

**ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672**  
**7558 SENATE LABOR & COMMERCE**

STRAIT 9/11/91

A M E N D M E N T

OFFERED IN THE SENATE

TO: CSSB 218 (TRANSPORTATION)

Page 1, line 7:

Delete "certain water of and adjacent to"  
Insert "the inland and coastal water of"

Page 1, line 11:

Delete "certain water of and adjacent to"  
Insert "the inland and coastal water of"

Page 2, line 3, following "in the":

Insert "inland and coastal"

Page 2, line 7, following "in the":

Insert "inland and coastal"

Page 2, line 11, following "in the":

Insert "inland and coastal"

A M E N D M E N T

OFFERED IN THE SENATE

TO: CSSB 218 (TRANSPORTATION)

Page 1, line 7:

Delete "ertain"

Insert "the inland and coastal"

Page 1, line 11:

Delete "ertain"

Insert "the inland and coastal"

Page 2, line 3:

Delete "water of"

Insert "inland and coastal water of and adjacent to"

Page 2, line 7:

Delete "water of"

Insert "inland and coastal water of and adjacent to"

Page 2, line 11:

Delete "water of"

Insert "inland and coastal water of and adjacent to"

A M E N D M E N T

OFFERED IN THE SENATE

TO: CSSB 218 (TRANSPORTATION)

Page 1, line 13:

Delete "tariffs"

Insert "rates for basic pilotage services"

A M E N D M E N T

OFFERED IN THE SENATE

TO: CSSB 218 (TRANSPORTATION)

Page 2, line 1:

Delete "independently of the shipping industry"

Insert "as independent contractors"

A M E N D M E N T

OFFERED IN THE SENATE

TO: CSSB 218 (TRANSPORTATION)

Page 2, lines 5 - 7:

Delete all material and insert:

"(5) properly run pilot organizations can provide important services on behalf of marine pilots and can further the policy of protecting lives and property and the marine environment in the water of the state."

A M E N D M E N T

OFFERED IN THE SENATE

TO: CSSB 218 (TRANSPORTATION)

Page 2, line 25:

Delete "all water [WATERS] covered by this chapter"

Insert "the inland and coastal water of the state [ALL WATERS COVERED BY THIS CHAPTER]"

Page 3, line 20:

Delete "water [WATERS] covered by this chapter"

Insert "inland and coastal water of the state [WATERS COVERED BY THIS CHAPTER]"

Page 6, line 20:

Delete "certain water of or adjacent to"

Insert "the inland or coastal water of"

A M E N D M E N T

OFFERED IN THE SENATE

TO: CSSB 218 (TRANSPORTATION)

Page 2, line 25:

Delete "water [WATERS] covered by this chapter"

Insert "the inland and coastal water of and adjacent to the state [ALL WATERS COVERED BY THIS CHAPTER]"

Page 3, line 20:

Delete "water [WATERS] covered by this chapter"

Insert "inland and coastal water of and adjacent to the state [WATERS COVERED BY THIS CHAPTER]"

Page 6, line 20:

Delete "certain"

Insert "the inland or coastal"

A M E N D M E N T

OFFERED IN THE SENATE

TO: CSSB 218 (TRANSPORTATION)

Page 3, line 5:

Delete "the criteria by which pilotage tariffs are established"

Insert "maximum rates for basic pilotage service"

A M E N D M E N T

OFFERED IN THE SENATE

TO: CSSB 218 (TRANSPORTATION)

Page 3, lines 5 - 6:

Delete "and

(D) pilotage tariffs for each pilotage region"

Insert

"(D) rates to be charged by pilots for basic pilotage services within  
each pilotage region; and

(E) charges to be paid by persons licensed or applying for a license  
under this chapter for licensing and other purposes"

ALSO ASSESSMENTS FOR AUDITS

A M E N D M E N T

OFFERED IN THE SENATE

TO: CSSB 218 (TRANSPORTATION)

Page 3, line 17:

Delete "pilot organizations"

Insert "pilots licensed under this chapter"

A M E N D M E N T

OFFERED IN THE SENATE

TO: CSSB 218 (TRANSPORTATION)

Page 3, line 27, after "organizations":

Insert "and by pilots licensed under this chapter"

A M E N D M E N T

OFFERED IN THE SENATE

TO: CSSB 218 (TRANSPORTATION)

Page 3, line 25:

Delete "and"

Page 3, line 27, after "organizations":

Insert ": and

(4) standards under which a pilot may receive a license and endorsements to pilot vessels in more than one pilotage region"

A M E N D M E N T

OFFERED IN THE SENATE

TO: CSSB 218 (TRANSPORTATION)

Page 7, following line 25:

Insert a new bill section to read:

\*\* Sec. 19. AS 08.62.200 is amended by adding a new paragraph to read:

(5) "basic pilotage service" means the conduct of a vessel over or within a specific waterway or into or out of a specific port."

Renumber the following bill sections accordingly.

AMENDMENT

OFFERED IN THE SENATE

TO: CSSB 218 (TRANSPORTATION)

Page 4, line 4:

Delete "an active"

Insert "a"

A M E N D M E N T

OFFERED IN THE SENATE

TO: CSSB 218 (TRANSPORTATION)

Page 4, lines 9 - 11:

Delete all material.

Insert new subsections to read:

"(b) A person may be licensed to pilot vessels in more than one pilotage region.

(c) A license must identify the specific waterways and ports in each pilotage region in which a licensee is authorized by the board to pilot vessels. The board shall authorize a licensee to pilot vessels in a specific waterway or port in a pilotage region upon the licensee satisfying the training and other qualifying requirements required by the board to pilot vessels in that waterway or port."

Reletter the following subsection accordingly.

A M E N D M E N T

OFFERED IN THE SENATE

TO: CSSB 218 (TRANSPORTATION)

Page 6, lines 12 - 13:

Delete "for pilotage services that is different from the pilotage tariff"

Insert "in excess of the maximum rate for basic pilotage services"

AMENDMENT

OFFERED IN THE SENATE

TO: CSB 218 (TRANSPORTATION)

Page 6, line 23:

Delete "direction and control"

Insert "conduct"

A M E N D M E N T

OFFERED IN THE SENATE

TO: CSSB 218 (TRANSPORTATION)

Page 6, line 30, following "misconduct":

Insert "or in a case where the pilot's error, omission, fault, or neglect is grounds for imposition of a disciplinary sanction on the pilot by the board under AS 08.62.150(a)(2) - (5)"

A M E N D M E N T

OFFERED IN THE SENATE

TO: CSSB 218 (TRANSPORTATION)

Page 7, line 8:

Delete "or organization of pilots that relate, directly or indirectly,"

Insert "that relate directly"

Page 7, line 10:

Delete "or organization of pilots"

A M E N D M E N T

OFFERED IN THE SENATE

TO: CSSB 218 (TRANSPORTATION)

Page 7, line 31, through page 8, line 6:

Delete all material.

Renumber the following bill sections accordingly.

CG

7-LS0923D.19  
Cook/Utermohle  
05/11/91

AMENDMENT

OFFERED IN THE SENATE

BY SENATOR PEARCE

TO: CSSB 218 (TRANSPORTATION)

Page 3, line 24, after "program":

Insert "consistent with 46 C.F.R. Part 16"

COVER IN PRGS

A M E N D M E N T

OFFERED IN THE SENATE

BY SENATOR PEARCE

TO: CSSB 218 (TRANSPORTATION)

Page 7, lines 14 - 15:

Delete all material and insert:

"Sec. 08.62.175. REGIONAL ORGANIZATIONS OF MARINE PILOTS. (a) To the extent permitted under federal and state law, persons licensed under this chapter may form organizations of marine pilots within each marine pilotage region.

(b) The board may recognize organizations of marine pilots within each marine pilotage region.

(c) An organization of marine pilots recognized by the board shall promote a safe and reliable system of marine pilotage for the region in which the organization is recognized, including dispatching and training of marine pilots and deputy marine pilots and other functions that the organization may assume. An organization of marine pilots recognized by the board may not begin operating until the articles, bylaws, and rules of the organization are approved by the board on the basis of

(1) uniform and nondiscriminatory application of the articles, bylaws, and rules to marine pilots and deputy marine pilots licensed under this chapter;

(2) compliance with applicable laws; and

(3) effectiveness in

(A) promoting an efficient, reliable, and professional marine pilotage system in the region;

(B) maintaining a sufficient number of qualified pilots available for dispatch to serve the needs of vessels visiting the region during each hour of the day and each day of the year;

(C) maintaining a training program for marine pilots and deputy marine pilots that is approved by the board."

ORGANIZATIONS MUST BE APPROVED  
BY BOARD

7-LS0923ND.20

Utermohle

05/13/91

A M E N D M E N T

OFFERED IN THE SENATE

BY SENATOR PEARCE

TO: CSSB 218 (TRANSPORTATION)

Page 7, lines 14 - 15:

Delete all material and insert:

"Sec. 08.62.175. REGIONAL ORGANIZATIONS OF MARINE PILOTS. (a) To the extent permitted under federal and state law, persons licensed under this chapter may form organizations of marine pilots within each marine pilotage region.

(b) The board ~~may~~ <sup>SHALL</sup> recognize organizations of marine pilots within each marine pilotage region.

(c) An organization of marine pilots recognized by the board shall promote a safe and reliable system of marine pilotage for the region in which the organization is recognized, including dispatching and training of marine pilots and deputy marine pilots and other functions that the organization may assume. An organization of marine pilots recognized by the board may not begin operating until the articles, bylaws, and rules of the organization are approved by the board on the basis of

(1) uniform and nondiscriminatory application of the articles, bylaws, and rules to marine pilots and deputy marine pilots licensed under this chapter;

(2) compliance with applicable laws; and

(3) effectiveness in

(A) promoting an efficient, reliable, and professional marine pilotage system in the region;

(B) maintaining a sufficient number of qualified pilots available for dispatch to serve the needs of vessels visiting the region during each hour of the day and each day of the year;

(C) maintaining a training program for marine pilots and deputy marine pilots that is approved by the board."

Page 8, following line 19:

Insert a new bill section to read:

**"\* Sec. 23. TRANSITION: REGIONAL ORGANIZATIONS OF MARINE PILOTS.** Notwithstanding AS 08.62.175(c), added by sec. 17 of this Act, an organization of marine pilots recognized by the Board of Marine Pilots may operate until July 1, 1992, without having its articles, bylaws, and rules approved by the board under AS 08.62.175(c)."

Renumber the following bill sections accordingly.

AMENDMENT

OFFERED IN THE SENATE

BY SENATOR PEARCE

TO: CSSB 218 (TRANSPORTATION)

Page 3, line 2, after "state":

Insert "that are, to the extent possible, similar to those established for federal pilotage waters under 46 U.S.C. 8502(a)"

"AT LEAST AS STRINGENT AS"

Pg 6 LN 20 <sup>Delaware</sup>  
INSERT "INLAND, + <sup>COASTAL WATERS</sup>  
~~INLAND~~ <sup>ADJACENT</sup> COASTAL WATERS"

A M E N D M E N T

OFFERED IN THE SENATE

BY SENATOR PEARCE

TO: CSSB 281 (TRANSPORTATION)

Page 4, line 11, after "region":

Insert "and that the pilot possesses currency of knowledge consistent with requirements of 46 C.F.R. 10.713"

N/O

A M E N D M E N T

OFFERED IN THE SENATE

BY SENATOR PEARCE

TO: CSSB 218 (TRANSPORTATION)

Page 6, line 6:

After "illegally"

Insert "possesses;"

After "uses"

Insert ";

YES

A M E N D M E N T

*JW*

OFFERED IN THE SENATE

BY SENATOR PEARCE

TO: CSSB 218 (TRANSPORTATION)

Page 7, after line 15:

Insert a new bill section to read:

\*\* Sec. 18. AS 08.62.180 is amended to read:

Sec. 08.62.180. EXEMPTIONS. This chapter does not apply to

(1) vessels subject to federal pilot requirements in 46 U.S.C. 8502 [UNDER ENROLLMENT, ~~EXCEPT AS PROVIDED IN AS 08.62.185~~];

(2) fishing vessels registered in the United States or in British Columbia, Canada;

(3) vessels propelled by machinery and not more than 65 feet in length over deck, except tugboats and towboats propelled by steam;

(4) vessels of United States registry of less than 300 gross tons and towboats of United States registry and vessels owned by the State of Alaska, engaged exclusively

(A) on the rivers of Alaska, or

(B) in the coastwise trade on the west coast of the United States including Alaska, Hawaii, and British Columbia, Canada;

(5) vessels of Canada, built in Canada and manned by Canadian citizens including Canadian cruise ships, engaged in frequent trade between British Columbia and Alaska, if reciprocal exemptions are granted by Canada to vessels owned by the State of Alaska and those of United States registry; and

(6) pleasure craft."

Renumber the following bill sections accordingly.

A M E N D M E N T

OFFERED IN THE SENATE

BY SENATOR PEARCE

TO: CSSB 218 (TRANSPORTATION)

Page 7, after line 15:

Insert a new bill section to read:

\*\* Sec. 18. AS 08.62.180 is amended to read:

Sec. 08.62.180. EXEMPTIONS. This chapter does not apply to

(1) vessels subject to federal pilot requirements in 46 U.S.C. 8502 [UNDER ENROLLMENT,] except as provided in AS 08.62.185;

(2) fishing vessels, including fish processing and fish tender vessels, registered in the United States or in British Columbia, Canada;

(3) vessels propelled by machinery and not more than 65 feet in length over deck, except tugboats and towboats propelled by steam;

(4) vessels of United States registry of less than 300 gross tons and towboats of United States registry and vessels owned by the State of Alaska, engaged exclusively

(A) on the rivers of Alaska, or

(B) in the coastwise trade on the west coast of the United States including Alaska, Hawaii, and British Columbia, Canada;

(5) vessels of Canada, built in Canada and manned by Canadian citizens including Canadian cruise ships, engaged in frequent trade between British Columbia and Alaska, if reciprocal exemptions are granted by Canada to vessels owned by the State of Alaska and those of United States registry; and

(6) pleasure craft."

Renumber the following bill sections accordingly.

A M E N D M E N T

OFFERED IN THE SENATE  
TO: CSSB 281 (TRANSPORTATION)

BY SENATOR PEARCE

Page 7, after line 15:

Insert a new bill section to read:

"\* Sec. 18. AS 08.62.180 is amended to read:

Sec. 08.62.180. EXEMPTIONS. This chapter does not apply to

- (1) vessels under enrollment, except as provided in AS 08.62.185;
- (2) fishing vessels, including fish processing and fish tender vessels, registered in the United States or in British Columbia, Canada;
- (3) vessels propelled by machinery and not more than 65 feet in length over deck, except tugboats and towboats propelled by steam;
- (4) vessels of United States registry of less than 300 gross tons and towboats of United States registry and vessels owned by the State of Alaska, engaged exclusively
  - (A) on the rivers of Alaska, or
  - (B) in the coastwise trade on the west coast of the United States including Alaska, Hawaii, and British Columbia, Canada;
- (5) vessels of Canada, built in Canada and manned by Canadian citizens including Canadian cruise ships, engaged in frequent trade between British Columbia and Alaska, if reciprocal exemptions are granted by Canada to vessels owned by the State of Alaska and those of United States registry; and
- (6) pleasure craft."

Re-number the following bill sections accordingly.

A M E N D M E N T



OFFERED IN THE SENATE

BY SENATOR PEARCE

TO: CSSB 218 (TRANSPORTATION)

12

Page 7, after line 15:

Insert a new bill section to read:

"\* Sec. 18. AS 08.62.185(a) is amended to read:

(a) Any oil tanker, whether enrolled or registered, of 50,000 dead weight tons or greater, shall, when navigating in state waters beyond Alaska pilot stations either

(1) employ a pilot licensed by the state under this chapter, or

~~(2) utilize a federally licensed pilot WHOSE DUTY STATION HAS BEEN ON~~

~~THAT TANKER THROUGHOUT THAT SPECIFIC VOYAGE?"~~

Renumber the following sections accordingly.

A M E N D M E N T

OFFERED IN THE SENATE

BY SENATOR PEARCE

TO: CSSB 218 (TRANSPORTATION)

Page 7, after line 15:

Insert a new bill section to read:

"\* **Sec. 18.** AS 08.62.185(a) is amended to read:

(a) Any oil tanker, whether enrolled or registered, of 50,000 dead weight tons or greater, shall, when navigating in state waters beyond Alaska pilot stations [EITHER

(1)] employ a pilot licensed by the state under this chapter [, OR

(2) UTILIZE A FEDERALLY LICENSED PILOT WHOSE DUTY STATION HAS BEEN ON THAT TANKER THROUGHOUT THAT SPECIFIC VOYAGE]."

Renumber the following bill sections accordingly.

A M E N D M E N T

OFFERED IN THE SENATE

BY SENATOR PEARCE

TO: CSSB 218 (TRANSPORTATION)

Page 7, after line 25:

Insert a new subsection to read:

"(c) For purposes of (a) of this section, the board shall adopt regulations defining the phrase "when a licensed pilot is available.""

A M E N D M E N T

OFFERED IN THE SENATE

TO: CSSB 218 (TRANSPORTATION)

Page 6, line 22, following "chapter.":

Insert "The board, where appropriate, shall define the mandatory pilotage water of the state, to be the same as federal pilotage waters established under 46 U.S.C. 8502(a)."

A M E N D M E N T

OFFERED IN THE SENATE

BY SENATOR PEARCE

TO: CSSB 218 (TRANSPORTATION)

Page 2, lines 8 - 11:

Delete all material and insert:

"(c) It is the intent of the legislature that the Board of Marine Pilots

(1) exercise jurisdiction over pilotage and marine pilots in the inland and coastal water of and adjacent to the state to the maximum extent allowed under federal and state law;  
and

(2) work with

(A) marine pilots to ensure that safe pilotage is maintained in the state;  
and

(B) pilot organizations in a cooperative effort to enhance the policy of protecting lives and property and the marine environment."

A M E N D M E N T

OFFERED IN THE SENATE

TO: CSSB 218 (TRANSPORTATION)

Page 4, lines 3 - 4:

Delete "administer and enforce"

Insert "assist the board in administering and enforcing"

FISCAL NOTE

STATE OF ALASKA  
1991 LEGISLATIVE SESSION

BILL NO. SB 218

Revision Date: \_\_\_\_\_ Department Affected: Commerce & Economic Dev.  
 Title: Relating to the Board of Marine Pilots, marine pilots, and .... BRU: Occupational Licensing  
 Component: Administration  
 Sponsor: Senate Labor & Commerce  
 Requestor: Senate Transportation COMPONENT SERIAL NO. 

0	3	5	6
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Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES	72.3	72.3	72.3	72.3	72.3	72.3
TRAVEL	20.0	20.0	20.0	20.0	20.0	20.0
CONTRACTUAL	5.0	5.0	5.0	5.0	5.0	5.0
SUPPLIES	1.0	1.0	1.0	1.0	1.0	1.0
EQUIPMENT	10.0					
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	108.3	98.3	98.3	98.3	98.3	98.3
:						
CAPITAL						-
REVENUE	0	240.1	0	240.1	0	240.1

FUNDING: (Thousands of Dollars)

GENERAL FUND	108.3					
FEDERAL FUNDS						
OTHER GF/PR		98.3	98.3	98.3	98.3	98.3
TOTAL	108.3	98.3	98.3	98.3	98.3	98.3

POSITIONS:

FULL-TIME	1	1	1	1	1	1
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary.)  
(SEE ATTACHED)

Prepared By: Jennifer Strickler, Admin. Officer Phone: 465-2144  
 Division: Occupational Licensing Date: April 25, 1991  
 Approved by Commissioner: Glenn A. Olds *[Signature]* Com. Council  
 Agency: Commerce and Economic Development Date: 4-25-91

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

FISCAL NOTE ANALYSIS

SB 218

The bill makes a number of amendments to the Marine Pilotage Act. The expenses identified in this fiscal note result from increasing the mandatory number of meetings to at least three as required by Section 4 of the bill, and the employment of a Marine Pilot Coordinator established by Section 7. The Marine Pilot Coordinator is placed in the partially exempt service of State government and is charged with the responsibility to administer and enforce the provisions of the chapter. The costs identified are based on a similar Executive Director position, Range 22.

Personal Services:

Marine Pilot Coordinator, XE, 12 months, Range 22A	\$72.3
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<u>Travel:</u>	20.0
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Section 4 of the bill increases the number of meetings to at least three each year. Currently the board is required to meet once a year and it is often difficult to fund an additional meeting. Funding of \$10.0 will provide for two additional meetings in addition to the one already included in the FY 92 budget request.

Funding of \$10.0 will cover travel and per diem expenses for the marine pilot coordinator to travel to each marine pilotage region to audit regional marine pilot organizations, review training programs, and to enforce compliance with the marine pilotage act.

<u>Contractual Services:</u>	5.0
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This funding will provide for communications, postage, printing and advertising costs.

<u>Supplies:</u>	1.0
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Funding will provide for daily operating supplies for the Marine Pilot Coordinator position.

Equipment:

10.0

Funding will provide one-time equipment costs for the Marine Pilot Coordinator position. This funding will also provide for on-going office space costs.

TOTAL COSTS:

\$108.3

Revenues:

There are approximately 123 licensed marine pilots whose licensing fees must be increased to cover the new costs provided in the bill. In addition, current expenses of the Board of Marine Pilots exceed revenues generated through licensing fees to support its program. Therefore, licensing fees will have to be increased substantially in order for the licensing program to support its costs.

Licensing fees must be raised to cover an additional \$240.0 (\$206.6 new costs identified in this fiscal note for the first two years and the current deficit of \$33.4). A biennial licensing fee of \$1,952 (\$976 per year) will be necessary to cover program costs. Marine Pilot licensees currently pay a biennial fee of \$180 (\$90 per year). If licensing fees are not increased to cover program costs, the program must then be supported by the general fund.

Since marine pilot licenses are due for renewal on December 31, 1992 (FY 93), revenues will not be collected in the first year of operation under provisions of HB 194. Funding in the first year must therefore be covered by general funds, unless a special one time assessment fee is made to licensees in FY 92.

The revenues identified in this fiscal note are based on the assumption that licensees will be willing to increase their fees to fully cover the costs of its licensing program beginning in FY 93 in conjunction with the license renewal period.

# Alaska State Legislature

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



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## SENATE LABOR AND COMMERCE COMMITTEE

TO: Senator Curt Menard, Chair  
Senate Transportation Committee

FROM: Rod Mourant, Legislative Aide  
Senate Labor & Commerce Committee

A handwritten signature in cursive script that reads "Rod".

Senator, thank you for scheduling SB 218 Marine Pilots legislation for a hearing. It has been over a decade since the legislature has updated the statutes dealing with marine pilotage in Alaska.

To assist the committee in its deliberations Senator Pearce has requested that I provide copies of Improving Alaska's Marine Pilotage System, copies of Senate Bill 218, copies of an article on marine pilotage from Seaways magazine, copies of proposed legislation approved by the Board of Marine Pilots, and a copy of a memorandum from the Office of the Governor on the topic. A fiscal note and position paper has been requested from the Department of Commerce & Economic Development.

Thank you again for considering this legislation.

Attachments

COMMITTEE TESTIMONY IN SUPPORT OF S.B. 218  
BY CAPT. W.E. MURPHY, SOUTHWEST ALASKA PILOTS

Mr. Chairman and members of the committee, thank you for this opportunity to testify in support of Senate Bill 218. My name is Edward Murphy. I reside in Homer and I've been a marine pilot in Alaska since 1974. I pilot ships throughout Southwest Alaska including very large crude carriers and other tankers, cruise ships, container ships, bulk carriers and fisheries related vessels. I served on the Alaska Board of Marine Pilots for four years, three of them as chairman.

In January of last year I wrote Governor Cowper a letter concerning grave safety problems I saw emerging in Alaska's state pilotage system. Among them:

- The lowest entry standards for licensing in the country.
- No state mandated standards or requirements for pilot training.
- Control and manipulation of state pilots by Outside steamship companies and agents.
- Pilot Board difficulties in maintaining and upgrading pilot standards.
- Inordinate delays in pilot discipline cases.
- Legal problems for pilot associations in training pilots and maintaining high standards in the absence of state requirements.

Governor Cowper responded to the concerns expressed in my letter by ordering his Office of Management and Budget to conduct an independent study of Alaska's state pilotage system and to make recommendations for improvement based on the study findings. The result of the staff study is a booklet entitled Improving Alaska's Marine Pilotage System. This document is a remarkably thorough and thoughtful look at pilotage in Alaska written by researchers who have no ax to grind except the public interest. If you have not already done so, I urge you to read the study. It will tell you far better than I can the problems with our state's pilotage system and the need for legislative change to the marine pilot statutes.

Senate Bill 218 is legislation which the pilots who live and work in Alaska believe in. It is legislation you can all proudly support because it is, ultimately, a safety bill. Consider the following:

1. The "FINDINGS" section makes clear for the first time the public service nature of a pilot's work in terms of protecting lives and property and protecting the marine environment. It recognizes that to properly fulfill that public service function marine pilots must operate independently of the shipping industry. That is, be free from the shipowner's interest and control. This is a crucial element of safety long recognized by state pilots and identified by the study staff. The federal government recognized this essential element of piloting in the Oil Pollution Act of 1990 by requiring state licensed pilots who are not a member of the ships crew to pilot tankers in certain sections of Prince William Sound.

2. The bill clearly establishes the powers and duties of the Board of Marine Pilots. The ambiguity of the existing law in this regard has long been the cause of conflicting interpretation by staff attorneys from the A.G.'s office. The result has often been Board confusion, frustration, failure to act in the public interest, and law suits.

3. The Bill raises the entry standards for pilot license applicants. The staff study, pages 15 through 17, clearly illustrates how remarkably low Alaska's standards are. The American Pilot Association says they are the lowest in the country.

4. The Bill declares that the pilot board may establish standards for training programs. Incredibly, pilot training is not addressed at all under current statute.

5. The staff study pointed out the essential element of local knowledge in all piloting and recommended that Alaska's vast coastline be divided into pilot regions where pilots would be restricted to piloting in one region only.

In addition to the features of the Bill previously listed, there is one additional area of concern which is equally crucial to a workable and professional piloting system. That is limiting pilot liability. The Bill limits a pilot's liability and that of pilot organizations. Every time a pilot steps on a ship he faces the possibility of financial ruin. This is in addition to possible criminal penalties he may suffer in the event the vessel he is piloting suffers an accident. Criminal penalties are called for in House Bill 315 passed by the legislature in 1990. Piloting is a high risk profession and few, if any, pilots can stand the sort of twin liabilities now emerging in this state. Some sort of liability limitation is reasonable as the legislatures of other maritime states have found.

Washington is an example: its pilot act also sets a liability limit of \$5,000. Note that S.B. 218 does not limit liability if the pilot's error or negligence was gross or wilful.

Liability is also a major problem for pilot organizations because they are caught in a "Catch-22" situation. The state doesn't require any pilot training. Yet all mariners, and probably laymen too, know that pilots have to be well trained. Yet when we train new pilots, as we must, we can be sued if that pilot has an accident. But if we failed to train a new pilot who then had an accident we would be sued for negligence. It's an impossible situation and another compelling reason why the state must both require pilot training and limit the liability of pilot organizations in their training function.

The Bill gives pilots the explicit authority to organize themselves, which of course they do now. It is important to recognize that the state cannot realistically maintain its own pilot training and dispatch service. Pilots form themselves into organizational structures called associations for this purpose. The associations provide pilots, central dispatching, employees, boats, equipment, pilot stations, radio and communications equipment, transportation, training and administration of the whole as a system. We do this with Alaska resident pilots 24 hours a day, 365 days a year in every kind of weather. The Bill does not franchise any pilot group or require membership in any pilot group.

While this is an excellent bill, there are a couple of areas I would recommend the committee add. These are:

1. Page 1, line 5 under POLICY, FINDINGS AND INTENT, add:

"The first and paramount duty of marine pilots licensed by the state is to provide for the public safety and the protection of the marine environment." This is an important declaration of legislative intent and obligation of state pilots.

2. Page 2, line 23 under POWERS AND DUTIES: substitute the word "shall" for "may". This wording change is important because of continuous past difficulties for the pilot board in doing its job with vague language now in statute. It is very important to make the pilot board's duties and obligations specific and required.

3. Page 5, line 11 insert a new section entitled "DEPUTY PILOTS AND DEPUTY PILOT TRAINING". It is extremely important to spell out in statute a progressive training program where an applicant gains training and obtains a deputy pilot license, then serves under that limited license for a period of time before progressing to higher tonnage and, eventually, an unlimited license. I have some suggested language if you would like to consider adding this suggested new section.

Alaska's original state pilotage act of 1970 has changed little since it was enacted. Yet shipping in the state has increased many fold with larger and faster ships carrying more dangerous cargoes and an ever increasing number of passengers. Often these ships ply the waters of Alaska with only one United States citizen aboard; that person is the ship's pilot who is licensed by this state. The consequences of the pilot's failure to adequately meet the demands placed upon him can have profound consequences for the marine environment and the citizens of Alaska. The pilot's role is a public service one. Alaska's citizens have a right to expect that state pilots have met high entry standards, have undergone rigorous training and possess extensive local knowledge. As the study group recognized, safety demands that pilots be independent and free of the shipowner or his agent's interest and control. Senate Bill 218 is long overdue. I urge you to consider it favorably.

Thank you

Senate Bill 218

My name is Mike Williams. I am Vice President, Environment & Contingencies, at Alyeska Pipeline Service Company. Alyeska is concerned about the quality of pilots because that can have a significant effect on the safety of tankers serving the Valdez Terminal.

Pilots are an essential part of tanker safety. Their knowledge and expertise is recognized. But as with any profession there is the need to ensure that the quality of the individuals in the organizations remains high. It is essential that the individual pilots retain their skills, are physically and mentally capable of performing their very important job.

The profession must therefore be regulated. Regulation can be through the free market where the pilot would be liable for his negligence or by statute where a balanced committee of fellow pilots and users of pilotage services can judge the competence of a pilot.

The general thrust of Senate Bill 218 is therefore to be applauded. However, it is apparent that on some major areas it is still weak.

The Bill should be strengthened in the area concerning drug and alcohol usage. Currently, as written, the board may introduce a drug and alcohol testing program. This should be changed to shall introduce these programs.

A similar use of the word "may" emasculates the section on disciplining sanctions. Too many pilotage authorities throughout the world are toothless tigers. A license should automatically be revoked if a pilot has breached any of the conditions listed in Section AS 08.62.150(a), viz:

- (1) is incompetent in the performance of pilotage duties;
- (2) is chemically impaired [HABITUALLY INTOXICATED];
- (3) illegally uses or sells narcotic or hallucinogenic drugs;
- (4) makes a false statement to obtain a license;
- (5) violates a provision of this chapter or a regulation adopted under it;
- (6) is guilty of misconduct during the course of employment; [OR]
- (7) has had the person's United States Coast Guard pilot license conditioned, suspended, or revoked; or
- (8) charges, collects, or receives an amount for pilotage services that is different from the pilotage tariff established by the board [SUFFERED REVOCATION OF FEDERAL LICENSURE AS A PILOT].

Simply stated, this legislation must ensure that Alaska has first class pilots by clearly delineating and requiring sanctions for certain unacceptable actions.

Finally, one section that is not covered in the proposed Bill is the composition of the Board. Currently the Alaskan Pilotage is made up prominently of pilots and shipping agents. If a profession is self-monitored in this way, it is most difficult for the disciplining of pilots to be objective. The Board must have representation of both ship owners and the general public to ensure that the best monitoring of the profession is carried out.

Thank you for considering these recommendations. I would be happy to respond to questions, if any.

SB 218 (Transportation)  
and  
HB 194 (L & C)  
Comparison

- Section 1: Ok
- Section 2: Ok
- Section 3: Ok, but public members are not in statute.
- Section 4: Three meetings versus four.
- Section 5: (1) Ok  
(2) Ok  
(3) Ok  
(4, 5, 6, 7, 8) Ok.
- Section 6: Ok.
- Section 7: Ok.
- Section 8: Ok.
- Section 9: 60 days versus 45.
- Section 10: SB 218 has one section relating to licensing, HB 194 has 3 because of the new Deputy Marine Pilot.
- Section 11: Ok.
- Section 12: Ok.
- Section 13: Ok.
- Section 14: Ok.
- Section 15: Ok.
- Section 16: Ok.
- Section 17: Ok.
- Section 18: Ok.
- Section 19: Ok.

Section 20: Ok.

Section 21: Ok.

Section 22: Ok, but will need to be amended with inclusion of Deputy Marine Pilot.

Section 23: Ok.

Section 24: Ok.

NOTE: HB 194, Section 16 PILOT'S LIEN FOR COMPENSATION, is not included in SB 218.

HB 194, Section 18 EXEMPTIONS, is not included in SB 218.

Side by Side Comparison  
Pearce Bill/Davis Bill

Because sections do not correspond numerically, Senator Pearce's bill will be used for reference.

Section 1: Policy, Findings, and Intent.  
Mentions need of Marine Pilots, wants to give board broad statutory authority.  
*Basically the same.*

TITLE QUESTION

Section 2: Extends sunset clause of the Board of Marine Pilots to 6/30/95.  
*Not mentioned.*

Section 3: Appointment and terms of office.  
*Same.*

START UP TAKEN TAPER

Section 4: Hold at least three meetings or with vote of board majority.  
*Up to four or with a vote of board majority.*

Section 5: Powers. (1) is in Davis Section 1, Findings.  
(2) is in Davis Section 4, (1)  
(3) is in Davis Section 4, (4)  
(4) is in Davis Section 4, (12 and 5)  
(5) is in Davis Section 4, (8)  
(6) is in Davis Section 4, (9)  
(7) is in Davis Section 4, (10)  
(8) is in Davis Section 23, Training  
Davis Section 4, (7)  
(b1) is in Davis Section 4, (2)  
(b2) is in Davis Section 4, (6)  
(b3) is in Davis Section 4, (7 except for selection criteria)

BY BD REQ +  
REGULATIONS PHYSICALS

Section 6: Pilot Board requiring a pilot to submit to a physical or mental exam.  
*Davis Section 4, (11c).*

Section 7: The department, with the approval of the board, is authorized to hire the Marine Pilot Coordinator. The Coordinator is partially exempt.  
*Davis Section 5. Coordinator is hired by the department and is approved by the board. Coordinator is not partially exempt (no mention).*

DEF. SUPPORTS

Section 8: Licensing a pilot in only one region. Public notice of exam dates.  
*Davis Section 6.*

DEFINITION  
OF LOCAL KNOWLEDGE.  
3 REGIONS AT FIRST

Section 9: Pilot must file application for exam 60 days before exam date.

*BOARD SUPPORTS* → Davis Sections 7 and 8. Pilot must apply for exam 15 working days before exam date.

Section 10: Qualifications.  
(a) in Davis Section 10 (1 and 2)  
(b) in Davis Section 10 (4b)  
(1-5e) in Davis Section 10 (1-5e)

*DAVIS SUPPORTS SENATE BILL*  
*BOARD SUPPORTS HOUSE BILL*

**NOTE:** Davis Bill sets up a Deputy Pilot which the requirements in Senator Pearce's Section 10 are. Furthermore, Davis' bill contains a whole new section on training.

Section 11: Renewal.  
(a) Davis Section 6, (b)  
(1) Davis Section 11, (1)  
(2) Davis Section 11, (2)  
(3) Davis Section 11, (3)  
(4b) Davis Section 11, (4a,b)

Section 12: Lapsed License.  
Meets requirements in AS 08.01.10-120 and passes a written and oral exam if the license has lapsed one year or more.

*it* → Same Section, plus fam trips.

Section 13: Disciplinary Actions.  
No significant differences.

Section 14: Allows board to take disciplinary sanctions.  
No reference.

Section 15: Lists water adjacent to the state for pilotage. Ship in state waters must have a pilot during movement of the ship.  
Davis Section 14 requires pilots on board vessels navigating the inland and coastal waters of Alaska as determined by the board.

*situation*  
*DEFINITION OF COASTAL WATERS INLAND*  
*Pg 6 LN 3*

Section 16: Liability:  
(a) \$5,000.00 per incident except if pilot is either grossly negligent or guilty of wilful misconduct.  
Technically the same as in Davis' Section 14, except potential for a higher liability.

Section 17: Pilots may organize themselves into organizations as permitted under state and federal law.  
Davis Section 17. Technically the same. However, Davis Bill has more guidelines as to the organizations goals, training, etc.

*BETTER*

Section 18: Penalties for not employing a pilot.  
*Same as in Davis Section 20.*

*Per* *CONRAD*  
*DAV*

Section 19: Short title.  
*Davis Section 21.*

Section 20: Technical add to statute.  
*Davis Section 22.*

*ONLY APPLICABLE  
TO STATE  
ANTI-TRUST*

Section 21: Anti-trust.  
*Davis Section 23 and adds "licensed."*

Section 22: Transition.  
*Davis Section 24, plus additional information.*

Section 23: Immediate effective Date.  
*Davis Sections 25, 26, 27; breaks down effective date to specific sections.*

#### ADDITIONAL SECTIONS IN DAVIS BILL:

Section 10: Qualifications for Deputy Marine Pilot License – Includes section "Training."

Section 16: Pilot's Lien for Compensation.

Section 18: Exemptions.



**By Capt. Ed Murphy**

*Founding member of Southwest Alaska Pilots Assn.*

## Attacks are assault on pilot profession

Last year then-Governor Steve Cowper directed his research staff to study Alaska's marine pilot system and report back to him. The staff studied other states' pilot licensing boards and the relationship between other states' boards and pilot associations. In addition, the researchers examined antitrust concerns, legal issues relevant to pilot experience and training and the necessity of state pilots operating independently of shipping industry control.

Nine months of research and study by the Governor's staff resulted in a booklet entitled "Improving Alaska's State Piloting System." This document presents a remarkably thorough and thoughtful look at pilotage in Alaska written by independent researchers who started out hardly knowing a marine pilot from an airline pilot. Notable among their many findings and recommendations are:

- Amend the state pilotage act to establish the fact that marine pilots are independent contractors under state control for the purpose of protecting lives, property, vessels and the marine environment.
- Give the pilot board clear and unambiguous authority to promulgate and enforce more extensive entry level requirements to the profession, now the lowest of any of the maritime states.
- Move to exclusive licensing by regions. The staff determined that the customary practice of pilots holding vast tracts of pilotage on their licenses and piloting throughout such large areas is inappropriate given the local knowledge requirement implicit in providing a pilot service. Hence they recommended exclusive licensing by region to insure local knowledge.
- Establish a formalized deputy pilot training program with substantial training and experience requirements before deputies can be advanced to higher tonnage limits.

## PERSPECTIVES



**By Scott Jones**

*Vice President  
Alaska Maritime Agencies*

## Monopolies do not mean safer transits

The following thoughts concern whether or not competition in marine pilotage will result in safety compromises in Alaska, and is also relevant to the position that industry has shown to the Alaska legislature concerning HB194.

It is apparent to most in the maritime industry that pilotage monopolies do not necessarily equal safer transits for vessels within pilotage waters. In Alaska, which presents some of the widest ranges of piloting requirements, it has been our experience that having a system in which it is possible for licensed pilots to compete based on skill and service is best.

Competition for piloting jobs enhances safety when there is strong regulatory oversight. The same holds true for areas where no competition exists. Without firm discipline in response to instances of poor judgment, safety will suffer, no matter what the competitive situation is. Competition amongst pilot groups does nothing to change this fact. If a state wants good pilots then it should see to it that poor piloting results in economic sanctions through disciplinary action. This is the proper weapon for states to wield in pilotage policy, not monopolies.

In Alaska there has been a need for stronger statutory authority for the pilot board for some time. Industry and pilots are in agreement on this. Uncertainty in its authority and mandate hurts a state's ability to provide the best pilotage possible. Recent events on the Columbia River point out the inherent danger of allowing this to happen. If indeed, as has been reported, radio requests for speed and position are being ignored, then the Oregon board should see to it that the offenders are terminated. The reports should be investigated immediately and thoroughly, including the monitoring of VHF traffic. Perhaps it is time to mandate a single channel for pilotage purposes so that such monitoring is feasible. The real cause for alarm in this case is not that there is competition, but rather that poor

**Murphy** CONTINUED FROM PAGE 10

- Establish better recency criteria; some sort of a "use it or lose it" provision such as a minimum number of ship movements between license renewals.
- Give the pilot board specific authority to establish and enforce pilot tariffs.
- Exempt pilot associations from antitrust exposure. The staff determined that pilot associations provide the core of pilotage service and training in Alaska (as well as in all the other maritime states) and that pilot associations are the most efficient mechanisms for providing comprehensive, 24-hour per day, year-round pilot services.
- Recognize pilot organizations in state law and charter them to provide state approved training for deputy pilots.

As a result of the study and the obvious and glaring ineffectiveness of Alaska's present pilot statute, Ketchikan Rep. Cheri Davis introduced House

Bill 194, a complete overhaul of the pilotage act. This started some hurried action by the cruise ship industry, apparently led by Holland America Line. Industry has mounted an impressive lobbying campaign in Juneau which Alaska pilots would describe as disinformation. Industry claims to support HB 194 while at the same time offering in committee last minute amendments apparently designed to delay passage until the legislature adjourns and the bill dies. These foreign flag operators have made no bones about their opposition to regional licensing, their desire to contract with their own pilots and their preference for a competitive pilotage system with no fixed tariff where the lowest bidder gets the piloting job.

The lobbying efforts of the cruise industry are being assisted by a small new group of so-called Alaska pilots led by individuals who do not reside in Alaska, do not hold full and unlimited state pilotage licenses, and who were involuntarily disassociated from the

Southeastern Alaska Pilots Association (SEAPILOTS), the former longtime provider of pilot services to Holland America . . .

This is enormously frustrating to Alaska pilot associations because, in the past, representatives of the cruise industry have complained to the state pilot board about the low caliber of some pilots. Yet when associations terminate a pilot for cause . . . that same person shows up as a competitor on the ships of one of the complaining companies! I believe this is a powerful example of bad faith on the part of the industry.

The opposition to the new Alaska pilot act by wealthy and powerful cruise ship companies is viewed by Alaska resident pilots as an assault on their profession, their independence as public pilots and, certainly, their livelihoods. If industry manages to defeat HB 194, a difficult future lies ahead. Alaska pilots face a situation where non-resident, part time pilots

**Murphy** CONTINUED ON PAGE 12

**PERSPECTIVES**

**Jones** CONTINUED FROM PAGE 10

piloting is being allowed to continue.

Therefore, under the best scenario, the better the pilot, the more work that pilot gets. This was the situation in San Francisco Bay prior to the forced amalgamation that the California legislature allowed in 1985. There were several inland pilots who were simply better than others and were frequently employed for trickier maneuvers at the request of agents serving vessels headed for such areas. Among them were Capt. Ken Hulme and Capt. Sam Davies, both now deceased, and we made frequent use of their skills. Their ability was such that the Coast Guard would frequently lift fog related shut downs once either captain started moving from anchorage! However, since 1985, the situation has deteriorated significantly which is widely acknowledged in the industry. Since a mandatory rotation system is now used (a frequent result in non-competitive areas), often times pilots are not suitably matched to the task at hand and the risk of an incident is greatly increased.

We won't go into the tremendous cost increases that have resulted because this article is related to safety issues, but I'm sure those whose task it is to approve the extra pilot and tug bills that now occur will be nodding agreement on this point!

---

*Any system that allows competition for jobs and innovation is innately superior to one that does not.*

---

Another example of competition benefitting safety is the current situation that exists in the Bering Sea and Bristol Bay. Prior to 1988, there was no competition for piloting jobs in this entire vast region. In that year a group of pilots in the existing organization broke away and formed their own association. Before this, feeder vessels calling Alaska in the fisheries trade often were forced to enter Alaskan

pilotage waters without a pilot at all! Then, when requesting to make the frequent inter-port shifts that the fish processors require of them, they often had to wait the required 36 hours for a pilot before they could proceed, on their own, to deep water destinations, where prudence mandated a pilot regardless of the wait, they were forced to sit idle much longer. In a place where weather, wind and tides are at such extremes, it is not very safe to force vessels to wait 36 hours for anything! It seemed that in the summer, when the salmon were running and the big fisheries push was on, vessels plying the Gulf of Alaska would get preference on available manpower. Despite our repeated protests and innumerable meetings, this went on for years. Into this frustrating void came the new association and now the trade is well served, year round, by a group dedicated to it. Safety is vastly improved. All vessels have a pilot when and where they need them (Alaska weather permitting of course!)

**Jones** CONTINUED ON PAGE 12



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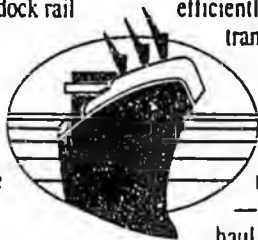
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**Murphy** CONTINUED FROM PAGE 11

come to Alaska in the summer and take the "cream" jobs at a cut rate.

Instead, pilots will be forced into inappropriate employer/employee relationships with shipowners where a pilot's independent navigational judgment on the bridge will be clouded by the financial and competitive interests of his shipowner employer. Pilots will worry more about keeping their jobs than performing their proper public service role of insisting that shipmasters follow the rules in Alaska waters. In short, Alaska pilots are worried about industry control of state piloting. Such a scenario is in no way far fetched.

Finally, if Holland America, that fine old company now under new ownership, and others in the cruise ship industry of similar persuasion get their way and realize a short term financial gain by advancing a system of cut rate pilotage with company pilots, they will create a future good for no one. Industry itself will come to regret the days of cut rate pilotage and industry will truly get what it pays for in the pilot profession. When that happens I predict the cruise ship operators will be back in Juneau. But this time they will be the ones asking for a better and safer state pilot system with independent pilots and a fixed tariff. ■

**Jones** CONTINUED FROM PAGE 11

and the practice of convoying several vessels at a time by a single pilot has stopped. The skill level and requisite familiarity that are so vital in the ever-changing harbors of western Alaska are improved.

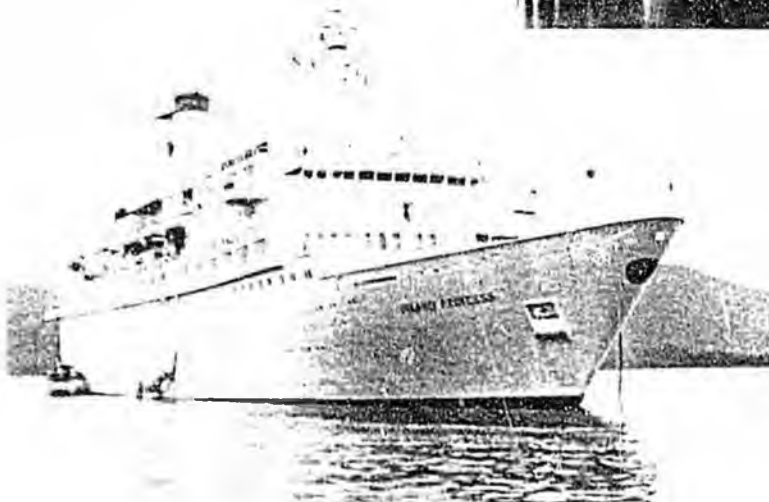
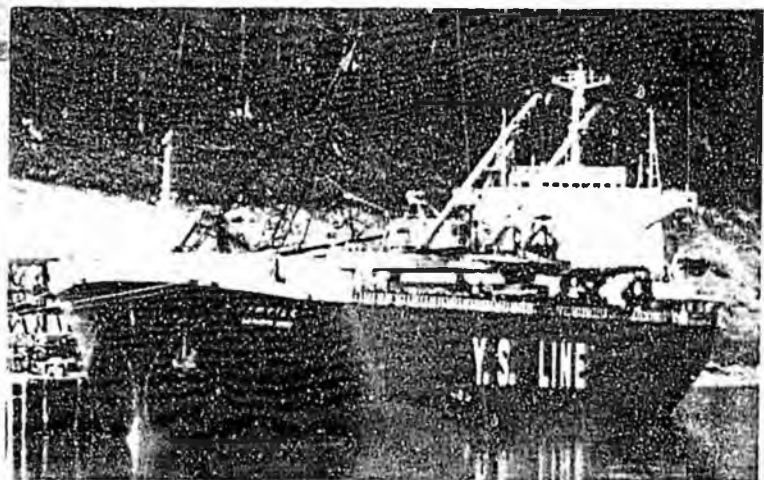
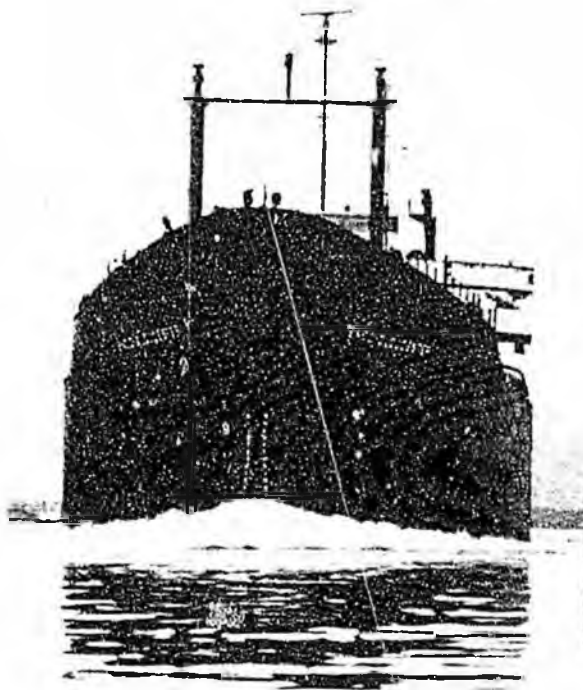
In conclusion, the benefits of competition are a positive force toward safety, especially when a strong pilot board is diligently exercising its prerogative. Any system that allows competition for jobs and innovation is innately superior to one that does not. That is why we so strongly favor the maintenance of such a system in Alaska. It is far more responsive to real issues of vessel safety instead of philosophical ones. Those that are opposed to this are either ill-informed or else do not truly have safety at the core of their concern. ■

**THE FOLLOWING DOCUMENT  
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*SEE SENATE TRANSPORTATION Comm.  
SB 218 FOR A COPY OF THIS DOCUMENT  
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# Improving Alaska's Marine Pilotage System



Office of the Governor  
Division of Policy  
November 1990



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TO : KEVIN DOUGHERTY & MARY PIERCE, CO-CHAIRS  
LABOR/MANAGEMENT AD HOC COMMITTEE

FROM : SHARI KOCHMAN, DIRECTOR *SK*  
WORKERS' COMPENSATION DIVISION *jk*

DATE : NOVEMBER 6, 1990

RE : SUGGESTIONS FOR AMENDMENTS TO THE ACT

---

The following is a list of issues, in order of priority, that the department is asking the Ad Hoc Committee to address in any workers' compensation legislation in 1991. As you will note, some of the issues were included in SB 508 from the 1990 session. Both Jan Hansen and I will be available to work with you to explain our concerns in these areas and establish language for bill introduction.

1. AS 23.30.041(k), payments to the employee during rehabilitation: The language in SB 508, proposed in the 1990 legislative session, solves most of the problems with this subsection.

2. AS 23.30.080: There are literally hundreds of uninsured employers in Alaska. Though the department has requested several prosecutions, none has been successfully undertaken since the 1988 amendment to AS 23.30.075(b) which increased the criminal fine from \$1,000 to \$10,000. Moreover, many uninsured employers work during the summer season only, and by the time the board goes through its required processes to issue a stop order under Section 80, the employer is gone or out of business. Accordingly, to enable the department to impress employers with the need to provide insurance to cover their employees, the department suggests the following: 1) give the division authority to issue stop orders that are immediately effective--that is, stop work now, have a hearing later; and 2) give the board the authority to assess civil penalties for failure to insure.

3. AS 23.30.107 and new AS 23.30.108, confidentiality of the board's files: There is a growing demand for copies of workers' compensation files. While there are legitimate uses for these records, the department is concerned about the commercial uses (index bureaus get the information from the State and then sell it to insurance companies) and the improper uses (employers seek the information to decide whether or not to hire a person) of this information. Under the current freedom of information provisions, the information must be provided to anyone regardless of how it may be used. The attached draft language seeks to preserve the legitimate uses while preventing some of the commercial or improper uses.

*Draft  
FINE 80  
BEING*

MEMO TO KEVIN DOUGHERTY & MARY PIERCE (CONT.)  
RE: SUGGESTIONS FOR AMENDMENTS TO THE ACT  
NOVEMBER 6, 1990

2

4. AS 23.30.095(e), the employer may have the employee examined by a doctor the employer chooses: AS 23.30.095(h) currently requires all parties to serve medical reports on the other party once an application or petition has been filed. We have structured this filing requirement in 8 AAC 45.052. However, in the division's experience, employers often do not send copies of their medical reports to the employee or his representative or the treating doctor when they have examinations done under AS 23.30.095(e) before an application or petition has been filed. This seems unfair to the employee and his treating physician; if there are suggestions for treatment from another examiner, the treating physician ought to know about them. Moreover, the employee ought to know what employer's examiner is saying about him since employer knows what employee's doctor is saying.

To solve this problem the department suggests the following changes to AS 23.30.095(e): Add something like, "The physician chosen by the employer shall prepare a written report following the examination. Within five days after the employer receives the report, it shall provide the original report to the board and a copy to the employee." Even that might not be enough. Perhaps something additional, such as the following, should be added: "For the purposes of AS 23.30.155(e), no controversion of benefits based on the report of a medical examination by a physician chosen by the employer is valid unless the employer files the original of the report with the board and a copy with the employee within five days after the report is received." The effect of this would be that the employer could be required to pay a 25% penalty to the employee even if it filed a timely controversion notice.

5. AS 23.30.175(a), minimum weekly rate payable: If you have had the opportunity to review the SB 322 sectional analysis with annotated cases Jan Hansen recently gave you, you will note that there are lots of petitions requesting permission to pay compensation at a rate less than \$154 per week. The statutory language is confusing and perhaps even contradictory, the regs we made solved some of the problem but not all of it, and it seems we need to find a better, self-executing way to do this. Here is the department's proposal: "The weekly rate of compensation for disability or death may not exceed \$700 and initially may be not less than \$110 when the employee has furnished documentary proof of the employee's wages or less than \$154 when the employee has not furnished documentary proof of the employee's wages. However, if the [BOARD DETERMINES THAT THE] employee's spendable weekly wage[S] is [ARE] less than \$110 a week as computed under AS 23.30.220, or less than \$154 a week in the case of an employee who has furnished documentary proof of the employee's wages, the employee's weekly compensation rate shall equal the employee's spendable weekly wage[S]. The employer may pay compensation at the

employee's spendable weekly wage without a board order according to rules established by the board. If the employer erroneously computes and pays the employee's rate at less than \$154 per week, the employer shall {insert some penalty or some incentive here so that employers will take this seriously and not try to take advantage of employees.} If the employee's spendable weekly wage[S] is [ARE] greater than \$154, but 80 percent of the employee's spendable weekly wage[S] is less than \$154, the employee's weekly rate of compensation shall be \$154. Prior payments made in excess of the adjusted rate shall be deducted from the unpaid compensation in the manner the board determines. In any case, the employer shall pay timely compensation."

The board could then require employers to file affidavits and documents with the compensation report. Some appropriate penalty should give them an incentive to do it right, unlike their current behavior.

6. AS 23.30.155(d), last employer in a multiple employer/insurer case pays benefits while the employers/insurers solve the liability dispute: As you can see from the cases under this subsection, there have been some problems with the language. The department suggests the following changes: "When payment of [TEMPORARY DISABILITY] benefits is controverted solely on the grounds that another employer or another insurer of the same employer may be responsible for all or a portion of the benefits, the most recent employer or insurer who is a party to the claim and who may be liable shall make the payments during the pendency of the dispute. When a final determination of liability is made, any reimbursement required, including interest at the statutory rate, and all reasonable costs and attorneys' fees incurred by the prevailing employer, shall be made within 14 days of the determination."

7. Fix the "compensation" definition problem. More than 15 years ago the Supreme Court noted that "compensation" needed to be more rigorously and consistently applied throughout the Act. See Williams v. Safeway Stores, 525 P.2d 1087 (Alaska 1974). The problem was dealt with in two places in the 1988 amendments, AS 23.30.105(a) and AS 23.30.130(a), but nothing else has been done. This is what the department recommends:

a. Keep the present definition of "medical and related benefits," AS 23.30.265(20).

b. Amend the definition of "compensation," AS 23.30.265(8), as follows: "compensation" means the money allowance payable to an employee for disability or the dependents for the employee's disability or death as provided for in this chapter and includes the funeral benefits provided for in this chapter;"

c. Add the following definition of benefits: "benefits" means compensation and medical and related benefits, reemployment preparation benefits, rehabilitation specialist fees, attorney's fees and legal costs, and interest."

d. Change the following sections as follows:

- 1/ AS 23.30.010 - Change "compensation" to "benefits."
- 2/ AS 23.30.011(b)(2) - Change "income benefits" to "compensation."
- 3/ AS 23.30.011(b)(3) - Eliminate this subsection.
- 4/ AS 23.30.011(c) - Change "compensation," used twice in this subsection, to "benefits."
- 5/ AS 23.30.011(c)(4) - Change "compensation benefits" to "benefits"; change "income benefits or medical and related benefits" to "benefits."
- 6/ AS 23.30.011(c)(6) - Change "compensation" to "benefits."
- 7/ AS 23.30.012 - Change "compensation" to "benefits."
- 8/ AS 23.30.015(a) - Change "compensation," used three times, to "benefits."
- 9/ AS 23.30.015(b) - Change "compensation," used four times, to "benefits."
- 10/ AS 23.30.015 - Change "compensation" to "a contribution."
- 11/ AS 23.30.015(e)(2) - Change "compensation" to "benefits."
- 12/ AS 23.30.015(f) - Delete "and compensation."
- 13/ AS 23.30.015(h) - Change "compensation," used three times, to "benefits."
- 14/ AS 23.30.015(i) - Change "compensation" to "benefits."
- 15/ AS 23.30.020 - Change "compensation" to "benefits."
- 16/ AS 23.30.025(b) - Change the first "compensation" to "benefits," and delete the second "compensation" or add the word "workers" before it.
- 17/ AS 23.30.030 - Change "compensation" to "benefits." I think this section could be shortened a lot by adding the definition of "benefits" and using the three terms, "benefits," "compensation," and "medical and related benefits" properly throughout instead of repeating the litany of what amounts to medical and related benefits.
- 18/ AS 23.30.045(a) - Change "compensation," used twice, to "benefits."
- 19/ AS 23.30.045(b) - Change "compensation" to

- "benefits."  
20/ AS 23.30.055 - Change "compensation" to  
"benefits."  
21/ AS 23.30.060(a) - Change "compensation" to  
"benefits."  
22/ AS 23.30.060(b) - Change "compensation"  
(in the sample notice) to "benefits."  
23/ AS 23.30.075(a) - Change "compensation,"  
used twice, to "benefits."  
24/ AS 23.30.075(b) - Change "compensation or  
other benefits" to "benefits."  
25/ AS 23.30.092 - Delete "and compensation."  
26/ AS 23.30.100(a) - Change "compensation" to  
"benefits."  
27/ AS 23.30.100(b) - Change "compensation" to  
"benefits."  
28/ AS 23.30.100(d)(3) - Change "compensation"  
to "benefits."  
29/ AS 23.30.110(a) - Change "compensation" to  
"benefits."  
30/ AS 23.30.110(e) - Change "compensation" to  
"benefits" or "workers' compensation"?  
31/ AS 23.30.110(g) - Should the first  
"compensation" be changed to "benefits"?  
32/ AS 23.30.120(a) - Change "compensation" to  
"benefits."  
33/ AS 23.30.125(a)-(f) - Depending on what is  
done in AS 23.30.110(e), it should be the same here. In other  
words, what should a "compensation order" be called?  
34/ AS 23.30.130(a)-(b) - Since this section  
was changed in the 1988 amendments, I am not sure what should be  
done with it.  
35/ AS 23.30.145(b) - Redraft this section as  
follows: " If an employer controverts any benefits except  
compensation, failed to file a timely controversion notice, failed  
to pay benefits within 15 days after they become due or otherwise  
resisted the payment of benefits, and if the employee has employed  
an attorney in the successful prosecution of the claim, the board  
shall make an award to reimburse the employee for the costs in the  
proceedings, including a reasonable attorney fee. The award is in  
addition to the benefits ordered."  
36/ AS 23.30.145(c) - The same term used for  
"compensation order" in AS 23.30.110 and 125 should be used here.  
In the last sentence of the section "compensation or medical and  
related benefits" should be changed to "benefits."  
37/ AS 23.30.155(a) - Change "compensation,"  
used twice, to "benefits."  
38/ AS 23.30.155(a)(1) - Change "compensation"  
to "benefits."  
39/ AS 23.30.155(a)(5) - Change

"compensation," used twice, to "benefits."  
40/ AS 23.30.155(f) - Change "compensation,"  
used three times, to "benefits."  
41/ AS 23.30.155(h) - Change "compensation,"  
used five time, to "benefits."  
42/ AS 23.30.155(i) - Change "compensation" to  
"benefits."  
43/ AS 23.30.155(k) - Delete the entire  
subsection.  
44/ AS 23.30.165(a) - Change "compensation,"  
used two times, to "benefits."  
45/ AS 23.30.165(d) - Change "compensation,"  
used two times, to "benefits."  
46/ AS 23.30.165(e) - Change "compensation" to  
"benefits."  
47/ AS 23.30.170(a) - Change "compensation,"  
used four times, to "benefits." The term for "compensation order"  
should be changed to comport with the term chosen in AS 23.30.110  
and 125.  
48/ AS 23.30.170(c) - Change "compensation  
order" to the same term used in AS 23.30.110 and 125.  
49/ AS 23.30.205(d)(2) - Change "compensation"  
to "workers' compensation."  
50/ AS 23.30.230(b) - Change "compensation  
order" to the same term chosen in AS 23.30.110 and 125.  
51/ AS 23.30.235 - Change "compensation" to  
"benefits."  
52/ AS 23.30.245(a) - Change "compensation or  
medical services and supplies" to "benefits."  
53/ AS 23.30.245(b) - Change "compensation" to  
"benefits."  
54/ AS 23.30.255(a) - Change "compensation,"  
used four times, to "benefits."  
55/ AS 23.30.255(b) - Change "compensation" to  
"benefits."  
56/ AS 23.30.260(2) - Change "compensation" to  
"benefits."  
57/ AS 23.30.265(28) - Change "compensation"  
to "benefits."

Most of these changes should be non-controversial; they are what the board has been doing. If I had any doubts about them I put in a questions mark. This is not an exhaustive list. Someone else should go through the law to look for all the uses of compensation. I have obviously left many uses as they are because I think they are correct.

8. AS 23.30.155(o), requiring the board to report frivolous or unfair controversions to the insurance division: The two recent board decisions under this subsection make it clear this

MEMO TO KEVIN DOUGHERTY & MARY PIERCE (CONT.)  
RE: SUGGESTIONS FOR AMENDMENTS TO THE ACT  
NOVEMBER 6, 1990

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is not working the way the Legislature, and presumably the Ad Hoc Committee, intended. This could be remedied in one of two ways: 1) either delete the subsection entirely to allow the division to report adjuster misbehavior to the Division of Insurance as it did before the enactment of this subsection; or 2) the more desirable approach would be to rewrite it as follows: "The board shall promptly notify the division of insurance if the board determines that the employer's insurer has filed a notice of controversion for a reason without legal merit or based on a false statement of fact [FRIVOLOUSLY OR UNFAIRLY CONTROVERTED COMPENSATION DUE UNDER THIS CHAPTER]. After receiving notice from the board, the division of insurance shall determine if the insurer has committed an unfair claims settlement practice under AS 21.36.125. When the board determines that the adjuster for a self-insured employer has filed a notice of controversion for a reason without legal merit or based on a false statement of fact, the board shall consider the self-insured employer's claims adjusting practices in determining whether to cancel or renew a self-insurance certificate."

9. AS 23.30.105(a), statute of limitations: The following change should be made to this subsection: "[HOWEVER, THE MAXIMUM TIME FOR FILING THE CLAIM IN ANY EVENT OTHER THAN ARISING OUT OF AN OCCUPATIONAL DISEASE SHALL BE FOUR YEARS FROM THE DATE OF INJURY, AND] The right to compensation for death is barred unless a claim therefore is filed within one year after the death, except that if payment of compensation has been made without an award on account of the injury or death, a claim may be filed within two years after the date of the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215." The deleted language was declared invalid in W.R. Grasle Co. v. Alaska Workmen's Compensation Board, 517 P.2d 999 (1974), and should have been removed from the statute long ago.

10. AS 23.30.220(a)(2), determining the gross weekly earnings: It is our understanding one of the purposes of the amendment to this subsection was to cut down on the great deal of litigation on this issue. The amendment has succeeded in that only a handful of cases on this issue have come before the board while a quarter of the cases concerned this issue before the amendment.

However, it is also our understanding the Ad Hoc Committee was concerned that deserving employee's receive compensation rate adjustments. Unfortunately, the amendment to this subsection has also resulted in a case like Murray. See the memo about court interpretation, numbered paragraph 3. Perhaps the subsection should be rewritten to say something like the following: "In the absence of clear and convincing evidence to the contrary it is presumed that the employee's gross weekly earnings can be fairly computed under AS 23.30.220(a)(1). If it is determined that the employee's gross weekly earnings cannot be fairly calculated under

MEMO TO KEVIN DOUGHERTY & MARY PIERCE (CONT.)  
RE: SUGGESTIONS FOR AMENDMENTS TO THE ACT  
NOVEMBER 6, 1990

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AS 23.30.220(a)(1), the employee's gross weekly earnings for calculating compensation shall be determined by considering the nature of the employee's work and work history, but compensation may not exceed the employee's gross weekly earnings at the time of injury."

LOMBARD  
GARDNER  
HONSOWETZ  
BREWER  
& SCHONS

Attorneys at Law

725 Country Club Road  
P.O. Box 10332  
Eugene, Oregon 97440

(503) 687-9001  
FAX (503) 484-7404

January 16, 1991

Timothy Byrnes  
Attorney at Law  
509 W. Third Avenue  
Anchorage, AK 99501-2273

Re: Oregon Worker's Compensation Laws

Dear Tim:

Enclosed please find the following:

1) Copies of the following statutes:

(a) ORS (short for Oregon Revised Statutes) 656.005(28) defining "independent contractor" by reference to another statute, ORS 701.025.

(b) ORS 701.025. Please note that this statute is virtually identical to the administrative rule (OAR 436-50-030) which you FAXed to me.

(c) ORS 656.027, defining subject workers under the Oregon Worker's Compensation Law.

(d) ORS 656.029, describing the conditions controlling independent contractor status.

2) Copies of the following Oregon Administrative Rules of the Worker's Compensation Division:

(a) OAR 436-50-030, which is identical to the rule you FAXed to me. Again, please note that this rule is exactly the same as the statutory definition of "independent contractor" set forth by reference in ORS 656.005(28).

(b) OAR 436-50-040, also a rule of the Worker's Compensation Division. Likewise, this rule is virtually identical to the description of conditions controlling independent contractor status in ORS 656.029.

3) A copy of Chapter 3, pages 12 and 13 of the Continuing Legal Education Handbook of the Oregon State Bar on worker's compensation, published in 1990. Section 3.35 contained a typographical error at the first line. The reference should be to ORS 656.005(28). I have handwritten in the correction. This excerpt summarizes the legislative and administrative rule changes created by the 1989 Oregon Legislature.

Herb Lombard, P.C.  
Jack A. Gardner, P.C.  
F. William Honsowetz, P.C.  
David Brewer, P.C.  
Larry H. Schons, P.C.  
Jeffrey E. Potter, P.C.  
Allen E. Gardner, P.C.

Page Two  
January 16, 1991  
Oregon Worker's Compensation Laws

You can see that the words "independent contractor" were first introduced into Oregon statutory and rule form in 1989. Please note the last sentence of Section 3.35. I shepardized ORS 656.005(28), and ORS 656.029, and found no case law interpreting those statutes following the 1989 amendments.

If I can be of further assistance, please let me know.

Very truly yours,

*David*

DAVID BREWER

DB/lav  
Enclosure

*P.S.  
Sorry this is  
a day later.  
D.B.*

personnel considered subject workers for purposes of ORS 658.001 to 658.794. ORS 658.031(2).

"Volunteer personnel" are all municipal personnel other than those employed full time, part time, or substitutes therefor. ORS 658.031(1).

The application must include an estimate of the number of volunteer personnel for which coverage is requested. Upon receiving the application, the insurer or self-insured employer may fix assumed wage rates for the volunteers which may be used for purposes of computations under ORS 658.001 to 658.794. ORS 658.031.

## B. Statutory Employers

### 1. (§3.33) Historical Perspective

In the past, much litigation has concerned the question whether a worker is an employee or an independent contractor. In resolving this question, the courts have applied the tests for finding a contract for hire and right of control.

In response to the unresolved problems created by a contractor-subcontractor relationship, many states have adopted "statutory employer" statutes which make employers liable for the compensation of certain independent contractors and employees of noncomplying subcontractors. These statutes protect employees against irresponsible or uninsured subcontractors, prevent the use of contracts to circumvent the workers' compensation statutes, and provide an incentive for prime contractors to ensure that their subcontractors comply with the law. See generally I.C.A. Larson, *The Law of Workmen's Compensation* §§49.00-49.22 (1982).

Oregon passed its first version of a statutory employer statute in 1979. 1979 Or Laws, ch 864, §2 (ORS 656.029). The statute was amended in 1981, 1983, and 1985. 1981 Or Laws, ch 726, §1; 1981 Or Laws, ch 854, §4; 1983 Or Laws, ch 397, §1; 1983 Or Laws, ch 679, s 2a; 1985 Or Laws, ch 706 §1; 1989 Or Laws, ch \_\_\_ §\_\_\_ (HB 2320); 1989 Or Laws, ch \_\_\_ §\_\_\_ (HB 2558)

### 2. (§3.34) Current Law.

Effective 10-3-89, if a person (defined to include partnerships, joint ventures, associations, corporations, governmental agencies, and sole proprietorships) awards a contract involving the performance of labor to a nonsubject worker (e.g., an independent contractor) and such labor is not a normal and customary part or process of the person's trade or business, the person awarding the contract is not responsible for providing workers' compensation insurance. The person to whom the contract is awarded is responsible for providing coverage for all non-exempt workers engaged to perform work under the contract. ORS 656.029(2).

If, however, the labor contemplated by the contract is a normal and customary part or process of the trade or business of the person awarding the contract, the person awarding the contract must provide workers' compensation insurance for all individuals other than those exempt under ORS 656.027 who perform labor under the contract unless the person to whom the contract is awarded provides such coverage before labor under the contract commences.

If the person to whom the contract is awarded obtains coverage before labor under the contract commences but allows the coverage to lapse before an individual is injured while performing labor under the contract, the person to whom the contract was awarded is treated as a noncomplying employer. ORS 656.029(1).

Notwithstanding the above provisions (ORS 656.029(1)), a person who is registered as a builder pursuant to ORS 701.076 and who is acting under a contract to perform work described by ORS Chapter 701 shall be considered the subject employer for all individuals employed by that person. 1989 Or Laws, ch \_\_\_ §\_\_\_ (HB2558).

### C. (§3.35) Independent Contractors

ORS 656.023(28) defines "independent contractor" as an individual or business entity providing labor or services for remuneration under the following circumstances:

(1) The individual or business entity providing the labor or services is free from direction and control over the means and manner of providing the labor or services, subject only to the right of the person for whom the labor or services are provided to specify the desired results;

(2) The individual or business entity providing labor or services is responsible for obtaining all assumed business registrations or professional occupation licenses required by state law or local government ordinances for the individual or business entity to conduct the business;

(3) The individual or business entity providing labor or services furnishes tools or equipment necessary for performance of the contracted labor or services;

(4) The individual or business entity providing labor or services has the authority to hire and fire employees to perform the labor or services;

(5) Payment for the labor or services is made upon completion of the performance of specific portions of the project or is made on the basis of an annual or periodic retainer;

(6) The individual or business entity providing labor or services is registered under ORS chapter 701 if the individual or business entity

*Borrowed Servant Rule*

*Section 3.36*

provides labor or services for which such registration is required;

(7) Federal and state income tax returns in the name of the business or a business Schedule C or farm Schedule F as part of the personal income tax return were filed for the previous year if the individual or business entity performed labor or services as an independent contractor in the previous year; and

(8) The individual or business entity represents to the public that the labor or services are to be provided by an independently established business. To qualify as an independently established business, the individual or business entity must file a Schedule F as part of the personal income tax returns, perform farm labor or services reportable on Schedule C, or satisfy four or more of the following circumstances:

(a) The labor or services are primarily carried out at a location that is separate from the residence of an individual who performs the labor or services, or are primarily carried out in a specific portion of the residence, which portion is set aside as the location of the business;

(b) Commercial advertising or business cards as is customary in operating similar businesses are purchased for the business, or the individual or business entity has a trade association membership;

(c) Telephone listing and service are used for the business that is separate from the personal residence listing and service used by an individual who performs the labor or services;

(d) Labor or services are performed only pursuant to written contracts;

(e) Labor or services are performed for two or more different persons within a period of one year;

(f) The individual or business entity assumes financial responsibility for defective workmanship for services not provided as evidenced by the ownership or performance bonds, warranties, errors and omission insurance or liability insurance relating to the labor or services to be provided.

The definition of independent contractor is applicable "as used in various provisions of ORS chapters 318, 565, 657 and 701," 1989 Or Laws ch \_\_\_ § \_\_\_ (HB 2558). Before the 1989 amendments, the words, "independent contractor" did not appear within Chapter 656. Case law generally viewed "independent contractor" and "subject employer" as mutually inconsistent concepts unless the independent contractor was designated as a subject employer (i.e., statutory employer) by statute. "Independent contractor" now appears in

chapter 656 in ORS 656.005(28) (definition of independent contractor), ORS 656.027(7) (regarding sole proprietors), ORS 656.027(8) (regarding partnerships), ORS 656.027(9) (regarding corporate officers), and ORS 656.029( ) (regarding persons registered as a builder per chapter 701; 1989 Or Laws ch \_\_\_ § \_\_\_ (HB 2558). It is not clear if the new definition of independent contractor supersedes the traditional case law concepts, thereby enlarging the potential category of subject employers and statutory employers by making the category of independent contractor more restrictive.

**D. (§3.36) Borrowed Servant Rule**

When a general employer lends an employee to a special employer, the special employer becomes liable for workers' compensation only if (1) the employee made a contract of hire with the special employer; (2) the work being done is essentially that of the special employer; and (3) the special employer has the right to control the details of the work. *Newport Seafood v. Shins*, 71 Or App 119, 691 P2d 132 (1984).

**VI. Multiple Employers**

**A. (§3.37) Temporary Service Companies**

In *Robinson v. Omark Industries*, 46 Or App 263, 611 P2d 665 (1980), *rev. dismissed*, 291 Or 5, 291 P2d 1263 (1981), and *Blacknall v. Westwood Corporation*, 89 Or App 145, 747 P2d 412 (1987), plaintiffs were employed by temporary labor service companies and were injured when performing services at plaintiff's job site. The temporary labor service company paid plaintiff's salary, taxes, workers' compensation insurance, social security, unemployment, and fringe benefits and accepted responsibility for the on the job injury. The defendants directly supervised the plaintiff's activities at the job sites, including hours, breaks, and work assignments. Defendants successfully defended civil negligence lawsuits by asserting immunity from suit based on status as plaintiff's employer.

**B. (§3.38) Concurrent Employment**

Concurrent employment was recognized in *Colecliff v. Trotman*, 47 Or App 855, 618 P2d 1095 (1980). Claimant worked for one dentist on Tuesdays and a second dentist on Wednesdays, Thursdays, and Fridays. Claimant developed epicondylitis as a result of her employment. The Court concluded that the last injurious exposure rule was not applicable because claimant had developed her disease concurrently due to both periods of employment. The case was remanded to develop a formula for apportioning claim costs between the two employers. The Board remanded the case to the referee. The referee's unspecified

L+C

Sharon  
Facklin's  
group

FEB 12 1991

**ALASKA PROFESSIONAL DESIGN COUNCIL  
1991 LEGISLATIVE PRIORITIES**

**Reinstatement of Statute of Repose - I cosponsored**

- The statute of repose for architects and engineers was declared unconstitutional by the Alaska Supreme Court in April, 1988. (Opinion No. 3290)
- With a statute of repose, the time period in which to bring an action usually begins running from the date of substantial completion of a project. This is different from a statute of limitations, which begins running from the date of injury or discovery thereof.
- Without a statute of repose, builders, architects, and engineers are subject to an indefinite period of liability even though they have no control over maintenance of the facilities after substantial completion.
- Since 1961, 47 states as well as the District of Columbia and Puerto Rico have passed statute of repose legislation. 43 of these statutes have been tested in court with 33 ruled constitutional and 10 ruled unconstitutional. Alaska is included in this latter group. New legislation has been adopted in four of the 10 states in which the statute was ruled unconstitutional.
- A 1983 study by Victor O. Shinnerer & Co. indicated that 89.3% of claims are brought within 6 years of substantial completion, 95.5% within 8 years, and 96.8% within 10 years.

**Design-Build-Lease**

- The State of Alaska should procure space with reasonable life-cycle cost and quality, particularly in large projects.
- The State of Alaska should build, own, and finance any space needs in excess of 10,000 square feet or any space needed for more than 10 years, unless existing space is available at lease rates competitive with life cycle costs of State-owned facilities.
- If the decision is made to lease rather than build and own, the Department of Administration should address in the lease criteria life-cycle costs, function, indoor environment, public convenience, planning, design, appearance, and location, in addition to lease costs.
- The lease evaluation committee should include qualified individuals reflecting appropriate experience and professional training.

\* **Workers' Compensation Exemption**

Design professionals have no control over construction methods and safety as is clearly stated in construction contract language. They are, however, often targets for third party suits from injured construction workers because of the design professional's E&O insurance.

Nationally approximately 23% of all claims against design professionals are for bodily injury. Of these, 50% are claims from workers injured at the job site.

How  
want  
L+C  
to  
understand

- Currently 12 states have adopted laws providing immunity to design professionals from third party suits on the construction site. These states recognized the importance of existing contractual relationships and wanted to minimize unnecessary litigation, a goal of the single remedy workers' compensation laws.
- The requested immunity for design professionals does not apply to the negligent preparations of design plans and specifications.

#### **Unified Building Codes**

The Alaska Professional Design Council fully supports the following concepts:

- Establishment of a statewide building code and appeals board.
- Automatic statewide updating to current building codes.
- Consolidation of the administration and enforcement of all building codes under one state agency.

February 21, 1991

Drue Pearce, Chairman  
Labor and Commerce Committee  
Senate, State of Alaska  
c/o Legislative Offices  
3111 C Street  
Anchorage, Alaska 99503

David Finkelstein, Chairman  
Labor and Commerce Committee  
House of Representatives  
State of Alaska

Dear Senator Pearce and Representative Finkelstein:

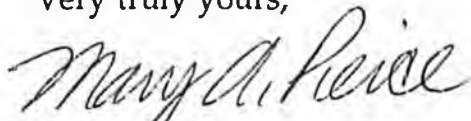
The Workers' Compensation Labor Management Ad Hoc Committee is submitting a proposal for legislation to be introduced in the 1991 legislative session.

This proposal is one that the committee has been working on for several months. It is something that labor and management is committed to and is a balanced bill. Our purpose, as always, is to amend the Workers' Compensation statute so that it provides the best compensation for loss to the injured worker while protecting the business community from escalating costs.

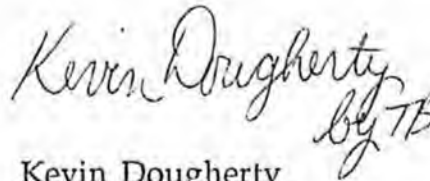
We are eager to answer your questions and discuss the proposal. We are also of course available to work with legislative drafting.

Thank you for your interest in supporting this legislation.

Very truly yours,



Mary A. Pierce  
Co-Chairman  
563-3414



Kevin Dougherty  
Co-Chairman  
276-1640

LEGISLATIVE INTENT: Sec AS 23.30.265 (15) The purpose of the amendment is to reaffirm the original intent of the 1982 amendment to include prior temporary total disability payments received within the definition of gross wages since such worker compensation serves as wage replacement income and was intended to be included as gross income.

LEGISLATIVE INTENT: Sec AS 23.30.055. This section addresses the Supreme Court's Van Biene decision and the Court's deferral to the legislature on the policy question of exclusive liability for insurer's in the performance of safety inspection. This amendment responds to the Court's public policy question by providing for exclusive liability involving safety inspections or safety advisory services. No change is intended regarding liability for conduct not concerning safety inspections or safety advisory services.

LEGISLATIVE INTENT: Sec AS 23.30.265(21). It is the intent of the legislature that the presumption of compensability in AS 23.30.120(a)(1) continue to be applied only to the question of whether an injury is related to the employment.

\*\*\* The Legislature requests that the Division of Insurance study the implementation of a "Contracting Classification Premium Adjustment Program" to provide premium credits for insured employers under the Alaska Workers Compensation Act. The Division shall consult with and seek periodic recommendations from a Committee comprised of Alaska Labor and Management representatives for this purpose. A report to the Legislature shall be given\_\_\_\_\_.

Proposed  
Draft

IN THE LEGISLATURE OF THE STATE OF ALASKA  
SEVENTEENTH LEGISLATURE - FIRST SESSION  
A BILL

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

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

Section 1. AS23.30.041(b) is amended to read:

(b) The administrator shall [PERFORM THE FOLLOWING  
FUNCTIONS:]

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

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

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

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

(5) submit to the department, on or before July 1  
[January 1] of each year, a report of reemployment benefits  
provided under this section for the previous calendar [FISCAL]  
year; the report must include a general section, sections related  
to each rehabilitation specialist employed under this section,  
and a statistical summary of all rehabilitation cases, including

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

(B) the estimated and actual time of each  
rehabilitation plan;

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

(D) the cost of reemployment benefits;

(6) maintain a list of rehabilitation specialists who

meet the qualifications established under this section;

(7) monitor the activities of medical managers assigned by the carrier to an injured employee, including reviewing reports or correspondence concerning the injured employee;

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

Sec. 2. AS 23.30.041(c) is amended to read:

(c) If an employee suffers a compensable injury that may permanently preclude an employee's return to the employee's occupation at the time of injury, the employee or employer may request an eligibility evaluation for reemployment benefits. The employee shall request an eligibility evaluation within 90 days after the employee gives the employer notice of injury unless the administrator determines the employee has an unusual and extenuating circumstance that prevents the employee from making a timely request. If, after a review of the board's case file, the administrator determines the employee is unlikely to be able to return to the employee's occupation at the time of injury, [T]he administrator shall, on a rotating and geographic basis, select a rehabilitation specialist from the list maintained under (b)(6) of this section to perform the eligibility evaluation.

Sec. 3. AS 23.30.041(e) is amended to read:

(e) An employee is [SHALL BE] eligible for benefits under this section upon the employee's written request and by having a licensed physician, or regarding muscular, skeletal, or neurological injuries, a licensed physician or a licensed physical or occupational therapist, predict that the employee will have permanent physical capacities that are less than the physical demands of the employee's job as described in the United States Department of Labor's "Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles" for

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

(2) other jobs that exist in the labor market that the employee has held or received training for within 10 years before the injury or that the employee has held following the injury for a period long enough to obtain the skills to complete in the labor market, according to specific vocational preparation codes as described in the United States Department of Labor's "Selected Characteristics of occupations Defined in the Dictionary of Occupational Titles."

Sec. 4. AS 23.30.041(h) is amended to read:

(h) Within 90 days after the rehabilitation specialist's selection under (g) of this section, the reemployment plan must be formulated and approved. The reemployment plan must be formulated and approved. The reemployment plan must include at least the following:

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

(2) an inventory of the employee's technical skills, physical and intellectual capacities, academic achievement, emotional condition and family support;

(3) a plan to acquire the occupational skills to be employable;

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

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

(6) the date the plan will commence;

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

(8) a detailed description and plan schedule; [AND]

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

limitations of the plan; and [.]

(10) a certification by the rehabilitation specialist that the plan meets all the requirements of this subsection. If the administrator finds the plan does not meet one or more of the requirements of this subsection, the rehabilitation specialist shall amend the plan to meet these requirements without addition to the rehabilitation specialist fees.

Sec. 5. AS 23.30.041(k) is repealed and reenacted to read:

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

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

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

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

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

rating is given, all benefits paid shall be included as permanent impairment benefits;

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

(6) if the employer controverts the employee's claim or appeals a ruling of the administrator or the board that is favorable to the employee, the controversion or appeal delays completion of an evaluation, development, commencement or completion of a plan, and the employee is successful in the claim or appeal, the employer shall pay the employee 60 percent of the spendable weekly wage during the period of controversions or appeal, except that temporary disability benefits shall be paid until the employee reaches medical stability; for purposes of this paragraph the two-year limitation on payment of benefits in (5) of this subsection does not begin to run or is tolled, and payments made at 60 percent of the employee's spendable weekly wage during controversion or appeal may not be offset from permanent impairment benefits due to the employee.

Sec. 6. AS 23.30.041(1) is amended to read:

(1) the cost of the reemployment plan incurred under this section is [SHALL BE] the responsibility of the employer, shall be paid on an expense incurred basis, and may not exceed \$10,000. The cost of the rehabilitation specialist shall be paid by the employer, but may not be included in determining the cost of the reemployment plan. Fees charged by and paid to a rehabilitation specialist for services must be comparable to fees for similar services in the community in which the services are performed, as determined by the administrator according to rules established by the board.

Sec. 7. AS 23.30.041(p) is amended to read:

(p) In this section

(1) "administrator" means the reemployment benefits administrator under (a) of this section;

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

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

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

(4) "medical manager" means a nurse, rehabilitation specialist, or other health care provider assigned by the carrier to assist an employee in coordinating medical benefits, or to monitor the employee's medical services;

(5) "physical capacities" means objective and measurable physical traits such as ability to lift and carry, walk, stand or sit, push, pull, climb, balance, stoop, kneel, crouch, crawl, reach, handle, finger, feel, talk, hear or see;

(6)[(5)] "physical demands" means the physical requirements of the job such as strength, including positions such as standing, walking, sitting, and movement of objects such as lifting, carrying, pushing, pulling, climbing, balancing, stooping, kneeling, crouching, crawling, reaching, handling, fingering, feeling, talking, hearing, or seeing;

(7)[(6)] "rehabilitation specialist" means a person who is a certified insurance rehabilitation specialist, a certified rehabilitation counselor, or a person who has equivalent or better qualifications as determined under regulations adopted by the department;

(8)[(7)] "remunerative employability" means having the skills that allow a worker to be compensated with wages or other earnings equivalent to at least 60 percent of the worker's gross hourly wages at the time of injury; if the employment is outside the state, the stated 60 percent shall be adjusted to account for

the difference between the applicable state average weekly wage and the Alaska average weekly wage.

Sec. 8. AS 23.30.041 is amended by adding a new section to read:

(g) After a medical manager has been assigned to an injured employee, the medical manager shall send written notice to the employee, the employer, and the employee's physician explaining in what capacity the medical manager is employed, who the medical manager represents, and the scope of the services to be provided.

Sec. 9. AS 23.30 is amended by adding a new section to read:

Sec 23.30.047 BENEFITS FOR HEALTH INSURANCE. (a) An employer who pays compensation to an injured employee under AS 23.30.041(k), AS 23.30.180, AS 23.30.185, AS 23.30.190, AS 23.30.200 or As 23.30.215, and who provided health insurance at the date of injury, shall make payments to reimburse the employee for health insurance benefits lost for the employee or employee and covered dependents as provided below.

(b) Payments under this section shall be determined at an amount equal to the employer's current contribution toward health insurance benefits as they relate to a term of employment or the amount paid by the employee for replacement coverage, whichever amount is less.

(c) Payments required under this section commence when the employee's health insurance provided by the employer's contribution ceases, and shall continue until the employee is no longer receiving benefits under section (a) above, or for eighteen months, whichever period is shorter.

(d) Provided that the benefits under this section shall only become due upon on-going demonstrated proof that the employee has secured health insurance. The insurance may be in the form of a purchased individual conversion policy, a private insurance policy, COBRA, or a notice of self-payment to or continuance under the hour bank provision of a union health or welfare trust.

(e) If benefits payable under the terms of this Section are not paid within 30 days after it has been presented for payment to the employer, there shall be added to that benefit an amount equal to 25 percent of it, which shall be paid at the same time as, but in addition to, the benefit.

Sec. 10. AS 23.30.055 is amended to read:

Sec. 23.30.055. EXCLUSIVENESS OF LIABILITY. The liability of an employer prescribed in AS 23.30.045 is exclusive and in place of all other liability of the employer and any fellow employee to the employee, the employee's legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from the employer or fellow employee at law or in admiralty on account of the injury or death. The liability of the employer is exclusive even if the employee's claim is barred under AS 23.30.022. However, if an employer fails to secure payment of compensation as required by this chapter, an injured employee or the employee's legal representative in case death results from the injury may elect to claim compensation under this chapter [,] or to maintain an action against the employer at law or in admiralty for damages on account of the injury or death. In that action, the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of the employment, or that the injury was due to contributory negligence of the employee. In this section "employer" includes the employer's carrier, an insurance service agent to a self-insured employer, or a trade association, if the carrier, insurance service agent, or trade association provides or fails to provide safety inspections or safety advisory services.

Sec. 11. AS 23.30.075(b) is amended to read:

(b) If an employer fails to insure and keep insured employees subject to this chapter or fails to obtain a certificate of self-insurance from the board the court shall

impose a fine of \$10,000 and may impose a sentence of imprisonment for not more than one year. In addition, the board may impose a civil penalty of three times the manual rates used to compute the employer's insurance premium for the period no insurance was in effect. The manual rates used shall be those that were in effect during the uninsured period. If an employer is a corporation, all persons who, at the time of the injury or death, had authority to insure the corporation or apply for a certificate of self-insurance, and the person actively in charge of the business of the corporation shall be subject to the penalties prescribed in this subsection and shall be personally, jointly, and severally liable together with the corporation for the payment of all compensation or other benefits for which the corporation is liable under this chapter if the corporation at that time is not insured or qualified as a self-insurer.

Sec. 12. AS 23.30.155(d) is amended to read:

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

Sec. 13. AS 23.30.175(a) is amended to read:

(a) The weekly rate of compensation for disability or death may not exceed \$700 and initially may not be less than \$154 when the employee has furnished documentary proof of the employee's wages or less than \$110 when the employee has not furnished documentary proof of the employee's wages [\$110]. However, if [THE BOARD DETERMINES THAT] the employee's spendable weekly wage[S] is [ARE] less than [\$110 A WEEK AS COMPUTED UNDER AS 23.30.221, OR LESS THAN] \$154 a week as computed under AS 23.30.220.[IN THE CASE OF AN EMPLOYEE WHO HAS FURNISHED DOCUMENTARY PROOF THE EMPLOYEE'S WAGES, IT SHALL ISSUE AN ORDER ADJUSTING THE WEEKLY RATE OF COMPENSATION TO A RATE] the employee's weekly compensation rate shall equal [TO] the employee's spendable weekly wage[S]. The employer may not pay compensation at the employee's spendable weekly wage without a board order except according to rules established by the board. [IF THE EMPLOYER MAY NOT PAY COMPENSATION AT THE EMPLOYEE'S SPENDABLE WEEKLY WAGES ARE LESS THAN \$154, THE EMPLOYER MAY ADJUST THE WEEKLY RATE OF COMPENSATION TO A RATE EQUAL TO THE EMPLOYEE'S SPENDABLE WEEKLY WAGES WITHOUT AN ORDER OF THE BOARD.] If the employee's spendable weekly wage[S] is [ARE] greater than \$154, but 80 percent of the employee's spendable weekly wage[S] is less than \$154, the employee's weekly rate of compensation shall be \$154. Prior payments made in excess of the adjusted rate shall be deducted from the unpaid compensation in the manner the board determines. In any case, the employer shall pay timely compensation.

Sec. 14. AS 23.30.190(b) is amended to read:

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

Medical Association Guides. An impairment rating shall be determined by a licensed physician or if the injury is related to muscular, skeletal, or neurological disabilities, by a licensed physician or licensed physical or occupational therapist.

Sec. 15. AS 23.30.195 is amended to read:

Sec. 23.30.195. SURVIVAL OF THE RIGHT TO COMPENSATION.  
(a) Compensation to which a [any] claimant would be entitled under AS 23.30.190 [EXCEPTING (a)(20) OF THAT SECTION] shall, notwithstanding death arising from causes other than the injury, be payable to and for the benefit of the following persons [FOLLOWING]:

(1) if there is [BE] a widow or widower, but [AND] no child of the deceased, to the widow or widower;

(2) if there is [BE] a widow or widower and a surviving child or children of the deceased, one-half to the widow or widower, the other half to the surviving child or children, in equal shares;

(3) if there is [BE] a surviving child or children of the deceased, but no widow or widower, then to the child or children, in equal shares.

(b) An award for impairment [DISABILITY] may be made after the death of the injured employee.

Sec. 16. AS 23.30 is amended by adding a new section to read:

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

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

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

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