ALASKA LEGISLATURE COMMITTEE FILES 1987-1988 8672
5392 SLAB SB 322 (file 12) - (file 13) 964

DATED at Fairbanks, Alaska, this 2nd day of December, 1987.

ALASKA WORKERS' COMPENSATION BOARD

William S.L. Walters, Designated Chairman

(Not Available For Signature)
Joe J. Thomas, Member

Steve M. Thompson, Member

WSLW/eb

If compensation payable under terms of this decision it is due on the date of issue, and penalty of 20-percent will accrue if not paid within 14 days of the due date unless interlocutory injunction staying payment is obtained in Superior Court.

APPEAL PROCEDURES

A compensation order may be appealed through proceedings in the Superior Court brought by a party in interest against the Board and all other parties to the proceedings before the Board, as provided in the Rules of Appellate Procedure of the State of Alaska.

A compensation order becomes effective when filed in the office of the Board, and unless proceedings to appeal it are instituted, it becomes final on the 31st day after it is filed.

Scott Wetzel Services Incorporated
An Affiliate of The Home Group, Inc
741 Sesame Street • Suite 1A • Anchorage, Alaska 99503
Phone: (907) 561-1725

FEBRUARY 17, 1983

E. E. WALDROUP, D. C.
6851 JEWELL LAKE ROAD
ANCHORAGE, AK 99502

RE: ETHICS COMMITTEE-ALASKA CHIROPRACTIC ASSOCIATION

DEAR DR. WALDROP:

I'M WRITING TO YOU AS CHAIRMAN OF THE ETHICS COMMITTEE OF THE ALASKA CHIROPRACTIC ASSOCIATION ABOUT A SITUATION WHICH I FEEL SHOULD BE CALLED TO THE ATTENTION OF YOUR COMMITTEE.

I'VE ATTACHED HERETO COPIES OF TWO BILLS FROM THE EAGLE RIVER CHIROPRACTIC CLINIC (GERALD W. LIZER, D.C.) WHEREIN IT IS CLEARLY INDICATED HE HAS TWO SEPARATE METHODS OF BILLING; ONE FOR PATIENTS WHO ARE COVERED BY WORKERS' COMPENSATION INSURANCE AND A LOWER BILLING RATE FOR PATIENTS WHO PAY ON A PERSONAL BASIS. THE $58 BILL WAS GIVEN DIRECTLY TO THE PATIENT AND YOU WILL NOTE THAT THE 12/28/82 CHARGE FOR PROCESS NUMBER 97260 IS IN THE AMOUNT OF $24 AND ON THE BILLING TO US THE SAME VISIT IS CHARGED OUT AT $28. THE SAME SITUATION APPLIES ON DECEMBER 30TH AND IN ADDITION FOR PROCESS NUMBER 97119, THE PATIENT WAS CHARGED $10 WHEREAS WE WERE CHARGED $26.

YOU WILL NOTE ON BOTH INVOICES, THE PRINTED CHARGE HAS BEEN CROSSED THROUGH AND ON INVOICE NUMBER 3577 WHICH WAS GIVEN TO THE PATIENT, THE $22 CHARGE WAS CHANGED TO $24 AND ON THE BILLING TO US, IT WAS CHANGED FROM $26 TO $28.

IN ADDITION, ON THE INSURANCE BILLING, I CALL YOUR ATTENTION TO THE CHARGE ON 1/10/83 FOR PROCESS 72010---X-RAYS OF ENTIRE SPINE, WHEREIN THE STATED PRICE ON THE INVOICE IS $56 AND WE HAVE BEEN CHARGED $95.

FRANKLY, THE INSURANCE INDUSTRY IS OF THE OPINION THAT THIS PRACTICE IS RATHER WIDE-SPREAD AMONGST MANY OF THE CHIROPRACTORS AND IT IS MOST UNFORTUNATE FOR THE REPUTATION OF ALL THE GOOD DOCTORS THAT THEY MUST SUFFER FOR THE UNETHICAL PRACTICES OF A FEW.

THIS IS NOT THE FIRST TIME THAT WE HAVE ENCOUNTERED THIS SITUATION, ALTHOUGH I DON'T RECALL IT SPECIFICALLY BEING THIS SAME CLINIC, BUT IN MOST INSTANCES WE ARE SIMPLY TOLD THAT IT WAS AN ERROR IN BILLING AND IT IS SIMPLY SWEPT UNDER THE RUG. I DO NOT THINK THAT IS THE PROPER SOLUTION AND THAT IS WHY I AM CALLING THIS MATTER TO YOUR ATTENTION FOR THE PROPER ACTION.

IN ADDITION TO THE OBVIOUS OVERCHARGE, WE WOULD LIKE TO ADD THE ADDITIONAL COMPLAINT OF EXCESSIVE CHARGES. WE ARE ATTACHING COPIES OF THE BILLINGS FROM THE EAGLE RIVER CHIROPRACTIC CLINIC FOR THE PERIOD 12/28/82 THROUGH 2/7/83, AND IN THAT PERIOD OF JUST OVER ONE MONTH, THE CHARGES TOTAL $1,387.50. INVOICE NUMBER 3640 INDICATES TOTAL CHARGES OF $521 BUT IN ADDING THE INDIVIDUAL CHARGES, THEY ONLY TOTAL $441 AND THAT IS THE AMOUNT WE HAVE USED IN ARRIVING AT THE TOTAL OF $1,387.50. HOWEVER, THERE MAY BE A CORRECTION ON THIS BILL IN THAT PROCESS NUMBER 90000 IS WHITED OUT AND INDICATES $2 AND THIS IS PROBABLY AN ERROR THAT THEY MEANT TO CORRECT BUT DIDN'T.

I MIGHT ALSO STATE THAT IT IS BECAUSE OF THE PRACTICE OF GOUGING INSURANCE COMPANIES BY THE CHIROPRACTIC AND MEDICAL COMMUNITY THAT THERE IS A LOBBYING EFFORT UNDERWAY TO HAVE A BENEFIT PAYMENT SCHEDULE ON ALL WORKERS' COMPENSATION CLAIMS AND NO CHARGE IN EXCESS OF THE BENEFIT SCHEDULE WOULD BE ALLOWED OR PAYABLE.

THANK YOU VERY MUCH FOR LOOKING INTO THIS MATTER FOR US.

VERY TRULY YOURS,

SCOTT WETZEL SERVICES, INC.

RENEE MURRAY
ALASKA MANAGER

RM/VP

CC: AWCB (WITH ENCLOSURES)

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March 7, 1984

George B. Wichman, M. D.
3645 LaTouche Street
Anchorage, AK. 99508

Re: Patient #5-77108
James M. Carter vs. Municipality of Anchorage
Date of alleged injury - 11/18/83

Dear Dr. Wichman:

You and I go back a good many years. In fact, long enough that I recall when you used to jokingly tell all your patients all they needed was a vacation in Hawaii - and one of them took you seriously and the comp board made the insurance carrier pay the claim. You assured me you had learned a lesson and would never repeat that mistake again. I doubt the Board would ever rule that way again because most of the ground rules have changed since those days.

Anyway, working up to the present, we now have the case of James M. Carter who was operated on with a laminectomy on 2/3/84 and given a 10% P.P.D. rating one week later with the recommendation that he be given a settlement so that he might be able to take a vacation in a warmer climate.

First of all, that "ain't the way the game is played anymore". Even in the "old days" when we used to make lump sum settlements for a P.P.D. rating, the Board would not accept a P.P.D. rating until a year or more following a back surgery.

Under current regulations, there is no such thing as a lump sum P.P.D. settlement per se. Settlements, if any, are now predicated on loss of wage earning capacity which can only be determined after the employee returns to gainful employment. If he returns to the same or similar employment, with no loss in wage earnings, he receives nothing.

Obviously, this determination is very premature in Mr. Carter's case. If he recovers and is able to return to his prior employment, he will suffer no wage loss. If he is unable to return to his former occupation, we are required by law to rehabilitate him to a new occupation and when he returns to employment and is again earning wages, then, and only then can his wage earning impairment, if any, be determined.

Should he, in fact, have an earning impairment, the Board generally favors a weekly payment as opposed to a lump sum payment in order to remove any disincentive to prolong disability to wait for a large settlement. I'm sure you will agree that this is a much more reasonable and humanitarian approach to claims handling.

Now the system is designed to return everyone to an active and productive life style in the shortest possible time, which is obviously the best possible result for an injured employee.

I am telling you all of this because I learned recently in a conversation with Dr. Reese that the medical profession is often the last to know of changes in the worker's compensation laws and methods of handling claims. This is really unfortunate because you are such an integral and important factor in the handling of worker's compensation claims. Perhaps we should have a joint meeting and discuss some of these factors.

At any rate, returning to the case of James Carter, he is now under the impression that we owe him a trip to Hawaii. Dr. Wichman, that is not the case and we are not going to do it. I seriously doubt that this back surgery is unique among the thousands of others and that he alone deserves an all expense trip to Hawaii.

Unless and until the Worker's Compensation Board rules that all back surgery patients must be sent out of state to warmer climates to recuperate or live, we are not going to set any precedents by paying for anyone to go to Hawaii, or anywhere else, including Mr. Carter. I feel sure you will understand and agree with our position.

As you know, Mr. Carter took the matter of his lump sum settlement for the rating you gave him to the Worker's Compensation Board and he was given the same information that I have provided you above. Mr. Carter has indicated to us that you told him the Board was wrong and he is still demanding we give him some kind of lump sum, although none of us have any basis to determine what that lump sum should be based on. The old days of a 10% P.P.D. computing to $3000.00 or $6000.00 are long gone.

It's a whole new ball game and we all have to play according to current rules, whether we like it or not. Old habits die hard, but fortunately they do die and everyone is usually better off for it.

Anytime you or your associates would like to take time out of your busy schedules to meet with me, or others from our industry, we will be happy to accomodate you.

Best personal regards,

Renee Murray
Vice President
SCOTT WETZEL SERVICES, INC.

RM/ss

cc: Alaska Worker's Compensation Board
cc: James Carter

IRA

JAMES G. GOLLOGLY, M.D., F.R.C.S. (C)
DOCTOR'S MEDICAL & SURGICAL CLINIC
411 FOURTH AVENUE
FAIRBANKS, ALASKA 99701

TELEPHONE 907-452-4646
907-452-2167

December 16, 1987

ORTHOPAEDIC CONSULTATION

Re: Lenore Morris
Referred by: Becky McLoud, Scott Wetzel Services

HISTORY OF PRESENTING COMPLAINT:

Ms. Morris, a 44 year old white female, relates that she works for Pay and Save, Gavora Mall, as a cashier/clerk/stocker. She has been working there for the past eight years, and in March of 1987, felt that she injured herself when she was lifting boxes and putting up shelving. She noticed a throbbing pain in her low back after she had been lifting up boxes of boots to put on a cart. This was almost at the end of the day, so she finished her shift and went home. When she got up the next morning, her back was still bothering her, so she went to the chiropractor, Dr. Rublee. She took that day off work, but returned to work the next day, and has been at work all the time without any further time lost. Her back is still hurting, but she is still doing her regular job. She is also still going to the chiropractor, approximately three times a week. There was an interval when she did not attend the chiropractor, as about the 15th of July, she was told that Worker's Comp would not pay for it any longer, so she stopped. Then she started going again in November because she started "aching all over."

PRESENTING COMPLAINTS:

She says now that her back still bothers her. She has no real idea of what causes this, but it is now associated with her arms going to sleep, and headaches. She says that sometimes when her back hurts it will go right down into the bottom of her feet and her heels will hurt. The chiropractors are reported to have said that thermo-

December 16, 1987
Re: Lenore Morris

graphy does not show anything, and nobody has given her a clear idea of what is wrong.

PAST MEDICAL HISTORY:

This is notable for her tonsils and adenoids being removed in 1971. Otherwise, she has had two children, who are now aged 27 and 25, and has been very well.

MEDICATIONS:

She occasionally takes Motrin for her menstrual cramps. She gets this medication from Dr. Steiner.

ALLERGIES:

She is not allergic to anything.

SOCIAL HISTORY:

She is originally from Missouri, where she dropped out of high school, but subsequently obtained her GED. She has never been to college. She came up to Fairbanks in 1974, and has been working for Pay and Save, here, since about 1976. She has worked most of her married life, variously in K-Mart and St. Elizabeth's Hospital in Oregon, and in Pay and Save at various locations. She has been married to her first husband for 28 years, and he is self-employed, owning a collection agency and a towing company.

COMPENSATION LEVEL:

She is currently at work and receives her normal work wages. She does not really know if there are any significant compensation problems.

ON EXAMINATION:

She is a very pleasant, middle-aged lady, who weighs 143 pounds and is 5'1.5" tall. Her blood pressure today is 90/50.

EXAMINATION OF HER HEAD:

This appeared to be normal. There was no obvious cause for headaches that I could

detect, as she had good dentition, her ears were normal, and there were no visual problems.

EXAMINATION OF HER NECK:

She had a good range of movement of her neck. She did, however, have some pain when her head was compressed on her neck, and much less pain when her head was distracted from the neck. The pain was localized mainly to the back of the neck.

EXAMINATION OF HER THORACIC AND LUMBAR SPINE:

This looks normal without any obvious deformity. There is a good range of movement of the spine, and she can flex forward to within three inches of the floor. As she straightens up, she does experience some pain in her back, manifest by her putting her hand behind her back. Extension can be carried out to approximately 20 degrees, and lateral flexion is 30 degrees on either side. She is tender at the lumbosacral junction and in the L2 area, and also is minimally tender in multiple other areas.

EXAMINATION OF HER LEGS:

Her leg lengths are equal, and her legs look normal, without any obvious deformities. She has no obvious muscle wasting. The Trendelenberg tests are normal, and straight leg raising tests are normal; LaSegue's signs are negative; the ankle jerks and knee jerks are present and equal bilaterally; the sensation is normal in all the dermatomes; and the power is normal in all the muscle groups tested. The pulses in her feet seemed to be normal.

EXAMINATION OF HER ARMS:

Both arms looked completely normal. There is no evidence of any deformity or muscle wasting. There is a full range of movement of all the joints; the sensation appears to be appropriate in all dermatomes; and the power is normal in all the muscle groups. She does, however, have Tinel's sign positive on both wrists, and Phalen's sign is also positive in both wrists, with the left experiencing more tingling and

numbness than the right. She thus has evidence of carpal tunnel syndrome.

REVIEW OF THE X-RAYS:

Initially, I thought she had no x-rays, so I x-rayed the involved areas of her body today. In the cervical spine, she was seen to have degenerative disc disease at C5-6, with some anterior osteophytosis at this level and some posterior osteophytes encroaching on the neural foramen, but nothiang that would be unacceptable for her age. Similarly, in the thoracic spine, she had some degenerative disc disease with anterior spurring at multiple levels. In the lumbosacral spine, there were minimal signs of disease, but these minimal signs were concentrated at L4-5 and L3-4. There was no advanced disease in any area. An x-ray of both wrists showed that there was a cyst in the right scaphoid, but it was unlikely that this abnormality was contributing to the carpal tunnel syndrome, which was worse on the left wrist.

Subsequent to her leaving, I found a rolled up packet of x-rays and notes from the chiropractor. The x-rays dated from November 5, 1987, and essentially showed the same manifestations of mild degenerative disease, as did the x-rays that I took earlier.

REVIEW OF THE RECORDS:

I do have two lots of copies of the chiropractor's records. According to the notes, she was initially seen by Dr. Rublee on April 27, 1987, and the diagnosis at that time was acute traumatic lumbosacral strain. The chiropractic treatment then commenced. Treatment continued through August 14, 1987, when it was stated that the patient was still having pain and discomfort in the area of injury, and that this was aggravated by her work. However, on June 30, 1987, a note stated that on June 16, 1987, she had started experiencing pain in the cervical and thoracic regions, and at this time chiropractic treatment had been extended to these regions. A new report dated November 15, 1987, by Doug Kenyon, D.C., now diagnoses "muscular strain in the

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Re: Lenore Morris

low back; cervical brachial syndrome."

DIAGNOSES:

My diagnoses are as follows.

1. Degenerative disc disease at multiple levels in the spinal column between the neck and the low back.

2. Bilateral carpal tunnel syndrome, left worse than right.

3. Possible polymyalgia rheumatica.

DISCUSSION:

Ms. Morris' initial story seems quite clear. She had some back pain at work and this bothered her for a few months. She initially received treatment for this from the chiropractor. About two months after this, she started having having pain in the neck and tingling in the arms. This has all been treated as an exacerbation of the original "injury" two months earlier. The treatment has continued and there is no clear basis put forward in the records as an explanation for the increase of the patient's symptoms.

As far as I am concerned, it seems clear that Ms. Morris has degenerative disease in the spinal column in the cervical, thoracic and lumbar areas. She also has bilateral carpal tunnel syndrome. In addition to this, I have the feeling that there is something else going on: that perhaps she has some arthritis or other underlying condition.

RECOMMENDATIONS:

I cannot see that treatment should continue without a more specific diagnosis in this case. The carpal tunnel syndrome seems obvious to me, and I think she should receive some treatment for this. This is new and has not been so far identified. The degenerative disc disease in her spine is common, and probably does not need a lot of treatment, as she can learn to modify her activities and then to ameliorate her

DOCTOR'S MEDICAL & SURGICAL CLINIC
FAIRBANKS, ALASKA 99701

December 16, 1987
Re: Lenore Morris

symptoms as necessary. I have, however, sent off some tests to see whether she has some sort of arthritis and these results should be forthcoming soon.

ABILITY TO WORK:

I have told Ms. Morris today that she could continue working, as she has been, but that she should try to modify her heavy work and not attempt to do as much as she was able to do twenty years ago. It seems to me that she is a very consciencious and probably very capable worker, and maybe at this point in her life, is doing more than other workers would consider reasonable.

CAUSAL RELATIONSHIP:

I have no doubt that her back started to ache after lifting boxes at work, back in April. However, I think there are other explanations for her other symptoms. Her carpal tunnel syndromes are most likely to be work related, and she may have an arthritic condition.

DISABILITY RATING:

I do not think that Ms. Morris is disabled in any permanent sense.

Sincerely,

James G. Collogly, M.D.
Orthopaedic Surgeon

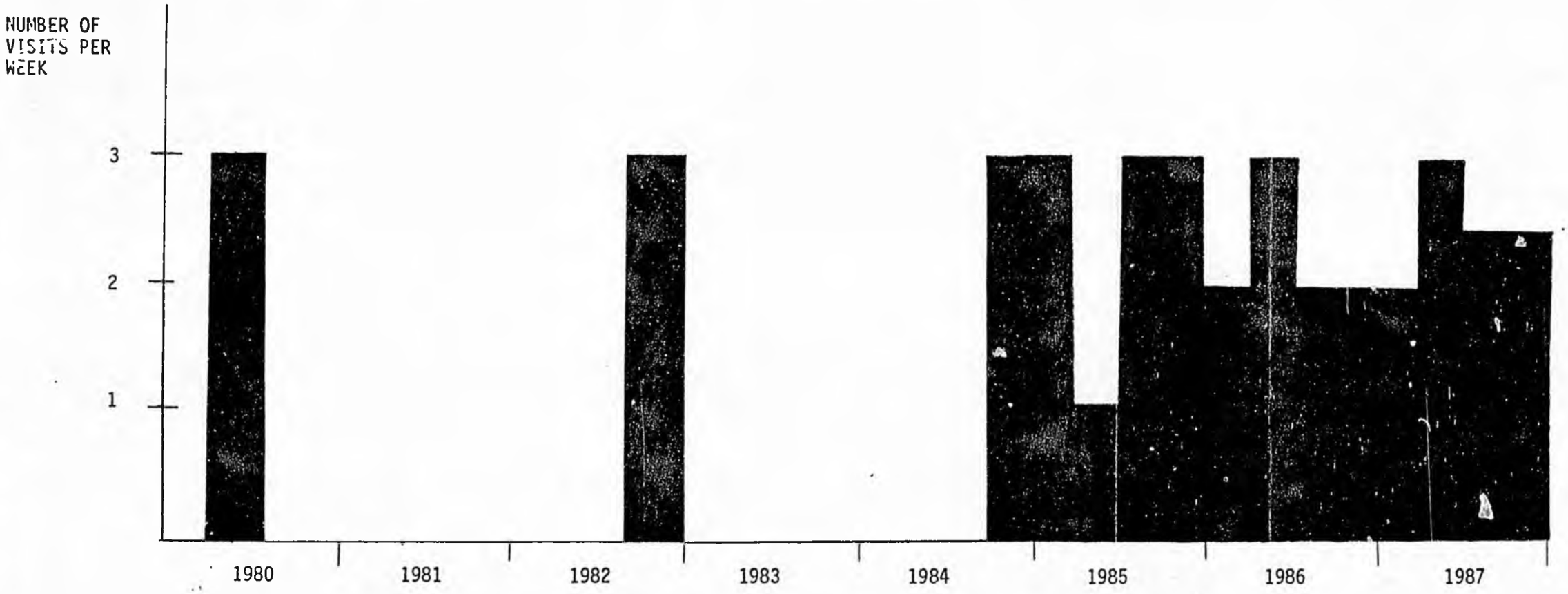
December 22, 1987

Addendum:

Her sedimentation rate was 48 mm/hr; she has abnormal thyroid function tests, and may be hypothyroid; and is also slightly anaemic. She needs an internal medicine evaluation, which I will organise.

HISTORY OF CHIROPRACTIC CARE FOR DAVID MULLINS

TREATED BY ROBERT KENT, D. C.



Mullins reported nine neck and/or back injuries between 1980 and 1987 and total chiropractic care cost

WHAT PRICE FREEDOM?

Economic realities strip the romance out of homesteading

By E.W. PIPER
Daily News reporter

The first day Jim and Gerry Lee Carter stepped foot onto what would become their homestead, they found a brown-bear track as big as the hubcap on a Volkswagen. "That," says Gerry, "was letting us know we had neighbors."

There aren't many human neighbors around the Carters' 160-acre agricultural homestead on the north side of Willow Creek. But there's plenty of wilderness: bears, moose, virgin land waiting to come under the plow. Sometime this spring, they'll have "proved up," giving life to the Jeffersonian ideal of yeoman pioneers carving a life out of the forbidding frontier by the honest sweat of their brows.

Well, not quite.

Jim Carter, Alaska homesteader: "When people start talking about homesteading, they think, 'Free land! We're going to live out in the boonies and get away from people!' That's not us. If we wanted to isolate ourselves, I wouldn't have put in the road."

Gerry Carter, pragmatist: "I think a lot of people would like to homestead, but a very small percentage can actually do it."

Alaska is the last place an American can stake a homestead, gaining title to the land by building a home and living on the land for a designated period. When the state Department of Natural Resources offers 5,300 acres of state land early next month, officials expect applications will come pouring in from would-be pioneers planning to duplicate the Carters' wilderness experience. Since the homestead program was created in 1984, record numbers of people have participated in lotteries and land disposals.

State land disposals are very much 20th-century programs, complete with government regulations and 20-year loans, surveying costs and soil conservation plans. Yet to many of the applicants, the programs provide a red-blooded rush of 19th-century nostalgia, an intoxicating potion mixed from equal parts of American Dream and Manifest Destiny.

"People still harbor the idea that they want to be trappers and live out in the woods," says Gary Gustafson, DNR's chief of land management. "Very few people can actually do that. We all need to have a job in town. This isn't a program where you can live in your cabin and commute to Anchorage. It just

See Page C-2 HOMESTEADING

Jim and Gerry Lee Carter on Alaska [illegible]

Anchorage Daily News/Michael Penn

CC: Larsen, D.C.

atty Friedan re

ILYN GARDNER
stian Science Monitor

/ YORK — Twenty-five years ago, a -old housewife and mother of three in nd County, N.Y., shook American so- uctures to the core with a best seller inched the modern women's movement. ding that deeply entrenched attitudes ial barriers imprisoned educated wom- "housewife trap," Betty Friedan called anded career opportunities and equali- men.

owerful was her message that many still chart the 1960s by two reference where they were when President John nedy was shot, and where they were ey read "The Feminine Mystique."

an appreciates how long a 25 years it n when she hears college students tell h youthful enthusiasm, "Oh, we've you in our history books!"

an hardly resembles a figure em- in a history text. Sitting in the ed living room of her 40th-floor apart- erlooking Central Park, she is dressed en turtleneck, black slacks, and white Modern art hangs on salmon-colored and winter sunlight bounces off a settee upholstered in a splashy red- ple print.

more and more these days, Friedan e her own historian. She will soon r Los Angeles to serve as a visiting ished professor at the University of n California, where, on Feb. 9, she he guest of honor at a gala celebrating er anniversary of her now-classic

is personal point for looking ahead cing back, how does Friedan see what ls "the adventure of my own life" to "the wonderful adventure of the s movement itself, this passionate that has changed possibilities for "?

rhetoric gives away Friedan as an ible optimist. How could she have "The Feminine Mystique" in the first ithout a surplus of hope? But in an w full of the retrospection, introspec- d prophecy appropriate to an anniver-

Feminist Betty I

sary, she sound her note before take over.

Friedan wor mystique in th worse if the s tremors we are recession and se is going to be a kind of uncert scapegoat, becau

Already she that new mystiq the implied mes up your feminis Go home again."

Friedan takes In "Fatal Attrac and crazy" care "pure evil, pure

om Utah to Maine

erma bombeck at wit's end

'8-year-old woman Marshall from Oak Tenn., wrote to ask, state of Utah still never hear it men- a the weather reports. and I worry. Last fall Ridge, the crickets trange. They made ves at home watching hopping about. They hirn, creek, chirp, or r that noise when this and that togeth- ead they let you ap- hem and then jumped to the ceiling ker

e were also moths e disruptive, stomp- nd in my hair when I read in bed. They

dous winter. Don't they measure the length of caterpillars' hair or fuzz? Seems like I've heard of turning over rocks but I don't remember why."

Marshall is a prime example of the nation's infatuation

HOMESTEADING: Ma

Continued from Page C-1

doesn't work that way."

For the majority of people who got state land through various disposal programs over the past 25 years, the little piece of Alaska they got was a little piece of recreational land. That goes for the homestead program, too.

"The homestead program, despite what the Legislature intended, is also a recreational residence program," says Gustafson. "Even though there are requirements that you actually live in it, people find ways to work around it, or they exercise the purchase option."

The "purchase option" to which Gustafson refers was not available to sodbusters in 19th-century Nebraska who "proved up" on their government claims by building a home and putting the prairie to the plow.

Under Alaska's 20th-century program, if you get a homestead or a homesite, you can gain title to the land by buying it outright from the state. Or, if you have the time, the initiative and the energy, you can prove up in the traditional manner. That's what the Carters have done. But this Alaska dream did not come cheaply.

Jim Carter can't put an exact number on his three-year investment, but it's in the tens of thousands of dollars. The Carters' house is a comfortable, two-story, wood-frame home built with conventional milled and manufactured materials. They have a radio telephone, flush toilets, a refrigerator, a gas stove, a microwave oven, and a washer and dryer. They also have a hard-charging diesel generator that provides ample electricity for all of it.

They live a couple of miles off Hatcher Pass Road on the north side of Willow Creek. The Matanuska-Susitna Borough and the state Department of Forestry teamed up to build a narrow bridge across the creek, along with part of the road, because it provides access to future timber harvests. Carter carved out the rest of the road with a rented D8 Cat.

The Carters, married for 25 years and Alaskans for most of the last 16, are very proud of what they've accomplished. And they've got a right to feel that way.

They moved onto the land within a month of winning the lottery. They lived in a tent for the first part of the winter, when they didn't have their small wood stove on the property yet. Gerry tends to shiver a bit when she tells of the day it was 23 below — inside the tent. There wasn't much more than a rough clearing and a rougher Cat trail to the land, but they started building as quickly as possible.

"We were putting nails in a can on the barrel stove so they'd warm up enough to where we could handle them," says Jim, rolling an imaginary, ice-cold 16-penny nail between his fingers as he tells the story.

They moved into the first section of their home little more than three months after seeing the land for the first time. It's been non-stop work since then: digging the well, adding more to the house, digging out and framing walls for a basement, clearing land and putting up fences.

In some respects, the story of the Carter homestead is a modern version of the Frontier Homestead Myth. They certainly have pushed back the forest, and they are sure to put some land to the plow in the future. They'll earn their patent to the land through their labor and initiative.

But in other ways, their experience is an anti-myth. And they know it.

"They give you the land, but then they give you all the government regulations," says Gerry. "I'm not knocking them (the government), but people need to know the land is not free."

The Carters were able to build their homestead because they saved up money from decades of conventional American jobs, and their nest egg has allowed them to work on their homestead rather than working for a paycheck. And in the future, Jim Carter is looking for small timber sales in the area and a little bit of farming to pay the bills. This is not subsistence farming of the 1840s.

In the long run, says Jim Carter, "you have to produce some income off the land."

The Carters understand th reality of homesteading bet ter than a lot of the peopl who make land policy fo Alaska. The frontier mytholc gy has been a major influenc on legislators and administra

CRIME-BURNING: A gruesome

Many dream, but few follow through

tors in both the state and federal governments.

The most blatant example of myth leading land policy in recent years came from the federal Department of the Interior under James Watt. Ronald Reagan's first Interior secretary. In 1983, Watt came to Alaska to announce the opening to homesteading of 10,000 acres of permafrost and black spruce in Alaska's Interior, near Slana, within sight of the magnificent peaks of the Wrangell Mountains.

State land and wildlife managers gagged at the thought, and predicted a fiasco at Slana. There wasn't enough land, water, wildlife or business to support the project, they said. They turned out to be right.

Would-be mountain men and women came to Alaska from all over the country to stake land under an obsolete homesteading law designed for the American prairie, not the Alaska tundra. Within a few months of the staking period, many of the pioneers had left, defeated by limited resources, limited decent land, and limited economic opportunities. Twentieth-century reality snuffed out 19th-century dreams.

State land managers have tried to design programs more suited to the modern day, yet they, too, have to deal with the effects of the frontier mystique on public policy.

The Alaska Constitution, for example, includes this set of straightforward instructions to posterity: "It is the policy of the state of Alaska to settle the land," reads the beginning of Article Eight, the natural resources section.

To comply with this constitutional injunction, the state natural resources department has offered about a million acres of land to the public from the Alaska statehood entitlement of 105 million acres.

The offerings have come through a variety of programs since the mid-1960s. Those programs have been popular, in the strictest sense of the word; people want land from the state and they ask for it frequently. In the 1986 disposal, DNR received 41,000 applications — a record — for parcels on 25,000 acres. (Budget cutbacks left the DNR unable to hold a sale in 1987.)

Gary Gustafson, the DNR manager in charge of the land disposal programs, finds the number of applications particularly striking, because the state's population has been dropping and overall income has been falling.

"There's still a real strong public interest in owning land, particularly rural land. The old cabin-in-the-woods syndrome still lives today," he says. "A lot of people just come in asking about it. The silent majority is really a viable component of the land disposal picture."

While the landless public may like the programs, a lot of institutions with landed interests do not.

"We get criticized all the time when we offer land, usually by people who the state has sold land to in the past," says Gustafson.

A number of people develop a "shut the door behind me' attitude once they've got their particular plot. Real estate developers resent the competition from the state. Conservation groups question the wisdom of Balkanizing the public estate. Rural legislators see disposals as threats to local interests. Local governments gripe about land disposals too, because an influx of new residents to new subdivisions means new schools, new roads and new services with expensive, up-front costs to the existing taxpayers.

Yet despite the variety of vocal — and influential — opponents, DNR is seeing record levels of interest in a rapidly shrinking land disposal program. The reason? An American myth embodied by a single word.

"The word 'homestead' has such a lot of appeal that we've had thousands of people come in," says Gustafson. "They get here and say, 'You're offering free land? How do I get some?' And then of course the word got out in the national media. It was on Paul Harvey. And then we were just inundated with requests. But it (the homestead program) wasn't really different than what we were doing before."

The homestead mythology has combined with economic reality to forge real changes in the state's land disposal program this year.

Gustafson says the state is all but out of the subdivision business. There's enough vacant, private subdivision land in saturated markets like the Mat-Su area right now, and probably will be for a long time. That, along with the fact that homestead lotteries are so popular, means that DNR is concentrating on homesteads, even if the acreage is limited.

"I think we're on the right track by reducing the number of acres we do every year," says Gustafson, who has seen the land disposal programs go from 100,000 acres a year to 5,000. "But, I still think the mystique of having that homestead, and the state constitutional mandate that requires us to offer land, and that in some areas of the state we're the only game in town — all those things combine to make it necessary that the state continue to offer a land disposal program."

But, he adds, most of the best land is gone. Or it was never really there. Back in the populist days of 100,000-acre disposals, people complained that most of it was swamp and muskeg. They were right. Everyone wanted five acres of high ground on a creek, but Alaska has neither enough high ground nor enough creeks in the public estate to satisfy everyone.

Today, says Gustafson, DNR is focusing on quality, not quantity. And now, that quality land — land on the road system, land with good soils and timber, land that people really want — all that is either in private hands or designated for public management, such as economic or conservation purposes.

Gustafson thinks that instead of the old, cabin-in-the-woods philosophy of selling public lands, the state needs to get more creative. He hopes to offer tracts for sale or lease to potential lodge owners, for example, as a way to stimulate the economy — and help the state get maximum return on the valuable public lands owned by all Alaskans. "We need to take the land we have and upgrade its value."

Meanwhile, the frontier myth lives on. People like Jim and Gerry Carter have modified the myth to make it work, but they know they're a minority. "If you have the skill to whittle a cabin out of the woods, all you need is time and an ax," says Gerry. "But realistically, it's not free. We were fortunate to have the time and income to get as far as we did."

The WCCA Sounder

"A publication for people concerned about workers' compensation reform"

November 1987

1988 Increases

Workers' Compensation premiums will skyrocket up to 68 percent in 1988 for some Alaskan businesses under recommended rates recently suggested by the National Council on Compensation Insurance. The 1988 rates were unveiled during public hearings conducted by the State Division of Insurance October 22.

While the average rate increase is 25 percent, many businesses will see greater rate hikes. As a result, Alaskan employers will contribute up to $38 million more in 1988 to cover increasing workers' compensation claims. Workers' comp losses have more than doubled in the past four years, growing from $71 million in 1983 to $159 million in 1986. In 1986, Alaskan businesses paid $153 million. At the same time, payrolls have dropped below 1982 levels.

Rate classifications are divided into four sections. The average 1988 rate increase for each will be:

Manufacturing: includes bakeries, canneries, carpentry shops, machine shops and newspapers: **-14 to +36 percent.**
Contracting: includes plumbing, masonry, welding, electrical, water drilling, excavating, roofing and sewer construction: **+4 to +54 percent.**
Oil and Gas: includes oil companies, oil-field service companies and pipeline firms: **+18 to +68 percent.**
Other: includes logging, trucking, airline, retail sales, hospitals, hotels, restaurants, legal and government agencies: **-7 to +43 percent.**

Reacting to the rate announcement, WCCA president Steve Haag said the increases will certainly signal an end for some employers. "Without a doubt I can say some of the businesses here today will not be here several months from now, and the skyrocketing insurance rates will be a major cause of that," Haag said.

WCCA continues to prepare a legislative reform package for introduction to the 1988 legislature. The State House Labor and Commerce Committee will hold a public hearing on workers' compensation issues November 12.(See page 4.)

New Members

The active membership of WCCA continues to grow as more employers realize the need to reform the workers' compensation system. WCCA thanks these new members for their financial and active support:

Klukwan, Inc.
Municipality of Anchorage
Robinhood, Inc.
Holland America
Alaska Cleaners
Anglo-Alaska Petroleum
Carr-Gottstein Enterprises
AGC, Anchorage Chapter
Hickel Investments
Totem Ocean Trailer Express
Lynden, Inc.
Northern Air Cargo
Alaska Airlines
Reeve Aleutian Airways
GCI
Veco
Arco
Standard Alaska
Enserch
Dimond Alaska Coal
Rain Proof Roofing
Marathon Oil

Seminar Success

Over 100 persons representing a broad cross-section of Alaskan businesses attended the October 8 seminar co-sponsored by WCCA, making it a resounding success. The focus of the seminar was to educate employers about the workers' compensation act.

The Fairbanks Chamber of Commerce has expressed interest in co-sponsoring a similar seminar in Fairbanks in 1988, and Juneau business representatives have also expressed a desire to conduct a similar conference.

WCCA thanks Dr. Michael James and State Insurance Director John George for taking the time from their busy schedules to conduct informative sessions of the seminar along with Shelby Nuenke-Davison and Mary Pierce.

Additional copies of the reference book distributed at the seminar are available for $30. A 5-tape set of audio cassettes of the seminar is available for $40. To obtain either, contact Shelby Nuenke-Davison at 276-6555.

1988 Plans

WCCA will retain noted national expert John Lewis to assist in preparation of reform workers' comp legislation which will be introduced to the 1988 legislature. Lewis, a lawyer, has been a consultant to state governments, business and labor organizations on workers' comp. His clients have included: U.S. Dept. of Labor, Rhode Island Dept. of Business Regulation, Delaware and Maryland State Chambers of Commerce, Louisiana Association of Business and Industry, Michigan State Departments of Labor and Commerce, Oregon Workers' Compensation Department and many others.

Committee Work

WCCA's four hard-working committees have focused on specific aspects of workers' comp law which, if changed, will save employers millions of dollars and make the system better serve both the employee and employer.

1. Vocational Rehabilitation Committee: Among recommendations made by the committee is making rehabilitation program entry voluntary rather than mandatory. Selecton of a re-employment preparation benefit provider would be arrived at mutually by employee and employer and a specific plan would be signed off by a qualified rehabilitation professional and the recipient. What constitutes non-cooperation with the plan would be clearly defined. A maximum amount would be designated for tuition and supply costs.

2. Compensation and Benefits Committee: Among recommendations is a re-definition of "gross earnings" to restrict inclusion of some fringe benefits. Vested interests in a qualified pension or profit sharing plan will be allowed toward determination of gross earnings. The task force has also agreed to a proposal which would hold the last employer liable to pay workers' compensation claims when a dispute arises over which employer may be at fault until the dispute is settled. The committee proposes to tie compensation rates to the area in which the recipient lives. This would allow recalculation of benefits if a claimant moves to a region with a lower cost of living.

3. Medical Committee: The committee recommends placing a limit on the number of times an injured worker can change primary physicians and a limit on how much doctors can charge for services provided to workers' comp recipients. The committee also recommends disputes between employers and employees on medical issues be settled following an evaluation by an independent medical examiner whose findings would carry predominant weight in disputes. The committee proposes a limit on the number of medical visits a claimant may make before an independent medical evaluation is required.

4. Second Injury Fund: The committee has recommended abolishing the current fund to be replaced by what will be called a Return-to-Work Fund administered by the Division of Vocational Rehabilitation. The fund would provide incentives for employers to hire injured workers. Claims now being paid by the second injury fund would be sunsetted with final payments negotiated with claimants prior to sunsetting.

An additional topic being discussed by the task force is the issue of stress as a cause of worker disability. WCCA supports a definition of stress being written into law which would limit when it can be claimed as contributing to a workers' compensation claim.

The labor-management task force is in final negotiations on these and other issues which will be incorporated into a legislative reform package for the 1988 legislature.

Meeting Schedule

Board of Directors
Nikko Gardens Restaurant
2550 Denali, Anchorage -7 a.m.

December 3
January 7
February 4
March 3

Executive Committee
Barratt Inn
4616 Spenard Road, Anchorage - 7 a.m.

November 18	December 9
November 25	December 16
December 2	December 23

House Labor and Commerce Public Hearing on Workers' Compensation
Thursday, November 12, 1987
Legislative Information Office
3111 C Street, Anchorage
1:30-5pm

Workers' Compensation Committee of Alaska
11401 Olive Way
Anchorage, Alaska 99515

MARC

Jim Kelly
P.O. Box 21-0001
Anchorage, AK 99521

LAW OFFICES OF
MITCHELL D. GRAVO, INC.
A PROFESSIONAL CORPORATION
625 W. 5TH. AVENUE, SUITE C
ANCHORAGE, ALASKA 99501
(907) 276-0358

MEMORANDUM

TO: WCCA

FROM: Alaska Society of Chiropractors

RE: WCCA Draft on Sec. 23.30.095 Medical Examinations

Per our recent review of the WCCA proposal for Sec. 23.30.095 Medical Examinations of the Alaska Workers' Compensation Act, we have serious concerns regarding the following:

Definition of "medical"

Independent medical exams by peer group

How is the independent medical exam weighed?

Fifteen visit issue

One change in physician issue

Benefits after contraversion issue

Health Insurance Association of America schedules issue

SB

322

(File 13)

American Consulting Engineers Council

1015 Fifteenth Street, N.W., Washington, D.C. 20005
202-347-7474

Robert L. Fogle
Director, Liability Legislation

EXCERPTS FROM
KANSAS WORKMEN'S COMPENSATION ACT

"...no construction design professional who is retained to perform professional services on a construction project or any employee of a construction design professional who is assisting or representing the construction design professional in the performance of professional services on the site of the construction project, shall be liable for any injury on the construction project for which compensation is recoverable under the workmen's compensation act, unless responsibility for safety practices is specifically assumed by contract or by the affirmative actions of the construction design professional or any employee of the construction design professional who is assisting or representing the construction design professional in the performance of professional services on the site of the construction project. The immunity provided by this subsection to any construction design professional shall not apply to the negligent preparation of design plans or specifications."

"'Construction design professional' means any person who is an architect, professional engineer, landscape architect or land surveyor who has been issued a license by the state board of technical professions to practice such technical profession in Kansas or any corporation organized to render professional services through the practice of one or more of such technical professions in Kansas under the professional corporation law of Kansas or any corporation issued a certificate of authorization under K.S.A. 74-7036 and amendments thereto to practice one or more of such technical professions in Kansas."

Fiftieth Legislative Assembly, State of North Dakota, begun and held at the Capitol in the City of Bismarck, on Tuesday, the sixth day of January, one thousand nine hundred and eighty-seven.

HOUSE BILL NO. 1595
(Moore)

AN ACT to create and enact a new section to chapter 43-19.1 of the North Dakota Century Code, relating to liability of engineers.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF THE STATE OF NORTH DAKOTA:

SECTION 1. A new section to chapter 43-19.1 of the North Dakota Century Code is hereby created and enacted to read as follows:

Engineer not liable for contractor's fault unless responsibility assumed - Liability for own negligence. An engineer shall not be liable for the safety of persons or property on or about a construction project site, or for the construction techniques, procedures, sequences and schedules, or for the conduct, action, errors, or omissions of any construction contractor, subcontractor, or material supplier, their agents or employees, unless he assumes responsibility therefor by contract or by his actual conduct. Nothing herein shall be construed to relieve an engineer from liability for his negligence, whether in his design work or otherwise.

STATE OF OKLAHOMA

AN ACT RELATING TO WORKERS' COMPENSATION, AMENDING 85 O.S. 1981, SECTION 12, AS AMENDED BY SECTION 1, CHAPTER 37, O.S.L. 1982 (85 O.S. SUPP. 1983, SECTION 12); PROVIDING PROCEDURES RELATING TO EXCLUSIVE LIABILITY, EXCEPTIONS, COURT ACTIONS, AND IMMUNITY INCLUDING PERSONS TO WHICH LIMITED LIABILITY APPLIES TO.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. AMENDATORY 85 O.S. 1981, Section 12, as amended by Section 1, Chapter 37, O.S.L. 1982 (85 O.S. Supp. 1983, Section 12), is amended to read as follows:

Section 12. The liability prescribed in Section 11 of this title shall be exclusive and in place of all other liability of the employer and any of his employees, any architect, professional engineer, or land surveyor retained to perform professional services on a construction project, at common law or otherwise, for such injury, loss of services, or death, to the employee, or the spouse, personal representative, parents, or dependents of the employee, or any other person. If an employer has failed to secure the payment of compensation for his injured employee, as provided for in this title, an injured employee, or his legal representatives if death results from the injury, may maintain an action in the courts for damages on account of such injury, and in such action the defendant may not plead or prove as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee; provided:

(i) The immunity created by the provisions of this section shall not extend to action by an employee, or the spouse, personal representative, parents, or dependents of the employee, or any other person against another employer, or its employees, on the same job as the injured or deceased worker where such other employer does not stand in the position of an intermediate or principal employer to the immediate employer of the injured or deceased worker;

(ii) The immunity created by the provisions of this section shall not extend to action against another employer, or its employees, on the same job as the injured or deceased worker even though such other employer may be considered as standing in the position of a special master of a loaned servant where such special master neither is the immediate employer of the injured or deceased worker nor stands in the position of an intermediate or principal employer to the immediate employer of the injured or deceased worker; and

(iii) This provision shall not be construed to abrogate the loaned servant doctrine in any respect other than that described in paragraph (ii) of this section. This section shall not be construed to relieve the employer from any other penalty provided for in this title for failure to secure the payment of compensation provided for in this title.

(iv) For the purpose of extending the immunity of this section, any architect, professional engineer, or land surveyor shall be deemed an intermediate or principal employer for services performed at or on the site of a construction project, but this immunity shall not extend to the negligent preparation of design plans and specifications.

LEGISLATIVE BILL 492

Approved by the Governor May 26, 1987

Introduced by Nelson, 35; Hannibal, 4; Chizek, 31; L. Johnson, 15; Elmer, 38; Pirsch, 10; Conway, 17; Hefner, 19; Korshoj, 16

AN ACT relating to liability; to amend section 25-21,187, Reissue Revised Statutes of Nebraska, 1943; to restrict the liability of professional architects, professional engineers, and professional land surveyors as prescribed; and to repeal the original section.

Be it enacted by the people of the State of Nebraska,

Section 1. That section 25-21,187, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

25-21,187. (1) In the event that a public or private contract or agreement, for the construction, alteration, repair, or maintenance of a building, structure, highway bridge, viaduct, water, sewer, or gas distribution system, or other work dealing with construction, or for any moving, demolition, or excavation connected with such construction, contains a covenant, promise, agreement, or combination thereof, to indemnify or hold harmless another person from that such person's own negligence, then such covenant, promise, agreement, or combination thereof is shall be void as against public policy and wholly unenforceable. This section subsection shall not apply to construction bonds or insurance contracts or agreements.

(2) No professional architect, professional engineer, or professional land surveyor who is retained to perform professional services on a construction project and no employee of a professional architect, professional engineer, or professional land surveyor who is assisting or representing the professional architect, professional engineer, or professional land surveyor in the performance of professional services on a construction project shall be liable in tort for any case of personal injury to or death of any employee working on a construction project arising out of and in the course of employment on the construction project and occurring as a result of a violation of a safety practice by any third party unless the responsibility

CORRECTION

THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY

Fiftieth Legislative Assembly, State of North Dakota, begun and held at the Capitol in the City of Bismarck, on Tuesday, the sixth day of January, one thousand nine hundred and eighty-seven.

HOUSE BILL NO. 1595
(Moore)

AN ACT to create and enact a new section to chapter 43-19.1 of the North Dakota Century Code, relating to liability of engineers.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF THE STATE OF NORTH DAKOTA:

SECTION 1. A new section to chapter 43-19.1 of the North Dakota Century Code is hereby created and enacted to read as follows:

Engineer not liable for contractor's fault unless responsibility assumed - Liability for own negligence. An engineer shall not be liable for the safety of persons or property on or about a construction project site, or for the construction techniques, procedures, sequences and schedules, or for the conduct, action, errors, or omissions of any construction contractor, subcontractor, or material supplier, their agents or employees, unless he assumes responsibility therefor by contract or by his actual conduct. Nothing herein shall be construed to relieve an engineer from liability for his negligence, whether in his design work or otherwise.

Speaker of the House

Chief Clerk of the House

President of the Senate

Secretary of the Senate

This certifies that the within bill originated in the House of Representatives of the Fiftieth Legislative Assembly of the State of North Dakota and is known on the records of that body as House Bill No. 1595.

Vote:	Ayes	81	Nays	17	Absent	8
Vote:	Ayes	46	Nays	6	Absent	1

Chief Clerk of the House

Received by the Governor at 1:19 P. M. on March 26, 1987.

Approved at 1:17 P. M. on March 27, 1987.

Governor

Filed in this office this 30 day of March, 1987, at 8:39 o'clock A M.

Secretary of State

STATE OF OKLAHOMA

AN ACT RELATING TO WORKERS' COMPENSATION. AMENDING 85 O.S. 1981, SECTION 12, AS AMENDED BY SECTION 1, CHAPTER 37, O.S.L. 1982 (85 O.S. SUPP. 1983, SECTION 12); PROVIDING PROCEDURES RELATING TO EXCLUSIVE LIABILITY, EXCEPTIONS, COURT ACTIONS, AND IMMUNITY INCLUDING PERSONS TO WHICH LIMITED LIABILITY APPLIES TO.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. AMENDATORY 85 O.S. 1981, Section 12, as amended by Section 1, Chapter 37, O.S.L. 1982 (85 O.S. Supp. 1983, Section 12), is amended to read as follows:

Section 12. The liability prescribed in Section 11 of this title shall be exclusive and in place of all other liability of the employer and any of his employees, any architect, professional engineer, or land surveyor retained to perform professional services on a construction project, at common law or otherwise, for such injury, loss of services, or death, to the employee, or the spouse, personal representative, parents, or dependents of the employee, or any other person. If an employer has failed to secure the payment of compensation for his injured employee, as provided for in this title, an injured employee, or his legal representatives if death results from the injury, may maintain an action in the courts for damages on account of such injury, and in such action the defendant may not plead or prove as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee; provided:

(i) The immunity created by the provisions of this section shall not extend to action by an employee, or the spouse, personal representative, parents, or dependents of the employee, or any other person against another employer, or its employees, on the same job as the injured or deceased worker where such other employer does not stand in the position of an intermediate or principal employer to the immediate employer of the injured or deceased worker;

(ii) The immunity created by the provisions of this section shall not extend to action against another employer, or its employees, on the same job as the injured or deceased worker even though such other employer may be considered as standing in the position of a special master of a loaned servant where such special master neither is the immediate employer of the injured or deceased worker nor stands in the position of an intermediate or principal employer to the immediate employer of the injured or deceased worker; and

(iii) This provision shall not be construed to abrogate the loaned servant doctrine in any respect other than that described in paragraph (ii) of this section. This section shall not be construed to relieve the employer from any other penalty provided for in this title for failure to secure the payment of compensation provided for in this title.

(iv) For the purpose of extending the immunity of this section, any architect, professional engineer, or land surveyor shall be deemed an intermediate or principal employer for services performed at or on the site of a construction project, but this immunity shall not extend to the negligent preparation of design plans and specifications.

LEGISLATIVE BILL 492

Approved by the Governor May 26, 1987

Introduced by Nelson, 35; Hannibal, 4; Chizek, 31;
L. Johnson, 15; Elmer, 38; Pirsch, 10;
Conway, 17; Hefner, 19; Korshoj, 16

AN ACT relating to liability; to amend section 25-21,187, Reissue Revised Statutes of Nebraska, 1943; to restrict the liability of professional architects, professional engineers, and professional land surveyors as prescribed; and to repeal the original section.

Be it enacted by the people of the State of Nebraska,

Section 1. That section 25-21,187, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

25-21,187. (1) In the event that a public or private contract or agreement, for the construction, alteration, repair, or maintenance of a building, structure, highway bridge, viaduct, water, sewer, or gas distribution system, or other work dealing with construction, or for any moving, demolition, or excavation connected with such construction, contains a covenant, promise, agreement, or combination thereof, to indemnify or hold harmless another person from ~~that~~ such person's own negligence, then such covenant, promise, agreement, or combination thereof is shall be void as against public policy and wholly unenforceable. This ~~section~~ subsection shall not apply to construction bonds or insurance contracts or agreements.

(2) No professional architect, professional engineer, or professional land surveyor who is retained to perform professional services on a construction project and no employee of a professional architect, professional engineer, or professional land surveyor who is assisting or representing the professional architect, professional engineer, or professional land surveyor in the performance of professional services on a construction project shall be liable in tort for any case of personal injury to or death of any employee working on a construction project arising out of and in the course of employment on the construction project and occurring as a result of a violation of a safety practice by any third party unless the responsibility

for supervision of safety practices has been assumed by contract or by other conduct. This subsection shall not be construed to establish, diminish, or abrogate any duty, standard of care, or liability of any person or individual except as expressly provided in this subsection.

Sec. 2. That original section 25-21,187, Reissue Revised Statutes of Nebraska, 1943, is repealed.

STATE OF WASHINGTON

Chapter 212, Laws of 1987

PART XVIII

LIABILITY OF DESIGN PROFESSIONALS AND ARCHITECTS

NEW SECTION. Sec. 1801. A new section is added to chapter 51.24 RCW to read as follows:

(1) Notwithstanding RCW 51.24.030(1), the injured worker or beneficiary may not seek damages against a design professional who is a third person and who has been retained to perform professional services on a construction project, or any employee of a design professional who is assisting or representing the design professional in the performance of professional services on the site of the construction project, unless responsibility for safety practices is specifically assumed by contract, the provisions of which were mutually negotiated, or the design professional actually exercised control over the portion of the premises where the worker was injured.

(2) The immunity provided by this section does not apply to the negligent preparation of design plans and specifications.

(3) For the purposes of this section, "design professional" means an architect, professional engineer, land surveyor, or landscape architect, who is licensed or authorized by law to practice such profession, or any corporation organized under chapter 18.100 RCW or authorized under RCW 18.08.420 or 18.43.130 to render design services through the practice of one or more of such professions.

STATE OF FLORIDA

"...no construction design professional who is retained to perform professional services on a construction project, nor any employee of a construction design professional in the performance of professional services on the site of a construction project, shall be liable for any injuries resulting from the employer's failure to comply with safety standards on the construction project for which compensation is recoverable under this chapter, unless responsibility for safety practices is specifically assumed by contracts. The immunity provided by this subsection to any construction design professional shall not apply to the negligent preparation of design plans and specifications."

File No. 458

House Bill No. 5290

State of Connecticut

House of Representatives

House of Representatives, April 16, 1986. The Committee on Judiciary reported through Rep. Wollenberg of the 21st District, Chairman of the Committee on the part of the House, that the bill ought to pass.

AN ACT CONCERNING THE CIVIL LIABILITY OF ARCHITECTS AND ENGINEERS UNDER THE WORKERS' COMPENSATION ACT.

Section 1

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 31-293 of the general statutes is repealed and the following is substituted in lieu thereof:

(a) When any injury for which compensation is payable under the provisions of this chapter has been sustained under circumstances creating in some other person than the employer a legal liability to pay damages in respect thereto, the injured employee may claim compensation under the provisions of this chapter, but the payment or award of compensation shall not affect the claim or right of action of such injured employee against such other person, but such injured employee may proceed at law against such person to recover damages for such injury; and an employer having paid, or having become obligated to pay, compensation under the provisions of this chapter may bring an action against such other person to recover any amount that he has paid or has become obligated to pay as compensation to such injured employee. If either such employee or such employer

brings such action against such third person, he shall forthwith notify the other, in writing, by personal presentation or by registered or certified mail, of such fact and of the name of the court to which the writ is returnable, and such other may join as a party plaintiff in such action within thirty days after such notification, and, if such other fails to join as a party plaintiff, his right of action against such third person shall abate. In any case in which an employee brings an action against a third party in accordance with the provisions of this section, and the employer is a party defendant in such action, the employer may join as a party plaintiff in such action. The bringing of any such action against an employer shall not constitute notice to such employer within the meaning of this section. If such employer and employee join as parties plaintiff in such action and any damages are recovered, such damages shall be so apportioned that the claim of the employer, as defined in this section, shall take precedence over that of the injured employee in the proceeds of such recovery, after the deduction of reasonable and necessary expenditures, including attorneys' fees, incurred by the employee in effecting such recovery. The rendition of a judgment in favor of the employee or the employer against such party shall not terminate the employer's obligation to make further compensation, including medical expenses, which the compensation commissioner thereafter deems payable to such injured employee. If the damages, after deducting the employee's expenses as provided above, are more than sufficient to reimburse the employer, damages shall be assessed in his favor in a sum sufficient to reimburse him for his claim, and the excess shall be assessed in favor of the injured employee. No compromise with such third person by either employer or employee shall be binding upon or affect the rights of the other, unless assented to by him. For the purposes of this section the employer's claim shall consist of (1) the amount of any compensation which he has paid on account of the injury which is the subject of the suit and (2) an amount equal to the present worth of any probable future payments which he has by award become obligated to pay on account of such injury. The word "compensation," as used in

this section, shall be construed to include not only incapacity payments to an injured employee and payments to the dependents of a deceased employee, but also sums paid out for surgical, medical and hospital services to an injured employee, the one thousand dollar burial fee provided by law and payments made under the provisions of sections 31-312 and 31-313.

(b) NOTWITHSTANDING THE PROVISIONS OF SUBSECTION (a) OF THIS SECTION, NO CONSTRUCTION DESIGN PROFESSIONAL WHO IS RETAINED TO PERFORM PROFESSIONAL SERVICES ON A CONSTRUCTION PROJECT, OR ANY EMPLOYEE OF A CONSTRUCTION DESIGN PROFESSIONAL WHO IS ASSISTING OR REPRESENTING THE CONSTRUCTION DESIGN PROFESSIONAL IN THE PERFORMANCE OF PROFESSIONAL SERVICES ON THE SITE OF THE CONSTRUCTION PROJECT, SHALL BE LIABLE FOR ANY INJURY ON THE CONSTRUCTION PROJECT FOR WHICH COMPENSATION IS PAYABLE UNDER THE PROVISIONS OF THIS CHAPTER, UNLESS RESPONSIBILITY FOR SAFETY PRACTICES IS SPECIFICALLY ASSUMED BY CONTRACT. THE IMMUNITY PROVIDED BY THIS SUBSECTION TO ANY CONSTRUCTION DESIGN PROFESSIONAL SHALL NOT APPLY TO THE NEGLIGENT PREPARATION OF DESIGN PLANS OR SPECIFICATIONS. FOR THE PURPOSES OF THIS SUBSECTION "CONSTRUCTION DESIGN PROFESSIONAL" MEANS (1) ANY PERSON LICENSED AS AN ARCHITECT UNDER THE PROVISIONS OF CHAPTER 390, (2) ANY PERSON LICENSED, OR EXEMPTED FROM LICENSURE, AS AN ENGINEER UNDER THE PROVISIONS OF CHAPTER 391, OR (3) ANY CORPORATION ORGANIZED TO RENDER PROFESSIONAL SERVICES THROUGH THE PRACTICE OF EITHER OR BOTH OF SUCH PROFESSIONS IN THIS STATE.

Committee Vote: Yea 26 Nay 0

See next page for Section 2

The Speaker ordered the vote be taken by roll call.

The following is the result of the vote:

Total Number Voting.....134
Necessary for Passage.....68
Those voting Yea.....130
Those voting Nay.....4
Those absent and not Voting.....17

On the roll call vote the bill as amended by Senate Amendment Schedule "A" was passed in concurrence with the Senate.

JUDICIARY. H.B. No. 5290 (COMM) (File No. 458) AN ACT CONCERNING THE CIVIL LIABILITY OF ARCHITECTS AND ENGINEERS UNDER THE WORKERS' COMPENSATION ACT.

The bill was explained by Rep. Rudolf of the 139th.
The bill was discussed by Reps. Rybak of the 66th and Looney of the 96th who offered House Amendment Schedule "A" (LCO 3468) and moved its adoption.

On a voice vote the amendment was adopted.
The Speaker ruled the amendment was technical.

The bill was further discussed by Reps. Rudolf of the 139th, Tabersak of the 109th and O'Neill of the 98th.

The Speaker ordered the vote be taken by roll call.

The following is the result of the vote:

Total Number Voting.....140
Necessary for Passage.....71
Those voting Yea.....110
Those voting Nay.....30
Those absent and not Voting.....11

On the roll call vote the bill as amended by House Amendment Schedule "A" was passed.

section 2

The following is House Amendment Schedule "A":

In line 1, insert "Section 1."
After line 102, insert the following:
"Sec. 2. section 52-584a of the general statutes is repealed and the following is substituted in lieu thereof:
(a) [Notwithstanding any provision of the general statutes, no] NO action or arbitration, whether in contract, in tort, or otherwise, (1) to recover damages (A) for any deficiency in the design, planning, contract administration, supervision, observation of construction or construction of an improvement to real property; (B) for injury to property, real or personal, arising out of any such deficiency; (C) for injury to the person or for wrongful death arising out of any such deficiency, or (2) for contribution or indemnity which is brought as a result of any such claim for damages shall be brought against any architect or professional engineer performing or furnishing the design, planning, supervision or observation of construction or construction of such improvement more than seven years after substantial completion of such improvement.
(b) Notwithstanding the provisions of subsection (a) of this section, in the case of such an injury to property or the perso

or such an injury causing wrongful death, which injury occurred during the seventh year after such substantial completion, an action in tort to recover damages for such an injury or wrongful death may be brought within one year after the date on which such injury occurred, irrespective of the date of death, but in no event may such an action be brought more than eight years after the substantial completion of construction of such an improvement.

(c) For purposes of subsections (a) and (b) of this section, an improvement to real property shall be considered substantially complete when (1) it is first used by the owner or tenant thereof or (2) it is first available for use after having been completed in accordance with the contract or agreement covering the improvement, including any agreed changes to the contract or agreement, whichever occurs first.

(d) [Nothing in this section shall be construed to extend the period prescribed by the laws of this state for the bringing of any action.

(e)] The limitation prescribed by this section shall not be asserted by way of defense by any person in actual possession or the control, as owner, tenant or otherwise, of such an improvement at the time any deficiency in such an improvement constitutes the proximate cause of the injury or death for which it is proposed to bring action."

ACEC
Liability & Litigation REPORT

AMERICAN CONSULTING ENGINEERS COUNCIL | Vol. 1, No. 1—October 1987

ACEC LEGAL DEFENSE FUND—A HELPING HAND

Since 1980, the American Consulting Engineers Council has provided financial and/or legal assistance in more than thirty disputes involving member (and sometimes non-member) firms. However, not every lawsuit, or regulatory disagreement, qualifies for Legal Defense Fund aid.

Specifically, a case must have the potential for producing a precedent-setting decision (or regulatory interpretation) that could affect the practices of many consulting engineers. Firms facing problems which meet this criterion may request assistance through an ACEC Member Organization. All requests are immediately relayed to members of the national Council's Legal Defense Fund Committee with responses due back in ten calendar days. Depending on the urgency committee members may discuss a priority request via a conference call before making a recommendation.

Assistance, if granted, can be in the form of money (to help pay local legal expenses) or an Amicus Curiae brief supporting a particular position. Contributions may range from $500 to $5000, or higher, in special cases.

Also, as a general rule, the LDF Committee is reluctant to enter a case until it has reached the appellate level. Experience has shown that many of the more bizarre suits are tossed out at the district or common pleas court level. While the Committee recognizes that all suits are important, care is taken in the commitment of legal defense funds to be sure they are not expended on suits which are likely to be rejected by a lower court.

Some typical LDF cases:

(a) Approximately $5000 was allocated to help defray legal costs incurred by a consulting engineer in contesting a

Defense Fund—*Cont'd Page Three*

Seven States Prohibit Third Party Suits

Imagine resolving an inequity which is the basis for nearly half of all personal injury claims brought against consulting engineers. And imagine further a 7 to 10 percent reduction in liability insurance premiums as a result of such action. A pipe dream? Not on your life. At least seven states have already accomplished step one, and at least twice that number are already laying plans to do likewise in 1988.

The issue is workers' compensation laws and the problem is failure to include consulting engineers and architects under the "exclusive remedy" clause in such statutes.

A real-life case illustrates the problem. In 1978 a University of Kansas football player, working as a summer construction employee, was killed when the unshored trench in which he was digging collapsed. The young man's widow sued and the court awarded $423,000 in damages from the contractor, the construction inspector and his consulting engineering firm. The construction company was dismissed from further liability, however, because the death fell under the "exclusive remedy" clause of the Kansas Workmens' Compensation Act. However, the engineering firm was assessed $208,250 despite the fact it had no contractual obligation to direct how the contractor performed the work. The reason? Consulting engineers were not exempted by the "exclusive remedy" language.

The Kansas Act was, until recently, similar to most other states in this regard. In the case of death or injury, when workers or their survivors accept workers' comp for injuries, lost hours, medical bills, etc., they may not sue for additional payment from their employer, the project owner, the general contractor or other subcontractors at the site. The growing practice, however, is to sue the consulting engineer and/or architect, oftentimes winning awards exceeding their workers' comp payment.

In the states of Oklahoma, Kansas, Washington, Connecticut, Florida, Nebraska, and North Dakota, this loophole may no longer be an option. All have enacted laws specifically aimed at exempting design professionals from such suits except in cases of negligence or professional errors or ommissions.

Enactment of state laws, to eliminate third-party liability where the E/A has no contractual responsibility for either workers' safetv or the contractors' project management approach, is one of five top-priority reforms advocated by the American Consulting Engineers Council. Recommended legislative language has been drafted and is available upon request.

Also available are copies of all seven existing workers comp statutes brought to ACEC's attention in the past three years. Interestingly, not all are aimed at workers' compensation law amendments. Some, like the North Dakota law, amend the state registration law. Both approaches appear to be equally effective.

For copies of recommended, or enacted, reform bills, contact Bob Fogle at ACEC headquarters.

In This Issue...

"86-PAD-145"—THE A-E'S UNINTELLIGIBLE MILLSTONE

A growing problem among consulting engineers seeking or performing federal work is the insistence of many government auditors that a prorata share of liability insurance premiums is no longer an allocable element of overhead cost. For those who haven't faced this problem, the culprit is a Defense Contract Audit Agency guidance memo, "86-PAD-145," entitled "Audit Guidance on Errors and Omissions Insurance and Professional Liability Insurance."

Guidance memo 86-PAD-145 was issued September 6, 1986, with no opportunity for public comment and no formal discussion with representatives of the professions most affected. It appears to be in conflict with the allowability and allocability policies of virtually every federal construction agency or program. It contains statements and assumptions that are unsupportable. It requests data that is generally unavailable and discusses (but does not mandate) modification of existing policy re: the allocability of A-E insurance costs.

Nevertheless, this memo is cited in numerous DCAA denials of architect-engineer professional liability premiums as part of firm overhead costs. Inexplicably, a careful reading of the contents reveals no specific directive to this effect. Instead, it contains some startling inaccuracies.

For example, the author correctly notes that E & O costs "have doubled or tripled in the past two years." But he goes on to state "This additional premium cost can be identified to litigation involving commercial activities associated with condominiums and other family housing projects."

Other statements include: "A & E contractors have rarely incurred insurance claims or losses on its Government contract activity," and ". . . third party exposure and risk of loss is minimal or nonexistent on (A-E) Government contracting activity." (Parens added.)

Elsewhere the memo notes that the government ". . . requires A & E firms to maintain errors and omissions insurance . . . (to) provide the Government some assurance that a quality and professional job will be performed." This conclusion is seemingly ignored in a later paragraph which declares ". . . allocation of errors and omissions and professional liability insurance costs to all work does not appear to meet the . . . beneficial or casual relationships between the insurance costs and the benefitting or causing cost objective."

A-E contractors are directed by the DCAA memo to "require the insurance carrier to segregate the premium cost between commercial and Government risk exposures so that the relationships can be demonstrated and evaluated." Said one underwriter, when confronted by such a request, "How the hell do we do that?"

ACEC and AIA, in a survey of federal agency policy on allowability/allocability of professional liability insurance premiums, has been assured that reasonable liability costs continue to be recognized and approved on A-E contracts awarded by NAVFAC, Corps of Engineers, NASA, Veterans Administration, U.S. Postal Service, and General Services Administration. Virtually every agency cited Federal Acquisition Regulation (FAR) 31.205-19 as its authority.

DCAA and ACEC officials met in August, and again in September (the latter with COFPAES and insurance industry representatives also attending). A third meeting is scheduled for late October. Discussions of the profession's and the government's respective positions have resulted in a better understanding of the issue by both sides. However, 86-PAD-145 is still the operative guidance and is still being cited by some DCAA auditors.

ACEC members, confronted by audits recommending against prorata allocation of professional liability insurance costs, may find the following helpful in persuading federal negotiators that E & O insurance is a normal overhead expense.

(1) The overall government practice regarding this matter is clearly stated in FAR 31.205-19. There is no formal federal policy that makes professional liability costs unallowable or unallocable.

(2) Government auditor recommendations are advisory to federal contracting officers. The latter can, if they choose, ignore such advice.

(3) 86-PAD-145, in addition to factual shortcomings, fails to specifically direct DCAA auditors to implement the gist of its content.

(4) Some DCAA auditors, apparently, have chosen to continue approving reasonable liability premiums. Thus, the Guidance is being inconsistently applied.

(5) A letter from an A & E's underwriter, explaining problems of providing risk and rate data on public vs private projects, may be useful.

(6) While Guidance Memos are not required to be disseminated for public comment, regulations are. If 86-PAD-145 is characterized as "mandatory," ask for documentation of its regulatory status.

ACEC member firms unable to resolve the allocability issue are encouraged to contact Mark Casso, in the Washington, D.C. office, for the latest word on developments re: eligibility of insurance premiums as an overhead cost.

ACEC
Liability & Litigation REPORT

LIABILITY & LITIGATION is a publication of the American Consulting Engineers Council. ACEC is a national federation of approximately 5,000 independent, private practice engineering firms providing services in virtually every field of professional engineering and surveying. The headquarters office is located at:

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LIABILITY & LITIGATION editors:
Robert L. Fogle, Director, Liability Issues
Larry Spiller, Special Projects Coordinator

Pretrial Screening Panels Reduce Lawsuits

Several ACEC Member Organizations are planning strategies to lobby their state legislatures next year to enact pretrial screening panels and/or certificates of merit for lawsuits involving design professionals. These legislative initiatives are designed to reduce the number and amount of litigation involved in non-meritorious lawsuits against independent engineers.

In the past, the ACEC Tort Reform Program has suggested many arguments to use when lobbying for pretrial screening panels and certificates of merit. Among these arguments is the fact that many states have existing pretrial procedures for the benefit of physicians involved in medical malpractice claims. ACEC suggests that engineers ask for the same treatment, and point out that their liability problems are similar to those of doctors.

Recent research by ACEC staff has revealed that 26 states have established medical pretrial screening panels for physicians and, in some states, other health care providers as well. There also is an emerging trend to enact laws requiring certificates of merit in medical malpractice cases on top of pretrial screening panels.

States With Medical Malpractice Screening Panels

Alaska	Kansas	New Jersey
Arizona	Louisiana	New Mexico
Arkansas	Maine	New York
Delaware	Maryland	Pennsylvania
Florida	Massachusetts	Rhode Island
Hawaii	Missouri	Tennessee
Idaho	Nebraska	Virginia
Illinois	Nevada	Wisconsin
Indiana	New Hampshire	

A recent study of Maryland's medical malpractice experience indicates that state's "Health Care Arbitration" system (a pretrial screening panel procedure) has been increasingly effective since its inception in 1976. More recently, beginning in July 1986, plaintiffs in Maryland were required to obtain a certificate of merit from a physician within 90 days of filing a case. According to statistics collected by the Maryland Health Claims Arbitration Office, the certificate of merit procedure has reduced non-meritorious claims by over 50%.

ACEC members, particularly those in states which have either of these two procedures for medical malpractice claims, might reference the successes of the physicians' panels and certification processes when lobbying for similar laws for engineers.

LIABILITY A TOP PRIORITY AT ENGINEERS' SUMMIT

A summer meeting of key officers and staff from thirty different associations and societies has determined that liability and infrastructure are the predominant issues facing U.S. engineers today. Represented at the 2nd annual "Summit Conference" were representatives of engineering, construction, building code and public works organizations. Host of the event was the American Society of Civil Engineers.

As in 1986, the insurance crisis received much of the delegates' attention. Reports of 100% or more increases in liability insurance rates, accompanied by increased deductibles and lowered coverage, were commonplace. So also was the practice of many firms (one out of every five in ACEC's case) practicing without any insurance.

One group—the American Association of Engineering Societies—presented a paper which predicts that tort reforms, necessary to halt today's litigation explosion, will be a major objective of the construction industry for at least five more years. Barring such reforms, engineers will be unable to provide services and products that benefit the public and aid the economy.

Copies of the findings and recommendations of the 1987 "Summit Conference" may be obtained from the American Society of Civil Engineers, 345 E. 47th St., New York, N.Y. 10017-2398.

Defense Fund—*Cont'd from Page One*

federal agency's insistence that the government had access to accounting and tax records for all the firm's work—including both public and private clients. The engineer (and ACEC) was disturbed that he had been denied the right to review the audit guidelines upon which the agency based its claims. Since the consultant was not being audited for fraud or program abuse, ACEC felt the case, if lost, could deprive any business of due process under law. The case was settled when the agency which had appealed a lower court's rejection, voluntarily released its guidelines and agreed to limit its audits to standard data and procedures.

(b) In some instances the LDF may support a non-member company. A case in point involved an architect who had been sued by a woman injured by falling glass when a brick was hurled through a two-story window at a racetrack pavilion. After incurring considerable legal expense, the architect was dismissed. In an effort to discourage future actions of this nature, he then filed a claim against the plaintiff's attorney charging him with having brought a frivolous suit. Despite financial and legal support from both ACEC and AIA, the suit failed.

(c) Several Legal Defense Fund cases have involved support of state consulting engineer efforts to preserve existing statutes of limitations. In 1987 alone, ACEC, along with NSPE, joined in the cost of preparing and filing amicus briefs contesting appeals court decisions declaring existing statutes of repose unconstitutional. Both cases involved projects completed more than twenty years prior to discovery of alleged defects or professional negligence by the design professional. Both judgments are now being appealed to their respective state supreme courts.

In its seven years of existence, the ACEC Legal Defense Fund has helped achieve victories in two-thirds of the cases in which it participated. For more details relative to the operation and procedures of the LDF, contact Bob Fogle in the ACEC national office.

Director and Officer Liability Rates Stabilizing

A recent survey of officer and director liability insurance rates indicates that premiums, while stabilizing, are continuing to run high. Unfortunately, the July survey by the Wyatt Company, fails to reflect the impact of numerous state laws eliminating or limiting personal liability of directors or shareholders, except in cases of misconduct, unlawful payments of dividends or improper acts resulting in personal benefit.

According to the American Tort Reform Association, at least 22 states have enacted exceptions from, or limitation of, liability claims against directors and officers of for-profit organizations. Thirty-nine states provide liability exemptions for officers and directors of not-for-profit organizations.

Wyatt's 1987 "Directors, Officers and Fiduciaries Liability Survey" shows a sharp increase form 1984 to 1986 in the cost of liability coverage for such officials. Most of the state laws addressing D and O liability were enacted over the past 18 months. Most came about as the number of lawsuits filed against Directors and Officers rose at a rate of 15 to 20 percent per year from 1980 to 1987.

Over the past two years the average cost of settling such claims, including defense costs, jumped 147%, going from $1.04 million in 1984 to $2.57 million in 1986.

Participating in the Wyatt survey were 1,047 different organizations, including manufacturers, banks, hospitals, educational institutions and others.

ACEC Brochure a Popular Item

A small, 10-page brochure, describing the impact of today's liability crisis upon consulting engineers and their clients, has become one of ACEC's "best sellers." Published last March, this oft-ordered pamphlet has already been distributed to approximately 14,000 engineers, public officials, businessmen and others. Plans are already underway to republish.

The pamphlet's popularity stems from its effective presentation of the five civil justice reforms of most importance to consulting engineers. These are: (1) modification of workers' compensation laws to discourage third-party lawsuits; (2) elimination of joint and several liability in cases involving property damage; (3) tightening of statutes of limitations or statutes of repose; (4) greater use of "screening panels" to weigh the legitimacy of a pending lawsuit; and (5) indemnification of firms willing to undertake projects dealing with hazardous waste or pollution abatement.

Robert Sparks, vice president of Lockwood Greene, in Atlanta, was one of several hundred ACEC members requesting extra copies of the "Liability Crisis" pamphlet. Said Bob, the ACEC brochure "is clever, attractive, and more importantly, full of good information about engineers' liability problems. We plan to place copies in the hands of many of our important clients and state legislators."

Another ACEC member ordered 75 copies for dissemination to firm employees. A Member Organization ordered 150 copies for distribution to key legislators.

Members wishing to make similar use of this easy-to-read explanation of consulting engineers' liability woes can obtain up to ten copies free. Additional copies are only 50 cents apiece. To order copies, send a preaddressed mailing label to ACEC's Publications Department and request Publication No. 210/REM. Enclose check or money order for copies in excess of ten.

Liability & Litigation
American Consulting Engineers Council
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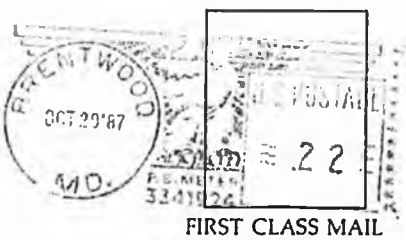
(202) 347-7474



FIRST CLASS MAIL

Dan M. Rowley
CH2M HILL NW, INC.
2550 Denali Street
8th Floor
Anchorage AK 99503-2792

To: Sharon Macklin
Lee Peterson
From: Jan Rowley

WORKMEN'S COMPENSATION AMENDMENT

Suggested Legislation
December 1986

Section 1. [Definitions.]

"Construction design professional" means any person who is an architect, professional engineer, landscape architect or land surveyor who has been issued a license by the state board of (name of board) to practice such technical profession in (state name) or any corporation organized to render professional services through the practice of one or more of such technical professions in (state name) under the professional corporation law of (state name).

Section 2. [Liability of construction design professional.]

Except as provided in the Workmen's Compensation Act, no construction design professional who is retained to perform professional services on or in conjunction with a construction project or any employee of a construction design professional who is assisting or representing the construction design professional in the performance of professional services on the site of the construction project, shall be liable for any injury on the construction project for which compensation is recoverable under the Workmen's Compensation Act, and Workmen's Compensation shall be the sole and exclusive remedy against a design professional, unless responsibility for safety practices is specifically assumed by contract or by the affirmative actions of the construction design professional or any employee of the construction design professional who is assisting or representing the construction design professional in the performance of professional services on the site of the construction project.

Senator Johne Binkley

Senate Finance Committee
P.O. Box V • Juneau, Alaska 99811 • (907) 465-4985

Finance Committee
Co-Chairman

February 2, 1988

Chancy Croft, Esq.
Chancy Croft Law Office
738 H Street, Suite 200
Anchorage, AK 99501

Dear Mr. Croft:

I have received your letter of January 29 expressing your concern regarding worker's compensation which you state is not adequately dealt with in SB 322 or its companion bill, HB 352. Thank you for sharing your thoughts with me.

As I am sure you are aware, these bills have a great deal of support. Senator Kelly, as Chairman of the Senate Labor and Commerce Committee, is dedicated to holding public hearings in order to hear from as many people as possible in order to have every reasonable assurance that as many problems as can be addressed in the bills are taken care of. No one claims, however, that these bills are the complete solution but instead are seen as a first step.

I would encourage you to attend the public hearing in Anchorage scheduled for Friday, February 12 at 3:30 in the LIO and share your concerns with the Committee for the record. Perhaps a workable solution can be found.

Sincerely,

Senator Johne Binkley
Yukon-Kuskokwim and
Interior Rivers

jka
✓cc: The Honorable Tim Kelly

THE PRECEDING DOCUMENT(S) MAY NOT FILM LEGIBLY BECAUSE OF POOR QUALITY OF THE ORIGINAL.

1-29-88
DATE

TO: Senate & House L&C Comtes.

FR: Sitka Chamber

NUMBER OF PAGES (INCLUDING COVER SHEET): 2

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Testimony for Hearing 1/29/88

(1)

Sunde's Alaska Traditions
401 Lincoln St.
Sitka, Alaska 99835
(907) 747-6232

Jan 29, 1988

To: House & Senate Committees on Labor & Commerce.

From: Dick Sunde Representing the Sitka Chamber Of Commerce

Re: HB 352 & SB 322 Workers Compensation Program.

With the increased cost in Workers Compensation Insurance Premiums it becomes more difficult for small and larger size businesses to expend there labor force. If businesses are hempered from expanding there labor force based on or partly on the High cost of Workers Compensation Premiums then both labor and business loss.

These bills should help in the reduction of premiums with out undue reductions in protection for the Workers injured during there employment and on the job premises.

It is the position of the Sitka Chamber of Commerce that we support the timely passage of these bills.

Thank you

Dick Sunde
Chairman Legislative Committee of the Sitka Chamber of Commerce.

2

GOLDEN WHEEL AMUSEMENTS OF ALASKA

506 W. 6th Avenue #9
Anchorage, Alaska 99501
(907) 272-9312
Entertaining Alaskans since 1967

Senator Tim Kelly
P.O. Box V Room 101
Juneau, AK 99811

Dear Senator Kelly ,

I am the owner of Golden Wheel Amusements Of Alaska. I am concerned with the escalating costs of workman's compensation insurance for my business. I employ nearly 250 people annually and provide a large part of much needed revenue to several state fairs and the Fur Rendezvous committee, and the rising cost of workman's compensation insurance is a threat to my continuing business.

I have been established in this state for over twenty years and have enjoyed moderate business success, yet the costs of workman's compensation insurance is a threat to my business. Imagine how many younger, less successful businesses are in as bad if not worse danger of financial collapse.

The Workman's Compensation Committee of Alaska is planning to introduce legislation advocating changes in the current compensation laws. I support this committee and their bill, and I appeal to you to not only support this bill as written, but to do all you can to expedite this bill's passage. For, even if passed on the first day of legislative meetings, Alaska business would not feel the relief until July.

Thank you for your support of the proposed changes of the Workman's Compensation Committee.

Sincerely,

Claire

Claire Morton
Golden Wheel Amusements

SUGGESTED AMENDMENTS
to
Alaska Workers' Compensation Board Rehabilitation Statute.

by

JON C. DEISHER, MA., C.R.C.

Sec. 23.30.041. Rehabilitation of injured workers.

(a) The board shall select and employ a rehabilitation administrator and may authorize the rehabilitation administrator to select and employ additional rehabilitation staff. The rehabilitation administrator will serve at the pleasure of and will be responsible directly to the board. The rehabilitation administrator will meet or exceed the qualifications requirements for a Qualified Rehabilitation Professional as defined by AS23.30.041(p) and will be certified by either the National Rehabilitation Association (NRA), the National Association of Rehabilitation Professionals in the Private Sector(NARPPS), or both. The Rehabilitation Administrator will meet these qualifications prior to appointment. The rehabilitation administrator is in the partially exempt service under AS39.25.120.

(b) The rehabilitation administrator shall implement the provisions of this section, study the issue of rehabilitation, both physical and vocational, on a continuing basis, and provide expert rehabilitation advise to the Board on disputed rehabilitation issues before the Board.

(c) If an employee suffers an <u>industrial injury</u> that precludes return to <u>suitable gainful employment</u> for a period of 90 continuous days, it is presumed the employee's industrial injury has resulted in a <u>vocational disability</u> unless or until otherwise determined through a vocational evaluation. Based upon the <u>presumptive disability</u> the employee is entitled to a full rehabilitation evalutation to determine if a rehabilitation plan is necessary to resolve the employee's barriers to suitable gainful employment. Referral for the full evaluation will include the treating physician's diagnosis, prognosis, recommended treatment and medical opinion regarding the employee's physical capabilities. Opinions regarding the employee's physical capacities may be obtained from a licenced occupational therapist approved and designated in writing by the treating physician. Referral for the full evaluation will be made not

later than the 90th day of disability. A full evaluation shall be performed by a qualified rehabilitation professional as defined in this subsection. If, in the opinion of the qualified rehabilitation professional, the medical, physical, vocational or emotional state of the employee precludes a full evaluation, the rehabilitation professional shall prepare a preliminary evaluation. A preliminary evaluation will include the reasons why a full vocational rehabilitation evaluation cannot be made or will not be necessary. If a full evaluation is necessary, the Qualified Rehabilitation professional will give a) an opinion as to if or when the employee will be eligible for the full vocational rehabilitation evaluation, and b) any information that would be included in a full vocational rehabilitation evaluation that can be determined and reported by the rehabilitation professional at the time of the preliminary evaluation. If the Qualified Rehabilitation Professional believes that the employee will be able to return to regular employment without further evaluation, then the rehabilitation professional will give an opinion as to the employee's ability to return to suitable gainful employment and report the physical and vocational basis for this opinion.

- -

d) 1) If the employer does not timely schedule an evaluation under this subsection, the employer will lose all rights to designate a rehabilitation professional and will pay to the employee 20% of a pro rated amount of the employee's compensation rate in addition to the amount already being paid for each day after the 90th day post injury and the employee may retain a qualified rehabilitation professional to perform the evaluation.

2) If the employee does not retain a qualified rehabilitation professional within 14 calender days after the 90th day of time loss, the employer's pro rated penalty will not be paid and the board or person designated by the board will retain a qualified rehabilitation professional to perform the full vocational rehabilitation evaluation.

3) If the board or designee does not retain a qualified rehabilitation professional within 14 calender days after the beginning of the employer's penalty period, the second injury fund will reimburse the employer for all penalties paid or due during the continuance of nonreferral.

4) If, after retaining a rehabilitation professional, either party is dissatisfied with the professional they may change to an alternative professional only once. Each party may change the designated rehabilitation professional once but not sooner than 90 days after the rehabilitation professional is retained. If a rehabilitation professional is retained and remains the provider on a case for six months or more he may be removed from the case only by the

rehabilitation administrator. If a provider is removed from a case by the rehabilitation administrator, the rehabilitation administrator will designate a replacement rehabilitation professional with 72 hours of removal.

The employer will pay the reasonable costs of the vocational rehabiliation evaluation under this subsection.

- -

(e) A full vocational rehabilitation evaluation by a qualified rehabilitation professional shall include following specific determinations:

(1) whether a vocational rehabilitation services plan will enable the employee to return to suitable gainful employment;

(2) whether the employee can return to suitable gainful employment with or without a vocational rehabilitation services plan;

(3) the wage earning capacity of the employee, if any, after the 90th day of time loss.

(4) if a plan is recommended, a systematic justification of the plan recommendations in terms of the order of preference.

- -

(f) For eligibility purposes, if the employee's wage earning capacity is determined to be greater than the minimum wage established by the Fair Labor Standards Act and is equal to 80% greater than the compensation rate based upon the average weekly wage (gross weekly earnings) as determined at the time of injury, the employee may elect to resolve his rehabilitation claim through a lump sum settlement based upon the lost wage earning capacity, if any, and in accordance with AS23.30.200 and/or AS23.30.210.

For eligibility purposes, if the wage earning capacity is less than the compensation rate, the full rehabilitation evaluation will determine whether or not a vocational rehabilitation services plan will enable an employee to return to work at a wage earning capacity equal to or greater than the compensation rate and as nearly as possible to the average weekly wage as determined at the time of injury.

- -

(g) If the Qualified Rehabilitation Professional determines that a rehabilitation plan is necessary, the plan will include; 1) a proposed vocational goal, 2) a justification for the vocational goal, 3) the beginning and ending dates of proposed rehabilitation services, 4) the responsibilities of the parties, 5) a labor market rationale for the plan, 6) justification of the plan in terms of the employee's physical capacities and 7) the proposed vocational goal's physical requirements. The plan will be designed to result in suitable gainful employment as determined at the beginning of the plan. The plan will

consider the employee's preferred vocational goal and if the employee's preferred vocational goal is not pursued then a justification for not pursuing the employee's preferred goal will be given. The plan will also include all the costs to be incurred by the employer during the vocational rehabilitation plan, and an estimate of whether the continuing benefits and compensation due to the employee under this chapter after the conclusion of the rehabilitation plan will be more or less than the benefits and compensation payable to the employee under this chapter if a rehabilitation plan is not implemented.

Once the Vocational Rehabilitation Services Plan (VRSP) is written by the Qualified Rehabilitation Professional, the VRSP will be served upon the primary parties for their approval or disapproval. If the parties fail to approve or disapprove the VRSP within 30 calender days of service, the QRP will automatically request an informal rehabilitation conference based upon a presumed plan dispute.

- -

(h) A vocational rehabilitation plan may consist of any of the following and will be consistent with a systematic working of the order of preference as presented in AS23.30.041(h); if the employee can be restored to suitable gainful employment with rehabilitation plans of a higher preference, then a rehabilitation plan of a lower preference may not be required from the employer. However, the employer and employee may agree by their signatures to a vocational rehabilitation services plan or letter of understanding, regardless of order of preference, labor market dynamics, expense, or subsequent changes in the parties' preference or circumstances. If the parties agree to a VRSP, then they will be irrevocably bound to their agreement.

- -

(i) The order of preference for vocational rehabilitation plans is

(1) prosthetic devices and training that enables work at the same or similar occupation with the same employer as at the time of injury;

(2) prosthetic devises and training that ables work at the same or similar occupation with a different employer than at the time of injury;

(3) work site modification and vocational training for the same or similar occupation with the same employer as at the time of injury;

(4) work site modification and vocational training for the same or similar occupation with a different employer than at the time of injury;

(5) training for a new occupation in light of the vocational rehabilitation evaluation, the injured worker's age, education, injury, work history, transferrable skills,

applicable labor market and which will result in suitable gainful employment as defined by AS23.30.265(28). The order of preference for training in a new occupation is as follows: a) on-the-job training; b) vocational training; and c) academic training;

(6) Self employment, if justifiable by the labor market, if the employee is able to successfully manage a self employment enterprise, and if that enterprise can be reasonably expected to meet Suitable Gainful Employment;

(7) direct placement in an occupation unrelated to previous work history establishing any wage earning capacity greater than the Fair Labor Standards Act for the minimum wage using transferrable skills.

If a vocational rehabilitation services plan is agreed upon by the employee and employer, then the parties will be bound to the agreed upon plan unless reasonable barriers beyond the control of the parties prohibit the successful completion of the plan. Reasonable barriers include medical, physical, psychiatric, emotional, vocational and financial circumstances which preclude the completion of the plan. Changes in the labor market after an agreed upon or approved plan is initiated is not a reasonable barrier. Disputes regarding reasonable barriers must be based upon objective facts presented by bonafide professional experts knowledgable of the alleged barrier(s), and will be first addressed in an informal rehabilitation conference. If an informal rehabilitation conference is not successful in resolving the dispute, then the rehabilitation administrator will resolve the dispute through a formal rehabilitation conference. Rehabilitation conferences will be scheduled upon written request.

If a plan is not agreed upon by the parties then the dispute will be resolved through a formal rehabilitation conference upon written request. The rehabilitation administrator may approve, disapprove or modify a disputed plan. If the rehabilitation administrator approves or modifies a rehabilitation plan, then the parties will be bound to the approved plan unless reasonable barriers to the successful completion of the plan, discovered after the plan is initiated, prevents completion. Disputes regarding reasonable barriers to an approved rehabilitation plan will be resolved by the rehabilitation administrator in a formal rehabilitation conference.

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(j) The employer and employee may agree on a vocational rehabilitation plan, whether or not the plan conforms to the provisions of this subsection. If the employer and employee dispute or fail to agree upon a vocational rehabilitation services plan, either of the parties may request a formal rehabilitation conference. Formal rehabilitation conferences will conducted with a formal record. If all of the necessary

information is available, the rehabilitation administrator will verbally approve, modify or deny the plan at the conclusion of the formal rehabilitation conference followed by a written decision within 30 calender days. If all of the necessary information is not available the record will remain open only long enough to obtain the information needed for the rehabilitation administrator's decision. If the record must remain open, then the parties will be noticed that 1) the record remains open, 2) what information is being obtained and 3) the date the record will be closed. The rehabilitation administrator will issue the decision within 30 calender days of the record's closing. If the Rehabilitation administrator approves, modifies or denies the vocational rehabilitation plan verbally, then the decision will be confirmed in writing within 30 calender days. The rehabilitation administrator's decision will be based upon 1) the provisions of this section, 2) the rehabilitation regulations AAC8.000.000, and 3) interpretations within subsequent decisions by the administrator, the Board and the Courts. Within 14 calender days of the rehabilitation administrator's decision either primary party may seek review of the decision by requesting a hearing in accordance with AS 23.30.110. However, the parties will be bound by the administrator's decision unless or until it is overturned by the board or the courts.

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(k) Rehabilitation reports and statistics regarding rehabilitation services and expenses will be documented and filed in accordance with the rehabilitation regulations.

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(l) Vocational rehabilitation services may not exceed 52 calender weeks, except that vocational rehabilitation services may be extended an additional 52 calender weeks if the parties agree, or the rehabilitation administrator approves based upon recommendations made by the qualified rehabilitation provider that special circumstances exist as defined by AS23.30.265(?) and AAC8.000.000. Rehabilitation services are limited to a total of 104 weeks and may not be exceeded unless agreed to by the parties. Holidays and vacations which are concurrent with rehabilitation services are included in the total of 104 weeks of rehabilitation services. This subsection does not prohibit an employee from requesting, or an employer or carrier from providing, extended vocational rehabilitation services on a voluntary basis. If rehabilitation requires residence away from the employee's customary residence, reasonable cost of board, lodging, and travel shall be paid by the employer. Temporary disability under AS23.30.185 or AS23.30.200 shall be paid throughout the rehabilitation process. The board or designee may, upon petition from the employee, award the employee being rehabilitated under this section an additional monthly

stipend of not more than 50% of the employee's compensation rate if it finds that a case of extreme financial hardship exists. Petitions for extreme financial hardship stipends, if approved, will not be paid retroactively and will be effective no earlier than the date of the petition. The employer shall pay all costs of a rehabilitation plan and rehabilitation services under this section.

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(m) Refusal by an injured employee to participate in, or otherwise fail to reasonably cooperate with, a vocational rehabilitation evaluation or a vocational rehabilitation services plan approved by the rehabilitation administrator or agreed to by the parties, results in a forfeiture of disability compensation for the period the refusal continues. Forfeiture of disability compensation will not begin until or unless allegations of refusal to participate are upheld by the Rehabilitation administrator, his designee or the Board. The rehabilitation administrator may retroactively assess forfeiture of disability compensation which may be liened from future compensation if allegations of refusal or failure to cooperate are sustained. Efforts to resolve disputes of refusal or cooperation will be first attempted in an informal rehabilitation conference upon written request from the employer, the employee, their representatives or the qualified rehabilitation provider. If the informal rehabilitation conference fails to resolve the dispute, then the dispute will automatically be referred for a formal rehabilitation conference. However, if an employee unilaterally begins participation in a rehabilitation plan not supported by the employer or not approved by the administrator during the period of alleged noncooperation, and then successfully completes the rehabilitation plan and becomes employed for a period of 30 consecutive business days following the completion of the rehabilitation plan, the employee shall receive a lump-sum payment of 50 percent of the compensation forfeited by the employee. The lump-sum payment is available only once to an employee refusing rehabilitation and is limited to the total of 52 weeks compensation allowable during the continuance of rehabilitation services or during the duration of the plan, whichever is less. Any wage loss determination made at the conclusion of the employee's unilateral plan will be based either upon the rehabilitation plan proposed by the qualified rehabilitation provider, if any, or the unilateral plan developed by the employee, whichever results in the highest wage earning capacity. The rehabilitation administrator may find that an employee refuses to participate in an evaluation or rehabilitation plan if the employee fails to cooperate with the rehabilitation provider, however a rehabilitation provider's allegation of noncooperation must be well documented and verifiable. A

secondary party may request an informal rehabilitation conference to address allegations of refusal or cooperation.

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(n) Refusal by an employer to participate in, or otherwise fail to reasonably cooperate with, an evaluation or a rehabilitation plan approved by the rehabilitation administrator results in a payment of double the disability compensation normally due during the period the refusal continues. Disputes of employer noncooperation will be addressed first by an informal rehabilitation conference. If the informal rehabilitation conference is not successful in resolving the dispute, then a formal rehabilitation conference before the rehabilitation administrator will resolve the dispute. Requests for rehabilitation conferences will be made in writing.

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(o) For purposes of this section, an employee is restored to suitable gainful employment if the employee can return to
(1) work at the same or similar occupation with the same employer or an employer in the same industry as the employer at the time of injury;
(2) an occupation using essentially the same skills as the job at time of injuy but in a different industry;
(3) an occupation using different skills or transferrable skills but using the employee's academic achievement level or existing vocational knowledge at the time of injury; or
(4) an occupation requiring an academic achievement level that is different from that attained at the time of injury. An employee shall be returned to suitable gainful employment in the order indicated in (1) - (4) of this subsection.

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(p) "Qualified rehabilitation professional" means a person who has at least a 4 year baccelaureat degree from an accredited University and work experience necessary to
(1) make judgements, administer and interpret tests, counsel, and make recommendations concerning the medical, intellectual, emotional ,physical, or motivational capacity of an injured worker to accept and perform suitable gainful employment, and to
(2) design, implement and supervise programs that tend to enhance an injured worker's medical, intellectual, emotional, physical or motivational capacity to accept suitable gainful employment.

Qualified rehabilitation professionals will meet or exceed the requirements for rehabilitation professionals as defined in the rehabilitation regulations. A rehabilitation professional may not practice unsupervised rehabilitation professional services under this section until and unless his/her credentials have been reviewed and approved by the rehabilitation administrator. A rehabilitation professional may work under the supervison of a Qualified Rehabilitation

Professional until his/her credentials are approved by the rehabilitation adminstrator. The rehabilitation administrator will approve or disapprove a rehabilitation professional's qualifications within 30 calender days of their submission for review. The administrator may suspend review of a rehabilitation professional's qualifications in order to recieve written verification of credentials presented for review. Approval or disapproval of a provider's credentials will be made in writing. The rehabilitation administrator may provide provisional approval of a rehabilitation professionals credentials which may be either revoked or confirmed upon verification of the credentials. A rehabilitation professional may not practice without written provisional or full approval by the rehabilitation administrator.

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(q) "Qualified rehabilitation adjuster" means an insurance company or adjusting company representative or employee who has at least four years of supervised adjusting experience in the field of workers' compensation insurance adjusting. Knowledge required of a Qualified rehabilitation adjuster includes:

(1) the ability to make judgements regarding compensability of industrial injury claims;

(2) knowledge of the psycho-social, physical and medical aspects of industrial injuries;

(3) knowledge of the rehabilitation statute governing industrial injuries;

(4) certification by the Alaska Adjusters Association as a Qualified Rehabilitation Adjuster.

The Rehabilitation Administrator may approve, disapprove, make recommendations to improve or disallow the qualifications of adjusters working with Alaska Industrially Injured Workers. A rehabilitation adjuster who does not meet the above requirements for a Qualified Rehabilitation Adjuster may work under the direct supervision of a Qualified Rehabilitation Adjuster.

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(r) Motions to disqualify a rehabilitation provider from practicing rehabilitation services may be made by or to the rehabilitation administrator. Disputes of a rehabilitation professional's qualifications will be heard in a formal rehabilitation conference. If the rehabilitation administrator affirms the disqualification of the rehabilitation professional, the rehabilitation professional may appeal the decision within 14 calender days to the Board. The rehabilitation administrator may provide guidelines for requalification to the rehabilitation professional effected. Disqualification will not take effect until the decision is written by the rehabilitation

administrator within 30 calender days of the formal conference and will include an effective date.

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(s) Within six (6) months of the adoption of this chapter, and any subsequent amendments to the rehabilitation provisions contained herein, rehabilitation regulations will be promulgated. The Board and its Director will be directly responsible for promulgation of rehabilitation regulations.

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(t) Amendments to the rehabilitation statute may be made upon petition to the Board. Changes may not be made more frequently than every four (4) years. Petitions for changes in the statute may be made by The Board, Employers, attorneys, employees, labor and management organizations, rehabilitation providers, physicians, and therapists. Upon adoption proposed amendments will supercede and incorporate all previous amendments and will be based in part upon rulings made by the rehabilitation administrator, the Board, and the Courts subsequent to previous amendments. Petitions to amend the rehabilitation statutue will include:

(1) the change(s) proposed;
(2) the reason the change is needed;
(3) the anticipated benefit of the proposed change;
(4) the anticipated effect if the change is not made;
(5) signatures of interested parties who support the proposed change.

Proposed changes to the rehabilitation statute will be presented to a vocational rehabilitation task force who will approve, disapprove or modify the proposed change within 90 days of the statute anniversary date. The task force will be composed of the following:

(1) the rehabilitation adminstrator;
(2) two representatives of management as recommended by the Board;
(3) two representatives of labor as recommended by the Board;
(4) two Qualified rehabilitation professionals as recommended by the Alaska Chapter of the National Association of Rehabilitation Professionals in the Private Sector (NARPPS);
(5) two medical professionals recommended by the Alaska Medical Association.

The rehabilitation administrator with chair the vocational rehabilitation task force. Recommendations for adoption of the proposed amendments will be promulgated according to AAC_____.

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All underlined terms above will require definition.

Alaska Interpersonal Communications: Deisher

Suggestions for other legislative efforts:
1) Licencing of Rehabilitation Professionals and Adjusters through the State of Alaska Division of Occupational Licencing;
2) Provisions for the suspension of U· ·mployment Insurance eligibility while an injured worker is recieving workers' compensation benefits. When Workers' compensation benefits are no longer being paid, access to the suspended Unemployment Insurance will be available without loss based upon the period of time the worker recieved workers' compensation benefits;
3)

ADD TO 23.30.041 (b)

The rehabilitation administrator will be an ex officio member of the Board and will participate in Board hearings and decisions when rehabilitation issues are in dispute.

PLEASE SEE ALSO THE RECOMMENDATIONS MADE IN "ALASKA'S WORKERS' COMPENSATION REHABILITATION: A CRITICAL PERSPECTIVE & SUGGESTIONS FOR A FUNCTIONAL SYSTEM." J.C. DEISHER, 1987.

COPY ENCLOSED.

ALASKA'S WORKERS' COMPENSATION REHABILITATION SYSTEM:
A Critical Perspective
and
Suggestions for a functional system.

by

Jon C. Deisher, MA, CRC

INTRODUCTION:

The difficulties being experienced in the Alaska Workers' Compensation Rehabilitation System are not unique. Our difficulties are mirror images of problems virtually nationwide. The central difficulties occur because each state periodically reinvents the rehabilitation wheel. Borrowing of statutory language has liberally occurred. Standardization of approaches is almost non-existent. Little effort is made to apply a systematic method of addressing a usually underestimated and incompletely understood problem. Advise from the rehabilitation industry is either not sought, discounted or ignored. Rehabilitation professionals are less than aggressive in offerring their advise anyway. The only significant standardization seems to be in the similarity of the percieved problems and the complaints made about them. Very little standardization exists regarding what rehabilitation is or what it ought to do.

This paper attempts to address the problems within the current Alaska Workers' Compensation Act and to outline a beginning point for the solutions. It is important to recognize that workable solutions to rehabilitation problems anticipate a process rather than a structure. In developing a process oriented method of addressing rehabilitation issues we must also be prepared to adjust the process periodically as techniques become available to make the process more effective, successful and responsive.

I. VALUES CLARIFICATION: a philosphical beginning.

The problems in Workers' Compensation Rehabilitation systems have been defined and redefined over the years. A recent paper provides a review of nationwide efforts to address rehabilitation issues1. Regardless of the methods addressing them, problems with rehabilitation persist. After changes are instituted, the same or similar complaints seem to arise. An impression persists that the problems are self-perpetuating or unavoidable. I believe we tend to address symptoms rather than the problems themselves. Problems are, perhaps, the nature of the beast. If we confront unavoidable problems which do not go away, regardless of attempted solutions, then we must seriously review how the solutions are generated. I do not believe we have a clear idea of what we want our rehabilitation system to do. We have a clear idea of the concepts we wish to use in developing a rehabilitation system, but not of what the system itself is supposed to do. Until we know what we want rehabilitation systems to do, any change attempt will fail. If we do not know where we are going we will end up somewhere else!

We all agree the system must be competent, responsive, responsible, managable, regulated, time sensitive and cost effective. These qualities are the <u>controls</u> rather than the <u>goals</u> of the system.There are many complaints about how the system is controlled. Because the goals toward which the controls are directed are poorly clarified, we must expect disputes to result. At present, we are more clear about what results we do not want the system to produce than what we want it to produce. Goals are results oriented2. If we do not know where we are going any road will take us there.

We must begin with a basic philosophical premise: a statement of values3. Given foundational values we may more easily move toward agreed upon goals. The following values are suggested:

1) the work ethic and the value of remunerative employment;
2) incentives for early and timely return to work;
3) removal of work disincentives;
4) rights matched with appropriate responsibilities wherein responsibilities are invested with authority, and rights are invested with protections;
5) a well ordered and compassionate sense of justice;
6) continuation of the no-fault assumption of workers' compensation risk.

These are practical values for a Workers' Compensation Rehabilitation system. They are not necessarily operational concepts. They represent the <u>drive</u> of the rehabilitation system. The rehabilitation system itself is the <u>vehicle</u>

carrying the injured worker to his rehabilitation destination. However, to have a vehicle does not mean it is well designed, its destination is clear or its course is well defined.

Improvements to the present Rehabilitation system are both inevitable and desirable. The changes can be either controlled or uncontrolled. Too much is at stake to permit the latter. To permit the former, a ballance is needed. I believe that controlled change must have a philosophical foundation. We must: 1) know where we are going, 2) know the course that will take us there, and 3) have a vehicle that is capable of transporting us.

"Anywhere but here" is NOT an acceptable goal! Any vehicle but the present vehicle is NOT an acceptable reason to change modes of transportation! Undirected change will result in fragmentary special interests influencing the change process, giving us an unballanced, fragmented result.

"What's in it for me" (WIIFM) is NOT necessarily an acceptable motive for change! If selfishly pursued WIIFM is adversarial in nature and inevitably results in dispute, conflict and litigation. Based upon a ballanced "win-win" philosophy, WIIFM is an acceptable negotiating process resulting in agreed upon results4. What we have today is a WIIFM system selfishly pursued. If change dynamics are based upon my wi ning at your expense, or vice versa, whatever result occurs will be no improvement but will simply move advantages from one place to another. The most productive change dynamics will emphasize values first and gain second.

Problems in workers' compensation rehabilitation are well recognized but poorly defined. Attempts to solve a poorly defined problem will fail in the long run. Our current problems are often described in terms of uncontrolled cost. However, the problem is NOT uncontrolled cost. Uncontrolled cost is the symptom of an ill-defined goal, a poorly constructed statute and an unregulated, paternalisitc bureaucracy. When we clearly define the goal, competently write ballanced, uncontradictatory legislation, and provide managable regulations, then costs will come under control.

Economic considerations must play a central role or nothing will work. However, we must begin with values and work toward economic support, not vice versa. To illustrate, in the 1960's the United States set a goal to place men on the moon. We then developed the means to achieve that goal. We did not decide to build a very expensive space vehicle, build it, and then cast about for something to shoot it at! Once the goal was defined, a vehicle was designed to accomplish it using the minimum bid process. We set a goal and went to the moon on a minimum bid. The goal was accomplished economically. But, as aggressive cost containment took control, our space program suffered a

series of failures not easily repaired. Over zealous cost containment resulted in egregious loss. Cost containment is not a goal but a process.

Rehabilitation is not going to the moon nor are we building space vehicles. We set goals and design vehicles to carry us there. We can learn from other industries as we develop a viable rehabilitation system. We will need careful vigilance. The goals and values we chose will have financial impacts and the ability to resist economic temptations pulling us from our goals will require obdurate self discipline. Economic goals presented as philosophical values must be seen for what they are; incomplete understanding of the problem.

Special interests will attempt to influence the change direction. Experts outside of rehabilitation will assume advisory roles influencing how rehabilitation systems will be designed. Is Joe Namath a credible expert for panty hose? Pete Rose for shampoo? Why should persons outside rehabilitation be credible experts to design rehabilitation systems? People outside of rehabilitation brought us AS23.30.041 which is problematic. The same people are involved in efforts to change AS23.30.041. The same advisors from outside of rehabilitation constructed the current dysfunctional vehicle (041) and are designing its replacement. Is it reasonable that after delivery of a dysfunctional vehicle that we would rely on the same "experts" to construct the next vehicle? Why are these "experts" more credible than representatives from the rehabilitation industry? We are living with an unacceptable product, will we live with the next product made by the same hands? Values and goals that result in rehabilitation systems that work are by definition cost effective and economically sound. But economic arguements resulting in rehabilitation systems that do not work are not cost effective or philosophically sound.

II. "CLASSIC REHABILITATION": the whole person approach

Often relationships are structured by formal systems influencing interactions between parties. We behave in standardized ways in hospitals, courts, churches, and other organizations. Behaviors are standardized by formal rules, codes of conduct and informal expectations and attitudes. Relationships in the Workers' Compensation System are not standarized. Due to a lack of goals, relationships are not structured. Attitudes the players have for eachother vary widely. Attitudes are structured by formal roles and play an important part in how the players work together toward a goal. Due to an absence of a clear goal, the parties in our system often assume informal roles outside of their expertise. If parties can assume responsibilities outside of their expertise it is difficult to hold anyone accountable.

Traditionally, the rehabilitation profession is a multidisciplinary. Multidisciplinary rehabilitation services are predicated upon a goal of the service recipient's successful return to work or maximized independence. Credibility between the various disciplines involved must be high. Physicians, therapists, counselors, social workers, psychologisists, nurses and families work closely together toward the rehabilitation goal. The multidisciplinary approach is the result of decades of experience which demonstrates that the best results obtain from the use of a systems methodology. The systems approach uses a "whole person" perspective of service delivery. The team is composed of professionals who have skills necessary to meet the rehabilitation goal. Team members are involved to the extent they contribute to the goal. This is the "classic Rehabilitation model".

Workers' compensation rehabilitation is not based on the classic model. Service delivery focuses upon the injury and is controlled within a quasilegal framework. The narrow focus upon the industrial injury and the legal or quasilegal overlay fragments services which traditionally work together. Rehabilitation regulations have not been promulgated since AS23.30.041 was initiated. Service providers work independently of other providers involved with the same case. The compentancies of the various players are not regulated, coordinated or controlled. Sometimes compentancies are totally erroded. The narrow focus of the workers' compensation responsibility and quasilegal overlay destoys and fragments traditionally multidisciplinary service. Professionals are not always in a position to deliver services they are capable of, or worse, may even be expected to provide services they are not capable of.

Conflicts between "classic" rehabilitation and workers' compensation rehabilitation result from different

assumptions of what rehabilitation is. "Rehabilitation" under the Alaska Workers' Compensation Act is not defined at all! A definition of rehabilitation provides a goal. Thus, we have no clear goal. Lack of a definition encourages assumptions which are not standardized. Therefore, the assumptions of the various players regarding what rehabilitation is or should be has resulted in conflicting expectations of rehabilitation goals, services, processes and so forth. A recent proposal to change the Alaska Workers' Compensation System even suggested that the concept of "rehabilitation" be totally eliminated from the provisions for rehabilitation services! We need operational definitions of "rehabilitation" and of rehabilitation concepts usable in the private sector. Rehabilitation professionals themselves must assume some responsibility for lack of clarity in this area.

III. REHABILITATION: not a dirty word

Rehabilitation is not just another fourteen letter word! It is an honorable concept of Latin origins. The prefix "re" means "again". "Habilitation" derives from "habilitare" meaning "to make fit", "enable", "endow with ability or capacity", "render able", "capacitate" and "qualify"5. Classically, to "make the worker fit again" requires medical, psycho-social, educational and vocational assessment services and decisions. Rehabilitation processes, then, must be multidisciplinary to make the worker "fit again". Exactly how this definition can be massaged to fit within a worker' compensation system must begin with operational definitions.

The pressure to amend or eliminate rehabilitation provisions in Alaska's Act is said to be driven by uncontrolled cost. Uncontrolled cost is the symptom that brings attention to rehabiliation systems. It is thought that cost containment will result from statutory change. Everyone agrees that rehabilitation is expensive, but no one knows exactly what forces drive those expenses. Competent rehabilitation is cost effective. Simply because costs are high does not necessarily mean they are uncontrolled or inappropriate. The industry is, and should be, held accountable for its expenses. But forces outside of rehabilitation also drive rehabilitation costs. When rehabilitation costs are symptomatic of those forces, the rehabilitation industry should not be held accountable. The source of the symptoms is not well understood because they are not seen as symptoms but as the basic problems.

Rehabilitation is expensive, but definitions of rehabilitation do not include provisions for cost. At least five forces influence expenses which show as rehabilitation costs: Legitimate rehabilitation services, insurance adjusting, legal services, medical services, and the judicial system. Decisions made by forces outside of rehabilitation have impacts upon expenses for which the rehabilitation industry alone is held accountable. The rehabilitation profession must identify methods to contain costs for which it is responsible. However, other industries are responsible for expenses for which the rehabilitation industry has no control. These expenses must be understood and accountability properly placed. No one, not even the AWCB, has data on this issue.

We do have multiple disciplines involved in Workers' Compensation rehabilitation, but they are not coordinated. The disciplines do not agree on what rehabilitation is. Services are fragmented and the various dsciplines operate in almost mutual exclusivity. The various disciplines practice virtually independently of, and sometimes in spite

of, eachother. Members of the same discipline often compete with eachother on a claim to the detriment of cost containment. Team meetings are rare or non-existent. Duplicated services are common. Concurrent services are uncoordinated. Time loss is uncontrolled and cost containment is illusive. Injured workers and employers are distrustful of eachother. Providers are protective of their turfs. Competence and credibility questions underlie professional interactions. These symptoms contribute to claim life and continuing cost. Rehabilitants are "made fit again" in spite of services rather than because of them. Rehabilitation professionals are often used as tools for litigation and settlement rather than as bonafide service providers. Despite examples of excellent rehabilitation service, everyone involved knows improvements are needed. I fear that present change dynamics threaten to perpetuate and worsen the problem rather than develop a productive process for addressing and resolving the real issues. The last group asked, as an industry, to address problems of vocational rehabilitation and suggest potential solutions is the vocational rehabilitation industry itself. They also seem loathe to initate suggestions.

Private rehabilitation providers are either private business people or employees of private businesses. They are, therefore, very aware of the free enterprise dynamics of making a business work. The same concepts which are viable for business as a whole are applicable to rehabilitation companies. As business people, rehabilitation providers should understand cost containment principles very well. However, given the statutory provisions of how services are requested, ordinary free market dynamics are not allowed to work. Rehabilitation providers are "seduced" into focusing marketing efforts toward the third party payor because the injured worker has no authority to select a rehabilitation provider and no resources to pay for services recieved. A double bind is active here. The goal of the third party is to meet their obligation as soon as possible to reduce costs. Therefore the marketing approach made to the payor focuses on time and cost containment, or the content nature of their services. The goal of the injured worker is to return to work at or near their pre-injury wage. So, the marketing approach to workers focuses on the "classic model", or process nature of services. A conflict exists between the content and process of services, when in both are important. The difficulty arises because providers are influenced by one side who pays and the other side who recieves. It is widely perceived that rehabilitation providers skew their efforts toward payors. The rehabilitation provider must advocate for the best possible rehabilitation service in both content and process.

IV. RHETORICAL CONSIDERATIONS: what are we talking about?

We have definitional problems resulting in conflicting or unrealistic assumptions and expectations. Most of the difficulties we encounter are related to communication or lack of it. (Pareto's Law) Different disciplines talk about the same or similar processes in different ways. The same language is used with different intent. Different words are used synonomously. A wide variety of issues are decided daily based upon no agreement on rehabilitation concepts or questions. To illustrate, the following rhetorical questions are offered which are not currently resolved by the Alaska Workers Compensation Act:

1) - How shall we define rehabilitation? Vocational Rehabilitation? Vocational Rehabilitation Evaluation? Rehabilitation services? Vocational Rehabilitation Services?
- Does successful rehabilitation mean return to work? Ability to return to work? Compromise and Release? Financial Independence? Reasonably attainable employment? Employment? Employability? Placement?
- Is a rehabilitation evaluation a rehabilitation service? Is a rehabilitation evaluation a screening process of collecting data used to justify or deny rehabilitation services? What are the goals of the evaluation?
- When do rehabilitation services begin and end?

2) - How shall Vocational Rehabilitation, Medical Rehabilitation and Psycho-social Rehabilitation services be juxtaposed? Are they the same? Overlapping? Mutually exclusive? Interdependent? Should they be developed without concurrence from their respective practitioners? How will professional advisors be selected?

3) - Who qualifies for rehabilitation services?
- Will claimants be manditorily referred under a time loss formula? Will claimants be voluntarily or self referred under a "rehabilitation fund" or "time window" concept?
- Are rehabilitation services a right or privilege?
- What, if any, financial or time limits obtain for rehabilitation evaluations and/or services?
- Can a claimant reasonably refuse rehabilitation evaluations or services?
- Will injured workers be screened for "elective" rehabilitation services by a return to work scale?

4) - Specifically, what are Qualified Rehabilitation Counselors (QRPs)? Are rehabilitation counselors actually

Re-employment Specialists? How do we know one when we see one?

- What educational/professional credentials are accecptable?
- What autonomy or control will QRPs work under?
- How will QRPs be reimbursed for their services?
- Who will assign the QRPs to injured workers? How?
- Should adjusters and attorneys be specifically qualified to work with industrially injured workers? How will we know a Qualified Rehabilitation Adjuster (QRAdj) or Qualified Rehabilitation Attorney (QRAtt) when we see one?
- What qualifications will the Rehab Administrator have? Can the R.A. be impeached or replaced? How? What is the relationship between the R.A. and the AWCB?
- What authority will qualify or disqualify QRPs, QRAdjs and QRAtts? How?

5) - What is a disability?
- What is the difference, if any, between medical and vocational disabilities? How do we know the difference?
- What is the relationship, if any, between medical stability and vocational stability?
- What is the distinction between permenant and temporary disability? scheduled and unscheduled disability?
- Should all injuries be scheduled?
- To what extent, if any, should rehabilitation services be tied to the Temporary Total Disability concept?

6) - What is a transferrable skill? How do we know one when we see one?6

7) - How is the labor market that applies to the injured worker defined? What variations are permissible? To what extent, if any, will rehabilitation services be determined by labor market conditions?7

8) - What consistutes non-cooperation? How are the concepts of cooperation, mitigation, malingering and refusal defined and related?
- Who can be uncooperative? Who decides?
- Specifically, how are claimants/employees, adjusters/employers, attorneys/representatives, providers, vendors or other participants uncooperative, if at all?
- Under what conditions is it proper to controvert a claim? Is controversion of a claim discretionary? May controversions occur without prior notice? What penalties, if any, accrue for improper controversion?
- What penalties, if any, accrue if a party other than a claimant is not cooperative?

9) - How can roles between the parties be clarified? Who will be responsible for what? How can the parties be encouraged to stay within their defined areas of expertise? How will accountability be established and enforced?

10)- What is Suitable Gainful Employment (S.G.E.)? Does S.G.E. mean "reasonably attainable employment" or "employment"? Is S.G.E. a viable concept?

- How much of a wage loss is acceptable upon return to work to be defined as "suitable"?

- Should a claimant's preference of a vocational goal be a component of S.G.E.?

- Are labor market conditions a component of Suitable Gainful Employment? How should labor market conditions be assessed?

The above rhetorical considerations are not all inclusive or mutually exclusive. However, they are questions which, due to lack of clear resolution, have resulted in significant misunderstanding and litigation. Of course, rehabilitation litigation contributes to rehabilitation expense. The drive of litigation is not the litigator. Rehabilitation litigation results from the absence of clearly defined goals and from confused statutory language. The above questions, when answered, point us toward the values and fundamental philosophy of a viable rehabilitation system and ultimately reduced cost. Efforts made to change how rehabilitation services are designed, defined and delivered must attempt to resolve the questions listed above (IV) in order to reduce the time required to produce a successful rehabilitation result, reduce case life and to establish methods of cost containment. The goal must be a viable system, not special interest advantage.

V. AS23.30.041/MANDITORY REHABILITATION: apples/oranges.

On July 1, 1982, AS23.30.041 or "041", the Workers' Compensation Rehabilitation statute was promulgated. 041 is poorly constructed. It is said to provide manditory rehabilitation services. In fact, only rehabilitation evaluations are manditory. If an injured worker suffers a permanent loss of wage earning capacity he/she must be referred for a full rehabilitation evaluation. As provided by 041, manditory rehabilitation is paralysed. The paralysis of 041 is not a failure of manditory rehabilitation. The failure of 041 is the result of confused statutory construction. Substantial efforts since promulgation have not produced rehabilitation regulations. Under the Alaska Workers' Compensation Act, rehabilitation cannot succeed. The rehabilitation statute is not regulatable due to poorly defined or undefined concepts and convoluted language problems. Neither of the primary parties (Management or Labor) like the rehabilitation product, but this is not necessarily the result (as alleged) of incompetent secondary parties (physicians, rehabilitation providers, educators, or other vendors). Competent and successful rehabilitation services exist inspite of an ambiguous and contradictory statute. Successes are usually the result professional standards and ethics rather than requirements of AS23.30.041.

041 OFTEN CONFLICTS WITH "CLASSIC", TRADITIONAL REHABILITATION PRACTICE. Conflicts between legislative mandate and professional standards are partially responsible for difficulties described above. The conflicts produce litigation. Litigation drives costs of the secondary parties. The secondary parties are then held responsible for increased costs. The extent to which rehabilitation issues are litigated is contrary to the intent of AS23.30.041. Efforts by the Workers' Compensation Committee of Alaska (W.C.C.A.) must be careful to avoid overreactions to costs attitributed to secondary parties which are in fact driven by poor statutory construction.

The avowed purpose of the W.C.C.A. is to reduce workers' compensation costs 30%, not to improve services. In addition, although respected rehabilitation professionals are involved, the W.C.C.A. did not approach professional rehabilitation organizations for consultation regarding problems or solutions. How viable vocational rehabilitation solutions could result from a group not recognized by the vocational rehabilitation profession is a curious question. This is the process which, 6 to 7 years ago, gave us AS23.30.041. Workers' Compensation Rehabilitation need not be in conflict with traditional rehabilition services. A rehabilitation system imposed without recognition or

contribution from rehabilitation organizations is an act of arrogance and questionable credibility. It is incredible that a system of professional practice would be imposed upon an industry which did not participate in its development. Here the motivation of the change agents supporting such efforts should be called into question. Why rehabilitation organizations have not more actively protested is also interesting. Again, the motivation must be to develop a viable system, not in moving or reinforcing advantages.

Manditory rehabilitation is intended to provide a timely and cost effective assessment for returning an industrial injured worker to the work place. Manditory rehabilitation may or may not be a viable concept. It is consistent with the historical no-fault assumption of Workers' Compensation insurance. The ideal of manditory rehabilitation service is to provide a no-fault process by which the injured worker's barriers to employment, if any, may be identified. The value of manditory rehabilitation referral is to reduce disputes over whether employers will refer and employees will be referred for rehabilitation evaluation. Reduced dispute means reduced litigation which means reduced expense, earlier movement of the worker back to the labor market and general cost effectiveness. The process provided by 041 does not adequately reduce litigation or result in timely rehabilitation referral.

Manditory rehabilitation may not be the answer to in providing relief to employers and employees in the workers' compensation dilema. However, the failure of 041 is not necessarily the failure of manditory rehabilitation. As discussed below, manditory rehabilitation never had, and never could have, an opportunity to succeed.

VI. LEGISLATIVE INTENT: the road to hell is paved....

One reason for writing AS23.30.041, was to reduce litigation. The current pressure to change, abolish or rewrite AS23.30.041 is also to reduce litigation. Rehabilitation evaluations to assess the need for rehabilitation services are intended to reduce employer's financial loss and employee's time loss. Due to the manditory nature of rehabilitation referral, claimants are said to have a right to a rehabilitation evaluation whether they want it or not. Employers are responsible to provide the rehabilitation referral (after 90 days of "permanent disability") whether they want to or not. Neither party believes they should be forced to be involved with rehabilitation services. Both parties often believe that rehabilitation is crammed down their throats.

The employer may believe that the manditory rehabilitation referral represents a return to work DISincentive. If a claimant recieves rehabilitation services while recieving disability compensation, he may not be motivated to return to work. An employee may prefer temporary disability (TTD) benefits to remunerative work which may pay less than his compensation. Employers often allege, usually with case citations, that after extensive and expensive rehabilitation services the employee settles his case and then returns to his regular work. Therefore, rehabilitation has been a waste of time and expense.

The employee may believe, that the manditory rehabilitation referral represents exploitation of his injury and paternalistic subversion of his genuine interests to return to work. If an employer can demonstrate an employee's wage earning capacity in any occupation, regardless of the employee's preferred area of employment, then the employee's disability benefits can be controverted. Therefore, rehabilitation is cited as a tool used to minimize the employer's obligations.

The intent of AS23.30.041 was to encourage the employee and employer to come to a mutual agreement for the course of rehabilitation evaluations and services. The parties may come to agreement on virtually anything. But it does not always work out that way. The problems arise when the parties do not come to agreement. Although examples of successful rehabilitation occur under 041, the promise intended by the statute has not been fully realized.

When the parties do not agree on rehabilitation issues, three possible disputes before the Rehabilitation Adminstrator are possible and then, if necessary, may be appealed to the Board. Board decisions may be appealed to Superior Court. The rehabilitation disputes under 041 are:

1) Is the employee eligible for rehabilitation?

a) Shall the employee recieve a rehab evaluation?
b) Does the employee need rehab to return to work?
c) Does the employer owe more service after the rehab services are interrupted or completed?

2) Has the employee been cooperative?
a) Cooperative with Rehab evaluations?
b) Cooperative with Rehab Plan?
c) Cooperative with Rehab provider?

3) Does/do the Rehab plan(s) comply with the 041?

The statutory language used to address rehabilitation disputes is ambigous. Therefore, whatever decision is handed down, appeals are almost automatic. No provisions enforce the Rehabilitation Administrator's decisions during the appeal process. Parties are not required to comply with the Administrator's decision during the appeal process. No formal record is kept during Rehabilitation Hearing. No rules of evidence are provided allowing for admissability of or disagreement on facts in evidence upon which the Administrator's decisions are made. When heard on appeal arguements are heard "de novo"; i.e. the Board may hear the same case based on different arguments, facts, evidence, interpretations and testimony than those heard by the Administrator. The Rehabilitation Administrator may be overturned or upheld for reasons unrelated to the rational of the appealed Decision and Order. <u>The method of dispute resolution perpetuates litigation, contributes to fragmented rehabilitation services, drives up the cost of vendor and attorney fees, and undermines the intent of the statute.</u>

Litigation influences the cost of rehabilitation service. But litigation should NOT be eliminated from the system. The reason for litigation is not because blood thirsty attorneys are chasing rehabilitation ambulances. Our litigation rate is the result of ambiguous rules. Parties need representation for their differences. Creation of an arbitrary process which would eliminate a "due process" method to resolve differences is dangerous and not justified. Current issues are litigated because 1) disputes are generated by the statutory language and 2) no other method is available to resolve bonafide differences. Provisions can be written for resolving rehabilitation disputes in a fair and equitable manner. Equitable rehabilitation provisions are less likely to result in disputes.

VII. REHABILITATION DISPUTES:
A quiet force in Rehabilitation expense.

As stated above, three possible disputes may be addressed by the Rehabilitation Administrator or designee:

1) Referral for rehabilitation evaluation or eligibility issues;
2) Allegations of refusal, non-cooperation or failure to mitigate; and
3) Disagreements regarding the acceptability of a plan.

1) Rehabilitation Referral: referral for an evaluation is called for by AS23.30.041(c):

> "If an employee suffers a permanent disability that precludes return to suitable gainful employment, the employee is entitled to be fully evaluated for participation in a rehabilitation plan within 90 days of the date of injury."

The most difficult interpretation is with the concept of "permanent disability". For the purposes of vocational rehabilitation, "disability" is defined in terms of lost wage earning capacity, not medical impairment as such.8 So, permanent disability means "permanent loss of wage earning capacity". If a question exists regarding whether an employee has lost his/her capacity to earn a wage as a result of an injury, the usual method of determining the loss, if any, is through a vocational evaluation. If the disablity is permanent and precludes return to suitable gainful employment, the employee will be referred for evaluation within 90 days. But evaluation is not required unless the disability is permanent. The permanence is often not known unless an evaluation is done. <u>An evaluation cannot be required unless the loss of wage earning cacity is permenant, but the permenance may not be known unless the wage earning capacity is evaluated!</u> What we have here is a circular language problem which paralyses the referral process and the referral may not be made at all, or made so late that rehabilitation services cannot be maximally effective.

It is common knowledge within the rehabilitation industry that the sooner one has access to rehabilitation services the greater the benefit from those services. Early referral takes advantage of the employee's motivation to work, his engrained work ethic, his existing physical fitness, and his lack of being accustomed to recieving time loss benefits. However, if referral is delayed then the advantages of early referral are lost and the time required for resolving a worker's barriers to return to work is extended. Thus, when a referral is not made in a timely

manner, and the rehabilitation provider is unable to produce early return to work, the provider is held responsible for the extended time loss! AS23.30.041 is said to require manditory referral for a rehabilitation evaluation, but the circular language of the statute prohibits the timely referral from happening.

2) Cooperation: AS23.30.041(h) is the basis for cooperation disputes:

> "Refusal by an injured employee to participate in an evaluation or a rehabilitation plan approved by the rehabilitation administrator or agreed to by the parties results in forfeiture of disability compensation for the period the refusal continues."

Later, the same paragraph goes on to say:

> "The rehabilitation administrator may find that an employee refuses to participate in an evaluation or rehabilitation plan if the employee fails to cooperate with the rehabilitation provider."

In other words, non-cooperation is based upon the employee's "refusal to participate". If an employee refuses to participate with a rehabilitation evaluation or with a rehabilitation plan that was agreed upon or approved by the administrator, then the employee's benefits may be controverted. No basis is given for reasonable refusal to participate. The statute is silent with respect to refusal of any another party to participate!

3) Plan Dispute: AS23.30.041 states that the parties "may agree upon a rehabilitation plan". The intent is that the parties will come to an agreement upon a plan without litigation. However, litigation occurs due to conflicting provisions within the Act. First, an order of preference (AS23.30.041(i)) is presented which must be followed systematically. Plans are prioritized such that if the injured worker can be returned to suitable gainful employment at a level on the order of preference, then plans of a lower level need not be offered. Generally, the higher a plan is on the order of preference, the shorter the plan. Second, the plan must result in suitable gainful employment. AS23.30.265(28) defines Suitable Gainful Employment:

> "'Suitable Gainful Employment' means employment that is reasonably attainable in light of an individual's age, education, previous occupation, and injury and offers an opportunity to restore the individual as soon as practical to a remunerative occupation and as nearly as possible to his average weekly wage as determined at the time of injury."

The concept giving rise to the greatest controversy is the "average weekly wage as determined at the time of injury." Longer plans may beadvocated by injured workers or their representatives because of the belief that a longer plan will result in a higher wage. Longer plans also involve longer Temporary Disability benefit payments. Shorter plans may be advocated by employers or their representatives because of a belief that a shorter plan will result in an earlier return to work. Shorter plans also require shortened Temporary Disability payments. Therefore, provisions of the order of preference are taken as the basis for one side of a dispute, while provisions for suitable gainful employment are taken as support for the other. Many disputed plans are argued based on this statutory conflict.

Other areas of litigation based upon the definition of Suitable Gainful Employment include:

1) What is reasonable employment?
What is attainable employment?
Are we discussing actual acquisition of employment or of employable skills?

As presently practiced, reasonably attainable employment is assumed to be focused upon a specific labor market. Although some variations may be taken, the basic parameters of any employee's labor market have been defined as a 50 mile radius or one hour commuting time one way from the workers' residence and from the employers' place of business. (Ragland) In some cases this definition is limiting if the employees' residence is a very rural area with no employment opportunities and the place of employment is also very rural with no employment opportunities. Is it fair that a detemrination of Permanent and Total Disability (PTD) be dependent upon strict labor market parameters?

2) What does "as soon as practical" mean?

Most injuries require virtually no vocational attention for immediate return to work. Others may require much more than the limits allowed under AS23.30.041. Indeed, Pareto's Law may apply here as perhaps 80% of the injuries require 20% of the time and expense of rehabilitation and 20% of the injuries require 80% of the time and expense. But the question remains, how much service is fair for the employer to support, and how much is fair for the employee to expect?

3) What does "as nearly as possible mean"?

In some cases as nearly as possible may mean a mere fraction of the average weekly wage as determined at the time of injury. What fraction of the average weekly wage is suitable to determine that rehabilitation services are no longer needed?

4) Suitable Gainful Employment definition makes no reference to or provisions for either of the parties' preferences. Particularly the injured worker has no choice for a preferred vocational rehabilitation goal. That the

worker's preferences have no statutory standing in determining a rehabilitation goal results in considerable litigation.

As a final comment on SGE, Alaska's definition of SGE is identical to the definition used by the State of Florida.9 It would seem wise to contact the appropriate persons in Florida and request information about 1) how and if they make this definition work, 2) what problems they have had with it, 3) how they resolve the problems and so forth. This would seem a prudent approach to finding successful solutions to a problematic definition.

VIII. THE EMPLOYEE'S and THE ATTORNEY'S INTEREST: Untouchable conflict?

An attorney's relationship with his client is sacred. It is a relationship with strict protections. However, the potential exists within the Worker's Compensation Act for a conflict of interest or appearance of a conflict of interest between an employee and his/her attorney. This is not to say there are occurrances, instances, examples or events to which the following description refers. This discussion simply points out that the construction of the Act permits at least the perception that a conflict could occur between the interests of an employee and his/her attorney. This is not to allege that examples of this kind of conflict have occurred, only that a perception of a conflict could occur. That a perception of a conflict is possible creates a friction between the various parties involved in any given case. Rehabilitation services are often condemned for perceptions which are not always supportable in fact. That condemnations of professional groups can be made based upon perceptions allowed by statutory constructions serves to demonstrate the complexity of our problem and reinforces the need for a ballanced, comprehensive approach to the system's modification.

What is the potential conflict? Our Act provides that employee's attorneys must provide a valuable service in order to be paid. Once it is established that a valuable service has been provided, an employee's representative will recieve 25% of the first $1000.00 he generates for the employee and then 10% of everything more than $1000.00.10 This provision makes it impossible for the employee and the attorney to establish a separate agreement using different percentages, as in personal injury cases.

At the risk of oversimplification, settlement amounts (X) are based upon the difference between the average weekly wage as determined at the time of injury (Y) and the weekly wage the employee is capable of at the end of rehabilitation services (Z), multiplied by a variable time factor (T weeks). In other words, $X = T(Y-Z)$. Formulas vary depending upon whether or not the injury was scheduled and the statutory provisions in effect when the injury occurred. Generally speaking, the bigger the difference between the employee's preinjury wage earning capacity and his post injury wage earning capacity, the larger the settlement amount authorized. A larger wage difference means a larger settlement. If the employee's attorney provides a valuable service he will be paid as outlined above. The larger the settlement, the larger the claimant's attorney's fees. Rehabilitation providers are clearly not involved in the

settlement process so what difference does this make to rehabilitation?

When a rehabilitation plan is written designed to bring an employee's wage earning capacity as nearly as possible to the average weekly wage as determined at the time of injury, then the potential exists for a smaller settlement amount. The statute therefore provides the perception that an attorney's interest may result in condemning an otherwise well designed rehabilitation plan because the settlement amount resulting from the wage earning capacity provides an unattractive percentage for an attorney's fees. It is possible that an attorney could even denigrate his own client to force the presentation of rehabilitation plan producing a lower age earning capacity. A lower wage earning capacity would result in a larger settlement amount from which a larger 10% could be expected.

This a discussion of perception and potential not fact. But this perception provides a credibility problem for employee attorneys. The credibility problem experienced by employee attorneys, combined with the credibility problem experienced by rehabilitation providers mitigates against the overall perception of professional ethics in the workers' compensation system. The credibility of all professionals involved in the Workers' Compensation system suffers as a result. Resolving a problem of perception is very difficult, particularly since instances demonstrating the problem are not available. It is not a problem that can be addressed by the rehabilitation industry or members thereof alone. However, the perception creates an additional credibility problem which directly influences rehabilitation processes. The perception of potential conflict of interest is indicative of another statutory construction problem which creates 1) an impression of predatory professionals feeding off injuries of Alaska workers and 2) establishes, as outlined above, attitudinal and credibility barriers between professional groups.

Finally, the issue of the rehabilitation result establishing a post injury wage earning capacity places rehabilitation professionals in a vulnerable position. It is absolutely prohibited that a rehabilitation provider be involved in settlement issues. Settlement issues properly belong exclusively to the injured worker and to his employer or the insurance carrier. But the rehabilitation product provides the wage earning capacity which will be used to compute a settlement amount. Therefore, the rehabilitation result is central to the ultimate resolution of a claim. Thus, the rehabilitation provider is placed in a conflict where the rehabilitation product anticipates a resolution of a claim, but the rehabilitation provider is prohibited from discussing the resulting impact on settlement of the rehabilitation services. It is probable that an injured

worker will want to discuss the rehabilitation results and its implications for settlement with the rehabilitation provider. In fact, the issue arises when virtually every rehabilitation plan is presented for approval.

Ideally, a provider will refer questions of settlement to the worker's attorney, if he has one. However, the employee's attorney may not have adequate information regarding the rationale for the plan. As discussed, the attorney's interest may not lie with the rehabilitation result. The ground work is laid for divisive relationships between the claimant, his attorney, the rehabilitation provider and the employer. The basis for the divisivness is rooted in the statutory construction of AS23.30.

IX. PROVISIONS FOR UNEMPLOYMENT SERVICES:
the lost benefit.

In Alaska, an unemployed worker must apply for unemployment benefits within nine months of his becoming unemployed or his benefits are lost (Citation needed). This means that if an employee is injured, immediately recieves workers' compensation benefits and remains on compensation for more than nine months, then his unemployment benefits are lost. Therefore, an injured worker who recieves workers' compensation and rehabilitation benefits for longer than 9 months, who develops employable or marketable skills as a result of rehabilitaion, but is unable to find immediate employment after rehabilitation, is not eligible for unemployment insurance. He is ineligible despite the fact that he and his employer paid unemployment insurance premiums from which he never recieved any payment because of his compensation benefits. He cannot recieve Unemployment benefits while simultaneously recieving Workers' Compensation. (Citation needed) Thus, a worker who has employable skills after completing rehabilitation services, but is not employed as a result of rehabilitation, has no financial choice but to remain, or attempt to remain, on compensation. A statutory provision is needed, separate from the provisions of the Worker' Compensation, which will hold unemployment benefits "in escrow" until a wage earning capacity or employability is established through rehabilitation services. At that point the employee would have access to unemployment benefits and the employer would be entitled to take an appropriate offset against the Partial Benefits due to the employee.