

**ALASKA LEGISLATURE**

**2683**

**HOUSE and SENATE FINANCE COMMITTEE FILES, 2003-2004**

249







**SB**

**120**

**HFIN**

**FILE**

# HOUSE COMMITTEE REPORT

(11)

Date Referred to Committee: April 22, 2003

FURTHER REFERRALS:

Date of Committee Action: 4/25/04

The FINANCE Committee considered:

SB 120

SENATE BILL NO. 120

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."

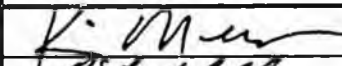
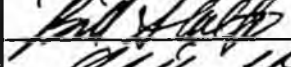
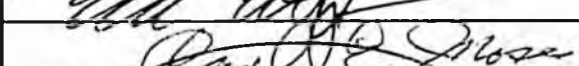
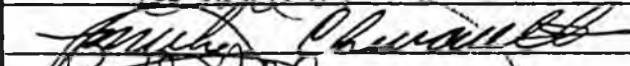
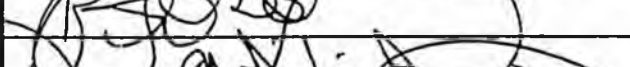

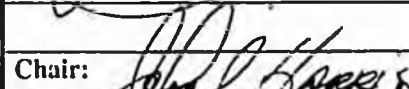
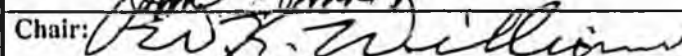
Recommends it be replaced with  HCS or  CS for \_\_\_\_\_ (\_\_\_\_\_)  
 For Senate Bills with new title:  Technical Title  New Title: HCR \_\_\_\_\_  Same Title  New Title

- attach amendments
- add new referral to \_\_\_\_\_ Committee
- Letter of Intent \_\_\_\_\_ Committee

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

<u>NEW FISCAL NOTES</u>				
*Assigned by Chief Clerk's Office				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero

<u>PREVIOUS FISCAL NOTES</u>				
List by Dept(s):	FN#	Fiscal	Indet.	Zero
ADM	#1			✓
LWF	#2	✓		

<u>Signing with recommendations</u>	Printed Last Name	DP	DNP	NR	AM
	Meyer	✓			
	STOLTZ			✓	
	MOSES			✓	
	Chenault	✓			
	Foster	X			
	Whitaker	✓			
Chair: 	Harris	✓			
Chair: 	Williams	✓			

# FISCAL NOTE

**STATE OF ALASKA**  
**2003 LEGISLATIVE SESSION**

Fiscal Note Number: 1  
 Bill Version: SB 120  
 (S) Publish Date: 3/6/03

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Administration  
 Title An Act relating to state immunity for certain BRU Risk Management  
actions by state employed seaman.... 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						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE** (Thousands of Dollars)

FUND SOURCE	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type—Do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

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

# FISCAL NOTE

**STATE OF ALASKA**  
**2003 LEGISLATIVE SESSION**

Fiscal Note Number: 2  
Bill Version: SB 120  
(S) Publish Date: 4/2/03

Revision: 3/31/03 11:02 AM Department: Labor and Workforce Development  
Title: Claims by State-Employed Seamen BRU: Workers' Compensation  
Sponsor: Rules Committee Component: Workers' Compensation  
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						
<b>TOTAL OPERATING</b>	<b>71.0</b>	<b>87.0</b>	<b>87.0</b>	<b>87.0</b>	<b>87.0</b>	<b>87.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE (Thousands of Dollars)**

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
103 F/Mental Health						
1157 Workers Safety Account	71.0	87.0	87.0	87.0	87.0	87.0
<b>TOTAL</b>	<b>71.0</b>	<b>87.0</b>	<b>87.0</b>	<b>87.0</b>	<b>87.0</b>	<b>87.0</b>

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 Grossl, Director Phone: 465-2790  
Division: Workers' Compensation Date/Time: 3/31/03 11:02 AM  
Approved by: Greg O'Claray, Commissioner Date: 03/31/03  
Agency: Department of Labor and Workforce Development

For distribution information, call the Governor's Legislative Office

# FISCAL NOTE

**STATE OF ALASKA**  
**2003 LEGISLATIVE SESSION**

Fiscal Note Number: \_\_\_\_\_  
 Bill Version: CSHB271(W&M)  
 () Publish Date: \_\_\_\_\_

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Revenue  
 Title Passenger Vehicle Rental Tax BRU Revenue Operations  
 Component Tax Division  
 Sponsor Representative Kott  
 Requester House Finance Committee Component No. 2476

**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	55.0	55.0	55.0	55.0	55.0	55.0
Travel	5.0	2.0	2.0	2.0	2.0	2.0
Contractual	25.0	12.0	12.0	12.0	12.0	12.0
Supplies	3.0	1.0	1.0	1.0	1.0	1.0
Equipment	8.5					
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>96.5</b>	<b>70.0</b>	<b>70.0</b>	<b>70.0</b>	<b>70.0</b>	<b>70.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>	<b>4,000.0</b>	<b>6,000.0</b>	<b>6,000.0</b>	<b>6,000.0</b>	<b>6,000.0</b>	<b>6,000.0</b>
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**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	96.5	70.0	70.0	70.0	70.0	70.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type-Do not abbreviate)						
<b>TOTAL</b>	<b>96.5</b>	<b>70.0</b>	<b>70.0</b>	<b>70.0</b>	<b>70.0</b>	<b>70.0</b>

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	1	1	1	1	1	1
Part-time						
Temporary						

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

This legislation would impose a 10% state tax on the rental or lease of passenger vehicles, and a 3% state tax on the lease or rental of recreational vehicles. The new taxes would take effect July 1, 2003. Commercial vehicles and farm equipment would be exempt, as would emergency and firefighting vehicles.

The definition of recreation vehicles in this legislation is broad, and would include not only the traditional RVs but also campers, camper trailers, and pickup trucks with camper units mounted on the bed.

Vehicles leased for more than 90 consecutive days are exempt from the tax.

Prepared by: Larry Persily, Deputy Commissioner Phone 465-5469  
 Division: Department of Revenue Date/Time 4/24/03 11:30 AM  
 Approved by: Larry Persily, Deputy Commissioner Date 4/24/2003  
 Agency: Department of Revenue

**CSHB271(W&M) - Passenger Vehicle Rental Tax  
Department of Revenue - April 24, 2003**

**Page 2 of 3**

**SUGGESTED CHANGES**

AS 43.52.010 and AS 43.52.030 refer to a tax on a vehicle "made in this state." Although we understand the intent that "made in Alaska" refers to the rental or lease agreement, and not the vehicle, we suggest changing the language to remove any possible confusion that a taxpayer might claim. In addition, the "made in Alaska" could be argued to prohibit imposing the state tax on rentals where the reservation is made out of state (such as through a toll-free line or a web site). We would recommend simply deleting the "made in Alaska" reference from these sections.

We also recommend amending AS 43.52.050(b) to clearly require that the tax be separately stated. This is a basic requirement of taxes to facilitate compliance, provide transparency, and establish the tax base vs. the tax itself. This should not cause concern with rental agencies, as most prefer to advertise prices on a pre-tax basis.

We also would recommend language to clearly state that rentals or leases by government employees for official business are exempt from the tax. This should cover federal, state, municipal and school district rentals, whether rented directly to the governmental entity or rented by a government employee on official business. This exemption would avoid a lot of confusion facing rental car providers and minimize complication within and between government agencies.

**OPERATING EXPENDITURES**

The Department of Revenue anticipates additional costs for administering the provisions of this bill. There are more than 100 businesses that rent out cars and RV's across Alaska. We envision that this tax would be paid quarterly, which would mean between 400 and 500 tax returns during the year, of which several might involve questions, audits or additional work, and perhaps enforcement and collection efforts.

The Department expects it will need the equivalent of one full-time employee to handle the accounting and collections, taxpayer service and compliance work associated with this tax. In addition, we would expect to conduct taxpayer outreach and education efforts to help start this new program.

In addition to the outreach and education effort, the Department would need to move quickly to set up this new tax for July 1, 2003, and would use the additional contractual funds requested in Fiscal 2004 to pay for a computer program for tracking payments.

**CSHB271(W&M) - Passenger Vehicle Rental Tax  
Department of Revenue - April 24, 2003**

**Page 3 of 3**

**REVENUE ESTIMATE**

The Department estimates the combination of a 10% passenger vehicle tax and a 3% RV tax would raise approximately \$6 million a year in additional revenue to the state. The revenue in the first year of the program, Fiscal 2004, is estimated at \$4 million because the state would receive just three quarterly tax payments in the first year, and would miss out on the start of the tourism season in May and June 2003.

For comparison purposes, Anchorage imposes an 8% tax on vehicle rentals, with Cordova at 6% and Yakutat at 4%. Renters at Anchorage airport also pay an 11% fee to cover the rental companies' airport charges.

FRANK H. MURKOWSKI  
GOVERNOR  
GOVERNOR@GOV.STATE.AK.US



STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
JUNEAU

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WWW.GOV.STATE.AK.US

7-9  
SB 120

SB 120

March 5, 2003

The Honorable Gene Therriault  
President of the Senate  
Alaska State Legislature  
State Capitol, Room 107  
Juneau, AK 99801-1182

Dear President Therriault:

Under the authority of article III, section 18, of the Alaska Constitution, I am transmitting a bill that would provide a uniform equitable remedy for work injuries of all state employees under a single compensation system.

AMHS crew and a small number of other ship based personnel are the only state employees presently authorized to file a direct civil (negligence) action against their employer for on -the-job injury or illness. Historically, this unique legal privilege was provided to maritime employees as a consideration to compensate for the perils of long ocean voyages away from home as well as to protect them from the risk of abandonment at a foreign port should they become ill or injured mid-voyage.

State maritime employees typically work scheduled voyages of a week or two in duration and are compensated with employer-provided retirement and comprehensive health plan benefits (including occupational disability.)

For over 8 years, during the 1980's, AMHS union labor agreements stipulated and the state paid Alaska Workers' Compensation Act benefits in lieu of traditional Jones Act and other maritime remedies. Many employees preferred the AWCA as a more complete and immediate no-fault payment (non-taxable wage indemnification rather than a modest daily maintenance stipend) - avoiding controversy, delays, and the extra costs inherent in protracted civil litigation. A single employee's constitutional challenge resulted in the Supreme Court decision (Brown v. State & Div. Of Marine Highway Systems (8/30/91) which precludes this practice under current law (unless new legislation is enacted.)

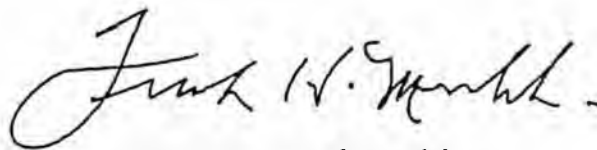
The Honorable Gene Therriault  
March 5, 2003  
Page 2

Legal arguments over liability and the subjective nature of non-economic damages provided under maritime law generate greater claims adjudication costs and significantly greater compensation awards to injured employees. The cost to the state for the claims of these employees is nearly 75% higher than the cost related to claims of other state employees covered by workers' compensation. Litigation expenses and defense costs presently incurred defending the Alaska Marine Highway System (AMHS) and other agency maritime employee claims will be significantly reduced by this legislation.

The proposed legislation would limit the remedy for work injuries incurred by the state-employed seaman to those benefits provided all other employees under the Alaska Workers' Compensation Act (AWCA).

I urge your prompt and favorable action on this measure.

Sincerely,

A handwritten signature in cursive script, appearing to read "Frank H. Murkowski".

Frank H. Murkowski  
Governor

# FISCAL NOTE

**STATE OF ALASKA**  
**2003 LEGISLATIVE SESSION**

Fiscal Note Number: 1  
 Bill Version: SB 120  
 (S) Publish Date: 3/6/03

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Administration  
 Title An Act relating to state immunity for certain BRU Risk Management  
actions by state employed seaman.... 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						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**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)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

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

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.

Provided by the Department of Administration

**AMHS CREW CLAIMS  
FREQUENCY TO 100 FTE'S**

FISCAL YEAR	2002			2001			2000			1999			1998			TOTALS
	# Claims	FTEs	#/100FTEs	# Claims	FTEs	#/100FTEs	# Claims	FTEs	#/100FTEs	# Claims	FTEs	#/100FTEs	# Claims	FTEs	#/100FTEs	
SHIP																
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
KENNCOTT	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	64	36	112.9	32	254
TAKU	48	111.7	43.0	48	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	15,518	8.4	1,382	14,271.8	9.7	1,060	14,182.0	7.5	1,102	14,210.0	7.8	1,198	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
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STATE W/C CLAIMS PER 100 FTE's	8
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**ALL DEPT CLAIMS  
FREQUENCY TO 100 FTE'S**

DEPARTMENT	2002			2001			2000			1999			1998			1997			TOTAL
	# Claims	FTEs	#/100FTEs	# Claims	FTEs	#/100FTEs	# Claims	FTEs	#/100FTEs	# Claims	FTEs	#/100FTEs	# Claims	FTEs	#/100FTEs	# Claims	FTEs	#/100FTEs	
Governor's Office	5	196	2.6	0	187	0.0	3	189	1.6	7	200	3.5	5	186	2.7	7	187	3.7	22
Administration	214	1466	14.6	260	1,404.0	18.6	211	1,536.0	13.7	180	1,334.0	13.5	192	1,289.0	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	67
Revenue	21	506	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	451	6.2	15	398.0	3.8	17	610.0	3.3	20	497.0	4.0	25	491.0	5.1	34	506.0	6.7	111
Health & Social Services	168	2459	6.8	196	2,215.0	8.8	143	2,201.0	6.5	165	2,094.0	7.9	183	2,047.0	8.9	199	2,103.0	9.5	686
Labor & Workforce Dev	37	867	4.3	35	784.0	4.4	29	719.0	4.0	19	633.0	3.0	23	736.0	3.1	25	815.0	3.1	131
Commerce & Economic Development	10	503	2.0	18	451.0	4.0	11	374.0	2.9	12	481.0	2.5	9	426.0	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	10	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	95	910.0	10.4	132	609.0	21.7	158	937.0	18.9	607
Fish & Game	72	1225	5.9	64	1,137.0	7.4	89	1,148.0	7.8	75	1,121.0	6.7	85	1,095.0	7.8	83	999.0	8.3	418
Public Safety	139	764	18.2	123	727.0	16.8	94	754.0	12.5	92	766.0	12.0	89	748.0	11.9	88	887.0	9.9	466
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	16	506.0	3.2	76
Corrections	182	1473	11.0	154	1,368.0	11.3	100	1,366.0	7.3	136	1,362.0	10.0	139	1,358.0	10.2	125	1,350.0	9.3	654
Transportation	251	2,386	9.5	253	2,418.0	10.2	181	2,241.0	8.0	207	2,391.0	8.8	205	2,356.0	8.8	231	2,487.0	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	292.0	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	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	1298	15516	8.4	1,382	14,272	9.7	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

\*DOT FTEs do not include AMRIS 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	28	64.7	40	35	64.7	54	24	64.7	37	21	62.8	33	11	42.7	26	
BAILEY	14	21.1	68.4	17	21.1	81	14	21.1	66	7	21.1	33	19	22.7	84	15	62.3	24	
BOND	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			
COLEMAN	35	97.7	35.3	1	97.7	1	25	97.7	26	31	97.7	32	21	84.8	22	35	122.9	28	
COX	31	62.8	49.4	28	62.8	45	20	62.8	32	13	62.8	21	10	55.1	18	19	62.9	30	
DEAN	22	36.3	60.6	40	36.3	110	18	36.3	50	13	36.3	36	19	45.4	42	38	123.2	31	
DEAN	65	82.9	78.4	56	82.9	68	44	82.9	53	29	82.9	35	36	112.9	32	25	89.8	36	
DEAN	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	
DEAN	25	65.9	37.9	37	65.9	56	23	65.9	35	24	65.9	36	22	66.0	33	21	62.4	34	
DEAN	31			19			3			13			7			8			
<b>FISCAL YEAR TOTALS</b>	<b>342</b>	<b>655.2</b>	<b>50.1</b>	<b>351</b>	<b>655.2</b>	<b>54</b>	<b>251</b>	<b>655</b>	<b>38</b>	<b>215</b>	<b>655.2</b>	<b>32.8</b>	<b>178</b>	<b>570.1</b>	<b>31.2</b>	<b>199</b>	<b>657.8</b>	<b>30.3</b>	
AMHS Other DOT/TA	199	2629	8	256	2,433.0	11	184	2,377.0	8	197	1,708.8	11.5	203	1,798.8	11.5	231	2,284.2	10.2	
AMHS DHS/ST/WH	154	2458	6	199	2,368.0	8	145	2,365.0	6	168	2,096.0	8.0	182	2,047.0	8.9	199	2,103.0	9.5	
AMHS CORRECTIONS	142	1473	10	150	1,460.0	10	102	1,366.0	7	131	1,362.0	8.6	139	1,258.0	10.2	125	1,350.0	9.3	
AMHS ADMINISTRATION	178	1466	12	259	1,442.0	18	210	1,404.0	15	178	1,334.0	13.3	192	1,289.0	14.9	182	1,155.0	15.8	
AMHS PUB SAFETY	121	784	16	125	745.0	17	95	727.0	13	92	768.0	12.0	89	746.0	11.9	88	687.0	9.9	
<b>(Top 5 Depts. Only) Work Comp Claims &amp; FTEs (not including AMHS)</b>	<b>794</b>	<b>8,791</b>	<b>9</b>	<b>989</b>	<b>8,445</b>	<b>12</b>	<b>736</b>	<b>8,241</b>	<b>9</b>	<b>788</b>	<b>7,266.8</b>	<b>10.5</b>	<b>808</b>	<b>7,190.8</b>	<b>11.2</b>	<b>825</b>	<b>7,739.2</b>	<b>10.6</b>	<b>4320</b>

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

Row 14	# Claims	FTEs		
AMHS COMBINED (5) YEAR TOTAL	1,337	3,190.9		
AMHS 5 YEAR AVERAGE	267	638.2		
AMHS 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	\$38,730	62.9	\$61,574	
LAUREL	\$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	
KENNESAW	\$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	
COLLETTA	\$81,994	97.7	\$83,924	4,308	97.7	\$4,409	\$115,447	97.7	\$118,165	\$111,820	97.7	\$114,452	\$32,107	94.8	\$33,668	
THE CORNER	\$78,545	62.8	\$125,072	70,388	62.8	\$112,083	\$191,004	62.8	\$304,146	\$663,504	62.8	\$1,056,535	\$625,761	55.1	\$1,135,682	
MAKERSHAW	\$12,878	36.3	\$35,477	2,222	36.3	\$6,121	\$139,958	36.3	\$385,559	\$24,219	36.3	\$66,719	\$107,033	45.4	\$235,756	
MATAMOROS	\$230,299	82.9	\$277,003	130,842	82.9	\$157,831	\$133,160	82.9	\$160,627	\$31,019	82.9	\$37,417	\$52,202	112.9	\$46,237	
SHADAKU	\$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	
JUSTUM	\$201,002	65.9	\$305,010	77,320	65.9	\$117,329	\$482,448	65.9	\$732,091	\$58,315	65.9	\$88,490	\$181,996	66.0	\$275,752	
<b>FISCAL YEAR TOTALS</b>	<b>\$946,227</b>	<b>655.2</b>	<b>\$144,418</b>	<b>1,307,249</b>	<b>655.2</b>	<b>\$199,519</b>	<b>\$1,652,232</b>	<b>655.2</b>	<b>\$252,172</b>	<b>\$1,289,204</b>	<b>655.2</b>	<b>\$196,765</b>	<b>\$1,093,235</b>	<b>570.1</b>	<b>\$191,762</b>	

	\$ 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	2000			2001			2002			2003			2004			2005			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	\$2,750	196	20,816	\$0	187	\$0	\$7,020	180	\$3,719	\$3,100	200	\$1,550	\$13,404	188	\$7,255	\$100,035	187	\$50,703	\$120,858
Administration	1,710,844	1406	116,888	\$1,607,177	1,404.0	\$120,882	\$1,141,189	1,538.0	\$74,295	\$1,135,226	1,334.0	\$85,060	\$1,328,798	1,288.0	\$103,067	\$1,823,940	1,155.0	\$157,917	\$7,126,309
Law	99,186	475	20,748	\$54,719	454.0	\$12,053	\$42,318	453.0	\$9,342	\$50,285	447.0	\$11,248	\$70,831	441.0	\$16,064	\$36,441	439.0	\$8,301	\$254,894
Revenue	172,444	508	34,080	\$78,741	474.0	\$16,180	\$112,713	492.0	\$22,908	\$81,243	492.0	\$16,545	\$192,708	502.0	\$38,388	\$95,248	487.0	\$19,558	\$568,851
Education	124,833	451	27,835	\$17,877	398.0	\$4,492	\$121,201	310.0	\$25,726	\$48,005	497.0	\$9,659	\$81,693	491.0	\$16,638	\$73,373	508.0	\$14,501	\$352,149
Health & Social Services	1,061,074	2459	43,151	\$821,878	2,215.0	\$37,105	\$780,679	2,201.0	\$35,489	\$531,971	2,008.0	\$25,356	\$904,103	2,947.0	\$44,167	\$719,481	2,103.0	\$34,212	\$3,758,110
Labor & Workers' Dev.	304,718	867	45,527	\$158,374	794.0	\$19,994	\$183,897	719.0	\$26,968	\$82,863	633.0	\$13,084	\$45,263	736.0	\$6,150	\$148,167	815.0	\$18,180	\$626,585
Commerce & Economic Dev.	14,812	503	2,945	\$60,023	451.0	\$13,309	\$2,034,760	374.0	\$544,053	\$89,214	481.0	\$18,548	\$58,985	426.0	\$13,377	\$40,588	457.0	\$8,881	\$2,281,504
Military & Veterans Affairs	134,295	259	51,851	\$35,868	223.0	\$16,083	\$73,094	222.0	\$32,925	\$139,450	218.0	\$64,580	\$280,248	178.0	\$157,442	\$16,244	171.0	\$9,500	\$544,922
Natural Resources	288,263	714	40,093	\$483,128	657.0	\$75,057	\$329,231	675.0	\$48,775	\$195,793	910.0	\$21,518	\$498,350	600.0	\$81,831	\$395,225	937.0	\$42,180	\$1,811,724
Fish & Game	251,087	1225	20,497	\$479,722	1,137.0	\$42,192	\$508,289	1,148.0	\$44,383	\$382,537	1,121.0	\$33,340	\$253,498	1,095.0	\$23,150	\$688,908	990.0	\$69,928	\$2,273,652
Public Safety	1,899,714	784	222,478	\$723,008	727.0	\$99,451	\$321,748	754.0	\$42,672	\$792,977	788.0	\$103,522	\$400,173	748.0	\$54,045	\$1,083,225	887.0	\$122,122	\$3,324,131
Environmental Conservation	73,544	481	14,978	\$65,925	487.0	\$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
Correctional	837,108	1473	56,830	\$831,086	1,368.0	\$60,752	\$485,731	1,368.0	\$34,094	\$873,703	1,362.0	\$64,149	\$873,000	1,258.0	\$71,649	\$784,805	1,350.0	\$58,134	\$3,928,325
*Transportation	2,108,473	1000	80,125	\$2,400,217	1000	\$88,908	\$1,437,892	1000	\$63,587	\$2,040,125	1000	\$98,373	\$1,315,377	1000	\$58,454	\$2,108,735	1000	\$107,781	\$9,300,148
Legislative Affairs	65,473	294	22,270	\$48,359	300.0	\$15,453	\$8,122	274.0	\$2,864	\$90,577	272.0	\$29,824	\$110,631	350.0	\$3,129	\$7	292.0	\$2	\$245,896
Legislative Audit	0	37	0	\$2,241	36.0	\$4,225	\$0	36.0	\$0	\$0	36.0	\$0	\$0	34.0	\$0	\$0	36.0	\$0	\$2,241
Courts	33,532	704	4,761	\$126,608	690.0	\$18,349	\$71,730	681.0	\$10,533	\$43,917	692.0	\$6,346	\$89,812	680.0	\$13,208	\$58,037	674.0	\$8,611	\$390,103
<b>FISCAL YEAR TOTALS</b>	<b>9,117,734</b>	<b>15,516</b>	<b>\$58,783</b>	<b>\$8,088,965</b>	<b>14,272</b>	<b>\$56,678</b>	<b>\$7,792,924</b>	<b>14,182</b>	<b>\$54,949</b>	<b>\$6,622,043</b>	<b>14,210.0</b>	<b>\$46,601</b>	<b>\$6,796,572</b>	<b>13,785.0</b>	<b>\$49,304</b>	<b>\$8,220,861</b>	<b>13,785.0</b>	<b>\$59,706</b>	<b>\$37,521,385</b>

\* Comp FTEs taken from CORA

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

FISCAL YEAR	2002			2001			2000			1999			1998			TOTALS
	WCS	FTEs	\$/100FTEs	WCS	FTEs	\$/100FTEs	WCS	FTEs	\$/100FTEs	WCS	FTEs	\$/100FTEs	WCS	FTEs	\$/100FTEs	
Other DOT (5)	2,106,473	2629	80,125	2,189,897	2,433.0	90,008	1,266,154	2,377.0	53,267	1,281,569	1,706.8	75,086.1	1,146,418	1,759.9	65,141.1	
RDSS (12)	988,473	2459	40,198	900,968	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 (1)	835,397	1473	56,714	813,498	1,480.0	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)	1,710,592	1406	116,684	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	
PUB SAFETY (1)	1,701,367	764	222,692	705,222	745.0	94,661	387,568	727.0	53,311	759,591	786.0	99,163.3	353,608	748.0	47,400.6	
(Top 5 Depts. Only) Work Comp Claims & FTEs (not including AMHS)	7,342,303	8,791	518,413	5,895,081	8,445	68,805	4,466,499	8,241	54,199	\$ 3,580,802	7,286.8	48,413.8	\$ 4,327,313	7,199.9	60,102.4	
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		

# Beard Stacey Trueb & Jacobsen, LLP

ATTORNEYS AT LAW

821 N Street, Suite 205 • Anchorage, Alaska 99501

March 24, 2003

Sent Via DHL Overnight & Facsimile (907) 465-3871 ( 3 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

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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. Coming 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

Senator Con Bunde  
March 24, 2003  
Page 3 of 3

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 yo'ur 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,



Lanning M. Trueb

# LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES  
LEGISLATIVE AFFAIRS AGENCY  
STATE OF ALASKA

(907) 465-3867 or 465-2450  
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State Capitol  
Juneau, Alaska 99801-1182  
Deliveries to: 129 6th St., Rm. 329

## 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 *M-F*  
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 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

Senator Con Bunde  
March 31, 2003  
Page 2

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

# STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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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.<sup>1</sup> *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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<sup>1</sup> 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.<sup>2</sup>

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. 35 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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<sup>2</sup> 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."<sup>3</sup>).

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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<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup>

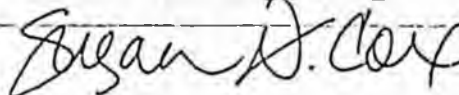
We recognize that this bill, if passed, may result in a legal challenge. However, we believe the bill has a solid legal foundation.

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

Sincerely,

GREGG D. RENKES  
ATTORNEY GENERAL

By:



Susan D. Cox  
Assistant Attorney General

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<sup>4</sup> The continued validity of this holding is being challenged in a case currently pending before the United States Supreme Court.

<sup>5</sup> 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 (9<sup>th</sup> Cir. 1987).

promulgated. I do not favor such a reading for two reasons.

First, it is wrong to say that cross-examination may not carry a price tag. In general civil litigation, deposition and witness costs are shifted to the losing party after judgment as a matter of course. Civ.R. 79. On the tilted playing field of workers' compensation, the employer must reimburse the employee "for the costs in the proceedings" when the employee wins. AS 23.30.145(b). (The employee does not have a similar obligation when the employer prevails.) The costs for which the employer must reimburse the employee include the costs of cross-examination paid by the employee under the Board's interpretation of *Smallwood*.<sup>3</sup> Thus, when a litigant, or, in workers' compensation, an employer, loses, cross-examination has a price.

Second, according to the Board, its interpretation of *Smallwood* has led to needless depositions resulting in delay, oppression of the economically weaker party—generally the employee—and economic waste. The Board states that many litigants have adopted as a matter of course the practice of "Smallwooding" any and all written reports served upon them. A protection granted by this court to prevent a violation of fundamental due process became a trial tactic which ran counter to the court's fundamental policy of "providing inexpensive and expeditious resolution of claims for compensation...."

Armed with knowledge that the "right to cross-examine is absolute," many litigants generally took the opportunity to assert the right, as a matter of tactics. In many instances, where closer evaluation and the use of discretion would have allowed the case to proceed expeditiously with an alternate to absolute cross-examination, *Smallwood* became, not a matter of due process, but an invitation for procedural maneuvering and a matter of trial strategy. Although both employees and employer have used *Smallwood* tactically, the Board observed that the injured worker, for whom the system ex-

3. The Board recognized this remedy in this case.

ists, often suffered the consequences of the resulting confusion and/or delay. Also, small employers, as well, have suffered from the same problems. Instead of providing what the court originally intended, *Smallwood* frequently became an impediment to the legendary "simple, speedy remedy" that the workers' compensation system was meant to provide.

(Footnotes omitted.)

The Board's position, based on more than a decade of experience, is persuasive. The cost disincentive inherent in the normal rule which makes the deposer pay is apparently of considerable importance in deterring needless depositions.

For the above reasons, I would not interpret *Smallwood* to require cost shifting. A party desiring to depose or examine the author of a report should bear the initial cost of the deposition or examination. Thus, I concur in the result of today's decision.



STATE of Alaska, DEPARTMENT OF  
PUBLIC SAFETY, and Tom  
Schwantes, Petitioners,

v.

Robert BROWN, Respondent.

No. S-2829..

Supreme Court of Alaska.

June 22, 1990.

After first accepting workers' compensation benefits, state employee who was injured on state vessel brought suit alleging that state was liable to him under Jones Act for negligence of the vessel's master and under admiralty doctrines of unseaworthiness, maintenance and cure. The Superior Court, Third Judicial District at

Decision, p. 6.

Provided by the Department of Administration

## STATE, DEPT. OF PUBLIC SAFETY v. BROWN Alaska 109

Cite as 794 P.2d 109 (Alaska 1990)

Anchorage, Joan M. Katz, J., denied state's motion for summary judgment on grounds of sovereign immunity and exclusive-remedy provision of the Workers' Compensation Act, and state's petition for review was granted. The Supreme Court, Matthews, C.J., held that Workers' Compensation Act's exclusive remedy provision did not deprive worker injured on state vessel of his federal maritime remedy.

Affirmed.

Compton, J., filed dissenting opinion.

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.

States 18.47

Workers' Compensation 2085

Workers' Compensation Act's exclusive remedy provision did not deprive worker injured on state vessel of his federal maritime remedy. AS 09.50.250, 23.30.055; Jones Act, 46 U.S.C.A.App. § 688.

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

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

Before MATTHEWS, C.J., and RABINOWITZ, BURKE and COMPTON, JJ.

### 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 under the Alaska Workers' Compensation Act, AS 23.30.005-.270,

#### 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 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.

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

employees is the State workmen's compensation act.

*Id.* at 11. The opinion next quoted the 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. It is true that under the Alaska Workmen's Compensation Act, employers, including the State (AS 28.30.265), are excluded from admiralty liability.

*Id.* at 12. The opinion then quoted the exclusive remedy provision of AS 28.30.055, 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 28.30.055 as limits the liability of employers in admiralty must be considered an invalid infringement on the Federal jurisdiction.

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.

Alaska Statute 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

1. We noted in *Barber* that double recovery would not be permitted as the amounts paid under the compensation award would be sub-

well as those based on state law. *State v. Stanley*, 606 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).

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 28.30.055. 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.*, 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.<sup>1</sup> 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 "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. Norred 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

ject to offset should the employee win his federal maritime case. *Id.* at 813, n. 39. This observation also governs the present case.

STATE, DEPT. OF PUBLIC SAFETY v. BROWN Alaska 111

Cite as 794 P.2d 166 (Alaska 1990)

court noted that it had been presented with an analogous question in *Roberts v. City of Piantation*, 558 F.2d 750 (5th Cir.1977). *Thibodaux*, 580 F.2d at 846. In *Roberts*, 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.

The *Thibodaux* court found support in the Supreme Court's decision in *Pope & Talbot, Inc. v. Hawk*, 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 "[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, 74 S.Ct. at 205 (footnote omitted). 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.'" *Id.* at 409, 74 S.Ct. at 205 (quoting *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 386, 44 S.Ct. 391, 393, 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 *Johanson 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. *Johanson* 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, 72 S.Ct. at 857. The *Johanson* 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*, 546 S.W.2d 56 (Tex.Civ.App.1977); *Gross v. Washington State Ferries*, 59 Wash.2d 241, 367 P.2d 600 (1961); *Maloney v. State*, 8 N.Y.2d 856, 165 N.Y.S.2d 465, 144 N.E.2d 364 (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 867. The sovereign immunity waiver in *Gross* was expressly conditioned by a 90-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 would 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, 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.

COMPTON, J., dissents.

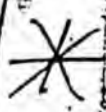
MOORE, J., not participating.

COMPTON, Justice, dissenting.

I

Assuming the court's conclusion is correct, state employed maritime workers

~~These cases teach that the legislature would 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, the legislature has not chosen to do so.~~



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, 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).<sup>1</sup>

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 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." § 47-3-10 ACLA (1949); § 48-3-38 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 enact-

1. It is worth noting that the court is unable to cite a single state case affording an injured state

ment 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 or state would have been immune from suit. *Ex Parte New York No. 1*, 256 U.S. 490, 500, 41 S.Ct. 588, 590, 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, 2945-46, 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

maritime employee Jones Act relief.

explicit, and then concludes that because sovereign immunity was not explicitly retained in CATSA itself, it was not retained at all.<sup>2</sup> This is not the issue; rather the question should be whether CATSA was intended to repeal the effect of AWCA.

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, 1868 (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, 408 (Alaska 1977).

Did the legislature, 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.

In saying this, however, I reject any implication that the legislature is somehow prevented by "federalism" from amending CATSA to make clear that the sole remedy of its injured maritime employees is worker's compensation, and that Brown is entitled to a "double dip." The mere fact that the Jones Act exists as a federal cause of action does not mean that state sovereign immunity, properly asserted, is abrogated. See *Atascadero State Hospital v. Scarlon*, 473 U.S. 234, 242, 105 S.Ct. 3142, 3147, 87 L.Ed.2d 171 (1985). Moreover, the Jones Act has been held not to abrogate properly asserted state sovereign immunity. *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 475-76, 107 S.Ct. 2941, 2946-47, 97 L.Ed.2d 389 (1987). Any Jones Act recovery by Brown must be offset by the workers' compensation benefits

2. 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

he has received. *Barber v. New England Fish Co.*, 510 P.2d 806, 812-18 & n. 39 (Alaska 1973).

## II.

The foregoing, of course, assumes away the bothersome question of whether the Jones Act was ever intended to apply at all to states as employers. One justice of the United States Supreme Court has opined that it was not. *Welch*, 483 U.S. at 496, 107 S.Ct. at 2957 (Scalia, J., concurring). The court in *Welch* left open the question. *Id.* at 476, 107 S.Ct. at 2947.

The rationale for Justice Scalia's concurrence appears to derive from the majority opinion in *Will v. Michigan Dep't of State Police*, 491 U.S. —, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). In *Will*, the Court held that states are not persons within the meaning of 42 U.S.C. § 1983. *Will*, 109 S.Ct. at 2308. In *Will*, the Court, while noting that the case did not involve the Eleventh Amendment since the underlying suit was brought in state court, *id.*, nonetheless opined that similar federalism concerns were implicated when Congress subjected a state to liability which it would not otherwise be subject to. Accordingly, the Court held that if Congress intends to preempt state sovereign immunity by subjecting a state to a federal remedy, it must make its intention to do so "unmistakably clear in the language of the statute." *Id.* at 2308-09. "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Id.*, quoting *United States v. Bass*, 404 U.S. 336, 349, 92 S.Ct. 515, 523, 80 L.Ed.2d 488 (1971).

A straightforward application of *Will* to the facts before us leads to the conclusion that the Jones Act simply is inapplicable to the states. The Court has already held, in

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.

the analogous though different context of the Eleventh Amendment, that the Jones Act is not sufficiently clear and unambiguous. *Welch*, 483 U.S. at 475-76, 107 S.Ct. at 2946-47.

Thus, either under traditional modes of statutory analysis as applied to AWCA and CATSA, or under the *Will* Court's method of interpreting federal statutes, Brown is limited to his workers' compensation remedy. Accordingly, I dissent.



STATE of Alaska, Petitioner,

v.

George KENDALL, Respondent.

No. A-9003.

Court of Appeals of Alaska.

June 22, 1990.

State appealed from an order of the Superior Court, Third Judicial District, Anchorage, Joan Katz, J., which suppressed evidence uncovered in warrantless search. The Court of Appeals, Coats, J., held that police had reasonable suspicion to stop defendant and to briefly detain him, and ultimately had sufficient information to arrest him for possession of cocaine.

Reversed.

**1. Arrest ¶63.5(5)**

Police had legal authority to detain defendant as part of investigative stop where defendant showed up at house that was being searched for drugs 15 minutes after anonymous call to house stated that caller would be coming with "some dope" in approximately 15 minutes, and after resident of house had told undercover agent that more cocaine would be coming at later time.

**2. Arrest ¶63.5(7)**

Police were entitled to use reasonable force to hold defendant after defendant, who was legally detained as part of investigative stop, attempted to flee.

**3. Arrest ¶71.1(7)**

Where police officers obtained sufficient information to arrest defendant for possession of cocaine at time they were struggling to arrest him for resisting arrest, cocaine found in film canister and velvet bag taken from defendant was admissible, even though officers did not arrest defendant on cocaine charges until after they had found cocaine; arrest was legal when objective information police had was sufficient to justify arrest. AS 11.71.080(a)(1); U.S.C.A. Const.Amend. 4.

**4. Arrest ¶63.4(4)**

Trial court should analyze objective information which police had at time they made arrest when determining whether there was probable cause to make arrest.

Michael S. McLaughlin, Asst. Dist. Atty.,  
Dwayne W. McConnell, Dist. Atty., Anchorage,  
and Douglas B. Baily, Atty. Gen., Juneau,  
for petitioner.

Leslie A. Hiebert, Asst. Public Advocate,  
and Brant McGee, Public Advocate, Anchorage,  
for respondent.

**OPINION**

Before BRYNER, C.J., and COATS and SINGLETON, JJ.

COATS, Judge.

On December 1, 1988, the grand jury indicted George Kendall for misconduct involving a controlled substance in the third degree, possession of cocaine, a class B felony. AS 11.71.030(a)(1). In March 1989, Kendall filed a motion to suppress evidence of a warrantless search conducted by the police on October 22, 1988, which resulted in the discovery of the cocaine. Following an evidentiary hearing, Superior Court Judge Joan Katz granted Kendall's motion and suppressed the evidence. The state filed a petition for review in this court.

**SB**

**120**

SFIN

FILE

# SENATE FINANCE COMMITTEE REPORT

DATE: 4/2/03

REPORTED OUT

APR 11 2003

SENATE FINANCE COMMITTEE

FURTHER:

DATE TURNED IN TO OFFICE: 4/11/03

Finance Committee considered

SENATE BILL NO. 120

## SB 120 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."

and recommends:

- be replaced with \_\_\_\_\_ CS \_\_\_\_\_ (\_\_\_\_\_)
- adopt previous \_\_\_\_\_ CS \_\_\_\_\_ (\_\_\_\_\_)
- attached amendment(s)
- adopt Letter of Intent by \_\_\_\_\_ Committee
- further referral to \_\_\_\_\_ Committee

**Senate Bill:**

- same title
- new title

**House Bill:**

- same title
- technical title
- new: SCR # \_\_\_\_\_

**NEW FISCAL NOTE(S):**

Department	Date	Fiscal	Zero	FN#

**PREVIOUS FISCAL NOTE(S):**

Department	Date	Fiscal	Zero	FN#
L DWD	3/31/03	71.0		2
ADMIN	3/16/03		✓	1.

APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:	Do PASS	Do NOT PASS	No REC	AMEND
<i>Adrian L. Taylor</i>		✓		
<i>[Signature]</i>			✓	
<i>[Signature]</i>			✓	
<i>[Signature]</i>	✓			
<i>Ben Stevens</i>	✓			
COCHAIR: <i>Gary Hughes</i>	✓			
COCHAIR: <i>Lyle Green</i>	✓			

# FISCAL NOTE

REPORTED OUT

B-R 11 2003

SENATE FINANCE  
COMMITTEE

**STATE OF ALASKA**  
**2003 LEGISLATIVE SESSION**

Fiscal Note Number: 1  
Bill Version: SB 120  
(S) Publish Date: 3/6/03

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Administration  
Title An Act relating to state immunity for certain BRU Risk Management  
actions by state employed seaman.... 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						
<b>TOTAL OPERATING</b>	0.0	0.0	0.0	0.0	0.0	0.0

<b>CAPITAL EXPENDITURES</b>						
-----------------------------	--	--	--	--	--	--

<b>CHANGE IN REVENUES ( )</b>						
-------------------------------	--	--	--	--	--	--

**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)						
<b>TOTAL</b>	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

APR 11 2003

SENATE FINANCE COMMITTEE

# FISCAL NOTE

STATE OF ALASKA  
2003 LEGISLATIVE SESSION

Fiscal Note Number: 2  
Bill Version: SB 120  
(S) Publish Date: 4/2/03

Revision: 3/31/03 11:02 AM Department: Labor and Workforce Development  
Title: Claims by State-Employed Seamen BRU: Workers' Compensation  
Sponsor: Rules Committee Component: Workers' Compensation  
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						
<b>TOTAL OPERATING</b>	<b>71.0</b>	<b>87.0</b>	<b>87.0</b>	<b>87.0</b>	<b>87.0</b>	<b>87.0</b>

CAPITAL EXPENDITURES						
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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
<b>TOTAL</b>	<b>71.0</b>	<b>87.0</b>	<b>87.0</b>	<b>87.0</b>	<b>87.0</b>	<b>87.0</b>

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 Grossl, Director Phone: 465-2790  
Division: Workers' Compensation Date/Time: 3/31/03 11:02 AM  
Approved by: Greg O'Claray, Commissioner Date: 03/31/03  
Agency: Department of Labor and Workforce Development

For distribution information, call the Governor's Legislative Office

SENATE FINANCE COMMITTEE  
4 / 11 / 2003 COMMITTEE ACTION

<b>Bill Number</b>	SB 120		
<b>Amendment</b>			
<b>Motion</b>	OBJECT To Report bill but		
<b>Motion by</b>	Bunde		
<b>Objection by</b>	Taylor		
<b>Removed</b>	✓		
<b>Second Objection by</b>			
<b><u>Committee Member</u></b>	<b>Y</b>	<b>Vote</b>	<b>N</b>
Senator Bunde			
Senator Hoffman			
Senator Olson			
Senator Stevens			
Senator Taylor			
Co-Chair Green			
Co-Chair Wilken			
<b><u>Tally</u></b>			
Yea			
Nay			
Absent			
<b><u>MOTION</u></b>	WITHDRAWN		

Withdrawn

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LEGISLATIVE AFFAIRS AGENCY  
STATE OF ALASKA

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Mail Stop 3101

State Capitol  
Juneau, Alaska 99801-1182  
Deliveries to: 129 6th St., Rm. 329

## 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 *M-F*  
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

Senator Con Bunde  
March 31, 2003  
Page 2

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

# STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

Frank H. Murkowski, Governor

P.O. BOX 110300  
DIMOND COURT HOUSE, 6<sup>TH</sup> FLOOR  
JUNEAU, ALASKA 99811-0300  
PHONE: (907)465-3600  
FAX: (907)465-6735

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<sup>1</sup> 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.<sup>1</sup> *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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<sup>1</sup> 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.<sup>2</sup>

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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<sup>2</sup> 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."<sup>3</sup>).

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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<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup>

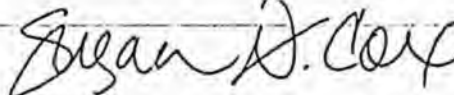
We recognize that this bill, if passed, may result in a legal challenge. However, we believe the bill has a solid legal foundation.

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

Sincerely,

GREGG D. RENKES  
ATTORNEY GENERAL

By:



Susan D. Cox  
Assistant Attorney General

<sup>4</sup> The continued validity of this holding is being challenged in a case currently pending before the United States Supreme Court.

<sup>5</sup> 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 (9<sup>th</sup> Cir. 1987).

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.

Provided by the Department of Administration

**AMHS CREW CLAIMS  
FREQUENCY TO 100 FTE'S**

FISCAL YEAR	2002			2001			2000			1999			1998			TOTALS
	# Claims	FTEs	#/100FTEs	# Claims	FTEs	#/100FTEs	# Claims	FTEs	#/100FTEs	# Claims	FTEs	#/100FTEs	# Claims	FTEs	#/100FTEs	
SHP																
AURORA	24	64.7	37.1	26	64.7	40	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	49.4	28	62.8	45	20	62.8	32	13	62.6	51	10	55.1	18	121
MALASPINA	22	36.3	60.8	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	64	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	1,382	14,271.8	9.7	1,060	14,182.0	7.5	1,102	14,210.0	7.8	1,198	13,785.0	8.7	4945

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

	Claims	FTEs
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
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STATE W/C CLAIMS PER 100 FTE's	8
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**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	5	198	2.6	0	187	0.0	3	189	1.6	7	200	3.5	5	186	2.7	7	187	3.7	22
Administration	214	1466	14.6	260	1,404.0	18.5	211	1,536.0	13.7	180	1,334.0	13.5	132	1,289.0	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	506	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	451	6.2	15	398.0	3.8	17	510.0	3.3	20	497.0	4.0	25	491.0	5.1	34	506.0	6.7	111
Health & Social Services	168	2459	6.8	196	2,215.0	8.8	143	2,201.0	6.5	165	2,098.0	7.9	163	2,047.0	8.9	199	2,103.0	9.5	886
Labor & Workforce Dev	37	867	4.3	35	794.0	4.4	29	719.0	4.0	19	633.0	3.0	23	736.0	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	426.0	2.1	17	457.0	3.7	87
Military & Veterans Affairs	22	259	8.5	19	223.0	8.5	14	222.0	6.3	17	216.0	7.9	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	95	610.0	10.4	132	609.0	21.7	158	937.0	16.9	607
Fish & Game	72	1,225	5.9	84	1,137.0	7.4	89	1,148.0	7.8	75	1,121.0	6.7	85	1,095.0	7.8	83	999.0	8.3	418
Public Safety	139	764	18.2	123	727.0	16.9	94	754.0	12.5	92	766.0	12.0	89	746.0	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	16	508.0	3.2	78
Corrections	162	1473	11.0	154	1,388.0	11.3	100	1,366.0	7.3	136	1,362.0	10.0	139	1,358.0	10.2	125	1,350.0	9.3	654
Transportation	251	1,869	9.5	253	1,774.0	10.2	181	1,714.0	8.0	207	1,724.0	8.8	205	1,701.0	8.8	231	1,655.0	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	36.0	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
<b>FISCAL YEAR TOTALS</b>	<b>1298</b>	<b>15516</b>	<b>8.4</b>	<b>1,382</b>	<b>14,272</b>	<b>9.7</b>	<b>1,060</b>	<b>14,182</b>	<b>7.5</b>	<b>1,102</b>	<b>14,210.0</b>	<b>7.8</b>	<b>1,198</b>	<b>13,785.0</b>	<b>8.7</b>				<b>4742</b>

Note: Work Comp FTEs taken from CORA

100 FTEs do not include 100 FTEs 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	
	24	64.7	37.1	28	64.7	40	35	64.7	54	24	64.7	37	21	62.9	33	11	42.7	26	
	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	
	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			
	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	
	31	62.8	49.4	28	62.8	45	20	62.8	32	13	62.8	21	10	55.1	18	19	62.9	30	
	22	36.3	60.6	40	36.3	110	18	36.3	50	13	36.3	36	19	45.4	42	38	123.2	31	
	65	82.9	78.4	56	82.9	68	44	82.9	53	29	82.9	35	36	112.9	32	25	69.8	36	
	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	
	25	65.9	37.9	37	65.9	56	23	65.9	35	24	65.9	36	22	66.0	33	21	62.4	34	
	31			19			3			13			7			8			
<b>FISCAL YEAR TOTALS</b>	<b>342</b>	<b>655.2</b>	<b>50.1</b>	<b>351</b>	<b>655.2</b>	<b>54</b>	<b>251</b>	<b>655</b>	<b>38</b>	<b>215</b>	<b>655.2</b>	<b>32.0</b>	<b>178</b>	<b>570.1</b>	<b>31.2</b>	<b>199</b>	<b>657.8</b>	<b>30.3</b>	
State Dept GOVT AFFAIRS	199	2629	8	256	2,433.0	11	184	2,377.0	8	197	1,706.8	11.5	203	1,759.9	11.5	231	2,264.2	10.2	
STATE POLICE	154	2459	6	199	2,365.0	8	145	2,365.0	6	168	2,098.0	8.0	182	2,047.0	8.9	199	2,103.0	9.5	
CORRECTIONS	142	1473	10	150	1,460.0	10	102	1,366.0	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	192	1,289.0	14.9	182	1,155.0	15.8	
PUB SAFETY	121	764	16	125	745.0	17	95	727.0	13	92	796.0	12.0	89	746.0	11.9	88	687.0	9.9	
<b>(Top 5 Depts. Only) Work Comp Claims &amp; FTEs (not including AMHS)</b>	<b>794</b>	<b>8,791</b>	<b>9</b>	<b>989</b>	<b>8,445</b>	<b>12</b>	<b>736</b>	<b>8,241</b>	<b>9</b>	<b>766</b>	<b>7,266.8</b>	<b>10.5</b>	<b>805</b>	<b>7,199.9</b>	<b>11.2</b>	<b>825</b>	<b>7,759.2</b>	<b>10.6</b>	<b>4320</b>

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

Row 14	# Claims	FTEs		
AMHS COMBINED (5) YEAR TOTAL	1,337	3,190.9		
AMHS 5 YEAR AVERAGE	267	638.2		
AMHS 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	\$38,730	62.9	\$61,574	
BARTLET	\$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	
CANTON	\$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	\$81,994	97.7	\$83,924	4,308	97.7	\$4,409	\$115,447	97.7	\$118,165	\$111,820	97.7	\$114,452	\$32,107	94.8	\$33,868	
CONTESSA	\$78,545	62.8	\$125,072	70,388	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	\$107,033	45.4	\$235,756	
MATANUSKA	\$230,209	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	
ROBTAKU	\$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	\$181,996	66.0	\$275,752	
<b>FISCAL YEAR TOTALS</b>	<b>\$946,227</b>	<b>655.2</b>	<b>\$144,418</b>	<b>1,307,249</b>	<b>655.2</b>	<b>\$199,519</b>	<b>\$1,652,232</b>	<b>655.2</b>	<b>\$252,172</b>	<b>\$1,289,204</b>	<b>655.2</b>	<b>\$196,765</b>	<b>\$1,093,235</b>	<b>570.1</b>	<b>\$191,762</b>	

	\$ 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
	Claims cost	FTEs	\$/100FTEs	Claims cost	FTEs	\$/100FTEs	Claims cost	FTEs	\$/100FTEs	Claims cost	FTEs	\$/100FTEs	Claims cost	FTEs	\$/100FTEs	Claims cost	FTEs	\$/100FTEs	
Governor's Office	52,756	196	26,916	\$0	187	\$0	\$7,029	189	\$3,719	\$3,100	200	\$1,550	\$13,494	186	\$7,252	\$106,035	167	\$6,703	\$129,858
Administration	1,710,644	1468	119,686	\$1,697,177	1,404.0	\$120,882	\$1,141,188	1,536.0	\$74,295	\$1,135,226	1,334.0	\$85,096	\$1,328,798	1,289.0	\$103,087	\$1,823,940	1,155.0	\$157,917	\$7,126,309
Law	96,166	478	20,746	\$54,719	454.0	\$12,053	\$42,318	453.0	\$9,342	\$50,285	447.0	\$11,249	\$70,931	441.0	\$16,064	\$36,441	438.0	\$8,301	\$254,694
Revenue	172,444	506	34,080	\$78,741	474.0	\$16,190	\$112,713	482.0	\$22,969	\$61,243	482.0	\$16,545	\$192,708	502.0	\$38,388	\$95,240	487.0	\$19,558	\$568,651
Education	124,833	451	27,635	\$17,877	398.0	\$4,482	\$131,201	510.0	\$25,726	\$48,005	497.0	\$9,659	\$81,693	481.0	\$16,838	\$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	\$531,971	2,098.0	\$25,356	\$904,103	2,047.0	\$44,167	\$719,481	2,103.0	\$34,212	\$3,758,110
Labor & Workers De-	364,716	887	45,527	\$156,374	794.0	\$19,804	\$193,097	719.0	\$26,958	\$82,883	633.0	\$13,094	\$45,283	739.0	\$6,150	\$148,167	815.0	\$18,180	\$626,585
Commerce & Economic Dev.	14,812	503	2,945	\$60,023	451.0	\$13,309	\$2,034,780	374.0	\$544,053	\$89,214	481.0	\$18,548	\$56,985	426.0	\$13,377	\$40,588	457.0	\$8,881	\$2,281,569
Military & Veterans Affairs	134,295	259	51,851	\$35,888	723.0	\$18,093	\$73,094	222.0	\$32,925	\$139,450	216.0	\$64,580	\$280,248	178.0	\$157,442	\$16,244	171.0	\$9,500	\$544,922
Natural Resources	288,263	714	40,093	\$490,126	657.0	\$75,057	\$329,231	675.0	\$48,775	\$195,793	910.0	\$21,518	\$498,350	606.0	\$81,831	\$395,225	937.0	\$42,180	\$1,911,724
Fish & Game	251,087	1225	20,497	\$479,722	1,137.0	\$42,192	\$506,288	1,148.0	\$44,363	\$362,537	1,121.0	\$32,340	\$253,498	1,095.0	\$23,150	\$668,608	909.0	\$86,928	\$2,273,652
Public Safety	1,899,714	784	222,476	\$723,008	727.0	\$99,451	\$321,749	754.0	\$42,872	\$792,977	760.0	\$100,522	\$403,173	746.0	\$54,045	\$1,083,225	887.0	\$122,122	\$3,324,131
Environmental Conservation	73,544	491	14,978	\$65,925	487.0	\$14,117	\$132,521	480.0	\$27,609	\$61,037	491.0	\$12,431	\$178,513	473.0	\$37,741	\$64,704	506.0	\$12,787	\$502,701
Corrections	837,108	1473	56,800	\$931,086	1,368.0	\$69,752	\$465,731	1,366.0	\$34,094	\$873,703	1,362.0	\$64,149	\$973,000	1,358.0	\$71,649	\$784,805	1,350.0	\$58,134	\$3,828,325
Transportation	2,108,473	801	80,125	\$2,400,217	700.0	\$343,008	\$1,437,692	700.0	\$205,587	\$2,040,125	700.0	\$292,373	\$1,315,377	700.0	\$56,454	\$2,106,735	700.0	\$107,761	\$8,300,146
Legislative Affairs	65,473	294	22,270	\$46,356	300.0	\$15,453	\$8,122	274.0	\$2,984	\$80,577	272.0	\$29,824	\$110,631	350.0	\$3,129	\$7	292.0	\$2	\$245,698
Legislative Audit	0	37	0	\$2,241	36.0	\$6,225	\$0	36.0	\$0	\$0	36.0	\$0	\$0	34.0	\$0	\$0	36.0	\$0	\$2,241
Courts	33,532	704	4,763	\$126,608	690.0	\$18,349	\$71,730	681.0	\$10,533	\$43,917	692.0	\$6,346	\$89,612	680.0	\$13,208	\$58,037	674.0	\$8,611	\$390,103
<b>FISCAL YEAR TOTALS</b>	<b>9,117,734</b>	<b>15,516</b>	<b>\$58,763</b>	<b>\$8,088,965</b>	<b>14,272</b>	<b>\$56,678</b>	<b>\$7,792,924</b>	<b>14,182</b>	<b>\$54,949</b>	<b>\$6,622,043</b>	<b>14,210.0</b>	<b>\$46,601</b>	<b>\$6,798,572</b>	<b>13,765.0</b>	<b>\$49,304</b>	<b>\$8,220,861</b>	<b>13,765.0</b>	<b>\$59,706</b>	<b>\$37,521,365</b>

Note: Work Comp FTEs taken from CORA



**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	
Other DOTs	2,106,473	2629	80,125	2,189,897	2,433.0	90,008	1,266,154	2,377.0	53,267	1,281,569	1,706.8	75,086.1	1,146,418	1,759.9	65,141.1	
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	
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	
ADMINISTRATION	1,710,592	1466	116,684	1,385,478	1,442.0	96,080	1,221,475	1,407.0	87,000	598,375	1,334.0	44,855.7	1,074,494	1,289.0	83,358.7	
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	
(Top 5 Depts. Only) Work Comp Claims & FTEs (not including AMHS)	7,342,303	8,791	516,413	5,895,061	8,445	69,805	4,466,499	8,241	54,189	\$ 3,590,802	7,266.8	49,413.8	\$ 4,327,313	7,199.9	60,102.4	
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	

promulgated. I do not favor such a reading for two reasons.

First, it is wrong to say that cross-examination may not carry a price tag. In general civil litigation, deposition and witness costs are shifted to the losing party after judgment as a matter of course. Civ.R. 79. On the tilted playing field of workers' compensation, the employer must reimburse the employee "for the costs in the proceedings" when the employee wins. AS 23.30.145(b). (The employee does not have a similar obligation when the employer prevails.) The costs for which the employer must reimburse the employee include the costs of cross-examination paid by the employee under the Board's interpretation of *Smallwood*.<sup>3</sup> Thus, when a litigant, or, in workers' compensation, an employer, loses, cross-examination has a price.

Second, according to the Board, its interpretation of *Smallwood* has led to needless depositions resulting in delay, oppression of the economically weaker party—generally the employee—and economic waste. The Board states that many litigants have adopted as a matter of course the practice of "Smallwooding" any and all written reports served upon them. A protection granted by this court to prevent a violation of fundamental due process became a trial tactic which ran counter to the court's fundamental policy of "providing inexpensive and expeditious resolution of claims for compensation...."

Armed with knowledge that the "right to cross-examine is absolute," many litigants generally took the opportunity to assert the right, as a matter of tactics. In many instances, where closer evaluation and the use of discretion would have allowed the case to proceed expeditiously with an alternate to absolute cross-examination, *Smallwood* became, not a matter of due process, but an invitation for procedural maneuvering and a matter of trial strategy. Although both employees and employer have used *Smallwood* tactically, the Board observed that the injured worker, for whom the system ex-

3. The Board recognized this remedy in this case.

ists, often suffered the consequences of the resulting confusion and/or delay. Also, small employers, as well, have suffered from the same problems. Instead of providing what the court originally intended, *Smallwood* frequently became an impediment to the legendary "simple, speedy remedy" that the workers' compensation system was meant to provide.

(Footnotes omitted.)

The Board's position, based on more than a decade of experience, is persuasive. The cost disincentive inherent in the normal rule which makes the depositor pay is apparently of considerable importance in deterring needless depositions.

For the above reasons, I would not interpret *Smallwood* to require cost shifting. A party desiring to depose or examine the author of a report should bear the initial cost of the deposition or examination. Thus, I concur in the result of today's decision.



STATE OF ALASKA, DEPARTMENT OF  
PUBLIC SAFETY, and Tom  
Schwantes, Petitioners,

v.  
Robert BROWN, Respondent.

No. S-2829..

Supreme Court of Alaska.

June 22, 1990.

After first accepting workers' compensation benefits, state employee who was injured on state vessel brought suit alleging that state was liable to him under Jones Act for negligence of the vessel's master and under admiralty doctrines of unseaworthiness, maintenance and cure. The Superior Court, Third Judicial District at

Decision, p. 6.

Provided by the Department of Administration

## STATE DEPT. OF PUBLIC SAFETY v. BROWN Alaska 109

Cite as 794 F.2d 109 (Alaska 1990)

Anchorage, Joan M. Katz, J., denied state's motion for summary judgment on grounds of sovereign immunity and exclusive-remedy provision of the Workers' Compensation Act, and state's petition for review was granted. The Supreme Court, Matthews, C.J., held that Workers' Compensation Act's exclusive remedy provision did not deprive worker injured on state vessel of his federal maritime remedy.

Affirmed.

Compton, J., filed dissenting opinion.

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 23.80.055. The trial court denied the motion. We granted the state's petition for review.

States ← 18.47

Workers' Compensation ← 2085

Workers' Compensation Act's exclusive remedy provision did not deprive worker injured on state vessel of his federal maritime remedy. AS 09.50.250, 23.80.055; Jones Act, 46 U.S.C.A.App. § 688.

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

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

Before MATTHEWS, C.J., and RABINOWITZ, BURKE and COMPTON, JJ.

## 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 under the Alaska Workers' Compensation Act, AS 23.80.005-.270,

### 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 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.

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

employees is the State workmen's compensation act.

*Id.* at 11. The opinion next quoted the 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. It is true that under the Alaska Workmen's Compensation Act, employers, including the State (AS 23.80.265), are excluded from admiralty liability.

*Id.* at 12. The opinion then quoted the exclusive remedy provision of AS 23.90.055, 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 23.90.055 as limits the liability of employers in admiralty must be considered an invalid infringement on the Federal jurisdiction.

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

Alaska Statute 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

1. We noted in *Barber* that double recovery would not be permitted as the amounts paid under the compensation award would be sub-

ject to offset should the employee win his federal maritime case. *Id.* at 813, n. 39. This observation also governs the present case.

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).

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 23.90.055. 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.*, 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.<sup>1</sup> 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 "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. Norred 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

ject to offset should the employee win his federal maritime case. *Id.* at 813, n. 39. This observation also governs the present case.

## STATE, DEPT. OF PUBLIC SAFETY v. BROWN · Alaska 111

Cite as 794 P.2d 108 (Alaska 1990)

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*, 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.

The *Thibodaux* court found support in the Supreme Court's decision in *Pope & Talbot, Inc. v. Hawk*, 345 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 "[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, 74 S.Ct. at 205 (footnote omitted). 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." *Id.* at 409, 74 S.Ct. at 205 (quoting *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 386, 44 S.Ct. 391, 393, 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 *Johanson 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. *Johanson* 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, 72 S.Ct. at 857. The *Johanson* 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 66 (Tex.Civ.App.1977); *Gross v. Washington State Ferries*, 59 Wash.2d 241, 367 P.2d 600 (1961); *Maloney v. State*, 3 N.Y.2d 368, 165 N.Y.S.2d 465, 144 N.E.2d 364 (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 68. 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

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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.

COMPTON, J., dissents.

MOORE, J., not participating.

COMPTON, Justice, dissenting.

I.

Assuming the court's conclusion is correct, state employed maritime workers

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, 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).<sup>1</sup>

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 929, 932 (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 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); § 48-3-38 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 enact-

ment 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 or state would have been immune from suit. *Ex Parte New York No. 1*, 256 U.S. 490, 500, 41 S.Ct. 588, 590, 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, 2945-46, 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

1. It is worth noting that the court is unable to cite a single state case affording an injured state

maritime employee Jones Act relief.

## STATE, DEPT. OF PUBLIC SAFETY v. BROWN Alaska 113

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explicit, and then concludes that because sovereign immunity was not explicitly retained in CATSA itself, it was not retained at all.<sup>2</sup> This is not the issue; rather the question should be whether CATSA was intended to repeal the effect of AWCA.

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*, 784 F.2d 1859, 1868 (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, 408 (Alaska 1977).

Did the legislature, 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.

In saying this, however, I reject any implication that the legislature is somehow prevented by "federalism" from amending CATSA to make clear that the sole remedy of its injured maritime employees is worker's compensation, and that Brown is entitled to a "double dip." The mere fact that the Jones Act exists as a federal cause of action does not mean that state sovereign immunity, properly asserted, is abrogated. See *Alascadero State Hospital v. Scanlon*, 473 U.S. 284, 242, 105 S.Ct. 3142, 3147, 87 L.Ed.2d 171 (1985). Moreover, the Jones Act has been held not to abrogate properly asserted state sovereign immunity. *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 475-76, 107 S.Ct. 2941, 2946-47, 97 L.Ed.2d 389 (1987). Any Jones Act recovery by Brown must be offset by the workers' compensation benefits.

2. 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

he has received. *Barber v. New England Fish Co.*, 510 P.2d 806, 812-18 & n. 39 (Alaska 1973).

## II.

The foregoing, of course, assumes away the bothersome question of whether the Jones Act was ever intended to apply at all to states as employers. One justice of the United States Supreme Court has opined that it was not. *Welch*, 483 U.S. at 496, 107 S.Ct. at 2957 (Scalia, J., concurring). The court in *Welch* left open the question. *Id.* at 476, 107 S.Ct. at 2947.

The rationale for Justice Scalia's concurrence appears to derive from the majority opinion in *Will v. Michigan Dep't of State Police*, 491 U.S. —, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). In *Will*, the Court held that states are not persons within the meaning of 42 U.S.C. § 1993. *Will*, 109 S.Ct. at 2308. In *Will*, the Court, while noting that the case did not involve the Eleventh Amendment since the underlying suit was brought in state court, *id.*, nonetheless opined that similar federalism concerns were implicated when Congress subjected a state to liability which it would not otherwise be subject to. Accordingly, the Court held that if Congress intends to preempt state sovereign immunity by subjecting a state to a federal remedy, it must make its intention to do so "unmistakably clear in the language of the statute." *Id.* at 2308-09. "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Id.*, quoting *United States v. Bass*, 404 U.S. 338, 349, 92 S.Ct. 515, 528, 80 L.Ed.2d 488 (1971).

A straightforward application of *Will* to the facts before us leads to the conclusion that the Jones Act simply is inapplicable to the states. The Court has already held, in

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.

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the analogous though different context of the Eleventh Amendment, that the Jones Act is not sufficiently clear and unambiguous. *Welch*, 483 U.S. at 475-76, 107 S.Ct. at 2946-47.

Thus, either under traditional modes of statutory analysis as applied to AWCA and CATSA, or under the *Will* Court's method of interpreting federal statutes, Brown is limited to his workers' compensation remedy. Accordingly, I dissent.



STATE of Alaska, Petitioner,

v.

George KENDALL, Respondent.

No. A-9003.

Court of Appeals of Alaska.

June 22, 1990.

State appealed from an order of the Superior Court, Third Judicial District, Anchorage, Joan Katz, J., which suppressed evidence uncovered in warrantless search. The Court of Appeals, Coats, J., held that police had reasonable suspicion to stop defendant and to briefly detain him, and ultimately had sufficient information to arrest him for possession of cocaine.

Reversed.

1. Arrest  $\S$  63.5(5)

Police had legal authority to detain defendant as part of investigative stop where defendant showed up at house that was being searched for drugs 15 minutes after anonymous call to house stated that caller would be coming with "some dope" in approximately 15 minutes, and after resident of house had told undercover agent that more cocaine would be coming at later time.

2. Arrest  $\S$  63.5(7)

Police were entitled to use reasonable force to hold defendant after defendant, who was legally detained as part of investigative stop, attempted to flee.

3. Arrest  $\S$  71.1(7)

Where police officers obtained sufficient information to arrest defendant for possession of cocaine at time they were struggling to arrest him for resisting arrest, cocaine found in film canister and velvet bag taken from defendant was admissible, even though officers did not arrest defendant on cocaine charges until after they had found cocaine; arrest was legal when objective information police had was sufficient to justify arrest. AS 11.71.030(a)(1); U.S.C.A. Const. Amend. 4.

4. Arrest  $\S$  63.4(4)

Trial court should analyze objective information which police had at time they made arrest when determining whether there was probable cause to make arrest.

Michael S. McLaughlin, Asst. Dist. Atty.,  
Dwayne W. McConnell, Dist. Atty., Anchorage,  
and Douglas B. Bally, Atty. Gen., Juneau,  
for petitioner.

Leslie A. Hiebert, Asst. Public Advocate,  
and Brant McGee, Public Advocate, Anchorage,  
for respondent.

## OPINION

Before BRYNER, C.J., and COATS  
and SINGLETON, JJ.

COATS, Judge.

On December 1, 1988, the grand jury indicted George Kendall for misconduct involving a controlled substance in the third degree, possession of cocaine, a class B felony. AS 11.71.030(a)(1). In March 1989, Kendall filed a motion to suppress evidence of a warrantless search conducted by the police on October 22, 1988, which resulted in the discovery of the cocaine. Following an evidentiary hearing, Superior Court Judge Joan Katz granted Kendall's motion and suppressed the evidence. The state filed a petition for review in this court.

# Beard Stacey Trueb & Jacobsen, LLP

ATTORNEYS AT LAW

821 N Street, Suite 205 • Anchorage, Alaska 99501

March 24, 2003

Sent Via DHL Overnight & Facsimile (907) 465-3871 ( 2, 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

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

Senator Con Bunde  
March 24, 2003  
Page 3 of 3

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

SENATE FINANCE COMMITTEE

SIGN-IN

SB 120-CLAIMS BY STATE-EMPLOYED SEAMEN

NAME: Tom Briggs Subject/Bill No: SB120  
Co./Dept./Title: Director, Alaska Marine Highway Phone: 465-6977  
Address: 3 mi Zip: \_\_\_\_\_  
Do you wish to testify? \_\_\_ Yes \_\_\_ No  Respond To Questions

NAME: Lynn Melin Subject/Bill No: SB120  
Co./Dept./Title: Sr. Port Capt. ANHS Phone: 465-8801  
Address: 3132 Chavvel DR Zip: 99801  
Do you wish to testify? \_\_\_ Yes \_\_\_ No  Respond To Questions

✓ NAME: Paul Grossi Subject/Bill No: SB 120  
Co./Dept./Title: Dept of Labor + W. D / W. Comp Dir Phone: 465-2796  
Address: \_\_\_\_\_ Zip: \_\_\_\_\_  
Do you wish to testify? \_\_\_ Yes \_\_\_ No  Respond To Questions

✓ NAME: BRAD THOMPSON Subject/Bill No: SB 120  
Co./Dept./Title: ADMIN - RISK MGMT Phone: 465-5723  
Address: \_\_\_\_\_ Zip: \_\_\_\_\_  
Do you wish to testify? \_\_\_ Yes \_\_\_ No  Respond To Questions

✓ NAME: SUSAN COX Subject/Bill No: SB 120  
Co./Dept./Title: LAW - TORTS Phone: 465-3600  
Address: \_\_\_\_\_ Zip: \_\_\_\_\_  
Do you wish to testify? \_\_\_ Yes \_\_\_ No  Respond To Questions

NAME: \_\_\_\_\_ Subject/Bill No: \_\_\_\_\_  
Co./Dept./Title: \_\_\_\_\_ Phone: \_\_\_\_\_  
Address: \_\_\_\_\_ Zip: \_\_\_\_\_  
Do you wish to testify? \_\_\_ Yes \_\_\_ No \_\_\_ Respond To Questions

NAME: \_\_\_\_\_ Subject/Bill No: \_\_\_\_\_  
Co./Dept./Title: \_\_\_\_\_ Phone: \_\_\_\_\_  
Address: \_\_\_\_\_ Zip: \_\_\_\_\_  
Do you wish to testify? \_\_\_ Yes \_\_\_ No \_\_\_ Respond To Questions

NAME: \_\_\_\_\_ Subject/Bill No: \_\_\_\_\_  
Co./Dept./Title: \_\_\_\_\_ Phone: \_\_\_\_\_  
Address: \_\_\_\_\_ Zip: \_\_\_\_\_  
Do you wish to testify? \_\_\_ Yes \_\_\_ No \_\_\_ Respond To Questions

NAME: \_\_\_\_\_ Subject/Bill No: \_\_\_\_\_  
Co./Dept./Title: \_\_\_\_\_ Phone: \_\_\_\_\_  
Address: \_\_\_\_\_ Zip: \_\_\_\_\_  
Do you wish to testify? \_\_\_ Yes \_\_\_ No \_\_\_ Respond To Questions

SENATE FINANCE COMMITTEE

SIGN-IN

SB 120-CLAIMS BY STATE-EMPLOYED SEAMEN

X NAME: Tom Briggs Subject/Bill No: SB120  
Co./Dept./Title: Director Alaska Marine Highway Phone: 465-6977  
Address: 3 mile DOT Bldg. Zip: \_\_\_\_\_  
Do you wish to testify? ~~Yes~~ \_\_\_ No  Respond To Questions

Y NAME: Lynn Melio Subject/Bill No: SB120  
Co./Dept./Title: AMHS-1 Port Captain <sup>Senior</sup> Phone: 465-8801  
Address: 3132 Channel Drive Zip: 99801  
Do you wish to testify? ~~Yes~~ \_\_\_ No  Respond To Questions

NAME: SUSAN COX Subject/Bill No: SB120  
Co./Dept./Title: DEPT OF LAW Phone: 465-3600  
Address: \_\_\_\_\_ Zip: \_\_\_\_\_  
Do you wish to testify?  Yes \_\_\_ No \_\_\_ Respond To Questions

NAME: BRAJ THOMPSON Subject/Bill No: SB120  
Co./Dept./Title: DIRECTOR - RISK MGMT Phone: 465-5723  
Address: \_\_\_\_\_ Zip: \_\_\_\_\_  
Do you wish to testify?  Yes \_\_\_ No \_\_\_ Respond To Questions

NAME: Paul Grassi Subject/Bill No: SB 120

Co./Dept./Title: Dept of Labor + W D / Director Work Comp Phone: 465-2790

Address: \_\_\_\_\_ Zip: \_\_\_\_\_

Do you wish to testify?  Yes  No  Respond To Questions

NAME: Susan Cox Subject/Bill No: SB 120

Co./Dept./Title: Dept of Law / Asst. AG Phone: 465-3600

Address: PO Box 110300, Juneau Zip: 99811

Do you wish to testify?  Yes  No  Respond To Questions

NAME: \_\_\_\_\_ Subject/Bill No: \_\_\_\_\_

Co./Dept./Title: \_\_\_\_\_ Phone: \_\_\_\_\_

Address: \_\_\_\_\_ Zip: \_\_\_\_\_

Do you wish to testify?  Yes  No  Respond To Questions

NAME: \_\_\_\_\_ Subject/Bill No: \_\_\_\_\_

Co./Dept./Title: \_\_\_\_\_ Phone: \_\_\_\_\_

Address: \_\_\_\_\_ Zip: \_\_\_\_\_

Do you wish to testify?  Yes  No  Respond To Questions

NAME: \_\_\_\_\_ Subject/Bill No: \_\_\_\_\_

Co./Dept./Title: \_\_\_\_\_ Phone: \_\_\_\_\_

Address: \_\_\_\_\_ Zip: \_\_\_\_\_

Do you wish to testify?  Yes  No  Respond To Questions

## SENATE COMMITTEE REPORT First Committee of Referral

DATE: 3/6/03

FURTHER: Finance

Date of 5-Day Notice: 3/20/03  
(in accordance with Uniform Rule 23)

DATE TURNED  
IN TO OFFICE: 4/1/03

Labor and Commerce Committee considered SENATE BILL NO. 120

### SB 120 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."

and recommends:

be replaced with \_\_\_\_\_ CS \_\_\_\_\_ (\_\_\_\_\_)

adopt previous \_\_\_\_\_ CS \_\_\_\_\_ (\_\_\_\_\_)

attached amendment(s)

adopt Letter of Intent by \_\_\_\_\_ Committee

further referral to \_\_\_\_\_ Committee

**Senate Bill:**

same title

new title

**House Bill:**

same title

technical title

new: SCR # \_\_\_\_\_

**NEW FISCAL NOTE(S):**

Department	Date	Fiscal	Zero	FN#
LWF	3/31/03	X		2

**PREVIOUS FISCAL NOTE(S):**

Department	Date	Fiscal	Zero	FN#
ADM	3/6/03		X	1

APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:		DO PASS	DO NOT PASS	NO REC	AMEND
Davis	<i>Bettye Davis</i>			X	
French	<i>[Signature]</i>	X			
Seekins	<i>Ralph Seekins</i>	✓			
G. Stevens	<i>[Signature]</i>	X			
Bunde	CHAIR: <i>[Signature]</i>	✓			

**SB**

**121**

SFIN

FILE

SB 121

was referred to the  
Senate Finance  
Committee

No hearing was held  
on this bill