, "The notice of the election is effective upon service to the administrator and the employer" is the same as saying the choice is now final.

MR. LISANKIE said he believes that is the intent.

4:05:57 PM

SENATOR FRENCH said there has been some discussion about having board approval of that decision, since it is irrevocable. He asked if the board could look at that form and determine whether the choice to waive those rights is in the employee's best interest.

MR. LISANKIE noted it says the election waiver of the unchosen benefits is effective upon service to the parties; therefore it is not reviewed [by the board] for content.

SENATOR FRENCH asked if that language is in current statute.

MR. LISANKIE said that sentence is in the final paragraph of Section 18 on page 16 of the bill. He explained that the previous section about what the board must include on that form says it must conspicuously describe the benefit being waived, but the board is not reviewing the substance of the decision at that point.

SENATOR FRENCH said when [the Senate Judiciary Committee] last heard this bill, it spent a fair amount of time talking about whether a lawyer should review the decision to make sure it is a good one. However, the committee decided as a whole that was probably not a good idea, as it would require injecting a lawyer into every single workers' compensation case. He said nevertheless, the job relocation benefit is brand new and he is concerned that an individual who chooses it may be making a terrible decision. He expressed concern that the bill does not require any board review of those decisions.

4:08:26 PM

MR. LISANKIE said what prevailed during that discussion is that currently, reemployment benefits do not have to be approved. The Legislature went to some effort in 2000 to reiterate that since the benefit is a voluntary choice. The Legislature underscored that the employee can explicitly waive it without further review of the board.

SENATOR FRENCH pointed out that the job dislocation benefit on lines 26-31 has dollar values assigned to different impairments and no one knows if those values are good or not. He suggested having the board review the job dislocation benefit elections because that is a new area of law that may not serve workers very well. He then said he is proposing a conceptual amendment.

REPRESENTATIVE CROFT asked if the board has the power, under this amendment and this section, to prescribe the form on which the employee waives these rights, but the board has no authority to look at whether the employee's decision to do so is in the employee's best interest.

MR. LISANKIE said that is correct.

REPRESENTATIVE CROFT asked if other boards that deal with medical benefits or lost wages use a similar approach.

MR. LISANKIE said they do not. This is specific to vocational rehabilitation-type benefits, which are referred to as re-employment benefits under the workers' compensation act and were amended into the act in 1988.

4:11:32 PM

REPRESENTATIVE CROFT asked if he would need board approval if he wanted to waive future wages.

MR. LISANKIE affirmed that if he wanted to waive his right to a benefit, other than vocational rehabilitation, he would need board approval but that would be limited somewhat.

REPRESENTATIVE CROFT asked if that is the purpose of board approval, meaning that the board is supposed to review a decision made by an unrepresented injured worker to make sure that decision is in the employee's best interest.

MR. LISANKIE said he believes that is the intention and is the specific standard under Section .012.

4:12:10 PM

SENATOR FRENCH moved to amend Amendment 3. His conceptual amendment would say that an election of job dislocation benefits shall be reviewed by the board to determine whether that election is in the employee's best interest.

He maintained the board could run under that regime for some time and determine whether the job relocation benefit is a good election for unrepresented employees since this is a brand new provision of law. He repeated that there should be some supervision of that election and the board is the appropriate entity to do that.

CHAIR THERRIAULT objected to Senator French's amendment to Amendment 3.

REPRESENTATIVE ANDERSON indicated that this could apply to a bricklayer who hurt his back and is offered retraining, for example, computer technician training. He asked if either the costs of that training would be covered or the bricklayer could take a lump sum payment.

MR. LISANKIE said that would be accurate under the existing statute.

4:14:52 PM

REPRESENTATIVE ANDERSON said he thought the amendment favors the employee because the employee signs the form under oath, which lends seriousness to the signing of the document. He expressed concern that requiring board review in every case could delay cases and prevent a person who might need the money for another purpose from getting it. He pointed out that the permanent fund dividend application offers people the choice of depositing that money into a college fund without oversight.

REPRESENTATIVE ROKEBERG asked Mr. Lisankie if DOLWD certifies training programs or whether an individual can choose any program of his/her choice.

MR. LISANKIE said DOLWD does not certify retraining programs. A person who exercises a right to the benefit works with a counselor to develop a plan for retraining. The parties are free

to agree to that plan or either party can object and ask the reemployment administrator to determine whether the plan is reasonable.

REPRESENTATIVE ROKEBERG asked if the bricklayer wanted to go to culinary school but the counselor felt that profession would be too arduous given the bricklayer's condition, the bricklayer could waive his rights, take the lump sum and go to chef school.

4:18:15 PM

MR. LISANKIE said under the bill that person would be somewhat limited. Right now, the worker can disagree with the proposed plan and ask to settle the case for what the worker believes the alternative value of that plan is. This amendment says the worker would have to elect the benefit; if he chose not to elect the benefit without even getting into the planning process, he would get the alternative job relocation benefit. The benefit would not be tied to the specific value of what he wanted to do. If he chose the retraining plan, he would work with a counselor to pursue it or he could choose not to seek retraining for any reason. However, the choices do not have any dollar-for-dollar relationship.

REPRESENTATIVE ROKEBERG thought one reason for the original proposal was to reduce the workload of the board; yet requiring the board to review every waiver would put another administrative burden on the board.

REPRESENTATIVE CROFT said people who are injured on a job often need money but retraining should be encouraged to get that person employed again. He noted that within 30 days of the injury, the employee would get a notification of eligibility, including the [waiver] form offering a person who is 50 percent disabled $13,000 right away if he signs the form. That person's bills may be stacking up and he may be desperate. The problem is that a lot of people will take the money and pay the bills but then have no job.

4:23:41 PM

REPRESENTATIVE TOM ANDERSON said conversely, the bricklayer may want to be retrained as a window washer. Under Senator French's amendment, the board might determine that a vocation of window washing could exacerbate his injury. He questioned how a person would appeal that determination and what recourse the injured employee would have if he disagreed with the board and preferred

to take a lump sump payment. He said the point of the bill is to reduce the cumbersome parts of the system, protect the employer and give employee a choice.

SENATOR FRENCH repeated that the job dislocation benefit is brand new and he is very concerned that the dollar values may not be set correctly and that the decisions being made by injured workers are profound and will have long-lasting implications. He believes broad oversight will benefit both sides.

A roll call vote was taken. Representative Croft and Senator French were in favor; Representative Anderson Representative Rokeberg, Senator Huggins and Senator Therriault were opposed.

CHAIR THERRIAULT announced the amendment to Amendment 3 failed.

CHAIR THERRIAULT announced that without further objection to Amendment 3, it was adopted.

4:26:33 PM

REPRESENTATIVE ROKEBERG moved to adopt Amendment 4, labeled R.2, which reads as follows:

24-GS1112\R.2
Bullock

A M E N D M E N T 4

TO: CCS SB 130

Page 23, lines 1 - 29:
Delete all material.

Renumber the following bill sections accordingly.

Page 24, line 27:
Delete "a new subsection"
Insert "new subsections"

Page 25, following line 3:
Insert a new subsection to read:
"(o) Notwithstanding (a) of this section, an employer is not liable for palliative care after the date of medical stability unless the palliative care is reasonable and necessary (1) to enable the employee to continue in the employee's employment at the time

of treatment, (2) to enable the employee to continue to participate in an approved reemployment plan; or (3) to relieve chronic debilitating pain. A claim for palliative care is not valid and enforceable unless it is accompanied by a certification of the attending physician that the palliative care meets the requirements of this subsection. A claim for palliative care is subject to the requirements of (c) - (n) of this section. If a claim for palliative care is controverted by the employer, the board may require an evaluation under (k) of this section regarding the disputed palliative care. A claim for palliative care may be heard by the board under AS 23.30.110."

Page 46, following line 23:
Insert a new paragraph to read:
"(36) "chronic debilitating pain" means pain that is of more than six months duration and that is of sufficient severity that it significantly restricts the employee's ability to perform the activities of daily living;"

Renumber the following paragraphs accordingly.

Page 47, line 2, following "department":
Insert ";
(42) "palliative care" means medical care or treatment rendered to reduce or moderate temporarily the intensity of an otherwise stable medical condition, but does not include those medical services rendered to diagnose, heal, or permanently alleviate or eliminate a medical condition."

Page 49, line 1:
Delete "sec. 65"
Insert "sec. 64"

Page 50, line 20:
Delete "sec. 53"
Insert "sec. 52"

Page 50, line 21:
Delete "sec. 53"
Insert "sec. 52"

Page 52, line 15:
Delete "sec. 34"

Insert "sec. 33"

Page 52, line 23:
Delete "sec. 65"
Insert "sec. 64"

Page 52, line 24:
Delete "sec. 76"
Insert "sec. 75"

Page 52, line 26:
Delete "Sections 34, 77, and 82(a)"
Insert "Sections 33, 76, and 81(a)"

Page 52, line 28:
Delete "Sections 1, 2, 53, and 83"
Insert "Sections 1, 2, 52, and 82"

Page 52, line 29:
Delete "secs. 85 and 86"
Insert "secs. 84 and 85"

SENATOR FRENCH objected.

REPRESENTATIVE ROKEBERG explained that Amendment 4 deletes Section 32 in the conference committee substitute on page 23:

> ... thereby defaulting back to statutory language between lines 2 and 21 that remains in the law. That's replaced by insertions on page 25 that add the sections in lines 12-22 on the first page of the amendment. And what that does, fundamentally, Mr. Chairman, is indicate that the palliative care comes into play after the date of medical stability is determined and is allowable for the provisions, subsection 1 and 2, on 14 and 15, that enable the employee to continue in the employment at the time of treatment and to enable the employee to continue to participate in an approved reemployment plan or – now we've used the disjunctive word 'or' and created subsection 3 to relieve chronic debilitating pain.
>
> In the prior iteration of the conference committee substitute, there was a cuff there and a concern, particularly in the House, so we had debated the impacts of having the language as a standalone sentence. If you refer back to page 23, lines 27-29,

that may give rise to other difficulties and the fact that that particular limitation would be entirely discretionary on the part of the attending physician and there would be no recourse to controvert it by the employer. So the amendment clearly indicates that this particular type of care is to be administered through the board and there can be action to controvert it by the employer there.

Additionally, to avoid confusion as to what the impacts were, I refer the members of the committee to the second page of the amendment, that is to say, subsection 36 added the definition of 'chronic debilitating pain' … following in the main definitions from medical dictionaries - I believe I was shown a copy of Mosby's. And then ... the amendment, on line 11, the definition of 'palliative care' is also provided to help avoid any ambiguity as to what this does.

REPRESENTATIVE ROKEBERG thought Amendment 4 overcomes substantial debate and objections made on the House floor about the [definition's] potential to give rise to additional cause of action in unlimited palliative care by any attending physician. This narrows that possibility substantially.

4:30:27 PM

CHAIR THERRIAULT clarified that the added language [Section 32] on page 23 of the existing version will be removed, which would retain the current statutory language. The language [from Section 32] will be placed in a new section, which will contain the two new definition sections.

REPRESENTATIVE CROFT maintained his objection to Amendment 4 and said his concern is about the new subsection, primarily the new definitions of chronic pain and palliative care. Regarding the palliative care definition, he questioned how one would moderate the intensity of an otherwise stable medical condition. He said all of the discussion he has heard on palliative care centered around pain, which is hard to evaluate. **He proposed inserting, between the word "of" and "an" [page 2, line 12], "pain caused by". Line 12 would read [amendment to Amendment 4]:**

"reduce or moderate temporarily the intensity of pain caused by an otherwise stable medical condition,".

REPRESENTATIVE ANDERSON objected for the purpose of discussion. He asked Mr. Lisankie if this definition was taken from the Oregon statute.

MR. LISANKIE told members it was.

REPRESENTATIVE ANDERSON asked if Representative Croft's amendment would change Alaska's palliative care definition so that it is no longer identical to Oregon's definition.

MR. LISANKIE said any changes to this definition would be a departure from Oregon's definition.

4:33:23 PM

REPRESENTATIVE ROKEBERG felt the amendment to Amendment 4 would limit the scope of the definition too much as other prognoses or medical conditions may give rise to the need for palliative care besides pain. He maintained that a stiff knee that cannot be cured might require ongoing care and would be eligible for palliative care under the Oregon definition.

REPRESENTATIVE CROFT said his concern is that once the treatment is described as palliative care it will be restricted to the three listed reasons. He noted that Christopher Reeves was a quadriplegic, which is considered to be a stable medical condition. Even if he was not in pain, he needed certain care to make his life better, such as bed turning. His wheelchair was not improving his condition at all but it helped him with mobility. He said the concern he has heard about the difficulty of evaluating pain is the very reason he wants to limit palliative care and the restrictions placed on it. He cautioned against making the definition so broad as to limit what a person can recover, i.e. a wheelchair. He then said diabetes is a stable medical condition and a diabetic will not recover but the diabetic's insulin should be covered. He further stated:

> ... if he [Christopher Reeves] was not in chronic debilitating pain - back to that first section and I don't know whether he was – is this treatment of moving you around in bed and things going to help you go back to work? I'm not going back to work. Is it going to help you on a reemployment benefit? I'm not going to be reemployed. I'm going to be in bed. Are you in chronic debilitating pain? No. Then sorry, it's palliative care and we don't cover it. We may be wiping out whole classes of things that help people

live with their workplace injuries. I agree we need to have a discussion about pain, but I hope we don't accidentally do in this second conference committee things that hurt whole areas that we don't know about.

CHAIR THERRIAULT indicated that the definition says, "diagnose, heal, or permanently alleviate" so that if a person lost the ability to walk, a wheelchair wouldn't permanently alleviate that medical condition. He didn't believe a wheelchair would be swept in under that definition.

4:37:49 PM

REPRESENTATIVE CROFT agreed the wheelchair will not alleviate a medical condition but argued that it might make life better. He cautioned that a doctor would be forced to say the wheelchair would not affect the medical condition so it would not be covered.

CHAIR THERRIAULT questioned how a person with a limited range of motion who is not in pain would be affected by Representative Croft's amendment.

REPRESENTATIVE CROFT said limiting one section to prevent limiting the remedies in another section is tricky. He argued that a tighter definition of "palliative care" would broaden the injured workers general ability to be part of the compensation system. He repeated that the concern about treatment for pain is that pain is so hard to measure and because of suspected fraud. He proposed limiting palliative care to the treatment of pain to make it more defensible.

SENATOR FRENCH said in listening to Chair Therriault's concern, Representative Croft was saying that a person with range of motion problems would be covered by another portion of the workers' compensation statute.

MR. LISANKIE agreed and said that condition would represent the need for additional medical treatment to improve the condition; therefore the person would not be medically stable yet. He noted the onset of medical stability is the trigger for this provision.

4:41:26 PM

REPRESENTATIVE ROKEBERG asked Mr. Lisankie to address the definition of medical stability and how that would play into the

various scenarios members have raised. He also asked how Section 3 would apply when a person is not working or being retrained. He wondered if a person could be unclassified as medically stable and qualify for [palliative care] treatment.

MR. LISANKIE said in many cases, the injured person gets the necessary medical treatment to improve the injury as much as possible. At that point, the person is considered to be medically stable. Under AS 23.30.095(21) (page 102 in green book), "medically stable" turns on whether there is a reasonable expectation that additional medical care or treatment will objectively improve the condition. Therefore, treatment continues until there is no reason to expect that additional medical treatment will improve and stabilize the condition. That would trigger, under the amendment, looking to treatment that is palliative in nature – treatment that can improve the symptoms but not the condition.

CHAIR THERRIAULT asked if treatment up to that point would be curative treatment.

MR. LISANKIE said that is correct.

CHAIR THERRIAULT asked if once curative treatment has been exhausted, palliative care applies.

MR. LISANKIE said that is correct, the medical care the person received has made him as healthy as possible. Palliative care could relieve pain but will not make the underlying condition improve.

4:45:12 PM

REPRESENTATIVE ANDERSON asked, using the range of motion example, whether, with a specific treatment, the range of motion could be temporarily improved through massage for example. But if the person suffers no pain, the person would not receive any treatment if the amendment to Amendment 4 passes.

MR. LISANKIE said that is correct. A layman might refer to that situation as stiffness rather than pain.

REPRESENTATIVE ANDERSON said he feels the amendment to Amendment 4 will hurt the worker so he plans to reject it.

A roll call vote was taken. Representative Croft and Senator French were in favor; Representative Anderson Representative Rokeberg Senator Huggins and Senator Therriault were opposed.

CHAIR THERRIAULT announced that the amendment to Amendment 4 failed. He then asked if there was further objection to Amendment 4.

SENATOR FRENCH said yes and asked how long this definition has been in Oregon law.

MR. DAVE FLORSINGER, Assistant Attorney General, Department of Law, said he believed the Oregon statute was adopted in 1990.

REPRESENTATIVE ANDERSON said his research shows a major contributing cause provision has been in effect for about 10 years in Oregon.

REPRESENTATIVE ROKEBERG asked, using the Christopher Reeves example, what would happen to an injured employee with a chronic medical condition that does not give rise to pain under Amendment 4.

4:48:52 PM

MR. LISANKIE said the definition is broader than just pain so he doesn't know how it would apply to someone in that situation.

REPRESENTATIVE ROKEBERG referred to subsection (3) on page 1, line 16, which is the third element of a three-stage test to qualify for palliative care. He questioned whether workers' compensation benefits would flow to a person with a long-term disability but no proven chronic debilitating pain. He added that even though there might be 45 days of no change, a condition of medical stability would be presumed.

MR. LISANKIE said that is a valid point. He explained that if one takes that situation as the worst-case scenario, the person might not qualify for further palliative care.

REPRESENTATIVE ROKEBERG asked if subsection (3) could be expanded to include a person in that type of situation.

CHAIR THERRIAULT announced an at-ease.

5:10:03 PM

REPRESENTATIVE ROKEBERG moved to rescind the committee's action to adopt the amendment to Amendment 4.

CHAIR THERRIAULT announced that without objection, the amendment to Amendment 4 was before the committee: [insert on page 2, line 12, the words, "pain caused by" in between the words "of" and "an"].

CHAIR THERRIAULT announced that without objection, the amendment to Amendment 4 was adopted.

CHAIR THERRIAULT asked if there was objection to adopting Amendment 4 as amended.

REPRESENTATIVE CROFT objected and said although Amendment 4 was improved, it still contains a lot of bad provisions.

5:11:53 PM

A roll call vote was taken. Representative Rokeberg, Representative Anderson, Senator Huggins and Senator Therriault voted in favor; Representative Croft and Senator French were opposed.

CHAIR THERRIAULT announced that Amendment 4 as amended was adopted.

REPRESENTATIVE CROFT moved to adopt Amendment 5, labeled R.17, which reads as follows:

24-GS1112\R.17
Bullock

A M E N D M E N T 5

TO: CCS SB 130

Page 2, following line 11:
Insert a new bill section to read:
"*** Sec. 3.** AS 22.05.010 is amended by adding a new subsection to read:
(f) The commissioner of labor and workforce development or a party in a workers' compensation matter in which an appealable decision has not been entered by the superior court, may file an original action in the supreme court to resolve a conflict between two final superior court decisions on a legal

issue relating to workers' compensation, if neither of the superior court decisions has been appealed to the supreme court and the time for taking the appeals has expired. The opinion of the supreme court in an action filed under this subsection is prospective only and does not affect the outcome of a superior court decision that is final before the date of the opinion by the supreme court. The supreme court shall issue an opinion under this subsection

(1) finding that no conflict exists;

(2) affirming the decision of one superior court on the legal issue presented; or

(3) adopting an interpretation different from that in either superior court decision."

Renumber the following bill sections accordingly.

Page 48, following line 28:
Insert a new bill section to read:
"*** Sec. 76.** AS 22.05.010(f) is repealed January 1, 2007."

Page 49, line 1:
Delete "sec. 65"
Insert "sec. 66"

Page 50, line 20:
Delete "sec. 53"
Insert "sec. 54"

Page 50, line 21:
Delete "sec. 53"
Insert "sec. 54"

Page 50, line 26:
Delete "sec. 8"
Insert "sec. 9"

Page 50, line 27:
Delete "sec. 8"
Insert "sec. 9"

Page 51, line 10:
Delete "sec. 8"
Insert "sec. 9"

Page 52, line 8:

Delete "sec. 8" in both places
Insert "sec. 9" in both places

Page 52, line 15:
Delete "sec. 34"
Insert "sec. 35"

Page 52, line 23:
Delete "sec. 65"
Insert "sec. 66"

Page 52, line 24:
Delete "sec. 76"
Insert "sec. 78"

Page 52, line 26:
Delete "Sections 34, 77, and 82(a)"
Insert "Sections 35, 79, and 84(a)"

Page 52, line 28:
Delete "53, and 83"
Insert "54, and 85"

Page 52, line 29:
Delete "secs. 85 and 86"
Insert "secs. 87 and 88"

CHAIR THERRIAULT objected.

5:12:46 PM

REPRESENTATIVE CROFT explained that Amendment 5 is partially conceptual; he is proposing to eliminate the appeals commission and allow the DOLWD commissioner or anyone hearing a workers' compensation case to ask for a ruling from the supreme court when decisions conflict. He said the creation of an appeals commission has been based on an allegation of conflicting court or board decisions, which has never been proven. He does not see conflicting opinions to be a significant problem but, if they are, the bill should include a procedure to fix that. He argued that the current proposal uses political appointees, is costly, and adds a layer of bureaucracy based on unproven justifications.

5:14:22 PM

CHAIR THERRIAULT asked if Amendment 5 would request the supreme court to pick and choose between opinions and almost issue advisory opinions.

REPRESENTATIVE CROFT replied, "Almost, but there are various ways that that happens now." He explained that questions of state law can be certified back to the state court, so that a federal court could certify a question back to the Alaska Supreme Court if a case turned on how Alaska law would apply. Precedent has been established for this procedure. He noted that Amendment 5 also gives that ability to the DOLWD commissioner to make the request. He pointed out that this governor said that is part of his concern so Amendment 5 provides a process to clean up conflicting decisions.

5:15:58 PM

CHAIR THERRIAULT asked if Amendment 5 would delete the appeals commission.

REPRESENTATIVE CROFT said yes but that is not in the amendment.

REPRESENTATIVE ROKEBERG asked if Representative Croft made a conceptual amendment to Amendment 5 to delete the appeals commission.

5:16:33 PM

REPRESENTATIVE CROFT said he did.

CHAIR THERRIAULT said he thought members understood that Amendment 5 would also delete the appeals commission section.

SENATOR FRENCH asked that Mr. Wooliver address alternatives to an appeals commission that would be inexpensive yet provide the surety and swiftness that some ascribe to the appeals commission.

MR. LISANKIE interjected to say that inconsistent decisions are not the only problem that needs to be addressed. Another major problem is that no binding precedent is being established short of the published opinions of the Alaska Supreme Court under the current system. Amendment 5 does not address the lack of any binding precedent that can be generally applied and relied upon. Superior court opinions are not binding beyond the parties involved.

5:18:29 PM

SENATOR FRENCH asked Mr. Lisankie if he is conceding that he has not been able to produce any hard evidence of inconsistent panel decisions.

MR. LISANKIE said he was not conceding that and he was not aware that he was required to do so.

SENATOR FRENCH said he asked to see two inconsistent decisions from either the panel or the superior court last year. He has never been given any.

MR. LISANKIE said that strikes him as unusual because it is unlikely that 30 or 40 judges and numerous panels always agree.

SENATOR FRENCH asked Mr. Lisankie if he is saying he imagines that inconsistent decisions exist.

MR. LISANKIE said he doesn't rely on his imagination when he testifies.

CHAIR THERRIAULT asked Mr. Wooliver to address Senator French's question.

SENATOR FRENCH clarified that he wanted to know if anyone has explored with the court system the possibility of assigning workers' compensation appeals cases to a single judge or to a pool of three judges.

MR. DOUG WOOLIVER, administrative attorney for the Alaska Court System, said that no one has asked the court to look into that possibility, but it would be willing to do so.

SENATOR FRENCH asked Mr. Wooliver to comment on the efficacy of that idea. He felt that 30 cases per year would be a light caseload.

5:22:14 PM

MR. WOOLIVER clarified that superior court judges have on average 600 open cases each year; that number does not represent new cases filed each year. He did not know whether Senator French's proposal would work or not.

SENATOR FRENCH suggested the task force ask the presiding judge to participate and discuss that idea.

MR. WOOLIVER said the court system would encourage such an invitation.

CHAIR THERRIAULT said that would not get around the problem that superior court decisions are not published or precedential.

MR. WOOLIVER said that is true.

SENATOR FRENCH said the court could be asked to publish its opinions. He added that most people don't overrule themselves; so three individuals publishing opinions over time would establish a consistent body of law.

CHAIR THERRIAULT asked if that would change when new judges were appointed.

SENATOR FRENCH said that would occur with an appeals commission or when the supreme court overrules the commission's decisions.

REPRESENTATIVE ANDERSON thought it was unfair to ask Mr. Wooliver to compare the precedential value of opinions by the superior court versus the supreme court. Mr. Wooliver's argument has been based on the costs associated with using the superior court versus the supreme court. He maintained that in his mind, the precedential value of the commission versus the superior court is far better. He said the three-judge idea is different.

5:25:39 PM

CHAIR THERRIAULT directed members to keep the discussion to Amendment 5, which does not propose a three-judge panel.

REPRESENTATIVE ROKEBERG asked how long it takes a judge to go through an entire proceeding in which a superior court judge would write an opinion in a civil case.

MR. WOOLIVER said he looked into that question for workers' compensation cases last year. From the time one files with the superior court until an opinion is issued takes less than a year on average. The supreme court usually takes about 20 months for those same cases.

REPRESENTATIVE ROKEBERG said he learned from testimony that 30 or 34 cases per year are appealed to the superior court now; therefore the new system would create a lighter caseload. He

asked if superior court judges are issuing opinions on civil cases at a rate of one per week or more.

5:27:24 PM

MR. WOOLIVER said such statistics are available but he does not have them at this time.

REPRESENTATIVE ROKEBERG asked if the court system has data on the number of opinions produced by superior court judges annually.

MR. WOOLIVER said he did not know.

CHAIR THERRIAULT maintained his objection based on the fact that a superior court judge approached him during the Alaska Bar Association Convention and asked him to [support an appeals commission] because the superior court does not do enough workers' compensation cases to develop the necessary expertise.

REPRESENTATIVE CROFT said Amendment 5 would save $1.5 million. In addition, he fears that the political appointees to the commission might represent a philosophy that some members prefer; however governors change. He feels the [appeals commission] is a poor, short-term proposal that members will live to regret. That can be avoided by using the current procedure to meet the objection.

5:29:22 PM

CHAIR THERRIAULT commented that the administrative law judge would select the person who oversees this function and participates in all appeals, which somewhat mitigates the concern about political appointees.

SENATOR FRENCH asked if administrative law judge appeals go to the superior court.

CHAIR THERRIAULT said they do.

A roll call vote was taken. Representative Croft and Senator French were in favor; Representative Anderson Representative Rokeberg Senator Huggins and Senator Therriault were opposed.

CHAIR THERRIAULT announced that Amendment 5 failed.

5:31:12 PM

REPRESENTATIVE CROFT moved to adopt Amendment 6 and explained that it is a conceptual amendment that will delete the provisions in the bill that freeze physicians' rates and instead freeze insurance rates for workers' compensation at their December 31, 2004 level.

REPRESENTATIVE ANDERSON objected.

REPRESENTATIVE CROFT said he is uncomfortable allowing government to set rates. It has never worked well for rent or price control. However, if the state is going to tell individuals what they can charge, he believes it is preferable to go to the root of the problem – insurance rates. Physicians' rates were set for Medicaid and Medicare coverage and that has led to the refusal by some physicians to take those patients. Amendment 6 is his attempt to substitute this intrusion on the market place by addressing the direct problem of insurance rates and freezing those rates for a period of time. He expressed concern that once a cap on doctors' rates is put in law, it will never come out. He has talked to doctors groups about this being a dangerous intrusion of government into the private sector.

5:35:18 PM

REPRESENTATIVE ANDERSON asked Mr. Lisankie if the presumption is that physicians won't leave the state if their rates are frozen at a reasonable level but that insurance companies will leave if their rates are frozen.

MR. LISANKIE said the Division of Insurance has grave concerns about maintaining an insurance market if insurance companies' rates are frozen.

SENATOR FRENCH said he would add a conceptual addition to Amendment 6 to say that insurance rates could go below the December 31, 2004 rate. He referred to a chart distributed in the Senate Labor and Commerce Committee that showed that 1992 workers' compensation rates were as high as they are now, so the current rates are not higher than they've ever been. Due to intense competition, the state saw a great decade of declining rates.

REPRESENTATIVE ROKEBERG pointed out that the legislature stepped in and reformed the system in 1988.

5:38:00 PM

SENATOR FRENCH said his point is that he wants to make sure rates aren't frozen at their high and are allowed to drift down.

CHAIR THERRIAULT clarified that the amendment to Amendment 6 says the intent is not to freeze the rates at the high level and prevent them from going down.

CHAIR THERRIAULT announced that without objection, the amendment to Amendment 6 passed.

CHAIR THERRIAULT said the motion before members was whether to adopt Amendment 6 as amended.

REPRESENTATIVE ROKEBERG expressed concern that the state only has 3 primary underwriters now. Amendment 6 speaks to their solvency and the availability of insurance in the state so he finds it objectionable.

A roll call vote was taken. Representative Croft, Representative Anderson and Senator French voted in favor; Representative Rokeberg, Senator Huggins and Senator Therriault were opposed.

CHAIR THERRIAULT announced that Amendment 6 as amended failed to be adopted.

5:40:15 PM

CHAIR THERRIAULT moved to adopt Amendment 7, labeled R.1, which reads as follows:

24-GS1112\R.1
Bullock

A M E N D M E N T 7

TO: CCS SB 130

Page 10, following line 7:
Insert a new bill section to read:
"*** Sec. 9.** AS 23.30.010 is repealed and reenacted to read:
Sec. 23.30.010. Coverage. (a) Except as provided in (b) and (c) of this section, compensation is payable under this chapter in respect of disability or death of an employee.

(b) Compensation and benefits under this chapter are not payable for aggravation, acceleration, or combination with a preexisting condition unless the employment is the major contributing cause of the disability or death of the employee or the employee's need for medical treatment.

(c) Compensation and benefits under this chapter are not payable for mental injury caused by mental stress, unless it is established that (1) the work stress was extraordinary and unusual in comparison to pressures and tensions experienced by individuals in a comparable work environment; and (2) the work stress was the predominant cause of the mental injury. The amount of work stress shall be measured by actual events. A mental injury is not considered to arise out of and in the course of employment if it results from a disciplinary action, work evaluation, job transfer, layoff, demotion, termination, or similar action taken in good faith by the employer."

Renumber the following bill sections accordingly.

Page 46, lines 3 - 13:

Delete ""injury" **does not include aggravation, acceleration, or combination with a preexisting condition, unless the employment is the major contributing cause of the disability or need for medical treatment, and** does not include mental injury caused by mental stress, unless it is established that (A) the work stress was extraordinary and unusual in comparison to pressures and tensions experienced by individuals in a comparable work environment, and (B) the work stress was the predominant cause of the mental injury; the amount of work stress shall be measured by actual events; a mental injury is not considered to arise out of and in the course of employment if it results from a disciplinary action, work evaluation, job transfer, layoff, demotion, termination, or similar action, taken in good faith by the employer;"

Insert "["INJURY" DOES NOT INCLUDE MENTAL INJURY CAUSED BY MENTAL STRESS UNLESS IT IS ESTABLISHED THAT (A) THE WORK STRESS WAS EXTRAORDINARY AND UNUSUAL IN COMPARISON TO PRESSURES AND TENSIONS EXPERIENCED BY INDIVIDUALS IN A COMPARABLE WORK ENVIRONMENT, AND (B) THE WORK STRESS WAS THE PREDOMINANT CAUSE OF THE MENTAL INJURY; THE AMOUNT OF WORK STRESS SHALL BE

MEASURED BY ACTUAL EVENTS; A MENTAL INJURY IS NOT CONSIDERED TO ARISE OUT OF AND IN THE COURSE OF EMPLOYMENT IF IT RESULTS FROM A DISCIPLINARY ACTION, WORK EVALUATION, JOB TRANSFER, LAYOFF, DEMOTION, TERMINATION, OR SIMILAR ACTION, TAKEN IN GOOD FAITH BY THE EMPLOYER;]"

Page 49, line 1:
Delete "sec. 65"
Insert "sec. 66"

Page 50, line 20:
Delete "sec. 53"
Insert "sec. 54"

Page 50, line 21:
Delete "sec. 53"
Insert "sec. 54"

Page 52, line 15:
Delete "sec. 34"
Insert "sec. 35"

Page 52, line 23:
Delete "sec. 65"
Insert "sec. 66"

Page 52, line 24:
Delete "sec. 76"
Insert "sec. 77"

Page 52, line 26:
Delete "Sections 34, 77, and 82(a)"
Insert "Sections 35, 78, and 83(a)"

Page 52, line 28:
Delete "Sections 1, 2, 53, and 83"
Insert "Sections 1, 2, 54, and 84"

Page 52, line 29:
Delete "secs. 85 and 86"
Insert "secs. 86 and 87"

CHAIR THERRIAULT explained that Amendment 7 deals with the definition of injury section of the bill. It addresses the issue raised during the House floor debate about whether the current definition in the bill creates a separate tort action of

possible claims outside of the coverage of workers' compensation. He continued:

> We are going to take out the language that tries to deal with that by just modifying the definition of injury and we created this (b) and (c) section.... It was my understanding from the argument that was made on the floor that if, in fact, the bill had the possibility of creating that separate tort action, then our current statutes also had language that could potentially create that separate tort action under that particular interpretation with regard to mental stress. And so this amendment has been drafted to deal with - the mental stress is the (c) section there on page 1 and the (b) section talks about the major contributing cause – by taking that out and defining that if you have an action that's not the major contributing cause, it doesn't open up a separate action for tort. So there's the tort issue and there's the policy call on the major contributing cause limitation.

5:42:02 PM

REPRESENTATIVE ANDERSON added that Amendment 7 would delete the exclusions for pre-existing and mental injuries from AS 23.33.095 on page 45 of the bill and place those two categories in a consolidated area under a coverage section, AS 23.30.010.

MR. FLORSINGER said the idea was to take those two categories out of the definition of "injury" and describe them as a limitation of benefits available under the act rather than a limitation of the term "injury" used throughout the act.

REPRESENTATIVE CROFT thought Amendment 7 was an attempt "to do the wrong thing better." He was unsure whether it would be constitutional because a remedy must be provided. He noted that a representative sustained a neck injury from a sledgehammer while on the job and asked if he would have no remedy if the same injury happened again.

5:44:22 PM

MR. FLORSINGER said the second employer would pay for the second sledgehammer injury. If, somewhere down the line, perhaps at the stage of medical stability, the question of whether the second injury was a major contributing cause for the ongoing need of

disability or medical benefits, the case would be presented to physicians for testimony and then to the board. The physicians would be asked whether the [second] sledgehammer injury or the preexisting condition was the major cause. If the second injury was the cause, the second employer would continue to pay. If the first injury was the major contributing factor, the second employer could seek reimbursement from the first employer, which occurs under existing law.

REPRESENTATIVE CROFT asked if the second employer could go after the first employer under this amendment.

MR. FLORSINGER said yes.

REPRESENTATIVE CROFT noted that Amendment 7 says compensation and benefits are not payable if [the first accident] is a substantial factor but not the major contributing cause.

MR. FLORSINGER replied the court addressed a case where the employee told the board he couldn't work because he needed more medical benefits, and the employer said the accident was not the major contributing cause and pointed to the earlier injury as the cause. The court said when the only dispute is between two insurers, the most recent insurer is required to pay until a final determination is made as to the cause of each. The issue is one of fairness between the two insurers.

5:48:11 PM

CHAIR THERRIAULT clarified that the issue is about fairness between the employers or their insurers.

REPRESENTATIVE ANDERSON said on May 15 staff from the DOL civil division tried to answer some of these questions. The first question posed was whether, under current law, an employee who suffers a work related injury at employer 1 and later suffers a related injury at employer 2, would receive workers' compensation benefits. The answer was yes. The answer was also yes under Amendment 7. He said regarding an employer's duty to pay workers' compensation benefits under the current law, the DOL memo reads:

> If an employee suffers a work-related injury at employer 1, and later suffers a related injury at employer 2, which employer pays the workers' compensation benefits?

He said the answer is employer 2. He read, "... and if the injury for which the compensation is sought is aggravated, accelerated or combined with the first injury and is substantial – that's the substantial factor, but under this bill, if the same scenario occurs, employer 2 will pay if the injury for which compensation is sought, aggravated, accelerated or combined is the major contributing cause." He thought that was the difference. He added that if the two employers were in dispute over who is responsible, employer 2 would be responsible during that time period under either standard.

CHAIR THERRIAULT asked Representative Croft if his concern about Amendment 7 is that the second employer would escape any coverage if a second injury aggravated a preexisting injury. He asked Mr. Lisankie if that is the intent of the division.

MR. LISANKIE said in the scenario where a prior work injury is followed by a second injury, the situation would be as described by Mr. Florsinger.

5:51:02 PM

SENATOR FRENCH asked what would happen if there was no first insurer, or the preexisting injury was not related to the workplace, and the workplace injury is a substantial factor but not a major contributing cause of the disability.

MR. LISANKIE said if a person was hurt at home and suffered an injury at the workplace that was not a substantial factor, no workers' compensation would be available. He said this raises the bar.

SENATOR FRENCH said it would result in fewer claims.

MR. LISANKIE said fewer claims would be paid for people whose predominant reason for the injury occurred outside of the workplace.

SENATOR FRENCH argued that now it is paid if [the workplace injury] is a substantial factor and that standard has been in place since 1980.

MR. LISANKIE agreed that came from a court interpretation.

SENATOR FRENCH expressed concern that Amendment 7 will affect a 30-year doctrine to raise the bar and let a few injured workers go home with nothing.

MR. LISANKIE countered, “Or ... let a few employers not pay for an injury that was predominantly caused at the worker’s home.”

SENATOR FRENCH said if a substantial factor represents 25 percent and a major contributing cause represents 51 percent, anyone with an injury that falls in the range between 25 and 51 percent would not be covered.

MR. LISANKIE indicated a health insurer might pay.

REPRESENTATIVE ROKEBERG read from AS 23.30.055(d):

> When payment of temporary disability benefits is converted solely on the grounds that another employer or another insurer of the same employer may be responsible for all or a portion of benefits, the most recent employer or insurer is party to the claim and who may be liable shall make the payments during dependency of the dispute.

He said lack of coverage would never be a problem when one or more employers are involved. The issue then becomes the prevailing employer in any cause of action. He said regarding a non-work related injury, “a substantial factor” has been established in case law and this is an attempt to statutorily raise that to a major contributing cause. He believed the coverage between an employer and employer would not change. He said how non-work related injuries fit into the causal allocation and awards is a major problem in the state right now. He asked Mr. Florsinger the name of the doctrine that applies to last employers.

5:55:40 PM

MR. FLORSINGER said it is the Last Injurious Exposure Doctrine.

REPRESENTATIVE ROKEBERG said now, the current employer gets stuck with the whole bill, whether right or wrong.

CHAIR THERRIAULT asked if he had a preexisting condition, such as an arthritic knee, and banged his knee at work so that he could not stand, whether he would get workers’ compensation coverage to repair the knee to its pre-injury condition but not to replace his knee.

MR. LISANKIE said he thought that is what Mr. Florsinger was getting to.

CHAIR THERRIAULT said the assumption that he would get no coverage because his knee was previously injured is incorrect.

MR. FLORSINGER said he couldn't imagine a doctor saying the banged knee was not a major contributing cause. He said the cases where this often comes into play involve a person with carpal tunnel syndrome with 4 or 5 employers. The most recent employer may have employed that person for two weeks yet may have to pick up the whole tab even though the two-week job was not the major contributing factor. Under Amendment 7, if that employee ran a power wrench for five years, which was the major cause of the carpal tunnel syndrome, that employer would be responsible for picking up the benefit.

CHAIR THERRIAULT asked if that employer would pick up the cost of all of the benefits or a portion of them.

5:59:03 PM

MR. FLORSINGER said once the most recent employer proved the major contributing cause, the earlier employer would have to pick up the cost.

REPRESENTATIVE CROFT asked if a person had several jobs that all contributed to the employee's carpal tunnel syndrome and each employer was considered to be a substantial cause but none rose to 51 percent, the employee would get no coverage.

MR. FLORSINGER said he is not sure where the 51 percent fits into the analysis but, if three employers were involved, the one that was 34 percent responsible would pay.

REPRESENTATIVE CROFT asked if he is saying that predominant means compared to all others or predominant in an absolute sense. He maintained that in the analogy Mr. Florsinger gave, a number of employers could be substantial causes but none would be predominant, leaving the employee without coverage. He cautioned that one employer might be 5 percent responsible while all others are 4 percent responsible.

6:02:00 PM

MR. FLORSINGER was skeptical that percentages might be applied at all. In practice, a physician would review the medical

records and, by a preponderance of the evidence, determine which injury was the major contributing cause.

REPRESENTATIVE CROFT said using the [carpal tunnel syndrome] analogy, a physician might not be able to determine the major contributing cause if the employee worked at two jobs for an equal length of time. He asked if the point of this provision is to save money in that type of situation.

MR. FLORSINGER said it could also be viewed as a way to determine which employer is most responsible for the disability and medical treatment benefits.

REPRESENTATIVE CROFT asked if a prior claim has been settled and the employee reinjures himself, the [first] employer is off the hook.

MR. FLORSINGER thought that would be correct from the disability standpoint, but, in general, medical claims are not settled.

REPRESENTATIVE CROFT asked if the employee was unable to work, his medical bills would be paid but he would not get any compensation because the condition is a combination of two injuries. He maintained that the problem with this new system is that a person could fall through the cracks.

MR. FLORSINGER replied in a situation where the employee previously settled a claim, the employee's condition would be similar to a preexisting condition that might have happened while, for example, gardening. The only difference is that the employee was paid for that injury.

6:05:23 PM

REPRESENTATIVE ANDERSON indicated that many people feel passionate about this issue and it is not about employee versus employer. The motive behind Amendment 7 is not to burn someone's benefits. He said he applauds Amendment 7 in many ways with the exception that he has heard doctors express concern about the definition of "major" in "major contributing cause," who makes that decision, and whether the right to appeal exists. He questioned how a medical provider could accurately determine the percentage. He said that question could be the deal-breaker for physician support of Amendment 7.

MR. LISANKIE said he has given that question a lot of thought. He looked at a follow-up study done by the State of Oregon. That

study included a poll of physicians in Oregon. His impression was that the physicians found this standard to be workable but it took some education of physicians involved in the process to get comfortable with it.

REPRESENTATIVE ROKEBERG asked if, under current law, an employee's injuries are all work related, he would receive benefits no matter what.

MR. LISANKIE said that is correct.

REPRESENTATIVE ROKEBERG asked what happens under current law if an employee has a non-work related sports injury among other work related injuries.

MR. LISANKIE said the court has clearly said that unless the work is not even a substantial factor, the employment bears the entire responsibility for the disability and medical care.

REPRESENTATIVE ROKEBERG asked, "...If there's say a non-work related preexisting condition and there's just a substantial factor – maybe if we use Senator French's 24 percent or 26 percent or whatever the cut line is, does that mean the employer is going to be on the hook for that entire benefit?"

MR. LISANKIE said yes, based on his recollection of the court cases.

6:09:56 PM

REPRESENTATIVE ROKEBERG asked how Amendment 7 would solve that situation and how it would work in the converse.

MR. LISANKIE said that would be the difference.

REPRESENTATIVE ROKEBERG asked, as a matter of policy, whether the board ever apportions what it believes to be a percentage of liability.

MR. LISANKIE said Alaska statute contains no provision that allows apportionment.

REPRESENTATIVE ROKEBERG asked why not.

MR. LISANKIE said it would be a grueling experience to precisely parse out the percentages of liability. The court has shied away from doing so.

CHAIR THERRIAULT asked how long Oregon's similar provision has been in place.

MR. LISANKIE said it was first adopted around 1990 and amended in 1995.

REPRESENTATIVE ROKEBERG asked if Oregon rewrote its entire body of workers' compensation law at one time or whether it made changes in a piecemeal fashion.

MR. LISANKIE said it added a piece here and there over a significant period of time.

REPRESENTATIVE CROFT asked if Amendment 7 was modeled after the Oregon law.

6:12:33 PM

MR. FLORSINGER thought that Oregon's law contains the "major contributing cause" provision.

REPRESENTATIVE CROFT asked if, under Oregon law, an employer is considered to be a substantial factor but not a major contributing cause and therefore not covered by workers' compensation, the employee could sue the individual employer under tort liability.

MR. FLORSINGER said it is his understanding that a case was based on a provision in Oregon's constitution; Alaska's constitution does not have a similar provision.

REPRESENTATIVE CROFT said an employee could sue in Oregon if a workplace injury was deemed to be a substantial factor but not a major contributing factor.

MR. FLORSINGER said he was not comfortable answering because he is not up to speed on that subject.

At 6:15 p.m., CHAIR THERRIAULT announced the committee would take a one-hour break.

9:12:18 PM

CHAIR THERRIAULT called the meeting back to order. All members were present.

CHAIR THERRIAULT moved to adopt an amendment to Amendment 7 labeled R.23, which reads as follows:

24-GS1112\R.23
Bullock

A M E N D M E N T 7

OFFERED IN CONFERENCE BY SENATOR THERRIAULT
No. 7 to CCS SB 130

Page 1, line 4, of Amendment No. 7:
Delete "and (c) of this section"
Insert "of this section regarding a preexisting condition, and (c) of this section regarding a mental injury caused by mental stress"

Page 1, line 10, of Amendment No. 7, following "treatment.":
Insert "Determining the major contributing cause requires the evaluation of the relative contribution of different causes of disability or death of the employee or the employee's need for medical treatment and finding the cause that is the primary cause."

He explained that Amendment 7 is somewhat subjective as to the interpretation that no coverage is available if a major contributing cause cannot be determined. He said his intent is to clarify that:

> ...the (b) limitation [in Amendment 7] is only [for] those things where it's an aggravation – it's not a new injury or, if in the aggravation, acceleration there is in fact a new injury - you bump the arthritic knee and in doing so there's a new gash or something - that that is going to be covered by the second employer.

He asked Mr. Lisankie to speak to lines 6-9 of the amendment to Amendment 7.

SENATOR FRENCH objected to amending Amendment 7.

MR. FLORSINGER explained that the language on lines 7-9 was taken from an Oregon case, which attempted to define "major contributing cause." The Oregon statute differs from Alaska statute, which talks about cause as cause of disability or need

for medical benefits. A portion of that language was drafted so that it will relate to Alaska statute in those terms and uses the term “primary cause.”

SENATOR FRENCH removed his objection.

CHAIR THERRIAULT announced that Amendment 7 was amended and before the committee.

REPRESENTATIVE ANDERSON said he does not support Amendment 7 at this time because too many folks in the medical community feel that empirical evidence is lacking to show that this works for the employee or from a health care standpoint. He pointed out that only 35 doctors were contacted and 11 responded in the Oregon follow-up study. His other concern is that an incredible onus is placed on physicians right now and, with the goal of trying to get workers back to work and the fraud aspect, he would rather direct the medical review committee to recommend a solution to the legislature at the end of the year. He said if the amendment fails, there's one portion that has to be reinserted or deleted.

REPRESENTATIVE ANDERSON noted that another amendment would have to be made to Amendment 7 to delete the language on page 1, lines 1-20, and page 2 and 3 and renumber accordingly. The result would be that the concept should be sent through the medical review committee to the task force.

CHAIR THERRIAULT pointed out the (c) section fixes the issue of a secondary tort if such a problem exists in current Alaska statute. He asked Representative Rokeberg if he is just trying to delete the (b) section.

REPRESENTATIVE ROKEBERG said his intent is to delete the (b) section and insert it into the task force and make conforming changes as necessary.

CHAIR THERRIAULT clarified that Representative Rokeberg wants to delete the major contributing cause section and have it referred to the task force for consideration.

REPRESENTATIVE ANDERSON noted that is on page 1, lines 7 –10 of Amendment 7, subsection (b) of AS 23.30.010.

CHAIR THERRIAULT objected.

SENATOR FRENCH said if the intention is to remove "major contributing cause," a definition section on page 46 uses the exact same language. He wondered whether the intention is to maintain the workers' compensation laws under the substantial factor standard or "whether we're splitting the baby."

REPRESENTATIVE ROKEBERG said he has no intention of splitting; it should be conforming [language].

SENATOR FRENCH pointed out a conceptual amendment would also remove the definition.

REPRESENTATIVE ANDERSON noted that definition is on page 46, lines 3-13.

REPRESENTATIVE ROKEBERG said that should be left in so that it will be deleted.

CHAIR THERRIAULT maintained his objection.

A roll call vote was taken. Senator French and Representative Rokeberg, Representative Croft, and Representative Anderson were in favor; Senator Huggins and Senator Therriault were opposed.

CHAIR THERRIAULT announced the second amendment to Amendment 7 failed lacking two affirmative votes from Senate members.

CHAIR THERRIAULT announced that Amendment 7 as amended was before the committee.

SENATOR FRENCH objected.

A roll call vote was taken. Representative Rokeberg, Senator Huggins and Senator Therriault were in favor; Representative Anderson, Representative Croft and Senator French were opposed.

CHAIR THERRIAULT announced that Amendment 7 as amended failed, lacking two affirmative votes from House members.

CHAIR THERRIAULT moved to adopt Amendment 8, labeled R.24, which reads as follows:

24-GS1112\R.24
Bullock

A M E N D M E N T 8

OFFERED IN THE SENATE BY SENATOR THERRIAULT

Page 7, line 30, following "individuals":
Insert "initially"

Page 50, lines 22 - 29:
Delete all material.

Renumber the following bill sections accordingly.

Page 52, line 26:
Delete "82(a)"
Insert "81(a)"

Page 52, line 28:
Delete "83"
Insert "82"

Page 52, line 29:
Delete "secs. 85 and 86"
Insert "secs. 84 and 85"

REPRESENTATIVE CROFT objected.

9:24:24 PM

MR. DON BULLOCK, Legislative Legal and Research Services, explained that Amendment 8 addresses redundant language in the bill regarding the initial appointments to the appeals commission. The terms were codified on page 7, line 30, so this clarifies, by inserting “initially” that the terms are for the initial appointments. It also deletes language on page 50, lines 22-29, which deals with the same issue of making the initial appointments so that members’ terms would be staggered.

CHAIR THERRIAULT added the word “initially” has to be included because that is when the rotation is set up.

REPRESENTATIVE CROFT asked about the changes to page 52.

MR. BULLOCK said the removal of a section on page 50 requires renumbering of the other sections.

CHAIR THERRIAULT noted that with no further objection, Amendment 8 was adopted.

CHAIR THERRIAULT moved to adopt Amendment 9.

MR. BULLOCK said Amendment 9 deals with the form filed by the employee electing one option or another. Amendment 9 changes the language in the latter part of Section 18 to make it consistent with an earlier change made by the committee. Instead of saying the administrator shall serve a copy it says the board shall serve a copy of the executed election, thereby giving the responsibility to the party who has it.

REPRESENTATIVE CROFT asked why it is only served on the employer rather than both parties.

MR. BULLOCK explained that one party signed the execution.

CHAIR THERRIAULT announced that without further objection, Amendment 9 was adopted.

CHAIR THERRIAULT announced an at-ease.

9:28:31 PM

CHAIR THERRIAULT announced the committee would recess until noon tomorrow.