

**ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE**

April 5, 2017

2:03 p.m.

MEMBERS PRESENT

Representative Matt Claman, Chair
Representative Zach Fansler, Vice Chair
Representative Jonathan Kreiss-Tomkins
Representative Gabrielle LeDoux
Representative David Eastman
Representative Chuck Kopp
Representative Lora Reinbold

MEMBERS ABSENT

Representative Charisse Millett (alternate)
Representative Louise Stutes (alternate)

COMMITTEE CALENDAR

HOUSE BILL NO. 79

"An Act relating to workers' compensation; repealing the second injury fund upon satisfaction of claims; relating to service fees and civil penalties for the workers' safety programs and the workers' compensation program; relating to the liability of specified officers and members of specified business entities for payment of workers' compensation benefits and civil penalties; relating to civil penalties for underinsuring or failing to insure or provide security for workers' compensation liability; relating to preauthorization and timely payment for medical treatment and services provided to injured employees; relating to incorporation of reference materials in workers' compensation regulations; relating to proceedings before the Workers' Compensation Board; providing for methods of payment for workers' compensation benefits; relating to the workers' compensation benefits guaranty fund authority to claim a lien; excluding independent contractors from workers' compensation coverage; establishing the circumstances under which certain nonemployee executive corporate officers and members of limited liability companies may obtain workers' compensation coverage; relating to the duties of injured employees to report income or work; relating to misclassification of employees and deceptive leasing; defining 'employee'; relating to the Workers' Compensation Board's approval of attorney fees in a settlement agreement; and providing for an effective date."

- HEARD & HELD

PREVIOUS COMMITTEE ACTION

BILL: HB 79

SHORT TITLE: OMNIBUS WORKERS' COMPENSATION

SPONSOR(S): RULES BY REQUEST OF THE GOVERNOR

01/25/17	(H)	READ THE FIRST TIME - REFERRALS
01/25/17	(H)	L&C, JUD, FIN
02/20/17	(H)	L&C AT 3:15 PM BARNES 124
02/20/17	(H)	Heard & Held
02/20/17	(H)	MINUTE(L&C)
03/01/17	(H)	L&C AT 3:15 PM BARNES 124
03/01/17	(H)	<Bill Hearing Canceled>
03/06/17	(H)	L&C AT 3:15 PM BARNES 124
03/06/17	(H)	Heard & Held
03/06/17	(H)	MINUTE(L&C)
03/08/17	(H)	L&C AT 3:15 PM BARNES 124
03/08/17	(H)	<Bill Hearing Canceled>
03/15/17	(H)	L&C AT 3:15 PM BARNES 124
03/15/17	(H)	-- MEETING CANCELED --
03/17/17	(H)	L&C AT 3:15 PM CAPITOL 106
03/17/17	(H)	<Bill Hearing Canceled>
03/20/17	(H)	L&C AT 3:15 PM BARNES 124
03/20/17	(H)	Heard & Held
03/20/17	(H)	MINUTE(L&C)
03/22/17	(H)	L&C AT 3:15 PM BARNES 124
03/22/17	(H)	Moved CSHB 79(L&C) Out of Committee
03/22/17	(H)	MINUTE(L&C)
03/24/17	(H)	L&C RPT CS(L&C) NT 3DP 1DNP 1NR 2AM
03/24/17	(H)	DP: JOSEPHSON, STUTES, KITO
03/24/17	(H)	DNP: KNOPP
03/24/17	(H)	NR: WOOL
03/24/17	(H)	AM: SULLIVAN-LEONARD, BIRCH
03/31/17	(H)	JUD AT 1:00 PM GRUENBERG 120
03/31/17	(H)	Heard & Held
03/31/17	(H)	MINUTE(JUD)
04/05/17	(H)	JUD AT 1:00 PM GRUENBERG 120

WITNESS REGISTER

STEVEN CONSTANTINO, Attorney
Anchorage, Alaska

POSITION STATEMENT: During the hearing of HB 79, testified regarding provision in the legislation.

AVES THOMPSON, Executive Director
Alaska Trucking Association
Anchorage, Alaska

POSITION STATEMENT: During the hearing of HB 79, offered support for the legislation.

DON ETHRIDGE
American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)
Anchorage, Alaska

POSITION STATEMENT: During the hearing of HB 79, offered support for the legislation.

TINA KING
Alpine Surgery Center
Anchorage, Alaska

POSITION STATEMENT: During the hearing of HB 79, offered concern for the legislation.

ERNIE EADS
Thorne Bay, Alaska

POSITION STATEMENT: During the hearing of HB 79, offered support for the legislation.

ELLIOTT DENNIS, Attorney
Anchorage, Alaska

POSITION STATEMENT: During the hearing of HB 79, testified to certain provisions.

COLBY SMITH, Attorney
Griffin & Smith
Anchorage, Alaska

POSITION STATEMENT: During the hearing of HB 79, testified regarding certain provisions.

BRONSON FRYE
Painters Union Local 1959
D.C. Washington

POSITION STATEMENT: During the hearing of HB 70, offered support for the legislation.

CHRIS NETTLES, President
GeoTek Alaska
Anchorage, Alaska

POSITION STATEMENT: During the hearing of HB 79, offered concern regarding the independent contractor definition.

KEVIN BARRY, Administrator/CEO
Alaska Surgery Center, Alaska Spine Center
Anchorage, Alaska

POSITION STATEMENT: During the hearing of HB 79, offered concern regarding certain provisions.

MARIE MARX, Director
Division of Workers' Compensation
Department of Labor & Workforce Development (DLWD)
Juneau, Alaska

POSITION STATEMENT: During the hearing of HB 79, testified and answered questions.

ACTION NARRATIVE

[2:03:35 PM](#)

CHAIR MATT CLAMAN called the House Judiciary Standing Committee meeting to order at 2:03 p.m. Representatives Claman, Eastman, Fansler, and Kreiss-Tomkins were present at the call to order. Representatives Kopp, LeDoux, and Reinbold arrived as the meeting was in progress.

HB 79-OMNIBUS WORKERS' COMPENSATION

[2:04:06 PM](#)

CHAIR CLAMAN announced that the only order of business would be HOUSE BILL NO. 79, "An Act relating to workers' compensation; repealing the second injury fund upon satisfaction of claims; relating to service fees and civil penalties for the workers' safety programs and the workers' compensation program; relating to the liability of specified officers and members of specified business entities for payment of workers' compensation benefits and civil penalties; relating to civil penalties for underinsuring or failing to insure or provide security for workers' compensation liability; relating to preauthorization and timely payment for medical treatment and services provided to injured employees; relating to incorporation of reference materials in workers' compensation regulations; relating to proceedings before the Workers' Compensation Board; providing for methods of payment for workers' compensation benefits; relating to the workers' compensation benefits guaranty fund authority to claim a lien; excluding independent contractors from workers' compensation coverage; establishing the

circumstances under which certain nonemployee executive corporate officers and members of limited liability companies may obtain workers' compensation coverage; relating to the duties of injured employees to report income or work; relating to misclassification of employees and deceptive leasing; defining 'employee'; relating to the Workers' Compensation Board's approval of attorney fees in a settlement agreement; and providing for an effective date."

CHAIR CLAMAN opened public testimony on HB 79.

[2:05:31 PM](#)

STEVEN CONSTANTINO, Attorney, advised he has been in the private practice of law representing injured workers for the last 20 years. He then commended Governor Bill Walker, Commissioner Heidi Drygas, and Director Marie Marx for their efforts in modernizing and streamlining the Workers' Compensation Act in its much needed reform. There are several good parts of this bill, he commented, and Sec. 14 addresses the problem of employees being left in limbo when an employer does not authorize medical care or controvert the care. The Supreme Court's decision in M-K Rivers v. Harris, 325 P.3d 510 (2014) (cited in Governor Walker's 01/24/17 transmittal letter) and a later decision in Bockus v. First Student Services, 384 P.3d 801 (Alaska 2016), suggest that, in some circumstances it may be an insurer's duty to authorize uncontroverted care, but it was not a specific duty and had no time limits. This bill clarifies the law by providing that when a medical provider seeks authorization, the insurer has 60 days to either authorize or controvert the medical care, and failure to authorize would be a controversion.

[2:06:52 PM](#)

MR. CONSTANTINO noted concern that in order to trigger the 60 days, the provider must submit a written statement or estimate of cost within the Workers' Compensation Board's maximum pay schedule. He represented that when looking at his medical bills from providers and what the insurance companies pay, medical providers often have retail charges well in excess of what his insurer pays and what would be payable under the Workers' Compensation Act. Most providers know they cannot collect more fees than is payable under the Workers' Compensation Act; therefore, the provision of the estimate of fees is unnecessary, he pointed out.

MR. CONSTANTINO referred to Sec. 20 [AS 23.30.155(b), page 10, lines 12-19] which read as follows:

(b) The first installment of compensation, excluding medical benefits, shall be paid [BECOMES DUE] on or before the 21st [14TH] day after the employer has knowledge of the injury or death. [ON THIS DATE ALL COMPENSATION THEN DUE SHALL BE PAID.] Subsequent compensation, excluding medical benefits, shall be paid in installments, every 21 [14] days, except where the board determines that payment in installments should be made monthly or at some other period. Medical benefits shall be paid in accordance with AS 23.30.095 and 23.30.097.

[2:08:51 PM](#)

MR. CONSTANTINO noted that HB 79 changes the compensation rate payment cycle from 14 days to 21 days, and that he heard the administration's reasoning. However, he pointed out, this presents a significant problem to injured workers as most people live paycheck-to-paycheck. In the event a person is on workers' compensation, he advised, the person does not receive a full paycheck, and in fact, receives 20 percent less than their spendable weekly wage at a minimum, a high wage earner can receive less than one-half of their spendable weekly wage. People have bills to pay and in the event insurers have a 21 day time limit, they are certain to delay until the 21st day, he remarked.

MR. CONSTANTINO expressed that he has strong feelings about Secs. 31, 32, and 33, [pages 18-19] in making it a criminal fraud to fail to report a material fact even though a material fact changes with whatever benefits are at stake. He related that making it a criminal act to fail to report a material fact is void for vagueness and is unconstitutional.

[2:09:14 PM](#)

MR. CONSTANTINO responded to Representative Reinbold that he had referred to the fraud sections, Secs. 31, 32, and 33, which makes it both a crime and a civil action to knowingly fail to report a material fact. He then referred to Sec. 33, and advised that it defines some material facts as collecting workers' compensation and working "that's obvious," but it also read that the collection of disability benefits while working is a material fact. Disability benefits, he opined, alludes to

social security for which insurers have an offset, but it also could include private disability insurance which is not subject to any offset. Finally, he explained, employment is defined as including employment for which there is no pay, so in other words, he questioned whether, in the event a minister noticed someone was out-of-work and asked the person to teach Sunday school, would the person have to report that fact, who do they report it to, and when do they report.

2:11:01 PM

MR. CONSTANTINO, in response to Representative Reinbold's request, advised he was in the process of putting his remarks in writing and would forward it to the committee.

2:11:22 PM

CHAIR CLAMAN advised that his office would distribute the 4/3/17 letter from Joseph Kalamarides and 3/31/17 letter from Michael Jensen concerning these topics, specifically Secs. 31, 32, and 33. He advised that the two letters were written by two workers' compensation attorneys who work for claimants, and addressed the issues Mr. Constantino raised.

2:13:06 PM

AVES THOMPSON, Executive Director, Alaska Trucking Association, read his testimony into the record as follows:

Mr. Chairman and members of the committee, I'm Aves Thompson, Executive Director of the Alaska Trucking Association. The Alaska Trucking Association is a statewide organization representing the interests of our nearly 200 member companies from Barrow to Ketchikan.

I testified before this committee on March 29, generally in support of this bill; however, with some concerns about specific provisions of the paragraph dealing with definitions of independent contractors, or as we call them in the trucking business, owner/operators. We've worked with the Department of Labor & Workforce Development to resolve these issues. In meetings with Commissioner Drygas and Director Marx we came to agreement with two minor changes in CSHB 79, specifically Sec. 28, [AS 23.30230(a)(11)(H)(ii), page 17, lines 1-3] dealing with business location on

page [17] on line 1. We have agreed to add a phrase "or a business mailing address" after the word "location". The new language will read: "the person maintains a business location or a business mailing address separate from the location of the individual for whom, or the entity for which, the services are performed.

[2:14:31 PM](#)

In this section, business location or business mailing address is given wide latitude to thought -- to define a location or office. Long term, the public cannot rely on the assurance of the DLWD [Department of Labor & Workforce Development] personnel that this will be broadly interpreted. Small and mobile contractors need certainty that they will not be deemed misclassified or put out of business simply because their work does not require, or is too small to support a separate physical office or location. Thus, the use of either location or mailing address.

Sec. 28, [AS 23.30230(a)(11)(H)(iii), page 17, lines 4-6] dealing with advertising or marketing, starting on page [17] line 4, we agreed to add the phrase "any kind of" after the word "in" on line 4. The new language will read: "the person engages in any kind of business advertising, solicitation, or other marketing efforts reasonably calculated to obtain new contracts to provide similar services." The intent is that this paragraph be interpreted in its broadest sense. In many situations advertising may include many different forms of advertising or marketing. Some examples might be word of mouth, in person meetings, or other direct communication with potential customers, business card exchange, social media, posting of flyers, and solicitation letters. Thus, the phrase "any kind of".

We support this bill, we thank Commissioner Drygas and Director Marx for their willingness to work with us to find a workable solution. It is our intent to develop a set of definitions that, to the largest extent possible in the future, can be used within the three divisions within the department, workers' compensation, wage and hour, and unemployment

insurance. And, I'll be happy to try to answer any questions, Mr. Chairman.

CHAIR CLAMAN noted that his office worked with the department to prepare Amendment 1, addressing those issues.

[2:17:12 PM](#)

DON ETHRIDGE, American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), advised he is testifying on behalf of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) Alaska, and it fully supports this legislation. An important aspect of the bill to the AFL-CIO Alaska is [Sec. 28, AS 23.30.230(a)(11), beginning page 15] the independent contractor definition because for over 20 years, in this building, it fought to come up with a longstanding definition of independent contractor that could be a true test, rather than the 20 point test. He related that the AFL-CIO believes this bill accomplishes a well-defined definition, and it is fully supportive of Sec. 28. He related there has been a problem for years wherein someone was injured, had been classified as an independent contractor, and yet it was later determined they were an employee and fell under workers' compensation. Many unscrupulous people try to get by with [classifying a worker as an independent contractor] because they can save money and bid lower jobs. However, he pointed out, when a worker is injured [and the worker is actually an employee] the employer can lose their business in a lawsuit, and their insurance costs will skyrocket. Not only is the employer responsible for the cost of the insurance, but there are also penalties, he advised.

[2:19:17 PM](#)

TINA KING, Alpine Surgery Center, advised that she has been involved in billing, coding, and the management of surgery centers for 25 plus years. She then referred to [Sec. 15. AS 23.30.098(a)(15-16), page 9, lines 13-16], which read as follows:

(15) Hospital Outpatient Prospective Payment System, produced by the federal Centers for Medicare and Medicaid Services; or

(16) Ambulatory Surgical Center Payment System, produced by the federal Centers for Medicare and Medicaid Services.

MS. KING requested that lines 13-16 be removed from HB 79. She then explained that it becomes confusing when attempting to apply a payment system designed for folks over the age of 65 years, to a younger population. The payment system (technical difficulties) there is some intention to co-mingle those two systems which would make things far more confusing for, not only the providers, but payers in the state to interpret.

2:21:03 PM

ERNIE EADS advised that he submitted written comments to the committee, and that he supports HB 79 as "it is one of those things that does get done"

REPRESENTATIVE KREISS-TOMKINS asked Mr. Eads to explain his support of the legislation.

MR. EADS responded that "I've been beat to death and back, actually right on my last leg as far as wanting to stay in business," and it had been almost eight years since he bought a timber (indisc.). Although, he explained, he's been a high bidder and has bid on many timber sales, but he is not a competitive bidder due to his higher wages and higher costs. This bill appears to give workers' compensation some teeth, he described, and "I'm hoping that they can get funded to do their job."

2:22:28 PM

ELLIOTT DENNIS, Attorney, advised he has practiced workers' compensation law and personal injury law for over 40 years. He related that it could not be emphasized enough that delay is the enemy of an injured worker because an injured worker is no longer earning money, they are in pain, not able to pay their bills, not able to take care of life, and they are scared. There are many good things in this bill from the standpoint of clarification but, he stressed, anything adding more time to the process and causing a delay to an injured worker receiving compensation is not appropriate. He referred to Mr. Constantino's testimony regarding the change from 14 to 21 days, and noted it is harmful to real life people and their families and that it does not appear to be necessary. He stressed that with respect to Sec. 14, [AS 23.30.097(d)] allowing an employer or insurer 60 days to either authorize or controvert a procedure is far too much time. For example, after an injured worker is referred to a specialist by their treating physician, it can take over six to eight weeks to get into see the specialist who

then determines whether the injured worker requires surgery. In the event the specialist determines the person does need surgery, the practitioner then makes a statement to the insurer, and if the insurer had 60 more days that would be "120 days before the procedure was just approved" and that's not even getting into the surgery schedule, he pointed out. The time period should be trimmed down as there is not a real reason for it, he stressed, other than convenience toward the insurers while being harmful to injured workers.

[2:25:59 PM](#)

CHAIR CLAMAN asked whether he typically represents the employer or the employee when involved in workers' compensation cases.

MR. DENNIS answered that, typically these days, he represents injured workers. For many years he practiced insurance defense law representing insurance companies in tort cases, and for several years has practiced some defense work for employers, so he has seen this issue from both sides of the equation, he remarked.

[2:26:57 PM](#)

REPRESENTATIVE KREISS-TOMKINS referred to [Sec. 15, AS 23.30.098] and asked his perspective as to the inclusion of the various medical entities' documents and the potential to effect medical reimbursement rates.

MR. DENNIS replied that he does not know enough about that aspect to offer any guidance.

REPRESENTATIVE LEDOUX commented that she was opposing counsel to Mr. Dennis in a case about 35 years ago, and said hello.

MR. DENNIS responded that he still recalls sitting in Representative LeDoux's office in Kodiak and opined that he represented the defense at that time.

[2:28:27 PM](#)

COLBY SMITH, Attorney, Griffin & Smith, advised he is with the law firm of Griffin & Smith, is not testifying on behalf of any of his clients, and that for the last 15 years he has exclusively represented employers with workers' compensation issues. He described the bill as courageous and commended everyone's efforts with so much being in this bill. He referred

to Sec. 17 [AS 23.30.110(c), page 9, lines 25-28] and noted it changes the current statutory allowance for non-attorneys to handle workers' compensation issues. Speaking from his perspective, he has seen non-attorneys put injured workers in the position of no remedy because a non-attorney missed a statutory deadline, for example, they have no recourse to handle that issue, or are given bad advice.

[2:29:48 PM](#)

MR. SMITH pointed to an unintended consequence of this bill as currently written, [Sec. 17. AS 23.30.110(d), page 9, lines 26-28] and suggested an amendment that would read as follows:

(d) At the hearing, each party may present evidence with respect to the claim and may be self-represented, **or supervised by an attorney license to practice law in this state,**

MR. SMITH explained that the suggested amendment would essentially allow a paralegal to attend various proceedings, which they do currently, and allows that paralegals would not be practicing the unauthorized practice of law, and this provision is still effectuating and accomplishing the bill's intended goal. He then referred to Sec. 31, [AS 23.30.250(b)], and the previously testified concerns, and suggested an amendment, and then said, "a person ... if an amendment says an employee in dealing with the fraud aspect of this, I think it will solve a large number of the concerns that were coming in." Basically, he noted, since 2010 and once again in 2013 there were two Alaska Supreme Court cases where the issue of fraud made its way all the way to the Supreme Court. In 2010, Shehata v. Salvation Army, 225 P.3d 1106 (Alaska 2010), dealt with an injured worker being paid by the employer, who constantly called the adjuster advising he could not work because he was completely disabled and he needed his checks. Surveillance was performed and the person was filmed making a phone call to the adjuster and then walked into their place of employment. The employer pursued the former statute of fraud because the person collected time loss benefits and was working.

CHAIR CLAMAN advised Mr. Smith to please start wrapping up his testimony, and noted there is an amendment dealing with that topic and the Shehata case is on the list for discussion.

MR. SMITH noted that he knows Shehata well because he represented the Salvation Army. Essentially, he advised, it was

determined that it was not fraud up until the telephone call, so even though he worked and received workers' compensation benefits, no fraud had been committed. The other case is Cummings v. ASRC, 295 P.3d 916 (Alaska 2013), which was a similar case where someone was working and the person said they were volunteering even though they were signing checks saying they were not accepting any income. He opined that the attempt of this statute is to broaden the fraud statute to enclose that because in both cases the Supreme Court indicated that unless it was legislatively changed, these actions would not be considered fraud.

[2:33:38 PM](#)

BRONSON FRYE, Painters Union, advised he is a representative of the Painters Union, and a lifelong Alaskan and painter by trade. On behalf of the International Union of Painters and Allied Trades endorsed HB 79, due specifically to the definition of independent sub-contractor and misclassification. He described it as relevant in the Alaska construction industry because a business model had taken root whereby certain unscrupulous construction employers required, as a condition of employment, that their workers obtain business licenses and perform as "so called independent sub-contractors or owner/operators." Oftentimes up to 13 individual so called independent contractors perform one task, such as drywall finishing on one building on one job, he explained. This is such a detriment to the construction industry, he described, due to the bidding process employers use to be awarded contracts. When a construction contractor sits down to bid a job they calculate the cost of materials, overhead, the time it takes to look at prints, work up the numbers, and process the percentage they put into their pockets at the end, which are all fixed costs that are about the same for every employer, he explained. The labor costs are the only real variable in the equation and the person with low labor costs oftentimes has the low bid and is awarded the job. In the event an employer chooses to misclassify their workers as independent sub-contractors rather than employees, they are no longer required to pay workers' compensation premiums or associated payroll taxes. Construction work is inherently dangerous and workers' compensation is expensive and up to 30 percent of labor costs can be cut by simply miss-classifying employees as independent contractors, thereby, giving the employer a substantial advantage over the competition. The reality is a fairness in contracting issue because honest employers are forced to either adopt this unscrupulous business model themselves, or simply be forced out of business

completely. He expressed that employers who lawfully profit by classifying their workers as employees cannot get their contracts for work through the construction bidding process because they are competing against dishonest employers who game the system by misclassifying their workers in order to cut labor costs. He stressed that HB 79 will rectify this problem by creating a clear definition of an independent contractor so there is no ambiguity in the law and everyone bidding the project will be doing so in a fair and equitable manner.

2:37:23 PM

CHRIS NETTLES, President, GeoTek Alaska, advised he is testifying on behalf of the National Federation of Independent Businesses (NFIB) and as president of his company, GeoTek Alaska. He explained that his company mostly engages in drilling for environmental geotechnical projects statewide, and has also worked for the State of Alaska. On the basis of geophysical consulting, he referred to [Sec. 28. AS 23.30.230(a)(11), beginning page 15, beginning line 29], the definition between a contractor and an employee, and offered concern about unintended consequences because these are "pretty specific definitions." The NFIB could "probably live with this," he opined, if subparagraph (H) was removed, having to do with setting up a business and its due diligence because it does not necessarily define whether a person is an employee or an [independent] contractor. Down the road, he speculated, a regulator could get "pretty tough" with someone in the consulting business who doesn't have their own tools and such, and commented that these definitions appear to be written toward the construction business to specifically define employee from an [independent] contractor, as well as the business of real estate. The real estate business located in [Sec. 28. AS 23.30.230(a)(10), page 15, lines 23-28] receives an exclusion from this and a realtor is automatically defined as an independent contractor. In the event realtors can meet all of the definitions of paragraph (11), he asked why realtors need an exclusion. Also, he opined, that when making these specifics for the construction industry, there are problems with the language on the consulting side. He then provided brief background information regarding a snowcap skiing business he owned in Hatcher Pass, and expressed that he is not in favor of the bill as currently written, and noted that compromises can be reached.

2:41:31 PM

KEVIN BARRY, Administrator/CEO, Alaska Surgery Center, Alaska Spine Center, advised that adopting the federal guidelines for Medicare and applying them to medical services for injured workers will create confusion for both the medical providers and insurers as Medicare patients and injured workers are two different and distinct types of patients. The billing and coding procedures within the federal reference guidelines conflict with commercial insurance processes for workers' compensation. As a medical practitioner, he offered concern about the future ability of injured workers to receive the care they need if these federal reference guidelines are adopted into law without a more meaningful opportunity to discuss the impacts with a both a legislator and the administration. He asked that the committee remove the two medical reference guides for Hospital Outpatient Prospective Payment System (OPPS) and Ambulatory Surgery Center Payment System from HB 79. He noted his understanding that Representative Kopp has an amendment regarding this issue and asked the committee to support the amendment.

[2:43:11 PM](#)

CHAIR CLAMAN listed the people available to answer questions.

CHAIR CLAMAN closed public testimony on HB 79, after ascertaining no one further wished to testify.

[2:44:11 PM](#)

REPRESENTATIVE FANSLER moved to adopt Amendment 1, labeled 30-GH1789\0.4, which read as follows:

Page 17, line 1, following "location":
Insert ", or a business mailing address,"

Page 17, line 4, following "in":
Insert "any kind of"

REPRESENTATIVE KREISS-TOMKINS objected for purposes of discussion.

[2:44:57 PM](#)

MARIE MARX, Director, Division of Workers' Compensation, Department of Labor & Workforce Development (DLWD), in addressing concerns from the Alaska Trucking Association,

explained that Amendment 1 clarifies that the business location would include a business mailing address to support the evidence of a separate business location, and clarifies the advertising requirement provision that it is any type of advertising within [Sec. 28. AS 23.30.230(a)(11)(H)(iii)]. She referred to her past testimony and said there was concern that the provision may be interpreted narrowly, and Amendment 1 confirms that the advertising prong is interpreted broadly.

[2:46:11 PM](#)

REPRESENTATIVE LEDOUX asked whether that would include someone orally holding themselves out as someone who does something, such as at a rotary meeting.

MS. MARX responded that "any kind of" is fairly broad and the Alaska Workers' Compensation Board, the entity tasked with weighing and evaluating facts, would look at all of the evidence. Evidence of oral comments is something the board would review to determine whether it was sufficient, it's up to the board to determine so she was hesitant to answer. Although, she said the Alaska Workers' Compensation Board can consider hearsay if it is collaborated by other evidence, and that type of evidence is something the board would review and interpret when looking at any type of advertising.

[2:47:19 PM](#)

REPRESENTATIVE KREISS-TOMKINS withdrew his objection to Amendment 1.

[2:47:25 PM](#)

REPRESENTATIVE EASTMAN objected.

CHAIR CLAMAN advised Representative Eastman that upcoming Amendment 5, offered by Representative Reinbold would actually remove these subparagraphs and in the event Amendment 5 was adopted, this would become a non-issue.

REPRESENTATIVE EASTMAN argued that this does not resolve his concern as the committee is creating broad definitions to offset the fact that it is adding to laws and regulations, and making previously legal issues illegal.

[2:48:23 PM](#)

A roll call vote was taken. Representatives Kopp, Kreiss-Tomkins, LeDoux, Fansler, Claman voted in favor of the adoption of Amendment 1. Representative Eastman voted against it. Therefore, Amendment 1 was adopted by a vote of 5-1.

[2:49:00 PM](#)

REPRESENTATIVE LEDOUX moved to adopt Amendment 2, labeled 30-GH1789\0.2, which read as follows:

Page 10, line 14:
Delete "21st [14TH] "
Insert "14th"

Page 10, line 17:
Delete "21 [14] "
Insert "14"

Page 10, line 18, following "period."
Insert "If an installment of compensation due under this subsection is not paid within 14 days, a grace period will not be allowed and an additional amount will become due under (e) of this section."

REPRESENTATIVE FANSLER objected for purposes of discussion.

[2:49:10 PM](#)

REPRESENTATIVE LEDOUX explained that Amendment 2 eliminates the grace period for insurers, discussed at the 3/31/17 hearing, which the Division of Workers' Compensation has given with respect to workers' compensation payments that are supposed to be paid within 14 days. The grace period allows the insurer to make payments to the injured worker within 21 days, and she opined that the division was trying to put into law the fact that insurers actually pay within 21 days, including the grace period. She explained that Amendment 2 requires a hard 14 days for workers' compensation payment and if the insurer doesn't pay within 14 days, the penalties go into play.

[2:50:24 PM](#)

MS. MARX referred to Amendment 2, and explained that it was changed from 14 days, with a 7 day grace period, to 21 days to "call a spade a spade." For efficiency purposes, the division thought to just call it 21 days, and it did not intend to

shorten that timeframe from 21 days to 14 days. Therefore, she related, the department is neutral on that issue.

[2:51:28 PM](#)

REPRESENTATIVE EASTMAN asked whether Amendment 2 would install a penalty for compensation determined to be eligible retroactively. He clarified his question and asked that if there was a determination that hadn't yet been made on whether or not compensation was appropriate, and [then later] upon that eligibility determination whether penalties would be applied to that compensation.

MS. MARX said she was unclear what Representative Eastman was asking, and explained that Amendment 2 changes an installment of compensation due, meaning time lost wages benefits. Currently, an employer has a duty to pay or controvert within the timeframes provided by statute, and in the event they do not perform one of those two requirements, a penalty is due regardless of whether, ultimately, they are responsible for that care. The purpose, she explained, is that there is some certainty as to whether the medical care will be paid. Although, if the employer denies that coverage within the timeframe and has a basis to deny the coverage, no penalty is due. She explained that it is when no action was taken that a penalty would be due.

[2:53:05 PM](#)

REPRESENTATIVE FANSLER withdrew his objection to Amendment 2, there being no objection, Amendment 2 was adopted.

[2:53:21 PM](#)

REPRESENTATIVE KOPP moved to adopt Amendment 3, labeled 30-GH1789\0.7, which read as follows:

Page 9, line 10, following "Services";:

Insert "or"

Page 9, lines 12 - 16:

Delete ";"

(15) Hospital Outpatient Prospective Payment System, produced by the federal Centers for Medicare and Medicaid Services; or

(16) Ambulatory Surgical Center Payment System, produced by the federal Centers for Medicare and Medicaid Services"

REPRESENTATIVE FANSLER objected for purposes of discussion.

2:53:25 PM

REPRESENTATIVE KOPP related that the committee received approximately 15 letters from ambulatory surgical centers and independent practitioners that may or may not perform surgery, voicing concerns. The first concern was that the state had recently adopted new medical reimbursement regulations that they were just beginning to understand and implement. This legislation adopts federal reference guides for Medicare and applies them to medical services for injured workers, which creates confusion in the law for both medical providers and insurers because they are two distinct types of patients, one being the elderly and the infirmed, and the other injured workers on the job. It does conflict with commercial insurance regulations currently applicable, he related. Another concern was that these two standards currently in the law, Hospital Outpatient Prospective Payment System and Ambulatory Surgical Center Payment System, reimburse at significantly different rates. They are based on Centers for Medicare and Medicaid Services, and the rates are biased toward larger payments to hospitals, and a reduced payment for the surgical centers. He advised that surgical centers do see Medicare patients but almost as "mission work, because they are already getting their reduced rate." Adopting this standard will further decrease incentive and a center to see Medicare patients, which includes access to the care that Medicare patient's need, which currently largely entails choosing between large hospitals rather than the further option of outpatient medical surgical centers. He related that the letters indicate that if the legislature's goal is cost containment of health care costs, then they asked for time to engage the legislature and the administration on what it means to be reimbursed under these two different rates. Removing these references from the bill would promote a better health care policy, he explained, allow access to care facilities, and an opportunity to see how the current medical regulations impact its ability to deliver care. He did speak with the governor's administration about this issue and it is supportive of Amendment 3, he advised.

2:56:32 PM

REPRESENTATIVE KREISS-TOMKINS referred to the list of medical publications the department can reference in amending

regulations, and asked the implications of new publications being added to this list.

MS. MARX replied that the removal of the entities listed in Amendment 3, are not critical because all of the substantive decisions regarding what reference materials to incorporate are, by statute, made through the Medical Service Review Committee (MSRC) and the Workers' Compensation Board through regulation. The list of reference materials is procedural to advise that future amended versions of the reference material already being used can be updated as they become available. In the event the two are removed, the remainder of the reference material already being used will be updated January 1, 2018, except those two will be one year behind. She reiterated that the administration does not object to this amendment because it is not critical and does not affect the substance of the medical fee schedule because that is decided at the MSRC and Workers' Compensation Board level.

[2:58:47 PM](#)

REPRESENTATIVE KREISS-TOMKINS asked that if Amendment 3 is non-critical, why is there such a negative response from the surgical community toward the inclusion of these two references.

CHAIR CLAMAN said he would let Ms. Marx answer, but advised Representative Kreiss-Tomkins that it would be speculation as to their objections.

MS. MARX offered concern that she may misstate public testimony and other's positions, and said she would speak from her understanding and not put words into the mouths of stakeholder groups. She opined that ultimately, the concerns are with regard to the continued struggle to balance the high costs of medical costs and bringing those down, against injured workers' rights and medical providers providing care. The division is working hard to strike the right balance and stakeholder groups expressed frustration as to cost containment efforts. She related that the division met with medical providers who expressed frustration that the cost containment measures are directed toward the medical community; the division met with injured worker groups who expressed frustration that cost containment is on the backs of injured workers; and the division met with insurer and employer groups who all are similarly frustrated. She described it as a balancing system, and noted that the objections to its inclusion in HB 79 stem from overall frustration with the cost containment measures the legislature

directed the department to take regarding cost containment of medical bills.

[3:00:54 PM](#)

REPRESENTATIVE KREISS-TOMKINS said he was unsure whether anyone was available to answer his question, it was determined that Ms. King could respond, and she asked him to repeat his question.

REPRESENTATIVE KREISS-TOMKINS referred to Amendment 3, and asked that if these two reference materials are not substantive or critical to the bill, why do they elicited such a strong negative response from the medical community. He further asked her opinion as to the inclusion of these two reference materials.

MS. KING responded that it is more substantive than the Workers' Compensation Board may realize with its unintended consequences as they are already using both of these documents in the Workers' Compensation Fee Schedule, effective April 1, 2017. She described confusion and opined that she is correct in saying that "we're" just getting used to the payment system established in December 2015, and that adding this extra layer comingling the two separate payments systems, is very confusing. She pointed out the importance of offering the vast differences in the payment system between an outpatient department of a hospital (HOPD), and an ambulatory surgery center (ASC), and Centers for Medicare and Medicaid (CMS). The two payment systems are vastly different, she explained, and "we" are paid at a much lower rate than the ASC's are paid. She reiterated that she has been in medical billing for greater than 20 years and she cannot interpret this new payment system, and if she can't understand it then certainly small insurance companies will not be able to figure how to pay "us," and that currently they are not even being paid correctly. Insurance companies are not on board with the system put in place in December 2015, she pointed out, and this will make it much more for difficult for insurance companies to interpret and try to make payments. She continued that a federal register is being incorporated within HB 79, and there are hundreds and hundreds of pages so this ability for them to incorporate, at any time or amend the payment system at any time, within those hundreds of pages without any kind of oversight or conversation or anything for the insurance companies, the state, and the providers, is concerning to her.

[3:06:18 PM](#)

REPRESENTATIVE LEDOUX asked whether the coding system offered by the American Medical Association (AMA) is no longer relevant, and further asked whether all coding is done by the Centers for Medicare and Medicaid Services (CMS). She then referred to [Sec. 15. AS 23.30.098(a)(2)] page 8, lines 16-18, which read as follows:

(2) Healthcare Common Procedure Coding System, produced by the federal Centers for Medicare and Medicaid Services [AMERICAN MEDICAL ASSOCIATION];

MS. KING answered that the AMA applies a list of rules and regulations for every group of CPT codes, and those rules and regulations are expected to be followed. The CMS then compounds the rules and regulations for each and every CPT code. Therefore, she said, when she bills an insurance company she follows the rules of the AMA, and when billing to Medicare or Medicaid she follows the Medicare rules and guidelines.

[3:08:08 PM](#)

REPRESENTATIVE LEDOUX offered that she does not understand why Medicare and Medicaid are written into this bill because people billing workers' compensation are supposed to use the procedure code of the AMA, and commented that she doesn't know what Medicare and Medicaid have to do with this issue.

MS. MARX answered that when House Bill 316 [passed in the 28th Alaska State Legislature], it completely changed the methodology and changed how maximum reimbursement is calculated under the Alaska Workers' Compensation Fee Schedule. She explained that a base value is established by the Centers for Medicaid and Medicare Services, and to that base value, Alaska, through the Medical Services Review Committee (MSRC) and the Workers' Compensation Board, determine a multiplier. The MSRC's recommendation in the report was that they now had the codes, they needed some rules and guidelines around implementing this system. She explained that rather than reinventing the wheel, a call was made that there are many codes and rules out there being used by both the American Medical Association and Centers for Medicaid and Medicare Services, systems across the nation that people are familiar with. The MSRC recommended and the board adopted the recommendation agreeing to spend money coming with a completely new book of rules and guidelines, and rather, would use what was already in existence. When it doesn't make sense for Alaska, she offered, parties can go to the Medical

Services Review Committee (MSRC) to explain their concerns, the MSRC can then carve out an Alaska exception, which has been done in multiple instances.

[3:10:27 PM](#)

MS. MARX offered that chiropractor stakeholder groups went before the MSRC and raised concerns that the guidelines for Centers for Medicare and Medicaid Services didn't allow reimbursement of services, such as electrical stimulation.

The MSRC agreed to allow that the service to be reimbursable and carved out something specific for Alaska. She offered her understanding that at one point, before she was its director, the division contracted to determine its own fee schedule and it cost the division about \$20,000 to \$30,000 per year. She remarked that when there is a conflict between the rules of the American Medical Association and the rules of the Centers for Medicaid and Medicare Services, regulation read that the American Medical Association has control.

[3:11:39 PM](#)

REPRESENTATIVE LEDOUX commented that she did not want to follow up because it is "about as clear as mud right now."

CHAIR CLAMAN noted that when the bill was passed a few years ago there was a recognition that both employees and employers wanted to get better control on costs for medical services. Therefore, there was an effort to determine a reasonable price to pay in Alaska.

MS. MARX responded that the methodology was chosen because the existing one was inherently inflationary as it paid the 90th percent of whatever the 90th percentile was of doctors' charges.

[3:12:26 PM](#)

CHAIR CLAMAN noted that the committee was created to actually look at prices and come up with a basis to determine a reasonable price to pay in Alaska, and it realized that the Medicare and Medicaid rates were, on a national level, much lower than what doctors were paid in Alaska for private services and by insurance companies. Rather than determining it would just adopt the Medicare and Medicaid rates, it noted that many doctors won't take Medicare and Medicaid patients. He surmised that it decided to start with the Medicare or Medicaid rate, and

use a multiplier to determine the Alaska rate which, hopefully, pushes down some of the inflationary concern Ms. Marx addressed. He then referred to all of the referenced materials, and offered that they are not meant to set the price per se, but they are the basis upon which the multiplier is applied, and this commission then decides the right multiplier to apply to the Medicare and Medicaid rates.

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MS. MARX related that he was mostly correct, and said she would go farther to say that the committee actually decides "which of these" it wants to use initially and "which of these" it wants to change, which is why Amendment 3 is not critical. The Medical Services Review Committee (MSRC) agreed that it chooses the multiplier, makes recommendations on the rules, and what to use in reference material. She remarked that the committee makes recommendations annually, per statute, and it goes to the board for approval or non-approval, and it addresses more than just the amounts. Based upon public comment, she explained, the committee can decide to not use the outpatient system for ambulatory surgical centers, or adopt the ambulatory surgical payment system set of rules and coding guidelines for ambulatory surgical centers, which is within purview of the Medical Services Review Committee (MSRC).

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CHAIR CLAMAN surmised that by adopting Amendment 3, "we would essentially be saying to the committee" it can use all of the current version of these different guidelines listed on pages 8-9 of the bill, but will have to use the older versions of the Hospital Outpatient Prospective Payment System, and the Ambulatory Surgery Care Payment System in making its decision. He related, "That information will be there from prior years, but not for the most current year. And so, that's mostly what this amendment does is take out the most current year's information on those rates from the CMS."

MS. MARX said he was correct, they just wouldn't be updated by telling people "We're using the most current version," as it would go through the regulatory process which takes about one year. She reiterated that those two references would be approximately one year behind if the MSRC preferred to use the most current version.

[3:15:36 PM](#)

REPRESENTATIVE REINBOLD asked Ms. Marx to identify the individuals on the Medical Services Review Committee (MSRC).

MS. MARX responded that currently, under AS 23.30.095(j), the commissioner appoints members of the committee to determine a fee schedule, and nine members are appointed by the commissioner of the Department of Labor & Workforce Development (DLWD). She described that one member is affiliated with the Alaska State Medical Association, one member affiliated with the Alaska Chiropractic Society, one member affiliated with the Alaska State Hospital and Nursing Home Association, and one member is a health care provider, together with four public members not within the definition of a health care provider. She further explained with regard to the public members "that has been one member from labor, and some people from -- who have billing expertise from the industry adjusters, and from Alaska Timber Insurance Exchange, Alaska National Insurance provide some billing expertise." One member designated by the commissioner to serve as chair, which is Ms. Marx as director of the Division of Workers' Compensation, she related.

[3:17:03 PM](#)

REPRESENTATIVE KREISS-TOMKINS related that it appears removing the two references will simply set the division back one year, and looking at these documents will make it more administratively complex.

[3:17:35 PM](#)

REPRESENTATIVE KOPP noted that House Bill 316 required the Department of Labor and Workforce Development (DLWD) to annually review and evaluate the medical fee schedules it publishes, and this adopts them automatically by reference. In the event a person is a provider "and the reimbursement rate that you are getting, you forfeit that opportunity to engage in a public process, to give comment on the record about the fee schedule as it's happening." He related that when something is automatically incorporated by reference, it does save time by simply appropriating it by reference. Society is going through a "see change" in the community of medicine currently, and a lot of it has to do with "how are we getting reimbursed, and -- and what is the government appropriately picking winners and losers, and right now the ambulatory surgery centers feel they are providing an effective return on investment for every dollar, and they feel that the tipping -- that -- that there is a

balance that is inappropriately tipped toward large hospitals." Therefore, he said, it is asking for transparency in this process. The fact that "We only have every single one telling us not to do this, we -- I think we should give some deference to that -- those providers."

[3:19:39 PM](#)

REPRESENTATIVE KREISS-TOMKINS surmised that the inclusion of these reference materials has the consequence of fee schedules being set by reference, noting that he did not pick that up from the division's testimony, and commented that Amendment 3 would be a substantive change.

[3:20:03 PM](#)

MS. MARX responded that the fee schedule uses reference material, "and it adopts the reference material already, this would allow future amended versions of -- of material already being used, to use the most current version." She asked for clarification of the question.

REPRESENTATIVE KREISS-TOMKINS said he was lost.

[3:20:48 PM](#)

REPRESENTATIVE REINBOLD advised that she sponsored Amendment 4 which is identical to Amendment 3, and withdrew Amendment 4 [not yet moved for adoption], and asked that her name be added to Amendment 3 as a co-sponsor.

REPRESENTATIVE REINBOLD said she understands adopting by reference, and adopting the federal reference guidelines for Medicare and applying them to medical services is creating confusion for medical providers and insurers. Therefore, she said, she believes all stakeholders, including medical providers and the Department of Labor & Workforce Development (DLWD) need better time to understand the new provisions adopted within the past year. The reason she brought this forth was because it increases local control, it empowers "you guys to not just automatically do it," but that it is a well thought out process, she said.

[3:22:19 PM](#)

REPRESENTATIVE FANSLER withdrew his objection to Amendment 3.

REPRESENTATIVE EASTMAN commented that when his personal surgeon called him and advised that this was a bad portion of the bill it meant the administration had not performed its due diligence in working out issues with affected parties. He suggested that before the administration proposes such a bill, that it spend more time talking with folks to determine its impact, and he concluded that if this language was to be "let in," the committee would be deferring to federal standards perhaps more than it needs to be for Alaskans. Also, he said, the committee would potentially have the result of a less diverse health care option in Alaska, and that is not what was wanted at this point.

[3:23:38 PM](#)

CHAIR CLAMAN stated there being no objection, Amendment 3 was adopted.

[CHAIR CLAMAN announced that HB 79 would be held over.]

[3:24:59 PM](#)

ADJOURNMENT

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 3:24 p.m.