HB

164

HOUSE COMMITTEE REPORT

(7)

Date Referred to Committee: April 2, 2003 **FURTHER REFERRALS: Finance**

Date of Committee Action: April 9, 2003

The JUDICIARY Committee considered: **HB 164**

HOUSE BILL NO. 164 **CLAIMS BY STATE-EMPLOYED SEAMEN**

"An Act relating to the state's sovereign immunity for certain actions regarding injury, illness, or death of state-employed seamen and to workers' compensation coverage for those seamen; and providing for an effective date."

Recommends it be replaced with [ ] HCS *or* [ ] CS *for* _____(_____)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [ ] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LEG
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

***NEW* FISCAL NOTES**
*Assigned by Chief Clerk's Office

List by Dept(s):	*FN#	Fiscal	Indet.	Zero
CRT				✓

***PREVIOUS* FISCAL NOTES**

List by Dept(s):	FN#	Fiscal	Indet.	Zero
ADM	1			✓
LWF	2	✓		

Signing ~~with~~ recommendations	Printed Last Name	DP	DNP	NR	AM
	SAMUELS	✓			
	HOLM	✓			
	COGHILL		✓		
	GREENBERG			—	
	OGG			✓	
	ANDERSON	X			
				✓	
Chair:	MCGUIRE	✓			
Chair:					

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Recommends it be replaced with [ ] HCS *or* [ ] CS *for* _____(_____)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [ ] New Title**

[ ] attach amendments
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*Assigned by Chief Clerk's Office

List by Dept(s):	*FN#	Fiscal	Indet.	Zero
CRT				✓

***PREVIOUS* FISCAL NOTES**

List by Dept(s):	FN#	Fiscal	Indet.	Zero
ADM	1			✓
LWF	2	✓		

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	SAMUELS	✓			
	HOLM	✓			
Gara	Cole		✓		
	Gruenberg			–	
	Ogg			✓	
Tom Anderson	ANDERSON	X			
Chair:	McGuire	✓			
Chair:					

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB 164
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected:
Title: Claims by state-employed seamen
BRU: Alaska Court System
Component: Trial Courts
Sponsor: Rules by request of the governor
Requester: House Judiciary
Component No.: 768

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type–Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

The court system does not anticipate any fiscal impact from the passage of HB 164.

Prepared by: Douglas Wooliver, Administrative Attorney
Phone 463-4750
Division: Alaska Court System
Date/Time 3/28/03 10:46 AM
Approved by: Stephanie Cole, Administrative Director
Date 3/28/2003
Agency: Alaska Court System

(Revised 9/2002 OMB)

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: HB 164
(H) Publish Date: 3/5/03

Revision Date/Time (Note if correction):
Dept. Affected: Administration
Title: An Act relating to state immunity for certain actions by state employed seaman....
BRU: Risk Management
Component: Risk Management
Sponsor:
Requester:
Component No. 71

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

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Other (Specify Type–Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

Very significant cost savings will be realized in future years as the AMHS and the few other maritime employees injury claims transition into the state average employee injury rate and cost.

The state funds its claim costs on a "cash flow" basis (appropriating only the amounts expected to be paid the next fiscal year) collected solely through interagency receipts (cost of risk allocations) assessed each agency.

If Risk Management (RM) was provided continuing funds for each FY (held in reserve until all outstanding liabilities from that period are paid - as an insurance carrier operates), then RM could immediately reduce premium assessments — reflecting the cost savings anticipated.

Future year premium assessments will reflect the cost reductions actually realized by this legislation as premiums are developed from actual claims expenses incurred.

Prepared by: J. Brad Thompson, Director
Phone
Division: Risk Management
Date/Time: 3/6/03 10:57 AM

Approved by:
Date: 3/6/2003
Agency: Administration

(Revised 9/2001 OMB)

HB164

Conceptual Amendment #1 - Failed

- Allow parties to negotiate ~~to~~ to be covered by WCOS comp law. But Don't mandate it.

With No agreement, the Jones Act will apply.

An analysis of AMHS crew claims costs compared to those provided under the Alaska Workers Comp Act (AWCA) for all other state employees.

The enclosed Excel workbook contains detailed breakouts of the actual incurred loss (cost to date plus anticipated expense) by each individual AMHS vessel for the past six fiscal years.

To objectively analyze the AMHS employee's injury experience to the state's overall employee injury rate, both frequency (number of claims) and severity (loss cost) are averaged and compared on a per 100 FTE (full time equivalent) basis.

Additional analysis was performed between AMHS and the five state agencies with the highest workers' compensation loss experience - to provide comparison to similar physically demanding jobs.

AMHS shows a five year average loss rate of 41 claims per 100 FTE's in comparison the state overall workers' compensation injury rate of 8, with the highest five agencies showing average loss experience of 10 claims per 100 FTE's.

On a cost per 100 FTE's analysis; AMHS actual claims experience during the last five years shows an average cost of $197,065 compared to the top five state agencies averaged cost of $64,145 during the same period.

The most significant difference is the award for the non-economic damages, not provided under workers compensation remedies and that life illnesses that are alleged to manifest during a voyage are covered under the Jones Act.

AMHS CREW CLAIMS
FREQUENCY TO 100 FTE'S

FISCAL YEAR	2002			2001			2000			1999			1998			TOTALS
SHIP	# Claims	FTEs	#/100FTEs	# Claims	FTEs	#/100FTEs	# Claims	FTEs	#/100FTEs	# Claims	FTEs	#/100FTEs	# Claims	FTEs	#/100FTEs	
AURORA	24	64.7	37.1	26	64.7	40	35	64.7	54	24	64.7	84	21	62.9	33	160
BARTLETT	14	21.1	66.4	17	21.1	81	14	21.1	66	7	21.1	314	19	22.7	84	130
KENNICOTT	47	112.1	41.9	81	112.1	72	44	112.1	39	33	112.1	35	not yet in service			211
COLUMBIA	35	97.7	35.8	1	97.7	1	25	97.7	26	31	97.7	26	21	94.8	22	108
LE CONTE	31	62.8	49.4	28	62.8	45	20	62.8	32	13	62.8	51	10	55.1	18	121
MALASPINA	22	36.3	60.6	40	36.3	110	18	36.3	50	13	36.3	137	19	45.4	42	149
MATANUSKA	65	82.9	78.4	56	82.9	68	44	82.9	53	29	82.9	84	36	112.9	32	254
TAKU	48	111.7	43.0	46	111.7	41	25	111.7	22	28	111.7	20	30	110.3	27	171
TUSTUMENA	25	65.9	37.9	37	65.9	56	23	65.9	35	24	65.9	53	22	66.0	33	142
OTHER AMHS	31			19			3			13			7			60
FISCAL YEAR TOTALS	342	655.2	50.1	351	655.2	54	251	655	38	215	655	33	178	570.1	31.2	1160
																0
State W/C Claims & FTEs (not including AMHS)	1298	15,516	8.4	1,362	14,271.6	9.7	1,060	14,182.0	7.5	1,102	14,210.0	7.8	1,108	13,785.0	8.7	4945

Note: Work Comp FTEs taken from CORA and adjusted for AMHS FTE count.

	Claims	FTE's
AMHS (5) YEAR TOTAL	1,337.0	3,191

	Claims	FTEs
5 YEAR AVERAGE	267.4	638.2

AMHS CLAIMS per 100 FTEs - 5 Year Average	41

STATE W/C CLAIMS PER 100 FTE's	8

ALL DEPT CLAIMS
FREQUENCY TO 100 FTE'S

DEPARTMENT	2002			2001			2000			1999			1998			1997			TOTALS
	# Claims	FTEs	#/100FTEs	# Claims	FTEs	#/100FTEs	# Claims	FTEs	#/100FTEs	# Claims	FTEs	#/100FTEs	# Claims	FTEs	#/100FTEs	# Claims	FTEs	#/100FTEs	
Governor's Office	6	180	2.8	0	187	0.0	3	189	1.6	7	200	3.5	6	180	2.7	7	187	3.7	22
Administration	214	1466	14.6	260	1,404.0	18.5	211	1,530.0	13.7	188	1,334.0	13.5	192	1,289.0	14.9	182	1,155.0	15.8	1025
Law	20	478	4.2	10	454.0	3.5	8	453.0	1.8	11	447.0	2.5	17	441.0	3.9	15	439.0	3.4	87
Revenue	21	508	4.2	32	474.0	6.8	28	492.0	5.7	15	492.0	3.0	28	502.0	5.6	32	487.0	6.6	135
Education	28	461	6.2	15	396.0	3.8	17	510.0	3.3	20	497.0	4.0	25	491.0	5.1	34	500.0	6.7	111
Health & Social Services	168	2458	6.8	190	2,215.0	8.6	143	2,201.0	6.5	165	2,098.0	7.9	183	2,047.0	8.9	199	2,103.0	9.5	886
Labor & Workforce Dev	37	807	4.3	35	794.0	4.4	29	710.0	4.0	19	633.0	3.0	23	730.0	3.1	25	815.0	3.1	131
Commerce & Economic Dev.	10	503	2.0	18	451.0	4.0	11	374.0	2.9	12	481.0	2.5	9	420.0	2.1	17	457.0	3.7	67
Military & Veterans Affairs	22	259	8.5	19	223.0	8.5	14	222.0	6.3	17	216.0	7.9	19	170.0	10.7	15	171.0	8.8	84
Natural Resources	112	714	15.7	135	657.0	20.5	87	675.0	12.9	95	910.0	10.4	132	609.0	21.7	168	937.0	18.9	607
Fish & Game	72	1225	5.9	84	1,137.0	7.4	89	1,148.0	7.8	76	1,121.0	6.7	85	1,095.0	7.8	83	998.0	8.3	416
Public Safety	139	764	18.2	123	727.0	16.9	94	754.0	12.5	92	766.0	12.0	89	740.0	11.9	88	887.0	9.9	486
Environmental Conservation	12	491	2.4	13	467.0	2.8	11	480.0	2.3	19	491.0	3.9	17	473.0	3.6	10	606.0	3.2	76
Corrections	162	1473	11.0	154	1,368.0	11.3	100	1,368.0	7.3	136	1,362.0	10.0	139	1,358.0	10.2	125	1,350.0	9.3	654
Transportation	251	2609	9.6	253	2,476.5	10.2	181	2,241.0	8.0	207	2,362.0	8.8	205	2,330.0	8.8	231	1,955.0	11.8	1077
Legislative Affairs	10	294	3.4	4	300.0	1.3	11	274.0	4.0	13	272.0	4.8	6	350.0	1.7	7	292.0	2.4	41
Legislative Audit	0	37	0.0	1	36.0	2.8	0	36.0	0.0	0	30.0	0.0	0	34.0	0.0	0	36.0	0.0	1
Courts	15	704	2.1	24	690.0	3.5	23	681.0	3.4	19	692.0	2.7	24	680.0	3.5	22	674.0	3.3	112
FISCAL YEAR TOTALS	1288	15516	8.4	1,382	14,272	9.7	1,060	14,182	7.5	1,102	14,210.0	7.8	1,108	13,785.0	8.7				4742

Note: Work Comp FTEs taken from CORA

FOOT FTE (do not include AMHS vessel employees)

AMHS Claims Frequency
compared to Top 5 State Dept W/C Claims Frequency per 100 FTEs

FISCAL YEAR>	2002			2001			2000			1999			1998			1997			TOTALS
	# Claims	FTEs	#/100FTEs	# Claims	FTEs	#/100FTEs	# Claims	FTEs	#/100FTEs	# Claims	FTEs	#/100FTEs	# Claims	FTEs	#/100FTEs	# Claims	FTEs	#/100FTEs	
AURORA	24	64.7	37.1	26	64.7	40	35	64.7	54	24	64.7	37	21	62.9	33	11	42.7	26	
BARTLETT	14	21.1	66.4	17	21.1	81	14	21.1	66	7	21.1	33	10	22.7	84	15	62.3	24	
KENNICOTT	47	112.1	41.9	81	112.1	72	44	112.1	39	33	112.1	29		not yet in service			not yet in service		
COLUMBIA	35	97.7	35.8	1	97.7	1	25	97.7	26	31	97.7	32	21	84.8	22	35	122.0	28	
CLEARCONTRACT	31	62.8	49.4	28	62.8	45	20	62.8	32	13	62.8	21	10	55.1	18	19	62.8	30	
MALASPINA	22	36.3	60.6	40	36.3	110	18	36.3	50	13	36.3	36	10	45.4	42	38	123.2	31	
MATANUSKA	65	82.9	78.4	56	82.0	68	44	82.0	53	29	82.0	35	36	112.0	32	25	69.8	36	
TAKU	48	111.7	43.0	46	111.7	41	25	111.7	22	28	111.7	25	30	110.3	27	35	111.6	31	
TUSTUMENA	25	65.9	37.9	37	65.9	56	23	65.9	35	24	65.9	36	22	66.9	33	21	62.4	34	
OTHER AMHS	31			10			3			13			7			8			
FISCAL YEAR TOTALS	342	655.2	50.1	351	655.2	54	251	655	38	215	655.2	32.8	178	670.1	31.2	100	657.8	30.3	
Other DOT	109	2629	8	250	2,433.0	11	184	2,377.0	8	107	1,706.8	11.5	203	1,769.0	11.5	231	2,264.2	10.2	
DHSS	154	2450	6	109	2,365.0	8	145	2,365.0	6	168	2,098.0	8.0	182	2,047.0	8.9	109	2,103.0	0.5	
CORRECTIONS	142	1473	10	150	1,460.0	10	102	1,368.0	7	131	1,362.0	9.6	139	1,358.0	10.2	125	1,350.0	9.3	
ADMINISTRATION	178	1466	12	259	1,442.0	18	210	1,404.0	15	178	1,334.0	13.3	182	1,280.0	14.0	182	1,165.0	15.6	
PUB SAFETY	121	764	16	125	745.0	17	85	727.0	13	82	766.0	12.0	89	740.0	11.0	88	887.0	0.0	
(Top 5 Depts. Only) Work Comp Claims & FTEs (not including AMHS)	794	8,781	9	989	8,445	12	736	8,241	9	768	7,268.8	10.5	805	7,199.9	11.2	825	7,750.2	10.6	4320

Note: Top 5 Dept. Work Comp FTEs taken from CORA Bonds FTE column and adjusted for AMHS FTE count.

Row 14	# Claims	FTEs		
AHMS COMBINED (5) YEAR TOTAL	1,337	3,180.0		
AHMS 5 YEAR AVERAGE	267	636.2		
AHMS Frequency Rate per 100 FTEs		42	Top 5 Dept. Frequency Rate per 100 FTEs	10

AMHS EMPLOYEE INJURY CLAIMS
Cost per 100 FTEs

FISCAL YEAR	2002			2001			2000			1999			1998			TOTALS
	$ Claims	FTEs	$/100FTEs	$ Claims	FTEs	$/100FTEs	$ Claims	FTEs	$/100FTEs	$ Claims	FTEs	$/100FTEs	$ Claims	FTEs	$/100FTEs	
AURORA	$44,248	64.7	$68,300	206,041	64.7	$319,847	$324,005	64.7	$500,781	$136,670	64.7	$211,236	$38,730	62.9	$61,574	
BARTLETT	$40,001	21.1	$189,578	95,302	21.1	$452,047	$30,666	21.1	$145,336	$29,706	21.1	$136,047	$30,060	22.7	$136,427	
KENNICOTT	$173,665	112.1	$154,920	384,527	112.1	$343,021	$99,886	112.1	$89,104	$166,378	112.1	$148,419	$0	0.0	$0	
COLUMBIA	$81,094	97.7	$83,024	4,300	97.7	$4,400	$115,447	97.7	$118,165	$111,820	97.7	$114,452	$32,107	94.8	$33,868	
LE CONTE	$78,545	62.8	$125,072	70,308	62.8	$112,083	$191,004	62.8	$304,146	$663,504	62.8	$1,056,535	$625,761	55.1	$1,135,602	
MALASPINA	$12,078	36.3	$35,477	2,222	36.3	$6,121	$139,058	36.3	$385,559	$24,219	36.3	$66,719	$107,033	45.4	$235,756	
MATANUSKA	$230,209	82.9	$277,003	130,842	82.9	$157,831	$133,160	82.9	$130,627	$31,019	82.9	$37,417	$52,202	112.9	$46,237	
TAKU	$83,594	111.7	$74,838	335,319	111.7	$300,196	$135,658	111.7	$121,449	$68,573	111.7	$61,390	$24,437	110.3	$22,155	
TUSTUMENA	$201,002	65.9	$305,010	77,320	65.9	$117,329	$482,448	65.9	$732,091	$58,315	65.9	$88,490	$181,990	66.0	$275,752	
FISCAL YEAR TOTALS	$946,227	655.2	$144,418	1,307,249	655.2	$199,519	$1,652,232	655.2	$252,172	$1,289,204	655.2	$196,785	$1,093,235	570.1	$191,762	

	$ Claims	FTEs
(5) YEAR TOTAL	6,286,147	3,190.0

	$ Claims	FTEs
6 YEAR AVERAGE	$1,257,629	638.2

	FTEs
Rate per 100 FTEs	$197,065

ALL DEPT WORKERS' COMPENSATION CLAIMS
SEVERITY TO 100 FTE'S

DEPARTMENT	2003			2001			2000			1999			1998			1997			TOTALS
	Claim cost	FTEs	$/100FTEs	Claim cost	FTEs	$/100FTEs	Claim cost	FTEs	$/100FTEs	Claim cost	FTEs	$/100FTEs	Claim cost	FTEs	$/100FTEs	Claim cost	FTEs	$/100FTEs	
Governor's Office	52,756	100	20,918	$0	187	$0	$7,029	189	$3,719	$3,100	200	$1,550	$13,494	186	$7,255	$108,035	187	$56,703	$129,658
Administration	1,710,614	1466	116,686	$1,697,177	1,404.0	$120,882	$1,141,169	1,636.0	$74,285	$1,135,226	1,334.0	$85,099	$1,328,780	1,289.0	$103,087	$1,823,940	1,155.0	$157,917	$7,128,309
Law	99,166	478	20,748	$54,719	454.0	$12,053	$42,318	453.0	$9,342	$50,285	447.0	$11,249	$70,931	441.0	$16,084	$38,441	439.0	$8,301	$254,694
Revenue	172,444	508	34,060	$76,741	474.0	$16,190	$112,713	492.0	$22,909	$91,243	492.0	$18,545	$102,708	502.0	$38,388	$95,240	487.0	$19,650	$568,051
Education	124,633	451	27,635	$17,877	398.0	$4,492	$131,201	510.0	$25,726	$48,005	487.0	$9,859	$81,693	491.0	$16,639	$73,373	506.0	$14,501	$352,149
Health & Social Services	1,061,074	2459	43,151	$821,878	2,215.0	$37,105	$780,879	2,201.0	$35,469	$531,071	2,098.0	$25,356	$904,103	2,047.0	$44,167	$710,481	2,103.0	$34,212	$3,758,110
Labor & Workforce Dev	394,718	867	45,527	$156,374	784.0	$19,894	$193,697	719.0	$26,958	$62,663	633.0	$13,094	$45,263	736.0	$6,150	$140,187	815.0	$18,180	$1,126,585
Commerce & Economic Dev.	14,812	503	2,945	$60,023	451.0	$13,309	$2,034,760	374.0	$544,053	$83,214	481.0	$18,548	$56,985	428.0	$13,377	$40,508	457.0	$8,861	$2,281,569
Military & Veterans Affairs	134,295	259	51,851	$35,860	223.0	$16,083	$73,094	222.0	$32,925	$139,450	218.0	$64,560	$280,240	178.0	$157,442	$16,244	171.0	$9,500	$544,922
Natural Resources	288,263	714	40,293	$493,128	657.0	$75,057	$329,231	675.0	$48,775	$195,793	910.0	$21,510	$498,350	609.0	$81,831	$395,225	937.0	$42,180	$1,911,724
Fish & Game	251,087	1225	20,497	$478,722	1,137.0	$42,102	$509,289	1,148.0	$44,363	$382,537	1,121.0	$32,340	$253,498	1,095.0	$23,150	$668,668	999.0	$66,928	$2,273,652
Public Safety	1,699,714	764	222,478	$723,006	727.0	$99,451	$321,749	754.0	$42,672	$782,977	788.0	$103,522	$403,173	746.0	$54,045	$1,063,225	867.0	$122,122	$3,324,131
Environmental Conservation	73,544	491	14,978	$65,925	457.0	$14,117	$132,521	480.0	$27,609	$61,037	491.0	$12,431	$178,513	473.0	$37,741	$64,704	508.0	$12,787	$502,701
Corrections	837,108	1473	56,830	$831,066	1,368.0	$60,752	$465,731	1,368.0	$34,094	$873,703	1,362.0	$64,149	$973,000	1,358.0	$71,649	$784,805	1,350.0	$58,134	$3,928,325
Transportation	2,106,473	[illegible]	80,125	$2,400,217	[illegible]	$96,908	$1,437,692	[illegible]	$63,587	$2,040,125	2,302.0	$88,373	$1,315,377	2,200.0	$56,454	$2,106,735	[illegible]	$107,761	$9,300,148
Legislative Affairs	65,473	294	22,270	$46,359	300.0	$15,453	$8,122	274.0	$2,964	$60,677	272.0	$29,824	$110,831	350.0	$3,129	$7	202.0	$2	$245,696
Legislative Audit	0	37	0	$2,241	30.0	$0,225	$0	36.0	$0	$0	36.0	$0	$0	34.0	$0	$0	30.0	$0	$2,241
Courts	33,532	704	4,763	$120,608	690.0	$18,349	$71,730	681.0	$10,533	$43,917	692.0	$6,340	$89,812	680.0	$13,208	$50,037	674.0	$8,011	$360,103
FISCAL YEAR TOTALS	9,117,734	16,610	$50,763	$8,088,985	14,272	$56,670	$7,702,024	14,182	$54,049	$6,622,043	14,210.0	$46,601	$8,706,672	13,785.0	$49,304	$8,220,861	#######	$50,706	$37,621,365

Note: Work Comp FTEs taken from CORA

[illegible]

AMHS CREW COSTS Compared to
TOP 5 DEPARTMENTS
WORK COMP
CLAIM COSTS per 100 FTEs

FISCAL YEAR>	2002			2001			2000			1999			1998			TOTALS
	WC$	FTEs	$/100FTEs	WC$	FTEs	$/100FTEs	WC$	FTEs	$/100FTEs	WC$	FTEs	$/100FTEs	WC$	FTEs	$/100FTEs	
											655.2			570.1		
Other DOT	2,106,473	2629	80,125	2,189,897	2,433.0	90,008	1,266,154	2,377.0	53,267	1,281,669	1,706.8	75,086.1	1,146,418	1,759.9	65,141.1	$7,990,511
DHSS	988,473	2459	40,198	800,966	2,365.0	33,867	1,022,922	2,365.0	43,253	407,626	2,098.0	19,429.3	902,172	2,047.0	44,072.9	$4,122,159
CORRECTIONS	835,397	1473	56,714	813,498	1,460.0	55,719	568,380	1,368.0	41,548	543,641	1,362.0	39,914.9	850,620	1,358.0	62,637.7	$3,511,536
ADMINISTRATION	1,710,592	1466	116,684	1,385,476	1,442.0	96,080	1,221,475	1,404.0	87,000	598,375	1,334.0	44,855.7	1,074,494	1,289.0	83,358.7	$5,990,414
PUB SAFETY	1,701,367	764	222,692	705,222	745.0	94,661	387,568	727.0	53,311	759,591	766.0	99,163.3	353,608	746.0	47,400.6	$3,907,356
(Top 5 Depts. Only) Work Comp Claims & FTEs (not including AMHS)	7,342,303	8,791	616,413	5,895,061	8,445	69,805	4,466,499	8,241	54,199	$ 3,590,802	7,266.8	49,413.8	$ 4,327,313	7,199.9	60,102.4	$26,521,975
COMBINED (5) YEAR TOTAL	$25,621,977	39,943.7				5 YEAR AVERAGE	$5,124,395.39	7,988.7					Top 5 Dept. Rate per 100 FTEs		$64,145	
													AMHS Rate per 100 FTEs		$197,065	

Subject: **More stuff on HB 164**
Date: Tue, 01 Apr 2003 09:29:56 -0900
From: Tom Anderson <Representative_Tom_Anderson@legis.state.ak.us>
Organization: Alaska State Legislature
To: Vanessa Tondini <Vanessa_Tondini@legis.state.ak.us>

Here you go, more stuff.

-Josh

Subject: **Did not the Alaska Supreme Court already address the question of whether or not the legislature can effect this change**
Date: Mon, 31 Mar 2003 14:37:49 -0900
From: "Kevin Jardell" <Kevin_Jardell@admin.state.ak.us>
To: <Representative_Tom_Anderson@legis.state.ak.us>

Representative Anderson,

I have attached some of the discussion points that Risk Management put together for purposes of giving testimony. I hope you find it beneficial.

Kevin Jardell

1_Hearing questions.doc	**Name:** 1_Hearing questions.doc **Type:** WINWORD File (application/msword) **Encoding:** base64 **Download Status:** Not downlcaded with message

Did not the Alaska Supreme Court already address the question of whether or not the legislature can effect this change?

Yes, State of Alaska v. Robert Brown – "*if it is the desire of the State to limit its tort liability to the work[er]'s compensation act, it may do so by legislative enactment of an exception to the waiver of sovereign immunity section contained in AS 09.50.250.*"

Did not the maritime unions stipulate in the past to just this result – to provide Alaska Workers' Compensation benefits in lieu of traditional Jones Act remedies?

Yes, through collective bargaining the maritime unions negotiated this arrangement from 1983 thru 1991 – this only stopped because the Supreme Court ruled in Dale Brown v. State Division of Marine Highways that this contractual arrangement was impermissible - unions could not negotiate away the individual seaman's rights.

So the purpose of this bill is to equalize the remedies of all State employees?

Yes, only the seaman today has the right of direct civil action against his or her employer; all other State of Alaska employees have workers' compensation as their exclusive remedy and may not sue their employer. These same seamen are also eligible for leave, retirement benefits, and medical coverage – like all other state employees.

Is there another example of a similar arrangement within Alaska?

Yes, ordinarily railroad employees are covered by a federal law known as FELA; yet by law the Alaska Workers' Compensation Act has been designated the exclusive remedy for Alaska Railroad employees since the time of transfer of the railroad to the state.

Can you explain the difference in how illness is treated under the present system and how it would be handled under this bill?

Presently, for any illness manifesting while the seaman is on a ship, unearned wages, maintenance and cure are due.

> "Unearned wages" are paid for the balance of the voyage the seaman was working (usually the rest of the week on); this means the seaman gets a regular paycheck even if he or she has to leave the ship before the voyage is over, without a deduction for leave usage.
>
> "Maintenance" is a stipend paid daily to help cover food and lodging costs while the seaman is recovering off the ship or out of a hospital. The amount of maintenance is set by union contract; currently it is $45 a day for most seamen.

"Cure" is the payment of medical expenses, including bills of health care providers, treatment, and associated travel costs.

Under this bill, illness would be handled the same way as for other state employees, primarily through the use of sick leave. (Only certain occupational diseases qualify as compensable injuries under the workers' compensation system.) Medical bills would still be handled the same way.

Beard Stacey Trueb & Jacobsen, LLP
ATTORNEYS AT LAW

821 N Street, Suite 205 • Anchorage, Alaska 99501

March 21, 2003

Representative Tom Anderson
State Capitol, Room 432
Juneau, AK 99801-1182

Re: House Bill 164

Dear Representative Anderson:

As a resident of the state for the last 14 years, I have frequently talked to my representatives about matters that concerned me. I write to you concerning House Bill 164, which has been referred to your committee, House Labor and Commerce.

I am writing to inform you that I have several objections to this legislation. My law firm has represented some of the State's employees who are now covered under the federal law known as the Jones Act. We are maritime law experts and we therefore have specialized knowledge concerning the legal problems with this bill.

First, the bill would create second-class citizens out of the State's Marine Highway employees. Every seaman in the State would be able to seek compensation under the Jones Act except the State's Marine Highway employees. If a person is employed as a commercial fisherman, for a tugboat company, or for Tote or CSX Lines, they are covered under the Jones Act and entitled to those remedies. The only exception would be State marine workers. Passage of this bill may indeed violate Article I, Section 1 of the Alaska Constitution guaranteeing equal protection of the laws to all citizens.

Second, in a long line of cases the United States Supreme Court, and every state court that has considered the issue, has held that states cannot apply worker's compensation statutes to merchant seamen. The reasoning is two-fold. The primary obstacle is the fact that seaman's remedies are maritime in nature and under the exclusive purview of federal admiralty jurisdiction. Under the federal Constitution maritime matters are reserved for the federal legislature to the exclusion of the states. In short, there is a federal constitutional bar to the states applying state worker's compensation laws to seamen. The secondary reason is that Congress has completely occupied the field

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with a law of national application, the Jones Act, and the states may not apply inconsistent laws. These principles are well established and beyond reasonable dispute. There are two Alaska cases that have dealt directly with this issue and are consistent with every other case on the subject. These cases are: Anderson v. Alaska Packers Association, 635 P.2d 1182 (1981), and Trident v. Murray, 2000 AMC 288 (Ak. Superior Ct. 1999). Therefore, if the Legislature were to make worker's compensation applicable to seamen, it would be a mere gratuity and not binding upon the injured worker.

Third, the state's waiver of sovereign immunity is contained in the Alaska Constitution. Article II, Section 21 provides: "The legislature shall establish procedures for suits against the state." (Emphasis supplied). The word "shall" is always mandatory. Article II, Section 21 abolished the doctrine of sovereign immunity in Alaska because it left no option for the legislature not to establish procedures for suits. Section 21 also mandates that the legislature establish the "procedures" for suits against the state. The word "procedures" is commonly understood to refer to the mechanics of filing suits and it has nothing to do with the substantive right to sue the state. This is the only logical manner in which Article II, Section 21 can be read. See Muskopf v. Corning Hospital District, 359 P.2d 457, 460-61 (Cal. 1961)(interpreting similar constitutional language, and judicially abolishing sovereign immunity). Accordingly, if Alaska is going to abolish sovereign immunity for these suits in its own courts it will have to do so via a constitutional amendment. House Bill 164 cannot accomplish the revocation of state sovereign immunity.

Fourth, the Jones Act provides that all state courts shall have concurrent jurisdiction over these suits. 45 U.S.C. § 56. The Alaska Supreme Court has held that Jones Act suits may be filed in any available forum. Nunez v. American Seafoods, 52 P.2d 720 (2002). Under federal and state case law these Jones Act suits could be filed in Bellingham, Washington because the state has a ferry terminal there and is subject to jurisdiction in that forum. The State of Alaska has no sovereign immunity in the Washington courts. Alden v. Maine, 119 S.Ct. 2240 (1999); Hall v. Nevada, 440 U.S. 410 (1979).

Acceptance of worker's compensation benefits cannot bar a Jones Act lawsuit. Chan v. Society Expeditions, Inc., 39 F.3d 1398, 1403 (9th Cir. 1994), cert. denied, 514 U.S. 1004 (1995); Roberts v. City of Plantation, 558 F.2d 750, 751 (5th Cir. 1977); Western Boat Bldg. Co. v. O'Leary, 198 F.2d 409, 411 (9th Cir. 1952); State v. Brown, 794 P.2d 108, 110, 111 (Alaska 1990). And the Washington courts are constitutionally bound to apply maritime law to a Jones Act suit filed against the State of Alaska in a Washington Court. Larios v. Victory Carries, Inc., 316 F.2d 63 (2d Cir. 1963); In Re: EXXON VALDEZ, 767 F.Supp. 1509, 1513 (D. Alaska 1991). Therefore, even if Alaska could close the courthouse door to these employees in the Alaska courts it cannot close the Washington courthouse door.

The state would therefore be faced with hiring expensive private counsel to defend itself from the lawsuits that would be filed in the Washington courts.

Fifth, there is no empirical evidence that the state would obtain any savings by covering these workers under the worker's compensation scheme. I am familiar with only one scientific study of the issue by the American Waterways Operators, and that organization looked at 371 cases that were covered by workers' compensation and the Jones Act and concluded that it was less expensive to compensate workers under the Jones Act.

In summary, House Bill 164, if passed will not accomplish its goals; it will lead to expensive and protracted litigation, make second-class citizens out of the state seamen, and create confusion and uncertainty for the injured workers.

In order to aid your staff in consideration of these technical legal matters I will in the near future send you a detailed legal brief on the matters outlined above. I respectfully request you to carefully consider my above comments while considering the wisdom of this legislation.

Sincerely yours,

Lanning Trueb

Beard Stacey Trueb & Jacobsen, LLP
ATTORNEYS AT LAW

821 N Street, Suite 205 • Anchorage, Alaska 99501

March 25, 2003

Representative Tom Anderson
State Capitol, Room 432
Juneau, AK 99801-1182

Re: Jones Act & Sovereign Immunity

Dear Representative Anderson:

I am following up on my previous letter to you concerning the legal obstacles to House Bill 164.

1. The Alaska Constitution abolished sovereign immunity and sovereign immunity may only be reinstated by a constitutional amendment.

It is well accepted that an individual state's sovereign immunity in its own courts is merely a common law doctrine. See e.g. Nieting v. Blondell, 235 N.W.2d 597, 599 (Minn. 1975)(ridiculing the doctrine of sovereign immunity and judicially abolishing it); Hicks v. New Mexico, 544 P.2d 1153 (N.M. 1975)(same).

The Alaska Constitution abolished the common law doctrine of sovereign immunity, and only allowed the legislature to provide by statute in which court suits against the state would be filed. Article II, Section 21 of the Alaska Constitution provides: "The legislature shall establish procedures for suits against the state." (Emphasis supplied). The word "shall" is always mandatory. Section 21 abolished the doctrine of sovereign immunity in Alaska because it left no option for the legislature not to establish procedures for suits. Section 21 also mandates that the legislature establish the "procedures" for suits against the state. The word "procedures" is commonly understood to refer to the mechanics of filing suits and it has nothing to do with the substantive right to sue the state. This is the only logical manner in which Section 21 can be

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read. See Muskopf v. Corning Hospital District, 359 P.2d 457, 460-61 (Cal. 1961)(interpreting similar constitutional language, and judicially abolishing sovereign immunity).

The debate in the constitutional convention establishes that the waiver of immunity is contained in the constitution. I have attached all the pages of the transcript that, according to the index found in the appendix in volume 6, deal with sovereign immunity, but the most telling exchange is the following.

> [Mr. Steve] McCutchen [Chairman of the Legislative Committee, the Committee which proposed Article II]: Mr. President, the intent of the Committee in this matter was nothing other than after the judiciary had been set up that they [the legislature] would designate which level of court that any suit against the state could be brought. In other words, there would be one particular level of court in which all suits against the state or their agencies must be brought. It would not be of any further determination as far as the legislature was concerned nor in otherwise concerning or controlling the courts. They would make one designation when the court system was set up. "This is it. From now on any suits against the state will be entered in that particular court."
>
> [Judge George] McLaughlin [Chairman of the Judiciary Committee]: May I inquire whether it was the intent of the [legislative] Committee to authorize suits against the state in court?
>
> [Mr. Steve] McCutchen: Yes.
>
> [Judge George] McLaughlin: Well, then I feel under those circumstances that the amendment is justified, that is if the Convention decides to authorize action against the state in the constitution.
>
> [Mr. Steve] McCutchen: I feel that because the [legislative] Committee intended one thing, I think that this group understands what the Committee intended, that our Committee has no objection if this particular amendment is the thing that makes it perfectly clear what was intended by our group. In other words, the Legislative Committee felt that the state may be sued, period: that the legislature shall indicate which level of court shall that suit against the state.

(Proceedings of the Constitutional Convention, Vol. 3, p. 1705, Copy attached).

The members of the constitutional convention understood that Article II, Section 21 abolished the doctrine of sovereign immunity. All that was left for the legislature was to provide for which court a suit was filed. As the later discussion demonstrates, Judge McLaughlin believed that it was up to the legislature whether it wanted to set up a court of claims for suits

against the state or simply provide for suits to be filed in the superior court. Article IV of the constitution, the Judiciary Article, which was proposed by Judge McLaughlin's committee, is written to allow the legislature to set up a court of claims if it so desired. Whether to provide for suits against the state in a court or claims or the superior court was the legislature's only decision.

In State v. Zia, Inc., 556 P.2d 1257, 1260 (Alaska 1976), the Supreme Court stated that the waiver of sovereign immunity is contained in the constitution.

> The State of Alaska provides for suits against the State in Article II, § 21, of its constitution:
>
> > *Suits Against the State*. The legislature shall establish procedures for suits against the state.

The only Alaska case to address the issue which I have raised, i.e. that the legislature only has the authority to promulgate the procedures for such suits, is Wilson v. Municipality of Anchorage, 669 P.2d 569, 571-72 (Alaska 1983). In Wilson the Supreme Court declined to address the argument because Article II, § 21 did not address immunity for municipalities only suits against the state, and it was therefore unnecessary to decide the issue.

Pursuant to my argument, the only way that the State can institute sovereign immunity for Jones Act suits in its own courts is to amend the constitution via Article XIII. The legislature may not revoke sovereign immunity with a statute. HB 164 cannot revoke the state's waiver of sovereign immunity.

2. Any attempt to institute sovereign immunity solely for Jones Act suits would offend the Alaska Bill of Rights.

The state's seamen have a constitutionally protected right to bring a Jones Act suit in the Alaska courts. For example, a seaman's right to access a local court to vindicate his federal rights is an important right and the Alaska Supreme Court will apply close scrutiny to an attempted revocation of the statutory sovereign immunity. See Patrick v. Lynden Transport, Inc., 765 P.2d 1375, 1379 (Alaska 1988); Turner Const. Co., Inc. v. Scales, 752 P.2d 467, 471 (Alaska 1988). The State's seamen also have the right to the same federal remedies all the other Alaskan citizens are entitled to. In Alaska laws that treat similarly situated injured workers in a divergent manner will not pass constitutional scrutiny. Gilmore v. Alaksa Workers' Compensation Bd., 882 P.2d 922, 929 (Alaska 1994).

There are tens of thousands of Alaska citizens who are covered under the Jones Act because they work as fishermen or merchant seamen. Thus any attempt to institute immunity would create a group of second-class citizens out of its seamen employees because every other injured seaman could file suit against her Jones Act employer in the Alaska state courts except

for the seven or eight hundred employees who work for the State. The result would be the same as Gilmore wherein two employees identically situated would have completely different remedies.

The Alaska Constitution provides that its citizens are entitled to the "equal protection" of the laws. The Jones Act is the type of law that is contemplated by the Constitution. Any attempt to close the Alaska Superior Courts to its seamen would deny them the equal protection of the laws in relation to all the other seamen who live and work in Alaska and who cannot legally be denied access to the courts to prosecute their Jones Act claims. 45 U.S.C. § 56; Burnett v. New York Cent. R. Co., 380 U.S. 424, 433-34, 85 S.Ct. 1050, 1057-58, 13 L.Ed.2d 941 (1965); Miles v. Illinois Cent. R. Co., 315 U.S. 698, 62 S.Ct. 827 (1942). Moreover, the right, which the State would be attempting to eliminate, is not one created or granted by the State, but one fashioned by Congress that applies to all other seamen in the United States.

Because the seamen's rights under Jones Act to access to the Alaska courts are constitutionally based under the equal protection clause, and the State's sovereign immunity is merely a common law privilege, the seamen's constitutional rights will trump any attempt by the State to institute sovereign immunity and be held unconstitutional.

3. As a matter of federal constitutional law Alaska cannot apply its workers' compensation laws to seamen.

Assuming that Alaska amended its constitution, it nevertheless cannot apply state workers' compensation laws to seamen. A long line of United States Supreme Court cases hold that, because of the federal Constitution, a state may not apply workers' compensation laws to seamen's injuries. Southern Pacific Co. v. Jensen, 243 U.S. 219, 37 S.Ct. 260 (1917); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 40 S.Ct. 438 (1920)(as a matter of constitutional law rejecting Congress' attempt to apply state workers' compensation laws to seamen) ; Washington v. W.C. Dawson & Co., 264 U.S. 219, 44 S Ct. 302 (1924)(same). Following this trilogy of cases the Supreme Court once again in Northern Coal & Dock v. Stroud, 278 U.S. 142, 49 S.Ct. 88, 73 S.Ct. 88, 73 L.Ed. 232 (1928), specifically held that a state could not constitutionally apply its worker's compensation laws to a seaman. See also Commercial Union Ins. Co. v. McKinna, 10 F.3d 1352, 1354 (8th Cir. 1993)(relying upon *Northern Coal & Dock v. Stroud*).

These Supreme Court cases are still good law and stand for the proposition that only Congress may enact statutes which provide remedies for seamen's injuries. Gilmore and Black, The Law of Admiralty, § 6-45, at 404-408 (2nd Ed. 1975). Accordingly, any attempt to cover its seamen employees under the workers' compensation regime will be a nullity because the Supreme Court has held that not even Congress has the power to apply state worker's

compensation laws to injured maritime workers. In rejecting Congress' attempt to apply state workers' compensation laws to injured maritime workers the Supreme Court stated in part:

> Without a doubt Congress has the power to alter, amend or revise the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general employers' liability law or general provisions for compensating injured employees; but it may not be delegated to the several states . . . The subject is national. Local interests must yield to the common welfare. The Constitution is supreme.

Washington v. W.C. Dawson & Co., 264 U.S. at 227-28, 44 S.Ct. at 305.

Because these cases were decided based upon constitutional principles and have never been overruled it means the application of a workers compensation remedy to seamen requires either a law of national application enacted by Congress, or an amendment of the United States Constitution allowing the several states workers' compensation laws to apply to seamen. Therefore, Alaska's attempt to apply workers' compensation to its seamen employees will be nothing more than a gratuity.

Long ago the Washington Supreme Court held that the legislature could not apply workers' compensation statutes to seamen. The court stated in part:

> The maritime law being a part of the law of the United States, the legislature of a state has no power to modify or abrogate it. Workman v. New York City, 179 U.S. 522. It follows, therefore, that the legislature in passing the compensation act could not take from a workman any right which he had under the maritime law of the United States. The petitioner here still has the right to pursue his remedy in admiralty. . . If the act were given this construction [to apply to seamen], it might well be doubted whether it would not offend against that provision of the fourteenth amendment to the constitution of the United States which provides that no state shall make or enforce any law which shall "deny to any person within its jurisdiction the equal protection of the laws."

State ex rel. Jarvis v. Daggett, 87 Wash. 253, 257-58, 151 Pac. 648 (1915). Accord John Hill, Jr. v. Workmen's Compensation Appeal Board, 1998 AMC 351 (Penn. 1997)(rejecting application of workers' compensation statutes to seamen).

The Alaska Courts have also weighed in on this issue. In Anderson v. Alaska Packers Association, 635 P.2d 1182 (1981), the Supreme Court held that, as a matter of federal constitutional law, that the Alaska workers' compensation statute could not be applied to a Jones

Act seamen. More recently in Trident v. Murray, 2000 AMC 288 (Ak. Superior Ct. 1999), the Superior Court, in a well reasoned opinion came to the same conclusion. (Copy attached).

A second reason that a state may not apply workers' compensation laws to seamen is because Congress has fully occupied the field, preempting any contrary state laws. The federal case law on the subject of the preemption of state laws by FELA and Jones Act is so well established as to be indisputable. For example, in New York Central Railroad Co. v. Winfield, 244 U.S. 147, 148-49, 151 (1917), the Supreme Court stated in pertinent part:

> [It] is settled that when Congress acts upon the subject all state laws covering the same field are necessarily superceded by reason of the national authority. Congress acted upon this subject in passing the Employer's Liability Act . . .
>
> That the Act is comprehensive and also exclusive is distinctly recognized in repeated decisions of this court. . . No state is at liberty thus to interfere with the operation of a law of Congress.

Once again in New York Central & R.R. Co. v. Toncellito, 244 U.S. 360, 362 (1917), the Court reiterated this bedrock principle. The Court stated in relevant part:

> Congress having declared when, how far, and to whom carriers shall be liable on account of accidents in the specified class, such liability can neither be extended nor abridged by common or statutory laws of the state.

And in Lindgren v. United States, 281 U.S. 38 (1930), a Jones Act case, the Court reviewed the earlier FELA cases and once again summed up the preclusive effect of FELA and Jones Act. After reviewing the earlier cases cited above, and others, the Court stated:

> In light of the foregoing decisions and in accordance with the principles therein announced we conclude that the Merchant Marine Act [Jones Act]---adopted by Congress in the exercise of its paramount authority in reference to the maritime law and incorporating in that law the provisions of the Federal Employers' Liability Act---establishes as a modification of the prior maritime law a rule of general application in reference to the liability of the owners of vessels for injuries to seamen extending territorially as far as Congress can make it go; that this operates uniformly within all of the States and is as comprehensive of those instances in which by reference to the Federal Employers' Liability Act it excludes liability, as of those in which liability it imposed; **and that, as it covers the entire field of liability for injuries to seamen, it is paramount and exclusive, and supercedes the operation of all state statutes dealing with that subject.** (Emphasis supplied).

Id. 281 U.S. at 46-47.

In every reported case concerning FELA and Jones Act over the last 95 years there is not a single reported decision in which a court applied a state statute to a seaman's personal injury.

In fact, every court that has considered the issue has refused to apply state statutes in these federal actions. To cite but a few examples, the Missouri Supreme Court stated: "The statute of this state limiting the amount of recovery in death cases has no force and should not be considered in cases under the federal act." Dodd v. Missouri-Kansas-Texas R.R. Co., 193 S.W. 2d 905, 908 (Mo. 1946). In Laughlin v. Kansas C. S. R. Co., 205 SW 3, 7 (Mo. 1918), the court stated that FELA imposes a uniform rule of damages that may not be changed by state common law or statute. And each of the following cases held that state statutes regarding personal injury or death are inapplicable in FELA cases. Armstrong v. Chicago & W. I. R. Co., 263 Ill. App. 126 , affd, 350 Ill 426, cert. denied, 289 U.S. 724 (1931); Baltimore & O.S.W.R. Co. v. Berdon, 195 Ind. 265, 150 N.E. 407, cert. denied, 266 U.S. 633 (1924); Grybowski v. Erie R. Co., 95 A. 764, (state statute cannot be applied in a FELA case), affd, 98 A. 1085 (1915).

Admittedly, this case law is specialized and obscure. But these cases are all good law; the remedy for seaman has been a settled subject for 83 years, and under the binding authority discussed above it is beyond the power of the Alaska legislature to reject this federal scheme.

4. Any attempt to close the door to the Alaska courts will not prohibit Jones Act suits from being filed in Washington courts.

Regardless of any attempts to amend the Alaska Constitution, the State will still be subject to suit in Washington courts. The Federal Employers Liability Act provides for concurrent jurisdiction for Jones Act cases in State courts. 45 U.S.C. § 56. With a ferry terminal in Bellingham, Washington, and the state doing a tremendous amount of business in Washington, Alaska is subject to jurisdiction of the Washington courts for Jones Act suits. Pure Oil Company v. Suarez, 384 U.S. 202, 86 S.Ct. 1394, 16 L.Ed.2d 474 (1966). Under the Jones Act, it matters not that the injury did not occur in Washington. Penrod Drilling Company v. Johnson, 414 F.2d 1217, 1220-21 (5th Cir. 1969); Huffman v. Inland Oil & Transport, 424 N.E.2d 1209 (Ill. Ct. App. 1981). In such a suit the reverse-Erie doctrine compels Washington state courts to apply substantive maritime law, Larios v. Victory Carries, Inc., 316 F.2d 63 (2d Cir. 1963); In Re: EXXON VALDEZ, 767 F.Supp. 1509, 1513 (D. Alaska 1991), not the Alaska worker's compensation statues. The Washington courts are constitutionally bound to apply the Jones Act to the marine highway's seamen.

State sovereign immunity from suits in its own courts is nothing more than a common law doctrine. See e.g. Nieting v. Blondell, 235 N.W.2d 597, 599 (Minn. 1975); Hicks v. New Mexico, 544 P.2d 1153 (N.M. 1975).

In Alden v. Maine, 119 S.Ct. 2240, 2264 (1999), the Supreme Court cited Hall v. Nevada, 440 U.S. 410, 99 S.Ct. 1182 (1979), for the proposition that immunity in the courts of a state's sister states is a matter of comity. Importantly, the Alden case repeatedly refers to state sovereign immunity from suits "in its own courts[.]" Id. The frequency that the Supreme Court refers to immunity in its "own" courts, and the citation to Hall v. Nevada, establishes that states are still subject to suit in other states' courts just as in Hall. The Court also took pains to point out that just because Congress was powerless to waive a state's immunity for suit in its home courts, nevertheless, the states were still governed by applicable federal law.

> The constitutional privilege of a State to assert its sovereign immunity *in its own courts* does not confer upon the State a concomitant right to disregard the Constitution or valid federal law. The States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design. We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States. The good faith of the States thus provides an important assurance that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land." U.S. Const., Art. VI.

Alden v. Maine, 119 S.Ct. at 2266 (emphasis supplied).

The supreme law of the United States in this case is the Jones Act and the general maritime law that plainly apply to the State insofar as its seamen are concerned. Alaska cannot prohibit suit in the Washington courts because it does not enjoy sovereign immunity in Washington courts. Hall v. Nevada, 440 U.S. 410, 99 S.Ct. 1182 (1979)

The amendment of the Alaska Constitution to close the Alaska superior court would lead to a cascade of expensive litigation for the State of Alaska in Washington's courts. This follows because if an employee accepted gratuitous worker's compensation benefits the State would still be subject to suit in the Washington court under the Jones Act. It is black letter law that acceptance of state worker's compensation benefits cannot bar a Jones Act lawsuit. Chan v. Society Expeditions, Inc., 39 F.3d 1398, 1403 (9th Cir. 1994), cert. denied, 514 U.S. 1004 (1995); Roberts v. City of Plantation, 558 F.2d 750, 751 (5th Cir. 1977); Western Boat Bldg. Co. v. O'Leary, 198 F.2d 409, 411 (9th Cir. 1952); State v. Brown, 794 P.2d 108, 110, 111 (Alaska 1990). The injured worker could therefore live on Alaska worker's compensation while he pursued his civil litigation in the Washington courts. The State would be in the business of

hiring expensive private counsel to defend it in Jones Act cases in the Washington courts, all of which could be filed in Bellingham, Washington.

In a suit filed in Washington, the court would be faced with an injured seaman, who may well be a citizen of Washington, making a claim under admittedly applicable federal maritime law. The State of Alaska's only defense to such a suit would be its claim that the worker was covered by worker's compensation (a law that constitutionally can not be applied to a seaman) and as a matter of comity the Washington court should refuse to hear the case.

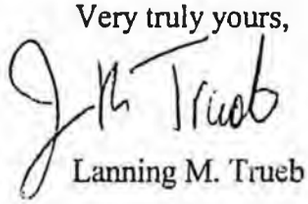
However, the State of Washington is not going to revoke its waiver of sovereign immunity for suits under the Jones Act. Accordingly, Alaska would be asking the Washington court to deny a constitutionally permitted remedy to the injured seaman by closing the doors of its court. The State's request for comity would also violate 45 U.S.C. § 56 because, as a matter of supreme federal law, the Washington courts are required to accept Jones Act cases. A request for comity is further eroded by the fact that the United States has waived its sovereign immunity for suits under the Jones Act, 46 U.S.C. § 742, and the Alaska Supreme Court has held that seamen's rights are inalienable. Brown v. State, 816 P.2d1368 (Alaska 1992); Abbott v. Alaska, 1999 AMC 2212 (1999)(contractual application of workers' compensation to seamen "illegal and unenforceable.").

Assuming that Alaska amended its constitution to prohibit Jones Act suits by its employees, it would still come into a Washington court with unclean hands by virtue of its unconstitutional attempt to apply workers' compensation statues to Jones Act seamen. It is hard to imagine a Washington court throwing out a Jones Act case on this basis.

5. There is no empirical evidence that coverage under the workers' compensation system would save the State money.

I have attached hereto a survey that was performed by the AWO report from 1990 that compared Jones Act liability to worker's compensation. The report found that overall it was less expensive for employers to compensate workers under the Jones Act than under a worker's compensation regime. From our perspective the seriously injured worker is much better off under the Jones Act that he or she would be under a worker's compensation scheme.

Very truly yours,



Lanning M. Trueb

Attachments

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: HB 164
(H) Publish Date: 3/5/03

Revision Date/Time (Note if correction):
Dept. Affected: Administration
Title: An Act relating to state immunity for certain actions by state employed seaman....
BRU: Risk Management
Component: Risk Management
Sponsor:
Requester:
Component No. 71

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type–Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal: [ ]

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

Very significant cost savings will be realized in future years as the AMHS and the few other maritime employees injury claims transition into the state average employee injury rate and cost.

The state funds its claim costs on a "cash flow" basis (appropriating only the amounts expected to be paid the next fiscal year) collected solely through interagency receipts (cost of risk allocations) assessed each agency.

If Risk Management (RM) was provided continuing funds for each FY (held in reserve until all outstanding liabilities from that period are paid - as an insurance carrier operates), then RM could immediately reduce premium assessments — reflecting the cost savings anticipated.

Future year premium assessments will reflect the cost reductions actually realized by this legislation as premiums are developed from actual claims expenses incurred.

Prepared by: J. Brad Thompson, Director
Phone
Division: Risk Management
Date/Time: 3/6/03 10:57 AM
Approved by:
Date: 3/6/2003
Agency: Administration

(Revised 9/2001 OMB)

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB 164
() Publish Date:

Revision: 3/31/03 11:01 AM
Title: Claims by State-Employed Seamen

Department: Labor and Workforce Development
BRU: Workers' Compensation
Component: Workers' Compensation

Sponsor: Rules Committee
Requester: House L&C

Component Number: 344

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services	55.6	74.1	74.1	74.1	74.1	74.1
Travel	3.0	4.0	4.0	4.0	4.0	4.0
Contractual	4.6	6.1	6.1	6.1	6.1	6.1
Supplies	7.8	2.8	2.8	2.8	2.8	2.8
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	71.0	87.0	87.0	87.0	87.0	87.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
1157 Workers Safety Account	71.0	87.0	87.0	87.0	87.0	87.0
TOTAL	71.0	87.0	87.0	87.0	87.0	87.0

Estimate of any current year (FY2003) cost: None

Check this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time	1	1	1	1	1	1
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This Bill would require work-related injuries or illnesses of state employed seamen to be covered under the State of Alaska's Workers' Compensation Act. This coverage is currently being provided through federal jurisdiction under the Jones Act and Admiralty Law. In the first year, funding is only needed for nine months due to recruitment for the position and the time it takes for a case to reach the hearing process.

Prepared by: Paul Grossi, Director
Division: Workers' Compensation
Phone: 465-2790
Date/Time: 3/31/03 11:01 AM

Approved by: Greg O'Claray, Commissioner
Agency: Department of Labor and Workforce Development
Date: 03/31/03

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(Rev 1/26/2000 OMB)

LEXSEE 794 p.2d 108

STATE OF ALASKA, DEPARTMENT OF PUBLIC SAFETY, and TOM SCHWANTES, Petitioners, v. ROBERT BROWN, Respondent

No. 3612, Supreme Court No. S-2829

Supreme Court of Alaska

794 P.2d 108; 1990 Alas. LEXIS 78

June 22, 1990

SUBSEQUENT HISTORY:
[**1] As Corrected June 26, 1990.

PRIOR HISTORY:
Petition for Review from the Superior Court of the State of Alaska, Third Judicial District of Anchorage, Joan M. Katz, Judge. Superior Court No. 3AN-87-5394 Civil.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant, the State of Alaska, sought review of the decision of the Superior Court of the State of Alaska, Third Judicial District of Anchorage, which denied the state's motion for summary judgment on the grounds of sovereign immunity and the exclusive remedy provision of the Workers' Compensation Act, *Alaska Stat. § 23.30.055*, in a claim brought against the state by plaintiff sailor for injuries he received while employed by the state.

OVERVIEW: The sailor, employed by the state, was injured when he boarded a fishing vessel to conduct an inspection in the course of his employment. After receiving workers' compensation benefits, the sailor filed a complaint seeking damages against the state. The state filed a motion for summary judgment on the ground that the state was immune and that the exclusive remedy provision of the Workers' Compensation Act barred the claim. The motion was denied and the state appealed. On appeal, the court affirmed. The court held first that merely because the exclusive remedy defense was not a condition of the waiver of the state's sovereign immunity did not mean a repeal of the exclusive remedy defense. The court found that the defense was fully applicable to all claims against the state brought under state law. However, the defense did not apply to federal remedies, and because the sailor was pursuing a federal maritime claim, the defenses of sovereign immunity and exclusive remedy were not applicable.

OUTCOME: The court affirmed the denial of the state's motion for summary judgment in the personal injury tort action brought by the sailor.

CORE TERMS: sovereign immunity, Jones Act, maritime, admiralty, exclusive remedy provision, workers' compensation, exclusive remedy, waiver of sovereign immunity, territory, immunity, Workers' Compensation Act, compensation act, State Act, waiver of immunity, state law, waiving, Alaska Workers' Compensation Act, worker's compensation, federal maritime law, conditioned, retentions, deprive, repeal, intend, Eleventh Amendment, statutory provision, summary judgment, tort liability, tort claim, unseaworthiness

LexisNexis(TM) HEADNOTES - Core Concepts

Admiralty Law > Personal Injuries > Maritime Tort Law
Torts > Public Entity Liability > Federal Causes of Action

Workers' Compensation & SSDI > Maritime Workers' Claims > Conflicts of Laws
[HN1] Once the tort claims act was passed, there was no intention to retain sovereign immunity vis-a-vis negligence claims against the state. The workers' compensation law is construed as simply a limitation regarding all employee-employer relations. It has nothing to do with limiting the waiver of sovereign immunity. In the case of admiralty law, workers' compensation principles are superseded by federal law for all employees, state workers constituting no exception.

Admiralty Law > Personal Injuries > Jones Act
Torts > Public Entity Liability > Liability
Workers' Compensation & SSDI > Maritime Workers' Claims > Compensability > Jones Act
[HN2] The Claims Against the State Act, *Alaska Stat. § 09.50.250*, states in part: By this waiver of immunity it must be concluded that the state may be sued for negligent torts which arise under the Jones Act.

Admiralty Law > Personal Injuries > Maritime Tort Law
Torts > Public Entity Liability > Liability
Workers' Compensation & SSDI > Maritime Workers' Claims > Conflicts of Laws
[HN3] It is true that under the Alaska Workmen's Compensation Act, employers, including the state, *Alaska Stat. § 23.30.265*, are excluded from admiralty liability.However, this exclusive liability provision cannot act as a limitation on suits against the state under the federal maritime law once the state has unqualifiedly waived its immunity for negligent torts. A state cannot protect private citizens from suit for a maritime tort by limiting the exclusive federal admiralty jurisdiction as delegated by Article III, § 2, of the United States Constitution. By waiving its immunity, the state stands in the position of a private party and cannot limit its tort liability by a general provision in the workmen's compensation act. So much of *Alaska Stat. § 23.30.055* as limits the liability of employers in admiralty must be considered an invalid infringement on the federal jurisdiction.

Admiralty Law > Personal Injuries > Maritime Tort Law
Torts > Public Entity Liability > Liability
Workers' Compensation & SSDI > Maritime Workers' Claims > Conflicts of Laws
[HN4] If it is the desire of the state to limit its tort liability to the workmen's compensation act, it may do so by legislative enactment of an exception to the waiver of sovereign immunity section contained in *Alaska Stat. § 09.50.250.*

Admiralty Law > Personal Injuries > Maritime Tort Law
[HN5] *Alaska Stat. § 09.50.250* provides that a person having a tort claim against the state may bring an action against the state in the superior court. This statute waives the sovereign immunity of the state as to claims brought in superior court for torts sounding in admiralty, as well as those based on state law. Subject to certain explicit exceptions, the intent of this statute was to put the state on an equal footing with private persons or entities who are sued in tort.

Admiralty Law > Personal Injuries > Maritime Tort Law
Workers' Compensation & SSDI > Maritime Workers' Claims > Conflicts of Laws
[HN6] The Workers' Compensation Act, to which the state is subject to the same extent as private employers, provides in part that the liability of an employer under the Workers' Compensation Act is exclusive and in place of all other liability of the employer and anyone otherwise entitled to recover damages at law or in admiralty on account of the injury or death. *Alaska Stat. § 23.30.055.*

Admiralty Law > Personal Injuries > Maritime Tort Law
Workers' Compensation & SSDI > Maritime Workers' Claims > Conflicts of Laws
[HN7] An exclusive remedy provision in a state workmen's compensation law cannot be applied when it will conflict with maritime policy and undermine substantive rights afforded by federal maritime law.

Admiralty Law > Personal Injuries > Maritime Tort Law
Workers' Compensation & SSDI > Maritime Workers' Claims > Conflicts of Laws
[HN8] While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of the court. To hold

otherwise would undermine the uniformity of maritime law which the Federal Constitution has placed under national purview to control in its substantial as well as procedural features.

COUNSEL:

Robert L. Eastaugh, Delaney, Wiles, Hayes, Reitman & Brubaker, Inc., Anchorage, for petitioners.

Ron J. Webb, Anchorage, and Eric Dickman, David S. Teske & Associates, Seattle, Washington, for respondent.

JUDGES:

Matthews, Chief Justice, and Rabinowitz, Burke and Compton, Justices. [Moore, Justice, not participating.]

OPINIONBY:

MATTHEWS

OPINION:

[*109] OPINION

MATTHEWS, Chief Justice.

I. FACTUAL AND PROCEDURAL BACKGROUND

Robert Brown was employed by the State of Alaska as First Mate on the Alaska Department of Public Safety patrol vessel VIGILANT, a 100-foot sea-going vessel. On June 18, 1985, while the VIGILANT was on patrol in Bristol Bay, Brown was injured as he boarded a fishing vessel to inspect it for a suspected violation of state fisheries laws.

After first accepting workers' compensation benefits [**2] under the Alaska Workers' Compensation Act, *AS 23.30.005*-.270, Brown filed suit against the state, among others, in the superior court. Brown alleged that the state was liable to him under the Jones Act, *46 U.S.C. App. § 688*, for negligence of the master of the VIGILANT, and under the admiralty doctrines of unseaworthiness, maintenance, and cure. The state moved for summary judgment on grounds of sovereign immunity and the exclusive remedy provision of the Workers' Compensation Act, *AS 23.30.055*. The trial court denied the motion. We granted the state's petition for review.

II. DISCUSSION

The trial court summarized its reasons in an order denying the state's motion for reconsideration as follows:

After statehood, the tort claims act was passed. It expanded the waiver of sovereign immunity to cover all tort claims, specifically mentioning admiralty. No limiting language referring to the workers' compensation statute was included in the tort claims act.

It is this court's view, thus, that [HN1] once the tort claims act was passed, there was no intention to retain sovereign immunity vis-a-vis negligence claims against the state. The workers' compensation law is construed as simply a limitation [**3] regarding all employee employer relations. It has nothing to do with limiting the waiver of sovereign immunity. In the case of admiralty law, workers' compensation principles are superseded by federal law for all employees, state workers constituting no exception.

The same rationale was expressed in an opinion issued by former Attorney General Hayes more than 25 years ago. 1963 Formal Op. Att'y Gen. 28. In addressing the question of whether workers employed by the state on state ferries could sue the state under the Jones Act, the opinion stated:

[T]he only question remaining is whether the State of Alaska has waived its sovereign immunity. If it has, the Jones Act is supreme; if it has not, the State cannot be sued under the Jones Act and the only remedy available to State [*110] employees is the State workmen's compensation act.

Id. at 11. The opinion next quoted the [HN2] Claims Against the State Act, *AS 09.50.250*, and continued:

By this waiver of immunity it must be concluded that the State may be sued for negligent torts which arise under the Jones Act. [HN3] It is true that under the Alaska Workmen's Compensation Act, employers, including the State (*AS 23.30.265*), are excluded from admiralty [**4] liability.

Id. at 12. The opinion then quoted the exclusive remedy provision of *AS 23.30.055*, and stated:

> However, this exclusive liability provision cannot act as a limitation on suits against the State under the Federal Maritime law once the State has unqualifiedly waived its immunity for negligent torts. . . . A state cannot protect private citizens from suit for a maritime tort by limiting the exclusive Federal admiralty jurisdiction as delegated by Article III, Section 2, of the United States Constitution. By waiving its immunity, the state stands in the position of a private party and cannot limit its tort liability by a general provision in the workmen's compensation act. So much of *AS 23.30.055* as limits the liability of employers in admiralty must be considered an invalid infringement on the Federal jurisdiction.
>
> [HN4] If it is the desire of the State to limit its tort liability to the workmen's compensation act, it may do so by legislative enactment of an exception to the waiver of sovereign immunity section contained in *AS 09.50.250.*

Id. at 13. We agree with this reasoning. Our explanation follows.

[HN5] *Alaska Statute 09.50.250* provides that "[a] person . . . having a **[**5]** . . . tort claim against the state may bring an action against the state in the superior court." This statute waives the sovereign immunity of the state as to claims brought in superior court for torts sounding in admiralty, as well as those based on state law. *State v. Stanley, 506 P.2d 1284, 1290-1291 and n.9 (Alaska 1973).* Subject to certain explicit exceptions, the intent of this statute was to put the state on an equal footing with private persons or entities who are sued in tort. See *State v. Abbott, 498 P.2d 712, 724 (Alaska 1972).*

[HN6] The Workers' Compensation Act, to which the state is subject to the same extent as private employers, provides in part that "[t]he liability of an employer [under the Workers' Compensation Act] is exclusive and in place of all other liability of the employer . . . and anyone otherwise entitled to recover damages . . . at law or in admiralty on account of the injury or death." *AS 23.30.055.* This provision would bar any suit by Brown for damages under state law. However, the present case is brought under federal maritime law.

The exclusive remedy provision cannot deprive Brown of his federal maritime remedy. In *Barber v. New England Fish Co.*, **[**6]** *510 P.2d 806 (Alaska 1973),* a longshoreman was injured while aboard a barge owned by his employer. Although he had already collected benefits under the Alaska Workers' Compensation Act, we held that the exclusive remedy provision of the act did not preclude him from seeking a further recovery against his employer under federal maritime law for unseaworthiness. n1 Similarly, in *Thibodaux v. Atlantic Richfield Co., 580 F.2d 841, 847 (5th Cir. 1978),* cert. denied, *442 U.S. 909, 99 S. Ct. 2820, 61 L. Ed. 2d 274 (1979),* the court held that [HN7] "an exclusive remedy provision in a state workmen's compensation law cannot be applied when it will conflict with maritime policy and undermine substantive rights afforded by federal maritime law." Accord *Purnell v. Nomed Shipping B.V., 801 F.2d 152, 156 (3rd Cir. 1986).* In Thibodaux, the court reversed summary judgment in favor of Atlantic Richfield and remanded the case to allow plaintiffs to pursue their general maritime claims against the latter for wrongful death. *580 F.2d at 847-48.* The **[*111]** court noted that it had been presented with an analogous question in *Roberts v. City of Plantation, 558 F.2d 750 (5th Cir. 1977). Thibodaux, 580 F.2d at 846.* In Roberts, **[**7]** the court held that the exclusive remedy provisions of Florida's workmen's compensation act were not a defense to a *Jones Act claim. 558 F.2d at 751.*

----------Footnotes----------

n1 We noted in Barber that double recovery would not be permitted as the amounts paid under the compensation award would be subject to offset should the employee win his federal maritime case. *Id. at 813, n.39.* This observation also governs the present case.

----------End Footnotes----------

The Thibodaux court found support in the Supreme Court's decision in *Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953).* There, the court refused to apply a state contributory negligence defense which would have barred recovery for a general maritime cause of action. The court stated that [HN8] "[w]hile states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court." *Id. at 409-10* (footnote omitted). To hold otherwise would undermine the uniformity of maritime **[**8]** law "which the [Federal] Constitution has placed

under national purview to control in its substantial as well as procedural features.'" *Id. at 409* (quoting *Panama R.R. Co. v. Johnson, 264 U.S. 375, 386, 44 S. Ct. 391, 68 L. Ed. 748 (1924)).* These precedents compel the conclusion that the exclusive remedy provisions of the Alaska Workers' Compensation Act cannot deprive Brown of his federal Jones Act claim against the state.

The state relies on *Johansen v. United States, 343 U.S. 427, 72 S. Ct. 849, 96 L. Ed. 1051 (1952),* in support of its argument that the exclusive remedy provision of the Workers' Compensation Act applies. Johansen involved an injury to a seaman-federal employee who sued the government for damages for negligence under the Public Vessels Act of 1925, *46 U.S.C. § § 781-799.* The court held that this remedy was barred by the Federal Employees' Compensation Act of 1916, which provided a workers' compensation remedy to federal employees. *Id. at 441.* The Johansen case presented a conflict between two federal remedies. It is thus unlike the state-federal problem which is present here.

The state also relies on three state cases: *Lyons v. Texas A & M University, 545 S.W.2d 56 (Tex.Civ.App. 1977); Gross v.* **[**9]** *Washington State Ferries, 59 Wash. 2d 241, 367 P.2d 600 (1961); Maloney v. State, 3 N.Y.2d 356, 165 N.Y.S.2d 465, 144 N.E.2d 364 (N.Y. 1957).* In these cases the sovereign immunity waiver was expressly conditioned on preserving the defense in question. Lyons involved an act waiving sovereign immunity which, as an integral part of the waiver, reserved to the state "all of the privileges and immunities granted by the Workmen's Compensation Act . . . to private persons and corporations." *545 S.W.2d at 58.* In Maloney, the act waiving sovereign immunity was "careful to provide that, in waiving immunity, the exclusiveness of the compensation remedy against the State is not impaired." *144 N.E.2d at 367.* The sovereign immunity waiver in Gross was expressly conditioned by a 30-day notice of claim proviso. *367 P.2d at 605.* By contrast, the waiver of immunity contained in the Alaska Claims Against the State Act is not conditioned on preserving the defense in question here -- the exclusive remedy provision. These cases teach that the legislature could make the exclusive remedy defense applicable to federal maritime claims by referring to the defense in the sovereign immunity waiver contained in the Claims Act. However, **[**10]** the legislature has not chosen to do so.

Merely because the exclusive remedy defense is not a condition of the waiver of the sovereign immunity of the state does not mean that the Claims Against the State Act has repealed the exclusive remedy defense. The defense is fully applicable to all claims against the state brought under state law. However, the defense does not apply to federal remedies, and thus the decision of the superior court is AFFIRMED.

DISSENTBY:
COMPTON

DISSENT:

COMPTON, J., dissents. MOORE, J., not participating.

COMPTON, Justice, dissenting.

I.

Assuming the court's conclusion is correct, state employed maritime workers **[*112]** stand to recover more than state employed land-based workers who suffer the same injury in a virtually identical accident. If the court is wrong, then state employed maritime workers stand to recover less than their privately employed counterparts. Thus, under either result, inequities are inevitable. However, traditional methods of statutory analysis lead to the conclusion that sovereign immunity was retained as to Jones Act suits.

The doctrine of sovereign immunity bars Jones Act suits for damages by injured state employees in state court, absent a waiver of immunity. *Gross v. Washington State Ferries, 59 Wash. 2d 241, 367 P.2d 600,* **[**11]** *602 (1961); Maloney v. State, 3 N.Y.2d 356, 165 N.Y.S.2d 465, 144 N.E.2d 364, 365 (1957); Lyons v. Texas A & M Univ., 545 S.W.2d 56, 58 (Tex. Civ. App. 1977).* n1

----------Footnotes----------

n1 It is worth noting that the court is unable to cite a single state case affording an injured state maritime employee Jones Act relief.

----------End Footnotes----------

The Claims Against the State Act (CATSA), *AS 09.50.250*, provides that "[a] person . . . having a . . . tort claim against the state may bring an action against the state in the superior court." Jones Act claims sound in tort. See *Collins v. State, 823 F.2d 329, 332 (9th Cir. 1987)* (CATSA does not waive Alaska's immunity from Jones Act suit in federal court). The Alaska Workers Compensation Act (AWCA), on the other hand, provides that the "liability of an employer [within this act] is exclusive and in place of all other liability of the employer . . . at law or in admiralty. . . ." "Employer" as defined includes the state. *AS 23.30.265(13)*. Should this language be given its plain meaning, Brown would be entitled to the worker's **[**12]** compensation he has received and no more.

The exclusive liability provision of AWCA, beginning in 1949, provided the exclusive remedy against the territory as an employer in lieu of claims "now existing at common law or otherwise." § 43-3-10 ACLA (1949); § 43-3-38 ACLA (1949). This was followed by a broad, general enactment providing relief to persons with "any claim" against the territory. § 56-7-1 ACLA (Supp. 1957). This enactment did not explicitly purport to supersede exclusive worker's compensation liability for the state; the exclusive liability provision was retained.

Upon statehood, the exclusive liability provision of AWCA was reenacted, limiting claims "at law or in admiralty." *AS 23.30.055*. Thus, despite the existence of a general right in third persons to make "claims" against the state in superior court, the legislature seemingly reaffirmed the state's limited waiver of immunity when acting as an employer. CATSA was refined to something near its present form in 1962. *AS 09.50.250*.

Without the enactment of AWCA or CATSA, an injured territorial or state worker would have had no claim at all against the territory or state, even with the aid of the Jones Act. The territory **[**13]** or state would have been immune from suit. *Ex Parte New York No. 1, 256 U.S. 490, 500, 41 S. Ct. 588, 65 L. Ed. 1057 (1921)*; cf. *Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 472-73, 107 S. Ct. 2941, 97 L. Ed. 2d 389 (1987)*. The original AWCA must therefore have been a limited waiver of sovereign immunity; otherwise an employee of the territory would not have been entitled to any compensation from the territory for an injury occurring while on the job. Thus, in order to prevail, Brown needs to show that the more general waiver of sovereign immunity in CATSA was somehow intended to abrogate the effect of the more limited waiver of sovereign immunity in AWCA, despite AWCA being left intact.

Despite its lengthy discussion of federal case law, none of which is relevant given that the employer here is the state, the court's rationale is really rather simple. The court seizes upon our prior cases narrowly construing retentions of sovereign immunity when the state is not an employer, e.g., *Freeman v. State, 705 P.2d 918, 920 (Alaska 1985)*, transforms them into establishing a requirement that retentions of sovereign immunity must necessarily be **[*113]** explicit, and then concludes that because sovereign immunity was not explicitly **[**14]** retained in CATSA itself, it was not retained at all. n2 This is not the issue; rather the question should be whether CATSA was intended to repeal the effect of AWCA.

----------Footnotes----------

n2 If the court is correct that retentions of sovereign immunity must be explicit, then the court's assertion that AWCA is still an effective defense against state law claims must be wrong, since CATSA does not explicitly retain sovereign immunity as to state claims. Nor could Collins be correctly decided if CATSA is as broad a waiver as the court maintains.

----------End Footnotes----------

Repeal by implication is not favored. *Peter v. State, 531 P.2d 1263, 1267 (Alaska 1975)*. A specific statutory provision ordinarily is not repealed by a later enacted, general statutory provision. *Preston v. Heckler, 734 F.2d 1359, 1368 (9th Cir. 1984); United States v. Hawkins, 228 F.2d 517, 519 (9th Cir. 1955)*. Repeal by implication is limited and only found when necessary to carry out the legislature's intent. *Warren v. Thomas, 568 P.2d 400, 403 (Alaska 1977)*.

Did the legislature, **[**15]** in enacting CATSA, intend to subject the state to Jones Act claims by its own employees, notwithstanding AWCA? Did it intend to allow its maritime workers to receive preferential treatment over its land-based workers? Had the question occurred to the legislators at the time, then arguably a clause referencing AWCA and maintaining its integrity as the sole, comprehensive remedy for injured state maritime workers could have been included.

An analysis of AMHS crew claims costs compared to those provided under the Alaska Workers Comp Act (AWCA) for all other state employees.

The enclosed Excel workbook contains detailed breakouts of the actual incurred loss (cost to date plus anticipated expense) by each individual AMHS vessel for the past six fiscal years.

To objectively analyze the AMHS employee's injury experience to the state's overall employee injury rate, both frequency (number of claims) and severity (loss cost) are averaged and compared on a per 100 FTE (full time equivalent) basis.

Additional analysis was performed between AMHS and the five state agencies with the highest workers' compensation loss experience - to provide comparison to similar physically demanding jobs.

AMHS shows a five year average loss rate of 41 claims per 100 FTE's in comparison the state overall workers' compensation injury rate of 8, with the highest five agencies showing average loss experience of 10 claims per 100 FTE's.

On a cost per 100 FTE's analysis; AMHS actual claims experience during the last five years shows an average cost of $197,065 compared to the top five state agencies averaged cost of $64,145 during the same period.

The most significant difference is the award for the non-economic damages, not provided under workers compensation remedies and that life illnesses that are alleged to manifest during a voyage are covered under the Jones Act.

AMHS CREW CLAIMS
FREQUENCY TO 100 FTE'S

FISCAL YEAR	2002			2001			2000			1999			1998			TOTALS
	# Claims	FTEs	# C/100FTEs	# Claims	FTEs	# C/100FTEs	# Claims	FTEs	# C/100FTEs	# Claims	FTEs	# C/100FTEs	# Claims	FTEs	# C/100FTEs	
SHIP																
AURORA	24	64.7	37.1	28	64.7	43	35	64.7	54	24	64.7	84	21	62.9	33	180
BARTLETT	14	21.1	66.4	17	21.1	81	14	21.1	66	7	21.1	314	19	22.7	84	130
KENNICOTT	47	112.1	41.9	81	112.1	72	44	112.1	39	33	112.1	35	not yet in service			211
COLUMBIA	35	97.7	35.8	1	97.7	1	25	97.7	26	31	97.7	26	21	94.8	22	108
LE CONTE	31	62.8	40.4	28	62.8	45	20	62.8	32	13	62.8	51	10	55.1	18	121
MALASPINA	22	36.3	60.6	40	36.3	110	18	36.3	50	13	36.3	137	19	45.4	42	149
MATANUSKA	65	82.9	78.4	58	82.9	68	44	82.9	53	28	82.9	64	36	112.9	32	254
TAKU	48	111.7	43.0	40	111.7	41	25	111.7	22	28	111.7	20	30	110.3	27	171
TUSTUMENA	25	65.9	37.9	37	65.9	56	23	65.9	35	24	65.9	53	22	66.0	33	112
OTHER AMHS	31			19			3			13			7			00
FISCAL YEAR TOTALS	342	655.2	60.1	351	655.2	54	251	655	38	215	655	33	178	570.1	31.2	1160
																1160
State W/C Claims & FTEs (not including AMHS)	1298	16,518	8.1	1,302	14,871.8	8.7	1,059	14,192.0	7.5	1,103	14,210.0	7.8	1,198	13,785.0	8.7	4918

Note: Work Comp FTEs taken from CORA and adjusted for AMHS FTE count.

	Claims	FTEs
AMHS (5) YEAR TOTAL	1,337.0	3,101

	Claims	FTEs
5 YEAR AVERAGE	267.4	638.2

AMHS CLAIMS per 100 FTEs - 5 Year Average	41

STATE W/C CLAIMS PER 100 FTE's	8

ALL DEPT CLAIMS
FREQUENCY TO 100 FTE'S

DEPARTMENT	2002			2001			2000			1999			1998			1997			TOTALS
	# Claims	FTEs	# /100FTEs	# Claims	FTEs	# /100FTEs	# Claims	FTEs	# /100FTEs	# Claims	FTEs	# /100FTEs	# Claims	FTEs	# /100FTEs	# Claims	FTEs	# /100FTEs	
Governor's Office	6	198	2.0	0	187	0.0	3	183	1.6	7	200	3.5	5	186	2.7	7	187	3.7	22
Administration	214	1488	14.6	260	1,404.0	18.5	211	1,538.0	13.7	180	1,334.0	13.5	192	1,288.0	14.9	182	1,155.0	15.8	1025
Law	20	478	4.2	16	454.0	3.5	8	453.0	1.8	11	447.0	2.5	17	441.0	3.9	15	439.0	3.4	87
Revenue	21	508	4.2	32	474.0	6.8	28	462.0	6.7	16	488.0	3.0	28	502.0	5.6	32	487.0	6.6	185
Education	28	451	6.2	15	398.0	3.8	17	510.0	3.3	20	497.0	4.0	25	491.0	5.1	34	508.0	6.7	111
Health & Social Services	168	2450	6.8	198	2,215.0	8.8	143	2,201.0	6.5	165	2,088.0	7.9	183	2,047.0	8.9	198	2,103.0	9.5	888
Labor & Workforce Dev	37	887	4.2	35	794.0	4.4	28	718.0	4.0	18	653.0	3.0	23	736.0	3.1	25	816.0	3.1	131
Commerce & Economic Dev	10	503	2.0	18	451.0	4.0	11	374.0	2.9	12	481.0	2.5	8	426.0	2.1	17	457.0	3.7	87
Military & Veterans Affairs	22	258	8.5	18	223.0	8.5	14	222.0	6.3	17	218.0	7.8	19	178.0	10.7	15	171.0	8.8	84
Natural Resources	112	714	15.7	135	657.0	20.5	87	675.0	12.9	85	810.0	10.4	132	608.0	21.7	158	937.0	16.9	607
Fish & Game	72	1225	5.9	84	1,137.0	7.4	69	1,148.0	7.6	76	1,121.0	6.7	85	1,095.0	7.8	83	999.0	8.3	416
Public Safety	139	764	18.2	123	727.0	16.9	94	754.0	12.5	92	766.0	12.0	88	746.0	11.9	88	887.0	9.9	486
Environmental Conservation	12	491	2.4	13	487.0	2.8	11	480.0	2.3	19	491.0	3.9	17	473.0	3.6	18	508.0	3.2	76
Corrections	182	1473	11.0	164	1,388.0	11.9	100	1,368.0	7.3	136	1,362.0	10.0	139	1,358.0	10.2	125	1,350.0	9.3	654
Transportation	251	2551	9.8	253	2475.0	10.2	181	2,331.0	8.0	207	2,342.0	8.8	205	2,330.0	8.8	231	2,350.0	11.8	1077
Legislative Affairs	10	294	3.4	4	300.0	1.3	11	274.0	4.0	13	272.0	4.8	8	350.0	1.7	7	282.0	2.4	41
Legislative Audit	0	37	0.0	1	36.0	2.8	0	36.0	0.0	0	36.0	0.0	0	34.0	0.0	0	36.0	0.0	1
Courts	15	704	2.1	24	680.0	3.5	23	681.0	3.4	19	682.0	2.7	24	680.0	3.6	22	674.0	3.3	112
FISCAL YEAR TOTALS	1288	16516	8.4	1,382	14,272	0.7	1,060	14,182	7.5	1,102	14,210.0	7.8	1,198	13,785.0	8.7				4742

Note: Work Comp FTEs taken from CORA

AMHS Claims Frequency
compared to Top 5 State Dept W/C Claims Frequency per 100 FTEs

FISCAL YEAR	2002			2001			2000			1999			1998			1997			TOTALS
	# Claims	FTEs	#/100FTEs	# Claims	FTEs	#/100FTEs	# Claims	FTEs	#/100FTEs	# Claims	FTEs	#/100FTEs	# Claims	FTEs	#/100FTEs	# Claims	FTEs	#/100FTEs	
AURORA	24	84.7	37.1	28	84.7	40	35	84.7	54	24	84.7	37	21	82.9	33	11	42.7	28	
BARTLETT	14	21.1	66.4	17	21.1	81	14	21.1	66	7	21.1	33	19	22.7	84	15	62.3	24	
KENNICOTT	47	112.1	41.9	81	112.1	72	44	112.1	39	33	112.1	29		not yet in service			not yet in service		
COLUMBIA	35	97.7	35.8	1	97.7	1	25	97.7	26	31	97.7	32	21	94.8	22	35	122.9	28	
CONTRACT	31	62.8	49.4	28	62.8	45	20	62.8	32	13	62.8	21	10	65.1	16	10	62.0	30	
MALASPINA	22	38.3	60.6	40	38.3	110	18	38.3	60	13	38.3	36	19	45.4	42	38	123.2	31	
MATANUSKA	65	82.9	73.4	58	82.9	88	44	82.9	53	20	82.9	35	36	112.9	32	25	80.8	30	
HOTAKU	46	111.7	43.0	46	111.7	41	25	111.7	22	28	111.7	25	30	110.3	27	35	111.6	31	
TUSTUMENA	26	65.9	37.9	37	65.9	60	23	65.9	35	24	65.9	36	22	66.0	33	21	62.4	34	
OTHER AMHS	31			19			9			13			7			8			
FISCAL YEAR TOTALS	342	655.2	50.1	351	655.2	54	251	655	39	216	655.2	32.8	178	670.1	31.2	199	857.8	30.9	
Other DOT	199	2629	8	258	2,433.0	11	184	2,377.0	8	197	1,708.8	11.5	203	1,759.9	11.5	231	2,264.2	10.2	
DHSS	154	2450	6	199	2,365.0	8	145	2,385.0	6	168	2,098.0	8.0	162	2,047.0	8.9	109	2,103.0	9.5	
CORRECTIONS	142	1473	10	160	1,460.0	10	102	1,358.0	7	131	1,362.0	9.6	139	1,358.0	10.2	125	1,360.0	9.3	
ADMINISTRATION	178	1460	12	259	1,442.0	18	210	1,404.0	15	178	1,334.0	13.3	192	1,269.0	14.0	182	1,155.0	15.8	
PUB SAFETY	121	764	16	125	745.0	17	95	727.0	13	92	766.0	12.0	89	748.0	11.9	88	687.0	9.0	
(Top 5 Depts. Only) Work Comp Claims & FTEs (not including AMHS)	794	8,779	9	900	8,445	12	736	8,241	9	766	7,268.8	10.5	905	7,199.9	11.2	825	7,759.2	10.6	4320

Note: Top 5 Dept. Work Comp FTEs taken from CORA Bonds FTE column and adjusted for AMHS FTE count.

Row 14	# Claims	FTEs
AHMS COMBINED (5) YEAR TOTAL	1,337	3,190.9
AHMS 5 YEAR AVERAGE	267	638.2

AHMS Frequency Rate per 100 FTEs	42	Top 5 Dept. Frequency Rate per 100 FTEs	10

AMHS EMPLOYEE INJURY CLAIMS
Cost per 100 FTEs

FISCAL YEAR	2002			2001			2000			1999			1998			TOTALS
	$ Claims	FTEs	$/100FTEs	$ Claims	FTEs	$/100FTEs	$ Claims	FTEs	$/100FTEs	$ Claims	FTEs	$/100FTEs	$ Claims	FTEs	$/100FTEs	
AURORA	$44,248	64.7	$68,390	206,941	64.7	$319,847	$324,005	64.7	$500,781	$136,670	64.7	$211,236	$30,730	62.9	$61,574	
BARTLETT	$40,001	21.1	$189,578	95,382	21.1	$452,047	$30,666	21.1	$145,336	$28,706	21.1	$136,047	$30,969	22.7	$136,427	
KENNICOTT	$173,665	112.1	$154,920	384,527	112.1	$343,021	$99,886	112.1	$89,104	$165,376	112.1	$148,419	$0	0.0	$0	
COLUMBIA	$81,094	97.7	$83,024	4,308	97.7	$4,409	$115,447	97.7	$118,165	$111,620	97.7	$114,452	$32,107	94.8	$33,868	
LITTLE CONTE	$78,545	62.8	$125,072	70,386	62.8	$112,083	$191,004	62.8	$304,146	$663,504	62.8	$1,056,535	$625,761	55.1	$1,135,682	
MALASPINA	$12,878	36.3	$35,477	2,222	36.3	$6,121	$139,958	36.3	$385,559	$24,219	36.3	$66,719	$107,039	45.4	$235,756	
NATAN JOKA	$230,299	82.9	$277,803	130,842	82.9	$157,831	$133,160	82.9	$160,627	$31,019	82.9	$37,417	$52,202	112.9	$46,237	
OTAKU	$83,594	111.7	$74,838	335,319	111.7	$300,106	$135,656	111.7	$121,449	$68,579	111.7	$61,390	$24,437	110.9	$22,155	
TUSTUMENA	$201,002	65.9	$305,010	77,320	65.9	$117,329	$482,448	65.9	$732,091	$58,315	65.9	$88,480	$181,996	66.0	$275,752	
FISCAL YEAR TOTALS	$946,227	655.2	$144,418	1,307,249	655.2	$199,519	$1,652,232	655.2	$252,172	$1,289,204	655.2	$196,765	$1,003,235	570.1	$191,762	

	$ Claims	FTEs
(5) YEAR TOTAL	6,288,147	3,190.9

	$ Claims	FTEs
5 YEAR AVERAGE	$1,257,629	638.2

	FTEs
Rate per 100 FTEs	$197,065

ALL DEPT WORKERS' COMPENSATION CLAIMS
SEVERITY TO 100 FTE'S

DEPARTMENT	2002			2001			2000			1999			1998			1997			TOTALS
	Claim cost	FTE's	$/100FTEs	Claim cost	FTEs	$/100FTEs	Claim cost	FTEs	$/100FTEs	Claim cost	FTEs	$/100FTEs	Claim cost	FTEs	$/100FTEs	Claim cost	FTEs	$/100FTEs	
Governor's Office	52,756	196	26,918	$0	187	$0	$7,028	189	$3,719	$3,100	200	$1,550	$13,494	186	$7,255	$108,035	187	$58,703	$129,658
Administration	1,710,044	1466	116,668	$1,687,177	1,404.0	$120,682	$1,141,188	1,530.0	$74,595	$1,135,858	1,334.0	$85,099	$1,328,798	1,288.0	$103,087	$1,823,840	1,155.0	$157,917	$7,128,309
Law	99,166	478	20,746	$54,718	454.0	$12,053	$42,318	453.0	$9,342	$50,285	447.0	$11,249	$70,951	441.0	$16,084	$36,441	439.0	$8,301	$264,094
Revenue	172,444	506	34,080	$76,741	474.0	$16,190	$112,713	492.0	$22,900	$91,243	482.0	$18,945	$192,706	502.0	$38,388	$93,846	487.0	$19,558	$660,651
Education	124,633	451	27,635	$17,877	388.0	$4,482	$131,301	510.0	$25,786	$46,005	487.0	$9,450	$81,993	401.0	$18,638	$73,373	508.0	$14,501	$352,149
Health & Social Services	1,001,074	2459	43,151	$821,878	2,216.0	$37,105	$780,879	2,201.0	$35,480	$531,971	2,096.0	$25,356	$904,103	2,047.0	$44,167	$719,481	2,103.0	$34,212	$3,760,110
Labor & Workforce Dev	394,716	847	46,527	$158,374	794.0	$19,604	$193,897	719.0	$26,968	$82,683	833.0	$10,001	$48,263	736.0	$6,150	$148,187	815.0	$18,180	$628,685
Commerce & Economic Dev.	14,812	603	2,046	$60,023	451.0	$13,309	$2,034,780	374.0	$544,053	$88,214	481.0	$18,340	$56,935	428.0	$13,377	$40,586	457.0	$8,881	$3,281,569
Military & Veterans Affairs	134,235	258	51,851	$35,868	223.0	$16,093	$73,094	222.0	$32,925	$139,460	216.0	$64,560	$280,248	178.0	$157,442	$16,244	171.0	$9,500	$544,922
Natural Resources	286,253	714	40,093	$423,126	657.0	$75,047	$320,631	676.0	$48,776	$195,793	910.0	$21,516	$498,350	608.0	$81,931	$385,225	937.0	$42,180	$1,911,724
Fish & Game	251,087	1225	20,497	$470,722	1,137.0	$42,102	$509,180	1,148.0	$44,353	$362,537	1,121.0	$32,340	$253,498	1,096.0	$23,150	$668,608	998.0	$68,028	$2,273,652
Public Safety	1,699,714	764	222,476	$723,006	727.0	$99,451	$321,749	754.0	$42,672	$782,977	768.0	$103,822	$403,173	748.0	$54,046	$1,083,825	887.0	$122,122	$3,224,131
Environmental Conservation	73,544	491	14,978	$65,925	467.0	$14,117	$132,521	480.0	$27,609	$61,037	491.0	$12,431	$178,813	473.0	$37,741	$64,704	508.0	$12,787	$602,701
Corrections	837,108	1473	56,830	$831,056	1,360.0	$60,768	$465,731	1,366.0	$34,094	$873,703	1,362.0	$64,148	$973,000	1,358.0	$71,649	$764,806	1,350.0	$56,134	$3,929,325
Transportation	2,108,473	[illegible]	80,126	$2,400,317	[illegible]	$66,906	$1,437,882	[illegible]	$63,587	$2,040,125	[illegible]	$69,373	$1,816,277	[illegible]	$56,464	$2,108,735	[illegible]	$107,761	$9,300,148
Legislative Affairs	65,473	294	22,270	$48,339	300.0	$15,453	$9,122	274.0	$3,064	$80,677	278.0	$29,024	$110,831	350.0	$3,128	$7	292.0	$2	$245,696
Legislative Audit	0	37	0	$2,841	34.0	$8,225	$0	36.0	$0	$0	36.0	$0	$0	34.0	$0	$0	36.0	$0	$2,841
Courts	33,632	704	4,783	$128,608	690.0	$18,348	$71,730	681.0	$10,533	$43,817	692.0	$6,346	$89,812	680.0	$13,206	$58,037	674.0	$8,611	$390,103
FISCAL YEAR TOTALS	9,117,734	15,516	$58,763	$8,088,965	14,272	$56,678	$7,792,924	14,182	$54,049	$6,622,043	14,210.0	$46,601	$5,708,672	13,785.0	$40,304	$8,220,881	######	$50,706	$37,521,345

Note: Work Comp FTEs taken from CORA

DOT FTE's do not include AMHS [illegible]

AMHS CREW COSTS Compared to
TOP 5 DEPARTMENTS
WORK COMP
CLAIM COSTS per 100 FTEs

FISCAL YEAR	2002			2001			2000			1999			1998			TOTALS
	WC$	FTEs	$/100FTE	WC$	FTEs	$/100FTE	WC$	FTEs	$/100FTE	WC$	FTEs	$/100FTE	WC$	FTEs	$/100FTE	
											656.2			670.1		
Other DOT	2,106,473	2629	80,125	2,189,697	2,433.0	90,008	1,266,154	2,377.0	53,267	1,201,589	1,700.8	75,086.1	1,146,418	1,759.8	65,141.1	
DHSS	988,473	2459	40,198	800,968	2,365.0	33,867	1,022,922	2,365.0	43,253	407,626	2,098.0	19,429.3	902,172	2,047.0	44,072.9	
CORRECTIONS	835,397	1473	56,714	813,488	1,460.0	55,719	568,380	1,368.0	41,548	543,641	1,362.0	39,914.9	850,620	1,358.0	62,637.7	
ADMINISTRATION	1,710,592	1456	116,664	1,385,478	1,442.0	96,080	1,221,475	1,404.0	87,000	598,375	1,334.0	44,855.7	1,074,494	1,289.0	83,358.7	
DPS PUBLIC SAFETY	1,701,387	764	222,692	705,222	745.0	94,661	387,588	727.0	53,311	759,591	766.0	99,163.3	353,608	748.0	47,400.6	
(Top 5 Depts. Only) Work Comp Claims & FTEs (not including AMHS)	7,342,303	8,781	618,513	5,895,061	8,445	69,805	4,466,499	8,241	54,199	$ 3,500,802	7,266.8	49,413.9	$ 4,327,313	7,199.8	60,102.4	
COMBINED (5) YEAR TOTAL	$25,621,977	39,913.7				5 YEAR AVERAGE	$5,124,395.39	7,988.7					Top 5 Dept. Rate per 100 FTEs		$64,145	
													AMHS Rate per 100 FTEs		$197,065	

Subject: More stuff on HB 164
Date: Tue, 01 Apr 2003 09:29:56 -0900
From: Tom Anderson <Representative_Tom_Anderson@legis.state.ak.us>
Organization: Alaska State Legislature
To: Vanessa Tondini <Vanessa_Tondini@legis.state.ak.us>

Here you go, more stuff.

-Josh

Subject: Did not the Alaska Supreme Court already address the question of whether or not the legislature can effect this change
Date: Mon, 31 Mar 2003 14:37:49 -0900
From: "Kevin Jardell" <Kevin_Jardell@admin.state.ak.us>
To: <Representative_Tom_Anderson@legis.state.ak.us>

Representative Anderson,

I have attached some of the discussion points that Risk Management put together for purposes of giving testimony. I hope you find it beneficial.

Kevin Jardell

1_Hearing questions.doc	**Name:** 1_Hearing questions.doc **Type:** WINWORD File (application/msword) **Encoding:** base64 **Download Status:** Not downloaded with message

Did not the Alaska Supreme Court already address the question of whether or not the legislature can effect this change?

Yes, State of Alaska v. Robert Brown – "*if it is the desire of the State to limit its tort liability to the work[er]'s compensation act, it may do so by legislative enactment of an exception to the waiver of sovereign immunity section contained in AS 09.50.250.*"

Did not the maritime unions stipulate in the past to just this result – to provide Alaska Workers' Compensation benefits in lieu of traditional Jones Act remedies?

Yes, through collective bargaining the maritime unions negotiated this arrangement from 1983 thru 1991 – this only stopped because the Supreme Court ruled in Dale Brown v. State Division of Marine Highways that this contractual arrangement was impermissible - unions could not negotiate away the individual seaman's rights.

So the purpose of this bill is to equalize the remedies of all State employees?

Yes, only the seaman today has the right of direct civil action against his or her employer; all other State of Alaska employees have workers' compensation as their exclusive remedy and may not sue their employer. These same seamen are also eligible for leave, retirement benefits, and medical coverage – like all other state employees.

Is there another example of a similar arrangement within Alaska?

Yes, ordinarily railroad employees are covered by a federal law known as FELA; yet by law the Alaska Workers' Compensation Act has been designated the exclusive remedy for Alaska Railroad employees since the time of transfer of the railroad to the state.

Can you explain the difference in how illness is treated under the present system and how it would be handled under this bill?

Presently, for any illness manifesting while the seaman is on a ship, unearned wages, maintenance and cure are due.

> "Unearned wages" are paid for the balance of the voyage the seaman was working (usually the rest of the week on); this means the seaman gets a regular paycheck even if he or she has to leave the ship before the voyage is over, without a deduction for leave usage.
>
> "Maintenance" is a stipend paid daily to help cover food and lodging costs while the seaman is recovering off the ship or out of a hospital. The amount of maintenance is set by union contract; currently it is $45 a day for most seamen.

"Cure" is the payment of medical expenses, including bills of health care providers, treatment, and associated travel costs.

Under this bill, illness would be handled the same way as for other state employees, primarily through the use of sick leave. (Only certain occupational diseases qualify as compensable injuries under the workers' compensation system.) Medical bills would still be handled the same way.

Beard Stacey Trueb & Jacobsen, LLP
ATTORNEYS AT LAW

821 N Street, Suite 205 • Anchorage, Alaska 99501

March 21, 2003

Representative Tom Anderson
State Capitol, Room 432
Juneau, AK 99801-1182

Re: House Bill 164

Dear Representative Anderson:

As a resident of the state for the last 14 years, I have frequently talked to my representatives about matters that concerned me. I write to you concerning House Bill 164, which has been referred to your committee, House Labor and Commerce.

I am writing to inform you that I have several objections to this legislation. My law firm has represented some of the State's employees who are now covered under the federal law known as the Jones Act. We are maritime law experts and we therefore have specialized knowledge concerning the legal problems with this bill.

First, the bill would create second-class citizens out of the State's Marine Highway employees. Every seaman in the State would be able to seek compensation under the Jones Act except the State's Marine Highway employees. If a person is employed as a commercial fisherman, for a tugboat company, or for Tote or CSX Lines, they are covered under the Jones Act and entitled to those remedies. The only exception would be State marine workers. Passage of this bill may indeed violate Article I, Section 1 of the Alaska Constitution guaranteeing equal protection of the laws to all citizens.

Second, in a long line of cases the United States Supreme Court, and every state court that has considered the issue, has held that states cannot apply worker's compensation statutes to merchant seamen. The reasoning is two-fold. The primary obstacle is the fact that seaman's remedies are maritime in nature and under the exclusive purview of federal admiralty jurisdiction. Under the federal Constitution maritime matters are reserved for the federal legislature to the exclusion of the states. In short, there is a federal constitutional bar to the states applying state worker's compensation laws to seamen. The secondary reason is that Congress has completely occupied the field

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with a law of national application, the Jones Act, and the states may not apply inconsistent laws. These principles are well established and beyond reasonable dispute. There are two Alaska cases that have dealt directly with this issue and are consistent with every other case on the subject. These cases are: Anderson v. Alaska Packers Association, 635 P.2d 1182 (1981), and Trident v. Murray, 2000 AMC 288 (Ak. Superior Ct. 1999). Therefore, if the Legislature were to make worker's compensation applicable to seamen, it would be a mere gratuity and not binding upon the injured worker.

Third, the state's waiver of sovereign immunity is contained in the Alaska Constitution. Article II, Section 21 provides: "The legislature shall establish procedures for suits against the state." (Emphasis supplied). The word "shall" is always mandatory. Article II, Section 21 abolished the doctrine of sovereign immunity in Alaska because it left no option for the legislature not to establish procedures for suits. Section 21 also mandates that the legislature establish the "procedures" for suits against the state. The word "procedures" is commonly understood to refer to the mechanics of filing suits and it has nothing to do with the substantive right to sue the state. This is the only logical manner in which Article II, Section 21 can be read. See Muskopf v. Corning Hospital District, 359 P.2d 457, 460-61 (Cal. 1961)(interpreting similar constitutional language, and judicially abolishing sovereign immunity). Accordingly, if Alaska is going to abolish sovereign immunity for these suits in its own courts it will have to do so via a constitutional amendment. House Bill 164 cannot accomplish the revocation of state sovereign immunity.

Fourth, the Jones Act provides that all state courts shall have concurrent jurisdiction over these suits. 45 U.S.C. § 56. The Alaska Supreme Court has held that Jones Act suits may be filed in any available forum. Nunez v. American Seafoods, 52 P.2d 720 (2002). Under federal and state case law these Jones Act suits could be filed in Bellingham, Washington because the state has a ferry terminal there and is subject to jurisdiction in that forum. The State of Alaska has no sovereign immunity in the Washington courts. Alden v. Maine, 119 S.Ct. 2240 (1999); Hall v. Nevada, 440 U.S. 410 (1979).

Acceptance of worker's compensation benefits cannot bar a Jones Act lawsuit. Chan v. Society Expeditions, Inc., 39 F.3d 1398, 1403 (9th Cir. 1994), cert. denied, 514 U.S. 1004 (1995); Roberts v. City of Plantation, 558 F.2d 750, 751 (5th Cir. 1977); Western Boat Bldg. Co. v. O'Leary, 198 F.2d 409, 411 (9th Cir. 1952); State v. Brown, 794 P.2d 108, 110, 111 (Alaska 1990). And the Washington courts are constitutionally bound to apply maritime law to a Jones Act suit filed against the State of Alaska in a Washington Court. Larios v. Victory Carries, Inc., 316 F.2d 63 (2d Cir. 1963); In Re: EXXON VALDEZ, 767 F.Supp. 1509, 1513 (D. Alaska 1991). Therefore, even if Alaska could close the courthouse door to these employees in the Alaska courts it cannot close the Washington courthouse door.

The state would therefore be faced with hiring expensive private counsel to defend itself from the lawsuits that would be filed in the Washington courts.

Fifth, there is no empirical evidence that the state would obtain any savings by covering these workers under the worker's compensation scheme. I am familiar with only one scientific study of the issue by the American Waterways Operators, and that organization looked at 371 cases that were covered by workers' compensation and the Jones Act and concluded that it was less expensive to compensate workers under the Jones Act.

In summary, House Bill 164, if passed will not accomplish its goals; it will lead to expensive and protracted litigation, make second-class citizens out of the state seamen, and create confusion and uncertainty for the injured workers.

In order to aid your staff in consideration of these technical legal matters I will in the near future send you a detailed legal brief on the matters outlined above. I respectfully request you to carefully consider my above comments while considering the wisdom of this legislation.

Sincerely yours,

Lanning Trueb

Beard Stacey Trueb & Jacobsen, LLP
ATTORNEYS AT LAW

821 N Street, Suite 205 • Anchorage, Alaska 99501

C

March 24, 2003

Sent Via DHL Overnight & Facsimile (907) 465-3871 (5 page(s))

Senator Con Bunde
State Capitol, Room 506
Juneau, AK 99801-1182

Re: Senate Bill 120

Dear Con:

As a constituent of your district for the last 11 years, I have chatted with you on a number of occasions regarding various issues. I write to you concerning Senate Bill 120, which has been referred to your committee, Senate Labor and Commerce.

I am writing to inform you that I have several objections to this legislation. My law firm has represented some of the State's employees who are now covered under the federal law known as the Jones Act. We are maritime law experts and, therefore, have considerable knowledge concerning this bill.

First, the bill would create second-class citizens out of the State's Marine Highway employees. Every seaman in the State would be able to seek compensation under the Jones Act except the State's Marine Highway employees. If a person is employed as a commercial fisherman, for a tugboat company, or for Tote or CSX Lines, they are covered under the Jones Act and entitled to those remedies. The only exception would be State marine workers. Passage of this bill may indeed violate Article I, Section 1 of the Alaska Constitution guaranteeing equal protection of the laws to all citizens.

Second, in a long line of cases the United States Supreme Court, and every state court that has considered the issue, has held that states cannot apply worker's compensation statutes to merchant seamen. The reasoning is two-fold. The primary obstacle is the fact that a seaman's remedies are maritime in nature and under the purview of federal admiralty jurisdiction. Under the federal Constitution, maritime matters are reserved for the federal legislature to the exclusion of the states. In short, there is a federal constitutional bar to the states applying state workers compensation laws to seamen. The secondary reason is that Congress has completely occupied the field with a law of national application, the Jones Act, and the states may not apply inconsistent laws. These principles are well established and beyond reasonable dispute. There are two Alaska cases that have dealt directly with this issue and are consistent with every other case on the subject. These cases are: Anderson v. Alaska Packers Association, 635 P.2d 1182 (1981), and Trident v. Murray, 2000 AMC 288 (Ak. Superior

Anchorage Office (907) 272-7207 • Telefax (907) 274-9115 • E-Mail: blstanc@alaska.net
Seattle Office (206) 282-3100 • Telefax (206) 282-1149 • E-Mail: blstsea@halcyon.com

Ct. 1999). Therefore, if the Legislature were to make workers' compensation applicable to seamen, it would be a mere gratuity, or supplemental benefit, and not binding upon the injured worker.

Third, the state's waiver of sovereign immunity is contained in the Alaska Constitution. Article II, Section 21 provides: "The legislature shall establish procedures for suits against the state." (Emphasis supplied). The word "shall" is always mandatory Article II, Section 21 abolished the doctrine of sovereign immunity in Alaska because it left no option for the legislature not to establish procedures for suits. Section 21 also mandates that the legislature establish the "procedures" for suits against the state. The word "procedures" is commonly understood to refer to the mechanics of filing suits and it has nothing to do with the substantive right to sue the state. This is the only logical manner in which Article II, Section 21 can be read. See Muskopf v. Corning Hospital District, 359 P.2d 457, 460-61 (Cal. 1961)(interpreting similar constitutional language, and judicially abolishing sovereign immunity). Accordingly, if Alaska is going to abolish sovereign immunity for these suits in its own courts it will have to do so via a constitutional amendment. Senate Bill 120 cannot accomplish the revocation of state sovereign immunity.

Fourth, the Jones Act provides that all state courts shall have concurrent jurisdiction over these suits. 45 U.S.C. § 56. The Alaska Supreme Court has held that Jones Act suits may be filed in any available forum. Nunez v. American Seafoods, 52 P.2d 720 (2002). Under federal and state case law these Jones Act suits could be filed in Bellingham, Washington because the state has a ferry terminal there and is subject to jurisdiction in that forum. The State of Alaska has no sovereign immunity in the Washington courts. Alden v. Maine, 119 S.Ct. 2240 (1999); Hall v. Nevada, 440 U.S. 410 (1979).

Acceptance of workers' compensation benefits cannot bar a Jones Act lawsuit. Chan v. Society Expeditions, Inc., 39 F.3d 1398, 1403 (9th Cir. 1994), cert. denied, 514 U.S. 1004 (1995); Roberts v. City of Plantation, 558 F.2d 750, 751 (5th Cir. 1977); Western Boat Bldg. Co. v. O'Leary, 198 F.2d 409, 411 (9th Cir. 1952); State v. Brown, 794 P.2d 108, 110, 111 (Alaska 1990). The Washington courts are constitutionally bound to apply maritime law to a Jones Act suit filed against the State of Alaska in a Washington Court. Larios v. Victory Carries, Inc., 316 F.2d 63 (2d Cir. 1963); In Re: EXXON VALDEZ, 767 F.Supp. 1509, 1513 (D. Alaska 1991). Therefore, even if Alaska could close the courthouse door to these employees in the Alaska courts, it cannot close the Washington courthouse door. The state would therefore be faced with hiring expensive private counsel to defend itself from the lawsuits that would be filed in the Washington courts.

Fifth, there is no empirical evidence that the state would obtain any savings by covering these workers under the workers' compensation scheme. I am familiar with only one scientific study of the issue by the American Waterways Operators. That organization looked at 371 cases that were covered by workers' compensation and the

Jones Act, and concluded that it was less expensive to compensate workers under the Jones Act.

In summary, Senate Bill 120, if passed will not accomplish its goals. It will lead to expensive and protracted litigation, make second-class citizens out of state employed seamen, and create confusion and uncertainty for injured workers.

In order to aid your staff in consideration of these technical legal matters, I will in the near future send you a legal brief on the matters outlined above. I respectfully request you to carefully consider the above comments while considering the wisdom of this legislation.

Sincerely,

for Lanning M. Trueb

Beard Stacey Trueb & Jacobsen, LLP
ATTORNEYS AT LAW

821 N Street, Suite 205 • Anchorage, Alaska 99501

April 8, 2003

Representative Lesil McGuire
State Capitol, Room 118
Juneau, AK 99801-1182

Re: House Bill 164

Dear Representative McGuire:

I am writing in response to the Attorney General's letter to the Committee and in response to the testimony of Brad Thompson at the hearing on Senate Bill 120.

Attorney General's Letter

The Attorney General's letter failed to adequately address several issues that were raised in the legal brief that I submitted to the Committee.

First, the letter states that the bill is simply following the template suggested by the Alaska Supreme Court in Department of Public Safety v. Robert Brown, 794 P.2d 108 (Alaska 1990). The problem with this analysis is that the Court's statements that provide this template are dictum because they were unnecessary to the case's holding.

> Dicta is defined as "[o]pinions of a judge which do not embody the resolution or determination of the specific case before the court. Expressions in court's opinion which go beyond the facts before the court and therefore are individual views of author of opinion and not binding in subsequent cases as legal precedent. *Black's Law Dictionary* 454 (6th Ed. 1990).

Veco, Inc. v. Rosebock, 970 P.2d 906, 922 (Alaska 1999). The Court's determined only that the State had waived sovereign immunity for suits in its own courts. The Supreme Court was not asked to decide whether the waiver is in the Constitution or in the statute. Also, Mr. Brown's counsel had not raised the argument that the federal constitution bars application of worker's compensation statutes to merchant seaman, as the Supreme Court had held in Bunde v. Alaska Packers Association, 635 P.2d 1182 (1981). In reaching its

decision in Brown the Supreme Court was never confronted with, and therefore never had to decide, the issues raised in my legal brief.

Second, the Constitutional language waiving sovereign immunity is unambiguous: "*Suits Against the State.* The legislature shall establish procedures for suits against the state." The convention debate says that the State's sovereign immunity is waived "period," and that the only thing left for the legislature to do is to determine which court such suits are to be filed. The Constitution allowed the legislature to set up a court of claims, or to provide that such suits be filed in the Superior Court. AS 09.50.250 was a proper exercise of the legislature's authority because the statute provided that tort claims were to be filed in the superior court. This was permissible because the legislature chose not to set up a separate court of claims for these suits.

The rest of the statute is superfluous. For example, AS 09.50.250(1), which exempts "discretionary" decisions from tort suits, is nothing more than a tautology because the constitutional separation of powers itself prohibits such tort suits, regardless of whether or not the legislature has spoken on the subject. Sea-Land Service Inc. v. United States, 919 F.2d 888 (3d Cir. 1990). Therefore, the State enjoys immunity from suit for discretionary decisions even without AS 9.50.250(1). Id.

The Attorney General's letter never seriously addresses the Constitutional language or the debate in the convention, both of which are diametrically opposed to the premise of this bill. The delegates at the convention were sophisticated legislators, judges, and lawyers. The Style Book for the Constitutional Committee on Style lays out the specific need to use the word "shall" when no discretion is left to the legislature or the executive. The convention used the word "shall" in this section of the constitution. The waiver of immunity in the Constitution is mandatory. The citizens of the state adopted the constitution by a democratic vote. They approved the fact that the Constitution could not be changed except by a formal amendment process in which they once again get to vote. This attempt to amend the Constitution by statute rather than by formal amendment is anti-democratic and unconstitutional. When this issue is placed before the Alaska Supreme Court, for the first time, it will scrupulously adhere to the Constitutional language and history.

Third, the Attorney General's letter never seriously addresses the equal protection clause of the Alaska Constitution. The Alaska Supreme Court has held that Alaska workers' compensation laws may not constitutionally be applied to seamen. Bunde v. Alaska Packers Association, 635 P.2d 1182 (1981). The United States Supreme Court has held that not even Congress has the constitutional power to apply state workers' compensation laws to seamen. Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 40 S.Ct. 438 (1920)(as a matter of constitutional law rejecting Congress' attempt to apply state workers' compensation laws to seamen). There is no dispute that the Jones Act applies to seaman employed by the State of Alaska. Petty v. Tenn.-Misou. Bridge Comm'n., 359 U.S. 275, 282, 79 S.Ct. 785, 790 (1959). Accord Port Authority of Trans-Hudson v. Feeney, 495 U.S. 299, 110 S.Ct. 1868 (1990).

Therefore, this bill attempts to single out a group of Alaska citizen seamen who work for the State and to deprive them of the protections of remedial federal legislation that unquestionably applies to them. It does so by trying to apply workers' compensation to them, even after the Alaska Supreme Court says that it cannot be applied to seamen. Because these seamen's rights are bound up with the U.S. Constitution and with a remedial federal statute, the Court will apply strict scrutiny to this bill, and it will not pass constitutional muster.

Brad Thompson's Testimony

It is respectfully submitted that Mr. Thompson's figures are comparing apples to oranges.

First, he combined both claims for maintenance and cure and Jones Act liability into one category. A claim for maintenance and cure may involve as little as a claim for one day of maintenance at the rate of $45.00 a day. When claims for a few days of maintenance are included in the statistics presented the Committee cannot get a real understanding of what is going on. The Committee should ask Mr. Thompson to segregate the claims between Jones Act and maintenance and cure, and to also list the number of maintenance and cure claims that are below $500.00. In this manner the Committee will obtain much more useful information.

Second, Jones Act liability is entirely front-loaded and paid for in the current budget process. The three-year statute of limitations requires claims to be filed within three years of the accident. These cases are either settled or tried. At the conclusion of that process the State's liability to a seaman is at an end, and no further payments are due. On the other hand, legislators in the year 2035 could be appropriating funds for accidents that happen this year. For example, a permanently disabled worker will be paid workers' compensation benefits until the end of his or her life. If a 35-year-old worker is involved, this will entail payments for up to 40 years based upon average life expectancy. The amount of payments over time may total $2,000,000.00.

Third, for at least three years after the enactment of this bill the State will be in the business of operating two systems, a workers' compensation system and the Jones Act system. There has been no claim that new system will help reduce the budget shortfall that is now being experienced by the State. Common sense dictates that this bill with a dual system for three years will probably cost more.

Fourth, the legislature has not been presented with a fair comparison of the claim rates and the expense involved. Mr. Thompson was asked at one of the hearings to compare the claims rates and workers' compensation costs of construction companies and logging companies to the Alaska Marine Highway workers. To my knowledge this has not been done, although it is plain that the Department of Labor must have these figures. It is my understanding that on recent trip one of the State's vessels was exposed to 80

knot winds and mountainous seas in the Gulf of Alaska. It simply is unfair to compare this type of a work environment to sitting in an office in Juneau as the statistics presented to the Committee probably do.

Fifth, in the hearing before the House Judiciary Committee, under questioning, Mr. Thompson testified that about one-half of the yearly claims are for Jones Act negligence. Mr. Thompson's submission to the committee says that there were 342 total claims in fiscal year 2002. That would mean that there were 171 Jones Act claims in Fiscal Year 2002. On the other hand, Ms. Susan Cox, the Chief Assistant Attorney General, testified that there were approximately 15 Jones Act lawsuits now pending against the State. It is respectfully submitted that Mr. Thompson should be asked to explain how the State can have an average of 170 Jones Act claims over the last two years and only 15 lawsuits pending. The numbers simply do not add up.

It is respectfully submitted that these tough questions deserve answers and, so far, no substantial answers have been provided to the Committee.

Sincerely yours,

Eric Evans

for James R. Jacobsen

CC Ms. Susan Cox (Via Facsimile)

Beard Stacey Trueb & Jacobsen, LLP
ATTORNEYS AT LAW

821 N Street, Suite 205 • Anchorage, Alaska 99501

March 25, 2003

Representative Lesil McGuire
State Capitol, Room 118
Juneau, AK 99801-1182

Re: House Bill 164

Dear Representative McGuire:

As a resident of the state for the last 14 years, I have frequently talked to my representatives about matters that concerned me. I write to you concerning House Bill 164, which has been referred to your committee, House Judiciary.

I am writing to inform you that I have several objections to this legislation. My law firm has represented some of the State's employees who are now covered under the federal law known as the Jones Act. We are maritime law experts and we therefore have specialized knowledge concerning the legal problems with this bill.

First, the bill would create second-class citizens out of the State's Marine Highway employees. Every seaman in the State would be able to seek compensation under the Jones Act except the State's Marine Highway employees. If a person is employed as a commercial fisherman, for a tugboat company, or for Tote or CSX Lines, they are covered under the Jones Act and entitled to those remedies. The only exception would be State marine workers. Passage of this bill may indeed violate Article I, Section 1 of the Alaska Constitution guaranteeing equal protection of the laws to all citizens.

Second, in a long line of cases the United States Supreme Court, and every state court that has considered the issue, has held that states cannot apply worker's compensation statutes to merchant seamen. The reasoning is two-fold. The primary obstacle is the fact that seaman's remedies are maritime in nature and under the exclusive purview of federal admiralty jurisdiction. Under the federal Constitution maritime matters are reserved for the federal legislature to the exclusion of the states. In short, there is a federal constitutional bar to the states applying state worker's compensation laws to seamen. The secondary reason is that Congress has completely occupied the field

with a law of national application, the Jones Act, and the states may not apply inconsistent laws. These principles are well established and beyond reasonable dispute. There are two Alaska cases that have dealt directly with this issue and are consistent with every other case on the subject. These cases are: Anderson v. Alaska Packers Association, 635 P.2d 1182 (1981), and Trident v. Murray, 2000 AMC 288 (Ak. Superior Ct. 1999). Therefore, if the Legislature were to make worker's compensation applicable to seamen, it would be a mere gratuity and not binding upon the injured worker.

Third, the state's waiver of sovereign immunity is contained in the Alaska Constitution. Article II, Section 21 provides: "The legislature shall establish procedures for suits against the state." (Emphasis supplied). The word "shall" is always mandatory. Article II, Section 21 abolished the doctrine of sovereign immunity in Alaska because it left no option for the legislature not to establish procedures for suits. Section 21 also mandates that the legislature establish the "procedures" for suits against the state. The word "procedures" is commonly understood to refer to the mechanics of filing suits and it has nothing to do with the substantive right to sue the state. This is the only logical manner in which Article II, Section 21 can be read. See Muskopf v. Corning Hospital District, 359 P.2d 457, 460-61 (Cal. 1961)(interpreting similar constitutional language, and judicially abolishing sovereign immunity). Accordingly, if Alaska is going to abolish sovereign immunity for these suits in its own courts it will have to do so via a constitutional amendment. House Bill 164 cannot accomplish the revocation of state sovereign immunity.

Fourth, the Jones Act provides that all state courts shall have concurrent jurisdiction over these suits. 45 U.S.C. § 56. The Alaska Supreme Court has held that Jones Act suits may be filed in any available forum. Nunez v. American Seafoods, 52 P.2d 720 (2002). Under federal and state case law these Jones Act suits could be filed in Bellingham, Washington because the state has a ferry terminal there and is subject to jurisdiction in that forum. The State of Alaska has no sovereign immunity in the Washington courts. Alden v. Maine, 119 S.Ct. 2240 (1999); Hall v. Nevada, 440 U.S. 410 (1979).

Acceptance of worker's compensation benefits cannot bar a Jones Act lawsuit. Chan v. Society Expeditions, Inc., 39 F.3d 1398, 1403 (9th Cir. 1994), cert. denied, 514 U.S. 1004 (1995); Roberts v. City of Plantation, 558 F.2d 750, 751 (5th Cir. 1977); Western Boat Bldg. Co. v. O'Leary, 198 F.2d 409, 411 (9th Cir. 1952); State v. Brown, 794 P.2d 108, 110, 111 (Alaska 1990). And the Washington courts are constitutionally bound to apply maritime law to a Jones Act suit filed against the State of Alaska in a Washington Court. Larios v. Victory Carries, Inc., 316 F.2d 63 (2d Cir. 1963); In Re: EXXON VALDEZ, 767 F.Supp. 1509, 1513 (D. Alaska 1991). Therefore, even if Alaska could close the courthouse door to these employees in the Alaska courts it cannot close the Washington courthouse door.

The state would therefore be faced with hiring expensive private counsel to defend itself from the lawsuits that would be filed in the Washington courts.

Fifth, there is no empirical evidence that the state would obtain any savings by covering these workers under the worker's compensation scheme. I am familiar with only one scientific study of the issue by the American Waterways Operators, and that organization looked at 371 cases that were covered by workers' compensation and the Jones Act and concluded that it was less expensive to compensate workers under the Jones Act.

In summary, House Bill 164, if passed will not accomplish its goals; it will lead to expensive and protracted litigation, make second-class citizens out of the state seamen, and create confusion and uncertainty for the injured workers.

In order to aid your staff in consideration of these technical legal matters I have also prepared an extended legal brief on the issues that I have raised. I respectfully request you to carefully consider my above comments while considering the wisdom of this legislation.

Sincerely yours,

Lanning Trueb

Beard Stacey Trueb & Jacobsen, LLP
ATTORNEYS AT LAW

821 N Street, Suite 205 • Anchorage, Alaska 99501

March 25, 2003

Representative Lesil McGuire
State Capitol, Room 118
Juneau, AK 99801-1182

Re: Jones Act & Sovereign Immunity

Dear Representative McGuire:

I am following up on my short letter to you concerning the legal obstacles to House Bill 164 with this extended brief on the various issues.

1. The Alaska Constitution abolished sovereign immunity and sovereign immunity may only be reinstated by a constitutional amendment.

It is well accepted that an individual state's sovereign immunity in its own courts is merely a common law doctrine. See e.g. Nieting v. Blondell, 235 N.W.2d 597, 599 (Minn. 1975)(ridiculing the doctrine of sovereign immunity and judicially abolishing it); Hicks v. New Mexico, 544 P.2d 1153 (N.M. 1975)(same).

The Alaska Constitution abolished the common law doctrine of sovereign immunity, and only allowed the legislature to provide by statute in which court suits against the state would be filed. Article II, Section 21 of the Alaska Constitution provides: "The legislature shall establish procedures for suits against the state." (Emphasis supplied). The word "shall" is always mandatory. Section 21 abolished the doctrine of sovereign immunity in Alaska because it left no option for the legislature not to establish procedures for suits. Section 21 also mandates that the legislature establish the "procedures" for suits against the state. The word "procedures" is commonly understood to refer to the mechanics of filing suits and it has nothing to do with the substantive right to sue the state. This is the only logical manner in which Section 21 can be

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read. See Muskopf v. Corning Hospital District, 359 P.2d 457, 460-61 (Cal. 1961)(interpreting similar constitutional language, and judicially abolishing sovereign immunity).

The debate in the constitutional convention establishes that the waiver of immunity is contained in the constitution. I have attached all the pages of the transcript that, according to the index found in the appendix in volume 6, deal with sovereign immunity, but the most telling exchange is the following.

> [Mr. Steve] McCutchen [Chairman of the Legislative Committee, the Committee which proposed Article II]: Mr. President, the intent of the Committee in this matter was nothing other than after the judiciary had been set up that they [the legislature] would designate which level of court that any suit against the state could be brought. In other words, there would be one particular level of court in which all suits against the state or their agencies must be brought. It would not be of any further determination as far as the legislature was concerned nor in otherwise concerning or controlling the courts. They would make one designation when the court system was set up. "This is it. From now on any suits against the state will be entered in that particular court."
>
> [Judge George] McLaughlin [Chairman of the Judiciary Committee]: May I inquire whether it was the intent of the [legislative] Committee to authorize suits against the state in court?
>
> [Mr. Steve] McCutchen: Yes.
>
> [Judge George] McLaughlin: Well, then I feel under those circumstances that the amendment is justified, that is if the Convention decides to authorize action against the state in the constitution.
>
> [Mr. Steve] McCutchen: I feel that because the [legislative] Committee intended one thing, I think that this group understands what the Committee intended, that our Committee has no objection if this particular amendment is the thing that makes it perfectly clear what was intended by our group. In other words, the Legislative Committee felt that the state may be sued, period; that the legislature shall indicate which level of court shall that suit against the state.

(Proceedings of the Constitutional Convention, Vol. 3, p. 1705, Copy attached).

The members of the constitutional convention understood that Article II, Section 21 abolished the doctrine of sovereign immunity. All that was left for the legislature was to provide for which court a suit was filed. As the later discussion demonstrates, Judge McLaughlin believed that it was up to the legislature whether it wanted to set up a court of claims for suits

against the state or simply provide for suits to be filed in the superior court. Article IV of the constitution, the Judiciary Article, which was proposed by Judge McLaughlin's committee, is written to allow the legislature to set up a court of claims if it so desired. Whether to provide for suits against the state in a court or claims or the superior court was the legislature's only decision.

In State v. Zia, Inc., 556 P.2d 1257, 1260 (Alaska 1976), the Supreme Court stated that the waiver of sovereign immunity is contained in the constitution.

> The State of Alaska provides for suits against the State in Article II, § 21, of its constitution:
>
> > *Suits Against the State*. The legislature shall establish procedures for suits against the state.

The only Alaska case to address the issue which I have raised, i.e. that the legislature only has the authority to promulgate the procedures for such suits, is Wilson v. Municipality of Anchorage, 669 P.2d 569, 571-72 (Alaska 1983). In Wilson the Supreme Court declined to address the argument because Article II, § 21 did not address immunity for municipalities only suits against the state, and it was therefore unnecessary to decide the issue.

Pursuant to my argument, the only way that the State can institute sovereign immunity for Jones Act suits in its own courts is to amend the constitution via Article XIII. The legislature may not revoke sovereign immunity with a statute. HB 164 cannot revoke the state's waiver of sovereign immunity.

2. Any attempt to institute sovereign immunity solely for Jones Act suits would offend the Alaska Bill of Rights.

The state's seamen have a constitutionally protected right to bring a Jones Act suit in the Alaska courts. For example, a seaman's right to access a local court to vindicate his federal rights is an important right and the Alaska Supreme Court will apply close scrutiny to an attempted revocation of the statutory sovereign immunity. See Patrick v. Lynden Transport, Inc., 765 P.2d 1375, 1379 (Alaska 1988); Turner Const. Co., Inc. v. Scales, 752 P.2d 467, 471 (Alaska 1988). The State's seamen also have the right to the same federal remedies all the other Alaskan citizens are entitled to. In Alaska laws that treat similarly situated injured workers in a divergent manner will not pass constitutional scrutiny. Gilmore v. Alaksa Workers' Compensation Bd., 882 P.2d 922, 929 (Alaska 1994).

There are tens of thousands of Alaska citizens who are covered under the Jones Act because they work as fishermen or merchant seamen. Thus any attempt to institute immunity would create a group of second-class citizens out of its seamen employees because every other injured seaman could file suit against her Jones Act employer in the Alaska state courts except

for the seven or eight hundred employees who work for the State. The result would be the same as Gilmore wherein two employees identically situated would have completely different remedies.

The Alaska Constitution provides that its citizens are entitled to the "equal protection" of the laws. The Jones Act is the type of law that is contemplated by the Constitution. Any attempt to close the Alaska Superior Courts to its seamen would deny them the equal protection of the laws in relation to all the other seamen who live and work in Alaska and who cannot legally be denied access to the courts to prosecute their Jones Act claims. 45 U.S.C. § 56; Burnett v. New York Cent. R. Co., 380 U.S. 424, 433-34, 85 S.Ct. 1050, 1057-58, 13 L.Ed.2d 941 (1965); Miles v. Illinois Cent. R. Co., 315 U.S. 698, 62 S.Ct. 827 (1942). Moreover, the right, which the State would be attempting to eliminate, is not one created or granted by the State, but one fashioned by Congress that applies to all other seamen in the United States.

Because the seamen's rights under Jones Act to access to the Alaska courts are constitutionally based under the equal protection clause, and the State's sovereign immunity is merely a common law privilege, the seamen's constitutional rights will trump any attempt by the State to institute sovereign immunity and be held unconstitutional.

3. As a matter of federal constitutional law Alaska cannot apply its workers' compensation laws to seamen.

Assuming that Alaska amended its constitution, it nevertheless cannot apply state workers' compensation laws to seamen. A long line of United States Supreme Court cases hold that, because of the federal Constitution, a state may not apply workers' compensation laws to seamen's injuries. Southern Pacific Co. v. Jensen, 243 U.S. 219, 37 S.Ct. 260 (1917); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 40 S.Ct. 438 (1920)(as a matter of constitutional law rejecting Congress' attempt to apply state workers' compensation laws to seamen) ; Washington v. W.C. Dawson & Co., 264 U.S. 219, 44 S.Ct. 302 (1924)(same). Following this trilogy of cases the Supreme Court once again in Northern Coal & Dock v. Stroud, 278 U.S. 142, 49 S.Ct. 88, 73 S.Ct. 88, 73 L.Ed. 232 (1928), specifically held that a state could not constitutionally apply its worker's compensation laws to a seaman. See also Commercial Union Ins. Co. v. McKinna, 10 F.3d 1352, 1354 (8th Cir. 1993)(relying upon *Northern Coal & Dock v. Stroud*).

These Supreme Court cases are still good law and stand for the proposition that only Congress may enact statutes which provide remedies for seamen's injuries. Gilmore and Black, The Law of Admiralty, § 6-45, at 404-408 (2nd Ed. 1975). Accordingly, any attempt to cover its seamen employees under the workers' compensation regime will be a nullity because the Supreme Court has held that not even Congress has the power to apply state worker's

compensation laws to injured maritime workers. In rejecting Congress' attempt to apply state workers' compensation laws to injured maritime workers the Supreme Court stated in part:

> Without a doubt Congress has the power to alter, amend or revise the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general employers' liability law or general provisions for compensating injured employees; but it may not be delegated to the several states . . . The subject is national. Local interests must yield to the common welfare. The Constitution is supreme.

Washington v. W.C. Dawson & Co., 264 U.S. at 227-28, 44 S.Ct. at 305.

Because these cases were decided based upon constitutional principles and have never been overruled it means the application of a workers compensation remedy to seamen requires either a law of national application enacted by Congress, or an amendment of the United States Constitution allowing the several states workers' compensation laws to apply to seamen. Therefore, Alaska's attempt to apply workers' compensation to its seamen employees will be nothing more than a gratuity.

Long ago the Washington Supreme Court held that the legislature could not apply workers' compensation statutes to seamen. The court stated in part:

> The maritime law being a part of the law of the United States, the legislature of a state has no power to modify or abrogate it. Workman v. New York City, 179 U.S. 522. It follows, therefore, that the legislature in passing the compensation act could not take from a workman any right which he had under the maritime law of the United States. The petitioner here still has the right to pursue his remedy in admiralty. . . If the act were given this construction [to apply to seamen], it might well be doubted whether it would not offend against that provision of the fourteenth amendment to the constitution of the United States which provides that no state shall make or enforce any law which shall "deny to any person within its jurisdiction the equal protection of the laws."

State ex rel. Jarvis v. Daggett, 87 Wash. 253, 257-58, 151 Pac. 648 (1915). Accord John Hill, Jr. v. Workmen's Compensation Appeal Board, 1998 AMC 351 (Penn. 1997)(rejecting application of workers' compensation statutes to seamen).

The Alaska Courts have also weighed in on this issue. In Anderson v. Alaska Packers Association, 635 P.2d 1182 (1981), the Supreme Court held that, as a matter of federal constitutional law, that the Alaska workers' compensation statute could not be applied to a Jones

Act seamen. More recently in Trident v. Murray, 2000 AMC 288 (Ak. Superior Ct. 1999), the Superior Court, in a well reasoned opinion came to the same conclusion. (Copy attached).

A second reason that a state may not apply workers' compensation laws to seamen is because Congress has fully occupied the field, preempting any contrary state laws. The federal case law on the subject of the preemption of state laws by FELA and Jones Act is so well established as to be indisputable. For example, in New York Central Railroad Co. v. Winfield, 244 U.S. 147, 148-49, 151 (1917), the Supreme Court stated in pertinent part:

> [It] is settled that when Congress acts upon the subject all state laws covering the same field are necessarily superceded by reason of the national authority. Congress acted upon this subject in passing the Employer's Liability Act . . .
>
> That the Act is comprehensive and also exclusive is distinctly recognized in repeated decisions of this court. . . No state is at liberty thus to interfere with the operation of a law of Congress.

Once again in New York Central & R.R. Co. v. Toncellito, 244 U.S. 360, 362 (1917), the Court reiterated this bedrock principle. The Court stated in relevant part:

> Congress having declared when, how far, and to whom carriers shall be liable on account of accidents in the specified class, such liability can neither be extended nor abridged by common or statutory laws of the state.

And in Lindgren v. United States, 281 U.S. 38 (1930), a Jones Act case, the Court reviewed the earlier FELA cases and once again summed up the preclusive effect of FELA and Jones Act. After reviewing the earlier cases cited above, and others, the Court stated:

> In light of the foregoing decisions and in accordance with the principles therein announced we conclude that the Merchant Marine Act [Jones Act]---adopted by Congress in the exercise of its paramount authority in reference to the maritime law and incorporating in that law the provisions of the Federal Employers' Liability Act---establishes as a modification of the prior maritime law a rule of general application in reference to the liability of the owners of vessels for injuries to seamen extending territorially as far as Congress can make it go; that this operates uniformly within all of the States and is as comprehensive of those instances in which by reference to the Federal Employers' Liability Act it excludes liability, as of those in which liability it imposed; **and that, as it covers the entire field of liability for injuries to seamen, it is paramount and exclusive, and supercedes the operation of all state statutes dealing with that subject.** (Emphasis supplied).

Id. 281 U.S. at 46-47.

In every reported case concerning FELA and Jones Act over the last 95 years there is not a single reported decision in which a court applied a state statute to a seaman's personal injury.

In fact, every court that has considered the issue has refused to apply state statutes in these federal actions. To cite but a few examples, the Missouri Supreme Court stated: "The statute of this state limiting the amount of recovery in death cases has no force and should not be considered in cases under the federal act." Dodd v. Missouri-Kansas-Texas R.R. Co., 193 S.W. 2d 905, 908 (Mo. 1946). In Laughlin v. Kansas C. S. R. Co., 205 SW 3, 7 (Mo. 1918), the court stated that FELA imposes a uniform rule of damages that may not be changed by state common law or statute. And each of the following cases held that state statutes regarding personal injury or death are inapplicable in FELA cases. Armstrong v. Chicago & W. I. R. Co., 263 Ill. App. 126 , affd, 350 Ill 426, cert. denied, 289 U.S. 724 (1931); Baltimore & O.S.W.R. Co. v. Berdon, 195 Ind. 265, 150 N.E. 407, cert. denied, 266 U.S. 633 (1924); Grybowski v. Erie R. Co., 95 A. 764, (state statute cannot be applied in a FELA case), affd, 98 A. 1085 (1915).

Admittedly, this case law is specialized and obscure. But these cases are all good law; the remedy for seaman has been a settled subject for 83 years, and under the binding authority discussed above it is beyond the power of the Alaska legislature to reject this federal scheme.

4. Any attempt to close the door to the Alaska courts will not prohibit Jones Act suits from being filed in Washington courts.

Regardless of any attempts to amend the Alaska Constitution, the State will still be subject to suit in Washington courts. The Federal Employers Liability Act provides for concurrent jurisdiction for Jones Act cases in State courts. 45 U.S.C. § 56. With a ferry terminal in Bellingham, Washington, and the state doing a tremendous amount of business in Washington, Alaska is subject to jurisdiction of the Washington courts for Jones Act suits. Pure Oil Company v. Suarez, 384 U.S. 202, 86 S.Ct. 1394, 16 L.Ed.2d 474 (1966). Under the Jones Act, it matters not that the injury did not occur in Washington. Penrod Drilling Company v. Johnson, 414 F.2d 1217, 1220-21 (5th Cir. 1969); Huffman v. Inland Oil & Transport, 424 N.E.2d 1209 (Ill. Ct. App. 1981). In such a suit the reverse-Erie doctrine compels Washington state courts to apply substantive maritime law, Larios v. Victory Carries, Inc., 316 F.2d 63 (2d Cir. 1963); In Re: EXXON VALDEZ, 767 F.Supp. 1509, 1513 (D. Alaska 1991), not the Alaska worker's compensation statues. The Washington courts are constitutionally bound to apply the Jones Act to the marine highway's seamen.

State sovereign immunity from suits in its own courts is nothing more than a common law doctrine. See e.g. Nieting v. Blondell, 235 N.W.2d 597, 599 (Minn. 1975); Hicks v. New Mexico, 544 P.2d 1153 (N.M. 1975).

In Alden v. Maine, 119 S.Ct. 2240, 2264 (1999), the Supreme Court cited Hall v. Nevada, 440 U.S. 410, 99 S.Ct. 1182 (1979), for the proposition that immunity in the courts of a state's sister states is a matter of comity. Importantly, the Alden case repeatedly refers to state sovereign immunity from suits "in its own courts[.]" Id. The frequency that the Supreme Court refers to immunity in its "own" courts, and the citation to Hall v. Nevada, establishes that states are still subject to suit in other states' courts just as in Hall. The Court also took pains to point out that just because Congress was powerless to waive a state's immunity for suit in its home courts, nevertheless, the states were still governed by applicable federal law.

> The constitutional privilege of a State to assert its sovereign immunity *in its own courts* does not confer upon the State a concomitant right to disregard the Constitution or valid federal law. The States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design. We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States. The good faith of the States thus provides an important assurance that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land." U.S. Const., Art. VI.

Alden v. Maine, 119 S.Ct. at 2266 (emphasis supplied).

The supreme law of the United States in this case is the Jones Act and the general maritime law that plainly apply to the State insofar as its seamen are concerned. Alaska cannot prohibit suit in the Washington courts because it does not enjoy sovereign immunity in Washington courts. Hall v. Nevada, 440 U.S. 410, 99 S.Ct. 1182 (1979)

The amendment of the Alaska Constitution to close the Alaska superior court would lead to a cascade of expensive litigation for the State of Alaska in Washington's courts. This follows because if an employee accepted gratuitous worker's compensation benefits the State would still be subject to suit in the Washington court under the Jones Act. It is black letter law that acceptance of state worker's compensation benefits cannot bar a Jones Act lawsuit. Chan v. Society Expeditions, Inc., 39 F.3d 1398, 1403 (9th Cir. 1994), cert. denied, 514 U.S. 1004 (1995); Roberts v. City of Plantation, 558 F.2d 750, 751 (5th Cir. 1977); Western Boat Bldg. Co. v. O'Leary, 198 F.2d 409, 411 (9th Cir. 1952); State v. Brown, 794 P.2d 108, 110, 111 (Alaska 1990). The injured worker could therefore live on Alaska worker's compensation while he pursued his civil litigation in the Washington courts. The State would be in the business of

hiring expensive private counsel to defend it in Jones Act cases in the Washington courts, all of which could be filed in Bellingham, Washington.

In a suit filed in Washington, the court would be faced with an injured seaman, who may well be a citizen of Washington, making a claim under admittedly applicable federal maritime law. The State of Alaska's only defense to such a suit would be its claim that the worker was covered by worker's compensation (a law that constitutionally can not be applied to a seaman) and as a matter of comity the Washington court should refuse to hear the case.

However, the State of Washington is not going to revoke its waiver of sovereign immunity for suits under the Jones Act. Accordingly, Alaska would be asking the Washington court to deny a constitutionally permitted remedy to the injured seaman by closing the doors of its court. The State's request for comity would also violate 45 U.S.C. § 56 because, as a matter of supreme federal law, the Washington courts are required to accept Jones Act cases. A request for comity is further eroded by the fact that the United States has waived its sovereign immunity for suits under the Jones Act, 46 U.S.C. § 742, and the Alaska Supreme Court has held that seamen's rights are inalienable. Brown v. State, 816 P.2d1368 (Alaska 1992); Abbott v. Alaska, 1999 AMC 2212 (1999)(contractual application of workers' compensation to seamen "illegal and unenforceable.").

Assuming that Alaska amended its constitution to prohibit Jones Act suits by its employees, it would still come into a Washington court with unclean hands by virtue of its unconstitutional attempt to apply workers' compensation statues to Jones Act seamen. It is hard to imagine a Washington court throwing out a Jones Act case on this basis.

5. There is no empirical evidence that coverage under the workers' compensation system would save the State money.

I have attached hereto a survey that was performed by the AWO in 1990 that compared Jones Act liability to worker's compensation. The report found that overall it was less expensive for employers to compensate workers under the Jones Act than under a worker's compensation regime. From our perspective the seriously injured worker is much better off under the Jones Act that he or she would be under a worker's compensation scheme.

Very truly yours,

LM Trueb

Lanning M. Trueb

Attachments

MCCUTCHEON: I believe there is only one other reference in a different place.

HELLENTHAL: That's the one on the question of polling the legislature about the mechanics of conducting a special session?

MCCUTCHEON: That's the one that comes to mind immediately.

UNIDENTIFIED DELEGATE: Question.

PRESIDENT EGAN: The question is, "Shall the proposed amendment as offered by Mr. Stewart be adopted by the Convention?" All those in favor of the adoption of the proposed amendment will signify by saing "aye". All opposed, by saying "no". The "noes" have it, and the proposed amendment has failed of adoption. Are there other amendments to Section 10? If not, are there amendments to Section 11? Mrs. Nordale.

NORDALE: Mr. President, I don't have an amendment, I just want to ask a question, if I may?

PRESIDENT EGAN: You may ask a question, Mrs. Nordale.

NORDALE: Mr. McCutcheon, I notice you say here, "Each house shall have the power to choose its officers and employees." I just want to get this absolutely clear, does that mean that it would be possible to have one central staff to serve both houses, in some capacities at any rate, wouldn't it?

MCCUTCHEON: The reason that we found it necessary to put in that particular wording is because in the line above "The houses of each legislature shall adopt uniform rules of procedure." It may be that one house requires a different number of employees than the other house, so it was felt that it should put this particular sentence in there to clarify that. There is nothing to prohibit them from having a uniform system of employees by having a pool, or labor pool or a clerical pool, and both houses utilize the same pool of labor. However, the prohibition here, you'll notice, does not extend to any officers. In other words, the senate shall choose their president, despite the uniform rules of procedure, and the house shall seek its speaker.

PRESIDENT EGAN: Are there amendments to Section 11? Mrs. Sweeney.

SWEENEY: I have an amendment, Mr. President.

PRESIDENT EGAN: You may present your amendment, Mrs. Sweeney. Will the Chief Clerk please read the proposed amendment as offered by Mrs. Sweeney.

CHIEF CLERK: "Line 11, delete 'of' and insert the words 'to which' after 'of', and after the word 'house' insert the words

'is entitled'."

PRESIDENT EGAN: What is your pleasure, Mrs. Sweeney?

SWEENEY: I move and ask unanimous consent for the adoption of this amendment, Mr. President.

PRESIDENT EGAN: Mrs. Sweeney moves and asks unanimous consent that her proposed amendment be adopted.

DAVIS: I must object. Will the clerk read the amendment.

PRESIDENT EGAN: Will the Chief Clerk please read it.

CHIEF CLERK: "Line 11, delete 'of' and insert 'to which', and after the word 'house' insert the words 'is entitled'."

SWEENEY: It will now read: "A majority of the members to which each house is entitled shall constitute a quorum to do business."

DAVIS: It is entirely possible, it is clearly understood that it would be a majority of the members to which each house is entitled, but I'm not sure. Maybe Style and Drafting can change it without any action here.

SWEENEY: Well, if it's clear then, I'll withdraw.

PRESIDENT EGAN: Unanimous consent is asked to adopt Mrs. Sweeney's proposed amendment. Is there objection? If there is no objection, it is so ordered, and the amendment has been adopted. Mr. Hellenthal.

HELLENTHAL: I have a question of Mr. McCutcheon. Was there any necessity indicated by the advisors, or anyone else, any legal necessity for the inclusion of the last sentence?

MCCUTCHEON: Yes, sir, there was. At least two, possibly three, of the consultants suggested that the last sentence be inserted in this particular section, because in some instances it had been held that where the constitution was silent, the legislature had no authority to actually control lobbying.

HELLENTHAL: One more question, was attention given to the problem that by the enumeration of certain powers that the inclusion of other powers by inference is more or less defeated, and it is restrictive on the powers of the legislature to specify some and not others?

PRESIDENT EGAN: Mr. McCutcheon.

MCCUTCHEON: I have no answer for your question, Mr. Hellenthal. The only thing is that I recall the Committee was concerned about the authority of the legislature to actually control lobbying,

and it was pointed out that in the absence in some states of a specific statement, that lobbying could not be controlled.

HELLENTHAL: Well, in the face of the opinion of those who know much more about it than I do, I'm afraid I'll yield to any objections.

PRESIDENT EGAN: Are there amendments to Section 11? If not, are there amendments to Section 12? Mr. McLaughlin.

MCLAUGHLIN: I move to amend Committee Proposal No. 5 on page 4. Strike Section 12 and substitute the words "Suits against the state for all liabilities hereinafter originating or now existing, shall be provided for by law."

SWEENEY: Point of order, Mr. President.

PRESIDENT EGAN: Mrs. Sweeney, what is your point of order?

SWEENEY: It seems to me that after Section 11 we were to return to Section 8 concerning recesses and adjournments.

PRESIDENT EGAN: After Section 11, Mrs. Sweeney?

SWEENEY: Yes, after the adoption of the paragraph on uniform rules of procedure, it seems to me we were to return to Section 8.

KILCHER: If I may. The intent of my motion to postpone -- I didn't mean that 8 would have to come up immediately after 11. Just any time after 11, that was my intention.

PRESIDENT EGAN: Will the Chief Clerk please read the proposed amendment as offered by Mr. McLaughlin.

CHIEF CLERK: "Page 4, strike Section 12 and substitute the following: 'Suits against the state for all liabilities hereinafter originating or now existing shall be provided for by law.'"

PRESIDENT EGAN: Mr. McLaughlin, what is your pleasure?

MCLAUGHLIN: I move that the amendment be adopted.

PRESIDENT EGAN: Mr. McLaughlin moves that his proposed amendment be adopted. Is there a second?

HERMANN: I'll second the motion.

BUCKALEW: Objection.

PRESIDENT EGAN: The motion is open for discussion. Mr. Buckalew.

BUCKALEW: I'd just like to ask Mr. McLaughlin a question here. Mr. McLaughlin, don't you think that part of that belongs properly in the transitional measures?

MCLAUGHLIN: In direct answer to that, I don't know where it belongs, and, frankly, I don't know whether you should have a section in there or not. I'm merely substituting another section to clarify it so that it won't be in conflict with the judiciary. If I may have an opportunity to explain?

PRESIDENT EGAN: Yes.

MCLAUGHLIN: It's my understanding that by Section 12 the Committee did plan to authorize suits against the sovereign, that is, to compel the legislature to recognize that law suits could be instituted, that is, monetary claims and factual claims, and tort claims for injuries. The legislaure would have to make provisions for those, that is, it would be mandatory, and it is my understanding -- not from the Committee -- but it is my understanding that about half the states include such a provision in their constitution one way or the other, either prohibiting the legislature from consenting that the state be sued or directing that it should be done. My concern is this, Section 12, as it now reads, was apparently taken from either the Arizona Constitution or the Washington Constitution. Was it the Washington State Constitution?

MCCUTCHEON: Arizona.

MCLAUGHLIN: And three words were added -- three words at the end of Section 12, "or agencies thereof". Reading this by itself, it would indicate that any suit, and suits by general definition means any action against anyone, and that includes both law and equity, would be subject against the state. Any suit against the state or any agency would be subject to the direction of the legislature, and the legislature could create the court in which that action could be tried. In substance, looking at it alone, it would mean that if someone wanted to institute an action to restrain a commission or board, it would have to go to the court and in the manner prescribed by the legislature. This would be acceptable in the constitution as it reads now, except for the fact that in the Arizona Constitution where they set up their courts, they specifically authorized the courts to try entertaining proceedings and mandamus, certiorari, review, and prohibitions, that is, actions that normally lie against boards and commissions, and my problem here was bringing it to the attention of the Convention, since we don't describe or authorize specifically in the judiciary article the entertainment by the superior court or the supreme court of these actions. It might be interpreted to mean that if you wanted to mandamus, if you wanted to restrain, if you wanted to review, the legislature would determine exactly what court created by them and what procedure would be for this determination. And I move to strike and I

substituted a provision out of Oregon in lieu of the present one so that at least the debate would be in order.

PRESIDENT EGAN: Mr. McCutcheon.

MCCUTCHEON: Mr. President, the intent of the Committee in this matter was nothing other than after the judiciary had been set up that they would designate which level of court that any suit against the state could be brought. In other words, there would be one particular level of court in which all suits against the state or their agencies must be brought. It would not be of any further determination as far as the legislature was concerned nor in otherwise concerning or controlling the courts. They would make the one designation when the court system was set up. "This is it. From now on any suits against the state will be entered in that particular court."

MCLAUGHLIN: May I inquire whether it was the intent of the Committee to authorize suits against the state in court?

MCCUTCHEON: Yes.

MCLAUGHLIN: Well, then I feel under those circumstances that the amendment is justified, that is if the Convention decides to authorize action against the state in the constitution.

MCCUTCHEON: I feel that because the Committee intended one thing, I think that this group understands what the Committee intended, that our Committee has no objection if this particular amendment is the thing that makes it perfectly clear what was intended by our group. In other words, the Legislative Committee felt that the state may be sued, period; that the legislature shall indicate which level of court shall hear that suit against the state.

PRESIDENT EGAN: Mr. Victor Rivers.

V. RIVERS: Mr. President, I rise for a question of Mr. McLaughlin. Do you think your language, using the word "liability", would cover the case of claims, such as claims under excessive condemnation or something of that type?

MCLAUGHLIN: I think it would, Mr. Rivers, and it would prevent the creation of claims nonexistent during Territorial status. The word "liability" there helps to clarify it. As I say, that was taken from the Oregon Constitution.

V. RIVERS: Does the word "liability" in any sense narrow the field of jurisdiction in which the sovereign could be sued?

MCLAUGHLIN: It does not, sir.

PRESIDENT EGAN: Any further discussion? Mr. Sundborg.

SUNDBORG: Mr. McLaughlin, in your opinion would the language which you propose here permit suits by taxpayers in matters in which the individual taxpayer is not damaged to any greater extent than all other taxpayers? Are you familiar with the case of Griffin versus Sheldon and the decision of the Court of Appeals?

MCLAUGHLIN: I understand what your problem is. I would say this amendment is not intended to cover a taxpayer's suit, as such. This as originally intended by the Committee, this was intended to cover merely claims against the State of Alaska for breach of contract on a contract between the individual and the State of Alaska. He'd have a court of claims to go to, or some other court, or it also directs that the legislature provide the tort claims, that is, for damages let us say, for negligence by the servants of the state. What I'm trying to do is to keep the taxpayers' suits in the superior courts or other courts, and authorize them.

SUNDBORG: You're not fearful that the use of this "all liabilities" might open this up to taxpayer suits?

MCLAUGHLIN: No.

COOPER: May we have a one-minute recess?

PRESIDENT EGAN: If there is no objection, the Convention will stand at recess for one minute.

RECESS

PRESIDENT EGAN: The Convention will come to order. Mr. McCutcheon.

MCCUTCHEON: The Committee had sort of a rough session here, and it was agreed, in the light of Mr. McLaughlin's expression, that for the record that the intent of the Committee is clear and the wording of this particular amendment. I will therefore ask unanimous consent for its adoption, Mr. President.

PRESIDENT EGAN: Mr. McCutcheon asks unanimous consent that the proposed amendment as offered by Mr. McLaughlin be adopted.

SUNDBORG: I'll object to the motion.

PRESIDENT EGAN: It has already been moved and seconded that the proposed amendment be adopted. Mr. Sundborg.

SUNDBORG: I've had an opportunity to look at the amendment during the recess and I think there is something wrong with it. I wonder if the Clerk would read it.

PRESIDENT EGAN: The Chief Clerk will please read the proposed amendment.

CHIEF CLERK: "Suits against the state for all liabilities hereinafter originating or now existing shall be provided for by law."

SUNDBORG: What it says is that suits against the state shall be provided for by law. Now it may be that Mr. McLaughlin's intention was that the manner of trial of suits or the manner of presentation of suits against the state shall be provided for, but I don't think that he meant that the suits shall be provided for by law. Did you, Mr. McLaughlin?

MCLAUGHLIN: Yes, sir, I did.

SUNDBORG: "Suits shall be provided for by law." Then I have a different understanding of the word "suit" than a lawyer has.

MCLAUGHLIN: Could we have about a two-minute recess, Mr. President?

PRESIDENT EGAN: The Convention will be recessed for two minutes.

RECESS

PRESIDENT EGAN: The Convention will come to order. Mr. Sundborg.

SUNDBORG: Mr. President, I would be willing to withdraw my objection, if Mr. McLaughlin, who is a member of Style and Drafting will promise to tell us when he gets into the bosom of the Committee what he intends by this amendment.

MCLAUGHLIN: Gentlemen, it is with great reluctance that I refuse to participate in such conspiracy. It should be on the record and they should know what they are voting for. I shall detail it very slowly if the President will permit me. What has happened is that they have taken from Arizona a provision providing for claims against the state and in Arizona when they authorized the claims against the state, they used this exact language, with the exception of the last three words "or agencies thereof". That's the language that is now presently in Section 12, and it was taken from Article 4 of the Arizona Constitution, and the words added by the Committee "or agencies thereof". But in the Arizona Constitution it provides that there are certain types of courts that shall be set up, the supreme court, superior court, justices of the peace, and other inferior courts. And then, in the Arizona Constitution, they specifically say, just as they do in all other constitutions that use this wording, they say that the superior court shall have jurisdiction in mandamus; it shall have jurisdiction in review, in prohibition, in certiorari. Now those are all remedies that are normally used against public bodies, that is, they have specifically vested the power in the superior court. So it's clear upon reading the Arizona Constitution that what you mean by the language that you have here in Section 12 is for claims against the state, and you're not taking away from the superior court the right to mandamus, certiorari, review, or prohibitions. That is, a taxpayer can go into those courts and

can restrain under the constitution, he can restrain any agency of the government from certain actions. I wanted to make sure also that it was clear here in the Convention, that the use of this language in Section 12, taking the Arizona provision and bringing it in here without any explanation in the judiciary article, it might well be interpreted to mean that for all types of actions -- mandamus, reviews, prohibitions, and certiorari, that the legislature had a right to create a special court, and in that special court all those types of actions would be tried, and you would be depriving the superior court of the constitutional jurisdiction to hear the cases, and I know that that was not your intent. So what I did is that I took from the State of Oregon, this present provision -- and it does appear in other constitutions -- so that it would make it clear that what you were talking about in substance is that you could, the legislature since it was being directed to, consent to suit on things that it is normally not subject to suit for. That is, the state consented as a sovereign, sets up its own court of claims and provides for procedure. Under the authority of this section and under the judiciary act, they have a right to determine the manner of procedure and everything else and I think my amendment does it. Is that clear?

PRESIDENT EGAN: Mr. Sundborg.

SUNDBORG: Is the language which you propose taken directly and completely from the Oregon Constitution?

MCLAUGHLIN: The language which I propose is taken directly from the Oregon Constitution. I have not included the latter half of the provision, which requires that it be by general law if possible, because you have a similar provision later on in your articles on the same subject matter, but it is verbatim out of the Oregon Constitution -- the first portion of it, and it is not taken out of context.

SUNDBORG: I withdraw my objection.

PRESIDENT EGAN: Objection is withdrawn. Mr. Davis.

DAVIS: Mr. President, I wish to make an objection. I have listened to Mr. McLaughlin and I have read this section, and I have read his proposed amendment, and so help me, I can't see where one is any better than the other. I like the one that is in there now.

PRESIDENT EGAN: Mr. Buckalew.

BUCKALEW: Mr. President, I'm sort of in the same position Mr. Davis is in. I frankly can't follow Mr. McLaughlin. I'm a member of the bar, and I don't know what he's talking about.

PRESIDENT EGAN: Mr. White.

WHITE: I'm confused, too. May I ask Mr. McLaughlin a question?

PRESIDENT EGAN: You may.

WHITE: Is it your desire to have these suits brought in superior court, period?

MCLAUGHLIN: No, I do not, but I don't want to deprive the superior court of a jurisdiction which it should have, and, under the wording of this, it could be interpreted as depriving the superior court of this jurisdiction.

HELLENTHAL: Mr. President.

PRESIDENT EGAN: Mr. White still has the floor, Mr. Hellenthal.

HELLENTHAL: Would you yield for a moment?

WHITE: Well, I want to pursue this for just one minute. I'm still confused, because in your amendment, where you say, "shall be provided for by law", how does that differ from the legislature "shall direct by law"? Aren't laws passed by the legislature?

MCLAUGHLIN: That adds another problem that I didn't want to raise at this moment, but in Style and Drafting, we were confronted with this problem: If you recall, we passed an article, a proposal called the initiative, and now we are confronted where certain types of the people were limited in the types of laws that they could institute or initiate, but we find out now that in every one of these sections we say the legislature "shall" and we are trying to determine now whether or not, where we used the expression "legislature" and approve of it, whether or not these proposals which are being passed subsequent to our article on the initiative where we used the expression "legislature" does not limit the initiative power. And so, in every instance where possible, we have been substituting for the word "legislature" the words "by law" so that it would conform to the style of the initiative, if you understand that. Is that clear? For example, Mr. White, in the judiciary article we say, "The legislature shall provide for the systems of courts." If we leave it in there, that means by initiative, the system of courts might be interpreted to mean that by the initiative you couldn't change the system of courts because we specifically said, "The legislature alone can do that." That is a problem that will confront us on every article that now appears, and I believe it is the intention of the Style and Drafting Committee, wherever possible, to use the expression "provided by law" instead of "by the legislature".

WHITE: As it stands now then your amendment reads it could be provided for by the legislature or by the courts? How did initiative get into this? As your amendment now reads, I don't

see that it reads any differently than Section 12, because you say, "shall be provided for by law", and the way we have been operating, it means "by the legislature".

PRESIDENT EGAN: Mr. Hellenthal.

HELLENTHAL: After talking to Mr. McLaughlin and others here, I should like to ask unanimous consent that this matter be taken up tomorrow sometime in mid-morning so that members of the Judiciary Committee can briefly assemble and pursue the intricacies of this matter.

PRESIDENT EGAN: You have heard Mr. Hellenthal's request. Is there any objection? If there is no objection, we will hold the matter in abeyance until tomorrow morning. Are there amendments to Section 13?

CHIEF CLERK: Yes.

PRESIDENT EGAN: Will the Chief Clerk read the proposed amendment to Section 13.

CHIEF CLERK: "Amendment by Mr. Buckalew to Section 13; line 21, strike the words 'the senate' and insert 'either house'. Line 22, strike 'of all the senators' and add a period after 'vote'. Line 24, strike 'before the house of representatives' and insert 'in joint session assembled'. Line 26, strike the last word in the line 'of' and on line 1, page 5, strike 'the house of representatives' and insert 'in joint session assembled'."

BUCKALEW: I move its adoption, Mr. President.

PRESIDENT EGAN: Mr. Buckalew moves adoption of his proposed amendment to Section 13. Is there a second to the motion?

SUNDBORG: Yes, I'll second the motion.

PRESIDENT EGAN: Mr. Sundborg seconds the motion. May we have it read again rather slowly.

(The Chief Clerk reread the proposed amendment.)

PRESIDENT EGAN: Mr. Johnson.

JOHNSON: May I ask a question?

PRESIDENT EGAN: If there is no objection, you may ask a question.

JOHNSON: I presume you would tell us anyway, Mr. Buckalew, but what is the purpose of this amendment?

BUCKALEW: I think it's quite clear. What I have done by this

MEMORANDUM

DATE: December 4, 1990

TO: Stephen D. Little, Chairman AWO Legislative Committee

FROM: AWO Seaman's Injury Compensation Task Force

SUBJECT: Final Report of Seaman's Injury Compensation Task Force

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This is the final report of the AWO Seaman's Injury Compensation Task Force ("Task Force"). The members of the Task Force were yourself, Mr. E. G. Conrad, Jr. (Compass Marine Services, Inc.), Mr. Lee Coulthard (Western Transportation Company), Mr. Billy Harbison (Arkansas River Company), Ms. Lisa Flemming (American Commercial Barge Line Company), and M. R. Buese (Dixie Carriers, Inc.), the Task Force Chairman.

Purpose and Objectives of Task Force

The Task Force was appointed by the AWO Legislative Committee at the Spring, 1990 meeting for the purpose of examining the issue of seaman's injury compensation in our industry largely in response to external events, specifically, the rail industry's intensive effort at Federal Employers Liability Act ("FELA") reform. FELA is the rail industry's injury compensation system and is incorporated by reference into the Jones Act. If FELA were modified, the Jones Act would be affected.

Additionally, concurrent with FELA reform efforts, the Federal Court Study Committee, a special panel created by Congress in 1988 to identify options for reducing case loads in the Federal courts system, issued a report in April 1990 recommending, among other things, that the Jones Act be replaced by the United States Longshoreman and Harbor Workers Act ("Longshoremen Act") no-fault compensation system, but that seamen retain the traditional remedy and right to sue their employer for unseaworthiness under General Maritime Law.

The Task Force established the following objectives:

- Develop sample statistics base which can be used to develop an industry profile.
- Assess cost of Jones Act/General Maritime Law compensation system and compare to no-fault systems such as the Longshoremen Act.
- Develop a strategy to guide AWO with respect to rail industry FELA reform efforts and the Federal Court Study Committee's recommendations.

Methodology

To accomplish the objectives established, the Task Force determined that lost-time personal injury cases incurred in calendar year 1987 would be analyzed for a group of participating companies operating in trades and geographic areas representative of the industry as a whole. The participating companies would recalculate the actual lost-time injuries which occurred in their operations in calendar year 1987 to determine compensation which would have been due under the Longshoremen Act and provide actual compensation paid under the Jones Act/General Maritime Law for such injuries. The participating companies are American Commercial Barge Line Company, Dixie Carriers, Inc., Hollywood Marine, Inc., Foss Maritime Company, Maritrans GP, Inc., and Midland Enterprises, Inc. The data supplied by the participating companies was sent directly from the participating company to AWO staff for analysis and input into the data base. AWO staff entered the data and released it to Task Force members in a fashion which does not allow attribution of any specific information to a contributing company.

Discussion

There were 341 usable claims analyzed. As you will note from Exhibit 1, the aggregate cost of claims under the Longshoremen Act was $3,599,817 as compared to an aggregate cost under the Jones Act/General Maritime Law of $3,061,462. The highest cost claim was $271,718 under the Longshoremen Act and $212,685 under the Jones Act/General Maritime Law (this was not the same individual claim). The average cost per claim was $10,554 under the Longshoremen Act as compared to $8,978 under the Jones Act.

The claims data was broken down into economic groupings for further analysis:

- Less than $1,000
- $1,001 to $10,000
- $10,001 to $25,000
- $25,001 to $50,000
- $50,001 to $100,000
- Excess of $100,000

As you will note from Exhibit 2, the distribution of claims, both in terms of number of claims and aggregate costs of those claims, which falls within each economic group is remarkably similar under the Longshoremen Act and Jones Act. It appears that the only dissimilarities which exist occur in the area of claims between $10,000 and $50,000 where the Jones Act has a higher number of claims for a higher aggregate cost in that range, and claims in excess of $50,000 which occur more frequently and at higher aggregate costs under the Longshoremen Act. Exhibit 3 graphically depicts in side-by-side comparison the number of claims as a percent of total number of claims in each category and the aggregate cost of claims as a percent of the overall aggregate cost of claims in each category. We observed that there appears to be an indication that in cases of serious claims, the Jones Act allows for a more economic settlement on average than does the Longshoremen Act. This is largely attributable to, in our opinion, the flexibility employers have under the Jones Act in settling claims which does not exist to the same extent under the Longshoremen Act.

It is worth noting that in the data analyzed, there did not appear to be any "shock losses" or unusually high dollar value cases which one would expect to see under the Jones Act jury system in this volume of claims. Of the 23 claims under the Longshoremen Act in excess of $50,000, most involved permanent total disability. However, these same claims generally settled for less under the Jones Act, notwithstanding the apparent severity of the injury. This is probably attributable to the handling of the claims by experienced claims personnel who were successful in settling claims without having the cases go into litigation or before juries.

Conclusions

Based on our analysis, we conclude that the Longshoremen Act would result in aggregate claim payouts roughly 17% greater than the Jones Act. We further conclude that the incremental cost estimate is probably on the high side in that the underlying data does not contain any "shock losses" on the Jones Act side. We would expect some "shock losses" to occur over a period of time. In comparing the Jones Act and the Longshoremen Act, we are also cognizant of the fact that we only examined compensation which was paid (under the Jones Act) or would have been paid (under the Longshoremen Act) to the injured party and did not take into consideration the claims adjudication costs incurred by employers, i.e., defense attorney fees, or the impact on the injured parties' compensation as a result of plaintiffs' attorneys fees. The compensation paid to the injured party in the study does not attempt to net-out the costs, if any, which the injured party incurred in obtaining the compensation..

We believe it is reasonable to assume that the Longshoremen Act may be a more efficient vehicle for compensating injured parties than is the Jones Act in that generally 35% of Jones Act settlements in serious cases will be diverted to plaintiff's attorneys and in some instances as much as 15% may be incurred by the employer as defense costs. For these reasons, we believe that the cost differential between the Jones Act and the Longshoremen Act inclusive of claims adjudication costs is substantially less than 17% and the injured seaman would receive a significantly higher proportion of compensation paid under the Longshoremen Act than the seaman does under the current Jones Act.

Recommendations

After consideration of the data, it is our recommendation that the following strategy be adopted by AWO with respect to seaman's injury compensation:

1. AWO will be an active participant in discussions in political, maritime industry, and insurance industry discussions/deliberations concerning injury compensation systems.

2. Assuming AWO endorses the finding of the Task Force, AWO will utilize the findings of the Task Force in discussions/deliberations so as to maintain consistency of position for the tug and barge industry.

3. AWO will adopt the position it is in favor of further study of no-fault injury compensation systems. Due to the limited scope of the study, the results are not comprehensive enough to build a maritime industry coalition or consensus. Any such coalition would be necessary to successfully advocate an industry position, either in favor of or opposed to change. Accordingly, we recommend the AWO Legislative Committee appoint a member of the Task Force to approach other maritime industry associations and explore further study on a joint basis.

4. AWO is adamantly opposed to replacing the Jones Act with the Longshoremen Act while still providing injured seamen the remedy of litigation for unseaworthiness under the General Maritime Law as recommended by the Federal Court Study Committee.

5. AWO should develop a closer relationship with the Railroad Alliance For Improved Liability Systems ("RAILS"), the rail industry organization created for the purpose of FELA reform. There is a mutuality of interest and AWO membership should be kept fully informed accordingly.

This report would not be complete without recognizing the contributing companies identified above and AWO staff, Dena Wilson, Lee Hill, and Michele Reese for their significant contributions to the study. The members of the Task Force thank each of you.

	LONGSHOREMEN	JONES ACT / GML
NUMBER OF CLAIMS ANALYZED	341	341
AGGREGATE COST	$3,599,817	$3,061,462
HIGHEST COST CLAIM *	$271,718	$212,685
AVERAGE COST PER CLAIM	$10,554	$8,978

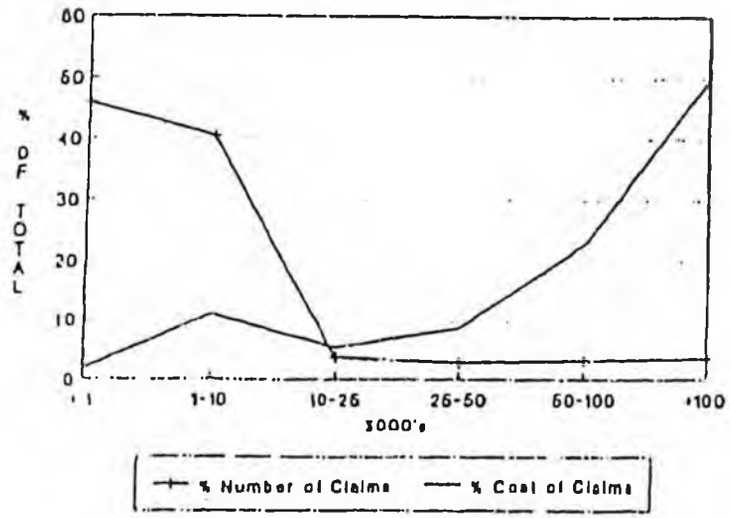
* Not the same claim

Exhibit 1

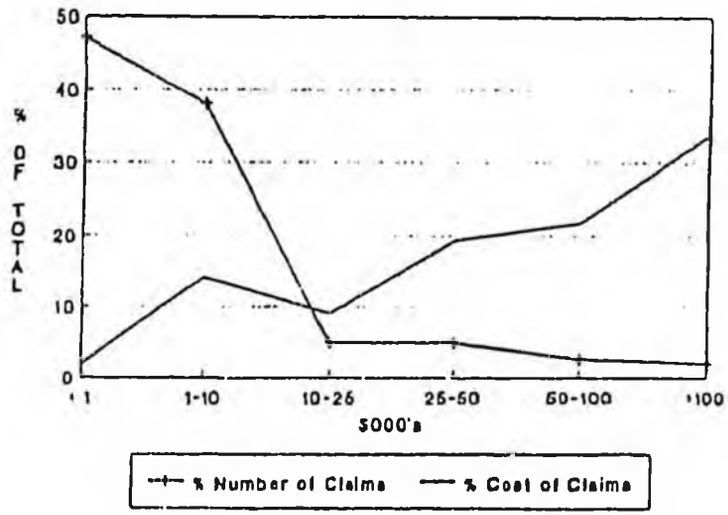
	LONGSHOREMEN		JONES ACT / GML	
	NUMBER	COST	NUMBER	COST
< 1	157	$65,601	161	$56,549
1-10	138	$397,553	130	$432,951
10-25	13	$196,617	17	$278,976
25-50	10	$315,795	17	$592,895
50-100	11	$828,457	9	$665,775
>100	12	$1,795,794	7	$1,034,316

Exhibit 2

LONGSHOREMEN ACT



JONES ACT / GENERAL MARITIME LAW



TRIDENT SEAFOODS CORPORATION, *ET AL.*

v.

DAN W. MURRAY, *ET AL.*

Alaska, Superior Court, Third Judicial District, July 21, 1999
No. 3AN-098-09723 CI

PERSONAL INJURY — 112. What Law Governs — WORKERS' COMPENSATION — 112. What Law Governs — 124. Federal Statutes — 14. Maritime or Non-Maritime Employment.

Under Alaskan law, on review of an administrative decision dealing with neither questions of fact nor questions of law involving agency expertise, a "substitution of judgment" standard of review is used by the reviewing court. Under this standard, a decision by the Alaska Workers' Compensation Board asserting jurisdiction over a claim for compensation by an employee onboard an ocean-going processing vessel was incorrect and must be vacated. The employee had previously been found to be a Jones Act seaman, and he had received a substantial judgment for his injuries in a federal court action under the Jones Act. State workers' compensation statutes cannot apply to the injury of a Jones Act seaman when, as here, that injury occurs within the worker's scope of employment as a seaman.

James F. Whitehead (Holmes, Weddle & Barcott) *for Trident Seafoods*
Dan W. Murray, *pro se*

SIGURD E. MURPHY, Super.Ct.J.:

I. Introduction

Trident Seafoods Corporation and National Union Fire Insurance Co. (Trident) appeal from the Decision and Order of the Alaska Workers' Compensation Board (Board), dated September 22, 1998. The sole issue on Appeal is whether or not the Board erred in asserting jurisdiction in this matter. The Decision of the Board is vacated.

II. Facts and Proceedings

Murray was employed by Trident aboard its vessel F/V *Sea Alaska*, which was processing crab in Akutan Bay. On February 1, 1991, he was injured while stacking boxes of frozen product in the vessel's freezer. He suffered a rupture of the tendon of the long head of the left biceps muscle and assorted injuries to his head, neck, and back. In December 1992, Murray underwent diskectomy and cervical fusion at C5-6.

The *Sea Alaska* is a 347-foot-long, self-propelled, ocean-going processing vessel. Depending on the fishing season, she travels across the

Bering Sea and the Gulf of Alaska, from St. Paul Island to southeast Alaska, to be available to catcher boats which deliver their catch to her for processing. Although the *Sea Alaska* is normally anchored in Alaskan waters during processing operations, she has no connection with a specific Alaska shoreside cannery or delivery facility, and she rarely delivers product to an Alaska shore facility, but typically delivers the same to foreign or domestic freighters. While working aboard the *Sea Alaska*, Murray lived on the vessel and, even though most of the crew have no shoreside duties, Murray did go ashore a couple of times to load bait to the vessel for delivery to catcher boats. On those occasions he was confined to the dock area while working and no product or goods of any kind were offloaded from the subject vessel.

On board *Sea Alaska*, Murray had a variety of jobs to include stacking boxes of product in the freezer, painting the vessel, cleaning the vessel, and butchering crab during processing operations. Murray was hired by Trident out of Seattle and was a resident of Montana at the time of the accident. Trident notes that at the times in question, it predominantly hired a crew from the Seattle area, and it was rare for Alaska residents to be among the crew.

Following his injury, Murray was paid benefits under the Alaska Workers' Compensation Act totalling $14,073.36, including $8,100 for a 6% whole-man permanent partial impairment. He then filed suit in the U.S. District Court for the District of Alaska, asserting a claim under the federal Jones Act and general maritime law. He pursued that claim in federal court all the way to trial, at which time Trident admitted liability under federal law and on September 27, 1994, Judge James von der Heydt, found Murray was a seaman under federal law, and awarded him $138,850 in damages. After interest and costs were added, the judgment totalled $164,726.74. Trident paid Murray in full the amount of his judgment and related interest and costs.

On April 15, 1998, Murray signed an Application for Adjustment of Claim, seeking to renew his Alaska Workers' Compensation claim. Trident filed an Answer asserting that Murray's pursuit of his maritime remedies in federal court precluded his compensation claim. A hearing was conducted on August 12, 1998, devoted exclusively to the jurisdictional question. On September 22, 1998, the Board issued its Interlocutory Decision, and concluded that it had jurisdiction over Murray's claim.

III. Standard of Review

The Alaska Supreme Court has summarized the different standards for reviewing administrative decisions:

> We have recognized four principal standards of review of administrative decisions. The "substantial evidence" test is used for questions of fact. The "reasonable basis" test is used for questions of law involving agency expertise. The "substitution of judgment" test is used for questions of law where no expertise is involved. The "reasonable and not arbitrary" test is used for review of administrative regulations.[1]

There is no dispute in this case about any material facts, and agency expertise is not involved in the Board's assertion of jurisdiction.

IV. Discussion

In its Decision, the Board acknowledged that its assertion of jurisdiction in this case would constitute an exception to the general rule of maritime cases:

> The general rule is maritime injuries are exclusively federal, and the states may not assert workers' compensation jurisdiction or maritime injury without unconstitutionally infringing on the "overriding federal policy of uniform maritime law." *Anderson v. Alaska Packers Association*, 635 P.2d 1182, 1184 (Alaska 1981) (quoting *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 1980 AMC 1930 (1980)).[2]

However, the Board determined that if the maritime injury falls within the "maritime but local" exception or the "twilight zone" of overlapping state and federal jurisdiction, "the assertion of concurrent state workers' compensation jurisdiction does not offend the Constitution and is permitted." The Board also quoted from an Alaska Supreme Court decision[3] wherein the court determined that there is little difference between the "maritime but local" and "twilight zone" exceptions, in that both are recognition of a right of a state to confer the kind of protection that it thinks wise on persons and employment in which it has a legitimate interest. In the *Estes* case referenced by the Board, the claimant was the master of a crabbing vessel operated during the day, within a mile from shore. He could only sell his catch to one packing house in Cordova and he slept ashore and at times had shore duty digging crab bait. He was injured aboard

1. *Blanas v. Brower Co.*, 938 P.2d 1056, 1059 (Alaska 1997) (citing *Handley v. State, Dep't of Revenue*, 838 P.2d 1231, 1233 (Alaska 1992)) (citing *Jaeger v. State*, 537 P.2d 1100, 1107 n.23 (Alaska 1975)).
2. Interlocutory Decision and Order, page 4.
3. *Cordova Fish and Cold Storage Co. v. Estes*, 370 P.2d 180, 184 (Alaska 1962).

the boat while she was tied to a dock. The court found the claimant's employment to be predominantly local in character and that the state had a primary and legitimate concern with his status and well-being. In *Anderson*, the claimant was a captain of a vessel who was injured while actually fishing. The court held his injury was beyond the reach of the state's jurisdiction. The court distinguished between employment with a closer connection to land-based activities than to traditional maritime work and concluded that where "the facts instead show a claimant engaged in wholly maritime work, the courts have declined to lengthen the shadow of the twilight zone, and have remitted the claimants to their federal remedy."[4] The Board, however, noted that in 1988 the Alaska Legislature amended the statutory definition of a "commercial fisherman" to provide that it does . . . "not include processing workers on floating fish processing vessels who do not operate fishing gear or engage in activities related to navigation or operation of this vessel . . .".[5] The Board interpreted this amendment to mean that the legislature found that fish processing work aboard a floating processing vessel is outside of the traditional maritime work of commercial fishing, and that thus "commercial fishermen" are excluded from coverage under the Alaska Workers' Compensation Act (Act).[6] The Board further found that by expressly removing processing workers from the excluded occupational class of commercial fishermen, "the legislature removed any doubt that it intends for processing workers to be covered by the Workers' Compensation Act."

The Board concluded that the 1988 amendment establishes a "legislative determination that processing workers employed aboard floating processors need our Act's protection and affirmed the state's legitimate interest in providing that protection." The Board stated that "the legislature pushed our jurisdiction over this group of industrial workers to the outer limits of the twilight zone, to the boundary line where the assertion of our jurisdiction would infringe on the 'overriding federal policy of uniform maritime law.' "[7] The Board found that the injuries sustained by Murray, stacking boxes of processed crab in the freezer, is similar to traditionally shore-based work at a fish processing plant, and is not like other traditional maritime duties. The Board acknowledged that he was a "seaman" under the Jones Act by virtue of relatively recent, liberal interpretations of the

4. 635 P.2d at 1186.
5. AS 16.65.940(4).
6. AS 23.30.230(6).
7. Decision, pages 6-7.

'seaman'' that extended the scope of federal maritime remedies to persons engaged in work outside of a traditional seaman's duties. Having determined he same, the Board believes that the federal courts have broadened the 'seaman'' definition to such an extent that ''the twilight zone of overlapping federal and state jurisdiction'' . . . ''did not diminish the state's workers' compensation jurisdiction.'' The Board determined that the *Sea Alaska*'s processing activities were done at anchor exclusively in Alaska territorial waters, and they used ''Alaska's territorial waters as its business location.'' It, therefore, determined that the vessel's mission ''was essentially industrial in nature, and more akin to a traditional shore-based cannery or processing facility, than to a vessel engaged in traditional maritime navigation or the business of catching fish.'' Thus, based on [sic] Alaska's legitimate interest ''in ensuring all processing workers within its boundaries are protected by the Workers' Compensation Act, is not less for employees who to [sic] work in a factory that floats at anchor on state's water, than it is for employees performing the same work in a building resting on its shore, a short distance away.'' The Board therefore found that it had jurisdiction over Murray's claim under the Act.

In understanding the interaction between state and federal law, it is important to understand the difference between the doctrines of suppression and preemption:

> The general rule of suppression is that in the case of a direct conflict between a rule of substantive federal law and one of state law, the federal rule governs. So the question applies whether the federal rule is statutory or a recognized principle of judge-made law. Preemption, on the other hand, involves two principles
>
> (1) an issue of statutory construction where, by legislating in a certain field, Congress intended to prohibit application of state law in that area; or
>
> (2) due to the requirements of national uniformity in maritime matters, state regulation in the maritime field is prohibited, although there is no congressional legislation on point.''[8]

The Commerce Clause allocates to Congress the power ''to regulate commerce with foreign nations, and among the several states . . .'' The Supremacy Clause makes the constitutional acts of Congress ''the supreme Law of the land'' and prescribes that ''the judges of every state shall be

8. *Federal Suppression of State Workers' Compensation Acts as Applied to Jones Act Seamen*, Charles M. Davis, 8 U.S.F.Mar.L.J. 185 (Spring 1996).

bound thereby, any Thing in the . . . Laws of any State to the Contrary notwithstanding.'' And the Admiralty Clause mandates that ''all Cases of admiralty and maritime Jurisdiction'' extend to the judicial power of the United States.[9] The *Jensen* doctrine concerns the exclusive federal jurisdiction where there is explicit or implicit occupation of that maritime subject by federal law. Suppression and preemption are the basis for the *Jensen* doctrine.[10] As noted by Davis's article, even though ''the *Jensen* doctrine applied to seamen and to longshore workers injured on navigable waters, a number of cases began to chip away at the edges of exclusive federal jurisdiction with respect to other workers who were neither ''seamen'' nor workers engaged in maritime employment, in whole or in part, upon the navigable waters of the United States.''[11] In 1927, when Congress enacted the Longshoremans' and Harborworkers' Compensation Act (LHWCA) it had the ''maritime but local'' doctrine in mind. The ''maritime but local'' doctrine was developed to supplement maritime law, not eradicate it. ''In maritime situations of genuine local concern where there was no existing rule of admiralty law, the LHWCA permitted the absorption of state compensation schemes. But the doctrine never inferred that in a 'maritime but local' matter, where there was no local rule, admiralty would relinquish its jurisdiction. As drafted in the LHWCA, however, it was open exactly to that interpretation.''[12]

As is the case in the present matter on Appeal, the confusion and uncertainty in the language of LHWCA left employers finding that their contributions to one compensation system, through the Jones Act, left them with no protection when the claims through other jurisdictions were made. Similarly, these inconsistencies caused numerous maritime employees to find their compensation barred by the statute of limitations when they chose the wrong scheme to pursue originally. In 1942 the United States Supreme Court[13] developed the ''Twilight Zone'' Doctrine. This case involved a steelworker who was dismantling a bridge over a navigable river who drowned when he fell from a barge. The State Supreme Court denied his widow's state compensation claim on the basis that he was engaged in maritime work upon navigable waters at the time of the accident. The United States Supreme Court reversed, holding that there is some limited

9. Decision at p.3.
10. *Id.* at p.4.
11. *Id.* at p.5.
12. Davis, supra, note 8 at p.198.
13. *Davis v. Department of Labor & Industries*, 317 U.S. 249, 248, 1942 AMC 1653 (1942).

overlap in state and federal law in such cases and that if a claimant was incorrect in the election between federal or state remedies, the same would not foreclose proper recovery. In 1951, the Ninth Circuit[14] held that injury of a deck hand on a tug in Alaska territorial waters was exclusively under federal maritime law. This case involved injury to a deckhand on a small towing launch that was used to tow sailing fishing vessels the short distance into Bristol Bay and then towed them back to shore-based canneries at the end of the fishing day.

In 1972, Congress amended the LHWCA[15] to extend the same to land-based employment activities relating to ship building, loading, unloading and repairing ships that occurred on land or in adjoining navigable waters. Following the same, the United States Supreme Court continued the "twilight zone" doctrine holding that the overlap of state and federal compensation schemes also covered land-based injuries that fell within the new amendment.[16] It also was determined that the "twilight zone" doctrine allows concurrent jurisdiction of state and federal workers' compensation statutes for workers injured while engaged in "maritime but local" employment, within the meaning of the 1972 amendments to the LHWCA concerning employment on navigable waters and ashore. With regard to this entire issue, Davis concludes that courts which have held that the "maritime but local" and "twilight zone" doctrines apply to Jones Act seamen injured or killed in the scope of their employment have erred in three significant ways. First, they have ignored the doctrine of suppression by focusing solely on the preemption prong of *Jensen* dealing with the uniformity and harmony of maritime law. They have neglected to consider that whenever there is a direct conflict between state and federal law, the federal law is supreme and the state law is superseded. Second, the "maritime but local" and "twilight zone" doctrines lie exclusively within LHWCA type cases, because Congress, in enacting the LHWCA, recognized the concurrent jurisdiction of the state and federal compensation schemes with regard to "maritime but local" workers. Conversely, Congress did not recognize the doctrines in enacting the Jones Act; they are irrelevant to seamen's death and injury cases. Federal law, therefore, maintains exclusive jurisdiction over "seamen" and supersedes any state law concerning the subject of injured or killed seamen.

4. *Alaska Industrial Board v. Alaska Packers Association*, 186 F.2d 1015 (9 Cir. 1951).
5. Act of March 4, 1927, Pub.L.No. 92-576, §19, 86 Stat. 1263 (1972) (current version at 33 U.S.C. §§901-950 (1994)).
6. *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 1980 AMC 1930 (1980).

Referencing the United States Constitution, Article III, §2, the Alaska Supreme Court in its *Anderson*[17] decision, noted that the policy behind the grant of exclusive jurisdiction to the federal government in maritime cases "is to ensure a nationally uniform system of maritime law." The court also acknowledged that the United States Supreme Court began to narrow the *Jensen* doctrine by identifying circumstances in which the subject of litigation might be maritime yet "local in character," and, thus, amenable to relief under state law. The court also acknowledged that difficulties of interpretation led the court to establish a "regime of concurrent jurisdiction,"[18] in the "twilight zone" between federal and state compensation programs.[19] The court in *Anderson*[20] refused to apply the local concern exception to the claim on behalf of a seaman engaged in an effort to board a boat that had broken loose from her mooring less than a mile from shore. Though the decedent was employed only on vessels that operated within five miles of the shore for pleasure fishing, it was held that the state could not constitutionally make a compensation award. The *Anderson* court, in view of the *London Guaranty* holding, stated "We see no way to extend *Estes* to the injury that occurred to Anderson while he was actually engaged in fishing on navigable waters."[21] The court noted that "other cases in which the local concern doctrine was invoked to provide a state remedy for an injury within the admiralty jurisdiction involved facts, like *Estes*, with a closer connection to land-based activity than to traditional maritime work."[22] The *Anderson* court determined that where the facts instead show a claimant engaged wholly in maritime work, "the courts have declined to lengthen the shadow of the twilight zone, and have remitted the claimants to their federal remedies."[23]

As indicated previously, the Board relied in part on its 1962 *Estes*[24] decision. Even though that decision properly identified the issue of whether or not the "twilight zone" doctrine related to both the LHWCA and to seamen's cases, the court did not address fully consideration of the suprem-

17. 635 P.2d at 1183-1185 (Alaska 1981).
18. *Id.* at 1185 (citing *Sun Ship*, 447 U.S. at 719, 1980 AMC at 1932).
19. *Id.* at 1185 (citing *Davis v. Dept. of Labor*, 317 U.S. 249, 1942 AMC 1653 (1942)).
20. *Id.* at 1185 (citing *London Guaranty & Accident Co. v. Indus. Accident Comm'n.*, 279 U.S. 109, 125 (1929)).
21. *Id.* at 1185.
22. *Id.* at 1186 (citing 4 A. Larson, *The Law of Workman's Compensation*, §90.41 (1980)).
23. *Id.* at 1186 (citations omitted).
24. *Supra*, 370 P.2d at 184.

acy of federal law to the extent that state workers' compensation laws conflict with Jones Act remedies, or general maritime law.

In 1990, the United States Supreme Court[25] considered the case where another crewman had killed a seaman aboard a vessel docked in Washington State territorial waters. The Jones Act claim was made by the decedent's mother and the Supreme Court held that even under the general maritime law, which allows for recovery of punitive damages, loss of consortium, and other non-pecuniary damages, the same cannot supplement the intent of Congress to limit seamen's damages to pecuniary losses and compensation under the Jones Act. Specifically, the court held "the Jones Act establishes a uniform system of tort law parallel to that available to employees of interstate railway carriers under FELA,"[26] and general maritime law does not add to it. In a later case,[27] the Supreme Court held that the interests of national uniformity require seamen's remedies must be uniformly applied. Thus, if federal courts cannot apply general maritime law to supplement Jones Act remedies, then it is obvious that a state may not employ state workers' compensation remedies to also interfere with this federal law. Federal law continues to occupy the field of seamen personal injury and death actions, and the state may not regulate the same. This is supported by another recent United States Supreme Court decision[28] wherein a shore-based engineering superintendent, whose duties placed him aboard fleet cruise ships, was a victim of medical malpractice on-board a ship. The injured employee sued under the Jones Act, but the employer argued that he was not a seaman. The Supreme Court stated that the Jones Act provides the cause of action in negligence for "any seaman" injured "in the course of his employment".

Referencing the *Latsis* decision, Davis notes that the court:

> . . . made it clear, however, that whether injury to a seamen [sic] occurred aboard ship or on shore is irrelevant to "seaman status". Jones Act coverage, like the jurisdiction of admiralty over causes of action for maintenance and cure for injuries received in the course of a seaman's employment, depends "not on the place where the injury is inflicted . . . but on the nature of a seaman's service, his status as a member of the vessel, and his relationship as such to the vessel and its operation in navigable waters." Thus, maritime workers who obtain

25. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 1991 AMC 1 (1990).
26. *Id.* 498 U.S. at 29, 1991 AMC at 8.
27. *Yamaha Motors Corp. v. Calhoun*, 516 U.S. 199, 1996 AMC 305 (1996).
28. *Chandris v. Latsis*, 515 U.S. 347, 1995 AMC 1840 (1995).

> seamen status do not lose that protection automatically when on shore, and may recover under the Jones Act whenever they are injured in the service of a vessel, regardless of whether the injury occurs on or off the ship. . .
>
> *Latsis* makes it clear that state workers' compensation statutes cannot provide any remedy for the personal injury or death of a seamen[sic]: it does not matter if the employment activity was "maritime but local", or even if it was performed on land; as long as the worker was a seaman, then his remedy is strictly federal in nature.[29]

V. Summary

Murray was a Jones Act seaman, as recognized by the federal court, and based upon the same he received a substantial judgment. Based on historical precedent, together with recent opinions from the United States Supreme Court and statutory construction, state workers' compensation statutes cannot apply to the injury of a Jones Act seaman when that injury occurs within the workers' scope of employment as a seaman. This is true, even if the vessel is engaged in local trade or, as in the present case, where the vessel is anchored at various locations offshore for the purpose of fish processing. As the court observed in *Latsis*[30] "seamen 'are emphatically the wards of the admiralty' because they 'are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labor.' " Thus, under the suppression doctrine, the remedies in this matter remain exclusively federal. The Alaska Workers' Compensation Board's determination of jurisdiction over the employee's claim for compensation is reversed.

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29. 8 U.S.F.Mar.L.J. 185, p.13.
30. 515 U.S. 347, 355, 1995 AMC 1840, 1845 (quoting *Harden v. Gordon*, 11 F.Cas. 480, 485, 483 No.6, 047) (C.C.Me. 1823).

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MEMORANDUM March 31, 2003

SUBJECT: State immunity against civil suits by state employees who are seamen (SB 120)

TO: Senator Con Bunde
Attn: Jane

FROM: Michael F. Ford
Legislative Counsel

You have asked for my opinion on the opinion of Mr. Trueb, regarding potential legal obstacles to the enactment of SB 120. As explained in this memo, I do not believe that the arguments raised by Mr. Trueb would preclude the legislature from changing existing law as contemplated by SB 120.

The issue raised by SB 120 was addressed by the Alaska Supreme Court in State, Dept. of Public Safety v. Brown, 794 P.2d 108 (Alaska 1990). In that case the court held that the legislature had waived its sovereign immunity by adoption of AS 09.50.250, but that the legislature could amend AS 09.50.250 to make workers' compensation the exclusive remedy for an injured state employee who is a seaman. This is precisely what SB 120 does.

Turning to the arguments raised by Mr. Trueb each point will be addressed in turn.

1. The Alaska Constitution abolished sovereign immunity and sovereign immunity may only be reinstated by a constitutional amendment.

Answer: The view is in conflict with the opinion of the Alaska Supreme Court in Brown. In that case the court stated that "the legislature could make the exclusive remedy defense applicable to federal maritime claims by referring to the defense in the sovereign immunity waiver contained in" AS 09.50.250. The court makes no mention of any limitation on the legislature's power to amend the sovereign immunity provisions created by the legislature in AS 09.50.250.

2. Any attempt to institute sovereign immunity solely for Jones Act suits would offend the Alaska Bill of Rights.

Answer: This argument is again not supported by case law. Injured seaman who are state employees will have a remedy, that being the workers' compensation laws (AS

23.30). If anything, SB 120 eliminates disparate treatment by requiring injured seamen who are state employees to be treated the same as all other state employees.

3. As a matter of federal constitutional law Alaska cannot apply its workers' compensation laws to seamen.

Answer: Again Brown, refutes this argument. The court cites to several cases from other states where the workers' compensation statutes are the exclusive remedy of injured workers, when the state has preserved its sovereign immunity.

4. Any amendment to close the door to the Alaska courts will not prohibit Jones Act suits from being filed in Washington Courts.

Answer: Assuming that the Washington Courts have jurisdiction in a particular case, the injured seaman would still be limited to benefits under the Alaska workers' compensation law, which is the intent of SB 120.

5. There is no empirical evidence that coverage under the workers' compensation system would save the State money.

Answer: The premise underlying workers' compensation is that employees trade a potential full recovery for certain partial compensation and avoid the expense and delay of litigation. This point was recognized by the Alaska Supreme Court in Brown v. State & Div. of Marine Highway Systems, 816 P.2d 1368 (Alaska 1991). This would seem to indicate that in general, the State would save money by requiring seamen who are State employees to use the workers' compensation system.

Please contact me if you have further questions.

MFF:mdr
03-051.mdr

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April 1, 2003

The Honorable Con Bunde, Chair
The Honorable Ralph Seekins
The Honorable Bettye Davis
The Honorable Hollis French
The Honorable Gary Stevens
Senate Labor & Commerce Committee
Alaska State Legislature
State Capitol, Room 206
Juneau, AK 99801-1182

Re: SB 120

Dear Senators:

Thank you for the opportunity to respond to legal questions raised by Lanning Trueb of the law firm Beard Stacey Trueb & Jacobsen regarding SB 120, relating to the state's withdrawal of consent to suit and provision of workers' compensation instead of maritime law remedies for state-employed seamen. We have reviewed the arguments put forth by Mr. Trueb and do not believe that any of them present insurmountable obstacles to effectuating the purpose of this bill, which is to provide a uniform system of remedy for injury, illness, or death of state employees.

As a preliminary matter, it is important to note that the approach taken by this bill was expressly suggested with approval by the Alaska Supreme Court in its decision in *State, Department of Public Safety v. Robert Brown* (Brown I), 794 P.2d 108 (Alaska 1990). The court found that the 1962 enactment of the state's tort claims act, AS 09.50.250, expanded the waiver of sovereign immunity to cover all tort claims against the state, including admiralty matters, without any limiting language referring to Alaska's workers' compensation law. *Brown I*, 794 P.2d at 109. The court expressly agreed with a 1963 opinion of the Attorney General:

> By this waiver of immunity it must be concluded that the State may be sued for negligent torts which arise under the Jones Act. It is true that under the Alaska Workmen's Compensation Act, employers, including the State (AS 23.30.265), are excluded from admiralty liability.
>
> ...
>
> However, this exclusive liability provision cannot act as a limitation on suits against the State under the Federal Maritime law once the State has unqualifiedly waived its immunity for negligent torts. ... By waiving its immunity, the state stands in the position of a private party and cannot limit its tort liability by a general provision in the workmen's compensation act.
>
> ...
>
> If it is the desire of the State to limit its tort liability to the workmen's compensation act, it may do so by legislative enactment of an exception to the waiver of sovereign immunity section contained in AS 09.50.250.

Brown I, 794 P.2d at 110 (citations omitted, emphasis added). In addition, after reviewing three cases from other states in which the relationship between maritime remedies and sovereign immunity was examined, the court held: "These cases teach that the legislature could make the exclusive remedy defense [of the Alaska Workers' Compensation Act] applicable to federal maritime claims by referring to the defense in the sovereign immunity waiver" contained in AS 09.50.250. *Brown I*, 794 P.2d at 111. That is what SB 120 attempts to do.

The United States Supreme Court has repeatedly upheld the states' sovereign immunity against claims founded in federal law, particularly in the decade since *Brown I* was decided. In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72 (1996), the Court held that Congress could not abrogate state sovereign immunity under Article I of the Constitution. Three years later the Court confirmed that Congress could not subject unconsenting states to private suits for damages in state courts pursuant to federal causes of action.[1] *Alden v. Maine*, 527 U.S. 706, 712 (1999) (affirming dismissal of employees' state court suit under Fair Labor Standards Act against State of Maine, without its consent). Most recently, in *Federal Maritime Commission (FMC) v. South Carolina*

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[1] Years earlier, the Court had found that Congress did not abrogate the states' Eleventh Amendment immunity from suit in federal court in the Jones Act. *Welch v. Texas Dept. of Highways & Public Trans.*, 483 U.S. 468, 475 (1987).

State Ports Authority, 535 U.S. 743, 122 S.Ct. 1864 (2002), the Court found that sovereign immunity barred a federal agency from adjudicating a private party's complaint against a state-run port under a federal law. The Court rejected the argument that a "constitutional necessity of uniformity in the regulation of maritime commerce limits the States' sovereignty with respect to the Federal Government's authority to regulate that commerce." *FMC*, 122 S.Ct. at 1878. The Court noted that it had "already held that the States' sovereign immunity extends to cases concerning maritime commerce." *Id.*, citing *Ex parte New York*, 256 U.S. 490 (1921).

Under the rationale of *Brown I* and the last decade of United States Supreme Court jurisprudence, state sovereign immunity is a legitimate defense to claims brought under the Jones Act or maritime law. Amendment of AS 09.50.250 is necessary to withdraw the state's consent to suit, assert sovereign immunity as to claims brought by or on behalf of state-employed seamen regarding injury, illness, or death, and provide workers' compensation benefits as an alternative remedy.[2]

We turn briefly to the legal arguments presented by Mr. Trueb's March 24, 2003, letter. First, the question has been raised whether passage of this bill might violate the equal protection provision in Article I, section 1 of the Alaska Constitution, because state-employed seamen would have different remedies than seamen in the private sector. We believe that the state's goal in providing a uniform system of no-fault workers' compensation benefits to all state employees has a rational basis that would satisfy equal protection. We note that, like other state employees, state-employed seamen have much in common with other state employees. State-employed seamen have many additional benefits, such as sick leave, employer contributions to health insurance, retirement, supplemental benefits, exemption from social security contributions, and other benefits, that private sector seamen do not have.

Furthermore, this would not be the only instance in which a federal remedial system did not apply to state employees. For example, Congress has specifically exempted employees of states from coverage of the Longshoremen's and Harbor Workers' Compensation Act. 33 U.S.C.§ 903(a)(2). In addition, while private sector railroad employees in Alaska are covered by the Federal Employers' Liability Act (FELA), and have the same right to sue their employers for damages as seamen do under the Jones Act, the employees of the Alaska Railroad have been expressly excluded from FELA since the railroad's transfer to state ownership. (Alaska Railroad employees are

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[2] We note that these seamen include not only those employed aboard AMHS ferries, but also seasonal seamen who work aboard research and law enforcement vessels. This bill would establish one remedy and a degree of certainty of expectations for all seamen who are state employees.

covered by state workers' compensation law.) As far back as 1957, New York law provided that the state did not waive its immunity to suit; workers' compensation was held to be the exclusive remedy for state-employed seamen. *Maloney v. State of New York*, 144 N.E.2d 364, 367 (N.Y. App. 1957). The Texas Court of Appeals found the same true under Texas law in 1977. *Lyons v. Texas A & M University*, 545 S.W.2d 56, 58-59 (Tex. Civ. App. 1977) ("The State, however, is immune from suit without its consent. It could provide any remedy it wished and limit seamen to that remedy exclusively.").[3]

As a general matter, states cannot apply workers' compensation statutes to limit federal maritime law for all seamen. However, as discussed above, a state can withhold its consent to suit under federal law, and its sovereign immunity cannot be abrogated by Congress. *Alden,* 527 U.S. 706. In the maritime arena, the arguable need for uniformity is secondary to the state's sovereign immunity. *FMC*, 122 S.Ct. at 1878. If the state does not agree to subject itself to claims under federal maritime law regarding injuries, illness, or death of its own employees, it can provide workers' compensation as an alternative remedy. *Brown I*, 794 P.2d at 110, 111; *Lyons*, 545 S.W.2d at 58-59; *Maloney*, 144 N.E.2d at 367; *see also Gross v. Washington State Ferries*, 367 P.2d 600, 602-603 (Wash. 1961).

We disagree with Mr. Trueb's contention that the Alaska legislature has no authority to assert sovereign immunity by amending AS 09.50.250. Such an argument flies directly in the face of the Alaska Supreme Court's holding in *Brown I*. No case has determined that the Alaska Constitution's provision in Article II, section 21 that the legislature shall establish procedures for suits against the state is a self-effectuating waiver of all state sovereign immunity. Instead, many Alaska appellate cases have found that waiver of the state's immunity is done by statute, and AS 09.50.250 is the vehicle by which the legislature has carried out its constitutionally delegated duty to "establish procedures for suits against the state." *See, e.g., State v. Haley*, 687 P.2d 305, 318 (Alaska 1984); *Adams v. State*, 555 P.2d 235, 241, 244 (Alaska 1976). Most recently, in *Samissa Anchorage v. DHSS, State of Alaska,* 57 P.3d 676, 678-679 and n. 9 (Alaska 2002), the court reiterated the common understanding that the legislature can waive the state's sovereign immunity, and it has done just that in enacting AS 09.50.250.

Finally, it is conceivable that some state-employed seamen could file suit in Washington to pursue Jones Act or other maritime law remedies if unsatisfied with workers' compensation. Under the holding of *Nevada v. Hall*, 440 U.S. 410 (1979), the

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[3] As the result of collective bargaining agreements with the unions representing AMHS vessel employees, the state provided workers' compensation to ferry workers from 1983 to 1991.

state does not have sovereign immunity within another state's courts.[4] However, Washington law strictly limits personal jurisdiction to torts arising from the state's business or presence in Washington. *Grange Insurance Assoc. v. State*, 757 P.2d 933, 937 (Wash. 1988). Moreover, even if personal jurisdiction were established, Washington courts could decline to entertain suits against Alaska out of respect for the state, or comity. For example, in two accidents where the State of Oregon was sued in Washington, the Washington state courts declined to hear the cases, on the grounds of comity. *Williams v. State*, 885 P.2d 845, 851 (Wash. App. 1994); *Fernandez v. State*, 741 P.2d 1010, 1017 (Wash. App. 1987). Additional arguments regarding choice of law also favor dismissal of cases filed in Washington unless the plaintiff is a Washington resident and/or the tortious act occurred in Washington State. For these reasons, we would not anticipate many legitimate cases to be filed in Washington state courts.[5]

We recognize that this bill, if passed, may result in a legal challenge. However, we believe the bill has a solid legal foundation.

Please let us know if you have any questions or would like more information.

Sincerely,

GREGG D. RENKES
ATTORNEY GENERAL

By: Susan D. Cox
Susan D. Cox
Assistant Attorney General

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[4] The continued validity of this holding is being challenged in a case currently pending before the United States Supreme Court.

[5] It is well-established that the state cannot be sued by a seaman in federal court in Washington or any other location. *Collins v. State of Alaska*, 823 F.2d 329 (9th Cir. 1987).

Inlandboatmen's Union of the Pacific

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April 8, 2003

Honorable Lesil McGuire
Chairperson
State of Alaska House Judiciary Committee
State Capitol, Room 118
Juneau, AK 99801-1182

Dear Representative McGuire:

Apparently there is some confusion regarding the position of the Inlandboatmen's Union of the Pacific regarding House Bill 164. This bill attempts to deny the injured seaman working on the Alaska Marine Highway System the right to bring claims under federal maritime law and/or the Jones Act. The Inlandboatmen's Union opposes House Bill 164. The employees of the Alaska Marine Highway System are steadfast in their opposition to any proposed legislation that would deny them the protections of federal maritime law. The fundamental rights and remedies of injured seamen have been acquired over centuries of well-reasoned judicial decisions, congressional hearings and of course, struggle by the marine workers themselves. These federal rights and remedies are necessary to protect the workers from the hazards associated with maritime employment. Any effort to remove the protections afforded seamen by the laws of the United States runs afoul of the Inlandboatmen's Union and the history and tradition of marine commerce in our nation and Alaska.

I am available in person or telephone to testify or share my thoughts and comments to your committee on our opposition to House Bill 164. Also, I know that the other maritime unions that represent employees of the Alaska Marine Highway System, the Masters, Mates and Pilots and the Marine Engineers Beneficial Association, join the Inlandboatmen's Union in opposing House Bill 164.

Respectfully yours,

David Carl Freiboth, President
Inlandboatmen's Union of the Pacific
Marine Division I.L.W.U.

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