

ALASKA LEGISLATURE COMMITTEE FILES - 1987-1988 86/2
5380 SLAB SB 322 (file 5) - (file 6)

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DRAFT LETTER OF INTENT FOR
HCS CS SB 322 (L&C) - WORKERS' COMPENSATION LEGISLATION

(EXISTING LETTER OF INTENT ADOPTED BY THE SENATE)
LETTER OF INTENT FOR CS SB 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 new rate filing reflecting a decution in workers' compensation premiums.

PROPOSED LETTER OF INTENT FOR HCS CS SB 322 (L&C)

The legislature recognizes that the increasing costs of workers' compensation insurance is creating a great hardship on Alaska's workers, our employers, and the insurance carriers that serve our businesses.

It is the intent of the Legislature in adopting this legislation to enable a more efficient, fair, and cost effective delivery of services under Alaska's workers compensation system. To accomplish this, SB 322 demands significant concessions from employees and employers. It is the intent of the legislature in adopting this measure ~~that each party to the workers' compensation system in Alaska, including workers, employers, and workers' compensation insurance carriers, initiate actions necessary to reduce the number of work related injuries, to assure prompt and fair compensation to injured workers, and to create incentives for prompt and fair settlement of disputes regarding workers' compensation claims.~~

With an acturarial analysis that concludes that this legislaton will provide at least a two percent savings in hard costs and with public testimony before this body that the measure will bring about significant soft dollar savings, it is the intent of the legislature that, upon passage of this bill, the Division of Insurance request a ~~new rate filing reflecting a reduction from current rates in workers' compensation premiums of no less than 10 percent as of July 1, 1988 and that this rate be maintained through January 1, 1990.~~

Original sponsor: Labor and Commerce
Committee

*House (L&C)
CHANGES*

BY THE LABOR AND
COMMERCE COMMITTEE

1 IN THE SENATE

2

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

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

FIFTEENTH LEGISLATURE - SECOND SESSION

5

A BILL

6 For an Act entitled: "An Act relating to workers' compensation; and pro-
7 viding for an effective date."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 * Section 1. LEGISLATIVE INTENT. (a) It is the intent of the legisla-
10 ture that AS 23.30 be interpreted so as to assure the quick, efficient,
11 fair, and predictable delivery of indemnity and medical benefits to injured
12 workers at a reasonable cost to the employers who are subject to the pro-
13 visions of AS 23.30.

14 (b) The legislature declares that the workers' compensation laws must
15 not be construed by the courts in favor of any party. It is the specific
16 intent of the legislature that workers' compensation cases be decided on
17 their merits, except when otherwise provided by statute. It is also the
18 intent of the legislature that the board possess the greatest possible
19 authority in the exercise of its fact finding responsibilities and that the
20 board's decisions be conclusive unless the court finds that a reasonable
21 person could not have reached the conclusion made by the board.

22 (c) It is the intent of the legislature in amending AS 23.30.175
23 regarding benefits payable to recipients not residing in the state to

24 (1) recognize the levels of workers' compensation benefits
25 brought about by the high cost of living that exists in the state as com-
26 pared to other localities;

27 (2) reduce disincentives to return to work; and

28 (3) remove obstacles to the utilization of vocational rehabili-
29 tation that may be brought about by the payment of workers' compensation

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1 benefits at the high levels provided by the Alaska workers' compensation
2 law to individuals residing in localities with living costs lower than
3 those in Alaska.

4 * Sec. 2. AS 23.30.005(h) is amended to read:

5 (h) The department shall [MAY] adopt [IDENTICAL] rules for all
6 panels, and procedures for the periodic selection, retention, and re-
7 moval of rehabilitation specialists or physicians under AS 23.30.041
8 and 23.30.095, and shall [MAY] adopt regulations to carry out the
9 provisions of this chapter. Process and procedure under this chapter
10 shall be as summary and simple as possible. The department, the board
11 or a member of it may for the purposes of this chapter subpoena wit-
12 nesses, administer or cause to be administered oaths, and may examine
13 or cause to have examined the parts of the books and records of the
14 parties to a proceeding that relate [WHICH RELATED] to questions in
15 dispute. The superior court, on application of the department, the
16 board or any members of it, shall enforce the attendance and testimony
17 of witnesses and the production and examination of books, papers, and
18 records.

19 * Sec. 3. AS 23.30.005 is amended by adding a new subsection to read:

20 (m) If a regulation adopted by the department and approved by a
21 majority of the full board is determined to be invalid by the state
22 supreme court, the department may adopt new regulations that conform
23 to the department's statutory authority as interpreted by the court.

24 * Sec. 4. AS 23.30.020 is amended by adding a new subsection to read:

25 (b) An employee who knowingly makes a false statement as to the
26 employee's physical condition on an employment application or preem-
27 ployment questionnaire may not receive benefits under this chapter if

28 (1) the employer relied upon the false representation and
29 this reliance was a substantial factor in the hiring; and

1 (2) there was a causal connection between the false rep-
2 resentation and the injury to the employee.

3 * Sec. 5. AS 23.30.025 is amended by adding a new subsection to read:

4 (c) An insurer extending coverage required under this chapter by
5 specifying Alaska in the other states section or similar provision of
6 the insurance policy shall provide notice to the department under
7 AS 23.30.085.

8 * Sec. 6. AS 23.30.030 is amended by adding a new paragraph to read:

9 (3) An annual premium paid for the insurance, that exceeds
10 \$2,000, may be paid semiannually, if requested by the insured. The
11 insurer shall include this provision in the insurance policy in a
12 manner that clearly informs the insured of the provision.

13 * Sec. 7. AS 23.30.040(b) is amended to read:

14 (b) If an employee suffers a compensable injury that results in
15 temporary total disability, temporary partial disability, permanent
16 partial disability, or permanent total disability, the employer or
17 insurance carrier shall contribute to the second injury fund. The
18 contribution shall be made annually at the time of the report filing
19 required by AS 23.30.155(m) [BY ONE YEAR FROM THE DATE OF THE INJURY
20 OR ON TERMINATION OF THE EMPLOYEE'S CLAIM, WHICHEVER IS SOONER. IF
21 THE CLAIM IS NOT TERMINATED WITHIN ONE YEAR, SUBSEQUENT CONTRIBUTIONS
22 SHALL BE MADE YEARLY UNTIL THE TERMINATION OF THE EMPLOYEE'S CLAIM].
23 The amount of the contribution is the product of the compensation to
24 which the employee is entitled for temporary total disability, tempo-
25 rary partial disability, permanent partial disability, or permanent
26 total disability and the applicable contribution rate set out in
27 column A of this subsection. Payment need not be made to the second
28 injury fund if the total contribution under this subsection is less
29 than \$20. By December 15 of each year the commissioner shall

1 determine and make available to the public the applicable contribution
 2 rate for the following calendar year according to the reserve rate of
 3 the second injury fund in column B of this subsection:

4	Column A	Column B	
5	Second Injury Fund	Reserve Rate	
6	Contribution Rate	At Least	But Less Than
7	(Percent)	(Percent)	(Percent)
8	6	0	50
9	5	50	75
10	4	75	100
11	3	100	125
12	2	125	150
13	1	150	175
14	0	175	

15 * Sec. 8. AS 23.30.040(h) is amended to read:

16 (h) Administration expenses of the state under this section and
 17 AS 23.30.205 must [SHALL] be paid from the second injury [GENERAL]
 18 fund.

19 * Sec. 9. AS 23.30.041 is repealed and reenacted to read:

20 Sec. 23.30.041. REHABILITATION OF INJURED WORKERS. (a) The
 21 board shall select and employ a reemployment benefits administrator.
 22 The board may authorize the administrator to select and employ addi-
 23 tional staff. The administrator is in the partially exempt service
 24 under AS 39.25.120.

25 (b) The administrator shall perform the following functions:

26 (1) enforce regulations adopted by the board to implement
 27 this section;

28 (2) recommend regulations for adoption by the board that
 29 establish performance and reporting criteria for rehabilitation

1 specialists;

2 (3) enforce the quality and effectiveness of reemployment
3 benefits provided for under this section;

4 (4) review on an annual basis the performance of rehabiili-
5 tation specialists to determine continued eligibility for delivery of
6 rehabilitation services;

7 (5) submit to the department, on or before January 1 of
8 each year, a report of reemployment benefits provided under this
9 section for the previous fiscal year; the report must include a
10 general section, sections related to each rehabilitation specialist
11 employed under this section, and a statistical summary of all reha-
12 bilitation cases, including

13 (A) the estimated and actual cost of each active
14 rehabilitation plan;

15 (B) the estimated and actual time of each rehabilita-
16 tion plan;

17 (C) a status report on all individuals completing or
18 terminating a reemployment benefits program including a return to
19 work date;

20 (D) the cost of reemployment benefits;

21 (6) maintain a list of rehabilitation specialists who meet
22 the qualifications established under this section;

23 (7) promote awareness among physicians, adjusters, injured
24 workers, employers, employees, attorneys, training providers, and
25 rehabilitation specialists of the reemployment program established in
26 this subsection.

27 (c) If an employee suffers a compensable injury that may perma-
28 nently preclude an employee's return to the employee's occupation at
29 the time of injury, the employee or employer may request an

1 eligibility evaluation for reemployment benefits. The employee shall
2 request an eligibility evaluation within 90 days after the employee
3 gives the employer notice of injury unless the administrator deter-
4 mines the employee has unusual and extenuating physical limitations
5 that prevent the employee from making a timely request. The adminis-
6 trator shall, on a rotating and geographic basis, select a rehabilita-
7 tion specialist from the list maintained under (b)(6) of this section
8 to perform the eligibility evaluation.

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9 (d) Within 30 days after the referral by the administrator, the
10 rehabilitation specialist shall perform the eligibility evaluation and
11 issue a report of findings. The administrator may grant up to an
12 additional 30 days for performance of the eligibility evaluation upon
13 notification of unusual and extenuating circumstances and the re-
14 habilitation specialist's request. Within 14 days after receipt of
15 the report from the rehabilitation specialist, the administrator shall
16 notify the parties of the employee's eligibility for reemployment
17 preparation benefits. Within 10 days after the decision, either party
18 may seek review of the decision by requesting a hearing under AS 23.-
19 30.110. The hearing shall be held within 30 days after it is re-
20 quested. The board shall uphold the decision of the administrator
21 except for abuse of discretion on the administrator's part.

22 (e) An employee shall be eligible for benefits under this sec-
23 tion upon the employee's written request and by having a physician
24 predict that the employee will have permanent physical capacities that
25 are less than the physical demands of the employee's job as described
26 in the United States Department of Labor's "Selected Characteristics
27 of Occupations Defined in the Dictionary of Occupational Titles" for

- 28 (1) the employee's job at the time of injury; or
29 (2) other jobs that exist in the labor market that the

1 employee has held or received training for within 10 years before the
2 injury or that the employee has held following the injury for a period
3 long enough to obtain the skills to compete in the labor market,
4 according to specific vocational preparation codes as described in the
5 dictionary of occupational titles.

6 (f) An employee is not eligible for reemployment benefits if

7 (1) the employer offers employment within the employee's
8 predicted post-injury physical capacities at a wage equivalent to at
9 least the state minimum wage under AS 23.10.065 or 60 percent of the
10 worker's gross hourly wages at the time of injury, whichever is great-
11 er, of injury and the employment prepares the employee to be employ-
12 able in other jobs that exist in the labor market;

13 (2) the employee has been previously rehabilitated in a
14 former workers' compensation claim and returned to work in the same or
15 similar occupation in terms of physical demands required of the em-
16 ployee at the time of the previous injury; or

17 (3) at the time of medical stability no permanent impair-
18 ment is identified or expected.

19 (g) Within 10 days after the employee receives the adminis-
20 trator's notification of eligibility for benefits, an employee who
21 desires to use these benefits shall give written notice to the em-
22 ployer of the employee's selection of a rehabilitation specialist who
23 shall provide a complete reemployment benefits plan. If the employer
24 disagrees with the employee's choice of rehabilitation specialist to
25 develop the plan and the disagreement cannot be resolved, then the
26 administrator shall assign a rehabilitation specialist. The employer
27 and employee each have one right of refusal of a rehabilitation
28 specialist.

29 (h) Within 90 days after the rehabilitation specialist's

1 selection under (g) of this section, the reemployment plan must be
2 formulated and approved. The reemployment plan must include at least
3 the following:

4 (1) a determination of the occupational goal in the labor
5 market;

6 (2) an inventory of the employee's technical skills, phys-
7 ical and intellectual capacities, academic achievement, emotional
8 condition and family support;

9 (3) a plan to acquire the occupational skills to be employ-
10 able;

11 (4) the cost estimate of the reemployment plan, including
12 provider fees; the amount of tuition, books, tools, and supplies;
13 transportation; temporary lodging; or job modification devices;

14 (5) the estimated length of time that the plan will take;

15 (6) the date the plan will commence;

16 (7) the estimated time of medical stability as predicted by
17 the physician;

18 (8) a detailed description and plan schedule; and

19 (9) a finding by the rehabilitation specialist that the
20 inventory under (2) of this subsection indicates that the employee can
21 be reasonably expected to satisfactorily complete the plan and perform
22 in a new occupation within the time and cost limitations of the plan.

23 (i) Reemployment benefits shall be selected from the following
24 in a manner that ensures remunerative employability in the shortest
25 possible time:

26 (1) on the job training;

27 (2) vocational training;

28 (3) academic training;

29 (4) self-employment; or

1 (5) a combination of (1) - (4) of this subsection.

2 (j) The employee, rehabilitation specialist, and the employer
3 shall sign the reemployment benefits plan. If the employer and em-
4 ployee fail to agree on a reemployment plan, either party may submit a
5 reemployment plan for approval to the administrator; the adminis-
6 trator shall approve or deny a plan within 14 days after the plan is
7 submitted; within 10 days of the decision, either party may seek
8 review of the decision by requesting a hearing under AS 23.30.110; the
9 board shall uphold the decision of the administrator unless evidence
10 is submitted supporting an allegation of abuse of discretion on the
11 part of the administrator; the board shall render a decision within 30
12 days after completion of the hearing.

13 (k) Benefits related to the reemployment plan may not extend
14 ^{OR APPROVAL} past two years from date of plan acceptance¹, at which time the bene-
15 fits expire. If an employee reaches medical stability before com-
16 pletion of the plan, temporary total disability benefits shall cease
17 and permanent impairment benefits shall then be paid at the employee's
18 temporary total disability rate. If the employee's permanent impair-
19 ment benefits are exhausted before the completion or termination of
20 the reemployment plan, the employer shall provide wages equal to 60
21 percent of the employee's spendable weekly wages but not to exceed
22 \$525, until the completion or termination of the plan. A permanent
23 impairment benefit remaining unpaid upon the completion or termination
24 of the plan shall be paid to the employee in a single lump sum. The
25 fees of the rehabilitation specialist or rehabilitation professional
26 shall be paid by the employer and may not be included in determining
27 the cost of the reemployment plan.

28 (l) The cost of the reemployment plan incurred under this sec-
29 tion shall be the responsibility of the employer, shall be paid on an

1 expense incurred basis, and may not exceed \$10,000.

2 (m) Only a rehabilitation specialist may accept case assignments
3 as a case manager and sign eligibility determinations and reemployment
4 plans. A person who is not a rehabilitation specialist may perform
5 rehabilitation casework if the work is performed under the direct
6 supervision of a rehabilitation specialist employed in the same firm
7 and location.

8 (n) After the employee has elected to participate in reemploy-
9 ment benefits, if the employer believes the employee has not coop-
10 erated the employer may terminate reemployment benefits on the date of
11 noncooperation. Noncooperation means unreasonable failure to

12 (1) keep appointments;

13 (2) maintain passing grades;

14 (3) attend designated programs;

15 (4) maintain contact with the rehabilitation specialist;

16 (5) cooperate with the rehabilitation specialist in devel-
17 oping a reemployment plan and participating in activities relating to
18 reemployability on a full-time basis;

19 (6) comply with the employee's responsibilities outlined in
20 the reemployment plan; or

21 (7) participate in any planned reemployment activity as
22 determined by the administrator.

23 (o) Upon the request of either party, the administrator shall
24 decide whether the employee has not cooperated as provided under (n)
25 of this section. A hearing before the administrator shall be held
26 within 30 days after it is requested. The administrator shall issue a
27 decision within 14 days after the hearing. Within 10 days after the
28 administrator files the decision, either party may seek review of the
29 decision by requesting a hearing under AS 23.30.110; the board shall

1 uphold the decision of the administrator unless evidence is submitted
2 supporting an allegation of abuse of discretion on the part of the
3 administrator; the board shall render a decision within 30 days after
4 completion of the hearing.

5 (p) In this section

6 (1) "administrator" means the reemployment benefits admin-
7 istrator under AS 23.30.041(a);

8 (2) "employability" means possessing the ability but not
9 necessarily the opportunity to engage in employment that is consistent
10 with the employee's physical status imposed by the compensable injury;

11 (3) "labor market" means a geographical area that offers
12 employment opportunities in the following priority:

13 (A) area of residence;

14 (B) area of last employment;

15 (C) the state;

16 (D) other states;

AREA OF EMPLOYMENT
IN THE LAST 120 DAYS

17 (4) "physical capacities" means objective and measurable
18 physical traits such as ability to lift and carry, walk, stand or sit,
19 push, pull, climb, balance, stoop, kneel, crouch, crawl, reach, han-
20 dle, finger, feel, talk, hear or see;

21 (5) "physical demands" means the physical requirements of
22 the job such as strength, including positions such as standing, walk-
23 ing, sitting, and movement of objects such as lifting, carrying,
24 pushing, pulling, climbing, balancing, stooping, kneeling, crouching,
25 crawling, reaching, handling, fingering, feeling, talking, hearing, or
26 seeing;

27 (6) "rehabilitation specialist" means a person who is a
28 certified insurance rehabilitation specialist, a certified rehabilita-
29 tion counselor, or a person who has equivalent or better

1 qualifications as determined under regulations adopted by the depart-
2 ment;

3 (7) "remunerative employability" means having the skills
4 that allow a worker to be compensated with wages or other earnings
5 equivalent to at least 60 percent of the worker's gross hourly wages
6 at the time of injury; if the employment is outside the state, the
7 stated 60 percent shall be adjusted to account for the difference
8 between the applicable state average weekly wage and the Alaska aver-
9 age weekly wage.

10 * Sec. 10. AS 23.30.055 is amended to read:

11 Sec. 23.30.055. EXCLUSIVENESS OF LIABILITY. The liability of an
12 employer prescribed in AS 23.30.045 is exclusive and in place of all
13 other liability of the employer and any fellow employee to the em-
14 ployee, the employee's legal representative, husband or wife, parents,
15 dependents, next of kin, and anyone otherwise entitled to recover
16 damages from the employer or fellow employee at law or in admiralty on
17 account of the injury or death. The liability of the employer is
18 exclusive even if the employee's claim is barred under AS 23.30.-
19 020(b). However, if an employer fails to secure payment of compen-
20 sation as required by this chapter, an injured employee or the em-
21 ployee's legal representative in case death results from the injury
22 may elect to claim compensation under this chapter, or to maintain an
23 action against the employer at law or in admiralty for damages on
24 account of the injury or death. In that action the defendant may not
25 plead as a defense that the injury was caused by the negligence of a
26 fellow servant, or that the employee assumed the risk of the employ-
27 ment, or that the injury was due to the contributory negligence of the
28 employee.

29 * Sec. 11. AS 23.30.095(a) is amended to read:

1 (a) The employer shall furnish medical, surgical, and other
2 attendants or treatment, nurse and hospital service, medicine, crutch-
3 es, and apparatus for the period which the nature of the injury or the
4 process of recovery requires, not exceeding two years from and after
5 the date of injury to the employee. However, if the condition requir-
6 ing the treatment, apparatus, or medicine is a latent one, the two-
7 year period runs from the time the employee has knowledge of the
8 nature of the employee's disability and its relationship to the em-
9 ployment and after disablement. It shall be additionally provided
10 that, if continued treatment or care or both beyond the two-year
11 period is indicated, the injured employee has the right of review by
12 the board. The board may authorize continued treatment or care or
13 both as the process of recovery may require. When medical care is
14 required, the injured employee may designate a licensed physician
15 inside the state where the employee resides to render the care. The
16 employee may not make more than one change in the employee's choice of
17 attending physician without the written consent of the employer.
18 Referral to a specialist by the employee's attending physician is not
19 considered a change in physicians [EXCEPT IN CASES WHERE, IN THE
20 JUDGMENT OF THE BOARD, CARE OR TREATMENT OR BOTH CAN BEST BE ADMINIS-
21 TERED BY THE SELECTION OF ANOTHER PHYSICIAN]. Upon procuring the
22 services of a physician, the injured employee shall give proper noti-
23 fication of the selection to the employer within a reasonable time
24 after first being treated. Notice of a change in the attending physi-
25 cian shall be given before the change [IF FOR ANY REASON DURING THE
26 PERIOD WHEN MEDICAL CARE IS REQUIRED THE EMPLOYEE WISHES TO CHANGE TO
27 ANOTHER PHYSICIAN, THE EMPLOYEE MAY DO SO IN ACCORDANCE WITH REGU-
28 LATIONS ADOPTED BY THE BOARD].

29 * Sec. 12. AS 23.30.095(c) is amended to read:

1 (c) A claim for medical or surgical treatment is not valid and
2 enforceable against the employer unless, within 14 days following
3 treatment, the physician giving the treatment or the employee re-
4 ceiving it furnishes to the employer and the board notice of the
5 injury and treatment, preferably on a form prescribed by the board.
6 The board shall, however, excuse the failure to furnish notice within
7 14 days when it finds it to be in the interest of justice to do so,
8 and it may, upon application by a party in interest, make an award for
9 the reasonable value of the medical or surgical treatment so obtained
10 by the employee. A claim for a course of treatment requiring con-
11 tinuing and multiple treatments of a similar nature is not valid
12 unless the treatments are carried out under a written treatment plan
13 prescribed before the commencement of the course of treatment, com-
14 pleted and signed by the attending physician, and mailed to the em-
15 ployer within one week of the beginning of treatment. The treatment
16 plan must include objectives, modalities, and frequency of treatment.
17 The initial treatment plan may not include more than 20 visits in the
18 first 60 days. If more than 20 visits are required within the first
19 60 days, or more than four visits a month after the first 60 days, the
20 physician shall document the need for services in excess of the guide-
21 lines in the written treatment plan.

22 * Sec. 13. AS 23.30.095(e) is amended to read:

23 (e) The employee shall, after an injury, at reasonable times
24 during the continuance of the disability, if requested by the employer
25 or when ordered by the board, submit to an examination by a physician
26 or surgeon of the employer's choice [AUTHORIZED TO PRACTICE MEDICINE
27 UNDER THE LAWS OF THE STATE IN WHICH THE EMPLOYEE MAY BE FOUND],
28 furnished and paid for by the employer. An examination requested by
29 the employer not less than 14 days after injury, and every 60 days

1 thereafter, shall be presumed to be reasonable, and the employee shall
2 submit to the examination without further request or order by the
3 board. Unless medically appropriate, the physician shall use existing
4 diagnostic data to complete the examination. Facts relative to the
5 injury or claim communicated to or otherwise learned by a physician or
6 surgeon who may have attended or examined the employee, or who may
7 have been present at an examination are not privileged, either in the
8 hearings provided for in this chapter or an action to recover damages
9 against an employer who is subject to the compensation provisions of
10 this chapter. If an employee refuses to submit to an [ANY] examina-
11 tion provided for in this section, the employee's rights to compensa-
12 tion shall be suspended until the obstruction or refusal ceases, and
13 the employee's compensation during the period of suspension may, in
14 the discretion of the board or the court determining an action brought
15 for the recovery of damages under this chapter, be forfeited. The
16 board in any case of death may require an autopsy at the expense of
17 the party requesting the autopsy. An autopsy may not be held without
18 notice first being given to the widow or widower or next of kin if
19 they reside in the state or their whereabouts can be reasonably ascer-
20 tained, of the time and place of the autopsy and reasonable time and
21 opportunity given the widow or widower or next of kin to have a repre-
22 sentative present to witness the autopsy. If adequate notice is not
23 given, the findings from the autopsy may be suppressed on motion made
24 to the board or to the superior court, as the case may be.

25 * Sec. 14. AS 23.30.095(f) is amended to read:

26 (f) All fees and other charges for medical treatment or service
27 [ARE LIMITED TO THE CHARGES THAT PREVAIL IN THE SAME COMMUNITY FOR
28 SIMILAR TREATMENT OF INJURED PERSONS OF LIKE STANDARD OF LIVING AND]
29 shall be subject to regulation by the board but may not exceed usual,

1 customary, and reasonable fees for the treatment or service in the
2 community in which it is rendered, as determined by the board. An
3 employee may not be required to pay a fee or charge for medical treat-
4 ment or service.

5 * Sec. 15. AS 23.30.095(j) is repealed and reenacted to read:

6 (j) The board may appoint a medical services review committee,
7 or contract with an existing organization in the state or another
8 state, to assist and advise the board in matters involving the appro-
9 priateness, necessity, and cost of medical and related services pro-
10 vided under this chapter.

11 * Sec. 16. AS 23.30.095 is amended by adding a new subsection to read:

12 (k) In the event of a medical dispute regarding determinations
13 of causation, medical stability, ability to enter a reemployment plan,
14 degree of impairment, functional capacity, the amount and efficacy of
15 the continuance of or necessity of treatment, or compensability be-
16 tween the employee's attending physician and the employer's indepen-
17 dent medical evaluation, a second independent medical evaluation shall
18 be conducted by a physician or physicians selected by the board from a
19 list established and maintained by the board. The cost of the exami-
20 nation and medical report shall be paid by the employer. The report
21 of the independent medical examiner shall be furnished to the board
22 and to the parties within 14 days after the examination is concluded.
23 The opinion of the independent medical examiner shall, in the absence
24 of clear and convincing objective evidence to the contrary, be pre-
25 sumed to be correct. A person may not seek damages from an indepen-
26 dent medical examiner caused by the rendering of an opinion or provid-
27 ing testimony under this subsection, except in the event of fraud or
28 gross incompetence.

29 * Sec. 17. AS 23.30.105(a) is amended to read:

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APPROVED BY THE
BOARD

1 (a) The right to compensation for disability under this chapter
2 is barred unless a claim for it is filed within two years after the
3 employee has knowledge of the nature of the employee's disability and
4 its relation to the employment and after disablement. However, the
5 maximum time for filing the claim in any event other than arising out
6 of an occupational disease shall be four years from the date of in-
7 jury, and the right to compensation for death is barred unless a claim
8 therefor is filed within one year after the death, except that if
9 payment of compensation has been made without an award on account of
10 the injury or death, a claim may be filed within two years after the
11 date of the last payment of benefits under AS 23.30.180, 23.30.185,
12 23.30.190, 23.30.200, or 23.30.215. It is additionally provided that,
13 in the case of latent defects pertinent to and causing compensable
14 disability, the injured employee has full right to claim as shall be
15 determined by the board, time limitations notwithstanding.

16 * Sec. 18. AS 23.30.120 is amended by adding a new subsection to read:

17 (c) The presumption of compensability established in (a) of this
18 section does not apply to a mental injury resulting from work-related
19 stress.

20 * Sec. 19. AS 23.30.125 is amended by adding a new subsection to read:

21 (f) Subject to an employer's or employee's burden of proof, a
22 finding of fact made by the board as a part of a compensation order is
23 conclusive unless the court specifically finds that a reasonable
24 person could not have reached the conclusion made by the board.

25 * Sec. 20. AS 23.30.130(a) is amended to read:

26 (a) Upon its own initiative, or upon the application of any
27 party in interest on the ground of a change in conditions, including,
28 for the purposes of AS 23.30.175, a change in residence, or because of
29 a mistake in its determination of a fact, the board may, before one

1 year after the date of the last payment of compensation benefits under
2 AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, whether
3 or not a compensation order has been issued, or before one year after
4 the rejection of a claim, review a compensation case under [IN ACCOR-
5 DANCE WITH] the procedure prescribed in respect of claims in AS 23.-
6 30.110. Under [IN ACCORDANCE WITH] AS 23.30.110 the board may issue a
7 new compensation order which terminates, continues, reinstates, in-
8 creases, or decreases the compensation, or award compensation.

9 * Sec. 21. AS 23.30.155(c) is amended to read:

10 (c) The insurer or adjuster [EMPLOYER] shall notify the board
11 and the employee on a form prescribed by the board that the payment of
12 compensation has begun or has been increased, decreased, suspended,
13 terminated, resumed, or changed in type. An initial report shall be
14 filed with the board and sent to the employee within 28 days after the
15 date of issuing the first payment of compensation. If at any time 21
16 days or more pass and no compensation payment is issued, a report
17 notifying the board and the employee of the termination or suspension
18 of compensation shall be filed with the board and sent to the employee
19 within 28 days after the date the last compensation payment was is-
20 sued. A report shall also be filed with the board and sent to the
21 employee within 28 days after the date of issuing a payment increas-
22 ing, decreasing, resuming, or changing the type of compensation paid.
23 If the [EMPLOYER FAILS TO NOTIFY THE] board and the employee are not
24 notified within the 28 days prescribed by this subsection for report-
25 ing, the insurer or adjuster [EMPLOYER] shall pay a civil penalty of
26 \$100 for the first day plus \$10 for each day thereafter that the
27 [EMPLOYER FAILED TO GIVE] notice was not given. Total penalties under
28 this subsection [SECTION] may not exceed \$1,000 for a failure to file
29 a required report. Penalties assessed under this subsection are

#6
INSERT
CONCLUDE
REQUIRE
TO BRING
LEGAL
TO
REPORT
OUT

1 eligible for reduction under (m) of this section. A penalty assessed
2 under this subsection after penalties have been reduced under (m) of
3 this section shall be increased by ³⁰20 percent and shall bear interest
4 at the rate established under AS 45.45.010.

5 * Sec. 22. AS 23.30.155(d) is amended to read:

6 (d) If the employer controverts the right to compensation the
7 employer shall file with the board and send to the employee a notice
8 of controversion on or before the 21st day after the employer has
9 knowledge of the alleged injury or death. If the employer controverts
10 the right to compensation after payments have begun, the employer
11 shall file with the board and send to the employee a notice of con-
12 troversion within seven days after an installment of compensation
13 payable without an award is due. When payment of temporary disability
14 benefits is controverted solely on the grounds that another employer
15 or another insurer of the same employer may be responsible for all or
16 a portion of the benefits, the most recent employer or insurer who is
17 party to the claim and who may be liable shall make the payments
18 during the pendency of the dispute. When a final determination of
19 liability is made, any reimbursement required, including interest at
20 the statutory rate, and all costs and attorneys' fees incurred by the
21 prevailing employer, shall be made within 14 days of the determina-
22 tion.

23 * Sec. 23. AS 23.30.155(m) is repealed and reenacted to read:

24 (m) On or before March 1 of each year the insurer or adjuster
25 shall file a verified annual report on a form prescribed by the board
26 stating the total amount of all compensation by type, medical, and
27 related benefits, vocational rehabilitation expenses, legal fees, and
28 penalties paid on all claims during the preceding calendar year. If
29 the annual report is timely and complete when received by the board

1 and provides accurate information about each category of payments, the
2 commissioner shall review the timeliness of the insurer's or adjuster's reports filed during the preceding year under (c) of this section.
3 If during the preceding year the insurer or adjuster filed at least 99 percent of the reports on time, the penalties assessed under
4 (c) of this section shall be waived. If during the preceding year the insurer or adjuster filed at least 97 percent of the reports on time,
5 75 percent of the penalties assessed under (c) of this section shall be waived. If during the preceding year the insurer or adjuster filed
6 95 percent of the reports on time, 50 percent of the penalties assessed under (c) of this section shall be waived. If during the
7 preceding year the insurer's or adjuster's reports have not been filed on time at least 95 percent of the time, none of the penalties
8 assessed under (c) of this section shall be waived. The penalties that are not waived are due and payable when the insurer or adjuster
9 receives notification from the commissioner regarding the timeliness of the reports. If the annual report is not filed by March 1 of each
10 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
11 day the report is late.

12 * Sec. 24. AS 23.30.155 is amended by adding a new subsection to read:

13 (n) If the employer is self-insured, the requirements of (c) and
14 (m) of this section apply to the employer.

15 * Sec. 25. AS 23.30.175 is repealed and reenacted to read:

16 Sec. 23.30.175. RATES OF COMPENSATION. (a) The weekly rate of
17 compensation for disability or death may not exceed \$700 and initially
18 may not be less than \$110. However, if the board determines that the
19 employee's spendable weekly wages are less than \$110 a week as computed under AS 23.30.220, or less than \$154 a week in the case of an

1 employee who has furnished documentary proof of the employee's wages,
2 it shall issue an order adjusting the weekly rate of compensation to a
3 rate equal to the employee's spendable weekly wages. If the employer
4 can verify that the employee's spendable weekly wages are less than
5 \$154, the employer may adjust the weekly rate of compensation to a
6 rate equal to the employee's spendable weekly wages without an order
7 of the board. If the employee's spendable weekly wages are greater
8 than \$154, but 80 percent of the employee's spendable weekly wages is
9 less than \$154, the employee's weekly rate of compensation shall be
10 \$154. Prior payments made in excess of the adjusted rate shall be
11 deducted from the unpaid compensation in the manner the board deter-
12 mines. In any case, the employer shall pay timely compensation.

13 (b) The following rules apply to benefits payable to recipients
14 not residing in the state at the time compensation benefits are pay-
15 able:

16 (1) the weekly rate of compensation shall be calculated by
17 multiplying the recipient's weekly compensation rate calculated under
18 AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, by the
19 ratio of the cost of living of the area in which the recipient resides
20 to the cost of living in this state;

21 (2) the calculation required by (1) of this subsection does
22 not apply if the recipient is absent from the state for medical or re-
23 habilitation services not reasonably available in the state;

24 (3) if the gross weekly earnings of the recipient and the
25 resulting compensation rate is determined under AS 23.30.220(a)(2),
26 the calculation required by this subsection applies only to the por-
27 tion of the recipient's weekly compensation rate attributable to wages
28 earned in the state;

29 (4) application of this subsection may not reduce the

1 weekly compensation rate to less than \$154 a week, except as provided
2 in (a) of this section.

3 (c) The board shall provide by regulation for the determination
4 and comparison of living costs for this state and the other areas in
5 which recipients reside and for the annual redetermination and
6 comparison of these costs.

7 * Sec. 26. AS 23.30.180 is amended to read:

8 Sec. 23.30.180. PERMANENT TOTAL DISABILITY. In case of total
9 disability adjudged to be permanent 80 percent of the injured em-
10 ployee's spendable weekly wages shall be paid to the employee during
11 the continuance of the total disability. If a permanent partial
12 disability award has been made before a permanent total disability
13 determination, permanent total disability benefits must be reduced by
14 the amount of the permanent partial disability award, adjusted for
15 inflation, in a manner determined by the board. Loss of both hands,
16 or both arms, or both feet, or both legs, or both eyes, or of any two
17 of them, in the absence of conclusive proof to the contrary, consti-
18 tutes permanent total disability. In all other cases permanent total
19 disability is determined in accordance with the facts. In making this
20 determination the market for the employee's services shall be

21 (1) area of residence;

22 (2) area of last employment;

23 (3) the state of residence; and

24 (4) the state of Alaska.

AREA OF EMPLOYMENT
IN THE LAST 10 YEARS

25 * Sec. 27. AS 23.30.180 is amended by adding a new subsection to read:

26 (b) Failure to achieve remunerative employability as defined in
27 AS 23.30.041(m)(7) does not, by itself, constitute permanent total
28 disability.

29 * Sec. 28. AS 23.30.185 is amended to read:

1 Sec. 23.30.185. COMPENSATION FOR TEMPORARY TOTAL DISABILITY. In
2 case of disability total in character but temporary in quality, 80
3 percent of the injured employee's spendable weekly wages shall be paid
4 to the employee during the continuance of the disability. Temporary
5 total disability benefits may not be paid for any period of disability
6 occurring after the date of medical stability. Temporary total dis-
7 ability benefits may not be paid for more than two years regardless of
8 continuance of the disability.

9 * Sec. 29. AS 23.30.190 is repealed and reenacted to read:

10 Sec. 23.30.190. COMPENSATION FOR PERMANENT PARTIAL IMPAIRMENT.
11 (a) In case of impairment partial in character but permanent in
12 quality, and not resulting in permanent total disability, the compen-
13 sation is \$240,000 multiplied by the employee's percentage of net
14 permanent impairment of the whole person, and payable in a single lump
15 sum, except as otherwise provided in AS 23.30.041, but the compensa-
16 tion may not be discounted for any present value considerations. The
17 percentage of net permanent impairment shall be determined by multi-
18 plying the employee's actual degree of permanent impairment by the
19 appropriate adjustment factor, as follows:

20	Degree of Actual Impairment	Adjustment Factor
21	0 - 5	0
22	6	0.060
23	7	0.120
24	8	0.180
25	9	0.240
26	10	0.300
27	11	0.333
28	12	0.366
29	13	0.399

1	14	0.432
2	15	0.465
3	16	0.495
4	17	0.540
5	18	0.585
6	19	0.630
7	20	0.675
8	21	0.680
9	22	0.688
10	23	0.696
11	24	0.704
12	25	0.712
13	26	0.740
14	27	0.765
15	28	0.790
16	29	0.815
17	30	0.840
18	31	0.880
19	32	0.910
20	33	0.940
21	34	0.970
22	35-100	1.000

23 (b) All determinations of the existence and degree of permanent
 24 impairment shall be made strictly and solely under the whole person
 25 determination as set out in the American Medical Association Guides to
 26 the Evaluation of Permanent Impairment, except that an impairment
 27 rating may not be rounded to the next five percent. The board ^{SHALL} may
 28 adopt a supplementary recognized schedule for injuries that cannot be
 29 rated by use of the American Medical Association Guides.

1 (c) An employee with an actual permanent impairment as deter-
2 mined under (b) of this section may not receive less than \$250 for the
3 impairment.

4 (d) The impairment rating determined under (a) of this section
5 shall be reduced by a permanent impairment that existed before the
6 compensable injury. If the combination of a prior impairment rating
7 and a rating under (a) of this section would result in the employee
8 being considered permanently totally disabled, the prior rating does
9 not negate a finding of permanent total disability.

10 * Sec. 30. AS 23.30.200 is amended to read:

11 Sec. 23.30.200. TEMPORARY PARTIAL DISABILITY. In case of tempo-
12 rary partial disability resulting in decrease of earning capacity the
13 compensation shall be 80 percent of the difference between the injured
14 employee's spendable weekly wages before the injury and the wage-
15 earning capacity of the employee after the injury in the same or
16 another employment, to be paid during the continuance of the disabili-
17 ty, but not to be paid for more than two [FIVE] years. Temporary
18 partial disability benefits may not be paid for a period of disability
19 occurring after the date of medical stability.

20 * Sec. 31. AS 23.30.200 is amended by adding a new subsection to read:

21 (b) The wage-earning capacity of an injured employee is deter-
22 mined by the actual spendable weekly wage of the employee if the
23 actual spendable weekly wage fairly and reasonably represents the
24 wage-earning capacity of the employee. The board may, in the interest
25 of justice, fix the wage-earning capacity that is reasonable, having
26 due regard to the nature of the injury, the degree of physical impair-
27 ment, the usual employment, and other factors or circumstances in the
28 case that may affect the capacity of the employee to earn wages in a
29 disabled condition, including the effect of disability as it may

1 naturally extend into the future.

2 * Sec. 32. AS 23.30.220(a) is amended to read:

3 (a) The spendable weekly wage of an injured employee at the time
4 of an injury is the basis for computing compensation. It is the
5 employee's gross weekly earnings minus payroll tax deductions. The
6 gross weekly earnings shall be calculated as follows:

7 (1) The gross weekly earnings are computed by dividing by
8 100 the gross earnings of the employee in the two calendar years
9 immediately preceding the injury.

10 (2) If the employee had no earnings during the two calendar
11 years preceding the injury or was [voluntarily] absent from the labor
12 market for ¹²18 months or more of the two calendar years preceding the
13 injury [THE BOARD DETERMINES THAT THE GROSS WEEKLY EARNINGS AT THE
14 TIME OF THE INJURY CANNOT BE FAIRLY CALCULATED UNDER (1) OF THIS
15 SUBSECTION], the board shall [MAY] determine the employee's gross
16 weekly earnings for calculating compensation by considering the nature
17 of the employee's work and work history, but compensation may not
18 exceed the employee's projected gross weekly earnings at the time of
19 injury.

20 (3) If an employee when injured is a minor, an apprentice,
21 or a trainee in a formal training program, as determined by the board,
22 whose wages under normal conditions would increase during the period
23 of disability, the projected increase may be considered by the board
24 in computing the gross weekly earnings of the employee.

25 (4) If the employee is injured while performing duties as a
26 volunteer ambulance attendant, policeman, or fireman, the gross weekly
27 earnings for calculating compensation shall be the minimum gross
28 weekly earnings paid a full-time ambulance attendant, policeman, or
29 fireman employed in the political subdivision where the injury

1 occurred, or, if the political subdivision has no full-time ambulance
2 attendants, policemen, or firemen, at a reasonable figure previously
3 set by the political subdivision to make this determination but in no
4 case may the gross weekly earnings for calculating compensation be
5 less than the minimum wage computed on the basis of 40 hours work per
6 week.

7 * Sec. 33. AS 23.30.225 is amended by adding a new subsection to read:

8 (c) If employer contributions to a qualified pension or profit
9 sharing plan have been included in the determination of gross earnings
10 and the employee is receiving pension or profit sharing payments,
11 weekly compensation benefits payable under this chapter shall be
12 reduced by the amount paid or payable to the injured worker under the
13 plan for any week or weeks during which compensation benefits are also
14 payable. The amount of the reduction may not in any week exceed the
15 increase in weekly compensation benefits brought about by the inclu-
16 sion of employer contributions to a qualified pension or profit shar-
17 ing plan in the determination of gross earnings.

18 * Sec. 34. AS 23.30 is amended by adding a new section to read:

19 Sec. 23.30.247. DISCRIMINATION PROHIBITED. (a) An employer may
20 not discriminate in hiring, promotion, or retention policies or prac-
21 tices against an employee who has in good faith filed a claim for or
22 received benefits under this chapter. An employer who violat:s this
23 section is liable to the employee for damages to be assessed by the
24 court in a private civil action.

25 (b) This section may not be construed to prevent an employer
26 from basing hiring, promotion, or retention policies or practices on
27 considerations of the employee's safety practices or the employee's
28 physical and mental abilities; nor may this section be construed so as
29 to create employment rights not otherwise in existence.

1 (c) This section may not be construed to prohibit an employer
2 from requiring a prospective employee to fill out a preemployment
3 questionnaire or application regarding the person's prior health or
4 disability history as long as it is meant to either document written
5 notice for second injury fund reimbursement under AS 23.30.205(c) or
6 to determine whether the employee has the physical or mental capacity
7 to meet the documented physical or mental demands of the work.

8 * Sec. 35. AS 23.30.265(15) is amended to read:

9 (15) "gross earnings" means periodic payments, by an em-
10 ployer to an employee for employment before any authorized or lawfully
11 required deduction or withholding of money by the employer, including
12 compensation that is deferred at the option of the employee, and
13 excluding irregular bonuses, reimbursement of expenses, expense allow-
14 ances, and any benefit or payment to the employee that is not fully
15 taxable to the employee during the pay period, except that the total
16 amount of contributions made by an employer to a qualified pension or
17 profit sharing plan during the two plan years preceding the injury,
18 multiplied by the percentage of the employee's vested interest in the
19 plan at the time of injury, shall be included in the determination of
20 gross earnings; the value of room and board if taxable to the employee
21 may be considered in determining gross earnings; however, the value of
22 room and board that would raise an employee's gross weekly earning
23 above the state [ALASKA] average weekly wage at the time of injury may
24 not be considered;

25 * Sec. 36. AS 23.30.265(17) is amended to read:

26 (17) "injury" means accidental injury or death arising out
27 of and in the course of employment, and an occupational disease or
28 infection which arises naturally out of the employment or which natu-
29 rally or unavoidably results from an accidental injury; "injury" [,

1 AND] includes breakage or damage to eyeglasses, hearing aids, den-
2 tures, or any prosthetic devices which function as part of the body
3 and further includes an injury caused by the wilful act of a third
4 person directed against an employee because of the employment; "in-
5 jury" does not include mental injury caused by mental stress unless it
6 is established that (A) the work stress was extraordinary and unusual
7 in comparison to pressures and tensions experienced by individuals in
8 a comparable work environment, and (B) the work stress was the predom-
9 inant cause of the mental injury; the amount of work stress shall be
10 measured by actual events rather than misperceptions by the employee;
11 a mental injury is not considered to arise out of and in the course of
12 employment if it results from a disciplinary action, work evaluation,
13 job transfer, layoff, demotion, termination or similar action, taken
14 in good faith by the employer;

15 * Sec. 37. AS 23.30.265 is amended by adding a new paragraph to read:

16 (34) "medical stability" means the date after which further
17 objectively measurable improvement from the effects of the compensable
18 injury is not reasonably expected to result from additional medical
19 care or treatment, notwithstanding the possible need for additional
20 medical care or the possibility of improvement or deterioration re-
21 sulting from the passage of time; medical stability shall be presumed
22 in the absence of objectively measurable improvement for a period of
23 45 days; this presumption may be rebutted by clear and convincing
24 evidence.

25 * Sec. 38. AS 23.30.210 is repealed.

26 * Sec. 39. TRANSITIONAL PROVISIONS. Notwithstanding AS 23.30.040(b),
27 as amended by sec. 7 of this Act, and AS 23.30.155(m), as amended by
28 sec. 23 of this Act, on or before March 1, 1989, each employer that is
29 subject to those sections shall file a report and make the appropriate

1 contribution for all claims existing as of December 31, 1988. The period
2 covered in the report shall be from the date of the termination report or
3 the last anniversary report filed, if one has been filed, through Decem-
4 ber 31, 1988.

5 * Sec. 40. APPLICABILITY. Except for secs. 7, 21, 23, and 24 of this
6 Act, this Act applies only to injuries sustained on or after July 1, 1988.

7 * Sec. 41. This Act takes effect July 1, 1988.

#10 SEC 36 (STRONG) HAS IMMEDIATE EFFECTIVE DATE.

INSERT NEW SECTION REQUIRING BENEFIT PAYMENTS TO BE DEPOSITED
ON ALASKAN BANKS

MANDATED 10% REDUCTION 7/1/88 - 12/31/88

MANDATE 5% FINE FOR MULTIVIOLETIONS
LAST YEAR

23 30 075 (b) MANDATED FINE $\frac{1}{1000}$ FOR
FAILURE TO CARRY COMP INSURANCE

REQUIRE INSURER TO REPORT # OF CLAIMS &
 $\frac{1}{10}$ COMPENSATED

REQUIRE BOARD TO NOTIFY DIVISION OF CARRIER
w/ EXCESSIVE DENIALS & DIVISION TO INVESTIGATE CARRIER
FOR VIOLATION

HOUSE LABOR AND COMMERCE COMMITTEE

ALASKA STATE LEGISLATURE
Chairman - Representative Dave Donley

P.O. BOX Y, JUNEAU 99811
(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 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.

A M E N D M E N T

Offered in the HOUSE

By Donley

TO: HCS CSSB 322(L&C)

Page 22, after line 3:

Insert a new bill section to read:

"* Sec. 26. AS 23.30.155(e) is amended to read:

(e) If any installment of compensation payable without an award is not paid within seven days after it becomes due, as provided in (b) of this section, there shall be added to the unpaid installment an amount equal to 25 [20] percent of it. This additional amount shall be paid at the same time as, and in addition to, the installment, unless notice is filed under (d) of this section or unless the nonpayment is excused by the board after a showing by the employer that owing to conditions over which the employer had no control the installment could not be paid within the period prescribed for the payment."

Renumber the following bill sections accordingly.

Page 33, line 1:

Delete "27"

Insert "28"

Page 33, line 18:

Delete "27, 28, 40, and 44"

Insert "28, 29, 41, and 45"

Page 33, line 21:

Delete "40"

Insert "41"

Page 33, line 22:

Delete "40"

Insert "41"

Page 33, line 23:

Delete "40 and 47"

Insert "41 and 48"

Page 33, line 25:

Delete "39, and 41 - 46"

Insert "40, and 42 - 47"

HOUSE LABOR AND COMMERCE COMMITTEE

ALASKA STATE LEGISLATURE

P.O. BOX Y, JUNEAU 99811

Chairman - Representative Dave Donley

(907) 465-3892

March 10, 1988

MEMORANDUM

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. ✓ P 33 A mandated rate decrease for workers' compensation premiums of no less than 6%, effective July 1, 1988 through January 1, 1990.
2. ✓ P 2 Additional intent language under section 1 regarding workplace safety with two new sections 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. ✓ P 10 Raising the mandatory fine for failure to carry workers' compensation insurance from \$1,000 to \$10,000
4. ✓ P 22 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.

Include language to require the Board (in addition to assessing any penalties under AS 23.30.155 (f), to notify the Division of Insurance when they determine that a carrier's controversions are excessive, frivolous, or designed to 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.
5. ✓ P 22 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.

6. ✓ Amend Section 11 (AS 23.30.095(a) to provide that an employers
P16 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.
7. ✓ Amend Section 41 (effective date) so that this act applies to any
P33 "stress" injury that occurred on or after the date of adoption of
this bill by the Legislature. IMMEDIATE EFFECTIVE DATE
8. Include language requiring that an IME must be in the same
P16 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.
9. ✓ Amend Section 21 (AS 23.30.155(c) (page 19, line 3) to provide that
P21 penalties assessed under this subsection (penalties for failing to
file annual report on time) shall be increased to (20) 25 percent.
10. ✓ Include new language amending AS 23.30.155 (f) (governing penalties
P22 for unfair denial of claims) to increase penalties from (20
percent), under current law, to 25 percent.
11. ✓ Amend Section 29 (AS 23.30.190(b) to change "may" to "shall" on
P27 page 24, line 27.
12. ✓ Include a new section requiring that benefits paid to recipients
P22 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.
13. ✓ Amend AS 23.30.041(k) (Page 9, line 14) to read: (k) "Benefits
P10 related to the reemployment plan may not extend past two years from
date of plan approval or acceptance at which time the
benefits.....".
14. ✓ Amend Section 13 (AS 23.30.095(e) to reinstate the deleted language
P16 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)".
15. ✓ Add a new section to repeal and reenact AS 23.30.110(C) in response
P19 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. The Division's response is that the time
lag is caused by attorney requests for a continuance after a case
has been scheduled and comes before the Board. The result is that
the hearing time is wasted because another case cannot be scheduled
on such short notice. The attorney response to the Divisions'
response is that they have to request a hearing when they receive a
case even if they aren't ready to proceed to hearing because it
takes so long to get a hearing scheduled. The Divisions response

FURNISH TO
MAYN UNLAWFUL
UNLAWFUL

to the attorney response if that it wouldn't take so long to get a hearing scheduled if they didn't have so many continuances.!

The proposed language this problem in a way that will not unfairly impact the employer or employee and will help the Board to manage their hearing schedule in a more responsive and efficient manner.

* REHAB SPECIALISTS GRANDFATHERING

1) TAKE IN EVERYONE

2) LIMITED GRACE PERIOD TO MEET QUALIFICATIONS

~~NOT REVIEWED OR ADOPTED~~

Not reviewed or adopted
by the House Labor & Commerce Committee
3/10/88

Original sponsor:

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IN THE SENATE

(PROPOSED)

BY THE LABOR AND
COMMERCE COMMITTEE

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

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

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

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. LEGISLATIVE INTENT. (a) It is the intent of the legislature that AS 23.30 be interpreted so as to assure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of AS 23.30.

(b) The legislature declares that the workers' compensation laws must not be construed by the courts in favor of any party. It is the specific intent of the legislature that workers' compensation cases be decided on their merits, except when otherwise provided by statute. It is also the intent of the legislature that the board possess the greatest possible authority in the exercise of its fact finding responsibilities and that the board's decisions be conclusive unless the court finds that a reasonable person could not have reached the conclusion made by the board.

(c) It is the intent of the legislature in amending AS 23.30.175 regarding benefits payable to recipients not residing in the state to

(1) recognize the levels of workers' compensation benefits brought about by the high cost of living that exists in the state as compared to other localities;

(2) reduce disincentives to return to work; and

(3) remove obstacles to the utilization of vocational rehabilitation that may be brought about by the payment of workers' compensation

1 benefits at the high levels provided by the Alaska workers' compensation
2 law to individuals residing in localities with living costs lower than
3 those in Alaska.

4 ^{not am} _{FR 4/10/0} (d) It is the intent of the legislature to encourage employers to
5 improve safety practices in the workplace and to use improved safety prac-
6 tices to reduce work related injuries.

7 * Sec. 2. AS 21.89 is amended by adding a new section to read:

8 Sec. 21.89.015. REFUND OF WORKERS' COMPENSATION PREMIUM. (a)

9 An insurer who provides workers' compensation insurance by participa-
10 tion in an assigned risk pool under AS 21.39.155, shall refund at
11 least 10 percent of the premium charged an insured for the assigned
12 risk pool insurance if, during the period covered by the premium
13 payment, the insured has a safety program that complies with the
14 general safety code standards adopted by the department and has not
15 been cited for a safety or health violation for which the insured
16 could be fined under AS 18.60.091.

17 (b) An insurer shall refund at least five percent of the premium
18 charged for workers' compensation insurance if, during the period
19 covered by the premium payment, the insured has a safety program that
20 complies with general safety code standards adopted by the department
21 and has not been cited for a safety or health violation for which the
22 insured could be fined under AS 18.60.091.

23 * Sec. 3. AS 23.30.005(h) is amended to read:

24 (h) The department shall [MAY] adopt [IDENTICAL] rules for all
25 panels, and procedures for the periodic selection, retention, and re-
26 moval of rehabilitation specialists or physicians under AS 23.30.041
27 and 23.30.095, and shall [MAY] adopt regulations to carry out the
28 provisions of this chapter. Process and procedure under this chapter
29 shall be as summary and simple as possible. The department, the board

1 or a member of it may for the purposes of this chapter subpoena wit-
2 nesses, administer or cause to be administered oaths, and may examine
3 or cause to have examined the parts of the books and records of the
4 parties to a proceeding that relate [WHICH RELATED] to questions in
5 dispute. The superior court, on application of the department, the
6 board or any members of it, shall enforce the attendance and testimony
7 of witnesses and the production and examination of books, papers, and
8 records.

9 * Sec. 4. AS 23.30.005 is amended by adding a new subsection to read:

10 (m) If a regulation adopted by the department and approved by a
11 majority of the full board is determined to be invalid by the state
12 supreme court, the department may adopt new regulations that conform
13 to the department's statutory authority as interpreted by the court.

14 * Sec. 5. AS 23.30.020 is amended by adding a new subsection to read:

15 (b) An employee who knowingly makes a false statement as to the
16 employee's physical condition on an employment application or preem-
17 ployment questionnaire may not receive benefits under this chapter if

18 (1) the employer relied upon the false representation and
19 this reliance was a substantial factor in the hiring; and

20 (2) there was a causal connection between the false rep-
21 resentation and the injury to the employee.

22 * Sec. 6. AS 23.30.025 is amended by adding a new subsection to read:

23 (c) An insurer extending coverage required under this chapter by
24 specifying Alaska in the other states section or similar provision of
25 the insurance policy shall provide notice to the department under
26 AS 23.30.085.

27 * Sec. 7. AS 23.30.030 is amended by adding a new paragraph to read:

28 (8) An annual insurance premium that exceeds \$2,000 may be
29 paid semiannually, if requested by the insured. The insurer shall

1 include this provision in the insurance policy in a manner that clear-
2 ly informs the insured of the provision.

3 * Sec. 8. AS 23.30.040(b) is amended to read:

4 (b) If an employee suffers a compensable injury that results in
5 temporary total disability, temporary partial disability, permanent
6 partial disability, or permanent total disability, the employer or
7 insurance carrier shall contribute to the second injury fund. The
8 contribution shall be made annually at the time of the report filing
9 required by AS 23.30.155(m) [BY ONE YEAR FROM THE DATE OF THE INJURY
10 OR ON TERMINATION OF THE EMPLOYEE'S CLAIM, WHICHEVER IS SOONER. IF
11 THE CLAIM IS NOT TERMINATED WITHIN ONE YEAR, SUBSEQUENT CONTRIBUTIONS
12 SHALL BE MADE YEARLY UNTIL THE TERMINATION OF THE EMPLOYEE'S CLAIM].
13 The amount of the contribution is the product of the compensation to
14 which the employee is entitled for temporary total disability, tempo-
15 rary partial disability, permanent partial disability, or permanent
16 total disability and the applicable contribution rate set out in
17 column A of this subsection. Payment need not be made to the second
18 injury fund if the total contribution under this subsection is less
19 than \$20. By December 15 of each year the commissioner shall deter-
20 mine and make available to the public the applicable contribution rate
21 for the following calendar year according to the reserve rate of the
22 second injury fund in column B of this subsection:

Column A		Column B	
Second Injury Fund		Reserve Rate	
Contribution Rate		At Least	But Less Than
(Percent)		(Percent)	(Percent)
6		0	50
5		50	75
4		75	100

3	100	125
2	125	150
1	150	175
0	175	

* Sec. 9. AS 23.30.040(h) is amended to read:

(h) Administration expenses of the state under this section and AS 23.30.205 must [SHALL] be paid from the second injury [GENERAL] fund.

* Sec. 10. AS 23.30.041 is repealed and reenacted to read:

Sec. 23.30.041. REHABILITATION OF INJURED WORKERS. (a) The board shall select and employ a reemployment benefits administrator. The board may authorize the administrator to select and employ additional staff. The administrator is in the partially exempt service under AS 39.25.120.

(b) The administrator shall perform the following functions:

(1) enforce regulations adopted by the board to implement this section;

(2) recommend regulations for adoption by the board that establish performance and reporting criteria for rehabilitation specialists;

(3) enforce the quality and effectiveness of reemployment benefits provided for under this section;

(4) review on an annual basis the performance of rehabilitation specialists to determine continued eligibility for delivery of rehabilitation services;

(5) submit to the department, on or before January 1 of each year, a report of reemployment benefits provided under this section for the previous fiscal year; the report must include a general section, sections related to each rehabilitation specialist

1 employed under this section, and a statistical summary of all reha-
2 bilitation cases, including

3 (A) the estimated and actual cost of each active
4 rehabilitation plan;

5 (B) the estimated and actual time of each rehabilita-
6 tion plan;

7 (C) a status report on all individuals completing or
8 terminating a reemployment benefits program including a return to
9 work date;

10 (D) the cost of reemployment benefits;

11 (6) maintain a list of rehabilitation specialists who meet
12 the qualifications established under this section;

13 (7) promote awareness among physicians, adjusters, injured
14 workers, employers, employees, attorneys, training providers, and
15 rehabilitation specialists of the reemployment program established in
16 this subsection.

17 (c) If an employee suffers a compensable injury that may perma-
18 nently preclude an employee's return to the employee's occupation at
19 the time of injury, the employee or employer may request an eligibil-
20 ity evaluation for reemployment benefits. The employee shall request
21 an eligibility evaluation within 90 days after the employee gives the
22 employer notice of injury unless the administrator determines the
23 employee has unusual and extenuating physical limitations that prevent
24 the employee from making a timely request. The administrator shall,
25 on a rotating and geographic basis, select a rehabilitation specialist
26 from the list maintained under (b)(6) of this section to perform the
27 eligibility evaluation.

28 (d) Within 30 days after the referral by the administrator, the
29 rehabilitation specialist shall perform the eligibility evaluation and

1 issue a report of findings. The administrator may grant up to an
2 additional 30 days for performance of the eligibility evaluation upon
3 notification of unusual and extenuating circumstances and the re-
4 habilitation specialist's request. Within 14 days after receipt of
5 the report from the rehabilitation specialist, the administrator shall
6 notify the parties of the employee's eligibility for reemployment
7 preparation benefits. Within 10 days after the decision, either party
8 may seek review of the decision by requesting a hearing under AS 23.-
9 30.110. The hearing shall be held within 30 days after it is re-
10 quested. The board shall uphold the decision of the administrator
11 except for abuse of discretion on the administrator's part.

12 (e) An employee shall be eligible for benefits under this sec-
13 tion upon the employee's written request and by having a physician
14 predict that the employee will have permanent physical capacities that
15 are less than the physical demands of the employee's job as described
16 in the United States Department of Labor's "Selected Characteristics
17 of Occupations Defined in the Dictionary of Occupational Titles" for

18 (1) the employee's job at the time of injury; or

19 (2) other jobs that exist in the labor market that the
20 employee has held or received training for within 10 years before the
21 injury or that the employee has held following the injury for a period
22 long enough to obtain the skills to compete in the labor market,
23 according to specific vocational preparation codes as described in the
24 dictionary of occupational titles.

25 (f) An employee is not eligible for reemployment benefits if

26 (1) the employer offers employment within the employee's
27 predicted post-injury physical capacities at a wage equivalent to at
28 least the state minimum wage under AS 23.10.065 or 60 percent of the
29 worker's gross hourly wages at the time of injury, whichever is

1 greater, of injury and the employment prepares the employee to be
2 employable in other jobs that exist in the labor market;

3 (2) the employee has been previously rehabilitated in a
4 former workers' compensation claim and returned to work in the same or
5 similar occupation in terms of physical demands required of the em-
6 ployee at the time of the previous injury; or

7 (3) at the time of medical stability no permanent impair-
8 ment is identified or expected.

9 (g) Within 10 days after the employee receives the adminis-
10 trator's notification of eligibility for benefits, an employee who
11 desires to use these benefits shall give written notice to the em-
12 ployer of the employee's selection of a rehabilitation specialist who
13 shall provide a complete reemployment benefits plan. If the employer
14 disagrees with the employee's choice of rehabilitation specialist to
15 develop the plan and the disagreement cannot be resolved, then the
16 administrator shall assign a rehabilitation specialist. The employer
17 and employee each have one right of refusal of a rehabilitation spe-
18 cialist.

19 (h) Within 90 days after the rehabilitation specialist's selec-
20 tion under (g) of this section, the reemployment plan must be formu-
21 lated and approved. The reemployment plan must include at least the
22 following:

23 (1) a determination of the occupational goal in the labor
24 market;

25 (2) an inventory of the employee's technical skills, phys-
26 ical and intellectual capacities, academic achievement, emotional
27 condition and family support;

28 (3) a plan to acquire the occupational skills to be employ-
29 able;

1 (4) the cost estimate of the reemployment plan, including
2 provider fees; the amount of tuition, books, tools, and supplies;
3 transportation; temporary lodging; or job modification devices;

4 (5) the estimated length of time that the plan will take;

5 (6) the date the plan will commence;

6 (7) the estimated time of medical stability as predicted by
7 the physician;

8 (8) a detailed description and plan schedule; and

9 (9) a finding by the rehabilitation specialist that the
10 inventory under (2) of this subsection indicates that the employee can
11 be reasonably expected to satisfactorily complete the plan and perform
12 in a new occupation within the time and cost limitations of the plan.

13 (i) Reemployment benefits shall be selected from the following
14 in a manner that ensures remunerative employability in the shortest
15 possible time:

16 (1) on the job training;

17 (2) vocational training;

18 (3) academic training;

19 (4) self-employment; or

20 (5) a combination of (1) - (4) of this subsection.

21 (j) The employee, rehabilitation specialist, and the employer
22 shall sign the reemployment benefits plan. If the employer and em-
23 ployee fail to agree on a reemployment plan, either party may submit a
24 reemployment plan for approval to the administrator; the adminis-
25 trator shall approve or deny a plan within 14 days after the plan is
26 submitted; within 10 days of the decision, either party may seek
27 review of the decision by requesting a hearing under AS 23.30.110; the
28 board shall uphold the decision of the administrator unless evidence
29 is submitted supporting an allegation of abuse of discretion on the

1 part of the administrator; the board shall render a decision within 30
2 days after completion of the hearing.

3 (k) Benefits related to the reemployment plan may not extend
4 #13 past two years from date of plan approval or acceptance, whichever
5 date occurs first, at which time the benefits expire. If an employee
6 reaches medical stability before completion of the plan, temporary
7 total disability benefits shall cease and permanent impairment bene-
8 fits shall then be paid at the employee's temporary total disability
9 rate. If the employee's permanent impairment benefits are exhausted
10 before the completion or termination of the reemployment plan, the
11 employer shall provide wages equal to 60 percent of the employee's
12 spendable weekly wages but not to exceed \$525, until the completion or
13 termination of the plan. A permanent impairment benefit remaining
14 unpaid upon the completion or termination of the plan shall be paid to
15 the employee in a single lump sum. The fees of the rehabilitation
16 specialist or rehabilitation professional shall be paid by the em-
17 ployer and may not be included in determining the cost of the reem-
18 ployment plan.

19 (l) The cost of the reemployment plan incurred under this sec-
20 tion shall be the responsibility of the employer, shall be paid on an
21 expense incurred basis, and may not exceed \$10,000.

22 (m) Only a rehabilitation specialist may accept case assignments
23 as a case manager and sign eligibility determinations and reemployment
24 plans. A person who is not a rehabilitation specialist may perform
25 rehabilitation casework if the work is performed under the direct
26 supervision of a rehabilitation specialist employed in the same firm
27 and location.

28 (n) After the employee has elected to participate in reemploy-
29 ment benefits, if the employer believes the employee has not

1 cooperated the employer may terminate reemployment benefits on the
2 date of noncooperation. Noncooperation means unreasonable failure to

3 (1) keep appointments;

4 (2) maintain passing grades;

5 (3) attend designated programs;

6 (4) maintain contact with the rehabilitation specialist;

7 (5) cooperate with the rehabilitation specialist in devel-
8 oping a reemployment plan and participating in activities relating to
9 reemployability on a full-time basis;

10 (6) comply with the employee's responsibilities outlined in
11 the reemployment plan; or

12 (7) participate in any planned reemployment activity as
13 determined by the administrator.

14 (o) Upon the request of either party, the administrator shall
15 decide whether the employee has not cooperated as provided under (n)
16 of this section. A hearing before the administrator shall be held
17 within 30 days after it is requested. The administrator shall issue a
18 decision within 14 days after the hearing. Within 10 days after the
19 administrator files the decision, either party may seek review of the
20 decision by requesting a hearing under AS 23.30.110; the board shall
21 uphold the decision of the administrator unless evidence is submitted
22 supporting an allegation of abuse of discretion on the part of the
23 administrator; the board shall render a decision within 30 days after
24 completion of the hearing.

25 (p) In this section

26 (1) "administrator" means the reemployment benefits admin-
27 istrator under AS 23.30.041(a);

28 (2) "employability" means possessing the ability but not
29 necessarily the opportunity to engage in employment that is consistent

1 with the employee's physical status imposed by the compensable injury;

2 (3) "labor market" means a geographical area that offers
3 employment opportunities in the following priority:

- 4 (A) area of residence;
5 (B) area of last employment;
6 (C) the state;
7 (D) other states;

8 (4) "physical capacities" means objective and measurable
9 physical traits such as ability to lift and carry, walk, stand or sit,
10 push, pull, climb, balance, stoop, kneel, crouch, crawl, reach, han-
11 dle, finger, feel, talk, hear or see;

12 (5) "physical demands" means the physical requirements of
13 the job such as strength, including positions such as standing, walk-
14 ing, sitting, and movement of objects such as lifting, carrying,
15 pushing, pulling, climbing, balancing, stooping, kneeling, crouching,
16 crawling, reaching, handling, fingering, feeling, talking, hearing, or
17 seeing;

18 (6) "rehabilitation specialist" means a person who is a
19 certified insurance rehabilitation specialist, a certified rehabilita-
20 tion counselor, or a person who has equivalent or better qualifica-
21 tions as determined under regulations adopted by the department;

22 (7) "remunerative employability" means having the skills
23 that allow a worker to be compensated with wages or other earnings
24 equivalent to at least 60 percent of the worker's gross hourly wages
25 at the time of injury; if the employment is outside the state, the
26 stated 60 percent shall be adjusted to account for the difference
27 between the applicable state average weekly wage and the Alaska aver-
28 age weekly wage.

29 * Sec. 11. AS 23.30.055 is amended to read:

1 Sec. 23.30.055. EXCLUSIVENESS OF LIABILITY. The liability of an
2 employer prescribed in AS 23.30.045 is exclusive and in place of all
3 other liability of the employer and any fellow employee to the em-
4 ployee, the employee's legal representative, husband or wife, parents,
5 dependents, next of kin, and anyone otherwise entitled to recover
6 damages from the employer or fellow employee at law or in admiralty on
7 account of the injury or death. The liability of the employer is
8 exclusive even if the employee's claim is barred under AS 23.30.-
9 020(b). However, if an employer fails to secure payment of compen-
10 sation as required by this chapter, an injured employee or the em-
11 ployee's legal representative in case death results from the injury
12 may elect to claim compensation under this chapter, or to maintain an
13 action against the employer at law or in admiralty for damages on
14 account of the injury or death. In that action the defendant may not
15 plead as a defense that the injury was caused by the negligence of a
16 fellow servant, or that the employee assumed the risk of the employ-
17 ment, or that the injury was due to the contributory negligence of the
18 employee.

19 * Sec. 12. AS 23.30.075(b) is amended to read:

20 (b) ~~If an [AN] employer [WHO] fails to insure and keep insured~~
21 ~~employees subject to this chapter or fails to obtain a certificate of~~
22 ~~self-insurance from the board, upon conviction the court shall impose~~
23 ~~a fine of \$10,000 and may impose a sentence of [, IS PUNISHABLE BY A~~
24 ~~FINE OF NOT MORE THAN \$1,000, OR BY]~~ imprisonment for not more than
25 one year [, OR BY BOTH]. If an employer is a corporation, all persons
26 who, at the time of the injury or death, had authority to insure the
27 [SAID] corporation or apply for a certificate of self-insurance, and
28 the person actively in charge of the business of the [SUCH] corpo-
29 ration shall be subject to the penalties prescribed in this subsection

1 [HEREIN] and shall be personally, jointly, and severally liable to-
2 gether with the corporation for the payment of all compensation or
3 other benefits for which the corporation is liable under this chapter
4 if the [SAID] corporation at that [SUCH] time is not insured or quali-
5 fied as a self-insurer.

6 * Sec. 13. AS 23.30.095(a) is amended to read:

7 (a) The employer shall furnish medical, surgical, and other
8 attendants or treatment, nurse and hospital service, medicine, crutch-
9 es, and apparatus for the period which the nature of the injury or the
10 process of recovery requires, not exceeding two years from and after
11 the date of injury to the employee. However, if the condition requir-
12 ing the treatment, apparatus, or medicine is a latent one, the two-
13 year period runs from the time the employee has knowledge of the
14 nature of the employee's disability and its relationship to the em-
15 ployment and after disablement. It shall be additionally provided
16 that, if continued treatment or care or both beyond the two-year
17 period is indicated, the injured employee has the right of review by
18 the board. The board may authorize continued treatment or care or
19 both as the process of recovery may require. When medical care is
20 required, the injured employee may designate a licensed physician
21 inside the state where the employee resides to render the care. The
22 employee may not make more than one change in the employee's choice of
23 attending physician without the written consent of the employer.
24 Referral to a specialist by the employee's attending physician is not
25 considered a change in physicians [EXCEPT IN CASES WHERE, IN THE
26 JUDGMENT OF THE BOARD, CARE OR TREATMENT OR BOTH CAN BEST BE ADMINIS-
27 TERED BY THE SELECTION OF ANOTHER PHYSICIAN]. Upon procuring the
28 services of a physician, the injured employee shall give proper noti-
29 fication of the selection to the employer within a reasonable time

1 after first being treated. Notice of a change in the attending physi-
2 cian shall be given before the change [IF FOR ANY REASON DURING THE
3 PERIOD WHEN MEDICAL CARE IS REQUIRED THE EMPLOYEE WISHES TO CHANGE TO
4 ANOTHER PHYSICIAN, THE EMPLOYEE MAY DO SO IN ACCORDANCE WITH REGU-
5 LATIONS ADOPTED BY THE BOARD].

6 * Sec. 14. AS 23.30.095(c) is amended to read:

7 (c) A claim for medical or surgical treatment is not valid and
8 enforceable against the employer unless, within 14 days following
9 treatment, the physician giving the treatment or the employee re-
10 ceiving it furnishes to the employer and the board notice of the
11 injury and treatment, preferably on a form prescribed by the board.
12 The board shall, however, excuse the failure to furnish notice within
13 14 days when it finds it to be in the interest of justice to do so,
14 and it may, upon application by a party in interest, make an award for
15 the reasonable value of the medical or surgical treatment so obtained
16 by the employee. A claim for a course of treatment requiring con-
17 tinuing and multiple treatments of a similar nature is not valid
18 unless the treatments are carried out under a written treatment plan
19 prescribed before the commencement of the course of treatment, com-
20 pleted and signed by the attending physician, and mailed to the em-
21 ployer within one week of the beginning of treatment. The treatment
22 plan must include objectives, modalities, and frequency of treatment.
23 The initial treatment plan may not include more than 20 visits in the
24 first 60 days. If more than 20 visits are required within the first
25 60 days, or more than four visits a month after the first 60 days, the
26 physician shall document the need for services in excess of the guide-
27 lines in the written treatment plan.

28 * Sec. 15. AS 23.30.095(e) is amended to read:

29 (e) The employee shall, after an injury, at reasonable times

1 during the continuance of the disability, if requested by the employer
2 or when ordered by the board, submit to an examination by a physician
3 or surgeon of the employer's choice authorized to practice medicine
4 under the laws of the jurisdiction in which the physician resides
5 [STATE IN WHICH THE EMPLOYEE MAY BE FOUND], furnished and paid for by
6 the employer. The physician or surgeon selected by the employer shall
7 be qualified in the same specialty as the treating physician or sur-
8 geon selected by the employee, unless the board or the board's
9 designee approves a different selection by the employer. The employer
10 may not make more than one change in the employer's choice of a
11 physician or surgeon without the written consent of the employee.
12 Referral to a specialist by the employer's physician is not considered
13 a change in physicians. An examination requested by the employer not
14 less than 14 days after injury, and every 60 days thereafter, shall be
15 presumed to be reasonable, and the employee shall submit to the
16 examination without further request or order by the board. Unless
17 medically appropriate, the physician shall use existing diagnostic
18 data to complete the examination. Facts relative to the injury or
19 claim communicated to or otherwise learned by a physician or surgeon
20 who may have attended or examined the employee, or who may have been
21 present at an examination are not privileged, either in the hearings
22 provided for in this chapter or an action to recover damages against
23 an employer who is subject to the compensation provisions of this
24 chapter. If an employee refuses to submit to an [ANY] examination
25 provided for in this section, the employee's rights to compensation
26 shall be suspended until the obstruction or refusal ceases, and the
27 employee's compensation during the period of suspension may, in the
28 discretion of the board or the court determining an action brought for
29 the recovery of damages under this chapter, be forfeited. The board

1 in any case of death may require an autopsy at the expense of the
2 party requesting the autopsy. An autopsy may not be held without
3 notice first being given to the widow or widower or next of kin if
4 they reside in the state or their whereabouts can be reasonably ascer-
5 tained, of the time and place of the autopsy and reasonable time and
6 opportunity given the widow or widower or next of kin to have a repre-
7 sentative present to witness the autopsy. If adequate notice is not
8 given, the findings from the autopsy may be suppressed on motion made
9 to the board or to the superior court, as the case may be.

10 * Sec. 16. AS 23.30.095(f) is amended to read:

11 (f) All fees and other charges for medical treatment or service
12 [ARE LIMITED TO THE CHARGES THAT PREVAIL IN THE SAME COMMUNITY FOR
13 SIMILAR TREATMENT OF INJURED PERSONS OF LIKE STANDARD OF LIVING AND]
14 shall be subject to regulation by the board but may not exceed usual,
15 customary, and reasonable fees for the treatment or service in the
16 community in which it is rendered, as determined by the board. An
17 employee may not be required to pay a fee or charge for medical treat-
18 ment or service.

19 * Sec. 17. AS 23.30.095(j) is repealed and reenacted to read:

20 (j) The board may appoint a medical services review committee,
21 or contract with an existing organization in the state or another
22 state, to assist and advise the board in matters involving the appro-
23 priateness, necessity, and cost of medical and related services pro-
24 vided under this chapter.

25 * Sec. 18. AS 23.30.095 is amended by adding a new subsection to read:

26 (k) In the event of a medical dispute regarding determinations
27 of causation, medical stability, ability to enter a reemployment plan,
28 degree of impairment, functional capacity, the amount and efficacy of
29 the continuance of or necessity of treatment, or compensability

1 between the employee's attending physician and the employer's indepen-
2 dent medical evaluation, a second independent medical evaluation shall
3 be conducted by a physician or physicians selected by the board from a
4 list established and maintained by the board. The cost of the exami-
5 nation and medical report shall be paid by the employer. The report
6 of the independent medical examiner shall be furnished to the board
7 and to the parties within 14 days after the examination is concluded.
8 The opinion of the independent medical examiner shall, in the absence
9 of clear and convincing objective evidence to the contrary, be pre-
10 sumed to be correct. A person may not seek damages from an indepen-
11 dent medical examiner caused by the rendering of an opinion or provid-
12 ing testimony under this subsection, except in the event of fraud or
13 gross incompetence.

14 * Sec. 19. AS 23.30.105(a) is amended to read:

15 (a) The right to compensation for disability under this chapter
16 is barred unless a claim for it is filed within two years after the
17 employee has knowledge of the nature of the employee's disability and
18 its relation to the employment and after disablement. However, the
19 maximum time for filing the claim in any event other than arising out
20 of an occupational disease shall be four years from the date of in-
21 jury, and the right to compensation for death is barred unless a claim
22 therefor is filed within one year after the death, except that if
23 payment of compensation has been made without an award on account of
24 the injury or death, a claim may be filed within two years after the
25 date of the last payment of benefits under AS 23.30.180, 23.30.185,
26 23.30.190, 23.30.200, or 23.30.215. It is additionally provided that,
27 in the case of latent defects pertinent to and causing compensable
28 disability, the injured employee has full right to claim as shall be
29 determined by the board, time limitations notwithstanding.

1 * Sec. 20. AS 23.30.110(c) is repealed and reenacted to read:

2
3 15
4 (c) Before a hearing is scheduled, the party seeking a hearing
5 shall file a request for a hearing together with an affidavit stating
6 that the party has completed all necessary discovery, obtained all
7 necessary evidence, and is fully prepared for the hearing. An
8 opposing party shall have 10 days after the hearing request is filed
9 to file a response. If a party opposes the hearing request, the board
10 or a board designee shall within 30 days of the filing of the
11 opposition conduct a prehearing conference and set a hearing date. If
12 opposition is not filed, a hearing shall be scheduled no later than 60
13 days after the receipt of the hearing request. The board shall give
14 each party at least 10 days' notice of the hearing, either personally
15 or by certified mail. After a hearing has been scheduled, a
16 continuance may not be granted. After completion of the hearing the
17 board shall close the hearing record. Evidence or arguments filed
18 after the conclusion of the hearing may not be considered by the
19 board, unless the board determines that good cause exists for failure
20 to complete the hearing at the scheduled time. If a settlement
21 agreement is reached by the parties less than 14 days before the
22 hearing, the parties shall appear at the time of the scheduled hearing
23 to state the terms of the settlement agreement. Within 30 days after
24 the hearing record closes, the board shall file its decision. If the
25 employer controverts a claim on a board-prescribed controversion
26 notice and the employee does not request a hearing within two years
27 following the filing of the controversion notice, the claim is denied.

28 * Sec. 21. AS 23.30.120 is amended by adding a new subsection to read:

29 (c) The presumption of compensability established in (a) of this
section does not apply to a mental injury resulting from work-related
stress.

1 * Sec. 22. AS 23.30.125 is amended by adding a new subsection to read:

2 (f) Subject to an employer's or employee's burden of proof, a
3 finding of fact made by the board as a part of a compensation order is
4 conclusive unless the court specifically finds that a reasonable
5 person could not have reached the conclusion made by the board.

6 * Sec. 23. AS 23.30.130(a) is amended to read:

7 (a) Upon its own initiative, or upon the application of any
8 party in interest on the ground of a change in conditions, including,
9 for the purposes of AS 23.30.175, a change in residence, or because of
10 a mistake in its determination of a fact, the board may, before one
11 year after the date of the last payment of compensation benefits under
12 AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, whether
13 or not a compensation order has been issued, or before one year after
14 the rejection of a claim, review a compensation case under [IN ACCOR-
15 DANCE WITH] the procedure prescribed in respect of claims in AS 23.-
16 30.110. Under [IN ACCORDANCE WITH] AS 23.30.110 the board may issue a
17 new compensation order which terminates, continues, reinstates, in-
18 creases, or decreases the compensation, or award compensation.

19 * Sec. 24. AS 23.30.155(c) is amended to read:

20 (c) The insurer or adjuster [EMPLOYER] shall notify the board
21 and the employee on a form prescribed by the board that the payment of
22 compensation has begun or has been increased, decreased, suspended,
23 terminated, resumed, or changed in type. An initial report shall be
24 filed with the board and sent to the employee within 28 days after the
25 date of issuing the first payment of compensation. If at any time 21
26 days or more pass and no compensation payment is issued, a report
27 notifying the board and the employee of the termination or suspension
28 of compensation shall be filed with the board and sent to the employee
29 within 28 days after the date the last compensation payment was

1 issued. A report shall also be filed with the board and sent to the
2 employee within 28 days after the date of issuing a payment increas-
3 ing, decreasing, resuming, or changing the type of compensation paid.
4 If the [EMPLOYER FAILS TO NOTIFY THE] board and the employee are not
5 notified within the 28 days prescribed by this subsection for report-
6 ing, the insurer or adjuster [EMPLOYER] shall pay a civil penalty of
7 \$100 for the first day plus \$10 for each day thereafter that the
8 [EMPLOYER FAILED TO GIVE] notice was not given. Total penalties under
9 this subsection [SECTION] may not exceed \$1,000 for a failure to file
10 a required report. Penalties assessed under this subsection are
11 eligible for reduction under (m) of this section. A penalty assessed
12 under this subsection after penalties have been reduced under (m) of
13 this section shall be increased by 25 percent and shall bear interest
14 at the rate established under AS 45.45.010.

15 * Sec. 25. AS 23.30.155(d) is amended to read:

16 (d) If the employer controverts the right to compensation the
17 employer shall file with the board and send to the employee a notice
18 of controversion on or before the 21st day after the employer has
19 knowledge of the alleged injury or death. If the employer controverts
20 the right to compensation after payments have begun, the employer
21 shall file with the board and send to the employee a notice of con-
22 troversion within seven days after an installment of compensation
23 payable without an award is due. When payment of temporary disability
24 benefits is controverted solely on the grounds that another employer
25 or another insurer of the same employer may be responsible for all or
26 a portion of the benefits, the most recent employer or insurer who is
27 party to the claim and who may be liable shall make the payments
28 during the pendency of the dispute. When a final determination of
29 liability is made, any reimbursement required, including interest at

1 the statutory rate, and all costs and attorneys' fees incurred by the
2 prevailing employer, shall be made within 14 days of the determina-
3 tion.

4 * Sec. 26. AS 23.30.155(f) is amended to read:

5 (f) If compensation payable under the terms of an award is not
6 paid within 14 days after it becomes due, there shall be added to that
7 unpaid compensation an amount equal to ~~25~~ [20] percent of it, which
8 #10 shall be paid at the same time as, but in addition to, the compensa-
9 tion, unless review of the compensation order making the award is had
10 as provided in AS 23.30.125 and an interlocutory injunction staying
11 payments is allowed by the court.

12 * Sec. 27. AS 23.30.155(m) is repealed and reenacted to read:

13 (m) On or before March 1 of each year the insurer or adjuster
14 shall file a verified annual report on a form prescribed by the board
15 stating the total amount of all compensation by type, the number of
16 #4 claims received and the percentage controverted, medical, and related
17 #5 benefits, vocational rehabilitation expenses, legal fees, including a
18 separate total for fees paid to attorneys and fees paid for the other
19 costs of litigation, and penalties paid on all claims during the
20 preceding calendar year. If the annual report is timely and complete
21 when received by the board and provides accurate information about
22 each category of payments, the commissioner shall review the timeli-
23 ness of the insurer's or adjuster's reports filed during the preceding
24 year under (c) of this section. If during the preceding year the
25 insurer or adjuster filed at least 99 percent of the reports on time,
26 the penalties assessed under (c) of this section shall be waived. If
27 during the preceding year the insurer or adjuster filed at least 97
28 percent of the reports on time, 75 percent of the penalties assessed
29 under (c) of this section shall be waived. If during the preceding

1 year the insurer or adjuster filed 95 percent of the reports on time,
2 50 percent of the penalties assessed under (c) of this section shall
3 be waived. If during the preceding year the insurer's or adjuster's
4 reports have not been filed on time at least 95 percent of the time,
5 none of the penalties assessed under (c) of this section shall be
6 waived. The penalties that are not waived are due and payable when
7 the insurer or adjuster receives notification from the commissioner
8 regarding the timeliness of the reports. If the annual report is not
9 filed by March 1 of each year, the insurer or adjuster shall pay a
10 civil penalty of \$100 for the first day the annual report is late, and
11 \$10 for each additional day the report is late.

12 * Sec. 28. AS 23.30.155 is amended by adding new subsections to read:

13 (n) If the employer is self-insured, the requirements of (c) and
14 (m) of this section apply to the employer.

15 (o) The board shall promptly notify the division of insurance if
16 the board determines that the employer's insurer has frivolously or
17 #4
PART
2
18 unfairly controverted compensation due under this chapter. After
19 receiving notice from the board, the division of insurance shall
20 determine if the insurer has committed an unfair claim settlement
21 practice under AS 21.36.125.

22 #12
23 (p) When an employer pays compensation due under this chapter to
24 the employee, the payment must be made by check or other negotiable
25 instrument drawn on funds deposited in this state or by certified
26 check.

27 * Sec. 29. AS 23.30.175 is repealed and reenacted to read:

28 Sec. 23.30.175. RATES OF COMPENSATION. (a) The weekly rate of
29 compensation for disability or death may not exceed \$700 and initially
may not be less than \$110. However, if the board determines that the
employee's spendable weekly wages are less than \$110 a week as

1 computed under AS 23.30.220, or less than \$154 a week in the case of
2 an employee who has furnished documentary proof of the employee's
3 wages, it shall issue an order adjusting the weekly rate of compen-
4 sation to a rate equal to the employee's spendable weekly wages. If
5 the employer can verify that the employee's spendable weekly wages are
6 less than \$154, the employer may adjust the weekly rate of compen-
7 sation to a rate equal to the employee's spendable weekly wages with-
8 out an order of the board. If the employee's spendable weekly wages
9 are greater than \$154, but 80 percent of the employee's spendable
10 weekly wages is less than \$154, the employee's weekly rate of compen-
11 sation shall be \$154. Prior payments made in excess of the adjusted
12 rate shall be deducted from the unpaid compensation in the manner the
13 board determines. In any case, the employer shall pay timely compen-
14 sation.

15 (b) The following rules apply to benefits payable to recipients
16 not residing in the state at the time compensation benefits are pay-
17 able:

18 (1) the weekly rate of compensation shall be calculated by
19 multiplying the recipient's weekly compensation rate calculated under
20 AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, by the
21 ratio of the cost of living of the area in which the recipient resides
22 to the cost of living in this state;

23 (2) the calculation required by (1) of this subsection does
24 not apply if the recipient is absent from the state for medical or re-
25 habilitation services not reasonably available in the state;

26 (3) if the gross weekly earnings of the recipient and the
27 resulting compensation rate is determined under AS 23.30.220(a)(2),
28 the calculation required by this subsection applies only to the por-
29 tion of the recipient's weekly compensation rate attributable to wages

1 earned in the state;

2 (4) application of this subsection may not reduce the
3 weekly compensation rate to less than \$154 a week, except as provided
4 in (a) of this section.

5 (c) The board shall provide by regulation for the determination
6 and comparison of living costs for this state and the other areas in
7 which recipients reside and for the annual redetermination and com-
8 parison of these costs.

9 * Sec. 30. AS 23.30.180 is amended to read:

10 Sec. 23.30.180. PERMANENT TOTAL DISABILITY. In case of total
11 disability adjudged to be permanent 80 percent of the injured em-
12 ployee's spendable weekly wages shall be paid to the employee during
13 the continuance of the total disability. If a permanent partial
14 disability award has been made before a permanent total disability
15 determination, permanent total disability benefits must be reduced by
16 the amount of the permanent partial disability award, adjusted for
17 inflation, in a manner determined by the board. Loss of both hands,
18 or both arms, or both feet, or both legs, or both eyes, or of any two
19 of them, in the absence of conclusive proof to the contrary, consti-
20 tutes permanent total disability. In all other cases permanent total
21 disability is determined in accordance with the facts. In making 'is
22 determination the market for the employee's services shall be

23 (1) area of residence;

24 (2) area of last employment;

25 (3) the state of residence; and

26 (4) the State of Alaska.

27 * Sec. 31. AS 23.30.180 is amended by adding a new subsection to read:

28 (b) Failure to achieve remunerative employability as defined in
29 AS 23.30.041(m)(7) does not, by itself, constitute permanent total

1 disability.

2 * Sec. 32. AS 23.30.185 is amended to read:

3 Sec. 23.30.185. COMPENSATION FOR TEMPORARY TOTAL DISABILITY. In
4 case of disability total in character but temporary in quality, 80
5 percent of the injured employee's spendable weekly wages shall be paid
6 to the employee during the continuance of the disability. Temporary
7 total disability benefits may not be paid for any period of disability
8 occurring after the date of medical stability. Temporary total dis-
9 ability benefits may not be paid for more than two years regardless of
10 continuance of the disability.

11 * Sec. 33. AS 23.30.190 is repealed and reenacted to read:

12 Sec. 23.30.190. COMPENSATION FOR PERMANENT PARTIAL IMPAIRMENT.
13 (a) In case of impairment partial in character but permanent in
14 quality, and not resulting in permanent total disability, the compen-
15 sation is \$240,000 multiplied by the employee's percentage of net
16 permanent impairment of the whole person, and payable in a single lump
17 sum, except as otherwise provided in AS 23.30.041, but the compensa-
18 tion may not be discounted for any present value considerations. The
19 percentage of net permanent impairment shall be determined by multi-
20 plying the employee's actual degree of permanent impairment by the
21 appropriate adjustment factor, as follows:

Degree of Actual Impairment	Adjustment Factor
0 - 5	0
6	0.060
7	0.120
8	0.180
9	0.240
10	0.300
11	0.333

1	12	0.366
2	13	0.399
3	14	0.432
4	15	0.465
5	16	0.495
6	17	0.540
7	18	0.585
8	19	0.630
9	20	0.675
10	21	0.680
11	22	0.688
12	23	0.696
13	24	0.704
14	25	0.712
15	26	0.740
16	27	0.765
17	28	0.790
18	29	0.815
19	30	0.840
20	31	0.880
21	32	0.910
22	33	0.940
23	34	0.970
24	35-100	1.000

(b) All determinations of the existence and degree of permanent impairment shall be made strictly and solely under the whole person determination as set out in the American Medical Association Guides to the Evaluation of Permanent Impairment, except that an impairment rating may not be rounded to the next five percent. The board shall

11

1 adopt a supplementary recognized schedule for injuries that cannot be
2 rated by use of the American Medical Association Guides.

3 (c) An employee with an actual permanent impairment as deter-
4 mined under (b) of this section may not receive less than \$250 for the
5 impairment.

6 (d) The impairment rating determined under (a) of this section
7 shall be reduced by a permanent impairment that existed before the
8 compensable injury. If the combination of a prior impairment rating
9 and a rating under (a) of this section would result in the employee
10 being considered permanently totally disabled, the prior rating does
11 not negate a finding of permanent total disability.

12 * Sec. 34. AS 23.30.200 is amended to read:

13 Sec. 23.30.200. TEMPORARY PARTIAL DISABILITY. In case of tempo-
14 rary partial disability resulting in decrease of earning capacity the
15 compensation shall be 80 percent of the difference between the injured
16 employee's spendable weekly wages before the injury and the wage-
17 earning capacity of the employee after the injury in the same or
18 another employment, to be paid during the continuance of the disabili-
19 ty, but not to be paid for more than two [FIVE] years. Temporary
20 partial disability benefits may not be paid for a period of disability
21 occurring after the date of medical stability.

22 * Sec. 35. AS 23.30.200 is amended by adding a new subsection to read:

23 (b) The wage-earning capacity of an injured employee is deter-
24 mined by the actual spendable weekly wage of the employee if the
25 actual spendable weekly wage fairly and reasonably represents the
26 wage-earning capacity of the employee. The board may, in the interest
27 of justice, fix the wage-earning capacity that is reasonable, having
28 due regard to the nature of the injury, the degree of physical impair-
29 ment, the usual employment, and other factors or circumstances in the

1 case that may affect the capacity of the employee to earn wages in a
2 disabled condition, including the effect of disability as it may
3 naturally extend into the future.

4 * Sec. 36. AS 23.30.22(a) is amended to read:

5 (a) The spendable weekly wage of an injured employee at the time
6 of an injury is the basis for computing compensation. It is the
7 employee's gross weekly earnings minus payroll tax deductions. The
8 gross weekly earnings shall be calculated as follows:

9 (1) The gross weekly earnings are computed by dividing by
10 100 the gross earnings of the employee in the two calendar years
11 immediately preceding the injury.

12 (2) If the employee had no earnings during the two calendar
13 years preceding the injury or was voluntarily absent from the labor
14 market for 18 months or more of the two calendar years preceding the
15 injury [THE BOARD DETERMINES THAT THE GROSS WEEKLY EARNINGS AT THE
16 TIME OF THE INJURY CANNOT BE FAIRLY CALCULATED UNDER (1) OF THIS
17 SUBSECTION], the board shall [MAY] determine the employee's gross
18 weekly earnings for calculating compensation by considering the nature
19 of the employee's work and work history, but compensation may not
20 exceed the employee's projected gross weekly earnings at the time of
21 injury.

22 (3) If an employee when injured is a minor, an apprentice,
23 or a trainee in a formal training program, as determined by the board,
24 whose wages under normal conditions would increase during the period
25 of disability, the projected increase may be considered by the board
26 in computing the gross weekly earnings of the employee.

27 (4) If the employee is injured while performing duties as a
28 volunteer ambulance attendant, policeman, or fireman, the gross weekly
29 earnings for calculating compensation shall be the minimum gross

1 weekly earnings paid a full-time ambulance attendant, policeman, or
2 fireman employed in the political subdivision where the injury oc-
3 curred, or, if the political subdivision has no full-time ambulance
4 attendants, policemen, or firemen, at a reasonable figure previously
5 set by the political subdivision to make this determination but in no
6 case may the gross weekly earnings for calculating compensation be
7 less than the minimum wage computed on the basis of 40 hours work per
8 week.

9 * Sec. 37. AS 23.30.225 is amended by adding a new subsection to read:

10 (c) If employer contributions to a qualified pension or profit
11 sharing plan have been included in the determination of gross earnings
12 and the employee is receiving pension or profit sharing payments,
13 weekly compensation benefits payable under this chapter shall be
14 reduced by the amount paid or payable to the injured worker under the
15 plan for any week or weeks during which compensation benefits are also
16 payable. The amount of the reduction may not in any week exceed the
17 increase in weekly compensation benefits brought about by the inclu-
18 sion of employer contributions to a qualified pension or profit shar-
19 ing plan in the determination of gross earnings.

20 * Sec. 38. AS 23.30 is amended by adding a new section to read:

21 Sec. 23.30.247. DISCRIMINATION PROHIBITED. (a) An employer may
22 not discriminate in hiring, promotion, or retention policies or prac-
23 tices against an employee who has in good faith filed a claim for or
24 received benefits under this chapter. An employer who violates this
25 section is liable to the employee for damages to be assessed by the
26 court in a private civil action.

27 (b) This section may not be construed to prevent an employer
28 from basing hiring, promotion, or retention policies or practices on
29 considerations of the employee's safety practices or the employee's

1 physical and mental abilities; nor may this section be construed so as
2 to create employment rights not otherwise in existence.

3 (c) This section may not be construed to prohibit an employer
4 from requiring a prospective employee to fill out a preemployment
5 questionnaire or application regarding the person's prior health or
6 disability history as long as it is meant to either document written
7 notice for second injury fund reimbursement under AS 23.30.205(c) or
8 to determine whether the employee has the physical or mental capacity
9 to meet the documented physical or mental demands of the work.

10 * Sec. 39. AS 23.30.265(15) is amended to read:

11 (15) "gross earnings" means periodic payments, by an em-
12 ployer to an employee for employment before any authorized or lawfully
13 required deduction or withholding of money by the employer, including
14 compensation that is deferred at the option of the employee, and
15 excluding irregular bonuses, reimbursement of expenses, expense allow-
16 ances, and any benefit or payment to the employee that is not fully
17 taxable to the employee during the pay period, except that the total
18 amount of contributions made by an employer to a qualified pension or
19 profit sharing plan during the two plan years preceding the injury,
20 multiplied by the percentage of the employee's vested interest in the
21 plan at the time of injury, shall be included in the determination of
22 gross earnings; the value of room and board if taxable to the employee
23 may be considered in determining gross earnings; however, the value of
24 room and board that would raise an employee's gross weekly earning
25 above the state [ALASKA] average weekly wage at the time of injury may
26 not be considered;

27 * Sec. 40. AS 23.30.265(17) is amended to read:

28 (17) "injury" means accidental injury or death arising out
29 of and in the course of employment, and an occupational disease or

1 infection which arises naturally out of the employment or which natu-
2 rally or unavoidably results from an accidental injury; "injury" [,
3 AND] includes breakage or damage to eyeglasses, hearing aids, den-
4 tures, or any prosthetic devices which function as part of the body
5 and further includes an injury caused by the wilful act of a third
6 person directed against an employee because of the employment; "in-
7 jury" does not include mental injury caused by mental stress unless it
8 is established that (A) the work stress was extraordinary and unusual
9 in comparison to pressures and tensions experienced by individuals in
10 a comparable work environment, and (B) the work stress was the predom-
11 inant cause of the mental injury; the amount of work stress shall be
12 measured by actual events rather than misperceptions by the employee;
13 a mental injury is not considered to arise out of and in the course of
14 employment if it results from a disciplinary action, work evaluation,
15 job transfer, layoff, demotion, termination or similar action, taken
16 in good faith by the employer;

17 * Sec. 41. AS 23.30.265 is amended by adding a new paragraph to read:

18 (34) "medical stability" means the date after which further
19 objectively measurable improvement from the effects of the compensable
20 injury is not reasonably expected to result from additional medical
21 care or treatment, notwithstanding the possible need for additional
22 medical care or the possibility of improvement or deterioration re-
23 sulting from the passage of time; medical stability shall be presumed
24 in the absence of objectively measurable improvement for a period of
25 45 days; this presumption may be rebutted by clear and convincing
26 evidence.

27 * Sec. 42. AS 23.30.210 is repealed.

28 * Sec. 43. TRANSITIONAL PROVISIONS. Notwithstanding AS 23.30.040(b),
29 as amended by sec. 8 of this Act, and AS 23.30.155(m), as amended by

1 sec. 27 of this Act, on or before March 1, 1989, each employer that is
2 subject to those sections shall file a report and make the appropriate
3 contribution for all claims existing as of December 31, 1988. The period
4 covered in the report shall be from the date of the termination report or
5 the last anniversary report filed, if one has been filed, through Decem-
6 ber 31, 1988.

7 #1 * Sec. 44. TEMPORARY RATE REDUCTION. Notwithstanding AS 21.39.030, an
8 insurer providing workers' compensation insurance in the state shall pro-
9 vide at least a six percent reduction in the premium rate charged within
10 the state for workers' compensation insurance, for the period beginning
11 July 1, 1988, and ending January 1, 1990.

12 * Sec. 45. APPLICABILITY. Except for secs. 8, 25, 27, 28, 40, and 44
13 of this Act, this Act applies only to injuries sustained on or after
14 July 1, 1988.

15 #7 * Sec. 46. Section 40 of this Act applies to injuries sustained on or
16 after the effective date of sec. 40 of this Act.

17 #7 * Sec. 47. Sections 40 and 46 of this Act takes effect immediately
18 under AS 01.10.070(c).

19 * Sec. 48. Sections 1 - 39, and 41 - 45 of this Act take effect July 1,
20 1988.

SB

322

(FILE 6)

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

STEVE COWPER, GOVERNOR

REPLY TO:

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465-3603

February 16, 1988

The Honorable Tim Kelly
Chairman
Senate Labor and Commerce Committee
Alaska State Senate
P.O. Box V
Juneau, Alaska 99811

Re: HB 352/SB 322 "An Act
relating to worker's
compensation; and providing
for an effective date."

Dear Senator Kelly:

I am an assistant attorney general with the Office of the Attorney General. My area of responsibilities includes legal matters related to the Department of Labor.

On Friday, February 12, 1988, I attended the joint meeting of House and Senate Labor and Commerce Committees on the workers' compensation bills. At that meeting you requested written comments on the bills by Wednesday, February 17, 1988.

In my review of the bills, I found a constitutional issue in Section 21, which I wanted to share with the committees. You will recall that Section 21 of the bills requires the department to adjust worker's compensation benefits paid to out of state recipients by a comparison of cost of living indexes.

The varying of benefits by such a method raises serious constitutional issues. These issues center around the possible impediment to the out-of-state recipient's constitutional right to travel.

Such an argument was previously recognized by the Alaska Supreme Court in Alaska Pacific Assurance Co. v. Brown, 687 P.2d 264 (Alaska 1984). In Brown, the court struck down a prior workers' compensation statute which varied benefits based on the average weekly wage in the state where the recipient relocated.

In reaching the Brown decision, the court recognized that the state had "important interests in avoiding disincentives to rehabilitation and in creating incentives for the injured to go back to work" and that high benefit amounts (in comparison to the prevailing wage in the locality) would serve as a disincentive to reaching these goals. Id. at 273. While not totally indicating its approval, the court indicated that the state's position to adjust benefits would be more persuasive if the benefit adjustment had been based upon "reasonable accurate cost of living statistics from other states ... to equalize the buying power of benefit dollars in each state" Id. at 274.

Thus, the court left open the possibility of adjusting benefits based on realistic and reliable cost of living index comparisons. Therefore, my constitutional concern lies more with the application of the statute, than with the precise language of Section 21 itself.

Specifically, I have concerns that reliable and realistic cost of living statistics may not presently exist to make the comparisons required by the court. For example, in 1984, the state took a position in the Brown case that such reliable cost of living statistics did not exist. I am not aware of any significant changes in this area in the four years since the Brown decision was reached. Therefore, individualized studies may need to be developed. Such studies are labor intensive and would require a significant commitment of state resources, depending on the degree of specificity for the index (i.e. state, region of state, or city) which the legislature finds necessary to meet the Supreme Court's mandate of a realistic and reliable measure. Additionally, if a new index is developed just for this purpose, the index would likely be subject to challenge before the Workers' Compensation Board and the court, until its reliability and validity have been established.

In short, the constitutionality of Section 21 in application, which requires varying workers' compensation benefits by cost of living index, is not clear. If the committees decide to pursue this issue, they should be advised that constitutional challenges (which are costly to defend) are likely to occur. The success of the suits will directly relate to the validity and reliability of the index chosen. Additionally, the committees should be advised that if this section passes, Alaska will be the only state to vary workers' compensation benefits by a cost of living index, to my knowledge.

The Honorable Tim Kelly
Alaska State Senate
HB 352/SB 322

February 16, 1988
Page 3

If you have questions on this letter, please contact me. I have not been advised that the Department of Labor or the Governor has taken a position on the bill or Section 21 yet.

Sincerely yours,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

By: *Deborah E. Behr*
Deborah E. Behr
Assistant Attorney General

DEB:jh

cc: Bob Evans
Office of the Governor

Ronald W. Lorensen
Deputy Attorney General

Arthur H. Peterson
Assistant Attorney General

ALASKA PACIFIC ASSURANCE
COMPANY and State of
Alaska, Appellants,

v.

Robert BROWN, Individually and as
Class Representative, Appellee.

Nos. 6600, 6626.

Supreme Court of Alaska.

Feb. 17, 1984.

Rehearing Granted in Part and
Denied in Part July 20, 1984.

As Modified July 20, 1984.

Workers' compensation recipient who had moved out of Alaska filed class action against insurer alleging that statute adjusting benefits of workers' compensation recipients who move out of state was unconstitutional, requesting monetary damages as well as declaratory and injunctive relief. The Superior Court, Third Judicial District, Anchorage, Milton M. Souter, J., declared statute unconstitutional and awarded class members monetary damages. On appeal, the Supreme Court, Rabinowitz, J., held that: (1) statute reducing benefits for recipients who move out of state imposes substantial penalty upon exercise by recipients of right to travel out of state; (2) state failed to meet its high burden of justifying penalty on interstate travel imposed by statute, and thus, statute, and 1982 and 1983 amendments which did not materially alter relevant provisions, are invalid under the state equal protection clause; and (3) insurer, which in good faith reduced benefits paid to recipients who had moved out of state pursuant to statute would not be assessed damages for complying with such statute upon determination that statute was unconstitutional.

Affirmed in part and reversed in part.
Compton, J., filed dissenting opinion.

1. Constitutional Law ⇐213.1(1)

Initial inquiry under the state equal protection clause is determination of what weight should be afforded constitutional interest impaired by challenged enactment, which is the most important variable in fixing appropriate level of review, and thus, goes to level of scrutiny. Const. Art. 1, § 1.

2. Constitutional Law ⇐213.1(1)

Depending upon the primacy of constitutional interest impaired by challenged enactment, state will have a greater or lesser burden under the state equal protection clause in justifying its legislation. Const. Art. 1, § 1.

3. Constitutional Law ⇐213.1(2)

Second step of analysis under the state equal protection clause is an examination of purposes served by challenged statutes; depending on level of review determined, state may be required to show only that its objectives were legitimate, at the low end of the continuum, or at the high end of the scale, that legislation was motivated by a compelling state interest. Const. Art. 1, § 1.

4. Constitutional Law ⇐213.1(2)

Under the state equal protection clause, an evaluation of state's interest in the particular means employed to further its goals must be undertaken, with state's burden differing in accordance with determination of level of scrutiny afforded constitutional interest impaired; at low end of the "sliding scale," a substantial relationship between means and ends is constitutionally adequate, while at higher end of scale, classification will be invalidated if purpose can be accomplished by a less restrictive alternative. Const. Art. 1, § 1.

5. Constitutional Law ⇐213.1(1)

First inquiry in analyzing challenged enactment under state equal protection clause goes to level of scrutiny, to be determined by importance of individual rights asserted and by degree of suspicion with which Supreme Court views resulting classification scheme. Const. Art. 1, § 1.

6. Workers' Compensation \Leftrightarrow 26

For purpose of determining level of inquiry to be used in determining validity of statute adjusting benefits of workers' compensation recipients who move out of state under the state equal protection clause, statute might be viewed as blanket "change in condition" adjustment for workers who move out of state; worker does not have inherent right to benefits set in disregard of his or her economic environment. AS 23.30.175(c, d); Const. Art. 1, § 1.

7. Constitutional Law \Leftrightarrow 245(4)Workers' Compensation \Leftrightarrow 26

Right of nonresident workers' compensation recipients who fall under statute adjusting benefits of recipients who have moved out of state to have their benefits determined in relation to same factors that are applied to workers' compensation recipients in general is not itself an individual right appropriate for standard criteria selection under the state equal protection clause; it is merely a particularized expression of the right to equal treatment of those similarly situated, the general principle underlying the equal protection clause. AS 23.30.175(c, d); Const. Art. 1, § 1.

8. Constitutional Law \Leftrightarrow 83(1)

Right of interstate migration is part of State Constitution.

9. Constitutional Law \Leftrightarrow 83(1)

Suspicion with which Supreme Court will view infringements upon right to travel depends upon degree to which challenged law can be said to penalize exercise of right, which in turn depends upon objective degree to which challenged legislation tends to deter interstate travel. Const. Art. 1, § 1.

10. Constitutional Law \Leftrightarrow 225.1

In analyzing statute which tends to deter interstate migration under either state or federal equal protection clauses, there is no requirement to demonstrate actual deterrence of right to travel; relevant criteria are the fact and the severity of the restric-

tion. U.S.C.A. Const. Amend. 14; Const. Art. 1, § 1.

11. Constitutional Law \Leftrightarrow 245(4)Workers' Compensation \Leftrightarrow 26

State's asserted goal of lowering insurance premiums in enacting statute adjusting benefits of workers' compensation recipients who move out of state can have no independent force in state's attempt to meet its burden of justifying statute under the equal protection clause; although reducing costs to taxpayers or consumers is a legitimate government goal in one sense, savings will always be achieved by excluding class of persons from benefits they would otherwise receive and is justifiable only when effected through independently legitimate distinctions. AS 23.30.175(c, d); Const. Art. 1, § 1.

12. Constitutional Law \Leftrightarrow 245(4)Workers' Compensation \Leftrightarrow 26

For equal protection purposes, statute adjusting benefits of workers' compensation recipients who move out of state based on average weekly wage of state into which recipient moves advances important state interests in avoiding disincentives to rehabilitation and in creating incentives for insured workers to go back to work, the effectiveness of which incentives may depend on cost of living in state in which worker lives, since worker's unadjusted compensation benefits may in terms of real income be in excess of actual wage he or she received when employed if injured worker is able to live in an area where general cost of living is much lower than in state in which he worked. AS 23.30.175(c, d); Const. Art. 1, § 1.

13. Constitutional Law \Leftrightarrow 213.1(2)

Under state equal protection analysis, the Supreme Court examines "the closeness of the means-to-ends fit" between legislation and its purported goals. Const. Art. 1, § 1.

14. Constitutional Law \Leftrightarrow 245(4)

Under the equal protection clause, when examining impact of statute adjusting benefits of workers' compensation re-

aw \Leftrightarrow 213.1(1)

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ipients who moved out of state on right of interstate migration, relevant questions are whether statute operates in such a way that reasonable recipient would be deterred from exercising right to travel, and degree of such deterrence. AS 23.30.175(c, d); Const. Art. 1, § 1.

15. Constitutional Law ⇐83(1)

Statute adjusting benefits of workers' compensation recipients who move out of state based on average weekly wage of state to which recipient moves imposes a substantial penalty upon exercise by recipients of right to travel out of state; accordingly, burden on state to justify legislation is a very high one. AS 23.30.175(c, d); Const. Art. 1, § 1.

16. Constitutional Law ⇐83(1)

Workers' Compensation ⇐26

State failed to meet its burden of justifying burden imposed on interstate travel by statute adjusting benefits for workers' compensation recipients who moved out of state based on average weekly wage in state to which recipient moved, and 1982 and 1983 amendments to such statute which did not materially alter relevant provisions, since there would not necessarily be any correlation between wages and cost of living and statute would always carry with it the risk that adjustment it effected would overcompensate for any cost of living differential that existed between Alaska and other states; therefore, statute was invalid under the state equal protection clause. AS 23.30.175(c, d); Const. Art. 1, § 1.

17. Civil Rights ⇐13.5(1)

Most of rights secured by Constitution are protected only against governmental infringement.

18. Civil Rights ⇐13.4(1)

Private entities who regulate their behavior in good-faith compliance with a validly enacted law cannot by fact of that

compliance be held legally responsible for constitutional defects in the law

19. Civil Rights ⇐13.17(3)

Workers' compensation insurer which in good faith reduced payments, pursuant to statute, to recipients who had moved out of state, would not be assessed damages for additional benefits such recipients would have received if statute requiring such adjustments had not been enacted upon determination that statute was unconstitutional. AS 23.30.175(c, d); Const. Art. 1, § 1.

Robert Draper, O'Melveny & Myers, Los Angeles, Cal., and Randall J. Weddle, Faulkner, Banfield, Doogan & Holmes, Anchorage, for appellant Alaska Pacific As-sur. Co.

Linda Scoccia, Asst. Atty. Gen., Wilson L. Condon, Atty. Gen., Juneau, for appellant State of Alaska.

Patrick B. Gilmore and Jerome H. Juday, Atkinson, Conway, Bell & Gagnon, Anchorage, and Herbert Colden, Los Angeles, Cal., for appellee.

Before BURKE, C.J., RABINOWITZ, MATTHEWS and COMPTON, JJ., and DIMOND, Senior Justice.*

OPINION

RABINOWITZ, Justice.

This appeal involves the constitutionality of former AS 23.30.175(d), which adjusted the benefits of Alaska workers' compensation recipients who had moved out of state. AS 23.30.175(d) provided:

For a recipient who resides in a state other than Alaska, the weekly rate of compensation shall be the weekly grant he would have received if he resided in Alaska times the ratio of the average weekly wage of the state in which he resides and the average weekly wage of Alaska. For the purposes of this chap-

Constitution of Alaska.

* Dimond, Senior Justice, sitting by assignment made pursuant to article IV, section 11 of the

ter, absence from Alaska for a continuous period of more than 90 days creates a rebuttable presumption of nonresiden-

tial status; however, this presumption does not arise if the absence from Alaska is for medical or rehabilitation services.¹

1. This provision was amended in 1982 along with the whole of AS 23.30.175. 1982 Alaska Sess.Laws, chap. 93, §§ 16-18, 27. Former section 175(d), the substance of which survives for purposes of this appeal, was reclassified as section 175(c). For convenience we will speak only of section 175(d) in this opinion, with the understanding that both the old and new versions are included in this reference. Former AS 23.30.175 read in its entirety as follows:

Rates of compensation. (a) The weekly rate of compensation for disability or death for a recipient residing in Alaska may not exceed the percentage of the Alaska average weekly wage in effect on the date of injury as determined by the table contained in this subsection and initially may not be less than \$65 a week. However, if the board determines that the employee's average weekly wages are less than \$65 a week as computed under AS 23.30.220, it shall issue an order decreasing the compensation to a rate equal to the employee's average weekly wages, and payments made earlier in excess of the decreased rate shall be deducted from the unpaid compensation in the manner the board determines. In any case, the employer shall pay timely compensation.

On	The Rate Shall Be
July 2, 1975	30 per cent of the Alaska average weekly wage
January 1, 1976	100 per cent of the Alaska average weekly wage
January 1, 1977	133.3 per cent of the Alaska average weekly wage
January 1, 1979	166.6 per cent of the Alaska average weekly wage
January 1, 1981	200 per cent of the Alaska average weekly wage

(b) As soon as practicable after June 30 of each year, and before December 15 of each year, the commissioner shall determine the Alaska average weekly wage for the three consecutive calendar quarters ending June 30. This determination is the applicable Alaska average weekly wage for the annual period beginning with January 1 of the next year and ending December 31. The initial determination under this subsection shall be made as soon as practicable after May 22, 1975. The average weekly wage calculation for Alaska shall be based on the wages of all employees in the state, both public and private, who are covered by this chapter.

(c) For the purposes of determining the average weekly wage of a state other than Alaska, the commissioner shall adopt the average weekly wage as computed and published by the state agency responsible for administering the workers' compensation laws of that state. For those states in which no such figure is

published, the commissioner shall adopt the average weekly wage for that state as published by the United States Secretary of Labor for the purposes of the Longshoremen's and Harbor Workers' Compensation Act (P.L. 69-803; 44 Stat. 1424; 33 U.S.C. 901 et seq.). The average weekly wage as calculated for all states shall be made available to the public.

(d) For a recipient who resides in a state other than Alaska, the weekly rate of compensation shall be the weekly grant he would have received if he resided in Alaska times the ratio of the average weekly wage of the state in which he resides and the average weekly wage of Alaska. For the purposes of this chapter, absence from Alaska for a continuous period of more than 90 days creates a rebuttable presumption of nonresidential status; however, this presumption does not arise if the absence from Alaska is for medical or rehabilitation services.

(e) For a recipient who resides in a jurisdiction other than a state as defined in (f) of this section, the weekly rate of compensation shall be the weekly grant he would have received if he resided in Alaska times the ratio of the average weekly wage of the jurisdiction in which he resides, as determined by the commissioner, and the average weekly wage of Alaska.

(f) In this section "state" means a state of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Trust Territory of the Pacific Islands.

In 1982 and 1983 the statute was amended in several respects. The current version of AS 23.30.175 provides:

Rates of compensation. (a) The weekly rate of compensation for disability or death for a recipient residing in Alaska may not exceed the percentage of the Alaska average weekly wage in effect on the date of injury as determined by the table contained in this subsection and initially may not be less than \$110 a week. However, if the board determines that the employee's spendable weekly wages are less than \$110 a week as computed under AS 23.30.220, it shall issue an order decreasing the weekly rate of compensation to a rate equal to the employee's spendable weekly wages, and payments made earlier in excess of the decreased rate shall be deducted from the unpaid compensation in the manner the board determines. In any case, the employer shall pay timely compensation.

On	The Rate Shall Be
July 2, 1975	80 per cent of the Alaska average weekly wage
January 1, 1976	100 per cent of the Alaska average weekly wage

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On January 22, 1977, Robert Brown injured his left ankle and leg while employed as an electrical foreman during construction of the Trans-Alaska Pipeline. He received temporary disability benefits under the Alaska Workers' Compensation Act. After the injury, Brown returned to his home in California, and his benefits were adjusted under AS 23.30.175(d). If Brown had remained in Alaska, he would have received \$551.86 per week. Under the adjustment provision, however, his benefits were reduced to \$211.91 per week.

In June 1979, Brown filed a class action complaint against the Alaska Pacific Assurance Company (ALPAC), the insurance carrier for Brown's employer. Brown alleged that section 175(d) violated federal and state equal protection and due process

On	The Rate Shall Be
January 1, 1977	133.3 per cent of the Alaska average weekly wage
January 1, 1979	166.6 per cent of the Alaska average weekly wage
January 1, 1981	200 per cent of the Alaska average weekly wage

(b) After June 30 and before December 1 of each year, the commissioner shall adopt and publish the average weekly wage for each jurisdiction for the preceding calendar year as published by the United States Secretary of Labor for the purposes of unemployment insurance. In determining the rate of compensation the commissioner shall use the average weekly wage figure for each jurisdiction, including Alaska, for which the Secretary of Labor computes an average weekly wage. These figures are the applicable average weekly wages for those jurisdictions for the following calendar year.

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

(1) The weekly rate of compensation shall be calculated by multiplying the recipient's weekly compensation rate calculated in accordance with AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215 times the ratio of the average weekly wage of the jurisdiction in which the recipient resides to the average weekly wage of Alaska. The ratio is based on the average weekly wages in effect when the recipient leaves Alaska and shall be adjusted annually upon publication of the average weekly wages for all jurisdictions.

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

(3) If the spendable weekly wage of the recipient and the resulting compensation rate is determined under AS 23.30.220(a)(1), the

guarantees, and the privileges and immunities and commerce clauses of the federal Constitution, and requested monetary damages as well as declaratory and injunctive relief.² Brown thereafter filed a motion for partial summary judgment, requesting that section 175(d) be declared unconstitutional and that the plaintiffs be awarded damages and injunctive relief. ALPAC and the State both filed cross-motions for partial summary judgment, requesting that section 175(d) be declared constitutional. ALPAC also requested that if the superior court invalidated the statute it not give retroactive effect to its ruling and thus deny any claims for damages.

The superior court declared AS 23.30.175(c)-(f) unconstitutional under Alaska's equal protection clause.³ The court reject-

calculation required by this subsection applies to only those wages earned in Alaska.

(4) Application of this subsection may not result in a reduction of the weekly compensation rate to less than \$110 a week except as provided in (a) of this section.

(d) In a jurisdiction for which no average weekly wage is computed by the United States Secretary of Labor for the purposes of unemployment insurance, the average weekly wage shall be as determined by the commissioner. Both current and former AS 23.30.175 must be considered since Brown seeks retroactive and prospective relief. For the purposes of our analysis we do not view the new section 175 as substantially different from its predecessor. It is true that the statute's operation has changed in several respects. Differences in the old and new version will be examined as they become relevant to our discussion.

2. The state intervened in September 1979. Under Alaska R.Civ.P. 24(c), the state may intervene in any action "[w]hen the constitutionality of a state statute affecting the public interest is drawn in question."

3. The superior court applied the three-part state equal protection formula set forth in *State v. Erickson*, 574 P.2d 1, 12 (Alaska 1978). The court found that the statute served the legitimate state purposes of reducing workers' compensation insurance premiums for Alaska employers and eliminating disincentives for non-resident recipients to return to work. The court also found that the statute substantially furthered its intended purposes. The court reasoned that "[u]nquestionably the reduction of the amounts paid to the many non-resident recipients of disability benefits will reduce the

ed ALPAC's contention that its decision should only be applied prospectively under the test set forth in *Plumley v. Hale*, 594 P.2d 497 (Alaska 1979). Class members were awarded damages in the amount of benefits they would have received if AS 23.30.175 had never been enacted.⁴ We affirm that portion of the superior court's decision striking down the adjustment provision but reverse with respect to ALPAC's liability for damages.

I. STATE EQUAL PROTECTION

Alaska's own equal protection analysis was engendered in *Isakson v. Rickzy*, 550 P.2d 359 (Alaska 1976), and *State v. Erickson*, 574 P.2d 1 (Alaska 1978).⁵ *Erickson* articulated an adjustable "uniform-balancing" test which placed a greater or lesser burden on the state to justify a classification depending on the importance of the individual right involved. *Id.* at 12. In effect, *Erickson* created a continuum of available levels of scrutiny, beginning with the rational basis test described in *Isakson*, 550 P.2d at 362-63, and ending with the functional equivalent of the federal compelling state interest test at the highest level of review.

[1, 2] In *Erickson* we looked first to the legitimacy of the state purposes behind challenged legislation, second to the relationship between the chosen means and the asserted goals of the statute, and third to the state's interest in the means chosen as balanced against the nature of the constitu-

total amount of insurance premiums to be paid and tend to persuade the recipients to return to work." Finally, the court weighed the state's interest in the means employed against "the extent to which the affected persons' constitutional rights may be impaired." At this stage of the *Erickson* test the court found AS 23.30.175 to be defective. First, the court concluded that the adjustment provision "caused a severe reduction in the purchasing power, in real terms, of the monetary benefits paid to disabled non-residents." As a result of this reduction, the court concluded that "disabled workers are strongly deterred from exercising their constitutional right to travel and take up residence in another state." Further, the court suggested that "the Legislature, by simply utilizing relative cost of living statistics, could have achieved its twin goals without the substantial infringement

tional right infringed. 574 P.2d at 12. Our recent opinion in *State v. Ostrosky*, 667 P.2d 1184 (Alaska 1983), formally revised the order of the analytic stages of *Erickson*. First, it must be determined at the outset what weight should be afforded the constitutional interest impaired by the challenged enactment. The nature of this interest is the most important variable in fixing the appropriate level of review. Thus, the initial inquiry under article I, section 1 of Alaska's constitution goes to the level of scrutiny. *Ostrosky*, 667 P.2d at 1192-93 & n. 14. Depending upon the primacy of the interest involved, the state will have a greater or lesser burden in justifying its legislation.

[3] Second, an examination must be undertaken of the purposes served by a challenged statute. Depending on the level of review determined, the state may be required to show only that its objectives were legitimate, at the low end of the continuum, or, at the high end of the scale, that the legislation was motivated by a compelling state interest.

[4] Third, an evaluation of the state's interest in the particular means employed to further its goals must be undertaken. Once again, the state's burden will differ in accordance with the determination of the level of scrutiny under the first stage of analysis. At the low end of the sliding scale, we have held that a substantial relationship between means and ends is consti-

of the right to travel which is entailed in the use of average weekly wage statistics."

4. The superior court awarded interest, and specified that no persons who had withdrawn from the class were to receive past benefits.

5. On appeal Brown invokes a host of constitutional theories in support of the result reached by the superior court. Because we conclude that the superior court was correct in ruling AS 23.30.175 unconstitutional under the state equal protection clause, we do not pass formal judgment on the other arguments raised. Compare *Carlson v. State*, 598 P.2d 969, 973 (Alaska 1979); *Davis v. Hallett*, 587 P.2d 1170, 1171 (Alaska 1978).

tutionally adequate. At the higher end of the scale, the fit between means and ends must be much closer. If the purpose can be accomplished by a less restrictive alternative, the classification will be invalidated.

[5] Thus, under *Ostrosky* our first inquiry goes to the level of scrutiny. This is "to be determined by the importance of the individual rights asserted and by the degree of suspicion with which we view the resulting classification scheme." 667 P.2d at 1192-93. Two areas of concern relevant to our inquiry are identifiable at this stage. First, Brown asserts a right to receive the full measure of workers' compensation benefits which he would receive but for the classification created by AS 23.30.175(d). Second, Brown asserts that his constitutional right to travel is directly burdened by the operation of the adjustment provision.

[6] No authority has been cited by Brown for the proposition that, as a matter

6. See *Wien Air Alaska v. Arant*, 592 P.2d 352, 360 (Alaska 1979), and the versions of AS 23.30.185, AS 23.30.190(a), and AS 23.30.200 in effect when Brown was injured. The House Committee Report accompanying amendments to the federal Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq., states that, "The basic requirement of the Act is for the injured worker to receive 66 2/3% of his average weekly wage." House Comm. on Education and Labor, Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, H.R. Rep. No. 92-1441, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Ad. News 4698, 4700.

7. AS 23.30.175(a), *supra* note 1, creates an absolute ceiling for benefits of all classes based upon the current average wages in Alaska. For the concept of "spendable weekly wage" and the associated 80% rule, see AS 23.30.220 and the state statutes cited at note 6 *supra*.

Although actual pre-injury earnings are generally the measure of compensation, they are not always used. Where actual earnings are thought not to fairly represent wage-earning capacity the Board can make adjustments, as it can in special cases of apprentices and volunteer firemen. See AS 23.30.210, AS 23.30.220(a)(2), (3) and (4). Similar rules were in effect when Brown was injured.

8. AS 23.30.130(a) provides:

(a) Upon its own initiative, or upon the application of any party in interest on the ground of a change in conditions, including, for the purposes of AS 23.30.175, a change in residence, or because of a mistake in its determi-

of constitutional law, workers' compensation benefits must be set at any particular level. Although the rule of thumb often stated is that benefits should approximate two-thirds of the worker's salary at the time of injury,⁶ this is hardly a constitutional mandate. It is no longer the rule in Alaska, which now attempts to pay an injured worker four-fifths of his or her "spendable weekly wage," and even this rule of thumb figure is subject to a fixed ceiling, so that some highly-paid workers receive only a small fraction of their former earnings in compensation benefits.⁷ Further, Alaska benefits may be modified under AS 23.30.130 if a sufficient "change in conditions" is demonstrated to warrant either an increase or decrease in the original award.⁸ AS 23.30.175(d) might be viewed as a blanket "change in condition" adjustment for workers who have moved out of state.⁹ Even though the "change"

nation of a fact, the board may, before one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or before one year after the rejection of a claim, review a compensation case in accordance with the procedure prescribed in respect of claims in AS 23.30.100. In accordance with AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation.

9. The bulk of "reopening" cases involve a claim by the worker that his or her disability has worsened and that his or her benefits should go up. A substantial portion of reopenings, however, are brought by employers or carriers who assert that the initial award overestimated the extent of the worker's disability, and that it is appropriate to reduce his or her benefits. Normally the debate centers upon the physical condition of the recipient. 3 A. Larson, *The Law of Workmen's Compensation*, § 81.31(a) at 15-553-554.18 (1983). As to whether economic changes may not also be considered, the small number of cases on point have split on the question. 3 Larson, § 81.31(e) at 15-554.41-554.42. See *Lerner v. Jakwall Embroidery Co.*, 203 A.D. 381, 196 N.Y.S. 736, 738 (1922) (rule allowing for compensation to be changed "as wages vary from time to time" would produce constant reopenings and administrative confusion); *McCormick S.S. Co. v. U.S. Employees' Compensation Comm'n*, 64 F.2d 84, 86 (9th Cir. 1933) (reopenings under the federal statute not

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rker that his or her disability has
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stantial portion of reopenings, how-
ought by employers or carriers who
the initial award overestimated the
he worker's disability, and that it is
to reduce his or her benefits. Nor-
lebate centers upon the physical con-
e recipient. 3 A. Larson, *The Law of*
Compensation, § 81.31(a) at 15-
(1983). As to whether economic
ay not also be considered, the small
cases on point have split on the
3 Larson, § 81.31(e) at 15-554.41-
Lerner v. Jakwall Embroidery Co.,
31, 196 N.Y.S. 736, 738 (1922) (rule
or compensation to be changed "as
from time to time" would produce
openings and administrative confu-
ormick S.S. Co. v. U.S. Employees'
on Comm'n, 64 F.2d 84, 86 (9th Cir.
enings under the federal statute not

to which section 175(d) reacts is one in
economic condition, we cannot say that a
worker has an inherent right to benefits
set in disregard of his or her economic
environment.

[7] Brown's argument, however, is
something different than this. The basis
of his claim is not that section 175(d) ad-
justs benefits according to criteria which
are impermissible per se. Rather, he as-
serts that non-resident workers who fall
under section 175(d) are subject to criteria
different than applied to non-section 175(d)
recipients. Brown thus states the follow-
ing interest for the purposes of equal pro-
tection analysis: the right of section 175(d)
recipients to have their workers' compensa-
tion benefits determined in relation to the
same factors that are applied to workers'
compensation recipients in general. This,
however, is merely a particularized expres-
sion of the right to equal treatment of
those similarly situated, the general princi-
ple underlying our equal protection clause.
It is not itself an individual right appropri-
ate for standard criteria selection.

warranted because of changed economic condi-
tions).

10. Both the analysis and the terms of art within
the context of Alaska's right to travel guarantee
are different than in the federal law. Migration
cases in the federal courts adopt the rigid two-
tiered analysis characteristic of federal equal
protection. In order for strict scrutiny to apply,
it must be shown that the classification burdens
"basic necessities of life" or some "fundamental
political right." *Zobel I*, 619 P.2d at 426; *Memorial Hospital v. Maricopa County*, 415 U.S. 250,
259, 94 S.Ct. 1076, 1082, 39 L.Ed.2d 306, 315
(1974). If a lesser individual interest is implic-
ated by the state's classification, the test of
minimum rationality is employed. *Sosna v. Iowa*,
419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532
(1975). In the federal courts, the right to travel
is "penalized" only if a right sufficient to invoke
the strict scrutiny test is impaired. See *Zobel II*,
619 P.2d at 454-55. Prior to *Zobel I* and *Zobel II*
we viewed the right to travel as a fundamental
right per se, and uniformly invoked the compell-
ing state interest test in reviewing durational
residence requirements. *State v. Wylie*, 516
P.2d 142, 147 (Alaska 1973); see, e.g., *Hicklin v. Orbeck*,
565 P.2d 159, 166 (Alaska 1977), *rev'd on other grounds*,
437 U.S. 518, 98 S.Ct. 2482, 57

[8-10] AS 23.30.175(d) distinguishes re-
cipients who remain in Alaska from those
who move out of state. Thus, Brown as-
serts that section 175(d) imposes a direct
penalty upon those recipients who choose
to leave Alaska, and thereby burdens their
right to travel. The right of interstate
migration is a part of the Alaska Constitu-
tion. *Williams v. Zobel (Zobel II)*, 619
P.2d 448, 452 (Alaska 1980), *rev'd on other*
grounds, 457 U.S. 55, 102 S.Ct. 2309, 72
L.Ed.2d 672 (1982). The suspicion with
which this court will view infringements
upon the right to travel depends upon the
degree to which the challenged law can be
said to penalize exercise of the right. See
id. at 457-58; *Williams v. Zobel (Zobel I)*,
619 P.2d 422, 432-33 (Alaska 1980) (Rabi-
nowitz, C.J., concurring).¹⁰ This in turn
depends upon the objective degree to which
the challenged legislation tends to deter
interstate migration.¹¹

One central area of dispute in this case is
whether section 175(d) has any adverse im-
pact upon recipients affected. The state
and ALPAC argue that there is no negative
effect, and that section 175(d) is necessary
to prevent workers who move out of state

L.Ed.2d 397 (1978); *Thomas v. Bailey*, 595 P.2d
1, 10 (Alaska 1979) (Rabinowitz, J., concurring).
In *Zobel I* and *Zobel II*, however, we announced
a new framework for the examination of migra-
tion rights under the state constitution. In *Zo-
bel II* we stated:

[W]e will no longer regard all durational resi-
dency requirements as automatically trigger-
ing strict scrutiny and requiring a showing
that such a classification is absolutely neces-
sary to promote a compelling state interest.
Instead, we will balance the nature and extent
of the infringement on this right caused by
the classification against the state's purpose in
enacting the statute and the fairness and sub-
stantiality of the relationship between that
purpose and the classification.

619 P.2d at 453 (footnote omitted). Because in
Zobel II we concluded that the right to migrate
into Alaska was not penalized in any respect by
the legislative scheme at issue, we applied the
lowest level of review under *Erickson*. 619 P.2d
at 458-60.

11. There is no requirement to demonstrate actu-
al deterrence of the right to travel in state or
federal law. *Zobel II*, 619 P.2d at 458 & n. 32.
The relevant criteria are the fact and the severi-
ty of the restriction.

from reaping a "windfall" in real terms through the exportation of Alaska benefits to the respective economies of our sister states. The parties' contentions regarding whether the right to travel is burdened by § 175(d) and the extent of that burden are related both to the selection of the standard of review and the question of whether the statute is fairly designed to accomplish its purposes. We will therefore defer discussion of this point until a discussion of the statutory purposes.

A. *The Purposes Furthered by AS 23.30.175(d).*

According to appellants, two broad categories of purposes are served by the adjustment provision. First, AS 23.30.175(d) achieves a "reduction of the cost of insurance premiums" paid by Alaska employers. Second, it is designed to align benefit levels to the economic environment of the recipient. ALPAC and the State argue that this serves to eliminate distortions and discriminations which would otherwise occur, in contravention of fundamental premises of workers' compensation.

[11] We hold that the asserted goal of lowering insurance premiums can have no independent force in the state's attempt to meet its burden under the equal protection clause. Although reducing costs to taxpayers or consumers is a legitimate government goal in one sense, savings will always be achieved by excluding a class of persons from benefits they would otherwise receive. Such economizing is justifiable only when effected through independently legitimate distinctions.¹²

12. In *Plyler v. Doe*, 457 U.S. 202, 227, 102 S.Ct. 2382, 2400, 72 L.Ed.2d 786, 806 (1982), the Supreme Court stated that "a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources." Earlier precedent held that fiscal considerations could not be used to explain invidious classifications. *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 263, 94 S.Ct. 1076, 1084, 39 L.Ed.2d 306, 318 (1974); *Graham v. Richardson*, 403 U.S. 365, 374-75, 91 S.Ct. 1848, 1853-54, 29 L.Ed.2d 534, 543 (1971); *Shapiro v. Thompson*, 394 U.S. 618, 633, 89 S.Ct. 1322, 1330, 22 L.Ed.2d 600, 614 (1969).

[12] The second goal proffered by the state and ALPAC is that AS 23.30.175(d) attempts to adjust benefit levels to the economic environment of recipients. The premise here is that a specified amount of money is worth something different in another state than it is in Alaska. Taking Brown's case as an example, the argument would be that the \$212 weekly payment received by Brown in California has the same real value as the \$552 he would have received in Alaska.

Appellants argue that adjustment to the wage levels in the recipient's locality is an important state goal for two reasons. First, they claim that Alaska-level benefits lose their relation to prospective earning capacity when a recipient moves to a different economic environment. According to ALPAC and the State, we are bound to recognize that a recipient's earning power varies with his place of residence.

Second, appellants point to a functional objective of disability compensation which would be frustrated if out-of-state recipients were allowed to receive benefits outstripping their geographically-determined earning power. The state argues that "[a]nother major goal of the workers' compensation system is the rehabilitation of the injured worker." Consistent with this goal, appellants assert that the state has a strong interest in ensuring that benefit levels are not so high for some recipients that they discourage the recipients from returning to work.¹³

We do not accept appellants' premise that earning power is exclusively determined by place of present residence. A

13. Cf. *Richardson v. Belcher*, 404 U.S. 78, 83-84, 92 S.Ct. 254, 258-259, 30 L.Ed.2d 231, 235-36 (1971) (upholding offset provision in federal social security act reducing social security benefits for recipients also receiving workers' compensation). AS 23.30.187 ("Compensation is not payable to an employee under [the permanent and temporary total disability statutes] for a week in which the employee receives unemployment benefits") appears to serve a similar purpose.

flaw runs through each of appellants' arguments regarding the importance of the state's interest in the goal of adjusting benefit levels to the economic environment of the recipient. It must be remembered that the statute pursues equality in terms of the prospective pre-injury earning capacity of each recipient. We think it unsupported to redefine earning capacity when a recipient changes his geographical residence. A worker's earning capacity is primarily determined both by the worker's skills and by his or her ability to seek out markets for his or her labor. As Brown points out, the members of the plaintiff class "have a demonstrated capacity to travel to high wage areas."¹⁴

Yet we agree that the State has important interests in avoiding disincentives to rehabilitation and in creating incentives for injured workers to go back to work, and we agree that the effectiveness of these incentives may depend on the cost of living in the state in which the worker lives. The mechanism by which the Alaska Workers' Compensation Act generally protects the state interests in rehabilitation and return to work is by setting benefit levels for each recipient below what he or she was actually making at the time of injury. See AS 23.30.175(a). As a general proposition lower benefit levels will carry a lesser danger of disincentive no matter where the recipient is located. However, if an injured worker is able to live in an area where the general cost of living is much lower than in Alaska, the worker's unadjusted compensation benefits may, in terms of real income, be in excess of the actual wage he or she received when employed, and paying the worker unadjusted amounts of benefits may actually discourage a return to work.

B. Application of Standard of Review.

[13] Under our equal protection analysis we examine "the closeness of the

14. If we posit the example of a pipe-fitter injured in Alaska who chooses to convalesce in Oregon, we think that the fact of his repose in Oregon casts no inference concerning his inclination to return to work in Alaska if he were healthy.

means-to-ends fit' between the legislation and its purported goals. *Ostrosky*, 667 P.2d at 1193. Accepting the proposition that the legislature may attempt to adjust the benefits of workers' compensation recipients based on their economic environment as defined in terms of geographic location, it remains to be determined whether AS 23.30.175(d) is well designed to achieve this objective. We hold that section 175(d) imposes a substantial penalty upon the exercise by Brown and the plaintiff class of the right to travel out of Alaska. Accordingly, the burden on the state to justify this legislation is a very high one.

[14] When examining section 175(d)'s impact on the right of interstate migration, the relevant questions are whether section 175(d) operates in such a way that the reasonable recipient would be deterred from exercising the right to travel, and the degree of that deterrence.¹⁵

[15] The State argues that injured workers who leave Alaska and thus come within the coverage of section 175(d) are really in no worse a position than workers who stay within the state and continue to receive unadjusted benefits. The State's rationale is that workers within Alaska receive benefits which reflect wages they could be earning in Alaska but for their injury, and workers within other states receive benefits related to the money they could be earning in their particular state if they were suddenly returned to health. Thus the State argues that section 175(d) recipients are in the same position as other recipients, and the exercise of their travel rights is not deterred.

An extension of the State's argument is that workers' compensation recipients will not be inhibited in exercising their migration rights by the fact that their benefits out of Alaska will be lower than benefits within Alaska. The recipients will be satis-

15. We follow the federal rule that no showing of actual deterrence need be made. The standard is an objective one. See *supra* note 11.

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fied, at least to the extent that their travel decisions will not be influenced, with the knowledge that their benefits bear the same relation to the average wages of their state of residence as they would have borne to Alaska wages had they remained in Alaska. We think that this is an unrealistic and untenable view of section 175(d)'s impact upon the interstate movement of disability recipients.

The appellants' argument regarding the degree to which section 175(d) penalizes the right to travel would be more persuasive if the adjustment calculation were based upon reasonably accurate cost of living statistics from other states rather than upon wage levels in those states. If there were a way to equalize the buying power of benefit dollars in each state we would have difficulty in concluding that recipients would thereby suffer any penalty despite a reduction in actual dollars paid to out-of-state workers.

[16] In holding section 175(d) unconstitutional, the superior court found that "the reduction in the average weekly wage which occurs when one travels from Alaska to the other States exceeds the reduction which results in the cost of living." Relying on a 1975 report of the Alaska Legislative Affairs Agency, the superior court concluded that a disabled worker "who moved in 1974 from Anchorage to a location in another State stood to suffer an average benefit reduction of approximately 142% of the reduction in the cost of living." The court stated that no reason had been advanced, and it could think of none, for supposing that the reduction in recipients' purchasing power effected by section 175(d) had done anything other than gotten worse since 1975. Based upon its comparative analysis of the statistics, the superior court found that "disabled workers are strongly deterred from exercising their constitutional right to travel and take up residence in another State."

The response made by ALPAC and the State to the superior court's finding is an indirect one. Appellants argue that it was not feasible for the legislature to key sec-

tion 175(d)'s adjustment to cost of living statistics because no reliable statistics of this kind exist. Further, the cost of living statistics published by the United States Department of Labor will no longer be available after 1982. Thus appellants contend that the legislature could not have incorporated those statistics into section 175(d).

Accepting for purposes of argument the inadequacy of all available cost of living statistics, this fact does not justify the substitution of a different statistical base and the measure of a different economic variable. Both sides apparently concede that there is no necessary correlation between wages and cost of living. AS 23.30.175(d) will therefore always carry with it the risk that the adjustment it effects will overcompensate for any cost of living differential that exists between Alaska and other states. The State notes that there is an "up side" to this risk, in that workers who move to a state where wages in relation to those in Alaska are higher than the relative cost of living will receive more in actual benefit value than they would receive in Alaska. However, this does not vitiate the finding of penalty made by the superior court. The risk of severe benefit reductions based upon variations in economic conditions which do not reflect the purchasing power of benefit dollars is a significant penalty in itself. By all appearances the current effect of section 175(d) is arbitrarily to over-deflate benefits for actual cost of living differentials. It is thus evident that the "down side" of the risk created by the incorporation of wage figures is quite real.

We conclude that the State has failed to meet its high burden. We affirm that portion of the superior court's opinion invalidating former AS 23.30.175(d) on state equal protection grounds. Because we do not view the 1982 and 1983 amendments to section 175 as materially altering the provision within the analysis of this decision, we hold also that AS 23.30.175(c) as currently enacted is also invalid.

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II. DAMAGES

Upon declaring former AS 23.30.175(d) unconstitutional, the superior court assessed damages against ALPAC for the additional benefits members of the plaintiff class would have received if section 175(d) had not been enacted. ALPAC argues on appeal that it is a private entity and should not be found liable in damages for its good faith compliance with a statute.

There are three conceivable causes of action available to Brown in this case which might support a damages suit against ALPAC. Under the federal law, 42 U.S.C. § 1983 subjects "any person" to damages liability who "under color of state law" deprives another of federally-guaranteed rights.¹⁶ Aside from section 1983, it is now well established in the federal courts that some provisions of the United States Constitution may be enforced in a suit for damages even in the absence of a specific statute supplying a cause of action. *Carlson v. Green*, 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1990) (eighth amendment); *Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979) (fifth amendment); *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) (fourth amendment). Finally, Brown suggests that we should find a *Bivens*-type implied damages remedy is available under the state constitution. See *King v. Alaska*

16. 42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

17. See also *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982). The *Lugar* Court reviewed two prerequisites that exist for the right to sue a private party under 42 U.S.C. § 1983:

State Housing Authority, 633 P.2d 256, 259-61 (Alaska 1981).

Assuming the existence of all three rights of action outlined above, it is next necessary to determine whether ALPAC is a proper defendant. Here Brown's claim encounters a major obstacle. Under all three theories it is necessary that ALPAC acted in some way which caused injury to the plaintiff class. Based upon Brown's arguments, it is difficult to identify what conduct on the part of ALPAC should be held to give rise to liability.

[17] Brown argues at length that the adjustment scheme in section 175(d) is the product of state action, and that ALPAC should therefore be vulnerable to a suit in damages. It is hornbook law that most of the rights secured by the constitution are protected only against governmental infringement. *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 156, 98 S.Ct. 1729, 1733, 56 L.Ed.2d 185, 193 (1978); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349, 95 S.Ct. 449, 452, 42 L.Ed.2d 477, 483 (1974). Private parties may sometimes be subjected to suit because they have usurped or assumed functions traditionally exercised only by the government, or because their actions were taken in collaboration with action by the state. See *Gerena v. Puerto Rico Legal Services, Inc.*, 697 F.2d 447, 449-52 (1st Cir.1983).¹⁷ Even in

First, the deprivation must be caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible.... Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state. Without a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them.

at 937, 102 S.Ct. at 2754, 73 L.Ed.2d at 495. The lower federal courts have been active in the short time since the *Lugar* decision in interpreting the "state actor" requirement. See *Coleman v. Turpen*, 697 F.2d 1341, 1345 (10th Cir.1983); *Gerena, supra*, at 449-52; *Adams v. Bain*, 697

cases where a cause of action is found to lie against a private party for the violation of the constitutional rights of another, it is a substantial additional leap to find that the private defendant may be liable in damages. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 942 n. 23, 102 S.Ct. 2744, 2757 n. 23, 73 L.Ed.2d 482, 499 n. 23 (1982); *Adickes v. Kress & Co.*, 398 U.S. 144, 174 n. 44, 90 S.Ct. 1598, 1617 n. 44, 26 L.Ed.2d 142, 163 n. 44 (1970). The Supreme Court in *Lugar*, although not passing upon the issue, suggested that there should be an affirmative defense for "private individuals who innocently make use of seemingly valid state laws." 457 U.S. at 942 n. 23, 102 S.Ct. at 2757 n. 23, 73 L.Ed.2d at 499 n. 23.

The general rule against private party liability for constitutional transgressions has particular force in the setting of this case. Were we to hold ALPAC liable in damages, we would in effect be creating an affirmative duty running to private persons to disobey unconstitutional statutes in advance of a judicial determination of the laws' validity.¹⁸ This we are reluctant to do.

[18, 19] We therefore conclude that private entities who regulate their behavior in good faith compliance with a validly enacted

F.2d 1213, 1217 (4th Cir.1982); *Dariels v. Twin Oaks Nursing Home*, 692 F.2d 1321, 1332-35 (11th Cir.1982) (Hoffman, District Judge, concurring); *Earnest v. Lowentritt*, 690 F.2d 1198, 1200-02 (5th Cir.1982).

18. The class action complaint filed by Brown against ALPAC illustrates the difficulty of this point. Brown alleged that, "[a]s a result of the enactment and enforcement of AS 23.30.175, [ALPAC] has wrongfully withheld monies due and owing Plaintiff BROWN and all other members of the class." ALPAC neither enacted section 175, nor was responsible for its enforcement. Second, Brown's complaint stated that "[ALPAC] has been unjustly enriched in an amount equal to the difference between the benefits actually paid to Plaintiff and other class members, and the benefits which would have been paid if the Plaintiff and other class members had resided in the State of Alaska at the time of payment." Brown's factual assertion on this score, however, ignores the relationship between benefits paid by the insurance carrier and premiums assessed against the employer. Brown has cited no evidence for the proposition

ed law cannot by the fact of their compliance be held legally responsible for constitutional defects in the law. We hold that the award of damages against ALPAC cannot be sustained.¹⁹ The decision below is AFFIRMED in part, and REVERSED in part, in accordance with this opinion.

MOORE, J., not participating.

COMPTON, Justice, dissenting.

I dissent from the court's holding that former AS 23.30.175(d) violates the equal protection clause of the Alaska Constitution.

First, I object to the court's conclusion "that section 175(d) imposes a substantial penalty upon the exercise by Brown and the plaintiff class of the right to travel out of Alaska." 687 P.2d at 273 (Alaska 1984). I acknowledge that a reduction in workers' compensation may influence an injured worker's decision on whether to convalesce outside of Alaska; however, I do not believe that section 175(d) actually penalizes a person's right to travel.

The interest of an injured worker convalescing outside of Alaska in receiving the same benefits as he would receive were he convalescing in Alaska is placed in its prop-

erty that ALPAC continued to collect premiums at the same level after the passage of the adjustment provision as before. Indeed, one of the two major purposes behind section 175(d) was the reduction of employer premiums. Third, Brown alleged that "[ALPAC], acting under color of the authority conferred upon it by the laws of the State of Alaska, and in particular, Alaska Statute 23.30.175, has been, and is currently, discriminating against Plaintiff and other non-resident workmen's compensation benefit recipients solely because of their status as nonresidents." Again, Brown's charges amount to nothing more than the fact that ALPAC complied with the law. No discriminations other than those mandated with mathematical specificity by section 175 have been attributed to ALPAC.

19. However, the prospective effect of the superior court's judgment is unaffected by this conclusion. From and after the effective date of the judgment appellant and the other class members are entitled to the payments they would have received except for the unconstitutional provisions of § 175.