SB 322

(File 18-Unified Fairbanks)

SEC I

IN CS. (1) NEW LANGUAGE : INSERTING 'FAIRLY' & 'PREPONDERANCE OF EVIDENCE'

SEC II

IN CS. (3) CHANGE "MAY TO SHALL"
" 'OR' TO '&' — SPECIALISTS & PHYSICIANS

SEC III

P2 L 20 INSTEAD OF : "IMMEDIATELY — "FORTHWITH"

(4) SEC IV

AGREE W/ INTENT BUT LANGUAGE IS VAGUE —
— NEEDS CLARIFYING —

SEC V

THE STATE S/ FUND & SEE THAT REPORT DATA IS COMPILED SO THAT INFO FOR RATE FIXING IS IMMEDIATELY AVAILABLE. THE COST S/BE OFFSET BY NOT PAYING INTEREST ON DELAYED PAYMENTS

SEC VI — NEW LANGUAGE IS PROVIDED

NOT CONVINCED THAT THE NEW PROPOSAL WILL MAKE ANY DIFFERANCE. WE HAVE NO DATA TO PROVE IT.
— PROPOSE (1) LEGISLATION REQUIRING THE KEEPING OF DATA ON COSTS OF REHAB EVALUATIONS, REHAB PLANS, LITIGATION, ETC.
(2) REQUIRE THAT REGS BE IMPLIMENTED IMMEDIATELY REQUIRING TIMELY ACTION ON CASES
(3) ESTABLISH A LEGISLATIVE TASK FORCE TO FOLLOW THE VOCATIONAL REHAB SYSTEM (4) REDIRECT THE SECOND INJURY FUND TO PROVIDE INCENTIVES FOR EMPLOYERS TO RETAIN INJURED WORKERS

SEC VII

U.F. FAVORS THE APPROACH, BUT FEEL THERE MUST BE STANDARDIZED QUESTIONAIRES & PROVISIONS FOR PROMT DETERMINATION OF WHETHER FRAUD HAS BEEN COMMITTED

- THERE S/B A STATUTE PROVIDING FOR FORFEITURE OF CIVIL LIABILITY AGAINST THE EMPLOYER IN ADDITION TO WORKERS' COMP. THIS S/B DONE UNDER TITLE XI

(15)

SEC VIII - AGREE w/ IDEA

- CHANGE "ATTENDING PHYSICIAN" TO "PRIMARY PHYSICIAN"
- TO AVOID PRIOR NOTICE PROBLEMS CHANGE TO NOTICE GIVEN "W/IN 14 DAYS"

NEW LANGUAGE IS ~~BE~~ INCLUDED

THIS SEC MISUNDERSTOOD (16)

SEC IX -

THIS WON'T WORK & WILL INCREASE COSTS

U.F RECOMMENDS NOT AMENDING THIS SECTION

(17)

SEC ~~X~~ DELETE FROM BILL

LEAVE AS 23.30.095 (e) AS IS & STUDY IT

MAKE RECOMMENDATION TO BOARD

SEC. XI - GOOD IDEA ~~AS IS~~

THE BOARD S/ USE HEALTH INSURANCE ASSO. OF AMERICA UCR SCHEDULE.

20

SEC ~~XII~~

THIS SECTION S/NOT BE CHANGED

DELETE FROM BILL

#21

SEC ~~XIII~~ NEW LANGUAGE PROVIDED

THE IME'S OPINION S/B EQUAL TO THE OPINION OF THE PRIMARY PHYSICIAN. AN INDEPENDENT MULTIPLE DISCIPLINE PANEL OF BOARD CERT. PHYSICIANS S/B USED ~~AS DEFINED OF THE~~ TO PROVIDE THE INDEPENDENT EXAM

SEC ~~XIV~~

ADOPT SEC. AS WRITTEN

23

SEC ~~XV~~

USE "PREPONDERANCE OF EVIDENCE" TEST OVER THIS SECTION — MENTAL INJURY NEEDS DEFINING

24

SEC ~~XVI~~

USE "PREPONDERANCE OF EVIDENCE"

SEC ~~XVII~~

AGREE W/ BILL AS IS

SEC ~~XVIII~~

IN ADDITION, THE BILL S/ REQUIRE COMPILING OF DATA ON A REGULAR BASIS TO ACCURATELY DEAL W/ THIS

SEC ~~XXVIII~~

ADOPT AS IS

SEC ~~XXIV~~

ADOPT AS IS

THEY MISUNDERSTAND THIS SEC.

SEC ~~XXX~~ DELETE FROM BILL ;

SHELF THIS TILL IT CAN BE CLARIFIED

SEC ~~XXXI~~

AGREE W/ BILL

SEC ~~XXXII~~

34 SAME AS IV

MENTAL INJURY NEEDS TO BE DEFINED

SEC ~~XXVIII~~

35 MEDICAL STABILITY NEEDS TO BE REDEFINED

SEC ~~XXXIV~~

ADOPT THIS SECTION

SEC ~~XXXV~~

ADOPT THIS

SEC ~~XXXVI~~

OK

ADD SEC ~~XXXVII~~ — ~~CAM~~ SEC XLII LANGUAGE INCLUDING

CREATING TASK FORCE TO MONITOR CHANGES

& ADDRESS UPCOMING PROBLEMS

SECTIONS AGREED WITH AS WRITTEN IN THE BILL

11, 14, 17, 19, 22, 23, 24, 26, 27, 28, 29, 31, 34, 35, 36

SECTIONS THAT SHOULD BE DELETED FROM BILL

10, 12, 30

Robson Law Office
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Attorney at Law

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(907) 479-6281

John: Here it is. I would have re done the letter but (1) I'm lazy, and (2) we're trying to rush. If I can help - let me know.

February 10, 1988

Niilo Kopenen
Alaska State Representative
710 Chena Ridge
Fairbanks, AK 99701

Dear Niilo:

The final meeting of the Unified Fairbanks Task Force on Workers' Compensation was a fairly frustrating affair. It was scheduled as a two hour meeting, and the first hour was taken up by a report from Gordon DePue in his capacity as insurance company representative and as member of the Governor's Task Force. We were again subjected to the proposition that a great majority of the legislators were irrevocably committed to passage of the WCCA bill, whether or not it reduced premiums and without changing a word even though it made some rather drastic errors. Several of us asked the question as to whether the Governor's Task Force believed that the legislators had actually been "bought" and the reply was, "I wouldn't phrase it that way, but they are irrevocably committed". The Governor's Task Force via DePue urged, begged, pleaded, directed, etc. that we limit ourselves to constructive comments with respect to WCCA proposed amendments only, and not get into the question of attempting to reduce premiums or attempting to "perfect the system". To my way of feeling, this had a rather disastrous effect on the Task Force. We worked late to bring our report up to snuff. We eliminated many strong criticisms, and totally eliminated the input from the big seminars in Fairbanks which were concerned with matters related to premiums paid, executive and administrative inefficiencies, etc.

For the above reasons, I am sending you a copy of the draft report so that you will know what our real work product was. As you requested, I am also enclosing a mass of committee reports and minutes to give you an idea of which states we checked with

and what their statistics happened to be. I am presuming that there will be statistics prepared by the State of Alaska. If, however, they come from NCCI, it is a foregone conclusion that they will not be accurate and that they will be only those statistics which NCCI has already put together to justify the rate increase. I've seen a copy of these and feel they totally lack credibility.

When giving you a large bundle like this, I should make it easier by pointing out the deletions that I refer to above. These are as follows:

1. The statement that there is no indication that any additional interest earned on second injury fund contributions by insurance companies during the one year delay in reporting will effect Workers' Compensation premiums. This is because these monies will doubtless be held in a claims reserve on which income is not reportable.

2. A statement that, if we don't get statistics, we will continue to set rates in a "blind fashion" and amend legislation without knowing at the time whether we are doing any good.

3. In Section XI, we had taken the time to point out that most usual, customary and reasonable schedules by insurance companies are set at the 90th percentile which means that 89% of doctors charge less that the UCR fee. The Workers' Compensation Board, being subject to the public meetings requirement and the adoption of regulation process being likewise public, there is a danger than any UCR schedule to be adopted would become public knowledge. Insurance companies jealously guard against this because those doctors charging less than the UCR fee (89% of all doctors) will then increase their fee so that the UCR fee tends to become a minimum fee. I have had some experience with this in union health plans, and can definitely back up the cause and effect sequence here.

4. In reaction to the WCCA attempt to modify the presumption of compensability in a "mental injury" case, we used Section XV to advocate adoption of the preponderance of evidence rule. We had intended to avoid this as a trade off as the draft shows.

5. In Section XXI, on maximum and minimum weekly disability payments, we had made reference to the fact that under the new

law, some people will draw more on unemployment than they would on Workers' Compensation. This may tend to force people into claiming to be uninjured so that they can draw the higher benefit.

6. In Section XXVIII, on the Board determination of employee's gross weekly earnings, our draft report makes some fairly disparaging comments about the inability of Mr. George's office to comprehend the economics of a boom and bust economy on a Workers' Compensation System that operates on a workers' earning history rather than on his or her earnings at the time of the accident. We were amazed that so few people understood the economics here, and the fact that Mr. George felt obligated to set rates where a profit would be earned of a decent size during the rapidly descending times when we slide into a bust. When I questioned him, he didn't seem to understand that the profits had been made a couple of years before when people could not afford to claim Workers' Compensation. This is found in the draft at the bottom of Page 38 and the top of Page 39.

7. In the draft, you will find a Section XXXVII on rate making. Its wording may seem strong, but that is the weakest that has been used in our discussions. Since this was the original problem on which we met, a lot of time has been spent going into this area. It may step on some egos, but the committee wanted badly to say this until we received the message that this reaction would be the kiss of death to anyone paying any attention to what we had to say.

8. This extends on into the premium paying criteria section numbered XXXVIII in the draft. (Here I note that the State of Washington has adopted premiums based on hours worked rather than on gross pay and it has been a tremendous success for them. Their rates are actually adjusted downward after adopting this approach.)

9. The section on attorney's fees tries to explain why so few attorneys in the state will even touch a Workers' Compensation case. I can tell you that in my experience, defense counsel is normally paid 3-4 times the amount paid to claimant's counsel. I have had it go as high as 13-1/2 times and, of course, very often claimant's counsel gets nothing (if claimant loses or if the insurance company is willing to settle).

10. Section XL on using a captive carrier or adopting state coverage, was a result of checking with a great number of other states. Most seemed quite satisfied with this system. In some, it has had bizarre consequences. For instance, Ohio, where so much money was saved, that the legislature raided the saving to supplement general budget funds.

11. Our recommendations on administrative matters are both practical and the result of a pique with the inability of either the Division of Insurance or the Division of Workers' Compensation to summarize the reports they have on hand.

12. One of our strongest recommendations fell in the executive department priorities section. This is to shift some priorities in the Attorney General's Office so that there is come prosecution of fraud in the Workers' Compensation area when it has been firmly established; and so that the Workers' Compensation Board can get the assistance needed in drafting regulations.

13. Recommendation XLIII on the second injury fund has come out of realizing that a tremendous surplus has been accumulated in the fund because it is virtually unusable in its present status. We felt that making it function as it was intended to function, would help, both by way of lowering premiums, and by way of encouraging an employer to hire a person who has had a disability at some time in the past.

That's about all there is. I personally wanted to see a change in the way third party claims are handled, but when I was picked as Chairman, I felt that it was not right for me to bring up my own concerns or try to bend the committee's action. If it appears that there is going to be room to make general improvements, I will attack that dragon at that time.

Sorry to burden you with so much reading.

Sincerely yours,

ROBSON LAW OFFICE

ARTHUR LYLE ROBSON, Attorney

ALR/sj

Enc.

ARGUMENTS AND PROBLEM AREAS

All outlined in the discussion of comparative wisdom of approaches to obtaining statistics discussed above.

XXXVI. EFFECTIVE DATE

COMMENTS

A good choice.

RECOMMENDATIONS

A PR campaign with recompilation of booklets available including the copies of the applicable code and regulation sections.

ACTIONS PROPOSED

A good date to start. Be sure to use lots of PR and recompile all publications, including the gray book.

ARGUMENTS AND PROBLEM AREAS

None.

XXXVII. OBSERVATIONS WITH RESPECT TO THE RATE MAKING AS PERFORMED BY JOHN GEORGE AND HIS SUBORDINATES

COMMENTS

NCCI is an insurance lobbying organization. It is hired by a total of twenty states to supply ~~to~~ their insurance commissions with data necessary for rate making. Alaska uses them in the workers's compensation field and pays them for their services. Alaska does not check their figures. They do not give breakdowns of figures to Alaska (according to Mr. George)

so that essentially, they provide the State with two or three choices of rates and a summary of probable effects of each of those choices. Alaska then selects one. Even though the State is aware that disability payments are being made, they do not know any sort of an average rate. Our survey indicated that $560.82 was the average workers' comp disability payment for those cases that have gone into contest in some manner. The Second Injury Fund statistics show a quantum leap in 1985 and 1986; several hundred percent each time. This represents a massive increase in payout for disability. The reason for this is not explained, nor apparently has it been inquired into. Premium rates are currently based upon a gross payroll. (Figuring that anything is taxable to an employee represents increased risk to the carrier and hence, justifies payments). Many states use this system rather than the "hours worked" system. The states we have contacted, however, are keenly aware of percentages of premium dollar and percentages of benefits paid for each of the areas of payment. Neither the workers' compensation folks nor the insurance division folks have been able to produce any kindred statistics for Alaska, nor do they seem to be aware of any way of combining the reports which they receive (setting forth these statistics) so as to give statistics on any meaningful or statewide basis.

RECOMMENDATION

We recommend obtaining the breakdown of the reasoning

for premium rates before they are adopted. We recommend that the Department have a person whose duties include maintaining these statistics and we feel that the insurance division should have a similar person. We recommend at least verifying NCCI representation. We recommend audits of carriers and any statistics supplied NCCI or carriers. We recommend that the Insurance Commissioner acknowledge that Alaska has a boom and bust economy and change its criteria for setting premiums to reflect the fact that profits are made in the boom time and no profits are made in the bust time. Generally, we feel that we feel should pattern ourselves after the more successful states.

ACTIONS PROPOSED

This will require extensive overhall of the ongoing procedures and hence, we recommend (and we are willing to participate in) a task force or study group in this area. Alaska simply does not have a grip on the rate making process as do other states. We feel that it must get such a grip. This will require legislative, administrative, and executive changes.

ARGUMENTS AND PROBLEM AREAS

These will depend upon the course taken. In all probability, there will be resistance to any change.

XXXVIII. PREMIUM PAYING CRITERIA

COMMENTS

Generally speaking, older accident-free employees are

paid more than beginners. Premium rates are structured so that the cost of insuring the older accident-free person (who is paid more) are higher than those for the neophyte employee. This is upsidedown. Gordon DePue feels strongly that insurance companies will not want to change, because neither they, nor the employers have any idea how many hours a person works, but they are all acutely aware of the taxable gross paid to that person. [redacted] a formula combining the category in which an employee works and the hours that they work should be explored as a more fair premium base.

Additionally, attached to this letter is an article entitled "Everything You Wanted to Know About the CAL SMACNA Workers Compensation Captive, But Were Afraid to Ask". The experience modification described therein is missing in more than 95% of the premium rate setting in Alaska. Additionally, the question of whether fringe benefits (paid by setting aside in a separate account and which are not likely to be paid to the individual employee) should be considered as wages paid under the present system must be addressed. We also feel that State or captive coverage, such as mentioned in the attached article or as found in the State of Arizona, should be considered. Colorado and Montana appear to be bad examples.

RECOMMENDATION

The problems in this area are hurting employers badly and hurting them now. A study of this area should not be

postponed until some future indefinite date, but should begin forthwith.

ACTIONS PROPOSED

Begin the study now. Think of including several carriers in the information gathering discussion and planning groups. If you want public participation, Unified Fairbanks will be glad to provide some.

ARGUMENTS AND PROBLEM AREAS

There will always be a reaction to change. In this area, employers with bad safety records and a history of expensive compensation injuries may well have their premiums increased and they should be expected to complain.

XXXIX. ATTORNEY'S FEES

COMMENTS

Attorneys ~~fees~~ representing employers and carriers are normally compensated on an hourly basis. Their economic incentive is therefore to spend the maximum amount of time which their relationship with the carrier or employer will stand, on each case. Attorneys for claimant are compensated at 10% (plus $150.00) of the amount recovered for client, but only if that amount has been controverted and fought out. In other words, settlements rarely carry attorney's fees. There are two problems in this area. The first is that both sets of attorney's fees are expenses which are ultimately reflected in

higher premium rates. In this area, we are yielding to WCCA who has advised that the WCCA will brook no interference whatsoever in the way that employers or carriers [illegible] compensate their attorneys, and therefore, the attorney's fee costs should not be approached. In the second area, there is the question of equality of treatment. The claimant's lawyer has an incentive to settle as quickly as possible, but for as much as possible. The carrier or employer's attorney has an incentive to go as deeply into the case (and discovery proceedings surrounding it) as can be justified. This is the reason that almost every attorney in the state would love to defend workers' compensation claims and most of the big and profitable firms do so, while only a very small percentage of attorneys in the state will take claimant's cases. Claimants have a very hard time getting representation because only a law office set up to divert most of the work to paralegals can afford to take the cases without losing money. In order to effect justice, representatives on each side should be reasonably equally motivated, and close to equally paid. If there are to be no limitations on counsel fees on one side, then perhaps the other side should be paid a percentage of what the hourly compensated counsel gets. Currently, claimant's counsel receives nothing unless they win which also discourages attorneys from representing workers' compensation claimants. A half dozen formulas have been suggested, but none of them stand the test of argument if we

accept the given(that employers and carriers will brook no interference in what they pay their counsel).

RECOMMENDATIONS

We therefore recommend study by the legislative task force proposed later, on with the cooperation of the Alaska Bar Association.

ACTIONS PROPOSED

As stated above.

ARGUMENTS AND PROBLEM AREAS

Medical costs are currently out of control in the compensation area. Presumptively, attorneys would like to have attorney's fees in that same category. There will then probably be lots of arguments in committee, etc., and there may ultimately be a test case as to whether the formula selected is fair.

XL. USING EITHER STATE COVERAGE OR A CAPTIVE CARRIER FOR COVERAGE

COMMENTS

As mentioned above, Alaska has a boom and bust economy. Either State coverage or a captive carrier can be expected to level out the compensation premiums making profit in boom times and suffering a loss in bust times. For the stability of our economy, this is probably essential. An alternative would be to actually use the authority of John George to set rates that would be fair to employers. Whether

this is possible is an open question.

RECOMMENDATION

This should be studied as it may turn out to be the only solution to level fair rates.

ACTIONS PROPOSED

A task force in this area is needed.

ARGUMENTS AND PROBLEM AREAS

On the one hand, carriers complain that they are not making money. It is to be expected, however, that if they are likely to be supplanted by a captive carrier or the State, they will vigorously oppose this because, in fact, a considerable profit is being made, ~~that~~ which profit would be lost to the "competition" of the State or the captive carrier.

XLI. ADMINISTRATIVE MATTERS

COMMENTS

We lack an easy manner for an employer to check on prior injuries having occurred to his employees. We have found that the reports received on each individual case (from insurance carriers) are not combined, ~~in any manner so that~~ the statistics are valueless because they are not cumulated. There is a long period of time between the request for a hearing, and a hearing, both before the Board, and most especially before the rehabilitation officer. Therefore, additional staffing is needed. The grey book which contains the statutes and

regulations with respect to workers' compensation is so outdated as to be useless. There are no regulations providing for audits for carriers. At this point, there is no support within the Department assigned to work with loss control programs which are badly needed.

RECOMMENDATION

The extra personnel should be added to the Department to provide: a) a last name index of workers' compensation filings for availability to employer; b) more Board members and more rehabilitation officers in order that the hearing calendar not be over one month after the request for hearing in either of these categories; c) regulations can be set up for adoption providing for audits of carriers to verify the information which is submitted; d) the information received from carriers should be put into a computer so that information would be continuously available (such as, for 1987, what percent of premium dollars went to pay medical costs?) There are many of these type of questions that should be answered in order to be at all effective; and, e) the grey book should be reissued up-to-date so as to make it useful.

PROPOSED ACTION

Budgets should be increased and personnel assigned as explained above. On the compilation of statistics matter, cooperation should be worked out with the Insurance Commissioner.

ARGUMENTS AND PROBLEM AREAS

There will be a slight increase in cost in running the Department. This, of course, will be offset by the fact that information and services will be available.

XLII. EXECUTIVE DEPARTMENT PRIORITIES

COMMENTS

The Attorney General's Office does not allocate money to prosecute workers' compensation fraud. The budget will require adjustment upward to provide for the needs set forth above. The Insurance Department will need to be regulated in order to have them accumulate statistics upon which they base their rate setting, and this may require cost increase. The Attorney General's Office should prosecute employers who are operating without insurance or with out-of-state insurance that actually has little, if any, value for Alaskan workers. The Insurance Department should perform audits of the carriers, in order to find out whether ~~what~~ the information they provide to us (but is just left in file drawers at this time) is reliable. ~~and~~ A certificate showing that workers' compensation is in effect should be designed so that it specifies where Alaskan workers are working, what carrier is covering them, and that they are given coverage at Alaska rates so as to be valid in Alaska. These certificates should be for filing on each Little Davis-Bacon job, with local government bodies that request it,

with the Department of Insurance, with the Department of Workers' Compensation, and anywhere else thought appropriate, in order to give meaning to the requirement of having workers' compensation coverage.

RECOMMENDATION

Each of the above problems be addressed and resolved at the earliest possible time.

ACTIONS PROPOSED

See above.

ARGUMENTS AND PROBLEM AREAS

There will be "empire" problems anytime some of these adjustments are made. The value of the adjustments makes it all seem worthwhile.

XLIII. SPECIAL RECOMMENDATION FOR THE SECOND INJURY FUND

COMMENTS

The 104 week time required to bring the Second Injury Fund into play is totally destroying the function of the fund. The "written record requirement" keeps many legitimate second injury cases from being compensated out of the fund, and lump sum settlements are discouraged by the fund reimbursing the carriers on an installment basis, rather than by lump sum.

RECOMMENDATIONS

We recommend that each of the above problems be addressed by legislation.

ACTIONS PROPOSED

To AS 23.30.205

Adoption of amendments as follows:

(a) If an employee who has a permanent impairment from any cause or origin incurs a subsequent disability by injury arising out of and in the course of his employment resulting in compensation liability for disability that is substantially greater by reason of the combined effects of the preexisting impairment and subsequent injury or by reason of the aggravation of the preexisting impairment than that which would have resulted from the subsequent injury alone, the employer or his insurance carrier shall be reimbursed for the second injury fund from? for all compensation payments subsequent to those payable from the first 26 (104) weeks of disability. The insurance carrier shall be reimbursed by a lump sum payment from the fund for lump sum settlements approved by the board.

(b) If the subsequent injury of the employee results in the death of the employee and it is determined that the death would not have occurred except for the preexisting permanent physical impairment, the employer or his insurance carrier shall in the first instance pay the compensation prescribed by this chapter, but he or his insurance carrier shall be reimbursed from the second injury fund for all compensation payable in excess of 26 (104) weeks.

(c) In order to qualify under this section for reimbursement from the second injury fund, the employer must

establish (by written records) that the employer had knowledge of the permanent physical impairment before the subsequent injury and that the employee was hired or retained in employment after the employer acquired that knowledge. Employer knowledge shall be established by written records except as follows:

(1) In cases of paralegia or quadriplegia,

(2) In cases of amputation of foot, leg, arm or hand, and

(3) When an employee has omitted qualifying information from employee's response to an employment questionnaire completed by the employee prior to the subsequent injury.

(f) An employer or his carrier shall notify the Commission of Labor of any possible claim against the second injury fund as soon as practicable, but in no event later than 15 (100) weeks after the employer or his carrier have knowledge of the injury or death.

ARGUMENTS AND PROBLEM AREAS

This will increase the usage of the second injury fund by between three and four times, ~~or so~~. It will minimize the "acceptance period", ~~but will require further action~~. This may produce a problem.

XLIV. LEGISLATIVE TASK FORCE

COMMENTS

As we addressed each of the problem areas, a number of

Memorandum for Points of Discussion for
HB 352/SB 322 - Workers' Compensation

February 5, 1988

1. The standard of "any evidence" was questioned by several participants, and the general consensus was that some qualifying language should be included. The current standard is "substantial evidence". The "any evidence" standard was included in response to what many people characterize as the Alaska Supreme Courts' insistence on expanding the bounds of their fact finding responsibilities to consistently and unfairly deny the Boards decisions. (See attachment #5).

2. There was considerable public testimony over whether this section would meet a constitutional challenge. (See attachment #5) There was also some testimony that there is no dependable source of cost of living adjustments for other states to use as a guide in determining benefits for persons residing outside of Alaska.

3. Some participants expressed concern with the method the Board would use to determine eligibility for and placement on the list maintained by the Board. The common fear expressed was that some health care providers would be "blackballed" and would have no recourse to address a possible conflict.

4. There was some concern expressed by participants that an employee may not consider their employment statement false, or may inadvertently omit information that they don't consider important and are later found to have "knowingly made a false statement".

5. A participant who currently serves as a rehabilitation specialist objected to the requirement that specialists must be chosen from a rotating list to perform an eligibility evaluation. She objected because of cost considerations, claiming that she can do several evaluations in adjacent communities at considerably less cost than it would take to send separate specialists for each injured worker seeking an evaluation. She also argued that this provision interfered with free enterprise in that workers would not be free to choose her if they felt she was the best unless her name was at the top of the list at the time.

6. Several participants expressed concern over this section. Their comments generally fell into two categories: 1) Those who felt that "60 percent of pre-injury wages" was not a fair standard for determining eligibility and, 2) those who were concerned that the effect of (2) would be to make rehabilitation a "once in a lifetime deal". Suggestions were made that the language in paragraph (2) include some qualifiers so that a worker can be eligible for a second rehabilitation plan if their previous injury had nothing to do with the second (e.g. working as a dozer operator a worker had a severed limb and was rehabilitated. Several years later the same worker returned to work as a dozer operator and was burned in a job

related fire. Under the current language, this worker would probably not be eligible for a second go at rehabilitation).

7. Several participants asked for qualifying language to be included in this section so that a worker may be able to refuse unreasonable requirements and would have some recourse if they inadvertently missed an appointment or had a family emergency that caused them to fail to adhere to each of the requirements under this section.

8. Several participants expressed concern that the time limits in this section may be difficult or impossible to comply with, in spite of the qualifers giving the Board and/or the rehabilitative specialist the ability to modify the time limits under unusual circumstances.

9. Some participants were concerned that the "abuse of discretion" language was too confusing and restrictive and did not give a worker sufficient ability to argue against a determination under this section.

10. There was concern expressed by several participants that the new definition of "employability" as opposed to "employment" was unfair.

11. Several participants testified in opposition to the expanded definition of "labor market".

12. Several professional rehabilitative groups have asked that their specialties be included in the definition of specialist (see attachment #1)

13. Again, some participants testified that the "60 percent" standard was too low and unfair.

14. The chiropractors offered several suggested amendments to Section 8. (See attachment #2)

15. Several participants objected to this language and testified that "doctor shopping" was as much a problem with employers/insurers as it was with employees. In addition, the chiropractors have suggested language in attachment 2.

16. There were several objections from participants about limiting the number of visits to a treating physician. It appears that most of the objection was based on a misunderstanding about what the language means since several people believed that the bill prohibited any visits beyond the guidelines spelled out in this section. There is a suggested amendment to this section in attachment #2.

17. Several participants objected to this language because they felt an employer would abuse the presumption of reasonableness. In addition, participants testified that if an employees ability to "doctor shop" were limited, then this section should also require a limit on the ability to "doctor shop" by the employer.

18. Some participants testified that some IME's use painful and unnecessary testing procedures in order to force an employee to refuse treatment/tests and thus loose their benefits. Participants asked that language be included to require that the tests had to be reasonably connected with the injury under investigation. There is additional suggested language in attachment #2 and additional information in attachment #5.

19. There was concern expressed that this section only applied to fees charged by an employee's provider and that the standard would not be applied to IME's chosen by the Board and/or the employer.

20. There was some concern expressed about permitting an "outside" organization to have any say about Alaska Workers' Compensation issues.

21. Participants expressed concern over language giving the presumption of correctness to the second IME.

22. Participants suggested that the "fraud" standard be expanded to include "misrepresentation and gross incompetence. (Also see attachment #2).

23. There was some concern about whether a stress claim could be defined in this manner and still meet a subsequent constitutional challenge.

24. Again, the "any evidence" standard. (See #1)

25. Again, there was some concern expressed as to whether determining benefits on the basis of residency could meet a constitutional challenge.

26. Several participants objected to the expanded definition of the labor market for employee's services.

27. Again, concern was expressed over the new definition of remunerative employability and, in particular, the way that definition is applied to this section in order (in some participants minds) "to avoid paying permanent total disability".

28. There was some objection voiced over the "arbitrary" decision that TTD benefits may not be paid for more than two years. Suggestions were made that this section should be amended to allow TTD benefits to continue beyond 2 years in extenuating circumstances.

29. There were many objections voiced over the new method of determining permanent partial disability benefits under this section. Testimony from John Lewis indicated that several national studies failed to show any correlation between the method used to determine PPD benefits and the subsequent well-being of an injured worker. There was also testimony that indicated that, while this new method would not necessarily reduce benefits workers, it would insert an "element of certainty" in determi benefits that

may reduce litigation and make it easier for insurers to make actuarial predictions.

30. Again, there was concern expressed over the definition of medical stability and whether it adequately addressed a situation where a worker may be stable but could deteriorate unless medical treatments were continued.

31. There was much concern expressed over this new section, most of which appeared to result from confusion over the wording and the intent.

32. Attachment #3 outlines concerns that legislative drafting has with the way this section is written.

33. Concern was expressed that this section assures that only vested pension and benefits be considered with determining the average weekly wage.

34. Concern was expressed that the definition of a "mental injury" may preclude claims based on mental injuries due to sexual, racial, and religious harassment and discrimination and other illegal employment practices.

35. Again, there was concern that "medical stability" did not adequately address conditions where an injured workers' condition may deteriorate without continued treatment.

* * * * *

In addition to concerns expressed over language included in the bill, there were several comments addressed to items that are not covered in the bill. They include:

1. The growing length of time between filing a workers' comp case and a Board hearing (See attachment #4).

2. A request that the bills include a mandated rate reduction of at least 10 percent.

3, Other "insurance questions", specifically the complaint that HB 352/SB322 fail to "get tough" or make any demands on the insurance industry, either to comply with laws requiring certain information to be filed or to require the Division of Insurance to beef up their financial and market examination functions.

4. The q ·stion of whether a contractor can be retroactively billed for workers' compensation insurance for an independent contractor who is a sole-proprietorship that they have contracted with.

5. The entire question of retroactive billing or "post audit" billing. One participant testified that a client of his, a small Southeast Alaska community, had a quote of $6500.00 for workers' comp

coverage for a small capital project. Upon completion of the project and a post audit report, the municipality was presented with a $75,000.00 bill for a completed project on which no injuries occurred.

6. Some participants requested that the measure address the problem with out of state companies not having to pay Alaska workers' compensation rates because they have an "all states rider" on their home-based policy that covers them. This puts Alaska businesses, particularly the construction industry, at a tremendous disadvantage.

7. Some participants suggested, in response to claims that injured workers prolonged their problems and used workers' comp as unemployment insurance, that the unemployment law be amended to allow an injured worker to claim unemployment that they have paid in to if they fail to find a job after recovering from an on-the-job injury.

ATTACHMENT #1

By the Labor and Commerce Committee

SENATE BILL NO. 322
HOUSE BILL No. 352

"AN ACT RELATING TO WORKERS' COMPENSATION..."

PROPOSED CHANGE:

Page 10. Sec. AS 23.30.041 REHABILITATION OF INJURED WORKERS. should be changed to read as follows:

(6) "Rehabilitation Specialist" means a person who is certified by at least one of the following national certifying boards: THE NATIONAL BOARD OF CERTIFIED COUNSELORS (National Certified Counselors - NCC); THE COMMISSION ON REHABILITATION COUNSELOR CERTIFICATION (Certified Rehabilitation Counselor - CRC); THE CERTIFIED INSURANCE REHABILITATION SPECIALISTS COMMISSION (Certified Insurance Rehabilitation Specialists - CIRS); THE AMERICAN BOARD OF VOCATIONAL EXPERTS (DIPLOMATE/FELLOW, VOCATIONAL EXPERT - ABVE).

AT PRESENT, P. 10, Sec. AS 23.30.041 (6) reads as follows:

"(6) "rehabilitation specialist" means a person who is a certified insurance rehabilitation specialist or a person who has equivalent or better qualifications as determined under regulations adopted by the department;

Representative Dave Donley, Chairman
I support the above proposed change
Dan Riggs NEC
2910 West Northern Lights Blvd. #E
Anchorage, AK. 99517

HB352/SB222

[redacted]

ATTACHMENT #2

SECTION A.S. 23.30.095(a):

(1) DELETE underlined passage beginning page 12, line 7 through line 11, starting with "The employee".

RATIONALE: This passage is objectionable for several reasons:

(a) because there is an insufficient definition of "attending physician";

(b) because there is an insufficient definition of "specialist";

(c) because there is no indication of when a physician becomes an "attending" physician as opposed to an examining or consulting physician; and,

(d) because there is no real indication of how a choice of a different specialty is treated. For instance, if employee's attending physician is a GP and he has a broken leg and decides that a orthopedist would be better able to treat him, does that decision count as a change? Or, the employee has a lower back injury, choses to try an osteopath or a chiropractor instead of his GP, does that decision count as a change when he is not merely changing from one doctor to another but is actually seeking a different type of treatment?

If the passage must remain in, here is a suggested change:

The employee may not make more than one change <u>of attending physician within the employee's attending physician's specialty</u> without the written consent of the employer.

(2) Keep language that will be deleted (bracketed langauge on page 12, line 11 through line 13). There does not appear to be any justification for taking away the boards authority to make exceptions to this rule in the appropriate cases.

(3) Amend the language in the next sentence, page 12, line 13, starting "Upon procuring" to read:

Upon procuring the services of an attending physician, etc.

(4) Add sentence to end of present section stating:

With the exception of the above, no party shall attempt to interfere with or restrict by any means the employee's right to select a physician of his or her choice.

SECTION A.S. 23.30.095(c):

(1) DELETE the added language (underlined and appearing on page 13, line 2 through line 13).

RATIONALE: This passage is ill considered:

(a) because there is no definition of what is considered "continuing and multiple treatments" and health care providers must necessarily guess;

(b) because there is no designation of who will approve the plan and what standards will be employed and upon what facts or basis the review will rest;

(c) because the process of review will occur simultaneously with the provision of treatment and, according to the current language, the health care provider must bear the financial risk of disapproval;

(d) because there are no provisions for amendment of the plan should the need arise; and,

(e) because the provision imposes maximum limits arbitrarily.

Generally, it appears to us that these provisions will probably result in an increase in litigation and resulting costs rather that a decrease since so much is left unstated.

If the reason for this amendment is to guard against unreasonable or unnecessary treatment, there are already regulations in place and the employer can, with most health care professions, submit perceived abuses to the appropriate peer review committees.

If the reason for this provision is, as some of our members strongly suspect, an indirect attack on Chiropractic, it is not in fact cost effective and is, to say the least, discriminatory.

SECTION A.S. 23.30.95(e):

(1) Proposed amendment deleting requirement that examining physician be authorized to practice is inappropriate and suspect. Therefore, bracketed section on page 13, line 18 through line 19, should be RETAINED.

How is either the Board or the employee able to rely upon the competence of a report or examination if there is no requirement that the physician doing the examining be appropriately licensed? Does the legislature really intend to require that the employee must submit to an examination by someone who may not be capable of meeting license requirements?

(2) The creation of a presumption of reasonableness of requiring examinations every 30 days appears to be irrational. It seems obvious that the added language could easily be used by the employer to harass an employee in cases where either (1) the condition is stable enough that monthly examinations are unnecessary, and/or the examination technique used is painful and the likelihood of substantial changes in condition would not, in the absence of an adversary relationship, be normally considered justified. In addition, should the employee not be able to work at his/her old job, a requirement for monthly examinations by the former employer's doctor may well interfere with the ability of the employee to secure other employment.

(3) Although there are fairly draconian provisions within this section for employee non-cooperation, there are no provisions for (i) advance (reasonable) notice requirement by the employer; or, (ii) a means by which the employee can contest the necessity and/or reasonableness of the monthly examinations prior to their imposition.

SECTION A.S. 23.30.95(f):

DELETE (UNDERLINED) changes.

RATIONALE: The present section, prior to amendment, limited fees charged for medical treatment and services to charges that generally prevailed in the community. (See bracketed section, page 14, lines 18 through 19). The new section (underlined, page 14, line 20 through line 22) adds to the Board's responsibility the necessity to determine whether or not the charge, which may well be customary in the community, is reasonable (underlined).

That being true, the phrase that the Board may regulate fees and charges contained within this section would become a reality since the Board would have authority under this section to override free market considerations, including local economics and the effects of local competition and declare that charges that were in fact usual and customary but, in the Board's opinion, unreasonable.

The proposed change is actually unnecessary since normal free enterprise processes supply reasonableness of price through market place competition.

SECTION A.S. 23.30.99(j):

DELETE changes. AMEND CURRENT LANGUAGE.

The most offensive of the added language is contained on page 14, lines 25 through 26, which allows for an out-of-state organization to advise the Board on the appropriateness and necessity for and costs of medical treatment of Alaskan workmen by Alaskan physicians. A host of questions arise by this wording. If an out-of-state organization is appointed, how well qualified are they to judge these issues? Could they pass the relevant Alaska boards? Are they in fact licensed physicians/health care providers? Are they anything more than claim adjusters? How is an out-of-state organization going to determine appropriateness of treatment without recourse to examining the patient or taking additional xrays or additional studies? Why is an out-of-state organization needed when there are peer review committees set up within the various disciplines for these purposes now?

Regarding costs, once again, how is an out-of-state organization going to determine appropriate levels of costs? If for instance, the person making the determination on appropriateness of costs lives in and is familiar with medical costs in some small town in Illinois, will that familiarity influence the advice he gives to the Board on treatment rendered in Alaska where the cost of everything is higher?

Based upon the recommendations that are made to the Board, the Board will be determining whether an employer should pay a bill for services that have already been rendered. Because it has the power to approve of the withholding of payment, the employee and the local physician in Alaska rendering treatment to him is at a distinct disadvantage in challenging the advice of an out-of-state organization.

If the advice is unsound, but because of economics, remains unchallenged, the Board's decision will eventually begin to influence the manner in which Alaskan physicians treat injured workmen since their choices will essentially be to either adopt an approved (but unsound) procedure or to refuse to treat the injured workman. Additionally, injured employees may not seek appropriate treatment since they might end up having to pay for it themselves, which will either add to the term of the injury or begin to increase costs of employee medical insurance plans.

We suggest the following language REPLACE Section (j):

> The board may appoint a medical services review board consisting of physicians licensed in the state and employer and employee representatives to assist and advise the Board in matters involving the costs of health care services. The medical services advisory board shall conduct anonymous surveys biannually to determine usual and customary costs of treatment and procedures, and in the case of unusual situations, may conduct special surveys to determine usual and customary costs for treatment of procedures not normally encountered. If the Board shall determine that a physician or health care provider has inappropriately or unnecessarily provided treatment, or has habitually and substantially exceeded the usual and customary charges in the community in which treatment was rendered, the committee shall refer the matter to the peer review committee of the health care provider's discipline and advise the Board to disapprove the charges in question.

SECTION A.S.23.30.095(k):

(1) AMEND proposed language.

RATIONALE: The clear import of this section is to provide the Board with an independent source to turn to when a dispute arises between the party's experts. Unfortunately, the proposed section as it's presently worded does not go far enough to insure the independence of the source. Additionally, it fails to guard against apples and oranges comparisons that so often create or increase litigation before the Board. Finally, the proposed section creates an inappropriate limited standard of review which is inconsistent with current diagnostic techniques.

First, in order to insure the independence of the review, the selection of a physician or health care provider should be from a rotating list so that there can be no question as to impartiality in the selection process.

Second, both parties should have the right to object to one selection within a reasonable time period so that questions of bias may be minimized.

Third, the lists that are resorted to by the Board should be kept by discipline and specialty and the selection made should conform to the discipline or specialty of the health care provider of the employee. Otherwise, there is every likelihood that the Board will become embroiled in jurisdictional disputes between disciplines and specialties that will provide no meaningful comparison.

Fourth, limiting the standard required to overcome the presumption to objective evidence deselects critical subjective findings that often times form the backbone of a valid diagnosis.

We would suggest the following language be substituted for the proposed language:

> In the event of a medical dispute regarding determinations of causation, medical stability, degree of impairment, functional capacity, the amount and efficacy of the continuance of or necessity of treatment, or compensability between the employee's attending physician and the employer's medical evaluation, an independent medical evaluation shall be conducted by a physician or physicians of the same

physicians licensed in the State of Alaska or the state that treatment was rendered from a list established by, with the aid and advice of the medical advisory board, and maintained by the Board. Both the employee and employer shall have the right to challenge one appointment. In the event of a challenge, the next physician on the list will be appointed. The contents of the list and the order of its contents shall be kept confidential by the Board. The report of the independent medical examiner shall be furnished to the Board and both parties within 14 days after the examination is concluded. The opinion of the independent medical examiner shall, in the absence of clear and convincing evidence to the contrary, be presumed to be correct. A person may not seek damages from an independent medical examiner caused by the rendering of an opinion or providing testimony under this subsection, except in the case of fraud, misrepresentation or gross negligence.

SECTION A.S. 23.30.155(c):

DELETE Added language.

RATIONALE: As will be explained more fully when Subsection (m) is discussed, the exception being grafted onto this section is, in essence, gutting the penalty provisions by allowing an employer to escape the penalties by simply performing once a year ministerial acts that have nothing to do with the merits of a particular controversion, or for that matter, to do with a habitual practice of unjustifiably controverting employee claims. As a result, it is our suggestion that the amenditory language be deleted.

SECTION A.S. 23.30.155(m):

DELETE changes.

RATIONALE: This section as it is proposed, essentially vacates the penalty provisions in subsection (c) by allowing an employer to avoid penalties for failure to timely notify the employee and the board of changes it unilaterally makes to the employee's compensation, or whether or not the employer intends to controvert at all. In essence this provision allows, on a sliding scale, an employer to escape substantial penalties if it performs the ministerial acts that, under the present and proposed statute, it must perform.

For the employee who is caught within the exception's parameters, however, there is little relief. If the filing requirements did not incorporate notifications to the employee and were, in fact, only ministerial, there might be some justification for the proposal, although it is not readily apparent even in that situation. However, the reports do require notification to the employee and, in the absence of receiving timely reports, the employee may well make decisions that he might not should he receive a timely notification that the employer was either going to controvert, suspend or terminate his compensation. In essence then, the employer is, according to this section, allowed to escape penalties for failing to comply with the employee notification provisions in Subsection (c).

SECTIONS A.S. 23.30.185, A.S. 23.30.200:

DELETE proposed language unless the term medical stability is changed as noted below.

RATIONALE: Obviously, the employers and their carriers are seeking to place a limit upon TTD and TPD payments. However, they are basing the proposed limit upon an unrealistic and unfair standard, "medical stability". As will be demonstrated below, the definition for the term "medical stability" is suspect.

SECTION A.S. 23.30.265 (34):

AMEND proposed language.

RATIONALE: According to the proposed language, an employee's medical condition is "stable" after the date that no further objectively measurable improvement is reasonably expected to result from additional medical care or treatment. This definition has several flaws.

First, hinging a definition of medical stability on whether or not the patient will improve disregards situations where continued treatment is necessary to prevent a diminishment of medical status, or to prolong the patient's medical status.

Second, once again the standards for masking the determination are based solely upon objective findings when modern diagnostic techniques used a combination of objective and subjective techniques. As a result, the employee and all of the physicians coming into contact with him are artificially limited to decision making that bears no relationship to how medical decisions are normally made.

SECTION ENTITLED LEGISLATIVE INTENT, SUBSECTION (b):

AMEND proposed language.

RATIONALE: In decreeing that the Board has increased powers, there must be some authority for decision making concerning his medical treatment left to the injured employee. Therefore, there should be some provision contained within the statute that it is not the legislature's intent that the employee's right to chose who his health care provider will be will not be restricted unreasonably.

We suggest that the following language be added to subsection (b):

> With the exception of the provisions contained in A.S. 23.30.095(a), nothing contained within this section shall empower either the board or any party to interfer with or infringe upon the employee's right to select the type of health care and the person to provide it for the treatment of his injuries. Any employer or its representative that violates this section is guilty of practicing discrimation against the employee and subject to the provisions of A.S. 23.30.247.

ATTACHMENT #3

STATE OF ALASKA
THE LEGISLATURE

POUCH Y · STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM February 1, 1988

SUBJECT: Calculation of gross weekly earnings - SB 322

TO: Senator Mike Szymanski

FROM: Michael F. Ford MFF
Legislative Counsel

You have asked for our opinion as to the determination of gross weekly wages under AS 23.30.220(a)(2) as amended in SB 322. Under current law, if the board determines that an employee's gross weekly earnings cannot be fairly calculated from the two previous years earnings, then the board may determine gross weekly earnings by considering the nature of the employee's work and work history, including probably future earnings. See Johnson v, RCA-OMS, Inc., 681 P.2d 905, 907 (Alaska 1984). The amendment to AS 23.30.220(a)(2) removes the language that allows the board to make a fairness determination, and limits compensation to the employee's earnings at the time of injury. It is not clear whether the board would be allowed to consider probable future weekly earnings in determining gross weekly earnings or whether gross weekly earnings are intended to be limited to actual earnings at the time of injury. Under sec. 21 of SB 322 the weekly rate of compensation received by an injured employee is equal to the employee's spendable weekly wages, determined under AS 23.30.220. Therefore, the weekly rate of compensation under AS 23.30.220(a)(2) could be the actual wages earned by the employee.

I would recommend that the language of AS 23.30.220(a)(2) be changed to clearly indicate whether in the case of an employee without sufficient work history, probable future earnings may be considered by the board in calculating gross weekly earnings. If you have further questions, please contact me.

MFF:gc
WKG1:060

ATTACHMENT #4

Chancy Croft Law Office

738 H Street -- Suite 200
Anchorage, Alaska 99501

Chancy Croft
Michael J. Jensen

(907) 272-3508

January 29, 1988

Representative Mike Navarre
Alaska State Legislature
P. O. Box V(MS 3100)
Juneau, Alaska 99811

Dear Mike Representative Navarre:

A problem of increasing proportions is developing with the 25,000 Alaskans injured at work each year. Claims cannot be heard in a prompt manner. Many people suffer.

The idea of workers compensation is to provide a speedy, efficient remedy to industrial accidents. Long delays must be avoided. This is the trade-off for limited benefits. It is crucial for workers to receive prompt payment of medical expenses and compensation if the system is to be effective. If claims cannot be heard in a timely and efficient manner workers suffer. Their spouses and children suffer.

The economic consequences of delay have a ripple effect. When compensation is not paid, lost wages to workers mean delayed or missed payments to landlords, utility companies, banks, groceries and department stores. Medical benefits are terminated. Indirectly these costs are passed to the public. Equally important, when workers are paid while disputes are litigated, the costs to employers of rehabilitation and other services are increased. The solution is not to penalize injured workers or good employers. It is to resolve disputes quickly.

The time between filing a claim and getting a decision from the Alaska Workers Compensation Board has increased 67% in the last two years. The delay is getting worse. None of the proposals before the Legislature or any administrative action addresses this problem. Senate Bill 322 and House Bill 352 will only make the problem worse without reducing the cost of premiums to employers or increasing benefits to injured workers.

Very truly yours,

Chancy

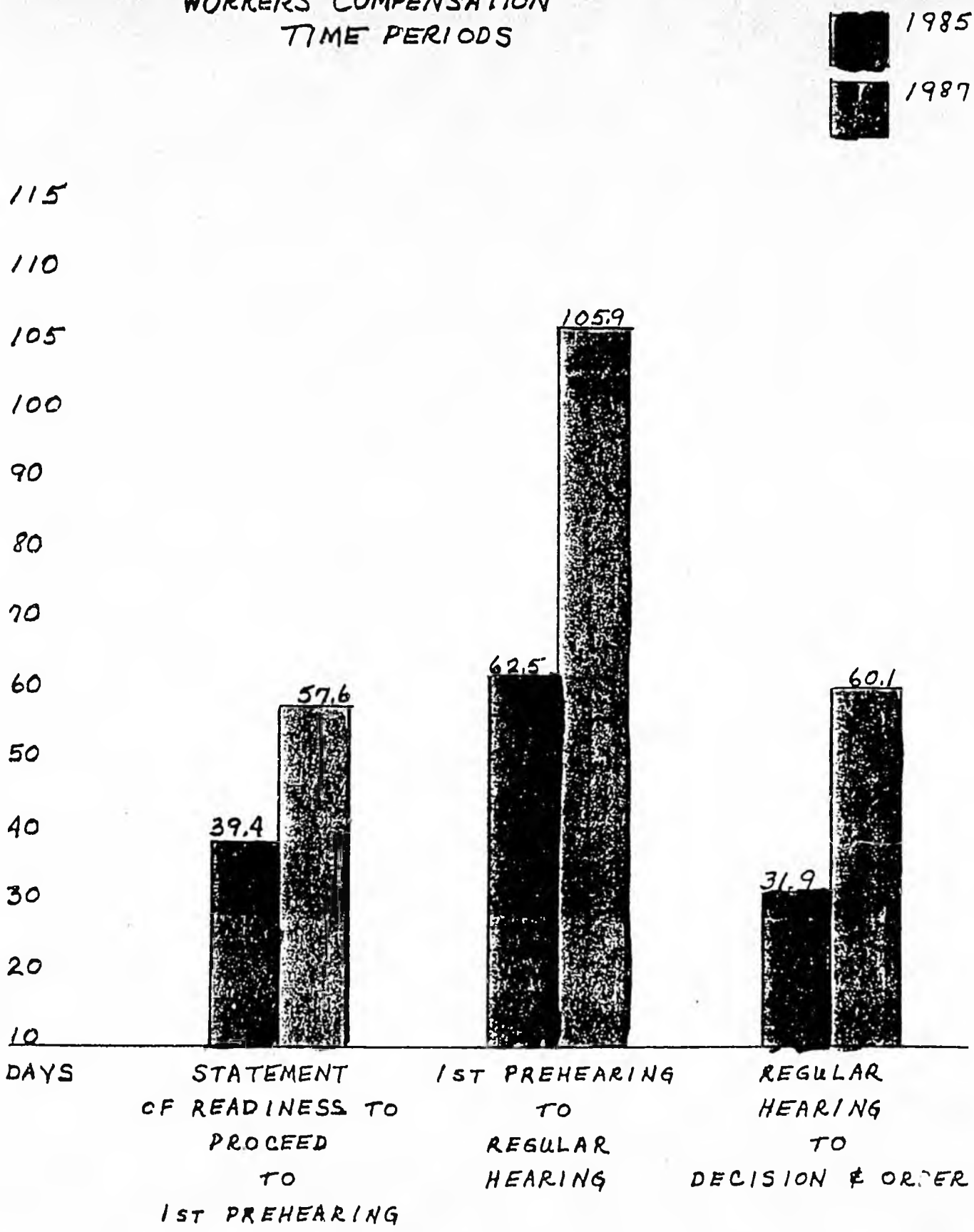
CHANCY CROFT

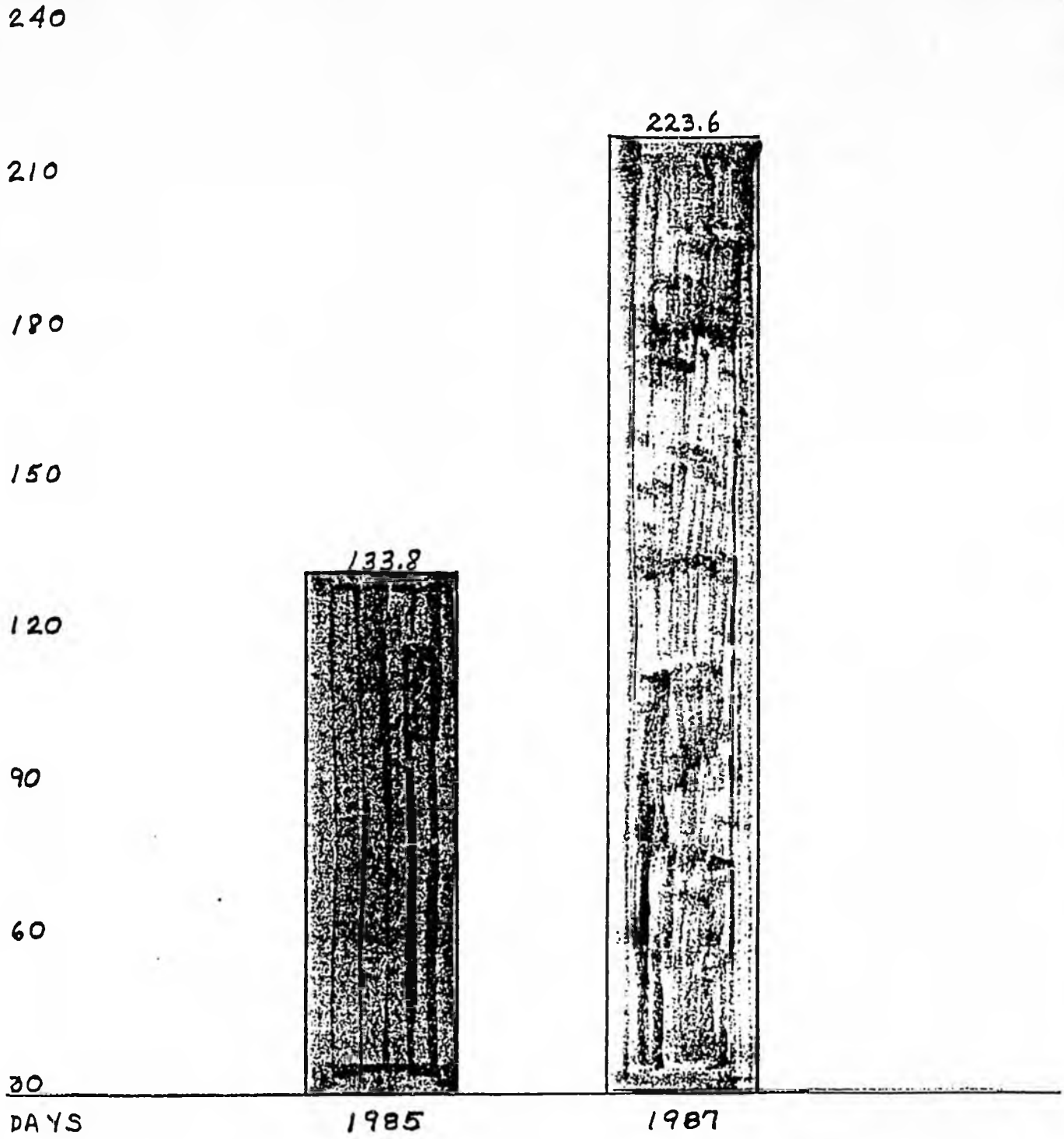
CC/blm/bh

Enclosures

THE INCREASING DELAYS

WORKERS' COMPENSATION TIME PERIODS





THE OVERALL EFFECT

JANUARY

29 STATEMENT OF READINESS TO PROCEED

FEBRUARY

14 VALENTINE'S DAY

MARCH

28 SEWARD'S DAY

APRIL

3 EASTER

MAY

9 LEGISLATURE ADJOURNS (120 DAYS)

30 MEMORIAL DAY

JUNE

JULY

4 INDEPENDENCE DAY

AUGUST

4 SPACE SHUTTLE LAUNCH

SEPTEMBER

5 LABOR DAY

9 DECISION & ORDER

224 DAYS OF WAITING

CHART #1

Chart #1 shows the increased delays in the three crucial steps of getting a workers' compensation case to hearing:

1. First, the filing of a Statement of Readiness to Proceed which initiates Board action,

2. Second, getting a prehearing at which time the date of a full board hearing is set, and

3. Third, to the time a Decision and Order of the Board is issued. Compensation is usually paid within two weeks of the Board's decision.

CHART #2

Chart #2 shows the combined effect of the three steps in Chart #1.

CHART #3

Chart #3 puts in a different perspective a wait of 224 days which is the average time between the date of filing of a Statement of Readiness to Proceed and the Board's decision in the 60 cases decided between October 1 and December 31, 1987.

ATTACHMENT #5

LAW OFFICE OF
SHELBY L. NUENKE-DAVISON
(907) 276-6555

2525 BLUEBERRY ROAD, SUITE 102
ANCHORAGE, ALASKA 99503

February 3, 1988

Representative Dave Donely
P.O. Box V
Juneau, AK 99811

Re: Workers' Compensation Bill

Dear Mr. Donely:

Thank you for phoning me the other evening in regard to some of your concerns about the Workers' Compensation bill. As indicated in our discussion, there are some valid points that were made at the hearing where some of the language should be cleaned up so as to avoid any potential abuses that could arise under the bill. I am going to attempt to sit down and draft up some amendment language on the issue of constitutionality of Brown v. AlPac, and the medical every 30 day IME, so that there is no doubt in anybodies mind that the IME is not meant to be used for a lot of "invasive diagnostic testing." Please feel free to call me any time you have comments or concerns regarding the bill, in that I am anxious to see this bill passed, and as you can tell from the hearings, one desperately needs to be passed as there are a lot of problems under the present system.

I think politically if you can clear up some of the concerns made by some of your constituents you could get the bill through with little changes. I do hope you continue to include the joint Labor Management Task Force in the involvement of any amendments, because as I testified at the hearings, the Workers' Compensation bill is a delicately balanced document.

Since I was unable to testify to everything I had wanted to, and most of the committee members were gone, enclosed please find written testimony I would like submitted to your committee. I will forward the same written testimony to Senator Tim Kelly and his committee.

Sincerely,

Shelby L. Nuenke-Davison
Attorney at Law

SND/kac

enclosure:

LAW OFFICE OF
SHELBY L. NUENKE-DAVISON (907) 276-6555

2525 BLUEBERRY ROAD, SUITE 102
ANCHORAGE, ALASKA 99503

Date: February 3, 1988

To: Honorable Tim Kelly and Honorable Dave Donley

From: Shelby L. Nuenke-Davison
Attorney at Law
2525 Blueberry Road, Suite 102
Anchorage, AK 99503
(907) 276-6555

Re: Labor Management Task Force Bill

WRITTEN TESTIMONY

I have been practicing workers' compensation defense almost exclusively in the State of Alaska for the last six years. I testified just briefly at the hearings held in Anchorage, on January 29, 1988 and was the last witness. Since a lot of committee members were unavailable, I have decided to take the time to do some written testimony because I think this bill is crucial.

I am of the opinion that the Labor Management Task Force Bill should be passed with no amendments made to the bill that do not go through the Labor Management Task Force. The reason for this is because, though I can see legally where some language changes need to be made, I know from working in the Alaska workers' compensation arena that all the statutes are directly related to each other and are intimately intertwined.

I would like to briefly comment on why some of the proposed changes are of the utmost importance. Failure of me to address any particular portion of the bill does not mean that I am not in support of those aspects of the bill.

1. Page 1, Section 1, lines 14 & 15 state, "The legislature declares that the workers' compensation laws must not be construed by the courts in favor of any party." This language is crucial to get passed and quite frankly I think it should be a lot stronger in that no matter what workers' compensation reform is done by the legislature, unless there is a message given to the Alaska Supreme Court that when there is any ambiguity in the workers'

compensation statute it should not go in favor of any party, then the Alaska Supreme Court through case law will nullify a lot of your work. Both the employer and employee give up significant rights in the workers' compensation arena. It is important that everybody understands this because much of the testimony has been surrounding the employee's rights. Employers give up the right to have the employee prove by a preponderance of evidence that he was injured, that the defendants are liable, and his damages. The employer also gives up his common law defenses to comparative negligence and assumption of risk. These are significant rights to give up and, as such, the law should not be construed just in favor of the employee. I understand that the employee also gives up his common law damages in exchange for the workers' compensation remedies. Because both parties give up significant rights, neither party should be favored in the law.

As the law presently stands, the Workers' Compensation Act does not state this. As such, the Alaska Supreme Court always construes the law in favor of the employee if there is any ambiguity in the statute. This is based upon a common law rule that the humanitarian purpose of the law is to favor claimants. To give you an example of how bad the Supreme Court is against employers, there is a common joke which goes around the workers' compensation arena, which is that if a claimant losses at the Board level, the claimant's attorney is malpractice not to appeal. That is somewhat of a significant statement and gives you an idea of how crucial this intent language is.

However, under this section, line 20, we should omit the word "any" evidence and substitute "substantial" evidence because that is the appropriate standard of review for appeals on issues of fact. Keep in mind, substantial evidence is easily found on appeal because it has been defined that any evidence is "substantial enough if it supports the conclusion in the contemplation of a reasonable mind."

2. I would now like to comment on page 2 of the bill Section 4, lines 24 through 29 and over to page 3, line 1. This proposed amendment is important to protect employers from being liable on a claim where an employee knowingly makes a false statement as to his physical condition and then allegedly has an aggravation to that condition. Because of the three-pronged test outlined in the proposed bill, this statute will be hard to prove and will not be easy to abuse against the claimant by the employer. This section however, needs to be supported by the new language in AS 23.30.055 which is on page 11, lines 9-10 & 11 of the

bill. Which states that, "the liability of the employer is exclusive even if the employee's claim is barred under AS 23.30.020 (b)."

3. AS 23.30.095, Section A which is found on page 12, lines 7 & 11, is an important amendment so as to avoid doctor shopping. Doctor shopping prolongs a claim unfairly to the employer. Doctor shopping can presently occur if a claimant goes to a doctor who does not support his position and wants to prolong the claim. Presently, there is nothing in the law stopping this and, therefore, claims go on indefinitely. This statute, however, appropriately protects a claimant if his treating physician refers him to a specialist in an area so as not to have the specialist be constituted a treating physician. At the hearing there was some testimony regarding the right of the employer to have IME's every 30 days and the fear that the claimant would be subjected to numerous "invasive diagnostic tests." As such, I recommend inserting on page 13, line 24 the following: "When possible, the IME physicians should use already existing diagnostic data to make his determination."

4. I would like to discuss briefly on two intertwined statutes which I think are very important to be passed untouched. There is nothing legally wrong with either of these paragraphs. One is Section 15 of AS 23.31.120 (c) which is found on page 16 of the bill, lines 4 through 7, and the other is Section 32, which is AS 23.30.265 (17) which is found on page 25 & 26, specifically on page 26, lines 4 through 14. Both of these amendments are absolutely crucial to be adopted without any changes because stress claims are as a general rule hard to objectify and are the up and coming big exposure for employers. Because there was no legislation on the books, the Alaska Supreme Court have made two devastating rulings on stress that make these claims almost undefensible. Since there are so many stressors in ones life and since a stress claim is subjective in nature, I urge you to enact both amendments untouched. These statutes still affords a party to file a stress claim.

5. Finally, the last areas I would like to address are Section 6, Voluntary Vocational Rehabilitation, Section 24, Temporary Total Disability, and Section 25, The Scheduling of All PPD Benefits and why these sections are important to pass without any significant amendments being made unless they go through the task force.

The present vocational rehabilitation statute in Alaska has already been labeled a failure by many claimants, employers, workers' compensation board members, and

vocational rehabilitation counselors alike. The Alaska vocational rehabilitation system is not fair because it is too intimately connected to the types, amount, and period of time benefits that will be received by the claimant and has resulted in increased litigation to the detriment of the employee. Because of its close connection to the types, amount, and period of time benefits that are received, vocational rehabilitation in Alaska is nothing more than a litigation tool, and as such, is usually computed to dollars and settled out in a settlement. After the settlement, the claimant is no longer entitled to vocational rehabilitation and will more than likely have to return to his work at the time of injury, even if he really should not.

To understand the failure of the present vocational rehabilitation statutes, one must understand the interplay between Temporary Total Disability benefits, Permanent Partial Disability and Vocational Rehabilitation under the present law. Under the present law, it is important for you to understand because there is no cap on the amount or period of time a person can collect Temporary Total Disability benefits and there is a cap on Permanent Partial Disability benefits and because the Alaska Supreme Court in a case called Bignell v. Wise, determined that until a person is both "medically and vocationally stationary" he is entitle to get Temporary Total Disability benefits, the claimant has no interest in getting off Temporary Total Disability and on to Permanent Partial Disability benefits. Therefore, because vocational rehabilitation is so closely tied to how much a person gets and for how long it results in a lot of litigation. This is why vocational rehabilitation does not work in the present system because all it is really used for is a tool to facilitate larger claims and/or to prolong the claim. This is where we lawyers do a lot of our work. As such, the Joint Labor Management Task Force Bill should be passed because it removes vocational rehabilitation from the litigation process and puts a cap on Temporary Total Disability benefits of two years and does not make Temporary Total Disability benefits or Permanent Partial Disability benefits tied to whether or not the patient is vocationally stable. However, in the bill pending vocational rehabilitation is still afforded to claimants who need the services. Only those claimants who truly want these services will use them if they are not tied so intimiately to the claim. Even though no one can give hard dollars in terms of savings, I cannot see how this concept would not save a lot of costs in the workers' compensation system.

If any of you have any questions in regard to this bill or any legal questions on this matter, please feel free to

connect me. Thank you for taking the time to read this written testimony.

Sincerely,

Shelby L. Nuenke-Davison

Shelby L. Nuenke-Davison

SND/kac

DRAFT REPORT TO THE ALASKA STATE LEGISLATURE
ON WORKERS' COMPENSATION BENEFITS

from

UNIFIED FAIRBANKS

This is the final report of the Special Task Force formed by Unified Fairbanks to address the problem of an apparently unjustified increase in workers' compensation premium costs.

The Task Force grew out of an information seminar attended by 160 people, and a followup seminar attended by half that many. Emphasis at the first seminar was on receipt of all information that the State could provide, together with information from professionals in every area. At the second seminar, the preliminary action areas were crystalized and direction was given thereon. At this point, the matter was transferred to the Task Force Committee which consisted of 24 persons who were employers, labor representatives, health professionals, rehabilitation professionals, and attorneys (on both sides). Meetings were held each Wednesday at North Star Terminals. Committees worked an average of 10 hours each on their various projects. Input was had from all members on all reports, and all recommendations contained herein are unanimous unless noted to the contrary.

Organizationally, this should be viewed as a supplement to the WCCA draft legislation which is now before you as SB

322. Sections will be taken in the order that they are set forth in SB 322. There are some additional recommendations beyond what was covered by that draft legislation. Some are of a legislative nature, there are also administrative recommendations for both proposed regulation and action. There are, finally, executive recommendations which must be considered by the Governor's Office in the budgeting process.

The overall goal was to make changes in the workers' compensation system which would reduce the cost of the system as it is reflected in premiums paid by employers.

The format for approaching each section or subject will be:

1. Comments addressing the WCCA proposal (SB 322);
2. The Unified Fairbanks recommended approach;
3. Actions proposed by Unified Fairbanks, whether legislative, administrative, or executive; and,
4. Arguments and problem areas which should be addressed.

I. LEGISLATIVE INTENT

COMMENTS

According to WCCA, this does not alter the presumption of compensability, but does indicate a legislative preference for a "preponderance of the evidence" test to be used by the Board without favor to either side. Additionally, the standard of judicial review is to be changed to provide that, on

questions of fact, the Board's findings are conclusive if supported by any evidence at all. Whether the court system will find a declaration of legislative intent sufficient to change the standard of judicial review is open to question. The final "intent" is to reduce benefits to persons with residences outside, so as to give them an incentive to go back to work.

RECOMMENDATION

Sections A and C are straight-forward legislative goals. Section B might better be amended along the lines of California Workers' Compensation Code, Section 3202.5 as follows: "The legislature declares that the workers' compensation laws must be fairly and impartially construed by the courts. In promotion of that goal, it is the intention of the legislature that the preponderance of evidence standard be utilized in determining the compensability of a workers' compensation claim. Preponderance of the evidence means such evidence as, when weighed ~~of~~ with that opposed to it, has more convincing force and a greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence."

ACTIONS PROPOSED

None in this area unless changing the standard of judicial review is seriously contemplated. If such is contemplated, there is a probability that multiple amendments may be requisite in such places as the Administrative Procedure Act and Title 22.

Act and Title 22.

ARGUMENTS AND PROBLEM AREAS

These have been raised above.

II. DEPARTMENT MAY SET UP TO SELECT AND REMOVE REHABILITATION SPECIALISTS OR PHYSICIANS

COMMENTS

In Fairbanks, we felt strongly that the "may" should be replaced by "shall", "must" or "will" creating a mandate. WCCA feels that, providing the Board with the power will be enough to cause it to act. Additionally, the "or" probably should be a "and" because the two are not meant to be alternatives.

RECOMMENDATIONS

Our recommendations in the medical and rehabilitation areas are addressed in those particular areas of this report. We concur with the intent of WCCA in Section 2 with the strong recommendation that the word "may" be made mandatory, and clarifying that both rehabilitation specialists and "physicians" (as defined elsewhere) are to be selected.

ACTIONS PROPOSED

See above.

ARGUMENTS AND PROBLEM AREAS

Hopefully, the qualifications for health care providers will not strongly differ from the standard of licensing, etc.

III. WHEN ANYTHING IS DECLARED UNCONSTITUTIONAL, DEPARTMENT "SHALL IMMEDIATELY" DRAFT NEW REGULATIONS

COMMENTS

A different drafter for WCCA uses the mandate "shall" and adds to it the word "immediately". This drafter probably meant to say "shall forthwith adopt a replacement regulation or regulations".

RECOMMENDATION

A good idea.

ACTIONS PROPOSED

See above.

ARGUMENTS AND PROBLEM AREAS

Since the Department does not have legal counsel and the route for cooperation with the Attorney General's Office is rather tortuous, any requirement of immediacy may be dysfunctional.

IV. FALSE STATEMENT ON PREEMPLOYMENT QUESTIONNAIRE WAIVES ALL BENEFITS

COMMENTS

First, there is no mechanism for determining whether any particular ~~this~~ statement is actually false. Questions composed by individual employers can mean various things. Well designed questionnaires can even be susceptible of dual interpretations. Second, (1) is vague. It probably should provide that, had the

employer known the true state of facts, a) the employee would not have been hired, and b) the non-hiring would have been legal under federal and state law. Third, (2) is again vague because a representation on a piece of paper in the office seldom causes anything. Reference should be to the condition hidden from the employer by the misrepresentation.

RECOMMENDATION

Unified Fairbanks agrees with the intent and feels that the drafting should be cleaned up.

ACTIONS PROPOSED

See above.

ARGUMENTS AND PROBLEM AREAS

See above.

V. SECOND INJURY FUND CONTRIBUTIONS AND REPORT TO BE FILED ANNUALLY

COMMENTS

The State receives currently both data and funds within a short period of time after each case is concluded. This amendment permits the State to have data consolidated on a single annual report from each carrier. It also permits the insurance company to earn interest on money due for the intervening time between closing a case and the annual report.

RECOMMENDATION

Since the State is unable or unwilling to compile data

from
~~for~~ reports filed on a case-by-case basis, this appears to be a way in which the annual reports from the carriers can be summarized, thereby providing for the first time, some data with respect to the validity of rates charged, and where the problems in the administration of the act happened to be. We join in the recommendation to attack the problem.

ACTIONS PROPOSED

Unified Fairbanks would like the State to explore the possibility that, either through the use of a personal computer or access to some other computer plus the addition of one person to the staff of the department, the reports as they are currently received could be entered into the computer so that all data necessary for fixing rates or ascertaining percentages of expenditure, etc. would be instantly available to the State and any employer or agency requesting the information. It is most likely that the cost to the State of a computer, its programing, and a person to operate it, at least on a part-time basis, would be less than the interest lost by providing the delay in payment by the carriers. There is no indication that the additional interest earned (which will probably be on the remainder in a claims reserve) will effect the workers' compensation premium rates in any way.

ARGUMENTS AND PROBLEM AREAS

The State Department of Insurance and the State Department of Workers' Compensation are both unable to produce

statistics indicating the basis for premiums or the disposition of monies paid out. If this problem is not addressed, we will continue to set rates in a blind fashion and amend legislation without knowing whether we are doing any good.

VI. REHABILITATION

COMMENTS

Unified Fairbanks agrees that rehabilitation should be voluntary with the employee. We find no evidence from any source which indicates the law which has been proposed will reduce the cost of workers' compensation. We have repeatedly sought facts from the State government indicating what segment or segments of a workers' compensation system had been causing the greatest increase in cost. Absolutely no information has been forthcoming, although we have been able to obtain the same information from other states with a telephone call. In short, all we know is that there is a serious problem with the cost of the system. However, no one in our State government has been able to identify where the problem lies. We firmly believe that it is wrong to legislate massive changes in what is basically a sound law when no one has yet identified where the problem lies. We are, in fact, worried that the cost of the system may be increased by the proposed changes. There have been no regulations adopted to put into effect the rehabilitation scheme that is presently in the law. We therefore do not know how the

presently existing scheme will work or what its costs will be. We are therefore reluctant to change for the sense of change.

RECOMMENDATION

A. INEFFECTIVE WORK BY STATE AGENCIES, Division of Insurance:

Much of the blame for the increased cost of the workers' compensation system has been placed on vocational rehabilitation. However, the Division of Insurance has absolutely no information available to anyone concerning the costs of vocational rehabilitation or of any other workers' compensation benefit for that matter. Nonetheless, the Division continues to approve massive rate increases for workers' compensation insurance, and a portion of the blame gets placed on a "vocational rehabilitation system which is too liberal." The last increase was granted without the preparation of any findings of fact and without the presentation of any specific information to those in this State who are involved. We suggest legislation requiring some state agency to keep statistics on the cost of rehabilitation evaluations, rehabilitation plans, the cost of litigation, and so forth. When future rate increases are suggested, facts and figures will be available to indicate where the cost increase is coming from.

B. INEFFECTIVE WORK BY STATE AGENCIES, Workers' Compensation Board:

The Department of Workers' Compensation has seriously faltered in its obligation to administer the existing vocational

rehabilitation law. Over five and a half years have passed without the promulgation of a single rule or regulation by the Board to govern procedures under the law which went into effect on July 1, 1982. The present law has never been given a chance to work and we find it ridiculous that the Legislature now stands ready to cast it aside. We suggest the legislature take whatever steps are necessary to immediately secure the promulgation of administrative rules and regulations by the Board.

Two good examples of what has happened as the present system has struggled without the benefit of administrative rules:

1. We suspect a major portion of any increased cost of vocational rehabilitation is in the payment of temporary benefits to injured workers while they wait for the vocational process to be completed. The system in Fairbanks has worked very slowly without the rules and regulations needed. As a result, injured workers remain far too long on temporary benefits. Rather than deprive injured workers of temporary benefits during vocational rehabilitation, which we think is a worthwhile benefit, we suggest the Board streamline the system with the promulgation of rules and that the existing law be tightened up to provide certain specific time limitations for each step of the process. This is the main thrust of our suggested changes in the existing law.

2. In Fairbanks, there is no full-time rehabilitation administrator. At present, the one administrator is in Fairbanks one day a month. This allows a maximum of three rehabilitation conferences. Without timely rehabilitation conferences available to all parties, increased costs of continuing temporary benefits have resulted. It is obvious additional staff are required.

C. LEGISLATIVE TASK FORCE

We believe the Legislature should form a task force to keep the existing vocational rehabilitation system moving. The group should have representatives of all major participants in the system. The information needed from the Division of Insurance could be pursued, enforcement of the Board's obligation to promulgate rules and regulations would be enhanced, and proposed changes in the law and regulations could be generated.

D. SECOND INJURY FUND/TEMPORARY PARTIAL DISABILITY

Our committee believes one of the greatest benefits to the system would be strong encouragement to employers to rehire injured workers. The present Second Injury Fund does nothing to provide this encouragement as coverage begins only after 104 weeks of disability. We suggest the period of coverage be drastically reduced to make it possible for injured workers' to return more rapidly to the work force. A further encouragement toward the goal of returning injured workers to a job is our

proposed new subsection(n) which encourages the use of TPD when employers rehire their injured workers in a "modified" or "light duty" capacity.

ACTIONS PROPOSED

In order to keep in line with the WCCA recommendation, we propose that the statutory language be as follows:

AS 23.30.041. Rehabilitation of injured workers.

(a) The board shall select and employ a rehabilitation administrator. The board shall adopt regulations to implement this section. The board shall authorize the rehabilitation administrator to select and employ sufficient rehabilitation staff to conduct hearings and to collect and analyze statistical data. The rehabilitation administrator is in the partially exempt service under AS 39.25.120.

(b) The rehabilitation administrator shall implement the provisions of this section, study the issue of rehabilitation, both physical and vocational, enforce the regulations as adopted, and maintain and report statistical data on a contining basis as to the cost of rehabilitation to the Legislature on at least an annual basis.

(c) If an employee suffers a compensable injury that could preclude return to the job held at the time of injury, the employee shall be referred for an evaluation for participation in rehabilitation services within 30 days after the date of injury. A full evaluation shall be performed by a qualified

rehabilitation professional within 30 days of the date of referral. If in the opinion of the qualified rehabilitation professional, the medical, physical, or emotional state of the employee precludes a full evaluation, the rehabilitation professional shall prepared a preliminary evaluation within 14 days of the date of referral. A preliminary evaluation shall include the reasons why a full evaluation cannot be made, an opinion as to when the employee will be able to participate in a full evaluation, and any information that would be included in a full evaluation that can be determined and reported by the rehabilitation professional at the time of the preliminary evaluation. If the employer does not timely make a referral for evaluation under this subsection, the rehabilitation administrator shall retain a qualified rehabilitation professional to perform the evaluation. The employer shall pay the reasonable costs of an evaluation under this subsection.

(d) A full evaluation by a qualified rehabilitation professional shall include a determination whether rehabilitation services are necessary, as outlined in the regulations.

(e) Refusal by an injured employee to participate in an evaluation results in forfeiture of disability compensation for the period the refusal continues. The rehabilitation administrator shall find that an employee refuses to participate in an evaluation if the employee fails to cooperate with the

rehabilitation provider as outlined in the regulations.

(f) After the evaluation is completed, the employee must elect in writing to the administrator within 14 days of receipt of the full evaluation whether or not he or she will participate in further rehabilitation services.

(g) The employee's election not to participate in rehabilitation services is final, provided, however, that the employee shall have the option within 30 days of the notice under subsection (f) to notify the administrator in writing that he now wishes to participate in rehabilitation services.

(h) After the employee has elected to participate in vocational rehabilitation services for which he is eligible, the vocational rehabilitation counselor will within 90 days submit a vocational rehabilitation plan to concerned parties including the rehabilitation administrator which will enable the employee to return to suitable gainful employment. A rehabilitation plan may consist of any of the following; however, if the employee can be restored to suitable gainful employment with rehabilitation plans of higher preference, then a rehabilitation plan of a lower preference need not be offered by the employer. The order of preference fore rehabilitation plans is return to work

(1) with the same employer at the same or modified job as at the time of injury;

(2) with the same employer at a new job using transferrable skills;

(3) with a new employer at the same or modified job;

(4) with a new employer in a new job using transferrable skills;

(5) through developing already existing skills or acquiring new skills through on-the-job training;

(6) after developing already existing skills or acquiring new skills through vocational training;

(7) after developing already existing skills or acquiring new skills through academic training;

(8) in self employment; and

(9) through direct placement in an unrelated job not using transferrable work skills.

(i) If the employer and employee fail to agree in writing on the submitted vocational rehabilitation plan within 14 days, the employee shall submit an alternative plan to the rehabilitation administrator. The employee's alternative plan must be submitted within an additional 14 days. In the event of a dispute, the rehabilitation administrator or his staff may either write a decision or schedule a formal rehabilitation conference to be held within 10 days of receipt of the alternative plan. If a conference is held, a decision as to the appropriate plan shall be issued within 10 days after the conference. The rehabilitation administrator's decision is

binding unless a party seeks review of the decision by requesting a hearing with the Board in accordance with AS 23.30.110.

(j) A vocational rehabilitation plan may not exceed ~~up to~~ 37 training weeks, except that the rehabilitation administrator may order a plan up to an additional 37 training weeks. This subsection does not prohibit 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 AS 23.30.185 or AS 23.30.200 shall be paid throughout the rehabilitation plan under this section.

(k) For purposes of this section, suitable gainful employment means employment that is reasonably attainable in the light of an individual's age, education, vocational history, and physical capabilities, and that offers an opportunity to restore the individual as soon as practical to a remunerative occupation as nearly as possible to the individual's gross weekly earnings as determined by section AS 23.30.220.

(l) For purposes of this section, "labor market" means a geographical area that offers employment opportunities in the following priority:

(1) area of last employment;

(2) area of residence;

(3) the State of Alaska;

(4) outside Alaska.

(m) "Qualified rehabilitation professional" means a person who by education and experience has the skills to work in the field of rehabilitation as determined by Board established regulations.

(n) While an injured worker is participating in a preliminary evaluation and/or a subsequent full evaluation under this section, he or she shall receive temporary partial disability benefits under AS 23.30.200 when an employee under section (h)(1) or (2) and primary physician agree, prior to medical stability and a full release, that an employee may return to modified, light duty, part time, or trial work status.

VII. BARRING ALL LIABILITY BY AN EMPLOYER (BOARD AND COURT) TO AN EMPLOYEE WHO COMMITS AN UNTRUTH ON HIS OR HER PREEMPLOYMENT QUESTIONNAIRE

COMMENTS

Much of this has been discussed under number IV above. No one can know what the courts will do with this. There is no way to provide a prompt adjudiciation of whether a worker committed an intentional falsehood, and it is not likely that the courts will deprive a worker of both compensation benefits and civil liability (if the employer was negligent) without a firm adjudication of intentional fraud.

RECOMMENDATION

We favor the approach, but feel there must be a standarized questionnaire with admonitions on it and, if need be, provisions to help illiterates complete it. We also recommend that there be some proviso for prompt determination of whether fraud has been committed in order that a carrier not pay benefits if they are not supposed to be paid, but not withhold benefits if they are supposed to be paid.

ACTIONS PROPOSED

There should be a statute providing for forfeiture of civil liability against the employer, as well as benefits under the workers' compensation law. This would be easiest if it were done under Title 11 (the criminal code). This will require legislation to effect what has just been set out, administrative cooperation in getting these matters to the proper authorities on a relatively emergency basis, and executive allocation of funds to handle the hearing which declares these rights to have been waived.

ARGUMENTS AND PROBLEM AREAS

Equal protection questions will doubtless be raised as they always are with any forfeiture or waiver. Additionally, we are all aware that, if employment is down as it is now, a person needing a job will say what is necessary to get that job. This will make that person a "good guy" in the eyes of the court, and there will be an effort to avoid this waiver, particularly in

the event of a hard case where the employee is very badly injured and the employer was quite negligent.

VIII. NO DOCTOR HOPPING

COMMENTS

In the first sentence, the word "attendance" should be "attendants". We feel that the cases where there is no specialist within the State (in an area where an employee needs treatment) will be sufficiently rare that the Board can handle these as special matters. We worry that the transfer to a specialist will be considered a change in "attending physician" because this is the ~~meeting~~ meaning that the medical profession attaches to such a change.

RECOMMENDATION

We concur fully with requesting the passage of Section VIII. There will have to be considerable public education and the adoption of regulation covering the Notice of Change ~~in~~ of a physician. We do recommend that the term "attending physician" be changed to be "primary physician". This will eliminate the semantical problem. We feel it advisable that the problems of prior notification be avoided by providing that the notice must be "within 14 days" of the change. This is in line with the present law.

ACTIONS PROPOSED

Aside from the semantical suggestion above, the

Department and the Board should prepare regulations and forms to cover change of physician. We would prefer that the amendment be as follows:

"The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. However, if the condition requiring the treatment, apparatus, or medicine is a latent one, the two-years period runs from the time the employee has knowledge of the nature of his disabililty and its relationship to his employment and after disablement. It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the Board. The Board may authorize continued treatment, or care, or both, as the process of recovery may require. When medical care is required, the injured employee may designate a licensed physician inside the state where the employee resides to render the care. Upon procuring the services of a physician, the injured employee shall give proper notification of his selection to the employer within a reasonable time after first being treated. The employee may not make more than one change in the employee;s choice of primary physician without the written consent of the employer. Referral to a specialist by the employee's primary

physician is not considered a change in physicians. Notice of a change in the primary physician shall be given within 14 days after the change."

ARGUMENTS AND PROBLEM AREAS

There will always be emergencies where there is not time to go through the notification procedure. This should be covered by the regulations. There will always be situations where an employee is referred to more than one specialist during the same time period. Once again, this can be worked out with the accompanying regulations.

IX. COURSES OF TREATMENT TO BE WRITTEN IN ADVANCE

COMMENTS

This proposal will greatly increase the medical cost of treatment. Physicians are not magicians. They cannot predict with exactitude at what point during a "course of treatment" a person will actually be cured. In order to avoid malpractice, all physicians will have to recommend a maximum course of treatment <u>in case such is needed</u>. Unified Fairbanks does not feel that the proposed amendment is workable, nor that the cost increase necessary for a physician to prevent malpractice is money well spent.

RECOMMENDATION

We recommend no amendment to Subsection C.

ACTION PROPOSED

The evil sought to be remedied here, namely that of endless treatments without real value, should be addressed by a study committee to find a feasible way of handling the situation. Hopefully, the way should not increase the cost.

ARGUMENTS AND PROBLEM AREAS

See above.

X. A DEFENSE MEDICAL EXAMINATION AFTER 14 DAYS AND THEN EACH 30 DAYS THEREAFTER

COMMENTS

Because of the definition of the word "physician" contained later on, it would be advisable to remove the words "or surgeon" in line 4 regardless of what else is done. Additionally, there may be problems with respect to types of practice (hypnotic, chiropractic, osteopathic, religious, etc.) and personality conflict which will sooner or later result in problems under this section whether or not amended. We felt that the present statute was adequate, and [redacted] that there was no need to wind everyone up with the idea of a defense medical exam every 30 days, and that money expended thereby would be a waste.

RECOMMENDATION

That we leave Section (e) as it currently is and schedule this problem for study as will be referenced later.

ACTIONS PROPOSED

Scheduling this problem for study in the future.

ARGUMENTS AND PROBLEM AREAS

Sending a Jehovah Witness to a hematologist is not likely to be functional. This sort of preference, as mentioned above, should be considered in study.

XI. USUAL, CUSTOMARY AND REASONABLE FEES

COMMENTS

This is a very good idea. Care will have to be taken by the Board in the manner in which it adopts a UCR fee so that that fee does not become known to medical practitioners (see below).

RECOMMENDATION

We join in requesting passage.

ACTIONS PROPOSED

Same (with caution so that the UCR schedule is not made available).

ARGUMENTS AND PROBLEM AREAS

UCR fees are used by almost every insurance company that writes health insurance. With the big carriers, the UCR rate for any procedure is set at the 90th percentile. This means that 89% of all doctors practicing in the area charge less than the UCR fee for that procedure, while 10% of the same doctors charge more. Each carrier jealously guards the secrecy of its UCR schedule because, if that schedule becomes known, it will become a "minimum fee schedule" and medical costs will

really escalate. If the Board adopts a UCR schedule, it will probably will have to do so in a public meeting and with notice. This will mean that the schedule could become public property or at least known to many physicians. That sort of action will result in a massive increase in medical costs with no enhancement of medical care.

XII. REPEALING RELIANCE ON AMA GUIDE FOR EVALUATION OF PERMANENT IMPAIRMENT AND OBTAINING A BOARD CONSULTANT ON APPROPRIATENESS, NECESSITY AND COST OF MEDICAL SERVICES

COMMENTS

This may be the one place where "may" should not be replaced by "shall". The repeal of the reliance on the AMA Guide is then undone later on in this bill with a subsequent adoption of the same guide. Additionally, we feel that new subsection (k) takes care of the problem without needing to spend extra monies on medical consultation.

RECOMMENDATION

We are negative on this repeal and new rule.

ACTIONS PROPOSED

None.

ARGUMENTS AND PROBLEM AREAS

Another layer of medical authority may well simply confuse the issue. Enough corrections have been taken in other sections.

XIII. INDEPENDENT MEDICAL EXAMINATION

COMMENTS

The use of a single physician as an independent medical examiner became obsolete in the medical profession several years back. We do not have, in Alaska yet, multiple discipline panels of Board certified physicians, and hence this portion of our medical practice is going outside. Alaska currently has a number of clinics who can perform this function and we are recommending a medical update by using them (unless the employer or carrier prefers an outside group). The principles set forth ~~is~~ are good. We have some reservations about using "clear and convincing objective evidence" since the medical meaning of "objective evidence" differs considerably from the lay persons definition.

RECOMMENDATION

To reword the proposal of WCCA creating the [illegible]t but updating the medical services and apportioning the weight to be given to the testimony of such a panel to be equal with the preference already given to a "treating physician".

ACTIONS PROPOSED

We recommend the following wording for Section (k) of AS 23.30.095(k) to read: "In the event of a medical dispute regarding determinations of causation, medical stability, degree of impairment, functional capacity, the amount and (ethicacy) of the continuance of or necessity of treatment, or compensability

between the employee's attending physician and the employer's independent medical evaluation, an independent multiple discipline panel of board certified physicians shall conduct an examination of the employee. This panel shall be selected by the Board from a list established and maintained by the Board. The cost of the examination and medical report shall be paid by the employer. The report of the panel shall be furnished to the Board and to the parties within 14 days after the examination is concluded. The opinion of the independent panel shall, in the absence of clear and convincing evidence to the contrary, have equal weight with the opinion of the attending physician. No person may seek damages from an independent multiple discipline panel of board certified physicians for the rendering of the opinion described in this subsection or for testimony by any member of said panel under this subsection, except in the event of fraud." This will require that the Board entertain applications from various clinics currently formed and to be formed for appointment to the panel list. Publication of the legislative change will probably be adequate to form a number of these panels within the state. The Department will probably need to assign an employee (part-time) to handle the rotating list. That same person (or computer) could handle the other rotating lists suggested in this legislative package.

ARGUMENTS AND PROBLEM AREAS

Care should be taken to watch out for panels which

spring up without fully qualified people in the necessary disciplines on them. There should be a regulation describing the disciplines which must be available on any panel and the requirement of Board certification to handle this problem. If the weight given the panel is equal to the weight given the attending physician, and if the two differ, then the defense medical examination will be the swing vote. This sort of apportionment is necessary because medicine is not yet reduced to total certainty and a demonstrably incorrect judgment call (in hindsight) and will produce lawsuits even if only between the physicians involved.

XIV. STATUTE OF LIMITATION TRIGGERED BY DIRECT COMPENSATION BENEFITS

COMMENTS

This amendment clarifies a confusing situation so that litigation in this area will no longer occur.

RECOMMENDATION

Support for the WCCA proposal.

ACTIONS PROPOSED

Adopt the WCCA proposal.

ARGUMENTS AND PROBLEM AREAS

Knowledge of the commencement of the Statute of Limitations is something that is difficult to come by for a layman. In all probability, regulations will be needed providing that, upon payment of the final payment, there be an

accompanying letter or form indicating that the Statute of Limitations commences as of the date of that letter.

XV. NO PRESUMPTION OF COMPENSABILITY IN MENTAL INJURY CASE

COMMENTS

The term "mental injury" is undefined in law and in medicine. What is probably meant here is a stress related injury with manifestations primarily found in brain dysfunction. Without clarifying the term, much litigation will be required.

RECOMMENDATION

The idea is good. The proposal should be adopted to eliminate litigation. The definition of the injury should be made clear.

ACTIONS PROPOSED

Same as above.

ARGUMENTS AND PROBLEM AREAS

Only if the term is not defined will there be much litigation to determine what is meant. All injuries have a mental aspect. Almost all diseases commonly thought of as mental diseases have physical manifestations.

XVI. BOARD'S FACTUAL DETERMINATIONS CONCLUSIVE IF ANY EVIDENCE AT ALL

COMMENTS

See our comments under Section I.

RECOMMENDATIONS

See our recommendations under Section I.

ACTIONS PROPOSED

See our actions proposed under Section I.

ARGUMENTS AND PROBLEM AREAS

See our arguments and problem areas under Section I.

XVII. BOARD HAS ONE YEAR TO RECONSIDER ERRONEOUS FACTUAL FINDINGS

COMMENTS

This is a technical correction to make clear when the one year starts running. The correction is needed and does make the situation clear. This doubtless supplements the "any evidence" rule found in Sections XVI and I, making Board determinations relatively unappealable on the facts.

RECOMMENDATION

We join the WCCA recommendation.

ACTIONS PROPOSED

Adopt the proposed amendment.

ARGUMENTS AND PROBLEM AREAS

This section will doubtless now be used because of the cutoff of appellate rights if the "any evidence" rule is adopted. It is part of an attempt to make the Board's decision final, except on questions of legal interpretation. The Board should anticipate ~~this~~ increased usage. There may be staffing implications in the increased usage.

XVIII. PENALTIES CAN BE REDUCED

COMMENTS

A necessary supplement to the amendment proposed in Section V.

RECOMMENDATIONS

See comments in Section V.

ACTIONS PROPOSED

See comments in Section V.

ARGUMENTS AND PROBLEM AREAS

See comments in Section V.

XIX. REAFFIRMATION OF LAST INJURIOUS EXPOSURE RULE

COMMENTS

Simply a restatement of the current law.

RECOMMENDATION

A good rule. It can't hurt to repeat it.

ACTIONS PROPOSED

Passage of the amendment.

ARGUMENTS AND PROBLEM AREAS

None, since the rule is already in effect.

XX. ANNUAL REPORTING DATE AND PENALTY INCENTIVE

COMMENTS

Another portion of the procedure set forth in Sections V and [illegible]III.

RECOMMENDATION

See comments under Section V.

ACTIONS PROPOSED

See comments under Section V.

ARGUMENTS AND PROBLEM AREAS

See comments under Section V.

XXI. MAXIMUM AND MINIMUM ON WEEKLY DISABILITY PAYMENTS

COMMENTS

While looking like a major reduction, this will probably effect very few injured persons under the various rules currently existing. For an injured employee with a wife and children, benefits will often be less than unemployment benefits.

RECOMMENDATION

Adopt the proposal and then monitor the situation to see whether injured employees are waiving disability in order to collect unemployment.

ACTIONS PROPOSED

Adopt the proposal.

ARGUMENTS AND PROBLEM AREAS

An injured employee whose disability benefit is less than unemployment may waive disability benefits and request that his doctor release him for work so that he can draw

unemployment. This could have a domino effect on other benefits.

REINSTATE REDUCED BENEFITS FOR THOSE RESIDING OUT-OF-STATE

COMMENTS

This portion of Section XXI seeks a return to ~~the~~ reduced benefits for those workers who reside out-of-state. It also indicates that only instate work will be used to calculate earnings in the past. Between the two, the long term effect will hopefully be to provide a substantial disincentive to residents of other states with respect to working in Alaska. This is a tradeoff for the increase in permanent partial disability.

RECOMMENDATION

Adopt the proposal in this form unless the Attorney General's Office suggests one less likely to be attackable in court.

ACTIONS PROPOSED

Same.

ARGUMENTS AND PROBLEM AREAS

A case entitled Brown v. Alpac in the Supreme Court found severe difficulty with compensating workers who reside out-of-state less than those who reside instate. There are equal protection and freedom of travel problems possible here and plans should be made to defend this scheme.

XXII. FACTORS TO BE CONSIDERED IN DETERMINING PERMANENT TOTAL DISABILITY

COMMENTS

A part of the package very very rarely used.

RECOMMENDATION

Adopt the amendment and monitor it for effect.

ACTIONS PROPOSED

Same.

ARGUMENTS AND PROBLEM AREAS

The reference to "area of last employment" may refer to work available in another state. This may be part of the equal

protection and freedom of travel problem. However, it doesn't seem likely that this would be an area of attack. This seems to eliminate the problem of whether a person is still able to work if that person can hold only some job that is only available in another state.

XXIII. FAILURE TO ACHIEVE EMPLOYABILITY NOT NECESSARILY PERMANENT TOTAL DISABILITY

COMMENTS

Presumptively, this refers to the person who could, with more effort put forth, hold some job that is available somewhere in Alaska, but does not do so.

RECOMMENDATION

We have no idea of the effect and therefore join WCCA in advocating the amendment.

ACTIONS PROPOSED

Same.

ARGUMENTS AND PROBLEM AREAS

If this is not spelled out to some greater detail in regulations, there will have to be a series of court cases to ascertain what its effect may happen to be.

XXIV. TEMPORARY TOTAL DISABILITY LIMITED TO TWO YEARS OR MEDICAL STABILITY, WHICHEVER IS FIRST

COMMENT

Under the proposed definition of medical stability

found in later sections, this will mean that TTD will last only so long as the injured employee makes objectively measurable improvement each 45 days. It would require at least 16 objectively measurable improvements to keep TTD running for two years. Only horrendous and compound injuries should ever find their way into that category. Most severely injured people will be without improvement for a 45 day period somewhere during their recovery and hence, they will pass directly to the permanent partial disability rating.

RECOMMENDATION

We have no idea of the effect and therefore join WCCA in advocating the amendment.

ACTIONS PROPOSED

Same.

ARGUMENTS AND PROBLEM AREAS

Medical professionals are likely to create illusory improvements to avoid this rule and to permit their patient to recover to a true point of medical stability before being permanently rated. Alternatively, people will be rated for permanent partial disability long before they have recovered and unless there is a motion to amend the Board's findings within one year, the carrier will not get ~~the~~ any funds (which have been paid) returned. This could be expensive.

XXV. PERMANENT PARTIAL DISABILITY RENAMED AND BASED ON $240,000 FOR A "WHOLE MAN", SPECIAL FACTOR TO REDUCE PAYOUT FOR THOSE LESS THAN 31% DISABLED

COMMENT

Almost all disabilities fall within the 0-30% category and hence, will be cut back rather than based on the $240,000 whole man. This will be a very beneficial amendment for those quite severely injured. The change in caption was probably a transcribing accident and should be rectified. The $250.00 minimum should be adequate to lock in the reduced payment for those with only minor disabilities such as loss of a hand. The amendment further readopts the American Medical Association's guides to evaluation of permanent impairment (repealed earlier in this package) and provides for the Board to adopt and use a supplemental schedule if they so desire. The language probably should be "shall" rather than "may" so that this supplemental schedule does not have to be created by courts on appeal.

RECOMMENDATION

Adopt the amendment and monitor it for effect.

ACTIONS PROPOSED

Same, but restore the caption to use the word "disability" so as to be consistent with other sections. Also, "may" should be changed to "shall".

ARGUMENTS AND PROBLEM AREAS

It is to be anticipated that people less than 31% disabled will test this section in the courts. It appears that it will withstand the test.

XXVI. CUTTING OFF TEMPORARY PARTIAL DISABILITY IN THE SAME MANNER AS TEMPORARY TOTAL DISABILITY

COMMENTS

The two-year and "medical stability" problems foreseen above in Section XXIV are encountered here again.

RECOMMENDATION

See number XXIV.

ACTIONS PROPOSED.

See number XXIV.

ARGUMENTS AND PROBLEM AREAS

See number XXIV.

XXVII. WAGE EARNING CAPACITY FOR CALCULATION OF PERMANENT DISABILITY TO BE DETERMINED BY ACTUAL SPENDABLE WEEKLY WAGE OR SET BY BOARD

COMMENTS

This is the only use of the term "actual spendable weekly wage". It is undefined and is obviously intended to be different from "spendable weekly wage" which is very narrowly defined. Until this term is defined by regulation or by the courts, the Board will probably have to have a hearing and set the wage earning capacity of each person who becomes eligible for permanent disability of any sort. Since this is the compensation on which the amount that the injured person will receive is based, we can only hope that settlements will become

a pattern. Otherwise, the Board will be snowed under with a new type of hearing which only occasionally occupied them in the past.

RECOMMENDATION

Adopt the amendment and monitor its effect.

ACTIONS PROPOSED

Adopt the amendment and monitor its effect.

ARGUMENTS AND PROBLEM AREAS

This appears to say that the wage earning capacity of a person will be based upon the spendable weekly wage which the person is earning at the time he or she is injured. The use of wages contempory with the injury is to be encouraged, particularly because of the bizarre effects of Alaska's boom and bust economy when a historical earnings criteria is used. The inconsistencies between this and the next section may result in litigation. Our discussions indicate that this is a more desirable approach in Alaska's economy (see our comments in the next section).

XXVIII. BOARD MUST DETERMINE EMPLOYEE'S GROSS WEEKLY EARNINGS

COMMENTS

This amendment is imposed upon the delightful conundrum which has been AS 23.30.220(a). The section as it currently exists begins by saying that the current wage at the time of injury is the basis for computing compensation. It goes on to

provide that this is current receivable wage and that this is calculated on the basis of earnings history only. There are two formulas that are customarily used in workers' compensation statutes. One bases the calculation of compensation on the earnings of the employee at the time of injury. The other bases the calculations on a wage earning history. This latter has created much of the problem on which we are currently working. In a boom and bust economy, a workers' compensation system that is based upon earnings history finds that in boom periods, the workers benefits are calculated on his earnings during the bust period and hence, are low, and there are plenty of jobs at high wages available as an incentive to return to work. At this time then, claim payments are very low and profits are very high. On the other side of the mountain, when the economy is going into a bust, the payments to the injured worker are based on earnings history and hence, are high, and wages available are low (if any). This provides a disincentive to return to work and during this period, there would normally be no profit at all for the insurance carriers since the profit was drawn during the boom time. Alaska has, however, elected to try to provide profit both during boom and bust while still calculating benefits based on historical wages. The effect of these two policies makes for low premiums (but lots of profit) at the boom time and impossibly high premiums (and small profit) at the bust time, thus further damping the economy and permitting those employers

who can come into the state from outside (with a multi-state workers' compensation policy) to underbid employers who are residents of the state. This is, of course, foolish in the extreme. Unified Fairbanks is exceedingly concerned that the Director of Insurance has adopted an "even profit throughout" theorum in setting rates, because this is incompatible with our economy, if we are going to predicate workers' compensation benefits on our earnings history.

RECOMMENDATION

Consider basing benefits paid on wages earned at the time of the injury as a condition precedent to the adoption of the amendments. Beyond this, adopt the amendments and monitor for the problems set forth below.

ACTIONS PROPOSED

Adopt the proposed amendment but change the definition of spendable weekly wage to one providing that it is based on the wage being earned at the time of injury.

ARGUMENTS AND PROBLEM AREAS

The judgment of two years, or 18 months out of two years, eliminate much of the flexibility in determining an employees compensation as a result. Those seeking to go back to work after a workers' compensation (or other) injury lasting, say, a year to a year and five months will have virtually no workers' compensation coverage. This will undoubtedly be litigated on equal protection and probably other grounds.

XXIX. REDUCTION IN BENEFITS FOR PEOPLE COLLECTING PENSION OR PROFIT SHARING BENEFITS

COMMENTS

A wise decision since those who retire would not, in most instances, be the ones sought to be covered by workers' compensation benefits.

RECOMMENDATION

Adopt the amendment.

ACTIONS PROPOSED

Adopt the amendment.

ARGUMENTS AND PROBLEM AREAS

There will probably be equal protection problems based on the fact that a worker may have accumulated pension benefits over a great number of years. A further problem will be the employee who, because of the compensable injury, is forced into disability retirement. Presumptively, these will be resolved in favor of the amendment.

XXX. NON-DISCRIMINATION IN HIRING AGAINST INJURED PERSONS EXCEPT DISCRIMINATION PERMITTED IF EMPLOYER CONSIDERS "SAFETY PRACTICES" OR "PHYSICAL AND MENTAL ABILITIES" EMPLOYER MAY REQUIRE QUESTIONNAIRE COMPLETION TO DETERMINE "PHYSICAL AND MENTAL CAPACITY"

COMMENTS

We were unable to consider this amendment adequately because of the obvious conflict between Section (a) and Sections

(b) and (c). It appears that the draftsman resolved the conflict by including everyone's proposed rule.

RECOMMENDATION

We will go along with WCCA, but do not endorse conflicting rules.

ACTIONS PROPOSED

Put this on the shelf until a clear rule can be drafted.

ARGUMENTS AND PROBLEM AREAS

The obvious conflict between the sections. There are also possible conflicts with the federal law prohibiting refusing to hire because of disability.

XXXI. REPEAL OF MOST RAGLAND BENEFITS

COMMENTS

The Ragland case provided that an employee's wage include fringe benefits paid and room and board if supplied. This removes the room and board unless it is taxable (true only with town jobs where room and board not supplied for the convenience of employer). Fringe benefits are not taxable to the employee, if they are paid into a trust, unless they are actually or constructively received by the employee. This amendment leaves only pension or profit sharing benefits for older and vested employees to be considered as part of an employee's income. This is a compromise and, in the view of

Unified Fairbanks, this is an agreeable reduction in benefits offset against a possible reduction based on collateral benefits received by the employee.

RECOMMENDATION

Unified Fairbanks considered adoption of this amendment in consideration of dropping potential adoption of an offset against collateral benefits rule. We therefore recommend its adoption.

ACTIONS PROPOSED

If this amendment is not adopted, fairness would decree that we then consider an amendment to AS 23.30.225 providing, "Where an employee receives periodic disability benefits under the provisions of a pension plan, disability or accident insurance plan, financed in whole or in part by the employer, the aggregate benefits payable for temporary total disability, temporary partial disability, permanent partial, and permanent total disability shall be reduced by an amount equivalent to such portion of the employer finance benefits paid to an employee in excess of temporary or permanent disability benefits calculated on the employees spendable weekly wages."

ARGUMENTS AND PROBLEM AREAS

Non-union employers on Davis-Bacon jobs often take the fringe benefit sums and place them in a separate account. This account is to be used to pay fringe benefits. However, if an employee does not work long enough to vest any interest in those

fringe benefits (which is the rule on construction jobs), the money returns to the employer. Since the chance of vesting is minimal and since under these circumstances these payments are not deductible to the employer, they are included in gross wages paid for the purpose of calculating workers' compensation premiums. If premiums are to be based on these sums, there may be lawsuits with respect to the way they are to be considered in gross earnings. It is probable that the "vested" requirement will shortcut any court test here.

XXXII. COMPENSABLE INJURIES NOT TO INCLUDE "MENTAL INJURY CAUSED BY MENTAL STRESS"

COMMENTS

The same defect of definition is found in this reference to "mental injury" as is found in Section XV. Please see comments on Section XV.

RECOMMENDATION

Please see comments at Section XV.

ACTIONS PROPOSED

Please see comments at Section XV.

ARGUMENTS AND PROBLEM AREAS

Please see comments at Section XV.

XXXIII. MEDICAL STABILITY (TERMINATING PAYMENT OF ALL TEMPORARY BENEFITS) OCCURS WHEN NO OBJECTIVELY MEASURABLE IMPROVEMENT HAS OCCURRED TO THE INJURED EMPLOYEE IN ANY 45 DAY PERIOD

COMMENT

This may be rebutted by clear and convincing evidence, but it divorces the medical definition of "medical stability" (meaning that the patient is improved as much as he or she is reasonably expected to improve) from the meaning of "medical stability" for workers' compensation purposes. Because of the burden of proof associated with it, this should greatly increase the number of hearings before the Board.

RECOMMENDATION

This has been earlier discussed in Sections XXIV and XXVI. Unified Fairbanks agrees that temporary benefits should be terminated and permanent benefits (if applicable) should be started immediately upon medical stability as that term is used by the medical profession. We hope the WCCA will agree to an amendment bringing their definition more in line with that of the medical profession.

ACTIONS PROPOSED

Try to redefine "medical stability" more toward that time when an injured person first reaches a condition in which whatever disability has been caused by the compensable injury is not likely to become measurably less in the near future.

ARGUMENTS AND PROBLEM AREAS

Doctors will probably continue to apply their definition of medical stability and will take whatever reporting steps are necessary to circumvent the imposition of the "45 day rule".

XXXIV. REPEAL OF THE CURRENT METHOD OF DETERMINATION OF WAGE EARNING CAPACITY

COMMENTS

A necessary part of the new method of determination proposed.

RECOMMENDATION

We concur with WCCA providing, of course, the new sections are adopted.

ACTIONS PROPOSED

Adoption as part of the overall package.

ARGUMENTS AND PROBLEM AREAS

None not mentioned in the section amending the new methcd of determination of wage earning capacity.

XXXV. REPORTING DURING TRANSITION

COMMENTS

This section is only needed if we go to the annual reporting format in order to permit the State to accumulate easily accessible figures.

RECOMMENDATION

To be adopted, if we adopt the annual reporting approach.

ACTIONS PROPOSED

Same.

ARGUMENTS AND PROBLEM AREAS

All outlined in the discussion of comparative wisdom of approaches to obtaining statistics discussed above.

XXXVI. EFFECTIVE DATE

COMMENTS

A good choice.

RECOMMENDATIONS

A PR campaign with recompilation of booklets available including the copies of the applicable code and regulation sections.

ACTIONS PROPOSED

A good date to start. Be sure to use lots of PR and recompile all publications, including the gray book.

ARGUMENTS AND PROBLEM AREAS

None.

XXXVII. OBSERVATIONS WITH RESPECT TO THE RATE MAKING AS PERFORMED BY JOHN GEORGE AND HIS SUBORDINATES

COMMENTS

NCCI is an insurance lobbying organization. It is hired by a total of twenty states to supply ~~to~~ their insurance commissions with data necessary for rate making. Alaska uses them in the workers's compensation field and pays them for their services. Alaska does not check their figures. They do not give breakdowns of figures to Alaska (according to Mr. George)

so that essentially, they provide the State with two or three choices of rates and a summary of probable effects of each of those choices. Alaska then selects one. Even though the State is aware that disability payments are being made, they do not know any sort of an average rate. Our survey indicated that $560.82 was the average workers' comp disability payment for those cases that have gone into contest in some manner. The Second Injury Fund statistics show a quantum leap in 1985 and 1986; several hundred percent each time. This represents a massive increase in payout for disability. The reason for this is not explained, nor apparently has it been inquired into. Premium rates are currently based upon a gross payroll (figuring that anything is taxable to an employee represents increased risk to the carrier and hence, justifies payments). Many states use this system rather than the "hours worked" system. The states we have contacted, however, are keenly aware of percentages of premium dollar and percentages of benefits paid for each of the areas of payment. Neither the workers' compensation folks nor the insurance division folks have been able to produce any kindred statistics for Alaska, nor do they seem to be aware of any way of combining the reports which they receive (setting forth these statistics) so as to give statistics on any meaningful or statewide basis.

RECOMMENDATION

We recommend obtaining the breakdown of the reasoning

for premium rates before they are adopted. We recommend that the Department have a person whose duties include maintaining these statistics and we feel that the insurance division should have a similar person. We recommend at least verifying NCCI representation. We recommend audits of carriers and any statistics supplied NCCI or carriers. We recommend that the Insurance Commissioner acknowledge that Alaska has a boom and bust economy and change its criteria for setting premiums to reflect the fact that profits are made in the boom time and no profits are made in the bust time. Generally, we feel that we feel should pattern ourselves after the more successful states.

ACTIONS PROPOSED

This will require extensive overhall of the ongoing procedures and hence, we recommend (and we are willing to participate in) a task force or study group in this area. Alaska simply does not have a grip on the rate making process as do other states. We feel that it must get such a grip. This will require legislative, administrative, and executive changes.

ARGUMENTS AND PROBLEM AREAS

These will depend upon the course taken. In all probability, there will be resistance to any change.

XXXVIII. PREMIUM PAYING CRITERIA

COMMENTS

Generally speaking, older accident-free employees are

paid more than beginners. Premium rates are structured so that the cost of insuring the older accident-free person (who is paid more) are higher than those for the neophyte employee. This is upsidedown. Gordon DePue feels strongly that insurance companies will not want to change, because neither they, nor the employers have any idea how many hours a person works, but they are all acutely aware of the taxable gross paid to that person. ~~The balance of Unified Fisheries feels that~~ A formula combining the category in which an employee works and the hours that they work should be explored as a more fair premium base.

Additionally, attached to this letter is an article entitled "Everything You Wanted to Know About the CAL SMACNA Workers Compensation Captive, But Were Afraid to Ask". The experience modification described therein is missing in more than 95% of the premium rate setting in Alaska. Additionally, the question of whether fringe benefits (paid by setting aside in a separate account and which are not likely to be paid to the individual employee) should be considered as wages paid under the present system must be addressed. We also feel that State or captive coverage, such as mentioned in the attached article or as found in the State of Arizona, should be considered. Colorado and Montana appear to be bad examples.

RECOMMENDATION

The problems in this area are hurting employers badly and hurting them now. A study of this area should not be

postponed until some future indefinite date, but should begin forthwith.

ACTIONS PROPOSED

Begin the study now. Think of including several carriers in the information gathering discussion and planning groups. If you want public participation, Unified Fairbanks will be glad to provide some.

ARGUMENTS AND PROBLEM AREAS

There will always be a reaction to change. In this area, employers with bad safety records and a history of expensive compensation injuries may well have their premiums increased and they should be expected to complain.

XXXIX. ATTORNEY'S FEES

COMMENTS

Attorneys ~~fees~~ representing employers and carriers are normally compensated on an hourly basis. Their economic incentive is therefore to spend the maximum amount of time which their relationship with the carrier or employer will stand, on each case. Attorneys for claimant are compensated at 10% (plus $150.00) of the amount recovered for client, but only if that amount has been controverted and fought out. In other words, settlements rarely carry attorney's fees. There are two problems in this area. The first is that both sets of attorney's fees are expenses which are ultimately reflected in

higher premium rates. In this area, we are yielding to WCCA who have advised that the WCCA will brook no interference whatsoever in the way that employers or carriers ~~[illegible]~~ compensate their attorneys, and therefore, the attorney's fee costs should not be approached. In the second area, there is the question of equality of treatment. The claimant's lawyer has an incentive to settle as quickly as possible, but for as much as possible. The carrier or employer's attorney has an incentive to go as deeply into the case (and discovery proceedings surrounding it) as can be justified. This is the reason that almost every attorney in the state would love to defend workers' compensation claims and most of the big and profitable firms do so, while only a very small percentage of attorneys in the state will take claimant's cases. Claimants have a very hard time getting representation because only a law office set up to divert most of the work to paralegals can afford to take the cases without losing money. In order to effect justice, representatives on each side should be reasonably equally motivated, and close to equally paid. If there are to be no limitations on counsel fees on one side, then perhaps the other side should be paid a percentage of what the hourly compensated counsel gets. Currently, claimant's counsel receives nothing unless they win which also discourages attorneys from representing workers' compensation claimants. A half dozen formulas have been suggested, but none of them stand the test of argument if we

accept the given(that employers and carriers will brook no interference in what they pay their counsel).

RECOMMENDATIONS

We therefore recommend study by the legislative task force proposed later, on with the cooperation of the Alaska Bar Association.

ACTIONS PROPOSED

As stated above.

ARGUMENTS AND PROBLEM AREAS

Medical costs are currently out of control in the compensation area. Presumptively, attorneys would like to have attorney's fees in that same category. There will then probably be lots of arguments in committee, etc., and there may ultimately be a test case as to whether the formula selected is fair.

XL. USING EITHER STATE COVERAGE OR A CAPTIVE CARRIER FOR COVERAGE

COMMENTS

As mentioned above, Alaska has a boom and bust economy. Either State coverage or a captive carrier can be expected to level out the compensation premiums making profit in boom times and suffering a loss in bust times. For the stability of our economy, this is probably essential. An alternative would be to actually use the authority of John George to set rates that would be fair to employers. Whether

this is possible is an open question.

RECOMMENDATION

This should be studied as it may turn out to be the only solution to level fair rates.

ACTIONS PROPOSED

A task force in this area is needed.

ARGUMENTS AND PROBLEM AREAS

On the one hand, carriers complain that they are not making money. It is to be expected, however, that if they are likely to be supplanted by a captive carrier or the State, they will vigorously oppose this because, in fact, a considerable profit is being made, which profit would be lost to the "competition" of the State or the captive carrier.

XLI. ADMINISTRATIVE MATTERS

COMMENTS

We lack an easy manner for an employer to check on prior injuries having occurred to his employees. We have found that the reports received on each individual case (from insurance carriers) are not combined, ~~in any manner so that~~ the statistics are valueless because they are not cumulated. There is a long period of time between the request for a hearing, and a hearing, both before the Board, and most especially before the rehabilitation officer. Therefore, additional staffing is needed. The grey book which contains the statutes and

regulations with respect to workers' compensation is so outdated as to be useless. There are no regulations providing for audits for carriers. At this point, there is no support within the Department assigned to work with loss control programs which are badly needed.

RECOMMENDATION

The extra personnel should be added to the Department to provide: a) a last name index of workers' compensation filings for availability to employer; b) more Board members and more rehabilitation officers in order that the hearing calendar not be over one month after the request for hearing in either of these categories; c) regulations can be set up for adoption providing for audits of carriers to verify the information which is submitted; d) the information received from carriers should be put into a computer so that information would be continuously available (such as, for 1987, what percent of premium dollars went to pay medical costs?) There are many of these type of questions that should be answered in order to be at all effective; and, e) the grey book should be reissued up-to-date so as to make it useful.

PROPOSED ACTION

Budgets should be increased and personnel assigned as explained above. On the compilation of statistics matter, cooperation should be worked out with the Insurance Commissioner.

ARGUMENTS AND PROBLEM AREAS

There will be a slight increase in cost in running the Department. This, of course, will be offset by the fact that information and services will be available.

XLII. EXECUTIVE DEPARTMENT PRIORITIES

COMMENTS

The Attorney General's Office does not allocate money to prosecute workers' compensation fraud. The budget will require adjustment upward to provide for the needs set forth above. The Insurance Department will need to be regulated in order to have them accumulate statistics upon which they base their rate setting, and this may require cost increase. The Attorney General's Office should prosecute employers who are operating without insurance or with out-of-state insurance that actually has little, if any, value for Alaskan workers. The Insurance Department should perform audits of the carriers, in order to find out whether ~~what~~ the information they provide to us (but is just left in file drawers at this time) is reliable. ~~and~~ A certificate showing that workers' compensation is in effect should be designed so that it specifies where Alaskan workers are working, what carrier is covering them, and that they are given coverage at Alaska rates so as to be valid in Alaska. These certificates should be for filing on each Little Davis-Bacon job, with local government bodies that request it.

with the Department of Insurance, with the Department of Workers' Compensation, and anywhere else thought appropriate, in order to give meaning to the requirement of having workers' compensation coverage.

RECOMMENDATION

Each of the above problems be addressed and resolved at the earliest possible time.

ACTIONS PROPOSED

See above.

ARGUMENTS AND PROBLEM AREAS

There will be "empire" problems anytime some of these adjustments are made. The value of the adjustments makes it all seem worthwhile.

XLIII. SPECIAL RECOMMENDATION FOR THE SECOND INJURY FUND

COMMENTS

The 104 week time required to bring the Second Injury Fund into play is totally destroying the function of the fund. The "written records requirement" keeps many legitimate second injury cases from being compensated out of the fund, and lump sum settlements are discouraged by the fund reimbursing the carriers on an installment basis, rather than by lump sum.

RECOMMENDATIONS

We recommend that each of the above problems be addressed by legislation.

To MCA 33.30.205,

Adoption of amendments as follows:

(a) If an employee who has a permanent impairment from any cause or origin incurs a subsequent disability by injury arising out of and in the course of his employment resulting in compensation liability for disability that is substantially greater by reason of the combined effects of the preexisting impairment and subsequent injury or by reason of the aggravation of the preexisting impairment than that which would have resulted from the subsequent injury alone, the employer or his insurance carrier shall be reimbursed for the second injury fund (From?) for all compensation payments subsequent to those payable from the first 26 (104) weeks of disability. The insurance carrier shall be reimbursed by a lump sum payment from the fund for lump sum settlements approved by the board.

(b) If the subsequent injury of the employee results in the death of the employee and it is determined that the death would not have occurred except for the preexisting permanent physical impairment, the employer or his insurance carrier shall in the first instance pay the compensation prescribed by this chapter, but he or his insurance carrier shall be reimbursed from the second injury fund for all compensation payable in excess of 26 (104) weeks.

(c) In order to qualify under this section for reimbursement from the second injury fund, the employer must

establish (by written records) that the employer had knowledge of the permanent physical impairment before the subsequent injury and that the employee was hired or retained in employment after the employer acquired that knowledge. Employer knowledge shall be established by written records except as follows:

(1) In cases of paraplegia or quadriplegia,

(2) In cases of amputation of foot, leg, arm or hand, and

(3) When an employee has omitted qualifying information from employee's response to an employment questionnaire completed by the employee prior to the subsequent injury.

(f) An employer or his carrier shall notify the Commission of Labor of any possible claim against the second injury fund as soon as practicable, but in no event later than 15 (100) weeks after the employer or his carrier have knowledge of the injury or death.

ARGUMENTS AND PROBLEM AREAS

This will increase the usage of the second injury fund by between three and four times. ~~over~~. It will minimize the "acceptance period". ~~but will require further action~~. This may produce a problem.

XLIV. LEGISLATIVE TASK FORCE

COMMENTS

As we addressed each of the problem areas, a number of

then were set forth as needing a legislatively oriented task force, to monitor changes being made, and to resolve those problems not yet addressed.

RECOMMENDATION

Immediate creation of a task force containing legislators, insurance carriers, medical care providers, attorneys (from both sides), rehabilitation personnel, labor unions, executive and administration representatives, and employers. This task force should first address those problems which have not been addressed by legislative, executive, or administrative changes and later on, they should monitor the effect of the changes now being made. Only in this way will we be able to hone these problems down to a workable point.

ACTIONS PROPOSED

Establishment of the above committee forthwith.

ARGUMENTS AND PROBLEM AREAS

The function of this committee is to address problems. Its creation will do a good deal toward satisfying the employers (who are now being gouged by workers' compensation premiums that are too high. Costs should be minimal.

his argument by stating that any ductwork which is not installed according to specific guidelines has the potential of being installed improperly. Thus, to alleviate the installation problem, he recommended that the State adopt—or at least reference—SMACNA's *HVAC* ing" stage from all of the testimony they received. Staff members of the Commission indicate that Vermeulen made his point and that the State will more than likely adopt his recommendations. We'll keep you posted on further updates. □

Everything You Wanted to Know About the CAL SMACNA Workers Compensation Captive, But Were Afraid to Ask

By James Gullone, CPCU, President CAL SMACNA Business Insurance Agency, Inc.

In order to give you a full picture of how the captive works, I need to digress for a bit and give you a synopsis of the inside workings of the California Workers Compensation System. Once the inner workings of this system are laid before you, it will be easy to see how the captive works to your advantage at every turn.

How are my workers comp rates calculated?

Every insurance company in the state is responsible for filing a Unit Statistical Report with the Workers Compensation Insurance Rating Bureau (WCIRB) for every employer who has workers compensation insurance with them. This report contains the premium and losses that the employer sustained during the year broken down by rating class.

The rating class is one of 232 categories where one of your workers can be categorized in order to determine his workers compensation rate. A common category in our industry is Sheet Metal Work, Erection, Installation or Repair ($16 or more per hour), Code 5542, rate $9.05.

By using three years worth of these statistics, the WCIRB determines by statistical analysis what rates are necessary to pay claims and insurance company expenses for each workers compensation class. For example, in the rate class 5542 mentioned above, the rate as of 1/1/86 was $6.66. As of 7/1/87, that rate had climbed to $9.05, almost a 36 percent increase in a year and a half.

By contrast, the rate for roofers on 1/1/86 was $30.33. By 7/1/87, it was $33.85 and had increased only a little less than 12 percent during the same year and a half.

Are the rates that the WCIRB promulgates the minimum rates that an insurance company can charge for workers compensation?

Yes. California is a minimum premium state. Companies can charge more than the minimum but they cannot charge less.

There is, however, a legal way for you to pay less and it involves the Unit Statistical Report that we mentioned. Not only is that report used to set the minimum rates, it is also used to set an individual company's Experience Modification Factor (EMF).

If your account develops over $14,500 in premium using the minimum rates, you automatically qualify for Experience Rating. By a set formula, the WCIRB measures the number of claims you have, the claims you have over $2,000 and your premium.

If you are above average, your Experience Modification will be 1.00. If you are above average, your Experience Modification will be less than one. And if your claims are worse than average, your experience Modification will be greater than one.

So the Experience Modification Factor can affect my rates?

Very much. Let's say that you have a $200,000 payroll of sheet metal workers in the 5542 code which charges $9.05 for each $100 of payroll. The minimum rate that would be developed is $18,100. If this acount had a number of losses and the Experience Modification Factor was 1.25, they would be charged $18,100 × 1.25 or $22,625.

If the account loss history was better than average and developed an Experience Modification Factor of .75, this account would be charged only $13,575.

Obviously, the Experience Modification Factor is very important. To my way of thinking, it is *THE* most important factor in your workers' compensation program for several reasons:

a) You can legally pay less for your workers' compensation insurance than your competitor.

b) A consistently low Experience Modification Factor means you probably have a good safety program and you are reaping the benefits of that program.

c) Unlike dividends—which are not guaranteed—a good Experience Modification Factor at least guarantees your rates for that year.

d) You can have some control over your Experience Modification Factor, whereas it is very difficult to control your dividend. □

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THE FOLLOWING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

Robson Law Office
Arthur Lyle Robson
Attorney at Law

600 University Avenue, Suite 6E
Fairbanks, Alaska 99709
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January 15, 1988

Honorable Tim Kelly, Chairman
Senate Labor & Commerce Committee
P. O. Box V
Juneau, AK 99811

Honorable Dave Donley, Chairman
House Labor & Commerce Committee
P. O. Box V
Juneau, AK 99811

RE: Workers' Compensation and Actions Taken by Unified Fairbanks

Each of you are aware that the apparently unmerited increase in Workers' Compensation premiums produced a "vigorous" reaction in Fairbanks. This is a status report to let you know how the Task Force, which is working on recommendations to make to yourselves, is proceeding. Because of considerable pressure by local legislative representatives to have our work completed today, the committee has directed me, as its Chairman, to at least get a report in, so that you will not feel that we have lost interest in the proceedings.

The original meeting was an all day session held on Saturday, December 12th. At this session, Jackie McClintock, Jan Henson, John George, and multiple other State officials appeared. A spiral booklet was prepared with information which was disseminated to the more than 160 attendees. The meeting was chaired by Borough Mayor Juanita Helms. It broke up into committees on each of the major areas, which committees made recommendations, and then we ran out of time.

Just about half of those who had been present at the first meeting appeared at the second meeting on Saturday, December 19th. The purpose of that meeting was to complete the business

scheduled for the first meeting and we did complete it. We also received a report from the WCCA group in Anchorage, and on a good number of points we are in agreement with them. There are a number of extra points which we felt should be considered to make the program workable. The final action at that meeting was to create a Task Force Committee of 24 persons. I include a roster of the Task Force Committee. This Task Force Committee meets on Wednesday afternoons from 3:00 to 5:00 p.m. and has met on December 23rd and 30th, as well as January 6th and 13th. At our scheduled meeting on January 20th, we will be combining the reports of the various groups, evaluating the compromise between various interests and assigning the entire matter for drafting in a legislative format. At the following meeting on January 27th, we will make whatever changes are necessary in the draft so that it can be forwarded to you by Friday, January 29th.

I hope that this letter will not be untimely, since we have an excellent committee of employers, union representatives, and the whole panoply of professionals who work in the area. They have debated these matters long and heatedly. We have committees that have done an absolutely amazing amount of work including consultation with a number of other states, research in the law of other states, and badgering the living daylights out of both our own Workers' Compensation program and the Division of Insurance, for Data. As you will see by my inclusion of those reports that are written (about two-thirds of the total of reports), a tremendous amount of time, energy and research has gone into this. I do not feel that the committee can give you a decent thoroughly fought out, and thought out, report at an earlier moment. On the other hand, I certainly don't want to see the many hours of meeting and research ignored because it is later than the WCCA recommendation (though being earlier than the Governor's Task Force recommendation).

The Task Force Committee has subcommittees, as you can see from the attachments. Of the 24 members (it expands one or two each week), almost all have attended all of the meetings. I cannot give enough praise to the hard work and enthusiasm that the Task Force Committee members have put in, and it is my fervent hope that you will be able to receive their input before action is

taken. They will make recommendations for legislative changes, as well as regulations to be adopted, and I believe there will be some structural changes recommended also. In great measure, they will coincide with the WCCA recommendation and again as a general statement, they will simply go into problems not addressed by WCCA and the regulation in administrative fields.

If there is any chance that we are missing the boat by the scheduling I have outlined, please call me (collect if necessary) as quickly as possible, and we will arrange to work evenings to complete our recommendations.

Sincerely yours,

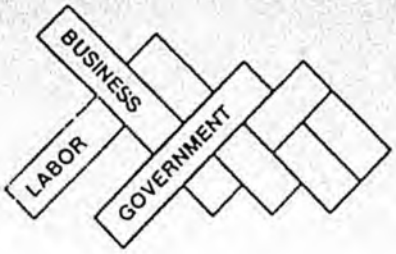
ROBSON LAW OFFICE

ARTHUR LYLE ROBSON, Attorney

ALR/sj

Enc.

cc: All media
Unified Fairbanks Task Force members
All Fairbanks legislators



UNIFIED FAIRBANKS

Good morning, and welcome to your seminar on Workers' Compensation.

The attached agenda is a revision that will take the place of the agenda in your bound reference book.

Some of the identification badges have been color coded; a yellow dot indicates one of our speakers or panelists, and a blue dot indicates Unified Fairbanks or Chamber of Commerce personnel.

Attached to this sheet, you will find the names and addresses of our speakers and panelists.

Also attached, you will find the list of questions that were pre-submitted by you, during the registration, which are addressed to Ms. McClintock and Mr. George.

Some time during the morning, we will pass out the list of all the attendees' names and addresses, as well as the position, if we receive it, that WCCA has just formulated in Anchorage. This should assist us in our deliberations during the afternoon session.

The rolls and coffee are furnished without additional charge as a part of the admission fee. There is an "honor table" set up in the refreshment area that contains milk, soft drinks, and juices. These items are for sale at $1.00 per item. There is a dish that you can put your money in as you take anything from the tray.

Please make sure that you wear your I.D. badge when you go to the luncheon buffet. This indicates you have paid for the luncheon.

At the completion of the seminar, there will be a box by the door. Would you please put your badges in the box as you leave for the day.

Thank you for participating in what we feel is a very important discussion on Workers' Compensation. We hope you will enjoy the program.

Sincerely,

UNIFIED FAIRBANKS

Charles P. Rees, President

CPR:jal:UF7

Attachments

P.O. Box 60389 Fairbanks, Alaska 99706 • (907) 456-7986

AGENDA

MODERATOR: **Mayor Juanita Helms, Fairbanks North Star Borough**

7:45 - 8:00 a.m. **Registration** - Rolls and Coffee - Gold Room

8:00 - 9:00 a.m. Speakers: **Jacque McClintock, Director of Division of Workers' Compensation and Jan Hansen, Chief of Adjudication.**
Topic: **What is Workers' Compensation Law? Is it Federal or State?**

9:00 - 10:15 a.m. **Shelby Nuenke-Davison, Workers' Compensation Defense Lawyer**
Topic: The basic legal aspects of Workers' Compensation will be discussed including: burden of proof, liability for aggravations and pre-existing conditions, types and computation of benefits, and the last injurious exposure rule.

10:15 - 11:00 a.m. **Ann Brown, Attorney**
Topic: Requirements for Second Injury Fund Contributions.

11:00 - 12:00 p.m. **Panel Discussion on Problems Areas of Workers' Compensation**

Chancy Croft	Attorney
Vince Gollogly	Rehab Counselor, Northern Rehab
Dr. Kurt D. Merkel	Orthopedic Surgeon
Earl Romans	Interior Manufacturers' Association
Peter Kelley	Insurance Broker
Steve Thompson	Workers' Compensation Board
Al Veazy	Alaska General Contractors

All guest speakers will be invited to join in panel discussion.

12:00 - 12:15 p.m. **Break**

12:15 - 1:30 p.m. **Lunch**
Luncheon Speaker: **Mr. John George, Director, Division of Insurance, State of Alaska.**
Topic: **How workers'compensation rates are computed.** Question and Answer Period.

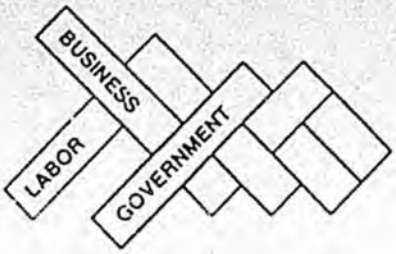
1:30 - 2:45 p.m. Divide into individual groups to formulate action plans on the workers' compensation structure specifically aimed at Legislative Changes.

2:45 - 3:00 p.m. **Break**

3:00 - 4:00 p.m. Combined meeting to hear reports by the different groups and to formulate and agree on a final action plan for Legislative Action to implement necessary changes.

As a follow up to the Seminar, a Task Force may be appointed. If you are interested in being considered for the Task Force, please contact Mayor Helms, Lois Payton, or Chuck Rees.

Reference Notebook: All attendees will be provided a reference notebook which they can utilize in business for training additional management and staff. It will include any materials provided by speakers and reference material on the Workers' Compensation Law.



UNIFIED FAIRBANKS

Following is the list of names and addresses of the speakers and panel members for the Workers' Compensation Seminar, December 12, 1987.

MODERATOR:

Mayor Juanita Helms
Fairbanks North Star Borough
P.O. Box 1267
Fairbanks, AK 99707
452-4761

SPEAKERS:

1 Ms. Jacque McClintock, Director
Division of Workers' Compensation
State of Alaska
P.O. Box 1149
Juneau, AK 99802
465-2790

2 Ms. Jan Hansen, Adjudicator
Dept. of Workers' Compensation
State of Alaska
P.O. Box 7-019
Anchorage, AK 99510
264-2424

3 Ms. Shelby Nuenke-Davison
Attorney at Law
2525 Blueberry, Suite 102
Anchorage, AK 99503
276-6555

4 Ms. Ann Brown
Hughes, Thorsness, Gantz,
Powell, & Brundin
590 University Avenue
Fairbanks, AK 99701
479-3161

5 Mr. John George, Director
Division of Insurance
State of Alaska
Pouch D
Juneau, AK 99811
465-2515

PANELISTS:

1 Mr. Chancy Croft
Attorney at Law
613 Cushman, Suite 210
Fairbanks, AK 99701
456-8777

2 Dr. Vince Gollogly
Northern Rehabilitation
232 Second St. Grachl
Fairbanks, AK 99701
451-0544

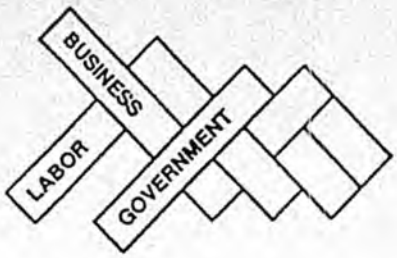
3 Mr. Peter Kelley
Cathart Ltd.
520 5th Ave., Ste. 323
Fairbanks, AK 99701
451-6863

4 Dr. Kurt Merkel
Fairbanks Clinic
1867 Airport Way
Fairbanks, AK 99701
452-1761

5 Mr. Earl Romans
ABI - Alaskan Battery Inc.
157 Old Richardson Highway
Fairbanks, AK 99701
452-2002

6 Mr. Steve Thompson
M & O Auto Parts
P.O. Box 2033
Fairbanks, AK 99707
452-3911

7 Mr. Al Veazy
Lakloey, Inc.
1216 Rangeview Road
North Pole, AK 99705
488-7212



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QUESTIONS FOR JACQUE McCLINTOCK

1) Concern about necessary and sufficient public access to complete and current listings of job description definitions and accompanying workers compensation insurance rates.

2) Concern about the adverse economic impact on this state. Where opportunities for local contractors are becoming less and less profitable, we're killing the incentive for our own business.

3) If a claim was filed, at the time of the incident, that would have a long term effect, how soon should someone reopen their claim and what are the limitations? For example: a hip injury that might not show full damage until later.

4) How does the number and type of claims directly relate to insurance premiums?

5) What are the legal problems with the organization of "Contractor's Workman's Comp. Co-Op" State wide to cover Alaska workers, paid into at rates established by the Co-Op, which would be all Alaskan Contractors?

6) Can limits be established by average of five year income, to establish weekly payments?

7) Can changes be made to require the employee to pay half of or all of the rate for the insurance to cover his welfare, and give the employee option of being covered or not being covered at the employees expense?

8) Can a State Workman's Comp. Fund be established and workers and contractors pay into it?

9) What is the legal background for Workman's Comp.?

10) When there is no comparable industry in the state, how are rates established?

11) Why does NCCI (National Council of Compensation Insurance) rate Alaska work experience heavier than other states?

12) Why are W. C. benefits based on the two preceeding years prior to the claim instead of the current work period?

13) Who monitors claimants and services rendered for rehabilitation?

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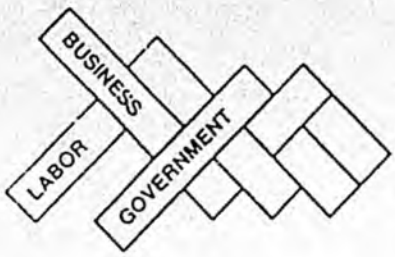

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14) Why the disparity in published figures of weekly benefit payments? (See attachment 1 from AJC written by Workman's Comp. Committee, stating 200% and attachment 2 from Employee W. C. Handbook, published by Alaska Dept. of Labor, W. C. Division stating 80% maximum.)

15) What can be done to establish fraud investigation?

16) How can out of State contractors be monitored to assure that when performing in Alaska they are paying Alaskan W. C. rates?

17) Can a proposal be made by a group like Unified Fairbanks be acted upon by the State without it going through the legislative process and being watered down?

18) Why doesn't someone enforce a penalty on those who cheat as far as rates and codes?

19) Why isn't cost based on hourly bases instead of per $100? Hourly would be much more fair.

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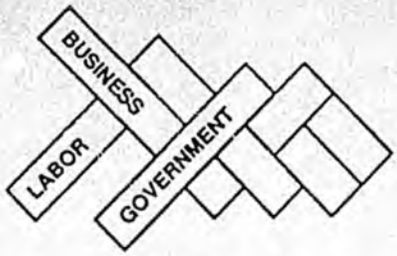

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QUESTIONS FOR JOHN GEORGE

1) When one employee is cross-utilized in more than one job capacity, why is the percentage of Workman's Comp. calculated at a higher rate, instead of calculating the percentage of time worked in each capacity and calculating Workman's Comp. accordingly?

2) How can a person doing one job function be trained for another function without having the higher rate apply?

3) Better rates should be available for low risk individuals, as well as low risk jobs: Some people are just innately, consistently more careful than others.

4) Better rates should be available for low risk businesses. It's unfair to charge businesses a standard industry rate, set in more dangerous circumstances than the businesses being considered "similar".

5) What must be done to bring the rates down to give our contractors a competitive edge?

6) What should we look for in an insurance binder?

7) What changes must be made to get reasonable rates?

8) Wouldn't it save paperwork, time, and money to have a deductible as under most other medical insurance policies?

9) Why couldn't large premiums be paid monthly or quarterly instead of annually?

10) Couldn't low risk non-profit organizations join an insurance trust and pay on a reimburseable basis?

11) When an employee's duties fall under more than one classification, why are we charged at the higher rate classification rather than according to the percentage of time devoted to each class?

12) How are claims paid? According to classification claimant worked under and wages paid to claimant?

13) Why am I required to cover a sub-contractor when he is a sole proprietor, and he doesn't carry his own coverage? When, up to last year, a sole owner could not even get coverage?

14) Can audit results be appealed? If so, where? If not, why not?

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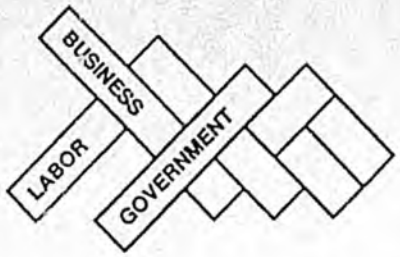


UNIFIED FAIRBANKS

AGENDA

BREAKFAST SERVING	7:45 a.m.
CALL TO ORDER	8:15 a.m.

DISCUSSION OF WCCA RECOMMENDATIONS

DISCUSSION OF SEMINAR RECOMMENDATIONS

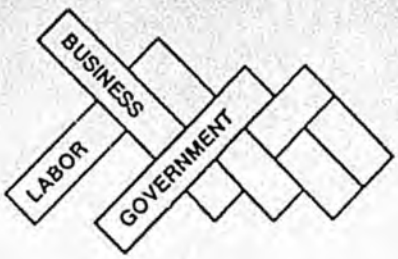
- Insurance
- Legal
- Medical
- Employers
- Employees

FINALIZATION OF RECOMMENDATIONS

APPOINTMENT OF FOLLOW UP COMMITTEE

ADJOURN

P.O. Box 60389 Fairbanks, Alaska 99706 • (907) 456-7986



UNIFIED FAIRBANKS

December 14, 1987

Dear Seminar Participants:

We should all feel very proud of the participation we had at the Workers Comp Seminar and for the positive way that we ended up with recommendations for possible changes. A copy of those recommendations are attached to this letter.

You will also find an agenda for this coming Saturday's meeting. As you can see from the agenda, we hope to resolve these questions, to make definite recommendations and to appoint a follow-up task force to pursue the implementations of those recommendations.

It is very important that you R.S.V.P. 456-7986 by Thursday at 5 p.m. whether or not you are going to attend Saturday morning's seminar. The charge will be $12.00 for the buffet breakfast and for the coffee service. If you do not want breakfast, it will be $4.50 for coffee. These prices cover our room fee. There also will be the honesty cart filled with milk, soda pop, etc.

If we can get a good reading by Thursday at 5:00 p.m., we can plan the room size a lot better and not have the crowded conditions or the stuffy air that we experienced last Saturday. We had approximately 30 people sign up at the door that we had not anticipated. It was too late to change the room configuration to accommodate the extra people.

We did not receive a recommendation from the medical participants and we hope, upon receipt of this letter, that they will come together and have some recommendations ready for presentation at Saturday morning's meeting.

We started the job, now let's finish it.

Sincerely,

UNIFIED FAIRBANKS

Charles P. Rees, President

CPR:mc:WCS:sp

P.O. Box 60389 Fairbanks, Alaska 99706 • (907) 456-7986

EMPLOYEES

Facilitator:

Jim Carroll

1. Workers' Compensation Rates.

Change the rates to by the hour instead of by the dollar. At the present time with rates set by the dollar everyone wants to hire as cheap as possible so they may not always get qualified people to save on insurance.

2. Rehabilitation.

Would like to see employee get to determine whether he/she wants settlement or rehabilitation. At the present time rehabilitation is mandatory and employees are put into a system they can't get out of.

If employee decides to take rehabilitation, suggest retraining at prompt wage comparable occupation so employee would not lose incentive to work.

If Rehab and employee cannot come to agreement on job that employee will accept then there should be an option to be able to be cashed out.

3. Workers' Compensation Payments.

Would like to see prompt payment on an injury. Sometimes payment has been delayed as much as 6 weeks, this causes hardship for the employee who cannot work and has no money either.

LEGAL

Facilitator

Art Robson

1. Priorities.

A realignment of priorities which must be executive in nature to cause the Attorney General to expend some percentum of his or her budget on prosecution of matters in which the employers have either no insurance or insurance that is not correct; that is not at the Alaska rate, so your probably not going to get paid at the Alaska rate, or in which the employee is committing fraud by drawing compensation.

2. Certificate of Insurance.

Require a filing of a particular form of a Certicate of Insurance (we discussed whether political subdivisions of the state should get this) the only thing where anybody who is an employer has to get anything is a business license, maybe thats the vehicle that you have to use to require that it be filed and forwarded to Department of Labor who forwards a copy to the Insurance Company. The form should be designed to cover all the loopholes, ie. yes we paid Alaska Rates, heres the estimated amount of the payroll, etcetera.

3. Attorney Fees.

State regulates the claimant's attorney fees and sets them minimally, thats why approximately five attorneys in the state will take compensation cases and the rest won't. The defense side is unregulated or regulated by the market, its whatever they can charge.

Require a form by which the court or some agency, probably the Board make some kind of determination on a fair fee for each side.

4. Time Limit on Temporary Total Disability, TTD.

Encountered problems due to treatments that have to be given for certain types of injuries and claimants are going through rehab, time limits will have to be set out to about two and a half to three years, which is longer than it should be set if these problems are not a factor. We did not come up with any suggestions or solutions and realize this still needs to be addressed.

5. Hearing Calander.

Hearings should be within one month of decision that one is needed. More Hearing Officers will be required. Also opinion should be submitted in ten days instead of thirty days, this will also require more Hearing Officers.

6. Procedural Matter.

After finishing hearing on a case, take your vote at that time if its at all possible, (if you don't have to read a mass of medical records or something), try to take the vote then in interest of time efficiency.

EMPLOYER

Facilatator:

Jan Steele

1. Temporary Partial Disability, (TPD's).

There should be a cap on this as it goes on forever unless you force them into a rating and get either a settlement or some kind of a percentage to pay out on these people that you can live with. It was decided that the TPD right now looked more like a retirement program than benefit program.

2. Medical Evaluations/Doctors.

The facilitators were questioning the doctors' opinions and some of these things are in place, but they'd like to see more teeth put into them. Right now the doctors can be selected by the patient, you then as as the employer can have an independent medical evaluation, but then who is the tie breaker if these things are different?

Possibly there be a list of doctors or a tie breaker appointed by the state.

3. Voluntary Loss Control.

We'd like to see the funding restored and really plugged up on the state program for voluntary loss control, everything is in place right now but the funding has been cut and every one of the employers felt that this would be an excellent benefit to have more people out there assisting us in the loss control.

4. Mandatory Review - Insurance.

We would like to see a mandatory review of the insurance department anytime there is going to be an increase. We want an independent evaluation so these people have to justify anytime that there is an increase. This was done in Texas. Dr. Merkel was talking about it earlier, they cried that they were losing money right and left; when the independent audit was finally done they saw that they were making a hellatious amount of profit instead. We would like to see this put in place and done on an annual basis.

5. Insurance Brokering - State

Some employers felt that it might be a good idea that the state enter into the insurance brokering business. If you make it a little bit competitive out there maybe some of the rates would come down. The State of Arizona is a good example.

6. Audit - Insurance Companies

We would like an independent audit of all the insurance companies that provide insurance in the State of Alaska, whether they reside here in Alaska or whether they just sell insurance to Alaskan companies. Again make them justify any rate increases that they may have.

7. Benefit Offset

At this time I don't believe there is a benefit offset. So if somebody is receiving compensation and say that they have Blue Cross on the side or something like that they would like to see some sort of benefit offset so this doesn't become such a lucrative business to be in; this being on compensation. This would also include retirement programs, maybe even a second job while on compensation or other incomes coming from insurance companies pertaining to the accident. There is Social Security Offsets.

8. Alaska Compensation Rates.

One of the employers brought up that he would like to see the state or an independent auditor investigate the dollars that would be saved by the employers by lowering the Alaska Maximum Compensation Rate to a figure closer to the national average, to reevaluate what our compensation rate is set on and see just what exactly we would save if we even knocked it down further. Compensation rates could be based on current wages at the time of the injury and adjustment for people under 18 who are dependents, like college students who are living at home, who may not have the same income requirements as others, if there could possibly be an adjustment for dependents that have other sources of income.

9. Wages - Current/Future.

Get some kind of a formula to look at what the difference in the benefit structure would be if it was based on current or future wages, and see what kind of a savings there would be.

10. Fraudulent Claims.

Some teeth put into wor[illegible]s' comp law. Either there is a fine in place if your discovered to have submitted a fraudulent claim, and this should be for all parties involved. Doctors and attorneys who may have decided that it would be a good way for the state to make money.

Mandatory employer contact prior to the doctor issuing his opinion of whether or not this person is or should be placed on compensation. So doctor has more than just claimants information to base his evaluation on.

WORKERS' COMPENSATION SEMINAR
DECEMBER 12, 1987

RECOMMENDATIONS

INSURANCE

Facilatators:

Gordon Depue
Kevin J. Krauklis

1. How to enforce the Alaska Statutes for Workers' Compensation at Alaska rates on contractors that come in from out of state and bring their payroll with them to perform Alaska jobs.

Certificate of Insurance states that workers' compensation policy is in force and qualifies under Alaska Statutes. Add wording that says that this is a public money project and certification of insurance is in place at Alaska rates with Alaska benefits. A copy of that goes to the insurance company who ought to be interested in collecting Alaska rates on that payroll. Also notification to insurance company of amount of payroll.

We should extend the penalty that applies to people who have no workers' compensation which is $1,000 per week or $50,000.00, to contractors who have improper workers' compensation. Contractors without proper workers' compensation would have to pay what they owe plus penalty, which should be turned over to the Attorney Generals' Office to ensure collection of that penalty.

2. The Insurance Companies are going to be looking at catching up, so even though we may be doing something quickly to turn this around the Insurance Companies are probably still looking at trying to recoup some of the differences between the premiums that they received and the benefits that they paid. So we may still be looking at increases from the Insurance Companies and this may be something we still need to address.

Suggestions and solutions to this problem still need to be addressed.

EDWARD T. NOONAN
Attorney at Law

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431 Old Steese Highway, Suite 200
Fairbanks, Alaska 99701

(907) 456-2100

December 18, 1987

Mr. Charles P. Rees, President
Unified Fairbanks
P.O. Box 60389
Fairbanks, AK 99706

Dear Mr. Rees:

We would like to express our thanks for your efforts, and the efforts of the other sponsors in putting together the recent worker's compensation seminar. We found it informative and helpful.

Enclosed you will find a letter we recently forwarded to Senator Fahrenkamp in response to a letter we received from her regarding legislative reform of the worker's compensation system. We hope our response will be of some help in initiating a legislative response to a matter of particular concern to us and our clients.

We would very much appreciate it if you could channel the enclosed copy to the appropriate seminar committee facilitator(s) so that the question of worker status is addressed in any final recommendations your organization formulates.

Thank you for your consideration.

Sincerely,

Daniel M. Duame
Attorney at Law

DMD:lk
Encl.

EDWARD T. NOONAN
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December 18, 1987

The Honorable Bettye Fahrenkamp
515 Seventh Avenue, Suite 130
Fairbanks, AK 99701

COPY

Dear Senator Fahrenkamp:

Thank you for your recent letter regarding upcoming legislative activities addressing worker's compensation issues. We appreciate your efforts in keeping us informed as to significant developments in this area.

Regarding specific areas in need of reform, we would like to share with you our thoughts and concerns respecting one relatively small, but to those affected, extremely significant area of the Worker's Compensation Act; *i.e.*, the issue of defining worker status as employee vs. independent contractor.

This problem arises primarily because the Act is absolutely silent on this issue. Because the Act is silent, the courts have by necessity ended up essentially "making" the law in this area. As the law now stands, employers wishing to establish legitimate independent contractor relationships through "arms length" negotiations are left in an untenable state of uncertainty as to whether the relationship will hold up for worker's compensation purposes. This problem is particularly troublesome in the trucking industry, where independent contractors (owner-operators) are used extensively.

The present situation could easily be remedied by legislative action, and we would like to propose that the following two options be explored. The first applies specifically to the trucking industry, while the second provides a generalized solution.

As to the problem facing the trucking industry specifically, a preferred method of dealing with the owner-operator (O/O) worker's compensation issue would be a legislative amendment to the Act which would exclude O/O's from coverage. Changes to the section of the Act which specifically addresses the question of

"persons not covered" (A.S. 23.30.230) have been made as recently as late 1986. The last two groups to be excluded were commercial fisherman and contract entertainers. A.S. 23.30.230(4), (5) (Supp. 1987).

This section now reads:

> **Sec. 23.30.230. Persons not covered.** (a) The following persons are not covered by this chapter:
>
> (1) part-time baby sitters;
>
> (2) cleaning persons;
>
> (3) harvest help and similar part-time or transient help'
>
> (4) persons employed as entertainers on a contractual basis; and
>
> (5) commercial fishermen, as defined in AS 16.05.940.
>
> (b) The exclusion of certain persons under (a) of this section, may not be construed to require inclusion of other persons as employees for purposes of compensation under this chapter. (§33(3) ch 193 SLA 1959; am § 1 ch 47 SLA 1986; am § 1 ch 77 SLA 1986)

It is our opinion that the trucking industry as a whole, and independent owner-operators as well, would favor a statutory exemption which would provide the *option* of establishing an employment relationship which is unquestionably outside the scope of the Act. At present, it is simply impossible to achieve any safe level of certainty, regardless of the agreement struck between the contracting parties.

A second, and more generalized approach, would be to simply define "independent contractor" in the Act. This is the approach taken by states considered leaders in the area of worker's compensation, such as Wisconsin.

The Wisconsin legislature has adopted the following provision which reflects the key aspects of the "relative nature of the work" test, which is the cumbersome, fact based test now employed by the Alaska courts to make status determinations.

> (8) Every independent contractor who does not maintain a separate business and who does not hold himself out to and render service to the public, provided he is not himself an employer subject to this chapter or has not complied with the conditions of subsection (2) of Section 102.29 [requiring

> insurance or the equivalent], shall for the purpose of this chapter be an employee of any employer under this chapter for whom he is performing service in the course of the trade, business profession or occupation of such employer at the time of the injury.

Wis. Stat. §102.07(8)

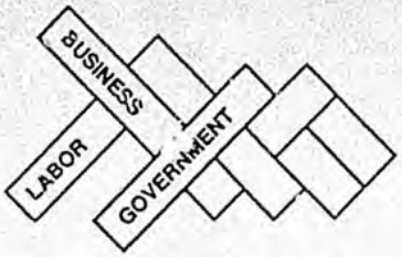
It would seem only reasonable that Alaska consider a similar approach, thereby relieving employers from the burden of attempting to establish employment relationships under a structure such as that presently existing, which tends to foster uncertainty.

In summary, either of the approaches outlined above would achieve the desired result--*i.e.,* provide clear and relatively definite criteria around which predictable employment relationships might be built. It is long past time for legislative action regarding this matter, and any help you can provide in raising this issue to the appropriate individuals and legislative committees would be very much appreciated.

Sincerely,

Daniel M. Duame
Attorney at Law

DMD:lk
cc: Mr. Charles P. Rees, President
Unified Fairbanks



UNIFIED FAIRBANKS

WORKERS' COMPENSATION SEMINAR
DECEMBER 12, 1987

RECOMMENDATIONS

INSURANCE

Facilatators: Gordon Depue, Kevin J. Krauklis

1. How to enforce the Alaska Statutes for Workers' Compensation at Alaska rates on contractors that come in from out of state and bring their payroll with them to perform Alaska jobs.

Certificate of Insurance states that workers' compensation policy is in force and qualifies under Alaska Statutes. Add wording that says that this is a public money project and certification of insurance is in place at Alaska rates with Alaska benefits. A copy of that goes to the insurance company who ought to be interested in collecting Alaska rates on that payroll. Also notification to insurance company of amount of payroll.

We should extend the penalty that applies to people who have no workers' compensation which is $1,000 per week or $50,000.00, to contractors who have improper workers' compensation. Contractors without proper workers' compensation would have to pay what they owe plus penalty, which should be turned over to the Attorney Generals' Office to ensure collection of that penalty.

EMPLOYER

Facilatator: Jan Steele

1. Medical Evaluations/Doctors.

The facilitators were questioning the doctors' opinions and some of these things are in place, but they'd like to see more teeth put into them. Right now the doctors can be selected by the patient, you then as as the employer can have an independent medical evaluation, but then who is the tie breaker if these things are different?

Possibly there be a list of doctors or a tie breaker appointed by the state.

2. Voluntary Loss Control.

We'd like to see the funding restored and really plugged up on the state program for voluntary loss control, everything is in place right now but the funding has been cut and every one of the employers felt that this would be an excellent benefit to have more people out there assisting us in the loss control.

2. Fraudulent Claims.

Some teeth put into workers' comp law. Either there is a fine in place if your discovered to have submitted a fraudulent claim, and this should be for all parties involved. Doctors and attorneys who may have decided that it would be a good way for the state to make money.

Mandatory employer contact prior to the doctor issuing his opinion of whether or not this person is or should be placed on compensation. So doctor has more than just claimants information to base his evaluation on.

3. Workers' Compensation Payments.

Would like to see prompt payment on an injury. Sometimes payment has been delayed as much as 6 weeks, this causes hardship for the employee who cannot work and has no money either.

REFERRED TO TASK FORCE

1. The Insurance Companies are going to be looking at catching up, so even though we may be doing something quickly to turn this around the Insurance Companies are probably still looking at trying to recoup some of the differences between the premiums that they received and the benefits that they paid. So we may still be looking at increases from the Insurance Companies and this may be something we still need to address.

Suggestions and solutions to this problem still need to be addressed.

2. Attorney Fees.

State regulates the claimant's attorney fees and sets them minimally, thats why approximately five attorneys in the state will take compensation cases and the rest won't. The defense side is unregulated or regulated by the market, its whatever they can charge.

Require a form by which the court or some agency, probably the Board make some kind of determination on a fair fee for each side.

3. Mandatory Review - Insurance.

We would like to see a mandatory review of the insurance department anytime there is going to be an increase. We want an independent evaluation so these people have to justify anytime that there is an increase. This was done in Texas. Dr. Merkel was talking about it earlier, they cried that they were losing money right and left; when the independent audit was finally done they saw that they were making a hellatious amount of profit instead. We would like to see this put in place and done on an annual basis.

4. Benefit Offset Collateral Benefits

At this time I don't believe there is a benefit offset. So if somebody is receiving compensation and say that they have insurance on the side or something like that they would like to see some sort of benefit offset so this doesn't become such a lucrative business to be in; this being on compensation. This would also include retirement programs, maybe even a second job while on compensation or other incomes coming from insurance companies pertaining to the accident. There is Social Security Offsets.

5. Alaska Compensation Rates.

One of the employers brought up that he would like to see the state or an independent auditor investigate the dollars that would be saved by the employers by lowering the Alaska Maximum Compensation Rate to a figure closer to the national average, to reevaluate what our compensation rate is set on and see just what exactly we would save if we even knocked it down further. Compensation rates could be based on current wages at the time of the injury and adjustment for people under 18 who are dependents, like college students who are living at home, who may not have the same income requirements as others, if there could possibly be an adjustment for dependents that have other sources of income.

Next week

6. Wages - Current/Future.

Get some kind of a formula to look at what the difference in the benefit structure would be if it was based on current or future wages, and see what kind of a savings there would be.

EMPLOYEES

Facilitator: Jim Carroll

1. Recommendations.

a. The board pass recommendations that implement the law before the 1988 session.

b. Rehabilitation voluntary for the employees.

c. The Division of Insurance develop a method they can break down costs that are paid out by these categories:

(1) Attorney fees
(2) Compensation to employees
(3) Vocational Rehabilitation
(4) Medical

d. That more hearing officers be hired.

LEGAL

Facilitator: Art Robson

1. Priorities.

A realignment of priorities which must be executive in nature to cause the Attorney General to expend some percentum of his or her budget on prosecution of matters in which the employers have either no insurance or insurance that is not correct; that is not at the Alaska rate, so your probably not going to get paid at the Alaska rate, or in which the employee is committing fraud by drawing compensation.

2. Certificate of Insurance.

Require a filing of a particular form of a Certicate of Insurance (we discussed whether political subdivisions of the state should get this) the only thing where anybody who is an employer has to get anything is a business license, maybe thats the vehicle that you have to use to require that it be filed and forwarded to Department of Labor who forwards a copy to the Insurance Company. The form should be designed to cover all the loopholes, ie. yes we paid Alaska Rates, heres the estimated amount of the payroll, etcetera.

3. Hearing Calendar.

Hearings should be within one month of decision that one is needed. More Hearing Officers will be required. Also opinion should be submitted in ten days instead of thirty days, this will also require more Hearing Officers.

WORKERS' COMPENSATION SEMINAR

RECOMMENDATIONS NOT PASSED

1. Temporary Partial Disability, (TPD's).

There should be a cap on this as it goes on forever unless you force them into a rating and get either a settlement or some kind of a percentage to pay out on these people that you can live with. It was decided that the TPD right now looked more like a retirement program than benefit program.

2. Insurance Brokering - State

Some employers felt that it might be a good idea that the state enter into the insurance brokering business. If you make it a little bit competitive out there maybe some of the rates would come down. The State of Arizona is a good example.

3. Time Limit on Temporary Total Disability, TTD.

Encountered problems due to treatments that have to be given for certain types of injuries and claimants are going through rehab, time limits will have to be set out to about two and a half to three years, which is longer than it should be set if these problems are not a factor. We did not come up with any suggestions or solutions and realize this still needs to be addressed.

4. Procedural Matter.

After finishing hearing on a case, take your vote at that time if its at all possible, (if you don't have to read a mass of medical records or something), try to take the vote then in interest of time efficiency.

5. Workers' Compensation Rates.

Change the rates to by the hour instead of by the dollar. At the present time with rates set by the dollar everyone wants to hire as cheap as possible so they may not always get qualified people to save on insurance.

RECOMMENDED ELSEWHERE

1. Audit - Insurance Companies

We would like an independent audit of all the insurance companies that provide insurance in the State of Alaska, whether they reside here in Alaska or whether they just sell insurance to Alaskan companies. Again make them justify any rate increases that they may have.

REPORT OF THE MEDICAL COMMITTEE
UNIFIED FAIRBANKS TASK FORCE ON WORKERS' COMPENSATION

Attached is a copy of the existing section of the Alaska Workers' Compensation Act (§095) which covers medical benefits for injured workers. The Medical Committee has accepted some of the changes proposed in the new bill before the Labor and Commerce Committee (indicated by underlining) and has rejected others. To help explain the Medical Committee's recommendations, section by section, the following explanation is provided:

Subsection (a).

1. The committee accepts most of the proposed changes in this subsection, particularly the limitation to one change of treating physician, designed to discourage "doctor hopping."

2. The committee believes use of the term "primary physician" is preferable to the suggested change to "attending physician," and has used "primary physician" throughout.

3. The committee does not agree with the proposed change requiring notice to the employer/carrier prior to changing primary treating physician. The committee has adopted language that notice must be "within 14 days" of the change, which is in line with the present law.

Subsection (b).

1. The present subsection (b) has been left unchanged both by the Medical Committee and by the proposed new law.

Subsection (c).

1. The committee recommends subsection (c) of the existing law be left without revision. Its opinion is that the proposed changes are not a good idea: (a) requiring written treatment plans before the commencement of treatment and (b) additional documentation for treatment in excess of certain limitations (20 visits the first 60 days; 4 visits a month after 60 days).

Subsection (d).

1. The present subsection (d) has been left unchanged both by the Medical Committee and by the proposed new law.

Subsection (e).

1. The committee believes the present provisions for an examination or examinations of the injured worker by the employer are adequate. The committee rejects the proposed change specifically authorizing such examination(s) to be requested every thirty (30) days.

Subsection (f).

1. The Medical Committee has adopted without revision the language proposed by the new law.

Subsection (g). [Previously repealed]

Subsection (h).

1. The present subsection (h) has been left unchanged both by the Medical Committee and by the proposed new law.

Subsection (i).

1. The present subsection (i) has been left unchanged both by the Medical Committee and by the proposed new law.

Subsection (j).

1. The committee disagrees with the suggested repeal of present subsection (j), which places reliance on an already existing Board regulation generally following the AMA Guide for the Evaluation of Permanent Impairment. This provision should be left in the law without revision.

2. The committee also rejects the proposed new subsection (j) which would give the board authority to appoint a committee or hire an existing organization to "advise the board in matters involving the appropriateness, necessity, and cost of medical and related services provided under this chapter."

Subsection (k).

1. The committee disagrees with the suggested totally new subsection (k) creating a "second independent medical evaluation" whose opinion shall control ("be presumed to be correct") in all medical disputes before the Board. The committee recommends that no such provision be adopted and that medical disputes continue to be handled by presentation of medical reports and evidence to the Board under existing procedures.

AS 23.30.095 **Medical Examinations.**

(a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. However, if the condition requiring the treatment, apparatus, or medicine is a latent one, the two-years period runs from the time the employee has knowledge of the nature of his disability and its relationship to his employment and after disablement. It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require. When medical care is required, the injured employee may designate a licensed physician inside the state where the employee resides to render the care. Upon procuring the services of a physician, the injured employee shall give proper notification of his selection to the employer within a reasonable time after first being treated. The employee may not make more than one change in the employee's choice of primary physician without the written consent of the employer. Referral to a specialist by the employee's primary physician is not considered a change in physicians. Notice of a change in the primary physician shall be given within 14 days after the change.

(b) If the employee is unable to designate a physician and the emergency nature of the injury requires immediate medical care, or if he does not desire to designate a physician and so advises the employer, the employer shall designate the physician. Designation under this subsection, however, does not prevent the employee from subsequently designating a physician for continuance of required medical care.

(c) A claim for medical or surgical treatment is valid and enforceable against the employer unless, within 14 days following treatment, the physician giving the treatment or the employee receiving it furnishes to the employer and the board notice of injury and treatment, preferably on a form prescribed by the board. The board shall, however, excuse the failure to furnish notice within 14 days when it finds it to be in the interest of justice to do so, and it may, upon application by a party in interest, make an award for the reasonable value of the medical or surgical treatment so obtained by the employee.

(d) If at any time during the period the employee unreasonably refuses to submit to medical or surgical treatment, the board may by order suspend the payment of further compensation while the refusal continues, and no compensation may be paid at any time during the period of suspension, unless the circumstances justified the refusal.

(e) The employee shall, after an injury, at reasonable times during the continuance of the disability, if requested by the employer or when ordered by the board, submit to an examination by a physician or surgeon of the employer's choice. No fact relative to the injury or claim communicated to or otherwise learned by a physician or surgeon who may have attended or

examined the employee, or who may have been present at an examination is privileged, either in the hearings provided for in this chapter or an action to recover damages against an employer who is subject to the compensation provisions of this chapter. If an employee refuses to submit to an examination provided for in this section, the employee's rights to compensation shall be suspended until the obstruction or refusal ceases, and the employee's compensation during the period of suspension may, in the discretion of the board or the court determining an action brought for recovery of damages under this chapter, be forfeited. The board in any case of death may require an autopsy at the expense of the party requesting the autopsy. No autopsy may be held without notice first being given to the widow or widower or next of kin if they reside in the state or their whereabouts can be reasonably ascertained, of the time and place of the autopsy and reasonable time and opportunity given the widow or widower or next of kin to have a representative present to witness the autopsy. If no adequate notice is given, the findings from the autopsy may be suppressed on motion made to the board or to the superior court, as the case may be.

(f) All fees and other charges for medical treatment or service shall be subject to regulation by the board but may not exceed usual, customary, and reasonable fees for the treatment or service in the community in which it is rendered, as determined by the board.

(g) Repealed by §27 ch 93 SLA 1982.

(h) Upon the filing with the board by a party in interest of an application or other pleading, all parties to the proceeding must immediately, or in any event within five days after service of the pleading, send to the board the original signed reports of all physicians relating to the proceedings which they may have in their possession or under their control, and copies of the reports shall be served by the party immediately on the adverse party. There is a continuing duty on the parties to so file and serve all the reports during the pendency of the proceeding.

(i) Interference by a person with the selection by an injured employee of an authorized physician to treat him, or the improper influencing or attempt by a person to influence a medical opinion of a physician who has treated or examined an injured employee is a misdemeanor.

(j) The board shall adopt and use a schedule for determining the existence and degree of permanent impairment consistent with the American Medical Association Guide to the Evaluation of Permanent Impairment."

Rep. Dave Donley, Chairman
House Labor and Commerce Committee
Alaska State Legislature
P. O. Box V
Juneau, Alaska 99811

Dear Representative Donley:

As you may be aware, Unified Fairbanks formed a legislative task force following a seminar here in Fairbanks on December 12, 1987, concerning workers' compensation. The task force subdivided into committees, of which ours on vocational rehabilitation was one. We have reviewed in detail the proposed changes in the vocational rehabilitation law (§041) as it presently exists in the Alaska Workers' Compensation Act. Our committee agrees with some of the proposed changes and disagrees with others. A report of our work follows.

Unified Fairbanks is proud of the fact that our legislative task force is made up of individuals involved in all aspects of workers' compensation. There have been no secret sessions. Our seminar and its follow-up meetings have been open to anyone interested which has allowed us to have input from all sides of the issue and has eliminated the opportunity for certain special interest groups to become too dominant in our work.

Regardless of the affiliation of our individual members, employer, union representative, insurance broker, physician, vocational rehabilitation consultant, employee or employer attorney/representative, etc., the one underlying theme that seems to have permeated our work is our belief that merely changing the law will not solve the problem. We find no evidence from any source which indicates the law which has been proposed will reduce the cost of workers' compensation. We have repeatedly sought facts from the state government indicating what segment or segments of the workers' compensation system have been causing the greatest increase in cost. Absolutely no information has been forthcoming, although we have been able to obtain the same information from other states with a telephone call. In short, all we know is that there is a serious problem with the cost of the system. However, no one in our state government has been able to identify where the problem lies. We firmly believe it is wrong to legislate massive changes in what is basically a sound law when no one has as yet identified where the problem lies.

In fact, if anything, it is the opinion of our committee that the cost of the system may well be increased because of the substantial changes proposed and the confusion and litigation that will naturally result. In the area in which our committee worked, vocational rehabilitation, we feel the above problems are particularly acute. May we elaborate.

A. INEFFECTIVE WORK BY STATE AGENCIES, Division of Insurance:

Much of the blame for the increased cost of the workers' compensation system has been placed on vocational rehabilitation. However, the Division of Insurance has absolutely no information available to anyone concerning the costs of vocational rehabilitation or of any other workers' compensation benefit for that matter. Nonetheless, the Division continues to approve massive rate increases for workers' compensation insurance, and a portion of the blame gets placed on a "vocational rehabilitation system which is too liberal." The last increase was granted without the preparation of any findings of fact and without the presentation of any specific information to those in this State who are involved. We suggest legislation requiring some state agency to keep statistics on the cost of rehabilitation evaluations, rehabilitation plans, the cost of litigation, and so forth. When future rate increases are suggested, facts and figures will be available to indicate where the cost increase is coming from.

B. INEFFECTIVE WORK BY STATE AGENCIES, Workers' Compensation Board:

The Department of Workers' Compensation has seriously faltered in its obligation to administer the existing vocational rehabilitation law. Over five and a half years have passed without the promulgation of a single rule or regulation by the Board to govern procedures under the law which went into effect on July 1, 1982. The present law has never been given a chance to work and we find it ridiculous that the Legislature now stands ready to cast it aside. We suggest the legislature take whatever steps are necessary to immediately secure the promulgation of administrative rules and regulations by the Board.

Two good examples of what has happened as the present system has struggled without the benefit of administrative rules:

1. We suspect a major portion of any increased cost of vocational rehabilitation is in the payment of temporary benefits to injured workers while they wait for the vocational process to be completed. The system in Fairbanks has worked very slowly without the rules and regulations needed. As a result, injured workers remain far too long on temporary benefits. Rather than deprive injured workers of temporary benefits during vocational rehabilitation, which we think is a worthwhile benefit, we suggest the Board streamline the system with the promulgation of rules and that the existing law be tightened up to provide certain specific time limitations for each step of the process. This is the main thrust of our suggested changes in the existing law.

2. In Fairbanks there is no full time rehabilitation administrator. At present, the one administrator is in Fairbanks one day a month. This allows a maximum of three rehabilitation conferences. Without timely rehabilitation conferences available

AS 23.30.041. Rehabilitation of injured workers.

(a) The board shall select and employ a rehabilitation administrator. The board shall adopt regulations to implement this section. Thye board shall authorize the rehabilitation administrator to select and employ sufficient rehabilitation staff to conduct hearings and to collect and analyze statistical data. The rehabilitation administrator is in the partially exempt service under AS 39.25.120.

(b) The rehabilitation administrator shall implement the provisions of this section, study the issue of rehabilitation, both physical and vocational, enforce the regulations as adopted, and maintain and report statistical data on a continuing basis as to the cost of rehabilitation to the Legislature on at least an annual basis.

(c) If an employee suffers a compensable injury that could preclude return to the job at the time of injury, the employee shall be referred for an evaluation for participation in rehabilitation services within 30 days after the date of injury. A full evaluation shall be performed by a qualified rehabilitation professional within 30 days of the date of referral. If in the opinion of the qualified rehabilitation professional, the medical, physical, or emotional state of the employee precludes a full evaluation, the rehabilitation professional shall prepare a preliminary evaluation within 14 days of the date of referral. A preliminary evaluation shall include the reasons why a full evaluation cannot be made, an opinion as to when the employee will be able to participate in a full evaluation, and any information that would be included in a full evaluation that can be determined and reported by the rehabilitation professional at the time of the preliminary evaluation. If the employer does not timely make a referral for evaluation under this subsection, the rehabilitation administrator shall retain a qualified rehabilitation professional to perform the evaluation. The employer shall pay the reasonable costs of an evaluation under this subsection.

(d) A full evaluation by a qualified rehabilitation professional shall include a determination whether rehabilitation services are necessary, as outlined in the regulations.

(e) Refusal by an injured employee to participate in an evaluation results in forfeiture of disability compensation for the period the refusal continues. The rehabilitation administrator shall find that an employee refuses to participate in an evaluation if the employee fails to cooperate with the rehabilitation provider as outlined in the regulations.

(f) After the evaluation is completed, the employee must elect in writing to the administrator within 14 days of receipt of the full evaluation whether or not he or she will participate in further rehabilitation services.

(g) The employee's election not to participate in rehabilitation services is final, provided, however, that the employee shall have the option within 30 days of the notice under subsection (f) to notify the administrator in writing that he now wishes to participate in rehabilitation services.

(h) After the employee has elected to participate in vocational rehabilitation services for which he is eligible, the vocational rehabilitation counselor will within 90 days submit a vocational rehabilitation plan to concerned parties including the rehabilitation administrator which will enable the employee to return to suitable gainful employment. A rehabilitation plan may consist of any of the following; however, if the employee can be restored to suitable gainful employment with rehabilitation plans of higher preference, then a rehabilitation plan of a lower preference need not be offered by the employer. The order of preference for rehabilitation plans is return to work

(1) with the same employer at the same or modified job as at the time of injury;

(2) with the same employer at a new job using transferrable skills;

(3) with a new employer at the same or modified job;

(4) with a new employer in a new job using transferrable skills;

(5) through developing already existing skills or acquiring new skills through on-the-job training;

(6) after developing already existing skills or acquiring new skills through vocational training;

(7) after developing already existing skills or acquiring new skills through academic training;

(8) in self employment; and

(9) through direct placement in an unrelated job not using transferrable work skills.

(i) If the employer and employee fail to agree in writing on the submitted vocational rehabilitation plan within 14 days, the employee shall submit an alternative plan to the rehabilitation administrator. The employee's alternative plan must be submitted within an additional 14 days. In the event of a dispute, the rehabilitation administrator or his staff may either write a decision or schedule a formal rehabilitation conference to be held within 10 days of receipt of the alternative plan. If a conference is held, a decision as to the appropriate plan shall be issued within 10 days after the conference. The rehabilitation administrator's decision is binding unless a party seeks review of the decision by requesting a hearing with the Board in accordance with AS 23.30.110.

(j) A vocational rehabilitation plan may not exceed up to 37 training weeks, except that the rehabilitation administrator may order a plan up to an additional 37 training weeks. This subsection does not prohibit 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 AS 23.30.185 or AS 23.30.200 shall be paid throughout the rehabilitation process. The employer shall pay all costs of a rehabilitation plan under this section.

(k) For purposes of this section, suitable gainful employment means employment that is reasonably attainable in the light of an individual's age, education, vocational history, and physical capabilities, and that offers an opportunity to restore the individual as soon as practical to a remunerative occupation that takes into consideration the local labor market and as nearly as possible to the individual's gross weekly earnings as determined by section AS 23.30.220.

(l) For purposes of this section, "labor market" means a geographical area that offers employment opportunities in the following priority:

(1) area of last employment;
(2) area of residence;
(3) the State of Alaska;
(4) outside Alaska.

(m) "Qualified rehabilitation professional" means a person who by education and experience has the skills to work in the field of rehabilitation as determined by Board established regulations.

(n) While an injured worker is participating in a preliminary evaluation and/or a subsequent full evaluation under this section, he or she shall receive temporary partial disability benefits under AS 23.30.200 when an employer under section (h)(1) or (2) and primary physician agree, prior to medical stability and a full release, that an employee may return to modified, light duty, part time, or trial work status.

Re: Offset against Collateral Benefits
Possible Amendment to AS 30.225:

Where an employee receives periodic disability benefits under the provisions of a pension plan, disability or accident insurance plan, financed in whole or in part by the employer, the aggregate benefits payable for temporary total disability, temporary partial disability, permanent partial and permanent total disability shall be reduced by an amount equivalent to such portion of the employer financed benefits paid to an employee in excess of temporary or permanent disability benefits calculated on the employee's spendable weekly wages.

re WCCA

M E M O R A N D U M

TO: United Fairbanks

FROM: John Connors

DATE: January 11, 1988

RE: Proposed Amendment to AS 23.30 Section 1(b); Standard of Evidence Applied in Determining the Compensability of a Workers' Compensation Claim.

California as of January 1, 1983 and North Dakota in 1977 legislatively adopted the preponderance of evidence standard in determining the compensability of workers' compensation claim.

In California, Section 3202.5 was added to the Labor Code effective January 1, 1983. That section is entitled Preponderance of Evidence Standard, and states:

> Nothing contained in Section 3202 shall be construed as relieving a party from meeting the evidentiary burden of proof by a preponderance of evidence. "Preponderance of the evidence" means such evidence as, when weighed with that opposed to it, has more convincing force and a greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence.

Section 3202 entitled Liberal construction of Divisions 4 and 5 provides that the applicable sections of the Labor Code dealing with workers' compensation and insurance are to be liberally construed by the courts for the purpose of extending benefits for the protection of persons injured in the course of their employment.

Section 3202.5, as adopted in 1982 constituted the California legislature's attempt insure that worker's compensation cases would be decided upon their merits, supported by a preponderance of evidence which would withstand judicial review of challenged awards. The stated legislative intent was to assure the quick and efficient delivery of benefits to injured workers, while at the same time seeking to insure that awards of benefits are supported by the weight of evidence presented.

Incorporating the preponderance of the evidence standard into the proposed language used in the 12/30/87 work draft for section 23.30 section 1(b), one possible phrasing might be:

> The Legislature declares that the workers' compensation laws must be fairly and impartially construed by the courts. In promotion of that goal, it is the intention of the legislature that the preponderance of evidence standard be utilized in determining the compensability of a workers' compensation claim. Preponderance of the evidence means such evidence as, when weighed with that opposed to it, has more convincing force and a greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence.

JJC/tlg

0086K

MEMORANDUM

TO: Unified Fairbanks Workers' Compensation Task Force
Art Robson Chairman

FROM: The Medical Committee

DATE: January 13, 1988

RE: Senate Bill HB 322 drafted by the Labor and Commerce Committee

---

The Medical Committee deliberated over the proposed changes for AS 23.30.095. Attached you will find the Medical Committee's recommended changes in HB 322, § 095. The Workers' Compensation Task Force Committee should recognize that the Medical Committee determined to approve some of the remedial legislation recommended by the Labor and Commerce Committee, which, as a practical matter, was aimed at resolving some glaring problems in the delivery of medical benefits to injured workers at a reasonable cost to employers. The Medical Committee, however, wishes the Workers' Compensation Task Force Committee as a whole to note that in its collective opinion, until such time as the Medical Committee receives evidence that the tremendous increase in workers' compensation costs is attributable in some manner to a tremendous increase in medical costs in the workers' compensation system, any vast changes in AS 23.30.095 would not seem appropriate.

ASB/las
1644s
Attachment

WORKERS' COMPENSATION TASK FORCE
Meeting Minutes
January 6, 1988

MEMBERS PRESENT

Arthur Robson, Attorney (Chair)
Ann Brown, Attorney
Jim Carroll, Iron Workers #751
John Connors, Attorney
Clare Hiratsuka, Northern Rehab
Judith Hannig, APSI
Ed Husted, Paralegal
Mary Klink, Paralegal
Kevin Krauklis
Phil Nelson, Holiday Parks
George Riley, UAF Employee Relations
Earl F. Romans, Alaska Battery
Charles Rublee, D.C.
Bill Sager, Chandler Plumbing & Heating
Carolyn Webster, Culligan
Tom Wilton, Wilton Adjusters
Eugene Yurkovich, Cook & Haugeburg

MEMBERS ABSENT

Ralph Beistline, Attorney
Dennis Brownsfield, Iron, Inc.
Skip (Dennis) Cook, Attorney
Gordon DePue, Alaska 100 Insurance
Scott Emery, M.D.
Vince Gollogly, Northern Rehab
George Haltuch, ARC
Owen Hanley, M.D.
Kurt Merkel, M.D.
Gene Rutland, Mechanical Contractors of Fairbanks
Mary Stella, Denali Transport Corp.
Joe Thomas, Laborers #945

CALL TO ORDER

Meeting was called to order at 3:10 p.m.

APPROVAL OF MINUTES:

Minutes of December 30, 1987, meeting were approved with the following correction: name of person in the Division of Insurance is Don Koch, not Don Cope.

NEW COMMITTEES:

George Riley stated his concerns regarding the administration of the Workers' Compensation program. An Administrative Structure Committee was formed to make a recommendation for language to forward to the Governor. The members are:

Ann Brown
George Riley
Earl Romans

REVIEW OF PROPOSED LEGISLATIVE CHANGES:

The Task Force reviewed the WCCA proposed legislative changes beginning with Sec. 1.

Sec. 1: This section concerns legislative intent. John Connors will provide a copy of the California language in their Workers' Compensation law which the task force will review and may choose to use as an example to modify the proposed changes in this section.

Sec. 2: The part of this Section regarding the enforcement of attendance and testimony of witnesses (the last sentence) will be addressed by the Administrative Structure Committee. That committee will also consider the matter of mandatory language as opposed to discretionary language throughout the law; i.e., the use of "may" instead of "shall" or "will".

Sec. 3: False statements on an employment or preemployment questionnaire is the issue. Action on this matter was referred to the Second Injury Fund Committee. Earl Romans will ask Skip Cook to draft new language for this Section.

Sec. 4: The inclusion to the law of "...The contribution shall be compensation payments made during the preceding calendar year." should read, "...shall be BASED ON compensation payments..."

Sec. 5: This Section concerns vocational rehab and was referred to the Vocational Rehabilitation Committee for a report next week. Judith Hannig is now a member of this committee.

Sec. 6: Discussion of this Section lead to the matter of insurance carriers not being able to recapture funds paid on a case which the Board rules fraudulent. Art Robson will address this issue.

Sec. 7: The changes here regard curbing the practice of "doctor shopping." Redraft of the language was referred to the Medical Committee. Judy Hannig is now a member of this committee.

Sec. 8: Treatment plans are the subject of this addition. This Section was referred to the Medical Committee for review and recommendations. The Task Force would also like the committee to address the subject of settlement of future medicals.

Sec. 9: Art Robson will draft new language to include the definition of physician as described by law.

Sec. 10: Modifications are acceptable.

Sec. 11: Once again, the use of mandatory language is preferred by the Task Force; i.e., "The board may...." should read, "The board will..."

Sec. 12: Art Robson will draft new language changing "independent medical examiner" to "independent medical panel". There will be further discussion on this at the next meeting.

MEMBERS' COMMENTS:

Report on WCCA: Tom Wilton reported that Steve Hague, president of WCCA, said they have hired a public relations' group and are meeting with Anchorage politicians who are leaving for Juneau. At this point, WCCA is involved mainly with political strategy.

Report Deadlines: The Task Force agreed that all committees should finalize their reports by next week.

Premium Rates: Gene Yurkovich distributed a report on premium rates on behalf of his committee.

ADJOURNMENT:

The meeting was adjourned at 5:15 p.m.

MEMORANDUM

Date: January 6, 1987

To: United Fairbanks

From: Gene Yurkovich

Subject: Workers' Compensation Premium Rates

Redetermining premium rates for workers' compensation can be somewhat arbitrary in that methods can shift cost from one class of employee/employer to another. For example, to shift the higher cost of construction workers to office workers. If the total cost of workers' compensation for Alaskan workers is still the same, a shift may be said unfair.

The easiest method for premium rate change would be to go back to a maximum weekly cap as we had in the 1970s.

> Example: $1,000 per week maximum base - Employers would only pay a maximum premium on $52,000 annual wage.

Costs must be cut on the benefit and administration side first. Oregon has benefits based on two-thirds of gross. The minimum wage base is $55.55 per week. Gross from $55.56 to $75.00 per week qualifies for a $50.00 benefit ($75.00 x 2/3 = $50.00). Gross over $75.00 would be 2/3 x 95 percent with a maximum benefit of $355.04 for everyone.

Piece meal or production/fishery workers who are hired on an "as needed" basis are averaged over a 26 week period for a wage base. Others, such as teachers, drivers etc., who normally work more than the four weeks but not all year also have a special calculation.

Oregon also analyzed the cost of 1986 vocational rehabilitation..

> NCCI (National Council of Comp Ins.) estimate of cost was 12.6 percent
>
> Claims were 11.2 percent
>
> State said cost should be only 5.4 percent and a rate increase for 1987 was denied.
>
> Analysis (Mike) - said cost should be 8 to 10 percent

Cost benefits of premimum collected for 1986 (Oregon)

	Percent	
Medical	32.4	
T.T.D. - time loss	30.3	
P.P.D.	11.9	
P.T.D.	8.9	
Legal	2.3	claimant only
Rehabilitation	11.2	
Denial*	3.0	
Total	100.0	

*Two parts -
1. Interim compensation to mediate loss (after 14 days)
2. Complimentary release - lump sum is "case questionable" status

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Total	100.0	

*Two parts -

1. Interim compensation to mediate loss (after 14 days)
2. Complimentary release - lump sum is "case questionable" status

WORKERS' COMPENSATION TASK FORCE
Meeting Minutes
December 23, 1987

Members Present:

Ralph Beistline, Attorney
Jim Carroll, Iron Workers #751
John Connors, Attorney
Skip (Dennis) Cook, Attorney
Vince Gollogly, Northern Rehab
George Haltuch, ARC
Clare Hiratsuka, Northern Rehab
Ed Husted, Attorney 3 paralegal
Mary Klink, Attorney
Phil Nelson, Holiday Parks
George Riley, UAF Employee Relations
Arthur Robson, Attorney
Earl F. Romans, Alaska Battery
Charles Rublee, ~~N~~D.C.
Bill Sager, Chandler Plumbing & Heating
Joe Thomas, Laborers #945
Tom Wilton, Wilton Adjusters
Eugene Yurkovich, Cook & Haugeburg

Members Absent:

Dennis Brownsfield, Iron, Inc.
Gordon DePue, Alaska 100 Insurance
Scott Emery, M.D.
Owen Hanley, M.D.
Judith Hannig, APSI
Kevin Krauklis, Arco
Kurt Merkel, M.D.
Mary Stella, Denali Transport Corp.
Carolyn Webster, Culligan

Meeting was called to order at 3:10 p.m. Art Robson was named chairman.

The majority of those present agreed the best path is to progress as rapidly as is possible while there is momentum and the legislature is paying attention.

Art Robson requested volunteers for a committee to research the basis of premium rates, ascertain what the law is and make recommendations for

appropriate action. The members for this committee on premium rates--what the basis is for them and what we should do about it--are:

(1) Jim Carroll
Gordon DePue
George Haltuch
Gene Yurkovich

Premium Rates basis

The committees will report to the Task Force at their next regular Wednesday meeting.

2 Tom Wilton will find out when WCCA is meeting and report to Art. Tom will be our liasion with WCCA on working on joint recommendations. The WCCA meetings take place in Anchorage.

Art Robson suggested going through the items referred to the Task Force and decide which items should have a committee. The first problem on the list was the possibility of insurance companies looking to catch up which would result in rate increases in the future. After discussion, it was decided a committee on this was not necessary at this time.

The second item on the list is Attorney Fees--these are regulated on one side, and not the other. There is concern on how the legal fees effect their premiums. The Workers' Comp Board does not have the figures on the defense attorneys' fees, although a form is filed with them which requests the information. At the time the form is submitted, this information is not usually available and is left unanswered. There is no supplemental form sent when the figures do become available. The Workers' Comp Board has never enforced this requirement, although recently action was taken to begin doing so. The legal fees effect the premiums because it is totally paid by the carrier, hence the employer.

There seems to be two issues regarding the attorney fees. One regards the concern that many people share the overall costs. The other issue seems to be whether or not individuals are getting equal treatment under the law. The labor side is concerned that an individual might not feel they are getting equal treatment if their attorney's costs are structured, but the other side's attorney's costs are not.

There is no breakdown of where the premium funds are going to as far as attorney fees, vocational rehab, medical, etc. The information to determine the breakdown appears to be in Juneau, but is not available in an organized form.

There was discussion regarding the lack of audits done on the insurance companies. Of special concern is that no audits are done at the time of rate increase requests. Audits may provide information on the breakdown of costs; specifically, which areas are responsible for the increase.

Returning to the question of attorney fees. There are two systems of compensation for attorneys. The defense attorneys generally bill the insurance companies by an hourly rate. The plaintiff's attorneys receive basically a minimum of 10% of the compensation paid out to the applicant. At times, the court has allowed a doubling of the attorneys' fees awarded to the plaintiff because of the contingent system. These different methods of payment between the attorneys make it difficult to compare the attorney's fees.

Art Robson stated that the bottom line is the costs of litigation in general and how to determine these costs. Before a committee can be formed to address the attorneys' fees problem, the breakdown of premium figures is necessary. A committee was formed to obtain these figures from Juneau:

3 Bill Sager
Ed Husted

The appointees were approved by those present.

Copies of the proposed law changes were distributed. The members agreed unanimously to read these proposed changes by next week's meeting, at which time it will be discussed.
Returning to the problems submitted to the Task Force, Mandatory Review was addressed. The mandatory review was meant to pertain to the auditing of the insurance companies. The members would like an audit of the insurance commission which grants the rates and the insurance companies which request the rates. Vince Gollogly will research the independent audit done for Texas and Mary Klink will research the independent audit done for Maine. 4

George Riley discussed the necessity of educating the employers to use effective loss control, loss prevention activities, and have effective claims management. Without this, nothing is going to be done to reduce the losses because the reserves will not be reduced by the insurance companies. There is going to be a seminar in the future by the American Society of Safety Engineers regarding safety and loss control.

Jim Carroll stated that many injuries are a result of out of state contractors who know nothing of Alaska's elements. Those injuries effect all the rates. He discussed the possibility of having pre-employment physicals for all employees as a possible loss control measure. There was general discussion on a pre-employment questionnaire. George Riley is obtaining a copy of the University's pre-employment questionnaire which is going to be distributed by Chuck Rees.

The problems with the Second Injury Fund were discussed. Many employers do not want to take back the employee and give him a different job until he fully recuperates. This often results in the employee remaining off the job, collecting his benefits. The 104 weeks waiting period on the Second Injury Fund should be reduced. The Second Injury Fund cases seem to be low priority to the State.

A committee was formed to work on changes in the Second Injury Fund. The previous committee which is obtaining figures from Juneau will also try to find figures pertaining to the Second Injury Fund. The committee members for the Second Injury Fund Recommendation Committee are:

5
Skip Cook
Vince Gollogly
Earl Romans

The next item on the problem list is Benefit Offset (also known as collateral benefits). THis has been declared unconstitutional in a number of states, although not necessarily where Workers' Comp is concerned. George Riley feels management often takes a punitive attitude towards the injured employee and we should stay away from this way of thinking. Mary Klink gave an example of a case with the City of Fairbanks which she felt was a good example of the type of problem the Task Force had been asked to work on. The intent being to prevent the employers from paying double, not to prevent the employee from getting what they deserve. The goal of the benefits should be to have the injured employee receiving 100% of his wages, but not over 100% as that then effects their incentive to return to work. There was disagreement as to how that might punish the employee who has tried to cover himself through other insurances. A Collateral Benefits Committee was formed with the following members:

6
Jim Carroll
John Connors
Clare Hiratsuka
George Riley

Wages, Current or Future is the next item on the problem list. This addresses the issue of basing the benefits on the employee's previous, current and/or future wages. The current system is not designed for Alaska's boom or bust economy. A committee will be formed on this subject next week.

Art Robson asked for input from members on any items not addressed today that still should be.

Dr. Rublee suggested looking into the medical costs area. A committee was formed consisting of:

7
Kurt Merkel, M.D.
Mary Klink
Charles Rublee, M.D.C.

At Vince Gollogly's suggestion, a Vocational Rehab Committee was formed:

7
Phil Nelson
Vince Gollogly
Clare Hiratsuka
Mary Klink
Joe Thomas (?)

Meeting was adjourned at 4:55 p.m.

WORKERS' COMPENSATION TASK FORCE

Committee List

Premium Rates

Jim Carroll
Gordon DePue
George Haltuch
Gene Yurkovich

Premium Rates Breakdown

Bill Sager
Ed Husted

Second Injury Fund Recommendations

Skip Cook
Vince Gollogly
Earl Romans

Collateral Benefits

Jim Carroll
John Connors
Clare Hiratsuka
George Riley

Medical Costs

Kurt Merkel, M.D.
Mary Klink
Charles Rublee, M.D.

Vocational Rehab

Vince Gollogly
Clare Hiratsuka
Mary Klink
Joe Thomas (?)
Phil Nelson

Chancy Croft, Attorney

613 Cushman Street Suite 210
Fairbanks, Alaska 99701
(907) 456-8777

MEMO TO: UNIFIED FAIRBANKS

FROM: Ed Husted, Chancy Croft Law Office

RE: Average payment to injured workers

DATE: December 30, 1987

I have been unable to contact Jan Hansen, the person responsible for computer work at the Alaska Workers' Compensation Board. She has been on vacation since our last meeting. No one else wanted to attempt an answer as to what the average weekly benefit to an injured worker was in Alaska.

At last week's meeting, most who work regularly with the workers' compensation program felt the average would fall between $500.00 and $600.00 a week. In an effort to verify this figure, I took an average of all cases we have handled in the Croft Law Office for the last two years, a total of 279 claims. The average weekly compensation to these claimants was $560.82. This included the full range of benefit payments, three workers at the minimum of $110.00 and one at the maximum of $1108.00.

Chancy Croft, Attorney

613 Cushman Street Suite 210
Fairbanks, Alaska 99701
(907) 456-8777

MEMO TO: UNIFIED FAIRBANKS

FROM: Ed Husted, Chancy Croft Law Office

RE: Second Injury Fund

DATE: December 30, 1987

As of November 30, 1987, the balance in the Second Injury Fund was slightly over $5,900.000.00.

Payments already committed for fiscal year 1988 (July 1, 1987, through June 30, 1988) are $2,387,000.00, of which roughly half have already been paid out. Thus, about $1,200,000.00 of the balance in the Second Injury Fund is already committed for payments between now and June 30, 1988. This leaves approximately $4,700,000.00 in unencumbered funds.

This information was obtained by telephone conference today with Richard Osterman, who is director of the Second Injury Fund. He is an employee of the Alaska Workers' Compensation Board.

The Second Injury Fund is funded by assessments against employers/insurance carriers. For injuries occurring between July, 1981, and December, 1985, the assessment was 6% of all wage loss benefits paid to injured workers. This assessment dropped to 5% for 1986. The assessment was eliminated altogether for injuries occurring in 1987. Mr. Osterman indicated no assessment is contemplated for 1988 injuries.

MEMO

TO: Workers' Compensation Task Force

FROM: Art Robson, Chairman

DATE: January 4, 1988

SUBJECT: Meeting Notification

Enclosed please find the minutes for the December 30, 1987, Workers' Compensation Task Force meeting.

Our next meeting is Wednesday, January 6, 1988, at 3:00 p.m. at the North Star Terminals conference room. We will continue to meet each Wednesday at 3:00 p.m. through the month of January.

Medical Costs: There will be a report next week as Kurt Merkel has been unavailable to work with the committee.

Vocational Rehabilitation: Vince Gollogly reported that currently the employer selects the rehab counselor. There is a proposal to go to a CIRS system. There is currently no CIRS in Fairbanks, although Vince is taking his CIRS examine in March. This will prevent current Fairbanks' vocational rehabilitation counselors from working in this field, and will require people to be brought in from outside the city, and possibly the state. The committee will study the proposed law further before making recommendations.

MEMBERS' COMMENTS:

Out of State Audits: Mary Klink reported on general information she learned during her research into the independent audit done for the state of Maine. The NCCI is very heavy into lobbying, with effective results. There are about 20 states which use NCCI ratings. Most of the states which do not use NCCI ratings are probably self-insured. In many states having problems similar to Alaska, the premiums are being increased, while benefits are being reduced.

Regarding Texas, Vince Gollogly reported that the audit was not an independent one. Many insurance companies have pulled out of Texas, and the majority of workers' compensation policies are written by the pool.

Letter From Bettye Fahrenkamp: Earl Romans read a letter from Senator Fahrenkamp offering her help on the workers' compensation issue. The Task Force should take advantage of her offer.

Proposed Legislative Changes: The committee will review the proposed changes at the next meeting, based upon committee reports.

ADJOURNMENT:

The meeting was adjourned at 5:15 p.m.

COMMITTEE REPORTS:

Premium Rates: Gene Yurkovich reported that benefits, overtime, holiday, room and board, if applicable, are all included in wages used to determine premium rates. Benefits are not included if they are put into trust funds, as with the unions. Employer's premium rates are based on the classification given to their employee's position by NCCI. In Alaska,Workers' Compensation is optional for partners and sole proprietors. The committee will recommend a new basis for premium rates at the next meeting.

Premium Rates Breakdown: Ed Husted distributed a memo with figures on the Second Injury Fund and a memo regarding the average weekly benefit received by Alaskan injured workers (attached). He will continue his efforts to contact Jan Hansen at the Division of Workers' Compensation. Gene Rutland wrote a letter to John George, Division of Insurance, requesting figures for the percentage of the premium dollar that is spent on each major component; i.e., medical costs, workers' compensation payments, vocational rehabilitation, insurance carrier reserves, legal fees, insurance carrier overhead and profit, and costs of administration. He requested separate breakdowns for insurance carriers and workers. He also asked what the change has been in each of these components since 1985, and in addition, what are the total annual costs of each of these major components for 1986, 1987 and what is projected for 1988. Gene has not received a reply yet, but he did speak with Don Cope of the Division of Insurance. Don Cope said he was not sure if they could provide the requested information, but is preparing a preliminary report which will be sent to us next week. Much of the requested information is not reported to the NCCI in the form in which we would like. The insurance carriers report costs lumped together in one figure, although their files do contain the individual figures. The problem which needs to be investigated is the line between the insurance companies and NCCI. Mary Klink commented on our state law which requires insurance carriers to file the Workers' Compensation Reports with the Workers Compensation Board. The inclusion of the breakdown of figures on these reports (medical, attorney fees, etc.) should be enforced by the Board and made available.

Second Injury Fund Recommendations: Skip Cook has obtained information on the Second Injury Fund from Senator Fahrenkamp's office (attached). The members would like the waiting period for SIF benefits to be reduced from 104 weeks to 30 days. Vince Gollogly is researching information on other liability coverage which can be used prior to the Second Injury Fund benefits going into effect. The committee will find out which account receives the interest earned on SIF.

Collateral Benefits: Page 22, Section 26 of the proposed law concerns this subject. Clare Hiratsuka reported committee members could not agree on recommendations. Task Force members present at the meeting agreed that we need to develop a formula for workers' comp to take an offset for pension benefits and possibly permanent disability benefits. Clare will continue to work on this issue.

WORKERS' COMPENSATION TASK FORCE
Meeting Minutes
December 30, 1987

MEMBERS PRESENT

Skip (Dennis) Cook, Attorney
Vince Gollogly, Northern Rehab
Clare Hiratsuka, Northern Rehab
Ed Husted, Paralegal
Mary Klink, Paralegal
Phil Nelson, Holiday Parks
Arthur Robson, Attorney
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Kurt Merkel, M.D.
George Riley, UAF Employee Relations
Mary Stella, Denali Transport Corp.
Carolyn Webster, Culligan
Joe Thomas, Laborers #945
Tom Wilton, Wilton Adjusters

CALL TO ORDER

Meeting was called to order at 3:18 p.m.

APPROVAL OF MINUTES:

Minutes of December 23, 1987, meeting were approved with the following corrections: changing of titles for Ed Husted and Mary Klink from attorney to paralegal; changing of title for Charles Rublee from M.D. to D.C.; and Phil Nelson to be included as member of Vocational Rehabilitation Committee.

Chancy Croft, Attorney
613 Cushman Street Suite 210
Fairbanks, Alaska 99701
(907) 456-8777

MEMO TO: UNIFIED FAIRBANKS

FROM: Ed Husted, Chancy Croft Law Office

RE: Second Injury Fund

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Chancy Croft, Attorney

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FROM: Ed Husted, Chancy Croft Law Office

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MEMORANDUM State of Alaska

TO: Jacquelyn L.McClintock, Director
Workers' Compensation Division

Frank Spargo, Director
Administrative Services Division

FROM: Chuck Caldwell, Chief
Research and Analysis

DATE: November 10, 1987

FILE NO:

TELEPHONE NO: 465-4500

SUBJECT: Second Injury Fund Contribution Rate 1988

The Second Injury Fund contribution rate, calculated in accordance with AS 23.30.040(b), is zero for calendar year 1988. Under state law, the contribution rate is zero when the Second Injury Fund reserve rate is at least 175 percent. The reserve rate is 277.3 percent.

Calculations are as follows:

$$\text{SIF Reserve Rate} = \frac{\text{Unencumbered Balance } 10/31/87}{\text{Disbursements } 7/1/86\text{-}6/30/87} = \frac{\$5,783,215.69}{\$2,085,270.84} = 277.3\%$$

Attachment

cc: Chris Miller w/attachment
Michael Hurst w/attachment
Thom Wylie w/attachment

02-C01A(Rev. 10/79)

DEC 30 '87 09:24 LEGISLATIVE INFO OFC, JUNEAU P.32

09-Nov-87 SECOND INJURY FUND CONTRIBUTION RATE

(1) YEAR	(2) SECOND INJURY FUND UNENCUMBERED BALANCE 12 MOS. ENDING 10/31	(3) SECOND INJURY FUND DISBURSEMENTS 12 MOS. ENDING 6/30	(4) RESERVE RATE (2)/(3)	(5) SECOND INJURY CONTRIBUTION
1982	301,036.00	1,129,462.28	26.7%	0.06
1983	253,250.21	1,147,289.51	22.1	6.0
1984	406,028.00	1,954,027.08	20.8	6.0
1985	1,305,989.18	1,867,983.93	69.9	5.0
1986	4,098,516.83	2,182,056.03	187.8	0.0
1987	5,783,215.69	2,085,270.84	277.3	0.0

SOURCE: ALASKA DEPT. OF LABOR, ADMINISTRATIVE SERVICES DIVISION, FISCAL SECTION.

1984-85 4.00 = .06 x

$15,000,000

x = .06 | 1900 0000

1985-86 3.793 = .05 x

$15,860,000

x = .05 | 379300000

4099
1306
3793

4099
1306
406

STATEWIDE ACCOUNTING SYSTEM — DATE: 12/02/8

BALANCE SHEET

FUND: 11117 SECOND INJURY FUND — ** - INTERNAL AND EXTERNAL ACTIVIT

COA-YR: 1988 LEVEL: 30-FUND

MONTH: 5 NOV. '87

	INCEPTION TO DATE	BALANCE FORWARD
ASSETS		
10000 TOTAL ASSETS	6,120,743.48	5,416,261.48
10040 CASH	.00	.00
10060 CASH HELD IN TRUST	.00	.00
10061 CONVERS-CASH W/TREAS	.00	.00
10100 RECEIVABLES	6,120,743.48	5,416,261.48
10170 DUE FROM OTHER FUNDS	6,120,743.48	5,416,261.48
10171 CASH WASH ACCOUNTS	6,120,743.48	5,416,261.48
10191 CASH W/TP FUND 90100	6,120,743.48	5,416,261.48
TOTAL ASSETS	6,120,743.48	5,416,261.48
LIABILITIES		
20000 TOTAL LIABILITIES	136,291.08-	384,877.31-
21000 CURRENT LIABILITIES	136,291.08-	384,877.31-
21275 ACCTS PAYABLE AFR	.00	289,742.46-
21300 ACCOUNTS PAYABLE	.00	289,742.46-
21331 ACCRUED PAYABLE	.00	289,742.46-
22595 WRTS OUTSTANDING AFR	136,291.08-	95,134.85-
22600 WARRANTS OUTSTANDING	136,291.08-	95,134.85-
FND EQUITIES		
30000 TOTAL FUND EQUITIES	5,984,452.40-	5,031,384.17-
30600 RESERVES	5,023,204.63-	5,023,204.63-
33500 OTHER RESERVES	5,023,204.63-	5,023,204.63-
36100 DESIGNATED	5,023,204.63-	5,023,204.63-
36118 SECOND INJURY FUND	5,023,204.63-	5,023,204.63-
34000 BUDGETARY RESERVES	2,395,779.54-	8,179.56-
34100 RESERVE FOR ENCUMB	15,412.99-	4,153.24-
34200 CY RESERVE ENCUMB	41,840.23-	26,427.24-
34500 PY RESERVE ENCUMB	26,427.24	22,274.00
34900 RESERVE CONT PROGRAM	560.03-	3,593.21
35000 RES CONTINUING	560.03-	3,593.21
35600 GENERAL SURPLUS	2,379,806.52-	7,619.51-
35700 RES CY APPROP	2,379,806.52-	7,619.51-
36000 EST RESTRICTED REC	.00	.00
36700 AVAILABLE FUND EQUIT	1,434,531.77	.00
36800 AVAILABLE FUND BAL	1,434,531.77	.00
TAL LIABILITIES AND FUND EQUITIES	6,120,743.48-	5,416,261.48-

Balance

CODE	EXPENDITURE CLASSIFICATION	PRIOR YEAR FY 87 ACTUAL	CURRENT YEAR FY 88 AUTHORIZED	BUDGET YEAR - FY 89		
				ADJUSTED BASE	INCREMENT/ DECREMENT	AGENCY REQUEST
73050	Land and Interest in Land					
75300	Buildings					
75500	Improvements Other Than Buildings					
75025	TOTAL LAND, BUILDING, NON-STRUCTURAL IMPROVEMENTS					
	INTER-AGENCY TRANSFERS (NON-ADD)					
77100	Local Assistance, State Sources					
77240	Benefits to Individuals	14.8	30.0	30.0		30.0
77350	Grants and Awards to Individuals	2738.8	2742.6	2742.6		2742.6
77440	Grants, Other Agencies	1.7	10.0	10.0		10.0
77570	Health Benefits					
77700	General Relief					
77000	TOTAL ASSISTANCE GRANTS AND BENEFITS	2755.3	2782.6	2782.6		2782.6
	INTER-AGENCY TRANSFERS (NON-ADD)	1.7	10.0	10.0		10.0

CODE	EXPLANATION	ADJUSTED BASE	INCREMENT/ DECREMENT
77240	Benefits to Individuals: Provides rehabilitation benefits from the Second Injury Fund for eligible workers injured prior to July 1, 1982. During FY87, 5 claimants received benefits at an average cost of 3.0. For workers injured after July 1, 1982, amendments to the Alaska Workers' Compensation Act require the employer/ insurer to pay costs of rehabilitation rather than the Second Injury Fund.	30.0	SIF
77350	Grants and Awards to Individuals: Payments under AS 23.30.172 represent the amount of funding required to pay supplemental workers' compensation benefits to permanently disabled workers in compliance with a 1975 amendment to the Workers' Compensation Act. Currently there are 65 permanently disabled workers drawing supplemental	2,742.6	

C700 LAND AND GRANTS

AGENCY Department of Labor

BRU Workers' Compensation

COMPONENT Workers' Compensation Admin.

Revised Date

FY 89

'87)-c700

	ADJUSTED BASE	INCREMENT/ DECREMENT
e number of recipients and the amount of benefits paid may fluctuate upward on the eligibility status of existing recipients and any new claims filed		
30.205 reflect the Second Injury Fund benefits to disabled workers and oyers/insurers on an estimated 100 claims at an estimated 23.4 cost per ith orders and awards of the Alaska Workers' Compensation Board - 2,347.6 SIF		
to Department of Education, Vocational Rehabilitation Division, for s of rehabilitation services provided to disabled workers under FY87, 1 claimant received benefits. SIF	10.0	

AGENCY Department of Labor

BRU Workers' Compensation

COMPONENT Workesr' Compensation Admin.

Page 2 of 2

Revised Date

FY 88

DEC 30 '87 09:26 LEGISLATIVE INFO OFC, JUNEAU P.6/7

TYPE OF REVENUE: Restricted Revenue Second Injury Fund				NAME AND TELEPHONE NUMBER OF AGENCY CONTACT: Elaine VanderSande 465-2790						
							BUDGET YEAR FY 89			
FUNDING SOURCE	FUND	REVENUE ACCOUNT	COLLOCATION CODE	PRIOR YEAR FY 87 ACTUAL	CURRENT YEAR FY 88 AUTHORIZED	CURRENT YEAR FY 88 CASH ESTIMATE	ADJUSTED BASE	INCREMENT/ DECREMENT	AGENCY REQUEST	FY 90 ESTIMATE
1031	11119	58410	07003841	4,291.5	2,800.0	3,600.0	3,000.0		3,000.0	2,800.0
			TOTAL	4,291.5	2,800.0	3,600.0	3,000.0		3,000.0	2,800.0

EXPLANATION (SEE INSTRUCTIONS):

Second Injury Fund receipts are derived solely from contributions made by employers/carriers in an amount equal to a varying percent of compensation paid to injured workers for job related injuries occurring in that year as determined annually by the commissioner, $10,000 in cases of death of a worker leaving no dependents entitled to benefits under provisions of the Alaska Workers' Compensation Act, and civil penalties payable to the fund. The contribution rate and revenue received fluctuate based on the formula set out in AS 23.30.040. The contribution rate for injuries occurring in calendar year 1987 was reduced to 0% from 5% the previous year.

C21 REVENUE DETAIL

AGENCY Department of Labor

BRU Workers' Compensation

COMPONENT Workers' Compensation

Revised Date

FY 89

6/87)-c21

Collateral references. — Workmen's compensation provision as precluding employee's action against employer for fraud, false imprisonment, defamation, or the like. 46 ALR3d 1279.

Sec. 23.30.035. Adjustment of insurance rates. If the provisions of this chapter require insurance rates adjustments, they must be made in strict compliance with the rate regulation provisions of state law. (§ 41 ch 193 SLA 1959)

Collateral references. — 82 Am. Jur. 2d, Workmen's Compensation, §§ 671, 672.

100 C.J.S., Workmen's Compensation, § 353(1).

Sec. 23.30.040. Second injury fund. (a) There is created a second injury fund, administered by the commissioner. Money in the second injury fund may only be paid for the benefit of those persons entitled to payment of benefits from the second injury fund under this chapter. Payments from the second injury fund must be made by the commissioner in accordance with the orders and awards of the board.

(b) If an employee suffers a compensable injury that results in temporary total disability, temporary partial disability, permanent partial disability, or permanent total disability, the employer or insurance carrier shall contribute to the second injury fund. The contribution shall be made by one year from the date of the injury or on termination of the employee's claim, whichever is sooner. If the claim is not terminated within one year, subsequent contributions shall be made yearly until the termination of the employee's claim. The amount of the contribution is the product of the compensation to which the employee is entitled for temporary total disability, temporary partial disability, permanent partial disability, or permanent total disability and the applicable contribution rate set out in column A of this subsection. Payment need not be made to the second injury fund if the total contribution under this subsection is less than $20. By December 15 of each year the commissioner shall determine and make available to the public the applicable contribution rate for the following calendar year according to the reserve rate of the second injury fund in column B of this subsection:

Column A Second Injury Fund Contribution Rate (Percent)	Column B Reserve Rate At Least (Percent)	But Less Than (Percent)
6	0	50
5	50	75
4	75	100
3	100	125
2	125	150

it, defamation, or
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the provisions
must be made
is of state law.

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created a second
y in the second
persons entitled
der this chapter.
by the commis-
he board.
it results in tem-
ermanent partial
yer or insurance
The contribution
or on termination
laim is not termi-
ll be made yearly
ne amount of the
hich the employee
partial disability,
disability and the
of this subsection.
fund if the total
By December 15 of
ake available to the
wing calendar year
fund in column B of

B
Rate
But Less Than
(Percent)
50
75
100
125
150

Column A Second Injury Fund Contribution Rate (Percent)	Column B Reserve Rate At Least (Percent)	But Less Than (Percent)
1	150	175
0	175	

(c) If an employee suffers a compensable injury that results in death and the employee is not survived by a widow, widower, child, or dependent relative eligible to receive death benefits under AS 23.30.215, the employer or insurance carrier shall pay $10,000 to the second injury fund.

(d) The board may refund a payment made into the second injury fund if the employer or insurance carrier shows that it made the payment by mistake or inadvertence, or if it shows there existed at the time of the death of the employee a beneficiary entitled to benefits under AS 23.30.215.

(e) *[Repealed, § 27 ch 93 SLA 1982.]*

(f) All amounts collected as civil penalties under AS 23.30.155(c) shall be paid into the second injury fund.

(g) The attorney general may investigate claims and hire expert witnesses necessary to prevent fraudulent or excessive claims for money in the second injury fund.

(h) Administration expenses of the state under this section and AS 23.30.205 shall be paid from the general fund.

(i) The amount of a payment to the second injury fund and the conditions under which a payment is required of an employer or insurance carrier must be in accordance with the version of (b) of this section in effect on the date that the injury to the employee occurred. (§ 32 ch 193 SLA 1959; am § 1 ch 117 SLA 1960; am § 8 ch 42 SLA 1962; am § 1 ch 99 SLA 1966; am § 1 ch 199 SLA 1970; am § 1 ch 6 SLA 1976; am §§ 2, 5 ch 59 SLA 1981; am §§ 2, 27 ch 93 SLA 1982)

Cross references. — For status of fund as an account in the general fund, see AS 37.05.155; for current provisions on vocational retraining, see AS 23.30.041; for contribution rate from July 1, 1981 until December 31, 1982, see sec. 6, ch. 59, SLA 1981 in the Temporary and Special Acts.

Effect of amendments. — The 1981 amendment rewrote this section.

The 1982 amendment substituted "or permanent total disability" for "permanent total disability, or for rehabilitation under AS 23.30.191" in the fourth sentence of subsection (b), added the present fifth sentence of subsection (b), and repealed subsection (e), which concerned vocational retraining and rehabilitation of certain permanently disabled persons.

NOTES TO DECISIONS

Applied in Bignell v. Wise Mechanical Contractors, Sup. Ct. Op. No. 2566 (File No. 5929), 651 P.2d 1163 (1982).

Quoted in Ketchikan Gateway Borough v. Saling, Sup. Ct. Op. No. 2006 (File No. 2226), 604 P.2d 590 (1979).

Sec. 23.30.041. Rehabilitation of injured workers. (a) The board shall select and employ a rehabilitation administrator and may autho-

DRAFT - 9/10/86

TITLE 8. LABOR

Chapter

47. Vocational Rehabilitation (8 AAC 47.010 -- 8 AAC 47.999)

CHAPTER 47. VOCATIONAL REHABILITATION

Article

1. Eligibility (8 AAC 47.010 -- 8 AAC 47.030)
2. Reporting Requirements (8 AAC 47.040 -- 8 AAC 47.050)
3. Suitable Gainful Employment (8 AAC 47.060)
4. Dispute Resolution Procedures (8 AAC 47.070 -- 8 AAC 47.090)
5. Qualifications of Rehabilitation Service Providers (8 AAC 47.100 -- 8 AAC 47.130)
6. [Reserved]
7. [Reserved]
8. General Provisions (8 AAC 47.900 -- 8 AAC 47.999)

ARTICLE 1. ELIGIBILITY

Section

10. Eligibility for evaluation
20. Extensions of time for referral for rehabilitation evaluation
30. Offer of modified work

8 AAC 47.010. ELIGIBILITY FOR EVALUATION. (a) Unless medical or other evidence indicates that an employee will be able to return to suitable gainful employment without rehabilitation services, the employee is eligible for a vocational rehabilitation evaluation if the employee is entitled to workers' compensation benefits, and

(1) the employee has been unable to return to suitable gainful employment for no more than 90 continuous days;

(2) the employee has lost total use of an arm, leg, hand or foot, or the use of at least 80% of the vision in one eye; or the use of at least 80% of the hearing in one ear; or

(3) the employer and employee agree that a vocational rehabilitation evaluation is needed.

(b) If an employee is eligible for a vocational rehabilitation evaluation and has not been referred for an evaluation in accordance with subsection (a) of this section, the administrator may refer the employee for a vocational rehabilitation evaluation.

(c) An employer or employee may appeal a decision of the administrator under (b) of this section following the procedures contained in AS 23.30.110. (Eff. / / , Register)

Authority: AS 23.30.005
AS 23.30.041

8 AAC 47.020. EXTENSION OF TIME FOR REFERRAL. (a) An employer and an employee may agree, in writing, to extend the time for a vocational rehabilitation evaluation for a period not exceeding 60 days. The administrator may grant additional 60 day extensions.

(b) If an employee requests, in writing, a vocational rehabilitation evaluation during an extension under (a) of this section, the employer must refer the employee for evaluation within 14 days after the request. If the employer does not refer the employee for evaluation within 14 days after the request, the administrator will refer the employee to a provider for evaluation.

(c) If the employer requests, in writing, that the employee participate in a vocational rehabilitation evaluation during an extension under (a) of this section, the employee must do so within 14 days after the request, or the employer may suspend benefits until the employee does participate. (Eff. / / , Register)

Authority: AS 23.30.005
AS 23.30.041

8 AAC 47.030. OFFER OF MODIFIED WORK. If an employer offers an employee who is eligible for a vocational rehabilitation evaluation an opportunity to return to work at a modified position, the employer must refer the employee to a provider for a rehabilitation evaluation unless the medical evidence indicates that the employee will be able to return to the same job as at the time of the injury. The provider must perform a job analysis, and obtain a physician's approval of the modified position. In the evaluation of the modified position the provider must consider the permanence of the work, the transferability of modified work activities and skills to other work sites or to other related jobs in the local labor market, and the suitability of the modified work for the employee considering the employee's physical and vocational abilities. (Eff. / / , Register)

Authority: AS 23.30.005
AS 23.30.041

ARTICLE 2. REPORTING REQUIREMENTS.

Section

40. Employer reporting requirements
50. Provider reporting requirements

8 AAC 47.040. EMPLOYER REPORTING REQUIREMENTS. An employer must submit a work status report, form 07-6140, to the administrator and the employee when the employee is referred for a vocational rehabilitation evaluation or by the 90th consecutive day of disability, whichever comes first. If a referral for a vocational rehabilitation evaluation is made, further work status reports are not required unless the employer stops rehabilitation services. If no referral is made, or if rehabilitation services stop, the work status report is required every 60 days until

(1) the employee returns to work;

(2) for purposes of rehabilitation, the employee is permanently totally disabled;

(3) the employee has been referred for rehabilitation services; or

(4) workers' compensation benefits have been stopped. (Eff. / / , Register)

Authority: AS 23.30.005
AS 23.30.041

8 AAC 47.050. PROVIDER REPORTING REQUIREMENTS. A provider must submit copies of all rehabilitation reports to the board, to the employer or its representative, and to the employee or his or her representative. The reports must be submitted in the format prescribed by the administrator. The reports must include

(1) a preliminary evaluation report within 45 days after referral of an employee;

(2) a full evaluation report within 90 days after referral, unless the provider determines a full evaluation is not appropriate because

(A) the employee is not medically ready for evaluation;

(B) the employee's disability is so severe that a vocational rehabilitation evaluation cannot be completed;

(C) the employee does not need rehabilitation services to return to work at suitable gainful employment;

(D) the employee is not available to complete the evaluation;

(E) the employee will not cooperate with the evaluation process; or

(F) the employer refuses to provide a further rehabilitation evaluation;

(3) a vocational rehabilitation services plan within 90 days after referral for evaluation unless the provider determines a vocational rehabilitation services plan is not appropriate because

(A) the employee is not medically ready for a rehabilitation plan;

(B) the employee's disability is so severe that a rehabilitation plan cannot be completed;

(C) the employee does not need rehabilitation services to return to work at suitable gainful employment;

(D) the employee is not available to begin or complete a plan;

(E) the employee will not cooperate with rehabilitation planning and services; or

(F) the employer refuses to provide further rehabilitation planning or services;

(4) progress reports every 60 days, including reasons why a full evaluation report or a vocational services plan cannot be filed, until the provider or the employer discontinues rehabilitation services; and

(5) a rehabilitation closure report within 10 days after rehabilitation closure. (Eff. / / , Register)

Authority: AS 23.30.005
AS 23.30.041

ARTICLE 3. SUITABLE GAINFUL EMPLOYMENT.

Section

60. Suitable gainful employment

8 AAC 47.060. SUITABLE GAINFUL EMPLOYMENT. (a) For purposes of developing a vocational rehabilitation plan and providing rehabilitation services under AS 23.30.041, a provider must determine whether employment is suitable gainful employment, as defined in AS 23.30.265(28), in accordance with the provisions of this section.

(b) A provider must consider each employment option in the order listed in (c) of this section and must utilize the option with the highest order of preference which returns the employee to suitable gainful employ-

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ment. If none of the options in (c) of this section provide an employment option that matches the employee's gross weekly wage, the option that most nearly matches shall be selected.

(c) The order of preference for rehabilitation plans and rehabilitation services is return to work

(1) with the same employer at the same or modified job as at the time of injury;

(2) with the same employer at a new job using transferable skills;

(3) with a new employer at the same or modified job;

(4) with a new employer in a new job using transferable skills;

(5) through developing already existing skills or acquiring new skills through on-the-job training;

(6) after developing already existing skills or acquiring new skills through vocational training;

(7) after developing already skills or acquiring new skills through academic training;

(8) in self-employment; and

(9) through direct placement in an unrelated job not using transferable work skills (Eff. / / , Register)

(d) An employer and an employee may agree to a rehabilitation plan or rehabilitation services other than in (c) of this section. The provider must certify that the agreement is voluntary, is overall in the interst of the employee and is not the result of coercion, ~~by the employer~~.

Authority: AS 23.30.005
AS 23.30.041
AS 23.30.265

ARTICLE 4. DISPUTE RESOLUTION PROCEDURES.

Section

70. General procedures
80. Informal conference procedures
90. Formal rehabilitation conference procedures

8 AAC 47.070. GENERAL PROCEDURES. (a) A dispute between an employer and an employee over a rehabilitation plan or rehabilitation services must be referred to the administrator. The administrator may hold a formal or informal conference to resolve a dispute.

Draft

(b) The administrator, the employer or representative, the employee, and all providers involved in the dispute must participate in the conference. (Eff. / / , Register)

Authority: AS 23.30.005
AS 23.30.041

8 AAC 47.080. INFORMAL CONFERENCE PROCEDURES. (a) The administrator, an employee, an employer, or a provider may request an informal rehabilitation conference. A party or provider shall request the conference in writing. The administrator will set a date for the conference and notify the parties and the providers. Copies of all documents to be discussed in the conference will be provided to all parties either before or during the conference.

(b) The administrator will send a summary of the issues discussed to all parties within seven working days after the conference. (Eff. / / , Register)

Authority: AS 23.30.005
AS 23.30.041

8 AAC 47.090. FORMAL REHABILITATION CONFERENCE PROCEDURES. (a) A party may request a formal rehabilitation conference of all the parties and the administrator.

(b) A request for a formal conference must be in writing and must include a description of the rehabilitation issue in dispute, a list of other compensation issues in dispute and the dates and times of any scheduled workers' compensation pre-hearings or hearing before the Alaska Workers' Compensation Board.

(c) The administrator may not hear the rehabilitation issue if resolution of other issues by the board might make consideration of the rehabilitation issue unnecessary. The administrator must notify appropriate parties of unresolved issues.

(d) The administrator must schedule a rehabilitation conference or decide not to hold a conference within 14 days after the receipt of the request. If a conference is scheduled it must be set no more than 30 days from the date of the receipt of the request. A change in the date or time for a rehabilitation conference will be allowed upon agreement of the employer, the employee, and the administrator. The party requesting the change is responsible for obtaining agreement of all parties to a new date and time. If the employer and employee do not agree on a change of date or time, the administrator may change the date and time if the party requesting the change shows good cause for the request.

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(e) Each party must submit copies of all documents to be used at the formal rehabilitation conference to the administrator five days before the conference. The administrator may request additional information.

(f) Within 14 days after the rehabilitation conference the administrator must

(1) send a summary to all parties describing any agreement reached at the conference;

(2) issue a formal decision on issues not agreed upon by all parties; or

(3) issue any instructions necessary to complete the record.

(g) Any party may appeal to the board a decision issued by the administrator within ten days after the decision, by requesting a hearing in accordance with AS 23.30.110. (Eff. / / , Register)

Authority: AS 23.30.005
AS 23.30.041

ARTICLE 5. QUALIFICATIONS OF REHABILITATION SERVICE PROVIDERS.

Section

100. Determination of eligibility
110. Minimum qualifications for providers
120. Disqualification of provider
130. Review of administrator qualification or disqualification decisions

8 AAC 47.100. DETERMINATION OF ELIGIBILITY. (a) The administrator will review the qualifications of prospective providers and determine if an applicant possesses the minimum qualifications.

(b) The administrator shall maintain a list of providers who are eligible to receive referrals of employees for rehabilitation evaluation and services.

(c) If an employee requires a rehabilitation evaluation or services outside the state of Alaska, the administrator may qualify the out-of-state provider

(1) based on the same application procedures and qualifications that apply to Alaskan applicants; or

(2) based on eligibility to receive workers' compensation rehabilitation referrals in the provider's state of residence.

(d) Upon request, a provider shall submit transcripts and descriptions of past work experience and affidavits affirming the provider's knowledge and skills in accordance with procedures established by the administrator. All information submitted is subject to verification by the administrator. (Eff. / / , Register)

Authority: AS 23.30.005
AS 23.30.041

8 AAC 47.110. MINIMUM QUALIFICATIONS FOR PROVIDERS. (a) A provider must possess

(1) a masters or doctoral degree in vocational rehabilitation counseling or related social and health services from an institution of higher education accredited by the Northwest Association of Secondary and Higher Schools (or its counterpart in other regions), plus one year of work experience in vocational rehabilitation counseling or physical rehabilitation;

(2) a baccalaureate in vocational rehabilitation counseling or related social and health support services from an institution of higher education accredited by the Northwest Association of Secondary and Higher Schools (or its counterpart in other regions); plus two years of work experience in vocational rehabilitation counseling or physical rehabilitation, at least one year of which must have been spent in the rehabilitation of persons with disabling conditions or diseases;

(3) a diploma in nursing from a school of professional nursing, plus a current registered nurse license, plus three years of work experience in physical rehabilitation or vocational rehabilitation, of which at least one year must have been spent in the rehabilitation of persons with disabling conditions or diseases, and one year of which must have been spent under the supervision of a rehabilitation professional who meets the requirements in (1) or (2) of this subsection; or

(4) a baccalaureate from an institution of higher education accredited by the Northwest Association of Secondary and Higher Schools (or its counterpart in other regions), plus three years of experience in vocational rehabilitation, at least two years of which must have been spent in the rehabilitation of persons with disabling conditions or diseases, and one year of which must have been spent under the supervision of a rehabilitation professional who meets the requirements in (1) or (2) of this subsection.

(b) A provider's minimum qualifying rehabilitation skills must include

(1) knowledge of and skill in interviewing and counseling of injured workers and others involved in the rehabilitation process;

(2) knowledge of medical and psychological aspects of physical disabilities and the specific functional and work limitations of disabilities;

(3) knowledge of psychiatric disabilities and the specific functional and work limitations of psychiatric disabilities;

(4) knowledge of and skill in vocational and psychological testing, including the ethical application of various tests and vocational evaluation methods;

(5) knowledge of and skill in the use of labor market information;

(6) knowledge of and skill in assessing the requirements of specific jobs and the capacities of specific workers, including expertise in job analysis and job modification;

(7) knowledge of and skill in techniques of job development and job placement, including techniques for assisting workers in self-placement activities and use of placement incentives with employers; and

(8) skill in working with a variety of interested parties to accomplish rehabilitation goals, including working with employers, insurance carriers, the medical community, attorneys, and the board.

(c) A rehabilitation provider in Alaska who has provided rehabilitation services to a workers' compensation claimant in Alaska during the twelve months preceding / / 1986, is eligible for inclusion on the list of providers without regard to the minimum qualifications in this section if the provider submits an application within 120 days after / / 1986.

(d) An applicant who meets all qualifications except for experience may apply for qualification as an intern. An intern may work under the supervision of a provider until the minimum experience requirements have been attained, but in no event longer than three years from the date of application for intern status. An intern may reapply for qualification as a provider at the completion of the internship period. (Eff. / / , Register)

Authority: AS 23.30.005
AS 23.30.041

8 AAC 47.120. DISQUALIFICATION OF PROVIDER. (a) The administrator may disqualify a provider for

(1) failure to demonstrate suitable rehabilitation skills;

(2) failure to timely file rehabilitation reports or provide rehabilitation services;

(3) failure to adhere to statutory or regulatory requirements;

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(4) failure to achieve positive rehabilitation results;

(5) unethical conduct; or

(6) falsification of information on the provider's application for qualification.

(b) Before disqualifying a provider, the administrator shall

(1) notify the provider in writing of any proposed disqualification;

(2) within 30 days of the notification, give the provider an opportunity to meet with the administrator to discuss the proposed action; and

(3) issue a written decision within 30 days following the meeting, or if no meeting is requested, issue a written decision within 45 days of the written notice of proposed disqualification.

(c) The administrator's written decision will

(1) require the provider to change problematic behavior or upgrade skills according to a plan determined by the administrator; or

(2) disqualify the provider and explain reasons for the action, the duration of the disqualification, and the conditions, if any, under which the provider may reapply for qualification.

(d) The administrator's decision must be served upon the provider or the provider's representative, either personally or by mail. A disqualification decision is effective ten days after the date of the disqualification decision unless the provider requests board review of the decision by the board under 8 AAC 47.130.

(e) If the administrator is considering disqualification of a provider under (a)(1) -- (5) of this section, the administrator may meet with the provider and develop a plan of corrective action.

(f) If the administrator believes that a provider has engaged in unethical practices or activity, the administrator may refer the issue to the ethics committee of the Alaska Rehabilitation Association or other appropriate professional rehabilitation organization for recommendations after written notification to the provider. (Eff. / / , Register)

Authority: AS 23.30.005
AS 23.30.041

8 AAC 47.130. REVIEW OF ADMINISTRATOR QUALIFICATION OR DISQUALIFICATION DECISIONS. An applicant or provider may request review by the board

of the administrator's decision under 8 AAC 47.110 or 8 AAC 47.120 by making a written request to the board within ten days after the date of the decision. (Eff. / / , Register)

Authority: AS 23.30.005
AS 23.30.041

ARTICLE 6. RESERVED.

ARTICLE 7. RESERVED.

ARTICLE 8. GENERAL PROVISIONS.

Section

900. Statement of purpose
910. Goals of vocational rehabilitation
999. Definitions

8 AAC 47.900. STATEMENT OF PURPOSE. It is the intent of the Alaska Workers' Compensation Act (AS 23.30) and this chapter that vocational rehabilitation services be provided to assure the earliest possible return of the industrially injured or diseased worker to suitable gainful employment with the least possible wage loss. (Eff. / / , Register)

Authority: AS 23.30.005
AS 23.30.041

8 AAC 47.910. GOALS OF VOCATIONAL REHABILITATION. The board recognizes four major goals of AS 23.30.041 in support of the provision of vocational rehabilitation services. The are

(1) To identify as soon after the injury as possible, those employees needing rehabilitation services;

(2) to assure employers and injured employees that quality rehabilitation services are provided by qualified providers;

(3) to provide the best possible opportunities for direct return to suitable gainful employment; and

(4) to maintain an atmosphere conducive to rehabilitation among all parties. (Eff. / / , Register)

Authority: AS 23.30.005
AS 23.30.041

8 AAC 47.999. DEFINITIONS. (a) In this chapter,

(1) "administrator" means the Rehabilitation Administrator in the Department of Labor, Division of Workers' Compensation, or designee;

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Authority: AS 23.30.005
AS 23.30.041

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THE PRECEDING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

WORKERS' COMPENSATION TASK FORCE
Meeting Minutes
January 20, 1988

RECEIVED JAN 25 1988

MEMBERS PRESENT

Art Robson, Attorney (Chair)
Kevin Krauklis, ARCO Alaska
Skip (Dennis) Cook, Attorney
John Connors, Attorney
Mary Klink, Paralegal, Croft Law Offices
Vince Gollogly, Northern Rehab
Gene Rutland, Mechanical Contractors of Fairbanks
Phil Nelson, Holaday Parks
Bill Sager, Chandler Plumbing & Heating
Gene Yurkovich, Cook & Haugeburg

MEMBERS ABSENT

Claire Hiratsika, Northern Rehab
Judith Hannig, APSI
Ed Husted, Paralegal, Croft Law Offices
Kurt Merkel, M.D.
George Riley, UAF Employee Relations
Earl F. Romans, Alaska Battery
Charles Rublee, D.C.
Tom Wilton, Wilton Adjusters
Ralph Beistline, Attorney
Ann Brown, Attorney
Dennis Brownsfield, Iron, Inc.
Jim Carroll, Iron Workers #751
Gordon DePue, Alaska 100 Insurance
Mary Stella, Denali Transport Corporation
Joe Thomas, Laborers #945
Carolyn Webster, Culligan

CALL TO ORDER

Meeting was called to order at 3:15 PM

Chairman Art Robson spoke regarding a Legislative input teleconference scheduled for 1/29/88, by which time he would like to have substantial input. He is preparing a document to be presented which includes summaries of all reports presented by the Committees of the Task Force. This document will be included with the minutes for this meeting to be mailed to Task Force members by Monday, 1/25/88. This documents needs to be reviewed by all members before next weeks meeting scheduled for Wednesday, 1/27/88. Please note any inconsistencies or changes so we may be well prepared for presenting this document. Included will be a section regarding points raised so we may alert them accordingly. The finalized copy will then be prepared in time for the teleconference.

APPROVAL OF MINUTES:

Minutes of January 13, 1988, meeting were approved.

Art Robson spoke regarding a motion made during last week's meeting that appears in the minutes - a copy of the cover letter of a report that he sent to Representative Dave Doneley, Tim Kelley, and the Legislative Affairs Office 1/19/88 to send to Juneau, was distributed to the Task Force members. Included in this report are the minutes of the Workers' Comp Task Force meetings, Committee reports, and other information accumulated. Also included is an explanation of the processes involved in accumulating this information. Copies were also sent to each of the local media to inform them of our efforts.

Workers' Compensation Senate Bill: Hypothetically, there is a good representation of the labor force on the Committee, but they are not present today. The Task Force is in agreement with a great number of points, and phrase most amendments as additional points. Along with considering Legislative Changes, some regulation changes and administrative changes are being discussed. These would be supplemental. By unanimous consensus, the Task Force agreed to make every effort to study and amend current draft of the bill.

COMMITTEE REPORTS

Art states these reports must be unanimous; there must be no objection to these Committee reports.

Vocational Rehabilitation: Final details need to be handled. A meeting will be scheduled for this Saturday, January 23, and information will be ready for next week's Task Force meeting, on January 27. One or two changes need to be examined on the bill.

Medical Costs: No representative of this committee was present to report. The committee met on Friday, January 15, and examined basic questions taken from WICCA's Bill. Suggestions included:

1. Appoint a medical peer review committee;
2. Should be a multi-disciplined panel of Board certified physicians, (orthopedic, chiropractic, etc.);
3. The Board shall make the final decision;
4. The Board shall appoint a medical review committee;
5. The Board should be responsible for their decisions

Collateral Benefits: John Connors discussed disability benefits, and stated that the draft proposal in the Legislature now is acceptable. Ragland benefits should be kept in the bill, but there was no need for the offsets.

Second Injury Fund: Skip Cook referred to his memo regarding the redraft of Section 205. The following changes were suggested:

Section B: The number of weeks.
Section C: Written Records.

Some simple changes in wording of the bill were suggested. The question was raised as to whether the employer should receive the second injury fund if not aware of the previous injury.

It was recommended that the Board should adopt by regulation a standardized form for the Health Questionnaire for all employees with a warning regarding false statements. A sample form was submitted, on which the employer should maintain a medical history of its employees. This information is not required until the employee is considered employed.

Premium Rates: Gene Rutland stated that he had nothing further to add, since efforts to obtain information on Workers' Comp rates have been futile; no information has been received as yet. The information, when it is received, will be in a very rough form, and it will take some digging to sort through it.

The State of Alaska has hired an actuary to study the new Legislation for its cost effect. That firm is Milliman and Robertson. A report from that firm is still forthcoming. The first opinion from NCCI on the new Legislation was that it would end up being a "wash"; some things were added and some things were taken away.

There is some indication of increased utilization of the Workmans' Compensation system, and it has been more durable utilization in recent years. The problem is with getting people off of Workers' Compensation and back to work. It is believed that this is where the extra costs are coming from. There is also some coincidence between the flagging economy and the rise in utilization of Workers' Compensation benefits.

An interim rate increase is anticipated by July of this year. No changes in current Legislation is presently anticipated.

Administrative Structure: No members of this committee were present, and it was not known whether the committee has met or not.

MEMBERS' COMMENTS:

Art asked for comments and observations that committee members might have that they would like included in the final report. He expected that next week's meeting on January 27 should be the last meeting in which everything is finalized. Art favors creating some category with everybody's miscellaneous statements.

A meeting should be scheduled with the Governor's Task Force when they come to Fairbanks on February 12th or 13th, during which these points will be raised.

Art will try to get a compilation of all submitted information insofar as he can compile it at this point for review next week. He expects that at the conclusion of next week's meeting, it will take only some final drafting before submission.

ADJOURNMENT:

The meeting was adjourned at 4:35 p.m.

DRAFT REPORT TO THE ALASKA STATE LEGISLATURE
ON WORKERS' COMPENSATION BENEFITS

from

UNIFIED FAIRBANKS

This is the final report of the Special Task Force formed by Unified Fairbanks to address the problem of an apparently unjustified increase in workers' compensation premium costs.

The Task Force grew out of an information seminar attended by 160 people, and a followup seminar attended by half that many. Emphasis at the first seminar was on receipt of all information that the State could provide, together with information from professionals in every area. At the second seminar, the preliminary action areas were crystalized and direction was given thereon. At this point, the matter was transferred to the Task Force Committee which consisted of 24 persons who were employers, labor representatives, health professionals, rehabilitation professionals, and attorneys (on both sides). Meetings were held each Wednesday at North Star Terminals. Committees worked an average of 10 hours each on their various projects. Input was had from all members on all reports, and all recommendations contained herein are unanimous unless noted to the contrary.

Organizationally, this should be viewed as a supplement to the WCCA draft legislation which is now before you as SB

322. Sections will be taken in the order that they are set forth in SB 322. There are some additional recommendations beyond what was covered by that draft legislation. Some are of a legislative nature, there are also administrative recommendations for both proposed regulation and action. There are, finally, executive recommendations which must be considered by the Governor's Office in the budgeting process.

The overall goal was to make changes in the workers' compensation system which would reduce the cost of the system as it is reflected in premiums paid by employers.

The format for approaching each section or subject will be:

1. Comments addressing the WCCA proposal (SB 322);
2. The Unified Fairbanks recommended approach;
3. Actions proposed by Unified Fairbanks, whether legislative, administrative, or executive; and,
4. Arguments and problem areas which should be addressed.

I. LEGISLATIVE INTENT

COMMENTS

According to WCCA, this does not alter the presumption of compensability, but does indicate a legislative preference for a "preponderance of the evidence" test to be used by the Board without favor to either side. Additionally, the standard of judicial review is to be changed to provide that, on

questions of fact, the Board's findings are conclusive if supported by any evidence at all. Whether the court system will find a declaration of legislative intent sufficient to change the standard of judicial review is open to question. The final "intent" is to reduce benefits to persons with residences outside, so as to give them an incentive to go back to work.

RECOMMENDATION

Sections A and C are straight-forward legislative goals. Section B might better be amended along the lines of California Workers' Compensation Code, Section 3202.5 as follows: "The legislature declares that the workers' compensation laws must be fairly and impartially construed by the courts. In promotion of that goal, it is the intention of the legislature that the preponderance of evidence standard be utilized in determining the compensability of a workers' compensation claim. Preponderance of the evidence means such evidence as, when weighed with that opposed to it, has more convincing force and a greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence."

ACTIONS PROPOSED

None in this area unless changing the standard of judicial review is seriously contemplated. If such is contemplated, there is a probability that multiple amendments may be requisite in such places as the Administrative Procedure Act and Title 22.

Act and Title 22.

ARGUMENTS AND PROBLEM AREAS

These have been raised above.

II. DEPARTMENT MAY SET UP TO SELECT AND REMOVE REHABILITATION SPECIALISTS OR PHYSICIANS

COMMENTS

In Fairbanks, we felt strongly that the "may" should be replaced by "shall", "must" or "will" creating a mandate. WCCA feels that, providing the Board with the power will be enough to cause it to act. Additionally, the "or" probably should be a "and" because the two are not meant to be alternatives.

RECOMMENDATIONS

Our recommendations in the medical and rehabilitation areas are addressed in those particular areas of this report. We concur with the intent of WCCA in Section 2 with the strong recommendation that the word "may" be made mandatory, and clarifying that both rehabilitation specialists and "physicians" (as defined elsewhere) are to be selected.

ACTIONS PROPOSED

See above.

ARGUMENTS AND PROBLEM AREAS

Hopefully, the qualifications for health care providers will not strongly differ from the standard of licensing, etc.

III. WHEN ANYTHING IS DECLARED UNCONSTITUTIONAL, DEPARTMENT "SHALL IMMEDIATELY" DRAFT NEW REGULATIONS

COMMENTS

A different drafter for WCCA uses the mandate "shall" and adds to it the word "immediately". This drafter probably meant to say "shall forthwith adopt a replacement regulation or regulations".

RECOMMENDATION

A good idea.

ACTIONS PROPOSED

See above.

ARGUMENTS AND PROBLEM AREAS

Since the Department does not have legal counsel and the route for cooperation with the Attorney General's Office is rather tortuous, any requirement of immediacy may be dysfunctional.

IV. FALSE STATEMENT ON PRE-EMPLOYMENT QUESTIONNAIRE WAIVES ALL BENEFITS

COMMENTS

First, there is no mechanism for determining whether any particular ~~this~~ statement is actually false. Questions composed by individual employers can mean various things. Well designed questionnaires can even be susceptible of dual interpretations. Second, (1) is vague. It probably should provide that, had the

employer known the true state of facts, a) the employee would not have been hired, and b) the non-hiring would have been legal under federal and state law. Third, (2) is again vague because a representation on a piece of paper in the office seldom causes anything. Reference should be to the condition hidden from the employer by the misrepresentation.

RECOMMENDATION

Unified Fairbanks agrees with the intent and feels that the drafting should be cleaned up.

ACTIONS PROPOSED

See above.

ARGUMENTS AND PROBLEM AREAS

See above.

V. SECOND INJURY FUND CONTRIBUTIONS AND REPORT TO BE FILED ANNUALLY

COMMENTS

The State receives currently both data and funds within a short period of time after each case is concluded. This amendment permits the State to have data consolidated on a single annual report from each carrier. It also permits the insurance company to earn interest on money due for the intervening time between closing a case and the annual report.

RECOMMENDATION

Since the State is unable or unwilling to compile data

From reports filed on a case-by-case basis, this appears to be a way in which the annual reports from the carriers can be summarized, thereby providing for the first time, some data with respect to the validity of rates charged, and where the problems in the administration of the act happened to be. We join in the recommendation to attack the problem.

ACTIONS PROPOSED

Unified Fairbanks would like the State to explore the possibility that, either through the use of a personal computer or access to some other computer plus the addition of one person to the staff of the department, the reports as they are currently received could be entered into the computer so that all data necessary for fixing rates or ascertaining percentages of expenditure, etc. would be instantly available to the State and any employer or agency requesting the information. It is most likely that the cost to the State of a computer, its programing, and a person to operate it, at least on a part-time basis, would be less than the interest lost by providing the delay in payment by the carriers. There is no indication that the additional interest earned (which will probably be on the remainder in a claims reserve) will effect the workers' compensation premium rates in any way.

ARGUMENTS AND PROBLEM AREAS

The State Department of Insurance and the State Department of Workers' Compensation are both unable to produce

statistics indicating the basis for premiums or the disposition of monies paid out. If this problem is not addressed, we will continue to set rates in a blind fashion and amend legislation without knowing whether we are doing any good.

VI. REHABILITATION

COMMENTS

Unified Fairbanks agrees that rehabilitation should be voluntary with the employee. We find no evidence from any source which indicates the law which has been proposed will reduce the cost of workers' compensation. We have repeatedly sought facts from the State government indicating what segment or segments of a workers' compensation system had been causing the greatest increase in cost. Absolutely no information has been forthcoming, although we have been able to obtain the same information from other states with a telephone call. In short, all we know is that there is a serious problem with the cost of the system. However, no one in our State government has been able to identify where the problem lies. We firmly believe that it is wrong to legislate massive changes in what is basically a sound law when no one has yet identified where the problem lies. We are, in fact, worried that the cost of the system may be increased by the proposed changes. There have been no regulations adopted to put into effect the rehabilitation scheme that is presently in the law. We therefore do not know how the

presently existing scheme will work or what its costs will be. We are therefore reluctant to change for the sense of change.

RECOMMENDATION

A. INEFFECTIVE WORK BY STATE AGENCIES, Division of Insurance:

Much of the blame for the increased cost of the workers' compensation system has been placed on vocational rehabilitation. However, the Division of Insurance has absolutely no information available to anyone concerning the costs of vocational rehabilitation or of any other workers' compensation benefit for that matter. Nonetheless, the Division continues to approve massive rate increases for workers' compensation insurance, and a portion of the blame gets placed on a "vocational rehabilitation system which is too liberal." The last increase was granted without the preparation of any findings of fact and without the presentation of any specific information to those in this State who are involved. We suggest legislation requiring some state agency to keep statistics on the cost of rehabilitation evaluations, rehabilitation plans, the cost of litigation, and so forth. When future rate increases are suggested, facts and figures will be available to indicate where the cost increase is coming from.

B. INEFFECTIVE WORK BY STATE AGENCIES, Workers' Compensation Board:

The Department of Workers' Compensation has seriously faltered in its obligation to administer the existing vocational

rehabilitation law. Over five and a half years have passed without the promulgation of a single rule or regulation by the Board to govern procedures under the law which went into effect on July 1, 1982. The present law has never been given a chance to work and we find it ridiculous that the Legislature now stands ready to cast it aside. We suggest the legislature take whatever steps are necessary to immediately secure the promulgation of administrative rules and regulations by the Board.

Two good examples of what has happened as the present system has struggled without the benefit of administrative rules:

1. We suspect a major portion of any increased cost of vocational rehabilitation is in the payment of temporary benefits to injured workers while they wait for the vocational process to be completed. The system in Fairbanks has worked very slowly without the rules and regulations needed. As a result, injured workers remain far too long on temporary benefits. Rather than deprive injured workers of temporary benefits during vocational rehabilitation, which we think is a worthwhile benefit, we suggest the Board streamline the system with the promulgation of rules and that the existing law be tightened up to provide certain specific time limitations for each step of the process. This is the main thrust of our suggested changes in the existing law.

2. In Fairbanks, there is no full-time rehabilitation administrator. At present, the one administrator is in Fairbanks one day a month. This allows a maximum of three rehabilitation conferences. Without timely rehabilitation conferences available to all parties, increased costs of continuing temporary benefits have resulted. It is obvious additional staff are required.

C. LEGISLATIVE TASK FORCE

We believe the Legislature should form a task force to keep the existing vocational rehabilitation system moving. The group should have representatives of all major participants in the system. The information needed from the Division of Insurance could be pursued, enforcement of the Board's obligation to promulgate rules and regulations would be enhanced, and proposed changes in the law and regulations could be generated.

D. SECOND INJURY FUND/TEMPORARY PARTIAL DISABILITY

Our committee believes one of the greatest benefits to the system would be strong encouragement to employers to rehire injured workers. The present Second Injury Fund does nothing to provide this encouragement as coverage begins only after 104 weeks of disability. We suggest the period of coverage be drastically reduced to make it possible for injured workers' to return more rapidly to the work force. A further encouragement toward the goal of returning injured workers to a job is our

proposed new subsection(n) which encourages the use of TPD when employers rehire their injured workers in a "modified" or "light duty" capacity.

ACTIONS PROPOSED

In order to keep in line with the WCCA recommendation, we propose that the statutory language be as follows:

AS 23.30.041. Rehabilitation of injured workers.

(a) The board shall select and employ a rehabilitation administrator. The board shall adopt regulations to implement this section. The board shall authorize the rehabilitation administrator to select and employ sufficient rehabilitation staff to conduct hearings and to collect and analyze statistical data. The rehabilitation administrator is in the partially exempt service under AS 39.25.120.

(b) The rehabilitation administrator shall implement the provisions of this section, study the issue of rehabilitation, both physical and vocational, enforce the regulations as adopted, and maintain and report statistical data on a contining basis as to the cost of rehabilitation to the Legislature on at least an annual basis.

(c) If an employee suffers a compensable injury that could preclude return to the job held at the time of injury, the employee shall be referred for an evaluation for participation in rehabilitation services within 30 days after the date of injury. A full evaluation shall be performed by a qualified

rehabilitation professional within 30 days of the date of referral. If in the opinion of the qualified rehabilitation professional, the medical, physical, or emotional state of the employee precludes a full evaluation, the rehabilitation professional shall prepared a preliminary evaluation within 14 days of the date of referral. A preliminary evaluation shall include the reasons why a full evaluation cannot be made, an opinion as to when the employee will be able to participate in a full evaluation, and any information that would be included in a full evaluation that can be determined and reported by the rehabilitation professional at the time of the preliminary evaluation. If the employer does not timely make a referral for evaluation under this subsection, the rehabilitation administrator shall retain a qualified rehabilitation professional to perform the evaluation. The employer shall pay the reasonable costs of an evaluation under this subsection.

(d) A full evaluation by a qualified rehabilitation professional shall include a determination whether rehabilitation services are necessary, as outlined in the regulations.

(e) Refusal by an injured employee to participate in an evaluation results in forfeiture of disability compensation for the period the refusal continues. The rehabilitation administrator shall find that an employee refuses to participate in an evaluation if the employee fails to cooperate with the

rehabilitation provider as outlined in the regulations.

(f) After the evaluation is completed, the employee must elect in writing to the administrator within 14 days of receipt of the full evaluation whether or not he or she will participate in further rehabilitation services.

(g) The employee's election not to participate in rehabilitation services is final, provided, however, that the employee shall have the option within 30 days of the notice under subsection (f) to notify the administrator in writing that he now wishes to participate in rehabilitation services.

(h) After the employee has elected to participate in vocational rehabilitation services for which he is eligible, the vocational rehabilitation counselor will within 90 days submit a vocational rehabilitation plan to concerned parties including the rehabilitation administrator which will enable the employee to return to suitable gainful employment. A rehabilitation plan may consist of any of the following; however, if the employee can be restored to suitable gainful employment with rehabilitation plans of higher preference, then a rehabilitation plan of a lower preference need not be offered by the employer. The order of preference fore rehabilitation plans is return to work

(1) with the same employer at the same or modified job as at the time of injury;

(2) with the same employer at a new job using transferrable skills;

(3) with a new employer at the same or modified job;

(4) with a new employer in a new job using transferrable skills;

(5) through developing already existing skills or acquiring new skills through on-the-job training;

(6) after developing already existing skills or acquiring new skills through vocational training;

(7) after developing already existing skills or acquiring new skills through academic training;

(8) in self employment; and

(9) through direct placement in an unrelated job not using transferrable work skills.

(i) If the employer and employee fail to agree in writing on the submitted vocational rehabilitation plan within 14 days, the employee shall submit an alternative plan to the rehabilitation administrator. The employee's alternative plan must be submitted within an additional 14 days. In the event of a dispute, the rehabilitation administrator or his staff may either write a decision or schedule a formal rehabilitation conference to be held within 10 days of receipt of the alternative plan. If a conference is held, a decision as to the appropriate plan shall be issued within 10 days after the conference. The rehabilitation administrator's decision is

binding unless a party seeks review of the decision by requesting a hearing with the Board in accordance with AS 23.30.110.

(j) A vocational rehabilitation plan may not exceed ~~up to~~ 37 training weeks, except that the rehabilitation administrator may order a plan up to an additional 37 training weeks. This subsection does not prohibit 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 AS 23.30.185 or AS 23.30.200 shall be paid throughout the rehabilitation plan under this section.

(k) For purposes of this section, suitable gainful employment means employment that is reasonably attainable in the light of an individual's age, education, vocational history, and physical capabilities, and that offers an opportunity to restore the individual as soon as practical to a remunerative occupation as nearly as possible to the individual's gross weekly earnings as determined by section AS 23.30.220.

(l) For purposes of this section, "labor market" means a geographical area that offers employment opportunities in the following priority:

(1) area of last employment;

(2) area of residence;

(3) the State of Alaska;

(4) outside Alaska.

(m) "Qualified rehabilitation professional" means a person who by education and experience has the skills to work in the field of rehabilitation as determined by Board established regulations.

(n) While an injured worker is participating in a preliminary evaluation and/or a subsequent full evaluation under this section, he or she shall receive temporary partial disability benefits under AS 23.30.200 when an employee under section (h)(1) or (2) and primary physician agree, prior to medical stability and a full release, that an employee may return to modified, light duty, part time, or trial work status.

VII. BARRING ALL LIABILITY BY AN EMPLOYER (BOARD AND COURT) TO AN EMPLOYEE WHO COMMITS AN UNTRUTH ON HIS OR HER PREEMPLOYMENT QUESTIONNAIRE

COMMENTS

Much of this has been discussed under number IV above. No one can know what the courts will do with this. There is no way to provide a prompt adjudiciation of whether a worker committed an intentional falsehood, and it is not likely that the courts will deprive a worker of both compensation benefits and civil liability (if the employer was negligent) without a firm adjudication of intentional fraud.

RECOMMENDATION

We favor the approach, but feel there must be a standarized questionnaire with admonitions on it and, if need be, provisions to help illiterates complete it. We also recommend that there be some proviso for prompt determination of whether fraud has been committed in order that a carrier not pay benefits if they are not supposed to be paid, but not withhold benefits if they are supposed to be paid.

ACTIONS PROPOSED

There should be a statute providing for forfeiture of civil liability against the employer, as well as benefits under the workers' compensation law. This would be easiest if it were done under Title 11 (the criminal code). This will require legislation to effect what has just been set out, administrative cooperation in getting these matters to the proper authorities on a relatively emergency basis, and executive allocation of funds to handle the hearing which declares these rights to have been waived.

ARGUMENTS AND PROBLEM AREAS

Equal protection questions will doubtless be raised as they always are with any forfeiture or waiver. Additionally, we are all aware that, if employment is down as it is now, a person needing a job will say what is necessary to get that job. This will make that person a "good guy" in the eyes of the court, and there will be an effort to avoid this waiver, particularly in

the event of a hard case where the employee is very badly injured and the employer was quite negligent.

VIII. NO DOCTOR HOPPING

COMMENTS

In the first sentence, the word "attendance" should be "attendants". We feel that the cases where there is no specialist within the State (in an area where an employee needs treatment) will be sufficiently rare that the Board can handle these as special matters. We worry that the transfer to a specialist will be considered a change in "attending physician" because this is the ~~meeting~~ meaning that the medical profession attaches to such a change.

RECOMMENDATION

We concur fully with requesting the passage of Section VIII. There will have to be considerable public education and the adoption of regulation covering the Notice of Change ~~in~~ of a physician. We do recommend that the term "attending physician" be changed to be "primary physician". This will eliminate the semantical problem. We feel it advisable that the problems of prior notification be avoided by providing that the notice must be "within 14 days" of the change. This is in line with the present law.

ACTIONS PROPOSED

Aside from the semantical suggestion above, the

Department and the Board should prepare regulations and forms to cover change of physician. We would prefer that the amendment be as follows:

"The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. However, if the condition requiring the treatment, apparatus, or medicine is a latent one, the two-years period runs from the time the employee has knowledge of the nature of his disabililty and its relationship to his employment and after disablement. It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the Board. The Board may authorize continued treatment, or care, or both, as the process of recovery may require. When medical care is required, the injured employee may designate a licensed physician inside the state where the employee resides to render the care. Upon procuring the services of a physician, the injured employee shall give proper notification of his selection to the employer within a reasonable time after first being treated. The emplcyee may not make more than one change in the employee;s choice of primary physician without the written consent of the employer. Referral to a specialist by the employee's primary

physician is not considered a change in physicians. Notice of a change in the primary physician shall be given within 14 days after the change."

ARGUMENTS AND PROBLEM AREAS

There will always be emergencies where there is not time to go through the notification procedure. This should be covered by the regulations. There will always be situations where an employee is referred to more than one specialist during the same time period. Once again, this can be worked out with the accompanying regulations.

IX. COURSES OF TREATMENT TO BE WRITTEN IN ADVANCE

COMMENTS

This proposal will greatly increase the medical cost of treatment. Physicians are not magicians. They cannot predict with exactitude at what point during a "course of treatment" a person will actually be cured. In order to avoid malpractice, all physicians will have to recommend a maximum course of treatment <u>in case such is needed</u>. Unified Fairbanks does not feel that the proposed amendment is workable, nor that the cost increase necessary for a physician to prevent malpractice is money well spent.

RECOMMENDATION

We recommend no amendment to Subsection C.

ACTION PROPOSED

The evil sought to be remedied here, namely that of endless treatments without real value, should be addressed by a study committee to find a feasible way of handling the situation. Hopefully, the way should not increase the cost.

ARGUMENTS AND PROBLEM AREAS

See above.

X. A DEFENSE MEDICAL EXAMINATION AFTER 14 DAYS AND THEN EACH 30 DAYS THEREAFTER

COMMENTS

Because of the definition of the word "physician" contained later on, it would be advisable to remove the words "or surgeon" in line 4 regardless of what else is done. Additionally, there may be problems with respect to types of practice (hypnotic, chiropractic, osteopathic, religious, etc.) and personality conflict which will sooner or later result in problems under this section whether or not amended. We felt that the present statute was adequate, and [redacted] that there was no need to wind everyone up with the idea of a defense medical exam every 30 days, and that money expended thereby would be a waste.

RECOMMENDATION

That we leave Section (e) as it currently is and schedule this problem for study as will be referenced later.

ACTIONS PROPOSED

Scheduling this problem for study in the future.

ARGUMENTS AND PROBLEM AREAS

Sending a Jehovah Witness to a hematologist is not likely to be functional. This sort of preference, as mentioned above, should be considered in study.

XI. USUAL, CUSTOMARY AND REASONABLE FEES

COMMENTS

This is a very good idea. Care will have to be taken by the Board in the manner in which it adopts a UCR fee so that that fee does not become known to medical practitioners (see below).

RECOMMENDATION

We join in requesting passage.

ACTIONS PROPOSED

Same (with caution so that the UCR schedule is not made available).

ARGUMENTS AND PROBLEM AREAS

UCR fees are used by almost every insurance company that writes health insurance. With the big carriers, the UCR rate for any procedure is set at the 90th percentile. This means that 89% of all doctors practicing in the area charge less than the UCR fee for that procedure, while 10% of the same doctors charge more. Each carrier jealously guards the secrecy of its UCR schedule because, if that schedule becomes known, it will become a "minimum fee schedule" and medical costs will

really escalate. If the Board adopts a UCR schedule, it will probably will have to do so in a public meeting and with notice. This will mean that the schedule could become public property or at least known to many physicians. That sort of action will result in a massive increase in medical costs with no enhancement of medical care.

XII. REPEALING RELIANCE ON AMA GUIDE FOR EVALUATION OF PERMANENT IMPAIRMENT AND OBTAINING A BOARD CONSULTANT ON APPROPRIATENESS, NECESSITY AND COST OF MEDICAL SERVICES

COMMENTS

This may be the one place where "may" should not be replaced by "shall". The repeal of the reliance on the AMA Guide is then undone later on in this bill with a subsequent adoption of the same guide. Additionally, we feel that new subsection (k) takes care of the problem without needing to spend extra monies on medical consultation.

RECOMMENDATION

We are negative on this repeal and new rule.

ACTIONS PROPOSED

None.

ARGUMENTS AND PROBLEM AREAS

Another layer of medical authority may well simply confuse the issue. Enough corrections have been taken in other sections.

XIII. INDEPENDENT MEDICAL EXAMINATION

COMMENTS

The use of a single physician as an independent medical examiner became obsolete in the medical profession several years back. We do not have, in Alaska yet, multiple discipline panels of Board certified physicians, and hence this portion of our medical practice is going outside. Alaska currently has a number of clinics who can perform this function and we are recommending a medical update by using them (unless the employer or carrier prefers an outside group). The principles set forth DRC is good. We have some reservations about using "clear and convincing objective evidence" since the medical meaning of "objective evidence" differs considerably from the lay persons definition.

RECOMMENDATION

To reword the proposal of WCCA creating the same effect but updating the medical services and apportioning the weight to be given to the testimony of such a panel to be equal with the preference already given to a "treating physician".

ACTIONS PROPOSED

We recommend the following wording for Section (k) of AS 23.30.095(k) to read: "In the event of a medical dispute regarding determinations of causation, medical stability, degree of impairment, functional capacity, the amount and ethicacy of the continuance of or necessity of treatment, or compensability

between the employee's attending physician and the employer's independent medical evaluation, an independent multiple discipline panel of board certified physicians shall conduct an examination of the employee. This panel shall be selected by the Board from a list established and maintained by the Board. The cost of the examination and medical report shall be paid by the employer. The report of the panel shall be furnished to the Board and to the parties within 14 days after the examination is concluded. The opinion of the independent panel shall, in the absence of clear and convincing evidence to the contrary, have equal weight with the opinion of the attending physician. No person may seek damages from an independent multiple discipline panel of board certified physicians for the rendering of the opinion described in this subsection or for testimony by any member of said panel under this subsection, except in the event of fraud." This will require that the Board entertain applications from various clinics currently formed and to be formed for appointment to the panel list. Publication of the legislative change will probably be adequate to form a number of these panels within the state. The Department will probably need to assign an employee (part-time) to handle the rotating list. That same person (or computer) could handle the other rotating lists suggested in this legislative package.

ARGUMENTS AND PROBLEM AREAS

Care should be taken to watch out for panels which

spring up without fully qualified people in the necessary disciplines on them. There should be a regulation describing the disciplines which must be available on any panel and the requirement of Board certification to handle this problem. If the weight given the panel is equal to the weight given the attending physician, and if the two differ, then the defense medical examination will be the swing vote. This sort of apportionment is necessary because medicine is not yet reduced to total certainty and a demonstrably incorrect judgment call (in hindsight) and will produce lawsuits even if only between the physicians involved.

XIV. STATUTE OF LIMITATION TRIGGERED BY DIRECT COMPENSATION BENEFITS

COMMENTS

This amendment clarifies a confusing situation so that litigation in this area will no longer occur.

RECOMMENDATION

Support for the WCCA proposal.

ACTIONS PROPOSED

Adopt the WCCA proposal.

ARGUMENTS AND PROBLEM AREAS

Knowledge of the commencement of the Statute of Limitations is something that is difficult to come by for a layman. In all probability, regulations will be needed providing that, upon payment of the final payment, there be an

accompanying letter or form indicating that the Statute of Limitations commences as of the date of that letter.

XV. NO PRESUMPTION OF COMPENSABILITY IN MENTAL INJURY CASE

COMMENTS

The term "mental injury" is undefined in law and in medicine. What is probably meant here is a stress related injury with manifestations primarily found in brain dysfunction. Without clarifying the term, much litigation will be required.

RECOMMENDATION

The idea is good. The proposal should be adopted to eliminate litigation. The definition of the injury should be made clear.

ACTIONS PROPOSED

Same as above.

ARGUMENTS AND PROBLEM AREAS

Only if the term is not defined will there be much litigation to determine what is meant. All injuries have a mental aspect. Almost all diseases commonly thought of as mental diseases have physical manifestations.

XVI. BOARD'S FACTUAL DETERMINATIONS CONCLUSIVE IF ANY EVIDENCE AT ALL

COMMENTS

See our comments under Section I.

RECOMMENDATIONS

See our recommendations under Section I.

ACTIONS PROPOSED

See our actions proposed under Section I.

ARGUMENTS AND PROBLEM AREAS

See our arguments and problem areas under Section I.

XVII. BOARD HAS ONE YEAR TO RECONSIDER ERRONEOUS FACTUAL FINDINGS

COMMENTS

This is a technical correction to make clear when the one year starts running. The correction is needed and does make the situation clear. This doubtless supplements the "any evidence" rule found in Sections XVI and I, making Board determinations relatively unappealable on the facts.

RECOMMENDATION

We join the WCCA recommendation.

ACTIONS PROPOSED

Adopt the proposed amendment.

ARGUMENTS AND PROBLEM AREAS

This section will doubtless now be used because of the cutoff of appellate rights if the "any evidence" rule is adopted. It is part of an attempt to make the Board's decision final, except on questions of legal interpretation. The Board should anticipate ~~this~~ increased usage. There may be staffing implications in the increased usage.

XVIII. PENALTIES CAN BE REDUCED

COMMENTS

A necessary supplement to the amendment proposed in Section V.

RECOMMENDATIONS

See comments in Section V.

ACTIONS PROPOSED

See comments in Section V.

ARGUMENTS AND PROBLEM AREAS

See comments in Section V.

XIX. REAFFIRMATION OF LAST INJURIOUS EXPOSURE RULE

COMMENTS

Simply a restatement of the current law.

RECOMMENDATION

A good rule. It can't hurt to repeat it.

ACTIONS PROPOSED

Passage of the amendment.

ARGUMENTS AND PROBLEM AREAS

None, since the rule is already in effect.

XX. ANNUAL REPORTING DATE AND PENALTY INCENTIVE

COMMENTS

Another portion of the procedure set forth in Sections V and XVIII.

RECOMMENDATION

See comments under Section V.

ACTIONS PROPOSED

See comments under Section V.

ARGUMENTS AND PROBLEM AREAS

See comments under Section V.

XXI. MAXIMUM AND MINIMUM ON WEEKLY DISABILITY PAYMENTS

COMMENTS

While looking like a major reduction, this will probably effect very few injured persons under the various rules currently existing. For an injured employee with a wife and children, benefits will often be less than unemployment benefits.

RECOMMENDATION

Adopt the proposal and then monitor the situation to see whether injured employees are waiving disability in order to collect unemployment.

ACTIONS PROPOSED

Adopt the proposal.

ARGUMENTS AND PROBLEM AREAS

An injured employee whose disability benefit is less than unemployment may waive disability benefits and request that his doctor release him for work so that he can draw

unemployment. This could have a domino effect on other benefits.

REINSTATE REDUCED BENEFITS FOR THOSE RESIDING OUT-OF-STATE

COMMENTS

This portion of Section XXI seeks a return to the reduced benefits for those workers who reside out-of-state. It also indicates that only instate work will be used to calculate earnings in the past. Between the two, the long term effect will hopefully be to provide a substantial disincentive to residents of other states with respect to working in Alaska. This is a tradeoff for the increase in permanent partial disability.

RECOMMENDATION

Adopt the proposal in this form unless the Attorney General's Office suggests one less likely to be attackable in court.

ACTIONS PROPOSED

Same.

ARGUMENTS AND PROBLEM AREAS

A case entitled Brown v. Alpac in the Supreme Court found severe difficulty with compensating workers who reside out-of-state less than those who reside instate. There are equal protection and freedom of travel problems possible here and plans should be made to defend this scheme.

XXII. FACTORS TO BE CONSIDERED IN DETERMINING PERMANENT TOTAL DISABILITY

COMMENTS

A part of the package very very rarely used.

RECOMMENDATION

Adopt the amendment and monitor it for effect.

ACTIONS PROPOSED

Same.

ARGUMENTS AND PROBLEM AREAS

The reference to "area of last employment" may refer to work available in another state. This may be part of the equal

protection and freedom of travel problem. However, it doesn't seem likely that this would be an area of attack. This seems to eliminate the problem of whether a person is still able to work if that person can hold only some job that is only available in another state.

XXIII. FAILURE TO ACHIEVE EMPLOYABILITY NOT NECESSARILY PERMANENT TOTAL DISABILITY

COMMENTS

Presumptively, this refers to the person who could, with more effort put forth, hold some job that is available somewhere in Alaska, but does not do so.

RECOMMENDATION

We have no idea of the effect and therefore join WCCA in advocating the amendment.

ACTIONS PROPOSED

Same.

ARGUMENTS AND PROBLEM AREAS

If this is not spelled out to some greater detail in regulations, there will have to be a series of court cases to ascertain what its effect may happen to be.

XXIV. TEMPORARY TOTAL DISABILITY LIMITED TO TWO YEARS OR MEDICAL STABILITY, WHICHEVER IS FIRST

COMMENT

Under the proposed definition of medical stability

found in later sections, this will mean that TTD will last only so long as the injured employee makes objectively measurable improvement each 45 days. It would require at least 16 objectively measurable improvements to keep TTD running for two years. Only horrendous and compound injuries should ever find their way into that category. Most severely injured people will be without improvement for a 45 day period somewhere during their recovery and hence, they will pass directly to the permanent partial disability rating.

RECOMMENDATION

We have no idea of the effect and therefore join WCCA in advocating the amendment.

ACTIONS PROPOSED

Same.

ARGUMENTS AND PROBLEM AREAS

Medical professionals are likely to create illusory improvements to avoid this rule and to permit their patient to recover to a true point of medical stability before being permanently rated. Alternatively, people will be rated for permanent partial disability long before they have recovered and unless there is a motion to amend the Board's findings within one year, the carrier will not get ~~the~~ any funds (which have been paid) returned. This could be expensive.

XXV. PERMANENT PARTIAL DISABILITY RENAMED AND BASED ON $240,000 FOR A "WHOLE MAN", SPECIAL FACTOR TO REDUCE PAYOUT FOR THOSE LESS THAN 31% DISABLED

COMMENT

Almost all disabilities fall within the 0-30% category and hence, will be cut back rather than based on the $240,000 whole man. This will be a very beneficial amendment for those quite severely injured. The change in caption was probably a transcribing accident and should be rectified. The $250.00 minimum should be adequate to lock in the reduced payment for those with only minor disabilities such as loss of a hand. The amendment further readopts the American Medical Association's guides to evaluation of permanent impairment (repealed earlier in this package) and provides for the Board to adopt and use a supplemental schedule if they so desire. The language probably should be "shall" rather than "may" so that this supplemental schedule does not have to be created by courts on appeal.

RECOMMENDATION

Adopt the amendment and monitor it for effect.

ACTIONS PROPOSED

Same, but restore the caption to use the word "disability" so as to be consistent with other sections. Also, "may" should be changed to "shall".

ARGUMENTS AND PROBLEM AREAS

It is to be anticipated that people less than 31% disabled will test this section in the courts. It appears that it will withstand the test.

XXVI. CUTTING OFF TEMPORARY PARTIAL DISABILITY IN THE SAME MANNER AS TEMPORARY TOTAL DISABILITY

COMMENTS

The two-year and "medical stability" problems foreseen above in Section XXIV are encountered here again.

RECOMMENDATION

See number XXIV.

ACTIONS PROPOSED.

See number XXIV.

ARGUMENTS AND PROBLEM AREAS

See number XXIV.

XXVII. WAGE EARNING CAPACITY FOR CALCULATION OF PERMANENT DISABILITY TO BE DETERMINED BY ACTUAL SPENDABLE WEEKLY WAGE OR SET BY BOARD

COMMENTS

This is the only use of the term "actual spendable weekly wage". It is undefined and is obviously intended to be different from "spendable weekly wage" which is very narrowly defined. Until this term is defined by regulation or by the courts, the Board will probably have to have a hearing and set the wage earning capacity of each person who becomes eligible for permanent disability of any sort. Since this is the compensation on which the amount that the injured person will receive is based, we can only hope that settlements will become

a pattern. Otherwise, the Board will be snowed under with a new type of hearing which only occasionally occupied them in the past.

RECOMMENDATION

Adopt the amendment and monitor its effect.

ACTIONS PROPOSED

Adopt the amendment and monitor its effect.

ARGUMENTS AND PROBLEM AREAS

This appears to say that the wage earning capacity of a person will be based upon the spendable weekly wage which the person is earning at the time he or she is injured. The use of wages contempory with the injury is to be encouraged, particularly because of the bizarre effects of Alaska's boom and bust economy when a historical earnings criteria is used. The inconsistencies between this and the next section may result in litigation. Our discussions indicate that this is a more desirable approach in Alaska's economy (see our comments in the next section).

XXVIII. BOARD MUST DETERMINE EMPLOYEE'S GROSS WEEKLY EARNINGS

COMMENTS

This amendment is imposed upon the delightful conundrum which has been AS 23.30.220(a). The section as it currently exists begins by saying that the current wage at the time of injury is the basis for computing compensation. It goes on to

provide that this is current receivable wage and that this is calculated on the basis of earnings history only. There are two formulas that are customarily used in workers' compensation statutes. One bases the calculation of compensation on the earnings of the employee at the time of injury. The other bases the calculations on a wage earning history. This latter has created much of the problem on which we are currently working. In a boom and bust economy, a workers' compensation system that is based upon earnings history finds that in boom periods, the workers benefits are calculated on his earnings during the bust period and hence, are low, and there are plenty of jobs at high wages available as an incentive to return to work. At this time then, claim payments are very low and profits are very high. On the other side of the mountain, when the economy is going into a bust, the payments to the injured worker are based on earnings history and hence, are high, and wages available are low (if any). This provides a disincentive to return to work and during this period, there would normally be no profit at all for the insurance carriers since the profit was drawn during the boom time. Alaska has, however, elected to try to provide profit both during boom and bust while still calculating benefits based on historical wages. The effect of these two policies makes for low premiums (but lots of profit) at the boom time and impossibly high premiums (and small profit) at the bust time, thus further damping the economy and permitting those employers

policy)
who can come into the state from outside (with a multi-state workers' compensation policy) to underbid employers who are residents of the state. This is, of course, foolish in the extreme. Unified Fairbanks is exceedingly concerned that the Director of Insurance has adopted an "even profit throughout" theorum in setting rates, because this is incompatible with our economy, if we are going to predicate workers' compensation benefits on our earnings history.

RECOMMENDATION

Consider basing benefits paid on wages earned at the time of the injury as a condition precedent to the adoption of the amendments. Beyond this, adopt the amendments and monitor for the problems set forth below.

ACTIONS PROPOSED

Adopt the proposed amendment but change the definition of spendable weekly wage to one providing that it is based on the wage being earned at the time of injury.

ARGUMENTS AND PROBLEM AREAS

The judgment of two years, or 18 months out of two years, eliminate much of the flexibility in determining an employees compensation as a result. Those seeking to go back to work after a workers' compensation (or other) injury lasting, say, a year to a year and five months will have virtually no workers' compensation coverage. This will undoubtedly be litigated on equal protection and probably other grounds.

XXIX. REDUCTION IN BENEFITS FOR PEOPLE COLLECTING PENSION OR PROFIT SHARING BENEFITS

COMMENTS

A wise decision since those who retire would not, in most instances, be the ones sought to be covered by workers' compensation benefits.

RECOMMENDATION

Adopt the amendment.

ACTIONS PROPOSED

Adopt the amendment.

ARGUMENTS AND PROBLEM AREAS

There will probably be equal protection problems based on the fact that a worker may have accumulated pension benefits over a great number of years. A further problem will be the employee who, because of the compensable injury, is forced into disability retirement. Presumptively, these will be resolved in favor of the amendment.

XXX. NON-DISCRIMINATION IN HIRING AGAINST INJURED PERSONS EXCEPT DISCRIMINATION PERMITTED IF EMPLOYER CONSIDERS "SAFETY PRACTICES" OR "PHYSICAL AND MENTAL ABILITIES" EMPLOYER MAY REQUIRE QUESTIONNAIRE COMPLETION TO DETERMINE "PHYSICAL AND MENTAL CAPACITY"

COMMENTS

We were unable to consider this amendment adequately because of the obvious conflict between Section (a) and Sections

(b) and (c). It appears that the draftsman resolved the conflict by including everyone's proposed rule.

RECOMMENDATION

We will go along with WCCA, but do not endorse conflicting rules.

ACTIONS PROPOSED

Put this on the shelf until a clear rule can be drafted.

ARGUMENTS AND PROBLEM AREAS

The obvious conflict between the sections. There are also possible conflicts with the federal law prohibiting refusing to hire because of disability.

XXXI. REPEAL OF MOST RAGLAND BENEFITS

COMMENTS

The Ragland case provided that an employee's wage include fringe benefits paid and room and board if supplied. This removes the room and board unless it is taxable (true only with town jobs where room and board not supplied for the convenience of employer). Fringe benefits are not taxable to the employee, if they are paid into a trust, unless they are actually or constructively received by the employee. This amendment leaves only pension or profit sharing benefits for older and vested employees to be considered as part of an employee's income. This is a compromise and, in the view of

(b) and (c). It appears that the draftsman resolved the conflict by including everyone's proposed rule.

RECOMMENDATION

We will go along with WCCA, but do not endorse conflicting rules.

ACTIONS PROPOSED

Put this on the shelf until a clear rule can be drafted.

ARGUMENTS AND PROBLEM AREAS

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Unified Fairbanks, this is an agreeable reduction in benefits offset against a possible reduction based on collateral benefits received by the employee.

RECOMMENDATION

Unified Fairbanks considered adoption of this amendment in consideration of dropping potential adoption of an offset against collateral benefits rule. We therefore recommend its adoption.

ACTIONS PROPOSED

If this amendment is not adopted, fairness would decree that we then consider an amendment to AS 23.30.225 providing, "Where an employee receives periodic disability benefits under the provisions of a pension plan, disability or accident insurance plan, financed in whole or in part by the employer, the aggregate benefits payable for temporary total disability, temporary partial disability, permanent partial, and permanent total disability shall be reduced by an amount equivalent to such portion of the employer finance benefits paid to an employee in excess of temporary or permanent disability benefits calculated on the employees spendable weekly wages."

ARGUMENTS AND PROBLEM AREAS

Non-union employers on Davis-Bacon jobs often take the fringe benefit sums and place them in a separate account. This account is to be used to pay fringe benefits. However, if an employee does not work long enough to vest any interest in those

fringe benefits (which is the rule on construction jobs), the money returns to the employer. Since the chance of vesting is minimal and since under these circumstances these payments are deductible to the employer, they are included in gross wages paid for the purpose of calculating workers' compensation premiums. If premiums are to be based on these sums, there may be lawsuits with respect to the way they are to be considered in gross earnings. It is probable that the "vested" requirement will shortcut any court test here.

XXXII. COMPENSABLE INJURIES NOT TO INCLUDE "MENTAL INJURY CAUSED BY MENTAL STRESS"

COMMENTS

The same defect of definition is found in this reference to "mental injury" as is found in Section XV. Please see comments on Section XV.

RECOMMENDATION

Please see comments at Section XV.

ACTIONS PROPOSED

Please see comments at Section XV.

ARGUMENTS AND PROBLEM AREAS

Please see comments at Section XV.

XXXIII. MEDICAL STABILITY (TERMINATING PAYMENT OF ALL TEMPORARY BENEFITS) OCCURS WHEN NO OBJECTIVELY MEASURABLE IMPROVEMENT HAS OCCURRED TO THE INJURED EMPLOYEE IN ANY 45 DAY PERIOD

COMMENT

This may be rebutted by clear and convincing evidence, but it divorces the medical definition of "medical stability" (meaning that the patient is improved as much as he or she is reasonably expected to improve) from the meaning of "medical stability" for workers' compensation purposes. Because of the burden of proof associated with it, this should greatly increase the number of hearings before the Board.

RECOMMENDATION

This has been earlier discussed in Sections XXIV and XXVI. Unified Fairbanks agrees that temporary benefits should be terminated and permanent benefits (if applicable) should be started immediately upon medical stability as that term is used by the medical profession. We hope the WCCA will agree to an amendment bringing their definition more in line with that of the medical profession.

ACTIONS PROPOSED

Try to redefine "medical stability" more toward that time when an injured person first reaches a condition in which whatever disability has been caused by the compensable injury is not likely to become measurably less in the near future.

ARGUMENTS AND PROBLEM AREAS

Doctors will probably continue to apply their definition of medical stability and will take whatever reporting steps are necessary to circumvent the imposition of the "45 day rule".

XXXIV. REPEAL OF THE CURRENT METHOD OF DETERMINATION OF WAGE EARNING CAPACITY

COMMENTS

A necessary part of the new method of determination proposed.

RECOMMENDATION

We concur with WCCA providing, of course, the new sections are adopted.

ACTIONS PROPOSED

Adoption as part of the overall package.

ARGUMENTS AND PROBLEM AREAS

None not mentioned in the section amending the new method of determination of wage earning capacity.

XXXV. REPORTING DURING TRANSITION

COMMENTS

This section is only needed if we go to the annual reporting format in order to permit the State to accumulate easily accessible figures.

RECOMMENDATION

To be adopted, if we adopt the annual reporting approach.

ACTIONS PROPOSED

Same.

ARGUMENTS AND PROBLEM AREAS

All outlined in the discussion of comparative wisdom of approaches to obtaining statistics discussed above.

XXXVI. EFFECTIVE DATE

COMMENTS

A good choice.

RECOMMENDATIONS

A PR campaign with recompilation of booklets available including the copies of the applicable code and regulation sections.

ACTIONS PROPOSED

A good date to start. Be sure to use lots of PR and recompile all publications, including the gray book.

ARGUMENTS AND PROBLEM AREAS

None.

XXXVII. OBSERVATIONS WITH RESPECT TO THE RATE MAKING AS PERFORMED BY JOHN GEORGE AND HIS SUBORDINATES

COMMENTS

NCCI is an insurance lobbying organization. It is hired by a total of twenty states to supply ~~to~~ their insurance commissions with data necessary for rate making. Alaska uses them in the workers's compensation field and pays them for their services. Alaska does not check their figures. They do not give breakdowns of figures to Alaska (according to Mr. George)

so that essentially, they provide the State with two or three choices of rates and a summary of probable effects of each of those choices. Alaska then selects one. Even though the State is aware that disability payments are being made, they do not know any sort of an average rate. Our survey indicated that $560.82 was the average workers' comp disability payment for those cases that have gone into contest in some manner. The Second Injury Fund statistics show a quantum leap in 1985 and 1986; several hundred percent each time. This represents a massive increase in payout for disability. The reason for this is not explained, nor apparently has it been inquired into. Premium rates are currently based upon a gross payroll. (Figuring that anything is taxable to an employee represents increased risk to the carrier and hence, justifies payments). Many states use this system rather than the "hours worked" system. The states we have contacted, however, are keenly aware of percentages of premium dollar and percentages of benefits paid for each of the areas of payment. Neither the workers' compensation folks nor the insurance division folks have been able to produce any kindred statistics for Alaska, nor do they seem to be aware of any way of combining the reports which they receive (setting forth these statistics) so as to give statistics on any meaningful or statewide basis.

RECOMMENDATION

We recommend obtaining the breakdown of the reasoning

for premium rates before they are adopted. We recommend that the Department have a person whose duties include maintaining these statistics and we feel that the insurance division should have a similar person. We recommend at least verifying NCCI representation. We recommend audits of carriers and any statistics supplied NCCI or carriers. We recommend that the Insurance Commissioner acknowledge that Alaska has a boom and bust economy and change its criteria for setting premiums to reflect the fact that profits are made in the boom time and no profits are made in the bust time. Generally, we feel that we feel should pattern ourselves after the more successful states.

ACTIONS PROPOSED

This will require extensive overhall of the ongoing procedures and hence, we recommend (and we are willing to participate in) a task force or study group in this area. Alaska simply does not have a grip on the rate making process as do other states. We feel that it must get such a grip. This will require legislative, administrative, and executive changes.

ARGUMENTS AND PROBLEM AREAS

These will depend upon the course taken. In all probability, there will be resistance to any change.

XXXVIII. PREMIUM PAYING CRITERIA

COMMENTS

Generally speaking, older accident-free employees are

paid more than beginners. Premium rates are structured so that the cost of insuring the older accident-free person (who is paid more) are higher than those for the neophyte employee. This is upsidedown. Gordon DePue feels strongly that insurance companies will not want to change, because neither they, nor the employers have any idea how many hours a person works, but they are all acutely aware of the taxable gross paid to that person. [redacted] a formula combining the category in which an employee works and the hours that they work should be explored as a more fair premium base.

Additionally, attached to this letter is an article entitled "Everything You Wanted to Know About the CAL SMACNA Workers Compensation Captive, But Were Afraid to Ask". The experience modification described therein is missing in more than 95% of the premium rate setting in Alaska. Additionally, the question of whether fringe benefits (paid by setting aside in a separate account and which are not likely to be paid to the individual employee) should be considered as wages paid under the present system must be addressed. We also feel that State or captive coverage, such as mentioned in the attached article or as found in the State of Arizona, should be considered. Colorado and Montana appear to be bad examples.

RECOMMENDATION

The problems in this area are hurting employers badly and hurting them now. A study of this area should not be

postponed until some future indefinite date, but should begin forthwith.

ACTIONS PROPOSED

Begin the study now. Think of including several carriers in the information gathering discussion and planning groups. If you want public participation, Unified Fairbanks will be glad to provide some.

ARGUMENTS AND PROBLEM AREAS

There will always be a reaction to change. In this area, employers with bad safety records and a history of expensive compensation injuries may well have their premiums increased and they should be expected to complain.

XXXIX. ATTORNEY'S FEES

COMMENTS

Attorney~~s~~ ~~fees~~ representing employers and carriers are normally compensated on an hourly basis. Their economic incentive is therefore to spend the maximum amount of time which their relationship with the carrier or employer will stand, on each case. Attorneys for claimant are compensated at 10% (plus $150.00) of the amount recovered for client, but only if that amount has been controverted and fought out. In other words, settlements rarely carry attorney's fees. There are two problems in this area. The first is that both sets of attorney's fees are expenses which are ultimately reflected in

higher premium rates. In this area, we are yielding to WCCA who have advised that the WCCA will brook no interference whatsoever in the way that employers or carriers ~~interfere or~~ compensate their attorneys, and therefore, the attorney's fee costs should not be approached. In the second area, there is the question of equality of treatment. The claimant's lawyer has an incentive to settle as quickly as possible, but for as much as possible. The carrier or employer's attorney has an incentive to go as deeply into the case (and discovery proceedings surrounding it) as can be justified. This is the reason that almost every attorney in the state would love to defend workers' compensation claims and most of the big and profitable firms do so, while only a very small percentage of attorneys in the state will take claimant's cases. Claimants have a very hard time getting representation because only a law office set up to divert most of the work to paralegals can afford to take the cases without losing money. In order to effect justice, representatives on each side should be reasonably equally motivated, and close to equally paid. If there are to be no limitations on counsel fees on one side, then perhaps the other side should be paid a percentage of what the hourly compensated counsel gets. Currently, claimant's counsel receives nothing unless they win which also discourages attorneys from representing workers' compensation claimants. A half dozen formulas have been suggested, but none of them stand the test of argument if we

accept the given(that employers and carriers will brook no interference in what they pay their counsel).

RECOMMENDATIONS

We therefore recommend study by the legislative task force proposed later, on with the cooperation of the Alaska Bar Association.

ACTIONS PROPOSED

As stated above.

ARGUMENTS AND PROBLEM AREAS

Medical costs are currently out of control in the compensation area. Presumptively, attorneys would like to have attorney's fees in that same category. There will then probably be lots of arguments in committee, etc., and there may ultimately be a test case as to whether the formula selected is fair.

XL. USING EITHER STATE COVERAGE OR A CAPTIVE CARRIER FOR COVERAGE

COMMENTS

As mentioned above, Alaska has a boom and bust economy. Either State coverage or a captive carrier can be expected to level out the compensation premiums making profit in boom times and suffering a loss in bust times. For the stability of our economy, this is probably essential. An alternative would be to actually use the authority of John George to set rates that would be fair to employers. Whether

this is possible is an open question.

RECOMMENDATION

This should be studied as it may turn out to be the only solution to level fair rates.

ACTIONS PROPOSED

A task force in this area is needed.

ARGUMENTS AND PROBLEM AREAS

On the one hand, carriers complain that they are not making money. It is to be expected, however, that if they are likely to be supplanted by a captive carrier or the State, they will vigorously oppose this because, in fact, a considerable profit is being made, ~~that~~ which profit would be lost to the "competition" of the State or the captive carrier.

XLI. ADMINISTRATIVE MATTERS

COMMENTS

We lack an easy manner for an employer to check on prior injuries having occurred to his employees. We have found that the reports received on each individual case (from insurance carriers) are not combined, ~~in any manner so that~~ The statistics are valueless because they are not cumulated. There is a long period of time between the request for a hearing, and a hearing, both before the Board, and most especially before the rehabilitation officer. Therefore, additional staffing is needed. The grey book which contains the statutes and

regulations with respect to workers' compensation is so outdated as to be useless. There are no regulations providing for audits for carriers. At this point, there is no support within the Department assigned to work with loss control programs which are badly needed.

RECOMMENDATION

The extra personnel should be added to the Department to provide: a) a last name index of workers' compensation filings for availability to employer; b) more Board members and more rehabilitation officers in order that the hearing calendar not be over one month after the request for hearing in either of these categories; c) regulations can be set up for adoption providing for audits of carriers to verify the information which is submitted; d) the information received from carriers should be put into a computer so that information would be continuously available (such as, for 1987, what percent of premium dollars went to pay medical costs?) There are many of these type of questions that should be answered in order to be at all effective; and, e) the grey book should be reissued up-to-date so as to make it useful.

PROPOSED ACTION

Budgets should be increased and personnel assigned as explained above. On the compilation of statistics matter, cooperation should be worked out with the Insurance Commissioner.

ARGUMENTS AND PROBLEM AREAS

There will be a slight increase in cost in running the Department. This, of course, will be offset by the fact that information and services will be available.

XLII. EXECUTIVE DEPARTMENT PRIORITIES

COMMENTS

The Attorney General's Office does not allocate money to prosecute workers' compensation fraud. The budget will require adjustment upward to provide for the needs set forth above. The Insurance Department will need to be regulated in order to have them accumulate statistics upon which they base their rate setting, and this may require cost increase. The Attorney General's Office should prosecute employers who are operating without insurance or with out-of-state insurance that actually has little, if any, value for Alaskan workers. The Insurance Department should perform audits of the carriers, in order to find out whether ~~what~~ the information they provide to us (but is just left in file drawers at this time) is reliable. ~~and A~~ certificate showing that workers' compensation is in effect should be designed so that it specifies where Alaskan workers are working, what carrier is covering them, and that they are given coverage at Alaska rates so as to be valid in Alaska. These certificates should be for filing on each Little Davis-Bacon job, with local government bodies that request it.

with the Department of Insurance, with the Department of Workers' Compensation, and anywhere else thought appropriate, in order to give meaning to the requirement of having workers' compensation coverage.

RECOMMENDATION

Each of the above problems be addressed and resolved at the earliest possible time.

ACTIONS PROPOSED

See above.

ARGUMENTS AND PROBLEM AREAS

There will be "empire" problems anytime some of these adjustments are made. The value of the adjustments makes it all seem worthwhile.

XLIII. SPECIAL RECOMMENDATION FOR THE SECOND INJURY FUND

COMMENTS

The 104 week time required to bring the Second Injury Fund into play is totally destroying the function of the fund. The "written records requirement" keeps many legitimate second injury cases from being compensated out of the fund, and lump sum settlements are discouraged by the fund reimbursing the carriers on an installment basis, rather than by lump sum.

RECOMMENDATIONS

We recommend that each of the above problems be addressed by legislation.

ACTIONS PROPOSED

To AS 23.30.205

Adoption of amendments as follows:

(a) If an employee who has a permanent impairment from any cause or origin incurs a subsequent disability by injury arising out of and in the course of his employment resulting in compensation liability for disability that is substantially greater by reason of the combined effects of the preexisting impairment and subsequent injury or by reason of the aggravation of the preexisting impairment than that which would have resulted from the subsequent injury alone, the employer or his insurance carrier shall be reimbursed for the second injury fund (From?) for all compensation payments subsequent to those payable from the first 26 (104) weeks of disability. The insurance carrier shall be reimbursed by a lump sum payment from the fund for lump sum settlements approved by the board.

(b) If the subsequent injury of the employee results in the death of the employee and it is determined that the death would not have occurred except for the preexisting permanent physical impairment, the employer or his insurance carrier shall in the first instance pay the compensation prescribed by this chapter, but he or his insurance carrier shall be reimbursed from the second injury fund for all compensation payable in excess of 26 (104) weeks.

(c) In order to qualify under this section for reimbursement from the second injury fund, the employer must

establish (by written records) that the employer had knowledge of the permanent physical impairment before the subsequent injury and that the employee was hired or retained in employment after the employer acquired that knowledge. Employer knowledge shall be established by written records except as follows:

(1) In cases of paralegia or quadriplegia,

(2) In cases of amputation of foot, leg, arm or hand, and

(3) When an employee has omitted qualifying information from employee's response to an employment questionnaire completed by the employee prior to the subsequent injury.

(f) An employer or his carrier shall notify the Commission of Labor of any possible claim against the second injury fund as soon as practicable, but in no event later than 15 (100) weeks after the employer or his carrier have knowledge of the injury or death.

ARGUMENTS AND PROBLEM AREAS

This will increase the usage of the second injury fund by between three and four times, ~~or~~. It will minimize the "acceptance period", ~~but will require further action~~. This may produce a problem.

XLIV. LEGISLATIVE TASK FORCE

COMMENTS

As we addressed each of the problem areas, a number of

them were set forth as needing a legislatively oriented task force, to monitor changes being made, and to resolve those problems not yet addressed.

RECOMMENDATION

Immediate creation of a task force containing legislators, insurance carriers, medical care providers, attorneys (from both sides), rehabilitation personnel, labor unions, executive and administration representatives, and employers. This task force should first address those problems which have not been addressed by legislative, executive, or administrative changes and later on, they should monitor the effect of the changes now being made. Only in this way will we be able to hone these problems down to a workable point.

ACTIONS PROPOSED

Establishment of the above committee forthwith.

ARGUMENTS AND PROBLEM AREAS

The function of this committee is to address problems. Its creation will do a good deal toward satisfying the employers (who are now being gouged by workers' compensation premiums) that are too high. Costs should be minimal.

his argument by stating that any ductwork which is not installed according to specific guidelines has the potential of being installed improperly. Thus, to alleviate the installation problem, he recommended that the State adopt—or at least reference—SMACNA's *HVAC*

ing" stage from all of the testimony they received. Staff members of the Commission indicate that Vermeulen made his point and that the State will more than likely adopt his recommendations. We'll keep you posted on further updates. □

Everything You Wanted to Know About the CAL SMACNA Workers Compensation Captive, But Were Afraid to Ask

By James Gullone, CPCU, President CAL SMACNA Business Insurance Agency, Inc.

In order to give you a full picture of how the captive works, I need to digress for a bit and give you a synopsis of the inside workings of the California Workers Compensation System. Once the inner workings of this system are laid before you, it will be easy to see how the captive works to your advantage at every turn.

How are my workers comp rates calculated?

Every insurance company in the state is responsible for filing a Unit Statistical Report with the Workers Compensation Insurance Rating Bureau (WCIRB) for every employer who has workers compensation insurance with them. This report contains the premium and losses that the employer sustained during the year broken down by rating class.

The rating class is one of 232 categories where one of your workers can be categorized in order to determine his workers compensation rate. A common category in our industry is Sheet Metal Work, Erection, Installation or Repair ($16 or more per hour), Code 5542, rate $9.05.

By using three years worth of these statistics, the WCIRB determines by statistical analysis what rates are necessary to pay claims and insurance company expenses for each workers compensation class. For example, in the rate class 5542 mentioned above, the rate as of 1/1/86 was $6.66. As of 7/1/87, that rate had climbed to $9.05, almost a 36 percent increase in a year and a half.

By contrast, the rate for roofers on 1/1/86 was $30.33. By 7/1/87, it was $33.85 and had increased only a little less than 12 percent during the same year and a half.

Are the rates that the WCIRB promulgates the minimum rates that an insurance company can charge for workers compensation?

Yes. California is a minimum premium state. Companies can charge more than the minimum but they cannot charge less.

There is, however, a legal way for you to pay less and it involves the Unit Statistical Report that we mentioned. Not only is that report used to set the minimum rates, it is also used to set an individual company's Experience Modification Factor (EMF).

If your account develops over $14,500 in premium using the minimum rates, you automatically qualify for Experience Rating. By a set formula, the WCIRB measures the number of claims you have, the claims you have over $2,000 and your premium.

If you are above average, your Experience Modification will be 1.00. If you are above average, your Experience Modification will be less than one. And if your claims are worse than average, your experience Modification will be greater than one.

So the Experience Modification Factor can affect my rates?

Very much. Let's say that you have a $200,000 payroll of sheet metal workers in the 5542 code which charges $9.05 for each $100 of payroll. The minimum rate that would be developed is $18,100. If this acount had a number of losses and the Experience Modification Factor was 1.25, they would be charged $18,100 × 1.25 or $22,625.

If the account loss history was better than average and developed an Experience Modification Factor of .75, this account would be charged only $13,575.

Obviously, the Experience Modification Factor is very important. To my way of thinking, it is *THE* most important factor in your workers' compensation program for several reasons:

a) You can legally pay less for your workers' compensation insurance than your competitor.

b) A consistently low Experience Modification Factor means you probably have a good safety program and you are reaping the benefits of that program.

c) Unlike dividends—which are not guaranteed—a good Experience Modification Factor at least guarantees your rates for that year.

d) You can have some control over your Experience Modification Factor, whereas it is very difficult to control your dividend. □

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REPORT TO THE ALASKA STATE LEGISLATURE ON WORKERS' COMPENSATION BENEFITS

from

UNIFIED FAIRBANKS

This is the final report of the Special Task Force formed by Unified Fairbanks to address the problem of an apparent increase in workers' compensation premium costs.

The Task Force grew out of an information seminar attended by 160 people, and a followup seminar attended by half that many. Emphasis at the first seminar was on receipt of all information that the State could provide, together with information from professionals in every area. At the second seminar, the preliminary action areas were crystalized and direction was given thereon. At this point, the matter was transferred to the Task Force Committee which consisted of 24 persons who were employers, labor representatives, health professionals, rehabilitation professionals, and attorneys (on both sides). Meetings were held each Wednesday at North Star Terminal. Committees worked an average of 10 hours each on their various projects. Input was had from all members on all reports, and all recommendations contained herein are consensus unless noted to the contrary.

Organizationally, this should be viewed as a supplement to the WCCA draft legislation which is now before you as SB

322. Sections will be taken in the order that they are set forth in SB 322. There are some additional recommendations beyond what was covered by that draft legislation. Some are of a legislative nature, there are also administrative recommendations for both proposed regulation and action. There are, finally, executive recommendations which must be considered by the Governor's Office in the budgeting process.

The overall goal was to make changes in the workers' compensation system which would reduce the cost of the system as it is reflected in premiums paid by employers.

The format for approaching each section or subject will be:

1. Comments addressing the WCCA proposal (SB 322);
2. The Unified Fairbanks recommended approach;
3. Actions proposed by Unified Fairbanks, whether legislative, administrative, or executive; and,
4. Arguments and problem areas which should be addressed.

I. LEGISLATIVE INTENT

COMMENTS

According to WCCA, this does not alter the presumption of compensability, but does indicate a legislative preference for a "preponderance of the evidence" test to be used by the Board without favor to either side. Additionally, the standard of judicial review is to be changed to provide that, on

questions of fact, the Board's findings are conclusive if supported by any evidence at all. Whether the court system will find a declaration of legislative intent sufficient to change the standard of judicial review is open to question. The final "intent" is to reduce benefits to persons with residences outside, so as to give them an incentive to go back to work.

RECOMMENDATION

Sections A and C are straight-forward legislative goals. Section B might better be amended along the lines of California Workers' Compensation Code, Section 3202.5 as follows: "The legislature declares that the workers' compensation laws must be fairly and impartially construed by the courts. In promotion of that goal, it is the intention of the legislature that the preponderance of evidence standard be utilized in determining the compensability of a workers' compensation claim. Preponderance of the evidence means such evidence as, when weighed with that opposed to it, has more convincing force and a greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence."

ACTIONS PROPOSED

Adoptions of the proposed language indicated above. There is a probability that multiple amendments may be requisite in such places as the Administrative Procedure Act and Title 22.

ARGUMENTS AND PROBLEM AREAS

These have been raised above.

II. DEPARTMENT MAY SET UP TO SELECT AND REMOVE REHABILITATION SPECIALISTS OR PHYSICIANS

COMMENTS

In Fairbanks, we felt strongly that the "may" should be replaced by "shall", "must" or "will" creating a mandate. WCCA feels that, providing the Board with the power will be enough to cause it to act. Additionally, the "or" probably should be a "and" because the two are not meant to be alternatives.

RECOMMENDATIONS

Our recommendation in the medical and rehabilitation areas are addressed in those particular areas of this report. We concur with the intent of WCCA in Section 2 with the strong recommendation that the word "may" be made mandatory, and clarifying that both rehabilitation specialists and "physicians" (as defined elsewhere) are to be selected.

ACTIONS PROPOSED

See above.

ARGUMENTS AND PROBLEM AREAS

Hopefully, the qualifications for health care providers will not strongly differ from the standard of licensing, etc.

III. WHEN ANYTHING IS DECLARED UNCONSTITUTIONAL, DEPARTMENT "SHALL IMMEDIATELY" DRAFT NEW REGULATIONS

COMMENTS

A different drafter for WCCA uses the mandate "shall" and adds to it the word "immediately". This drafter probably meant to say "shall forthwith adopt a replacement regulation or regulations".

P 2 L 20

RECOMMENDATION

A good idea.

ACTIONS PROPOSED

See above.

ARGUMENTS AND PROBLEM AREAS

Since the Department does not have legal counsel and the route for cooperation with the Attorney General's Office is rather tortuous, any requirement of immediacy may be dysfunctional.

IV. FALSE STATEMENT ON PREEMPLOYMENT QUESTIONNAIRE WAIVES ALL BENEFITS

COMMENTS

Sec 4 is vague

First, there is no mechanism for determining whether any particular statement is actually false. Questions composed by individual employers can mean various things. Well designed questionnaires can even be susceptible of dual interpretations. Second, (1) is vague. It probably should provide that, had the

employer known the true state of facts, a) the employee would not have been hired, and b) the non-hiring would have been legal under federal and state law. Third, (2) is again vague because a representation on a piece of paper in the office seldom causes anything. Reference should be to the condition hidden from the employer by the misrepresentation.

RECOMMENDATION

Unified Fairbanks agrees with the intent and feels that the drafting should be cleaned up.

ACTIONS PROPOSED

See above.

ARGUMENTS AND PROBLEM AREAS

See above.

V. SECOND INJURY FUND CONTRIBUTIONS AND REPORT TO BE FILED ANNUALLY

COMMENTS

The State receives currently both data and funds within a short period of time after each case is concluded. This amendment permits the State to have data consolidated on a single annual report from each carrier. It also permits the insurance company to earn interest on money due for the intervening time between closing a case and the annual report.

RECOMMENDATION

Since the State is unable or unwilling to compile data

from reports filed on a case-by-case basis, this appears to be a way in which the annual reports from the carriers can be summarized, thereby providing for the first time, some data with respect to, the validity of rates charged, and where the problems in the administration of the act happened to be. We join in the recommendation to attack the problem.

ACTIONS PROPOSED

Unified Fairbanks would like the State to explore the possibility that, either through the use of a personal computer or access to some other computer plus the addition of one person to the staff of the department, the reports as they are currently received could be entered into the computer so that all data necessary for fixing rates or ascertaining percentages of expenditure, etc. would be instantly available to the State and any employer or agency requesting the information. It is most likely that the cost to the State of a computer, its programing, and a person to operate it, at least on a part-time basis, would be less than the interest lost by providing the delay in payment by the carriers.

ARGUMENTS AND PROBLEM AREAS

The State Department of Insurance and the State Department of Workers' Compensation are both unable to produce statistics indicating the basis for premiums or the disposition of monies paid out.

VI. REHABILITATION

COMMENTS

Unified Fairbanks agrees that rehabilitation should be voluntary with the employee. We find no evidence from any source which indicates the law which has been proposed will reduce the cost of workers' compensation. We have repeatedly sought facts from the State government indicating what segment or segments of a workers' compensation system had been causing the greatest increase in cost. Absolutely no information has been forthcoming, although we have been able to obtain the same information from other states with a telephone call. In short, all we know is that there is a serious problem with the cost of the system. However, no one in our State Division of Insurance has been able to identify where the problem lies. We firmly believe that it is wrong to legislate when no one has yet identified where the problem lies. We are, in fact, worried that the cost of the system may be increased by the proposed changes. There have been no regulations adopted to put into effect the rehabilitation system that is presently in the law. We therefore do not know how the presently existing system will work or what its costs will be. We are therefore reluctant to change for the sake of change.

RECOMMENDATION

A. INEFFECTIVE WORK BY STATE AGENCIES, Division of Insurance:

Much of the blame for the increased cost of the workers' compensation system has been placed on vocational rehabilitation. However, the Division of Insurance has absolutely no information available to anyone concerning the costs of vocational rehabilitation or of any other workers' compensation benefit for that matter. Nonetheless, the Division continues to approve rate increases for workers' compensation insurance, and a portion of the responsibility gets placed on a "vocational rehabilitation system which is too liberally interpreted." The last increase was granted without the preparation of any findings of fact and without the presentation of any specific information to those in this State who are involved. We suggest legislation requiring some state agency to keep statistics on the cost of rehabilitation evaluations, rehabilitation plans, the cost of litigation, and so forth. When future rate increases are suggested, facts and figures will be available to indicate where the cost increase is coming from.

B. INEFFECTIVE WORK BY STATE AGENCIES, Workers' Compensation Board:

Perhaps due to lack of funding and staff, the Department of Workers' Compensation has seriously faltered in its obligation to administer the existing vocational

rehabilitation law. Over five and a half years have passed without the promulgation of a single rule or regulation by the Board to govern procedures under the law which went into effect on July 1, 1982. The present law has never been given a chance to work and we find it curious and the Legislature now stands ready to cast it aside. We suggest the legislature take whatever steps are necessary to immediately secure the promulgation of administrative rules and regulations by the Board.

Two good examples of what has happened as the present system has struggled without the benefit of administrative rules:

1. We suspect a major portion of any increased cost of vocational rehabilitation is in the payment of temporary benefits to injured workers while they wait for the vocational process to be completed. The system in Fairbanks has worked very slowly without the rules and regulations needed. As a result, injured workers remain far too long on temporary benefits. Rather than deprive injured workers of temporary benefits during vocational rehabilitation, which we think is a worthwhile benefit, we suggest the Board streamline the system with the promulgation of rules and that the existing law be tightened up to provide certain specific time limitations for each step of the process. This is the main thrust of our

suggested changes in the existing law.

2. In Fairbanks, there is no full-time rehabilitation administrator. At present, the one administrator is in Fairbanks one day a month. This allows a maximum of three rehabilitation conferences. Without timely rehabilitation conferences available to all parties, increased costs of continuing temporary benefits have resulted. It is obvious, if we intend to reduce costs, additional staff are required.

C. LEGISLATIVE TASK FORCE

We believe the Legislature should form a task force to keep the existing vocational rehabilitation system moving. The group should have representatives of all major participants in the system. The information needed from the Division of Insurance could be pursued, enforcement of the Board's obligation to promulgate rules and regulations would be enhanced, and proposed changes in the law and regulations could be generated.

D. SECOND INJURY FUND/TEMPORARY PARTIAL DISABILITY

Our committee believes one of the benefits to the system would be strong encouragement to employers to rehire injured workers. The present Second Injury Fund does nothing to provide this encouragement as coverage begins only after 104 weeks of disability. We suggest the period of coverage be drastically reduced to make it possible for injured workers' to

return more rapidly to the work force. A further encouragement toward the goal of returning injured workers to a job is our proposed new subsection(n) which encourages the use of TPD when employers rehire their injured workers in a "modified" or "light duty" capacity.

ACTIONS PROPOSED

In order to keep in line with the WCCA recommendation, we propose that the statutory language be as follows:

AS 23.30.041. Rehabilitation of injured workers.

(a) The board shall select and employ a reemployment services administrator who is a qualified rehabilitation specialist. The board shall authorize the rehabilitation administrator to select and employ sufficient rehabilitation staff to hold hearings wherever the board meets and to collect and analyze statistical data. The reemployment services administrator is in the partially exempt service under AS 39.25.120.

(b) The reemployment services administrator shall perform the following functions:

1. enforce regulations adopted by the board to implement this section;
2. recommend regulations for adoption by the board that establish performance and reporting criteria for rehabilitation specialists;
3. enforce the quality and effectiveness of reemployment benefits provided for under this section;
4. review on an annual basis the performance of rehabilitation specialists to determine continued eligibility for delivery of rehabilitation services;
5. submit to the department, on or before January 1st of each year, a report of reemployment benefits provided under this section for the previous fiscal year; the report must include a general section and sections related to each

rehabilitation specialist used under this section; the report must also include for each section a statistical summary of all rehabilitation cases, including

A. the estimated and actual cost of each active rehabilitation plan;

B. the estimated and actual time of each rehabilitation plan;

C. a status report on all individuals completing or terminating a reemployment services program including a return to work date; and

D. the cost of reemployment services;

6. maintain a list of rehabilitation specialists who meet the qualifications established under this section; and

7. promote awareness among physicians, adjustors, injured workers, employers, employees, attorneys, training providers, and rehabilitation specialists of the reemployment program established in this subsection.

(c) If an employee suffers a compensable injury that precludes return to the job at the time of injury; within 30 days, the physician must notify the employer whether the client is capable of performing modified work. Modified work is available at a reduced wage and the employee refuses to accept this work, the employee's benefits shall be changed to TPD. The employee shall be fully evaluated for participation in rehabilitation services within 60 days after the date of injury. A full evaluation shall be performed by a qualified rehabilitation specialist selected by the employer within 30 days of referral. If, in the opinion of the qualified rehabilitation specialist, the medical, physical, or emotional state of the employee precludes a full evaluation, the rehabilitation specialist shall prepare a preliminary evaluation. A preliminary evaluation shall include the reasons why a full evaluation cannot be made, an opinion as to when the employee will be eligible for a full evaluation, and any information that would be included in a full evaluation that can be determined and reported by the rehabilitation specialist at the time of the preliminary evaluation. If the employer does not timely schedule an evaluation under this subsection, the reemployment services administrator shall retain a qualified rehabilitation specialist to perform the evaluation. The employer shall pay the reasonable costs of an evaluation under this subsection. To facilitate this, the board may require a rehabilitation professional to work with the independent multiple discipline panel of board certified physicians referred to in AS 23.30.095(k).

(d) A full evaluation by a qualified rehabilitation specialist shall include a determination whether rehabilitation services are necessary.

(e) An employee is not eligible for reemployment benefits if

(1) the employer offers employment within the employee's physical capacities at a wage equivalent to at least 60 percent of the worker's gross hourly wages at the time of injury and the employment prepares the employee to be employable in other jobs that exist in the labor market; or

(2) the employee has been previously rehabilitated in a former workers' compensation claim and returned to work in the same or similar occupation in terms of physical demands;

(f) Refusal by an injured employee to participate in an evaluation results in forfeiture of disability compensation for the period the refusal continues. The reemployment services administrator shall find that an employee refused to participate in an evaluation if the employee fails to cooperate with the rehabilitation provider as outlined in the regulations.

(g) After the evaluation is completed, the employee must elect in writing to the reemployment services administrator within 14 days whether or not to participate in further rehabilitation services.

(h) The employee's election not to participate in rehabilitation services is final, provided, however, that the employee shall have the option within 30 days of the notice under subsection (g) to notify the administrator in writing that he now wishes to participate in rehabilitation services.

(i) After the employee has elected to participate in vocational rehabilitation services for which he is eligible, the vocational rehabilitation counselor will, within 90 days, submit a vocational rehabilitation plan to concerned parties including the reemployment services administrator which will enable the employee to return to suitable gainful employment. A rehabilitation plan may consist of any of the following; however, if the employee can be restored to suitable gainful employment with rehabilitation plans of higher preference, then a rehabilitation plan of a lower preference need not be offered by the employer. The order of preference for rehabilitation plans is return to work

(1) with the same employer at the same or modified job as

at the time of injury;
(2) with the same employer at a new job using transferrable skills;
(3) with a new employer at the same or modified job;
(4) with a new employer in a new job using transferrable skills;
(5) through developing already existing skills or acquiring new skills through on-the-job training;
(6) after developing already existing skills or acquiring new skills through vocational training;
(7) after developing already existing skills or acquiring new skills through academic training;
(8) in self employment; and
(9) through direct placement in an unrelated job not using transferrable work skills.

The reemployment plan must include the following:
(1) an occupational goal in the labor market;
(2) a plan to acquire the occupational skills to be employable;
(3) the cost estimate of the reemployment plan, including provider fees; the amount of tuition, books, tools, and supplies; transportation; temporary lodging; or job modification devices;
(4) the estimated length of time that the plan will take;
(5) the date the plan will commence; and
(6) the time of medical stability as provided by the doctor.

(j) The employee, rehabilitation specialist, and the employer shall sign the reemployment services plan.

(k) After the injured worker has elected to participate in reemployment benefits, noncooperation by the worker shall result in the termination of reemployment benefits on the date of noncooperation. Employee shall have the right of review by the board. Noncooperation means failure to:
(1) keep appointments;
(2) maintain average grades;
(3) attend designated programs;
(4) maintain contact with the rehabilitation specialist;
(5) cooperate with the rehabilitation specialist in developing a reemployment plan and participating in activities relating to reemployability on a full-time basis;
(6) comply with the employee's responsibilities outlined in the reemployment plan; or
(7) participate in any planned reemployment activity as determined by the reemployment services administrator.

(l) Reemployment benefits may not extend past two years from date of plan acceptance, at which time the benefits expire, except at the discretion of the employer.

(m) If the employer and employee fail to agree in writing on the submitted vocational rehabilitation plan within 14 days, the employee shall submit an alternative plan to the rehabilitation within an additional 14 days. In the event of a dispute, the reemployment services administrator or his staff may either write a decision or schedule a formal rehabilitation conference to be held within 10 days of receipt of the alternative plan. If a hearing is held, a decision as to the appropriate plan shall be issued with 10 days after the hearing. The reemployment services administrator's decision is binding unless a party seeks review of the decision by requesting a hearing with the Board in accordance with AS 23.30.110. The reemployment plan shall be initiated when the employee is considered physically able to engage in the plan by the employer's physician.

(n) A vocational rehabilitation plan may not exceed up to 37 training weeks, except that the reemployment services administrator may order a plan up to an additional 37 training weeks. This subsection does not prohibit 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. The employer shall pay all costs of the rehabilitation plan under this section. These monies shall only be paid if the employee participates in its rehabilitation plan. Temporary disability under AS 23.30.185 or AS 23.30.200 shall be paid throughout the rehabilitation process at the following rate:

(1) 80% of the employees spendable weekly wages for the first 37 weeks, and thereafter

(2) 70% of the employees spendable weekly wages until the completion or termination of the plan.

A permanent impairment benefit remaining unpaid upon the completion or termination of the plan shall be paid to the employee in a single lump sum.

(o) For purposes of this section, suitable gainful employment means employment that is reasonably attainable in the light of an individual's age, education, vocational history, and physical capabilities, and that offers an opportunity to restore the individual as soon as practical to a remunerative occupation that takes into consideration the local labor market and as determined by section AS 23.30.220.

(p) Labor market means a geographical area that offers employment opportunities in the following priority:

(1) area of last employment;
(2) area of residence;
(3) the State of Alaska;
(4) other states.

(q) A "qualified rehabilitation specialist" means a person who by education and experience has the skills to work in the field of rehabilitation as determined by Board established regulations. Only a qualified rehabilitation specialist may accept case assignments as a case manager and sign eligibility determinations and reemployment plans. The board shall adopt rules for training and supervision of those persons employed as paraprofessionals in rehabilitation specialist work. For those persons seeking to become a qualified rehabilitation specialist, the board shall adopt standards for training and supervision.

VII. BARRING ALL LIABILITY FROM AN EMPLOYER (BOARD AND COURT) TO AN EMPLOYEE WHO COMMITS AN UNTRUTH ON HIS OR HER PREEMPLOYMENT QUESTIONNAIRE

COMMENTS

Much of this has been discussed under number IV above. No one can know what the courts will do with this. There is no way to provide a prompt adjudiciation of whether a worker committed an intentional falsehood, and it is not likely that the courts will deprive a worker of both compensation benefits and civil liability (if the employer was negligent) without a firm adjudication of intentional fraud.

RECOMMENDATION

We favor the approach, but feel there must be a standardized questionnaire with admonitions on it and, if need be, provisions to help illiterates complete it. We also

recommend that there be some proviso for prompt determination of whether fraud has been committed in order that a carrier not pay benefits if they are not supposed to be paid, but not withhold benefits if they are supposed to be paid.

ACTIONS PROPOSED

There should be a statute providing for forfeiture of civil liability against the employer, as well as benefits under the workers' compensation law. This would be easiest if it were done under Title 11 (the criminal code). This will require legislation to effect what has just been set out, administrative cooperation in getting these matters to the proper authorities on a relatively emergency basis, and executive allocation of funds to handle the hearing which declares these rights to have been waived.

ARGUMENTS AND PROBLEM AREAS

Equal protection questions will doubtless be raised as they always are with any forfeiture or waiver. Additionally, we are all aware that, if employment is down, as it is now, a person needing a job will say what is necessary to get that job. This will make that person a "good guy" in the eyes of the court, and there will be an effort to avoid this waiver, particularly in the event of a hard case where the employee is very badly injured and the employer was quite negligent.

VIII. NO DOCTOR SHOPPING

COMMENTS

In the first sentence, the word "attendance" should be "attendants". We feel that the cases where there is no specialist within the State (in an area where an employee needs treatment) will be sufficiently rare that the Board can handle these as special matters. We worry that the transfer to a specialist will be considered a change in "attending physician" because this is the meaning that the medical profession attaches to such a change.

RECOMMENDATION

We concur fully with requesting the passage of Section VIII. There will have to be considerable public education and the adoption of regulation covering the Notice of Change of a physician. We do recommend that the term "attending physician" be changed to be "primary physician". This will eliminate the semantical problem. We feel it advisable that the problems of prior notification be avoided by providing that the notice must be "within 14 days" of the change. This is in line with the present law.

ACTIONS PROPOSED

Aside from the semantical suggestion above, the Department and the Board should prepare regulations and forms to cover change of physician. We would prefer that the amendment be as follows:

"The employer shall furnish medical, surgical, and other

attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. However, if the condition requiring the treatment, apparatus, or medicine is a latent one, the two-years period runs from the time the employee has knowledge of the nature of his disabililty and its relationship to his employment and after disablement. It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the Board. The Board may authorize continued treatment, or care, or both, as the process of recovery may require. When medical care is required, the injured employee may designate a licensed physician inside the state where the employee resides to render the care. Upon procuring the services of a physician, the injured employee shall give proper notification of his selection to the employer within a reasonable time after first being treated. The employee may not make more than one change in the employee;s choice of primary physician without the written consent of the employer. Referral to a specialist by the employee's primary physician is not considered a change in physicians. Notice of a change in the primary physician shall be given within 14 days after the change.

ARGUMENTS AND PROBLEM AREAS

There will always be emergencies where there is not time to go through the notification procedure. This should be covered by the regulations. There will always be situations where an employee is referred to more than one specialist during the same time period. Once again, this can be worked out with the accompanying regulations.

IX. COURSES OF TREATMENT TO BE WRITTEN IN ADVANCE

COMMENTS

This proposal will greatly increase the medical cost of treatment. Physicians are not magicians. They cannot predict with exactitude at what point during a "course of treatment" a person will actually be cured. In order to avoid malpractice, all physicians will have to recommend a maximum course of treatment <u>in case such is needed</u>. Unified Fairbanks does not feel that the proposed amendment is workable, nor that the cost increase necessary for a physician to prevent malpractice is money well spent. We believe this amendment will create an increase in costs.

RECOMMENDATION

We recommend no amendment to Subsection C.

ACTION PROPOSED

The evil sought to be remedied here, namely that of

endless treatments without real value, should be addressed by a study committee to find a feasible way of handling this situation. Hopefully, the way should not increase the cost.

ARGUMENTS AND PROBLEM AREAS

See above.

X. A DEFENSE MEDICAL EXAMINATION AFTER 14 DAYS AND THEN EACH 30 DAYS THEREAFTER

COMMENTS

Because of the definition of the word "physician" contained later on, it would be advisable to remove the words "or surgeon" in line 4 regardless of what else is done. Additionally, there may be problems with respect to types of practice (hypnotic, chiropractic, osteopathic, religious, etc.) and personality conflict which will sooner or later result in problems under this section whether or not amended. We felt that the present statute was adequate and provided for that there was no need to excite everyone with the idea of a defense medical exam every 30 days and that money expended thereby would be a waste. We believe that this would result in increased costs. We believe it should be made clear that this examination shall be at the request of the employer or his carrier only.

RECOMMENDATION

That we leave Section (e) as it currently is and schedule this problem for study as will be referenced later.

ACTIONS PROPOSED

Scheduling this problem for study in the future.

ARGUMENTS AND PROBLEM AREAS

Sending a Jehovah Witness to a hematologist is not likely to be functional. This sort of preference, as mentioned above, should be considered in study.

XI. USUAL, CUSTOMARY AND REASONABLE FEES

COMMENTS

This is a very good idea. Care will have to be taken by the Board in the manner in which it adopts a UCR fee so that that fee does not become known to medical practitioners (see below).

RECOMMENDATION

We join in requesting passage.

ACTIONS PROPOSED

Same (with caution so that the UCR schedule is not made available). The board might wish to use the Health Insurance Association of America UCR schedule.

ARGUMENTS AND PROBLEM AREAS

(deleted)

XII. REPEALING RELIANCE ON AMA GUIDE FOR EVALUATION OF PERMANENT IMPAIRMENT AND OBTAINING A BOARD CONSULTANT ON APPROPRIATENESS, NECESSITY AND COST OF MEDICAL SERVICES

COMMENTS

This may be the one place where "may" should not be replaced by "shall". The repeal of the reliance on the AMA Guide is then undone later on in this bill with a subsequent adoption of the same guide. Additionally, we feel that new subsection (k) takes care of the problem without needing to spend extra monies on medical consultation.

RECOMMENDATION

We are negative on this repeal and new rule.

ACTIONS PROPOSED

None.

ARGUMENTS AND PROBLEM AREAS

Another layer of medical authority may well simply confuse the issue. Enough corrections have been taken in other sections.

XIII. INDEPENDENT MEDICAL EXAMINATION

COMMENTS

The use of a single physician as an independent medical examiner became obsolete in the medical profession several years back. We do not have, in Alaska yet, multiple discipline panels of Board certified physicians, and hence this portion of our medical practice is going outside. Alaska currently has a number of clinics who can perform this function and we are

recommending a medical update by using them (unless the employer or carrier prefers an outside group). The principles set forth are good. We have some reservations about using "clear and convincing objective evidence" since the medical meaning of "objective evidence" differs considerably from the lay persons definition.

RECOMMENDATION

To reword the proposal of WCCA creating the same effect but updating the medical services and apportioning the weight to be given to the testimony of such a panel to be equal with the preference already given to a "treating physician".

ACTIONS PROPOSED

We recommend the following wording for Section (k) of AS 23.30.095(k) to read: "In the event of a medical dispute regarding determinations of causation, medical stability, degree of impairment, functional capacity, the amount and eficacy of the continuance of or necessity of treatment, or compensability between the employee's attending physician and the employer's independent medical evaluation, an independent multiple discipline panel of board certified physicians shall conduct an examination of the employee. This panel shall be selected by the Board from a list established and maintained by the Board. The cost of the examination and medical report shall be paid by the employer. The report of the panel shall be furnished to the

Board and to the parties within 14 days after the examination is concluded. The opinion of the independent panel shall, in the absence of clear and convincing evidence to the contrary, have equal weight with the opinion of the attending physician. No person may seek damages from an independent multiple discipline panel of board certified physicians for the rendering of the opinion described in this subsection or for testimony by any member of said panel under this subsection, except in the event of fraud." This will require that the Board entertain applications from various clinics currently formed and to be formed for appointment to the panel list. Publication of the legislative change will probably be adequate to form a number of these panels within the state. The Department will probably need to assign an employee (part-time) to handle the rotating list. That same person (or computer) could handle the other rotating lists suggested in this legislative package.

ARGUMENTS AND PROBLEM AREAS

Care should be taken to watch out for panels which spring up without fully qualified people in the necessary disciplines on them. There should be a regulation describing the disciplines which must be available on any panel and the requirement of Board certification to handle this problem. If the weight given the panel is equal to the weight given the attending physician, and if the two differ, then the defense

medical examination will be the swing vote. This sort of apportionment is necessary because medicine is not yet reduced to total certainty. A demonstrably incorrect judgment call (in hindsight) and will produce lawsuits even if only between the physicians involved.

XIV. STATUTE OF LIMITATION TRIGGERED BY DIRECT COMPENSATION BENEFITS

COMMENTS

This amendment clarifies a confusing situation so that litigation in this area will no longer occur.

RECOMMENDATION

Support for the WCCA proposal.

ACTIONS PROPOSED

Adopt the WCCA proposal.

ARGUMENTS AND PROBLEM AREAS

Knowledge of the commencement of the Statute of Limitations is something that is difficult to come by for a layman. In all probability, regulations will be needed providing that, upon payment of the final payment, there be an accompanying letter or form indicating that the Statute of Limitations commences as of the date of that letter.

XV. NO PRESUMPTION OF COMPENSABILITY IN MENTAL INJURY CASE

COMMENTS

The term "mental injury" is undefined in law and in medicine. What is probably meant here is a stress related injury with manifestations primarily found in brain dysfunction. Without clarifying the term, much litigation will be required. If we adopt the "preponderance of evidence" test recommended above, then there is no need for this section at all.

RECOMMENDATION

The idea is good. The proposal should be adopted to eliminate litigation. The definition of the injury should be made clear. We prefer the adoption of the "preponderance of the evidence" test over the adoption of this section.

ACTIONS PROPOSED

Same as above.

ARGUMENTS AND PROBLEM AREAS

Only if the term is not defined will there be much litigation to determine what is meant. All injuries have a mental aspect. Almost all diseases commonly thought of as mental diseases have physical manifestation.

XVI. BOARD'S FACTUAL DETERMINATIONS CONCLUSIVE IF ANY EVIDENCE AT ALL

COMMENTS

See our comments under Section I.

RECOMMENDATIONS

See our recommendations under Section I.

ACTIONS PROPOSED

See our actions proposed under Section I.

ARGUMENTS AND PROBLEM AREAS

See our arguments and problem areas under Section I.

XVII. BOARD HAS ONE YEAR TO RECONSIDER ERRONEOUS FACTUAL FINDINGS

COMMENTS

This is a technical correction to make clear when the one year starts running. The correction is needed and does make the situation clear. This doubtless supplements the "any evidence" rule found in Sections XVI and I, making Board determinations relatively unappealable on the facts.

RECOMMENDATION

We join the WCCA recommendation.

ACTIONS PROPOSED

Adopt the proposed amendment.

ARGUMENTS AND PROBLEM AREAS

This section will doubtless now be used because of the cutoff of appellate rights if the "any evidence" rule is adopted. It is part of an attempt to make the Board's decision final, except on questions of legal interpretation. The Board should anticipate increased usage. There may be staffing

implications in the increased usage.

XVIII. PENALTIES CAN BE REDUCED

COMMENTS

A necessary supplement to the amendment proposed in Section V.

RECOMMENDATIONS

See comments in Section V.

ACTIONS PROPOSED

See comments in Section V.

ARGUMENTS AND PROBLEM AREAS

See comments in Section V.

XIX. REAFFIRMATION OF LAST INJURIOUS EXPOSURE RULE

COMMENTS

Simply a restatement of the current law.

RECOMMENDATION

A good rule. It can't hurt to repeat it.

ACTIONS PROPOSED

Passage of the amendment.

ARGUMENTS AND PROBLEM AREAS

None, since the rule is already in effect.

XX. ANNUAL REPORTING DATE AND PENALTY INCENTIVE

COMMENTS

Another portion of the procedure set forth in Sections

V and XVIII.

RECOMMENDATION

See comments under Section V.

ACTIONS PROPOSED

See comments under Section V.

ARGUMENTS AND PROBLEM AREAS

See comments under Section V.

XXI. MAXIMUM AND MINIMUM ON WEEKLY DISABILITY PAYMENTS

COMMENTS

While looking like a major reduction, this will probably effect very few injured persons under the various rules currently existing. For an injured employee with a wife and children, benefits will often be less than unemployment benefits.

RECOMMENDATION

Adopt the proposal and then monitor the situation to see whether injured employees are waiving disability in order to collect unemployment.

ACTIONS PROPOSED

Adopt the proposal.

ARGUMENTS AND PROBLEM AREAS

(deleted)

REINSTATE REDUCED BENEFITS FOR THOSE RESIDING OUT-OF-STATE

COMMENTS

This portion of Section XXI seeks a return to reduced benefits for those workers who reside out-of-state. It also indicates that only instate work will be used to calculate earnings in the past. Between the two, the long term effect will hopefully be to provide a substantial disincentive to residents of other states with respect to working in Alaska. This is a tradeoff for the increase in permanent partial disability.

RECOMMENDATION

Adopt the proposal in this form unless the Attorney General's Office suggests one less likely to be attackable in court.

ACTIONS PROPOSED

Same.

ARGUMENTS AND PROBLEM AREAS

A case entitled Brown v. Alpac in the Supreme Court found severe difficulty with compensating workers who reside out-of-state less than those who reside instate. There are equal protection and freedom of travel problems possible here and plans should be made to defend this scheme.

XXII. FACTORS TO BE CONSIDERED IN DETERMINING PERMANENT TOTAL DISABILITY

COMMENTS

A part of the package very very rarely used.

RECOMMENDATION

Adopt the amendment and monitor it for effect.

ACTIONS PROPOSED

Same.

ARGUMENTS AND PROBLEM AREAS

The reference to "area of last employment" may refer to work available in another state. This may be part of the equal protection and freedom of travel problem. However, it doesn't seem likely that this would be an area of attack. This seems to eliminate the problem of whether a person is still able to work if that person can hold only some job that is only available in another state.

XXIII. FAILURE TO ACHIEVE EMPLOYABILITY NOT NECESSARILY PERMANENT TOTAL DISABILITY

COMMENTS

Presumptively, this refers to the person who could, with more effort put forth, hold some job that is available somewhere in Alaska, but does not do so.

RECOMMENDATION

We have no idea of the effect and therefore join WCCA in advocating the amendment.

ACTIONS PROPOSED

Same.

ARGUMENTS AND PROBLEM AREAS

If this is not spelled out to some greater detail in regulations, there will have to be a series of court cases to ascertain what its effect may happen to be.

XXIV. TEMPORARY TOTAL DISABILITY LIMITED TO TWO YEARS OR MEDICAL STABILITY, WHICHEVER IS FIRST

COMMENT

Under the proposed definition of medical stability found in later sections, this will mean that TTD will last only so long as the injured employee makes objectively measurable improvement each 45 days. It would require at least 16 objectively measurable improvements to keep TTD running for two years. Only horrendous and compound injuries should ever find their way into that category. Most severely injured people will be without improvement for a 45 day period somewhere during their recovery and hence, they will pass directly to the permanent partial disability rating.

RECOMMENDATION

We have no idea of the effect and therefore join WCCA in advocating the amendment.

ACTIONS PROPOSED

Same.

ARGUMENTS AND PROBLEM AREAS

Medical professionals are likely to create illusory improvements to avoid this rule and to permit their patient to recover to a true point of medical stability before being permanently rated. Alternatively, people will be rated for permanent partial disability long before they have recovered and unless there is a motion to amend the Board's findings within one year, the carrier will not get any funds (which have been paid) returned. This could be expensive.

XXV. PERMANENT PARTIAL DISABILITY RENAMED AND BASED ON $240,000 FOR A "WHOLE MAN", SPECIAL FACTOR TO REDUCE PAYOUT FOR THOSE LESS THAN 31% DISABLED

COMMENT

Almost all disabilities fall within the 0-30% category and hence, will be cut back rather than based on the $240,000 whole man. This will be a very beneficial amendment for those quite severely injured. The change in caption was probably a transcribing accident and should be rectified. The $250.00 minimum should be adequate to lock in the reduced payment for those with only minor disabilities such as loss of a hand. The amendment further readopts the American Medical Association's guides to evaluation of permanent impairment (repealed earlier in this package) and provides for the Board to adopt and use a supplemental schedule if they so desire. The language probably

should be "shall" rather than "may" so that this supplemental schedule does not have to be created by courts on appeal.

RECOMMENDATION

Adopt the amendment and monitor it for effect. Further study is absolutely essential here.

ACTIONS PROPOSED

Same, but restore the caption to use the word "disability" so as to be consistent with other sections. Also, "may" should be changed to "shall". Further study is needed badly.

ARGUMENTS AND PROBLEM AREAS

It is to be anticipated that people less than 31% disabled will test this section in the courts. It appears that it will withstand the test. Further study, however, is absolutely essential.

XXVI. CUTTING OFF TEMPORARY PARTIAL DISABILITY IN THE SAME MANNER AS TEMPORARY TOTAL DISABILITY

COMMENTS

The two-year and "medical stability" problems foreseen above in Section XXIV are encountered here again.

RECOMMENDATION

See number XXIV.

ACTIONS PROPOSED.

See number XXIV.

ARGUMENTS AND PROBLEM AREAS

See number XXIV.

XXVII. WAGE EARNING CAPACITY FOR CALCULATION OF PERMANENT DISABILITY TO BE DETERMINED BY ACTUAL SPENDABLE WEEKLY WAGE OR SET BY BOARD

COMMENTS

This is the only use of the term "actual spendable weekly wage". It is undefined and is obviously intended to be different from "spendable weekly wage" which is very narrowly defined. Until this term is defined by regulation or by the courts, the Board will probably have to have a hearing and set the wage earning capacity of each person who becomes eligible for permanent disability of any sort. Since this is the compensation on which the amount that the injured person will receive is based, we can only hope that settlements will become a pattern. Otherwise, the Board will be snowed under with a new type of hearing which only occasionally occupied them in the past.

RECOMMENDATION

Adopt the amendment and monitor its effect.

ACTIONS PROPOSED

Adopt the amendment and monitor its effect.

ARGUMENTS AND PROBLEM AREAS

This appears to say that the wage earning capacity of a

person will be based upon the spendable weekly wage which the person is earning at the time he or she is injured. The use of wages contempory with the injury is to be encouraged, particularly because of the effects of Alaska's boom and bust economy when a historical earnings criteria is used. The inconsistencies between this and the next section may result in litigation. Our discussions indicate that this is a more desirable approach in Alaska's economy (see our comments in the next section).

XXVIII. BOARD MUST DETERMINE EMPLOYEE'S GROSS WEEKLY EARNINGS

COMMENTS

This amendment is imposed upon the delightful conundrum which has been AS 23.30.220(a). The section as it currently exists begins by saying that the current wage at the time of injury is the basis for computing compensation. It goes on to provide that this is current receivable wage and that this is calculated on the basis of earnings history only. There are two formulas that are customarily used in workers' compensation statutes. One bases the calculation of compensation on the earnings of the employee at the time of injury. The other bases the calculations on a wage earning history. This latter has created much of the problem on which we are currently working. In a boom and bust economy, a workers' compensation system that

is based upon earnings history finds that in boom periods, the workers benefits are calculated on his earnings during the bust period and hence, are low, and there are plenty of jobs at high wages available as an incentive to return to work. At this time then, claim payments are low and profits are high. On the other side of the mountain, when the economy is going into a bust, the payments to the injured worker are based on earnings history and hence, are high, and wages available are low (if any). This provides a disincentive to return to work and during this period, there would normally be no profit at all for the insurance carriers since the profit was drawn during the boom time. Alaska has, however, elected to try to provide profit both during boom and bust while still calculating benefits based on historical wages. The effect of these two policies makes for low premiums at the boom time and high premiums at the bust time, thus further damping the economy and permitting those employers who can come into the state from outside (using an all state endorsement without the necessary Alaska riders and rates being paid) to underbid employers who are residents of the state.

RECOMMENDATION

Consider basing benefits paid on wages earned at the time of the injury as a condition precedent to the adoption of the amendments. Beyond this, adopt the amendments and monitor for the problems set forth below.

ACTIONS PROPOSED

Adopt the proposed amendment but change the definition of spendable weekly wage to one providing that it is based on the wage being earned at the time of injury.

ARGUMENTS AND PROBLEM AREAS

The judgment of two years, or 18 months out of two years, eliminate much of the flexibility in determining an employees compensation as a result. Those seeking to go back to work after a workers' compensation (or other) injury lasting, say, a year to a year and five months will have virtually no workers' compensation coverage. This will undoubtedly be litigated on equal protection and probably other grounds.

XXIX. REDUCTION IN BENEFITS FOR PEOPLE COLLECTING PENSION OR PROFIT SHARING BENEFITS

COMMENTS

A wise decision since those who retire would not, in most instances, be the ones sought to be covered by workers' compensation benefits.

RECOMMENDATION

Adopt the amendment.

ACTIONS PROPOSED

Adopt the amendment.

ARGUMENTS AND PROBLEM AREAS

There will probably be equal protection problems based

on the fact that a worker may have accumulated pension benefits over a great number of years. A further problem will be the employee who, because of the compensable injury, is forced into disability retirement. Presumptively, these will be resolved in favor of the amendment.

XXX. NON-DISCRIMINATION IN HIRING AGAINST INJURED PERSONS EXCEPT DISCRIMINATION PERMITTED IF EMPLOYER CONSIDERS "SAFETY PRACTICES" OR "PHYSICAL AND MENTAL ABILITIES EMPLOYER MAY REQUIRE QUESTIONNAIRE COMPLETION TO DETERMINE "PHYSICAL AND MENTAL CAPACITY"

COMMENTS

We were unable to consider this amendment adequately because of the obvious conflict between Section (a) and Sections (b) and (c). It appears that the draftsman resolved the conflict by including everyone's proposed rule.

RECOMMENDATION

We will go along with WCCA, but do not endorse conflicting rules.

ACTIONS PROPOSED

Put this on the shelf until a clear rule can be drafted.

ARGUMENTS AND PROBLEM AREAS

The obvious conflict between the sections. There are also possible conflicts with the federal law prohibiting refusing to hire because of disability.

XXXI. REPEAL OF MOST RAGLAND BENEFITS

COMMENTS

The Ragland case provided that an employee's wage include fringe benefits paid and room and board if supplied. This removes the room and board unless it is taxable (true only with town jobs where room and board not supplied for the convenience of employer). Fringe benefits are not taxable to the employee, if they are paid into a trust, unless they are actually or constructively received by the employee. This amendment leaves only pension or profit sharing benefits for older and vested employees to be considered as part of an employee's income. This is a compromise and, in the view of Unified Fairbanks, this is an agreeable reduction in benefits offset against a possible reduction based on collateral benefits received by the employee.

RECOMMENDATION

Unified Fairbanks considered adoption of this amendment in consideration of dropping potential adoption of an offset against collateral benefits rule. We therefore recommend its adoption.

ACTIONS PROPOSED

If this amendment is not adopted, fairness would decree that we then consider an amendment to AS 23.30.225 providing, "Where an employee receives periodic disability benefits under

the provisions of a pension plan, disability or accident insurance plan, financed in whole or in part by the employer, the aggregate benefits payable for temporary total disability, temporary partial disability, permanent partial, and permanent total disability shall be reduced by an amount equivalent to such portion of the employer finance benefits paid to an employee in excess of temporary or permanent disability benefits calculated on the employees spendable weekly wages.

ARGUMENTS AND PROBLEM AREAS

Non-union employers on Davis-Bacon jobs often take the fringe benefit sums and place them in a separate account. This account is to be used to pay fringe benefits. However, if an employee does not work long enough to vest any interest in those fringe benefits (which is the rule on construction jobs), the money may return to the employer. Since the chance of vesting is minimal and since under these circumstances these payments are not deductible to the employer, they are included in gross wages paid for the purpose of calculating workers' compensation premiums. If premiums are to be based on these sums, there may be lawsuits with respect to the way they are to be considered in gross earnings. It is probable that the "vested" requirement will shortcut any court test here.

XXXII. COMPENSABLE INJURIES NOT TO INCLUDE "MENTAL INJURY CAUSED BY MENTAL STRESS"

COMMENTS

The same defect of definition is found in this reference to "mental injury" as is found in Section XV. Please see comments on Section XV.

RECOMMENDATION

Please see comments at Section XV.

ACTIONS PROPOSED

Please see comments at Section XV.

ARGUMENTS AND PROBLEM AREAS

Please see comments at Section XV.

XXXIII. MEDICAL STABILITY (TERMINATING PAYMENT OF ALL TEMPORARY BENEFITS) OCCURS WHEN NO OBJECTIVELY MEASURABLE IMPROVEMENT HAS OCCURRED TO THE INJURED EMPLOYEE IN ANY 45 DAY PERIOD

COMMENT

This may be rebutted by clear and convincing evidence, but it divorces the medical definition of "medical stability" (meaning that the patient is improved as much as he or she is reasonably expected to improve) from the meaning of medical stability for workers' compensation purposes. Because of the burden of proof associated with it, this should greatly increase the number of hearings before the Board.

RECOMMENDATION

This has been earlier discussed in Sections XXIV and XXVI. Unified Fairbanks agrees that temporary benefits should be terminated and permanent benefits (if applicable) should be started immediately upon medical stability as that term is used by the medical profession. We hope the WCCA will agree to an amendment bringing their definition more in line with that of the medical profession.

ACTIONS PROPOSED

Try to redefine "medical stability" more toward that time when an injured person first reaches a condition in which whatever disability has been caused by the compensable injury is not likely to become measurably less in the near future.

ARGUMENTS AND PROBLEM AREAS

Doctors will probably continue to apply their definition of medical stability and will take whatever reporting steps are necessary to circumvent the imposition of the "45 day rule".

XXXIV. REPEAL OF THE CURRENT METHOD OF DETERMINATION OF WAGE EARNING CAPACITY

COMMENTS

A necessary part of the new method of determination proposed.

RECOMMENDATION

We concur with WCCA providing, of course, the new sections are adopted.

ACTIONS PROPOSED

Adoption as part of the overall package.

ARGUMENTS AND PROBLEM AREAS

None not mentioned in the section amending the new method of determination of wage earning capacity.

XXXV. REPORTING DURING TRANSITION

COMMENTS

This section is only needed if we go to the annual reporting format in order to permit the State to accumulate easily accessible figures.

RECOMMENDATION

To be adopted, if we adopt the annual reporting approach.

ACTIONS PROPOSED

Same.

ARGUMENTS AND PROBLEM AREAS

These are set forth in our recommendations on the principal statutory changes.

XXXVI. EFFECTIVE DATE

COMMENTS

A good choice.

RECOMMENDATIONS

A PR campaign with recompilation of booklets available including the copies of the applicable code and regulation sections.

ACTIONS PROPOSED

A good date to start. Be sure to use lots of PR and recompile all publications, including the gray book.

ARGUMENTS AND PROBLEM AREAS

None.

XXXVII. LEGISLATIVE TASK FORCE

COMMENTS

As we addressed each of the problem areas, a number of them were set forth as needing a legisatively oriented task force, to monitor changes being made, and to resolve those problems not yet addressed.

RECOMMENDATION

Immediate creation of a task force containing legislators, insurance carriers, medical care providers, attorneys (from both sides), rehabilitation personnel, labor unions, executive and administration representatives, and employers. This task force should first address those problems which have not been addressed by legislative, executive, or administrative changes and later on, they should monitor the effect of the changes now being made. Only in this way will we

be able to hone these problems down to a workable point.

ACTIONS PROPOSED

Establishment of the above committee forthwith.

ARGUMENTS AND PROBLEM AREAS

The function of this committee is to address problems. Its creation will do a good deal toward satisfying the employers whose premiums ~~their~~ are too high. Costs should be minimal.

his argument by stating that any ductwork which is not installed according to specific guidelines has the potential of being installed improperly. Thus, to alleviate the installation problem, he recommended that the State adopt—or at least reference—SMACNA's *HVAC* ing" stage from all of the testimony they received. Staff members of the Commission indicate that Vermeulen made his point and that the State will more than likely adopt his recommendations. We'll keep you posted on further updates. □

Everything You Wanted to Know About the CAL SMACNA Workers Compensation Captive, But Were Afraid to Ask

By James Gallone, CPCU, President CAL SMACNA Business Insurance Agency, Inc.

In order to give you a full picture of how the captive works, I need to digress for a bit and give you a synopsis of the inside workings of the California Workers Compensation System. Once the inner workings of this system are laid before you, it will be easy to see how the captive works to your advantage at every turn.

How are my workers comp rates calculated?

Every insurance company in the state is responsible for filing a Unit Statistical Report with the Workers Compensation Insurance Rating Bureau (WCIRB) for every employer who has workers compensation insurance with them. This report contains the premium and losses that the employer sustained during the year broken down by rating class.

The rating class is one of 232 categories where one of your workers can be categorized in order to determine his workers compensation rate. A common category in our industry is Sheet Metal Work, Erection, Installation or Repair ($16 or more per hour), Code 5542, rate $9.05.

By using three years worth of these statistics, the WCIRB determines by statistical analysis what rates are necessary to pay claims and insurance company expenses for each workers compensation class. For example, in the rate class 5542 mentioned above, the rate as of 1/1/86 was $6.66. As of 7/1/87, that rate had climbed to $9.05, almost a 36 percent increase in a year and a half.

By contrast, the rate for roofers on 1/1/86 was $30.33. By 7/1/87, it was $33.85 and had increased only a little less than 12 percent during the same year and a half.

Are the rates that the WCIRB promulgates the minimum rates that an insurance company can charge for workers compensation?

Yes. California is a minimum premium state. Companies can charge more than the minimum but they cannot charge less.

There is, however, a legal way for you to pay less and it involves the Unit Statistical Report that we mentioned. Not only is that report used to set the minimum rates, it is also used to set an individual company's Experience Modification Factor (EMF).

If your account develops over $14,500 in premium using the minimum rates, you automatically qualify for Experience Rating. By a set formula, the WCIRB measures the number of claims you have, the claims you have over $2,000 and your premium.

If you are above average, your Experience Modification will be 1.00. If you are above average, your Experience Modification will be less than one. And if your claims are worse than average, your experience Modification will be greater than one.

So the Experience Modification Factor can affect my rates?

Very much. Let's say that you have a $200,000 payroll of sheet metal workers in the 5542 code which charges $9.05 for each $100 of payroll. The minimum rate that would be developed is $18,100. If this account had a number of losses and the Experience Modification Factor was 1.25, they would be charged $18,100 × 1.25 or $22,625.

If the account loss history was better than average and developed an Experience Modification Factor of .75, this account would be charged only $13,575.

Obviously, the Experience Modification Factor is very important. To my way of thinking, it is *THE* most important factor in your workers' compensation program for several reasons:

a) You can legally pay less for your workers' compensation insurance than your competitor.

b) A consistently low Experience Modification Factor means you probably have a good safety program and you are reaping the benefits of that program.

c) Unlike dividends—which are not guaranteed—a good Experience Modification Factor at least guarantees your rates for that year.

d) You can have some control over your Experience Modification Factor, whereas it is very difficult to control your dividend. □

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