

**ALASKA STATE LEGISLATURE**  
**SENATE LABOR AND COMMERCE STANDING COMMITTEE**

March 1, 2005

1:33 p.m.

**MEMBERS PRESENT**

Senator Con Bunde, Chair  
Senator Ralph Seekins, Vice Chair  
Senator Ben Stevens  
Senator Johnny Ellis

**MEMBERS ABSENT**

Senator Bettye Davis

**COMMITTEE CALENDAR**

SENATE BILL NO. 105

"An Act relating to the retrospective application and applicability of the overtime compensation exemption for flight crew members; and providing for an effective date."

MOVED CSSB 105(L&C) OUT OF COMMITTEE

SENATE BILL NO. 67

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

MOVED SB 67 OUT OF COMMITTEE

**PREVIOUS COMMITTEE ACTION**

BILL: SB 105

SHORT TITLE: OVERTIME WAGES FOR FLIGHT CREW

SPONSOR(S): SENATOR(S) SEEKINS

02/14/05	(S)	READ THE FIRST TIME - REFERRALS
02/14/05	(S)	L&C, JUD
02/22/05	(S)	L&C AT 1:30 PM BELTZ 211
02/22/05	(S)	Heard & Held
02/22/05	(S)	MINUTE(L&C)
03/01/05	(S)	L&C AT 1:30 PM BELTZ 211

BILL: SB 67

SHORT TITLE: CLAIMS AGAINST HEALTH CARE PROVIDERS

SPONSOR(s): SENATOR(s) SEEKINS

01/21/05	(S)	READ THE FIRST TIME - REFERRALS
01/21/05	(S)	L&C, JUD
02/08/05	(S)	L&C AT 1:30 PM BELTZ 211
02/08/05	(S)	Heard & Held
02/08/05	(S)	MINUTE(L&C)
03/01/05	(S)	L&C AT 1:30 PM BELTZ 211

**WITNESS REGISTER**

Peter Nosek  
Birch, Horton, Bittner and Cherot  
Representing Hageland Pilots  
Anchorage AK  
**POSITION STATEMENT:** Commented on SB 105.

Grey Mitchell, Director  
Labor Standards and Safety  
Department of Labor & Workforce  
Development  
PO Box 21149  
Juneau, AK 99802-1149  
**POSITION STATEMENT:** Commented on SB 105.

Tom Daniel, Atty.  
Hageland Aviation  
Anchorage AK  
**POSITION STATEMENT:** Commented on SB 105.

Donna McCrady  
Alaska Academy of Travel Lawyers  
Anchorage AK  
**POSITION STATEMENT:** Opposed SB 67.

Pat Luby, Advocacy Director  
AARP  
Anchorage AK  
**POSITION STATEMENT:** Opposed SB 67.

**ACTION NARRATIVE**

**CHAIR CON BUNDE** called the Senate Labor and Commerce Standing Committee meeting to order at [1:33:33 PM](#). Senators Ben Stevens, Seekins, Ellis and Chair Bunde were present.

**SB 105-OVERTIME WAGES FOR FLIGHT CREW**

CHAIR BUNDE announced SB 105 to be up for consideration.

PETER NOSEK, Birch, Horton, Bittner and Cherot, said he represented Hageland pilots, the plaintiffs, and advised the committee that before the lawsuit was filed, Mr. Harms offered to settle and walk away for \$45,000. He believed SB 105 has a very serious constitutional problem. The Alaska Supreme Court has recognized that legal claims are property for purposes of the constitution. Since the time claims were filed in 2002, long before the flight crew exemption was passed by the 23<sup>rd</sup> Legislature, the Superior Court had already ruled that pilots were entitled to overtime. To retroactively wipe out rights the court has already recognized would be a constitutional taking.

SB 105 puts into place the Department of Labor and Workforce Development (DOLWD) interpretation of overtime based on the attorney general's letter, which says that air carriers operating solely in-state are not exempt under the federal Railway Labor Act and that the Alaska Wage and Hour Act (AWHA) applies to them.

Before filing any claim, Mr. Nosek said he wrote a letter to the DOLWD about its position on pilots' wages in the state of Alaska. The chief of the Labor Standards Division replied saying that he follows the 1980 attorney general's opinion saying that air carriers operating solely in-state are subject to AWhA. When the claim was filed on behalf of the pilots, the department recognized that their employer was subject to the law and the claims were valid.

MR. NOSEK claimed that Hageland Aviation tried to have the best of both worlds. If a pilot was late, he would be docked pay; if he worked longer than eight hours, he wasn't paid extra. "To have the best of both worlds is simply a violation of the Wage and Hour Act as it has been established."

MR. NOSEK said the law was changed in 2003 to exempt flight crews. That change provided the protection the industry needs. A claim can only be filed for two years and that two-year window is almost completely closed. SB 105 is only about the three air carriers that have been subjected to lawsuits. To resolve the constitutional problem, he suggested an amendment that would provide certainty to the air carrier industry, protection that air carrier industry seeks and recognizes the court judgment giving overtime rights solely to Hageland Aviation.

No other lawsuit was filed before the change in the law. No other lawsuit has had a judgment in their favor on the right to overtime. By simply amending SB 105 to say this doesn't apply, if a court of law has recognized in summary judgment the entitlement to overtime. Then the air carrier industry is fully protected and the rights of those pilots as established by the Superior Court are protected as well. While we believe there are problems with SB 105, we believe it could be simply fixed to protect the industry as well as protect those pilots who went forward in good faith under the law before 2003.

GREY MITCHELL, Director, Labor Standards and Safety, Department of Labor and Workforce Development (DOLWD), said the department has applied a policy since 1980 that looks at two factors. One is whether the air carrier is interstate and whether the pilot is covered by a collective bargaining agreement. Both are exempt from the Wage and Hour Act under the department's policy. Once the inter/intra-state issue is cleared up, he can go on to further clarify whether an employee is subject to the law.

[1:42:55 PM](#)

TOM DANIEL, representing Hageland Aviation, said Mr. Nosek's position is that SB 105 doesn't enact DOLWD policy, but it does because of the way the statute that passed in 2002 was worded. It only applies effectively to the interstate carriers because it only covers carriers that are covered under the Railway Labor Act. Also, the constitutional issue in SB 105 could be dealt with elsewhere, but he didn't think it presented a takings problem, because it's quite common for the Legislature to pass legislation on pending legislation. He said that SB 105 is constitutional and implements DOLWD policy as it has been followed for over 20 years.

SENATOR ELLIS moved to adopt Amendment 1.

24-LS0502\G.1  
Craver  
6/10/05

**A M E N D M E N T 1**

OFFERED IN THE SENATE

TO: SB 105

Page 1, line 13:

Delete "resolved"

Insert "determined"

Page 1, line 14:  
Delete "final"

CHAIR BUNDE objected for an explanation.

SENATOR ELLIS said he had looked for ways to overcome his concerns about retroactivity and preventing people from their final day in court on this subject and explained that Amendment 1 makes him more comfortable. Using "determined" instead of "resolved" makes the language clearer. The second part of the amendment deleting "final" would obviate the court cases that came along after the law was changed. But it would leave in place the court case that was brought before the law was changed - that has summary judgment going in their favor at this stage of the proceedings.

SENATOR SEEKINS asked him to explain the difference between "resolved" and "determined".

SENATOR ELLIS replied that a settlement would have to be signed off by a judge. He is not an attorney and "determined" seemed clearer from a layman's perspective.

SENATOR SEEKINS said he didn't mind using "determined", but objected to using "final". The intent of the legislation is to make sure state law is on an equal footing with federal law. If this legislature knew there was a conflict, it would have acted to eliminate it sooner. It was always the intent of the Legislature to agree with the principals the state was operating under since 1980. He wouldn't object to its passing out of committee, because the Judiciary Committee would look at the legal aspects of the word.

SENATOR ELLIS moved to divide the question. There were no objections.

CHAIR BUNDE moved Amendment 1, on page 1, line 13, to delete "resolved" and insert "determined". Senators Ellis, Seekins, Ben Stevens and Chair Bunde voted yea; and Amendment 1 passed.

CHAIR BUNDE moved Amendment 2 to delete "final" on page 1, line 14. Senators Ben Stevens, Seekins and Chair Bunde voted nay; Senator Ellis voted yea; and Amendment 2 failed.

SENATOR SEEKINS moved to pass CSSB 105(L&C) out of committee with individual recommendations and attached fiscal note.

SENATOR ELLIS objected saying he still has legitimate concerns without adopting the second half of the amendment.

SENATOR SEEKINS guaranteed looking at the issue in the Judiciary Committee. Senators Ben Stevens, Seekins and Chair Bunde voted yea; Senator Ellis voted nay; and CSSB 105(L&C) moved from committee.

### **SB 67-CLAIMS AGAINST HEALTH CARE PROVIDERS**

CHAIR BUNDE announced SB 67 to be up for consideration.

SENATOR SEEKINS said there is some concern about whom the bill covers and that it is intended to cover a broad scope of health care providers including nurse practitioners, physician assistants and doctors.

DONNA MCCRADY, Alaska Academy of Travel Lawyers, opposed SB 67, but she immediately dispelled the idea that this is a case of lawyers against doctors. She is a consumer of health care and a citizen in this state and cares about physicians who are working here. She is against the bill because it is a solution in search of a problem. The state already has a damage cap of \$400,000 for physical injury and \$1 million cap for serious permanent physical injury or severe disfigurement. She understands the lower figure has been proposed because of concerns about the low number of physicians practicing in the state. But, Alaska has always had a low number of physicians and data shows that it is increasing.

She has found anecdotally no link between the number of doctors in the state and the amount of the non-economic damage cap. However, there is an issue with the lack of a residency program. Data shows that any problems doctors are having with insurance premiums have to do with the stock market and nothing to do with medical malpractice payout.

Particularly in this state, we don't have a crisis in this state with medical malpractice - in premiums or with payments or settlements.... Again, we have damages capped in this state.... Let me explain from a practical matter...there really aren't that many lawyers in Alaska practicing in the area of medical malpractice and the reason why is it's a very technical area and it's very expensive to bring these cases.

If you put a cap of \$250,000 on non-economic damages, I can tell you right now that medical malpractice claims lawyers are not going to be able bring cases on behalf of children, on behalf of people who are retired, on behalf of stay-at-home spouses. The reason why is people who are victims of medical errors or medical malpractice that fall into those categories - those are folks whose damages are going to be mainly non-economic value. Unfortunately the court doesn't put a lot of economic value on the lives of children, stay-at-home spouses or retired folks. It just doesn't and sometimes just the cost - it's not the fees - can be over \$200,000. So, no practitioner is going bring a case on behalf of somebody in one of those categories who is a victim of malpractice because they're not going to be able to afford to do it. It's not going to make any economic sense. So, you're going to be cutting out three categories of Alaskan citizens that I can think of from even having access to the court system if they were to be victims of malpractice.

Further there is already standards of proof for bringing malpractice cases, more so than other kinds of negligence cases. For instance, if I bring a negligence case, I have to hire experts and just by a practical matter, I'm going to have hire experts who are in the Lower 48 in order to bring a case forward. That can be quite costly.

She was also concerned that she didn't see an exemption for gross negligence or reckless behavior in the bill.

[2:01:38 PM](#)

PAT LUBY, Advocacy Director, AARP, believes that accidents do happen - even to skilled health professionals. AARP believes the Legislature should focus on prevention, not on damages.

The tort system encourages providers to cover up mistakes to avoid lawsuits rather than report errors and learn how to prevent them.... If someone is hurt by a medical mistake, they are entitled to some fair compensation. What is more important is to make sure errors are reported so that we can learn how to prevent them in the future. AARP thinks that \$250,000 damages would be too low for non-economic damages. Older people who have limited income potential based

on life expectancy will get less in economic damages than younger persons who are victims of a similar error.

The Institute of Medicine (IOM) has proposed testing non-judicial no-fault alternatives to the tort system for medical errors. It might foster fair compensation and error reduction and that should be the real goal of consumer-oriented reform. Under the IOM approach, compensation would be based on avoidability of errors rather than negligence. It recommends preset schedules for compensation with reasonable limits that may help stabilize malpractice premiums. Providers would be required to report errors and make prompt compensation payments. Mandated reporting of errors would help experts in finding system-wide ways to prevent them in the future. The system would continually improve patient safety; with fewer errors, the cost of compensating injured people would eventually decline.

[2:03:14 PM](#)

CATHY GIESSEL, Nurse Practitioners' Association, said she had no further comments.

[2:04:00 PM](#)

SENATOR ELLIS moved Amendment 1.

24-LS0393\A.1  
Bullock  
6/10/05

### A M E N D M E N T 1

OFFERED IN THE SENATE  
TO: SB 67

BY SENATOR ELLIS

Page 3, line 1:  
Delete "\$250,000"  
Insert "\$850,000"

Page 3, line 17:  
Delete "\$250,000"  
Insert "\$850,000"

CHAIR BUNDE objected for explanation.

SENATOR ELLIS explained when people from other states have used California as an example of how good a cap works, they have been laughed out of the building. He changed the amount of the cap to

reflect a reasonable CPI since 1975 in Alaska and in today's dollars to \$850,000. Indiana and Virginia have a current cap of \$1 million; Maryland has an \$805,000 cap.

Industry players have said that caps don't help doctors' premiums go lower. That led him to think, if there was going to be a cap, that it should reasonable reflect the cost of living and economic circumstances over the many years. His main concern was that a lower cap would limit access to counsel for legitimate cases.

SENATOR SEEKINS asked what the California cap is today.

SENATOR ELLIS didn't know, but if left at the 1975 standard, it would be woefully out of date.

SENATOR SEEKINS reflected that many states, as well as the federal government, are considering a \$250,000 cap on non-economic damages. The bill deals with non-economic damages in two sections. The first cap is at \$250,000; if it's severe, it goes to \$1 million. Alaska doesn't have a definition of "severe" in its statutes, so the court in one of its cases imposed the definition - if it embarrasses someone, it's a severe damage. This is the first step, but it does not say that's all that can happen. If the accident gets to a certain threshold of severity, it immediately goes to the \$1 million cap. If three quarters of all Alaska citizens will not be able to bring a case if the first step of liability is reduced to \$250,000 (from \$400,000) the problem is worse than he thought it was.

CHAIR BUNDE noted there was no further discussion on the amendment. Senators Ben Stevens, Seekins and Chair Bunde voted nay; Senator Ellis yea; and Amendment 1 failed.

SENATOR BEN STEVENS moved to pass SB 67 from committee with individual recommendations. Senators Seekins, Ben Stevens and Chair Bunde voted yea; Senator Ellis voted nay; and SB 67 moved from committee.

There being no further business to come before the committee, CHAIR BUNDE adjourned the meeting at [2:13:26 PM](#).