

SB

322

(FILE 13)



American Consulting Engineers Council

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Robert L. Fogle
Director, Liability Legislation

EXCERPTS FROM
KANSAS WORKMEN'S COMPENSATION ACT

"...no construction design professional who is retained to perform professional services on a construction project or any employee of a construction design professional who is assisting or representing the construction design professional in the performance of professional services on the site of the construction project, shall be liable for any injury on the construction project for which compensation is recoverable under the workmen's compensation act, unless responsibility for safety practices is specifically assumed by contract or by the affirmative actions of the construction design professional or any employee of the construction design professional who is assisting or representing the construction design professional in the performance of professional services on the site of the construction project. The immunity provided by this subsection to any construction design professional shall not apply to the negligent preparation of design plans or specifications."

"'Construction design professional' means any person who is an architect, professional engineer, landscape architect or land surveyor who has been issued a license by the state board of technical professions to practice such technical profession in Kansas or any corporation organized to render professional services through the practice of one or more of such technical professions in Kansas under the professional corporation law of Kansas or any corporation issued a certificate of authorization under K.S.A. 74-7036 and amendments thereto to practice one or more of such technical professions in Kansas."

Fiftieth Legislative Assembly, State of North Dakota, begun and held at the Capitol in the City of Bismarck, on Tuesday, the sixth day of January, one thousand nine hundred and eighty-seven.

HOUSE BILL NO. 1595
(Moore)

AN ACT to create and enact a new section to chapter 43-19.1 of the North Dakota Century Code, relating to liability of engineers.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF THE
STATE OF NORTH DAKOTA:

SECTION 1. A new section to chapter 43-19.1 of the North Dakota Century Code is hereby created and enacted to read as follows:

Engineer not liable for contractor's fault unless responsibility assumed - Liability for own negligence. An engineer shall not be liable for the safety of persons or property on or about a construction project site, or for the construction techniques, procedures, sequences and schedules, or for the conduct, action, errors, or omissions of any construction contractor, subcontractor, or material supplier, their agents or employees, unless he assumes responsibility therefor by contract or by his actual conduct. Nothing herein shall be construed to relieve an engineer from liability for his negligence, whether in his design work or otherwise.

Paul L. Lunde
Speaker of the House

Ray Gilbreath
Chief Clerk of the House

Alton W. Pedler, Jr.
President of the Senate

James Groth
Secretary of the Senate

This certifies that the within bill originated in the House of Representatives of the Fiftieth Legislative Assembly of the State of North Dakota and is known on the records of that body as House Bill No. 1595.

Vote:	Ayes	81	Nays	17	Absent	8
Vote:	Ayes	46	Nays	6	Absent	1

Ray Gilbreath
Chief Clerk of the House

Received by the Governor at 1:19 P.M. on March 26, 1987.

Approved at 1:17 P.M. on March 27, 1987.

George A. Sinner
Governor

Filed in this office this 30 day of March, 1987, at 8:39 o'clock A.M.

Ben Meier
Secretary of State

STATE OF OKLAHOMA

AN ACT RELATING TO WORKERS' COMPENSATION, AMENDING 85 O.S. 1981, SECTION 12, AS AMENDED BY SECTION 1, CHAPTER 37, O.S.L. 1982 (85 O.S. SUPP. 1983, SECTION 12); PROVIDING PROCEDURES RELATING TO EXCLUSIVE LIABILITY, EXCEPTIONS, COURT ACTIONS, AND IMMUNITY INCLUDING PERSONS TO WHICH LIMITED LIABILITY APPLIES TO.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. AMENDATORY 85 O.S. 1981, Section 12, as amended by Section 1, Chapter 37, O.S.L. 1982 (85 O.S. Supp. 1983, Section 12), is amended to read as follows:

Section 12. The liability prescribed in Section 11 of this title shall be exclusive and in place of all other liability of the employer and any of his employees, any architect, professional engineer, or land surveyor retained to perform professional services on a construction project, at common law or otherwise, for such injury, loss of services, or death, to the employee, or the spouse, personal representative, parents, or dependents of the employee, or any other person. If an employer has failed to secure the payment of compensation for his injured employee, as provided for in this title, an injured employee, or his legal representatives if death results from the injury, may maintain an action in the courts for damages on account of such injury, and in such action the defendant may not plead or prove as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee; provided:

(i) The immunity created by the provisions of this section shall not extend to action by an employee, or the spouse, personal representative, parents, or dependents of the employee, or any other person against another employer, or its employees, on the same job as the injured or deceased worker where such other employer does not stand in the position of an intermediate or principal employer to the immediate employer of the injured or deceased worker;

(ii) The immunity created by the provisions of this section shall not extend to action against another employer, or its employees, on the same job as the injured or deceased worker even though such other employer may be considered as standing in the position of a special master of a loaned servant where such special master neither is the immediate employer of the injured or deceased worker nor stands in the position of an intermediate or principal employer to the immediate employer of the injured or deceased worker; and

(iii) This provision shall not be construed to abrogate the loaned servant doctrine in any respect other than that described in paragraph (ii) of this section. This section shall not be construed to relieve the employer from any other penalty provided for in this title for failure to secure the payment of compensation provided for in this title.

(iv) For the purpose of extending the immunity of this section, any architect, professional engineer, or land surveyor shall be deemed an intermediate or principal employer for services performed at or on the site of a construction project, but this immunity shall not extend to the negligent preparation of design plans and specifications.

LEGISLATIVE BILL 492

Approved by the Governor May 26, 1987

Introduced by Nelson, 35; Hannibal, 4; Chizek, 31;
L. Johnson, 15; Elmer, 38; Pirsch, 10;
Conway, 17; Hefner, 19; Korshoj, 16

AN ACT relating to liability; to amend section 25-21,187, Reissue Revised Statutes of Nebraska, 1943; to restrict the liability of professional architects, professional engineers, and professional land surveyors as prescribed; and to repeal the original section.

Be it enacted by the people of the State of Nebraska,

Section 1. That section 25-21,187, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

25-21,187. (1) In the event that a public or private contract or agreement, for the construction, alteration, repair, or maintenance of a building, structure, highway bridge, viaduct, water, sewer, or gas distribution system, or other work dealing with construction, or for any moving, demolition, or excavation connected with such construction, contains a covenant, promise, agreement, or combination thereof, to indemnify or hold harmless another person from that such person's own negligence, then such covenant, promise, agreement, or combination thereof is shall be void as against public policy and wholly unenforceable. This section subsection shall not apply to construction bonds or insurance contracts or agreements.

(2) No professional architect, professional engineer, or professional land surveyor who is retained to perform professional services on a construction project and no employee of a professional architect, professional engineer, or professional land surveyor who is assisting or representing the professional architect, professional engineer, or professional land surveyor in the performance of professional services on a construction project shall be liable in tort for any case of personal injury to or death of any employee working on a construction project arising out of and in the course of employment on the construction project and occurring as a result of a violation of a safety practice by any third party unless the responsibility

LB 492

LB 492

for supervision of safety practices has been assumed by contract or by other conduct. This subsection shall not be construed to establish, diminish, or abrogate any duty, standard of care, or liability of any person or individual except as expressly provided in this subsection.

Sec. 2. That original section 25-21,187, Reissue Revised Statutes of Nebraska, 1943, is repealed.

STATE OF WASHINGTON
Chapter 212, Laws of 1987

PART XVIII

LIABILITY OF DESIGN PROFESSIONALS AND ARCHITECTS

NEW SECTION. Sec. 1801. A new section is added to chapter 51.24
RCW to read as follows:

(1) Notwithstanding RCW 51.24.030(1), the injured worker or beneficiary may not seek damages against a design professional who is a third person and who has been retained to perform professional services on a construction project, or any employee of a design professional who is assisting or representing the design professional in the performance of professional services on the site of the construction project, unless responsibility for safety practices is specifically assumed by contract, the provisions of which were mutually negotiated, or the design professional actually exercised control over the portion of the premises where the worker was injured.

(2) The immunity provided by this section does not apply to the negligent preparation of design plans and specifications.

(3) For the purposes of this section, "design professional" means an architect, professional engineer, land surveyor, or landscape architect, who is licensed or authorized by law to practice such profession, or any corporation organized under chapter 18.100 RCW or authorized under RCW 18.08.420 or 18.43.130 to render design services through the practice of one or more of such professions.

STATE OF FLORIDA

"...no construction design professional who is retained to perform professional services on a construction project, nor any employee of a construction design professional in the performance of professional services on the site of a construction project, shall be liable for any injuries resulting from the employer's failure to comply with safety standards on the construction project for which compensation is recoverable under this chapter, unless responsibility for safety practices is specifically assumed by contracts. The immunity provided by this subsection to any construction design professional shall not apply to the negligent preparation of design plans and specifications."

File No. 458

House Bill No. 5290

State of Connecticut
House of Representatives

The seal of the State of Connecticut House of Representatives is centered between the words "State of Connecticut" and "House of Representatives". It features a shield with a ship (the USS *Constitution*) and a banner below it with the motto "QUI PROSTAT SUPPLETE".

House of Representatives, April 16, 1986.
The Committee on Judiciary reported through Rep. Wollenberg of the 21st District, Chairman of the Committee on the part of the House, that the bill ought to pass.

AN ACT CONCERNING THE CIVIL LIABILITY OF ARCHITECTS AND ENGINEERS UNDER THE WORKERS' COMPENSATION ACT.

Section 1

Be it enacted by the Senate and House of Representatives in General Assembly convened:
Section 31-293 of the general statutes is repealed and the following is substituted in lieu thereof:
(a) When any injury for which compensation is payable under the provisions of this chapter has been sustained under circumstances creating in some other person than the employer a legal liability to pay damages in respect thereto, the injured employee may claim compensation under the provisions of this chapter, but the payment or award of compensation shall not affect the claim or right of action of such injured employee against such other person, but such injured employee may proceed at law against such person to recover damages for such injury; and an employer having paid, or having become obligated to pay, compensation under the provisions of this chapter may bring an action against such other person to recover any amount that he has paid or has become obligated to pay as compensation to such injured employee. If either such employee or such employer

22 brings such action against such third person, he
23 shall forthwith notify the other, in writing, by
24 personal presentation or by registered or
25 certified mail, of such fact and of the name of
26 the court to which the writ is returnable, and
27 such other may join as a party plaintiff in such
28 action within thirty days after such notification,
29 and, if such other fails to join as a party
30 plaintiff, his right of action against such third
31 person shall abate. In any case in which an
32 employee brings an action against a third party in
33 accordance with the provisions of this section,
34 and the employer is a party defendant in such
35 action, the employer may join as a party plaintiff
36 in such action. The bringing of any such action
37 against an employer shall not constitute notice to
38 such employer within the meaning of this section.
39 If such employer and employee join as parties
40 plaintiff in such action and any damages are
41 recovered, such damages shall be so apportioned
42 that the claim of the employer, as defined in this
43 section, shall take precedence over that of the
44 injured employee in the proceeds of such recovery,
45 after the deduction of reasonable and necessary
46 expenditures, including attorneys' fees, incurred
47 by the employee in effecting such recovery. The
48 rendition of a judgment in favor of the employee
49 or the employer against such party shall not
50 terminate the employer's obligation to make
51 further compensation, including medical expenses,
52 which the compensation commissioner thereafter
53 deems payable to such injured employee. If the
54 damages, after deducting the employee's expenses
55 as provided above, are more than sufficient to
56 reimburse the employer, damages shall be assessed
57 in his favor in a sum sufficient to reimburse him
58 for his claim, and the excess shall be assessed in
59 favor of the injured employee. No compromise with
60 such third person by either employer or employee
61 shall be binding upon or affect the rights of the
62 other, unless assented to by him. For the purposes
63 of this section the employer's claim shall consist
64 of (1) the amount of any compensation which he has
65 paid on account of the injury which is the subject
66 of the suit and (2) an amount equal to the present
67 worth of any probable future payments which he has
68 by award become obligated to pay on account of
69 such injury. The word "compensation," as used in

70 this section, shall be construed to include not
71 only incapacity payments to an injured employee
72 and payments to the dependents of a deceased
73 employee, but also sums paid out for surgical,
74 medical and hospital services to an injured
75 employee, the one thousand dollar burial fee
76 provided by law and payments made under the
77 provisions of sections 31-312 and 31-313.
78 (b) NOTWITHSTANDING THE PROVISIONS OF
79 SUBSECTION (a) OF THIS SECTION, NO CONSTRUCTION
80 DESIGN PROFESSIONAL WHO IS RETAINED TO PERFORM
81 PROFESSIONAL SERVICES ON A CONSTRUCTION PROJECT,
82 OR ANY EMPLOYEE OF A CONSTRUCTION DESIGN
83 PROFESSIONAL WHO IS ASSISTING OR REPRESENTING THE
84 CONSTRUCTION DESIGN PROFESSIONAL IN THE
85 PERFORMANCE OF PROFESSIONAL SERVICES ON THE SITE
86 OF THE CONSTRUCTION PROJECT, SHALL BE LIABLE FOR
87 ANY INJURY ON THE CONSTRUCTION PROJECT FOR WHICH
88 COMPENSATION IS PAYABLE UNDER THE PROVISIONS OF
89 THIS CHAPTER, UNLESS RESPONSIBILITY FOR SAFETY
90 PRACTICES IS SPECIFICALLY ASSUMED BY CONTRACT.
91 THE IMMUNITY PROVIDED BY THIS SUBSECTION TO ANY
92 CONSTRUCTION DESIGN PROFESSIONAL SHALL NOT APPLY
93 TO THE NEGLIGENT PREPARATION OF DESIGN PLANS OR
94 SPECIFICATIONS. FOR THE PURPOSES OF THIS
95 SUBSECTION "CONSTRUCTION DESIGN PROFESSIONAL"
96 MEANS (1) ANY PERSON LICENSED AS AN ARCHITECT
97 UNDER THE PROVISIONS OF CHAPTER 390, (2) ANY
98 PERSON LICENSED, OR EXEMPTED FROM LICENSURE, AS AN
99 ENGINEER UNDER THE PROVISIONS OF CHAPTER 391, OR
100 (3) ANY CORPORATION ORGANIZED TO RENDER
101 PROFESSIONAL SERVICES THROUGH THE PRACTICE OF
102 EITHER OR BOTH OF SUCH PROFESSIONS IN THIS STATE.

103 Committee Vote: Yea 26 Nay 0

see next page
for Section 2

April 28, 1986]

JOURNAL OF THE HOUSE

The Speaker ordered the vote be taken by roll call.

The following is the result of the vote:

Total Number Voting.....	134
Necessary for Passage.....	68
Those voting Yes.....	130
Those voting Nay.....	4
Those absent and not Voting.....	17

On the roll call vote the bill as amended by Senate Amendment Schedule "A" was passed in concurrence with the Senate.

JUDICIARY. H.B. No. 5290 (COMM) (File No. 458) AN ACT CONCERNING THE CIVIL LIABILITY OF ARCHITECTS AND ENGINEERS UNDER THE FOREKERS' COMPENSATION ACT.

The bill was explained by Rep. Rudolf of the 139th. The bill was discussed by Reps. Rybak of the 66th and Looney of the 96th who offered House Amendment Schedule "A" (LCO 3468) and moved its adoption.

On a voice vote the amendment was adopted. The Speaker ruled the amendment was technical.

The bill was further discussed by Reps. Rudolf of the 139th, Taborsak of the 109th and O'Neill of the 98th.

The Speaker ordered the vote be taken by roll call.

The following is the result of the vote:

Total Number Voting.....	140
Necessary for Passage.....	71
Those voting Yea.....	110
Those voting Nay.....	30
Those absent and not Voting.....	11

On the roll call vote the bill as amended by House Amendment Schedule "A" was passed.

Section 2

The following is House Amendment Schedule "A":

In line 1, insert "Section 1."
 After line 102, insert the following:
 "Sec. 2. section 52-584a of the general statutes is repealed and the following is substituted in lieu thereof:
 (A) [Notwithstanding any provision of the general statutes, no] NO action or arbitration, whether in contract, in tort, or otherwise, (1) to recover damages (A) for any deficiency in the design, planning, contract administration, supervision, observation of construction or construction of an improvement to real property; (B) for injury to property, real or personal, arising out of any such deficiency; (C) for injury to the person or for wrongful death arising out of any such deficiency, or (2) for contribution or indemnity which is brought as a result of any such claim for damages shall be brought against any architect or professional engineer performing or furnishing the design, planning, supervision or observation of construction or construction of such improvement more than seven years after substantial completion of such improvement.
 (B) Notwithstanding the provisions of subsection (a) of this section, in the case of such an injury to property or the person

or such an injury causing wrongful death, which injury occurred during the seventh year after such substantial completion, an action in tort to recover damages for such an injury or wrongful death may be brought within one year after the date on which such injury occurred, irrespective of the date of death, but in no event may such an action be brought more than eight years after the substantial completion of construction of such an improvement.

(c) For purposes of subsections (a) and (b) of this section, an improvement to real property shall be considered substantially complete when (1) it is first used by the owner or tenant thereof or (2) it is first available for use after having been completed in accordance with the contract or agreement covering the improvement, including any agreed changes to the contract or agreement, whichever occurs first.

(d) [Nothing in this section shall be construed to extend the period prescribed by the laws of this state for the bringing of any action.

(e)] The limitation prescribed by this section shall not be asserted by way of defense by any person in actual possession or the control, as owner, tenant or otherwise, of such an improvement at the time any deficiency in such an improvement constitutes the proximate cause of the injury or death for which it is proposed to bring action."

10: John K...
Naron Black... 10: Willy Van...
12/187

ACEC

Liability & Litigation REPORT

AMERICAN CONSULTING ENGINEERS COUNCIL

Vol. 1, No. 1—October 1987

From Sam Rowley

ACEC LEGAL DEFENSE FUND—A HELPING HAND

Since 1980, the American Consulting Engineers Council has provided financial and/or legal assistance in more than thirty disputes involving member (and sometimes non-member) firms. However, not every lawsuit, or regulatory disagreement, qualifies for Legal Defense Fund aid.

Specifically, a case must have the potential for producing a precedent-setting decision (or regulatory interpretation) that could affect the practices of many consulting engineers. Firms facing problems which meet this criterion may request assistance through an ACEC Member Organization. All requests are immediately relayed to members of the national Council's Legal Defense Fund Committee with responses due back in ten calendar days. Depending on the urgency committee members may discuss a priority request via a conference call before making a recommendation.

Assistance, if granted, can be in the form of money (to help pay local legal expenses) or an Amicus Curiae brief supporting a particular position. Contributions may range from \$500 to \$5000, or higher, in special cases.

Also, as a general rule, the LDF Committee is reluctant to enter a case until it has reached the appellate level. Experience has shown that many of the more bizarre suits are tossed out at the district or common pleas court level. While the Committee recognizes that all suits are important, care is taken in the commitment of legal defense funds to be sure they are not expended on suits which are likely to be rejected by a lower court.

Some typical LDF cases:

- (a) Approximately \$5000 was allocated to help defray legal costs incurred by a consulting engineer in contesting a

Defense Fund—Cont'd Page Three

Seven States Prohibit Third Party Suits

Imagine resolving an inequity which is the basis for nearly half of all personal injury claims brought against consulting engineers. And imagine further a 7 to 10 percent reduction in liability insurance premiums as a result of such action. A pipe dream? Not on your life. At least seven states have already accomplished step one, and at least twice that number are already laying plans to do likewise in 1988.

The issue is workers' compensation laws and the problem is failure to include consulting engineers and architects under the "exclusive remedy" clause in such statutes.

A real-life case illustrates the problem. In 1978 a University of Kansas football player, working as a summer construction employee, was killed when the unshored trench in which he was digging collapsed. The young man's widow sued and the court awarded \$423,000 in damages from the contractor, the construction inspector and his consulting engineering firm. The construction company was dismissed from further liability, however, because the death fell under the "exclusive remedy" clause of the Kansas Workmens' Compensation Act. However, the engineering firm was assessed \$208,250 despite the fact it had no contractual obligation to direct how the contractor performed the work. The reason? Consulting engineers were not exempted by the "exclusive remedy" language.

The Kansas Act was, until recently, similar to most other states in this regard. In the case of death or injury, when workers or their survivors accept workers' comp for injuries, lost hours, medical bills, etc., they may not sue for additional payment from their employer, the project owner, the general contractor or other subcontractors at the site. The

growing practice, however, is to sue the consulting engineer and/or architect, oftentimes winning awards exceeding their workers' comp payment.

In the states of Oklahoma, Kansas, Washington, Connecticut, Florida, Nebraska, and North Dakota, this loophole may no longer be an option. All have enacted laws specifically aimed at exempting design professionals from such suits except in cases of negligence or professional errors or omissions.

Enactment of state laws, to eliminate third-party liability where the E/A has no contractual responsibility for either workers' safety or the contractors' project management approach, is one of five top-priority reforms advocated by the American Consulting Engineers Council. Recommended legislative language has been drafted and is available upon request.

Also available are copies of all seven existing workers comp statutes brought to ACEC's attention in the past three years. Interestingly, not all are aimed at workers' compensation law amendments. Some, like the North Dakota law, amend the state registration law. Both approaches appear to be equally effective.

For copies of recommended, or enacted, reform bills, contact Bob Fogle at ACEC headquarters.

11/9/87 JH

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"86-PAD-145"—THE A-E'S UNINTELLIGIBLE MILLSTONE

A growing problem among consulting engineers seeking or performing federal work is the insistence of many government auditors that a prorata share of liability insurance premiums is no longer an allocable element of overhead cost. For those who haven't faced this problem, the culprit is a Defense Contract Audit Agency guidance memo, "86-PAD-145," entitled "Audit Guidance on Errors and Omissions Insurance and Professional Liability Insurance."

Guidance memo 86-PAD-145 was issued September 6, 1986, with no opportunity for public comment and no formal discussion with representatives of the professions most affected. It appears to be in conflict with the allowability and allocability policies of virtually every federal construction agency or program. It contains statements and assumptions that are unsupported. It requests data that is generally unavailable and discusses (but does not mandate) modification of existing policy re: the allocability of A-E insurance costs.

Nevertheless, this memo is cited in numerous DCAA denials of architect-engineer professional liability premiums as part of firm overhead costs. Inexplicably, a careful reading of the contents reveals no specific directive to this effect. Instead, it contains some startling inaccuracies.

For example, the author correctly notes that E & O costs "have doubled or tripled in the past two years." But he goes on to

state "This additional premium cost can be identified to litigation involving commercial activities associated with condominiums and other family housing projects."

Other statements include: "A & E contractors have rarely incurred insurance claims or losses on its Government contract activity," and "... third party exposure and risk of loss is minimal or non-existent on (A-E) Government contracting activity." (Parens added.)



Elsewhere the memo notes that the government "... requires A & E firms to maintain errors and omissions insurance ... (to) provide the Government some assurance that a quality and professional job will be performed." This conclusion is seemingly ignored in a later paragraph which declares "... allocation of errors and omissions and professional liability insurance costs to all work does not appear to meet the ... beneficial or casual relationships between the insurance costs and the benefitting or causing cost objective."

A-E contractors are directed by the DCAA memo to "require the insurance carrier to segregate the premium cost between commercial and Government risk exposures so that the relationships can be demonstrated and evaluated." Said one underwriter, when confronted by such a request, "How the hell do we do that?"

ACEC and AIA, in a survey of federal agency policy on allowability/allocability of professional liability insurance premiums, has been assured that reasonable liability costs continue to be recognized and approved on A-E contracts awarded by NAVFAC, Corps of Engineers, NASA, Veterans Administra-

tion, U.S. Postal Service, and General Services Administration. Virtually every agency cited Federal Acquisition Regulation (FAR) 31.205-19 as its authority.

DCAA and ACEC officials met in August, and again in September (the latter with COFPAES and insurance industry representatives also attending). A third meeting is scheduled for late October. Discussions of the profession's and the government's respective positions have resulted in a better understanding of the issue by both sides. However, 86-PAD-145 is still the operative guidance and is still being cited by some DCAA auditors.

ACEC members, confronted by audits recommending against prorata allocation of professional liability insurance costs, may find the following helpful in persuading federal negotiators that E & O insurance is a normal overhead expense.

- (1) The overall government practice regarding this matter is clearly stated in FAR 31.205-19. There is no formal federal policy that makes professional liability costs unallowable or unallocable.
- (2) Government auditor recommendations are advisory to federal contracting officers. The latter can, if they choose, ignore such advice.
- (3) 86-PAD-145, in addition to factual shortcomings, fails to specifically direct DCAA auditors to implement the gist of its content.
- (4) Some DCAA auditors, apparently, have chosen to continue approving reasonable liability premiums. Thus, the Guidance is being inconsistently applied.
- (5) A letter from an A & E's underwriter, explaining problems of providing risk and rate data on public vs private projects, may be useful.
- (6) While Guidance Memos are not required to be disseminated for public comment, regulations are. If 86-PAD-145 is characterized as "mandatory," ask for documentation of its regulatory status.

ACEC member firms unable to resolve the allocability issue are encouraged to contact Mark Casso, in the Washington, D.C. office, for the latest word on developments re: eligibility of insurance premiums as an overhead cost.

ACEC Liability & Litigation REPORT

LIABILITY & LITIGATION is a publication of the American Consulting Engineers Council. ACEC is a national federation of approximately 5,000 independent, private practice engineering firms providing services in virtually every field of professional engineering and surveying. The headquarters office is located at:

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Robert L. Fogle, Director, Liability Issues
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Pretrial Screening Panels Reduce Lawsuits

Several ACEC Member Organizations are planning strategies to lobby their state legislatures next year to enact pretrial screening panels and/or certificates of merit for lawsuits involving design professionals. These legislative initiatives are designed to reduce the number and amount of litigation involved in non-meritorious lawsuits against independent engineers.

In the past, the ACEC Tort Reform Program has suggested many arguments to use when lobbying for pretrial screening panels and certificates of merit. Among these arguments is the fact that many states have existing pretrial procedures for the benefit of physicians involved in medical malpractice claims. ACEC suggests that engineers ask for the same treatment, and point out that their liability problems are similar to those of doctors.

Recent research by ACEC staff has revealed that 26 states have established medical pretrial screening panels for physicians and, in some states, other health care providers as well. There also

States With Medical Malpractice Screening Panels

Alaska	Kansas	New Jersey
Arizona	Louisiana	New Mexico
Arkansas	Maine	New York
Delaware	Maryland	Pennsylvania
Florida	Massachusetts	Rhode Island
Hawaii	Missouri	Tennessee
Idaho	Nebraska	Virginia
Illinois	Nevada	Wisconsin
Indiana	New Hampshire	

is an emerging trend to enact laws requiring certificates of merit in medical malpractice cases on top of pretrial screening panels.

A recent study of Maryland's medical malpractice experience indicates that state's "Health Care Arbitration" system (a pretrial screening panel procedure) has been increasingly effective since its inception in 1976. More recently, beginning in July 1986, plaintiffs in Maryland were required to obtain a certificate of merit from a physician within 90 days of filing a case.

According to statistics collected by the Maryland Health Claims Arbitration Office, the certificate of merit procedure has reduced non-meritorious claims by over 50%.

ACEC members, particularly those in states which have either of these two procedures for medical malpractice claims, might reference the successes of the physicians' panels and certification processes when lobbying for similar laws for engineers.

Defense Fund—Cont'd from Page One

federal agency's insistence that the government had access to accounting and tax records for all the firm's work—including both public and private clients. The engineer (and ACEC) was disturbed that he had been denied the right to review the audit guidelines upon which the agency based its claims. Since the consultant was not being audited for fraud or program abuse, ACEC felt the case, if lost, could deprive any business of due process under law. The case was settled when the agency which had appealed a lower court's rejection, voluntarily released its guidelines and agreed to limit its audits to standard data and procedures.

(b) In some instances the LDF may support a non-member company. A case in point involved an architect who had been sued by a woman injured by falling glass when a brick was hurled through a two-story window at a racetrack pavilion. After incurring considerable legal expense, the architect was dismissed. In an effort to discourage future actions of this nature, he then filed a claim against the plaintiff's attorney charging him with hav-

LIABILITY A TOP PRIORITY AT ENGINEERS' SUMMIT

A summer meeting of key officers and staff from thirty different associations and societies has determined that liability and infrastructure are the predominant issues facing U.S. engineers today. Represented at the 2nd annual "Summit Conference" were representatives of engineering, construction, building code and public works organizations. Host of the event was the American Society of Civil Engineers.

As in 1986, the insurance crisis received much of the delegates' attention. Reports of 100% or more increases in liability insurance rates, accompanied by increased deductibles and lowered coverage, were commonplace. So also was the practice of many firms (one out of every five in

ACEC's case) practicing without any insurance.

One group—the American Association of Engineering Societies—presented a paper which predicts that tort reforms, necessary to halt today's litigation explosion, will be a major objective of the construction industry for at least five more years. Barring such reforms, engineers will be unable to provide services and products that benefit the public and aid the economy.

Copies of the findings and recommendations of the 1987 "Summit Conference" may be obtained from the American Society of Civil Engineers, 345 E. 47th St., New York, N.Y. 10017-2398.

ing brought a frivolous suit. Despite financial and legal support from both ACEC and AIA, the suit failed.

(c) Several Legal Defense Fund cases have involved support of state consulting engineer efforts to preserve existing statutes of limitations. In 1987 alone, ACEC, along with NSPE, joined in the cost of preparing and filing amicus briefs contesting appeals court decisions declaring existing statutes of repose unconstitutional. Both cases involved projects completed more

than twenty years prior to discovery of alleged defects or professional negligence by the design professional. Both judgments are now being appealed to their respective state supreme courts.

In its seven years of existence, the ACEC Legal Defense Fund has helped achieve victories in two-thirds of the cases in which it participated. For more details relative to the operation and procedures of the LDF, contact Bob Fogle in the ACEC national office.

Director and Officer Liability Rates Stabilizing

A recent survey of officer and director liability insurance rates indicates that premiums, while stabilizing, are continuing to run high. Unfortunately, the July survey by the Wyatt Company, fails to reflect the impact of numerous state laws eliminating or limiting personal liability of directors or shareholders, except in cases of misconduct, unlawful payments of dividends or improper acts resulting in personal benefit.

According to the American Tort Reform Association, at least 22 states have enacted exceptions from, or limitation of, liability claims against directors and officers of for-profit organizations. Thirty-nine states provide liability exemptions for officers and directors of not-for-profit organizations.

Wyatt's 1987 "Directors, Officers and Fiduciaries Liability Survey" shows a sharp increase from 1984 to 1986 in the cost of liability coverage for such officials. Most of the state laws addressing D and O liability were enacted over the past 18 months. Most came about as the number of lawsuits filed against Directors and Officers rose at a rate of 15 to 20 percent per year from 1980 to 1987.

Over the past two years the average cost of settling such claims, including defense costs, jumped 147%, going from \$1.04 million in 1984 to \$2.57 million in 1986.

Participating in the Wyatt survey were 1,047 different organizations, including manufacturers, banks, hospitals, educational institutions and others.

ACEC Brochure a Popular Item



A small, 10-page brochure, describing the impact of today's liability crisis upon consulting engineers and their clients, has become one of ACEC's "best sellers." Published last March, this oft-ordered pamphlet has already been distributed to approximately 14,000 engineers, public officials, businessmen and others. Plans are already underway to republish.

The pamphlet's popularity stems from its effective presentation of the five civil justice reforms of most importance to consulting engineers. These are: (1) modification of workers' compensation laws to discourage third-party lawsuits; (2) elimination of joint and several liability in cases involving property damage; (3) tightening of statutes of limitations or statutes of repose; (4) greater use of "screening panels"

to weigh the legitimacy of a pending lawsuit; and (5) indemnification of firms willing to undertake projects dealing with hazardous waste or pollution abatement.

Robert Sparks, vice president of Lockwood Greene, in Atlanta, was one of several hundred ACEC members requesting extra copies of the "Liability Crisis" pamphlet. Said Bob, the ACEC brochure "is clever, attractive, and more importantly, full of good information about engineers' liability problems. We plan to place copies in the hands of many of our important clients and state legislators."

Another ACEC member ordered 75 copies for dissemination to firm employees. A Member Organization ordered 150 copies for distribution to key legislators.

Members wishing to make similar use of this easy-to-read explanation of consulting engineers' liability woes can obtain up to ten copies free. Additional copies are only 50 cents apiece. To order copies, send a preaddressed mailing label to ACEC's Publications Department and request Publication No. 210/REM. Enclose check or money order for copies in excess of ten.

Liability & Litigation

American Consulting Engineers Council
1015 Fifteenth Street, N.W.—Suite 802
Washington, D.C. 20005
(202) 347-7474



FIRST CLASS MAIL

Dan M. Rowley
CH2M HILL NW, INC.
2550 Denali Street
8th Floor
Anchorage

AK 99503-2792



To: Sharon Macklin
Lee Peterson
From: Jan Rowley

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WORKMEN'S COMPENSATION AMENDMENT

Suggested Legislation
December 1986

Section 1. [Definitions.]

"Construction design professional" means any person who is an architect, professional engineer, landscape architect or land surveyor who has been issued a license by the state board of (name of board) to practice such technical profession in (state name) or any corporation organized to render professional services through the practice of one or more of such technical professions in (state name) under the professional corporation law of (state name).

Section 2. [Liability of construction design professional.]

Except as provided in the Workmen's Compensation Act, no construction design professional who is retained to perform professional services on or in conjunction with a construction project or any employee of a construction design professional who is assisting or representing the construction design professional in the performance of professional services on the site of the construction project, shall be liable for any injury on the construction project for which compensation is recoverable under the Workmen's Compensation Act, and Workmen's Compensation shall be the sole and exclusive remedy against a design professional, unless responsibility for safety practices is specifically assumed by contract or by the affirmative actions of the construction design professional or any employee of the construction design professional who is assisting or representing the construction design professional in the performance of professional services on the site of the construction project.



Senator Johne Binkley

Senate Finance Committee
P.O. Box V • Juneau, Alaska 99811 • (907) 465-4985



Finance Committee
Co-Chairman

February 2, 1988

Chancy Croft, Esq.
Chancy Croft Law Office
738 H Street, Suite 200
Anchorage, AK 99501

Dear Mr. Croft:

I have received your letter of January 29 expressing your concern regarding worker's compensation which you state is not adequately dealt with in SB 322 or its companion bill, HB 352. Thank you for sharing your thoughts with me.

As I am sure you are aware, these bills have a great deal of support. Senator Kelly, as Chairman of the Senate Labor and Commerce Committee, is dedicated to holding public hearings in order to hear from as many people as possible in order to have every reasonable assurance that as many problems as can be addressed in the bills are taken care of. No one claims, however, that these bills are the complete solution but instead are seen as a first step.

I would encourage you to attend the public hearing in Anchorage scheduled for Friday, February 12 at 3:30 in the LIO and share your concerns with the Committee for the record. Perhaps a workable solution can be found.

Sincerely,

A handwritten signature in black ink, appearing to read "Johne Binkley".

Senator Johne Binkley
Yukon-Kuskokwim and
Interior Rivers

jka
✓ cc: The Honorable Tim Kelly

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DATE

TO: Senate & House L&C Comtes.

FR: Sitka Chamber

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Hearing 1/29/88

①

Sunde's Alaska Traditions
401 Lincoln St.
Sitka, Alaska 99835
(907) 747-6262

Jan 29, 1988

To: House & Senate Committees on Labor & Commerce.

From: Dick Sunde Representing the Sitka Chamber Of Commerce

Re: HB 362 & SB 322 Workers Compensation Program.

With the increased cost in Workers Compensation Insurance Premiums it becomes more difficult for small and larger size businesses to expand there labor force. If businesses are hampered from expanding there labor force based on or partly on the high cost of Workers Compensation Premiums then both labor and business loss.

These bills should help in the reduction of premiums with out undue reductions in protection for the Workers injured during there employment and on the job premises.

It is the position of the Sitka Chamber of Commerce that we support the timely passage of these bills.

Thank you



Dick Sunde

Chairman Legislative Committee of the Sitka Chamber of Commerce.

2



506 W. 6th Avenue #9
Anchorage, Alaska 99501
(907) 272-9312

Entertaining Alaskans since 1967

Senator Tim Kelly
P.O. Box V Room 101
Juneau, AK 99811

Dear Senator Kelly ,

I am the owner of Golden Wheel Amusements Of Alaska. I am concerned with the escalating costs of workman's compensation insurance for my business. I employ nearly 250 people annually and provide a large part of much needed revenue to several state fairs and the Fur Rendezvous committee, and the rising cost of workman's compensation insurance is a threat to my continuing business.

I have been established in this state for over twenty years and have enjoyed moderate business success, yet the costs of workman's compensation insurance is a threat to my business. Imagine how many younger, less successful businesses are in as bad if not worse danger of financial collapse.

The Workman's Compensation Committee of Alaska is planning to introduce legislation advocating changes in the current compensation laws. I support this committee and their bill, and I appeal to you to not only support this bill as written, but to do all you can to expedite this bill's passage. For, even if passed on the first day of legislative meetings, Alaska business would not feel the relief until July.

Thank you for your support of the proposed changes of the Workman's Compensation Committee.

Sincerely,

Claire Morton
Golden Wheel Amusements

Claire Morton, Owner • Manager

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SUGGESTED AMENDMENTS

to

Alaska Workers' Compensation Board Rehabilitation Statute.

by

JON C. DEISHER, MA., C.R.C.

Sec. 23.30.041. Rehabilitation of injured workers.

(a) The board shall select and employ a rehabilitation administrator and may authorize the rehabilitation administrator to select and employ additional rehabilitation staff. The rehabilitation administrator will serve at the pleasure of and will be responsible directly to the board. The rehabilitation administrator will meet or exceed the qualifications requirements for a Qualified Rehabilitation Professional as defined by AS23.30.041(p) and will be certified by either the National Rehabilitation Association (NRA), the National Association of Rehabilitation Professionals in the Private Sector (NARPPS), or both. The Rehabilitation Administrator will meet these qualifications prior to appointment. The rehabilitation administrator is in the partially exempt service under AS39.25.120.

(b) The rehabilitation administrator shall implement the provisions of this section, study the issue of rehabilitation, both physical and vocational, on a continuing basis, and provide expert rehabilitation advise to the Board on disputed rehabilitation issues before the Board.

(c) If an employee suffers an industrial injury that precludes return to suitable gainful employment for a period of 90 continuous days, it is presumed the employee's industrial injury has resulted in a vocational disability unless or until otherwise determined through a vocational evaluation. Based upon th: presumptive disability the employee is entitled to a full rehabilitation evaluation to determine if a rehabilitation plan is necessary to resolve the employee's barriers to suitable gainful employment. Referral for the full evaluation will include the treating physician's diagnosis, prognosis, recommended treatment and medical opinion regarding the employee's physical capabilities. Opinions regarding the employee's physical capacities may be obtained from a licenced occupational therapist approved and designated in writing by the treating physician. Referral for the full evaluation will be made not

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later than the 90th day of disability. A full evaluation shall be performed by a qualified rehabilitation professional as defined in this subsection. If, in the opinion of the qualified rehabilitation professional, the medical, physical, vocational or emotional state of the employee precludes a full evaluation, the rehabilitation professional shall prepare a preliminary evaluation. A preliminary evaluation will include the reasons why a full vocational rehabilitation evaluation cannot be made or will not be necessary. If a full evaluation is necessary, the Qualified Rehabilitation professional will give a) an opinion as to if or when the employee will be eligible for the full vocational rehabilitation evaluation, and b) any information that would be included in a full vocational rehabilitation evaluation that can be determined and reported by the rehabilitation professional at the time of the preliminary evaluation. If the Qualified Rehabilitation Professional believes that the employee will be able to return to regular employment without further evaluation, then the rehabilitation professional will give an opinion as to the employee's ability to return to suitable gainful employment and report the physical and vocational basis for this opinion.

d) 1) If the employer does not timely schedule an evaluation under this subsection, the employer will lose all rights to designate a rehabilitation professional and will pay to the employee 20% of a pro rated amount of the employee's compensation rate in addition to the amount already being paid for each day after the 90th day post injury and the employee may retain a qualified rehabilitation professional to perform the evaluation.

2) If the employee does not retain a qualified rehabilitation professional within 14 calendar days after the 90th day of time loss, the employer's pro rated penalty will not be paid and the board or person designated by the board will retain a qualified rehabilitation professional to perform the full vocational rehabilitation evaluation.

3) If the board or designee does not retain a qualified rehabilitation professional within 14 calendar days after the beginning of the employer's penalty period, the second injury fund will reimburse the employer for all penalties paid or due during the continuance of nonreferral.

4) If, after retaining a rehabilitation professional, either party is dissatisfied with the professional they may change to an alternative professional only once. Each party may change the designated rehabilitation professional once but not sooner than 90 days after the rehabilitation professional is retained. If a rehabilitation professional is retained and remains the provider on a case for six months or more he may be removed from the case only by the

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rehabilitation administrator. If a provider is removed from a case by the rehabilitation administrator, the rehabilitation administrator will designate a replacement rehabilitation professional with 72 hours of removal.

The employer will pay the reasonable costs of the vocational rehabilitation evaluation under this subsection.

(e) A full vocational rehabilitation evaluation by a qualified rehabilitation professional shall include following specific determinations:

(1) whether a vocational rehabilitation services plan will enable the employee to return to suitable gainful employment;

(2) whether the employee can return to suitable gainful employment with or without a vocational rehabilitation services plan;

(3) the wage earning capacity of the employee, if any, after the 90th day of time loss.

(4) if a plan is recommended, a systematic justification of the plan recommendations in terms of the order of preference.

(f) For eligibility purposes, if the employee's wage earning capacity is determined to be greater than the minimum wage established by the Fair Labor Standards Act and is equal to ^{or} greater than the compensation rate based upon the average weekly wage (gross weekly earnings) as determined at the time of injury, the employee may elect to resolve his rehabilitation claim through a lump sum settlement based upon the lost wage earning capacity, if any, and in accordance with AS23.30.200 and/or AS23.30.210.

For eligibility purposes, if the wage earning capacity is less than the compensation rate, the full rehabilitation evaluation will determine whether or not a vocational rehabilitation services plan will enable an employee to return to work at a wage earning capacity equal to or greater than the compensation rate and as nearly as possible to the average weekly wage as determined at the time of injury.

(g) If the Qualified Rehabilitation Professional determines that a rehabilitation plan is necessary, the plan will include; 1) a proposed vocational goal, 2) a justification for the vocational goal, 3) the beginning and ending dates of proposed rehabilitation services, 4) the responsibilities of the parties, 5) a labor market rationale for the plan, 6) justification of the plan in terms of the employee's physical capacities and 7) the proposed vocational goal's physical requirements. The plan will be designed to result in suitable gainful employment as determined at the beginning of the plan. The plan will

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consider the employee's preferred vocational goal and if the employee's preferred vocational goal is not pursued then a justification for not pursuing the employee's preferred goal will be given. The plan will also include all the costs to be incurred by the employer during the vocational rehabilitation plan, and an estimate of whether the continuing benefits and compensation due to the employee under this chapter after the conclusion of the rehabilitation plan will be more or less than the benefits and compensation payable to the employee under this chapter if a rehabilitation plan is not implemented.

Once the Vocational Rehabilitation Services Plan (VRSP) is written by the Qualified Rehabilitation Professional, the VRSP will be served upon the primary parties for their approval or disapproval. If the parties fail to approve or disapprove the VRSP within 30 calendar days of service, the QRP will automatically request an informal rehabilitation conference based upon a presumed plan dispute.

(h) A vocational rehabilitation plan may consist of any of the following and will be consistent with a systematic working of the order of preference as presented in AS23.30.041(h); if the employee can be restored to suitable gainful employment with rehabilitation plans of a higher preference, then a rehabilitation plan of a lower preference may not be required from the employer. However, the employer and employee may agree by their signatures to a vocational rehabilitation services plan or letter of understanding, regardless of order of preference, labor market dynamics, expense, or subsequent changes in the parties' preference or circumstances. If the parties agree to a VRSP, then they will be irrevocably bound to their agreement.

(i) The order of preference for vocational rehabilitation plans is

(1) prosthetic devices and training that enables work at the same or similar occupation with the same employer as at the time of injury;

(2) prosthetic devices and training that enables work at the same or similar occupation with a different employer than at the time of injury;

(3) work site modification and vocational training for the same or similar occupation with the same employer as at the time of injury;

(4) work site modification and vocational training for the same or similar occupation with a different employer than at the time of injury;

(5) training for a new occupation in light of the vocational rehabilitation evaluation, the injured worker's age, education, injury, work history, transferrable skills,

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applicable labor market and which will result in suitable gainful employment as defined by AS23.30.265(28). The order of preference for training in a new occupation is as follows: a) on-the-job training; b) vocational training; and c) academic training;

(6) Self employment, if justifiable by the labor market, if the employee is able to successfully manage a self employment enterprise, and if that enterprise can be reasonably expected to meet Suitable Gainful Employment;

(7) direct placement in an occupation unrelated to previous work history establishing any wage earning capacity greater than the Fair Labor Standards Act for the minimum wage using transferrable skills.

If a vocational rehabilitation services plan is agreed upon by the employee and employer, then the parties will be bound to the agreed upon plan unless reasonable barriers beyond the control of the parties prohibit the successful completion of the plan. Reasonable barriers include medical, physical, psychiatric, emotional, vocational and financial circumstances which preclude the completion of the plan. Changes in the labor market after an agreed upon or approved plan is initiated is not a reasonable barrier. Disputes regarding reasonable barriers must be based upon objective facts presented by bonafide professional experts knowledgeable of the alleged barrier(s), and will be first addressed in an informal rehabilitation conference. If an informal rehabilitation conference is not successful in resolving the dispute, then the rehabilitation administrator will resolve the dispute through a formal rehabilitation conference. Rehabilitation conferences will be scheduled upon written request.

If a plan is not agreed upon by the parties then the dispute will be resolved through a formal rehabilitation conference upon written request. The rehabilitation administrator may approve, disapprove or modify a disputed plan. If the rehabilitation administrator approves or modifies a rehabilitation plan, then the parties will be bound to the approved plan unless reasonable barriers to the successful completion of the plan, discovered after the plan is initiated, prevents completion. Disputes regarding reasonable barriers to an approved rehabilitation plan will be resolved by the rehabilitation administrator in a formal rehabilitation conference.

(j) The employer and employee may agree on a vocational rehabilitation plan, whether or not the plan conforms to the provisions of this subsection. If the employer and employee dispute or fail to agree upon a vocational rehabilitation services plan, either of the parties may request a formal rehabilitation conference. Formal rehabilitation conferences will be conducted with a formal record. If all of the necessary

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information is available, the rehabilitation administrator will verbally approve, modify or deny the plan at the conclusion of the formal rehabilitation conference followed by a written decision within 30 calendar days. If all of the necessary information is not available the record will remain open only long enough to obtain the information needed for the rehabilitation administrator's decision. If the record must remain open, then the parties will be noticed that 1) the record remains open, 2) what information is being obtained and 3) the date the record will be closed. The rehabilitation administrator will issue the decision within 30 calendar days of the record's closing. If the Rehabilitation administrator approves, modifies or denies the vocational rehabilitation plan verbally, then the decision will be confirmed in writing within 30 calendar days. The rehabilitation administrator's decision will be based upon 1) the provisions of this section, 2) the rehabilitation regulations AAC8.000.000, and 3) interpretations within subsequent decisions by the administrator, the Board and the Courts. Within 14 calendar days of the rehabilitation administrator's decision either primary party may seek review of the decision by requesting a hearing in accordance with AS 23.30.110. However, the parties will be bound by the administrator's decision unless or until it is overturned by the board or the courts.

(k) Rehabilitation reports and statistics regarding rehabilitation services and expenses will be documented and filed in accordance with the rehabilitation regulations.

(l) Vocational rehabilitation services may not exceed 52 calendar weeks, except that vocational rehabilitation services may be extended an additional 52 calendar weeks if the parties agree, or the rehabilitation administrator approves based upon recommendations made by the qualified rehabilitation provider that special circumstances exist as defined by AS23.30.265(?) and AAC8.000.000. Rehabilitation services are limited to a total of 104 weeks and may not be exceeded unless agreed to by the parties. Holidays and vacations which are concurrent with rehabilitation services are included in the total of 104 weeks of rehabilitation services. This subsection does not prohibit an employee from requesting, or an employer or carrier from providing, extended vocational rehabilitation services on a voluntary basis. If rehabilitation requires residence away from the employee's customary residence, reasonable cost of board, lodging, and travel shall be paid by the employer. Temporary disability under AS23.30.185 or AS23.30.200 shall be paid throughout the rehabilitation process. The board or designee may, upon petition from the employee, award the employee being rehabilitated under this section an additional monthly

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stipend of not more than 50% of the employee's compensation rate if it finds that a case of extreme financial hardship exists. Petitions for extreme financial hardship stipends, if approved, will not be paid retroactively and will be effective no earlier than the date of the petition. The employer shall pay all costs of a rehabilitation plan and rehabilitation services under this section.

(m) Refusal by an injured employee to participate in, or otherwise fail to reasonably cooperate with, a vocational rehabilitation evaluation or a vocational rehabilitation services plan approved by the rehabilitation administrator or agreed to by the parties, results in a forfeiture of disability compensation for the period the refusal continues. Forfeiture of disability compensation will not begin until or unless allegations of refusal to participate are upheld by the Rehabilitation administrator, his designee or the Board. The rehabilitation administrator may retroactively assess forfeiture of disability compensation which may be liened from future compensation if allegations of refusal or failure to cooperate are sustained. Efforts to resolve disputes of refusal or cooperation will be first attempted in an informal rehabilitation conference upon written request from the employer, the employee, their representatives or the qualified rehabilitation provider. If the informal rehabilitation conference fails to resolve the dispute, then the dispute will automatically be referred for a formal rehabilitation conference. However, if an employee unilaterally begins participation in a rehabilitation plan not supported by the employer or not approved by the administrator during the period of alleged noncooperation, and then successfully completes the rehabilitation plan and becomes employed for a period of 30 consecutive business days following the completion of the rehabilitation plan, the employee shall receive a lump-sum payment of 50 percent of the compensation forfeited by the employee. The lump-sum payment is available only once to an employee refusing rehabilitation and is limited to the total of 52 weeks compensation allowable during the continuance of rehabilitation services or during the duration of the plan, whichever is less. Any wage loss determination made at the conclusion of the employee's unilateral plan will be based either upon the rehabilitation plan proposed by the qualified rehabilitation provider, if any, or the unilateral plan developed by the employee, whichever results in the highest wage earning capacity. The rehabilitation administrator may find that an employee refuses to participate in an evaluation or rehabilitation plan if the employee fails to cooperate with the rehabilitation provider, however a rehabilitation provider's allegation of noncooperation must be well documented and verifiable. A

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secondary party may request an informal rehabilitation conference to address allegations of refusal or cooperation.

(n) Refusal by an employer to participate in, or otherwise fail to reasonably cooperate with, an evaluation or a rehabilitation plan approved by the rehabilitation administrator results in a payment of double the disability compensation normally due during the period the refusal continues. Disputes of employer noncooperation will be addressed first by an informal rehabilitation conference. If the informal rehabilitation conference is not successful in resolving the dispute, then a formal rehabilitation conference before the rehabilitation administrator will resolve the dispute. Requests for rehabilitation conferences will be made in writing.

(o) For purposes of this section, an employee is restored to suitable gainful employment if the employee can return to (1) work at the same or similar occupation with the same employer or an employer in the same industry as the employer at the time of injury;

(2) an occupation using essentially the same skills as the job at time of injury but in a different industry;

(3) an occupation using different skills or transferrable skills but using the employee's academic achievement level or existing vocational knowledge at the time of injury; or

(4) an occupation requiring an academic achievement level that is different from that attained at the time of injury. An employee shall be returned to suitable gainful employment in the order indicated in (1) - (4) of this subsection.

(p) "Qualified rehabilitation professional" means a person who has at least a 4 year baccalaureat degree from an accredited University and work experience necessary to

(1) make judgements, administer and interpret tests, counsel, and make recommendations concerning the medical, intellectual, emotional, physical, or motivational capacity of an injured worker to accept and perform suitable gainful employment, and to

(2) design, implement and supervise programs that tend to enhance an injured worker's medical, intellectual, emotional, physical or motivational capacity to accept suitable gainful employment.

Qualified rehabilitation professionals will meet or exceed the requirements for rehabilitation professionals as defined in the rehabilitation regulations. A rehabilitation professional may not practice unsupervised rehabilitation professional services under this section until and unless his/her credentials have been reviewed and approved by the rehabilitation administrator. A rehabilitation professional may work under the supervision of a Qualified Rehabilitation

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Professional until his/her credentials are approved by the rehabilitation administrator. The rehabilitation administrator will approve or disapprove a rehabilitation professional's qualifications within 30 calendar days of their submission for review. The administrator may suspend review of a rehabilitation professional's qualifications in order to receive written verification of credentials presented for review. Approval or disapproval of a provider's credentials will be made in writing. The rehabilitation administrator may provide provisional approval of a rehabilitation professional's credentials which may be either revoked or confirmed upon verification of the credentials. A rehabilitation professional may not practice without written provisional or full approval by the rehabilitation administrator.

(q) "Qualified rehabilitation adjuster" means an insurance company or adjusting company representative or employee who has at least four years of supervised adjusting experience in the field of workers' compensation insurance adjusting. Knowledge required of a Qualified rehabilitation adjuster includes:

(1) the ability to make judgments regarding compensability of industrial injury claims;

(2) knowledge of the psycho-social, physical and medical aspects of industrial injuries;

(3) knowledge of the rehabilitation statute governing industrial injuries;

(4) certification by the Alaska Adjusters Association as a Qualified Rehabilitation Adjuster.

The Rehabilitation Administrator may approve, disapprove, make recommendations to improve or disallow the qualifications of adjusters working with Alaska Industrially Injured Workers. A rehabilitation adjuster who does not meet the above requirements for a Qualified Rehabilitation Adjuster may work under the direct supervision of a Qualified Rehabilitation Adjuster.

(r) Motions to disqualify a rehabilitation provider from practicing rehabilitation services may be made by or to the rehabilitation administrator. Disputes of a rehabilitation professional's qualifications will be heard in a formal rehabilitation conference. If the rehabilitation administrator affirms the disqualification of the rehabilitation professional, the rehabilitation professional may appeal the decision within 14 calendar days to the Board. The rehabilitation administrator may provide guidelines for requalification to the rehabilitation professional effected. Disqualification will not take effect until the decision is written by the rehabilitation

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administrator within 30 calender days of the formal conference and will include an effective date.

(s) Within six (6) months of the adoption of this chapter, and any subsequent amendments to the rehabilitation provisions contained herein, rehabilitation regulations will be promulgated. The Board and its Director will be directly responsible for promulgation of rehabilitation regulations.

(t) Amendments to the rehabilitation statute may be made upon petition to the Board. Changes may not be made more frequently than every four (4) years. Petitions for changes in the statute may be made by The Board, Employers, attorneys, employees, labor and management organizations, rehabilitation providers, physicians, and therapists. Upon adoption proposed amendments will supercede and incorporate all previous amendments and will be based in part upon rulings made by the rehabilitation administrator, the Board, and the Courts subsequent to previous amendments. Petitions to amend the rehabilitation statute will include:

- (1) the change(s) proposed;
- (2) the reason the change is needed;
- (3) the anticipated benefit of the proposed change;
- (4) the anticipated effect if the change is not made;
- (5) signatures of interested parties who support the proposed change.

Proposed changes to the rehabilitation statute will be presented to a vocational rehabilitation task force who will approve, disapprove or modify the proposed change within 90 days of the statute anniversary date. The task force will be composed of the following:

- (1) the rehabilitation administrator;
- (2) two representatives of management as recommended by the Board;
- (3) two representatives of labor as recommended by the Board;
- (4) two Qualified rehabilitation professionals as recommended by the Alaska Chapter of the National Association of Rehabilitation Professionals in the Private Sector (NARPPS);
- (5) two medical professionals recommended by the Alaska Medical Association.

The rehabilitation administrator with chair the vocational rehabilitation task force. Recommendations for adoption of the proposed amendments will be promulgated according to AAC_____.

All underlined terms above will require definition.

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Suggestions for other legislative efforts:

1) Licencing of Rehabilitation Professionals and Adjusters through the State of Alaska Division of Occupational Licencing;

2) Provisions for the suspension of Unemployment Insurance eligibility while an injured worker is receiving workers' compensation benefits. When Workers' compensation benefits are no longer being paid, access to the suspended Unemployment Insurance will be available without loss based upon the period of time the worker received workers' compensation benefits;

3)

ADD TO 23.30.041 (b)

The rehabilitation administrator will be an ex officio member of the Board and will participate in Board hearings and decisions when rehabilitation issues are in dispute.

PLEASE SEE ALSO THE RECOMMENDATIONS MADE IN

*"ALASKA'S WORKERS' COMPENSATION REHABILITATION:
A CRITICAL PERSPECTIVE & SUGGESTIONS FOR A
FUNCTIONAL SYSTEM." J.C. DEISHER, 1987.*

COPY ENCLOSED.

Alaska Interpersonal Communications: Deisher.

ALASKA'S WORKERS' COMPENSATION REHABILITATION SYSTEM:

A Critical Perspective
and
Suggestions for a functional system.

by

Jon C. Deisher, MA, CRC

INTRODUCTION:

The difficulties being experienced in the Alaska Workers' Compensation Rehabilitation System are not unique. Our difficulties are mirror images of problems virtually nationwide. The central difficulties occur because each state periodically reinvents the rehabilitation wheel. Borrowing of statutory language has liberally occurred. Standardization of approaches is almost non-existent. Little effort is made to apply a systematic method of addressing a usually underestimated and incompletely understood problem. Advice from the rehabilitation industry is either not sought, discounted or ignored. Rehabilitation professionals are less than aggressive in offering their advice anyway. The only significant standardization seems to be in the similarity of the perceived problems and the complaints made about them. Very little standardization exists regarding what rehabilitation is or what it ought to do.

This paper attempts to address the problems within the current Alaska Workers' Compensation Act and to outline a beginning point for the solutions. It is important to recognize that workable solutions to rehabilitation problems anticipate a process rather than a structure. In developing a process oriented method of addressing rehabilitation issues we must also be prepared to adjust the process periodically as techniques become available to make the process more effective, successful and responsive.

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I. VALUES CLARIFICATION: a philosophical beginning.

The problems in Workers' Compensation Rehabilitation systems have been defined and redefined over the years. A recent paper provides a review of nationwide efforts to address rehabilitation issues¹. Regardless of the methods addressing them, problems with rehabilitation persist. After changes are instituted, the same or similar complaints seem to arise. An impression persists that the problems are self-perpetuating or unavoidable. I believe we tend to address symptoms rather than the problems themselves. Problems are, perhaps, the nature of the beast. If we confront unavoidable problems which do not go away, regardless of attempted solutions, then we must seriously review how the solutions are generated. I do not believe we have a clear idea of what we want our rehabilitation system to do. We have a clear idea of the concepts we wish to use in developing a rehabilitation system, but not of what the system itself is supposed to do. Until we know what we want rehabilitation systems to do, any change attempt will fail. If we do not know where we are going we will end up somewhere else!

We all agree the system must be competent, responsive, responsible, managable, regulated, time sensitive and cost effective. These qualities are the controls rather than the goals of the system. There are many complaints about how the system is controlled. Because the goals toward which the controls are directed are poorly clarified, we must expect disputes to result. At present, we are more clear about what results we do not want the system to produce than what we want it to produce. Goals are results oriented². If we do not know where we are going any road will take us there.

We must begin with a basic philosophical premise: a statement of values³. Given foundational values we may more easily move toward agreed upon goals. The following values are suggested:

- 1) the work ethic and the value of remunerative employment;
- 2) incentives for early and timely return to work;
- 3) removal of work disincentives;
- 4) rights matched with appropriate responsibilities wherein responsibilities are invested with authority, and rights are invested with protections;
- 5) a well ordered and compassionate sense of justice;
- 6) continuation of the no-fault assumption of workers' compensation risk.

These are practical values for a Workers' Compensation Rehabilitation system. They are not necessarily operational concepts. They represent the drive of the rehabilitation system. The rehabilitation system itself is the vehicle

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carrying the injured worker to his rehabilitation destination. However, to have a vehicle does not mean it is well designed, its destination is clear or its course is well defined.

Improvements to the present Rehabilitation system are both inevitable and desirable. The changes can be either controlled or uncontrolled. Too much is at stake to permit the latter. To permit the former, a balance is needed. I believe that controlled change must have a philosophical foundation. We must: 1) know where we are going, 2) know the course that will take us there, and 3) have a vehicle that is capable of transporting us.

"Anywhere but here" is NOT an acceptable goal! Any vehicle but the present vehicle is NOT an acceptable reason to change modes of transportation! Undirected change will result in fragmentary special interests influencing the change process, giving us an unbalanced, fragmented result.

"What's in it for me" (WIIFM) is NOT necessarily an acceptable motive for change! If selfishly pursued WIIFM is adversarial in nature and inevitably results in dispute, conflict and litigation. Based upon a balanced "win-win" philosophy, WIIFM is an acceptable negotiating process resulting in agreed upon results⁴. What we have today is a WIIFM system selfishly pursued. If change dynamics are based upon my winning at your expense, or vice versa, whatever result occurs will be no improvement but will simply move advantages from one place to another. The most productive change dynamics will emphasize values first and gain second.

Problems in workers' compensation rehabilitation are well recognized but poorly defined. Attempts to solve a poorly defined problem will fail in the long run. Our current problems are often described in terms of uncontrolled cost. However, the problem is NOT uncontrolled cost. Uncontrolled cost is the symptom of an ill-defined goal, a poorly constructed statute and an unregulated, paternalistic bureaucracy. When we clearly define the goal, competently write balanced, uncontradictory legislation, and provide manageable regulations, then costs will come under control.

Economic considerations must play a central role or nothing will work. However, we must begin with values and work toward economic support, not vice versa. To illustrate, in the 1960's the United States set a goal to place men on the moon. We then developed the means to achieve that goal. We did not decide to build a very expensive space vehicle, build it, and then cast about for something to shoot it at! Once the goal was defined, a vehicle was designed to accomplish it using the minimum bid process. We set a goal and went to the moon on a minimum bid. The goal was accomplished economically. But, as aggressive cost containment took control, our space program suffered a

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series of failures not easily repaired. Over zealous cost containment resulted in egregious loss. Cost containment is not a goal but a process.

Rehabilitation is not going to the moon nor are we building space vehicles. We set goals and design vehicles to carry us there. We can learn from other industries as we develop a viable rehabilitation system. We will need careful vigilance. The goals and values we chose will have financial impacts and the ability to resist economic temptations pulling us from our goals will require obdurate self discipline. Economic goals presented as philosophical values must be seen for what they are; incomplete understanding of the problem.

Special interests will attempt to influence the change direction. Experts outside of rehabilitation will assume advisory roles influencing how rehabilitation systems will be designed. Is Joe Namath a credible expert for panty hose? Pete Rose for shampoo? Why should persons outside rehabilitation be credible experts to design rehabilitation systems? People outside of rehabilitation brought us AS23.30.041 which is problematic. The same people are involved in efforts to change AS23.30.041. The same advisors from outside of rehabilitation constructed the current dysfunctional vehicle (041) and are designing its replacement. Is it reasonable that after delivery of a dysfunctional vehicle that we would rely on the same "experts" to construct the next vehicle? Why are these "experts" more credible than representatives from the rehabilitation industry? We are living with an unacceptable product, will we live with the next product made by the same hands? Values and goals that result in rehabilitation systems that work are by definition cost effective and economically sound. But economic arguments resulting in rehabilitation systems that do not work are not cost effective or philosophically sound.

II. "CLASSIC REHABILITATION": the whole person approach

Often relationships are structured by formal systems influencing interactions between parties. We behave in standardized ways in hospitals, courts, churches, and other organizations. Behaviors are standardized by formal rules, codes of conduct and informal expectations and attitudes. Relationships in the Workers' Compensation System are not standardized. Due to a lack of goals, relationships are not structured. Attitudes the players have for each other vary widely. Attitudes are structured by formal roles and play an important part in how the players work together toward a goal. Due to an absence of a clear goal, the parties in our system often assume informal roles outside of their expertise. If parties can assume responsibilities outside of their expertise it is difficult to hold anyone accountable.

Traditionally, the rehabilitation profession is a multidisciplinary. Multidisciplinary rehabilitation services are predicated upon a goal of the service recipient's successful return to work or maximized independence. Credibility between the various disciplines involved must be high. Physicians, therapists, counselors, social workers, psychologists, nurses and families work closely together toward the rehabilitation goal. The multidisciplinary approach is the result of decades of experience which demonstrates that the best results obtain from the use of a systems methodology. The systems approach uses a "whole person" perspective of service delivery. The team is composed of professionals who have skills necessary to meet the rehabilitation goal. Team members are involved to the extent they contribute to the goal. This is the "classic Rehabilitation model".

Workers' compensation rehabilitation is not based on the classic model. Service delivery focuses upon the injury and is controlled within a quasilegal framework. The narrow focus upon the industrial injury and the legal or quasilegal overlay fragments services which traditionally work together. Rehabilitation regulations have not been promulgated since AS23.30.041 was initiated. Service providers work independently of other providers involved with the same case. The competencies of the various players are not regulated, coordinated or controlled. Sometimes competencies are totally eroded. The narrow focus of the workers' compensation responsibility and quasilegal overlay destroys and fragments traditionally multidisciplinary service. Professionals are not always in a position to deliver services they are capable of, or worse, may even be expected to provide services they are not capable of.

Conflicts between "classic" rehabilitation and workers' compensation rehabilitation result from different

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assumptions of what rehabilitation is. "Rehabilitation" under the Alaska Workers' Compensation Act is not defined at all! A definition of rehabilitation provides a goal. Thus, we have no clear goal. Lack of a definition encourages assumptions which are not standardized. Therefore, the assumptions of the various players regarding what rehabilitation is or should be has resulted in conflicting expectations of rehabilitation goals, services, processes and so forth. A recent proposal to change the Alaska Workers' Compensation System even suggested that the concept of "rehabilitation" be totally eliminated from the provisions for rehabilitation services! We need operational definitions of "rehabilitation" and of rehabilitation concepts usable in the private sector. Rehabilitation professionals themselves must assume some responsibility for lack of clarity in this area.

III. REHABILITATION: not a dirty word

Rehabilitation is not just another fourteen letter word! It is an honorable concept of Latin origins. The prefix "re" means "again". "Habilitation" derives from "habilitare" meaning "to make fit", "enable", "endow with ability or capacity", "render able", "capacitate" and "qualify"⁵. Classically, to "make the worker fit again" requires medical, psycho-social, educational and vocational assessment services and decisions. Rehabilitation processes, then, must be multidisciplinary to make the worker "fit again". Exactly how this definition can be massaged to fit within a worker' compensation system must begin with operational definitions.

The pressure to amend or eliminate rehabilitation provisions in Alaska's Act is said to be driven by uncontrolled cost. Uncontrolled cost is the symptom that brings attention to rehabilitation systems. It is thought that cost containment will result from statutory change. Everyone agrees that rehabilitation is expensive, but no one knows exactly what forces drive those expenses. Competent rehabilitation is cost effective. Simply because costs are high does not necessarily mean they are uncontrolled or inappropriate. The industry is, and should be, held accountable for its expenses. But forces outside of rehabilitation also drive rehabilitation costs. When rehabilitation costs are symptomatic of those forces, the rehabilitation industry should not be held accountable. The source of the symptoms is not well understood because they are not seen as symptoms but as the basic problems.

Rehabilitation is expensive, but definitions of rehabilitation do not include provisions for cost. At least five forces influence expenses which show as rehabilitation costs: Legitimate rehabilitation services, insurance adjusting, legal services, medical services, and the judicial system. Decisions made by forces outside of rehabilitation have impacts upon expenses for which the rehabilitation industry alone is held accountable. The rehabilitation profession must identify methods to contain costs for which it is responsible. However, other industries are responsible for expenses for which the rehabilitation industry has no control. These expenses must be understood and accountability properly placed. No one, not even the AWCB, has data on this issue.

We do have multiple disciplines involved in Workers' Compensation rehabilitation, but they are not coordinated. The disciplines do not agree on what rehabilitation is. Services are fragmented and the various disciplines operate in almost mutual exclusivity. The various disciplines practice virtually independently of, and sometimes in spite

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of, each other. Members of the same discipline often compete with each other on a claim to the detriment of cost containment. Team meetings are rare or non-existent. Duplicated services are common. Concurrent services are uncoordinated. Time loss is uncontrolled and cost containment is illusive. Injured workers and employers are distrustful of each other. Providers are protective of their turfs. Competence and credibility questions underlie professional interactions. These symptoms contribute to claim life and continuing cost. Rehabilitants are "made fit again" in spite of services rather than because of them. Rehabilitation professionals are often used as tools for litigation and settlement rather than as bonafide service providers. Despite examples of excellent rehabilitation service, everyone involved knows improvements are needed. I fear that present change dynamics threaten to perpetuate and worsen the problem rather than develop a productive process for addressing and resolving the real issues. The last group asked, as an industry, to address problems of vocational rehabilitation and suggest potential solutions is the vocational rehabilitation industry itself. They also seem loathe to initiate suggestions.

Private rehabilitation providers are either private business people or employees of private businesses. They are, therefore, very aware of the free enterprise dynamics of making a business work. The same concepts which are viable for business as a whole are applicable to rehabilitation companies. As business people, rehabilitation providers should understand cost containment principles very well. However, given the statutory provisions of how services are requested, ordinary free market dynamics are not allowed to work. Rehabilitation providers are "seduced" into focusing marketing efforts toward the third party payor because the injured worker has no authority to select a rehabilitation provider and no resources to pay for services received. A double bind is active here. The goal of the third party is to meet their obligation as soon as possible to reduce costs. Therefore the marketing approach made to the payor focuses on time and cost containment, or the content nature of their services. The goal of the injured worker is to return to work at or near their pre-injury wage. So, the marketing approach to workers focuses on the "classic model", or process nature of services. A conflict exists between the content and process of services, when in both are important. The difficulty arises because providers are influenced by one side who pays and the other side who receives. It is widely perceived that rehabilitation providers skew their efforts toward payors. The rehabilitation provider must advocate for the best possible rehabilitation service in both content and process.

IV. RHETORICAL CONSIDERATIONS: what are we talking about?

We have definitional problems resulting in conflicting or unrealistic assumptions and expectations. Most of the difficulties we encounter are related to communication or lack of it. (Pareto's Law) Different disciplines talk about the same or similar processes in different ways. The same language is used with different intent. Different words are used synonymously. A wide variety of issues are decided daily based upon no agreement on rehabilitation concepts or questions. To illustrate, the following rhetorical questions are offered which are not currently resolved by the Alaska Workers Compensation Act:

1) - How shall we define rehabilitation? Vocational Rehabilitation? Vocational Rehabilitation Evaluation? Rehabilitation services? Vocational Rehabilitation Services?
- Does successful rehabilitation mean return to work? Ability to return to work? Compromise and Release? Financial Independence? Reasonably attainable employment? Employment? Employability? Placement?

- Is a rehabilitation evaluation a rehabilitation service? Is a rehabilitation evaluation a screening process of collecting data used to justify or deny rehabilitation services? What are the goals of the evaluation?

- When do rehabilitation services begin and end?

2) - How shall Vocational Rehabilitation, Medical Rehabilitation and Psycho-social Rehabilitation services be juxtaposed? Are they the same? Overlapping? Mutually exclusive? Interdependent? Should they be developed without concurrence from their respective practitioners? How will professional advisors be selected?

3) - Who qualifies for rehabilitation services?

- Will claimants be manditorily referred under a time loss formula? Will claimants be voluntarily or self referred under a "rehabilitation fund" or "time window" concept?

- Are rehabilitation services a right or privilege?

- What, if any, financial or time limits obtain for rehabilitation evaluations and/or services?

- Can a claimant reasonably refuse rehabilitation evaluations or services?

- Will injured workers be screened for "elective" rehabilitation services by a return to work scale?

4) - Specifically, what are Qualified Rehabilitation Counselors (QRPs)? Are rehabilitation counselors actually

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Re-employment Specialists? How do we know one when we see one?

- What educational/professional credentials are acceptable?
- What autonomy or control will QRPs work under?
- How will QRPs be reimbursed for their services?
- Who will assign the QRPs to injured workers? How?
- Should adjusters and attorneys be specifically qualified to work with industrially injured workers? How will we know a Qualified Rehabilitation Adjuster (QRAdj) or Qualified Rehabilitation Attorney (QRAtt) when we see one?
- What qualifications will the Rehab Administrator have? Can the R.A. be impeached or replaced? How? What is the relationship between the R.A. and the AWCB?
- What authority will qualify or disqualify QRPs, QRAdjs and QRAttS? How?

- 5) - What is a disability?
- What is the difference, if any, between medical and vocational disabilities? How do we know the difference?
 - What is the relationship, if any, between medical stability and vocational stability?
 - What is the distinction between permanent and temporary disability? scheduled and unscheduled disability?
 - Should all injuries be scheduled?
 - To what extent, if any, should rehabilitation services be tied to the Temporary Total Disability concept?

6) - What is a transferrable skill? How do we know one when we see one?6

7) - How is the labor market that applies to the injured worker defined? What variations are permissible? To what extent, if any, will rehabilitation services be determined by labor market conditions?7

8) - What constitutes non-cooperation? How are the concepts of cooperation, mitigation, malingering and refusal defined and related?

- Who can be uncooperative? Who decides?
- Specifically, how are claimants/employees, adjusters/employers, attorneys/representatives, providers, vendors or other participants uncooperative, if at all?
- Under what conditions is it proper to controvert a claim? Is controversion of a claim discretionary? May controversions occur without prior notice? What penalties, if any, accrue for improper controversion?
- What penalties, if any, accrue if a party other than a claimant is not cooperative?

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9) - How can roles between the parties be clarified? Who will be responsible for what? How can the parties be encouraged to stay within their defined areas of expertise? How will accountability be established and enforced?

10)- What is Suitable Gainful Employment (S.G.E.)? Does S.G.E. mean "reasonably attainable employment" or "employment"? Is S.G.E. a viable concept?

- How much of a wage loss is acceptable upon return to work to be defined as "suitable"?

- Should a claimant's preference of a vocational goal be a component of S.G.E.?

- Are labor market conditions a component of Suitable Gainful Employment? How should labor market conditions be assessed?

The above rhetorical considerations are not all inclusive or mutually exclusive. However, they are questions which, due to lack of clear resolution, have resulted in significant misunderstanding and litigation. Of course, rehabilitation litigation contributes to rehabilitation expense. The drive of litigation is not the litigator. Rehabilitation litigation results from the absence of clearly defined goals and from confused statutory language. The above questions, when answered, point us toward the values and fundamental philosophy of a viable rehabilitation system and ultimately reduced cost. Efforts made to change how rehabilitation services are designed, defined and delivered must attempt to resolve the questions listed above (IV) in order to reduce the time required to produce a successful rehabilitation result, reduce case life and to establish methods of cost containment. The goal must be a viable system, not special interest advantage.

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V. AS23.30.041/MANDATORY REHABILITATION: apples/oranges.

On July 1, 1982, AS23.30.041 or "041", the Workers' Compensation Rehabilitation statute was promulgated. 041 is poorly constructed. It is said to provide mandatory rehabilitation services. In fact, only rehabilitation evaluations are mandatory. If an injured worker suffers a permanent loss of wage earning capacity he/she must be referred for a full rehabilitation evaluation. As provided by 041, mandatory rehabilitation is paralysed. The paralysis of 041 is not a failure of mandatory rehabilitation. The failure of 041 is the result of confused statutory construction. Substantial efforts since promulgation have not produced rehabilitation regulations. Under the Alaska Workers' Compensation Act, rehabilitation cannot succeed. The rehabilitation statute is not regulatable due to poorly defined or undefined concepts and convoluted language problems. Neither of the primary parties (Management or Labor) like the rehabilitation product, but this is not necessarily the result (as alleged) of incompetent secondary parties (physicians, rehabilitation providers, educators, or other vendors). Competent and successful rehabilitation services exist inspite of an ambiguous and contradictory statute. Successes are usually the result professional standards and ethics rather than requirements of AS23.30.041.

041 OFTEN CONFLICTS WITH "CLASSIC", TRADITIONAL REHABILITATION PRACTICE. Conflicts between legislative mandate and professional standards are partially responsible for difficulties described above. The conflicts produce litigation. Litigation drives costs of the secondary parties. The secondary parties are then held responsible for increased costs. The extent to which rehabilitation issues are litigated is contrary to the intent of AS23.30.041. Efforts by the Workers' Compensation Committee of Alaska (W.C.C.A.) must be careful to avoid overreactions to costs attributed to secondary parties which are in fact driven by poor statutory construction.

The avowed purpose of the W.C.C.A. is to reduce workers' compensation costs 30%, not to improve services. In addition, although respected rehabilitation professionals are involved, the W.C.C.A. did not approach professional rehabilitation organizations for consultation regarding problems or solutions. How viable vocational rehabilitation solutions could result from a group not recognized by the vocational rehabilitation profession is a curious question. This is the process which, 6 to 7 years ago, gave us AS23.30.041. Workers' Compensation Rehabilitation need not be in conflict with traditional rehabilitation services. A rehabilitation system imposed without recognition or

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contribution from rehabilitation organizations is an act of arrogance and questionable credibility. It is incredible that a system of professional practice would be imposed upon an industry which did not participate in its development. Here the motivation of the change agents supporting such efforts should be called into question. Why rehabilitation organizations have not more actively protested is also interesting. Again, the motivation must be to develop a viable system, not in moving or reinforcing advantages.

Mandatory rehabilitation is intended to provide a timely and cost effective assessment for returning an industrial injured worker to the work place. Mandatory rehabilitation may or may not be a viable concept. It is consistent with the historical no-fault assumption of Workers' Compensation insurance. The ideal of mandatory rehabilitation service is to provide a no-fault process by which the injured worker's barriers to employment, if any, may be identified. The value of mandatory rehabilitation referral is to reduce disputes over whether employers will refer and employees will be referred for rehabilitation evaluation. Reduced dispute means reduced litigation which means reduced expense, earlier movement of the worker back to the labor market and general cost effectiveness. The process provided by 041 does not adequately reduce litigation or result in timely rehabilitation referral.

Mandatory rehabilitation may not be the answer to in providing relief to employers and employees in the workers' compensation dilemma. However, the failure of 041 is not necessarily the failure of mandatory rehabilitation. As discussed below, mandatory rehabilitation never had, and never could have, an opportunity to succeed.

VI. LEGISLATIVE INTENT: the road to hell is paved....

One reason for writing AS23.30.041, was to reduce litigation. The current pressure to change, abolish or rewrite AS23.30.041 is also to reduce litigation. Rehabilitation evaluations to assess the need for rehabilitation services are intended to reduce employer's financial loss and employee's time loss. Due to the mandatory nature of rehabilitation referral, claimants are said to have a right to a rehabilitation evaluation whether they want it or not. Employers are responsible to provide the rehabilitation referral (after 90 days of "permanent disability") whether they want to or not. Neither party believes they should be forced to be involved with rehabilitation services. Both parties often believe that rehabilitation is crammed down their throats.

The employer may believe that the mandatory rehabilitation referral represents a return to work DISincentive. If a claimant receives rehabilitation services while receiving disability compensation, he may not be motivated to return to work. An employee may prefer temporary disability (TTD) benefits to remunerative work which may pay less than his compensation. Employers often allege, usually with case citations, that after extensive and expensive rehabilitation services the employee settles his case and then returns to his regular work. Therefore, rehabilitation has been a waste of time and expense.

The employee may believe, that the mandatory rehabilitation referral represents exploitation of his injury and paternalistic subversion of his genuine interests to return to work. If an employer can demonstrate an employee's wage earning capacity in any occupation, regardless of the employee's preferred area of employment, then the employee's disability benefits can be controverted. Therefore, rehabilitation is cited as a tool used to minimize the employer's obligations.

The intent of AS23.30.041 was to encourage the employee and employer to come to a mutual agreement for the course of rehabilitation evaluations and services. The parties may come to agreement on virtually anything. But it does not always work out that way. The problems arise when the parties do not come to agreement. Although examples of successful rehabilitation occur under 041, the promise intended by the statute has not been fully realized.

When the parties do not agree on rehabilitation issues, three possible disputes before the Rehabilitation Administrator are possible and then, if necessary, may be appealed to the Board. Board decisions may be appealed to Superior Court. The rehabilitation disputes under 041 are:

- 1) Is the employee eligible for rehabilitation?

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- a) Shall the employee receive a rehab evaluation?
 - b) Does the employee need rehab to return to work?
 - c) Does the employer owe more service after the rehab services are interrupted or completed?
- 2) Has the employee been cooperative?
 - a) Cooperative with Rehab evaluations?
 - b) Cooperative with Rehab Plan?
 - c) Cooperative with Rehab provider?
 - 3) Does/do the Rehab plan(s) comply with the 041?

The statutory language used to address rehabilitation disputes is ambiguous. Therefore, whatever decision is handed down, appeals are almost automatic. No provisions enforce the Rehabilitation Administrator's decisions during the appeal process. Parties are not required to comply with the Administrator's decision during the appeal process. No formal record is kept during Rehabilitation Hearing. No rules of evidence are provided allowing for admissibility of or disagreement on facts in evidence upon which the Administrator's decisions are made. When heard on appeal arguments are heard "de novo"; i.e. the Board may hear the same case based on different arguments, facts, evidence, interpretations and testimony than those heard by the Administrator. The Rehabilitation Administrator may be overturned or upheld for reasons unrelated to the rational of the appealed Decision and Order. The method of dispute resolution perpetuates litigation, contributes to fragmented rehabilitation services, drives up the cost of vendor and attorney fees, and undermines the intent of the statute.

Litigation influences the cost of rehabilitation service. But litigation should NOT be eliminated from the system. The reason for litigation is not because blood thirsty attorneys are chasing rehabilitation ambulances. Our litigation rate is the result of ambiguous rules. Parties need representation for their differences. Creation of an arbitrary process which would eliminate a "due process" method to resolve differences is dangerous and not justified. Current issues are litigated because 1) disputes are generated by the statutory language and 2) no other method is available to resolve bonafide differences. Provisions can be written for resolving rehabilitation disputes in a fair and equitable manner. Equitable rehabilitation provisions are less likely to result in disputes.

VII. REHABILITATION DISPUTES:

A quiet force in Rehabilitation expense.

As stated above, three possible disputes may be addressed by the Rehabilitation Administrator or designee:

- 1) Referral for rehabilitation evaluation or eligibility issues;
- 2) Allegations of refusal, non-cooperation or failure to mitigate; and
- 3) Disagreements regarding the acceptability of a plan.

1) Rehabilitation Referral: referral for an evaluation is called for by AS23.30.041(c):

"If an employee suffers a permanent disability that precludes return to suitable gainful employment, the employee is entitled to be fully evaluated for participation in a rehabilitation plan within 90 days of the date of injury."

The most difficult interpretation is with the concept of "permanent disability". For the purposes of vocational rehabilitation, "disability" is defined in terms of lost wage earning capacity, not medical impairment as such.⁸ So, permanent disability means "permanent loss of wage earning capacity". If a question exists regarding whether an employee has lost his/her capacity to earn a wage as a result of an injury, the usual method of determining the loss, if any, is through a vocational evaluation. If the disability is permanent and precludes return to suitable gainful employment, the employee will be referred for evaluation within 90 days. But evaluation is not required unless the disability is permanent. The permanence is often not known unless an evaluation is done. An evaluation cannot be required unless the loss of wage earning capacity is permanent, but the permanence may not be known unless the wage earning capacity is evaluated! What we have here is a circular language problem which paralyzes the referral process and the referral may not be made at all, or made so late that rehabilitation services cannot be maximally effective.

It is common knowledge within the rehabilitation industry that the sooner one has access to rehabilitation services the greater the benefit from those services. Early referral takes advantage of the employee's motivation to work, his engrained work ethic, his existing physical fitness, and his lack of being accustomed to receiving time loss benefits. However, if referral is delayed then the advantages of early referral are lost and the time required for resolving a worker's barriers to return to work is extended. Thus, when a referral is not made in a timely

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manner, and the rehabilitation provider is unable to produce early return to work, the provider is held responsible for the extended time loss! AS23.30.041 is said to require mandatory referral for a rehabilitation evaluation, but the circular language of the statute prohibits the timely referral from happening.

2) Cooperation: AS23.30.041(h) is the basis for cooperation disputes:

"Refusal by an injured employee to participate in an evaluation or a rehabilitation plan approved by the rehabilitation administrator or agreed to by the parties results in forfeiture of disability compensation for the period the refusal continues."

Later, the same paragraph goes on to say:

"The rehabilitation administrator may find that an employee refuses to participate in an evaluation or rehabilitation plan if the employee fails to cooperate with the rehabilitation provider."

In other words, non-cooperation is based upon the employee's "refusal to participate". If an employee refuses to participate with a rehabilitation evaluation or with a rehabilitation plan that was agreed upon or approved by the administrator, then the employee's benefits may be controverted. No basis is given for reasonable refusal to participate. The statute is silent with respect to refusal of any another party to participate!

3) Plan Dispute: AS23.30.041 states that the parties "may agree upon a rehabilitation plan". The intent is that the parties will come to an agreement upon a plan without litigation. However, litigation occurs due to conflicting provisions within the Act. First, an order of preference (AS23.30.041(i)) is presented which must be followed systematically. Plans are prioritized such that if the injured worker can be returned to suitable gainful employment at a level on the order of preference, then plans of a lower level need not be offered. Generally, the higher a plan is on the order of preference, the shorter the plan. Second, the plan must result in suitable gainful employment. AS23.30.265(28) defines Suitable Gainful Employment:

"'Suitable Gainful Employment' means employment that is reasonably attainable in light of an individual's age, education, previous occupation, and injury and offers an opportunity to restore the individual as soon as practical to a remunerative occupation and as nearly as possible to his average weekly wage as determined at the time of injury."

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The concept giving rise to the greatest controversy is the "average weekly wage as determined at the time of injury." Longer plans may be advocated by injured workers or their representatives because of the belief that a longer plan will result in a higher wage. Longer plans also involve longer Temporary Disability benefit payments. Shorter plans may be advocated by employers or their representatives because of a belief that a shorter plan will result in an earlier return to work. Shorter plans also require shortened Temporary Disability payments. Therefore, provisions of the order of preference are taken as the basis for one side of a dispute, while provisions for suitable gainful employment are taken as support for the other. Many disputed plans are argued based on this statutory conflict.

Other areas of litigation based upon the definition of Suitable Gainful Employment include:

1) What is reasonable employment?

What is attainable employment?

Are we discussing actual acquisition of employment or of employable skills?

As presently practiced, reasonably attainable employment is assumed to be focused upon a specific labor market. Although some variations may be taken, the basic parameters of any employee's labor market have been defined as a 50 mile radius or one hour commuting time one way from the workers' residence and from the employers' place of business. (Ragland) In some cases this definition is limiting if the employees' residence is a very rural area with no employment opportunities and the place of employment is also very rural with no employment opportunities. Is it fair that a determination of Permanent and Total Disability (PTD) be dependent upon strict labor market parameters?

2) What does "as soon as practical" mean?

Most injuries require virtually no vocational attention for immediate return to work. Others may require much more than the limits allowed under AS23.30.041. Indeed, Pareto's Law may apply here as perhaps 80% of the injuries require 20% of the time and expense of rehabilitation and 20% of the injuries require 80% of the time and expense. But the question remains, how much service is fair for the employer to support, and how much is fair for the employee to expect?

3) What does "as nearly as possible mean"?

In some cases as nearly as possible may mean a mere fraction of the average weekly wage as determined at the time of injury. What fraction of the average weekly wage is suitable to determine that rehabilitation services are no longer needed?

4) Suitable Gainful Employment definition makes no reference to or provisions for either of the parties' preferences. Particularly the injured worker has no choice for a preferred vocational rehabilitation goal. That the

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worker's preferences have no statutory standing in determining a rehabilitation goal results in considerable litigation.

As a final comment on SGE, Alaska's definition of SGE is identical to the definition used by the State of Florida.⁹ It would seem wise to contact the appropriate persons in Florida and request information about 1) how and if they make this definition work, 2) what problems they have had with it, 3) how they resolve the problems and so forth. This would seem a prudent approach to finding successful solutions to a problematic definition.

VIII. THE EMPLOYEE'S and THE ATTORNEY'S INTEREST:
Untouchable conflict?

An attorney's relationship with his client is sacred. It is a relationship with strict protections. However, the potential exists within the Worker's Compensation Act for a conflict of interest or appearance of a conflict of interest between an employee and his/her attorney. This is not to say there are occurrences, instances, examples or events to which the following description refers. This discussion simply points out that the construction of the Act permits at least the perception that a conflict could occur between the interests of an employee and his/her attorney. This is not to allege that examples of this kind of conflict have occurred, only that a perception of a conflict could occur. That a perception of a conflict is possible creates a friction between the various parties involved in any given case. Rehabilitation services are often condemned for perceptions which are not always supportable in fact. That condemnations of professional groups can be made based upon perceptions allowed by statutory constructions serves to demonstrate the complexity of our problem and reinforces the need for a balanced, comprehensive approach to the system's modification.

What is the potential conflict? Our Act provides that employee's attorneys must provide a valuable service in order to be paid. Once it is established that a valuable service has been provided, an employee's representative will receive 25% of the first \$1000.00 he generates for the employee and then 10% of everything more than \$1000.00. This provision makes it impossible for the employee and the attorney to establish a separate agreement using different percentages, as in personal injury cases.

At the risk of oversimplification, settlement amounts (X) are based upon the difference between the average weekly wage as determined at the time of injury (Y) and the weekly wage the employee is capable of at the end of rehabilitation services (Z), multiplied by a variable time factor (T weeks). In other words, $X = T(Y-Z)$. Formulas vary depending upon whether or not the injury was scheduled and the statutory provisions in effect when the injury occurred. Generally speaking, the bigger the difference between the employee's preinjury wage earning capacity and his post injury wage earning capacity, the larger the settlement amount authorized. A larger wage difference means a larger settlement. If the employee's attorney provides a valuable service he will be paid as outlined above. The larger the settlement, the larger the claimant's attorney's fees. Rehabilitation providers are clearly not involved in the

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settlement process so what difference does this make to rehabilitation?

When a rehabilitation plan is written designed to bring an employee's wage earning capacity as nearly as possible to the average weekly wage as determined at the time of injury, then the potential exists for a smaller settlement amount. The statute therefore provides the perception that an attorney's interest may result in condemning an otherwise well designed rehabilitation plan because the settlement amount resulting from the wage earning capacity provides an unattractive percentage for an attorney's fees. It is possible that an attorney could even denigrate his own client to force the presentation of rehabilitation plan producing a lower wage earning capacity. A lower wage earning capacity would result in a larger settlement amount from which a larger 10% could be expected.

This a discussion of perception and potential not fact. But this perception provides a credibility problem for employee attorneys. The credibility problem experienced by employee attorneys, combined with the credibility problem experienced by rehabilitation providers mitigates against the overall perception of professional ethics in the workers' compensation system. The credibility of all professionals involved in the Workers' Compensation system suffers as a result. Resolving a problem of perception is very difficult, particularly since instances demonstrating the problem are not available. It is not a problem that can be addressed by the rehabilitation industry or members thereof alone. However, the perception creates an additional credibility problem which directly influences rehabilitation processes. The perception of potential conflict of interest is indicative of another statutory construction problem which creates 1) an impression of predatory professionals feeding off injuries of Alaska workers and 2) establishes, as outlined above, attitudinal and credibility barriers between professional groups.

Finally, the issue of the rehabilitation result establishing a post injury wage earning capacity places rehabilitation professionals in a vulnerable position. It is absolutely prohibited that a rehabilitation provider be involved in settlement issues. Settlement issues properly belong exclusively to the injured worker and to his employer or the insurance carrier. But the rehabilitation product provides the wage earning capacity which will be used to compute a settlement amount. Therefore, the rehabilitation result is central to the ultimate resolution of a claim. Thus, the rehabilitation provider is placed in a conflict where the rehabilitation product anticipates a resolution of a claim, but the rehabilitation provider is prohibited from discussing the resulting impact on settlement of the rehabilitation services. It is probable that an injured

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worker will want to discuss the rehabilitation results and its implications for settlement with the rehabilitation provider. In fact, the issue arises when virtually every rehabilitation plan is presented for approval.

Ideally, a provider will refer questions of settlement to the worker's attorney, if he has one. However, the employee's attorney may not have adequate information regarding the rationale for the plan. As discussed, the attorney's interest may not lie with the rehabilitation result. The ground work is laid for divisive relationships between the claimant, his attorney, the rehabilitation provider and the employer. The basis for the divisiveness is rooted in the statutory construction of AS23.30.

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IX. PROVISIONS FOR UNEMPLOYMENT SERVICES:
the lost benefit.

In Alaska, an unemployed worker must apply for unemployment benefits within nine months of his becoming unemployed or his benefits are lost (Citation needed). This means that if an employee is injured, immediately receives workers' compensation benefits and remains on compensation for more than nine months, then his unemployment benefits are lost. Therefore, an injured worker who receives workers' compensation and rehabilitation benefits for longer than 9 months, who develops employable or marketable skills as a result of rehabilitation, but is unable to find immediate employment after rehabilitation, is not eligible for unemployment insurance. He is ineligible despite the fact that he and his employer paid unemployment insurance premiums from which he never received any payment because of his compensation benefits. He cannot receive Unemployment benefits while simultaneously receiving Workers' Compensation. (Citation needed) Thus, a worker who has employable skills after completing rehabilitation services, but is not employed as a result of rehabilitation, has no financial choice but to remain, or attempt to remain, on compensation. A statutory provision is needed, separate from the provisions of the Worker's Compensation, which will hold unemployment benefits "in escrow" until a wage earning capacity or employability is established through rehabilitation services. At that point the employee would have access to unemployment benefits and the employer would be entitled to take an appropriate offset against the Partial Benefits due to the employee.

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X. SUGGESTIONS: worth every cent you paid for them!

1) **NATIONWIDE REHABILITATION SERVICES RESEARCH:** Due to the width and breadth of the workers' compensation problem and the seemingly similar complaints about rehabilitation nationwide, it seems logical to conduct a nationwide analysis of rehabilitation systems. This analysis would be performed by an "independent uninterested third party" funded by the insurance industry. Research groups which have done this type of analysis are: the Rand Corporation and the Meninger Foundation. The research would address issues such as;

What rehabilitation systems are successful?

What determines rehabilitation success?

What are reasonable solutions to the problems of establishing a fair compensation rate?

What is a reasonable goal for vocational rehabilitation services?

What is the definition of Suitable gainful employment?

Basicly, what standarized answers can be suggested for the Rhetorical Questions section described above?

To initiate research of this magnitude will be expensive. But it would provide standardized answers to the fundamental questions hotly being debated concerning Workers' Compensation and Vocational Rehabilitation. As a result of the research perhaps a standardized process could be established. Hypothetically, this research should pay for itself.

2) **STATUTORY PROVISIONS FOR PROACTIVE AND EVOLUTIONARY CHANGE:** To promulgate a workable workers' compensation system, including rehabilitation systems, will require a planned change process. However, the approach we have taken in recent years has been to sweep all vestages of the previous ways of doing things away and redesign an entire new system. The result is to throw the baby out with the bath water. We need to establish a process whereby existing statutory provisions can be changed thoughtfully and systematically, keeping provisions worth keeping and eliminating or adjusting provisions that are not worth keeping. A system of planned and orderly fine tuning is needed. Statutory provisions can be made allowing for systematic improvements to the workers' compensation system in general and the rehabilitation provisions in particular. Our pattern seems to be a complete revision of the rehabilitation statute every five to six years. Complete revisions of the rehablitation statute create uncertainty, inconsistency, misunderstandings, prolonged case life and pervasive dissatisfaction. And the stated purpose, to impose cost containment, seems as illusive as ever.

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3) ESTABLISH A VOCATIONAL REHABILITATION TASK FORCE: To attempt the design and promulgation of a rehabilitation system by a subcommittee which minimally involves rehabilitation organizations seems designed to fail. It certainly is not designed to represent a perspective of rehabilitation supported by vocational rehabilitation organizations. If our goal is genuinely to design a workable system of rehabilitation then the committee charged with the goal should be predominantly rehabilitation professionals. Ideally, the professionals would be designated by their peers. The Task Force would address specific questions and problems presented to it and would provide specific recommendations from a rehabilitation point of view.

4) REGULATIONS: Establish mandatory regulations to be promulgated within 6 months of promulgation of the statutory changes and within 6 months of any subsequent change.

5) QUALIFICATIONS: Establish qualifications for professionals serving industrially injured workers: Rehabilitation Providers, adjusters, attorneys. Establish a rule that the Rehabilitation Administrator must, prior to appointment, meet or exceed the qualifications needed for a "journeyman" rehabilitation provider. Qualifications might be established through the Alaska Division of Occupational Licencing.

Separate statutory provisions are needed to ensure that adjusters working with workers' compensation cases are qualified to do so. The current licencing testing for insurance adjusters contain less than five questions related to workers' compensation. Adjusting workers' compensation cases requires a fund of knowledge significantly and qualitatively different from adjusting automobile collision or home fire damage. Specific training of adjusters of the issues, dynamics and concepts involved in workers' compensation and in rehabilitation could represent a source of considerable savings due to more efficient, insightful and appropriate adjusting decisions.

6) DISPUTE RESOLUTION PROCESS: Establish a reasonable dispute resolution process which would include, arbitration, mediation, negotiation and conflict resolution. Litigation should not be eliminated, but should be a method of last resort.

7) SUITABLE GAINFUL EMPLOYMENT: 1) Bring the definition of Suitable Gainful employment under the rehabilitation statute; 2) clarify the definition of SGE. 3) make the definition of SGE compatible with the order of preference.

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8) PREVENTION: Establish incentives for employers to prevent injuries from occurring in the first place.

9) REHABILITATION WITH THE SAME EMPLOYER: Establish incentives for employers to reemploy their injured workers. An education process may be necessary to educate employers how reemployment of workers who were hurt working for them represents a method to save compensation payments.

10) POST REHABILITATION UNEMPLOYMENT INSURANCE: Statutory provisions are necessary to allow for unemployment insurance access to workers who have completed rehabilitation services. Exactly how the provisions would work would depend heavily upon the definitions and goals of rehabilitation, as explained above.

11) MANDATORY REHABILITATION EVALUATION, VOLUNTARY REHABILITATION SERVICES: Referral for a full rehabilitation evaluation for those workers who have not returned to work for 90 days post injury should continue to be mandatory. If the evaluation demonstrates that a worker would benefit from rehabilitation services, but the worker chooses to not receive rehabilitation services, methods should be available to resolve the claim without prejudice. If a worker then decides to obtain rehabilitation services from another source then he could pay for the services from settlement amounts received. This suggestion is helpful because it allows the worker to have truly voluntary rehabilitation services after the rehabilitation evaluation. This suggestion is not helpful because the requirements to pay for rehabilitation services out of settlement monies would be impossible to enforce.

12) BALANCE REHAB. ADMIN. RESPONSIBILITY WITH AUTHORITY. The rehabilitation administrator must have the following authorities:

1) the power to qualify and disqualify, and to assign and reassign rehabilitation professionals and adjusters.

2) enforce rehabilitation decision and orders until or unless overturned by decisions of the Board or Courts.

3) maintain a formal record.

4) act as the rehabilitation authority for, and ex officio member of, the Board on issues concerning rehabilitation. This would include writing those portions of Board D&O's pertaining to rehabilitation.

5) obtain second rehabilitation opinions, subpoena rehabilitation information.

6) assign penalties to any party for lack of compliance with the rehabilitation statute, rehabilitation regulations or rehabilitation D & O's.

7)

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8)

9)

13) STANDARDIZE DEFINITIONS AND CONCEPTS.

Define concepts as presented in section IV Rhetorical Considerations.

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XI. BIBLIOGRAPHY

- 1) Something More Important Than Money - Vocational Rehabilitation in Workers' Compensation Cases, Chancy Croft, c.1986. Alaska Law Review.
- 2) Leadership and the One Minute Manager. Ken Blanchard.
- 3) Meet Me at the Top. Zig Zigler.
- 4) The Successful Negotiators. The Institute of Applied Learning. Robert Rutherford.
- 5) Oxford English Dictionary. Oxford University Press. 1971.
- 6) Transferrability of Work Skills. Timothy F. Field, PhD. & Celeste M. Taylor, MA. Valpar Interntnl. 1986.
- 7) Orval Ragland v. Morison Knudsen and Crawford & Co. AWCB 216222. Rehabilitation Administrator D&O, 3/28/86.
Donald Campbell v. Weaver Brothers and Alaska Pacific Assurance/INA, 2/25/85.
John Blume v. Arctic Slope/Wright Schuchart & Wausau Ins. AWCB 319836. 10/20/86.
- 8) Vetter v. AWCB. Sup.Ct.Op.#1057 (file #1943) 524 P.2d 264 (1974).
- 9) Florida Workmen's Compensation Law. 440.49.
- 10) AS23.30.145.

ALASKA W.C. EXPERIENCE CALENDAR YEAR 1986 (000)

INSURANCE COMPANY	RANK 1986	RANK 1985	MARKT SHARE	WRITTN PREM	EARNED REM	INCURD LOSS	LOSS RATIO	LOSS UNPAID	
INDUS INDEM OF AK	1	1	13.95%	21067	21409	16976	79.3%	29392	
ALASKA NATIONAL	2	4	13.12%	19675	20127	15327	76.2%	17503	
PAC MAR INS CO	3	--	9.04%	16257	13873	11535	83.1%	8997	
A L P A C	4	5	8.24%	12095	12646	6643	52.5%	23461	
PROY WASH OF AK	5	3	6.68%	10430	10247	12668	123.6%	16444	
AK TIMBER EXCH	6	7	6.24%	9583	9583	3383	35.3%	10202	
AMERICAN INS CO	7	9	4.21%	6565	6468	7580	117.2%	13737	
TRAVELERS INS	8	6	3.92%	5747	6017	7496	124.6%	18816	
EMPLOYERS WAUSAU	9	11	2.86%	4729	4395	6339	144.2%	9873	
PAC MAR OF AK	10	3	2.24%	1652	3436	4298	125.1%	7617	
OLD REPUBLIC	11	28	1.76%	3799	2701	1448	53.6%	1229	
EAGLE PACIFIC INS CO	12	23	1.63%	2230	2502	2680	107.1%	2036	
FID & CAS OF NY	13	--	1.59%	2602	2440	1998	81.9%	2036	
WAUSAU UNDRWRTS	14	18	1.57%	2517	2404	1850	77.0%	5393	
ROYAL INS AMERICA	15	16	1.43%	2093	2192	2555	116.6%	3135	
INS CO NORTH AMER	16	8	1.33%	2471	2035	-8	-0.4%	1165	
NATIONAL UNION FIRE	17	17	1.29%	2202	1984	4100	206.7%	4553	
LIBERTY MUTL FIRE	18	21	1.24%	1978	1896	947	49.9%	837	
STANDARD FIRE	19	10	1.22%	1757	1879	2537	135.0%	5016	
U. S. FIRE INS CO	20	--	1.02%	1758	1563	612	39.2%	1	
AETNA CAS & SUR	21	--	0.90%	1316	1380	3403	246.6%	6192	
FIREMANS FUND	22	13	0.88%	1207	1356	-95	-7.0%	3809	
STATE FARM F&C	23	24	0.85%	1242	1309	1099	84.0%	2147	
ALASKA INS CO	24	25	0.78%	1144	1194	946	79.2%	1560	
AMERICAN NATL FIRE	25	19	0.74%	869	1134	1674	147.6%	2939	
EMPLOYERS CAS CO	26	12	0.73%	1114	1114	2478	222.4%	1832	
CITY INS CO	27	14	0.66%	-2441	1010	1609	159.3%	2430	
INDUS INDEM N.W.	28	30	0.63%	946	964	862	89.4%	1432	
ASSOCIATED INDEM	29	--	0.57%	885	873	723	82.8%	1724	
CONTINENTAL INS	30	27	0.53%	712	818	1250	152.8%	4001	
TOP 30 WRITERS	-----	-----	88.73%	136985	136170	117991	86.6%	198090	
REMAINDER	-----	-----	11.27%	13489	17292	32302	196.9%	54065	
TOTAL ALL WRITERS	-----	-----	100.0%	150474	153462	150294	97.9%	252175	
TOP 10 WRITERS ACCOUNTED FOR			39.19%					70.51%	OF THE MARKET

1986 ALASKA W.C. EXPERIENCE

Compliments of Senator
Paul Fischer

ALASKA W.C. EXPERIENCE CALENDAR YEAR 1985 (000)

INSURANCE COMPANY	RANK 1985	RANK 1984	MARKT SHARE	WRITN PREM	EARNED PREM	INCURD LOSS	LOSS RATIO	LOSS UNPAID
INDUS INDEM OF AK	1	2	15.11%	23869	22110	22593	102.2%	27062
PAC MAR OF AK	2	5	10.69%	16132	15636	11589	74.1%	9929
PROY WASH OF AK	3	4	9.70%	11716	14186	15137	106.7%	13597
ALASKA NATIONAL	4	5	8.89%	16642	13010	6777	52.1%	9853
A L P A C	5	3	6.89%	9218	10084	-457	-4.5%	28417
TRAVELERS INS	6	8	5.76%	8938	8433	11346	134.5%	15373
AK TIMBER EXCH	7	9	3.12%	4542	4560	1343	29.5%	6955
INS CO NORTH AMER	8		2.82%	4250	4118	151	3.7%	3235
AMERICAN INS CO	9	14	2.42%	4364	3541	2237	63.2%	9244
STANDARD FIRE	10	10	2.07%	1768	3022	2096	69.4%	4052
EMPLOYERS WAUSAU	11	6	2.03%	3379	2963	4089	138.0%	8776
EMPLOYERS CAS CO	12	20	1.88%	2745	2746	1947	70.9%	1128
FIREMANS FUND	13	13	1.73%	2308	2526	2502	99.0%	4944
CITY INS CO	14	30	1.71%	4103	2496	2346	94.0%	2056
PACIFIC EMPLOYERS	15	15	1.71%	2653	2495	1624	65.1%	3157
ROYAL INS AMERICA	16	18	1.54%	2291	2252	1593	70.7%	1815
NATIONAL UNION FIRE	17	7	1.53%	2311	2234	2674	119.7%	2499
WAUSAU UNDWRTS	18	11	1.45%	2083	2128	4319	203.0%	5487
AMERICAN NATL FIRE	19	21	1.19%	1729	1739	2212	127.2%	2106
HOME INDEMNITY	20		1.10%	1639	1606	2638	164.3%	5803
LIBERTY MUTL FIRE	21		1.09%	1374	1598	730	45.7%	649
ARGONAUT-MIDWEST	22	22	1.07%	998	1558	708	45.4%	1606
EAGLE PACIFIC	23		1.04%	2145	1518	1370	90.3%	985
STATE FARM F&C	24	19	0.99%	1518	1452	1378	94.9%	1957
ALASKA INS CO	25	23	0.90%	1431	1316	598	45.4%	1071
INDUSTRIAL INDEM	26	26	0.75%	1019	1101	2665	242.1%	2764
CONTINENTAL INS	27	16	0.73%	995	1073	1439	134.1%	4059
OLD REPUBLIC	28		0.73%	1650	1068	549	51.4%	501
FEDERAL INS CO	29		0.66%	1082	959	1190	124.1%	1584
INDUS INDEM N.W.	30	12	0.50%	788	729	1520	208.5%	1516
TOP 30 WRITERS	-----	-----	91.78%	139680	134257	110903	82.6%	182180
REMAINDER	-----	-----	8.22%	12560	12028	14054	116.8%	30357
TOTAL ALL WRITERS	-----	-----	100.0%	152240	146285	124957	85.4%	212537
TOP 3 WRITERS ACCOUNTED FOR			35.50%	OF THE MARKET.				
TOP 10 WRITERS ACCOUNTED FOR			67.47%	OF THE MARKET				

Compliments of Senator Paul Fischer

ALASKA W.C. EXPERIENCE CALENDAR YEAR 1984 (000)

INSURANCE COMPANY	RANK 1984	RANK 1983	MARKT SHARE	WRITTN PRMIUM	EARNED PRMIUM	INCURRD LOSS	LOSS RATIO
PROY WASH OF AK	1	1	13.47%	14922	16400	9535	58.1%
INDUS INDEM OF AK	2	2	12.84%	16123	15632	8953	57.3%
A L P A C	3	3	9.99%	9802	12164	16012	131.6%
PAC MAR OF AK	4	6	8.29%	10410	10097	4285	42.4%
ALASKA NATL	5	5	5.11%	6441	6222	2100	33.8%
EMPLOYERS WAUSAU	6	4	4.87%	5702	5933	5187	87.4%
NATL UNION FIRE	7	13	3.65%	3982	4448	962	21.6%
TRAVELERS INS	8	10	3.44%	3512	4185	6373	152.3%
AK TIMBER EXCH	9	12	2.77%	3383	3368	2995	88.9%
STANDARD FIRE	10	11	2.60%	2685	3169	1957	61.8%
WAUSAU UNDWR	11	29	2.45%	3055	2978	2091	70.2%
INDUS INDEM N W	12	20	2.06%	1490	2503	944	37.7%
FIREMENS FUND	13	25	2.03%	2431	2469	2343	94.9%
AMERICAN INS	14	8	2.02%	1862	2457	1659	67.5%
PACIFIC EMPLOYERS	15	19	1.61%	1971	1964	1282	65.3%
CONTINENTAL INS	16	15	1.60%	1773	1952	2484	127.3%
AETNA CAS & SUR	17	26	1.52%	1374	1855	3882	209.3%
ROYAL INS AMER-	18	--	1.40%	1833	1705	1140	66.9%
STATE FARM F & C	19	23	1.24%	1590	1504	527	35.0%
EMPLOYERS CAS	20	18	1.23%	1492	1495	1024	68.5%
AMER NATL FIRE	21	17	1.20%	1622	1464	473	32.3%
ARGONAUT MIDWEST	22	22	1.14%	1729	1385	1380	99.6%
ALASKA INS	23	24	0.76%	981	931	10	1.1%
FID & CAS OF NY	24	--	0.65%	804	792	1020	128.8%
ARECA INS EXCH	25	--	0.48%	588	588	344	58.5%
INDUS INDEM	26	16	0.47%	581	576	175	30.4%
MISSION INS CO	27	--	0.44%	542	532	385	72.4%
ASSOCIATED INDEM	28	28	0.40%	571	493	473	95.9%
ARGONAUT INS CO	29	21	0.30%	891	364	1066	292.9%
CITY INS	30	--	0.29%	2234	348	247	71.0%
TOP 30 WRITERS	----	----	90.34%	106376	109973	81308	73.9%
REMAINDER	----	----	9.66%	10625	11766	7667	65.2%
TOTAL ALL WRITERS	----	----	100.0%	117001	121739	88975	73.1%
TOP 3 WRITERS ACCOUNTED FOR			32.30% OF THE MARKET				
TOP 10 WRITERS ACCOUNTED FOR			67.04% OF THE MARKET				

1984 ALASKA W.C. EXPERIENCE *Compliments of Senator Paul Fischer*

Summary of 1982 Supplementary Data System

- * The Alaska Division of Workers' Compensation processed 10,125 time loss claims for 1982.
- * August was the peak month for injuries in 1982. Injuries are always most prevalent during the summer and early fall when Alaska's labor force is at the peak of its seasonal activity.
- * Women filed 17.5% of the time loss claims during 1982 although they comprised roughly 44% of the work force. Women workers tend to be found in less hazardous occupations.
- * The construction industry lead all others in the number of reported time loss cases (2,308) accounting for 22.8% of the total while having only 9.2% of the nonfederal employment.
- * Craftsmen, laborers, and operatives (excluding transport), are consistently the leading occupational groups for time loss cases, with nearly two thirds of the claims.
- * Sprains and strains continue to be the leading nature of injury (46.2% of the total). The incidence of such injuries is greater among women (49.6%) than for men (45.5%).
- * The back is historically the most frequently injured part of the body and is involved in one fourth of all time loss cases. Sprains and strains are the most common result of back injuries.
- * The primary source of injury is "working surfaces" which caused 20% of all injuries. "Working surfaces" usually are the ground or floor above which an employee was working.
- * The proportion of time loss cases due to overexertion has grown steadily since 1976 and this type of accident now accounts for 28% of all injuries.
- * For the first time, Monday was replaced by Wednesday as the most hazardous day of the regular work week. Friday continues as the most injury free day.
- * Over one half of all injuries involved employees who had been on the job one year or less. In construction and manufacturing, at least 25% of the cases were during an employee's first month of service.
- * Roughly one third of all time loss injuries happen during or after the eighth hour of the work day.

The number of time loss claims for 1982 is just 3% lower than 1976, the peak year for construction of the trans-Alaska Pipeline. This represents a drop in the time loss claim rate from that year of record activity.

Summary of 1982 Occupational Injury and Illness Survey

- * The 1982 Alaska occupational injury and illness incidence rate for the private sector was 10.3 cases per 100 workers. The rate falls between the rates recorded in 1980 and 1981. Since 1977, the private sector rate has fluctuated between 10.0 and 10.4.
- * The rate for occupational injuries in Alaska's private sector was stable from 1978 to 1981. In 1982, the injury rate increased slightly to its highest level in five years.
- * The rate for occupational illnesses in the private sector was identical to 1981 and remains the lowest in several years.
- * The 1981 incidence rate for lost workday cases in the private sector (4.8) was the lowest ever recorded in the annual survey. The 1982 rate (4.9) represents a slight increase over that prior year and is the second lowest to date.
- * The total estimated number of lost workdays in the private sector in 1982 represent a loss of one year's work for 369 people. If measured by average salary, the cost was over 10 million dollars.
- * Construction employment increased for another year at a record rate only surpassed during the Trans-Alaska Pipeline project. Its rate of occupational injuries and illnesses significantly surpassed last year's level and was the highest in nine years.
- * Manufacturing industries broke last year's record low and experienced the lowest total case rate in the eleven years of the survey. Seafood processing's rate fell dramatically reaching record lows while the rate in lumber and wood products was stable. Losses in seafood processing employment were a factor in the declining rates.
- * The oil and gas industry had 5% growth in employment from 1981 to 1982 and its occupational injury and illness rate decreased from its recent record high level in 1981.

Injury and Illness Incidence Rates

The rate of 10.3 means that roughly one out of every ten Alaskan workers in private industry suffered a recordable injury or illness during the course of their employment.

Occupational Injury Rate

The private sector injury rate declined steadily from 12.8 in 1974 to its low of 9.7 in 1978 and 1979. In 1980 and 1981 an injury rate of 9.8 was recorded. From 1981 to 1982 the private average annual employment and estimated hours worked increased 9% and 13%, respectively. In 1981 Alaska's private sector employment surpassed the prior record level of 1976, the high point in the construction of the Trans-Alaska Pipeline. Annual average private sector employment during 1982 was 14% above that record pipeline year. The total number of estimated injuries in 1982 rose by 17%, from 10,628 to 12,441 over 1981.

Occupational Illness Rate

The occupational illness incidence rate in 1982 for the private sector was 0.2, identical to 1981. The illness case rate therefore continues to hold at its lowest level in seven years.

Lost Workday Cases

Injuries and illnesses which result in lost worktime are generally more severe than those that do not result in time loss. The incidence rate for lost workday cases constitutes a measure of the more severe occupational injuries and illnesses. Lost worktime includes not only days the employee was absent from work because of job related injury or illness, but also days an employee was working but could not perform all regularly assigned duties.

The incidence rate for time loss cases in the private sector during 1982 was 4.9 cases per 100 workers, an increase from the 1981 record low of 4.8, but still the second lowest rate ever recorded for Alaska's private sector.

Of the total lost workdays in the private sector in 1982, days away from work accounted for 95% while the remainder were days of restricted activity. The proportion of days away from work has been constant each year. Total lost workdays in Alaska's private sector in 1982 amounted to the equivalent of a full year of work from 369 employees. The cost for this lost time, in terms of salary, would equal over 10 million dollars.

Figure 1-1
Occupational Injuries, Employment, and Hours Worked
Private Sector
Alaska
1974-1982

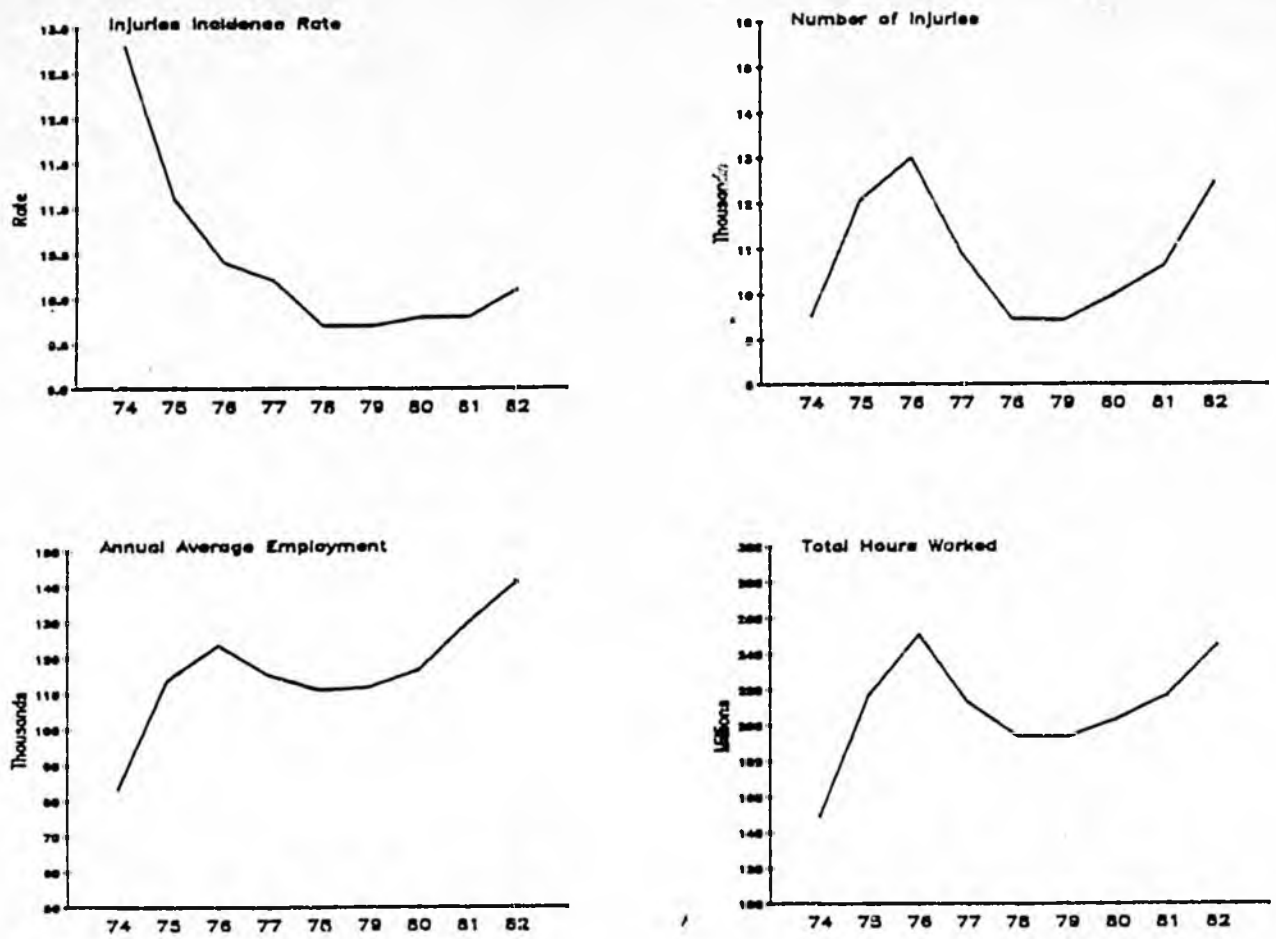
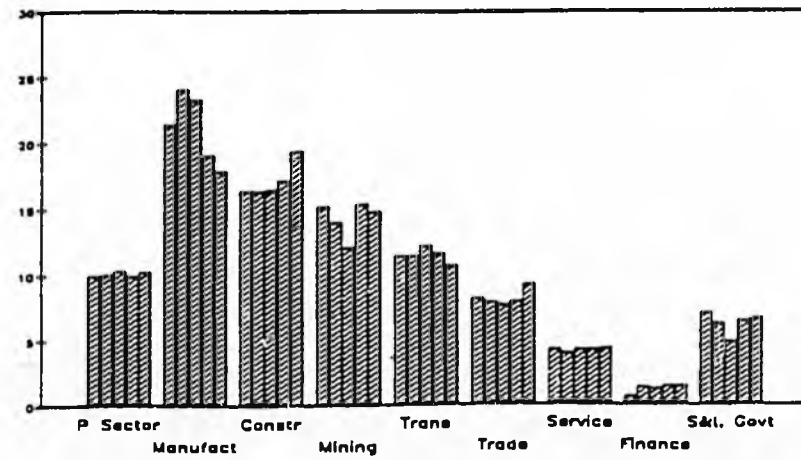
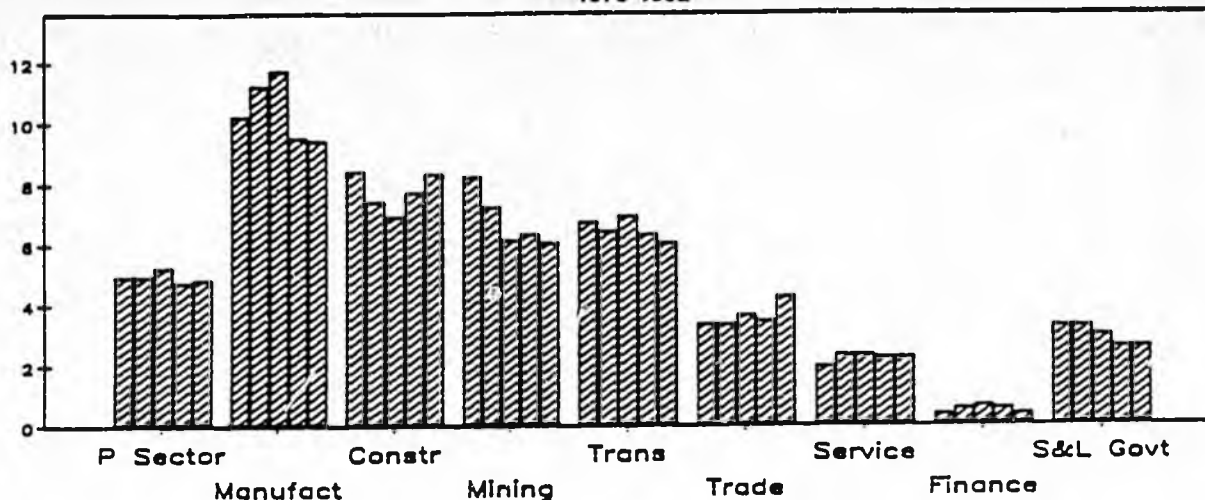


Figure 1-2
Occupational Injuries and Illnesses
Incidence Rates
Alaska
1978-1982



**Figure 1-4
Occupational Injuries and Illnesses Lost Workday Cases
Incidence Rates
Alaska
1978-1982**



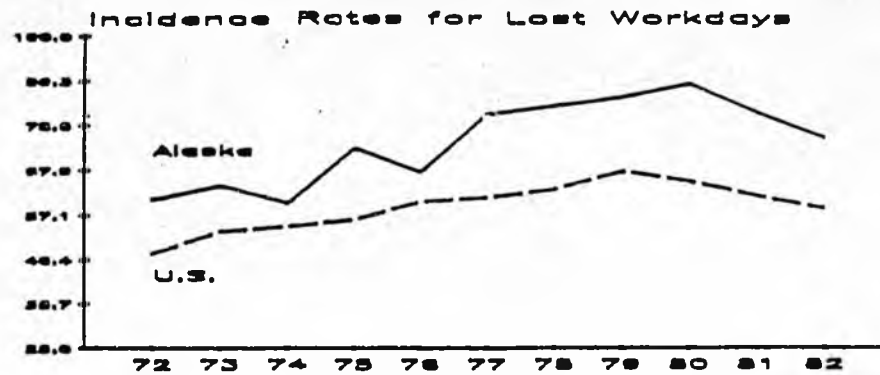
**Table 1-1
Average Lost Workdays Per Lost Workday Case
Alaska
1975-1982**

	1975	1976	1977	1978	1979	1980	1981	1982
Private Sector	14	13	16	17	17	17	17	15
Mining	16	44	31	26	33	35	25	23
Construction	16	11	14	21	23	15	17	17
Manufacturing	10	15	13	13	11	11	14	11
Transportation & Public Utilities	15	14	21	18	20	20	20	18
Trade	10	7	12	11	14	15	12	11
Finance, Insurance, Real Estate	15	7	10	16	22	7	8	10
Services	10	14	15	13	12	16	17	15
State & Local Government	13	9	11	14	14	16	18	15

**Figure 1-5
Lost Workday Cases and Lost Workdays
Private Sector
Alaska and United States
1972-1982**



**Figure 1-5
Lost Workday Cases and Lost Workdays
Private Sector
Alaska and United States
1972-1982**



**Table 1-2
Lost Workdays, Days Away From Work, and Days of Restricted Work Activity
Incidence Rates
Alaska
1981 and 1982**

Industry	Total Lost Workdays		Days Away From Work		Days of Restricted Work Activity	
	1981	1982	1981	1982	1981	1982
Private Sector	81.5	75.4	76.4	71.5	5.1	3.9
Mining	162.3	142.7	161.6	141.8	0.7	0.8
Construction	134.7	143.3	126.6	134.5	8.1	8.8
Manufacturing	132.4	109.1	123.3	105.1	9.2	4.0
Transportation & Public Utilities	126.5	110.7	119.5	103.7	6.7	7.0
Trade	42.3	48.3	38.9	44.1	3.4	4.2
Finance, Insurance, Real Estate Services	4.9	2.9	4.6	0	0.3	2.9
Services	37.6	53.0	32.2	52.1	5.4	1.0
State & Local Government	47.2	38.4	46.0	37.2	1.3	1.3

Incidence rates represent the number of lost workdays per 100 full time workers. Total lost workday rates equal rates for days away from work plus days of restricted work activity. Some figures may not add to the total due to rounding in the estimation process.

Source: Annual Survey of Occupational Injuries and Illnesses, 1981 and 1982, Research and Analysis Section, Alaska Department of Labor

Figure 1-7
Occupational Injuries and Illnesses
Incidence Rate Trends
Private Sector
Alaska and United States

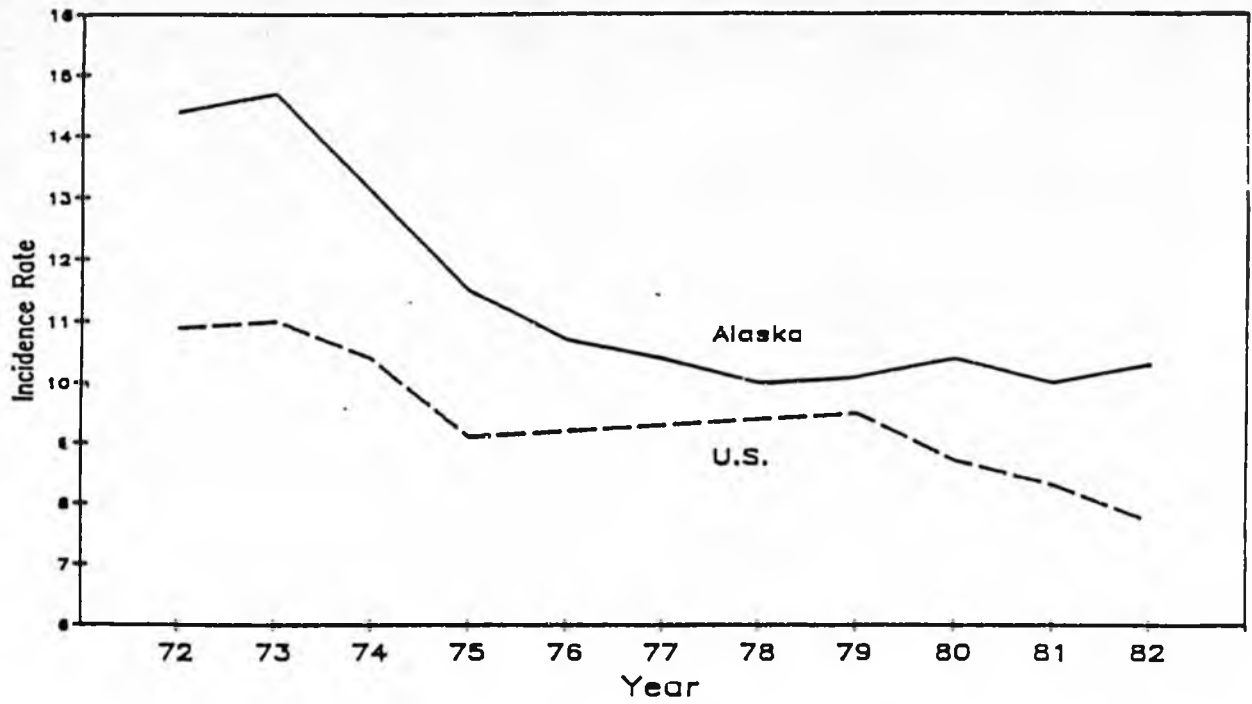


Figure 1-8
Occupational Injury and Illness Incidence Rates
Private Sector
Region X States

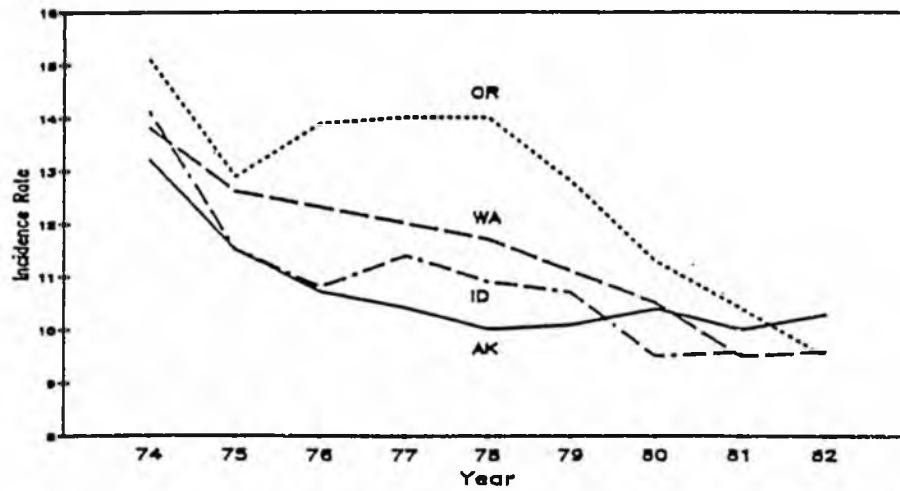


Figure 2-6
Work Injuries and Illnesses by Occupation
Alaska
1982

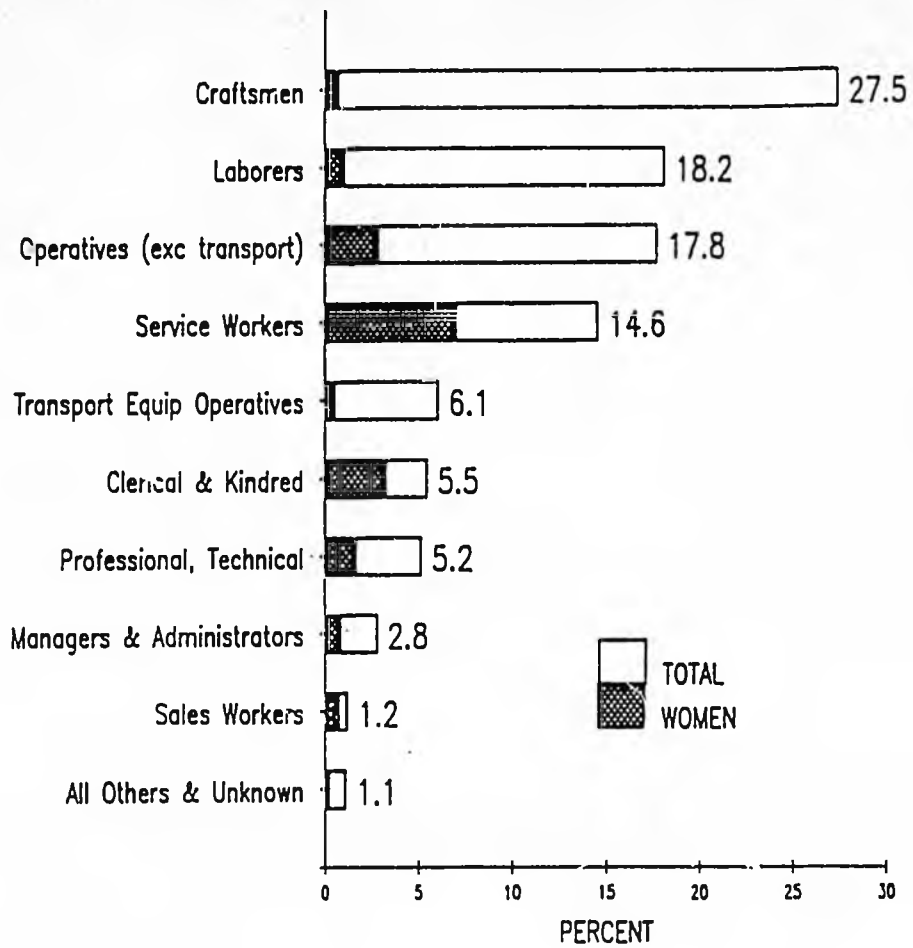


Figure 2-7
Work Injuries and Illnesses by Nature of Injury or Illness
Alaska
1982

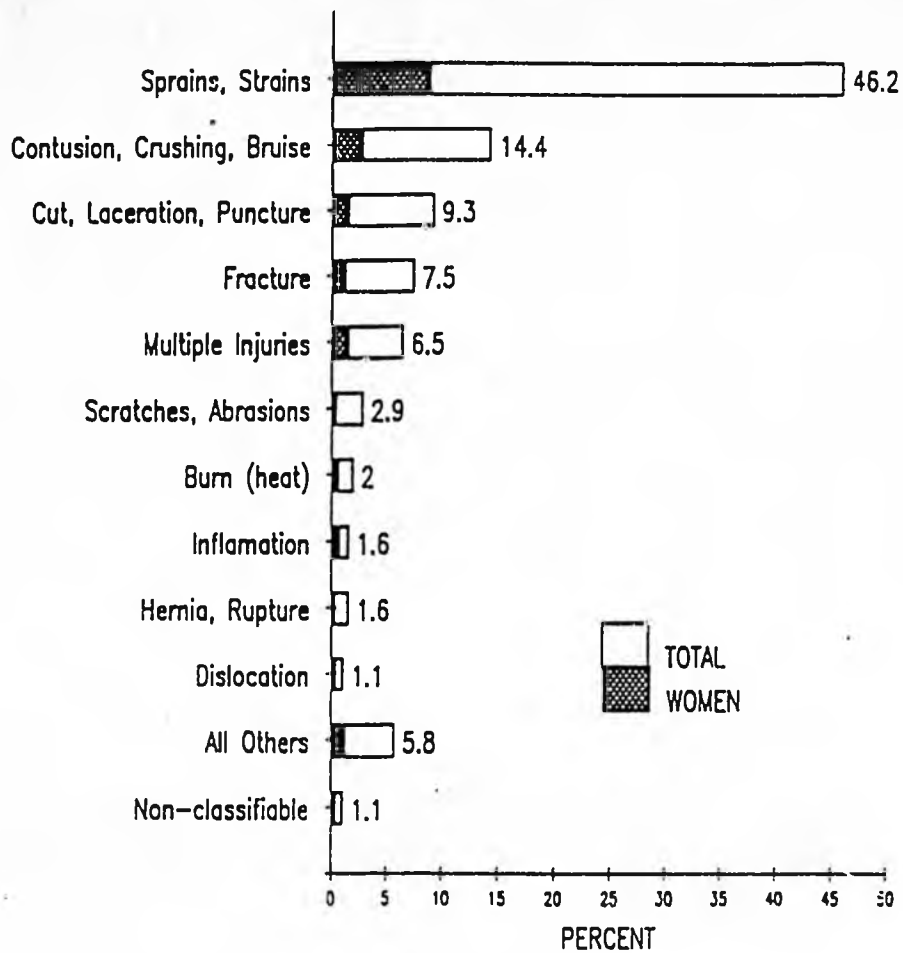


Figure 2-8
Work Injuries and Illnesses by Part of Body Affected
Alaska
1982

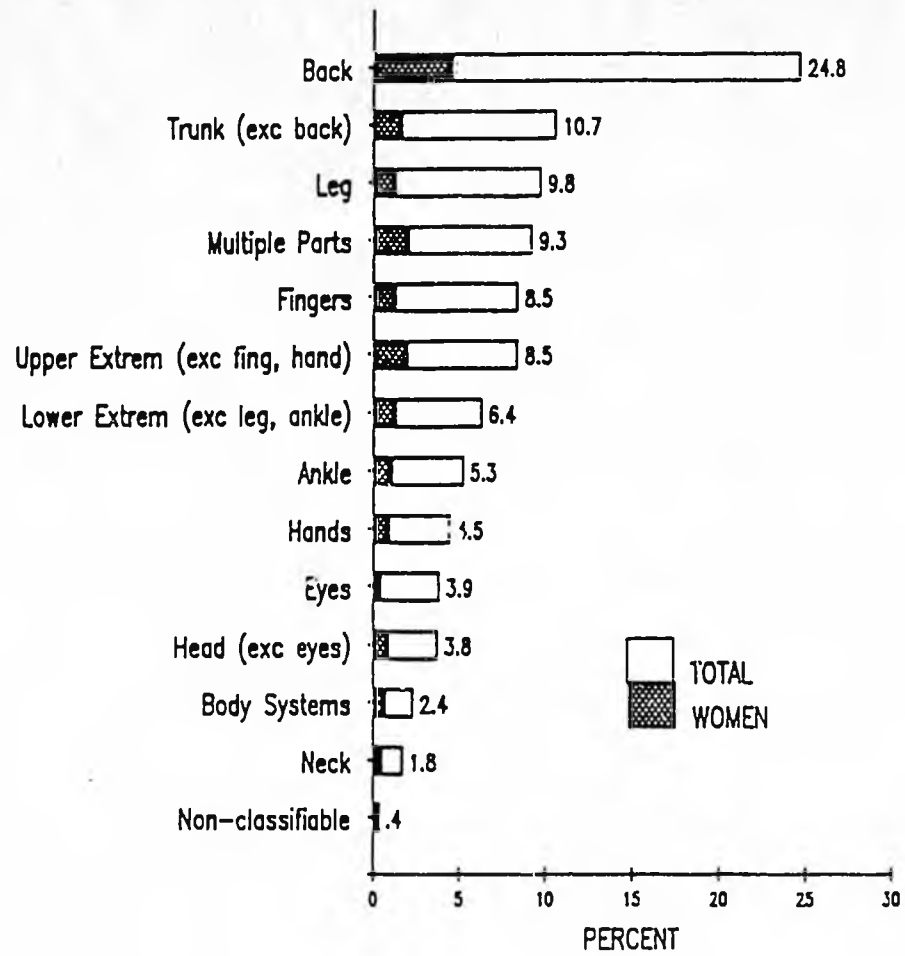
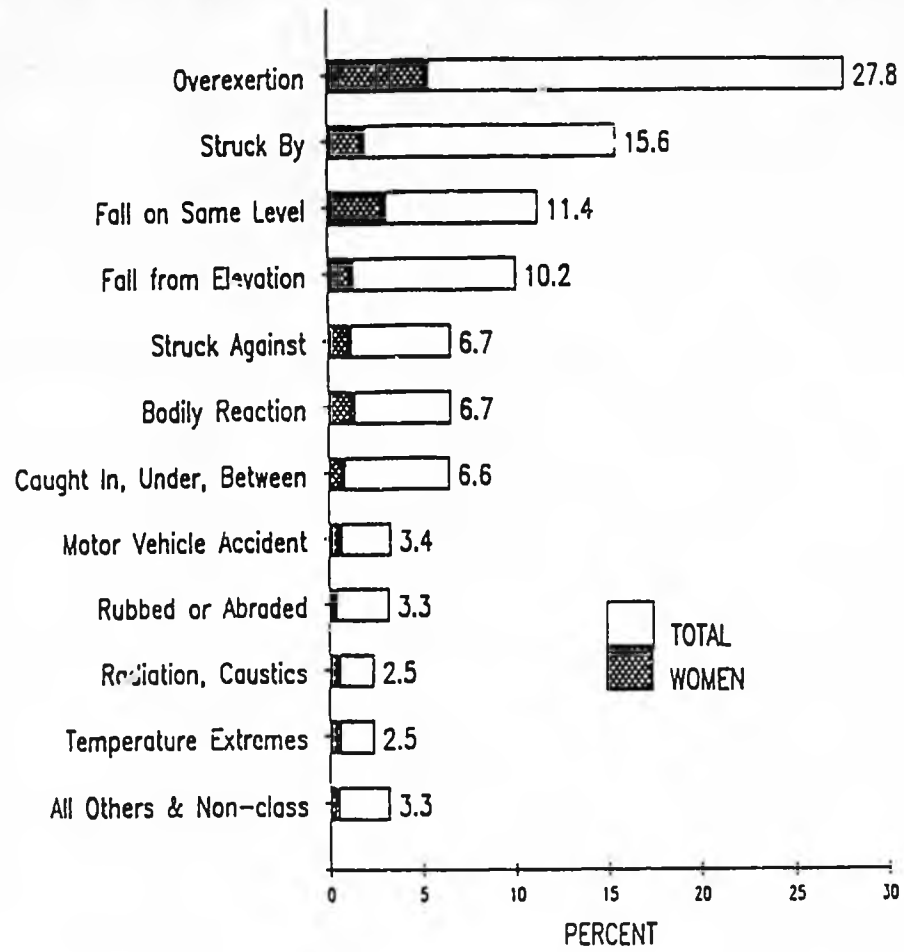


Figure 2-10
Work Injuries and Illnesses by Type of Accident or Exposure
Alaska
1982



15

INJURED WORKERS INTERNATIONAL ASSO.

200 W. 34th. Ave.

SUITE 233

ANCH. AK. 99503

277 - 8485

10,125 Time Loss Claims for 1982

WOMEN filed 17.5% of the Time Loss Claims

DVR and PRIVATE REHAB firms SUCCESSFULLY rehabilitated

124 of the 14,140 Time Loss cases in 1980

	CONTROVERTED CASES		BOARD ACTIONS	
	Totals	Hearings	Scheduled	Heard
FY 82	3502		848	340
FY 83	7171		863	345
FY 84	7309		855	285

1 out of EVERY 10 ALASKANS INJURED through course of employment

1982 Private Sector Employment UP 14% from Peak Pipeline Years

1981 -1982 Lowest Private Sector Injury rates EVER RECORDED

Premium Rates are UP -----
(4 to 5 times???)

Accident Rates are Down
(as much as 44.7%!!!!)

Employer Premiums Totaled roughly \$20 Billion in 1979

Medical Benefits Totaled roughly 3.5 Billion

Compensation Benefits totaled 8.4 Billion

WHO HAS SUFFERED??!??

Watch for future information

Summary

Analysis of Workers Compensation Laws 1982

Prepared and Published Annually by the U.S. Chamber of Commerce

Six basic objectives of the workers compensation laws.

Provide sure, prompt, and reasonable income and medical benefits to work-accident victims, or income benefits to their dependants regardless of fault.

Provide a single remedy and reduce court delays, costs, and work loads arising out of personal-injury litigation.

Relieve public and private charities of financial drains-incident to uncompensated industrial accidents.

Eliminate payment of fees to lawyers and witnesses as well as time-consuming trials and appeals.

Encourage maximum employer interest in safety and rehabilitation through an appropriate experience-rating mechanism.

Promote frank study of causes of accidents (rather than concealment of fault) reducing preventable accidents and human suffering.

The Chamber of Commerce of the United States policy states:

"Insurance is an integral part of private enterprise. Insurance should not be regarded as a function to be carried on by the government, and insurance monopolies carried on by governmentally created entities should not be permitted."

Compensation rates are scientifically based on payroll. Average cost per \$100 payroll in 1978 amounted to \$1.85. In 1979, it amounted to \$1.93.

Medical payments in 1979 totaled 3.5 billion dollars. Compensation benefits totaled 8.4 billion dollars.

Employers premiums paid roughly totaled 17 billion in 1978, and 20 billion in 1979.

Compensation laws are classified as Compulsory and Elective. Three states have elective laws, they are New Jersey, South Carolina and Texas. In all other states, it is compulsory to employees in both the private and public sector.

Coverage of minors takes into consideration future earning capacity and illegal employment. Coverage for all occupational diseases is supposedly included, and must be filed within 1 to 3 years after relation to employment. In Alaska, the filing period is 2 years.

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Interior/North Alaska Newsletter

Media Project

Vol. 1, No. 4 (c. 1980)

February 11, 1980

Orbeck Fiddles, Claimants Burn

Fairbanks Court Cases Tell Sad Story of Workers' Comp

Background: With support from the Fund for Investigative Journalism, during 1979 Richard A. Fineberg researched and wrote eight articles on workers' comp for the Anchorage Daily News and the Alaska Advocate. Apart from a few broadcast talk shows, the subject received little attention from Interior/North Alaska media.

Fineberg subsequently prepared an assessment of workers' comp problems at the request of the state House Labor & Management Committee. (The contract granted the writer the right to use all research materials on completion of the project.) That assessment, completed last month, was the subject of recent All-Alaska Weekly and Fairbanks Daily News-Miner articles.

This article incorporates some material from earlier reporting and legislative research.

Almost any way you look at it, the workers' compensation program in Alaska is a headache.

Employers, who make premium payments for the compulsory insurance on behalf of their employees, say the program costs too much.

Insurance companies (carriers) who collect the premiums and then cover medical expenses, rehabilitation and partial wage loss for injured workers (claimants) say they can't make money on comp.

While the Workmen's Compensation Division (a part of the State Department of Labor) appears to be drowning in a sea of paperwork, the Insurance Division (Department of Commerce and Economic Development) keeps its feet dry by focusing on narrow aspects of the arcane rate-making mechanism.

When you consider the size of the comp bill in Alaska, the headache assumes migraine proportions. In 1977 comp premiums topped \$100 million and constituted 24 per cent of all insurance premiums in the state, more than any other type, according to

Insurance Division figures. The dramatic increase in comp costs in recent years (comp premiums totalled \$16.4 million in 1973, compared to \$107 million in 1977) has overshadowed growing dissatisfaction with the services provided by the carriers and the state.

But service problems may be the biggest headache of all. Claimants frequently find their benefit payments stalled in red tape, and some claimants believe some carriers deliberately shirk their responsibility to cover long-term disabling injuries.

Two Fairbanks court cases, previously unreported in the Interior/North Alaska press, spotlight comp service problems.

One suit was filed last year by Fairbanks attorney Lance Parrish

(continued on page 3)

Do Union Leaders Fear Them?



Sam Goodman (left) and Chris White are part of a small group building a union reform movement in Alaska. Their efforts are described on page 5.

Isolated sob stories or widespread problems?**Workers' Comp: Claimants Burn . . .***(continued from page 3)*

Claimants in Anchorage and Fairbanks have voiced and documented similar criticisms. Their complaints are echoed by a number of claimants who belong to neither group, lending strength to claimants' requests for a special review of carrier and Board handling of long-term disability cases.

There is a striking similarity, for example, in the testimony of three Alaska claimants with back problems. Alpac sent OVIA's MacArmour, Diane Black of Fairbanks and an Anchorage woman

Alpac uses Frisco 'defense mill' to axe Alaska claimants

who asked to remain unidentified to San Francisco for examination by Dr. Willard F. Pennell, a specialist in neurology and psychiatry; all three say Dr. Pennell determined each to be malingering and provided Alpac with a long report describing his findings; all three say Dr. Pennell's opinion played a significant part in the Board's rejection of their claims.

Dr. Pennell's partner is featured in a legal textbook that says the firm consistently provides insurance companies with testimony damaging to persons seeking insurance payments. In the textbook co-author Marvin E. Lewis (past President of the American Trial Lawyers Association) cites his concluding statement from a trial in which he faced that medical firm. Lewis told the jury:

Dr. Knox Finley (Dr. Pennell's partner) comes from a defense mill. That's what his office is . . . nearly a hundred times he has testified on the stand like this . . . in injury cases and always for the City and always for . . . insurance companies. Besides that, he has been in every county of Northern California doing the same thing . . . Then his two partners were doing the same thing. Then they were not only having these cases, but there were other plaintiffs who were injured that never got to Court . . . and they were doing all this . . . as a business of testifying for insurance companies . . .

Alpac says it has sent at least half a dozen Alaska claimants to Dr. Pennell; other Alaska carriers also use this specialist. Last year John Cook, then Director of the Comp Division, was asked how many times the Board encountered the testimony of Dr. Pennell. Cook replied that he did not know. He said he could not assign staff to investigate the question because the Division was already overburdened.

Cook denied that the Board was unduly influenced by Dr. Pennell. However, the records show that the San Francisco specialist's testimony played a key role in the Board's decision against claimants Black and MacArmour. The third claimant said Dr. Pennell's report stripped her of "everything but my driver's license."

Workers' comp . . .*(continued from page 4)*

"We've had many other people tell us they wish we had been there when they were hurt, and some who came in told us of friends who had been hurt and have gone to the Lower 48," Lambeth said. "And we were gathering more people all the time when we closed down."

"I've seen people lose their house and car," the OVIA secretary said. "It just makes you feel terrible."

MacMillan, a nurse with 17 years professional experience, observed that some accident victims are treated with drugs whose side effects impair their ability to deal effectively with the bureaucratic problems they inevitably run into.

Does Alpac have an inordinate number of complaints, or does the carrier's name appear so frequently in comp disputes because Alpac writes 56 per cent of the comp premiums in Alaska? The answer to this question is not available from public records.

A state Division of Insurance auditor who examined Alpac's records in 1978 came away with the impression that the company's claims service was excellent, but some insurance industry sources feel Alpac handles its claims poorly.

Part of the problem, one industry source explains, is that Alpac simply grew too fast. Trying to keep up with its rapidly-expanding pipeline business during the mid-70's the company ran into the same kind of paperwork problems that plague the Comp Division.

Informed sources report that Alpac miscalculated on long-term payments the company must make for accident victims employed by Alyeska Pipeline Service Co., Alpac's largest client during several years of rapid growth. Some observers believe this reported miscalculation may have caused Alpac to tighten up on claim settlement practices.

Rate-setting falls within the jurisdiction of the Division of Insurance, but the procedures are so cumbersome that the Division cannot provide basic answers to simple questions concerning the profitability of the burgeoning comp business for Alpac and Alaska's other carriers. Although Alpac's growth has outpaced the workers' comp field as a whole, the company's profit-and-loss figures on comp are lumped together with the company's comp operations in other states.

Alpac is a wholly-owned subsidiary of the Insurance Company of North America, one of the ten largest casualty insurance companies in the nation.

Despite a statutory provision that appears to give the Director of Insurance responsibility for making sure carriers comply with all aspects of comp law, the Division of Insurance tends to focus only on rate matters, shunting complaints about service problems back to the Comp Division where many of the problems originated.

Lack of state agency responsiveness led comp claimant MacArmour to set up OVIA. Last July the organization opened an office with funding for a three-person staff from the Comprehensive Employment Training Act (CETA). When paychecks were delayed in CETA's paperwork pipeline, the first project coordinator soon resigned.

The remaining two staff members, Charles MacMillan and Judy Lambeth, stayed with the job for 72 days before the first paycheck emerged from a state office foul-up in Juneau. Lambeth and MacMillan say they stayed with OVIA because they became convinced the comp system was either unable or unwilling to help many claimants with legitimate problems.

The program operated on a shoe-string budget. To pay office rent MacMillan worked out an agreement with the landlord to double as the building's janitor. To pay workers' comp for the OVIA staff, OVIA founder MacArmour sold a stereo set, one of his few remaining possessions.

Despite these difficulties, the two-person staff counseled about 30 claimants before a CETA cutback closed the operation Nov. 30. MacMillan and Lambeth say the organization could have been of service to many more comp claimants if funding had continued.

(continued on page 6)

Comp Problems Add To...**... The Long Ordeal of Patrick Jackson**

March 1977. Pat Jackson was surveying, working out of a northern pipeline camp. The job included scrambling over rough terrain, wrestling with surveying equipment, jolting along the pipeline right-of-way in a crowded pickup truck — any number of activities at which you can bash your leg.

He is not sure how he hurt his knee. It was 30 to 35 degrees below zero, he recalls—the kind of weather in which you can bang yourself up right smartly and not notice it because you're hurrying to get out of the cold or you're fumbling awkwardly with tools and clothing. (Jackson says he often dinged himself driving rebar survey markers into the ground in cold weather, though he doesn't remember doing so the day he was hurt.)

Alpac lawyers take amputee to court to set new legal precedent

He does remember twisting his knee slightly as he stepped out of the truck. He went to the medic with a tender, swollen and discolored left knee and was sent back to Fairbanks for treatment.

May 1977. After eight weeks on workers' comp, Jackson returned to the pipeline and worked for several weeks. He was laid off when the pipeline was completed.

July 1977 - June 1978. For most of this period Jackson drew unemployment. As a Teamster steward he had an excellent position in the hall, but there weren't any jobs. He did the usual Fairbanks things: he cut and chopped firewood, he ran.

July 1978. Jackson finally got a job call. He says he had been experiencing cramps in his left leg for a few weeks prior to the call. He worked six days before the problem became acute and he had to quit work and return to Fairbanks for medical care.

The problem was diagnosed as thrombophlebitis (arterial damage caused by a blood clot). Ten days later corrective surgery was performed in Fairbanks.

August 1978. Jackson's comp carrier, Alaska Pacific Assurance Co. (Alpac) refused to cover his medical expenses, arguing that the problem was not related to his pipeline injury the preceding year. Jackson was out of work, out of insurance — and his knee was not getting any better. He contacted an attorney.

September 1978. A second attempt at corrective surgery was unsuccessful.

December 3, 1978. Jackson and Alpac squared off before the Comp Board.

Alpac presented the testimony of an orthopedic surgeon, Dr. John Joosse, who advised the carrier and the Board by letter: "It is my opinion that the condition simply spontaneously developed during the course of the patient's employment and has no causal relationship to his employment.... Likewise, I can find no compelling evidence that the patient's work did not effect the problem."

Jackson's physician, Dr. Joseph Montano, reviewed the case in detail and testified that "reasonable medical probability" indicated the thrombophlebitis was a direct result of Jackson's 1977 job-related problem. Dr. Montano thought it likely Jackson had suffered some kind of a blow on the knee in March 1977. He

also said the problem might have resulted from the twisting when he slighted from the company vehicle.

Normally, he said, arterial problems would develop more quickly than a year after the injury. However, he said, there were only four medical possibilities. The condition of Jackson's leg ruled out the other three, leaving only trauma of the sort that caused the March 1977 pain, discoloration and swelling as a possible cause for the 1978 malady.

Christmas, 1978. The Board was still out on Jackson's case. His physicians wanted him to go to Seattle for special treatment. There was one problem: The patient lacked the means to get there. Jackson's nurses at the hospital started making phone calls to friends, and associates to find somebody who could pay for Jackson's exit to Seattle. (The state Vocational Rehabilitation division finally picked up the tab for the necessary flight to Seattle.)

To evaluate Alpac's position at this point, a bit of legal background may be helpful. Although the evidence in Jackson's case is not clear cut — comp cases seldom are — the statutory guideline and court precedents seem to line up squarely on Jackson's side.

Alaska comp law holds that a claim is valid in the absence of substantial evidence to the contrary. A State Supreme Court decision interprets that passage to mean "if there is any doubt as to the substance of medical testimony, it must be resolved in favor of the claimant." A second Supreme Court decision uses almost identical phrasing.

Alpac claims adherence to this guideline. In January 1979 Alpac's director of workers' comp said, "I personally would rather pay a claim that was doubtful... than take the chance I had denied benefits to a man unjustly."

January 1979. With Jackson in Seattle facing another round of surgery, the Board issued an unusually rapid decision ordering Alpac to pay disability and medical costs. Instead, Alpac appealed the decision to court.

June 1979. Fairbanks Superior Court Judge Gerald Van Hoomissen upheld the Board. "The sole issue presented by this appeal, Van Hoomissen wrote, "is whether there is any substantial evidence to support the decision of the Board." Reviewing the hearing, Van Hoomissen concluded that Dr. Montano's testimony outweighed that of Dr. Joosse. July 1979. Alpac decided to make one more pitch to the State Supreme Court.

December 1979. Briefs were filed, restating the same arguments. Meantime, after seven more unsuccessful operations, doctors decided to amputate Jackson's leg just below the knee.

January 1980. One more brief filed by Alpac attorneys. One more inch of Jackson's leg removed in operation number eleven.

February 1980. "I haven't been in pain since the last operation two weeks ago," Jackson says. "This time it's healing really well." He says he's looking forward to physical therapy and learning to walk with an artificial lower leg.

Working with Alaska vocational rehabilitation counselors, Jackson planned to enter a fisheries research program, but that was before the amputation. He says he'd still like to try it, but he doesn't know whether he can handle it. "I may have to drop back and make a whole new plan," he says.

(continued on page 3)

COMMON GROUND

Published by Alaska Common Ground Collective

VOL 4 NO. 2

FREE-

SUMMER 1979

WORKMEN'S COMPENSATION Disabled workers raked over coals

photo by Rob Stapleton



We have all seen over and over again how hard it is to get work with decent wages and working conditions, and now easy it is to get laid off as the economy spirals downward into recession. But when on-the-job dangers cause workers temporary or even permanent disability, then we really see how expendable we are in the inhuman economics of capitalism.

On July 3 a group of about 20 members of Action for Victims of Industrial Accidents (AVIA) were in Anchorage to let the public know of their plight. They picketed at the State offices in front of the McKay Building, their picket signs reading "Compensation Board is a Kangaroo Court"; "Hammond, Clean up your W.C. Board" and "Get Help to the Handicapped and Disabled workers without incomes". Although they talked with Lt. Governor Terry Miller, so far there has been no response to their request for a meeting with Labor Commissioner Ed Orbeck.

Alaska cuts a deal

Many of the victims were workers caught in Alyeska's attempt to cut the costs of workmen's compensation.

Alyeska had an agreement with ALPAC, the State's largest underwriter of workmen's comp insurance, where Alyeska would pay its own workmen's comp claims using ALPAC as adjustor and to handle the paperwork. This is called self-insurance. It gives Alyeska a direct financial interest, the same as that of the insurance company, in seeing that workers do not get money from workmen's comp claims. The deal with ALPAC also gives Alyeska easy access to ALPAC's "bought" medical advisors and legal help.

The three person Workmen's Compensation Board appointed by Ed Orbeck has a history of favoring the opinions of ALPAC and Alyeska experts rather than the workers' doctors, which means that workers are up against a stacked deck.

ALPAC started to do business in Alaska in 1967 by insuring loggers in Southeast. It was purchased by Insurance Company of North America in 1971. During pipeline construction, 25% of ALPAC's business was with Alyeska Pipeline Service Company, but it also writes workmen's compensation insurance for trucking companies, banks, the Fairbanks Medical Clinic, and the State of Alaska.

Diane Black, AVIA spokesperson, was a pipeline builcook who suffered a back injury in a camp on the pipeline in 1976. She subsequently developed a myofascial syndrome which causes leg weakness and muscle spasms and which requires treatment, therapy and rehabilitation. But ALPAC's doctors disagree with her doctor and say she is faking it to get out of work, a line they use frequently to deny benefits to injured workers. The Workmen's Comp Board has twice ruled against her, but Diane fights on, unable to walk without a metal brace, unable to sit in a chair for more than an hour or two, forced to lie on the floor because of the pain. She fights her own cause and that of others throughout the state who have been reduced to welfare status because of their injuries and the decision of the Board to terminate their benefits.

Robert MacArmour, another member of AVIA, was thrown from a truck and knocked unconscious on the pipeline haul road when the brakes on the truck failed on a steep grade in May of 1977. He was hospitalized for eight days, received compensation for

Continued on page 7

Disabled workers continued

two months, went back to work, and landed back in the hospital. He is fighting the determination of the Workmen's Comp Board which says that his complaints are based on a conscious attempt to get additional workmen's comp benefits. His doctor, an orthopedic surgeon in Los Angeles, differs and says that MacArmour is totally and permanently disabled and incapable of competing in the open labor market for employment.

ALPAC's 'own' doctors

Workers who disagree with the decision of the Workmen's Comp Board when their cases are terminated and they are still unable to work have a tough battle ahead. Workers are sent to Seattle, Portland, San Francisco, and Los Angeles for independent consultation with doctors that are known as "defendant doctors", physicians who routinely see clients for an insurance company. Workers are sent to insurance company neurologist or psychiatrists who proclaim

their injuries to be the result of mental problems. These doctors report on possible malingering, previous nervous disorders--anything that will serve to discredit the victim/claimant and save money for the insurance company. The workers' only recourse is to sue the Workmen's Comp Board and the litigation process could take years and thousands of dollars. And of course there is no guarantee that the courts will reverse the Comp Board's decision.

The law says that if you're injured on the job and can't work for two years after an accident you are entitled to wage compensation, and it says that if there is permanent damage, the carrier (insurance company) must make a permanent settlement with the claimant. This law was instituted so that workers couldn't sue the companies for injuries incurred on the job. A worker is entitled to vocational rehabilitation if unable to return to her/his trade or skill because of the accident. But when the Workmen's Comp Board is slow

to process cases because of their backlog and when they pay more attention to insurance doctors' opinions than they do to the claimants' doctors, workers wind up with no compensation while continuing to have medical expenses and being unable to work. And as long as they are unable to work, they are automatically ineligible for unemployment, even if they have accrued unemployment benefits.

There is no reason why working people should put up with this kind of treatment. It is clear for all to see that the State Workmen's Comp Board does not care about the welfare of workers and is instead working for the companies, both Alyeska and ALPAC. When a stacked deck like this is so easy for all to see, can there be any doubt that the whole game should be thrown out? Working people must organize against this whole system that uses our labor for profits and then discards us when we can no longer labor to line their pockets.

--Ruth Sheridan



Workmen's Comp Abuses Cited In Legislative Agency Report

By Joe La Rocca

JUNEAU — It may seem far-fetched to link the arrest and imprisonment of a man in California for stealing and slaughtering a cow, with the alleged failure of the state Workmen's Compensation Division to carry out its statutory responsibilities.

But a report just issued by the Legislative Affairs Agency on workers' compensation problems in Alaska says that's one of the more bizarre consequences of the division's persistent failure to follow the law in dealing with countless workers' claims stemming from non-fatal injuries in Alaska.

In that case, a man working in Nome for a gold-mining company injured his back, and had to go to California to seek proper medical treatment. Although the Alaska Workers' Comp board ruled in favor of the man's claim for payments, his employer's insurance carrier arbitrarily suspended payments without notifying the board, as required by law.

Destitute, and with a family of four to support, the man stole and slaughtered a cow to feed his family, but was apprehended, convicted and imprisoned. The report says that if the Workers' Comp Div. routinely enforced, rather than ignored, state law requiring insurance carriers to notify the board when they suspend payments to claimants, the man would not likely have found himself in the position of having to steal to feed his family.

The incident dramatizes what the author of the report, Richard Ineberg, says is the longstanding failure of the state, nor, the Dept. of Labor and the Legislature to address pervasive deficiencies in the state's workers' comp program.

The report was prepared by Ineberg on contract to the Legislature's Interim Committee on Labor and Management, according to the acting chairman Rep. Brian Rogers (D-Fairbanks).

Other major problem areas, he says, are the department's "chaotic and cumbersome" records system; underfunding and under staffing; tardy or non-payment of legitimate claims; ambiguous, conflicting and fragmented workers' comp law; lack of coordination among the agencies which handle the workers' comp division says has reached the crisis stage.

Despite a huge increase in the dollar value of the comp program during the past decade, from \$8 million in 1968, to more than \$100 million in 1979, with a corresponding increase in claims, the administrative structure with which the state oversees the workers' comp program has remained essentially unchanged since statehood, according to the report.

During that same decade, workers' comp insurance rose from 10% of the total insurance business in Alaska, to 24%. In just the past four years, the hearing caseload for disputed claims facing the workers' comp board — a citizen panel which decides whether an injured worker is eligible for payments — has more than doubled, from 615 cases in 1975, to nearly 1,500 in 1979.

The program's budget, on the other hand, has fallen far be-

hind the workload increase, which rose dramatically following the construction of the trans-Alaska oil pipeline.

According to the report, State Labor Commissioner Ed Orbeck, in a public meeting last October, blamed the workers' comp program's problems on lack of attention and funding by the legislature.

While there's "a kernel of truth" to Orbeck's statement, it says, "It's difficult to demonstrate that legislative cuts in the administration's budgets are the primary cause of today's problems."

"On the contrary," it asserts, "a major cause... may be that the Dept. of Labor failed to anticipate or take timely measures to cope with the situation as it developed."

In an effort to remedy the workers' comp program's pervasive deficiencies, the report says, the division has asked for new positions and additional funding to modernize and computerize its "antiquated" record-keeping system. While that proposal is commendable and long overdue, it adds, other important measures are also necessary.

Delays at two critical stages of the process which occur in violation of law account for many of the complaints about unsatisfactory handling of claims for payments. State law requires the insurance carriers to make the first payment to claimants within 14 days of notification.

Figures show that during 1978, only 28% of the first payments were made within the 14-day period required by law. Similarly, the division is required by law to issue decisions in disputed cases within 20 days after a hearing. But the average time lapse, according to the report is currently more than three months.

In order to upgrade enforcement of the deadlines, the report says, the state should consider utilizing a full-time professional board, rather than the part-time citizen board which meets once monthly, and hiring professional investigators to determine whether insurance carriers are making timely payments to claimants.

The report also suggests that the division should prepare and issue an explanatory booklet clarifying for lay persons how the program works, as is done in other states with more successful programs. Much time-consuming and expensive litigation stemming from misunderstandings of what the workers' comp law provides could be avoided. The report also calls for a complete overhaul of the state law to eliminate ambiguities and conflicts which make it internally inconsistent. It has been fragmented by piecemeal changes over the years.

According to the report, a spokesman for one firm which carries 56% of all comp insurance written in Alaska has stated that when there is any doubt, the company sides with the claimants.

But available records suggest otherwise. Some claimants complain that carriers have litigated valid claims, and suspended or delayed payments, in order to pressure them into settling their claims for smaller lump sums.

Another pattern which the division has ignored, the report

says, concerns the use by Alaska insurance carriers of certain San Francisco specialists to evaluate claimants with back injury complaints.

One firm used often which has issued rulings unfavorable to at least three Alaska claimants, the report says, "consistently provides insurance companies with testimony damaging to plaintiffs seeking insurance payments."

Notwithstanding the firm's reputation, the report adds, the workers' comp board has relied heavily upon the firm's evaluations, without exercising its authority to appoint independent examiners.

The report also cites the state labor commissioner and the Division of Insurance, the Dept. of Commerce, which regulates the industry, for their failure to involve themselves in the workers' comp program, despite clear-cut statutory provisions mandating their jurisdiction.

The report raises a major question over how the insurance carriers use the premiums paid them by Alaska employees. Little information is available to answer this basic question. While the Div. of Insurance requires carriers to submit annual reports from all carriers in Alaska, they do not provide these data because the figures from Alaska are lumped together with those of other states in which the carrier operates.

In Alaska, comp insurance carriers collect more than \$100 million annually in premiums. Under the rate-setting procedure used in Alaska, the report says, nearly all of the investment income from those premiums is excluded from the rate base. Thus a "loophole" can be shown to justify higher premium rates, as occurred in 1974, when the "loophole" data "enabled carriers to push comp premium rates higher." Says the report, "This hidden profit factor is often overlooked by some policymakers" who hold that increased benefits for workers is the primary cause of higher premium rates.

The report ends with a series of recommendations for immediate and long-term consideration by the legislature and the executive branch. These include hearings to measure the state's failure to enforce workers' comp laws, a special review of comp cases to determine to the legislature which show whether remedial action is needed, closer interagency cooperation, more information about how the carriers use the premium dollars paid them by employers, ways of reducing premiums for small employers, and studies to determine whether a state fund to write workers' comp insurance would improve the program.

RALPH C. DANFORD

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Approximately 30,000 American, German, Canadian and Belgian soldiers took part in the exercise.

Danford is a platoon sergeant with the 3rd Armored Division in Frankfurt.

The sergeant's wife, Nancy, is with him in Germany.

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Jan 25, 1979
The Alaska Advocate

Workmen's Comp Abuses Cited In Legislative Agency Report

By Joe La Rocca

JUNEAU — It may seem far-fetched to link the arrest and imprisonment of a man in California for stealing and slaughtering a cow, with the alleged failure of the state Workmen's Compensation Division to carry out its statutory responsibilities.

But a report just issued by the Legislative Affairs Agency on workers' compensation problems in Alaska says that's one of the more bizarre consequences of the division's persistent failure to follow the law in dealing with countless workers' claims stemming from job-related injuries in Alaska.

In that case, a man working in Nome for a gold-mining company injured his back, and had to go to California to seek proper medical treatment. Although the Alaska Workmen's Comp board ruled in favor of the man's claim for payments, his employer's insurance carrier arbitrarily suspended payments without notifying the board as required by law.

Destitute, and with a family of four to support, the man stole and slaughtered a cow to feed his family, but was apprehended, convicted and imprisoned. The report says that if the Workmen's Comp Div. routinely enforced rather than ignored state law requiring insurance carriers to notify the board when they suspend payments to claimants, the man would not likely have found himself in the position of having to steal to feed his family.

The incident dramatizes what the author of the report, Richard Fineberg, says is the longstanding failure of the superior, the Dept. of Labor and the Legislature to address a pervasive deficiency in the state's workmen's comp program.

The report was prepared by Fineberg on contract to the Legislature's Interim Committee on Labor and Management, according to the acting chairman Rep. Brian Rogers (D-Fairbanks).

Other major problem areas, he says, are the department's "chaotic and cumbersome" records system; understaffing and under staffing; tardy or non-payment of legitimate claims; ambiguous, conflicting and fragmented worker comp law; lack of coordination among the agencies which handle the workers' comp division says has reached the crisis stage.

Despite a huge increase in the dollar value of the comp program during the past decade, from \$8 million in 1966, to more than \$100 million in 1979, with a corresponding increase in claims, the "administrative structure with which the state oversees the workers' comp program has remained essentially unchanged since statehood," according to the report.

During that same decade, workers' comp insurance rose from 10% of the total insurance business in Alaska, to 24%. In just the past few years, the hearing caseload for disputed claims facing the workers' comp board — a citizen panel which decides whether an injured worker is eligible for payments — has more than doubled, from 615 cases in 1975, to nearly 1,500 in 1979.

The program's budget, on the other hand, has fallen far be-

hind the workload increase, which rose dramatically following the construction of the trans-Alaska oil pipeline.

According to the report, State Labor Commissioner Ed Orbeck, in a public meeting last October, blamed the workers' comp program's problems on lack of attention and funding by the legislature.

While there's "a kernel of truth" to Orbeck's statement, it says, "It's difficult to demonstrate that legislative cuts in the administration's budgets are the primary cause of today's problems."

"On the contrary," it asserts, "a major cause... may be that the Dept. of Labor failed to anticipate or take timely measures to cope with the situation as it developed."

In an effort to remedy the workers' comp program's pervasive deficiencies, the report says, the division has asked for new positions and additional funding to modernize and computerize its "antiquated" record-keeping system. While that proposal is commendable and long overdue, it adds, other important measures are also necessary.

Delays at two critical stages of the process which occur in violation of law account for many of the complaints about unsatisfactory handling of claims for payments. State law requires the insurance carrier to make the first payment to claimants within 14 days of notification.

Figures show that during 1978 only 28% of the first payments were made within the 14-day period required by law. Similarly, the division is required by law to issue decisions in disputed cases within 20 days after a hearing. But the average time lapse, according to the report is currently more than three months.

In order to upgrade enforcement of the deadlines, the report says, the state should consider utilizing a full-time professional board, rather than the part-time citizen board which meets once monthly, and hiring professional investigators to determine whether insurance carriers are making timely payments to claimants.

The report also suggests that the division should prepare and issue an explanatory booklet clarifying for lay persons how the program works, as is done in other states with more successful programs. Much time-consuming and expensive litigation stemming from misunderstandings of what the workers' comp law provides could be avoided. The report also calls for a complete overhaul of the state law to eliminate ambiguities and conflicts which make it internally inconsistent. It has been fragmented by piecemeal changes over the years.

According to the report, a spokesman for one firm which carries 56% of all comp insurance written in Alaska has stated that when there is any doubt, the company sides with the claimants.

But available records suggest otherwise. Some claimants complain that carriers have litigated valid claims, and suspended or delayed payments, in order to pressure them into settling their claims for smaller lump sums.

Another pattern which the division has ignored, the report

says, concerns the use by Alaska insurance carriers of certain San Francisco specialists to evaluate claimants with back injury complaints.

One firm used often which has issued rulings unfavorable to at least three Alaska claimants, the report says, "consistently provides insurance companies with testimony damaging to plaintiffs seeking insurance payments."

Notwithstanding the firm's reputation, the report adds, the workers' comp board has relied heavily upon the firm's evaluations, without exercising its authority to appoint independent examiners.

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In Alaska, comp insurance carriers collect more than \$100 million annually in premiums. Under the re-insuring procedures used in Alaska, the report says, nearly all of the lowest-cost income from those premiums is excluded from the rate base. Thus a "low" can be shown to justify higher premium rates, as occurred in 1974, when the "low" data "enabled carriers to push comp premium rates higher."

"This hidden profit factor is often overlooked by some policymakers" who hold that increased benefits for workers is the primary cause of higher premium rates.

The report ends with a series of recommendations for immediate and long-term consideration by the legislature and the executive branch. These include hearings to measure the state's failure to enforce workers' comp laws, a special review of comp cases to determine to the legislature which action is needed, closer interagency cooperation, more information about how the carriers use the premium dollars paid them by employers, ways of reducing premiums for small employers, and studies to determine whether a state fund to write workers' comp insurance would improve the program.

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Jan 25, 1979

Alpac

Compensation rates may artificially boost costs

By R. A. FINEBERG
Daily News correspondent

(Last of a series)

Variations in the way Alaska insurance companies report data to the national workmen's compensation rate-making organization may be artificially boosting the price Alaska employers pay for workers' comp insurance, The Daily News has learned.

This possibility has led the state Division of Insurance to hire accounting specialists to examine the complicated comp rate-setting procedure. The report, by the California-based firm of Millman and Robertson, is due by June 30, according to state insurance director Kenneth Moore.

Informed sources say the investigation was triggered when the Division of Insurance learned Alaska Pacific Assurance Co. (Alpac), the state's largest workers' comp insurance carrier, may not list its reserves — the amount the company sets aside for anticipated payments — in the same way other major carriers operating in Alaska list theirs.

But an Alpac official said Monday the company does not list its reserves in a different manner.

Don Koch, the state's insurance market surveillance chief, said one area of confusion is the manner in which Alpac reports annuity payments to the National Council on Compensation Insurance, the industry's rate-setting organization.

Alpac buys annuities (simply guarantees to make regular payments) to cover long-term payments to disabled comp claimants or to survivors of persons killed in job-related accidents.

Alpac, or any other insurance company, may — for example — buy an annuity that pays \$1.5 million over a 30-year period for less than \$500,000.

Insurance division officials are concerned that a company may record the money set aside for anticipated pay-outs — the \$1.5 million figure — with the National Council for rate-making purposes, even though the company later pays the lower figure.

And it may be that the lower

See Back Page, RATES

Anchorage Daily News 5/2/79

Some doctors rough on comp claims

By R. A. FINEBERG

(Second of a series)

When Robert MacArmour, a Fairbanks pipeline worker injured in a truck accident in the Brooks Range in May 1977, pressed his claim for workers' compensation benefits, Alaska Pacific Assurance Co. (Alpac) sent him to a San Francisco specialist for examination.

The physician, Dr. Willard F. Pennell, spent three hours with MacArmour, then wrote a 12-page, single-spaced report to Alpac.

The neurologist-psychiatrist told the insurance company, MacArmour most likely was faking his back problems.

Alpac denied MacArmour further benefits. Citing Dr. Pennell's opinion, the state Workmen's Compensation Board upheld the insurance company, concluding MacArmour's complaints were "based on a conscious attempt to get additional workmen's compensation benefits."

Today MacArmour is still seek-

ing medical treatment while he looks for a lawyer to help him tackle Alpac and the compensation board.

MacArmour says he knew early in his interview with Dr. Pennell that the physician was going to side with the insurance company.

Diane Black, another Fairbanks worker who says she too has a back problem, tells an almost identical story about Dr. Pennell and Alpac.

An Anchorage woman, who asked that her name be withheld, claims Alpac sent her to Dr. Pennell and that the San Francisco specialist stripped her of "almost everything but my driver's license."

None of the three Alaska worker's comp claimants knew each other when Alpac sent them to San Francisco. Until recently they had never heard of a lawyer named Marvin E. Lewis.

Lewis says he could have warned them about Dr. Pennell. A San Francisco attorney and past president of the American Trial Lawyers Association, Lewis has

been in court with Dr. Pennell and his partner, Dr. Knox Finley, for more than two decades.

"They always say my client is faking it; I always win," the lawyer snaps, noting that he has won at least half a dozen major injury suits for clients against whom Dr. Finley has testified.

Lewis is the author of a legal text, "The Psychic Injury." In that volume he describes in detail several of the cases in which he has faced Dr. Pennell's partner. Those comments, he says, are equally applicable to the work of Dr. Pennell.

In one case quoted in the text-book, Lewis pointed out that Dr. Finley had appeared in nearly 100 cases in San Francisco as an expert witness, then asked the doctor to name a single case in which the physician had testified that there is a link between the accident in question and the psychological damage for which the plaintiff seeks damages.

The physician was unable to

name a case in which he sided with the plaintiff.

Lewis concluded one successful prosecution with this statement to the jury:

"Dr. Knox Finley comes from defense mill. That's what his office is...nearly a hundred times he testified on the stand like I in...injury cases and always for the City and always for...insurance companies...Then his two partners were doing the same thing. They were not only having the cases, but there were other plaintiffs who were injured that never got to Court...they were doing this...as a business, a business testifying for insurance companies..."

Dr. Pennell declines to discuss lawyer Lewis' criticisms of him and his partners. What about complaints of MacArmour, Black and other Alaskans? Professor ethics, Dr. Pennell replies, pruned him from discussing individual cases.

See Back Page, WORKMEN

Anchorage Daily News April 30, 1979

How many pipeline deaths?

Surprisingly, there's no reliable official tally, but our investigation turns up more than they claimed

by Richard A. Fineberg

Fairbanks

If he could, Gary Russett would probably question Alyeska Pipeline Service Co.'s carefully worded assertion that there were 29 fatalities connected with construction of the trans-Alaska pipeline.

"It's at least 30," he might say, adding to the total his own death after he contracted pneumonia at a northern pipeline camp and died en route to Fairbanks, unattended, on an emergency medical evacuation flight.

But Russett, who was not yet 30 when he died somewhere after midnight in the air between Happy Valley and Fairbanks on Jan. 10 three years ago, is not on Alyeska's narrowly defined list of construction-related deaths. He is one of at least 44 employees of pipeline contractors whose deaths during construction are omitted from the figure Alyeska chooses to use.

Alyeska's figure of 29 includes 22 equipment-related fatalities, four air and three highway deaths, according to Alyeska spokesman Sam Akin.

Figures derived from various state records show that during pipeline construction, 23 workers died in equipment-related accidents, 12 in plane crashes and 10 in highway accidents. That adds up to 45—18 more than Alyeska takes responsibility for. In addition, 28 employees of pipeline contractors were fatally stricken at pipeline camps or job sites (pneumonia victim Russett falls into this category).

Since some of the latter 28 may be considered natural deaths, not job related, the unofficial pipeline construction death toll appears to be somewhere between 45 and 73. This estimate is based on records of the Alaska State Troopers, the state Workmen's Compensation Division, the state Division of Occupational Safety & Health (DOSH), the State Pipeline Coordinator's Office and court cases.

Asked to explain the discrepancy between Alyeska's figures and the estimate from state records, Alyeska's Akin



Photo by Nancy Simmerman

said in some instances a person may have been off the job when an accident or death occurred, and Alyeska might deem these cases not to be pipeline-related. Alyeska based its count on nationally accepted guidelines, he said.

This explanation might apply to three of the 10 highway deaths listed in state reports, but it could not apply to the remaining seven accidents which are known to have involved on-the-job workers or loaded tractor-trailers hauling materials north. Nor would this rationale seem to apply to any of the 12 persons who died in the crashes of four separate planes bound to or from pipeline camps.

Akin could not confirm the 28 other deaths of pipeline workers. "We have nothing that fits that category," he said.

Despite Alyeska's disavowal, state records indicate death struck the 28 employees of pipeline contractors at pipeline camps or job sites in the following manner:

- 12 heart fatalities (it could not be ascertained how many of these occurred on the job and how many took place during non-working hours; industrial health studies indicate that job stress may cause heart attacks);

- three pneumonia deaths (including Russett);

- two hepatitis deaths (an ex-pipeline worker who contracted hepatitis and died several months after he left the pipeline is not counted here);

- five other natural deaths;
- three deaths apparently related to drinking;

- one gunshot death;
- two of unknown causes.

Of the 23 equipment-related accidents resulting in worker deaths, six occurred when trucks or heavy machinery backed over the victims; five resulted during the loading or unloading of materials; three involved crushing by vehicles stopped along the highway; and the remaining nine were isolated incidents not readily fitted in categories.

In addition to the fatalities described here, available records left in doubt the employment status or circumstances of death of 14 persons who died in the vicinity of the pipeline. Although some might be pipeline-related, these fatalities were not included in the Advocate's count. Also excluded from the list were Prudhoe Bay fatalities and non-project people who died in accidents involving vehicles operated by pipeline personnel.

Alyeska developed the following system to take care of more than 20,000 workers in more than 20 ersatz communities along the 800-mile pipeline

corridor:

- Primary responsibility for worker safety fell to the contractor. Alyeska's safety department supervised the program but was not directly involved in day-to-day operations.

- Unions held weekly safety meetings on the job to discuss safety problems, real and potential.

- A Fairbanks pipeline camp medical team, headed by a camp physician, was responsible for the supervision of the camp-based physician. When necessary, aircraft were available to medivac (short for medical evacuation) the patient to the nearest hospital.

Compared to the ill-equipped, pot-bellied medic in the typical remote Alaska camp of days gone by, the Alyeska system was a great improvement, commented Dr. Phillip Hardie, who headed the pipeline medical teams from Fairbanks. "It was a sophisticated system instead of a lick and a promise," Hardie said of the Alyeska program.

How well did this system work? Alyeska and state officials generally agree the system worked quite well, but they do not present substantive data to buttress their contention (see accompanying story).

Should Russett be counted a pipeline-related fatality? You decide. Here are the facts, as

related by several sources familiar with the case:

The camp medic at Pump Station 3 ordered a midnight emergency flight to Fairbanks for the ailing worker, then drove Russett to the airstrip at Happy Valley, 45 minutes away. Russett was carried to the light plane on a stretcher; he was sent to Fairbanks without oxygen or a medical attendant.

The pilots, one source told the Advocate, presumed their passenger was sleeping and were unaware Russett had died on the flight.

The medic, who reportedly elected to stay in camp to take care of other pressing medical problems, was dismissed by Alyeska for failing to accompany Russett.

Alyeska declined to comment on Russett's death. Russett's family has sued Alyeska and the pipeline company does not comment on pending litigation.

Dr. Hardie of Alyeska's medical team said the medivac system usually worked without a hitch. However, the Advocate has learned of three other medivacs that were unaccountably delayed for extended periods. One involved a fatality; whether the delay contributed to the death could not be ascertained from the available records.

Who counts the bodies Pipeline's safety record lacks scrutiny

Fairbanks

As Alaska state officials plan for possible construction of a second world record pipeline across the state, lack of data about the safety of the last one hasn't stopped them from parroting company praise for its record.

For example, Joseph "Stan" Godsoe, chief of compliance for the state Labor Department's Division of Occupational Safety and Health (DOSH) views the oil pipeline as "one of the safest projects that's ever been accomplished in the world."

But ask him how many people died on the project: "I have no idea," he says. "It's published somewhere."

And although worker safety was the subject of major controversy before and during the first year of trans-Alaska oil line construction, the state used no special procedure to keep tabs on project safety statistics. No state agency surveyed in an Advocate investigation could cite an authoritative figure even for the number of actual deaths related to pipeline construction (see accompanying story).

Alyeska Pipeline Service Co. says the count was 29, but a composite list compiled from the reports of several state agencies yields 45 pipeline-related fatalities. In addition of 28 more non-accidental deaths among workers, many appear definitely pipeline-related. There are reports on 14 deaths beyond even that figure in which records simply aren't clear enough to specify whether they were associated with the pipeline.

The confusion over pipeline deaths—which would appear to be a simple statistic—highlights a broader question over difficulty of developing other meaningful pipeline safety statistics. Alyeska, a consortium of seven major oil companies formed to manage the construction job, has not released total accident figures for the three and one-half year project, which cost more than \$9 billion and employed more than 20,000 people.

Northwest Alaska Pipeline Co. now is trying to secure financing to build a natural gas pipeline through Alaska and Canada whose U.S. and Canadian components would be of even grander scale. That possibility moves questions about oil line

Analysis

deaths into an even more important category for government regulators, unions and prospective gas line workers. Nevertheless, a number of uncertainties about past performance on a mammoth pipeline project remain unresolved.

Alyeska boasted in 1978 that after two full seasons of construction, the oil pipeline safety program had cut fatalities and accidents "to a point far below predictions." The injury rate, the company said, was "nearly 28 percent below the national figures" for contract construction.

The question is, what do those figures really show?

Some observers feel figures matching pre-project predictions against actual performance shouldn't be given much credence. The fact is that nobody knew just what to expect of any pipeline activity before the fact. That uncertainty was illustrated by the fact that contractors didn't operate on customary fixed-fee bids, but instead negotiated reimbursable cost contracts with Alyeska. Similarly, contracts for insurance premiums were rated retroactively—after experience with the massive project.

Nor is comparison between the pipeline and national statistics necessarily meaningful. Industry accident and job-related illness reports are often unreliable, according to a two-year Ford Foundation study of industrial safety. That study, prepared by Dr. Nicholas Ashford of the Massachusetts Institute of Technology, also found that "official statistics barely represent the tip of the iceberg as far as the magnitude of the U.S. health and safety problem is concerned," due in part to widespread under-reporting.

Both state and company officials say it was the safest construction job ever, but it is difficult to think of a comparable project: Hoover Dam? Holland Tunnel? Is it meaningful to compare the pipeline, much of which was ordinary trenching and construction, to the building of a canyon dam more than 700 feet high or tunneling for several miles beneath the Hudson River?

These observations do not

demonstrate that the Alyeska project was unsafe; they simply point out the common sense of examining Alyeska project safety not in terms of generalities, but in terms of detailed facts about the project itself. Unfortunately, when it comes to pipeline safety figures, facts are hard to come by.

Naomi Kipp, director of DOSH, was one of many state officials who praised the pipeline safety system—"They had a very good safety record," she told the Advocate—but could not provide safety statistics.

DOSH, she explained, keeps detailed records of its field inspections on the pipeline and other jobs around the state. But the safety agency does not compile safety records on specific projects—not even the largest construction project ever attempted by private industry.

Kipp said she based her view of the pipeline on the fact that reports of the state Labor Department's research and analysis section show that statewide accident rates dropped during the 1974-78 period, when the pipeline was far and away the largest single project in the state.

However, sources at Research and Analysis were not so sure the apparent statewide turn-down in heavy construction accident rates can be equated with a safe pipeline. Accident rates are based on hours worked, and on the pipeline it is well known that workers often spent a lot of paid work hours doing nothing, explained one source, who asked to remain unidentified. Those slow hours tend to be accident-free ("You can't hurt yourself too bad sleeping on the bus," one worker said with a grin), and they make the project look safer than it actually was, the source said.

Additionally, there is a great deal of difference in the way companies fill out the forms from which the Research & Analysis section tabulates its data. Recent changes in reporting methods, the source said, account for part of the apparent improvement in safety statistics.

A DOSH field inspector agreed to discuss pipeline safety but vowed he would deny publicly he ever did so, said. "Nobody's going to give you much (in the way of statistics)...you're buying politics." There's another

(continued on next page)

STATE OF ALASKA PUBLIC NOTICE DEPARTMENT OF HEALTH AND SOCIAL SERVICES STATE OF ALASKA PROPOSED COMPREHENSIVE ANNUAL SOCIAL SERVICES PLAN FOR 1980 Program Year July 1, 1979 through June 30, 1980

The Proposed Plan for Plan Year 1980 has been published and is available for review by the public.

The services offered under the State's Proposed Social Services Program are directed at:

- Achieving or maintaining economic self-support to prevent, reduce, or eliminate dependency;
- Achieving or maintaining self-sufficiency, including reduction or prevention of dependency;
- Preventing or remedying neglect, abuse, or exploitation of children and adults unable to protect their own interests, or preserving, rehabilitating, or reuniting families;
- Preventing or reducing inappropriate institutional care by promoting for community-based care, home-based care, or other forms of less intensive care; or
- Securing referral or admission for institutional care when other forms of care are not appropriate, or providing services to individual institutions.

The Proposed Social Services Program includes the following discrete services:

- Information and Referral Services (I&R)
- Individual and Family Counseling (I&FC—State Funds Only)
- Child Protective Services (CPS)
- Adult Protective Services (APS)

Family planning support may be provided to serve individuals requiring any of the four services; day care support may be provided to individuals requiring Child Protective Services, and homemaker support may be provided to individuals requiring either Adult or Child Protective Services.

Services available by eligibility category are as follows:

Eligible Persons	Service Available
—Available to anyone upon request	I&R
—Available to anyone upon request on a staff available basis	I&FC
—All children under 18 years of age who are subject to potential, actual or alleged neglect, abuse or exploitation, their parents, guardians or caretakers; and runaway youth under age 18.	CPS
—All adults, age 18 or over who are subject to potential, actual or alleged neglect, abuse or exploitation when services are not otherwise available.	APS

Family planning support will be available to all applicants for and recipients of AFDC.

Services offered to Alaskans under this Plan are not based on individual income level.

Estimated Expenditures for Program Year

Federal Title XX allotment to State	\$4,400,000
State Match	\$1,467,000
State expenditures above Match	\$11,017,000

Public Comments for Proposed Plan

Written comments from the general public will be received on the Proposed Plan for 1980 during the period beginning February 5 and ending March 27, 1979. Written comments may be sent to the Title XX Coordinator, Division of Social Services, Pouch M-08, Juneau, Alaska, 99811. Copies of the Proposed Plan are available without charge at your local office of the Division of Social Services or by telephoning the Regional Office nearest you listed below. Copies of the Proposed Plan are also available by calling the Title XX Coordinator in Juneau (collect) at 465-3207.

On the following days citizens are invited to visit one of the six regional offices listed below where a Title XX representative of the Division will be available from 12:00 noon to 4:00 P.M. to answer questions and receive recommendations for improving this plan:

REGIONAL OFFICES	LOCATION & DATE OF PUBLIC MEETINGS
Southeast Regional Office Room 318, Goldstein Building Juneau, Alaska 99801 PHONE: 588-1981	February 26, 1979 (Tuesday) Meeting will be held in the Regional Office Annex (Juneau).
Southern Regional Office 416 Main Street State Office Building, Room 201 Ketchikan, Alaska 99901 PHONE: 225-4411	February 27, 1979 (Wednesday) Meeting will be held in the 2nd Floor Conference Room, State Office Building, Ketchikan, Alaska.
Southernmost Regional Office Steinfield Building 400 Gambel Street Anchorage, Alaska 99501 PHONE: 274-1450	February 27, 1979 (Tuesday) Meeting will be held in the 2nd Floor Conference Room of the Steinfield Building, 400 Gambel Street, Anchorage, Alaska.
Western Regional Office State Office Building P. O. Box 323 Bethel, Alaska 99808 PHONE: 543-3141	March 1, 1979 (Thursday) Meeting will be held in the Regional Office (Trimmer's Building) Bethel, Alaska.
Northwestern Regional Office State Office Building P. O. Box 231 Nome, Alaska 99762 PHONE: 443-5247	March 6, 1979 (Monday) Meeting will be held in the Regional Office, State Office Building, Nome, Alaska.
Northern Regional Office 1819 Lathrop Street Drexler 40 Fairbanks, Alaska 99701 PHONE: 443-1844	March 7, 1979 (Tuesday) Meeting will be held in the Regional Office, 1819 Lathrop Street, Fairbanks, Alaska.

Safety

(continued from preceding page)
pipeline company, he said, and nobody wants to make waves.

According to the inspector, Alyeska initially refused to cooperate with DOSH. It took some months to secure access to the line, and once DOSH won that battle, Alyeska then fought every citation the inspectors issued.

Did the inspector think the pipeline was relatively safe? The inspector scratched his chin. He had a hard time answering, he said, because he didn't cover enough of the project to form an authoritative opinion.

"Parts of it were and parts of it weren't," he said after thinking it over. "I don't think it was the worst thing going on, but it could have been better." A lot depended on the individual contractor and the field supervisors, he added.

Could he name a more hazardous construction job? Sure: the first off-shore oil platforms in Cook Inlet. There was no government safety program then, he said.

Did he believe Alyeska's assertion that the pipeline had a better record than the national average for contract construction? The inspector replied, "I don't believe that."

For one thing, he said, there were too many people coming and going on the pipeline. A general rule, he said, is the less experienced the work force, the higher the accident rate.

Workmen's compensation figures don't reveal much about the pipeline accident rate. Here again, the state agency did not keep pipeline-specific records.

Had the Comp Division done so, interpretation would have been a problem. Some workers may have faked injuries to collect comp. On the other hand, some injured workers tried to stay on the job because they did not want to lose once-in-a-lifetime wages. Without Alyeska comp data, there is no way to ascertain how many accident victims saw the medic and went back to work after suffering an injury that might have resulted, under other circumstances, in medical expenses or work time lost normally covered by workmen's comp.

Workmen's comp may play another unstudied role in the pipeline safety picture. According to Larry Plessinger, chief of safety compliance for DOSH, by paying the workmen's comp tab itself Alyeska removed one of the primary incentives for contractor safety on the job. "It's obviously going to have a very adverse effect on their safety program," Plessinger said. A Fluor employee during construction, he said that



(photo by Rob Stipstein)

company, unlike some other contractors, did live up to customary obligations to provide a safe workplace.

Workers interviewed expressed divergent opinions about pipeline safety. Many thought the project was unusually safe because Alyeska had the money to provide adequate equipment and manpower, and because you could usually walk away from a job you thought was dangerous.

The Ford Foundation report on industrial safety cautions that "an inability to assess... low-probability, large-harm contingencies is a behavior trait common to many... workers are socialized to accept the hazardous nature of certain jobs and are convinced of the necessity of performing them in order to earn their livelihood."

Technology, the report observes, has both increased potential workplace dangers, and made a higher safety standards possible.

Some pipeline workers viewed the job as dangerous—in part because of casual work habits and in part because of inexperienced workers. Differences

in safety practices, some said, depended on factors such as the pressure the contractor was under at that moment.

When a contractor was under the gun to get a job done, work often became more dangerous. The death of Fred W. Bretzer, who died April 18, 1976 at Livengood may be a case in point.

Bretzer was fatally crushed when a crate of large pipe being loaded by cranes onto a truck broke and fell on top of him. DOSH later issued a citation, fining an Alyeska contractor, the Price Group, \$600 for a "serious" violation of safety procedures. The crates, DOSH said, were deteriorated and liable to break.

Why were the crates moved in a reportedly unsafe manner? Several sources told the Advocate they believe Bretzer died because the contractor was trying to clear out of that material site in a rush in order to avoid a severe excess rent penalty. That rush, which could have been avoided by proper planning, created the conditions that led to Bretzer's death, sources familiar with the situation say.

How many other fatalities or serious accidents occurred under needlessly rushed conditions? Without assessing pipeline safety data, it is impossible to say.

The role played by unions varied from job site to job site, depending on the interest and capabilities of the union field leaders. Laborers' business agent Joe Thomas in Fairbanks said he thought the project had an excellent safety record. Like everyone else the Advocate contacted, he had no data to support his contention.

Although the Teamsters shut down the haul road for several days on one occasion and stopped the trucks for short periods several other times, the union has not produced data to document its charges that the pipeline exposed truckers to undue risks.

In February 1976, when the Teamsters asked for a restraining order preventing the state Highway Department from issuing permits for pipeline-bound wide loads drivers said were dangerous, Fairbanks Judge Gerald Van Hoomissen, who said he was quite concerned about the potential danger, said

he found himself faced with irreconcilable contentions. The Highway Department, on the one hand, contended hauling the apparently dangerous wide load on a narrow, winding road was a cake-walk while the Teamsters argued the same task was highly dangerous.

The Teamsters did not offer statistics to support their contention: Van Hoomissen did not stop the wide loads.

Chris White, a leader of the disjointed union organization ROOR (Ruled Out Of Order), summarized the pipeline experience this way:

"This is one shot in a workman's life. Men are desperate enough to take chances. The price you pay is maybe a couple of fingers here, or a buddy there."

White, a long-time blaster, said, "I've never in my life been so scared as on that pipeline. And the next one—the gas line—is going to be all in the ground."

To White, that means more blasting—and more safety problems.

—Fineberg

recalled mentioning the subject immediately prior to his fall at a safety meeting at the manager's office. His supervisor, who was qualified as a safety expert, testified that the walkboards could be utilized in a safe manner, but he also testified that that particular walkboard was unsafe. He further testified that the applicant had told him on more than one occasion that the walkboard was unsafe. Nothing was done to improve the safety of the walkboards prior to the accident. *Bekins Moving & Storage Co. v Workers' Compensation Appeals Board* (1980) 103 CA3d 675, 163 Cal Rptr 213.

employer at the time of acquisition, installation, or manufacturer-required modification of the power press.

(3) "Manufacturer" means the designer, fabricator, or assembler of a power press.

(4) "Power press" means any material-forming machine that utilizes a die which is designed for use in the manufacture of other products.

(5) "Removal" means physical removal of a point of operation guard which is either installed by the manufacturer or installed by the employer pursuant to the requirements or instructions of the manufacturer.

(6) "Specifically authorized" means an affirmative instruction issued by the employer prior to the time of the employee's physical injury or death, but shall not mean any subsequent acquiescence in, or ratification of, removal of a point of operation safety guard.

(b) An employee, or his or her dependents in the event of the employee's death, may bring an action at law for damages against the employer where the employee's injury or death is proximately caused by the employer's knowing removal of, or knowing failure to install, a point of operation guard on a power press, and this removal or failure to install is specifically authorized by the employer under conditions known by the employer to create a probability of serious injury or death.

(c) No liability shall arise under this section absent proof that the manufacturer designed, installed, required, or otherwise provided by specification for the attachment of the guard and conveyed knowledge of the same to the employer. Proof of conveyance of this information to the employer by the manufacturer may come from any source.

(d) No right of action for contribution or indemnity by any defendant shall exist against the employer; however, a defendant may seek contribution after the employee secures a judgment against the employer pursuant to the provisions of this section if the employer fails to discharge his or her comparative share of the judgment.

Added Stats 1982 ch 922 § 12.

Review of 1982 Legislation. 14 Pac LJ 763.

In an action under Lab. Code, § 4558 (permitting action against employer by employee injured as result of absence of power press safety guard if employer had knowledge of manufacturer's specifications regarding guard), an employee who was injured by a power press bought second hand from a seller, not the manufacturer, and whose only evidence regarding defendant's knowledge of the need for a safety guard indicated that the seller made defendant aware that the press failed to meet applicable federal standards, plaintiff's reliance on

Lab. Code, § 4558, subd. (c), providing in part that proof of conveyance of the manufacturer's specifications to the employer by the manufacturer need not come from the manufacturer, was misplaced. Although the statute does not restrict how the plaintiff presents evidence of conveyance of the manufacturer's specifications, it requires that the specifications have come from the manufacturer. *Swanson v Matthews Products, Inc.* (1985, 6th Dist) 175 Cal App 3d 901, 221 Cal Rptr 84.

§ 4600. Responsibility of employer

Medical, surgical, chiropractic, and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches, and apparatus, including artificial members, which is reasonably required to cure or relieve from the effects of the injury shall be provided by the employer. In the case of his neglect or refusal seasonably to do so, the employer is liable for the reasonable expense incurred by or on behalf of the employee in providing treatment. After 30 days from the date the injury is reported, the employee

may be treated by a physician of his own choice or at a facility of his own choice within a reasonable geographic area. However, if an employee has notified his employer in writing prior to the date of injury that he or she has a personal physician, the employee shall have the right to be treated by such physician from the date of injury. For the purpose of this section, "personal physician" means the employee's regular physician and surgeon, licensed pursuant to Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code, who has previously directed the medical treatment of the employee, and who retains the employee's medical records, including his or her medical history.

Where at the request of the employer, the employer's insurance carrier, the administrative director, the appeals board or a referee, the employee submits to examination by a physician, he shall be entitled to receive in addition to all other benefits herein provided all reasonable expenses of transportation, meals and lodging incident to reporting for such examination, together with one day of temporary disability indemnity for each day of wages lost in submitting to such an examination. "Reasonable expenses of transportation" includes mileage fees from the employee's home to the place of the examination and back at the rate of twenty-one cents (\$.21) a mile, plus any bridge tolls. Such mileage and tolls shall be paid to the employee at the time he is given notification of the time and place of the examination.

This section shall become operative on July 1, 1984.

Added Stats 1981 ch 1150 § 7, operative January 1, 1984; Amended Stats 1983 ch 1284 § 4, operative July 1, 1984, Stats 1984 ch 596 § 2, effective July 19, 1984, operative July 1, 1984.

Amendments:

1983 Amendment: Substituted "July 1, 1984" for "January 1, 1984" in the last paragraph.

1984 Amendment: Deleted the former second paragraph which read: "In accordance with the rules of practice and procedure of the appeals board, the employee, or the dependents of a deceased employee, shall be reimbursed for expenses reasonably, actually, and necessarily incurred for X-rays, laboratory fees, medical reports, medical testimony, and, as needed, interpreter's fees, to prove a contested claim. The reasonableness of and necessity for incurring such expenses to prove a contested claim shall be determined with respect to the time when such expenses were actually incurred. Expenses of medical testimony shall be presumed reasonable if in conformity with the fee schedule charges provided for impartial medical experts appointed by the administrative director."

Former Section: Former § 4600 was amended by Stats 1977 ch 1172 § 1, Stats 1980 ch 1247 § 1, Stats 1981 ch 1150 § 6, Stats 1983 ch 1284 § 3 and repealed, effective July 1, 1984, by its own terms.

Jurisdictional limitations of Workers' Compensation Appeals Board: Gov C §§ 21026, 21363.

Cal Jur 3d Work Injury Compensation §§ 204, 205, 206, 207, 208, 210, 213, 224, 235, 305.

Review of Selected 1977 California Legislation. 9 Pacific LJ 694.

2. Construction

In imposing on a workers' compensation insurance carrier the penalty provided by Lab. Code, § 5814, which requires that "when payment of compensation has been unreasonably delayed . . . the full amount of the order, decision or award shall be increased by 10 percent," the Workers' Compensation Appeals Board erred in refusing to apply the statute to medical-legal costs that were included in the award. Such costs were clearly a part of the "full amount of the order, decision or award," and Lab. Code, § 3207, provides that "compensation . . . includes every benefit or payment conferred by Division 4 upon an injured employee," which division includes Lab. Code, § 4600, 5811, which provide the statutory authority for the reimbursement to an applicant of medical-legal costs incurred in prosecuting a claim.

(Disapproving, to the extent they are inconsistent with the opinion, *Hockett v. Industrial Accident Commission* (1959) 170 Cal.App.2d 155 [338 P.2d 604], *Vogh v. Workmen's Comp. App. Bd.* (1968) 264 Cal.App.2d 724 [70 Cal.Rptr 722], and *Ramsey v. Workmen's Comp. App. Bd.* (1969) 2 Cal.App.3d 693 [83 Cal.Rptr.51].) *Adams v. Workers' Compensation Appeals Board* (1976) 18 C3d 226, 133 Cal Rptr 517, 555 P2d 303.

Though the law in force at the time of an industrial injury is to be taken as the measure of the injured person's right of recovery and though statutes are not given retrospective operation in the absence of clear legislative intent that they so operate, an employee injured on January 22, 1975, had the right to designate his own physician pursuant to an amendment to Lab. Code, § 4600, that took effect on January 1, 1976, because the

amendment did not impose new or additional liabilities on the employer, who would be merely for the reasonable cause of treatment regardless of who chose the doctor, but changed only the procedure under which benefits were to be furnished; thus, there was no retroactive effect in applying the amendment to retroactive due from the employer after January 1, despite the injuries having occurred before that date. *State Compensation Ins. Fund v. Workers' Compensation Appeals Board* (1977) 71 Cal.3d 133, 139 Cal Rptr 410.

Medical-legal costs incurred by the survivor of a Public Employees Retirement System member to prove industrial causation of death so as to entitle the survivor to special death benefits, were properly awarded by the workers' compensation appeals board. For purposes of determining industrial causation pursuant to Gov. Code, § 4600, such costs are procedural in nature; that is, they also provides that the board, using the procedure as in workers' compensation hearings, shall determine whether the death of a member was industrial, and Lab. Code, § 4600, provides that in "accordance with the rules of practice and procedure of the appeals board" dependent on a deceased employee are entitled to reimbursement for medical reports and testimony to prove a contested claim. To allow such expenses in workers' compensation cases and deny them in retirement cases before the retirement system would create an unreasonable inconsistency and defeat the legislative motive behind the statutes. The board did not act without or in excess of its power, or unreasonably, in awarding the medical-legal costs. *Public Employees' Retirement System v. Workers' Compensation Appeals Board* (1977) 71 Cal.3d 133, 151 Cal Rptr 35.

An applicant for workers' compensation benefits who was found not to be an "employee" under the meaning of the definition of such term in Lab. Code, § 3351, was not entitled to a workers' compensation award of medical-legal costs, deposition costs and attorney fees, under Lab. Code, § 4600, providing for reimbursement of an employee for medical expenses, and Lab. Code, § 5710, subd (b), providing for deposition and attorney fees. Furthermore the applicant was not entitled to an award of such items as "deposition expenses" under Lab. Code, § 5811. *Z. Adams v. Workers' Compensation Appeals Board* (1976) 18 C3d 226, 133 Cal Rptr 408.

Under Lab. Code, § 4600, requiring an employer to provide a disabled employee with medical treatment reasonably required to cure or relieve the effects of an injury, housekeeping services considered essential by a medical doctor are included. The terms of the statute are inclusive, and the provision of Lab. Code, § 4600, allowing recovery for medical treatment, in specified services, suggests that the statute covers other services not specifically enumerated. Hence the statute extends coverage to costs of housekeeping services when the medical demonstrated medical need for such services. *Smyers v. Workers' Comp. Appeals Bd.* (1977) 157 Cal App 3d 36, 203 Cal Rptr 521.

own choice or at a facility of his own
ic area. However, if an employee has
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July 1, 1984.

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gardless of who chose the doctor, but rather
changed only the procedure under which benefits
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tive effect in applying the amendment to treatment
due from the employer after January 1, 1976,
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date. *State Compensation Ins. Fund v Workers'
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also provides that the board, using the same
procedure as in workers' compensation hearings,
shall determine whether the death of a member
was industrial, and Lab. Code, § 4600, provides
that in "accordance with the rules of practice and
procedure of the appeals board" dependents of a
deceased employee are entitled to reimbursement
for medical reports and testimony to prove a
contested claim. To allow such expenses in work-
ers' compensation cases and deny them in matters
before the retirement system would create an
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not entitled to an award of such items as "litiga-
tion expenses" under Lab Code, § 5811. *Zarate v
Workers' Compensation Appeals Board* (1979) 99
CA3d 598, 160 Cal Rptr 408.

Under Lab. Code, § 4600, requiring an employer
to provide a disabled employee with medical treat-
ment reasonably required to cure or relieve from
the effects of an injury, housekeeping services
considered essential by a medical doctor are recov-
erable. The terms of the statute are inclusive, not
exclusive, and the provision of Lab. Code, § 4600,
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specified services, suggests that the statute grants
coverage for other services not specifically enumer-
ated. Hence the statute extends coverage to recipi-
ents of housekeeping services when there is a
demonstrated medical need for such services.
Smyers v Workers' Comp. Appeals Bd. (1984, 1st
Dist) 157 Cal App 3d 36, 203 Cal Rptr 521.

Recipients of workers' compensation benefits,
whose employer had stipulated to findings and
awards of 100 percent disability and continuing
medical treatment for life, were entitled to recover
for housekeeping services as part of their medical
treatment, where three physicians strongly recom-
mended for medical reasons that such services be
provided as part of the recipients' medical treat-
ment. Under Lab. Code, § 4600, requiring an
employer to provide a disabled employee with
medical treatment reasonably required to cure or
relieve from the effects of an injury, certain ser-
vices must be performed for a recipient of benefits
when there is a medical recommendation or pre-
scription for such services. *Smyers v Workers'
Comp. Appeals Bd.* (1984, 1st Dist) 157 Cal App
3d 36, 203 Cal Rptr 521.

Lab. Code, § 3202, requiring that the workers'
compensation laws be liberally construed by the
courts with the purpose of extending their benefits
for the protection of persons injured in the course
of employment, is applicable to Lab. Code, § 4600,
requiring an employer to provide a disabled em-
ployee with medical treatment reasonably required
to cure or relieve from the effects of an injury.
Smyers v Workers' Comp. Appeals Bd. (1984, 1st
Dist) 157 Cal App 3d 36, 203 Cal Rptr 521.

4. Duty and Liability of Employer Generally

While Lab. Code, § 4600, imposes a broad duty
on the employer to provide medical and other
treatment to an employee, and makes him liable
for expenses incurred by the employee or by third
parties in his behalf when it fails to do so, Lab.
Code, § 5405, sets clear limits on the time periods
within which procedures for the enforcement of
that duty must be invoked. Such statute of limita-
tions neither limits duties, nor makes them less
than mandatory, but merely requires diligent pros-
ecution of known claims thereby providing neces-
sary finality and predictability in legal affairs, and
insuring that claims will be resolved while the
evidence bearing on the issues is reasonably avail-
able and fresh. *Kaiser Foundation Hospitals v
Workers' Compensation Appeals Board* (1977) 19
C3d 329, 137 Cal Rptr 878, 562 P2d 1037.

Workers' compensation benefits awarded two
and one-half years after an industrial injury legiti-
mately constituted compensation for a new and
further disability under Lab. Code, § 5410, where
a claimant suffered a recurrence of her injury after
not having seen a doctor for a 15-month period
following an initial period of treatment lasting six
months, and where the claimant received after the
accident a voluntary furnishing of benefits from
her employer, equivalent to a discharge of its
obligation to provide medical treatment for com-
pensable injuries under Lab. Code, § 4600, in the
form of medical treatment under a group insur-
ance policy, the payments for which were paid by
the employer. *Pizza Hut Inc. v Workers' Compensa-
tion Appeals Board* (1978) 76 CA3d 818, 143
Cal Rptr 131.

In a workers' compensation proceeding arising
from a back and elbow injury sustained in the
course of applicant's employment the Workers'
Compensation Appeals Board (WCAB) properly
awarded him compensation for future medical

treatment in the form of a continuing weight reduction program. Applicant presented recommendations from two physicians that he continue losing weight in order to relieve him from the effects of his industrial injury. Treatment aimed at affording relief from the effects of an industrial injury represents a compensable expense under Lab. Code, § 4600. *Braewood Convalescent Hospital v Workers' Comp. Appeals Bd.* (1983) 34 Cal 3d 159, 193 Cal Rptr 157.

6. Liability of Employer for Employee's Self-Procured Treatment

The definition of physician in Lab. Code, § 3209.3, does not exclude a physician licensed to practice in another country, and when medical treatment and reports are procured by an employee from such a physician in accordance with Lab. Code, § 4600, setting forth the basic rules regarding the provision of medical treatment to an injured worker, the employer is responsible for the reasonable expense of such treatment and medical-legal costs. An interpretation of Lab. Code, § 3209.3, to exclude non-California physicians is unreasonable in light of the clear jurisdiction of the Workers' Compensation Appeals Board over extraterritorial injuries when the contract of hire was made in California. (Lab. Code, § 5305.) Accordingly, a Mexican worker injured while employed in California who procured medical treatment and incurred medical-legal costs from Mexican physicians in Mexico, was entitled to reimbursement for such expenses, where it did not appear the treatment was unreasonably expensive or the medical reports were not "reasonably, actually, and necessarily incurred . . . to prove a contested claim." (Lab. Code, § 4600.) *State Compensation Ins. Fund v Workers' Compensation Appeals Board* (1977) 69 CA3d 884, 138 Cal Rptr 509.

8. —Liability as Following Upon Neglect or Refusal of Employer to Provide Treatment

In a workers' compensation proceeding arising from a back and elbow injury sustained in the course of the applicant's employment, the Workers' Compensation Appeals Board (WCAB) prop-

erly awarded him reimbursement for his postinjury participation in a self-procured weight reduction program located in North Carolina. Lab. Code, § 4600, imposes liability on the employer for the reasonable cost of medical treatment furnished to an employee within a reasonable geographic area, and three physicians directed applicant to lose weight in order to aid in the cure of his industrial injury. While the employer initially had the right to direct him to a specific program, the employer lost that right by failing to identify and offer such a program; at that point, he acquired the right to choose for himself which program he reasonably might undertake. Moreover, the employer failed to show that treatment at the program was unreasonable as to cost or location, whereas applicant showed that the location was reasonable in light of his lifelong obesity problem and lack of success with traditional weight loss methods. Thus, substantial evidence supported the award. *Braewood Convalescent Hospital v Workers' Comp. Appeals Bd.* (1983) 34 Cal 3d 159, 193 Cal Rptr 157.

9. Employer's Control of Treatment; "Change of Condition"

Though the law in force at the time of an industrial injury is to be taken as the measure of the injured person's right of recovery and though statutes are not given retrospective operation in the absence of clear legislative intent that they so operate, an employee injured on January 22, 1975, had the right to designate his own physician pursuant to an amendment to Lab. Code, § 4600, that took effect on January 1, 1976, because the amendment did not impose new or additional liabilities on the employer, who would be liable merely for the reasonable cause of treatment regardless of who chose the doctor, but rather changed only the procedure under which benefits were to be furnished; thus, there was no retroactive effect in applying the amendment to treatment due from the employer after January 1, 1976, despite the injuries having occurred before that date. *State Compensation Ins. Fund v Workers' Compensation Appeals Board* (1977) 71 CA3d 133, 139 Cal Rptr 410.

§ 4601. Change of physicians upon request of employee

(a) If the employee so requests, the employer shall tender the employee one change of physicians. Upon request of the employee for a change of physicians, the maximum amount of time permitted by law for the employer or insurance carrier to provide the employee an alternative physician or, if requested by the employee, a chiropractor, shall be five working days from the date of the request. The employee is entitled, in any serious case, upon request, to the services of a consulting physician or chiropractor of his or her choice at the expense of the employer. The treatment shall be at the expense of the employer.

(b) If an employee requesting a change of physicians pursuant to subdivision (a) has notified his or her employer in writing prior to the date of injury that he or she has a personal chiropractor, the alternative physician provided, if requested by the employee, shall be the employee's personal

chiropractor. For the purpose the employee's regular chiropracting with Section 1000) (Code, who has previously d retains the employee's chiropractic history.

Amended Stats 1985 ch 241 § 1.

Amendments:

1985 Amendment: (1) Designated the substituting "the employee" for "him" a "of his" in the third sentence; and (c) su and (3) added subd (b).

§ 4601.5. [Amended by Stat ch 596 § 3, effective July 19, See §§ 4620 et seq.

§ 4603.2. Notification to employer pursuant to § 4600; Reports by Upon selecting a physician physician shall forthwith notify physician. The physician shall working days from the date periodic reports at such intervals regulations adopted by the act payment for the services of reports.

Amended Stats 1984 ch 909 § 2.

Amendments:

1984 Amendment: (1) Substituted "the" appears; and (2) added "working" before

§ 4605. Employee's right to j Cal Jur 3d Work Injury Compensation

Physicians treating industrially injured were subject to the authority of the Compensation Appeals Board, pursuant Code, § 5304, to decide any contro amounts to be paid for such services physicians could not lawfully charge ces for amounts in excess of payment employers for their workmen's comp insurance carriers. Though Lab. Code,

§ 4608. Payment of pharmar

No workers' compensation insurer or self-insured employer because the claim form utilizes pharmacy benefits, provided used by the insurer, self-insured Added Stats 1984 ch 137 § 1.

erly awarded him reimbursement for his postinjury participation in a self-procured weight reduction program located in North Carolina. Lab. Code § 4600, imposes liability on the employer for the reasonable cost of medical treatment furnished to an employee within a reasonable geographic area and three physicians directed applicant to lose weight in order to aid in the cure of his industrial injury. While the employer initially had the right to direct him to a specific program, the employer lost that right by failing to identify and offer such a program; at that point, he acquired the right to choose for himself which program he reasonably might undertake. Moreover, the employer failed to show that treatment at the program was unreasonable as to cost or location, whereas applicant showed that the location was reasonable in light of his lifelong obesity problem and lack of success with traditional weight loss methods. Thus, substantial evidence supported the award. *Braewood Convalescent Hospital v Workers' Comp. Appeals Bd.* (1983) 34 Cal 3d 159, 193 Cal Rptr 157.

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chiropractor. For the purpose of this section, "personal chiropractor" means the employee's regular chiropractor licensed pursuant to Chapter 2 (commencing with Section 1000) of Division 2 of the Business and Professions Code, who has previously directed treatment of the employee, and who retains the employee's chiropractic treatment records, including his or her chiropractic history.

Amended Stats 1985 ch 241 § 1.

Amendments:

1985 Amendment: (1) Designated the former section to be subd (a); (2) amended subd (a) by (a) substituting "the employee" for "him" after "shall tender" in the first sentence; (b) added "or her" after "of his" in the third sentence; and (c) substituted "The" for "Such" at the beginning of the last sentence; and (3) added subd (b).

§ 4601.5. [Amended by Stats 1977 ch 442 § 2 and repealed by Stats 1984 ch 596 § 3, effective July 19, 1984.]

See §§ 4620 et seq.

§ 4603.2. Notification to employer of name and address of physician selected pursuant to § 4600; Reports by physician; Payment for services

Upon selecting a physician pursuant to Section 4600, the employee or physician shall forthwith notify the employer of the name and address of the physician. The physician shall submit a report to the employer within five working days from the date of the initial examination and shall submit periodic reports at such intervals as may be prescribed by rules and regulations adopted by the administrative director. The employer shall make payment for the services of the physician after receipt of the required reports.

Amended Stats 1984 ch 909 § 2.

Amendments:

1984 Amendment: (1) Substituted "the" for "such" before "physician" the third, fourth, and fifth time it appears; and (2) added "working" before "days" in the second sentence.

§ 4605. Employee's right to provide own physicians

Cal Jur 3d Work Injury Compensation § 210.

Physicians treating industrially injured employees were subject to the authority of the Workers' Compensation Appeals Board, pursuant to Lab. Code, § 5304, to decide any controversies over amounts to be paid for such services, and the physicians could not lawfully charge the employees for amounts in excess of payments from the employers for their workmen's compensation insurance carriers. Though Lab. Code, § 4605, does

permit an injured employee to seek independent or additional care from a physician of his choice and at his own expense, there was no indication that the treatments in question were sought or provided on any other basis than as for industrially injured employees whose employers were liable for reasonable fees charged. *Bell v Samaritan Medical Clinic, Inc.* (1976) 60 CA3d 486, 131 Cal Rptr 582.

§ 4608. Payment of pharmacy benefits; Reproduction of claim form

No workers' compensation insurer, self-insured employer, or agent of an insurer or self-insured employer, shall refuse to pay pharmacy benefits solely because the claim form utilized is reproduced by the person providing the pharmacy benefits, provided the reproduced form is an exact copy of that used by the insurer, self-insured employer, or agent.

Added Stats 1984 ch 137 § 1.

§ 4050

WORKMEN'S COMPENSATION

- § 4053. Failure or refusal to submit to, or obstruction of, examination: After request by employer: Effect
- § 4054. Failure or refusal to submit to, or obstruction of, examination: After direction of appeals board, or referee: Effect
- § 4055. Testimony of physician
- § 4055.2. Party who subpoenas medical records to send copy of subpoena to parties of record
- § 4056. Submission to treatment: Unreasonable refusal: Effect

Collateral References:

Witkin Summary (8th ed) p 1029.

Law Review Articles:

Discovery in workmen's compensation proceedings. 56 CLR 812.

§ 4050. Submission by employee to examination upon request or order
Whenever the right to compensation under this division exists in favor of an employee, he shall, upon the written request of his employer, submit at reasonable intervals to examination by a practicing physician, provided and paid for by the employer, and shall likewise submit to examination at reasonable intervals by any physician selected by the administrative director or appeals board or referee thereof.

Enacted 1937; Amended Stats 1965 ch 1513 § 74, operative January 15, 1966.

Prior Law:

- (a) Stats 1917 ch 586 § 16 p 845.
- (b) Stats 1913 ch 176 § 21 p 291.
- (c) Stats 1911 ch 399 § 11 p 802.

Amendments:

1965 Amendment: substituted "administrative director or appeals board" for "commission or any member".

Collateral References:

- Cal Jur 2d Workmen's Compensation §§ 194, 250.
- 82 Am Jur 2d Workmen's Compensation §§ 457, 458
- 25 Am Jur Pl & Pr Forms (Rev ed), Workmen's Compensation, Forms 171-173, 191, 280.
- 20 Am Jur Legal Forms 2d, Workmen's Compensation, § 267:83.

Annotations:

- Duty of injured employee to submit to physical examination. 6 ALR 1270; 41 ALR 866.
- Duty of claimant, other than employee, to submit to physical examination. 131 ALR 768.

NOTES OF DECISIONS

In proceeding in certiorari to review award made by Industrial Accident Commission in favor of employee for compensation on account of knee injury sustained in course of his employment, compensation was not waived by employee, even though he left his employment and went to foreign

country and remained there, where prior to his departure he submitted to repeated examinations by physician representing employer, and no written demand or request was ever subsequently made upon him by employer to submit to further examination. *Union Lbr. Co. v Industrial Acc.*

Com. (1932) 124 CA 584, 12 P2d 1047.

Injured employee is entitled to compensation for time lost from work while complying with request of employer's insurance carrier in being examined by carrier's physician. *Peak v Industrial Acc. Com.* (1947) 82 CA2d 926, 187 P2d 905.

§ 4051. Request or order to fix time and place of examination: Considerations

The request or order for the medical examination shall fix a time and place therefor, due consideration being given to the convenience of the employee and his physical condition and ability to attend at the time and place fixed.

Enacted 1937.

Prior Law:

- (a) Stats 1917 ch 586 § 16 p 845.
- (b) Stats 1913 ch 176 § 21 p 291.
- (c) Stats 1911 ch 399 § 11 p 802.

Collateral References:

- Cal Jur 2d Workmen's Compensation § 194.
- 82 Am Jur 2d Workmen's Compensation §§ 457, 458.
- 25 Am Jur Pl & Pr Forms (Rev ed), Workmen's Compensation, Forms 171, 173.
- 20 Am Jur Legal Forms 2d, Workmen's Compensation, § 267:83.

SUGGESTED FORM

Order to Employee To Submit to Medical Examination

To: 1 [Employee]

As prescribed by Section 4051 of the Labor Code of the State of California, you are directed to appear on 2 , 19 3 , at 4 o'clock, 5 a.m., at 6 [address], to be examined by 7 [name of doctor]. The expense for such examination will be paid for by the undersigned employer.

If you feel that your physical condition and ability to submit to the medical examination will work an undue inconvenience upon you at the designated time and place, please contact 8 at 9 , and appropriate changes will be made.

You are further notified that you may employ, at your own expense, a physician to be present at the examination by 10 [name of doctor].

If you refuse to submit to the medical examination, or obstruct it in any manner, your right to begin or maintain any proceeding for the collection of compensation shall be suspended as prescribed by Section 4053 of the Labor Code of the State of California.

[Signature]

§ 4052. Employment of physician by employee

The employee may employ at his own expense a physician, to be present at any examination required by his employer.

Enacted 1937.

Law Review Articles:

- Digest of child labor laws and regulations applicable in California. 8 CLR 404.
 Liability of employer when employee misrepresents age in obtaining employment. 5 SCLR 252.
 Liability for fault, a distinguishing feature of workmen's compensation law. 42 St BJ 534.

Annotations:

- Applicability and effect of workmen's compensation acts in case of injuries to minors. 14 ALR 818; 33 ALR 337; 49 ALR 1435; 60 ALR 847; 83 ALR 416; 142 ALR 1018.
 Right of parent who consents to or acquiesces in employment of child under statutory age to recover for latter's injury or death while in such employment. 23 ALR 635; 40 ALR 1206.
 Status of minor employed by parent as regards provision of workmen's compensation act relating to compensation thereunder, or precluding action at law. 132 ALR 1030.

ARTICLE 2

Medical and Hospital Treatment

- § 4600. Provision by employer: Liability for neglect or refusal: Reimbursement for medical expense to prove contested claim: Right to reasonable expenses of transportation, meals and lodging, together with temporary disability indemnity
- § 4601. Change of physicians upon request of employee: Maximum amount of time for employer or insurance carrier to act: Right to services of consulting physician or chiropractor: Expense of treatment
- § 4601.5. Prompt payment of medical fees and expenses: Interest on late payment: Contested claims
- § 4602. Certification of competency of consulting or additional physicians
- § 4603. Procedure where employer desires change of physicians
- § 4603.2. Notification to employer of name and address of physician selected pursuant to § 4600: Reports by physician: Payment for services
- § 4603.5. Duties of administrative director: Adoption of rules: Notification to employees of rights
- § 4604. Determination of controversies
- § 4605. Employee's right to provide own physicians
- § 4606. Provision of treatment, etc., by local public entities, who were self-insured employers under Act of 1913 without regard to the act's time limitation
- § 4607. Attorney's fees incurred in resisting proceeding to terminate medical treatment

Cross References:

- Effect of death of employee on liability for medical treatment: § 4700.
 Allowance of lien against compensation for reasonable expenses incurred under this article: § 4903.
 Determination of reasonable medical expenses: § 4906.

Jurisdiction of appeals board over any controversy arising out of portions of this article: § 5304.

Limitations period governing proceedings for collection of benefits provided by this article: § 5405.

Medical and hospital treatment of state employees not otherwise covered by worker's compensation: § 6140.

§ 4600. Provision by employer: Liability for neglect or refusal: Reimbursement for medical expense to prove contested claim: Right to reasonable expenses of transportation, meals and lodging, together with temporary disability indemnity

Medical, surgical, chiropractic, and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches, and apparatus, including artificial members, which is reasonably required to cure or relieve from the effects of the injury shall be provided by the employer. In the case of his neglect or refusal seasonably to do so, the employer is liable for the reasonable expense incurred by or on behalf of the employee in providing treatment. After 30 days from the date the injury is reported, the employee may be treated by a physician of his own choice or at a facility of his own choice within a reasonable geographic area.

In accordance with the rules of practice and procedure of the appeals board, the employee, or the dependents of a deceased employee, shall be reimbursed for expenses reasonably, actually, and necessarily incurred for X-rays, laboratory fees, medical reports, and medical testimony to prove a contested claim. The reasonableness of and necessity for incurring such expenses to prove a contested claim shall be determined with respect to the time when such expenses were actually incurred. Expenses of medical testimony shall be presumed reasonable if in conformity with the fee schedule charges provided for impartial medical experts appointed by the administrative director.

Where at the request of the employer, the employer's insurance carrier, the administrative director, the appeals board or a referee, the employee submits to examination by a physician, he shall be entitled to receive in addition to all other benefits herein provided all reasonable expenses of transportation, meals and lodging incident to reporting for such examination, together with one day of temporary disability indemnity for each day of wages lost in submitting to such an examination. "Reasonable expenses of transportation" includes mileage fees from the employee's home to the place of the examination and back at the rate of fourteen cents (\$0.14) a mile, plus any bridge tolls. Such mileage and tolls shall be paid to the employee at the time he is given notification of the time and place of the examination.

Enacted 1937; Amended Stats 1941 ch 594 § 1; Stats 1949 ch 751 § 1; Stats 1951 ch 606 § 6; Stats 1959 ch 1189 § 9; Stats 1965 ch 1513 § 85, operative January 15, 1966; Stats 1971 ch 1404 § 1; Stats 1973 ch 1147 § 1; Stats 1975 ch 1259 § 1.

Prior Law:

(a) Stats 1917 ch 586 § 9 p 836, as amended by Stats 1919 ch 471 § 4 p 913, Stats 1925 ch 354 § 1 p 640, Stats 1929 ch 222 § 1 p 420.

(b) Stats 1913 ch 176 § 15 p 284, as amended by Stats 1915 ch 607 § 4 p 1082.

(c) Stats 1911 ch 399 § 8 p 798.

Amendments:

1941 Amendment: Substituted "cure or relieve" for "cure and relieve" in the first sentence.

1949 Amendment: Added the second paragraph.

1951 Amendment: Added "laboratory fees," after "X-rays," in the second paragraph.

1959 Amendment: (1) Deleted "and" after "laboratory fees" in the second paragraph; (2) substituted "and medical testimony to" for "required to successfully" after "medical reports" in the second paragraph; (3) added the second and third sentences in the second paragraph; and (4) added the third paragraph.

1965 Amendment: (1) Amended the second paragraph by substituting (a) "appeals board" for "commission"; and (b) "administrative director" for "commission"; and (2) substituted "administrative director, the appeals board or a" for "commission, or any commissioner or" in the third paragraph.

1971 Amendment: Added the second and third sentences of the third paragraph.

1973 Amendment: Substituted "fourteen cents (\$0.14)" for "twelve cents (\$0.12)" in the third paragraph.

1975 Amendment: Amended the first paragraph by adding (1) "chiropractic," in the first sentence; and (2) the third sentence.

Cross References:

Hospital service provided by employer: §§ 2500 et seq.

"Appeals board": § 3205.5.

"Administrative director": § 3206.

"Physician": § 3209.3.

Medical, surgical and hospital treatment: what included in term: § 3209.5.

Inspection of hospital facilities: §§ 3950 et seq.

Medical examinations on employee: §§ 4050 et seq.

Notification to employer of name and address of physician selected pursuant to this section: § 4603.2.

Duty of administrative director to define reasonable geographic areas for purposes of this section: § 4603.5.

California Highway Patrol or Department of Justice members' or harbor policemen's right to treatment: § 4802.

Policemen and firemen's right to treatment: § 4852.

Treatment of state employees not otherwise covered: § 6140.

Collateral References:

Witkin Summary (8th ed) pp 986, 987, 988, 1003, 1006.

Cal Jur 2d Unemployment Insurance § 31, Workmen's Compensation §§ 187, 188, 189, 194, 307.

Cal Digest of official Reports 3d Series Workmen's Compensation §§ 114-116.

82 Am Jur 2d Workmen's Compensation §§ 391 et seq.

20 Am Jur Legal Forms 2d, Workmen's Compensation, § 267:51.

Law Review Articles:

Liability of an employer for medical services to an injured employee. 10 CLR 529.

Right to control medical treatment under workmen's compensation law. 21 Hast LJ 700.

Review of Selected 1975 Code Legislation. 7 Pacific LJ 569.

Initial choice of physician under workmen's compensation: Is California right for the panel approach? (1973) 8 USF LR 149.

Choice of physician under workmen's compensation; employer-carrier choice in California. 8 USF LR 157.

Annotations:

Liability of employer or insurance company for medical and hospital aid furnished to injured employee. 7 ALR 545.

Workmen's compensation act as affecting master's duty and liability under contract to furnish medical treatment to employees. 33 ALR 1204.

Applicability of workmen's compensation act as affected by the character or qualifications of the person rendering the medical services. 40 ALR 1265.

Construction and effect of provisions relating to compensation of physicians or others rendering services to injured employee. 72 ALR 1012; 143 ALR 1264.

Application of specific provisions of workmen's compensation act relating to duty of employer or insurer to furnish medical, surgical, hospital or nursing treatment in cases where cure is impossible. 88 ALR 1192.

Limit of compensation under workmen's compensation act as including medical expenses. 128 ALR 136.

Selection or change of physician, surgeon, or hospital. 142 ALR 1205.

Award with respect to operation performed to make use of corrective appliance possible or more effective. 143 ALR 581.

Master's duty to care for or to furnish medical aid to servant stricken by illness or injury. 64 ALR2d 1108.

Allowance as costs, of such items as maps, models, wall charts, photographs, and the like. 97 ALR2d 138, 169.

Insured's receipt of or right to workmen's compensation benefits as affecting recovery under accident, hospital, or medical expense policy. 40 ALR3d 1012.

NOTES OF DECISIONS

1. In General
2. Construction
3. Jurisdiction of Administrative Body
4. Duty and Liability of Employer Generally
5. Notice to Employer of Injury; Necessity for and Sufficiency
6. Liability of Employer for Employee's Self-Procured Treatment
7. —Success of Self-Procured Treatment as Factor in Determining Liability
8. —Liability as Following Upon Neglect or Refusal of Employer to Provide Treatment
9. Employer's Control of Treatment; "Change of Condition"

1. In General

A tender of medical and surgical treatment by an employer to an injured employee must be unequiv-

ocal and one which the employee could and should accept when made; a tender of such services contingent upon a determination of the Industrial Accident Commission in the employee's favor is not sufficient. *Gildersleeve v Industrial Acc. Com.* (1931) 212 C 763, 1 P2d 1.

The lien allowed an employer or his insurance carrier on the insured employee's recovery against a third person under § 3856 includes expenditures for medical and hospital treatment under this section. *Heaton v Kerlan* (1946) 27 C2d 716, 166 P2d 857.

When all conditions prescribed by this section for reimbursement for medical expense to prove contested claim occur, and commission makes its determination, the award for such costs becomes part of judgment for special additional compensation, an incidental feature of that judgment. State

attorney for a workmen's compensation claimant, seeking fees in addition to those awarded by the Workmen's Compensation Appeals Board for services on behalf of the workmen's compensation claimant. The subject matter, by virtue of Cal Const, art XX, § 21, providing for a "complete system of workmen's compensation," and Lab Code, §§ 4600, 5300, 5304, 5955, vesting the Workmen's Compensation Appeals Board with exclusive jurisdiction to fix the fees of medical witnesses in matters before the board, was within the exclusive jurisdiction of the Workmen's Compensation Appeals Board. *Workmen's Compensation Appeals Board v Small Claims Court* (1973) 35 CA3d 643, 111 Cal Rptr 6.

4. Duty and Liability of Employer Generally

Treatment which this section requires employer to furnish injured employee is such as would reasonably and seasonably tend to relieve and cure employee from effects of injury. *Union Iron Works v Industrial Acci. Com.* (1922) 190 C 33, 210 P 410; *Industrial Indem. Co. v Industrial Acci. Com.* (1961) 188 CA2d 656, 10 Cal Rptr 566.

An employer may be required to pay the cost of plastic surgery, though incidentally for cosmetic purposes, where the compensable injury causes a decided handicap to the employee in obtaining reemployment. *Los Angeles County v Industrial Acc. Com.* (1927) 202 C 437, 261 P 295.

An employer may be required to furnish treatment to an employee even though the employee is permanently injured. *United States Fid. & Guar. Co. v Department of Industrial Relations* (1929) 207 C 144, 277 P 492.

The aggravation of an employee's pre-existing hernia may be adequately compensated by the furnishing of a surgical operation, since compensation is allowed only for the proportion of the disability due to the aggravation of the disease as may reasonably be attributed to the injury for which the employer is liable. *Bige v Industrial Acc. Com.* (1930) 105 CA 210, 287 P 577.

This section does not require an employer to replace eyeglasses which have been damaged in an industrial accident. *California Cas. Indem. Exchange v Industrial Acc. Com.* (1939) 13 C2d 529, 90 P2d 289.

An injured employee is entitled to practical nursing services and private custodial care and supervision when the need therefor appears and conditions therefor are appropriate under and in accordance with this section and other applicable provisions of the law. *Kaiser Co. v Industrial Acc. Com.* (1952) 109 CA2d 54, 240 P2d 57.

Duty imposed on employer who has notice of injury for which employee seeks compensation is not, in first instance, passive one of reimburse-

ment, but active one in offering aid in advance and of making whatever investigation is necessary to determine extent of employer's obligation and employee's needs. *United States Cas. Co. v Industrial Acc. Com.* (1954) 122 CA2d 427, 265 P2d 35.

Employer's duty is to furnish all medical, surgical and hospital treatment that is reasonably required to cure or relieve effects of injury, and this primary duty imposes liability from which employer is not to be relieved except for good cause. *Simien v Industrial Acc. Com.* (1956) 138 CA2d 397, 291 P2d 951; *California Union Ins. Co. v Industrial Acci. Com.* (1960) 183 CA2d 644, 7 Cal Rptr 67.

It is employer's duty under Workmen's Compensation Act to provide injured employee with that medical, surgical and hospital treatment that is reasonably required to cure or relieve from effects of injury and to take initiative in furnishing same. *Deauville v Hall* (1961) 188 CA2d 535, 10 Cal Rptr 511, cert den 368 US 824, 7 L Ed 2d 28, 82 S Ct 43.

Payment of premiums for medical insurance by employer pursuant to collective bargaining agreement with union constitutes wages within meaning of employment agreement with employee who dies of industrial injury and should not be construed to be medical treatment rendered for which employer, as its own compensation carrier, is entitled to credit against award of death benefits. *Foremost Dairies, Inc. v Industrial Acci. Com.* (1965) 237 CA2d 560, 47 Cal Rptr 173.

Whether medical treatment for industrial injury is administered by doctor chosen by injured employee or one selected by employer, employer is liable for no more than reasonable cost of medical treatment reasonably required to cure or relieve effects of injury. *McCoy v Industrial Acci. Com.* (1966) 64 C2d 82, 48 Cal Rptr 858, 410 P2d 362.

An employee's medical treatment unrelated to the industrial injury need not be furnished by the employer. *Granado v Workmen's Compensation Appeals Board* (1968) 69 C2d 399, 71 Cal Rptr 678, 445 P2d 294.

So long as medical treatment is reasonably required to cure or relieve from the effects of an industrial injury, the employer is required to provide the treatment, and treatment for nonindustrial conditions may be required of the employer where it becomes essential in curing or relieving from the effects of the industrial injury itself; such medical expense is not apportionable. *Granado v Workmen's Compensation Appeals Board* (1968) 69 C2d 399, 71 Cal Rptr 678, 445 P2d 294.

A workmen's compensation insurance carrier is liable for providing a private room for the care of an employee who has sustained an industrial in-

jury only where such private room is required (Lab Code, § 4600). Thus, in a proceeding to enforce an award of life-long rest home care, including such other care as might be necessary by reason of the employee's injury, such employee was not entitled to an order for a private room where there was no medical evidence that a private room was needed to cure or relieve him from the effects of the injury. *Kauffman v Workmen's Compensation Appeals Board* (1969) 273 CA2d 829, 78 Cal Rptr 620.

An employer must seasonably offer to an industrially injured employee that medical, surgical or hospital care reasonably required to cure or relieve from the effects of the industrial injury (Lab Code, § 4600); he must begin payment of compensation for temporary disability by a payment for one week in advance as wages on the eighth day after the employee leaves work as a result of the injury (§ 4650); and he must begin payment of compensation for permanent disability by a payment for one week in advance as wages on the eighth day after disability becomes permanent or the date of the last payment of temporary disability indemnity, whichever occurs first (§ 4650). *Ramirez v Workmen's Compensation Appeals Board* (1970) 10 CA3d 227, 88 Cal Rptr 865.

Medical expense reasonably necessary to relieve from an industrial injury is not apportionable; the basis for the recovery of such expenses is that it be reasonably necessary to relieve from the effects of the industrial injury, and there is no provision requiring a finding of disability, temporary or permanent, as a condition to the recovery thereof. *Cedillo v Workmen's Compensation Appeals Board* (1971) 5 C3d 450, 96 Cal Rptr 471, 487 P2d 1039.

If practical nursing care is reasonably required to cure or relieve the effects of an injury compensable under workmen's compensation, and such care has been adequately provided by a wife, she should be entitled to compensation for her services. *Henson v Workmen's Compensation Appeals Board* (1972) 27 CA3d 452, 103 Cal Rptr 785.

5. Notice to Employer of Injury; Necessity for and Sufficiency

Employer received sufficient notice of injury to employee to render it liable for medical expenses incurred by employee where, on day following accident, his daughter phoned foreman under whom employee was working that her father had been injured, and three days later employee's wife went to plant yard and personally notified employer of her husband's injury, and where after having been so notified denied liability. *Bethlehem Steel Co. v Industrial Acci. Com.* (1945) 70 CA 2d 382, 161 P2d 59.

While a member of the family of an injured employee is not entitled to compensation for nursing services which are rendered without the knowledge of the employer and are not of an extraordinary nature, where an injured workman requires nursing equivalent to hospital treatment, and the physician attending him requests his wife to care for him at home because of the inadequacy of available hospital facilities, although the wife is not an experienced nurse, and made no formal request for a regular nurse or for compensation for her services at the time they were rendered, it was proper to make an award for the nursing services rendered by her over a period of months where the attending physician, in legal effect, contracted on behalf of the insurer for such services by requesting them. *California Cas. Indem. Exchange v Industrial Acc. Com.* (1948) 84 CA2d 417, 190 P2d 990.

Employer had been given sufficient notice and fair opportunity to furnish medical services to employee injured in course of her employment so as to render employer liable for self-incurred medical expenses incident to operation, where injury occurred several years before and employer had then furnished medical services, employee became worse, employer knew for year before operation that it had been recommended by employee's private physician, and copy of petition for surgery to be performed at employer's expense was served on employer three months before operation was performed. *Pacific Elec. R. Co. v Industrial Acc. Com.* (1950) 96 CA 2d 651, 216 P2d 135.

In proceeding to determine extent of employer's liability for injured employee's self-incurred medical expenses, finding that emergency existed when employee went to hospital was amply supported by evidence that year before such operation physician appointed by Industrial Accident Commission had recommended surgery, three months before such operation employee's physician stated that further delay might endanger results which could be obtained by surgery, pain suffered by employee necessitated increased drug administrations until her side became paralyzed, and thereupon her physician and one he recommended insisted on immediate hospitalization and surgery. *Pacific Elec. R. Co. v Industrial Acc. Com.* (1950) 96 CA2d 651, 216 P2d 135.

Notice to the employer liable for an industrial injury is necessary to create a duty to furnish medical care. *Columbia-Geneva Steel Div., U.S. Steel Co. v Industrial Acc. Com.* (1953) 115 CA2d 862, 253 P2d 45.

That employer had sufficient notice of his employee's compensable injury to entitle employee to reimbursement for self-incurred medical expenses is established by evidence that employee discussed

injury with er and that emp after operation United States (1954) 122 CA

Employee's du service-connect receive comper if treatment, c obtained by en opportunity to of injury, exp but employer's and hospital tr remains, and it notice for inju (1956) 138 CA

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Where surgery pensionation awa quired to cure injury, and wli pensionation carr injury and cla zation, they ne provide them need for then this section, a did not give further futile such treatment from liability ical treatment trial Acci. Co 67.

It is duty of

medical care; it was question of fact to be decided by Industrial Accident Commission whether it would be futile for employee to make further request of carrier for medical care. *Industrial Indem. Co. v Industrial Acci. Com.* (1961) 188 CA2d 656, 10 Cal Rptr 566.

In a proceeding to obtain workmen's compensation benefits, the record showed that the workman was entitled to reimbursement for the expenses of self-procured medical, hospital, and surgical care, where, although the workman did not inform defendants specifically of anticipated surgery nor seek their permission and did not wait until his claim had been fully litigated and decided, he had previously advised defendants of his new and further disability and need for treatment, where there was no question that such treatment was reasonably required to cure or relieve from the effects of the industrial injury, and where there was no unreasonable delay or substantial change in the workman's condition between the time that he was last examined by doctors on behalf of defendants and the date of surgery. *Brotherton v Workmen's Compensation Appeals Board* (1969) 273 CA2d 451, 78 Cal Rptr 70.

Where an employer knew that practical nursing services were required for an employee as a result of compensable injury and knew that the services were being provided by the employee's wife, the wife was entitled to recover compensation therefor, even though she had not foregone outside employment in order to provide the nursing care for her husband, and even though she did not make demand for compensation until after the husband's death. *Henson v Workmen's Compensation Appeals Board* (1972) 27 CA3d 452, 103 Cal Rptr 785.

6. Liability of Employer for Employee's Self-Procured Treatment

An injured employee who fails to go to the hospital to which he is sent by the employer's physician, but goes to another hospital, is not entitled to an award covering hospital services. *Cella v Industrial Acc. Com.* (1918) 38 CA 760, 177 P 490.

The express or implied consent of an employer to the procurement by an employee of his own medical treatment, renders the employer liable for the reasonable expenses thus incurred. *Myers v Industrial Acc. Com.* (1923) 191 C 673, 218 P 11.

An employer did not fail to provide necessary medical treatment, where the employer's doctor who was treating the employee for a back injury told her that he was going to be away for two months and gave her an appointment for the end of that period, and the employee expressed no dissatisfaction with the arrangement, where the

employer telephoned the employee toward the end of the two months and she told him she would wait for the return of the doctor, where she then procured the services of another doctor and entered into long and expensive course of treatment and hospitalization without keeping her appointment with the employer's doctor or requesting him to furnish another one. *Sun Indem. Co. v Industrial Acci. Com.* (1948) 85 CA2d 171, 192 P2d 765.

In proceeding to determine extent of employer's liability for injured employee's self-incurred medical expenses, commission's finding that operation in connection with which expenses were incurred was necessary was sustained by evidence that employee's condition became progressively worse over long period of medical treatment and advice following her injury, for several months prior to operation she was in bed most of time suffering severe and increasing pain, and shortly after operation she was able to get up and do some of housework. *Pacific Elec. R. Co. v Industrial Acc. Com.* (1950) 96 CA2d 651, 216 P2d 135.

Under this section, workmen's compensation claimant is entitled to reimbursement for expenses reasonably and necessarily incurred for specified medical services, and claim barred by limitation statute is not frivolous as matter of law so as to preclude recovery for such medical expenses. *Furudich v Industrial Acci. Com.* (1965) 237 CA2d 455, 47 Cal Rptr 21.

In a workmen's compensation case, the denial of any award for medical-legal costs by the Workmen's Compensation Appeals Board must be annulled and the matter remanded for further proceedings where the board failed to distinguish the issue of reimbursement for self-procured medical treatment from the issue of reimbursement for medical-legal costs and did not review the evidence in the light of the latter issue. *Garrett v Workmen's Compensation Appeals Board* (1968) 258 CA2d 326, 65 Cal Rptr 721.

7. —Success of Self-Procured Treatment as Factor in Determining Liability

Before an injured employee is entitled to compensation for expenses incurred by the treatment of him by a physician of his own choice, it must be shown that this treatment was not only a success but that it was reasonably and seasonably necessary to cure and relieve him, taking all the circumstances into consideration. *Union Iron Works v Industrial Acc. Com.* (1922) 190 C 33, 210 P 410.

Where after twenty-two surgical operations on an employee, the employer admitted its inability to further relieve the employee from the effect of his injuries, the employer may be made liable for the necessary expense connected with operations per-

by 10 percent, together with interest thereon at the rate of 7 percent per annum retroactive to the date of the filing of the order of the board directing payment.

The employer shall notify, in writing, the provider of the services, the employee, or if represented, his attorney, if the employer contests the reasonableness and necessity of incurring such expenses, and shall indicate the reasons therefore.

The provisions of Sections 5800 and 5814 shall not apply to this section.

Added Stats 1976 ch 446 § 1, effective July 10, 1976, operative October 9, 1976.

§ 4602. Certification of competency of consulting or additional physicians

If the employee so requests, the employer shall procure certification by either the administrative director or the appeals board as the case may be of the competency, for the particular case, of the consulting or additional physicians.

Enacted 1937; Amended Stats 1965 ch 1513 § 86, operative January 15, 1966.

Prior Law:

(a) Stats 1917 ch 586 § 9 p 836, as amended by Stats 1919 ch 471 § 4 p 913, Stats 1925 ch 354 § 1 p 640, Stats 1929 ch 222 § 1 p 420.

(b) Stats 1913 ch 176 § 15 p 284, as amended by Stats 1915 ch 607 § 4 p 1082.

(c) Stats 1911 ch 399 § 8 p 798.

Amendments:

1965 Amendment: Substituted "either the administrative director or the appeals board as the case may be" for "the commission or a commissioner".

Cross References:

Certification of consulting physician: 8 Cal Adm Code §§ 9796-9802.

Collateral References:

Cal Jur 2d Workmen's Compensation § 192.

82 Am Jur 2d Workmen's Compensation §§ 391, 392, 394, 397.

Annotations:

Applicability of provisions as to medical or surgical services as affected by character or qualifications of person rendering them. 40 ALR 1265.

§ 4603. Procedure where employer desires change of physicians

If the employer desires a change of physicians or chiropractor, he may petition the administrative director who, upon a showing of good cause by the employer, may order the employer to provide a panel of five physicians, or if requested by the employee, four physicians and

§ 4603

WORKMEN'S COMPENSATION

one chiropractor competent to treat the particular case, from which the employee must select one.

Added Stats 1975 ch 1259 § 5.

Former Section: Former § 4603, providing for inapplicability of provisions relating to change of physicians where employer maintains hospital and staff, was enacted 1937, amended by Stats 1965 ch 1513 § 87, operative January 15, 1966, and repealed by Stats 1975 ch 1259 § 4.

Collateral References:

Law Review Articles:

Review of Selected 1975 Code Legislation. 7 Pacific LJ 569.

Annotations:

Selection or change of physician, surgeon, or hospital. 142 ALR 1205.

§ 4603.2. Notification to employer of name and address of physician selected pursuant to § 4600: Reports by physician: Payment for services

Upon selecting a physician pursuant to Section 4600, the employee or physician shall forthwith notify the employer of the name and address of such physician. Such physician shall submit a report to the employer within five days from the date of the initial examination and shall submit periodic reports at such intervals as may be prescribed by rules and regulations adopted by the administrative director. The employer shall make payment for the services of such physician after receipt of the required reports.

Added Stats 1975 ch 1259 § 6.

Collateral References:

25 Am Jur Pl & Pr Forms (Rev ed), Workmen's Compensation, Forms 192, 193.
20 Am Jur Legal Forms 2d, Workmen's Compensation, § 267:74.

Law Review Articles:

Review of Selected 1975 Code Legislation. 7 Pacific LJ 569.

§ 4603.5. Duties of administrative director: Adoption of rules: Notification to employees of rights

The administrative director shall adopt rules pertaining to the format and content of notices required by this article; define reasonable geographic areas for the purposes of Section 4600; specify time limits for all such notices, and responses thereto; and adopt any other rules necessary to make effective the requirements of this article.

Employers shall notify all employees of their rights under this section.

Added Stats 1975 ch 1259 § 7.

Collateral References:

81 Am Jur 2d Workmen's Compensation § 81.

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cannot vest in commission jurisdiction to determine controversies not incidental to such relief. *Gerson v Industrial Acci. Com.* (1961) 188 CA2d 735, 11 Cal Rptr 1.

In a workmen's compensation proceeding, there was no error in a referee's conclusion that "there was no evidence of any available treatment reasonably required to cure or relieve from the effects of the injury," that "there is no medical, including dental, evidence that the teeth should be removed either by reason of the injury herein or otherwise,"

and that "in the event that medical treatment becomes reasonably required, applicant may petition to reopen," and in his denial of further medical treatment, where it was based on the reports of three physicians, one to the effect that petitioner's major complaint was irremediable, another stating that no operative treatment was indicated, and the third indicating that no further vascular study nor treatment was indicated. *Gaiera v Workmen's Compensation Appeals Board* (1969) 271 CA2d 246, 76 Cal Rptr 656.

§ 4605. Employee's right to provide own physicians

Nothing contained in this chapter shall limit the right of the employee to provide, at his own expense, a consulting physician or any attending physicians whom he desires.

Enacted 1937.

Prior Law:

(a) Stats 1917 ch 586 § 9 p 836, as amended by Stats 1919 ch 471 § 4 p 913, Stats 1925 ch 354 § 1 p 640, Stats 1929 ch 222 § 1 p 420.

(b) Stats 1913 ch 176 § 15 p 284, as amended by Stats 1915 ch 607 § 4 p 1082.

(c) Stats 1911 ch 399 § 8 p 798.

Collateral References:

Witkin Summary (8th ed) pp 893, 988, 1041.

Cal Jur 2d Workmen's Compensation § 191.

82 Am Jur 2d Workmen's Compensation § 393.

Law Review Articles:

Initial choice of physician under workmen's compensation: Is California right for the panel approach? (1973) 8 USF LR 149.

NOTES OF DECISIONS

While it is the duty of an employer of an injured employee under § 4600 to provide medical attention as well as surgical supplies, crutches, apparatus, nurse and medicines, it is the right of the injured employee to refuse the assistance of a physician so supplied and to independently contract for a physician of his own choice and at his own expense. *Credit Bureau of San Diego, Inc. v Johnson* (1943) 61 CA2d Supp 834, 142 P2d 963.

Under Lab Code, § 4605, providing that nothing

contained in Chapter 2 of the workmen's compensation statutes shall limit the right of an employee to provide, at his own expense, a consulting physician or "any attending physician" whom he desires, the term "any attending physician" includes an operating surgeon selected by the employee, in view of the rule that compensation statutes are to be liberally construed in favor of extending benefits to the injured employee (Lab Code, § 3202). *Gallegos v Workmen's Compensation Appeals Board* (1969) 273 CA2d 569, 78 Cal Rptr 157.

§ 4606. Provision of treatment, etc., by local public entities, who were self-insured employers under Act of 1913 without regard to the act's time limitation

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**656.228 Payments directly to benefi-
ciary or custodian.** (1) If compensation is
payable for the benefit of a beneficiary other than
the injured worker, the insurer or the self-insured
employer may segregate any additional compen-
sation payable on account of that beneficiary and
make payment directly to the beneficiary, if sui
juris; otherwise, to the guardian or person having
custody of the beneficiary.

(2) Compensation paid to an injured worker
who is a minor prior to receipt of notice by the
insurer or the self-insured employer from the
parent or guardian of the minor that the parent or
guardian claims the compensation shall discharge
the obligation to pay compensation to the extent
of such payment. [Amended by 1957 c.477 §1; 1965 c.285
§25; 1981 c.854 §12]

**656.230 Accelerating award payments
with approval of director.** (1) Where a
worker has been awarded compensation for per-
manent partial disability, and the award has
become final by operation of law or waiver of the
right to appeal its adequacy, the director may, in
the director's discretion, upon the worker's
application order all or any part of the remaining
unpaid award to be paid to the worker in a lump
sum. Any remaining balance shall be paid pur-
suant to ORS 656.216.

(2) In all cases where the award for perma-
nent partial disability does not exceed 64 degrees,
the insurer or the self-insured employer shall pay
all of the award to the worker in a lump sum.
[Amended by 1957 c.574 §4; 1959 c.449 §1; 1965 c.285 §23a;
1973 c.221 §1; 1981 c.854 §13; 1983 c.816 §15]

**656.232 Payments to aliens residing
outside of United States.** (1) If a beneficiary
is an alien residing outside of the United States or
its dependencies, payment of the sums due such
beneficiary may, in the discretion of the director,
be made to the consul general of the country in
which such beneficiary resides on behalf of the
beneficiary. The receipt of the consul general to
the director for the amounts thus paid shall be a
full and sufficient receipt for the payment of the
funds thus due the beneficiary.

(2) If a beneficiary is an alien residing outside
of the United States or its dependencies, the
director may, in lieu of awarding such beneficiary
compensation in the amount provided by ORS
656.001 to 656.794, award such beneficiary such
lesser sum by way of compensation which,
according to the conditions and costs of living in
the place of residence of such beneficiary will, in
the opinion of the director, maintain the benefi-
ciary in a like degree of comfort as a beneficiary of
the same class residing in this state and receiving

the full compensation authorized by ORS 656.001
to 656.794. The director shall determine the
amount of compensation benefits upon the basis
of the rate of exchange between the United States
and any foreign country as determined by the
Federal Reserve Bank as of January 1 and July 1
of the year when paid.

(3) All benefit rights shall be canceled upon
the commencement of a state of war between the
United States and the country of a beneficiary's
domicile.

**656.234 Compensation not assignable,
nor to pass by operation of law and is
exempt from process.** No moneys payable
under ORS 656.001 to 656.807 on account of
injuries or death are subject to assignment prior
to their receipt by the beneficiary entitled
thereto, nor shall they pass by operation of law.
All such moneys and the right to receive them are
exempt from seizure on execution, attachment or
garnishment, or by the process of any court.
[Amended by 1967 c.468 §1]

**656.236 Prohibition against releases;
charging costs.** (1) No release by a worker or
beneficiary of any rights under ORS 656.001 to
656.794 is valid.

(2) Except as provided in ORS 656.506 and
656.538, none of the cost of workers' compensa-
tion to employers under ORS 656.001 to 656.794
shall be charged to a subject worker. [1965 c.285 §28;
1985 c.212 §5]

**656.240 Deduction of benefits from
sick leave payments paid to employes.** Not-
withstanding any other law, an employer, with
the consent of the worker, may deduct from any
sick leave payments made to an individual
amounts equal to benefits received by the indi-
vidual under ORS 656.001 to 656.807 with respect
to the same injury that gave rise to the sick leave.
However, the deduction of sick leave shall not
exceed an amount determined by taking the
worker's daily wage for the period less daily time
loss benefits received under ORS 656.001 to
656.807 divided by the worker's daily wage. [1969
c.398 §2; 1983 c.816 §5]

656.242 [Amended by 1959 c.589 §1; repealed by 1965
c.285 §95]

656.244 [Amended by 1959 c.378 §1; repealed by 1965
c.285 §95]

**656.245 Medical services to be pro-
vided; choice of doctor.** (1) For every compen-
sable injury, the insurer or the self-insured
employer shall cause to be provided medical serv-
ices for conditions resulting from the injury for
such period as the nature of the injury or the

process of the recovery requires, including such medical services as may be required after a determination of permanent disability. Such medical services shall include medical, surgical, hospital, nursing, ambulances and other related services, and drugs, medicine, crutches and prosthetic appliances, braces and supports and where necessary, physical restorative services. The duty to provide such medical services continues for the life of the worker.

(2) When the time for submitting a claim under ORS 656.273 has expired, any claim for medical services referred to in this section shall be submitted to the insurer or self-insured employer. If the claim for medical services is denied, the worker may submit to the board a request for hearing pursuant to ORS 656.283.

(3) The worker may choose an attending doctor or physician within the State of Oregon. The worker may choose the initial attending physician and may subsequently change attending physician four times without approval from the director. If the worker thereafter selects another attending physician the insurer or self-insured employer may require the director's approval of the selection and, if requested, the director shall determine with the advice of one or more physicians, whether the selection by the worker shall be approved. Nothing in this section shall be construed to permit the director to determine specific treatment criteria. [1965 c.285 §23; 1979 c.839 §32; 1981 c.535 §31; 1981 c.854 §14; 1985 c.739 §4]

656.246 [Repealed by 1965 c.285 §95]

656.248 Medical service rates. (1) The director, in compliance with ORS 183.310 to 183.550 and 656.794, shall promulgate rules for medical fee schedules. These schedules shall represent the 75th percentile of usual and customary fees as determined by the director who shall determine those fees on the basis of generally accepted descriptions of medical service.

(2) Medical fees equal to or less than the 75th percentile shall be paid when the vendor submits a billing for medical services. In no event shall that portion of a medical fee be paid that exceeds the 75th percentile.

(3) In no event shall a provider charge more than the provider charges to the general public.

(4) If no usual and customary fee has been established for a given service or procedure the director may, in compliance with ORS 183.310 to 183.550 and 656.794, promulgate a reasonable rate, which shall be the same within any given area for all primary health care providers to be paid for that service or procedure.

(5) The director may, in compliance with ORS 183.310 to 183.550 and 656.794, promulgate a reasonable rate of markup for the sale of medical devices.

(6) Notwithstanding subsection (1) or (2) of this section, such rates or fees provided in subsections (1) and (2) of this section shall be adequate to insure at all times to the injured workers the standard of services and care intended by ORS 656.001 to 656.794.

(7) The director shall update the schedule required by subsection (1) of this section annually. The update shall be based upon:

(a) A statistically valid survey by the director of usual and customary medical fees or upon the basis of that information provided to the director by any state agency having access to usual and customary medical fee information; or

(b) The annual percentage increase or decrease in the physician's services component of the national Consumer Price Index published by the Bureau of Labor Statistics of the United States Department of Labor.

(8) The director is specifically prohibited from adopting or administering rules which treat manipulation, when performed by a physician, as anything other than a separate therapeutic procedure which is paid in addition to other services or office visits. [Amended by 1965 c.285 §26; 1969 c.611 §1; 1971 c.329 §1; 1981 c.535 §5; 1983 c.816 §6; 1985 c.107 §1; 1985 c.739 §5]

656.252 Director to regulate medical reports; disclosure of information; notification of changing attending physicians.

(1) In order to insure the prompt reporting and payment of compensation in compensable injuries the director shall make rules governing reports by attending and consulting physicians and other personnel of all medical information relevant to the determination of a claim to the injured worker's representative, the worker's employer, the employer's insurer and the department. Such rules shall include, but not necessarily be limited to:

(a) Requiring attending physicians to make the insurer or self-insured employer a first report of injury within a specified time after the first service rendered.

(b) Requiring attending physicians to submit follow-up reports within specified time limits or upon the request of an interested party.

(c) Requiring examining physicians to submit their reports, and to whom, within a specified time.

(d) Such other reports as the director may deem necessary. Reports of compensation to interested parties be given to the prompt determination.

(2) The attending physician shall file the following:

(a) Advise the insurer or self-insured employer of the anticipated date of the injured worker to return to work, stationary, and the nature of the injury. Except when the attending physician has previously indicated that the claim will not exceed 14 days, the insurer or self-insured employer may request a report within 14 days, and the attending physician shall file such reports.

(b) Advise the insurer or self-insured employer within five days after the injured worker is released to return to work.

(c) After a claim has been denied by the insurer or self-insured employer after the treatment is recommended, the director shall, after a claim is recommended under this paragraph, require the attending physician to file a report within 14 days after the claim was closed.

(3) In promulgating rules for medical reporting the director shall consult with physicians and medical associations and societies.

(4) No person who is subject to a sanction under this section, in accordance with the rules, shall incur any penalty or closure of such information.

(5) Whenever an attending physician, consulting physician, or other personnel shall see an insurer or self-insured employer within five days after the date of first treatment. Even if the insurer refers a worker to a self-insured employer, the insurer or self-insured employer shall promptly notify the self-insured employer of the injury. [1979 c.839 §3; 1981 c.535 §3]

656.254 Medical reporting forms. (1) The director shall promulgate report forms, in duplicate, which shall be applicable, to be used by insurers, employers and physicians to report information required in the determination of a claim.

(2) The director shall make rules for the enforcement of

(d) Such other reporting requirements as the director may deem necessary to insure that payments of compensation be prompt and that all interested parties be given information necessary to the prompt determination of claims.

(2) The attending physician shall do the following:

(a) Advise the insurer or self-insured employer of the anticipated date for release of the injured worker to return to employment, the anticipated date that the worker will be medically stationary, and the next appointment date. Except when the attending physician has previously indicated that temporary disability will not exceed 14 days, the insurer or self-insured employer may request a medical report every 15 days, and the attending physician shall forward such reports.

(b) Advise the insurer or self-insured employer within five days of the date the injured worker is released to return to work.

(c) After a claim has been closed, advise the insurer or self-insured employer within five days after the treatment is resumed or the reopening of a claim is recommended. The attending physician under this paragraph need not be the same attending physician who released the worker when the claim was closed.

(3) In promulgating the rules regarding medical reporting the director may consult and confer with physicians and members of medical associations and societies.

(4) No person who reports medical information to a person referred to in subsection (1) of this section, in accordance with department rules, shall incur any legal liability for the disclosure of such information.

(5) Whenever an injured worker changes attending physicians, the newly selected attending physician shall so notify the responsible insurer or self-insured employer not later than five days after the date of the change or the date of first treatment. Every attending physician who refers a worker to a consulting physician promptly shall notify the responsible insurer or self-insured employer of the referral. [1967 c.626 §2.5; 1979 c.839 §3; 1981 c.535 §6; 1981 c.874 §17]

656.254 Medical report forms; sanctions. (1) The director shall establish medical report forms, in duplicate snap-outs where applicable, to be used by insurers, self-insured employers and physicians, including in such forms information necessary to establish facts required in the determination of the claim.

(2) The director shall establish sanctions for the enforcement of medical reporting require-

ments. Such sanctions may include, but are not limited to, forfeiture of fees and penalty not to exceed \$1,000 for each occurrence. [1967 c.626 §§3, 4; 1975 c.556 §40; 1979 c.839 §30; 1981 c.854 §15]

656.258 Vocational assistance service payments. The insurer or self-insured employer shall pay a vocational assistance provider for all vocational assistance services, including the cost of an evaluation to determine whether a worker is eligible for vocational assistance, that are performed at the request of the insurer or self-insured employer. Within 60 days after receiving a billing, the insurer or self-insured employer shall pay for all vocational assistance services performed, including those services performed in good faith without knowledge that the worker's eligibility to receive vocational assistance has been terminated or that the worker has withdrawn or is otherwise ineligible for vocational assistance. [1985 c.606 §18]

PROCEDURE FOR OBTAINING COMPENSATION

656.262 Responsibility for processing and payment of compensation; acceptance and denial of claim; reporting claims; penalties for payment delays. (1) Processing of claims and providing compensation for a worker shall be the responsibility of the insurer or self-insured employer. All employers shall assist their insurers in processing claims as required in this chapter.

(2) The compensation due under this chapter shall be paid periodically, promptly and directly to the person entitled thereto upon the employer's receiving notice or knowledge of a claim, except where the right to compensation is denied by the insurer or self-insured employer.

(3) Employers shall, immediately and not later than five days after notice or knowledge of any claims or accidents which may result in a compensable injury claim, report the same to their insurer. The report shall include:

(a) The date, time, cause and nature of the accident and injuries.

(b) Whether the accident arose out of and in the course of employment.

(c) Whether the employer recommends or opposes acceptance of the claim, and the reasons therefor.

(d) The name and address of any health insurance provider for the injured worker.

(e) Any other details the insurer may require.

Failure to so report subjects the offending employer to a charge for reimbursing the insurer

F.H. Linneman Constr., 137, 479 P.2d 990 (1971). This section specifically gives the commission discretion in matters of abuse of discretion, but it abused its discretion. *Industrial Comm'n*, 73 Colo. 456, 333 P.2d 617 (1958); *National Lumber & Kelly*, 101 Colo. 535, 75

of an abuse of discretion, industrial commission as to of a claimant's refusal to undergo surgery, is not subject to review by the courts. *Hays v. Industrial Comm'n*, 73 Colo. 456, 333 P.2d 617 (1958). A claimant cannot be penalized for acting on the advice of a physician. *National Lumber & Kelly*, 101 Colo. 535, 75

who refuses corrective surgery after previous convictions cannot avoid greater liability than would otherwise be permitted him to avoid. *Industrial Comm'n v. Kelly*, 101 Colo. 535, 75 P.2d 308 (1962). The elements of fear and duress are to be taken into consideration by the commission on a proper basis for the award of workmen's compensation. *National Lumber & Creosoting Co. v. Kelly*, 101 Colo. 535, 75 P.2d 144 (1937).

WORKER'S RIGHT TO SELECT PHYSICIAN.

The insurer has the right in the absence of a contract to select the physician and secure proper treatment of the injured employee. *Comp. Ins. Fund v. Luna*, 156 Colo. 106, 397 P.2d 231 (1964).

The statute authorizes the employer to select a physician "in the first instance." *Comp. Ins. Fund v. Luna*, 156 Colo. 106, 397 P.2d 231 (1964).

The right of selection is lost if the employer is negligent. *Comp. Ins. Fund v. Luna*, 156 Colo. 106, 397 P.2d 231 (1964).

The employer cannot give an employee the right to select a different physician when the employee's selection of a physician results in surgical expense to the employer but also the fund. *Comp. Ins. Fund v. Luna*, 156 Colo. 106, 397 P.2d 231 (1964).

The use of another physician by the industrial commission may be held liable. *Colorado v. Industrial Comm'n*, 129 Colo. 353, 333 P.2d 617 (1958); *Vanadium*

Corp. of America v. Sargent, 134 Colo. 555, 307 P.2d 454 (1957); *Wishbone Restaurant v. Moya*, 162 Colo. 30, 424 P.2d 119 (1967).

Notice and consent necessary to change or add physicians. The workmen's compensation act does not permit an injured employee to change physicians or to employ additional physicians without notice to his employer or its insurer and consent of the division of labor. *Pickett v. Colorado State Hosp.*, 32 Colo. App. 282, 513 P.2d 228 (1973).

It does not follow that the act of the employee, in engaging his own surgeon, relieves the employer from all responsibility for the payment of benefits provided by law for disability incurred by the employee in an industrial accident. *Colorado Fuel & Iron Corp. v. Industrial Comm'n*, 129 Colo. 353, 269 P.2d 1070 (1954); *Vanadium Corp. of America v. Sargent*, 134 Colo. 555, 307 P.2d 454 (1957); *Mennonite Hosp. v. Corley*, 28 Colo. App. 585, 476 P.2d 274 (1970).

And where insurer refuses to pay expenses for operation reducing disability, insurer may not benefit. If there has been a significant reduction in the percentage of permanent disability suffered by the employee due to an operation successfully performed by the employee's own physician, and the insurance carrier refuses to defray this expense, the insurer is not entitled to accept the benefits

thereof which take the form of substantially reduced payments of compensation for permanent disability. *State Comp. Ins. Fund v. Luna*, 156 Colo. 106, 397 P.2d 231 (1964); *Wishbone Restaurant v. Moya*, 162 Colo. 30, 424 P.2d 119 (1967).

Employer or insurer not liable for unauthorized medical expenses. When an injured employee incurs unauthorized medical expenses, the employer or its insurer is not liable for such expenses. *Pickett v. Colorado State Hosp.*, 32 Colo. App. 282, 513 P.2d 228 (1973).

But an employee may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion, or, with full knowledge over a sustained period of time, has failed to object to claimant's change of physician. *Greager v. Industrial Comm'n*, 701 P.2d 168 (Colo. 1985).

Also insurer's refusal to pay claimant's unauthorized medical expenses does not entitle claimant to compensation for a higher degree of permanent disability than that which she actually suffered. *Pickett v. Colorado State Hosp.*, 32 Colo. App. 282, 513 P.2d 228 (1973).

Statute as basis for jurisdiction. See *Industrial Comm'n v. Pacific Employers Ins. Co.*, 120 Colo. 373, 209 P.2d 908 (1949).

8-51-111. State treasurer to invest funds. (1) The state treasurer shall invest any portion of the subsequent injury fund, including its surplus and reserves, which the division determines is not needed for immediate use. All interest earned upon such invested portion shall be credited to the fund and used for the same purposes and in the same manner as other moneys in the fund. Such moneys may be invested in the types of investments authorized in sections 24-36-109, 24-36-112, and 24-36-113, C.R.S.

(2) In addition, such moneys may be invested in notes and loans secured by first mortgages or first deeds of trust on real property located in Colorado and guaranteed by government or private insurance or in nonconvertible corporate notes and bonds and equipment trust certificates of United States domestic corporations rated investment grade by a recognized security rating service.

Source: L. 69, p. 631, § 169; C.R.S. 1963, § 81-12-12; L. 77, p. 455, § 1; L. 79, p. 342, § 1; L. 81, p. 473, § 1; L. 86, p. 477, § 47.

Am. Jur.2d. See 82 Am. Jur.2d, Workmen's Compensation, § 661.

C.J.S. See 100 C.J.S., Workmen's Compensation, § 358.

8-51-112. Last employer liable - exception. (1) Where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease and the insurance carrier, if any, on the risk when such employee was last so

C.J.S. See 100 C.J.S., Workmen's Compensation, § 484, 537.

Annotator's note. Cases included in the annotations to this section which refer to the industrial commission were decided prior to the 1969 amendment which vested the director of the division of labor with the power previously exercised by the industrial commission to enforce the provisions of this section.

Law reviews. For article, "A Significant Change in the Colorado Workmen's Compensation Act: 'Accidents', 'Injuries', and 'Heart Attack'", see 41 Den. L. Cir. J. 189 (1964).

Resumption of benefits after suspension. This section permits a resumption of benefits after a period of suspension when the disqualifying condition has been removed. *Dziewior v. Michigan Gen. Corp.*, 672 P.2d 1026 (Colo. App. 1983).

Applied in *Safeway Stores v. Industrial Comm'n*, 678 P.2d 1078 (Colo. App. 1984).

II. EMPLOYEE'S REFUSAL TO BE TREATED.

Where risks do not justify claimant's refusal to submit to operation, no full compensation. While a claimant has the option to refuse corrective surgery, he may not do so and continue to receive full compensation where it appears that the risk involved in the recommended surgery is not such as to justify claimant's refusal thereof. *Hays v. Industrial Comm'n*, 138 Colo. 334, 333 P.2d 617 (1958).

But the industrial commission must determine no unusual risks before denying relief. Before the commission would be justified in denying relief to an applicant because of his refusal to submit to treatment or surgery it must appear that the proposed treatment or surgery is such as to be free of unusual risks and calculated to effect a cure. *Cain v. Industrial Comm'n*, 136 Colo. 227, 315 P.2d 823 (1957).

The reasonableness of claimant's refusal to submit to operative treatment is a question of fact to be determined by the commission. *Overton v. City & County of Denver*, 106 Colo. 114, 102 P.2d 474 (1940); *Cain v. Industrial Comm'n*, 136 Colo. 227, 315 P.2d 823 (1957); *Hays v. Industrial Comm'n*, 138 Colo. 334, 333 P.2d 617 (1958).

And the burden of proof is on the employer to establish that a tendered operation is simple, safe, and reasonably certain to effect a cure. *Cain v. Industrial Comm'n*, 136 Colo. 227, 315 P.2d 823 (1957).

So that evidence will not support the suspension of compensation where there is no showing of a refusal to submit to surgery or that claimant persisted in any unsanitary or injurious practice which tended to imperil or retard his

recovery. *Padillo v. F.H. Linneman Constr. Co.*, 29 Colo. App. 137, 479 P.2d 990 (1971).

In any event, this section specifically gives the industrial commission discretion in matters of this kind, and those seeking to attack the result must show that it abused its discretion. *Andrews v. Industrial Comm'n*, 73 Colo. 456, 216 P. 256 (1923); *National Lumber & Creosoting Co. v. Kelly*, 101 Colo. 535, 75 P.2d 144 (1937).

And in the absence of an abuse of discretion, the decision of the industrial commission as to the reasonableness of a claimant's refusal to submit to corrective surgery, is not subject to revision by the courts. *Hays v. Industrial Comm'n*, 138 Colo. 334, 333 P.2d 617 (1958).

Claimant not to be penalized for acting on advice of personal physician. *National Lumber & Creosoting Co. v. Kelly*, 101 Colo. 535, 75 P.2d 144 (1937).

But a claimant who refuses corrective surgery because of his religious convictions cannot subject his employer to greater liability than would obtain if claimant's faith permitted him to undergo surgery required. *Industrial Comm'n v. Vigil*, 150 Colo. 356, 373 P.2d 308 (1962).

On the other hand the elements of fear and anxiety may be taken into consideration by the commission as a proper basis for the award of compensation in a workmen's compensation case. *National Lumber & Creosoting Co. v. Kelly*, 101 Colo. 535, 75 P.2d 144 (1937).

III. EMPLOYER'S RIGHT TO SELECT PHYSICIAN.

The employer or insurer has the right in the first instance to select the physician and services requisite to proper treatment of the employee. *State Comp. Ins. Fund v. Luna*, 156 Colo. 106, 397 P.2d 231 (1964).

This section authorizes the employer to select the treating physician "in the first instance". *Granite Constr. Co. v. Leonard*, 40 Colo. App. 20, 568 P.2d 500 (1977).

And where medical services are tendered to an injured employee in the first instance, the employee's secondary right of selection is lost. *Vanadium Corp. of America v. Sargent*, 134 Colo. 555, 307 P.2d 454 (1957).

Furthermore, an employer cannot give an employee carte blanche to select a different doctor, especially when the employee's selection has resulted in surgical expense to not only the employer but also the fund. *Vanadium Corp. of America v. Sargent*, 134 Colo. 555, 307 P.2d 454 (1957).

For claimant's use of another physician requires consent of the industrial commission before employer may be held liable. *Colorado Fuel & Iron Corp. v. Industrial Comm'n*, 129 Colo. 353, 269 P.2d 1070 (1954); *Vanadium*

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(3) So long as the employee, after written request by the employer or insurer, refuses to submit himself to medical examination or in any way obstructs the same, his right to collect, or to begin or maintain any proceeding for the collection of, compensation shall be suspended. If he refuses to submit to such examination after direction by the director or any agent, referee, or hearing officer of the division appointed pursuant to section 8-46-107 (1) or in any way obstructs the same, his right to weekly indemnity which accrues and becomes payable during the period of such refusal or obstruction shall be barred. If any employee persists in any unsanitary or injurious practice which tends to imperil or retard his recovery or refuses to submit to such medical or surgical treatment or vocational rehabilitation as is reasonably essential to promote his recovery and rehabilitation, the director, in his discretion, may reduce or suspend the compensation of any such injured employee.

(4) Any physician or chiropractor who makes or is present at any such examination may be required to testify as to the results thereof. Any physician or chiropractor having attended an employee in a professional capacity may be required to testify before the division when it so directs. A physician or chiropractor will not be required to disclose confidential communications imparted to him for the purpose of treatment and which are unnecessary to a proper understanding of the case.

(5) (a) In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of injury, the employee shall have the right to select his own physician or chiropractor. Upon written request to the employer or insurance carrier, the employee may procure written permission to have his own physician or chiropractor attend him. If such permission is neither granted nor refused within fifteen days, the employer or insurance carrier shall be deemed to have waived any objection thereto. Upon the proper showing to the division, the employee may procure its permission at any time to have a physician of his own selection attend him, and in any nonsurgical case the employee, with such permission, in lieu of medical aid, may procure any nonmedical treatment recognized by the laws of this state as legal, the practitioner administering such treatment to receive such fees therefor under the medical provisions of articles 40 to 54 of this title as may be fixed by the division.

(b) Any private insurer or self-insured employer acting as his own insurance carrier as provided in section 8-44-109 providing workmen's compensation coverage shall pay for chiropractic care as provided in paragraph (a) of this subsection (5).

(6) Application or prosecution of a claim for benefits shall be a waiver of any privilege concerning communications relating to all medical issues raised by the claim, for the purposes of the adjudication of the claim.

Source: L. 19, p. 733, § 81; C. L. § 4455; CSA, C. 97, § 360; CRS 53, § 81-12-12; L. 57, p. 506, § 1; C.R.S. 1963, § 81-12-11; L. 69, p. 629, § 168; L. 75, pp. 303, 314, 317, § § 35, 2, 1; L. 79, p. 341, § 1; L. 81, p. 470, § 2; L. 86, pp. 476, 520, § § 46, 2.

- I. General Consideration.
- II. Employer's Refusal to be Treated.
- III. Employer's Right to Select Physician.

- I. GENERAL CONSIDERATION.
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ALASKA PACIFIC ASSURANCE
COMPANY and State of
Alaska, Appellants,

v.

Robert BROWN, Individually and as
Class Representative, Appellee.

Nos. 6600, 6626.

Supreme Court of Alaska.

Feb. 17, 1984.

Rehearing Granted in Part and
Denied in Part July 20, 1984.

As Modified July 20, 1984.

Workers' compensation recipient who had moved out of Alaska filed class action against insurer alleging that statute adjusting benefits of workers' compensation recipients who move out of state was unconstitutional, requesting monetary damages as well as declaratory and injunctive relief. The Superior Court, Third Judicial District, Anchorage, Milton M. Souter, J., declared statute unconstitutional and awarded class members monetary damages. On appeal, the Supreme Court, Rabinowitz, J., held that: (1) statute reducing benefits for recipients who move out of state imposes substantial penalty upon exercise by recipients of right to travel out of state; (2) state failed to meet its high burden of justifying penalty on interstate travel imposed by statute, and thus, statute, and 1982 and 1983 amendments which did not materially alter relevant provisions, are invalid under the state equal protection clause; and (3) insurer, which in good faith reduced benefits paid to recipients who had moved out of state pursuant to statute would not be assessed damages for complying with such statute upon determination that statute was unconstitutional.

Affirmed in part and reversed in part.
Compton, J., filed dissenting opinion.

1. Constitutional Law ⇐213.1(1)

Initial inquiry under the state equal protection clause is determination of what weight should be afforded constitutional interest impaired by challenged enactment, which is the most important variable in fixing appropriate level of review, and thus, goes to level of scrutiny. Const. Art. 1, § 1.

2. Constitutional Law ⇐213.1(1)

Depending upon the primacy of constitutional interest impaired by challenged enactment, state will have a greater or lesser burden under the state equal protection clause in justifying its legislation. Const. Art. 1, § 1.

3. Constitutional Law ⇐213.1(2)

Second step of analysis under the state equal protection clause is an examination of purposes served by challenged statutes; depending on level of review determined, state may be required to show only that its objectives were legitimate, at the low end of the continuum, or at the high end of the scale, that legislation was motivated by a compelling state interest. Const. Art. 1, § 1.

4. Constitutional Law ⇐213.1(2)

Under the state equal protection clause, an evaluation of state's interest in the particular means employed to further its goals must be undertaken, with state's burden differing in accordance with determination of level of scrutiny afforded constitutional interest impaired; at low end of the "sliding scale," a substantial relationship between means and ends is constitutionally adequate, while at higher end of scale, classification will be invalidated if purpose can be accomplished by a less restrictive alternative. Const. Art. 1, § 1.

5. Constitutional Law ⇐213.1(1)

First inquiry in analyzing challenged enactment under state equal protection clause goes to level of scrutiny, to be determined by importance of individual rights asserted and by degree of suspicion with which Supreme Court views resulting classification scheme. Const. Art. 1, § 1.

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6. Workers' Compensation ⇨26

For purpose of determining level of inquiry to be used in determining validity of statute adjusting benefits of workers' compensation recipients who move out of state under the state equal protection clause, statute might be viewed as blanket "change in condition" adjustment for workers who move out of state; worker does not have inherent right to benefits set in disregard of his or her economic environment. AS 23.30.175(c, d); Const. Art. 1, § 1.

7. Constitutional Law ⇨245(4)**Workers' Compensation** ⇨26

Right of nonresident workers' compensation recipients who fall under statute adjusting benefits of recipients who have moved out of state to have their benefits determined in relation to same factors that are applied to workers' compensation recipients in general is not itself an individual right appropriate for standard criteria selection under the state equal protection clause; it is merely a particularized expression of the right to equal treatment of those similarly situated, the general principle underlying the equal protection clause. AS 23.30.175(c, d); Const. Art. 1, § 1.

8. Constitutional Law ⇨83(1)

Right of interstate migration is part of State Constitution.

9. Constitutional Law ⇨83(1)

Suspicion with which Supreme Court will view infringements upon right to travel depends upon degree to which challenged law can be said to penalize exercise of right, which in turn depends upon objective degree to which challenged legislation tends to deter interstate travel. Const. Art. 1, § 1.

10. Constitutional Law ⇨225.1

In analyzing statute which tends to deter interstate migration under either state or federal equal protection clauses, there is no requirement to demonstrate actual deterrence of right to travel; relevant criteria are the fact and the severity of the restric-

tion. U.S.C.A. Const. Amend. 14; Const. Art. 1, § 1.

11. Constitutional Law ⇨245(4)**Workers' Compensation** ⇨26

State's asserted goal of lowering insurance premiums in enacting statute adjusting benefits of workers' compensation recipients who move out of state can have no independent force in state's attempt to meet its burden of justifying statute under the equal protection clause; although reducing costs to taxpayers or consumers is a legitimate government goal in one sense, savings will always be achieved by excluding class of persons from benefits they would otherwise receive and is justifiable only when effected through independently legitimate distinctions. AS 23.30.175(c, d); Const. Art. 1, § 1.

12. Constitutional Law ⇨245(4)**Workers' Compensation** ⇨26

For equal protection purposes, statute adjusting benefits of workers' compensation recipients who move out of state based on average weekly wage of state into which recipient moves advances important state interests in avoiding disincentives to rehabilitation and in creating incentives for insured workers to go back to work, the effectiveness of which incentives may depend on cost of living in state in which worker lives, since worker's unadjusted compensation benefits may in terms of real income be in excess of actual wage he or she received when employed if injured worker is able to live in an area where general cost of living is much lower than in state in which he worked. AS 23.30.175(c, d); Const. Art. 1, § 1.

13. Constitutional Law ⇨213.1(2)

Under state equal protection analysis, the Supreme Court examines "the closeness of the means-to-ends fit" between legislation and its purported goals. Const. Art. 1, § 1.

14. Constitutional Law ⇨245(4)

Under the equal protection clause, when examining impact of statute adjusting benefits of workers' compensation re-

recipients who moved out of state on right of interstate migration, relevant questions are whether statute operates in such a way that reasonable recipient would be deterred from exercising right to travel, and degree of such deterrence. AS 23.30.175(c, d); Const. Art. 1, § 1.

15. Constitutional Law ⇨83(1)

Statute adjusting benefits of workers' compensation recipients who move out of state based on average weekly wage of state to which recipient moves imposes a substantial penalty upon exercise by recipients of right to travel out of state; accordingly, burden on state to justify legislation is a very high one. AS 23.30.175(c, d); Const. Art. 1, § 1.

16. Constitutional Law ⇨83(1)

Workers' Compensation ⇨26

State failed to meet its burden of justifying burden imposed on interstate travel by statute adjusting benefits for workers' compensation recipients who moved out of state based on average weekly wage in state to which recipient moved, and 1982 and 1983 amendments to such statute which did not materially alter relevant provisions, since there would not necessarily be any correlation between wages and cost of living and statute would always carry with it the risk that adjustment it effected would overcompensate for any cost of living differential that existed between Alaska and other states; therefore, statute was invalid under the state equal protection clause. AS 23.30.175(c, d); Const. Art. 1, § 1.

17. Civil Rights ⇨13.5(1)

Most of rights secured by Constitution are protected only against governmental infringement.

18. Civil Rights ⇨13.4(1)

Private entities who regulate their behavior in good-faith compliance with a validly enacted law cannot by fact of that

* Dimond, Senior Justice, sitting by assignment made pursuant to article IV, section 11 of the

compliance be held legally responsible for constitutional defects in the law.

19. Civil Rights ⇨13.17(3)

Workers' compensation insurer which in good faith reduced payments, pursuant to statute, to recipients who had moved out of state, would not be assessed damages for additional benefits such recipients would have received if statute requiring such adjustments had not been enacted upon determination that statute was unconstitutional. AS 23.30.175(c, d); Const. Art. 1, § 1.

Robert Draper, O'Melveny & Myers, Los Angeles, Cal., and Randall J. Weddle, Faulkner, Banfield, Doogan & Holmes, Anchorage, for appellant Alaska Pacific Assur. Co.

Linda Scoccia, Asst. Atty. Gen., Wilson L. Condon, Atty. Gen., Juneau, for appellant State of Alaska.

Patrick B. Gilmore and Jerome H. Juday, Atkinson, Conway, Bell & Gagnon, Anchorage, and Herbert Colden, Los Angeles, Cal., for appellee.

Before BURKE, C.J., RABINOWITZ, MATTHEWS and COMPTON, JJ., and DIMOND, Senior Justice.*

OPINION

RABINOWITZ, Justice.

This appeal involves the constitutionality of former AS 23.30.175(d), which adjusted the benefits of Alaska workers' compensation recipients who had moved out of state. AS 23.30.175(d) provided:

For a recipient who resides in a state other than Alaska, the weekly rate of compensation shall be the weekly grant he would have received if he resided in Alaska times the ratio of the average weekly wage of the state in which he resides and the average weekly wage of Alaska. For the purposes of this chap-

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ter, absence from Alaska for a continuous period of more than 90 days creates a rebuttable presumption of nonresiden-

tial status; however, this presumption does not arise if the absence from Alaska is for medical or rehabilitation services.¹

1. This provision was amended in 1982 along with the whole of AS 23.30.175. 1982 Alaska Sess.Laws, chap. 93, §§ 16-18, 27. Former section 175(d), the substance of which survives for purposes of this appeal, was reclassified as section 175(c). For convenience we will speak only of section 175(d) in this opinion, with the understanding that both the old and new versions are included in this reference. Former AS 23.30.175 read in its entirety as follows:

Rates of compensation. (a) The weekly rate of compensation for disability or death for a recipient residing in Alaska may not exceed the percentage of the Alaska average weekly wage in effect on the date of injury as determined by the table contained in this subsection and initially may not be less than \$65 a week. However, if the board determines that the employee's average weekly wages are less than \$65 a week as computed under AS 23.30.220, it shall issue an order decreasing the compensation to a rate equal to the employee's average weekly wages, and payments made earlier in excess of the decreased rate shall be deducted from the unpaid compensation in the manner the board determines. In any case, the employer shall pay timely compensation.

On	The Rate Shall Be
July 2, 1975	80 per cent of the Alaska average weekly wage
January 1, 1976	100 per cent of the Alaska average weekly wage
January 1, 1977	133.3 per cent of the Alaska average weekly wage
January 1, 1979	166.6 per cent of the Alaska average weekly wage
January 1, 1981	200 per cent of the Alaska average weekly wage

(b) As soon as practicable after June 30 of each year, and before December 15 of each year, the commissioner shall determine the Alaska average weekly wage for the three consecutive calendar quarters ending June 30. This determination is the applicable Alaska average weekly wage for the annual period beginning with January 1 of the next year and ending December 31. The initial determination under this subsection shall be made as soon as practicable after May 22, 1975. The average weekly wage calculation for Alaska shall be based on the wages of all employees in the state, both public and private, who are covered by this chapter.

(c) For the purposes of determining the average weekly wage of a state other than Alaska, the commissioner shall adopt the average weekly wage as computed and published by the state agency responsible for administering the workers' compensation laws of that state. For those states in which no such figure is

published, the commissioner shall adopt the average weekly wage for that state as published by the United States Secretary of Labor for the purposes of the Longshoremen's and Harbor Workers' Compensation Act (P.L. 69-803; 44 Stat. 1424; 33 U.S.C. 901 et seq.). The average weekly wage as calculated for all states shall be made available to the public.

(d) For a recipient who resides in a state other than Alaska, the weekly rate of compensation shall be the weekly grant he would have received if he resided in Alaska times the ratio of the average weekly wage of the state in which he resides and the average weekly wage of Alaska. For the purposes of this chapter, absence from Alaska for a continuous period of more than 90 days creates a rebuttable presumption of nonresidential status; however, this presumption does not arise if the absence from Alaska is for medical or rehabilitation services.

(e) For a recipient who resides in a jurisdiction other than a state as defined in (f) of this section, the weekly rate of compensation shall be the weekly grant he would have received if he resided in Alaska times the ratio of the average weekly wage of the jurisdiction in which he resides, as determined by the commissioner, and the average weekly wage of Alaska.

(f) In this section "state" means a state of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Trust Territory of the Pacific Islands.

In 1982 and 1983 the statute was amended in several respects. The current version of AS 23.30.175 provides:

Rates of compensation. (a) The weekly rate of compensation for disability or death for a recipient residing in Alaska may not exceed the percentage of the Alaska average weekly wage in effect on the date of injury as determined by the table contained in this subsection and initially may not be less than \$110 a week. However, if the board determines that the employee's spendable weekly wages are less than \$110 a week as computed under AS 23.30.220, it shall issue an order decreasing the weekly rate of compensation to a rate equal to the employee's spendable weekly wages, and payments made earlier in excess of the decreased rate shall be deducted from the unpaid compensation in the manner the board determines. In any case, the employer shall pay timely compensation.

On	The Rate Shall Be
July 2, 1975	80 per cent of the Alaska average weekly wage
January 1, 1976	100 per cent of the Alaska average weekly wage

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On January 22, 1977, Robert Brown injured his left ankle and leg while employed as an electrical foreman during construction of the Trans-Alaska Pipeline. He received temporary disability benefits under the Alaska Workers' Compensation Act. After the injury, Brown returned to his home in California, and his benefits were adjusted under AS 23.30.175(d). If Brown had remained in Alaska, he would have received \$551.86 per week. Under the adjustment provision, however, his benefits were reduced to \$211.91 per week.

In June 1979, Brown filed a class action complaint against the Alaska Pacific Assurance Company (ALPAC), the insurance carrier for Brown's employer. Brown alleged that section 175(d) violated federal and state equal protection and due process

On	The Rate Shall Be
January 1, 1977	133.3 per cent of the Alaska average weekly wage
January 1, 1979	166.6 per cent of the Alaska average weekly wage
January 1, 1981	200 per cent of the Alaska average weekly wage

(b) After June 30 and before December 1 of each year, the commissioner shall adopt and publish the average weekly wage for each jurisdiction for the preceding calendar year as published by the United States Secretary of Labor for the purposes of unemployment insurance. In determining the rate of compensation the commissioner shall use the average weekly wage figure for each jurisdiction, including Alaska, for which the Secretary of Labor computes an average weekly wage. These figures are the applicable average weekly wages for those jurisdictions for the following calendar year.

(c) The following rules apply to recipients who do not reside in Alaska:

(1) The weekly rate of compensation shall be calculated by multiplying the recipient's weekly compensation rate calculated in accordance with AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215 times the ratio of the average weekly wage of the jurisdiction in which the recipient resides to the average weekly wage of Alaska. The ratio is based on the average weekly wages in effect when the recipient leaves Alaska and shall be adjusted annually upon publication of the average weekly wages for all jurisdictions.

(2) The calculation required by this subsection does not apply if the recipient is absent from Alaska for medical or rehabilitation services not reasonably available in Alaska.

(3) If the spendable weekly wage of the recipient and the resulting compensation rate is determined under AS 23.30.220(a)(1), the

guarantees, and the privileges and immunities and commerce clauses of the federal Constitution, and requested monetary damages as well as declaratory and injunctive relief.² Brown thereafter filed a motion for partial summary judgment, requesting that section 175(d) be declared unconstitutional and that the plaintiffs be awarded damages and injunctive relief. ALPAC and the State both filed cross-motions for partial summary judgment, requesting that section 175(d) be declared constitutional. ALPAC also requested that if the superior court invalidated the statute it not give retroactive effect to its ruling and thus deny any claims for damages.

The superior court declared AS 23.30.175(c)-(f) unconstitutional under Alaska's equal protection clause.³ The court reject-

calculation required by this subsection applies to only those wages earned in Alaska.

(4) Application of this subsection may not result in a reduction of the weekly compensation rate to less than \$110 a week except as provided in (a) of this section.

(d) In a jurisdiction for which no average weekly wage is computed by the United States Secretary of Labor for the purposes of unemployment insurance, the average weekly wage shall be as determined by the commissioner. Both current and former AS 23.30.175 must be considered since Brown seeks retroactive and prospective relief. For the purposes of our analysis we do not view the new section 175 as substantially different from its predecessor. It is true that the statute's operation has changed in several respects. Differences in the old and new version will be examined as they become relevant to our discussion.

2. The state intervened in September 1979. Under Alaska R.Civ.P. 24(c), the state may intervene in any action "[w]hen the constitutionality of a state statute affecting the public interest is drawn in question."

3. The superior court applied the three-part state equal protection formula set forth in *State v. Erickson*, 574 P.2d 1, 12 (Alaska 1978). The court found that the statute served the legitimate state purposes of reducing workers' compensation insurance premiums for Alaska employers and eliminating disincentives for non-resident recipients to return to work. The court also found that the statute substantially furthered its intended purposes. The court reasoned that "[u]nquestionably the reduction of the amounts paid to the many non-resident recipients of disability benefits will reduce the

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ed ALPAC's contention that its decision should only be applied prospectively under the test set forth in *Plumley v. Hale*, 594 P.2d 497 (Alaska 1979). Class members were awarded damages in the amount of benefits they would have received if AS 23.30.175 had never been enacted.⁴ We affirm that portion of the superior court's decision striking down the adjustment provision but reverse with respect to ALPAC's liability for damages.

I. STATE EQUAL PROTECTION

Alaska's own equal protection analysis was engendered in *Isakson v. Rickey*, 550 P.2d 359 (Alaska 1976), and *State v. Erickson*, 574 P.2d 1 (Alaska 1978).⁵ *Erickson* articulated an adjustable "uniform-balancing" test which placed a greater or lesser burden on the state to justify a classification depending on the importance of the individual right involved. *Id.* at 12. In effect, *Erickson* created a continuum of available levels of scrutiny, beginning with the rational basis test described in *Isakson*, 550 P.2d at 362-63, and ending with the functional equivalent of the federal compelling state interest test at the highest level of review.

[1, 2] In *Erickson* we looked first to the legitimacy of the state purposes behind challenged legislation, second to the relationship between the chosen means and the asserted goals of the statute, and third to the state's interest in the means chosen as balanced against the nature of the constitu-

total amount of insurance premiums to be paid and tend to persuade the recipients to return to work." Finally, the court weighed the state's interest in the means employed against "the extent to which the affected persons' constitutional rights may be impaired." At this stage of the *Erickson* test the court found AS 23.30.175 to be defective. First, the court concluded that the adjustment provision "caused a severe reduction in the purchasing power, in real terms, of the monetary benefits paid to disabled non-residents." As a result of this reduction, the court concluded that "disabled workers are strongly deterred from exercising their constitutional right to travel and take up residence in another state." Further, the court suggested that "the Legislature, by simply utilizing relative cost of living statistics, could have achieved its twin goals without the substantial infringement

tional right infringed. 574 P.2d at 12. Our recent opinion in *State v. Ostrosky*, 667 P.2d 1184 (Alaska 1983), formally revised the order of the analytic stages of *Erickson*. First, it must be determined at the outset what weight should be afforded the constitutional interest impaired by the challenged enactment. The nature of this interest is the most important variable in fixing the appropriate level of review. Thus, the initial inquiry under article I, section 1 of Alaska's constitution goes to the level of scrutiny. *Ostrosky*, 667 P.2d at 1192-93 & n. 14. Depending upon the primacy of the interest involved, the state will have a greater or lesser burden in justifying its legislation.

[3] Second, an examination must be undertaken of the purposes served by a challenged statute. Depending on the level of review determined, the state may be required to show only that its objectives were legitimate, at the low end of the continuum, or, at the high end of the scale, that the legislation was motivated by a compelling state interest.

[4] Third, an evaluation of the state's interest in the particular means employed to further its goals must be undertaken. Once again, the state's burden will differ in accordance with the determination of the level of scrutiny under the first stage of analysis. At the low end of the sliding scale, we have held that a substantial relationship between means and ends is consti-

of the right to travel which is entailed in the use of average weekly wage statistics."

4. The superior court awarded interest, and specified that no persons who had withdrawn from the class were to receive past benefits.

5. On appeal Brown invokes a host of constitutional theories in support of the result reached by the superior court. Because we conclude that the superior court was correct in ruling AS 23.30.175 unconstitutional under the state equal protection clause, we do not pass formal judgment on the other arguments raised. Compare *Carlson v. State*, 598 P.2d 969, 973 (Alaska 1979); *Davis v. Hallett*, 587 P.2d 1170, 1171 (Alaska 1978).

tutionally adequate. At the higher end of the scale, the fit between means and ends must be much closer. If the purpose can be accomplished by a less restrictive alternative, the classification will be invalidated.

[5] Thus, under *Ostrosky* our first inquiry goes to the level of scrutiny. This is "to be determined by the importance of the individual rights asserted and by the degree of suspicion with which we view the resulting classification scheme." 667 P.2d at 1192-93. Two areas of concern relevant to our inquiry are identifiable at this stage. First, Brown asserts a right to receive the full measure of workers' compensation benefits which he would receive but for the classification created by AS 23.30.175(d). Second, Brown asserts that his constitutional right to travel is directly burdened by the operation of the adjustment provision.

[6] No authority has been cited by Brown for the proposition that, as a matter

6. See *Wien Air Alaska v. Arant*, 592 P.2d 352, 360 (Alaska 1979), and the versions of AS 23.30.185, AS 23.30.190(a), and AS 23.30.200 in effect when Brown was injured. The House Committee Report accompanying amendments to the federal Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq., states that, "The basic requirement of the Act is for the injured worker to receive 66 2/3% of his average weekly wage." House Comm. on Education and Labor, Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, H.R. Rep. No. 92-1441, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Ad. News 4698, 4700.

7. AS 23.30.175(a), *supra* note 1, creates an absolute ceiling for benefits of all classes based upon the current average wages in Alaska. For the concept of "spendable weekly wage" and the associated 80% rule, see AS 23.30.220 and the state statutes cited at note 6 *supra*.

Although actual pre-injury earnings are generally the measure of compensation, they are not always used. Where actual earnings are thought not to fairly represent wage-earning capacity the Board can make adjustments, as it can in special cases of apprentices and volunteer firemen. See AS 23.30.210, AS 23.30.220(a)(2), (3) and (4). Similar rules were in effect when Brown was injured.

8. AS 23.30.130(a) provides:

(a) Upon its own initiative, or upon the application of any party in interest on the ground of a change in conditions, including, for the purposes of AS 23.30.175, a change in residence, or because of a mistake in its determi-

of constitutional law, workers' compensation benefits must be set at any particular level. Although the rule of thumb often stated is that benefits should approximate two-thirds of the worker's salary at the time of injury,⁶ this is hardly a constitutional mandate. It is no longer the rule in Alaska, which now attempts to pay an injured worker four-fifths of his or her "spendable weekly wage," and even this rule of thumb figure is subject to a fixed ceiling, so that some highly-paid workers receive only a small fraction of their former earnings in compensation benefits.⁷ Further, Alaska benefits may be modified under AS 23.30.130 if a sufficient "change in conditions" is demonstrated to warrant either an increase or decrease in the original award.⁸ AS 23.30.175(d) might be viewed as a blanket "change in condition" adjustment for workers who have moved out of state.⁹ Even though the "change"

nation of a fact, the board may, before one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or before one year after the rejection of a claim, review a compensation case in accordance with the procedure prescribed in respect of claims in AS 23.30.100. In accordance with AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation.

9. The bulk of "reopening" cases involve a claim by the worker that his or her disability has worsened and that his or her benefits should go up. A substantial portion of reopenings, however, are brought by employers or carriers who assert that the initial award overestimated the extent of the worker's disability, and that it is appropriate to reduce his or her benefits. Normally the debate centers upon the physical condition of the recipient. 3 A. Larson, *The Law of Workmen's Compensation*, § 81.31(a) at 15-553-554.18 (1983). As to whether economic changes may not also be considered, the small number of cases on point have split on the question. 3 Larson, § 81.31(e) at 15-554.41-554.42. See *Lerner v. Jakwall Embroidery Co.*, 203 A.D. 381, 196 N.Y.S. 736, 738 (1922) (rule allowing for compensation to be changed "as wages vary from time to time" would produce constant reopenings and administrative confusion); *McCormick S.S. Co. v. U.S. Employees' Compensation Comm'n*, 64 F.2d 84, 86 (9th Cir. 1933) (reopenings under the federal statute not

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to which section 175(d) reacts is one in economic condition, we cannot say that a worker has an inherent right to benefits set in disregard of his or her economic environment.

[7] Brown's argument, however, is something different than this. The basis of his claim is not that section 175(d) adjusts benefits according to criteria which are impermissible per se. Rather, he asserts that non-resident workers who fall under section 175(d) are subject to criteria different than applied to non-section 175(d) recipients. Brown thus states the following interest for the purposes of equal protection analysis: the right of section 175(d) recipients to have their workers' compensation benefits determined in relation to the same factors that are applied to workers' compensation recipients in general. This, however, is merely a particularized expression of the right to equal treatment of those similarly situated, the general principle underlying our equal protection clause. It is not itself an individual right appropriate for standard criteria selection.

warranted because of changed economic conditions).

10. Both the analysis and the terms of art within the context of Alaska's right to travel guarantee are different than in the federal law. Migration cases in the federal courts adopt the rigid two-tiered analysis characteristic of federal equal protection. In order for strict scrutiny to apply, it must be shown that the classification burdens "basic necessities of life" or some "fundamental political right." *Zobel I*, 619 P.2d at 426; *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 259, 94 S.Ct. 1076, 1082, 39 L.Ed.2d 306, 315 (1974). If a lesser individual interest is implicated by the state's classification, the test of minimum rationality is employed. *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975). In the federal courts, the right to travel is "penalized" only if a right sufficient to invoke the strict scrutiny test is impaired. See *Zobel II*, 619 P.2d at 454-55. Prior to *Zobel I* and *Zobel II* we viewed the right to travel as a fundamental right per se, and uniformly invoked the compelling state interest test in reviewing durational residence requirements. *State v. Wylie*, 516 P.2d 142, 147 (Alaska 1973); see, e.g., *Hicklin v. Orbeck*, 565 P.2d 159, 166 (Alaska 1977), *rev'd on other grounds*, 437 U.S. 318, 98 S.Ct. 2482, 57

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[8-10] AS 23.30.175(d) distinguishes recipients who remain in Alaska from those who move out of state. Thus, Brown asserts that section 175(d) imposes a direct penalty upon those recipients who choose to leave Alaska, and thereby burdens their right to travel. The right of interstate migration is a part of the Alaska Constitution. *Williams v. Zobel (Zobel II)*, 619 P.2d 448, 452 (Alaska 1980), *rev'd on other grounds*, 457 U.S. 55, 102 S.Ct. 2309, 72 L.Ed.2d 672 (1982). The suspicion with which this court will view infringements upon the right to travel depends upon the degree to which the challenged law can be said to penalize exercise of the right. See *id.* at 457-58; *Williams v. Zobel (Zobel I)*, 619 P.2d 422, 432-33 (Alaska 1980) (Rabinowitz, C.J., concurring).¹⁰ This in turn depends upon the objective degree to which the challenged legislation tends to deter interstate migration.¹¹

One central area of dispute in this case is whether section 175(d) has any adverse impact upon recipients affected. The state and ALPAC argue that there is no negative effect, and that section 175(d) is necessary to prevent workers who move out of state

L.Ed.2d 397 (1978); *Thomas v. Bailey*, 595 P.2d 1, 10 (Alaska 1979) (Rabinowitz, J., concurring). In *Zobel I* and *Zobel II*, however, we announced a new framework for the examination of migration rights under the state constitution. In *Zobel II* we stated:

[W]e will no longer regard a' durational residency requirements as automatically triggering strict scrutiny and requiring a showing that such a classification is absolutely necessary to promote a compelling state interest. Instead, we will balance the nature and extent of the infringement on this right caused by the classification against the state's purpose in enacting the statute and the fairness and substantiality of the relationship between that purpose and the classification.

619 P.2d at 453 (footnote omitted). Because in *Zobel II* we concluded that the right to migrate into Alaska was not penalized in any respect by the legislative scheme at issue, we applied the lowest level of review under *Erickson*. 619 P.2d at 458-60.

11. There is no requirement to demonstrate actual deterrence of the right to travel in state or federal law. *Zobel II*, 619 P.2d at 458 & n. 32. The relevant criteria are the fact and the severity of the restriction.

from reaping a "windfall" in real terms through the exportation of Alaska benefits to the respective economies of our sister states. The parties' contentions regarding whether the right to travel is burdened by § 175(d) and the extent of that burden are related both to the selection of the standard of review and the question of whether the statute is fairly designed to accomplish its purposes. We will therefore defer discussion of this point until a discussion of the statutory purposes.

A. *The Purposes Furthered by AS 23.30.175(d).*

According to appellants, two broad categories of purposes are served by the adjustment provision. First, AS 23.30.175(d) achieves a "reduction of the cost of insurance premiums" paid by Alaska employers. Second, it is designed to align benefit levels to the economic environment of the recipient. ALPAC and the State argue that this serves to eliminate distortions and discriminations which would otherwise occur, in contravention of fundamental premises of workers' compensation.

[11] We hold that the asserted goal of lowering insurance premiums can have no independent force in the state's attempt to meet its burden under the equal protection clause. Although reducing costs to taxpayers or consumers is a legitimate government goal in one sense, savings will always be achieved by excluding a class of persons from benefits they would otherwise receive. Such economizing is justifiable only when effected through independently legitimate distinctions.¹²

12. In *Plyler v. Doe*, 457 U.S. 202, 227, 102 S.Ct. 2382, 2400, 72 L.Ed.2d 786, 806 (1982), the Supreme Court stated that "a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources." Earlier precedent held that fiscal considerations could not be used to explain invidious classifications. *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 263, 94 S.Ct. 1076, 1084, 39 L.Ed.2d 306, 318 (1974); *Graham v. Richardson*, 403 U.S. 365, 374-75, 91 S.Ct. 1848, 1853-54, 29 L.Ed.2d 534, 543 (1971); *Shapiro v. Thompson*, 394 U.S. 618, 633, 89 S.Ct. 1322, 1330, 22 L.Ed.2d 600, 614 (1969).

[12] The second goal proffered by the state and ALPAC is that AS 23.30.175(d) attempts to adjust benefit levels to the economic environment of recipients. The premise here is that a specified amount of money is worth something different in another state than it is in Alaska. Taking Brown's case as an example, the argument would be that the \$212 weekly payment received by Brown in California has the same real value as the \$552 he would have received in Alaska.

Appellants argue that adjustment to the wage levels in the recipient's locality is an important state goal for two reasons. First, they claim that Alaska-level benefits lose their relation to prospective earning capacity when a recipient moves to a different economic environment. According to ALPAC and the State, we are bound to recognize that a recipient's earning power varies with his place of residence.

Second, appellants point to a functional objective of disability compensation which would be frustrated if out-of-state recipients were allowed to receive benefits outstripping their geographically-determined earning power. The state argues that "[a]nother major goal of the workers' compensation system is the rehabilitation of the injured worker." Consistent with this goal, appellants assert that the state has a strong interest in ensuring that benefit levels are not so high for some recipients that they discourage the recipients from returning to work.¹³

We do not accept appellants' premise that earning power is exclusively determined by place of present residence. A

13. Cf. *Richardson v. Belcher*, 404 U.S. 78, 83-84, 92 S.Ct. 254, 258-259, 30 L.Ed.2d 231, 235-36 (1971) (upholding offset provision in federal social security act reducing social security benefits for recipients also receiving workers' compensation). AS 23.30.187 ("Compensation is not payable to an employee under [the permanent and temporary total disability statutes] for a week in which the employee receives unemployment benefits") appears to serve a similar purpose.

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flaw runs through each of appellants' arguments regarding the importance of the state's interest in the goal of adjusting benefit levels to the economic environment of the recipient. It must be remembered that the statute pursues equality in terms of the prospective pre-injury earning capacity of each recipient. We think it unsupportable to redefine earning capacity when a recipient changes his geographical residence. A worker's earning capacity is primarily determined both by the worker's skills and by his or her ability to seek out markets for his or her labor. As Brown points out, the members of the plaintiff class "have a demonstrated capacity to travel to high wage areas."¹⁴

Yet we agree that the State has important interests in avoiding disincentives to rehabilitation and in creating incentives for injured workers to go back to work, and we agree that the effectiveness of these incentives may depend on the cost of living in the state in which the worker lives. The mechanism by which the Alaska Workers' Compensation Act generally protects the state interests in rehabilitation and return to work is by setting benefit levels for each recipient below what he or she was actually making at the time of injury. See AS 23.30.175(a). As a general proposition lower benefit levels will carry a lesser danger of disincentive no matter where the recipient is located. However, if an injured worker is able to live in an area where the general cost of living is much lower than in Alaska, the worker's unadjusted compensation benefits may in terms of real income be in excess of the actual wage he or she received when employed, and paying the worker unadjusted amounts of benefits may actually discourage a return to work.

B. Application of Standard of Review.

[13] Under our equal protection analysis we examine "the closeness of the

means-to-ends fit" between the legislation and its purported goals. *Ostrosky*, 667 P.2d at 1193. Accepting the proposition that the legislature may attempt to adjust the benefits of workers' compensation recipients based on their economic environment as defined in terms of geographic location, it remains to be determined whether AS 23.30.175(d) is well designed to achieve this objective. We hold that section 175(d) imposes a substantial penalty upon the exercise by Brown and the plaintiff class of the right to travel out of Alaska. Accordingly, the burden on the state to justify this legislation is a very high one.

[14] When examining section 175(d)'s impact on the right of interstate migration, the relevant questions are whether section 175(d) operates in such a way that the reasonable recipient would be deterred from exercising the right to travel, and the degree of that deterrence.¹⁵

[15] The State argues that injured workers who leave Alaska and thus come within the coverage of section 175(d) are really in no worse a position than workers who stay within the state and continue to receive unadjusted benefits. The State's rationale is that workers within Alaska receive benefits which reflect wages they could be earning in Alaska but for their injury, and workers within other states receive benefits related to the money they could be earning in their particular state if they were suddenly returned to health. Thus the State argues that section 175(d) recipients are in the same position as other recipients, and the exercise of their travel rights is not deterred.

An extension of the State's argument is that workers' compensation recipients will not be inhibited in exercising their migration rights by the fact that their benefits out of Alaska will be lower than benefits within Alaska. The recipients will be satis-

14. If we posit the example of a pipe-fitter injured in Alaska who chooses to convalesce in Oregon, we think that the fact of his repose in Oregon casts no inference concerning his inclination to return to work in Alaska if he were healthy.

15. We follow the federal rule that no showing of actual deterrence need be made. The standard is an objective one. See *supra* note 11.

fied, at least to the extent that their travel decisions will not be influenced, with the knowledge that their benefits bear the same relation to the average wages of their state of residence as they would have borne to Alaska wages had they remained in Alaska. We think that this is an unrealistic and untenable view of section 175(d)'s impact upon the interstate movement of disability recipients.

The appellants' argument regarding the degree to which section 175(d) penalizes the right to travel would be more persuasive if the adjustment calculation were based upon reasonably accurate cost of living statistics from other states rather than upon wage levels in those states. If there were a way to equalize the buying power of benefit dollars in each state we would have difficulty in concluding that recipients would thereby suffer any penalty despite a reduction in actual dollars paid to out-of-state workers.

[16] In holding section 175(d) unconstitutional, the superior court found that "the reduction in the average weekly wage which occurs when one travels from Alaska to the other States exceeds the reduction which results in the cost of living." Relying on a 1975 report of the Alaska Legislative Affairs Agency, the superior court concluded that a disabled worker "who moved in 1974 from Anchorage to a location in another State stood to suffer an average benefit reduction of approximately 142% of the reduction in the cost of living." The court stated that no reason had been advanced, and it could think of none, for supposing that the reduction in recipients' purchasing power effected by section 175(d) had done anything other than gotten worse since 1975. Based upon its comparative analysis of the statistics, the superior court found that "disabled workers are strongly deterred from exercising their constitutional right to travel and take up residence in another State."

The response made by ALPAC and the State to the superior court's finding is an indirect one. Appellants argue that it was not feasible for the legislature to key sec-

tion 175(d)'s adjustment to cost of living statistics because no reliable statistics of this kind exist. Further, the cost of living statistics published by the United States Department of Labor will no longer be available after 1982. Thus appellants contend that the legislature could not have incorporated those statistics into section 175(d).

Accepting for purposes of argument the inadequacy of all available cost of living statistics, this fact does not justify the substitution of a different statistical base and the measure of a different economic variable. Both sides apparently concede that there is no necessary correlation between wages and cost of living. AS 23.30.175(d) will therefore always carry with it the risk that the adjustment it effects will overcompensate for any cost of living differential that exists between Alaska and other states. The State notes that there is an "up side" to this risk, in that workers who move to a state where wages in relation to those in Alaska are higher than the relative cost of living will receive more in actual benefit value than they would receive in Alaska. However, this does not vitiate the finding of penalty made by the superior court. The risk of severe benefit reductions based upon variations in economic conditions which do not reflect the purchasing power of benefit dollars is a significant penalty in itself. By all appearances the current effect of section 175(d) is arbitrarily to over-deflate benefits for actual cost of living differentials. It is thus evident that the "down side" of the risk created by the incorporation of wage figures is quite real.

We conclude that the State has failed to meet its high burden. We affirm that portion of the superior court's opinion invalidating former AS 23.30.175(d) on state equal protection grounds. Because we do not view the 1982 and 1983 amendments to section 175 as materially altering the provision within the analysis of this decision, we hold also that AS 23.30.175(c) as currently enacted is also invalid.

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II. DAMAGES

Upon declaring former AS 23.30.175(d) unconstitutional, the superior court assessed damages against ALPAC for the additional benefits members of the plaintiff class would have received if section 175(d) had not been enacted. ALPAC argues on appeal that it is a private entity and should not be found liable in damages for its good faith compliance with a statute.

There are three conceivable causes of action available to Brown in this case which might support a damages suit against ALPAC. Under the federal law, 42 U.S.C. § 1983 subjects "any person" to damages liability who "under color of state law" deprives another of federally-guaranteed rights.¹⁶ Aside from section 1983, it is now well established in the federal courts that some provisions of the United States Constitution may be enforced in a suit for damages even in the absence of a specific statute supplying a cause of action. *Carlson v. Green*, 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980) (eighth amendment); *Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979) (fifth amendment); *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) (fourth amendment). Finally, Brown suggests that we should find a *Bivens*-type implied damages remedy is available under the state constitution. See *King v. Alaska*

State Housing Authority, 633 P.2d 256, 259-61 (Alaska 1981).

Assuming the existence of all three rights of action outlined above, it is next necessary to determine whether ALPAC is a proper defendant. Here Brown's claim encounters a major obstacle. Under all three theories it is necessary that ALPAC acted in some way which caused injury to the plaintiff class. Based upon Brown's arguments, it is difficult to identify what conduct on the part of ALPAC should be held to give rise to liability.

[17] Brown argues at length that the adjustment scheme in section 175(d) is the product of state action, and that ALPAC should therefore be vulnerable to a suit in damages. It is hornbook law that most of the rights secured by the constitution are protected only against governmental infringement. *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 156, 98 S.Ct. 1729, 1733, 56 L.Ed.2d 185, 193 (1978); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349, 95 S.Ct. 449, 452, 42 L.Ed.2d 477, 483 (1974). Private parties may sometimes be subjected to suit because they have usurped or assumed functions traditionally exercised only by the government, or because their actions were taken in collaboration with action by the state. See *Gerena v. Puerto Rico Legal Services, Inc.*, 697 F.2d 447, 449-52 (1st Cir.1983).¹⁷ Even in

16. 42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

17. See also *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982). The *Lugar* Court reviewed two prerequisites that exist for the right to sue a private party under 42 U.S.C. § 1983:

First, the deprivation must be caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible.... Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state. Without a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them.

at 937, 102 S.Ct. at 2754, 73 L.Ed.2d at 495. The lower federal courts have been active in the short time since the *Lugar* decision in interpreting the "state actor" requirement. See *Coleman v. Turpen*, 697 F.2d 1341, 1345 (10th Cir.1983); *Gerena, supra*, at 449-52; *Adams v. Bain*, 697

cases where a cause of action is found to lie against a private party for the violation of the constitutional rights of another, it is a substantial additional leap to find that the private defendant may be liable in damages. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 942 n. 23, 102 S.Ct. 2744, 2757 n. 23, 73 L.Ed.2d 482, 499 n. 23 (1982); *Adickes v. Kress & Co.*, 398 U.S. 144, 174 n. 44, 90 S.Ct. 1598, 1617 n. 44, 26 L.Ed.2d 142, 163 n. 44 (1970). The Supreme Court in *Lugar*, although not passing upon the issue, suggested that there should be an affirmative defense for "private individuals who innocently make use of seemingly valid state laws." 457 U.S. at 942 n. 23, 102 S.Ct. at 2757 n. 23, 73 L.Ed.2d at 499 n. 23.

The general rule against private party liability for constitutional transgressions has particular force in the setting of this case. Were we to hold ALPAC liable in damages, we would in effect be creating an affirmative duty running to private persons to disobey unconstitutional statutes in advance of a judicial determination of the laws' validity.¹⁸ This we are reluctant to do.

[18, 19] We therefore conclude that private entities who regulate their behavior in good faith compliance with a validly enact-

F.2d 1213, 1217 (4th Cir.1982); *Daniels v. Twin Oaks Nursing Home*, 692 F.2d 1321, 1332-35 (11th Cir.1982) (Hoffman, District Judge, concurring); *Earnest v. Lowentritt*, 690 F.2d 1198, 1200-02 (5th Cir.1982).

18. The class action complaint filed by Brown against ALPAC illustrates the difficulty of this point. Brown alleged that, "[a]s a result of the enactment and enforcement of AS 23.30.175, [ALPAC] has wrongfully withheld monies due and owing Plaintiff BROWN and all other members of the class." ALPAC neither enacted section 175, nor was responsible for its enforcement. Second, Brown's complaint stated that "[ALPAC] has been unjustly enriched in an amount equal to the difference between the benefits actually paid to Plaintiff and other class members, and the benefits which would have been paid if the Plaintiff and other class members had resided in the State of Alaska at the time of payment." Brown's factual assertion on this score, however, ignores the relationship between benefits paid by the insurance carrier and premiums assessed against the employer. Brown has cited no evidence for the proposition

ed law cannot by the fact of their compliance be held legally responsible for constitutional defects in the law. We hold that the award of damages against ALPAC cannot be sustained.¹⁹ The decision below is AFFIRMED in part, and REVERSED in part, in accordance with this opinion.

MOORE, J., not participating.

COMPTON, Justice, dissenting.

I dissent from the court's holding that former AS 23.30.175(d) violates the equal protection clause of the Alaska Constitution.

First, I object to the court's conclusion "that section 175(d) imposes a substantial penalty upon the exercise by Brown and the plaintiff class of the right to travel out of Alaska." 687 P.2d at 273 (Alaska 1984). I acknowledge that a reduction in workers' compensation may influence an injured worker's decision on whether to convalesce outside of Alaska; however, I do not believe that section 175(d) actually penalizes a person's right to travel.

The interest of an injured worker convalescing outside of Alaska in receiving the same benefits as he would receive were he convalescing in Alaska is placed in its prop-

erty that ALPAC continued to collect premiums at the same level after the passage of the adjustment provision as before. Indeed, one of the two major purposes behind section 175(d) was the reduction of employer premiums. Third, Brown alleged that "[ALPAC], acting under color of the authority conferred upon it by the laws of the State of Alaska, and in particular, Alaska Statute 23.30.175, has been, and is currently, discriminating against Plaintiff and other non-resident workmen's compensation benefit recipients solely because of their status as non-residents." Again, Brown's charges amount to nothing more than the fact that ALPAC complied with the law. No discriminations other than those mandated with mathematical specificity by section 175 have been attributed to ALPAC.

19. However, the prospective effect of the superior court's judgment is unaffected by this conclusion. From and after the effective date of the judgment appellant and the other class members are entitled to the payments they would have received except for the unconstitutional provisions of § 175.

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er perspective by comparing this statute with statutes that have been found to penalize the right to travel. The United States Supreme Court has invalidated statutes challenged under the federal equal protection clause because they penalized the right to travel in only three cases, *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974), *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972), and *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969). The classifications in these cases differ from section 175(d) in several respects.

First, in all three cases, the classifications denied either a "basic necessity of life" (*Maricopa County* (nonemergency health care) and *Shapiro* (welfare benefits)) or a "fundamental political right" (*Dunn* (voting)). In this case, the classification denies neither a basic necessity of life nor a fundamental political right. Furthermore, the statute does not deny workers' compensation benefits, but at most only reduces the amount received. Even with the reduction, Brown received about \$11,000 per year, which is \$3,000 more than the maximum amount available under the California workers' compensation system.

The second distinction is that *Maricopa County*, *Dunn*, and *Shapiro* all involved durational residency requirements, i.e., whether a state may deny certain benefits or privileges to new residents which are enjoyed by its "old" residents, until they have been residents for a specified period. Section 175(d) does not impose any durational requirement, nor is it even a "residency requirement" in the usual sense of the phrase.¹ Even if it were, a state generally is much more able to distinguish between residents and non-residents than between long and short term residents. *Wil-*

liams v. Zobel, 619 P.2d 448, 451 n. 7 (1980), *rev'd on other grounds*, 457 U.S. 55, 102 S.Ct. 2309, 72 L.Ed.2d 672 (1982), *citing Vlandis v. Kline*, 412 U.S. 441, 93 S.Ct. 2230, 37 L.Ed.2d 63; *Fisher v. Reiser*, 610 F.2d 629 (9th Cir.1979).

The Nevada statute challenged in *Fisher v. Reiser* is similar to section 175(d). The statute granted cost of living increases to workers' compensation recipients who resided in Nevada, but not to those who were no longer Nevada residents. The court noted that "[i]n *Shapiro*, *Dunn*, and *Maricopa County*, the issue involved the obligation and responsibility of the claimant's new state of residence; here the claimants seek to enforce an obligation against the state of former residence. The distinction is critical." 610 F.2d at 633. In support of its conclusion that the obligation to new residents imposed under *Shapiro* and *Maricopa County* does not automatically extend to former residents, the court in *Fisher* cited to *Califano v. Torres*, 435 U.S. 1, 98 S.Ct. 906, 55 L.Ed.2d 65 (1978). In that case, the Supplemental Security Income Act provided SSI benefits only while the claimant resided in a state or the District of Columbia. Torres lost his benefits upon moving to Puerto Rico. The Court stated:

As the Court said in *Memorial Hospital*, "the right of interstate travel must be seen as insuring new residents the same right to vital governmental benefits and privileges in the States to which they migrate as are enjoyed by other residents." [*Memorial Hospital v. Maricopa County*, 415 U.S. at 261 [94 S.Ct. at 1084], 39 L.Ed.2d at 317.]

In the present cases the District Court altogether transposed that proposition. It held that the Constitution requires that a person who travels to Puerto Rico must be given benefits superior to those enjoyed by other residents of Puerto

Therefore, "residence" does not mean "domicile" (presence plus intent to remain); the benefits of recipients domiciled outside of Alaska but living in Alaska are not reduced, whereas the benefits of recipients who are domiciled in Alaska but living outside of Alaska are reduced.

1. 8 AAC 45.900(b) provides:

In AS 23.30.175, "resides" means abides, dwells, inhabits, or lives. In applying the term to the facts of a specific case, the inquiry will be directed largely toward determining with what jurisdiction's economy the employee must contend.

Rico if the newcomer enjoyed those benefits in the State from which he came. This Court has never held that the constitutional right to travel embraces any such doctrine, and we decline to do so now.

435 U.S. at 4, 98 S.Ct. at 908, 55 L.Ed.2d at 68-69 (footnote omitted).

Although the courts in *Fisher* and *Torres* applied the federal equal protection test, I believe they are persuasive in pointing out that there is no constitutional right for benefits received in one state to continue after the person has left that state. As the State notes in its brief, "a state certainly need not encourage injured workers to leave the state for destinations where they can live more inexpensively and continue to collect Alaska compensation benefits that are higher than the wages they would earn if working. Nor should Alaskan consumers, who ultimately bear the cost of the premiums, be burdened with financing these excesses." In my opinion, the statute does not penalize Brown's right to travel. Rather, it attempts to prevent him from receiving an economic windfall when he moves to a state with a lower cost of living.

Second, I object to the court's rejection of the state's objective of fostering rehabilitation by adjusting benefits when convalescence occurs outside of Alaska. It cannot be disputed that a major goal of the workers' compensation system in general is the rapid rehabilitation of an injured worker so that he or she can return to work. See 1 A. Larson, *The Law of Workmen's Compensation* § 2.50, at 11-12 (1982). One reason most states award an injured worker only a percentage of his wages is because excessive benefits may hamper the incentive to return to work, and encourage him to malingering. Given that Alaska benefits are based on Alaskan wages, which are higher than wages in most states, receiving these benefits in other states would frustrate the rehabilitation goal because it would be more profitable to receive benefits than to work. Adjusting the wages so that they are closer to the wages in the

state of residence removes or lessens the incentive to malingering.

It is true, as the court's opinion notes, that just because an injured worker convalesces in a certain state does not mean he will work in that state after recovery. 687 P.2d at 273, n. 14. It is equally presumptuous, however, to assume that the worker will return to Alaska and find another high-paying job after he is rehabilitated. If an injured worker were allowed to receive the full two-thirds of his pre-injury salary (up to \$49,000 per year) while living in a state with a much lower cost of living, I suspect that his incentive to work in any state, including Alaska, would be greatly diminished. By adjusting the benefit levels to more accurately reflect the economic conditions of the state of convalescence, the injured worker's incentive to return to work, no matter where that is, will be enhanced. Thus, section 175(d) substantially furthers the legitimate goal of rehabilitation, and on this ground, the statute should be upheld.

The superior court agreed that section 175(d) furthers this objective, but invalidated the statute on the ground that the objective could have been accomplished by using a less restrictive alternative to the chosen means. Rather than adjusting benefits based on average weekly wage data, the superior court believed that using the cost of living data would have accomplished the same objective more accurately. The court stated:

In the Fall of 1973, the average annual cost of living for a four member family in Anchorage with an intermediate budget was \$16,520, compared to a national urban average for such a family of \$12,626. Thus, the national urban average cost of living was 76% of the Anchorage cost, a reduction of 24%. In 1974, the published average weekly wage for Alaska was \$248.00, compared to an average weekly wage outside Alaska of \$162.93. Thus, the average weekly wage outside Alaska was only 66% of the Alaskan average, a reduction of 34%.

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The court concluded that this ten percent difference between the two formulas causes a "severe reduction in the purchasing power, in real terms, of the monetary benefits paid to disabled non-residents," but not to Alaska residents, and therefore injured workers are deterred from residing in another state.

In my opinion, it was error for the superior court to invalidate section 175(d) on this ground. First, cost of living statistics do not provide a workable alternative to average weekly wage statistics. Cost of living statistics are based on hypothetical family budgets for only twenty-eight urban areas and thus cannot accurately determine the actual cost of living in the area in which the injured worker convalesces. A more practical problem with using cost of living statistics is that they have been discontinued.²

Second, although using average weekly wage data is an imperfect measure of cost of living differentials, a perfect fit between means and ends is not required. Requiring compulsively neat logical correlations between classification and objective would ignore legitimate demands for legislative flexibility. Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv.L.Rev. 1, 21 (1972). See also *Rose v. Commercial Fisheries Entry Commission*, 647 P.2d 154, 159-60 (Alaska 1982); *Commercial Fisheries Entry Commission v. Apokedak*, 606 P.2d 1255, 1267 (Alaska 1980).

Although the adjustment is not perfect, I believe that section 175(d) is an acceptable attempt to meet acknowledged differences in the economic conditions of Alaska and other states. The equal protection clause requires that all individuals, similarly situ-

ated, be treated alike. As the State asserts:

Rather than taking identically-situated individuals, and treating them dissimilarly, AS 23.30.175(d) has the opposite effect; that is, the benefits of individuals who *should* receive comparable compensation, but absent the statute, would not, because of the disparate wage levels and living costs of their places of residence, are adjusted to account for those circumstances.

If there were no statutory adjustment, recipients who remain in Alaska would be placed at a disadvantage when compared to those recipients because the cost of living is twenty four percent higher in Alaska than the national urban average.

In sum, the distinction between residence and non-residence is really a distinction between the economic conditions with which benefit recipients must contend, and is a rough attempt by the state to be neutral to recipients living in and outside of Alaska. This attempt seems to be the most fair and workable alternative. One could imagine a harsher alternative. For example, a statute that requires all benefits to be allocated only on the basis of the state of continued residence, rather than on the state of injury; under section 175(d)'s formula, Alaska's higher wages are always factored into the ratio and therefore an injured worker would always receive more under section 175(d) than under this hypothetical statute.³ In this sense, he is always "rewarded" for his initiative to migrate to Alaska. When viewed from this angle, and considering how dissimilar this classification is from other classifications that have been invalidated under the Alaska and federal

required revision of concepts and expenditure data and extensive price collection, for which funding was not available.

2. The Autumn 1981 Urban Family Budget, released April 16, 1982, by the United States Department of Labor, Bureau of Labor Statistics, states:

This is the last release of four-person family budget data. The Bureau of Labor Statistics eliminated the program as part of the recent budget reduction. The expenditure data on which the budgets are based are now 20 years old. Continuation of the program would have

3. For example, under the hypothetical statute, the maximum amount Brown would receive is \$154.00 per week (using the California rates); the amount he received under section 175(d) was \$211.91 per week.

equal protection clauses, I would hold that this statute is constitutional.



RESOURCE INVESTMENTS, a joint venture composed of Harold J. Moening, David G. Fritz, Bruce G. Purcell, Albert A. Kelly and Harvey P. Pittelko, Appellants,

v.

STATE of Alaska, DEPARTMENT OF TRANSPORTATION & PUBLIC FACILITIES, Appellee.

No. 7229.

Supreme Court of Alaska.

July 27, 1984.

In eminent domain action, the Superior Court, Third Judicial District, Anchorage, Karl S. Johnstone, J., granted State's motion for partial summary judgment, holding that State already had 100-foot-wide right-of-way along highway, awarded amount to property owner greater than ten percent total amount deposited by State, and awarded property owner \$115,000 attorney fees and \$76,877.13 for costs, and property owner appealed. The Supreme Court, Matthews, J., held that: (1) original patentee's entry on land was valid existing right, and therefore, no part of homestead was affected by public land order which withdrew 100 feet of land for highway purposes; (2) trial court's failure to award entire attorney fees requested was not abuse of discretion; and (3) property owner was entitled to recover costs for trips by its soil expert, expert architect, and appraiser.

Reversed and remanded.

1. Public Lands ⇨135(1)

Original patentee's homestead entry of property was "valid existing right" within meaning of Secretary of Interior's public land order withdrawing for highway purposes 100 feet on each side of centerline of highway; thus, State did not own 100-foot-wide right-of-way.

2. Eminent Domain ⇨265(3)

Although full attorney fees are norm under rule entitling property owner to award of costs and attorney fees where award obtained is more than ten percent larger than amount deposited by state, attorney fees must be both reasonable and necessarily incurred to achieve just and adequate compensation for owner. Rules Civ.Proc., Rule 72(k).

3. Eminent Domain ⇨262(1)

Court of Appeals will not disturb trial court's decision to award less than property owner's actual costs or fees in eminent domain case unless it appears that court's decision is abuse of discretion.

4. Eminent Domain ⇨265(1)

When trial court decides not to award full attorney fees and costs in eminent domain case where award obtained is more than ten percent larger than amount deposited by state, trial court must state its reasons. Rules Civ.Proc., Rule 72(k).

5. Eminent Domain ⇨265(3)

Trial court's refusal to award full amount of attorney fees requested in eminent domain action in which award obtained was more than ten percent larger than amount deposited by State was not abuse of discretion, where trial court's stated reasons for failure to grant full award were that there was unnecessary utilization of two and sometimes three attorneys at trial and pretrial proceedings at which presence of one attorney would have sufficed, time spent was excessive in view of straightforward nature of issues to be tried, claim of \$17,887.55 in attorney fees for preparing motions for costs and attorney fees was not only excessive in itself but suggested excessiveness as to all other fees, and one attorney's billings for travel

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