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AN INTERIM REPORT ON THE ALASKA WORKERS' COMPENSATION SYSTEM

John H. Lewis
P.O. Box 330550
Miami, Florida 33133
(305) 443-8111

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INTRODUCTION

The purpose of this document is to analyze the major areas of concern within the Alaska workers' compensation system. The items discussed were chosen because of their economic significance, and in some instances because of existing controversies as to their proper role in the compensation system. Although many issues remain for additional discussion, those contained in this report represent the critical questions which must be resolved in order to develop an appropriate legislative response to the current workers' compensation controversy.

THE BUNKHOUSE RULE

The major criteria for determining the compensability of an accidental injury is whether it arose out of and in the course of the employment (AOE/COE). This phrase is contained in the Alaska Workers' Compensation Act as well as 48 others. Obviously this test must be interpreted in those instances in which compensability is disputed, and as a result, there is a huge volume of case decisions from across the country, providing additional and more specific guidelines for determining when the AOE/COE test has been met. Since the Alaska Workers' Compensation Act is relatively new, it did not go through the developmental period in which these rules were structured, and simply adopted existing guidelines, in many cases selecting the most far-reaching of available options. The bunkhouse rule is one of these guidelines.

Normally an injury must occur during the hours of employment and be caused by some incident of the work to meet the AOE/COE test. However, years ago the courts determined that when a worker is required to live away from home, particularly for extended periods of time, the test should be broader. This gave rise to the bunkhouse rule. The rule has many variations, all of which to one extent or another make the point that under these circumstances, injuries outside of normal working hours can still be deemed compensable, since the requirements of the job "forced" the employee to be in the circumstances which led to the injury. Despite some very unusual results, the bunkhouse rule has never been considered enough of a threat to the integrity of the workers' compensation system in any state to justify legislative intervention. In Alaska, due to the large number of remote work sites, the relatively high number of bunkhouse rule cases and the cost of even a minor injury, some question has been raised as to the continued application of the rule in its present form. However, any attempt at statutory modification of the rule should be undertaken with caution and something less than extreme optimism, because new language means new court tests, with unpredictable results. It may well be the fear of the unknown that has led other states to accept the certainty of existing case law rather than embark on the uncertain path of legislative action and subsequent court decisions.

A major consideration is whether the magnitude of the problem is worth the legislative effort. To date it appears that bunkhouse cases, at least those that raise questions about their propriety, do not constitute a significant expense when compared to the compensation system as a whole. However, they may very well constitute a significant portion of compensation expense for a number of employers.

Another consideration is the implications of modification of the rule. Assuming that a legitimate injury occurs at a remote site, but is not compensable due to the operation of a modified bunkhouse rule, the injured party will almost certainly incur considerable expense in returning to an area where medical treatment is available. There are a number of obvious solutions to this problem, but it cannot be ignored. One should also consider the impact on employers of a modification of the bunkhouse rule. The obligation to provide workers' compensation coverage grants the employer immunity from civil action by an employee only when an injury is compensable. A significant narrowing of the bunkhouse rule will increase the possibility of civil suits, which tend to be more expensive than workers' compensation cases. Given the standards which presently govern the question of liability in civil cases, many "minor" compensation cases could become "major" civil cases. Even the lowly broken tooth suffered during mealtime could find its way to the courts, if caused by a foreign or improper object in the employee's food.

A final consideration is a virtually unverifiable opinion expressed by a number of individuals familiar with the problem that most "abuses" of the bunkhouse rule result from a desire to return to civilization for various purposes and that any solution other than a better leave policy on the part of employers will simply lead to either "abuses" of the new rule or the development of other, equally expensive ways of getting back home.

The list of alternatives is practically endless. The following is a limited range of alternatives all of which can be modified and combined with others to reach the desired conclusion.

1. Limit compensable injuries at remote sites to accidents occurring during actual working hours.

2. Limit compensable injuries to those accidents occurring on the premises of the camp, regardless of the hour of occurrence or the activity engaged in.

3. Limit compensable injuries to those accidents occurring during working hours and those resulting from a special hazard directly related to the conditions of remote site living, such as a fire or weather related incident.

4. Eliminate from the range of compensable accidents those resulting from personal activities such as eating, and/or recreational activities.

MEDICAL BENEFITS

A number of concerns have been expressed, primarily by those on the employer/carrier side, over the impact on costs of the current physician selection mechanism, which leaves the choice of treating physician to the employee. On its face this is a totally appropriate method, but there are a number of competing interests which at least deserve consideration. A factor weighing most heavily in favor of employee choice, a method used by approximately half the states, is that it is the employee who is being treated, and who should be given the opportunity to select physicians he trusts. On the other hand it is the employer who is paying the bills, which leads to legitimate concerns over paying for doctors who may not be the best available, or whose primary reason for selection may be a willingness to give a high disability rating, which in turn may lead to increased compensation benefits. Obviously the employee may have reason to be equally as concerned about an employer/carrier choosing a physician primarily on the basis of a willingness to testify "properly."

Perhaps the most effective solution to this dilemma lies with the Board. Given the small number of health care providers in Alaska, the Board should be well aware of the abilities of each. If a party feels improper treatment is being provided, an expedited hearing will give the Board the opportunity to order a change in treating physician, if necessary. If a physician is consistently one-sided in his testimony, the Board should be able to take this factor into consideration in reaching decisions on questions such as causation and extent of disability. The only potential problem here is with the appellate courts, which in their decisions tend to limit the Board's authority to accept or reject testimony based upon evaluation of a witness's credibility. If the Board is to be encouraged to take steps to minimize problems in medical care, it may be necessary to provide specific legislative direction to the courts, to insure that the Board's authority is not diluted.

The use of physicians in contested cases simply because of their extreme views can also be limited by encouraging the Board to select impartial examining physicians to help resolve medical disputes, and by explicitly relying on experts in whom the Board has a high degree of faith. Once again some legislative direction may have to be given to the courts to permit the Board to accept such testimony in appropriate cases rather than that presented by the litigants. This type of action can send a message to litigants that it does not pay to use medical testimony from witnesses who are biased, and can also result in a moderation of positions taken by medical experts.

In conjunction with the foregoing, there are a number of methods of physician selection in use in various states which can be considered.

1. Pure employee selection, as presently exists in Alaska.

2. Pure employer/carrier selection, tempered by the ability of the employee to apply to the Board on an expedited basis for change.

3. Initial employee selection for a limited period of time, such as ten days, with the employer having the right to change at the end of the period.

4. Initial employer/carrier selection for a limited period, with the employee having the right to change at the end of the period.

5. Employee selection from a panel selected by the employer/carrier.

6 Employer/carrier or employee selection from a panel designated by the Board. This typically involves initial inclusion of all practitioners in the state, with removal from the panel by the Board for cause.

SECOND INJURY FUND

The sole purpose of a second injury fund is to encourage the employment of physically impaired persons, or perhaps more accurately, to minimize the disincentives to their employment. A simple example will clearly explain the theory behind the operation of second injury funds. If an employer hires a worker with no physical impairment, who then loses an eye in a compensable accident, the compensation payable in Alaska for that loss will be for a period of 140 weeks. However, if that individual had suffered the loss of one eye prior to employment, the result of loss of the remaining eye would be permanent total disability, with benefit payments continuing for life rather than 140 weeks. In order to eliminate this financial disincentive to hiring, the Second Injury Fund, as it is used in Alaska, would pay all compensation payments subsequent to the first 104 weeks of disability.

Unfortunately, attempts have been made, sometimes successfully, to use funds as tools to reduce an employer/carrier's liability after the fact, when the preexisting impairment was questionable, or the employer's knowledge of its existence doubtful. This type of improper fund use typically leads to stringent controls which in turn lead employers to question whether the fund will work in their favor even when they act properly. In the face of such uncertainty, it is doubtful that even the best intentioned employer will rely on a fund and consider its benefits when contemplating the hiring of a physically impaired worker. Alaska has suffered from this syndrome and now appears to be in the phase which makes it more difficult to obtain reimbursement from its Second Injury Fund.

If the Second Injury Fund is to serve its purpose, two elements must exist. First, benefits from the Fund must flow only to those employers who hire or retain in employment individuals with significant permanent impairments which would otherwise be an obstacle to employment. Secondly, employers must at the time of hiring be as secure as possible in the knowledge that should an injury occur they will be financially protected by the Fund. Presently, uncertainty exists in Alaska as to both elements, and as a result there is considerable doubt as to whether the existence of the Fund provides much incentive for hiring physically impaired workers.

A relatively simple change in procedure may provide the certainty needed in both areas to make the Fund an effective tool. In order to establish knowledge of the impairment at the time of hiring, the employer of a permanently impaired worker could be required to file a simple form with the Fund, settling that question without a doubt, and precluding "after the fact" attempts to prove the requisite knowledge at the time of hiring. To simplify the filing process, each individual who sustained a permanent impairment in a compensable accident could, when ready to reenter the job market, be given a simple two-part form to present to prospective employers. The form would educate the employer as to the protection offered him by the Fund and would also provide the documentation of employment to be forwarded to the Fund. In such cases the employer would be guaranteed the protection of the Fund, should a subsequent injury occur, and would thus be given the incentive to hire. If necessary, a similar mechanism could be used to provide documentation for employees whose injuries would qualify them for Fund protection in the future but were not the result of a compensable accident.

AVERAGE WEEKLY WAGE

For a number of reasons related primarily to the pipeline, Alaska uses a method of computing average weekly wage which is different than those used in the other 49 states. In determining average weekly wage, and in turn the weekly benefit, the injured employee is permitted to pick the calendar year out of the three calendar years immediately preceding the injury in which total wages were the highest, and then divide by 52 to arrive at an average weekly wage. In some cases, this can result in unfairness to one side or the other. For example, an employer with an injured worker may find himself paying weekly benefits in excess of actual wages because of a high paying job with another employer three years prior to the accident. Similarly, an employee with a new but permanent high paying job may find his weekly benefit a small fraction of wages being earned at the time of injury, because of low earnings in the prior three years. Even for those with consistent annual earnings the rule can work a hardship. For example, a worker in extremely seasonal employment who earns a substantial income while working half the year, and nothing the remainder of the year, will have his earnings based upon a 52 week average. If he is injured and is totally disabled during a portion of the season his actual income loss will be twice as high as the average weekly wage on which the benefit is based.

Due to the impact of seasonality, no solution which is even remotely equitable for all concerned can be found unless the various segments of the benefit system, such as temporary total disability and permanent partial disability, are dealt with separately. Therefore, most of the average weekly wage question will be dealt with in those sections of the report which deal with benefits.

There is one aspect of average weekly wage which can be considered independently of benefits. That is, what elements of remuneration should be considered in determining the amount of pre-injury earnings. In Alaska the major concerns in this category are room and board, and fringe benefits. Conceptually, room and board are to be considered as part of average weekly wage only to the extent that they reduce the amount an employee would have expended for these items if he was not working. For example, with regard to room, if an employee is away from home for a few days, and the employer provides living facilities, there is no reason for the value of the facility to be included in average weekly wage computations. This is because the employee was still paying for his own home or rental while away, and did not experience an increase in net income because of the employer's payments. In the case of the worker who may be at a remote site for many months, and live in a facility provided by the employer, resolution of the question is not so simple. Theoretically, the value of living facilities should be included in the wage calculation only if the employee does not maintain another residence while at the remote site, since if he continued to make mortgage or rent payments at home, there would be no net economic benefit derived from living at the employer's facility. Whether a dual system of this type is acceptable, with employees being treated somewhat differently based upon their living arrangements at home, is a matter that is of purely legislative concern, with each of the alternatives somewhat arbitrary in its application.

The question of board is much easier to deal with, at least as to the initial determination as to whether it should be included in the weekly wage at all. Since a meal provided by the employer means a meal that the employee does not have to pay for, the provision of board will always result in a net economic benefit to the employee, and thereby justifies its inclusion in the wage computation. The value of the meal, as well as the value of living facilities, is another matter.

If it is an accurate assumption that room and board cost more to provide on the North Slope than in Anchorage, the valuation of these items presents a real question. Once again on a conceptual basis, the value to the employee is not what it costs the employer to provide room and board, but rather the amount of net economic to the employee. This requires valuation on the basis of how much would have been spent for these items had the employee remained at home. Obviously theory is of little help in this instance, since applying as esoteric an economic theory as this would create an administrative nightmare. Unless the legislature is willing to leave the question of valuation to contractual agreement or litigation on a case by case basis, legislative action is required. The most efficient mechanism may be to give the Board rule making authority to establish room and board values on a statewide or regional basis, to be included in the average weekly wage computation in appropriate cases. This authority provides a great deal of flexibility, in that changes in economic conditions can be quickly reflected in the rules, and adjustments made without the need for additional legislative or court action.

A much more difficult question is how to treat fringe benefits such as hospitalization insurance and employer-funded pension plans. At the present time, almost by practice rather than case decision, these items are not included in the computation of average weekly wage in Alaska. This occurs despite the fact that a reasonable argument can be made for the proposition that the statute is broad enough to permit their inclusion. The issue is of more than academic interest. If at some point a court holds that fringe benefits must be included in the wage computation, many open cases from past years will be entitled to have the weekly benefit increased retroactively, which would result in an enormous economic impact on employers and carriers. This is in addition to the financial impact such a ruling would have on new cases, particularly in view of the high level of fringes in some employments.

From the standpoint of the worker, fringes which are not continued after injury represent an economic loss, and therefore, a basis exists for the inclusion of their value in weekly wage computation. From the standpoint of the compensation system, their inclusion creates administrative problems (which are not entirely insurmountable) and more importantly would provide most workers with weekly compensation benefits substantially in excess of their take home pay, a situation which may be considered something less than optimum in view of the disincentives which it creates. The arguments on both sides are endless, and if the legislature decides to deal with this question it will hear each and every one. Suffice it to say that virtually every other state has avoided including this type of fringe benefit in the wage computation, except on an isolated basis, and Alaska has managed to operate its compensation system without their inclusion. Unless the state is willing to take on the economic and social problems which would be created by fringe benefit inclusion, the legislature should act to clarify the law and avoid the potential for court decision.

TEMPORARY TOTAL DISABILITY

The purpose of temporary total disability benefits is quite simple. They are intended to replace lost income during the time that the injured worker is recovering and unable to return to work. In most states this is also the easiest type of loss to deal with, by simply replacing a portion of the income lost during the period of total disability, with duration measured primarily from a medical standpoint. However, the impact of seasonality on a substantial portion of the Alaska work force creates a situation which cannot be dealt with by traditional means. Therefore, the following analysis and proposed solution may very well be viewed as radical within the context of existing workers' compensation systems. It may also be the only way to establish equity for those receiving and those paying temporary total disability benefits in Alaska.

As previously discussed, the "best of three" method for determining average weekly wage, and thereby temporary total disability benefits, creates problems for all concerned. If one accepts the proposition that temporary total disability benefits are intended to replace lost income during the period of recovery, then the wage basis used to compute these benefits must reflect the income which would have been earned during this period, rather than the level of income earned three years previously. This can be accomplished more accurately by applying the traditional average weekly wage formula used in a significant number of states. The period of comparision, rather than one of the preceding three years, would be the 13 weeks immediately prior to the injury. If the injured employee was not employed for substantially the whole of 13 weeks, the wages of a similar employee who was so employed are used, and if no similar worker is available, then the average weekly wage would be based upon the contemplated full-time wages of the injured worker. Since workers in seasonal employment tend to be highly paid, use of this mechanism may also require an increase in the maximum weekly benefit, so that the higher paid worker is not deprived of adequate income replacement due to the application of an inappropriate weekly maximum.

Of course there is another side to the coin. For the seasonal worker, this level of income replacement is only proper during the period of time that income would actually have been earned. To take the extreme case, is it correct to provide temporary total disability benefits when the injury occurs on the last day of the job, and recovery takes place during a period of time when the employee would have been receiving unemployment benefits? If the answer is no, then temporary total disability benefits in Alaska should be more closely matched to periods of gainful employment, rather than merely relying on the employee's physical condition, with unemployment benefits replacing workers' compensation benefits during what normally would be a period of unemployment. Obviously this method creates new opportunities for litigation, which may make it unacceptable. The only way to determine if the cure is worth the price is through an open discussion involving those primarily concerned, employees and employers. The answer depends upon the extent to which employees are currently being deprived of proper benefits due to the operation of the existing law, the extent to which employers are currently paying what may be considered excessive benefits during periods of seasonal unemployment, and the difficulties which will have to be overcome if "income matching" is to be accomplished in a significant number of cases.

PERMANENT PARTIAL DISABILITY

In every workers' compensation system the most expensive element, and the most controversial, is that of permanent partial disability benefits. Much can and has been written about the history, development and philosophy of permanent partial disability benefits, and some of it is quite interesting. However, what is necessary at this time is simply an understanding of the various benefit alternatives available for compensating permanent partial disability, a philosophical decision as to the reasons for which Alaska wishes to provide such benefits and, based upon that decision, the development of a mechanism and formula to distribute those benefits appropriately.

Permanent partial disability results when an individual is injured and having recovered to the greatest extent possible is left with a physical problem which did not exist prior to injury. If the condition is severe enough to totally destroy the individual's ability to obtain and retain gainful employment, the result is classified as permanent total disability. What we are concerned with here is that class of cases in which a permanent physical problem exists, but the ability to earn has not been totally destroyed. At this point there are three basic criteria which can be used to determine who is to receive permanent partial disability benefits, and in what amount.

The first theory is based upon permanent physical impairment, and is often referred to as the "whole man theory." Pursuant to this theory, the amount of benefits payable for permanency is determined on the basis of the degree of permanent physical impairment suffered, a purely medical determination, without reference to its effect upon the individual's life, employment or economic status. Assuming equal average weekly wages, a lawyer and a machinist who both suffered equally serious hand injuries would receive the same amount of money for their injuries, despite the probable difference in economic impact.

The second theory deals with loss of wage earning capacity, which takes into consideration not only the degree of physical injury, but also its probable impact on the ability of the individual to earn a living. This requires that in the event of a dispute, the fact finder must predict, usually quite soon after release from active medical care, what effect the injury will have on the individual's ability to compete in the open labor market. The test does not require any economic loss to occur and in fact, because the concern is with loss of capacity, a substantial award for partial loss of that capacity is in no way inconsistent with a factual situation in which the employee remains with the same employer and on the same job track until normal retirement, with no economic loss resulting from the injury. Typically, if this prediction, which usually takes the form of an award, proves wrong, nothing can be done to modify it in the absence of a change in the employee's actual physical condition.

The final alternative for paying permanent partial disability benefits is what is commonly known as the "wage loss" method. This system involves paying benefits based solely upon actual loss of income resulting from the effects of an injury, with the amount of the loss determined as it actually occurs, rather than on a "prediction" basis as would take place under the earning capacity loss theory described above.

Alaska follows a pattern used in well over half the states, with a few unique twists, starting with a combination of the impairment theory and the earning capacity loss theory. If a permanent injury is limited to any of the extremi-

ties (fingers, toes, hand, leg, etc.) or the eye or hearing, the amount of the benefit paid is based solely upon the physical impairment sustained, which in turn is based almost solely upon medical evaluation of the loss. The actual benefit calculation is accomplished by first determining the workers' weekly benefit rate, which is 66 2/3% of his average weekly wage, subject to a maximum of $942 per week. Sec. 23.30.190 of the Act is then consulted, which contains a schedule indicating the weeks of benefits, at the rate just described, for total loss or total loss of use of the particular bodily member involved. For example, total loss of an arm results in benefits being paid for 280 weeks, at the individual's weekly benefit rate. If the loss is less than total, the worker is paid benefits for the proportionate number of weeks. For example, a 50% loss of use of the arm would result in benefits paid for 50% of 280 weeks or 140 weeks. This method of benefit computation, known as "the schedule", is used to one extent or another in most states in the manner just described, but Alaska has complicated the picture to some extent by adding another limitation, that of a maximum dollar amount. For example, while the loss of an arm is theoretically 280 weeks of compensation, it is also subject to a dollar maximum of $43,680.00. This means that anyone whose weekly benefit is in excess of $156 (over 75% of injured Alaskan workers) will not receive the full 280 weeks provided initially by the statute. In fact, the average injured worker will only receive 136.5 weeks of compensation for total loss or loss of use of an arm. The same result holds true, within a few dollars and a few percentage points, for all of the other injuries covered by the schedule.

For those injuries not covered by the schedule, primarily back and head injuries, the benefit is based upon loss of wage-earning capacity, which is determined by computing the difference between earning capacity prior to injury and after injury, and replacing 66 2/3% of the difference, on a weekly basis. Theoretically these benefits are payable for life, but in reality are subject to a maximum dollar amount of $60,000.00. Although, as previously mentioned, earning capacity loss does not require actual loss of earnings, the Alaska statute does require that determination of the amount of loss in the first instance be accomplished by considering actual post injury earnings, but if actual earnings are found not to "fairly and reasonably" represent earning capacity, other factors can be considered, and an award made which is at variance with the actual economic loss sustained. Application of this "adjustment factor" varies from time to time, primarily due to changes in the philosophy of the Board, which must determine t . degree of loss in contested cases. At the present time, the Board appears to place heavy reliance on actual earnings, and in many instances applies the law in a manner approaching that of a wage loss system, with benefits determined on a weekly basis as actual loss of income occurs.

Each of these methods contains a number of flaws, in both the amount of benefits which may be paid to an individual worker, and in the problems inherent in determining the amount to be paid. From the standpoint of getting the money to the people who need it, the impairment method is the weakest of the three. Historically, workers' compensation has placed major emphasis on paying benefits to replace economic loss, and since the schedule or impairment method does not consider economic loss at all, it misses the mark in most cases. Its primary justification is ease of application, since there is supposedly very little to argue about when determining the extent of physical impairment. However, it has been found that it is relatively easy to locate doctors who will be 20 to 30 percentage points apart when evaluating the same injury, and as a result use of a schedule does not guarantee an absence of litigation.

It is possible to minimize these shortcomings in two ways. First, if guidelines are adopted for the determination of the extent of impairment, such as those published by the American Medical Association, it is relatively easy to avoid significant disagreement among medical experts. Secondly, some degree of economic reality can be incorporated in the schedule, as is done in California, by modifying the weeks to be paid in a number of ways. On the assumption that the economic impact of an injury increases geometrically, rather than proportionately as severity increases, the schedule can be "stepped" so that one week of benefits may be payable for each of the first 10 points of impairment (1-10% impairment), two weeks paid for each of the next 10 points, three weeks for each of the next 10, and so on. In this manner an individual with a 10% loss of use of the arm would receive 10 weeks of compensation and someone with a 20% loss would receive 30 weeks, reflecting an assumption, of limited validity, that the economic impact of a 20% loss is more than twice as severe as that from a 10% loss.

The weeks payable can also be modified to take into consideration other factors such as age, type of occupation (physical vs. sedentary), and amount of education, with a percentage increase or decrease in the rating depending upon the answers given to relevant questions contained in a rating formula. Obviously this significantly increases the liklihood of litigation, so that a price is paid for attempting to make the schedule more economically realistic.

Use of a schedule basis raises an interesting question as to the development of average weekly wage, particularly if an unmodified schedule based totally on physical impairment is used. Since economic impact is being ignored, there is no reason to tie the amount of benefit to average weekly wage. The fact that one worker makes more than another does not mean that his arm is also "worth" more, and in fact the opposite may be true. As a result, if an impairment schedule is used, the amount of benefits to be paid can be established legislatively as a specific dollar amount for each loss, to be paid in every case regardless of the individual's earnings.

Application of an earning capacity loss system also presents a number of problems, primarily on the operational side. From a philosophical standpoint, it more closely follows the basic workers' compensation premise of dealing with economic loss, although as previously described it is entirely possible to pay benefits for loss of capacity in cases in which no actual economic loss ever occurs. In fact, the few studies which have been undertaken tend to show that only a minority of cases demonstrated significant economic loss several years after injury, although in most of those cases the loss was significant.

Another finding from these studies demonstrates a more serious problem with earning capacity loss systems. For most of the cases with significant losses, the compensation paid was totally inadequate to deal with the economic loss incurred, while in the remaining cases the amount of compensation paid was far in excess of the loss. This resulted primarily from the fact that the award must by its very nature be a prediction, and an estimate, a task which is probably beyond the ability of mere mortals. There are simply too many variables determining the effect an injury may have on a given individual, and attempts to make the award fit the case are something less than accurate. Also inherent in this uncertainty is the need for lawyers and litigation in order to arrive at a "correct" decision. Since a determination of loss of earning capacity is strictly a judgment call, a claimant would be foolish to simply accept a determination made by the employer/carrier, and would be equally foolish to go before the Board without an attorney to present his case. Unfortunately there is little that can be done to eliminate these problems without virtually switching to another benefit system.

For purposes of determining loss of earning capacity, the computation of average weekly wage should simply reflect a realistic and established preinjury earning capacity. Since in this type of system we are not concerned with matching benefit payments with actual loss of income, it is possible and preferable to base the wage on average earnings for a recent but extended period of time, such as the previous twelve months. Given a willingness to accept the opportunity for additional litigation, the Board could be given the authority to modify the figure arrived at in this manner, if it can be established that because of extraordinary circumstances the figure is significantly high or low.

The third and final alternative is a wage loss system. In its purest form, it provides benefits only in the event of actual loss of income attributable to the injury. This immediately raises a question as to its fairness, since in the extreme case an individual who suffered a loss of limb but was able to return to full employment would receive nothing in the way of benefits for his injury. While this may not be inconsistent with historical workers' compensation philosophy, it does leave a great deal to be desired when applied in real life. This problem can be cured by paying an impairment award, preferably limited to serious injuries, regardless of any wage loss benefits which may also be due.

Another problem may result from comparing preinjury wages with inflated postinjury wages, an obvious inequity. This can be limited to a great extent by adjusting the comparison to take into consideration the change in wage rates through time, although given the experience under the Longshore Act, it is questionable whether an unlimited adjustment would be acceptable.

For Alaska, use of a wage loss system would raise two very significant questions. First, a wage loss system can only be successful, from a cost standpoint, if the great majority of workers can be returned to jobs which pay the same or almost the same as those held at the time of injury. If the frequently heard statement that "there is no light duty in Alaska" is true, adoption of a wage loss system would be an economic disaster. Similarly, if union rules are so strict that a worker with a permanent injury cannot be given preferential treatment in obtaining work within his capabilities, the ability to return people to gainful employment would be greatly reduced, and the benefits of a wage loss system eliminated.

Secondly, serious consideration must be given to the system's ability to determine when an income loss is "due to the injury" rather than some other factor, such as the end of the season. As in the case of temporary total disability, use of a wage loss system depends on matching benefit payments with actual economic loss, so that factors such as end of season, a return to a state with lower wage levels, and an individual's desire to reduce his workweek must all be taken into consideration in determining wage loss. If this cannot be accomplished with a fair degree of accuracy, the system would be a total disaster.

While research is continuing in an attempt to determine the ability of Alaska employers to return injured individuals to the workplace, in the final analysis a decision on these potential problems can only be reached by joint labor/management discussions. It is doubtful that anyone else can or should determine whether this type of system can be used effectively in Alaska and without their concurrence an attempt to implement a wage loss system would probably result in economic disaster.

If a wage loss system is adopted, the computation of average weekly wage would closely follow that recommended for temporary total disability. The wage base should reflect the weekly wages actually earned during the period of employment, whether it be six months or a year, so that the comparison of pre- and post-injury wages will reflect the actual loss incurred. Therefore, a 13 week average, or something in that range, would be appropriate, with the safeguards described in the temporary total disability section.

PERMANENT TOTAL DISABILITY

Statistically, permanent total disabili… efits do not constitute a signif-
icant proportion of the overall cost o… rs' comensation in Alaska, al-
though the state does rank sixth natio… n frequency of permanent total
cases. This does not mean that perman… l disability does not signifi-
cantly impact on the compensation syst… s importance is hidden to a great
extent, because its effects are felt i… rea of permanent partial disabil-
ity benefits. This is due to the th… case becoming a permanent total,
with lifetime benefits and no dollar … which results in cases being
settled at levels approaching their ma… rmanent partial disability value,
$60,000.00, instead of being litigated… ossibly resulting in a finding
of total disability.

As mentioned previously, permanent tota… bility occurs in those circum-
stances in which the injury is so sever… o totally destroy, for all prac-
tical purposes, the ability of an inju… ker to obtain anything other
than intermittent and financially insi… nt employment. In cases in
which the physical injury is severe, t… usually no question as to the
individual's entitlement to total disa… benefits. However, of concern
to the Alaska compensation system is t… er who retains relatively sub-
stantial physical abilities, but clai… or is actually unable to work
because of the limited job opportuniti… he area. For example, should
an injured worker who cannot find empl… in Eagle, where he lives, have
his workers' compensation status deter… n the basis of Eagle alone, or
should the availability of suitable em… t in other parts of the state
be considered? And if there is no suit… mployment in Alaska for someone
injured shortly after moving to the sta… who has indicated in some
manner that working in Alaska is tempo… ther than permanent, should
employment opportunities in the lower … considered? Again there is no
correct answer, only issues that are … ate for legislative decision on
a policy basis.

At the present time the statutory provi… ealing with permanent total disa-
bility, Sec. 23.30.180, provides virtu… indiction of the factors to be
considered in determining total disabil… atus. This is left to the courts,
and results in a great deal of uncerta… to the possible outcome of indi-
vidual cases. Although no statute can … ate the potential for court in-
volvement, the legislature can create … t deal more certainty by enacting
amendments to Sec. 23.30.180 which pro… lear policy guidelines to those
who must apply the law.