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(3) the State of Alaska;

(4) outside Alaska.

(m) "Qualified rehabilitation professional" means a person who by education and experience has the skills to work in the field of rehabilitation as determined by Board established regulations.

(n) While an injured worker is participating in a preliminary evaluation and/or a subsequent full evaluation under this section, he or she shall receive temporary partial disability benefits under AS 23.30.200 when an employee under section (h)(1) or (2) and primary physician agree, prior to medical stability and a full release, that an employee may return to modified, light duty, part time, or trial work status.

VII. BARRING ALL LIABILITY BY AN EMPLOYER (BOARD AND COURT) TO AN EMPLOYEE WHO COMMITS AN UNTRUTH ON HIS OR HER PREEMPLOYMENT QUESTIONNAIRE

COMMENTS

Much of this has been discussed under number IV above. No one can know what the courts will do with this. There is no way to provide a prompt adjudiciation of whether a worker committed an intentional falsehood, and it is not likely that the courts will deprive a worker of both compensation benefits and civil liability (if the employer was negligent) without a firm adjudication of intentional fraud.

RECOMMENDATION

We favor the approach, but feel there must be a standarized questionnaire with admonitions on it and, if need be, provisions to help illiterates complete it. We also recommend that there be some proviso for prompt determination of whether fraud has been committed in order that a carrier not pay benefits if they are not supposed to be paid, but not withhold benefits if they are supposed to be paid.

ACTIONS PROPOSED

There should be a statute providing for forfeiture of civil liability against the employer, as well as benefits under the workers' compensation law. This would be easiest if it were done under Title 11 (the criminal code). This will require legislation to effect what has just been set out, administrative cooperation in getting these matters to the proper authorities on a relatively emergency basis, and executive allocation of funds to handle the hearing which declares these rights to have been waived.

ARGUMENTS AND PROBLEM AREAS

Equal protection questions will doubtless be raised as they always are with any forfeiture or waiver. Additionally, we are all aware that, if employment is down as it is now, a person needing a job will say what is necessary to get that job. This will make that person a "good guy" in the eyes of the court, and there will be an effort to avoid this waiver, particularly in

the event of a hard case where the employee is very badly injured and the employer was quite negligent.

VIII. NO DOCTOR HOPPING

COMMENTS

In the first sentence, the word "attendance" should be "attendants". We feel that the cases where there is no specialist within the State (in an area where an employee needs treatment) will be sufficiently rare that the Board can handle these as special matters. We worry that the transfer to a specialist will be considered a change in "attending physician" because this is the ~~meeting~~ meaning that the medical profession attaches to such a change.

RECOMMENDATION

We concur fully with requesting the passage of Section VIII. There will have to be considerable public education and the adoption of regulation covering the Notice of Change ~~in~~ of a physician. We do recommend that the term "attending physician" be changed to be "primary physician". This will eliminate the semantical problem. We feel it advisable that the problems of prior notification be avoided by providing that the notice must be "within 14 days" of the change. This is in line with the present law.

ACTIONS PROPOSED

Aside from the semantical suggestion above, the

Department and the Board should prepare regulations and forms to cover change of physician. We would prefer that the amendment be as follows:

"The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. However, if the condition requiring the treatment, apparatus, or medicine is a latent one, the two-years period runs from the time the employee has knowledge of the nature of his disabililty and its relationship to his employment and after disablement. It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the Board. The Board may authorize continued treatment, or care, or both, as the process of recovery may require. When medical care is required, the injured employee may designate a licensed physician inside the state where the employee resides to render the care. Upon procuring the services of a physician, the injured employee shall give proper notification of his selection to the employer within a reasonable time after first being treated. The emplcyee may not make more than one change in the employee;s choice of primary physician without the written consent of the employer. Referral to a specialist by the employee's primary

physician is not considered a change in physicians. Notice of a change in the primary physician shall be given within 14 days after the change."

ARGUMENTS AND PROBLEM AREAS

There will always be emergencies where there is not time to go through the notification procedure. This should be covered by the regulations. There will always be situations where an employee is referred to more than one specialist during the same time period. Once again, this can be worked out with the accompanying regulations.

IX. COURSES OF TREATMENT TO BE WRITTEN IN ADVANCE

COMMENTS

This proposal will greatly increase the medical cost of treatment. Physicians are not magicians. They cannot predict with exactitude at what point during a "course of treatment" a person will actually be cured. In order to avoid malpractice, all physicians will have to recommend a maximum course of treatment <u>in case such is needed</u>. Unified Fairbanks does not feel that the proposed amendment is workable, nor that the cost increase necessary for a physician to prevent malpractice is money well spent.

RECOMMENDATION

We recommend no amendment to Subsection C.

ACTION PROPOSED

The evil sought to be remedied here, namely that of endless treatments without real value, should be addressed by a study committee to find a feasible way of handling the situation. Hopefully, the way should not increase the cost.

ARGUMENTS AND PROBLEM AREAS

See above.

X. A DEFENSE MEDICAL EXAMINATION AFTER 14 DAYS AND THEN EACH 30 DAYS THEREAFTER

COMMENTS

Because of the definition of the word "physician" contained later on, it would be advisable to remove the words "or surgeon" in line 4 regardless of what else is done. Additionally, there may be problems with respect to types of practice (hypnotic, chiropractic, osteopathic, religious, etc.) and personality conflict which will sooner or later result in problems under this section whether or not amended. We felt that the present statute was adequate, and [redacted] that there was no need to wind everyone up with the idea of a defense medical exam every 30 days, and that money expended thereby would be a waste.

RECOMMENDATION

That we leave Section (e) as it currently is and schedule this problem for study as will be referenced later.

ACTIONS PROPOSED

Scheduling this problem for study in the future.

ARGUMENTS AND PROBLEM AREAS

Sending a Jehovah Witness to a hematologist is not likely to be functional. This sort of preference, as mentioned above, should be considered in study.

XI. USUAL, CUSTOMARY AND REASONABLE FEES

COMMENTS

This is a very good idea. Care will have to be taken by the Board in the manner in which it adopts a UCR fee so that that fee does not become known to medical practitioners (see below).

RECOMMENDATION

We join in requesting passage.

ACTIONS PROPOSED

Same (with caution so that the UCR schedule is not made available).

ARGUMENTS AND PROBLEM AREAS

UCR fees are used by almost every insurance company that writes health insurance. With the big carriers, the UCR rate for any procedure is set at the 90th percentile. This means that 89% of all doctors practicing in the area charge less than the UCR fee for that procedure, while 10% of the same doctors charge more. Each carrier jealously guards the secrecy of its UCR schedule because, if that schedule becomes known, it will become a "minimum fee schedule" and medical costs will

really escalate. If the Board adopts a UCR schedule, it will probably will have to do so in a public meeting and with notice. This will mean that the schedule could become public property or at least known to many physicians. That sort of action will result in a massive increase in medical costs with no enhancement of medical care.

XII. REPEALING RELIANCE ON AMA GUIDE FOR EVALUATION OF PERMANENT IMPAIRMENT AND OBTAINING A BOARD CONSULTANT ON APPROPRIATENESS, NECESSITY AND COST OF MEDICAL SERVICES

COMMENTS

This may be the one place where "may" should not be replaced by "shall". The repeal of the reliance on the AMA Guide is then undone later on in this bill with a subsequent adoption of the same guide. Additionally, we feel that new subsection (k) takes care of the problem without needing to spend extra monies on medical consultation.

RECOMMENDATION

We are negative on this repeal and new rule.

ACTIONS PROPOSED

None.

ARGUMENTS AND PROBLEM AREAS

Another layer of medical authority may well simply confuse the issue. Enough corrections have been taken in other sections.

XIII. INDEPENDENT MEDICAL EXAMINATION

COMMENTS

The use of a single physician as an independent medical examiner became obsolete in the medical profession several years back. We do not have, in Alaska yet, multiple discipline panels of Board certified physicians, and hence this portion of our medical practice is going outside. Alaska currently has a number of clinics who can perform this function and we are recommending a medical update by using them (unless the employer or carrier prefers an outside group). The principles set forth DRC is good. We have some reservations about using "clear and convincing objective evidence" since the medical meaning of "objective evidence" differs considerably from the lay persons definition.

RECOMMENDATION

To reword the proposal of WCCA creating the same effect but updating the medical services and apportioning the weight to be given to the testimony of such a panel to be equal with the preference already given to a "treating physician".

ACTIONS PROPOSED

We recommend the following wording for Section (k) of AS 23.30.095(k) to read: "In the event of a medical dispute regarding determinations of causation, medical stability, degree of impairment, functional capacity, the amount and ethicacy of the continuance of or necessity of treatment, or compensability

between the employee's attending physician and the employer's independent medical evaluation, an independent multiple discipline panel of board certified physicians shall conduct an examination of the employee. This panel shall be selected by the Board from a list established and maintained by the Board. The cost of the examination and medical report shall be paid by the employer. The report of the panel shall be furnished to the Board and to the parties within 14 days after the examination is concluded. The opinion of the independent panel shall, in the absence of clear and convincing evidence to the contrary, have equal weight with the opinion of the attending physician. No person may seek damages from an independent multiple discipline panel of board certified physicians for the rendering of the opinion described in this subsection or for testimony by any member of said panel under this subsection, except in the event of fraud." This will require that the Board entertain applications from various clinics currently formed and to be formed for appointment to the panel list. Publication of the legislative change will probably be adequate to form a number of these panels within the state. The Department will probably need to assign an employee (part-time) to handle the rotating list. That same person (or computer) could handle the other rotating lists suggested in this legislative package.

ARGUMENTS AND PROBLEM AREAS

Care should be taken to watch out for panels which

spring up without fully qualified people in the necessary disciplines on them. There should be a regulation describing the disciplines which must be available on any panel and the requirement of Board certification to handle this problem. If the weight given the panel is equal to the weight given the attending physician, and if the two differ, then the defense medical examination will be the swing vote. This sort of apportionment is necessary because medicine is not yet reduced to total certainty and a demonstrably incorrect judgment call (in hindsight) and will produce lawsuits even if only between the physicians involved.

XIV. STATUTE OF LIMITATION TRIGGERED BY DIRECT COMPENSATION BENEFITS

COMMENTS

This amendment clarifies a confusing situation so that litigation in this area will no longer occur.

RECOMMENDATION

Support for the WCCA proposal.

ACTIONS PROPOSED

Adopt the WCCA proposal.

ARGUMENTS AND PROBLEM AREAS

Knowledge of the commencement of the Statute of Limitations is something that is difficult to come by for a layman. In all probability, regulations will be needed providing that, upon payment of the final payment, there be an

accompanying letter or form indicating that the Statute of Limitations commences as of the date of that letter.

XV. NO PRESUMPTION OF COMPENSABILITY IN MENTAL INJURY CASE

COMMENTS

The term "mental injury" is undefined in law and in medicine. What is probably meant here is a stress related injury with manifestations primarily found in brain dysfunction. Without clarifying the term, much litigation will be required.

RECOMMENDATION

The idea is good. The proposal should be adopted to eliminate litigation. The definition of the injury should be made clear.

ACTIONS PROPOSED

Same as above.

ARGUMENTS AND PROBLEM AREAS

Only if the term is not defined will there be much litigation to determine what is meant. All injuries have a mental aspect. Almost all diseases commonly thought of as mental diseases have physical manifestations.

XVI. BOARD'S FACTUAL DETERMINATIONS CONCLUSIVE IF ANY EVIDENCE AT ALL

COMMENTS

See our comments under Section I.

RECOMMENDATIONS

See our recommendations under Section I.

ACTIONS PROPOSED

See our actions proposed under Section I.

ARGUMENTS AND PROBLEM AREAS

See our arguments and problem areas under Section I.

XVII. BOARD HAS ONE YEAR TO RECONSIDER ERRONEOUS FACTUAL FINDINGS

COMMENTS

This is a technical correction to make clear when the one year starts running. The correction is needed and does make the situation clear. This doubtless supplements the "any evidence" rule found in Sections XVI and I, making Board determinations relatively unappealable on the facts.

RECOMMENDATION

We join the WCCA recommendation.

ACTIONS PROPOSED

Adopt the proposed amendment.

ARGUMENTS AND PROBLEM AREAS

This section will doubtless now be used because of the cutoff of appellate rights if the "any evidence" rule is adopted. It is part of an attempt to make the Board's decision final, except on questions of legal interpretation. The Board should anticipate ~~this~~ increased usage. There may be staffing implications in the increased usage.

XVIII. PENALTIES CAN BE REDUCED

COMMENTS

A necessary supplement to the amendment proposed in Section V.

RECOMMENDATIONS

See comments in Section V.

ACTIONS PROPOSED

See comments in Section V.

ARGUMENTS AND PROBLEM AREAS

See comments in Section V.

XIX. REAFFIRMATION OF LAST INJURIOUS EXPOSURE RULE

COMMENTS

Simply a restatement of the current law.

RECOMMENDATION

A good rule. It can't hurt to repeat it.

ACTIONS PROPOSED

Passage of the amendment.

ARGUMENTS AND PROBLEM AREAS

None, since the rule is already in effect.

XX. ANNUAL REPORTING DATE AND PENALTY INCENTIVE

COMMENTS

Another portion of the procedure set forth in Sections V and XVIII.

RECOMMENDATION

See comments under Section V.

ACTIONS PROPOSED

See comments under Section V.

ARGUMENTS AND PROBLEM AREAS

See comments under Section V.

XXI. MAXIMUM AND MINIMUM ON WEEKLY DISABILITY PAYMENTS

COMMENTS

While looking like a major reduction, this will probably effect very few injured persons under the various rules currently existing. For an injured employee with a wife and children, benefits will often be less than unemployment benefits.

RECOMMENDATION

Adopt the proposal and then monitor the situation to see whether injured employees are waiving disability in order to collect unemployment.

ACTIONS PROPOSED

Adopt the proposal.

ARGUMENTS AND PROBLEM AREAS

An injured employee whose disability benefit is less than unemployment may waive disability benefits and request that his doctor release him for work so that he can draw

unemployment. This could have a domino effect on other benefits.

REINSTATE REDUCED BENEFITS FOR THOSE RESIDING OUT-OF-STATE

COMMENTS

This portion of Section XXI seeks a return to the reduced benefits for those workers who reside out-of-state. It also indicates that only instate work will be used to calculate earnings in the past. Between the two, the long term effect will hopefully be to provide a substantial disincentive to residents of other states with respect to working in Alaska. This is a tradeoff for the increase in permanent partial disability.

RECOMMENDATION

Adopt the proposal in this form unless the Attorney General's Office suggests one less likely to be attackable in court.

ACTIONS PROPOSED

Same.

ARGUMENTS AND PROBLEM AREAS

A case entitled Brown v. Alpac in the Supreme Court found severe difficulty with compensating workers who reside out-of-state less than those who reside instate. There are equal protection and freedom of travel problems possible here and plans should be made to defend this scheme.

XXII. FACTORS TO BE CONSIDERED IN DETERMINING PERMANENT TOTAL DISABILITY

COMMENTS

A part of the package very very rarely used.

RECOMMENDATION

Adopt the amendment and monitor it for effect.

ACTIONS PROPOSED

Same.

ARGUMENTS AND PROBLEM AREAS

The reference to "area of last employment" may refer to work available in another state. This may be part of the equal

protection and freedom of travel problem. However, it doesn't seem likely that this would be an area of attack. This seems to eliminate the problem of whether a person is still able to work if that person can hold only some job that is only available in another state.

XXIII. FAILURE TO ACHIEVE EMPLOYABILITY NOT NECESSARILY PERMANENT TOTAL DISABILITY

COMMENTS

Presumptively, this refers to the person who could, with more effort put forth, hold some job that is available somewhere in Alaska, but does not do so.

RECOMMENDATION

We have no idea of the effect and therefore join WCCA in advocating the amendment.

ACTIONS PROPOSED

Same.

ARGUMENTS AND PROBLEM AREAS

If this is not spelled out to some greater detail in regulations, there will have to be a series of court cases to ascertain what its effect may happen to be.

XXIV. TEMPORARY TOTAL DISABILITY LIMITED TO TWO YEARS OR MEDICAL STABILITY, WHICHEVER IS FIRST

COMMENT

Under the proposed definition of medical stability

found in later sections, this will mean that TTD will last only so long as the injured employee makes objectively measurable improvement each 45 days. It would require at least 16 objectively measurable improvements to keep TTD running for two years. Only horrendous and compound injuries should ever find their way into that category. Most severely injured people will be without improvement for a 45 day period somewhere during their recovery and hence, they will pass directly to the permanent partial disability rating.

RECOMMENDATION

We have no idea of the effect and therefore join WCCA in advocating the amendment.

ACTIONS PROPOSED

Same.

ARGUMENTS AND PROBLEM AREAS

Medical professionals are likely to create illusory improvements to avoid this rule and to permit their patient to recover to a true point of medical stability before being permanently rated. Alternatively, people will be rated for permanent partial disability long before they have recovered and unless there is a motion to amend the Board's findings within one year, the carrier will not get ~~the~~ any funds (which have been paid) returned. This could be expensive.

XXV. PERMANENT PARTIAL DISABILITY RENAMED AND BASED ON $240,000 FOR A "WHOLE MAN", SPECIAL FACTOR TO REDUCE PAYOUT FOR THOSE LESS THAN 31% DISABLED

COMMENT

Almost all disabilities fall within the 0-30% category and hence, will be cut back rather than based on the $240,000 whole man. This will be a very beneficial amendment for those quite severely injured. The change in caption was probably a transcribing accident and should be rectified. The $250.00 minimum should be adequate to lock in the reduced payment for those with only minor disabilities such as loss of a hand. The amendment further readopts the American Medical Association's guides to evaluation of permanent impairment (repealed earlier in this package) and provides for the Board to adopt and use a supplemental schedule if they so desire. The language probably should be "shall" rather than "may" so that this supplemental schedule does not have to be created by courts on appeal.

RECOMMENDATION

Adopt the amendment and monitor it for effect.

ACTIONS PROPOSED

Same, but restore the caption to use the word "disability" so as to be consistent with other sections. Also, "may" should be changed to "shall".

ARGUMENTS AND PROBLEM AREAS

It is to be anticipated that people less than 31% disabled will test this section in the courts. It appears that it will withstand the test.

XXVI. CUTTING OFF TEMPORARY PARTIAL DISABILITY IN THE SAME MANNER AS TEMPORARY TOTAL DISABILITY

COMMENTS

The two-year and "medical stability" problems foreseen above in Section XXIV are encountered here again.

RECOMMENDATION

See number XXIV.

ACTIONS PROPOSED.

See number XXIV.

ARGUMENTS AND PROBLEM AREAS

See number XXIV.

XXVII. WAGE EARNING CAPACITY FOR CALCULATION OF PERMANENT DISABILITY TO BE DETERMINED BY ACTUAL SPENDABLE WEEKLY WAGE OR SET BY BOARD

COMMENTS

This is the only use of the term "actual spendable weekly wage". It is undefined and is obviously intended to be different from "spendable weekly wage" which is very narrowly defined. Until this term is defined by regulation or by the courts, the Board will probably have to have a hearing and set the wage earning capacity of each person who becomes eligible for permanent disability of any sort. Since this is the compensation on which the amount that the injured person will receive is based, we can only hope that settlements will become

a pattern. Otherwise, the Board will be snowed under with a new type of hearing which only occasionally occupied them in the past.

RECOMMENDATION

Adopt the amendment and monitor its effect.

ACTIONS PROPOSED

Adopt the amendment and monitor its effect.

ARGUMENTS AND PROBLEM AREAS

This appears to say that the wage earning capacity of a person will be based upon the spendable weekly wage which the person is earning at the time he or she is injured. The use of wages contempory with the injury is to be encouraged, particularly because of the bizarre effects of Alaska's boom and bust economy when a historical earnings criteria is used. The inconsistencies between this and the next section may result in litigation. Our discussions indicate that this is a more desirable approach in Alaska's economy (see our comments in the next section).

XXVIII. BOARD MUST DETERMINE EMPLOYEE'S GROSS WEEKLY EARNINGS

COMMENTS

This amendment is imposed upon the delightful conundrum which has been AS 23.30.220(a). The section as it currently exists begins by saying that the current wage at the time of injury is the basis for computing compensation. It goes on to

provide that this is current receivable wage and that this is calculated on the basis of earnings history only. There are two formulas that are customarily used in workers' compensation statutes. One bases the calculation of compensation on the earnings of the employee at the time of injury. The other bases the calculations on a wage earning history. This latter has created much of the problem on which we are currently working. In a boom and bust economy, a workers' compensation system that is based upon earnings history finds that in boom periods, the workers benefits are calculated on his earnings during the bust period and hence, are low, and there are plenty of jobs at high wages available as an incentive to return to work. At this time then, claim payments are very low and profits are very high. On the other side of the mountain, when the economy is going into a bust, the payments to the injured worker are based on earnings history and hence, are high, and wages available are low (if any). This provides a disincentive to return to work and during this period, there would normally be no profit at all for the insurance carriers since the profit was drawn during the boom time. Alaska has, however, elected to try to provide profit both during boom and bust while still calculating benefits based on historical wages. The effect of these two policies makes for low premiums (but lots of profit) at the boom time and impossibly high premiums (and small profit) at the bust time, thus further damping the economy and permitting those employers

policy)
who can come into the state from outside (with a multi-state workers' compensation policy) to underbid employers who are residents of the state. This is, of course, foolish in the extreme. Unified Fairbanks is exceedingly concerned that the Director of Insurance has adopted an "even profit throughout" theorum in setting rates, because this is incompatible with our economy, if we are going to predicate workers' compensation benefits on our earnings history.

RECOMMENDATION

Consider basing benefits paid on wages earned at the time of the injury as a condition precedent to the adoption of the amendments. Beyond this, adopt the amendments and monitor for the problems set forth below.

ACTIONS PROPOSED

Adopt the proposed amendment but change the definition of spendable weekly wage to one providing that it is based on the wage being earned at the time of injury.

ARGUMENTS AND PROBLEM AREAS

The judgment of two years, or 18 months out of two years, eliminate much of the flexibility in determining an employees compensation as a result. Those seeking to go back to work after a workers' compensation (or other) injury lasting, say, a year to a year and five months will have virtually no workers' compensation coverage. This will undoubtedly be litigated on equal protection and probably other grounds.

XXIX. REDUCTION IN BENEFITS FOR PEOPLE COLLECTING PENSION OR PROFIT SHARING BENEFITS

COMMENTS

A wise decision since those who retire would not, in most instances, be the ones sought to be covered by workers' compensation benefits.

RECOMMENDATION

Adopt the amendment.

ACTIONS PROPOSED

Adopt the amendment.

ARGUMENTS AND PROBLEM AREAS

There will probably be equal protection problems based on the fact that a worker may have accumulated pension benefits over a great number of years. A further problem will be the employee who, because of the compensable injury, is forced into disability retirement. Presumptively, these will be resolved in favor of the amendment.

XXX. NON-DISCRIMINATION IN HIRING AGAINST INJURED PERSONS EXCEPT DISCRIMINATION PERMITTED IF EMPLOYER CONSIDERS "SAFETY PRACTICES" OR "PHYSICAL AND MENTAL ABILITIES" EMPLOYER MAY REQUIRE QUESTIONNAIRE COMPLETION TO DETERMINE "PHYSICAL AND MENTAL CAPACITY"

COMMENTS

We were unable to consider this amendment adequately because of the obvious conflict between Section (a) and Sections

(b) and (c). It appears that the draftsman resolved the conflict by including everyone's proposed rule.

RECOMMENDATION

We will go along with WCCA, but do not endorse conflicting rules.

ACTIONS PROPOSED

Put this on the shelf until a clear rule can be drafted.

ARGUMENTS AND PROBLEM AREAS

The obvious conflict between the sections. There are also possible conflicts with the federal law prohibiting refusing to hire because of disability.

XXXI. REPEAL OF MOST RAGLAND BENEFITS

COMMENTS

The Ragland case provided that an employee's wage include fringe benefits paid and room and board if supplied. This removes the room and board unless it is taxable (true only with town jobs where room and board not supplied for the convenience of employer). Fringe benefits are not taxable to the employee, if they are paid into a trust, unless they are actually or constructively received by the employee. This amendment leaves only pension or profit sharing benefits for older and vested employees to be considered as part of an employee's income. This is a compromise and, in the view of

(b) and (c). It appears that the draftsman resolved the conflict by including everyone's proposed rule.

RECOMMENDATION

We will go along with WCCA, but do not endorse conflicting rules.

ACTIONS PROPOSED

Put this on the shelf until a clear rule can be drafted.

ARGUMENTS AND PROBLEM AREAS

The obvious conflict between the sections. There are also possible conflicts with the federal law prohibiting refusing to hire because of disability.

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Unified Fairbanks, this is an agreeable reduction in benefits offset against a possible reduction based on collateral benefits received by the employee.

RECOMMENDATION

Unified Fairbanks considered adoption of this amendment in consideration of dropping potential adoption of an offset against collateral benefits rule. We therefore recommend its adoption.

ACTIONS PROPOSED

If this amendment is not adopted, fairness would decree that we then consider an amendment to AS 23.30.225 providing, "Where an employee receives periodic disability benefits under the provisions of a pension plan, disability or accident insurance plan, financed in whole or in part by the employer, the aggregate benefits payable for temporary total disability, temporary partial disability, permanent partial, and permanent total disability shall be reduced by an amount equivalent to such portion of the employer finance benefits paid to an employee in excess of temporary or permanent disability benefits calculated on the employees spendable weekly wages."

ARGUMENTS AND PROBLEM AREAS

Non-union employers on Davis-Bacon jobs often take the fringe benefit sums and place them in a separate account. This account is to be used to pay fringe benefits. However, if an employee does not work long enough to vest any interest in those

fringe benefits (which is the rule on construction jobs), the money returns to the employer. Since the chance of vesting is minimal and since under these circumstances these payments are deductible to the employer, they are included in gross wages paid for the purpose of calculating workers' compensation premiums. If premiums are to be based on these sums, there may be lawsuits with respect to the way they are to be considered in gross earnings. It is probable that the "vested" requirement will shortcut any court test here.

XXXII. COMPENSABLE INJURIES NOT TO INCLUDE "MENTAL INJURY CAUSED BY MENTAL STRESS"

COMMENTS

The same defect of definition is found in this reference to "mental injury" as is found in Section XV. Please see comments on Section XV.

RECOMMENDATION

Please see comments at Section XV.

ACTIONS PROPOSED

Please see comments at Section XV.

ARGUMENTS AND PROBLEM AREAS

Please see comments at Section XV.

XXXIII. MEDICAL STABILITY (TERMINATING PAYMENT OF ALL TEMPORARY BENEFITS) OCCURS WHEN NO OBJECTIVELY MEASURABLE IMPROVEMENT HAS OCCURRED TO THE INJURED EMPLOYEE IN ANY 45 DAY PERIOD

COMMENT

This may be rebutted by clear and convincing evidence, but it divorces the medical definition of "medical stability" (meaning that the patient is improved as much as he or she is reasonably expected to improve) from the meaning of "medical stability" for workers' compensation purposes. Because of the burden of proof associated with it, this should greatly increase the number of hearings before the Board.

RECOMMENDATION

This has been earlier discussed in Sections XXIV and XXVI. Unified Fairbanks agrees that temporary benefits should be terminated and permanent benefits (if applicable) should be started immediately upon medical stability as that term is used by the medical profession. We hope the WCCA will agree to an amendment bringing their definition more in line with that of the medical profession.

ACTIONS PROPOSED

Try to redefine "medical stability" more toward that time when an injured person first reaches a condition in which whatever disability has been caused by the compensable injury is not likely to become measurably less in the near future.

ARGUMENTS AND PROBLEM AREAS

Doctors will probably continue to apply their definition of medical stability and will take whatever reporting steps are necessary to circumvent the imposition of the "45 day rule".

XXXIV. REPEAL OF THE CURRENT METHOD OF DETERMINATION OF WAGE EARNING CAPACITY

COMMENTS

A necessary part of the new method of determination proposed.

RECOMMENDATION

We concur with WCCA providing, of course, the new sections are adopted.

ACTIONS PROPOSED

Adoption as part of the overall package.

ARGUMENTS AND PROBLEM AREAS

None not mentioned in the section amending the new method of determination of wage earning capacity.

XXXV. REPORTING DURING TRANSITION

COMMENTS

This section is only needed if we go to the annual reporting format in order to permit the State to accumulate easily accessible figures.

RECOMMENDATION

To be adopted, if we adopt the annual reporting approach.

ACTIONS PROPOSED

Same.

ARGUMENTS AND PROBLEM AREAS

All outlined in the discussion of comparative wisdom of approaches to obtaining statistics discussed above.

XXXVI. EFFECTIVE DATE

COMMENTS

A good choice.

RECOMMENDATIONS

A PR campaign with recompilation of booklets available including the copies of the applicable code and regulation sections.

ACTIONS PROPOSED

A good date to start. Be sure to use lots of PR and recompile all publications, including the gray book.

ARGUMENTS AND PROBLEM AREAS

None.

XXXVII. OBSERVATIONS WITH RESPECT TO THE RATE MAKING AS PERFORMED BY JOHN GEORGE AND HIS SUBORDINATES

COMMENTS

NCCI is an insurance lobbying organization. It is hired by a total of twenty states to supply ~~to~~ their insurance commissions with data necessary for rate making. Alaska uses them in the workers's compensation field and pays them for their services. Alaska does not check their figures. They do not give breakdowns of figures to Alaska (according to Mr. George)

so that essentially, they provide the State with two or three choices of rates and a summary of probable effects of each of those choices. Alaska then selects one. Even though the State is aware that disability payments are being made, they do not know any sort of an average rate. Our survey indicated that $560.82 was the average workers' comp disability payment for those cases that have gone into contest in some manner. The Second Injury Fund statistics show a quantum leap in 1985 and 1986; several hundred percent each time. This represents a massive increase in payout for disability. The reason for this is not explained, nor apparently has it been inquired into. Premium rates are currently based upon a gross payroll. (Figuring that anything is taxable to an employee represents increased risk to the carrier and hence, justifies payments). Many states use this system rather than the "hours worked" system. The states we have contacted, however, are keenly aware of percentages of premium dollar and percentages of benefits paid for each of the areas of payment. Neither the workers' compensation folks nor the insurance division folks have been able to produce any kindred statistics for Alaska, nor do they seem to be aware of any way of combining the reports which they receive (setting forth these statistics) so as to give statistics on any meaningful or statewide basis.

RECOMMENDATION

We recommend obtaining the breakdown of the reasoning

for premium rates before they are adopted. We recommend that the Department have a person whose duties include maintaining these statistics and we feel that the insurance division should have a similar person. We recommend at least verifying NCCI representation. We recommend audits of carriers and any statistics supplied NCCI or carriers. We recommend that the Insurance Commissioner acknowledge that Alaska has a boom and bust economy and change its criteria for setting premiums to reflect the fact that profits are made in the boom time and no profits are made in the bust time. Generally, we feel that we feel should pattern ourselves after the more successful states.

ACTIONS PROPOSED

This will require extensive overhall of the ongoing procedures and hence, we recommend (and we are willing to participate in) a task force or study group in this area. Alaska simply does not have a grip on the rate making process as do other states. We feel that it must get such a grip. This will require legislative, administrative, and executive changes.

ARGUMENTS AND PROBLEM AREAS

These will depend upon the course taken. In all probability, there will be resistance to any change.

XXXVIII. PREMIUM PAYING CRITERIA

COMMENTS

Generally speaking, older accident-free employees are

paid more than beginners. Premium rates are structured so that the cost of insuring the older accident-free person (who is paid more) are higher than those for the neophyte employee. This is upsidedown. Gordon DePue feels strongly that insurance companies will not want to change, because neither they, nor the employers have any idea how many hours a person works, but they are all acutely aware of the taxable gross paid to that person. [redacted] a formula combining the category in which an employee works and the hours that they work should be explored as a more fair premium base.

Additionally, attached to this letter is an article entitled "Everything You Wanted to Know About the CAL SMACNA Workers Compensation Captive, But Were Afraid to Ask". The experience modification described therein is missing in more than 95% of the premium rate setting in Alaska. Additionally, the question of whether fringe benefits (paid by setting aside in a separate account and which are not likely to be paid to the individual employee) should be considered as wages paid under the present system must be addressed. We also feel that State or captive coverage, such as mentioned in the attached article or as found in the State of Arizona, should be considered. Colorado and Montana appear to be bad examples.

RECOMMENDATION

The problems in this area are hurting employers badly and hurting them now. A study of this area should not be

postponed until some future indefinite date, but should begin forthwith.

ACTIONS PROPOSED

Begin the study now. Think of including several carriers in the information gathering discussion and planning groups. If you want public participation, Unified Fairbanks will be glad to provide some.

ARGUMENTS AND PROBLEM AREAS

There will always be a reaction to change. In this area, employers with bad safety records and a history of expensive compensation injuries may well have their premiums increased and they should be expected to complain.

XXXIX. ATTORNEY'S FEES

COMMENTS

Attorney~~s~~ ~~fees~~ representing employers and carriers are normally compensated on an hourly basis. Their economic incentive is therefore to spend the maximum amount of time which their relationship with the carrier or employer will stand, on each case. Attorneys for claimant are compensated at 10% (plus $150.00) of the amount recovered for client, but only if that amount has been controverted and fought out. In other words, settlements rarely carry attorney's fees. There are two problems in this area. The first is that both sets of attorney's fees are expenses which are ultimately reflected in

higher premium rates. In this area, we are yielding to WCCA who have advised that the WCCA will brook no interference whatsoever in the way that employers or carriers ~~interfere or~~ compensate their attorneys, and therefore, the attorney's fee costs should not be approached. In the second area, there is the question of equality of treatment. The claimant's lawyer has an incentive to settle as quickly as possible, but for as much as possible. The carrier or employer's attorney has an incentive to go as deeply into the case (and discovery proceedings surrounding it) as can be justified. This is the reason that almost every attorney in the state would love to defend workers' compensation claims and most of the big and profitable firms do so, while only a very small percentage of attorneys in the state will take claimant's cases. Claimants have a very hard time getting representation because only a law office set up to divert most of the work to paralegals can afford to take the cases without losing money. In order to effect justice, representatives on each side should be reasonably equally motivated, and close to equally paid. If there are to be no limitations on counsel fees on one side, then perhaps the other side should be paid a percentage of what the hourly compensated counsel gets. Currently, claimant's counsel receives nothing unless they win which also discourages attorneys from representing workers' compensation claimants. A half dozen formulas have been suggested, but none of them stand the test of argument if we

accept the given(that employers and carriers will brook no interference in what they pay their counsel).

RECOMMENDATIONS

We therefore recommend study by the legislative task force proposed later, on with the cooperation of the Alaska Bar Association.

ACTIONS PROPOSED

As stated above.

ARGUMENTS AND PROBLEM AREAS

Medical costs are currently out of control in the compensation area. Presumptively, attorneys would like to have attorney's fees in that same category. There will then probably be lots of arguments in committee, etc., and there may ultimately be a test case as to whether the formula selected is fair.

XL. USING EITHER STATE COVERAGE OR A CAPTIVE CARRIER FOR COVERAGE

COMMENTS

As mentioned above, Alaska has a boom and bust economy. Either State coverage or a captive carrier can be expected to level out the compensation premiums making profit in boom times and suffering a loss in bust times. For the stability of our economy, this is probably essential. An alternative would be to actually use the authority of John George to set rates that would be fair to employers. Whether

this is possible is an open question.

RECOMMENDATION

This should be studied as it may turn out to be the only solution to level fair rates.

ACTIONS PROPOSED

A task force in this area is needed.

ARGUMENTS AND PROBLEM AREAS

On the one hand, carriers complain that they are not making money. It is to be expected, however, that if they are likely to be supplanted by a captive carrier or the State, they will vigorously oppose this because, in fact, a considerable profit is being made, ~~that~~ which profit would be lost to the "competition" of the State or the captive carrier.

XLI. ADMINISTRATIVE MATTERS

COMMENTS

We lack an easy manner for an employer to check on prior injuries having occurred to his employees. We have found that the reports received on each individual case (from insurance carriers) are not combined, ~~in any manner so that~~ The statistics are valueless because they are not cumulated. There is a long period of time between the request for a hearing, and a hearing, both before the Board, and most especially before the rehabilitation officer. Therefore, additional staffing is needed. The grey book which contains the statutes and

regulations with respect to workers' compensation is so outdated as to be useless. There are no regulations providing for audits for carriers. At this point, there is no support within the Department assigned to work with loss control programs which are badly needed.

RECOMMENDATION

The extra personnel should be added to the Department to provide: a) a last name index of workers' compensation filings for availability to employer; b) more Board members and more rehabilitation officers in order that the hearing calendar not be over one month after the request for hearing in either of these categories; c) regulations can be set up for adoption providing for audits of carriers to verify the information which is submitted; d) the information received from carriers should be put into a computer so that information would be continuously available (such as, for 1987, what percent of premium dollars went to pay medical costs?) There are many of these type of questions that should be answered in order to be at all effective; and, e) the grey book should be reissued up-to-date so as to make it useful.

PROPOSED ACTION

Budgets should be increased and personnel assigned as explained above. On the compilation of statistics matter, cooperation should be worked out with the Insurance Commissioner.

ARGUMENTS AND PROBLEM AREAS

There will be a slight increase in cost in running the Department. This, of course, will be offset by the fact that information and services will be available.

XLII. EXECUTIVE DEPARTMENT PRIORITIES

COMMENTS

The Attorney General's Office does not allocate money to prosecute workers' compensation fraud. The budget will require adjustment upward to provide for the needs set forth above. The Insurance Department will need to be regulated in order to have them accumulate statistics upon which they base their rate setting, and this may require cost increase. The Attorney General's Office should prosecute employers who are operating without insurance or with out-of-state insurance that actually has little, if any, value for Alaskan workers. The Insurance Department should perform audits of the carriers, in order to find out whether ~~what~~ the information they provide to us (but is just left in file drawers at this time) is reliable. ~~and A~~ certificate showing that workers' compensation is in effect should be designed so that it specifies where Alaskan workers are working, what carrier is covering them, and that they are given coverage at Alaska rates so as to be valid in Alaska. These certificates should be for filing on each Little Davis-Bacon job, with local government bodies that request it.

with the Department of Insurance, with the Department of Workers' Compensation, and anywhere else thought appropriate, in order to give meaning to the requirement of having workers' compensation coverage.

RECOMMENDATION

Each of the above problems be addressed and resolved at the earliest possible time.

ACTIONS PROPOSED

See above.

ARGUMENTS AND PROBLEM AREAS

There will be "empire" problems anytime some of these adjustments are made. The value of the adjustments makes it all seem worthwhile.

XLIII. SPECIAL RECOMMENDATION FOR THE SECOND INJURY FUND

COMMENTS

The 104 week time required to bring the Second Injury Fund into play is totally destroying the function of the fund. The "written records requirement" keeps many legitimate second injury cases from being compensated out of the fund, and lump sum settlements are discouraged by the fund reimbursing the carriers on an installment basis, rather than by lump sum.

RECOMMENDATIONS

We recommend that each of the above problems be addressed by legislation.

ACTIONS PROPOSED

To AS 23.30.205

Adoption of amendments as follows:

(a) If an employee who has a permanent impairment from any cause or origin incurs a subsequent disability by injury arising out of and in the course of his employment resulting in compensation liability for disability that is substantially greater by reason of the combined effects of the preexisting impairment and subsequent injury or by reason of the aggravation of the preexisting impairment than that which would have resulted from the subsequent injury alone, the employer or his insurance carrier shall be reimbursed for the second injury fund (From?) for all compensation payments subsequent to those payable from the first 26 (104) weeks of disability. The insurance carrier shall be reimbursed by a lump sum payment from the fund for lump sum settlements approved by the board.

(b) If the subsequent injury of the employee results in the death of the employee and it is determined that the death would not have occurred except for the preexisting permanent physical impairment, the employer or his insurance carrier shall in the first instance pay the compensation prescribed by this chapter, but he or his insurance carrier shall be reimbursed from the second injury fund for all compensation payable in excess of 26 (104) weeks.

(c) In order to qualify under this section for reimbursement from the second injury fund, the employer must

establish (by written records) that the employer had knowledge of the permanent physical impairment before the subsequent injury and that the employee was hired or retained in employment after the employer acquired that knowledge. Employer knowledge shall be established by written records except as follows:

(1) In cases of paralegia or quadriplegia,

(2) In cases of amputation of foot, leg, arm or hand, and

(3) When an employee has omitted qualifying information from employee's response to an employment questionnaire completed by the employee prior to the subsequent injury.

(f) An employer or his carrier shall notify the Commission of Labor of any possible claim against the second injury fund as soon as practicable, but in no event later than 15 (100) weeks after the employer or his carrier have knowledge of the injury or death.

ARGUMENTS AND PROBLEM AREAS

This will increase the usage of the second injury fund by between three and four times, ~~or~~. It will minimize the "acceptance period", ~~but will require further action~~. This may produce a problem.

XLIV. LEGISLATIVE TASK FORCE

COMMENTS

As we addressed each of the problem areas, a number of

them were set forth as needing a legislatively oriented task force, to monitor changes being made, and to resolve those problems not yet addressed.

RECOMMENDATION

Immediate creation of a task force containing legislators, insurance carriers, medical care providers, attorneys (from both sides), rehabilitation personnel, labor unions, executive and administration representatives, and employers. This task force should first address those problems which have not been addressed by legislative, executive, or administrative changes and later on, they should monitor the effect of the changes now being made. Only in this way will we be able to hone these problems down to a workable point.

ACTIONS PROPOSED

Establishment of the above committee forthwith.

ARGUMENTS AND PROBLEM AREAS

The function of this committee is to address problems. Its creation will do a good deal toward satisfying the employers (who are now being gouged by workers' compensation premiums) that are too high. Costs should be minimal.

his argument by stating that any ductwork which is not installed according to specific guidelines has the potential of being installed improperly. Thus, to alleviate the installation problem, he recommended that the State adopt—or at least reference—SMACNA's *HVAC*

ing" stage from all of the testimony they received. Staff members of the Commission indicate that Vermeulen made his point and that the State will more than likely adopt his recommendations. We'll keep you posted on further updates. □

Everything You Wanted to Know About the CAL SMACNA Workers Compensation Captive, But Were Afraid to Ask

By James Gullone, CPCU, President CAL SMACNA Business Insurance Agency, Inc.

In order to give you a full picture of how the captive works, I need to digress for a bit and give you a synopsis of the inside workings of the California Workers Compensation System. Once the inner workings of this system are laid before you, it will be easy to see how the captive works to your advantage at every turn.

How are my workers comp rates calculated?

Every insurance company in the state is responsible for filing a Unit Statistical Report with the Workers Compensation Insurance Rating Bureau (WCIRB) for every employer who has workers compensation insurance with them. This report contains the premium and losses that the employer sustained during the year broken down by rating class.

The rating class is one of 232 categories where one of your workers can be categorized in order to determine his workers compensation rate. A common category in our industry is Sheet Metal Work, Erection, Installation or Repair ($16 or more per hour), Code 5542, rate $9.05.

By using three years worth of these statistics, the WCIRB determines by statistical analysis what rates are necessary to pay claims and insurance company expenses for each workers compensation class. For example, in the rate class 5542 mentioned above, the rate as of 1/1/86 was $6.66. As of 7/1/87, that rate had climbed to $9.05, almost a 36 percent increase in a year and a half.

By contrast, the rate for roofers on 1/1/86 was $30.33. By 7/1/87, it was $33.85 and had increased only a little less than 12 percent during the same year and a half.

Are the rates that the WCIRB promulgates the minimum rates that an insurance company can charge for workers compensation?

Yes. California is a minimum premium state. Companies can charge more than the minimum but they cannot charge less.

There is, however, a legal way for you to pay less and it involves the Unit Statistical Report that we mentioned. Not only is that report used to set the minimum rates, it is also used to set an individual company's Experience Modification Factor (EMF).

If your account develops over $14,500 in premium using the minimum rates, you automatically qualify for Experience Rating. By a set formula, the WCIRB measures the number of claims you have, the claims you have over $2,000 and your premium.

If you are above average, your Experience Modification will be 1.00. If you are above average, your Experience Modification will be less than one. And if your claims are worse than average, your experience Modification will be greater than one.

So the Experience Modification Factor can affect my rates?

Very much. Let's say that you have a $200,000 payroll of sheet metal workers in the 5542 code which charges $9.05 for each $100 of payroll. The minimum rate that would be developed is $18,100. If this acount had a number of losses and the Experience Modification Factor was 1.25, they would be charged $18,100 × 1.25 or $22,625.

If the account loss history was better than average and developed an Experience Modification Factor of .75, this account would be charged only $13,575.

Obviously, the Experience Modification Factor is very important. To my way of thinking, it is *THE* most important factor in your workers' compensation program for several reasons:

a) You can legally pay less for your workers' compensation insurance than your competitor.

b) A consistently low Experience Modification Factor means you probably have a good safety program and you are reaping the benefits of that program.

c) Unlike dividends—which are not guaranteed—a good Experience Modification Factor at least guarantees your rates for that year.

d) You can have some control over your Experience Modification Factor, whereas it is very difficult to control your dividend. □

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REPORT TO THE ALASKA STATE LEGISLATURE ON WORKERS' COMPENSATION BENEFITS

from

UNIFIED FAIRBANKS

This is the final report of the Special Task Force formed by Unified Fairbanks to address the problem of an apparent increase in workers' compensation premium costs.

The Task Force grew out of an information seminar attended by 160 people, and a followup seminar attended by half that many. Emphasis at the first seminar was on receipt of all information that the State could provide, together with information from professionals in every area. At the second seminar, the preliminary action areas were crystalized and direction was given thereon. At this point, the matter was transferred to the Task Force Committee which consisted of 24 persons who were employers, labor representatives, health professionals, rehabilitation professionals, and attorneys (on both sides). Meetings were held each Wednesday at North Star Terminal. Committees worked an average of 10 hours each on their various projects. Input was had from all members on all reports, and all recommendations contained herein are consensus unless noted to the contrary.

Organizationally, this should be viewed as a supplement to the WCCA draft legislation which is now before you as SB

322. Sections will be taken in the order that they are set forth in SB 322. There are some additional recommendations beyond what was covered by that draft legislation. Some are of a legislative nature, there are also administrative recommendations for both proposed regulation and action. There are, finally, executive recommendations which must be considered by the Governor's Office in the budgeting process.

The overall goal was to make changes in the workers' compensation system which would reduce the cost of the system as it is reflected in premiums paid by employers.

The format for approaching each section or subject will be:

1. Comments addressing the WCCA proposal (SB 322);
2. The Unified Fairbanks recommended approach;
3. Actions proposed by Unified Fairbanks, whether legislative, administrative, or executive; and,
4. Arguments and problem areas which should be addressed.

I. LEGISLATIVE INTENT

COMMENTS

According to WCCA, this does not alter the presumption of compensability, but does indicate a legislative preference for a "preponderance of the evidence" test to be used by the Board without favor to either side. Additionally, the standard of judicial review is to be changed to provide that, on

questions of fact, the Board's findings are conclusive if supported by any evidence at all. Whether the court system will find a declaration of legislative intent sufficient to change the standard of judicial review is open to question. The final "intent" is to reduce benefits to persons with residences outside, so as to give them an incentive to go back to work.

RECOMMENDATION

Sections A and C are straight-forward legislative goals. Section B might better be amended along the lines of California Workers' Compensation Code, Section 3202.5 as follows: "The legislature declares that the workers' compensation laws must be fairly and impartially construed by the courts. In promotion of that goal, it is the intention of the legislature that the preponderance of evidence standard be utilized in determining the compensability of a workers' compensation claim. Preponderance of the evidence means such evidence as, when weighed with that opposed to it, has more convincing force and a greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence."

ACTIONS PROPOSED

Adoptions of the proposed language indicated above. There is a probability that multiple amendments may be requisite in such places as the Administrative Procedure Act and Title 22.

ARGUMENTS AND PROBLEM AREAS

These have been raised above.

II. DEPARTMENT MAY SET UP TO SELECT AND REMOVE REHABILITATION SPECIALISTS OR PHYSICIANS

COMMENTS

In Fairbanks, we felt strongly that the "may" should be replaced by "shall", "must" or "will" creating a mandate. WCCA feels that, providing the Board with the power will be enough to cause it to act. Additionally, the "or" probably should be a "and" because the two are not meant to be alternatives.

RECOMMENDATIONS

Our recommendation in the medical and rehabilitation areas are addressed in those particular areas of this report. We concur with the intent of WCCA in Section 2 with the strong recommendation that the word "may" be made mandatory, and clarifying that both rehabilitation specialists and "physicians" (as defined elsewhere) are to be selected.

ACTIONS PROPOSED

See above.

ARGUMENTS AND PROBLEM AREAS

Hopefully, the qualifications for health care providers will not strongly differ from the standard of licensing, etc.

III. WHEN ANYTHING IS DECLARED UNCONSTITUTIONAL, DEPARTMENT "SHALL IMMEDIATELY" DRAFT NEW REGULATIONS

COMMENTS

A different drafter for WCCA uses the mandate "shall" and adds to it the word "immediately". This drafter probably meant to say "shall forthwith adopt a replacement regulation or regulations".

P 2 L 20

RECOMMENDATION

A good idea.

ACTIONS PROPOSED

See above.

ARGUMENTS AND PROBLEM AREAS

Since the Department does not have legal counsel and the route for cooperation with the Attorney General's Office is rather tortuous, any requirement of immediacy may be dysfunctional.

IV. FALSE STATEMENT ON PREEMPLOYMENT QUESTIONNAIRE WAIVES ALL BENEFITS

COMMENTS

Sec 4 is vague

First, there is no mechanism for determining whether any particular statement is actually false. Questions composed by individual employers can mean various things. Well designed questionnaires can even be susceptible of dual interpretations. Second, (1) is vague. It probably should provide that, had the

employer known the true state of facts, a) the employee would not have been hired, and b) the non-hiring would have been legal under federal and state law. Third, (2) is again vague because a representation on a piece of paper in the office seldom causes anything. Reference should be to the condition hidden from the employer by the misrepresentation.

RECOMMENDATION

Unified Fairbanks agrees with the intent and feels that the drafting should be cleaned up.

ACTIONS PROPOSED

See above.

ARGUMENTS AND PROBLEM AREAS

See above.

V. SECOND INJURY FUND CONTRIBUTIONS AND REPORT TO BE FILED ANNUALLY

COMMENTS

The State receives currently both data and funds within a short period of time after each case is concluded. This amendment permits the State to have data consolidated on a single annual report from each carrier. It also permits the insurance company to earn interest on money due for the intervening time between closing a case and the annual report.

RECOMMENDATION

Since the State is unable or unwilling to compile data

from reports filed on a case-by-case basis, this appears to be a way in which the annual reports from the carriers can be summarized, thereby providing for the first time, some data with respect to, the validity of rates charged, and where the problems in the administration of the act happened to be. We join in the recommendation to attack the problem.

ACTIONS PROPOSED

Unified Fairbanks would like the State to explore the possibility that, either through the use of a personal computer or access to some other computer plus the addition of one person to the staff of the department, the reports as they are currently received could be entered into the computer so that all data necessary for fixing rates or ascertaining percentages of expenditure, etc. would be instantly available to the State and any employer or agency requesting the information. It is most likely that the cost to the State of a computer, its programing, and a person to operate it, at least on a part-time basis, would be less than the interest lost by providing the delay in payment by the carriers.

ARGUMENTS AND PROBLEM AREAS

The State Department of Insurance and the State Department of Workers' Compensation are both unable to produce statistics indicating the basis for premiums or the disposition of monies paid out.

VI. REHABILITATION

COMMENTS

Unified Fairbanks agrees that rehabilitation should be voluntary with the employee. We find no evidence from any source which indicates the law which has been proposed will reduce the cost of workers' compensation. We have repeatedly sought facts from the State government indicating what segment or segments of a workers' compensation system had been causing the greatest increase in cost. Absolutely no information has been forthcoming, although we have been able to obtain the same information from other states with a telephone call. In short, all we know is that there is a serious problem with the cost of the system. However, no one in our State Division of Insurance has been able to identify where the problem lies. We firmly believe that it is wrong to legislate when no one has yet identified where the problem lies. We are, in fact, worried that the cost of the system may be increased by the proposed changes. There have been no regulations adopted to put into effect the rehabilitation system that is presently in the law. We therefore do not know how the presently existing system will work or what its costs will be. We are therefore reluctant to change for the sake of change.

RECOMMENDATION

A. INEFFECTIVE WORK BY STATE AGENCIES, Division of Insurance:

Much of the blame for the increased cost of the workers' compensation system has been placed on vocational rehabilitation. However, the Division of Insurance has absolutely no information available to anyone concerning the costs of vocational rehabilitation or of any other workers' compensation benefit for that matter. Nonetheless, the Division continues to approve rate increases for workers' compensation insurance, and a portion of the responsibility gets placed on a "vocational rehabilitation system which is too liberally interpreted." The last increase was granted without the preparation of any findings of fact and without the presentation of any specific information to those in this State who are involved. We suggest legislation requiring some state agency to keep statistics on the cost of rehabilitation evaluations, rehabilitation plans, the cost of litigation, and so forth. When future rate increases are suggested, facts and figures will be available to indicate where the cost increase is coming from.

B. INEFFECTIVE WORK BY STATE AGENCIES, Workers' Compensation Board:

Perhaps due to lack of funding and staff, the Department of Workers' Compensation has seriously faltered in its obligation to administer the existing vocational

rehabilitation law. Over five and a half years have passed without the promulgation of a single rule or regulation by the Board to govern procedures under the law which went into effect on July 1, 1982. The present law has never been given a chance to work and we find it curious and the Legislature now stands ready to cast it aside. We suggest the legislature take whatever steps are necessary to immediately secure the promulgation of administrative rules and regulations by the Board.

Two good examples of what has happened as the present system has struggled without the benefit of administrative rules:

1. We suspect a major portion of any increased cost of vocational rehabilitation is in the payment of temporary benefits to injured workers while they wait for the vocational process to be completed. The system in Fairbanks has worked very slowly without the rules and regulations needed. As a result, injured workers remain far too long on temporary benefits. Rather than deprive injured workers of temporary benefits during vocational rehabilitation, which we think is a worthwhile benefit, we suggest the Board streamline the system with the promulgation of rules and that the existing law be tightened up to provide certain specific time limitations for each step of the process. This is the main thrust of our

suggested changes in the existing law.

2. In Fairbanks, there is no full-time rehabilitation administrator. At present, the one administrator is in Fairbanks one day a month. This allows a maximum of three rehabilitation conferences. Without timely rehabilitation conferences available to all parties, increased costs of continuing temporary benefits have resulted. It is obvious, if we intend to reduce costs, additional staff are required.

C. LEGISLATIVE TASK FORCE

We believe the Legislature should form a task force to keep the existing vocational rehabilitation system moving. The group should have representatives of all major participants in the system. The information needed from the Division of Insurance could be pursued, enforcement of the Board's obligation to promulgate rules and regulations would be enhanced, and proposed changes in the law and regulations could be generated.

D. SECOND INJURY FUND/TEMPORARY PARTIAL DISABILITY

Our committee believes one of the benefits to the system would be strong encouragement to employers to rehire injured workers. The present Second Injury Fund does nothing to provide this encouragement as coverage begins only after 104 weeks of disability. We suggest the period of coverage be drastically reduced to make it possible for injured workers' to

return more rapidly to the work force. A further encouragement toward the goal of returning injured workers to a job is our proposed new subsection(n) which encourages the use of TPD when employers rehire their injured workers in a "modified" or "light duty" capacity.

ACTIONS PROPOSED

In order to keep in line with the WCCA recommendation, we propose that the statutory language be as follows:

AS 23.30.041. Rehabilitation of injured workers.

(a) The board shall select and employ a reemployment services administrator who is a qualified rehabilitation specialist. The board shall authorize the rehabilitation administrator to select and employ sufficient rehabilitation staff to hold hearings wherever the board meets and to collect and analyze statistical data. The reemployment services administrator is in the partially exempt service under AS 39.25.120.

(b) The reemployment services administrator shall perform the following functions:

1. enforce regulations adopted by the board to implement this section;
2. recommend regulations for adoption by the board that establish performance and reporting criteria for rehabilitation specialists;
3. enforce the quality and effectiveness of reemployment benefits provided for under this section;
4. review on an annual basis the performance of rehabilitation specialists to determine continued eligibility for delivery of rehabilitation services;
5. submit to the department, on or before January 1st of each year, a report of reemployment benefits provided under this section for the previous fiscal year; the report must include a general section and sections related to each

rehabilitation specialist used under this section; the report must also include for each section a statistical summary of all rehabilitation cases, including

A. the estimated and actual cost of each active rehabilitation plan;

B. the estimated and actual time of each rehabilitation plan;

C. a status report on all individuals completing or terminating a reemployment services program including a return to work date; and

D. the cost of reemployment services;

6. maintain a list of rehabilitation specialists who meet the qualifications established under this section; and

7. promote awareness among physicians, adjustors, injured workers, employers, employees, attorneys, training providers, and rehabilitation specialists of the reemployment program established in this subsection.

(c) If an employee suffers a compensable injury that precludes return to the job at the time of injury; within 30 days, the physician must notify the employer whether the client is capable of performing modified work. Modified work is available at a reduced wage and the employee refuses to accept this work, the employee's benefits shall be changed to TPD. The employee shall be fully evaluated for participation in rehabilitation services within 60 days after the date of injury. A full evaluation shall be performed by a qualified rehabilitation specialist selected by the employer within 30 days of referral. If, in the opinion of the qualified rehabilitation specialist, the medical, physical, or emotional state of the employee precludes a full evaluation, the rehabilitation specialist shall prepare a preliminary evaluation. A preliminary evaluation shall include the reasons why a full evaluation cannot be made, an opinion as to when the employee will be eligible for a full evaluation, and any information that would be included in a full evaluation that can be determined and reported by the rehabilitation specialist at the time of the preliminary evaluation. If the employer does not timely schedule an evaluation under this subsection, the reemployment services administrator shall retain a qualified rehabilitation specialist to perform the evaluation. The employer shall pay the reasonable costs of an evaluation under this subsection. To facilitate this, the board may require a rehabilitation professional to work with the independent multiple discipline panel of board certified physicians referred to in AS 23.30.095(k).

(d) A full evaluation by a qualified rehabilitation specialist shall include a determination whether rehabilitation services are necessary.

(e) An employee is not eligible for reemployment benefits if

(1) the employer offers employment within the employee's physical capacities at a wage equivalent to at least 60 percent of the worker's gross hourly wages at the time of injury and the employment prepares the employee to be employable in other jobs that exist in the labor market; or

(2) the employee has been previously rehabilitated in a former workers' compensation claim and returned to work in the same or similar occupation in terms of physical demands;

(f) Refusal by an injured employee to participate in an evaluation results in forfeiture of disability compensation for the period the refusal continues. The reemployment services administrator shall find that an employee refused to participate in an evaluation if the employee fails to cooperate with the rehabilitation provider as outlined in the regulations.

(g) After the evaluation is completed, the employee must elect in writing to the reemployment services administrator within 14 days whether or not to participate in further rehabilitation services.

(h) The employee's election not to participate in rehabilitation services is final, provided, however, that the employee shall have the option within 30 days of the notice under subsection (g) to notify the administrator in writing that he now wishes to participate in rehabilitation services.

(i) After the employee has elected to participate in vocational rehabilitation services for which he is eligible, the vocational rehabilitation counselor will, within 90 days, submit a vocational rehabilitation plan to concerned parties including the reemployment services administrator which will enable the employee to return to suitable gainful employment. A rehabilitation plan may consist of any of the following; however, if the employee can be restored to suitable gainful employment with rehabilitation plans of higher preference, then a rehabilitation plan of a lower preference need not be offered by the employer. The order of preference for rehabilitation plans is return to work

(1) with the same employer at the same or modified job as

at the time of injury;
(2) with the same employer at a new job using transferrable skills;
(3) with a new employer at the same or modified job;
(4) with a new employer in a new job using transferrable skills;
(5) through developing already existing skills or acquiring new skills through on-the-job training;
(6) after developing already existing skills or acquiring new skills through vocational training;
(7) after developing already existing skills or acquiring new skills through academic training;
(8) in self employment; and
(9) through direct placement in an unrelated job not using transferrable work skills.

The reemployment plan must include the following:
(1) an occupational goal in the labor market;
(2) a plan to acquire the occupational skills to be employable;
(3) the cost estimate of the reemployment plan, including provider fees; the amount of tuition, books, tools, and supplies; transportation; temporary lodging; or job modification devices;
(4) the estimated length of time that the plan will take;
(5) the date the plan will commence; and
(6) the time of medical stability as provided by the doctor.

(j) The employee, rehabilitation specialist, and the employer shall sign the reemployment services plan.

(k) After the injured worker has elected to participate in reemployment benefits, noncooperation by the worker shall result in the termination of reemployment benefits on the date of noncooperation. Employee shall have the right of review by the board. Noncooperation means failure to:
(1) keep appointments;
(2) maintain average grades;
(3) attend designated programs;
(4) maintain contact with the rehabilitation specialist;
(5) cooperate with the rehabilitation specialist in developing a reemployment plan and participating in activities relating to reemployability on a full-time basis;
(6) comply with the employee's responsibilities outlined in the reemployment plan; or
(7) participate in any planned reemployment activity as determined by the reemployment services administrator.

(l) Reemployment benefits may not extend past two years from date of plan acceptance, at which time the benefits expire, except at the discretion of the employer.

(m) If the employer and employee fail to agree in writing on the submitted vocational rehabilitation plan within 14 days, the employee shall submit an alternative plan to the rehabilitation within an additional 14 days. In the event of a dispute, the reemployment services administrator or his staff may either write a decision or schedule a formal rehabilitation conference to be held within 10 days of receipt of the alternative plan. If a hearing is held, a decision as to the appropriate plan shall be issued with 10 days after the hearing. The reemployment services administrator's decision is binding unless a party seeks review of the decision by requesting a hearing with the Board in accordance with AS 23.30.110. The reemployment plan shall be initiated when the employee is considered physically able to engage in the plan by the employer's physician.

(n) A vocational rehabilitation plan may not exceed up to 37 training weeks, except that the reemployment services administrator may order a plan up to an additional 37 training weeks. This subsection does not prohibit an employer or carrier from providing extended vocational rehabilitation services on a voluntary basis. If rehabilitation requires residence away from the employee's customary residence, reasonable cost of board, lodging, and travel shall be paid by the employer. The employer shall pay all costs of the rehabilitation plan under this section. These monies shall only be paid if the employee participates in its rehabilitation plan. Temporary disability under AS 23.30.185 or AS 23.30.200 shall be paid throughout the rehabilitation process at the following rate:

(1) 80% of the employees spendable weekly wages for the first 37 weeks, and thereafter

(2) 70% of the employees spendable weekly wages until the completion or termination of the plan.

A permanent impairment benefit remaining unpaid upon the completion or termination of the plan shall be paid to the employee in a single lump sum.

(o) For purposes of this section, suitable gainful employment means employment that is reasonably attainable in the light of an individual's age, education, vocational history, and physical capabilities, and that offers an opportunity to restore the individual as soon as practical to a remunerative occupation that takes into consideration the local labor market and as determined by section AS 23.30.220.

(p) Labor market means a geographical area that offers employment opportunities in the following priority:

(1) area of last employment;
(2) area of residence;
(3) the State of Alaska;
(4) other states.

(q) A "qualified rehabilitation specialist" means a person who by education and experience has the skills to work in the field of rehabilitation as determined by Board established regulations. Only a qualified rehabilitation specialist may accept case assignments as a case manager and sign eligibility determinations and reemployment plans. The board shall adopt rules for training and supervision of those persons employed as paraprofessionals in rehabilitation specialist work. For those persons seeking to become a qualified rehabilitation specialist, the board shall adopt standards for training and supervision.

VII. BARRING ALL LIABILITY FROM AN EMPLOYER (BOARD AND COURT) TO AN EMPLOYEE WHO COMMITS AN UNTRUTH ON HIS OR HER PREEMPLOYMENT QUESTIONNAIRE

COMMENTS

Much of this has been discussed under number IV above. No one can know what the courts will do with this. There is no way to provide a prompt adjudiciation of whether a worker committed an intentional falsehood, and it is not likely that the courts will deprive a worker of both compensation benefits and civil liability (if the employer was negligent) without a firm adjudication of intentional fraud.

RECOMMENDATION

We favor the approach, but feel there must be a standardized questionnaire with admonitions on it and, if need be, provisions to help illiterates complete it. We also

recommend that there be some proviso for prompt determination of whether fr- d has been committed in order that a carrier not pay benefits if they are not supposed to be paid, but not withhold benefits if they are supposed to be paid.

ACTIONS PROPOSED

There should be a statute providing for forfeiture of civil liability against the employer, as well as benefits under the workers' compensation law. This would be easiest if it were done under Title 11 (the criminal code). This will require legislation to effect what has just been set out, administrative cooperation in getting these matters to the proper authorities on a relatively emergency basis, and executive allocation of funds to handle the hearing which declares these rights to have been waived.

ARGUMENTS AND PROBLEM AREAS

Equal protection questions will doubtless be raised as they always are with any forfeiture or waiver. Additionally, we are all aware that, if employment is down, as it is now, a person needing a job will say what is necessary to get that job. This will make that person a "good guy" in the eyes of the court, and there will be an effort to avoid this waiver, particularly in the event of a hard case where the employee is very badly injured and the employer was quite negligent.

VIII. NO DOCTOR SHOPPING

COMMENTS

In the first sentence, the word "attendance" should be "attendants". We feel that the cases where there is no specialist within the State (in an area where an employee needs treatment) will be sufficiently rare that the Board can handle these as special matters. We worry that the transfer to a specialist will be considered a change in "attending physician" because this is the meaning that the medical profession attaches to such a change.

RECOMMENDATION

We concur fully with requesting the passage of Section VIII. There will have to be considerable public education and the adoption of regulation covering the Notice of Change of a physician. We do recommend that the term "attending physician" be changed to be "primary physician". This will eliminate the semantical problem. We feel it advisable that the problems of prior notification be avoided by providing that the notice must be "within 14 days" of the change. This is in line with the present law.

ACTIONS PROPOSED

Aside from the semantical suggestion above, the Department and the Board should prepare regulations and forms to cover change of physician. We would prefer that the amendment be as follows:

"The employer shall furnish medical, surgical, and other

attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. However, if the condition requiring the treatment, apparatus, or medicine is a latent one, the two-years period runs from the time the employee has knowledge of the nature of his disabililty and its relationship to his employment and after disablement. It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the Board. The Board may authorize continued treatment, or care, or both, as the process of recovery may require. When medical care is required, the injured employee may designate a licensed physician inside the state where the employee resides to render the care. Upon procuring the services of a physician, the injured employee shall give proper notification of his selection to the employer within a reasonable time after first being treated. The employee may not make more than one change in the employee;s choice of primary physician without the written consent of the employer. Referral to a specialist by the employee's primary physician is not considered a change in physicians. Notice of a change in the primary physician shall be given within 14 days after the change.

ARGUMENTS AND PROBLEM AREAS

There will always be emergencies where there is not time to go through the notification procedure. This should be covered by the regulations. There will always be situations where an employee is referred to more than one specialist during the same time period. Once again, this can be worked out with the accompanying regulations.

IX. COURSES OF TREATMENT TO BE WRITTEN IN ADVANCE

COMMENTS

This proposal will greatly increase the medical cost of treatment. Physicians are not magicians. They cannot predict with exactitude at what point during a "course of treatment" a person will actually be cured. In order to avoid malpractice, all physicians will have to recommend a maximum course of treatment <u>in case such is needed</u>. Unified Fairbanks does not feel that the proposed amendment is workable, nor that the cost increase necessary for a physician to prevent malpractice is money well spent. We believe this amendment will create an increase in costs.

RECOMMENDATION

We recommend no amendment to Subsection C.

ACTION PROPOSED

The evil sought to be remedied here, namely that of

endless treatments without real value, should be addressed by a study committee to find a feasible way of handling this situation. Hopefully, the way should not increase the cost.

ARGUMENTS AND PROBLEM AREAS

See above.

X. A DEFENSE MEDICAL EXAMINATION AFTER 14 DAYS AND THEN EACH 30 DAYS THEREAFTER

COMMENTS

Because of the definition of the word "physician" contained later on, it would be advisable to remove the words "or surgeon" in line 4 regardless of what else is done. Additionally, there may be problems with respect to types of practice (hypnotic, chiropractic, osteopathic, religious, etc.) and personality conflict which will sooner or later result in problems under this section whether or not amended. We felt that the present statute was adequate and provided for that there was no need to excite everyone with the idea of a defense medical exam every 30 days and that money expended thereby would be a waste. We believe that this would result in increased costs. We believe it should be made clear that this examination shall be at the request of the employer or his carrier only.

RECOMMENDATION

That we leave Section (e) as it currently is and schedule this problem for study as will be referenced later.

ACTIONS PROPOSED

Scheduling this problem for study in the future.

ARGUMENTS AND PROBLEM AREAS

Sending a Jehovah Witness to a hematologist is not likely to be functional. This sort of preference, as mentioned above, should be considered in study.

XI. USUAL, CUSTOMARY AND REASONABLE FEES

COMMENTS

This is a very good idea. Care will have to be taken by the Board in the manner in which it adopts a UCR fee so that that fee does not become known to medical practitioners (see below).

RECOMMENDATION

We join in requesting passage.

ACTIONS PROPOSED

Same (with caution so that the UCR schedule is not made available). The board might wish to use the Health Insurance Association of America UCR schedule.

ARGUMENTS AND PROBLEM AREAS

(deleted)

XII. REPEALING RELIANCE ON AMA GUIDE FOR EVALUATION OF PERMANENT IMPAIRMENT AND OBTAINING A BOARD CONSULTANT ON APPROPRIATENESS, NECESSITY AND COST OF MEDICAL SERVICES

COMMENTS

This may be the one place where "may" should not be replaced by "shall". The repeal of the reliance on the AMA Guide is then undone later on in this bill with a subsequent adoption of the same guide. Additionally, we feel that new subsection (k) takes care of the problem without needing to spend extra monies on medical consultation.

RECOMMENDATION

We are negative on this repeal and new rule.

ACTIONS PROPOSED

None.

ARGUMENTS AND PROBLEM AREAS

Another layer of medical authority may well simply confuse the issue. Enough corrections have been taken in other sections.

XIII. INDEPENDENT MEDICAL EXAMINATION

COMMENTS

The use of a single physician as an independent medical examiner became obsolete in the medical profession several years back. We do not have, in Alaska yet, multiple discipline panels of Board certified physicians, and hence this portion of our medical practice is going outside. Alaska currently has a number of clinics who can perform this function and we are

recommending a medical update by using them (unless the employer or carrier prefers an outside group). The principles set forth are good. We have some reservations about using "clear and convincing objective evidence" since the medical meaning of "objective evidence" differs considerably from the lay persons definition.

RECOMMENDATION

To reword the proposal of WCCA creating the same effect but updating the medical services and apportioning the weight to be given to the testimony of such a panel to be equal with the preference already given to a "treating physician".

ACTIONS PROPOSED

We recommend the following wording for Section (k) of AS 23.30.095(k) to read: "In the event of a medical dispute regarding determinations of causation, medical stability, degree of impairment, functional capacity, the amount and eficacy of the continuance of or necessity of treatment, or compensability between the employee's attending physician and the employer's independent medical evaluation, an independent multiple discipline panel of board certified physicians shall conduct an examination of the employee. This panel shall be selected by the Board from a list established and maintained by the Board. The cost of the examination and medical report shall be paid by the employer. The report of the panel shall be furnished to the

Board and to the parties within 14 days after the examination is concluded. The opinion of the independent panel shall, in the absence of clear and convincing evidence to the contrary, have equal weight with the opinion of the attending physician. No person may seek damages from an independent multiple discipline panel of board certified physicians for the rendering of the opinion described in this subsection or for testimony by any member of said panel under this subsection, except in the event of fraud." This will require that the Board entertain applications from various clinics currently formed and to be formed for appointment to the panel list. Publication of the legislative change will probably be adequate to form a number of these panels within the state. The Department will probably need to assign an employee (part-time) to handle the rotating list. That same person (or computer) could handle the other rotating lists suggested in this legislative package.

ARGUMENTS AND PROBLEM AREAS

Care should be taken to watch out for panels which spring up without fully qualified people in the necessary disciplines on them. There should be a regulation describing the disciplines which must be available on any panel and the requirement of Board certification to handle this problem. If the weight given the panel is equal to the weight given the attending physician, and if the two differ, then the defense

medical examination will be the swing vote. This sort of apportionment is necessary because medicine is not yet reduced to total certainty. A demonstrably incorrect judgment call (in hindsight) and will produce lawsuits even if only between the physicians involved.

XIV. STATUTE OF LIMITATION TRIGGERED BY DIRECT COMPENSATION BENEFITS

COMMENTS

This amendment clarifies a confusing situation so that litigation in this area will no longer occur.

RECOMMENDATION

Support for the WCCA proposal.

ACTIONS PROPOSED

Adopt the WCCA proposal.

ARGUMENTS AND PROBLEM AREAS

Knowledge of the commencement of the Statute of Limitations is something that is difficult to come by for a layman. In all probability, regulations will be needed providing that, upon payment of the final payment, there be an accompanying letter or form indicating that the Statute of Limitations commences as of the date of that letter.

XV. NO PRESUMPTION OF COMPENSABILITY IN MENTAL INJURY CASE

COMMENTS

The term "mental injury" is undefined in law and in medicine. What is probably meant here is a stress related injury with manifestations primarily found in brain dysfunction. Without clarifying the term, much litigation will be required. If we adopt the "preponderance of evidence" test recommended above, then there is no need for this section at all.

RECOMMENDATION

The idea is good. The proposal should be adopted to eliminate litigation. The definition of the injury should be made clear. We prefer the adoption of the "preponderance of the evidence" test over the adoption of this section.

ACTIONS PROPOSED

Same as above.

ARGUMENTS AND PROBLEM AREAS

Only if the term is not defined will there be much litigation to determine what is meant. All injuries have a mental aspect. Almost all diseases commonly thought of as mental diseases have physical manifestation.

XVI. BOARD'S FACTUAL DETERMINATIONS CONCLUSIVE IF ANY EVIDENCE AT ALL

COMMENTS

See our comments under Section I.

RECOMMENDATIONS

See our recommendations under Section I.

ACTIONS PROPOSED

See our actions proposed under Section I.

ARGUMENTS AND PROBLEM AREAS

See our arguments and problem areas under Section I.

XVII. BOARD HAS ONE YEAR TO RECONSIDER ERRONEOUS FACTUAL FINDINGS

COMMENTS

This is a technical correction to make clear when the one year starts running. The correction is needed and does make the situation clear. This doubtless supplements the "any evidence" rule found in Sections XVI and I, making Board determinations relatively unappealable on the facts.

RECOMMENDATION

We join the WCCA recommendation.

ACTIONS PROPOSED

Adopt the proposed amendment.

ARGUMENTS AND PROBLEM AREAS

This section will doubtless now be used because of the cutoff of appellate rights if the "any evidence" rule is adopted. It is part of an attempt to make the Board's decision final, except on questions of legal interpretation. The Board should anticipate increased usage. There may be staffing

implications in the increased usage.

XVIII. PENALTIES CAN BE REDUCED

COMMENTS

A necessary supplement to the amendment proposed in Section V.

RECOMMENDATIONS

See comments in Section V.

ACTIONS PROPOSED

See comments in Section V.

ARGUMENTS AND PROBLEM AREAS

See comments in Section V.

XIX. REAFFIRMATION OF LAST INJURIOUS EXPOSURE RULE

COMMENTS

Simply a restatement of the current law.

RECOMMENDATION

A good rule. It can't hurt to repeat it.

ACTIONS PROPOSED

Passage of the amendment.

ARGUMENTS AND PROBLEM AREAS

None, since the rule is already in effect.

XX. ANNUAL REPORTING DATE AND PENALTY INCENTIVE

COMMENTS

Another portion of the procedure set forth in Sections

V and XVIII.

RECOMMENDATION

See comments under Section V.

ACTIONS PROPOSED

See comments under Section V.

ARGUMENTS AND PROBLEM AREAS

See comments under Section V.

XXI. MAXIMUM AND MINIMUM ON WEEKLY DISABILITY PAYMENTS

COMMENTS

While looking like a major reduction, this will probably effect very few injured persons under the various rules currently existing. For an injured employee with a wife and children, benefits will often be less than unemployment benefits.

RECOMMENDATION

Adopt the proposal and then monitor the situation to see whether injured employees are waiving disability in order to collect unemployment.

ACTIONS PROPOSED

Adopt the proposal.

ARGUMENTS AND PROBLEM AREAS

(deleted)

REINSTATE REDUCED BENEFITS FOR THOSE RESIDING OUT-OF-STATE

COMMENTS

This portion of Section XXI seeks a return to reduced benefits for those workers who reside out-of-state. It also indicates that only instate work will be used to calculate earnings in the past. Between the two, the long term effect will hopefully be to provide a substantial disincentive to residents of other states with respect to working in Alaska. This is a tradeoff for the increase in permanent partial disability.

RECOMMENDATION

Adopt the proposal in this form unless the Attorney General's Office suggests one less likely to be attackable in court.

ACTIONS PROPOSED

Same.

ARGUMENTS AND PROBLEM AREAS

A case entitled Brown v. Alpac in the Supreme Court found severe difficulty with compensating workers who reside out-of-state less than those who reside instate. There are equal protection and freedom of travel problems possible here and plans should be made to defend this scheme.

XXII. FACTORS TO BE CONSIDERED IN DETERMINING PERMANENT TOTAL DISABILITY

COMMENTS

A part of the package very very rarely used.

RECOMMENDATION

Adopt the amendment and monitor it for effect.

ACTIONS PROPOSED

Same.

ARGUMENTS AND PROBLEM AREAS

The reference to "area of last employment" may refer to work available in another state. This may be part of the equal protection and freedom of travel problem. However, it doesn't seem likely that this would be an area of attack. This seems to eliminate the problem of whether a person is still able to work if that person can hold only some job that is only available in another state.

XXIII. FAILURE TO ACHIEVE EMPLOYABILITY NOT NECESSARILY PERMANENT TOTAL DISABILITY

COMMENTS

Presumptively, this refers to the person who could, with more effort put forth, hold some job that is available somewhere in Alaska, but does not do so.

RECOMMENDATION

We have no idea of the effect and therefore join WCCA in advocating the amendment.

ACTIONS PROPOSED

Same.

ARGUMENTS AND PROBLEM AREAS

If this is not spelled out to some greater detail in regulations, there will have to be a series of court cases to ascertain what its effect may happen to be.

XXIV. TEMPORARY TOTAL DISABILITY LIMITED TO TWO YEARS OR MEDICAL STABILITY, WHICHEVER IS FIRST

COMMENT

Under the proposed definition of medical stability found in later sections, this will mean that TTD will last only so long as the injured employee makes objectively measurable improvement each 45 days. It would require at least 16 objectively measurable improvements to keep TTD running for two years. Only horrendous and compound injuries should ever find their way into that category. Most severely injured people will be without improvement for a 45 day period somewhere during their recovery and hence, they will pass directly to the permanent partial disability rating.

RECOMMENDATION

We have no idea of the effect and therefore join WCCA in advocating the amendment.

ACTIONS PROPOSED

Same.

ARGUMENTS AND PROBLEM AREAS

Medical professionals are likely to create illusory improvements to avoid this rule and to permit their patient to recover to a true point of medical stability before being permanently rated. Alternatively, people will be rated for permanent partial disability long before they have recovered and unless there is a motion to amend the Board's findings within one year, the carrier will not get any funds (which have been paid) returned. This could be expensive.

XXV. PERMANENT PARTIAL DISABILITY RENAMED AND BASED ON $240,000 FOR A "WHOLE MAN", SPECIAL FACTOR TO REDUCE PAYOUT FOR THOSE LESS THAN 31% DISABLED

COMMENT

Almost all disabilities fall within the 0-30% category and hence, will be cut back rather than based on the $240,000 whole man. This will be a very beneficial amendment for those quite severely injured. The change in caption was probably a transcribing accident and should be rectified. The $250.00 minimum should be adequate to lock in the reduced payment for those with only minor disabilities such as loss of a hand. The amendment further readopts the American Medical Association's guides to evaluation of permanent impairment (repealed earlier in this package) and provides for the Board to adopt and use a supplemental schedule if they so desire. The language probably

should be "shall" rather than "may" so that this supplemental schedule does not have to be created by courts on appeal.

RECOMMENDATION

Adopt the amendment and monitor it for effect. Further study is absolutely essential here.

ACTIONS PROPOSED

Same, but restore the caption to use the word "disability" so as to be consistent with other sections. Also, "may" should be changed to "shall". Further study is needed badly.

ARGUMENTS AND PROBLEM AREAS

It is to be anticipated that people less than 31% disabled will test this section in the courts. It appears that it will withstand the test. Further study, however, is absolutely essential.

XXVI. CUTTING OFF TEMPORARY PARTIAL DISABILITY IN THE SAME MANNER AS TEMPORARY TOTAL DISABILITY

COMMENTS

The two-year and "medical stability" problems foreseen above in Section XXIV are encountered here again.

RECOMMENDATION

See number XXIV.

ACTIONS PROPOSED.

See number XXIV.

ARGUMENTS AND PROBLEM AREAS

See number XXIV.

XXVII. WAGE EARNING CAPACITY FOR CALCULATION OF PERMANENT DISABILITY TO BE DETERMINED BY ACTUAL SPENDABLE WEEKLY WAGE OR SET BY BOARD

COMMENTS

This is the only use of the term "actual spendable weekly wage". It is undefined and is obviously intended to be different from "spendable weekly wage" which is very narrowly defined. Until this term is defined by regulation or by the courts, the Board will probably have to have a hearing and set the wage earning capacity of each person who becomes eligible for permanent disability of any sort. Since this is the compensation on which the amount that the injured person will receive is based, we can only hope that settlements will become a pattern. Otherwise, the Board will be snowed under with a new type of hearing which only occasionally occupied them in the past.

RECOMMENDATION

Adopt the amendment and monitor its effect.

ACTIONS PROPOSED

Adopt the amendment and monitor its effect.

ARGUMENTS AND PROBLEM AREAS

This appears to say that the wage earning capacity of a

n the spendable weekly wage which the

ime he or she is injured. The use of

ury is to be encouraged,

e effects of Alaska's boom and bust

cal earnings criteria is used. The

etween this and the next section may result in

Our discussions indicate that this is a more

e approach in Alaska's economy (see our comments in the

c section).

XXVIII. BOARD MUST DETERMINE EMPLOYEE'S GROSS WEEKLY EARNINGS

COMMENTS

This amendment is imposed upon the delightful conundrum which has been AS 23.30.220(a). The section as it currently exists begins by saying that the current wage at the time of injury is the basis for computing compensation. It goes on to provide that this is current receivable wage and that this is calculated on the basis of earnings history only. There are two formulas that are customarily used in workers' compensation statutes. One bases the calculation of compensation on the earnings of the employee at the time of injury. The other bases the calculations on a wage earning history. This latter has created much of the problem on which we are currently working. In a boom and bust economy, a workers' compensation system that

CORRECTION

THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY