

ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672  
7014 HOUSE JUDICIARY

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# Alaska State Legislature

Senator Drua Pearce, Chair  
Senator Virginia Collins, Vice Chair  
Senator Dick Eliason  
Senator Rick Halford  
Senator Jay Kerttula



WHILE IN JUNEAU  
P.O. BOX V  
JUNEAU, ALASKA 99811  
(907) 465-3844

3111 C STREET, SUITE 150  
ANCHORAGE, ALASKA 99504  
(907) 561-2018

## SENATE LABOR AND COMMERCE COMMITTEE

### SENATE LETTER OF INTENT

#### CS SB 208 (L&C)

The Senate Labor and Commerce Committee is concerned that volunteer firefighters providing volunteer service outside an incorporated city or borough may not be covered by workers' compensation. This committee encourages representatives from the Alaska Fire Chiefs Association, the Alaska Firefighters Association, the state Fire Marshal's office, the Emergency Medical Services Association, and the state Emergency Medical Services' office to meet during the interim to address this concern. Recommendations on how to remedy this lack of insurance coverage should be reported to the Second Session of the Seventeenth Alaska State Legislature by January 31, 1992, for possible legislative action.

Senate adopted 4/19/91

FISCAL NOTE

N. 1

STATE OF ALASKA  
1991 LEGISLATIVE SESSION

BILL Version: SA 208  
(S) Publish Date: 4/15/91

Revision Date: \_\_\_\_\_  
Title: " An Act relating to workers' compensation for emergency medical ..."  
Sponsor: Senator Ellason  
Requestor: Senate Labor & Commerce

Department Affected: Labor  
BRU: Workers' Compensation  
Component: Workers' Compensation  
COMPONENT SERIAL NO. 344

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND&STRUCTURES						
Gr. INTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

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

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

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary)

Changes in CS SB 208 (LVC) have no fiscal impact. This fiscal note is appropriate.

4-15-91 date MMW Comite Aide (initial)

Prepared by: Linda Rexwinkel, Director *LR* Phone: 465-2790  
Division: Workers' Compensation Date: 4/2/91

Approved by Commissioner: Nancy Bear Usura *NBU*  
Agency: Department of Labor Date: 4/2/91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

FISCAL NOTE

2

STATE OF ALASKA  
1991 LEGISLATIVE SESSION

bill Version: SB 208

(S) Publish Date: 4/15/91

Revision Date: \_\_\_\_\_ Department Affected: ADMINISTRATION  
Title: An act relating to Workers' Compensation for emergency medical BRU: Risk Management

Sponsor: Eliason techs Component: \_\_\_\_\_

Requestor: Labor and Commerce COMPONENT SERIAL NO. 

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Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL	0	0	0	0	0	0
---------	---	---	---	---	---	---

REVENUE	0	0	0	0	0	0
---------	---	---	---	---	---	---

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year impact: 0

ANALYSIS: (Attach a separate page if necessary.)  
  
See Attached

Changes in CS SB 208 (1+c) have no fiscal impact. This fiscal note is appropriate.  
4-15-91 RRM  
date Comte Aide (initial)

Prepared By: Don Hitchcock Phone: 465-2180  
Division: Risk Management Date: 3-20-91  
Approved by Commissioner: Miller + Keller M.H. Miller See MK  
Agency: Administration AMC Date: 3/21/91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

# Alaska State Legislature

Senator Drue Pearce, Chair  
Senator Virginia Collins, Vice Chair  
Senator Dick Ellason  
Senator Rick Halford  
Senator Jay Kerttula



## SENATE LABOR AND COMMERCE COMMITTEE

WHILE N JUNEAU  
P.O. BOX V  
JUNEAU, ALASKA 99811  
(907) 465-3844

3111 C STREET, SUITE 150  
ANCHORAGE, ALASKA 99504  
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## SENATE LABOR AND COMMERCE COMMITTEE LETTER OF INTENT

### CS SB 208 (L&C)

The Senate Labor and Commerce Committee is concerned that volunteer firefighters providing volunteer service outside an incorporated city or borough may not be covered by workers' compensation. This committee encourages representatives from the Alaska Fire Chiefs Association, the Alaska Firefighters Association, the state Fire Marshal's office, the Emergency Medical Services Association, and the state Emergency Medical Services' office to meet during the interim to address this concern. Recommendations on how to remedy this lack of insurance coverage should be reported to the Second Session of the Seventeenth Alaska State Legislature by January 31, 1992, for possible legislative action.

(7)

Date Referred: April 22, 1991

FURTHER REFERRALS:

Judiciary  
Finance

Date of Committee Action: 5-9-91

The LABOR AND COMMERCE Committee considered:

CSSB 208(L&C)

CS FOR SENATE BILL NO. 208 (L&C)

WORKERS' COMP FOR VOLUNTEER EMT'S

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

RECOMMENDATIONS:  the same title  
be replaced with \_\_\_\_\_  a new title

have attached amendments(s)

do pass

do not pass

no recommendations

individual recommendations

additional referral to the \_\_\_\_\_ Committee

ADOPTS: Senate L+C Comm. letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept)

APPROVES PREVIOUS: (Dept/Date)

fiscal impact \_\_\_\_\_

fiscal note(s) \_\_\_\_\_

zero fiscal note \_\_\_\_\_

zero fiscal note(s) Repts. of Labor & Admin.

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<i>David Duley</i>	✓				
<i>Erin Buchanan</i>	✓				
<i>Adrian G. Taylor</i>	✓				
<i>Gene [unclear]</i>	x				
<i>Kevin [unclear]</i>	✓				
<i>John [unclear]</i>	✓				

*[Signature]*  
CHAIRMAN'S SIGNATURE

For an Act entitled: "An Act relating to worker's compensation for volunteer emergency medical technicians."

SB 208 would provide workers' compensation coverage by the state for state certified volunteer EMT's who are injured while providing emergency medical services outside an incorporated city or borough and who are not otherwise covered for worker's compensation.

#### Background

Approximately two-thirds of Alaska's twenty five hundred state certified Emergency Medical Technicians (EMT's) are volunteers. These volunteers provide the backbone of the emergency medical services system in many parts of rural Alaska. Although most volunteers respond to fewer emergency medical calls than paid EMT's, they often face similar hazards and are at some risk of becoming injured.

Under AS 23.30.092, a political subdivision may elect to provide benefits and compensation to volunteer ambulance attendants, policemen or firemen by obtaining insurance and filing copies of the policies with the commissioner of the Department of Labor. However, volunteer EMT's who live in, and provide services in, unincorporated communities outside organized incorporated cities or boroughs do not have worker's compensation coverage at the present time. A review of the computer records of the Emergency Medical Services Section in the Division of Public Health reveals that less than one hundred fifty state certified volunteer EMT's reside in unincorporated areas and therefore would be eligible to receive benefits under this bill.

If this bill passes, those volunteer EMT's who reside in incorporated cities or boroughs that elect not to provide this coverage would still not be eligible to receive workers' compensation benefits, except if they happen to be injured while providing services outside incorporated cities and boroughs. We have no way of estimating how many volunteer EMT's would be in this category, but we estimate that the number is low.

The Matanuska-Susitna Borough has provided workers' compensation coverage for volunteer EMT's and firefighters for over ten years. Currently, 350 volunteers are covered by borough paid worker's compensation coverage. According to Kevin Koechlein, Director of Emergency Services for the Matanuska-Susitna Borough, over ten years there have been two lost work time injuries, costing less than \$1,000 apiece, and an average of about \$2,000.00 per year in medical claims. Last

year, among the volunteer EMT's, there were two needlestick injuries, one back strain, and one laceration.

Position


The Department of Health and Social Services supports SB 208. We believe it is only fair that EMT's who provide emergency medical services in unincorporated areas should receive the same or similar benefits if injured as those volunteer EMT's who are provided workers' compensation coverage by a local government. This should help emergency medical services in remote rural areas to recruit and retain volunteer EMT's.

The Department of Health and Social Services supports SB 208.

Recommended by: 

Peter M. Nakamura, MD, MPH  
Director  
Division of Public Health

Date: 4/3/91

Approved by: 

Theodore A. Mala, MD, MPH  
Commissioner  
Department of Health and Social Services

Date: 3 Apr 91

## SOUTHEAST REGION

EMERGENCY MEDICAL SERVICES COUNCIL  
207 MOLLER DRIVE RM. 113 • SITKA, ALASKA 99835  
TELEPHONE 907-747-8005

Senator Pearce  
P.O. Box V  
Juneau, AK 99811

April 2, 1991

Dear Senator Pearce,

I am writing to comment on SB208.

The bill goes a long way toward supporting the volunteer EMS workers who provide an essential state-mandated service to Alaska for free. Senator Eliason's bill, through providing worker's compensation insurance for volunteers in Alaska's unincorporated areas, supports those volunteers in a very quantifiable way. We've notified people from unincorporated areas in Southeast about the upcoming hearing on SB 208, and I believe you'll be hearing from folks in places like Hollis, Gustavus, Elfin Cove and Port Protection who are really behind the bill. These people have no significant sources of local funding and rely on the state to support their work through mini grants (funded through the Grants to EMS Councils line item) and bills like this one and SB194, that would make Hepatitis B vaccinations available to volunteer EMS workers.

In a conversation with Jack Mason, EMS Captain for Port Protection, he noted that SB208 proposes to cover "emergency medical technicians...". Our experience is that in a lot of smaller communities, emergency trauma technicians make up the brunt of the emergency medical service workers. We, therefore, suggest that a broader definition of emergency medical service workers be considered that would include the whole range of EMS volunteers.

As liaison between the communities of Southeast and the state of Alaska, Southeast Region EMS Council fully supports SB208 and the philosophy behind it-- supporting Alaska's volunteer EMS system.

Sincerely,



Shawn Newell  
Executive Director

To Senator Dick Eliason 4/3/91  
From Reed Reynolds, SE Region EMS

Re: SB 208 Worker's Comp for EMS

This will advise you that the entire 30 member Regional Board of Directors voted unanimously on March 19, 1991, to endorse SB 208. In making this decision, the regional board called attention to the significance of having volunteers to provide emergency medical care to the unincorporated areas of Alaska. The risk to the workers' compensation fund is considered very low based on 13 years of experience; the benefits to the public far outweigh the risk. Protection of such volunteer EMS workers is proper and is essential to the maintenance of vital, high quality EMS on a continuous year round basis. On behalf of rural, isolated volunteer EMS workers, the regional board strongly encourages adoption of SB 208.

SB

212

L&C waived 5/14/91

# HOUSE COMMITTEE REPORT

(7)  
Date Referred: May 14, 1991

FURTHER REFERRALS:

Date of Committee Action: 5-15-91

The JUDICIARY Committee considered:

SB 212 am

SENATE BILL NO. 212 am

MEDICAL INDEMNITY CORPORATION DISSOLUTION

"An Act relating to the Medical Indemnity Corporation of Alaska

- RECOMMENDATIONS:  the same title  
 be replaced with \_\_\_\_\_  a new title  
 have attached amendments(s)  
 do pass  
 do not pass  
 no recommendations  
 individual recommendations  
 additional referral to the \_\_\_\_\_ Committee

ADOPTS: \_\_\_\_\_ letter of Intent

- ATTACHES NEW FISCAL NOTE(s): (Dept)  
 fiscal impact \_\_\_\_\_  
 zero fiscal note \_\_\_\_\_

- APPROVES PREVIOUS: (Dept/Date)  
 fiscal note(s) \_\_\_\_\_  
 zero fiscal note(s) Commerce ECON Dev 4-8-91

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<i>Terry Martinus</i>	<input checked="" type="checkbox"/>				
<i>Malcolm Stanley</i>	<input checked="" type="checkbox"/>				
<i>St. Krumpholtz</i>	<input checked="" type="checkbox"/>				
<i>St. Ellis</i>	<input checked="" type="checkbox"/>	<i>Kevin Pat Parnell</i>		<input checked="" type="checkbox"/>	
<i>Doree Dowley</i>	<input checked="" type="checkbox"/>				

*Doree Dowley*  
 CHAIRMAN'S SIGNATURE

FISCAL NOTE

No. 1

Bill Version: SB 212

(S) Publish Date: 4/8/91

STATE OF ALASKA  
1991 LEGISLATIVE SESSION

Revision Date: \_\_\_\_\_ Department Affected: Commerce & Economic Dev.  
 Title: An Act relating to the Medical BRU: Insurance  
Indemnity Corporation of Alaska Component: \_\_\_\_\_  
 Sponsor: Senate L & C  
 Requestor: \_\_\_\_\_ COMPONENT SERIAL NO. 

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Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL	0	0	0	0	0	0
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REVENUE	0	0	0	0	0	0
---------	---	---	---	---	---	---

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

Estimate of current year impact: \_\_\_\_\_

ANALYSIS: (Attach a separate page if necessary.)

Prepared By: David Walsh, Director Phone: 465-2515  
 Division: Insurance Date: 3/20/91  
 Approved by Commissioner: Glenn A. Olds *Ballouax* ASST Comm.  
 Agency: Department of Commerce & Economic Development Date: 3/20/91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

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# Alaska State Legislature




House of Representatives  
House Judiciary Committee

P. O. Box V  
State Capitol  
Juneau, Alaska 99811  
(907) 465-4990  
(907) 465-4712

HOUSE JUDICIARY LETTER OF INTENT

HCS CSSB 213 (JUD)

The Revisor of Statutes is requested to insert paragraph  
(C) of Section 1. in a note under AS 22.20.020.

  
\_\_\_\_\_  
Chairman Dave Donley

Date:

5/17/91  
\_\_\_\_\_

FISCAL NOTE

REQUEST:

Revision Date: \_\_\_\_\_ Affected Agency: Ak. Perm. Fund Corp  
 Title: Act relating to transfers BRU: Ak. Perm. Fund Corp  
to dividend fund  
 Sponsor: Rules/Gov. Components: Ak. Perm. Fund Corp  
 Requestor: Senate Finance

EXPENDITURES/REVENUES: (THOUSANDS OF DOLLARS)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants, Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL						
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REVENUE	*					
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FUNDING: (THOUSANDS OF DOLLARS)

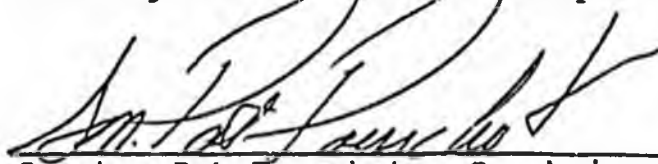
General Fund						
Federal Fund						
Other	*					
<b>TOTAL</b>	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

Full-Time						
Part-Time						
Temporary						

ANALYSIS: (ATTACH A SEPARATE PAGE IF NECESSARY)

\* Provisions of this bill will reduce the Permanent Fund Dividends and retain monies within the corpus of the fund. See attached sheets on P.F.D. and future growth of the P-F corpus.



Senator Pat Fourchot, Co-chairman  
Senate Finance Committee

Phone: 465-3879  
Date: 3-Apr-91

DISTRIBUTION (BY PREPARER)  
LEGISLATIVE FINANCE  
LEGISLATIVE SPONSOR

REQUESTOR  
OFFICE OF MANAGEMENT AND BUDGET  
AGENCY (IES)



**Alaska Permanent Fund Corporation**

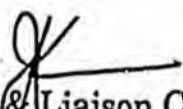
P.O. Box 4-1000 Juneau, Alaska 99802-4100

(907) 465-2047

**MEMORANDUM**

**DATE:** March 29, 1991

**TO:** Senator Pat Pourchot  
Co-Chair, Senate Finance

**FROM:** Jim Kelly   
Research & Liaison Officer

**SUBJECT:** Analysis of Senate Bill No. 213

Attached are two financial projections prepared by the Alaska Permanent Fund Corporation at your request.

**Financial Projection #1:** This is the status quo case as of February 28, 1991. It provides the benchmark against which to compare and contrast any changes to current law.

**Financial Projection #2:** This projection depicts the impacts of enacting SB 213. The State Constitution mandates that the Fund receive at least 25 percent of all royalty-in-kind (RIK) payments received by the State. SB 213 would add the stipulation that all income earned on the Fund's share of the RIK claims which are awarded after trial in State v. Amerada Hess forever be excluded from Permanent Fund dividend calculations and instead be deposited to Fund principal. For the purpose of this analysis, it is assumed, in accordance with the Department of Law's most recent estimates, that the RIK payment will be made on January 1, 1992 and will total \$62.5 million (25 percent of \$250 million).

You specifically asked for an analysis which reflects the positive impact on Permanent Fund principal of SB 213. Included on the following page is a chart which provides that information in tabular form. By the year 2005,

the difference in principal would total \$223 million which is derived from the following sources:

\* initial deposit of \$62.5 million;

\* subsequent annual deposits of income earned on that deposit totaling \$165 million;

\* the \$4.5 million difference between \$223 million and \$227.5 million (\$62.5 million plus \$165 million) is accounted for by the increased inflation-proofing shortfall in the case of SB 213. If there were no inflation-proofing shortfalls in future years, the positive impacts on principal under SB 213 would be even greater.

(In millions of \$)			
FY	Principal Status Quo	Principal SB 213	Difference
91	10,890	10,890	
92	11,674	11,742	69
93	12,675	12,754	79
94	13,757	13,849	92
95	14,912	15,018	106
96	16,141	16,262	121
97	17,386	17,490	105
98	18,587	18,702	115
99	19,831	19,957	127
0	21,125	21,264	139
1	22,465	22,618	153
2	23,858	24,026	168
3	25,300	25,484	185
4	26,796	26,998	203
5	28,357	28,580	223



# Alaska Permanent Fund Corporation

## FINANCIAL PROJECTIONS (in millions)

as of February 28, 1991

GROWTH OF FUND PRINCIPAL						
FY	FY Begin Balance	Appropriations	Dedicated State Revenues*	Inflation Proofing	FY End Balance	Inflation Proofing Shortfall
78	0		54		54	
79	54		84		139	
80	139		344		483	
81	483	900	385		1,769	
82	1,769	800	400		2,969	
83	2,969	400	421	231	4,021	
84	4,021	300	365	151	4,838	
85	4,838	300	368	235	5,741	
86	5,741		323	216	6,281	
87	6,281	1,264 **	170	148	7,864	
88	7,864		418	303	8,585	
89	8,585		228	360	9,173	
90	9,173		267	454	9,894	
91	9,894		437	559	10,890	
92	10,890		228	556	11,674	
93	11,674		284	718	12,675	
94	12,675		304	779	13,757	
95	13,757		311	844	14,912	
96	14,912		315	914	16,141	
97	16,141		310	936	17,386	51
98	17,386		307	894	18,587	168
99	18,587		292	952	19,831	181
0	19,831		282	1,012	21,125	195
1	21,125		266	1,074	22,465	209
2	22,465		255	1,139	23,858	225
3	23,858		238	1,205	25,300	240
4	25,300		221	1,275	26,796	257
5	26,796		215	1,347	28,357	274
Cumulative Totals Projected For FY 1991 - 2005:			3,824	14,202		1,799

USE OF FUND INCOME					
Net Income	Distributions			Reserves	
	Dividends	Inflation Proofing	General Fund	Add (Delete)	FY End Balance
2			1		
8			7		
32	12		12		
150	28		28	59	59
368	71		71	185	244
471	108	231	110	110	354
530	175	151		203	557
650	217	235		206	763
1,021	303	216		501	1,264 **
1,069	391	148		529	529
789	424	303		62	591
868	460	360	4	44	635
916	487	454	4	(30)	605
928	481	659		(112)	493
1,021	477	556		(13)	480
1,159	514	718		(72)	408
1,247	553	779		(85)	323
1,342	598	844		(101)	222
1,441	652	914		(125)	98
1,545	707	936		(98)	
1,653	759	894			
1,765	813	952			
1,882	870	1,012			
2,003	929	1,074			
2,129	991	1,139			
2,260	1,054	1,205			
2,395	1,120	1,275			
2,535	1,189	1,347			
25,305	11,708	14,202			

### REALIZED RATE OF RETURN ASSUMPTIONS:

	Nominal	Inflation	Real
FY 91:	8.50%	5.41%	3.09%
FY 92:	8.50%	5.00%	3.50%
FY 93-05:	9.00%	6.00%	3.00%

STATUS QUO

3/28/91

\* SOURCE: Dedicated State oil revenue estimates are from the Department of Revenue (DOR) Fall 1990 Low-Case Revenue Forecast.

\*\* The FY 86 Earnings Reserve Account end balance was appropriated by the legislature to the principal of the Permanent Fund effective July 1, 1986.

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## Alaska Permanent Fund Corporation

### FINANCIAL PROJECTIONS (in millions)

as of February 28, 1991

GROWTH OF FUND PRINCIPAL						
FY	FY Begin Balance	Appropriations	Dedicated State Revenues*	Inflation Proofing	FY End Balance	Inflation Proofing Shortfall
78	0		54		54	
79	54		84		139	
80	139		344		483	
81	483	900	385		1,769	
82	1,769	800	400		2,969	
83	2,969	400	421	231	4,021	
84	4,021	300	366	151	4,838	
85	4,838	300	368	235	5,741	
86	5,741		323	216	6,281	
87	6,281	1,264 **	170	148	7,864	
88	7,864		418	303	8,585	
89	8,585		228	360	9,173	
90	9,173		267	454	9,894	
91	9,894		437	559	10,890	
92	10,890	65	228	559	11,742	
93	11,742	6	284	722	12,754	
94	12,754	7	304	784	13,849	
95	13,849	8	311	850	15,018	
96	15,018	9	315	921	16,262	
97	16,262	10	310	909	17,490	86
98	17,490	11	307	894	18,702	175
99	18,702	12	292	952	19,957	189
0	19,957	13	282	1,012	21,264	203
1	21,264	14	266	1,074	22,618	219
2	22,618	16	255	1,138	24,026	235
3	24,026	17	236	1,205	25,484	252
4	25,484	19	221	1,274	26,998	270
5	26,998	21	215	1,346	28,580	288
Cumulative Totals Projected						
FY 1991 - 2005:		227	3,824	14,198		1,916

USE OF FUND INCOME					
Net Income	Distributions			Reserves	
	Dividends	Inflation Proofing	General Fund	Add (Delete)	FY End Balance
2			1		
8			7		
32	12		12		
150	28		28	59	59
368	71		71	185	244
471	108	231	110	110	354
530	175	151		203	557
658	217	235		206	763
1,021	303	216		501	1,264 **
1,069	391	148		529	529
789	424	303		62	591
868	460	360	4	44	635
916	487	454	4	(30)	606
928	481	559	RIK Income	(112)	493
1,024	477	559	3	(16)	477
1,165	514	722	6	(76)	400
1,254	553	784	7	(90)	310
1,349	593	850	8	(107)	203
1,450	652	921	9	(132)	72
1,554	707	909	10	(72)	
1,663	759	894	11		
1,777	813	952	12		
1,895	870	1,012	13		
2,017	929	1,074	14		
2,144	991	1,138	16		
2,276	1,054	1,205	17		
2,413	1,120	1,274	19		
2,556	1,189	1,346	21		
25,465	11,708	14,198	165		

#### REALIZED RATE OF RETURN ASSUMPTIONS:

	Nominal	Inflation	Real
FY 91:	8.50%	5.41%	3.09%
FY 92:	8.50%	5.00%	3.50%
FY 93-05:	9.00%	6.00%	3.00%

\* SOURCE: Dedicated State oil revenue estimates are from the Department of Revenue (DOR) Fall 1990 Low-Case Revenue Forecast.

\*\* The FY 86 Earnings Reserve Account end balance was appropriated by the legislature to the principal of the Permanent Fund effective July 1, 1986.

# STATE OF ALASKA

## DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

March 27, 1991

WALTER J. HICKEL, GOVERNOR

REPLY TO:

- 1031 W 4th AVENUE SUITE 200  
ANCHORAGE, ALASKA 99501-1994  
PHONE: (907) 276-3550  
FAX: (907) 276-3697
- KEY BANK BUILDING  
100 CUSHMAN ST. SUITE 400  
FAIRBANKS, ALASKA 99701-4679  
PHONE: (907) 452-1568  
FAX: (907) 456-1317
- P.O. BOX K— STATE CAPITOL  
JUNEAU, ALASKA 99811-0300  
PHONE: (907) 465-3600  
FAX: (907) 463-5295

The Honorable Pat Pourchot  
Alaska State Senate  
Co-Chairman Senate Finance Committee  
P. O. Box V  
Juneau, AK 99811-3100

Re: Requested information  
regarding SB 213

Dear Senator Pourchot:

This letter is in response to your request this morning respecting the fiscal impact of SB 213 on the permanent fund dividend. The following chart, based on the Alaska Permanent Fund Corporation's model for calculation of dividends, sets forth the approximate impact on individual dividends, were all of the state's RIK claims (which SB 213 would exclude from the dividend stream) paid on January 1, 1992.

1991	\$ 0.00
1992	0.19
1993	1.52
1994	2.79
1995	4.01
1996	5.19
1997	6.32
1998	6.55
1999	6.77
2000	7.13
2001	7.33
2002	7.51
2003	7.69
2004	8.01
2005	8.16

With adoption of SB 213 the 15-year total loss to a permanent fund dividend recipient is approximately \$79.17, having a net present value of \$37.65.

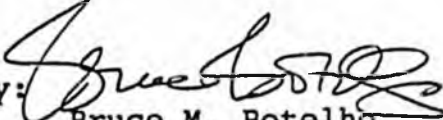
The Honorable Pat Pourchot  
Alaska State Senate

March 27, 1991  
Page 2

Should you wish further information, please do not  
hesitate to contact my office.

Sincerely,

CHARLES E. COLE  
ATTORNEY GENERAL

By:   
Bruce M. Botelho  
Assistant Attorney General

BMB:tg

INTENT

MS worky draft

1. The legislature intends that the issue raised by the defendants' challenge for cause in State v. Amerada Hess, et al., 1JU-77-847 Civ. (Superior Court, First Judicial District) be resolved by the Alaska Supreme Court as quickly as possible so that the trial set for November 4, 1991, is not ~~be~~ delayed. The legislature, therefore, respectfully requests the department of law to seek immediate review of the superior court ruling~~x~~ and also requests the Alaska Supreme Court <sup>to</sup> issue a decision as soon as possible, if necessary~~x~~ in advance of a formal opinion.

3. It is not the intent of the legislature in enacting AS 22.20.022 to allow the disqualification of a judge, if ~~the~~ judge has no financial interest in the outcome of the case other than that of a taxpayer or ~~an~~ Permanent Fund dividend recipient.

1. The legislature also requests that the State seek an early decision in this case on whether, in light of Alaska Civil Rule 47(c)(12), a juror must be disqualified, if the juror has no financial interest in the outcome of the case other than that of a taxpayer or a Permanent Fund dividend recipient.



## INTRODUCTION

1  
2 Defendants, North Slope oil producers who are being sued by the state in  
3 a dispute over royalties owed on oil production with direct and indirect claims  
4 in excess of two billion dollars, have moved this court to rule that no Alaska  
5 judge or juror is qualified to decide this case because each has an interest in the  
6 outcome of the case. That is so, the producers argue, because one quarter of  
7 any amounts recovered will be deposited into the Alaska Permanent Fund, from  
8 which direct payments in the form of dividends will be paid to all Alaska  
9 residents. The state opposes the motion on several grounds, most prominently  
10 that any direct financial interest which Alaska judges and jurors might have held  
11 in the outcome of this case was removed by the amendment of AS 43.23.045(b)  
12 in 1989 to provide that "income earned on money awarded after trial in State v.  
13 Amerada Hess, et al. [now known as *In re ANS Royalty Litigation*] . . . is not  
14 available for distribution to the dividend fund . . . ."

## RULING

21 Having reviewed the voluminous briefs and exhibits submitted by the  
22 parties and the arguments presented orally in court on February 21, 1991, the  
23 court rules as follows:  
24

- 25 1. AS 43.23.045(b) removes most, but not all, of the sources of

revenue flowing to the Permanent Fund Dividend fund as a result of any judgment in this case.

2. While the motions for disqualification would be ruled untimely if the basis for disqualification could be waived, the basis for disqualification cannot be waived in the present case.
- 3.a. This court and any Alaska court has a financial interest in the outcome of this case, as a result of the failure of AS 43.23.045(b) to include additional monies going to the Alaska Permanent Fund as a result of "Amerada Hess price adjustment clauses" in royalty-in-kind (RIK) contracts, which requires disqualification, if not cured.
- 3.b. Even if this or any Alaska court's financial interest resulting from the failure of AS 43.23.045(b) to exclude RIK income is not a direct interest, it is an "other interest" which strongly resembles a direct interest and hence any amount<sup>2</sup> is sufficient to disqualify, if the statute is not amended.
- 3.c. The impartiality of this or any Alaska court in this litigation might reasonably be questioned as a result of the failure of AS 43.23.045(b) to exclude RIK income. This appearance requires disqualification, if the statute is not amended.
4. The rule of necessity does not mandate denial of the motion for disqualification. There has been no showing that there

---

<sup>2</sup>The precise amount by which the annual dividend might be augmented as a result of increased RIK obligations is disputed. The court agrees with the producers' position that it is unnecessary to quantify that amount with precision. In reaching the decision announced today it is sufficient for the court to note that such an increase would not be so insubstantial as to be *de minimis*. In their briefing and at oral argument the producers alleged that RIK contract adjustments would result in an increase of \$81.03 in the dividend during the years 1990 through 2005; the present value of that increase was given as \$35.87. The state failed to rebut these contentions. Compare *Alaska Oil Co. v. State of Alaska*, 45 B.R. 358 (D. Alaska 1985) (disqualification not warranted where possible increase in dividend a mere \$1.78 annually). The amounts in question are even greater when the interests of the judge's "spouse or minor children residing in his household", Code of Judicial Conduct, Canon 3.C.(1)(c), are considered.

is no other forum available for trial of this case.

### EXPLANATION

1  
2 These conclusions will be discussed very briefly, with particular attention to the  
3 perceived flaw in the amendment to AS 43.23.045(b).  
4

- 5 1. AS 43.23.045(b) removes most, but not all, of the sources of  
6 revenue flowing to the Permanent Fund Dividend fund as a  
7 result of any judgment in this case.

8 As a piece of curative legislation, AS 43.23.045(b) is unique. Not only  
9 was it passed in response to a particular case, but it has application only to that  
10 case.<sup>3</sup> In these circumstances, the intent of the legislature must be interpreted  
11 broadly, for it is clear that the legislature intended to and made a good faith  
12 effort to cure the problem posed by this case and this case alone. It might well  
13 be thought that the legislature intended to do whatever was necessary to cure  
14 whatever problem gave rise to the need to disqualify Alaska residents from  
15  
16  
17

---

18 <sup>3</sup>While legislatures on occasion pass legislation in response to particular  
19 cases, this court is unaware of any such legislation which had application only  
20 to that one case. The closest example located by the court is H.R. 3054, 78th  
21 Cong., 2nd Sess. (1944), 58 Stat. 272 (1944) amending 32 Stat. 823., (1903) 15  
22 U.S.C. §29 (1940). That legislation was also passed in regard to a problem  
23 involving disqualification of judges. A federal law provided that six justices  
are required for a quorum of the Supreme Court. In an important antitrust case  
disqualification by four justices made it impossible for the Court to act.  
Congress adopted the statute cited above, which provided that in any case where  
the Supreme Court was unable to act because of inability to convene a quorum of  
the Court, the case would be certified to the circuit court of appeals from the  
originating circuit, and that the senior circuit judge and next two judges in  
seniority should comprise the court which would hear and finally decide the case.  
There would be "no review of such decision by appeal or certiorari or otherwise."  
The application of the legislation was limited to "every case pending before the  
Supreme Court of the United States on the date of its enactment."

1 acting as judge or jurors in this case. Cases and authorities supporting the  
2 proposition that it is the court's duty to determine the legislature's intent and  
3 then carry it out support this very expansive argument.<sup>4</sup> It is persuasive with  
4 regard to past royalty payments, future payments affected by any declaratory  
5 judgment of this court, and to interest on interest, and the court concludes that  
6 the phrase "money awarded after trial" is broad enough to cover these items.

7  
8 Yet any determination of legislative intent must ultimately be based on the  
9 words of the statute, and must consider the entire legislative history of the  
10 document.<sup>5</sup> Neither the words of the statute -- principally, "money awarded  
11 after trial in State v. Amerada Hess, et al." -- nor the legislative history -- which  
12 contains no mention at all of the effect of a decision in this case on the third-  
13 party royalty-in-kind contracts -- is sufficient to establish that the curative  
14 legislation extends to the royalty-in-kind contracts with third parties. While  
15 remedial statutes are generally to be liberally construed, nevertheless words and  
16  
17  
18

---

19 <sup>4</sup>See generally *United States v. Hardcastle*, 10 Alaska 254 (D.Alaska [First  
20 Division, Ketchikan] 1942) (fundamental rule of statutory construction is to  
21 ascertain and give effect to the expressed intention of the legislature); *Tosoro*  
22 *Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896 (Alaska 1987); *Kenai*  
23 *Penninsula Borough v. Andrus*, 436 F.Supp. 288 (D.Alaska 1977) (literal reading  
which would be contrary to legislative purpose to be avoided if the statute can  
be read in a manner consistent with its words and purposes). The legislature  
does not always "speak cogently", *Blackard v. City National Bank*, 16 Alaska 344,  
142 F.Supp. 753 (D.Alaska [Third Division, Anchorage] 1956).

24 <sup>5</sup>That history ought to include the antecedent historical conditions in  
25 which the legislation was proposed, as well as any letter of transmittal from the  
governor, the committee work and floor debates, and related materials.

1 phrases are to be given their common, ordinary meaning where a statute contains  
2 such word or phrase without defining it. AS 01.10.040; *State v. Lambert*, 694  
3 P.2d 791 (Alaska App. 1985). And while it is true that "words are inexact tools  
4 at best", *Harrison v. Northern Trust Co.*, 317 U.S. 476 (1943), it is also true  
5 that liberal statutory construction should not result in "the exercise of the  
6 legislative power of amendment under the mask of so-called interpretation".  
7 *State v. Baker*, 102 N.E. 732, 734 (Ohio 1913). While the court believes that  
8 the words of the statute may fairly be read to encompass any monies received  
9 within the framework of the Amerada Hess/ANS case, the same cannot be said  
10 as to any increased liability by nonparty RIK purchasers. The court has  
11 carefully reviewed all legislative history available to it, but has located not a  
12 single reference to the royalty-in-kind question, either by a legislator or by any  
13 of the bill's sponsors. Mindful that its role is to apply statutes and not to write  
14 (or rewrite) them, the court must defer to the legislature to deal with this  
15 question as it sees fit.

- 16  
17  
18  
19  
20 2. While the motions for disqualification would be ruled untimely  
21 if the basis for disqualification could be waived, the basis  
22 for disqualification cannot be waived in the present case.

23  
24 As to untimeliness generally, *see United States v. Patrick*, 542 F.2d 381,

1 390 (7th Cir. 1976), *cert den.* 430 U.S. 931 (1977) (well settled that party must  
2 raise disqualification of judge at earliest moment). However, some bases for  
3 disqualification are not waivable in Alaska. AS 22.20.020(b) (only certain bases  
4 for disqualification may be waived, direct financial interest is not one of those  
5 listed).

6 3.a. This court and any Alaska court has a financial interest  
7 in the outcome of this case, as a result of the failure of  
8 AS 43.23.045(b) to include additional monies going to  
9 the Alaska Permanent Fund as a result of "Amerada Hess price  
10 adjustment clauses" in RIK contracts, which requires dis-  
11 qualification.

12 *See also In re Cement Antitrust Litigation*, 688 F.2d 1297, 1308 (9th Cir.  
13 1982), *aff'd* 459 U.S. 1191 (1983). *Cf. Beattie ex rel. Beattie v. United States*,  
14 635 F.Supp. 481, 492 (D. Alaska 1986) *aff'd sub nom. Greisen ex rel. Greisen*  
15 *v. United States*, 831 F.2d 916 (9th Cir. 1987), *cert den. sub nom. Beattie v.*  
16 *United States*, 485 U.S. 1006 (1988) (while analogy imperfect, Alaska  
17 Permanent Fund dividends not substantially different from corporate dividend).  
18  
19

20  
21 3.b. Even if this or any Alaska court's financial interest result-  
22 ing from the failure of AS 43.23.045(b) to exclude RIK income  
23 is not a direct interest, it is an "other interest" which  
24 strongly resembles a direct interest and hence any amount  
25 is sufficient to disqualify.

1 Alaska Code of Judicial Conduct, Canon 3.C.(1)(c); *In re Virginia Electric*  
2 & Power Co., 539 F.2d 357, 368 (4th Cir. 1976); Note, *Disqualification of*  
3 *Judges and Justices in the Federal Courts*, 86 Harv. L. Rev. 736 (1973).

4  
5 3.c. The impartiality of this or any Alaska court in this litigation  
6 might reasonably be questioned as a result of the failure of  
7 AS 43.23.045(b) to exclude RIK income. This appearance requires  
8 disqualification.

9  
10 Alaska Code of Judicial Conduct, Canon 3.C.(1). *Cf. Liljeberg v. Health*  
11 *Services Acquisition Corp.*, 486 U.S. 847 (1988) (construing similar federal  
12 statute).

13  
14 4. The rule of necessity does not mandate denial of the motion for  
15 disqualification. There has been no showing that there is no other  
16 forum available for trial of this case.

17  
18 *Hudson v. Johnstone*, 660 P.2d 1180 (Alaska 1983). United States  
19 Constitution, Article III, Section 2, Clause 1; 28 U.S.C. §1251(b)(3) (original  
20 jurisdiction of United States Supreme Court).

21 **CONCLUSION**

22 AS 43.23.045(b) removes all sources of revenue flowing from the  
23 Permanent Fund to the dividend fund but one: money received in respect of RIK  
24

1 contract adjustment clauses. As a result of this failure, Alaska judges who  
2 receive Permanent Fund dividends have a direct financial interest or an other  
3 interest which strongly resembles a direct interest in the outcome of this case.  
4 The impartiality of any Alaska judge in this litigation might reasonably be  
5 questioned, requiring disqualification.

6 The motion for disqualification is not untimely, because the conflict arising  
7 from a financial interest cannot be waived.

8 The doctrine of necessity does not apply in this case.

9 The court's decision will become final, unless, within 75 days of the date  
10 of this order, the legislature enacts curative legislation; that is, legislation which  
11 clearly and explicitly precludes Alaska Permanent Fund monies realized by the  
12 state as a result of "Amerada Hess contract adjustments" in RIK contracts, or  
13 interest earned on such monies, or on the earnings of such monies, from being  
14 placed in the dividend fund.<sup>6</sup>

15  
16  
17  
18 **IT IS SO ORDERED.**  
19

20  
21 

---

<sup>6</sup>This order only gives notice of the court's intent to grant the  
22 disqualification motion in the event of the State of Alaska's failure to amend  
23 the statute. The court retains jurisdiction of the case, and the Fourth Amended  
24 Case Management and Scheduling Order remains in effect. Given plaintiff's  
25 request to seek curative legislation if necessary, see n.1, and this court's  
commitment to bring this case to resolution within the time set out in the Fourth  
Amended Case Management and Scheduling Order, the court would not view with favor  
a motion for continuance brought by any party where it appeared that that party  
had failed to make diligent preparation during the 75-day period.

DONE at Juneau this 14th day of March, 1991.

*Walter L. Carpeneti*

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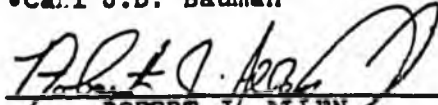
**WALTER L. CARPENETI  
SUPERIOR COURT JUDGE**

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CERTIFICATE OF SERVICE

1 The undersigned certifies that on March 14, 1991  
2 the foregoing Order was transmitted  
3 to the following attorneys via telecopier:

- Wilson L. Condon
- Carl J.D. Bauman

4   
5 \_\_\_\_\_  
6 ROBERT J. ALLEN  
7 STAFF ATTORNEY

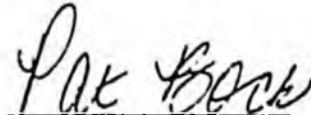
8 The undersigned certifies that on March 15, 1991  
9 a true copy of the foregoing was served upon the  
10 following counsel of record:

VIA JUNEAU COURTHOUSE BOX:

- Bruce Botelho
- Michael L. Lessmeier
- William B. Rozell

VIA FIRST-CLASS MAIL:

- Wilson L. Condon
- Carl J.D. Bauman
- James P. Murphy
- Robert E. Jordan III/F. Michael Kail
- John C. Held
- Julian L. Mason
- Paul R. Griffin

15 

16 \_\_\_\_\_  
17 Secretary to Judge Carpeneti

S B

2 1 9

**I JUDGE COMMITTEE REPORT**

(7)  
Date Referred: May 13, 1991

FURTHER REFERRALS:

Date of Committee Action: 5-16-91

The JUDICIARY Committee considered:

CSSB 219(L&C)

CS FOR SENATE BILL NO. 219 (L&C)

WORKERS' COMPENSATION: MISC. CHANGES

"An Act relating to workers' compensation and civil liability for workplace safety inspections; and providing for an effective date."

**RECOMMENDATIONS:**

be replaced with HCS CSSB 219 (Jud)  the same title  a new title

have attached amendments(s)

do pass

do not pass

no recommendations

individual recommendations

additional referral to the \_\_\_\_\_ Committee

ADOPTS: \_\_\_\_\_ letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept)

APPROVES PREVIOUS: (Dept/Date)

fiscal impact \_\_\_\_\_

fiscal note(s) \_\_\_\_\_

zero fiscal note \_\_\_\_\_

2  zero fiscal note(s) LABOR 5-3-91  
CSB 5-3-91

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<i>James D. Ouley</i>	<input checked="" type="checkbox"/>				
<i>Ed Elder</i>	<input checked="" type="checkbox"/>	<i>Terry Markham</i>		<input checked="" type="checkbox"/>	
<i>Frank Shively</i>	<input checked="" type="checkbox"/>	<i>Mark Shively</i>		<input checked="" type="checkbox"/>	

*James D. Ouley*  
CHAIRMAN'S SIGNATURE

FISCAL NOTE

no. 2

STATE OF ALASKA  
1991 LEGISLATIVE SESSION

Bill Version: CSSB 219(R&C)

(S) Publish Date: 5/3/91

Revision Date: 4/29/91 Department Affected: Commerce & Economic Dev.  
 Title: An Act relating to Workers' Compensation BRU: Insurance  
 Component: Operations

Sponsor: \_\_\_\_\_  
 Requestor: Senate Labor & Commerce COMPONENT SERIAL NO. 

0	3	5	4
---	---	---	---

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL	0	0	0	0	0	0
---------	---	---	---	---	---	---

REVENUE	0	0	0	0	0	0
---------	---	---	---	---	---	---

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

Estimate of current year impact: \_\_\_\_\_

ANALYSIS: (Attach a separate page if necessary.)

Prepared By: Don Koch, Chief of Market Surveillance Phone: 465-2515  
 Division: Insurance Date: 4/29/91

Approved by Commissioner: Glenn A. Olds  
 Agency: Department of Commerce & Economic Development Date: 4/29/91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

FISCAL NOTE

No. 3

STATE OF ALASKA  
1991 LEGISLATIVE SESSION

BILL NO Bill Version: CSSB 219 (240)

(S) Publish Date: 5/3/91

Revision Date: \_\_\_\_\_  
Title: " An Act relating to workers' compensation ..."  
Sponsor: Senate Labor & Commerce  
Requestor: Senate Labor & Commerce

Department Affected: Labor  
BRU: Workers' Compensation  
Component: \_\_\_\_\_  
Workers' Compensation  
COMPONENT SERIAL NO. 344

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND&STRUCTURES						
GRANTS,CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

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

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

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>


POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Linda Rexwinkel, Director Phone: 465-2790  
Division: Workers' Compensation Date: 4/22/91

Approved by Commissioner: Nancy Bear Usery   
Agency: Department of Labor Date: 4/22/91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

RECEIVED MAY 13 1991

# Alaska State Legislature

During Session  
P.O. Box V  
Juneau, Alaska 99811  
(907) 465-2828

---

During Interim  
3111 C Street, Suite 510  
Anchorage, Alaska 99503  
(907) 561-2040

---

**Senator Virginia Collins**

May 13, 1991

Representative Dave Donley  
House Judiciary Chair  
Room 122  
Capitol Building  
Juneau, Alaska 99811

Dear Representative Donley:

I would appreciate the scheduling of a teleconference on today's House Judiciary meeting. There are people in Anchorage who want to hear and testify on the Workers Compensation Bill. This bill affects these people and I ask that you allow them this public process.

I have made arrangements for all who want to testify to be notified at the time of the Judiciary hearing. My staff, Nanci Spear, will be available to monitor the equipment in the Committee room if necessary.

Thank you for your consideration.

Sincerely,



Senator Virginia Collins

HOUSE COMMITTEE REPORT

5/13/91

(7) Date Referred: May 7, 1991

FURTHER REFERRALS:

Judiciary

Date of Committee Action: 5-11-91

The LABOR AND COMMERCE Committee considered:

CSSB 219(L&C)

CS FOR SENATE BILL NO. 219 (L&C)

WORKERS' COMPENSATION: MISC. CHANGES

"An Act relating to workers' compensation and civil liability for workplace safety inspections; and providing for an effective date."

RECOMMENDATIONS: be replaced with HCS CS SB 219 (L&C) [x] the same title [ ] a new title

[ ] have attached amendments(s)

[ ] do pass

[ ] do not pass

[x] no recommendations

[ ] individual recommendations

[ ] additional referral to the \_\_\_\_\_ Committee

ADOPTS: \_\_\_\_\_ letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept)

APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal impact \_\_\_\_\_

[ ] fiscal note(s) \_\_\_\_\_

[ ] zero fiscal note \_\_\_\_\_

(2) Senate 5/3/91 zero fiscal note(s) DC FID L&C 5/3/91

Table with columns: SIGNING DO PASS, DP, OTHER RECOMMENDATIONS, DNP, NR, AM. Includes signatures of Bruckman, Donley, Darnell, Finkelstein, and DUN.

Chairman's Signature Finkelstein

HOUSE CS FOR CS FOR SENATE BILL NO. 219 (L&C)  
IN THE LEGISLATURE OF THE STATE OF ALASKA  
SEVENTEENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE LABOR AND COMMERCE COMMITTEE

Offered: 5/13/91  
Referred: Judiciary

Sponsor(s): SENATE LABOR AND COMMERCE COMMITTEE BY REQUEST

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to workers' compensation and civil liability for workplace safety  
2 inspections; and providing for an effective date."

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

4 \* Section 1. PURPOSE OF SECTIONS 10 AND 13. (a) It is the purpose of sec. 10 of this Act to  
5 amend AS 23.30 to provide that an insurer is not liable for providing or failing to provide safety  
6 inspections or safety advisory services; this amendment would decide a public policy question concerning  
7 the liability of an insurer for the performance of a safety inspection or safety advisory service raised in  
8 Van Biene v. ERA Helicopters, Inc., 779 P.2d 315 (Alaska 1989).

9 (b) It is the purpose of sec. 13 of this Act to amend AS 23.30.265(15) to reaffirm the original  
10 intent of changes made to this definition in sec. 24, ch. 93, SLA 1980, to include prior temporary total  
11 disability payments within the definition of gross wages.

12 \* Sec. 2. AS 23.30.041(k) is repealed and reenacted to read:

13 (k) The employer shall pay compensation to an employee eligible for reemployment  
14 benefits, as follows:

1 (1) until the employee reaches medical stability or the reemployment plan is  
2 completed or terminated, whichever comes first, temporary disability benefits shall be paid;

3 (2) if the employee reaches medical stability or has been found eligible for reem-  
4 ployment benefits, temporary disability benefits shall cease and permanent impairment benefits  
5 shall then be paid biweekly at the employee's temporary total disability rate until plan  
6 completion, termination, or exhaustion of permanent impairment benefits; permanent impairment  
7 benefits remaining unpaid upon completion or termination of the plan shall be paid to the  
8 employee in a single lump sum;

9 (3) if the employee's permanent impairment benefits are exhausted before the  
10 completion or termination of the reemployment plan, the employer shall pay, on a biweekly basis,  
11 an amount equal to 60 percent of the employee's spendable weekly wage as determined under  
12 AS 23.30.220, not to exceed \$525, until the completion or termination of the plan;

13 (4) if the employee reaches medical stability before an impairment rating is given  
14 as provided in AS 23.30.190, except for the first 30 days the employee shall be paid 60 percent  
15 of the employee's spendable weekly wage until an impairment rating is given; benefits paid more  
16 than 30 days after medical stability but before an impairment rating is given shall be offset from  
17 the total sum of permanent impairment benefits due to the employee; after the employee reaches  
18 medical stability and an impairment rating is given, all benefits paid shall be included as  
19 permanent impairment benefits;

20 (5) benefits related to the reemployment plan may not extend past two years from  
21 the date of the initiation of the 60 percent payment of the employee's spendable weekly wage,  
22 plan approval, or plan acceptance, whichever date occurs first, at which time the benefits expire;

23 (6) if the employer controverts the employee's claim or appeals a ruling of the  
24 administrator or the board and the controversion or appeal delays completion of an evaluation,  
25 development, commencement or completion of a plan

26 (A) the employer shall pay the employee 60 percent of the spendable  
27 weekly wage during the period of controversion or appeal, except that temporary  
28 disability benefits shall be paid until the employee reaches medical stability;

29 (B) the two-year limitation on payment of benefits in (5) of this subsection  
30 does not begin to run or is tolled; and

31 (C) payments made at 60 percent of the employee's spendable weekly

1 wage during controversion or appeal may not be offset from permanent impairment  
2 benefits due to the employee.

3 \* Sec. 3. AS 23.30 is amended by adding a new section to read:

4 Sec. 23.30.047. BENEFITS FOR HEALTH INSURANCE. (a) An employer who pays  
5 compensation to an injured employee under AS 23.30.041(k), 23.30.180, 23.30.185, 23.30.190,  
6 23.30.200, or 23.30.215, and who provided health insurance to the employee at the date of injury  
7 shall also reimburse the employee for health insurance coverage for the employee and covered  
8 dependents, as provided in this section.

9 (b) Payment required under this section is equal to the employer's current contribution  
10 for health insurance or the amount paid by the employee for replacement coverage, whichever  
11 amount is less. Payment required under this section commences when the employee's health  
12 insurance provided by the employer's contribution ceases and shall continue until the employee  
13 is no longer receiving compensation described in (a) of this section, or for 18 months, whichever  
14 period is shorter.

15 (c) Payment is not required under this section until the employee provides proof of health  
16 insurance coverage. In this subsection, "health insurance" includes

17 (1) an individual policy of health insurance; or

18 (2) a notice of self-payment for continuance of coverage required under 29 U.S.C.  
19 1161 (Consolidated Omnibus Budget Reconciliation Act of 1985) or under a union health or  
20 welfare trust agreement.

21 (d) If benefits required under this section are not paid within 30 days after the employer  
22 receives a request for payment, the employer shall pay a penalty equal to 25 percent of the  
23 amount due.

24 \* Sec. 4. AS 23.30.075(b) is amended to read:

25 (b) If an employer fails to insure and keep insured employees subject to this chapter or  
26 fails to obtain a certificate of self-insurance from the board, upon conviction, the court may  
27 [SHALL] impose a fine of up to \$10,000 and may impose a sentence of imprisonment for not  
28 more than one year. In addition, the board may impose a civil penalty of up to three times  
29 the manual rate that would have been charged for the employer's insurance premium  
30 during the period the employer failed to obtain insurance. If an employer is a corporation,  
31 all persons who, at the time of the injury or death, had authority to insure the corporation or

1 apply for a certificate of self-insurance [,] and the person actively in charge of the business of  
2 the corporation shall be subject to the penalties prescribed in this subsection and shall be  
3 personally, jointly, and severally liable together with the corporation for the payment of all  
4 compensation or other benefits for which the corporation is liable under this chapter if the  
5 corporation at that time is not insured or qualified as a self-insurer.

6 \* Sec. 5. AS 23.30.095 is amended by adding a new subsection to read:

7 (l) The employer shall provide to the employee one round trip coach fare airline ticket  
8 to the place at which an examination described under (e) of this section is performed and two  
9 days per diem at the rate paid to state employees who travel outside the state if the examination  
10 requires the employee to travel outside the state. If the employee objects to the physician's  
11 report of the examination, takes the deposition of the physician and the deposition is taken  
12 outside the state, or if the employer takes the deposition of the physician who performs the  
13 examination and the deposition is taken outside the state, the employer shall provide one round  
14 trip coach fair airline ticket to the location of the deposition and two days per diem at the rate  
15 paid to state employees who travel outside the state.

16 \* Sec. 6. AS 23.30.107 is amended to read:

17 Sec. 23.30.107. RELEASE OF INFORMATION; CONFIDENTIALITY. Upon request,  
18 an employee shall provide written authority to the employer, carrier, rehabilitation provider, or  
19 rehabilitation administrator to obtain medical and rehabilitation information relative to the  
20 employee's injury and any prior injury. Except for medical records released to the  
21 employer, carrier, rehabilitation provider, rehabilitation administrator, or other person  
22 selected by the employee, the employee's medical records in the possession of the division  
23 of workers' compensation are confidential and are not subject to the public records  
24 inspection requirements of AS 09.25.110 - 09.25.121.

25 \* Sec. 7. AS 23.30.110 is amended by adding a new subsection to read:

26 (h) If the board determines that the employee's injury resulted from the employer's  
27 wilful, serious, and repeated violation of state or federal occupational safety or health guidelines,  
28 the board shall report the violation to the Occupational Safety and Health Review Board  
29 (AS 18.60.057).

30 \* Sec. 8. AS 23.30.155(o) is amended to read:

31 (o) The division of workers' compensation [BOARD] shall promptly notify the division

1 of insurance if the division of workers' compensation [BOARD] determines that the employer's  
2 insurer, including an adjuster for a self-insured employer, has filed a notice of controversion  
3 for a frivolous or unfair reason. Notice of frivolous or unfair controversion is required even  
4 if a hearing is not held or compensation is not awarded by the board [FRIVOLOUSLY OR  
5 UNFAIRLY CONTROVERTED COMPENSATION DUE UNDER THIS CHAPTER]. After  
6 receiving notice from the division of workers' compensation [BOARD], the division of  
7 insurance shall determine if the insurer or adjuster has committed an unfair claim settlement  
8 practice under AS 21.36.125. If the division of workers' compensation determines that an  
9 adjuster for a self-insured employer has filed a notice of controversion for a frivolous or  
10 unfair reason, the board shall consider the self-insured employer's claims adjusting  
11 practices and may cancel or fail to renew the employer's self-insurance certificate.

12 \* Sec. 9. AS 23.30.155 is amended by adding a new subsection to read:

13 (p) Compensation due an employee under this chapter shall be paid by negotiable bank  
14 check that can be cashed not more than three business days after being issued.

15 \* Sec. 10. AS 23.30 is amended by adding a new section to read:

16 Sec. 23.30.232. CIVIL LIABILITY FOR WORKPLACE SAFETY INSPECTIONS. A  
17 carrier, an insurance service agent to a self-insured employer, or a trade association is not liable  
18 for civil damages as a result of an act or omission in performing or failing to perform a  
19 workplace safety inspection or a safety advisory service, ~~unless the carrier's, agent's, or~~  
20 ~~association's act or failure to act constitutes reckless or intentional misconduct.~~

21 \* Sec. 11. AS 23.30 is amended by adding a new section to read:

22 Sec. 23.30.238. VOLUNTEER EMERGENCY MEDICAL TECHNICIANS AS  
23 EMPLOYEES. (a) A person who is injured during the course and within the scope of providing  
24 service as a volunteer emergency medical technician is an employee of the state for purposes of  
25 this chapter if the person

26 (1) is certified by the state under AS 18.08 as an emergency medical technician;

27 (2) provides emergency medical service outside an incorporated city or borough;

28 and

29 (3) is not otherwise covered for that injury by an employer's workers'  
30 compensation insurance policy or self-insurance certificate.

31 (b) The gross weekly earnings for a person receiving benefits under this section shall be

1 the gross weekly earnings paid a full-time emergency medical technician employed in the city  
2 or borough nearest to the place where the injury occurred, or, if the nearest city or borough has  
3 no full-time emergency medical technician, at a reasonable figure previously set by the nearest  
4 city or borough to make this determination, but in no case may the gross weekly earnings for  
5 calculating compensation be less than the minimum wage computed on the basis of 40 hours of  
6 work a week.

7 \* Sec. 12. AS 23.30.265(2) is amended to read:

8 (2) "arising out of and in the course of employment" includes employer-required  
9 or supplied travel to and from a remote job site; activities performed at the direction or under the  
10 control of the employer; and employer-sanctioned activities at employer-provided facilities; but  
11 excludes recreational activities sponsored by the employer that are performed at facilities  
12 not provided by the employer, unless participation is required as a condition of  
13 employment, and activities of a personal nature away from employer-provided facilities;

14 \* Sec. 13. AS 23.30.265(15) is amended to read:

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

28 \* Sec. 14. AS 23.30.265 is amended by adding a new paragraph to read:

29 (34) "volunteer emergency medical technician" means a person who is certified  
30 by the state as an emergency medical technician under AS 18.08 and who provides emergency  
31 medical services on a voluntary basis.

1 \* Sec. 15. DIVISION OF INSURANCE REPORT. The division of insurance shall prepare a report  
2 on the feasibility of implementing a contracting classification premium adjustment program to provide  
3 premium credits for employers who purchase workers' compensation insurance. The report must include  
4 comments and recommendations from labor and management representatives in the state. The division  
5 of insurance shall submit the report to the Second Session of the Seventeenth Alaska State Legislature  
6 by January 31, 1992.

7 \* Sec. 16. DIVISION OF WORKERS' COMPENSATION REPORT. The division of workers'  
8 compensation shall report to the Alaska State Legislature by January 1, 1992, with the following:

- 9 (1) recommendations for changes to AS 23.30 that will promote workplace safety;
- 10 (2) recommendations for increasing workplace safety;
- 11 (3) a discussion of the effect, if any, of the enactment of ch. 79, SLA 1988, on workers'  
12 compensation;
- 13 (4) a determination of the effectiveness of AS 23.30.145 in ensuring that employees who  
14 file claims are receiving adequate legal representation;
- 15 (5) a survey of claims filed in 1989 and 1990 to determine
  - 16 (A) how many employees were not represented by an attorney in making the  
17 claim; and
  - 18 (B) how many employees who were not represented by an attorney tried but  
19 failed to find legal representation;
- 20 (6) a determination of whether the procedures used by the board in granting a "blanket"  
21 release of medical information are adequate to avoid the release of nonmedical information that is not  
22 relevant to the claim;
- 23 (7) a determination of whether employers or carriers are routinely requesting a "blanket"  
24 release of medical information in an effort to discourage injured employees from filing a claim, and if  
25 this is occurring, recommendations for legislation to halt this practice; and
- 26 (8) recommendations for reducing fees charged by attorneys who represent employees  
27 and carriers.

28 \* Sec. 17. This Act takes effect immediately under AS 01.10.070(c).

**DIVISION OF LEGAL SERVICES**

**LEGISLATIVE AFFAIRS AGENCY  
STATE OF ALASKA**

MAY 25 1991

P.O. Box Y, Juneau, Alaska 99811  
(907) 465-3867 or 465-2450  
FAX (907) 465-2029

Deliveries to: 240 Main Street  
Court Plaza, Room 500  
Mail Stop 3101

MEMORANDUM

May 14, 1991

**SUBJECT:** Workers' compensation - (HCS CSSB 219(Jud))

**TO:** Senator Virginia Collins

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

As discussed in an earlier memo, the amendment to AS 23.30.120(a) concerning demonstration of a "preliminary link" before an injury is compensable would place a requirement into statute that is already imposed by the courts. See Burgess Const. Co. v. Smallwood, 623 P.2d 312 (Alaska 1981). Therefore, the proposed amendment would not enact new law in the sense that a new requirement would be imposed on a claimant. This "preliminary link" simply requires that the employee present some evidence that the claim arose out of or in the course of employment. If the employee can show this "preliminary link" then the presumption contained in AS 23.30.120(a)(1) would apply.

Please contact me if you have further questions.

MFF:pl  
91-368.plm

A M E N D M E N T

OFFERED IN THE HOUSE

TO: HCS CSSB 219 (JUDICIARY)

Page 1, line 4:

Delete "12, 15, AND 16. (a)"

Insert "10, 11, 14, 17, AND 18. (a) It is the purpose of secs. 10 and 11 of this Act to amend AS 23.30.120 to assure that the presumption of compensability continues to be applied only to the question of whether an injury is related to employment.

(b)"

Delete "12"

Insert "14"

Reletter the following subsections accordingly.

Page 1, line 9:

Delete "15"

Insert "17"

Page 1, line 12:

Delete "16"

Insert "18"

Page 6, after line 7:

Insert new bill sections to read:

\*\* Sec. 10. AS 23.30.120(a) is amended to read:

(a) After a preliminary link has been established by the claimant between the claimant's injury and the claimant's employment, [IN A PROCEEDING FOR THE ENFORCEMENT OF A CLAIM FOR COMPENSATION UNDER THIS CHAPTER] it is

3

presumed, in the absence of substantial evidence to the contrary, that

(1) the initial injury arose out of or occurred in the course and scope of employment [CLAIM COMES WITHIN THE PROVISIONS OF THIS CHAPTER];

(2) sufficient notice of the claim has been given;

(3) the injury was not proximately caused by the intoxication of the injured employee or proximately caused by the employee being under the influence of drugs unless the drugs were taken as prescribed by the employee's physician;

(4) the injury was not occasioned by the wilful intention of the injured employee to injure or kill self or another.

\* Sec. 11. AS 23.30.120(c) is amended to read:

(c) The presumption of compensability established in (a) of this section does not apply to

(1) a mental injury resulting from work-related stress; or

(2) other aspects of a claim for compensation or other benefits under this chapter."

Renumber the following bill sections accordingly.

Statement  
of  
Mary A. Nordale  
in behalf of  
American Insurance Association

My name is Mary A. Nordale. I am an attorney with Robertson, Monagle & Eastaugh in Juneau, and I represent the American Insurance Association. The AIA is an insurance industry group representing approximately 240 insurers primarily engaged in property and casualty insurance, but a number of the companies write workers' compensation policies. AIA members account for almost 38 percent of the Alaska market for workers' compensation.

AIA opposes Section 10 of CS for SB 219 (L&C) for the reason that its members do not believe that the language of the section accords with the intent of overruling the case of Van Biene v. Era Helicopters, Inc., 779 P.2d 315 (Alaska 1989). Rather, AIA is of the opinion that Section 10 would codify the holding of Van Biene and, instead of discouraging litigation, would impose a duty upon attorneys representing workers' compensation claimants to sue.

The determination of "reckless or intentional misconduct" requires a finding of fact by a court. In every case in which arguably there might exist an issue of fact as to a safety inspection, litigation by the claimant against the insurer could be expected to be brought. Canon 7 of the Code of Professional Responsibility provides that "a lawyer should represent a client zealously within the bounds of the law." In representing a client, a lawyer may not fail to seek the lawful objectives of his client through reasonably available means. If Canon 7 is to be adhered to, a lawyer could not fail to sue a person conducting a safety inspection unless his contract of representation explicitly provided that he would not represent the client in such a suit. Thus, labor organizations, insurers, and independent engineers conducting safety inspections should, if the language of Section 10 is adopted in its present form, be prepared to defend suits involving all injuries occurring in the workplaces inspected. Only an employer who conducts its own safety inspections will have the protection of the exclusivity of remedy provisions of law.

An argument has been advanced that "reckless or intentional misconduct" raises the level of proof to a degree that the likelihood of a claimant's being successful in his suit is remote. That is not the point. The point is that any person performing a safety inspection in connection with workers' compensation insurance can expect to be sued and can expect to incur the expense of litigation. A person being sued not only has the direct expenses of suit--the judgment, if he loses, attorney fees and other costs--but also has the indirect expenses of participating in the litigation--loss of time, inconvenience, loss of productivity. Indirect costs are sufficiently onerous that many defendants settle simply to buy peace with plaintiffs. The incentive to sue contained in the language of Section 10 is

Attachment #1  
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Statement of Mary A. Nordale  
Re: SB 219  
May 13, 1991  
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reinforced by the prospect that a monetary settlement will be reached with the defendant simply because the defendant wants to limit all of its costs, direct and indirect.

If the language of Section 10 is incorporated into law, members of AIA and, probably, other companies writing workers' compensation policies will have to take measures to limit their exposure to such suits. Two possible means would be to require the employer to conduct its own safety inspection or to require the employer to contract with a person or persons to conduct the inspection. Each of these measures would impose significant costs upon employers to obtain services that are now furnished at no cost. For large employers the added cost may not impose a financial burden. For small employers, the cost may be prohibitive. Persons contracting to perform safety inspections must cover themselves with errors and omissions insurance, a very expensive form of insurance. Their fees will have to reflect their added costs of doing business and the small employers will find their total costs for workers' compensation coverage significantly increased.

Section 10 of CSSB 219 also creates an ambiguity. Since liability would attach for a failure to act, presumably an insurer or other person capable of performing a safety inspection could be sued for not having performed, or for not having caused to be performed, a safety inspection.

AIA recommends that Section 10 be amended either by placing a period after "service" on page 5, line 19, and deleting the balance of the sentence, or by deleting the language of Section 10 in its entirety and substituting the language of Section 5 of SB 508, a bill that was before the legislature in 1990. The language in the 1990 bill was agreed to by all parties last year as effectively overruling Van Biene. Section 5 of SB 508 would have amended AS 23.30.055, the section that provides that the liability of an employer under AS 23.30.045 is exclusive, and would have added language as follows: "In this section, 'employer' includes the employer's carrier, an insurance service agent to a self-insured employer, or a labor organization, if the carrier, insurance service agent, or labor organization provides or fails to provide safety inspection or safety advisory services."

Workers' compensation legislation imposes strict liability on employers for work-related injuries. Fault, in whatever degree, is not an issue. In order to overrule the holding of Van Biene and retain the services provided by insurers and labor organizations with respect to safety inspections, the same

Statement of Mary A. Nordale

Re: SB 219

May 13, 1991

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protection should be extended to those entities with respect to the inspections. After all, it is the employer's duty to provide a safe workplace. Inspections are performed to assist the employer in fulfilling that duty. To subject an inspector to suit while protecting the employer is patently unfair and patently contrary to the goal of encouraging concern for safety.

AIA was specifically excluded from the deliberations and negotiations of the Ad Hoc Committee drafting the present Section 10. It is my understanding that the Ad Hoc Committee was composed of persons representing only management and labor and, therefore, they did not have the benefit of the views of those insurers writing workers' compensation policies for over a third of Alaska employers required to provide workers' compensation coverage for their employees.

AIA urges this committee to solve the Van Biene problem for the protection of Alaska's workers in a way that will be of benefit to both workers and their employers.

**ALASKA WORKERS' COMPENSATION BOARD**

P.O. Box 25512



Juneau, Alaska 99802-5512

F.G. PATTERSON,  
Employee,  
Applicant,

v.

STATE OF ALASKA,  
DEPARTMENT OF LABOR,  
(self-insured) Employer,  
Defendant.

FILED with  
ALASKA WORKERS'

APR 24 1991

COMPENSATION BOARD  
FAIRBANKS, ALASKA

DECISION AND ORDER  
CASE NO. 8101238

We are deciding this case on the basis of the written record on April 23, 1991 in Fairbanks, Alaska. Attorney Randall Weddle represents the defendant employer, and attorney Michael Stepovich represents the applicant employee. We proceed under AS 23.30.005 as a two-member quorum of the Board as Joe Thomas, Board member representing labor, is out of state.

ISSUE

Should we cancel the hearing on the employee's claim for benefits?

CASE HISTORY AND SUMMARY OF THE EVIDENCE

The employee was injured in a motor vehicle accident on November 9, 1981 while on a worksite inspection tour in the course of his work as a safety compliance officer for the employer. He suffered injury to his back, shoulder, neck, chest and right leg, and developed shortness of breath. The employee's respiratory difficulties continued, and he was eventually diagnosed to have right diaphragm weakness or paralysis and sleep apnea. The breathing stoppages from the sleep apnea may have damaged the employee's

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heart. He claims he took early retirement from his work on October 1, 1986 because of his respiratory difficulties.

The employer paid the employee temporary total disability (TTD) benefits intermittently through January 13, 1985. The employer controverted further benefits on December 15, 1987. The employee filed an Application for Adjustment of Claim on November 12, 1987, requesting additional TTD benefits, permanent total disability (PTD) benefits, medical benefits, transportation costs, penalties, interest, attorney fees, and legal costs. In a prehearing conference held on February 8, 1991, the hearing was set for Tuesday, April 23, 1991.

On Friday, April 19, 1991, the attorney for the employer telephoned the Fairbanks Workers' Compensation office to indicate that he had tentatively settled all aspects of the claim with the employee. The attorney was instructed to present the proposed settlement at the scheduled hearing as provided in AS 23.30.110(c). When the employer objected to that procedure, the staff consulted the hearing officer who was the designated chairman for the Board panel with jurisdiction over the case. The designated chairman agreed that the proposed settlement should be presented at the hearing as required by the statute and regulations.

Shortly after the designated chairman refused to cancel the hearing, the Director of the Workers' Compensation Division telephoned him to order him to cancel the hearing, and to continue the case at the request of the employer's attorney. The designated chairman indicated that this was not in keeping with his understanding of the law, but agreed as a state employee to follow his Director's orders. Board member representing labor, Joe Thomas, was not available to consider the matter. Board member representing employers, Steve Thompson, agreed to approve the cancellation and continuance, considering the circumstances. The designated chairman telephoned the Director once again to report that two members of the panel would cancel the hearing and continue the case as ordered. The Director indicated she would contact the employer's attorney to convey the message. No one appeared for the scheduled hearing. We closed the record at the time of the scheduled hearing to cancel the employee's hearing and to continue the case as directed. We have not yet received a written proposed Compromise and Release agreement.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE DESIGNATED CHAIRMAN

AS 23.30.110(c) provides, in the pertinent part:

If a settlement agreement is reached by the parties less than 14 days before the hearing, the parties shall appear at the time of the scheduled hearing to state the terms of the settlement agreement.

8 AAC 45.070 provides, in part:

(d) If an agreed settlement is reached less than 14 days before a scheduled hearing and

. . . .

(2) it is not in accordance with AS 23.30.012, 8 AAC 45.160 and this subsection, the parties must appear before the board or its designee at the scheduled hearing time to state the terms of the settlement agreement; after the parties have stated the terms of the settlement, a request to continue, postpone, cancel, or change the scheduled hearing may be made in accordance with 8 AAC 45.074; if the board or its designee denies the request to continue, postpone, cancel, or change the scheduled hearing, the hearing will proceed as scheduled.

AS 23.30.012 provides, in part:

The agreement shall be approved by the board only when the terms conform to the provisions of this chapter and, if it involves or is likely to involve permanent disability, the board may require an impartial medical examination and a hearing in order to determine whether or not to approve the agreement. The board may approve lump-sum settlements when it appears to be to the best interest of the employee or beneficiary or beneficiaries.

8 AAC 45.160 provides, in part:

(a) The board will review settlement agreements which provide for the payment of compensation due or to become due and which undertake to release the employer from any or all future liability. Settlement agreements will be approved by the board only where a dispute exists concerning the rights of the parties or where clear and convincing evidence demonstrates that approval would be for the best interests of the employee or his beneficiaries.

. . . .

(c) Agreed settlements in which the employee waives medical benefits or benefits during rehabilitation training are presumed unreasonable and will not be approved absent showing that the waiver is in the employee's best interest.

In addition, lump-sum settlements of board-ordered permanent total disability claims are presumed unreasonable and will not be approved absent a showing that the lump-sum settlement is in the employee's best interests.

The settlement was proposed by the employer approximately four calendar days before the scheduled hearing. Under section 110(c) of the Alaska Workers' Compensation Act the parties are required to appear to present an agreed settlement for Board review by the panel in the venue of their case on the date of the scheduled hearing. Regulation 70(d) lays out the procedure for the Board to use in reviewing a settlement proposed in this way, providing for the continuance of the hearing after the terms of settlement have been reviewed. The standards for reviewing the proposed settlement are detailed in section 012 of the statute and section 160 of our regulations.

Considering the specific language of AS 23.30.110(c) I must conclude that under the terms of the statute the employee's hearing should not have been cancelled. Nevertheless, I am an employee of the Workers' Compensation Division and I have been ordered to cancel the hearing and continue the case by the Division Director. In compliance with those orders, I will cancel the hearing and continue the case.

The best evidence available to us indicates that the proposed settlement would eliminate the employee's claim to future medical care and PTD benefits. Waiver of these entitlements are presumed unreasonable under 8 AAC 45.160, and we will retain jurisdiction over the case to permit the parties to request a hearing to present clear and convincing evidence that this settlement is in the best interest of the employee. AS 23.30.012. 8 AAC 45.160(a).

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF BOARD MEMBER STEVE THOMPSON

• Board member Thompson makes no findings of fact or conclusion of law but concurs in the order below.

ORDER

The hearing on the employee's claim for benefits is cancelled. We retain jurisdiction over the case to allow the parties to request a hearing

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to present a proposed Compromise and Release together with supporting evidence showing the settlement to be in the employee's best interest.

DATED at Fairbanks, Alaska, this 24<sup>th</sup> day of April, 1991.

ALASKA WORKERS' COMPENSATION BOARD

*William S.L. Walters*

William S.L. Walters, Designated Chairman

*Steve M. Thompson*

Steve M. Thompson, Member

WSLW/ml

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

APPEAL PROCEDURES

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

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

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Decision and Order in the matter of F.G. Patterson, employee/respondent v. State of Alaska, employer; and Surety of Alaska, insurer/petitioners, Case No. 8101238; dated and filed in the office of the Alaska Workers' Compensation Board at Fairbanks, Alaska this 24<sup>th</sup> day of April, 1991.

*Mandi Lynch*  
Clerk

LAW OFFICES OF  
KEMPPEL, HUFFMAN AND GINDER  
A PROFESSIONAL CORPORATION

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May 14, 1991

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VIA FAX: 463-3611

David Hutchens  
Executive Director  
Alaska Rural Electric Cooperative  
Association, Inc.  
703 W. Tudor Road, Suite 200  
Anchorage, AK 99503

Re: Van Biene Legislation

Dear David:

You have asked me where the legal concept of "reckless" falls on the continuum of legal liability. The answer is that the "reckless" standard requires more than "negligence" but much less than "intentional" and seems to be defined by the Alaska courts as little different than "gross negligence."

In 1968, the Supreme Court of the State of Alaska in the case of Leavitt v. Gillaspie, 443 P.2d 61, 65, defined gross negligence:

In order for one to be guilty of gross negligence, the evidence must show that he had full knowledge of the hazards he was creating by his actions, such as to evidence a reckless disregard of possible consequences and indifference to the rights of others.

In continuing to define gross negligence, the court stated:

Gross negligence is different from ordinary negligence in several important particulars.

David Hutchens  
May 14, 1991  
Page 2

The court then went on to immediately cite Section 500 of the Restatement (2d) of Torts, which is entitled "Reckless Disregard of Safety Defined" and is found in Chapter 19 entitled "Reckless Disregard of Safety." In fact, the Alaska Supreme Court, quoting the Restatement (2d) of Torts, stated that:

It [reckless misconduct or gross negligence] differs from that form of negligence . . . .

I have attached a full copy of the above case from which I have been quoting the Alaska Supreme Court at page 65.

The above case is to be contrasted with Stores v. Lutheran Hospitals, 661 P.2d 632, which, in a footnote at page 634, while stating that "gross negligence" has "no generally accepted meaning," implies that it may fall somewhat below the "reckless disregard" standard.

In conclusion, however, it appears that the Alaska courts find little difference between the legal standards of "gross negligence" and "reckless."

If you have any further questions, please feel free to contact me.

Sincerely yours,

KEMPPEL, HUFFMAN AND GINDER, P.C.

  
Roger R. Kempel

RRK:lka  
Enclosure

In my opinion *Schaible* is dispositive of the materiality issue in the case at bar. Here the perjury section of the 1899 Act of Congress "was almost identical with the like provision" in the laws of Oregon.<sup>2</sup> Prior to the 1899 congressional enactment, the Supreme Court of Oregon had consistently construed the Oregon perjury statute as requiring the element of materiality.<sup>3</sup> To my knowledge, this same construction had been accorded Alaska's perjury statute by Alaska's territorial courts and state trial courts until the superior court's ruling in the case at bar. Before holding that AS 11.30.010(a), with its severe penalty, is a false swearing statute, I believe a stronger showing should have been made that the *Schaible* canon of statutory construction is inapplicable. I concur in all other aspects of the court's opinion.



Herbert LEAVITT, Individually and as Administrator of the Estate of William Leavitt, Deceased, Appellant,

v.

Russell E. GILLASPIE, Jr., and Cripple Creek Resort, Inc., Appellees.

Russell E. GILLASPIE, Jr., Appellant,

v.

Herbert LEAVITT, Individually and as Administrator of the Estate of William Leavitt, Deceased, Appellee.

Nos. 800, 803.

Supreme Court of Alaska.

June 24, 1968.

Action for death of passenger in automobile accident. The Superior Court.

The Supreme Court, Dimond, J., held that giving of instruction on host driver's affirmative defense of assumption of risk, which instruction was not limited by notion of what reasonably prudent man would have done under the circumstances in which passenger found himself was improper, and passenger's administrator was entitled to new trial without instruction on assumption of risk.

Reversed and remanded for new trial.

Nesblitt, C. J., dissented in part.

#### 1. Trial ⇨ 252(B)

Allegation in complaint of passenger's administrator that driver of host automobile was guilty of gross negligence was not sufficient to justify instruction on subject of gross negligence in absence of evidentiary basis for such instruction.

#### 2. Negligence ⇨ 136(14)

If reasonable minds could justifiably have different views on question of whether defendant was guilty of gross negligence, then issue of gross negligence should be submitted to jury for determination, but if evidence is such that reasonable minds might reach only the conclusion that there is no showing of gross negligence, then instruction on such issue is not justified.

#### 3. Negligence ⇨ 13

In order for one to be guilty of "gross negligence," evidence must show that he had full knowledge of hazards he was creating by his actions, such as to evidence reckless disregard of possible consequences and indifference to rights of others, and there must be facts which would lead reasonable man to realize that actor's conduct under circumstances not only creates unreasonable risk of harm to another but also involves high degree of probability that such harm will result.

## 4. Negligence ⇨13

"Gross negligence" differs from "ordinary negligence" in that latter consists in mere inadvertence, incompetence, unskillfulness, or failure to take precautions and gross negligence requires conscious choice of course of action with knowledge that it contains risk of harm to others.

See publication Words and Phrases for other judicial constructions and definitions.

## 5. Automobiles ⇨181(7)

Driver of host automobile who was not shown to be incapable of driving because of beer he had drunk was not grossly negligent in losing control of automobile on curve with resulting death of passenger.

## 6. Evidence ⇨207(4), 205(11)

Normally, plea of guilty of defendant in criminal action is admissible against him in civil action growing out of the same offense and would constitute evidence by way of admission which would tend to prove truth of matter admitted by the guilty plea.

## 7. Trial ⇨281

Where it was not clear what driver of host automobile did admit by his plea of guilty to reckless driving in criminal action, and request of passenger's administrator for instruction upon effect of driver's plea of guilty did not specify which of the alternate grounds in reckless driving statute applied to driver's case, instruction was properly refused. AS 28.35.040.

## 8. Automobiles ⇨246(58)

Evidence that passenger killed in automobile accident willingly, without protest, rode with driver who had had several glasses of beer and who was driving at speeds of from 60 to 70 miles per hour supported giving of instruction upon issue of contributory negligence.

## 9. Appeal and Error ⇨1030(1)

Allowing officer of corporation owning bar where driver of automobile and plaintiff's decedent purchased and consumed beer before...

law suit was not shown to have prejudiced plaintiff's case or to have influenced jury to return verdict for driver.

## 10. Negligence ⇨105

Concept of assumption of risk, which could result in situation where accident victim, even though not contributorily at fault, could be barred from recovery because he knew or should have known of negligently created risk, is disapproved; the just concept should be whether reasonably prudent man in exercise of due care would have incurred the risk despite that knowledge, and if so, whether he would have conducted himself in manner in which he acted in light of all circumstances, including the appreciated risk.

## 11. Appeal and Error ⇨1177(5)

## Automobiles ⇨246(36)

Giving of instruction on host driver's affirmative defense of assumption of risk, which instruction was not limited by notion of what reasonably prudent man would have done under the circumstances in which passenger found himself was improper, and passenger's administrator was entitled to new trial without instruction on assumption of risk.

## 12. Death ⇨95(2)

In death action where measure of damages is amount by which decedent's estate has been diminished because of his death, future loss of earnings should not be reduced to present worth.

## 13. Automobiles ⇨243(1)

Whether corporation owning bar where driver and deceased passenger purchased and consumed beer prior to accident had executed confession of judgment in favor of passenger's administrator prior to trial of action against driver was not relevant to determination of issues between administrator and driver, and refusal to permit driver to elicit testimony from officer of corporation respecting confession of judgment was not error.

## 14. Evidence ⇨508

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can receive appreciable help from the expert witness on the subject on which he testifies.

15. Evidence  $\Rightarrow$  381

Statistical data introduced through expert witness for purpose of proving lifetime income expectations of plaintiff's decedent presented to jury reasonable basis for assisting them in estimating probable future earnings, and admission of charts in evidence was not error.

Millard F. Ingraham and Barry W. Jackson, Fairbanks, for appellant and appellee Herbert Leavitt.

Edward A. Merdes and Howard Staley, of Merdes, Schaible, Staley & DeLisio, Fairbanks, for appellee and appellant Russell E. Gillaspie, Jr.

Before NESBETT, C. J., and DIMOND and RABINOWITZ, JJ.

## OPINION

DIMOND, Justice.

William Leavitt died from injuries received when an automobile, driven by Russell E. Gillaspie, Jr., left the highway and overturned. This action for wrongful death was brought by the decedent's administrator, Herbert Leavitt, against Gillaspie and the Cripple Creek Resort, Inc.<sup>1</sup> The jury returned a verdict in favor of Gillaspie and Leavitt has appealed.

*Leavitt's Appeal**Gross Negligence.*

In his opening statement, Gillaspie's counsel admitted that Gillaspie was negligent. Leavitt requested the court to instruct the jury as follows:

Ordinary contributory negligence on the part of plaintiff is not a defense to an action for injury or death caused by the defendant's reckless or wanton mis-

conduct. Only if the Plaintiff's own conduct is willful or wanton will it be recognized as a defense.

The court refused to give this instruction. Leavitt contends that by refusing to give this instruction the court refused to submit to the jury the issue of whether Gillaspie had been guilty of gross negligence, or to put it in other words meaning the same thing, willful, wanton or reckless misconduct. The evidence from which it must be determined whether or not this contention is correct may be briefly summarized as follows:

Gillaspie, the decedent and Mike Sheehan, and two other persons, were drinking beer at the Malamute Saloon in Ester, Alaska, at approximately 1:30 a. m., the night of the fatal accident. They drank beer together for one and a half or two hours taking turns buying pitchers of beer, each of which held about three glasses. The amount of beer consumed by the five persons amounted to four or five pitchers. Sheehan, the decedent and Gillaspie then rode to the University of Alaska in Gillaspie's car with Gillaspie driving. After spending about fifteen minutes at the University, the three returned to the Malamute Saloon. There they each purchased a pitcher of beer, and taking the pitchers with them, started back to the University with Gillaspie driving. On the way to the University defendant's car failed to make a curve, left the road, and rolled or flipped over two or three times throwing decedent from the car where he suffered fatal injuries.

Gillaspie testified that on the first trip back to the University he felt "high" but "not intoxicated," that the beer he consumed never impaired his ability to drive, and that he kept control of the car at all times. He described his driving as "good." He estimated his speed on the second and fatal trip back to the University at "over

1. Prior to trial, Cripple Creek Resort, Inc., after first denying the allegations of the complaint for wrongful death in its answer to the complaint, executed a consent judgment for the sum of \$100,000, and a judgment in that amount was entered in favor of decedent's administrator against Cripple Creek Resort, Inc.

50," although he admitted telling a police officer right after the accident that he was going from 65 to 70 miles an hour. Nobody said anything to Gillaspie about his driving on the fatal trip, and he did not think that his driving was impaired by his drinking. As regards the accident, Gillaspie testified that he "just lost control of the car \* \* \* instead of \* \* \* making the turn, the car kept on going straight." He knew of the steep shoulders of the curve and the lack of banking. He claimed to have a "pretty good capacity for drinking."

Mike Sheehan, the other passenger on the fatal trip, testified that other than each of the five persons buying a round of beer, he "couldn't say" how much beer the group consumed. He estimated Gillaspie's speed on both trips to the University at "60 and 70." He described Gillaspie as "the least intoxicated" and "intoxicated," and said "I don't remember" in response to questioning about Gillaspie's driving.

Donald Pearson, vice president and stockholder of Cripple Creek Resort, Inc., testified to Gillaspie's presence at the Malamute Saloon the night of the fatal accident but denied remembering serving him anything to drink. He did remember that the decedent "seemed to be sober enough," but denied noticing the condition of the rest of the group. Pearson also denied giving the group permission to take the pitchers of beer out of the bar.

Dr. Raymond Evans testified on the basis of his autopsy of decedent that "something like a beer can or a beer mug or something of that nature or anything round, of that magnitude" pushed in decedent's abdominal wall and crushed his liver.

Sergeant Schlichtig of the Alaska State Police, the investigating officer of the accident, testified as to his observations of the car on the scene of the accident, of the condition of the road, and a reconstruc-

tion of the accident. Sergeant Schlichtig's reconstruction of how the accident occurred, based on his observation and experience, was that Gillaspie's car went into a sideways skid on the pavement, being lifted off of the right wheels onto the left. It continued along the shoulder, with the edge of the pavement scraping the paint off the car under the bottom of the door. It then left the ground at the end of the tracks to the first impact point, where it hit on its right rear, flipped again to the second impact point where it hit on its nose, and flipped over onto the railroad track, where it came to rest upside down pointing in the opposite direction of travel. The sergeant also testified that the road condition was good blacktop, free of ice and snow, moisture or loose gravel. The sergeant also testified that the odor of alcohol on all three persons in the car was quite strong.

[1] Leavitt alleged in his complaint that Gillaspie was guilty of gross negligence. This allegation alone is not sufficient to justify an instruction on that subject. There must be an evidentiary basis for such an instruction.<sup>2</sup>

[2] Where the question has arisen as to whether a directed verdict or a judgment notwithstanding the verdict should be entered with respect to an issue of negligence or contributory negligence, we have held that such issues are for the jury to determine where there is room for diversity of opinion among reasonable men as to whether a defendant is guilty of negligence or a plaintiff is guilty of contributory negligence.<sup>3</sup> We apply that same rule where the question is whether an instruction on the issue of gross negligence should be submitted to the jury for its consideration. If reasonable minds could justifiably have different views on the question of whether plaintiff was guilty of gross negligence, then the issue of gross negligence should

2. *Groseth v. Ness*, 421 P.2d 624, 629 n. 14 (Alaska 1968).

3. *Mallonee v. Finch*, 413 P.2d 159, 162 (Alaska 1966); *McCoy v. Alaska Brick Co.*, 389 P.2d 1000, 1010 (Alaska 1964).

be submitted to the jury for determination. On the other hand, if the evidence is such that reasonable minds might reach only one conclusion, i. e., that from the facts presented there is no showing of gross negligence, then an instruction on such an issue is not justified.<sup>4</sup>

[3,4] In order for one to be guilty of gross negligence, the evidence must show that he had full knowledge of the hazards he was creating by his actions, such as to evidence a reckless disregard of possible consequences and indifference to the rights of others.<sup>5</sup> There must be facts which would lead a reasonable man to realize that the actor's conduct under the circumstances not only creates an unreasonable risk of physical harm to another, but also involves a high degree of probability that such harm will result.<sup>6</sup> Gross negligence differs from ordinary negligence in several important particulars. As stated in the Restatement of the Law of Torts, Second:

It [reckless misconduct or gross negligence] differs from that form of negligence which consists in mere inadvertence, incompetence, unskillfulness, or a failure to take precautions to enable the actor adequately to cope with a possible or probable future emergency, in that reckless misconduct requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man. It differs not only from the above-mentioned form of negligence, but also from that negligence which consists in intentionally doing an act with knowledge that it contains a risk of harm to others, in that the actor to be reckless must recognize that his conduct involves a risk substantially greater in amount than that which is necessary to

make his conduct negligent. The difference between reckless misconduct and conduct involving only such a quantum of risk as is necessary to make it negligent is a difference in the degree of the risk, but this difference of degree is so marked as to amount substantially to a difference in kind.<sup>7</sup>

[5] We do not believe that the evidence shows a conscious choice of a course of action by Gillaspie with full knowledge of a serious danger to others such as to evidence a reckless disregard of possible consequences and indifference to the rights of other persons. Gillaspie was shown to have drunk some beer and to have travelled at a high rate of speed between the Malemute Saloon and the University of Alaska. There is no evidence showing that he was incapable of driving because of the beer he drank; and since he made the first trip to the University and back to the Malemute Saloon without incident, there was no reason to believe that when he started on the fatal trip there was a high degree of probability that the car would fail to make a curve and turn over. We believe that there was no room for diversity of opinion among reasonable men as to whether Gillaspie was guilty of gross negligence, and that reasonable minds could come to only one conclusion, i. e., that Gillaspie was not grossly negligent. The court did not err in declining to give the jury an instruction concerning gross negligence.

During his testimony Gillaspie admitted having entered a plea of guilty to a charge of reckless driving. With respect to such a plea, Leavitt requested the court to instruct the jury that "A plea of guilty is a confession on the part of a defendant of the truth of the material facts of the charge." The court refused to give the

4. Rocky Mtn. Prod. Trucking Co. v. Johnson, 78 Nev. 44, 369 P.2d 198, 202 (1962).

5. McLomere v. Harris, 874 P.2d 410, 412 (Alaska 1962).

413 P.2d-5

6. Nichols v. Baker, 101 Ariz. 151, 415 P.2d 534, 535 (1966).

7. Restatement (Second) of Torts § 600 comment g at 600 (1965).

requested instruction and Leavitt assigns this as error.

[6,7] Normally, a plea of guilty of a defendant in a criminal action is admissible against him in a civil action growing out of the same offense.<sup>8</sup> It would constitute evidence by way of an admission by a defendant which would tend to prove the truth of the matter admitted by the guilty plea. But here it is not clear what Gillaspie did admit by his plea of guilty to reckless driving. That offense is defined by statute as consisting of driving "carelessly, heedlessly or in willful or wanton disregard of the rights or safety of others", or in driving "without due caution or circumspection", or in driving "at a speed or in a manner so as to endanger or be likely to endanger a person or property."<sup>9</sup> The requested instruction did not specify which of the alternate grounds in the statute defining reckless driving applied to Gillaspie's case. Because it is not clear just what Gillaspie pled guilty to, the instruction was properly refused.<sup>10</sup>

#### *Contributory Negligence.*

The court instructed the jury on Gillaspie's affirmative defense of contributory negligence on the part of decedent. Leavitt claims this was error.

In *Saslow v. Rexford*, 395 P.2d 36, 41 (Alaska 1964), we defined contributory negligence as:

"conduct which involves an undue risk of harm to the person who sustains it." It is one's failure to exercise reasonable prudence for his own safety when he perceives danger to himself created by another's negligence.

Leavitt concedes that riding with a driver whom a reasonable man should know to be intoxicated may be contributory negligence. The question here is whether the evidence

is such that reasonable minds could differ on the question of whether decedent knew or should have known that Gillaspie's capacity for driving had been impaired by reason of intoxication.

In *Meade v. Meade*,<sup>11</sup> the Virginia Supreme Court of Appeals stated:

[T]he fact that the host had been drinking and the guest had knowledge of this fact is not sufficient to establish contributory negligence as a matter of law. \* \* \* The evidence must go beyond this and show that because of his drinking the driver's ability to drive was impaired, that the guest knew, or in the exercise of ordinary care should have known, this and yet entered or continued to ride in the car. Whether the guest knew or should have known that the intoxicated condition of the driver impaired his ability to drive is ordinarily a question for the jury.

Here the situation is one where decedent willingly, without protest, drove with a driver who had had several glasses of beer and, in the words of one witness, was "the least intoxicated," and who was driving at speeds of from 60 to 70 miles per hour. The question is whether, under these circumstances, decedent by staying with Gillaspie in his car acted with the care that a reasonably prudent person would have used under those circumstances.

In *Zumwalt v. Lindland*,<sup>12</sup> the Supreme Court of Oregon held that the issue of contributory negligence was properly submitted to the jury where there was evidence of the driver's drinking a substantial amount of beer, known to the plaintiff, and nothing more. The court said:

We need not decide, at this time, how much or how little beer at either end of the scale will require the court to

8. *Mongma v. Williams*, 355 P.2d 107, 110 (Alaska 1963).

9. AS 28.35.040.

10. *Zenuk v. Johnson*, 114 Conn. 383, 153 A. 910, 911-912 (1932); *Bethorn v.*

*Vandyke*, 114 N.J.L. 500, 174 A. 877, 870 (1934).

11. 208 Va. 823, 147 S.E.2d 171, 174 (1960).

12. 220 Or. 28, 300 P.2d 205, 210 (1964).

withdraw the question from the jury. We do hold, however, that upon the evidence in the case at bar a jury could say that the amount of alcohol consumed was sufficient to put a reasonable man upon inquiry concerning the fitness of his driver to convey him safely home. Upon such evidence, the jury could have found that the plaintiff failed to exercise that degree of care that a reasonable person would have exercised for his own safety.

There was no contenti n that the defendant was intoxicated. However, a jury could have considered from the youthfulness of the parties and from the manner in which they had been spending their time immediately prior to the accident that the defendant's ability to operate his vehicle safely had become impaired and that a reasonable person in the plaintiff's position should have known that it was unsafe to ride with the defendant under all the circumstances.

[8] As in the foregoing case, we believe that the issue of decedent's contributory negligence was properly submitted to the jury for its determination. Considering the facts relating to Gillaspie's beer drinking and the speeds at which he drove his car on the first trip from the Malemute Saloon to the University, we believe that reasonable minds could differ as to whether decedent failed to exercise reasonable prudence for his own safety when he decided to ride with Gillaspie on the second, and fatal trip from the saloon to the University. The court's instruction to the jury on contributory negligence was not error.

#### *Testimony of Pearson.*

Gillaspie called as a witness, Donald Pearson, vice president and manager of Cripple Creek Resort, Inc., the corporation owning the bar where Gillaspie and decedent purchased and consumed beer prior to the accident. After questioning Pearson on other matters, Gillaspie's counsel asked

this question: "Mr. Pearson, has Cripple Creek, Inc., been a defendant in this law suit?" Over plaintiff's objections, following a conference in chambers, the trial court allowed the witness to answer this question but prohibited further inquiry into the matter. The court said:

I am going to, as it stands, allow him to be—to answer the fact of whether or not he has been a defendant in this lawsuit. I think that maybe the defendant Gillaspie didn't understand what he was coming up to, and I don't think—I don't want this jury to be misled by the statements of this person if in fact they would find that he may have had some interest in to discolor the truth. But I'm not going to allow any more of those and—

Leavitt alleges error on the part of the trial court in allowing the question and in refusing to give an instruction cautioning the jury, in determining any liability or damages, not to consider the fact that Cripple Creek Resort, Inc., may have been a defendant in the action. Leavitt argues that the question was, alone, irrelevant to the issues before the jury, and that it was likely to invite improper speculation.

[9] We need not decide whether it was proper to allow the question and answer, because Leavitt has not shown that such evidence prejudiced his case or was such as to have influenced the jury to return a verdict for Gillaspie.

#### *Assumption of Risk.*

The court instructed the jury on Gillaspie's affirmative defense of assumption of risk. Leavitt claims this was error.

The concept of assumption of risk was developed from the common law action of a servant against his master. The master was held to be not negligent if he provided a reasonably safe place to work, and the servant was said to have assumed the inherent risks that remained. In this sense assumption of risk was not an affirmative defense, but rather was another way of

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saying the master was not negligent; for the servant had the burden of proving that his injury resulted from a risk other than one inherent in a place that was a reasonably safe place to work.

As the doctrine developed, however, it became an affirmative defense, with the burden of pleading and proof on the master. Thus, even if the servant could show that the master was negligent because he had failed to provide a reasonably safe place to work, the master could escape liability if he could establish that the servant had voluntarily exposed himself to a risk negligently created by the master. As the Supreme Court of New Jersey has pointed out, "Thus two utterly distinct thoughts bore the same label with inevitable confusion."<sup>13</sup>

But the matter did not stop here. The courts came to use the doctrine of assumption of risk, as an affirmative defense, in a way that was different in essence from the defense of contributory negligence. Where contributory negligence was a defense, the question was whether the plaintiff had acted for his own safety as a reasonably prudent man would have acted under the circumstances. But where assumption of risk was a defense, the question was whether plaintiff had voluntarily entered into a situation involving obvious danger, with knowledge of the danger, and without regard to whether he had acted in such a situation as a reasonably prudent man would have acted. The effect of this concept was to exculpate a negligent defendant upon the notion that a plaintiff assumed the risk of that negligence even though he was not contributorily at fault, i. e., even though he had exercised the care of the reasonably prudent man under all the circumstances.<sup>14</sup>

This is the sense in which the doctrine was used by the trial court in this case. The court instructed the jury that Gillaspie would be relieved from liability if he proved that decedent had freely and voluntarily entered into a situation involving danger of personal harm from Gillaspie's conduct, with the knowledge of facts which created the danger and a realization of the risk of harm to decedent from that danger. Such an instruction had the effect of creating the potential of a verdict for Gillaspie, despite the fact that the jury may have found under the issue of contributory negligence that decedent, in the face of the danger of which he had knowledge, still had exercised the care of a reasonably prudent person under all the circumstances. Thus, even though the decedent may have been found to be not contributorily negligent, he would be barred from recovery by reason of assumption of risk.

[10] As a matter of policy we disapprove of a concept which could result in a situation where an accident victim, even though not contributorily at fault, could be barred from recovery because he knew or should have known of a negligently created risk. The just concept should be whether a reasonably prudent man in the exercise of due care would have incurred the risk despite that knowledge, and if so, whether he would have conducted himself in the manner in which the plaintiff acted in the light of all the circumstances, including the appreciated risk.<sup>15</sup> This means that only the traditional notions of negligence and contributory negligence should govern cases such as we have here and that the defense of assumption of risk should not be a defense and should not be used.<sup>16</sup>

13. *McStrick v. Casino Aaron Attractions, Inc.*, 81 N.J. 44, 165 A.2d 90, 93, 63 A.L.R.2d 1208, 1214 (1959).

14. *Id.*, 165 A.2d at 94, 63 A.L.R.2d at 1214-1215.

15. *Id.*, 165 A.2d at 95, 63 A.L.R.2d at 1216.

16. *Folger v. Anderson*, 375 Mich. 29, 193 N.W.2d 180, 141-154 (1965); *McGrath v. Amerlenn Cynamid Co.*, 41 N.J. 272, 100 A.2d 239 (1963); *Zumwalt v. Lindland*, 289 Or. 20, 300 P.2d 205, 207 (1964); II F. Harper & F. James, *The Law of Torts* § 21.3 at 1101-02 (1956).

[11] If the instruction on assumption of risk had been limited by the notion of what a reasonably prudent man would have done under the circumstances in which decedent found himself, with knowledge of the danger that might have been involved, then such an instruction would have dealt with nothing more than another phase of contributory negligence.<sup>17</sup> But as we have pointed out, the instruction was not so limited. It was entirely possible, under the instructions on contributory negligence and assumption of risk, for the jury to have found that decedent was free from contributory negligence but nevertheless could not recover because he had exposed himself to a negligently created risk, without regard to whether a reasonably prudent man may have done so in the same circumstances. Because of such a possibility and because we disapprove of such a concept, a new trial must be ordered with instructions not to give the jury an instruction on assumption of risk.

#### *Reduction of Damages to Present Worth.*

The court instructed the jury that if they found for Leavitt, in computing the amount by which decedent's estate had been diminished because of his wrongful death, the jury must determine the present cash value of such amount. In other words, the jury was instructed to reduce damages to present worth. Leavitt admits that since he lost the case on the question of liability, he is in no position to claim any prejudice from the court's instruction. But he asks us, in the event a new trial is ordered, to hold that such an instruction was erroneous and not a correct statement of the law.

[12] Since the judgment was entered in this case, we decided the case of *Beaulieu v. Elliott*.<sup>18</sup> There we held that in computing future loss of earnings a reduction should not be made to present worth.<sup>19</sup> The reasoning used there would apply in a wrongful death case where the measure of

damages is the amount by which the decedent's estate had been diminished because of his death. We assume that on a retrial of this case the trial court will take cognizance of the *Beaulieu* case and give appropriate instructions to the jury as to the computation of damages.

#### *Gillaspie's Appeal*

Gillaspie appeals on two grounds. The first has to do with the permissible scope of his counsel's examination of Gillaspie's witness, Donald Pearson, vice president and manager of Cripple Creek Resort, Inc., the corporation owning the bar where Gillaspie and decedent and others in the party purchased and consumed beer prior to the accident. Pearson testified that he recalled speaking to decedent on the fatal night and that decedent "seemed to be sober enough." Pearson did not recall the state of sobriety of Gillaspie and the others, except to say that if they had been drunk he would have thrown them out.

Gillaspie's counsel was permitted by the court to inquire of Pearson as to whether the corporation had been a defendant in this action, to which question the answer was "yes." Counsel was not permitted, however, to show by further questioning that the corporation had executed a confession of judgment in Leavitt's favor for \$100,000 prior to the trial of this action. The court held that evidence as to a confession of judgment was not relevant to the determination of the issue between Leavitt and Gillaspie.

Gillaspie claims this ruling was error. His argument is that the state of decedent's sobriety was a material factor to be considered by the jury in determining whether or not decedent was contributorily negligent, that Pearson's testimony that Leavitt appeared to be sober was adverse to the interest of Gillaspie who stood to gain by showing that decedent was not sober, that Pearson may have been motivated in so

17. *Molstrich v. Casino Arena Attractions, Inc.*, 81 N.J. 44, 155 A.2d 90, 95, 82 A.L.R.2d 1208, 1216 (1959).

18. 434 P.2d 605 (Alaska 1967).

19. *Id.*, at 671-672.

testifying by his bias against Gillaspie and in favor of Leavitt, that such bias would be shown by establishing that Pearson's corporation had a financial interest in the case adverse to the interest of Gillaspie, and that such a financial interest would be demonstrated by showing that the corporation had confessed judgment in Leavitt's favor for \$100,000. Gillaspie's reasoning in support of his contention that the corporation had a financial interest in the outcome of the dispute between Leavitt and Gillaspie, is that it was in the interest of the corporation that Leavitt obtain judgment against Gillaspie because this would decrease the possibility that Leavitt would seek to collect the full \$100,000 judgment from the corporation by reason of its confession of judgment in that amount.

[13] This is nothing more than speculation. There was no way of knowing to what extent Leavitt would attempt to collect a judgment from the corporation if a judgment had also been rendered against Gillaspie. Evidence as to the corporation's confession of judgment was, as the trial court correctly held, irrelevant as to the issues between Leavitt and Gillaspie. There was no error in excluding such testimony.

Based upon testimony regarding decedent's educational background, grades<sup>20</sup> and character, the court allowed the introduction in evidence by Leavitt of certain charts prepared by Professor Haring, an economist at the University of Alaska, from income figures contained in the 1960 Alaska census. These charts contained statistical data showing the average annual income of males in Alaska in certain age groups, certain areas, and in certain educational levels. Gillaspie claims this was error on the ground that it was so speculative as to decedent's lifetime income expectations as to be useless to the jury.

20. Decedent was a student at the University of Alaska at the time of his death.

21. *Pedersen v. State*, 420 P.2d 827, 835 (Alaska 1966); *Crawford v. Rogers*, 400 P.2d 189, 192 (Alaska 1965).

[14,15] The charts introduced in evidence reflected Professor Haring's opinion as to the statistical data contained therein. The criterion for determining whether such an expert opinion is admissible is whether the jury can receive appreciable help from the expert witness on the subject on which he testifies.<sup>21</sup> We believe that the jury could receive such help in this case. In determining the loss to an estate in a wrongful death action, the jury at some point must make an estimate as to the decedent's lifetime income expectations. This must be arrived at largely through probabilities, and any evidence that would reasonably tend to indicate the decedent's earning capacity in the future had he lived would be of assistance to the jury.<sup>22</sup> We believe that Professor Haring's data presented to the jury a reasonable basis for assisting them in estimating the probable future earnings of decedent.<sup>23</sup> The admission of the charts in evidence was not error.

The judgment is reversed and the case remanded for a new trial.

NESBETT, Chief Justice (concurring and dissenting).

I concur in the result. It is my opinion that the court erred in giving an instruction on assumption of risk because there was no evidence that Leavitt comprehended the dangers. In *Evans v. Buchner*<sup>1</sup> this court said:

The general rule is that the defense of assumption of risk is not applicable unless the facts which create a dangerous condition or situation are known and the danger itself comprehended by the person against whom the defense is being exerted.

In *Buchner* the court adopted a subjective test. The question in each case was to be

22. See *Turrietta v. Wyche*, 54 N.M. 5, 213 P.2d 1041, 1047, 13 A.L.R.2d 407 (1949).

23. *Krohmer v. Dahl*, 145 Mont. 491, 402 P.2d 979, 981-993 (1965).

1. 380 P.2d 830, 837 (Alaska 1968) (footnote omitted).

whether the plaintiff had a knowledge of the facts and an actual comprehension of the danger. Under *Buchner* it would not be enough to invoke the doctrine of assumption of risk to argue that Leavitt must have had an awareness of the fact that Gillaspie had drunk a lot of beer; that his judgment may have been impaired; that it was dangerous to ride with him and that because he did ride with Gillaspie he comprehended the danger and elected to assume the risk.<sup>2</sup>

Although I concur in the result reached by the majority I do not agree that the defense of assumption of risk should be entirely abolished. Whether the doctrine is entitled assumption of risk or given an appropriate label as a variation of the doctrine of contributory negligence, I believe that it has a place in our jurisprudence in some factual situations.

As was aptly stated by the Supreme Court of California in *Prescott v. Ralph's Grocery Co.*<sup>3</sup>:

The defenses of assumption of risk and contributory negligence are based on different theories. Contributory negligence arises from a lack of due care. The defense of assumption of risk, on the other hand, will negative liability regardless of the fact that plaintiff may have acted with due care. (See *Prosser on Torts* [1941], p. 377.) It is available when there has been a voluntary acceptance of a risk and such acceptance, whether express or implied, has been made with

knowledge and appreciation of the risk. (See *Rest., Torts*, § 893).

Assumption of risk has been abolished as a defense in the master servant relationship in Alaska, as it has in many other states.<sup>4</sup> It has also been abolished in many states in automobile guest statutes. It appears that the defense has been entirely abolished in at least three states.<sup>5</sup> Although some of the legal aspects of the defense may duplicate those of contributory negligence in some factual situations, this is not generally so where there has been a voluntary acceptance of a *comprehended risk*.<sup>6</sup> It is significant that in the cases cited in the preceding note, two of which are relied on by the majority, the plaintiff in *Bolduc v. Crain* had no appreciation whatever of the unusual risk involved in attempting to assist the handler of a particularly "lively" team of horses; that in *Feigmer v. Anderson* there was, as far as can be learned from the opinion, no evidence that plaintiff had an appreciation of any danger involved in hunting ducks out of the same blind as defendant; and that in *Meistrich v. Casino* the only evidence that plaintiff had an appreciation of the danger involved in skating on arena ice which defendant operator had frozen so hard that it became slippery, was that he "noted that his skates slipped on turns". The requirement that there be evidence showing a comprehension of the danger involved would, in my opinion, have made the defense of assumption of risk in

2. The subjective test adopted by *Buchner* is the rule in the majority of jurisdictions. See *Quarero v. Westgate*, 164 Cal.App.2d 612, 831 P.2d 107, 110 (1958); *Prescott v. Ralph's Grocery Co.*, 42 Cal. 2d 158, 265 P.2d 804, 905-908 (1954); *Dean v. Martz*, 829 S.W.2d 371, 374 (Kan.1959); *Evans v. Johns Hopkins Univ.*, 224 Md. 284, 107 A.2d 591, 594 (1961); *Fitzpatrick v. Maratonol*, 234 Or. 102, 370 P.2d 1022, 1028 (1963); *Shoemaker v. Floor*, 117 Utah 484, 217 P.2d 382, 387 (1950); *Kingwell v. Hart*, 47 Wash.2d 401, 275 P.2d 431, 434-435 (1954); *Restatement of Torts* § 893 (1950); *Restatement (Second) of Torts* §§ 400 A-G (1965).

3. 42 Cal.2d 158, 265 P.2d 804, 900 (1954) (emphasis added).

4. AS 28.30.055, 28.30.090.

5. *Feigmer v. Anderson*, 375 Mich. 28, 189 N.W.2d 186, 141-164 (1963) (except in employment relationships and where there has been an express contractual assumption of risk.); *Bolduc v. Crain*, 104 N.H. 108, 151 A.2d 641, 644 (1962); *Meistrich v. Casino Arena Attractions, Inc.*, 51 N.Y. 41, 185 A.2d 80, 82 A.L.R.2d 1208 (1959).

6. See W. Prosser, *The Law of Torts* § 67 (8d ed. 1961).

the foregoing cases inapplicable in Alaska and in other jurisdictions requiring an actual comprehension of the danger.

Section 893 of the *Restatement of Torts* contains numerous factual illustrations of where the doctrine of voluntary acceptance of a comprehended danger has logical application. One example is *Hunt v. Portland Baseball Club*<sup>7</sup> where the court held that a spectator could not recover from the ball club for injuries received when struck by a foul ball because he was intimately familiar with the game of baseball and the risks inherent in being a spectator and had knowingly placed himself in an area of appreciated risk.<sup>8</sup>

Under the majority holding, even though the evidence may show a voluntary acceptance of an appreciated risk, the question would be

whether a reasonably prudent man in the exercise of due care would have incurred the risk despite that [actual] knowledge, and if so, whether he would have conducted himself in the manner in which the plaintiff acted in the light of all the circumstances, including the appreciated risk.

The new doctrine is intended to simplify and clarify the law of negligence and eliminate incompatible defenses by subsuming assumption of risk under contributory negligence, but I doubt if this will be the ultimate effect. If the new test were applied to the facts of the Oregon baseball case just mentioned, the jury would be asked to determine first whether a reasonably prudent person in the exercise of due care would have purchased a seat not behind a screen even though he comprehended the danger. The evidence would ordinarily have established that seats behind a screen

were available and that management could have made the balance of the seats safer by screening,<sup>9</sup> but at the expense of visibility. The jury would be aware of the fact that hundreds of thousands of baseball, hockey and other sports fans daily and knowingly sit in areas of danger as spectators. If the jury conscientiously applied the objective test of the average man, and based its judgment on what it knew the average man was doing daily throughout the country, it might very well conclude that the spectator had acted with "due care" in purchasing a ticket for an unprotected seat, even though he knew there was a danger that he might be injured while occupying the seat.

What appears to be an unrealistic aspect of the new test is at once apparent. Why should any controlling effect be given to the question of whether a reasonably prudent man would have incurred the comprehended risk if the evidence has established that the particular plaintiff did in fact voluntarily incur the comprehended risk? How can it be logically said that a person has acted with "due care" when it has become apparent from the evidence that he deliberately and knowingly chose to place himself in a position of danger? If the jury should find that the spectator had not acted with due care, in spite of the fact that a large segment of the population daily engaged in identical conduct, can it be said that the objective test of the average, or reasonably prudent man, has been realistically applied?

If the jury finds that the plaintiff spectator has acted with due care, the next question it would be asked to decide under the new test would be whether he

would have conducted himself in the manner in which the plaintiff acted in

7. 207 Or. 337, 200 P.2d 405, 406-508 (1950).

8. Footnote 18 of the majority opinion cites the Oregon case of *Zumwalt v. Lindland*, 230 Or. 28, 398 P.2d 205, 207 (1964), as authority for the complete abolition of the doctrine of assumption of risk, but since the Oregon automobile

guest statute was involved it would appear that the case has a limited application.

9. In which case the jury would experience little difficulty in finding management negligent, particularly if there was insurance in the background.

the light of all the circumstances, including the appreciated risk.

This aspect of the test must mean that the jury must next decide whether the spectator, after having knowingly and without negligence placed himself in an area of danger, thereafter conducted himself in such a manner as not to increase the danger to himself. In other words, was he contributorily negligent after having taken his seat? Judging by the wording of the new test, this question would be asked in every case where the jury had found initially that the spectator was not negligent in purchasing an unprotected seat, even though no evidence may have been introduced during the trial which would tend to show that he had done anything to increase the existing danger. In my opinion, it is unrealistic to ask a jury to determine the answer to a question which has no factual basis in the evidence. For example, if the evidence showed that the spectator had merely occupied his seat until he was hit in the head by a foul ball, the judge would be obligated, it would seem, to set aside a verdict for the defendant's management because of lack of any evidence that the spectator had done anything to increase the risk of injury. The question might be appropriate if there was evidence that the spectator had remained seated in a fixed posture until struck by the ball when he could have avoided being struck by ducking to one side or the other, or downward, or perhaps could have even caught the ball in his hands. Evasive or protective action of this sort is regularly employed by the average fan who must, at times, be an athlete of sorts himself in order to exercise the judgment and agility necessary to avoid injury.

The foregoing discussion demonstrates, in my opinion, the impracticability of attempting to determine the usual assumption of risk situation by the rules of negligence. For other examples see a discussion with illustrations in Restatement of Torts § 893 (1939).

Noe G. FLORES, Appellant,

v.

STATE of Alaska, Appellee.

No. 879.

Supreme Court of Alaska.

July 10, 1968.

Homicide prosecution. The Superior Court, Third Judicial District, Anchorage District, Ralph E. Moody, J., rendered judgment on verdict finding defendant guilty of murder in one case and manslaughter in another, and defendant appealed. The Supreme Court, Rabinowitz, J., held that indictment charging defendant with first-degree killing of victim "by a method and means unknown" was sufficient.

Affirmed.

1. Homicide  $\Rightarrow$  7

Means or manner by which victim met death are not elements of murder. AS 11.15.010.

2. Indictment and Information  $\Rightarrow$  69

Indictment charging defendant with first-degree killing of victim "by a method and means unknown" was sufficient. Rules of Criminal Procedure, rule 7(c); AS 11.15.010, 12.40.100

3. Witnesses  $\Rightarrow$  44

Sworn witness was not rendered incompetent by his statement on cross-examination that he did not believe in God. Rules of Civil Procedure, rule 43(b, d), (g) (5); Rules of Criminal Procedure, rule 26(n).

4. Criminal Law  $\Rightarrow$  699(3), 759(2), 887

Sworn witness' statement on cross-examination that he did not believe in God did not entitle defendant to have testimony stricken, to a mistrial, or to judgment of acquittal.

5. Witnesses  $\Rightarrow$  78

In absence of showing that witness was unaware of his serious obligation to re-