

ALASKA STATE LEGISLATURE
HOUSE LABOR AND COMMERCE STANDING COMMITTEE

February 6, 2017

3:22 p.m.

MEMBERS PRESENT

Representative Sam Kito, Chair
Representative Adam Wool, Vice Chair
Representative Andy Josephson
Representative Louise Stutes
Representative Chris Birch
Representative Gary Knopp
Representative Colleen Sullivan-Leonard

MEMBERS ABSENT

Representative Mike Chenault (alternate)
Representative Bryce Edgmon (alternate)

COMMITTEE CALENDAR

HOUSE BILL NO. 69

"An Act repealing the Workers' Compensation Appeals Commission; relating to decisions and orders of the Workers' Compensation Appeals Commission; relating to superior court jurisdiction over appeals from Alaska Workers' Compensation Board decisions; repealing Rules 201.1, 401.1, and 501.1, Alaska Rules of Appellate Procedure, and amending Rules 202(a), 204(a) - (c), 210(e), 601(b), and 603(a), Alaska Rules of Appellate Procedure; and providing for an effective date."

- HEARD & HELD

PREVIOUS COMMITTEE ACTION

BILL: HB 69

SHORT TITLE: REPEAL WORKERS' COMP APPEALS COMMISSION

SPONSOR(s): RULES BY REQUEST OF THE GOVERNOR

01/20/17	(H)	READ THE FIRST TIME - REFERRALS
01/20/17	(H)	L&C, JUD
02/06/17	(H)	L&C AT 3:15 PM BARNES 124

WITNESS REGISTER

HEIDI DRYGAS, Commissioner

Department of Labor & Workforce Development (DOLWD)
Juneau, Alaska

POSITION STATEMENT: Presented HB 69 on behalf of the governor.

DEBBIE BANASZAK, Legislative Liaison
Office of the Commissioner
Department of Labor & Workforce Development (DOLWD)
Juneau, Alaska

POSITION STATEMENT: Gave an overview of the sectional analysis for HB 69.

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

POSITION STATEMENT: Answered questions about HB 69.

ANDREW HEMENWAY
Juneau, Alaska

POSITION STATEMENT: Answered questions about HB 69.

NANCY MEADE, General Counsel
Office of the Administrative Director
Alaska Court System

POSITION STATEMENT: Answered questions about HB 69.

ACTION NARRATIVE

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CHAIR SAM KITO called the House Labor and Commerce Standing Committee meeting to order at 3:22 p.m. Representatives Wool, Josephson, Stutes, Birch, Knopp, Sullivan-Leonard, and Kito were present at the call to order.

HB 69-REPEAL WORKERS' COMP APPEALS COMMISSION

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CHAIR KITO announced that the only order of business would be HOUSE BILL NO. 69, "An Act repealing the Workers' Compensation Appeals Commission; relating to decisions and orders of the Workers' Compensation Appeals Commission; relating to superior court jurisdiction over appeals from Alaska Workers' Compensation Board decisions; repealing Rules 201.1, 401.1, and 501.1, Alaska Rules of Appellate Procedure, and amending Rules

202(a), 204(a) - (c), 210(e), 601(b), and 603(a), Alaska Rules of Appellate Procedure; and providing for an effective date."

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HEIDI DRYGAS, Commissioner, Department of Labor & Workforce Development (DOLWD), presented HB 69 on behalf of the governor. She remarked:

HB 69, which is before you, would repeal the Workers' Compensation Appeals Commission and return the appeals process from the Workers' Compensation Board to the courts. The commission was created to streamline the appeals process from the Workers' [Compensation] Board and provide expertise in handling workers' [compensation] cases. Since its creation in 2005, however, 50 percent of the commission's decisions have been reversed by the Alaska Supreme Court. The high reversal rate underscores the fact that the commission is ineffective. The commission is essentially an appellate court just like the [Alaska] Superior Court, and almost every appellate court in the country is composed of a panel a lawyers. Yet the commission's lay commissioners have no legal training and contribute very little in the way of legal analysis to the issues being decided by the commission. It falls to the commission's chair alone, who is an attorney, to resolve the legal issues with minimal input from lay commissioners. Further, the chair also writes the decisions. Therefore, the commission's decisions are the work of one person, and not the work of a panel with legal expertise in workers' compensation - a further departure from the original intent of the legislation. By eliminating the Workers' Compensation Appeals Commission, the department anticipates a cost savings of \$220,400 for the remainder of Fiscal Year 18, due to the transition provisions in the legislation, and ... a savings of \$440,800 ... in subsequent years. The impact on the public will be minimal. By repealing the commission, the appeals process will revert back to the [Alaska] Superior Court which was the process in state from statehood until 2005. The court system would see an increase of approximately 20-30 cases per year. This volume can easily be absorbed by the court system.

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DEBBIE BANASZAK, Legislative Liaison, Office of the Commissioner, Department of Labor & Workforce Development (DOLWD), gave an overview of the sectional analysis for HB 69. She noted that "board" refers to the Workers' Compensation Board, and "commission" refers to the Workers' Compensation Appeals Commission. She said HB 69 would repeal the commission. She stated that some technical changes are being made with [consultation from] the Department of Law and will be available shortly. She paraphrased from the sectional analysis, which read as follows [original punctuation provided]:

Section 1 amends AS 23.30.005, by adding a new subsection, clarifying that unless reversed or modified by a court, decisions of the former commission have the force of legal precedent.

Section 2 amends AS 23.30.107(b), by removing reference to the commission.

Section 3 amends AS 23.30.108(d), by removing reference to the commission.

Section 4 amends AS 23.30.108(e), by removing reference to the commission.

Section 5 amends AS 23.30, by adding a new section, clarifying when a board order becomes effective and is final, when it may be stayed, and clarifying when the board's findings are conclusive and binding on a reviewing court, and when the director may intervene in an appeal or petition for review.

Section 6 amends AS 23.30.155, by adding a new subsection changing a statutory reference from the commission to the superior court.

Section 7 amends AS 39.50.200(b)(31), by removing reference to the commission.

Section 8 amends the uncodified law of the State of Alaska, by amending Rule 204(c)(2) Alaska Rules of Appellate Procedure, to address bonds for appeal purposes.

Section 9 repeals Rules 201.1, 401.1, and 501.1, Alaska Rules of Appellate Procedure.

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MS. BANASZAK stated paraphrasing again from the sectional analysis at section 10, which read as follows [original punctuation provided]:

Section 10 repeals AS 23.20.007, 23.30.008, 23.30.009, 23.30.009, 23.30.125, 23.30.127, 23.30.128, 23.30.129, 23.30.155(f), 23.30.395(10); AS 39.25.110(40); AS 44.64.020(a)(12), and 44.64.020(a)(13).

Section 11 amends the uncodified law of the State of Alaska, by adding a new section relating to indirect court rule amendments.

Section 12 amends the uncodified law of the State of Alaska, by adding conditional effect language that the Act takes effect only if secs. 8, 9 and 11 receive the two-thirds majority vote of each house required by art. IV, sec. 15 of the Alaska Constitution.

Section 13 amends the uncodified law of the State of Alaska, by adding a new section relating to applicability of amendments to proceedings pending before the Commission.

Section 14 amends the uncodified law of the State of Alaska, by adding transitional language clarifying proceedings seeking review of a board decision and order that have not yet been filed before the Commission, must be filed in the superior court on or after June 1, 2017 Any appeals not completed by the Commission on or before December 1, 2017 will be transferred to the superior court on December 2, 2017, and clarifying procedures for requests for reconsideration during the transition period.

Section 15 amends the uncodified law of the State of Alaska, by adding transitional language.

Section 16 clarifies when the Act takes effect.

MS. BANASZAK added that statutes relating to the commission would remain in existence until December 2, [2017], even though the bill would be enacted on June 1, [2017]. This would give time for the commission to finish its pending cases and transfer files before the terms of the commissioners expire on December 31, 2017. The commission would not take any new cases after May 31, [2017], and would have six months to wind up its pending cases by December 1, [2017]. She stated that the proposed bill would essentially put into place the procedures that existed before the commission was created.

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REPRESENTATIVE JOSEPHSON asked Ms. Drygas what the impact would be of moving 20-30 cases to the Alaska Superior Court. He asked how the court would adapt, and if the money saved by the department would be transferred to the court.

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MS. DRYGAS stated that the department would see the savings. She mentioned that last year a similar bill was drafted and had a zero fiscal note. She stated that the number of cases [potentially shifted to the Alaska Superior Court] is a small fraction of the court's work. She noted that since the commission's inception, the number of appeals filed has been dropping: in 2007 there were 49, but in 2016 there were only 20 appeals. The figure of 20-30 cases per year was pulled from this information.

REPRESENTATIVE JOSEPHSON asked whether the department considered using the Office of Administrative Hearings (OAH) to act as the first "trier of fact" and the Alaska Superior Court to act as an intermediate appellate court or something similar. He stated that the OAH is used to dealing with appeals.

MS. DRYGAS answered yes, it was considered. She stated that after hearing from practitioners, she learned that the process prior to 2005 had worked. She stated her concern regarding the current practice of having two layers of administrative hearings - going from the board to the OAH - before getting a case heard in court at either the Alaska Superior Court or the Alaska Supreme Court. She stated that a litigant is entitled to a review of his/her case in court.

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REPRESENTATIVE BIRCH asked for clarification on the appeal process for an injured employee.

[3:39:38 PM](#)

MARIE MARX, Director, Division of Workers' Compensation, Department of Labor & Workforce Development (DOLWD), summarized the process of reporting an injury. She stated that if an employee is injured, the employer must report the injury to the division and immediately begin paying benefits. Most of the time, benefits are provided seamlessly to an injured worker, and the board doesn't need to intervene. If a dispute arises about whether or not benefits are owed, then the dispute resolution process begins. She reviewed that the employee would file a workers' compensation claim with the Alaska Workers' Compensation Board. Both parties engage in discovery and the employer can either admit or deny the claim. After discovery is

complete, the parties can either settle or request a hearing before the board. She explained that the board has 18 members, but only a three-member panel hears each case. The panel consist of: one member from [the portion of the board affiliated with] labor, one member from [the portion of the board affiliated with] industry - both of whom are lay members of the community who serve on the board - and one full-time hearing officer, who is a full-time staff member and chairs the hearing. She stated that the hearing panel takes evidence; listens to opinions from the treating doctor, the employer's medical evaluator, and sometimes doctors from the board's list of recommended doctors; decides which opinion to believe the most; and issues a decision within 30 days of the hearing. Afterwards, either party may appeal the board's decision to the Workers' Compensation Appeals Commission, which makes a determination on the appeal request. From there, either party may appeal to the Alaska Supreme Court, which is briefed by both parties and issues a decision.

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REPRESENTATIVE BIRCH noted that the commission dismissed 56 cases, and he asked whether the dismissals were in favor of the employee or employer.

MS. MARX stated the cases can be dismissed for a variety of reasons, which include time deadlines, requirements of the appeal, and briefing timeframes.

REPRESENTATIVE BIRCH asked for the total number of cases that end up before the Workers' Compensation Board.

MS. MARX answered that approximately 1,200 reports of injuries are filed each year and, of those, about 250 claims end up before the board. She explained that about 10 percent of the cases before the board go further in the dispute process.

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REPRESENTATIVE STUTES asked how many commissioners there are.

MS. MARX responded that each case before the [Workers' Compensation Appeals] Commission is heard by a three-member panel. The three-member panel is selected from two labor members, two industry members, and one full-time appeals commissioner.

REPRESENTATIVE STUTES asked if the full-time commissioner is the only person on the payroll.

MS. MARX stated her belief that there is one staff member who assists the chair with administrative functions like maintaining case files and providing notices to parties.

REPRESENTATIVE STUTES asked how many positions would be eliminated or repositioned if the cases move to the court system.

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MS. DRYGAS stated that two full-time positions are on the payroll for the commission: one full-time chair position filled by an attorney and one full-time support staff position to assist the chair with getting decisions out and noticing hearings.

REPRESENTATIVE STUTES asked if the positions would be eliminated or repositioned.

MS. DRYGAS stated the positions would be eliminated.

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REPRESENTATIVE JOSEPHSON asked who finds the facts along the procedural pathway and he asked if the commission revisits the details of the injury.

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MS. MARX stated that generally the trial court - served by the board in this capacity - is the fact-finding body. The appellate level decides questions of law and whether the lower court erred. She stated her understanding that the commission is not fact-finding.

[3:47:56 PM](#)

ANDREW HEMENWAY answered questions about HB 69 and drew upon his experience as the former chair of the Alaska Workers' Compensation Appeals Commission. He responded to Representative Birch's previous question about dismissals in the Alaska Supreme Court. He stated that when dismissed from the Alaska Supreme Court, the decision of the board is final. Whichever side appealed would lose the dismissed case. He responded to

Representative Josephson's question and stated that the appellate court has no fact-finding authority or role concerning the merits of the case, except in matters where a request for a stay is made. The commission can determine if there was sufficient evidence to support the findings made by the board.

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REPRESENTATIVE BIRCH stated his interest in the outcome of the process. He asked how often injured employees' claims are upheld through the board, the commission, and the court.

MR. HEMENWAY stated that the spreadsheet [included in the committee packet] shows the outcome from the Alaska Supreme Court of decisions that were appealed from the commission. Of those cases, 20 were affirmed, 15 were reversed, and a smaller number were affirmed in part or reversed in part. He stated that this is an indication of the commission's decisions in the Alaska Supreme Court. He stated that he is not sure of the numbers on appeals from the board to the commission. He offered his belief that employees are often unsuccessful on appeal in cases where the primary issue of the appeal is the board's factual findings - when a party disputes that the worker had an injury. Generally the board's fact findings are sustained, although there may be a reversal if the commission determined that the board applied an incorrect legal standard or considered evidence inappropriately. He remarked that he couldn't venture to say which parties tend to be more successful on appeal. He stated that employees are less likely to succeed if they are not represented by an attorney. He observed that when both parties are represented by counsel and have legal issues on appeal, "You win some, you lose some."

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MR. DRYGAS followed up with more information about funding. She stated that when the board was created in 2005, no funding was given to the department; the department had to use existing funding from the Workers Safety and Compensation Administration Account (WSCAA). She offered her opinion that it would be unfair to give funding to the court system when the Division of Workers' Compensation is already "pretty strapped" to function as is, as a result of previous funding cuts.

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REPRESENTATIVE KNOPP noted that 100 appeals have gone to the Alaska Supreme Court, of which only 15 have been reversed. He asked if this shows ineffectiveness. He asked if a three-person panel is the problem, and suggested that more members on a panel might increase effectiveness.

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MS. MARX clarified that there are 18 board members, 1 appeals commissioner, and 4 lay members who serve on the Workers' Compensation Appeals Commission. She stated the appellate panel is made up of five individuals.

REPRESENTATIVE KNOPP asked which level has one hearing officer and two members.

MS. MARX responded that is at the Workers' Compensation Board level - essentially the trial court level.

REPRESENTATIVE KNOPP again asked if 15 out of 100 cases being reversed is a sign of inefficiency.

[3:57:31 PM](#)

MS. DRYGAS stated that 56 cases were dismissed, 20 were affirmed, 15 were reversed, and 4 were affirmed in part and reversed in part. She offered her interpretation that the [Workers' Compensation] Appeals Commission is not getting it right enough of the time. She mentioned that there are other measures of ineffectiveness. She stated that she spoke with two board chairs who told her they were essentially doing the work of the commission - writing the decisions with little input from commissioners - and she offered her concern of its effect on the significant reversal rate. She stated that it is possible that a difference could have been seen with a bigger panel, but it would depend on how the panel was made up. The cases are legally intensive, and the appellate level determines questions of law. She stated that the members of the commission have expertise on workers' compensation, but the commission's job is to do an evaluative process of law. She opined that a lay person is at a disadvantage to determine if the law and the facts "measure up." She stated that this is likely part of the problem with the structure of the commission. She noted that this issue has been before the legislature in previous iterations in 2015 and 2016, and at that time neither the legislature nor the department heard from individuals' opinions one way or the other. She offered her understanding that there

is a consensus that the current process is not working. She stated that she does not see why the earlier process was a problem - returning to the courts after going through one layer of administrative review.

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NANCY MEADE, General Counsel, Office of the Administrative Director, Alaska Court System, stated that the court system is neutral on the proposed legislation and had submitted a fiscal note showing zero impact to the Alaska Court System.

[4:01:29 PM](#)

REPRESENTATIVE STUTES asked how a zero fiscal note is possible with additional work for the Alaska Court System.

MS. MEADE stated that the Alaska Court System tries to absorb changes, to the extent it can, without a fiscal impact. She emphasized the Alaska Court System aims to be extremely honest when producing fiscal notes. She stated that Alaska Superior Court judges would have more work, and she acknowledged that workers' compensation cases are sometimes difficult. Notwithstanding that, she said it's not the sort of impact that would require hiring a new judge or clerk. She stated that the 20-30 new cases per year would be spread among 40 Alaska Superior Court judges. She stated that individual judges may get one to three more administrative appeals per year. She stated that the court system already handles between 160-170 administrative appeals per year, so adding 30 to 33 appeals would be an impact, but not such an impact to require additional resources to handle it.

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CHAIR KITO related the impact to a pick-up truck with four wheels carrying a load: At a certain point, the wheels will pop, but, "I think what Ms. Meade is saying is the wheels aren't quite ready to pop yet."

[4:03:28 PM](#)

REPRESENTATIVE JOSEPHSON stated his sense that although these appeals come with relatively short hearings, in order to do a good job, the judges would likely be working weekends to research cases and write opinions, which are often 20-30 pages. He asked for confirmation that this is intensive academic work.

4:04:26 PM

MS. MEADE responded, "That is not inaccurate." She stated that appeals cases are difficult and the court's mission is to resolve controversies. She agreed that administrative appeals are different from trials and often involve: more desk time and studious time, a hearing, and longer decisions. Administrative appeals are often not as urgent as other matters judges handle, such as children's matters or scheduled hearings. She mentioned that the appeals can take longer than the public expects; the Alaska Court System has lost positions with budget cuts, and some things are taking more time. She remarked, "On the other hand, we need to do this sort of work. So, if ... the legislature passes a bill that says we will get 30 more cases, we will do 30 more cases. Our judges will handle these in the course of their work, and perhaps they'll be coming in on a Saturday to do it, or maybe they'll squeeze it in."

MS. MEADE related that DOLWD has been very receptive of her proposed language changes or additions which would clarify statute and make it easier for the courts to take the cases. She stated her belief that through working with DOLWD, some revisions will be suggested to make it work better for everybody, including the injured workers and employers.

4:07:17 PM

CHAIR KITO opened public testimony on HB 69.

[HB 69 was held over.]

4:07:47 PM

ADJOURNMENT

There being no further business before the committee, the House Labor and Commerce Standing Committee meeting was adjourned at 4:08 p.m.