

ALASKA LEGISLATURE COMMITTEE FILES 1987-1988 8672

4772 HJUD SB 322 (FILE 2) - SB 322 (FILE 3)

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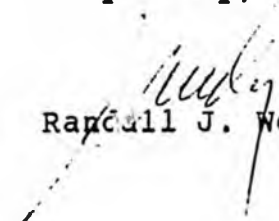
Letter to Representative John Sund
April 20, 1988
Page Three

by insurance carriers, through a reduction in defense attorney fees, the carriers ability to defend itself would be reduced beyond the limitations already imposed by the Compensation Act and amounts paid for compensation and medical expenses would certainly increase as a result. Therefore, adoption of this proposal would not reduce total costs and I suspect that the end result would be an increase in overall system costs.

For all of these reasons, I would urge you to eliminate any amendment which requires the Board to review and approve defense attorneys' fees. This is particularly appropriate in light of the fact that, to my knowledge, there is no data to suggest that defense costs are a significant factor in contributing to the insurance premium crisis that presently exists.

I greatly appreciate your consideration of these matters.

Very truly,


Russell J. Weddle

RJW/llg
7674k

MTL

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MARJORIE T. LINDER, M.A., C.R.C., C.I.R.S.
Vocational Rehabilitation Counselor

April 5, 1988

Representative John Sund
State of Alaska
House of Representatives
Juneau, Alaska 99811

APR 11 1988

Re: SB 322

Dear Representative Sund:

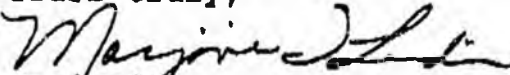
The following represents my feelings in support of scheduling all injuries using the Whole Person theory under the AMA Guides instead of using the wage-loss concept.

As a rehabilitationist, I believe that any system for compensating disability of any sort tends to contribute to the degree of disability by reducing the normal economic incentives for return to work. I believe that scheduled systems seem to offer an advantage over wage loss systems in that they discontinue the dependency relationship between the worker and the insurance company at the earliest possible opportunity. That minimizes the effect of compensation on functional overlay and incentives for return to work.

Scheduled systems also minimize the necessity for insurance companies to maintain relatively large numbers of reserves against the potential of future wage loss, a very expensive proposition in the current insurance rating system. By removing the interest of the claimant and his attorney to build awards based on wage loss, substantial savings in costs should be realized. By discontinuing the relationship with the insurance company at the earliest possible time, the claimant will also discontinue his relationship with his attorney sooner, thus reducing litigation (which I believe will be heavy at first.)

Despite the critics and actuarial reports, I know that while the currently scheduled awards may increase, the unscheduled awards will decrease and be more predictable. Please give every consideration to supporting this bill.

Yours truly,



Marjorie T. Linder, M.A., CRC, CIRS

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March 23, 1988

Representative John Sund
Pouch V
Juneau, Alaska

Dear Representative Sund:

I am a vocational rehabilitation counselor who has worked in Alaska in the workers' compensation system for ten years, which gives me a unique vantage point. I also worked on the WCCA rehab committee. Thus, I believe I understand the intent of the proposed legislation.

Rehabilitation under the current Alaska Workers' Compensation System reminds me of the movie, "Requiem for a Heavy Weight," which deals with a no longer popular but aging boxer. His trainer and manager arrange a phony wrestling match for this once proud athlete and then they bet against him. Like the movie's protagonist, the injured worker, in the course of his claim, must enter an arena he does not want, participate in a contest he does not choose, and purposely throw the fight to support others who bet against him. If he works hard to preserve his income, under the wage loss concept, he receives no money. I have seen many a frustrated claimant utilize rehabilitation not to advance himself but to advance his claim. Likewise, I have seen many an insurance company utilize rehabilitation services to decrease the value of the claim. Both are a waste of time, energy, and money!

I believe that SB322 provides the claimant with an alternative to winning by losing. By scheduling all injuries, the claimant can obtain a settlement based on the degree of medical impairment and help himself without hurting his claim. By requiring the claimant to invest the proceeds from his claim into his own support during his rehabilitation program should the program's length extend past medical stability, the system can attend to more motivated clients and promote early intervention. By reducing the amount of support provided after medical stability, the system will discourage crippling dependency. By making participation voluntary, the system will encourage freedom of choice. The increased length of training programs should make bonafide programs more possible.

While I hope I have your attention, I wish to comment on a recent amendment which came out of the House Labor and Commerce Committee regarding a Board order to change the specialty of the Board selected IME physician from that of the treating physician.

Some people have dubbed this the "chiropractic amendment". I believe the issue is much larger than chiropractor vs. M.D. It has to do with the Board's right to have complete information to make an informed decision without requiring the employer to put on an expensive hearing and the employee to incur delays in swift adjudication of his case. It has to do with quality medical attention. For instance, I can think of cases in which the claimant naively chose the wrong specialist as his treating physician. I remember a claimant who was utilizing a pulmonary specialist to treat her back pain. I remember a claimant who was misdiagnosed by a GP as having a herniated disc when the claimant's real problem was a disc space infection (a life threatening problem, I might add). I remember a chiropractor who alleged that a plantar wart was somehow related to a female claimant's lifting a cow. Yet another claimant's cancer of the spine was missed by his family practitioner from whom he sought care after he experienced back pain on the job. Obviously, all of these folks were treating with the wrong specialist for their problem. Had it not been for an IME ordered by the employer, no one would have had appropriate information. In these cases, the IME physicians' opinions radically differed from the claimants' treating physicians. Under the House amendment outlined, the Board would be limited to selecting yet another inappropriate specialist for the claimant's problem. Somehow, this does not make sense in either the name of justice or the quality medical care.

Yet one more amendment to the bill disturbs me. This one has to do with a mandated roll back in insurance rates. I believe the proposed bill, should it not be tampered with, has at least a 6% reduction in costs built into it. My understanding is that a new NCCI report corroborates this belief. However, having a roll back in rates thwarts the free enterprise system. It may well chase carriers from Alaska leaving only one Alaskan based company. Creating a monopoly may foster opportunism. I strongly urge you to reconsider this additive, which I believe will prevent healthy competition and eventually raise the insurance rates.

In short, I support the original Senate Bill negotiated by the Labor Management Task Force and no House substitute. I invite you to call on me to provide information to you or your committee. Please thank Sherry Kockman for being responsive to my comments when I telephoned her last week.

Yours truly,


Marjorie T. Linder, M.A., CRC, CIRS

Section 10 AS 23.30.041

(e) (2) other jobs that exist in the labor market that the employee has held or received training for within 10 years before the injury or that the employee has held following the injury, in either case for a period long enough to obtain the skills to compete in the labor market according to specific vocational preparation codes as described in the "Selected Characteristics of Occupations."

MY NAME IS FRANK THOMAS-MEARS. I AM THE SECRETARY OF THE ALASKA CHAPTER OF THE AMERICAN SUBCONTRACTORS ASSOCIATION AND I AM TESTIFYING IN THEIR BEHALF TODAY.

FIRST, LET ME SAY WE ARE EXTREMELY SUPPORTATIVE OF THE ACTIONS OF THE LABOR/MANAGEMENT TASK FORCE AND OF THE WORKERS' COMPENSATION COMMITTEE OF ALASKA. WE APPLAUD THEIR COLLECTIVE EFFORTS. EACH INDIVIDUAL HAS DELIVERED ON THEIR PERSONAL COMMITMENTS TO EFFECT REASONABLE CHANGES IN THE WORKERS' COMPENSATION SYSTEM AND THEY DESERVE OUR SUPPORT.

OUR APPRECIATION ASIDE, WE ARE NOT SATISFIED WITH THE FINANCIAL RESULTS OF SB 322.

SIXTEEN MONTHS OF NEGOTIATIONS HAVE ONLY MITIGATED A FUTURE PREMIUM INCREASE. THESE NEGOTIATIONS HAVE NOT REDUCED CURRENT PREMIUMS BY 15% AS WAS AGREED TO BY ORGANIZED LABOR AND MANAGEMENT. AND I THINK IT'S NOTEWORTHY HERE THAT THE ORIGINAL GOAL OF THE LABOR/MANAGEMENT TASK FORCE WAS A 30% REDUCTION IN CURRENT PREMIUMS.

WE ARE NOT SATISFIED WITH THE LEGISLATIVE RESPONSE MANDATING A PREMIUM DECREASE FROM THE INSURANCE COMMUNITY. WHY SHOULD THESE FREE ENTERPRISE INSURANCE CARRIERS BEAR THE FINANCIAL BURDEN OF WRITING WORKERS' COMPENSATION BUSINESS IN ALASKA AT A LOSS. WHY MAKE THEM RESPONSIBLE FOR THE SHORTCOMINGS OF THE SYSTEM.

WHILE WE APPLAUD THE INSURANCE INDUSTRY ON ONE HAND FOR VOLUNTARILY REDUCING THEIR PREMIUM LEVELS, WE ARE CRITICAL OF THE PROCESS AND METHOD BY WHICH THEY ARRIVED AT THIS COLLECTIVE ACTION. WE DO NOT BELIEVE THE PROCESS (and let me emphasize process) BY WHICH THEY ARRIVED AT THIS CONSENSUS IS IN THE BEST PUBLIC INTEREST.

SO HERE WE ARE TODAY, AFTER ALL THE NEGOTIATIONS AND POLITICING, WITH ALASKAN COMPANIES STILL UNABLE TO COMPETE WITH OUTSIDE FIRMS DOING BUSINESS IN OUR STATE. AFTER ALL THIS, WE STILL HAVE ONE OF - IF NOT THE MOST - EXPENSIVE WORKERS' COMPENSATION SYSTEM IN THE NATION.

SO WHERE DO WE STAND ON THE ISSUE OF WORKERS' COMPENSATION REFORM AND SB 322.

FOR OUR OWN SELF-PRESERVATION, WE SUPPORT PASSAGE OF SB 322.

WE HAVE WITNESSED THE DEMISE OF MANY CONTRACTORS AND SUPPLIERS DURING 1987 AND 1988. IN MANY INSTANCES, THE INCREASED COST OF WORKERS' COMPENSATION WAS THE FINAL STRAW THAT BROKE THE CAMEL'S BACK.

IF THIS LEGISLATION IS NOT PASSED, AND ALASKAN CONTRACTORS AND SUPPLIERS MUST ABSORB A PROJECTED 25% TO 30% PREMIUM INCREASE, MANY MORE OF US WILL DEMISE IN 1989 AND 1990.

TO REPEAT, WE ADAMANTLY STAND BEHIND PASSAGE OF SB 322.

NOW TO THE GOVERNMENT'S SIDE OF THE WORKERS' COMPENSATION EQUATION.

WE FEEL THAT THE STATE OF ALASKA HAS A DUTY TO THE CITIZENS AND BUSINESSES OF THIS STATE TO ADEQUATELY ENFORCE OUR WORKERS' COMPENSATION LAWS AND REGULATIONS. IN MANY INSTANCES, WE DO NOT FEEL THE STATE HAS DONE AN ADEQUATE JOB.

WE HAVE LAWS CURRENTLY IN EFFECT THAT REQUIRE ALL BUSINESS ENTITIES DOING BUSINESS IN ALASKA TO HAVE WORKERS' COMPENSATION WITH ALASKA BENEFIT LEVELS.

THE DEPARTMENT OF LABOR IS CHARGED WITH THE RESPONSIBILITY TO ENFORCE THIS LAW. IN OUR OPINION, THE DEPARTMENT OF LABOR HAS INEFFECTUAL IN CARRYING OUT ITS DUTY AND IT HAS COST BUSINESS IN OUR STATE VERY DEARLY. WE DO NOT BELIEVE THIS IS BECAUSE THE DEPARTMENT OF LABOR LACKS THE WILL OR INCLINATION TO DO SO, WE BELIEVE IT IS BECAUSE THEY ARE NOT ADEQUATELY FUNDED.

WE UNDERSTAND THAT COMMISSIONER SAMPSON INHERITED THE CURRENT SYSTEM AND IS NOT RESPONSIBLE FOR ITS PAST FAILURE TO ADEQUATELY POLICE ENFORCEMENT OF THIS LAW. WE HAVE EVERY FAITH THAT HE WILL TAKE PERSONAL ACTION TO INCREASE THE ENFORCEMENT BUDGET FOR HIS DEPARTMENT TO RAISE THE STANDARDS OF ENFORCEMENT TO ACCEPTABLE LEVELS.

THE DIVISION OF INSURANCE, IN THE PAST, HAS NOT ADEQUATELY RESPONDED TO THEIR ROLE AS A PUBLIC REGULATOR AND FACILITATOR OF RULES, REGULATIONS AND STATUTE RECOMMENDATIONS TO MITIGATE THE EFFECTS OF AN ADVERSE SITUATION. IN PART, WE BELIEVE THIS WAS DO TO LACK OF LEADERSHIP AND ADEQUATE FUNDING.

WE HAVE BEEN PLEASED WITH THE IDEAS AND ACTIONS OF THE NEW DIRECTOR OF INSURANCE, MR. PAUL ROLLER, IN LAST SEVERAL MONTHS. WE BELIEVE HE IS PERSONALLY COMMITTED TO MAKING THE SYSTEM A BETTER AND MORE COST EFFECTIVE SYSTEM.

TO MR. ROLLER, WE WOULD VOICE TWO CONCERNS.

FIRST, WE WOULD POINT TO THE STATUTES DEALING WITH THE REQUIREMENT THAT INSURANCE CARRIERS IN THIS STATE CONFORM TO THE FORM AND RATE FILINGS OF THE NATIONAL COUNCIL ON COMPENSATION INSURANCE - HEREAFTER NCCI.

WHEN WAS THE LAST TIME THE DIVISION INSTITUTED A COMPETITIVE BIDDING PROCESS, WHEREIN NCCI- A RATING BUREAU - WOULD HAVE TO COMPETE WITH OTHER FREE ENTERPRISE RATING BUREAUS FOR THE PRIVLEDGE OF PROVIDING SERVICES TO INSURANCE CARRIERS IN THIS STATE. WE BELIEVE THERE IS A POTENTIAL TO GENERATE SIGNIFICANT COST SAVINGS TO PREMIUM PAYORS WITH SUCH COMPETITION.

SECONDLY, WE ARE OPPOSED TO THE EXCLUSION OF REPRESENTATION FOR PREMIUM PAYING ALASKAN BUSINESSES FROM A SUBSET OF NCCI KNOWN AS THE CLASSIFICATION AND RATE COMMITTEE.

CURRENTLY, ONLY MEMBERS OF NCCI AND THE DIRECTOR OF INSURANCE CAN SIT ON THE CLASSIFICATION AND RATE COMMITTEE. TO BE A MEMBER OF NCCI, ONE MUST BE AN INSURANCE CARRIER.

WE WOULD REMIND THE DIVISION, NCCI AND MEMBERS OF THE C&R COMMITTEE, THAT WHILE THE OPERATIONS OF THE INSURANCE INDUSTRY ARE BEST LEFT TO THE DEVICES OF THE FREE ENTERPRISE SYSTEM WITH PROPER STATE REGULATORY OVERSIGHT, WORKERS' COMPENSATION INSURANCE IS A TYPE OF INSURANCE WHICH TRANSCENDS THE NEED OF THE FREE ENTERPRISE MARKETPLACE - IT IS A SOCIAL AND VERY PUBLIC ISSUE.

ALASKAN EMPLOYERS WANT A VOICE AND A VOTE ON THOSE MATTERS WHICH SO AFFECT OUR ECONOMIC WELLBEING. WE BELIEVE THE INSURANCE INDUSTRY WOULD FIND US REASONABLE AND COMPETENT PARTNERS, EAGER LEARNERS AND VALUABLE ALLIES - IF GIVEN A CHANCE.

WE HAVE BEEN INFORMED, ON SEVERAL OCCASIONS, THAT EVEN WHEN THE DEPARTMENT OF LABOR OR THE DIVISION OF INSURANCE HAVE, IN THE PUBLIC INTEREST, STOPPED PRACTICES AGAINST PUBLIC LAW OR PUBLIC WELLBEING, THE STATE ATTORNEY GENERAL'S OFFICE HAS REFUSED TO COOPERATE - CITING THE NEED TO FRY BIGGER FISH. IF THIS IS INDEED THE CASE, THE ATTORNEY GENERAL'S OFFICE IS THE WEAKEST LINK IN THE CHAIN, AND THE SITUATION SHOULD BE CORRECTED - NOW.

WHILE WE ARE NO PROPONENTS OF INCREASED GOVERNMENT SPENDING, WE ARE VERY SUPPORTIVE OF INCREASED BUDGETS FOR BOTH THE DEPARTMENT OF LABOR AND THE DIVISION OF INSURANCE TO SUBSTANTIALLY ENHANCE THEIR ABILITY TO ENFORCE THE LAWS OF THIS STATE FOR THE PUBLIC GOOD.

IT IS INTERESTING TO NOTE THAT TO OUR KNOWLEDGE, THE DIVISION OF INSURANCE IS THE SECOND LARGEST INCOME GENERATOR FOR THE STATE OF ALASKA - PRODUCING IN EXCESS OF \$20,000,000 PREMIUM TAX DOLLARS PER YEAR. THESE PREMIUM TAXES ARE PAID TO THE STATE, THROUGH INSURANCE PREMIUMS, BY EVERY INDIVIDUAL OR BUSINESS THAT PURCHASES INSURANCE IN ALASKA.

TO OUR KNOWLEDGE, NEITHER THE DIVISION OF INSURANCE OR THE DEPARTMENT OF LABOR ARE APPORTIONED ANY OF THESE PREMIUM TAX DOLLARS FOR LAW ENFORCEMENT, BUT RATHER THAT THESE PREMIUM TAXES ARE DIRECTED INTO THE STATE'S GENERAL FUND FOR OTHER PURPOSES.

GOOD PUBLIC POLICY WOULD DICTATE THAT A PORTION OF THESE PREMIUM TAX DOLLARS BE ALLOCATED TO PROVIDE FOR THE ENFORCEMENT OF INSURANCE AND INSURANCE RELATED STATUTES AND REGULATIONS.

WE PROPOSE, IN KEEPING WITH THE VITAL PUBLIC INTEREST THAT SURROUNDS THE ISSUE OF WORKERS' COMPENSATION, THAT SEVERAL MILLION OF THESE PREMIUM TAX DOLLARS BE ALLOCATED TO THE DEPARTMENT OF LABOR AND THE DIVISION OF INSURANCE TO FURTHER THEIR LAW ENFORCEMENT AND REGULATORY ACTIVITIES.

IN CLOSING, MUCH REMAINS TO BE DONE TO REDUCE AND STABILIZE THE COST OF PROVIDING WORKERS COMPENSATION INSURANCE TO ALASKAN BUSINESSES.

INSOMUCH AS IS POSSIBLE, ADMINISTRATIVE AND NON-STATUTE CHANGES WHICH DO NOT JEOPARDIZE BENEFIT LEVELS FOR THE TRULY INJURED EMPLOYEE ARE THE REFORMS OF CHOICE.

BUT, ALASKAN LABOR, ORGANIZED AND UNORGANIZED, MUST WORK IN COOPERATION WITH ALASKAN EMPLOYERS AND BE ALSO WILLING TO REDUCE AND STABILIZE THE COST OF BENEFITS DELIVERY AND BENEFIT LEVELS.

LET US ALL, EMPLOYERS, LABOR AND GOVERNMENT, CONTINUE OUR EFFORTS. WE HAVE MADE A REASONABLE START - BUT ALL WILL BE FOR NAUGHT IF WE STOP AT THE END OF SESSION.

THANK YOU FOR THE OPPORTUNITY TO MAKE THESE REMARKS.

FACT AND ANALYSIS SHEET, RELATED TO AND OPPOSING PROPOSED CHANGES IN THE WORKERS'COMPENSATION ACT, VIA SB322 AND HB 352. See attached PETITION.

- * The original intent of the Workers' Comp Act(s), was to protect and provide for injured workers and their families, due to job related injuries. The proposed bills do not accomplish this.
- * The proposed bills are intended to "cut costs" of the WC system, but do so at a greater cost to the injured workers rights and benefits, families and health, and placing a burden on an already depressed economy and society.
- * It appears that the so called Tort Reform has been extended to the WC system, which is already oppressive and unjust to injured workers and their dependents. With long, unnecessary delays in benefit delivery, claims settlements; causing impoverishment, return to health and employment. (Insurance Reform, not Tort Reform is needed).
- * The AWCC ad hoc committee (whose members recommended and drafted the bills), represent many business and insurance interests and not the majority and wide range of injured workers, themselves. (They now have opened an office representing employers only).
- * Employers themselves need to be aware that an increase in comp claims is not the reason for the rise in premiums, but the high cost of defense litigation, too many independent medical evaluations (IME's), travel expenses for expert witnesses, pain clinics, rehabilitation, etc., in order to defeat legitimate claims. Rates will not be reduced with the proposed bills, and the worker will also be paying a higher cost for his/her union health benefits.
- * Many more "independent medical evaluations" will be required by the proposed bills, in an effort to deny benefits (to an already harassed injured person), and will not reduce costs, but increase them.
- * Injured employees are denied doctor/patient "privileged" information and communication, and their "free choice of physician" and treatment will be challenged every 30 days, by an IME.
- * There is no accountability of physicians who "knowingly and willingly make false statements or misrepresentations" in a comp claim. Those doctors should have their licenses suspended or revoked.
- * Certified Rehabilitation Insurance Specialists are naturally pro employer/carrier. At present they are not licensed or regulated by the state, and in many cases not qualified. In many cases the injured worker is not reemployed, while it appears that only rehab agencies and personnel "profit" from such programs. Injured employees need equal protection, and should be allowed to discharge their Rehab counselor, etc. without losing their benefits.
- * The proposed bills give almost total authority, privileges and immunity, to appointed board members, without accountability for their actions and decisions.
- * The injured workers' rights under the Constitution of the State of Alaska, specifically Article I §§ 2 and 7 (Inherent rights and due process), § 22 (Right to Privacy) are threatened by these bills, as well as Article VII §§ 4 and 5, regarding the promotion and protection of public health. There are many problems with the health care system in Alaska--- these problems need to be addressed and reformed, not the Workers' Comp system!

* *Union. ... "off set."*

Injured and Disabled Workers Asso.
 PO Box 671495
 Chugiak, AK. 99567
 phone-008-JULI / 336 4506

PETITION

WE, THE UNDERSIGNED, STRONGLY OPPOSE AND FIND OBJECTIONABLE, SENATE BILL 322 AND HOUSE BILL 352 RELATING TO WORKERS' COMPENSATION, AS THEY FURTHER UNJUSTLY AND UNFAIRLY DEPRIVE INJURED AND DISABLED WORKERS OF RIGHTS AND BENEFITS DUE THEM UNDER THE LAW.

SIGNATURE	PRINTED NAME	ADDRESS	PHONE
<i>W D Bales</i>	W D Bales	4559 Wagon Dr.	333 5454
<i>Lillian C Woods</i>	Lillian C. Woods	3314 Newcomb Dr.	333-1802
<i>Charles H. Hayes</i>	Charles H. Hayes	172 Birch Park Dr.	344-2697
<i>Curtis Young</i>	Curtis Young	177 Oceanview Dr.	344-2697
<i>Linda Montgomery</i>	LINDA MONTGOMERY	2224 Glacier 307	337-7886
<i>Max Cochran</i>	Max Cochran	2224 Glacier 306	337-0552
<i>Cheryl Rates</i>	CITRUC RATES	2224 Glacier 306	337-0552
<i>Verna R. West</i>	Verna R. West	2105 Farmer Pl.	338-3132
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<i>Dale Savage</i>	DALE SAVAGE	6135 E Tudor Rd #40	333-5206
<i>Derek Dunley</i>	DEREK Dunley	1135 E Tudor Rd #40	333-5206
<i>Don Clark</i>	Don Clark	Malden Blvd	377-7570
<i>Darla K. Jackson</i>	DARLA K. JACKSON	3021A Chris Circle	344-7166
<i>Gisela Harris</i>	Gisela Harris	3401 Wisconsin	243-4893
<i>Brentley McKnight</i>	Brentley McKnight	3401 Wisconsin	243-4893
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<i>Jimmy Bryant</i>	Jim Bryant	PO Box 10025	562-4296
<i>Bob Bryant</i>	BOB BRYANT	PO Box 10025	562-7296
<i>Penny Harris</i>	Penny Harris	1574 Vanguard	522-3626
<i>Mark Harris</i>	Mark Harris	1574 Vanguard	522-3626
<i>David K. Holbert</i>	David K. Holbert	11321 Pyramid Dr.	522-5265
<i>John C. Herbert</i>	John C. Herbert	1526 2nd	272-6579
<i>Fritzie's Rates</i>	Fritzie's Rates	1812 W 53rd St	561-6276
<i>Fred Young</i>	Fred Young	2224 Glacier 307	373-3800
<i>Carlos Montgomery</i>	CARLOS MONTGOMERY	11	337-7886
<i>James K. Castleberry</i>	JAMES K. CASTLEBERRY	2240 S. Antelope Dr. Anch.	344-2061
<i>Genevieve H. ...</i>	Genevieve H. ...	41	37

* See attached Page Sheet

Injured and Disabled Workers
 PO Box 671495
 Chugiak, AK. 99567

For information: 338-4506

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PETITION

WE, THE UNDERSIGNED, STRONGLY OPPOSE AND FIND OBJECTIONABLE, SENATE BILL 322 AND HOUSE BILL 352 RELATING TO WORKERS' COMPENSATION, AS THEY FURTHER UNJUSTLY AND UNFAIRLY DEPRIVE INJURED AND DISABLED WORKERS OF RIGHTS AND BENEFITS DUE THEM UNDER THE LAW.

SIGNATURE	PRINTED NAME	ADDRESS	PHONE
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<i>Michael T. Moore</i>	MICHAEL T. MOORE	1937 MIDDLETON LP ANCH ^{FAIRBANKS}	694 6341
<i>Frank W. Ligon</i>	FRANK W. LIGON	P.O. 670683 Chugiak	488-3952
<i>Jim Rafter</i>	Jim Rafter	1721 Early View Anch AK 99501	338-3191
<i>Osgood Hallback</i>	OSGOD HALLBACK	6917 WARRIOR RD. ANCH AK	216-2697
<i>Robert Warner</i>	ROBERT WARNER	1521 Northwestern Anch AK 99508	277-9277
<i>Thomas M. Morrison</i>	THOMAS M. MORRISON	2710 SCARBROUGH H. ANCH, AK 99504	537-5248
<i>James Dixon</i>	James Dixon	7341 Dorchester Anch, AK 99502	248-1194
<i>Eric A. Sundt</i>	Eric A. Sundt	1414 Benvue Pl. Anch. AK 99504	333-9540
<i>Robert P. Clark Jr.</i>	Robert P. Clark Jr.	2204 34th St Anch, AK 99503	944-1777
<i>James Rabb</i>	James Rabb	8211 KIP CRT, ANCH 99507	944-6552
<i>Larry Phillips</i>	LARRY PHILLIPS	801 AIRPORTS HTS #256 ANCH AK 99508	274-0858
<i>Donald P. Werner</i>	DONALD P. WERNER	300 W. KAIT BAY AK 99502	344-2553
<i>Arnold R. Toussaint</i>	ARNOLD R. TOUSSAINT	7100 DUNDY DR Anch AK 99507	248-3862
<i>Gordon Wasson</i>	GORDON WASSON	44420 STRAWBERRY KENAI AK 99611	283-7173
<i>General F. May</i>	GENERAL F. MAY	RT 1 BOX 1224 KENAI AK 99603	776-8772
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<i>Jack Skelton</i>	Jack Skelton	1714 Windland AK AK 99507	243-1977
<i>Franklin R. Taylor</i>	FRANKLIN R. TAYLOR	3501 G 42nd St Anch AK 99508	562-4131
<i>Roger Crosby</i>	ROGER CROSBY	15950 CHANCE Anch AK	344-0721
<i>Rina C. Nanton</i>	RINA C. NANTON	1402 - 4386 B, Anch AK	745-7844
<i>Dale Centofanti</i>	DALE CENTOFANTI	4724 Kent Anch AK 99503	563-2414
<i>Barron W. Davis</i>	BARRON W. DAVIS	2424 INGRAHAM St Anch AK 99508	574-4320
<i>Albert A. Fronteras</i>	ALBERT A. FRONTERAS	7721 MENTFA ST ANCH AK 99508	344-4495
<i>Candida Amaro</i>	CANDIDA AMARO	5711 E 11th Anch AK	333-6788
<i>Beth L. Snyder</i>	BETH L. SNYDER	387 Alaska St Anch AK	336-7916
<i>Roni Whitney</i>	Roni Whitney	6233 TUDOR St Anch AK	338-4800
<i>Robert B. Freeman</i>	ROBERT B. FREEMAN	5748 NORTH STAR Anch AK 99508	849-0000
<i>Margel N. Daunais</i>	MARGEL N. DAUNAIS	834 Laramie Blvd, Anch AK 99503	562-4909
<i>Leslie S. Suckson</i>	Leslie Suckson	2826 Redmond Pl. Anch AK	272-2004
<i>Arnie Blackstone</i>	Arnie Blackstone	16617 El Cidano Dr. Anch AK	549-2417
<i>Robert Eder</i>	ROBERT EDER	2230 E. 52nd St Anch AK 99507	562-2018
<i>Dick Sidenker</i>	DICK SIDENKER	2121 W 7th St Anch AK	243-8014

See attached Fact Sheet

Injured and Disabled Workers
 PO Box 671495
 Chugiak, AK. 99567

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For information: ~~562-2018~~ 338-4506

PETITION

WE, THE UNDERIGNED, STRONGLY OPPOSE AND FIND UNOBJECTIONABLE, SENATE BILL 322 AND HOUSE BILL 392 RELATING TO WORKERS' COMPENSATION, AS THEY FURTHER UNJUSTLY AND UNFAIRLY DEPRIVE INJURED AND DISABLED WORKERS OF RIGHTS AND BENEFITS DUE THEM UNDER THE LAW.

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<i>Leonard Hancock</i>	Leonard Hancock	2735 Telegraph Ave	276-3188
<i>Michael L. Shaw</i>	Michael L. SHAW	Box 97 Petersburg AK	
<i>Kimberly J. Nelson</i>	Kimberly J. Nelson	3021 Wiley Post Ave	274-3188
<i>Tamela A. Hackett</i>	TAMELA A. HACKETT	2735 TELEGRAPH AVE	273-7523
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<i>Sirven Pradelic</i>	SIRVEN PRADELIC	BOX 102062 Anch. AK	276-3188
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<i>David M. ...</i>	David M. ...	7911 ...	248-5023
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See attached fact sheet

Injured and Disabled Workers
 PO Box 671495
 Chugiak, AK. 99567

For information: ~~██████████~~ 338-4506

9



Alaska Occupational Therapy Association

Committee to Establish Standards for
Performance Based
Physical Capacities Evaluations



ALASKA PHYSICAL THERAPY ASSOCIATION, INC.

A CHAPTER OF THE AMERICAN
PHYSICAL THERAPY ASSOCIATION

Gary W. McCarthy
11132 Placer Circle
Eagle River, Alaska 99577
694-4590 or 561-1876

January 21, 1988

Senator Tim Kelly
Pouch V
Juneau, Alaska 99811

Attention: John Ringstad

Dear Mr. Ringstad:

This letter is in follow-up to our telephone conversation today. As we discussed, a joint committee of the Physical and Occupational Therapy Association is interested in incorporating Performance-Based Physical Capacities Evaluations into the new Workers' Compensation Legislation and Regulation. I have enclosed a list of committee members and proposed guidelines for these evaluations for your review.

Please keep us informed about the progress of the Bill, as well as the teleconferences scheduled for January 29th and February 12th. If you have any questions, please contact me.

Sincerely,

Gary W. McCarthy, L.P.T.

GWM:ph
Enclosures

**Adhoc Committee Members
PCE and Work Hardening Regulations**

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PROTOCOL #1 FOR PERFORMING PCE'S (up to 8 weeks post-injury)

Total time for evaluation: one hour

Purpose: To determine if patient can return to work.

When: Test to be performed any time between s/p injury and up to 8 weeks. Note: after 8 weeks s/p injury and patient has not been working refer to Protocol 2.

One Hour Evaluation - Pain level to be monitored during evaluation.

I. Subjective Interview:

- A. Critical demands of job
- B. Brief work history
- C. Affects of environmental factors

Objective: Height, weight, posture, gait, balance.

II. Range of Motion: Full ROM measurements of injured joint and related muscles of adjacent joints.

III. Strength: (Dynamic) Manual muscle testing of muscles surrounding injured joint

- A. Maximum effort tests
- B. Functional tests - i.e., squats or hand grip
- C. Lifting tasks - floor to knuckle
knuckle to shoulder
12" to knuckle
knuckle to overhead
- D. Carrying
- E. Pushing/pulling
- F. Critical demands

IV. ADL: Evaluate body mechanics

V. Gross Coordination and Fine Manipulation: General assessment.

VI. Static Positions: observed (choose 1-2 appropriate to job)

VII. Endurance: reported (such as sitting, walking, standing)

Recommendations:

- I. Return to work
- II. More diagnostic testing
- III. More acute therapy
- IV. Work hardening or OJT

PROTOCOL #2 FOR PERFORMING PCE'S (greater than 8 weeks post injury)

Total time for evaluation: 6-8 hours

Purpose: To determine if patient can return to work.

When: Test to be performed on anyone off work 8 weeks or more after injury.

Need: Job Analysis

Six-Eight Hour Evaluation

I. Subjective Interview:

- A. Critical demands of job
- B. Brief work history
- C. Affects of environmental factors

Objective: Height, weight, posture, gait, balance.

II. ROM: Full ROM measurements of injured joint and related muscles of adjacent joints.

III. Strength: (Dynamic) Manual muscle testing of muscles surrounding injured joint

- A. Maximum effort tests
- B. Functional tests - i.e., squats or hand grip
- C. Lifting tasks - floor to knuckle
knuckle to shoulder
12" to knuckle
knuckle to overhead
- D. Carrying
- E. Pushing/pulling
- F. Critical demands
- G. Other maximum effort tests - climbing and bending

IV. ADL: Evaluate body mechanics

V. Gross Coordination and Fine Manipulation: Specific tasks that measure the function of injured joint.

VI. Static Position Strength Tests: muscles around affected joint. For back patients, use a dynamometer. For all patients be as objective as possible to measure inconsistencies.

VII. Endurance: (Objective measures) duplicate job tasks, frequency and other factors of job site as much as possible. Monitor pain, exertion and cardiovascular level of activity. Dynametric testing. In addition, sitting, standing, and walking as appropriate.

A. The injured worker can:

- Sit for ___ hrs. at a time; ___ hrs. in an ___ hr. day.
- Stand for ___ hrs. at a time; ___ hrs. in an ___ hr. day.
- Walk for ___ hrs. at a time; ___ hrs. in an ___ hr. day.
- Alternately sit/stand for ___ hrs. at a time; ___ hrs. in an ___ hr. day.
- Alternately sit/walk for ___ hrs. at a time; ___ hrs. in an ___ hr. day.
- Alternately stand/walk for ___ hrs. at a time; ___ hrs. in an ___ hr. day.

- Level Lift ___ # frequently (60x in 8 hrs.); ___ # occasionally (4x in 8 hrs.)
- Stand Up Lift ___ # frequently from floor height to waist height.
- Weight Carry ___ # frequently (60x in 8 hrs.); ___ # occasionally (4x in 8 hrs.)
- Push/Pull ___ # frequently (60x in 8 hrs.); ___ # occasionally (4x in 8 hrs.)

B. Additional Testing:

- ___ Squat/Kneel Frequently; Occasionally
- ___ Bend/Stoop Frequently; Occasionally
- ___ Crawl Frequently; Occasionally
- ___ Climb Ladders/Stairs
- ___ Reach Overhead
- ___ Perform Fine Manipulation
- ___ Operate Foot Controls
- ___ Operate Hand Controls

VIII. Feasibility Report: Based on evaluator's observations.

- A. Correlation between pain rating and observed behavior. Good Fair Poor
- B. Observed body mechanics and material handling ability. Good Fair Poor
- C. Observed gross coordination. Good Fair Poor
- D. Do the endurance projections appear to be reliable? Yes No
 Explain: _____
- E. The results of this test appear to be valid. Yes No
 Explain: [] Pain [] Poor Effort [] Other _____
- F. Is client a symptom magnifier Yes No
 If so, this is substantiated how? _____

IX. Safety: _____

Recommendations:

- I. PCE level _____
- II. Part time _____ Full time
- III. Limitations
- IV. Remedial programs that might reduce client's physical limitations
- V. Prognosis

This information was gathered during a _____ hour Physical Capacities Evaluation over _____ days.

PROTOCOL FOR PERFORMING HAND/UPPER EXTREMITY PCE'S

Time: 4 to 8 hours recommended

Purpose:

To determine if the worker can perform usual and customary work or a specified job.

To determine if modification can facilitate return to usual and customary work or a specified job.

To identify work restrictions.

To identify remedial programs for the worker.

To determine general upper extremity (UE) functional capacity.

To offer recommendations for job possibilities.

To assess worker feasibility and willingness to put forth maximum effort.

Requirements may include:

- I. Job analysis
- II. Pertinent medical records.

Evaluation:

- I. Subjective: Pain complaints, major concerns, goals of the worker, functional level as perceived by the worker.
- II. Objective:
 - A. Skin/scar condition
 - B. Altered physical appearance of hand/UE
 - C. Body mechanics/compensatory posturing
 - D. Edema/atrophy measurements
 - E. ROM - active/passive
 - F. Sensation
 - G. Pressure/vibration tolerance
 - H. Dexterity testing (standardized)
 - I. Strength endurance
 1. manual muscle testing
 2. maximum effort testing - static, dynamic
 - J. ADL's and hand/UE physical demands testing
 1. fingering
 2. handling
 3. reaching
 4. pushing/pulling
 5. torquing
 6. lifting

7. carrying
8. climbing
9. tool use
10. writing
- K. Work simulation/situational assessment
- L. Reevaluation
 1. inflammatory response to activity
 2. sensation
 3. strength
 4. pain

Summary and Recommendations:

- I. General UE functional capacity
- II. Job possibility recommendations
- III. Validity assessment
- IV. Limitations
- V. Modifications
- VI. Appropriate remedial programs

1/26/88

PROTOCOL

Education Courses

1. Keys Functional Assessments - Minnesota since 1982
 - a. Protocol driven test
 - b. Statistically correlated
 - c. Tests are limited to what's been validated
 - d. 3-day training program
 - e. Use their form and send results to them; stats are updated
 - f. Equipment needed
2. FCA Polinski - Minnesota
 - a. 2-day training program
 - b. Analyses of how a person moves
 - c. Testing protocol
 - d. Pay them \$50/test for every test
 - e. Equipment needed
3. Blankinship - P.T. - American Therapeutics
 - a. Testing protocol - ideas
 - b. State - minimal
 - c. Equipment suggested (minimal needed)
 - d. 2-1/2 day course - no certification
 - e. Introduction to principles
 - f. Only for back patients
 - g. General functional abilities
4. Matheson - psychologist since 1970's (component symptom magnification)
 - a. Principle work hardening evaluation
 - b. All injuries
 - c. Years of experience - not as much physical objective measurements
 - d. Psychological measurement tools
 - e. 2-1/2 day course
 - f. Equipment needed
5. Other options electives
 - a. Suanders
 - b. American Back Seminars
 - c. Group from Maine
 - d. Hand Seminars (to be presented by Linda Glick)

Date: February 3, 1988

To: Honorable Tim Kelly and Honorable Dave Donley

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

Re: Labor Management Task Force Bill

WRITTEN TESTIMONY

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

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

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

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

February 3, 1988

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

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

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

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

February 3, 1988

Page 3

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

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

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

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

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

February 3, 1988

Page 4

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

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

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

February 3, 1988
Page 5

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

Sincerely,

Shelby L. Nuenke-Davison
Shelby L. Nuenke-Davison

SND/kac

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

December 17, 1987

SUBJECT: Workers' Compensation
(Work Order No. 15-1514)

TO: Senator Tim Kelly
Chairman, Senate Labor and Commerce

FROM: Michael F. Ford *M.F.*
Legislative Counsel

The changes you requested to the existing workers' compensation laws have been incorporated into the attached draft. The draft language received from your office has been changed for purposes of form and style. There are a few substantive matters that remain unresolved that I wanted to bring to your attention:

1. Although there is a reference in section 2 to "panels established in AS 23.30.041 and 23.30.095", I could not find any language establishing panels in those sections. Therefore, the language in section 2 has been slightly changed.
2. The applicability section, section 34, provides that the Act applies to injuries sustained after July 1, 1988, which is also the effective date of the bill. But several sections of the bill would apply to injuries sustained prior to July 1, at least regarding reporting of compensation and contribution to the second injury fund. Specifically you may want sections 4, 18, and 33 to have retroactive application. If those sections are to apply to the entire calendar year, rather than the period after the effective date of the bill then the applicability section should be changed.
3. There may be constitutional equal protection problems concerning the exclusivity language in section 6, which would prevent an employee who is barred from receiving compensation benefits from bringing a lawsuit for any injuries sustained. In combination with section 3, an injured employee guilty of this kind of misconduct would be denied

Senator Tim Kelly
Page 2
December 17, 1987

both workers' compensation and access to the courts. The constitutional question should be researched.

Please contact me if you have any further questions.

MFF:mi
wkmi1/109

NOTICE: This opinion is subject to formal correction before publication in the Pacific Reporter. Readers are requested to bring typographical or other formal errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, in order that corrections may be made prior to permanent publication.

THE SUPREME COURT FOR THE STATE OF ALASKA

CORAZON FOX,)	
)	
Appellant,)	File No. S-482
)	
v.)	<u>O P I N I O N</u>
)	
ALASCOM, INC.,)	
)	
Appellee.)	[No. 3051 - May 9, 1986]
)	

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Karen L. Hunt, Judge.

Appearances: Ernest N. Rehbock, Rehbock & Rehbock, Anchorage, for Appellant. Marilyn E. Bain, Vancouver, Washington, for Appellee.

Before: Rabinowitz, Chief Justice, Burke, Matthews, Compton and Moore, Justices.

RABINOWITZ, Chief Justice.

Fox experienced many medical problems during her years at Alascom. These problems became particularly acute during 1977 and 1980 after the Caesarean birth of her second child. Among these problems were a variety of physical ailments to which no physical cause could be found, such as pains in her legs and breathing difficulties. Fox also experienced irritability and an inability to concentrate.

Fox continued experiencing these problems through 1982. During this time she was seeing a physician, Dr. Wilder, who could not find a physical cause for her complaints and who advised her to see a psychologist. On February 1, 1982, Fox went to Dr. Wilder on an emergency basis, stating that if she had not left work a few moments before she probably would have had a complete nervous breakdown. Fox was placed in a "sick leave" category where she apparently remained until she was terminated in September, 1982.

Fox filed a workers' compensation claim against Alascom for temporary total disability benefits, medical expenses, vocational rehabilitation costs, and attorney's fees and costs. Fox alleged that she had "suffered a nervous breakdown due to stresses and pressures placed upon her in the course of her employment." The board held a hearing on May 5, 1983. The evidence before the board consisted of a variety of medical reports, Fox's deposition,

CORRECTION

**THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY**

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Before: Rabinowitz, Chief Justice, Burke, Matthews, Compton and Moore, Justices.

RABINOWITZ, Chief Justice.

This case involves an employee who suffered a mental disability allegedly due to non-traumatic, gradual work-related stress. The Workers' Compensation Board held that in order to recover benefits in this situation the employee must make a preliminary showing that the on-the-job stress she experienced was greater than the stress which all employees experience. We hold that under the Workers' Compensation Act the board erred in imposing such a requirement.

FACTS.

Appellant Corazon Fox was hired by appellee Alascom, Inc. in October, 1974, as a Senior Clerk Typist in the field installation department. Her duties included processing weekly time reports, making travel arrangements, requisitioning supplies, keeping business expense reports, distributing payroll checks, answering the telephone, distributing mail, typing, and filing. In April, 1979, she was transferred to the traffic administration department as a clerk. Her duties in this job included processing weekly time reports, verifying absences, balancing the bi-weekly payroll, doing fill-in secretarial work, typing, and obtaining supplies. Fox continued at this job until she left work in February, 1982.

Fox experienced many medical problems during her years at Alascom. These problems became particularly acute during 1977 and 1980 after the Caesarean birth of her second child. Among these problems were a variety of physical ailments to which no physical cause could be found, such as pains in her legs and breathing difficulties. Fox also experienced irritability and an inability to concentrate.

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Fox filed a workers' compensation claim against Alascom for temporary total disability benefits, medical expenses, vocational rehabilitation costs, and attorney's fees and costs. Fox alleged that she had "suffered a nervous breakdown due to stresses and pressures placed upon her in the course of her employment." The board held a hearing on May 5, 1983. The evidence before the board consisted of a variety of medical reports, Fox's deposition,

the deposition and reports of Dr. Robert Ohlson, Ph.D., a psychologist who interviewed Fox several times in early 1983, and the testimony at the hearing of several Alascom employees.

The evidence before the board clearly indicated that Fox perceived her job with Alascom as the source of her physical and emotional problems. Fox attributed her problems solely to her job and denied that she experienced stress from other events in her life such as the Caesarean birth of her child and financial difficulties. Fox also stated that even though she was no longer employed by Alascom her present stress was caused by memories of her job there. Fox felt that stress from the job emanated from not being told what was expected of her and from being treated unequally. Among Fox's more specific complaints were that her supervisors talked behind her back; she was denied requests to take several hours off for personal business; she was the last one to know about her transfer to another department; she had many rush jobs; her supervisors refused to move a filing cabinet closer to her desk; and she was required to answer the phones during lunch.

Fox's three supervisors testified at the hearing. They stated that Fox was good at her job and received regular merit pay increases. They also stated that they did not feel their relationship with Fox was stressful or tense,

and they did not believe her job was stressful. They also stated that they did not talk about her behind her back nor fail to tell her what was expected of her. The woman who replaced Fox and worked at her position for ten months testified that in her opinion the job was not stressful and that her personal relationship with her supervisor was neither stressful nor tense.

The major medical evidence upon which the board relied was provided by Dr. Ohlson. Dr. Ohlson indicated that Fox's exact diagnosis was unclear but that her symptoms resembled a "conversion disorder," a "psychogenic pain disorder" or a "somatization disorder." Dr. Ohlson made clear that in his opinion Fox was not malingering and that in Fox's mind her job with Alascom was the only source of her stress. This conclusion was not disputed by Alascom.

Dr. Ohlson indicated that Fox's work-relationships had created a great deal of stress for her. However, he also indicated that there were many other non-employment factors in Fox's life that were more likely to be the "real sources" of stress. One of these factors was that Fox's husband had been unemployed since 1975, thereby forcing a reversal in expected roles, with Fox becoming the family's main provider. Another factor which Dr. Ohlson felt would be very stressful was that Fox and her husband experienced great financial difficulties, eventually having to declare

bankruptcy. Other likely sources of stress were the Caesarean births of her children, her difficulties in caring for them, and surgery which Fox had for the removal of an ovary.

Dr. Ohlson stated that these other factors rated higher as sources of stress on a "Social Re-adjustment Rating Scale" than did "trouble with the boss." Dr. Ohlson acknowledged that the fact that an item rated lower or did not appear on the scale did not necessarily preclude it from being stressful to a given individual. Dr. Ohlson felt, however, that Fox's difficulties would have developed if she had never worked at Alascom:

[I]n my opinion, the condition would have developed no matter where she worked. Just the experience of having to work with all the other kinds of things that were going on in her life would have caused the same kinds of stresses.

Fox, however, denied that these other factors were stressful to her and attributed all her stress to her job at Alascom. In Dr. Ohlson's view this denial was a defense mechanism against intense feelings which would normally be expected from the other factors.

On July 27, 1983, the board issued a Decision and Order denying Fox's claim. The board stated that under the Alaska Workers' Compensation Act "it is presumed that an injury is compensable in the absence of substantial evidence

to the contrary." The board next stated, quoting this court in Burgess Construction Co. v. Smallwood, (Smallwood II) 623 P.2d 312, 316 (Alaska 1981), that "before the presumption attaches, some preliminary link must be established between the disability and the employment." The board stated that in order for this preliminary link to be established the claimant had to show that "the employment situation produces mental stress and tension greater than all employees must experience."

The board held that the preliminary link had not been established in this case. The board found that none of the testimony indicated that work related stress was greater than that which all workers must experience and was not a substantial factor in causing Fox's disability. The board stated that "[h]aving to work is something all employee [sic] must do. Therefore, the stress of having to work is not greater than the stress all employees experience." Since the preliminary link had not been established the presumption did not attach. Therefore Fox had to prove all the elements of her claim and the board concluded that she had not done so.

Fox appealed the board's decision to the superior court. The court upheld the decision, holding in part that the "greater than all employees must experience" requirement was consistent with AS 23.30.265(17)'s definition of

"injury" as "arising out of and in the course of employment." The superior court was of the further view that the requirement was consistent with the board's own prior decisions and "with the trend nationally to use objective standards for determining work-relatedness in mental disability claims." The court also rejected Fox's argument that the test should focus on the claimant's "honest perception" of whether the employment was the source of the injury. The superior court concluded that the record fully supported the board's finding that Fox had not proved that "work stress" was a substantial factor in creating her emotional disability. Fox appealed to this court.

DISCUSSION.

A. Introduction

AS 23.30.120(a)(1) provides that it is presumed that a claim for compensation comes within the coverage of the Workers' Compensation Act unless there is "substantial evidence to the contrary." We have held that before this presumption attaches,

some preliminary link must be established between the disability and the employment, and . . . in claims 'based on highly technical considerations' medical evidence is often necessary to make that connection.

Smallwood II, 623 P.2d at 316.

The purpose of requiring this preliminary link is to rule out cases in which the claimant can show neither that the injury occurred in the course of employment nor that it arose out of it. See Smallwood II, 623 P.2d at 316. Such a requirement is necessary under AS 23.30.265(17) which defines "injury" as "accidental injury or death arising out of and in the course of employment."

The "arising out of" requirement is present in all workers' compensation statutes. The requirement is essential to the political compromise behind the statute whereby the employer bears the initial cost of injuries that arise from employment related risks, regardless of "fault," and the employee surrenders his common-law right to sue in tort when an employment related risk creates his injury. See L. Joseph, The Causation Issue in Workers' Compensation Mental Disability Cases: An Analysis, Solutions, and a Perspective, 36 Vand. L. Rev. 263, 280 (1983). The requirement reflects the primary "policy" or "legal" causation formula by holding employers responsible only for compensating employment related risks. Id. at 283.

There is an inherent difficulty, however, in determining whether a mental disorder "arises out of" employment. The problem is simply that "the body of knowledge regarding mental or emotional injuries is not certain enough to make rational determinations as to the

true nature, extent and cause of injury." S. Sersland, Mental Disability Caused by Mental Stress: Standards of Proof in Workers' Compensation Cases, 33 Drake L. Rev. 751, 752 (1983-84).

As another commentator put it:

The precise etiology of most mental disorders is inexplicable. Mental disorders result from an extraordinarily complex interrelation between an individual's internal or subjective reality and his external or environmental reality . . . The precise psychogenesis of an individual's subjective reality is impossible to determine. Moreover, the interrelation between subjective and environmental realities is so profoundly complex that no method exists either to quantify or qualify the extent to which one reality and not the other is a cause of mental disorder. Therefore, the time lapse between an external stress and the manifestation of mental disorder symptoms, and the intensity, suddenness, or gradualness of the external symptoms are irrelevant in determining cause . . . When mental disorder symptoms appear in parts of the body other than the brain, medical science is able, in most cases, to attach a quantitative or qualitative etiological probability. Scientists cannot make this determination, however, when the symptoms manifest themselves subjectively. An individual who suffers a mental disorder has an a priori personal subjective vulnerability or predisposition to the disorder.

Joseph, 36 Vand L. Rev. at 271-72 (footnotes omitted); See also Sersland, Drake L. Rev. at 752-58; Comment, Workmen's Compensation Awards for Psychoneurotic Reactions, 70 Yale L.J. 1129 (1961).

It is this inherent difficulty in proving causation that has led courts in many jurisdictions to impose additional definitional limits on the compensability of mental injury caused by mental stress by looking "objectively" at the type and/or degree of the stress. Some jurisdictions have held that mental injuries are not compensable unless there is some "physical element" involved or unless the mental stimulus is a "sudden," "traumatic" event or a series of such events. See Hanson Buick v. Chatham, 292 S.E.2d 428, 429-30 (Ga. 1982); Albanese's Case, 389 N.E.2d 83, 86 (Mass. 1979). See generally Sersland, 33 Drake L. Rev. at 759-67, 767-72; J.B. A. Larson, Workmen's Compensation Law §§ 42.23, 42.23(a) at 7-647 - 7-661 (1986). Some jurisdictions have held that mental injury caused by gradual mental stress is compensable, but only if the employee shows that he was subject to mental stress and tension "greater than all employees must experience." See, e.g., Sloss v. Industrial Commission, 588 P.2d 303, 304 (Ariz. 1978); Townsend v. Maine Bureau of Public Safety, 404 A.2d 1014, 1020 (Me. 1979); Seitz v. L&R Industries, Inc., 437 A.2d 1345, 1351 (R.I. 1981); Jose v. Equifax, Inc., 556 S.W.2d 82, 84 (Tenn. 1977); School District #1 v. Dept. of Industry, Labor and Human Relations, 215 N.W.2d 373, 377 (Wis. 1974).

B. The "Greater Than All Employees Must Experience" Test.

The Board applied the "greater than all employees must experience" test in this case. Courts that have adopted this test have often expressed a fear that due to the difficulty in determining the causes of mental illness, failure to impose additional objective requirements would "open the flood gates" to fraudulent mental injury claims. E.g., School District #1, 215 N.W.2d at 377. Courts also often state that worker's compensation acts were not designed to make employers "general insurers," which could happen if there were no objective threshold requirements, since some causal connection between the mental illness and employment could be established in most cases. E.g., Townsend, 404 A.2d at 1018-19. Alascom argues that the "greater than all employees must experience" test is appropriate to ensure that the injury "arise out of" employment by providing that there is some objective, realistic, connection between the injury and the employment.

While we recognize these concerns, we reject the "greater than all employees must experience" test, or any other additional "objective" threshold requirement, for several reasons.

First, we are unconvinced that requiring a showing of stress greater than all employees must experience will

make it more likely that employment was a contributing cause of the mental injury.

The existence of a mental impact stimulus or unusual excessive mental employment stresses, however, does not medically assure the genuineness of the causal relationship between a worker's mental disability and his employment any more than does the existence of a physical impact. The intensity of the mental stresses is etiologically irrelevant. The metaphorical description of the threshold limitations by courts as "sufficient badge[s] of reliability", therefore, is accurate: like the objective criteria in tort actions for emotional injury, these "badges" at best assure the appearance of an objective causal relation.

Joseph, 36 Vand. L. Rev. at 305 (emphasis in original) (footnotes omitted); see Comment, 70 Yale L. J. at 1138-45. We therefore think that the "greater than all employees must experience" test is neither essential nor even germane to the legislative requirement that the injury "arise out of" the employment.

Second, we believe the argument that threshold requirements are necessary for mental injuries because such injuries are easier to feign than physical injuries is unsubstantiated. There is no evidence that it will be easier to feign or more difficult to detect complex patterns of psychoneurotic reactions than certain "physical" injuries. See Comment, 70 Yale L. J. at 1137.

Finally, and most importantly, we think that adoption of the "greater than all employees must experience" requirement is contrary to the fundamental principle in workers' compensation law that the Act should be read liberally and that the employer must take the employee "as he finds him." See, e.g., S.L.W. v. Alaska Workmen's Compensation Board, 490 P.2d 42, 44 (Alaska 1971); Wilson v. Erickson, 477 P.2d 998, 1000 (Alaska 1970). There will be employees who will suffer mental injuries from "usual," "everyday," employment stresses. Under this requirement these "eggshell" employees would not be compensated for their injuries, because the stress to which they succumbed was a stress to which the average worker would not have succumbed.

Several jurisdictions have rejected the "greater than all employees must experience" requirement on the explicit or implicit grounds that the employer must take the employee as he finds him, and that there is nothing in the workers' compensation statute that implies there should be any different rule for mental illness. See Royal State National Insurance Co. v. Labor & Industrial Relations Appeal Board, 487 P.2d 278, 282 (Hawaii 1971); Yocom v. Pierce, 534 S.W.2d 796, 798-800 (Ky. 1976); Breeden v. Workmen's Compensation Comm'r, 285 S.E.2d 398, 400 (W.Va. 1981); McGarrah v. SAIF, 675 P.2d 159, 167 (Or. 1983);

Albertson's, Inc. v. Workers' Compensation Appeals Bd. of State of California, 182 Cal. Rptr. 304, 307 (Cal. App. 1982).

We agree with these decisions. "Greater stress than all employees must experience" does not insure that the injury "arises out of employment." While no "test" can adequately insure this, we have not imposed additional threshold requirements in physical injury cases where it was difficult to determine whether employment was a causal factor. See, e.g., Providence Washington Insurance Co. v. Bonner, 680 P.2d 96 (Alaska 1984). In Delaney v. Alaska Airlines, 693 P.2d 859 (Alaska 1985), a pilot who had Crohn's disease claimed compensation. We rejected Delaney's claim that Crohn's disease was an occupational disease of airplane pilots caused by excessively stressful conditions because there had been no medical testimony that the disease had originally been caused by conditions of employment. Id. at 862. Therefore the preliminary link between the illness and the employment had not been established. We then stated that the "preliminary link" had been established as to whether the employment conditions aggravated, accelerated or combined with a pre-existing disease to produce disability. Id. at 863. We held, however, that the employer had produced "substantial evidence" that employment stress was not a contributing factor, based on unequivocal expert

testimony, and therefore had rebutted the presumption of compensability. Id. at 863.

While ultimately rejecting the employee's claim in Delaney, we did not vary from the traditional analysis even though the question of whether the employment contributed to the injury was novel and difficult. We see no reason to vary from the traditional analysis in mental injury cases by imposing additional requirements on the quality or quantity of employment conditions. No legal approach can be entirely accurate in this area because there is insufficient scientific knowledge regarding what actually causes mental disorders. The creation of additional requirements that do not necessarily bear on whether there is a connection between the injury and the employment, and which per se exclude a class of claimants from legislatively directed compensation coverage, is not the way to deal with this reality.

C. The "Honest Perception" Test

Fox urges us to adopt the approach taken in Deziel v. Difco Laboratories, Inc., 268 N.W.2d 1 (Mich. 1978). In Deziel the court adopted a "strictly subjective" causal nexus to determine compensability. Under this standard:

[A] claimant is entitled to compensation if it is factually established that claimant honestly perceives some personal injury incurred during the ordinary

work of his employment "caused" his disability. This standard applies where the plaintiff alleges a disability resulting from either a physical or mental stimulus and honestly, even though mistakenly, believes that he is disabled due to that work-related injury and therefore cannot resume his normal employment.

Id. at 11 (emphasis in original).

The court stated that this test was appropriate because psychoneuroses were, by definition, subjective injuries and disabilities existing only in the minds of their victims. The court viewed the "honest perception" test as reflecting the central fact that the mentally ill claimant was "mis-manufacturing" or misperceiving reality.

Id. at 12. The court also stated that the workers' compensation act should be construed liberally and that "[c]ompensation for disability takes preference over any subsidiary doubts about the existence of an objective causal nexus." Id. at 15.

We decline to adopt the "honest perception" test because we believe it is fundamentally inconsistent with the statutory requirement that the injury "arise out of" the employment. The "honest perception" approach does not take into account the fact that objective, environmental realities, such as employment, may or may not contribute to the disability. See Joseph, 36 Vand. L. Rev. at 308-09. While it is true, as a general policy preference, that remedial

legislation should be construed liberally, this does not give us license to ignore the statutory directive. The "arising out of" requirement is the legislature's primary means of limiting compensation to employment related risks. A test that focuses exclusively upon the employee's honest perception ignores the statutory directive because it does not ask whether the mental injury arose from an employment related risk nor does it even look to whether an employee's subjective reaction to work stresses actually contributed to the injury. Under this test, even if the subjective reaction of a predisposed or "eggshell" employee did not contribute to the employee's injury, the injury would still be compensable if the employee "honestly perceived" that his job caused the injury.

The dissent in Deziel pointed out that this scenario could occur often since it is very likely that a claimant would "perceive" his employment as the cause of his disorder:

[F]or a neurotic state to exist, . . . the person must be unable or unwilling to recognize and resolve these [inner conflicts and emotional weaknesses]. The disorder is an unconscious attempt at resolution. The only possible causative factor of which the claimant is, or will allow himself to be, consciously aware is the work-related trauma. Reality is elusive. It is, therefore, highly unlikely that the claimant's perception of causation will be anything but his employment.

268 N.W.2d at 24.

D. The "Preliminary Link"

We conclude that this case should be analyzed in the same way as any other claim for workers' compensation benefits. We are not alone in treating a claim for mental injury caused by gradual mental stress in the same manner as any other workers' compensation disability claim. See Royal State National Insurance Co. v. Labor & Industrial Relations Appeal Board, 487 P.2d 278 (Hawaii 1971); Yocom v. Pierce, 534 S.W.2d 796 (Ky. 1976); McGarrah v. SAIF, 675 P.2d 159 (Or. 1983); Breeden v. Workmen's Compensation Comm'r; 285 S.E.2d 398 (W.Va. 1981). The "preliminary link" and presumption of compensability is established if there is evidence that the employment contributed to the injury. See Bonner, 680 P.2d at 99. The fact that the employee perceives employment as the source of the injury is not enough to establish the preliminary link unless there is some testimony that the employment affected the employee to help create the disability. As one court put it, there must be some evidence that the employment played an "active role" in the development of the mental disability and did not "merely provide a stage for the event." Albertson's, Inc. v. Workers' Compensation Appeals Bd. of State of California, 182 Cal. Rptr. 304, 309 (Cal. App. 1982).

Here the evidence establishes a preliminary link between the employment and the disability. While Dr. Ohlson indicated that in his opinion there were a variety of factors more likely to produce stress in Fox, he also stated that "[Fox's] relationship with fellow workers and supervisors at Alascom has evidently produced a tremendous amount of stress in her." Dr. Ohlson also stated that Fox's employment with Alascom was a factor causing stress although he thought it was not the exclusive nor precipitating factor.

In order to establish the preliminary link necessary for the presumption of compensability the claimant need not present substantial evidence that his or her employment was a substantial cause of his disability. Such a showing would be necessary only if the employer had rebutted the presumption of compensability. See Bonner, 680 P.2d at 98 (Alaska 1984). The record contains evidence that the employment was a factor in creating Fox's disability. This is enough to establish the presumption of compensability. On remand, Alascom may rebut the presumption by presenting substantial evidence that Fox's disability was not work-related through (1) affirmative evidence that the disability was not work-related, or (2) elimination of all reasonable possibilities that the injury was work connected. Burgess Construction Co. v.

Smallwood (Smallwood III), 698 P.2d 1206, 1211 (Alaska 1985). If Alascom does rebut the presumption then Fox will have to prove all the elements of her claim by a preponderance of the evidence. Id. at 1211.

REVERSED and REMANDED for proceedings consistent with this opinion.

Workers' comp legislation no help to workers

By CHANCY CROFT

Workers' compensation reform was touted as reducing costs 15 to 20 percent until reality entered the debate.

A study by the National Council of Compensation Insurance was followed by a second major study from a private actuarial firm. Both concluded that the legislation under consideration in Juneau would not reduce costs. There might even be a cost increase! Yes, that's right — the hard number boys said there might be a cost increase.

The bill was touted as providing jobs from cost savings to employers. Without any cost savings, of course, no jobs will be created. But senators, anxious to please their business constituents, ignored the hard facts and passed a resolution — which has no legal effect — asking insurance companies to reduce premiums by 2 percent.

Even a fictitious 2 percent reduction would provide a saving of only a few hundred dollars to the average employer. The permanent fund dividend would be three times as large as any fictitious savings to an employer under SB 322.

Do we have the most expensive workers' compensation system in the United States? No. Several states have more expensive systems, including Oregon and Montana.

Are we the only state that's facing an increase? No. Oklahoma, Louisiana, South Carolina, Maine and New Hampshire are all facing larger increases.

So why is there an increase in Alaska? Nobody can say for sure. The Division of Insurance has no figures, the Workers' Comp Division has no figures.

The only thing we know for sure is the injury frequency has hit a 10-year high and that the delay in handling cases has increased 70 percent. This alone probably accounts for some of the increase. But SB 322



ignores safety and makes delays worse.

If the legislation does nothing to control insurance companies or reduce premiums, does it benefit injured workers? Only a few workers at the expense of the many. Some legislative provisions are good. Many more are regressive.

The benefits are not worth the price most injured workers will pay.

- Seriously disabled workers get less. People with closed head injuries, burn victims, multiple trauma injuries requiring repeated operations, all are arbitrarily cut off temporary disability after two years. This is done in the name of a false premium reduction to those employers who caused the injury in the first place.

- All payments for permanent partial wage loss are totally eliminated. This would make Alaska the first state to reject compensation to injured workers based on permanent loss of earning capacity. Instead payment is solely on medical impairment.

If you're a lawyer and lose an arm you'll get a lot, but if you're a laborer with a bad back, you're mostly out of luck.

- Workers pay their own time loss during rehabilitation once they are medically stationary.

- A worker's right to a determination of actual earning capacity is ignored, claims based on stressful jobs are excluded, compensation is limited regardless of actual earnings, out-of-state benefits are reduced (a similar provision was declared unconstitu-

tional years ago) and workers get only one choice of a doctor.

- Court review of board decisions is severely restricted.

But even more strangely, all medical benefits are excluded. To the average Alaska family, medical benefits are more important than pension. Some states have mandated that employees continue health insurance for injured workers — why not Alaska?

The legislation was the result of long hours of hard work by a select group of people. But it has three philosophical premises not in the interest of injured workers.

First, the legislation is arbitrary. What is the legal or moral authority to make arbitrary rules about injured workers? Who can say that some workers get a high percentage of their pre-injury earnings and others have to get by on less? Why aren't all workers treated equally?

Second, a case is closed regardless of condition. Injured workers are treated like dated products on a grocer's shelves. After time, they are disposed of.

Third — and the most serious fallacy behind this legislation — is the notion that workers' compensation can be reduced without reducing benefits. It's a nice theory, but it doesn't work here. In short, there's no free lunch. This bill is the first workers' comp legislation in a long time that both raises costs and reduces benefits!

The theory of workers' compensation legislation is "that the cost of all industrial accidents should be born by the consumer as part of the cost of the product." *Searfus vs. Northern Gas Company*, 472 Pacific 2nd 966 (Alaska 1970).

If workers' compensation is costing too much, it's because employers are injuring too much. If the cost of doing business in Alaska is too great because workers are too careless,

Do Alaska businesses really deserve an economic bailout from the state and a subsidy by their injured workers, as well?

Why reduce benefits to injured workers? Do Alaska businesses really deserve an economic bailout from the state and a subsidy by their injured workers, as well?

Workers in other states are fighting winning battles for a higher minimum wage, decent health insurance and better working conditions. Why do Alaska workers have to settle for a second-rate compensation act?

So, I come back again to the question each of us should ask. Why is it that when injured workers and businesses alike are affected by increased delays by the Division of Workers' Compensation, the legislative solution is to increase those delays? Why is it that when workers' comp costs increase because of an increasing injury rate, nobody does anything about safety?

Why is it that if insurance companies want an increase in premiums one year, nobody asks if they made excess profits years before? Why is it that every time something is done about insurance costs the reaction is always to reduce benefits to the state's 25,000 injured workers? Why must the workers always pay the price?

Chancy Croft is an Anchorage attorney.

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

HOUSE JUDICIARY COMMITTEE

APRIL 11-16 AGENDA

SB 322 - WORKERS' COMPENSATION

WEDNESDAY, APRIL 6 5:30 - 6:30

OVERVIEW OF SB 322

Bob Anders; Labor-Management Task Force - Labor
representative
Workers' Comp Board

DISCUSSION: Remaining areas of controversy
Labor priorities

Note: Committee will be on listen-only teleconference.

MONDAY, APRIL 11 1:30 - 3:00

INSURANCE SPECIFIC TOPICS

Rate History:

Paul Roller; Director, Division of Insurance
Don Koch; Special Deputy, Division of Insurance

Assigned Risk Pool:

Stan Sparks; Director, Government, Consumer and Industry
Affairs - National Council on Compensation
Insurance (NCCI) (on teleconference from
Portland)

Alaska Timber Trust experience:

Donna Lewis; Alaska Timber Trust (on teleconference from
Ketchikan)

Industry aspects:

Gary Purdom; Industrial Indemnity and Alaska
Classification and Rating (C&R)
Committee

DISCUSSION:

- 1) Mandated Rate Reduction or Rate Freeze
- 2) Revamping the Assigned Risk Pool
- 3) Rate Reductions for Safety Programs
Note: Richard Arab; Deputy Director, Occupational
Safety and Health, will be
available for questions.

Note: Committee will be on listen-only teleconference

House Judiciary Committee Workers' Comp agenda (cont.)

TUESDAY, APRIL 12 1:30 - 3:00

CONTINUATION OF APRIL 11 AGENDA IF NEEDED

OVERVIEW OF SB 322

Labor-Management Task Force - Management representatives
(Note: Task Force members will be in Juneau personally and
on line from Anchorage.)

BENEFIT STRUCTURE - PRESENT AND PROPOSED

Jaquelyn McClintock; Director, Division of Workers' Comp

Note: Committee will be on listen-only teleconference

WEDNESDAY, APRIL 13 1:30 - 3:00

INDEPENDENT MEDICAL EXAM (IME)

Note: Open to public testimony specific to this topic only.

VOCATIONAL REHABILITATION

Note: Open to public testimony specific to this topic only.

LEGAL ASPECTS

Janice Hansen; Chief of Adjudications, Division of Workers'
Compensation

DISCUSSION:

Section 18 - Board IME - unanimous vote requirement

Section 10 - Vocational Rehabilitation changes

Note: Committee will be on listen-only teleconference except
as noted above.

House Judiciary Committee Workers' Comp agenda (cont.)

THURSDAY, APRIL 14 1:30 - 3:00

RATE REDUCTION

John Lewis; consultant to Labor-Management Task Force
(Note: on teleconference from Chicago)

DISCUSSION:

Pros and cons of mandated rate reductions and freezes;
The Maine experience - comparable to Alaska?

EMPLOYER TESTIMONY

Kevin James; Klukwan, Inc.

Ray Bond; R&R Scaffolding (note: on teleconference from
Anchorage)

PUBLIC TESTIMONY

Testimony will be taken on all topics related to bill.

FRIDAY, APRIL 15 1:30 - 3:00

EFFECT TO WORKERS - Temporary Total Disability (TTD) and
Permanent Partial Disability (PPD)
Chancy Croft, attorney

PUBLIC TESTIMONY

Testimony will be taken on all topics related to bill.

SATURDAY, APRIL 16

9:00 - 12:00

PUBLIC TESTIMONY

Testimony will be taken on all topics related to bill.

1:00 - 5:00

COMMITTEE AMENDMENTS

Note: Committee will remain on listen-only teleconference.

Workers' Compensation Monthly

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MENTAL DISABILITY CLAIMS: A NEW EPIDEMIC?

*California, always a pacesetter - for better or worse -
has had an explosion of mental disability Workers' Compensation claims in recent years.*

By Eric Marcus, M.D.

Approximately 50% of all these claims are for mental injury. Psychiatric disability claims have also been sharply increasing in most states. This article shall attempt to describe the anatomy of a typical Southern California disability claim arising out of a mental injury/disability.

Causation: Applications for psychiatric disability stem from two sources: physical injuries and purely mental factors. Regarding physical injuries, it has all but become common practice for applicants' attorneys to automatically file a claim for "injury to the psyche".

The theory being that physical injury causes mental distress which is then considered as a separate disease - subject to additional disability compensation. Also, in the event that orthopedists, neurologists, and other health care professionals fail to find any objective evidence for continuing disability, then the "mental component" can be pursued with appropriate diagnoses, termed as "psychogenic pain disorder", etc.

The second source of mental disability claims involve no physical injury and are related to "job stress". This may include any and all types of dissatisfactions. Difficulties with supervisors, reprimands, transfers, demotions, terminations, lack of promotions, and a myriad of job-related grievances, legitimate or otherwise typically result in the filing of a mental disability claim.

Pattern in Physical Disability Claims: Following an industrial (physical) injury or alleged injury, the customary orthopedic examinations and treatment ensues. Most of the cases eventually referred to psychiatrists involve claims of back injury followed by complaints of continued pain and disability.

Typically, after a number of months (or years) the worker is referred to a psychiatrist because orthopedists and

disability. These physicians will in turn be selective in their choice of psychiatric consultants along the same lines.

Psychiatrists rendering treatment who are *not* in the Workers' Compensation community may be subject to several possible sources of bias.

The effect of the doctor's personal opinions and biases upon his professional opinions is a very important factor, and this aspect is frequently not given sufficient consideration in court.

People generally find what they look for. A not so obvious bias of doctors is that they are trained to look for, and therefore, *expect to find disease*. For example, a life insurance salesman will generally find that a potential client is deficient in their life insurance coverage.

Likewise, a doctor typically finds *something* to "doctor". This bias to "finding something wrong" should not be entirely attributed to a financial vested interest of the doctor, but most often stems from a humanitarian point of view. Doctors often find that it is better to overtreat a patient and not miss something than to take a risk and, perhaps, miss treating the disease. This viewpoint results in billions of dollars spent for unnecessary diagnostic studies and treatment, but a more comfortable medicine practitioner.

Doctors, being basically humanitarian, also tend to believe whatever the patient says. If a patient says they hurt, when the doctor believes they must be hurting, otherwise, why would they be going to a doctor? Malingering is not something the medical practitioner looks for or expects from his "patient".

Economic bias may also operate. Psychiatrists realize that a Workers' Compensation case can yield rather lucrative long-term rewards. Frequently, sessions are billed at very

permanent and stationary ratings of at least a moderate degree of permanent psychiatric disability.
Bonafide Psychiatric Injuries: Having examined over 1,000 injured workers, I have seen a number of legitimately mentally injured workers and have rendered treatment. Objectively verified physical injuries, such as amputations, lacerations, and eye injuries, may benefit from early psychiatric or psychological counseling. These workers may be truly distressed, and even though they may not technically have sustained a psychiatric injury, they would benefit from supportive counseling to help them cope with their physical trauma.

hospitalized? Answer: How long will his insurance coverage pay for it? Since insurance coverage limitations do not apply to Workers' Compensation, these patients are a real bonanza for the psychiatric hospital and psychiatrist.

Psychiatrists, psychologists and other mental health professions who are not generally involved in the Workers' Compensation community treat injured workers as they would any other patient. No attempt is made to obtain information from sources such as the employer in order to verify or refute the complaints of the patient.

The doctor may not even be aware of pending litigation. If the doctor is aware, then the doctor's natural tendency is to side with the patient and write reports accordingly. The doctor is simply paid to be sympathetic with the patient.

The results are threefold:

1. All symptoms are accepted at face value; 2. findings and diseases are typically related to the litigated trauma as a "favor" for the patient; 3. if no disease is found, the doctor then lists the patient's symptoms as if they were an objective diagnosis, for example, "headaches, low back ache, etc." Unfortunately, this practice dignifies a symptom (or alleged symptom) by making it appear as if it were an established diagnosis when it in fact is merely a symptom.

Not infrequently the psychiatric treatment/counseling goes far beyond the consequences of the industrial injury. Marital problems, difficulties with children, financial problems, perhaps alcoholism, all are dealt with by the treating therapist. However, since the therapist knows that Workers' Compensation is the source of funding, the therapist only treats those issues related to the purported injury. On occasion, the therapist's handwritten notes may reveal non-industrial sources of stress. Not infrequently, however, psychotherapists don't make progress notes and it becomes impossible to determine what was actually the context of the treatment.

Psychiatrists personally render very little psychotherapy, rather they prescribe medications for whatever the patient complains of. For example, if the patient says they are sad, then the doctor gives them antidepressants. If they say they are upset, then the doctor prescribes tranquilizers. Patients may be seen once or twice a month for short visits. The doctors' bills generally do not reflect these short visits and sessions are billed at the customary one hour fee. The doctor can, of course, see multiple patients during the same hour.

Psychiatrists or psychologists receiving referrals primarily from applicants' attorneys, who are not involved in one of the "compensation factories", will typically see an individual indefinitely. Progress reports, primarily generated by a word processor and essentially identical from month to month have indicated that the person is still very sick but "slowly improving". After a year or two, or longer, the person may ultimately be declared "permanent and stationary" with, typically, at least a moderate level of permanent psychiatric disability. As already mentioned, the "treatment" consisted of once or twice a month brief sessions to prescribe and renew medications.

Typically the doctor offers the opinion that the individual's job was very stressful and the person should be rehabilitated to a job of less stress. The "stressful jobs" range from police work to secretary, sanitation worker,

school teacher, - actually the entire gamut of existing occupations. A "less stressful job" becomes a meaningless recommendation since there are no jobs which have no requirements, no supervision, no ground rules, and no stress.

In cases of physical injury such as a back injury, the psychiatrist states that the person is permanently crippled (in spite of the lack of objective orthopedic findings) the crippling being the result of both orthopedic and severe psychiatric disease. These individuals are also given

Occasionally I find a verified instance of job-related stress - verified by sources other than the employee. In these cases, a short period of counseling may restore the individual to a better state of mind and resumption of employment. Based upon the American Medical Association's "Guide to The Evaluation of Permanent Impairment" the most important single factor in assessing psychiatric disability is the issue of motivation.

Additional considerations having a direct bearing on whether an injured worker may benefit from psychiatric intervention include the following:

1. Whether the individual has obtained an attorney.
2. The time elapsed since the original injury.
3. Whether there is objective evidence of a trauma (in physical injuries).
4. Whether the individual continues to work after the trauma.
5. How long the individual has been off work.

Conclusion: Whether a mentally injured worker can be returned to employability status depends not only upon the worker's personal motivation but equally upon the motivation of their attorney. If the attorney's income is dependent upon the size of the disability award, then the interests of the attorney are obvious. Since the worker's attorney selects the treating and examining physicians, those physicians' sentiments will also be to find, establish and treat pathology to its maximum. There is no distinction made whatsoever between finding the individual *unwilling* versus *unable* to work.

The most comprehensive and objective criteria in existence for occupational disability is the Social Security Administration guidelines for evaluating psychiatric impairment. (SSA booklet No. 05-10089).

Unfortunately, California has only adopted a partial version of these guidelines. The various categories to be assessed include:

- Ability to comprehend and follow instructions.
 - Ability to perform simple and repetitive tasks.
 - Ability to maintain a work pace appropriate to a given workload.
 - Ability to perform complex or varied tasks.
 - Ability to relate to other people beyond giving and receiving instructions.
 - Ability to influence people.
 - Ability to make generalizations, evaluations or decisions without immediate supervision.
 - Ability to accept and carry out responsibility for direction, control and planning.
- Only by the use of meaningful and objective criteria for psychiatric impairment will there be a fairer settlement of psychiatric disability claims.

Steven Babitsky (Esq.) Editor, Falmouth, Mass.

Published monthly by Workers' Compensation Monthly, SEAK, Inc.
P.O. Box 829, East Falmouth, Massachusetts 02536

CORRECTION

**THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY**

Workers' Compensation Monthly

Post Office Box 829, East Falmouth, MA 02536. A publication of SEAK, Inc.

MENTAL DISABILITY CLAIMS: A NEW EPIDEMIC?

*California, always a pacesetter - for better or worse -
has had an explosion of mental disability Workers' Compensation claims in recent years.*

By Eric Marcus, M.D.

Approximately 50% of all these claims are for mental injury. Psychiatric disability claims have also been sharply increasing in most states. This article shall attempt to describe the anatomy of a typical Southern California disability claim arising out of a mental injury/disability.

Causation: Applications for psychiatric disability stem from two sources: physical injuries and purely mental factors. Regarding physical injuries, it has all but become common practice for applicants' attorneys to automatically file a claim for "injury to the psyche".

The theory being that physical injury causes mental distress which is then considered as a separate disease - subject to additional disability compensation. Also, in the event that orthopedists, neurologists, and other health care professionals fail to find any objective evidence for continuing disability, then the "mental component" can be pursued with appropriate diagnoses, termed as "psychogenic pain disorder", etc.

The second source of mental disability claims involve no physical injury and are related to "job stress". This may include any and all types of dissatisfactions. Difficulties with supervisors, reprimands, transfers, demotions, terminations, lack of promotions, and a myriad of job-related grievances, legitimate or otherwise typically result in the filing of a mental disability claim.

Pattern in Physical Disability Claims: Following an industrial (physical) injury or alleged injury, the customary orthopedic examinations and treatment ensues. Most of the cases eventually referred to psychiatrists involve claims of back injury followed by complaints of continued pain and disability.

Typically, after a number of months (or years) the worker is referred to a psychiatrist because orthopedists and internists have not found an objective basis for the continuing complaints.

These specialists may then state that the patient has a "functional overlay". Doctors are loathe to say there is absolutely nothing wrong, so instead, "functional overlay" shunts the person to a psychiatrist. This particular process is called diagnosis by exclusion and has been found unacceptable by the Veterans Administration.

"A psychiatric diagnosis must be supported by positive findings, meet the criteria established by the Diagnostic and Statistical Manual, and *must never be made solely by exclusion*. In other words, absence of physical findings is not in itself sufficient to justify a psychiatric diagnosis, nor does the mere suspicion on the part of the physician that the symptoms are functional warrant a positive psychiatric diagnosis." Physicians' Guide for Disability Evaluation Examinations, Veterans Administration, March, 1985.

Pattern in Mental Disability Claims: Approximately half of California's Workers' Compensation Claims do not involve physical injuries, rather alleging mental disability and impairment. Typically, following any type of job dissatisfaction the employee consults with a union representative, fellow employee, and immediately proceeds to retain an attorney. Also, following a termination, the employee may feel some distress, seek an attorney who refers them to a psychiatrist.

The Psychiatrist and His Bias: Injured workers referred to psychiatrists by treating physicians, or self-referred, tend to be the more legitimate situations. In metropolitan areas, especially in California with its vast number of Workers' Compensation cases, physicians are readily identified in the Workers' Compensation Community as to their

disability. These physicians will in turn be selective in their choice of psychiatric consultants along the same lines.

Psychiatrists rendering treatment who are *not* in the Workers' Compensation community may be subject to several possible sources of bias.

The effect of the doctor's personal opinions and biases upon his professional opinions is a very important factor, and this aspect is frequently not given sufficient consideration in court.

People generally find what they look for. A not so obvious bias of doctors is that they are trained to look for, and therefore, *expect to find disease*. For example, a life insurance salesman will generally find that a potential client is deficient in their life insurance coverage.

Likewise, a doctor typically finds *something* to "doctor". This bias to "finding something wrong" should not be entirely attributed to a financial vested interest of the doctor, but most often stems from a humanitarian point of view. Doctors often find that it is better to overtreat a patient and not miss something than to take a risk and, perhaps, miss treating the disease. This viewpoint results in billions of dollars spent for unnecessary diagnostic studies and treatment, but a more comfortable medicine practitioner.

Doctors, being basically humanitarian, also tend to believe whatever the patient says. If a patient says they hurt, when the doctor believes they must be hurting, otherwise, why would they be going to a doctor? Malingering is not something the medical practitioner looks for or expects from his "patient".

Economic bias may also operate. Psychiatrists realize that a Workers' Compensation case can yield rather lucrative long-term rewards. Frequently, sessions are billed at very high rate (recently I saw a psychiatrist's bill for \$200 per hour). Typically, the worker is seen by low-salaried psychiatrists aides or employees, while the psychiatrist bills his or her full professional fee. Also, the psychiatrist may bill for one full hour of psychotherapy while in actuality spending only 10 or 15 minutes with the worker.

On occasion individuals are psychiatrically hospitalized due to allegedly being "severely depressed", "suicidal", or "extremely agitated". When I have been called upon to examine these patients in a psychiatric hospital, I found them not at all in need of hospitalization. These "patients" are content with the typical psychiatric hospital program which consists of handicrafts, prolonged periods of idleness spent smoking and chatting with other patients, sporting and other recreational activities.

Psychiatrists who have a hospital practice generally "make rounds" which amounts to coming to the hospital multiple times per week, chatting a few minutes with each patient and then billing the insurance carrier for a "hospital consultation". Obviously this is extremely lucrative, since the doctor can see 1/2 dozen or so patients in a couple of hours' hospital visit.

Psychiatric hospitalization, at least in California, costs approximately \$400-\$600 per day. This is, of course, extremely profitable for the hospital. A common joke regarding the necessary length of psychiatric hospitalization goes like this: Question: How long does Mr. X need to be

hospitalized? Answer: How long will his insurance coverage pay for it? Since insurance coverage limitations do not apply to Workers' Compensation, these patients are a real bonanza for the psychiatric hospital and psychiatrist.

Psychiatrists, psychologists and other mental health professions who are not generally involved in the Workers' Compensation community treat injured workers as they would any other patient. No attempt is made to obtain information from sources such as the employer in order to verify or refute the complaints of the patient.

The doctor may not even be aware of pending litigation. If the doctor is aware, then the doctor's natural tendency is to side with the patient and write reports accordingly. The doctor is simply paid to be sympathetic with the patient.

The results are threefold:

1. All symptoms are accepted at face value; 2. findings and diseases are typically related to the litigated trauma as a "favor" for the patient; 3. if no disease is found, the doctor then lists the patient's symptoms as if they were an objective diagnosis, for example, "headaches, low back ache, etc." Unfortunately, this practice dignifies a symptom (or alleged symptom) by making it appear as if it were an established diagnosis when it in fact is merely a symptom.

Not infrequently the psychiatric treatment/counseling goes far beyond the consequences of the industrial injury. Marital problems, difficulties with children, financial problems, perhaps alcoholism, all are dealt with by the treating therapist. However, since the therapist knows that Workers' Compensation is the source of funding, the therapist only relates those issues related to the purported injury. On occasion, the therapist's handwritten notes may reveal non-industrial sources of stress. Not infrequently, however, psychotherapists don't make progress notes and it becomes impossible to determine what was actually the context of the treatment.

Psychiatrists personally render very little psychotherapy, rather they prescribe medications for whatever the patient complains of. For example, if the patient says they are sad, then the doctor gives them antidepressants. If they say they are upset, then the doctor prescribes tranquilizers. Patients may be seen once or twice a month for short visits. The doctors' bills generally do not reflect these short visits and sessions are billed at the customary one hour fee. The doctor can, of course, see multiple patients during the same hour.

Psychiatrists or psychologists receiving referrals primarily from applicants' attorneys, who are not involved in one of the "compensation factories", will typically see an individual indefinitely. Progress reports, primarily generated by a word processor and essentially identical from month to month have indicated that the person is still very sick but "slowly improving". After a year or two, or longer, the person may ultimately be declared "permanent and stationary" with, typically, at least a moderate level of permanent psychiatric disability. As already mentioned, the "treatment" consisted of once or twice a month brief sessions to prescribe and renew medications.

Typically the doctor offers the opinion that the individual's job was very stressful and the person should be rehabilitated to a job of less stress. The "stressful jobs" range from police work to secretary, sanitation worker,

school teacher, - actually the entire gamut of existing occupations. A "less stressful job" becomes a meaningless recommendation since there are no jobs which have no requirements, no supervision, no ground rules, and no stress.

In cases of physical injury such as a back injury, the psychiatrist states that the person is permanently crippled (in spite of the lack of objective orthopedic findings) the crippling being the result of both orthopedic and severe psychiatric disease. These individuals are also given permanent and stationary ratings or at least a moderate degree of permanent psychiatric disability.

Bonafide Psychiatric Injuries: Having examined over 1,000 injured workers, I have seen a number of legitimately mentally injured workers and have rendered treatment.

Objectively verified physical injuries, such as amputations, lacerations, and eye injuries, may benefit from early psychiatric or psychological counseling. These workers may be truly distressed, and even though they may not technically have sustained a psychiatric injury, they would benefit from supportive counseling to help them cope with their physical trauma.

Occasionally I find a verified instance of job-related stress - verified by sources other than the employee. In these cases, a short period of counseling may restore the individual to a better state of mind and resumption of employment. Based upon the American Medical Association's "Guide to The Evaluation of Permanent Impairment" the most important single factor in assessing psychiatric disability is the issue of motivation.

Additional considerations having a direct bearing on whether an injured worker may benefit from psychiatric intervention include the following:

1. Whether the individual has obtained an attorney.
2. The time elapsed since the original injury.
3. Whether there is objective evidence of a trauma (in physical injuries).
4. Whether the individual continues to work after the trauma.
5. How long the individual has been off work.

Conclusion: Whether a mentally injured worker can be returned to employability status depends not only upon the worker's personal motivation but equally upon the motivation of their attorney. If the attorney's income is dependent upon the size of the disability award, then the interests of the attorney are obvious. Since the worker's attorney selects the treating and examining physicians, those physicians' sentiments will also be to find, establish and treat pathology to its maximum. There is no distinction made whatsoever between finding the individual unwilling versus unable to work.

The most comprehensive and objective criteria in existence for occupational disability is the Social Security Administration guidelines for evaluating psychiatric impairment. (SSA booklet No. 05-10089).

Unfortunately, California has only adopted a partial version of these guidelines. The various categories to be assessed include:

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Section 1. LEGISLATIVE INTENT

Page 1, Line 9

This intent language is meant to give a clear message to the courts that they are not to construe workers' compensation laws in favor of any party but to be fair and to decide cases upon their merit and always within the confines of the written statute. It is also intended that the Board possess the weight of fact-finding authority and that its decision is conclusive unless the court finds that a reasonable person could not have reached the conclusion made by the board.

Further, it is the legislature's intent to address the Alaska Pacific Assurance Co. v. Brown, 687 P.2d 264 (Alaska 1984), decision and constitutionality of the cost of living between claimants receiving benefits in Alaska and living elsewhere.

It is also the Legislature's intent to encourage employers to improve safety practices in the workplace and to use improved safety practices to reduce work related injuries.

Section 2. SAFETY PROGRAM REFUNDS

Page 2, Line 7

This section encourages workplace safety by mandating a 10% premium rebate for employers in an assigned risk pool and a 5% premium rebate for employers not in an assigned risk pool if they have a safety program that meets the standards established under the occupational safety code and have had no OSHA

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION : HCS SCS SB322(L&C)
PUBLISH DATE : _____

FISCAL NOTE

REQUEST:

Revision Date: _____ Agency Affected: Labor
 Title: "An Act relating to Worker's Compensation" BRU: Worker's Compensation
 Sponsor: Senate Labor & Commerce Components: _____
 Requestor: House Labor & Commerce Worker's Compensation

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL		124.0	49.7	49.7	49.7	49.7
SUPPLIES						
EQUIPMENT						
LAND&STRUCTURES						
GRANTS,CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	124.0	49.7	49.7	49.7	49.7

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND			(74.3)	(74.3)	(74.3)	(74.3)
FEDERAL FUNDS						
OTHER *		124.0	124.0	124.0	124.0	124.0
TOTAL	0.0	124.0	49.7	49.7	49.7	49.7

* Second Injury Fund

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

(See Attached)

Prepared by: Jacque McClintock Phone: 465-2790
 Division: Worker's Compensation Date: 3/16/88
 Approved by Commissioner: Jim Sampson Date: 3/16/88
 Agency: Department of Labor

Distribution (by preparer) :
 Legislative Finance
 Legislative Sponsor
 Requestor
 Office of Management and Budget
 Impacted Agency(ies)

Analysis of Fiscal Note

For HCS SCS SB 322(L&C)

This bill would require the Department of Labor to keep track of certain Workers' Compensation information it is not currently tracking, and would also require an annual cost of living survey of the 50 states and 10 foreign countries. Details of these two additional costs are as follows:

1. Additional Information Requirements

As a result of this bill, additional detail on information items for each workers' compensation claim would have to be reported by employers/ insurers on a by claim and annual basis. This additional information would be input into our computer database which would require a change in the computer programs associated with that system. Estimated costs are \$57,500 to modify the programs, and an additional \$13,000 in CPU time to test and verify the modifications. The total one-time data processing cost would therefore be \$70,500.

2. Annual Cost of Living Survey

An annual cost of living survey would be required to adjust the compensation to those workers compensation recipients who move from Alaska. We estimate that 250 locations (an average of 5 per state) would have to be surveyed each year. In addition, we estimate that 10 foreign locations would have to be surveyed each year at an approximate cost of \$350 per site. At \$200 per site, the total cost the first year would be \$53,500. The cost of the survey in future years would decrease slightly to an estimated \$49,700 a year.

Assumptions:

1. An effective date of July 1, 1988.
2. Per the bill, Second Injury Funds will now be utilized to pay the administrative costs associated with the Second Injury program. The savings to the existing general funds in the Worker's Compensation BRU will then be available to fund the costs of this bill.

HOUSE COMMITTEE REPORT

(7)

Date referred: 2/26/88

FURTHER REFERRALS: Judiciary

DATE: 3/15/88

The Labor & Commerce Committee has considered CSSB 322 (L&C)

"An Act relating to workers' compensation; and providing for an effective date."

RECOMMENDS:

- replace with HCS CS SB322(L+C) the same title
- attached amendment(s) a new title
- do pass
- do not pass
- no recommendation
- individual recommendations
- additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(S):

- fiscal impact same as previous fiscal note published _____
- zero fiscal note same as previous zero fiscal note published _____
- zero with analysis

SIGNING DO PASS:

SIGNING OTHER RECOMMENDATIONS:

David Douglas (NO REC)
W. L. Keenan (no rec)
Samuel Hammond - WTRAR
Bob P. Smith (no rec)
W. Ellis (no rec)

David Douglas
 Chairman's signature

HOUSE LABOR AND COMMERCE COMMITTEE

ALASKA STATE LEGISLATURE

P.O. BOX Y, JUNEAU 99811

Chairman - Representative Dave Donley

(907) 465-3892

March 15, 1988

M E M O R A N D U M

To: Members, House Labor and Commerce Committee

From: Representative Dave Donley, Chair
House Labor and Commerce Committee

Re: Proposed HCS for CS SB 322 (L&C)

Following is a brief synopsis of the changes proposed in the House Labor and Commerce Committee Substitute for SB 322 - relating to workers' compensation. The changes include:

1. A mandated rate decrease for workers' compensation premiums of no less than 6%, effective July 1, 1988 through January 1, 1990. (Page 33, line 7, Section 44)
2. Additional intent language under section 1 (Page 2, line 4, paragraph (d)) regarding workplace safety with two new sections (Page 2, beginning on line 7) mandating a 10% rebate for employers in an assigned risk pool and a 5% rebate for employers not in an assigned risk pool if they have a safety program that meets the standards established under the occupational safety code and have had no OSHA violations subject to fines during the period covered by the annual premium.
3. Raising the mandatory fine for failure to carry workers' compensation insurance from \$1,000 to \$10,000. (Page 13, line 22)
4. Amend language governing contents of insurers annual report to the Division of Workers' Compensation to include the number of claims filed and the percent of claims controverted during the year for which the annual report was submitted. (Page 22, line 16)

Include language to require the Board to notify the Division of Insurance when they determine that a carrier's controversions are frivolous or unfairly deny employees benefits that are due them. Upon receipt of a notice from the Board, the Division of Insurance will initiate an investigation of the carrier for violation of the unfair claims settlement act. (Page 23, line 15, paragraph (o))

5. Amend language governing the contents of the annual report to break out the costs of legal fees to reflect the fees paid to both the plaintiff and defense attorney, including all other costs associated with litigation. (Page 22, line 17)
6. Amend Section 11 (AS 23.30.095(a) to provide that an employers choice of physician for an IME is limited to no more than one

change in choice, as is an employees right of choice under the proposed legislation. (Page 16, line 6)

7. Amend Section 41 (effective date) so that this act applies to any "stress" injury that occurred on or after the date of adoption of this bill by the Legislature. (Page 33, line 21, Section 47)
8. Include language requiring that an IME must be in the same ^{unanimously,} speciality as the treating physician unless the Board agrees ^{on a} case by case basis, to authorize an IME by a physician who is not within the same speciality of the employees physician. (Page 18, line 2)
9. Amend Section 21 (AS 23.30.155(c) (Page 19, line 3) to provide that penalties assessed under this subsection (penalties for failing to file notification of changes in payment of benefits on time) shall be increased to (20) 25 percent.
10. PROPOSED AMENDMENT - The attached amendment would increase the penalty for late payment of compensation under AS 23.30.155(e) from (20) to 25%, to make this subsection consistent with other proposed changes in AS 23.30.155.
11. Include new language amending AS 23.30.155 (f) (governing penalties for unfair denial of claims) to increase penalties from (20 percent), under current law, to 25 percent. (Page 22, line 7).
12. Amend Section 29 (AS 23.30.190(b) to change "may" to "shall" on page 27, line 29.
13. Include a new section requiring that benefits paid to recipients residing in Alaska be paid by checks drawn on Alaska banks or other method of payment that is accepted as immediately redeemable by a bank in this state. (Page 23, paragraph (p))
14. Amend AS 23.30.041(k) (Page 9, line 14) to read: (k) "Benefits related to the reemployment plan may not extend past two years from date of plan approval or acceptance at which time the benefits.....". (Page 10, line 3)
15. Amend Section 13 (AS 23.30.095(e) to reinstate the deleted language and to add new language so that it reads: "AUTHORIZED TO PRACTICE MEDICINE UNDER THE LAWS OF THE jurisdiction in which the physician resides (STATE IN WHICH THE EMPLOYEE MAY BE FOUND)". (Page 16, line 4)
16. Add a new section to repeal and reenact AS 23.30.110(C) in response to public testimony that there has been a significant increase in the amount of time between filing a case and obtaining a formal hearing before the Board. (Page 19, line 2, paragraph (c))
17. Include a "grandfather" clause (Page 33, Section 45) to authorize current rehab specialists who do not have the credentials required under the bill to be able to practice for one year after adoption

of this act at which time they have to have gained the required credentials or are barred from practicing independently as a rehab specialist.

ALASKA STATE SENATE



SENATOR TIM KELLY
ANCHORAGE/EAGLE RIVER
CHAIRMAN

SENATOR DICK ELIASON
SITKA
VICE CHAIRMAN

LABOR AND COMMERCE COMMITTEE

MEMBERS
SENATOR BETTYE FAHRENKAMP
FAIRBANKS

SENATOR RICK UELAND
ANCHORAGE

SENATOR MIKE SZYMANSKI
ANCHORAGE

LETTER OF INTENT FOR CSSB 322 (L&C)

With an actuarial analysis concluding that this bill will provide a two percent savings in hard costs and an unquantifiable amount of soft dollar savings, it is the intent of the Alaska State Senate that, upon passage of this bill, the Division of Insurance request a new rate filing reflecting a reduction in workers' compensation premiums.

Senate adopted 2/25/88

29

14) The weekly maximum rate is decreased from \$1,094 to \$700, and the minimum is increased from \$110 to \$154.

15) Employees residing outside AK during recuperation will receive reduced benefits in most cases based on cost-of-living comparisons.

32, 34,
41

16) EEs cannot collect TTD or TPD benefits past medical stability or longer than two years, whichever comes first.

33

17) Permanent impairment will be rated in a comprehensive system for all parts of the body in relation to the whole man. Benefits paid for impairment are weighted toward the more seriously impaired.

36

18) Most EEs will receive compensation based on a formula instead of being computed on a case-by-case basis.

37,39

19) ER contributions into vested pension plans will be included in determining the comp rate and will be deducted in the same amount if the EE draws pension benefits in the disability period.

38

20) ERs who discriminate in bringing harassment cause an EE filed a WC claim may be held civilly liable

14) Less than 3% of EEs (the still generously compensated ones) will receive less compensation, but about 13% of EEs (the ones barely making it) will receive a little more compensation. An overall slight cost increase is expected.

15) Since 30% of EEs move outside AK after injury, a cost reduction is expected.

16) Reduced compensation costs.

17) Significantly reduced litigation, more successful rehab, more benefits going to those who need it more and fewer benefits go to those who need it less; Proper RTW expected with resultant reduction in TTD and TPD costs but increase in PPD costs.

18) Significant reduction in litigation; probably fairer benefits rates in most cases because past performance is usually a better predictor of future performance than speculation.

19) Increased costs.

20) ERs will be less likely to discriminate

ALASKA STATE SENATE



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SENATOR MIKE SZYMANSKI
ANCHORAGE

DIFFERENCES IN CSSB 322 FROM ORIGINAL

Page 1 Line 11; after "efficient," insert "fair,".

Page 1 Line 20; after "conclusive", insert "unless the court finds that a reasonable person could not have reached the conclusion made by the board."

Page 2 Line 5; change "may" to "shall"; delete "identical".

Page 2 Line 8; change "may" to "shall".

Page 2 Line 22; delete "shall immediately", insert "may".

Page 3 Line 3; a new section 5 is inserted requiring insurers notify the department of all policies naming Alaska in their all states coverage section.

Page 3 Line 8; a new section 6 is inserted to require that premiums may be paid twice a year and that notice of this clause will be given to the insured.

Page 4 Line 15; a new section 8 is inserted allowing the second injury fund to be used for administrative expenses of this section."

Page 4 - 12; Sec. 9 Rehabilitation - has been rewritten in a new format with only a few substantive changes;

Page 5 L9 -11; a phrase is inserted to further clarify the administrator's report.

P6 L1 - .5; sentence from P8 L5-9 inserted; 60 increased to 90.

P6 L6; after "rotating" insert "and geographic".

P7 L1; after "held" insert "or received training for".

P7 L9 - 10; a phrase is inserted to provide a floor is this section of the minimum wage.

P7 L15 & 16; after "demands" insert "required of the employee at the time of the previous injury; or".

P7 L17 & 18; insert "(3) at the time of medical stability no permanent impairment is identified or expected."

P8 L4; after "(1)", insert "a determination of".

P8 L6 - 8; a new paragraph 2 is inserted to require an inventory of the employee's abilities.

P8 L16; after "the", insert "estimated".

P8 L18; a new paragraph 8 is inserted to require a detailed description and schedule of the plan.

P8 L19 - 22; a new paragraph 9 is inserted to require findings in the plan.

P10 L11; after "means" insert "unreasonable".

P10 L13; delete "average", insert "passing".

P10 L23 - P11 L4; new paragraph inserted to provide for an appeal process in the determination of noncooperation.

P11 L6 & 7; definition of administrator is inserted.

P11 L10; "or disease" is deleted from the end of the phrase.

P11 L28 & 29; after "specialist," insert "a certified rehabilitation counselor".

Page 14 Line 13; after "commencement", insert "of the course".

Page 14 Line 29; delete "30", insert "60".

Page 15 Line 3 & 4; after "board.", insert "Unless medically necessary, the physician shall use existing diagnostic data to complete the examination."

Page 16 Lines 2 - 4; a sentence is inserted to clarify that the employee will not have to pay for services.

Page 16 Line 13; after "stability," insert "the ability to enter a re-employment plan,".

Page 16 Lines 27 - 28; after "fraud" insert "or gross incompetence".

Page 17 Lines 23 - 24; delete language after "conclusive", insert "unless the court specifically finds that a reasonable person could not have reached the conclusion made by the board".

Page 18 Line 10; delete "employer" insert "insurer or adjuster".

Page 18 Line 23; delete "employer fails to notify the".

Page 18 Line 23; after "employee" insert "are not notified".

Page 18 Line 25; delete "employer" insert "insurer or adjuster".

Page 18 Line 27; delete "employer failed to give".

Page 18 Line 27; before "." insert "was not given".

Page 19 Line 1 - 4; a new sentence is included regarding penalties.

Page 19 Line 24; delete "employer", insert "insurer or adjuster".

Page 20 Lines 2,4,7,9,12 & 15; delete "employer" insert "insurer or adjuster".

Page 20 Lines 3,4,6,9 & 11; insert "during the preceding year".

Page 20 Lines 17-20; insert " If the annual report is not filed by March 1 of each year, the insurer or adjuster shall pay a civil penalty of \$100 for the first day the annual report is late, and \$10 for each additional day the report is late."

Page 20 Line 22 & 23; insert a new section stating that for self-insureds the notification and penalty sections don't apply.

Page 20 Line 26; delete "for a recipient residing in the state".

Page 21 Line 3 - 7; insert "If the employer can verify that the employee's spendable weekly wages are less than \$154, the employer may adjust the weekly rate of compensation to the employee's weekly spendable wages without an order of the board."

Page 21 Line 19: after "living" insert "index" delete "locality" insert "area".

Page 21 Line 20: delete language after "living", insert "index in this state".

Page 21 Line 24: delete "average" insert "gross"; delete "wage" insert "earnings".

Page 22 Line 4: delete "the", insert "this"; delete "other localities" insert "the other areas".

Page 22 Lines 10 - 14; a new sentence is inserted to prevent a person from improperly receiving both PPD and PTD.

Page 22 Line 22; after "state" insert "of residence; and"

Page 22 Line 23; insert a new line, "(4) the state of Alaska."

Page 23 Line 21; a new schedule of adjustment factors is used to smooth out the curve.

Page 24 Line 27; delete "and use a supplemental", insert "a supplementary recognized".

Page 25 Line 18; delete "unless otherwise provided under AS 23.30.041"

Page 28 Line 10; insert "Except for sections 7, 21, 23 and 24 of this Act,".

WORKERS' COMPENSATION LABOR-MANAGEMENT TASK FORCE

Synopsis of proposed legislative changes To Chapter 30 of Title 23, Alaska Statutes (Workers' Compensation)

BACKGROUND: In October 1986, the Department of Workers' Compensation Insurance announced their approval to allow an average increase in workers' compensation premium rates of 14.1%. In November of this year, the Department of Workers' Compensation again announced their intent to approve an average increase in premium rates of 25%. The actual increases requested by insurers was in excess of 33% in 1986 and 50% in 1987. Within a two year period, the average cost of workers' compensation insurance within the State of Alaska increased over 42.6%. At the same time, claims increased from \$75 million to in excess of \$150 million. The increases in claims and premium costs are even greater if consideration is given to the declining wage base within the State of Alaska. The resulting increases in workers' compensation premiums paid by the employer are a significant factor in the cost of labor in the state and make Alaska's labor force less competitive. Both labor and management have recognized that high workers' compensation costs are detrimental to Alaska business and Alaska labor and needed to be significantly reduced.

TASK FORCE ORGANIZATION: The Workers' Compensation Labor-Management Task Force (Task Force) was first organized in 1981 to address perceived inequities in the Alaska Workers' Compensation Statutes and to propose legislation aimed at correcting those inequities without increasing the cost to the employer. Following passage of their proposed legislative changes to the Statute, the Task Force became inactive. Following the Department of Workers' Compensation Insurance rate increase announcement in October 1986, the Task Force was reactivated with the purpose of reducing rates paid by employers through legislative changes to the Statute. The current Task Force is comprised of five management and five labor negotiators. The five members of the management team are:

Mary Pierce	Co-Chair and management member of the Workers' Compensation Board Executive Director, Medical Indemnity Corporation of Alaska
Richard Cattanach*	Vice President Finance Unit Company
David Gottstein	Vice President Carr-Gottstein, Inc.
Ralph Lewis	Vice President Ketchikan Pulp & Paper
Stephen Rehnberg, CMA	Vice President Finance Tanadgusix Corporation

* Member of 1981 Task Force

Benefits (cont.)

2. Increase the permanent partial disability benefit for the more severely injured worker.
3. Broaden the market for employee's services to reduce claims for Permanent Total Disability (PTD) due to lack of employment opportunities.
4. Limit Temporary Total Disability (TTD) payments to two years.
5. Limit Temporary Partial Disability (TPD) payments to such time as the injured worker is deemed to have reached medical stability.

Other. Other legislative changes to the current Workers' Compensation Statute proposed by the Task Force include:

1. Provide intent language within the Statute to the effect:

It is the specific intent of the legislature that workers' compensation cases be decided on their merits and that the common law of liberal construction ...will not apply in such cases. ...the legislature hereby declares that the workers' compensation laws are not remedial in any sense and are not to be given broad liberal construction in favor of the claimant or employee on the one hand, nor are the rights and interests of the employer to be favored over those of the employee on the other hand.

2. Bar an employee from making a workers' compensation claim if the employee knowingly and willfully made false representations as to his physical condition, such representations were material to the hiring, and there is a causal connection between the false representations and the injury.
3. Prevent the employee from seeking redress under a tort claim against the employer if the employee's claim is barred under AS 23.30.020 (b).
4. Require claimants to prove mental injury resulted from work related stress and that such stress was extraordinary and unusual.
5. Require the last employer to pay benefits if a claim is controverted solely on the grounds that another employer may be liable until such time as final liability is determined.
6. Prohibit employer discrimination in the hiring, promotion or retention of an employee who has in good faith filed a claim or received workers' compensation benefits.

Medical. Task Force proposed changes to the Statute are:

1. Subject medical payments to the usual, customary and reasonable criteria of major medical plans.
2. Allow injured worker to change treating physician only once without the written consent of the employer. (Eliminate doctor shopping).
3. Limit treatment plans of a continuing or similar in nature to no more than 20 visits within 60 days.
4. Allow for a Board appointed Independent Medical Examiner (IME) whose opinion shall, in the absence of clear and convincing objective evidence to the contrary, be presumed to be correct.
5. Bar claims for civil damages against an IME resulting from their opinion except in the event of fraud.

Compensation. The Task Force proposed the following legislative changes with regards to compensation:

1. Change the maximum weekly benefit from 200% of the State average weekly wage, currently \$1,100, to a set maximum of \$700.
2. Change the minimum weekly benefit from \$110 to \$154 if the injured worker submits wage documents. If no wage documents are submitted, the minimum benefit is \$110.
3. Allow an employees vested pension contributions to be considered determining weekly wage benefit.
4. Allow employers to offset compensation benefits for pension benefits paid to injured workers'.
5. Limit Board determination of an injured worker's gross weekly earnings to only those cases where the employee (1) had no earnings during the two calendar years preceding the injury, (2) was voluntarily absent from the labor market for 18 months preceding the injury or (3) was a minor, an apprentice or a trainee in a formal training program.
6. Adjust weekly compensation benefits for differences in the cost of living for claimants residing outside the State of Alaska.

Benefits. The Task Forces recommendations for changes in benefits paid or available under workers' compensation are:

1. Schedule all injuries and determine the degree of disability based upon the "whole man" concept as provided in the American Medical Association guidelines.

The five labor members of the Task Force are:

Robert Anders	Co-Chair and labor member of the Workers' Compensation Board Business Agent, Operating Engineers
Kevin Dougherty*	AFL-CIO
Ralph Mingo	Safety Engineer Teamsters Local 959
Joseph Thomas	Business Agent Laborers Union
Kenneth Weist	Business Agent Roofers

PROPOSED LEGISLATIVE CHANGES: The proposed legislative changes submitted by the Task Force can be divided into five categories:

- * Vocational Rehabilitation Services
- * Medical
- * Compensation
- * Benefits
- * Other

Vocational Rehabilitation Services. Task Force proposed changes to vocational rehabilitation services are as follows:

1. Change from a mandatory to a voluntary program
2. Limit the program to those injured workers whose injury prevents them from performing the duties of their profession.
3. Limit vocational rehabilitation programs to two years.
4. Cap rehabilitation plan costs to a maximum of \$10,000.
5. Pay TPD/PPD payments at the TTD rate until plan completion or termination. Remainder, if any, paid in lump sum.
6. Change purpose of rehabilitation services to make an injured worker employable versus employed.

* Member of 1981 Task Force

HOUSE CS FOR CS FOR SENATE BILL NO. 322 (L&C)

SECTIONAL ANALYSIS

APRIL 6, 1988

House Judiciary Committee

Section 1. This intent language is meant to give a clear message to the courts that they are not to construe workers' compensation laws in favor of any party but to be fair and to decide cases upon their merit and always within the confines of the written statute. It is also intended that the Board possess the weight of fact-finding authority and that its decision is conclusive unless the court finds that a reasonable person could not have reached the conclusion made by the board.

Further, it is the legislature's intent to address the Alaska Pacific Assurance Co. v. Brown, 687 P.2d 264 (Alaska 1984), decision and constitutionality of the cost of living between claimants receiving benefits in Alaska and living elsewhere.

It is also the Legislature's intent to encourage employers to improve safety practices in the workplace and to use improved safety practices to reduce work related injuries.

Section 2. This section encourages workplace safety by mandating a 10% premium rebate for employers in an assigned risk pool and a 5% premium rebate for employers not in an assigned risk pool if they have a safety program that meets the standards established under the occupational safety code and have had no OSHA violations subject to fines during the period covered by the annual premium.

Section 3. This section creates departmental authority to establish and maintain a board roster of rehabilitation specialists and physicians consistent with the

violations subject to fines during the period covered by the annual premium.

Section 3. **BOARD ROSTERS**
Page 2, Line 23

This section creates departmental authority to establish and maintain a board roster of rehabilitation specialists and physicians consistent with the repeal and reenactment of AS 23.30.041 in section 10 and enactment of AS 23.30.095(k) in section 18.

Section 4. **DEPARTMENT REGULATIONS/COURT DECISIONS**
Page 3, Line 9

This section mandates the department to adopt new regulations if an existing regulation is held invalid by the supreme court. The intent of this section is to assure that any new regulation adopted under this section have retroactive as well as prospective application so that everyone is treated equally.

Section 5. **DENIAL OF BENEFITS/EMPLOYEE FALSE REPRESENTATION**
Page 3, Line 14

This section enacts a new provision that denies benefits to an employee who knowingly makes a false statement about his/her physical condition on an employment application or preemployment questionnaire if reliance on the false representation was a substantial factor in the hiring and there was a causal connection between the false representation and the employee's injury. Its purpose is to codify the result in the following board decision and