

**ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE**

April 16, 2010

2:47 p.m.

MEMBERS PRESENT

Representative Jay Ramras, Chair
Representative Carl Gatto
Representative Bob Herron
Representative Bob Lynn
Representative Max Gruenberg
Representative Lindsey Holmes

MEMBERS ABSENT

Representative Nancy Dahlstrom, Vice Chair

OTHER LEGISLATORS PRESENT

Senator Thomas Wagoner
Senator Joe Thomas
Representative Tammie Wilson

COMMITTEE CALENDAR

2D CS FOR SENATE BILL NO. 303(RLS)

"An Act relating to a subcontractor's, contractor's, and project owner's liability for workers' compensation and excluding certain persons from liability for securing the payment of workers' compensation benefits to employees; and providing for an effective date."

- FAILED TO MOVE 2D CSSB 303(RLS) OUT OF COMMITTEE

PREVIOUS COMMITTEE ACTION

BILL: SB 303

SHORT TITLE: WORKERS' COMP; CONTRACTORS & OTHERS

SPONSOR(S): LABOR & COMMERCE

03/08/10	(S)	READ THE FIRST TIME - REFERRALS
03/08/10	(S)	L&C, JUD
03/25/10	(S)	L&C AT 1:30 PM BELTZ 105 (TSBldg)
03/25/10	(S)	Heard & Held
03/25/10	(S)	MINUTE(L&C)
04/01/10	(S)	L&C AT 1:30 PM BELTZ 105 (TSBldg)

04/01/10 (S) Moved SB 303 Out of Committee
 04/01/10 (S) MINUTE(L&C)
 04/02/10 (S) L&C RPT 3DP 1NR
 04/02/10 (S) DP: PASKVAN, DAVIS, THOMAS
 04/02/10 (S) NR: MEYER
 04/05/10 (S) JUD AT 11:00 AM BUTROVICH 205
 04/05/10 (S) Heard & Held
 04/05/10 (S) MINUTE(JUD)
 04/07/10 (S) JUD AT 8:30 AM BUTROVICH 205
 04/07/10 (S) Moved CSSB 303(JUD) Out of Committee
 04/07/10 (S) MINUTE(JUD)
 04/07/10 (S) JUD RPT CS 2DP 1NR NEW TITLE
 04/07/10 (S) DP: FRENCH, WIELECHOWSKI
 04/07/10 (S) NR: COGHILL
 04/10/10 (S) RETURNED TO RLS COMMITTEE
 04/10/10 (S) RULES WAIVED PUBLIC HEARING NOTICE,
 RULE 23
 04/11/10 (S) RLS AT 1:45 PM BUTROVICH 205
 04/11/10 (S) Moved 2d CSSB 303(RLS) Out of Committee
 04/11/10 (S) MINUTE(RLS)
 04/12/10 (S) RLS RPT 2D CS 1DP 3NR NEW TITLE
 04/12/10 (S) DP: ELLIS
 04/12/10 (S) NR: HUGGINS, STEDMAN, STEVENS
 04/13/10 (S) TRANSMITTED TO (H)
 04/13/10 (S) VERSION: 2D CSSB 303(RLS)
 04/13/10 (H) READ THE FIRST TIME - REFERRALS
 04/13/10 (H) L&C
 04/15/10 (H) L&C AT 3:15 PM BARNES 124
 04/15/10 (H) Scheduled But Not Heard
 04/15/10 (H) L&C REFERRAL WAIVED
 04/15/10 (H) JUD REFERRAL ADDED
 04/16/10 (H) JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

SENATOR JOE PASKVAN

Alaska State Legislature

Juneau, Alaska

POSITION STATEMENT: Spoke as chair of the Senate Labor and Commerce Standing Committee, sponsor of SB 303.

DON ETHERIDGE, Lobbyist

Alaska American Federation of Laborers - Congress of Industrial Organizations (Alaska AFL-CIO)

Juneau, Alaska

POSITION STATEMENT: Testified in support of SB 303.

WAYNE A. STEVENS, President/CEO
Alaska State Chamber of Commerce (ASCC)
Juneau, Alaska

POSITION STATEMENT: Testified in opposition to SB 303.

JOHN LEWIS, President;
Organizer
Ironworkers Local Union 751
Anchorage, Alaska

POSITION STATEMENT: Testified in support of SB 303.

STACY ALLEN, R.N.C.
Healthcare Unit Representative
Laborers Local 341
Palmer, Alaska

POSITION STATEMENT: Testified in Support of SB 303

ROBERT D. STONE, Attorney at Law
Law Office of Robert Stone, LLC
Anchorage, Alaska

POSITION STATEMENT: Provided comments during discussion of SB 303.

HOWARD GREY, Director
Anchorage Branch
Alaska Miners Association (AMA)
Anchorage, Alaska

POSITION STATEMENT: Provided comments during discussion of SB 303.

KENTON BRINE, Assistant Vice President
State Government Relations
Property Casualty Insurers Association of America (PCIAA)
Olympia, Washington

POSITION STATEMENT: Testified in opposition to SB 303.

KEVIN B. DOUGHERTY
General Counsel
Alaska District Council of Laborers
Eagle River, Alaska

POSITION STATEMENT: Testified in support of SB 303.

KIP KNUDSON, Manager
External Affairs
Tesoro Alaska Company ("Tesoro")
Anchorage, Alaska

POSITION STATEMENT: Provided comments during discussion of SB 303.

MAYNARD TAPP, Owner
Hawk Consultants, LLC
Anchorage, Alaska

POSITION STATEMENT: Testified in opposition to SB 303.

MICHAEL COMBS, Owner
Combs Insurance Agency, Inc.
Palmer Alaska

POSITION STATEMENT: Provided comments during discussion of SB 303.

JEANINE ST. JOHN, Vice President
Lynden Logistics, Inc.
Seattle, Washington

POSITION STATEMENT: Provided comments during discussion of SB 303.

EVERETT H. BILLINGSLEA, General Counsel
Lynden Incorporated
Seattle, Washington

POSITION STATEMENT: Provided comments during discussion of SB 303.

JOHN GRUMMETT
Shattuck & Grummett Insurance;
National Director
Alaska Independent Insurance Agents & Brokers, Inc. (AIIAB)
Juneau, Alaska

POSITION STATEMENT: Testified in opposition to SB 303.

MICHELE KAHLE
Tomahawk, WI

POSITION STATEMENT: Testified in support of SB 303 on behalf of her deceased son, Tyler Kahle, who was killed while working at a mine construction site in Nome.

RALPH SEEKINS
Fairbanks, Alaska

POSITION STATEMENT: During discussion of SB 303, testified as the former Alaska State Senator who sponsored Senate Bill 323 in 2004.

GAIL VOIGTLANDER, Chief Assistant Attorney General - Statewide
Section Supervisor

Torts and Worker's Compensation Section
Civil Division (Anchorage)
Department of Law (DOL)
Anchorage, Alaska

POSITION STATEMENT: Responded to questions during discussion of SB 303.

TRENA HEIKES, Director
Central Office
Division of Workers' Compensation
Department of Labor & Workforce Development (DLWD)
Juneau, Alaska

POSITION STATEMENT: Responded to questions during discussion of SB 303.

GREY MITCHELL, Director
Central Office
Division of Labor Standards & Safety
Department of Labor & Workforce Development (DLWD)
Juneau, Alaska

POSITION STATEMENT: Responded to questions during discussion of SB 303.

ACTION NARRATIVE

[2:47:23 PM](#)

CHAIR JAY RAMRAS called the House Judiciary Standing Committee meeting to order at 2:47 p.m. Representatives Ramras, Holmes, Herron, Gatto, Lynn, and Gruenberg were present at the call to order. Senators Thomas and Wagoner, and Representative T. Wilson were also in attendance.

SB 303 - WORKERS' COMP; CONTRACTORS & OTHERS

[2:48:47 PM](#)

CHAIR RAMRAS announced that the final order of business would be 2d CS FOR SENATE BILL NO. 303(RLS), "An Act relating to a subcontractor's, contractor's, and project owner's liability for workers' compensation and excluding certain persons from liability for securing the payment of workers' compensation benefits to employees; and providing for an effective date."

[2:50:23 PM](#)

SENATOR JOE PASKVAN, Alaska State Legislature, speaking as chair of the Senate Labor and Commerce Standing Committee, sponsor of SB 303, relayed that according to the Department of Labor & Workforce Development (DLWD), there have been 455 fatalities in the Alaska workplace since 1993, as well as "literally tens of thousands of injuries" Alaska can be a dangerous place to work, and it is therefore imperative - as part of the concept that there be accountability and responsibility in the workplace - that those who work in Alaska's industries have access to justice when they are injured or killed due to the fault of others. However, SB 303 would not apply in every situation involving injury or death; instead, the bill would only apply in those situations where a worker is injured or killed due to the fault of a party other than his/her employer.

SENATOR PASKVAN explained that due to statutory changes enacted in 2004 - via Senate Bill 323 - an owner or general contractor avoids all liability for an injury to or the death of a subcontractor's employee that occurs on the job even if the owner or general contractor was acting with criminal negligence. He offered his understanding that this information is included in a memorandum from Legislative Legal and Research Services that members now have in their packets. At issue, he opined, is whether there is accountability and responsibility when there is fault, and the purpose of SB 303 is to return Alaska to the system that was in place prior to 2004.

SENATOR PASKVAN noted that the sponsor statement for Senate Bill 323 - included in members' packets - claimed that that bill's two principal modifications were, one, extending the responsibility for payment of workers' compensation up the chain of contracts to include project owners, and, two, barring injured workers collecting workers' compensation benefits from also filing a tort claim - which the sponsor statement called "double dipping." Senator Paskvan opined, however, that there was no such thing as double dipping - that that was an erroneous presentation - because AS 23.30.015(g) expressly provides that any recovery by an injured person requires a reimbursement to the insurance carrier for the workers' compensation benefits.

The committee took an at-ease from 2:57 p.m. to 2:58 p.m.

[2:59:01 PM](#)

SENATOR PASKVAN mentioned that AS 23.30.015(g) specifically says:

(g) If the employee or the employee's representative recovers damages from the third person, the employee or representative shall promptly pay to the employer the total amounts paid by the employer under (e)(1)(A) - (C) of this section insofar as the recovery is sufficient after deducting all litigation costs and expenses. Any excess recovery by the employee or representative shall be credited against any amount payable by the employer thereafter. If the employer is allocated a percentage of fault under AS 09.17.080, the amount due the employer under this subsection shall be reduced by an amount equal to the employer's equitable share of damages assessed under AS 09.17.080(c).

SENATOR PASKVAN, in response to a comment, pointed out under the "exclusive remedy provisions," the employer of an injured worker retains immunity from tort claims. Under a capitalist system, over time, job safety is promoted because employees can choose to work for safe employers and employers can choose to hire safe employees. Furthermore, a determination was made approximately 100 years ago which said that as part of advancing American commerce and industry, each business should inherently bear the cost of injury or death on an overall basis. Again, under statute, there is no double dipping, whether it's for benefits paid up to the date of the tort recovery, or for future benefits that might be paid; such recovery, he ventured, is viewed simply as an advance of benefits, so the employer has no potential risk whatsoever - in terms of employees - of tort liability.

SENATOR PASKVAN said the question remaining is whether a subcontractor's employee who's injured or killed through the fault of the contractor or the project owner would be taken care of reasonably well. [Under the aforementioned 2004 legislation] workers' compensation addresses situations wherein the fault lies within an employer/employee "unit," but not if it lies outside of that unit. He opined that the person who is at fault for the injury should be the one who is held responsible under the statutory reimbursement structure. Furthermore, in Alaska, fault is apportioned - for example, if a project owner or general contractor is found to be 50 percent at fault and the employee is found to be 50 percent at fault, then the project owner or general contractor would only owe 50 percent of the damages - and passage of SB 303 would not change that.

[3:04:53 PM](#)

SENATOR PASKVAN, in response to a question, relayed that as an attorney, he has represented those who've been injured or killed on the job, workers' compensation insurance carriers seeking to obtain recovery of their costs, and general liability insurance carriers, and thus he believes that he understands the [workers' compensation] system reasonably well. In response to a comment, he noted that one of his core values is that of personal responsibility - if a person breaks something, then he/she pays for it; particularly in a capitalist system, those who are engaged in activities for profit should be responsible for their actions. The whole concept of immunity from one's own fault arose out of common law developed in Europe hundreds of years ago whereby the king could do no wrong, no matter how bad his conduct, and thus citizens had no redress against the king for his wrongful actions.

SENATOR PASKVAN ventured that Americans, having fought a war for independence, disagree with that type of immunity and believe that "the king" should be accountable and responsible to the citizens for "the king's wrong," providing them with redress for their grievances. The aforementioned 2004 legislation, however, created "little kingdoms," all seeking immunity from their actions, even negligent, grossly negligent, criminally negligent, or recklessly indifferent actions. This is neither a best policy nor even a good policy, he opined, and offered his belief that returning to the system that was put in place during the formation of the state and that remained in place until 2004 would be the best policy, particularly given that during that 45 years in between, there simply was no flood of litigation as proponents of Senate Bill 323 argued there was - those arguments were overblown and exaggerated. The prior system worked well and provided an appropriate balance, and, at its core, contained conservative principals and capitalist incentives.

CHAIR RAMRAS expressed disagreement with Senator Paskvan's comments.

REPRESENTATIVE GRUENBERG questioned whether the immunity of a hotel or restaurant owner who supplies food to a worker who then gets sick would be affected by passage of SB 303.

SENATOR PASKVAN indicated that it would not.

[3:15:33 PM](#)

DON ETHERIDGE, Lobbyist, Alaska American Federation of Laborers - Congress of Industrial Organizations (Alaska AFL-CIO), said

that the Alaska AFL-CIO is very supportive of SB 303, and is of the same opinion as the sponsor: if a person breaks something, he/she needs to pay for it. Offering an example of a hotel owner whose employee gets injured as the result of illegal actions undertaken by a bus driver hired on contract, he questioned whether it's fair for the hotel owner to have to pay higher workers' compensation insurance rates as a result.

CHAIR RAMRAS said yes, adding his belief that that's the way the system works.

MR. ETHERIDGE remarked that most AFL-CIO members don't believe that that's a good idea. In conclusion, he reiterated that the AFL-CIO is very supportive of SB 303.

[3:17:23 PM](#)

WAYNE A. STEVENS, President/CEO, Alaska State Chamber of Commerce (ASCC), said that the ASCC opposes SB 303 as it pertains to exclusive liability, but supports the statutory changes adopted by the legislature in 2004. Currently, there is a statutory requirement for immediate employers and other project participants to pay an injured employee's workers' compensation benefits regardless of fault, whereas prior to 2004, he asserted, there wasn't. Under current law, all [employers], including subcontractors, must carry workers' compensation insurance, thus ensuring that all workers are insured regardless of who their direct employer is, and workers' compensation is the exclusive remedy. Prior to 2004, he asserted, project owners, contractors, and subcontractors were spending tremendous resources attempting to avoid liability, whereas under current law they might instead integrate their safety programs.

MR. STEVENS offered his understanding that Alaska's workers' compensation statutes are intended to provide injured workers with reasonable compensation for work-related injuries regardless of fault or cause, and that current law allows for increased safety awareness and coordinated safety programs - interconnecting subcontractors and project owners. Furthermore, he proffered, other federal and state agencies have the authority to fine and/or shut down companies that violate safety standards. The ASCC advocates reducing workers' compensation expenses, particularly workers' compensation insurance rates, and, again, does not support SB 303. In response to questions, he offered his belief that passage of SB 303 will result in an increase in workers' compensation insurance rates, acknowledged

that the current workers' compensation system is unfair, and ventured that perhaps a task force could be created to investigate what could be done to address the system's shortcomings.

REPRESENTATIVE LYNN, with regard to the assertion that other federal and state agencies have the authority to fine and/or shut down companies that violate safety standards, questioned how any of that activity is going to directly help the injured worker.

MR. STEVENS acknowledged that it probably wouldn't help.

REPRESENTATIVE GRUENBERG opined that if someone is injured, then it's fair that his/her expenses be paid so that he/she is made whole, and that it's fair for the person who is responsible for the injury occurring to pay those expenses. Referring to the language in SB 303's sponsor statement that read in part, "... the exclusive liability provisions of AS 23.30.055, established in 2004, protect a project owner or general contractor from any liability when a subcontractor's employee is injured or killed, even when the project owner or general contractor acts with criminal negligence ...", Representative Gruenberg asked of Mr. Stevens, "You're not saying that's fair, are you?".

MR. STEVENS said he was not.

CHAIR RAMRAS indicated that in his view, workers' compensation provides an immediate remedy, whereas litigation provides a delayed remedy, and that allowing for litigation would render workers' compensation inadequate and therefore result in increased insurance costs.

REPRESENTATIVE GATTO indicated a belief that criminal negligence would be hard to prove.

[3:32:52 PM](#)

JOHN LEWIS, President; Organizer, Ironworkers Local Union 751, opined that the legislation passed in 2004 effectively provided immunity to project owners and general contractors from legal challenges by a worker injured on the job due to negligence; prior to this change, an injured worker retained the right to pursue a remedy from those responsible for that negligence. He characterized the argument for changing the law in 2004 - that it would prevent "double dipping" - as a red herring since AS

23.30.015 was already in place and clearly states that if an injured worker received monies through court action, then the workers' compensation benefits have to be repaid. What that 2004 change really did, he opined, was provide a way for project owners and general contractors to cut corners on safety without fear of financial loss from having to pay an injured worker, while still allowing them to "sue down" or sue subcontractors for those very same actions.

MR. LEWIS noted that under existing AS 23.30.055, if an ironworker is hurt by the actions of someone else, the ironworker's employer would be the one to bear the cost, and so even just one accident could raise the employer's workers' compensation insurance rates so high that he/she would no longer be able to compete for jobs. Why should the person who is responsible for an injury not be the one to pay for it, he queried, opining that the right thing would be for the person who caused an injury to pay for it. Existing AS 23.30.055 indemnifies everyone else who might be the true responsible party while essentially shifting the blame/cost to the employer who may have very well taken every step humanly possible to safeguard his/her employee.

MR. LEWIS offered his understanding that prior to the 2004 change, AS 23.30.055 was intended to provide a resolution in the event a worker was injured or killed on the job - a means of clarifying that the injured worker's exclusive remedy was to use workers' compensation insurance to take care of the costs associated with regaining his/her health; instead, AS 23.30.055, as a result of the 2004 change, has become a method for general contractors and project owners to push a subcontractor into cutting corners on safety in order to reduce their overall costs. In conclusion, he asked the committee to support passage of SB 303, surmising that it would simply restore the language of AS 23.30.055 to what it was prior to the 2004 change.

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STACY ALLEN, R.N.C., Healthcare Unit Representative, Laborers Local 341, said that the Laborers Local 341, which has 2,200 members, strongly supports SB 303, and feels that the bill supports and enhances a culture of safety that it and other unions have built up with management and government over the long years prior to 2004. Senate Bill 303 would provide an incentive for employers to work together to maintain a safe work environment, mostly by showing that negligence will not be tolerated and that there is a penalty for not being careful on

the job and not providing a safe work environment. In conclusion, she urged members to move SB 303 from committee.

3:37:46 PM

ROBERT D. STONE, Attorney at Law, Law Office of Robert Stone, LLC, first mentioned that he has represented "workers' compensation employers" - both those that were insured and those that were self-insured; is now representing plaintiffs "on the liability side"; has represented both large and small businesses; has helped workers' compensation employers recover their "subrogation interest" under [AS 23.30.015(g)]; and is the president of the Alaska Association for Justice (AK.A.J.) - formerly the Alaska Academy of Trial Lawyers (AATL). He then opined that Senator Paskvan accurately outlined the problems with current law - as amended in 2004 - regarding workers' compensation, and why it's necessary to change the law [via SB 303] back to what it was prior to 2004.

MR. STONE then provided some historical information regarding the workers' compensation system, and explained that under that system, prior to 2004, an employee injured because of a third party's negligence could collect workers' compensation benefits from his/her employer, then bring suit against the third party that actually caused his/her injury, and then, under [AS 23.30.015(g)], pay back his/her employer for the workers' compensation benefits that he/she received. After the passage of Senate Bill 323 in 2004, however, workers' compensation premiums for small business owners increased because employers were then being assessed not only on the risk that their actions/inactions might result in injury to their employees, but also on the risk that a third party's actions/inactions might result in injury to their employees, and the insurance companies had lost their reimbursement rights under [AS 23.30.015(g)] because injured employees could no longer bring suit against the third party that was responsible for their injuries.

MR. STONE opined that when a person causes injury to somebody else, he/she must be held accountable, and offered a hypothetical example wherein a subcontractor on the North Slope gets killed by the general contractor's negligent employee. Under current law, neither the general contractor nor his/her employee face any liability, but prior to 2004, the general contractor and his/her employee would be held accountable. In conclusion, he ventured that there are many such examples of why the law should be changed back to the way it was prior to 2004.

3:45:38 PM

HOWARD GREY, Director, Anchorage Branch, Alaska Miners Association (AMA), mentioned that he currently manages a company and has owned companies in the past, and is therefore familiar with the workers' compensation system in Alaska. He offered his belief that the current system appears to work pretty well, particularly for employees, because responsibility is defined and placed where it should be - with the employer. The employer should be responsible for both the supervision and safety of his/her employees, and if the supervisor doesn't think the situation is safe, then he/she shouldn't expose his/her employee to that situation. The current concern the AMA has with SB 303, he relayed, is that it will probably create a legal morass - and should thus be avoided - and could also encourage [subcontractors] to forego or ignore or try to avoid their workers' compensation responsibilities, whereas under existing law, that's not the case - the employer has the responsibility and liability.

MR. GREY, in conclusion, said that SB 303 doesn't appear to be correcting a problem or an oversight; reiterated that the current system seems to be working fairly well overall; acknowledged that perhaps administrative and enforcement issues could still be addressed by the administration; and offered his belief that overall, the responsibility is currently being placed where it belongs.

3:48:59 PM

KENTON BRINE, Assistant Vice President, State Government Relations, Property Casualty Insurers Association of America (PCIAA), after mentioning that the property casualty insurance companies belonging the PCIAA collectively provide about one-third of the workers' compensation coverage in Alaska, stated that the PCIAA is opposed SB 303, believing it would expose general contractors to civil litigation related to on-the-job injuries, and wouldn't keep workers' compensation rates affordable. He asked legislators to carefully consider the ramifications of passing SB 303, predicting that it couldn't help but have an impact on insurance rates and lead to higher costs for employers, contractors, and subcontractors. In response to questions, he ventured that the goals of any workers' compensation system are to provide the greatest amount of access to workers' compensation coverage to employees, treat the injuries they sustain on the job, and get them back to work as quickly as possible. He predicted that if the system that's

in place encourages all workers' to be covered, and provides oversight to ensure that such policies are in place, then it's probably also a system that encourages greater risk-management oversight by insurers.

REPRESENTATIVE HOLMES asked Mr. Brine whether he thinks it's fair for a general contractor or project owner to be completely immune from liability when a worker is injured or killed on the jobsite due to criminal negligence on the part of the general contractor or project owner.

MR. BRINE said that that doesn't very sound fair, but added that he couldn't say that there isn't already a remedy for such a worker under current law. Furthermore, insurance companies don't pay out benefits for intentional acts, so if there is a pattern of intentional [bad] behavior by a project owner or a general contractor, it's going to be difficult for him/her to get insurance in the first place.

REPRESENTATIVE HOLMES asked Mr. Brine whether he thinks it's fair for a subcontractor's workers' compensation insurance rates to go up when an injury is due to the negligence or criminal negligence of the general contractor or project owner.

MR. BRINE said that that doesn't sound fair if that's what's actually occurring. However, insurance companies - through risk management programs - do their best to analyze the root causes of workplace accidents, he explained, and opined that it's not fair to assert that workers' compensation insurance rates are automatically going to go up in any given situation due to the negligence of others on the jobsite.

[3:57:17 PM](#)

KEVIN B. DOUGHERTY, General Counsel, Alaska District Council of Laborers, after mentioning that he has been active in the workers' compensation "area" since about 1981, said he supports SB 303 as restoring the traditional workers' compensation values of looking after injured employees and their families. Those values were in place in Alaska from 1915 until a loophole was created in 2004 [by passage of Senate Bill 323]. He offered his belief that SB 303 would correct that loophole and would restore an incentive for safety, and listed some of the safety education programs offered by various companies in Alaska prior to 2004. It's really important to ensure that Alaska's laws are honest and straightforward, he opined, for example, by defining employers as employers, not as some other party as current law

does - such political double speak in statute is not a good thing for Alaskans and does not constitute good public policy.

MR. DOUGHERTY said that whenever he's spoken to a widow or an injured worker, they've been expecting honesty from the system, and therefore he appreciates the sponsor's intent to statutorily restore that. In response to a question, he said that the statutory definition of employer was artificially expanded in 2004 with the passage of Senate Bill 323, and characterized that definition as inaccurate and that expansion as not being forthright. In response to further questions, he said that from a practical standpoint, most people know who their employer is, and in the workers' compensation system, people can't sue their employer and must simply live with that. For example, there was a 19-year-old who was killed on the job in Anchorage, and his family received only \$20,000 for that death because that's all that workers' compensation provided for. If that man had been killed by a project owner or some other third party, however, then all could agree, he surmised, that that third party should be the one to have been held responsible. That's where safety emanates from: when people have to be responsible, then safety is typically taken very seriously.

MR. DOUGHERTY, in response to other questions, indicated that [under SB 303], if a general contractor was doing construction on an office building and an office employee was injured due to the general contractor's negligence, then that general contractor would be held responsible, and proceeds from any resulting litigation would go towards reimbursing the workers' compensation benefits paid by the office worker's employer. Regardless, though, the employer could not be sued, and, if the employer was a government entity, then neither could the citizens whom that government entity was entrusted to serve. Again, under the aforementioned traditional values, the party that's negligent should have to pay, he concluded.

[4:07:04 PM](#)

KIP KNUDSON, Manager, External Affairs, Tesoro Alaska Company ("Tesoro"), asked the committee to set aside SB 303, offering his belief that adoption of its language would undo a reform that created a safety benefit for the Alaska workplace and specifically for Tesoro. He said he doesn't believe that tort liability motivates safety programs. Current law has allowed for the dismantling of what he called cumbersome and bizarre legal barriers between Tesoro's safety programs and those run by its contractors, and coordinating such programs results in a

better culture of safety and ultimately a safer workplace. Noting that supporters of SB 303 say it will restore the concept of "you break it you pay for it," he argued that such a concept was never really in place prior to 2004, and predicted that SB 303 wouldn't bring that concept any closer to fruition either.

MR. KNUDSON proffered that the no-fault standard of workers' compensation was adopted to eliminate uncertainty for both the employee and employer in cases involving injury or death; regardless of fault, the employee would be compensated. Prior to 2004, he opined, Alaska law contained a loophole that created uncertainty for project owners and contractors, and SB 303 would reestablish that loophole. He offered his belief that currently, no employer - either contractor or project owner - is immune from providing workers' compensation coverage, and, in return, the no-fault standard is applied.

[Chair Ramras turned the gavel over to Representative Herron.]

MR. KNUDSON opined that if the concern is that workers' compensation is not providing an adequate remedy in the case of injury or death, then the debate should focus on that deficiency rather than on expanding tort liability.

[Representative Herron returned the gavel to Chair Ramras.]

MR. KNUDSON offered his belief that prior to 2004, things were unclear, particularly regarding control of the workplace and allocating fault. In conclusion, he added, "I think the issue of fairness [both under current law and prior to 2004] ... has been set aside in the ... [workers' compensation] deal; it's not fair for a project owner to be sued regardless of fault, as was the case prior to 2004, for example."

[4:10:58 PM](#)

MAYNARD TAPP, Owner, Hawk Consultants, LLC, after mentioning that his company is primarily involved in oil and gas construction and maintenance projects in Alaska, recommended that SB 303 be set aside. He relayed that just recently, his company passed its "million-hour mark for no lost-time-injuries"; that it took 25 years to reach that milestone; and that he believes existing workers' compensation laws are sufficient in protecting Alaska workers. With the industry's current high safety standards in place, he opined, there is no need to support SB 303, and all that its passage would do would

be to increase insurance rates in an attempt to cover an indefinable risk, thus making it difficult for companies to maintain economic viability thereby resulting in less project development. In conclusion, he said he opposes SB 303.

MR. TAPP, in response to questions, offered his understanding that injuries/deaths resulting from acts of criminal negligence aren't covered by workers' compensation insurance; that acts of criminal negligence wouldn't be addressed by SB 303; and that all insurance rates for all jobs covered under workers' compensation "are assured liability" by all workers and all companies within the system, and so it's fair for everyone's rates to go up when problems with safety aren't dealt with.

[4:15:43 PM](#)

MICHAEL COMBS, Owner, Combs Insurance Agency, Inc., noted that under [existing AS 23.30.045(a),] the contractor only becomes liable for the subcontractor's employees if the subcontractor fails to secure workers' compensation insurance, whereas in contrast, SB 303's proposed AS 23.30.045(a) reads in part, "If the employer is a subcontractor ..., the contractor is liable for and shall secure the payment of the compensation to employees of the subcontractor **unless the subcontractor secures the payment.**" Furthermore, existing AS 23.30.055 in part reads, "The liability of an employer prescribed in AS 23.30.045 is exclusive ...", and yet, he pointed out, no attempt has been made to update the definition of the term "employer" beyond how AS 23.30.395(20) defines that term: "'employer' means the state or its political subdivision or a person employing one or more persons in connection with a business or industry coming within the scope of this chapter and carried on in this state;".

MR. COMBS opined that since SB 303 proposes to put the general contractor within the scope of coverage under AS 23.30, even though he/she may be able to transfer the obligation to the subcontractor by written contract, unless the subcontractor secures payment, the contractor should still be eligible for the exclusive-remedy protection afforded under AS 23.30.055. "We took and moved the general contractor into the first position as an employer, in this case; I'm not sure why that's been done, but it looks to me like in the language itself, that's what's been done," he added. There is nothing fair about workers' compensation, he opined, because it pays for both the employee's and the employer's negligence regardless whether it's [simple] negligence or criminal negligence - the employee is protected at

all times. In conclusion, he encouraged the committee to set SB 303 aside.

MR. COMBS, in response to questions, offered his understanding that although it's not fair for somebody to be criminally negligent, there are other methods of dealing with such behavior other than via the workers' compensation system and general liability coverage; and that with regard to safety issues on a jobsite, everyone who sets foot on that jobsite - whether a general contractor or a subcontractor - is responsible for the safety conditions their employees must work under. Moreover, under the workers' compensation system, it doesn't matter who causes the injury to an employee or who has the workers' compensation insurance - the employee will be covered regardless - though injury claims are going to result in an increase in workers' compensation insurance rates.

[4:25:41 PM](#)

[Due to technical difficulties with the official recording, all volumes must be set at maximum for the period between 4:25:42 p.m. and 4:30:06 p.m.]

JEANINE ST. JOHN, Vice President, Lynden Logistics, Inc., remarking that stable and predictable laws are very critical for enabling companies to conduct business in Alaska, said her company believes that SB 303 would sharply reverse the 2004 statutory changes, which were recently upheld [as not being unconstitutional] by the Alaska Supreme Court [in Schiel v. Union Oil Company of California], and which, she opined, were fair, appropriate, and good - providing the benefit of exclusive remedy to the companies that pay workers' compensation. Senate Bill 303, she predicted, would undermine the underlying concept of workers' compensation. In conclusion, she expressed disfavor with changing the current law; suggested that before taking any action, members review what the court had to say on the issue; and opined that SB 303 would result in increased costs and was not the right answer for addressing any of the perceived problems.

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REPRESENTATIVE HOLMES asked Ms. St. John whether she thinks it's fair for a general contractor or project owner to be completely immune from liability when a worker is injured or killed on the job due to negligence or criminal negligence on the part of the general contractor or project owner.

MS. ST. JOHN offered her belief that there would be various other remedies available to the injured worker in such a situation.

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EVERETT H. BILLINGSLEA, General Counsel, Lynden Incorporated, added his belief that if a company is absolved of negligence, that's consistent with the concept of the workers' compensation system, and so the company - the upstream contractors and owners - should have the benefit of the exclusive remedy.

REPRESENTATIVE HOLMES asked Mr. Billingslea whether he thinks it's fair for a subcontractor's workers' compensation insurance rates to go up when an injury or death is due to the negligence of the general contractor or project owner.

MR. BILLINGSLEA said he doesn't agree with the argument that workers' compensation rates either have or are going to go up due to the statutory changes made in 2004. If they do go up, however, any increase would be more than offset by the savings on litigation costs and general liability insurance premiums, he opined.

[4:33:43 PM](#)

JOHN GRUMMETT, Shattuck & Grummett Insurance; National Director, Alaska Independent Insurance Agents & Brokers, Inc. (AIIAB), said that the AIIAB is opposed to SB 303, and doesn't think it would enhance the system at all. At issue, he surmised, is how the legislature wants to treat workers in terms of ensuring that they are covered and getting treatment, and whether it wants to create another level of litigation. He remarked, "There's talk about negligence, here, but there's also the issue of ... partners and sole proprietors and LLCs, where people are allowed to ... be excluded from coverage when they buy a [workers' compensation] policy, ... whereas on the ... corporation side, they're automatically included unless they're excluded." So although there might be a lot of things wrong with the workers' compensation system, the AIIAB doesn't believe that SB 303 will solve them, he concluded.

REPRESENTATIVE HOLMES asked Mr. Grummett whether he thinks a general contractor or project owner should be completely immune from liability when a worker is injured or killed on the job due

to negligence or criminal negligence on the part of the general contractor or project owner.

MR. GRUMMETT said he doesn't think general contractors and project owners should be the only ones [to have immunity], and indicated that he is questioning why the bill appears to be focused on just the construction industry and not on every industry.

REPRESENTATIVE HOLMES asked Mr. Grummett whether he thinks it's fair for a subcontractor's workers' compensation insurance rates to go up when an injury is due to the negligence or criminal negligence of the general contractor or project owner.

MR. GRUMMETT said, "I don't think it's fair but I think that that's what ... we're left to deal with right now."

[4:37:40 PM](#)

MICHELE KAHLE relayed that she would be speaking on behalf of her deceased son, Tyler Kahle, who was killed while working at a mine construction site in Nome. She said that although the 2004 statutory changes effected by Senate Bill 323 were touted as being necessary in order to ensure that workers were insured under workers' compensation, that was already the case prior to 2004: everyone - whether project owner, general contractor, or subcontractor - was already required to have workers compensation insurance. Furthermore, when Senate Bill 323 was enacted, workers lost all of their rights, she opined, but most didn't realize it at the time, since the question wouldn't arise until they were injured or killed; for giving up all those rights, workers received nothing in return.

MS. KAHLE, with regard to the argument that other federal and state agencies have the authority to address safety violations, pointed out that such actions are not going to make an injured [or killed] employee [or his/her family] whole. For the death of her son, for example, those responsible were only legally required to pay \$5,000. "Were we made whole?" she queried, and challenged those present to look her in the eye tell her that her family was. Alaska's workers' compensation system is broken, and although SB 303 isn't going to fix it, it would be a good start, she opined, to at least put the statute back to what it was for the 40 years prior to 2004 so that workers would have some rights again in situations involving gross negligence.

MS. KAHLE offered her belief that currently, an injured worker in Alaska is better off if there isn't any insurance at all, because that's the only way he/she can recover damages. She noted that her son was not the only fatality that occurred that day - both he and a coworker were dropped 60-plus feet from a man lift. She stated that she supports SB 303, and surmised that unless a person has experienced what she has, that person is just kidding himself/herself to think that the current statute encourages safety on the job. Since when does a lack of accountability encourage compliance with anything? Although the federal Mine Safety & Health Administration (MSHA) fined one of the parties responsible for her son's death, that fine is still being litigated - that party "has all sorts of recourse, and we have none," she added.

MS. KAHLE offered her belief that as things stand today, employers, subcontractors, and project owners are not only experiencing cost savings, they are actually profiting from people's deaths and injuries. Employees are unknowingly assuming all of the risks, and no one is being held accountable for their safety. Tyler and his co-worker are proof of that. Going to work should never be a grave mistake for anyone in the U.S., but today it is, she concluded.

[4:44:28 PM](#)

RALPH SEEKINS, speaking as the former Alaska State Senator who sponsored Senate Bill 323 in 2004, offered his understanding that workers' compensation insurance doesn't cover deliberate acts, and expressed agreement with that exclusion. Acknowledging that nothing could compensate one for the loss of a family member or even an employee, he indicated that when the legislature was addressing the workers' compensation statutes back in 2004 via Senate Bill 323, the issue of just compensation wasn't addressed. Indicating that passage of SB 303 would result in the statutory language reverting back to what it was prior to passage of Senate Bill 323 - wherein the contractor was responsible for securing workers' compensation for the employees of the subcontractor - he relayed that he'd disagreed with that concept, and explained that Senate Bill 323 was intended to change that requirement such that the contractor would be responsible for securing workers' compensation for the employees of the subcontractor only if the subcontractor failed to do so, and such that if the contractor failed to do so, then the project owner would be required to do so, and thereby close what he considered to be a loophole. Again, the compensation schedule wasn't addressed via Senate Bill 323.

MR. SEEKINS accused the State of Alaska of scamming contractors by requiring them to sign indemnification agreements that hold the State of Alaska harmless; relayed that research indicates that many government entities and large employers have the same requirement; and accused insurance adjusters and attorneys of conspiring with each other against employers. Senate Bill 323, he then indicated, was intended to allow small employers the ability to require the same type of indemnification while still providing coverage for all employees, and to exempt situations involving defective equipment so that any employees injured by such equipment could still file suit unrelated to workers' compensation. He acknowledged that at the time he was promoting the passage of Senate Bill 323, he knew that no double dipping was really occurring. He asserted, however, that an employer who paid out workers' compensation benefits, even though he/she might eventually get reimbursed as the result of a successful tort action, was then subject to what he called an experience modification on his/her insurance policy; he referred to this as "double jeopardy." Mr. Seekins, too, noted that the court has ruled that the current statutes [are not unconstitutional], and accused Senator Paskvan of not declaring a conflict of interest. In conclusion, he predicted that if SB 303 is adopted, "it" will happen again and the State of Alaska will continue to benefit from "it."

MR. SEEKINS, in response to a question, indicated that the Alaska State Chamber of Commerce (ASCC) asked him to sponsor Senate Bill 323.

CHAIR RAMRAS characterized SB 303 as an inadequate solution to the problems imbedded in the workers' compensation system.

MR. SEEKINS opined that what employers were after in 2004 was the benefit of "the deal" without the "double jeopardy," and again reiterated that Senate Bill 323 did not address the compensation schedule. He offered his understanding that project owners were only seeking the same coverage granted to contractors and subcontractors, and indicated that if the goal of SB 303 is to get rid of that coverage for project owners, then it should also be gotten rid of for all employers. In response to a question, he offered his understanding that the terms, "criminal negligence" and "gross negligence" are defined in statute, opined that such acts shouldn't be exempted from other penalties, and again predicted that passage of SB 303 would result in litigation and "double jeopardy."

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GAIL VOIGTLANDER, Chief Assistant Attorney General - Statewide Section Supervisor, Torts and Worker's Compensation Section, Civil Division (Anchorage), Department of Law (DOL), in response to questions, explained that there isn't any language in SB 303 limiting it to just the construction industry; that under SB 303, the project owner would no longer be required to pick up coverage of workers' compensation and so would also no longer be subject to proposed AS 23.30.055 as an employer for purposes of exclusive liability; that whether a contract's indemnification provisions would protect the project owner and the contractor would depend on the contract itself; that although contracts vary widely, generally they address those whom the project owner is seeking indemnification from; that with regard to contracts entered into by the State of Alaska, some of what's required in such contracts is set forth in statute and some is just prudent practice, particularly given that the State of Alaska could be viewed as a deep pocket in terms of someone seeking a tort remedy via litigation; that although including indemnification in contracts entered into by the State of Alaska provides a better way to manage risk, it does come at some cost to the State, with that cost being reflected in the bidding; and that because of statutory requirements, in contracts entered into by the State of Alaska, indemnification can't be shifted to another entity in situations where negligent acts have occurred and the sole negligent party is the State of Alaska.

REPRESENTATIVE GRUENBERG, in response to questions, explained that AS 11.81.900(a)(4) reads:

(4) a person acts with "criminal negligence" with respect to a result or to a circumstance described by a provision of law defining an offense when the person fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

MS. VOIGTLANDER indicated that she has not seen any instances wherein the mens rea required under that definition of "criminal negligence" was used in a civil context.

REPRESENTATIVE GRUENBERG, in response to a question, surmised that a charge of criminally negligent homicide might be

warranted for an on-the-job accident, such as when a party's criminally negligent behavior results in a mining disaster, for example.

[5:22:54 PM](#)

TRENA HEIKES, Director, Central Office, Division of Workers' Compensation, Department of Labor & Workforce Development (DLWD), in response to a question, said that it's been the reduction in injuries over the past decade which has resulted in workers' compensation insurance rates declining, and that those rates are set based on two elements: payroll multiplied by risk, with risk - or experience modification - having to do with the number of injuries the employer has experienced. In response to another question, she declined to venture whether passage of SB 303 would affect workers' compensation rates.

[Chair Ramras turned the gavel over to Representative Herron.]

[5:24:04 PM](#)

GREY MITCHELL, Director, Central Office, Division of Labor Standards & Safety, Department of Labor & Workforce Development (DLWD), in response to a question, explained that there are statutory provisions that hold a controlling employer liable for safety violations at a worksite, and that that liability would transfer to a general contractor, but [neither SB 303 nor Senate Bill 323] change that liability in terms of complying with occupational safety and health standards.

REPRESENTATIVE HOLMES surmised, then, that passage of SB 303 wouldn't do anything to discourage employers from engaging in safety programs.

MR. MITCHELL concurred. In response to a question, he offered his understanding that in a recent accident that occurred during construction of a [sky bridge] between two legislative office buildings, a piece of equipment that was being used was not actually designed for the purpose it was being used for, and the resulting investigation determined that both the main contractor and the subcontractor were liable for the resulting accident that injured two employees. Neither the main contractor nor the subcontractor, though, was found to be criminally negligent.

REPRESENTATIVE GATTO expressed disagreement with that finding.

[Representative Herron returned the gavel to Chair Ramras.]

MR. MITCHELL, in response to a comment and a question, offered his understanding that a lack of proper training was a factor in that accident, and that no deaths resulted.

CHAIR RAMRAS, after ascertaining that no one else wished to testify, closed public testimony on SB 303.

[5:29:36 PM](#)

SENATOR PASKVAN, in wrap up, relayed that the intent of SB 303 is to return Alaska to what he referred to as the good public policy that was in place prior to 2004, and opined that passage of Senate Bill 323 in 2004 resulted in the elimination of what he termed, "just compensation for at-fault conduct" and in the injection of the concept of "fault immunity" into the workers' compensation system. Prior to 2004, the tort-liability system provided a remedy, and although it was a delayed remedy, it held only those at fault accountable, and, again, in Alaska, damages are apportioned according to fault. The workers' compensation system is broken, he opined, when a contractor or project owner who is at fault can kill or injure a subcontractor's employee without being held accountable. Senate Bill 303 would fix that problem, and in no way asserts that there isn't currently a commitment to safety. However, because there are incidences, the question becomes whether, when there is fault, that responsibility and accountability should attach to the wrongdoer.

SENATOR PASKVAN, with regard to the assertion that contractual indemnification provisions effect a scam, pointed out that although he agrees that allowing for such provisions constitutes bad public policy, it isn't the workers who are involved in that process but rather the business owners who are deciding whether to assume risk or not. He urged the committee to not continue to allow the immunization of at-fault conduct, which, he opined, is what current law does. With regard to the aforementioned term, "double jeopardy", he opined that that's the wrong term to be using with regard to contractual indemnification provisions. With regard to the argument that passage of SB 303 would result in litigation, he pointed out that wasn't the case during the 45 years prior to the enactment of Senate Bill 323, and so won't be the case if SB 303 is adopted. And if there is a concern regarding indemnification provisions, he ventured, then the statutes being addressed via SB 303 should be returned to what they were prior to 2004. The words, "and justice for all" - as used in the pledge of allegiance - should not be just hollow

words for workers injured due to the fault of someone other than themselves or their employer, he concluded.

CHAIR RAMRAS expressed a preference for maintaining the current statutes.

[5:39:57 PM](#)

REPRESENTATIVE HERRON moved to report 2d CSSB 303(RLS) out of committee with individual recommendations and the accompanying fiscal notes.

CHAIR RAMRAS objected.

A roll call vote was taken. Representatives Lynn, Gruenberg, and Holmes voted in favor of reporting 2d CSSB 303(RLS) out of committee. Representatives Herron, Gatto, and Ramras voted against it. Therefore, 2d CSSB 303(RLS) failed to be reported from the House Judiciary Standing Committee by a vote of 3-3.

[5:41:00 PM](#)

ADJOURNMENT

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 5:41 p.m.