

ALASKA LEGISLATURE COMMITTEE FILES 1987-1988 8672

5393 SLAB SB 322 (file 13) - (file 14)

Alaska Interpersonal Communications: Deisher.

X. SUGGESTIONS: worth every cent you paid for them!

1) **NATIONWIDE REHABILITATION SERVICES RESEARCH:** Due to the width and breadth of the workers' compensation problem and the seemingly similar complaints about rehabilitation nationwide, it seems logical to conduct a nationwide analysis of rehabilitation systems. This analysis would be performed by an "independent uninterested third party" funded by the insurance industry. Research groups which have done this type of analysis are: the Rand Corporation and the Meninger Foundation. The research would address issues such as;

What rehabilitation systems are successful?

What determines rehabilitation success?

What are reasonable solutions to the problems of establishing a fair compensation rate?

What is a reasonable goal for vocational rehabilitation services?

What is the definition of Suitable gainful employment?

Basically, what standardized answers can be suggested for the Rhetorical Questions section described above?

To initiate research of this magnitude will be expensive. But it would provide standardized answers to the fundamental questions hotly being debated concerning Workers' Compensation and Vocational Rehabilitation. As a result of the research perhaps a standardized process could be established. Hypothetically, this research should pay for itself.

2) **STATUTORY PROVISIONS FOR PROACTIVE AND EVOLUTIONARY CHANGE:** To promulgate a workable workers' compensation system, including rehabilitation systems, will require a planned change process. However, the approach we have taken in recent years has been to sweep all vestiges of the previous ways of doing things away and redesign an entire new system. The result is to throw the baby out with the bath water. We need to establish a process whereby existing statutory provisions can be changed thoughtfully and systematically, keeping provisions worth keeping and eliminating or adjusting provisions that are not worth keeping. A system of planned and orderly fine tuning is needed. Statutory provisions can be made allowing for systematic improvements to the workers' compensation system in general and the rehabilitation provisions in particular. Our pattern seems to be a complete revision of the rehabilitation statute every five to six years. Complete revisions of the rehabilitation statute create uncertainty, inconsistency, misunderstandings, prolonged case life and pervasive dissatisfaction. And the stated purpose, to impose cost containment, seems as illusive as ever.

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3) ESTABLISH A VOCATIONAL REHABILITATION TASK FORCE: To attempt the design and promulgation of a rehabilitation system by a subcommittee which minimally involves rehabilitation organizations seems designed to fail. It certainly is not designed to represent a perspective of rehabilitation supported by vocational rehabilitation organizations. If our goal is genuinely to design a workable system of rehabilitation then the committee charged with the goal should be predominantly rehabilitation professionals. Ideally, the professionals would be designated by their peers. The Task Force would address specific questions and problems presented to it and would provide specific recommendations from a rehabilitation point of view.

4) REGULATIONS: Establish mandatory regulations to be promulgated within 6 months of promulgation of the statutory changes and within 6 months of any subsequent change.

5) QUALIFICATIONS: Establish qualifications for professionals serving industrially injured workers: Rehabilitation Providers, adjusters, attorneys. Establish a rule that the Rehabilitation Administrator must, prior to appointment, meet or exceed the qualifications needed for a "journeyman" rehabilitation provider. Qualifications might be established through the Alaska Division of Occupational Licencing.

Separate statutory provisions are needed to ensure that adjusters working with workers' compensation cases are qualified to do so. The current licencing testing for insurance adjusters contain less than five questions related to workers' compensation. Adjusting workers' compensation cases requires a fund of knowledge significantly and qualitatively different from adjusting automobile collision or home fire damage. Specific training of adjusters of the issues, dynamics and concepts involved in workers' compensation and in rehabilitation could represent a source of considerable savings due to more efficient, insightful and appropriate adjusting decisions.

6) DISPUTE RESOLUTION PROCESS: Establish a reasonable dispute resolution process which would include, arbitration, mediation, negotiation and conflict resolution. Litigation should not be eliminated, but should be a method of last resort.

7) SUITABLE GAINFUL EMPLOYMENT: 1) Bring the definition of Suitable Gainful employment under the rehabilitation statute; 2) clarify the definition of SGE. 3) make the definition of SGE compatible with the order of preference.

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8) PREVENTION: Establish incentives for employers to prevent injuries from occurring in the first place.

9) REHABILITATION WITH THE SAME EMPLOYER: Establish incentives for employers to reemploy their injured workers. An education process may be necessary to educate employers how reemployment of workers who were hurt working for them represents a method to save compensation payments.

10) POST REHABILITATION UNEMPLOYMENT INSURANCE: Statutory provisions are necessary to allow for unemployment insurance access to workers who have completed rehabilitation services. Exactly how the provisions would work would depend heavily upon the definitions and goals of rehabilitation, as explained above.

11) MANDATORY REHABILITATION EVALUATION, VOLUNTARY REHABILITATION SERVICES: Referral for a full rehabilitation evaluation for those workers who have not returned to work for 90 days post injury should continue to be mandatory. If the evaluation demonstrates that a worker would benefit from rehabilitation services, but the worker chooses to not receive rehabilitation services, methods should be available to resolve the claim without prejudice. If a worker then decides to obtain rehabilitation services from another source then he could pay for the services from settlement amounts received. This suggestion is helpful because it allows the worker to have truly voluntary rehabilitation services after the rehabilitation evaluation. This suggestion is not helpful because the requirements to pay for rehabilitation services out of settlement monies would be impossible to enforce.

12) BALANCE REHAB. ADMIN. RESPONSIBILITY WITH AUTHORITY. The rehabilitation administrator must have the following authorities:

1) the power to qualify and disqualify, and to assign and reassign rehabilitation professionals and adjusters.

2) enforce rehabilitation decision and orders until or unless overturned by decisions of the Board or Courts.

3) maintain a formal record.

4) act as the rehabilitation authority for, and ex officio member of, the Board on issues concerning rehabilitation. This would include writing those portions of Board D&O's pertaining to rehabilitation.

5) obtain second rehabilitation opinions, subpoena rehabilitation information.

6) assign penalties to any party for lack of compliance with the rehabilitation statute, rehabilitation regulations or rehabilitation D & O's.

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9)

13) STANDARDIZE DEFINITIONS AND CONCEPTS.

Define concepts as presented in section IV Rhetorical Considerations.

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XI. BIBLIOGRAPHY

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- 6) Transferrability of Work Skills. Timothy F. Field, PhD. & Celeste M. Taylor, MA. Valpar Interntnl. 1986.
- 7) Orval Ragland v. Morison Knudsen and Crawford & Co. AWCB 216222. Rehabilitation Administrator D&O, 3/28/86.  
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John Blume v. Arctic Slope/Wright Schuchart & Wausau Ins. AWCB 319836. 10/20/86.
- 8) Vetter v. AWCB. Sup.Ct.Op.#1057 (file #1943) 524 P.2d 264 (1974).
- 9) Florida Workmen's Compensation Law. 440.49.
- 10) AS23.30.145.

ALASKA W.C. EXPERIENCE CALENDAR YEAR 1986 (000)

INSURANCE COMPANY	RANK 1986	RANK 1985	MARKT SHARE	WRITTN PREM	EARNED REM	INCURD LOSS	LOSS RATIO	LOSS UNPAID
INDUS INDEM OF AK	1	1	13.95%	21067	21409	16976	79.3%	29392
ALASKA NATIONAL	2	4	13.12%	19675	20127	15327	76.2%	17503
PAC MAR INS CO	3	--	9.04%	16257	13873	11535	83.1%	8997
A L P A C	4	5	8.24%	12095	12646	6643	52.5%	23461
PROY WASH OF AK	5	3	6.68%	10430	10247	12668	123.6%	16444
AK TIMBER EXCH	6	7	6.24%	9583	9583	3383	35.3%	10202
AMERICAN INS CO	7	9	4.21%	6565	6468	7580	117.2%	13737
TRAVELERS INS	8	6	3.92%	5747	6017	7496	124.6%	18816
EMPLOYERS WAUSAU	9	11	2.86%	4729	4395	6339	144.2%	9873
PAC MAR OF AK	10	3	2.24%	1652	3436	4298	125.1%	7617
OLD REPUBLIC	11	28	1.76%	3799	2701	1448	53.6%	1229
EAGLE PACIFIC INS CO	12	23	1.63%	2230	2502	2680	107.1%	2036
FID & CAS OF NY	13	--	1.59%	2602	2440	1998	81.9%	2036
WAUSAU UNDRWTRS	14	18	1.57%	2517	2404	1850	77.0%	5393
ROYAL INS AMERICA	15	16	1.43%	2093	2192	2555	116.6%	3135
INS CO NORTH AMER	16	8	1.33%	2471	2035	-8	-0.4%	1165
NATIONAL UNION FIRE	17	17	1.29%	2202	1984	4100	206.7%	4553
LIBERTY MUTL FIRE	18	21	1.24%	1978	1896	947	49.9%	837
STANDARD FIRE	19	10	1.22%	1757	1879	2537	135.0%	5016
U. S. FIRE INS CO	20	--	1.02%	1758	1563	612	39.2%	1
AETNA CAS & SUR	21	--	0.90%	1316	1380	3403	246.6%	6192
FIREMANS FUND	22	13	0.88%	1207	1356	-95	-7.0%	3809
STATE FARM F&C	23	24	0.85%	1242	1309	1099	84.0%	2147
ALASKA INS CO	24	25	0.78%	1144	1194	946	79.2%	1560
AMERICAN NATL FIRE	25	19	0.74%	869	1134	1674	147.6%	2939
EMPLOYERS CAS CO	26	12	0.73%	1114	1114	2478	222.4%	1832
CITY INS CO	27	14	0.66%	-2441	1010	1609	159.3%	2430
INDUS INDEM N.W.	28	30	0.63%	946	964	862	89.4%	1432
ASSOCIATED INDEM	29	--	0.57%	885	873	723	82.8%	1724
CONTINENTAL INS	30	27	0.53%	712	818	1250	152.8%	4001
TOP 30 WRITERS	-----	-----	88.73%	136985	136170	117991	86.6%	198090
REMAINDER	-----	-----	11.27%	13489	17292	32302	186.9%	54065
TOTAL ALL WRITERS	-----	-----	100.0%	150474	153462	150294	97.9%	252175
TOP 10 WRITERS ACCOUNTED FOR			70.51%	OF THE MARKET				

29.19

TOP 10 WRITERS ACCOUNTED FOR 70.51% OF THE MARKET

1986 ALASKA W.C. EXPERIENCE

Compliments of Senator Paul Fischer

ALASKA W.C. EXPERIENCE CALENDAR YEAR 1985 (000)

INSURANCE COMPANY	RANK 1985	RANK 1984	MARKT SHARE	WRITN PREM	EARNED PREM	INCURD LOSS	LOSS RATIO	LOSS UNPAID
INDUS INDEM OF AK	1	2	15.11%	23869	22110	22593	102.2%	27062
PAC MAR OF AK	2	5	10.69%	16132	15636	11589	74.1%	9929
PROY WASH OF AK	3	4	9.70%	11716	14186	15137	106.7%	13597
ALASKA NATIONAL	4	5	8.89%	16642	13010	6777	52.1%	9853
A L P A C	5	3	6.89%	9218	10084	-457	-4.5%	28417
TRAVELERS INS	6	8	5.76%	8938	8433	11346	134.5%	15373
AK TIMBER EXCH	7	9	3.12%	4542	4560	1343	29.5%	6955
INS CO NORTH AMER	8		2.82%	4250	4118	151	3.7%	3235
AMERICAN INS CO	9	14	2.42%	4364	3541	2237	63.2%	9244
STANDARD FIRE	10	10	2.07%	1768	3022	2096	69.4%	4052
EMPLOYERS WAUSAU	11	6	2.03%	3379	2963	4089	138.0%	8776
EMPLOYERS CAS CO	12	20	1.88%	2745	2746	1947	70.9%	1128
FIREMANS FUND	13	13	1.73%	2308	2526	2502	99.0%	4944
CITY INS CO	14	30	1.71%	4103	2496	2346	94.0%	2056
PACIFIC EMPLOYERS	15	15	1.71%	2653	2495	1624	65.1%	3157
ROYAL INS AMERICA	16	18	1.54%	2291	2252	1593	70.7%	1815
NATIONAL UNION FIRE	17	7	1.53%	2311	2234	2674	119.7%	2499
WAUSAU UNDWRTS	18	11	1.45%	2083	2128	4319	203.0%	5487
AMERICAN NATL FIRE	19	21	1.19%	1729	1739	2212	127.2%	2106
HOME INDEMNITY	20		1.10%	1639	1606	2638	164.3%	5803
LIBERTY MUTL FIRE	21		1.09%	1374	1598	730	45.7%	649
ARGONAUT-MIDWEST	22	22	1.07%	998	1558	708	45.4%	1606
EAGLE PACIFIC	23		1.04%	2145	1518	1370	90.3%	985
STATE FARM F&C	24	19	0.99%	1518	1452	1378	94.9%	1957
ALASKA INS CO	25	23	0.90%	1431	1316	598	45.4%	1071
INDUSTRIAL INDEM	26	26	0.75%	1019	1101	2665	242.1%	2764
CONTINENTAL INS	27	16	0.73%	995	1073	1439	134.1%	4059
OLD REPUBLIC	28		0.73%	1650	1068	549	51.4%	501
FEDERAL INS CO	29		0.66%	1082	959	1190	124.1%	1584
INDUS INDEM N.W.	30	12	0.50%	788	729	1520	208.5%	1516
TOP 30 WRITERS	-----	-----	91.78%	139680	134257	110903	82.6%	182180
REMAINDER	-----	-----	8.22%	12560	12028	14054	116.8%	30357
TOTAL ALL WRITERS	-----	-----	100.0%	152240	146285	124957	85.4%	212537
TOP 3 WRITERS ACCOUNTED FOR			35.50%	OF THE MARKET.				
TOP 10 WRITERS ACCOUNTED FOR			67.47%	OF THE MARKET				

*Compliments of Senator Paul Fischer*

ALASKA W.C. EXPERIENCE CALENDAR YEAR 1984 (000)

INSURANCE COMPANY	RANK 1984	RANK 1983	MARKT SHARE	WRITTN PRMIUM	EARNED PRMIUM	INCURRD LOSS	LOSS RATIO
PROY WASH OF AK	1	1	13.47%	14922	16400	9535	58.1%
INDUS INDEM OF AK	2	2	12.84%	16123	15632	8953	57.3%
A L P A C	3	3	9.99%	9802	12164	16012	131.6%
PAC MAR OF AK	4	6	8.29%	10410	10097	4285	42.4%
ALASKA NATL	5	5	5.11%	6441	6222	2100	33.8%
EMPLOYERS WAUSAU	6	4	4.87%	5702	5933	5187	87.4%
NATL UNION FIRE	7	13	3.65%	3982	4448	962	21.6%
TRAVELERS INS	8	10	3.44%	3512	4185	6373	152.3%
AK TIMBER EXCH	9	12	2.77%	3383	3368	2995	88.9%
STANDARD FIRE	10	11	2.60%	2685	3169	1957	61.8%
WAUSAU UNDWR	11	29	2.45%	3055	2978	2091	70.2%
INDUS INDEM N W	12	20	2.06%	1490	2503	944	37.7%
FIREMENS FUND	13	25	2.03%	2431	2469	2343	94.9%
AMERICAN INS	14	8	2.02%	1862	2457	1659	67.5%
PACIFIC EMPLOYERS	15	19	1.61%	1971	1964	1282	65.3%
CONTINENTAL INS	16	15	1.60%	1773	1952	2484	127.3%
AETNA CAS & SUR	17	26	1.52%	1374	1855	3882	209.3%
ROYAL INS AMER-	18	--	1.40%	1833	1705	1140	66.9%
STATE FARM F & C	19	23	1.24%	1590	1504	527	35.0%
EMPLOYERS CAS	20	18	1.23%	1492	1495	1024	68.5%
AMER NATL FIRE	21	17	1.20%	1622	1464	473	32.3%
ARGONAUT MIDWEST	22	22	1.14%	1729	1385	1380	99.6%
ALASKA INS	23	24	0.76%	981	931	10	1.1%
FID & CAS OF NY	24	--	0.65%	804	792	1020	128.8%
ARECA INS EXCH	25	--	0.48%	588	588	344	58.5%
INDUS INDEM	26	16	0.47%	581	576	175	30.4%
MISSION INS CO	27	--	0.44%	542	532	385	72.4%
ASSOCIATED INDEM	28	28	0.40%	571	493	473	95.9%
ARGONAUT INS CO	29	21	0.30%	891	364	1066	292.9%
CITY INS	30	--	0.29%	2234	348	247	71.0%
TOP 30 WRITERS	----	----	90.34%	106376	109973	81308	73.9%
REMAINDER	----	----	9.66%	10625	11766	7667	65.2%
TOTAL ALL WRITERS	----	----	100.0%	117001	121739	88975	73.1%
TOP 3 WRITERS ACCOUNTED FOR			32.30% OF THE MARKET				
TOP 10 WRITERS ACCOUNTED FOR			67.04% OF THE MARKET				

1984 ALASKA W.C. EXPERIENCE *Compliments of Senator Paul Fischer*

## Summary of 1982 Supplementary Data System

- \* The Alaska Division of Workers' Compensation processed 10,125 time loss claims for 1982.
- \* August was the peak month for injuries in 1982. Injuries are always most prevalent during the summer and early fall when Alaska's labor force is at the peak of its seasonal activity.
- \* Women filed 17.5% of the time loss claims during 1982 although they comprised roughly 44% of the work force. Women workers tend to be found in less hazardous occupations.
- \* The construction industry lead all others in the number of reported time loss cases (2,308) accounting for 22.8% of the total while having only 9.2% of the nonfederal employment.
- \* Craftsmen, laborers, and operatives (excluding transport), are consistently the leading occupational groups for time loss cases, with nearly two thirds of the claims.
- \* Sprains and strains continue to be the leading nature of injury (46.2% of the total). The incidence of such injuries is greater among women (49.6%) than for men (45.5%).
- \* The back is historically the most frequently injured part of the body and is involved in one fourth of all time loss cases. Sprains and strains are the most common result of back injuries.
- \* The primary source of injury is "working surfaces" which caused 20% of all injuries. "Working surfaces" usually are the ground or floor above which an employee was working.
- \* The proportion of time loss cases due to overexertion has grown steadily since 1976 and this type of accident now accounts for 28% of all injuries.
- \* For the first time, Monday was replaced by Wednesday as the most hazardous day of the regular work week. Friday continues as the most injury free day.
- \* Over one half of all injuries involved employees who had been on the job one year or less. In construction and manufacturing, at least 25% of the cases were during an employee's first month of service.
- \* Roughly one third of all time loss injuries happen during or after the eighth hour of the work day.

The number of time loss claims for 1982 is just 3% lower than 1976, the peak year for construction of the trans-Alaska Pipeline. This represents a drop in the time loss claim rate from that year of record activity.

## Summary of 1982 Occupational Injury and Illness Survey

- \* The 1982 Alaska occupational injury and illness incidence rate for the private sector was 10.3 cases per 100 workers. The rate falls between the rates recorded in 1980 and 1981. Since 1977, the private sector rate has fluctuated between 10.0 and 10.4.
- \* The rate for occupational injuries in Alaska's private sector was stable from 1978 to 1981. In 1982, the injury rate increased slightly to its highest level in five years.
- \* The rate for occupational illnesses in the private sector was identical to 1981 and remains the lowest in several years.
- \* The 1981 incidence rate for lost workday cases in the private sector (4.8) was the lowest ever recorded in the annual survey. The 1982 rate (4.9) represents a slight increase over that prior year and is the second lowest to date.
- \* The total estimated number of lost workdays in the private sector in 1982 represent a loss of one year's work for 369 people. If measured by average salary, the cost was over 10 million dollars.
- \* Construction employment increased for another year at a record rate only surpassed during the Trans-Alaska Pipeline project. Its rate of occupational injuries and illnesses significantly surpassed last year's level and was the highest in nine years.
- \* Manufacturing industries broke last year's record low and experienced the lowest total case rate in the eleven years of the survey. Seafood processing's rate fell dramatically reaching record lows while the rate in lumber and wood products was stable. Losses in seafood processing employment were a factor in the declining rates.
- \* The oil and gas industry had 5% growth in employment from 1981 to 1982 and its occupational injury and illness rate decreased from its recent record high level in 1981.

## Injury and Illness Incidence Rates

The rate of 10.3 means that roughly one out of every ten Alaskan workers in private industry suffered a recordable injury or illness during the course of their employment.

### Occupational Injury Rate

The private sector injury rate declined steadily from 12.8 in 1974 to its low of 9.7 in 1978 and 1979. In 1980 and 1981 an injury rate of 9.8 was recorded. From 1981 to 1982 the private average annual employment and estimated hours worked increased 9% and 13%, respectively. In 1981 Alaska's private sector employment surpassed the prior record level of 1976, the high point in the construction of the Trans-Alaska Pipeline. Annual average private sector employment during 1982 was 14% above that record pipeline year. The total number of estimated injuries in 1982 rose by 17%, from 10,628 to 12,441 over 1981.

### Occupational Illness Rate

The occupational illness incidence rate in 1982 for the private sector was 0.2, identical to 1981. The illness case rate therefore continues to hold at its lowest level in seven years.

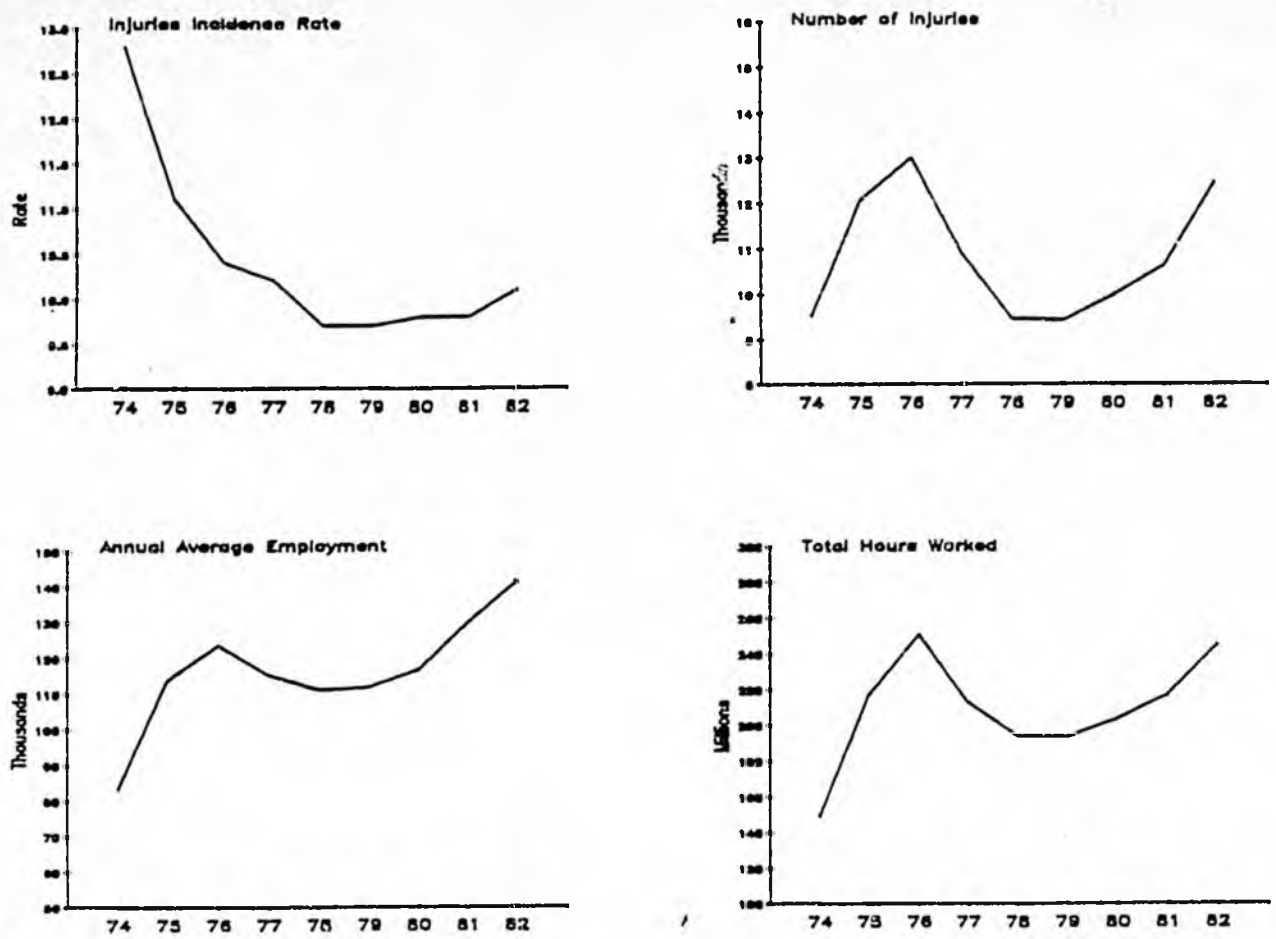
### Lost Workday Cases

Injuries and illnesses which result in lost worktime are generally more severe than those that do not result in time loss. The incidence rate for lost workday cases constitutes a measure of the more severe occupational injuries and illnesses. Lost worktime includes not only days the employee was absent from work because of job related injury or illness, but also days an employee was working but could not perform all regularly assigned duties.

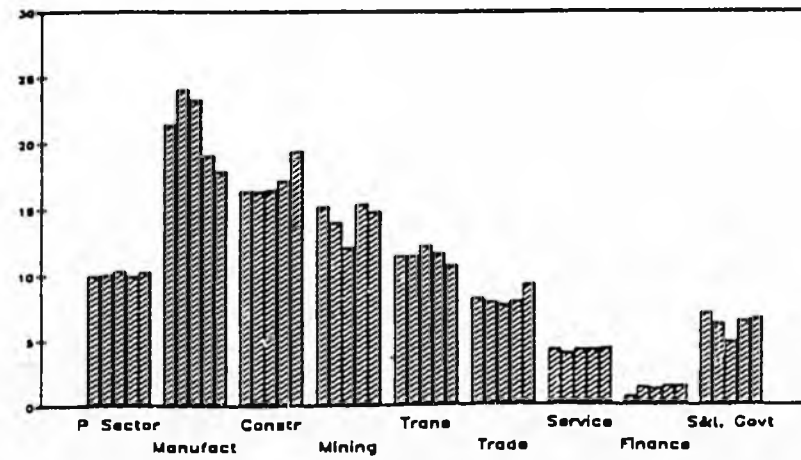
The incidence rate for time loss cases in the private sector during 1982 was 4.9 cases per 100 workers, an increase from the 1981 record low of 4.8, but still the second lowest rate ever recorded for Alaska's private sector.

Of the total lost workdays in the private sector in 1982, days away from work accounted for 95% while the remainder were days of restricted activity. The proportion of days away from work has been constant each year. Total lost workdays in Alaska's private sector in 1982 amounted to the equivalent of a full year of work from 369 employees. The cost for this lost time, in terms of salary, would equal over 10 million dollars.

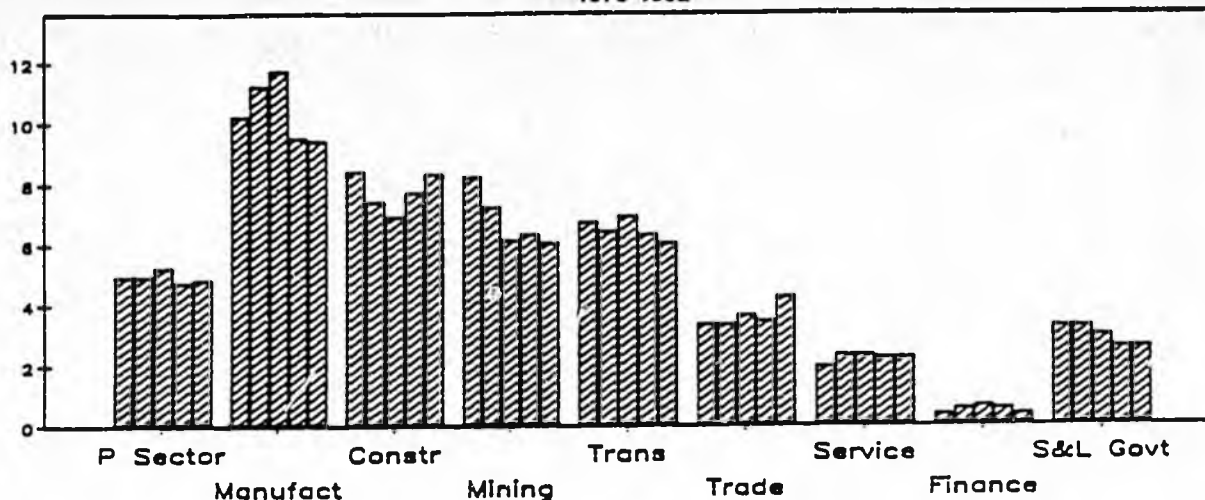
**Figure 1-1**  
**Occupational Injuries, Employment, and Hours Worked**  
**Private Sector**  
**Alaska**  
**1974-1982**



**Figure 1-2**  
**Occupational Injuries and Illnesses**  
**Incidence Rates**  
**Alaska**  
**1978-1982**



**Figure 1-4**  
**Occupational Injuries and Illnesses Lost Workday Cases**  
**Incidence Rates**  
**Alaska**  
**1978-1982**



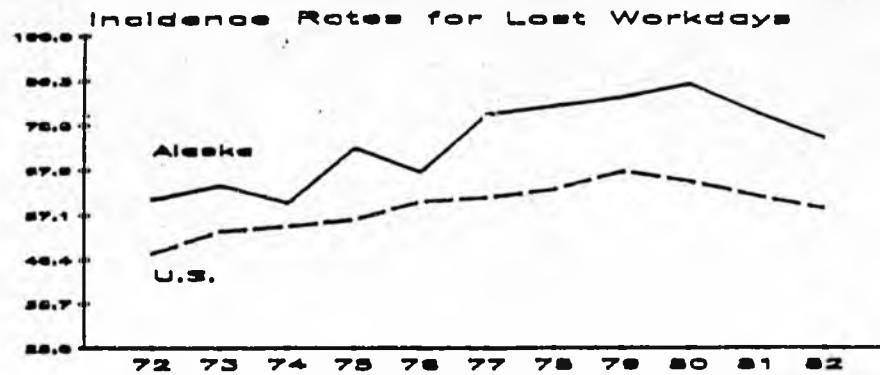
**Table 1-1**  
**Average Lost Workdays Per Lost Workday Case**  
**Alaska**  
**1975-1982**

	1975	1976	1977	1978	1979	1980	1981	1982
Private Sector	14	13	16	17	17	17	17	15
Mining	16	44	31	26	33	35	25	23
Construction	16	11	14	21	23	15	17	17
Manufacturing	10	15	13	13	11	11	14	11
Transportation & Public Utilities	15	14	21	18	20	20	20	18
Trade	10	7	12	11	14	15	12	11
Finance, Insurance, Real Estate	15	7	10	16	22	7	8	10
Services	10	14	15	13	12	16	17	15
State & Local Government	13	9	11	14	14	16	18	15

**Figure 1-5**  
**Lost Workday Cases and Lost Workdays**  
**Private Sector**  
**Alaska and United States**  
**1972-1982**



**Figure 1-5  
Lost Workday Cases and Lost Workdays  
Private Sector  
Alaska and United States  
1972-1982**



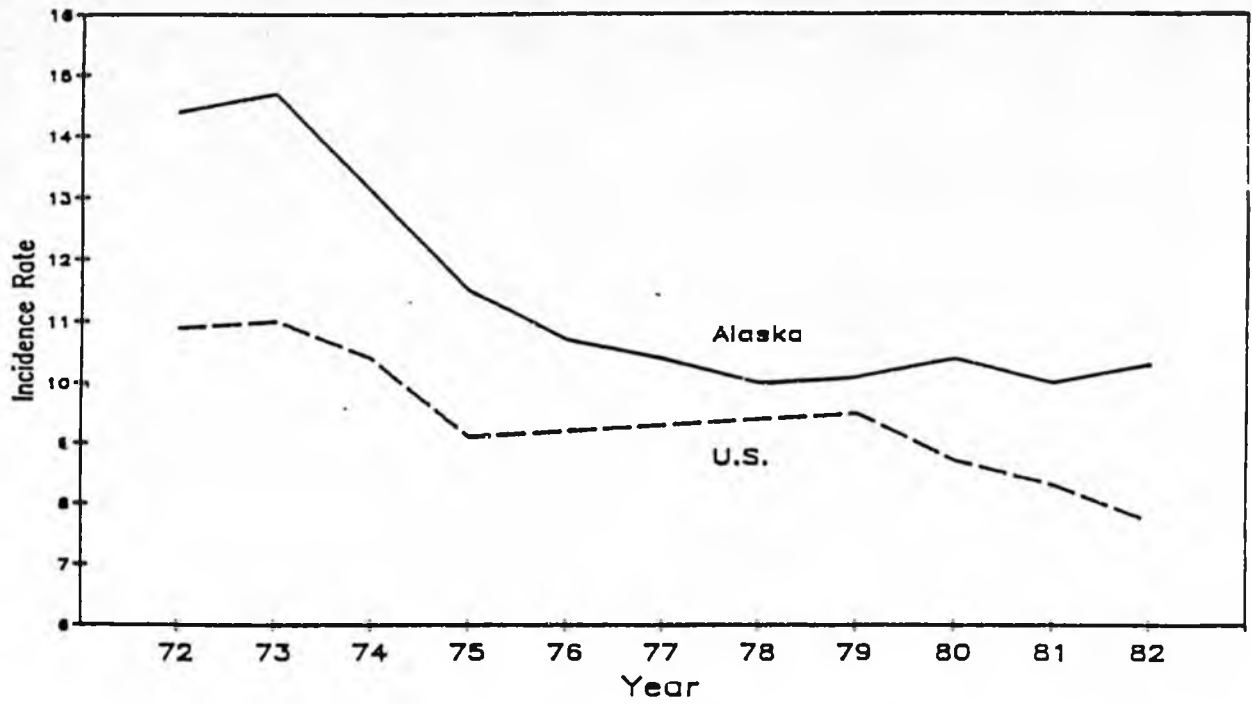
**Table 1-2  
Lost Workdays, Days Away From Work, and Days of Restricted Work Activity  
Incidence Rates  
Alaska  
1981 and 1982**

Industry	Total Lost Workdays		Days Away From Work		Days of Restricted Work Activity	
	1981	1982	1981	1982	1981	1982
Private Sector	81.5	75.4	76.4	71.5	5.1	3.9
Mining	162.3	142.7	161.6	141.8	0.7	0.8
Construction	134.7	143.3	126.6	134.5	8.1	8.8
Manufacturing	132.4	109.1	123.3	105.1	9.2	4.0
Transportation & Public Utilities	126.5	110.7	119.5	103.7	6.7	7.0
Trade	42.3	48.3	38.9	44.1	3.4	4.2
Finance, Insurance, Real Estate	4.9	2.9	4.6	0	0.3	2.9
Services	37.6	53.0	32.2	52.1	5.4	1.0
State & Local Government	47.2	38.4	46.0	37.2	1.3	1.3

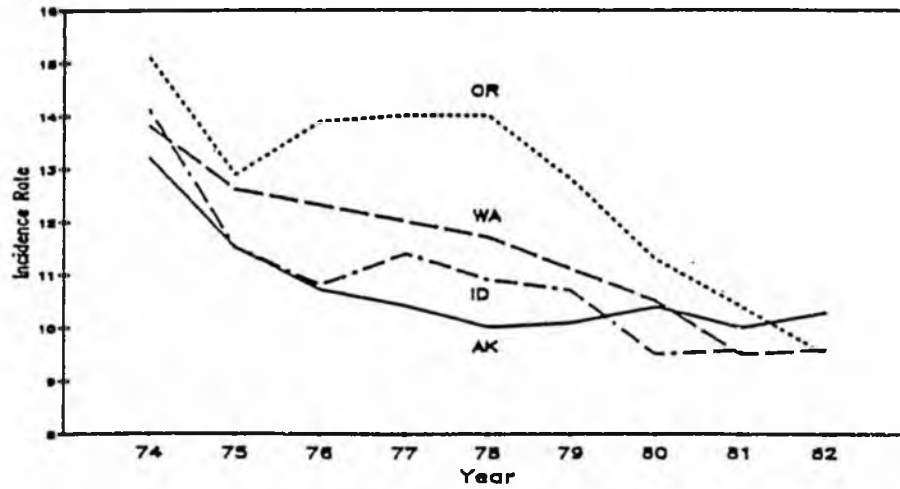
Incidence rates represent the number of lost workdays per 100 full time workers. Total lost workday rates equal rates for days away from work plus days of restricted work activity. Some figures may not add to the total due to rounding in the estimation process.

Source: Annual Survey of Occupational Injuries and Illnesses, 1981 and 1982, Research and Analysis Section, Alaska Department of Labor

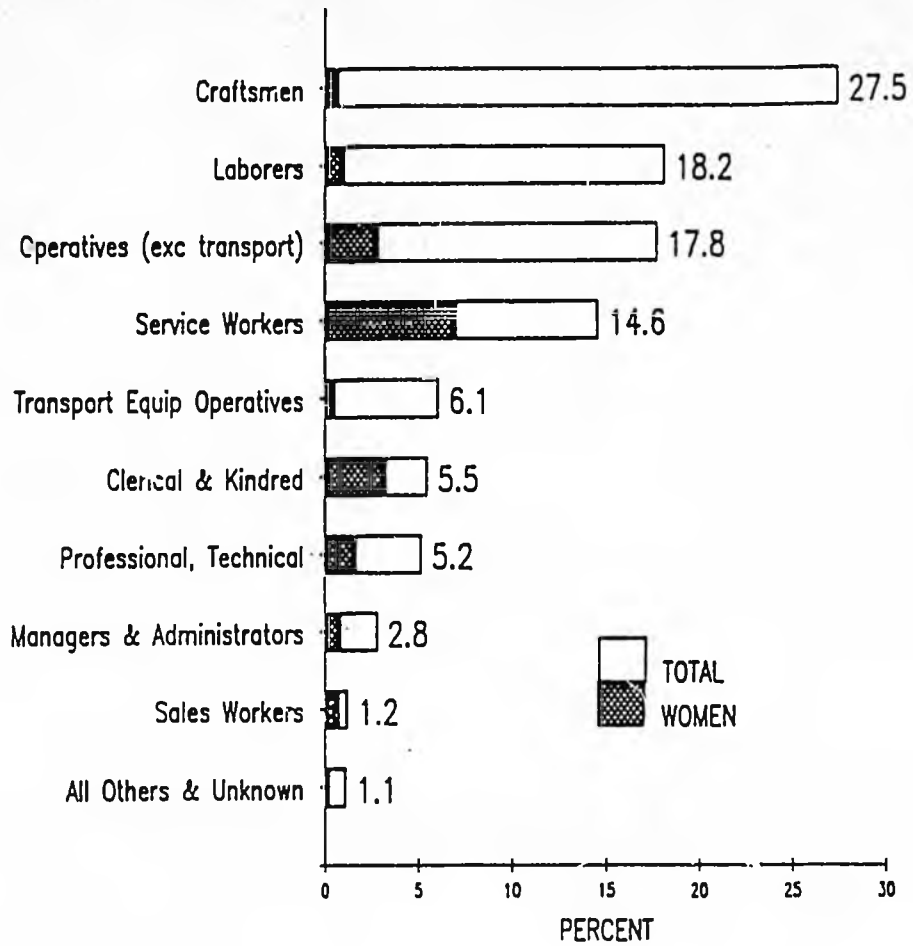
**Figure 1-7**  
**Occupational Injuries and Illnesses**  
**Incidence Rate Trends**  
**Private Sector**  
**Alaska and United States**



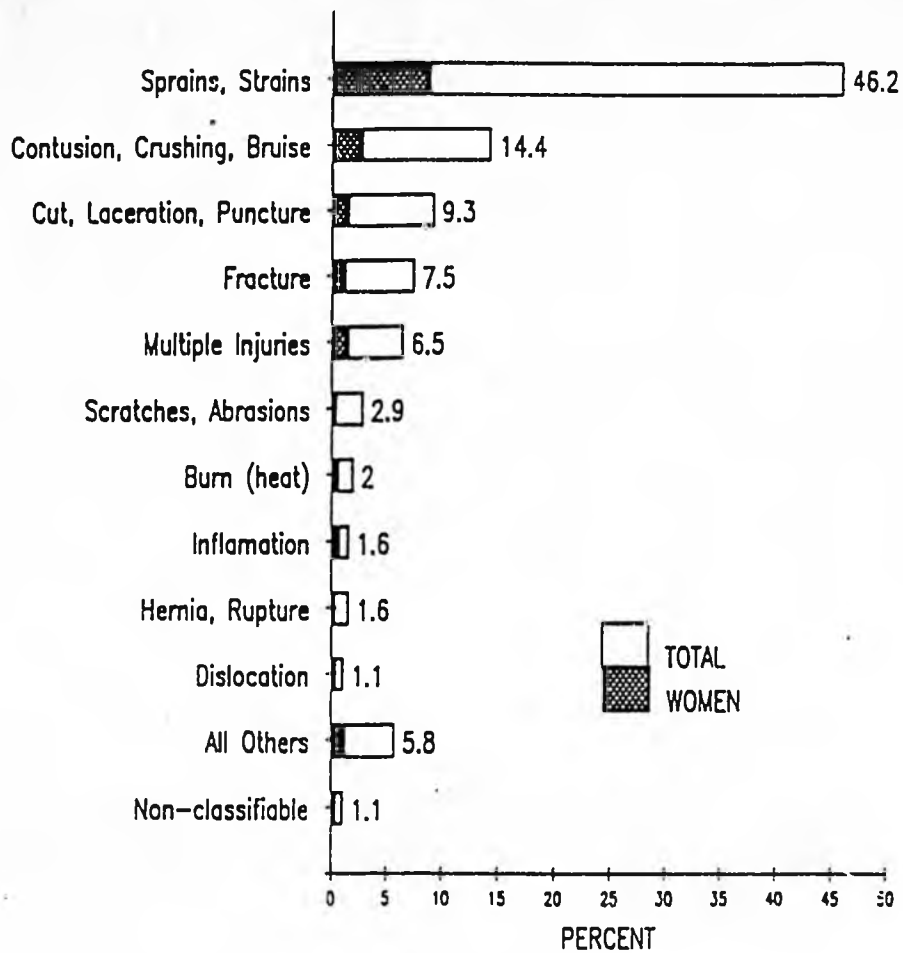
**Figure 1-8**  
**Occupational Injury and Illness Incidence Rates**  
**Private Sector**  
**Region X States**



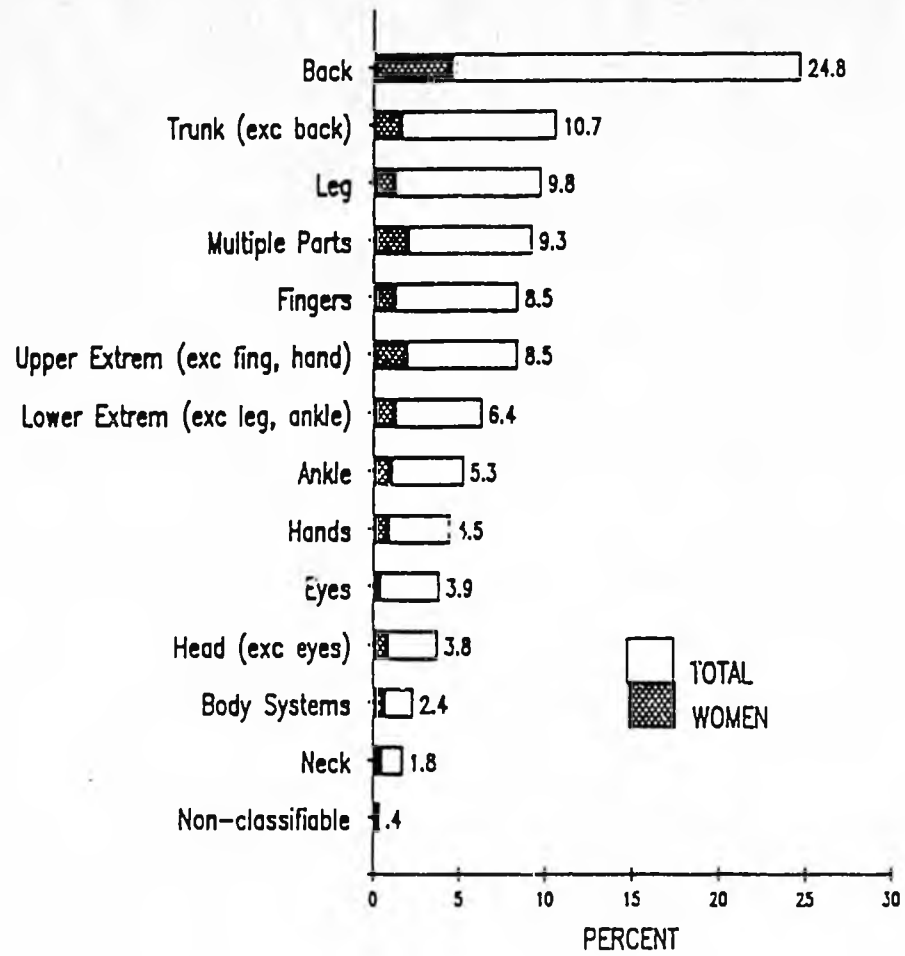
**Figure 2-6**  
**Work Injuries and Illnesses by Occupation**  
**Alaska**  
**1982**



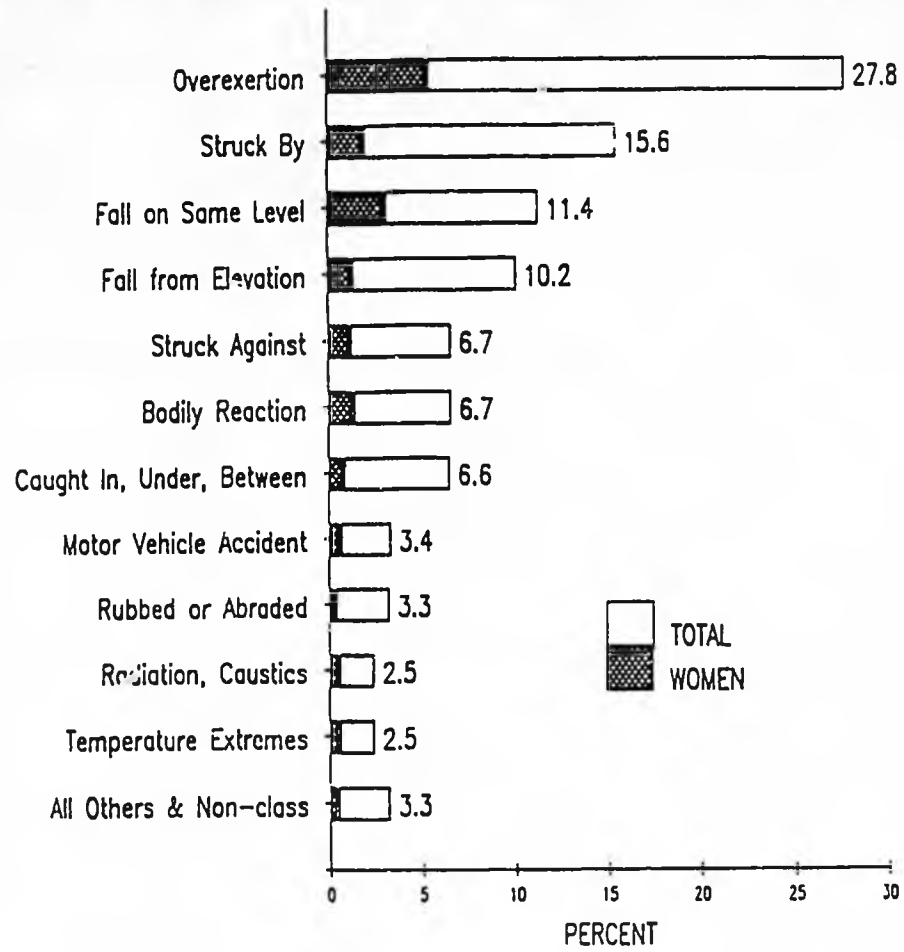
**Figure 2-7**  
**Work Injuries and Illnesses by Nature of Injury or Illness**  
**Alaska**  
**1982**



**Figure 2-8**  
**Work Injuries and Illnesses by Part of Body Affected**  
**Alaska**  
**1982**



**Figure 2-10**  
**Work Injuries and Illnesses by Type of Accident or Exposure**  
**Alaska**  
**1982**



15

INJURED WORKERS INTERNATIONAL ASSO.

200 W. 34th. Ave.

SUITE 233

ANCH. AK. 99503

277 - 8485

10,125 Time Loss Claims for 1982

WOMEN filed 17.5% of the Time Loss Claims

DVR and PRIVATE REHAB firms SUCCESSFULLY rehabilitated

124 of the 14,140 Time Loss cases in 1980

	CONTROVERTED CASES		BOARD ACTIONS	
	Totals	Hearings	Scheduled	Heard
FY 82	3502		848	340
FY 83	7171		863	345
FY 84	7309		855	285

1 out of EVERY 10 ALASKANS INJURED through course of employment

1982 Private Sector Employment UP 14% from Peak Pipeline Years

1981 -1982 Lowest Private Sector Injury rates EVER RECORDED

Premium Rates are UP -----  
(4 to 5 times???)

Accident Rates are Down  
(as much as 44.7%!!!!)

Employer Premiums Totaled roughly \$20 Billion in 1979

Medical Benefits Totaled roughly 3.5 Billion

Compensation Benefits totaled 8.4 Billion

WHO HAS SUFFERED??!??

Watch for future information

Summary  
Analysis of Workers Compensation Laws 1982  
Prepared and Published Annually by the U.S. Chamber of Commerce

Six basic objectives of the workers compensation laws.

Provide sure, prompt, and reasonable income and medical benefits to work-accident victims, or income benefits to their dependants regardless of fault.

Provide a single remedy and reduce court delays, costs, and work loads arising out of personal-injury litigation.

Relieve public and private charities of financial drains-incident to uncompensated industrial accidents.

Eliminate payment of fees to lawyers and witnesses as well as time-consuming trials and appeals.

Encourage maximum employer interest in safety and rehabilitation through an appropriate experience-rating mechanism.

Promote frank study of causes of accidents (rather than concealment of fault) reducing preventable accidents and human suffering.

The Chamber of Commerce of the United States policy states:

"Insurance is an integral part of private enterprise. Insurance should not be regarded as a function to be carried on by the government, and insurance monopolies carried on by governmentally created entities should not be permitted."

Compensation rates are scientifically based on payroll. Average cost per \$100 payroll in 1978 amounted to \$1.85. In 1979, it amounted to \$1.93.

Medical payments in 1979 totaled 3.5 billion dollars. Compensation benefits totaled 8.4 billion dollars.

Employers premiums paid roughly totaled 17 billion in 1978, and 20 billion in 1979.

Compensation laws are classified as Compulsory and Elective. Three states have elective laws, they are New Jersey, South Carolina and Texas. In all other states, it is compulsory to employees in both the private and public sector.

Coverage of minors takes into consideration future earning capacity and illegal employment. Coverage for all occupational diseases is supposedly included, and must be filed within 1 to 3 years after relation to employment. In Alaska, the filing period is 2 years.

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## Interior/North Alaska Newsletter

## Media Project

Vol. 1, No. 4 (c. 1980)

February 11, 1980

### Orbeck Fiddles, Claimants Burn

# Fairbanks Court Cases Tell Sad Story of Workers' Comp

Background: With support from the Fund for Investigative Journalism, during 1979 Richard A. Fineberg researched and wrote eight articles on workers' comp for the Anchorage Daily News and the Alaska Advocate. Apart from a few broadcast talk shows, the subject received little attention from Interior/North Alaska media.

Fineberg subsequently prepared an assessment of workers' comp problems at the request of the state House Labor & Management Committee. (The contract granted the writer the right to use all research materials on completion of the project.) That assessment, completed last month, was the subject of recent All-Alaska Weekly and Fairbanks Daily News-Miner articles.

This article incorporates some material from earlier reporting and legislative research.

Almost any way you look at it, the workers' compensation program in Alaska is a headache.

Employers, who make premium payments for the compulsory insurance on behalf of their employees, say the program costs too much.

Insurance companies (carriers) who collect the premiums and then cover medical expenses, rehabilitation and partial wage loss for injured workers (claimants) say they can't make money on comp.

While the Workmen's Compensation Division (a part of the State Department of Labor) appears to be drowning in a sea of paperwork, the Insurance Division (Department of Commerce and Economic Development) keeps its feet dry by focusing on narrow aspects of the arcane rate-making mechanism.

When you consider the size of the comp bill in Alaska, the headache assumes migraine proportions. In 1977 comp premiums topped \$100 million and constituted 24 per cent of all insurance premiums in the state, more than any other type, according to

Insurance Division figures. The dramatic increase in comp costs in recent years (comp premiums totalled \$16.4 million in 1973, compared to \$107 million in 1977) has overshadowed growing dissatisfaction with the services provided by the carriers and the state.

But service problems may be the biggest headache of all. Claimants frequently find their benefit payments stalled in red tape, and some claimants believe some carriers deliberately shirk their responsibility to cover long-term disabling injuries.

Two Fairbanks court cases, previously unreported in the Interior/North Alaska press, spotlight comp service problems.

One suit was filed last year by Fairbanks attorney Lance Parrish

(continued on page 3)

### Do Union Leaders Fear Them?



Sam Goodman (left) and Chris White are part of a small group building a union reform movement in Alaska. Their efforts are described on page 5.

**Isolated sob stories or widespread problems?****Workers' Comp: Claimants Burn . . .***(continued from page 3)*

Claimants in Anchorage and Fairbanks have voiced and documented similar criticisms. Their complaints are echoed by a number of claimants who belong to neither group, lending strength to claimants' requests for a special review of carrier and Board handling of long-term disability cases.

There is a striking similarity, for example, in the testimony of three Alaska claimants with back problems. Alpac sent OVIA's MacArmour, Diane Black of Fairbanks and an Anchorage woman

**Alpac uses Frisco 'defense mill' to axe Alaska claimants**

who asked to remain unidentified to San Francisco for examination by Dr. Willard F. Pennell, a specialist in neurology and psychiatry; all three say Dr. Pennell determined each to be malingering and provided Alpac with a long report describing his findings; all three say Dr. Pennell's opinion played a significant part in the Board's rejection of their claims.

Dr. Pennell's partner is featured in a legal textbook that says the firm consistently provides insurance companies with testimony damaging to persons seeking insurance payments. In the textbook co-author Marvin E. Lewis (past President of the American Trial Lawyers Association) cites his concluding statement from a trial in which he faced that medical firm. Lewis told the jury:

Dr. Knox Finley (Dr. Pennell's partner) comes from a defense mill. That's what his office is . . . nearly a hundred times he has testified on the stand like this . . . in injury cases and always for the City and always for . . . insurance companies. Besides that, he has been in every county of Northern California doing the same thing . . . Then his two partners were doing the same thing. Then they were not only having these cases, but there were other plaintiffs who were injured that never got to Court . . . and they were doing all this . . . as a business of testifying for insurance companies . . .

Alpac says it has sent at least half a dozen Alaska claimants to Dr. Pennell; other Alaska carriers also use this specialist. Last year John Cook, then Director of the Comp Division, was asked how many times the Board encountered the testimony of Dr. Pennell. Cook replied that he did not know. He said he could not assign staff to investigate the question because the Division was already overburdened.

Cook denied that the Board was unduly influenced by Dr. Pennell. However, the records show that the San Francisco specialist's testimony played a key role in the Board's decision against claimants Black and MacArmour. The third claimant said Dr. Pennell's report stripped her of "everything but my driver's license."

**Workers' comp . . .***(continued from page 4)*

"We've had many other people tell us they wish we had been there when they were hurt, and some who came in told us of friends who had been hurt and have gone to the Lower 48," Lambeth said. "And we were gathering more people all the time when we closed down."

"I've seen people lose their house and car," the OVIA secretary said. "It just makes you feel terrible."

MacMillan, a nurse with 17 years professional experience, observed that some accident victims are treated with drugs whose side effects impair their ability to deal effectively with the bureaucratic problems they inevitably run into.

Does Alpac have an inordinate number of complaints, or does the carrier's name appear so frequently in comp disputes because Alpac writes 56 per cent of the comp premiums in Alaska? The answer to this question is not available from public records.

A state Division of Insurance auditor who examined Alpac's records in 1978 came away with the impression that the company's claims service was excellent, but some insurance industry sources feel Alpac handles its claims poorly.

Part of the problem, one industry source explains, is that Alpac simply grew too fast. Trying to keep up with its rapidly-expanding pipeline business during the mid-70's the company ran into the same kind of paperwork problems that plague the Comp Division.

Informed sources report that Alpac miscalculated on long-term payments the company must make for accident victims employed by Alyeska Pipeline Service Co., Alpac's largest client during several years of rapid growth. Some observers believe this reported miscalculation may have caused Alpac to tighten up on claim settlement practices.

Rate-setting falls within the jurisdiction of the Division of Insurance, but the procedures are so cumbersome that the Division cannot provide basic answers to simple questions concerning the profitability of the burgeoning comp business for Alpac and Alaska's other carriers. Although Alpac's growth has outpaced the workers' comp field as a whole, the company's profit-and-loss figures on comp are lumped together with the company's comp operations in other states.

Alpac is a wholly-owned subsidiary of the Insurance Company of North America, one of the ten largest casualty insurance companies in the nation.

Despite a statutory provision that appears to give the Director of Insurance responsibility for making sure carriers comply with all aspects of comp law, the Division of Insurance tends to focus only on rate matters, shunting complaints about service problems back to the Comp Division where many of the problems originated.

Lack of state agency responsiveness led comp claimant MacArmour to set up OVIA. Last July the organization opened an office with funding for a three-person staff from the Comprehensive Employment Training Act (CETA). When paychecks were delayed in CETA's paperwork pipeline, the first project coordinator soon resigned.

The remaining two staff members, Charles MacMillan and Judy Lambeth, stayed with the job for 72 days before the first paycheck emerged from a state office foul-up in Juneau. Lambeth and MacMillan say they stayed with OVIA because they became convinced the comp system was either unable or unwilling to help many claimants with legitimate problems.

The program operated on a shoe-string budget. To pay office rent MacMillan worked out an agreement with the landlord to double as the building's janitor. To pay workers' comp for the OVIA staff, OVIA founder MacArmour sold a stereo set, one of his few remaining possessions.

Despite these difficulties, the two-person staff counseled about 30 claimants before a CETA cutback closed the operation Nov. 30. MacMillan and Lambeth say the organization could have been of service to many more comp claimants if funding had continued.

*(continued on page 6)*

**Comp Problems Add To...****... The Long Ordeal of Patrick Jackson**

March 1977. Pat Jackson was surveying, working out of a northern pipeline camp. The job included scrambling over rough terrain, wrestling with surveying equipment, jolting along the pipeline right-of-way in a crowded pickup truck — any number of activities at which you can bash your leg.

He is not sure how he hurt his knee. It was 30 to 35 degrees below zero, he recalls—the kind of weather in which you can bang yourself up right smartly and not notice it because you're hurrying to get out of the cold or you're fumbling awkwardly with tools and clothing. (Jackson says he often dinged himself driving rebar survey markers into the ground in cold weather, though he doesn't remember doing so the day he was hurt.)

**Alpac lawyers take amputee to court to set new legal precedent**

He does remember twisting his knee slightly as he stepped out of the truck. He went to the medic with a tender, swollen and discolored left knee and was sent back to Fairbanks for treatment.

May 1977. After eight weeks on workers' comp, Jackson returned to the pipeline and worked for several weeks. He was laid off when the pipeline was completed.

July 1977 - June 1978. For most of this period Jackson drew unemployment. As a Teamster steward he had an excellent position in the hall, but there weren't any jobs. He did the usual Fairbanks things: he cut and chopped firewood, he ran.

July 1978. Jackson finally got a job call. He says he had been experiencing cramps in his left leg for a few weeks prior to the call. He worked six days before the problem became acute and he had to quit work and return to Fairbanks for medical care.

The problem was diagnosed as thrombophlebitis (arterial damage caused by a blood clot). Ten days later corrective surgery was performed in Fairbanks.

August 1978. Jackson's comp carrier, Alaska Pacific Assurance Co. (Alpac) refused to cover his medical expenses, arguing that the problem was not related to his pipeline injury the preceding year. Jackson was out of work, out of insurance — and his knee was not getting any better. He contacted an attorney.

September 1978. A second attempt at corrective surgery was unsuccessful.

December 3, 1978. Jackson and Alpac squared off before the Comp Board.

Alpac presented the testimony of an orthopedic surgeon, Dr. John Jooose, who advised the carrier and the Board by letter: "It is my opinion that the condition simply spontaneously developed during the course of the patient's employment and has no causal relationship to his employment.... Likewise, I can find no compelling evidence that the patient's work did not effect the problem."

Jackson's physician, Dr. Joseph Montano, reviewed the case in detail and testified that "reasonable medical probability" indicated the thrombophlebitis was a direct result of Jackson's 1977 job-related problem. Dr. Montano thought it likely Jackson had suffered some kind of a blow on the knee in March 1977. He

also said the problem might have resulted from the twisting when he slighted from the company vehicle.

Normally, he said, arterial problems would develop more quickly than a year after the injury. However, he said, there were only four medical possibilities. The condition of Jackson's leg ruled out the other three, leaving only trauma of the sort that caused the March 1977 pain, discoloration and swelling as a possible cause for the 1978 malady.

Christmas, 1978. The Board was still out on Jackson's case. His physicians wanted him to go to Seattle for special treatment. There was one problem: The patient lacked the means to get there. Jackson's nurses at the hospital started making phone calls to friends, and associates to find somebody who could pay for Jackson's exit to Seattle. (The state Vocational Rehabilitation division finally picked up the tab for the necessary flight to Seattle.)

To evaluate Alpac's position at this point, a bit of legal background may be helpful. Although the evidence in Jackson's case is not clear cut — comp cases seldom are — the statutory guideline and court precedents seem to line up squarely on Jackson's side.

Alaska comp law holds that a claim is valid in the absence of substantial evidence to the contrary. A State Supreme Court decision interprets that passage to mean "if there is any doubt as to the substance of medical testimony, it must be resolved in favor of the claimant." A second Supreme Court decision uses almost identical phrasing.

Alpac claims adherence to this guideline. In January 1979 Alpac's director of workers' comp said, "I personally would rather pay a claim that was doubtful... than take the chance I had denied benefits to a man unjustly."

January 1979. With Jackson in Seattle facing another round of surgery, the Board issued an unusually rapid decision ordering Alpac to pay disability and medical costs. Instead, Alpac appealed the decision to court.

June 1979. Fairbanks Superior Court Judge Gerald Van Hoomissen upheld the Board. "The sole issue presented by this appeal, Van Hoomissen wrote, "is whether there is any substantial evidence to support the decision of the Board." Reviewing the hearing, Van Hoomissen concluded that Dr. Montano's testimony outweighed that of Dr. Jooose. July 1979. Alpac decided to make one more pitch to the State Supreme Court.

December 1979. Briefs were filed, restating the same arguments. Meantime, after seven more unsuccessful operations, doctors decided to amputate Jackson's leg just below the knee.

January 1980. One more brief filed by Alpac attorneys. One more inch of Jackson's leg removed in operation number eleven.

February 1980. "I haven't been in pain since the last operation two weeks ago," Jackson says. "This time it's healing really well." He says he's looking forward to physical therapy and learning to walk with an artificial lower leg.

Working with Alaska vocational rehabilitation counselors, Jackson planned to enter a fisheries research program, but that was before the amputation. He says he'd still like to try it, but he doesn't know whether he can handle it. "I may have to drop back and make a whole new plan," he says.

(continued on page 3)

# COMMON GROUND

Published by Alaska Common Ground Collective

VOL 4 NO. 2

FREE-

SUMMER 1979

## WORKMEN'S COMPENSATION Disabled workers raked over coals



photo by Rob Stapleton

We have all seen over and over again how hard it is to get work with decent wages and working conditions, and now easy it is to get laid off as the economy spirals downward into recession. But when on-the-job dangers cause workers temporary or even permanent disability, then we really see how expendable we are in the inhuman economics of capitalism.

On July 3 a group of about 20 members of Action for Victims of Industrial Accidents (AVIA) were in Anchorage to let the public know of their plight. They picketed at the State offices in front of the McKay Building, their picket signs reading "Compensation Board is a Kangaroo Court"; "Hammond, Clean up your W.C. Board" and "Get Help to the Handicapped and Disabled workers without incomes". Although they talked with Lt. Governor Terry Miller, so far there has been no response to their request for a meeting with Labor Commissioner Ed Orbeck.

### Alaska cuts a deal

Many of the victims were workers caught in Alyeska's attempt to cut the costs of workmen's compensation.

Alyeska had an agreement with ALPAC, the State's largest underwriter of workmen's comp insurance, where Alyeska would pay its own workmen's comp claims using ALPAC as adjustor and to handle the paperwork. This is called self-insurance. It gives Alyeska a direct financial interest, the same as that of the insurance company, in seeing that workers do not get money from workmen's comp claims. The deal with ALPAC also gives Alyeska easy access to ALPAC's "bought" medical advisors and legal help.

The three person Workmen's Compensation Board appointed by Ed Orbeck has a history of favoring the opinions of ALPAC and Alyeska experts rather than the workers' doctors, which means that workers are up against a stacked deck.

ALPAC started to do business in Alaska in 1967 by insuring loggers in Southeast. It was purchased by Insurance Company of North America in 1971. During pipeline construction, 25% of ALPAC's business was with Alyeska Pipeline Service Company, but it also writes workmen's compensation insurance for trucking companies, banks, the Fairbanks Medical Clinic, and the State of Alaska.

Diane Black, AVIA spokesperson, was a pipeline builcook who suffered a back injury in a camp on the pipeline in 1976. She subsequently developed a myofascial syndrome which causes leg weakness and muscle spasms and which requires treatment, therapy and rehabilitation. But ALPAC's doctors disagree with her doctor and say she is faking it to get out of work, a line they use frequently to deny benefits to injured workers. The Workmen's Comp Board has twice ruled against her, but Diane fights on, unable to walk without a metal brace, unable to sit in a chair for more than an hour or two, forced to lie on the floor because of the pain. She fights her own cause and that of others throughout the state who have been reduced to welfare status because of their injuries and the decision of the Board to terminate their benefits.

Robert MacArmour, another member of AVIA, was thrown from a truck and knocked unconscious on the pipeline haul road when the brakes on the truck failed on a steep grade in May of 1977. He was hospitalized for eight days, received compensation for

Continued on page 7

## Disabled workers continued

two months, went back to work, and landed back in the hospital. He is fighting the determination of the Workmen's Comp Board which says that his complaints are based on a conscious attempt to get additional workmen's comp benefits. His doctor, an orthopedic surgeon in Los Angeles, differs and says that MacArmour is totally and permanently disabled and incapable of competing in the open labor market for employment.

### ALPAC's 'own' doctors

Workers who disagree with the decision of the Workmen's Comp Board when their cases are terminated and they are still unable to work have a tough battle ahead. Workers are sent to Seattle, Portland, San Francisco, and Los Angeles for independent consultation with doctors that are known as "defendant doctors", physicians who routinely see clients for an insurance company. Workers are sent to insurance company neurologist or psychiatrists who proclaim

their injuries to be the result of mental problems. These doctors report on possible malingering, previous nervous disorders--anything that will serve to discredit the victim/claimant and save money for the insurance company. The workers' only recourse is to sue the Workmen's Comp Board and the litigation process could take years and thousands of dollars. And of course there is no guarantee that the courts will reverse the Comp Board's decision.

The law says that if you're injured on the job and can't work for two years after an accident you are entitled to wage compensation, and it says that if there is permanent damage, the carrier (insurance company) must make a permanent settlement with the claimant. This law was instituted so that workers couldn't sue the companies for injuries incurred on the job. A worker is entitled to vocational rehabilitation if unable to return to her/his trade or skill because of the accident. But when the Workmen's Comp Board is slow

to process cases because of their backlog and when they pay more attention to insurance doctors' opinions than they do to the claimants' doctors, workers wind up with no compensation while continuing to have medical expenses and being unable to work. And as long as they are unable to work, they are automatically ineligible for unemployment, even if they have accrued unemployment benefits.

There is no reason why working people should put up with this kind of treatment. It is clear for all to see that the State Workmen's Comp Board does not care about the welfare of workers and is instead working for the companies, both Alyeska and ALPAC. When a stacked deck like this is so easy for all to see, can there be any doubt that the whole game should be thrown out? Working people must organize against this whole system that uses our labor for profits and then discards us when we can no longer labor to line their pockets.

--Ruth Sheridan



# Workmen's Comp Abuses Cited In Legislative Agency Report

By Joe La Rocca

JUNEAU — It may seem far-fetched to link the arrest and imprisonment of a man in California for stealing and slaughtering a cow, with the alleged failure of the state Workmen's Compensation Division to carry out its statutory responsibilities.

But a report just issued by the Legislative Affairs Agency on workers' compensation problems in Alaska says that's one of the more bizarre consequences of the division's persistent failure to follow the law in dealing with countless workers' claims stemming from non-fatal injuries in Alaska.

In that case, a man working in Nome for a gold-mining company injured his back, and had to go to California to seek proper medical treatment. Although the Alaska Workers' Comp board ruled in favor of the man's claim for payments, his employer's insurance carrier arbitrarily suspended payments without notifying the board, as required by law.

Destitute, and with a family of four to support, the man stole and slaughtered a cow to feed his family, but was apprehended, convicted and imprisoned. The report says that if the Workers' Comp Div. routinely enforced, rather than ignored, state law requiring insurance carriers to notify the board when they suspend payments to claimants, the man would not likely have found himself in the position of having to steal to feed his family.

The incident dramatizes what the author of the report, Richard Ineberg, says is the longstanding failure of the state, nor, the Dept. of Labor and the Legislature to address pervasive deficiencies in the state's workers' comp program.

The report was prepared by Ineberg on contract to the Legislature's Interim Committee on Labor and Management, according to the acting chairman Rep. Brian Rogers (D-Fairbanks).

Other major problem areas, he says, are the department's "chaotic and cumbersome" records system; underfunding and under staffing; tardy or non-payment of legitimate claims; ambiguous, conflicting and fragmented workers' comp law; lack of coordination among the agencies which handle the workers' comp division says has reached the crisis stage.

Despite a huge increase in the dollar value of the comp program during the past decade, from \$8 million in 1968, to more than \$100 million in 1979, with a corresponding increase in claims, the administrative structure with which the state oversees the workers' comp program has remained essentially unchanged since statehood, according to the report.

During that same decade, workers' comp insurance rose from 10% of the total insurance business in Alaska, to 24%. In just the past four years, the hearing caseload for disputed claims facing the workers' comp board — a citizen panel which decides whether an injured worker is eligible for payments — has more than doubled, from 615 cases in 1975, to nearly 1,500 in 1979.

The program's budget, on the other hand, has fallen far be-

hind the workload increase, which rose dramatically following the construction of the trans-Alaska oil pipeline.

According to the report, State Labor Commissioner Ed Orbeck, in a public meeting last October, blamed the workers' comp program's problems on lack of attention and funding by the legislature.

While there's "a kernel of truth" to Orbeck's statement, it says, "It's difficult to demonstrate that legislative cuts in the administration's budgets are the primary cause of today's problems."

"On the contrary," it asserts, "a major cause... may be that the Dept. of Labor failed to anticipate or take timely measures to cope with the situation as it developed."

In an effort to remedy the workers' comp program's pervasive deficiencies, the report says, the division has asked for new positions and additional funding to modernize and computerize its "antiquated" record-keeping system. While that proposal is commendable and long overdue, it adds, other important measures are also necessary.

Delays at two critical stages of the process which occur in violation of law account for many of the complaints about unsatisfactory handling of claims for payments. State law requires the insurance carriers to make the first payment to claimants within 14 days of notification.

Figures show that during 1978, only 28% of the first payments were made within the 14-day period required by law. Similarly, the division is required by law to issue decisions in disputed cases within 20 days after a hearing. But the average time lapse, according to the report is currently more than three months.

In order to upgrade enforcement of the deadlines, the report says, the state should consider utilizing a full-time professional board, rather than the part-time citizen board which meets once monthly, and hiring professional investigators to determine whether insurance carriers are making timely payments to claimants.

The report also suggests that the division should prepare and issue an explanatory booklet clarifying for lay persons how the program works, as is done in other states with more successful programs. Much time-consuming and expensive litigation stemming from misunderstandings of what the workers' comp law provides could be avoided. The report also calls for a complete overhaul of the state law to eliminate ambiguities and conflicts which make it internally inconsistent. It has been fragmented by piecemeal changes over the years.

According to the report, a spokesman for one firm which carries 56% of all comp insurance written in Alaska has stated that when there is any doubt, the company sides with the claimants.

But available records suggest otherwise. Some claimants complain that carriers have litigated valid claims, and suspended or delayed payments, in order to pressure them into settling their claims for smaller lump sums.

Another pattern which the division has ignored, the report

says, concerns the use by Alaska insurance carriers of certain San Francisco specialists to evaluate claimants with back injury complaints.

One firm used often which has issued rulings unfavorable to at least three Alaska claimants, the report says, "consistently provides insurance companies with testimony damaging to plaintiffs seeking insurance payments."

Notwithstanding the firm's reputation, the report adds, the workers' comp board has relied heavily upon the firm's evaluations, without exercising its authority to appoint independent examiners.

The report also cites the state labor commissioner and the Division of Insurance, the Dept. of Commerce, which regulates the industry, for their failure to involve themselves in the workers' comp program, despite clear-cut statutory provisions mandating their jurisdiction.

The report raises a major question over how the insurance carriers use the premiums paid them by Alaska employees. Little information is available to answer this basic question. While the Div. of Insurance requires carriers to submit annual reports from all carriers in Alaska, they do not provide these data because the figures from Alaska are lumped together with those of other states in which the carrier operates.

In Alaska, comp insurance carriers collect more than \$100 million annually in premiums. Under the rate-setting procedure used in Alaska, the report says, nearly all of the investment income from those premiums is excluded from the rate base. Thus a "loss" can be shown to justify higher premium rates, as occurred in 1974, when the "loss" data "enabled carriers to push comp premium rates higher." Says the report, "This hidden profit factor is often overlooked by some policymakers" who hold that increased benefits for workers is the primary cause of higher premium rates.

The report ends with a series of recommendations for immediate and long-term consideration by the legislature and the executive branch. These include hearings to measure the state's failure to enforce workers' comp laws, a special review of comp cases to determine to the legislature which show whether remedial action is needed, closer interagency cooperation, more information about how the carriers use the premium dollars paid them by employers, ways of reducing premiums for small employers, and studies to determine whether a state fund to write workers' comp insurance would improve the program.

## RALPH C. DANFORD

Sgt. 1st Class Ralph C. Danford, son-in-law of Mrs. B. Smith, 4608 Gruman Ave., Anchorage, recently participated in Constant Enforcer, a major field training exercise in central Germany.

Approximately 30,000 American, German, Canadian and Belgian soldiers took part in the exercise.

Danford is a platoon sergeant with the 3rd Armored Division in Frankfurt.

The sergeant's wife, Nancy, is with him in Germany.

to bring costs back down, may have cut some people with legitimate problems, as well as the grifters. In any event, many of the problems AVIA members experienced date from those last days of the pipeline.

During the reportedly tense trimming period, Alpac's cutting knife took an ironic twist and chopped off one member of Alyeska's own insurance staff, Cecil Kessick, a heavy equipment damage appraiser for Alyeska, hurt his back early in 1976 when he slipped on the ice boarding a helicopter after inspecting some trailers at Franklin Bluffs.

Alpac dumped Kessick off the workmen's comp roll in April 1977—three months before his doctor released him for light work. Under comp law, if you're injured on the job and can't work for two years after the accident you are entitled to wage compensation. If there is permanent damage, the carrier must make a permanent settlement with the claimant.

Unlike the case of Black and MacArmour, in this case Alpac didn't even have its own physician's report to counter Kessick's; the insurance company just decided Kessick had had enough compensation.

There are several complicating factors in Kessick's case. The comp record shows, for example, that in Kessick's case the Fairbanks Clinic apparently double-billed insurance carriers in some instances, and incorrectly over-billed Alpac in others. But that's not Kessick's fault. The salient fact is that Alpac dropped Kessick without any medical examination or direct testimony.

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Jan 25, 1979  
The Alaska Advocate

# Workmen's Comp Abuses Cited In Legislative Agency Report

By Joe La Rocca

JUNEAU — It may seem far-fetched to link the arrest and imprisonment of a man in California for stealing and slaughtering a cow, with the alleged failure of the state Workmen's Compensation Division to carry out its statutory responsibilities.

But a report just issued by the Legislative Affairs Agency on workers' compensation problems in Alaska says that's one of the more bizarre consequences of the division's persistent failure to follow the law in dealing with countless workers' claims stemming from job-related injuries in Alaska.

In that case, a man working in Nome for a gold-mining company injured his back, and had to go to California to seek proper medical treatment. Although the Alaska Workmen's Comp board ruled in favor of the man's claim for payments, his employer's insurance carrier arbitrarily suspended payments without notifying the board as required by law.

Destitute, and with a family of four to support, the man stole and slaughtered a cow to feed his family, but was apprehended, convicted and imprisoned. The report says that if the Workmen's Comp Div. routinely enforced rather than ignored state law requiring insurance carriers to notify the board when they suspend payments to claimants, the man would not likely have found himself in the position of having to steal to feed his family.

The incident dramatizes what the author of the report, Richard "Ineborg," says is the longstanding failure of the superior, the Dept. of Labor and the Legislature to address pervasive deficiencies in the state's workmen's comp program.

The report was prepared by Fineberg on contract to the Legislature's Interim Committee on Labor and Management, according to the acting chairman Rep. Brian Rogers (D-Fairbanks).

Other major problem areas, he says, are the department's "chaotic and cumbersome" records system; understaffing and under staffing; tardy or non-payment of legitimate claims; ambiguous, conflicting and fragmented worker comp law; lack of coordination among the agencies which handle the workers' comp division says has reached the crisis stage.

Despite a huge increase in the dollar value of the comp program during the past decade, from \$8 million in 1966, to more than \$100 million in 1979, with a corresponding increase in claims, the "administrative structure with which the state oversees the workers' comp program has remained essentially unchanged since statehood," according to the report.

During that same decade, workers' comp insurance rose from 10% of the total insurance business in Alaska, to 24%. In just the past few years, the hearing caseload for disputed claims facing the workers' comp board — a citizen panel which decides whether an injured worker is eligible for payments — has more than doubled, from 615 cases in 1975, to nearly 1,500 in 1979.

The program's budget, on the other hand, has fallen far be-

hind the workload increase, which rose dramatically following the construction of the trans-Alaska oil pipeline.

According to the report, State Labor Commissioner Ed Orbeck, in a public meeting last October, blamed the workers' comp program's problems on lack of attention and funding by the legislature.

While there's "a kernel of truth" to Orbeck's statement, it says, "It's difficult to demonstrate that legislative cuts in the administration's budgets are the primary cause of today's problems.

"On the contrary," it asserts, "a major cause... may be that the Dept. of Labor failed to anticipate or take timely measures to cope with the situation as it developed."

In an effort to remedy the workers' comp program's pervasive deficiencies, the report says, the division has asked for new positions and additional funding to modernize and computerize its "antiquated" record-keeping system. While that proposal is commendable and long overdue, it adds, other important measures are also necessary.

Delays at two critical stages of the process which occur in violation of law account for many of the complaints about unsatisfactory handling of claims for payments. State law requires the insurance carrier to make the first payment to claimants within 14 days of notification.

Figures show that during 1978 only 28% of the first payments were made within the 14-day period required by law. Similarly, the division is required by law to issue decisions in disputed cases within 20 days after a hearing. But the average time lapse, according to the report is currently more than three months.

In order to upgrade enforcement of the deadlines, the report says, the state should consider utilizing a full-time professional board, rather than the part-time citizen board which meets once monthly, and hiring professional investigators to determine whether insurance carriers are making timely payments to claimants.

The report also suggests that the division should prepare and issue an explanatory booklet clarifying for lay persons how the program works, as is done in other states with more successful programs. Much time-consuming and expensive litigation stemming from misunderstandings of what the workers' comp law provides could be avoided. The report also calls for a complete overhaul of the state law to eliminate ambiguities and conflicts which make it internally inconsistent. It has been fragmented by piecemeal changes over the years.

According to the report, a spokesman for one firm which carries 56% of all comp insurance written in Alaska has stated that when there is any doubt, the company sides with the claimants.

But available records suggest otherwise. Some claimants complain that carriers have litigated valid claims, and suspended or delayed payments, in order to pressure them into settling their claims for smaller lump sums.

Another pattern which the division has ignored, the report

says, concerns the use by Alaska insurance carriers of certain San Francisco specialists to evaluate claimants with back injury complaints.

One firm used often which has issued rulings unfavorable to at least three Alaska claimants, the report says, "consistently provides insurance companies with testimony damaging to plaintiffs seeking insurance payments."

Notwithstanding the firm's reputation, the report adds, the workers' comp board has relied heavily upon the firm's evaluations, without exercising its authority to appoint independent examiners.

The report also cites the state labor commissioner and the Insurance Commissioner, the Dept. of Commerce, which regulates the industry, for their failure to involve themselves in the workers' comp program despite clear-cut evidence of abuses assigning them jurisdiction.

The report raises a major question over how the insurance carriers use the premiums paid them by Alaska employees. Little information is available to answer this basic question. While the Div. of Insurance requires insurance carriers to report from all carriers in Alaska, they do not provide these data because the figures from Alaska were lumped together with those of other states in which the carrier operates.

In Alaska, comp insurance carriers collect more than \$100 million annually in premiums. Under the re-insuring procedures used in Alaska, the report says, nearly all of the lowest-cost income from those premiums is excluded from the rate base. Thus a "low" can be shown to justify higher premium rates, as occurred in 1974, when the "low" data "enabled carriers to push comp premium rates higher." Says the report, "This hidden profit factor is often overlooked by some policymakers" who hold that increased benefits for workers is the primary cause of higher premium rates.

The report ends with a series of recommendations for immediate and long-term consideration by the legislature and the executive branch. These include hearings to measure the state's failure to enforce workers' comp laws, a special review of comp cases to determine to the legislature which action is needed, closer interagency cooperation, more information about how the carriers use the premium dollars paid them by employers, ways of reducing premiums for small employers, and studies to determine whether a state fund to write workers' comp insurance would improve the program.

**RALPH C. DANFORD**  
Sgt. 1st Class Ralph C. Danford, son-in-law of Mrs. B. Smith, 4608 Gruman Ave., Anchorage, recently participated in Constant Enforcer, a major field training exercise in central Germany.

Approximately 30,000 American, German, Canadian and Belgian soldiers took part in the exercise.

Danford is a platoon sergeant with the 3rd Armored Division in Frankfurt.

The sergeant's wife, Nancy, is with him in Germany.

to bring costs back down, may have cut some people with legitimate problems, as well as the grifters. In any event, many of the problems AVIA members experienced date from those last days of the pipeline.

During the reportedly tense training period, Alpac's culture knife took an ironic twist and chopped off one member of Alyaska's own insurance staff, Cecil Kessick, a heavy equipment damage appraiser for Alyaska, hurt his back early in 1976 when he slipped on the ice bonding a helicopter after inspecting some trailers at Franklin Bluffs.

Alpac dumped Kessick off the workmen's comp roll in April 1977—three months before his death—released him for light work. Under comp law, if you're injured on the job and cannot work, for two years after the accident you are entitled to wage compensation. If there is permanent damage, the carrier must make a permanent settlement with the claimant.

Unlike the case of Black and MacArmour, in this case Alpac didn't even have its own physician report to counter Kessick's: the insurance company just decided Kessick had had enough compensation.

There are several complicating factors in Kessick's case. The comp record shows, for example, that in Kessick's case the Fairbanks Clinic apparently double-billed insurance carriers in some instances, and incorrectly over-billed Alpac in others. But that's not Kessick's fault. The salient fact is that Alpac dropped Kessick without any medical examination or direct testimony.

Stranger still, the Board upheld Alpac. Kessick has come

Jan 25, 1979

Alpac

# Compensation rates may artificially boost costs

By R. A. FINEBERG  
Daily News correspondent

(Last of a series)

Variations in the way Alaska insurance companies report data to the national workmen's compensation rate-making organization may be artificially boosting the price Alaska employers pay for workers' comp insurance, The Daily News has learned.

This possibility has led the state Division of Insurance to hire accounting specialists to examine the complicated comp rate-setting procedure. The report, by the California-based firm of Millman and Robertson, is due by June 30, according to state insurance director Kenneth Moore.

Informed sources say the investigation was triggered when the Division of Insurance learned Alaska Pacific Assurance Co. (Alpac), the state's largest workers' comp insurance carrier, may not list its reserves — the amount the company sets aside for anticipated payments — in the same way other major carriers operating in Alaska list theirs.

But an Alpac official said Monday the company does not list its reserves in a different manner.

Don Koch, the state's insurance market surveillance chief, said one area of confusion is the manner in which Alpac reports annuity payments to the National Council on Compensation Insurance, the industry's rate-setting organization.

Alpac buys annuities (simply guarantees to make regular payments) to cover long-term payments to disabled comp claimants or to survivors of persons killed in job-related accidents.

Alpac, or any other insurance company, may — for example — buy an annuity that pays \$1.5 million over a 30-year period for less than \$500,000.

Insurance division officials are concerned that a company may record the money set aside for anticipated pay-outs — the \$1.5 million figure — with the National Council for rate-making purposes, even though the company later pays the lower figure.

And it may be that the lower

See Back Page, RATES

Anchorage Daily News 5/2/79

# Some doctors rough on comp claims

By R. A. FINEBERG

(Second of a series)

When Robert MacArmour, a Fairbanks pipeline worker injured in a truck accident in the Brooks Range in May 1977, pressed his claim for workers' compensation benefits, Alaska Pacific Assurance Co. (Alpac) sent him to a San Francisco specialist for examination.

The physician, Dr. Willard F. Pennell, spent three hours with MacArmour, then wrote a 12-page, single-spaced report to Alpac.

The neurologist-psychiatrist told the insurance company, MacArmour most likely was faking his back problems.

Alpac denied MacArmour further benefits. Citing Dr. Pennell's opinion, the state Workmen's Compensation Board upheld the insurance company, concluding MacArmour's complaints were "based on a conscious attempt to get additional workmen's compensation benefits."

Today MacArmour is still seek-

ing medical treatment while he looks for a lawyer to help him tackle Alpac and the compensation board.

MacArmour says he knew early in his interview with Dr. Pennell that the physician was going to side with the insurance company.

Diane Black, another Fairbanks worker who says she too has a back problem, tells an almost identical story about Dr. Pennell and Alpac.

An Anchorage woman, who asked that her name be withheld, claims Alpac sent her to Dr. Pennell and that the San Francisco specialist stripped her of "almost everything but my driver's license."

None of the three Alaska worker's comp claimants knew each other when Alpac sent them to San Francisco. Until recently they had never heard of a lawyer named Marvin E. Lewis.

Lewis says he could have warned them about Dr. Pennell. A San Francisco attorney and past president of the American Trial Lawyers Association, Lewis has

been in court with Dr. Pennell and his partner, Dr. Knox Finley, for more than two decades.

"They always say my client is faking it; I always win," the lawyer snaps, noting that he has won at least half a dozen major injury suits for clients against whom Dr. Finley has testified.

Lewis is the author of a legal text, "The Psychic Injury." In that volume he describes in detail several of the cases in which he has faced Dr. Pennell's partner. Those comments, he says, are equally applicable to the work of Dr. Pennell.

In one case quoted in the text-book, Lewis pointed out that Dr. Finley had appeared in nearly 100 cases in San Francisco as an expert witness, then asked the doctor to name a single case in which the physician had testified that there is a link between the accident in question and the psychological damage for which the plaintiff seeks damages.

The physician was unable to

name a case in which he sided with the plaintiff.

Lewis concluded one successful prosecution with this statement to the jury:

"Dr. Knox Finley comes from defense mill. That's what his office is...nearly a hundred times he testified on the stand like I in...injury cases and always for the City and always for...insurance companies...Then his two partners were doing the same thing. They were not only having the cases, but there were other plaintiffs who were injured that never got to Court...they were doing this...as a business, a business testifying for insurance companies..."

Dr. Pennell declines to discuss lawyer Lewis' criticisms of him and his partners. What about complaints of MacArmour, Black and other Alaskans? Professor ethics, Dr. Pennell replies, pruned him from discussing individual cases.

See Back Page, WORKMEN

Anchorage Daily News April 30, 1979

# How many pipeline deaths?

## Surprisingly, there's no reliable official tally, but our investigation turns up more than they claimed

by Richard A. Fineberg

### Fairbanks

If he could, Gary Russett would probably question Alyeska Pipeline Service Co.'s carefully worded assertion that there were 29 fatalities connected with construction of the trans-Alaska pipeline.

"It's at least 30," he might say, adding to the total his own death after he contracted pneumonia at a northern pipeline camp and died en route to Fairbanks, unattended, on an emergency medical evacuation flight.

But Russett, who was not yet 30 when he died somewhere after midnight in the air between Happy Valley and Fairbanks on Jan. 10 three years ago, is not on Alyeska's narrowly defined list of construction-related deaths. He is one of at least 44 employees of pipeline contractors whose deaths during construction are omitted from the figure Alyeska chooses to use.

Alyeska's figure of 29 includes 22 equipment-related fatalities, four air and three highway deaths, according to Alyeska spokesman Sam Akin.

Figures derived from various state records show that during pipeline construction, 23 workers died in equipment-related accidents, 12 in plane crashes and 10 in highway accidents. That adds up to 45—18 more than Alyeska takes responsibility for. In addition, 28 employees of pipeline contractors were fatally stricken at pipeline camps or job sites (pneumonia victim Russett falls into this category).

Since some of the latter 28 may be considered natural deaths, not job related, the unofficial pipeline construction death toll appears to be somewhere between 45 and 73. This estimate is based on records of the Alaska State Troopers, the state Workmen's Compensation Division, the state Division of Occupational Safety & Health (DOSH), the State Pipeline Coordinator's Office and court cases.

Asked to explain the discrepancy between Alyeska's figures and the estimate from state records, Alyeska's Akin



Photo by Nancy Simmerman

said in some instances a person may have been off the job when an accident or death occurred, and Alyeska might deem these cases not to be pipeline-related. Alyeska based its count on nationally accepted guidelines, he said.

This explanation might apply to three of the 10 highway deaths listed in state reports, but it could not apply to the remaining seven accidents which are known to have involved on-the-job workers or loaded tractor-trailers hauling materials north. Nor would this rationale seem to apply to any of the 12 persons who died in the crashes of four separate planes bound to or from pipeline camps.

Akin could not confirm the 28 other deaths of pipeline workers. "We have nothing that fits that category," he said.

Despite Alyeska's disavowal, state records indicate death struck the 28 employees of pipeline contractors at pipeline camps or job sites in the following manner:

- 12 heart fatalities (it could not be ascertained how many of these occurred on the job and how many took place during non-working hours; industrial health studies indicate that job stress may cause heart attacks);

- three pneumonia deaths (including Russett);

- two hepatitis deaths (an ex-pipeline worker who contracted hepatitis and died several months after he left the pipeline is not counted here);

- five other natural deaths;
- three deaths apparently related to drinking;

- one gunshot death;

- two of unknown causes.

Of the 23 equipment-related accidents resulting in worker deaths, six occurred when trucks or heavy machinery backed over the victims; five resulted during the loading or unloading of materials; three involved crushing by vehicles stopped along the highway; and the remaining nine were isolated incidents not readily fitted in categories.

In addition to the fatalities described here, available records left in doubt the employment status or circumstances of death of 14 persons who died in the vicinity of the pipeline. Although some might be pipeline-related, these fatalities were not included in the Advocate's count. Also excluded from the list were Prudhoe Bay fatalities and non-project people who died in accidents involving vehicles operated by pipeline personnel.

Alyeska developed the following system to take care of more than 20 ersatz communities along the 800-mile pipeline

corridor:

- Primary responsibility for worker safety fell to the contractor. Alyeska's safety department supervised the program but was not directly involved in day-to-day operations.

- Unions held weekly safety meetings on the job to discuss safety problems, real and potential.

- A field camp medical team, consisting of a physician, a nurse and a medic, was stationed at the camp. When necessary, aircraft were available to medivac (short for medical evacuation) the patient to the nearest hospital.

Compared to the ill-equipped, pot-bellied medic in the typical remote Alaska camp of days gone by, the Alyeska system was a great improvement, commented Dr. Phillip Hardie, who headed the pipeline medical teams from Fairbanks. "It was a sophisticated system instead of a lick and a promise," Hardie said of the Alyeska program.

How well did this system work? Alyeska and state officials generally agree the system worked quite well, but they do not present substantive data to buttress their contention (see accompanying story).

Should Russett be counted a pipeline-related fatality? You decide. Here are the facts, as

related by several sources familiar with the case:

The camp medic at Pump Station 3 ordered a midnight emergency flight to Fairbanks for the ailing worker, then drove Russett to the airstrip at Happy Valley, 45 minutes away. Russett was carried to the light plane on a stretcher; he was sent to Fairbanks without oxygen or a medical attendant.

The pilots, one source told the Advocate, presumed their passenger was sleeping and were unaware Russett had died on the flight.

The medic, who reportedly elected to stay in camp to take care of other pressing medical problems, was dismissed by Alyeska for failing to accompany Russett.

Alyeska declined to comment on Russett's death. Russett's family has sued Alyeska and the pipeline company does not comment on pending litigation.

Dr. Hardie of Alyeska's medical team said the medivac system usually worked without a hitch. However, the Advocate has learned of three other medivacs that were unaccountably delayed for extended periods. One involved a fatality; whether the delay contributed to the death could not be ascertained from the available records.

# Who counts the bodies Pipeline's safety record lacks scrutiny

## Fairbanks

An Alaska state official plan for possible construction of a second world record pipeline across the state, lack of data about the safety of the last one hasn't stopped them from parroting company praise for its record.

For example, Joseph "Stan" Godsoe, chief of compliance for the state Labor Department's Division of Occupational Safety and Health (DOSH) views the oil pipeline as "one of the safest projects that's ever been accomplished in the world."

But ask him how many people died on the project: "I have no idea," he says. "It's published somewhere."

And although worker safety was the subject of major controversy before and during the first year of trans-Alaska oil line construction, the state used no special procedure to keep tabs on project safety statistics. No state agency surveyed in an Advocate investigation could cite an authoritative figure even for the number of actual deaths related to pipeline construction (see accompanying story).

Alyeska Pipeline Service Co. says the count was 29, but a composite list compiled from the reports of several state agencies yields 45 pipeline-related fatalities. In addition of 28 more non-accidental deaths among workers, many appear definitely pipeline-related. There are reports on 14 deaths beyond even that figure in which records simply aren't clear enough to specify whether they were associated with the pipeline.

The confusion over pipeline deaths—which would appear to be a simple statistic—highlights a broader question over difficulty of developing other meaningful pipeline safety statistics. Alyeska, a consortium of seven major oil companies formed to manage the construction job, has not released total accident figures for the three and one-half year project, which cost more than \$9 billion and employed more than 20,000 people.

Northwest Alaska Pipeline Co. now is trying to secure financing to build a natural gas pipeline through Alaska and Canada whose U.S. and Canadian components would be of even grander scale. That possibility moves questions about oil line

## Analysis

deaths into an even more important category for government regulators, unions and prospective gas line workers. Nevertheless, a number of uncertainties about past performance on a mammoth pipeline project remain unresolved.

Alyeska boasted in 1978 that after two full seasons of construction, the oil pipeline safety program had cut fatalities and accidents "to a point far below predictions." The injury rate, the company said, was "nearly 28 percent below the national figures" for contract construction.

The question is, what do those figures really show?

Some observers feel figures matching pre-project predictions against actual performance shouldn't be given much credence. The fact is that nobody knew just what to expect of any pipeline activity before the fact. That uncertainty was illustrated by the fact that contractors didn't operate on customary fixed-fee bids, but instead negotiated reimbursable cost contracts with Alyeska. Similarly, contracts for insurance premiums were rated retroactively—after experience with the massive project.

Nor is comparison between the pipeline and national safety statistics necessarily meaningful. Industry accident and job-related illness reports are often unreliable, according to a two-year Ford Foundation study of industrial safety. That study, prepared by Dr. Nicholas Ashford of the Massachusetts Institute of Technology, also found that "official statistics barely represent the tip of the iceberg as far as the magnitude of the U.S. health and safety problem is concerned," due in part to widespread under-reporting.

Both state and company officials say it was the safest construction job ever, but it is difficult to think of a comparable project: Hoover Dam? Holland Tunnel? Is it meaningful to compare the pipeline, much of which was ordinary trenching and construction, to the building of a canyon dam more than 700 feet high or tunneling for several miles beneath the Hudson River?

These observations do not

demonstrate that the Alyeska project was unsafe; they simply point out the common sense of examining Alyeska project safety not in terms of generalities, but in terms of detailed facts about the project itself. Unfortunately, when it comes to pipeline safety figures, facts are hard to come by.

Naomi Kipp, director of DOSH, was one of many state officials who praised the pipeline safety system—"They had a very good safety record," she told the Advocate—but could not provide safety statistics.

DOSH, she explained, keeps detailed records of its field inspections on the pipeline and other jobs around the state. But the safety agency does not compile safety records on specific projects—not even the largest construction project ever attempted by private industry.

Kipp said she based her view of the pipeline on the fact that reports of the state Labor Department's research and analysis section show that statewide accident rates dropped during the 1974-78 period, when the pipeline was far and away the largest single project in the state.

However, sources at Research and Analysis were not so sure the apparent statewide turn-down in heavy construction accident rates can be equated with a safe pipeline. Accident rates are based on hours worked, and on the pipeline it is well known that workers often spent a lot of paid work hours doing nothing, explained one source, who asked to remain unidentified. Those slow hours tend to be accident-free ("You can't hurt yourself too bad sleeping on the bus," one worker said with a grin), and they make the project look safer than it actually was, the source said.

Additionally, there is a great deal of difference in the way companies fill out the forms from which the Research & Analysis section tabulates its data. Recent changes in reporting methods, the source said, account for part of the apparent improvement in safety statistics.

A DOSH field inspector agreed to discuss pipeline safety but vowed he would deny publicly he ever did so, said. "Nobody's going to give you much (in the way of statistics)...you're buying politics." There's another

(continued on next page)

### STATE OF ALASKA PUBLIC NOTICE DEPARTMENT OF HEALTH AND SOCIAL SERVICES STATE OF ALASKA PROPOSED COMPREHENSIVE ANNUAL SOCIAL SERVICES PLAN FOR 1980 Program Year July 1, 1979 through June 30, 1980

The Proposed Plan for Plan Year 1980 has been published and is available for review by the public.

The services offered under the State's Proposed Social Services Program are directed at:

- Achieving or maintaining economic self-support to prevent, reduce, or eliminate dependency;
- Achieving or maintaining self-sufficiency, including reduction or prevention of dependency;
- Preventing or remedying neglect, abuse, or exploitation of children and adults unable to protect their own interests, or preserving, rehabilitating, or reuniting families;
- Preventing or reducing inappropriate institutional care by promoting for community-based care, home-based care, or other forms of less intensive care; or
- Securing referral or admission for institutional care when other forms of care are not appropriate, or providing services to individual institutions.

The Proposed Social Services Program includes the following discrete services:

- Information and Referral Services (I&R)
- Individual and Family Counseling (I&FC—State Funds Only)
- Child Protective Services (CPS)
- Adult Protective Services (APS)

Family planning support may be provided to serve individuals requiring any of the four services; day care support may be provided to individuals requiring Child Protective Services, and homemaker support may be provided to individuals requiring either Adult or Child Protective Services.

Services available by eligibility category are as follows:

Eligible Persons	Services Available
—Available to anyone upon request	I&R
—Available to anyone upon request on a staff available basis	I&FC
—All children under 18 years of age who are subject to potential, actual or alleged neglect, abuse or exploitation, their parents, guardians or caretakers; and runaway youth under age 18.	CPS
—All adults, age 18 or over who are subject to potential, actual or alleged neglect, abuse or exploitation when services are not otherwise available.	APS

Family planning support will be available to all applicants for and recipients of AFDC.

Services offered to Alaskans under this Plan are not based on individual income level.

#### Estimated Expenditures for Program Year

Federal Title XX allotment to State	\$4,400,000
State Match	\$1,467,000
State expenditures above Match	\$11,017,000

#### Public Comments for Proposed Plan

Written comments from the general public will be received on the Proposed Plan for 1980 during the period beginning February 5 and ending March 27, 1979. Written comments may be sent to the Title XX Coordinator, Division of Social Services, Pouch M-08, Juneau, Alaska, 99811. Copies of the Proposed Plan are available without charge at your local office of the Division of Social Services or by telephoning the Regional Office nearest you listed below. Copies of the Proposed Plan are also available by calling the Title XX Coordinator in Juneau (collect) at 465-3207.

On the following days citizens are invited to visit one of the six regional offices listed below where a Title XX representative of the Division will be available from 12:00 noon to 4:00 P.M. to answer questions and receive recommendations for improving this plan:

REGIONAL OFFICES	LOCATION & DATE OF PUBLIC MEETINGS
Southeast Regional Office Room 318, Goldstein Building Juneau, Alaska 99801 PHONE: 588-1981	February 26, 1979 (Tuesday) Meeting will be held in the Regional Office Annex (Juneau).
Southern Regional Office 416 Main Street State Office Building, Room 201 Ketchikan, Alaska 99901 PHONE: 225-4411	February 27, 1979 (Wednesday) Meeting will be held in the 2nd Floor Conference Room, State Office Building, Ketchikan, Alaska.
Southernmost Regional Office Stein Field Building 400 Gambel Street Anchorage, Alaska 99501 PHONE: 274-1450	February 27, 1979 (Tuesday) Meeting will be held in the 2nd Floor Conference Room of the Stein Field Building, 400 Gambel Street, Anchorage, Alaska.
Western Regional Office State Office Building P. O. Box 323 Bethel, Alaska 99808 PHONE: 543-3141	March 1, 1979 (Thursday) Meeting will be held in the Regional Office (Trimmer's Building) Bethel, Alaska.
Northwestern Regional Office State Office Building P. O. Box 231 Homer, Alaska 99603 PHONE: 443-5247	March 6, 1979 (Monday) Meeting will be held in the Regional Office, State Office Building, Homer, Alaska.
Northern Regional Office 1819 Lathrop Street Drexler 40 Fairbanks, Alaska 99701 PHONE: 443-1844	March 7, 1979 (Wednesday) Meeting will be held in the Regional Office, 1819 Lathrop Street, Fairbanks, Alaska.

# Safety

(continued from preceding page)  
pipeline company, he said, and nobody wants to make waves.

According to the inspector, Alyeska initially refused to cooperate with DOSH. It took some months to secure access to the line, and once DOSH won that battle, Alyeska then fought every citation the inspectors issued.

Did the inspector think the pipeline was relatively safe? The inspector scratched his chin. He had a hard time answering, he said, because he didn't cover enough of the project to form an authoritative opinion.

"Parts of it were and parts of it weren't," he said after thinking it over. "I don't think it was the worst thing going on, but it could have been better." A lot depended on the individual contractor and the field supervisors, he added.

Could he name a more hazardous construction job? Sure: the first off-shore oil platforms in Cook Inlet. There was no government safety program then, he said.

Did he believe Alyeska's assertion that the pipeline had a better record than the national average for contract construction? The inspector replied, "I don't believe that."

For one thing, he said, there were too many people coming and going on the pipeline. A general rule, he said, is the less experienced the work force, the higher the accident rate.

Workmen's compensation figures don't reveal much about the pipeline accident rate. Here again, the state agency did not keep pipeline-specific records.

Had the Comp Division done so, interpretation would have been a problem. Some workers may have faked injuries to collect comp. On the other hand, some injured workers tried to stay on the job because they did not want to lose once-in-a-lifetime wages. Without Alyeska comp data, there is no way to ascertain how many accident victims saw the medic and went back to work after suffering an injury that might have resulted, under other circumstances, in medical expenses or work time lost normally covered by workmen's comp.

Workmen's comp may play another unstudied role in the pipeline safety picture. According to Larry Plessinger, chief of safety compliance for DOSH, by paying the workmen's comp tab itself Alyeska removed one of the primary incentives for contractor safety on the job. "It's obviously going to have a very adverse effect on their safety program," Plessinger said. A Fluor employee during construction, he said that



(photo by Rob Stipation)

company, unlike some other contractors, did live up to customary obligations to provide a safe workplace.

Workers interviewed expressed divergent opinions about pipeline safety. Many thought the project was unusually safe because Alyeska had the money to provide adequate equipment and manpower, and because you could usually walk away from a job you thought was dangerous.

The Ford Foundation report on industrial safety cautions that "an inability to assess... low-probability, large-harm contingencies is a behavior trait common to many... workers are socialized to accept the hazardous nature of certain jobs and are convinced of the necessity of performing them in order to earn their livelihood."

Technology, the report observes, has both increased potential workplace dangers, and made a higher safety standards possible.

Some pipeline workers viewed the job as dangerous—in part because of casual work habits and in part because of inexperienced workers. Differences

in safety practices, some said, depended on factors such as the pressure the contractor was under at that moment.

When a contractor was under the gun to get a job done, work often became more dangerous. The death of Fred W. Bretzer, who died April 18, 1976 at Livengood may be a case in point.

Bretzer was fatally crushed when a crate of large pipe being loaded by cranes onto a truck broke and fell on top of him. DOSH later issued a citation, fining an Alyeska contractor, the Price Group, \$600 for a "serious" violation of safety procedures. The crates, DOSH said, were deteriorated and liable to break.

Why were the crates moved in a reportedly unsafe manner? Several sources told the Advocate they believe Bretzer died because the contractor was trying to clear out of that material site in a rush in order to avoid a severe excess rent penalty. That rush, which could have been avoided by proper planning, created the conditions that led to Bretzer's death, sources familiar with the situation say.

How many other fatalities or serious accidents occurred under needlessly rushed conditions? Without assessing pipeline safety data, it is impossible to say.

The role played by unions varied from job site to job site, depending on the interest and capabilities of the union field leaders. Laborers' business agent Joe Thomas in Fairbanks said he thought the project had an excellent safety record. Like everyone else the Advocate contacted, he had no data to support his contention.

Although the Teamsters shut down the haul road for several days on one occasion and stopped the trucks for short periods several other times, the union has not produced data to document its charges that the pipeline exposed truckers to undue risks.

In February 1976, when the Teamsters asked for a restraining order preventing the state Highway Department from issuing permits for pipeline-bound wide loads drivers said were dangerous, Fairbanks Judge Gerald Van Hoomissen, who said he was quite concerned about the potential danger, said

he found himself faced with irreconcilable contentions. The Highway Department, on the one hand, contended hauling the apparently dangerous wide load on a narrow, winding road was a cake-walk while the Teamsters argued the same task was highly dangerous.

The Teamsters did not offer statistics to support their contention: Van Hoomissen did not stop the wide loads.

Chris White, a leader of the disjointed union organization ROOR (Ruled Out Of Order), summarized the pipeline experience this way:

"This is one shot in a workman's life. Men are desperate enough to take chances. The price you pay is maybe a couple of fingers here, or a buddy there."

White, a long-time blaster, said, "I've never in my life been so scared as on that pipeline. And the next one—the gas line—is going to be all in the ground."

To White, that means more blasting—and more safety problems.

—Fineberg

recalled mentioning the subject immediately prior to his fall at a safety meeting at the manager's office. His supervisor, who was qualified as a safety expert, testified that the walkboards could be utilized in a safe manner, but he also testified that that particular walkboard was unsafe. He further testified that the applicant had told him on more than one occasion that the walkboard was unsafe. Nothing was done to improve the safety of the walkboards prior to the accident. *Bekins Moving & Storage Co. v Workers' Compensation Appeals Board* (1980) 103 CA3d 675, 163 Cal Rptr 213.

employer at the time of acquisition, installation, or manufacturer-required modification of the power press.

(3) "Manufacturer" means the designer, fabricator, or assembler of a power press.

(4) "Power press" means any material-forming machine that utilizes a die which is designed for use in the manufacture of other products.

(5) "Removal" means physical removal of a point of operation guard which is either installed by the manufacturer or installed by the employer pursuant to the requirements or instructions of the manufacturer.

(6) "Specifically authorized" means an affirmative instruction issued by the employer prior to the time of the employee's physical injury or death, but shall not mean any subsequent acquiescence in, or ratification of, removal of a point of operation safety guard.

(b) An employee, or his or her dependents in the event of the employee's death, may bring an action at law for damages against the employer where the employee's injury or death is proximately caused by the employer's knowing removal of, or knowing failure to install, a point of operation guard on a power press, and this removal or failure to install is specifically authorized by the employer under conditions known by the employer to create a probability of serious injury or death.

(c) No liability shall arise under this section absent proof that the manufacturer designed, installed, required, or otherwise provided by specification for the attachment of the guard and conveyed knowledge of the same to the employer. Proof of conveyance of this information to the employer by the manufacturer may come from any source.

(d) No right of action for contribution or indemnity by any defendant shall exist against the employer; however, a defendant may seek contribution after the employee secures a judgment against the employer pursuant to the provisions of this section if the employer fails to discharge his or her comparative share of the judgment.

Added Stats 1982 ch 922 § 12.

Review of 1982 Legislation. 14 Pac LJ 763.

In an action under Lab. Code, § 4558 (permitting action against employer by employee injured as result of absence of power press safety guard if employer had knowledge of manufacturer's specifications regarding guard), an employee who was injured by a power press bought second hand from a seller, not the manufacturer, and whose only evidence regarding defendant's knowledge of the need for a safety guard indicated that the seller made defendant aware that the press failed to meet applicable federal standards, plaintiff's reliance on

Lab. Code, § 4558, subd. (c), providing in part that proof of conveyance of the manufacturer's specifications to the employer by the manufacturer need not come from the manufacturer, was misplaced. Although the statute does not restrict how the plaintiff presents evidence of conveyance of the manufacturer's specifications, it requires that the specifications have come from the manufacturer. *Swanson v Matthews Products, Inc.* (1985, 6th Dist) 175 Cal App 3d 901, 221 Cal Rptr 84.

### § 4600. Responsibility of employer

Medical, surgical, chiropractic, and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches, and apparatus, including artificial members, which is reasonably required to cure or relieve from the effects of the injury shall be provided by the employer. In the case of his neglect or refusal seasonably to do so, the employer is liable for the reasonable expense incurred by or on behalf of the employee in providing treatment. After 30 days from the date the injury is reported, the employee

may be treated by a physician of his own choice or at a facility of his own choice within a reasonable geographic area. However, if an employee has notified his employer in writing prior to the date of injury that he or she has a personal physician, the employee shall have the right to be treated by such physician from the date of injury. For the purpose of this section, "personal physician" means the employee's regular physician and surgeon, licensed pursuant to Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code, who has previously directed the medical treatment of the employee, and who retains the employee's medical records, including his or her medical history.

Where at the request of the employer, the employer's insurance carrier, the administrative director, the appeals board or a referee, the employee submits to examination by a physician, he shall be entitled to receive in addition to all other benefits herein provided all reasonable expenses of transportation, meals and lodging incident to reporting for such examination, together with one day of temporary disability indemnity for each day of wages lost in submitting to such an examination. "Reasonable expenses of transportation" includes mileage fees from the employee's home to the place of the examination and back at the rate of twenty-one cents (\$.21) a mile, plus any bridge tolls. Such mileage and tolls shall be paid to the employee at the time he is given notification of the time and place of the examination.

This section shall become operative on July 1, 1984.

Added Stats 1981 ch 1150 § 7, operative January 1, 1984; Amended Stats 1983 ch 1284 § 4, operative July 1, 1984, Stats 1984 ch 596 § 2, effective July 19, 1984, operative July 1, 1984.

#### Amendments:

1983 Amendment: Substituted "July 1, 1984" for "January 1, 1984" in the last paragraph.

1984 Amendment: Deleted the former second paragraph which read: "In accordance with the rules of practice and procedure of the appeals board, the employee, or the dependents of a deceased employee, shall be reimbursed for expenses reasonably, actually, and necessarily incurred for X-rays, laboratory fees, medical reports, medical testimony, and, as needed, interpreter's fees, to prove a contested claim. The reasonableness of and necessity for incurring such expenses to prove a contested claim shall be determined with respect to the time when such expenses were actually incurred. Expenses of medical testimony shall be presumed reasonable if in conformity with the fee schedule charges provided for impartial medical experts appointed by the administrative director."

Former Section: Former § 4600 was amended by Stats 1977 ch 1172 § 1, Stats 1980 ch 1247 § 1, Stats 1981 ch 1150 § 6, Stats 1983 ch 1284 § 3 and repealed, effective July 1, 1984, by its own terms.

Jurisdictional limitations of Workers' Compensation Appeals Board: Gov C §§ 21026, 21363.

Cal Jur 3d Work Injury Compensation §§ 204, 205, 206, 207, 208, 210, 213, 224, 235, 305.

Review of Selected 1977 California Legislation. 9 Pacific LJ 694.

## 2. Construction

In imposing on a workers' compensation insurance carrier the penalty provided by Lab. Code, § 5814, which requires that "when payment of compensation has been unreasonably delayed . . . the full amount of the order, decision or award shall be increased by 10 percent," the Workers' Compensation Appeals Board erred in refusing to apply the statute to medical-legal costs that were included in the award. Such costs were clearly a part of the "full amount of the order, decision or award," and Lab. Code, § 3207, provides that "compensation . . . includes every benefit or payment conferred by Division 4 upon an injured employee," which division includes Lab. Code, § 4600, 5811, which provide the statutory authority for the reimbursement to an applicant of medical-legal costs incurred in prosecuting a claim.

(Disapproving, to the extent they are inconsistent with the opinion, *Hockett v. Industrial Accident Commission* (1959) 170 Cal.App.2d 155 [338 P.2d 604], *Vogh v. Workmen's Comp. App. Bd.* (1968) 264 Cal.App.2d 724 [70 Cal.Rptr 722], and *Ramsey v. Workmen's Comp. App. Bd.* (1969) 2 Cal.App.3d 693 [83 Cal.Rptr.51].) *Adams v. Workers' Compensation Appeals Board* (1976) 18 C3d 226, 133 Cal Rptr 517, 555 P2d 303.

Though the law in force at the time of an industrial injury is to be taken as the measure of the injured person's right of recovery and though statutes are not given retrospective operation in the absence of clear legislative intent that they so operate, an employee injured on January 22, 1975, had the right to designate his own physician pursuant to an amendment to Lab. Code, § 4600, that took effect on January 1, 1976, because the

amendment did not impose new or additional liabilities on the employer, who would be merely for the reasonable cause of treatment regardless of who chose the doctor, but changed only the procedure under which benefits were to be furnished; thus, there was no retroactive effect in applying the amendment to retroactive due from the employer after January 1, despite the injuries having occurred before that date. *State Compensation Ins. Fund v. Workers' Compensation Appeals Board* (1977) 71 Cal.3d 133, 139 Cal Rptr 410.

Medical-legal costs incurred by the survivor of a Public Employees Retirement System member to prove industrial causation of death so as to entitle the survivor to special death benefits, were properly awarded by the workers' compensation appeals board. For purposes of determining industrial causation pursuant to Gov. Code, § 4600, such costs are procedural in nature; that is, they also provides that the board, using the procedure as in workers' compensation hearings, shall determine whether the death of a member was industrial, and Lab. Code, § 4600, provides that in "accordance with the rules of practice and procedure of the appeals board" dependent on a deceased employee are entitled to reimbursement for medical reports and testimony to prove a contested claim. To allow such expenses in workers' compensation cases and deny them in retirement cases before the retirement system would create an unreasonable inconsistency and defeat the legislative motive behind the statutes. The board did not act without or in excess of its power, or unreasonably, in awarding the medical-legal costs. *Public Employees' Retirement System v. Workers' Compensation Appeals Board* (1977) 87 CA3d 215, 151 Cal Rptr 35.

An applicant for workers' compensation benefits who was found not to be an "employee" under the meaning of the definition of such term in Lab C § 3351, was not entitled to a workers' compensation award of medical-legal costs, deposition costs and attorney fees, under Lab. Code, § 4600, providing for reimbursement of an employee for medical expenses, and Lab. Code, § 5710, subd (b), providing for deposition and attorney fees. Furthermore the applicant was not entitled to an award of such items as "deposition expenses" under Lab Code, § 5811. *Z. Adams v. Workers' Compensation Appeals Board* (1976) 18 CA3d 598, 160 Cal Rptr 408.

Under Lab. Code, § 4600, requiring an employer to provide a disabled employee with medical treatment reasonably required to cure or relieve the effects of an injury, housekeeping services considered essential by a medical doctor are included. The terms of the statute are inclusive, and the provision of Lab. Code, § 4600, allowing recovery for medical treatment, in specified services, suggests that the statute covers other services not specifically enumerated. Hence the statute extends coverage to costs of housekeeping services when the medical demonstrated medical need for such services. *Smyers v. Workers' Comp. Appeals Bd.* (1977) 157 Cal App 3d 36, 203 Cal Rptr 521.

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July 1, 1984.

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LJ 694.

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liabilities on the employer, who would be liable  
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gardless of who chose the doctor, but rather  
changed only the procedure under which benefits  
were to be furnished; thus, there was no retroac-  
tive effect in applying the amendment to treatment  
due from the employer after January 1, 1976,  
despite the injuries having occurred before that  
date. *State Compensation Ins. Fund v Workers'  
Compensation Appeals Board* (1977) 71 CA3d  
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Medical-legal costs incurred by the survivor of a  
Public Employees Retirement System member to  
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trial causation pursuant to Gov. Code, § 21363,  
such costs are procedural in nature; that statute  
also provides that the board, using the same  
procedure as in workers' compensation hearings,  
shall determine whether the death of a member  
was industrial, and Lab. Code, § 4600, provides  
that in "accordance with the rules of practice and  
procedure of the appeals board" dependents of a  
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for medical reports and testimony to prove a  
contested claim. To allow such expenses in work-  
ers' compensation cases and deny them in matters  
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specified services, suggests that the statute grants  
coverage for other services not specifically enumer-  
ated. Hence the statute extends coverage to recipi-  
ents of housekeeping services when there is a  
demonstrated medical need for such services.  
*Smyers v Workers' Comp. Appeals Bd.* (1984, 1st  
Dist) 157 Cal App 3d 36, 203 Cal Rptr 521.

Recipients of workers' compensation benefits,  
whose employer had stipulated to findings and  
awards of 100 percent disability and continuing  
medical treatment for life, were entitled to recover  
for housekeeping services as part of their medical  
treatment, where three physicians strongly recom-  
mended for medical reasons that such services be  
provided as part of the recipients' medical treat-  
ment. Under Lab. Code, § 4600, requiring an  
employer to provide a disabled employee with  
medical treatment reasonably required to cure or  
relieve from the effects of an injury, certain ser-  
vices must be performed for a recipient of benefits  
when there is a medical recommendation or pre-  
scription for such services. *Smyers v Workers'  
Comp. Appeals Bd.* (1984, 1st Dist) 157 Cal App  
3d 36, 203 Cal Rptr 521.

Lab. Code, § 3202, requiring that the workers'  
compensation laws be liberally construed by the  
courts with the purpose of extending their benefits  
for the protection of persons injured in the course  
of employment, is applicable to Lab. Code, § 4600,  
requiring an employer to provide a disabled em-  
ployee with medical treatment reasonably required  
to cure or relieve from the effects of an injury.  
*Smyers v Workers' Comp. Appeals Bd.* (1984, 1st  
Dist) 157 Cal App 3d 36, 203 Cal Rptr 521.

#### 4. Duty and Liability of Employer Generally

While Lab. Code, § 4600, imposes a broad duty  
on the employer to provide medical and other  
treatment to an employee, and makes him liable  
for expenses incurred by the employee or by third  
parties in his behalf when it fails to do so, Lab.  
Code, § 5405, sets clear limits on the time periods  
within which procedures for the enforcement of  
that duty must be invoked. Such statute of limita-  
tions neither limits duties, nor makes them less  
than mandatory, but merely requires diligent pros-  
ecution of known claims thereby providing neces-  
sary finality and predictability in legal affairs, and  
insuring that claims will be resolved while the  
evidence bearing on the issues is reasonably avail-  
able and fresh. *Kaiser Foundation Hospitals v  
Workers' Compensation Appeals Board* (1977) 19  
C3d 329, 137 Cal Rptr 878, 562 P2d 1037.

Workers' compensation benefits awarded two  
and one-half years after an industrial injury legiti-  
mately constituted compensation for a new and  
further disability under Lab. Code, § 5410, where  
a claimant suffered a recurrence of her injury after  
not having seen a doctor for a 15-month period  
following an initial period of treatment lasting six  
months, and where the claimant received after the  
accident a voluntary furnishing of benefits from  
her employer, equivalent to a discharge of its  
obligation to provide medical treatment for com-  
pensable injuries under Lab. Code, § 4600, in the  
form of medical treatment under a group insur-  
ance policy, the payments for which were paid by  
the employer. *Pizza Hut Inc. v Workers' Compensa-  
tion Appeals Board* (1978) 76 CA3d 818, 143  
Cal Rptr 131.

In a workers' compensation proceeding arising  
from a back and elbow injury sustained in the  
course of applicant's employment the Workers'  
Compensation Appeals Board (WCAB) properly  
awarded him compensation for future medical

treatment in the form of a continuing weight reduction program. Applicant presented recommendations from two physicians that he continue losing weight in order to relieve him from the effects of his industrial injury. Treatment aimed at affording relief from the effects of an industrial injury represents a compensable expense under Lab. Code, § 4600. *Braewood Convalescent Hospital v Workers' Comp. Appeals Bd.* (1983) 34 Cal 3d 159, 193 Cal Rptr 157.

#### 6. Liability of Employer for Employee's Self-Procured Treatment

The definition of physician in Lab. Code, § 3209.3, does not exclude a physician licensed to practice in another country, and when medical treatment and reports are procured by an employee from such a physician in accordance with Lab. Code, § 4600, setting forth the basic rules regarding the provision of medical treatment to an injured worker, the employer is responsible for the reasonable expense of such treatment and medical-legal costs. An interpretation of Lab. Code, § 3209.3, to exclude non-California physicians is unreasonable in light of the clear jurisdiction of the Workers' Compensation Appeals Board over extraterritorial injuries when the contract of hire was made in California. (Lab. Code, § 5305.) Accordingly, a Mexican worker injured while employed in California who procured medical treatment and incurred medical-legal costs from Mexican physicians in Mexico, was entitled to reimbursement for such expenses, where it did not appear the treatment was unreasonably expensive or the medical reports were not "reasonably, actually, and necessarily incurred . . . to prove a contested claim." (Lab. Code, § 4600.) *State Compensation Ins. Fund v Workers' Compensation Appeals Board* (1977) 69 CA3d 884, 138 Cal Rptr 509.

#### 8. —Liability as Following Upon Neglect or Refusal of Employer to Provide Treatment

In a workers' compensation proceeding arising from a back and elbow injury sustained in the course of the applicant's employment, the Workers' Compensation Appeals Board (WCAB) prop-

erly awarded him reimbursement for his postinjury participation in a self-procured weight reduction program located in North Carolina. Lab. Code, § 4600, imposes liability on the employer for the reasonable cost of medical treatment furnished to an employee within a reasonable geographic area, and three physicians directed applicant to lose weight in order to aid in the cure of his industrial injury. While the employer initially had the right to direct him to a specific program, the employer lost that right by failing to identify and offer such a program; at that point, he acquired the right to choose for himself which program he reasonably might undertake. Moreover, the employer failed to show that treatment at the program was unreasonable as to cost or location, whereas applicant showed that the location was reasonable in light of his lifelong obesity problem and lack of success with traditional weight loss methods. Thus, substantial evidence supported the award. *Braewood Convalescent Hospital v Workers' Comp. Appeals Bd.* (1983) 34 Cal 3d 159, 193 Cal Rptr 157.

#### 9. Employer's Control of Treatment; "Change of Condition"

Though the law in force at the time of an industrial injury is to be taken as the measure of the injured person's right of recovery and though statutes are not given retrospective operation in the absence of clear legislative intent that they so operate, an employee injured on January 22, 1975, had the right to designate his own physician pursuant to an amendment to Lab. Code, § 4600, that took effect on January 1, 1976, because the amendment did not impose new or additional liabilities on the employer, who would be liable merely for the reasonable cause of treatment regardless of who chose the doctor, but rather changed only the procedure under which benefits were to be furnished; thus, there was no retroactive effect in applying the amendment to treatment due from the employer after January 1, 1976, despite the injuries having occurred before that date. *State Compensation Ins. Fund v Workers' Compensation Appeals Board* (1977) 71 CA3d 133, 139 Cal Rptr 410.

### § 4601. Change of physicians upon request of employee

(a) If the employee so requests, the employer shall tender the employee one change of physicians. Upon request of the employee for a change of physicians, the maximum amount of time permitted by law for the employer or insurance carrier to provide the employee an alternative physician or, if requested by the employee, a chiropractor, shall be five working days from the date of the request. The employee is entitled, in any serious case, upon request, to the services of a consulting physician or chiropractor of his or her choice at the expense of the employer. The treatment shall be at the expense of the employer.

(b) If an employee requesting a change of physicians pursuant to subdivision (a) has notified his or her employer in writing prior to the date of injury that he or she has a personal chiropractor, the alternative physician provided, if requested by the employee, shall be the employee's personal

chiropractor. For the purpose the employee's regular chiropracting with Section 1000) (Code, who has previously d retains the employee's chiropractic history.

Amended Stats 1985 ch 241 § 1.

#### Amendments:

1985 Amendment: (1) Designated the substituting "the employee" for "him" a "of his" in the third sentence; and (c) su and (3) added subd (b).

§ 4601.5. [Amended by Stat ch 596 § 3, effective July 19, See §§ 4620 et seq.

§ 4603.2. Notification to employer pursuant to § 4600; Reports to physician. Upon selecting a physician, the physician shall forthwith notify the employer of the date of the physician's working days from the date of the periodic reports at such intervals as the regulations adopted by the act require. Payment for the services of the physician shall be made by the employer. Reports.

Amended Stats 1984 ch 909 § 2.

#### Amendments:

1984 Amendment: (1) Substituted "the" for "his" before "reports"; and (2) added "working" before "days".

§ 4605. Employee's right to sue for damages. Cal Jur 3d Work Injury Compensation

Physicians treating industrially injured employees were subject to the authority of the Workers' Compensation Appeals Board, pursuant to Lab. Code, § 5304, to decide any controversy as to the amounts to be paid for such services. Physicians could not lawfully charge employees for amounts in excess of payments made by employers for their workmen's compensation insurance carriers. Though Lab. Code,

§ 4608. Payment of pharmacy benefits. No workers' compensation insurer or self-insured employer shall deny or reduce the amount of pharmacy benefits provided to an employee because the claim form utilized was not used by the insurer, self-insured employer. Added Stats 1984 ch 137 § 1.

erly awarded him reimbursement for his postinjury participation in a self-procured weight reduction program located in North Carolina. Lab. Code § 4600, imposes liability on the employer for the reasonable cost of medical treatment furnished to an employee within a reasonable geographic area and three physicians directed applicant to lose weight in order to aid in the cure of his industrial injury. While the employer initially had the right to direct him to a specific program, the employer lost that right by failing to identify and offer such a program; at that point, he acquired the right to choose for himself which program he reasonably might undertake. Moreover, the employer failed to show that treatment at the program was unreasonable as to cost or location, whereas applicant showed that the location was reasonable in light of his lifelong obesity problem and lack of success with traditional weight loss methods. Thus, substantial evidence supported the award. *Braewood Convalescent Hospital v Workers' Comp. Appeals Bd.* (1983) 34 Cal 3d 159, 193 Cal Rptr 157.

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#### quest of employee

Employer shall tender the employee one of the employee for a change of time permitted by law for the employer employee an alternative physician or, if factor, shall be five working days from e is entitled, in any serious case, upon g physician or chiropractor of his or ployer. The treatment shall be at the

ge of physicians pursuant to subdivi- oyer in writing prior to the date of hiropractor, the alternative physician ee, shall be the employee's personal

chiropractor. For the purpose of this section, "personal chiropractor" means the employee's regular chiropractor licensed pursuant to Chapter 2 (commencing with Section 1000) of Division 2 of the Business and Professions Code, who has previously directed treatment of the employee, and who retains the employee's chiropractic treatment records, including his or her chiropractic history.

Amended Stats 1985 ch 241 § 1.

#### Amendments:

1985 Amendment: (1) Designated the former section to be subd (a); (2) amended subd (a) by (a) substituting "the employee" for "him" after "shall tender" in the first sentence; (b) added "or her" after "of his" in the third sentence; and (c) substituted "The" for "Such" at the beginning of the last sentence; and (3) added subd (b).

§ 4601.5. [Amended by Stats 1977 ch 442 § 2 and repealed by Stats 1984 ch 596 § 3, effective July 19, 1984.]

See §§ 4620 et seq.

§ 4603.2. Notification to employer of name and address of physician selected pursuant to § 4600; Reports by physician; Payment for services

Upon selecting a physician pursuant to Section 4600, the employee or physician shall forthwith notify the employer of the name and address of the physician. The physician shall submit a report to the employer within five working days from the date of the initial examination and shall submit periodic reports at such intervals as may be prescribed by rules and regulations adopted by the administrative director. The employer shall make payment for the services of the physician after receipt of the required reports.

Amended Stats 1984 ch 909 § 2.

#### Amendments:

1984 Amendment: (1) Substituted "the" for "such" before "physician" the third, fourth, and fifth time it appears; and (2) added "working" before "days" in the second sentence.

§ 4605. Employee's right to provide own physicians

Cal Jur 3d Work Injury Compensation § 210.

Physicians treating industrially injured employees were subject to the authority of the Workers' Compensation Appeals Board, pursuant to Lab. Code, § 5304, to decide any controversies over amounts to be paid for such services, and the physicians could not lawfully charge the employees for amounts in excess of payments from the employers for their workmen's compensation insurance carriers. Though Lab. Code, § 4605, does

permit an injured employee to seek independent or additional care from a physician of his choice and at his own expense, there was no indication that the treatments in question were sought or provided on any other basis than as for industrially injured employees whose employers were liable for reasonable fees charged. *Bell v Samaritan Medical Clinic, Inc.* (1976) 60 CA3d 486, 131 Cal Rptr 582.

§ 4608. Payment of pharmacy benefits; Reproduction of claim form

No workers' compensation insurer, self-insured employer, or agent of an insurer or self-insured employer, shall refuse to pay pharmacy benefits solely because the claim form utilized is reproduced by the person providing the pharmacy benefits, provided the reproduced form is an exact copy of that used by the insurer, self-insured employer, or agent.

Added Stats 1984 ch 137 § 1.

§ 4050

WORKMEN'S COMPENSATION

- § 4053. Failure or refusal to submit to, or obstruction of, examination: After request by employer: Effect
- § 4054. Failure or refusal to submit to, or obstruction of, examination: After direction of appeals board, or referee: Effect
- § 4055. Testimony of physician
- § 4055.2. Party who subpoenas medical records to send copy of subpoena to parties of record
- § 4056. Submission to treatment: Unreasonable refusal: Effect

**Collateral References:**

Witkin Summary (8th ed) p 1029.

**Law Review Articles:**

Discovery in workmen's compensation proceedings. 56 CLR 812.

**§ 4050. Submission by employee to examination upon request or order**  
Whenever the right to compensation under this division exists in favor of an employee, he shall, upon the written request of his employer, submit at reasonable intervals to examination by a practicing physician, provided and paid for by the employer, and shall likewise submit to examination at reasonable intervals by any physician selected by the administrative director or appeals board or referee thereof.

Enacted 1937; Amended Stats 1965 ch 1513 § 74, operative January 15, 1966.

**Prior Law:**

- (a) Stats 1917 ch 586 § 16 p 845.
- (b) Stats 1913 ch 176 § 21 p 291.
- (c) Stats 1911 ch 399 § 11 p 802.

**Amendments:**

1965 Amendment: substituted "administrative director or appeals board" for "commission or any member".

**Collateral References:**

- Cal Jur 2d Workmen's Compensation §§ 194, 250.
- 82 Am Jur 2d Workmen's Compensation §§ 457, 458
- 25 Am Jur Pl & Pr Forms (Rev ed), Workmen's Compensation, Forms 171-173, 191, 280.
- 20 Am Jur Legal Forms 2d, Workmen's Compensation, § 267:83.

**Annotations:**

- Duty of injured employee to submit to physical examination. 6 ALR 1270; 41 ALR 866.
- Duty of claimant, other than employee, to submit to physical examination. 131 ALR 768.

**NOTES OF DECISIONS**

In proceeding in certiorari to review award made by Industrial Accident Commission in favor of employee for compensation on account of knee injury sustained in course of his employment, compensation was not waived by employee, even though he left his employment and went to foreign

country and remained there, where prior to his departure he submitted to repeated examinations by physician representing employer, and no written demand or request was ever subsequently made upon him by employer to submit to further examination. *Union Lbr. Co. v Industrial Acc.*

Com. (1932) 124 CA 584, 12 P2d 1047.

Injured employee is entitled to compensation for time lost from work while complying with request of employer's insurance carrier in being examined by carrier's physician. *Peak v Industrial Acc. Com.* (1947) 82 CA2d 926, 187 P2d 905.

**§ 4051. Request or order to fix time and place of examination: Considerations**

The request or order for the medical examination shall fix a time and place therefor, due consideration being given to the convenience of the employee and his physical condition and ability to attend at the time and place fixed.

Enacted 1937.

**Prior Law:**

- (a) Stats 1917 ch 586 § 16 p 845.
- (b) Stats 1913 ch 176 § 21 p 291.
- (c) Stats 1911 ch 399 § 11 p 802.

**Collateral References:**

- Cal Jur 2d Workmen's Compensation § 194.
- 82 Am Jur 2d Workmen's Compensation §§ 457, 458.
- 25 Am Jur Pl & Pr Forms (Rev ed), Workmen's Compensation, Forms 171, 173.
- 20 Am Jur Legal Forms 2d, Workmen's Compensation, § 267:83.

**SUGGESTED FORM**

**Order to Employee To Submit to Medical Examination**

To:   1   [Employee]

As prescribed by Section 4051 of the Labor Code of the State of California, you are directed to appear on   2  , 19  3  , at   4   o'clock,   5   a.m., at   6   [address], to be examined by   7   [name of doctor]. The expense for such examination will be paid for by the undersigned employer.

If you feel that your physical condition and ability to submit to the medical examination will work an undue inconvenience upon you at the designated time and place, please contact   8   at   9  , and appropriate changes will be made.

You are further notified that you may employ, at your own expense, a physician to be present at the examination by   10   [name of doctor].

If you refuse to submit to the medical examination, or obstruct it in any manner, your right to begin or maintain any proceeding for the collection of compensation shall be suspended as prescribed by Section 4053 of the Labor Code of the State of California.

[Signature]

**§ 4052. Employment of physician by employee**

The employee may employ at his own expense a physician, to be present at any examination required by his employer.

Enacted 1937.

*Law Review Articles:*

- Digest of child labor laws and regulations applicable in California. 8 CLR 404.
- Liability of employer when employee misrepresents age in obtaining employment. 5 SCLR 252.
- Liability for fault, a distinguishing feature of workmen's compensation law. 42 St BJ 534.

*Annotations:*

- Applicability and effect of workmen's compensation acts in case of injuries to minors. 14 ALR 818; 33 ALR 337; 49 ALR 1435; 60 ALR 847; 83 ALR 416; 142 ALR 1018.
- Right of parent who consents to or acquiesces in employment of child under statutory age to recover for latter's injury or death while in such employment. 23 ALR 635; 40 ALR 1206.
- Status of minor employed by parent as regards provision of workmen's compensation act relating to compensation thereunder, or precluding action at law. 132 ALR 1030.

ARTICLE 2

Medical and Hospital Treatment

- § 4600. Provision by employer: Liability for neglect or refusal: Reimbursement for medical expense to prove contested claim: Right to reasonable expenses of transportation, meals and lodging, together with temporary disability indemnity
- § 4601. Change of physicians upon request of employee: Maximum amount of time for employer or insurance carrier to act: Right to services of consulting physician or chiropractor: Expense of treatment
- § 4601.5. Prompt payment of medical fees and expenses: Interest on late payment: Contested claims
- § 4602. Certification of competency of consulting or additional physicians
- § 4603. Procedure where employer desires change of physicians
- § 4603.2. Notification to employer of name and address of physician selected pursuant to § 4600: Reports by physician: Payment for services
- § 4603.5. Duties of administrative director: Adoption of rules: Notification to employees of rights
- § 4604. Determination of controversies
- § 4605. Employee's right to provide own physicians
- § 4606. Provision of treatment, etc., by local public entities, who were self-insured employers under Act of 1913 without regard to the act's time limitation
- § 4607. Attorney's fees incurred in resisting proceeding to terminate medical treatment

**Cross References:**

- Effect of death of employee on liability for medical treatment: § 4700.
- Allowance of lien against compensation for reasonable expenses incurred under this article: § 4903.
- Determination of reasonable medical expenses: § 4906.

Jurisdiction of appeals board over any controversy arising out of portions of this article: § 5304.

Limitations period governing proceedings for collection of benefits provided by this article: § 5405.

Medical and hospital treatment of state employees not otherwise covered by worker's compensation: § 6140.

**§ 4600. Provision by employer: Liability for neglect or refusal: Reimbursement for medical expense to prove contested claim: Right to reasonable expenses of transportation, meals and lodging, together with temporary disability indemnity**

Medical, surgical, chiropractic, and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches, and apparatus, including artificial members, which is reasonably required to cure or relieve from the effects of the injury shall be provided by the employer. In the case of his neglect or refusal seasonably to do so, the employer is liable for the reasonable expense incurred by or on behalf of the employee in providing treatment. After 30 days from the date the injury is reported, the employee may be treated by a physician of his own choice or at a facility of his own choice within a reasonable geographic area.

In accordance with the rules of practice and procedure of the appeals board, the employee, or the dependents of a deceased employee, shall be reimbursed for expenses reasonably, actually, and necessarily incurred for X-rays, laboratory fees, medical reports, and medical testimony to prove a contested claim. The reasonableness of and necessity for incurring such expenses to prove a contested claim shall be determined with respect to the time when such expenses were actually incurred. Expenses of medical testimony shall be presumed reasonable if in conformity with the fee schedule charges provided for impartial medical experts appointed by the administrative director.

Where at the request of the employer, the employer's insurance carrier, the administrative director, the appeals board or a referee, the employee submits to examination by a physician, he shall be entitled to receive in addition to all other benefits herein provided all reasonable expenses of transportation, meals and lodging incident to reporting for such examination, together with one day of temporary disability indemnity for each day of wages lost in submitting to such an examination. "Reasonable expenses of transportation" includes mileage fees from the employee's home to the place of the examination and back at the rate of fourteen cents (\$0.14) a mile, plus any bridge tolls. Such mileage and tolls shall be paid to the employee at the time he is given notification of the time and place of the examination.

Enacted 1937; Amended Stats 1941 ch 594 § 1; Stats 1949 ch 751 § 1; Stats 1951 ch 606 § 6; Stats 1959 ch 1189 § 9; Stats 1965 ch 1513 § 85, operative January 15, 1966; Stats 1971 ch 1404 § 1; Stats 1973 ch 1147 § 1; Stats 1975 ch 1259 § 1.

**Prior Law:**

(a) Stats 1917 ch 586 § 9 p 836, as amended by Stats 1919 ch 471 § 4 p 913, Stats 1925 ch 354 § 1 p 640, Stats 1929 ch 222 § 1 p 420.

(b) Stats 1913 ch 176 § 15 p 284, as amended by Stats 1915 ch 607 § 4 p 1082.

(c) Stats 1911 ch 399 § 8 p 798.

**Amendments:**

**1941 Amendment:** Substituted "cure or relieve" for "cure and relieve" in the first sentence.

**1949 Amendment:** Added the second paragraph.

**1951 Amendment:** Added "laboratory fees," after "X-rays," in the second paragraph.

**1959 Amendment:** (1) Deleted "and" after "laboratory fees" in the second paragraph; (2) substituted "and medical testimony to" for "required to successfully" after "medical reports" in the second paragraph; (3) added the second and third sentences in the second paragraph; and (4) added the third paragraph.

**1965 Amendment:** (1) Amended the second paragraph by substituting (a) "appeals board" for "commission"; and (b) "administrative director" for "commission"; and (2) substituted "administrative director, the appeals board or a" for "commission, or any commissioner or" in the third paragraph.

**1971 Amendment:** Added the second and third sentences of the third paragraph.

**1973 Amendment:** Substituted "fourteen cents (\$0.14)" for "twelve cents (\$0.12)" in the third paragraph.

**1975 Amendment:** Amended the first paragraph by adding (1) "chiropractic," in the first sentence; and (2) the third sentence.

**Cross References:**

Hospital service provided by employer: §§ 2500 et seq.

"Appeals board": § 3205.5.

"Administrative director": § 3206.

"Physician": § 3209.3.

Medical, surgical and hospital treatment: what included in term: § 3209.5.

Inspection of hospital facilities: §§ 3950 et seq.

Medical examinations on employee: §§ 4050 et seq.

Notification to employer of name and address of physician selected pursuant to this section: § 4603.2.

Duty of administrative director to define reasonable geographic areas for purposes of this section: § 4603.5.

California Highway Patrol or Department of Justice members' or harbor policemen's right to treatment: § 4802.

Policemen and firemen's right to treatment: § 4852.

Treatment of state employees not otherwise covered: § 6140.

**Collateral References:**

Witkin Summary (8th ed) pp 986, 987, 988, 1003, 1006.

Cal Jur 2d Unemployment Insurance § 31, Workmen's Compensation §§ 187, 188, 189, 194, 307.

Cal Digest of official Reports 3d Series Workmen's Compensation §§ 114-116.

82 Am Jur 2d Workmen's Compensation §§ 391 et seq.

20 Am Jur Legal Forms 2d, Workmen's Compensation, § 267:51.

*Law Review Articles:*

Liability of an employer for medical services to an injured employee. 10 CLR 529.

Right to control medical treatment under workmen's compensation law. 21 Hast LJ 700.

Review of Selected 1975 Code Legislation. 7 Pacific LJ 569.

Initial choice of physician under workmen's compensation: Is California right for the panel approach? (1973) 8 USF LR 149.

Choice of physician under workmen's compensation; employer-carrier choice in California. 8 USF LR 157.

*Annotations:*

Liability of employer or insurance company for medical and hospital aid furnished to injured employee. 7 ALR 545.

Workmen's compensation act as affecting master's duty and liability under contract to furnish medical treatment to employees. 33 ALR 1204.

Applicability of workmen's compensation act as affected by the character or qualifications of the person rendering the medical services. 40 ALR 1265.

Construction and effect of provisions relating to compensation of physicians or others rendering services to injured employee. 72 ALR 1012; 143 ALR 1264.

Application of specific provisions of workmen's compensation act relating to duty of employer or insurer to furnish medical, surgical, hospital or nursing treatment in cases where cure is impossible. 88 ALR 1192.

Limit of compensation under workmen's compensation act as including medical expenses. 128 ALR 136.

Selection or change of physician, surgeon, or hospital. 142 ALR 1205.

Award with respect to operation performed to make use of corrective appliance possible or more effective. 143 ALR 581.

Master's duty to care for or to furnish medical aid to servant stricken by illness or injury. 64 ALR2d 1108.

Allowance as costs, of such items as maps, models, wall charts, photographs, and the like. 97 ALR2d 138, 169.

Insured's receipt of or right to workmen's compensation benefits as affecting recovery under accident, hospital, or medical expense policy. 40 ALR3d 1012.

NOTES OF DECISIONS

1. In General
2. Construction
3. Jurisdiction of Administrative Body
4. Duty and Liability of Employer Generally
5. Notice to Employer of Injury; Necessity for and Sufficiency
6. Liability of Employer for Employee's Self-Procured Treatment
7. —Success of Self-Procured Treatment as Factor in Determining Liability
8. —Liability as Following Upon Neglect or Refusal of Employer to Provide Treatment
9. Employer's Control of Treatment; "Change of Condition"

1. In General

A tender of medical and surgical treatment by an employer to an injured employee must be unequiv-

ocal and one which the employee could and should accept when made; a tender of such services contingent upon a determination of the Industrial Accident Commission in the employee's favor is not sufficient. *Gildersleeve v Industrial Acc. Com.* (1931) 212 C 763, 1 P2d 1.

The lien allowed an employer or his insurance carrier on the insured employee's recovery against a third person under § 3856 includes expenditures for medical and hospital treatment under this section. *Heaton v Kerlan* (1946) 27 C2d 716, 166 P2d 857.

When all conditions prescribed by this section for reimbursement for medical expense to prove contested claim occur, and commission makes its determination, the award for such costs becomes part of judgment for special additional compensation, an incidental feature of that judgment. State

attorney for a workmen's compensation claimant, seeking fees in addition to those awarded by the Workmen's Compensation Appeals Board for services on behalf of the workmen's compensation claimant. The subject matter, by virtue of Cal Const, art XX, § 21, providing for a "complete system of workmen's compensation," and Lab Code, §§ 4600, 5300, 5304, 5955, vesting the Workmen's Compensation Appeals Board with exclusive jurisdiction to fix the fees of medical witnesses in matters before the board, was within the exclusive jurisdiction of the Workmen's Compensation Appeals Board. *Workmen's Compensation Appeals Board v Small Claims Court* (1973) 35 CA3d 643, 111 Cal Rptr 6.

#### 4. Duty and Liability of Employer Generally

Treatment which this section requires employer to furnish injured employee is such as would reasonably and seasonably tend to relieve and cure employee from effects of injury. *Union Iron Works v Industrial Acci. Com.* (1922) 190 C 33, 210 P 410; *Industrial Indem. Co. v Industrial Acci. Com.* (1961) 188 CA2d 656, 10 Cal Rptr 566.

An employer may be required to pay the cost of plastic surgery, though incidentally for cosmetic purposes, where the compensable injury causes a decided handicap to the employee in obtaining reemployment. *Los Angeles County v Industrial Acc. Com.* (1927) 202 C 437, 261 P 295.

An employer may be required to furnish treatment to an employee even though the employee is permanently injured. *United States Fid. & Guar. Co. v Department of Industrial Relations* (1929) 207 C 144, 277 P 492.

The aggravation of an employee's pre-existing hernia may be adequately compensated by the furnishing of a surgical operation, since compensation is allowed only for the proportion of the disability due to the aggravation of the disease as may reasonably be attributed to the injury for which the employer is liable. *Bige v Industrial Acc. Com.* (1930) 105 CA 210, 287 P 577.

This section does not require an employer to replace eyeglasses which have been damaged in an industrial accident. *California Cas. Indem. Exchange v Industrial Acc. Com.* (1939) 13 C2d 529, 90 P2d 289.

An injured employee is entitled to practical nursing services and private custodial care and supervision when the need therefor appears and conditions therefor are appropriate under and in accordance with this section and other applicable provisions of the law. *Kaiser Co. v Industrial Acc. Com.* (1952) 109 CA2d 54, 240 P2d 57.

Duty imposed on employer who has notice of injury for which employee seeks compensation is not, in first instance, passive one of reimburse-

ment, but active one in offering aid in advance and of making whatever investigation is necessary to determine extent of employer's obligation and employee's needs. *United States Cas. Co. v Industrial Acc. Com.* (1954) 122 CA2d 427, 265 P2d 35.

Employer's duty is to furnish all medical, surgical and hospital treatment that is reasonably required to cure or relieve effects of injury, and this primary duty imposes liability from which employer is not to be relieved except for good cause. *Simien v Industrial Acc. Com.* (1956) 138 CA2d 397, 291 P2d 951; *California Union Ins. Co. v Industrial Acci. Com.* (1960) 183 CA2d 644, 7 Cal Rptr 67.

It is employer's duty under Workmen's Compensation Act to provide injured employee with that medical, surgical and hospital treatment that is reasonably required to cure or relieve from effects of injury and to take initiative in furnishing same. *Deauville v Hall* (1961) 188 CA2d 535, 10 Cal Rptr 511, cert den 368 US 824, 7 L Ed 2d 28, 82 S Ct 43.

Payment of premiums for medical insurance by employer pursuant to collective bargaining agreement with union constitutes wages within meaning of employment agreement with employee who dies of industrial injury and should not be construed to be medical treatment rendered for which employer, as its own compensation carrier, is entitled to credit against award of death benefits. *Foremost Dairies, Inc. v Industrial Acci. Com.* (1965) 237 CA2d 560, 47 Cal Rptr 173.

Whether medical treatment for industrial injury is administered by doctor chosen by injured employee or one selected by employer, employer is liable for no more than reasonable cost of medical treatment reasonably required to cure or relieve effects of injury. *McCoy v Industrial Acci. Com.* (1966) 64 C2d 82, 48 Cal Rptr 858, 410 P2d 362.

An employee's medical treatment unrelated to the industrial injury need not be furnished by the employer. *Granado v Workmen's Compensation Appeals Board* (1968) 69 C2d 399, 71 Cal Rptr 678, 445 P2d 294.

So long as medical treatment is reasonably required to cure or relieve from the effects of an industrial injury, the employer is required to provide the treatment, and treatment for nonindustrial conditions may be required of the employer where it becomes essential in curing or relieving from the effects of the industrial injury itself; such medical expense is not apportionable. *Granado v Workmen's Compensation Appeals Board* (1968) 69 C2d 399, 71 Cal Rptr 678, 445 P2d 294.

A workmen's compensation insurance carrier is liable for providing a private room for the care of an employee who has sustained an industrial in-

jury only where such private room is required (Lab Code, § 4600). Thus, in a proceeding to enforce an award of life-long rest home care, including such other care as might be necessary by reason of the employee's injury, such employee was not entitled to an order for a private room where there was no medical evidence that a private room was needed to cure or relieve him from the effects of the injury. *Kauffman v Workmen's Compensation Appeals Board* (1969) 273 CA2d 829, 78 Cal Rptr 620.

An employer must seasonably offer to an industrially injured employee that medical, surgical or hospital care reasonably required to cure or relieve from the effects of the industrial injury (Lab Code, § 4600); he must begin payment of compensation for temporary disability by a payment for one week in advance as wages on the eighth day after the employee leaves work as a result of the injury (§ 4650); and he must begin payment of compensation for permanent disability by a payment for one week in advance as wages on the eighth day after disability becomes permanent or the date of the last payment of temporary disability indemnity, whichever occurs first (§ 4650). *Ramirez v Workmen's Compensation Appeals Board* (1970) 10 CA3d 227, 88 Cal Rptr 865.

Medical expense reasonably necessary to relieve from an industrial injury is not apportionable; the basis for the recovery of such expenses is that it be reasonably necessary to relieve from the effects of the industrial injury, and there is no provision requiring a finding of disability, temporary or permanent, as a condition to the recovery thereof. *Cedillo v Workmen's Compensation Appeals Board* (1971) 5 C3d 450, 96 Cal Rptr 471, 487 P2d 1039.

If practical nursing care is reasonably required to cure or relieve the effects of an injury compensable under workmen's compensation, and such care has been adequately provided by a wife, she should be entitled to compensation for her services. *Henson v Workmen's Compensation Appeals Board* (1972) 27 CA3d 452, 103 Cal Rptr 785.

**5. Notice to Employer of Injury; Necessity for and Sufficiency**

Employer received sufficient notice of injury to employee to render it liable for medical expenses incurred by employee where, on day following accident, his daughter phoned foreman under whom employee was working that her father had been injured, and three days later employee's wife went to plant yard and personally notified employer of her husband's injury, and where after having been so notified denied liability. *Bethlehem Steel Co. v Industrial Acci. Com.* (1945) 70 CA 2d 382, 161 P2d 59.

While a member of the family of an injured employee is not entitled to compensation for nursing services which are rendered without the knowledge of the employer and are not of an extraordinary nature, where an injured workman requires nursing equivalent to hospital treatment, and the physician attending him requests his wife to care for him at home because of the inadequacy of available hospital facilities, although the wife is not an experienced nurse, and made no formal request for a regular nurse or for compensation for her services at the time they were rendered, it was proper to make an award for the nursing services rendered by her over a period of months where the attending physician, in legal effect, contracted on behalf of the insurer for such services by requesting them. *California Cas. Indem. Exchange v Industrial Acc. Com.* (1948) 84 CA2d 417, 190 P2d 990.

Employer had been given sufficient notice and fair opportunity to furnish medical services to employee injured in course of her employment so as to render employer liable for self-incurred medical expenses incident to operation, where injury occurred several years before and employer had then furnished medical services, employee became worse, employer knew for year before operation that it had been recommended by employee's private physician, and copy of petition for surgery to be performed at employer's expense was served on employer three months before operation was performed. *Pacific Elec. R. Co. v Industrial Acc. Com.* (1950) 96 CA 2d 651, 216 P2d 135.

In proceeding to determine extent of employer's liability for injured employee's self-incurred medical expenses, finding that emergency existed when employee went to hospital was amply supported by evidence that year before such operation physician appointed by Industrial Accident Commission had recommended surgery, three months before such operation employee's physician stated that further delay might endanger results which could be obtained by surgery, pain suffered by employee necessitated increased drug administrations until her side became paralyzed, and thereupon her physician and one he recommended insisted on immediate hospitalization and surgery. *Pacific Elec. R. Co. v Industrial Acc. Com.* (1950) 96 CA2d 651, 216 P2d 135.

Notice to the employer liable for an industrial injury is necessary to create a duty to furnish medical care. *Columbia-Geneva Steel Div., U.S. Steel Co. v Industrial Acc. Com.* (1953) 115 CA2d 862, 253 P2d 45.

That employer had sufficient notice of his employee's compensable injury to entitle employee to reimbursement for self-incurred medical expenses is established by evidence that employee discussed

injury with er and that emp after operation United States (1954) 122 CA

Employee's du service-connect receive comper if treatment, c obtained by en opportunity to of injury, exp but employer's and hospital tr remains, and it notice for inju (1956) 138 CA

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Legislature i er's liability s liability should neglect of emp accept treatm before surgery, knowledge of i unreasonable i notice which *Simien v Indu* 397, 291 P2d 990.

Where surgery pensation awa quired to cure injury, and w pensation carr injury and cla zation, they n provide them need for then this section, a did not give further futile such treatm from liability ical treatment trial Acci. Co 67.

It is duty of

medical care; it was question of fact to be decided by Industrial Accident Commission whether it would be futile for employee to make further request of carrier for medical care. *Industrial Indem. Co. v Industrial Acci. Com.* (1961) 188 CA2d 656, 10 Cal Rptr 566.

In a proceeding to obtain workmen's compensation benefits, the record showed that the workman was entitled to reimbursement for the expenses of self-procured medical, hospital, and surgical care, where, although the workman did not inform defendants specifically of anticipated surgery nor seek their permission and did not wait until his claim had been fully litigated and decided, he had previously advised defendants of his new and further disability and need for treatment, where there was no question that such treatment was reasonably required to cure or relieve from the effects of the industrial injury, and where there was no unreasonable delay or substantial change in the workman's condition between the time that he was last examined by doctors on behalf of defendants and the date of surgery. *Brotherton v Workmen's Compensation Appeals Board* (1969) 273 CA2d 451, 78 Cal Rptr 70.

Where an employer knew that practical nursing services were required for an employee as a result of compensable injury and knew that the services were being provided by the employee's wife, the wife was entitled to recover compensation therefor, even though she had not foregone outside employment in order to provide the nursing care for her husband, and even though she did not make demand for compensation until after the husband's death. *Henson v Workmen's Compensation Appeals Board* (1972) 27 CA3d 452, 103 Cal Rptr 785.

#### 6. Liability of Employer for Employee's Self-Procured Treatment

An injured employee who fails to go to the hospital to which he is sent by the employer's physician, but goes to another hospital, is not entitled to an award covering hospital services. *Cella v Industrial Acc. Com.* (1918) 38 CA 760, 177 P 490.

The express or implied consent of an employer to the procurement by an employee of his own medical treatment, renders the employer liable for the reasonable expenses thus incurred. *Myers v Industrial Acc. Com.* (1923) 191 C 673, 218 P 11.

An employer did not fail to provide necessary medical treatment, where the employer's doctor who was treating the employee for a back injury told her that he was going to be away for two months and gave her an appointment for the end of that period, and the employee expressed no dissatisfaction with the arrangement, where the

employer telephoned the employee toward the end of the two months and she told him she would wait for the return of the doctor, where she then procured the services of another doctor and entered into long and expensive course of treatment and hospitalization without keeping her appointment with the employer's doctor or requesting him to furnish another one. *Sun Indem. Co. v Industrial Acci. Com.* (1948) 85 CA2d 171, 192 P2d 765.

In proceeding to determine extent of employer's liability for injured employee's self-incurred medical expenses, commission's finding that operation in connection with which expenses were incurred was necessary was sustained by evidence that employee's condition became progressively worse over long period of medical treatment and advice following her injury, for several months prior to operation she was in bed most of time suffering severe and increasing pain, and shortly after operation she was able to get up and do some of housework. *Pacific Elec. R. Co. v Industrial Acc. Com.* (1950) 96 CA2d 651, 216 P2d 135.

Under this section, workmen's compensation claimant is entitled to reimbursement for expenses reasonably and necessarily incurred for specified medical services, and claim barred by limitation statute is not frivolous as matter of law so as to preclude recovery for such medical expenses. *Furudich v Industrial Acci. Com.* (1965) 237 CA2d 455, 47 Cal Rptr 21.

In a workmen's compensation case, the denial of any award for medical-legal costs by the Workmen's Compensation Appeals Board must be annulled and the matter remanded for further proceedings where the board failed to distinguish the issue of reimbursement for self-procured medical treatment from the issue of reimbursement for medical-legal costs and did not review the evidence in the light of the latter issue. *Garrett v Workmen's Compensation Appeals Board* (1968) 258 CA2d 326, 65 Cal Rptr 721.

#### 7. —Success of Self-Procured Treatment as Factor in Determining Liability

Before an injured employee is entitled to compensation for expenses incurred by the treatment of him by a physician of his own choice, it must be shown that this treatment was not only a success but that it was reasonably and seasonably necessary to cure and relieve him, taking all the circumstances into consideration. *Union Iron Works v Industrial Acc. Com.* (1922) 190 C 33, 210 P 410.

Where after twenty-two surgical operations on an employee, the employer admitted its inability to further relieve the employee from the effect of his injuries, the employer may be made liable for the necessary expense connected with operations per-

by 10 percent, together with interest thereon at the rate of 7 percent per annum retroactive to the date of the filing of the order of the board directing payment.

The employer shall notify, in writing, the provider of the services, the employee, or if represented, his attorney, if the employer contests the reasonableness and necessity of incurring such expenses, and shall indicate the reasons therefore.

The provisions of Sections 5800 and 5814 shall not apply to this section.

Added Stats 1976 ch 446 § 1, effective July 10, 1976, operative October 9, 1976.

#### § 4602. Certification of competency of consulting or additional physicians

If the employee so requests, the employer shall procure certification by either the administrative director or the appeals board as the case may be of the competency, for the particular case, of the consulting or additional physicians.

Enacted 1937; Amended Stats 1965 ch 1513 § 86, operative January 15, 1966.

##### Prior Law:

(a) Stats 1917 ch 586 § 9 p 836, as amended by Stats 1919 ch 471 § 4 p 913, Stats 1925 ch 354 § 1 p 640, Stats 1929 ch 222 § 1 p 420.

(b) Stats 1913 ch 176 § 15 p 284, as amended by Stats 1915 ch 607 § 4 p 1082.

(c) Stats 1911 ch 399 § 8 p 798.

##### Amendments:

1965 Amendment: Substituted "either the administrative director or the appeals board as the case may be" for "the commission or a commissioner".

##### Cross References:

Certification of consulting physician: 8 Cal Adm Code §§ 9796-9802.

##### Collateral References:

Cal Jur 2d Workmen's Compensation § 192.

82 Am Jur 2d Workmen's Compensation §§ 391, 392, 394, 397.

##### Annotations:

Applicability of provisions as to medical or surgical services as affected by character or qualifications of person rendering them. 40 ALR 1265.

#### § 4603. Procedure where employer desires change of physicians

If the employer desires a change of physicians or chiropractor, he may petition the administrative director who, upon a showing of good cause by the employer, may order the employer to provide a panel of five physicians, or if requested by the employee, four physicians and

§ 4603

WORKMEN'S COMPENSATION

one chiropractor competent to treat the particular case, from which the employee must select one.

Added Stats 1975 ch 1259 § 5.

Former Section: Former § 4603, providing for inapplicability of provisions relating to change of physicians where employer maintains hospital and staff, was enacted 1937, amended by Stats 1965 ch 1513 § 87, operative January 15, 1966, and repealed by Stats 1975 ch 1259 § 4.

Collateral References:

Law Review Articles:

Review of Selected 1975 Code Legislation. 7 Pacific LJ 569.

Annotations:

Selection or change of physician, surgeon, or hospital. 142 ALR 1205.

§ 4603.2. Notification to employer of name and address of physician selected pursuant to § 4600: Reports by physician: Payment for services

Upon selecting a physician pursuant to Section 4600, the employee or physician shall forthwith notify the employer of the name and address of such physician. Such physician shall submit a report to the employer within five days from the date of the initial examination and shall submit periodic reports at such intervals as may be prescribed by rules and regulations adopted by the administrative director. The employer shall make payment for the services of such physician after receipt of the required reports.

Added Stats 1975 ch 1259 § 6.

Collateral References:

25 Am Jur Pl & Pr Forms (Rev ed), Workmen's Compensation, Forms 192, 193.

20 Am Jur Legal Forms 2d, Workmen's Compensation, § 267:74.

Law Review Articles:

Review of Selected 1975 Code Legislation. 7 Pacific LJ 569.

§ 4603.5. Duties of administrative director: Adoption of rules: Notification to employees of rights

The administrative director shall adopt rules pertaining to the format and content of notices required by this article; define reasonable geographic areas for the purposes of Section 4600; specify time limits for all such notices, and responses thereto; and adopt any other rules necessary to make effective the requirements of this article.

Employers shall notify all employees of their rights under this section.

Added Stats 1975 ch 1259 § 7.

Collateral References:

81 Am Jur 2d Workmen's Compensation § 81.

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(a) Stats 1917  
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(b) Stats 1912  
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cannot vest in commission jurisdiction to determine controversies not incidental to such relief. *Gerson v Industrial Acci. Com.* (1961) 188 CA2d 735, 11 Cal Rptr 1.

In a workmen's compensation proceeding, there was no error in a referee's conclusion that "there was no evidence of any available treatment reasonably required to cure or relieve from the effects of the injury," that "there is no medical, including dental, evidence that the teeth should be removed either by reason of the injury herein or otherwise,"

and that "in the event that medical treatment becomes reasonably required, applicant may petition to reopen," and in his denial of further medical treatment, where it was based on the reports of three physicians, one to the effect that petitioner's major complaint was irremediable, another stating that no operative treatment was indicated, and the third indicating that no further vascular study nor treatment was indicated. *Gaiera v Workmen's Compensation Appeals Board* (1969) 271 CA2d 246, 76 Cal Rptr 656.

**§ 4605. Employee's right to provide own physicians**

Nothing contained in this chapter shall limit the right of the employee to provide, at his own expense, a consulting physician or any attending physicians whom he desires.

Enacted 1937.

**Prior Law:**

(a) Stats 1917 ch 586 § 9 p 836, as amended by Stats 1919 ch 471 § 4 p 913, Stats 1925 ch 354 § 1 p 640, Stats 1929 ch 222 § 1 p 420.

(b) Stats 1913 ch 176 § 15 p 284, as amended by Stats 1915 ch 607 § 4 p 1082.

(c) Stats 1911 ch 399 § 8 p 798.

**Collateral References:**

Witkin Summary (8th ed) pp 893, 988, 1041.

Cal Jur 2d Workmen's Compensation § 191.

82 Am Jur 2d Workmen's Compensation § 393.

**Law Review Articles:**

Initial choice of physician under workmen's compensation: Is California right for the panel approach? (1973) 8 USF LR 149.

**NOTES OF DECISIONS**

While it is the duty of an employer of an injured employee under § 4600 to provide medical attention as well as surgical supplies, crutches, apparatus, nurse and medicines, it is the right of the injured employee to refuse the assistance of a physician so supplied and to independently contract for a physician of his own choice and at his own expense. *Credit Bureau of San Diego, Inc. v Johnson* (1943) 61 CA2d Supp 834, 142 P2d 963.

Under Lab Code, § 4605, providing that nothing

contained in Chapter 2 of the workmen's compensation statutes shall limit the right of an employee to provide, at his own expense, a consulting physician or "any attending physician" whom he desires, the term "any attending physician" includes an operating surgeon selected by the employee, in view of the rule that compensation statutes are to be liberally construed in favor of extending benefits to the injured employee (Lab Code, § 3202). *Gallegos v Workmen's Compensation Appeals Board* (1969) 273 CA2d 569, 78 Cal Rptr 157.

**§ 4606. Provision of treatment, etc., by local public entities, who were self-insured employers under Act of 1913 without regard to the act's time limitation**

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**656.228 Payments directly to benefi-  
ciary or custodian.** (1) If compensation is  
payable for the benefit of a beneficiary other than  
the injured worker, the insurer or the self-insured  
employer may segregate any additional compen-  
sation payable on account of that beneficiary and  
make payment directly to the beneficiary, if sui  
juris; otherwise, to the guardian or person having  
custody of the beneficiary.

(2) Compensation paid to an injured worker  
who is a minor prior to receipt of notice by the  
insurer or the self-insured employer from the  
parent or guardian of the minor that the parent or  
guardian claims the compensation shall discharge  
the obligation to pay compensation to the extent  
of such payment. [Amended by 1957 c.477 §1; 1965 c.285  
§25; 1981 c.854 §12]

**656.230 Accelerating award payments  
with approval of director.** (1) Where a  
worker has been awarded compensation for per-  
manent partial disability, and the award has  
become final by operation of law or waiver of the  
right to appeal its adequacy, the director may, in  
the director's discretion, upon the worker's  
application order all or any part of the remaining  
unpaid award to be paid to the worker in a lump  
sum. Any remaining balance shall be paid pur-  
suant to ORS 656.216.

(2) In all cases where the award for perma-  
nent partial disability does not exceed 64 degrees,  
the insurer or the self-insured employer shall pay  
all of the award to the worker in a lump sum.  
[Amended by 1957 c.574 §4; 1959 c.449 §1; 1965 c.285 §23a;  
1973 c.221 §1; 1981 c.854 §13; 1983 c.816 §15]

**656.232 Payments to aliens residing  
outside of United States.** (1) If a beneficiary  
is an alien residing outside of the United States or  
its dependencies, payment of the sums due such  
beneficiary may, in the discretion of the director,  
be made to the consul general of the country in  
which such beneficiary resides on behalf of the  
beneficiary. The receipt of the consul general to  
the director for the amounts thus paid shall be a  
full and sufficient receipt for the payment of the  
funds thus due the beneficiary.

(2) If a beneficiary is an alien residing outside  
of the United States or its dependencies, the  
director may, in lieu of awarding such beneficiary  
compensation in the amount provided by ORS  
656.001 to 656.794, award such beneficiary such  
lesser sum by way of compensation which,  
according to the conditions and costs of living in  
the place of residence of such beneficiary will, in  
the opinion of the director, maintain the benefi-  
ciary in a like degree of comfort as a beneficiary of  
the same class residing in this state and receiving

the full compensation authorized by ORS 656.001  
to 656.794. The director shall determine the  
amount of compensation benefits upon the basis  
of the rate of exchange between the United States  
and any foreign country as determined by the  
Federal Reserve Bank as of January 1 and July 1  
of the year when paid.

(3) All benefit rights shall be canceled upon  
the commencement of a state of war between the  
United States and the country of a beneficiary's  
domicile.

**656.234 Compensation not assignable,  
nor to pass by operation of law and is  
exempt from process.** No moneys payable  
under ORS 656.001 to 656.807 on account of  
injuries or death are subject to assignment prior  
to their receipt by the beneficiary entitled  
thereto, nor shall they pass by operation of law.  
All such moneys and the right to receive them are  
exempt from seizure on execution, attachment or  
garnishment, or by the process of any court.  
[Amended by 1967 c.468 §1]

**656.236 Prohibition against releases;  
charging costs.** (1) No release by a worker or  
beneficiary of any rights under ORS 656.001 to  
656.794 is valid.

(2) Except as provided in ORS 656.506 and  
656.538, none of the cost of workers' compensa-  
tion to employers under ORS 656.001 to 656.794  
shall be charged to a subject worker. [1965 c.285 §28;  
1985 c.212 §5]

**656.240 Deduction of benefits from  
sick leave payments paid to employes.** Not-  
withstanding any other law, an employer, with  
the consent of the worker, may deduct from any  
sick leave payments made to an individual  
amounts equal to benefits received by the indi-  
vidual under ORS 656.001 to 656.807 with respect  
to the same injury that gave rise to the sick leave.  
However, the deduction of sick leave shall not  
exceed an amount determined by taking the  
worker's daily wage for the period less daily time  
loss benefits received under ORS 656.001 to  
656.807 divided by the worker's daily wage. [1969  
c.398 §2; 1983 c.816 §5]

**656.242** [Amended by 1959 c.589 §1; repealed by 1965  
c.285 §95]

**656.244** [Amended by 1959 c.378 §1; repealed by 1965  
c.285 §95]

**656.245 Medical services to be pro-  
vided; choice of doctor.** (1) For every compen-  
sable injury, the insurer or the self-insured  
employer shall cause to be provided medical serv-  
ices for conditions resulting from the injury for  
such period as the nature of the injury or the

process of the recovery requires, including such medical services as may be required after a determination of permanent disability. Such medical services shall include medical, surgical, hospital, nursing, ambulances and other related services, and drugs, medicine, crutches and prosthetic appliances, braces and supports and where necessary, physical restorative services. The duty to provide such medical services continues for the life of the worker.

(2) When the time for submitting a claim under ORS 656.273 has expired, any claim for medical services referred to in this section shall be submitted to the insurer or self-insured employer. If the claim for medical services is denied, the worker may submit to the board a request for hearing pursuant to ORS 656.283.

(3) The worker may choose an attending doctor or physician within the State of Oregon. The worker may choose the initial attending physician and may subsequently change attending physician four times without approval from the director. If the worker thereafter selects another attending physician the insurer or self-insured employer may require the director's approval of the selection and, if requested, the director shall determine with the advice of one or more physicians, whether the selection by the worker shall be approved. Nothing in this section shall be construed to permit the director to determine specific treatment criteria. [1965 c.285 §23; 1979 c.839 §32; 1981 c.535 §31; 1981 c.854 §14; 1985 c.739 §4]

656.246 [Repealed by 1965 c.285 §95]

**656.248 Medical service rates.** (1) The director, in compliance with ORS 183.310 to 183.550 and 656.794, shall promulgate rules for medical fee schedules. These schedules shall represent the 75th percentile of usual and customary fees as determined by the director who shall determine those fees on the basis of generally accepted descriptions of medical service.

(2) Medical fees equal to or less than the 75th percentile shall be paid when the vendor submits a billing for medical services. In no event shall that portion of a medical fee be paid that exceeds the 75th percentile.

(3) In no event shall a provider charge more than the provider charges to the general public.

(4) If no usual and customary fee has been established for a given service or procedure the director may, in compliance with ORS 183.310 to 183.550 and 656.794, promulgate a reasonable rate, which shall be the same within any given area for all primary health care providers to be paid for that service or procedure.

(5) The director may, in compliance with ORS 183.310 to 183.550 and 656.794, promulgate a reasonable rate of markup for the sale of medical devices.

(6) Notwithstanding subsection (1) or (2) of this section, such rates or fees provided in subsections (1) and (2) of this section shall be adequate to insure at all times to the injured workers the standard of services and care intended by ORS 656.001 to 656.794.

(7) The director shall update the schedule required by subsection (1) of this section annually. The update shall be based upon:

(a) A statistically valid survey by the director of usual and customary medical fees or upon the basis of that information provided to the director by any state agency having access to usual and customary medical fee information; or

(b) The annual percentage increase or decrease in the physician's services component of the national Consumer Price Index published by the Bureau of Labor Statistics of the United States Department of Labor.

(8) The director is specifically prohibited from adopting or administering rules which treat manipulation, when performed by a physician, as anything other than a separate therapeutic procedure which is paid in addition to other services or office visits. [Amended by 1965 c.285 §26; 1969 c.611 §1; 1971 c.329 §1; 1981 c.535 §5; 1983 c.816 §6; 1985 c.107 §1; 1985 c.739 §5]

**656.252 Director to regulate medical reports; disclosure of information; notification of changing attending physicians.**

(1) In order to insure the prompt reporting and payment of compensation in compensable injuries the director shall make rules governing reports by attending and consulting physicians and other personnel of all medical information relevant to the determination of a claim to the injured worker's representative, the worker's employer, the employer's insurer and the department. Such rules shall include, but not necessarily be limited to:

(a) Requiring attending physicians to make the insurer or self-insured employer a first report of injury within a specified time after the first service rendered.

(b) Requiring attending physicians to submit follow-up reports within specified time limits or upon the request of an interested party.

(c) Requiring examining physicians to submit their reports, and to whom, within a specified time.

(d) Such other reports as the director may deem necessary. Reports of compensation interested parties be given to the prompt determination.

(2) The attending physician shall file the following:

(a) Advise the insurer or self-insured employer of the anticipated date of the injured worker to return to work, stationary, and the nature of the injury. Except when the attending physician has previously indicated that the claim will not exceed 14 days, the insurer or self-insured employer may request a report within 14 days, and the attending physician shall file such reports.

(b) Advise the insurer or self-insured employer within five days after the injured worker is released to return to work.

(c) After a claim has been denied by the insurer or self-insured employer after the treatment is recommended, the director shall, after a claim is recommended under this paragraph, require the attending physician to file a report within 14 days after the claim was closed.

(3) In promulgating rules for medical reporting the director shall consult with physicians and medical associations and societies.

(4) No person who is subject to a citation to a person referred to in this section, in accordance with the rules, shall incur any civil liability or closure of such information.

(5) Whenever an attending physician, consulting physician, or examining physician shall see an insurer or self-insured employer within five days after the date of first treatment. Even if the insurer refers a worker to a self-insured employer, the insurer shall promptly notify the self-insured employer of the date of first treatment. [1979 c.839 §3; 1981 c.535 §3]

**656.254 Medical reporting forms.** (1) The director shall promulgate report forms, in duplicate, which shall be applicable, to be used by the insurer or self-insured employer and physician to report information required in the determination of a claim.

(2) The director shall make rules for the enforcement of

(d) Such other reporting requirements as the director may deem necessary to insure that payments of compensation be prompt and that all interested parties be given information necessary to the prompt determination of claims.

(2) The attending physician shall do the following:

(a) Advise the insurer or self-insured employer of the anticipated date for release of the injured worker to return to employment, the anticipated date that the worker will be medically stationary, and the next appointment date. Except when the attending physician has previously indicated that temporary disability will not exceed 14 days, the insurer or self-insured employer may request a medical report every 15 days, and the attending physician shall forward such reports.

(b) Advise the insurer or self-insured employer within five days of the date the injured worker is released to return to work.

(c) After a claim has been closed, advise the insurer or self-insured employer within five days after the treatment is resumed or the reopening of a claim is recommended. The attending physician under this paragraph need not be the same attending physician who released the worker when the claim was closed.

(3) In promulgating the rules regarding medical reporting the director may consult and confer with physicians and members of medical associations and societies.

(4) No person who reports medical information to a person referred to in subsection (1) of this section, in accordance with department rules, shall incur any legal liability for the disclosure of such information.

(5) Whenever an injured worker changes attending physicians, the newly selected attending physician shall so notify the responsible insurer or self-insured employer not later than five days after the date of the change or the date of first treatment. Every attending physician who refers a worker to a consulting physician promptly shall notify the responsible insurer or self-insured employer of the referral. [1967 c.626 §2.5; 1979 c.839 §3; 1981 c.535 §6; 1981 c.874 §17]

**656.254 Medical report forms; sanctions.** (1) The director shall establish medical report forms, in duplicate snap-outs where applicable, to be used by insurers, self-insured employers and physicians, including in such forms information necessary to establish facts required in the determination of the claim.

(2) The director shall establish sanctions for the enforcement of medical reporting require-

ments. Such sanctions may include, but are not limited to, forfeiture of fees and penalty not to exceed \$1,000 for each occurrence. [1967 c.626 §§3, 4; 1975 c.556 §40; 1979 c.839 §30; 1981 c.854 §15]

**656.258 Vocational assistance service payments.** The insurer or self-insured employer shall pay a vocational assistance provider for all vocational assistance services, including the cost of an evaluation to determine whether a worker is eligible for vocational assistance, that are performed at the request of the insurer or self-insured employer. Within 60 days after receiving a billing, the insurer or self-insured employer shall pay for all vocational assistance services performed, including those services performed in good faith without knowledge that the worker's eligibility to receive vocational assistance has been terminated or that the worker has withdrawn or is otherwise ineligible for vocational assistance. [1985 c.606 §18]

#### PROCEDURE FOR OBTAINING COMPENSATION

**656.262 Responsibility for processing and payment of compensation; acceptance and denial of claim; reporting claims; penalties for payment delays.** (1) Processing of claims and providing compensation for a worker shall be the responsibility of the insurer or self-insured employer. All employers shall assist their insurers in processing claims as required in this chapter.

(2) The compensation due under this chapter shall be paid periodically, promptly and directly to the person entitled thereto upon the employer's receiving notice or knowledge of a claim, except where the right to compensation is denied by the insurer or self-insured employer.

(3) Employers shall, immediately and not later than five days after notice or knowledge of any claims or accidents which may result in a compensable injury claim, report the same to their insurer. The report shall include:

(a) The date, time, cause and nature of the accident and injuries.

(b) Whether the accident arose out of and in the course of employment.

(c) Whether the employer recommends or opposes acceptance of the claim, and the reasons therefor.

(d) The name and address of any health insurance provider for the injured worker.

(e) Any other details the insurer may require.

Failure to so report subjects the offending employer to a charge for reimbursing the insurer



C.J.S. See 100 C.J.S., Workmen's Compensation, § 484, 537.

Annotator's note. Cases included in the annotations to this section which refer to the industrial commission were decided prior to the 1969 amendment which vested the director of the division of labor with the power previously exercised by the industrial commission to enforce the provisions of this section.

Law reviews. For article, "A Significant Change in the Colorado Workmen's Compensation Act: 'Accidents', 'Injuries', and 'Heart Attack'", see 41 Den. L. Cir. J. 189 (1964).

Resumption of benefits after suspension. This section permits a resumption of benefits after a period of suspension when the disqualifying condition has been removed. *Dziewior v. Michigan Gen. Corp.*, 672 P.2d 1026 (Colo. App. 1983).

Applied in *Safeway Stores v. Industrial Comm'n*, 678 P.2d 1078 (Colo. App. 1984).

## II. EMPLOYEE'S REFUSAL TO BE TREATED.

Where risks do not justify claimant's refusal to submit to operation, no full compensation. While a claimant has the option to refuse corrective surgery, he may not do so and continue to receive full compensation where it appears that the risk involved in the recommended surgery is not such as to justify claimant's refusal thereof. *Hays v. Industrial Comm'n*, 138 Colo. 334, 333 P.2d 617 (1958).

But the industrial commission must determine no unusual risks before denying relief. Before the commission would be justified in denying relief to an applicant because of his refusal to submit to treatment or surgery it must appear that the proposed treatment or surgery is such as to be free of unusual risks and calculated to effect a cure. *Cain v. Industrial Comm'n*, 136 Colo. 227, 315 P.2d 823 (1957).

The reasonableness of claimant's refusal to submit to operative treatment is a question of fact to be determined by the commission. *Overton v. City & County of Denver*, 106 Colo. 114, 102 P.2d 474 (1940); *Cain v. Industrial Comm'n*, 136 Colo. 227, 315 P.2d 823 (1957); *Hays v. Industrial Comm'n*, 138 Colo. 334, 333 P.2d 617 (1958).

And the burden of proof is on the employer to establish that a tendered operation is simple, safe, and reasonably certain to effect a cure. *Cain v. Industrial Comm'n*, 136 Colo. 227, 315 P.2d 823 (1957).

So that evidence will not support the suspension of compensation where there is no showing of a refusal to submit to surgery or that claimant persisted in any unsanitary or injurious practice which tended to imperil or retard his

recovery. *Padillo v. F.H. Linneman Constr. Co.*, 29 Colo. App. 137, 479 P.2d 990 (1971).

In any event, this section specifically gives the industrial commission discretion in matters of this kind, and those seeking to attack the result must show that it abused its discretion. *Andrews v. Industrial Comm'n*, 73 Colo. 456, 216 P. 256 (1923); *National Lumber & Creosoting Co. v. Kelly*, 101 Colo. 535, 75 P.2d 144 (1937).

And in the absence of an abuse of discretion, the decision of the industrial commission as to the reasonableness of a claimant's refusal to submit to corrective surgery, is not subject to revision by the courts. *Hays v. Industrial Comm'n*, 138 Colo. 334, 333 P.2d 617 (1958).

Claimant not to be penalized for acting on advice of personal physician. *National Lumber & Creosoting Co. v. Kelly*, 101 Colo. 535, 75 P.2d 144 (1937).

But a claimant who refuses corrective surgery because of his religious convictions cannot subject his employer to greater liability than would obtain if claimant's faith permitted him to undergo surgery required. *Industrial Comm'n v. Vigil*, 150 Colo. 356, 373 P.2d 308 (1962).

On the other hand the elements of fear and anxiety may be taken into consideration by the commission as a proper basis for the award of compensation in a workmen's compensation case. *National Lumber & Creosoting Co. v. Kelly*, 101 Colo. 535, 75 P.2d 144 (1937).

## III. EMPLOYER'S RIGHT TO SELECT PHYSICIAN.

The employer or insurer has the right in the first instance to select the physician and services requisite to proper treatment of the employee. *State Comp. Ins. Fund v. Luna*, 156 Colo. 106, 397 P.2d 231 (1964).

This section authorizes the employer to select the treating physician "in the first instance". *Granite Constr. Co. v. Leonard*, 40 Colo. App. 20, 568 P.2d 500 (1977).

And where medical services are tendered to an injured employee in the first instance, the employee's secondary right of selection is lost. *Vanadium Corp. of America v. Sargent*, 134 Colo. 555, 307 P.2d 454 (1957).

Furthermore, an employer cannot give an employee carte blanche to select a different doctor, especially when the employee's selection has resulted in surgical expense to not only the employer but also the fund. *Vanadium Corp. of America v. Sargent*, 134 Colo. 555, 307 P.2d 454 (1957).

For claimant's use of another physician requires consent of the industrial commission before employer may be held liable. *Colorado Fuel & Iron Corp. v. Industrial Comm'n*, 129 Colo. 353, 269 P.2d 1070 (1954); *Vanadium*

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(3) So long as the employee, after written request by the employer or insurer, refuses to submit himself to medical examination or in any way obstructs the same, his right to collect, or to begin or maintain any proceeding for the collection of, compensation shall be suspended. If he refuses to submit to such examination after direction by the director or any agent, referee, or hearing officer of the division appointed pursuant to section 8-46-107 (1) or in any way obstructs the same, his right to weekly indemnity which accrues and becomes payable during the period of such refusal or obstruction shall be barred. If any employee persists in any unsanitary or injurious practice which tends to imperil or retard his recovery or refuses to submit to such medical or surgical treatment or vocational rehabilitation as is reasonably essential to promote his recovery and rehabilitation, the director, in his discretion, may reduce or suspend the compensation of any such injured employee.

(4) Any physician or chiropractor who makes or is present at any such examination may be required to testify as to the results thereof. Any physician or chiropractor having attended an employee in a professional capacity may be required to testify before the division when it so directs. A physician or chiropractor will not be required to disclose confidential communications imparted to him for the purpose of treatment and which are unnecessary to a proper understanding of the case.

(5) (a) In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of injury, the employee shall have the right to select his own physician or chiropractor. Upon written request to the employer or insurance carrier, the employee may procure written permission to have his own physician or chiropractor attend him. If such permission is neither granted nor refused within fifteen days, the employer or insurance carrier shall be deemed to have waived any objection thereto. Upon the proper showing to the division, the employee may procure its permission at any time to have a physician of his own selection attend him, and in any nonsurgical case the employee, with such permission, in lieu of medical aid, may procure any nonmedical treatment recognized by the laws of this state as legal, the practitioner administering such treatment to receive such fees therefor under the medical provisions of articles 40 to 54 of this title as may be fixed by the division.

(b) Any private insurer or self-insured employer acting as his own insurance carrier as provided in section 8-44-109 providing workmen's compensation coverage shall pay for chiropractic care as provided in paragraph (a) of this subsection (5).

(6) Application or prosecution of a claim for benefits shall be a waiver of any privilege concerning communications relating to all medical issues raised by the claim, for the purposes of the adjudication of the claim.

Source: L. 19, p. 733, § 81; C. L. § 4455; CSA, C. 97, § 360; CRS 53, § 81-12-12; L. 57, p. 506, § 1; C.R.S. 1963, § 81-12-11; L. 69, p. 629, § 168; L. 75, pp. 303, 314, 317, § § 35, 2, 1; L. 79, p. 341, § 1; L. 81, p. 470, § 2; L. 86, pp. 476, 520, § § 46, 2.

- I. General Consideration.
- II. Employer's Refusal to be Treated.
- III. Employer's Right to Select Physician.

#### I. GENERAL CONSIDERATION.

Am. Jur.2d. Sec 82 Am. Jur.2d, Workmen's Compensation. § § 457, 458.



**ALASKA PACIFIC ASSURANCE  
COMPANY and State of  
Alaska, Appellants,**

v.

**Robert BROWN, Individually and as  
Class Representative, Appellee.**

Nos. 6600, 6626.

Supreme Court of Alaska.

Feb. 17, 1984.

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

As Modified July 20, 1984.

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

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

**1. Constitutional Law ⇨213.1(1)**

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

**2. Constitutional Law ⇨213.1(1)**

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

**3. Constitutional Law ⇨213.1(2)**

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

**4. Constitutional Law ⇨213.1(2)**

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

**5. Constitutional Law ⇨213.1(1)**

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

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**6. Workers' Compensation** ⇨26

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

**7. Constitutional Law** ⇨245(4)**Workers' Compensation** ⇨26

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

**8. Constitutional Law** ⇨83(1)

Right of interstate migration is part of State Constitution.

**9. Constitutional Law** ⇨83(1)

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

**10. Constitutional Law** ⇨225.1

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

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

**11. Constitutional Law** ⇨245(4)**Workers' Compensation** ⇨26

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

**12. Constitutional Law** ⇨245(4)**Workers' Compensation** ⇨26

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

**13. Constitutional Law** ⇨213.1(2)

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

**14. Constitutional Law** ⇨245(4)

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

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

#### 15. Constitutional Law ⇨83(1)

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

#### 16. Constitutional Law ⇨83(1)

##### Workers' Compensation ⇨26

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

#### 17. Civil Rights ⇨13.5(1)

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

#### 18. Civil Rights ⇨13.4(1)

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

compliance be held legally responsible for constitutional defects in the law.

#### 19. Civil Rights ⇨13.17(3)

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

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

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

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

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

#### OPINION

RABINOWITZ, Justice.

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

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

Constitution of Alaska.

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

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

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

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

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

On	The Rate Shall Be
July 2, 1975	80 per cent of the Alaska average weekly wage
January 1, 1976	100 per cent of the Alaska average weekly wage
January 1, 1977	133.3 per cent of the Alaska average weekly wage
January 1, 1979	166.6 per cent of the Alaska average weekly wage
January 1, 1981	200 per cent of the Alaska average weekly wage

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### I. STATE EQUAL PROTECTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8. AS 23.30.130(a) provides:

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

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

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

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

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

[7] Brown's argument, however, is something different than this. The basis of his claim is not that section 175(d) adjusts benefits according to criteria which are impermissible per se. Rather, he asserts that non-resident workers who fall under section 175(d) are subject to criteria different than applied to non-section 175(d) recipients. Brown thus states the following interest for the purposes of equal protection analysis: the right of section 175(d) recipients to have their workers' compensation benefits determined in relation to the same factors that are applied to workers' compensation recipients in general. This, however, is merely a particularized expression of the right to equal treatment of those similarly situated, the general principle underlying our equal protection clause. It is not itself an individual right appropriate for standard criteria selection.

warranted because of changed economic conditions).

10. Both the analysis and the terms of art within the context of Alaska's right to travel guarantee are different than in the federal law. Migration cases in the federal courts adopt the rigid two-tiered analysis characteristic of federal equal protection. In order for strict scrutiny to apply, it must be shown that the classification burdens "basic necessities of life" or some "fundamental political right." *Zobel I*, 619 P.2d at 426; *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 259, 94 S.Ct. 1076, 1082, 39 L.Ed.2d 306, 315 (1974). If a lesser individual interest is implicated by the state's classification, the test of minimum rationality is employed. *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975). In the federal courts, the right to travel is "penalized" only if a right sufficient to invoke the strict scrutiny test is impaired. See *Zobel II*, 619 P.2d at 454-55. Prior to *Zobel I* and *Zobel II* we viewed the right to travel as a fundamental right per se, and uniformly invoked the compelling state interest test in reviewing durational residence requirements. *State v. Wylie*, 516 P.2d 142, 147 (Alaska 1973); see, e.g., *Hicklin v. Orbeck*, 565 P.2d 159, 166 (Alaska 1977), *rev'd on other grounds*, 437 U.S. 318, 98 S.Ct. 2482, 57

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

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

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

[W]e will no longer regard a' durational residency requirements as automatically triggering strict scrutiny and requiring a showing that such a classification is absolutely necessary to promote a compelling state interest. Instead, we will balance the nature and extent of the infringement on this right caused by the classification against the state's purpose in enacting the statute and the fairness and substantiality of the relationship between that purpose and the classification.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### B. Application of Standard of Review.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## II. DAMAGES

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## II. DAMAGES

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

There are three conceivable causes of action available to Brown in this case which might support a damages suit against ALPAC. Under the federal law, 42 U.S.C. § 1983 subjects "any person" to damages liability who "under color of state law" deprives another of federally-guaranteed rights.<sup>16</sup> Aside from section 1983, it is now well established in the federal courts that some provisions of the United States Constitution may be enforced in a suit for damages even in the absence of a specific statute supplying a cause of action. *Carlson v. Green*, 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980) (eighth amendment); *Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979) (fifth amendment); *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) (fourth amendment). Finally, Brown suggests that we should find a *Bivens*-type implied damages remedy is available under the state constitution. See *King v. Alaska*

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

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

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

## 16. 42 U.S.C. § 1983 provides:

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

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

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

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

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

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

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

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

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

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

MOORE, J., not participating.

COMPTON, Justice, dissenting.

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

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

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

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

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

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er perspective by comparing this statute with statutes that have been found to penalize the right to travel. The United States Supreme Court has invalidated statutes challenged under the federal equal protection clause because they penalized the right to travel in only three cases, *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974), *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972), and *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969). The classifications in these cases differ from section 175(d) in several respects.

First, in all three cases, the classifications denied either a "basic necessity of life" (*Maricopa County* (nonemergency health care) and *Shapiro* (welfare benefits)) or a "fundamental political right" (*Dunn* (voting)). In this case, the classification denies neither a basic necessity of life nor a fundamental political right. Furthermore, the statute does not deny workers' compensation benefits, but at most only reduces the amount received. Even with the reduction, Brown received about \$11,000 per year, which is \$3,000 more than the maximum amount available under the California workers' compensation system.

The second distinction is that *Maricopa County*, *Dunn*, and *Shapiro* all involved durational residency requirements, i.e., whether a state may deny certain benefits or privileges to new residents which are enjoyed by its "old" residents, until they have been residents for a specified period. Section 175(d) does not impose any durational requirement, nor is it even a "residency requirement" in the usual sense of the phrase.<sup>1</sup> Even if it were, a state generally is much more able to distinguish between residents and non-residents than between long and short term residents. *Wil-*

*liams v. Zobel*, 619 P.2d 448, 451 n. 7 (1980), *rev'd on other grounds*, 457 U.S. 55, 102 S.Ct. 2309, 72 L.Ed.2d 672 (1982), *citing Vlandis v. Kline*, 412 U.S. 441, 93 S.Ct. 2230, 37 L.Ed.2d 63; *Fisher v. Reiser*, 610 F.2d 629 (9th Cir.1979).

The Nevada statute challenged in *Fisher v. Reiser* is similar to section 175(d). The statute granted cost of living increases to workers' compensation recipients who resided in Nevada, but not to those who were no longer Nevada residents. The court noted that "[i]n *Shapiro*, *Dunn*, and *Maricopa County*, the issue involved the obligation and responsibility of the claimant's new state of residence; here the claimants seek to enforce an obligation against the state of former residence. The distinction is critical." 610 F.2d at 633. In support of its conclusion that the obligation to new residents imposed under *Shapiro* and *Maricopa County* does not automatically extend to former residents, the court in *Fisher* cited to *Califano v. Torres*, 435 U.S. 1, 98 S.Ct. 906, 55 L.Ed.2d 65 (1978). In that case, the Supplemental Security Income Act provided SSI benefits only while the claimant resided in a state or the District of Columbia. Torres lost his benefits upon moving to Puerto Rico. The Court stated:

As the Court said in *Memorial Hospital*, "the right of interstate travel must be seen as insuring new residents the same right to vital governmental benefits and privileges in the States to which they migrate as are enjoyed by other residents." [*Memorial Hospital v. Maricopa County*, 415 U.S. at 261 [94 S.Ct. at 1084], 39 L.Ed.2d at 317.]

In the present cases the District Court altogether transposed that proposition. It held that the Constitution requires that a person who travels to Puerto Rico must be given benefits superior to those enjoyed by other residents of Puerto

Therefore, "residence" does not mean "domicile" (presence plus intent to remain); the benefits of recipients domiciled outside of Alaska but living in Alaska are not reduced, whereas the benefits of recipients who are domiciled in Alaska but living outside of Alaska are reduced.

1. 8 AAC 45.900(b) provides:

In AS 23.30.175, "resides" means abides, dwells, inhabits, or lives. In applying the term to the facts of a specific case, the inquiry will be directed largely toward determining with what jurisdiction's economy the employee must contend.

Rico if the newcomer enjoyed those benefits in the State from which he came. This Court has never held that the constitutional right to travel embraces any such doctrine, and we decline to do so now.

435 U.S. at 4, 98 S.Ct. at 908, 55 L.Ed.2d at 68-69 (footnote omitted).

Although the courts in *Fisher* and *Torres* applied the federal equal protection test, I believe they are persuasive in pointing out that there is no constitutional right for benefits received in one state to continue after the person has left that state. As the State notes in its brief, "a state certainly need not encourage injured workers to leave the state for destinations where they can live more inexpensively and continue to collect Alaska compensation benefits that are higher than the wages they would earn if working. Nor should Alaskan consumers, who ultimately bear the cost of the premiums, be burdened with financing these excesses." In my opinion, the statute does not penalize Brown's right to travel. Rather, it attempts to prevent him from receiving an economic windfall when he moves to a state with a lower cost of living.

Second, I object to the court's rejection of the state's objective of fostering rehabilitation by adjusting benefits when convalescence occurs outside of Alaska. It cannot be disputed that a major goal of the workers' compensation system in general is the rapid rehabilitation of an injured worker so that he or she can return to work. See 1 A. Larson, *The Law of Workmen's Compensation* § 2.50, at 11-12 (1982). One reason most states award an injured worker only a percentage of his wages is because excessive benefits may hamper the incentive to return to work, and encourage him to malingering. Given that Alaska benefits are based on Alaskan wages, which are higher than wages in most states, receiving these benefits in other states would frustrate the rehabilitation goal because it would be more profitable to receive benefits than to work. Adjusting the wages so that they are closer to the wages in the

state of residence removes or lessens the incentive to malingering.

It is true, as the court's opinion notes, that just because an injured worker convalesces in a certain state does not mean he will work in that state after recovery. 687 P.2d at 273, n. 14. It is equally presumptuous, however, to assume that the worker will return to Alaska and find another high-paying job after he is rehabilitated. If an injured worker were allowed to receive the full two-thirds of his pre-injury salary (up to \$49,000 per year) while living in a state with a much lower cost of living, I suspect that his incentive to work in any state, including Alaska, would be greatly diminished. By adjusting the benefit levels to more accurately reflect the economic conditions of the state of convalescence, the injured worker's incentive to return to work, no matter where that is, will be enhanced. Thus, section 175(d) substantially furthers the legitimate goal of rehabilitation, and on this ground, the statute should be upheld.

The superior court agreed that section 175(d) furthers this objective, but invalidated the statute on the ground that the objective could have been accomplished by using a less restrictive alternative to the chosen means. Rather than adjusting benefits based on average weekly wage data, the superior court believed that using the cost of living data would have accomplished the same objective more accurately. The court stated:

In the Fall of 1973, the average annual cost of living for a four member family in Anchorage with an intermediate budget was \$16,520, compared to a national urban average for such a family of \$12,626. Thus, the national urban average cost of living was 76% of the Anchorage cost, a reduction of 24%. In 1974, the published average weekly wage for Alaska was \$248.00, compared to an average weekly wage outside Alaska of \$162.93. Thus, the average weekly wage outside Alaska was only 66% of the Alaskan average, a reduction of 34%.

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The court concluded that this ten percent difference between the two formulas causes a "severe reduction in the purchasing power, in real terms, of the monetary benefits paid to disabled non-residents," but not to Alaska residents, and therefore injured workers are deterred from residing in another state.

In my opinion, it was error for the superior court to invalidate section 175(d) on this ground. First, cost of living statistics do not provide a workable alternative to average weekly wage statistics. Cost of living statistics are based on hypothetical family budgets for only twenty-eight urban areas and thus cannot accurately determine the actual cost of living in the area in which the injured worker convalesces. A more practical problem with using cost of living statistics is that they have been discontinued.<sup>2</sup>

Second, although using average weekly wage data is an imperfect measure of cost of living differentials, a perfect fit between means and ends is not required. Requiring compulsively neat logical correlations between classification and objective would ignore legitimate demands for legislative flexibility. Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv.L.Rev. 1, 21 (1972). See also *Rose v. Commercial Fisheries Entry Commission*, 647 P.2d 154, 159-60 (Alaska 1982); *Commercial Fisheries Entry Commission v. Apokedak*, 606 P.2d 1255, 1267 (Alaska 1980).

Although the adjustment is not perfect, I believe that section 175(d) is an acceptable attempt to meet acknowledged differences in the economic conditions of Alaska and other states. The equal protection clause requires that all individuals, similarly situ-

ated, be treated alike. As the State asserts:

Rather than taking identically-situated individuals, and treating them dissimilarly, AS 23.30.175(d) has the opposite effect; that is, the benefits of individuals who *should* receive comparable compensation, but absent the statute, would not, because of the disparate wage levels and living costs of their places of residence, are adjusted to account for those circumstances.

If there were no statutory adjustment, recipients who remain in Alaska would be placed at a disadvantage when compared to those recipients because the cost of living is twenty four percent higher in Alaska than the national urban average.

In sum, the distinction between residence and non-residence is really a distinction between the economic conditions with which benefit recipients must contend, and is a rough attempt by the state to be neutral to recipients living in and outside of Alaska. This attempt seems to be the most fair and workable alternative. One could imagine a harsher alternative. For example, a statute that requires all benefits to be allocated only on the basis of the state of continued residence, rather than on the state of injury; under section 175(d)'s formula, Alaska's higher wages are always factored into the ratio and therefore an injured worker would always receive more under section 175(d) than under this hypothetical statute.<sup>3</sup> In this sense, he is always "rewarded" for his initiative to migrate to Alaska. When viewed from this angle, and considering how dissimilar this classification is from other classifications that have been invalidated under the Alaska and federal

required revision of concepts and expenditure data and extensive price collection, for which funding was not available.

2. The Autumn 1981 Urban Family Budget, released April 16, 1982, by the United States Department of Labor, Bureau of Labor Statistics, states:

This is the last release of four-person family budget data. The Bureau of Labor Statistics eliminated the program as part of the recent budget reduction. The expenditure data on which the budgets are based are now 20 years old. Continuation of the program would have

3. For example, under the hypothetical statute, the maximum amount Brown would receive is \$154.00 per week (using the California rates); the amount he received under section 175(d) was \$211.91 per week.

equal protection clauses, I would hold that this statute is constitutional.



**RESOURCE INVESTMENTS**, a joint venture composed of Harold J. Moening, David G. Fritz, Bruce G. Purcell, Albert A. Kelly and Harvey P. Pittelko, Appellants,

v.

**STATE of Alaska, DEPARTMENT OF TRANSPORTATION & PUBLIC FACILITIES**, Appellee.

No. 7229.

Supreme Court of Alaska.

July 27, 1984.

In eminent domain action, the Superior Court, Third Judicial District, Anchorage, Karl S. Johnstone, J., granted State's motion for partial summary judgment, holding that State already had 100-foot-wide right-of-way along highway, awarded amount to property owner greater than ten percent total amount deposited by State, and awarded property owner \$115,000 attorney fees and \$76,877.13 for costs, and property owner appealed. The Supreme Court, Matthews, J., held that: (1) original patentee's entry on land was valid existing right, and therefore, no part of homestead was affected by public land order which withdrew 100 feet of land for highway purposes; (2) trial court's failure to award entire attorney fees requested was not abuse of discretion; and (3) property owner was entitled to recover costs for trips by its soil expert, expert architect, and appraiser.

Reversed and remanded.

**1. Public Lands** ⇨135(1)

Original patentee's homestead entry of property was "valid existing right" within meaning of Secretary of Interior's public land order withdrawing for highway purposes 100 feet on each side of centerline of highway; thus, State did not own 100-foot-wide right-of-way.

**2. Eminent Domain** ⇨265(3)

Although full attorney fees are norm under rule entitling property owner to award of costs and attorney fees where award obtained is more than ten percent larger than amount deposited by state, attorney fees must be both reasonable and necessarily incurred to achieve just and adequate compensation for owner. Rules Civ.Proc., Rule 72(k).

**3. Eminent Domain** ⇨262(1)

Court of Appeals will not disturb trial court's decision to award less than property owner's actual costs or fees in eminent domain case unless it appears that court's decision is abuse of discretion.

**4. Eminent Domain** ⇨265(1)

When trial court decides not to award full attorney fees and costs in eminent domain case where award obtained is more than ten percent larger than amount deposited by state, trial court must state its reasons. Rules Civ.Proc., Rule 72(k).

**5. Eminent Domain** ⇨265(3)

Trial court's refusal to award full amount of attorney fees requested in eminent domain action in which award obtained was more than ten percent larger than amount deposited by State was not abuse of discretion, where trial court's stated reasons for failure to grant full award were that there was unnecessary utilization of two and sometimes three attorneys at trial and pretrial proceedings at which presence of one attorney would have sufficed, time spent was excessive in view of straightforward nature of issues to be tried, claim of \$17,887.55 in attorney fees for preparing motions for costs and attorney fees was not only excessive in itself but suggested excessiveness as to all other fees, and one attorney's billings for travel

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February 19, 1988

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ADMITTED IN WASHINGTON, D.C.  
AND ALASKA

ALL OTHERS ADMITTED  
IN ALASKA

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

and

The Honorable Dave Donley, Chairman  
House Labor & Commerce Committee  
Alaska State Legislature  
P. O. Box V  
Juneau, Alaska 99811

Dear Senator Kelly, Representative Donley,  
and Committee Members:

The American Insurance Association, which represents more than 180 companies writing property/casualty insurance, is vitally concerned with the changes in workers' compensation law proposed by SB 322 and HB 352. The 17 AIA companies writing comp in Alaska in 1986, including Industrial Indemnity of Alaska, Alaska Pacific Assurance Company (ALPAC), Providence Washington of Alaska, and Fireman's Fund, accounted for slightly more than 50% of the direct premiums written in that market, according to statistics compiled by A. M. Best & Company.

Although the insurance industry did not participate directly in the deliberations that produced these bills, we support reforms designed not only to improve and increase the delivery of benefits to injured workers, but also to reduce the cost to the Alaska employers. While recognizing that employers

Senator Tim Kelly  
Representative Dave Donley  
Alaska State Legislature  
February 19, 1988  
Page -2-

are laboring under substantial cost pressures, the industry has also been struggling with what it and others view as inadequate rates. The Milliman & Robertson report presented to the joint committee, for example, suggests that not only have recent increases been warranted, but also that rates should increase further.

Generally, we applaud the efforts of the management/-labor ad hoc committee that produced the reform package now before the Legislature. We especially support, for example, the statement of legislative intent concerning judicial interpretation; proposed changes in vocational rehabilitation; and the use of the AMA "whole person" concept for compensation of permanent partial impairment.

However, one obvious difficulty in analyzing the proposed legislation, especially from the insurance industry's perspective, is attempting to predict what impact the changes will have on the overall cost of the workers' compensation system, i.e., whether premiums will increase, stay the same or decrease. On February 12, 1988, the joint committee heard testimony from representatives of the National Council on Compensation Insurance (NCCI), and Milliman & Robertson, that there is no significant "hard dollar" savings.

The management/labor ad hoc committee itself, in a January 14, 1988 letter to this joint committee, said the savings would be difficult to quantify. While some elements of the proposed legislation conceivably might produce a long-term cost reduction, that potential reduction is highly speculative. Other elements of the legislation will increase cost. For example, the proposed bill would increase the maximum permanent partial disability benefits for the more severely injured workers by 400% from a maximum of \$60,000 to \$240,000.

The American Insurance Association and its member companies are concerned about possible amendments that would mandate an immediate rate reduction. A mandatory rate reduction is not supported by the reports of the NCCI or Milliman & Robertson and would be strongly opposed by the insurance industry.

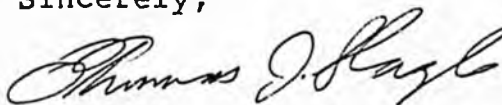
It will take several years for the actual effect of the changes to be known. No one can predict how the Board or courts will interpret the changes. Ultimately, if the changes reduce the overall cost of providing benefits to injured workers, those savings will, because of adequate competition in the market place, be passed onto employers in the form of rate reductions. In our view, however, it would be irresponsible, and negatively affect the availability of workers' compensation insurance, to

Senator Tim Kelly  
Representative Dave Donley  
Alaska State Legislature  
February 19, 1988  
Page -3-

reduce already inadequate rates, in the absence of any evidence suggesting the proposed changes will, in fact, reduce costs.

Notwithstanding these concerns, the American Insurance Association again commends the work of the management/labor ad hoc committee. We look forward to assisting the Legislature in any way we reasonably can in attempting to resolve the difficult problems in the worker's compensation system.

Sincerely,



Thomas J. Slagle

TJS:sd/11.76

cc: Senator Dick Eliason  
Senator Rick Uehling  
Senator Bettye Fahrenkamp  
Senator Mike Szymanski

Representative Niilo Koponen  
Representative Red Boucher  
Representative Cliff Davidson  
Representative Johnny Ellis  
Representative Walter Furnace  
Representative Curt Menard

Mary Pierce (Management/Labor Ad Hoc Committee)  
Robert Anders (Management/Labor Ad Hoc Committee)

Alaska Division of Insurance

March 4, 1988

House and Senate Labor & Commerce Committees  
Re: HB 352\CSSB 322 Workers Compensation  
On March 8th and 10th you will have hearings on the Workers  
Compensation Bills.

Before major changes are made in the bill(s) consideration should be given to the parties with a vital interest in Workers Compensation.

1. Self Insureds. This group of Municipalities and Corporation pay no Workers Compensation premiums. They pay -0- in Alaska State Premium Tax that is 3% of premiums paid to a private carrier. At present no method is available to collect an "in lieu" of tax payments from self insureds. They receive the same service from the Division of Workers Compensation and Division of Insurance without any financial contribution. This may be checked with the Department of Revenue.
2. Medium and small firms that purchase Workers Compensation thru private carriers and pay the premium tax.

On July 1, 1988 the Alaska Municipal League will have a self insurance plan available so that many cities, boroughs and school districts in Alaska will participate.

At present the self insureds are -

1. State of Alaska
2. Municipality of Anchorage
3. Anchorage School District
4. Carr-Gottstein
5. Alyeska Pipeline Service Co.
6. City of Fairbanks
7. Fairbanks North Star Borough
8. City & Borough of Juneau
9. Fred Meyer
10. Safeway
11. Pay N Save
12. Sears
13. Sea Land Industries
14. Veco, Inc.

The list of self insured accounts is growing and those firms buying insurance is getting smaller. (see attached list)

The Governor Oversight committee on Workers Compensation had the actuaries from the National Council on Compensation Insurance and Milliman & Robertson testify. NCCI stated a 4% reduction had been recommended but after the Alaska Classification & Rating Committee "sanitized" the data a 1.8% increase was due on SB 322. Milliman & Robertson estimate was .006 increase.

Since the purpose of the legislation is to get a decrease in rates, the only means is for the legislature to mandate a rate reduction.

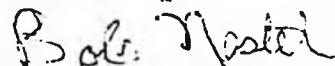
The Governor has the choice to veto or sign the resulting bill.

If he signs a bill which mandates a rate decrease the Worker Compensation carriers may withdraw. Alaska does not have a standby plan to write Workers Compensation. Studies have been made in 1974 and 1987 on this subject.

A blue ribbon task force should be established to explore a competitive state fund. A State Industrial Division could be set up in the Department of Administration.

This plan would allow private insurance carriers to compete with the State Fund.

Sincerely,

  
Bob Nestel, CPCU, ARM

  
Myron G. Schweigert, D.C.

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702 ALASKA INTERNATIONAL INC  
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