1760 HLC HB 159

where the alleged injury or death occurred; and

(5) the otner information the board may require.

(b) Additional reports in respect to the injury and to the condition of the employee shall be sent by the employer to the board at the times and in the manner which the board prescribes.

(c) A report made under (a) or (b) of this section is not evidence of a fact stated in the report in a proceeding in respect to the injury or death on account of which the report is made.

(d) Mailing of the report and copy to the board in a stamped envelope, within the time prescribed in (a) or (b) of this section, is compliance with this section.

(e) If the employer or the carrier has been given notice, or the employer (or his agent in charge of the business in the place where the injury occurred) or the carrier has knowledge of an injury or death of an employee and fails, neglects, or refuses to file a report of it as required by the provisions of (a) of this section, the limitations in AS 23.30.105 do not begin to run against the claim of the injured employee or his dependents entitled to compensation, or in favor of either the employer or the carrier, until the report has been furnished as required by the provisions of (a) of the section.

(f) Upon receipt of written notice of injury from the employee, the employer shall, within 14 days, deliver or mail to the injured worker at his last known address, a summary statement which sets forth in clear and understandable language, the rights, benefits, and obligations of injured workers under the Workers' Compensation Act, together with an explanation of its operation.

(g) An employer who fails or refuses to send a report required of him by this section or who fails or refuses to send the report required by (a) of this section within the time required shall, if so required by the board, pay the employee or his legal representative or other person entitled to compensation by reason of the the employee's injury or death an additional award equal to 20 per cent of the amounts which were unpaid when due. The award shall be against either the employer or his insurance carrier, or both.

PROPOSED AS 23.30.094

REHABILITATION OF INJURED EMPLOYEES

Problem:

No legislative guidance exists on rehabilitation.

Solution:

- Utilize the most effective rehabilitation methods and create cost incentives to encourage their use.
- Continue to study the rehabilitation problem to make better use of funds spent.
- Define the goal of a vocational rehabilitation program.
- Give employer first opportunity to provide retraining.
- Structure proposed statute to give all possible latitude to the Division of Workers' Compensation to utilize the results of a current study in progress to formulate regulations.
- Provide for necessary expenses.
- Coordinate with the Division of Employment Security for job placements.
- Provide employee incentive to utilize program.
- If employer does not offer re-employment, place rehabilitation under the control and direction of Board.

A great many state laws were reviewed to find other approaches to solving the problem. Many states had wording similar to our proposal in their statute and reports concerning the effectiveness of their law varied from poor to mediocre at the best. It became quite apparent that the effectiveness of the rehabilitation program depended not upon the statute wording but the implementation of the regulations which add concrete substance to the statute.

The State is studying the rehabilitation problem and have hired a very competent consultant who's recommendations will result in regulations guiding the operation of the plan. ACE therefore decided the best approach would be to recommend statutory language which spoke only to those areas which require statutory authorization and which allow the legislature to establish limits or bounds which ought not be exceeded.

Justification:

The "Workmen's Compensation and Rehabilitation Law, Revised," drafted by The Council on State Government, a model workers' compensation act, provided the format for our recommendation and is reproduced with minor changes. This model wording has also been adopted by Kansas, Idaho, New Mexico, Connecticut, West Virginia, and possibly others. The original is reproduced in Exhibit III.

Recommendation:

Sec. 23.30.094 REHABILITATION OF INJURED EMPLOYEES

(a) One of the primary purposes of this act shall be the restoration of the injured employee to suitable gainful employment. To that end it is obvious from the testimony given to the Labor and Commerce Committee that the most effective rehabilitation programs are those which involve re-employment by the employer, therefore, the board will give responsible employers who provide re-employment opportunities sufficient latitude to manage the rehabilitation of their injured employees.

(b) The division shall continuously study the problems of rehabilitation, both physical and vocational, and shall investigate and maintain a directory of all rehabilitation facilities, both private and public. The division shall approve as qualified such facilities, institutions, and physicians as are capable of rendering compentent rehabilitation services to seriously injured employees. No facility or institution shall be considered as qualified unless it is specifically equipped to provide rehabilitation services for persons suffering either from some specialized type of disability or general type of disability within the field of occupational injury and is staffed with trained and qualified personnel.

(c) An employee who has incurred an injury covered by this act shall be entitled to prompt medical rehabilitation services. When as a result of injury he is unable to perform the primary duties of his occupation or any other occupation for which he is qualified by education, training, and experience, he shall be entitled to such vocational rehabilitation services, including retraining, as may be reasonably necessary to restore him for suitable gainful employment. In all instances the board shall inquire if such services have been voluntarily offered and accepted. The board, on its own motion, or upon application of any party after affording the parties

an opportunity to be heard by the board, may refer the employee to a qualified physician or facility for evaluation of the practicability of, need for, and kind of service, treatment or training necessary and appropriate to render him fit for a remunerative occupation. Upon receipt of such report, and after affording the parties an opportunity to be heard by the board, the board may order that the services and treatment recommended in the report, or such other rehabilitation treatment or service as the board may deem necessary, be provided at the expense of the employer. Vocational rehabilitation training, treatment or service shall not extend for a period of more than 26 weeks except in unusual cases when by special order of the board, after hearing, and upon a finding, determined by sound medical evidence which indicates such further rehabilitation is feasible, practical, and justifiable the period may be extended for an additional period. However, no carrier or employer shall be precluded from continuing such rehabilitation beyond such period on a voluntary basis.

(d) Where rehabilitation requires residence at or near the facility or institution, away from the employee's customary residence, reasonable cost of his board, lodging or travel shall be paid for by the employer.

(e) Refusal to accept rehabilitation pursuant to an order of the board shall result in a 50 per cent loss of compensation for each week of the period of refusal.

(f) The division shall cooperate on a reciprocal basis with the vocational rehabilitation section of the Department of Education and the employment service of the Division of Employment Security, and may make cooperative arrangements with insurance carriers, private organizations and institutions or state or federal agencies, to restore the employee to suitable gainful employment.

(g) Temporary disability benefits paid pursuant to AS 23.30.185 or AS 23.30.200 shall include such period as may be reasonably required for training in the use of artifical members and appliances, and shall include such period as the employee may be receiving training or education under a rehabilitation program pursuant to paragraph (c). Notwithstanding AS 23.30.265 (9), the date of maximum medical improvement, for purposes of AS 23.30.190 (b), shall be no earlier than the last day for which such temporary disability benefits are paid.

AS 23.30.095
MEDICAL EXAMINATIONS

Problems and Solutions:

1. Doctor shopping. Doctor shopping occurs at two times during the life of a claim. First, when the employee's physician infers that it is time to return to work because of a lack of objective medical findings, and second, when an employee who has received a permanent impairment and the amount of money received is depended upon a disability rating computed, often times subjectively, by a physician. ACE analyzed the problem as one which is the result of the system and preferred to change the system rather than restrict the free choice of the employee to pick his own physician.

2. Statute limits medical treatment to two years, yet the board regularily orders extended treatments. That portion of subsection (a) which limits medical treatment to two years is deleted and results in medical treatment being given "for the period which the nature of the injury or the process of recovery requires".

3. Independent medical examinations are often times impossible to obtain. The medical examinations are given by a "physician or surgeon authorized to practice medicine" only, as per AS 23.30.095 (e), and the professional friction between the medical profession and chiropractors is aggravated when a medical doctor performs an examination of a chiropractor's patient. The situation is caused because the statute allows an employee to have his physician (or chiropractor) present at the examination, and medical doctors usually will not allow a chiropractor to observe a medical examination. The Workers' Compensation Board and ACE agree that the solution is to delete that portion of AS 23.30.095(e) which states, "the employee has the right to have a physician, paid for by the employer, present at the examination or examinations".

4. It is alleged that employees are deliberately missing medical examination appointments to extend the payment of compensation. The cost to employers resulting from employees missing medical examinations is exceptionally heavy as the weekly indemnity payments continue during the delay. The laws of other states, and the Workmen's Compensation and

Rehabilitation Law, Revised, all incorporate stringent requirements and penalties for missing examination appointments. It is from these laws, used as a model, that ACE recommends requirements for meeting appointments. If an appointment for examination is missed, compensation should be suspended during the delay.

5. Medical reports from physicians are often subjective rather than objective. Independent medical examinations should be based upon objective findings, and if controversy arises as to the facts, the evidence should be weighed by the board at a hearing.

6. In adversary proceedings before the Workers' Compensation Board, the party with the greatest number of supporting medical opinions regularily wins. Obtaining multiple medical opinions to support continued disability or in non-support of disability, is very costly to the employer, yet it is currently necessary to present a preponderance of medical evidence before the Workers' Compensation Board. No one opinion carries more weight than the others in the existing law. Therefore, subsection (e) is amended to allow the formation of an advisory committee to aid the Workers' Compensation Board to select physician's qualified to render independent medical examinations. The examinations given by those physicians will be given greater weight than others in a hearing before the board.

Justification:

1. Request of ACE.

2. Recommended by the Workers' Compensation Board and requested in H.B. 159, and supported and recommended by ACE.

3. An amalgamation of provisions from the Workmen's Compensation and Rehabilitation Law, Revised, and the Delaware Model Workers' Compensation Act, Section 26, pages 63-67.

4. Recommended by the Workers' Compensation Board and ACE.

5. Workmen's Compensation and Rehabilitation Law, Revised, paragraph (C)(2), page 15, and almost all other states.

6. Delaware Model Workers' Compensation Act, Section [illegible], paragraph (b)(3), page 64.

Recommendation:

Sec 23.30.095 MEDICAL EXAMINATIONS

(a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires. [NOT EXCEEDING TWO YEARS FROM AND AFTER THE DATE OF INJURY TO THE EMPLOYEE. HOWEVER, IF THE CONDITION REQUIRING THE TREATMENT, APPARATUS, OR MEDICINE IS A LATENT ONE, THE TWO-YEAR PERIOD RUNS FROM THE TIME THE EMPLOYEE HAS KNOWLEDGE OF THE NATUR OF HIS DISABILITY AND ITS RELATIONSHIP TO HIS EMPLOYMENT AND AFTER DISABLEMENT. IT SHALL BE ADDITIONALLY PROVIDED THAT, IF CONTINUED TREATMENT OR CARE OR BOTH BEYOND THE TWO-YEAR PERIOD IS INDICATED, THE INJURED EMPLOYEE HAS THE RIGHT OF REVIEW BY THE BOARD. THE BOARD MAY AUTHORIZE CONTINUED TREATMENT OR CARE OR BOTH AS THE PROCESS OF RECOVERY MAY REQUIRE.] When medical care is required, the injured employee may designate a licensed physician inside the state to render the care except in cases where, in the judgment of the board, care or treatment or both can best be administered by the selection of another physician. Upon procuring the services of a physician, the injured employee shall give proper notification of his selection to the employer within a reasonable time after first being treated.

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

(c) No claim for medical or surgical treatment is valid and enforceable as against the employer unless, within 20 days following the first treatment, the physician giving the treatment or the employee receiving it furnishes to the employer and the board notice of the injury and treatment, preferably on a form prescribed by the board. The board shall, however, excuse the failure to furnish notice within 20 days when it finds it to be in the interest of justice to do so, and it may, upon application by a party in interest, make an award for the reasonable value of the medical or surgical treatment so obtained by the employee.

(d) If at any time during the period the employee unreasonably refuses to

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

(e) The employee shall, after an injury, at reasonable times during the continuance of his disability if requested by his employer or, when ordered by the board, submit himself to an independent medical examination by a physician or surgeon authorized to practice medicine under the laws of the state in which the employee may be found, furnished and paid for by the employer. [THE EMPLOYEE HAS THE RIGHT TO HAVE A PHYSICIAN, PAID FOR BY THE EMPLOYER, PRESENT AT THE EXAMINATION OR EXAMINATIONS.] No fact relative to the injury or claim communicated to or otherwise learned by a physician or surgeon who may have attended or examined the employee, or who may have been present at an examination is privileged, either in the hearings provided for in this chapter or an action to recover damages against and employer who is subject to the compensation provisions of the chapter. If an employee refuses to submit himself to, or in any way obstructs, any independent medical examination by a physician or surgeon designated by the board, carrier, or employer [PROVIDED FOR IN THIS SECTION] his rights to compensation and right to take or prosecute any proceedings under this chapter shall be suspended until the obstruction or refusal ceases, and his compensation during the period of refusal or obstruction shall be suspended until the refusal or obstruction ceases [SUSPENSION MAY, IN THE DISCRETION OF THE BOARD OR THE COURT IN DETERMINING AN ACTION BROUGHT FOR THE RECOVERY OF DAMAGES UNDER THIS CHAPTER, BE FORFEITED]. The physician or surgeon selected by the board, employer, or carrier shall render an impartial medical opinion, based upon his own objective examination after discussion, if possible, with the treating physician, as to the nature and extent of the injury. The physician may, if appropriate, consult with other physicians outside of his specialty to assist him in forming his medical opinion, which shall be rendered within 2 weeks of the date of the examination. The board shall compile and keep current for each region of the state, a separate list of physicians engaged for not less than 3 years in the active licensed practice of surgery or medicine who are willing to render impartial medical opinions pursuant to this subsection. The board may appoint an Advisory Committee to aid and assist the board in compiling and keeping current such

list of physicians, where members shall be appointed by and serve at the pleasure of the board. The Advisory Committee shall consist of 10 members, including, and be apportioned amongst, members of the medical soceity, carriers, self insurers, hospitals, and the general public. The board shall appoint one member of the Advisory Committee as chairman. Medical opinions provided by physicians authorized by the board to render independent medical examinations shall be given greater weight by all parties in a hearing before the board.

(f) The board in any case of death may require an autopsy at the expense of the party requesting the autopsy. No autopsy may be held without notice first being given to the widow or widower or next of kin if they reside in the state or their whereabouts can be reasonably ascertained, of the time and place of the autopsy and reasonable time and opportunity given the widow or widower or next of kin to have a representative present to witness the autopsy. If no adequate notice is given, the findings from the autopsy may be suppressed on motion made to the board or to the superior court, as the case may be.

(g) [(f)] All fees and other charges for medical treatment or service are limited to the charges that prevail in the same community for similar treatment of injured persons of like standard of living and shall be subject to regulation by the board.

(h) [(g)] Nothing in this section limits the right of the employee to provide in any case at his own expense a consulting physician, surgeon, chiropractor or osteopath or any attending physician, surgeon, chiropractor or osteopath whom he desires.

(i) [(h)] Upon the filing with the board by a party in interest of an application or other pleading, all parties to the proceeding must immediately, or in any event within 5 days after service of the pleadings, send to the board the original signed reports of all physicians relating to the proceedings which they may have in their possession or under their control, and copies of the reports shall be served by the party immediately on the adverse party. There is a continuing duty on the parties to so file and serve all the reports during the pendency of the proceeding.

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

AS 23.30.100
NOTICE OF INJURY OR DEATH

Problems and Solutions:

1. The existing statute provides that a claim must be submitted to the employer and board within 30 days. Claims submitted after the 30 day period are routinely allowed to be filed. "Limitation periods pertaining to notice of injury possess a dual purpose of enabling the employer to provide immediate medical diagnosis and treatment with a view to minimizing the seriousness of the injury; and second, to facilitate the earliest possible investigation of the facts surrounding the injury." (Alaska State Housing Authority vs. Sullivan, Sup. Ct. Op. No. 994 (File No. 1989), 518 P.2d 759 (1974).

If claims filed subsequently to the limitation period are routinely accepted by the board, the purpose of the limitation is obscured and the 2 year statutory time limit for filing claims becomes subsequently prominent. If an employer is denied the right to immediate investigation, the employee should be required to provide minimum substantiation of the facts surrounding the claim. The existing statute is defective in this regard as claims filed up to two (2) years after the accident have to be accepted in accordance with §105 and §120. There presently exists three statutory conditions (see subsection (d)(1)-(3) below) and one judical condition sufficient to overcome the existing 30 day notice provision to support the liberal interpretation given to this statute by the board. It is to one of these conditions that we recommend the following: "however, when the delay in giving notice is so excused .... the burden of proof as to the validity of the claim shall shift to the employee who shall be required to show evidence of independent substantiation of the facts pertaining to the occurrence". The membership of ACE unanimously agreed that the employee would not be prejudiced by being required to relate "facts pertaining to the occurrence" and to obtain the facts from an independent source as the employer would have done if notification was timely.

2. Employees can be paid incorrect benefits in error under a new program such as recommended, resulting in possible financial injury to an innocent employee. Paid benefits should be monitored by a neutral party to assure

the correct benefit is being paid. Adopting wording from Florida, who has had a wage-loss system in effect for 2 1/2 years, will provide the necessary control.

3. Controversies headed for board hearing can sometimes be adverted by the intervention of the division. The Workers' Compensation Division has laid the groundwork for such action but statutory support is needed to enforce and make intervention mandatory. Adopting wording from another state successfully utilizing this system is appropriate to add authority to this requirement. (See also AS 23.30.110(h) proposed)

4. Utilizing a wage-loss program requires that the employee report wages in order to compute the actual wage loss. A statutory wage reporting provision is necessary to support proposed AS 23.30.190(b), Compensation for Wage-Loss.

Justification:

1. Recommendation of ACE.
2. Florida Workers' Compensation Act 440.185(4).
3. Florida Workers' Compensation Act 440.185(4).
4. Florida Workers' Compensation Act 440.185(10).

Recommendation:

Sec. 23.30.100 NOTICE OF INJURY OR DEATH

(a) Notice of an injury or death in respect to which compensation is payable under this chapter shall be given to the board and to the employer within 15 days after the date of such injury or within 30 days after a death [WITHIN 30 DAYS AFTER THE DATE OF SUCH INJURY OR DEATH TO THE BOARD AND TO THE EMPLOYER.]

(b) The notice shall be in writing, on the form prescribed by the board or on any form which contains the name and address of the employee, and a statement of the time, place, nature, and cause of the injury or death, and be signed by the employee or by a person on his behalf, or in the case of death, by a person claiming to be entitled to compensation for the death or by a person on his behalf.

(c) Notice shall be given to the board by delivering it or sending it by mail addressed to the board's office, and to the employer by delivering it to him or by sending it by mail addressed to him at his last known place of

business. If the employer is a partnership, the notice may be given to a partner, or if a corporation, the notice may be given to an agent or officer upon whom legal process may be served or who is in charge of the business in the place where the injury occurred.

(d) Failure to give notice does not bar a claim under this chapter

1. if the employer (or his agent in charge of the business in the place where the injury occurred) or the carrier had knowledge of the injury or death and the board determines that the employer or carrier has not been prejudiced by the failure to give notice;

2. if the board excuses the failure on the ground that for some satisfactory reason notice could not be given. However, when the delay in giving notice is so excused, notwithstanding the provisions of AS 23.30.120, the burden of proof as to the validity of the claim shall shift to the employee who shall be required to show evidence of independent substantiation of the facts pertaining to the occurrence;

3. unless objection to the failure is raised before the board at its first hearing of a claim for benefits in respect to injury or death.

(e) The division shall monitor the furnishing of compensation by the employer or carrier to ascertain that correct benefits are being furnished in cases accepted as compensable injuries. In the event of controversion or a dispute and the filing of a claim, the division shall attempt to resolve the dispute promptly in accordance with AS 23.30.110.

(f) When a claimant has the right or is required to mail a notice within the times prescribed in subsection (a), such mailing will be completed and in compliance with this section if it is postmarked and mailed prepaid to the appropriate recipient prior to the expiration of the timeframes in this section.

(g) Any compensable wage loss shall be reported by the employee to the carrier or self-insured employer within 30 days after the termination of the month for which such loss is claimed. The division shall provide by regulation for the reporting of wage loss by the injured worker, and for the reporting of wage loss and payment of wage loss benefits by the employer, to the division, and may prescribe forms for such reporting. The division, upon request by the employer or carrier, shall provide verification through unemployment compensation records of any claimed wage loss and shall obtain such verification from other states, if applicable. The division shall

require by regulation that the employer inform a worker who suffers a permanent impairment of his possible entitlement to wage-loss and other benefits and of the worker's obligation to report a claimed wage loss.

AS 23.30.105
TIME FOR FILING OF CLAIMS

Problems and Solutions:

1. This section allows claims for benefits to be filed for virtually an unlimited period of time after the original injury causing rates for compensation to be excessive. A review of workers' compensation statutes from other jurisdictions reveals many states support a one-year period (No. Dakota, Tennessee, Washington, Connecticut, Wyoming) but the majority have adopted a two year statute. The two (2) year time limit is also consistent with Alaska tort law. The Workmen's Compensation and Rehabilitation Law, Revised, utilizes a three (3) year period and its wording has been adopted by many states with a revision reducing the time to 2 years.

Whether the time period should run from the date of injury or after the employee has knowledge of the nature of his disability and its relation to his employment and after disablement is also in question. A survey of state statutes indicates overwhelming support for the date of injury as starting the period of time limitation. In addition, the Workmen's Compensation and Rehabilitation Law, Revised utilizes the date of injury.

ACE supports a two (2) year period starting with the date of injury but advocates an unlimited time period for occupational diseases. Additionally, we support a two (2) year period after the last payment of compensation or medical and related benefits.

2. A claim for medical and related benefits (not included in the definition of compensation) has no limit. Insert "medical and related benefits" and apply a two year limitation.

Justification:

Workmen's Compensation and Rehabilitation Law, Revised, Section 27, page 34.

Recommendation:

Sec 23.30.105 TIME FOR FILING OF CLAIMS

(a) The right to compensation for disability, wage-loss, impairment, or medical and related benefits under this chapter is barred unless a claim for it is filed within two years after the [EMPLOYEE HAS KNOWLEDGE OF THE NATURE OF HIS DISABILITY AND ITS RELATION TO HIS EMPLOYMENT AND AFTER DISABLEMENT. HOWEVER, THE MAXIMUM TIME FOR FILING THE CLAIM IN ANY EVENT OTHER THAN ARISING OUT OF AN OCCUPATIONAL DISEASE SHALL BE FOUR YEARS FROM THE] date of injury, and the right to compensation for death is barred unless a claim therefore is filed within one year after death. Except that if payment of compensation or medical and related benefits has been made without an award on account of the injury or death, a claim may be filed within two years from the date of the last payment. It is additionally provided that, in the case of a latent injury [DEFECTS PERTINENT TO AND CAUSING COMPENSABLE DISABILITY], the injured employee has full right to claim as shall be determined by the board, time limitations notwithstanding.

(b) Failure to file a claim within the period prescribed in (a) of this section is not a bar to compensation unless objection to the failure is made at the first hearing of the claim in which all parties in interest are given reasonable notice and opportunity to be heard.

(c) If a person who is entitled to compensation under this chapter is mentally incompetent or a minor, the provisions of (a) of this section are not applicable so long as he has no guardian or other authorized representative, but are applicable in the case of a person who is mentally incompetent or a minor from the date of appointment of a guardian or other representative, or in the case of a minor, if no guardian is appointed before he becomes of age, from the date he becomes of age.

(d) If recovery is denied to a person, in a suit brought at law or in admiralty to recover damages in respect to injury or death, on the ground that he was an employee and that the defendant is an employer within the meaning of this chapter and that the employer as secured compensation to the employee under this chapter, the limitations of time prescribed in (a) of this section begins to run only from the date of termination of the suit.

AS 23.30.110
PROCEDURE ON CLAIMS

Problems and Solutions:

1. It is possible to request a board hearing without having requested the benefit from the employer. Rehabilitation programs are often brought to the board for approval without confirming with the employer. Some aspects of compensation are arbitrary, and requesting the benefit from the employer first, before filing for a board hearing would encourage negotiations and compromise. Board hearings are expensive. Compensation is paid during the request period, attorney fee's are incurred by both sides, and the desired benefit is delayed. ACE's desire is to reduce the cost of compensation, in part, by reducing the number of board hearings. The solution is to require that a request for a board hearing be attached to a request for a benefit and a formal denial of the benefit requested.

2. Board hearings are ordered when negotiating differences might result in immediate delivery of benefits and the resulting cost savings realized by all employers. The solution is to require the Workers' Compensation Division to staff with employees familiar with workers' compensation benefit entitlements. When a controversy develops, have both sides discuss the controversy and attempt to settle differences. The negotiation sessions have to be approved by both the employer and employee, as their right to a hearing before the board should be preserved. The negotiations should be confidential and not be passed to any member of the board. Statutorily creating this section on negotiating will inform employees of this benefit. It will not create claims, as a benefit has to be requested from the employee, and the employer has to deny the benefit. Only then can a request for a board hearing be submitted which initiates the negotiation process.

3. Allegations that board decisions are inordinately delayed by the board or attorneys are not documented, but cases often take excessive periods of time. Benefits are based upon time, therefore time is very expensive, especially at $942 per week in 1982. The actual reasons for delays are not documented. The solution is to require the Worker's Compensation Board to report to key individuals the facts pertaining to hearings not settled within the time period required to obtain sufficient facts to determine and treat the causes of overdue decisions.

Justifications:

1. Adopted from Florida Workers' Compensation Act, 440.25(1).
2. Adopted from Florida Workers' Compensation Act, 440.19(1).
3. Recommended by ACE and adopted from wording in Florida Worker's Compensation Act, 440.25(d).

Recommendation:

AS 23.30.110 PROCEDURE ON CLAIMS

(a) Subject to the provisions of AS 23.30.105, a claim for compensation may be filed with the board at any time after a notice to controvert is filed by the employer or carrier or at any time after a specific benefit becomes due and is not provided. The board shall have full power and authority to hear and determine all questions presented in respect to such claims. [IN ACCORDANCE WITH ITS REGULATIONS AT ANY TIME AFTER THE FIRST SEVEN DAYS OF DISABILITY FOLLOWING AN INJURY, OR AT ANY TIME AFTER DEATH, AND THE BOARD MAY HEAR AND DETERMINE ALL QUESTIONS IN RESPECT TO THE CLAIM.]

(b) Within 10 days after a claim is filed the board, in accordance with its regulations, shall notify the employer and any other person (other than the claimant) whom the board considers an interested party that a claim has been filed. The notice may be served personally upon the employer or other person, or sent by registered mail.

(c) The board shall make the investigation which it considers necessary in respect of the claim, and upon application of an interested party shall order a hearing on it within 90 days from the receipt of the request. If a hearing on a claim is ordered the board shall give the claimant and other interested parties at least 20 [10] days' notice of the hearing, served personally upon the claimant and other interested parties or sent by registered mail, and shall, within 30 [20] days after the hearing is held [had], by order, reject the claim or make an award in respect to it. If a hearing is continued by the board, additional notice is not required under this subsection. [IF NO HEARING IS ORDERED WITHIN 20 DAYS AFTER NOTICE IS GIVEN AS PROVIDED IN (b) OF THIS SECTION, THE BOARD SHALL BY ORDER REJECT THE CLAIM OR MAKE AN AWARD IN RESPECT TO IT.]

(d) At the hearing the claimant and the employer may each present evidence in respect to the claim and may be represented by any person authorized in writing for that purpose.

(e) The order rejecting the claim or making the award (referred to in this chapter as a compensation order) shall be filed in the office of the board, and a copy of it shall be sent by registered mail to the claimant and to the employer at the last known address of each.

(f) An award of compensation for disability may be made after the death of an injured employee.

(g) An injured employee claiming or entitled to compensation shall submit to the physical examination by a duly qualified physician which the board may require. The place or places shall be reasonably convenient for the employee. [THE PHYSICIAN OR PHYSICIANS AS THE EMPLOYEE, EMPLOYER, OR CARRIER MAY SELECT AND PAY FOR MAY PARTICIPATE IN AN EXAMINATION IF THE EMPLOYEE, EMPLOYER, OR CARRIER SO REQUESTS.] Proceedings shall be suspended and no compensation may be payable for a period during which the employee refuses to submit to examination.

(h) Upon receipt by the board, every claim for compensation and medical and related benefits filed under this chapter shall be evaluated by the division to ascertain, within 20 days after the filing of a claim, whether the claim can be resolved without a hearing by contacting the employer and employee and inviting both to a confidential meeting in an attempt to resolve the issues. No member of the board may be present nor will any part of the negotiation be made known to any other person not in attendence. Both parties must consent in writing to the meeting and neither party may utilize the services of counsel in the meeting. If an agreement is reached between the parties each party will agree in writing to a dismisal of the claim. If no agreement is reached the division will inform the board that the parties met to negotiate the dispute without resolving the issues.

(i) Each panel chairman is required to submit a special report to the division in each contested workers' compensation case in which the case is not determined within 30 days of final hearing. Said form shall be provided by the division and shall contain the names of the panel chairman and the attorneys involved, and a brief explanation by the panel chairman as to the reason for such a delay in issuing a final order. The division will compile these special reports into an annual public report to the Governor, the Commissioner, and the Legislature.

AS 23.30.120
PRESUMPTIONS

Problem and Solution:

Although workers' compensation is a no-fault law, it is not a prerequisite that the employee be protected by a presumption of compensibility on every claim submitted. Modern no-fault auto insurance does not have a blanket presumption of coverage clause. The facts of an injury should substantiate the payment of disability compensation, and if the facts surrounding an injury are in dispute, it is the duty of the board to interpret the facts. When fraudulent claims are submitted under the cover of the presumption, the employer must show substantial evidence of non-compensibility; almost an impossible task as required by the board and courts. In applying a liberal construction to the Workers' Compensation Act, the liberal attitude should be applied to the law, not to the evidence offered to support a claim by virtue of the law. Many jurisdictions hold that awards of compensation cannot be based on speculation or conjecture evidence, but must be based upon sufficient evidence showing that the disability was the result of an accident arising out of and in the course of employment.

The existing statute appears to have been copied from the Workmen's Compensation and Rehabilitation Law, and edited. ACE restored the deleted wording in its recommendation which creates a presumption only for those who are unable to testify as to the facts surrounding the occurrence of a claim.

The State of Idaho utilizes this wording in their section on presumptions without ill effects. The National Council on Compensation Insurance (NCCI) continually compares Idaho, Washington, Oregon, California and Montana with Alaska. Alaskan employees submit 65 percent more claims than Idaho employees and these variations between statistics could in part be the result of the wording in the presumption clause. Denying claims which cannot be substantiated by the facts will not leave an employee destitute as non-occupational benefits also fully protect employees.

Justification:

1. Copied verbatim from Workmen's Compensation and Rehabilitation Law, Revised, Section 9, page 8.

Recommendation:

Sec. 23.30.120 PRESUMPTIONS

In any claim for compensation, where the employee has been killed, or is physically or mentally unable to testify, and there is unrebutted prima facie evidence that indicates that the injury arose in the course of employment, [IN A PROCEEDING FOR THE ENFORCEMENT OF A CLAIM FOR COMPENSATION UNDER THIS CHAPTER] it shall be [IS] presumed in the absence of substantial evidence to the contrary, that

(1) the injury arose out of the employment [CLAIM COMES WITHIN THE PROVISIONS OF THIS CHAPTER];

(2) sufficient notice of the injury [CLAIM] has been given;

(3) the injury or death was not occasioned while the employee was under the influence of alcohol or a controlled substance [SOLELY BY THE INTOXICATION OF THE INJURY EMPLOYEE]; and

(4) the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another.

AS 23.30.145
ATTORNEY FEES

Problems and Solutions:

1. Employers strenuously object to paying attorney fees based upon the full award of the board when a portion of the award pertains to non-contested benefits. It is their belief that the fees should be awarded only upon the actual benefit gained in the hearing that wasn't offered prior to the hearing. A number of states, including Florida, have adopted provisions concerning the payment of attorney fees which parallel the Workmen's Compensation and Rehabilitation Law, Revised, which awards fees based upon the whole award if compensation was controverted, or that part of the award which was not previously offered by the employer. ACE recommends the adoption of the essence of the provisions of the Workmen's Compensation and Rehabilitation Law, Revised.

2. Attorney fees should be paid in a lump sum, not periodically. ACE supports the payment of attorney fees in a lump sum as allowed by Florida and many other states and recommended by the Workmen's Compensation and Rehabilitation Law, Revised.

Justification:

1. Workmen's Compensation and Rehabilitation Law, Revised, Section 42, page 42.

2. Florida Workers' Compensation Act, 440.34.

Recommendation:

Sec. 23.30.145 ATTORNEY FEES

(a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less that 25 per cent on the first $1,000 of compensation or part of the first $1,000 of compensation, and 10 per cent of all sums in excess of $1,000 of compensation. [WHEN THE BOARD ADVISES THAT A CLAIM HAS BEEN CONTROVERTED, IN WHOLE OR IN PART, THE BOARD MAY DIRECT THAT THE FEES FOR LEGAL SERVICES BE PAID BY THE EMPLOYER OR CARRIER IN ADDITION TO COMPENSATION AWARDED: THE FEES MAY BE ALLOWED ONLY ON THE AMOUNT OF COMPENSATION CONTROVERTED AND AWARDED. WHEN THE BOARD ADVISES THAT A CLAIM HAS NOT BEEN CONTROVERTED, BUT FURTHER ADVISES THAT A BONA FIDE LEGAL SERVICES HAVE BEEN RENDERED IN RESPECT TO THE CLAIM, THEN THE BOARD SHALL DIRECT THE PAYMENT OF THE FEES OUT OF THE COMPENSATION AWARDED.]

(b) Except as provided in (c) of this section, if an employer declines to pay any compensation on the ground that there is no liability for compensation under this chapter, or [(b) IF AN EMPLOYER FAILS TO FILE TIMELY NOTICE OF CONTROVERSY OR FAILS TO PAY COMPENSATION OR MEDICAL AND RELATED BENEFITS WITHIN 15 DAYS AFTER IT BECOMES DUE, OR] otherwise resists the payment of compensation or medical and related benefits, and if the claimant has employed an attorney in the successful prosecution of his claim, the board shall make an award to reimburse the claimant for his costs in the proceedings, including a reasonable attorney fee. The award is in addition to the compensation or medical and related benefits ordered and shall be paid after final decision directly by the employer or carrier to the attorney for the claimant in a lump sum.

(c) If an employer pays or tenders payment of compensation, but contests the amount of compensation due, and the person seeking benefits utilizes the services of an attorney and an order is made or an agreement is reached thereafter on the amount of compensation due which is greater than the amount paid or tendered by the employer, a reasonable attorney's fee based

soley upon the difference between the amount ordered and the amount tendered or paid shall be ordered in addition to the amount of compensation, which shall be paid directly by the employer or carrier to the attorney for the claimant in a lump sum.

(d) In determining the amount of fees the board shall take into consideration the nature, length and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries.

(e) If proceedings are had for review of a compensation or medical and related benefits order before a court, the court may allow or increase an attorney's fees. The fees are in addition to compensation or medical and related benefits ordered and shall be paid as the court may direct.

AS 23.30.155
PAYMENT OF COMPENSATION

Problems and Solutions:

1. Failure to notify the board within a given time period of a change in the amount of benefit paid, automatically subjects the employer or carrier to a fine of $100 plus $25 for each day late, a maximum fine of $2,500 on each claim. ACE believes penalties should be levied when the failure to do something results in damage to an interested party, not because an office clerk mislaid some correspondence. ACE recommends that the board "may" assess a penalty rather than "shall" assess a penalty, and that it only be assessed "if the failure to notify the board causes significant financial hardship to the employee".

2. An employer cannot recover overpayments inadvertently made to a claimant. Subsection (j) should include recovery of overpayments out of future installments due the employee.

3. Lump sum payment of awards provides a positive incentive, a pot-of-gold, for each employee to aim for when appropriate. Adequate testimony was presented before the committee to support the multiple incentives created by the existence of cash awards. The Workers' Compensation Board supports the conclusion that lump sum awards are generally not in the employee's best interest if truly injured. Additionally, the payment of a lump sum does not discharge the employer's liability for future medical treatment. The

Workers' Compensation Board supports the general discouragement of lump sum awards. ACE concurs but believes lump sum awards are appropriate only when the employee incurs the loss of a member (arm, leg, hand, foot) as provided in the recommended AS 23.30.190(a). In other situations, lump sum payments are appropriate "only under special circumstances as when the claimant can demonstrate that lump sum payments will definitely aid in his rehabilitation or are otherwise clearly in his best interest and that lump sum payments will avoid undue expense or undue hardship to any party". The payment of future liability in a lump sum will also include future medical expense, closing the claim forever. A lump sum payment will not be payable before six months after the employee reaches the date of maximum medical improvement, thereby precluding the utilization of a lump sum payment in contested medical cases. Application to the board for approval of a lump sum payment requires the parties to first agree to the amount and to jointly petition the board.

4. Compensation can only be paid by a check. Companies prefer to utilize a draft, however not all drafts are payable immediately. Subsection (o) provides for the payment of compensation by a draft, providing however, that the draft be cashable at any bank the day after it is received by the employee.

Justification:

1. ACE recommendation.
2. ACE recommendation.
3. Florida Worker's Compensation Act, Section 440.20(12) (a) and (b).
4. Division of Workers' Compensation, Department of Labor, H.B. 159.

Recommendation:

Sec. 23.30.155 PAYMENT OF COMPENSATION

(a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. To controvert a claim the employer must file a notice, on a form prescribed by the board, stating:

(1) that the right of the employee to benefits are controverted;

(2) the name of the employee;

(3) the name of the employer;

(4) the date of the alleged injury or death; and

(5) the type of benefits and all grounds upon which the right to benefits are controverted.

(b) The first installment of compensation becomes due on the 14th day after the employer has knowledge of the injury or death. On this date all compensation then due shall be paid. Subsequent compensation shall be paid in installments, every 14 days, except where the board determines that payment in installments should be made monthly or at some other period.

(c) Upon making the first payment, and upon an increase, reduction, termination, suspension, resumption or a change in rate or type of compensation paid, the employer shall notify the board within 14 days, on a form prescribed by the board, that payment of compensation has begun or has been increased, reduced, terminated, resumed, changed, or suspended, as the case may be. If the employer fails to notify the board within 14 days, the board may [SHALL] assess against the employer a civil penalty of $100 plus $25 for each day in excess of 14 days that the employer fails to give notice if the failure to notify the board causes significant financial hardship to the employee. Total penalties under this section may not exceed $2,500 for each failure to file a required report.

(d) If the employer controverts the right to compensation he shall file with the board on or before the 14th day after he has knowledge of the alleged injury or death or on or before an installment of compensation payable without an award is due, a notice of controversion on a form prescribed by the board.

(e) If any installment of compensation payable without an award is not paid within 14 days after it becomes due, as provided in (b) of this section, there shall be added to the unpaid installment an amount equal to 20 per cent of it, which shall be paid at the same time as, and in addition to, the installment, unless notice is filed under (d) of this section or unless the nonpayment is excused by the board after a showing by the employer that owing to conditions over which he had no control the installment could not be paid within the period prescribed for the payment.

(f) If compensation payable under the terms of an award is not paid within 14 days after it becomes due, there shall be added to that unpaid

compensation an amount equal to 20 per cent of it, which shall be paid at the same time as, but in addition to, the compensation, unless review of the compensation order making the award is had as provided in AS 23.30.125 and an interlocutory injunction staying payments is allowed by the court.

(g) Repealed

(h) The board may upon its own initiative at any time in a case in which payments are being made with or without an award, where the right to compensation is controverted, or where payments of compensation have been increased, reduced, terminated, changed, or suspended, upon receipt of notice from a person entitled to compensation or from the employer, that the right to compensation is controverted, or the payments of compensation have been increased, reduced, terminated, changed, or suspended, make the investigations, cause the medical examinations to be made, or hold the hearings, and take the further action which it considers will properly protect the rights of all parties.

(i) When the board considers it advisable it may require an employer to make a deposit with the Department of Revenue to secure the prompt and convenient payment of compensation and payments from the deposit upon an award shall be made upon order of the board.

(j) If an employer has made advance payments or overpayments of compensation, he is entitled to be reimbursed out of any unpaid installment or installments of compensation due.

(k) An injured employee, or in case of death his dependents or personal representative, shall give receipts for payment of compensation to the employer paying it and the employer shall produce them for inspection by the board, whenever required.

(l) Repealed

(m) An employer shall file on or before the date one year from the date of injury or upon termination of the claim whichever is sooner, a report on a form prescribed by the board, showing the total amount of all compensation, medical and related benefits, legal fees, and penalties paid during the period since the injury including the name of the claimant, the date of injury, and the claim number. If the claim is not terminated within one year, subsequent reports shall be made yearly until the termination of the claim.

(n)(1) It is the stated policy for the administration of the workers' compensation system that it is in the best interest of the injured worker that he receive disability payments on a periodic basis, and that a lump sum settlement shall be the exception rather than the rule. Lump sum payments in exchange for the employer's or carrier's release for liability for future payments of compensation and medical attendance shall be allowed only under special circumstances, as when the claimant can demonstrate that lump sum payments will definitely aid in his rehabilitation or are otherwise clearly in his best interests and that lump sum payments will avoid undue expense or undue hardship to any party. In no case shall a lump sum payment be allowed until 6 months after the date of maximum medical improvement has been reached.

(2) Upon the joint petition of the interested parties, and after giving due consideration to the interest of the parties, if the Board finds that a lump sum payment in exchange for a release from liability is in their best interest under paragraph 1, the Board will enter a compensation order requiring that the liability of the employer for compensation and medical and related benefits shall be discharged by the payment of a lump sum.

(o) Compensation owed to an injured employee in the state shall be paid by a check or draft which may be cashed on the first banking day after it is received by the employee and on any succeeding banking day.

AS 23.30.175
RATES OF COMPENSATION

Problems and Solutions:

1. This section was compatible with our proposal as written, however, the Workers' Compensation Division recommended in H.B. 159 a complete re-wording of a major portion of the section in order to treat out-of-state recipients of compensation more fairly. These changes have been incorporated into our recommended change.

2. Subsections (e) and (f) were added which deal with the rounding off of compensation benefit payments to the nearest dollar, and the multiple to be used to convert weekly benefits to monthly benefits. These changes were made to facilitate the administration of the new benefits.

Justifications:

1. Division of Worker's Compensation, H.B. 159.
2. ACE recommendation.

Recommendation:

Sec. 23.30.175 RATES OF COMPENSATION

(a) The weekly rate of compensation for disability or death for a recipient residing in Alaska may not exceed 200 per cent of the Alaska average weekly wage in effect on the date of injury, nor be less than $65 per week.

(b) After June 30 and before December 1 of each year, the commissioner shall adopt and publish the average weekly wage for the preceeding calendar year as computed by the United States Secretary of Labor for the purpose of unemployment insurance. In determining the rate of compensation the commissioner shall use the average weekly wage figure for each jurisdiction, including Alaska, for which the Secretary of Labor computes an average weekly wage. These figures are the applicable average weekly wages for those jurisdictions for the following calendar year. The average weekly wage for Alaska is the amount determined by dividing (1) the total wages paid by all employers covered by the Alaska Employment Security Act by (2) the average monthly employment reported by those employers for the same period and dividing the result by 52.

(c) In jurisdictions for which no average weekly wage is computed by the Secretary of Labor for the purposes of unemployment insurance, the average weekly wage shall be as determined by the commissioner.

(d) The following rules apply to recipients who do not reside in Alaska:

(1) The weekly rate of compensation shall be calculated using the recipient's average weekly wage times the ratio of the average weekly wage of the jurisdiction in which the recipient resides to the average weekly wage of Alaska. The rate is based on the average weekly wage in effect when the recipient leaves Alaska and shall be adjusted annually upon publication of the average weekly wage for all jurisdictions.

(2) If the average weekly wage of the recipient and the resulting compensation rate is determined under AS 23.30.220(2), the calculation required by this subsection applies to only those wages earned in Alaska.

(3) The calculation required by this subsection does not apply if the absence of the recipient is for medical or rehabilitation services not reasonably available in Alaska.

(4) Application of this subsection may not result in a reduction of the weekly compensation rate to less than $65 a week except as provided in (a) of this section.

(e) All payments of compensation shall be adjusted to the nearest dollar.

(f) The monthly wage-loss benefits shall not exceed 4.3 times the maximum weekly benefit as computed pursuant to paragraph (a).

AS 23.30.180
PERMANENT TOTAL DISABILITY

Problems and Solutions:

1. What losses or permanent impairments shall be presumptively considered to constitute permanent total disability? The argument for including the loss of both arms, both hands, both legs, etc. in the permanent total section, and creating a presumption that they constitute permanent total disability, is a weak argument as evidenced by the Work Draft Paper on H.B. 159 issued November 23, 1981 by the State of Alaska. This draft completely omitted the so-called shopping list. The list was retained in our recommendation mainly to avoid confrontation with advocates of retaining the list and we did require "conclusive proof" of a substantial earning capacity to avoid the award. This should prove a more difficult test than the mere showing of "conclusive proof to the contrary". All other cases, as in the past, are determined by the facts as interpreted by the board. A substantial earning capacity as defined in AS 23.30.265 "means that an employee is engaged in, or is physically capable of engaging in, gainful employment, including light work."

We do not contemplate a major cost reduction in the permanent total classification as this class represents a very minor portion (.81 percent) of total claims. The NCCI reports permanent total disability cost accounts for 3.7 percent of all compensation costs, so any change in this area will not have a large impact. (see Exhibit (II)

2. If an employee is drawing permanent total disability and subsequently develops an earning capacity, do payments of permanent total continue? The Alaskan Workers' Compensation Act does not preclude an employee who has been awarded permanent total disability status from subsequently obtaining employment. There is a reported, but unconfirmed, case where a resident has been awarded the permanent total disability status three times in his life. The dollars available for compensation are not infinite, and our recommendation clearly takes advantage of those cases where time and rehabilitation, and the employee's own incentives, have combined to produce an earning capacity. In the ACE recommendation, when an employee develops an earning capacity after being awarded permanent total disability benefits, the permanent total benefit will stop and wage-loss benefits will continue from that point on. The benefit computation is the same, but the wage-loss benefit is reduced by earnings and can extend for as long as 10 years.

3. Inflation has severely eroded the spending power of recipients who have been awarded permanent total benefits in the past. Testimony before the Committee indicates a real need for cost of living increases. It appears justified to include a cost of living clause in the permanent total disability section, as to do otherwise is gross neglect of the industrially injured. A cost of living increase has to be stated in terms that are actuarily computable or else the rating mechanism is thrown off balance, and rates have to be packed with extra contingency dollars. An annual increase of 5 percent of the original benefit is an acceptable increase. The inclusion of this benefit is a first step toward addressing the cost of living problem, and future legislators may want to liberalize this percentage in the future as compensation dollars become more plentiful.

Justification:

1-3 The permanent total disability sections of numerous state laws were researched as well as the complete review of Larson, Workers' Compensation Law. The Florida statutes provide the best guidance for wording and also their interpretation by the court was extensively documented to provide guidance to Alaskan's who will test these same issues in the Alaska courts.

Florida Workers' Compensation Act, Section 440.15(1).

Recommendation:

Sec. 23.30.180 PERMANENT TOTAL DISABILITY

(a) In case of total disability adjudged to be permanent, 80 [66 2/3] per cent of the injured employee's spendable [AVERAGE] weekly wages shall be paid to the employee during the continuance of the total disability.

(b) Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two of them, or paraplegia, or quadriplegia, in the absence of conclusive proof of a substantial earning capacity, [TO THE CONTRARY] constitutes permanent total disability. In all other cases permanent total disability is determined in accordance with the facts. In such other cases, no compensation shall be payable under paragraph (a) if the employee is engaged in, or is physically capable of engaging in, gainful employment, and the burden shall be upon the employee to establish that he is not able uninterruptedly to do even light work due to physical limitation.

(c) If an employee who is being paid compensation for permanent total disability shall become rehabilitated to the extent that he shall establish an earning capacity, he shall be paid instead of the compensation provided in paragraph (a), wage-loss benefits pursuant to AS 23.30.190(b). The division shall adopt rules to enable a permanently and totally disabled employee, who may have established an earning capacity to undertake a trial period of reemployment without prejudicing his return to permanent total status in the case that such employee is unable to sustain an earning capacity.

(d) In case of permanent total disability resulting from an accident incurred subsequent to the effective date of this section, the employee shall be entitled to receive additional weekly compensation equal to 5 per cent of the employees' weekly compensation rate at the time of the injury. Such additional 5 per cent benefit will accrue 12 months from the date of the award and each 12 month period thereafter.

(e) The division shall provide by regulation for the periodic reporting to the division of all earnings of any nature and social security income by the injured employee entitled to or claiming benefits for permanent total disability or additional compensation under paragraph (d). Neither the employer or carrier shall make any payment of the permanent total disability

or additional compensation under paragraph (d) for any period during which the employee willfully fails or refuses to report upon request by the division, employer, or carrier in the manner prescribed by said regulations.

(f) Two years after the date the employee is eligible to receive permanent total disability and every two years thereafter, the employer or carrier will re-evaluate the employee's physical condition to ascertain the employee's capacity for rehabilitation to develop an earning capacity. The employer or carrier will report such findings to the Board along with their recommendation for rehabilitation, if any.

AS 23.30.185
TEMPORARY TOTAL DISABILITY

Problem:

This section is not in need of revision except for changing average weekly wage to spendable weekly wage which is discussed in Section 220, to follow.

Recommendation:

Sec. 23.30.185 TEMPORARY TOTAL DISABILITY

(a) In case of disability total in character but temporary in quality, 80 [66 2/3] per cent of the injured employee's spendable [AVERAGE] weekly wages shall be paid to the employee during the continuance of the disability.

AS 23.30.190
COMPENSATION FOR PERMANENT PARTIAL DISABILITY

Preface:

The revision of this section of the statute is the most important revision of the recommendation, as it completely changes the entire philosophy of Alaskan Workers' Compensation from one that currently compensates for loss of earning capacity to one based upon compensation for actual economic loss. The only state to accomplish this change to date is Florida, however Louisiana, Washington, Oregon, and Delaware tried to pass the same program last year and will attempt again this year.

ACE selected a wage-loss program to meet it's goals; in fact the benefits

received by the employee who is truly injured is far greater under wage-loss than under the existing program.

The one factor that prompted the decision to utilize wage-loss is the high cost of the permanent partial disability cases in Alaska as compared to other states. Our existing compensation law is virtually the same as other state laws in this area, and what has been found to be fact in other jurisdictions is presumed at this time to be true in Alaska. The same claim survey that verified the facts in other states is being concluded here and the results will be available in early 1982. Surveys in other states with similar laws show that an average 70 percent of the employees who are compensated under the permanent partial disability section for presumed loss of future wage earning capacity, actually incur no economic loss after payment of the award. Seventy percent of the employees return to the same job, same pay, same or different employers. Alaskan employers no longer have sufficient dollars to pay employees who incur no economic loss when others are not paid enough.

The cost savings inherent in a wage-loss program are obtained by re-distributing those dollars. Florida used them to obtain a 36.4 percent rate reduction and also increased the maximum weekly benefit from 66 2/3rds percent of the states average weekly wage to 100 percent of the states average weekly wage, a 50 percent increase. Because Alaska is already at 200 percent of the average weekly wage, that benefit will not be increased. The savings will however, be directed toward increasing benefits for permanently impaired workers who were formerly compensated under the permanent partial disability schedule of benefits, and for employer rate reductions.

A common perception an analyst of workers' compensation systems is that the severly injured are under compensated and the slightly injured are over compensated. This should no longer be true under a wage-loss program. Loss, as defined by the worker on the street, is loss of dollars in the weekly paycheck as the impact is obvious. Loss, as understood by the worker on the street, is not the theoretical loss of some future wage earning capacity. Compensation for the later loss is a windfall to many and no longer affordable by employers in Alaska.

Problems:

Scheduled Benefits

- Insufficient compensation for loss of scheduled impairments. The loss of an arm to two workers earning the same wages is equal, but the impact to an electrical lineman is far more severe than to an executive in terms of future wage earning capacity.
- The loss of one member qualifies employee for a scheduled benefit of a certain amount for a certain number of weeks. No provision for a lump sum payment. In order to obtain a lump sum, the employee normally must hire an attorney to negotiate a sum less than the amount of the benefit times the number of weeks entitlement (present value). Employees loose; attorneys gain; employers pay.
- Benefit entitlement has no direct relationship to economic loss.
- The need for an attorney to collect the benefit creates an adversary environment not consistent with a no-fault program.
- The actual value of the benefit is reduced annually by inflation, requiring periodic legislative adjustment.

Unscheduled Benefits:

- The predominate impairment in this category is the common back injury.
- Most cases require the utilization of an attorney to advise the employee on how to obtain the maximum benefit. The employee with the best attorney receives more than a person utilizing no attorney or one who is slightly less than best.
- Appointments for medical examinations are missed to prelong payment of temporary total disability prior to settling the permanent partial disability loss for a lump sum (lump sum payment is authorized for unscheduled losses).
- Maximum compensation under this section is $60,000 regardless of the employee's actual economic loss resulting in approximately 10 - 30 percent of all employees being under compensated.
- Disability ratings are largely subjective encouraging over utilization of the medical profession in seeking higher ratings.
- No uniform standard of rating by physicians.

Solutions:

The section has been reworded making a dual benefit, permanent impairment and wage-loss.

The portion dealing with permanent impairment is comparable to the existing scheduled benefit. A true or 100 percent wage-loss program would not include this benefit as it is not based upon actual wage loss, but is a concession to those that historically place a value upon a lost arm or leg. The amount of dollars paid under the impairment subsection are not directly comparable to the existing scheduled benefits. Under the existing permanent partial schedule, that is all the employee receives, regardless of his future economic loss. Under the impairment subsection, a sum of money is paid in cash and any actual wage-loss over the next 10 years is also paid pursuant to subsection (b), Wage-Loss.

Under the existing schedule a person who lost an arm will receive a maximum of $43,680 (paid monthly). Under the recommended impairment schedule the employee would receive a 60 percent whole man disability rating entitling him to $471 X 60 = $28,260, PLUS 80 percent of the employee's actual decrease in wages over the next 10 years, which could equal as much as $489,840 if he incurred a 100 percent wage loss. A total sum of $518,100 ($489,840 + $28,260) is considerably higher than $43,680, the existing benefit. Critics of this low lump sum schedule should not forget that employer and union group life insurance plans also pay dismemberment benefits for the loss of an arm or leg.

Exhibit IV lists the major impairments listed in the subsection on impairments and lists the percentage of disability assigned as provided in the recommendation, and the cash benefit resulting from the application of the 1982 State Average Weekly Wage.

When a loss occurs which entitles the employee to a cash award, the award is due after the employee reaches maximum medical improvement. This period could be called the healing period and during this time, the temporary total disability benefit is payable (80% of spendable weekly wage).

The method employed in determining the employees disability or impairment rating is objective rather than subjective thereby eliminating doctor shopping for higher ratings. The AMA's Guide to the Evaluation of Permanent Impairment is reproduced in part in Exhibit V, and is easy to use and acceptable to all medical doctors. Both Florida and Kentucky have adopted its use to resolve numerous problems similar to Alaska's.

It should also be noted that the cash payments authorized in the impairment subsection of the recommendation allow payment of the benefit for those double losses (both arms, both legs) which carry a presumption of total disability as discussed in a preceding section on permanent total disability. The existing statute does not pay the cash benefit for the multiple member losses which constitute permanent and total disability, plus pay the permanent total benefit.

In summary, the recommended impairment subsection is clear and concise, allowing the average worker to determine the exact benefit to which he is entitled without the necessity of employing an attorney. Additionally, each year as the state average weekly wage increases, this benefit will keep pace with inflation.

The wage-loss section entitles the injured worker to a replacement of wages lost subsequent to an accident when the employee has incurred a permanent impairment. The permanent impairment may or may not have entitled the employee to a cash award under the impairment provisions of subsection (a) as discussed above. If the loss was one that is "scheduled" or named in the impairment section, both the lump sum cash benefit and the wage-loss benefit are payable. If the loss is not named in the impairment subsection, only the wage-loss benefit is due.

The weekly benefit is easily computed by subtracting post injury spendable weekly wages from pre-injury spendable weekly wages, and the benefit payable is 80 percent of that difference.

The most predominate loss occurring will be the back injury as it was with the non-scheduled permanent partial disability section previously discussed. However, no impairment ratings from physicians will be necessary again eliminating the need for "doctor shopping". To prevent the employee from attempting to extend the period of entitlement, when the employee reaches the date of maximum medical improvement, benefits are likely to be reduced by actual wages earned, or if no employment is available, by the unemployment benefit, or by the dollar value of his earning capacity if he were to accept employment.

The wage-loss benefit can continue for a period of 10 years, but eligibility is terminated if during a 2 year period its use is less than for 3 consecutive months.

Justification:

The guide for the recommendation on permanent impairment and wage-loss has been the Florida Workers' Compensation Act, Section 440.15(3). The overwhelming support of the business community and the predominate labor union, the AFL-CIO, have made it a success.

The success of the Florida Wage-Loss System is well documented in the 1981 NCCI report entitled, "Preliminary Report on the Wage-Loss Law in Florida", (Exhibit VI) and a similar report entitled "Florida's New Workers' Compensation System: An Interium Report, dated March 1981 with October 1981 Addendum, prepared by the Bureau of Economic Analysis, Division of Economic Development, Florida Department of Commerce. (Exhibit I)

Preliminary analysis of the claim figures presented to the committee during 1980 by the NCCI indicate Alaska's problems track statistically with Florida before enacting wage loss. Prior to wage-loss, 30 percent of Florida's claims involved permanent partial disability and our computation based upon NCCI figures indicates 24 percent for Alaska; approximately 3 times the average of some other states. Florida allocated 67.2 percent of its benefit dollars for permanent partial disability cases and Alaska allocates 66.2 percent of its benefit dollars; again 2 times the average of some other states.

The wage loss package recommended will reduce these figures to acceptable levels and as a result provide significant rate reductions for employers while allocating more dollars to the seriously injury employee.

Recommendation:

Sec. 23.30.190 COMPENSATION FOR PERMANENT IMPAIRMENT AND WAGE-LOSS

(a) Compensation for permanent impairment.

(1) In case of permanent impairment due to amputation or total loss of use of an arm, or leg or loss of 80 per cent or more of vision after correction, or the total loss of hearing, or serious head or facial disfigurement, there shall be paid to the injured worker for each per cent of permanent impairment of the body as a whole, a sum equal to the state average weekly wage at the time of injury. As used in this paragraph, the term "total loss of use" shall mean that a person is no better off with the member than he would be if the member had been severed.

(2) Once the employee has reached the date of maximum medical improvement impairment benefits are due and payable within 20 days after the carrier or employer has knowledge of the status.

(3) The division shall establish and use a schedule for determining the existence and degree of permanent impairment based upon medically or scientifically demonstrable findings. The schedule shall be based on generally accepted medical standards for determining impairment and may incorporate all or part of any one or more generally accepted schedules used for such purpose. Pending the adoption, by regulation, of a permanent schedule, Guides to the Evaluation of Permanent Impairment, copyright 1977, 1971, or as subsequently updated, by the American Medical Association, shall be the temporary schedule and shall be used for the purposes hereof.

(b) Compensation for wage-loss

(1) Each injured worker who incurs any permanent impairment, which permanent impairment is determined pursuant to the schedule adopted in accordance with paragraph (3) of subsection (a), may be entitled to compensation for wage loss under this subsection. Such compensation shall be based on actual wage loss and shall be equal to 80 per cent of the difference between the employee's spendable weekly wages at the time of injury and the employee's spendable weekly salary, wages, and other remuneration the employee is able to earn after reaching the date of maximum medical improvement, as compared on a monthly basis. Notwithstanding the provisions of AS 23.30.175(a), compensation for wage-loss will not be payable in any month when the amount of compensable wage loss is less than 10 per cent of the employee's spendable weekly wage at the time of the injury. The division may adopt, by regulation, rules to simplify the monthly comparison so as to coincide as closely as possible with an injured worker's pay periods.

(2) The amount determined to be the salary, wages, and other remunerations the employee is able to earn after reaching the date of maximum medical improvement shall in no case be less than the sum actually being earned by the employee, including earnings from sheltered employment. In the event the employee voluntarily limits his or her income or fails to accept employment commensurate with his or her abilities, the salary, wages and other remuneration the injured employee is able to earn after the date of maximum medical improvement shall be deemed to be the amount which would have been earned if the employee did not limit his or her income or accepted appropriate employment. Whenever compensation for wage-loss is payable as set forth in paragraph (1) the burden shall be on the employee to establish that any wage-loss claimed is the result of the compensable injury.

(3) The right to compensation for wage-loss shall terminate:

(A) At the end of any 2 year period commencing at any time subsequent to the month when the injured employee reaches the date of maximum medical improvement, unless during such 2 year period wage-loss benefits have been payable during at least 3 consecutive months; or

(B) 520 weeks after the injured employee reaches the date of maximum medical improvement; or

(C) when the injured employee reaches age 65 and becomes eligible for retirement benefits under 42 U.S.C. ss. 402 and 405, whichever comes first, but not before the payment of at least 2 years of wage-loss.

(4) When the injured employee reaches age 62, wage-loss benefits shall be reduced by the total amount of social security retirement benefits which the employee is receiving or is eligible to receive without reduction for age, not to exceed 50 per cent of the employee's wage-loss benefit.

AS 23.30.191
EXPENSES FOR REHABILITATING INJURED EMPLOYEES

ACE recommends repeal of this section as the content has been transferred to recommended Section 094, Rehabilitation.

Recommendation:

Sec. 23.30.191 EXPENSES FOR REHABILITATING INJURED ENPLOYEES

Repealed

AS 23.30.195
SURVIVAL OF THE RIGHT TO COMPENSATION

Problem:

The problems are minor and should be classified as editing which is made necessary by the adoption of wage-loss, and to give equity to surviving children. The changes have no impact on benefit levels or premium rates.

Recommendation:

Sec. 23.30.195 SURVIVAL OF THE RIGHT TO COMPENSATION

(a) Compensation to which any claimant would be entitled under AS 23.30.190 (a) of this chapter [EXCEPTING (20) OF THAT SECTION] shall, notwithstanding death arising from causes other than the injury, be payable to and for the benefit of the persons following:

(1) if there be a widow or widower and no child of the deceased, to the widow or widower;

(2) if there be a widow or widower and a surviving child or children of the deceased, one-half to the widow or widower, the other half to the surviving child or children, to share equally;

(3) if there be [A] surviving children [CHILD] of the deceased, but no widow or widower, then to the child or children to share equally.

(b) An award for disability may be made after the death of the injured employee.

AS 23.30.196
SUBSEQUENT INJURY
(AN ENTIRELY NEW SECTION)

Problem and Solution:

This section deals with apportionment of benefits. Apportionment can take three forms; between successive employers or carriers, between the employer and a second injury fund, and between an employer and the employee himself. The first two situations assure the employee of full benefits from either source, while the third means the employee will bear a portion of the claim himself. This section deals with the third situation; apportionment between the employer and employee.

Alaska already is a "last carrier" state which eliminates apportionment of costs between successive carriers or employers. Alaska has a second injury fund to fill the gap in benefit source for aggravation of injuries attributable to prior employment.

Paragraph (b) of the recommended section re-states current Alaska law pertaining to aggravation or acceleration of a preexisting condition, when that impairment is an obvious condition and ordinarily one capable of being rated, such as the loss of a hand or arm.

Workers who have general diseases or defects, especially degenerative diseases present an unusually serious exposure to loss to the employer. The

defect or disease not disabling itself, when merged or combined with a minor aggravation, can become totally disabling and cost the employer thousands in unanticipated loss without second injury fund protection. We do not believe an employer should be held liable under the workers' compensation program for that portion of the disability which is attributable to the employee's general diseases, especially degenerative diseases which are the result of age.

That portion of subsection (a) which reads "where a preexisting disease or anomaly is accelerated or aggravated by an accident arising out of and in the course of employment, only the acceleration of death or the acceleration or aggravation of the preexisting condition attributable to the accident shall be compensable with respect to permanent impairment or death" reduces this exposure to loss faced by employers. Compensation for permanent impairment and death therefore, are apportionable with the employee. Compensation for temporary total disability, medical and wage-loss are not apportionable with the employee, which has the effect of softening the harshness of this rule as 99 percent of all claims fall into these categories.

Approximately half of the states have some form of apportionment statute, Larson, Workers' Compensation Law was researched along with the provisions of various state statutes to find the most fair, complete, and adequate wording that has been tested in court to give guidance to Alaskans dealing with its provisions should our recommendation ever be enacted into law. The Florida law met the needs of Alaska more closely than any other, possibly because their section on apportionment is operational with the wage-loss program. Larson devotes considerable space to the decisions of the Florida Supreme Court in interpreting the historical development and principles supporting this section. For those who desire further information (see pages 10-345 to 10-534).

Subsection (c) and (d) deal with situations where an employee drawing wage-loss incurs a subsequent injury which entitles the employee to additional benefits, paid simultaneously. The benefit payable because of the prior injury is reduced if the total of the two exceeds normal maximums.

Justification:

Florida Workers' Compensation Act, Section 440-15(5).

Recommendation:

Sec. 23.30.196 SUBSEQUENT INJURY

(a) The fact that an employee has suffered previous disability, impairment, anomaly, or disease, or received compensation therefore, shall not preclude him from benefits for a subsequent injury nor preclude benefits for death resulting therefrom. However, where a preexisting disease or anomaly is accelerated or aggravated by an accident arising out of and in the course of employment, only the acceleration of death or the acceleration or aggravation of the preexisting condition attributable to the accident shall be compensable with respect to permanent impairment or death. Compensation for temporary disability, medical, and wage-loss shall not be subject to apportionment.

(b) If a compensable permanent impairment, or any portion thereof, is a result of aggravation or acceleration of a preexisting condition, or is the result of merger with a preexisting impairment, an employee eligible to receive impairment benefits under AS 23.30.190 (a) shall receive such benefits for the total impairment found to result, excluding the degree of impairment existing at the time of the subject injury or which would have existed by the time of the impairment rating without the intervention of the compensable injury. The degree of permanent impairment attributable to the injury shall be compensated in accordance with AS 23.30.190 (a). As used in the paragraph, "merger" means the combining of a preexisting permanent impairment with a subsequent compensable permanent impairment which, when the effects of both are considered together, result in a permanent impairment rating which is greater than the sum of the two permanent impairment ratings when each impairment is considered individually.

(c) If an employee is receiving compensation for wage-loss suffers a subsequent injury causing temporary disability, both wage-loss benefits and temporary disability benefits shall be payable during the duration of temporary disability; however, the total benefits payable shall not exceed the maximum compensation rate in effect for temporary disability at the time of the subsequent injury. Any reduction in benefits due to such limit shall be applied first to the wage-loss benefits payable as a result of the prior injury.

(d) If an employee receiving wage-loss benefits suffers a subsequent injury causing an additional compensable wage loss, benefits for each wage

loss shall be payable; however, the total wage-loss benefits payable shall not exceed the maximum compensation rate in effect for wage-loss at the time of the subsequent injury. Any reduction in wage-loss benefits due to such limitation shall be applied first to the benefits payable as a result of the prior injury.

AS 23.30.200
TEMPORARY PARTIAL DISABILITY

Problem:

Existing wording not compatible with wage-loss.

Solution:

This section has been completely re-written to coordinate the benefit with wage-loss. The benefit is almost exactly the same as the wage loss benefit, but this form of compensation does not contemplate the employee's injury being so acute that a permanent impairment will exist after reaching maximum medical improvement.

Both the existing benefit and the recommended version contain a maximum period of entitlement of 5 years. The recommended section contains provisions not contained in the existing section:

1. A provision to reduce the benefit if the employee voluntarily reduces income or fails to accept employment available.

2. A provision requiring reporting of wages earned if the employee leaves the employment of the original employer.

Justification:

Adopted from the Florida Workers' Compensation Act, Section 440-15(4).

Recommendation:

Sec. 23.30.200 TEMPORARY PARTIAL DISABILITY

(a) In case of temporary partial disability, benefits shall be based on actual wage loss and shall not be subject to the minimum compensation rate set forth in AS 23.30.175 (a). The compensation shall be equal to 80 per cent of the difference between the employee's spendable weekly wages at the

time of injury and the spendable weekly salary, wages, and other remuneration the employee is able to earn. In order to simplify the comparison of the pre-injury spendable weekly wages with the salary, wages, and other remuneration the employee is able to earn, the division may by regulation provide for the modification of the weekly comparison so as to coincide as closely as possible with the injured worker's pay periods.

(b) The amount determined to be salary, wages, and other remunerations the employee is able to earn shall in no case be less than the sum actually being earned by the employee, including earnings from sheltered employment. In the event the employee voluntarily limits his or her income or fails to accept employment commensurate with his or her abilities, the salary, wages, and other remuneration the employee is able to earn shall be deemed to be the amount which would have been earned if the employee did not limit his or her income or accepted appropriate employment. Whenever compensation as set forth in paragraph (a) may be payable, the burden shall be on the employee to establish that any wage loss claimed is the result of the compensable injury.

(c) Such compensation shall be paid during the continuance of such disability, not to exceed a period of 5 years.

(d) If an injured employee, when receiving compensation for temporary partial disability, leaves the employment of the employer by whom he was employed at the time of the accident for which such compensation is being paid, he shall, upon securing employment elsewhere, give to such former employer an affidavit in writing containing the name of his new employer, the place of employment and the amount of wages being received at such new employment and until he gives such affidavit the compensation for temporary partial disability will cease. The employer by whom such employee was employed at the time of the accident for which such compensation is being paid may also at any time demand of such employee additional affidavits in writing containing the name of his employer, the place of his employment and the amount of wages he is receiving, and if the employee, upon such demand, fails or refuses to make and furnish such affidavit, his right to compensation for temporary partial disability shall cease until such affidavit is made and furnished.

AS 23.30.205

INJURY COMBINED WITH PRE-EXISTING IMPAIRMENT

Problem:

1. Cost. Each employer contributes 6 percent of paid claims to support the second injury fund which is utilized by only a few employers and carriers. Employers and their carriers who do not document pre-hire or the current employee medical status essentially forfeit their right to participate in the benefits of the fund. Those employers pay the 6 percent surcharge to support the fund and also the full amount of subsequent claims that do not qualify for reimbursement. Contribution to the fund should be universal as should the utilization.

2. The existing law requires that employers, in order to qualify for reimbursement from the fund, "must establish by written records that the employer had knowledge of the permanent physical impairment before the subsequent injury and that the employee was hired or retained after the employer acquired that knowledge". Pre-employment physicals are costly and for employers who hire the construction trades for short periods of time during projects, the cost can be enormous. Health questionnaires are often inaccurate as the employee fears the continuance of his job if his employer knows his physican condition.

3. The original purpose of the section was to encourage the hiring of the handicapped by relieving employers of the cost of subsequent injuries made more serious by the pre-existing handicap. In this regard the section fails to achieve its purpose as the non-reimbursed portion of the claim can exceed $100,000.

4. Reimbursement is allowed subsequent to 104 weeks. Even though a claim qualifies for reimbursement from the second injury fund the costs associated with the first 104 weeks can be staggering. Consider a case where medical costs are $30,000 during the first 104 weeks (not uncommon) and the employee is entitled to the maximum benefit in 1982 of $942 per week, or $97,968, for a total of $127,968 within the first 104 weeks. This is a high cost to pay, especially if the accident would not have occurred except for the existence of the preexisting handicap.

Solutions:

The cost will increase generally in proportion to the degree to which reimbursement qualifications are liberalized, which is in conflict with solving problems 2, 3, and 4. The cost of the benefit was considered as important as facilitating the hiring of the handicapped, and the resulting compromise recommendation is suggested.

In order to reduce costs, the cost associated with claims must be reduced which will be accomplished in part by the wage-loss program. Additionally, the apportionment provision (section 196 (a)) which refers to permanent total disability and death which is accelerated or aggravated by a preexisting disease or anomaly, was added to apportion to the employee that portion of the cost of disability associated with the aging process: degenerative back disease, arthritis, and others. These factors will reduce benefits in cases where the preexisting condition is not the result of an accident but the result of simply aging. All employers will share in the costs as they do now, but all employers will be able to share in the benefits of the fund equally as each employee with a preexisting condition will be registered with the division. The employer's ability to give physicals or his method of hiring will not determine second injury fund eligibility.

Rather than require employers to absorb the costs associated with documenting prior knowledge of the preexisting condition, a new requirement used successfully in a number of other states has been added. In order for an employer to obtain second injury fund benefits, he must register with the Workers' Compensation Division the name of the employee and a description of the handicap. This pre-registration along with the combined effects of the apportionment and second injury fund should make the employment situation better for the handicapped, decrease costs, and provide absolute knowledge of second injury fund application.

The issue of reimbursement being allowed after 104 weeks being considered too long and too costly was very difficult to analyze without an accurate projection of the cost impact of any change. Considerable support existed for reducing the time period down to 26 or 52 weeks or to base reimbursement upon a percentage (50, 60, 70, or 80 percent of all costs from the first day rather than 100 percent after 104 weeks). Without rating help from the NCCI, it was determined that the 104 week provision had to remain, subject to further study.

Justification:

This section is in part modeled after the Florida provision, but extensively editited, and the existing Alaska statute. The schedule of preexisting conditions has been liberalized slightly to conform with the model act produced by The Council on State Governments, the Workers' Compensation and Rehabilitation Law, Revised. That part of the section pertaining to pre-registration of handicaps was obtained from the Kansas act, although others could have been utilized.

Recommendation:

Sec. 23.30.205 INJURY COMBINED WITH PRE-EXISTING IMPAIRMENT

(a) Legislative intent. It is the purpose of this section to encourage the employment of persons who have existing physical impairments by protecting employers from excess liability for compensation and medical expense when an injury to a physically impaired worker merges with his preexisting permanent physical impairment to cause a greater disability, permanent impairment, or wage-loss than would have resulted from the injury alone. The division shall inform all employers of the existence and function of the second injury fund. This section shall not be construed to create or provide any benefits for injured employees or their dependents not otherwise provided by this chapter. The entitlement of an injured employee or his dependents to compensation under this chapter shall be determined without regard to this section, the provisions of which shall be considered only in determining whether an employer or carrier who has paid compensation under this chapter is entitled to reimbursement from the second injury fund.

(b) Definitions. As used in this subsection:

(1) "Permanent physical impairment" means any permanent condition due to previous accident or disease or any congenital condition which is, or is likely to be, a hindrance or obstacle to employment.

(2) "Merger" describes or means that:

(A) Had the permanent physical impairment not existed, the subsequent injury would not have occurred;

(B) The permanent disability, permanent impairment, or wage-loss resulting from the subsequent injury is materially and substantially greater than that which would have resulted had the permanent physical impairment

not existed and the employer has been required to pay, and has paid, permanent total disability, permanent impairment, or wage-loss for that materially and substantially greater disability; or

(C) Death would not have been accelerated had the permanent physical impairment not existed.

(c) If an employee who has a preexisting permanent physical impairment incurs a subsequent permanent impairment from injury arising out of and in the course of his employment which merges with the preexisting permanent physical impairment to cause a permanent impairment, wage-loss, total disability, or the need for medical and related benefits, the employer shall, in the first instance, pay all compensation provided by this chapter, but subject to the limitations in subsection (e), such employer shall be entitled to reimbursement from the second injury fund created by AS 23.30.040 for the compensation and medical and related benefits he has been required to provide under this chapter subsequent to those payable for the first 104 weeks.

(d) When death results. If death results from the subsequent permanent impairment contemplated in subsection (c), and it shall be determined by the board that the death resulted from a merger, the employer in the first instance will pay the funeral and death benefits prescribed by this chapter, but he shall be reimbursed from the second injury fund created by AS 23.30.040 for for compesation and medical and related benefits payable in excess of 104 weeks.

(e) Reimbursement Limitations

(1) In order to qualify under this section for reimbursement from the second injury fund the employer must, prior to the occurrence of a subsequent injury to an impaired or handicapped employee, file with the division, on a form prescribed by the division, a notice of the employment or retention of the impaired employee, together with a description of the impairment or handicap claimed.

(2) No condition shall be considered a "permanent impairment" unless it is one of the following conditions:

(A) Epilepsy

(B) Diabetes

(C) Cardiac disease

(D) Arthritis

(E) Amputated foot, leg, arm or hand

(F) Loss of sight of one or both eyes or a partial loss of uncorrected vision of more than 75 per cent bilaterally

(G) Residual disability from poliomyelitis

(H) Cerebral palsy

(I) Multiple sclerosis

(J) Parkinson's disease

(K) Cerebral vascular accident

(L) Tuberculosis

(M) Silicosis

(N) Psychoneurotic disability following treatment in a recognized medical or mental institution

(O) Hemophilia

(P) Chronic osteomyelitis

(Q) Ankylosis of joints

(R) Hyperinsulism

(S) Muscular dystrophies

(T) Arteriosclerosis

(U) Thrombophlebitis

(V) Varicose veins

(W) Heavy metal poisoning

(X) Ionizing radiation injury

(Y) Compressed air sequelae

(Z) Ruptured intervertebral disk, or

(AA) any permanent physical condition which, prior to the injury, constitutes a 20 per cent impairment of the body as a whole determined pursuant to AS 23.30.190 (a)(3).

(3) The second injury fund shall not be liable for any costs, interest, penalties, or attorneys' fees.

(4) An employer's or carrier's right to apportionment or deduction pursuant to AS 23.30.196 shall not preclude reimbursement from said fund except when the merger comes within the definition of paragraph (b)(2)(B) and such apportionment or deduction relieves the employer or carrier from providing the materially and substantially greater permanent disability benefits otherwise contemplated in said paragraphs.

(f). The second injury fund may not be bound as to any question of law or fact by reason of an award or an adjudication to which it was not a party or in relation to which the commissioner of labor was not notified at least 3 weeks before the award or adjudication, that the fund might be subject to liability for the injury or death.

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

AS 23.30.210
DETERMINATION OF WAGE-EARNING CAPACITY

This section is in direct conflict with the wage-loss theory and its repeal is essential.

Recommendation:

Sec. 23.30.210 DETERMINATION OF WAGE-EARNING CAPACITY

REPEALED

AS 23.30.215
COMPENSATION FOR DEATH

Problems and Solutions:

1. The $1,000 death benefit is inadequate. ACE recommends that the death benefit be increased to $2,500 from the existing $1,000. The $2,500 is recommended by the Division of Workers' Compensation in H.B. 159 along with a cost of living proposal. ACE supports the $2,500 as a more appropriate benefit but believes automatic escalators to be detrimental to proper rating. Future increases can be requested.

2. Remarriage penalty is considered unjust in today's society. If a widow or widower entitled to death benefits remarries two (2) years of benefit entitlement are paid in a lump sum and future benefits are forfeited. ACE recommends the deletion of the remarriage penalty.

Justification:

ACE recommendation.

Recommendation:

Sec. 23.30.215 COMPENSATION FOR DEATH

(a) If death results within one year after the accident or follows continuous disability and results from the accident within 5 years thereafter, the compensation is known as the death benefit and is payable in the following amounts to or for the benefit of the following persons:

(1) Reasonable and necessary funeral expenses not exceeding $2,500 [$1,000];

(2) If there is a widow or widower or a child or children of the deceased, the following percentages of the deceased employee's spendable [AVERAGE] weekly wages:

(A) 80 [66 2/3] per cent for the widow or widower with no children;

(B) 40 [33 1/3] per cent for the widow or widower with one child and 40 [33 1/3] per cent for the child;

(C) 80 [20] per cent for the widow or widower with two or more children, payable 1/3 to the widow or widower, and 2/3 divided equally among the children [AND 46 2/3 PER CENT DIVIDED EQUAILY AMONG THE CHILDREN];

(D) deleted

(E) 80 [66 2/3] per cent for an only child where there is no widow or widower;

(F) Deleted

(G) 80 [66 2/3] per cent, divided equally, if there are two or more children and no widow or widower.

(3) [IF THE WIDOW OR WIDOWER REMARRIES, SHE OR HE IS ENTITLED TO BE PAID IN ONE SUM AN AMOUNT EQUAL TO THE COMPENSATION TO WHICH THE WIDOW OR WIDOWER WOULD OTHERWISE BE ENTITLED IN THE TWO YEARS COMMENCING ON THE DATE OF REMARRIAGE AS FULL AND FINAL SETTLEMENT OF ALL SUMS DUE THE WIDOW OR WIDOWER.]

(4) If there is no widow or widower or child or children, then for the support of father, mother, grandchildren, brothers and sisters, if dependent upon the deceased at the time of the injury, 35 per cent of the spendable [AVERAGE] weekly wage of the deceased to such beneficiaries, share and share alike, not to exceed $20,000 in the aggregrate.

(b) In computing death benefits, the spendable [AVERAGE] weekly wage of the deceased shall be computed under AS 23.30.220 of this chapter and shall be paid in accordance with AS 23.30.155 of this chapter and subject to the weekly maximum limitation in the aggregate as provided in AS 23.30.175 of this chapter, but the total weekly compensation may not be less than $45 for a widow or widower nor less than $15 weekly to a child or $30 for children.

(c) All questions of dependency shall be determined as of the time of the injury, or death.

(d) Compensation under this chapter to aliens not residents (or about to become non-residents) of the United States or Canada is the same in amount as provided for residents, except that dependents in a foreign country are limited to widow or widower and child or children, or if there is no widow or widower and child or children, to surviving father or mother whom the employee has supported, either wholly or in part, for a period of one year before the date of injury. The board, at its option, or upon the application of the employer or carrier, may commute all future installments of compensation to be paid to an alien dependent who is not a resident of the United States or Canada by paying or causing to be paid to him one-half of the commuted amount of the future installments of compensation as determined by the board.

(e) Death benefits payable to a widow or widower in accordance with (a) of this section shall abate as that person ceases to be entitled and does not inure to persons subject to continued entitlement. In the event a child ceases to be entitled, that child's share shall inure to the benefit of the surviving spouse subject to adjustment as provided in (f) of this section.

(f) Except as provided in (g) of this section, the death benefit payable to a widow or widower shall:

(1) five years following date of death of the deceased worker be reduced to 66 2/3 per cent of the benefit being then paid;

(2) eight years following date of death of the deceased worker be reduced to 50 per cent of the benefit being then paid;

(3) terminate 10 years following death of the deceased worker.

(g) The provisions of (f) of this section do not apply to a widow or widower who at the time of death of the deceased worker is permanently and totally disabled. The death benefits payable to a widow or widower are not subject to reduction under (f) of this section after the widow or widower has attained the age of 52 years.

(h) In the event a deceased worker is survived by children of a former marriage not living with the surviving widow or widower, then those children shall receive the amount being paid under a decree of child support; the difference between this amount and the maximum benefit payable under this section shall be distributed pro-rata to the remainder of those entitled.

(i) In the event the total amount of all benefits computed under (a)(2) of this section exceeds the maximum benefit provided in AS 23.30.175 of this chapter, the maximum benefit under AS 23.30.175 of this chapter shall be pro-rated among entitled survivors.

AS 23.30.220

DETERMINATION OF SPENDABLE [AVERAGE] WEEKLY WAGE

Problems:

1. The utilization of 66 2/3 percent of average weekly wage allows high wage earners to bring home practically the same after tax dollars while injured than they would working. A disincentive to return to work.

For low income wage earners who have fewer discretionary dollars, they are bring home considerably less than their normal after tax income when injured. (see Exhibit VII)

2. The average weekly wage is presently computed utilizing the highest earnings recorded over the past 3 calendar years. Employers who have jobs available avoid hiring employees who have work histories showing high prior earnings. Employers ordinarily willing to employ workers under a rehabilitation or retraining program can be hit with shock losses for subsequent injuries with compensation based on prior earnings.

3. Somewhat unique to Alaska are the North Slope jobs which utilize an extraordinary shift (3 weeks on, 3 weeks off). Normal formulas for computing average weekly wage can produce a windfall to the employee or the employer, or be detrimental to either.

4. Workers who are employed on a permanent basis working 8 A.M. - 5 P.M., five days a week, are paid based upon last year's wage, but should be paid on existing wage. All workers are entitled to compensation based upon existing rather than last year's wage.

5. Workers' compensation premiums are paid on existing wages but benefits paid often show no relationship to premiums which introduces

variability into the rating scheme.

6. Employees holding two jobs or who are self employed on a part- time basis, can draw benefits from one employer far in excess of normal wages paid. Employer's should know before hand of outside wages.

7. Employees who have no wage history because they are new to the work force, are always paid the minimum of $65 per week by carriers until the board hears the case and assigns a compensation rate.

Solutions:

1. As recommended in the model law drafted by The Council on State Governments, the Workmen's Compensation and Rehabilitation Law, Revised, when the maximum benefit exceeds 100 percent of the state average weekly wage (Alaska is 200 percent), average weekly wage should be dropped in favor of spendable weekly wage. Spendable weekly wage is gross wage less federal income and social security tax.

ACE recommends the use of 80 percent of the spendable weekly wage. (see Exhibit VIII) In comparing this benefit level with the existing benefit level, be aware that the recommended benefit is 80 percent of the current spendable weekly wage. The existing law bases average weekly wage on last year's wage which is generally lower than existing wages. The utilization of this formula will insure the same income replacement level for all wage earners, high and low.

2, 3 & 4. Utilizing an employees highest earnings during any of the three previous calendar years has some good and bad features depending upon the evaluator's point of view. Numerous possibilities were discussed, including basing temporary disability benefits on current wage and permanent disability benefits upon the average of the past 3 years. They were discarded in favor of the recommendation because of our desire to base the benefit on current wage rates rather than previous wages. An employee earning $35,000 on a new job is entitled to receive compensation based upon the existing wage, not $25,000, the salary earned in a previous job.

The recommendation covers every employee as fairly as possible, from the worker on annual, monthly, weekly, or hourly rates of pay; even the worker employed on an exceptional North Slope shift. If a current wage rate is not applicable and prior year wages need to be utilized, prior year wages are divided by 50 rather than 52 to approximate the effect of inflation. (see subsection (d)).

5. Compensation paid is more directly related to existing wage rates bringing a closer correlation between benefits and premiums.

6. The recommendation excludes a reference to self employment income in the computation of average weekly wage. However, subsection (n) makes the employer liable for compensation derived from other employment if the employer is aware of the other employment.

7. Employees who have no wage history, will now have compensation rates based upon actual earnings over the previous 13 weeks, or what he would have earned had he worked the past 13 weeks, eliminating the necessity for board hearings and the issuance of $65 minimum payment checks during the initial weeks of disability.

Justification:

The majority of this recommendation has been adopted from the model act prepared by The Council on State Governments, the Workmen's Compensation and Rehabilitation Law, Revised. Also adopted by Kansas, Kentucky, Idaho, and others.

Recommendation:

AS 23.30.220 DETERMINATION OF SPENDABLE [AVERAGE] WEEKLY WAGE

Except as otherwise provided in this chapter, the spendable weekly wage of the injured employee at the time of the injury is the basis for computing compensation, and shall be the employee's average weekly wage minus the deductions for federal income and social security taxes that the employee would pay if he were to receive his average weekly wage for a year and if he were to take the standard income tax deductions for the maximum number of dependents to which he is entitled for federal income tax purposes. The Division shall annually prepare formulas which shall be used to calculate an employee's spendable weekly wage on the basis of his average weekly wage and of his number of dependents.

(a) If at the time of the injury the wages are fixed by the week, the amount so fixed shall be the average weekly wage;

(b) If at the time of the injury the wages are fixed by the month, the average weekly wage shall be the monthly wage so fixed multiplied by twelve and divided by fifty-two;

(c)(1) If at the time of the injury the wages are fixed by the day, hour, or by the output of the employee, the average weekly wage shall be the wage most favorable to the employee computed by dividing by thirteen the wages said employee earned in the employ of the employer in the first, second, third, or fourth period of thirteen consecutive calendar weeks in the fifty-two weeks immediately preceding the injury.

(2) If the employee has been in the employ of the employer less than thirteen calendar weeks immediately preceding the injury, his average weekly wage shall be computed under the foregoing paragraph, taking the wages for such purpose to be the amount he would have earned had he been so employed by the employer the full thirteen calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation.

(d) Notwithstanding (a), (b), and (c) above, if an employee is scheduled to work a pre-determined number of days, weeks, or months and receives a pre-determined number of days, weeks, or months off, the employee's average weekly wage shall be determined by accumulating wages earned from the scheduled work and dividing by the total number of scheduled days, weeks, or months worked and given off.

(e) If at the time of the injury the wages are fixed by the year, the average weekly wage shall be the yearly wage so fixed divided by fifty-two;

(f) If at the time of the injury the hourly wage has not been fixed or can not be ascertained, the wage for the purpose of calculating compensation shall be taken to be the usual wage for similar services where such services are rendered by paid employees.

(g) In occupations which are typically seasonal or characterized by intermittent periods of employment and unemployment, and therefore normally cannot be carried on throughout the year, the spendable weekly wage shall be computed using one fiftieth of the total wages which the employee has earned from all occupations during the immediately preceding calendar year.

(h) When the employee is working under concurrent contracts with two or more employers and the defendant employer has knowledge of such employment prior to the injury, his wages from all such employers shall be considered as if earned from the employer liable for compensation.

(i) If the employee was a minor, apprentice or trainee when injured, and it is established that under normal conditions his wages should be expected

to increase during the period of disability, that fact may be considered in computing his average weekly wage.

AS 23.30.235
CASES IN WHICH NO COMPENSATION IS PAYABLE

Problems:

1. Requires that intoxication be the "sole" cause of the injury, which is almost impossible to show.
2. Intoxication is not defined.
3. Entire section is not effective in cases involving alcohol.
4. Employers go to great expense to establish safety rules to protect employees. Employees can wilfully violate rules and still receive compensation.
5. Employees can misrepresent his physical condition when applying for a job. When such misrepresentations result in the employer assuming an increased amount of risk, there is no recourse for the employer.

Solutions:

1, 2, & 3. Subsection (a) in the recommendation deletes the word "solely" in conjunction with the cause of alcohol related injuries. In its place is a double standard:

(a) "if the injury was occasioned by an employee under the influence of alcohol".

(b) "if there was at the time of injury 0.10 percent or more by weight of alcohol in the employee's blood ..."

This change will have broad implications for employee's on business trips or employees working in remote sites in Alaska, as many alcohol related injuries will not be covered by compensation. It should be remembered by the reader that employees will not be destitude because of this change as such accidents will be covered by non-occupational accident and sickness programs that virtually every employee has in his non-occupational benefit package.

This recommendation is adopted from Florida where it has been proven to be effective for several years

4. Almost every state includes provisions concerning a reduction or forfeiture of compensation when safety rules are willfully disregarded or ignored or when an employee injures himself while not using available safety devices. The wording employed by many states is similar, and the recommendation adopts common wording. Reviewing Larson, Workers' Compensation Laws on this subject reveals very limited success in proving willful intent.

5. The State of Alaska, for workers' compensation, is a "last employer" state. The last employer takes the employee as he finds him and any preexisting physical impairment which causes subsequent disability is the risk of the new employer.

Employers believe they have a right to be informed of an employee's actual physical condition when hired, as the unexpected cost of injury related to preexisting conditions can be a major loss. Employees, fearful of not being hired, often misrepresent their physical condition in employment applications. The provisions of this recommendation in subsection (c) allow an employer to discontinue the payment of compensation where an employee misrepresented his pre-hire physical condition which subsequently contributed to a claim. With an apportionment provision (Section 196) reducing the employer's liability when preexisting conditions are involved in an injury, and the registration of the employee and handicap with the second injury fund, the employer's willingness to hire the handicapped should improve considerably, thereby eliminating the need for an employee to misrepresent his physical condition.

This provision has been adopted from the Kansas law and conversations with adjusters there indicate it is only effecitve in those cases involving "gross" misrepresentation - our target.

Justification:

1, 2, & 3. Adopted from the Florida Workers' Compensation Act, Section 440.09(3).

4. Standard wording in almost all workers' compensation acts.

5. Kansas Workers' Compensation Act, Section 44.567 (2)(c).

Recommendation:

Sec. 23.30.235 CASES IN WHICH NO COMPENSATION IS PAYABLE OR IS REDUCED

(a) No compensation shall be payable if the injury was occasioned by an

employee under the influence of alcohol; by the influence of any narcotic drugs, barbiturates, or other stimulants which affected the employee to such an extent that the employee's normal faculties were impaired; or by the willful intention of the employee to injure or kill himself, herself, or another. If there was at the time of the injury 0.10 per cent or more by weight of alcohol in the employee's blood, it shall be presumed, in the absence of substantial evidence to the contrary, that the injury was occasioned primarily by the intoxication of the employee. Per cent by weight of alcohol in the blood shall be based upon grams of alcohol per 100 milliliters of blood.

(b) When the injury is caused by the willful disobedience of a safety rule or the willful failure to use a safety device, compensation as provided in this chapter shall be reduced 25 per cent.

(c) No compensation is payable if an employee, in connection with an application for employment or an employment medical examination or otherwise in connection with obtaining or retaining employment with the employer, knowingly

(1) misrepresents himself or herself as not having an impairment or handicap;

(2) misrepresents himself or herself as not having had any previous accidents;

(3) misrepresents himself or herself as not having previously been disabled or compensated in damages or otherwise because of any prior accident, injury or disease;

(4) misrepresents himself or herself as not having had any employment terminated or suspended because of any prior accident, injury or disease;

(5) misrepresents himself or herself as not having any mental, emotional or physical impairment, disability, condition, disease or infirmity; or

(6) misrepresents or conceals any facts or information which is reasonably related to the employee's possible subsequent claim for workers' compensation.

AS 23.30.236

RESIDENT EMPLOYEES

(A NEW SECTION)

Problem:

Employees working in remote sites are covered by workers' compensation 24 hours per day, and for employers whose primary business is at remote sites, the cost of claims resulting from injuries occurring during off duty hours is enormous. Testimony before legislative committees during the past two years has repeatedly brought to light the unfairness of charging the employer with such claims. The testimony, whether from employers, attorneys, or unions, was unanimous in that the employer should not have those claims charged to compensation. (see Exhibit IX, testimony, Alascom Inc., January 16, 1981)

Solution:

The situation in Alaska is the result of Supreme Court decisions, who undoubtedly had no other recourse as the workers' compensation act gave no legislative guidance in these cases. Therefore, in order to change the situation, legislative guidance is required.

The problem was analyzed as one which combines two common workers' compensation problems which have ample case law history; resident employees and recreational and social activities. Larson, Workers' Compensation Law, devotes section 22 to recreational and social activities and section 24 to resident employees. His summation of the laws of the states is easy to read and is concise. Larson states:

> § 22.00 Recreational or social activities are within the course of employment when
>
> 1. They occur on the premises during a lunch or recreation period as a regular incident of the employment; or
>
> 2. The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or
>
> 3. The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and moral that is common to all kinds of recreation and social life.
>
> § 24.00 When an employee is required to live on the premises, either by his contract of employment or by the nature of the

employment, and is continuously on call (whether or not actually on duty), the entire period of his presence on the premises pursuant to this requirement is deemed included in the course of employment. However, if the employee has fixed hours of work outside of which he is not on call, compensation is awarded usually only if the source of injury was a risk associated with the conditions under which claimant lived because of the requirement of remaining on the premises.

These two summations were combined into the recommended Section, 236 Resident Employees. Others have recommended that injuries which occur outside of normal work hours be excluded from coverage altogether but a cursory review of Larsons, Workers' Compensation Laws, reveals that many legitimate claims would be excluded at remote sites that would be covered under the same circumstances in urban employment.

Justification:

No other state has severe problems in this area which precluded ACE from seeking guidance from other state statutes. The recommendation is original, but the words are time tested.

Recommendation:

AS 23.30.236 RESIDENT EMPLOYEES

(a) When an employee is required to live on the premises, either by his contract of employment or by the nature of the employment, and is continuously on call, the entire period of his presence on the premises pursuant to this requirement is deemed included in the course of employment except when the source of the injury derives from an activity that is strictly personal to the employee. However, if the employee is not continuously on call, compensation and medical and related benefits shall not be paid unless

(1) the accident occurs on the premises during a lunch or recreational period which is a regular incident of the employment, or

(2) the employer has expressly or impliedly required participation, or made the activity part of the services of an employee bringing the activity within the orbit of employment, or

(3) the employer derives a substantial direct benefit from the activity beyond the intangible value of

(A) improvement in employee health or morale that is common to all kinds of recreation and social life, or

(B) recreation as an economic factor in industrial relations, and

(4) the source of the injury was a risk distinctly associated with the conditions under which the employee lived because of the requirement of remaining on the premises.

(b) In any case, notwithstanding (a), compensation for disability shall be limited to reasonable travel time both to and from the point where adequate medical treatment can be obtained and the number of days the employee was under the care of the physician.

AS 23.30.238
COORDINATION WITH OTHER BENEFITS
(A NEW SECTION)

Problem:

Employee's often submit claims that are denied by employers or carriers, and on appeal to the board or courts, the controversion is reversed and benefits awarded. In making a case for occupational benefits, the employee defeats a non-occupational claim under a group program. As a result, the employee finds both workers' compensation and group insurance non-responsive to the claim for injury. All benefits are denied and the appeal process can take weeks, months, or years. Occasionally, non-occupational plans step in and voluntarily pay but are hurt financially when employees fail to return the benefits when compensation is finally awarded. Employers and carriers cannot honor a group insurance company's request for reimbursement out of compensation due.

Solution:

The purpose of this section is to assure employees who submit controverted claims, that if compensation is denied, non-occupational group plans will pay, while at the same time protecting the non-occupational group insurer's access to future compensation awarded.

Justification:

Delaware model Workers' Compensation Act. Section 14.

Recommendation:

Sec. 23.30.238 COORDINATION WITH OTHER BENEFITS

(a) Sickness and/or Accident Health Insurance.

1. In any case where, due to a dispute over whether benefits are due to an employee under this chapter, benefits are not being paid by the employer or its workers' compensation carrier and the employee is covered by a sickness and/or accident insurance policy provided by the employer or a collective bargining unit of a type which would pay him benefits only if the injury is determined not to be compensable under this chapter, the sickness and/or accident carrier shall make all payments it would normally be required to make to the employee under its policy if the injury had been determined not to be compensable under this chapter, pending a final determination of compensibility; provided, however, that it shall be required to make such payments only to the extent they would also be required under this chapter if the injury is compensable.

2. If the injury is subsequently and finally determined to be compensable under this chapter, the party required to pay the workers' compensation claim shall, upon notification of the amount due, promptly pay to the sickness and/or accident carrier all sums paid by it to the injured employee, along with the carriers reasonable costs and attorneys' fees necessary to enforce this right if not promptly so paid; provided, however, that the obligation of the workers' compensation carrier to make such payment shall be solely limited to the payments required under this chapter.

3. All sums paid by the sickness and/or accident carrier pursuant to this subsection shall count toward the total compensation, if any, due to the injured employee under this chapter.

4. In no case shall this section be interpreted to relieve the sickness and/or accident carrier from any liability for payment otherwise due under its contract of insurance, including but not limited to its obligation to make supplemental payments in workers' compensation claims to the extent required by that contract of insurance.

AS 23.30.239

EMPLOYEE ELIGIBLE FOR BENEFITS UNDER THIS CHAPTER WHO HAS RECEIVED OR IS ENTITLED TO RECEIVE UNEMPLOYMENT COMPENSATION

(A NEW SECTION)

Problem:

The Workers' Compensation Act has been called upon throughout the years to compensate employees after they reach the date of maximum medical improvement and before that point in time when employment opportunities improve and jobs become available. The practice is based upon the theory that a compensable injury caused a loss of the job, and therefore the unemployment is the result of the industrial injury and workers' compensation is proper until a new job is available.

Solution:

In such cases it is the belief of ACE that the primary benefit should be unemployment compensation and that workers' compensation, if still payable, shall be supplemental to the unemployment compensation. This provision is successful in other states in reducing employer costs.

Justification:

Adopted from the Florida Workers' Compensation Act, Section 440.15(11).

Recommendation:

Sec 23.30.239 EMPLOYEE ELIGIBLE FOR BENEFITS UNDER THIS CHAPTER WHO HAS RECEIVED OR IS ENTITLED TO RECEIVE UNEMPLOYMENT COMPENSATION

(a) No compensation shall be payable for temporary total disability or permanent total disability under this chapter for any week in which the injured employee has received, or is receiving, or is eligible for unemployment compensation benefits.

(b) If an employee is entitled to both compensation for wage-loss pursuant to AS 23.30.190(b) and unemployment compensation benefits, such unemployment compensation benefits shall be primary and the compensation for wage-loss shall be supplemental only, the sum of the two benefits not to

exceed the amount of wage-loss compensation which would otherwise be payable. For purposes of termination of wage-loss pursuant to AS 23.30.190(b)(3)(A), the term "payable" shall be construed to include payment of unemployment compensation benefits in lieu of compensation for wage-loss as provided in this section.

AS 23.30.250
PENALTY FOR MISREPRESENTATION

Problems:

1. Provision would apply only to someone providing false information to "obtain" a benefit; an employee. The provision should also apply to an adjuster who might mislead an injured employee.

2. The existing statute is not an effective tool in prosecuting someone suspected of defrauding the system.

Solution:

Reviewing the statutes of other states in conjunction with the information contained in Larsons, Workers' Compensation Laws, reveals that statutes vary widely. Their biggest attribute is the deterrent they pose to the person who might otherwise consider utilizing a deceptive tactic to further his own desire.

The recommendation should be adopted, and the provisions and penalty advertised, as people pay attention to the word "felony".

The provision is infinitely more complete than the existing statute which will contribute a great deal in enforcing the provision when needed.

Justification:

Adopted from the Florida Workers' Compensation Act, Section 440.37(1) and (2)(a).

Recommendation:

Sec. 23.30.250 PENALTY FOR MISREPRESENTATION

(a) Any person who wilfully makes a false or misleading statement or representation for the purpose of obtaining or denying any benefit or payment under this chapter, or who presents or causes to be presented any written or oral statement as part of, or in support of, a claim for payment or other

benefit pursuant to any provision of this chapter, knowing that such statement contains any false or misleading information concerning any fact or thing material to such claim, or who prepares or makes any written or oral statement that is intended to be presented to any employer, insurance company, or self-insured program in connection with, or in support of, any claim for payment or other benefit pursuant to any provision of this chapter, knowing that such statement contains any false or misleading information concerning any fact or thing material to such claim, is guilty of theft as defined in AS 11.46.100(3) and punishable as provided in AS 11.46.120 - 11.46.150 [A MISDEMEANOR, AND UPON CONVICTION IS PUNISHABLE BY A FINE OF NOT MORE THAN $1,000, OR BY IMPRISONMENT FOR NOT MORE THAN ONE YEAR, OR BY BOTH].

(b) All claim forms as provided for in this chapter shall contain a notice that clearly states in substance the following: "Any person who, knowingly and with intent to injure, defraud, or deceive any employer or employee, insurance company, or self-insured program, files a statement of claim containing any false or misleading information is guilty of a felony."

AS 23.30.265
DEFINITIONS

ACE has added five (5) new definitions and has altered the definitions of three terms.

The word "accident" was defined as it is now used in the definition of injury.

The phrase "date of maximum medical improvement" is added because it becomes a significant date in the wage-loss program; specifically section 190, Permanent Impairment and Wage-Loss. That date triggers the time period (20 day) limitation after which any lump sum impairment award is due and payable. In the wage-loss subsection it is the date when the wage-loss benefit begins as the employee is entitled to total temporary disability prior to that time.

The term "primary duties" is used in section 094, Rehabilitation. The term is used to differentiate between employees entitled to vocational rehabilitation and those who are not. If an employee can perform the primary duties of his occupation or any other occupation for which he is

qualified by education, training, and experience, he is not entitled to vocational rehabilitation.

The term "suitable gainful employment" is used in the Rehabilitation section to define the goal of the rehabilitation effort and add direction to future rehabilitation programs.

The term "substantial earning capacity" is primarily used in section 180, Permanent Total Disability. If after injury and after reaching the date of maximum medical improvement, an employee has a "substantial earning capacity", disability is not considered permanent and total. The wage-loss benefit would be payable in these cases rather than the permanent total benefit.

The definition of "injury" was also modified in that portion which addresses breakage or damage to prosthetic devices. The problem with the current definition is that it is not necessary to have an accident to the body in conjunction with or simultaneously with damage to teeth or prosthetic devices. Fillings falling out of teeth are covered at remote site operations, glasses falling off an employee's face are covered, all without an accident to the body. (see Exhibit IX) ACE believes the intent of the Workers' Compensation Act has been exceeded and requires tightening.

Originally requested in H.B. 159 by the Workers' Compensation Division, "pain clinic services" has been added in the definition of medical and related benefits. The definition of medical and related benefits also specifically included "physical rehabilitation", apparently to the exclusion of "vocational rehabilitation". Section 094, Rehabilitation covers both, and both should be considered medical, therefore necessitating the deletion of the word "physical".

The definition of "wages" has also been altered to clarify its meaning in regard to board, rent, housing, lodging or similar advantages received in remote site work and for clarification of the status of employee benefits.

The value of lodging in remote site work is substantial and including that value in wages would materially affect the employer's compensation costs. The value of lodging is normally included in wage calculations when the salary has been reduced to offset the cost of on-site housing when on-site housing is to the advantage of the employer. Wage rates have not been reduced for remote site employment and therefore the wage base for workers' compensation should not include such value.

Clarification of the status of employee benefits is also deemed desirable as it has not been addressed by the legislature or courts in Alaska. It has been discussed in terms of wages lost when an employee is totally and permanently disabled and thereafter looses his employer funded benefit package. Excluding benefits from the definition of wages allows employers and employees to bargain solutions to any remaining problem.

The words "in force at the time of hiring" have also been deleted as recommended in H.B. 159 proposed by the Workers' Compensation Division.

Recommendation:

Sec. 23.30.265 DEFINITIONS. as used in this chapter

(1) "accident" means only an unexpected or unusual event or result, happening suddenly, the results of which are neither expected or intended from the standpoint of the employee.

(2) "adoption" or "adopted" means legal adoption before the time of the injury;

(3) "board" means the Alaska Workers' Compensation Board;

(4) "child" includes a posthumous child, a child legally adopted before the injury of the employee, a child in relation to whom the deceased employee stood in loco parentis for at least one year before the time of injury, and a stepchild or acknowledged illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent on him;

(5) "grandchild" means a child as defined in (4) of this section of a child as defined in (4) of this section;

(6) "brother" and "sister" include stepbrothers and stepsisters, half brothers and half sisters, and brothers and sisters by adoption, but do not include married brothers and married sisters unless wholly dependent on the employee;

(7) "child," "grandchild," "brother," and "sister," include only persons who are under 19 years of age, persons who, though 19 years of age or over, are wholly dependent upon the deceased employee and incapable of self-support by reason of mental or physical disability, and persons of any age while they are attending the first four years of vocational school, trade school, or college, and persons of any age while they are attending high school;

(8) "compensation" means the money allowance payable to an employee or his dependents as provided for in this chapter, and includes the funeral benefits provided for in this chapter;

(9) "date of maximum medical improvement" means the date after which further recovery from, or lasting improvement to, an injury or disease can no longer resonably be anticipated, based upon reasonable medical probability;

(10) "death" as a basis for a right to benefits means only death resulting from an injury;

(11) "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment;

(12) "employee" means an employee employed by an employer as defined in paragraph (13);

(13) "employer" means the state or its political subdivison or a person employing one or more persons in connection with a business or industry coming within the scope of this chapter and carried on in this state;

(14) "injury" means accidental injury or death arising out of and in the course of employment, and an occupational disease or infection which arises naturally out of the employment or which naturally or unavoidably results from an accidental injury, and includes breakage or damage to eyeglasses, hearing aids, dentures, teeth, and [OR] any prosthetic devises which function as part of the body, but only when damage is shown to be part of, or in conjunction with and as a result of, an accident in the normal course of employment, and further includes an injury caused by the willful act of a third person directed against an employee because of his employment.

(15) "insurance director" refers to the person who heads the insurance division or section of the Department of Commerce and is charged with the administration of the state insurance laws;

(16) "married" includes a person who is divorced but is required by the decree of divorce to contribute to the support of his former spouse;

(17) "medical and related benefits" includes but is not limited to physicians' fees, nurses' charges, pain clinic services, hospital services,

hospital supplies, medicine and prosthetic devices, [PHYSICAL] rehabilitation, and treatment for the fitting and training for use of such devices as may reasonably be required which arises out of or is necessitated by an injury, and transportation charges to the nearest point where adequate medical facilities are available;

(18) "parent" includes stepparents and parents by adoption, parents-in-law, and a person who for more than three years before the death of the deceased employee stood in the place of a parent to him, if dependent on the injured employee;

(19) "permanent impairment" means any anatomic or functional abnormality or loss, existing after the date of maximum medical improvement, which results from injury;

(20) "physician" includes doctors of medicine, surgeons, chiropractors, osteopathys, dentists, and opteomyelits;

(21) "primary duties" are those activities which comprise the substantial amount of time for, and are essential to, the performance of that position after the employer has made reasonable accommodations for the worker's physical impairments;

(22) "reserve rate" means the unencumbered second injury fund balance on October 31 of each year as a percentage of disbursements from the second injury fund during the twelve month period ending on June 30 of the same calendar year.

(23) "self-insurers" means an employer who, instead of insuring his liability under this chapter as it provides, elects to pay directly the benefits provided for, and who has furnished to the board satisfactory proof of his financial ability to make the direct payments;

(24) "suitable gainful employment" means employment or self employment which is reasonably attainable in light of the injured individual's age, educational background, previous occupation, and injury and which offers an opportunity to restore the individual as soon as practical and nearly as possible to his average weekly earnings at the time of his injury;

(25) "substantial earning capacity" means that an employee is engaged in, or is physically capable of engaging in, gainful employment, including light work;

(26) "widow" includes only the decedent's wife living with or dependent for support upon him at the time of his death, or living apart for

justifiable cause or by reason of his desertion at such a time;

(27) "widower" includes only the decedent's husband living with or dependent for support upon her at the time of her death, or living apart for justifiable cause or by reason of her desertion at such a time;

(28) "prosthetic devices" includes but is not limited to eyeglasses, hearing aids, dentures, and such other devices and appliances, and the repairment or replacement of the devices necessitated by ordinary wear and arising out of an injury;

(29) "volunteer fireman" means an individual whose name is registered with the state fire marshal as a member of a regularly organized volunteer fire department or who serves with a full-time fire department on a temporary, voluntary basis;

(30) "regularly organized volunteer fire department" means a volunteer fire department registered with the state fire marshal which has official recognition and financial support from the political subdivision where it is situated;

(31) "volunteer policeman" means an individual who serves as a peace officer with a full-time police department of a general law or home rule municipality on a temporary, voluntary basis;

(32) "volunteer ambulance attendant" means an individual who serves as an ambulance attendant on a temporary, voluntary basis with a volunteer or full-time fire department or municipal ambulance service of a general law or home rule municipality;

(33) "wages" means the money rate at which the service rendered is recompensed under the contract of hiring, [IN FORCE AT THE TIME OF THE INJURY,] and includes the reasonable value to the employee of board, rent, housing, lodging, or similar advantage received from the employer, gratuities received in the course of employment from <u>other</u> [OTHERS] than the employer, <u>except the value of board, rent, housing, lodging or similar advantage received from an employer in conjunction with remote site employment, and excluding in any situation the cost or value of employee benefits provided voluntarily or by labor agreement by an employer;</u>

OCCUPATIONAL DISEASES

During the Legislative hearings considerable testimony was presented describing the inadequacy of the Workers' Compensation Act in meeting the needs of workers who suffer from an occupational disease known as asbestosis. The disease results from the inhalation of asbestos fibers causing damage to the lungs which is practically impossible to diagnose prior to death.

In the Alaska Workers' Compensation Act, the word "injury", by definition, includes occupational disease. For a normal or regular occupational disease the coverage provided appears adequate and responsive. Because of the peculiar traits of asbestosis, the coverage provided under the act has been demonstrated to be non-existent in time of need.

The ACE study has not been able to cope with this disease in that people experienced and knowledgable in this disease do not reside in Alaska. Further study is needed in order to make intelligent and meaningful recommendations on how it should be integrated into the workers' compensation system.

Therefore, we recommend that the Alaska legislature will continue to study this desease and its effects on Alaskan residents, and put together a recommended program for this group of Alaskans who so desperately need help.

EXHIBIT SCHEDULE

I. Florida's New Workers' Compensation System: An Interim Report, March, 1981.

II. National Council on Compensation Insurance, Graphs.

III. Workmen's Compensation and Rehabilitation Law, Revised, The Council on State Government, Lexington, Ky., 1974.

VI. Comparison of Permanent Partial Disability Schedule Awards and 1982 Impairment Values.

V. Guide to the Evaluation of Permanent Impairments, American Medical Association, 1977.

VI. Preliminary Report on the Wage-Loss Law in Florida, National Council on Compensation Insurance, 1981.

VII Alaska Income Replacement Levels, National Council on Compensation Insurance.

VIII. Comparison of 66 2/3 Percent of Average Weekly Wage with 80 Percent of Spendable Weekly Wage, National Council on Compensation Insurance.

IX. Alascom, Inc.'s Paper In Support of Worker's Compensation Committee of Alaska.

EXHIBIT I

FLORIDA'S NEW WORKERS' COMPENSATION SYSTEM: AN INTERIM REPORT

March 1981

(WITH OCTOBER 1981 ADDENDUM)

Prepared By:

BUREAU OF ECONOMIC ANALYSIS
DIVISION OF ECONOMIC DEVELOPMENT
FLORIDA DEPARTMENT OF COMMERCE

ADDENDUM

October 1981

Since the completion of this report in March 1981 there has been a second Workers' Compensation premium reduction ordered by the State Insurance Commissioner. This reduction can be described briefly.

The effective date of the rate reduction was July 1, 1981. On average, Workers' Compensation premiums paid to private insurance carriers were decreased 15.6%. Since the volume of premiums paid in a year in Florida is about $1 billion, that would mean a savings of $156 million for Florida employers annually.

The actual premium reduction varied by employment class. All 600 classes were guaranteed at least a 5% reduction. The manufacturing classes averaged a 22.7% decrease with rates for some manufacturing classes falling by as much as 48%.

This latest action was the third Workers' Compensation premium decline since the 1979 reforms. The first, a 15% across-the-board reduction was enacted by the Legislature as a part of the 1979 reform package. The Insurance Commissioner ordered an 11.4% rate reduction in January 1981 which actually translated into a 5.1% premium dollar reduction when other changes were considered.

Cumulatively, the impact of these premium reductions has been to lower premium rates by 36.4% and save Florida employers $325 million annually in premiums. The average Workers' Compensation premium rate is now at its lowest point since September 1975 and places the State only 23rd highest in the nation. Before the reforms, Florida had ranked among the five most expensive states in this regard.

Further premium reductions may be in the offing. As is indicated on pages 21-24 of this report, early indications of claims activity, total claim costs, attorney involvement and other factors are quite promising. The State Insurance Commissioner has requested another Workers' Compensation premium rate filing later this year to take effect January 1, 1982.

TABLE OF CONTENTS

LIST OF TABLES AND FIGURES

TABLES

FIGURES

I. OVERVIEW

At one time, Florida's Workers' Compensation program was a system seriously in need of fundamental reform. Injured workers genuinely entitled to assistance received inadequate benefits. Employers were overburdened with premiums while insurance carriers lost millions of dollars annually attempting to provide Workers' Compensation coverage. The State's efforts to attract new industry were severely hampered by the reputation of the Florida Workers' Compensation system as extremely costly to employers.

Study of the system indicated that its very structure encouraged subjectivity in benefit determination. This fact, in turn, provided incentives for exaggerated if not invalid claims, and for the unusually frequent involvement of attorneys and medical specialists. The inadequate authority and resources accorded those government agencies charged with overseeing Workers' Compensation further contributed to the problem.

These problems were directly addressed in sweeping changes to the Workers' Compensation law effective August 1, 1979. These reforms were aimed at making Florida's Workers' Compensation system affordable, equitable and efficient. Perhaps the most important change was a switch to the "wage-loss" concept in benefit determination. Under this concept, a worker disabled by an injury on the job would receive (in addition to coverage of his medical expenses) compensation based on the actual decrease in average wages he suffered as a result of his disability.

Among the more important additional changes were: 1) an increase in statutory benefit levels for injured workers; 2) fundamental revisions in the authority and responsibilities of the Bureau of Workers' Compensation; 3) an enhancement of the ability of both the citizenry and its government to participate in the rate-making process; 4) a shift, to the claimant, of responsibility for paying attorneys' fees; 5) the discouragement of lump sum settlements of claims; and, 6) an across-the-board 15 percent reduction in premium rates with further reductions anticipated as experience was gained under the new law.

Any future reductions in Workers' Compensation premium rates are likely to be ordered by the Florida Insurance Commissioner based on his evaluation of rate filings made by the insurance industry. (Direct action by the Legislature is always a theoretical possibility.) Not until June 1981 will the insurance industry make its first premium rate adjustment filing based directly on experience under the new law.

Nevertheless, the early indications are quite positive in regard to the Legislative objective of reducing the cost of the Workers' Compensation system. Substantial progress already has been made; available information encourages the belief that further premium rate reductions are a distinct possibility. At this point, the following observations are warranted:

1. The Workers' Compensation insurance industry has been able to absorb two sizable premium rate reductions. Estimates made at the time these rate reductions were put into effect suggest that they will result in combined premium savings of approximately $170 million annually for Florida employers. The two rate reductions marked the reversal of a long-term trend of rapidly increasing Workers' Compensation premiums in the State. Before the 1979 legislative action, Florida ranked 5th in the nation in terms of its premium rates for Workers' Compensation coverage. It now has fallen to 13th.

2. These significant premium reductions have occurred even while statutory benefits available to injured workers were being increased substantially. The maximum weekly benefit amount has gone from $130 in 1978 to $226 in 1981, moving Florida's rank among the states from 41st to 18th. The maximum period for benefit collection has been extended; the inflation adjustment used in benefit calculation, increased; and the schedule of fees for medical services, revised upward by nearly 30 percent.

3. Available analyses suggest that the new law is having its intended effects in terms of the costliness of Workers' Compensation claims.

   - A study commissioned by the Insurance Committee of the Florida House of Representatives found that, during the first five months of operation of the new law, the percentage of claims of the particularly expensive "permanent partial" injury type had declined significantly. So too had indemnity costs and the percentage of claims involving attorney representation. The proportion of workers returning to their same employer after recovery from their injury had increased.

   - A November 1980 analysis by the National Council on Compensation Insurance (NCCI) also found a decrease in the frequency of permanent partial injury claims. While concluding that available data did not yet provide an adequate basis for a premium rate adjustment decision, one preliminary finding was an indication of significant insurance carrier cost reductions resulting from experience under the new law.

   - A Division of Workers' Compensation comparison of 1979 and 1980 data revealed that, during the first full year under the new law, there was a 4 percent reduction in total premiums paid by employers in the State. The number of formal claims declined by 48 percent. The number of joint petition settlements of Workers' Compensation claims fell by 36 percent while benefits paid in these claims dropped by 18 percent--a savings of $15.7 million. The amount of attorneys' fees awarded in Workers' Compensation cases decreased by 10.6 percent.

As the first state in the nation to adopt the wage-loss concept as the basis for determining permanent disability benefits for injured workers, Florida is serving as an experimental model watched closely by other states. Perhaps the best guarantee that Florida's Workers' Compensation reforms will succeed is the number of determined and careful monitoring programs being conducted both inside and outside government.

II. WORKMEN'S COMPENSATION IN FLORIDA (1935-1979)

A System in Need of Reform

In 1935, the State of Florida established a Workmen's Compensation system designed to lend stability and predictability to an employer's obligations to his injured employees while, at the same time, insuring that the injured worker would receive prompt and adequate compensation for his injury.[1] By the 1970s, Workmen's Compensation had evolved into a system which was unsatisfactory from virtually every perspective.

Consider the plight of the parties directly involved in the Workmen's Compensation system prior to its reform in 1979:

The Injured Worker--The benefits available to the average injured worker in Florida were quite low compared to those available in other states. An analysis conducted by the National Council on Compensation Insurance (NCCI) revealed that Florida's "statutory benefits", that is the maximum benefit amounts and collection periods set by law, ranked the state 37th in the nation.[2] For example, while in most states an injured worker received 66-2/3 percent of his average weekly wage while disabled, in Florida he received 60 percent.

Furthermore, compensation claims were taking a long time to resolve. The Miami Herald, in a comprehensive analysis of Florida's Workmen's Compensation system, reported that many injured workers were forced to hire attorneys because their legitimate claims were not being paid on time.[3]

The Employer--The cost to Florida employers of carrying the required Workmen's Compensation insurance was extremely high. Florida's premium rates (the decimal fractions applied to payrolls to calculate premiums due) were the fifth highest in the nation in 1979 according to NCCI data.[4] These premium rates had increased 229 percent from 1970 to 1978 and further rate increases were being requested by the insurance industry.[5] In 1979, the total premiums paid by Florida employers ranked it seventh in the nation according to figures from the National Association of Insurance Commissioners.[6]

These ever-increasing premiums did more than just force up the cost of doing business in Florida. They also put the State's businesses at a disadvantage when bidding for contracts against out-of-state firms. Bids submitted by Florida firms reflected the unusually high Workmen's Compensation premiums.[7]

The Insurance Companies--During the five-year period extending from 1973 through 1977, insurance companies offering Workmen's Compensation coverage in the State experienced $205.1 million in net losses according to NCCI data.[8] Although investment returns did result in a 3 percent net profit in 1978, there had not been an underwriting profit in Florida Workmen's Compensation since the 1950s.[9]

The impact of this unsatisfactory system extended beyond those directly involved. Ultimately, all Floridians felt the effects of the escalating premiums. Producers of goods and services passed their increased operating costs on to consumers.

State efforts to diversify the Florida economy, to further develop the industrial base, were severely hampered by the costly Workmen's Compensation system. Premium rates paid by Florida employers were nearly triple those paid by Alabama, North Carolina and South Carolina--states very much in competition with Florida in efforts to attract new industries. The NCCI reported that the cost of claims from permanently and totally disabled Florida workers was double that of seven other southern states.[10] An "Economic Development Study" prepared by the Fantus Company for the Florida Council of 100 cited high Workmen's Compensation premium rates as a competitive disadvantage for the State in its effort to recruit industry.[11]

In their efforts to attract new industry to Florida, officials often were confronted with questions about the reputation of Florida's Workmen's Compensation system. Former Commerce Department Secretary Phil Ashler once described a standard industrial recruitment scenario demonstrating the obstacle posed by Florida's high Workmen's Compensation premiums. According to Ashler, a prospective employer typically would ask a series of questions about the adequacy of labor supply and other business conditions. As State officials responded to these questions, the attractiveness of Florida to the prospect would grow--until the issue of Workmen's Compensation was encountered. At that point, Florida's image suffered a setback.[12]

The Miami Herald reported that the Governor and Lieutenant Governor had similar experiences. While delivering a promotional speech in Chicago, Governor Bob Graham was interrupted by a firm's indignation over Florida's Workmen's Compensation rates. Lieutenant Governor Wayne Mixson lamented the effects of a costly Workmen's Compensation system on industrial recruitment.

> Several prospects that we've had, specific prospects that we've talked to in other states that have had the kind of industry or business that we would desire to locate in Florida, have been reluctant to make any commitment because of that, the workmen's comp.[13]

Further Defining the Problem

Florida's Workmen's Compensation system was costing employers and insurance companies far more than the typical benefits paid to the vast majority of injured workers warranted. Why was this the case?

In 1978, a study was conducted by the National Council on Compensation Insurance (NCCI) with the results printed by the Florida Association of Insurance Agents.[14] This analysis, which compared Florida's claim and benefit figures to those of Alabama and Georgia, identified the major elements of Florida's Workmen's Compensation problem.

1. Total medical benefits paid to injured workers in Florida were significantly higher than those paid in other states.[15] The average medical benefits paid, the proportion of cases in which specialized medical practitioners were used, the frequency with which injured workers were confined to a hospital and the average hospital bill in Florida were invariably higher than in Alabama and Wisconsin.

2. Benefits paid for impairment or disability in Florida were higher than for Alabama and Wisconsin despite Florida's comparatively low statutory benefits.

3. Workmen's Compensation activity in Florida featured an unusually great amount of litigation. The percentage of Florida cases in which attorneys were involved on the plaintiff side (20.8 percent) was far above that of Alabama (2.8 percent) and Wisconsin (3.0 percent). Attorneys typically became involved at an earlier point in Florida cases; Florida cases normally took a longer time to be resolved; and, a greater number of cases were reopened by plaintiff attorneys. According to the Division of Workers' Compensation, Florida Compensation lawyers took in $19.7 million in fees during 1978.[16]

4. The proportion of cases which involved "permanent partial" disabilities was far higher in Florida than in Alabama or Wisconsin. Furthermore this injury category was responsible for a disproportionately large share of the Workmen's Compensation benefits paid in the State.

Because this fourth item was perhaps the key finding, it deserves more detailed attention. In the table below, Florida's

distribution of Workmen's compensation by injury type is compared to those of Alabama and Wisconsin.

TABLE 1

PERCENTAGE DISTRIBUTION OF RESOLVED WORKMEN'S COMPENSATION CASES BY INJURY TYPE: FLORIDA, ALABAMA AND WISCONSIN (November-December 1977)

Injury Type	Florida	Alabama	Wisconsin	
Death	0.4	0.2	0.4	0.89
Permanent Total	0.8	0.1	0.5	0.15
Permanent Partial	30.0	7.1	9.0	24.16
Temporary Total	68.5	90.6	89.0	74.60
Temporary Partial	0.3	2.1	1.2	0.13

SOURCE: Florida Association of Insurance Agents, 1977 Workmen's Compensation Closed Claim Study, conducted by the National Council on Compensation Insurance, March, 1978.

Note that the proportion of resolved Florida cases which fall into the permanent partial category was more than three times the proportion recorded in Wisconsin and more than four times the Alabama figure.

The disproportionately large role of permanent partial injuries is just as striking when the distribution of benefits by injury type is examined as in Table 2.

TABLE 2

PERCENTAGE DISTRIBUTION OF BENEFITS PAID IN RESOLVED WORKMEN'S COMPENSATION CASES BY INJURY TYPE: FLORIDA, ALABAMA AND WISCONSIN (November-December 1977)

Injury Type	Florida	Alabama	Wisconsin	
Death	1.6	2.1	5.4	19.14
Permanent Total	10.8	1.9	2.2	2.73
Permanent Partial	67.2	37.5	40.8	66.91
Temporary Total	20.3	57.4	50.8	11.21
Temporary Partial	0.0	1.0	0.8	0

SOURCE: Florida Association of Insurance Agents, 1977 Workmen's Compensation Closed Claim Study, conducted by the National Council on Compensation Insurance, March, 1978.

As the table reveals, permanent partial injury cases accounted for 67.2 percent of medical and indemnity benefits paid in Florida but only 37.5 percent and 40.8 percent of Alabama and Wisconsin benefits, respectively.

Causes Underlying the Problems

The responsibility for these problems appeared to rest with the structure of Florida's Workmen's Compensation system itself. More specifically, it was a system which placed too much reliance on the subjective judgments required of doctors and of Judges of Industrial Claims. It was a system which encouraged the active involvement of attorneys and the granting of lump sum settlements by insurance companies. It was a system which provided government agencies with insufficient authority and resources with which to regulate the program in the public interest. Finally, it was a system which provided indemnity benefits to injured workers who had not actually suffered any loss in wages.

The subjectivity of procedures was most evident at the point of "maximum medical improvement" or MMI, i.e., the point of which a doctor decided that the injured worker had recovered to the greatest extent possible. At that point, it would be determined whether the worker had either: 1) no disability, 2) a partial disability which was nonetheless permanent (permanent partial), or 3) a permanent and total disability (permanent total).

As noted previously the permanent partial category was responsible for an unusually large number of cases and a disproportionately high level of benefits in Florida. If a worker had received a permanent partial disability in the form of an injury specified in the Florida Statutes (a "scheduled" injury), he received a specific number of weeks of compensation at 60 percent of his average weekly wage. These benefits were paid whether or not the worker had been able to resume employment at his previous wage or even higher.

For "unscheduled" injuries within the permanent partial category, a doctor assigned a percentage disability rating to the worker. This percentage disability rating then was multiplied <u>first</u> by a specified number of weeks (175 for a 1-to-10 percent rating, 350 for an 11-to-50 percent rating, and 525 for a 51-to-100 percent rating) and <u>then</u> by 60 percent of the worker's average weekly wage.

This rating system was not only highly judgmental, it also provided a strong incentive for attempting to increase the disability rating. Fred Karl, speaking for the Florida Association of Insurance Agents, provided an example of this. At the time his example was formulated, the maximum weekly benefit amount available to an injured worker was $130. Note the difference in benefits paid if the worker's disability rating were to be raised from 10 percent to 11 percent.

10% x 175 weeks @ $130 per week = $2,275
11% x 350 weeks @ $130 per week = $5,005

A one percentage point revision in the disability rating raised the benefits paid to twice the original amount. This was because, as was explained earlier, the 11 percent disability rating marked a threshold in the benefit structure. The disability rating increased by one percentage point, but, more significantly, the number of weeks of benefits paid jumped from 175 to 350. This latter change was primarily responsible for the huge jump in the benefit amount. A similar threshold existed at the 51 percent rating level.

The subjectivity did not stop with the doctor's disability rating however. In recognition of the fact that the same injury could affect the careers of two people in different occupations to a much different extent (for example, compare the ramifications of the loss of a finger to a lawyer as opposed to a pianist), the system had a second form of disability rating, wage diminution. The worker's lifelong wage earning capacity could be diminished by his injury. This contention would be presented to a Judge of Industrial Claims who would determine a diminution of wage earning capacity rating based on such factors as the age, occupation, education of the worker and other circumstances. In the end, the higher of the two disability ratings, the wage diminution rating from the judge or the physical disability (impairment) rating from the doctor, would determine the worker's benefits.

In other words, the system provided the injured worker with an incentive to obtain a higher disability rating. This incentive, combined with the subjectivity of the ratings themselves, resulted frequently in the use of legal counsel and the involvement of medical specialists. The NCCI study of two months' of resolved permanent partial cases in 1977 revealed that 71 percent of injured Florida workers were represented by an attorney. This proportion was more than twice the Alabama figure and four times that of Wisconsin.[17] Medical specialists, as opposed to general practioners, were involved in 63.4 percent of the Florida cases in which physicians were consulted. The corresponding percentages for Alabama and Wisconsin were 30.8 percent and 39.3 percent, respectively.[18] This suggested what the Miami Herald called "doctor shopping", an attempt to find the physician who would give a higher disability rating.[19]

While the role of subjective judgments in benefit determination was perhaps the most central deficiency in the system, there were other, often related problems.

1. Attorneys' fees were related to benefit and settlement amounts. Until 1978, the claimant paid no attorney's fees. Legislation in that year required that claimants pay 25 percent of the fees with certain exceptions. Thus, attorneys had an incentive to strive for the largest award possible unencumbered by concern about the claimant's ability to pay an attorney's fee.